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TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

October Term, 19[illegible]

No. [illegible]

[illegible] OF AMERICA, APPELLANT,

vs.

[illegible] NATIONAL

[illegible] PROD.

[illegible]

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED [illegible], 19[illegible]

VOLUME I

(Pages 1 to [illegible])

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 13

THE UNITED STATES OF AMERICA, APPELLANT,

VS.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, CERTAIN-TEED PRODUCTS CORPORATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

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226. Memorandum of G. Brown dated June 4, 1929	10441	5390
227. Letter from Whittemore to Van Hagan dated June 11, 1929 and attached memorandum of C. O. Brown dated June 6, 1929	10442	5392
228. Memorandum of C. O. Brown dated July 3, 1929	10445	5394
230. Original bundling license agreement, Certain-teed USG, dated July 3, 1929	10448	5396
231. Copies of memoranda from C. O. Brown dated Aug. 9, 1929, and July 30, 1929	10453	5400
232. Copy of release of bond in *USG v. Certain-teed* dated May 22, 1929	10457	5405
234. Original memorandum from C. O. Brown to Whittemore dated Oct. 3, 1929	10459	5407
235. Original letter from USG to C. O. Brown dated Nov. 5, 1929	10460	5409
236. Copy of memorandum from Henley to Coffin dated Dec. 3, 1929	10461	5410
237. Original letter from C. O. Brown to USG dated Jan. 2, 1930	10462	5411
238. Original letter from MacLeish to C. O. Brown dated Jan. 18, 1930	10463	5412
241. Original copy of USG-Certain-teed contract dated July 1, 1932	10465	5413
244. Original letter from Henning to C. O. Brown dated Sept. 24, 1934	10474	5420
245. Copy of letter from Henning to Van Hagan dated Aug. 14, 1934	10475	5421

		Original	Print
246.	Copy of letter from Van Hagan to Henning dated Sept. 4, 1934	10476	5422
247.	Copy of memorandum from C. O. Brown to salesmen	10477	5423
248.	Copy of memorandum from C. O. Brown to salesmen dated Dec. 3, 1934	10479	5425
249.	Metallized Board Price Bulletin No. 1 (Oct. 30, 1934 to Jan. 24, 1940)	10480	5427
250.	Metallized Board Price Bulletin No. 2 (Oct. 30, 1934 to Feb. 6, 1939)	10631	5607
251.	Metallized Board Price Bulletin No. 3 (Dec. 20, 1935 to May 13, 1939)	10687	5664
252.	Metallized Board Price Bulletin No. 4 (April 24, 1935 to Feb. 6, 1939) and No. 5 (Feb. 24, 1936 to Feb. 6, 1939)	10729	5721
253.	Metallized Board Price Bulletins—Supplements (Jan. 4, 1935 to Dec. 9, 1936)	10756	5750
254.	Memorandum from Van Hagan to several individuals dated Nov. 26, 1934	10793	5783
255.	Letter from N. H. Laney to Certain-teed dated March 26, 1935, to A. W. Irwin	10794	5784
256.	Letter from Irwin to Laney dated April 4, 1935	10795	5785
258.	Certain-teed invoice to Pinellas dated Sept. 8, 1937	10796	5786
259.	Copy of Certain-teed invoice to Kemp-Shaw & Co. dated Sept. 12, 1937	10797	5787
260.	Copy of Certain-teed invoice to Witt Lumber dated July 27, 1937	10798	5788
261.	Copy of Certain-teed invoice to Morris Austin dated Dec. 16, 1936	10799	5789
262.	Copy of Certain-teed's invoice to Smith Kelly dated Sept. 27, 1937	10800	5790
263.	Copy of Certain-teed's invoice to Smith Kelly dated Aug. 17, 1937	10801	5791
264.	Copy of Certain-teed's invoice to Smith Kelly dated July 7, 1937	10802	5792
265.	Copy of Certain-teed's invoice to Campbell Coal dated July 28, 1937	10803	5793
266.	Copy of Certain-teed's invoice to Campbell Coal dated July 15, 1937	10804	5794
268.	Copy of memorandum from Van Hagan to C. O. Brown dated Dec. 26, 1934	10805	5795
269.	Letter from Rahr to Spencer dated Oct. 28, 1935 and carbon copy of Spencer's reply to Rahr dated Nov. 1, 1935	10807	5796
271.	Letter from Henley to Henning dated Aug. 25, 1931	10811	5799
274.	Agreement dated May 7, 1930 between USG and Certain-teed	10812	5800
275.	Agreement dated Oct. 28, 1930 between USG and Certain-teed	10818	5805
276.	Agreement dated Sept. 1, 1932 between USG and Certain-teed, and attached assignment dated July 14, 1933	10827	5810

	Original	Print
277. Agreement dated Jan. 15, 1936 between USG and Certain-teed	10839	5819
278. Copy of draft of bubble license agreement (not executed) dated June 28, 1929	10850	5825
279. Original letter from Fuller to Avery dated May 24, 1927	10863	5835
280. Carbon copy of letter from Avery to Fuller dated May 29, 1929	10865	5836
281. Original letter from Fuller to Avery dated May 31, 1929	10866	5837
282. Original letter from Neale to Baker dated July 22, 1929	10867	5837
283. Original letter from Fuller to Baker dated Aug. 9, 1929	10868	5838
284. Original letter from Neale to Baker dated Aug. 29, 1929	10869	5839
285. Original letter from Neale to Henning dated May 2, 1932	10870	5840
286. Copy of letter from Neale to Fuller dated Mar. 30, 1933	10871	5840
287. Original letter from Henning to Neale dated Aug. 20, 1934	10872	5841
288. Original letter from Henning to Neale dated Sept. 6, 1934	10873	5842
289. Copy of letter from Fuller to Neale dated Sept. 6, 1934	10874	5843
290. Original letter from Henning to Neale dated Nov. 30, 1934	10875	5844
291. Copy of letter from Hallowell to Neale dated Nov. 30, 1934	10876	5844
292. Copy of letter from Warren to Neale dated Dec. 3, 1934	10877	5845
293. Copy of letter from Neale to Hallowell dated Dec. 5, 1934	10878	5845
294. Carbon copy of letter from Neale to Henning dated Dec. 10, 1934	10879	5846
295. Original letter from Sadler to Neale dated Nov. 27, 1935	10880	5847
298. Copy of letter from Neale to Fuller dated March 23, 1936	10881	5847
299. Letter from Kling to Black dated Aug. 15, 1929	10885	5851
300. Letter from Baker to Black dated June 23, 1934	10886	5851
(a) Mr. Finck's letter dated June 18, 1934 to National	10887	5852
301. Letter from Burley to Black dated Sept. 17, 1934	10890	5855
302. Copy of letter from Black to Burley dated Sept. 18, 1934	10891	5855
305. Photostat of letter from Black to Holland (undated)	10892	5856
306. Photostat of letter dated Oct. 17, 1928 from Holland to Black	10893	5856
307. Letter from Black to Henning dated Oct. 16, 1930	10894	5857

	Original	Print
308. Letter from Henning to Black dated Aug. 20, 1934	10895	5858
310. Letter dated Sept. 16, 1926 from C. F. Miller to J. B. Davis	10897	5859
311. Letter from J. B. Davis to C. F. Miller dated Sept. 26, 1926	10896	5858
312. Letter from G. M. Brown to Avery dated June 10, 1929	10899	5861
313. Memorandum from Henley to Whittemore dated March 13, 1936	10900	5862
314. Memorandum from Henley to Whittemore dated Mar. 25, 1936	10904	5868
315. Memorandum from Henley to Whittemore dated Mar. 23, 1936	10906	5870
316. Letter from Henley to Keady dated Oct. 26, 1938	10907	5872
317. Letter dated May 15, 1929, from G. M. Brown to Avery	10908	5873
318. Telegram dated May 18, 1929, from Avery to G. M. Brown	10909	5873
321. Copy of memorandum from Nelson to G. M. Brown dated Feb. 23, 1928	10910	5874
322. Copy of memorandum of Nelson dated March 2, 1928	10911	5874
323. Bill of complaint in *USG v. Beaver*	10912	5876
324. Certain-teed's answer in *USG v. Beaver*	10962	5916
325. Order granting temporary injunction in *USG v. Beaver*	10998	5951
326. Stipulation dismissing *USG v. Beaver* and releasing bond	11001	5952
327. Order dismissing *USG v. Beaver*	11003	5953
328. Report to stockholders, 1925 USG Annual Report	11005	5954
329. Report to stockholders, 1926 USG Annual Report	11017	5962
330. Report to stockholders, 1927 USG Annual Report	11029	5970
331. Report to stockholders, 1928 USG Annual Report	11041	5978
332. USG Annual Report, 1929	11053	5986
333. Carbon copy of memorandum from Mr. Baumhogger to Management Board dated May 10, 1938	11065	5993
334. Carbon copy of memorandum from Van Hagan to Baumhogger dated May 16, 1938	11070	5999
335. Carbon copy of memorandum from Henley to Baumhogger dated July 11, 1938	11073	6002
336. Original invoice of Oakfield to Quality Materials dated May 21, 1938	11074	6003
357. Original invoice on board of Oakfield to Cox dated June 16, 1938	11075	6004
338. Original invoice on board of Oakfield to Cox dated June 20, 1938	11076	6005
339. Original letter dated May 17, 1932, from Miller to Baker	11077	6006
340. Original memorandum from Burley to Higgins dated May 25, 1932	11078	6007
341. Original memorandum from Burley to Higgins dated May 25, 1932	11079	6008

	Original	Print
343. Photostat of letter from Baker to Miller dated May 24, 1932	11080	6008
345. Original of follow-up letter from Burley to Fairmont dated Sept. 20, 1927	11089	6016
346. Original of follow-up letter from National to Fairmont dated Oct. 12, 1927	11091	6017
347. Original letter from Baker to Spease dated Sept. 27, 1929	11093	6018
348. Carbon copy of letter from Fairmont to Baker dated Oct. 3, 1929	11094	6019
349. Original letter from Baker to Spease dated Oct. 7, 1929	11095	6020
350. Carbon copy of letter from Spease to Baker dated Jan. 11, 1930	11096	6020
351. Original letter from Baker to Spease dated Jan. 22, 1930	11097	6021
352. Original letter from Baker to Spease dated April 3, 1930	11098	6021
353. Handwritten copy of telegram from Spease to Baker dated April 7, 1930	11099	6022
354. Handwritten copy of telegram from Baker to Spease dated April 7, 1930	11100	6022
355. Original letter from Baker to Spease dated May 23, 1930	11101	6023
356. Original letter from Hanson to Fairmont dated April 24, 1933	11102	6024
357. Original copy of Fairmont-Oakfield contract dated Dec. 17, 1933	11103	6025
359. Original letter from Eldred to Spease dated April 27, 1935	11106	6027
360. Carbon copy of letter from Spease to Baker dated July 23, 1938	11107	6028
361. Original letter from Baker to Spease dated July 26, 1938	11108	6029
362. USG-Newark-Kelly agreement dated April 29, 1937	11109	
363. Original assignment from Kelley to Newark dated Dec. 16, 1938	11113	6032
364. Original agreement between USG and Newark dated Jan. 3, 1939	11116	6034
365. Original copy of consent to sell Calvin Tomkins dated Jan. 3, 1939	11120	6037
366. Carbon copy of letter from Wileman to USG dated July 8, 1937	11121	6038
(a) Carbon copy of letter from USG to Tomkins dated July 16, 1937	11122	6038
367. Carbon copy of letter from USG to Tomkins dated July 14, 1937	11123	6039
368. Carbon copy of letter from Tomkins to Keady dated July 21, 1937	11124	6040
(a) Carbon copy of letter from USG to Tomkins dated July 26, 1937	11125	6040

	Original	Print
369. Original letter from Tomkins to Keady dated Sept. 23, 1938	11126	6041
(a) Original letter from Tomkins to Keady dated Sept. 23, 1938	11127	6042
(b) Kelley royalty free perforated lath license dated Sept. 16, 1938	11128	6043
370. Original letter from Keady to Kelley dated Oct. 3, 1938	11130	6045
(a) Carbon copy of letter from USG to Kelley dated Oct. 3, 1938	11131	6046
371. Original letter from Kelley to Henning dated Sept. 21, 1936	11132	6047
372. Copy of letter from Wileman to Paragon dated June 7, 1937	11133	6047
373. Carbon copy of letter from Wileman to Structural dated June 7, 1937	11134	6048
374. Carbon copy of letter from Wileman to Oakfield dated April 2, 1938	11135	6049
375. Original Kelley office voucher on United Clay order dated Sept. 27, 1937	11136	6050
(a) Kelley shipping memo dated Sept. 27, 1937 on United Clay order	11137	6050
(b) Kelley shipping memo dated Sept. 27, 1937 on United Clay order	11138	6051
(c) Original Kelley invoice to Oakfield dated Sept. 27, 1937 on United Clay order	11139	6051
(d) Oakfield order to Kelley dated Sept. 27, 1937 on United Clay order	11140	6052
376. Kelley office voucher on United Clay order dated Dec. 10, 1937	11141	6053
(a) Kelley shipping memo (undated) on United Clay order	11142	6053
(b) Kelley shipping memo dated Dec. 10, 1937 on United Clay order	11143	6054
(c) Kelley invoice to Oakfield dated Dec. 10, 1937 on United Clay order	11144	6054
377. Kelley office voucher on Robinson & Sons order dated Nov. 18, 1937	11145	6055
(a) Kelley shipping memo dated Nov. 18, 1937 on Robinson & Sons order	11146	6055
(b) Oakfield order to Kelley dated Nov. 9, 1937 on Robinson & Sons order	11147	6056
(c) Kelley shipping memo dated Nov. 18, 1937 on Robinson & Sons order	11148	6056
(d) Bill of lading dated Nov. 18, 1937 on Robinson & Sons order	11149	6057
(e) Kelley invoice to Oakfield dated Nov. 18, 1937 on Robinson & Sons order	11150	6060
378. Kelley office voucher on United Clay order dated Oct. 14, 1937	11151	6061

		Original	Print
	(a) Telegram from Oakfield to Kelley order shipment dated Oct. 13, 1937	11152	6062
	(b) Kelley shipping memo dated Oct. 14, 1937 on United Clay order	11153	6062
	(c) Kelley invoice to Oakfield dated Oct. 14, 1937 on United Clay order	11154	6063
379.	Kelley invoice to Oakfield dated April 16, 1937	11155	6064
	(a) Kelley office voucher on Robinson & Sons order dated April 16, 1937	11156	6065
	(b) Kelley shipping memo dated April 16, 1937 on Robinson & Sons order	11156A	6065
	(c) Kelley shipping memo dated April 16, 1937 on Robinson & Sons order	11157	6066
	(d) Kelley shipping memo (undated) on Robinson & Sons order	11158	6066
	(e) Oakfield order to Kelley dated April 16, 1937 on Robinson & Sons order	11159	6066
380.	Carbon copy of letter from Tomkins to Eldred dated Nov. 17, 1937	11160	6067
381.	Original letter from Bartlett to Tomkins dated Dec. 27, 1937	11161	6068
382.	Original Board Survey complaint re Oakfield dated Dec, 27, 1937	11162	6069
383.	Carbon copy of letter from Tomkins to Eldred dated Dec. 29, 1937	11163	6070
384.	Original letter from Eldred to Tomkins dated Dec. 30, 1937	11164	6071
385.	Original report from Tomkins to Board Survey dated Jan. 3, 1938	11166	6072
386.	Carbon copy of letter from Tomkins to Eldred dated Jan. 3, 1938	11167	6073
387.	Original letter from Bartlett to Tomkins dated May 17, 1938	11168	6074
388.	Carbon copy of letter from Tomkins to Bartlett dated May 20, 1938	11169	6075
389.	Original letter from Kelley to Board Survey dated July 11, 1932	11170	6076
390.	Carbon copy of letter from Miller to Kelley dated July 1, 1932	11171	6077
391.	Original letter from Kelley to Henning dated June 1, 1932	11172	6078
392.	Original letter from Kelley to Board Survey dated May 23, 1932	11174	6079
393.	Carbon copy of letter from Board Survey to Kelley dated May 17, 1932	11175	6080
394.	Carbon copy of letter from Board Survey to Henley dated May 9, 1932	11176	6081
395.	Original letter from Henley to Miller dated May 2, 1932	11177	6082
396.	Carbon copy of letter from Miller to Kelley dated March 22, 1932	11178	6083

	Original	Print
397. Original letter from Baker to Miller dated March 21, 1932	11179	6084
398. Original letter from Pellet to Board Survey dated Oct. 25, 1933	11180	6085
399. Carbon copy of letter from Board Survey to Pellet dated Nov. 7, 1933	11181	6086
400. Carbon copy of letter from Newark to Ebsary dated Jan. 20, 1937	11182	6087
403. Original letter from Stromquist to Burley dated Jan. 8, 1930	11183	6088
404. Original letter from Henning to Lenci dated May 23, 1929	11185	6090
405. Carbon copy of letter from Lenci to Niel dated May 28, 1929	11188	6094
406. Carbon copy of letter from Lenci to all salesmen dated May 23, 1929	11189	6095
407. Carbon copy of letter from Lenci to Niel dated May 24, 1929	11190	6096
408. Original letter from Henning to Lenci dated May 24, 1929	11191	6097
409. Original letter from Henning to Lenci dated May 25, 1929	11192	6098
410. Original letter from Henning to Lenci dated June 7, 1929	11193	6099
411. Original letter from Henning to Lenci dated June 19, 1929	11195	6101
412. Original letter from Henning to Lenci dated June 19, 1929	11196	6102
413. Original letter from Henning to Lenci dated June 26, 1929	11199	6104
414. Original letter from Henning to Lenci dated July 9, 1929	11201	6106
415. Original letter from Henning to Lenci dated July 24, 1929	11205	6110
416. Original letter from Henning to Lenci dated July 25, 1929	11207	6112
417. Original letter from Henning to Lenci dated July 26, 1929	11210	6116
418. Original letter from Henning to Lenci dated Aug. 3, 1929	11211	6117
420. Carbon copy of letter from Lenci to Rippey dated June 21, 1929	11213	6119
421. Carbon copy of letter from Lenci to USG dated June 21, 1929	11214	6120
422. Original letter from MacLeish to Ebsary dated July 3, 1929	11215	6121
423. Carbon copy of letter from Lenci to Rippey dated July 17, 1929	11216	6121
424. Original letter from Henning to Lenci dated April 5, 1930	11217	6122

	Original	Print
425. Original letter from Henning to Lenci dated April 15, 1930	11219	6124
426. Original letter from Henning to Ebsary dated June 3, 1930	11220	6125
427. Original letter from Henning to Ebsary dated Feb. 11, 1931	11221	6126
428. Carbon copy of letter from Lenci to Henning dated Jan. 20, 1930	11223	6127
(a) Original letter from Henning to Lenci dated Jan. 22, 1930	11224	6128
429. Carbon copy of letter from Lenci to Henning dated Feb. 13, 1930	11225	6129
430. Original letter from Henning to Ebsary dated Aug. 8, 1930	11226	6130
431. Copy of memorandum from Turner to Lenci dated Sept. 22, 1930	11227	6131
432. Original letter from Henning to Ebsary dated March 4, 1932	11228	6132
433. Original letter from Henning to Lenci dated Feb. 16, 1934	11229	6133
434. Original letter from Henning to Ebsary dated Dec. 3, 1934	11230	6134
435. Duplicate original of letter from Henning to Ebsary dated Oct. 29, 1935	11231	6135
436. Handwritten copy of letter from Ehrlicher to Hough dated April 20, 1932	11232	6136
(a) Typewritten copy of Ex. 436	11234	6137
437. Original letter from Hough to Lenci dated May 5, 1932	11235	6138
438. Carbon copy of letter from Lenci to Board Survey dated May 6, 1932	11236	6139
439. Original letter from Hough to Lenci dated June 9, 1932	11237	6141
440. Carbon copy of letter from Lenci to Henning dated June 9, 1932	11238	6142
441. Carbon copy of letter from Lenci to Henning dated June 25, 1932	11240	6143
442. Carbon copy of letter from Lenci to Henning dated July 16, 1932	11242	6145
443. Carbon copy of letter from Lenci to Henning dated July 26, 1932	11241	6144
444. Original letter from Henning to Lenci dated Aug. 1, 1932	11245	6147
445. Carbon copy of letter from Lenci to Ebsary dated Aug. 10, 1932	11246	6148
446. Carbon copy of letter from Lenci to Henning dated Aug. 16, 1932	11247	6148
447. Carbon copy of letter from Lenci to Board Survey dated May 16, 1932	11248	6149
448. Copy of letter from Henning to Lenci dated May 17, 1932	11249	6150

	Original	Print
449. Carbon copy of letter from Lenci to Henning dated June 17, 1932	11251	6151
450. Original letter from Miller to Lenci dated June 25, 1932	11252	6152
451. Original letter from Miller to Lenci dated Aug. 18, 1932	11253	6153
452. Carbon copy of letter from Lenci to Henning dated May 26, 1932	11254	6154
453. Carbon copy of letter from Lenci to Board Survey dated May 31, 1932	11255	6155
454. Original letter from Hough to Lenci dated June 9, 1932	11256	6156
455. Carbon copy of letter from Lenci to Board Survey dated June 11, 1932	11257	6157
456. Carbon copy of letter from Lenci to Board Survey dated June 21, 1932	11258	6158
457. Original letter from Miller to Lenci dated June 23, 1932	11259	6159
458. Original letter from Miller to Lenci dated Sept. 21, 1932	11260	6160
459. Original letter from Lenci to Board Survey dated Sept. 24, 1932	11261	6161
460. Carbon copy of letter from Henning to Lenci dated Sept. 27, 1932	11262	6162
461. Original letter from Lenci to Henning dated Dec. 6, 1932	11263	6163
462. Carbon copy of letter from Henning to Ebsary dated Dec. 23, 1932	11264	6164
463. Original letter from Miller to Lenci dated May 8, 1933	11265	6165
464. Original letter from Miller to Lenci dated May 11, 1933	11266	6166
465. Original letter from Miller to Lenci dated May 29, 1933	11267	6167
466. Original letter from Miller to Lenci May 31, 1933	11268	6168
467. Original letter from Lenci to Board Survey dated June 13, 1933	11269	6169
468. Carbon copy of letter from Lenci to Board Survey dated June 13, 1933	11270	6169
469. Original letter from Miller to Lenci dated June 15, 1933	11271	6171
470. Original letter from Diegel to Lenci dated Nov. 21, 1932	11272	6172
471. Carbon copy of letter from Lenci to Board Survey dated Nov. 28, 1932	11273	6173
472. Original letter from Henning to Lenci dated July 29, 1929	11274	6174
473. Original letter from Henning to Lenci dated March 26, 1930	11275	6174
474. Original letter from Henning to Lenci dated March 4, 1931	11276	6175

	Original	Print
475. Original letter from Henning to Lenci dated June 4, 1936	11277	6176
476. Original letter from Henning to Lenci dated Feb. 7, 1936	11278	6176
480. Carbon copy of letter Lenci to Henning, Dec. 7, 1932	11279	6177
481. Carbon copy of letter from Lenci to Diegel dated Dec. 19, 1932	11280	6178
482. Carbon copy of letter from Lenci to Board Survey dated Feb. 16, 1933	11281	6178
483. Original memo from Diegel to Lenci dated March 3, 1933	11282	6179
484. Carbon copy of letter from Lenci to Board Survey dated March 24, 1933	11283	6180
485. Original letter from Miller to Ebsary dated March 28, 1933	11284	6181
486. Original letter from Lenci to Board Survey dated April 13, 1933	11285	6182
487. Carbon copy of letter from Miller to Lenci dated April 17, 1933	11286	6183
489. Original letter from Miller to Lenci dated March 31, 1933	11287	6184
490. Original letter from Diegel to Lenci dated April 10, 1933	11288	6185
491. Carbon copy of letter from Lenci to Board Survey dated April 12, 1933	11289	6186
492. Original letter from Miller to Lenci dated April 14, 1933	11290	6187
493. Carbon copy of letter from Lenci to Board Survey dated April 20, 1933	11291	6188
494. Original letter from Miller to Lenci dated June 15, 1933	11292	6189
495. Original letter from Lenci to Board Survey dated June 20, 1933	11293	6190
496. Carbon copy of memo from Sadler to Miller dated June 13, 1933	11294	6191
497. Carbon copy of letter from Miller to Lenci dated June 15, 1933	11295	6192
498. Original letter from Lenci to Board Survey dated June 20, 1933	11296	6193
499. Carbon copy of memo from Sadler to Miller dated June 13, 1933	11297	6194
500. Original letter from Sadler to Lenci dated April 24, 1934	11298	6195
501. Original letter from Lenci to Board Survey dated May 3, 1934	11299	6196
502. Copy of telegram from Ebsary to Henning dated Nov. 8, 1934	11300	6197
(a) Memo of Diegel attached to Ex. 502	11301	6197
503. Original letter from Miller to Baker dated April 22, 1932	11302	6198

	Original	Print
504. Original letter from Neal to Lenci dated March 30, 1933	11303	6199
505. Carbon copy of letter from Ebsary to Henning dated April 12, 1933	11304	6200
506. Original letter from Miller to Ebsary dated April 17, 1933	11305	6201
508. Original letter from Miller to Lenci dated May 8, 1933	11306	6202
509. Original letter from Neal to Lenci dated May 17, 1933	11307	6204
510. Carbon copy of letter from Lenci to Board Survey dated May 22, 1933	11308	6205
511. Carbon copy of letter from Lenci to Board Survey dated June 1, 1933	11310	6206
512. Original letter from Lenci to Henning dated March 28, 1936	11311	6206
513. Original letter from Price to Ebsary dated May 9, 1936	11312	6207
(a) Lenci complaint on Delaware Clay Products dated April 1, 1936	11313	6208
514. Copy of Kelley explanation dated May 1, 1936 with respect to Delaware Clay Products matter (enclosed with Ex. 513)	11314	6209
515. Original of Kelley explanation dated May 1, 1936	11315	6210
516. Original letter from Henning to Lenci dated Sept. 11, 1936	11316	6211
517. Carbon copy of letter from Lenci to Henning dated Sept. 14, 1936	11317	6212
518. Original letter from Henning to Lenci dated Sept. 18, 1936	11318	6213
519. Original letter from Blanchfield to Lenci dated July 20, 1938	11319	6214
520. Carbon copy of letter from Lenci to USG dated July 22, 1938	11320	6215
521. Carbon copy of letter from Lenci to USG dated Aug. 30, 1938	11321	6216
522. Carbon copy of letter from Lenci to USG dated Sept. 15, 1938	11322	6216
523. Original letter from Sensibar to Ebsary dated July 31, 1939	11323	6217
524. Carbon copy of letter from Lenci to Cardiff dated Aug. 3, 1939	11324	6218
525. Original letter from Cardiff to Lenci dated Aug. 3, 1939	11325	6219
526. Carbon copy of letter from Lenci to Cardiff dated Aug. 10, 1939	11326	6220
527. Carbon copy of letter from Lenci to Cardiff dated Sept. 18, 1939	11327	6221
528. Original letter from Gutman to Lenci and enclosure dated Sept. 18, 1939	11328	6222

	Original	Print
529. Carbon copy of letter from Lenci to USG dated Sept. 28, 1939	11330	6224
530. Original letter from Gutman to Lenci dated Sept. 29, 1939	11331	6225
531. Copy of telegram from Ebsary to USG dated Oct. 3, 1939	11333	6226
532. Original letter from Bartlett to Lenci dated Oct. 3, 1939	11334	6227
533. Original memo from Allen to Sales Department dated Oct. 7, 1939	11335	6227
534. Copy of telegram from Ebsary to USG dated Oct. 11, 1939	11336	6228
535. Original letter from Bartlett to Ebsary dated Oct. 12, 1939	11337	6228
536. Carbon copy of letter from Lenci to Cardiff dated Oct. 13, 1939	11338	6229
537. Original letter from Gutman to Lenci dated Oct. 14, 1939	11339	6230
538. Carbon copy of letter from Lenci to Bartlett dated Oct. 16, 1939	11340	6231
539. Carbon copy of letter from Lenci to Cardiff dated Oct. 16, 1939	11341	6232
540. Original letter from Gutman to Lenci dated Oct. 17, 1939	11342	6233
541. Carbon copy of letter from Lenci to Cardiff dated Oct. 21, 1939	11343	6234
542. Original telegram from USG to Ebsary dated Oct. 21, 1939	11344	6235
543. Copy of telegram from Ebsary to Cardiff dated Oct. 25, 1939	11345	6235
544. Original telegram from Ebsary to USG dated Nov. 8, 1935	11346	6235
545. Carbon copy of telegram from Henning to Ebsary dated Nov. 8, 1935	11347	6236
546. Original letter from Henning to Ebsary dated Nov. 8, 1935	11348	6237
547. Original letter from Henning to Lenci dated Aug. 20, 1934	11349	6238
548. Original letter from Burley to Lenci dated April 1, 1935 and enclosed copy of letter from Burley to Diegel dated March 18, 1935	11350	6239
549. Original letter from Carey to Lenci dated Dec. 28, 1934	11355	6243
550. Original letter from Carey to Black dated Dec. 28, 1934	11352	6241
553. Original letter from Carey to Lenci dated Dec. 31, 1934	11358	6245
554. Original letter from Carey to Black dated Dec. 31, 1934	11359	6246
555. Original letter from Carey to Lenci dated Dec. 31, 1934	11360	6247

	Original	Print
556. Original letter from Carey to Black dated Dec. 31, 1934	11361	6248
558. Copy of letter from Carey to Lenci dated May 10, 1935	11362	6249
562. Original letter from Lenci to Paragon of Syracuse dated July 31, 1929	11363	6250
571. Signed copy of Oakfield-Kelley contract dated Dec. 1, 1933	11364	6251
572. Carbon copy of telegram from Sensibar to American dated Aug. 25, 1933	11368	6254
573. Original telegram from American to Sensibar dated Aug. 25, 1933	11369	6254
574. Original letter from Black to Sensibar dated Sept. 21, 1933	11370	6255
575. Carbon copy of telegram from Sensibar to American dated Oct. 3, 1933	11371	6255
576. Original letter from Sensibar to Black dated Feb. 1, 1936	11372	6256
577. Carbon copy of letter from Black to Sensibar dated Feb. 10, 1936	11373	6257
578. Original letter from Baker to Sensibar dated Oct. 24, 1938	11374	6258
584. Carbon copy of letter from Cardiff to Lenci dated Oct. 4, 1939	11375	6259
585. Original letter from Hough to Cardiff dated Oct. 5, 1939	11376	6260
591. Kelley price list dated April 26, 1932	11377	6261
592. Kelley price list dated January 1938	11386	6271
593. Kelley price list dated March 1, 1937	11394	6279
594. Sadler complaint against Kelley on Stremble's activities dated June 5, 1936	11397	6283
595. Carbon copy of letter from Mahin to Kelley dated June 8, 1936	11398	6284
596. Carbon copy of letter from Mahin to USG dated July 16, 1936	11399	6285
(a) Kelley form of answer to Stremble complaint dated June 22, 1936	11400	6286
597. Carbon copy of letter from McCormack to Stremble dated June 20, 1938	11401	6287
598. Structural price list dated Sept. 14, 1936	11402	6288
599. Texas-USG license dated April 11, 1927	11403	6289
(a) Exhibit A attached to Texas license	11415	6299
601. Original letter from Spencer to Certain-teed dated March 4, 1936	11419	6303
602. Original letter from Spencer to Straub dated Dec. 27, 1933	11424	6307
603. Original letter from Chism to USG dated March 16, 1939	11431	6312
604. Original letter from Knode to Moylan of Schumacher dated Oct. 21, 1937	11432	6313
605. Makowski patent No. 1,349,778	11436	6317

	Original	Print
609. Original letter from Stromquist to Paragon dated June 3, 1929	11444	6324
(a) Two Universal sales bulletins enclosed with Ex. 609	11446	6326
610. Report of Bureau of Standards on test of Schumacher perforated lath	11448	6328
611. Report of Bureau of Standards on test of National perforated lath	11464	6345
612. Certain answers to interrogatories addressed to USG	11479	6362
613. Certain answers to interrogatories addressed to National	11484	6369
614. Certain answers to interrogatories addressed to Certain-teed	11487	6371
615. Certain answers to interrogatories addressed to Ebsary	11490	6375
616. USG report of Sales Department 1926	11494	6380
617. USG report of Sales Department first quarter 1927	11499	6385
618. USG report of Sales Department first half 1927	11509	6401
619. USG report of Sales Department 1927	11515	6402
620. USG report of Sales Department first half 1928	11521	6409
621. USG report of Sales Department first quarter 1929	11526	6415
624. Certain-teed royalty statement signed by Krug dated August 20, 1929	11529	6419
625. Certain-teed royalty statement signed by Krug dated Sept. 17, 1929	11530	6421
626. Certain-teed royalty statement signed by Krug Oct. 21, 1929	11531	6423
627. Certain-teed royalty statement signed by Krug Nov. 20, 1929	11532	6425
628. Certain-teed royalty statement signed by Krug dated Dec. 20, 1929	11533	6427
629. Certain-teed royalty statement signed by Krug dated Jan. 20, 1930	11534	6429
630. Certain-teed royalty statement signed by Krug dated March 3, 1930	11535	6431
631. Certain-teed royalty statement signed by Krug dated March 15, 1930	11536	6433
632. Certain-teed royalty statement signed by Krug dated April 16, 1930	11537	6435
633. Certain-teed royalty statement signed by Krug dated May 14, 1930	11538	6437
634. Certain-teed royalty statement signed by Krug dated June 17, 1930	11539	6439
635. Certain-teed royalty statement signed by Krug dated July 15, 1930	11540	6441
636. Certain-teed royalty statement signed by Krug dated Aug. 14, 1930	11541	6443
637. Certain-teed royalty statement signed by Krug dated Sept. 15, 1930	11542	6445
638. Certain-teed royalty statement signed by Krug dated Oct. 18, 1930	11543	6447

		Original	Print
639.	Certain-teed royalty statement signed by Krug dated Nov. 14, 1930	11544	6449
640.	Certain-teed royalty statement signed by Krug dated Feb. 17, 1931	11545	6451
641.	Small sample of Speer board and strip of Bestwall advertising material attached thereto	11546	6453
642.	Speer Patent No. 1,790,252	11547	6454
643.	Patent office file wrapper on Speer application	11553	6459
644.	Original contract between Speer and Certain-teed dated June 4, 1930	11582	6488
693.	Original letter from Baker to Henning dated Sept. 11, 1931	11585	6492
694.	Carbon copy of letter from Burley to Diegel dated March 22, 1935	11586	6493
695.	Carbon copy of letter from Burley to Lenci dated Aug. 27, 1935	11587	6494
696.	Original letter from Burley to Biesinger dated Oct. 7, 1935	11588	6495
697.	Carbon copy of letter from Burley to Krumholz dated Oct. 24, 1935	11589	6496
699.	Original letter from Burley to Board Survey dated June 25, 1932	11590	6497
700.	Carbon copy of letter from Board Survey to Burley dated July 2, 1932	11591	6498
701.	Original letter from Burley to Board Survey dated July 12, 1932	11592	6499
702.	Carbon copy of letter from Board Survey to Burley dated Aug. 9, 1932	11593	6500
703.	Original letter from Burley to Board Survey dated Sept. 17, 1932	11594	6501
704.	Original letter from Burley to Board Survey dated Sept. 26, 1932	11595	6502
705.	Carbon copy of letter from Board Survey to Burley dated Sept. 27, 1932	11596	6503
706.	Original letter from Burley to Board Survey dated Oct. 4, 1932	11597	6504
707.	Carbon copy of letter from Board Survey to Burley dated Oct. 8, 1932	11598	6505
708.	Original letter from Burley to Board Survey dated June 2, 1933	11599	6506
709.	Carbon copy of letter from Board Survey to Burley dated June 3, 1933	11600	6507
710.	Original letter from Burley to Board Survey dated July 11, 1933	11601	6508
711.	Carbon copy of letter from Board Survey to Burley dated July 29, 1933	11603	6509
712.	Carbon copy of letter from Burley to Board Survey dated Jan. 5, 1935	11604	6510
713.	Original letter from Biesinger to Board Survey dated Feb. 19, 1936	11605	6511

	Original	Print
714. Original letter from Certain-teed to National dated Dec. 17, 1930	11606	6512
(a) Original letter from Certain-teed to National dated Dec. 17, 1930	11608	6514
(b) Original Certain-teed-National agreement dated Dec. 17, 1930 enclosed in Ex. 714a	11609	6515
716. Original telegram from Baker to Avery dated May 17, 1929	11613	6521
717. Original letter from Baker to Avery dated June 20, 1929	11614	6521
718. Original letter from Baker to Avery dated Nov. 2, 1931	11615	6522
719. Original letter from Carey to Black dated May 10, 1935	11616	6523
720. Copy of telegram from Avery to Gloyd dated May 17, 1929	11617	6524
721. Copy of telegram from Avery to Gloyd dated May 18, 1929	11618	6524
722. Original telegram from Gloyd to Avery dated May 20, 1929	11619	6524
723. Carbon copy of letter from Avery to Gloyd dated May 20, 1929	11620	6525
724. Copy of telegram from Avery to Ebsary dated May 18, 1929	11621	6526
725. Copy of telegram from Avery to Baker dated May 18, 1929	11622	6526
726. Copy of telegram from MacLeish to Baker dated June 24, 1929	11623	6527
727. Copy of letter from Sadler to Miller dated June 13, 1933	11624	6527
729. Carbon copy of letter from Board Survey to C. O. Brown dated Nov. 14, 1932	11625	6528
730. Original letter from Henley to Board Survey dated Nov. 28, 1932	11626	6529
731. Carbon copy of letter from Board Survey to C. O. Brown dated May 13, 1933	11627	6530
732. Original letter from Henley to Board Survey dated May 25, 1933	11628	6531
733. Carbon copy of letter from Board Survey to C. O. Brown dated Aug. 2, 1933	11629	6532
734. Original letter from Henley to Board Survey dated Aug. 18, 1933	11630	6533
735. Carbon copy of letter from Board Survey to C. O. Brown dated Aug. 3, 1933	11631	6534
736. Original letter from Henley to Board Survey dated Aug. 18, 1933	11632	6535
737. Carbon copy of letter from Board Survey to C. O. Brown dated Aug. 3, 1933	11633	6536
738. Original letter from Henley to Board Survey dated Aug. 18, 1933	11634	6537

		Original	Print
739.	Carbon copy of letter from Board Survey to Henley dated Aug. 19, 1932	11635	6538
740.	Carbon copy of letter from Sadler to Miller dated Aug. 15, 1932	11636	6539
741.	Original letter from Henley to Miller dated Aug. 29, 1932	11637	6540
742.	Carbon copy of letter from Board Survey to C. O. Brown dated Aug. 23, 1932	11638	6541
743.	Original letter from Henley to Board Survey dated Sept. 8, 1932	11639	6542
744.	Original letter from Henley to Board Survey dated March 24, 1934	11640	6543
745.	Carbon copy of letter from Board Survey to C. O. Brown dated March 16, 1934	11642	6545
746.	Carbon copy of letter from Board Survey to Henley dated April 24, 1934	11641	6544
747.	Original letter from Henley to Board Survey dated May 11, 1934	11643	6546
748.	Carbon copy of letter from Board Survey to C. O. Brown dated July 19, 1934	11644	6547
749.	Original letter from Henley to Board Survey dated July 31, 1934	11645	6548
750.	Original Certain-teed form of answer to Board Survey dated Sept. 13, 1935	11646	6549
751.	Copy of USG form of complaint to Board Survey dated Sept. 3, 1935	11647	6550
752.	Copy of Board Survey form of complaint to Certain-teed dated Sept. 3, 1935	11648	6551
753.	Carbon copy of letter from Board Survey to Baker dated April 13, 1932	11649	6552
754.	Original letter from Henley to Board Survey dated April 5, 1932	11650	6553
755.	Carbon copy of letter from Board Survey to Baker dated Aug. 10, 1932	11651	6554
756.	Copy of letter from Sadler to Board Survey dated Aug. 10, 1932	11652	6555
757.	Original letter from Baker to Board Survey dated Aug. 23, 1932	11653	6556
758.	Original letter from Henley to Board Survey dated Oct. 13, 1932	11654	6557
759.	Carbon copy of letter from Board Survey to Burley dated Oct. 31, 1932	11655	6558
760.	Carbon copy of letter from Board Survey to Baker dated Dec. 20, 1932	11656	6559
761.	Original letter from National to Board Survey dated Jan. 9, 1933	11657	6560
762.	Copy of letter from Sadler to Miller dated April 15, 1933	11658	6561
763.	Carbon copy of letter from Board Survey to National dated April 17, 1933	11659	6562

		Original	Print
764.	Original letter from Burley to Miller dated May 1, 1933	11660	6563
765.	Copy of letter from Sadler to Miller, dated April 21, 1933	11661	6564
766.	Carbon copy of letter from Board Survey to National dated July 31, 1933	11662	6564
767.	Original letter from Burley to Board Survey dated Aug. 9, 1933	11663	6563
768.	Original USG form of complaint to Board Survey dated June 23, 1936	11664	6566
769.	Original letter from Burley to Scott, MacLeish & Falk dated Nov. 11, 1936	11665	6567
770.	Carbon copy of letter from Board Survey to Certain-teed dated May 21, 1935	11666	6568
771.	Original letter from Henley to Board Survey dated June 11, 1935	11667	6569
772.	Carbon copy of letter from Board Survey to Certain-teed dated June 14, 1935	11668	6570
773.	Original letter from Henley to Board Survey dated June 19, 1935	11669	6571
774.	Original USG form of complaint to Board Survey dated June 22, 1936	11670	6572
775.	Carbon copy of letter from Mahin to Certain-teed dated July 16, 1936	11671	6574
776.	Copy of Certain-teed form of reply to Board Survey dated July 29, 1936	11672	6575
777.	Carbon copy of letter from Board Survey to Baker dated May 17, 1933	11673	6576
778.	Original letter from Burley to Board Survey dated May 22, 1933	11674	6577
779.	Original letter from Burley to Board Survey dated Oct. 31, 1932	11675	6578
780.	Carbon copy of letter from Board Survey to Universal dated Nov. 21, 1932	11676	6579
781.	Copy of letter from Sadler to Miller dated July 20, 1933	11677	6580
782.	Carbon copy of letter from Board Survey to National dated July 29, 1933	11678	6580
783.	Original letter from Burley to Board Survey dated Aug. 9, 1933	11679	6581
784.	Carbon copy of letter from Board Survey to Burley dated Sept. 12, 1933	11680	6582
785.	Copy of letter from Sadler to Gallagher dated July 24, 1933	11681	6583

3 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

[File Endorsement Omitted.]

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

Complaint

Filed Aug. 15, 1940

The United States of America, seeking equitable relief, by its attorneys, acting under the direction of the Attorney General, complains and alleges, on information and belief, as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the above-named defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," said act being commonly known as the "Sherman Antitrust Act," in order to prevent continued violations by said defendants, jointly and severally, as hereinafter alleged, of Section 1 of the Sherman Antitrust Act, as amended by the Act of August 17, 1937, and of Sections 2 and 3 of said Act.

4 2. Each of the defendant companies, except Texas Cement Plaster Company, transacts business in the District of Columbia. Said companies are engaged in a continuous course of business in selling and delivering gypsum products, including gypsum board and plaster, to dealers and consumers within the District of Columbia. Said companies are engaged in soliciting through salesmen orders for said gypsum products from dealers and consumers within the District of Columbia and in promoting the sale of said gypsum products in the District of Columbia by adver-

tising in the District of Columbia and by distributing price lists, bulletins, and circulars among dealers and consumers within the District of Columbia.

3. The defendants United States Gypsum Company and The Celotex Corporation may be found within the District of Columbia. Each of said companies maintains sales offices, warehouses, and duly authorized agents within the District of Columbia for the transaction of the aforesaid business in said gypsum products.

4. The unlawful combination, conspiracy, and monopoly hereinafter described has been, and is being, carried out and made effective in part within the District of Columbia and many acts in furtherance of said combination, conspiracy, and monopoly have been performed by the defendants, or some of them, within the District of Columbia.

DESCRIPTION OF DEFENDANTS

5. The defendant United States Gypsum Company (sometimes referred to hereinafter as U.S.G.) is a corporation organized under the laws of the State of Illinois and having its principal offices in Chicago, Ill.

6. The defendant National Gypsum Company (sometimes referred to hereinafter as National) is a corporation organized under the laws of the State of Delaware and having its principal offices in Buffalo, N. Y.

7. The defendant Certain-teed Products Corporation (sometimes referred to hereinafter as Certain-teed) is a corporation organized under the laws of the State of Maryland and having its principal offices in New York, N. Y.

8. The defendant The Celotex Corporation (sometimes referred to hereinafter as Celotex) is a corporation organized under the laws of the State of Delaware and having its principal offices in Chicago, Ill.

9. The defendant Ebsary Gypsum Company, Inc. (sometimes referred to hereinafter as Ebsary), is a corporation organized under the laws of the State of New York and having its principal offices in New York, N. Y.

10. The defendant Newark Plaster Company (sometimes referred to hereinafter as Newark) is a corporation organized under the laws of the State of New Jersey and having its principal offices in Newark, N. J.

11. The defendant Samuel M. Gloyd is the sole owner of an unincorporated business venture doing business under the name of Texas Cement Plaster Company (sometimes referred to hereinafter as Texas) and having its principal offices in Oklahoma City, Okla.

12. The above-named defendants will sometimes be referred to hereinafter as the defendant companies.

13. The defendant Sewell L. Avery was President of U.S.G. from 1920 to 1936, and is, and has been since the year 1936, Chairman of the Board of Directors of U.S.G. His business address is 300 West Adams Street, Chicago, Ill.

14. The defendant Oliver M. Knode is President of U.S.G. His business address is 300 West Adams Street, Chicago, Ill.

15. The defendant Melvin H. Baker is President of National. His business address is 192 Delaware Avenue, Buffalo, N. Y.

16. The defendant Bror H. Dahlberg is President of Celotex and Chairman of the Board of Directors of Certain-teed. His business address is 919 North Michigan Avenue, Chicago, Ill.

6 17. The defendant Henry J. Hartley is President of Certain-teed. His business address is 100 East 42d Street, New York, N. Y.

18. The defendant Frederick G. Ebsary is President of Ebsary. His business address is 52 Vanderbilt Avenue, New York, N. Y.

19. The defendant Frederick Tomkins is President of Newark. His business address is 65 Bridge Street, Newark, N. J.

THE NATURE OF THE TRADE AND COMMERCE INVOLVED IN THIS COMPLAINT

20. The defendant companies are engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at plants located throughout the United States. Said companies sell said gypsum products in interstate commerce to distributors and consumers within the States east of the Rocky Mountains, and in commerce between the States and the District of Columbia to distributors and consumers within the District of Columbia. Said sales area, including each of the States east of the Rocky Mountains and including the District of Columbia, will be referred to hereinafter as the Eastern area. The defendant companies manufacture and sell 100% of all gypsum board and 80% of all gypsum plaster manufactured and sold in the Eastern area.

A. Description of gypsum and of gypsum products

21. Gypsum is the primary constituent of various important products used in the building construction industry.

It is a rock-like mineral composed of calcium sulphate in combination with water, and is found in deposits in numerous states of the United States and in Canada. After the rock is mined or quarried, it is crushed and subjected to a process known as calcination, which involves driving off part of the water originally combined with the calcium sulphate by heating the crushed gypsum in large kettles or kilns to a temperature above the boiling point of water. The resulting product, known as calcined gypsum or stucco, has the characteristic of readily recombining with water to form a hard, rigid mass.

7 22. The principal products of calcined gypsum are wall plaster and gypsum board. In addition, there are several miscellaneous less important products of calcined gypsum used in the building industry, such as gypsum block or tile. In 1939, the sales value of all products of calcined gypsum used in the building industry in the United States amounted to approximately $42,000,000, $17,000,000 of which was accounted for by plaster and $23,000,000 of which was accounted for by gypsum board.

23. Until the year 1900, the principal ingredient of all wall plaster was lime. About 1900, however, gypsum became commercially important as an ingredient of plaster in place of lime. Since that time, gypsum has gradually displaced lime in plaster, and over 90% of all plaster now used in building construction in the United States is made with gypsum.

24. Commercial production of gypsum board commenced about 1905. For many years thereafter, by far the greatest amount of gypsum board produced was board designed to be used as a base for plaster in wall and ceiling structures and known as plasterboard. About 1925, a board smaller than plasterboard, known as gypsum lath, was introduced on the market as a plaster support. By reason of the smaller and, therefore, more convenient size of gypsum lath, it has displaced plasterboard in new construction, and plasterboard is now used solely for repair work. Gypsum lath and plasterboard constitute approximately 50% of all products used as a support for plaster in all wall and ceiling structures, and over 90% of all such products in wall and ceiling structures in residential buildings. The sales value of gypsum lath and plasterboard manufactured by the defendant companies and sold in the United States in 1939 was about $13,000,000, over 90% of which was that of board sold in the Eastern area.

25. Several years after the first commercial manufacture of plasterboard, a gypsum board, known as wallboard and designed to be used as a finished panel in place of plaster and lath in wall and ceiling structures, was introduced on the market. The production of this board was greatly stimulated by the World War of 1914-1918 by reason of the extensive used of gypsum wallboard by the Government of the United States in temporary structures such as barracks. Gypsum wallboard is now one of the most important of various boards on the market which are used as substitutes for plaster and lath. The sales value of gypsum wallboard manufactured by the defendant companies and sold in the United States in 1939 was about $8,500,000, over 90% of which was that of board sold in the Eastern area.

26. All gypsum board consists of a flat, thin core of hardened calcined gypsum covered on both surfaces with heavy paper, known as liners. Since gypsum lath and plasterboard are intended to support plaster, the paper liners with which the surfaces of the gypsum core are covered are coarse and absorbent in order to permit the plaster to penetrate through the paper and to unite with the gypsum core. Because gypsum wallboard is a substitute for plaster and lath, and is, therefore, not covered with plaster, one of its liners consists of a good grade of heavy, smooth paper.

27. Since about the year 1934, gypsum board sometimes has been covered on one surface with a metallic foil for the purpose of increasing the heat-insulating qualities of the wall or ceiling structure in which said metallized board is used. Since about the year 1936, gypsum lath sometimes has been perforated for the purpose of permitting the plaster, when applied to the lath, to penetrate through the perforations and to form heads on the back of the lath, which act as mechanical keys to increase the bond between the lath and the layer of plaster.

28. The manufacture of plaster from calcined gypsum involves a relatively simple operation consisting principally of the addition of chemical compounds to the dry calcined gypsum to retard the hardening of the finished product, and of hair or fiber to increase its strength.

The manufacture of gypsum board from calcined gypsum involves a much more complicated operation requiring expensive equipment and machines. All gypsum calcining plants are equipped to manufacture gypsum plaster, but said plants are not always equipped to manufacture gypsum board.

29. The usual process of manufacturing gypsum board is as follows: Calcined gypsum is mixed with water to form a thick plastic mass known as a slurry. An adhesive to increase the bond between the core and the liners is mixed, either with the dry calcined gypsum or with the slurry. To the slurry is added a so-called aggregate to lighten the weight of the finished board. Until 1929, the most commonly used aggregate was sawdust. Since 1929, the aggregate has generally been composed of soap foam or chemical compounds, which cause the formation of numerous minute voids in the board. After the addition of the aggregate to the slurry, the mixture is spread upon the lower liner and the upper liner is placed upon the top of the mixture. The calcined gypsum and water are then permitted to "set" to form a hard, rigid core, firmly bonded to the liners.

30. Whenever the term "plaster" is used hereinafter it shall mean gypsum plaster; whenever the terms "lath," "plasterboard," and "wallboard" are used hereinafter they shall mean gypsum lath, gypsum plasterboard, and gypsum wallboard, respectively; whenever the terms "gypsum board" or "board" are used hereinafter they shall include lath, plasterboard, and wallboard.

B. Description and history of the manufacturers of gypsum products

31. U.S.G. was incorporated in 1901 to effect a merger of thirty-five producers, processors, and distributors of gypsum products. From that date to the present, it has been the largest producer of gypsum board and plaster in the United States, producing and selling in 1939 approximately 55% of all gypsum board and approximately 40% of all plaster manufactured and sold in the Eastern area. During the last twenty years, U.S.G. has acquired the gypsum plants of ten other producers, including the Niagara Gypsum Company (sometimes referred to hereinafter as Niagara) which, at the date of its acquisition by U.S.G. in 1929, had been engaged in the production of plaster and gypsum board for over ten years. U.S.G. now operates sixteen plants in the Eastern area, at twelve of which board is produced.

32. Since 1925, U.S.G. has expanded into fields of other allied building materials, and it is now one of the most important manufacturers of lime, metal lath, asphalt shingle and roofing, fiber insulation board, insulation wool, paper, texture and casein paints, acoustical materials, and many other products used in the building industry.

33. National is the second largest producer of gypsum products in the United States, producing in 1939 approximately 23% of all gypsum board and over 20% of all plaster manufactured and sold in the Eastern area. It was incorporated in 1925 and commenced production of gypsum board and plaster in 1926. In 1935 National acquired the assets, including three plants, of Universal Gypsum & Lime Company (sometimes referred to hereinafter as Universal), which company had been manufacturing gypsum board and plaster since 1922. In 1936, National acquired the assets, including two plants, of the Atlantic Gypsum Products Corporation (sometimes referred to hereinafter as Atlantic), which had been producing gypsum board and plaster since 1926. National now operates ten plants in the Eastern area, seven of which produce gypsum board.

34. In 1930, National, like U.S.G., commenced to expand into fields of other allied building materials and is now engaged in the production of lime products, acoustical materials, texture and casein paints, and other products used in the building industry.

11 35. Certain-teed is the third largest producer of gypsum products in the United States. In 1939 it produced about 12% of all gypsum board and about 10% of all plaster manufactured and sold in the Eastern area. Certain-teed did not enter the gypsum industry until 1923 after it had become well established as an important producer of roofing materials, paints and varnishes, composition flooring, and paper. In 1923 Certain-teed entered the plaster business by acquiring six gypsum plants of the Acme Cement Plaster Company, but did not commence manufacturing gypsum board until 1926, and then only at a single plant. In 1928, Certain-teed acquired The Beaver Products Company, Inc., and the Beaver Board Company (sometimes referred to hereinafter as Beaver). Beaver had been for many years an important producer of fiber wallboard, and entered the gypsum industry in 1920 by the purchase of the American Cement Plaster Company, with six gypsum plants, four of which produced board, and Bestwall Manufacturing Company, with one plant equipped to manufacture board. Certain-teed now operates five plants, four of which produce gypsum board.

36. The defendants Celotex, Ebsary, Newark, and Texas are single plant operators and, together, account for not more than approximately 10% of the gypsum board and plaster manufactured and sold in the Eastern area.

37. Celotex, which for many years has been the largest producer of fiber insulation board in the United States,

is a newcomer in the gypsum industry. In 1937, it acquired a controlling stock interest in, and in 1939 it acquired the assets of, The American Gypsum Company (sometimes referred to hereinafter as American), which had been a producer of plaster since about 1910, and of gypsum board since 1920.

38. Ebsary has been engaged in the manufacture of plaster since 1911 and of gypsum board since 1928.
12 Newark has been engaged in the production of plaster since 1922, but did not commence the manufacture of gypsum board until 1937 when it acquired the Kelley Plasterboard Company, Inc. (sometimes referred to hereinafter as Kelley Plasterboard), which had been engaged in the production of gypsum board at a single plant since before 1918. Texas has been manufacturing plaster since about 1910 and gypsum board since 1924.

C. The distribution of gypsum products

39. The defendant companies sell most of the gypsum board and plaster manufactured by them, in interstate commerce and in commerce between the States and the District of Columbia, to retail building material dealers located throughout the Eastern area. Said dealers resell said gypsum products principally to building contractors. Since 1929 the defendant companies have refrained from selling said gypsum products direct to contractors.

40. Said gypsum products are transported by truck or railroad to the yards of said dealers, usually from the plants in which the products are manufactured, but sometimes from warehouses, owned by the larger defendant companies and conveniently located throughout the Eastern area to serve retail dealers. Gypsum board is usually transported in mixed cars or trucks of board, plaster, and miscellaneous gypsum products, and straight carload or truckload shipments of board are infrequent.

41. The defendants U.S.G., National, and Certain-teed sell said gypsum products to retail dealers, as aforesaid, within all of the States embraced within the Eastern area. The other defendant companies sell gypsum products produced by them in some, but not all, of the States within the Eastern area.

42. The defendant companies sell in interstate commerce a substantial part of the gypsum board manufactured by them to various small manufacturers of calcined
13 gypsum and plaster not engaged in the manufacture of gypsum board, sometimes referred to hereinafter as manufacturing distributors. Said manufacturing dis-

tributors purchase said gypsum board at a discount from the defendant companies' price to dealers and resell said board to dealers in competition with the defendant companies. Said manufacturing distributors usually ship said board in mixed cars or trucks made up of gypsum board purchased aforesaid and of plaster produced by said manufacturing distributors.

43. Prior to the year 1932, the defendant companies and others engaged in the manufacture of gypsum board and plaster sold a substantial part of the board and plaster manufactured by said companies to building material jobbers at a discount from said companies' price to dealers. Said jobbers resold said board to retail dealers in competition with the defendant companies and other manufacturers of plaster and board. Some of said jobbers were also engaged in the manufacture of plaster from calcined gypsum at mixing plants owned or operated by said jobbers. Since the year 1932, no substantial amount of gypsum board or plaster has been distributed by the defendant companies through jobbers.

OFFENSES CHARGED

44. Defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in gypsum board, plaster, and miscellaneous gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act. Defendants are, and have been for may years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act. Defendants are monopolizing, and have monopolized for many years last past, trade and commerce in said
14 gypsum products among the several States, in violation of Section 2 of the Sherman Antitrust Act. Defendants are, and have been for many years last past, attempting to monopolize trade and commerce in said gypsum products among the several States and are, and have been for many years last past, actively engaged in a continuing combination and conspiracy to monopolize trade and commerce in said gypsum products among the several States, in violation of Section 2 of the Sherman Antitrust Act. Defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act. Defendants are, and have been for

many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act. Said unlawful contracts, combination, conspiracy, monopoly, and attempt to monopolize will be referred to hereinafter as the combination.

45. Said combination has been formed, has been carried out, and is being carried out by each of the defendant companies (acting, in part, through those of their officers and directors made defendants herein) and by other companies hereinafter referred to engaged in the manufacture of said gypsum products. Said companies have entered into, have carried out, and are carrying out said combination for the purpose, and with the effect, of restraining, dominating, and controlling the manufacture and distribution of said gypsum products in the Eastern area by:

(a) Concertedly raising and fixing at arbitrary and noncompetitive levels the prices of gypsum board manufactured and sold by said companies in the Eastern area;

(b) concertedly standardizing gypsum board and its method of production by limiting the manufacture of board to uniform methods, and by producing only uniform kinds of board, for the purpose, and with the effect, of eliminating competition arising from variations in methods of production and in kinds of board manufactured and distributed in the Eastern area;

(c) concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern area:

(d) concertedly refraining from distributing gypsum board, plaster, and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern area, and concertedly refusing to sell said products to jobbers at prices below said companies' prices to dealers, for the purpose, and with the effect, of eliminating substantially all jobbers from the distribution of said gypsum products in the Eastern area;

(e) concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies.

46. Said combination was entered into and has been, and is being, carried out by the defendant companies in part under the guise of numerous license agreements purporting

to relate to the use of certain patents owned by the defendant U.S.G. in the manufacture of gypsum board. To give color of legality to said combination, the defendant companies, and other companies hereinafter named, concertedly agreed among themselves to enter into, and did enter into, said license agreements. Said license agreements are not bona fide patent license agreements reasonably designed to secure to U.S.G. the pecuniary reward for valid patent monopolies, but were entered into and executed for the illegal purposes described in paragraphs 44 and 45 hereof. The formation and operation of said combination is more fully set forth in paragraphs 47 to 120 hereof.

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THE FORMATION OF THE COMBINATION

A. The patent litigation leading up to the formation of the combination

47. The combination was formed during the period between the month of September 1925 and early in the year 1930. It has its roots, however, in litigation surrounding certain improvement patents relating to the edges of gypsum board.

48. Until 1912, the edges of the core of all gypsum board were exposed and unprotected. About 1912, U.S.G. commenced the manufacture and distribution of a board with the edges bound and sealed by folding the lower liner over the edges of the core. This improvement was covered by United States Letters Patent No. 1,034,746, issued on August 6, 1912, upon the application of Clarence W. Utzman, and assigned to U.S.G. A copy of said patent is set forth as Exhibit No. 1 in the appendix hereto. Said patent will be referred to hereinafter as the Utzman patent, and board embodying the edges described in said patent will be referred to as closed-edge board as distinguished from board with an unprotected edge, referred to hereinafter as open-edge board.

49. The closed-edge board represented a substantial improvement of that then on the market by eliminating chipping and crumbling of the core at the edges. Its introduction on the market by U.S.G. and the consumer demand for it which followed eventually stimulated other manufacturers to produce and market board with a protected edge. The result was a series of infringement suits by U.S.G.

50. On July 14, 1917, U.S.G. filed suit against Bestwall Manufacturing Company in the District Court of the

United States for the Northern District of Illinois,
17 and obtained, on July 21, 1919, a judgment holding the Utzman patent valid and infringed by Bestwall (258 Fed. 647). The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Seventh Circuit on January 4, 1921 (270 Fed. 542).

51. After the filing of the above suit, Bestwall sought to avoid the Utzman patent by manufacturing a board with a modified form of closed edge. In 1920 Beaver acquired Bestwall and continued the manufacture of said board through Bestwall. On June 13, 1921, U.S.G. filed a supplemental bill against Bestwall and Beaver, alleging that this new board infringed the Utzman patent. On July 21, 1925, the district court sustained U.S.G.'s claim and entered judgment against Beaver (15 F.(2d) 704).

52. The aforesaid decisions against Bestwall and Beaver established the validity of the Utzman patent and construed the scope of the patent so broadly as to make manufacture of a closed-edge board by a competitor of U.S.G. impossible without infringing said patent. The superior position which this gave to U.S.G. in the manufacture of a protected-edge board was further increased by the acquisition by that company in 1920 of United States Letters Patent No. 1,358,508, known as the Birdsey patent, which covered board with the upper and lower parts of the edges protected, but with the center part exposed, manufactured by folding both the top and bottom liner sheets over the sides of the core, turning them inward, and embedding them in the body of the core.

53. Between 1920 and 1925, American and Universal manufactured board with semiprotected edges somewhat like that covered by the Birdsey patent. During the same period, Niagara, as a licensee of American under a patent owned by American and purporting to cover board with semiprotected edges, manufactured the same kind of board as American. After the decision of the district court against
Beaver, U.S.G. filed suit against American on Sep-
18 tember 22, 1925, and against Universal on September 24, 1925, alleging infringement of both the Utzman and Birdsey patents.

54. The period from the latter part of 1925, after U.S.G. had obtained the judgment against Beaver and after the filing of the infringement suits against American and Universal, until the year 1930, was marked by efforts by all of the parties to settle the aforesaid litigation, expansion of these efforts into a comprehensive plan for stabil-

ization of prices in the gypsum industry under the leadership of U.S.G., temporary delay in the execution of this plan with a resulting intensification of price competition in the industry, and eventual adoption of the plan by every important board manufacturer in the Eastern area.

B. The period from September 1925 to July 1926

55. Beginning after September 1925, and continuing into the year 1926, numerous conferences were had between Sewell Avery, then president of U.S.G., Augustus Blagden, then president of Beaver, and Frank Griswold, then vice president of American, to consider compromises of the suits by U.S.G. against Beaver and American. The conclusions reached by Avery, Blagden, and Griswold at these conferences are set forth in paragraphs 56 to 58 hereof, as follows:

56. The industry had nothing to gain by further prosecution of the suits then pending. The litigation of the last nine years had already created bitterness in the industry which reflected itself in increasing price competition in an industry which until 1925 had been unusually stable and profitable. Further prosecution of the Beaver and American suits would produce one of two undesirable results: (1) A decision by an appellate court holding the Utzman patent invalid, or at least narrow in scope, the effect of which would be to permit every company in the industry to manufacture closed-edge board and to compete
19 freely in its sale; (2) a decision by an appellate court sustaining the validity of the Utzman patent and declaring Beaver and American infringers, the effect of which (in the absence of a patent licensing arrangement) would be to compel Beaver, American, and other manufacturers of board with closed or semiprotected edges to manufacture board with noninfringing edges and to reduce prices to promote the sale of such board in competition with closed-edge board.

57. U.S.G.'s recent successes in the courts had placed it in a strategic position to dominate the industry by licensing all board manufacturers in the Eastern area to manufacture the closed-edge board under the Utzman patent with the right reserved to U.S.G. to fix the selling prices of its licensees. Under such licenses, the industry could unite to produce a uniform board and to distribute it at prices controlled and stabilized by U.S.G.

58. Avery, Blagden, and Griswold agreed among themselves that efforts should be made to induce the industry

to enter into license agreements with U.S.G. having for their purpose long-term price stabilization of the board industry. Blagden and Griswold agreed to act as a liaison between U.S.G. and the industry for this purpose.

59. Commencing in April 1926, Blagden and Griswold held a series of meetings and conferences with all companies manufacturing and selling gypsum board in the Eastern area. At said meetings and conferences, U.S.G.'s proposal to license the industry as a whole under the Utzman patent and the resulting advantages of standardized production and uniform prices at stabilized levels under the control of U.S.G. were explained by Blagden and Griswold and discussed by the representatives of the companies in attendance.

60. The response of the industry was prompt and unanimous. At a meeting in May 1926, attended by representatives of every company manufacturing and selling board in the Eastern area, including each of the defendant companies then manufacturing board, and by representatives of the defendants Certain-teed and National, which were about to commence the manufacture of board, each of said companies agreed to become a licensee of U.S.G. under the Utzman patent and U.S.G. agreed to license each of the other companies to use said patent, provided a contract with satisfactory provisions concerning royalties and price control could be agreed upon.

61. The form of the contract proved, however, to be a stumbling block in the program. Avery, having obtained an agreement from all board manufacturers in the Eastern area to become licensees of U.S.G. under the Utzman patent, proposed a contract involving not only the Utzman patent, but 29 other patents, the most important of which was a patent covering a machine for the manufacture of closed-edge board, and 38 applications for patents. Under the proposed contract, each of the licensees was required to admit the validity of the patents then issued and of patents subsequently to be issued on the applications covered by the contract; to agree not to contest the validity and scope of said patents; and to pay royalties on all board manufactured by it, whether patented or unpatented, until February 10, 1937, the date of expiration of the machine patent. Price control by U.S.G. was, by the terms of the contract, to continue only until August 6, 1929, the date of expiration of the Utzman patent.

62. The members of the industry considering licenses objected to this contract. Said companies were unwilling to bind themselves to pay royalties for a period of almost eleven years for patents most of which they did not desire to use and the validity and scope of most of which were unknown to said companies. Said companies urged that, if royalties were to be paid until 1937, control of licensee prices by U.S.G. should not cease in 1929.

63. For the foregoing reasons, said companies proposed that the license agreements under consideration cover only the Utzman patent and run only until the expiration
21 of said patent. Avery rejected said counterproposal and insisted upon the contract submitted by him. The result was a stalemate in negotiations concerning the licenses, except with respect to four companies.

C. The 1926-1927 license agreements

64. Between July and September 1926, Beaver and Universal elected to accept the contract proposed by U.S.G. in order to settle the aforesaid suits pending against them. A compromise of the suit between U.S.G. and Beaver was executed on July 29, 1926, and a compromise of the suit between U.S.G. and Universal was executed on September 17, 1926. On the same days on which said compromises were executed both Beaver and Universal entered into substantially identical license agreements with U.S.G. A copy of the Beaver agreement is set forth as Exhibit No. 2 in the appendix hereto. So far as material here, said license agreements provided in substance as follows:

(a) U.S.G. licensed Beaver and Universal to use inventions covered by the Utzman patent, 29 other patents, including the aforesaid machine patent, and 38 applications for patents, in manufacturing gypsum board, until the expiration of the machine patent on February 10, 1937.

(b) U.S.G. reserved the right to determine and fix, during the life of the Utzman patent, the price at which said licensees sold closed-edge board.

(c) Said licensees agreed to pay specified royalties on all board manufactured by them, whether patented or unpatented, until February 10, 1937.

(d) Said licensees agreed to admit that all board having a protected edge fell within the scope of the Utzman patent, during the life of said patent, and that, after the expiration of said patent, all board having a protected
22 edge was made under the machine patent or under other patents covered by the license agreements.

(e) Said licensees acknowledged, and agreed not to contest, the validity of all patents involved in the license agreements and of all patents subsequently issued on applications involved in said agreements.

65. During the fall of 1926 and the spring of 1927, Griswold and Blagden continued to agitate for the execution of license agreements by the rest of the industry in the Eastern area, and numerous meetings and conferences were held to induce the industry to accept licenses. As a result of these meetings and conferences, and of the persuasions of Blagden, Griswold, and Avery, Atlantic, on March 5, 1927, and Texas, on April 18, 1927, entered into separate license agreements with U.S.G. which were substantially identical with the aforesaid Beaver and Universal agreements.

66. Pursuant to the terms of said agreements, U.S.G., immediately following the execution of said agreements, exercised its right to determine and fix the selling prices of its licensees for board.

D. The period from April 1927 to May 1929

67. Despite the capitulation of the aforesaid four companies, the rest of the industry remained adamant in its refusal to accept the contract as submitted by U.S.G. The period from 1927 to May 1929 was marked by an intensification of competition in the board industry, which demonstrated the necessity for unanimity of action by the industry if stabilization of board prices was to be accomplished by the licensing plan.

68. Late in 1926, Certain-teed commenced the manufacture of open-edge board. To overcome consumer preference for the closed-edge board, Certain-teed sold its open-edge board at a differential below the price of closed-edge board. The breakdown of license negotiations,
23 with the prospect that Certain-teed would continue indefinitely the manufacture of open-edge board, stimulated Certain-teed to expand its market by further price reductions.

69. The introduction of the open-edge board on the market by Certain-teed at reduced prices constituted a substantial competitive threat to the rest of the board industry. American, National, and Niagara, which were manufacturing board with semiprotected edges, attempted to meet the competition of the open-edge board by marketing a second grade board which said companies sold at about the same price as that of open-edge board. U.S.G. refused

to reduce, or to permit its licensees to reduce, the basic prices of closed-edge board, but agreed to permit said licensees to manufacture and distribute at reduced prices a second grade closed-edge board. Universal commenced marketing said second grade board in the fall of 1927 at prices below those for its first grade product.

70. Early in 1928, Certain-teed acquired Beaver, the second largest producer of board at that time and a licensee of U.S.G. U.S.G. refused to modify the royalty provision of its license agreement with Beaver to limit royalties to patented board only and thus to permit the production of open-edge board at the Beaver plants if deemed necessary by Certain-teed. Certain-teed, therefore, refused to assume the Beaver agreement and commenced the production of open-edge board at all of the Beaver plants.

71. During the same year, three other companies commenced manufacturing and marketing open-edge board: Ebsary early in the year, and American and Niagara after July 11, 1928, when the District Court of the United States for the Northern District of Ohio held that the semi-protected-edge board of American infringed the U.S.G. Birdsey patent.

72. The substantial increase in the amount of open-edge board on the market in 1928 caused U.S.G. and those of its licensees not yet doing so, to commence in that year the manufacture and distribution of a second grade closed-edge board, and to sell the same at prices competitive with those for open-edge board.

24 73. To meet the competition of the second grade closed-edge board, manufacturers of open-edge board reduced the prices of said board. Manufacturers of second grade closed-edge board, in turn, reduced the prices of said board. This process of price reductions was repeated from time to time during the year 1928. By the year 1929, prices for all gypsum board were substantially below 1927 levels. During the year 1928, when prices for gypsum board were declining, prices were substantially reduced for other gypsum products, principally plaster and block.

74. The vigorous competition of 1928 caused a revival of interest on the part of gypsum board producers in price stabilization for all gypsum products. Avery urged that those companies in the industry not yet licensees of U.S.G. reconsider his proposal for an industry-wide patent licensing plan covering board with price control by U.S.G. Eugene Holland, then president of Universal, agreed with Avery to promote the licensing plan. In the latter part of 1928

and the early part of 1929, meetings and conferences, some of which were arranged by Holland, were held by the companies not yet licensees. At said meetings, further consideration was given to the licensing program.

75. By 1929, however, U.S.G.'s proposal of licenses running until 1937 had become even less attractive to the unlicensed board manufacturers than it had been two years before when said companies had rejected it. The expiration date of the Utzman patent was August 1929. Price control beyond said date under color of that patent alone was, therefore, not possible. To induce the other companies to enter into agreements running until 1937, U.S.G., through Avery, assured representatives of said companies that, if said agreements were executed, U.S.G. would then take steps to control the prices of its licensees throughout the life of the licenses under color of some patent. In reliance upon these assurances, National, Certain-teed, Ebsary, and Niagara agreed among themselves and with U.S.G. to become licensees of U.S.G.

E. The May 1929 license agreements

76. During the period between May 16 and May 22, 1929, after meetings and conferences attended by representatives of U.S.G., representatives of each of its licensees, and representatives of Certain-teed, National, Ebsary, and Niagara, each of the latter companies entered into separate license agreements with U.S.G. A photostatic copy of the license agreement with Ebsary, set forth as Exhibit No. 3 in the appendix hereto, is substantially identical with each of said agreements. Said agreements, so far as material here, were substantially the same as the Beaver agreement, except that said agreements contained the following additional provisions:

(a) The licensees agreed to sell gypsum board to manufacturers, jobbers, and other wholesale distributors only with the written consent of U.S.G.

(b) U.S.G. agreed to license said licensees to use the methods covered by certain of its patents in bundling gypsum board for shipment and said licensees agreed to use only the methods covered by said patents in bundling gypsum board.

77. In addition to the agreements contained in the aforesaid license agreements, U.S.G. and its licensees mutually agreed among themselves as follows:

(a) Said companies would immediately discontinue the manufacture of unpatented open-edge board and second

grade closed-edge board and would dispose of inventories of said boards at prices to be determined and fixed by U.S.G. After disposal of said inventories, all companies would manufacture and sell a closed-edge board manufactured and bundled by the processes and methods used by U.S.G.

(b) U.S.G. would advance and stabilize the prices for board immediately after the execution of said license agreements. As prices for board were increased, all companies would increase their prices for plaster and miscellaneous gypsum products.

26 (c) U.S.G. would continue to control, through the use of other patents, the price of its licensees for board manufactured by said licensees after the expiration of the Utzman patent in August 1929.

F. The period from June 1, 1929, to October 1929

78. Immediately after the execution of the May agreements, U.S.G. offered to enter into additional license agreements with its licensees, permitting them to use a new process developed by U.S.G. for lightening the weight of board, hereinafter referred to as the foam process. Said foam process was covered by pending applications for United States patents which U.S.G. expected to issue before the end of the year 1929. U.S.G. offered said additional agreements to its licensees pursuant to its agreement to continue price control after the expiration of the Utzman patent and to give color of legality to such price control by purporting to base it on licenses covering patents on the foam process.

79. The foam process consisted of the introduction of soap foam into the slurry as an aggregate to cause the formation of numerous air voids in the board. Said process required that the numerous minute bubbles in the foam be sufficiently stable and pliable to resist collapse during the process of manufacturing board. To obtain said stability and pliability in the bubbles, U.S.G. contemplated, at the time of its offer of the foam process to its licensees, the use of several methods, including, among others, the use of a colloidal agent, such as farinaceous paste, to reinforce the walls of the bubbles.

80. At the time U.S.G. offered to license its licensees to use the foam process, Universal owned United States Letters Patent No. 1,230,297, issued to Charles E. Hite on June 17, 1917, and United States Letters Patent No. 1,500,452, issued to Joseph F. Haggerty on July 8, 1924, sometimes referred to hereinafter as the Hite and Haggerty or

starch patents. The Hite patent, a copy of which is set forth as Exhibit No. 4 in the appendix hereto, pur-
27 ported to cover a heat-resistant, cementitious material, including calcined gypsum, containing voids produced by the use of a water-cooked, gelatinized carbohydrate such as starch. The Haggerty patent, a copy of which is set forth as Exhibit No. 5 in the appendix hereto, purports to cover an improved wallboard manufactured by the use of water-cooked starch gelatin to increase adhesion between the core and paper liners of the board.

81. For the purpose of inducing U.S.G. to purchase said starch patents, Universal asserted that the use of farinaceous paste in the foam process infringed said patents.

82. The contemplated use of farinaceous paste in the foam process to reinforce the walls of the bubbles did not, in fact, as U.S.G. well knew, infringe the Hite and Haggerty patents. In addition, other practicable and equally efficient methods for lending stability and pliability to the bubbles, not infringing the starch patents, were known to U.S.G. at the time of Universal's assertion. U.S.G. advised its licensees that the Hite and Haggerty patents were of doubtful validity and that the foam process did not infringe said patents.

83. Notwithstanding the facts alleged in paragraph 82 hereof, U.S.G. agreed to purchase the Hite and Haggerty patents from Universal provided its licensees would accept licenses covering said patents and the foam process. Each of the licensees agreed with U.S.G. and among themselves to accept said licenses and U.S.G. agreed to acquire, and did acquire, the starch patents from Universal.

84. U.S.G. agreed to acquire, and did acquire, said starch patents, and U.S.G. and its licensees agreed to execute, and did execute, license agreements covering said patents for the purpose of giving color of legality to price control by U.S.G. of board manufactured by its licensees during the period between the date of expiration of the Utzman patent and the date of issuance of patents on the foam process.

28 G. The October and November 1929 license agreements

85. Immediately after the agreement of U.S.G. to acquire the starch patents, National, Certain-teed, Universal, Atlantic, Ebsary, American, and Kelley Plasterboard entered into new license agreements with U.S.G. Said agreements superseded those previously executed. A copy of

the Ebsary agreement, set forth as Exhibit No. 6 in the appendix hereto, is substantially identical with each of said agreements. Said agreements, in so far as material here, provided in substance as follows:

(a) U.S.G. agreed to disclose the foam process to its licensees.

(b) U.S.G. licensed its licensees to use the inventions covered by 50 patents, including the Hite and Haggerty patents, and 7 applications for patents, including the applications relating to the foam process.

(c) U.S.G. reserved the right to determine and fix the prices at which the licensees sold board embodying the improvements claimed in the Hite and Haggerty patents, or in any patents subsequently issued on the applications relating to the foam process.

(d) The licensees agreed to pay stipulated royalties on all board manufactured by them, whether patented or unpatented.

(e) U.S.G. licensed the licensees to use the methods covered by certain of its patents in bundling gypsum board for shipment, and the licensees agreed to pay royalties on bundles of all kinds, whether patented or unpatented.

(f) The licensees agreed to sell gypsum board to manufacturers, jobbers, and other wholesale distributors only with the written consent of U.S.G.

(g) The licensees acknowledged, and agreed not to contest, the validity of all patents then issued and of all patents subsequently issued on applications covered by the agreements.

29 (h) U.S.G. agreed to reduce the royalties of its licensees by 1% if the foam process was rendered obsolete by other processes and if, but only if, U.S.G. permanently and wholly abandoned the foam process.

86. In addition to the agreements contained in said licenses, each of the licensees mutually agreed among themselves and with U.S.G. as follows:

(a) For many years prior to 1929, the licensees, except Ebsary and Kelley Plasterboard, had been using adhesives in the manufacture of board to increase adhesion between the core and liners. Each of said licensees agreed to consider said use of adhesives as falling within the scope of the Hite and Haggerty patents for the purpose of permitting price control by U.S.G. during the life of said patents. Ebsary and Kelley Plasterboard agreed to commence using adhesives for the same purpose.

(b) The licensees agreed to use the foam process in the manufacture of gypsum board as soon as their plants could be equipped, and agreed to manufacture and distribute a closed-edge board, manufactured and bundled by substantially the same processes as those employed by U.S.G.

87. By virtue of the aforesaid agreements, U.S.G., by 1930, was authorized to control the prices of nearly all gypsum board manufactured in the United States east of the Rocky Mountains. Said price control was to last, by the terms of said agreements, until a date 17 years after the date of issuance of patents not then issued. By virtue of said agreements, all companies manufacturing and selling board in the Eastern area, except Texas, were obliged to manufacture a uniform, standardized board.

88. In February 1937, after the expiration of the 1927 agreement between U.S.G. and Texas, and after threats by U.S.G. of suit against Texas for infringement of the starch patents, Texas executed a new license agreement with U.S.G., now in effect, substantially the same as those described above. Since this time U.S.G. has controlled the prices of all gypsum board manufactured in the Eastern area. The license agreement between Kelley Plasterboard and U.S.G. was assumed by the defendant Newark in 1938 upon the acquisition by Newark of Kelley Plasterboard and is now in effect. The license agreement between American and U.S.G. was assumed by the defendant Celotex upon the acquisition of American by Celotex and is now in effect. The license agreements of National, Certain-teed, and Ebsary with U.S.G. have been continuously since the year 1929, and are now, in effect.

THE OPERATION OF THE COMBINATION

89. Where the word "licensee" is used hereinafter it shall be deemed to include National, Certain-teed, Ebsary, and Texas throughout the period from the formation of the combination as aforesaid to the date of filing this complaint; American, Universal, Atlantic, and Kelley Plasterboard from the time of the formation of said combination to the respective dates of dissolution of said companies as aforesaid: the defendant Celotex from the date of its acquisition of American as aforesaid to the date of filing this complaint; and the defendant Newark from the date of its acquisition of Kelley Plasterboard as aforesaid to the date of filing this complaint.

A. Control by U.S.G. over the prices and methods of manufacture and distribution of its licensees

1. Control of prices and terms and conditions of sale for gypsum board

90. Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. has determined and fixed the selling prices and terms and conditions of sale of its licensees for all gypsum board manufactured by said licensees. Throughout said period the licensees of U.S.G. have sold all gypsum board manufactured by them at the prices and on the terms and conditions of sale determined and fixed by U.S.G. as aforesaid. Pursuant to the agreements described in paragraphs 76 and 85 hereof, U.S.G. raised and stabilized the prices of gypsum board during the period from 1929 to 1932, and has maintained
31 said prices throughout the period from 1932 to the date of filing this complaint at high, arbitrary, and non-competitive levels.

91. From time to time throughout said period, U.S.G. has circulated among its licensees numerous bulletins setting forth the aforesaid prices and terms and conditions of sale for gypsum board. The licensees, throughout said period, have adhered to said prices and terms and conditions of sale. The prices and terms and conditions of sale contained in said bulletins will sometimes be referred to hereinafter as the bulletin prices. Said bulletins, copies of forms of which are set forth as Exhibit No. 7 in the appendix hereto, have contained the following limitations and regulations upon sales of gypsum board by the licensees:

(a) Minimum prices to dealers f.o.b. specified basing points;

(b) specified delivered price zones for rail delivery, with the applicable minimum delivered price to dealers for each zone;

(c) specified delivered price zones for truck delivery, with the applicable minimum delivered price to dealers for each zone;

(d) specified areas in which dealers may pick up gypsum board at mills or warehouses, with applicable minimum prices to dealers for such pickups;

(e) minimum quantities of gypsum board for: (1) Carload sales; (2) delivered truck sales; (3) pickups at mills or warehouses; (4) mixed carload and truckload sales; and (5) pooled car sales;

(f) standard sizes of gypsum board, with specified differentials for board of non-standard sizes and prohibition of sales to dealers of board of non-standard sizes;

(g) specified "billing weights" for different sizes of board to be used by all licensees in calculating the transportation charge to be included in the net price to buyers;

32 (h) maximum cash discounts and terms of sale;

(i) fixed price differentials to various classes of customers and prohibition of discounts to certain classes of buyers, including mail order houses and jobbers;

(j) prohibition of sales in quantities less than specified minimums;

(k) prohibition of deliveries to job sites;

(l) prohibition of mixed car or truck sales at carload or truckload prices unless the carload or truckload quantity is composed entirely of gypsum products;

(m) prohibition of sales direct to builders or contractors, with certain exceptions;

(n) prohibition of sales to the United States Government at other than dealer prices, except in the case of certain specified housing or building projects for which special price bulletins have been issued;

(o) prohibition of sales through commission salesmen;

(p) prohibition of sales to or through "brokers" or "commission houses";

(q) minimum charges to be added to delivered price for railroad car switching;

(r) prohibition of the hiring of buyers' trucks, or the making of allowances or payments to dealers for unloading, storing, or trucking by dealers;

(s) prohibition of warehousing allowances, advertising allowances, or other forms of allowances or payments to dealers for services rendered by dealers to the licensees;

(t) prohibition of payments or credits by the licensees to buyers for claims by buyers for defective merchandise or for other reasons, until after approval by U.S.G.;

(u) prohibition against direct or indirect reduction of minimum prices by rebates or other concessions to buyers, or "by reducing the price of other products" to buyers.

33 92. Throughout said period U.S.G., through its officers, employees, attorneys, and a corporation known as the Board Survey Company, has enforced adherence by the licensees to said bulletin prices and has investigated and policed alleged violations by the licensees of

said bulletin prices. U.S.G. has required its licensees to make regular reports of all sales of board by its licensees and to permit U.S.G. to audit the books of the licensees from time to time to enable U.S.G. to enforce said bulletin prices. The licensees frequently have filed complaints with U.S.G. of alleged violations of bulletin prices by other licensees and U.S.G. has, through the aforesaid agencies, regularly investigated said complaints. U.S.G. and its licensees have held numerous meetings at which the prices and terms and conditions of sale prescribed by U.S.G. in said bulletins and at which complaints of violations by licensees of said bulletin prices were discussed for the purpose of obtaining adherence by the licensees to said bulletin prices.

2. Control over methods of manufacture of the licensees

93. Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees, including the defendant companies, have, by concerted action, sought to standardize the production of gypsum board and have refrained from manufacturing and marketing open-edge board and other board not within the agreed-upon scope of patents involved in the license agreements. During the years 1934 and 1935, the defendant National was induced by U.S.G. and the other licensees to refrain, and did refrain, from marketing a new lightweight board until the other licensees were equipped to manufacture and market a board of a similar weight.

34

3. Control of methods of distribution of licensees-control and elimination of jobbers

94. For the purpose of limiting jobber distribution by the licensees to those jobbers who sold only to dealers and who maintained bulletin prices in sales to dealers, the defendant companies agreed in their license agreements to sell to jobbers only with the express consent of U.S.G. Pursuant to said agreement, U.S.G., during the period from 1929 to 1932, permitted its licensees, including the defendant companies who were then licensees, to sell only to jobbers who sold to dealers and who maintained bulletin prices in said sales.

95. To make more effective the control of distribution of gypsum board by U.S.G., U.S.G. and its licensees discussed and considered, at numerous meetings held during

the period from 1929 to 1932, concerted elimination of jobber distribution by U.S.G. and its licensees. As a result of said meetings and for the purpose of eliminating distribution by U.S.G. and its licensees of gypsum board, plaster, and miscellaneous gypsum products through jobbers, U.S.G. and the licensees agreed among themselves to sell gypsum board to jobbers at no less than the minimum prices set by U.S.G. for sales of board to dealers and to sell plaster and miscellaneous gypsum products to jobbers at no less than the prevailing market prices to dealers for said gypsum products. Pursuant to said agreement, U.S.G. in the year 1932 issued and circulated among the licensees bulletins prohibiting sales to jobbers at less than dealer prices. Throughout the period from 1932 to the date of filing this complaint, U.S.G. and its licensees have refused to sell board to jobbers at less than the minimum dealer prices set by U.S.G. and have refused to sell plaster and miscellaneous gypsum products to jobbers at less than the prevailing market prices to dealers for said products.

35 B. Concerted control of prices and methods of distribution of unpatented gypsum products

96. The control by U.S.G. of gypsum board manufactured by its licensees, described in paragraphs 90 to 95 hereof, has been exercised from time to time throughout the period from the year 1929 to the date of filing this complaint upon gypsum board of the licensees not covered by valid patents involved in the license agreements, all as is more fully set forth in paragraphs 97 to 100 hereof. From time to time during said period, U.S.G. and its licensees have by concerted action controlled the prices and methods of distribution of plaster and miscellaneous gypsum products sold by U.S.G. and its licensees, all as is more fully set forth in paragraphs 103 to 107 hereof.

1. Gypsum board

a. The period from May 1929 to November 1929

97. Continuously during the period from May 1929 to November 1929, U.S.G., pursuant to the aforesaid agreement among U.S.G. and its licensees, determined and fixed the prices, and the licensees adhered to said prices, for unpatented open-edge board. During the period between August and November 1929, U.S.G. determined and fixed the prices, and the licensees adhered to said prices, for closed-edge board, despite the fact that during said period

U.S.G. did not own, or purport to own, patents covering said board.

b. The period from November 1929 to October 1935

98. Patents upon the foam process were not issued until October 8, 1935, May 4, 1937, and May 11, 1937. Copies of said patents, being United States Letters Patent Nos. 2,017,022; 2,079,338; and 2,080,009, are set forth as Exhibits Nos. 8, 9, and 10 in the appendix hereto. Throughout the period from November 1929 until October 1935,
U.S.G. exercised price control solely on the basis of
36 the Hite and Haggerty patents. During said period,
none of the licensees, except Universal, manufactured board falling within the scope of said patents.

99. As described in paragraph 80 hereof, the Hite patent purported to cover board containing voids produced by a specified process involving the use of a water-cooked starch gelatin. No licensee, except Universal, manufactured during said period board with voids produced by said process.

100. As described in paragraph 80 hereof, the Haggerty patent purports to cover board manufactured by a specified process involving the use of a water-cooked starch gelatin to increase adhesion between the core and the liners of the board. During said period none of the licensees, except Universal, used a water-cooked starch gelatin to increase said adhesion, but all of said licensees used adhesives which were beyond the scope of the Haggerty patent.

c. The period from October 1935 to date

101. During the period from October 1935 to the date of filing this complaint, a substantial part of the board produced by various of the licensees has not been covered by the aforesaid patents issued upon the foam process. For the reasons set forth in paragraphs 99 and 100 hereof, none of said licensees produced during said period board which was covered by the Hite or Haggerty patents.

102. Kelley Plasterboard did not commence using the foam process until said company was acquired by Newark in 1938. Texas did not commence using the foam process until after February 1937. During 1936 and 1937 National temporarily abandoned the use of the foam process. In 1937 America:., which had been using the foam process since 1929, abandoned it and since that time neither it nor its successor, the defendant Celotex, has used the foam
process.

37 2. Plaster and miscellaneous gypsum products

103. Beginning in May 1929, as U.S.G. raised and stabilized the prices of gypsum board as aforesaid,

U.S.G. and its licensees concertedly raised and stabilized the prices of plaster and miscellaneous gypsum products. From time to time throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees have agreed among themselves to sell, and have sold, plaster and miscellaneous gypsum products on the basis of various of the terms and conditions prescribed by U.S.G. for the sale of gypsum board, including terms and conditions relating to basing points, cash discounts, trucking areas, advertising allowances, and delivered price zones.

104. As described in paragraph 40 hereof, gypsum board is customarily transported in mixed cars or trucks with plaster and miscellaneous gypsum products. Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees have concertedly refrained from selling plaster and miscellaneous gypsum products in mixed cars or trucks with gypsum board at prices below prevailing market prices for said plaster and miscellaneous gypsum products.

105. For many years past, it has been customary for dealers in gypsum products to enter into contracts with contractors to supply gypsum products to contractors for specific construction jobs at prices current at the time of execution of said contracts and, thus, to protect contractors against an increase in prices for gypsum products during the course of construction of said specific jobs. In turn, manufacturers of gypsum products have customarily entered into contracts with dealers to protect dealers against an increase in prices for gypsum products required by dealers to meet their outstanding specific job commitments. Said contracts between manufacturers and dealers have been, and are, known as protected job contracts.

38 106. When prices for plaster and miscellaneous gypsum products from time to time have advanced, manufacturers have frequently permitted dealers to purchase said gypsum products at prices prevailing prior to the price advances. Said purchases have been made ostensibly under protected job contracts, but have involved material not actually covered by said contracts, but in excess of the amounts required for specific jobs for which dealers were committed. Manufacturers have knowingly permitted dealers to make said purchases at said prices for the purpose of allowing dealers a competitive concession. The effect of such concessions has been to retard from time to time advances in the prices of said gypsum products.

107. In the year 1936, U.S.G. and its licensees agreed among themselves to file all protected job contracts covering plaster and miscellaneous gypsum products with an agency

selected by a gypsum trade association, known as the Gypsum Statistical Institute. Said companies entered into said agreement to prevent by concerted action the granting by said companies to dealers of concessions described in paragraph 106 hereof, and thereby to facilitate increases in the prices of said gypsum products. Pursuant to said agreement, U.S.G. and its licensees have continuously from the year 1936 to the date of filing this complaint filed said protected job contracts with an agency selected by said Institute and have thereby raised and stabilized the prices of plaster and miscellaneous gypsum products.

C. Concerted control of manufacturing distributors

108. Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for sales of board by its licensees to dealers and consumers, as described in paragraph 91 hereof.

39 109. As a condition for the consent of U.S.G. to sales by the licensees of gypsum board to said manufacturing distributors, U.S.G. has required that said manufacturing distributors maintain and adhere to said bulletin prices in reselling said gypsum board to dealers and consumers. U.S.G. and its licensees have agreed among themselves to sell gypsum board to said manufacturing distributors only on condition that the distributors maintain, and adhere to, said bulletin prices.

110. U.S.G. and its licensees have required said manufacturing distributors, as a condition of sale, to agree, and said manufacturing distributors have so agreed, to resell gypsum board to dealers and consumers at said bulletin prices.

111. Pursuant to said agreements, U.S.G. and its licensees have from time to time advised said manufacturing distributors of said bulletin prices, and have investigated and policed sales of gypsum board by said manufacturing distributors for the purpose of compelling said manufacturing distributors to maintain, and adhere to, said bulletin prices. Throughout said period, said manufacturing distributors have resold substantially all of the gypsum board, purchased from U.S.G. and its licensees as aforesaid, at said bulletin prices.

D. Subordinate license agreements

112. For the purpose of extending and strengthening the operation of the basic license agreements, U.S.G. and

certain of its licensees entered into separate license agreements covering the manufacture and sale of metallized board and perforated lath.

1. Metallized board agreements

113. In 1934 U.S.G. offered to license each of its licensees to manufacture and sell metallized board under a patent owned by U.S.G. and purporting to cover
40 metallized gypsum board. During the years 1934 and 1935, each of the licensees agreed among themselves and with U.S.G. to become, and did become, licensees of U.S.G. under agreements in which U.S.G. licensed said licensees to use said patent in the manufacture and sale of metallized board and reserved the right to determine and fix the prices at which said licensees sold metallized board. A copy of the Ebsary agreement, set forth as Exhibit No. 11 in the appendix hereto, is substantially identical with each of said agreements.

114. At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board, but all of said licensees, except National, intended, as U.S.G. well knew, to purchase metallized board from U.S.G. or National for resale to dealers and consumers. Notwithstanding said facts, U.S.G. required its licensees to execute said agreements in order to be enabled to purchase metallized board for resale to dealers and consumers. Throughout the period from the execution of said license agreements to the date of filing this complaint, U.S.G. has determined and fixed the minimum prices and terms and conditions of sale governing the sale by its licensees of metallized board, with the knowledge, and notwithstanding the fact, that a substantial part of the metallized board sold by its licensees, except National, during said period was purchased from National and U.S.G.

2. Perforated lath agreements

115. Early in the year 1936, U.S.G. offered to license its licensees to manufacture and sell perforated gypsum lath under a patent purporting to cover a gypsum lath with perforations of a certain dimension and number and with a designated spacing and relationship.

116. The license agreements proposed by U.S.G. reserved to U.S.G. the right to determine and fix the
41 the prices of its licensees for said perforated lath. To induce said licensees to enter into said agreements, U.S.G. agreed to fix the price of perforated lath at a differential above the price of straight lath.

117. In reliance upon U.S.G.'s commitment to fix the price of perforated lath at said differential, Certain-teed and American entered into said license agreements. Thereafter, Ebsary and Kelley Plasterboard executed similar agreements. A copy of the Certain-teed agreement, set forth as Exhibit No. 12 in the appendix hereto, is substantially identical with each of said agreements.

118. By the terms of said agreements, U.S.G. authorized its licensees to manufacture perforated lath under said patent, with the right reserved to U.S.G. to determine and fix the prices of its licensees for perforated lath, and each of the licensees acknowledged the validity of, and agreed not to contest, said patent. Throughout the period from the date of execution of the first of said agreements to the month of May 1938, U.S.G. determined and fixed the prices of perforated lath at a differential above the prices of straight lath, and all of the licensees of U.S.G. sold perforated lath at said prices so determined and fixed by U.S.G.

119. At the time of the execution, and throughout the period of the operation, of said perforated lath license agreements, U.S.G., Certain-teed, and American were informed, sometimes by patent counsel, and believed that said patent was void and did not embrace in any of the specifications or claims thereof any patentable invention or discovery within the meaning of the patent laws of the United States. Said companies entered into said license agreements principally for the purpose of enabling U.S.G. to determine and fix the prices of perforated gypsum lath manufactured and sold by U.S.G. and its licensees. Said license agreements were not, in truth and in fact, bona fide patent license agreements and the exercise of price control by U.S.G. under said agreements was not
42 normally and reasonably adapted to protect the pecuniary rewards of a patentee under a lawful patent monopoly.

120. The validity of said patent has not been presented to, or determined by, any court of the United States. Although U.S.G., during the years 1937 and 1938, notified various non-licensee manufacturers of perforated gypsum lath that said manufacturers were infringing said patent, U.S.G. has refrained from instituting infringement proceedings against said manufacturers. Pursuant to the terms of their license agreements, the licensees have refrained from contesting the validity of said patent.

THE EFFECT OF THE COMBINATION

121. By means of the combination, the defendants have controlled and dominated, for more than ten years, the manufacture and distribution of 100% of the gypsum board and 80% of the plaster and miscellaneous gypsum products manufactured and sold in the Eastern area and the defendants will, unless restrained, continue to dominate and control the manufacture and distribution of said gypsum products, at least until the year 1954 when the last of the U.S.G. patents on the foam process expires. Since the year 1929, all gypsum board sold by all manufacturers and all manufacturing distributors in the Eastern area has been sold at uniform and non-competitive prices dictated by U.S.G., with a resultant elimination of all price competition in the distribution of gypsum board from manufacturers to dealers. For the purpose of maintaining said uniform and non-competitive prices, the defendants have standardized the manufacture of board, have limited said distribution of board to themselves and to certain manufacturing distributors, and have completely eliminated from the distributive system wholesale distributors who might fail to maintain said prices.

43 122. Said uniform and non-competitive prices have been, throughout the period of the operation of the combination, substantially higher than those prices prevailing at the time of the formation of said combination in the year 1929. Said prices have failed to reflect substantial reductions in manufacturing costs which have occurred since the year 1929. Each of the defendant companies has thereby realized substantial profits in the manufacture and sale of gypsum board.

123. The uniformity among the defendant companies in the distribution of gypsum board has reflected itself in uniformity among said companies in the distribution of plaster and miscellaneous gypsum products. The defendant companies now distribute said products on the basis of many of the terms and conditions of sale prescribed by U.S.G. for the sale of gypsum board.

PRAYER

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the aforesaid monopoly, attempt to monopolize, combination and conspiracy to monopolize, and contracts, combination, and conspiracy to restrain trade and commerce in gypsum board,

plaster, and miscellaneous gypsum products among the several States, and between the States and the District of Columbia, are in violation of Sections 1, 2, and 3 of the Sherman Antitrust Act.

2. That the Court adjudge and decree that the defendants have monopolized, attempted to monopolize, combined and conspired to monopolize, and contracted, combined, and conspired to restrain trade and commerce in said gypsum products among the several States, and between the States and the District of Columbia, in violation of Sections 1, 2, and 3 of the Sherman Antitrust Act.

44 3. That the Court adjudge and decree that each of the aforesaid license agreements between the defendant U.S.G. and each of the other defendant companies is in violation of Sections 1, 2, and 3 of the Sherman Antitrust Act.

4. That the defendants and each of them, and their directors, officers, agents, representatives, and all persons or corporations acting on behalf of the defendants, be perpetually enjoined from continuing to carry out said monopoly, attempt to monopolize, contracts, combination, and conspiracy, and be required to desist and withdraw from all connection therewith, and be perpetually enjoined from in any way monopolizing, or attempting to monopolize, combining and conspiring to monopolize, or agreeing, combining, or conspiring to restrain trade and commerce in said gypsum products among the several States, and between the States and the District of Columbia, in violation of Sections 1, 2, and 3 of the Sherman Antitrust Act.

5. That the defendant companies, and each of them, be required to cancel the provisions of the aforesaid license agreements which (a) authorize the defendant U.S.G. to determine and fix the prices of gypsum board manufactured by the licensees, (b) provide for payment of royalties by the licensees on patents not used by the licensees or on gypsum board not manufactured or bundled by patents owned by U.S.G., and (c) prohibit the sale of gypsum board by the licensees to manufacturers, jobbers, and other distributors without the consent of the defendant U.S.G.

6. That the defendant companies, and each of them, and their directors, officers, employees, and agents, and all persons or corporations acting on behalf of said companies, be perpetually enjoined from entering into any license agreement relating to any gypsum products and containing provisions which (a) authorize the licensor to determine and fix the prices of its licensees, (b) provide for payment of

royalties by the licensees on patents not used by the licensees or on gypsum products not manufactured by the use of patents, or (c) control in any way the methods of distribution of the licensees.

7. That the defendant companies, and each of them, and their directors, officers, employees, and agents, and all persons or corporations acting on behalf of said companies, be enjoined from entering into any license agreement relating to gypsum products without first obtaining the consent of the Court.

8. That plaintiff have such other further and general relief as may be proper.

9. That, pursuant to Section 5 of the Sherman Antitrust Act, writs of subpœna issue to such of the defendants as are not otherwise subject to service within the District of Columbia, commanding them and each of them to appear herein and to answer under oath each allegation contained in this complaint, and to abide by and perform such acts, orders, and decrees as the Court may make in the premises.

UNITED STATES OF AMERICA,

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EDWARD M. CURRAN,
United States Attorney.

Appendix to complaint

Exhibit No. 1—The Utzman Patent

United States Patent Office

CLARENCE W. UTZMAN, OF CHICAGO, ILLINOIS, ASSIGNOR TO THE UNITED STATES GYPSUM COMPANY, OF CHICAGO, ILLINOIS, A CORPORATION OF NEW JERSEY.

PLASTER-BOARD

1,034,746. Specification of Letters Patent. Patented Aug. 6, 1912. Original application filed June 26, 1911, Serial No. 635,284. Divided and this application filed December 16, 1911. Serial No. 666,083.

To all whom it may concern:

Be it known that I, Clarence W. Utzman, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented certain new and useful Improvements in Plaster-Board, of which the following is a specification.

This invention relates to a plaster board, and aims to produce a board which shall be more substantial, durable and efficient than any plaster board heretofore manufactured, which will give better results and more satisfactory service in use, and will better withstand the handling and rough usage to which all plaster board is necessarily subjected.

The present application constitutes a division of my prior application, Serial No. 635,284, filed June 26th, 1911.

My invention further aims to produce a plaster board the edges of which will be entirely inclosed by a sheet of covering material, and which will have no free or exposed edges of the covering material such as would be liable to be torn, loosened or peeled back in the handling of the board.

My invention consists in certain novel features, of constructions hereinafter described and more particularly pointed out in the claims, references being had to the accompanying drawings forming a part of this specification, whereon—

Figure 1 is a perspective view of a board embodying my invention showing certain parts broken away, and Fig. 2 is a transverse sectional view taken through the board shown in Fig. 1.

Referring to the drawings it will be observed that, upon a large covering sheet 10, which may be of any fibrous material, there is disposed the body of the board con-

sisting of a plurality of layers of plastic material 11 alternating with layers of fibrous material 12 which are of slightly less width than the said layers of plastic material. The layers of plastic material in extending on either side beyond the layers of fibrous material flow together forming a homogeneous board reinforced by said fibrous layers. The sides of the sheet 10 are turned upwardly at 13 to form a covering for the side edges of the board and at the top of the board the edges 14 are turned inwardly over the board to form inturned laps 15. A top covering 16 of less width than the width of the plaster board is superimposed upon said inturned laps and the whole board is then subjected to pressure which forces the upper face of the top covering down flush with the upper faces of the inturned laps 15 and causes the plastic material at the top of the board to flow over the inturned laps between their inner edges and the edges of the covering whereby the edges of the covering are securely fastened or sealed down. A smooth upper surface is thereby obtained and all of the edges of the covering material are securely sealed and the corners of the board are left smooth without any projecting edges of covering such as are left in the construction of boards in which the upper layer of covering extends flush with or beyond the side edges of the completed board. In the present invention no exposed or raw edges are left to be caught and drawn or peeled back and the strength, durability and life of the board is manifestly materially increased.

It will be evident from the foregoing that the completed board is inclosed on both sides and both edges and that the edges of the top sheet of covering material are spaced from the corners of the board so that they will not be cut or peeled back during the handling of the board, and furthermore these edges are securely fastened or sealed down by the plastic material disposed over the inturned portions of the lower covering sheet 10. No exposed plaster is presented and by reason of the fact that all portions of the board are inclosed a uniform absorption of moisture from the finished plaster applied to the wall at the joints between the plaster boards and over their entire surfaces will take place. The side edges of the plaster board are straight and true. They require no cutting or trimming, resulting consequently in a saving of paper, plaster and labor. The completed board presents a finished and pleasing appearance and the edges are smooth to handle and strong so that the board will not be fractured or injured by driving nails there-through.

While I have described in detail my improved board, it will be obvious that various minor mechanical changes in its construction may be resorted to without de-
49 parting from the spirit or sacrificing any of the advantages of the invention.

I claim:—

1. A plaster board comprising a body, a covering of fibrous material adhering to one face of the body folded to inclose an edge of the body and overlie a portion of the opposite face thereof, and a covering of fibrous material for said opposite face of the body overlying said folded-over portion of the first mentioned covering but having its edge spaced from the edge of the board.

2. A plaster board comprising a body, a covering of fibrous material adhering to one face of the body folded to inclose opposite edges of the body and overlie the margins of the opposite face, and a covering of fibrous material for said opposite face of the body overlying said folded-over portions of the first mentioned covering and having its edges spaced from the edges of the board.

3. A plaster board comprising a body, a covering of fibrous material for one face of the body folded to inclose an edge of the body and overlie the margin of the opposite face, and a covering of fibrous material for said opposite face having an edge overlying the folded over portion of the first-mentioned covering and pressed inwardly of the body depressing the edge of the first mentioned covering to afford protection for the said edge of the second-mentioned covering.

4. A plaster board comprising a body, a covering of fibrous material for one face of the body folded to inclose an edge of the body and overlie the margin of the opposite face and a covering of fibrous material for said opposite face overlying the folded over portion of the first mentioned covering, a part of the material of the body being disposed between the folded over edge of the first mentioned covering and the overlying edge of the second mentioned covering to secure said edges together.

CLARENCE W. UTZMAN.

Witnesses:

IRA J. WILSON,

M. A. KIDDIE.

38

50

C. W. UTZMAN.

PLASTER BOARD.

APPLICATION FILED DEC. 16, 1911.

1,034,746.

Patented Aug. 6, 1912.

Fig 1

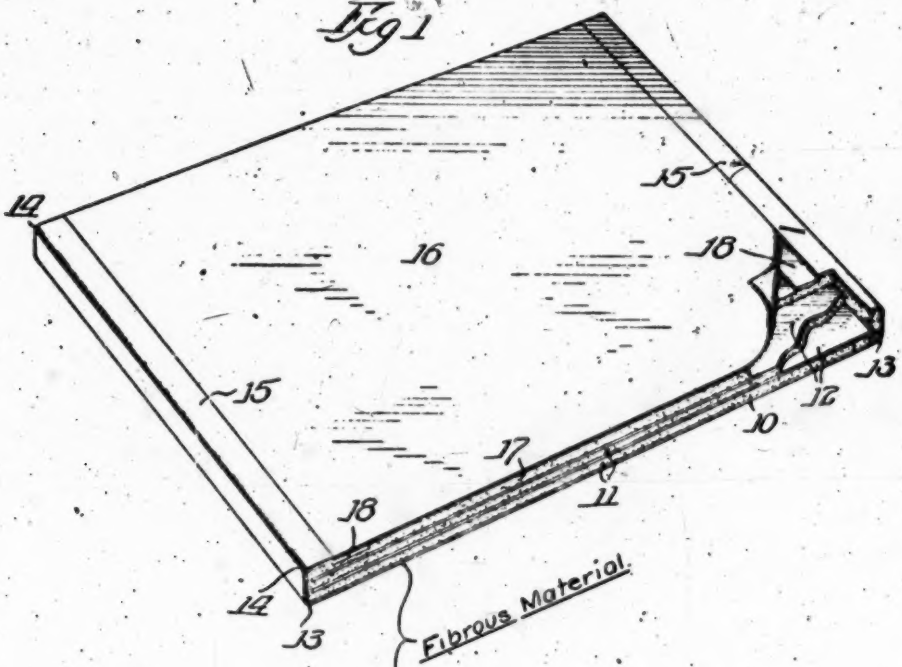
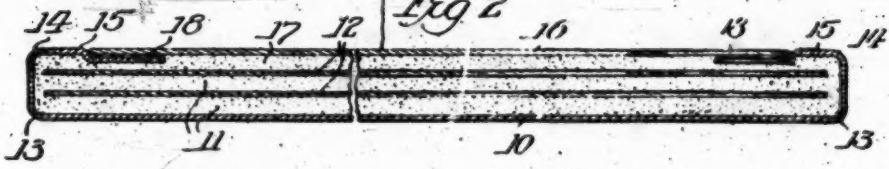


Fig 2



Witnesses:

Geo. C. Gorsuch

Geo. J. Wilson

Inventor:

Clarence W. Utzman

By Luthiemann & Gelt Fuller & Mackey
Attys

51 *Exhibit No. 2—The 1926 License Agreement between U.S.G. and Beaver*

52 LICENSE AGREEMENT

This agreement executed in duplicate this 29th day of July, 1926, by and between the United States Gypsum Company, an Illinois corporation of Chicago, Illinois, hereinafter referred to as "Licensor" and The Beaver Products Company, Inc., a New York Corporation of the Town of Tonawanda, State of New York, hereinafter referred to as "Licensee," witnesseth:

Whereas, Licensor is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, No. 1,029,328, dated June 11th, 1912, and No. 1,034,746, dated August 6th, 1912, (hereinafter called the "Utzman Patents"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and applications for Letters Patent of the United States set forth in Exhibit "A" attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, heretofore said Utzman patents have been adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; see also 263 U. S. 713), and said courts have decreed that said Utzman patents are valid and were infringed by the defendants in the cases so reported, and in the decision of the said District Court rendered on or about July 21, 1925, and not yet reported, by reason of the making,

53 using and selling of plaster board or gypsum wallboard having protected edges, and said District Court has ordered perpetual injunctions and accountings against said defendants; and

Whereas, Licensee recognizes and admits the validity and scope of said Utzman patents and admits that Licensee has heretofore infringed upon the same, and the Licensor has a substantial claim against Licensee for damages and profits because and on account of said infringement, and both Licensor and Licensee have expended or will be compelled to expend large sums of money in patent litigation in respect of said infringement, and such litigation has been, or will be otherwise costly and expensive to both of said parties who are therefore desirous of making a full and

complete settlement of their controversies and of avoiding further litigation; and

Whereas, the parties hereto have agreed to settle said claim by the payment to the Licensor by the Licensee, of a sum of money in cash and an amount equivalent to five per cent. (5%) of Beaver Company's selling price of all plaster board or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent. (1½%) of such selling price from August 6, 1929 to February 10, 1937, and the assignment to Licensor of certain Letters Patent and applications for Letters Patent, and the granting of this License to the Licensee.

Now, therefore, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to-wit:

54 1. Licensor has agreed to and does hereby give and grant unto Licensee, an indivisible and non-exclusive right, license and privilege of using the processes, and making and using the machines and/or inventions set forth and claimed in said Utzman Patents, and in any and all of said patents or applications for letters patent described in said Exhibit "A", at any and all factories now or hereafter owned and/or operated or controlled by Licensee or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and/or using plaster board or gypsum wallboard embodying the inventions and improvements set forth and claimed in said Utzman patents and said patents and applications for letters patent described in Exhibit "A", until the 10th day of February, 1937, the date of expiration of Patent No. 1,330,413, mentioned in said Exhibit "A".

It is expressly agreed and understood that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves the right to determine and fix at any time, and to change from time to time during the term of said Utzman Patent number 1,034,746 the minimum price or prices (not more, however, than the then prevailing market price or prices) at which the Licensee shall sell any plaster board or gypsum wallboard manufactured by Licensee embodying the improvements set forth and claimed in said Utzman Patent number 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the price or prices at which the

Licensee shall sell said patented product, and thereafter shall give to the Licensee written or telegraphic
55 notice of any change in such price or prices, and the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman Patent number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale, any plaster board or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent number 1,034,746 at a price or prices less than that stated by the Licensor in said notice, or in any such written or telegraphic notice of a change in such price or prices. It is expressly understood and agreed that this provision of the said License shall apply only to the said Utzman Patent number 1,034,746, and shall not apply to any of said other Letters Patent.

2. The Licensee further agrees to pay to the Licensor, in settlement and discharge of the said claim, and for the right, license and privilege of manufacturing, using and/or selling plaster board or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions; embodying the inventions and improvements set forth and claimed in said Utzman Patents and in any and all of said patents and applications for letters patent described in Exhibit "A", an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to five per cent. (5%) of the selling price of the Licensee, of all plaster board or gypsum wallboard of every kind, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman Patent No. 1,034,746, and thereafter an amount equivalent to one and one-half per cent. (1½%) of the selling price of the Licensee, of all such plaster board or gypsum wallboard, from August 6, 1929 until February 10, 1937, the date of the expiration of said patent No. 1,330,413.

56 3. It is expressly understood and agreed that the said License shall be personal to the Licensee and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent of the Licensor or transferred by operation of law, except that the same may be assigned to any successor or subsidiary corporation of Licensee, and except that in the event of the appointment of a receiver or receivers for the purpose of conserving the business and assets of Licensee, such receiver or receivers shall succeed to all of Licensee's rights under said license and under this agreement.

4. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plaster board and gypsum wallboard manufactured and sold by it, and agrees that on or before the 20th day of each and every calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plaster board and gypsum wallboard manufactured and sold by it during the preceding calendar month, together with the price or prices at which the same was sold, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor, on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said plaster board and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

5. Licensor, or its duly authorized representative shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plaster board and gypsum wallboard manufactured and sold by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom.

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6. Licensee agrees that all plaster board or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents shall be distinctly marked with the word "patented", together with the dates of the Utzman patents, and the dates of any other patents which Licensor may properly specify, and in connection with the said markings it will further mark said patented product with the words "Licensed under the above Letters Patent", which markings shall be plainly visible.

7. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products who do not or may not manufacture gypsum wallboard or plaster board but who desire or may desire to have gypsum wallboard or plaster board manufactured for them, it is understood and agreed that Licensee may manufacture gypsum wallboard or plaster board embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer; provided, however, that the said license fee or royalty to be

paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plaster board manufactured for such other manufacturer and upon the regular selling price of Licensee of such plaster board or
58 gypsum wallboard to its regular dealer trade at the time of such sale, and shall not be based upon the price at which plaster board or gypsum wallboard is sold by Licensee to such other manufacturer.

8. Licensee expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as "seconds" shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

9. It is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by Licensee having a protected edge is within the scope of said Utzman patents Nos. 1,029,328 and 1,034,746.

After the expiration of said Letters Patent No. 1,034,746 and until the expiration of Letters Patent No. 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a protected edge is within the claims or is manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent No. 1,330,413, or of one or more of the other of said letters patent listed in Exhibit "A" hereto, under which the aforesaid indivisible and non-exclusive right, license and privilege is granted.

10. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted,
59 Licensee hereby acknowledges the validity of the Letters Patent, granted and to be granted, forming the subject-matter of this license, throughout the respective lives of the said Letters Patent and each of them, and agrees that it will not at any time before or after the expiration or termination of this license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said Letters Patent or the title thereto of Licensor, or question in any way the prima facie scope of either or any of said Letters Patent, or the priority, novelty or patentability of the subject-matter of any of the said applications for letters patent.

11. In the event that Licensee shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements herein to be by Licensee kept and performed, then Licensor, at its election, may serve upon Licensee notice of intention to terminate the license herein granted, which notice shall specify the alleged neglect, failure or refusal; and if, within thirty (30) days from the date of delivery of said notice, Licensee shall not keep or perform the conditions and agreements specified in said notice, then said license and all rights acquired by Licensee hereunder shall be and become cancelled and terminated without the necessity of any court action; provided, however, that Licensee shall not be relieved thereby from paying to Licensor any license fees or royalties or any other obligations accrued hereunder at the time of such termination. In case at any time Licensee shall commit any act of bankruptcy, then the license hereunder shall immediately be and become cancelled and terminated, but Licensor
60 shall not thereby be prevented from collecting all license fees or royalties and other obligations accrued hereunder at the time of such termination. Failure on the part of Licensor to notify Licensee of a breach of this license contract or to terminate said license because of such breach shall not constitute a waiver of Licensor's right to terminate said license in accordance with the provisions of this paragraph. Licensor may specifically enforce this contract or any of the terms, conditions and covenants hereof, by injunction or in such other manner as may be provided by law.

12. Any notice to be given under the terms hereof may be served upon the Licensee by mailing the same to the Licensee, postage prepaid, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of said notice upon the Licensee.

13. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, whether now or hereafter issued, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper; and in case the Licensor shall grant to any such infringer, or to any other person, any license under said patents upon terms more

favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms.

14. The terms "plasterboard" and "gypsum wall board" shall be understood to mean all board by whatever
61 name called having the structural characteristics of plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used.

15. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by the Licensee except as hereinabove specifically provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY,
By S. L. AVERY,
Its President.

Attest:
GEO. S. GLYNN,
Asst. Secretary.

THE BEAVER PRODUCTS COMPANY, INC.,
By A. S. BLAGDEN,
Its President.

Attest:
E. H. LEICHMONT,
Secretary.

62 *Exhibit "A" to agreement*

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

63 Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6 ,1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

64 Birdsey application Serial No. 437,062, filed January 13, 1921.

Birdsey application Serial No. 506,676, filed October 10, 1921.

Birdsey application Serial No. 545,231, filed March 20, 1922.

Birdsey application Serial No. 555,627, filed April 19, 1922.

Birdsey application Serial No. 583,795, filed August 23, 1922.

Moore application Serial No. 590,356, filed September 25, 1922.

Knode application Serial No. 590,358, filed September 25, 1922.

Birdsey application Serial No. 605,896, filed December 9, 1922.

Smith application Serial No. 662,359, filed September 12, 1923.

Birdsey application Serial No. 737,237, filed September 12, 1924.

Utzman application Serial No. 750,224, filed November 17, 1924.

Birdsey application Serial No. 754,927, filed December 10, 1924.

Brookby application Serial No. 50,538, filed August 17, 1925.

Birdsey application Serial No. 57,507, filed September 21, 1925.

Brookby & Absmeier application Serial No. 91,297, filed March 1, 1926.

65 Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial 565,737.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial 567,205.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

66 Armstrong application Serial No. 310,470, filed July 12, 1919.

Utzman application Serial No. 374,833, filed April 19, 1920.

Armstrong application Serial No. 377,421, filed April 29, 1920.

Speer application Serial No. 427,044, filed November 29, 1920.

Speer application Serial No. 427,045, filed November 29, 1920.

Mehlhope application Serial No. 473,288, filed May 28, 1921.

Utzman application Serial No. 477,371, filed June 14, 1921.

Kohler application Serial No. 482,073, filed July 2, 1921.

Gustafson application Serial No. 509,366, filed December 2, 1919; renewed October 21, 1921.

Kohler, et al., application Serial No. 540,412, filed March 2, 1922.

Armstrong application Serial No. 565,737, filed June 3, 1922.

Armstrong application Serial No. 567,205, filed June 9, 1922.

Utzman application Serial No. 581,361, filed August 12, 1922.

Utzman application Serial No. 581,362, filed August 12, 1922.

Williams application Serial No. 582,606, filed August 18, 1922.

Tonning application Serial No. 590,221, filed September 25, 1922.

Armstrong application Serial No. 596,983, filed October 26, 1922.

67 Speer application Serial No. 610,739, filed January 5, 1923.

Rehm application Serial No. 8,654, filed February 12, 1925.

Rehm application Serial No. 8,655, filed February 12, 1925.

Rehm application Serial No. 8,656, filed February 12, 1925.

Rehm application Serial No. 8,657, filed February 12, 1925.

Rehm application Serial No. 23,775, filed April 17, 1925.

68 *Exhibit No. 3—The May 1929 License Agreement Between U.S.G. and Ebsary*

69 LICENSE AGREEMENT

This agreement, executed in duplicate this 22nd day of May, 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as "Licensor," and Ebsary Gypsum Co., Inc., a New York corporation, of Newark, N. J., hereinafter referred to as "Licensee," witnesseth:

Whereas, Licensor is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, No. 1,029,328, dated June 11th, 1912, and No. 1,034,746, dated August 6th, 1912 (hereinafter called the "Utzman Patents"), and Letters Patent of the United States, No. 1,358,508, dated November 9, 1920 (hereinafter called the "Birdsey Patent"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and applications for Letters Patent of the United States set forth in Exhibit "A" attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, heretofore said Utzman Patents have been adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; 15 Fed. (2d) 704; see also 263 U. S. 713), and said courts have decreed that said Utzman Patents are valid and were infringed by the defendants named in said suits, by reason of their making, using and selling plasterboard or gypsum wallboard having protected edges, and said District Court ordered perpetual injunctions and accountings against said defendants; and

Whereas, said Birdsey Patent Number 1,358,508 has been adjudicated by the United States District Court
70 for the Northern District of Ohio (In Equity Number 1621), and said Court has decreed that said Birdsey Patent is valid and was infringed by defendant in said cause by reason of its making, using and selling

plasterboard and/or gypsum wallboard having edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit (Appeal Number 5392); and

Whereas, Licensee recognizes and admits the validity and scope of said patents and is desirous of obtaining a license to use the processes and make and use the machines and/or inventions set forth and claimed in said patents and in said patents or applications for letters patent described in Exhibit "A"; and

Whereas, Licensor has been unwilling to grant a license except upon the express condition that Licensee will manufacture plasterboard or gypsum wallboard only with a folded or protected edge similar to that manufactured by Licensor, so that Licensor may be protected in its own business of manufacturing and selling said patented products and realize to the fullest extent the benefits under said patents from the manufacture by said Licensee; and

Whereas, Licensor has agreed to waive the express condition aforesaid and grant the said License in consideration of the agreement of Licensee to pay to it for the license to use the processes and make and use the machines and/or inventions set forth and claimed in all of said patents and applications for letters patent the amounts hereinafter stated and upon the terms and conditions hereinafter set forth,

Now, therefore, in consideration of the sum of One Dollar ($1.00), and other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to-wit:

71 1. Licensor has agreed to and does hereby give and grant unto Licensee, an indivisible and non-exclusive right, license and privilege of using the processes, and making and using the machines and/or inventions set forth and claimed in said Utzman Patents, and in any and all of said patents or applications for letters patent described in said Exhibit A, at the plant or factory now owned and/or operated by Licensee at Wheatland, New York, or at any other plant or factory hereafter owned or operated by it, and of manufacturing at said plant or factory and selling and/or using plasterboard or gypsum wallboard manufactured at said plant or factory and embodying the inventions and improvements set forth and claimed in said Utzman Patents and said patents and

applications for letters patent described in Exhibit A, until the 10th day of February, 1937, the date of expiration of patent number 1,330,413 mentioned in said Exhibit A, all subject to the terms and conditions hereinafter stated.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves the right to determine and fix at any time and to change from time to time during the term of said Utzman Patent Number 1,034,746 the minimum price or prices at which the Licensee shall sell any plasterboard or gpsum wallboard manufactured by Licensee embodying the improvements set forth and claimed in the said Utzman Patent 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the price or prices at which the Licensee shall sell said patented product, and thereafter shall give to the Licensee written or telegraphic notice of any change in such price or prices, and the Licensee expressly covenants and
72 agrees that it will not at any time during the term of said Utzman Patent Number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale any plasterboard or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746 prior to the expiration thereof at a price or prices less than that stated by the Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

2. The Licensee further agrees to pay to the Licensor for the right, license and privilege of manufacturing, using and/or selling plasterboard or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions embodying the inventions set forth and claimed in said Utzman Patents and in any and all of said patents and applications for letters patent described in Exhibit A, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to five per cent (5%) of the selling price of the Licensee of all plasterboard or gypsum wallboard of every kind, whether patented or unpatented, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman Patent Number 1,034,746, and thereafter an amount equivalent to one and one half per cent (1½%) of the selling price of the Licensee of all

such plasterboard or gypsum wallboard from August 6, 1929, until February 10, 1937, the date of the expiration of said Patent Number 1,330,413.

3. It is further agreed that so long as this agreement shall remain in force between the parties hereto, or in case the License granted under Paragraph 1 hereof shall continue until February 10, 1937, then until the expiration of the patent specifically described in this paragraph,
73 the Licensor does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in that certain patent known as the Birdsey Plasterboard Bundle Patent Number 1,696,877, dated December 25, 1928, at the plant or factory now owned and/or operated by Licensee at Wheatland, New York, or at any other plant or factory hereafter owned or operated by it, and of selling bundles of plasterboard and/or gypsum wallboard set forth and claimed in said patent number 1,696,877, upon the terms and conditions hereinafter stated.

The Licensee agrees to pay to the Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said Patent Number 1,696,877, in addition to the sums hereinabove set forth, a license fee or royalty of ten cents (10¢) per thousand square feet of plasterboard and/or gypsum wallboard which is sold by it in bundles of any kind, payable at the times and in accordance with the terms of Paragraph 4 hereof. It is expressly understood that licensee in its business of manufacturing and selling plasterboard and/or gypsum wallboard will use only said bundle set forth and claimed in said Patent Number 1,696,877 and will not use any other bundle or method of bundling plasterboard during the term of said license.

4. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent of the Licensor or transferred by operation of law.

It is expressly understood that the Licensee shall not discontinue its business of manufacturing and selling plasterboard and/or gypsum wallboard until the Licensor shall have received the full payment of all of the amounts
74 agreed to be paid to it hereunder by the Licensee, nor shall this license be assigned to any company or companies acquiring the capital stock or assets of Li-

censee, or to any company resulting from any merger or consolidation between Licensee and any other company, nor shall any such merger, consolidation or acquisition affect any claim which Licensor has against Licensee or against any such other company for infringement of its said patents; provided, however, that this license may, with the written consent of the Licensor, be assigned to any company holding a similar license from Licensor upon the express assumption by such company of all claims of Licensor against Licensee and of the agreements and obligations of the Licensee herein contained.

5. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the 20th day of each and every calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and gypsum wallboard manufactured and sold by it during the preceding calendar month, and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor, on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said plasterboard and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

6. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it, and the quantity thereof put up and sold by it in bundles, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom.

7. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents shall be distinctly marked with the word "PATENTED", together with the dates of the Utzman Patents, and the dates of any other patents which

Licensor may properly specify, and in connection with the said markings it will further mark said patented product with the words, "Licensed under the above Letters Patent," which markings shall be plainly visible.

8. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, or jobbers of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may with the written consent of Licensor manufacture gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer and/or jobber; provided, however, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard or plasterboard manufactured for, and sold and invoiced to, such other manufacturer and/or jobber and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the
76 price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer or jobber. The Licensee shall have no right to manufacture and sell any plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent to other manufacturers or jobbers or other wholesale distributors of such products, without the written consent of Licensor.

It is understood that the selling price of the Licensee wherever mentioned in this instrument means the selling price to its regular dealer trade, and in case of the sale of any of said plasterboard or gypsum wallboard, whether patented or unpatented, for a price less than said price to Licensee's regular dealer trade, Licensee shall account to the Licensor in the payment of royalties hereunder at its regular dealer price; provided, however, that nothing herein contained shall give the Licensee the right to sell any of said patented products upon which the Licensor shall have fixed and determined the price thereof in accordance with the terms hereof at less than such price.

9. The Licensee and the Licensor each expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as "seconds" shall be plainly invoiced as seconds and shall be plainly marked

with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

10. It is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by Licensee having a protected edge is within the scope of said Utzman Patents Numbers 1,029,326 and 1,034,746.

77 After the expiration of said Letters Patent number 1,034,746 and until the expiration of Letters Patent Number 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a protected edge is within the claims or is manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent Number 1,330,413, or of one or more of the other of said Letters Patent listed in Exhibit "A" hereto, under which the aforesaid indivisible and non-exclusive right, license and privilege is granted.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of the Letters Patent, granted and to be granted, forming the subject-matter of this license, throughout the full term of this contract, unless the same shall be cancelled or terminated prior thereto by reason of the default of the Licensor hereunder, and agrees that it will not at any time before February 10th, 1937, or the earlier termination of the license by reason of the default of the Licensor hereunder, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said Letters Patent or the title thereto of Licensor, or question in any way the prima facie scope of either or any of said Letters Patent, or the priority, novelty or patentability of the subject-matter of any of the said applications for letters patent.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements herein to be by it kept and performed, then the other party, at its election, may serve upon the

78 party in default written notice of intention to terminate this Agreement, which notice shall specify the alleged neglect, failure or refusal, and if within thirty

(30) days from the date of delivery of said notice, the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this Agreement, by notifying the party in default, in writing, of its election so to do, without the necessity of any court action; provided, however, that neither party shall be relieved thereby from any liability accrued at the time of such termination. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may specifically enforce this contract or any of the terms, conditions and covenants hereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served upon the Licensor or the Licensee by mailing the same to the Licensor or Licensee, postage prepaid, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, whether now or hereafter issued,
79 under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper; and in case the Licensor shall grant to any such infringer, or to any other person, any license under said patents upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license of the same terms.

15. The terms "plasterboard" and "gypsum wallboard" shall be understood to mean all board by whatever name called having the structural characteristics of plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used.

16. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but noth-

ing in this paragraph shall be construed to permit an assignment hereof by the Licensee except as hereinabove specifically provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY,

[SEAL] By S. L. AVERY,
Its President.

JOHN E. MACLEISH,
Witness.

EBSARY GYPSUM CO., INC.,

[SEAL] By F. G. EBSARY,
Its President.

GEORGE N. LENCI,
Witness.

80 *Exhibit "A" to agreement*

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

81 Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Birdsey application Serial No. 437,062, filed January 13, 1921.

Birdsey application Serial No. 506,676, filed October 10, 1921.

Birdsey application Serial No. 545,231, filed March 20, 1922.

Birdsey application Serial No. 555,627, filed April 19, 1922.

Birdsey application Serial No. 583,795, filed August 23, 1922.

Moore application Serial No. 590,356, filed September 25, 1922.

Knode application Serial No. 590,358, filed September 25, 1922.

Birdsey application Serial No. 605,896, filed December 9, 1922.

Smith application Serial No. 662,359, filed September 12, 1923.

Birdsey application Serial No. 737,237, filed September 12, 1924.

Utzman application Serial No. 750,224, filed November 17, 1924.

Birdsey application Serial No. 754,927, filed December 10, 1924.

Brookby application Serial No. 50,538, filed August 17, 1925.

82 Birdsey application Serial No. 57,507, filed September 21, 1925.

Brookby & Absmeier application Serial No. 91,297, filed March 1, 1926.

Armstrong patent No. 1,278,821. Applications filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial 565,737.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial 567,205.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Armstrong application Serial No. 310,470 filed July 12, 1919.

Utzman application Serial No. 374,833, filed April 19, 1920.

Armstrong application Serial No. 377,421, filed April 29, 1920.

Speer application Serial No. 427,044, filed November 29, 1920.

Speer application Serial No. 427,045, filed November 29, 1920.

Mehlhope application Serial No. 473,288, filed May 28, 1921.

83 Utzman application Serial No. 477,371, filed June 14, 1921.

Kohler application Serial No. 482,073, filed July 2, 1921.

Gustafson application Serial No. 509,366, filed December 2, 1919; renewed October 21, 1921.

Kohler, et al., application Serial No. 540,412, Filed March 2, 1922.

Armstrong application Serial No. 565,737, filed June 3, 1922.

Armstrong application Serial No. 567,205, filed June 9, 1922.

Utzman application Serial No. 581,361, filed August 12, 1922.

Utzman application Serial No. 581,362, filed August 12, 1922.

Williams application Serial No. 582,606, filed August 18, 1922.

Tonning Application Serial No. 590,221, filed September 25, 1922.

Armstrong application Serial No. 596,983, filed October 26, 1922.

Spcer Application Serial No. 610,739, filed January 5, 1923.

Rehm application Serial No. 8,654, filed February 12, 1925.

Rehm application Serial No. 8,655, filed February 12, 1925.

Rehm application Serial No. 8,656, filed February 12, 1925.

Rehm application Serial No. 8,657, filed February 12, 1925.

Rehm application Serial No. 23,775, filed April 17, 1925.

84 *Exhibit No. 4—The Hite Patent*

85 United States Patent Office

CHARLES E. HITE, OF PHILAELPHIA, PENNSYLVANIA.

HEAT-INSULATING MATERIAL AND METHOD OF MAKING SAME.

1,230,297. Specification of Letters Patent. Patented June 19, 1917. No Drawing. Application filed August 18, 1916. Serial No. 115,649.

To all whom it may concern:

Be it known that I, Charles E. Hite, a citizen of the United States, residing at Philadelphia, in the county of Philadelphia, State of Pennsylvania, have invented a new and useful Heat-Insulating Material and Methods of Making Same, of which the following is a specification.

My invention relates to an improved heat insulating material and the method of making same. The object is to provide an improved insulating material, suitable for covering steam and hot and cold water pipes, refrigerating machinery, boilers and furnaces, and for numerous other uses requiring insulation of high efficiency, which is non-combustible, durable and light in weight.

It is a well known fact that the efficiency of material used as insulation for heat or cold depends largely upon the percentage of voids or air spaces for containing dead air in the insulating medium.

Among the best insulating mediums or materials now in use, may be mentioned hair felt, cork, carbonate of magnesia and asbestos. These materials are expensive, and each has certain disadvantages.

The present invention consists in the production of an extremely porous substance by the use of a suitable suspending agent such as a carbo-hydrate formed into a paste with water. This liquid paste is sufficiently gelatinous in character to be capable of holding in suspension until set, a powdered material such as calcium sulfate (plaster of Paris) or other like material, whereby a greater quantity of water or other fluid can be mixed with the given quantity of plaster than would ordinarily be possible.

The significance of the invention will immediately become manifest upon realizing the following facts:—

The greatest amount of water that can be actually mixed with plaster of Paris is one and one half parts water to one part of plaster. Thus the original plaster can only be increased to a total dimension or bulk of about double its original volume by mixing with water.

As a result of my method one part of plaster of Paris by weight can be mixed with six parts of water by weight. This will result in a mass, formed from the same bulk of plaster, having a volume six times its original cubical volume.

As an example of the method and the product resulting therefrom I combine 600 cubic centimeters of water, 24 grams of starch and 100 grams of calcium sulfate in the following manner: I bring to a boiling point 500 centimeters

of water; I mix thoroughly with 100 centimeters of cold water, 24 grams of starch. This mixture is poured into and thoroughly mixed with the 500 cubic centimeters of boiling water, and the boiling continued for a few minutes, thereby forming a paste. While the mixture is still hot or after it has cooled, 100 grams of calcium sulfate is rapidly stirred into the liquid paste, and after becoming thoroughly mixed, the entire mass is poured into a suitable mold or molds. After the mass has become set, it is of a uniform consistency throughout, occupying approximately a little more than 600 cubic centimeters. The water is now evaporated at a temperature approximately from 200° F. to 212° F. The resulting product is extremely porous, owing to the large percentage of air cells, and is a good insulating medium, possessing considerable strength and being very light in weight.

If desired, one gram of borax or alum or other paste preservative may be added to the mixture of carbo-hydrate and water.

This mass of carbo-hydrate, water and sulfate, is at first quite fluid, but soon sets and becomes firm. The action of the carbo-hydrate paste is to hold the particles of sulfate in suspension, preventing settling until the sulfate hardens, then on the evaporation of the water, a substance is produced full of air cells, which has proved of greater insulating efficiency, as above stated, than insulating substances composed of 85% carbonate of magnesia and 15% asbestos.

In some instances and for certain purposes it is necessary to water-proof the material. This I accomplish by adding to the paste one per cent., for example, of a vegetable or animal oil, such as linseed oil or fish oil, or mineral oil, such as petroleum, or the asphaltum residue from the distillation of crude oil. After the water has been evaporated, at a heat ranging approximately 500° F. or higher, these substances either oxidize or carbonize, as in the case of resins, asphalts or other hydrocarbons having a melting point above 60° F.

86 In cases where the insulating material has to stand a heat above 300° F, or a harder material is desired, such material is produced by adding to the paste one per cent., for example, of borax and one per cent. of oxid of iron. These materials tend to flux under the influence of sufficient heat, or in other words a temperature of 500° F., or over, thereby adding greatly to the strength of the article produced; or a harder material can be made by the addition to the paste of what is known as

glutrin, or sulfite pitch and subjecting the composition to a temperature of 500° F., or over, during the process of drying.

It is to be understood that the proportions of the various materials may be varied to suit different requirements.

The liquid mixture as described, is poured into suitable molds, allowed to set, and then is dried at a temperature ranging from approximately 212° F. to 700° F. At the higher temperatures, the starch undergoes a chemical change and is not thereafter affected by the heat from any steam pipes.

When borax and oxid of iron, Fe_2O_3, are added to the paste, the dried substances have been found to withstand a temperature of 1700° F. for four hours or more, without cracking or disintegrating, and it becomes even harder than the original substance.

To the plaster of Paris may be added calcined magnesium carbonate with the result that the material produced is lighter and of slightly more efficient insulating character.

It will be understood that plaster-of-Paris and carbo-hydrate paste are given in the above description, merely as examples of a suitable material and a suitable suspending agent, in order to effect the process and secure the product desired. Other substances and agents may obviously be used with similar results.

The essence of the invention, is the suspension of the particles of a suitable powdered material such as calcium sulfate, calcium hydroxid, or diatomaceous earth, by an agent, such for example as a carbo-hydrate paste, until the material is changed from a fluid or semi-fluid state to a self-sustaining and extremely porous body.

What I claim is:—

1. The method which consists in forming a fluid or semi-fluid mass by suspending the particles of a powdered mineral material in a previously prepared viscous liquid agent until the material becomes self-sustaining, and then evaporating the moisture, thereby producing a body provided with air cells.

2. The method which consists in associating the particles of a powdered mineral material with a previously prepared suspending agent to form a fluid mass and to hold the mineral particles in suspension until the material becomes self-sustaining, and then evaporating the moisture, thereby producing a porous body.

3. The method which consists in mixing a carbo-hydrate paste with water, and thoroughly mixing therewith calcium

sulfate to be held in suspension then allowing the mixture to set in a mold and then evaporating the moisture therefrom.

4. The method which consists in mixing plaster-of-Paris with a carbo-hydrate paste mixed with water, so that the paste will hold the plaster in suspension until it has set and then evaporating the moisture therefrom.

5. The method which consists in making a paste by mixing a carbo-hydrate with a quantity of water, and thoroughly mixing therewith calcium sulfate to be held in suspension, then allowing the mixture to set in a suitable mold and then evaporating the moisture.

6. The method which consists in mixing a carbo-hydrate paste to which is added borax and oxid of iron, with water, and thoroughly mixing therewith calcium sulfate to be held in suspension and then allowing the mixture to set in a suitable mold.

7. A heat insulating body composed of mineral particles formed into a porous self-sustaining mass by first suspending the particles in a liquid paste until the mass has set, and then evaporating the moisture therefrom.

8. A heat insulating body composed of mineral particles formed into a porous self-sustaining mass by first suspending the particles in a liquid paste until the mass has set in a suitable mold, and then evaporating the moisture therefrom.

CHARLES E. HITE.

87 *Exhibit No. 5—The Haggerty Patent*

88 Patented July 8, 1924. 1,500,452

United States Patent Office.

JOSEPH F. HAGGERTY, OF BATAVIA, NEW YORK, ASSIGNOR TO UNIVERSAL GYPSUM COMPANY, OF CHICAGO, ILLINOIS, A CORPORATION OF DELAWARE.

PLASTER WALL BOARD

No. Drawing. Application filed June 2, 1922. Serial No. 565,433.

To all whom it may concern:

Be it known that I, Joseph F. Haggerty, a citizen of the United States, residing at Batavia, in the county of Genesee, State of New York, have invented certain new and useful Improvements in Plaster Wall Board; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others

skilled in the art to which it appertains to make and use the same.

Wall board for use in place of lath and plaster in the construction of buildings is now made with a gypsum core lined on both sides with heavy paper. The board is made in large panels usually three-eighths of an inch thick. Sawdust is sometimes mixed with the gypsum to decrease the weight of the board and also to decrease the liability to chipping when nails are driven through the board to secure it to the studding of the building. The longitudinal edges of the board may be sealed with paper as by bending up the edges of one or both of the liners.

The gypsum while still wet and plastic is rolled into shape on the lower liner and the natural adhesiveness of the gypsum when it crystallizes or sets is relied on to secure the paper liners to the board. Unfortunately this natural adhesiveness of the gypsum is variable. It depends in large measure on the amount of moisture present in the gypsum when the plastic mass is being shaped. It depends on the amount and character of the sawdust or other foreign material added. It depends on the fibrous structure, the moisture content, the surface characteristics and the thickness of the paper liners. The result is that in regular commercial practice much material is produced in which there is not good adhesion between the paper liners and the gypsum core. Such a lack of adhesion materially reduces the strength of the board for the liners are relied on to stiffen the board and any lack of adhesion results in lines or areas of weakness. Ordinarily the defective adhesion does not become apparent until after the board has been dried in the kiln and is ready for shipment. Very often the defect does not become apparent until the board has been shipped and is ready for use by the consumer. Replacements of gypsum boards rendered defective through lack of proper adhesion of the liners is an item of large importance in regular commercial manufacture.

It is an object of the present invention to secure better adhesion of the paper liners to the gypsum through the use of an appropriate amount of carbohydrate material in the mixture, as for instance starch or the like, while the board is being made. Thus by adding cooked starch paste, for instance, to the dry gypsum the natural adhesiveness of the gypsum is augmented by the adhesiveness of the starch with the result that the liner or liners stick tenaciously. Furthermore, a larger percentage of water can be used in the mixture, when starch or other carbohydrate

is used. In the usual practice, the difficulties of securing adhesion of the liners increases with an increase in the amount of water used. While it is possible to use as high as 50% or 60% of water, in the usual process it is impracticable, because the mixture must be stirred to so near the point of setting before it is delivered to the liners that the liners will not adhere. The use of starch has other advantages as hereinafter briefly pointed out.

The procedure followed by me in practice of the preferred embodiment of the present invention consists in adding 2 lbs. of starch to 6 lbs. of cold water to form a suspension in which the starch granules are separated one from another. The starch may be corn starch, potato starch, or equivalent gelatinizable material. This suspension is then added to 52 lbs. of water heated preferably to about the boiling point. The hot water bursts the granules of starch and cooks or gelatinizes the starch. The result is a thin and somewhat clouded liquor. 40 lbs. of dry powdered gypsum is then added to the liquor and thoroughly mixed therewith. The best way known to me for securing the desired intimate mixing is to agitate the mix thoroughly for about two minutes in a tank having a vertical rotatable shaft with blades or propellers. After this agitation, the thoroughly mixed mass in a plastic condition is ready for delivery to the board machine to be rolled out into a thin sheet in conformity with standard practice.

A paper liner suitable for use with this board may be made from ground wood fibre or from waste paper beaten to a pulp and formed into sheets, or may be made from mixtures of these. A proper liner has a caliper of 25 points, that is to say, it is .025 of an inch in thickness. Such a paper weighs about 75 lbs. per 1000 square feet.

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In the board machine the plastic gypsum and starch mixture is rolled into intimate contact with the bottom liner, and likewise with the top liner, if one is used, and some of the moisture from the gypsum soaks into the paper liner rendering it soft and plastic and facilitating the bonding of the paper to the gypsum core when the latter crystallizes or solidifies. When gelatinized starch is present in the gypsum mix as above described the starch prevents the water of the gypsum from going too freely into the paper. The chemical affinity of the starch for the water holds the moisture in the gypsum and prevents the paper from becoming mushy. A soft mushy paper greatly in-

creases the difficulty of handling gypsum board in the mill prior to drying.

In conformity with usual practice, the gypsum layer is formed in a continuous sheet and while still moist is cut to approximately finished dimensions. The moist sheets or panels so formed are then dried in kiln as usual at 140 to 190° F. for about 24 hours. I find it expedient to make the boards with a finished thickness of seven-sixteenths of an inch, this being one-sixteenth of an inch thicker than the usual practice. I am able to do this and still keep the weight of the board within permissible limits because of the gelatinized starch which seems to separate the crystals of the gypsum and so yield what might be regarded as a more porous and consequently lighter board. With starch present in the proportion above mentioned the finished board seven-sixteenths of an inch thick weighs approximately 1,250 lbs. per 1000 square feet as against usual weights of 1,750 to 2,000 lbs. per 1000 square feet three-eighths of an inch thick when gypsum alone or a mixture of gypsum and sawdust is used as the core of the board. This addition to the thickness with simultaneous saving in weight is an important commercial consideration in the transportation and marketing of this relatively heavy product.

The gypsum board with the starch addition as above described is easier to saw than ordinary gypsum board, presumably because of the slight separation of the gypsum crystals by the intervening starch jell, or more strictly speaking the residue of that jell. The product saws more like lumber while the material of the prior art saws much like a soft rock with resultant heavy wear on the carpenter's tools even when sawdust is present. With the boards of my present invention sawdust can be omitted entirely and yet the boards can be nailed to the studding without serious chipping or splitting of the gypsum. This result is no doubt due in part to the improved crystalline structure of the gypsum core, but is also due in part to the increased adhesion between the paper liners and the board. The paper sheet or liner is intimately bound to the surface of the gypsum not only by the crystallization of the gypsum, but also because of the adhesiveness of the starch held in the interstices of the gypsum Furthermore the gypsum while setting has not been drained of its proper moisture content through diffusion and dissipation of the water into the paper liner where its presence serves no useful purpose and materially increases the difficulty of

handling the boards on their way to the kiln. Such a close bond between the paper and the gypsum materially reduces breakage in handling at the kiln and the finished board is stronger because use is made of the full strengthening value of the paper uniformly distributed over the entire board.

The strength of the board as above made, may be materially increased, and the tendency to breakage reduced by the addition of fiber, as for instance, asbestos fiber, wood fiber, sulfite fiber, jute and the like. The asbestos fiber is preferably in some respects, being fire-proof and of a mineral nature. When fiber, as for instance, asbestos fiber, is added to the paste and thoroughly distributed so that the fiber is completely separated, each individual fiber becomes covered with the paste, which being adhesive, causes the gypsum to adhere more tenaciously to the fiber when the board is dried.

The relative quantity of starch above indicated is the best known to me for the purpose set forth, but I am aware that the percentage can be varied to some extent without substantial sacrifice and similarly that details of the procedure of compounding the plastic mixture of gypsum with starch can be varied without departing from the spirit of my invention as defined by the appended claims.

I claim:

1. A wall board consisting mainly of gypsum and having a paper liner, cooked starch being incorporated with the gypsum, to insure secure adhesion of said paper liner.

2. A wall board consisting mainly of gypsum and having a paper liner, cooked starch being incorporated with the gypsum in about the proportion of 2 lbs. of starch to 40 lbs. of gypsum, to insure adhesion of said paper liner.

3. A wall board consisting mainly of gypsum and having a thickness of about seven-sixteenths of an inch and having paper liners on both sides, cooked starch being uniformly distributed throughout the gypsum in about the proportions of 2 lbs. of starch to 40 lbs. of gypsum, to secure better adhesion of said paper liners than is to be had from gypsum alone; substantially as described.

4. The method of making a paper lined gypsum board which consists in intimately mixing cooked starch with dry gypsum and then rolling into shape on a paper liner; substantially as described.

5. The method of making a paper lined gypsum board which consists in cooking starch in water, adding gypsum

thereto, thoroughly agitating and then rolling into shape on a paper liner; substantially as described.

6. The method of making a paper lined gypsum board which consists in mixing 2 lbs. of starch with 6 lbs. of cold water to form a suspension, adding said suspension to 52 lbs. of hot water to burst the starch granules and gelatinize the starch, adding 40 lbs. gypsum, mixing thoroughly and then rolling into shape on a paper liner; substantially as described.

7. The method of making a paper lined gypsum board which consists in mixing 2 lbs. of starch with 6 lbs. of cold water to form a suspension, adding said suspension to 52 lbs. of hot water to burst the starch granules and gelatinize the starch, adding 40 lbs. of gypsum, agitating thoroughly in a blade mixer for about two minutes and then rolling into a sheet about seven-sixteenths of an inch thick between paper liners; substantially as described.

8. A wall board consisting mainly of gypsum and having a paper liner, cooked carbohydrate being incorporated with the gypsum to insure secure adhesion of the paper liner, fiber being thoroughly distributed throughout the carbohydrate to strengthen the board.

9. A wall board consisting mainly of gypsum and having a paper liner, cooked starch being incorporated with the gypsum to insure secure adhesion of the paper liner, fiber being thoroughly distributed throughout the starch to strengthen the board.

10. A wall board consisting mainly of gypsum and having a paper liner, cooked carbohydrate being incorporated with the gypsum to insure secure adhesion of said paper liner.

11. A plaster board, or the like, comprising a body portion of plaster, mixed with a starch product and a covering of paper, adhering thereto.

12. A plaster board, or the like, comprising a body portion of plaster, mixed with a finely comminuted starch product and a covering of paper adhering thereto.

In testimony whereof I affix my signature.

JOSEPH F. HAGGERTY.

91 *Exhibit No. 6—The October 1929 License Agreement Between U.S.G. and Ebsary*

92 LICENSE AGREEMENT

This agreement made this 18th day of October, A.D. 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, herein-

after referred to as Licensor, and Ebsary Gypsum Co., Inc., a New York corporation, of Newark, New Jersey, hereinafter referred to as Licensee, witnesseth, that

Whereas, Licensor is the owner of certain letters patent and applications for letters patent of the United States covering an improved gypsum wallboard and method or process of making the same, together with machines and appliances for the manufacture of such inventions which, with certain other patents, are more specifically set forth in Exhibit A attached hereto and made a part hereof; and

Whereas, Licensor was the owner of all of the right, title and interest in and under letters patent of the United States number 1,029,328 and number 1,034,746 known as the Utzman Patents, the last of which expired August 6, 1929, which said Utzman Patents were adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit, and were decreed by said courts as valid and having been infringed by the defendants named in said suits; and

Whereas, Birdsey Patent number 1,358,508, mentioned in said Exhibit A, was decreed by the United States District Court for the Northern District of Ohio as valid and infringed by the defendant in said cause by reason of
93 its having made, used and sold plasterboard and/or gypsum wallboard with edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit; and

Whereas, Licensor is the owner of a new process disclosed in that certain application for United States letters patent filed by Carlisle K. Roos, entitled "Cementitious Material," now pending in the United States Patent Office and covering the process of making a cellular product, which comprises forming a tenacious foam and mixing the foam with a cementitious material, and of certain other applications filed by said Roos covering specific employment of said invention, and Licensor has heretofore acquired the sole and exclusive rights in the United States of America (when gypsum is used as the main binding material) in that certain application for United States letters patent described in Exhibit A filed by Erik Christian Bayer, entitled "Methods of Manufacturing Porous Building Materials," and relating to a process broadly similar to that of said first mentioned Roos application, which said Roos and Bayer

applications are described and set forth in said Exhibit A; and

Whereas, Licensor has agreed to purchase that certain Haggerty Patent number 1,500,452, dated July 8, 1924, and that certain Hite Patent number 1,230,297, dated June 19, 1917, both mentioned in said Exhibit A, subject to approval of the United States District Court for the Northern District of Illinois, Eastern Division thereof, and
94 other United States district courts in receivership proceedings therein pending against the present owner of said patents; and

Whereas, gypsum wallboard or plasterboard manufactured by Licensee is made by the use of the machines or according to the processes or embodying the claims of some or all of said patents and applications for letters patent set forth in said Exhibit A, and Licensee desires to include in its manufacture the inventions and improvements set forth and claimed in said Roos and Bayer applications and said Haggerty and Hite patents, and to obtain a license from Licensor to make, use and sell the inventions and improvements set forth and claimed in all of said patents and applications for letters patent set forth in said Exhibit A throughout the full term thereof; and

Whereas, Licensor has agreed to grant said License and to make certain disclosures as to the said Roos and Bayer applications referred to in said Exhibit A, upon the terms and conditions hereinafter stated;

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged from each party to the other party, and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto do hereby agree as follows, to-wit:

1. Licensor agrees promptly to disclose to Licensee all information and formulæ which it now has or may obtain relating to the process of making a cellular product through the formation of a tenacious foam and mixing the foam with a cementitious material, as set forth and claimed in said applications for letters patent filed by Carlisle K. Roos and Erik Christian Bayer, in so far as the same is
95 or may be applied to gypsum, and including all information and formulæ for the manufacture of gypsum plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Roos and Bayer applications, together with a description of the machines or appliances which it now has for making the same. It will assist Licensee to make its plant ready for

practicing said process in the manufacture of plasterboard and gypsum wallboard by furnishing without cost to Licensee the advice and instruction of Licensor's experts and information with respect to the purchase and cost of said machines and appliances.

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters patent
96 described in said Exhibit A, for the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or core of which is made according to the process set forth and claimed in any

patent granted for or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum wallboard, and thereafter shall give to Licensee
97 written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by second parties and which during the existence thereof shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

98 3. Licensee agrees to pay to Licensor for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and

claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,452, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; Provided, However, that if no
99 patent shall have been granted or issued for or upon any of said Roos or Bayer applications covering said process referred to in paragraph 1 hereof, within two (2) years from the date hereof, then commencing with the end of said two (2) year period the said license fees or royalties agreed to be paid by Licensee shall be reduced by one per cent (1%) of Licensee's said selling price until such patents shall have been granted or issued for or upon any of said Roos and Bayer applications, at which time Licensee shall again commence to pay the full amount of said license fees or royalties until the date of the expiration of the last to expire of any such patent or patents. If at the time of the execution of this contract Licensee's plant shall not be equipped to practice the process set forth and claimed in said Roos or Bayer applications in the manufacture of plasterboard or gypsum wallboard, then Licensee shall pay as such license fees or royalties two and one-half per cent (2½%) of said selling price between the date hereof and January 1, 1930, or such earlier date as Licensee shall make its plant ready to practice said process in the manufacture of said board, and the payment of three and one-half per cent (3½%) of said selling price and said period of two (2) years in this paragraph mentioned shall commence on January 1, 1930, or such earlier date as Licensee shall have made its plant ready as aforesaid. The amount of one

per cent (1%) of said selling price included in said royalties or license fees is the amount agreed to be paid by Licensee for the use of said Haggerty and Hite patents.

Licensee's selling price shall mean the delivered selling price of Licensee, less freight paid by the customer and less regular cash discounts allowed by Licensee.

4. It is further agreed that so long as the license provided for in paragraph 2 hereof shall remain in force between the parties hereto, or in case the license granted under paragraph 2 hereof shall expire before the expiration of the patents specifically described in this paragraph, and the said license granted under paragraph 2 shall continue in force between the parties hereto for the full term of the last to expire of any of said patents described in said Exhibit A, or of any patent or patents granted for or upon any application described in said Exhibit A, then until the expiration of the patents specifically described in this paragraph, Licensor does hereby give and grant unto the Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in those certain patents known as the Birdsey Plaster-Board Bundle Patent number 1,696,877, dated December 25, 1928, Utzman Patent number 1,724,740 dated August 13, 1929, Birdsey Patent number 1,730,113 dated October 1 1929, and applications for letters patent serial numbers 329,581 filed December 31, 1928, and 296,354 filed July 30, 1928, and any patent which may be granted for or upon said applications, including any extensions and/or reissues thereof, at the plants or factories now owned or operated by Licensee or at any other plant or factory hereafter owned and/or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, and of selling or using bundles of plasterboard and/or gypsum wallboard put up or bundled by Licensee at any such place or places according to the claims set forth and claimed in the said patents and applications for letters patent in this paragraph described, upon the terms and conditions hereinafter stated.

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Licensee agrees to pay to Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said patents and applications in the next preceding paragraph described, in addition to the sums hereinabove set forth, an amount (hereinafter referred to as a license fee or royalty) equivalent to ten cents (10¢) per one thousand (1,000) square feet of plasterboard and/or gypsum wallboard which is sold by Licensee in bundles of any kind, whether or not the bundles shall be made according to the claims

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set forth and claimed in said patents; which said license fee or royalty shall be payable at the times and in accordance with the terms of paragraph 6 hereof. The term "bundle" shall not include unbundled material wired or strapped for purpose of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates.

5. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; Provided, However, that the same may be assigned by Licensee to any company acquiring all the assets and business or all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, and to agree to be bound by all of the terms and conditions of this contract, and deliver such agreement to Licensor.

6. Licensee agrees to keep separate full and accurate books of account and records showing the exact
102 quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the twentieth day of each calendar month it will render unto Licensor true written returns verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and/or gypsum wallboard manufactured and sold by it during the preceding calendar month and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold and is to be accounted for hereunder, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement

on account of all said plasterboard and/or gypsum wallboard manufactured and sold by it and put up and sold by it in bundles during the next preceding calendar month.

7. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it and the quantity thereof put up and sold by it in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; Provided, However, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne
103 equally by both parties. If the parties at any such time shall not agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing not directly or indirectly employed by it or in any other way connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself,

8. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents and/or applications for letters patent shall be distinctly marked with the word "PATENTED" and/or "PATENT APPLIED FOR," as the case may be, together with the numbers of any of said patents or applications specified by Licensor, the claims of which may be embodied in said plasterboard or gypsum wallboard, and in connection with said marking Licensee will further mark said board with the words "LICENSED UNDER THE ABOVE LETTERS PATENT" and/or "LICENSED UNDER PENDING APPLICATIONS FOR LETTERS PATENT," as the case may be, which marking shall be plainly visible. Licensee further agrees that all bundles put up and sold by it embodying the claims of any of said patents numbers 1,696,877, 1,724,740 and 1,730,113 and/or any of said applications serial numbers 329,581 and 296,354 shall be similarly marked together with the numbers of said bundle patents and/or applications.

9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products,

jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum-wallboard in straight cars or in mixed cars with other building material
104 and who do not sell at retail) gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in any letters patent after the same shall have been issued, granted for or upon any of the said application and may with the written consent of first party manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent or in any letters patent after the same shall have been granted for or upon any of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

10. Licensee covenants and agrees that all of said gypsum plasterboard and gypsum wallboard manufactured and sold by it embodying the inventions and improvements set forth and claimed in any of said Letters patent or patents issued upon any of said applications and commonly known in the trade as "seconds" shall be plainly invoiced
105 as "seconds" and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee

hereby acknowledges the validity of said letters patent or of any letters patent which may be granted or issued for or upon said applications, forming the subject-matter of said license so long as said license shall remain in full force and effect, and agrees that it will not at any time during the existence of said license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said letters patent or the title thereto of Licensor.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; Provided, However, that neither party shall be relieved thereby from any liability accrued at the time of such termination; and Provided Further, that if the party upon whom said notice is served shall deny that it is in default in whole or in part, as specified therein, then the party serving such notice shall not be privileged to cancel this contract on account of the alleged default specified therein, provided the party upon whom said notice shall have been served shall within said thirty (30) day period perform the agreements and submit the question to arbitration, as in this paragraph hereinafter set forth. In case of any such denial the party upon whom the notice shall have been served shall within said thirty (30) day period state in writing to the other party wherein and in what respect it denies the default specified in said notice and shall at the same time make good any default specified therein which it does not deny and appoint in writing one person as arbiter to arbitrate the question of whether or not it is in default in respect to that which it shall have denied as aforesaid, it being understood, however, that if the question shall be with respect to the amount of royalties or license fees to be paid hereunder, then the Licensee shall first pay or offer to pay the amount of such license fees or royalties which it then admits is due and payable in accordance with the terms

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hereof, and the acceptance thereof by the Licensor shall not operate as a waiver of any of its rights hereunder or of any claim it may have made in any notice served by it upon Licensee. The party so serving said notice shall, after the other party shall have made good any default specified in said notice which it did not deny in writing as aforesaid, including the payment of royalties or license fees, if any, admitted by it to be due and payable hereunder, and within ten (10) days from the date of the appointment of said first arbiter in accordance with the terms hereof, appoint in writing another person as arbiter, and the two persons so appointed shall within ten (10) days or as soon as possible thereafter appoint in writing a third person as arbiter. The three persons so appointed shall, within thirty (30) days from the date of the appointment of said last mentioned arbiter, or as soon as possible thereafter, decide whether or not the party
107 upon whom said notice has been served is in default hereunder with respect to anything contained in said notice. The decision of a majority of the three arbiters so appointed shall constitute a final settlement of the said question and be binding and conclusive upon both the Licensor and the Licensee, and if it shall have been determined by a majority of the said arbiters that the party upon whom said notice was served is in default with respect to anything contained in said notice and the party so found to have been in default shall fail or refuse to comply with the terms of the award or finding made by said arbiters within thirty (30) days from the date such award or finding shall have been made, the party serving said notice may at its election terminate and cancel this agreement in writing. In the event of default hereunder by either party and notice of such default is served by the other party as herein provided, and after service of such notice the party in default shall cure the same as hereinbefore provided the same shall constitute a nullification of said notice to the same effect as if said notice had not been served. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become canceled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may proceed by action to specifically enforce this con-

tract or any of the terms, conditions and covenants thereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served by the Licensor or the Licensee by mailing the same to the other party hereto, postage prepaid and registered, addressed to any of its officers at its last
108 known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under paragraph 2 hereof shall be confirmed in writing in the ordinary course of business.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement on the part of any person or persons of any of said letters patent or of any patent that may be granted upon said applications, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper.

If a court of last resort upon final appeal or review shall decree all the claims of the patents granted for or upon said Roos and Bayer applications invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard, the body or core of which is made according to the process set forth and claimed in said Roos and Bayer applications in such manner that they cannot practice in any way any of the inventions set forth in the said applications, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree that all the claims of the patents granted or issued for or upon said Roos and Bayer applications are invalid, or make such injunction permanent and final, the license fees or royalties to be paid by Licensee hereunder shall be reduced by one per cent (1%) of said selling price, or if a court of last resort upon final appeal or review shall decree that all the claims of said Haggerty and Hite
109 patents are invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Haggerty and Hite patents in such manner that they cannot practice in any way any of the inventions set forth in said patents, and such injunction shall be made final by a court of last resort upon final

appeal or review, then from the time the court of last resort upon final appeal or review shall decree all claims of said Haggerty and Hite patents invalid or make said injunction permanent and final, the said license fees or royalties agreed to be paid by Licensee for said Haggerty and Hite patents shall cease and determine.

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

16. The terms "gypsum plasterboard," "gypsum
110 wallboard" and "plasterboard" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

17. If at any time after the expiration of two (2) years from January 1, 1930, or such earlier date that Licensee shall make its plant ready to practice the process set forth and claimed in said Roos and Bayer applications in the manufacture of gypsum wallboard or plasterboard, there shall have been invented or come into use any process which shall make the said process of forming a cellular product as set forth and claimed in said Roos and Bayer applications obsolete or shall displace the same, and the Licensor shall in its own manufacture permanently and wholly abandon the use of the subject-matter of the claims of said Roos and Bayer applications, it shall notify Licensee in writing thereof, and Licensee may then, upon thirty (30) days' written notice to Licensor, cancel and terminate this license in so far as the same applies to said Roos and Bayer appli-

cations or to the patent or patents granted or issued therefor or thereupon, and from the date of such cancellation the royalties or license fees to be paid by Licensee hereunder shall be reduced by one per cent (1%) of its said selling price; Provided, However, that if Licensor shall not in such event permanently and wholly abandon the use of said process but shall only partially abandon the same, then to the extent or degree and for the term that Licensor shall abandon the same in its own manufacture Licensee shall be relieved from the payment of license fees or royalties to the same extent, that is to say, if Licensor shall in such event manufacture and sell any board the core of
111 which is made of gypsum of a particular size, kind or make, or for a particular purpose or use, without the use of said process embodied therein, then if Licensee shall manufacture and sell the same board of the same particular size, kind or make and for the same purpose or use, without the use of said process embodied therein, then Licensee shall not be required to pay royalties or license fees upon such particular board for the term that Licensor shall manufacture and sell the same. "License fees" and "royalties" for the purpose of this paragraph shall mean one per cent (1%) of said selling price. The use by Licensor of any improvement which Licensee has the right to use as set forth in paragraph 18 hereof, or the manufacture of plasterboard or gypsum wallboard without the use of said process for sale only in foreign countries where Licensor has no patented rights in said process, shall not constitute an abandonment of said process or a partial abandonment thereof within the meaning of this paragraph.

18. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubble described in the process set forth in said Roos and Bayer applications and or method of its introduction in the core of plasterboard or gypsum wallboard, and which improvement is covered by the claims of said Roos and Bayer applications, and shall itself use the same in its own manufacture, then so long as Licensee shall continue to pay the license fees or royalties hereinbefore stipulated the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum plasterboard or gypsum wallboard, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional sum,

royalty or license fee therefor. It is further understood that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement, as well as the provision of paragraph 2 hereof reserving the right in Licensor to determine and fix at any time and to change from time to time the minimum price or prices at which Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the claims of said patents, shall apply to the improvement set forth and claimed in any patent or patents granted or issued for or upon said improvement. Licensor will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of plasterboard and gypsum wallboard.

19. Licensee has investigated and fully satisfied itself with respect to the inventions and improvements set forth in said patents and applications for letters patent and the use thereof in its own manufacture, and has executed this agreement without relying upon any representations which may have been made by Licensor with respect thereto. No representations have been made by Licensor not expressly stated in this contract which Licensee shall at any time have any right to rely upon as an inducement for its making this contract or for any result or results to be obtained by Licensee in its own plant by its use of the inventions and improvements set forth and claimed in any of said patents or applications for letters patent.

20. The Licensor agrees at any time during the term hereof to extent to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the said process or processes set forth and claimed in said Roos or Bayer applications in the manufacture in its said plants of any other gypsum product not specifically covered by this agreement and in which Licensor shall use the same in its own manufacture and to sell the same, upon the payment to Licensor of one per cent (1%) of the selling price of Licensee of all of said other gypsum product, whether or not embodying the said process in making the same, manufactured and sold by Licensee and upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the words "plasterboard and/or gypsum wallboard" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and

signed by both parties before the same shall become effective.

21. From the date this contract shall become effective the same shall supersede all prior license agreements at any time made between the parties hereto relating to the subject-matter hereof or relating to any of the patents or applications for letters patent referred to in this agreement; Provided, However, that Licensor shall not be barred or prevented from recovering any claim which may have accrued under any such prior license agreements prior to the time this contract shall become effective, including all payments, royalties or license fees agreed to be paid thereunder by Licensee up to the date this agreement shall go into effect.

22. This license and all of the covenants and agreements hereof shall become effective upon the date Licensor shall receive a conveyance and assignment of said Haggerty and Hite patents to it, pursuant to authority granted by the United States District Court to the receivers of the Universal Gypsum & Lime Co., a Delaware corporation, and to said company, to sell and assign said Haggerty and Hite patents to Licensor, and from the effective date thereof this license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the
114 successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by Licensee, except as hereinabove specifically provided.

In witness whereof the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY,
By S. L. AVERY,
Its President.

Attest:
[SEAL]
R. G. BAR,
Secretary.

EBSARY GYPSUM CO., INC.,
By F. G. EBSARY,
Its Pesident.

Attest:
[SEAL]
O. E. HOUGH,
Secretary.

115 *Exhibit "A" to agreement*

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

116 Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial No. 565,737, reissued January 24, 1928, as Reissue patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial No. 567,205, reissued May 22, 1928, as Reissue Patent No. 16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,189. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

117 Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,676, filed October 1[illegible], 1921, granted November 29, 1927, expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,627, filed April 19, 1922, granted April 30, 1929, expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662,359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1,631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927, expires May 31, 1944.

Bookby & Absmeier patent No. 1,689,322. Application Serial No. 91,297, filed March 1, 1926, granted October 30, 1928, expires Oct. 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.

Utzman patent No. 1,638,280. Application Serial No. 374,833, filed April 19, 1920, granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927, expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No. 427,044, filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,045, filed November 29, 1920, granted September 6, 1927, expires September 6, 1944.

Mehlhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926, expires October 26, 1943.

118 Gustafson patent No. 1,665,168. Application Serial No. 509,366, filed December 2, 1919, renewed October 21, 1921, granted April 3, 1928, expires April 3, 1945.

Kohler et al. patent No. 1,673,944. Application Serial No. 540,412, filed March 2, 1922, granted June 19, 1928, expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey Patent No. 1,718,890. Application Serial No. 583,795, filed August 23, 1922, granted June 25, 1929, expires June 25, 1946.

Utzman application Serial No. 477,371, filed June 14, 1921, finally allowed April 26, 1929. Patent No. 1,731,116 will issue October 8, 1929.

Knode application Serial No. 590,358. Filed September 25, 1922.

Utzman application Serial No. 581,361. Filed August 12, 1922.

Williams application Serial No. 582,606. Filed August 18, 1922.

Roos application Serial No. 733,197, filed August 20, 1924.

Bayer application Serial No. 661,723, filed September 8, 1923.

Roos application Serial No. 3477, filed January 19, 1925.

Roos application Serial No. 142,155, filed October 16, 1926.

Haggerty patent No. 1,500,452. Application Serial No. 565,433, filed June 2, 1922, granted July 8, 1924.

Hite patent No. 1,230,297. Application Serial No. 115,649, filed August 18, 1916, granted June 19, 1917.

119 *Exhibit No. 7—Price Bulletins from U.S.G. to Licensees*

120 UNITED STATES GYPSUM COMPANY
300 WEST ADAMS STREET,
Chicago, February 6, 1939.

Carload Shipments—Board License Bulletin No. 1 (Page 1)—Cancels Page 1, Dated April 1, 1938

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective February 7, 1939, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent) are as follows:

Minimum prices per thousand square feet of patented gypsum board products for delivery by rail, in straight cars or cars mixed with other gypsum products, including pool cars and stopover cars, shall be the lowest combination of mill price listed below and all rail freight from such mill to destination. Rail freight shall be determined in accordance with rail rates as published in regular freight tariffs, using weights shown below, plus all stopover, switching, cartage and other extra delivery charges in connection with the shipment. In stopover cars, minimum prices of the patented gypsum board products in any portion of the car shall be the minimum prices as herein defined to the point of delivery of that portion of the car.

MILLS	¾" Gypsum Wallboard (Wt. 1050 #. per M)	⅜" Gypsum Wallboard (Wt. 1475 # per M)	½" Gypsum Wallboard (Wt. 2000 # per M)	½" Gypsum Sheathing (Wt. 2000 # per M)	⅜" Tiled Gypsum Wallbd. (Wt. 1475 # per M)	⅜" Gypsum Plaster Lath (Wt. 1475 # per M)	½" Gypsum Plaster Lath (Wt. 2000 # per M)	½" Gypsum Liner Board (Wt. 1050 # per M)	⅜" Gypsum Liner Board (Wt. 1475 # per M)	½" Gypsum Liner Board (Wt. 2000 # per M)
Acme, Texas Boston, Mass. Detroit, Mich. E. Chicago, Ind. Ft. Dodge, Iowa Grand Rapids, Mich. Gypsum, Ohio Heath, Montana Jacksonville, Fla. National City, Mich. New Brighton, S. I., N. Y. Oakfield, N. Y. Philadelphia, Pa. Plasterco, Va. Southard, Okla. Sweetwater, Tex.	20.00	23.00	25.00	22.00	50.00	13.00	15.00	15.00	15.00	16.25

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Dated March 25, 1938

Where an old 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on the basis of rate per cwt., fractions of less than ¼¢ per cwt. to be dropped, fractions of ¼¢ per cwt. to ½¢ per cwt. to be considered as ½¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

The above prices apply to the sale of all patented gypsum board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Pacific Coast—Until further notice, minimum prices as above defined shall not apply to sales of the patented gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington; also that portion of the State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 32"x48" Gypsum Board—Specific Roof Jobs—The minimum price of cutstock board in size 32"x48", when sold for use on specific roof jobs, is the same as the minimum liner board price.

(3) Key West, Florida—The minimum price of ¼" patented gypsum wallboard delivered to Key West, Florida is $24.00 per M sq. ft.

* The minimum price of ⅜" patented gypsum wallboard delivered to Key West, Florida is $29.00 per M sq. ft.

† The minimum price of ⅜" patented gypsum plaster lath delivered to Key West, Florida is $17.20 per M sq. ft.

(4) Minimum Prices into Delivered Price Areas—Minimum prices of the patented gypsum board products in straight cars or cars mixed with other gypsum products, including pool cars and stopover cars, for delivery by rail within areas listed below, are the prices set forth below plus any stopover charges (except that stopover charges need not be added to determine the minimum price on shipments to destinations in delivered price areas wherein the minimum price delivered by truck is the same as the minimum price for delivery by rail):

	½" Gypsum Wallboard	⅜" Gypsum Wallboard	½" Gypsum Wallboard	½" Gypsum Sheathing	⅝" Tiled Gypsum Wallbd	⅜" Gypsum Plaster Lath	½" Gypsum Plaster Lath	½" Gypsum Liner Board	⅝" Gypsum Liner Board	½" Gypsum Liner Board
(a) Into Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass., north of continuation of Southern boundary of Norfolk County and town of Mansfield, Mass., also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J., west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75

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(b) Into balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also Rockingham and Strafford Counties, New Hampshire; also State of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J., east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:	21.05	24.50	27.00	24.00	51.50	14.50	17.00	16.05	16.50	18.25
(c) Into Westchester, Rockland and Suffolk Counties, New York:	20.90	24.30	26.75	23.75	51.30	14.30	16.75	15.90	16.30	18.00
(d) Into State of Connecticut (except Fairfield and Litchfield Counties):	21.20	24.65	27.25	24.25	51.65	14.65	17.25	16.20	16.65	18.50
(e) Into Sullivan, Ulster and Dutchess Counties, New York, and Litchfield County, Connecticut:	21.30	24.85	27.50	24.50	51.85	14.85	17.50	16.30	16.85	18.75
(f) Into Delaware, Greene and Columbia Counties, New York:	21.60	25.20	28.00	25.00	52.20	15.20	18.00	16.60	17.20	19.25
(g) Into Niagara and Erie Counties, New York (including town of Gowanda):	20.75	24.05	26.40	23.40	51.05	14.05	16.40	15.75	16.05	17.65
(h) Into Cook and DuPage Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest, in Lake County, Illinois:	20.40	23.55	25.75	22.75	50.55	13.55	15.75	15.40	15.55	17.00
(i) Into McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest):	20.55	23.75	26.00	23.00	50.75	13.75	16.00	15.55	15.75	17.25
(j) Into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75

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Dated August 6, 1938

(k) Into Grand Rapids, Mich., Switching Area (as described in published railroad tariffs):	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25
(l) Into Jacksonville and So. Jacksonville, Fla., Switching Area, where per car switching rates apply (as described in published railroad tariffs):	21.25	24.25	26.25	23.25	51.25	14.25	16.25	16.25	16.25	17.50

(5) Minimum prices delivered in Markets as listed are same as in adjacent cities, as indicated below:

	Same as
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown, Mount Healthy and North College Hill, Ohio	Cincinnati, O.
Euclid, North Randall and Bedford, Ohio	Cleveland, O.
Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Oklahoma City, Okla.
Rosslyn and Lacy; Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

(6) Minimum Prices to Contractors—Consumers—On sales of standard sixes to contractors, roofing contractors, metal ceiling contractors, prefabricated house manufacturers and consumers generally, the minimum price shall be the minimum price as above established plus the following

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Dated October 21, 1937

amounts per M sq. ft.:

[Std. Sizes]

To Contractors (Inc. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. and Consumers Generally		To Contractors for Use on Roof Decks	
Wall Bd. & Sheating	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(7) Minimum Prices for Non-Standard or Odd Sizes—On sales of non-standard or odd sizes, the minimum price shall be the minimum price as above established plus the following amounts per M sq. ft.:

[Odd Sizes]

To Dealers		To Contractors (Inc Metal Ceiling Contrs.) & to Prefabricated House Mfrs. and Consumers Generally		To Contractors for Use on Roof Decks	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

125 UNITED STATES GYPSUM COMPANY,
300 WEST ADAMS STREET,
Chicago, March 25, 1937.

Supplement to Board License Bulletins Nos. 1 & 2—
Dated February 24, 1937.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective immediately, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

24"x48" Cutstock Liner Board—in order to afford opportunity to move excessive stocks accumulated in southwest which are subject to imminent deterioration, the price of this product for shipment and delivery in state of Oklahoma only, until further announcement, shall be same as minimum gypsum plaster lath price.

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

126 UNITED STATES GYPSUM COMPANY,
300 WEST ADAMS STREET,
Chicago, April 1, 1938.

Prices F.O.B. Trucks at Mills & Warehouses
Board License Bulletin No. 2 (Page 1)
Cancels Page 1 Dated March 15, 1938.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective April 5, 1938, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices F.O.B Trucks, Mills or Whses. (Applying for Standard Sizes as Listed in Bulletin No. 4)	⅜" Gypsum Wallboard (Wt. 1050# per M)	⅜" Gypsum Wallboard (Wt. 1475# per M)	½" Gypsum Wallboard (Wt. 2000# per M)	½" Gypsum Sheating (Wt. 2000# per M)	¾" Gypsum Wallboard (Wt. 3300# per M)	⅜" Tiled Gypsum Wallbd. (Wt. 1475# per M)	⅜" Gypsum Plaster Lath (Wt. 1475# per M)	½" Gypsum Plaster Lath (Wt. 2000# per M)	⅜" Gypsum Liner Board (Wt. 1050# per M)	⅜" Gypsum Liner Board (Wt. 1475# per M)	½" Gypsum Liner Board (Wt. 2000# per M)
Acme, Texas	21.00	24.00	26.00	23.00	....	51.00	14.00	16.00	16.00	16.00	17.25
Boston, Mass.*	20.80	24.10	26.50	23.50	....	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland	....	....	....	....	....	....	16.00	....	....	....	....
Eldorado, Okla.	21.00	24.00	26.00	23.00	....	51.00	14.00	....	16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	....	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	20.00	23.00	25.00	22.00	....	50.00	13.00	15.00	15.00	15.00	16.25
Kansas City, Mo.†	....	....	....	....	....	56.75†	....	....	....	....	....
Laramie, Wyo.†	24.55†	29.35†	....	....	....	56.35†	19.35†	....	....	21.35†	....
Loveland, Colo.†	24.55†	29.35†	....	30.60†	....	56.35†	19.35†	....	....	21.35†	....
MetroNY-NJWhses.*	20.80	24.10	26.50	23.50	....	51.10	14.10	16.50	15.80	16.10	17.75
Miami, Fla.	....	....	....	....	....	....	17.50	....	....	....	....
Milwaukee, Wis.	....	....	....	....	....	....	15.67	....	....	....	....
National City, Mich.	21.00	24.00	26.00	23.00	....	51.00	14.00	16.00	16.00	16.00	17.25
Oakfield, N. Y.*	20.75	24.05	26.40	23.40	38.80	51.05	14.05	16.40	15.75	16.05	17.65
Philadelphia, Pa.*	20.80	24.10	26.50	23.50	....	51.10	14.10	16.50	15.80	16.10	17.75
Piedmont, S. D.†	24.10†	28.75†	32.80†	....	....	....	18.75†	....	....	....	....
Plasterco, Va.	21.00	24.00	26.00	23.00	....	51.00	14.00	16.00	16.00	16.00	17.25
Portsmouth, N. H.*	21.47	25.07	27.80	24.80	....	52.07	15.07	17.80	16.47	17.07	19.05
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Texas	21.00	24.00	26.00	23.00	....	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products) and metallized patented

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board products may be combined to make up the 7500 feet minimum. Exception: ⅜" Tiled Gypsum Wallboard or special surfaced gypsum board products may be picked up in any quantity at Metro, N.Y.-N.J. Warehouses, Boston, Mass., Portsmouth, New Hampshire and Philadelphia, Pa.

† Indicates changes in this reissue.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 32″x48″ Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32″x48″ is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32″x48″ cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36″x48″ Gypsum Board—36″x48″ is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

[Std. Sizes]

To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs.		To Roofing Contractors	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

[Odd Sizes]

To Dealers		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs.		To Roofing Contractors	
Wallbd. & Sheathing	Lath & Liner	Wallbd. & Sheathing	Lath & Liner	Wallbd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

128 UNITED STATES GYPSUM COMPANY
300 WEST ADAMS STREET,
Chicago, July 16, 1938.

Board Prices, Delivered by Truck to Dealers' Warehouses—
Board License Bulletin No. 3 (Page 1)—Cancels
Page 1, Dated October 21, 1937

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452, are as follows:

(1) Eastern Area: Minimum prices for patented gypsum board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. This applies into States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Sullivan, Ulster and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware. See paragraph 3 for minimum loads.

(2) Western New York Area: Minimum prices for patented gypsum board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. This applies into Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York; also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 3 for minimum loads.

(3) Minimum quantities: (Applying to paragraphs 1 and 2 above). Each truck delivery of patented gypsum board products at carload prices shall contain a minimum of 7500 sq. ft. gypsum board products consigned to one destination and invoiced to one account. Truck deliveries

shall be made by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. *Note:* Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum load.

129 (4) Detroit Area: *Minimum prices for patented gypsum board products delivered by truck to dealer's warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board products, or n mixed loads minmum weight 10 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

(5) Miami Area: Minimum prices for patented gypsum plaster lath as provided in Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) deivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with other gypsum products to make minimum weight.

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

* Indicates change in this reissue.

130 UNITED STATES GYPSUM COMPANY
300 WEST ADAMS STREET,
Chicago, February 6, 1939.

Application of Prices—Board License Bulletin No. 4 (Page 1)—Cancels Bulletin No. 4, Dated June 12, 1937

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and

gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), are as follows:

The minimum prices named in Bulletins 1, 2 and 3 apply (except where otherwise specified) to sales of patented gypsum board products in sizes suitable for use in construction and regularly manufactured and offered for sale for use in construction, which products are sometimes referred to herein as standard size products. Such sizes are now as follows:

Thickness & Width	*Length*
(1) *Square Edge Wallboard:*	
¼" x 32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
⅜" x 32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
½" x 32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
½" x 36"	8'-9' and 10'
(2) *T&G Edge Wallboard:*	
½" x 36" or 48"	8'-9' and 10'
(3) *T&G Edge Sheathing:*	
½" x 24"	6'-8" and 8'
(4) *Plaster Lath:*	
⅜" x 16"	32"-36" and 48"
½" x 16"	32"-36" and 48"
(5) *Liner Board:*	
¼" x 24"	32" and 48"
¼" x 32"	36"
¼" x 32"	48" (grey surfaced and round edged)
⅜" x 24"	32" and 48"
⅜" x 32"	36"
⅜" x 32"	48" (grey surfaced and round edged)
½" x 24"	32" and 48"
½" x 32"	36"
½" x 32"	48" (grey surfaced and round edged)
(6) *Special Liner Board for Use on Specific Roof Jobs:*	
⅜" x 32" or 36"	48"
½" x 32" or 36"	48"

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

131 UNITED STATES GYPSUM COMPANY
300 WEST ADAMS STREET,
Chicago, February 6, 1939.

Effective Date of Minimum Prices—Rebates—Board License Bulletin No. 5 (Page 1)—Cancels Bulletin No. 5, Dated February 24, 1937

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the mini-

mum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), are as follows:

Advances in Minimum Price

In the event of an increase in the minimum prices of patented gypsum board products, the advanced minimum prices shall apply to all shipments made after the effective date of the price increase, except that in the following cases the minimum price shall be the minimum price in effect immediately prior to such increase:

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

(2) On sales of gypsum plaster lath to dealers for any specific job requiring not less than the minimum carload quantity of plaster lath (each building of a project to be considered as a separate specific job hereunder); and

On sales of gypsum wallboard or gypsum liner to gypsum roofing contractors for specific gypsum roof jobs; and

On sales of gypsum wallboard, gypsum sheathing or gypsum liner board to dealers for specific industrial housing projects; and

On sales of gypsum wallboard, gypsum sheathing or gypsum liner on direct bids to the federal government for specific federal government jobs;*

But only where the general contract for such specific job is awarded prior to the effective date of the price increase, or where the dealer (or contractor on specific roof jobs) has made a written quotation on such job prior to the effective date of the price increase, and provid-
132 ing the order is placed by such dealer or contractor and accepted by the licensee within 30 days, on private jobs, and 60 days on federal government jobs, after the effective date of the price increase.

(3) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee, prior to the effective date of price increase.

* A Federal Government job is one where the Federal Government lets the contract to a general contractor or places an order directly with licensee.

Decreases in Minimum Price

In the event of a decrease in the minimum prices of the patented gypsum board products, the new and lower minimum prices shall apply to all sales and shipments made after the effective date of the decrease in minimum price, including all orders for the patented gypsum board products on file at the time of decrease in minimum prices, and also shipments in transit; but licensee must be prepared to furnish licensor with satisfactory evidence of the fact that the shipment was actually in transit and not delivered when the price decrease became effective. Carrier's freight bill will be accepted as evidence of that fact.

Rebates, Allowances, Etc.

Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price by granting the customer rebates, unearned or unwarranted refunds, credits or discounts, by reducing the price of other products, by hiring customers' trucks, by granting allowances for advertising or other purposes, by splitting of salesmen's compensation or commissions with customers, by overshipment of patented products, by including board under the guise of dunnage, or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by licensee below such minimum price.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

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Vice President.

133 *Exhibit No. 8—The First Roos Foam Patent*

134 Patented Oct. 8, 1935 2,017,022

United States Patent Office

2,017,022. CEMENTITIOUS MATERIAL

CARLISLE K. ROOS, FORT DODGE, IOWA, ASSIGNOR TO UNITED STATES GYPSUM COMPANY, CHICAGO, ILL., A CORPORATION OF ILLINOIS

No Drawing. Application August 20, 1924, Serial No. 733,197. 12 Claims. (Cl. 106—24).

This invention relates to building materials and more particularly to a light weight cementitious material of this character and the method for producing the same.

It is an object of this invention to combine with the cementitious material used for the finishing of walls, in the production of plaster wallboard, partition tile, roof tile, poured roof and floor constructions and other structural building units certain materials that will reduce the weight of such articles, will not shrink or fall when cast, and which will not materially reduce the hardness or strength of the material now employed for such purposes by expanding the cementitious material into cellular form while in the moist or wet state, thereby increasing its volume, and maintaining the same until hardened or set.

Ordinary hydrated gypsum plaster weighs from about 65 to 85 pounds per cubic foot. By the process developed here weights may be obtained in cast articles ranging from those mentioned above down to about 15 pounds per cubic foot. This is brought about by incorporating an aerated foam into the cementitious material, thereby imparting a cellular structure to the mass which forms a product of light weight. Such a foam may be obtained by the violent agitation of solutions of certain compounds which act as foaming reagents. This foam may be whipped into a fine grained form and to further stabilize it, it has been found desirable to stir into it a certain quantity of calcined gypsum. This addition was found to reinforce the walls of the bubbles to such an extent that the foam might be preserved indefinitely. Other addition reagents such as gelatin, dextrin and gum arabic have a similar foam preservative effect. This reinforced foam may be stirred into any mass of wet plaster or other cementitious material without destroying the character of the foam and thus a cellular structure is imparted to the wet mass.

The first step in carrying out this invention is the preparation of a solution capable of being converted into a foam by agitation. There are several types of reagents which will produce such a foaming solution or mixture such as solutions, mixtures or emulsions of flotation oils, various organic compounds similar to soap, saponin, soap bark, gelatin, licorice, etc. The efficiency of the above mentioned reagents of course varies considerably and it has been found that a water solution containing up to three percent of powdered soap bark produces satisfactory results, however, it is not desired to limit the means of production or the reagents used in the production of this foam, as it may

be desired to assist the formation of this foam by means of an addition of such reagents as calcium carbonate and aluminum sulphate to the foaming solution, which in their chemical reaction evolve a gas. Such a solution as of soap bark and water may be agitated or whipped into a foam in the same manner as eggs or cream. Immediately after the formation of satisfactory foam a relatively small quantity of calcined gypsum is added and stirred into it thoroughly. This reinforced foam is in a condition to be more readily assimilated by the main untreated cementitious mass to which it is subsequently added with sufficient agitation to obtain uniform distribution. The quantity of foam incorporated into the wet mass will of course determine its cellular structure, and this in turn determines the bulk and weight when dry.

A specific example of the process with approximate quantities of the materials used is as follows: One part of powdered soap bark is added to 160 parts of water and allowed to soak for a few minutes. This solution is vigorously agitated until the liquid is entirely beaten into a stiff foam. Two hundred parts of calcined gypsum are now added to the foam and stirred into it until its distribution is complete. This foam, when stirred into a mass of twelve hundred parts of calcined gypsum and the required amount of water to bring it to normal consistency, will effect a reduction in weight of the subsequently set or hardened mass of about 30%.

This process possesses the following advantages. The weight control is effected by the amount of foam which in turn is determined by the weight of soap bark. Installation, operation and reagent costs are small. Drying costs of the finished product are not increased. In this process the increase in water contents is very slight, and the porous nature of the product permits drying at a lower temperature and in a shorter time. The foam does not hinder or retard the setting of the calcined gypsum to any noticeable extent. An examination of the hardened mass shows a very uniformly fine cellular structure. The strength of the material is less than the normal value but is not reduced in proportion to its weight and still has hardness enough for many structural purposes. The plastic mixture produced by this process may be moulded and worked and cast in the same manner as the usual practice.

While ordinary hydrated gypsum has been used as a specific example of cementitious material in carrying out this invention, it is to be understood that other cementitious materials, such as, Portland

cement, natural cements, oxichloride cements, and in fact any cementitious material capable of being molded or cast while in the plastic state, may be used as well and the resultant porous structure is just as pronounced irrespective of the nature of the cementitious material and its time of set. This is possible because the foaming agent can be so manipulated that foams of adequate permanence for greatly lengthened time of set in the cast articles can be provided.

What I claim is:

1. The process of producing a light weight building material which comprises incorporating in a mixture of calcined gypsum and water a stabilized foam and allowing the mixture to set.

2. The process of producing a light weight building material by incorporating in a mixture of cementitious material binding fiber and water, a preformed tenacious foam that imparts a cellular structure thereto to increase the volume of said mixture, and then removing the excess moisture, said foam maintaining the cellular structure in said mixture when hardened and dried.

3. The process of producing a light weight building material by forming a foam through beating air into a solution containing a foaming agent and incorporating the foam into a mixture of calcined gypsum and water by agitation and allowing the mass to set.

4. The process of forming a cellular cement which comprises forming a tenacious foam and mixing the foam with a cement.

5. The method of making a light weight building material that possesses a cellular structure which comprises making a tenacious foam and mixing the same with a substance capable of being hardened.

6. A plastic mass capable of being hardened into a light weight cellular building material comprising a mechanical mixture of a stable foam, a material capable of being hardened, and water.

7. A plastic mass capable of being hardened into a light weight cellular building material comprising a mechanical mixture of a stable foam, a cementitious setting material, and water.

8. A plastic mass capable of being hardened into a light weight cellular building material comprising a mechanical mixture of a stable foam, calcined gypsum, and water.

9. A light weight building material composed of a hard mass of cellular structure which comprises set cementitious

material having permanently fixed therein foam cells that possess their original form and which are arranged throughout the structure in foam-like formation.

10. A structural building material comprising a mass of set cementitious material having foam-like arranged voids therein left by the drying of the bubbles of a stable foam which had been added to the cementitious material while the latter was in a plastic state.

11. A light weight cellular building material resulting from the setting and drying of a water-gauged composition comprising calcined gypsum and an aggregate composed of a stable foam.

12. A light weight cellular building material resulting from the hardening and drying of a plastic composition comprising a substance capable of hardening when dried and an aggregate composed of a stable foam.

CARLISLE K. ROOS.

136 *Exhibit No. 9—The Second Roos Foam Patent*

137 Patented May 4, 1937 2,079,338

United States Patent Office

2,079,338. CEMENTITIOUS MATERIAL

CARLISLE K. ROOS, FORT DODGE, IOWA, ASSIGNOR TO UNITED STATES GYPSUM COMPANY, CHICAGO, ILL., A CORPORATION OF ILLINOIS

No Drawing. Application January 19, 1925, Serial No. 3,477. 5 Claims. (Cl. 106—24).

This invention relates to improvements in building material and more particularly to the production of cementitious material of a porous structure which is obtained by the use of confined gas as an aggregate, rather than gas as an expansive force to distend the volume of the cementitious material during the setting process.

Cementitious material and particularly calcined gypsum has been employed for years as a finishing coat or covering for the interior walls of buildings, and has been molded into blocks to form partitions and tiles to form roofs and floors, it has also been employed as a filler in poured roofs and floors and as a core for plaster board and plaster wallboard, as well as having been employed in other forms and articles. Calcined gypsum on account of its non-conductive and fire resisting qualities has been a desirable product for the purposes above described. In wall coverings the calcined gypsum has been used with sand as an aggregate to give it body for the first coats and a retarder to delay

the setting so that it may be properly applied and in other cases fiber and sawdust has been added as an aggregate in lieu of the heavy sand aggregate which reduces the weight of the finished product. In the formation of roofs, floors, tile, block and plaster board or wallboard the addition of fiber or sawdust aggregate detracts from its fire resisting quality which is as desirable in these products as decreasing the weight of the finished product.

To overcome this objection and produce such articles of calcined gypsum in which the weight is greatly reduced and in which the articles possess the qualities of unadulterated set gypsum, certain chemicals or minerals have been added to the dry calcined gypsum which will upon the addition of water evolve a gas causing the mixture to puff out or expand in volume and upon the setting of the gypsum will form a porous body so that articles thus produced will be of less weight per volume and be as fire resisting and better insulating mediums than unadulterated set gypsum.

It is an object of this invention to produce a porous body of set calcined gypsum without the use or addition of chemicals or gas producing agents to the gypsum which react with the water to form an expanded plastic mass to be molded or otherwise formed into the required shape of the article desired. To this end an inert foam is formed comprising a plurality of minute bubbles or air the enveloping films of which are so individual in mass form that these air bubbles are in effect an aggregate and then as the calcined gypsum is being mixed with water, in the same manner as ordinarily employed to form the desired article, such inert aggregate of minute air bubbles is thoroughly incorporated in the plastic mass during the mixing process.

The incorporation of the air or gas aggregate has the same effect upon reducing the density of the plastic mass as any other aggregate lighter in weight than the cementitious material itself and reduces density of the entire mass to give lighter weight per unit volume. Because the air or gas is so much lighter in weight than any solid aggregate the reduction in unit volume weights is correspondingly much greater and due to the fact that the air or gas is so thoroughly confined in such a tough film or film forming substance, the air or gas will remain confined during the mixing process of cementitious solid and water and thus permit of the novel aggregate being incorporated therein. Any amount of porosity desired can be produced

and a definite size of porosity can be maintained, because the tough filmed bubbles of air or gas maintain their identity until the gypsum has set, and the tough film envelope of the confined air or gas aggregate is replaced by a permanent set wall of cementitious material with the air or gas still confined.

This application is a continuation-in-part of my prior application Ser. No. 733,197, filed August 20, 1924, now U. S. Patent No. 2,017,022, which describes broadly the application of this principle of reducing the weight of articles made from calcined gypsum by the incorporation of a foam of minute air bubbles in the plastic mass and specifically describes the reinforcing of the air bubble enveloping films by an inorganic stabilizer, such as calcined gypsum, before the foam is mixed with the plastic mass. This prior application describes the foam being whipped into a fine grained form and stabilized by the addition of a relatively small quantity of calcined gypsum which reinforces the walls of the bubbles to such an extent that the foam might be preserved indefinitely. It also states that other reagents such as gelatin, dextrin and gum arabic added to the foam will reinforce the walls of the bubbles and produce a preservative effect.

In the formation of articles produced in accordance with this invention which are dried or set in the open air a foam of air bubbles stabilized by an inorganic agent, such as calcined gypsum, is desirable, while in the formation of plaster board and other articles subjected to the heat of a drying kiln to set a foam with air bubbles stabilized by organic agents is desirable. In molded articles, where
138 no external pressure is applied, the air bubble walls may be readily reinforced, as specifically described in my said prior application, by calcined gypsum or other inorganic agent which will harden and produce a rigid and more or less fragile wall, and foam bubbles so stabilized will act satisfactorily in such articles but where external pressure is applied to air bubble foam and cementitious material mixture the best result is obtained by a foam in which the walls of the air bubbles are tough and pliable.

In applying this invention to the manufacture of plaster wallboard such as made on a continuous machine like that described in the Utzman Patent 1,330,413, February 10, 1920, and afterwards dried in a drying kiln the foam is produced and then deposited upon the mixing belt where the calcined gypsum and water are mixed by the mixing fingers to form a homogeneous mass to be deposited upon

the bottom cover sheet of the wallboard as it advances thereunder. It is seen that the addition of an inert foam at this step in the process of making wallboard is treating the foam in the same manner as any other aggregate that may be desired to be incorporated in the body of the core of the wallboard. In the course of formation of plaster wallboard on machines similar to the above referred to Utzman patent the plastic mass deposited on the bottom cover sheet is advanced between pressure rolls as the top cover sheet is applied, the pressure so applied to the plastic mass collecting in front of the rolls spreads it out to form a core between the top and bottom cover sheets of even thickness between the edges.

In such an application of this invention the first step is to prepare a solution capable of being converted into a foam by agitation. There are several types of reagents which will produce such a foaming solution or mixture such as solutions, mixtures, or emulsions of flotation oils, various organic compounds similar to soap, saponin, soap bark, albumens, licorice, etc. The efficiency of the above mentioned reagents of course varies considerably and it has been found that a water solution containing up to three percent of powdered soap bark produces satisfactory results. Such a solution of soap bark and water may be agitated or whipped into a foam in the same manner as eggs or cream.

Immediately after the formation of satisfactory foam a relatively small quantity of gelatin, dextrin, gum arabic or other organic colloid such as rice flour or other farinaceous paste is added and stirred into it thoroughly. The addition of this colloidal agent will reinforce the film enveloping the air bubbles so that each one will have tough and pliable walls and enable the bubbles to form an aggregate that may be substituted for solid aggregate. The stabilized foam is then deposited on the mixing belt of the machine and stirred into the mixture of water and calcined gypsum thereon by the mixing fingers until the whole is a homogeneous mass as it is deposited on the advancing covering sheet. The walls of the air bubbles incorporated in the plastic mass being tough and pliable not only remain intact during the mixing with the cementitious material and water but are not broken or changed in volume and the aggregate formation is maintained in passing through the pressure rolls as the board is formed. The quantity of foam incorporated into the wet mass on the mixing belt will of course determine its cellular struc-

ture, and this in turn determines the bulk and weight of the finished product. The wallboards so formed are quickly dried by passing through a drying kiln as they are removed from the discharge end of the machine.

In such an application of this invention the foam is continuously mixed, stabilized and immediately incorporated into the plastic core material which is continuously deposited on the continuously moving cover sheet and immediately passed through the pressure rolls and the board so formed continuously cut and removed from the machine and immediately entered into the drying kilns from which it emerges the finished product so that but little time is consumed from the initial stabilization of the air bubble walls to the completion of the finished product and the toughness and pliability of the air bubble walls is of more importance and more necessary to such an article than the permanency of the preservatives of the air bubble formation as is required in a slow setting article.

What I claim is:

1. A composition of matter comprising a cementitious material having an aggregate of bubbles incorporated therein to increase its normal bulk, the walls of said bubbles being reinforced with a colloidal agent from the group comprising gelatin, gum arabic, farinaceous paste, rice flour and dextrin to render them tough and pliable.

2. The process of producing a porous cement which comprises first forming a foam, stabilizing the same by the addition of a colloid to reinforce the walls of the bubbles constituting the foam thereby rendering said walls tough and pliable and the foam substantially non-collapsible, incorporating said foam as an aggregate in a plastic cement mixture, and then allowing the same to harden.

3. A composition of material comprising a cement and an aggregate of bubbles having tough and pliable walls incorporated therein to increase the normal bulk and to decrease the normal weight of the cement, said bubbles resulting from a wet foam initially formed before being added to the cement and to which foam a colloid has been added prior to its incorporation with the cement to reinforce the walls enveloping the air bubbles with tough, pliable and substantially non-collapsing films.

4. The process of producing porous cement which comprises whipping an aqueous solution of a foaming agent into a foam or lather, preventing the subsequent collapse of said foam by the addition thereto of a gummy colloidal stabilizing agent, and thereupon incorporating said sub-

stantially non-collapsible foam into a slurry of a cementitious substance capable of setting.

5. The process of producing a moldable cementitious product which comprises forming a foam, then rendering the walls of the bubbles of said foam tough and pliable by adding to said foam after formation a colloidal substance, and then mixing the foam with a cement.

CARLISLE K. ROOS.

139 *Exhibit No. 10—The Third Roos Foam Patent*

140 Patented May 11, 1937 2,080,009

United States Patent Office

2,080,009. PLASTER WALLBOARD AND METHOD OF MAKING IT

CARLISLE K. ROOS, FORT DODGE, IOWA, ASSIGNOR TO UNITED STATES GYPSUM COMPANY, CHICAGO, ILL., A CORPORATION OF ILLINOIS

No Drawing. Original application January 19, 1925, Serial No. 3,477, which is a continuation of application Serial No. 733,197, August 20, 1924. Divided and this application October 16, 1926, Serial No. 142,155. 18 Claims. (Cl. 154—2).

This invention relates to improvements in building material and more particularly to the production of cementitious material of a porous or cellular structure which is obtained by the use of confined gas as an aggregate, rather than gas as an expansive force to distend the volume of the cementitious material during the setting process.

Cementitious material and particularly calcined gypsum has been employed for years as a finishing coat or covering for the interior walls of buildings, and has been molded into blocks to form partitions and tiles to form roofs and floors, it has also been employed as a filler in poured roofs and floors and as a core for plaster board and plaster wall board, as well as having been employed in other forms and articles. Calcined gypsum on account of its non-conductive and fire resisting qualities has been a desirable product for the purposes above described. In wall coverings the calcined gypsum has been used with sand as an aggregate to give it body for the first coats and a retarder to delay the setting so that it may be properly applied and in other cases fibre or sawdust has been added as an aggregate in lieu of the heavy sand aggregate which reduces the weight of the finished product. In the formation of roofs, floors, tile, block and plaster board or wallboard the addition of fiber or sawdust

aggregate detracts from its fire resisting quality which is as desirable in these products as decreasing the weight of the finished product.

To overcome this objection and produce such articles of calcined gypsum in which the weight is greatly reduced and in which the articles possess the qualities of unadulterated set gypsum, certain chemicals or minerals have sometimes been added to the dry calcined gypsum which will upon the addition of water evolve a gas causing the mixture to puff out or expand in volume and upon the setting of the gypsum will form a porous or cellular body so that the articles thus produced will be of less weight per volume and be as fire resisting and getter insulating mediums than unadultered set gypsum.

It is an object of this invention to produce a porous or cellular body of set calcined gypsum without the use or addition of chemical gas evolving agents to the gypsum which react with the water to form an expanded plastic mass to be molded or otherwise formed into the required shape of the article desired. To this end an inert foam is formed comprising a plurality of minute bubbles of air the enveloping films of which are so individual in mass form that these air cells are in effect an aggregate and then as the calcined gypsum is being mixed with water, in the same manner as ordinarily employed to form the desired article, such inert aggregate of minute air bubbles is thoroughly incorporated in the plastic mass during the mixing process.

The incorporation of the air or gas aggregate has the same effect upon reducing the density of the plastic mass as any other aggregate lighter in weight than the cementitious material itself and reduces density of the entire mass to give lighter weight per unit volume. Because the air or gas is so much lighter in weight than any solid aggregate the reduction in unit volume weights is correspondingly much greater and due to the fact that the air or gas is so thoroughly confined in such a tough film of a suitable film forming substance, the air or gas will remain confined during the mixing process of cementitious solid and water and thus permit of the novel aggregate being incorporated therein. Any amount of porosity or cellular structure desired can be produced and a definite size of porosity can be maintained, because the tough filmed bubbles of air or gas maintain their identity until the gypsum has set, and the tough film envelope of the confined air or gas aggregate is replaced by a permanent set wall of cementitious material with the air or gas still confined.

This application is a division of my application for Cementitious material, Serial No. 3,477, filed January 19, 1925, which is a continuation of my prior application Serial No. 733,197 filed August 20, 1924 (now U. S. Patent No. 2,017,022), which latter describes broadly the application of this principle of reducing the weight of articles made from cementitious material by the incorporation of a foam of minute air bubbles in the plastic mass and specifically describes the reinforcing of the air bubble enveloping films before the foam is mixed with the plastic mass. Patent No. 2,017,022 describes the foam as having a fine grained form and stabilized to such an extent that the foam might be preserved indefinitely. It also states that other reagents such as gelatin, dextrin and gum arabic added to the foam will reinforce the walls of the bubbles and produce a preservative effect.

In the formation of articles produced in accordance with the invention described in Patent No. 2,017,022 which are dried or set in the open air a foam of air bubbles suitably stabilized is desirable. In the formation of plaster board and other articles subjected to the heat of a drying kiln, a foam with air bubbles stabilized by organic agents is
141 desirable. In articles where no external pressure is applied, the air bubble walls may be readily reinforced as specifically described in my said patent by calcined gypsum or other inorganic agent which will harden and produce a rigid and more or less fragile wall, and foam bubbles so stabilized will act satisfactorily in such articles but where external pressure is applied to air bubble foam and cementitious material mixture the best result is obtained by a foam in which the walls of the air bubbles are rendered tough and pliable.

In applying this invention to the manufacture of plaster wallboard such as made on a continuous machine like that described in the Utzman Patent 1,330,413, February 10, 1920, and afterwards dried in a drying kiln the foam is produced and then deposited upon the mixing belt where the calcined gypsum and water are mixed by the mixing fingers to form a homogeneous mass to be deposited upon the bottom cover sheet of the wallboard as it advances thereunder. It is seen that the addition of an inert foam at this step in the process of making wallboard is treating the foam in the same manner as any other aggregate that may be desired to be incorporated in the body of the core of the wallboard. In the course of formation of plaster wallboard on machines similar to the above referred to Utzman patent the

plastic mass deposited on the bottom cover sheet is advanced between pressure rolls as the top cover sheet is applied, the pressure so applied to the plastic mass collecting in front of the rolls spreads it out to form a core between the top and bottom cover sheets of even thickness between the edges.

In such an application of this invention the first step is to prepare a solution capable of being converted into a foam by agitation. There are several types of reagents which will produce such a foaming solution or mixture such as solutions, mixtures, or emulsions of flotation oils, various organic compounds similar to soap, saponin, soap bark, albumens, licorice, etc. The efficacy of the above mentioned reagents of course varies considerably and it has been found that a water solution containing up to three percent of powdered soap bark produces satisfactory results. Such a solution of soap bark and water may be agitated or converted into a foam in the same manner as eggs or cream.

Immediately after the formation of satisfactory foam a relatively small quantity of gelatin, dextrin, gum arabic or other organic colloid such as rice flour or other farinaceous paste is added and stirred into the foam thoroughly. The addition of this colloidal agent will reinforce the film enveloping the air bubbles so that each bubble will have tough and pliable walls and enable the bubbles to form an aggregate that may be substituted for solid aggregate. The thus stabilized foam is then deposited on the mixing belt of the machine and stirred into the mixture of water and calcined gypsum thereon by the mixing fingers until the whole is a homogeneous mass as it is deposited on the advancing covering sheet. The walls of the air bubbles incorporated in the plastic mass being tough and pliable not only remain intact during the mixing with the cementitious material and water but are not broken or changed in volume and the aggregate formation is maintained in passing through the pressure rolls as the board is formed. The quantity of foam incorporated into the wet mass on the mixing belt will of course determine its cellular structure, and this in turn determines the bulk and weight of the finished product. The wallboards so formed are quickly dried by passing through a drying kiln as they are removed from the discharge end of the machine.

In such an application of this invention the foam is continuously formed, stabilized and immediately incorporated into the plastic core material which is continuously deposited on the continuously moving cover sheet and immediately passed through the pressure rolls and the board so formed continuously cut and removed from the machine and imme-

diately entered into the drying kilns from which it emerges the finished product so that but little time is consumed from the initial stabilization of the air bubble walls to the completion of the finished product and the toughness and pliability of the air bubble walls is of more importance and more necessary to such an article than the permanency of the preservatives of the air bubbles formation as is required in a slow setting article.

What I claim is:

1. The process of producing cellular cementitious products which comprises making a fine-grained foam from a solution containing foam-producing agents, thereupon stabilizing said formed foam by the addition of organic colloidal stabilizing agents, then adding said stabilized foam to a slurry of gauging fluid and cementitious substance, and then molding the resultant mixture.

2. The process of producing cellular cementitious products which comprises whipping a comparatively freely fluid solution containing a foaming agent into a fine-grained foam, adding to said foam a soluble organic colloid capable of stabilizing said foam, adding the thus stabilized foam to a slurry of gauging fluid and cementitious substance, and molding the resultant mixture.

3. The process of producing a plasterboard having a cellular core which comprises whipping a comparatively freely fluid solution of a foaming agent into a fine-grained foam, adding to said foam a water soluble organic colloid capable of stabilizing said foam and of rendering the walls of the air bubbles of said foam resistant to crushing by pressure, gauging calcined gypsum with water, adding aforesaid stabilized foam to the gauged gypsum, passing the thus prepared mixture through a plasterboard machine, allowing the gypsum to set, and drying the resulting plasterboards.

4. The process of making cellular insulating material comprising aerating a starch paste, mixing finely divided calcined gypsum with water to hydrate the same, uniformly mixing the aerated starch with the gypsum slurry, bringing the mass into the desired shape and drying the same.

5. The process of making insulating material which comprises incorporating a foam into a starch paste, adding water to finely divided calcined gypsum, intimately mixing the foam-containing starch with the gypsum slurry, giving the mass the desired form and drying the same.

6. In the process of making insulating material the step which comprises incorporating an aerated starch in a gypsum slurry.

7. The process of making wall board which comprises mixing a dense foam with a starch paste to expand the latter and form cells therein, adding the mixture to a slurry of calcined gypsum, placing the mass between sheet liners and drying the same.

142 8. The process of making wall board which comprises forming a dense foam, uniformly mixing the same with a starch paste to expand the latter and form cells therein, adding water to finely divided calcined gypsum in quantity sufficient to hydrate the same and before the latter begins to set intimately incorporating the starch-foam mixture therein, placing the mass between paper liners and drying the same.

9. The process of making insulating material comprising emulsifying a starch paste with air, mixing the starch emulsion with a slurry of gypsum, giving the mass the desired form and drying the same.

10. A plaster board having a porous body comprising a hardened cementitious material enclosing a plurality of voids encased in tough pliable films.

11. A plaster board having a light weight porous body of hardened cementitious material enclosing a plurality of minute voids each enveloped in a tough pliable colloidal casing.

12. The process of producing a plaster board having a porous body comprising the formation of an aggregate of minute gas cells encased in tough pliable envelopes, adding the aggregate to calcined gypsum and water, thoroughly mixing therewith, passing the homogeneous mixture through a plaster board machine and removing the moisture from the plaster boards so formed.

13. The process of manufacturing plaster boards having a porous body comprising the production of fine grained gaseous aggregate consisting of minute colloidal film encased individual bubbles, incorporating the aggregate in the plastic body material, passing the mixture through a plaster board machine and allowing the plaster boards so formed to harden, the tough pliable casings of the bubbles maintaining their individuality during the process.

14. A wallboard comprising a porous body of hardened cellular cementitious material enclosing a plurality of voids voids encased in tough pliable films, and cover sheets between which said cementitious material is interposed.

15. A wallboard comprising a porous body of hardened cellular cementitious material enclosing a plurality of voids encased in tough pliable films, and cover sheets between which said cementitious material is interposed and to which said cover sheets are bonded.

16. A wallboard comprising a porous body of hardened cellular cementitious material enclosing a plurality of voids encased in tough pliable films, and cover sheets applied to said cellular cementitious material while in a plastic condition and to which said cover sheets are bonded when the plastic cementitious material hardens.

17. A wallboard comprising a porous body of hardened cellular cementitious material enclosing a plurality of voids encased in tough pliable films, and cover sheets therefor which are applied by means of pressure when said cementitious material is in a plastic state whereupon said cover sheets remain bonded to said cementitious material after the same has set and hardened.

18. The process of manufacturing wallboard having a cellular cementitious core which comprises the production of a fine grained foam consisting of a plurality of voids encased in tough pliable films, incorporating said foam in the cementitious material in a plastic state, passing the mixture through a plasterboard machine whereupon cover sheets are applied to said mixture through the application of pressure, and allowing the same to harden whereby the cover sheets become bonded to the cementitious cellular core and the tough pliable casings of the bubbles maintain their individuality.

CARLISLE K. ROOS.

143 *Exhibit No. 11—The Metallized Board License Agreement Between U.S.G. and Ebsary*

144 PLASTER BOARD AGREEMENT

This agreement, made and entered into this 14th day of August, A. D. 1935, by and between United States Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and having its principal place of business at 300 West Adams Street, Chicago, Illinois, hereinafter referred to as the "Gypsum Company," and Ebsary Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 52 Vanderbilt Avenue, New York, New York, hereinafter referred to as "Licensee," witnesseth:

Whereas, Gypsum Company is the owner of United States Letters Patent to Roos No. 1,914,345, relating to wall construction, and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas, Licensee desires an indivisible and non-exclusive license from Gypsum Company, under the terms and conditions hereinafter set forth and as hereinafter specified, to manufacture, use and sell plaster board under said Roos Patent No. 1,914,345 and under said patent rights set forth in said Schedule A; and

Whereas, Gypsum Company is willing to grant such license, under the terms and conditions hereinafter set forth and as hereinafter specified,

Now, therefore, in consideration of the premises, the sum of One Dollar ($1.00) in hand paid, receipt
145 of which is hereby acknowledged by Gypsum Company, and the mutual covenants herein contained, it is hereby agreed as follows:

I

Gypsum Company hereby represents and warrants that it has the right to grant the license hereby granted.

II

The term "plaster board," as herein used, is intended to include material commonly known as plasterboard and also materials known as plaster wall board, plaster lath, and plaster sheathing boards.

III

Gypsum Company has agreed to and does hereby give and grant unto Licensee the indivisible, non-exclusive right, license and privilege to make, use and sell plaster board having a metallized surface embodying the inventions disclosed and claimed in said Roos Patent and in the patents or patent applications set forth in Schedule A, or in any of them; Provided, However, that the right, license and privilege herein and hereby granted is specifically limited to the plaster board and building structures incorporating the same as set forth in said Schedule A, and does not extend to any other product or structure.

IV

(a) It is expressly understood and agreed that the indivisible and non-exclusive rights, licenses and privileges aforesaid are granted, and they are hereby accepted, upon the express condition that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights,
146 licenses and privileges granted hereunder shall continue, the minimum price or prices at which Licensee

shall or may sell plaster board having a metallized surface which is covered by said Roos Patent or any of the said patents set forth in Schedule A, or which shall embody the inventions or improvements set forth and claimed in any patents issued upon any of the applications for patent set forth in said Schedule A, provided that the right hereinabove reserved to determine and fix the minimum price or prices of any such plaster board shall not be exercised with respect to any such plaster board embodying only the inventions or improvements, or one or more of them, set forth and claimed in any of the applications for patent set forth in said Schedule A, prior to the date when the patent or patents shall have been granted or issued upon such application or applications, respectively.

(b) In the event Gypsum Company shall exercise the right thus reserved, namely, to determine and fix at any time, and to change from time to time, such minimum price or prices, it shall notify Licensee of its election to exercise such right, and shall include in such notice, or accompany such notice by, a statement of such minimum price or prices at which Licensee shall or may sell said plaster board having a metallized surface, manufactured by Licensee, and thereafter shall give Licensee written or telegraphic notice of any change in such price or prices; and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any plaster board having a metallized surface manufactured by said Licensee embodying the inventions and improvements set forth in said Roos Patent or in any of said patents set forth in said Schedule
147 A, or embodying the inventions or improvements set forth and claimed in any patents issued upon any applications for patent set forth in said Schedule A, at a price or prices less than that stated by Gypsum Company in said notice or in any such written or telegraphic notice of change in said price or prices. The said minimum price or prices at which Licensee shall or may sell said patented products as determined and fixed by Gypsum Company may be the same for all classes of trade, provided that Gypsum Company may, at any time and from time to time, determine and fix different prices for different classes of trade. It is further understood and agreed that any such minimum price or prices so determined and fixed

by Gypsum Company may be made with respect to each trade market or place where said plaster board having a metallized surface may be sold, and may also be made with respect to different quantities purchased, such as carloads, less than carloads and truck loads; and that such minimum price or prices may differ in amount in each different market or place according to market conditions or quantities, all as may be determined by Gypsum Company.

(c) The said minimum price or prices so determined and fixed from time to time by Gypsum Company shall not be more than the respective price or prices at which Gypsum Company itself determines to sell such products embodying the said inventions and improvements hereinbefore mentioned, to its own like trade in the same market.

(d) It is understood and agreed that all orders, contracts, or commitments for the future sale of said plaster board having a metallized surface and embodying the inventions and improvements hereinbefore mentioned shall be made subject to establishment of, and/or change in, such minimum price at which said materials or products may be sold, and that all shipments thereof shall be
148 made at no less than the minimum price or prices contained in any notice of establishment of, and/or change in, price or prices received before shipment; provided, however, that on all orders taken for immediate shipment at not less than the minimum price, if any, then in effect, shipment thereof may be made at the price at which taken within five days of the date of such order; provided, further, that written contracts may be made at not less than the minimum price, if any, then in effect, to furnish such patented material for any specific work or job then contemplated or under construction; Provided, Further, that where contracts for specific work or jobs have been let to general contractors before notice of establishment of, and/or change in, price, then Licensee, if it has made a commitment for any such specific work or job prior to such notice, may at any time within thirty (30) days after such notice make a written contract to furnish the material for such specific work or job, at the price at which it was committed, but not less than the minimum price, if any, in effect at the time of such commitment. Within ten (10) days after each notice of minimum price or change thereof, Licensee will furnish to Gypsum Company a written statement of all specific work or jobs,

contracts and commitments which Licensee had at the time such notice was given, showing the date of the contract or commitment, name of purchaser, location and description of specific work or job, quantity of material, and price at which the same was sold or commitment made, and shall immediately notify Gypsum Company of the making of any such contract for such specific work or job within the thirty-day term hereinbefore mentioned, and of the completion or abandonment of all specific work, jobs, contracts and commitments theretofore had by Licensee. It is understood and agreed that no such
149 contract or commitment shall be recognized as valid hereunder, unless the contract or commitment shall have been made in good faith before notice of making a price or change thereof, and unless such contract or commitment shall have been for some specific work or job then contemplated or under construction in which such patented material specified in the said contract or commitment is to be furnished or installed.

V

As consideration for the rights, licenses, and privileges herein granted to Licensee, Licensee agrees to pay royalty to Gypsum Company for all plaster board having a metallized surface manufactured and sold by Licensee and which are covered by claims of said Roos patent or patents set forth in the said Schedule A, or patents which may be issued under any of the applications set forth under said Schedule A, or which are to be used in making structures covered by said patent rights, at the rate of forty cents (40¢) per thousand square feet surface area where only one face is metallized, and at the rate of fifty cents (50¢) per thousand square feet where both faces are metallized, on any product covered by any of the patent rights aforesaid.

VI

It is expressly understood that Licensee shall have no right, without the written consent of Gypsum Company first obtained, to manufacture any of said patented material for any other manufacturer of plaster board, whether or not licensed under said patents, or to sell such patented material to any other such manufacturer, or to deliver any of the same to any person, firm or corporation whatsoever on consignment.

VII

It is expressly understood and agreed that the
150 rights, licenses and privileges herein granted are and shall be personal to Licensee, and none of said rights, licenses and privileges, nor any right herein or thereunder, shall be sold, assigned, or transferred without the written consent of Gypsum Company first obtained, nor shall Licensee permit the same, or any of them, to be transferred by operation of law; Provided, however, that such rights, licenses, and privileges may be assigned by Licensee to any company acquiring all of the business and assets of said Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee, in which such agreement such assignee agrees to assume all of the obligations of Licensee under this agreement and agrees to be bound by all of the terms and conditions hereof, and shall deliver such agreement to Gypsum Company.

VIII

In the event Gypsum Company shall, subsequent to the effective date hereof, grant to any other person, firm or corporation, any license under said Roos Patent or under said patents or applications for patent set forth in said Schedule A, for the manufacture, use, or sale of plaster board having a metallized surface, and embodying the claims or inventions set forth and claimed in said patents or said applications for patent, upon terms more favorable than those granted hereunder to Licensee, then Gypsum Company will grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted to such other licensee.

IX

Licensee agrees to keep true and accurate books of account, showing the total amount of plaster board having a metallized surface manufactured and/or sold by
151 Licensee under the rights, licenses and privileges herein granted, and the prices at which the same have been sold. Such books and records shall at all times during business hours be open to the inspection of Gypsum Company or its duly authorized representatives. Gypsum Company shall have the right to make copies of any of such records and make memoranda therefrom, provided that if at the time of such examination Licensee shall so request, such examination shall be made by a certified

public accountant satisfactory to Gypsum Company, in which event the expense of such examination by the said certified public accountant shall be borne by Licensee.

X

Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report, under the hand and verification of some officer or other duly authorized agent of Licensee, showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month and which was manufactured by Licensee under the rights, licenses and privileges herein granted, and also showing whether such plaster board had one or two metallized surfaces, together with the prices at which the same shall have been sold, and at the time of furnishing such report, Licensee will pay to Gypsum Company the full royalty as herein provided for such plaster board having a metallized surface so sold by Licensee during such preceding calendar month. Such reports shall be furnished to Gypsum Company at its principal office, at Chicago, Illinois.

XI

Licensee expressly covenants and agrees that all sales by Licensee hereunder of plaster board having a metallized surface shall be bona fide sales thereof, and Licensee
152 further expressly covenants and agrees that no such products shall be placed on consignment. For the purposes of this agreement, a sale shall be considered to have been made not later than the date on which the goods are shipped.

XII

Licensee agrees that all plaster board having a metallized surface sold by it hereunder shall be numbered with the respective numbers of any appropriate patents under which the rights, licenses and privileges herein granted are granted, and covering the manufacture, sale, or use thereof. Gypsum Company shall have the right from time to time to specify the substance of the notice with which said products shall be so marked.

XIII

As one of the considerations for the indivisible and non-exclusive rights, licenses and privileges herein and hereby granted to Licensee, Licensee agrees that it will not at

any time during the life of this agreement, or during the existence of said rights, licenses and privileges, directly or indirectly, by itself or through or together with another or others, contest the validity of said letters patent, or of said patent rights, or of any letters patent hereafter issued upon said applications so set forth in said Schedule A, or the right or title of Gypsum Company therein or thereto as herein or as in said Schedule A set forth, but in the event that any of said patents under which Licensee is licensed hereunder is held invalid or of limited construction by a court of competent jurisdiction from whose decision no appeal is or can be taken, then the Licensee shall have the right to make, use or vend the structure so held to be outside of the scope of said patent rights, free and clear of the terms of this agreement.

153 Licensee agrees to give prompt notice of any suit or action which shall be brought against it in consequence of practicing the inventions set forth in said patents and said patent rights, and thereupon, if Gypsum Company shall desire to conduct the defense of such suit or action, it shall have the right to do so, but Licensee shall have the right, in such event, to be represented in such suit or action, at its own expense, by counsel of its own selection. Gypsum Company shall not, by undertaking to conduct the defense of any such suit or action, be under any obligation to indemnify the Licensee against any judgment, order or decree or other result therein.

XIV

(a) In the event Licensee shall fail to make any report or shall fail to pay the royalty herein provided to be paid, or in the event that Licensee shall sell any of the materials covered by the price restriction provisions of Paragraph IV hereof, at a price or prices lower than the specified price or prices established and fixed by Gypsum Company as herein provided, Gypsum Company shall have the right to cancel all of the rights, licenses and privileges herein granted to Licensee; provided, however, that Licensee shall not be relieved thereby from any liability accrued at the time of such cancellation. In the event of any such breach, Gypsum Company shall give written notice to Licensee of the default or defaults claimed by Gypsum Company to have occurred, and of the desire of Gypsum Company to cancel the rights, licenses and privileges of Licensee hereunder; and if Licensee shall not make good the default or defaults complained of within a period of thirty (30) days from the giving of such

notice, then all of the rights, licenses and privileges of Licensee hereunder shall forthwith cease and terminate without further action on the part of Gypsum Company; provided, however, that if, upon the giving of any such notice, Licensee shall deny that the defaults, or any of them, complained of have occurred, then the question as to whether the default or defaults, the occurrence of which is so denied by Licensee, have in fact occurred, shall be referred to arbitration under Paragraph XV hereof.

(b) In the event that such arbiters find that such default or defaults have occurred, then Licensee shall promptly cure the same, and in any event shall cure the same within thirty (30) days from the date of the finding of such arbiters; and in the event such default or defaults shall not be so cured within the time limited, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine without further action on the part of Gypsum Company; the termination of said rights, licenses and privileges following the finding of the arbiters as aforesaid shall not release Licensee from any liability then existing.

(c) In the event (1) that Licensee shall be adjudicated a bankrupt, or (2) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty (60) days thereafter, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of Gypsum Company, provided that such termination shall not relieve Licensee of any and all liability then existing.

(d) The waiver by Gypsum Company of any breach on the part of Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

(e) In the event any default shall have occurred as specified in sub-paragraph (a) of this Paragraph XIV, Gypsum Company may give notice of such default without stating its desire to terminate the rights, licenses and privileges herein granted to Licensee, and in the event such defaults shall not be cured by Licensee within the times mentioned in said sub-paragraph (a), Gypsum Company shall have the right, without terminating the said rights, licenses and privileges herein granted to Licensee, to maintain any appropriate action hereunder, at law or in equity, for the collection of license fees or royalties, or for damages, or for any other remedy as may be appropriate. The provisions mentioned in said sub-paragraph

(a) with respect to arbitrating the fact as to whether any default or defaults complained of has or have in fact occurred, shall be applicable in all respects in the event notice of default is given without any statement by Gypsum Company of its desire to terminate the rights, licenses and privileges herein granted to Licensee, excepting that if the arbiters shall find that any of said defaults complained of shall have occurred, then Gypsum Company shall have the same right, without a termination of said rights, licenses and privileges so granted to Licensee, to maintain its appropriate action hereunder.

XV

Any question subject to arbitration under any provision of this contract shall be arbitrated in accordance with the rules then obtaining of the American Arbitration Association. The finding or findings of the arbiters with respect to the occurrence or non-occurrence of any claimed default, shall be final and conclusive. In the event the finding or findings of the arbiters shall be with respect to any default or defaults, or claimed default or defaults, in the payment of royalties or other sums of money herein required to be paid by the Licensee to Gypsum Company and the arbiters shall find that such default or defaults shall have occurred, the arbiters shall in their finding fix and determine the amount of royalties or other sums of money due from License to Gypsum Company, whereupon
156 Licensee will promptly pay the same to Gypsum Company, and in any event will pay the same within the times hereinbefore mentioned in Paragraph XIV hereof for the curing of defaults, provided that Gypsum Company shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbiters in any court of competent jurisdiction.

XVI

Any notice to be given under the terms hereof may be served by either party by mailing such notice to the other party hereto, by registered mail, postage prepaid, addressed to such party at its last known principal office, and the deposit of any such notice in the United States mails, registered, postage prepaid, and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under Paragraph IV hereof shall be confirmed in writing. Either party may change, from time to time, the address

to which all notices shall be mailed, provided that in the absence of any different address, the respective addresses herein first above stated shall be the addresses to which such notices shall be mailed.

XVII

Except as herein otherwise expressly provided, this agreement shall remain in force for the full term of each patent under which the respective rights, licenses and privileges are hereby granted, and shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns, provided, however, that nothing in this Paragraph XVII contained shall be construed to permit any assignment hereof or of any of the rights, licenses, and privileges herein granted, except as herein otherwise specifically provided. Nothing herein contained shall be con-
157 strued as extending any license for the manufacture and/or use and/or sale of plaster board not having a metallized surface heretofore or hereafter granted under any other agreement between the parties hereto.

In the event that the exclusive right and license of the Gypsum Company, as set forth in said Schedule A hereto, shall for any reason whatsoever (whether on account of the default of the Gypsum Company or otherwise) terminate, and such termination shall have the effect of terminating or shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate, without further act on the part of either of the parties hereto, provided that Licensee shall not be relieved thereby from any liability then existing, and provided further that Gypsum Company shall not be liable in any way to Licensee on account of such termination. Gypsum Company agrees that if its said exclusive right and license shall so be terminated, it will promptly notify Licensee of such termination.

XVIII

Anything hereinabove contained to the contrary notwithstanding, this agreement and the rights, licenses and privileges herein granted to the Licensee may be cancelled and terminated, at any time, by either party hereto, by at least ninety (90) days' prior written notice to the other party of the election of the party serving the notice to exercise such right of cancellation and of the date on which such cancellation shall be effective, but such cancellation shall not relieve either party from any liability accrued or due at the date of such cancellation; Provided, However,

that if Gypsum Company shall exercise the right to cancel this agreement as in this paragraph provided, then within ninety (90) days of its said notice it will submit
158 to Licensee a new contract embodying a proposal for a non-exclusive license under said patents for the life of said patents, for acceptance by Licensee within ten (10) days from the date of such submittal.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY,
By C. F. HENNING,
Its Vice President.

Attest:
[Seal]
C. H. SHANER,
Secretary.

EBSARY GYPSUM COMPANY, INC.,
By F. G. EBSARY,
Its President.

Attest:
[Seal]
GEORGE N. LENCI,
Secretary.

159 *Schedule A to agreement*

The Gypsum Company has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of plaster board having a metallized surface under the following patents and applications for patents known as the Alfol patents.

Patents

Inventor	Patent No.	Issue Date
E. Schmidt, et al	1,757,479	May 5, 1930
E. Schmidt	1,890,418	Dec. 6, 1932
Eduard Dyckerhoff	1,934,174	Nov. 7, 1933

Applications

Inventor	Ser. No.	Filing Date
Schmidt, et al	105,753	April 30, 1926
Eduard Dyckerhoff	442,219	April 7, 1930
Ernst Schmidt	663,572	March 30, 1933

together with any divisions, continuations, renewals or re-issues thereof, but is understood that the term "building structures" is limited to the walls, floors, roofs and

ceilings of buildings and does not include pipes or ducts or other heating apparatus installed in the building or refrigerating or cooling apparatus or structures whether built into the building or not, and it is further understood that Gypsum Company has no right or license under said patents or applications to use metal foil for insulators except where such foil is applied to a non-metallic member as a facing therefor.

160 *Exhibit No. 12—The Perforated Lath License Agreement Between U.S.G. and Certain-teed*

161 Agreement made this 8th day of June, 1936, by and between United States Gypsum Company, an Illinois corporation, having its principal office and place of business at Chicago, Illinois, hereinafter referred to as "Licensor", and Certain-teed Products Corp., a Maryland corporation, having its principal office and place of business at New York, N. Y., hereinafter referred to as "Licensee"; witnesseth:

Whereas, Licensor is the owner of Letters Patent of the United States No. 1,938,354, relating to a plasterboard lath particularly adapted for the fire-resistant wall and ceiling constructions and structures, covered by the claims of said patent, and Licensee desires to be licensed to manufacture, use and sell such patented plasterboard lath;

Now, therefore, in consideration of the sum of One Dollar ($1.00) in hand paid, each to the other, the receipt whereof is hereby acknowledged, and of the mutual covenants herein contained, the parties hereto agree as follows:

1. Licensor hereby grants to Licensee, subject to the terms and conditions hereinafter set forth, an indivisible and non-exclusive right, license and privilege of manufacturing at the plants and factories now or hereafter owned by Licensee or any of its wholly owned subsidiaries, perforated plasterboard lath having a gypsum core and paper covering adhering thereto embodying the inventions and improvements set forth and claimed in said Letters Patent of the United States No. 1,938,354, and of selling and using, in the United States of America and the territories and possessions thereof, said perforated plasterboard lath manufactured by Licensee at its said plants and factories, or the said plants or factories of its subsidiaries, for the full term of said Letters Patent and any extensions
162 or reissues thereof, subject, however, to cancellation or termination as hereinafter provided.

2. The license above granted, to manufacture, use and sell perforated plasterboard lath embodying the inventions

and improvements of said Letters Patent, is granted on condition that Licensor reserves the right to determine, change and/or withdraw at any time and from time to time, during the term of this agreement, the minimum price or prices and/or terms and conditions of sale at which Licensee shall sell or offer for sale any such perforated plasterboard lath, and in case Licensor shall exercise the right so reserved, it shall first serve upon Licensee written notice of such minimum price or prices and/or terms and conditions of sale, and shall thereafter give to Licensee written or telegraphic notice of any change or changes in or withdrawal of such price or prices and/or terms and conditions of sale; and Licensee expressly covenants and agrees that after notice of any such price or prices and/or terms and conditions of sale or any change therein, it will not, directly or indirectly, sell or offer for sale any *such* perforated plasterboard lath at a price or prices less than those, or upon terms and conditions of sale other than as, stated by Licensor in such written notice or any such written or telegraphic notice of a change in such price or prices and/or terms and conditions of sale. Such minimum price or prices and/or terms and conditions of sale so determined by Licensor and any change or changes therein may be with respect to any one or more, or all, classes of trade, markets, or methods of shipment or delivery, and may be the same or different with respect to different classes of trade, markets, or methods of shipment or delivery, all as may be determined from time to time by Licensor. All orders, contracts or commitments for future sale or delivery of any such perforated plasterboard lath shall be made subject to change in such minimum price or prices and/or terms and conditions of sale as above provided, and no shipments thereof may be made at less than
163 the minimum price or prices or upon terms and conditions of sale other than as, contained in the last such notice of minimum price or prices and/or terms and conditions of sale, and the last notice of change or changes therein, received before shipment.

Said minimum price or prices shall not be more than that price, nor shall such terms and conditions of sale be other than those, at which Licensor determines to sell such perforated plasterboard lath embodying the inventions and improvements set forth and claimed in said Letters Patent, to its own like trade in the same market.

3. Notwithstanding any other provisions of this agreement, it is a condition and limitation of the licenses above

granted that Licensee may not sell any of said perforated plasterboard lath to other manufacturers, jobbers or wholesalers without the written consent of Licensor, and then only at the minimum price or prices fixed and determined by Licensor therefor, as provided in Section 2 hereof; that Licensee shall not deliver any of said perforated plasterboard lath to any person or company on consignment; and that Licensee may not use or sell any of said perforated plasterboard lath of inferior manufacture and commonly known as "seconds".

4. All such perforated plasterboard lath shall be plainly marked by Licensee, "Licensed under United States Letters Patent No. 1,938,354."

5. As consideration for the grant of the aforesaid rights, licenses and privileges, Licensee agrees to pay to Licensor a royalty or license fee at the rate of ten cents (10¢) per thousand square feet of all said perforated plasterboard lath sold or used by Licensee during the term of this agreement, which shall be paid monthly to Licensor on or before the 20th day of each calendar month for all of said perforated plasterboard lath sold or used by Licensee during the next preceding calendar month, as hereinafter more specifically set forth.

164 For the purpose of this section of this agreement, all perforated plasterboard lath manufactured by Licensee and sold for erection in said patented wall and ceiling constructions and structures shall be conclusively treated as perforated plasterboard lath manufactured in accordance with the claims of said patent; and all perforated plasterboard lath shall be considered sold on the date shipped or delivered to purchaser, whether or not title passes at the time of shipment or delivery.

The royalties or license fees payable by Licensee under this license shall be in addition to any royalties or license fees payable by Licensee for any license under any other patents which may have been granted heretofore by Licensor to Licensee.

6. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all of said perforated plasterboard lath manufactured, sold or used by it, and agrees that on or before the 20th day of each calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all of said perforated plasterboard lath manufactured, sold or used by it during the preceding calendar month, together with

the price or prices at which the same was sold, such returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said perforated plasterboard lath sold or used by it during the next preceding calendar month.

7. Licensor or its duly authorized representative shall have the right at all reasonable times during business hours to inspect such books of account and records of Licensee as are necessary to determine the quantity of such perforated plasterboard lath manufactured, sold or used by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; provided, however, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne by Licensee. If the parties at any such time shall not agree upon a certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other way connected with it, and Licensee shall have the right to select which of them shall make such examination, and if Licensee shall not accept any of them within ten (10) days after receiving the names thereof from Licensor, then Licensor shall have the right to make such examination itself.

8. As one of the considerations of this agreement, Licensee hereby acknowledges the validity of Letters Patent of the United States No. 1,938,354, and agrees that it will not, during the existence of this agreement, directly or indirectly, either alone or through or together with another or others, contest the validity of such Letters Patent or any of the claims thereof, or the title thereto of Licensor. The granting of the license herein contained shall not be construed or deemed to grant to Licensee any license under any other letters patent owned by Licensor or under which it is licensed with a right to license others. Nothing herein contained shall be construed to permit Licensee to use, at any time, any of Licensor's trade marks or names.

9. In the event either party hereto shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept or performed by it, then the other party may at its election serve upon the party

claimed to be in default, notice of termination of this agreement, which notice shall specify the neglect, failure
166 or refusal, and if within thirty (30) days from the date of delivery of said notice the party claimed to be in default shall not have cured all the defaults specified in said notice, then this agreement shall terminate without the necessity of any other or further notice and without the necessity of any court action; provided, however, that neither party shall be relieved thereby of any liability accrued at the time of such termination. A waiver by either party hereto of any breach by the other party shall not be deemed or construed to be a waiver of any other or subsequent breach or breaches hereof.

10. In case at any time Licensee shall be adjudged bankrupt or insolvent, or a receiver appointed for its assets and business, or its assets assigned for the benefit of creditors, then Licensor may at its option cancel this agreement with or without notice, but in any such event Licensor shall not thereby be prevented from collecting any and all license fees or royalties accrued hereunder at the time of such termination.

11. In the event Licensor grants to any other person, firm or corporation, a license similar to this license under said letters patent to manufacture, use and sell said perforated plasterboard lath under more favorable terms or conditions than stated herein, Licensor shall immediately give notice thereof to Licensee, and grant to Licensee a license on such terms and conditions, or amend this agreement so as to extend such more favorable terms and conditions to Licensee during the time they are enjoyed by such other person, firm or corporation.

12. The licenses herein granted are personal to Licensee, and the same or any right therein or thereunder shall not be sold, assigned, or transferred without the written consent of Licensor first had and obtained; and if this agreement or any of Licensee's rights hereunder are transferred by operation of law, then Licensor may cancel this agreement at any time thereafter, with or without notice.

167 13. This agreement shall continue in force and effect for the full term of said letters patent and any extensions or reissues thereof; provided, however, that the same may be canceled or terminated by either party hereto upon giving to the other of said parties one year's written notice of its intention to cancel or terminate the same. Upon the giving of such notice this contract and all of the provisions hereof, together with said license, shall,

at the end of six (6) months from the end of the period stated in such notice, be and become canceled and terminated without the necessity of any further notice by either party hereto. Licensee, by reason of any such cancelation or termination, shall not be relieved from the payment of any royalties or license fees payable hereunder for all of said patented perforated plasterboard lath sold or used by it up to the date of final cancelation or termination hereof.

14. Any and all notices required to be served hereunder upon Licensor may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Licensor at 300 West Adams Street, Chicago, Illinois; and any and all notices required to be served hereunder upon Licensee may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Licensee at *100 E. 42nd St., New York, N. Y.;* and such mailing of notice shall constitute proper service of notice hereunder.

15. This agreement shall be binding upon and enure to the benefit of the successors and assigns of the parties hereto; provided, however, that nothing herein contained shall be construed to permit any assignment of this agreement or of any rights hereunder except as hereinabove specifically provided.

In witness whereof, the parties hereto have hereunto caused these presents to be signed on their behalf by their respective presidents, attested by their respective sec-
168 retaries, and their corporate seals hereunto affixed, all done the day and year first above written.

UNITED STATES GYPSUM COMPANY,

[SEAL] By C. F. HENNING,
Vice-President.

Attest:

C. H. SHANER,
Secretary.

CERTAIN-TEED PRODUCTS CORP.,
By CHESTER E. RAHN,
President.

Attest:
[SEAL] AUGUST SHERTHON,
Secretary.

169 In the District Court of the United States for the District of Columbia

[Title omitted]

[File endorsement omitted.]

Motion for a more definite statement or bill of particulars

Filed Nov. 18, 1940

Upon the complaint herein, the defendants, having united in this motion for the convenience of the Court, hereby respectfully move this Court as follows:

I

For an order, pursuant to Rule 12(e) of the Rules of Civil Procedure for the District Courts of the United States, directing plaintiff to furnish a more definite statement, or a bill of particulars, with respect to the following matters, upon the ground that the complaint is defective in that such matters, in the absence of the details hereby requested, are not averred with sufficient definiteness or particularity to enable the defendants properly to prepare their answers or to prepare for trial:

1. Specify the miscellaneous gypsum products re-
ferred to in paragraph 40, in the first sentence of
170 paragraph 44, in paragraphs 45(c) and (d), in the second and last sentences of paragraph 95, in paragraphs 103, 104, 106, 107, 121 and 123, respectively, of the complaint.

2. Identify the "various small manufacturers of calcined gypsum and plaster not engaged in the manufacture of gypsum board" referred to in paragraph 42 of the complaint.

3. State whether or not the allegations of paragraph 54 of the complaint are intended to charge the defendants with the commission of any acts other than the acts referred to in other paragraphs of the complaint.

4. If the answer to item 3 is in the affirmative, identify and describe each such act.

5. State, as exactly as possible, the time and place of each of the conferences referred to in paragraph 55 of the complaint.

6. With respect to the allegation of paragraph 58 of the complaint that Avery, Blagden and Griswold agreed among themselves that efforts should be made to induce the industry to enter into license agreements with U.S.G. having for their purposes long term price stabilization of the board industry:

(a) specify, as exactly as possible, the time or times when and the place or places where Avery, Blagden and Griswold are claimed to have made the agreement or agreements referred to;

(b) specify, as to each such agreement, the person or persons claimed to have represented each of the parties thereto in the making thereof; and

171 (c) as to each such agreement state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

7. With respect to the allegation of paragraph 58 of the complaint that Blagden and Griswold agreed to act as a liaison between U.S.G. and the industry for this purpose:

(a) specify, as exactly as possible, the time or times when and the place or places where Blagden and Griswold are claimed to have made the agreement or agreements referred to;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

8. With respect to each of the meetings and conferences referred to in paragraph 59 of the complaint:

(a) state, as exactly as possible, the time and

172 place thereof;

(b) identify the representative or representatives of each of the companies present thereat; and

(c) state the substance, as exactly as possible, of what was said by each of the persons present.

9. With respect to the allegation of paragraph 60 of the complaint that at a meeting in May, 1936, attended by representatives of every company manufacturing and selling board in the Eastern area, including each of the defendant companies then manufacturing board, and by representatives of the defendants Certain-teed and National, which were about to commence the manufacture of board, each of

said companies agreed to become a licensee of U.S.G. under the Utzman patent, and the U.S.G. agreed to license each of the other companies to use said patent, provided a contract with satisfactory provisions concerning royalties and price control could be agreed upon:

(a) state the place of the meeting referred to and identify the persons present thereat; and

(b) state, as to each of the agreements referred to, whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if partly oral and partly in writing, as to the part in writing furnish a copy thereof or identify the same.

10. With respect to the allegation of paragraph 61 of the complaint that defendant Avery, having obtained an agreement from all board manufacturers in the Eastern area to become licensees of U.S.G. under the Utzman
173 patent, proposed a contract involving not only the Utzman patent, but 29 other patents and 38 applications for patents:

(a) specify as exactly as possible the time or times when and the place or places where defendant Avery proposed such a contract;

(b) specify as to each such time the name or names of the persons, firms or corporations to whom such a contract was proposed and the name or names of the person or persons representing such persons, firms or corporations; and

(c) as to each such time, specify whether defendant Avery's proposal was oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part, state the substance thereof, as to the part in writing, furnish a copy thereof or identify the same.

11. With respect to the averment of paragraph 62 of the complaint that the members of the industry considering licenses objected to this contract:

(a) identify each such member of the industry;

(b) specify, as exactly as possible, the time or times when and the place or places where each such member of the industry so objected;

(c) specify, as to each such time and member of the industry, the person or persons claimed to have represented such member of the industry and the person or persons to whom the objection was made; and

(d) as to each such time, state whether the objection is claimed to have been oral or in writing;
174 if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part, state the substance thereof, as to the part in writing, furnish a copy thereof, or identify the same.

12. With respect to the allegation of paragraph 62 of the complaint that said companies urged that control of licensee prices by U.S.G. should not cease in 1929:

(a) specify, as exactly as possible, the time or times when and the place or places where each such company so urged;

(b) specify, as to each such time, the person or persons claimed to have represented each of such companies and the person or persons who were so urged; and

(c) as to each such time, state whether such companies are claimed to have so urged orally or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part, state the substance thereof, as to the part in writing, furnish a copy thereof or identify the same.

13. With respect to the allegation of paragraph 63 of the complaint that said companies proposed that the license agreements under consideration cover only the Utzman patent and run only until the expiration of said patent:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the proposals referred to was made;

175 (b) specify as to each such proposal, the name or names of the person or persons claimed to have represented the company or companies making such proposal and the name or names of the person or persons to whom it is claimed such proposal was made; and

(c) as to each such proposal, specify whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing, furnish a copy thereof or identify the same.

14. With respect to the allegation of paragraph 63 of the complaint that defendant Avery rejected said counterproposal and insisted upon the contract submitted by him:

(a) specify the time or times when and the place or places where defendant Avery rejected said counter-proposal or insisted upon the contract submitted by him; and

(b) as to each such time, specify whether the rejection of the counter-proposal or the insistence upon the contract submitted was oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing, furnish a copy thereof or identify the same.

176 15. State where, when and how Messrs. Griswold and Blagden continued to agitate for the execution of license agreements by the rest of the industry in the Eastern area as alleged in paragraph 65 of the complaint.

16. State the time and the place of each of the meetings and conferences referred to in paragraph 65 of the complaint, and set forth the names of the persons present at each thereof and the substance of what was said thereat.

17. With respect to the allegation of paragraph 69 of the complaint that U.S.G. refused to reduce or to permit its licensees to reduce the basic prices of closed-edge board:

(a) specify, as exactly as possible, the time or times when and the place or places where U.S.G. so refused;

(b) specify, as to each such time, the person or persons claimed to have represented U.S.G., the name or names of the licensee or licensees and the person or persons representing such licensee or licensees; and

(c) as to each such time, specify whether the refusal is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

18. With respect to the allegation of paragraph 69 of the complaint that U.S.G. agreed to permit its licensees to manufacture and distribute at reduced prices a

177 second-grade closed-edge board:

(a) specify, as exactly as possible, the time or times when and the place or places where U.S.G. is claimed to have made the agreement or agreements referred to;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement state whether it is claimed to have been oral or in writing; if in writing, set

forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

19. With respect to the allegation of paragraph 70 of the complaint that U.S.G. refused to modify the royalty provisions of its license agreement with Beaver:

(a) specify, as exactly as possible, the time or times when and the place or places where U.S.G. so refused;

(b) specify, as to each such time, the person or persons claimed to have represented U.S.G. and the person or persons claimed to have represented Beaver; and

(c) as to each such time, state whether the refusal of U.S.G. to modify the royalty provisions was oral or in writing; if in writing, set forth a true and complete copy
178 thereof or identify the same; or, if oral state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

20. With respect to the allegation of paragraph 73 of the complaint that, to meet the competition of the second-grade closed-edge board, manufacturers of open-edge board reduced the prices of said board, identify each such manufacturer and in respect of each such manufacturer specify the time or times when the price of such board was so reduced and set forth the amount of each reduction.

21. With respect to the allegation of paragraph 73 of the complaint that manufacturers of second-grade closed-edge board, in turn, reduced the prices of said board, identify each such manufacturer and in respect of each such manufacturer specify the time or times when the price of such board was reduced and set forth the amount of each reduction.

22. Specify the other gypsum products the prices of which were substantially reduced as alleged in the last sentence of paragraph 73 of the complaint and in respect of each of such products specify the time or times when the price thereof was reduced and set forth the amount of each reduction.

23. With respect to the allegation of paragraph 74 of the complaint that defendant Avery urged that those companies in the industry not yet licensees of U.S.G. reconsider his proposal for an industry-wide patent licensing plan covering board with price control by U.S.G.

(a) specify, as exactly as possible, the time or times when and the place or places where said defendant is claimed to have so urged such companies;

(b) specify, as to each such time, the person or persons representing such companies claimed to have been so urged; and

(c) as to each such time, state whether said defendant is claimed to have urged such companies orally or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

24. With respect to the allegation of paragraph 74 of the complaint that Eugene Holland, then President of Universal, agreed with Avery to promote the licensing plan:

(a) specify the time when and the place where it is claimed that said Holland made the agreement or agreements referred to; and

(b) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

25. Specify, as exactly as possible, the date and place of each of the meetings and conferences referred to in the last two sentences of paragraph 74 of the complaint, setting forth the names of the persons present at each such meeting or conference and the substance of what was said at each such meeting or conference by each person present thereat.

26. With respect to the allegation of paragraph 75 of the complaint that U.S.G., through Avery, assured representatives of the other companies that, if said agreements were executed, U.S.G. would then take steps to control the prices of its licensees throughout the life of the license under color of some patent:

(a) state, as exactly as possible, the time or times when and the place or places where U.S.G. so assured such representatives;

(b) state, as to each such time, the name or names of the representatives referred to; and

(c) as to each such time, state whether U.S.G. is claimed to have so assured such representatives orally or in writing; if in writing, set forth a true and complete

copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

27. With respect to the agreement or agreements referred to in the allegation contained in the last sentence of paragraph 75 of the complaint that National, Certain-teed, Ebsary and Niagara agreed among themselves and with U.S.G. to become licensees of U.S.G.

(a) specify, as exactly as possible, the time or times when, and the place or places where, each such agreement is claimed to have been made;

181 (b) specify as to each such agreement the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it was oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

28. With respect to each of the meetings and conferences referred to in paragraph 76 of the complaint:

(a) state, as exactly as possible, the time and place thereof;

(b) identify the representative or representatives of U.S.G., its licensees, Certain-teed, National, Ebsary and Niagara, respectively, present thereat; and

(c) state, as exactly as possible, the substance of what was said by each of such persons.

29. With respect to the agreement or agreements referred to in the allegation of paragraph 77 of the complaint that U.S.G. and its licensees mutually agreed among themselves as alleged in said paragraph:

(a) specify, as exactly as possible, the time or times when, and the place or places where, each such agreement is claimed to have been made:

(b) as to each such agreement, specify the
182 parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it was oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral,

state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

30. With respect to the allegation of paragraph 78 of the complaint that immediately after the execution of the May agreements, U.S.G. offered to enter into additional license agreements with its licensees, permitting them to use a new process developed by U.S.G. for lightening the weight of the board:

(a) specify, as exactly as possible, the time or times when, and the place or places where, U.S.G. is claimed to have offered to enter in such agreements;

(b) as to each such time, specify the persons claimed to have represented U.S.G. and the person or persons to whom the offer was made; and

(c) as to each such offer, state whether it was oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part
183 in writing furnish a copy thereof or identify the same.

31. With respect to the allegation of paragraph 79 of the complaint that, to obtain said stability and pliability in the bubbles, U.S.G. contemplated, at the time of its offer of the foam process to its licensees the use of several methods:

(a) specify the name or names of the person or persons who, on behalf of U.S.G., contemplated the use of several methods; and

(b) specify and describe each of the methods referred to.

32. With respect to the allegation of paragraph 81 of the complaint that Universal asserted that the use of farinaceous paste in the foam process infringed said patents:

(a) specify, as exactly as possible, the time or times when and the place or places where Universal made the assertion or assertions that the use of farinaceous paste in the foam process infringed the patents referred to in said paragraph;

(b) specify, as to each such assertion, the person or persons claimed to have represented Universal and the person or persons to whom the assertion was made; and

(c) as to each such assertion, state whether it is claimed to have been oral or in writing; if in writing, set

forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if
184 partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

33. With respect to the allegation of paragraph 82 of the complaint that the contemplated use of farinaceous paste in the foam process to reinforce the walls of the bubbles did not, in fact, as U.S.G. well knew, infringe the Hite and Haggerty patents, specify the name or names of the person or persons representing U.S.G. who are claimed to have known that such use did not infringe said patents.

34. With respect to the allegation of paragraph 82 of the complaint that other practicable and equally efficient methods for lending stability and pliability to the bubbles, not infringing the starch patents, were known to U.S.G. at the time of Universal's assertion, specify the name or names of the person or persons representing U.S.G. who are claimed to have known of such alleged other practicable and equally efficient methods.

35. Identify and describe the other practicable and equally efficient methods for lending stability and pliability to the bubbles referred to in paragraph 82 of the complaint.

36. With respect to the allegation of paragraph 82 of the complaint that U.S.G. advised its licensees that the Hite and Haggerty patents were of doubtful validity and that the foam process did not infringe said patents:

(a) specify, as exactly as possible, the time or times when and the place or places where it is claimed that U.S.G. so advised its licensees;

185 (b) specify, as to each such time, the person or persons claimed to have represented U.S.G. in so advising its licensees, the name or names of the licensee or licensees who were so advised and the name or names of the person or persons claimed to have represented such licensee or licensees; and

(c) as to each such time, state whether the advice of U.S.G. is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or if oral state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

37. With respect to the allegations of paragraph 83 of the complaint that U.S.G. agreed to purchase the Hite and Haggerty patents from Universal provided its licensees

would accept licenses covering said patents and the foam process:

(a) specify, as exactly as possible, the time or times when and the place or places where each agreement referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

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38. With respect to the allegations of paragraph 83 of the complaint that each of the licensees agreed with U.S.G. and among themselves to accept said license and that U.S.G. agreed to acquire, and did acquire, the starch patents from Universal:

(a) specify, as exactly as possible, the time or times when and the place or places where each agreement referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

39. With respect to the allegations of paragraph 84 of the complaint that U.S.G. agreed to acquire said starch patents, and U.S.G. and its licensees agreed to execute, and did execute, license agreements covering said patents for the purpose of giving color of legality to price control by U.S.G. of board manufactured by its licensees during the period between the date of expiration of the Utzman patent and the date of issuance of patents on the foam process:

187

(a) specify, as exactly as possible, the time or times when and the place or places where each agreement (other

than license agreements) referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

40. With respect to the allegations of paragraph 86 of the complaint that each of the licensees mutually agreed among themselves and with U.S.G. as alleged in said paragraph; that each of the licensees referred to therein agreed to consider the use of adhesives as falling within the scope of the Hite and Haggerty patents for the purpose of permitting price control by U.S.G. during the life of said patents; that Ebsary and Kelley Plasterboard agreed to commence using adhesives for the same purpose, and that the licensees agreed to use the foam process in the manu-
188 facture of gypsum board as soon as their plants could be equipped, and agreed to manufacture and distribute a closed-edge board, manufactured and bundled by substantially the same processes as those employed by U.S.G.:

(a) specify, as exactly as possible, the time or times when, and the place or places where, each of the agreements referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

41. Specify the agreements referred to in the first sentence of paragraph 87 as "the aforesaid agreements".

42. With respect to the threats referred to in paragraph 88 of the complaint:

(a) specify the time or times when and the place or places where each such threat is claimed to have been made;

(b) specify the person or persons through whom U.S.G. is claimed to have made each such threat and
189 the person or persons representing Texas to whom such threat is claimed to have been made; and

(c) as to each such threat, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if the same is claimed to have been partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

43. Identify and describe each act, means and instrumentality whereby it is claimed, as alleged in paragraph 90 of the complaint, that U.S.G. determined and fixed the selling prices and terms and conditions of sale of its licensees for all gypsum board manufactured by said licensees.

44. Identify and describe each act, means and instrumentality whereby it is claimed that the defendant companies have, by concerted action, sought to standardize the production of gypsum board as alleged in paragraph 93 of the complaint.

45. Describe the agreed-upon scope of each of the patents referred to in the first sentence of paragraph 93 of the complaint.

46. With respect to the allegations of paragraph 93 of the complaint that defendant National during the years 1934 and 1935 was induced by U.S.G. and its other licensees to refrain from marketing a new light-weight board until the other licensees were equipped to manufacture and market a board of similar weight:

190 (a) specify the time or times when and the place or places where defendant National was so induced by U.S.G. and the other licensees;

(b) specify, as to each such time, the person or persons claimed to have represented U.S.G., the person or persons claimed to have represented each of its licensees and the person or persons claimed to have represented National; and

(c) as to each such time, state whether defendant National is claimed to have been so induced orally or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing, furnish a copy thereof or identify the same.

47. With respect to the allegation of paragraph 94 of the complaint that, pursuant to said agreement, U.S.G., during the period from 1929 to 1932, permitted its licensees,

including the defendant companies who were then licensees, to sell only to jobbers who sold to dealers and who maintained bulletin prices in said sales, identify and describe each act, means and instrumentality whereby it is claimed that U.S.G. so permitted its licensees to sell only to such jobbers.

48. With respect to each of the meetings referred to in the first sentence of paragraph 95 of the complaint, specify the time and place thereof and the person or persons present thereat representing U.S.G. and each of the licensees, respectively, and state the substance of
191 what was said by each of such persons.

49. With respect to the allegations of paragraph 95 of the complaint that U.S.G. and the licensees agreed among themselves to sell gypsum board to jobbers at no less than the minimum prices set by U.S.G. for sales of board to dealers and to sell plaster and miscellaneous products to jobbers at no less than the prevailing market prices to dealers for said gypsum products:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

50. Specify the agreement referred to in the first sentence of paragraph 97 of the complaint as "the aforesaid agreement among U.S.G. and its licensees".

51. Identify and describe each act, means and instrumentality whereby it is claimed, as alleged in paragraph 97 of the complaint, that U.S.G. during the period from May, 1929, to November, 1929, determined and
192 fixed the prices, for unpatented open-edge board and each act, means and instrumentality whereby it is claimed that during the period between August and November, 1929, U.S.G. determined and fixed the prices for closed-edge board.

52. With respect to the allegation of paragraph 100 of the complaint that all of the licensees, except Universal, used adhesives which were beyond the scope of the Haggerty

patent, specify the adhesive or adhesives beyond the scope of said patent which are claimed to have been used by each of such licensees.

53. With respect to the allegation of paragraph 101 of the complaint that during the period from October, 1935, to the date of the filing of the complaint, a substantial part of the board produced by various of the licensees has not been covered by the aforesaid patents issued upon the foam process:

(a) specify which licensees have, during such period, produced board not covered by such patents; and

(b) in respect of each such licensee, state as exactly as possible the time or times when, and the place or places where, such board has been produced during such period and in respect of each such time, describe the board so produced and set forth as exactly as possible an estimate of the amount thereof.

54. Identify and describe each act, means and instrumentality whereby it is claimed that U.S.G. and its licensees concertedly raised and stabilized the prices of plaster and miscellaneous gypsum products as alleged in
193 paragraph 103 of the complaint.

55. With respect to the allegation of paragraph 103 of the complaint that from time to time throughout the period from the year 1929 to the date of the filing of the complaint, U.S.G. and its licensees had agreed among themselves to sell plaster and miscellaneous gypsum contracts on the basis of various of the terms and conditions prescribed by U.S.G. for the sale of gypsum board:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

56. Specify the terms and conditions on the basis of which it is claimed that from the year 1929 to the date of the filing of the complaint U.S.G. and its licensees have agreed among themselves to sell, and have sold, plaster

and miscellaneous gypsum products as alleged in paragraph 103 of the complaint.

194 57. Identify and describe each act, means and instrumentality whereby it is claimed that U.S.G. and its licensees, as alleged in paragraph 104 of the complaint, have concertedly refrained from selling plaster and miscellaneous gypsum products in mixed cars or trucks with gypsum board at prices below the prevailing market prices for said plaster and miscellaneous gypsum products.

58. With respect to the allegation of paragraph 107 of the complaint that in the year 1936 U.S.G. and its licensees agreed among themselves to file all protected job contracts covering plaster and miscellaneous gypsum contracts with an agency selected by a gypsum trade association known as the Gypsum Statistical Institute:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements referred to it claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

59. Identify and describe each act, means and
195 instrumentality whereby it is claimed that U.S.G. and its licensees, as alleged in paragraph 108 of the complaint, have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for sales of board by its licensees.

60. With respect to the allegation contained in paragraph 109 of the complaint that U.S.G., as a condition for the consent of U.S.G. to sales by the licensees of gypsum board to manufacturing distributors, has required that manufacturing distributors maintain and adhere to bulletin prices in reselling gypsum board to dealers and consumers:

(a) specify, as exactly as possible, the time or times when, the place or places where, and the names of the persons, firms or corporations of whom it is claimed that U.S.G. exacted such a condition;

(b) specify, as to each such time, the name or names of person or persons claimed to have represented U.S.G. and the name or names of the person or persons claimed to have represented such persons, firms or corporations;

(c) as to each such time, specify whether the condition is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same;

196 (d) state whether it is claimed that there were any agreements between U.S.G. and the manufacturers, or any of them, or between U.S.G. and the distributors, or any of them, whereby the manufacturers, or any of them, were to require any of the distributors, or whereby the distributors were required to maintain and adhere to U.S.G. dealer prices in reselling gypsum board to dealers and consumers; and

(e) if it is claimed that there were any such agreements:

(i) specify, as exactly as possible, the time or times when and the place or places where each such agreement was made;

(ii) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(iii) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

61. With respect to the allegation of paragraph 109 of the complaint that U.S.G. and its licensees have agreed among themselves to sell gypsum board to manufacturing distributors only on condition that the distributors

197 maintain, and adhere to, bulletin prices:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set

forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

62. With respect to the allegations of paragraph 110 of the complaint that manufacturing distributors have agreed to resell gypsum board to dealers and consumers at bulletin prices:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether
198 it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

63. With respect to the allegation contained in paragraph 111 of the complaint that U.S.G. and its licensees have from time to time advised manufacturing distributors of bulletin prices:

(a) specify, as exactly as possible, the time or times when and the place or places where U.S.G. and its licensees are claimed to have advised manufacturing distributors of such prices;

(b) specify, as to each such time, the name or names of the licensee or licensees claimed to have advised one or more manufacturing distributors of such prices, the name or names of the person or persons representing U.S.G., and/or each such licensee, the name of each manufacturing distributor who was so advised and the name or names of the person or persons representing such manufacturing distributor; and

(c) specify, as to each such time, whether the advice is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish
199 a copy thereof or identify the same.

64. With respect to the allegation of paragraph
111 of the complaint that U.S.G. and its licensees have

investigated and policed sales of gypsum board by manufacturers and distributors:

(a) specify what is meant by the word "policed" and whether it is intended to use such word synonymously with the word "investigated";

(b) identify and describe each act, means and instrumentality by which it is claimed that U.S.G. and its licensees have so investigated such sales of gypsum board; and

(c) identify and describe each act, means and instrumentality by which it is claimed that U.S.G. and its licensees have policed such sales of gypsum board.

65. With respect to the allegations of paragraph 113 of the complaint that each of the licensees agreed among themselves and with U.S.G. to become licensees of U.S.G.

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons representing each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

66. With respect to the allegation of paragraph 114 of the complaint that U.S.G. required its licensees to execute said agreements in order to be enabled to purchase metalized board for resale to dealers and consumers:

(a) specify, as exactly as possible, the time or times when, the place or places where, and the name or names of the licensee or licensees upon whom U.S.G. imposed such a requirement;

(b) specify, as to each such time, the name or names of the person or persons claimed to have represented U.S.G. and the name or names of the person or persons claimed to have represented each of the licensees; and

(c) specify, as to each such time, whether the requirement was imposed orally or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

67. With respect to the allegations of paragraph 116 of the complaint that U.S.G. agreed to fix the price of perforated lath at a differential above the price of straight lath:

201 (a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons representing each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

68. State whether it is intended by the use of the expression "all of the licensees of U.S.G." in the last sentence of paragraph 118 of the complaint to refer to the licensees named in paragraph 89 of the complaint or whether it is intended by the use of such expression to refer to the licensees of the licenses to manufacture perforated lath referred to in the first sentence of said paragraph 118.

69. With respect to the allegation of paragraph 119 of the complaint that U.S.G., Certain-teed and American were informed that the patent referred to therein was void and did not embrace in any of the specifications or claims thereof any patentable invention or discovery within the meaning of the patent laws of the United States:

(a) specify, as exactly as possible, the time or times when and the place or places where U.S.G.,

202 Certain-teed and American were so informed;

(b) as to each such time, specify the person or persons representing the U.S.G., Certain-teed and American, respectively, who were so informed and the person or persons who so informed each of such persons; and

(c) as to each such time, state whether the information is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same: or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

70. With respect to the allegation of paragraph 119 of the complaint that U.S.G., Certain-teed and American believed that the patent was void and did not embrace in

any of the specifications or claims thereof any patentable invention or discovery within the meaning of the patent laws of the United States, specify the name or names of the persons or persons representing U.S.G., Certain-teed and American, respectively, who so believed and the period of time during which each such person so believed.

71. With respect to the allegations of paragraph 121 of the complaint that the defendants have standardized the manufacture of board, have limited the distribution of board to themselves and to certain manufacturing distributors, and have completely eliminated from the distributive system wholesale distributors who might fail to maintain said prices, specify whether such allega-
203 tions, or any of them, are intended to charge the defendants with the commission of any acts other than acts with the commission of which the defendants are charged in other paragraphs of the complaint, and if the answer to this question is in the affirmative, identify and describe each such act.

72. With respect to the allegations of paragraph 123 of the complaint that the uniformity among the defendant companies in the distribution of gypsum board has reflected itself in the uniformity among said companies in the distribution of plaster and miscellaneous gypsum products, specify whether such allegations are intended to charge the defendants with the commission of any acts other than acts with the commission of which the defendants are charged in other paragraphs of the complaint, and if the answer to this question is in the affirmative, identify and describe each such act.

73. Specify the terms and conditions of sale prescribed by U.S.G. for the sale of gypsum board on the basis of which, it is claimed, as alleged in paragraph 123 of the complaint, that the defendant companies now distribute plaster and miscellaneous gypsum products.

AND directing that as to such paragraphs of this motion or of any items thereof as to which plaintiff shall state in its more definite statement or bill of particulars that it has no knowledge or information or incomplete knowledge or information, plaintiff furnish the defendants in its more definite statement or bill of particulars whatever knowledge or information it may have, and furnish further par-
ticulars within sixty (60) days after it has ob-
204 tained further knowledge or information and, in any event, not later than thirty (30) days before the trial of this action.

II

For an order, pursuant to Rule 6(b) of said Rules, extending the time of the defendants within which to answer the complaint herein until sixty (60) days after service upon the attorneys for the defendants of a copy of the more definite statement or bill of particulars directed to be furnished by the order to be entered upon this motion, or in the event that this motion for a more definite statement or a bill of particulars be denied in all respects, until sixty (60) days after service upon the attorneys for the defendants of a copy of the order denying such motion, with notice of entry thereof.

III

For an order granting the defendants such other and further relief as may be deemed just and proper in the premises.

Dated, November 18, 1940.

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JOSEPH P. TUMULTY,
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Frederick G. Ebsary, 1317 F St., W., Wash., D. C.

Attorney for defendant Newark Plaster Company and Frederick Tomkins, 1331 G St., N. W., Wash., D. C.

DAVID I. JOHNSTON,
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Attorneys for defendant Samuel M. Gloyd, Munsey Bldg., Wash., D. C.

206 In the District Court of the United States for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Order—Filed May 12, 1941

This matter having come on to be heard on April 23, 1941, on motion of the defendants for an order, pursuant to Rule 12(e) of the Rules of Civil Procedure for the District Courts of the United States, directing plaintiff to furnish a more definite statement or a bill of particulars, and the Court having heard the arguments of Bruce Bromley, Esq., of counsel for defendants of United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, in support of said motion, and of Grant W. Kelleher, Esq., Special Assistant to the Attorney General, and of Edward J. Hickey, Jr., in opposition thereto, and having considered the arguments of counsel and briefs submitted on behalf of the plaintiff and on behalf of the defendants, it is, this 12th day of May, 1941,

Ordered that plaintiff on or before thirty (30) days from the date hereof serve upon the attorneys for the respective defendants and file in the office of the Clerk of this Court a more definite statement or bill of particulars of matters embraced within the complaint as follows:

First: Specify the miscellaneous gypsum products referred to in paragraph 40, in the first sentence of paragraph 44, in paragraph 45(c) and (d), in the second and
207 last sentence of paragraph 95, in paragraphs 103, 104, 106, 107, 121 and 123, respectively, of the complaint.

Second: Identify the "various small manufacturers of calcined gypsum and plaster not engaged in the manufac-

ture of gypsum board" referred to in paragraph 42 of the complaint.

Third: State whether or not the allegations of paragraph 54 of the complaint are intended to charge the defendants with the commission of any acts other than the acts referred to in other paragraphs of the complaint and if the allegations are so intended, identify and describe each such act.

Fourth: Specify the other gypsum products the prices of which were substantially reduced as alleged in the last sentence of paragraph 73 of the complaint and in respect of each of such products specify the time or times when the price thereof was reduced and set forth the amount of each reduction.

Fifth: Specify the agreements referred to in the first sentence of paragraph 87 as "the aforesaid agreements".

Sixth: Describe the agreed-upon scope of each of the patents referred to in the first sentence of paragraph 93 of the complaint.

Seventh: Specify the agreement referred to in the first sentence of paragraph 97 of the complaint as "the aforesaid agreement among U.S.G. and its licensees".

Eighth: Specify the terms and conditions on the basis of which it is claimed that from the year 1929 to the date of the filing of the complaint U.S.G. and its licensees have agreed among themselves to sell, and have sold,
208 plaster and miscellaneous gypsum products as alleged in paragraph 103 of the complaint.

Ninth: With respect to the allegation of paragraph 111 of the complaint that U.S.G. and its licensees have investigated and policed sales of gypsum board by manufacturers and distributors:

(a) specify what is meant by the word "policed" and whether it is intended to use such word synonymously with the word "investigated".

Tenth: State whether it is intended by the use of the expression "all of the licensees of U.S.G." in the last sentence of paragraph 118 of the complaint to refer to the licensees named in paragraph 89 of the complaint or whether it is intended by the use of such expression to refer to the licensees of the licenses to manufacture perforated lath referred to in the first sentence of said paragraph 118.

Eleventh: With respect to the allegations of paragraph 121 of the complaint that the defendants have standardized

the manufacture of board, have limited the distribution of board to themselves and to certain manufacturing distributors, and have completely eliminated from the distributive system wholesale distributors who might fail to
209 maintain said prices, specify whether such allegations, or any of them, are intended to charge the defendants with the commission of any acts other than acts with the commission of which the defendants are charged in other paragraphs of the complaint, and if the answer to this question is in the affirmative, identify and describe each such act.

Twelfth: With respect to the allegations of paragraph 123 of the complaint that the uniformity among the defendant companies in the distribution of gypsum board has reflected itself in the uniformity among said companies in the distribution of plaster and miscellaneous gypsum products, specify whether such allegations are intended to charge the defendants with the commission of any acts other than acts with the commission of which the defendants are charged in other paragraphs of the complaint, and if the answer to this question is in the affirmative, identify and describe each such act; and it is

Further ordered that the time of the defendants within which to answer the complaint herein be, and the same hereby is, extended until sixty (60) days after service upon the attorneys for the defendants of a copy of the more definite statement or bill of particulars herein directed to be furnished and it is

Further ordered that said motion of the defendants be, and the same hereby is, in all other respects denied.

DANIEL W. O'DONOGHUE,
Justice.

May 12, 1941.

210 In the District Court of the United States
for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Bill of Particulars

Filed May 15, 1941

Comes now the United States of America, by its attorneys, and files the following bill of particulars in compliance with the order of the Court filed herein the 12th day of May, 1941, granting certain of the requests for particulars contained in defendants' motion for a bill of particulars filed November 18, 1940:

I

In compliance with the first paragraph of said order: The term "miscellaneous gypsum products" appearing in Paragraph 40, in the first sentence of Paragraph 44, in Paragraphs 45 (c) and (d), in the second and last sentences of Paragraph 95 and in Paragraphs 103, 104, 106, 107, 121 and 123, respectively, of the complaint, means and includes gypsum block, gypsum tile and Keene's cement.

II

In compliance with the second paragraph of said order: The "various small manufacturers of calcined gypsum and plaster not engaged in the manufacture of gypsum board" referred to in Paragraph 42 of the complaint refers to the following companies:

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Structural Gypsum Corporation, Linden, N. J.

American Cyanamid & Chemical Corporation, New York, N. Y.

Connecticut Adamant Plaster Company, New Haven, Conn.

Oakfield Gypsum Products Corporation, Oakfield, N. Y.

The Calvin Tomkins Company, New York, N. Y.

Grand Rapids Plaster Company, Grand Rapids, Mich.

Michigan Gypsum Company, Grand Rapids, Mich.

The Alabastine Company, Grand Rapids, Mich.

Wasem Plaster Company, Fort Dodge, Iowa.

III

In compliance with the third paragraph of said order: The allegations of Paragraph 54 of the complaint are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint.

IV

In compliance with the fourth paragraph of said order: The term "other gypsum products" appearing in the last sentence of Paragraph 73 of the complaint means and includes gypsum plaster, gypsum tile, gypsum block, and Keene's cement. Reductions in the prices of said products were made by all manufacturers on numerous occasions during the year 1928. The exact time and the exact amount of each price reduction by each manufacturer is unknown to the Government.

V

In compliance with the fifth paragraph of said order: The agreements referred to in the first sentence of

Paragraph 87 of the complaint as "the aforesaid agreements" are the agreements alleged in Paragraphs 85 and 86 of the complaint.

VI

In compliance with the sixth paragraph of said order: The words "agreed-upon scope of patents involved in the license agreements" as used in Paragraph 93 of
212 the complaint have reference to the allegations contained in Paragraph 86 (a) of the complaint, to the effect that each of the licensees agreed to consider the use of adhesives in the manufacture of board to increase adhesion between the core and liners as falling within the scope of the Hite and Haggerty patents for the purpose of permitting price control by U. S. G. during the life of said patents.

VII

In compliance with the seventh paragraph of said order: The term "the aforesaid agreement among U. S. G. and its licensees" appearing in the first sentence of Paragraph 97 of the complaint refers to the agreement described in Paragraph 77 (a) of said complaint.

VIII

In compliance with the eighth paragraph of said order: The Government claims that pursuant to the agreements referred to in Paragraph 103 of the complaint, U. S. G. and its licensees have adopted and utilized for sales of plaster and miscellaneous gypsum products the basing points, the delivered price zones for rail delivery, the delivered price zones for truck delivery, the areas in which dealers may make pick-up purchases at mills or warehouses, and the maximum cash discounts and terms of sale specified by U. S. G. for sales of gypsum board; and that, pursuant to said agreements, U. S. G. and its licensees, in making sales of plaster and gypsum products, have eliminated deliveries to job sites, sales direct to builders or contractors (with certain exceptions), sales to the United States Government at prices other than dealer prices except in the cases of projects to which sales of gypsum board may be made at special prices, sales through commission salesmen, brokers, and commission houses, payments for the use of buyers' trucks and payments or allowances
213 to dealers for unloading, storing, and trucking by dealers, and warehousing allowances, and other forms of allowances or payments to dealers for services

rendered by the dealers to the licensees; and that pursuant to said agreements, U. S. G. and its licensees have adopted a policy of fixed price differentials to various classes of customers and elimination of discounts to certain classes of buyers, including mail order houses and jobbers, which said policy has been applied to sales of plaster and miscellaneous gypsum products as well as to sales to gypsum board.

IX

In compliance with the ninth paragraph of said order:

The word "policed" as used in Paragraph 111 of the complaint is employed in its usual connotation and its commonly accepted sense, to wit: Governed; maintained order in; placed under the control of a police system; guarded; watched over.

The word "policed" is not intended to be used synonymously with the word "investigated".

X

In compliance with the tenth paragraph of said order:

The phrase "all of the licensees of U. S. G." appearing in the last sentence of Paragraph 118 of the complaint, refers to the licensees of U. S. G. under the perforated lath patent, as set forth in Paragraph 117 of said complaint.

XI

In compliance with the eleventh paragraph of said order:

The allegations of Paragraph 121 of the complaint that "the defendants have standardized the manufacture of board, have limited the distribution of board to themselves and to certain manufacturing distributors, and have
214 completely eliminated from the distributive system wholesale distributors who might fail to maintain said prices," are not intended to charge the defendants with any acts in addition to the acts with the commission of which the defendants are charged in other paragraphs of the complaint.

XII

In compliance with the twelfth paragraph of said order:

The allegations of Paragraph 123 of the complaint that "the uniformity among the defendant companies in the distribution of gypsum board has reflected itself in uniformity among said companies in the distribution of plaster and miscellaneous gypsum products" are not intended to charge the defendants with the commission of any acts

other than acts with the commission of which the defendants are charged in other paragraphs of the complaint.

Grant W. Kelleher,
GRANT W. KELLEHER,
Special Assistant to the Attorney General.
Geo. B. Haddock,
GEORGE B. HADDOCK,
Special Attorney.

Receipt of a copy of this bill of particulars is hereby acknowledged this 15th day of May, 1941.

DOUGLAS D. HATCH,
Counsel for Defendants.

215 In the District Court of the United States for The District of Columbia

[Title omitted.]

[File endorsement omitted.]

Amendment to Complaint

Filed June 5, 1941

Whereas the complaint herein was filed on the 15th of August, 1940, and no responsive pleading thereto has been filed or served, the United States of America, by its attorneys, acting pursuant to the provisions of Rule 15 (a) of the Rules of Civil Procedure for the District Courts of the United States, hereby amends said complaint as follows:

1. Strike the third and fourth sentences of Paragraph 20 of the complaint, and substitute in lieu thereof the following:

"Said sales area will be referred to hereinafter as the Eastern area, and includes the District of Columbia and the States of Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New
216 York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, and that portion of the State of Montana east of the counties of Phillips, Petroleum, Musselshell, Yellowstone and Carbon. The defendant companies manufacture and sell 100% of all gypsum board sold in the Eastern area, and 80% of all gypsum plaster sold in the Eastern area."

2. Strike the second sentence of Paragraph 31 of the complaint and substitute in lieu thereof the following:

"From that date to the present, it has been the largest producer of gypsum board and plaster in the United States. In 1939 it produced and sold approximately 55% of all gypsum board and approximately 40% of all plaster sold in the Eastern area. In said year, the sales by U.S.G. in the Eastern area of gypsum board manufactured by it amounted to approximately $10,600,000."

3. Strike the first sentence of Paragraph 33 of the complaint and substitute in lieu thereof the following:

"National is the second largest producer of gypsum products in the United States. In 1939 it produced and sold approximately 23% of all gypsum board and over 20% of all plaster sold in the Eastern area. In said year, the sales by National in the Eastern area of gypsum board manufactured by it amounted to approximately $4,500,000.

4. Strike the second sentence of Paragraph 35 of the complaint and substitute in lieu thereof the following:

217 "In 1939 it produced and sold approximately 11% of all gypsum board and approximately 10% of all plaster sold in the Eastern area. In said year, the sales by Certain-teed in the Eastern area of gypsum board manufactured by it amounted to approximately $2,100,000."

5. Strike Paragraph 36 of the complaint and substitute in lieu thereof the following:

"The defendants Celotex, Ebsary, Newark, and Texas are single plant operators and, together, in 1939 produced and sold approximately 11% of the gypsum board and 10% of the plaster sold in the Eastern area. In 1939, sales by Celotex in the Eastern area of gypsum board manufactured by it amounted to approximately $585,000; sales by Ebsary in the Eastern area of gypsum board manufactured by it amounted to approximately $670,000; sales by Newark in the Eastern area of gypsum board manufactured by it amounted to approximately $750,000; and sales by Texas in the Eastern area of gypsum board manufactured by it amounted to approximately $230,000."

6. Strike Paragraph 87 of the complaint and substitute in lieu thereof the following:

"In 1930, U.S.G., National, Certain-teed, Universal, Atlantic, Ebsary, American, Kelley Plasterboard, and Texas manufactured and sold 100% of the gypsum board sold in the Eastern area. In said year, sales by U.S.G. in the Eastern area of gypsum board manufactured by it amounted to approximately $8,530,000; sales by National in the East-

ern area of gypsum board manufactured by it amounted to approximately $1,720,000; sales by Certain-teed in
218 the Eastern area of gypsum board manufactured by it amounted to approximately $1,380,000; sales by Universal in the Eastern area of gypsum board manufactured by it amounted to approximately $690,000; sales by Atlantic in the Eastern area of gypsum board manufactured by it amounted to approximately $356,000; sales by Ebsary in the Eastern area of gypsum board manufactured by it amounted to approximately $210,000; sales by American in the Eastern area of gypsum board manufactured by it amounted to approximately $460,000; sales by Kelley Plasterboard in the Eastern area of gypsum board manufactured by it amounted to approximately $118,000; and sales by Texas in the Eastern area of gypsum board manufactured by it amounted to approximately $252,000. By virtue of the agreements described in Paragraphs 85 and 86 of the complaint, U.S.G., by 1930, was authorized to control the price of all gypsum board sold in the Eastern area except that manufactured by Texas. Said price control was to last by the terms of said agreements until a date 17 years after the date of issuance of patents not then issued. By virtue of said agreements, all companies manufacturing and selling board in the Eastern area, except Texas, were obliged to manufacture a uniform, standardized board."

7. Strike the second sentence of Paragraph 88 of the complaint and substitute in lieu thereof the following:
219 "Since this time, U.S.G. has controlled the prices of all gypsum board sold in the Eastern area."

Grant W. Kelleher,
GRANT W. KELLEHER,
Special Assistant to the Attorney General.

Geo. B. Haddock,
GEORGE B. HADDOCK,
Special Attorney.

Thurman Arnold,
THURMAN ARNOLD,
Assistant Attorney General.

220 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Answer of defendants, Frederick G. Ebsary, and Ebsary Gypsum Company, Inc.

Filed July 30, 1941

The defendants, Frederick G. Ebsary and Ebsary Gypsum Company, Inc., answering the complaint herein, as amended:

1. Will adopt and sometimes hereinafter refer to the persons, firms and corporations mentioned in the complaint by the abbreviated names or initials used in the complaint to designate such persons, firms and corporations.

2. Admit that Ebsary and one or more of the other defendant companies are engaged in the business of selling and delivering certain gypsum products, including board and plaster, to dealers in the District of Columbia, and soliciting orders from dealers for such products in said District, and otherwise promoting the sale of gypsum products in said District; that the defendant companies are engaged in the manufacture of gypsum products at plants located at various points throughout the United States, and sell gypsum products to dealers and distributors in interstate commerce, and some of them in commerce between the states and the District of Columbia; admit that Ebsary operates but one manufacturing plant, and that its sales in the Eastern area of gypsum board manufactured by it amounted to approximately $670,000.00 in 1939; admit that Ebsary has been engaged in the manufacture of gypsum blocks since 1911 and has been engaged in the manufacture of plaster since 1918, and has, since 1928, manufactured gypsum board; admit that Ebsary entered into license agreements with U. S. G. as set forth in Exhibits "3" and "6" annexed to the complaint; that except as hereinabove expressly admitted or denied, these defendants and each of them are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs of the complaint numbered, respectively, 2, 3, 20, 24, 31, 32, 33, 34, 35, 36, 37, 38, 50, 51, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 81, 101 and 102.

221 3. Deny each and every of the averments contained in paragraphs of the complaint numbered 4, 44, 45, 46, 47, 54, 77, 96, 97, 103, 104, 107, 108, 109, 110, 111 and 121.

4. Admit in substance the averments contained in paragraphs of the complaint numbered 26, 27, 28, 29 and 79 except the last sentence of said paragraph 79, but deny that the descriptions therein contained as to the composition and processes of manufacture of the products therein mentioned are accurate or complete and deny that the manufacture of said products only involves simple operations and allege that such manufacture requires extensive machinery and plants, coupled with extensive chemical and mechanical knowledge and skill; that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the last sentence of said paragraph 79.

5. Admit that Ebsary and certain of the other defendants have been and are operating, or became or have become obligated to operate their patented gypsum board business under the terms of the patent license agreements made by them respectively with U. S. G. similar to the agreement referred to in the complaint marked Exhibit No. 6; deny that gypsum board is usually transported or shipped in mixed cars or trucks of board, plaster and miscellaneous gypsum products, and deny that straight carload or truckload shipments of board are infrequent; deny that Ebsary ever sold a substantial part of the board and plaster manufactured by it to jobbers or to manufacturing distributors; deny that since 1929 Ebsary has refrained from selling gypsum products (other than board) to contractors; except as is herein denied, these defendants admit the averments contained in paragraphs 39, 40, 41, 42 and 43 of the complaint, insofar as they relate to the manner of operation of the gypsum board business by Ebsary; that except as is herein admitted or specifically denied, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraphs 39, 40, 41, 42 and 43.

6. Admit that during the year 1928 the prices of certain gypsum products including plaster and block, were substantially lower than the prevailing prices in 1927; except as is herein admitted, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 73 of the complaint.

7. Admit that in May, 1929, there was a meeting or conference between these defendants and U. S. G. and others, at which there was discussed the granting by U. S. G. to the defendant Ebsary and others of a license to use

various patents in the manufacture of gypsum board, upon terms substantially similar to those subsequently embodied in the agreement (Exhibit No. 3 annexed to the complaint) and that on or about the 22nd day of May, 1929, Ebsary entered into said license agreement, a copy of which is set forth in said Exhibit No. 3; admit that prior to May, 1929 Ebsary had conferred with others concerning the contemplated license; admit that a copy of the patent issued to Charles E. Hite on June 17, 1917 is annexed to the complaint as Exhibit No. 4 and that a copy of the patent issued to Joseph F. Haggerty on July 8, 1924 is annexed to the complaint as Exhibit No. 5; deny that the scope
222 or purport of said patents is other than as specifically set forth in said patents respectively; deny that U. S. G. advised these defendants, or either of them, that the Hite and Haggerty patents were of doubtful validity or that the foam process did not infringe said patents; that except as is herein admitted or denied, these defendants deny the averments of paragraphs 74, 76, 80, 82 and 99 of the complaint insofar as said averments relate to or concern these defendants and these defendants are without knowledge or information sufficient to form a belief as to the truth of the other averments contained in said paragraphs 74, 76, 80, 82 and 99.

8. Admit that the expiration date of one of the several Utzman patents included in the license agreements (Exhibits 3 and 6 annexed to the complaint), was in August, 1929; admit that Ebsary became a licensee of U. S. G.; that except as is herein admitted, these defendants deny the averments of paragraph 75 of the complaint insofar as any of said averments directly or indirectly refer (a) to these defendants or either of them, (b) to their state of mind, (c) to representations and assurances made to these defendants, (d) inducements offered to these defendants, and (e) any reliance thereupon by these defendants; that except as is herein specifically admitted or denied, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 75 of the complaint.

9. Admit that U. S. G. offered to various of its licensees, including Ebsary, an additional or new license agreement permitting them and it to manufacture gypsum board by use of the foam process; deny so much of paragraph 78 of the complaint as in effect alleges that U. S. G. offered the additional license agreements for use of the so-called foam process pursuant to any agreement with the defend-

ant, Ebsary, to continue price control after the expiration of the Utzman patent or to give color of legality to any price control by purporting to base it on licenses covering patents on the foam process; deny that there existed at any time any agreement to which Ebsary was a party in any way relating to or affecting the control of prices of gypsum products, other than those contained in the written patent license agreements made by Ebsary with U. S. G., copies of which are annexed to the complaint; deny the averments contained in the last sentence of paragraph 78; these defendants are without knowledge or information sufficient to form a belief as to the truth of each and all of the other averments in paragraph 78 of the complaint.

10. Admit that after U. S. G. had acquired or had arranged for the acquisition of the Hite and Haggerty patents and on or about October 18, 1929, Ebsary entered into a new patent license agreement with U. S. G., which included the Hite and Haggerty patents, a copy of which agreement is annexed to the complaint and marked Exhibit No. 6 and which agreement superseded the earlier license agreement held by Ebsary from U. S. G.; deny that Ebsary made any agreement with U. S. G. in regard to the Hite and Haggerty patents or in relation to the use of the foam process or in relation to the manufacture or bundling of gypsum board other than is contained in the written agreement of October 18, 1929, annexed to the complaint as Exhibit No. 6; deny that the summary of said agreement as contained in paragraph 85 of the complaint is adequate or complete; deny that said agreement of October 18, 1929 was made by Ebsary for the purpose of giving color of legality to any price control by
223 U. S. G.; deny that Ebsary made any agreement with any other licensee of U. S. G., in relation to the so-called Hite and Haggerty patents, or either of them, or in relation to any other patent owned or controlled by U. S. G., or of or concerning any price control; deny that Ebsary made any agreement with U. S. G., or anyone else concerning any price control other than is contained in its written patent license agreements annexed to the complaint, to the actual and complete terms thereof reference thereto is hereby made; that except as is herein specifically admitted or denied, these defendants deny the averments of paragraphs 83, 84, 85 and 86 of the complaint insofar as said averments relate to these defendants or either of them; these defendants are without knowledge

or information sufficient to form a belief as to the truth of each of the other averments contained in paragraphs of the complaint numbered 83, 84, 85 and 86.

11. These defendants admit that in 1929, the sales of gypsum board by Ebsary in the so-called Eastern area, amounted to approximately $200,000.00, and that the license agreement made between Ebsary and U. S. G. in October, 1929, a copy of which is annexed to the complaint as Exhibit No. 6, is now in effect and has been continuously in effect since at or about the date thereof; these defendants deny the averments of paragraphs 87 and 88 of the complaint as to the interpretation and effect of the several agreements therein referred to, and except as is herein specifically admitted or denied, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 87 and 88 of the complaint.

12. Deny the allegations of paragraph 89 of the complaint insofar as they purport to allege the formation, maintenance or existence of any combination of any character between Ebsary and any other party mentioned in said complaint.

13. Admit that U. S. G., pursuant to the terms of its patent license agreements, has from time to time issued and circulated bulletins among the licensees, setting forth the minimum prices and terms at which it fixed and determined for the sale of its gypsum board and which its several licensees (including Ebsary) were, under their respective license agreements, required by such agreements to sell their patented gypsum board (embodying the inventions and improvements set forth or claimed in one or more of the currently existing patents referred to in the respective license agreements); further admit that Exhibit No. 7 annexed to the complaint contains copies of certain bulletins issued by U. S. G. and that some of the bulletins issued by said U. S. G. in advising said licensees of U. S. G.'s minimum terms, referred to some of the subject matters outlined in subdivisions (a) to (u) inclusive of paragraph 91 of the complaint; except as is herein admitted, these defendants deny the allegations of paragraphs 90 and 91 of the complaint.

14. Deny the averments of paragraphs 93 and 94 of the complaint insofar as they relate to or are intended to relate to these defendants or either of them; that except as is herein specifically denied, these defendants and each of them are without knowledge or information sufficient to

form a belief as to the truth of the averments contained in said paragraphs 93 and 94.

224 15. Admit that during the period from 1929 to 1932 there were several meetings of representatives of U. S. G. and its patent licensees, which meetings were all for lawful purposes and primarily to more clearly understand the terms and conditions of sales permitted by the licensees under the license agreements and the bulletins issued pursuant thereto; that U. S. G., from time to time, issued bulletins which, in effect, under the license agreements precluded sales by Ebsary of plaster board (embodying patents owned by U. S. G.) to jobbers at less than dealer prices; that such terms of said bulletins remained effective; admit that Ebsary adhered to the written license agreement from U. S. G.; other than is herein admitted, these defendants deny the averments contained in paragraph 95 of the complaint.

16. Admit the alleged dates of issuance of the patents upon the so-called "foam process" and that copies of said patents are annexed to the complaint as Exhibits Nos. 8, 9 and 10; deny the averments contained in the last sentence of paragraph 98; aver that from November, 1929 until October, 1935 U. S. G. exercised the right to fix the minimum selling price on gypsum board manufactured by Ebsary embodying the inventions covered by the Hite and Haggerty patents; that except as is herein specifically admitted, or specifically denied, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 98 of the complaint.

17. Admit that a copy of the Haggerty patent is annexed to the complaint and marked Exhibit No. 5 and contains a complete statement of the invention thereby patented; admit and allege that Ebsary used adhesives in the manufacture of gypsum board within the scope of the Haggerty patent; that except as is herein admitted, these defendants deny the allegations of paragraph 100 of the complaint insofar as they refer to these defendants, and otherwise deny knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph in relation to the other defendants.

18. Admit that where quotations for gypsum products to be used upon specific jobs have been made to a customer or prospective customer by Ebsary, it has been the general policy and practice of Ebsary and in accordance with the customs and usages of the gypsum industry, to give

to such customer or prospective customer protection against price increases for a reasonable time and to sell to such purchaser the material required for such specific job at the prices quoted therefor, notwithstanding that such prices have been increased prior to the purchase; except as is herein admitted, these defendants deny the allegations of paragraph 106 of the complaint, insofar as they relate or purport to relate, to these defendants or either of them, and insofar as such allegations relate to other manufacturers, these defendants deny knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph 106.

19. Admit that U. S. G. and certain of its licensees entered into separate agreements covering the manufacture and sale of metalized gypsum board and perforated lath and that in 1935 Ebsary and other licensees entered into license agreements with U. S. G. to manufacture metalized gypsum board under certain patents therefor owned by U. S. G., and that a copy of such agreement with Ebsary is annexed to the complaint as Exhibit No. 11; admit that

225 U. S. G. has since the date of such agreement determined the minimum prices and terms at which Ebsary might sell patented metalized board manufactured by it under such licenses; admit that some of the other licensees at or about the same time entered into similar agreements with said U. S. G.; that except as is herein admitted, these defendants deny each and every of the averments contained in paragraphs 112, 113 and 114 of the complaint insofar as they in any way relate or refer to these defendants or either of them; that except as is herein specifically admitted or denied, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in each of the paragraphs 112, 113 and 114 of the complaint.

20. Admit that on or about February 2nd, 1937, Ebsary entered into a license agreement with U. S. G. for the license to use Letters Patent of the United States number 1,938,354, relating to a plaster board perforated lath, said agreement being in substantially the same form and effect as the agreement between Certain-teed Products Co. and U. S. G. annexed to the complaint and marked Exhibit No. 12; further admit that pursuant to said license agreement, Ebsary sold perforated gypsum lath embodying the inventions included within the claims of said patent at not less than the minimum prices fixed by U. S. G. pursuant to said agreement; these defendants deny that said agree-

ment was induced or made upon any other consideration than is therein named, and deny that said agreement was not, in fact, a bona fide license agreement made in good faith by Ebsary, and deny that Ebsary entered into said agreement for the purpose of aiding or abetting any illegal price control by U. S. G. or others, and deny that said agreement was not one normally and reasonably adapted for the protection of the respective parties thereto under the letters patent and to secure to Ebsary the right to the use of said patent and protection against claims for damage for infringement thereof if used by Ebsary; that except as herein expressly admitted or denied, these defendants have no knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 116, 117 and 118 of the complaint.

21. Deny each and every of the averments contained in paragraph 119 of the complaint insofar as they in any manner relate to any act, intent, knowledge, or purpose of these defendants, or either of them; deny the last sentence of paragraph 119; that except as is hereinabove specifically denied, these defendants and each of them are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph 119.

22. Admit that Ebsary has not contested with U. S. G. the validity of the perforated lath patent (Letters Patent of the United States No. 1,938,354); that except as is herein admitted, these defendants and each of them are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 120 of the complaint.

23. Deny the formation, operation and existence of any combination to which these defendants, or either of them, were parties; admit that Ebsary has during most of the period since 1929 realized a modest profit from the operation of its business as a whole (of which business the manufacture and sale of gypsum board formed a part), but these defendants deny that such profits were excessive or in excess of the average profits of Ebsary during the previous years; except as is herein specifically admitted or specifically denied, these defendants have no knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 122 of the complaint.

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24. Admit that there may have been and may now exist some uniformity between certain of the terms and con-

ditions of sale required by the several license agreements from U. S. G. mentioned in the complaint (applicable to patented gypsum board) and the terms and conditions of sale used by one or more of the defendants in the sale of their other products, but deny that any such uniformity is due to any agreement or understanding between these defendants or either of them with any other person, firm or corporation; these defendants allege that the uniformity among the defendant companies of the terms and conditions of sale and distribution of gypsum board, plaster and miscellaneous gypsum products, is primarily due to customs and usages pertaining to the gypsum industry, and which have existed over a period of many years and prior to any of the acts complained of in the complaint; that such customs and usages were at all times lawful; that such uniformity is also in part due to the establishing of rules for the gypsum industry under the direction and approval of the Federal Trade Commission, pursuant to law, which rules were so adopted on or about June 10th, 1929; that such uniformity is also in part due to the "Code of Fair Competition for the Gypsum Industry" duly adopted by the industry and approved by the President of the United States pursuant to the provisions of the National Industrial Recovery Act of 1933; that Ebsary has been a member of said gypsum industry for over thirty years, and as a member of such industry, has conducted its business in accordance with the lawful usages and customs of said industry and was obligated by law to conduct its business in accordance with the existing rules of the industry as approved by the Federal Trade Commission, and as were contained in the aforesaid Code of Fair Competition for the Gypsum Industry. These defendants further allege that all acts and things done by them or either of them pursuant to the said rules for said industry approved by the Federal Trade Commission or done pursuant to the aforesaid Code, were lawful and were done pursuant to law; that except as is herein admitted, these defendants deny each and every of the averments contained in paragraph 123 of the complaint insofar as they refer to these defendants; except as is herein specifically admitted, explained or denied, these defendants deny knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph 123.

25. Further answering the complaint, these defendants allege:

A. Ebsary entered into each of the several written license agreements mentioned in the complaint, in good faith and in order to obtain the right, license and privilege of using and or adopting the inventions referred to therein to the uses and purposes of its own legitimate gypsum business to such extent as it might from time to time appear to Ebsary to be desirable.

B. That all of the acts in fact done by these defendants and which are referred to in said complaint were done in compliance with the written terms and conditions of the respective license agreements or for the purpose of trying to obtain and secure the full benefits of the rights and privileges granted by U. S. G. to Ebsary by said agreements, and to which Ebsary became lawfully entitled, and for which Ebsary became obligated to and did pay a royalty to U. S. G.

227 C. That these defendants did not engage in any conspiracy or combination to restrain trade or do any act or thing contrary to the anti-trust laws of the United States.

D. That these defendants had no purpose or motive in making said license agreements other than is clearly expressed in the terms thereof, and if any of the other parties to any of said license agreements had any other, different or additional purpose or motive, the same was and is unknown to these defendants.

26. These defendants deny each and every averment of said complaint inconsistent with any of the allegations set forth and contained in the last preceding paragraph of this answer and numbered 25.

WHEREFORE defendants demand judgment that the complaint herein be dismissed with costs.

Dated, July 29th, 1941.

TUMULTY & TUMULTY,
JOSEPH P. TUMULTY, JR.,
TUMULTY & TUMULTY,
Attorneys for Defendants,
Ebsary Gypsum Company, Inc.
and Frederick G. Ebsary,
1317 F Street, N. W.,
Washington, D. C.

BLACK, VARIAN & SIMON,
ALFRED W. VARIAN,
HERBERT M. SIMON,
Of Counsel,
60 Wall Street, New York City.

Receipt of a copy of the foregoing answer is hereby acknowledged this 30th day of July 1941.

GEO. B. HADDOCK,
Special Assistant to the Attorney General.

228 In the District Court of the United States
For the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Answer of Samuel M. Gloyd
Filed July 31, 1941

229 Comes now Samuel M. Gloyd, a defendant, designated herein as Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company, and for his answer to the complaint, the amendment thereto, and the bill of particulars states as follows:

1. He admits that the complaint was filed and the proceedings instituted against him and other defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", said act being commonly known as the "Sherman Antitrust Act", but denies that either acting alone or in conjunction with any other person, firm, or corporation, he has heretofore violated or is now violating said Act or any Section or
230 part thereof as alleged in the complaint, or otherwise.

2. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other defendants, or any of them in paragraph 2 and states that he has not at any time engaged in the business of selling and delivering gypsum products to dealers and consumers within the District of Columbia, and has not otherwise engaged in business therein, either now or at any time mentioned in the complaint.

3. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 3 of the complaint.

4. He denies each and all of the statements in paragraph 4 of the complaint.

5 to 19, inclusive. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraphs 5 to 19, both inclusive, of the complaint, except that he admits the statements in paragraph 11.

20. He denies each and all of the statements in paragraph 20 of the complaint as amended except that he admits he is engaged in the manufacture of gypsum products, with a plant at Plasterco, Texas, and sells said products principally east of the Rocky Mountains and west of the Allegheny Mountains in the southwestern states, and states that he is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other defendants, or any of them, in said paragraph 20 as amended, or in reference to the percentages of gypsum board or plaster sold by defendant companies.

21. He admits the statements in paragraph 21 of the complaint but states that the description of gypsum and the manufacturing process thereof is very meager and incomplete.

231 22. He admits sentences 1 and 2 of paragraph 22 of the complaint but is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentence 3 of said paragraph.

23. He admits the statements in paragraph 23 of the complaint.

24. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 24 of the complaint.

25. He admits sentences 1 and 3 of paragraph 25 of the complaint but is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them in sentences 2 and 4 of said paragraph.

26. He denies each and all of the statements in paragraph 26 of the complaint except that he admits the plaintiff has described gypsum board in a general way.

27. He admits the statements in paragraph 27 of the complaint.

28. He admits sentences 1 and 2 of paragraph 28 of the complaint except he states that the manufacture of plaster involves expensive equipment and many manufacturing problems, and is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentence 3 of said paragraph.

29. He admits the statements in paragraph 29 of the complaint but states that the description of the process of manufacturing gypsum board is very meager and incomplete.

30. He admits the statements in paragraph 30 of the complaint.

31. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 31 of the complaint as amended.

32. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 32 of the complaint.

232 33. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 33 of the complaint as amended.

34. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 34 of the complaint.

35. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 35 of the complaint as amended.

36. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 36 of the complaint as amended as to whether or not Celotex, Ebsary, and Newark are single plant operators, or as to the percentage or dollar value of their sales in 1939, or at any other time, or as to said approximate sales of 11% for gypsum board and 10% for plaster in the eastern area. He states that in 1939 his sales of gypsum board in the area designated in his answer to paragraph 20 of the complaint as amended amounted to approximately $230,000.00.

37. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 37 of the complaint.

38. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 38 of the complaint, except that he states that he has been manufacuring plaster since about 1902 and gypsum board since about 1924.

39. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to other persons, firms, or

233 corporations, or the other defendants, or any of them, in paragraph 39 of the complaint, and states that he sells gypsum board and plaster both in interstate and intrastate commerce and at all times has sold principally to retail building material dealers located throughout his trade area, with occasional sales in the earlier years of his business, to contractors, and that he has not at any time had any agreement or understanding with any of the

other defendants in reference to the selection of his customers or to the effect that he would refrain from selling said gypsum products directly to contractors.

40. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other defendants, or any of them, in paragraph 40 of the complaint, and states that the gypsum products from his plant are transported principally by rail, in mixed cars, and in some instances, by truck.

41. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other defendants, or any of them, in paragraph 41 of the complaint, and states that he sells his gypsum products in the states and area designated in his answer to paragraph 20 of the complaint as amended.

42. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1 and 2 of paragraph 42 of the complaint, in reference to the other defendants, or any of them, but denies each and all of the statements therein as applicable to him except he admits that he sells gypsum products in interstate commerce and ships a part of said products in mixed cars or trucks, but has not sold and does not sell to manufacturing distributors, and he is without knowledge or information sufficient to form a belief
234 as to the truth of the statements contained in the third sentence of said paragraph.

43. He denies each and all of the statements in paragraph 43 of the complaint as applicable to him except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to the other defendants, companies, or parties, and answering further he states that he sold gypsum board and plaster both in interstate and intrastate commerce and at all times sold principally to retail building material dealers located throughout his trade area, with occasional sales to contractors.

44. He denies each and all of the statements in paragraph 44 of the complaint.

45. He denies each and all of the statements in paragraph 45 of the complaint.

46. He denies each and all of the statements in paragraph 46 of the complaint. Answering further, this defendant states that at various times he entered into license agreements with the United States Gypsum Company, under

which he manufactured and sold gypsum products, and in connection therewith, negotiated and dealt only with said United States Gypsum Company and without any agreement or understanding with any other person, firm, or corporation. Said license agreements were made in good faith and in the belief that the United States Gypsum Company had basic patents under which the license privileges were granted for the manufacture of gypsum products and all of said agreements were made in due course of business and for legal purposes, and relying upon the validity of said patents and the use of said privileges granted in the license agreements, he expended large sums of money in equipping his plant for the manufacture of gypsum products.

47. He denies each and all of the statements in paragraph 47 of the complaint.

235 48. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1 and 2 of paragraph 48 of the complaint, but admits the statements in sentences 3, 4 and 5 of said paragraph.

49. He admits the statements in paragraph 49 of the complaint.

50. He admits the statements in paragraph 50 of the complaint.

51. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1 and 2 of paragraph 51 of the complaint, but admits the statements in sentences 3 and 4 of said paragraph.

52. He admits the statements in paragraph 52 of the complaint.

53. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1 and 2 of paragraph 53 of the complaint, but admits sentence 3 of said paragraph.

54. He denies each and all of the statements in paragraph 54 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements with respect to the efforts of other parties to settle the litigation referred to in said paragraph.

55. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 55 of the complaint.

56. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 56 of the complaint.

57. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 57 of the complaint.

236 58. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 58 of the complaint.

59. He denies each and all of the statements in paragraph 59 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to companies or parties other than this defendant.

60. He denies each and all of the statements in paragraph 60 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, as applicable to other companies or parties, or any of them, in said paragraph.

61. He denies each and all of the statements in paragraph 61 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to companies or members of the industry other than this defendant, and except that he avers that he did enter into the license agreement of April 18, 1927, with the United States Gypsum Company as hereinbefore stated.

62. He denies each and all of the statements in paragraph 62 of the complaint as applicable to him, and is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to the other companies, or any of them. He denies specifically that either individually or in conjunction with any other person, firm, or corporation, he urged that there should be control of licensee prices beyond 1929 and states specifically that under his license agreement of April 18, 1927 he was not subject to any minimum prices as fixed by said price bulletins beyond August, 1929.

63. He denies each and all of the statements in paragraph 63 of the complaint except that he is without knowl-

237 edge or information sufficient to form a belief as to the truth of the statements as applicable to members of the industry other than this defendant. Further answering, he denies that he made any proposal to the effect that said license agreement should cover only the remainder of the period of the Utzman patent.

64. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 64 of the complaint.

65. He denies each and all of the statements in paragraph 65 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to members of the industry other than this defendant, and, further answering, denies that he had any conferences with Griswold, Blagden, or anyone else except United States Gypsum Company and its representatives with reference to accepting licenses, but states that he did enter into a license agreement with United States Gypsum Company on April 18, 1927 and that said agreement was not the result, either directly or indirectly, of any persuasions, meetings, or conferences with anyone except with the representatives of the United States Gypsum Company in due course of negotiations for said license agreement.

66. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other licensees, or any of them, in paragraph 66 of the complaint but states that after the execution of said license agreement of April 18, 1927 he complied with the terms thereof in regard to minimum prices at which he might sell the patented board manufactured by him, as shown in the bulletins issued by the United States Gypsum Company.

67. He denies each and all of the statements in paragraph 67 of the complaint except that he is without knowl-
238 edge or information sufficient to form a belief as to the truth of the statements as applicable to other members of the industry or any of them, and, further answering, denies that he capitulated in any manner in securing said license agreement to enable him to manufacture and market a product protected by patents and to meet the demands of his trade, all of which he considered, and now considers, beneficial to his business, and in securing said license agreement he did not act in conjunction with other manufacturers nor for the purpose of securing unanimity of action in the stabilization of board prices, but did act independently of other manufacturers except United States Gypsum Company, the owner of the patent, and from whom he secured said license agreement.

68. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 68 of the complaint.

69. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 69 of the complaint except that he

knew that during certain times second grade board was being manufactured and sold.

70. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 70 of the complaint.

71. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 71 of the complaint.

72. He denies each and all of the statements in paragraph 72 of the complaint as applicable to him except he states that there were times he did manufacture and sell second grade closed-edge board at competitive prices with other similar product, but is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to United States Gypsum Company and its other licensees.

239 73. He denies each and all of the statements in paragraph 73 of the complaint as applicable to him except he states that his prices were governed by the terms of his contract of April 18, 1927, and he states that he is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to other manufacturers, or any of them.

74. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 74 of the complaint.

75. He is without knowledge or information sufficient to form a belief as to the truth of the statement, or any of them, in paragraph 75 of the complaint except that he knew the Utzman patent expired in 1929.

76. He denies each and all of the statements in paragraph 76 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to licensees or companies, or any of them, other than this defendant, and, further answering, denies that he was present at any meetings or conferences or had a representative at any such meetings or conferences, and denies that he entered into any agreements except said license agreement of April 18, 1927.

77. He denies each and all of the statements in paragraph 77 of the complaint.

78. He denies each and all of the statements in paragraph 78 of the complaint as applicable to him except he states that United States Gypsum Company represented

that it was the owner of certain patents, or had applications pending, referred to as the foam process, and offered to enter into a license agreement, but that he did not enter into any such agreement until in February, 1937, and states that he is without knowledge or information
240 sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to the other defendants, or any of them. Answering further, he denies the existence of any such agreement as alleged in the last sentence of said paragraph.

79. He admits the statements in sentences 1 and 2 of paragraph 79 of the complaint and is without knowledge or information sufficient to form a belief as to the truth of the statements in sentence 3 of said paragraph.

80. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 80 of the complaint except that he admits that said Haggerty patent is set forth as Exhibit 5 in the Appendix to the complaint and states that the summary of said patent set forth in said paragraph is incomplete and inaccurate.

81. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 81 of the complaint.

82. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1 and 2 of paragraph 82 of the complaint, but denies that United States Gypsum Company advised him that the Hite and Haggerty patents were of doubtful validity or that the foam process did not infringe said patents.

83. He denies each and all of the statements in paragraph 83 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to licensees or any of them other than this defendant.

84. He denies each and all of the statements in paragraph 84 of the complaint except that he states that he was informed that United States Gypsum Company had acquired said Haggerty and Hite patents.

241 85. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 85 of the complaint.

86. He denies each and all of the statements in paragraph 86 of the complaint.

87. He denies each and all of the statements in paragraph 87 of the complaint as amended as applicable to him except he admits that he was not obliged to manufacture a uniform standardized board, and states that his sales in his trade area described in his answer to paragraph 20 of the complaint as amended, for the year 1929 were approximately $250,000.00, and states that he is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to the other defendants, or any of them. Answering further, he denies the existence of any agreement of the character described in paragraph 86 of the complaint.

88. He denies that after the expiration of the 1927 license agreement with United States Gypsum Company any new agreement was made by threats or under duress as stated in sentence 1 of paragraph 88 of the complaint, but states that in February, 1937 he and United States Gypsum Company entered into a new license agreement, after negotiations, which was the result of their free and voluntary acts and without any conferences, agreements, or understanding, either directly or indirectly, with any other person, firm, or corporation. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 2, 3, 4, and 5 of said paragraph.

89. He admits the application of the word "licensee" as it may be applied to him in paragraph 89 of the complaint, but denies the formation or existence of any combination, agreement, or understanding as set forth in the complaint, or otherwise.

242 90. He denies each and all of the statements in paragraph 90 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements contained in the first two sentences of said paragraph as applicable to United States Gypsum Company and its licensees, or any of them, other than this defendant. Answering further, he denies that United States Gypsum Company has determined and fixed his selling prices and terms and conditions of sale in any manner, either directly or indirectly, except as provided for in said license agreements of April 18, 1927, and February 10, 1937.

91. He denies each and all of the statements in paragraph 91 of the complaint as applicable to him except he states that from April, 1927 to August, 1929, from time

to time, he received from United States Gypsum Company price bulletins fixing minimum prices in accordance with the terms of his license agreement. After August, 1929 and until February, 1937 he did not receive any minimum price bulletins and was not governed in any manner by price bulletins issued by the United States Gypsum Company or anyone else, but his license agreement of February 10, 1937 with United States Gypsum Company provided for minimum price bulletins and he has complied with the terms of said agreement. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to United States Gypsum Company and its other licensees. Answering further, he admits that copies of certain of said minimum price bulletins are set forth in Exhibit 7 in the Appendix to the complaint but denies that subparagraphs (a) to (u), inclusive, of said paragraph 91 accurately or sufficiently describe the terms and provisions of said minimum price bulletins.

92. He denies the statements contained in paragraph 92 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to United States Gypsum Company and its other licensees, or any of them, and states that he has made reports of sales from time to time and otherwise complied with said license agreements, and denies that he attended any meetings with the United States Gypsum Company or other licensees at which the prices and terms and conditions of sale as set out in said bulletins were discussed, or any agreements made in reference thereto.

93. He denies each and all of the statements contained in paragraph 93 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements contained in the second sentence of said paragraph insofar as they refer to United States Gypsum Company and licensees other than this defendant.

94. He denies each and all of the statements in paragraph 94 of the complaint.

95. He denies each and all of the statements contained in paragraph 95 of the complaint, and, answering further, denies that he received or complied with any minimum price bulletins issued by United States Gypsum Company in 1932 or thereafter until February 10, 1937, the date of execution of his license agreement with said United States Gypsum Company. Answering further, this defendant

states that from the commencement of his business he has sold his gypsum products principally to dealers and only occasionally to jobbers and that said policy has not changed materially since 1929.

96. He denies each and all of the statements in paragraph 96 of the complaint.

97. He denies each and all of the statements in paragraph 97 of the complaint.

98. He admits the statements in sentences 1 and 2 of paragraph 98 of the complaint, but is without
244 knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 3 and 4 of said paragraph.

99. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 99 of the complaint.

100. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 100 of the complaint except that the summary of the Haggerty patent contained in said paragraph is incomplete and inaccurate. Answering further, he states that during the period from November, 1929 to October, 1935, he was not a licensee under the Haggerty patent.

101. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 101 of the complaint except that he states that the gypsum board manufactured and sold by him under the provisions of his license agreement of February 10, 1937, with United States Gypsum Company did embody the inventions set forth and claimed in said Haggerty patent and said foam patents.

102. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1, 3, and 4 of paragraph 102 of the complaint, but admits the statements in sentence 2 of said paragraph.

103. He denies each and all of the statements in paragraph 103 of the complaint.

104. He denies each and all of the statements in paragraph 104 of the complaint except he admits that he transported gypsum products in mixed cars or trucks.

105. He admits the statements in paragraph 105 of the complaint.

245 106. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to other manufacturers, or any of them, in paragraph 106 of the complaint, and de-

nies each and all of the statements in said paragraph as applicable to him.

107. He denies each and all of the statements in paragraph 107 of the complaint and states that he was not a member of the Gypsum Statistical Institute and did not participate in any of its activities.

108. He denies each and all of the statements in paragraph 108 of the complaint.

109. He denies each and all of the statements in paragraph 109 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements in the first sentence thereof as applicable to United States Gypsum Company and its licensees other than this defendant.

110. He denies each and all of the statements in paragraph 110 of the complaint.

111. He denies each and all of the statements in paragraph 111 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements contained in the last sentence of said paragraph.

112. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other licensees, or any of them, in paragraph 112 of the complaint, and denies each and all of the statements in said paragraph as applicable to him.

113. He denies each and all of the statements in paragraph 113 of the complaint except that he admits that about 1934, or thereafter, United States Gypsum Company offered to enter into a license agreement to manufac-
246 ture and sell metallized board under patents owned by the United States Gypsum Company, covering metallized gypsum board, but states that he did not enter into any such license agreement or agreements, and he is not informed as to whether or not Exhibit No. 11 is a substantial copy of the license agreement between Ebsary and United States Gypsum Company.

114. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other defendants, or any of them, in paragraph 114 of the complaint, and denies each and all of the statements in said paragraph as applicable to him.

115. He admits the statements in paragraph 115 of the complaint as applicable to him, and states that he is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to the other defendants, or any of them.

116. He is without knowledge or information sufficient to

form a belief as to the truth of the statements, or any of them, in paragraph 116 of the complaint, but denies that to induce this defendant to enter into a perforated lath license agreement United States Gypsum Company agreed to fix the price of perforated lath at a differential above the price of straight lath.

117. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 117 of the complaint.

118. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 118 of the complaint.

119. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 119 of the complaint.

120. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 120 of the complaint.

247 121. He denies each and all of the statements in paragraph 121 of the complaint.

122. He denies each and all of the statements in paragraph 122 of the complaint.

123. He denies each and all of the statements in paragraph 123 of the complaint.

Answering further, this defendant denies each and every material statement or allegation in said complaint, the amendment thereto, and the bill of particulars which he has not heretofore specifically denied, admitted, qualified, or explained, and as to all such matters where he is without knowledge or information sufficient to form a belief as to the truth of the statements or allegations and as to all matters denied, he calls upon the plaintiff to make strict proof thereof.

Wherefore, this defendant prays that the complaint and the amendment thereto be dismissed as to him, and at the cost of the plaintiff.

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248 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Answer of defendant the Celotex Corporation

Filed July 31, 1941

249 Now come the defendants, The Celotex Corporation and Bror G. Dahlberg, and, for answer to the complaint filed herein and the amendment to said complaint filed herein on June 5, 1941, severally admit, deny and aver, and otherwise make answer unto said complaint, as so amended, as hereinafter set forth.

PART I

ANSWER OF DEFENDANT THE CELOTEX CORPORATION

For answer to said complaint, as amended, as aforesaid, with each of the numbered paragraphs of this Part I being in answer to the paragraph of said complaint bearing the same number, the defendant The Celotex Cor-
250 poration (hereinafter in this Part I sometimes referred to as "this defendant") admits, denies and avers as follows:

1. Admits that the complaint is filed and that these proceedings are instituted against the several defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," said act being commonly known as the "Sherman Antitrust Act," but denies (a) that this defendant, either alone or in conjunction with one or more of the other defendants to this action or any other person or persons, firm or firms, corporation or corporations, whatsoever, has heretofore engaged or is now engaged in any action or course of action prohibited or declared illegal by Section 1, Section 2 or Section 3 of said Sherman Antitrust Act, or by any other provision of said Act, and (b) that the plaintiff is entitled, under Section 4 of said Sherman Antitrust Act, to the relief prayed for in said complaint.

2. Denies each and all of the averments of Paragraph 2 insofar as they refer to the defendant, The Celotex Corporation, except that this defendant admits that this defendant is engaged in a continuous course of business in selling and delivering gypsum products, including gypsum board and plaster, to dealers within the District of Columbia, that it is engaged in soliciting through salesmen orders

for gypsum products from dealers within the District of Columbia and in promoting the sale of said gypsum products in the District of Columbia by advertising in the District of Columbia and by distributing price lists, bulletins and circulars among dealers within the District of Columbia; denies that this defendant is engaged in selling and delivering gypsum products to consumers within the District of Columbia or in soliciting orders for gypsum products from consumers within the District of Columbia or in promoting the sale of gypsum products in the District of Columbia by distributing price lists, bulletins and circulars among consumers within the District of Columbia; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the

251 allegations of paragraph 2 of said complaint in so far as the same refer to the other defendant companies.

3. Answering Paragraph 3 of the Complaint, this defendant denies that it may be found within the District of Columbia except that it admits that it maintains a sales office within the District of Columbia and maintains salesmen for the solicitation of business in said gypsum products as set forth in Paragraph 2 of this answer, and this defendant denies that it maintains a warehouse or warehouses within the District of Columbia or maintains duly authorized agents there for the transaction of business within the District of Columbia other than the salesmen for the solicitation of business as hereinbefore set forth. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 3 insofar as they refer to the defendant, United States Gypsum Company.

4. Denies (a) that this defendant is or has been a party to any unlawful combination, conspiracy or monopoly of the kind and character referred to in paragraph 4 of said complaint, (b) the formation, maintenance, operation or existence of the specific combination, conspiracy and monopoly referred to in said paragraph 4, and (c) that this defendant has performed any acts, either within or without the District of Columbia, in furtherance of any such combination, conspiracy or monopoly.

5. Admits the allegations of paragraph 5 of said complaint and adopts the use of the phrase "U.S.G." therein set forth.

6. Admits the allegations of paragraph 6 of said complaint and adopts the use of the word "National" therein set forth.

7. Admits the allegations of paragraph 7 of said complaint and adopts the use of the word "Certain-teed" therein set forth.

8. Admits the allegations of paragraph 8 of said complaint.

9. Admits the allegations of paragraph 9 of said complaint and adopts the use of the word "Ebsary" therein set forth.

252 10. Admits the allegations of paragraph 10 of said complaint and adopts the use of the word "Newark" therein set forth.

11. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 of said complaint, but this defendant adopts the use of the word "Texas" as therein set forth.

12. Adopts for the purpose of this answer the definition of the term "defendant companies" set forth in paragraph 12 of said complaint.

13. Admits the allegations of paragraph 13 of said complaint.

14. Admits the allegations of paragraph 14 of said complaint.

15. Admits the allegations of paragraph 15 of said complaint.

16. Admits that Bror Dahlberg, whose middle initial is "G" (not "H" as set forth in said complaint), is President of this defendant and Chairman of the Board of Directors of Certain-teed, and that his business address is 919 North Michigan Avenue, Chicago, Illinois.

17. Admits the allegations of paragraph 17 of said complaint.

18. Admits the allegations of paragraph 18 of said complaint.

19. Admits the allegations of paragraph 19 of said complaint.

20. Adopts the definition of the term "Eastern area" set forth in paragraph 20 of said complaint, as amended, as aforesaid; admits that each of the defendant companies is engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at one or more plants located throughout the United States, that each of the defendant companies sells a portion of the gypsum products so manufactured in interstate commerce in some or all of the States comprised within the Eastern area,

that each of the defendant companies, with the exception of Texas, sells a portion of such gypsum products
253 in commerce between the States and the District of Columbia to retail dealers in building products within the District of Columbia, and that the defendant companies manufacture and sell approximately 100% of all gypsum board but this defendant is without knowledge or information sufficient to form a belief as to whether said defendant companies manufacture and sell approximately 80% of all gypsum plaster currently manufactured, and sold in the Eastern area; avers that this defendant owns and operates a plant for the manufacture of gypsum products located at Port Clinton, Ohio; that the sales of gypsum products made by this defendant in the Eastern area are comprised of sales to retail dealers in building materials and sales to certain of the other defendant companies, and that this defendant does not sell gypsum products to consumers within the Eastern area; assuming the term "distributors", as used in paragraph 20 of said complaint is intended to describe the various small manufacturers of calcined gypsum and plaster referred to in paragraph 42 of said complaint and specifically named in subdivision II of the Bill of Particulars heretofore filed by the plaintiff in these proceedings, further avers that the last sale of gypsum products made by this defendant to any of said distributors was consummated during the year 1939, and avers that this defendant has no knowledge or information sufficient to form a belief as to whether the other defendant companies sell gypsum products to consumers or to manufacturing distributors within said Eastern area.

21. Admits the allegations of paragraph 21 of said complaint with respect to the description of gypsum, except that said description is not complete; and avers that no commercial deposits of gypsum rock are 100% pure gypsum, but that the mineral, as mined, is mixed with varying amounts of limestone, sand, shale, anhydrite, and sometimes minute quantities of rock salt and organic matter, and that the production of calcined gypsum or stucco employed in the manufacture of gypsum products used in the building construction industry, including gypsum board and gypsum plaster, requires the utilization of certain processes in addition to crushing and heating, such as
254 grading and sorting, the removal of impurities, and the addition, during the heating process, of various substances for the purpose of controlling the setting time and other characteristics of the resulting product.

22. Adopting the definition of the term "gypsum board" set forth in paragraph 30 of said complaint, admits the allegations of the first two sentences of paragraph 22; but avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the last sentence of said paragraph 22.

23. Admits the allegation of paragraph 23 of said complaint.

24. Admits the allegations of the first four sentences of paragraph 24 of said complaint except that this defendant avers that there is no substantial difference in the character of the product known as gypsum lath and plaster board; and this defendant further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the last two sentences of said paragraph 24.

25. Admits that several years after the first commercial manufacture of plasterboard, a gypsum board, known as "wallboard" and designed to be used as a finished panel in place of plaster and lath in wall and ceiling structures, was introduced on the market, that gypsum wallboard is now one of the most important of various boards on the market which are used as substitutes for plaster and lath; but avers that this defendant is without knowledge or information sufficient to form a belief as to whether the sales value of gypsum wallboard manufactured by the defendant companies and sold in the United States in 1939 was approximately $8,500,000, or whether approximately 90% of such gypsum wallboard was sold in the Eastern area, or as to the extent of the use by the United States Government of gypsum wallboard during the World War of 1914-18 in temporary structures such as barracks; and denies that such use by the Government of the United States has operated greatly to stimulate the production of gypsum wallboard.

26. Admits the allegations of paragraph 26 of
255 said complaint, except that the description of the products therein contained is neither accurate nor complete.

27. This defendant admits the averments contained in paragraph 27 of the complaint.

28. Admits that the manufacture of plaster from calcined gypsum involves the addition of various substances in varying amounts for the purpose of retarding or accelerating the setting time of the finished product and the addition of hair or fiber in varying amounts for the pur-

pose of increasing the strength of the finished product, that the manufacture of gypsum board from calcined gypsum is a more complicated operation than the manufacture of gypsum plaster, that the manufacture of gypsum board requires expensive equipment and machinery, that substantially all gypsum calcining plants are equipped to manufacture gypsum plaster, and that gypsum calcining plants are not always equipped to manufacture gypsum board; denies that the manufacture of plaster from calcined gypsum involves a relatively simple operation; and avers that the gypsum plant of this defendant is equipped to produce and is producing gypsum plaster of many kinds, grades and qualities and possessing varying characteristics, dependent on the place at and the purpose for which the same is to be used and other considerations, and that such manufacture involves a high degree of control of conditions of manufacture, conformity to specifications and other factors, requiring a highly trained and skilled supervising and engineering personnel.

29. Admits that, in the manufacture of gypsum board, calcined gypsum is first mixed with water to form a thick plastic mass known as a slurry, that an adhesive to increase the bond between the core and the liners is mixed, either with the dry calcined gypsum or with the slurry, that to the slurry is added a so-called aggregate to lighten the weight of the finished board, that, until 1929, the most commonly used aggregate was sawdust, that, since 1929, the aggregate employed by this defendant has been composed in part of soap foam, which causes the formation of numerous minute voids in the board, and that, after the addition of the aggregate to the slurry, the mixture is spread upon the lower liner and the upper liner is
256 placed upon the top of the mixture; but this defendant avers that it uses certain processes and materials not used by others in its manufacture and avers further that the description of the process for manufacture contained in paragraph 29 of said complaint is inadequate in failing to set forth certain important aspects of said process.

30. Adopts, for the purposes of this answer, the definition of the term "plaster," "lath," "plasterboard," "wallboard," "gypsum board" and "board" set forth in paragraph 30 of said complaint.

31. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31 of said complaint.

32. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32 of said complaint, except that this defendant admits that since 1925 U.S.G. has expanded into fields of other allied building materials and is now an important manufacturer of some of the materials enumerated in said paragraph 32.

33. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33 of said complaint, as amended, except that this defendant admits that National is the second largest producer of gypsum products in the United States.

34. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 34 of said complaint, except that this defendant admits that National has expanded into fields of other allied building materials and is now engaged in the production of some of the products enumerated in said paragraph 34.

35. Admits that Certain-teed is the third largest producer of gypsum products in the United States, that, in 1939, it produced approximately 11% of all gypsum board and approximately 10% of all plaster manufactured and sold in the Eastern area, that sales of gypsum board by Certain-teed in the Eastern area during the year 1939 amounted to approximately $2,100,000, that Certain-
257 teed did not enter the gypsum industry until 1923 after it had become well established as an important producer of roofing materials, paints and varnishes and composition flooring, that, in 1923, Certain-teed entered the plaster business through the acquisition of six gypsum plants from Acme Cement Plaster Company, that Certain-teed did not commence the manufacture of gypsum board until 1926, that the manufacture of gypsum board by Certain-teed during the year 1926 was confined to a single plant, that in 1928, Certain-teed acquired the assets of The Beaver Board Companies, a Delaware corporation, and The Beaver Products Company, Inc., a New York corporation, that, in the year 1928, said The Beaver Products Company, Inc., had been for many years an important producer of fiber wallboard, that said The Beaver Products Company, Inc., entered the gypsum industry in 1920 through the purchase of the six gypsum plants of American Cement Plaster Company, at four of which plants gypsum board

was produced, and the single gypsum plant of Bestwell Manufacturing Company, which plant was also equipped to manufacture gypsum board, and that Certain-teed now operates five gypsum plants, at four of which gypsum board is produced; denies that, in 1923, or prior thereto, Certain-teed was an important producer of paper; and avers that Certain-teed is not presently engaged in the manufacture of paints and varnishes, that it has heretofore disposed of it composition flooring business to Sloane-Blabon Corporation, a Delaware corporation and a partially owned subsidiary of Certain-teed, and that Certain-teed is not now engaged in the manufacture of paper, except to the extent that it may be deemed to be so engaged as a result of its indirect ownership of the capital stock of The Beaver Wood Fibre Company, Limited, an Ontario corporation.

36. Admits that this defendant as well as Ebsary and Texas are single plant operators and that the allegations of said paragraph 36 of said complaint as amended, state with substantial accuracy the sales by this defendant of gypsum board manufactured by it in the Eastern area in 1939; and avers that, except to the extent that such allegations are admitted above, this defendant is without knowledge or information sufficient to form a belief
258 as to the truth of the allegations of paragraph 36 of said complaint, as amended, as aforesaid.

37. Admits the allegations of paragraph 37 of said complaint.

38. Admits that Ebsary and Newark and Texas are each engaged in the manufacture and sale of gypsum products but this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 38 of said complaint, as amended.

39. Admits that this defendant sells some of the gypsum board and plaster manufactured by it in interstate commerce and in commerce between the States and the District of Columbia and that most of its gypsum products are sold to retail building material dealers located throughout a part of the Eastern area; avers that this defendant does not sell gypsum products directly to contractors; avers that this defendant is without knowledge or information sufficient to form a belief as to whether since 1929 the other defendant companies have not sold gypsum products directly to contractors; and avers that the discontinuance of or failure to make sales of gypsum products directly to contractors, whether on the part of this defendant or of the other defendant companies was not, and is not, the subject of any agreement, understanding or undertaking, either express or implied, between this defendant and any one or

more of the other defendant companies; further avers that it is without knowledge or information sufficient to form a belief as to whether each of the other defendant companies sells most of the gypsum board and plaster manufactured by it in interstate commerce and in commerce between the States and the District of Columbia to retail building material dealers located throughout the Eastern area; and further avers that only a small fraction of the gypsum board manufactured by this defendant and by all of the defendant companies in the aggregate is sold in commerce between the States and the District of Columbia. Further answering, defendant avers that from its inception it has had the policy of selling its principal products through the dealer trade and has built the good will of its business upon such a policy, and that when it acquired the gypsum business formerly conducted by The American Gyp-
259 sum Company it followed as to gypsum its established practice, and this defendant accordingly admits that it has generally refrained from selling said gypsum products direct to contractors, as such sales would have destroyed, or tended to destroy, its principal means of distribution and alienate its established dealer outlets. As to all matters set forth in paragraph 39 of the complaint which are not admitted, qualified or denied, defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

40. Admits that the gypsum products manufactured by this defendant are transported by truck or railroad to the yards of dealers usually from the plants in which the products are manufactured but sometimes from warehouses owned by this defendant, and admits that gypsum board is frequently transported in mixed cars or trucks of board, plaster and miscellaneous gypsum products; but avers that, while straight carload shipments of board by this defendant are infrequent, straight truckload shipments of board are frequent; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40 of said complaint so far as the same apply to other defendant companies.

41. Admits that this defendant sells gypsum products to retail dealers within all of the states embraced within the Eastern area and that the other defendant companies sell gypsum products in some of the states within the Eastern Area; but avers that this defendant is without knowledge or information sufficient to form a belief as to whether U.S.G. and National sell their said gypsum products within all of the states embraced within the Eastern area.

42. Denies each and all of the allegations of paragraph 42 of the complaint in so far as they relate to this defendant, and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of averments contained in paragraph 42 of the complaint in so far as they refer to companies or parties other than this defendant.

43. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 43 of said complaint.

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44. Denies each and all of the allegations of paragraph 44 of said complaint; and, without limiting the generality of the foregoing, denies that the defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in gypsum board, plaster and miscellaneous gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act, that the defendants are, and have been for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act, that the defendants are monopolizing, and have monopolized for many years last past, trade and commerce in said gypsum products among the several States in violation of Section 2 of the Sherman Antitrust Act, that the defendants are, and have been for many years last past, attempting to monopolize trade and commerce in said gypsum products among the several States and are, and have been for many years last past, actively engaged in a continuing combination and conspiracy to monopolize trade and commerce in said gypsum products among the several States, in violation of Section 2 of the Sherman Antitrust Act, that the defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act, and that the defendants are, and have been for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act.

45. Denies each and all of the allegations contained in paragraph 45 of said complaint; and, without limiting the generality of the foregoing, denies (a) the formation, maintenance, consummation and existence of the combina-

tion described in said paragraph 45, and (b) that the
defendant companies have entered into, have car-
261 ried out or are carrying out any combination for
the purpose and with the effect of restraining, dominating and controlling the manufacture and distribution of gypsum products in the Eastern area, either by the means set forth in subdivision (a) to (e) inclusive, of said paragraph 45, or otherwise; and further denies:

(a) that the defendant companies have concertedly raised and fixed at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by the defendant companies in the Eastern area;

(b) that the defendant companies have concertedly standardized gypsum board and its method of production by limiting the manufacture of gypsum board to uniform methods and by producing only uniform kinds of gypsum board for distribution in the Eastern area;

(c) that the defendant companies have concertedly raised, maintained and stabilized the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by the defendant companies in the Eastern area;

(d) that the defendant companies have concertedly refrained from distributing gypsum board, plaster and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern area;

(e) that the defendant companies have concertedly refused to sell said products to jobbers at prices below the prices of said defendant companies to dealers; and

(f) that the defendant companies have concertedly induced and coerced manufacturing distributors to resell, at the prices raised and fixed by the defendant companies, gypsum board purchased from the defendant companies.

46. Denies each and all of the allegations of paragraph 46 of said complaint. Further answering this defendant avers that it was organized in 1935 and that upon its organization it acquired the assets and business of The Celotex Company, its predecessor, which was organized about 1922; avers that until 1937 neither this defendant nor its predecessor had ever been engaged, directly or indirectly, in the gypsum business or had any relationship with any of the defendants in this cause with respect to the carrying on and conduct of the gypsum business. In 1937,
this defendant entered into negotiations looking
262 towards the acquisition by it of certain shares of
capital stock of Certain-teed and these negotiations ultimately culminated in the acquisition in 1938 by this

defendant of a minority stock interest in Certain-teed. Following such acquisition, this defendant carried on negotiations with Certain-teed looking towards the consummation of an arrangement whereby this corporation should be entitled to manufacture or have manufactured in the surplus manufacturing facilities of Certain-teed roofing and gypsum products. As a result of these and other negotiations, in the Fall of 1938 this defendant started in a limited way the sale of gypsum products manufactured in the plants of Certain-teed and in 1939 this defendant completed arrangements for marketing gypsum products manufactured in the plants of Certain-teed other than gypsum board and lath in the territories logically served by the plants of Certain-teed producing the same, and started the sale as agent of Certain-teed and for and in its behalf of gypsum wallboard and gypsum lath in certain territories logically served by plants of Certain-teed. In 1939, this defendant acquired all of the assets of American. At the time of such acquisition, American was a licensee of U.S.G. under the license agreement mentioned in paragraph 35 of the complaint in this cause. Under the terms of said license agreement, American was obligated to pay U.S.G. large sums of money, and it was made a condition of such license agreement that American would not sell or dispose of all or substantially all of its assets without requiring the purchaser to assume and agree to be bound by all the terms, conditions and provisions of said license agreement. At the time of the acquisition by this defendant of the assets of American in 1939, this defendant was advised by counsel that this defendant could not engage in the manufacturing, distribution and sale of gypsum board and gypsum lath, which would have public acceptance and be competitive with the gypsum wallboard and gypsum lath generally sold throughout the United States, without infringing on some one or more of the many patents of U.S.G. covered by such license agreement, that American had acknowledged the validity of such patents under the terms of said license agreement,

263 and that it was obligatory upon this defendant in connection with the acquisition of said assets of American to take over and assume said license agreement and to observe the terms and conditions thereof.

This defendant was further advised that said license agreement was a valid obligation and was lawful, and this defendant in good faith and in an honest and sincere belief that it was obliged to assume the terms and provisions of said license agreement and carry out its terms if it engaged in the gypsum business and that all of the terms and provisions of said license agreement were valid and lawful and did not violate any of the laws of the United

States or the several states thereof, including the so-called Anti-Trust laws, this defendant has since 1939 faithfully and to the best of its ability observed the terms and provisions of said license agreement according to its terms, and has not engaged in any practices contrary to the provisions of said agreement and has not had any private, secret or other understandings or agreements with U.S.G., and its sole and only agreements, arrangements or understandings with U.S.G. have been said written agreement above referred to.

This defendant denies each and all of the allegations of said paragraph 46 of said complaint not herein expressly admitted.

47. Denies each and all of the allegations of paragraph 47 of said complaint.

48. Admits the allegations of paragraph 48 of said complaint (except that this defendant does not by this paragraph of this answer make any admission as to the scope, validity or effect of said Utzman patent) and adopts the use of the terms "closed-edge board" and "open-edge board" therein set forth.

49. Admits the allegations of paragraph 49 of said complaint.

50. Admits the allegations of paragraph 50 of said complaint.

51. Admits the allegations of paragraph 51 of said complaint.

52. Admits the allegations of paragraph 52 of said complaint.

264 53. Admits the allegations of paragraph 53 of said complaint.

54. Denies each and all of the allegations of paragraph 54 of said complaint, except that this defendant admits that the period from the latter part of 1925, after U.S.G. had obtained the judgment against Beaver referred to in paragraph 51 of said complaint and after the filing of the infringement suits by U.S.G. against American and the Universal Gypsum & Lime Company referred to in paragraph 53 of said complaint, until the year 1930, was marked by efforts of the parties thereto to settle said litigation.

55. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 55 of said complaint.

56. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 56 of said complaint.

57. Avers that this defendant is without knowledge or

information sufficient to form a belief as to the truth of the allegations of paragraph 57 of said complaint.

58. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 58 of said complaint.

59. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 59 of said complaint.

60. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 60 of said complaint.

61. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 61 of said complaint.

62. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 62 of said complaint.

63. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 63 of said complaint.

265 64. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 64 of said complaint.

65. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 65 of said complaint.

66. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 66 of said complaint.

67. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 67 of said complaint.

68. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 68 of said complaint.

69. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 69 of said complaint.

70. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 70 of the complaint.

71. Admits the allegations of paragraph 71 of said complaint.

72. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 72 of the complaint.

73. This defendant is without knowledge or information

sufficient to form a belief as to the truth of the allegations of paragraph 73 of the complaint.

74. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 74 of said complaint.

75. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 75 of the complaint.

76. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 76 of said complaint.

266 77. Denies, in so far as the same relate to (if at all) this defendant or American or the conduct of either of them, each and all of the allegations of paragraph 77 of said complaint; and, without limiting the generality of the foregoing, denies, in so far as the same relate to (if at all) this defendant or American or the conduct of either of them, that U.S.G. and its licensees mutually agreed among themselves as follows:

(a) that said companies would immediately discontinue the manufacture of unpatented open-edge board and second grade closed-edge board and would dispose of inventories of said boards at prices to be determined and fixed by U.S.G. and that, after disposal of said inventories, all companies would manufacture and sell a closed-edge board manufactured and bundled by the processes and methods used by U.S.G.;

(b) that U.S.G. would advance and stabilize the prices for board immediately after the execution of said license agreements and that, as prices for board were increased, all companies would increase their prices for plaster and miscellaneous gypsum products; and/or

(c) that U.S.G. would continue to control, through the use of other patents, the price of its licensees for board manufactured by said licensees after the expiration of the Utzman patent in August, 1929;

and avers that this defendant was in no manner engaged in the gypsum business until 1939 and that it did not at any time enter into any agreement, understanding or undertaking with U.S.G. or with any one or more of the other licensees of U.S.G. with respect to the subject matter of said paragraph 77. Further answering this defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 77 of said complaint except in so far as it has in this paragraph of this answer admitted, qualified or denied such allegations.

78. This defendant admits that during the period from June 1, 1929 to October 1, 1929, U.S.G. had pending certain applications in the U. S. Patent Office purporting to cover board manufactured through the use of the so-called "foam process," hereinafter sometimes called "Foam Board" but avers that, except as above stated, this
267 defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 78 of said complaint.

79. Admits that the foam process may be generally described as consisting of the introduction of foam into the slurry as an aggregate to cause the formation of numerous air voids in the board, and that said process requires that the numerous minute bubbles in the foam be sufficiently stable and pliable to resist collapse during the process of manufacturing board; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 79 of said complaint with respect to whether, at the time U.S.G. offered said foam board license to this defendant or to other licensees of U.S.G., U.S.G. contemplated for the purpose of obtaining stability and pliability in the bubbles, the use of several methods, including among others, the use of a colloidal agent such as farinaceous paste to reinforce the walls of the bubbles.

80. Admits that, at the time U.S.G. offered such foam board licenses, Universal Gypsum & Lime Company owned United States Letters Patent No. 1,230,297 issued to Charles E. Hite on June 17, 1917 and United States Letters Patent No. 1,500,452 issued to Joseph F. Haggerty on July 8, 1924, that a true and correct copy of said Hite patent is set forth as Exhibit No. 4 in the appendix to said complaint, and that a true and correct copy of the Haggerty patent is set forth as Exhibit No. 5 in the appendix to said complaint; but avers that the summaries of the claims of said Hite and Haggerty patents contained in said paragraph 80 are incomplete and inadequate and as this defendant is presently advised are inaccurate.

81. Avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 81 of said complaint.

82. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 82 of said complaint except that this defendant denies that U.S.G. ever advised or communicated with

this defendant concerning any of the matters referred to in said paragraph.

268 83. Admits that U.S.G. agreed to purchase the Hite and Haggerty patents from Universal Gypsum & Lime Company, that U.S.G. did acquire said patents from Universal Gypsum & Lime Company, and that American agreed to accept a license from U.S.G. covering said patents and the patent applications for said foam board; denies that this defendant at any time entered into any agreement, undertaking or understanding with any other licensee or licensees of U.S.G. with respect to the acceptance by this defendant or by such other licensees of a license from U.S.G. covering said patents and patent applications or with respect to U.S.G. acquiring said Haggerty and Hite patents; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 83 of said complaint.

84. Except to the extent that such allegations are hereinafter in this paragraph specifically admitted, denies each and all of the allegations of paragraph 84 of said complaint; admits that U.S.G. agreed with the Receivers for Universal to acquire, and did acquire, said Hite and Haggerty patents.

85. Admits that, following the acquisition of the Hite and Haggerty patents by U.S.G. from Universal Gypsum & Lime Company, American entered into a license agreement with U.S.G., and that this defendant acquired the rights of the licensee thereunder in 1939 but avers that said license contract was the first agreement entered into between American and U.S.G.; admits that said license agreement contained provisions of the character specified in subdivisions (a) to (h) inclusive of paragraph 85 of said complaint; avers that a duplicate original of said new license agreement between U.S.G. and this defendant was furnished to the Additional Grand Jury for the April, 1940, term of this Court in response to a *subpoena duces tecum* issued at the instance of the Attorney General of the United States, avers that said duplicate original of said license agreement is presently in the possession of the Attorney General of the United States, and that said new license agreement differs in certain particulars from

269 the agreement between U.S.G. and Ebsary set forth as Exhibit No. 6 in the appendix to said complaint; further admits that U.S.G. entered into similar agreements with National, Universal Gypsum & Lime Company, Atlantic Gypsum Company, Ebsary and Certain-teed; and fur-

ther avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 85 of said complaint.

86. Denies that, American or this defendant at any time entered into any agreements or understandings with U.S.G. and its licensees, or with U.S.G., individually, or with any one or more of the licensees of U.S.G. of the kind and character specified in paragraph 86 of said complaint; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 86, as applied to U.S.G. and the other licensees of U.S.G.

87. Denies each and all of the allegations of paragraph 87 of said complaint, as amended, as aforesaid, in so far as the same purport to relate to the alleged agreement referred to in paragraph 86 of said complaint, or to any agreements of similar character; admits that, by virtue of the agreements referred to in paragraph 85 of said complaint, U.S.G., by 1930, was vested with the right to control the minimum prices of gypsum board manufactured by American but only to the extent that the manufacture of such board might be covered by one or more of the patents then owned by U.S.G., the use of which was licensed by the agreement with American referred to in said paragraph 85 and that such price control was to last by the terms of said agreements until a date 17 years after the date of issuance of patents not then issued; and denies that, by virtue of the agreements referred to in paragraph 85 of said complaint or by virtue of any agreements of the character specified in paragraph 86 of said complaint, all companies manufacturing and selling board in the Eastern area, except Texas, were obliged to manufacture a uniform, standardized board, or to manufacture a board falling within the scope of one or more of said patents; and further avers

270 that as to all other allegations of said paragraph 87 of said complaint this defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

88. Avers that, since this defendant acquired the rights of the licensee under said agreement between U.S.G. and American, referred to in paragraph 85 of said complaint, all gypsum board manufactured by this defendant has fallen within the scope of one or more of the patents owned by U.S.G. and which this defendant became licensed under said agreement upon acquiring the rights of American thereunder, to utilize in the manufacture of gypsum boards;

and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of said paragraph.

89. Denies the formation, maintenance, consummation and existence of the combination referred to in paragraph 89 of said complaint, or of any combination of similar character.

90. Admits that, throughout the period from the year 1939 to the date of the filing of said complaint, U.S.G. has determined and fixed the minimum selling prices and terms and conditions of sale of this defendant as its licensee for all gypsum board manufactured by this defendant as its licensee under patents owned by U.S.G. and which this defendant was licensed to utilize under the agreement described in paragraph 85 of said complaint; that throughout said period, this defendant has sold all gypsum board manufactured by it at the prices and on the terms and conditions of sale determined and fixed by U.S.G. as aforesaid; denies (a) that U.S.G. was or at any time became obligated so far as this defendant was concerned to raise and stabilize or to maintain the price of gypsum board under the license agreements referred to in paragraphs 76, 85 and 88 of said complaint, or any agreement or understanding collateral thereto, and (b) that U.S.G. has since 1932 maintained the prices of gypsum board at high, arbitrary and non-competitive levels: and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 90 of said complaint, as applied to the prices at and terms and conditions on which other licensees of U.S.G. have sold gypsum board manufactured by them, and as to all
271 matters alleged in said paragraph 90 not herein expressly admitted, qualified or denied.

91. Admits that from time to time throughout the period from the date this defendant became a licensee in 1939, to the date of the filing of said complaint, U.S.G., has circulated among its licensees numerous bulletins setting forth the minimum selling prices and most favorable terms and conditions of sale for patented gypsum board, and that this defendant has adhered to said prices and terms and conditions of sale in the sale of board manufactured by it under said license agreement, and that certain of said bulletins are set forth as Exhibit 7 in the appendix to said complaint; but this defendant denies that subparagraphs (a) to (u) inclusive of paragraph 91 of said complaint accurately or sufficiently describe the contents of said bulletins; avers that this defendant is without knowl-

edge or information sufficient to form a belief as to the truth of the allegations of paragraph 91 of said complaint with respect to adherence by other licensees of U.S.G. to such prices and terms and conditions of sale; and further avers that adherence to such prices and terms and conditions of sale, either by this defendant or by any one or more of the other licensees of U.S.G., has never been the subject of any agreement, understanding or undertaking, either expressed or implied, between this defendant and any one or more of such other licensees.

92. Admits that since 1939, U.S.G., through its officers, employees, attorneys and a corporation known as the Board Survey Company, has, in the exercise of the rights and privileges reserved to the licensor under the agreement between U.S.G. and American referred to in paragraph 85 of said complaint, which was acquired by this defendant as aforesaid, made periodic examinations of the records of this defendant relating to sales of gypsum board, and that this defendant has, in discharge of its obligation under said agreement so to do, made regular reports to U.S.G. of sales of gypsum board by this defendant; avers that this defendant has at no time endeavored to evade or avoid its obligations under said agreement, and, so far as this defendant is concerned, no occasion has arisen requiring any action on the part of U.S.G. to enforce
272 any of its rights, powers and privileges under said agreement; denies that this defendant has attended numerous meetings between U.S.G. and its licensees at which the prices and terms and conditions of sale prescribed by U.S.G. in said bulletins and at which complaints of violations by licensees of said bulletin prices were discussed; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 92 of said complaint.

93. Denies that this defendant has entered into any agreement, understanding or undertaking, either expressed or implied, or has been a party to any concerted action with U.S.G. and any one or more licensees of U.S.G., relating to the scope of the patents referred to in paragraph 93 of said complaint or relating to the production or refraining from production of open-edge board or other board not falling within the scope of said patents; avers that this defendant has refrained from manufacturing and marketing open-edge board during such part of the period specified in said paragraph 93 as this defendant was engaged in the manufacture of gypsum board for the reason that

closed-edge board costs less to manufacture, primarily because of the elimination of spoilage, and is a more marketable product; and that this defendant has refrained from manufacturing and marketing other board not within the scope of said patents, for the reason that such other board would have constituted an inferior product, or a product not having public acceptance, which could not be marketed in competition with patented board; denies each and all of the allegations of the last sentence of said paragraph 93; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 93 of said complaint.

94. Denies each and all of the allegations of paragraph 94 of said complaint.

95. This defendant admits that since 1939 and up to the date of filing said complaint, this defendant (in compliance with bulletins issued by U.S.G.) has refused
273 to sell patented board to jobbers at less than the minimum dealer prices established by U.S.G., and that this defendant acting individually, and not in concert or pursuant to agreement, has refused to sell plaster and miscellaneous gypsum products to jobbers at less than the prevailing market prices to dealers for said products. This defendant is without knowledge or information with respect to the other matters mentioned in said paragraph 95 of said complaint sufficient to permit it to form a belief as to the truth thereof.

96. Denies each and all of the allegations of paragraph 96 of said complaint; and, without limiting the generality of the foregoing, denies that price control by U.S.G. of gypsum board manufactured by its licensees has been exercised at any time while this defendant has been engaged in the gypsum business or has been a licensee upon gypsum board of the licensees not covered by valid patents involved in the license agreements, and that, from time to time during said period, U.S.G. and its licensees have by concerted action controlled the prices and methods of distribution of plaster and miscellaneous gypsum products sold by U.S.G. and its licensees.

97. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 97 of said complaint.

98. Admits that the first United States patent relating to foam board was issued on October 8, 1935, that the second patent relating to foam board was issued on May 4,

1937, that the third patent relating to foam board was issued on May 11, 1937, that copies of said patents, being United States Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009 are set forth as Exhibits Nos. 8, 9 and 10 in the appendix to said complaint; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 98 of said complaint not herein expressly admitted.

99. Avers that a true and correct copy of said Hite patent is set forth as Exhibit No. 4 in the appendix to said complaint, and that the summary of said patent set forth in paragraph 99 of said complaint is incom-
274 plete and inadequate and as this defendant is presently advised is inaccurate; and further avers that except as above stated this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 99 of said complaint.

100. Avers that a true and correct copy of said Haggerty patent is set forth as Exhibit No. 5 in the appendix to said complaint, and that the summary of said patent set forth in paragraph 100 of said complaint is incomplete and inadequate and as this defendant is presently advised is inaccurate; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 100 of said complaint, except as above stated.

101. Avers that, during the period from 1939 (the date this defendant became a licensee, as aforesaid, under the patents of U.S.G.) to the date of the filing of this complaint, all gypsum board and lath produced by this defendant fell within the scope of some one or more of the claims of the patents of U.S.G. covered by the terms of said license agreement, and denies that during said period none of the licensees of U.S.G. produced board which was covered by the Hite and Haggerty patents; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 101 of said complaint as applied to gypsum board manufactured by U.S.G. and other licensees of U.S.G. As to all of the allegations of said paragraph 101 of said complaint relating to transactions, happenings or events occurring prior to 1939, this defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations.

102. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 102 of said complaint.

103. Denies all of the allegations of paragraph 103 of said complaint, except defendant admits that, acting individually and not as a licensee of U.S.G. and not in concert or pursuant to agreement, this defendant has sold
275 plaster and miscellaneous gypsum products on certain of the terms and conditions employed in the sale of gypsum board; and except that this defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 103 of said complaint in so far as the same apply to sales of plaster and miscellaneous gypsum products by U.S.G. and its other licensees.

104. Denies each and all of the allegations of paragraph 104 of said complaint, except that this defendant admits that gypsum board is frequently transported in mixed cars or trucks with plaster and miscellaneous gypsum products.

105. Admits the allegations of paragraph 105 of said complaint.

106. Denies each and all of the allegations of paragraph 106 of said complaint; and, without limiting the generality of the foregoing, denies that, when prices for plaster and miscellaneous gypsum products from time to time have advanced, this defendant has frequently permitted dealers to purchase said gypsum products at prices prevailing prior to the price advances, that such purchases have been made ostensibly under protected job contracts, but have involved material not actually covered by said contracts, and that this defendant has knowingly permitted dealers to make such purchases at such prices for the purpose of allowing such dealers a competitive concession.

107. Denies each and all of the allegations of paragraph 107 of said complaint.

108. Denies each and all of the allegations of paragraph 108 of said complaint; and, without limiting the generality of the foregoing, denies that, throughout the period from the year 1929 to the date of filing of said complaint, U.S.G. and its licensees have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for sales of board by its licensees to dealers and consumers, as referred to in para-
276 graph 91 of said complaint; and further denies that this defendant has at any time controlled or attempted to control the prices charged by any manufacturing distributor (if any there be) to whom this defendant may have sold gypsum board or other gypsum products.

109. Denies each and all of the allegations of paragraph 109 of said complaint.

110. This defendant denies the allegations of paragraph 110 of said complaint.

111. Denies each and all of the allegations of the first sentence of paragraph 111 of said complaint; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of said paragraph 111 of said complaint.

112. Admits that U.S.G. and certain of its licensees have entered into separate license agreements covering the manufacture and sale of metallized board and perforated lath; but denies that said license agreements were entered into for the purpose of extending and strengthening the right to control minimum prices and terms and conditions of sale of gypsum products vested in U.S.G. under the basic license agreements referred to in paragraphs 85 and 88 of said complaint.

113. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 113 of said complaint.

114. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 114 of said complaint.

115. Admits the allegations of paragraph 115 of said complaint.

116. Admits that the license agreements proposed by U.S.G. referred to in paragraph 115 of said complaint reserved to U.S.G. the right to determine and fix the minimum selling prices for perforated lath manufactured and sold by each of its licensees; but denies that U.S.G. agreed to fix such minimum prices of perforated lath at a differential above the price of straight lath.

277 117. Admits that The American Gypsum Company executed the license agreements offered by U.S.G., referred to in paragraph 115 of said complaint; but denies that this defendant assumed said license agreement of American with U.S.G.; and avers that this defendant is not and has not been a licensee under said perforated lath agreement and further avers that except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 117 of said complaint.

118. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 118.

119. Denies each and all of the allegations of paragraph 119 of said complaint except that it admits that American

was advised by patent counsel that the patent owned by U.S.G. covering perforated lath was of doubtful validity at least as to certain claims of said patent; and avers it is without knowledge or information sufficient to form a belief as to the allegations of said paragraph in so far as they relate to the other matters therein alleged; but avers that U.S.G., by virtue of the provisions of the basic license agreement referred to in paragraph 85 of said complaint, was authorized to determine and fix the minimum prices and terms and conditions of sale for perforated lath manufactured and sold by this defendant inasmuch as such board embodied other patented features within the scope of U.S.G. patents covered by said basic license agreement.

120. Admits that the validity of the patent referred to in paragraph 120 of said complaint has not been presented to or determined by any court of the United States, and that none of the licensees of U.S.G. has contested the validity of said patent and avers that the perforated lath manufactured by this defendant is different from that manufactured and sold by U.S.G. and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph.

278 121. Denies each and all of the allegations of paragraph 121 of said complaint.

122. Denies the existence, operation and formation of the combination referred to in paragraph 122 of said complaint; denies that the prices referred to in said paragraph 122 are or have been non-competitive; admits that the prices of gypsum board during the period subsequent to the execution of the license agreements referred to in paragraph 85 of said complaint have been higher than those prevailing prior to the execution of said agreements; avers that, since the execution of said license agreements the minimum selling prices for gypsum board manufactured pursuant to said license agreements have been prescribed by U.S.G., in the exercise of the right and privilege so to do reserved to it as licensor under said agreements, that this defendant has no knowledge or information sufficient to form a belief as to the basis on which such prices have been from time to time established by U.S.G. and is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 122 to the effect that said prices have failed to reflect substantial reductions in the manufacturing costs of U.S.G.; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 122 of said complaint to

the effect that each of the defendant companies has realized substantial profits in the manufacture and sale of gypsum board; and further avers that such profits, if any, as this defendant has from time to time realized as a result of the manufacture and sale of gypsum board have not been unreasonable or disproportionate to the cost of the investment by this defendant in the assets employed by it in its gypsum business.

123. Denies each and all of the allegations of paragraph 123 of said complaint, except that this defendant admits that this defendant, acting individually and not in concert or agreement, now distributes plaster and miscellaneous gypsum products on certain of the same terms and conditions of sale utilized by this defendant in the sale of its gypsum board.

279 Further answering the allegations of said complaint, as to all of such allegations with respect to which this defendant in the foregoing numbered paragraphs of this Part I has averred that it is without knowledge or information sufficient to form a belief as to the truth of such allegations, this defendant demands that the plaintiff make strict proof thereof; and as to all other allegations of said complaint except such as are hereinbefore specifically admitted, this defendant denies each and all of such allegations, irrespective of whether the same have been heretofore specifically denied.

This defendant denies that it is or has been a party to any contract, agreement or understanding or to any combination or conspiracy in restraint of trade in violation of the provisions of Sections 1, 2 or 3 of the Sherman Antitrust Act, or in violation of any other provision of the Antitrust Laws of the United States, and, therefore, prays that the relief prayed for in the complaint be denied and further prays judgment that the complaint be dismissed with costs to this defendant.

280 [Omitted.]

281 [Omitted.]

282 Walter G. Moyle,
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and Bror G. Dahlberg.

ANDREW J. DALLSTREAM,
NORMAN WAITE,
Of Counsel,
231 South La Salle Street, Chicago, Illinois,
Dated July 31, 1941.

Service of copies of the Answers of Defendants, The Celotex Corporation and Bror G. Dahlberg, is hereby acknowledged this 31st day of July, 1941.

GEO. B. HADDOCK,
Attorney for Plaintiff.

283 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Answer of defendants National Gypsum Company and Melvin H. Baker

Filed Aug. 1, 1941

284 Now comes National Gypsum Company and Melvin H. Baker, hereinafter sometimes referred to as "these defendants," and for answer to the complaint herein as amended, admit, deny and allege as hereinafter set forth. For brevity and convenience in reference they adopt for purposes of this Answer the short names of the co-defendants in this cause as used by the Plaintiff in the Complaint.

1. Admit that the complaint was filed and the proceedings instituted under Section 4 of the "Sherman Antitrust Act," but deny any violation or attempted violation, in any manner whatsoever, of Sections 1, 2 and 3 of said Act or either or any of them.

2. Deny each and every allegation contained in paragraph 2 of the complaint, insofar as they relate to the defendant National, except that they allege that National is engaged in a continuous course of selling and delivering gypsum products, including gypsum board and plaster, to dealers within the District of Columbia, and is engaged in soliciting through salesmen orders for gypsum products from dealers within the District of Columbia and in promoting the sale of gypsum products in the District of Columbia by advertising and by distributing price lists, bulletins and circulars among dealers within said District.

These defendants further allege that they are without knowledge or information sufficient to form a
285 belief as to the truth of the allegations contained in said paragraph 2, insofar as they relate to the defendant companies other than National.

3. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint.

4. Deny each and every allegation contained in paragraph 4 of the complaint and further deny that these defendants, or either of them, ever entered into, or in any manner became a party to, any agreement, combination, conspiracy or monopoly, of any kind whatsoever, in violation of the Antitrust laws or any other laws of the United States, whether in the District of Columbia or elsewhere and that they have performed acts in furtherance of any combination, conspiracy or monopoly within the District of Columbia or elsewhere.

5. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the complaint.

6. Admit the allegations contained in paragraph 6 of the complaint.

7. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 7, 8, 9, 10 and 11 of the complaint.

8. Adopt the designation "defendant companies" set forth in paragraph 12 for the companies described in paragraphs 5 to 11, inclusive, of the complaint.

9. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 13 and 14 of the complaint.

10. Admit the allegations contained in paragraph 15 of the complaint.

11. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 16, 17, 18 and 19 of the complaint.

12. Deny each and every allegation contained in paragraph 20 of the complaint, as amended, insofar as the defendant, National, is concerned, except that they admit that the defendant, National, is engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at plants located throughout the United
286 States and allege that said defendant sells said products to dealers within the States east of the Rocky Mountains and in commerce between the States and the District of Columbia to dealers within the District of Columbia. These defendants further allege that they are without knowledge or information sufficient to form a belief

as to the truth of the allegations contained in said paragraph relating to the defendant companies other than National, and to the percentage of gypsum board and gypsum plaster sold in the Eastern area and adopt the definition of "Eastern area" set forth in said paragraph 20.

13. Admit the allegations contained in paragraph 21 of the complaint, but allege that such allegations are incomplete, inadequate, and too general.

14. Admit the allegations contained in the first and second sentences of paragraph 22 of the complaint and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third sentence of said paragraph.

15. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 23, 24 and 25 of the complaint.

16. Deny the allegations contained in paragraph 26 of the complaint, except that these defendants allege that all gypsum board consists of a flat, thin core, which is a mixture of gypsum and certain other ingredients, covered on both sides with heavy paper, known as liners.

17. Admit the allegations contained in paragraph 27 of the complaint.

18. Admit the allegations contained in the first two sentences of paragraph 28, except that they allege that the manufacture of plaster is inaccurately described and that it is simple and inexpensive only in contrast to the more complicated and expensive manufacture of gypsum board. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third sentence of said paragraph.

19. Admit the allegations contained in paragraph 29 of the complaint, except that they allege that the description of the manufacture of gypsum board contained therein is inaccurate and inadequate. These defendants further allege that the defendant, National, at no time used sawdust as an aggregate, but at all times in addition to patents licensed from U. S. G. used a patented process of its own not used by other manufacturers, which enabled said defendant, National, to lay claim to the production of
287 a gypsum board which was lighter and stronger than competitive gypsum board.

20. Adopt the definitions set forth in paragraph 30 of the complaint.

21. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 31 and 32 of the complaint, as amended, except that they admit that U. S. G. has expanded into fields of other allied building materials.

22. Admit the allegations contained in paragraphs 33 and 34 of the complaint, as amended. These defendants further allege that of the ten gypsum plants which the defendant, National, operates in the Eastern area, eight produce gypsum board.

23. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs 35, 36, 37 and 38 of the complaint, as amended.

24. Deny the allegations contained in paragraph 39 of the complaint insofar as they relate to the defendant, National. Allege that a substantial part of the gypsum board and plaster manufactured by said defendant is sold in intrastate commerce; that National, from the inception of its business in 1925, adopted a policy of selling gypsum board only to the retail lumber dealers and that consequently at all times it has refrained from selling directly to contractors. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph insofar as they relate to persons, firms or corporations other than National.

25. Admit the allegations contained in paragraph 40 of the complaint, insofar as they relate to the defendant, National, except that they allege that the defendant, National, has only one warehouse for gypsum products in the Eastern area and further allege that said defendant makes frequent straight carload or truckload shipments of board. These defendants further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, insofar as they relate to defendant companies other than National.

26. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 41 of the complaint except that they allege that since 1936 the defendant, National, has sold gypsum products to retail dealers within all of the States embraced within the Eastern area.

288 27. Deny each and every allegation of paragraph 42 of the complaint, insofar as they relate to the defendant, National, except that they allege that National

has made infrequent sales of gypsum board at a discount to manufacturing distributors, which sales in any year have amounted to less than 1% of its total board sales for such year. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, insofar as they relate to persons, firms or corporations other than National.

28. Deny each and every allegation contained in paragraph 43 of the complaint, insofar as they refer to the defendant, National, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, insofar as they refer to defendant companies other than National, to resales of board made by jobbers, or to the business of said jobbers.

29. Deny each and every allegation contained in paragraphs 44, 45 and 46 of the complaint.

30. Deny each and every allegation contained in paragraph 47 of the complaint and allege that these defendants have never entered into any combination in violation of the Antitrust acts, either at the time set forth in said paragraph 47 or at any other time.

31. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 48, 49, 50, 51, 52 and 53 of the complaint.

32. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 54 of the complaint concerning settlement of the patent litigation referred to therein and deny each and every other allegation contained therein.

33. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 55, 56, 57, 58 and 59 of the complaint.

34. Deny each and every allegation contained in paragraph 60 of the complaint.

35. Deny each and every allegation contained in paragraph 61 of the complaint, insofar as they are intended to refer to the defendant, National. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 61 of the complaint, insofar as they relate to companies other than National.

289 36. Deny each and every allegation contained in paragraph 62 of the complaint, insofar as they refer to the defendant, National. Further answering the alle-

gations of paragraph 62 of the complaint, allege that they are without knowledge or information sufficient to form a belief as to the truth thereof, insofar as they refer to companies other than National.

37. Deny each and every allegation of paragraph 63 of the complaint, insofar as they are intended to refer to the defendant, National, and allege that they are without knowledge or information sufficient to form a belief as to the truth of said allegations, insofar as they refer to companies other than National.

38. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 64 of the complaint, except that they admit that under date of September 17, 1926, a license agreement was entered into between U. S. G. and Universal, which agreement was substantially in the form of the Beaver agreement, set forth as Exhibit No. 2 of the complaint.

39. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 65 of the complaint, except that they admit that on March 5, 1927, a license agreement was entered into between U. S. G. and Atlantic, which agreement was substantially the same as the Beaver agreement, set forth as Exhibit No. 2 of the complaint, and the Universal agreement, except that the Atlantic agreement contained no provision for damages.

40. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 66 of the complaint.

41. Deny each and every allegation contained in paragraph 67 of the complaint, except that they allege that the period referred to in said complaint was marked by severe competition in the board industry, which resulted in decreasing the selling price of board, and except that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, insofar as they relate to companies other than National.

42. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 68 of the complaint.

43. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 69 of the complaint except they further allege that the defendant, National,
290 from the time it commenced production of gypsum board, was manufacturing semi-open edge board and

that for a time it was marketing a second grade board to compete with second grade board manufactured by other manufacturers.

44. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 70, 71 and 72 of the complaint.

45. Deny each and every allegation contained in paragraph 73 of the complaint, insofar as they refer to the defendant, National, and allege that defendant, National, reduced its prices from time to time during the year 1928 in order to meet competitive prices of other gypsum board which was being sold in the market and that by the year 1929 its prices for gypsum board were substantially below 1927 levels. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 73 of the complaint, insofar as they relate to manufacturers other than National.

46. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 74 of the complaint.

47. Deny each and every allegation contained in paragraph 75 of the complaint, insofar as they relate to the defendant, National, except that they admit that the expiration late of the Utzman Patent was August, 1929. These defendants further allege that during the year 1929 prior to the execution by National of its license agreement, representatives of National and U. S. G. from time to time discussed terms of settlement of patent infringement suits brought by U. S. G. against National and then pending in the United States District Court for the Western District of New York; that National negotiated all terms and conditions of its settlement and its license agreement solely with the representatives and attorneys of U. S. G. and that it at no time consulted with or had any agreements with any of the other defendant companies or their representatives other than U. S. G. regarding the terms, conditions or scope of its license agreement or the settlement of its infringement suits. Further allege that National did not rely upon or receive any inducements or favors from Avery or U. S. G. and that it made no agreements with any gypsum manufacturer other than U. S. G. to become a licensee. Further allege that market conditions as evidenced by the demands of its dealers and of the consuming public required a closed edge board, that its investigation had in-

dicated to it that it could effect a substantial saving in manufacturing cost by the use of U. S. G. patents to manufacture closed edge board, and that the so-called
291 "bundling patents" included in the license agreement permitted the most efficient and economical method of bundling board which has as yet been developed. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 75 of the complaint, insofar as they relate to companies other than National.

48. Deny each and every allegation contained in paragraph 76 of the complaint and allege that on May 16, 1929, after prior conferences with representatives of U. S. G. concerning the form, terms and conditions of the agreement, the defendant, National, entered into a license agreement with U. S. G. substantially in the form of the Ebsary agreement attached as Exhibit No. 3 to the complaint, except that the agreement between U. S. G. and National contained provisions for the settlement of the claims of U. S. G. against National for damages on account of the infringement of certain of the U. S. G. patents pursuant to which National was required to pay to U. S. G. in the manner provided in said license agreement the aggregate approximate sum of $180,000.

49. Deny each and every allegation contained in paragraph 77 of the complaint.

50. Admit the allegations contained in the first sentence of paragraph 78 of the complaint. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence of said paragraph except that they admit that the foam process was covered by pending applications for United States patents. Deny each and every allegation contained in the third sentence of said paragraph and specifically deny that any such agreement or understanding existed. Further allege that the foam patents afforded a substantial improvement in the quality and a reduction in the cost of manufacturing gypsum board.

51. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 79 of the complaint, except they admit that in a general way the description of the foam process is correct.

52. Admit the allegations contained in paragraph 80 of the complaint, except that they allege that the summaries of the Hite and Haggerty patents are incomplete and inaccurate.

53. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 81 of the complaint.

54. Deny each and every allegation contained in paragraph 82 of the complaint, insofar as they relate
292 to the defendant, National, and allege that they are without knowledge or information sufficient to form a belief as to the truth thereof, insofar as such allegations relate to companies other than National.

55. Deny each and every allegation contained in paragraph 83 of the complaint, insofar as they relate to the defendant, National. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 83 of the complaint, insofar as they relate to companies other than National.

56. Deny each and every allegation contained in paragraph 84 of the complaint, except that they allege that U. S. G. acquired the Hite and Haggerty patents subject to the rights of the defendant, National, and that National, entered into a new license agreement with U. S. G. Further allege that the Hite and Haggerty patents were essential to National in the manufacture of gypsum board and that without them it was impossible to secure satisfactory adhesion of paper to board in quantity production. That in addition to the superior product which resulted, the use of the Hite and Haggerty patents produced a substantial saving in manufacturing cost.

Further allege that National had been a defendant in a law suit brought by Universal, alleging infringement of the Haggerty patent then owned by Universal, which was in receivership, and that the United States District Court for the Western District of New York, on plaintiff's motion for a preliminary injunction in said suit, had restrained the defendant, National, from continuing the manufacture of board, except on condition that National post a bond in the sum of $50,000 and make monthly reports of sales to said Court, which National did in order to continue its business. That on the advice of patent counsel National's operation constituted infringement of both the Hite and Haggerty patents. That National, from the time of its organization, had used every means available to avoid infringement of the Haggerty patent and after having tried many substitutes for starch, was unable to manufacture a satisfactory board without the use of starch or some other ingredient covered by the said patent. That said suit was settled and adjusted on

or about August 2, 1929, by an agreement providing that Universal would license National to manufacture its products under the Hite and Haggerty patents and that U. S. G. subsequently purchased said Hite and Haggerty patents subject to the right of National to use the same in the manufacture of its products. That thereafter National, by and with the consent and approval of the United States District Court for the Northern District of Illinois, Eastern Division, of the United States District Court for the Western District of New York, and of other district courts wherein receivership proceedings were pending against Universal, entered into an agreement with Uni-
293 versal, dated November 5, 1929, whereby National finally settled the aforesaid law suit with Universal by the payment of the sum of $87,500 in cash with the further agreement to pay an amount equivalent to one-half per cent of National's selling price of all board from the date of said agreement until the 8th day of July, 1941.

57. Deny each and every allegation contained in paragraph 85 of the complaint and allege that on October 17, 1929, National entered into a new license agreement with U. S. G. which cancelled and terminated the agreement dated May 16, 1929, previously in effect. Further allege that said new license agreement did not take effect until U. S. G. received a conveyance of the Hite and Haggerty patents, which conveyance was subject to the approval of the United States District Court for the Northern District of Illinois, Eastern Division, and other district courts wherein receivership proceedings were pending against Universal, and which approval was subsequently obtained. Further allege that the license agreement of the defendant, National, was substantially the same as the Ebsary agreement, Exhibit No. 6 attached to the complaint, except that National's agreement set forth U. S. G.'s claims for damages by reason of the infringement hereinabove referred to, which claims had been liquidated at $178,213.06, and provided for the payment thereof by an additional royalty amounting to one and one-half per cent of National's selling price of board, until such royalty payments aggregated the sum of $173,644.95, which sum still remained unpaid under said settlement.

58. Deny each and every allegation contained in paragraph 86 of the complaint insofar as they relate to the defendant, National, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph insofar as they relate to companies other than National.

59. Deny each and every allegation contained in paragraph 87 of the complaint, and allege that sales of gypsum board by the defendant, National, in the Eastern area amounted to approximately $1,500,000 in 1929. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph relating to sales by other defendants, and that under the license agreement between U. S. G. and National, U. S. G. had the right to prescribe the licensee's minimum selling prices for all board manufactured by the licensee under the patents described in said agreement for the period also described therein.

60. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 88 of the complaint,
294 except that they admit that the license agreement of the defendant, National, has been in effect continuously since the year 1929 and is now in effect.

61. Deny each and every allegation contained in paragraph 89 of the complaint.

62. Deny each and every allegation contained in paragraph 90 of the complaint, except that they admit that U. S. G. during the period referred to has fixed the minimum selling prices of each licensee for patented board manufactured and sold by such licensee and that the defendant, National, has observed said minimum prices in its sales of patented board manufactured by it under its said licenses, and further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations referring to sales by defendant companies other than National.

63. Admit that U. S. G. has circulated bulletins from time to time during the period referred to in paragraph 91 of the complaint, setting forth minimum prices and other terms and conditions to which the defendant, National, has adhered in its sale of patented gypsum board manufactured by it under its said license agreement with U. S. G. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations relating to adherence to such prices and terms by other licensees. Admit that Exhibit No. 7 of the complaint sets forth copies of forms of such bulletins but deny that the complaint accurately describes such bulletins. Except as hereinbefore specifically admitted or denied, these defendants deny each and every allegation contained in said paragraph.

64. Admit the allegations contained in the first and second sentences of paragraph 92 of the complaint and deny each and every other allegation contained in said paragraph, except that they allege that the defendant, National, has occasionally filed complaints of alleged violations by other licensees and has occasionally been the subject of similar complaints filed by other licensees. Further allege that meetings of U. S. G. and its licensees have been held infrequently at which matters of common interest relating to the license agreement and the bulletins have been discussed.

65. Deny each and every allegation contained in paragraph 93 of the complaint.

66. Deny each and every allegation contained in paragraph 94 of the complaint.

67. Deny each and every allegation contained in paragraph 95 of the complaint.

68. Deny each and every allegation contained in paragraphs 96 and 97 of the complaint.

295 69. Admit the allegations contained in the first and second sentences of paragraph 98 of the complaint. Deny each and every allegation contained in the third and fourth sentences of paragraph 98 of the complaint, insofar as they relate to the defendant, National, except that they admit that during the period referred to in said paragraph, U. S. G. fixed minimum prices for patented board embodying the claims of the Hite and Haggerty patents. Allege that from the time National commenced production in 1926 up to the time of filing the complaint it manufactured board falling within the scope of the Hite and Haggerty patents. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third and fourth sentences of paragraph 98 of the complaint, insofar as they relate to companies other than National.

70. Deny each and every allegation contained in paragraph 99 of the complaint, insofar as they relate to the defendant, National, and allege that the first sentence of said paragraph sets forth an inadequate and inaccurate summary of the Hite patent and further allege that during the period referred to in said paragraph National manufactured board falling within the scope of the Hite patent. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 99 of the complaint, insofar as they refer to licensees other than National.

71. Deny each and every allegation contained in paragraph 100 of the complaint, insofar as they relate to the defendant, National, and allege that the first sentence of said paragraph sets forth an inadequate and inaccurate summary of the Haggerty patent. Further allege that from the time National commenced production in 1926 up to the time of filing the complaint National used starch and other adhesives in the manufacture of board which were within the scope of the Haggerty patent. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 100 of the complaint, insofar as they relate to licensees other than National.

72. Deny each and every allegation contained in paragraph 101 of the complaint, insofar as they relate to the defendant, National, and allege that during the period referred to in said paragraph National manufactured board covered by the foam patents and further allege that during all of said period the board produced by National was covered by the Hite and Haggerty patents. Further allege that they are without knowledge or information sufficient to form a belief as to the allegations contained in said paragraph, insofar as they relate to licensees other than National.

296 73. Deny the allegations contained in the third sentence of paragraph 102 of the complaint. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first, second and fourth sentences of said paragraph.

74. Deny each and every allegation contained in paragraph 103 of the complaint.

75. Deny each and every allegation contained in paragraph 104 of the complaint, except that they admit that gypsum board is frequently transported in mixed cars or trucks with other gypsum products.

76. Admit the allegations contained in paragraph 105 of the complaint.

77. Deny each and every allegation contained in paragraph 106 of the complaint, insofar as they relate to the defendant, National, and allege that National has permitted sales to dealers at prices prevailing prior to price advances only to the extent of material required for a specific job covered by a bona fide specific job contract. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained

in said paragraph of the complaint, insofar as they relate to manufacturers other than National.

78. Deny each and every allegation contained in paragraph 107 of the complaint.

79. Deny each and every allegation contained in paragraphs 108, 109, 110 and 111 of the complaint, except that they allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentence of paragraph 111 of the complaint.

80. Deny each and every allegation contained in paragraph 112 of the complaint, insofar as they relate to the defendant, National, and allege that they are without knowledge or information sufficient to form a belief as to the truth of such allegations, insofar as they relate to licensees other than National.

81. Deny each and every allegation contained in paragraph 113 of the complaint insofar as they relate to the defendant, National, and allege that in 1934 U. S. G. offered to National a metallized board license and that on October 5, 1934, National entered into such a license with U. S. G. substantially in the form of the Ebsary agreement, Exhibit No. 11 attached to the complaint. Further allege that a license under said patents afforded a means to manufacture a low cost insulation board and thereby in-
297 crease the market for gypsum board and that National had previously carried on extensive research on such methods of insulation and that none were as satisfactory as that provided by the metallized board patents covered by said license. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph insofar as they relate to licensees other than National.

82. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 114 of the complaint, except that they allege that at the time National executed the metallized board license it intended to manufacture patented metallized board and did manufacture such board and that from the time of the execution of such agreement to the time of filing the complaint U. S. G. has fixed National's minimum prices for the sale of such patented metallized board manufactured by it pursuant to said license agreement.

83. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 115 of the complaint, ex-

cept that they admit that in 1936 U. S. G. offered National a license to manufacture and sell perforated gypsum lath.

84. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 116, 117, 118, 119 and 120 of the complaint.

85. Deny each and every allegation contained in paragraphs 121, 122 and 123 of the complaint.

Wherefore, the defendants, National Gypsum Company and Melvin H. Baker, pray that the complaint be dismissed as to them at plaintiff's cost.

Dated: July 30, 1941.

Frederick A. Ballard,
FREDERICK A. BALLARD,
American Security Bldg., Washington, D. C.,
Attorney for the defendants, National Gypsum Company and Melvin H. Baker.

Elmer E. Finck,
ELMER E. FINCK,
804 Liberty Bank Bldg., Buffalo, N. Y.
Counsel.

Received a copy of the foregoing answer this 1st day of August, 1941.

GEO. B. HADDOCK,
Special Assistant to the Attorney General.

298 In the District Court of the United States
for the District of Columbia

[Title omitted.)]
[File endorsement omitted.]

Answers of Defendants Certain-teed Products Corporation and Henry J. Hartley

Filed August 1, 1941

299 Now come the defendants, Certain-teed Products Corporation and Henry J. Hartley, and, for answer to the complaint filed herein and the amendment to said complaint filed herein on June 5, 1941, severally admit, deny and aver, and otherwise make answer unto said complaint, as so amended, as hereinafter set forth.

PART I

Answer of Defendant Certain-teed Products Corporation

For answer to said complaint, as amended, as aforesaid, with each of the numbered paragraphs of this
300 Part I being in answer to the paragraph of said complaint bearing the same number, the defendant Certain-teed Products Corporation (hereinafter in this

Part I sometimes referred to as "this defendant") admits, denies and avers as follows:

1. Admits that the complaint is filed and that these proceedings are instituted against the several defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," said act being commonly known as the "Sherman Antitrust Act," but denies (a) that this defendant, either alone or in conjunction with one or more of the other defendants to this action or any other person or persons, firm or firms, corporation or corporations, whatsoever, has heretofore engaged or is now engaged in any action or course of action prohibited or declared illegal by Section 1, Section 2 or Section 3 of said Sherman Antitrust Act, or by any other provision of said Act, and (b) that the plaintiff is entitled, under Section 4 of said Sherman Antitrust Act, to the relief prayed for in said complaint.

2. Admits that this defendant transacts business in the District of Columbia, that it is engaged in a continuous course of business in selling and delivering gypsum products, including gypsum board and plaster, to dealers within the District of Columbia, that it is engaged in soliciting through salesmen orders for gypsum products from dealers within the District of Columbia and in promoting the sale of said gypsum products in the District of Columbia by advertising in the District of Columbia and by distributing price lists, bulletins and circulars among dealers within the District of Columbia; denies that this defendant
301 is engaged in selling and delivering gypsum products to consumers within the District of Columbia or in soliciting orders for gypsum products from consumers within the District of Columbia or in promoting the sale of gypsum products in the District of Columbia by distributing price lists, bulletins and circulars among consumers within the District of Columbia; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of said complaint in so far as the same refer to the other defendant companies.

3. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3 of said complaint.

4. Denies (a) that this defendant is or has been a party to any unlawful combination, conspiracy or monopoly of the kind and character referred to in paragraph 4 of said complaint, (b) the formation, maintenance, operation and

existence of the specific combination, conspiracy and monopoly referred to in said paragraph 4, and (c) that this defendant has performed any acts, either within or without the District of Columbia, in furtherance of any such combination, conspiracy or monopoly.

5. Admits the allegations of paragraph 5 of said complaint and adopts the use of the phrase "U.S.G." therein set forth.

6. Admits the allegations of paragraph 6 of said complaint and adopts the use of the word "National" therein set forth.

7. Admits the allegations of paragraph .7 of the said complaint.

302 8. Admits the allegations of paragraph 8 of said complaint and adopts the use of the word "Celotex" therein set forth.

9. Admits the allegations of paragraph 9 of said complaint and adopts the use of the word "Ebsary" therein set forth.

10. Admits the allegations of paragraph 10 of said complaint and adopts the use of the word "Newark" therein set forth.

11. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 of said complaint, but this defendant adopts the use of the word "Texas" as therein set forth.

12. Adopts the definition of the term "defendant companies" set forth in paragraph 12 of said complaint.

13. Admits the allegations of paragraph 13 of said complaint.

14. Admits the allegations of paragraph 14 of said complaint.

15. Admits the allegations of paragraph 15 of said complaint.

16. Admits that Bror Dahlberg, whose middle initial is "G" (not "H" as set forth in said complaint) is President of Celotex and Chairman of the Board of Directors of this defendant, and that his business address is 919 North Michigan Avenue, Chicago, Illinois.

17. Admits the allegations of paragraph 17 of said complaint.

303 18. Admits the allegations of paragraph 18 of said complaint.

19. Admits the allegations of paragraph 19 of said complaint.

20. Adopts the definition of the term "Eastern area" set forth in paragraph 20 of said complaint, as amended, as aforesaid; admits that each of the defendant companies is engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at one or more plants located throughout the United States, that each of the defendant companies sells a portion of the gypsum products so manufactured in interstate commerce in some or all of the States comprised within the Eastern area, that each of the defendant companies, with the exception of Texas, sells a portion of such gypsum products in commerce between the States and the District of Columbia to retail dealers in building products within the District of Columbia, and that the defendant companies manufacture and sell approximately 100% of all gypsum board, but this defendant is without knowledge or information sufficient to form a belief as to whether said defendant companies manufacture and sell approximately 80% of all gypsum plaster currently manufactured and sold in the Eastern area; avers that this defendant owns and operates plants for the manufacture of gypsum products located at Akron, New York, Grand Rapids, Michigan, Fort Dodge, Iowa, Blue Rapids, Kansas, and Acme, Texas, that the sales of gypsum products made by this defendant in the Eastern area are comprised of sales to retail dealers in building materials and sales to certain of the other defendant
304 companies, and that this defendant does not sell gypsum products to consumers within the Eastern area; assuming the term "distributors", as used in paragraph 20 of said complaint is intended to describe the various small manufacturers of calcined gypsum and plaster referred to in paragraph 42 of said complaint and specifically named in subdivision II of the Bill of Particulars heretofore filed by the plaintiff in these proceedings, further avers that the last sale of gypsum products made by this defendant to any of said distributors was consummated during the year 1939; and avers that this defendant has no knowledge or information sufficient to form a belief as to whether the other defendant companies sell gypsum products to consumers or to manufacturing distributors within said Eastern area.

21. Admits the allegations of paragraph 21 of said complaint with respect to the description of gypsum, except that said description is not complete; and avers that no commercial deposits of gypsum rock are 100% pure gypsum, but that the mineral, as mined, is mixed with varying amounts of limestone, sand, shale, anhydrite, and some-

times minute quantities of rock salt and organic matter, and that the production of calcined gypsum or stucco employed in the manufacture of gypsum products used in the building construction industry, including gypsum board and gypsum plaster, requires the utilization of certain processes in addition to crushing and heating, such as grading and sorting, the removal of impurities, and the addition, during the heating process, of various substances for the purpose of controlling the setting time and other characteristics of the resulting product.

22. Adopting the definition of the term "gypsum board" set forth in paragraph 30 of said complaint,
305 admits the allegations of the first two sentences of paragraph 22; but avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the last sentence of said paragraph 22.

23. Admits the allegations of paragraph 23 of said complaint.

24. Admits the allegations of the first four sentences of paragraph 24 of said complaint; but avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the last two sentences of said paragraph 24.

25. Admits that several years after the first commercial manufacture of plasterboard, a gypsum board, known as "wallboard" and designed to be used as a finished panel in place of plaster and lath in wall and ceiling structures, was introduced on the market, that gypsum wallboard is now one of the most important of various boards on the market which are used as substitutes for plaster and lath; but avers that this defendant is without knowledge or information sufficient to form a belief as to whether the sales value of gypsum wallboard manufactured by the defendant companies and sold in the United States in 1939 was approximately $8,500,000, or whether approximately 90% of such gypsum wallboard was sold in the Eastern area, or as to the extent of the use by the United States Government of gypsum wallboard during the World War of 1914-18 in temporary structures such as barracks; and denies that such use by the Government of the United States has operated greatly to stimulate the production of gypsum wallboard.

306 26. Admits the allegations of paragraph 26 of said complaint, except that the description of the products therein contained is neither accurate nor complete.

27. Admits the allegations of paragraph 27 of said complaint; and avers that the use of perforated lath of the type and character manufactured and sold by this defendant since about the year 1936 operates to increase the fire resisting quality of the wall or ceiling structure in which such perforated lath is used.

28. Admits that the manufacture of plaster from calcined gypsum involves the addition of various substances in varying amounts for the purpose of retarding or accelerating the setting time of the finished product and the addition of hair or fiber in varying amounts for the purpose of increasing the strength of the finished product, that the manufacture of gypsum board from calcined gypsum is a more complicated operation than the manufacture of gypsum plaster, that the manufacture of gypsum board requires expensive equipment and machinery, that substantially all gypsum calcining plants are equipped to manufacture gypsum plaster, and that gypsum calcining plants are not always equipped to manufacture gypsum board; denies that the manufacture of plaster from calcined gypsum involves a relatively simple operation; and avers that each of the gypsum plants of this defendant is equipped to produce and is producing gypsum plaster of many kinds, grades and qualities and possessing varying characteristics, dependent on the place at and the purpose for which the same is to be used and other considerations and that such manufacture involves a high degree of control of conditions of manufacture, conformity to specifications
307 and other factors, requiring a highly trained and skilled supervising and engineering personnel.

29. Admits that, in the manufacture of gypsum board, calcined gypsum is first mixed with water to form a thick plastic mass known as a slurry, that an adhesive to increase the bond between the core and the liners is mixed, either with the dry calcined gypsum or with the slurry, that to the slurry is added a so-called aggregate to lighten the weight of the finished board, that, until 1929, the most commonly used aggregate was sawdust, that, since 1929, the aggregate employed by this defendant has been composed in part of soap foam, which causes the formation of numerous minute voids in the board, and that, after the addition of the aggregate to the slurry, the mixture is spread upon the lower liner and the upper liner is placed upon the top of the mixture; but defendant avers, however, that the description of said process contained in paragraph 29 of said complaint is inadequate in failing to set forth certain important aspects of said process such as, for example, (i)

the so-called aggregate presently used consists in part of sawdust, which is used to assist in decreasing the weight of the board and to impart thereto certain other desired characteristics, (ii) an accelerator, consisting of pulverized gypsum rock, potassium sulphate, zinc sulphate or other chemical is added to the dry calcined gypsum or to the slurry for the purpose of accelerating the setting and drying of the finished product and (iii) the setting and drying of the finished wallboard is completed after the same has been cut into proper lengths and is mechanically aided by the use of expensive drying equipment in which the temperature is carefully controlled at all stages;
308 further avers that the foam which is added to the slurry in the manufacture of gypsum board by this defendant consists of a mixture of resin soap and casein solutions, that the addition of such foam produces microscopic air voids throughout the gypsum core, that, after the foam is added to the slurry, the casein reacts with the gypsum, forming insoluble gypsum caseinate which reinforces the void structure of the gypsum core, and that this foam is added to the slurry for the following reasons: (a) to increase thermal insulation, (b) to increase nailing properties, (c) to reduce the brittleness of the core, (d) to increase flexibility and (e) to lighten the weight of the board; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 29, insofar as the same purport to constitute a description of the process or processes employed by the other defendant companies in the manufacture of gypsum board.

30. Adopts the definition of the terms, "plaster," "lath," "plasterboard," "wallboard," "gypsum board" and "board" set forth in paragraph 30 of said complaint.

31. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31 of said complaint.

32. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32 of said complaint, except that this defendant admits that since 1925 U.S.G. has expanded into fields of other allied building materials
309 and is now an important manufacturer of some of the materials enumerated in said paragraph 32.

33. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33 of said complaint, as amended, except that this defendant admits that National

is the second largest producer of gypsum products in the United States.

34. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 34 of said complaint, except that this defendant admits that National has expanded into fields of other allied building materials and is now engaged in the production of some of the products enumerated in said paragraph 34.

35. Admits that this defendant is the third largest producer of gypsum products in the United States, that in 1939, this defendant produced approximately 11% of all gypsum board and approximately 10% of all plaster manufactured and sold in the Eastern area, that sales of gypsum board by this defendant in the Eastern area during the year 1939 amounted to approximately $2,100,000, that this defendant did not enter the gypsum industry until 1923 after it had become well established as an important producer of roofing materials, paints and varnishes and composition flooring, that, in 1923, this defendant entered the plaster business through the acquisition of six gypsum plants from Acme Cement Plaster Company, that this defendant did not commence the manufacture of gypsum board until 1926, that the manufacture of gypsum board by this defendant during the year 1926 was confined
310 to a single plant, that in 1928, this defendant acquired the assets of The Beaver Board Companies, a Delaware corporation, and The Beaver Products Company, Inc., a New York corporation, that, in the year 1928, said The Beaver Products Company, Inc. had been for many years an important producer of fiber wallboard, that said The Beaver Products Company, Inc. entered the gypsum industry in 1920 through the purchase of the six gypsum plants of American Cement Plaster Company, at four of which plants gypsum board was produced, and the single gypsum plant of Bestwall Manufacturing Company, which plant was also equipped to manufacture gypsum board, and that this defendant now operates five gypsum plants, at four of which gypsum board is produced; denies that, in 1923, or prior thereto, this defendant was an important producer of paper; and avers that this defendant is not presently engaged in the manufacture of paints and varnishes, that it has heretofore disposed of its composition flooring business to Sloane-Blabon Corporation, a Delaware corporation and a partially owned subsidiary of this defendant, and that this defendant is not now engaged in the manufacture of paper, except to the extent that it may be

deemed to be so engaged as a result of its indirect ownership of the capital stock of The Beaver Wood Fibre Company, Limited, an Ontario corporation.

36. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 36 of said complaint, as amended, as aforesaid, except that this defendant admits that Celotex, Ebsary and Texas are single plant operators.

311 37. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 37 of said complaint.

38. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 38 of said complaint.

39. Admits that this defendant sells most of the gypsum board and plaster manufactured by it in interstate commerce and in commerce between the States and the District of Columbia to retail building material dealers located throughout the Eastern area, that said dealers resell said gypsum products principally to building contractors, and that, since 1929, this defendant has not sold gypsum products directly to contractors; avers that this defendant is without knowledge or information sufficient to form a belief as to whether since 1929 the other defendant companies have not sold gypsum products directly to contractors; further avers that the discontinuance of or failure to make sales of gypsum products directly to contractors, whether on the part of this defendant or of the other defendant companies was not, and is not, the subject of any agreement, understanding or undertaking, either express or implied, between this defendant and any one or more of the other defendant companies; further avers that it is without knowledge or information sufficient to form a belief as to whether each of the other defendant companies sell most of the gypsum board and plaster manufactured by it in interstate commerce and in commerce between the States and the District of Columbia to retail building material dealers located throughout the Eastern area; and further

312 avers that only a small fraction of the gypsum board manufactured by this defendant and by all of the defendant companies in the aggregate is sold in commerce between the States and the District of Columbia.

40. Admits that the gypsum products manufactured by this defendant are transported by truck or railroad to the yards of dealers usually from the plants in which the prod-

ucts are manufactured but sometimes from warehouses owned by this defendant, and admits that gypsum board is frequently transported in mixed cars or trucks of board, plaster and miscellaneous gypsum products; but avers that, while straight carload shipments of board are infrequent, straight truckload shipments of board are frequent; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40 of said complaint so far as the same apply to other defendant companies.

41. Admits that this defendant sells its gypsum products to retail dealers within all of the states embraced within the Eastern area and that the other defendant companies sell gypsum products in some of the states within the Eastern area; but avers that this defendant is without knowledge or information sufficient to form a belief as to whether U.S.G. and National sell their said gypsum products within all of the states embraced within the Eastern area.

42. Admits that this defendant has heretofore sold relatively small quantities of gypsum board manufactured by it to certain of the companies named in subdivision II of the Bill of Particulars heretofore filed by the plaintiff in these proceedings as constituting the manufacturing
313 distributors referred to in paragraph 42 of said complaint, only a relatively small percentage of which sales were in interstate commerce, that said sales of gypsum board were made at a discount from this defendant's prices to dealers, that said gypsum board was resold by said manufacturing distributors to dealers in competition with this defendant and others of the defendant companies, and that said manufacturing distributors usually shipped said gypsum board in mixed cars or trucks made up of gypsum board aforesaid and of plaster produced by said manufacturing distributors; avers that this defendant has made no sales of gypsum board to any of the manufacturing distributors so named since some time in the year 1939, that, at no time, have sales to manufacturing distributors constituted a substantial portion of the production or sales of gypsum board by this defendant, and that no portion of the gypsum board sold by the defendant to manufacturing distributors has been resold in the District of Columbia; but avers that this defendant is without knowledge or information sufficient to form a belief with respect to the truth of the allegations of paragraph 42 of said complaint, as applied to the other defendant companies, or to sales made by the other defendant companies to manufacturing distributors, or to resales of gypsum products by any such manufacturing distributors.

43. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 43 of said complaint, except that this defendant admits that prior to 1932 this defendant sold some board and plaster to building material jobbers at a discount from the price at which said products were sold to dealers and that some of said jobbers
314 were also engaged in the manufacture of plaster, and that, since 1932, this defendant has not sold any substantial amounts of gypsum board or plaster to jobbers.

44. Denies each and all of the allegations of paragraph 44 of said complaint; and, without limiting the generality of the foregoing, denies that the defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in gypsum board, plaster and miscellaneous gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act, that the defendants are, and have been for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act, that the defendants are monopolizing, and have monopolized for many years last past, trade and commerce in said gypsum products among the several States in violation of Section 2 of the Sherman Antitrust Act, that the defendants are, and have been for many years last past, attempting to monopolize trade and commerce in said gypsum products among the several States and are, and have been for many years last past, actively engaged in a continuing combination and conspiracy to monopolize trade and commerce in said gypsum products among the several States, in violation of Section 2 of the Sherman Antitrust Act, that the defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act, and that the defendants are, and have been
315 for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act.

45. Denies each and all of the allegations contained in paragraph 45 of said complaint; and, without limiting the generality of the foregoing, denies (a) the formation, maintenance, consummation and existence of the combination described in said paragraph 45, and (b) that the defendant

companies have entered into, have carried out or are carrying out any combination for the purpose and with the effect of restraining, dominating and controlling the manufacture and distribution of gypsum products in the Eastern area, either by the means set forth in subdivisions (a) to (e) inclusive, of said paragraph 45, or otherwise; and further denies:

(a) that the defendant companies have concertedly raised and fixed at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by the defendant companies in the Eastern area;

(b) that the defendant companies have concertedly standardized gypsum board and its method of production by limiting the manufacture of gypsum board to uniform methods and by producing only uniform kinds of gypsum board for distribution in the Eastern area;

(c) that the defendant companies have concertedly raised, maintained and stabilized the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by the defendant companies in the Eastern area;

(d) that the defendant companies have concertedly refrained from distributing gypsum board, plaster
316 and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern area;

(e) that the defendant companies have concertedly refused to sell said products to jobbers at prices below the prices of said defendant companies to dealers; and (f) that the defendant companies have concertedly induced and coerced manufacturing distributors to resell, at the prices raised and fixed by the defendant companies, gypsum board purchased from the defendant companies.

46. Denies each and all of the allegations of paragraph 46 of said complaint, except that this defendant avers that U.S.G., as licensor, and this defendant, as licensee, have on various dates entered into the various license agreements referred to in paragraphs 76, 85, 113 and 117 of said complaint; without limiting the generality of the foregoing denial, further denies that said license agreements were made or entered into by this defendant for any of the purposes described in paragraphs 44, 45 and 46 of said complaint and avers that each of said license agreements was voluntarily and in good faith entered into and made by this defendant for the wholly lawful purpose of enabling this defendant to engage in the manufacture, sale and distribution of the gypsum products covered by one or more of the claims of all or certain of the United States Letters

Patent owned by U.S.G. and more particularly described and referred to in said respective license agreements.

47. Denies each and all of the allegations of paragraph 47 of said complaint.

48. Admits the allegations of paragraph 48 of said complaint and adopts the use of the terms "closed-
317 edge board" and "open-edge board" therein set forth.

49. Admits the allegations of paragraph 49 of said complaint.

50. Admits the allegations of paragraph 50 of said complaint.

51. Admits the allegations of paragraph 51 of said complaint.

52. Admits the allegations of paragraph 52 of said complaint.

53. Admits the allegations of paragraph 53 of said complaint.

54. Denies each and all of the allegations of paragraph 54 of said complaint, except that this defendant admits that the period from the latter part of 1925, after U.S.G. had obtained the judgment against Beaver referred to in paragraph 51 of said complaint and after the filing of the infringement suits by U.S.G. against American Gypsum Company and the Universal Gypsum & Lime Company referred to in paragraph 53 of said complaint, until the year 1930, was marked by efforts of the parties thereto to settle said litigation.

55. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 55 of said complaint.

56. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 56 of said complaint.

57. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 57 of said complaint.

318 58. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 58 of said complaint.

59. Admits that some time in May, 1926 a meeting was held between representatives of U.S.G. and this defendant regarding the execution of a license agreement between U.S.G., as licensor, and this defendant, as licensee, under which this defendant would be authorized to manufacture and sell closed-edge board covered by the claims of the Utzman patent referred to in paragraph 48 and other

portions of said complaint, and that at said meeting there were present representatives of some other manufacturers of gypsum products who were conducting similar negotiations with U.S.G.; but denies each and all of the other allegations of paragraph 59 of said complaint.

60. Denies each and all of the allegations of paragraph 60 of said complaint, except that this defendant admits that in May, 1926 this defendant expressed to representatives of U.S.G. a willingness to consider becoming a licensee under the Utzman patent, provided a mutually satisfactory contract could be agreed upon; but avers that the willingness of this defendant to enter into such a license agreement was not conditioned upon or motivated or influenced by any similar agreement on the part of any other manufacturer or group of manufacturers of gypsum board, and that this defendant at no time entered into any agreement or understanding with any other manufacturer or group of manufacturers, either written or oral, expressed or implied, relating to the execution by this defendant or any such other manufacturer of any license agreement with U.S.G.

319 61. Denies each and all of the allegations of paragraph 61 of said complaint, except that this defendant admits that a draft of a license agreement containing, among others, the terms and provisions generally referred to in paragraph 61 was submitted by U.S.G. to this defendant.

62. Admits that this defendant objected to the form of license agreement submitted to it by U.S.G., as alleged in paragraph 61 of said complaint; denies that this defendant urged as an objection to the form of said license agreement, or otherwise, that, if royalties were to be paid until 1937, control of licensees' prices by U.S.G. should not cease in 1929; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 62 of said complaint, as applied to other members of the gypsum industry or the negotiations between U.S.G. and such members.

63. Denies that this defendant made any proposal to U.S.G, or to Sewell Avery to the effect that the license agreement cover only the Utzman patent and run only until the expiration of said patent; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 63 of said complaint, as applied to the other companies therein referred to or the disposition by U.S.G. or Avery of any counter-proposals which may have been made by such companies.

64. Admits that, between July and September, 1926, The Beaver Products Company, Inc. became licensee of U.S.G. under the Utzman patent for the purpose, *inter alia*,
of funding the liability evidenced by the
320 judgment theretofore obtained by U.S.G. against
said The Beaver Products Company, Inc., as alleged in paragraph 61 of said complaint, and that, on July 29, 1926, U.S.G. and said The Beaver Products Company, Inc. entered into an agreement compromising the litigation aforesaid and into the license agreement, a copy of which is set forth as Exhibit No. 2 in the appendix to said complaint; avers that Universal Gypsum & Lime Company was not a party to the aforesaid agreements or to the negotiations preceding the execution thereof, and that this defendant was not a party to any agreements of similar character between U.S.G. and said Universal Gypsum & Lime Company or to the negotiations, if any, preceding the execution thereof; and further avers that, except as above set forth, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 64.

65. Denies that, during the fall of 1926 and the spring of 1927, negotiations between this defendant and U.S.G. with respect to the grant by U.S.G. to this defendant of a license under the Utzman patent were continued, and that this defendant attended any meetings or conferences held during said period to induce members of the industry to accept licenses; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 65 of said complaint.

66. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 66 of said complaint.

67. Admits that, during the period from 1927 to May,
1929, this defendant did not accept the form of
321 license agreement submitted by U.S.G., and referred
to in paragraph 61 of this answer, and that the period aforesaid was marked by an intensification of competition in the board industry; denies the formation, maintenance, consummation and existence of any plan for the stabilization of board prices of the character referred to in paragraph 67 of said complaint; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 67 of said complaint.

68. Admits the allegations of paragraph 68 of said complaint, except that this defendant denies that the breakdown of license negotiations was the cause of this defendant expanding its market for open-edge board.

69. Admits that the introduction of open-edge board on the market by this defendant at reduced prices constituted a substantial competitive threat to the remainder of the board industry, that American Gypsum Company, National, and Niagara Gypsum Company, who were then manufacturing board with semi-protected edges, attempted to meet the competition of the open-edge board manufactured by this defendant by marketing a second grade board which said companies sold at approximately the same price as that of open-edge board, and that Universal Gypsum & Lime Company commenced marketing second grade board in the fall of 1927 at prices below those charged by it for its first-grade product; but avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 69 of said complaint with respect to the refusal of U.S.G. to reduce or to permit its licensees to reduce the basic prices for
322 closed-edge board or the agreement by U.S.G. to permit said licensees to manufacture and distribute at reduced prices a second grade closed-edge board.

70. Admits the allegation of paragraph 70 of said complaint, except that this defendant denies that U.S.G.'s refusal to modify the royalty provisions of the license agreement between U.S.G. and Beaver operated to prevent the production of open-edge board at the Beaver plants.

71. Admits the allegations of paragraph 71 of said complaint.

72. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 72 of said complaint.

73. Avers that this defendant is without knowledge or information sufficient to form a belief as to the reasons why manufacturers other than this defendant reduced prices of open-edge board; admits that in 1929 the prices for all board were substantially below 1927 levels and that during 1928 the prices of other gypsum products were substantially reduced.

74. Denies each and all of the allegations of paragraph 74 of said complaint, except that this defendant admits that during the year 1928 or the early part of the year 1929 there was some discussion between representatives of this defendant and others in the industry relative to the possibility of this defendant becoming a licensee of U.S.G.

75. Admits that the Utzman patent expired in August, 1929; denies (a) that U.S.G. through said Avery as-
323 sured representatives of this defendant that, if a license agreement between U.S.G., as licensor, and this defendant, as licensee, were executed, U.S.G. would then take steps to control the prices of its licensees throughout the life of the licenses under color of some patent, and (b) that, in reliance upon these assurances, this defendant agreed with National, Ebsary, Niagara Gypsum Company and U.S.G. to become licensees of U.S.G.; avers that, as alleged in paragraph 70 of said complaint, following the acquisition by this defendant of the assets of said The Beaver Products Company, Inc. and the refusal of U.S.G. to modify the royalty provisions of its license agreement with said The Beaver Products Company, Inc., this defendant refused to perform said agreement, that, following such refusal on the part of this defendant, U.S.G. instituted suit against this defendant, said The Beaver Products Company, Inc. and said The Beaver Board Companies in the District Court of the United States for the Northern District of Illinois, seeking an accounting under the aforesaid agreement between U.S.G. and said The Beaver Products Company, Inc., specific performance of said agreement, the entry of a decree enjoining this defendant from disposing of the property and assets acquired by this defendant from said The Beaver Products Company, Inc. and said The Beaver Board Companies, and other relief, that, upon the filing by U.S.G. in said suit of a motion for a preliminary injunction, this defendant filed its bond in the penal sum of $1,000,000.00 with George M. Brown and Elisha Walker, then directors of this defendant, as sureties, which bond was conditioned upon the payment by this defendant of
324 any judgment, decree, costs, interest, or damages, which might be finally rendered or assessed against any one or more of the defendants in said suit, that, in and by the agreement between this defendant and said The Beaver Board Companies and said The Beaver Products Company, Inc. providing for the purchase by this defendant of the assets aforesaid, this defendant specifically assumed, with certain exceptions enumerated in said agreement, all outstanding liabilities and obligations of said The Beaver Board Companies and said The Beaver Products Company, Inc., that the liabilities and obligations thus assumed by this defendant included the obligations of said The Beaver Products Company, Inc. under its aforesaid license agreement with U.S.G., that, by virtue of such assumption and the nature and character of the purchase by this defendant

of the assets aforesaid, this defendant, at the time of the institution by U.S.G. of the suit aforesaid, had become obligated by virtue of the acquisition of said assets to perform the obligations of the licensee under said agreement between U.S.G. and said The Beaver Products Company, Inc., and this defendant had no adequate defense to said suit, that, in the light of the circumstances aforesaid, the institution of said suit by U.S.G. constituted one of the controlling factors inducing this defendant to agree with U.S.G. to become a licensee of U.S.G. and to execute the license agreement more particularly referred to in paragraph 76 of said complaint; that the execution by this defendant of said license agreement was not the subject matter of any agreement, understanding or undertaking between this defendant and National, Ebsary, or Niagara Gypsum Company, and that this defendant did not agree to become a licensee of U.S.G. or to execute said license agreement in reliance upon any agreement,
325 understanding or undertaking of National, Ebsary or Niagara Gypsum Company likewise to become a licensee of U.S.G.; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 75 of said complaint.

76. Avers that, motivated by the reasons set forth in paragraph 75 of this answer, and because of its desire to obtain the right to manufacture closed-edge board, for which there was strong public demand, during the period between May 16 and May 22, 1929, this defendant entered into a license agreement with U.S.G., a duplicate original of which has heretofore been furnished by this defendant to the Additional Grand Jury for the April, 1940 term of this Court in response to a subpoena *duces tecum* issued at the instance of the Attorney General of the United States, that the aforesaid duplicate original of said license agreement is presently in the possession of the Attorney General of the United States, that said license agreement differs in certain particulars from the license agreement between U.S.G. and Ebsary set forth as Exhibit No. 3 in the appendix to said complaint, and from the license agreement between U.S.G. and The Beaver Products Company, Inc. set forth as Exhibit No. 2 in the appendix to said complaint; that said Exhibit No. 3 and said Exhibit No. 2 differ from each other in certain particulars, and that the aforesaid license agreement between U.S.G. and this defendant contains no provision of the character specified in subdivision (b) of paragraph 76 of said complaint; and further avers

that this defendant is not informed as to the form and contents of the several license agreements between
326 U.S.G. and National and between U.S.G. and Niagara Gypsum Company referred to in paragraph 76 of said complaint or as to whether the license agreement between U.S.G. and Ebsary referred to in said paragraph 76 was in the form set forth as Exhibit No. 3 in the appendix to said complaint; and further avers that this defendant is without knowledge or information sufficient to form a belief as to whether all of the licensees of U.S.G. were represented at the meeting or meetings referred to in paragraph 76.

77. Denies each and all of the allegations of paragraph 77 of said complaint; and, without limiting the generality of the foregoing, denies that U.S.G. and its licensees mutually agreed among themselves as follows:

(a) that said companies would immediately discontinue the manufacture of unpatented open-edge board and second grade closed-edge board and would dispose of inventories of said boards at prices to be determined and fixed by U.S.G. and that, after disposal of said inventories, all companies would manufacture and sell a closed-edge board manufactured and bundled by the processes and methods used by U.S.G.;

(b) that U.S.G. would advance and stabilize the prices for board immediately after the execution of said license agreements and that, as prices for board were increased, all companies would increase their prices for plaster and miscellaneous gypsum products; and/or

(c) that U.S.G. would continue to control, through the use of other patents, the price of its licensees for board manufactured by said licensees after the expiration of the Utzman patent in August, 1929;
327 and avers that this defendant did not at any time enter into any agreement, understanding or undertaking with U.S.G. or with any one or more of the other licensees of U.S.G. with respect to the subject matter of said paragraph 77.

78. Except to the extent that such allegations are hereinafter in this paragraph specifically admitted, denies each and all of the allegations of paragraph 78 of said complaint, as applied to this defendant; admits that, immediately after the execution of the agreement between U.S.G. and this defendant referred to in paragraph 76 of said complaint, U.S.G. offered to enter into an additional license agreement with this defendant, permitting this defendant to practice a new invention developed by U.S.G. for light-

ening the weight of board, hereinafter referred to as "the foam invention" and that said foam invention was covered by pending applications for United States patents; avers that U.S.G. at no time entered into any agreement with this defendant to establish, maintain or continue price control, either prior to or subsequent to the expiration of the Utzman patent, and that the aforesaid additional license agreement was not offered by U.S.G. to this defendant pursuant to any such agreement to establish, maintain or continue price control; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 78 of said complaint.

79. Admits that the foam invention may be generally described as involving the introduction of foam into the slurry as an aggregate to cause the formation of numerous air voids in the board, and that said process requires
328 that the numerous minute bubbles in the foam be sufficiently stable and pliable to resist collapse during the process of manufacturing board; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 79 of said complaint with respect to whether, at the time U.S.G. offered said foam process to this defendant or to other licensees of U.S.G., U.S.G. contemplated for the purpose of obtaining stability and pliability in the bubbles, the use of several methods, including among others, the use of a colloidal agent such as farinaceous paste to reinforce the walls of the bubbles.

80. Admits that, at the time U.S.G. offered to license this defendant to practice the foam invention, Universal Gypsum & Lime Company owned United States Letters Patent No. 1,230,297 issued to Charles E. Hite on June 17, 1917 and United States Letters Patent No. 1,500,452 issued to Joseph F. Haggerty on July 8, 1924, that a true and correct copy of said Hite patent is set forth as Exhibit No. 4 in the appendix to said complaint, and that a true and correct copy of the Haggerty patent is set forth as Exhibit No. 5 in the appendix to said complaint; but avers that the summaries of the claims of said Hite and Haggerty patents contained in said paragraph 80 are incomplete and inaccurate.

81. Avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 81 of said complaint.

82. Denies that the contemplated use of farinaceous paste to reinforce the walls of the bubbles would not have in-

fringed the Hite and Haggerty patents, and denies that U.S.G. advised this defendant that the Hite and Haggerty patents were of doubtful validity and that the foam process did not infringe said patents; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 82 of said complaint.

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83. Admits that U.S.G. agreed to purchase the Hite and Haggerty patents from Universal Gypsum & Lime Company, that U.S.G. did acquire said patents from Universal Gypsum & Lime Company, and that this defendant agreed to accept a license from U.S.G. covering said patents and the foam invention; denies that this defendant at any time entered into any agreement, undertaking or understanding with any other licensee or licensees of U.S.G. with respect to the acceptance by this defendant or by such other licensees of a license from U.S.G. covering said patents and the foam invention or with respect to the acquisition by U.S.G. of the Hite and Haggerty patents; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 83 of said complaint.

84. Except to the extent that such allegations are hereinafter in this paragraph specifically admitted, denies each and all of the allegations of paragraph 84 of said complaint; admits that U.S.G. agreed to acquire, and did acquire, said Hite and Haggerty patents, that U.S.G. and this defendant agreed to execute and did execute a license agreement covering said patents, and that U.S.G. entered into similar license agreements with certain of its other licensees; avers that this defendant entered into said license agreement with U.S.G. for the sole and only purpose of availing itself of the benefit of the inventions embraced within said Hite and Haggerty patents and the foam invention, and the other patents held by U.S.G. and included in said license agreement; that at no time did this defendant enter into any agreement with U.S.G., or with any of the other licensees of U.S.G., with respect to the exercise by U.S.G. of price control of board manufactured by the licensees of U.S.G., and that U.S.G. at no time agreed with this defendant to exercise the right to specify minimum prices for board manufactured by this defendant or any other licensee or licensees of U.S.G.

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85. Admits that, following the acquisition of the Hite and Haggerty patents by U.S.G. from Universal Gypsum

& Lime Company, this defendant became a licensee under a new license agreement with U.S.G., that said new license agreement superseded the license agreement between U.S.G. and this defendant referred to in paragraph 76 of said complaint, that, for an accurate and complete statement of the terms of said agreement, this defendant refers to a duplicate original of said new license agreement between U.S.G. and this defendant which was furnished to the Additional Grand Jury for the April, 1940 term of this Court in response to a subpoena *duces tecum* issued at the instance of the Attorney General of the United States; avers that said duplicate original of said license agreement is presently in the possession of the Attorney General of the United States, that said new license agreement differs in certain particulars from the agreement between U.S.G. and Ebsary set forth as Exhibit No. 6 in the appendix to said complaint; further admits that U.S.G. entered into similar agreements with National, Universal Gypsum & Lime Company, Atlantic Gypsum Company, Ebsary, American Gypsum Company and Kelley Plasterboard Company, Inc.; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 85 of said complaint.

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86. Denies each and all of the allegations of paragraph 86 of said complaint.

87. Denies each and all of the allegations of paragraph 87 of said complaint, as amended, as aforesaid, in so far as the same purport to relate to the alleged agreements referred to in paragraph 86 of said complaint or to any agreements of similar character; admits that the sales by this defendant in the Eastern area of gypsum board manufactured by it amounted to approximately $1,400,000 in the year 1929; and further admits, that, by virtue of the license agreement entered into between this defendant and U.S.G., U.S.G. was authorized to fix a minimum price for all gypsum board manufactured and sold by this defendant pursuant to said license agreement, which right to fix said minimum price was, by the terms of said agreement, to last for a period of seventeen years after the date of the issuance of certain letters patent; denies that, by virtue of the agreements referred to in paragraphs 85 and 86 of said complaint, all companies manufacturing and selling board in the Eastern area, except Texas, were obliged to manufacture a uniform standardized board; and avers that as to all other allegations of said paragraph 87 this

defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

88. Avers that this defendant is without knowledge or information sufficient to form a belief as to the
332 truth of the averments of paragraph 88 of said complaint, except that this defendant admits that the license agreement between U.S.G. and this defendant has been continuously in effect since the same was executed in the year 1929 and is now in effect; and this defendant avers that, the Haggerty patent having expired on July 8, 1941, this defendant was advised by U.S.G. on or about July 8, 1941, that bulletins and notices regarding current minimum prices theretofore sent to this defendant under its license agreement with U.S.G. of October 15, 1929, were no longer applicable, so that no minimum price restrictions upon gypsum board manufactured and sold by this defendant are now in force and effect.

89. Denies the formation, maintenance, consummation and existence of the combination referred to in paragraph 89 of said complaint, or of any combination of similar character.

90. Denies each and all of the allegations of paragraph 90 of said complaint, except that this defendant admits that during the period that the license agreement entered into between U.S.G. as licensor and this defendant as licensee has been in force and effect, and up to July 8, 1941, U.S.G. has, in accordance with the terms and provisions of said license agreement, fixed a minimum selling price for gypsum board manufactured and sold by this defendant and has likewise fixed certain of the terms and conditions of sale of such gypsum board, and that this defendant has observed the terms of said license agreement and has sold all gypsum board manufactured by it pursuant to the terms of said license agreement at not less than the minimum prices so fixed by said U.S.G. and on the terms and conditions of sale so determined by U.S.G.; and
333 except that this defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 90 in so far as the same refer to other licensees of U.S.G.

91. Admits that from time to time throughout the period from November 5, 1929, to the date of the filing of said complaint, U.S.G. has circulated among its licensees numerous bulletins setting forth the minimum selling prices and most favorable terms and conditions of sale for patented gypsum board, and that this defendant has adhered

to said prices and terms and conditions of sale in the sale of such board manufactured by it under its license agreement, and that certain of said bulletins are set forth as Exhibit 7 in the appendix to said complaint; but this defendant denies that subparagraphs (a) to (u) inclusive of paragraph 91 of said complaint accurately or sufficiently describe the contents of said bulletins; avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 91 of said complaint with respect to adherence by other licensees of U.S.G. to such prices and terms and conditions of sale; and further avers that adherence to such prices and terms and conditions of sale, either by this defendant or by any one or more of the other licensees of U.S.G., has never been the subject of any agreement, understanding or undertaking, either express or implied, between this defendant and any one or more of such other licensees.

92. Admits that, throughout the period aforesaid, U.S.G., through its officers, employees, attorneys and a corporation known as the Board Survey Company, has, in the exercise of the rights and privileges reserved to the licensor
334 under the agreement between U.S.G. and this defendant referred to in paragraph 85 of said complaint, made periodic examinations of the records of this defendant relating to sales of gypsum board, and that this defendant has, in discharge of its obligation under said agreement so to do, made regular reports to U.S.G. of sales of gypsum board by this defendant; avers that this defendant has at no time endeavored to evade or avoid its obligations under said agreement, and, so far as this defendant is concerned, no occasion has arisen requiring any action on the part of U.S.G. to enforce any of its rights, powers and privileges under said agreement; denies that this defendant has attended numerous meetings between U.S.G. and its licensees at which the prices and terms and conditions of sale prescribed by U.S.G. in said bulletins and at which complaints of violations by licensees of said bulletin prices were discussed; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 92 of said complaint.

93. Denies that this defendant has entered into any agreement, understanding or undertaking, either express or implied, or has been a party to any concerted action with U.S.G. or any one or more licensees of U.S.G., relating to the scope of the patents referred to in paragraph 93 of

said complaint or relating to the production or refraining from production of open-edge board or other board not falling within the scope of said patents; avers that this defendant has refrained from manufacturing and marketing open-edge board during the period specified in said paragraph 93 for the reason that closed-edge board costs less to manufacture, primarily because of the elimination of spoilage, and is a more marketable product, and that this defendant has refrained from manufacturing and marketing other board not within the scope of said patents, for the reason that such other board would have constituted an inferior product which could not be marketed in competition with patented board; denies each and all of the allegations of the last sentence of said paragraph 93; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 93 of said complaint.

94. Denies each and all of the allegations of paragraph 94 of said complaint.

95. Denies each and all of the allegations of paragraph 95 of said complaint, except that this defendant admits that U.S.G. from time to time issued to licensees bulletins fixing the minimum selling price to jobbers of patented gypsum board manufactured and sold by licensees at the same minimum price fixed for patented gypsum board manufactured and sold by licensees to dealers, and admits that this defendant observed said minimum prices so fixed, and further admits that several meetings were held by U.S.G. for the purpose of explaining and clarifying various bulletins issued by it; and except that this defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 95 in so far as the same relate to the acts and conduct of licensees other than this defendant.

96. Denies each and all of the allegations of paragraph 96 of said complaint; and, without limiting the generality of the foregoing, denies that price control by U.S.G. of gypsum board manufactured by its licensees has been exercised at any time throughout the period from the year 1929 to the date of filing said complaint upon gypsum board of the licensees not covered by valid patents involved in the license agreements, and that, from time to time during said period, U.S.G. and its licensees have by concerted action controlled the prices and methods of distribution of plaster and miscellaneous gypsum products sold by U.S.G. and its licensees.

97. Denies each and all of the allegations of paragraph 97 of said complaint, and, without limiting the generality of the foregoing, denies that, continuously during the period from May, 1929 to November, 1929, U.S.G. determined and fixed the prices and the licensees adhered to said prices for unpatented open-edge board, and that, during the period between August and November, 1929, U.S.G. determined and fixed the prices and the licensees adhered to said prices for closed-edge board.

98. Admits that the first United States patent upon the foam invention was issued on October 8, 1935, that the second patent on said invention was issued on May 4, 1937, that the third patent on said invention was issued on May 11, 1937, that copies of said patents, being United States Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009, are set forth as Exhibits Nos. 8, 9 and 10 in the appendix to said complaint, and that, throughout the period from November, 1929 until October, 1935, U.S.G. exercised the right to fix the minimum selling price of patented gypsum board manufactured and sold by this defendant embodying the claims of the Hite and Haggerty patents; denies that, during the period from November, 1929 until October, 1935, none of the licensees of U.S.G. except Universal Gypsum
337 & Lime Company, manufactured board falling within the scope of said Hite and Haggerty patents; avers that, throughout the period last aforesaid, all gypsum board and lath manufactured by this defendant fell within the scope of said Haggerty patent; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 98 of said complaint, as applied to gypsum board manufactured by U.S.G. and other licensees of U.S.G.

99. Avers that a true and correct copy of said Hite patent is set forth as Exhibit No. 4 in the appendix to said complaint, and that the summary of said patent set forth in paragraph 99 of said complaint is incomplete and inaccurate; admits that, during the period described in paragraph 98 of said complaint, this defendant did not manufacture board falling within the scope of said Hite patent; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 99 of said complaint, as applied to gypsum board manufactured by U.S.G. and other licensees of U.S.G.

100. Avers that a true and correct copy of said Haggerty patent is set forth as Exhibit No. 5 in the appendix to

said complaint, and that the summary of said patent set forth in paragraph 100 of said complaint is incomplete and inaccurate; further avers that, during the period aforesaid, all board manufactured by this defendant fell within the scope of said Haggerty patent; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations
338 of paragraph 100 of said complaint, as applied to gypsum board manufactured by U.S.G. and other licensees of U.S.G.

101. Avers that, during the period from October, 1935 to the date of filing this complaint, all gypsum board and lath produced by this defendant fell within the scope of said Haggerty patent and the aforesaid patents issued upon the foam process; denies that, during said period, none of the licensees of U.S.G. produced board which was covered by the Hite or Haggerty patents; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 101 of said complaint, as applied to gypsum board manufactured by U.S.G. and other licensees of U.S.G.

102. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 102 of said complaint.

103. Denies the allegations of paragraph 103 of said complaint, except that this defendant admits that, acting individually and not in concert or pursuant to agreement, this defendant has generally sold plaster and miscellaneous gypsum products on certain of the terms and conditions which this defendant has generally employed in the sale of patented gypsum board, and except that this defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 103 of said complaint in so far as the same apply to sales of plaster and miscellaneous gypsum products by U.S.G. and its other licensees.

104. Denies each and all of the allegations of paragraph 104 of said complaint, except that this defendant ad-
339 mits that gypsum board is frequently transported in mixed cars or trucks with plaster and miscellaneous gypsum products.

105. Admits the allegations of paragraph 105 of said complaint.

106. Denies each and all of the allegations of paragraph 106 of said complaint; and, without limiting the generality of the foregoing, denies that, when prices for plaster and

miscellaneous gypsum products from time to time have advanced, this defendant has frequently permitted dealers to purchase said gypsum products at prices prevailing prior to the price advances, that such purchases have been made ostensibly under protected job contracts, but have involved material not actually covered by said contracts, and that this defendant has knowingly permitted dealers to make such purchases at such prices for the purpose of allowing such dealers a competitive concession.

107. Denies each and all of the allegations of paragraph 107 of said complaint.

108. Denies each and all of the allegations of paragraph 108 of said complaint; and, without limiting the generality of the foregoing, denies that, throughout the period from the year 1929 to the date of filing of said complaint, U.S.G. and its licensees have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for sales of board by its licensees to dealers and consumers, as referred to in paragraph 91 of said complaint; and further denies that this defendant has at any time controlled or attempted to control the prices charged by any manufacturing
340 distributor to whom this defendant has sold gypsum board or other gypsum products.

109. Denies each and all of the allegations of paragraph 109 of said complaint, and, without limiting the generality of the foregoing, denies that, as a condition to the consent of U.S.G. to sales by its licensees of gypsum board to said manufacturing distributors, U.S.G. has required that said manufacturing distributors adhere to said bulletin prices in reselling gypsum board to dealers and consumers, and that U.S.G. and its licensees have agreed among themselves to sell gypsum board to said manufacturing distributors only on condition that the distributors maintain and adhere to said bulletin prices; and avers that this defendant has from time to time requested the consent of U.S.G. to sales of gypsum board by this defendant to various manufacturing distributors, that, in the case of each such request, U.S.G. has granted its consent to such sale or sales, that, in no case, has U.S.G. imposed or attached any condition to such consent, and that U.S.G. has never threatened to withdraw and has never withdrawn any consent theretofore given to any such sale or sales by this defendant.

110. Denies the allegations of paragraph 110 of said complaint; and, without limiting the generality of the fore-

going, denies that U.S.G. and its licensees have required said manufacturing distributors as a condition of sale to agree, and that said manufacturing distributors have agreed, to resell gypsum board to dealers and consumers at said bulletin prices.

111. Denies the allegations in the first sentence of paragraph 111 of said complaint; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of said paragraph.

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112. Admits that U.S.G. and certain of its licensees have entered into separate license agreements covering the manufacture and sale of metallized board and perforated lath; but denies that said license agreements were entered into for the purpose of extending and strengthening the right to control minimum prices and terms and conditions of sale of gypsum products vested in U.S.G. under the basic license agreements referred to in paragraphs 85 and 88 of said complaint.

113. Admits that in 1934 U.S.G. offered to license each of its licensees to manufacture and sell metallized board under a patent owned by U.S.G. covering metallized gypsum board, that, during the year 1934, this defendant agreed with U.S.G. to become, and did become, a licensee of U.S.G. under said patent, and that said license agreement is substantially identical with the license agreement between U.S.G. and Ebsary set forth as Exhibit No. 11 in the appendix to said complaint; denies that the several licensees of U.S.G. agreed among themselves to become licensees of U.S.G. under said patent; avers that the execution by this defendant of said license agreement with U.S.G. was not the subject of any agreement, understanding or undertaking between this defendant and any one or more of the other licensees of U.S.G. and was not conditioned or predicated upon the execution of a similar agreement by any one or more of such licensees; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 113 of said complaint.

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114. Denies each and all of the allegations of paragraph 114 of said complaint; and without limiting the generality of the foregoing, denies that, at the time of the execution of the license agreements referred to in paragraph 113 of said complaint, none of the licensees of U.S.G., except National, intended to manufacture metallized board, that all of said licensees, except National, intended to purchase metallized board from U.S.G. or Na-

tional for resale to dealers and consumers, that U.S.G. required its licensees to execute said license agreements in order to be enabled to purchase metallized board for resale to dealers and consumers, and that, throughout the period from the execution of said license agreements to the date of filing of said complaint, U.S.G. has determined and fixed the minimum prices and terms and conditions governing sales by its licensees of metallized board purchased by said licensees during said period from U.S.G. and National; and avers that, at the time of the execution of the license agreement between U.S.G. and this defendant referred to in said paragraph 113, this defendant intended to manufacture metallized board, that, pending the installation of the necessary equipment for such manufacture at the Buffalo, New York, plant of this defendant, this defendant purchased certain quantities of metallized board from U.S.G., that U.S.G. at no time specified or attempted to specify the minimum prices or terms and conditions on which this defendant might resell such metallized board, that this defendant proceeded to install in said Buffalo plant the equipment necessary for the manufacture of metallized board and since the completion of such installation, has continuously engaged in the manufacture of metallized board at said plant, that this defendant originally intended similarly to equip other of its plants for the manufacture of metallized board, and that the sales of metallized gypsum board proved so inconsequential that this defendant determined that the expense of equipping other plants for the manufacture of metallized board was not warranted.

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115. Admits the allegations of paragraph 115 of said complaint, except that this defendant denies that said patent merely purported to cover a gypsum lath with perforations, but avers that said patent did cover such perforated lath.

116. Admits that the license agreements proposed by U.S.G. referred to in paragraph 115 of said complaint reserved to U.S.G. the right to determine and fix the minimum selling prices of perforated lath manufactured and sold by each of its licensees; but denies that U.S.G. agreed to fix such minimum prices of perforated lath at a differential above the price of straight lath.

117. Admits that this defendant, American Gypsum Company, Ebsary and Kelley Plasterboard, Inc., executed the license agreements offered by U.S.G., as alleged in paragraph 115 of said complaint; but denies that this defendant entered into said license agreement with U.S.G. in reliance upon the commitment of U.S.G. to fix the price of perforated

lath at a differential above the price of straight lath; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 117 of said complaint.

118. Admits that, by the terms of the license agreement entered into by U.S.G. with this defendant, U.S.G. authorized this defendant to manufacture perforated lath
344 under said letters patent and reserved the right to determine the minimum price at which this defendant might sell perforated lath manufactured by this defendant pursuant to the terms of said license agreement, and admits that said license agreement contained the usual provision by which the licensee admitted the validity of the letters patent under which the license was issued and agreed not to contest said patent; and further admits that, throughout the period from the execution of the license agreement with this defendant to the month of May, 1938, U.S.G. exercised its right to fix the minimum selling prices of perforated lath manufactured and sold by this defendant and did fix and determine said minimum selling prices at a differential above the prices of straight lath, and that this defendant sold said perforated lath at not less than the said prices so fixed and determined by U.S.G.; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 118 as applied to sales of perforated lath by other licensees of U.S.G.

119 Denies each and all of the allegations of paragraph 119 of said complaint, except that this defendant admits that it was advised by patent counsel prior to the execution of said license agreement with U.S.G. that, in the opinion of such patent counsel, the claims embraced within said perforated lath patent did not rise to the dignity of an invention; but avers that at the same time said patent counsel advised this defendant that said patent was presumptively valid and that some District Judge might sustain the patent and a Circuit Court of Appeals might affirm such a decision, that the patent had tremendous nuisance value and that it would be very costly for this defendant to attempt to make exactly what is shown
345 in the patent; that, in order to avoid either extended and expensive litigation with U.S.G. with respect to the validity of said patent, which appeared probable in the event that this defendant declined to accept the license agreement tendered by U.S.G., or the expense and delay which would necessarily be involved in the development

of a perforated lath possessing the desirable characteristics covered by said patent but avoiding the claims thereof, and because of the fact that U.S.G., by virtue of the provisions of the basic license agreement referred to in paragraph 85 of said complaint, was authorized to determine and fix the minimum selling prices and terms and conditions of sale for all perforated lath manufactured and sold by this defendant, this defendant, in good faith and in the exercise of its sound business judgment, entered into said license agreement with U.S.G. covering perforated lath manufactured in accordance with said perforated lath patent; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 119 of said complaint in so far as the same refer to the knowledge, beliefs or acts of U.S.G. or of licensees, other than this defendant.

120. Admits that the validity of the patent referred to in paragraph 120 of said complaint has not been presented to or determined by any court of the United States, and that none of the licensees of U.S.G. has contested the validity of said patent; denies that this defendant has entered into any agreement, understanding or undertaking with any one or more of said licensees with respect to the contest of or acquiescence in said patent; avers that this defendant is without knowledge or information sufficient to
346 form a belief as to the truth of the allegations of said paragraph 120, except to the extent that such allegations are hereinabove in this paragraph specifically admitted or denied; and further avers that, in May, 1938, U.S.G. voluntarily included said patent under the terms and provisions of the general license agreements referred to in paragraphs 85 and 88 of said complaint, thus eliminating the royalty theretofore payable under the provisions of the license agreements referred to in paragraph 117 of said complaint, and that, thereafter, no occasion existed for the prosecution of infringements by U.S.G. or the contest of said patent by licensees of U.S.G.

121. Denies each and all of the allegations of paragraph 121 of said complaint.

122. Denies the existence, operation and formation of the combination referred to in paragraph 122 of said complaint; denies that the prices referred to in said paragraph 122 are or have been non-competitive; admits that the prices of gypsum board during the period subsequent to the execution of the license agreements referred to in paragraph 85 of said complaint have been higher than those prevailing prior to the execution of said agreements; avers that,

since the execution of said license agreements the minimum selling prices for gypsum board manufactured pursuant to said license agreements have been prescribed by U.S.G., in the exercise of the right and privilege so to do reserved to it as licensor under said agreement; that this defendant has no knowledge or information sufficient to form a belief as to the basis on which such prices have been from time to time established by U.S.G. and is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 122 to the effect
347 that said prices have failed to reflect substantial reductions in the manufacturing costs of U.S.G.; and further ayers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 122 of said complaint to the effect that each of the defendant companies has realized substantial profits in the manufacture and sale of gypsum board; and further avers that such profits, if any, as this defendant has from time to time realized as a result of the manufacture and sale of gypsum board have not been unreasonable or disproportionate to the cost of the investment by this defendant in the assets employed by it in its gypsum business.

123. Denies each and all of the allegations of paragraph 123 of said complaint, except that this defendant admits that this defendant, acting individually and not in concert or agreement, now distributes plaster and miscellaneous gypsum products on certain of the same terms and conditions of sale utilized by this defendant in the sale of its gypsum board.

Further answering the allegations of said complaint, as to all of such allegations with respect to which this defendant in the foregoing numbered paragraphs of this Part I has averred that it is without knowledge or information sufficient to form a belief as to the truth of such allegations, this defendant demands that the plaintiff make strict proof thereof; and as to all other allegations of said complaint except such as are hereinbefore specifically admitted, this defendant denies each and all of such allegations, irrespective of whether the same have been heretofore specifically denied.

This defendant denies that it is or has been a party to any contract, agreement or understanding or to any combination or conspiracy in restraint of trade in vio-
348 lation of the provisions of Sections 1, 2 or 3 of the Sherman Antitrust Act, or in violation of any other

provisions of the Antitrust Laws of the United States, and, therefore, prays that the relief prayed for in the complaint be denied and further prays judgment that the complaint be dismissed with costs to this defendant.

PART II

Answer of Defendant Henry J. Hartley

For answer to said complaint, the defendant Henry J. Hartley (hereinafter in this Part II sometimes referred to as "this defendant") admits, denies and avers as follows:

1. Admits that the complaint is filed and that these proceedings are instituted against the several defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", said act being commonly known as the "Sherman Antitrust Act", but denies that this defendant, either alone or in conjunction with other defendants to this action or any other person or persons, firm or firms, corporation or corporations, whatsoever, either individually or on behalf of any other person, firm, or corporation, has heretofore engaged in or is now engaged in any action or course of action prohibited or declared illegal by Section 1, Section 2, or Section 3 of said Sherman Antitrust Act, or by any other provisions of said Act or of any of the antitrust laws of the United States, and denies that the plaintiff is entitled, under Section 4 of said Sherman Antitrust Act, to the relief prayed for in said complaint.

349 2. Adopts the definition of the term "defendant companies" set forth in paragraph 12 of said complaint.

3. Admits that, as stated in paragraph 17 of said complaint, he is president of the defendant Certain-teed Products Corporation, a Maryland corporation.

4. Avers that, at a special meeting of the Board of Directors of the defendant Certain-teed Products Corporation duly and regularly called and held in accordance with the by-laws of said Certain-teed Products Corporation on the thirteenth day of May, 1939 at the office of said Certain-teed Products Corporation in the City of New York, State of New York, this defendant was elected a director of said Certain-teed Products Corporation to fill a vacancy then existing in said board, that, thereafter at said meeting, this defendant was elected president of Certain-teed Products Corporation to fill the vacancy then existing in said office, that this defendant has, since the date last afore-

said, continuously served said Certain-teed Products Corporation in the capacities aforesaid, that, prior to the date last aforesaid, this defendant had no business relations of any kind or character, either individually or in a representative capacity, with said Certain-teed Products Corporation or with any of the other defendants to said complaint, or with any jobber, manufacturing distributor or retail dealer of gypsum products, that this defendant does not have personal knowledge of any facts or events occurring or of conditions existing with respect to the subject matter of said complaint at any time prior to May 13, 1939,

350 and that, insofar as the period prior to May 13, 1939 is concerned, the knowledge of this defendant as to the pertinent facts respecting the subject matter of these proceedings is based entirely on information derived from an examination of the files and records of said Certain-teed Products Corporation and interviews with the present officers and employees of said Certain-teed Products Corporation, that this defendant, in the course of the performance of his duties as president of Certain-teed Products Corporation has become familiar with the provisions of the several existing license agreements between United States Gypsum Company, as licensor, and said Certain-teed Products Corporation, as licensee, more particularly referred to in paragraphs 85 and 113 of said complaint and with various other contracts and agreements between said Certain-teed Products Corporation and other defendant companies relating to the manufacture, purchase, sale and distribution of gypsum products, that this defendant has not learned of or become aware of any agreement, understanding and/or arrangement, either now or heretofore existing between said Certain-teed Products Corporation and said United States Gypsum Company and/or any one or more of the other defendant companies relating to the manufacture, purchase, sale or distribution of gypsum products, except as expressed in the written agreements between the parties above referred to, and that none of said written agreements, either in letter or in spirit, violates any of the provisions of Sections 1, 2 and 3 of said Sherman Antitrust Act, or any other provisions of the antitrust laws of the United States.

5. Subject to the qualifications expressed in paragraph 4 of this Part II as to the source of the knowledge and information of this defendant with respect to the per-

351 tinent facts relating to the subject matter of these proceedings, adopts the answer of Certain-teed Products Corporation to said complaint as set forth in Part I.

Dated August 1, 1941.

O. Max Gardner,
O. MAX GARDNER,
Harold F. McGuire,
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Of Counsel.

352 In the District Court of the United States

[Title Omitted.]

[File Endorsement Omitted.]

Answer of United States Gypsum Company, Sewell L. Avery and Oliver M. Knode

Filed August 1, 1941

United States Gypsum Company, a corporation, Sewell L. Avery and Oliver M. Knode, defendants herein, hereinafter sometimes referred to as "defendants" and "these defendants", answering the Complaint as amended:

1. Admit that the Complaint was filed and the proceedings instituted under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" and commonly known as the "Sherman Anti-Trust Act", but deny that they or any one or more of them have violated or are now violating Sections 1, 2 or 3 of the Sherman Act, as alleged in said Complaint or otherwise and further deny that plaintiff is entitled, under Section 4 of the Sherman Act, to the relief prayed for in said Complaint.

2. Deny each and all of the averments of Paragraph 2 in so far as they refer to the defendant, United States Gypsum Company, except that these defendants admit that said United States Gypsum Company is engaged in a continuous course of selling and delivering gypsum products, including gypsum board and plaster, to dealers within the District of Columbia and is engaged in soliciting, through salesmen, orders for gypsum products from dealers within

the District of Columbia, and in promoting the sale of said gypsum products in the District of Columbia by advertising in the District of Columbia by means of signs and displays in dealers' offices and at dealers' warehouses and by
353 its national periodical advertising and by distributing price lists and circulars among dealers within the District of Columbia, and to that extent said defendant transacts business within the District of Columbia. These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 2 of the Complaint in so far as they refer to the defendant companies other than said United States Gypsum Company.

3. Deny each and all of the averments contained in Paragraph 3 of the Complaint, except that these defendants admit that the defendant, United States Gypsum Company, maintains a sales office within the District of Columbia and maintains salesmen for the solicitation of business in said gypsum products as set forth in Paragraph 2 of this answer, and except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 3 in so far as they refer to the defendant, The Celotex Corporation.

4. Deny each and all of the averments contained in Paragraph 4 of the Complaint.

5. Admit the averments contained in Paragraphs 5, 6, 7, 8, 9 and 10 of the Complaint.

6. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 11 of the Complaint.

7. For brevity and convenience, these defendants adopt for the purposes of this answer the plaintiff's designation in Paragraph 12 of those companies described in Paragraphs 5, 6, 7, 8, 9, 10 and 11 of the Complaint as "defendant companies" and said defendants will sometimes be referred to in this answer as "defendant companies."

8. Admit the averments contained in Paragraphs 13 and 14 of the Complaint.

9. Are without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraphs 15, 16, 17, 18 and 19 of the Complaint.

10. Admit, with respect to the averments contained in Paragraph 20 of the Complaint, that the defendant companies are engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at plants at various points throughout the United States so located as to have a readily accessible source of supply of

raw gypsum rock, either through mining or quarrying operations in the immediate vicinity of the plant or through water transportation of the crude gypsum from the source of supply located at points distant from the plant; and, further answering,

354 these defendants aver that plants for the manufacture of one or more gypsum products now operated by defendant, United States Gypsum Company, in the Eastern area are located at: Oakfield, N.Y., Boston, Mass., New Brighton, N. Y., Philadelphia, Pa., Plasterco, Va., Jacksonville, Fla., Detroit, Mich., Grand Rapids Mich., Gypsum, Ohio, East Chicago, Ind., Fort Dodge, Ia., Sweetwater, Tex., Southard, Okla., Laramie, Wyo., Loveland, Colo., Piedmont, S. D.

aver, on information and belief, that such plants now operated by defendant, National Gypsum Company, in the Eastern area are located at: Clarence Center, N. Y., Akron, N. Y., New York, N. Y., Portsmouth, N. H., Saltville, Va., Savannah, Ga., National City, Mich., Fort Dodge, Ia., Medicine Lodge, Kan., Rotan, Tex.

aver, on information and belief, that such plants now operated by defendant, Certain-teed Products Corporation, in the Eastern area are located at: Akron, N. Y., Grand Rapids, Mich., Fort Dodge, Ia., Acme, Tex., Blue Rapids, Kan.

aver, on information and belief, that the defendant, Celotex Corporation, operates a single plant located at Port Clinton, Ohio; that the defendant, Ebsary Gypsum Company, Inc., operates a single plant located at Wheatland, New York; that the defendant Texas Cement Plaster Company operates a single plant located at Plasterco, Texas; and that the defendant, Newark Plaster Company, operates a board plant at Kearney, New Jersey, and a plaster mill at Newark, New Jersey. These defendants admit that defendant, United States Gypsum Company, sells a part of said gypsum products in interstate commerce to distributors within the States east of the Rocky Mountains, and that said defendant, United States Gypsum Company, sells a part of said gypsum products in commerce between the States and the District of Columbia to distributors within the District of Columbia, but these defendants deny that it is the policy of defendant, United States Gypsum Company, to sell consumers and aver that said defendant rarely sells any part of its said products to consumers and further aver that the distributors to whom said defendant sells its said products are normally and in almost all instances dealers in building materials. These defendants are with-

out knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph with respect to the sale of said gypsum products by said defendant companies other than said United States Gypsum Company. These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph with respect to the exact percentages of gypsum board and gypsum plaster manufactured
355 and sold in the Eastern area by the defendant companies but aver that they are of the belief that the percentage alleged with respect to gypsum board is approximately correct, and, further answering, these defendants aver that the gypsum board so manufactured and sold in the Eastern area is a patented product embodying the claims and inventions of patents owned by the defendant, United States Gypsum Company, and that said defendant and its duly authorized licensees are the only persons or corporations having any legal right to manufacture and sell such gypsum board. For brevity and convenience, these defendants adopt for the purposes of this answer the plaintiff's definition of the Eastern area set forth in the third sentence of said paragraph.

11. Admit the averments contained in Paragraph 21 of the Complaint, except that these defendants aver that such averments fail to state the complete process in the manufacture of calcined gypsum or stucco, and, further answering, these defendants aver that gypsum is a hydrous calcium sulphate rock ($CA\ SO_4\ 2H_2O$), containing approximately twenty per cent. (20%) of water of crystallization as an integral part of the gypsum, and aver that when the calcined gypsum or stucco is mixed with water it again takes on as an integral part its original content of water of crystallization. Further answering, these defendants aver that, although gypsum deposits are widely scattered over the United States, there are certain gypsum deposits in the United States which are and have been for many years the chief centers for the production of gypsum, these gypsum production centers being located in western New York State, the western part of Virginia, northern Ohio, the western and northeastern part of Michigan, Iowa (in and around Fort Dodge), the northern part of Texas, the southern and western part of Oklahoma, the southern and northeastern part of Kansas and southern California and, to a less extent, in Arizona, Colorado, Utah, Wyoming, Nevada and South Dakota.

12. Admit the averments contained in Paragraph 22 of the Complaint, except that these defendants are without

knowledge or information sufficient to form a belief as to the truth of the averments contained in the third sentence of said paragraph although they admit that the Bureau of Mines' "Minerals Year-book, 1940, Review of 1939" reported sales value figures substantially as alleged.

13. Admits the averments contained in the first and second sentences in Paragraph 23 of the Complaint and, further answering, these defendants aver that throughout the period of years of the existence of defendant, United States Gypsum Company, said company has constantly endeavored, through the efforts of its research department and through the yearly expenditure of substantial sums of money to improve the quality and performance record of the gypsum products, including gypsum plaster, which it offers to the users of building material products, and these defendants admit that since about the year 1900 gypsum has gradually displaced lime in plaster and that over ninety per
856 cent. (90%) of all plaster now used in building construction in the United States is made with gypsum, and these defendants aver that the steady and substantial increase in the use of gypsum plaster is at least in part due to the extensive research of defendant, United States Gypsum Company, in its constant effort to develop improved building material products.

14. Deny each and all of the averments contained in Paragraph 24 of the Complaint, except as hereinafter specifically admitted, qualified or denied. These defendants admit that commercial production of gypsum board commenced about 1905 and that for many years thereafter by far the greatest amount of gypsum board produced was board designed to be used as a base for plaster in wall and ceiling structures and known as plasterboard. Further answering, these defendants aver that in about 1925 defendant, United States Gypsum Company, adopted the practice of marketing a gypsum plaster base of smaller dimensions, designed, among other reasons, to facilitate the ease with which the product might be handled by workmen applying the lath to the studs of the building, but these defendants aver that there is no difference in the product known as plasterboard and the product known as gypsum lath but, on the contrary, the term "gypsum lath" has by custom in the trade been generally adopted to designate the product formerly known as "plasterboard". Further answering, these defendants admit, upon information and belief, that the sales value of gypsum lath and plasterboard manufactured by the defendant companies and sold in the United States in 1939 was approximately $13,000,000, of which approxi-

mately 90% represented board sold in the Eastern area, but these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said Paragraph 24 regarding the percentage of products used as support for plaster in all wall and ceiling structures that is represented by gypsum lath and plasterboard, except that these defendants aver that gypsum lath and plasterboard are marketed in a highly competitive field, competing directly with other products used for plaster bases, such as wood lath, metal lath, insulating lath and wire lath, and these defendants aver that, from information available to them, the percentage of gypsum lath and plasterboard used in wall and ceiling structures in residential buildings is substantially less than the 90% averred in the Complaint.

15. Admit the averments contained in the first three sentences of Paragraph 25 of the Complaint, and, upon information and belief, admit the averments contained in the fourth sentence of said paragraph, and further answering, these defendants aver that the market for substitutes for plaster and lath is a highly competitive one and that in said market gypsum wallboard is directly competitive with masonry, lumber, plywood, insulation board, paper fiberboard and steel.

16. Deny each and all of the averments contained in Paragraph 26 of the Complaint, except as hereinafter specifically admitted, qualified or denied. These de-
357 fendants aver that all gypsum board consists of two outer sheets of heavy, tough paper, front and back, between which there is a lightened gypsum core which is firmly bonded to the paper; that the gypsum board is fairly rigid, saws and nails like lumber, and because of its gypsum composition is fireproof and will not warp, buckle or rot; that the dimensions of the gypsum wallboard vary as to length, width and thickness but that generally it is in sheets, 4′ wide, with lengths from 4′ to 12′ and having a thickness of ¼″, ⅜″ or ½″; that the dimensions of gypsum lath or plasterboard vary as to length, width and thickness, depending upon use, but that said product is usually of the size of 16″ in width, 48″ in length and ⅜″ in thickness; and that the dimensions of gypsum sheathing sold by defendant, United States Gypsum Company, are usually 2′ x 8′ x ½″. Further answering, these defendants aver that gypsum lath and plasterboard are covered with heavy, tough sheets of paper, which are coarse and absorbent in order that the plaster may thereby obtain a better bond to the gypsum lath and plasterboard and that both of the

outer sheets of paper of gypsum wallboard are of a good grade of heavy, tough, smooth paper and that because the product is not intended to be covered with plaster, one of its said surfaces is especially treated so as to make it a suitable interior wall surface.

17. Admit the averments contained in Paragraph 27 of the Complaint, except that, further answering, they aver that gypsum board covered with a metallic foil on one or both of its surfaces embodies the inventions and improvements set forth and claimed in certain United States Letters Patent and that defendant, United States Gypsum Company, and its duly authorized licensees, are the only persons or corporations having a legal right to manufacture and sell such patented product in the United States and except that they aver that perforated gypsum lath embodies the inventions and improvements set forth and claimed in United States Letters Patent No. 1,938,354, issued to defendant, United States Gypsum Company, on December 5, 1933, and that said defendant and its duly authorized licensees are the only persons or corporations having a legal right to manufacture and sell such perforated gypsum lath in the United States. Further answering, these defendants aver that the perforations in such gypsum lath not only permit the plaster, when applied to the lath, to penetrate through the perforations and to form heads on the back of the lath which act as mechanical keys to increase the bond between the lath and the layer of plaster but also, in numerous other particulars constitute such an improvement and advancement in the art as to greatly increase the utility and enlarge the market for such gypsum lath.

18. Admit, with respect to the averments contained in Paragraph 28 of the Complaint, that the manufacture of plaster from calcined gypsum involves a relatively simple operation as compared with the manufacture of gypsum board from calcined plaster, but these defendants deny that the operation of manufacturing plaster from calcined gypsum is adequately described in said paragraph and
358 aver that such manufacture involves a substantial investment in plant, equipment and machinery which will produce, bag by bag, a proper proportion of the calcined gypsum, fibre and chemicals and effect the intimate mixing of these ingredients necessary to insure a proper and uniform result. These defendants aver that the manufacture of gypsum board from calcined gypsum requires a substantial investment in plant, expensive equipment and machines and admit that such manufacture involves

a much more complicated operation than the manufacture of plaster and that all gypsum calcining plants are equipped to manufacture gypsum plaster but that said plants are not always equipped to manufacture gypsum board.

19. Admit that the averments contained in Paragraph 29 of the Complaint describe in a general way the usual process of manufacturing gypsum board, except that these defendants aver that in addition to the processes described in said paragraph the manufacture of such board involves the addition of chemicals for the purpose of accelerating and controlling the "set" of the gypsum core, the scoring and folding over of one of the heavy paper covers so as to cover the edges of the board, the chamfering of the back paper in order to make a uniform thickness, the recessing of the edges in the case of wallboard, the cutting of the board to length, and the drying of the board by passing it through the drying kilns. Further answering, these defendants admit that until the year 1929 the most commonly used aggregate for lightening the board was sawdust, although the defendant, United States Gypsum Company, had prior thereto used foam in lieu of sawdust in the manufacture of substantial quantities of gypsum board, and admit that since the year 1929 said aggregate has generally been composed of soap foam or chemical compounds embodying the inventions set forth and claimed in United States Gypsum Company's applications for Letters Patent covering its foam lightened or cellular gypsum board and the patents issued thereon.

20. For brevity and convenience, these defendants adopt for the purposes of this answer plaintiff's definitions of the terms "plaster", "lath", "plasterboard" and "wallboard" as set forth in Paragraph 30 of the Complaint and sometimes hereinafter in this answer gypsum plaster will be referred to as "plaster", gypsum lath as "lath", gypsum plasterboard as "plasterboard" and gypsum wallboard as "wallboard."

21. Deny each and all of the averments contained in Paragraph 31 of the Complaint, except as hereinafter specifically admitted, qualified or denied. These defendants admit that defendant, United States Gypsum Company, was incorporated in 1901, and, further answering, aver that prior thereto the gypsum business had represented a purely local operation and that the incorporation of defendant, United States Gypsum Company, represented the first effort to conduct a gypsum business upon a nation-wide scale and thus to secure the benefits of more efficient

management and production and the opportunity for greater research in the improvement and development of gypsum products. These defendants admit that from the date of its incorporation to the present time defendant,
359 United States Gypsum Company, has been the largest producer of gypsum board and plaster in the United States and that said company produced and sold in 1939 approximately 55% of all gypsum board sold in the Eastern area, but these defendants are without knowledge or information sufficient to form a belief as to the truth of the averment that in 1939 said defendant, United States Gypsum Company, produced and sold approximately 40% of all plaster sold in the Eastern area. These defendants admit that in 1939 the sales by defendant, United States Gypsum Company, in said area of gypsum board manufactured by it amounted to approximately $10,600,000. Further answering, these defendants aver that defendant, United States Gypsum Company, during the twenty years preceding the filing of the Complaint herein, acquired the gypsum plants of eight other producers, including the Niagara Gypsum Company, which at the date of its said acquisition in 1929 had been engaged in the production of gypsum plaster and plasterboard for over ten years, and of gypsum wallboard for six or seven years, but has not acquired the plant or plants of any producer of gypsum board since that acquisition; and that in the past ten years said defendant has not acquired the plants of any producer of gypsum plaster, except for the acquisition of the plant of one producer situated outside the said Eastern area which was acquired in order to give said defendant proper plant facilities to more effectively serve the territory in the vicinity of the plant so purchased. During said twenty-year period referred to above, said defendant, United States Gypsum Company, has made substantial improvements in and additions to its gypsum plaster and board plant facilities and equipment and has built and equipped new, modern plants at Sweetwater, Texas; Midland, California; Boston, Massachusetts; Philadelphia, Pennsylvania; Detroit, Michigan; East Chicago, Indiana; and Jacksonville, Florida. These defendants admit that defendant United States Gypsum Company now operates sixteen plants in the Eastern area and aver that gypsum board is produced at thirteen of said plants.

22. Deny each and all of the averments contained in Paragraph 32 of the Complaint, except that these defendants admit that since 1925 defendant, United States Gyp-

sum Company, has expanded into fields of other allied building materials and is now a manufacturer of all of the building material products listed in said paragraph except insulation wool, which product is manufactured for it.

23. Admit, on information and belief, the averments contained in Paragraph 33 of the Complaint except that they are without knowledge or information sufficient to form a belief as to the truth of the averments regarding the percentage of plaster sold by defendant, National Gypsum Company, in the Eastern area in 1939, and regarding the details of its acquisition of Universal Gypsum & Lime Company in 1935 and Atlantic Gypsum Products Corporation in 1936.

24. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 34 of the Complaint, except that these defendants admit that the defendant, National Gypsum Company, has expanded into fields of other allied building materials.

360 25. Admit, on information and belief, the averments contained in Paragraph 35 of the Complaint except that they are without knowledge or information sufficient to form a belief as to the truth of the averments (a) as to the percentage of plaster sold by defendant, Certain-teed Products Corporation, in the Eastern area in the year 1939, (b) as to the importance of said defendant as a producer of the various materials referred to in the fourth sentence of said paragraph, and (c) as to the details regarding its acquisition of the Acme Cement Plaster Company plants in 1923 and the Beaver Companies in 1928.

26. Admit, on information and belief, the averments contained in Paragraph 36 of the Complaint except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments regarding the percentages of plaster sold by the respective defendant companies in the Eastern area in 1939 and except that these defendants aver that defendant Newark Plaster Company has two plants, one for the manufacture of gypsum board and one for the manufacture of gypsum plaster.

27. Admit, on information and belief, the averments contained in Paragraph 37 of the Complaint except that they are without knowledge or information sufficient to form a belief as to the truth of the averments regarding the details of the acquisition of American Gypsum Company by defendant Celotex Corporation.

28. Admit, on information and belief, the averments contained in Paragraph 38 of the Complaint except that they are without knowledge or information sufficient to form a belief as to the truth of the averments regarding the acquisition of Kelley Plasterboard Company, Inc., by defendant Newark Plaster Company and except that they deny that said Kelley Plasterboard Company, Inc. had been engaged in the production of gypsum wallboard since before 1918.

29. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 39 of the Complaint in so far as they refer to persons, companies or corporations other than the defendant, United States Gypsum Company. These defendants deny that the defendant, United States Gypsum Company, sells most of the gypsum board and plaster manufactured by it in interstate commerce and in commerce between the States and the District of Columbia, but these defendants admit that said defendant, United States Gypsum Company, sells most of the gypsum board and plaster manufactured by it to retail building material dealers located throughout the Eastern area, and these defendants aver that a substantial part of said sales are made to said retail building material dealers in intrastate commerce. Further answering, these defendants aver that defendant, United States Gypsum Company, from its inception has had the policy of selling its gypsum products through the dealer trade and has built the good will of its business upon such a policy, and these defendants accordingly admit that since 1929 and for many years prior thereto defend-
361 ant, United States Gypsum Company, has generally refrained from selling said gypsum products direct to contractors, as such sales would have destroyed, or tended to destroy, its principal means of distribution.

30. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 40 of the Complaint in so far as they refer to defendants other than defendant, United States Gypsum Company. These defendants otherwise admit the averments contained in the first sentence of said paragraph except that, further answering, they aver that defendant, United States Gypsum Company, has only two such warehouses located in the Eastern area from which its said gypsum products are transported to dealers, these warehouses being located in the Metropolitan New York area. These defendants deny each and all of the averments con-

tained in the last sentence of said paragraph, and, on the contrary, aver that although gypsum board sold by said defendant is often transported in mixed cars or trucks of board, plaster and miscellaneous gypsum products said defendant also frequently makes straight carload or truckload shipments of its said gypsum board sold by it in said Eastern area.

31. Admit the averments contained in Paragraph 41 of the Complaint.

32. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the first sentence of Paragraph 42 of the Complaint in so far as they refer to defendant companies other than defendant, United States Gypsum Company, but these defendants deny said averments in so far as they refer to said United States Gypsum Company and, on the contrary, aver that said defendant's sales to manufacturing distributors constitute an inconsequential part of the total gypsum board manufactured by it and that such sales as said defendant makes to said manufacturing distributors are for the most part made in intrastate commerce. Further answering, these defendants admit the averments contained in the second sentence of said Paragraph 42, but are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the third and last sentence of said paragraph.

33. Deny each and all of the averments contained in Paragraph 43 of the Complaint except as hereinafter specifically admitted, qualified or denied. These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph in so far as they refer to defendant companies other than defendant United States Gypsum Company and aver that for many years prior to the year 1932 said United States Gypsum Company had established and followed a policy of dealer distribution and had built up a valuable good will for said defendant and its gypsum products among the dealer trade in the entire United States and has at all times distributed by far the greatest part of its said gypsum products through building material dealers rather than jobbers although some of the
362 dealers to whom said defendant sold its gypsum board and plaster have carried on for many years past and now are carrying on a jobbing business in the sale and distribution of less than carload quantities of gypsum board and plaster to other building material deal-

ers. Further answering, these defendants admit that jobbers to whom gypsum board was sold by some manufacturers of such board resold said board to retail dealers in competition with the defendant companies and other manufacturers of gypsum plaster and board and these defendants admit that some of said jobbers were also engaged in the manufacture of plaster from calcined gypsum at mixing plants owned or operated by said jobbers.

34. Deny each and all of the averments contained in Paragraphs 44 and 45 of the Complaint.

35. Deny each and all of the averments contained in Paragraph 46 of the Complaint and, further answering, these defendants aver that through extensive research work carried on by the expenditure each year of substantial sums of money, the defendant, United States Gypsum Company, developed extensive improvements in the art of manufacturing gypsum products and in the character and quality of such products and acquired and now owns numerous United States Letters Patent covering its inventions and improvements embodied in said gypsum products and in their manufacture, particularly with regard to gypsum board. Further answering, these defendants aver that, in accordance with the patent laws of the United States, the defendant, United States Gypsum Company, acquired a legal monopoly in the manufacture, sale and use of such gypsum products embodying the inventions and improvements set forth and claimed in its said patents and that, after due deliberation, said defendant determined to share its said monopoly with other manufacturers of gypsum board through the granting of licenses to manufacture and sell gypsum board embodying the inventions and improvements set forth and claimed in said defendant's patents, to the end that the gypsum industry and the public generally might benefit through the production and enjoyment of a superior product they could not otherwise have produced or had, and, as a condition in said licenses and for the reasonable and appropriate protection of the patent rights which it has acquired, the defendant, United States Gypsum Company, reserved the right to establish the minimum prices at which its licensees might sell the patented products so manufactured by them, pursuant to the terms of the license agreement. These defendants further aver that the right so reserved to defendant, United States Gypsum Company, was designed to and did protect said defendant's patent rights and was an entirely proper and legal restriction within the purview

of the patent laws and the decisions of the Supreme Court of the United States; that the said license agreements involved basic patents in the manufacture of gypsum board and were, in law and in fact, bona fide license agreements, reasonably designed to secure to the defendant, United States Gypsum Company, the pecuniary reward for its valid patent monopolies to which it was entitled.

363 36. Deny each and all of the averments contained in Paragraph 47 of the Complaint and, further answering, these defendants aver that neither they nor any one or more of them have entered into any combination, conspiracy or agreement with each other or with the other defendants named in the Complaint or any one or more of them in violation of Sections 1, 2 or 3 of the Sherman Act, either during the period between the month of September, 1925, and early in the year 1930, as alleged in the Complaint, or at any other time or times.

37. Admit the averments contained in Paragraph 48 of the Complaint and, further answering, these defendants aver that shortly after the defendant, United States Gypsum Company, commenced the manufacture of gypsum board it became aware of the fundamental need of an improvement in the board so as to eliminate the disadvantages of an open-edge board, leaving the core of the board exposed and unprotected, and to the end of solving this need said defendant caused its employee, said Clarence W. Utzman, to devote his entire and undivided attention to the solving of this problem; that after a period of approximately a year and a half of experimentation and research said Utzman found the solution to the problem in his invention of the closed-edge board, as set forth and claimed in United States Letters Patent No. 1,034,746, issued on August 6, 1912, to defendant, United States Gypsum Company, in accordance with the understanding and agreement of said defendant and its said employee, Utzman, for the terms of which patent these defendants beg leave to refer to the original Letters Patent upon the trial of this cause. For brevity and convenience, these defendants adopt for the purposes of this answer plaintiff's description of said United States Letters Patent No. 1,034,746 as the "Utzman patent" and the board embodying the edges described in said patent as "closed-edge board" and the board with an unprotected edge as "open-edged board" and such patent, such closed-edge board and such unprotected-edge board will sometimes hereinafter be referred to as the "Utzman patent", "closed-edge board" and "open-edge board", respectively.

38. Admit the averments contained in Paragraph 49 of the Complaint and, further answering, these defendants aver that, in addition to the substantial improvement which the closed-edge board represented over that on the market by eliminating chipping and crumbling of the core at the edges, said closed-edge board represented a further substantial improvement among others in reducing manufacturing costs and production problems involved in the manufacture of gypsum board as theretofore produced.

39. Admit the averments contained in Paragraphs 50 and 51 of the Complaint and, further answering, these defendants aver that the said courts in upholding the validity of said Utzman patent determined that the closed edge was the heart of the invention described in said patent.

40. Admit the averments contained in Paragraph 52 of the Complaint and, further answering, these defend-
364 ants aver that the inventions and improvements set forth and claimed in United States Letters Patent No. 1,358,508, known as the Birdsey patent, were the result of extensive research and experimental work carried on by the defendant, United States Gypsum Company, at its own expense, and that the patent was acquired by said defendant pursuant to understanding and agreement which said defendant had with its employee, the said inventor, Birdsey.

41. Admit the averments contained in Paragraph 53 of the Complaint, except that these defendants aver that the board with semi-protected edges manufactured by American Gypsum Company and Universal Gypsum & Lime Company between the period 1920 and 1925 and manufactured by Niagara Gypsum Company was so like the board with edges covered by the Birdsey patent as to constitute, in law and in fact, an infringement of said Birdsey patent, and these defendants further aver that said American Gypsum Company, Universal Gypsum & Lime Company and Niagara Gypsum Company subsequently accounted to the defendant, United States Gypsum Company, in damages for their said infringement of the patent rights of said United States Gypsum Company.

42. Deny each and all of the averments contained in Paragraph 54 of the Complaint, except that these defendants admit that during the period from the latter part of 1925, after the defendant, United States Gypsum Company, had obtained judgment against said Beaver Products Company and after the filing of infringement suits against American Gypsum Company and Universal Gypsum & Lime Company and until the year 1930, efforts were made by the

parties to the respective infringement suits to settle the litigation with respect to the infringement of the patent rights of defendant, United States Gypsum Company, by the said respective defendants in said infringement suits.

43. Deny each and all of the averments contained in Paragraphs 55, 56, 57 and 58 of the Complaint and these defendants aver that, on the contrary, the suggestion of a license agreement from defendant, United States Gypsum Company, arose in the course of negotiations between the defendant, Sewell L. Avery, and Augustus S. Blagden, then President of the Beaver Products Company, which were initiated by said Blagden in an effort to bring about a settlement of the litigation then pending between his company and the defendant, United States Gypsum Company, wherein the Beaver Products Company had been adjudged an infringer of certain closed-edge board patents, including said Utzman patent, owned by defendant, United States Gypsum Company.

44. Deny each and all of the averments contained in Paragraph 59 of the Complaint.

45. Deny each and all of the averments contained in Paragraph 60 of the Complaint, except that these defendants admit that the defendant, Sewell L. Avery, did attend, pursuant to invitation, a meeting held on or about the 20th day of May, 1926, at which meeting the possibility of the settlement of all outstanding litigation between de-
365 fendant, United States Gypsum Company, and other manufacturers of gypsum board was discussed, and defendants aver that at said meeting each of the companies present expressed a willingness to consider becoming a licensee of United States Gypsum Company under the said Utzman patent, and the defendant, Sewell L. Avery, as President of defendant, United States Gypsum Company, expressed a willingness to consider such a settlement of outstanding litigation and the negotiation of such a license contract with each of the manufacturers of gypsum board who desired to secure such a license.

46. Deny each and all of the averments contained in Paragraph 61 of the Complaint and these defendants aver that, on the contrary, shortly after the meeting held on or about the 20th day of May, 1926, hereinbefore referred to in Paragraph 46 of this answer, defendant, United States Gypsum Company, and said Beaver Products Company, acting through their respective representatives and attorneys, proceeded to work out a settlement of the existing litigation between those companies, a part of which settle-

ment was the granting of a license contract from defendant, United States Gypsum Company, to said Beaver Products Company, granting to said Beaver Products Company a non-exclusive right and license to use the inventions and improvements set forth and claimed in certain patents and applications for Letters Patent owned by defendant, United States Gypsum Company, for the terms of which contract these defendants beg leave to refer to the original thereof upon the trial of this cause. Further answering, these defendants aver that upon the execution of said license contract by the defendant, United States Gypsum Company, and said Beaver Products Company the said defendant, United States Gypsum Company, expressed a willingness to negotiate a license contract with each of the other manufacturers of gypsum board, which offer was not accepted by any other gypsum board manufacturer, except Universal Gypsum & Lime Company, as is hereinafter more fully set forth.

47. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 62 of the Complaint, except that these defendants admit that certain members of the industry did not accept a license contract from said United States Gypsum Company similar to the license granted to said Beaver Products Company.

48. Deny each and all of the averments contained in Paragraph 63 of the Complaint, except that these defendants admit that certain companies considering the offer of said defendant, United States Gypsum Company, to negotiate with each of them a license similar to that granted said Beaver Products Company proposed that the license agreements under consideration cover only the Utzman patent and run only until the expiration of said patent, and except that these defendants admit that the defendant, Sewell L. Avery, acting in his capacity as an officer of the defendant, United States Gypsum Company, did not
366 accept said counter proposal, and except that these defendants are without knowledge or information sufficient to form a belief as to the truth of such averments with respect to the reasons prompting any company to make the counter proposal, as alleged in Paragraph 63 of the Complaint.

49. Deny each and all of the averments contained in Paragraph 64 of the Complaint, except that these defendants admit that said Beaver Products Company elected to settle the litigation then pending between it and the de-

fendant, United States Gypsum Company, and as part of said settlement said United States Gypsum Company granted a license contract to said Beaver Products Company in the form negotiated between the companies, and that the Universal Gypsum & Lime Company elected to settle the litigation between it and the defendant, United States Gypsum Company, and as a part of such settlement said United States Gypsum Company granted a license contract to said Universal Gypsum & Lime Company in form similar to the contract theretofore made between said defendant, United States Gypsum Company, and said Beaver Products Company, and, further answering, these defendants admit that the litigation between the defendant, United States Gypsum Company, and said Beaver Products Company was settled and the license contract granted under date of July 29, 1926, and the litigation between the defendant, United States Gypsum Company, and said Universal Gypsum & Lime Company was settled and the license contract executed under date of September 17, 1926. Further answering, these defendants admit that a copy of the Beaver Products Company license agreement is set forth as Exhibit 2 in the appendix to said Complaint, and for the terms of said license agreement and the Universal Gypsum & Lime Company license agreement these defendants beg leave to refer to the originals thereof upon the trial of this cause.

50. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the first sentence of Paragraph 65 of the Complaint. These defendants deny the averments contained in the second sentence of said Paragraph 65 and aver that, on the contrary, representatives of said Atlantic Gypsum Products Company and said Texas Cement Plaster Company requested license contracts and that license contracts with each were executed on March 5, 1927, and April 18, 1927, respectively, both of which license contracts were similar to the license contracts theretofore granted by defendant, United States Gypsum Company, to said Beaver Products Company and said Universal Gypsum & Lime Company, except as to the provisions of said latter contracts covering the payment of damages for past infringement. For the terms of said license contracts these defendants beg leave to refer to the originals thereof upon the trial of this cause.

51. Deny each and all of the averments contained in Paragraph 66 of the Complaint, except that these defend-

ants admit that pursuant to the terms of said license contracts defendant, United States Gypsum Company, did from time to time following the execution of said
367 contracts exercise its right to establish the minimum price at which each of its said licensees might sell gypsum board embodying the inventions and improvements set forth and claimed in said Utzman patent which was manufactured and sold by each such licensee pursuant to the terms of its said license contract.

52. Deny each and all of the averments contained in Paragraph 67 of the Complaint, except that these defendants admit that the period from 1927 to May, 1929, was a period in which the prices of all gypsum products were from time to time reduced to a point where the prices had no relation whatsoever to the cost of production and the value of the product to the purchaser, with the result that all companies were carrying on their gypsum operations at a loss, to the detriment of said companies, their stockholders, bondholders and employees and to the detriment of the distributors of said products throughout the country, as well as others having any interest in the general welfare and continued existence of the gypsum industry.

53. Admit, with respect to the averments contained in Paragraph 68 of the Complaint, that late in 1926 the defendant, Certain-teed Products Company, commenced the manufacture of open-edge board and sold its open-edge board at a differential below the price of closed-edge board, but these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said Paragraph 68 as to the reasons for the action of Certain-teed Products Company in so pricing its said open-edge board and in making further price reductions, as alleged in said paragraph, and these defendants, further answering, aver that the open-edge board was, in fact, an inferior product to the closed-edge board and that it would be necessary to sell said open-edge board at a differential below the price of closed-edge board in order to attempt to overcome consumer preference for said closed-edge board.

54. Deny each and all of the averments contained in Paragraph 69 of the Complaint except that these defendants admit that the introduction of open-edge board on the market presented a competitive problem and that the American, National and Niagara Gypsum companies sold a second grade board at about the same price as that of open-edge board, but these defendants aver that for years prior

to the year 1927 there had always been second grade gypsum board resulting from the manufacture of board which failed in some particular to meet the perfection required of first grade board and that at least a part of this second grade gypsum board was sold to the same class of trade buying first grade board at prices lower than the prices charged for first grade board. Further answering, these defendants admit that Universal Gypsum & Lime Company commenced marketing a second grade board in the fall of 1927 at prices below those for its first grade board.

55. Admit, with respect to the averments contained in Paragraph 70 of the Complaint, that early in 1928 the defendant, Certain-teed Products Corporation, acquired
368 said Beaver Products Company, the second largest producer of board at that time and a licensee of said defendant, United States Gypsum Company, that said defendant, United States Gypsum Company, refused to modify the royalty provision of its license agreement with said Beaver Products Company to limit royalties to patented board only but these defendants deny that such refusal had anything whatsoever to do with permitting said Certain-teed Products Corporation to produce open-edge board at the Beaver Products Company plants and deny that permission of said United States Gypsum Company for Certain-teed Products Corporation to manufacture open-edge board at the Beaver Products Company plants was ever required or requested. Further answering, these defendants admit that Certain-teed Products Corporation refused to assume Beaver Products Company's agreement and commenced the production of an open-edge board at all of the Beaver Products Company plants, but these defendants are without knowledge or information sufficient to form a belief as to the reasons for Certain-teed Products Corporation's refusal so to assume said Beaver Products Company's agreement and its commencement of the production of open-edge board at all of the Beaver Products Company plants.

56. Admit the averments contained in Paragraph 71 of the Complaint.

57. Deny each and all of the averments contained in Paragraph 72 of the Complaint except that these defendants admit that in the year 1928 the defendant, United States Gypsum Company, and those of its licensees not yet so doing sold their second-grade closed-edge board at prices competitive with those for open-edge board.

58. Deny each and all of the averments contained in Paragraph 73 of the Complaint except as hereinafter specifically admitted, qualified or denied. These defendants aver that defendant, United States Gypsum Company, reduced its prices on said board from time to time in order to make its prices competitive with other prices of gypsum board which it found in the field but they are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph in so far as they refer to manufacturers other than said United States Gypsum Company. Further answering, these defendants admit that by the year 1929 prices for all gypsum board were substantially below 1927 price levels and admit that during the year 1928, when prices for gypsum board were declining, prices were substantially reduced for other gypsum products, but these defendants deny that such price reductions in other gypsum products applied principally to plaster and block.

59. Deny each and all of the averments contained in Paragraph 74 of the Complaint, except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments regarding the meetings and conferences alleged to have been held in the latter part of 1928 and the early part of 1929 by the companies not yet licensees.

369 60. Deny each and all of the averments contained in Paragraph 75 of the Complaint, except that these defendants admit that the expiration date of the Utzman patent was August 6, 1929, and that the right of defendant, United States Gypsum Company, to establish the minimum price at which its licensees might manufacture and sell patented gypsum board embodying the claims and inventions of said Utzman patent did not extend beyond said date of August 6, 1929, in so far as such right to establish the minimum price of such patented products was based upon said defendant's rights as the owner of said Utzman patent.

61. Deny each and all of the averments contained in Paragraph 76 of the Complaint, except that these defendants aver that prior to the date of May 22, 1929, said defendants, Certain-teed Products Corporation, National Gypsum Company, Ebsary Gypsum Company, Inc., and said Niagara Gypsum Company had each determined to take a license agreement from defendant, United States Gypsum Company, giving to the licensees thereunder the right to manufacture and sell a closed-edge board embodying the inventions and improvements set forth and claimed

in certain patents, including said Utzman patent, owned by said defendant, United States Gypsum Company, and that at a meeting or conference on or about May 22, 1929, attended by representatives of said defendant, United States Gypsum Company, representatives of certain of its licensees and representatives of said Certain-teed Products Corporation, National Gypsum Company, Ebsary Gypsum Company, Inc., and Niagara Gypsum Company the details of said license contracts were worked out and separate license contracts were entered into with United States Gypsum Company by each of said last mentioned companies, for the terms of which these defendants beg leave to refer to the originals upon the trial of this cause. Further answering, these defendants admit that Exhibit 3 in the appendix attached to said Complaint is a copy of said license agreement so entered into between the defendants, United States Gypsum Company and Ebsary Gypsum Company, Inc.

62. Deny each and all of the averments contained in Paragraph 77 of the Complaint.

63. Aver, with respect to the averments contained in Paragraph 78 of the Complaint, that prior to the invention of the cellular gypsum board produced by the foam process which these defendants admit was covered by pending applications for United States Letters Patent which in May, 1929, the defendant, United States Gypsum Company, expected to issue on its said pending applications before the end of the year 1929, it was customary in the gypsum board industry to lighten gypsum board by the use of sawdust in the gypsum mix but that the use of sawdust presented many problems, resulting in part from the variations in quality of the sawdust available and in part from the fact that a sufficient supply of saydust was frequently difficult to obtain, and these defendants further aver that, after years of experimentation and the expenditure of substantial sums of money, defendant, United States Gypsum Company, developed said use of foam in the
370 board which afforded an efficient and less costly substitute for the sawdust formerly used and effectuated a marked improvement in the quality of the board so manufactured. Further answering, these defendants aver that said gypsum board containing the numerous minute cells was an outstanding contribution to the art of the manufacture of gypsum board and that the United States Letters Patent issued to said defendant, United States Gypsum Company, upon its said ap .ications represent valuable patent rights of said defendant which it was and is entitled

to fully exploit; and these defendants further aver that defendant, United States Gypsum Company, knowing that said cellular gypsum board was an improved board and that its manufacture by the industry would therefore be beneficial not only to the industry but also to the users of gypsum board, accordingly determined after settlement of all pending patent litigation against other manufacturers of gypsum board to offer licenses under said patents to its board licensees provided said defendant's patent rights were duly and appropriately protected in such licenses and accordingly said defendant offered to enter into such a license agreement with each of its said licensees as averred in the first sentence of said Paragraph 78, but these defendants deny each and all of the averments contained in the last sentence of said Paragraph 78 and deny that there was ever any agreement whatsoever between said defendant, United States Gypsum Company, and its said licensees or any one or more of them that said defendant would continue price control after the expiration of said Utzman patent.

64. Deny each and all of the averments contained in Paragraph 79 of the Complaint, except that these defendants aver that at the time the cellular gypsum board licenses were offered to its board licensees by defendant, United States Gypsum Company, the foam process for producing cellular gypsum board consisted of the introduction of "soap foam", as averred in the Complaint, into the slurry as an aggregate to cause the formation of numerous air voids, or cells, in the board and except that these defendants admit that said process required that the numerous minute bubbles in the foam be sufficiently stable and pliable to resist collapse during the process of manufacturing board.

65. Admit the averments contained in the first sentence of Paragraph 80 and that a copy of United States Letters Patent No. 1,230,297, issued to Charles E. Hite on June 17, 1917, hereinafter sometimes referred to as the Hite patent, is set forth as Exhibit 4 in the Appendix to the Complaint and that a copy of United States Letters Patent No. 1,500,452, issued to Joseph P. Haggerty on July 8, 1924, hereinafter sometimes referred to as the Haggerty patent, is set forth as Exhibit 5 in the Appendix to the Complaint, but these defendants deny that the said Hite patent is in any way limited in its coverage to a heat-resistant, cementitious material, including calcined gypsum, containing voids produced by the use of a water-cooked gelatinized carbohydrate such as starch, and deny that said Haggerty

patent is in any way limited in its coverage to an improved wallboard manufactured by the use of water-cooked starch gelatin to increase adhesion between the core
371 and paper liners of the board, as might be inferred from the averments in said Complaint and aver that said Haggerty patent does not disclose and in no way involves the use of gelatin. For the terms and disclosures of said United States Letters Patent No. 1,230,297 and No. 1,500,452 these defendants beg leave to refer to the originals thereof upon the trial of this cause.

66. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 81 of the Complaint covering the purpose or purposes prompting the assertions of Universal Gypsum & Lime Company, but these defendants admit that said Universal Gypsum & Lime Company asserted that the use of farinaceous paste in the foam infringed the Haggerty and Hite patents and, further answering, these defendants aver that it was necessary that said defendant, United States Gypsum Company, acquire said patents for its protection against damage claims for prior infringement and for its protection in its continued manufacture of gypsum board.

67. Deny each and all of the averments contained in Paragraph 82 of the Complaint.

68. These defendants deny each and all of the averments contained in Paragraph 83 of the Complaint, except that they aver that defendant United States Gypsum Company, agreed to acquire and did acquire said Haggerty and Hite patents in the manner specifically set forth in Paragraph 69 of this answer.

69. Deny each and all averments contained in Paragraph 84 of the Complaint, and, further answering, these defendants aver that at the time of the negotiations for the purchase of said Haggerty and Hite patents by defendant, United States Gypsum Company, said Universal Gypsum & Lime Company was in federal equity receivership, with its properties and business under the jurisdiction of the United States District Court for the Northern District of Illinois and six other United States District Courts where ancillary receivership proceedings were pending and these defendants admit that, after considerable negotiations with the receivers for said Universal Gypsum & Lime Company, said defendant, United States Gypsum Company, did agree with said receivers to acquire the said Haggerty and Hite patents and to grant to said receivers a license to manu-

facture and sell gypsum board embodying the inventions and improvements set forth and claimed in said defendant's patent application covering said cellular gypsum board and said foam process and any patents issuing thereon and in said Haggerty and Hite patents, subject, however, to said receivers first obtaining the approval of such sale and license by all of the Federal District Courts in which said receivership proceedings were then pending, and these defendants aver that said defendant, United States Gypsum Company, did acquire said patents from said receivers and did grant such license to said receivers, upon and with the approval of the said Federal District Courts upon
372 petition filed by said receivers with each of said seven Federal District Courts fully setting forth the facts with respect to said sale and license. Further answering, these defendants aver that certain of its board licensees agreed with said United States Gypsum Company to accept a license from said United States Gypsum Company under said Haggerty and Hite patents and under the applications for letters patent and any letters patent issued thereon covering said cellular gypsum board and said foam process, and such license agreements were entered into between said United States Gypsum Company and certain of its said licensees, which licenses, however, did not become effective until the sale of the said Haggerty and Hite patents by the receivers of Universal Gypsum & Lime Company to said United States Gypsum Company had been approved by the United States District Court for the Northern District of Illinois and by the six United States District Courts in which ancillary receiverships were pending as hereinbefore set forth.

70. Deny each and all of the averments contained in Paragraph 85 of the Complaint, except as hereinafter specifically admitted, qualified or denied. These defendants aver that after the defendant, United States Gypsum Company, had agreed with the Receivers for said Universal Gypsum & Lime Company to purchase said Haggerty and Hite patents, as hereinbefore set forth in Paragraph 69 of this answer, National Gypsum Company, Certain-teed Products Corporation, Universal Gypsum & Lime Company, Atlantic Gypsum Products Company and Ebsary Gypsum Company, Inc., entered into license agreements with United States Gypsum Company, but that said license agreements by their express terms did not become effective until after said Receivers had obtained the approval of the United States District Court of the conveyance and assignment of said Haggerty and Hite patents to defend-

ant, United States Gypsum Company. Subsequently American Gypsum Company and Kelley Plasterboard Company, Inc. also entered into license agreements with said United States Gypsum Company. For the terms of each of said license agreements so entered into these defendants beg leave to refer to the originals thereof upon the trial of this cause. Further answering, these defendants admit that when each of said license agreements went into effect it superseded all prior license contracts between the licensor and licensee thereunder except in the case of said American Gypsum Company and said Kelley Plasterboard Company, Inc., neither of which had theretofore entered into a license contract with said United States Gypsum Company.

71. Deny each and all of the averments contained in Paragraph 86 of the Complaint. Further answering, these defendants aver that for some years prior to the year 1929 defendant, United States Gypsum Company, had been using adhesives in the manufacture of board to improve adhesion between the core and the liners which were within the scope of said Haggerty patent and on information and belief aver that the other manufacturers of gypsum board were so using adhesives prior to the year 1929 which were within the scope of said Haggerty patent.

373 72. Deny each and all of the averments contained in Paragraph 87 of the Complaint except that these defendants are without knowledge and information sufficient to form a belief as to the truth of the averments contained in said paragraph as to the dollar sales of gypsum board in the Eastern area in 1929 by companies other than United States Gypsum Company and, further answering, these defendants aver that in the period from August 6, 1929 to February 10, 1937 said United States Gypsum Company was not authorized to establish or control in any way the price or prices at which said Texas Cement Plaster Company might sell gypsum board and aver that said Texas Cement Plaster Company was at no time obliged to manufacture a uniform, standardized board by virtue of any agreement with said United States Gypsum Company. Further answering, these defendants aver that the dollar sales of gypsum board made by defendant, United States Gypsum Company, in the Eastern area in 1929 was substantially larger than the figure shown in said Paragraph 87.

73. Admit the averments contained in Paragraph 88 of the Complaint except that these defendants deny that the Texas Cement Plaster Company executed its said License Agreement in February 1937 under duress as is implied in

said paragraph and aver that the execution of said License Agreement was the free and voluntary act of said Texas Cement Plaster Company and except that these defendants deny the averments in the second sentence of said paragraph.

74. For brevity and convenience in reference, these defendants adopt for the purposes of the remainder of this answer the plaintiff's definition of the meaning of the word "licensee" as set forth in Paragraph 89 of the Complaint, except that these defendants deny the formation or existence of any combination as set forth in the Complaint or otherwise.

75. Deny each and all of the averments contained in Paragraph 90 of the Complaint, except that these defendants aver that following the execution of the license agreements referred to in Paragraph 85 of the Complaint, United States Gypsum Company has determined and established the minimum price or prices at which each licensee might sell patented gypsum board manufactured and sold by it under the terms of its said license contract and except that these defendants aver that during the period in which said minimum prices have been so determined and established by said defendant, United States Gypsum Company, its said licensees have sold a substantial part of all the gypsum board manufactured by them at prices not less than said minimum prices so determined and established by said United States Gypsum Company. Further answering, these defendants specifically deny that defendant, United States Gypsum Company, has maintained the prices of said gypsum board throughout the period from 1932 to the date of the filing of this complaint at high, arbitrary and non-competitive levels, but, on the contrary, these defendants aver that the prices at which such board has been sold by defendant, United States Gypsum Company,
374 and its said licensees during said period have been fair and reasonable and that such sales have been made in a highly competitive market, subject not only to the competition within the gypsum industry but also to the competition of non-gypsum products which are sold for the same general uses and purposes as said gypsum board; and, further answering, these defendants aver that at the time of the filing of this Complaint and for some period of time prior thereto the prices at which said gypsum board was sold were in fact substantially below the normal market prices for such product which had prevailed prior to the execution of the first license agreement between defendant, United States Gypsum Company, and Beaver Products Company on July 29, 1926, whereas the quality

and utility of such gypsum board were far superior to the quality and utility of the gypsum board then being marketed.

76. Aver, with respect to the averments contained in Paragraph 91 of the Complaint, that defendant, United States Gypsum Company, has from time to time since the execution of the license agreements referred to in Paragraph 85 of the Complaint issued to each of its licensees bulletins setting forth the minimum prices at which such licensee might sell patented gypsum board manufactured by such licensee under its said license contract, including the setting forth of terms and conditions of sale reasonably necessary to the determination and establishment of such minimum prices, and these defendants aver that throughout said period each of its said licensees has in the main adhered to said minimum price bulletins in the sale of the patented board manufactured by such licensee under its said license contract. Further answering, these defendants admit that copies of certain of said minimum price bulletins are set forth in Exhibit 7 in the appendix to said Complaint, but these defendants deny that Subparagraphs (a) to (u), inclusive, of said Paragraph 91 accurately or sufficiently describe the terms and provisions of said minimum price bulletins, for the terms of all of which these defendants beg leave to refer to the originals thereof upon the trial of this cause.

77. Admit the averments contained in Paragraph 92 of the Complaint, except that these defendants deny that the alleged meetings between defendant, United States Gypsum Company, and its licensees have been numerous and deny that the alleged activities of said defendant, United States Gypsum Company, through its officers, employees and attorneys and said corporation known as Board Survey Company were anything more than was reasonably necessary to protect, by legal and proper means, the patent and contract rights of said defendant, and except that these defendants deny that defendant, United States Gypsum Company, has insisted upon auditing, or has audited, the books of any licensee who has exercised its right under the license contract to have such audit made by a certified public account.

78. Deny each and all of the averments contained in Paragraphs 93 and 94 of the Complaint.

79. Deny each and all of the averments contained in Paragraph 95 of the Complaint except, with respect
375 to the fourth sentence of said Paragraph, these defendants deny knowledge or information sufficient to form a belief as to the truth of the averments with

respect to others than defendant United States Gypsum Company and aver that said defendant's policy was to sell its gypsum products to jobbers and dealers at the same price.

80. Deny each and all of the averments contained in Paragraphs 96 and 97 of the Complaint.

81. Admit, with respect to the averments contained in Paragraph 98 of the Complaint, that the first patent issued upon the cellular gypsum board and foam process applications was United States Letters Patent No. 2,017,022, issued October 8, 1935, and that subsequently two additional United States Letters Patent were issued on said applications, No. 2,079,338 issued May 4, 1937, and No. 2,080,009 issued May 11, 1937, and admit that copies of said patents are set forth in the appendix to the Complaint as Exhibits 8, 9 and 10, respectively, and for the terms and disclosures of all of said patents these defendants beg leave to refer to the originals thereof upon the trial of this cause. Further answering, these defendants deny each and all of the averments contained in the last two sentences of said Paragraph 98 and, further answering, they aver that throughout the period from November 5, 1929, to October, 1935, the defendant, United States Gypsum Company, exercised the right reserved to it in said license contracts referred to in Paragraph 85 of the Complaint to establish the minimum price or prices at which each licensee might sell gypsum board manufactured by such licensee and embodying the inventions and improvements set forth and claimed in letters patent under which said licensees were licensed, including the said Haggerty and Hite patents.

82. Deny each and every averment contained in Paragraph 99 of the Complaint except that these defendants aver that the inventions covered by said Hite patent included, among other things, a heat-resistant, cementitious material, including calcined gypsum, containing voids produced by the use of a water-cooked, gelatinized carbohydrate such as starch.

83. Deny each and all of the averments contained in Paragraph 100 of the Complaint except that these defendants aver that the inventions covered by said Haggerty patent included, among other things, a board manufactured by a process involving the use of a water-cooked starch to increase adhesion between the core and the liners of the board.

84. Deny each and all of the averments contained in Paragraph 101 of the Complaint.

85. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 102 of the Complaint, except that these defendants admit that the Kelley Plasterboard Company did not commence manufacturing the foam light-
376 ened board until said company was acquired by the defendant, Newark Plaster Company, and except that these defendants admit that Texas Cement Plaster Company did not commence manufacturing the foam lightened board until February, 1937.

86. Deny each and all of the averments contained in Paragraph 103 of the Complaint.

87. Deny each and all of the averments contained in Paragraph 104 of the Complaint, except that these defendants aver that gypsum board is frequently transported in mixed cars or trucks with plaster and miscellaneous gypsum products.

88. Admit the averments contained in Paragraph 105 of the Complaint.

89. Deny each and all of the averments contained in Paragraph 106 of the Complaint, except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said Paragraph 106, in so far as they refer to manufacturers other than said defendant, United States Gypsum Company. Further answering, these defendants aver that when prices for plaster and miscellaneous gypsum products from time to time have advanced the policy of defendant, United States Gypsum Company, has been to sell said products to all of its dealers at the prices in effect at the time of purchase, except in cases where the dealer-customer was entitled by contract or custom to protection at prices prevailing prior to the price advances.

90. Deny each and all of the averments contained in Paragraph 107 of the Complaint, except that these defendants admit that in the year 1936 defendant, United States Gypsum Company, and certain of its licensees and other manufacturers of gypsum products formed an association known as the "Gypsum Statistical Institute" and through said association set up an agency where each of the members of the Association could file data regarding their outstanding specific job contracts covering plaster, said action constituting a legal and proper attempt on the part of said defendant and the other gypsum manufacturers participating to protect themselves against the efforts of certain dealers to impose upon gypsum manufacturers by

making false and improper claims with respect to the amount of tonnage to which they were entitled on their specific job contracts protected by the various gypsum manufacturers, and these defendants aver that said gypsum manufacturers have continued to file from time to time information regarding specific job contracts with the agency so established through the formation of said association and aver that such action is necessary to the protection of said manufacturers.

91. Deny each and all of the averments contained in Paragraphs 108, 109 and 110 of the Complaint.

377 92. Deny each and all of the averments contained in Paragraph 111 of the Complaint, except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the last sentence of said paragraph.

93. Deny each and all of the averments contained in Paragraph 112 of the Complaint, except that these defendants admit that defendant, United States Gypsum Company, and certain of its licensees entered into separate license agreements covering the manufacture and sale of metalized board and perforated lath, and aver that each of said separate license agreements was a bona fide license agreement entered into in good faith in order to grant to the licensee thereunder the right to manufacture a patented product embodying the inventions and improvements set forth and claimed in the patents or patent rights of defendant, United States Gypsum Company, under which said licenses were granted.

94. Deny each and all of the averments contained in Paragraph 113 of the Complaint except that these defendants admit that in the year 1934 defendant, United States Gypsum Company, offered to grant to each of its licensees a license to manufacture and sell metalized board embodying the inventions and improvements set forth and claimed in patents and patent rights owned by said defendant and that such a license agreement was entered into with said United States Gypsum Company by American Gypsum Company, Atlantic Gypsum Products Company, Certainteed Products Corporation, Ebsary Gypsum Company, Inc., Kelley Plasterboard Company, Inc., National Gypsum Company and Universal Gypsum & Lime Company, and except that these defendants admit that the copy of the metalized board license agreement entered into with Ebsary Gypsum Company, Inc., which is set forth as Exhibit 11 in the appendix to the Complaint, is substantially identical with

each of the metalized board licenses entered into with said other licensees, and for the terms of said metalized board license agreements these defendants beg leave to refer to the originals thereof upon the trial of this cause.

95. Deny each and all of the averments contained in Paragraph 114 of the Complaint except that these defendants aver that throughout the period from the execution of said license agreements to the date of the filing of said Complaint defendant, United States Gypsum Company, has determined the minimum prices at which each licensee might sell metalized gypsum board manufactured by it and embodying the inventions and improvements set forth and claimed in said patents and patent rights of the licensor under which said license was granted.

96. Admit the averments contained in Paragraph 115 of the Complaint except that these defendants aver that said perforated gypsum lath was, in law and in fact, covered by United States Letters Patent No. 1,938,354, owned by said defendant, United States Gypsum Company.

97. Deny each and all of the averments contained in Paragraph 116 of the Complaint except that these
378 defendants aver that the perforated lath license agreements so proposed by the United States Gypsum Company reserved to said company the right to determine and fix the minimum price at which any licensee thereunder might sell perforated gypsum lath manufactured by it and embodying the inventions and improvements set forth and claimed in said United States Letters Patent No. 1,938,354, and these defendants further aver that the perforated gypsum lath covered by said perforated lath license agreements also embodied inventions and improvements set forth and claimed in patents of defendant, United States Gypsum Company, which were included in the license agreements referred to in Paragraph 85 of the Complaint and therefore was subject to the minimum price provisions of those license contracts.

98. Deny each and all of the averments contained in Paragraph 117 of the Complaint except that these defendants admit that subsequent to execution of perforated lath license contracts between defendant, United States Gypsum Company, and Certain-teed Products Corporation and American Gypsum Company, similar perforated lath license agreements were entered into by said United States Gypsum Company with Ebsary Gypsum Company, Inc., and Kelley Plasterboard Company, Inc., and except that these defendants admit that a copy of the Certain-teed Products

Corporation perforated lath license agreement is set forth as Exhibit 12 in the appendix to the Complaint and is substantially identical with the perforated lath license agreements entered into with each of the other companies hereinbefore in this paragraph referred to, and for the terms of said perforated lath license agreements these defendants beg leave to refer to the originals thereof upon the trial of this cause.

99. Deny each and all of the averments contained in Paragraph 118 of the Complaint except that they aver that by the terms of said perforated lath license agreements defendant, United States Gypsum Company, authorized its licensees to manufacture perforated lath under said patent, with the right reserved in said United States Gypsum Company to determine and fix the minimum price at which each of its licensees might sell perforated lath manufactured by such licensee and embodying the inventions and improvements set forth and claimed in said United States Letters Patent No. 1,938,354, and these defendants admit that by the terms of said license agreements each of the licensees acknowledged the validity of said patent and agreed not to contest its validity. Further answering, these defendants aver that throughout the period from the date of the execution of each such perforated lath license agreement to the month of May, 1938, defendant, United States Gypsum Company, determined the minimum price at which the licensee thereunder might sell such patented perforated lath manufactured by such licensee under said contract, and these defendants admit that the said minimum price of perforated lath so fixed was at a differential above the prices of straight lath and admit that each of such licensees sold a substantial part of the patented perforated lath manufactured by such licensee under said license at prices not less than said minimum prices so determined by said United States Gypsum Company.

379 100. Deny each and all of the averments contained in Paragraph 119 of the Complaint, except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the first sentence of said paragraph in so far as they purport to state the information and belief as to the validity of said United States Letters Patent No. 1,938,354 of companies other than defendant, United States Gypsum Company.

101. Admit the averments contained in Paragraph 120 of the Complaint except that these defendants are without knowledge or information sufficient to form a belief as to the reason or reasons why the licensees have refrained from contesting the validity of said United States Letters Patent No. 1,938,354.

102. Deny each and all of the averments contained in Paragraphs 121, 122 and 123 of the Complaint.

103. Deny each and every averment in the Complaint not hereinbefore admitted, qualified, explained, or specifically denied.

Wherefore, these defendants demand judgment dismissing the Complaint, with costs.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

380 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Answer of Defendants Newark Plaster Company and Frederick Tomkins.

Filed August 2, 1941

381 Defendants Newark Plaster Company and Frederick Tomkins answering the complaint herein as amended by an amendment filed herein on June 5, 1941:

1. Admit that the complaint was filed and these proceedings instituted under Section 4 of the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and commonly known as the "Sherman Anti-Trust Act", but deny that they or either of them alone or in conjunction with any other defendant or defendants have violated or are now violating Section 1 of the said Sherman Anti-Trust Act as amended or Sections 2 and 3 of the said Act.

2. Deny each and every allegation in paragraphs 2, 42, 86, 93, 94, 95, 106, 108 and 109 of the complaint insofar as they refer to defendant Newark Plaster Company, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraphs.

3. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 3, 7, 8, 9, 11, 13, 14, 15, 16, 17, 18, 24, 25, 31, 33, 35, 37, 49, 50, 51, 52, 53, 55 to 79, inclusive, 81, 82, 83, 84, 97, 115 and 116 of the complaint as amended.

382 4. Deny each and every allegation in paragraphs 4, 44, 45, 46, 47, 96, 103, 110, 121, 122 and 123 of the complaint.

5. Admit the allegations in paragraphs 5, 6, 10, 19, 27 and 105 of the complaint.

6. For the purposes of this answer adopt plaintiff's designations in paragraphs 5 to 12, inclusive, 20 and 30 of the complaint as amended.

7. Admit that Newark operates a gypsum board plant at Kearny, New Jersey and a gypsum plaster mill at Newark, New Jersey, that U. S. G. and National operate plants in the United States and that Newark sells gypsum products manufactured by it in interstate commerce, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 20 of the complaint as amended insofar as they refer to other defendant companies and deny each and every other allegation in the said paragraph.

8. Deny that the process alleged in paragraph 21 of the complaint is the complete process in the manufacture of calcined gypsum or stucco, but admit the other allegations in the said paragraph.

9. Admit the allegations in the first and second sentences of paragraph 22 of the complaint, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

10. Admit the allegations contained in the first and second sentences of paragraph 23 of the complaint but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

11. Deny that gypsum wallboard is a substitute for plaster and lath, but admit the other allegations in paragraph 26 of the complaint.

12. Admit that the manufacture of plaster from calcined gypsum involves a relatively simple operation as compared with the manufacture of gypsum board from calcined gypsum and that the manufacture of gypsum board involves a much more complicated operation requiring expen-

sive equipment and machines, but deny that the operation of the manufacture of gypsum plaster is adequately described in paragraph 28 of the complaint and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

13. Admit that the allegations in paragraph 29 of the complaint describe generally the usual process of manufacturing gypsum board, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

14. Admit that U. S. G. and National have expanded into fields of other building materials but allege that they
383 are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraphs 32 and 34 of the complaint.

15. Admit that Newark has a single plant for the manufacture of gypsum board and a single plant for the manufacture of gypsum plaster and that its sales in the Eastern area of gypsum board manufactured by it amounted in 1939 to approximately $750,000, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 36 of the complaint as amended.

16. Admit that Newark has been engaged in the production of plaster since 1922, that it commenced the manufacture of gypsum board in 1939, that Kelley Plasterboard had been engaged in the production of gypsum board at a single plant for a number of years prior thereto, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 38 of the complaint.

17. Admit that Newark sells most of the gypsum board and plaster manufactured by it in interstate commerce and that Newark has generally refrained from selling said gypsum products direct to contractors, but deny each and every other allegation in paragraph 39 of the complaint insofar as they refer to Newark and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

18. Admit that gypsum products are generally transported from the plants of Newark by truck or railroad to the yards of dealers and occasionally in mixed cars or trucks, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 40 of the complaint.

19. Admit that Newark sells gypsum products produced by it in some, but not all, of the States within the Eastern area, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 41 of the complaint.

20. Admit that since the year 1932 no substantial amount of gypsum board or plaster has been distributed by Newark through jobbers and deny each and every other allegation in paragraph 43 of the complaint insofar as they refer to Newark and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

21. Admit that Exhibit 1 in the appendix to the complaint is a copy of United States Letters Patent No. 1,034,746, referred to as the Utzman patent, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 48 of the complaint.

22. Deny that Kelley Plasterboard adopted the plan alleged in paragraph 54 of the complaint, and allege
384 that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

23. Admit that Exhibits 4 and 5 are copies, respectively, of the so-called Hite and Haggerty patents, and beg leave to refer to the said patents for their scope, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 80 of the complaint.

24. Admit that under date of April 23, 1930 Kelley Plasterboard entered into a license agreement with U. S. G. but deny the allegations in paragraph 85 of the complaint insofar as they are allegations of the provisions of the said agreement between Kelley Plasterboard and U. S. G. and beg leave to refer for the provisions thereof to the original of the said agreement which will be produced upon the trial hereof, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

25. Admit that sales by Kelley Plasterboard in the Eastern area of gypsum board manufactured by it amounted to approximately $120,000 in 1929 and that U. S. G. was authorized by the said license agreement between Kelley Plasterboard and U. S. G. dated April 23, 1930, until a date 17 years after the date of issuance of patents not then

issued to establish the minimum price at which Kelley Plasterboard might sell gypsum board manufactured by Kelley Plasterboard under its said license, but deny that Kelley Plasterboard was obliged to manufacture a uniform standardized board, and that it was a party to any agreement referred to in paragraph 86 of the complaint, except the said license agreement with U. S. G. dated April 23, 1930, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 87 of the complaint as amended.

26. Admit that the license agreement between Kelley Plasterboard and U. S. G. was assumed by Newark in or about 1938 and that the said license agreement is now in effect, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 88 of the complaint as amended.

27. Adopt for the purposes of the remainder of this answer plaintiff's definition in paragraph 89 of the complaint of the word "licensee", but deny the formation or existence of any combination as set forth in the said paragraph or elsewhere in the complaint.

28. Deny each and every allegation in paragraph 90 of the complaint insofar as they refer to Newark, deny that the prices of gypsum board throughout the period from 1932 to the date of filing the complaint have been maintained at high, arbitrary and non-competitive levels and admit that U. S. G. has determined and fixed the minimum price or prices at which Kelley Plasterboard and Newark might sell gypsum board manufactured and sold by them under the terms of the said license agreement be-
385 tween Kelley Plasterboard and U. S. G. and that during the period in which said minimum prices have been so determined and fixed such gypsum board has been sold at prices not less than such minimum prices and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

29. Admit that from time to time since the execution of the said license agreement between Kelley Plasterboard and U. S. G., U. S. G. has issued to Kelley Plasterboard and Newark bulletins setting forth minimum prices and terms and conditions of sale for gypsum board manufactured under the said license agreement, that Kelley Plasterboard and

Newark have adhered thereto and that copies of certain of such bulletins are set forth as Exhibit 7 in the appendix to the complaint, but deny that the terms and provisions thereof are accurately or sufficiently described in paragraph 91 of the complaint and beg leave to refer for the provisions thereof to the said bulletins which will be produced upon the trial hereof, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

30. Admit that U. S. G. has required Kelley Plasterboard and Newark to make reports of all sales of board and to permit U. S. G. to audit their books, that complaints have been investigated by Board Survey Company, but deny that Newark has attended numerous meetings at which the prices and terms and conditions of sale prescribed by U. S. G. in said bulletins and at which complaints of violations by licensees of said bulletin prices were discussed for the purpose of obtaining adherence by the licensees to said bulletin prices, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 92 of the complaint.

31. Admit that Exhibits 8, 9 and 10 in the appendix to the complaint are copies of the United States Letters Patent referred to therein, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 98 of the complaint.

32. Admit that Exhibits 4 and 5 in the appendix to the complaint are copies of the Hite and Haggerty patents, and beg leave to refer to the said patents for their scope, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraphs 99 and 100 of the complaint.

33. Admit that during the period from October, 1935 to the date of the filing of the complaint herein Kelley Plasterboard and Newark did not produce board covered by the Hite patent, but deny each and every other allegation in paragraph 101 of the complaint.

34. Admit that Kelley Plasterboard did not commence using the foam process until 1938, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 102 of the complaint.

386 35. Except as admitted in paragraph 18 of this answer, deny each and every allegation in paragraph 104 of the complaint insofar as they refer to Newark and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

36. Admit that in or about the year 1936 Newark became a member of the Gypsum Statistical Institute and that from in or about the year 1936 to in or about the year 1939 Newark filed protected job contracts with the said Gypsum Statistical Institute, but deny that Newark entered into any agreement with U. S. G. and its licensees to file such contracts or to prevent by concerted action the granting by said companies to dealers of concessions described in paragraph 106 of the complaint and thereby to facilitate increases in the prices of said gypsum products and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 107 of the complaint.

37. Deny each and every allegation in paragraph 111 of the complaint, except that they allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of the last sentence of said paragraph.

38. Admit that Kelley Plasterboard and U. S. G. entered into license agreements dated October 12, 1934 and June 23, 1937, respectively, under which U. S. G. licensed Kelley Plasterboard to manufacture and sell plasterboard having a metallized surface and perforated plasterboard lath, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 112 of the complaint.

39. Admit that in 1934 U. S. G. licensed Kelley Plasterboard to manufacture and sell plasterboard having a metallized surface under United States Letters Patent No. 1,914,345 known as the Roos patent and that under the said agreement U. S. G. reserved the right to establish minimum prices at which Kelley Plasterboard could sell such board manufactured by it under its said license, but beg leave to refer for the provisions thereof to the original of the said agreement which will be produced upon the trial hereof and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegation in paragraph 113 of the complaint.

40. Admit that U. S. G. has determined and fixed mini-

mum prices and terms and conditions of sale governing the sale by its licensees of metallized board, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 114 of the complaint.

41. Admit that Kelley Plasterboard entered into an agreement with U. S. G. dated June 23, 1937, a copy of which will be produced at the trial hereof, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 117 of the complaint.

387 42. Admit that by the terms of the said agreement with Kelley Plasterboard U. S. G. authorized Kelley Plasterboard to manufacture perforated lath under the said patent and that U. S. G. reserved the right to establish minimum prices at which Kelley Plasterboard could sell such lath, but beg leave to refer for the provisions thereof to the original of the said agreement which will be produced upon the trial hereof and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 118 of the complaint.

43. Deny the allegation that the said license agreement between Kelley Plasterboard and U. S. G. was not a bona fide patent license agreement and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 119 of the complaint.

44. Admit that Newark has not contested the validity of the perforated gypsum lath patent, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 120 of the complaint.

45. Deny each and every allegation in the complaint not hereinbefore admitted or specifically denied.

Wherefore, defendants pray that the complaint be dismissed as to them.

Fulton Brylawski,
FULTON BRYLAWSKI,
Attorney for Defendants,
Newark Plaster Company
and Frederick Tomkins.

BENJAMIN P. DEWITT,
Counsel.

388 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Expediting certificate

Filed December 16, 1941

To the Clerk of Said Court:

I, Francis Biddle, Attorney General of the United States, hereby certify that the above-entitled cause, now pending in said court, is a civil action brought by the United States against United States Gypsum Company and other defendants named in the complaint therein, under the Act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (26 Stat. 209), and that said action is, in my opinion, a case of general public importance.

I therefore request that, complying with the provisions of the Act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,'" approved February 11, 1903 (32 Stat. 823), as amended by the Act of Congress approved June 25, 1910 (36 Stat. 854), you will file this certificate among the records of the above-entitled cause, and immediately furnish a copy thereof to each of

389 the Justices of the Court of Appeals for the District of Columbia, to the end that said case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day before not less than three of the Justices of said Court of Appeals, as provided in said Act of February 11, 1903, as amended.

Francis Biddle,
FRANCIS BIDDLE,
Attorney General.

WASHINGTON, D. C., *December 5, 1941.*

GRANT W. KELLEHER,
By A. KARSTED,
Department of Justice, Washington, D. C.

390 In the United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Designation of judges pursuant to the provisions of Sec. 28, Title 15, U. S. Code

Filed September 17, 1942

The Attorney General having filed an expediting certificate in the District Court of the United States for the District of Columbia in the above entitled cause, pursuant to the provisions of Section 28 of Title 15 of the Code of Laws of the United States of America; now, therefore, pursuant to the authority vested in me by said section (15 U.S.C. Sec. 28, as amended by the Act of April 6, 1942, Pub. No. 515, 77th Congress), I do hereby designate the Honorable Harold M. Stephens, Associate Justice of the United States Court of Appeals for the District of Columbia, and the Honorable Finis J. Garrett and the Honorable Oscar E. Bland, heretofore designated to perform the duties of district judges in the District Court of the United States for the District of Columbia, to hear and determine the above entitled case.

Dated September 15, 1942.

Chief Justice of the United States Court of Appeals for the District of Columbia.

391 In the District Court of the United States for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Motion by defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode for leave to file supplemental answer

Filed October 15, 1942

Defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, by their attorneys named below, and upon the annexed affidavit of Bruce Bromley sworn to October 14, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of Bruce Bromley.

Dated: October 14, 1942.

RICHARD H. WILMER,
BRUCE BROMLEY,
Attorneys for Defendants, United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, 616-621 Transportation Building, Washington, D. C.

392 *Exhibit I*

In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, supplementing their answer filed herein on August 1, 1941, and further answering the Complaint as amended, allege:

For a first affirmative defense:

104. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, Oliver M. Knode, Melvin H. Baker and others. A copy of said indictment is annexed hereto as Exhibit A and made a part hereof.

105. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answer herein of defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, the defendants named in said indictment (except Warren Henley who died prior to the
393 trial), were tried thereon before the District Court and a jury from October 13, 1941, to November 20, 1941.

106. On November 20, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. A copy of the judgment of the District Court entered upon said verdict is annexed hereto as Exhibit B and made a part hereof.

107. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint, as amended herein.

108. At all times mentioned in said indictment and in the complaint, as amended herein, defendant herein Sewell L. Avery, was President or Chairman of the Board of Directors of United States Gypsum Company. All of the matters alleged in the complaint herein with respect to Sewell L. Avery relate to his acts as President or Chair-

man of the Board of United States Gypsum Company. Said Sewell L. Avery therefore was and is in privity with said United States Gypsum Company with respect to all matters mentioned in said indictment and in said complaint relating to said company.

109. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal cause as hereinabove set forth are res judicata and said judgment is a bar to the maintenance
394 of this suit.

For a second affirmative defense:

110. Repeat each and all of the averments contained in paragraphs 104, 105, 106 and 108 of this supplemental answer with the same force and effect as if they were set forth here in full.

111. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors, were adjudged to be without merit.

112. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing dis-
395 tributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing distributors of their alleged sales of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to

such prices in order to continue to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

113. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

114. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

115. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy
396 charged did not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

116. The matters referred to in paragraphs 111, 112, 113 and 114 of this supplemental answer are repeated in the Complaint, as amended herein.

117. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal cause as hereinabove set forth, the matters referred to in paragraphs 111, 112, 113, 114 and 115 of this supplemental answer are res judicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode demand judgment dismissing the Complaint, with costs.

RICHARD H. WILMER,
BRUCE BROMLEY,
Attorneys for Defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

Exhibit "A" to Supplemental Answer

397 In the District Court of the United States
For the District of Columbia
Holding & Criminal Term
April Term, 1940
Criminal No. 66008

UNITED STATES OF AMERICA
v.
UNITED STATES GYPSUM COMPANY ET AL., DEFENDANTS

Returned June 28, 1940

UNITED STATES OF AMERICA,
District of Columbia, ss:

INDICTMENT

The Grand Jurors of the United States of America, duly impaneled, sworn, and charged, at a regular term, to wit: the April 1940 term, in the District Court of the United States for the District of Columbia, as an additional grand jury inquiring for said District at said term of said Court, upon their oaths do find and present as follows:

398 COUNT I

A. THE DEFENDANTS AND OTHER PARTIES TO THE CONSPIRACY

1. The following named corporations, engaged in the manufacture and sale of gypsum board and plaster, are hereby made defendants herein. Each of said corporations is authorized to do business under and by virtue of the laws of the state of incorporation as indicated, and has its principal place of business as indicated. Each will sometimes be referred to hereinafter by the abbreviated name as indicated:

Name of corporation	Abbreviated name	Incorporation State of	Principal place of business
United States Gypsum Co.	U.S.G.	Illinois	Chicago, Ill.
National Gypsum Co.	National	Delaware	Buffalo, N. Y.
Certain-teed Products Corp.	Certain-teed	Maryland	New York, N. Y.
Ebsary Gypsum Co., Inc.	Ebsary	New York	do
Newark Plaster Co.	Newark	New Jersey	Newark, N. J.

2. The following named corporations, formerly engaged in the manufacture and sale of gypsum board and plaster during part of the period covered by this indictment, are hereby named as co-conspirators with the defendants in the combination and conspiracy hereinafter alleged, but not as defendants herein. Each of said corporations had its principal place of business as indicated, and the assets of

each were acquired, during the period covered by this indictment, by the corporation as indicated:

399

Name of corporation	Principal place of business	Corporation by which acquired
Universal Gypsum & Lime Co.	Chicago, Ill.	National
Atlantic Gypsum Products Co.	Portsmouth, N. H.	do
The American Gypsum Co.	Port Clinton, Ohio	The Celotex Corp.
Kelley Plasterboard Co., Inc.	Delawanna, N. J.	Newark

3. The corporations named in paragraphs 1 and 2 hereon will sometimes be referred to hereinafter as manufacturers.

4. The following named corporations, some of which were engaged in the manufacture and sale of gypsum plaster and all of which were engaged in the wholesale distribution, but not in the manufacture of gypsum board, are hereby named as co-conspirators with the defendants in the combination and conspiracy hereinafter alleged, but not as defendants herein. Each of said corporations has (or had) its principal place of business as indicated:

Name of corporation	Principal place of business
Structural Gypsum Corp.	Linden, N. J.
American Cyanamid & Chemical Corp.	New York, N. Y.
Connecticut Adamant Plaster Co.	New Haven, Conn.
Oakfield Gypsum Products Corp.	Oakfield, N. Y.
Mathieson Alkali Works, Inc.	New York, N. Y.
The Calvin Tomkins Co.	do
Grand Rapids Plaster Co.	Grand Rapids, Mich.
Michigan Gypsum Co.	do
The Alabastine Co.	do
Wasem Plaster Co.	Fort Dodge, Iowa
Wallboard Wholesalers, Inc.	Brooklyn, N. Y.
Plastergon Wallboard Co.	Buffalo, N. Y.

Said corporations will sometimes be referred to hereinafter as distributors.

5. The following named individuals are hereby made defendants herein, each having the business address
400 and being (or having been) associated with the corporate manufacturers as indicated and having (or having had) the official position therewith as indicated. Said individual defendants were, within three years prior to the presentation of this indictment, actively engaged in the management, direction, and control of the affairs and policies of their respective corporations, particularly those affairs and policies of said corporations described in this indictment, and have authorized, ordered, or done the acts charged to be illegal by this indictment.

Name	Business address	Company with which associated	Official position
Oliver M. Knode	300 W. Adams St., Chicago, Ill.	U.S.G.	President
William L. Keady	300 W. Adams St., Chicago, Ill.	do	Vice President in Charge of Sales
H. Frank Sadler	300 W. Adams St., Chicago, Ill.	do	Assistant to Vice President in Charge of Sales
Sidney F. Bartlett	300 W. Adams St., Chicago, Ill.	do	District Sales Manager
Ernest A. Gallagher	30 Rockefeller Plaza, New York, N. Y.	do	Regional Manager
Melvin H. Baker	192 Delaware Ave., Buffalo, N. Y.	National	President
Ralph F. Burley	192 Delaware Ave., Buffalo, N. Y.	do	Vice President in Charge of Sales
Warren F. Henley	105 W. Adams St., Chicago, Ill.	Certain-teed	Merchandise Manager, Gypsum Division
Arthur R. Black	Port Clinton, Ohio	The American Gypsum Co.	Sales Manager

B. THE NATURE OF THE TRADE AND COMMERCE INVOLVED IN THIS INDICTMENT

6. Gypsum is a mineral composed of calcium sulphate in combination with water and found in deposits in many of the states of the United States and in Canada. When said mineral is crushed and the water is removed by evaporation, the resulting product, known as calcined gypsum, has the characteristic of readily recombining with water to form a hard, rigid mass. Various products of calcined gypsum, such as plaster and board, are widely used in the building construction industry.

7. Gypsum board is one of the most important products of calcined gypsum. Said board consists of a flat, thin core of hardened calcined gypsum covered on both surfaces with heavy paper. Gypsum board may be lath, plasterboard, or wallboard, depending, principally, upon the size of the board and the quality of paper with which it is covered. Gypsum lath and plasterboard are used support plaster in wall and ceiling structures. Said gypsum lath and plasterboard constitute approximately 50% of all products used as a support for plaster in all such structures and over 90% of all products used as a support for plaster in wall and ceiling structures in residential buildings. Gypsum wallboard is larger than lath and plasterboard and is covered with a better quality paper than that covering lath and plasterboard. Said wallboard is used as a substitute for plaster and lath in non-fireproof wall and ceiling structures and is one of the most important substitutes for plaster and lath used in such structures. Said gypsum wallboard became commercially important during the World
402 War of 1914-1918, principally because of its extensive use by the Government of the United States in

the construction of barracks and other temporary structures necessary for military purposes. The existing national emergency may substantially increase the demand of the Government for gypsum wallboard for similar military purposes.

8. The manufacturers named as defendants and co-conspirators herein were engaged, during the period covered by this indictment, in the production of gypsum board at plants located throughout the United States and in the sale of said gypsum board. Said manufacturers produced and sold substantially all of the gypsum board manufactured and sold in the United States east of the Rocky Mountains, and U.S.G. manufactured and sold over 50% of said gypsum board.

9. The greater part of said gypsum board was sold by said manufacturers, in interstate commerce and in commerce between the states and the District of Columbia, to building material dealers and consumers. A substantial part of the gypsum board produced by said manufacturers as aforesaid was sold in interstate commerce to the distributors named as co-conspirators herein at a discount below the manufacturers' price to dealers.

10. Said distributors resold said gypsum board in interstate commerce to building material dealers and consumers within most of the states east of the Rocky Mountains, including the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, West Virginia, Kentucky, Tennessee, Arkansas, and Mississippi, and in commerce between the states and the District of Columbia to dealers and consumers within the District of Columbia. In
403 so selling to said dealers and consumers, said distributors competed with one or more of said manufacturers.

C. THE PATENT LICENSE AGREEMENTS

11. During the years 1929 and 1930, U.S.G. entered into separate and substantially identical license agreements with each of the other manufacturers, except Newark. In January, 1939, Newark assumed, and agreed to be bound by, the license agreement of Kelley Plasterboard Company, Inc. The manufacturers, except those named as co-conspirators herein, have been bound by said license agreements from the date of their execution until the date of the presentation of this indictment. By virtue of said agreements, the manufacturers agreed as follows, that is to say: U.S.G. purported to license each of the other manufacturers to manufacture and sell gypsum board under patents owned by

U.S.G., purporting to cover an improved gypsum board and processes, methods, and machines for the manufacture thereof. U.S.G. reserved the right to determine and fix the minimum prices and other terms and conditions governing the sale by manufacturers of gypsum board manufactured by them under said license agreements, and the manufacturers agreed to abide by said minimum prices and other terms and conditions in the sale of gypsum board manufactured by them under said license agreements. Each of the manufacturers agreed to refrain from selling gypsum board manufactured by it under said license agreements to jobbers, manufacturers, and wholesale distributors, except with the written consent of U.S.G.

12. Pursuant to said license agreements, U.S.G. has, throughout the period covered by this indictment,
404 determined and fixed the minimum prices and other terms and conditions governing the sale by manufacturers of substantially all of the gypsum board produced by the manufacturers. U.S.G. has, from time to time throughout said period, circulated among the other manufacturers numerous bulletins setting forth said minimum prices and other terms and conditions of sale. The manufacturers have, throughout the period during which they were bound by their license agreements, sold substantially all of the gypsum board manufactured by them on the basis of the minimum prices and other terms and conditions of sale set forth in said bulletins. The minimum prices and other terms and conditions governing sales by the manufacturers to dealers and consumers and determined and fixed by U.S.G. as aforesaid will sometimes be referred to hereinafter as U.S.G. dealer prices.

D. THE CONSPIRACY

13. Beginning in the year 1929, the exact date being to the Grand Jurors unknown, and continuing to the date of the presentation of this indictment, the defendants and the corporations hereinbefore named as co-conspirators, herein, and others to the Grand Jurors unknown, have been continuously engaged in a wrongful and unlawful combination and cospiracy in restraint of the aforesaid trade and commerce in gypsum board between the states and the District of Columbia, in violation of Section 3 of the Act of Congress of July 2, 1890, known as the Sherman Act, that is to say:

14. Throughout the period of time aforesaid, the manufacturers, including each of the defendant corporations,

and the distributors acting, in part, through the individuals named as defendants herein, were engaged, within
405 the District of Columbia, in an unlawful combination and conspiracy to establish, fix, and make uniform and non-competitive the distributors' resale prices to dealers and consumers (including the various terms and conditions of sale) for gypsum board purchased from the manufacturers by the distributors and resold by the distributors in commerce between the states and the District of Columbia as aforesaid. Pursuant to said combination and conspiracy and in furtherance of the objectives thereof, the distributors have resold said gypsum board, in commerce between the states and the District of Columbia, to dealers and consumers within the District of Columbia at the prices and on the terms and conditions of sale so established, fixed, and made uniform and non-competitive. Said combination and conspiracy has been effectuated in the manner and by the means as follows, that is to say:

15. As a condition for the consent of U.S.G. to sales of gypsum board to the distributors by the manufacturers at a discount below U.S.G. dealer prices, U.S.G. required that the distributors maintain, and adhere to, U.S.G. dealer prices in reselling said board to dealers and consumers. The manufacturers agreed among themselves to sell gypsum board to the distributors at a discount below U.S.G. dealer prices only on condition that the distributors maintain and adhere to, U.S.G. dealer prices in reselling said board to dealers and consumers. The manufacturers required the distributors as a condition of sale to agree, and the distributors so agreed, to resell at U.S.G. dealer prices gypsum board purchased from the manufacturers. Pursuant to said agreements, the manufacturers from time to
406 time advised the distributors of U.S.G. dealer prices and of changes therein and the distributors resold gypsum board to dealers and consumers at said prices.

16. The manufacturers and the distributors investigated and policed sales of gypsum board by the distributors and reported to U.S.G., and among themselves, sales by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices. Throughout the period of the conspiracy, the manufacturers held numerous meetings at which sales by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices were discussed and at which the supplying manufacturers agreed to investigate said sales and to induce the distributors making said sales to maintain, and adhere to, U.S.G. dealer prices.

17. From time to time during the period of the conspiracy, the manufacturers notified the distributors of alleged sales of gypsum board by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices for the purpose, and with the effect, of warning the distributors that they must maintain, and adhere to, U.S.G. dealer prices in order to continue to purchase gypsum board from the manufacturers. In some instances, manufacturers discontinued the sale of gypsum board to distributors because of the failure of said distributors to maintain, and adhere to, U.S.G. dealer prices in sales of gypsum board by said distributors.

18. Pursuant to said combination and conspiracy, U.S.G. refused to permit manufacturers to sell, and manufacturers refused to sell, gypsum board to companies selling
407 gypsum products at wholesale, other than those named as co-conspirators herein, because of the reputation of said companies for selling gypsum products at prices below prevailing market prices.

E. EFFECTS OF THE COMBINATION AND CONSPIRACY

19. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially, and unreasonably restrained the aforesaid trade and commerce in gypsum board; have exacted arbitrary and non-competitive prices for gypsum board from dealers and consumers purchasing from distributors as aforesaid and have prevented and restrained free and active competition in the distribution of gypsum board by distributors as aforesaid.

F. JURISDICTION AND VENUE

20. The combination and conspiracy herein set forth has operated and has been carried out in part within the District of Columbia. In pursuance of said combination and conspiracy and in furtherance of the objectives thereof, some of the distributors named as co-conspirators herein, within three years prior to the presentation of this indictment, (a) have contracted to sell, have sold, and have delivered large quantities of gypsum board to dealers and consumers within the District of Columbia at the prices and on the terms and conditions of sale so determined, fixed, and made uniform and non-competitive as aforesaid, (b) have solicited orders for gypsum board from dealers and consumers within the District of Columbia at said prices and on said terms and conditions of sale, and (c) have circulated among dealers and consumers within the
408 District of Columbia numerous bulletins and lists quoting said prices, terms, and conditions of sale.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that defendants, throughout the period aforesaid, at the places, and in the manner and form aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce between the states and the District of Columbia, contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT II

21. Paragraphs 1 to 12, inclusive, of Count I of this indictment are hereby realleged and incorporated herein as if hereinafter set forth in full.

D. THE CONSPIRACY

22. Beginning in the year 1929, the exact date being to the Grand Jurors unknown, and continuing to the date of the presentation of this indictment, the defendants and the corporations hereinbefore named as co-conspirators herein, and others to the Grand Jurors unknown, have been continuously engaged in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in gypsum board between the states and the District of Columbia, in violation of Section 3 of the Act of Congress of July 2, 1890, known as the Sherman Act, that is to say:

23. Throughout the period of time aforesaid, the manufacturers, including each of the defendant corporations, and the distributors acting, in part, through the individuals named as defendants herein, were engaged, within the District of Columbia, in an unlawful combination and conspiracy to establish, fix, and make uniform and non-competitive the distributors' resale prices to dealers and consumers (including the various terms and conditions of sale) for gypsum board purchased by the distributors from the manufacturers and resold by the distributors in interstate commerce and in commerce between the states and the District of Columbia as aforesaid. Pursuant to said combination and conspiracy and in furtherance of the objectives thereof, the distributors have resold said gypsum board in interstate commerce to dealers and consumers within most of the states east of the Rocky Mountains, and in commerce between the states and the District of Columbia to dealers and consumers within the District of Columbia, at the prices and on the terms and conditions of sale so established, fixed, and made uniform

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and non-competitive. Said combination and conspiracy has been effectuated in the manner and by the means as follows, that is to say:

24. As a condition for the consent of U.S.G. to sales of gypsum board to the distributors by the manufacturers at a discount below U.S.G. dealer prices, U.S.G. required that the distributors maintain, and adhere to, U.S.G. dealer prices in reselling said board to dealers and consumers. The manufacturers agreed among themselves to sell gypsum board to the distributors at a discount below U.S.G. dealer prices only on condition that the distributors maintain, and adhere to, U.S.G. dealer prices in reselling said board to dealers and consumers. The manufacturers
410 required the distributors as a condition of sale to agree, and the distributors so agreed, to resell at U.S.G. dealer prices gypsum board purchased from the manufacturers. Pursuant to said agreements, the manufacturers from time to time advised the distributors of U.S.G. dealer prices and of changes therein and the distributors resold gypsum board to dealers and consumers at said prices.

25. The manufacturers and the distributors investigated and policed sales of gypsum board by the distributors and reported to U.S.G., and among themselves, sales by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices were discussed and at which the supplying manufacturers agreed to investigate said sales and to induce the distributors making said sales to maintain, and adhere to, U.S.G. dealer prices.

26. From time to time during the period of the conspiracy, the manufacturers notified the distributors of alleged sales of gypsum board by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices for the purpose, and with the effect, of warning the distributors that they must maintain, and adhere to, U.S.G. dealer prices in order to continue to purchase gypsum board from the manufacturers. In some instances, manufacturers discontinued the sale of gypsum board to distributors because of the failure of said distributors to maintain, and adhere to, U.S.G. dealer prices in sales of gypsum board by said distributors.

27. Pursuant to said combination and conspiracy, U.S.G. refused to permit manufacturers to sell, and manufacturers refused to sell, gypsum board to companies
411 selling gypsum products at wholesale, other than those named as co-conspirators herein, because of the

reputation of said companies for selling gypsum products at prices below prevailing market prices.

E. EFFECTS OF THE COMBINATION AND CONSPIRACY

28. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially, and unreasonably restrained the aforesaid trade and commerce in gypsum board; have exacted arbitrary and non-competitive prices for gypsum board from dealers and consumers purchasing from distributors as aforesaid; and have prevented and restrained free and active competition in the distribution of gypsum board by distributors as aforesaid.

F. JURISDICTION AND VENUE

29. The combination and conspiracy herein set forth has operated and has been carried out in part within the District of Columbia. In pursuance of said combination and conspiracy and in furtherance of the objectives thereof, some of the distributors named as co-conspirators herein, within three years prior to the presentation of this indictment, (a) have contracted to sell, have sold, and have delivered large quantities of gypsum board to dealers and consumers within the District of Columbia at the prices and on the terms and conditions of sale so determined, fixed, and made uniform and non-competitive as aforesaid, (b) have solicited orders for gypsum board from dealers and consumers within the District of Columbia at said prices and on said terms and conditions of sale, and (c)
412 have circulated among dealers and consumers within the District of Columbia numerous bulletins and lists quoting said prices, terms, and conditions of sale.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that defendants, throughout the period aforesaid, at the places, and in the manner and form aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce between the states and the District of Columbia, contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT III

30. Paragraphs 1 to 12, inclusive, of Count I of this indictment are hereby realleged and incorporated herein as if hereinafter set forth in full.

31. Throughout the period of the combination and conspiracy hereinafter alleged, dealers within the District of

Columbia were in competition with dealers within the states of Maryland and Virginia in the resale to consumers of gypsum products, including gypsum board, purchased from manufacturers and distributors. By reason of said competition, prices for gypsum products to dealers within the states of Maryland and Virginia fluctuated directly with prices for gypsum products to dealers within the District of Columbia, and a reduction in the price of gypsum products to dealers in the District of Columbia was almost invariably accompanied by a reduction in prices of gypsum products to dealers within the states of Maryland
413 and Virginia. Dealers in gypsum products, including gypsum board, within the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, Kentucky, Tennessee, Arkansas, and Mississippi, were served by one or more of the distributors from sales offices located in the District of Columbia.

D. THE CONSPIRACY

32. Beginning in the year 1929, the exact date being to the Grand Jurors unknown, and continuing to the date of the presentation of this indictment, the defendants and the corporations hereinbefore named as co-conspirators herein, and others to the Grand Jurors unknown, have been continuously engaged in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in gypsum board among the states, in violation of Section 1 of the Act of Congress of July 2, 1890, known as the Sherman Act, as amended by the Act of August 17, 1937, that is to say:

33. Throughout the period of time aforesaid, the manufacturers, including each of the defendant corporations, and the distributors, acting, in part, through the individuals named as defendants herein, were engaged, within the District of Columbia, in an unlawful combination and conspiracy to establish, fix, and make uniform and noncompetitive the distributors' resale prices to dealers and consumers (including the various terms and conditions of sale) for gypsum board purchased from the manufacturers by the distributors and resold by the distributors in interstate commerce and in commerce between the states and the District of Columbia as aforesaid. Pursuant to
414 said combination and conspiracy and in furtherance of the objectives thereof, the distributors have resold said gypsum board in interstate commerce to dealers and consumers within most of the states east of the Rocky

Mountains, including the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, West Virginia, Kentucky, Tennessee, Arkansas, and Mississippi, and in commerce between the states and the District of Columbia to dealers and consumers within the District of Columbia, at the prices and on the terms and conditions of sale so established, fixed, and made uniform and non-competitive. Said combination and conspiracy has been effectuated in the manner and by the means as follows, that is to say:

34. As a condition for the consent of U.S.G. to sales of gypsum board to the distributors by the manufacturers at a discount below U.S.G. dealer prices, U.S.G. required that the distributors maintain, and adhere to, U.S.G. dealer prices in reselling said board to dealers and consumers. The manufacturers agreed among themselves to sell gypsum board to the distributors at a discount below U.S.G. dealer prices only on condition that the distributors maintain, and adhere to, U.S.G. dealer prices in reselling said board to dealers and consumers. The manufacturers required the distributors as a condition of sale to agree, and the distributors so agreed, to resell at U.S.G. dealer prices gypsum board purchased from the manufacturers. Pursuant to said agreements, the manufacturers from time to time advised the distributors of U.S.G. dealer prices and of changes therein, and the distributors resold gypsum board to dealers and consumers at said prices.

415 35. The manufacturers and the distributors investigated and policed sales of gypsum board by the distributors and reported to U.S.G., and among themselves, sales by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices. Throughout the period of the conspiracy, the manufacturers held numerous meetings at which sales by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices were discussed and at which the supplying manufacturers agreed to investigate said sales and to induce the distributors making said sales to maintain, and adhere to, U.S.G. dealer prices.

36. From time to time during the period of the conspiracy, the manufacturers notified the distributors of alleged sales of gypsum board by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices for the purpose, and with the effect, of warning the distributors that they must maintain, and adhere to, U.S.G. dealer prices in order to continue to purchase gypsum board from the manufacturers. In some instances, manufactur-

ers discontinued the sale of gypsum board to distributors because of the failure of said distributors to maintain, and adhere to, U.S.G. dealer prices in sales of gypsum board by said distributors.

37. Pursuant to said combination and conspiracy, U.S.G. refused to permit manufacturers to sell, and manufacturers refused to sell, gypsum board to companies selling gypsum products at wholesale, other than those named as co-conspirators herein, because of the reputation of said companies for selling gypsum products at prices below prevailing market prices.

416

E. EFFECTS OF THE COMBINATION AND CONSPIRACY

38. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially, and unreasonably restrained the aforesaid trade and commerce in gypsum board; have exacted arbitrary and non-competitive prices for gypsum board from dealers and customers purchasing from distributors as aforesaid; and have prevented and restrained free and active competition in the distribution of gypsum board by distributors as aforesaid.

F. JURISDICTION AND VENUE

39. The combination and conspiracy herein set forth has operated and has been carried out in part within the District of Columbia. In pursuance of said combination and conspiracy and in furtherance of the objectives thereof, some of the distributors named as co-conspirators herein, within three years prior to the presentation of this indictment, (a) have contracted to sell, have sold, and have delivered large quantities of gypsum board to dealers and consumers within the District of Columbia at the prices and on the terms and conditions of sale determined, fixed, and made uniform and non-competitive as aforesaid, (b) have solicited orders for gypsum board from dealers and consumers within the District of Columbia at said prices and on said terms and conditions of sale, (c) have circulated among dealers and consumers within the District of Columbia numerous bulletins and lists quoting said prices, terms and conditions of sale, (d) have contracted to sell,

417 have sold, and have delivered, through sales offices located in the District of Columbia, large quantities of gypsum board to dealers and consumers within the states of Maryland, Virginia, North Carolina, South

Carolina, Georgia, West Virginia, Kentucky, Tennessee, Arkansas, and Mississippi, at said prices and on said terms and conditions of sale, (e) have solicited and have transmitted, through sales offices located in the District of Columbia, orders for gypsum board from dealers and consumers within the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, West Virginia, Kentucky, Tennessee, Arkansas, and Mississippi, at said prices and on said terms and conditions of sale, and (f) have circulated, from sales offices located in the District of Columbia, among dealers and consumers within the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, West Virginia, Kentucky, Tennessee, Arkansas, and Mississippi, numerous bulletins and lists quoting said prices, terms and conditions of sale.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that defendants, throughout the period aforesaid, at the places, and in the manner and form aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce among the several states, contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America.

GRANT W. KELLEHER,
Special Assistant to the Attorney General.

GEORGE B. HADDOCK,
EDWARD J. HICKEY, JR.,
418 GEORGE N. WISE,
ROBERT R. REYNOLDS, JR.,
ARTHUR S. CLARK, JR.,
Special Attorneys.

THURMAN ARNOLD,
Assistant Attorney General.

EDWARD M. CURRAN,
United States Attorney.

419 *Exhibit "B" to supplemental answer*

WEDNESDAY, NOVEMBER 19TH, A. D. 1941

The court resumes its session pursuant to adjournment: Mr. Justice Goldsborough, presiding.

No. 66008

Indicted for Vio. Secs. 1 and 3, Act of Congress July 2, 1890, known as the Sherman Anti-trust Act, 15 U.S.C.A., Secs. 1 and 3

UNITED STATES

v.

UNITED STATES GYPSUM CO., NATIONAL GYPSUM CO., CERTAIN-TEED PRODUCTS CORPORATION, EBSARY GYPSUM CO., INC., NEWARK PLASTER CO., OLIVER M. KNODE, WILLIAM L. KEADY, H. FRANK SADLER, SIDNEY F. BARTLETT, ERNEST A. GALLAGHER, MELVIN H. BAKER, RALPH F. BURLEY, ARTHUR R. BLACK

Come again the parties aforesaid, in manner as aforesaid and the same jury that was respited in this case yesterday; whereupon the said jury upon their oath and by direction of the Court say that each defendant is not guilty on the first, second, and third counts of the indictment; and thereupon it is considered by the Court that each defendant go thereof without day.

420 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Motion by defendants Certain-teed Products Corporation and Henry J. Hartley for leave to file supplemental answer.

Filed October 19, 1942

Defendants Certain-teed Products Corporation and Henry J. Hartley, by their attorneys named below, and upon the annexed affidavit of F. W. H. Adams, sworn to October 18, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of F. W. H. Adams. Dated October 18, 1942.

HAROLD G. MCGUIRE,
1026 17th St., N. W., Washington, D. C.,
F. W. H. ADAMS,
44 Wall Street, New York City, N. Y.;
Attorneys for Defendants,
Certain-teed Products Corporation and Henry J. Hartley.

421 *Exhibit I*

In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Defendants Certain-teed Products Corporation and Henry J. Hartley, supplementing their answers filed herein on August 1, 1941, and further answering the Complaint as amended, allege:

For a first affirmative defense:

1. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, Oliver M. Knode, Melvin H. Baker and others. Said indictment is incorporated herein by reference and made a part hereof as though the same were fully set forth herein.

2. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answers herein of defendants Certain-teed Products Corporation and Henry J. Hartley, the defendants named in said indictment (except Warren Henley who died prior to the trial), were tried thereon before the District Court and a jury from October 13, 1941, to November 20, 1941.

422 3. On November 20, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. The judgment of the District Court entered upon said verdict is incorporated herein by reference hereto and made a part hereof as though fully set forth herein.

4. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint, as amended herein.

5. At all times mentioned in said indictment subsequent to May 13, 1939 and in the complaint, as amended herein, defendant herein Henry J. Hartley as President of Certain-teed Products Corporation. All of the matters alleged in

the complaint herein with respect to Henry J. Hartley relate to his acts as President of Certain-teed Products Corporation. Said Henry J. Hartley therefore was and is in privity with said Certain-teed Products Corporation with respect to all matters mentioned in said indictment and in said complaint relating to said company.

6. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal cause as hereinabove set forth are res adjudicata and said judgment is a bar to the maintenance of this suit.

For a second affirmative defense:

7. Repeat each and all of the averments contained in paragraphs 1, 2, 3 and 5 of this supplemental answer with the same force and effect as if they were set forth here in full.

423 8. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors, were adjudged to be without merit.

9. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing distributors of their alleged sales of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order to continue

to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors
424 who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

10. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

11. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

12. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy charged did not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

13. The matters referred to in paragraphs 8, 9, 10 and 11 of this supplemental answer are repeated in the Complaint, as amended herein.

14. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal cause as hereinabove set forth, the matters referred to in paragraphs 8, 9, 10, 11 and 12 of this supplemental answer are res adjudicata and plaintiff is estopped to relitigate them in this suit.

425 Wherefore, defendants Certain-teed Products Corporation and Henry J. Hartley demand judgment dismissing the Complaint, with costs.

HAROLD G. MCGUIRE,
F. W. H. ADAMS,
Attorneys for Defendants,
Certain-teed Products Corporation and Henry J. Hartley.

426 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Motion by defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary for leave to file supplemental answer

Filed Oct. 19, 1942

Defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary, by their attorneys named below, and upon the annexed affidavit of Alfred W. Varian sworn to October 16th, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of Alfred W. Varian.

Dated October 16, 1942.

Tumulty and Tumulty,
TUMULTY AND TUMULTY,
Attorneys for Defendants,
Ebsary Gypsum Company, Inc.,
and Frederick G. Ebsary,
1317 F Street NW.,
Washington, D. C.

I hereby certify that I have served the above Motion and Affidavit attached thereto and Statement of Points and Authorities on counsel for the plaintiff by mailing copies to Honorable Thurman Arnold, Assistant Attorney General, Department of Justice, Washington, D. C., on the 19th day of October, 1942.

Joseph P. Tumulty, Jr.
JOSEPH P. TUMULTY, JR.

427 *Exhibit I*

In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary, supplementing their answer filed herein on August 1, 1941, and further answering the Complaint as amended, allege:

For a first affirmative defense:

27. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Com-

pany, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, Oliver M. Knode, Melvin H. Baker and others.

28. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answer herein of defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary, the defendants named in said indictment (except Warren Henley who died prior to the trial), were tried thereon before the District Court and a jury from October 13, 1941, to November 19, 1941.

29. On November 19, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty
428 as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment.

30. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint, as amended herein.

31. At all times mentioned in said indictment and in the complaint, as amended herein, defendant herein Frederick G. Ebsary, was President and a member of the Board of Directors of Ebsary Gypsum Company, Inc. All of the matters alleged in the complaint herein with respect to Frederick G. Ebsary relate to his acts as President of Ebsary Gypsum Company, Inc. Said Frederick G. Ebsary therefore was and is in privity with said Ebsary Gypsum Company, Inc., with respect to all matters mentioned in said indictment and in said complaint relating to said company.

32. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal cause as hereinabove set forth are res judicata and said judgment is a bar to the maintenance of this suit.

For a second affirmative defense:

33. Repeat each and all of the averments contained in paragraphs 27 to 32 (both inclusive) of this supplemental answer with the same force and effect as if they were set forth here in full.

34. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uni-
429 form and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors, were adjudged to be without merit.

35. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing distributors of their alleged sales of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order to continue to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors who failed to maintain and adhere to
430 such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

36. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

37. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

38. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy charged did not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

39. The matters referred to in paragraphs 34, 35, 36 and 37 of this supplemental answer are repeated in the Complaint, as amended herein.

40. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal cause as hereinabove
431 set forth, the matters referred to in paragraphs 34, 35, 36 and 37, of this supplemental answer are res judicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary demand judgment dismissing the Complaint, with costs.

Dated October 10, 1942.

TUMULTY AND TUMULTY,
Attorneys for Defendants,
Ebsary Gypsum Company, Inc.,
and Frederick G. Ebsary,
1317 F Street NW.,
Washington, D. C.

BLACK, VARIAN & SIMON,
ALFRED W. VARIAN,
HERBERT M. SIMON,
Of Counsel,
60 Wall Street, New York City.

432 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Motion for defendants, The Celotex Corporation and Bror G. Dahlberg for leave to file supplemental answer.

Filed Oct. 19, 1942

Defendants, The Celotex Corporation and Bror G. Dahlberg, by their attorneys named below, and upon the an-

nexed affidavit of Walter G. Moyle sworn to October 19, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of Walter G. Moyle.

Dated October 19, 1942.

Walter G. Moyle,
WALTER G. MOYLE,
Ralph P. Wanlass,
RALPH P. WANLASS,
ANDREW J. DALLSTREAM,
NORMAN WAITE,
Attorneys for defendants,
The Celotex Corporation,
and Bror G. Dahlberg,
1109 Earle Building,
Washington, D. C.

Receipt of a copy of the within motion of The Celotex Corporation and Bror G. Dahlberg for leave to file supplemental answer, and accompanying papers, is hereby acknowledged this 19th day of October, 1942.

EDWARD KNUFF,
Special Assistant to the Attorney General.

433 *Exhibit I*

In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Defendants, The Celotex Corporation and Bror G. Dahlberg, supplementing their answer filed herein on July 31, 1941, and further answering the complaint as amended, allege:

PART III

For a first affirmative defense:

1. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, and several officers and employees of some of these companies and of American Gypsum Company (acquired by The Celotex Corporation). A copy of said indictment is annexed hereto as Exhibit A and made a part hereof.

2. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answer herein of defendants, The Celotex Corporation and Bror G. Dahlberg, the defendants named in said indictment, were tried thereon before the District Court and a jury from October 13, 1941, to November 19, 1941.

434 3. On November 19, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. A copy of the judgment of the District Court entered upon said verdict is annexed hereto as Exhibit B and made a part hereof.

4. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint, as amended herein.

5. American Gypsum Company was named as co-conspirator with the defendants in the alleged combination and conspiracy referred to in said indictment. American Gypsum Company was a licensee of United States Gypsum Company, one of the defendants in said indictment, under the license agreement mentioned in paragraph 85 of the Complaint. All the defendant companies named in said indictment were licensees of United States Gypsum Company under similar license agreements. The Celotex Corporation acquired the assets of American Gypsum Company in April, 1939, and in connection with such acquisition, The Celotex Corporation became licensee of United States Gypsum Company under said license agreement of American Gypsum Company.

6. Bror G. Dahlberg is President of The Celotex Corporation and Chairman of the Board of Directors of Certain-teed Products Corporation, one of the defendants in said indictment, and the allegations in the Complaint with respect to him relate solely to his acts in such capacities.

7. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal cause as hereinabove set forth are

435 res judicata and said judgment is a bar to the maintenance of this suit.

For a second affirmative defense:

8. Repeat each and all of the averments contained in paragraphs 1, 2, 3, 5 and 6, Part III, of this supplemental answer with the same force and effect as if they were set forth here in full.

9. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors, were adjudged to be without merit.

10. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing distributors of their alleged sales
436 of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order to continue to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

11. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in

restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

12. Upon the trial on said indictment, the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

13. Upon the trial on said indictment, it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy charged did not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

14. The matters referred to in paragraphs 9, 10, 11 and 12, Part III, of this supplemental answer are repeated in the Complaint, as amended herein.

437 15. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal cause as hereinabove set forth, the matters referred in paragraphs 9, 10, 11, 12 and 13, Part III, of this supplemental answer are res judicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendants, The Celotex Corporation and Bror G. Dahlberg, demand judgment dismissing the Complaint, with costs.

Walter G. Moyle,
WALTER G. MOYLE,
Ralph P. Wanlass,
RALPH P. WANLASS,
ANDREW J. DALLSTREAM,
NORMAN WAITE,
Attorneys for Defendants,
The Celotex Corporation
and Bror G. Dahlberg.

438 *Exhibit A*

[Omitted. Printed side page. 397 ante.]

458 *Exhibit B*

[Omitted. Printed side page. 419 ante.]

459 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Motion by defendants Newark Plaster Company and Frederick Tomkins for leave to file supplemental answer

Filed October 19, 1942

Defendants Newark Plaster Company and Frederick Tomkins, by their attorneys named below, and upon the annexed affidavit of Benjamin P. DeWitt sworn to October 16, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of Benjamin P. DeWitt.

Dated October 16, 1942.

James O'Donnell, Jr.,
JAMES O'DONNELL,
Benjamin P. DeWitt,
BENJAMIN P. DEWITT,
Attorneys for Defendants Newark Plaster Company and Frederick Tomkins, Hibbs Building, Washington, D. C.

Oct. 19, 1942.
Service accepted.

EDWARD KNUFF,
Special Assistant to Attorney General.

460 *Exhibit*

In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Defendants Newark Plaster Company and Frederick Tomkins, supplementing their answer filed herein on August 2, 1941, and further answering the Complaint as amended, allege:

For a first affirmative defense:

46. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plas-

ter Company, Oliver M. Knode, Melvin H. Baker and others. A copy of said indictment is annexed hereto as Exhibit A and made a part hereof.

47. The defendants named in said indictment pleaded not guilty to the matters therein charged, and subsequent to the filing of the original answer herein of defendants Newark Plaster Company and Frederick Tomkins,
461 the defendants named in said indictment (except Warren Henley who died prior to the trial), were tried thereon before the District Court and a jury from October 13, 1941, to November 20, 1941.

48. On November 20, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. A copy of the judgment of the District Court entered upon said verdict is annexed hereto as Exhibit B and made a part hereof.

49. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint, as amended herein.

50. At all times mentioned in said indictment and in the complaint, as amended herein, defendant herein Frederick Tomkins, was President of Newark Plaster Company. All of the matters alleged in the complaint herein with respect to Frederick Tomkins relate to his acts as President of Newark Plaster Company. Said Frederick Tomkins, therefore, was and is in privity with said Newark Plaster Company with respect to all matters mentioned in said indictment and in said complaint relating to said company.

51. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal cause as hereinabove set forth
462 are res judicata and said judgment is a bar to the maintenance of this suit.

For a second affirmative defense:

52. Repeat each and all of the averments contained in paragraphs 46, 47, 48 and 50 of this supplemental answer with the same force and effect as if they were set forth here in full.

53. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in

restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors, were adjudged to be without merit.

54. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing distributors of their alleged sales of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order to continue to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

463

55. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

56. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and

conditions of sale, were adjudged to be valid and lawful.

57. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy
464 charged did not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

58. The matters referred to in paragraphs 53, 54, 55, 56 and 57 of this supplemental answer are res judicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendants Newark Plaster Company and Frederick Tomkins demand judgment dismissing the Complaint, with costs.

JAMES O'DONNELL,
BENJAMIN P. DEWITT,
Attorneys for Defendants Newark Plaster Company and Frederick Tomkins.

465 *Exhibit A*

[Omitted. Printed side page. 397 ante.]

487 *Exhibit B*

[Omitted. Printed side page. 419 ante.]

488 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Motion by defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company, for leave to file supplemental answer

Filed October 20, 1942

Defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company, by his attorneys named below, and upon the annexed affidavit of David I. Johnston sworn to October 17, 1942, and upon all the proceedings herein, hereby respectfully moves this Court for an order permitting him to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of David I. Johnston.

Dated October 17, 1942.

David I. Johnston,
DAVID I. JOHNSTON,
Commerce Exchange Building,
Oklahoma City, Oklahoma.
Geo. E. H. Goodner,
GEO. H. GOODNER,
Munsey Building, Washington, D. C.

This will acknowledge receipt of the foregoing motion with attached Statement of Points and Authorities, Affidavit of David I. Johnston and Supplemental Answer.

This 20th day of October, 1942.

Roscoe T. Steffen,
ROSCOE T. STEFFEN,
Counsel for Plaintiff.

489 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

The defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company, supplementing his answer filed herein on July 31, 1941, and further answering the Complaint as amended, alleges:

For a first affirmative defense:

124. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, Oliver M. Knode, Melvin H. Baker and others. A copy of said indictment is annexed hereto as Exhibit A and made a part hereof by reference to said Exhibit attached to the supplemental answer of United States Gypsum Company, et al.

125. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answer herein of defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, the defendants named in said indictment (except Warren Henley who died prior to the trial),
490 were tried thereon before the District Court and a jury from October 13, 1941, to November 19, 1941.

126. On November 19, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. A copy of the judgment of the District Court entered upon said verdict is annexed hereto as Exhibit B and made a part hereof by reference to said Exhibit attached to the supplemental answer of United States Gypsum Company, et al.

127. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and

conspiracy which is alleged in the Complaint, as amended herein, and though this defendant was not indicted, the United States is the plaintiff in both actions and the charges of the combination and conspiracy are between and among this defendant and the other defendants who were indicted and who were acquitted.

128. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal action as hereinabove set forth are res judicata and said judgment is a bar to the maintenance of this action.

For a second affirmative defense:

129. Repeats each and all of the averments con-
491 tained in paragraphs 124, 125 and 126 of this supplemental answer which are hereby adopted with the same force and effect as if they were set forth here in full.

130. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors, were adjudged to be without merit.

131. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing
distributors of their alleged sales of gypsum board
492 at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order

to continue to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

132. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

133. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

134. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy charged did not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

135. The matters referred to in paragraphs 130, 131, 132 and 133 of this supplemental answer are repeated in the Complaint, as amended herein.

493 136. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal action as hereinabove set forth, the matters referred to in paragraphs 130, 131, 132, 133 and 134 of this supplemental answer are res judicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company, demands judgment dismissing the Complaint, with costs.

David I. Johnston
DAVID I. JOHNSTON,
Commerce Exchange Building, Oklahoma City, Oklahoma.

Geo. E. H. Goodner,
GEO. H. GOODNER,
Munsey Building, Washington, D. C.

494 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Motion by defendants National Gypsum Company and Melvin H. Baker for leave to file supplemental answer

Filed Oct. 20, 1942

Defendants National Gypsum Company, and Melvin H. Baker, by their attorneys named below, and upon the annexed affidavit of Elmer E. Finck, sworn to October 19, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of Elmer E. Finck.

Dated October 19, 1942.

Nicholas J. Chase,
NICHOLAS J. CHASE,
Elmer E. Finck,
ELMER E. FINCK,
Attorneys for Defendants,
NATIONAL GYPSUM COMPANY
and
MELVIN H. BAKER,
1000 Bowen Building,
Washington, D. C.

Service had by mailing copy to Roscoe T. Steffens, Esq., Dept. of Justice, this 20th day of October, 1942. Each of the co-defendants was mailed a copy Oct. 19, 1942. Original and 6 copies filed with Deputy Clerk Coplin.

NICHOLAS J. CHASE,

495 *Exhibit I*

In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Defendants National Gypsum Company and Melvin H. Baker, supplementing their answer filed herein on August 1, 1941, and further answering the Complaint as amended, allege:

For a first affirmative defense:

86. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of

Columbia against Defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, Oliver M. Knode, Melvin H. Baker and others. A copy of said indictment is annexed to the Supplemental Answer of the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode as Exhibit A and by reference made a part hereof.

87. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answer herein of defendants National Gypsum Company, and Melvin H. Baker, the defendants named in said indictment (except Warren Henley who died prior to the trial), were tried thereon before the District Court and a jury from October 13, 1941, to November 20, 1941.

88. On November 20, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. A copy of the judgment of the District Court entered upon said verdict is annexed to the Supplemental Answer of the Defendants, United States Gypsum Company, Sewell L. Avery and Oliver M. Knode as Exhibit B and by reference made a part hereof.

496 89. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint, as amended herein.

90. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal cause as hereinabove set forth are res judicata and said judgment is a bar to the maintenance of this suit.

For a second affirmative defense:

91. Repeat each and all of the averments contained in paragraphs 86, 87 and 88 of this supplemental answer with the same force and effect as if they were set forth here in full.

92. Upon the trial on said indictment the charges that the defendants therein named, combined and conspired in restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board

of manufacturing distributors, were adjudged to be without merit.

93. Upon the trial on said indictment the charges that the defendants therein named, combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing distributors of their alleged sales of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order to continue to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

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94. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

95. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

96. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy charged did

not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

97. The matters referred to in paragraphs 92, 93, 94 and 95 of this supplemental answer are repeated in the Complaint, as amended herein.

98. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal cause as hereinabove set forth, the matters referred to in paragraphs 92, 93, 94, 95 and 96 of this supplemental answer are *res judicata* and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendants National Gypsum Company, and Melvin H. Baker demand judgment dismissing the Complaint, with costs.

Nicholas G. Chase,
NICHOLAS G. CHASE,
Elmer E. Finck,
ELMER E. FINCK,
Attorneys for Defendants
National Gypsum Company
and Melvin H. Baker,
1000 Bowen Building,
Washington, D. C.

498 In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Motion by plaintiff, United States of America, for leave to amend the prayer of the complaint.

Filed Oct. 31, 1942

Plaintiff, United States of America, by its attorney named below, hereby respectfully moves this Court for an order permitting it to amend the prayer of the complaint in accordance with the amendment annexed hereto.

Dated October 30, 1942.

Roscoe T. Steffen,
ROSCOE T. STEFFEN,
Edward Knuff,
EDWARD KNUFF,
Special Assistants to the
Attorney General,
Attorneys for Plaintiff.

Thurman Arnold,
THURMAN ARNOLD,
Assistant Attorney General.

I hereby certify that I have served the above motion, and Statement of Points and Authorities on counsel for each of the defendants by mailing copies to them at their offices on the 30th day of October, 1942.

Roscoe T. Steffen,
ROSCOE T. STEFFEN,
Attorney for Plaintiff.

499 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

These ordered substituted on March 12, 1943, for prayers of orig. complaint.

Amendment to prayer in complaint

Plaintiff, United States of America, hereby amends the prayer contained in the complaint heretofore filed on August 15, 1940, in the following respects: viz., strike paragraphs Nos. 5 to 9, inclusive, and substitute therefor the following:

5. That the defendant companies, and each of them, be required to cancel the provisions of the aforesaid license agreements which (a) authorize the defendant U. S. G. to determine and fix the prices of gypsum board manufactured by the licensees, (b) provide for payment of royalties by the licensees on patents not used by the licensees or on gypsum board not manufactured or bundled by patents owned by U. S. G., (c) prohibit the sale of gypsum board by the licensees to manufacturers, jobbers, and other distributors without the consent of the defendant U. S. G., and (d) acknowledge the validity of any existing patents or of any patents which may be issued in the future upon pending applications.

6. That the defendant companies, and each of them, and their directors, officers, employees, and agents, and all persons or corporations acting on behalf of said companies, be perpetually enjoined from entering into any license agreement relating to any gypsum products and containing provisions which (a) authorize the licensor to determine and fix the prices of its licensees, (b) provide for payment of royalties by the licensees on patents not used by the licensees or on gypsum products not manufactured by the use of patents, (c) control in any way the methods of distribution of the licensees, or (d) acknowledge the validity of

any existing patents or of any patents which may be issued in the future upon pending applications.

7. That the defendant companies, and each of them, and their directors, officers, employees, and agents, and all persons or corporations acting on behalf of said companies be enjoined from

(a) bringing any action for infringement of any patent or patents now owned or controlled by any of the defendants or hereafter issued on pending applications now owned or controlled by any of the defendants,

(b) attempting by suit or otherwise to collect royalties or license fees or profits for the use of patents now owned or controlled by any of the defendants or hereafter issued on pending applications now owned or controlled by any of the defendants

relating to gypsum products or to any process or machine used in connection with gypsum products, until it is made to appear to the Court that all improper practices have been abandoned and the consequences of all misuses of patents have been dissipated.

8. That the defendant companies, and each of them, and their directors, officers, employees, and agents, and all persons or corporations acting on behalf of said companies, be enjoined from entering into any license agreement relating to gypsum products without first obtaining the consent of the Court.

9. That plaintiff have such other further and general relief as may be proper.

10. That, pursuant to Section 5 of the Sherman Antitrust Act, writs of subpoena issued to such of the defendants as are not otherwise subject to service within the District of Columbia, commanding them and each of them to appear herein and to answer under oath each allegation contained in this complaint, and to abide by and perform such acts, orders, and decrees as the Court may make in the premises.

Roscoe T. Steffen,
ROSCOE T. STEFFEN,
Edward Knuff,
EDWARD KNUFF,
Special Assistants to the Attorney General,
Attorneys for Plaintiff.

Thurman Arnold,
THURMAN ARNOLD,
Assistant Attorney General.

501 In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Order granting leave to file supplemental answers

Filed Nov. 6, 1942

On consideration of the motions of defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode; of the Certain-teed Products Corporation and Henry J. Hartley; and of the Ebsary Gypsum Company, Inc., and Frederick G. Ebsary, filed herein on October 15, 1942; of the motions of the defendants Celotex Corporation and Bror G. Dahlberg; and of the Newark Plaster Company and Frederick Tomkins, filed herein on October 19, 1942; of the motions of defendants Samuel M. Gloyd doing business under the name of Texas Cement Plaster Company; and of the National Gypsum Company and Melvin H. Baker, filed herein on October 20, 1942, for leave to file supplemental answers, accompanied by proposed supplemental answers and exhibits thereto, it is by the Court this 6th November, 1942,

Ordered that the motions of the said defendants for leave to file supplemental answers be and the same is hereby granted: and it is

Further ordered that the proposed supplemental answers and attached exhibits accompanying the motions are ordered filed as supplemental answers this date.

By the court:

HAROLD M. STEPHENS,
Justice Presiding.

502 In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Motion by plaintiff, United States of America, for leave to amend the complaint

Filed Feb. 24, 1943

Plaintiff, United States of America, by its attorneys named below, hereby respectfully moves this Court for an order permitting it to amend the complaint in accordance with the amendment annexed hereto.

Dated February 22, 1943.

Roscoe T. Steffen,
ROSCOE T. STEFFEN,
Edward Knuff,
EDWARD KNUFF,
Special Assistant to the Attorney General,
Attorneys for Plaintiff.

I hereby certify that I have served the above motion, and Statement of Points and Authorities on counsel for each of the defendants by mailing copies to them at their offices on the 22nd day of February, 1943.

Edward Knuff,
EDWARD KNUFF,
Attorney for Plaintiff.

503 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Amendment to complaint

Plaintiff, United States of America, hereby amends the complaint heretofore filed on August 15, 1940, in the following respects; viz., insert after paragraph No. 46 a new paragraph numbered 46a which reads as follows:

46a. Many of the patents mentioned and described in said license agreements by which the said combination has been, and is being carried out in part, are process or machine patents. The article and product claims of Roos patents No. 2,017,022, No. 2,079,338, No. 2,080,009, No. 1,914,345 and No. 1,938,354 mentioned and described in said license agreements and said patents, are each invalid and void for each of the following reasons: (a) there is no real invention or novelty in the claims of said patents; (b) the claims of said patents disclose no patentable invention in view of the prior art at the time the respective applications were filed; (c) the alleged inventions described in the claims of said patents were shown and described in printed publications in the United States more than two years prior to the filing of the respective applications; (d) the alleged inventions described in the claims of said patents are inoperative and devoid of novelty or utility; (e) the alleged inventions described in the claims of said patents were abandoned by the inventor and he was guilty of laches before the respective applications were filed; (f) the alleged inventions described in the claims of said patents were not reduced to practice until after other inventors had invented and reduced the same to practice and applied for patents thereon; (g) the said alleged inventions are
504 described in ambiguous and not in properly clear, concise and exact terms and; (h) the defendants have been informed of the invalidity of the claim of the said patents and have unreasonably failed to file in the United States Patent Office any disclaimer of such claims.

The said patents mentioned and described in the said license agreements, even assuming they are valid, are not basic article or product patents and do not singly or all together cover completely the business of mining and selling gypsum, or cover completely gypsum board, which is one of the forms in which unpatented gypsum is sold by the defendants, but at most constitute minor additions to the established and unpatented art of making gypsum board and afford no legal justification for the said combination.

Roscoe T. Steffen,
ROSCOE T. STEFFEN,
Edward Knuff,
EDWARD KNUFF,
Special Assistants to the Attorney General,
Attorneys for Plaintiff.

505 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Order amending prayers of complaint

Filed March 12, 1943

Upon consideration of the motion of the plaintiff for leave to amend prayers of the complaint by striking paragraphs 5 to 9 inclusive and substituting therefor the proposed prayers filed on October 31, 1942, and there being no objection of record or argued, it is by the Court this 12th day of March, 1943,

Ordered, That the proposed prayers 5 to 9 inclusive filed October 31, 1942, be and they hereby are substituted for the prayers 5 to 9 inclusive in the original complaint.

HAROLD M. STEPHENS,
Justice Presiding

506 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Order to amend complaint

Filed March 12, 1943

Upon consideration of the motion of the plaintiff for leave to amend the complaint and the same having been argued, it is by the Court this 12th day of March, 1943,

Ordered, That the motion of the plaintiff to amend the complaint by adding a paragraph numbered 46a be and the same is hereby granted and the proposed amendment filed

February 24, 1943, is ordered filed as paragraph 46a of the complaint.

This order is without prejudice to the right of the defendants to attack the legal sufficiency of said paragraph 46a, and subject also to the right of the defendants to move in writing for a bill of particulars as to the matters set out in said amendment, and subject also to the right of the defendants to adequate time to answer or otherwise plead following the filing of such particulars, and subject also to the right of the defendants to reasonable opportunity to prepare, prior to the commencement of trial, to defend the allegations of said amendment.

HAROLD M. STEPHENS,
Justice Presiding.

506(1) In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Interrogatories on behalf of the United States of America to be answered under oath by defendant United States Gypsum Company pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(5) 40. Describe the process or processes used by you from November 1929 to October 1935 to increase adhesion between the core and liners of gypsum board manufactured by you.

41. When did you first produce a gypsum board in which any starch, flour, carbohydrate or gelatin was incorporated?

42. Describe fully all processes or methods used by you from and including the year 1920 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour, or gelatin, whether cooked or uncooked, indicating how and at what state in the production of said gypsum board said starch, flour, carbohydrate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or

gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

506(6) Grant W. Kelleher,
GRANT W. KELLEHER,
Special Assistant to the Attorney General.

THURMAN ARNOLD,
Assistant Attorney General.

GEORGE HADDOCK,
Special Assistant to the Attorney General.

ALFRED KARSTED,
Special Attorney.

Date:

506(7) In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Interrogatories on behalf of the United States of America to be answered under oath by defendant National Gypsum Company pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(11) 40. Describe the process or processes used by you from November 1929 to October 1935 to increase adhesion between the core and liners of gypsum board manufactured by you.

42. When did you first produce gypsum board in which any starch, flour, carbohydrate or gelatin was incorporated?

43. Describe fully all processes or methods used by you from and including the year 1925 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how and at what state in the production of said gypsum board said starch, flour, carbohy-

drate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

506(12) Grant W. Kelleher,
GRANT W. KELLEHER,
Special Assistant to the Attorney General.

THURMAN ARNOLD,
Assistant Attorney General.

GEORGE HADDOCK,
Special Assistant to the Attorney General.

ALFRED KARSTED,
Special Attorney.

Date:

506(13) In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Interrogatories on behalf of the United States of Amercia to be answered under oath by defendant Certain-teed Products Corporation pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(17) 43. Describe the process or processes used by you from November 1929 to October 1935 to increase adhesion between the core and liners of gypsum board manufactured by you.

45. When did you first produce a gypsum board in which any starch, flour, carbohydrate or gelatin was incorporated?

46. Describe fully all processes or methods used by you from and including the year 1925 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how and at what state in the pro-

duction of said gypsum board said starch, flour, carbohydrate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

506(18)

Grant W. Kelleher,
GRANT W. KELLEHER,
Special Assistant to the Attorney General.
THURMAN ARNOLD,
Assistant Attorney General.
GEORGE HADDOCK,
Special Assistant to the Attorney General.
ALFRED KARSTED,
Special Attorney.
Date:

506(19) In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Interrogatories on behalf of the United States of America to be answered under oath by defendant, The Celotex Corporation, pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(21). 31. When did you first produce a gypsum board in which any starch, flour, carbohydrate or gelatin was incorporated?

506(22) 32. Describe fully all processes or methods used by you from and including the year 1938 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how and at what state in the production of said gypsum board said

starch, flour, carbohydrate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

506(23) Grant W. Kelleher,
GRANT W. KELLEHER,
Special Assistant to the Attorney General.
THURMAN ARNOLD,
Assistant Attorney General.
GEORGE HADDOCK,
Special Assistant to the Attorney General.
ALFRED KARSTED,
Special Attorney.

506(24) In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Interrogatories on behalf of the United States of America to be answered under oath by defendant, Ebsary Gypsum Company, Inc., pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(28) 40. Describe the process or processes used by you from November 1929 to October 1935 to increase adhesion between the core and liners of gypsum board manufactured by you.

42. When did you first produce a gypsum board in which any starch, flour, carbohydrate or gelatin was incorporated?

43. Describe fully all processes or methods used by you from and including the year 1928 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how and at what state in the pro-

duction of said gypsum board said starch, flour, carbohydrate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

506(29). Grant W. Kelleher,
GRANT W. KELLEHER,
Special Assistant to the Attorney General.

THURMAN ARNOLD,
Assistant Attorney General.

GEORGE HADDOCK,
Special Assistant to the Attorney General.

ALFRED KARSTED,
Special Attorney.

506(30) In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Interrogatories on behalf of the United States of America to be answered under oath by defendant, Newark Plaster Company, pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(34) 42. When did you or Kelley first produce a gypsum board in which any starch, flour, carbohydrate or gelatin was incorporated?

43. Describe fully all processes or methods used by you and all processes or methods used by Kelley from and including the year 1937 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you or Kelley, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you or Kelley in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you or Kelley; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how and at what state in the production of said gypsum board said starch, flour, carbohydrate, or gelatin was incorporated,

and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substance of which said board was composed.

506(35) Grant W. Kelleher,
GRANT W. KELLEHER,
Special Assistant to the Attorney General.

THURMAN ARNOLD,
Assistant Attorney General.

GEORGE HADDOCK,
Special Assistant to the Attorney General.

ALFRED KARSTED,
Special Attorney.

506(36) In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Interrogatories on behalf of the United States of America to be answered under oath by defendant, Texas Cement Plaster Company, pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(39) 36. Describe the process or processes used by you from November 1929 to October 1935 to increase adhesion between the core and liners of gypsum board manufactured by you.

38. When did you first produce a gypsum board in which any starch, flour, carbohydrate, or gelatin was incorporated?

39. Describe fully all processes or methods used by you from and including the year 1925 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gyp-

506(40) sum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how

and at what state in the production of said gypsum board said starch, flour, carbohydrate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

Grant W. Kelleher,
GRANT W. KELLEHER,
Special Assistant to the Attorney General.

THURMAN ARNOLD,
Assistant Attorney General.

GEORGE HADDOCK,
Special Assistant to the Attorney General.

ALFRED KARSTED,
Special Attorney.

506(41) District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Order upon motions for orders sustaining objections to interrogatories

Filed April 5, 1943

Whereas the United States of America, plaintiff, hereinafter referred to as the Government, served upon the defendants in the above entitled case and filed with the clerk of the court, pursuant to Rule 33 of the Federal Rules of Civil Procedure, interrogatories as follows:

United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, all hereinafter referred to as United States Gypsum Company, interrogatories 1 to 51 inclusive.

National Gypsum Company and Melvin H. Baker, both hereinafter referred to as National Gypsum Company, interrogatories 1 to 53 inclusive.

Certain-teed Products Corporation and Henry J. Hartley, both hereinafter referred to as Certain-teed Products Corporation, interrogatories 1 to 56 inclusive.

The Celotex Corporation and Bror G. Dahlberg, both hereinafter referred to as The Celotex Corporation, interrogatories 1 to 42 inclusive.

Ebsary Gypsum Company, Inc., and Frederick G. Ebsary, both hereinafter referred to as Ebsary Gypsum Company, interrogatories 1 to 53 inclusive.

Newark Plaster Company and Frederick Tomkins, both hereinafter referred to as Newark Plaster Company, interrogatories 1 to 59 inclusive.

Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company, hereinafter referred to as Texas Cement Plaster Company, interrogatories 1 to 47 inclusive; and

Whereas the defendants served upon the Government and filed with the clerk of the court motions for orders sustaining objections to said interrogatories; and

Whereas upon the fifteenth day of October, 1942, the court heard argument by counsel both for the Government and for the defendants upon said motions; and

506(42) Whereas thereafter the Government withdrew certain of said interrogatories or portions thereof as follows:

United States Gypsum Company: interrogatories 1 to 14 inclusive; 17, 18, 19; the first sentence of 20; the first sentence of 21; the words "or No. 1, closed edge or semi-closed edge gypsum board" in line 4 of 26; 30, 31, 37, 38, 49, 50, 51.

National Gypsum Company: interrogatories 1 to 14 inclusive; 17, 18, 19, 20; the first sentence of 21; all of 22 except the last four lines; the words "or No. 1, closed edge or semi-closed edge gypsum board" in line 4 of 26; all of 27 following the words "closed edge gypsum board" in line 2 thereof; 32, 33, 35, 36, 38, 39, 44, 51, 52, 53.

Certain-teed Products Corporation: interrogatories 1 to 14 inclusive; 17, 18, 19, 20, 21; the first sentence of 22; that portion of 23 ending with the words "to August 15, 1940"; the words "or No. 1, closed edged or semi-closed edge gypsum board" in line 4 of 27; all of 28 following the words "closed edge gypsum board" in line 2 thereof; 29, 30, 31, 32, 37, 38, 40, 41, 47, 54, 55, 56.

The Celotex Corporation: interrogatories 1 to 14 inclusive; 17, 18, 19, 20; the second sentence of 21; that portion of 22 ending with the words "to August 15, 1940"; 24, 25, 27, 28, 33, 40, 41, 42.

Ebsary Gypsum Company: interrogatories 1 to 14 inclusive; 17, 18, 19; the first sentence of 20; all of 21 except the last four lines; all of 26 following the words "closed edge gypsum board" in line 2; the words "or No. 1, closed edge or semi-closed edge gypsum board" in line 4 of 25; 31, 32, 33, 35, 36, 38, 39, 44, 51, 52, 53.

Newark Plaster Company: interrogatories 1 to 14 inclusive; 17, 18, 19, 20, 21, 22; first sentence of 23; first sentence of 24; that portion of 25 ending with the words "to August 15, 1940"; that portion of 26 ending with the words "to January 1, 1939"; 33, 34, 35, 36, 38, 39, 44, 54, 55, 56, 57, 58, 59.

Texas Cement Plaster Company: interrogatories 1 to 12 inclusive; 15, 16, 17; that portion of 18 ending with the words "to August 15, 1940"; the words "or No. 1, closed edge or semi-closed edge gypsum board" in line 4 of 22; that portion of 23 following the words "closed edge gypsum board" in line 2; 27, 28, 31, 32, 34, 35, 40, 45, 46, 47; and

Whereas upon the twelfth day of March, 1943, further argument upon said interrogatories was heard; and

Whereas counsel for the respective parties have filed briefs in support of said interrogatories and the objections thereto; and

Whereas the court has given consideration to all of the interrogatories or portions thereof which have not been withdrawn and to the objections thereto and to the arguments and briefs of the respective parties and is now fully advised in the premises;

Now, therefore, the court orders and rules in respect of those interrogatories or portions thereof which have not been withdrawn as follows, to wit:

506(44) United States Gypsum Company: interrogatory 40.

National Gypsum Company: interrogatory 40.

Certain-teed Products Corporation: interrogatory 43.

Ebsary Gypsum Company: interrogatory 40.

Texas Cement Plaster Company: interrogatory 36.

The objections of the defendants, respectively, upon the ground that the interrogatories seek irrelevant material are overruled.

The objections of the defendants, respectively, upon the ground that the same interrogatories in asking for trade secrets seek privileged material are overruled for the reason that trade secrets are not the subject of an

506(45) absolute but only of a qualified privilege. But that portion of the defendants' answers which describes trade secrets may be furnished to the clerk of the court, subject to examination by counsel for the Government only and subject to the understanding that the information disclosed by any one defendant shall not be furnished to any other defendant or person except by permission of the court at the trial of this case.

The objections of the defendants, respectively, upon the ground that the same interrogatories are unduly burdensome are treated as withdrawn, the defendants having agreed at the hearing on March 12, 1943, notwithstanding such objections, to answer said interrogatories.

United States Gypsum Company: interrogatory 41.

National Gypsum Company: interrogatory 42.

Certain-teed Products Corporation: interrogatory 45.
The Celotex Corporation: interrogatory 31.
Ebsary Gypsum Company: interrogatory 42.
Newark Plaster Company: interrogatory 42.
Texas Cement Plaster Company: interrogatory 38.

The objections of the defendants, respectively, are overruled, except that the Newark Plaster Company is not to be required in answering interrogatory 42 to investigate records outside of its own possession concerning the Kelley Plasterboard Company, Inc.

United States Gypsum Company: interrogatory 42.
National Gypsum Company: interrogatory 43.
Certain-teed Products Corporation: interrogatory 46.
The Celotex Corporation: interrogatory 32.
Ebsary Gypsum Company: interrogatory 43.
Newark Plaster Company: interrogatory 43.
Texas Cement Plaster Company: interrogatory 39.

The objections of the defendants, respectively, upon the ground that the interrogatories seek irrelevant material are overruled.

The objections of the defendants, respectively, upon the ground that the same interrogatories in asking for trade secrets seek privileged material are overruled for the reason that trade secrets are not the subject of an absolute but only of a qualified privilege. But that portion of the defendants' answers which describes trade secrets may be furnished to the clerk of the court, subject to examination by counsel for the Government only and subject to the understanding that the information disclosed by any one defendant shall not be furnished to any other defendant or person except by permission of the court at the trial of this case.

The objections of the defendants, respectively, upon the ground that the same interrogatories are unduly burdensome are treated as withdrawn, the defendants having agreed at the hearing on March 12, 1943, notwith-
506(46) standing such objections, to answer said interrogatories to the best of their ability, except that the Newark Plaster Company is not to be required in answering interrogatory 43 to investigate records outside of its own possession concerning the Kelley Plasterboard Company, Inc.

506(48) This order is made subject to the ruling of the court on the motions for summary judgment, as follows: If said motions are sustained, no interrogatories are to be answered. If said motions are overruled, thirty

days from the time of the overruling of said motions is allowed to each of the defendants in which to answer the interrogatories required to be answered.

Harold M. Stephens,
HAROLD M. STEPHENS,
Justice Presiding.

APR. 5, 1943.

507 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Defendants' motion to strike or, in the alternative, for partial judgment

Filed September 28, 1943

Defendents, by their respective attorneys named below, and upon the pleadings herein and annexed affidavit of Bruce Bromley, sworn to September 27, 1943, respectfully move this Court for an order, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, striking paragraph 46(a) of the complaint, as amended, upon the ground that the allegations thereof are immaterial and impertinent to the issue herein or, in the alternative, for partial judgment, pursuant to Rules 12(b) and 56(b) dismissing that part of plaintiff's claim as is contained in said paragraph 46(a) upon the ground that, as a matter of law, plaintiff may not attack the validity of patents in these proceedings in the manner attempted in said paragraph, and for such other and further relief as to the Court shall seem just and proper. Dated September 27, 1943.

Hugh Lynch, Jr., Bruce Bromley, Esq., Lewis Ulman, Esq., Attorneys for defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, 616-621 Transportation Building,
508 Washington, D. C.; Nicholas J. Chase, Esq., Elmer E. Finck, Esq., Attorneys for defendants National Gypsum Company and Melvin H. Baker, 1000 Bowen Building, Washington, D. C.; Harold F. McGuire, Esq., F. W. H. Adams, Esq., Attorneys for defendants Certain-teed Products Corporation and Henry J. Hartley, 1026 17th Street, N.W., Washington, D. C.; Norman Waite, Esq., Walter G. Moyle, Esq., Attorneys for defendants The Celotex Corporation and Bror G. Dahlberg, Earle Building, Washington, D. C.: Alfred W. Varian, Esq., Joseph P. Tumulty, Esq., Attorneys for defendants Ebsary Gypsum Company, Inc., and

Frederick G. Ebsary, 1317 F Street, N.W., Washington, D. C.; Benjamin P. DeWitt, Esq., James O'Donnell, Jr., Esq., Attorneys for defendants Newark Plaster Company and Frederick Tomkins, 305 Hibbs Building, Washington, D. C.; David I. Johnston, Esq., Geo. E. H. Goodner, Esq., Attorneys for defendant Samuel M. Gloyd, Munsey Building, Washington, D. C.

Served September 28, 1943.

ROSCOE T. STEFFEN

509 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Affidavit of Bruce Bromley

Filed Sept. 28, 1943

Bruce Bromley, being duly sworn, deposes and says:

I am an attorney and counselor at law and am counsel for defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode in the above-entitled action.

In order to avoid any question as to whether the legal sufficiency of paragraph 46(a) of the complaint, as amended, can be considered on the bare allegations contained therein, the following facts are submitted in connection with the alternative relief sought under Rules 12(b) and 56(b). The five patents referred to in paragraph 46(a) were issued by the United States Patent Office as follows: No. 2,017,022 on October 8, 1935, No. 2,079,338 on May 4, 1937, No. 2,080,009 on May 11, 1937, No. 1,914,345 on June 13, 1933, and No. 1,938,354 on December 5, 1933. None of said patents has ever been held to be invalid by any court.

510 Defendants further state that, on this motion, they do not admit the allegations of paragraph 46(a), their contention being that, as a matter of law, the validity of patents duly issued by the United States Patent Office may not be questioned as attempted in said paragraph.

Bruce Bromley

BRUCE BROMLEY

Sworn to before me this 27th day of September 1943.

Saul Schneiderman,

SAUL SCHNEIDERMAN,

Notary Public, Kings County.

Kings Co. Clk's No. 1149, Reg. No. 491S5, N. Y. Co. Clk's No. 1, Reg. No. 592S5.

Commission Expires March 30, 1945.

510(1) In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Affidavit of Edward Knuff
Filed Oct. 5, 1943

CITY OF WASHINGTON,
District of Columbia, :::

Edward Knuff, being duly sworn, deposes and says:

I am a Special Assistant to the Attorney General and am of counsel for the plaintiff in the above-entitled cause and am familiar with all proceedings therein.

It is true that the five patents mentioned in paragraph 46(a) of the complaint were issued on the dates set out in the Bromley affidavit of September 27, 1943, and that "none of said patents has ever been held invalid by any court." It is also true that the claims of said patents, alleged in said paragraph 46(a) to be invalid and void, have never been held valid by any court.

It is further believed that the claims of the five patents alleged in paragraph 46(a) to be invalid and void are the only patents upon which the defendants have based their admitted price-fixing combination in restraint of trade.

Edward Knuff,
EDWARD KNUFF,
Special Assistant to the Attorney General,
Attorney for Plaintiff.

Subscribed and sworn to before me this 4th day of October 1943.

[SEAL] DOROTHY J. HEALE,
Notary Public.

My commission expires October 1, 1944.

510(2) In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Oct. 16, 1943. Service of copy accepted. Edward Knuff, Sp. Asst. to Atty. Gen., Atty. for Plf.

Reply affidavit of defendants on motion to strike or, in the alternative, for partial judgment
Filed Oct. 16, 1943

STATE OF NEW YORK,
County of New York, ss:

George S. Collins, being duly sworn, deposes and says:

Certain statements are made in the affidavit of Edward Knuff, sworn to October 4, 1943, which, it is submitted,

are immaterial to the present motion. However, in order to maintain the accuracy of the record, defendants respectfully submit this affidavit in reply.

The Knuff affidavit states that the claims of the patents referred to in paragraph 46(a) of the complaint have never been held valid by any court. In connection with Patent No. 2,017,022 interference proceedings, within the Patent Office and in the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia, covering a period of over ten years, were had as the result of which said patent finally issued on October 8, 1935. Patent No. 2,079,338 was finally issued on May 4, 1937, after a suit in the Supreme Court of the District of Columbia in which the final decree provided that the claims of the patent defined inventions that
510(3) were new, useful and patentable and that the applicant was the true, original and sole inventor thereof, and that United States Gypsum Company, as assignee of the applicant, was entitled to receive letters patent thereon. Similarly, after a suit in the Supreme Court of the District of Columbia, that Court entered a final decree holding that claims 10 to 18, both inclusive, of Patent No. 2,080,009 defined inventions that were new, useful and patentable and that the applicant was the true, original and sole inventor thereof, and that United States Gypsum Company, as assignee of the applicant, was entitled to receive letters patent thereon. Claims 1, 2 and 3 of this patent were allowed by the Board of Appeals of the Patent Office and claims 4 to 9, both inclusive, were allowed as the result of interference proceedings within the Patent Office.

The Knuff affidavit further states that it is believed that the five patents referred to in paragraph 46(a) "are the only patents upon which the defendants have based their admitted price fixing combination in restraint of trade." Reference to the license agreements involved in this case will demonstrate the inaccuracy of this statement in so far as it refers to the patents mentioned in paragraph 46(a). In so far as the balance of the statement is concerned, defendants have made no such admission.

GEORGE S. COLLINS.

Sworn to before me this 15th day of October 1943.

Saul Schneiderman,
SAUL SCHNEIDERMAN,
Notary Public, Kings County.

Kings Co. Clk's No. 1149, Reg. No. 491S5, N. Y. Co. Clk's No. 1, Reg. No. 592S5.

Commission Expires March 30, 1945.

510(4) Department of Commerce

United States Patent Office

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the Letters Patent of Carlisle K. Roos, assignor to United States Gypsum Company, Number 2,017,022. Granted October 8, 1935, for Improvement in Cementitious Materials.

Filed Nov. 18, 1943. Charles E. Stewart, Clerk.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this eleventh day of November, in the year of our Lord one thousand nine hundred and forty-three, and of the Independence of the United States of America the one hundred and sixty-eighth.

[SEAL] CONWAY P. COE,
Commissioner of Patents.

Attest:

JOHN HANS, *Chief of Division.*

510(5) The United States of America

To all to whom these presents shall come:

Whereas, Carlisle K. Roos, of Fort Dodge, Iowa, assignor to United States Gypsum Company, of Chicago, Illinois, a corporation of Illinois, presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in cementitious materials, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and complied with the various requirements of Law in such cases made and provided, and

Whereas upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the Law.

Now therefore these Letters Patent are to grant unto the said United States Gypsum Company, its successors or assigns for the term of seventeen years from the date of this grant the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this eighth day of October, in the year of our Lord one thousand nine hundred and thirty-five, and

of the Independence of the United States of America the one hundred and sixtieth.

[SEAL] CONWAY P. COE,
Commissioner of Patents.

Attest: H. S. MILLER, *Law Examiner.*

511 Supreme Court of the United States

Revocation of designation of judge of the United States Court of Customs and Patent Appeals for service in the District Court of the United States for the District of Columbia

Filed Nov. 13, 1943

The Honorable Oscar E. Bland having requested that because of his ill-health he be relieved of his assignment to perform the duties of District Judge and hold a District Court in the District of Columbia, made by me on September 15, 1942; and it appearing in my judgment that the public interests require that his designation and assignment for judicial service in the District Court in the District of Columbia be revoked; Now, therefore, pursuant to the authority vested in me by Title 28, Section 20, of the Code of Laws of the United States of America, I do hereby revoke, effective November 15, 1943, said designation and assignment of Honorable Oscar E. Bland, Judge of the United States Court of Customs and Patent Appeals, to perform the duties of District Judge and hold a District Court in the District of Columbia.

HARLAN F. STONE,
Chief Justice of the United States.

Dated, Washington, D. C., November 12, 1943.

512 Supreme Court of the United States

Designation of a judge of the United States Court of Customs and Patent Appeals for service in the District Court of the United States for the District of Columbia

Filed Nov. 13, 1943

The Chief Justice of the District Court of the United States for the District of Columbia having requested the designation and assignment of a judge of the United States Court of Customs and Patent Appeals for service in said District Court because of the accumulation and urgency of business in said Court, and it appearing in my judgment that the public interest requires such designation and assignment for judicial service in the District Court of the

United States for the District of Columbia during the period beginning November 15, 1943, and ending December 31, 1943; NOW THEREFORE, pursuant to the authority vested in me by Title 28, Section 22, of the Code of Laws of the United States of America, I do hereby designate and assign, effective November 15, 1943, the Honorable Joseph R. Jackson, Judge of the United States Court of Customs and Patent Appeals, to perform the duties of a District Judge and hold a District Court in the District of Columbia, during the period aforesaid, and for such further time as may be required to complete unfinished business.

HARLAN F. STONE,
Chief Justice of the United States.

Dated, Washington, D. C., November 12, 1943.

513 In the United States Court of Appeals
For the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Amendment to designation of judges

Filed Nov. 13, 1943

The Chief Justice of the United States, because of the ill-health of Honorable Oscar E. Bland, having revoked, effective November 15, 1943, his designation of the Honorable Oscar E. Bland under date of September 15, 1942, to perform the duties of a District Judge in the District Court of the United States for the District of Columbia, it has become necessary to amend my designation of judges to hear and determine the above-entitled case dated September 15, 1942, so as to provide for the replacement of said Honorable Oscar E. Bland by another district judge; NOW THEREFORE, pursuant to the authority vested in me by Section 28 of Title 15 of the Code of Laws of the United States, I hereby amend said designation of September 15, 1942, by designating, effective November 15, 1943, the Honorable Joseph R. Jackson, heretofore designated by the Chief Justice of the United States to perform the duties of a District Judge in the District Court of the United States for the District of Columbia, in the place and stead of the said Oscar E. Bland, to hear and determine the above-entitled case.

Dated November 13, 1943.

_____,
Chief Justice of the United States Court of Appeals for the District of Columbia.

514 In the District Court of the United States
For the District of Columbia

[File endorsement omitted.]

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY ET AL., DEFENDANTS

Opinion on motion to strike paragraph 46 (a) of the Government's complaint, or, in the alternative, for partial judgment dismissing that part of the Government's claim contained in that paragraph

Decided November 15, 1943

Messrs. Roscoe T. Steffen and Edward Knuff, Special Assistants to the Attorney General, for plaintiff.

Messrs. Bruce Bromley and Hugh Lynch, Jr., for the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode; Messrs. Nicholas J. Chase and Elmer E. Finck, for the defendants National Gypsum Company and Melvin H. Baker; Messrs. Harold F. McGuire, F. W. H. Adams, Leonard B. Ettelson and Stephen Allie, for the defendants Certain-teed Products Corporation and Henry J. Hartley; Messrs. Walter G. Moyle, Ernest M. Oliver, Andrew J. Dallstream and Norman Waite, for the defendants The Celotex Corporation and Bror G. Dahlberg; Messrs. Joseph P. Tumulty, Joseph P. Tumulty, Jr., Alfred W. Varian and Herbert M. Simon, for the defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary; Messrs. James O'Donnell, Jr., and Benjamin P. DeWitt, for the defendants Newark Plaster Company and Frederick Tomkins; and Messrs. George E. H. Goodner, Scott P. Crampton, D. I. Johnston, Roy C. Lytle, James R. Keaton, and Frank Wells, for the defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company.

Before STEPHENS, Associate Justice, United States Court of Appeals for the District of Columbia (Presiding), and BLAND and GARRETT, Judges, United States Court of Customs and Patent Appeals, designated as Justices of the District Court of the United States for the District of Columbia.[1]

515 STEPHENS, J.: This action, commenced by the United States, hereafter for convenience referred to as the Government, on August 15, 1940, is for equitable

[1] Holding a three-judge statutory court, pursuant to the provisions of 15 U.S.C. § 28, as amended by the Act of April 6, 1942, Public No. 515, 77th Congress, 2d Sess.

relief under Section 4 of the Sherman Act. The complaint charges that the defendants have been engaged in a combination and conspiracy in restraint of trade and commerce in gypsum products in violation of Sections 1, 2 and 3 of the Act.[2] It is alleged that the combination and conspiracy have been carried out in connection with certain patent license agreements based on patents owned by the United States Gypsum Company covering the manufacture of gypsum board. Upon these license agreements the defendants themselves rely as properly establishing prices and terms of sale of gypsum board within the doctrine of United States v. General Electric Company, 272 U.S. 476 (1926). On March 12, 1943, the Government was permitted by an order of this court to amend its complaint by adding a paragraph 46 (a) attacking the validity of the patents upon which the license agreements are based. The paragraph is in the following terms:

46a. Many of the patents mentioned and described in said license agreements by which the said combination has been, and is being carried out in part, are process or machine patents. The article and product claims of Roos patents No. 2,017,022, No. 2,079,338, No. 2,080,009, No. 1,914,345 and No. 1,938,354 mentioned and described in said license agreements and said patents, are each invalid and void for each of the following reasons: (a) there is no real invention or novelty in the claims of said patents; (b) the claims of said patents disclose no patentable invention in view of the prior art at the time the respective applications were filed; (c) the alleged inventions described in the claims of said patents were shown and described in printed publications in the United States more than two years prior to the filing of the respective applications; (d) the alleged inventions described in the claims of said patents are inoperative and devoid of novelty or utility; (e) the alleged inventions described in the claims of said patents were abandoned by the inventor and he was guilty of laches before the respective applications were filed; (f) the alleged inventions described in the claims of said patents were not reduced to practice until after other inventors had invented and reduced the same to practice and applied for patents thereon; (g) the said alleged inventions are described in ambiguous and not in properly clear, concise and exact terms and; (h) the defendants have been
516 informed of the invalidity of the claims of the said patents and have unreasonably failed to file in the

[2] 26 Stat. 209 (1890), as amended by 38 Stat. 1167 (1911), 50 Stat. 693 (1937); 15 U.S.C. §§ 1, 2, 3, 4 (1940).

United States Patent Office any disclaimer of such claims. The said patents mentioned and described in the said license agreements, even assuming they are valid, are not basic article or product patents and do not singly or all together cover completely the business of mining and selling gypsum, or cover completely gypsum board, which is one of the forms in which unpatented gypsum is sold by the defendants, but at most constitute minor additions to the established and unpatented art of making gypsum board and afford no legal justification for the said combination.

The order allowing this paragraph to be added to the complaint was made expressly without prejudice to the right of the defendants to question the legal sufficiency of the allegations, and it was urged by counsel for all parties that a ruling upon this question should be made prior to the commencement of trial in order that counsel might be advised as to the necessity of preparation for attack upon, or defense of, the validity of the patents. The defendants accordingly filed this motion to strike or for partial judgment. The motion is one, pursuant to Rule 12 (f) of the Federal Rules of Civil Procedure, to strike paragraph 46 (a) upon the ground that the allegations thereof are immaterial and impertinent to the issues in the case; and the motion is made, in the alternative, under Rules 12 (b) and 56 (b) for partial judgment dismissing that part of the Government's claim contained in paragraph 46 (a) upon the gound that as a matter of law the Government may not attack the validity of the patents in this proceeding in the manner attempted. It is conceded that the five patents mentioned in the paragraph were issued by the Commissioner of Patents, sometimes hereafter referred to as the Commissioner, and that none of them has heretofore been held invalid by any court. The dates of application and issuance of the Roos patents are: No. 2,017,022, application filed August 20, 1924, patent issued October 8, 1935; No. 2,079,338, application filed January 19, 1925, patent issued May 4, 1937; No. 2,080,009, application filed October 16, 1926,[3] patent issued May 11, 1937; No. 1,914,345, application filed July 7, 1932, patent issued June 13, 1933; No. 1,938,354, application filed March 15, 1933, pat-
517 ent issued December 5, 1933. The patents are each in the usual form, set forth in the margin.[4] It is not

[3] Original application January 19, 1925, which was a division of the August 20, 1924, application.

[4] No. 2017022

The United States of America

To All To Whom These Presents Shall Come:

Whereas Carlisle K. Roos, of Fort Dodge, Iowa, assignor to United States Gypsum Company, of Chicago, Illinois, a corporation of Illinois, presented to the Commissioner of

charged by the Government in its complaint that the issuance of the patents was obtained by fraud or any
518 other wrongful act. What the Government asserts, in essence, is that, for the reasons set out in paragraph 46 (a), the Commissioner erred in issuing the patents. It is to be noted further that the attack upon the validity of the patents, in this aspect of the case, is not upon the ground that they are invalid because being used in violation of the Sherman Act; it is the converse, that the Sherman Act is being violated, through the license agreements, because the patents upon which the agreements are based are invalid. It is also to be borne in mind that, while this is not an independent cancelation proceeding, but an antitrust suit in which the Government contends that the patents are invalid, nevertheless the Government is seeking a judicial determination that the Patent Office erred in issuing the patents and that they are for that reason invalid. This was conceded in the oral argument. And the Government's prayer asks cancelation of the provisions of the license agreements, asks that the defendants be perpetually enjoined from entering into any license agreements containing similar provisions, and that the defendants be enjoined from bringing any action for infringement of any of the patents now owned or controlled by them, and from attempting to collect royalties or license fees or profits for the use of the patents now owned or controlled by them, until it is made to appear to the court that all improper practices have been abandoned and the consequences of all misuses of the patents have been dissipated, and that the defendants be enjoined from entering into any license agreements relating to gypsum products without first obtaining the consent of the court. Accordingly, so far as the effect upon the defendants and the patents is concerned, the distinction be-

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Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in cementitious materials, a description of which invention is contained in the specification of which a copy is hereunto annexed, and made a part hereof, and complied with the various requirements of law in such cases made and provided, and

Whereas upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the Law.

Now therefore these letters patent are to grant unto the said United States Gypsum Company, its successors or assigns for the term of SEVENTEEN years from the date of this grant the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this eighth day of October, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the United States of America the one hundred and sixtieth.

[Seal]

CONWAY P. COE,
Commissioner of Patents.

Attest:
H. S. MILLER,
Law Examiner.

Roos patent No. 2,079,338 is in haec verba, as are the other patents except that No. 2,080,009 is for an improvement in plaster wallboards and methods of making them; No. 1,914,345 for an improvement in wall construction; and No. 1,938,354 for an improvement in fire-resistant wall and ceiling structures.

tween this suit and an independent cancelation proceeding is not substantial.

The essential question raised by the motion is whether or not the Government, in an antitrust proceeding prosecuted by its Department of Justice, can seek a determination that the Commissioner erred in issuing patents relied on by the defendants as a foundation for license agreements, and that the patents are therefore invalid, it not being charged that the action of the Commissioner was
519 obtained by fraud.[5] The question involves inquiry into the authority of the Government to question its own action, and into the power of the court to review an administrative determination.

I

No statute answers the question. The Act of June 25, 1910, 36 Stat. 851, 35 U.S.C. § 68 (1940), providing that whenever an invention covered by a United States patent is used or manufactured by the United States itself without license of the owner, or lawful right, the owner's remedy shall be by a suit against the United States in the Court of Claims for compensation and that in such suit the United States may avail itself of any defense that might be pleaded by a defendant in an action for infringement, contemplates, when read in connection with Rev. Stat. § 4920 (1875), 35 U.S.C. § 69 (1940), a defense based upon the ground that the patent was erroneously granted—thus allowing the Government to question the action taken by its own official, the Commissioner of Patents. Cf. Richmond Screw Anchor Co. v. United States, 275 U.S. 331 (1928). But this statute is obviously not pertinent here. The Government is not in this case defending against accusation of infringement.

II

There is no controlling judicial decision directly in point. In United States v. Porcelain Appliance Corp., unreported (N.D. Ohio E.D. Sept. 9, 1926), an antitrust proceeding to dissolve an allegedly illegal combination, the court denied a motion to strike from the Government's bill allegations pertaining to the validity and scope of patents. The court reasoned that, while the suit was not one to cancel patents and it was probably beyond the scope of all possible
520 issues to decree patents or patent claims to be void, it was conceivable that patents invalid or limited in

[5] The term "invalid" as applied to patents issued in error is a misnomer. Strictly such a term should be applied only to patents obtained by fraud, or wholly beyond the jurisdiction of the Commissioner. But the term is constantly used in the authorities in application to patents issued in error, and for convenience and verbal consistency, will be so used herein.

nature, in view of the prior art, might be wrongfully used in building up an illegal combination, and that whether the case was of such nature as to permit or require inquiry into questions of validity or scope of patents could not be determined adversely to the plaintiff on a motion to strike out. The court did not, however, discuss the essence of the matter, i.e., the question whether the Government can raise an issue as to the validity of its own action in granting patents, and the case is not, therefore, of persuasive value; and, as it is a District Court decision, and is from another jurisdiction, it is not controlling.

Other cases principally relied upon by the Government are the following, which are here enumerated, for convenience, in the order in which they will be discussed: United States v. Standard Oil Co., 33 F.(2d) 617 (N.D. Ill. 1929), reversed on other grounds 283 U.S. 163 (1931); Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., unreported (D. Mass. Oct. 4, 1943); Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Univis Lens Co., 316 U.S. 241 (1942); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. Bell Telephone Company, 167 U.S. 224 (1897). In United States v. Standard Oil Co., an antitrust injunction suit alleging restraint of trade by virtue of agreements dealing with the right to use patented processes and apparatus, a master certified to the District Court the question of the admissibility of evidence offered by the Government to show lack of patentability in respect of two patents, and the court directed that the evidence be received. Later, in considering the master's report, which was favorable to the defendants on all issues, including that of validity of the patents, the District Court did not pass upon the patent validity question, stating that it was "divided respecting the right of the government to attack the validity of the patents in these proceed-
521 ings * * *" (33 F.(2) at 623). Otherwise, the District Court reversed the decision of the master on the merits and the defendants then appealed to the Supreme Court which reversed the District Court. But the Supreme Court likewise did not pass upon the question of patent validity. The case therefore constitutes no ruling of any value, on the question now before this court. In Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., the United States was allowed to intervene in

an action brought by a patentee to collect royalties, the defense in the action being that the license agreement had been validly terminated by the defendant because it violated the Sherman Act and because the patents upon which it was based were invalid. This decision again, however, constitutes no direct ruling except that a court may properly exercise its discretion to allow Government intervention in such an action as described. The court did not rule that the Government as intervenor would be allowed to introduce evidence to the effect that the patents were invalid. Indeed, it appears from the opinion that the Government had informed the court that if allowed to intervene it would be chiefly concerned with directing the attention of the court "first to the operation of this and similar license contracts made by plaintiff, and second to the form of decree which the Government deems appropriate." It is clear from the opinion that the court did not have in mind in allowing the intervention, and was not ruling upon, the question now before this court, i.e., whether the Government can attack the validity of patents which the Government itself has, through its Commissioner, granted. Sola Electric Co. v. Jefferson Electric Co. holds that if the price fixing provisions of a patent license agreement are, if not within the protection of a lawfully granted patent monopoly, violations of the Sherman Act, a patent licensee sued for royalties may offer evidence of invalidity of the patents upon which the license agreement is founded, notwithstanding rules of estoppel, whether local or Federal, which would otherwise forbid him, because of his license agreement, to do so. But this is not a ruling that the Government itself may in a Sherman Act proceeding attack
522 the validity of patents which it has issued through the Commissioner. The attack in Sola Electric Co. v. Jefferson Electric Co. was by a private party. In respect of United States v. Univis Lens Co., Ethyl Gasoline Corp. v. United States, and United States v. Masonite Corp., the reliance of the Government in the instant case is upon mere dicta uttered in cases decided in terms of the question whether licensing and price fixing arrangements were or were not within the proper limits of a patent monopoly, but in which no question of validity of patents was raised.

In United States v. Bell Telephone Company, the Government relies in particular upon the following language in the opinion of Mr. Justice Brewer:

"Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a

proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual. In the former cases it has all the privileges and rights of a sovereign. The statutes of limitation do not run against it. The laches of its own officials does not debar its right. Van Brocklin v. Tennessee, 117 U.S. 151; United States v. Nashville, Chattanooga &c. Railway, 118 U.S. 120; United States v. Insley, 130 U. S. 263. But when it has no proprietary or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants. * * * [167 U.S. 264-5]"

When read alone this language seems to lend aid to the Government's contentions in support of paragraph 46 (a), but when read in the context of the opinion and decision as a whole it is clear that it is not in conflict with the holding of the Supreme Court in the case. The holding is that while the Government may, in a direct cancelation proceeding, attack a patent on the ground that it was obtained by fraud, it may not secure a determination that it was issued in error. This case is discussed in greater detail below.

523 III

In addition to relying on the cases discussed above, the Government in support of its right to attack the validity of the patents referred to in paragraph 46 (a) makes four contentions of law. The first of these is that the Government when prosecuting an antitrust suit is acting in a sovereign as distinguished from a proprietary capacity and is hence not subject to local rules of estoppel. It is true that the Government is suing in sovereign capacity. But to say this does not answer the question before the court. The question is not really one of estoppel, which assumes a right but forbids its exercise. The question is a deeper one—whether the Government, having once issued these patents through the Commissioner of Patents, has any authority founded upon statute, case or principle to repudiate its own action in so doing, or whether the courts have power, at the instance of the Government, to review the action of the Commissioner, in issuing the patents, in the absence of

a charge of fraud in the obtaining of the same. It is to be noted in this connection that the grant of a patent is as much a sovereign act as the prosecution of an antitrust suit.

The second contention is that the present action, including the relief sought under paragraph 46(a), is not a collateral attack upon the action of the Commissioner in granting the patents but a direct attack upon price fixing, in which the fact of invalidity of the patents may incidentally be shown and determined. But again, to demonstrate that the attack is incidental to a direct attack upon price fixing does not any more answer the question raised by the present motion than to say that the attack is sovereign. The fundamental question still remains: Where does the Government find the authority to question, even in an antitrust proceeding and incidentally, its own action once taken through the Commissioner of Patents, there being no charge of fraud in the obtaining of the patents; or where does a Federal court find its power to review the action of the
524 Commissioner at the instance of the Government.

The cases principally relied upon by the Government under this aspect of its argument—Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255 (1897); Becher v. Contoure Laboratories, Inc., 279 U.S. 388 (1929); United States v. Bradford, 148 Fed. 413 (C.C. E.D., La. 1905), affirmed per curiam, 152 Fed. 616 (C.C.A. 5th, 1907), certiorari denied 206 U.S. 563 (1907)—do not answer these questions. The first two of these three cases correctly hold that, although a court does not have primary authority to deal with a question of patent invalidity, it may nevertheless determine such a question in a case in which it otherwise has power over the subject matter and parties. And all three of the cases correctly decide, stating their holding in general terms, that a court may incidentally determine a question of fact in a case in which the court has primary jurisdiction of the subject matter and parties even though it might not have authority to make such determination in a direct suit for that purpose. But obviously these cases do not decide the question involved in the instant motion to strike because in none of them was the incidental question raised by the very person whose action was being questioned. In Pratt v. Paris Gas Light & Coke Company the attack upon the validity of the plaintiff's patent was made by the defendant, a private party, and the same is true in Becher v. Contoure Laboratories, Inc. In neither case was the Government seeking to repudiate and asking the court to review the Government's own action in the issuance

of the patent. In United States v. Bradford, the attack in the Federal court, in a criminal prosecution, was upon the validity of the appointment of an administrator by a state court. But the question in that case would parallel the one involved under the instant motion to strike only if the United States itself had appointed the administrator. That case is further distinguishable be-
525 cause the appointment of the administrator was, according to the averments in the indictment, obtained by fraud and because the court appointing the administrator, under the facts averred in the indictment, lacked power to make the appointment so that the same was void. Thus these three cases leave unanswered the question before this court under the motion to strike paragraph 46(a) of the Government's complaint.

The Government asserts, third, that patents for invention are only prima facie valid and the courts have always permitted a party "in a proper case" to show their actual invalidity in the respects mentioned in paragraph 46(a) of the complaint. This is of course well established for private infringement cases. One accused of infringement may defend upon the ground that the accuser's patent is invalid for lack of invention. Reckendorfer v. Faber, 92 U.S. 347 (1875); Dunbar v. Myers, 94 U.S. 187 (1876). In Reckendorfer v. Faber, where the plaintiff accuser contended that the Commissioner's decision was conclusive upon the point of invention and that that question was not open to the judgment of the court, the Court rejected the contention. The Government relies on the following statement of the Court:

"Before the commissioner is authorized to issue a patent, it must appear to him that the claimant is justly entitled to a patent; i.e., that his art, machine, or manufacture, possesses all the qualities before mentioned. The commissioner must also be satisfied, that, if it possesses these qualities, it is sufficiently useful and sufficiently important to justify him in investing it with the prima facie respect arising from the governmental approval. * * *

"It is nowhere declared in the statute that the decision of the commissioner, as to the extent of the utility or importance of the improvement, shall be conclusive upon that point. * * * [92 U.S. at 351]"

In Dunbar v. Myers, again an infringement suit between private parties, the question of the validity of the patent was raised by the defendant. The Supreme Court,
526 reversing a ruling of the trial court that on the facts the plaintiff's patent was valid, said:

"Persons seeking redress for the unlawful use of letters-patent must allege and prove that they, or those under whom they claim, are the original and first inventors of the alleged improvement, and that the letters-patent have been infringed by the party against whom the suit is brought. Prima facie support to the first requirement is derived from the patent, if it is introduced in evidence and is in due form, provided the alleged improvement is one which in its nature is patentable. Evidence to overcome that presumption, however, is always admissible, if due notice is given by the opposite party, as required by law; and the question is now well settled, that the question whether the alleged improvement is or is not patentable, is, in an equity suit, a question for the court. [94 U.S. at 196]"

In Slawson v. Grand Street R. R. Co., 107 U.S. 649 (1882), the Court took the position that lack of invention could be urged in an infringement suit even though not specifically pleaded.

But the defendants in the instant case are not accused of infringement and the Government is not so accused. The assertion of the Government and the cases cited still leave open the question whether or not the instant case is "a proper case" for determination by the court of invalidity of the patents upon which the defendants' license agreements rest. That is to say, neither the proposition stated by the Government nor the cases cited answer the question whether the Government which issued the patents can even in an antitrust suit, attack and the court review the validity of the Government's own action in issuing them. No such question was presented in the cases cited, for in those cases the attack upon the validity of the patents was made by a private party.

The Government contends, fourth, that, assuming that in an ordinary antritrust proceeding the Government would be estopped to question the validity of the defendants' patents, nevertheless, on the facts of the instant case, the defendants are themselves estopped to insist upon the point. It has been suggested above that the question presented under the motion to strike paragraph 46(a) cannot be answered in terms of mere estoppel—that the question is more fundamental. However, the contention of the Government in this aspect of the case will be discussed in the Government's own terms. The argument of "estoppel against estoppel" divides itself into two propositions. In one the Government asserts that the Patent Office is overburdened and is also not in a position to make

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a searching examination and final determination of all considerations bearing upon the right of an applicant to obtain a patent, such considerations as inventions, utility, commercial success, novelty, anticipation and the like, and that it accordingly relies heavily upon the oath and affidavits of the applicant in issuing a patent. And the Government declares that at the time the application was made to the Commissioner for issuance of the Roos "Foam" patent, No. 2,017,022, counsel for the applicant submitted an affidavit stating that more than 3 billion square feet of wallboard, embodying the Roos invention had been manufactured and sold during the preceding ten year period and that seven manufacturers, to wit, the present defendants or their predecessors, had taken licenses and were producing the board in large quantities. Evidence of commercial success, the Government points out, may properly be considered by the Commissioner in determining whether or not an alleged invention is patentable. But, contends the Government, the Commissioner had no practical means of checking the Roos figures or affidavit but evidently assumed them to be true; and no mention was made to the Commissioner, the Government avers, that the United States Gypsum Company and its licensees comprised all of the manufacturers east of the Rocky Mountains, that the license agreements under which the licensees operate provide for price fixing and had the effect, alleged by the Government in the instant case, of driving unpatented board from the market. Such matters, so it is urged, if known to the Commissioner might obviously have had a bearing upon his determination. Spelling out its argument somewhat further, the Government asserts that the primary purpose of the industry in adopting the Roos patents may not have been so much to take advantage of their
528 novelty or utility as that they afforded a ready means of bringing erstwhile competitors together in a combination in restraint of trade; that therefore some of the data furnished the Commissioner as a basis for the issuance of the Roos patent No. 2,017,022 may have been the result of the present combination. Hence, the Government contends, "It would be a strange perversion of law if the defendants could combine to provide the evidence of novelty and utility upon which a patent is issued and then be allowed to estop the Government from showing the true facts in an antitrust proceeding, since it had issued the patent[s] in reliance on that evidence."

But we think that the Government is itself "estopped" to make this contention in this case. The contention is in effect a charge that the Roos patent referred to was obtained by fraudulent misrepresentation on the part of the applicant. It is hence in conflict with the concession of the Government that there is no issue of fraud in this case in respect of the obtaining of the patents which it seeks to attack under paragraph 46(a). At no point in the complaint, even in paragraph 46(a), does the Government charge that the patents were obtained by fraud. And it is expressly stated at another point in the Government's brief presented under the instant motion to strike that fraud is a matter not in issue in the case. Commonwealth v. Bierly, 37 Pa. Super. Ct. 496 (1908), cited by the Government in this aspect of the case, was a case in which a patent had been issued by the Commonwealth of Pennsylvania for land on an application for a warrant (to be followed by a patent) alleging a vacancy when in fact no vacancy existed. Subsequently the Commonwealth took title to the same land for forestry purposes by means of conveyances from the holder of an older title. It was held that one claiming under the junior patent could not allege that as the junior patent was issued by the Commonwealth for a valuable consideration the Commonwealth was estopped from afterwards acquiring by purchase the older title and setting it up to defeat its own later grant. Two considerations distinguish the case from the instant case. One is that the land
529 laws of the Commonwealth neither required nor authorized, upon the filing of an application for a warrant, an independent investigation by the land office to ascertain the truth of the basic fact asserted in it. The warrant issued as of course, and the responsibility for the result that, if the land had been previously appropriated no title passed, was left to rest with the applicant who had voluntarily assumed it. The other consideration is that the rule of estoppel of a grantor to dispute the title of his grantee, as by setting up a prior paramount title in himself or in a third person, applies only to solemn deeds with covenants of seizin and warranty or for quiet enjoyment, and not to mere quitclaims containing none of the covenants referred to. A patent to an invention is not issued without investigation but on the contrary after consideration by expert patent examiners in the office of the Commissioner; and the grant of a patent to an invention is more than a mere quitclaim. There is set forth in the margin, supra, a copy of Roos patent No. 2,017,022 which is in the usual

form in which the United States issues letters patent. The same indicates on its face due examination and a solemn grant,

The second proposition of the Government under its fourth contention of law is this: It is provided in each of the license agreements involved in the instant case that the licensees, who with the United States Gypsum Company comprise all of the manufacturers east of the Rocky Mountains, will not contest the validity of the United States Gypsum Company's patents; and in certain agreements of October, 1929, the licensees in acknowledging the validity of patents already issued purport also to acknowledge the validity of any letters patent which may be granted or issued upon pending applications. In effect, therefore, the Government urges, the United States Gypsum Company has not only asked the Government through the Commissioner to issue the patents in suit upon its representations of fact but also it has combined with the licensee defendants to stop
530 any normal test of their validity. Ordinarily, the Government asserts, the check upon the determinations of the Commissioner is the infringement suit; an invalid patent will either not be used at all by the inventor or if used will be quickly challenged by others interested in the art, since Rev. Stat. § 4920 (1875), 35 U.S.C. § 69 (1940), fully recognizes the rights of an alleged infringer to contest the validity of a patent. But in the circumstances of the instant case, says the Government, no one outside the group of licensee defendants is likely to hazard the expense necessary to make an effective challenge against "a powerful combination carefully fenced in behind, not one, but many patents in the art." This is in effect an argument by the Government that the defendants are not in court with clean hands. It was so put in the oral argument on this motion. The defendants therefore, it is urged, have estopped themselves to insist that the Government may not attack the validity of the patents, and the matter is now at large. But there is nothing inherently unclean about an agreement by a licensee not to contest the validity of his licensor's patent. Indeed there may be circumstances in which such an agreement is natural and wholesome, as, for example, where after expensive delaying litigation between patentees and alleged infringers it is desired by such parties to settle their controversies by an agreement which will avoid future litigation. Such agreements not to contest the validity of patents are moreover not illegal, and the Government does not make an outright contention that they are. It suggests that they may be, or ought to be,

treated as void as against public policy. But the only authority cited for this is Pope Manufacturing Co. v. Gormully, 144 U.S. 224 (1892). In that case the defendant had been granted a license to manufacture and sell stated patented devices under patents owned by the plaintiff and had agreed not to import, manufacture or sell devices covered by certain other patents, and had also agreed that he would not contest the validity of the plaintiff's pat-
531 ents or his title thereto. There was a further provision that if after termination of the license agreement the defendant manufactured, sold or used any devices covered by the patents involved in the agreement, the plaintiff might treat him as breaching the contract or as an infringer and might have an injunction issued by any court without notice. The action was for an accounting and injunction, it being asserted that the defendant had imported, manufactured or sold devices covered by "the other patents." But it was found that the defendant, due to the plaintiff's artifice, had signed the license agreement without comprehending its import so far as concerned the "unusual or oppressive" stipulations of that portion which forbade the defendant to contest the validity of or title to the plaintiff's patents, bound him to agree not to import, manufacture or sell devices covered by other patents, and subjected him to an injunction without notice. The Court held that, because of the oppressive character of the contract and the apparent artifice used by the plaintiff in securing the defendant's consent to it, the plaintiff was not in court with clean hands and could therefore not seek equitable relief. But the Court expressly declined to pass upon the question whether the contract was invalid as against public policy, i.e., it refused to answer the question whether the defendant could estop himself from disputing patents which might be void or to which the plaintiff might have no title. It is to be noted further that if, as the Government suggests, an agreement by a licensee not to contest the validity of the licensor's patent is void as against public policy, then the defendant licensees in the instant case are free to contest the validity of the patents, and therefore the premise of the Government's argument, that the Government ought not be forbidden to contest the validity of the patents for the reason that the normal test by individuals in infringement suits has been foreclosed, falls. It is to be noted also that the contention of the Government that the licensee defendants have bound themselves not to contest the validity of the patents and that no other persons

are likely to do so and that therefore the Government ought to be permitted itself to raise the question of validity, is an argument of what the law ought to be with respect to the right of the Government to repudiate the action of its own Commissioner of Patents and the power of the courts to review the action of the Commissioner except where induced by fraud; it is not an argument as to what the law is. On that subject further comment is made below.

532 IV

The answer to the question presented by the motion to strike or for partial judgment dismissing paragraph 46(a) lies not in the contentions made, and authorities cited, by the Government, but in considerations of a more fundamental nature:

1. The United States is an entity of conferred, not inherent, powers. Its authority is found in the objective law set up by the people in the Constitution, in statutes, in judicially recognized principles. What is true of the United States in this respect is true of its governmental departments and agencies. The Constitution, Art. I, § 8, Clause 8, gives Congress power "To promote the Progress of Science and useful Arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective writings and Discoveries." The statute authorizing the issuance of patents provides that:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof * * * not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor. [Rev. Stat. § 4886 (1875), amended 29 Stat. 692 (1897), 46 Stat. 376 (1930), 53 Stat. 1212 (1939), 35 U.S.C. § 31 (1940)]"

The United States acts in its sovereign capacity in issuing patents under these constitutional and statutory provisions. There is nothing in them or in the Sherman Act or in judicially recognized principles that permits it to repudiate patents or to ask the courts to do so after their issuance,

except for fraud in the obtaining of the patents. The right to cancel for fraud is mentioned below.

2. The attack upon the validity of the patents under paragraph 46(a) involves a breach, as between the Government and the patentees and those dealing with the patentees, of the Government's grant. In issuing the
533 patents through the Commissioner the Government "upon due examination . . . adjudged [the claimants] to be justly entitled to a patent under the Law" and thereupon made a solemn grant. When an alleged infringer attacks the validity of a patent under Rev. Stat. § 4920 (1875), 35 U.S.C. § 69 (1940), he is breaking no grant of his own since he did not issue the patent. No private litigant could expect relief in a court of equity upon the premise of a broken promise on his own part. A fortiori the Government should not. On the contrary it should scrupulously keep and perform each of its own covenants. One of the first objectives and essentials of good government is order and certainty in relations between government and citizen. This cannot be secured if the Government itself is not to be depended upon to abide its grants, even if they have been improvidently or erroneously made. The attack of the Government upon the patents under paragraph 46(a) is based upon the extraordinary premise that the Government can in one department issue a grant and in another question its own action, in the absence of charges of fraud in inducing the action. Common principles of justice and fairness in dealings between patent applicants and the Government give patentees a right to assume that their patents are valid insofar as any attack on them by the Government which issued them is concerned, unless the attack is for fraud in the obtaining of the patents.

In ruling that the Government cannot attack, nor the court review, in this proceeding the validity of the patents, the court does not assume to justify any misuse of the patents as a cloak for illegal restraints of trade or price fixing beyond the proper limits of a patent monopoly. If such conduct be shown, as charged, it is amenable to law. But that is a different aspect of this case; and two wrongs do not make a right. That the defendants may be shown to have misused the patents is no warrant for the Government's repudiating its own assurance that they were issued upon due examination and according to law and conferred an exclusive right for a given period of years. As pointed out above, in the present aspect of the Government's
534 case, i.e., that arising under paragraph 46(a), the patents are not attacked as invalid because illegally

used; on the contrary illegal use is predicated upon their invalidity, and this is not charged in the complaint as due to any fraud or overreaching, but only to erroneous action of the Commissioner in issuing the patents.

3. It is settled law that although the Federal courts may compel an officer or agency in the executive branch of the Government to perform a ministerial duty or to refrain from threatened action clearly beyond legal authority and may, under the due process clause of the Constitution, examine upon a bill in equity into governmental action alleged to have been taken wholly without jurisdiction, or to have been arbitrary or induced by fraud, the courts do not have authority in the absence of statute to review the exercise of discretion or judgment by officers or agencies of the executive branch of the Government. Welch v. Obispo Oil Co., 301 U.S. 190 (1937); Leach v. Carlile, 258 U.S. 138 (1922); Houston v. St. Louis Independent Packing Co., 249 U.S. 479 (1919); see American T. & T. Co. v. United States, 299 U.S. 232, 236 (1936).[6] This is the theory which underlies the decision of United States v. Bell Telephone Company, 167 U.S. 224 (1897), certain language of which has been quoted above as relied upon by the Government in support of its contentions herein. That was a suit by the United States to cancel a patent to a telephone transmitter upon two separate grounds, one that the patent had been obtained by fraud, the other that the patentee was not the original and first inventor. It was held that the Government must fail as to the first ground because fraud had not been established, and that as to the second it must fail also, for the reason that "The judgment of the Patent Office, the tribunal established by Congress to determine such questions, was adverse to the contention of the Govern-
535 ment, and such judgment cannot be reviewed in this suit." (167 U.S. at 264). In the course of the opinion the Court discussed two previous cases, United States v. Bell Telephone Co., 128 U.S. 315 (1888), and United States v. American Bell Telephone Co., 159 U.S. 548 (1895), saying there was nothing in either of them to conflict with the views expressed in the opinion. In concluding its opinion the Court said:

"In United States v. Telephone Co., supra, [the reference is to the first of the two cases just mentioned] it was decided that where a patent for a grant of any kind issued by the United States has been obtained by fraud, by mistake or by accident, a suit by the United States against the

[6] For a description of matters appropriate for judicial review see Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 274-8 (1933).

patentee is the proper remedy for relief, and that in this country, where there is no kingly prerogative, but where patents for land and inventions are issued by the authority of the Government, and by officers appointed for that purpose, who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself, the appropriate remedy is by proceedings by the United States against the patentee."

But while there was thus rightfully affirmed the power of the Government to proceed by suit in equity against one who had wrongfully obtained a patent for land or for an invention, there was no attempt to define the character of the fraud, or deceit or mistake, or the extent of the error as to power which must be established before a decree could be entered cancelling the patent. It was not affirmed that proof of any fraud, or deceit, or the existence of any error on the part of the officers as to the extent of their power, or that any mistake in the instrument was sufficient to justify a decree of cancellation. Least of all was it intended to be affirmed that the courts of the United States, sitting as courts of equity, could entertain jurisdiction of a suit by the United States to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred. We are of opinion, therefore, that the question, as stated, is not open for consideration in this case. * * * [167 U.S. at 269-270]

The Court said also in the course of the opinion:

"* * * the Government is as much bound by the laws of Congress as an individual, and when Congress has created a tribunal to which it has given exclusive determination in the first instance of certain questions of fact and has specifically provided under what circumstances that determination may be reviewed by the courts, the argument is a forcible one that such determination should be held conclusive upon the Government, subject to the same limitations as apply in suits between individuals. [167 U.S. at 268]"

The decision of course does not constitute a direct ruling that the Government cannot seek in an antitrust proceeding, incidental to determination of the primary question
536 of violation of the Sherman Act, a judicial determination of the invalidity of patents relied upon by the defendants as a basis of license agreements themselves urged in defense of the charge of Sherman Act violation.

But the case does reflect the general principle that the Federal courts sitting in equity do not have power in the absence of statute to set aside at the instance of the Government a determination made by a tribunal or officer in the executive branch of the Government except when such determination has been induced by fraud. And the reasoning of the Court in the case is as apt for incidental attack upon the validity of patents as for direct attack.

There are similar rulings by the United States Supreme Court in respect of determinations of the Land Office. In United States v. Coronado Beach Co., 255 U.S. 472 (1921), the Government sought by a bill in equity to ascertain the rights of private parties in an island in the harbor of San Diego, California, and to condemn the island for public purposes. The Government contended that private ownership went only to the shore line, the Beach Company that it included tide lands. The title of the Beach Company was derived from a Mexican grant of 1846 to one Carrillo, a Mexican citizen, to whose rights the Beach Company had succeeded. Intermediate holders of the title had in 1852 petitioned Commissioners to settle Private Land Claims appointed under an Act of March 3, 1851, 9 Stat. 631, to confirm to them the land in question, and although this petition was rejected by the Commissioners, on appeal to the United States District Court the title was declared good and confirmed, the decree stating the boundaries on the north, east and south as in the original grant, and "west by the anchorage for ships, according to the documents of title and map to which reference is had." In 1869 a patent was issued reciting this decree, a return with a plat of a survey approved under the Act of 1851, and giving and granting the land described in the survey. The Government attempted to show that the extent of the land patent as thus confirmed was erroneous. The Court held that this was not allowable. Speaking for the Court Mr. Justice Holmes said:

537 "* * * The grant to Carrillo was bounded 'west by the anchorage for ships' and although it well may be that in view of the purpose set out in his petition and the circumstances the grant could have been construed more narrowly, that was a matter to be passed upon and when the decree and the patent went in favor of the grantee it is too late to argue that they are not conclusive against the United States. It is said that the field notes, not put in evidence at the trial, show that the deep water line was not surveyed, but was taken from the Coast Survey maps. But however arrived at it was adopted by the United States for

its grant and it cannot now be collaterally impeached. * * * [255 U.S. at 488]."

The Government's attack in United States v. Coronado Beach Co. upon the land patent for error in issuing it was direct. A fortiori an indirect or collateral attack is not allowable. In Burke v. Southern Pacific R. R. Co., 234 U.S. 669 (1914), there was a bill in equity to establish a right to lands. The plaintiff claimed under a clearly junior title but asserted that the grant to the defendant Railroad Company was invalid because the lands contained minerals. Mineral land was excepted by statute from grants. The District Court dismissed the bill and upon certification by the Circuit Court of Appeals of questions to the Supreme Court that Court said:

"The exclusion of mineral lands is not confined to railroad land grants, but appears in the homestead, desert-land, timber and stone, and other public-land laws, and the settled course of decision in respect of all of them has been that the character of the land is a question for the Land Department, the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends, and that when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it. Smelting Co. v. Kemp, 104 U.S. 636, 641; Steel v. Smelting Co., 106 U.S. 447; Maxwell Land Grant Case, 121 U.S. 325, 379-381; Heath v. Wallace, 138 U.S. 573, 585; Noble v. Union River Logging Railroad, 147 U.S. 165, 174; Burfenning v. Chicago, &c. Railway Co., 163 U.S. 321, 323. In this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such a distinction.

"Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral-land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and

were not prejudiced by it. [Citing cases] [234 U. S. at 691-2]"

538 4. The Government's contentions in respect of the right to attack the validity of the patents under paragraph 46(a) of the complaint really amount to an assertion not that it is, but that it ought to be, the law that notwithstanding the grant of a patent by the Commissioner of Patents the Government may test the validity of the patent in the courts. The Commissioner and his staff are asserted to be incapable, because of press of business and the conditions under which the Patent Office operates, including unavoidable ignorance of anticipation, of reaching conclusively dependable determinations in respect of the right to a patent; hence recourse to the courts to correct the Commissioner's action should be allowed, so it is urged. It is to be noted that this argument is as valid for direct attack as for incidental. If the assertions of the Government in respect of the limitations of the Patent Office are correct —upon this the court does not assume to pass—and if such limitations cannot otherwise be corrected, a case may perhaps be made for the devising of some test outside the Patent Office of the validity of patents. But it does not follow that it is within the proper function of the courts to devise it. There is of course a recognized place for growth of the law through judicial decision in the "interstitial" or borderline case, but radical departures or innovations are not properly made by courts. Judges are not appointed in representative capacity for the purpose of law making; and judicial innovations upon the law are especially to be avoided when they would upset transactions entered into on the faith of the law as it is. Conceivably there should be Congressional action creating a statutory right in the Government to test in the courts the correctness of determinations of the Commissioner of Patents, some such remedy perhaps as is now afforded patent applicants under Rev. Stat. § 4915 (1875), 35 U.S.C. § 63 (1940): But such a remedy if created by statute would undoubtedly be made prospective in effect, that is to say, would apply only to patents issued after the passage of the act. Moreover, the actions permitted under such a statute would properly be made subject to a limitation in time, so that after a given period the rights under a patent would be secure to the patentee and those dealing with him so far as interference by the Government was concerned. It is not within the proper function of courts to open the door by judicial innovation to Government attack on patents, retroactive in effect and without limitation in time, and thus

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to unsettle industrial security so far as it is based on the patent system.

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There is auhority to the effect that motions under Rule 12(f) are not an appropriate means of testing the legal sufficiency of a pleading. Hartford-Empire Co. v. Glenshaw Glass Co., 47 F. Supp. 711, 6 Fed. Rules Serv. 12 b. 51 (W.D. Pa. 1942); Dysart v. Remington Rand, 31 F. Supp. 296, 2 Fed. Rules Serv. 12 b. 51 (D. Conn. 1939). Therefore the motion now before the court is ruled on in terms of the alternative motion for a partial judgment, and the court will order a dismissal of that portion of the Government's complaint contained in paragraph 46 (a) except the first and last sentences of that paragraph. It is true that, as suggested by the defendants, the last sentence is in somewhat conclusional terms, but the court thinks not objectionably so under the broad allowances of the Federal Rules of Civil Procedure with respect to pleadings.

In deciding as the court does that the Government cannot properly attack the validity of patents as it seeks to do under paragraph 46 (a) of the complaint, it is not ruled that all evidence on the topics mentioned in those portions of paragraph 46 (a) other than the first and last sentences is necessarily inadmissible on some issue in the case other than that of the validity of the patents. It occurs from time to time in the trial of cases that evidence inadmissible in respect of one issue is admissible in respect of another. So far as the right of the Government to attack the validity of the patents is concerned the court rules definitely that it has no such right, and the court no authority to
540 pass on the same; that the patentees and those dealing with them had and have a right to assume the validity of the patents so far as any attack by the Government on its own grant is concerned. But in respect of other issues the relevancy, materiality and competency of evidence offered, whether or not it touches the topics mentioned in paragraph 46(a), will be passed upon at the time of the offer.

I am authorized to state that Judge Garrett concurs in the foregoing opinion and decision.

HAROLD M. STEPHENS.

FINIS J. GARRETT.

BLAND, J., dissenting:

In my view, it makes little difference whether or not paragraph 46(a) of the complaint is stricken, but the im-

plication drawn from the striking of it requires that I briefly express my views in dissenting.

The Sherman Anti-Trust Law forbids illegal combinations or monopolies which restrain interstate trade. It is well-settled that an inventor or his assignee has the right to a monopoly in the manufacture and sale of his patented article. United States v. General Electric Co. et al., 272 U.S. 476 (1926). However, such a monopoly has been declared to be a "limited monopoly." Oxford Varnish Corporation et al. v. Ault & Wiborg Corporation, 83 F. (2d) 764 (C.C.A. 6, 1936); see also Bement v. National Harrow Co., 186 U.S. 70, 91 (1902). Thus it is seen that when Congress passed the Sherman Act, we had two conflicting laws on the subject of monopoly. It is the duty of the courts, if possible, to harmonize the two statutes in such a way as to give force and effect to both and arrive at the true
541 intent of Congress in the enactment of the anti-trust law.

As I understand it, the chief reliance of the defendants in support of their contention that the Government in this case has no right, through its Department of Justice, to attack the validity of a patent, is upon United States v. Bell Telephone Company, 167 U.S. 224 (1897). The holding in that case, as pertinent to the inquiry here, is in the following language:

"Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual. In the former cases it has all the privileges and rights of a sovereign. The statutes of limitation do not run against it. The laches of its own officials does not debar its right. Van Brocklin v. Tennessee, 117 U.S. 151; United States v. Nashville, Chattanooga &c. Railway, 118 U.S. 120; United States v. Insley, 130 U.S. 263. But when it has no proprietary or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants. * * *"

This case is not authority for a holding that the Government in the instant action, when acting for the public through the Department of Justice, being duly empowered

by Congress to enforce the anti-trust laws as against what it alleges is a combination built around certain invalid patents, is estopped from challenging the validity of said patents. On the contrary, the mandate of the Sherman Act is that, under the direction of the Attorney General by appropriae officers, proceedings shall be instituted to remedy the wrongs brought about by a violation of the Sherman Act. The statute calls into action and authorizes proceedings in which it may be determined whether
542 the Sherman Act is being violated or "valid patent rights" are being exercised.

The exact question presented here has never been directly presented before as far as I know; and since I am convinced that there must be some new declaration of law made by our highest court as to where the line of demarcation rests between the exercise of valid patent rights and acts that are in violation of the anti-trust laws, I feel that such cases as Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942), should be given more consideration than has been accorded them by the majority. In that case (a royalty suit) the defendant-licensee was, under the decisions, when the case came to the Supreme Court, barred from pleading the invalidity of the patent, but it pleaded that the agreement was in violation of the anti-trust laws and that therefore it had a right to say that the agreement was unlawful if the patent was invalid. The Supreme Court upheld this contention and stated:

"Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements. * * *"

It also stated:

"* * * We granted certiorari * * * the question being of importance to the administration of the patent laws and the Sherman Anti-Trust Act."

As a basis for my conclusion, I rely also upon the following authorities: Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942); United States v. Univis Lens Co., Inc., et al., 316 U.S. 241 (1942); United States v. Masonite Corporation et al., 316 U.S. 265 (1942); and Becher v. Contoure Laboratories, Inc., et al., 279 U.S. 388 (1929).

In the last-cited case the following is found:
543 "* * * Again, even if the logical conclusion from the establishing of Oppenheimer's claim is that

Becher's patent is void, that is not the effect of the judgment. Establishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment in rem binds all the world, but the facts on which it necessarily proceeds are not established against all the world, Manson v. Williams, 213 U.S. 453, 455, and conversely establishing the facts is not equivalent to a judgment in rem.

"That decrees validating or invalidating patents belong to the Courts of the United States does not give sacrosanctity to the facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is true an important patent is void—and, although there is language here and there that seems to suggest it, we can see no ground for giving less effect to proof of such a fact than to any other. * * *"

The last-cited authority is important in view of my conclusion that the fact of invalidity is pertinent to the issue here involved aside from the question of the declaration of a patent's invalidity. The invalidity of defendants' patents, if any of them are invalid, is of concern here only in so far as it goes to the determination of the right of defendants to rely upon a patent monopoly for acts which would otherwise, admittedly, be contrary to the Sherman Act.

When the Department of Justice attempts to take action against a monopoly, it frequently occurs that the defendants contend that they have a right to have a monopoly and to restrain trade because their conduct is nothing more than the exercise of their rights under the patent laws. So, defendants file an answer, as they did in the instant case, showing that they rely upon the ownership of "valid patents" as an excuse for their contracts of price-fixing and trade-restraining. When such a defense is interposed, it is my view that, whether or not the Government has pleaded that the patents are invalid and regardless of the fact that they are to be regarded as prima facie valid, the Government has the right to show, if it can, that the patents
544 relied upon are either invalid (concerning which the defendants would probably have more knowledge than anyone else) or are of such character in their relation to the prior art as to be no justification for violating the Sherman Act.

It seems to me that any other conclusion is anomalous. Can a defendant say, "Yes, I would be violating the Sherman Act if I were not acting under my valid patent rights," and then close the mouth of the Government to show that

the patents are such as to be no justification for such a violation? In attacking the validity of the patents, as the Government seeks to do in the instant case, it is not attempting to establish invalidity for the purpose of cancellation or for the purpose of protecting any other inventor or anyone who wishes to manufacture defendants' products. It is attempting to show, in "discharge of its obligations to the public" under statutory mandate, the nature of the patents for the purpose of showing that they are no justification for the alleged monopoly and restraint of trade, whether valid or invalid.

In this view, it seems to me that the decisions relied upon by the majority are no authority for holding that the Government, under such circumstances, has no right to question the validity of the patents for the purposes stated. The result of the ascertainment of invalidity in the instant case is not the result sought in any decided case relied upon by the majority. It is the fact of invalidity which goes to the question as to whether or not the defendants in the instant case are using the patents as a smoke-screen (and I am not implying that they are) in order to carry on what the Government charges is a violation of the law.

If the striking of paragraph 46(a), which alleges that the patents relied upon are invalid, implies that the
545 court does not have the right to accept evidence as to the nature of the patents relied upon, even though it shows them to be invalid, I think the striking would be erroneous. If the paragraph is stricken because it is unnecessary, or if the evidence of invalidity could be accepted for other purposes, then it is of little consequence what happens to paragraph 46(a).

I need not here discuss the broader aspect of the question as to whether or not the General Electric case (which, unlike the instant case, involved the conduct of principal and agent) should be modified where competitors and not bona fide agents are concerned, in the light of the present trend of decisions, and as to whether a valid patent monopoly should be held not to be one which encompasses the scope contained in the allegations of the Government. I have matured no view on this phase of the case.

For reasons hereinbefore stated, I feel compelled to dissent from the conclusion reached by the majority on the motion to strike and for partial judgment.

OSCAR E. BLAND.

546 In the District Court of the United States for the District of Columbia

Holding a Three Judge Statutory Court.

Justice Harold M. Stephens of the U. S. Court of Appeals for the District of Columbia, (Presiding), and Judge Oscar E. Bland and Judge Finis J. Garrett of the U. S. Court of Customs and Patent Appeals, designated as Justices of the District Court of the United States for the District of Columbia.

[File endorsement omitted.]

Civil Action No. 8017.

UNITED STATES OF AMERICA

v.

UNITED STATES GYPSUM COMPANY, ET AL.

Order on Motion to Strike Paragraph 46(a) of the Government's Complaint, or, in the alternative, for Partial Judgment dismissing that Part of the Government's Claim Contained in that Paragraph.

Filed Nov. 15, 1943

Upon consideration of the motion of the defendants herein under Rule 12(f) of the Federal Rules of Civil Procedure to strike paragraph 46(a) of the complaint, as amended, upon the ground that the allegations thereof are immaterial and impertinent to the issues herein, or in the alternative for partial judgment pursuant to Rules 12(b) and 56(b) of said Federal Rules dismissing that part of the plaintiff's claim contained in said paragraph 46(a) upon the ground that as a matter of law the plaintiff may not attack the validity of patents in these proceedings in the manner attempted in said paragraph; and upon consideration of the plaintiff's opposition to said motion and alternative motion; and after hearing oral argument thereon by the attorneys for the plaintiff and the defendants; and after considering the brief submitted by said attorneys, it is by the Court this fifteenth day of November, 1943,

Adjudged that the defendants' alternative motion for partial judgment pursuant to Rules 12(b) and 56(b) of the Federal Rules of Civil Procedure for dismissal of that part of the plaintiff's claim contained in paragraph

547 46(a) of the complaint, as amended upon the ground that as a matter of law the plaintiff may not attack the validity of patents in these proceedings in the manner attempted in said paragraph, be and the same is hereby

granted, except as to the first and last sentences of said paragraph, and the plaintiff's claim so far as it is contained in said paragraph 46(a) of the complaint, as amended, except the first and last sentences of said paragraph, is hereby dismissed.

By the Court.

HAROLD M. STEPHENS,
Justice Presiding.

548 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Supplemental answer of United States Gypsum Company, Sewell L. Avery and Oliver M. Knode

Filed Nov. 15, 1943

United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, defendants herein, answering the first and last sentences of paragraph 46(a) of the Complaint, as amended:

Deny each and all of the averments in the first and last sentences of paragraph 46(a) of the Complaint, as amended, except that some of the claims of some of the patents cover processes or machines and except that said defendants beg leave to refer to the patents involved in the license agreements for the coverage thereof.

November 15, 1943,

Bruce Bromley,
BRUCE BROMLEY,
Attorney for Defendants,
United States Gypsum Company,
Sewell L. Avery, and
Oliver M. Knode.

Service acknowledged. Roscoe T. Steffen, Nov. 15, 1943.

549 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Supplemental answer of Certain-teed Products Corporation and Henry J. Hartley.

Filed Nov. 17, 1943

Certain-teed Products Corporation and Henry J. Hartley, defendants herein, answering the first and last sentences of paragraph 46(a) of the Complaint, as amended:

Deny each and all of the averments in the first and last sentences of paragraph 46(a) of the Complaint, as amended, except that some of the claims of some of the patents cover processes or machines and except that said defendants beg leave to refer to the patents involved in the license agreements for the coverage thereof.

November 17, 1943.

F. W. H. Adams,
F. W. H. ADAMS,
Attorney for Defendants,
Certain-teed Products Corporation
and Henry J. Hartley.

550 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Supplemental answer of Ebsary Gypsum Company and Frederick G. Ebsary to paragraph 46(a) of the complaint as amended

Filed Nov. 17, 1943

Ebsary Gypsum Company and Frederick G. Ebsary, defendants herein, answering paragraph 46(a) of the Complaint as amended:

Deny each and every allegation of said paragraph 46(a), of the Complaint as amended, except admit that some of the claims of some of the patents cover processes or machines.

November 16, 1943.

Alfred W. Varian,
ALFRED W. VARIAN,
Attorney for Defendants,
Ebsary Gypsum Company and
Frederick G. Ebsary.

551 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Supplemental answer of the National Gypsum Company and Melvin H. Baker

Filed Nov. 17, 1943

National Gypsum Company and Melvin H. Baker, defendants herein, answering the first and last sentences of paragraph 46(a) of the Complaint as amended:

Deny each allegation in the first and last sentences of paragraph 46(a) of the Complaint as amended, except

that said defendants admit that some of the claims of some of the patents cover processes or machines.

November 16, 1943.

Elmer E. Finck,
ELMER E. FINCK,
Attorney for Defendants,
National Gypsum Company
and Melvin H. Baker.

552 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Supplemental answer of the Celotex Corporation and Bror G. Dahlberg

Filed Nov. 18, 1943

The Celotex Corporation and Bror G. Dahlberg, defendants herein, answering the first and last sentences of paragraph 46(a) of the Complaint, as amended:

Deny each and all of the averments in the first and last sentences of paragraph 46(a) of the Complaint, as amended, except that some of the claims of some of the patents cover processes or machines and except that said defendants beg leave to refer to the patents involved in the license agreements for the coverage thereof.

November 18, 1943.

Ernest H. Oliver,
ERNEST H. OLIVER,
Attorney for Defendants,
The Celotex Corporation and
Bror G. Dahlberg.

Now, Nov. 18, 1943, service accepted.

EDWARD KNUFF,
Special Assistant to Attorney General,
Attorney for Plaintiff.

553 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Supplemental answer of Newark Plaster Company and Frederick Tomkins

Filed Nov. 19, 1943

Newark Plaster Company and Frederick Tomkins, defendants herein, answering the first and last sentences of

paragraph 46(a) of the Complaint as amended:

Deny each and all of the averments in the first and last sentences of paragraph 46(a) of the Complaint, as amended, except that some of the claims of some of the patents cover processes or machines and except that said defendants beg leave to refer to the patents involved in the license agreements for the coverage thereof.

Dated November 18, 1943.

BENJAMIN P. DEWITT,
JAMES O'DONNELL, JR.,
By James O'Donnell, Jr.,
Attorneys for Defendants Newark Plaster Company and Frederick Tomkins, 305 Hibbs Building, Washington, D. C.

Service of a copy of the foregoing Supplemental Answer of Defendants Newark Plaster Company and Frederick Tomkins is hereby acknowledged, this 19th day of November, 1943.

EDWARD KNUFF,
Assistant to the Attorney General for Plaintiff.

554 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Supplemental answer of Samuel M. Gloyd doing business as Texas Cement Plaster Co.

Filed Nov: 29, 1943

Comes now Samuel M. Gloyd doing business as Texas Cement Plaster Company and, for his answer to the first and the last sentences of paragraph 46a of the amended complaint states that he denies said averments except that some claims of some patents cover machines or processes, as shown by the patents.

DAVID I. JOHNSTON,
GEO. E. H. GOODNER,
Attorneys for Samuel M. Gloyd doing business as Texas Cement Plaster Company.

I certify that I served copies of this supplemental answer on counsel for the plaintiff.

DAVID I. JOHNSTON.

556 In the District Court of the United States
For the District of Columbia
Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

Reporter's transcript of proceedings
Statement by Mr. Steffen

557 Mr. STEFFEN. We have, in the middle part of our Par. 46(a) asserted or averred the particular grounds upon which we will attack the validity of the five patents which are now thrown in issue by virtue of the proposed amendment.

Those, as I say, are the five patents which are the basic article patents on which the said price-fixing agreements have been based. There may be other patents, but so far we are calling attention at this moment to, and the only thing we are raising in this trial as to validity, is these particular five patents, and we have stated there, in great particularity, the reasons why we think those patents are invalid, and the points upon which we expect to offer evidence.

558–559 In the District Court of the United States
For the District of Columbia
Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, WASHINGTON, D. C.,
Monday, October 18, 1943.

The above-entitled cause came on for hearing at 10:00 o'clock a.m., before Honorable Harold M. Stephens, Honorable Oscar E. Bland and Honorable Finis J. Garrett, sitting as District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances: On behalf of the Plaintiff: Roscoe T. Steffen, Esq., and Edward Knuff, Esq., Special Assistants to the Attorney General of the United States.

560 On behalf of the Defendants: Bruce Bromley, Esq., New York, New York, George S. Collins, Esq., New York, N. Y., and Cranston Spray, Esq., Chicago, Illinois, for defendants United States Gypsum Company, Avery and Knode. Elmer E. Finck, Esq., Buffalo, New York, and Nicholas J. Chase, Esq., Washington, D. C., for defendants National Gypsum Company and Baker. F. W. H. Adams, Esq., New York, New York, for defendants Certain-teed Products Corporation and Hartley. Ernest H. Oliver, Washington, D. C., for defendants The Celotex Corporation and Dahlberg. Joseph P. Tumulty, Jr., Esq., of Tumulty & Tumulty, Washington, D. C., for defendants Ebsary Gypsum Company, Inc., and Ebsary. James O'Donnell, Jr., Esq., Washington, D. C., for defendants Newark Plaster Company and Tomkins. Scott P. Crampton, Esq., and David I. Johnston, Esq., Oklahoma City, Okla., for defendant Gloyd.

561 PROCEEDINGS

Justice STEPHENS. Are there any preliminary matters, gentlemen, before we proceed with the argument on the motion to strike Paragraph 46(a)?

Mr. BROMLEY. I believe not, sir.

Justice STEPHENS. How much time do you wish, Mr. Bromley?

Mr. BROMLEY. I should think our side would not require more than an hour, sir.

Justice STEPHENS. Would that be sufficient for you, Mr. Steffen?

Mr. STEFFEN. Yes.

Justice STEPHENS. Now the defendants have also requested opportunity to make an argument on a motion for a Bill of Particulars. Do you wish to be heard on that this morning?

Mr. STEFFEN. I think we might well, yes.

Justice STEPHENS. How much time do you want on that?

Mr. STEFFEN. I think maybe half to three-quarters of an hour would be sufficient.

Justice STEPHENS. We will hear argument briefly on that.

If the motion to strike Paragraph 46(a) should be granted, of course, there would be no basis for any Bill of Particulars. However, you may proceed, Mr. Bromley, to argue the motion to strike Paragraph 46(a) of the complaint.

Argument by Mr. Bromley

Mr. BROMLEY. May it please Your Honors:

562 Justice STEPHENS. Mr. Steffen.

Argument by Mr. Steffen

Mr. STEFFEN. Your Honors:

In opening for the Government in this case I would say we make no objection to the first two technical points discussed by Mr. Bromley. We are quite content to let the question go to issue as it has been argued by Mr. Bromley.

I would like, in discussing the question, to go back a little bit and take up some of the questions indicating the type of issue that is presented here.

I want to show first that the pleadings in the case are an allegation on the part of the Government that the defendants have violated the Sherman Act, Sections 1, 2 and 3, in that they have conspired to restrain commerce in gypsum board and gypsum products, in interstate commerce.

We have detailed in the brief rather carefully what the charges are, and we have also detailed in the brief what some of the admissions are. But the admissions on the part of defense counsel in argument before this Court, and in their answers to the complaint, indicate that they agree that interstate commerce is involved, they agree that there has been price fixing, they agree that there has been some measure of standardization of product; and while they dispute that there has been any fixing of prices or resale prices by manufacturing distributors, the evidence,

563 I think, will bear out the point that they have been in substantial compliance with the prices fixed by the United States Gypsum Company.

Now in the brief we cite the usual pronouncement of the United States Supreme Court in the Masonite case—that is on pages 3 and 4 of our brief—that where you have a

case of admitted price fixing, which is what we have in this case, that you have, per se, a violation of the Sherman Act. The language of Mr. Justice Douglas, at the top of page 4, is uncompromising on that point. So that what we take to have been established here is the point, first, that there is admitted violation of the Sherman Act excepting as the defendants are able by their pleading in Section 35 of the U. S. Gypsum answer, to set up the legality of their conduct under their patent license agreements.

Now it seems to us—and we set out, let me point out, Section 35 of the defendants answer, not in this brief but in the brief on the bill of particulars—it seems to us that the defendants by their pleading of the validity of their patent license agreements, and the validity of their patents, are making an argument in confession and avoidance.

They say, "True we have on the one hand violated the Sherman Act, but on the other what we have done is legitimate under our patent license agreements and", as they say, "under the decisions of the United States Supreme Court."

Now there is only one decision of the U. S. Su-
564 preme Court that they can really rely upon, and that, I take it, is the General Electric case which we also discuss in the brief.

I want to show that in order to bring themselves within the General Electric case, which is their affirmative defense, they must show, it seems to me, that they have valid article patents substantially covering, or covering, the product which they make. They must show secondly that their product is manufactured under those patents; and they must show thirdly that the various regulations appearing in their license agreements are reasonable.

In the General Electric case Chief Justice Taft assumed that the patents were valid. He assumed that they covered the product. Both of those matters are challenged by our 46(a). He went on and then discussed the reasonableness of the regulation and found in that particular case that it was reasonable.

We have already said that we are contesting that in this respect, that the facts here are different. This is not a case where you have a single licensor and single licensee and an individual license arrangement. This is a case where all of the manufacturers of gypsum board in the territory east of the Rocky Mountains have combined, did combine in May, 1929, to regulate the sale and distribution of gypsum board in that territory.

That is a very different situation, we contend, that what was before the court in the General Electric case.
565 But that is a collateral matter.

Now in order to bring this matter into focus, as we told the Court back in March, we asked permission to amend our complaint to add Section 46(a). We contended there, or stated there, that the defendants had raised the issue of patent validity by their pleading in Paragraph 35. We contended, however, that in order to practically delimit what the Government might show we would designate five of the essential and principal patents, as we saw them, and challenge their validity in particular respects.

We went into as much detail as we thought was required under the present Federal Rules of Civil Procedure, to state that they are invalid, and invalid in the respects mentioned, and I take it that what we did there was practically to limit ourselves to those five patents, because under the Rules of Civil Procedure, the defendants having pleaded that their patents are valid, we would be deemed to have denied that as to all of their patents. So that our pleading was in order to bring this matter into better focus and to get at the issues in question.

Now let's get down to the question that is presented here this morning. The broad question as I see it is—may the Government introduce evidence in an anti-trust proceeding to show that the patents which the defendants allege form the basis of their defense are valid, or are invalid.
566 I take it that on the substantive matter the defendants certainly make no contention, and can make no contention, that they are justified in a price-fixing arrangement based on invalid patents. What they say is that "if our patents are valid or invalid is none of your business, you can't inquire into it, and if they are invalid it is all the same to us, we are entitled to have a license agreement and a price-fixing arrangement until 1954 based on invalid patents, if we see fit".

Now maybe that states it too emotionally, but that is substantially the position which the defendants must sustain, that is, that they have no position as a substantive matter, but that it is a purely procedural matter; that the Government is estopped, in effect, to show the true state of facts as alleged in the complaint that the defendant's patents are invalid.

Needless to say in an equity court it would seem that that is a pretty slender position to have to take, that they have no question but what if their patents are invalid that

they ought to be allowed to fix prices. "But", they say, "the Government may not show that fact."

And I might add that they have very carefully in their agreements in 1929 provided that they won't test the question. They have agreed, all of them, that they will not test the validity of any patents issued or to be issued under the agreement. And as a consequence—well, strike
567 that, I don't know whether it was as a consequence or not—but as a fact there has been no test since 1929 of the validity of any of these patents.

So that the net effect is that they stand fenced in behind what may or may not be invalid patents, and tell the Government, "You can't inquire into that matter".

Now they rest their argument largely, as I see it, on the American Bell Telephone Company case. I want to point out at once that I think the distinction between that case and this case that gets at the center of discussion, is this, that is a discussion as to whether the Government should be estopped in an anti-trust proceeding to show that the defendant's patents are invalid and not what they seem.

The American Bell Telephone Company case in 167 U.S. was itself the last of three cases. It was a long and elaborately worked out proceeding. The Government appears to have made the contention in those three cases that the defendant's patents were invalid and should be cancelled, and the grounds were substantially two in the third case:

(1) That there was something in the nature of fraud in that a period of 11 to 13 years had elapsed between the time of the application and the time that the patent issued; and

(2) As stated by Mr. Bromley, the patent was invalid for the reason that it had been anticipated by prior patents issued to the same inventor.

568 Therefore, there were two grounds: (1)—fraud; (2)—anticipation.

Now I might say that the Court very clearly points out that upon the matter of fraud, if fraud can be shown, that the Government is privileged, and in fact it is the Government's duty, to bring an action to show that the patents are invalid because of fraud, and to have them cancelled. That is established, at least, definitely by the case.

As respects the matter of having them cancelled because there was a prior patent, or there may have been a prior patent, that is the issue of anticipation, the Court was equally positive that the Government might not interfere and cancel.

Now our contention here is that that decision, so far stated, is absolutely correct. It seems to us that it says that the Government is in no sense entitled to step out of a clear sky and say, "We think your patent is invalid because Mr. Jones had another patent which anticipated you". Well, the Attorney General hasn't any right, hasn't any power or any authority at all——

Justice BLAND. There is no remedy provided like that.

Mr. STEFFEN. No statute, no common law or anything, to step into a situation like that and say, "We think your patent is invalid and we are going to have it cancelled". Of course the Court told him quite vehemently and properly that he could not have it cancelled. That isn't in
569 issue here; we are not asking to have any of these patents cancelled.

The second point is more important. We are not proceeding out of a clear sky. We are now just saying, "We think your patents are bad". This is a direct attack brought by the United States Government to show that the defendants have violated the anti-trust laws, and I think it should be taken to be agreed that as a substantive matter if they have fixed prices on invalid patents, they have violated the law.

The question, the whole question, is therefore—is the Government in an authorized position to proceed to show the actual and true facts as to the invalidity, if that is the case?

In other words, we are moving under the Sherman Act, Section 4 of which provides that it shall be the duty of the Attorney General to bring proceedings before an equity court to restrain violations of the Sherman Act. It isn't a volunteer proceeding, it is simply a Congressional mandate requiring the Attorney General to bring proceedings to show that the patents are invalid, if that is the basis upon which the defendants have sought to restrain trade.

Now I think that accounts for the American Bell Telephone Company case. It seems to me that the court had before it simply those two questions, and it had that particular issue before it, simply whether the Government could or could not cancel.

570 Let's point out what we are trying to do here, what the Government contends for in this case. We are contending that the defendants have restrained trade on the basis of invalid patents. We are not attempting to show that those patents should be cancelled, or that they

should be stricken out in any sense. We simply are contending that the fact of invalidity may be disclosed in a proceeding of this sort in order to get at the essential facts of whether or not the defendants are, as a substantive matter, violating the Sherman Act.

Justice BLAND. It hasn't been questioned here by any of the defendants, that even if the patents were valid but were insignificant in bringing about the result of which you complain, nevertheless they could be restrained—as I understand, that is not disputed. Now it is your position, I take it, that you can raise the question of invalidity as well as you can raise the question of insignificance?

Mr. STEFFEN. That is right, or the question of whether they have used the patents, or whether their regulations are reasonable, or any other fact.

Justice BLAND. Didn't we strike out the interrogatories with reference to the use of the patents, that is, in the answers now, Mr. Bromley—I don't remember?

Justice STEPHENS. I think I can answer that question. We didn't rule that that was irrelevant; we only ruled that the questions as phrased required too much
571 detailed effort to describe the prices.

Mr. STEFFEN. May I read to the Court briefly the paragraph of the American Bell Telephone Company case which we think affirmatively says that the Government is privileged to show facts, as it is attempting to do here. That is on pages 264 and 265 of the opinion, and on page 12 of our brief. There the Court says:

"Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a propriety and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual."

Then on farther down it says:

"But when it has no propriety or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants"—and then only.

Now our contention here is that under Section 4 of the Sherman Act the public interest is very definitely stated. The Attorney General is required to bring suits, if
572 the facts are such, to show that the defendants have violated the Sherman Act; he is not acting as a volunteer, he is acting very positively along the lines laid down for him by Congress, and the American Bell Telephone Company case very clearly recognizes that there is such a possibility of the government moving in its sovereign capacity to eliminate invalid patents; it says so.

Now it doesn't go on and discuss it. The discussion it goes on to make is that where the issue, the basic issue, is simply between two inventors, one who holds a prior patent and one who holds a later patent, that the interference and infringement procedure is entirely adequate.

That is very carefully stated by Mr. Justice Brewer, that the remedy at law is adequate. He then goes into Section 4920 and discloses in full what those remedies are, and says in effect that, inasmuch as the defendant who would be benefited by a suit brought by the Attorney General, for these reasons has a completely adequate remedy at law and has had since the patent laws were inaugurated, there is no occasion for the Attorney General to start a proceeding to help one individual at the expense of another.

Justice BLAND. Let me ask you—in that case that you are discussing they held that you didn't have any right to cancel a patent when you were doing it in the interest of some third person and not doing it under the public
573 policy as a sovereign. Did they apply the doctrine of estoppel to the Government there?

Mr. STEFFEN. I don't recall whether they did or not.

Justice BLAND. Is it estoppel nevertheless?

Mr. STEFFEN. I would say not an estoppel; it was simply a complete showing of lack of authority on the part of the Attorney General to act.

Justice BLAND. Doesn't this follow, that the Government having issued the patent, and not being interested except where a third party is involved is estopped to intervene—or would that be estoppel?

Mr. STEFFEN. The two ideas are different ways of saying much the same thing.

That portion of the brief, Your Honor, was directed to the proposition that it does not apply to the Government where it is acting in its sovereign capacity and acting in

the public interest, and in this very quotation that I read to you the Court goes on to say that where the Government is moving to cancel a patent because of fraud, that the ordinary rules of estoppel do not apply.

Perhaps I should go on immediately now to the Sola Electric case which has been referred to. The Sola Electric case is our most recent decision by the U. S. Supreme Court, indicating the general attitude of the Court as respects matters of estoppel in anti-trust proceedings.

574 That was a suit brought by a licensor against an individual licensee for two matters; (1) to obtain back royalties; and (2), to require the defendant to abide by a general price-fixing scheme, very muh as if U.S.G. should sue National and require them to pay royalties.

The defendant in that case, by a declaratory judgment, was permitted to raise the question in the Supreme Court of whether or not the plaintiff's patent were invalid, and the reasons which the Supreme Court attached for its position are very persuasive in the present litigation. Note that it was not an infringement case. The defendants in their brief say that it was an infringement case, which of course is not the fact.

It was an action brought on contract; it didn't raise Section 4920 of the Patent Laws at all. Plaintiff is suing for a royalty. The defendant says, "I don't have to pay a royalty because your patents are invalid"—and he asks a declaration to the effect that the plaintiff's patents are invalid. It has nothing to do with infringement, it is simply a contract action.

It has nothing to do with the statute. There is no statutory provision which authorizes the defendants to put in a case that the plaintiff's patents are invalid.

The lower court said that the patents should stand just as they read, that the patents could not be ques-

575 tioned. It stated most of the things that counsel here have said, that patents are issued by the Government and there ought not to be any question as to their validity excepting in a proceeding set up by statute.

The Supreme Court, Mr. Justice Stone speaking, was very explicit upon the point that the matter of validity was wide open to a defendant who sought to show that he was not obligated to pay royalties under the patent because the patent was invalid, and hence the price-fixing arrangement was invalid under the Sherman Act.

That is exactly the issue we have here. The patent being invalid, Mr. Justice Stone said, the defendant may show

that fact for the purposes of showing that there has been a violation of the Sherman Act, and that therefore he is under no obligation to pay royalties.

Now the reasons that the Court assigns for that statement are that the public interest requires, not only as respects patents but as respects the fair administration of the anti-trust laws, that the fact of invalidity in a transaction of that sort should be shown. That is a very clear-cut pronouncement, as we contend, concerning the attitude of the Supreme Court on that point.

I might go back to our other authorities which are also in point, on whether the Government may or may not show patent invalidity in a suit of this sort.

576 The Standard Oil case, the gasoline cracking case, which the defendant mentions, is also cited in our brief at some length.

Justice BLAND. Was that an anti-trust suit?

Mr. STEFFEN. That was a gasoline cracking patent suit, an anti-trust suit, brought by the Government for the purpose of showing that patent pooling was invalid, and among the allegations were allegations that the patents were invalid. It is discussed at page 14 of our brief.

I want to call your attention to the fact that when the matter was assigned by the three judge court to a master to take evidence, one of the first questions that the Master brought back to the Court was the question of whether it would be appropriate for the Government to introduce evidence to show that the patents were invalid, and also to show that they were limited in scope.

And the ruling of the court—this is a 3-judge court—is stated there on page 14 of the brief. No, that is the question. The question asserted is:

"The main question is to get this fairly before the court for decision, in all its aspects—as to whether the Government has a right to attack either the validity or the scope of these Letters Patent and whether this attack is collateral or whether it is direct * * *".

Then on page 15 we quote what the Court ruled:

577 "The Master having certified questions to this Court respecting the admission of evidence, and this Court, having heard counsel and being fully advised, is of the opinion that the objections should be over-ruled and the evidence received".

Now that is the only ruling in that case on the exact question of whether that evidence should or should not be received. When the matter went back to the Master there

were further proceedings and further argument, and a new petition as to two defendants presented, and the Master then came to the conclusion, referred to by Mr. Bromley, that in his opinion it wasn't appropriate to put in any evidence to show that the patent was invalid or that it was limited in scope, it must read just as it issued from the Patent Office.

The matter then came back to the District Court for its opinion and the District Court then said:

(1) That they were very clear that evidence should be admitted for purposes of showing the actual scope of the patent; and

(2) That in view of their decision it was not necessary for the Court to pass upon the question of whether or not the Government could put in evidence of invalidity.

They said they were divided on the point, presumably they had been divided on the point when they made their first ruling, perhaps 2 to 1 in favor, maybe 2 to 1 against.

578 That, of course, is a very inconclusive ruling, but in so far as there is any ruling by the Court it is favorable to the Government.

When the case went to the U. S. Supreme Court, Mr. Justice Brandeis, writing for the Court, said that the matter of patent validity not being presented, they wouldn't pass upon it, and that ended that case so far as it being an authority here is concerned.

I want to refer, though, to the Porcelain Appliance case which is also cited by us as a definite authority for the right of the Government to bring an action of this sort and to show patent invalidity. That is United States v. Porcelain Appliance Corporation, on page 13 of the brief, decided in an unreported opinion by Judge Westenhaver. We have copies of the opinion here which we will furnish to the Court.

There the Judge stated:

"Obviously, this is not a suit by the United States to cancel patents. (Making the distinction which we made to start with). It is probably beyond the scope of all possible issues to decree certain patents or certain claims thereof to be void. (We, in our prayer, do not ask that these patents be cancelled). The issue here is whether or not the defendants have organized and are members of an illegal conspiracy and a final decree can probably not have any broader scope. These expressions are not to be taken as the final determination of any such question.

579 However, assuming they correctly state the law, it would still appear that the allegations of the bill are

proper and that the testimony in support thereof might be received. . . . I can perceive many combinations, in violation of the Sherman antitrust law, in which patents or claims thereof, invalid in view of prior art, or limited in nature, may be wrongfully used in building up or maintaining such an illegal conspiracy."

The Court then allowed the Government to proceed to show—I mean that was an allowance on the part of the Court to permit the Government to show—invalidity.

Mr. Bromley said the case never amounted to much because they settled it by a consent decree. Of course the consent decree was the judgment of the Court that they had violated the patents, and when it was shown that the plaintiff could show patent invalidity, there wasn't any further contest left, apparently.

But it is an actual holding by a Court saying that the Government may introduce evidence to show the patent invalidity in an antitrust proceeding.

Now we have, in the Supreme Court, a number of dicta which I want to call Your Honors' attention to because while they do not constitute a ruling by that Court they most clearly constitute a showing of the attitude of the Court upon this question, which has been much mooted through the years.

In the Ethyl case—this is on page 16 of the brief
580 —Mr. Justice Stone said:

"In considering that question we assume the validity of the patents, which is not questioned here".

In the Masonite Corporation case, which is also cited, Mr. Justice Douglas said:

"We assume arguendo that the patents in question, owned by Masonite, are valid."

And in the case of United States v. Univis Lens Company, cited on page 17, the Chief Justice went on to say:

"The Government has not put in issue the validity of the lens patents, but argues that their scope does not extend beyond the structure of the lens blanks and consequently affords no basis for the Corporation's restrictions on the sale of the finished lenses which the wholesalers and finishing retailers fashion from blanks purchased from the Lens Company. * * *

"The record gives no account of the prior art and does not provide us with other material to which, if available, resort might appropriately be had in determining the nature of an alleged invention and the validity and scope of the patent claims founded upon it."

Now our contention is that in these prior cases when Mr. Justice Brandeis, Mr. Justice Douglas and others have said, "We assume arguendo that the patents * * *are valid", or that "* * * we assume the validity of the patents, which is not questioned here", that had they had
581 the defendants' contention in view they would have said, "which cannot be questioned here", "that validity may not be questioned in the case", and when we consider Mr. Chief Justice Stone's writing in the Univis case it is very clear to us that the U. S. Supreme Court has practically invited a showing of evidence as to the validity or invalidity of the patents involved in a proceeding of this character.

In the Sola Electric case the Court stated that the public interest required that the Patent Laws and the Sherman Act be fully and completely enforced, and they allowed an individual, in the Sola case to show patent invalidity, apart from any statutory authorization whatever, in order that he might show a violation, that he individually might show a violation, of the Sherman Act.

Now our contention is that if those reasons obtain in a private litigation, that is, the public interest in seeing that the Sherman Act is fully enforced, they would obtain all the more clearly in a case where the Attorney General is moving pursuant to the authority of Section 4 of the Sherman Act to bring the questions in an orderly fashion before the Court for a hearing as to the actual facts as to whether their patents are valid or invalid, and therefore whether their price-fixing structure is right or wrong.

We have divided our argument up in the brief into four general points. The first point I have discussed,
582 which concerns the fact that the Government is moving in this proceeding in its sovereign capacity.

The second point, mentioned on page 9, makes the argument that this proceeding is a proceeding merely to show the fact of invalidity, and does not constitute an effort to cancel the patent or to in any way interfere with the patent, that the defendants may continue to hold their patents, for what they may be worth.

Third, we say that patents have never been more than prima facie in effect, and I think that if you will look at the history of patents from the day they were first issued back in the 1790's, when they were issued largely as a purely ministerial thing by the Secretary of State and anybody could come in and apply and say, "I have satisfied the statute," and they would issue him a patent, to the present day, that they have never been final and conclusive upon the matters listed in Section 46(a). There isn't any authority at all to support the defendants' contention in their

points and authorities that patents are final and conclusive determinations of the Patent Office, they have always been regarded as merely prima facie.

Perhaps the best authority—Your Honors are undoubtedly familiar with the Reckendorfer case, and Dunbar and Myers, and that whole line of cases, where the Court very clearly has said that the determinations of the Patent
583 Office as between a patent holder and infringer, are wide open, they are merely prima facie determinations by the Patent Office, which are entitled to a certain dignity, having been issued by the Government, but on the other hand are not final and conclusive, and a moment's thought, I think, would show that this case is very different from either the land cases or the certificate of naturalization cases in that respect.

A patent is authorized only pursuant to the statute. The Commissioner has no power actually to issue a patent, according to the Reckendorfer case, unless certain requisites have been fulfilled. Those are that he has an invention, that it hasn't been anticipated by somebody else, that there has been no publication, no prior use, that he has stated his terms concisely and clearly—and other matters that are stated in the Act.

Upon that the Patent Office asks the inventor to present an oath. The inventor says, "I have invented something, it is new, it is useful, it hasn't been published within two years."

The Patent Office has never been equipped to go out and find out whether or not Mr. Jones, in California, or Mr. Smith in Florida may not have used a device of the sort claimed in the patent. It is impossible, as a matter of fact, to have a patent which has been completely searched as respects all matters of anticipation. And as a con-
584 sequence the Patent Office says, "Well, Mr. Roos (in this case) you have told us that your patent is valid, you have told us that there are no prior publications, you have told us that it is an invention; we have looked over certain matters and we think it is entitled to a least a prima facie position".

That is all we say, that is all we have ever said. And it is open, then, under Section 4920 or under the other statutes for anybody to test the validity and we are contending here that the Government may show whether it is valid or invalid, as a matter of fact, in a proceeding of this sort.

Justice GARRETT. I would like to ask one question here. You have drawn some distinction here—I suppose you in-

tend us to regard it as a distinction—between the Bell Telephone case, the fact that there they sought to cancel and here you are not seeking that but are simply seeking to have it declared invalid. What is the difference, in effect?

Mr. STEFFEN. We don't ask to have it declared invalid. We just wish to show the fact that it is invalid. It would not have any bearing as a determination, it is just a showing that in this particular case the facts are that the patent is invalid and that therefore the defendants have violated the Sherman Act.

Justice GARRETT. Well, if we agree with you we would have to hold it invalid, wouldn't we? There would have to be a judgment of the Court that it was invalid,
585 wouldn't there, in order for you to benefit by your contention?

Mr. STEFFEN. No; all that you would actually have to do would be to say that the defendants have violated the Sherman Act, and they have violated it in that their affirmative defense of a valid patent monopoly isn't supported by the facts.

Perhaps I can make my point clearer, Judge Garrett, by referring you to the case of Pratt v. Paris Gas Light & Coke Company, on page 20 of the brief.

That, stripped to its essential facts, was a case where the plaintiff had agreed to construct a gas works for the defendant pursuant to a particular patent. The patent turned out to be invalid and the defendant refused to pay the consideration for his contract. Now in that case the Court said on the fact of invalidity, whether the patent was or wasn't invalid, that it was open to the defendant to show that the patent was invalid and that he could do that apart from any statute whatever. It was not a declaration of the court which would set aside the patent or cancel the patent, it was simply the finding of an incidental fact which was necessary in order that you wouldn't do injustice by forcing a contract party to pay a consideration where the consideration had essentially failed.

Justice STEPHENS. But we would have to make a judicial determination, would we not? The defense to price-
586 fixing here is that price-fixing is proper under the General Electric case because it is price-fixing which occurs under patent license agreements. You assert that the patent license agreements are not valid for two reasons; first, because they go beyond the corporate confines of the

General Electric case decision; and second, because of the patents on which they are founded being invalid. It seems to me that that goes to the very gist of the contentions. Have we got to reach a judicial determination that these patents are invalid, and if we do what is the difference between that and cancelling them, except in the form of the ruling?

Mr. STEFFEN. I would say that you are quite right, that you would have to make a judicial determination. The difference is one in remedy. We don't ask to have it cancelled. Our only authority, as I see it here, is to enforce the Sherman Act, and that is all that we ask, that such remedies be granted as are necessary to make sure that the central policy of the Sherman Act is fully carried out. And if, in the course of that, it is necessary to say that patent number so and so is invalid, and therefore their price-fixing scheme is invalid based on that, that would be a judicial determination, but we do not ask to have the patent cancelled.

I might point out, Judge Garrett, that the other ground is that we are not proceeding on any question of fraud, which was granted in the American Bell Telephone
587 case as being a proper means of proceeding.

Justice GARRETT. Yes, I understand that. The particular thing I was inquiring about is that I was curious to see if there was a judicial determination and that the patent was invalid, what is the difference between that and an order to cancel it. It has the same effect, doesn't it? That throws that process open to the public and destroys the value of the patent as far as its owner is concerned?

Mr. STEFFEN. I should think so, and let me point out that we have asked the Court in this case, on the authority of the Morton Salt Company decision, to go so far as to enjoin the defendants from enforcing any of their fifty patents because of their violation, or alleged violation, of the Sherman Act.

So that whether we ask to have the patent cancelled, or don't, becomes more or less of an academic question, because if we take that position that the patents are unenforcible anyway because of a violation of the Sherman Act, then the collateral matter of whether they are actually void is of course more or less of an incidental matter.

Justice GARRETT. Now just a question on the issue with respect to these patents in view of the fact or of your statement that you are asking that they be enjoined from

enforcing all fifty or whatever the number is—from proceeding under any of the fifty. I thought you were just attacking five here?

588 Mr. STEFFEN. That is right.

Justice GARRETT. What are we going to do about the other 45, are we supposed to do anything about those?

Mr. STEFFEN. Let me point out this, that if the Court finds that there has been a violation by the defendants of the Sherman Act, under the doctrine announced by the Supreme Court in the Morton Salt case a year ago, they cannot come into an equity court thereafter and ask to have those patents, the patents which contributed to their violation of the Sherman Act, enforced; that their hands are dirty, in the language of the law, and until such time as the evils of the monopoly have been dissipated, that they are without power to sue for an infringement of those patents and should be enjoined, and we have asked the Court to do that as respects all of them.

Now that is a matter quite apart from the validity or invalidity of these five. If we simply show, by whatever means, that they have violated the Sherman Act and have used their patents in some measure toward that end, then we may ask the Court to have those patents, not cancelled, but ask to have the defendants enjoined from using or enforcing them, before an equity court, and that is cold law, as I understand it, by the U. S. Supreme Court in the Morton Salt case, cited here in our brief.

Justice STEPHENS. I suppose you are also making this distinction with respect to the five patents and the
589 forty-five. As to the five, you have got two legs under your stool so far as your case is concerned, you say in the first place that the license agreements went beyond the proper scope of the patents, and secondly, that the patents were invalid. As to the other 45, you say only the first.

Mr. STEFFEN. That is right.

I call Your Honors' attention to the case of United States v. Bradford, cited on page 22, which is a criminal case and raises this matter of collateral attack. The United States there brought an action charging that the defendants had conspired to defraud the United States by obtaining the issuance of land-script, and the means by which they had done it, it was charged, was by having an administrator appointed in a state court. It was argued before the court

that inasmuch as the administrator had been duly appointed, that it wasn't open to the United States, in enforcing its criminal statutes, to show that the administrator had been improperly appointed.

The Court quickly disposed of that with the holding that the United States, in enforcing a criminal statute, would not be prevented or estopped from showing the actual fact that the appointment of this administrator was part of the general scheme and done for the purpose of aiding them in defrauding the federal government.

Of course the case is not on all fours, but it is an indication of the sort of thing which we are contending for here.

590 Now I want to make my final point, which is that regardless of how the Court might wish to decide this question in an ordinary antitrust case, that in the present case the defendants have estopped themselves entirely from setting up any question of government estoppel to show that the patent is not good.

The defendants have all gotten together, did in May of 1929, and have signed an agreement that they wouldn't contest the validity of these patents, that they wouldn't contest the validity of the patents issued or to be issued on applications then known.

Now the Supreme Court has been fairly clear in stating that that goes a long way, and that the policy underlying it is not to be favored. I cite you the opinion in the Gormully case on page 36 of the brief, in which the court says:

"It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly".

Then it goes on to discuss whether a patent holder or licensee who had agreed never to contest the validity of the patent-holder's patents, even after the license had elapsed, whether that would be a proper policy, and their indication is definitely that it would be a bad policy.

But the defendants here have gone much farther,
591 they have agreed not to contest the validity of any of these patents, and as a fact since 1929 there has been no contest of the validity of any of the five patents that we are questioning. In fact, so far as I know there has been no question as to the validity of any of the fifty patents.

Justice BLAND. Let me see if I understand that. You say that these folks having agreed not to contest the valid-

ity, that then we have a case of estoppel against estoppel. That is, they are estopped from raising the question of estoppel on the part of the Government?

Mr. STEFFEN. That is correct.

Justice BLAND. What are the authorities on the question of double estoppel?

Mr. STEFFEN. We cite, on page 34, the case of Commonwealth v. Brierly, which is one case which came fairly close, as we saw it. In that case Pennsylvania had apparently issued a grant for land. Later on Brierly applied for a patent to the same land and in his application or oath, which compares with the application or oath of an inventor, he said that the land was vacant, that is, that it had not been previously covered by a patent. Thereafter it developed that there was timber on the land and the Commonwealth of Pennsylvania bought up the land from the holder of the original grant, and then started this suit for trespass against Brierly who had bought by the subsequent grant.

592 The Court quite clearly said that where the defendant in the case, Brierly, had stated to the government that the land was vacant, that he would be in no position to estop the government from attacking the validity of that warrant or deed.

And I want to call your attention also to the point that they do not put it on the basis of fraud. They said:

"Under such circumstances we cannot see how Strouse could have successfully invoked the aid of the doctrine of equitable estoppel (and that is all we are concerned with here, equitable estoppel by deed, deed of patent) to ward off the consequences that necessarily flowed from his own mistaken or false representation that the land applied for was vacant land."

And in this case it is our contention that the defendants are equally estopped by virtue of their self-restrictive clauses, and having prevented any test in the ordinary way by an interference proceeding, as well as by their assertions that is that they do have an invention, that there is no prior art, and that therefore their patents are good.

Justice BLAND. For them to be estopped from raising estoppel on the part of the Government, they must have done something or said something contrary to the position they are now taking?

Mr. STEFFEN. Not necessarily contrary, but contrary to fact.

593 Justice BLAND. They haven't admitted anywhere that these patents are invalid; they have merely said, "You shall not contest them".

Mr. STEFFEN. That is right.

Justice BLAND. I can't apply that——

Mr. STEFFEN (interposing). Let me make it as clear as I can. In the Brierly case, if this analogy is to hold, the Government is proceeding by way of trespass to test the title to the land which it has purchased from a prior grantor, under a prior grant. Now let me point out that the Government is proceeding in a proprietary interest, and in the American Bell Telephone Company case it is recognized that you may proceed in your sovereign capacity or for your proprietary interest, and in that case the Government would be properly proceeding for the protection of its interest.

It had bought land and it wanted to know whether it owned the land or not. In the course of that the defendant said, "You are estopped because you issued me a deed". The Government said, "You are estopped because you told us that the deed was upon vacant land when in fact it was upon land which had already been granted."

Justice BLAND. I don't quite see the analogy of that to the facts involved. In other words, his saying that this was unoccupied land it seems to me is not equivalent to some one saying, mind you, not saying a word about
594 whether the patents are valid or invalid, but saying that you shall not contest their validity. I don't get the analogy.

Mr. STEFFEN. Well, in both cases it is the government, and in both cases we have a deed, and the ordinary estoppel by deed would apply. That is, I take it, that the citation of Mr. Bromley and the defendants on the land cases where the Government has issued a deed to land, that it cannot come in in another proceeding and later on say, "We didn't mean it".

The land cases are quite distinct from the patent cases, and are clear. The doctrine of estoppel by deed is largely based on the land cases. So in the Brierly case we took the strongest situation. The Government had issued a title for land and it later acquires the title from the prior

grantor and sues in trespass. Now its authority to bring that suit is because of its proprietary interest, it is the owner of the land.

We contend that the authority of the Government to sue here is in order to protect the public generally from monopolies, that we are likewise proceeding under an authorized statutory authority, and that when we are met with the statement, "Oh yes, but you issued the patent, therefore you should not be allowed to go behind that patent and show that a price-fixing structure based on that patent is bad", to that we say, "We issued the patent but we issued it in reliance upon your statement and oath" not that the
595 land was vacant, but that there were no prior patents of the same sort, that the prior art discloses——

Justice BLAND (interposing). Then you are not relying upon the agreement not to contest; you are relying upon the oath of the patent holder that it was valid?

Mr. STEFFEN. In this case. But I haven't made my argument clear, I take it.

There are two branches, Your Honor, and the first branch of the argument is just as you are quite properly pointing out, that so far as we have gone with the Brierly case it rests entirely upon the matter of oath and assertions made by the defendants to the Patent Office, and we say that inasmuch as the Patent Office issued it in reliance on those assertions, that the Government may not be estopped to test the validity of those assertions where the Government is proceeding, as in this case, under the authority of a Congressional statute.

Now I went on from that. What I wanted to do was to go on to the second point. A double reason why these defendants should not be permitted to estop the Government from testing the validity of their patents. And that is that not only did they make oath to the Government, not only did they present affidavits—in this case they presented an affidavit in connection with the Roos patent, saying that 3 billion board feet had been manufactured under this patent in the ten year period preceding the time when it came up before the court on the interference pro-
596 ceeding, a proceeding before the time it was even ruled upon by the Patent Office—but they did not show that during that time there was an agreement between these defendants to use these particular patents. Therefore, the disclosure to the Patent Office was much smaller perhaps, and not as complete, as can be developed in a case of this sort where all those facts can be brought out.

But that argument goes so far as to bring it, I hope, within the analogy of the Brierly case.

Then we go on from that and say that the defendants have estopped themselves further by agreeing not to permit an ordinary contest of the validity of the patent by infringement suit, that is, they have taken all of the people who are in the business and have tied their hands and have said, or they have said, "We won't contest the validity".

It is perfectly possible that Mr. X could start a plant and infringe, but as a matter of practical business sense, no one is going to put in, no one has put in, the million or more dollars necessary to start a plant and to make an actual infringement suit which would test the validity of these patents.

And we say that in a court of equity, where the defendants are asking you to tie the hands of the Government, that it is encumbent upon the defendants themselves to show complete and fair dealing on their part. We do not see that, in the light of those agreements not to con-
597 test the validity, that they have fairly permitted the ordinary processes to operate.

If you read carefully the American Bell Telephone decision I think you will find that the Court there clearly had in mind that the remedy at law was adequate for the reason that under Section 4920 anybody could have started an interference proceeding or infringement proceeding, and have thereby tested the validity.

Where the defendants step in and stop the normal way of testing the validity of a patent, even though they do it only nine-tenths, it seems to me that they are in a bad light to come here and say that the Government shouldn't be permitted to test the facts, and to say, "It is true that our patents may be invalid and we won't let anybody test their validity in the usual way——

Justice BLAND (interposing). I take it that you think if the doctrine of estoppel against estoppel applies at all it is on the basis that they are asking something in equity with unclean hands. Now is it unclean for anyone else not to contest the validity of his patent if he takes a lease on it?

Mr. STEFFEN. I don't think so, not in a simple case of that sort.

May I state this just again very briefly. We make the first contention here that by virtue of their oath and their application the defendants have said that the patents are valid in the respects challenged by $46(a)——

598 Justice BLAND (interposing). If they had said something that said they were invalid, then they would be estopped from afterwards asserting their validity.

Mr. STEFFEN. No, they give the reasons why the Patent Office ought to act. The Patent Office says, "Mr. Roos, you, having done all that, we will issue the patent to you in reliance on your assertion that there is no prior act in that case." Then the Patent Office having issued the patent in reliance on his affidavit and oath, they turn around and say to the Government, "Now you, having relied on our statement once, are estopped to show the actual facts" even though it is necessary in the interest of carrying out the policy of the Sherman Act to have price restrictions based only on valid patents and not on invalid patents. We say that that is a species of estoppel. Next the argument goes on and says that where you have prevented a test, that that makes the estoppel double-dyed.

Justice STEPHENS. Mr. Steffen, I think in view of the numerous questions you have been interrupted with, that your time has not been quite exhausted, but we will have to adjourn now because one of the members of the Court has an engagement at 12:30. And we will resume at quarter of two.

(Whereupon, at 12:20 o'clock, p.m., the hearing was adjourned until 1:45 o'clock, p.m., of the same day).

599 AFTERNOON SESSION

(The proceedings were resumed at 1:45 o'clock p.m., at the expiration of the recess.)

Justice STEPHENS. Proceed, Mr. Steffen.

Mr. STEFFEN. I have only one or two comments to make and then I will close, Your Honor.

I want to refer to the Lucas bill, Senate Resolution 2730, which Mr. Bromley referred to, and point out that section 4 covers not only an action brought by the Government but by any party to a proceeding charging a violation of the Act of July 2, 1890, and it goes on to say that, in any such proceeding, "the opposing party or parties shall be entitled to show the invalidity or the limited scope of the patent or patent rights set up by way of defense."

That section of the statute is probably already unnecessary in the case of any private party. The decision of the Supreme Court in the Sola Electric case has covered that point completely, and only since this statute was drafted, saying that an individual party to a proceeding involving

the Sherman Act may set up the invalidity of the patents asserted by the opposite party. We do not find that there is any concession on the part of the Governm nt that the Government may not, except for statute, do the same thing.

The statute was apparently designed largely to clarify the situation in the absence of a cold decision on the
600 point. The Supreme Court has now given a cold decision as respects a private party.

I want to refer to one other section of the bill in the same respect. Paragraph 1 provides that where there is a proceeding between two individual parties involving the validity of patents and involving a matter coming under the Sherman Act, that the Government may intervene. That would be to allow the Government to intervene and to establish the invalidity of the patents because of the general public interest involved in showing that there was a violation of the Sherman Act. The two individual parties might not be concerned, but it does involve a public interest which the Government would be interested in, and the reason I refer to that is that it also is probably no longer necessary. Within the last few days in Boston the District Court there, in a proceeding between two individuals, has had an intervention proceeding presented by the Government. The Government, in its intervention proceeding, has alleged that the patents are invalid and void.

Justice STEPHENS. You are referring to the Wyzauski decision?

Mr. STEFFEN. That is correct. In that decision, he allowed the Government to intervene and set up the invalidity of the patents.

It is true that the proceedings, of course, are only
601 in the opening stages, but the opinion, as announced by Judge Wyzauski, would indicate that a motion to strike the Government's intervention proceedings upon the ground urged by the defendants here would not get very far. That is, he says, a matter which ought to be brought up before a District Court and completely heard, and he says it for reasons which I think may be very persuasive to Your Honors. We have submitted to you, or presented, a copy of Judge Wyzauski's opinion.

I have only one other point to make and that is on this matter of congressional intent with respect to the Act of 1910 which permitted the Government, when sued as an intervener, to set up not only the defenses called for under section 4920 but any defenses which any party, by virtue

of section 4920, or otherwise, might be able to set up. In that case, it is obvious that the Government, being sued as an intervener, is interested in its proprietary right, that is, it would have to take money out of its pocket if sued for infringement and under the doctrine of the American Bell Telephone case, that was one case where the Government would be entitled to show——

Justice BLAND (interposing). In this situation, you contend the same thing maintains with respect to this bill here.

Mr. STEFFEN. I searched the Congressional Record to find the answer to your question, and you will find
602 throughout the discussion before Congress that the main debate or the main fight was whether Congress would be the best organ to pass upon these questions of claims because of possible infringement or whether they should set up a Court of Claims or some other tribunal which would hear them. The whole debate turned on that point. In the common law, the Government could infringe and not be subject to suit and it only could be held liable for losses where there was an implied contract to pay a royalty. That struck everyone as being unjust and, accordingly, many bills were presented to Congress and Congress, after much debate back and forth, determined it might pass a statute to aid a particular claimant, and the debate in Congress in 1910 was whether that procedure should continue or whether it should be taken out of the hands of Congress and put in the hands of a special tribunal. Throughout the debate in Congress, I think you will find there is no suggestion that the Government should not be permitted, because it is the Government, to introduce evidence of invalidity. In fact, that is taken as a casual matter that the Government should, and I ran across one quotation which I thought might be particularly persuasive with this Court.

Mr. Lenroot, who had a very definite part in getting that statute passed, had this to say, and I quote from page 27 of our brief. Mr. Lenroot said:

"Mr. Chairman, it is not, as I have said two or
603 three times on the floor during this debate—it is not competent, in my opinion, for Congress to settle these questions of compensation for torts to patentees. In the first place, the first questions in nine cases out of ten of this character is, Has the inventor a valid patent? The patent granted in the first instance gives the inventor only

a prima facie right. Anyone can go into court and test the validity of a patent because of a prior patent covering the same subject, or for many other reasons. That is the first question and a most serious question. Then, if that be decided in favor of the inventor, comes the question of damages, and in every case the damages are unliquidated. These are not easy of ascertainment . . . I submit that the Committee on Claims is not competent, with the limited time at its disposal, to dispose of and decide these questions, the validity of the patents and the amount of damages which should be awarded."

I say that that is typical of the debate before Congress. It was purely a question of whether Congress or the Court of Claims should pass upon the question, and there was no suggestion made in the debate that I could find to the effect that the Government should, in any sense, be given or be denied a right to test the validity of the patents. In fact, the whole debate goes the other way, that patents are admittedly only prima facie patents.

Justice GARRETT. Mr. Steffen, I would like to
604 ask you one question which goes back to a matter that was under discussion just before the recess was taken, with respect to these licensees binding themselves by contract not to contest the validity of these patents. I have never had any occasion, so far as I can remember, to look at a contract made under conditions of this sort where the owner of a patent is given a license. Doubtless you have.

Is there anything unusual about a licensee binding itself? Of course, generally speaking, I understand the courts have held that a licensee cannot generally contest the validity of the patent when he has accepted a license under it. The Sola Electric case appears to make an exception under peculiar conditions of that case but is there anything unusual in this contest about one not binding himself not to contest and is there any element pertinent to this case involved in the fact that the licensees did so bind themselves?

Mr. STEFFEN. I think so, Your Honor. I would say first that Your Honor is quite right, that it is very usual for a single licensee to put in a phrase to the effect that the licensee will not contest the validity of the patent. That is simply an individual and ordinary arrangement. The Sola Electric case said that, in spite of the usual estoppel obtaining in that case, if the defendant alleged a violation

of the Sherman Act growing out of the misuse of patents, that the validity of the patent could then be shown.
605 That is in an individual case.

The unusual things in this case are two-fold; one, that the defendants here are all of the manufacturers of gypsum board in the bulk of the United States, and we contend—we have no authorities on the point nor are there any against it—we contend that where all of the persons involved in manufacture agree among themselves that they won't contest the validity of the patents, that what they have done is prevented the normal and usual way of testing patents and that it ought to be looked at by a court of equity and looked at with very great concern that what it operates as being is a prevention of the usual way of keeping the patent stream clean from invalid patents.

Justice BLAND. Do your readings disclose the fact that any of these five patents were owned by any of the defendants prior to their transfer to the Gypsum people?

Mr. STEFFEN. I think all five patents were issued to the United States Gypsum Company direct, all five of them.

Justice BLAND. Were the applications filed by any of the defendants other than the Gypsum people?

Mr. STEFFEN. No, not on these five.

The second point that I mentioned, Judge Garrett, is that the defendants here have gone beyond anything ever seen in an individual patent arrangement where they agree in advance to the validity of patents which may or
606 may not be issued at some future date on applications then pending.

Justice GARRETT. I have been thinking about that.

Mr. STEFFEN. There is no authority at all that I know of for that. I would like to call your attention to the American Equipment Company v. Tuthill case in the brief, which says that where the parties have agreed to use a patent for purposes of controlling the price on an unpatented article and have really come together on the basis of the patent not because the patent was useful but because it afforded a means of getting together on prices, that when you look at these clauses in the light of those allegations to that effect, it makes them all the more reprehensible, in our opinion. That is, we allege that the defendants have taken the patents not because they were

particularly valuable but because they afforded a means of getting together on prices. In the case of the Utzman patent, which we are not challenging as that is long since gone, they did not get to use it, but they agreed to fix prices and did fix prices right away. That seems to us an obvious attempt to simply use a patent because it happened to be handy and allowed them to fix prices.

Their main purpose, we have contended, is to fix prices, and the patents are incidental. If you look, therefore, at these clauses, they would not permit these patents to be contested in the normal way among all of the defendants by an infringement suit or otherwise, and if they, in
607 fact, have not been tested during all of these years, it makes it look as though they are very questionable clauses, and when the defendants assert, as they do, that the Government should be estopped from testing the validity of the patents, we point out the fact that the developments of their part have prevented any ordinary test of their validity and that, therefore, for that reason we say, they should likewise be estopped and, therefore, the matter is "at large" as Lord Cope once said.

Justice GARRETT. In the matter of binding themselves not to contest the validity of any patent that might be granted on applications then pending, did it say "or thereafter pending"?

Mr. STEFFEN. Then pending, I think.

Justice GARRETT. Were they named, named by number?

Mr. STEFFEN. It refers, as far as this case is concerned, to the three Roos patents, the validity of which we are challenging. They were issued in 1935 and 1937, and this agreement was in 1929. The defendants did not know what form those patents were going to take when they finally issued, or much about them, nor do we contend did they care.

Justice STEPHENS. I would like to ask one or two questions. One of the first points you made was that the defendants themselves raised the question of validity by relying upon these patents. It seems to me, and if I am mistaken I would like to hear to the contrary, it seems to me
608 that that in a way is just a form of words which begs the question in the case, which is whether or not any question of validity can be raised in the case by the Government through the defendants, in relying upon

the patents, relying upon the validity of the patents. They do not assert them to be invalid, of course. They rely upon them as if they are valid patents, but can they be put in the position, because they plead that those patents are the subject of their license agreements, of having estopped themselves from contending the Government has not any affirmative right to contest the validity of the patents?

Mr. STEFFEN. I do not wish to make the contention that, because they have pleaded their patents are valid and their license agreements are valid, that, therefore, they are stopped.

Justice STEPHENS. I have not had the benefit of reading your final brief. I only received it this morning, and maybe the answer to the doubt that presently exists in my mind is in your brief. I have read the brief submitted by the other side and made some examination of the cases, but I wanted to state to you, so you can have the opportunity to answer or help me with it, what seemed to me to be the most serious difficulty that the Government has to meet in approaching this aspect of the case.

It seems to me that, so far as the estoppel case is
609 concerned, that they do not help the Government very much because estoppel is a machinery which prevents the exercise of a right which otherwise would exist, so that the estoppel argument does not get us far. It seems to me you might lay aside entirely the Bell Telephone case upon which the defendants rely, and assume, for the sake of argument, that it is distinguishable——

Mr. STEFFEN (interposing). That it is not distinguishable?

Justice STEPHENS. Assume, for the sake of argument, that it is distinguishable as you contend and lay it out of the case as a bulwark for the defendants. It still seems to me that the Government has failed to demonstrate thus far in its argument an affirmative basis upon which to rest the right of the Government to assail the validity of these patents, and it does not seem to me that it can be established merely by saying that this is an equity case and the matter is procedural only. Procedural rights have as great dignity in the law as substantive rights and it is true we are arguing here with a procedural question because substantive questions go to the validity of the patents, as such, and the right of the Government to protect them.

The doubt I have about your proposition and the contention you make is whether you have been able to establish for us thus far anything in the case except, in the
610 casual remarks in the Standard Oil case and in the Porcelain case, of the District Judge, anything in the cases which affirmatively indicates that the courts have recognized thus far in the development of the law a right on the part of the Government in an antitrust case or otherwise to attack the validity of a patent which has been issued by the Patent Office. You have offered no statutory basis for that. In short, it seems to me what the Government is really asking the Court to do is to make law, to develop a procedural right on the part of the Government which has not heretofore existed. I realize there there is a proper field for the growth of law through judicial adaptation of principles to broader lines on new cases, but it seems to me, in this situation where you ask the Court to recognize the right of the Government to strike down the validity of patents upon which—or so it is asserted—the industry has, in part, been built or these license agreements have been asked under, is, in effect, asking us to do something which the legislature ought to do because it is a very radical departure from procedural rights thus far established and it has a retroactive effect which statutes do not.

I suppose an argument could be made, and I understand, in some patent systems of other countries there is a declaratory action made available in the courts or an annulment action in the courts, so, upon the issuance a patent,
611 a judicial proceeding can be at once had to determine finally its validity.

It may be there are excellent arguments in favor of some such legislative remedy, but have we, sitting as trial judges, any right to make such a decision? And continuing with the argument you made with respect to grants of land to homesteaders or mining claims, and the homesteader proceeds to use the land for 10 years and then, according to the Government, continues to use it illegally; with respect to mining, or if it is a farm, Government regulations with respect to health of his animals, for example, the Government commences an action to restrain illegal use of the mine or of the farm, and in that action assumes at that time retroactively to strike down the patent. That is the big doubt that I have in my mind about the Government's position and it seems to me the lack of an affirmative foundation, either in the cases or in the statute, would be, in effect, a

request of this Court as a trial court to erect a new remedy. I have some doubts whether we have the right or the power to do that.

I state those things fully because I want you to have an opportunity to answer if I have a mistaken point of view about your argument.

Mr. STEFFEN. May I spend five minutes in answer to that?

Justice STEPHENS. Yes, indeed.

612 Mr. STEFFEN. On the square authority, if that is what Your Honor is seeking, in part, in the cases we have cited to you only the Porcelain case as being squarely in point. We have cited the Standard Oil case where the Court itself decided, apparently upon a prior ruling, that the Government might put in evidence in a case very similar to this. That is the opinion of the Master, or report of the Master, which, of course, has no standing at all other than it is the opinion of a competent man. We have cited, in addition to that, the recent case by Judge Wyzauski which very definitely foreshadows a ruling that the Government may intervene and show invalidity of patents, and he has given reasons which are, I think, rather persuasive in that case.

The defendants, on their part, have shown no authority to the contrary. They have shown only the American Bell Telephone case which I agree with you to lay aside for the moment. I construe that to be in support of the Government's action here. Therefore, on the basis of court decision, we haven't anything by way of decision which is cold.

When you move to the Univis case, the Supreme Court very definitely said within the year that it would be appropriate for the Government to introduce evidence in an anti-trust suit to show invalidity and lack of scope.

Justice STEPHENS. Which case is that?

Mr. STEFFEN. That is the Univis case. When the
613 United States Supreme Court goes out as positively and as lately as that——

Justice GARRETT (interposing). That is on page 17, isn't it?

Mr. STEFFEN. Yes, on page 17, and that is in 1942.

"The Government has not put in issue the validity of the patents." That is a case where we did not allege invalidity. "The record gives no account of the prior art and

does not provide us with other material to which, if available, resort might appropriately be had in determining the nature of an alleged invention and the validity and scope of the patent claims founded upon it."

That is not just an isolated dictum. It is a statement very clearly by a judge who has made several other statements of that same character within the last two or three years indicating that, when the time comes, the Supreme Court will sustain a showing of invalidity in an antitrust suit, and the reasons why the Court in the Sola case allowed the individual to show the invalidity in spite of local rules of estoppel, the reasons were, that by so doing it would contribute to the public interest not only in respect to eliminating invalid patents but enforcing antitrust laws. If those reasons obtain in a private suit, they obtain doubly in a suit brought directly by the Government to enforce the Sherman Act.

We are not here to declare the patents invalid.
614 We are here on the statutory thought, very definitely stating that the Attorney General shall bring actions before equity courts to remove restraints upon trade, and if we find a restraint upon trade hiding behind an invalid patent, the public interest in removing it, I should think, would be pretty clear.

On the matter of your land grant cases, I am not an expert on land grant cases or land cases, but my understanding is that in those cases the Court has been very definite in saying, contrary to what they said in the Univis case, that where a grant of land has been made by the United States, it is going to have to stand back of it. The Government has had every opportunity ordinarily to determine whether they should issue the patent under one statute or another, to refer to the Price case which the defendants urge, and if it is a homestead matter, they have an opportunity, before they ever issue the patent, to have applicant prove to their satisfaction that he did reside on the premises the required time; that he did do the necessary improvements, and they are equipped to go out and make those determinations.

As I said this morning, in your patents for inventions nobody can contend that the Patent Office or anyone else would be able to say that Mr. Jones out in California did not make a prior invention. Nobody knows, and, therefore, what the Patent Office does is to say, "We will give
615 you the dignity of a grant which we think, prima facie, is valid. We are relying on your oath on your application to sustain the validity," but we contend that

there is no further estoppel, and if, in a proper procedure brought under proper statutory authority, that becomes an incidental fact, we contend that it is open to the Government to show the fact. As I say, all the authorities that have had the point up have gone our way. They are not strong authorities, but there is nothing on the other side.

615(1) *Excerpt from argument on motion for bill of particulars*

Justice BLAND. What about that allegation that you make that they were informed of the invalidity of the claim? I do not know the point you seek to make of the fact they were informed of the invalidity of the claim. Do you mean to say that goes to the intent?

Mr. STEFFEN. That is in Paragraph 46(a), subdivision (h), where it states the defendants have been informed of the invalidity. That simply raises the question of disclaimer, and in this brief we have withdrawn any assertion on that score. I agree with you that I do not think it is a valuable allegation and we are not insisting on it.

Justice BLAND. I was going to say, if the defendants were informed, they ought to look to the place where that information was given.

Mr. STEFFEN. My point here is, Judge Bland, it would be appropriate perhaps by way of interrogatory but not by way of bill of particulars.

Justice BLAND. Do you waive it?

Mr. STEFFEN. We waive it entirely, so that is out of the picture.

615(2) In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, WASHINGTON, D. C.,
Monday, November 15, 1943.

The above-entitled cause came on for hearing at 10:00 a.m., before Honorable Harold M. Stephens, Honorable Oscar E. Bland, and Honorable Finis J. Garrett, sitting as the District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances: On behalf of the Plaintiff: Roscoe T. Steffen, Esq., and Edward Knuff, Esq., Special Assist-
615(3) ants to the Attorney General. On behalf of the Defendants: Bruce Bromley, Esq., New York, N. Y., and George S. Collins, Esq., New York, N. Y., for defendants United States Gypsum Company, Avery and Knode. Elmer E. Finck, Esq., Buffalo, N. Y., Nicholas J. Chase, Esq., Washington, D. C., and Paul W. Lapey, Esq., Buffalo, N. Y., for defendants National Gypsum Company and Baker. F. W. H. Adams, Esq., New York, New York, and Peter Keber, Esq., New York, New York, for defendants Certain-teed Products Corporation and Hartley. Ernest H. Oliver, Esq., Washington, D. C., for defendants The Celotex Corporation and Dahlberg. Joseph P. Tumulty, Jr., Esq., Washington, D. C., and Alfred W. Varian, Esq., New York, New York, for defendants Ebsary Gypsum Company, Inc., and Ebsary. James O'Donnell, Jr., Esq., Washington, D. C., and Benjamin P. DeWitt, Esq., New York, N. Y., for defendants Newark Plaster Company and Tomkins. David I. Johnston, Esq., Oklahoma City, Okla., and George E. H. Goodner, Munsey Bldg., Washington, D. C., for defendant Gloyd.

615(4) *Colloquy re stipulation as to patents*

Justice STEPHENS. At the last session of court, counsel were asked to stipulate, for the purposes of the

Motion to Strike and for Partial Judgment, with respect to Paragraph 46(a) of the Complaint, as to the form and content of the Roos Patents.

Has that stipulation been prepared yet?

Mr. BROMLEY. Yes, Your Honor, it is right here. (Stipulation handed to the Court.)

Justice STEPHENS. Gentlemen, that stipulation, probably due to my too general a statement as to what I wanted, doesn't quite fit what I desire to have. I wish to have a stipulation as to the exact form of each of the Roos Patents mentioned in Paragraph 46(a). This stipulation may be filed of record, but fearing that my directions might not have been sufficiently specific, I obtained from the Patent Office certified copies of the Roos Patents, and I will ask that they be handed to counsel and let them be inspected in comparison with the stipulation.

I think you will find they are correct, and I will be glad, if you can do so, if counsel will stipulate that those may be treated as a part of the record for the purpose of that Motion to Strike. Also hand the stipulation to counsel. (Copies of Roos Patents and Stipulation handed to counsel.)

615(5) Justice STEPHENS. The reason for that is that in my Opinion, I have printed the form of one of the Roos Patents complete, and I would like to have something in the record technically to support it.

Mr. BROMLEY. May it please Your Honors, the Defendants will stipulate that the five Roos Patents, certified copies of which have been handed to us, may be made a part of the record in connection with the Motion for Partial Summary Judgment.

Justice STEPHENS. Will you hand them to counsel for the Government? I think you will find them correct, Mr. Steffen. (Copies of Roos Patents handed to Mr. Steffen.)

Mr. STEFFEN. Your Honor, I should like to make a rather broad statement, that may take me about ten minutes, in this connection.

We are, as a preliminary matter, not willing to stipulate concerning the form of the patents. Your Honor asked us very specifically last time merely to stipulate as to the form of the grant, and we very carefully stipulated as to the form of the grant.

Your Honor asked whether the application dates were the particular application dates, and we understood that

that was the matter that was in the Court's mind, and we stipulated that those application dates were correct and that the form of the grant was correct.

615(6) It has been our contention, if I may continue here for a few minutes, it has been our contention throughout that as a substantive matter the validity or invalidity of these patents was a very material part of this case; or, in other words, basing our argument on the Sola Electric case, that the defendants may not fix prices and restrain trade on the basis of invalid patents, as a substantive matter; and our allegation in 46(a) is to the effect that the patents are invalid.

That is a clean-cut, definite allegation of fact which is a necessary issue in this case, whether it comes up under 46(a) or whether it comes up under the defendants' pleadings under 35; and we therefore wish to take an exception to any ruling at this time—and I might say that we are very unprepared and that we haven't seen the Court's judgment, we don't know what the sweep of the Opinion may be—but we are very much opposed, if the Court's judgment is to be one of holding the question of invalidity not an issue in this case, we would have to take a very definite exception to that.

If the Court's judgment—and I am again going on a hypothesis—is that the matter of invalidity is completely out of this case, and that the defendants should have judgment on 46(a) before there is any evidence at all as to what those patents are, before the Court has even seen those patents, we think that the judgment is entirely premature;

615(7) and I will say further that we have given very serious consideration to the posture of this case. The Court's opinion, if it follows that original opinion, I think goes clear beyond certainly what the United States Supreme Court has said in the Univis case, and it goes squarely counter to two very well-established lines of authority having to do with the invention, the need of showing invention, and having to do with the need to show a concisely stated patent.

And I can say that we have considered whether it might not be desirable for the Division, the Government in this case, to either take a non-suit and try this case in another Court, or possibly to shape our record and take an immediate appeal.

This is not a matter of importance simply to this case, it is a matter of importance to a large number of cases. I think, as Your Honors are familiar, since 1926 one of the favorite devices of defendants has been to use patents

of whatever character and to formulate an agreement that they will all take out licenses, fix prices, and that they have then been able to make a very positive restraint upon trade.

It is a newer device whereby they can circumvent the Sherman Act, and what has happened in this case is typical. Therefore, we have had in many cases to raise this question of whether patents are going to be allowed to be used as a means of circumventing the Act.

615(8) We would therefore ask first that this case be put over at least one day, that we have a recess for at least one day, until we can consider what our action should be.

Justice BLAND. Wouldn't it be better for you to read those Opinions before you make any radical statement?

Mr. STEFFEN. I say we don't know where we stand at the moment.

Justice STEPHENS. Mr. Steffen, you haven't given the Court an opportunity to tell you where you stand.

Mr. STEFFEN. All right, I will be glad to read the Opinion.

Justice STEPHENS. I am afraid that the matter is a tempest in a teapot, except to the extent that you wish to take an exception to any action of the Court. That, of course, you are entitled to, and your exception may be recorded. But so far as the form of these patents is concerned, I am afraid we are wasting time over a triviality.

I did want to put in my Opinion, as you will see when it is handed to you in a moment, the form of one of the Roos Patents, and to say that the balance of the Roos Patents followed that form. And I was referring to the grant and not to the specifications.

I thought possibly counsel, in view of my rather general directions the other day, would stipulate, as they have stipulated, to the form of the Roos Patent. I thought it might be a little more regular to have a stipula-

615(9) tion to the form of the Roos Patents.

I am not interested at all except as to the form of the grant. As far as the contents of the specifications are concerned, that is not material to the Opinion which I have written. However, when I asked the Patent Office to furnish me certified copies of the five Roos Patents mentioned in your pleading, Mr. Steffen, it didn't occur to me that either the defendants' counsel or the Government counsel could have any objection to there being made known to the Court the contents of the patent grants of the five

Roos patents which the Government itself has included in its pleadings, or the contents of the specifications.

But if there is any objection on the part of the Government to the Court at the present time seeing the contents of the specifications, or if counsel for the Government are not willing to stipulate that the contents of the specifications may be submitted as a part of the motion with respect to Paragraph 46(a), then I will suggest and invite counsel for the defendants to offer as a part of the motion and to make as a part of the record, under the Motion to Strike Paragraph 46(a), the certified copies of the five Roos Patent grants which were just handed to counsel, but offer only those portions of them which certify the grant as distinguished from the specification..

That will protect you, Mr. Steffen, in every way.

615(10) Mr. STEFFEN. We would agree to that.

Mr. BROMLEY. May it please the Court, I offer in evidence the granting portion of each of the following numbered patents: Roos 1,914,345; Roos 1,938,354; Roos 2,017,022; Roos 2,079,338; and Roos 2,080,009, as a part of the record in connection with the Defendants' Motion for Partial Summary Judgment.

Justice STEPHENS. They may be made a part of the record.

You have no objection to that I take it, Mr. Steffen?

Mr. STEFFEN. That is correct. (Certified copies of the following Roos Patents were received in evidence: #2,080,009 as Defendants' Exhibit 1; #1.914,345 as Defendants' Exhibit 2; #2,079,338 as Defendants' Exhibit 3; #1,938,354 as Defendants' Exhibit 4; #2,017,022 as Defendants' Exhibit 5.)

Justice STEPHENS. I now hand to the Clerk a copy for the defendants and one for the Government's counsel, of the signed Judgment of the Court with respect to the Motion for a Dismissal of 46(a); and I now hand to the Court Porter and to the Government and to the Defendants' counsel, a copy of the Opinion of the Court, including a dissenting opinion by Judge Bland.

615(11) Justice STEPHENS. The Court will be in session.

Mr. BROMLEY. I should like the record to show that I, personally, regret very much the necessity which compels the retirement of Judge Bland from this case. I know all the other defendants join me in this expression of feeling,

and we all want him to know that we wish him well in the future.

Mr. STEFFEN. I would like to underline everything that Mr. Bromley has said. We appreciate very much Judge Bland's interest and the care with which he has handled the arguments that have been presented, and we wish him well in every way.

Justice STEPHENS. I might ask at this time whether or not counsel for the defendants or counsel for the Government raise any question or objection to this change of judge?

Mr. BROMLEY. No sir.

Mr. STEFFEN. We make no objection.

Justice STEPHENS. We will be in informal recess for a few moments. The Court will be in session.

Mr. STEFFEN. I will say to you that with respect to your request for time we of course will give counsel for the Government, as well as counsel for the defendants,
615(12) time to read this opinion and this judgment, and make up their minds as to what further steps they wish to take, but we must reconstitute the Court this morning because of Judge Bland's illness, as he must get a train to the Mayo Clinic this afternoon or evening.

615(13) In the District Court of the United States
for the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, WASHINGTON, D. C.,

Tuesday, November 16, 1943.

The above-entitled cause came on for further hearing at 10:00 a.m., before Honorable Harold M. Stephens, Hon-

orable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances. (Same as heretofore noted.)

615(14) PROCEEDINGS

Justice STEPHENS. I call the attention of the reporter to one or two minor corrections in the transcript of yesterday's proceedings. They are very small, but I might as well call your attention to them while I have them on my mind, Mr. Reporter.

On page 681, the third line from the top, the word "clause" should be the word "portion".

I may say that in making these corrections, I have not yet had proofread the Opinion of the Court which was copied in. I assume the correctness of that. My secretaries will proofread that in the usual course.

On page 735, the word "and" at the end of the third line, should be "as".

I think that is all.

Mr. BROMLEY. May it please Your Honor, on page 681 I noticed that the five Roos patents have been marked as Defendants' Exhibits 1 to 5, inclusive, in this case. I am not sure that it makes any difference, but my offer was that they be a part of the record in connection with the Motion for Summary Judgment.

Justice STEPHENS. What page is that?

Mr. BROMLEY. 681, sir.

Justice STEPHENS. It says, "I offer in evidence the granting clause"—which is now "portion"—"of each
615(15) of the following numbered patents . . . as a part of the record in connection with the Defendants' Motion for Partial Summary Judgment".

Yes, that would have been sufficient that far. It is not necessary or proper to describe them as evidence, because no exhibits have been offered yet, so far as the trial is concerned, and they are sufficiently identified by their numbers so that I should think the description of them as exhibits might be eliminated, Mr. Reporter.

Is there anything else of a preliminary character?

Have you any motions, Mr. Steffen?

Motion for reargument

Mr. STEFFEN. Your Honor, we would like to renew our motion of yesterday that we be permitted at this time to

have a reargument upon the matter of the right of the Government to introduce evidence to establish the allegations of paragraph 46(a) of the Complaint, which Your Honors have ruled upon.

Justice STEPHENS. What are your reasons for desiring a reargument?

Mr. STEFFEN. My reasons are, even after having read very carefully Your Honor's able opinion in the matter, that this, from the Government's standpoint, is a case of very great consequence, or a question of consequence; and we have one reason, that the bench has been changed, Judge Jackson has been added since the argument was
615(16) originally made, and I think it is more or less usual to reargue a question where there has been a change in the bench.

Second, the much more important question is that the Opinion is based upon, as I read it, a line of authorities which we didn't cite in our brief and which the defendants didn't cite in their briefs, and which were not argued at all before Your Honors; and it seems that in a matter of this consequence we should at least have an opportunity to express the Government's position upon those authorities.

We request, I think, about 30 minutes. This case has gone on for 3½ years, and an additional 30 minutes isn't going to hurt, particularly.

Justice STEPHENS. Do you wish to be heard, Mr. Bromley?

Mr. BROMLEY. I object to it, sir, on the ground it is a pure waste of time; that the briefs were exhaustive, the oral arguments were extended, and the obvious care and attention which the Court gave to the matter, I think does not make appropriate a request for reargument.

He makes no contention he has anything new or that anybody overlooked anything, and it seems to me that it is a pure waste of time, under the circumstances. Therefore, I oppose it.

Justice STEPHENS. Do you have any authorities to cite, Mr. Steffen, which were not decided at the time the briefs were submitted?

615(17) Mr. STEFFEN. Yes, I have authorities which, in the light of Your Honor's opinion, would take on an entirely different significance.

Justice STEPHENS. I didn't make myself quite clear, I think. Do you have any cases to cite which were not decided by the Courts in which they were rendered at the time your brief was rendered?

Mr. STEFFEN. There have been no new cases that have come down in the last few days, but I urge very strongly that we at least have an opportunity to present the Government's view upon the line of authorities which Your Honor adopted, quite without any argument on our part and quite without any argument on the part of defense counsel.

Justice STEPHENS. I think that is not quite correct, Mr. Steffen. The defense brief urged in several places that the courts have no power, either directly or indirectly, to review the determinations of administrative agencies in the Government in the absence of statutory authority to do so. The argument was somewhat amplified in the Court's opinion, by the additional cases cited, which is not usually the subject of objection.

The Court will rule as follows on this request for reargument:

In the first place, the Court wishes to comment that the statement made yesterday by counsel for the
615(18) Government that the ruling was premature, we think is not well founded. The ruling on the motion to strike or for partial judgment dismissing paragraph 46(a) was made in advance of the actual calling of the case for trial at the request, indeed after several requests by counsel on both sides of the case during the several months preceding the argument, in order that counsel might be advised as to the necessity of preparation on the subject; and counsel informally arranged in the hearing in my chambers on the 10th of August that this matter might be raised in advance in the manner in which it was raised, and we think there is nothing premature about the decision of the Court.

The Court will deny the motion for reargument at the present time. The Court will say to counsel for the Government, however, that of course, the Government has a right to make a record in the case if it wishes to make a further record for purposes of appeal. It may make a proffer of testimony, either at the outset of the trial or during the trial. It may offer to prove, by calling a witness and offering to prove the invalidity of the patents alleged; if the Government wishes to make that record at the outset of the trial or later, it of course may do so, and at that

time if Judge Jackson, not having heard the argument, wishes to hear further argument, it will then be allowed.

Mr. STEFFEN. May I ask, Your Honor, that the
615(19) record show that we do not agree with the Court's statement on page 5 of the Opinion, that it was conceded in oral argument that the only question presented was whether or not the Patent Office, as an administrative tribunal, had erred in its findings. Our brief did not proceed on that, and I have searched our argument and I do not find that we made any such concession; in fact, our argument is exactly to the contrary.

Justice STEPHENS. The record may show counsel's statement of disagreement with the Opinion of the Court.

Mr. STEFFEN. Would Your Honors care to be favored with the Government's argument by way of a brief? We can formulate what I would say in this 30 minutes, and present it to you in writing.

Justice STEPHENS. No, I think the matter has been gone into so thoroughly and the Court gave such thorough attention to the matter, that it would not be proper to have it reargued.

The Court can understand the disappointment of any counsel who is on the adverse side of a ruling, and the zeal and desire of counsel to reargue a case; but the trial is a practical affair, and we must move along with it, and we can't have reargruments every time we make an adverse ruling, especially where a matter has been so thoroughly argued and so thoroughly considered as this has been.

You may make a proffer of testimony on the
615(20) subject in order to make your record, in order to insure your right to have full advantage of the adverse ruling for the purposes of appeal should the ultimate decision in the case go against the Government.

And if at that time Judge Jackson would like to hear additional argument, we will hear it, all three of us will hear it. But otherwise, the ruling of the Court will stand.

Announcements by the Court

Are there any other preliminary motions? If not, one or two preliminary announcements will be made for the guidance of counsel during the trial of the case.

First, the formalities of procedure to be observed in accordance with the usual practice of Federal trial courts in the District. The rising of all persons at the instance

of the Marshal when the Court goes into or resume session. This little ceremony, at which it is to be noted that the Judges rise as well as counsel, is a mark of respect not to individuals but to the function which the Court and counsel are performing. The fact that we are engaged as lawyers and judges together in the common task of searching for the truth in the law and the proper application of the law in this case itself gives dignity to our proceedings, but these formalities are customary and necessary, and we will continue them.

The Court will ask counsel to stand, if it has not been the practice to do so in other jurisdictions, during
615(21) the examination of witnesses. That greatly promotes a workmanlike and speedy examination.

The Court will ask counsel to remain a substantial distance away from the witness, preferably at counsel table or at the lectern, during the examination of the witness. Exceptions, of course, to this occur with respect to the presentation and inspection of exhibits, but in general this rule will be followed. The purpose of the rule is not a formality, but because of the fact that if counsel stand a reasonable distance away from the witness, both counsel and the witness keep their voices lifted; whereas, otherwise both of them drop their voices and we don't hear. My experience in the trial of cases has brought that out very clearly.

As far as the arrangements of tables for the convenience of counsel are concerned, there are so many lawyers here that it is a little difficult. We have had additional tables moved in, with the hope that enough of them would be there for each of defendants' counsel as well as Government counsel. If there are not enough, we will get more.

If it would be preferable to counsel to remove the lectern entirely and put tables in the form of a square so that there be more sides of a table to sit at, that is entirely agreeable. We will leave those arrangements largely to the convenience of counsel, and the Marshal may consult me, if necessary.

615(22) If papers are to be handed to the Court for inspection or to witnesses, that will ordinarily be done, as a matter of convenience, through the Clerk; or if the Clerk is not available, through the Marshal.

We are commencing a trial, gentlemen, which bids fair to be extended and complicated. Our task of searching for the truth and ascertaining and applying the law will be greatly aided if there is a cooperative spirit and good feel-

ing on the part of all in the case, toward the Court, toward counsel, toward witness. The trial is, of course, in some sense a contest, but it is a contest which can be carried on with good feeling toward the Court and good feeling toward each other, as far as counsel are concerned. Such a spirit will greatly aid the conduct of the trial.

Heat in trials usually shuts out light. We do not mean by this that we expect counsel not to conduct their case in a vigorous and spirited manner. That is customary and proper, but it may be done with good feeling.

The Court expect counsel to abide adverse rulings with good grace and without expressions of resentment toward the Court. It is recognized that lawyers are human, but in the zeal of controversy sometimes are tempted to overstep themselves. Their proper recourse against rulings which they feel are erroneous is by appeal, and not by expressions of dissatisfaction and resentment.

615(23) This does not mean that counsel are not to feel entirely free at all times to take such steps as they feel necessary, take all proper steps for the purposes of appeal, to advance every right which is necessary for the protection of their clients on both sides of the case. But their proper recourse against rulings which they feel are erroneous is by appeal or by the proper steps for taking appeals, and not by expressions of dissatisfaction or resentment.

The Court wishes to have counsel feel at ease in the court, and not to feel that there are a lot of unnecessary formalities or pretentions. Nevertheless, the Court must be conducted with dignity and such formality as is necessary for efficiency.

We regret to feel obliged to say that the episode yesterday, in which counsel for the Government expressed the possible purpose to dismiss this case because of the adverse ruling on the motion to dismiss paragraph 46(a) in order to seek another court in which to try the case, was passed over at the time because the Court thought that perhaps counsel did not fully appreciate, in the haste of the moment, the unpleasant implications of the statement. But the Court wishes counsel to understand that it does not condone such statements, which are a reflection upon the fairness of the Court. The proper remedy is by appeal.

615(24) Adverse rulings are bound to occur in the course of a trial in respect to both parties, and the Court expects the parties not to agree with them, but to abide them with grace and courtesy. By this it is not meant

that the Court desires to deny the Government the right to make any motion it sees fit, and that motion will be given full and fair consideration.

If there are no preliminary motions, the first witness may be called.

I believe you were going to make an opening. Judge Jackson suggests, gentlemen, that he has given a very careful study to the pleadings, and I think has had time to examine the preliminary memoranda which have been submitted by the defendants, and he has read the Opinion of the Court recently rendered; and that as far as he is concerned, you need not make an extended opening, nor more of an extended opening than you would for those who have been associated with the case from the beginning.

But I shall not restrict counsel, and they may make such opening statement as they wish.

Mr. STEFFEN. We requested yesterday the privilege of making a brief opening statement, partly in order to aid Judge Jackson and partly to make clear the structure of the Government's argument, and I would like to proceed to make that statement now.

May I say at the outset, in regard to Your
615(25) Honor's reference to exceptions just now, that it is my understanding that in the course of the trial, as evidence is being put on, that it is not our or the defendants' obligation to note an exception. That is taken for granted?

Justice STEPHENS. The new rules do not require that.

Mr. STEFFEN. That is correct, that is my understanding.

Justice STEPHENS. You are correct.

Mr. STEFFEN. And as respects possible errors in the proceedings up to date, I take it that we do not need to note an exception there either, do we?

Justice STEPHENS. I don't think so, Mr. Steffen, my understanding under the new rules is that the formality of taking exceptions is not necessary. However, in order to adequately protect you, if there is any doubt about it the record may show that you note an exception to any adverse ruling which may have occurred thus far against the Government. That would include the granting of the motion to strike or for partial judgment under paragraph 46(a), and there have been one or two other adverse rulings, which I don't recollect. If you wish to aggregate them accurately

and present them, the Court will note an exception in the record for you with respect to each one of them.

Mr. STEFFEN. I am not prepared at the moment to list them.

Justice STEPHENS. I understand that, but you
615(26) may do that if you think it is necessary.

Mr. BROMLEY. Would that apply to all parties, sir?

Justice STEPHENS. Yes, sir.

616 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, WASHINGTON, D. C.,
Wednesday, November 17, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances. (Same as heretofore noted)

617 Justice STEPHENS. You may proceed, gentlemen.

Offers in evidence

Mr. STEFFEN. We offer in evidence Government's Exhibits 1 to 5, inclusive, which have been marked for Identification. These exhibits are photostats of the license agreements entered into between USG and the companies mentioned therein, for the manufacture and sale of board under the Utzman patent. These agreements are as follows:

No. 1—Agreement between United States Gypsum Company and Beaver, dated July 29, 1926. That was the original agreement.

No. 2—Agreement between USG and Universal, dated September 17, 1926.

618 No. 3—Agreement between USG and National, dated May 16, 1929.

No. 4—Agreement between USG and Certain-teed, dated May 22, 1929.

No. 5—Agreement between USG and Ebsary, dated May 22, 1929.

The foregoing exhibits are all the license agreements entered into by USG under the Utzman patents, except the agreements between USG and Atlantic, Texas and Niagara.

The Atlantic agreement was dated March 5, 1927, and the Texas agreement was dated April 18, 1927. It is admitted by USG in paragraph 50 of their answer that these two agreements are substantially the same as the Beaver and Universal agreements. The Niagara agreement was dated in May, 1929, and in paragraph 61 of the USG answer it is admitted that this agreement was similar to the Ebsary agreement.

These are the basic agreements which will be introduced for purposes of showing, as the Government contends, the initial combination between the defendants.

As I have stated, they have been substantially admitted in the answers, each of the defendants, however, asking leave to refer to the original at the trial. We now are producing either originals or photostatic copies of the originals.

I may say further that these agreements were introduced in the criminal case before Judge Goldsborough, and the defendants there stipulated, for the purposes of that case, that they, being original documents, would be admitted without question.

619

Justice STEPHENS. Are these the originals or the photostats?

Mr. STEFFEN. Photostats of the originals. I will submit them to defense counsel. (Documents handed to defense counsel.)

Mr. STEFFEN. I may say that we have photostatic copies of all letters and memoranda, but these run into such volume that it would be impossible to photostat all of these agreements without a very great expense, and they are, moreover, set out in the Appendix to the Complaint. So you have before you substantially the wording, in fact the exact wording of the agreements.

Justice STEPHENS. You have no photostatic copies of these particular agreements for the Court?

Mr. STEFFEN. Not sufficient to give each member of the Court. We have sufficient of the letters and memoranda so that each member of the Court may have a photostatic copy.

Justice STEPHENS. Do you have enough to give one member of the Court a copy? The reason I ask that is that I am trying to keep, through my secretarial staff, an abstract of the testimony as it goes along, and an index of exhibits to the transcript, for my own convenience
620 and possibly for the convenience of counsel in the case, and it would help me if I could have, myself, a photostatic copy of each of the exhibits introduced. I don't ask you to do the impossible.

Mr. STEFFEN. We can have them photostated and make up a copy.

Justice STEPHENS. Thank you very much.

Justice GARRETT. I understood Mr. Steffen to state that the text of all those proposed exhibits is printed in the Bill of Complaint; is that correct? Or are they just referred to, I mean in the Appendix?

Justice JACKSON. Are they all there, Mr. Steffen?

Mr. STEFFEN. No, they are not all there. There is a sample of each one there, not each one of them. We have in the Appendix to the Complaint the original Beaver agreement. That was the one upon which they laid this plan.

Then we have the Ebsary agreement set out, which is agreed by all defendants in their answers to be substantially identical with the other exhibits which we are now offering.

Mr. BROMLEY. Subject to our right to compare these documents to see that they are accurate copies, we have no objection to the five exhibits.

Justice STEPHENS. Those are United States Nos. 1, 2, 3, 4, and 5, are they?

Mr. STEFFEN. Yes.

621 Justice STEPHENS. They will be admitted in evidence. (The five photostatic copies of license agreements referred to were marked as Government's Exhibits 1, 2, 3, 4, and 5, and were received in evidence.)

Mr. ADAMS. May I be heard?

Justice STEPHENS. I am sorry.

Mr. ADAMS. With respect to the Certain-teed license, of course, I will admit that subject to the inspection of the actual license. I haven't admitted in our answer the licenses of the other defendants, I don't know anything about them.

Secondly, as I understand it, there is a statement made here that these other licenses of Atlantic and Texas and Niagara were substantially identical with these licenses. We have said in our answer that we deny any knowledge or information about that. We do not have before us the licenses of these other companies, we have never had them, and we have no way of knowing whether they are substantially identical or not. And I object to any suggestion that I am agreeing now that they are substantially identical.

Mr. Steffen stated that USG, in its answer, agreed or admitted that they were substantially identical. That, I take it, is the fact, but we did not, and I object to any such statement as binding on Certain-teed Products Cor-
. portion.

622 Justice STEPHENS. I don't quite get your objection. These agreements are between USG and Beaver, USG and Universal, USG and National, USG and Certain-teed, and USG and Ebsary. Now you represent Certain-teed?

Mr. ADAMS. That is right.

Justice STEPHENS. Are you objecting to the admission of the exhibits or to the statement of counsel?

Mr. ADAMS. Well, I have two parts of it, if I may make it clear.

As to these five exhibits, I have no objection to the Certain-teed license being admitted. I do object to the other licenses in that they are not binding on us, and they have not been identified or proved in any way. We do not admit them in our answer, and I specifically object on the ground that those agreements are not binding on us.

Secondly, in so far as the statement of counsel is concerned—and I take it he is referring to the Complaint and Answers—he says that licenses were entered into with Atlantic and Texas, and I believe Niagara, which were substantially identical with the Beaver license; and he says that USG, in its answer, admitted that.

In our answer we did not admit that. We had no basis, and still have no basis, for making any such admission. I do not want it to be taken that I agree that the other licenses were similar to the Beaver license, nor do I
623 agree that even if they were, they are binding upon us in any way.

Justice STEPHENS. Well now, of course, you are entitled to make a statement, Mr. Adams, as to what you agree to and admit, or do not agree to and do not admit, and that may appear in the record.

With respect to Mr. Adams' objection to the agreements introduced, other than the one between Certain-teed and USG, because not binding upon Certain-teed, do you wish to be heard on that, Mr. Steffen?

Mr. STEFFEN. I think it is premature to raise that question. It seems to me perfectly clear that if the agreements have been introduced and they are admitted to be valid agreements, that that is all that the Government contends for at this time.

624 Justice STEPHENS. It seems to me, Mr. Adams, that while in a technical sense the agreements between the other defendants mentioned and U.S.G. are not contracts binding upon Certain-teed, because Certain-teed is not a party to them, that nevertheless they are relevant to the general charges against all the defendants in the case that there were a series of agreements and a combination of agreements. The Government must prove its case on numerous agreements and circumstances and documents, and therefore your objection in that aspect is overruled.

Government's Exhibits 1 to 5 inclusive are therefore admitted in evidence subject to the right of counsel for the U. S. Gypsum Company to compare them with the originals for the purpose of testing their accuracy.

I believe the exhibits are to be kept in the custody of the reporters for the convenience of all concerned, and they will be returned to the reporters.

Mr. ADAMS. This objection which I have just made is perhaps illustrative of the objections which will be taken throughout the course of the trial from time to time, and it is our suggestion that it be agreed that every objection taken by one defendant will inure to the benefit of all other defendants. That will avoid the necessity of each counsel for each defendant rising on each occasion and making such an objection, repeating in effect the objection
625 just made by some other counsel.

Justice STEPHENS. That would be a very convenient rule if all the parties defendant agree to it.

Mr. BROMLEY. I agree to it.

Mr. FINCK. And I agree to it.

Justice STEPHENS. Is there any defendant not represented today?

Mr. Finck is here; Mr. Adams is here; Mr. Oliver is here; Mr. Varian; Mr. O'Donnell, and Mr. Johnston.

Unless some defendant's counsel objects to that suggestion, the Court will accept it, that any objection made by any defendant in the case to the admission of testimony or evidence will inure to the benefit, so far as applicable, of all defendants.

Very well, that will be understood.

Mr. STEFFEN. We now offer in evidence Government's Exhibits 6 to 16, inclusive, which have been marked for identification.

Exhibits 6 to 13, inclusive, and Exhibit 15 are the original or photostatic copies of the license agreements entered into between U.S.G. and the companies mentioned therein for the manufacture and sale of board under the Hite and Haggerty patents, and the Roos application for patent. These are the agreements appearing in the complaint, a copy of which appears in the complaint as Exhibit
626 6. We have set out in the complaint, Exhibit 6, the Ebsary agreement, and these are the agreements comparable to that agreement.

Exhibit No. 6—between U.S.G. and Universal, dated November 5, 1929.

Exhibit No. 7—between U.S.G. and Atlantic, dated October 21, 1929.

Exhibit No. 8—between U.S.G. and Texas, dated February 10, 1937.

Exhibit No. 9—between U.S.G. and National, dated October 17, 1929.

Exhibit No. 10—between U.S.G. and Certain-teed, dated October 15, 1929.

Exhibit No. 11—between U.S.G. and Ebsary, dated October 18, 1929.

Exhibit No. 12—between U.S.G. and Niagara, dated October 8, 1929.

Exhibit No. 13—between U.S.G. and American, dated November 25, 1929.

Exhibit No. 15—between U.S.G. and Kelly, dated April 23, 1930.

Exhibit No. 14 is an assignment and bill of sale, dated April 12, 1939, between American and Celotex, conveying

to Celotex all the assets of American, including the license agreement between U.S.G. and American (Exhibit 13).

627 The U.S.G.-American agreement of November 25, 1929, in paragraph 5, page 1 thereof, provides that the license agreement may be assigned by licensee to any company acquiring all the assets and business or all the capital stock of licensee, on condition that the licensee shall first obtain an agreement in writing from such assignee agreeing to assume all the obligations of licensee."

In the bill of sale, Celotex assumes American's obligations as licensee.

Exhibit 16 is an agreement, dated January 3, 1929, between U.S.G. and Newark, whereby U.S.G. consents to the assignment by Kelly to Newark of the license agreement between U.S.G. and Kelly. (Exhibit 15.) In this agreement Newark assumes the U.S.G.-Kelly license agreement of April 23, 1930.

By the offer of these various contracts, we have shown the original agreements signed and executed in 1929 and early in 1930, and have also introduced, or are offering to introduce, the assignments which, in the case of two companies—the Kelly Plasterboard Company which assigned to the Newark people, and the American assignment, when they assigned to Celotex. In both cases, Celotex, which is a defendant here, and Newark, which is a defendant here, became parties to the agreement to the full extent and the same extent, so far as the terms of the agreement are concerned, as did the other parties who had signed at the original time.

628 We offer these in evidence, and I will show them to defense counsel.

Mr. BROMLEY. Subject to our right to check for accuracy, we have no objection.

Justice STEPHENS. Is there any objection by any of the other defendants?

Mr. OLIVER. I yet, Your Honor, haven't had a chance to look at Exhibit 14 which directly affects me.

Justice STEPHENS. Take your time and look at it; you are entitled to look at it.

Mr. OLIVER. I have no objection to Exhibit No. 14, subject of course to check for accuracy against the original.

Justice STEPHENS. Exhibit No. 14 is what?

Mr. OLIVER. It is in two parts, an assignment and bill of sale, American to Celotex; and memorandum agreement between American and Celotex.

Justice STEPHENS. Does any other defendant have any objection to offer? If not, the exhibits mentioned are received in evidence, subject to the right of counsel to check their accuracy against the originals.

(The documents referred to, marked Government's Exhibits Nos. 6 to 16, inclusive, were received in evidence.)

Justice STEPHENS. I would like to suggest to you, Mr. Steffen—I assume that these agreements which are part of the complaint are introduced for the purpose of
629 proving your general charge of conspiracy and combination, and that you rely upon the agreement as a whole. Where you are relying upon particular portions of the agreement or of any exhibit, if you will call our attention to it at the time, it would be of great help to the Court in getting acquainted with the evidence as it goes along.

Mr. STEFFEN. I would be glad to do that, sir.

Mr. OLIVER. May I make a suggestion here? It seems to me that in attempting to check and verify these copies against the originals, it is going to be very difficult for counsel to do so unless they have a copy of the exhibit, and I was wondering if it would be asking too much of counsel for the Government to at least let the defendant's counsel who is directly interested in a particular exhibit, have one copy.

Justice STEPHENS. Well, that depends upon the possibilities, I suppose. I am sure the Government will be glad to do it if they can, but the question of furnishing so many photostats I suppose is a pretty serious question.

Mr. KNUFF. I don't think we have any other copies, other than what we have introduced here in evidence today. You will notice that the first copy of the second group of exhibits is an original; we didn't even have a photostat of that made.

Justice STEPHENS. Let me say this to you, Mr. Oliver. These exhibits, for convenience, will be left in the custody of the court reporter's staff. They will not be taken
630 from this building. There is an exhibit room here, and the court reporters, I presume, could have someone available immediately after the adjournment of Court so that you can see the exhibit itself and compare it with your own original, if you have one. I am afraid we cannot ask the Government to perform the impossible; if they haven't got them, they haven't got them.

Mr. STEFFEN. We now offer in evidence Government's Exhibits 17 to 25, inclusive, which have been marked for identification.

Exhibits 17 to 22, inclusive, and Exhibit 24 are the license agreements entered into between U.S.G. and the companies mentioned therein, for the manufacture and sale of metallized board. I might say to the Court that Exhibit 11 in our complaint gives a sample of these agreements which we are now offering in evidence.

These agreements are as follows:

Exhibit No. 17—between U.S.G. and Universal, dated April 4, 1935.

Exhibit No. 18—between U.S.G. and Atlantic, dated November 30, 1934.

Exhibit No. 19—between U.S.G. and National, dated October 5, 1934.

Exhibit No. 20—between U.S.G. and Certain-teed, dated November 2, 1934.

Exhibit No. 21—between U.S.G. and Ebsary,
631 dated August 14, 1935.

Exhibit No. 22—between U.S.G. and American, dated December 4, 1934.

Exhibit No. 24—between U.S.G. and Kelly, dated October 12, 1934.

Exhibit No. 23 is an agreement between American and Celotex, dated April 12, 1939, whereby Celotex agrees to assume the license agreement between U.S.G. and American, dated December 4, 1934 (Exhibit No. 22). The U.S.G.-American agreement of December 4, 1934, in paragraph VII, page 5 thereof, made provision for such a contingency.

Exhibit No. 25 is an agreement between U.S.G. and Newark, dated January 3, 1939, whereby U.S.G. consents to the assignment by Kelly to Newark of the license agreement between U.S.G. and Kelly (Exhibit 24). In this agreement, Newark assumes the U.S.G.-Kelly agreement of October 12, 1934.

I offer these in evidence and will show them to defense counsel.

Mr. BROMLEY. No objection, subject to the same arrangement.

Justice STEPHENS. Have the other defendants concluded with their examination?

Mr. OLIVER. May I inquire of Mr. Steffen as to whether or not he has a copy of Exhibit 23 which will legibly show the signatures? This copy I have does not.

632 Mr. KNUFF. I think, if I may answer Mr. Oliver's question, that that is the only available copy we have. We may have in our files the original of that, I am not sure, but if Mr. Oliver will take it up with me, I will endeavor to look at our files and see if we have the original.

Justice STEPHENS. Very well, accommodate him if you can, Mr. Knuff.

Mr. OLIVER. Then, if Your Honor please, subject to check for accuracy against the original, I have no objection to Exhibit 23.

Justice STEPHENS. If no other defendant has objection, and if counsel for all defendants have completed examining the exhibits, the last series of exhibits offered, being Government's Exhibits 17 to 25, inclusive, are admitted into evidence subject to check for accuracy.

(The documents referred to, marked Government's Exhibits 17 to 25, inclusive, were received in evidence.)

Mr. STEFFEN. We now offer in evidence Government's Exhibits 26 to 32, inclusive, which have been marked for identification.

Exhibits 26, 28, 30, and 31 are photostatic copies of license agreements between U.S.G. and the companies mentioned therein, for the manufacture and sale of perforated lath. We have set out in the complaint, as Exhibit 12, the Certain-teed agreement, and these agreements relate
633 to paragraphs 115 to 120 of the complaint. These agreements are:

Exhibit No. 26—between U.S.G. and Certain-teed, dated June 8, 1936.

Exhibit No. 28—between U.S.G. and Ebsary, dated February 2, 1937.

Exhibit No. 30—between U.S.G. and American, dated July 10, 1936.

Exhibit No. 31—between U.S.G. and Kelly, dated June 23, 1937.

Exhibits 27, 29, and 32 are letter agreements between U.S.G. and the companies mentioned therein, granting royalty-free licenses to said companies to manufacture and sell perforated lath. These letter agreements are the ones that were made between U.S.G. and certain of its licensees in 1938, after the industry had raised a discussion as to whether the patents in question were valid, and certain of the members of the industry refused to take out licenses for that and other reasons.

Mr. BROMLEY. I object to any such statement as that. That is not evidence and I move to strike it out.

Mr. STEFFEN. That was simply for the information of the Court.

Mr. BROMLEY. It is an easy way to prove your case.

Justice STEPHENS. The Court will not treat it as evidence; it is descriptive, Mr. Bromley, of the general
634 purpose of the introduction of the exhibits.
Proceed, Mr. Steffen.

Mr. STEFFEN. These letter agreements are as follows:

Exhibit No. 27—letter of U.S.G. to Certain-teed, accepted October 4, 1938——

Mr. BROMLEY (interposing). Haven't you already had an Exhibit 27, the Ebsary contract?

Mr. STEFFEN. No.

Exhibit No. 29—letter of U.S.G. to Ebsary, accepted January 10, 1939.

Exhibit No. 32—letter of U.S.G. to Newark, accepted January 3, 1939.

These we offer in evidence, and I will show them to defense counsel.

Mr. BROMLEY. Subject to the same arrangement, we have no objection.

Justice STEPHENS. Have the defendants completed their examination? If so, Government's Exhibits 26 to 32, inclusive, are received in evidence, subject to the right of the defendants to check them for accuracy.

(The documents referred to, marked Government's Exhibits 26 to 32, inclusive, were received in evidence.)

Mr. STEFFEN. We now offer in evidence Government's Exhibits 33 to 39, inclusive, which have been marked for identification.

635 These exhibits have to do with the bulletins, the license agreement bulletins, which were issued by U.S.G. from the time that the license agreements were put into effect. They were all supplied to us under subpoena; they were all introduced before the Court in the criminal action, excepting one, Exhibit 39, which has to do with perforated lath, and which was excluded because of the ruling, I believe, that perforated lath had no part in that case.

I will show these exhibits to defense counsel.

I might say for the information of the Court that we have one bulletin as Exhibit 7 in the complaint, and paragraphs 90 and 91 of the complaint relate to the matters with which these are concerned.

Mr. FINCK. If the Court please, may I interrupt at this point?

Justice STEPHENS. Mr. Finck.

Mr. FINCK. I assume that Exhibits 26 to 32, inclusive, which are the perforated lath agreements, are admitted for what they are worth. Of course National Gypsum Company was not a party to any of the perforated lath agreements, and did not take a license under the perforated lath patents, so that they would not be binding upon National Gypsum Company. But I assume that all of these exhibits are admitted by you for what they are worth, and that you will apply them as against the defendants which have made the agreements.

636 Justice STEPHENS. Unless counsel point out, or unless it should occur to the Court upon inspection, that they are not relevant, they will be considered, as far as they are relevant, as bearing on any defendant in the case.

Mr. FINCK. We object to them as being incompetent, irrelevant, and immaterial, and not binding on National. I don't suppose the Court would like to have us interrupt every minute to make that objection, because there are many letters here, and documents, which will have to be objected to by various counsel.

Justice STEPHENS. Well, you must feel free to interrupt, gentlemen, when you feel that you must do so to protect the record. To the extent that you can agree upon class objections, or class admissions, of course that is desirable in the interests of saving time, but you are entitled to interrupt when you want to object to any particular exhibit as not competent, relevant, or material to your particular defendant.

You do object to this class of exhibits?

Mr. FINCK. I do.

Justice STEPHENS. As in no way binding upon or relevant to the case as charged against National?

Mr. FINCK. Yes; that is as to Exhibits 26 to 32.

Justice STEPHENS. That is the series just offered?

Mr. FINCK. No, the prior series.

637 Justice STEPHENS. Well, just wait a moment until we have the attention of all counsel, and we will then take the matter up.

Mr. FINCK. Yes, sir.

Mr. BROMLEY. Subject to the same arrangement, we have no objection to these bulletins.

By failing to object, I do not mean to infer that we admit that these bulletins were sent out to anybody who did not have a license and whose prices were not subject, therefore, to regulation under the license.

Justic STEPHENS. That statement may appear in the record. Does any other defendant have any objection to this last group of exhibits?

Mr. JOHNSTON. If the Court please.

Justice STEPHENS. Mr. Johnston.

Mr. JOHNSTON. First as to these exhibits, and then I want to go back to what Mr. Finck spoke about.

Justice STEPHENS. We will take that up later; we are now dealing with Exhibits 33 to 39, inclusive. What about them, Mr. Johnston?

Mr. JOHNSTON. Exhibits 33 to 39 have to do with these bulletins. Our contention is that we did not have any bulletins from 1929 to 1937, and that these would not be binding on us. I do not know, I have not examined them, whether they are being introduced as bulletins, or
638 copies of bulletins, that were sent to us. There is no proof here now that they ever sent any bulletins to Texas, and until there would be some proof, I would want to object to these insofar as Texas is concerned.

Justice STEPHENS. Mr. Steffen?

Mr. STEFFEN. We agree that at the appropriate time objections could be made. We have to introduce this as a preliminary matter.

Justice STEPHENS. You expect to connect it by showing that it did reach the attention of Texas, of Mr. Gloyd, or that such bulletin did?

Mr. STEFFEN. We may or may not as far as Texas is concerned, and if, of course, we fail to show that they are a

party to the conspiracy, they can ask for a dismissal at the appropriate time.

Justice STEPHENS. But it is your purpose to show that, if your evidence is sufficient?

Mr. STEFFEN. That is correct.

Mr. FINCK. If the Court please, on behalf of National and Baker, I object to any bulletins introduced referring to perforated lath. National did not have a license under the perforated lath patents, and therefore they cannot be binding on those defendants.

Justice STEPHENS. What do you say to that objection, Mr. Steffen?

639 Mr. STEFFEN. What I say, Your Honor, is that it is true that so far as we know, National did not have a perforated lath license agreement, but we want to show the whole situation in the industry and to show the reasons why National did not take out a perforated lath license agreement, and to show their part in that as indicative of being parties to this combination.

I think all of these objections are very premature for the reasons that they go to the relevancy and whether they are binding upon a particular defendant in proving a combination or conspiracy. We will put our first witness on, and he will testify as to one isolated transaction. Every one that is not involved in that can say, "We were not a party to that," and obviously they were not. We have to tie this all together in due time.

Justice STEPHENS. I think the Government's position is correct in respect of that, gentlemen. Of course these exhibits which are now under consideration, with respect to the bulletins, do not of themselves prove, and are not received in and of themselves alone to prove, that either Texas or National, either Mr. Gloyd, doing business as Texas, or National and Baker, received bulletins. Nevertheless, the Government cannot prove all of its case out of one exhibit or one witness, nor can any other party do so. I think they are admissible subject to connection with
640 other proof which would indicate that the system or scheme which is charged by the Government was in operation to the knowledge of all the defendants. I assume that that is why you are offering them, gentlemen?

Mr. STEFFEN. That is correct.

Justice STEPHENS. That objection is overruled on behalf of Mr. Finck for National and Baker, and on behalf of Mr. Johnston with respect to Gloyd, doing business as Texas, with respect to this last set of exhibits, 33 to 39, inclusive.

(The documents referred to, marked Government's Exhibits 33 to 39, inclusive, were received in evidence.)

Mr. OLIVER. I am in the same position as National on Exhibits 26 to 32, on the perforated lath. We have never had any contract on perforated lath at any time, or today, and we did not come into the gypsum industry until April 12, 1939. We have never seen a board bulletin before.

Justice STEPHENS. Well, it is entirely proper and natural for you to make that objection, and it is entirely proper for you to feel free to do so. At the same time, the Government cannot be expected to prove all its case at once, and it seems to me and to the Court that the exhibits are admissible at this time. Of course, if they are not in some manner connected properly before the end of the case, there might be a motion to strike with respect to particular defendants. But at the present time they are admissible.

641 Mr. JOHNSTON. If I may, for the record, if the Court please, enter the same objection as to Mr. Gloyd on perforated lath. We did not have any contract on perforated lath; and while I am on my feet, I have been wondering about this thing. I can see a very extended time here in the matter of these objections. Isn't there some method by which we could rather unify that, so that it wouldn't make such a voluminous record, and yet our record might be saved, our exceptions?

Justice STEPHENS. Have you a suggestion as to how it can be unified?

Mr. JOHNSTON. Yes, I have one. If the Government would submit to us in advance these documents and exhibits they expect to offer, so that counsel might have time to look them over before they are offered. I have done that in other cases, and I am sure it would facilitate the thing very greatly here.

Justice STEPHENS. Great minds run in the same channel—that suggestion had occurred to me, but I was a little loath to make it because I know of the great number

of documents to be dealt with, and the problem of organizing them. If it can be met, however, by the Government, if the Government could submit these proposed exhibits for a given day, the afternoon before, or at 9:00 o'clock in the morning of the same day, it would save a great deal
642 of time. I was considering suggesting that if it is not an undue burden upon the Government. It would save a lot of time if all these exhibits could be gone over in advance of the time at which they are offered, so that counsel can correlate their objections and get them ready.

I think also, Mr. Johnston, as the case develops, it may turn out—we are just getting started and there is always a little period of experimentation in commencing a trial as to how best to handle it—and I think perhaps classes of objections will be developed which can be made in a unified manner—and I appreciate suggestions along that line. If the Government can cooperate in that, the Court will ask them to do so.

Mr. OLIVER. May it be understood, Your Honor, that what I said concerning Exhibits 26 to 39, inclusive, was intended to be a specific objection on the part of Celotex?

Justice STEPHENS. It may be so understood, and the same ruling will be made with respect to these objections, as on similar objections by other defendants.

Mr. FINCK. Referring to Exhibits 26 to 32, inclusive, Your Honor, I object to those as being incompetent and Himmaterial, and not binding on National.

Justice STEPHENS. Because National had no contract with U.S.G., or no license in respect to perforated lath?

Mr. FINCK. Yes.

Justice STEPHENS. Well, the exhibits are not re-
643 ceived to prove a contract with National, they are not offered for that purpose, as I understand it, but they are received as a part of the Government's case, offered as tending to prove the general conspiracy and system, of which all were aware eventually, and your objection is therefore overruled and exception noted.

Mr. STEFFEN. We now offer Exhibits which have been marked for identification as Government's Exhibits Nos. 40 to 42 inclusive. These exhibits are freight rate schedules for the New York area, the Michigan area, and the Ohio area. They were introduced in evidence at the crim-

inal trial and are necessary as a means of calculating price under the price bulletins.

I offer them in evidence and will show them to defense counsel.

Mr. OLIVER. May I ask, Mr. Steffen, what period they cover?

Mr. STEFFEN. That is shown on the face of them. They cover a number of years, carrying right on down to 1939 and 1940.

Mr. BROMLEY. We object to Exhibits 40, 41, and 42 for identification, on the ground that they are immaterial and incompetent, and particularly because no proper foundation has been laid. They appear to be a schedule of freight rates issued by something called the Gypsum Insti-
644 tute. They were not received in the criminal case, they were excluded on my objection. They were only marked for identification in the criminal case.

Justice STEPEHENS. Is the Gypsum Institute not mentioned in the pleadings?

Mr. BROMLEY. I believe not. The Gypsum Statistical Institute is mentioned, but that is not this thing.

Justice STEPHENS. Is the Gypsum Institute not menthat?

Mr. STEFFEN. It is our understanding that they are relevant because of the fact that the price bulletins require prices on a delivered basis, and it is necessary, to calculate the freight rates from a given point, to include in the prices that are specified in the price bulletin.

This is one means of establishing the freight rates that pertain to given areas. They were supplied to us under subpoena, and they were offered—we are not clear whether they were admitted or not.

It is my understanding, and Mr. Knuff's understanding, that they had been admitted in evidence in the criminal trial. That we will have to verify.

Justice STEPHENS. I have some question in my mind as to whether they are admissible unless you show that they were issued either by some one of the defendants, or sent to and acted upon by some one of the defendants. If
645 some third party, not connected with the case, issued a freight bulletin, that would be irrelevant as far as the defendants are concerned, wouldn't it?

Mr. STEFFEN. I should think so. Isn't it a matter of connecting that up by further testimony to show the use made by the industry of these tables? I would ask, therefore, that they be admitted subject to being tied in as being relevant and material, by other evidence.

Mr. OLIVER. If Your Honor please, I think the objection goes deeper than that. The best evidence of freight rates are the tariffs themselves. These certainly are not tariffs.

Furthermore, they contain pencil notations—there seem to be changes of figures in them.

Now, certainly, just to dump a mass of such documents, which possibly is somebody's draw-off of what he thinks was the freight rate in the tariff, and by someone who has no connection whatever with the parties involved in this proceeding, I think is clearly objectionable.

Justice STEPHENS. Hand them to the Marshal and let the Court inspect them.

(The documents referred to were passed to the Court.)

Mr. STEFFEN. We are not trying to prove that these are the freight rates, but we are expecting to prove that these are the documents that the defendant companies would make use of in calculating the prices at which they
646 sold gypsum. Therefore I would say that it makes no difference whether they were genuine or not.

Justice STEPHENS. Yes, I would think that that objection was not very well taken. If the Government can show that these documents were used by the defendants in connection with their alleged bulletin practices, it doesn't make any difference whether they were sent out by the Interstate Commerce Commission or the railroads or by whom, if they are a part of an alleged price-fixing system. The question is whether they are connected.

Mr. OLIVER. But the part of the transportation charge, in the transportation of the commodity, would be the rate in the tariff filed by the Interstate Commerce Commission, and not that rate.

Justice STEPHENS. We are agreed that these exhibits should be excluded at the present time, subject to the right of the Government to re-offer them if further connecting evidence can be produced—and it is so ruled.

Mr. STEFFEN. We have no more exhibits at the moment, to offer, and we are prepared to put on our first witness.

I might suggest, as long as it is within ten minutes of recess time, that if the Court would care to, we would be very pleased to recess now.

Justice STEPHENS. That is agreeable. We will recess now until a quarter of two.

647 Will the Marshal announce the recess.

(Thereupon, at 12:05 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

648 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice STEPHENS. You may proceed, gentlemen.

Mr. STEFFEN. Mr. Griswold, please.

Thereupon, FRANK J. GRISWOLD, appearing as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. STEFFEN.

Q. Mr. Griswold, will you state your full name for the record, please?

A. Frank J. Griswold.

Q. Where do you reside, Mr. Griswold?

A. Port Clinton, Ohio.

Q. How long have you been in Port Clinton, Mr. Griswold?

A. Since 1906.

Q. Were you connected with the gypsum industry at any time?

A. Yes, sir.

Q. During what period?

A. Well, directly connected with the manufacturing end of the industry from 1906 to 1929.

649 Q. And with what company?

A. The American Gypsum Company of Port Clinton, Ohio.

Q. What was your capacity with the company?

A. For the first year or possibly year and a half, I was simply the superintendent of the plant that was being constructed.

Q. That would be in 1906 and 1907?

A. Yes. And after that I was elected Vice President and General Manager of the company.

Q. And what was the date that you left the company, do you remember?

A. February 1, 1929.

Q. And what was your capacity when you left, what was your title or office when you left?

A. Vice President and General Manager.

Q. Prior to 1906, Mr. Griswold, what was your business?

A. I was in the machinery business.

Q. For what years?

A. From approximately 1891 until 1906.

Q. And what type of machinery?

A. Well, the manufacture of brick and tile machinery, clayworking machinery, power plants, and among other things gypsum machinery for the manufacturing of gypsum wall plaster.

Q. Did you have to do with the sale of the machinery to the gypsum companies?

650 A. Yes, sir.

Q. And how widely did you travel in making your sales?

A. For the machinery company?

Q. Correct.

A. Well, I went pretty much all over the United States.

Q. Could you name any of the gypsum companies with whom you dealt during this period?

A. You mean that I sold machinery to?

Q. Yes.

A. Well, first, the United States Gypsum Company, who were the successors to the Mineral Plaster Company of Fort Dodge; the Fort Dodge Plaster Company; the Waterloo Plaster Company; the Cardiff Gypsum Plaster Company; I sold some to Emil Durr of Milwaukee; and the Niagara Gypsum Company; the Plymouth Gypsum Company; the Empire Gypsum Company; the Pittsburgh Plate Glass Company; Atlantic Gypsum Company; I don't think I ever sold the National Gypsum Company anything.

Q. How about the Universal Gypsum Company?

A. The Universal was formed after I left the machinery business.

Q. I see.

Well now, what were your duties as an officer or general manager of the American Gypsum Company, particularly during the period from 1925 to 1929 when you left the company?

A. Well, I had charge of operations and also had

651 charge of sales for the company.

Q. And could you tell us what your sales territory for the Gypsum Company was?

A. Well, the territory differed on different products that we made.

On wall plaster it was rather limited, on account of the freight rates, but after we were in the plasterboard business or wallboard business, we shipped farther. The farthest west we went was Chicago, and from that we went east to the Atlantic Coast.

Q. That was on wallboard?

A. Wallboard.

Q. And your territory for plaster was over what area, do you recall?

A. Well, we didn't go east of Buffalo, on plaster; and west, very seldom beyond Chicago, the freight rate was too high. Once in a while we would get in on some special job.

Q. What other products did your company make?

A. In addition to wallboard; stucco, calcine plaster, molding plaster—that was practically all.

Q. Did you make any tile or block?

A. We made gypsum blocks, and we also made roof tile at one time.

Q. As sales manager, did you have contact or have occasion to call upon various members of the gypsum
652 industry during these years?

A. Yes.

Q. And did you call on some of the customers that you had formerly dealt with in the machinery business?

A. Yes.

Q. Could you describe your relations with the different members of the industry, as to whether they were friendly or unfriendly?

Mr. BROMLEY. I object to that as calling for a conclusion, and therefore incompetent.

Justice STEPHENS. I think that is not objectionably conclusional. It describes the relationship of the parties. Overruled.

By Mr. STEFFEN.

Q. Could you state whether your relationships with various people in the industry were friendly or unfriendly?

A. They were friendly, with most of them.

Q. Did you know the officers of the United States Gypsum Company?

A. Well, I knew some of them, possibly not all of them.

Q. Who was President of the United States Gypsum Company?

A. During what period?

Q. During 1925 to 1929.

A. My recollection is that it was Mr. Sewell
653 Avery that was President.

Q. Did you know Mr. Sewell Avery?

A. Yes, I had known him for some time before that.

Q. For how long, Mr. Griswold?

A. Well, I would say 10 years, possibly longer, I don't remember now.

Q. Were your relations with Mr. Avery friendly?

A. Most of the time.

Q. Now who did you know, if anyone, with the National Gypsum Company?

A. I knew Mr. Haggerty, who was the President of it.

Q. That is, during this period from 1925 to 1929?

A. Well, he died between that period, I think, but in 1925 he was the President, as I remember, of the National Gypsum Company.

Q. Who, if anyone, did you know with the Niagara Gypsum Company?

A. Mr. M. A. Reeb, the President.

Q. Who did you know, if anyone, with the Universal Gypsum Company, during this period?

A. William Shearer, who was the President of the Universal, as I remember it.

Q. And did you know anyone with the Atlantic Gypsum Company during this period?

A. I don't believe that the Atlantic Gypsum Com-
654 pany was formed until 1925 or somewhere along there, but after it was formed, Mr. Fuller was Secretary of the company; and Mr. Channing, I don't know whether he was an officer of the company, but he was the attorney for the company. And they were the only two that I knew personally.

Q. Did you know anyone connected with the Universal Company other than Mr. Shearer?

A. I can't recall anyone.

Q. Do you remember anyone by the name of Mr. Eugene Holland?

A. Well, that was after the Universal Gypsum Company went in receivership, and he was the Receiver for the Universal Gypsum Company. I knew him slightly, I hadn't met him but a few times.

Q. Did you know anyone connected with the Ebsary Gypsum Company?

A. I did, Fred Ebsary, who was President.

Q. Did you know Mr. George Lenci?

A. Yes.

Q. And the Beaver Products Company, did you know anyone connected with that concern?

A. The only one I recall at the present time was Mr. Blagden.

Q. And did you know him?

A. Yes, I knew him.

655 Q. And the Certain-teed Company, did you know anyone connected with them?

A. Yes.

Q. Who?

A. Mr. George Brown.

Q. Who was he, what was his title?

A. President of Certain-teed Products.

Q. Did you know anybody else connected with the Certain-teed Company?

A. Well, I knew the Vice President, but I can't recall his name at the present time, it is too long ago.

Q. I recognize that this goes back quite a ways.

Was your relationship with these men friendly or unfriendly.

A. Friendly.

Q. Will you tell the Court now who were the officers of the American Gypsum Company between 1925 and 1929, with respect to that period?

A. J. H. McCrady was President.

Q. Is he living? Is Mr. McCrady still alive?

A. No, he has been dead for several years.

Q. Who was the Secretary?

A. J. B. Davis, of Cleveland.

Q. Is he alive?

A. No, he is deceased.

656 Q. Do you know any of the other officers of the American Gypsum Company during that period?

A. Edward McCrady, the son of J. H. McCrady, was Vice President.

Q. Was there a man named Kling connected with the company?

A. Later on, not at 1925.

Q. As an officer?

A. No, he was not an officer, he was a stockholder at that time. He wasn't even a director until later than 1925.

Q. Well now, I would like to have you describe the property owned by the American Gypsum Company at its inception, and the process of mining and producing gypsum,

in general terms. It is a very broad question; if you will state how gypsum is mined or produced, that will answer.

A. Well, in this particular locality, the gypsum was underground about 44 feet, there at Port Clinton, and it covered quite an area of territory, all around in about 2 or 3 directions from the village of Port Clinton; and in order to get at it in those days, which was before the days of stripping operations like they do now with coal, we had to sink a shaft, the same as a coal shaft, a vertical shaft directly down; and from that we drove entries; and from the entries, rooms; and mined it practically the same as coal is mined.

657 Q. Do you know about what the capacity of the company was when it started in 1906 or 1907?

A. You mean of finished product?

Q. No, I mean raw product.

A. Well, probably between 300 and 400 tons of rock per day.

Q. And did that capacity increase?

A. Was it increased?

Q. Did it increase?

A. Yes, it did.

Q. About what were you producing when you left the company, if you can recall?

A. Probably on an average of between 800 and 900 tons, somewhere along there.

Q. Per day?

A. Yes.

Q. How many acres of ground did the company have, do you recall?

A. We originally had only 90 acres, but we kept purchasing additional ground, land that adjoined our property, until when I left we had very close to 900 acres.

Q. Could you tell the Court where else in the country gypsum is found, and produced commercially?

A. Well, in addition to Port Clinton, Ohio, it was found at Grand Rapids, Michigan; and at Alabaster, Michi-

658 gan, which were the only points that I recall in Michigan.

Going west from there, it was found in Iowa, at Fort Dodge, Iowa, and Centerville, Iowa; and west from Iowa it was found in Kansas; and west from Kansas, in Oklahoma; some in the Indian Territory, not very much.

Let me explain that there were two kinds of gypsum, one the rock gypsum or solid form; and then there was another called gypsite. It was more like clay, soft. That was found

quite extensively in parts of Oklahoma and Kansas, and some parts of Texas, and there was gypsum rock found in Texas; also at one or two points in New Mexico, Nevada, and California.

Justice STEPHENS. There is one word I missed. Did you mention Texas?

The WITNESS. Nevada and California.

Justice JACKSON. You said they found gypsum in Texas?

The WITNESS. Yes, they found both gypsite and rock.

By Mr. STEFFEN.

Q. Now in the Eastern part of the country?
A. Going east from Fort Dodge was Grand Rapids, Michigan, and Alabaster, Michigan, as I mentioned.
Q. Were there any deposits found in New York State?
A. Oakfield, New York, and Plasterco, Virginia.
There were other points where it was found, but it was not of sufficient depth to operate a plant, or use it, it was too expensive.

659 Justice STEPHENS. You mean it was too deep?

The WITNESS. No, the vein wasn't deep enough, it was too shallow a vein, it would be too expensive to operate it.

By Mr. STEFFEN.

Q. I show you a piece of rock, and ask you if you can tell what it is, Mr. Griswold?
A. Well, I would say that that was a sample of gypsum rock, it is pretty hard to tell where it is from, from what locality, because it is all very much alike.

Mr. STEFFEN. Would the Court care to inspect this?

Justice JACKSON. Yes.
(Gypsum sample handed to the Court.)

By Mr. STEFFEN.

Q. Now will you tell the Court, Mr. Griswold——

Justice STEPHENS (interposing). Do you want to offer this in evidence?

Mr. STEFFEN. We will mark it later, if we may.

Justice STEPHENS. All right.

By Mr. STEFFEN.

Q. Will you tell the Court what the process is after gypsum rock is brought up from the mine?

A. Well, after it was mined, most of it was in lump form, and it would be broken down to the size that a man could handle. We didn't want any pieces larger than that in those days, than what one man could lift. It was put
660 in mine cars and originally it was brought to the foot of the vertical shaft and the cars were hoisted to the surface, and then dumped into a bin, and it went through a crusher which reduced it to smaller sizes.

Q. Then what was the next step in treating it?

A. Well, we kept on reducing it down, and finally put it through grinding machines which reduced it to a very fine-ground material, usually most of us tried to get it probably 85 to 90 percent through a hundred-mesh screen.

That was then the ground, raw gypsum, and it was afterwards put through a calcining process.

Q. Will you describe briefly that calcining process?

A. Well, in those early days, in this period, it was practically all known as the kettle process. The calcining kettles were usually big steel cylinders, usually 10 feet in diameter,—once in a while they might be larger, but usually 10 feet in diameter,—and they were 8 or 10 feet deep. And they consisted of simply a circular steel shell of ⅜ flanged steel; and the process in using them was to set them on a cast iron bottom, in those days, with a furnace underneath for the fire, and the fire came up around the shell and through usually 2 tubes, 8 to 14 inches in diameter.

The application of the heat was kept up until the temperature usually, on what was known in those days as first settle, was around 325 degrees Fahrenheit.
661 This material boiled after the heat got through it, it boiled up just like water, and at that temperature it settles down.

Justice STEPHENS. Did you put the raw rock into these kettles?

The WITNESS. There was about 21 percent of water, enough to keep it boiling, and we tried to evaporate all but about 5 percent at that temperature, there was 5 or 6 percent of moisture. It settled down, and that was the point at which it was discharged into the pits.

It was then calcined gypsum or stucco, as we call it.

By Mr. STEFFEN.

Q. It this the same as plaster of paris?

A. Yes.

Q. Now that product, stucco or calcined gypsum, what did you do with it?

A. Well, that was the finished product from which all the other products that we made were made, that was the base from which we started. We made wall plaster, gypsum block and molding and casting plasters, and later on plasterboard and wallboard.

Q. All from that calcined gypsum base?

A. All from that base, yes.

Justice GARRETT. May I ask what is meant by gypsum block in the trade?

662 The WITNESS. Gypsum block is a block that is pre-cast in a form, or mold, and they are usually 12 inches high and 30 inches long, and some of them are only 2 inches thick up to 6 inches thick, usually that is the limit.

It is used for partition blocks in building, for interior work, not exterior.

By Mr. STEFFEN.

Q. When did your company start making block, Mr. Griswold, if you remember?

A. Well, I can not say without something to refresh my memory, it has been too long ago.

Q. But you originally made plaster, as I understood your testimony, and then added these others?

A. Yes.

Q. And do you recall what you took up next, what product you manufactured next?

A. What?

Q. Do you recall what product you manufactured next after having manufactured plaster?

A. Well, they started the plant to manufacture calcined gypsum or stucco; we later on began the manufacture of prepared plasters just as you see in bags all over the country; and later on we added a department where we added the sand to it right at the plant and shipped it to a man all ready to mix water with it, and the different
663 products as we grew along, and the last one to add, as I remember, was the wallboard.

Q. Now describe your sales organization, Mr. Griswold. You were in charge of sales?

A. Yes.

Q. Describe your sales organization?

A. We had salesmen for certain territories, the territories were divided up, and we had a man in each territory who represented the sales for the company.

Q. Did you have any warehouses throughout the country?

A. Not that you would term strictly a warehouse. We

had a plant at Cleveland, Ohio, and also one at Detroit, mixing plants we called them.

Q. What does that mean?

A. That was a place where we shipped calcined gypsum or stucco, and then put it through the mixing process and added sand there.

Of course, we had warehouses there, and we did carry small stocks of some of these other products that we could deliver.

Q. Did you sell your product through jobbers, or through salesmen only?

A. Well, most of it was through salesmen, but we had a few jobbers.

Q. And they handled your entire line, your jobbers?

A. No, not always.

Q. Could you name any of the jobbers that you
664 had at about the time you left the company in 1929?

A. The Fairmont Wall Plaster Company of Fairmont, West Virginia, and the W. B. Abbey Company, of Newark, New Jersey, were the two principal jobbers we had.

Q. That is A-b-b-e-y, the Abbey Company?

A. Yes.

Q. Did you have any jobbers in the Cleveland area?

A. No, we sold our goods direct there, we had no jobbers.

Q. Well now, when did your company commence making wallboard or gypsum lath or any of the board products?

A. Our first start was to make a plant to make plasterboard, as we call it, which means the small size board, 16 x 32 and 32 x 48, known as plasterboard. We started to manufacture those first, and that plant, as I remember it now, was built in 1919.

Q. And you got into operation in 1919 or 1920?

A. I think it began operation in 1919. That is a good ways back to remember details.

Q. And the first product that you started to make, or the first board you started to make, was what you called plasterboard?

A. Plasterboard.

Q. And would you describe to the Court what plasterboard is, as you understood it?

665 A. Well, plasterboard was made in the early days by hand, by simply taking one piece of paper like that (indicating) and covering it with a mixture of this gypsum sludge to about the consistency of thick cream, and another sheet of paper was laid on top of it like that (indi-

cating), and then they were put through under a roller or a press that pressed it down to the thickness wanted. The thicknesses in those days were usually either a quarter of an inch or 3/8.

After it left there—you had to leave it there long enough for it to set, as we called it, this gypsum,—the peculiar thing about it is that after it goes through this calcining process and the water is driven out, when you add water to it it rehydrates and takes the water up and goes back into rock formation again—and this material that we made there at Port Clinton usually took about 12 minutes to set. It had to remain there long enough in order to set or get stiff enough so we could handle the board.

Then they were taken and put on cars and put through a drier and dried out by whatever process we used. We usually ran it under a shed, and in the early days it dried naturally by the air alone.

Q. About how long would that take, Mr. Griswold?

A. Well, if they had to depend on atmospheric conditions, they sometimes might dry in a day or two, or sometimes in a week, depending on the moisture.

666 Justice STEPHENS. How did you keep it flat, pour it out on a flat surface and lay something flat over it?

The WITNESS. Some people used a press in the first days, and others a roller. What we used was a traveling belt, a very short one as I remember it—the first one was only possibly about 75 or 80 feet long, and 34 or 36 inches wide. This belt traveled along like a belt conveyor, and at one end of it, here, this sludge or mixture was put on; the top of this belt was covered with a paper that traveled right along with it; as this sludge was put on there it was spread out over the surface by some process, or a roller, and another roller right above it, there was another roll of paper came around, and that roller pressed this material down to the thickness you wanted this, and pressed the top paper down, and the whole mass, to make it either a 1/4 inch, 5/16 or 3/8, or whatever you wanted.

The material kept on traveling down, and it had to set in those days before we could cut it off.

After it got down here——

Justice JACKSON (interposing). Did you have to stop the movement of your belt to do that?

The WITNESS. We did in the early days. We had a traveling cutter, a knife came down or perforator, what-

ever it was, and it traveled right with the belt and cut them in any lengths we wanted, usually 48 inches.

667 Now in those days this edge of the board was very rough, a very rough proposition, and there was a lot of waste attached to it; and we had to, later in the process, trim the edges of the board, that all had to be thrown away. So when we got through with our sawing the edge was square, but on this edge it was trimmed and on this edge it was trimmed, and all four edges were raw.

Justice STEPHENS. The record may show that the witness indicates that the top and bottom surfaces were flat, but the two edges were rough; is that right?

Mr. STEFFEN. All four edges.

The WITNESS. The board was originally made wider than 32 inches, but it was trimmed down to 32 inches, and then cut off to whatever length we wanted, usually 32 or 48, and that left a raw edge where it was cut off, and also these trimmed edges, so all four edges were raw edges.

By Mr. STEFFEN.

Q. Would you describe a little what this gypsum slurry or sludge is, the composition of it as you put it on this moving belt, in the beginning in 1920, and whatever changes were made?

A. Well, as I remember now, at the beginning we didn't add much of anything to it except possibly some sawdust, but—well, we did add material to hasten the set, what we called an accelerator. The trouble was that we didn't

668 want to wait, to stop the belt for it to set, we wanted it to set by the time it got down there so as to increase our capacity. The faster that material set, the more board we could make. So the accelerator and the sawdust, I think, were the only things we used, to start.

Q. And do you recall about how much sawdust, or could you give any idea of the amount?

A. I don't remember the amount.

Q. But you used, you say, sawdust from the beginning?

A. Yes.

Q. What was the purpose of the sawdust?

A. Well, we figured it helped absorb the moisture in there, for one thing, and had a tendency to possibly make the board a little lighter.

Q. Would it have any effect upon the nailing qualities or sawing qualities of the board?

A. Well, the amount of sawdust we used, I don't think would affect it very materially, we never used a great amount of it.

Q. Could you give the Court an idea of how much the sawdust tended to lighten the board?

A. Well, of course, that would depend upon the amount, and we used such a limited amount that I don't think it would lighten it but a very few pounds.

Q. How heavy was the board you were making in
669 1920 and 1921?

A. As I remember it, it ranged from 2,000 to 2,100 pounds per thousand square feet, that is a 3/8 board.

Q. Was that weight, to your knowledge, similar to the weight of board made by other companies, if you know?

A. Well, at the time we started this plant, this wallboard plant, in 1925, where we made wide board—that is what I was talking about now—I don't think there were very many people manufacturing board that ran much lighter than that, there might have been but I don't remember now.

Q. Well now, was there any board made during this period, say 1919 and 1920, that had a different type of edge than the one that you have described here, which had to be pared off?

A. Between 1919 and 1920?

Q. Yes, at about the time you started your plant.

A. Yes.

Q. Will you describe that?

A. Well, the United States Gypsum Company were making a wallboard or plasterboard, at that time, in which the edges were completely covered, and the Best Wall Company were manufacturing a wallboard that had covered edges.

Q. Did you consider making a board with a covered edge when you started your plant in 1920, or thereabouts?

A. Well, we might have considered it, but we
670 didn't do it.

Q. Did you make any effort to make a covered-edge board?

A. Well, I really wanted to make a covered-edge board, because I recognized the advantages of it, and always felt that that was the board to make.

Q. What effort did you make, if any, to make such a board?

A. Well, at that time I knew of the litigation going on between the United States Gypsum Company and the Best Wall Board Company, and having heard more or less about it as I traveled around all over the country, I wasn't particularly anxious to get mixed up in any litigation if I could help it.

So as I remember it, I called on Mr. Avery to discuss with him the possibility of securing a license, whether he would be willing to issue a license to us to make the same type of board that they were doing, with a covered-type edge.

Q. You mean Mr. Sewell Avery, President of the United States Gypsum Company?

A. Yes.

Mr. BROMLEY. Could we have the date of that fixed, please.

By Mr. STEFFEN.

Q. Could you state about when this was that you called on Mr. Avery?

A. No, I could not.

671 Q. Could you fix it with relation to the time when you started operations at your plant there?

A. It was prior to the time we started operation of the plant, as I remember it, the old, original plasterboard plant.

Q. And how long prior, one year or a few months, or could you say?

A. Well, I would say possibly 6 months, when we were considering going into the proposition.

Q. When you were arranging your plant?

A. Yes.

Q. Well, tell us what Mr. Avery said——

Justice STEPHENS (interposing). Can you fix the place of the conversation, so as to identify it a little more?

By Mr. STEFFEN.

Q. Could you tell us where you saw Mr. Avery?

A. No, I don't remember where it was that I met him at this time.

Q. Where are the offices of the United States Gypsum Company, if you know?

A. At that time they were in Chicago.

Q. You are not sure whether you went to Chicago or whether you saw Mr. Avery somewhere else?

A. I could not say at this time.

Q. Well, what transpired, at your meeting with

672 Mr. Avery?

A. Well, as I remember it, Mr. Avery told me about the litigation that he had with the Best Wall Board Company, and as I remember it there was some talk about the amount of the claim that he had against them.

Q. Did he mention the royalty figure that he was claiming in his suit?

A. The royalty or damages, whatever he called it, I didn't pay much attention to that. But when it came down to granting a royalty to my company, or rather a license to the American Gypsum Company, to permit it to make the same type edge, he figured that he would have to charge us, of course, the same price he was claiming in his suit from the other people; and that price, when reduced to the cost per thousand square feet, was prohibitive. So we couldn't see it, or I couldn't see it.

Q. And did you take out a license with the United States Gypsum Company?

A. No, I never took out one.

Q. Do you recall what the price of gypsum board was, f.o.b. mills, at this time, or plasterboard?

A. I am quite sure it was $30 a thousand for wallboard, a thousand square feet, and gypsum lath always sold for a much lesser price, probably 15 or 16 dollars a thousand, or somewhere along there.

673 Q. And could you give the Court an idea of how much the royalty would be that Mr. Avery suggested, if he suggested a figure at all?

A. Well, as I remember it—I wouldn't say this is correct—my recollection is that it would figure around about $8 a thousand feet on wallboard.

Q. That would be prohibitive, you thought?

A. Well, it seemed that way to me.

Q. Did you attempt to make a type of closed-edge board when you started your plant?

A. No, not a closed-edge board.

Q. What sort of an edge did you put on your board?

A. Well, at the first start, when we started the manufacturing process, we manufactured the plasterboard with an open-edge type board. But we soon discovered that there were many people that preferred the closed-edge type of board that was being made by the Gypsum Company—I guess the Gypsum Company was the only company making it at that time. So we began to figure ways and means of making something to compete with their closed-edge board, and wound up with what was known afterwards as the Clark patent and the Birdsey patent, which were both claimed to be in conflict with each other.

Q. Who was Clark?

A. Clark was the superintendent that I had at the American Gypsum Company wallboard plant.

674 Q. When did he come with you?

A. I would say in the beginning of the construction of the plant, about 1919, as I remember it.

Q. Do you recall when he filed an application for a patent on the closed-edge or partially closed-edge board?
A. No, I do not remember the date.
Q. Was it sometime in 1920?
A. When we filed the application?
Q. When the Clark application was filed.
I think the records will show that it was in the early part of 1920.
A. Well, it probably was, I couldn't give the exact date of it, but I would say it was probably in 1920.

Mr. BROMLEY. I will concede, if the Court pleases, that the date that Clark filed his application was July 31, 1920.

Justice STEPHENS. Thank you.

Mr. STEFFEN. And the date when Birdsey filed his application was what?

Mr. BROMLEY. January 2, 1920.

Mr. STEFFEN. That is, filed his application?

Mr. BROMLEY. Yes, sir.

Mr. STEFFEN. Would you stipulate also as to the date when his patent was issued?

Mr. BROMLEY. The Birdsey patent, 1,358,508,
675 issued November 9, 1920.

By Mr. STEFFEN.

Q. When Mr. Clark filed his application, did he know of the Birdsey application, or the Birdsey patent?
A. I did not.
Q. Did Mr. Clark know?

Mr. BROMLEY. If he knows.

By Mr. STEFFEN.

Q. If you know.
A. He did not know, to my knowledge.
Q. Now will you describe just briefly the type of edge that was claimed under the Clark patent, and which you started production of?

Justice STEPHENS. Was the Clark patent issued?

Mr. STEFFEN. Was the Clark patent ever issued?

The WITNESS. Yes.

Justice STEPHENS. I understood you to stipulate on the Birdsey patent, but there was no stipulation with regard

to the Clark patent. I assumed perhaps it didn't issue. Did it issue?

Mr. STEFFEN. I think not.

Mr. BROMLEY. No, it did not issue, because on May 10, 1921, an interference was instituted, and Birdsey was awarded priority many years later, in 1926.

Mr. STEFFEN. I meant application, not patent.

676 By Mr. STEFFEN.

Q. Will you describe the type of board that you manufactured according to the application filed by Clark?

Justice STEPHENS. I didn't mean to be super-technical about your wording, but we don't want to get into the record that there was a Clark patent unless there was one.

The WITNESS. I have already described the process of making it on a belt, a traveling belt.

Now this improvement consisted of the edges, both edges of the board, and the paper on the board, the lower one was crimped and turned in like that; and the top one, when it came around, it was also crimped in; so that when they came under the rolls, the slurry of the gypsum squeezed out in here, and the roller pressed it down and cemented the two edges together, leaving a gypsum core exposed here, the paper did not cover the entire edge. But it did have four thicknesses of paper when we went to nail through it, or anything. There was this edge that was doubled under, and also the lower edge that was folded up, and the nail went through there, and it had four thicknesses of paper. And we called it a four-ply edge.

But it was not wholly covered, the gypsum core showed part way.

Justice JACKSON. But the paper covered a portion of the edge, did it?

The WITNESS. Only, as a rule, just the thickness
677 where it doubled down. It might be that the slurry might, during the pressure, squeeze up under that a little but, but there was always a substantial amount of gypsum that showed through the center.

By Mr. STEFFEN.

Q. Now I would like to ask you, if you know, what the Utzman closed-edge process looked like?

Justice STEPHENS. I am not sure that this is important, but I don't understand how there would be four thicknesses of paper.

The WITNESS. This is the bottom paper, lying on the belt, on which the edge had been turned over like that. Then here comes the top paper, coming down from the roll, and coming in like that. The roll presses them down to the 3/8 thickness, or whatever thickness it was, this slurry holding it apart——

Justice STEPHENS (interposing). The exterior edge is exposed?

The WITNESS. Yes, that was probably folded under at least a half an inch.

Justice STEPHENS. It wasn't folded over the edge?

The WITNESS. No.

Justice STEPHENS. The edge itself was exposed?

The WITNESS. Yes.

Justice STEPHENS. The paper was pressed down just coincidental with the edge?

678 The WITNESS. Yes.

By Mr. STEFFEN.

Q. Now will you describe to the Court what the Utzman edge was?

A. Well, you are asking me some questions that I am liable to get mixed up myself on, this has been so long ago.

Justice STEPHENS. Take your time; and if you get tired, we would be glad to give you a little recess from time to time.

The WITNESS. The Utzman-type edge, as it was called, was made by the same process, the same traveling process, but the paper that came through, the bottom paper was scored, as they called it, with a device that ran along here, that creased it there, and also if we wanted a 3/8 board it was creased up there so as to be 3/8 of an inch thick.

Then the top paper that came t ough the same way, came through under there, and was pressed down, but it didn't come quite over to the edge of this, as I remember it, but the people that made that type of board usually applied some kind of a paste on the paper that cemented the top paper down onto this lower paper; and when it was finished you had a completely covered edge, the gypsum sludge was sealed in there and could not get out, it was a completely covered edge; and that was known as the Utzman patent.

Mr. STEFFEN. I show you a piece of board here,
679 furnished by defendants, and ask if you can identify that as an Utzman edge?

Justice STEPHENS. Before you answer that question——

Mr. STEFFEN (interposing). It should be marked as an exhibit?

Justice STEPHENS. I was about to say, Mr. Steffen, that if it is really critical that the record show how these edges are made, it won't show it now, because of the informal use of this paper as an illustration. Have you any exhibits or descriptions or drawings which could be introduced to show it later?

Mr. STEFFEN. As a matter of fact, in the Complaint the Utzman patent is set out, and the design.

Justice STEPHENS. I thought so.

Mr. STEFFEN. I simply wanted to more or less informally introduce the subject.

Justice STEPHENS. Very well.

Mr. BROMLEY. You haven't got the right edge, you handed him a round edge. Here is the Utzman edge.

Justice STEPHENS. Read the last question.
(The pending question was read by the reporter.)

By Mr. STEFFEN.

Q. Mr. Griswold, that I have shown you has been marked Government's Exhibit No. 43 for Identification, and I ask you if you can identify that as substantially the
680 Utzman-type edge?

A. Well, this is not like they originally used to make it, this is a rounded edge. The original Utzman edge used to have a pretty square edge, at least they tried to get it square.

Q. I show you Government's Exhibit 44 for Identification, and ask you if you can identify that as to the type of Utzman edge that was being made in 1920?

A. This is the type that the Utzman edge was at that time, or practically so, as I remember it. It is a completely closed edge, the way I remember the Utzman-type edge was made.

Mr. STEFFEN. Does the Court care to look at these edges?

Justice JACKSON. Certainly.
Have both of these been offered, Mr. Steffen?

Mr. STEFFEN. They haven't been offered yet.

Justice GARRETT. May I ask here, one edge of both of these exhibits is covered. The other edges are exposed. I have been under the impression that in that Utzman patent all the edges were covered. Is this just a——

Mr. STEFFEN (interposing). I can testify that that is just a sample, or I think Mr. Griswold could testify to that better.

The WITNESS. What you see there is only a piece of a board. That covered edge ran continuously along
681 on a belt that was probably 200 feet long.

Justice STEPHENS. In other words, those are small samples cut out of a larger board?

The WITNESS. Yes.

Justice STEPHENS. And in a board itself, all edges are covered?

The WITNESS. Both of them, this side and that side (indicating); but where they are cut off, that cut through paper.

Justice STEPHENS. They would not be covered?

The WITNESS. No, if a board was 10 feet long, that edge would be raw; and the next 10-foot cut would be raw; but the edges would be completely covered.

Justice STEPHENS. Do you want to offer these in evidence?

Mr. STEFFEN. They are for Identification I would rather not offer them for the moment.

Justice STEPHENS. Very well.
Mr. Marshal, put these in the possession of counsel for the Government.

By Mr. STEFFEN.

Q. Mr. Griswold, I understand from your statements that the Birdsey and the Clark patents were in interference in the Patent Office beginning somewhere around 1920?
A. Yes, about that date. I couldn't give the exact dates.
682 Q. Do you know about how long that interference proceeding continued?

A. I couldn't say the exact date, but I would say around five years, anyway, before the final decision was made.

Q. I think that is correct, it was around February, 1926. And what was the outcome of the interference proceeding?

A. Very unsatisfactory to me. Priority was given to Birdsey, and the interference suit that was started was finally decided in favor of United States Gypsum Company.

Q. But who was Birdsey?

A. Birdsey was connected with the United States Gypsum Company, I don't remember his capacity, in just what capacity he was connected but he was connected with them.

Q. Was the patent, to your knowledge, owned by Birdsey or by the United States Gypsum Company?

A. Well, they were taken out by Birdsey, but of course assigned to the United States Gypsum Company. They owned it, as I understood it.

Q. And during this period from 1920, when you started your plant, to 1926, you manufactured, as I understand your testimony, a board according to the terms of the Clark application, is that correct?

A. Well, originally, when we first started, we made an open-edge board, but later on we started to make that Clark patent, the four-ply edge, as we called it, and
683 continued that until such time as we were stopped by the decision of the Court.

Q. Well, was there ever a notice given to you by United States Gypsum that you were infringing either the Birdsey or the Utzman patents?

A. Well, I think there was, I know there was on the Birdsey patent. I am not sure about the Utzman patent because that case never went into the courts, as I remember it. The Birdsey patent, they served us a notice on.

Q. Do you remember about what date that was?

A. Well, I would say approximately the latter part of 1924 or in 1925, but that is not definite, that is as near as I can place it.

Q. I show you what has been marked Government's Exhibit No. 101 for identification, which purports to be a letter from Arthur A. Olson, addressed to the American Gypsum Company, under date of August 18, 1925. Does that refresh your recollection, Mr. Griswold, as to the date?

A. Yes, sir.

Q. And on what date would you say you received this notice?

A. This letter was written on the 18th of August, and was replied to, on the 22nd of August 1925.

Q. How can you tell that?

A. By the stamp on it, showing the date it was
684 received and the date it was answered.

Q. Did you send the answer?

A. Yes. This is signed with my initials. I dictated the letter.

Q. What patents are listed on that notice?

A. The two Utzman patents and one patent issued to C. R. Birdsey.

Q. That is the Birdsey that you have been speaking of?

A. Yes.

Mr. STEFFEN. We offer Government's Exhibit No. 101 in evidence.

Mr. BROMLEY. No objection.

Justice STEPHENS. Is this the notice which appears at the top of the file which the Government has just furnished us?

Mr. STEFFEN. That is right.

Mr. KNUFF. On the bottom of the copy that is furnished to Your Honor, on the right lower corner, you will find "D-1." D-1 is the number that the witness now has in his hand.

Justice STEPHENS. And it is now offered as Exhibit 101?

Mr. STEFFEN. Yes, it is offered as Government's Exhibit 101.

Mr. JOHNSTON. If the Court please, I want to make a further observation in regard to these exhibits. Here is an exhibit that hasn't anything to do with my client
685 that I can see. It happens that it is one page and we have had an opportunity to look at it. These exhibits this morning, particularly those offered as the tariffs, which were excluded for the moment—but there is typical of what I want to bring to the attention of the Court—they consisted of several hundred pages, and they offered and passed down the line here, and at best we could only have a few moments to see what they contained. First, we don't know whether there is authenticity to them. It appeared very apparent this morning that those tariffs were not authentic, they were copies with penciled notes on them. Now, we couldn't make an examination to determine that for the purpose of offering an objection. Secondly, as to those, and particularly now as to this exhibit, I cannot

see where there is any materiality in the case as to Texas, and I am just wondering now, in view of what I had understood the Court to say earlier in the day, that if we did not object it would be taken then as introduced and effective against us if it was material at all—now I am hoping there can be some way worked out here to facilitate this thing. I don't want to be in the position of objecting to every exhibit that comes in.

I am going to be obliged, I fear, unless I can have reasonable opportunity to know beforehand what they are going to offer, to do so: I just make that as an observation, I am doing it on my own authority, and not speaking for
686 any other defendant, but I think the other defendants are similarly situated.

Justice STEPHENS. Well, Mr. Johnston, as the Court indicated this morning, it intends of course that the defendants' counsel shall have an opportunity to inspect these exhibits. I adopted your suggestion and Government counsel agreed to submit them to you as soon as they can arrange to do so outside of the session of the Court, so you may have an opportunity to examine them at leisure.

I don't quite understand why you are reiterating it, I thought that was the understanding.

Mr. JOHNSTON. My point in bringing it up now is, that I asked counsel if they would be able to furnish us copies, and they said they would not, that there was only a limited number of copies, and they were only going to furnish one copy to all the defendants, and that would be at the time they made the offer. I submit that that is not very satisfactory.

Mr. STEFFEN. I would say in that connection that the next 100 exhibits that we are going to discuss were all photostated and defense counsel have already been furnished with one set of photostatic copies when Mr. Griswold's deposition was taken out in Port Clinton, which would seem to me to be more than adequate for the occasion. They have had them for six months.

Justice STEPHENS. Do you mean that this set of
687 photostats which was furnished to the Court has also been furnished to the defendants?

Mr. STEFFEN. Yes.

Justice STEPHENS. Each one of counsel?

Mr. ADAMS. I never received a copy of them.

Mr. JOHNSTON. I got a copy of the Griswold deposition, but I did not get a copy of the exhibits, and I have been unable to see a copy of those exhibits until this one was passed down the table, and I asked counsel for the Government, and they said they could not furnish them.

Mr. STEFFEN. At Port Clinton, I might say, we argued for a matter of fifteen or twenty minutes to see if we couldn't get the reporter to put those exhibits in the minutes. Everybody, Mr. Adams included, said that that was preposterous, to have them put in the minutes. The best we could do there was to give them one set of photostatic copies. They can make as many reproductions as they want to, from that, and they have had six months to do so. We are glad to cooperate in any way that we can, but, after all, one set to the defendants six months ago, and another set given to them today, and all the time in the world to examine them, seems to me to be sufficient.

Mr. ADAMS. May I be heard on this, Your Honor?

Justice STEPHENS. Yes, Mr. Adams.

Mr. ADAMS. The question of whether or not we
688 were going to set these exhibits out, some 120 exhibits, in full, in the course of typing the deposition, was something that I protested against, and I think I am right; I think I was right then. It cost several hundred dollars, and perhaps a lot more than that, to go out to Port Clinton and take this deposition which is not even being used today. And I protested against the expense involved.

Secondly, I questioned the propriety of it, which I still do. I never heard of such a proceeding before. I never got a single one of the exhibits to that deposition that the Government introduced out there. Now, they say that they furnished a set to defense counsel. There are some seven or eight defendants here, located in different cities, having different clients. I know that counsel for U.S.G. did get a copy of those exhibits, one copy. The only reason that I had any information as to what was in them at all was because I took the trouble to go to their office and read them. But I agree with Mr. Johnston here, that this is a most unsatisfactory situation because none of us want to take the time of this Court to have to object to every single exhibit as it comes along, but it seems to me that unless we do that, we are going to possibly be waiving some rights for our clients.

I think if we could work out some system to get along with this a little quicker, it would be very much more helpful.

Justice STEPHENS. The Court will be in recess
689 informally for a few moments.

(At this point a short recess was taken, after which the proceedings were resumed.)

Justice STEPHENS. Gentlemen, this matter of exhibits, and the right to inspect them, presents a problem of one absolute right, and some conflicting conveniences. There isn't any question at all but what the defendants, and each of the defendants, have a right to see the original or a correct copy of the original, for a sufficient length of time to inform himself as to the contents thereof, so that he can determine whether or not to take an objection or not.

Now, on the other hand, I don't know that the Government is under any absolute duty to furnish copies to the defendants, but if the Government does not do so, the Court has got to sit here and wait for minutes or hours or days, when it accumulates, while the defendants take time to inspect these exhibits.

So that it is a question of time and expense, whichever way you look at it. If the Government furnishes photostatic copies in sufficient number so that each of the defendants can have a reasonable opportunity to see these exhibits, outside of court hours, that will cost the Government some expense to get those photostats made. If the Government does not do that, it is going to cost, not the Department of Justice, but the Government as a
690 whole, a great deal of expense to have three judges sitting here, and all the court attaches, for much more time than they would otherwise sit, because of the necessity of having these exhibits examined in the courtroom, or taking recesses so that the defendants can examine them. Consequently, we strongly urge upon the Government that it have photostatic copies of all these documentary exhibits stricken off in the Department of Justice Photostatic Bureau, which was operating when I was, some years ago, connected with the Department.

We, as judges, will cooperate in this by letting these copies be used by the defendants. There are three here, so far as this set is concerned. We don't want to be selfish about our use of them, and we will do everything we can to accommodate counsel on both sides. But we express the very strong hope that the Government will be able to aid

the Court, and the progress of the case, by making additional photostats available. We are thoroughly agreed that one photostatic copy of these exhibits for six or eight or twelve defendants is not enough. Each defendant has an absolute right to see what is introduced against him, and to see it long enough to know what is in it, and examine it and consider it.

What can you do, gentlemen, as to that?

Mr. STEFFEN. We can investigate and find out what we can do. I can say that this is wartime and that
691 photostatic paper and photostating is very difficult to get done. As a matter of time and of expense, it will be very difficult. We will be very glad to cooperate in any way we can, however, to facilitate the trial.

Justice STEPHENS. There is one other alternative which is not a desirable alternative, in view of the fact that witnesses are here from abroad, and that is that we shall adjourn for several days while a set of exhibits is furnished, a set of proposed originals is furnished to the defendants, so that they can examine them. But that again prolongs the trial and causes expense to all concerned, of hotels and witnesses and all that sort of difficulty.

So I think the best way out of it, if you can possibly arrange it, gentlemen, is to see if you cannot get photostats and get them promptly. You can tell, perhaps, by tomorrow morning, after consulting with the Department, how far you can go in the direction of furnishing additional photostats, can you not, Mr. Steffen?

Mr. STEFFEN. Mr. Knuff suggests that we can give, right at the present time, one copy of the photostats which they can use at the table, and return to us at the close of the day. That will give them complete opportunity to inspect them.

May I make one other brief statement? Much of this is a tempest in a teapot, to use Your Honor's language,
692 because many of these defendants don't know anything about some of these exhibits.

The Texas company doesn't know anything about whether the American Gypsum Company held a meeting or not, and they are offered, and if they are admitted by the American Gypsum Company, or if they are a United States Gypsum Company exhibit, and they are admitted by the United States Gypsum Company, while all the other defendants are certainly entitled to inspect them, actually they won't

know any more after they have inspected them than they did before.

Justice STEPHENS. Of course there is another problem, Mr. Steffen, so far as that is concerned. It is true, even in smaller cases, but particularly in a large and complicated case like this it is of great importance to the Court and counsel on both sides of the case, that definite rulings should be made on the admissibility of evidence at the time it is offered, except in some particular exceptions where there has to be connecting evidence supplied, and instances of that sort. Otherwise, if we take a lot of evidence in for what it is worth, and determine whom it will apply to later, nobody knows what is in the record or isn't in the record at the end of the case, and that is not satisfactory. Of course it may be, as you suggest, that some of the defendants may not know much more about the exhibits after they have inspected them, than they do at the beginning, but nevertheless they have the right to determine the extent of their own ignorance, and not have somebody else determine it for them.

693

Mr. STEFFEN. In this case the Celotex people, Mr. Oliver was handed all these exhibits, and they were the people who have taken over the American, and they know the American affairs as well as anybody. They have had access to a full set of the exhibits in this case.

Justice STEPHENS. What do you say to that, Mr. Oliver?

Mr. OLIVER. About a month ago I went to the Department of Justice and asked them if they would let me have a photostatic copy of the Griswold deposition exhibits, and they said they did not have a copy that they could let me have, but they loaned me a copy, from which I had a photostatic copy made, and I do have that here.

Justice STEPHENS. Then you are not in trouble over this one.

Mr. OLIVER. Not right now.

Justice STEPHENS. As some of the other defendants seem to be.

Mr. OLIVER. But I will be in the same boat as the others when they pass from the exhibits that were submitted at the time of the taking of the deposition of Mr. Griswold.

Justice STEPHENS. Let's see if we can make a little progress for the moment, and then Government counsel
694 will see, during the recess this evening, whether they can furnish us with further photostats. We have three here, and Mr. Oliver has one, and there was still another one furnished to one of the defendants at the time of the deposition, as I understand it, which makes five.

Mr. BROMLEY. That is not so. We did not receive any copy of those exhibits, although Mr. Steffen made that statement.

Mr. STEFFEN. I believe my statement was incorrect.

Justice STEPHENS. Then there are four copies. Now there are six defendants, with their associated individuals. Can't the defendants, this evening, or after court, make out sufficiently so far as these Griswold exhibits are concerned, with those four sets, so we will not have to delay any longer? Can't we go ahead with these this afternoon by identifying them and explaining what they are, and then let you gentlemen for the defendants inspect those four sets this evening, and make your objections in the morning, if you have any? That will get us that much further ahead today. Is that agreeable to all concerned?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. Let's proceed that way, then, and I will use my very best offices with the Government to get photostats of everything you can in large and sufficient
695 quantities for the defendants, because they do have the right to examine them, and because otherwise we are going to be here twice as long as we planned, and we are planning to stay quite a while as it is.

If the defendants want to have these copies, which we now have up here, in their possession while the examination is going forward, they may have them.

I think Government's Exhibit 101 has been offered, but not ruled on? Will you read the offer, if you can locate it, Mr. Reporter?

(The reporter read from the record as follows:)

"Mr. STEFFEN. We offer Government's Exhibit No. 101 in evidence."

Justice STEPHENS. Is there any objection to this Exhibit 101? Mr. Bromley has not objected to it. Does any defendant object to it?

Mr. O'DONNELL. Might I ask the purpose of the exhibit, what the plaintiff expects to prove by this letter?

Mr. STEFFEN. Just general background.

Mr. O'DONNELL. Then the Newark Plaster Company, and Mr. Tomkins, will have to object upon the ground that they had no tie-up with the wall board industry at the time this letter was written.

Justice STEPHENS. Who did not?

Mr. O'DONNELL. The Newark Plaster Company and the individual defendant Tomkins—and that objection
696 would apply to all exhibits offered by the Government dated prior to 1939.

Justice STEPHENS. Mr. Steffen, what do you mean by "general background"?

Mr. STEFFEN. It corroborates the statement of the witness as to the time when this notice was received. It doesn't prove in one document that all these defendants have conspired, but it certainly is relevant to establish the point that the United States Gypsum Company did notify the American Gypsum Company that it was infringing upon those three patents, and it is very material to know which patents they were giving notice upon, and very material to know that they did serve notice, because many things transpired after that notice was received which we expect to establish in evidence.

If I may answer the point made here, I think we quoted this morning from the Interstate Circuit case, that if we proved a conspiracy, even prior to the time that any of the present defendants had anything to do with it, and they came in, knowing of that, that it is perfectly proper proof of a conspiracy. So that, so far as Newark is concerned, they are on the sidelines, they don't know anything about the thing, perhaps up until 1937 or some such time, but when they came in, then it becomes particularly relevant to them, and they cannot object to our proof of the earlier conspiracy.

Justice STEPHENS. Mr. Adams?

697 Mr. ADAMS. I simply make the general objection at this time that it is not binding on us until it is connected, and I would like to make that objection to this whole line of exhibits, without having to arise with respect to each one.

Secondly——

Justice STEPHENS (interposing). That may be noted.

Mr. ADAMS. I just wanted to advise the Court that Mr. Finck and I can get along with one set of these exhibits here this afternoon, if it would be more convenient for the Court to have this set.

Justice STEPHENS. We would like to have one set on the bench during the afternoon, if you don't need it.

The Court rules as follows, gentlemen, with respect to the admissibility of this exhibit. Of course it is not admissible to prove that anyone except the American Gypsum Company was given the notice which the exhibit describes, or which the exhibit embodies, but it seems to me that the objection, Mr. O'Donnell, that you make, and that perhaps Mr. Adams also makes, really goes to its weight rather than to its competency or admissibility or relevancy so far as the other defendants are concerned, even those who, like you, claim to have come into this arrangement with the United States Gypsum Company at a much later date than this, because this case does involve a charge of conspiracy and combination, and the Government has a right
698 to try to prove, if it can, that the arrangements which were earlier made, ultimately ripened into a general combination and conspiracy, and it has to prove that a step at a time.

Now, I do not mean by ruling that way, that we intend to take in large and indefinite areas of so-called background evidence, but I do think that the theory upon which this is offered, as described by Mr. Steffen and amplified by myself at the moment, is proper, and with that explanation of the Court's ruling, unless my colleagues have something to say, I will overrule the objections and the exhibit is received in evidence.

(The document referred to, marked as Government's Exhibit No. 101, was received in evidence.)

By Mr. STEFFEN.

Q. Mr. Griswold, can you tell the Court what, if any, action the American Gypsum Company took upon receipt of this notice from the attorneys that you were infringing the Utzman and Birdsey patents?

A. As I remember it, now, they appointed a committee, the Board of Directors did, to look into the matter. The details of that I do not remember without something to refresh my recollection.

Q. When you say "they" appointed a committee, would you tell me who you mean?

699 A. The Board of Directors.

Q. Of the American Gypsum Company?

A. Yes.

Q. Were you named, do you recall, as a member of that committee, or who were the members of the committee?

A. I could not say offhand. I think I was a member of it, but I couldn't say who the others were.

Q. And do you recall the date?

A. No, I do not.

Q. I show you what has been marked as Government's Exhibit 102 for identification, which purports to be a copy of the Board of Directors' meeting of the American Gypsum Company on August 19, 1925, and ask if you can identify the signatures.

A. Yes.

Q. Take the first signature and state if you can identify that.

A. The first signature is J. H. McCrady, president.

Q. And can you identify the second signature?

A. J. B. Davis, secretary.

Q. Now, I believe you testified, did you not, that both of those men are not living?

A. Both of them are deceased.

Q. Do you have any recollection of having attended the meeting which is described in those minutes?

700 A. Yes, I attended the meeting because it so states here, and I have a recollection of what happened, but I couldn't say as to the date exactly.

Q. I call your attention to the last paragraph of the minutes, and ask if it correctly portrays what took place at the meeting, the last paragraph on the first page.

A. "Whereas, the American Gypsum Company has received a letter dated August 18, 1925, from Attorneys Jones, Addington, Ames, and Seibold, of Chicago, representing the United States Gypsum Company, notifying us that the plaster board which we are manufacturing and selling, and the process used by us in manufacturing it, infringe three United States Letters Patent owned by the U. S. Gypsum Company"—Do you want the rest of it?

Q. I didn't want you to read it. I asked you if that is a correct statement of what took place at the meeting, according to your recollection.

A. I would say yes.

Mr. STEFFEN. We offer Government's Exhibit 102 in evidence.

Mr. BROMLEY. No objection.

Justice STEPHENS. Is there any objection by any of the other defendants?

It is received in evidence.

(The document referred to, marked Government's Exhibit No. 102, was received in evidence.)

701 Mr. JOHNSTON. If the Court please, I understood that we were not to raise any further objections during the day, but that we were to reserve them until tomorrow.

Justice STEPHENS. That is very true. It is received subject to the right of the defendants to make objections in the morning after an opportunity to inspect. Thank you for reminding me of that.

By Mr. STEFFEN.

Q. Now, Mr. Griswold, the minutes provide that: "Therefore, C. F. Miller moved, and H. K. Tadsen seconded, that a committee consisting of J. H. McCrady, J. B. Davis, and F. J. Griswold be appointed with full power to take such action as may be necessary to protect the interests of the American Gypsum Company."

Did that committee take any action that you can recollect now?

A. Yes, I am sure they did, but I don't remember the details without something to refresh my memory.

Justice STEPHENS. Mr. Steffen, I think probably, in view of the fact that probably with respect to this set of exhibits the defendants haven't as yet had a chance to see them, it might be more convenient, as far as making our record is concerned, if, instead of receiving them in evidence now, they be offered now, and then tomorrow morning when defendants have seen them, the objections and rul-

702 ings all be made at one place in the record. Otherwise they will be shown as received now, and then if there are objections made tomorrow morning, and the ruling has to be modified, the ruling on the exhibits will be in two different places in the record. So I will revoke the ruling on admitting Exhibit 101, with the right of the Government to re-offer it tomorrow morning. But you may proceed and conduct your examination, nevertheless.

Mr. STEFFEN. Does that apply to Exhibit 102 also, which has just been identified?

Justice STEPHENS. Yes, to Exhibits 101 and 102 both. That is only for the purpose of making it more convenient,

when this case reaches the stage of appeal, should either side appeal from an adverse ruling. But you need not stop your examination this afternoon. Go right ahead and examine the witness and describe all the papers you want to, and make your offers.

(The documents heretofore received in evidence as Government's Exhibits 101 and 102 were withdrawn from evidence.)

By Mr. STEFFEN.

Q. Well, your committee, Mr. Griswold, did it have any meetings with the United States Gypsum Company or anyone else in regard to settling the alleged infringe-
703 ment claim of the United States Gypsum Company?

A. As I remember it, we had a meeting with Mr. Avery, one meeting at least, but I don't remember just when, or the details, at this time.

Q. What is your best recollection of the date or time of your meeting with Mr. Avery and the United States Gypsum Company?

A. I have no distinct recollection as to the exact date. It was too long ago.

Q. You do recollect, you say, that you had such a meeting?

A. I am sure we had a meeting.

Q. Do you know where it may have been held?

A. My recollection is it was at Chicago. We very seldom met any place else, so I would say we met at Chicago.

Q. I show you Government's exhibit marked for identification No. 103, which purports to be a letter, an unsigned letter, from Mr. Griswold to Mr. J. H. McCrady, under date of May 21, 1926—no, I have offered the wrong exhibit.

First, I would like to refer to what has been marked as Government's Exhibit 104 for identification.

Justice STEPHENS. That is the letter of May 12?

Mr. STEFFEN. Yes, addressed by Mr. Griswold to Mr. J. H. McCrady. I will show that to Mr. Griswold and ask if he can identify it.

704 Justice JACKSON. Is that properly marked as Exhibit 104 for identification? It is Exhibit 103 if you are keeping rotation.

Mr. STEFFEN. We are out of rotation, that is the point. We are taking Exhibit 104 in advance of Exhibit 103.

Justice JACKSON. I see.

The WITNESS. Yes.

By Mr. STEFFEN.

Q. That letter was signed by you?

A. The signature was not written by me, but that is a facsimile of my signature, but a stamp was used for signing the mail.

Q. And how did you come to be writing Mr. McCrady, if you know?

A. Well, he was the president of the company, and he was really the only one of the company, outside of myself, that took any interest in the operation or the running of the plant. In addition to that, he was familiar with this possible threatened litigation over the infringement of the wall board edge.

705 Q. Was he a member of the committee that the Board of Directors had authorized to negotiate?

A. He was also a member of that committee, if that was appointed before this time, and I don't remember the dates. He and Mr. Davis and myself were three members of the committee, as I remember.

Q. Now you are reporting at that time, of a meeting with Mr. Blagden. Did you arrange the meeting with Mr. Blagden in order to handle a matter of this character concerning the Utzman and Birdsey litigation?

A. My recollection is that there was no prearranged plan for a meeting, and that I did not make a special trip. In connection with my business I was in Buffalo usually on an average of once every thirty days, and my recollection is now that it was on these trips that I contacted Blagden for this meeting.

Q. And who was Mr. Blagden?

A. Mr. Blagden at that time was President of the Beaver Products.

Q. Was he interested in the negotiations with Mr. Avery and the United States Gypsum Company concerning a license agreement?

Mr. BROMLEY. I object to that as immaterial and incompetent because calling for a conclusion.

Justice STEPHENS. Read the question, please?

706 (The reporter read the pending question.)

Justice STEPHENS. It seems to me objectionable, but I will hear you.

Mr. STEFFEN. I will rephrase it, if your Honor will permit.

Justice STEPHENS. Very well.

Mr. STEFFEN. Would you describe, if you will to the Court, what took place at your meeting with Mr. Blagden in Buffalo?

Mr. BROMLEY. I object to that as incompetent and immaterial, incompetent because hearsay and not binding on the defendants represented by me.

Mr. STEFFEN. I would say, Your Honor, if I may speak, that this is distinctly not hearsay, that it is alleged in Paragraphs 47, 48 and 49 of the complaint that the conversation took place in 1925 and 1926, and that Mr. Blagden and Mr. Griswold were two of the moving spirits at that time, and the whole negotiations were taking place at that time; according to the Government's contention of the case, there is nothing more relevant in the case.

Justice STEPHENS. Well, relevancy and hearsay are two different questions.

Mr. STEFFEN. There is no question of hearsay.

Justice STEPHENS. Why isn't it, Mr. Bromley, like the words of a contract? If these events occurred and
707 these things were said, why aren't they circumstances, regardless of truth, which bear upon the general charge of conspiracy?

Mr. BROMLEY. Because they are words said and things done not in the presence of any defendant represented by me or any representative of any such defendant.

Justice STEPHENS. Well, I am talking about a real exception to the hearsay rule. If they are in exception to the hearsay rule then they don't have to be in the presence of the defendant.

Mr. STEFFEN. We claim them as declarations against interest, which are of course exceptions to the hearsay rule.

Justice STEPHENS. By whom?

Mr. STEFFEN. By co-conspirators. It is true we haven't tied up these conspirators. We have alleged in the complaint that they were two of the original leading parties in the formation of the combination, and any declaration by Mr. Griswold or by Mr. Blagden concerning why the conspiracy or combination which we expect to prove took place, would be admissible and the hearsay rule has nothing to do with it.

Mr. BROMLEY. It certainly can't be maintained to be binding upon us in our absence.

Justice GARRETT. What was Blagden's relation to this?

Mr. STEFFEN. He was President of the Beaver Board Company, and both Beaver Board and American were being sued for infringement. We would expect to prove,
708 if I may go on, that both Mr. Griswold and Mr. Blagden were in contact with Mr. Avery, and that out of that original arrangement between Mr. Griswold, Mr. Blagden and Mr. Avery, this agreement which we have introduced this morning took shape. And the declarations of any one of the conspirators, provided we can subsequently, and to your satisfaction, tie them together as parties to the conspiracy, are admissible, and the hearsay rule, as Mr. Bromley well knows, has no application whatever.

Justice STEPHENS. We think that the objection is not well taken and it is overruled, subject of course to the general connection of these circumstances with other circumstances indicating a general conspiracy.

Mr. STEFFEN. We expect to call representatives from each of these various companies, as I announced this morning.

Mr. BROMLEY. I just want to make my position clear. As I understand counsel, he is seeking to prove the conspiracy which he alleges we are a party to, by these declarations made out of our presence, and the ground of my objection is that you can't prove a conspiracy that way; that the declarations of an alleged co-conspirator are not binding until you have first proved a conspiracy. He is trying to prove the conspiracy by proving declarations made not in our presence.

There is a long line of authority that you have first got to prove a conspiracy before there become admissible declarations of co-conspirators not in the presence of the others.

709 Justice STEPHENS. Well, may not circumstances, including conversations the existence and content of which is later proved to have been known to other persons, be among the items which tend to prove a conspiracy?

Mr. BROMLEY. I should think you first had to prove an agreement, an arrangement, in order to bring the principle of agency into operation, and that is the only reason that a declaration of a co-conspirator is admissible, because if

you have first proved there was a combination, then the principle of agency operates, and each member of the proved combination has implied authority to bind the others by his statements and admissions.

Justice STEPHENS. What do you say to that, Mr. Steffen?

Mr. BROMLEY. There is another requirement, and that is that a hearsay declaration must have been made in furtherance of the conspiracy. But none of those rules apply until counsel first establishes a conspiracy. He can't lift himself by his bootstraps, in other words.

Mr. STEFFEN. We contend, Your Honor, that we have made a prima facie case by the introduction this morning of all of the agreements which have been signed, identical agreements, between each of the different defendants here, and what we are endeavoring now to do is to show what the purposes of that conversation were. Those agreements are identical, they are all signed by the defendants, and
710 they form a combination which is clearly one, I think, to fix prices and to restrain trade, unless excused by virtue of the General Electric case.

With that as a prima facie showing of combination, whether it is illegal or not illegal, as the Hitchman Coal & Coke case will show in our brief, it is admissible then for us to show what the purposes of that agreement were, and we can do that by the declarations of anyone who took part in the formation of what eventuated as being the combination.

Mr. BROMLEY. My position as to that is that these differently dated agreements, which are in evidence, covering a long period of time, over three years, do not prove any combination or conspiracy such as is required that there be proved first in the Hitchman Coal & Coke case. There there and were going to use force and fraud and violence to vention and had a meeting at which they adopted the plan to go out and try to unionize the coal company's mines. They had a meeting and an agreement with one another that they would send organizers out, and as to just what they would do.

Then it was proved on the trial that these organizers, after they got out, made statements that they were out there was a labor union, an organization which met in conunionize the mines. And evidence of their declarations was held admissible as the declarations of a co-conspirator,

but there was a meeting in hall assembled, a meeting and combination among the members of this union, the
711 defendants in that case, as to what they would do.

My position is that that is not at all analogous to this set of separately negotiated contracts, differently dated, extending over a period of three years, from 1926 to 1929. That doesn't prove a combination among the parties to those contracts.

Justice STEPHENS. Do you have other items of evidence upon which you are going to rely to prove the combination and conspiracy itself, outside of these license agreements thus far introduced? Perhaps we are dealing with the problem of the order of testimony rather than otherwise. Can you introduce that first?

Mr. STEFFEN. We can, by Mr. Griswold, introduce a great deal of testimony concerning the relations in the industry and the general formation of the conspiracy, whether this particular letter is proof of that being beside the point. It seems to me that this letter is admissible as showing the inception of the purpose which eventuated in the combination, of which we introduced proof this morning.

We have proven, by introducing all of the agreements, that we have a 100 per cent organization among the different defendants here, among the gypsum board makers, let us say, in the Eastern territory of the United States. It is true that they did not sign their agreements on the same date, although many of them are very close
712 to the same date. It is true, however, that they were identical in form, and we are now seeking largely to show that that combination had, as its real purpose, not the exploitation of the patent license but had as its purpose the fixing of prices upon the sale of gypsum board, and it was incidental that they should enter into the matter of licensing under the patent.

Mr. BROMLEY. Now it can be very easily tested, it seems to me, whether that is a sound theory. Does my friend mean to indicate that because of these contracts that Ebsary became the agent of the Certain-teed Company; or that the National Company became the agent of the Ebsary Company just because they had contracts with the U.S.G.? You can't possibly infer from these license contracts any combination which makes operative the principle of agency, and it is the principle of agency that is the essential thing to make valid and binding on all the members

of a combination what anyone says or does, and this rule, by the way, applies not only to what a member of a combination says, but to what he does.

If the Government first proves there was a combination, then each is the agent of the other and anything that one does, either by way of act or by way of declaration, is binding on all. But it is a very serious step to apply that rule before any combination has been established, and I don't believe that it is possible to say, tested with relation to agency principles, that the existence of these
713 contracts between the U.S.G. and its licensees, would, by any stretch of the imagination make one licensee the agent of the other, or the agent of the licensor, or the licensor the agent of any licensee, sufficient to make the principle of agency operate so that the acts and declarations of one would become the acts and declarations of all, or binding on all, or binding on the others.

And I think the law is perfectly clear that you have to have proof of some combination, some association together, that is definite enough to make one the agent of all.

Justice STEPHENS. I assume that Mr. Steffen doesn't dispute that rule, that there must be an agency to ultimately make the declarations or acts of the co-conspirators binding upon each other. But I had understood he was offering this conversation as one of the circumstances indicating that arrangements were made to get together.

Mr. OLIVER. May I say a word?

Justice STEPHENS. Yes.

Mr. OLIVER. I have tried to follow this closely, but it seems to me that the question which was objected to was whether or not Mr. Blagden was interested——

Justice STEPHENS (interposing). Well, that was withdrawn. I indicated that the question in that form was objectionable, and it was withdrawn. There was a question following it, however.

714 Mr. BROMLEY. The question was as to what occurred at the meeting between Blagden and Griswold.

Justice STEPHENS. Will you read from the record the exact question to which objection is now being made, and will you type it up and furnish it to me immediately after the recess. Read it now, if you can find it. This objection

will go to a large class of testimony, apparently, and inasmuch as it is near the recess time, and as defeindants' counsel want to examine these exhibits, we will consider this matter during the evening, if you can leave one set of these exhibits with us. Perhaps you could leave the original of the letter which is now under discussion, with us.

Mr. STEFFEN. It is D-4 on your set.

Justice JACKSON. If you can let us have the original, then one of the defendants can use this set of exhibits.

Justice STEPHENS. Will the reporter now read the particular question to which objection is made?

(The reporter read the pending question as follows:)

"Mr. STEFFEN. Would you describe, if you will to the Court, what took place at your meeting with Mr. Blagden in Buffalo?"

Justice STEPHENS. I assume the question intends to have the witness answer what took place in the way of conversations?

Mr. STEFFEN. We include that.

Justice STEPHENS. We will be in recess until to-
715 morrow morning at 10:00 o'clock.

(Whereupon at 4:00 o'clock, p.m., the hearing was recessed until Thursday morning, November 18, 1943, at 10:00 o'clock).

716 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,
Washington, D. C., Thursday, November 18, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., before Honorable Harold M. Stephens,

Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances. (Same as heretofore noted.)

719 Now with respect to the matter of this testimony which was under discussion at the conclusion of yesterday's session the ruling of the Court is as follows:

The law is well settled that the declarations of conspirators or the acts of conspirators are admissible, that is, of one conspirator against the others, provided prima facie evidence of conspiracy has been shown, but not

720 otherwise. The declarations are not admissible to prove the conspiracy, they are only admissible after the conspiracy has been shown.

However, it seems to us that the problem is really more one of order of proof at the moment than of anything else, because we ought not rule, it seems to the Court, at the present time, whether or not a prima facie case of conspiracy has been made. We ought to have the opportunity of inspecting these exhibits with much more pains, we ought to have the benefit of argument of counsel on both sides, we ought to perhaps hear other circumstances and evidence.

Consequently, we think we ought not make a ruling now that a conspiracy has or has not been shown prima facie. It would seem, therefore, that the sensible thing to do would be to allow the witness to testify to these declarations, with the understanding that they are not received in evidence as proof of the conspiracy, but that they are only received in evidence subject to ultimate proof of prima facie character of the existence of a conspiracy. If that proof fails, then these declarations will be stricken out and not considered. If that proof succeeds, then they will be considered.

For the record, I may state that there are two cases in the District of Columbia, Heppel v. United States, 66 Appeals, D.C., 71 (1936), and Lorenz v. United States, 24 Appeals, D.C., 337, (1904), in which exactly that

721 ruling was made, that the matter is properly one of order of testimony, and that it is not error to receive the declarations out of order, provided it is understood that they are to be considered not as proof of the conspiracy, but only if the conspiracy is proved aliunde the declarations.

With that understanding the objection to the proffered testimony of Mr. Griswold is overruled.

Mr. BROMLEY. May it please the Court, I assume, and I hope not presumptuously, that the basis of this ruling is

that the Government has or will indicate, by way of a promise or assurance to the Court, that it has some independent evidence of a conspiracy. As I understand the order of proof rule to which Your Honor has referred, there must be a statement by counsel in the nature of a professional assurance, or a promise as some courts say, that he has other evidence.

Now we went through this in the criminal case, where that assurance was given to the Court, and we were there for 6½ weeks and the assurance was not performed. It seems to me here that that should be an implied condition of the ruling, and I mention it now only because, as I understood him yesterday, he said he would make no such assurance, that he had no other evidence.

Justice STEPHENS. I didn't understand that, Mr. Bromley, and the Court has made the ruling upon the assumption that the Government, in good faith, expects to
722 be able to prove a conspiracy and combination. Of course, otherwise it would be idle to sit here for weeks and listen to declarations. I assume the Government itself wouldn't want to spend that time; and we do make the ruling upon the assumption that the Government is proceeding upon the assurance that it has evidence to prove a conspiracy, that it so believes in good faith towards the Court and counsel.

Mr. BROMLEY. I understood him to say yesterday that he had only the agreements and no other proof of a conspiracy.

Justice STEPHENS. I think you misunderstood Mr. Steffen in that. I inquired myself, I think the transcript will show, whether there were other items of evidence tending to prove a conspiracy upon which he would rely, and he said yes, there were.

Mr. BROMLEY. And that, I assume, is his position now, that he gives us that assurance that he has other evidence?

Mr. STEFFEN. I surely will.

Justice STEPHENS. You may take the witness stand, Mr. Griswold, unless there is something else to come up first.

There is one other matter before we start taking testimony that ought to be discussed. You may take your seat, however, Mr. Griswold.

Mr. Johnston suggested this morning to me that it would be a very great convenience to all counsel if a serially ar-

ranged list of exhibits could be kept by someone so
728 that not merely the index which appears at the beginning of each transcript, where exhibits have been introduced, appears, and it shows the transcript pages, but a serial index giving the number of the exhibit, a brief description of its contents, and a reference to each page of the transcript on which it is mentioned for identification, for offer, for acceptance, rejection, or what-not; and he wondered if some arrangement could be made for the keeping of such an index.

I am myself attempting to keep such an index in my own Chambers for my own convenience, but my secretary who is keeping it is also engaged in preparing an abstract of the record, and I am afraid I can't offer her services to sit here in the court room to keep an index.

I wondered if the Court Reporter could, without undue inconvenience, expand the index which he is already making into that kind of an index. It wouldn't be very much more of a job. The index today says "Government's Exhibits Nos. 1 to 5, inclusive—page 919". It would, of course, require some rearrangement of the indexing method.

What do you think about that, Mr. Paul?

Mr. PAUL. I think we can arrange it. I will get in touch with Mr. Johnston and find out exactly what he wants, and I think we can arrange to do that.

Justice STEPHENS. It also occurred to me that possibly one of the juniors in one of the defendants' firms
724 might possibly be able to do it.

I would offer the services of the Clerk of the Court to do it, but unhappily the Clerk's office is four men short at the present time, and another resignation in the offing, and we have had to make a change of Clerks this morning. And the Clerk is very busy outside of the actual court hours, and I am afraid I can't do that.

So I will ask the Court Reporter to do that, if possible.

Mr. PAUL. We will endeavor to work it out.

Mr. BROMLEY. If he can't, we will be able to do it.

Justice STEPHENS. Will you report to us if it is an undue burden, and will you do it in cooperation with counsel for both sides so as to get some regular system which will suit and please the convenience of all?

Mr. PAUL. Yes, sir.

Justice STEPHENS. Now you may proceed.

Thereupon, FRANK J. GRISWOLD, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

DIRECT EXAMINATION (resumed) by Mr. STEFFEN.

Q. Yesterday, Mr. Griswold, you were telling of having gone to Buffalo about May, 1926, and at Buffalo you had met Mr. Blagden, I believe you testified, and I asked
725 you the general question, at the close of the session yesterday, what took place in your conversation with Mr. Blagden at Buffalo, on the date that the meeting took place?

Mr. BROMLEY. The same objection, of course, if Your Honor please.

Justice STEPHENS. The record may show the objection, and the same ruling.

The WITNESS. As I remember the meeting now, Mr. Blagden simply reported that the decision, I guess, had been rendered at that time, I am not sure, or at least he reported his troubles with the United States Gypsum Company.

At that time I think Mr. Blagden had only been President of this company for a short time. The burden fell on his shoulders to run the company, and among the other difficulties was this litigation he had with the United States Gypsum Company. And he reported to me, at my request, what efforts he had made, and what the Court had done about it so far. I was vitally interested because we were threatened with infringement, and I was anxious to find out where the Certain-teed Products or the Beaver Board, whichever it was at this time, stood.

Justice STEPHENS. You were anxious to ascertain what?

The WITNESS. To find out what he had done with regard to settling the case, and what the Court had ruled in his case. I wasn't familiar with it, I hadn't heard.

726 By Mr. STEFFEN.

Q. Do I understand that you say the Beaver Board people were in litigation with USG at this time?

A. Well, the Beaver Products Company, which at the time this letter was written seems to be the company that Mr. Blagden represented. And he had only recently, a short time before, become President of the Beaver Products, and he had these interviews, as he reported, I don't remem-

ber how many he had had, with Mr. Avery, in an attempt to get them adjusted and settle the litigation.

Q. To settle the litigation with the USG?

A. With the USG.

Q. And did he ever tell you, or state whether or not he told you of the meetings that he had with Mr. Avery?

Mr. BROMLEY. May I have a continuing objection to this line of testimony, if the Court please?

Justice STEPHENS. The record may show that all of the testimony of declarations of statements between Mr. Blagden and Mr. Griswold and others, outside the presence of the defendants or their representatives, are received subject to the objection and to the ruling which the Court has just made with respect to Exhibit 104, and that class of testimony.

Mr. STEFFEN. Would you repeat the question?

(The pending question was read by the reporter.)

The WITNESS. I don't remember of him telling me,
727 he possibly did, but I don't remember at this time, except in a general way that he had had one or more, I don't remember how many.

By Mr. STEFFEN.

Q. Meetings with Mr. Avery?

A. Yes.

Q. State whether or not he said that he had discussed the amount of a possible royalty with Mr. Avery?

A. My recollection is that he said that he had.

Q. Do you recall what the amount of the royalty was that Mr. Blagden spoke of?

A. Well, this was my earliest recollection of any figure of what the royalty might be, and as I remember it, Mr. Blagden reported that it was either $2 or $2.10 per thousand square feet. That applied, as I remember it, to future —from this point on—not to past infringements.

Q. Was that figure acceptable to you and Mr. Blagden?

Mr. BROMLEY. I object to the form of that question as leading and calling for a conclusion.

Justice STEPHENS. Is this witness within the rule with respect to leading questions? There is a rule, I think you are all familiar with the rule, the new rules permit cross-examination of any adverse party or the officer of an adverse party, stating it roughly. Is he within this rule?

Mr. STEFFEN. That rule applies, as I understand
728 it, to an officer of a defendant, and while American is supposed to be a conspirator, as we contend, it is not a present defendant.

I will rephrase the question.

Justice STEPHENS. Well, it is technically leading. You might ask him, rephrase your question and ask him to state what happened or what was said, so as not to suggest the answer.

By Mr. STEFFEN.

Q. State whether or not, Mr. Griswold, you and Mr. Blagden discussed whether you would accept a $2.10 royalty?

A. Well, as I remember it at this time, we thought that was a little bit high, because——

Justice STEPHENS (interposing). Answer the question, Mr. Griswold. We don't want to be over-technical with you, but we must confine the answers to the questions. The question was—did you and Mr. Blagden discuss whether or not you would accept that?

By Mr. STEFFEN:

Q. That can be answered yes or no.
A. Yes, I think we did discuss it.
Q. What was your discussion?

Mr. BROMLEY. May his answer, "we thought", and so forth, be stricken?

Justice STEPHENS. It may.

729 By Mr. STEFFEN.

Q. Well, is it your best recollection that you did discuss it, or not?

A. Yes.

Q. What was your discussion, Mr. Griswold, concerning the royalty of $2.10 which Mr. Avery had asked?

A. As I remember it now, I did not object so seriously to it. I think it was Mr. Blagden that thought the royalty should be reduced from that amount, but I had gone into the matter probably to a greater extent than he, and I considered it more favorably, as I remember it, at that time.

Mr. BROMLEY. I move to strike that out as not responsive, it doesn't give the conversation.

Justice STEPHENS. Well, I think, Mr. Bromley, that technically speaking, whether or not an answer is responsive is an objection that lies only in the mouth of the examining counsel, because he might make it responsive by asking another question. I think the witness is really trying to give the substance of what was said in his own way. I deny the motion.

By Mr. STEFFEN.

Q. Now, Mr. Griswold, will you state whether or not you and Mr. Blagden discussed the matter of fixing prices on gypsum board?

Justice STEPHENS. Please repeat the question.

By Mr. STEFFEN.

730 Q. State whether or not you and Mr. Blagden discussed a plan for fixing prices and stabilizing them for a period of 10 or 15 years?

Mr. BROMLEY. I object to that as incompetent, because leading and calling for a conclusion.

Justice STEPHENS. Strictly speaking, Mr. Steffen, you should ask the witness what was discussed there.

I do not think, however, Mr. Bromley, it is objectionable to ask the witness if certain topics of discussion were gone into, because the witness is not himself a trained lawyer, and perhaps doesn't make quite the discriminations that we do.

You may proceed, Mr. Steffen.

Mr. STEFFEN. Will you read the question?

(The pending question was read by the reporter.)

The WITNESS. We did not.

By Mr. STEFFEN.

Q. Mr. Griswold, I direct your attention to the final paragraph of the letter, and ask if that will refresh your recollection? I am referring to Government's Exhibit 104. Please read that. It is dated May 12, 1926.

My question, Mr. Griswold, is—does that refresh your recollection as to one of the subjects which you discussed with Mr. Blagden?

A. To this extent, that apparently at this meeting we had been discussing the possibility of a license agree-
731 ment with the United States Gypsum Company, and I think Mr. Blagden and I thoroughly understood at that time that the law granted to the United States Gypsum

Company, under the authority of the patent they were claiming, the right to fix prices, and if one or both of us took out a license we probably would have nothing to say about the price, as the licensor had the authority to tell us what price at which we should sell the licensed product, and it would probably have a stabilizing influence on the market.

But so far as us discussing prices between ourselves, fixing prices, absolutely not.

Q. Do you recall whether you and Mr. Blagden discussed the length of time for which the price might be stabilized under a license agreement?

A. No, I do not remember.

Q. Will you please refer to Exhibit 104 and see if that refreshes your recollection?

A. To the extent that we probably had in mind that the license, if it was taken out—the patent had 14 or 15 years to run yet—and the licensor would have that authority over us, and the price we were to sell the product at, for that time.

Q. Did you discuss any particular patent with Mr. Blagden?

A. Well, we discussed the Utzman patent. There
732 were really only two, as I remember it, patents really under discussion, so far as wallboard edge at that time was concerned. One was the Utzman patent, which the United States Gypsum Company were using in the manufacture of their product, and the other was this Clark or Birdsey patent, which we were manufacturing board under, the Clark patent. And the United States Gypsum Company claimed the Birdsey patent, they were practically the same thing. Those were the two that we had in mind at that time, as I remember it.

Q. Do you recall, Mr. Griswold, whether you discussed any other patents with Mr. Blagden at this time, upon which your company and Mr. Blagden's company might take a license from USG?

A. No, I do not remember, without something to refresh my mind, I don't remember at this time.

Q. Do you know at what time the Utzman closed-edge board patent would expire, or did you know at that time?

A. I don't think I really knew, at that time, what time it did expire. I remember at the start I felt it had several years to run yet, but I had never looked at the date of the patent, I think, because we were interested in the Clark patent, we had paid no attention to the Utzman patent, and had gone ahead and manufactured board under what we considered was our own patent at that time.

Q. Did you subsequently learn when the Utzman
733 patent expired?

A. Yes, later on I found out.

Q. And could you state now?

A. I think, as I remember it, it expired in about 1937, or somewhere thereabouts.

Mr. STEFFEN. I will state as a matter of record that the Utzman closed-edge patent expired on August 6, 1929, and your letter was written in 1926.

The WITNESS. That is right.

Mr. BROMLEY. The Utzman machine patent did expire, just as the witness said, in 1937.

By Mr. STEFFEN.

Q. Now did you and Mr. Blagden discuss, in addition to the closed-edge patent which you have spoken of, a second Utzman patent under which you might take a license?

A. I don't remember doing so, at this time.

Mr. STEFFEN. We offer Government's Exhibit 104 in evidence.

Mr. BROMLEY. The same objection as heretofore stated.

Justice STEPHENS. For what purpose is it offered, Mr. Steffen, just to refresh the recollection of the witness?

Mr. STEFFEN. No, I offer it generally as a declaration of a co-conspirator.

Justice STEPHENS. Let me see it, please.

Mr. STEFFEN. In furtherance of the plan of conspiracy.

734 Mr. OLIVER. I would be glad to join in Mr. Bromley's objection, if it is necessary.

Justice STEPHENS. This may be received in evidence subject to the ruling of the Court already announced on this class of testimony.

(The letter of Mr. Griswold to Mr. McCrady, dated May 12, 1926, was marked as Government's Exhibit No. 104 and received in evidence.)

Mr. FINCK. If the Court please, may I make a further objection on behalf of National? It seems to me that in order that the statements or admissions of one co-conspirator may be binding on the others, that a combination must

exist at the time that the statements or acts were made or committed, and in so far as National is concerned I understand now, from the opening statement and admission of Mr. Steffen, that the combination was formed at the time the agreements were entered into, and that makes the date May 17, 1929, for National, when it presumably joined the combination, if there was one.

Now the American did not join the combination by any agreement until long after that time, and prior to the joining of the combination Mr. Griswold, as the agent of American, was no longer with that company. So that it doesn't seem to me that the application of the principle of principal and agent exists here, and I don't see how any of this testimony that Mr. Griswold can give can be binding on National, if he is to speak as our agent. He was never a member of this combination, if there was one, at any time while we were a member of the combination.

735

Justice STEPHENS. Will you state those dates again, I am sorry but I don't quite get your point, Mr. Finck.

Mr. FINCK. National signed its first license agreement with USG on May 17, 1929. Mr. Griswold was out of business at that time, he was never a member of this combination at any time that National was in it. Furthermore, he was out of American before American joined the combination, because they did not take a license——

Justice STEPHENS (interposing). What is the date of these conversations that he is talking about?

Mr. FINCK. In 1926.

Justice STEPHENS. And National came in in 1929, I see your point.

Mr. FINCK. Yes. Griswold resigned prior to the time that National came into the combination. He was no longer in the business on May 17, 1929.

Justice STEPHENS. Was his company still in the business?

Mr. FINCK. His company was still in business, but they didn't join the combination until some time thereafter, and they certainly were not members of this combination at the time Mr. Griswold could speak of.

736

Justice STEPHENS. What do you say to that, Mr. Steffen?

Mr. STEFFEN. Well, I say that I think the argument is all predicated on a misapprehension of the situation as regards when the combination was formed. All that I said, and I want to make the record very clear, is that the combination and conspiracy in 1929 became full blown, it became a clearly illegal combination at that time under the Masonite case, but we did not say that it then and for the first time came into being.

We say that it rather started back in 1925 and 1926, and parties were added from time to time. National came in a little later, and the combination became a complete monopoly by 1929.

Mr. FINCK. Well, Your Honor, with respect to this particular exhibit, it couldn't affect National, because National did not manufacture any board until June, 1926, so that as to this exhibit dated May 12, 1926, I don't see how that can be accepted or is competent as against National or any of these other defendants who joined the combination later on.

Justice STEPHENS. We are in difficulty, Mr. Finck, of only being able to judge of this case piecemeal, at the present time. We don't know, from any evidence here, when National started manufacturing board.

737 Mr. FINCK. Well, that is true, I think that is admitted, they admit that in the Complaint, that is all outlined in the Complaint, Your Honor.

Now in the Hitchman case, it says:

"In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants * * *"——

that there was one, there must be a combination in existence if this evidence is going to be received by one co-conspirator against another.

And then, furthermore, it must also show that it is in furtherance of the conspiracy.

Now how on earth could he commit any act or make any statement in furtherance of the conspiracy before his company was a member of this combination? It couldn't be done, as far as I can see.

Justice STEPHENS. What do you say, Mr. Steffen, to that?

Mr. STEFFEN. Well, I say that I think Mr. Finck's arguments proceed upon the same error that there could be no combination until there is a written agreement.

Mr. FINCK. No, no.

Mr. STEFFEN. And that National didn't sign a written agreement until sometime in 1929.

Justice STEPHENS. What do you say to the proposition that Mr. Finck announces, that it is admitted in the pleading that National wasn't even manufacturing board at the time of these conversations?

738

Mr. STEFFEN. Well, I would cite Your Honor the case of Roberts v. United States, 248 Fed. 873, which has to do with the question of a continuing conspiracy where additional parties are added from time to time, and the objection was made in that case, just as Mr. Finck is making it here, that the particular party was not a party to the original conspiracy or a party at the beginning.

And the Court there said:

"We do not find that the admission of evidence relating to matters that occurred prior to Roberts' connection with the case was in any way prejudicial to the defendant Roberts. This evidence was purely introductory, and was only significant in the light of the testimony relating to the proceedings in which the defendant Roberts afterwards participated. Besides, the evidence was admissible under the familiar rule that, where a person enters into a conspiracy after its formation, the acts and declarations of the other conspirators before he entered are admissible against him."

It is our contention that the conspiracy took complete shape and was of an illegal character in 1929, but that the roots of the conspiracy started in 1925 and 1926, and parties were added, and that it took substance and form as it progressed. Our evidence here is largely to show the substance and form of the conspiracy which was then in being and growing, and to which additional parties were added.

739

Mr. FINCK. I would like to have Mr. Steffen answer your question, he didn't do it.

Justice STEPHENS. I think he did. The question I asked was what he answered in respect of your question that National didn't manufacture board at the time of these declarations, and he answered by citing this authority to the effect that if the evidence eventually shows that National joined the combination, the Federal Court which he cites has decided that once it has joined the combination it has adopted it, and it is bound by what was said by the co-conspirators before or afterwards.

Mr. FINCK. I agree with that statement, but I don't agree that the statements can be made by some outsider, some third person who was not a member of the combination at the time the statements were made.

Justice STEPHENS. Perhaps that is a further point, Mr. Steffen, I ought to hear you on. Now the point is that at the time these statements were made, American was not part of the conspiracy.

Mr. STEFFEN. We would contend that American, and Mr. Blagden, were in process of going into the conspiracy as of this time, 1926, and that American subse-
740 quently did join the conspiracy by signing agreements, I mean they made their joining complete in 1929 by signing the agreement which all the other manufacturers signed at that time.

Justice STEPHENS. It seems to me that the problem is the same problem we ruled on at the outset of this morning's session, Mr. Finck. These declarations are not being received by the Court to prove the existence of the conspiracy or to prove that American entered the conspiracy. They are received subject to the duty of the Government to prove that a conspiracy was entered into at such time as would make these declarations and in such manner as would make them admissible as binding upon co-conspirators. But the same ruling will be made, with an exception for your client.

Mr. STEFFEN. I should now like to read for the record Government's Exhibit 104, which is short. It is a letter by Mr. Griswold addressed to J. H. McCrady, under date of May 12, 1926:

"MR. J. H. MCCRADY,
c/o McCrady Brothers Co., Braddock, Pa.

Dear Sir: I just returned from a meeting at Buffalo yesterday with Mr. Blagden, President of the Beaver Products Company. He has had one or two interviews with Avery on the matter of settling all disputes and litigations between the wall board manufacturers by entering
741 into a licensing arrangement and the thing looks very favorable. We are standing on 50¢ per M royalty. Avery is talking about $1.00 per M and I am inclined to think he will probably stand pretty firm on this price. However, on his own admission he has so much at stake on the proposition that he may change his views.

This matter will be discussed by all the independent wall board manufacturers at a meeting in Chicago next Wednesday afternoon and probably some definite action taken on it as the probabilities are that Avery may meet with us at that meeting. If you feel able to attend the meeting I will be very glad indeed to have you be there. According to the plans we have we figure that there is a possibility of us holding the price steady on wall board for the next fourteen or fifteen years which means much to the industry.

Yours truly,

THE AMERICAN GYPSUM CO.

(S) F. J. GRISWOLD."

By Mr. STEFFEN.

Q. Now, Mr. Griswold, do you remember whether there was a meeting or not in Chicago, of the independent wallboard manufacturers?

A. I do not, without something to refresh my memory. I couldn't remember it at this time.

Q. You used the word "independent" in your letter. What did you mean by "independent"?

742 A. By that I had reference to the manufacturers of wallboard that were independent, separate companies. The United States Gypsum Company was the largest concern in the country that was in the business, and anybody else was considered an independent manufacturer.

Q. Could you state what the occasion of the meeting of the independent wallboard manufacturers was, on the Wednesday mentioned?

Mr. OLIVER. I object to the question. He hasn't even established that there was a meeting on Wednesday.

Mr. STEFFEN. I will strike the question.

By Mr. STEFFEN.

Q. State whether or not the wallboard manufacturers held meetings from time to time for any purpose?

A. Well, I do not remember of them holding very many, if any, special meetings of the strictly wallboard manufacturers, but practically every member of the—every company that manufactured gypsum products east of the Rocky Mountains was a member of this gypsum association, gypsum industry association—it was called several different names at different times—and those meetings were usually held once a month, and such meetings as are

referred to in these letters by me as being a special meeting, undoubtedly those meetings were at the time the gypsum industry held their meetings, because that was
743 at the time to see these people when they would be together, and it is undoubtedly what I had in mind there. I think if the records could be looked at that would show.

Q. I will show you Government's Exhibit which has been marked for identification No. 103, and ask you to examine that, please, and tell us whether that refreshes your recollection as to whether there was a meeting on the Wednesday mentioned in your previous letter?

A. It does to this extent. There was a meeting, but I still am of the opinion that it was not a special meeting called for that particular purpose, that it was a meeting in conjunction with this meeting of the gypsum industry, in which all of these people were present, attending the industry meeting, and we undoubtedly discussed this license situation at the same time, and I think, as I remember, that is what this refers to.

Q. What was the purpose of the Gypsum Industries, was it a trade association?

A. Yes, a trade association.

Q. What sort of matters did it discuss?

A. Matters for the good of the industry, and new projects, and all that sort of stuff. They had several experts hired to develop the business, and if anything new came up they were discussed in a general way, anything that was for the good of the industry.

744 Q. State whether or not at this meeting on Wednesday, that you speak of, the matter of a licensing agreement came up for discussion?

A. If it was at a meeting of the Gypsum Industries, the license agreement was never discussed where there were wall plaster manufacturers present, they had nothing to do with that. This was only discussed by those people who manufactured wallboard, and by all of them, due to the fact that this patent litigation was up at that time.

Q. Can you state whether or not there was a meeting of the wallboard manufacturers at or about the time of the Industries meeting?

A. There was a meeting held, but as I state, not a special meeting called for that, a meeting in conjunction with this other meeting.

Q. Now at that second meeting on Wednesday, did the wallboard manufacturers, to the best of your recollection, discuss the licensing agreement?

A. To the best of my recollection they did.

Q. Could you tell us what manufacturers of wallboard were present at the meeting at which the licensing agreement was discussed?

A. Well, I could not say positively at this time, that is too long ago. The records probably might show it.

Q. Could you tell by examining Government's
745 Exhibit No. 103?

A. According to this letter, they were practically all there.

Q. Well, I would like your recollection, Mr. Griswold. Does that refresh your recollection as to who might have been there?

A. No, this doesn't. Just a minute until I read this——

Mr. FINCK (interposing). May I ask what Exhibit No. 103 is?

Mr. KNUFF. D-5, in the photostats that you have.

Mr. FINCK. Thank you.

The WITNESS. It only mentions two, Mr. Blagden's and Mr. Avery's names are mentioned, but there are no other members mentioned in this letter, and I do not remember who was there.

By Mr. STEFFEN.

Q. What was the Atlantic Gypsum Company making board at this time, do you recollect?

A. What company?

Q. The Atlantic.

A. Well, I could not say definitely without something to refresh my memory; but I do not think they were in the business at that time.

Q. Was the Universal Gypsum Company manufacturing board in 1926?

746 A. As I remember it, they were at that time.

Q. Do you recall whether a representative of Universal was at this meeting on Wednesday?

A. I do not remember positively at this time.

Q. Was Texas manufacturing wallboard at this time?

A. I don't think they had started the manufacture of wallboard at this date.

Q. Was Ebsary manufacturing wallboard at this time?

A. No, Ebsary's plant was not built that early, it was at a later date than that.

Q. Was the Beaver Products Company manufacturing gypsum board at this time?

A. Yes.

Q. And do you recall whether a representative of the Beaver Products Company was present at this meeting?

A. Mr. Blagden's name is mentioned here, so he evidently was present or I wouldn't have mentioned it.

Justice STEPHENS. Do you recollect yourself whether he was there?

The WITNESS. No, I can not say that I remember that he was there.

By Mr. STEFFEN.

Q. Was the Niagara Gypsum Company manufacturing board at this time, Mr. Griswold, if you recollect?

A. I think they were, but they had not been manu-
747 facturing any great length of time.

Q. Do you recollect who was President of Niagara?

A. M. A. Reeb of Buffalo.

Q. Do you remember whether he was present or not at this meeting?

A. No, I do not.

Q. Was the Certain-teed Products Company making gypsum board at this time?

A. I could not say, but if they were it was at Acme, Texas, not up in this northern territory.

Q. Do you recall whether there were any manufacturers present at the meeting on Wednesday who were not making gypsum board? I refer you to the first part of the exhibit.

A. I do not remember, but the letter states that there were two who were contemplating going into the wallboard business, or would soon be in production and were building plants, probably at that time.

Justice STEPHENS. Please read the question and answer. I didn't get it.

(The record was read by the reporter.)

Mr. FINCK. If the Court please, I object to that, and move to strike it out as not responsive.

Justice STEPHENS. I think, Mr. Finck, that the objection that a question is not responsively answered can only be made by examining counsel, for the reason
748 that if it is not responsive he can ask another question which, reframed, will make it responsive. You will have to object on some other ground than that.

Mr. BROMLEY. We New York lawyers seem to have that rule backwards.

Justice STEPHENS. Perhaps the Court has it backwards. I don't claim to be infallible, gentlemen, but I think that really is the rule, that adverse counsel can object on the grounds of irrelevancy or incompetency or on other grounds, but if it is not responsive the person who has asked the question is the one who should object.

The Court so far isn't asked to consider, and I suppose it won't be asked to consider, anything but what the witness recollects himself.

Mr. ADAMS. That is the basis for my objection. I don't think he should be permitted to read what is said in a letter unless he says this refreshes his recollection. I don't think we should take as evidence simply what he now reads from the letter, and I therefore object.

Justice STEPHENS. The Court is not considering as evidence what he reads from the letter, but only his recollection.

Mr. OLIVER. May I make the additional observation that the document is not signed by anyone, and I don't think it has been established that this was a letter of Mr. Griswold's.

Justice STEPHENS. Well, I don't think that ob-
749 jection is well taken, Mr. Oliver. If anything, whether a stick or stone or a letter or anything else, refreshes the witness' recollection, whether it is an object or a writing, it may be shown him to refresh his recollection. But it is not evidence, and the Court is not considering it as evidence.

By Mr. STEFFEN.

Q. Mr. Griswold, do you recall having attended a meeting on the date mentioned in Government's Exhibit 103?

A. Yes, I have a recollection of attending the meeting.

Q. Do you recall whether Mr. Avery was at that meeting?

A. I think at some time during the meeting Mr. Avery was there; whether it was where we were meeting or whether they went over to the United States Gypsum Company offices, I do not remember.

Q. Could you tell by referring to the exhibit, would that refresh your recollection as to where the meeting was held at which Mr. Avery attended? I refer you particularly to the second paragraph.

A. The second paragraph?

Q. Yes.

A. There was a meeting the next day after the first meeting. Whether that has reference to the Gypsum Industries meeting or the wallboard manufactureres, I couldn't say, the first day——

750 Q. (Interposing). My question, Mr. Griswold, is—could you tell from examining the second paragraph there, or does it refresh your recollection so that you can now say of your best recollection where the meeting was held at which Mr. Avery attended?

A. I could not say where it was held. It was at a place in Chicago, but at just what point I do not remember at this time, and I can't tell from this letter.

Q. Can you tell the Court whether the matter of the licensing agreement was discussed with Mr. Avery at this meeting—again I refer you to the second paragraph, if that is necessary to refresh your recollection?

A. Yes, the license agreement proposition was evidently discussed at this meeting.

Q. Will you state what the discussion——

Mr. BROMLEY (interposing). I move to strike that answer out on the ground that it states a conclusion, because he says "evidently".

Justice STEPHENS. The witness said, Mr. Steffen, that it was evidently discussed. In view of the witness' care in his answers, I take it that he means by that that he doesn't remember, himself; and if that is true, if he is simply stating what is in that record, it may go out.

By Mr. STEFFEN.

Q. May I ask, Mr. Griswold, to have you state
751 whether or not you now recollect that the matter of the licensing agreement was discussed at that meeting at which Mr. Avery was present?

A. No, that is too long ago, I could not state positively that it was discussed without something of this kind to refresh my memory.

Justice STEPHENS. You are entitled, Mr. Griswold, to look at these items that are submitted to you, for the purpose of helping to refresh your recollection, we all need to refresh our recollection at times. But what the Court is interested in having, of course, is your own recollection, if you have any; and if you haven't, you should frankly state that you haven't, as you have stated.

By Mr. STEFFEN.

Q. To further refresh your recollection, possibly, Mr. Mr. Griswold, I show you your answers to questions when

your deposition was taken at Port Clinton, and I refer you to page 36 of the transcript. Now, Mr. Griswold, can you state whether or not you recollect that the matter of a licensing agreement was discussed at this meeting at which Mr. Avery was present?

A. Yes, this refreshes my memory to this extent, that these notifications or suits for infringement were on, and that the patents which the United States Gypsum Company were claiming covered practically every type
752 of edge, including the one we were making, the Clark patent; so there was really nothing left for any manufacturer of wallboard to make except an open-edge type of board, where all four sides of the board had a raw edge. And it was a matter that those who were manufacturing board and those contemplating the manufacture of board had to consider very seriously, because if they were only allowed to manufacture an open-edge type board they were up against a pretty serious handicap to carry the business on successfully.

For that reason they were discussing the possibility of what would face them if the United States Gypsum Company won these suits for infringement, which evidently at that time had not been decided, but if they were decided in favor of the United States Gypsum Company we would be up against a serious proposition.

Q. Now do you recollect whether there was any statement of the attitude of the different manufacturers present, given to Mr. Avery at this meeting?

Justice STEPHENS. Please read that question.

(The question was read by the reporter.)

The WITNESS. Yes, there was, as I remember it.

By Mr. STEFFEN.

Q. And what was their attitude toward the licensing agreement, as expressed to Mr. Avery?

Mr. BROMLEY. Objected to as incompetent and
753 calling for a conclusion.

Mr. ADAMS. Moreover, I may point out that there has been no person present identified as representing any manufacturer, other than perhaps Mr. Blagden and Mr. Griswold himself, and Mr. Avery.

Justice STEPHENS. I think the question calls for a conclusion. I think you ought to ask the witness what was stated. With respect to the witness not remembering who was there, that is the first time that objection has been raised. The defendants' counsel are entitled to have the

time and place and the circumstances and the persons present identified with reasonable certainty. On the other hand, we can't expect to have the witness remember the impossible. He does say that board manufacturers were present, he doesn't identify them.

I think I ought not rule that he can't answer what was said at that meeting merely because he can't identify the persons; but I think the witness ought to be asked not what their attitude was, but what they stated, in substance and effect.

We don't expect you to remember the exact words, Mr. Griswold, but you should tell us what, in effect and substance, was said.

754 Mr. ADAMS. I don't want to labor this point, Your Honor, but the difficulty that I have here is in having the witness testify to something that was said at a meeting of wall board manufacturers, presumably in furtherance of the conspiracy. We have no idea who was present. Now, it illustrates again the vice in this whole situation.

I quite agree with Your Honor that it is impossible for him presently to remember all of these details, but it seems to me that this is more fundamental than that.

Justice STEPHENS. But the witness has testified, Mr. Adams, who was manufacturing wall board at about this time.

Mr. ADAMS. I agree with that, but that does not say that they were present at the meeting, or that those who represented a particular company were present at the meeting; that is, if th "X" Corporation was there, it does not say who was there in its behalf. We are at a loss to know how to meet this kind of evidence.

Justice STEPHENS. Do you remember any individuals there by their names, Mr. Griswold?

The WITNESS. No, Your Honor, not at this time. I can't recall who was at the meeting, outside of the names mentioned. Mr. Avery, I know, came at some period during the meeting, and Mr. Blagden apparently was there, because it so states in this letter, and I also stated it in my testimony.

For your information, the letter I have here is a
755 letter in which I am reporting to the president of my own company, who was on the committee with me.

Justice STEPHENS. I think, Mr. Steffen, I will hear you.

but I am inclined to think that Mr. Adams' objection, on further consideration is well taken. Unless the witness can identify the persons present at the meeting, he can't tell what they said. Otherwise, the defendants are in no position to test the accuracy of his statements by calling those persons and examining them. He does seem to remember that Mr. Blagden and Mr. Avery were there. He may be interrogated as to what they said, but I think we will rule that he cannot tell what other persons said unless he remembers who they were.

By Mr. STEFFEN.

Q. I want to ask you, Mr. Griswold, to turn the first page of Exhibit No. 103 over, and read the first paragraph of the second page, and ask if that refreshes your recollection as to who may have been present at the meeting.

A. Yes; I had not noticed this second page. Mr. Shearer's name is mentioned.

Q. Who is Mr. Shearer?

A. He was connected with the Universal Gypsum Company at that time, and was president, as I remember it.

Q. Now, would you tell the Court whom you remember as having been present at the meeting, each individual?

A. Well, Mr. Avery. I said in the other answer
756 that I didn't remember distinctly, but evidently Mr. Avery was there, and Mr. Blagden was there, and Mr. Shearer—those three are all mentioned—and probably there is no question but what they were there, but it is too far back, and I can't remember distinctly that far.

Justice STEPHENS. You are stating that because of what is in the writing, or because you remember it?

The WITNESS. Well, because it is in the reference here. Outside of that, I could not remember distinctly if they were there at that meeting.

Mr. BROMLEY. I move to strike out the answer.

Justice STEPHENS. It may go out.

By Mr. STEFFEN.

Q. Did you, Mr. Griswold, draw up a report——

Justice STEPHENS (interposing). Just a moment. Judge Garrett raises a point. He says that technically the answer you moved to strike, Mr. Bromley, was the answer to the Court's question. You meant to move to strike the answer that they were "evidently" there, I presume.

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. That is the answer I intended to rule out.

Mr. BROMLEY. The answer to Mr. Steffen's question.

Justice STEPHENS. Yes.

By Mr. STEFFEN.

757 Q. I want your best recollection, Mr. Griswold, without saying "evidently" or "probably"—either yes or no—was Mr. Blagden at the meeting, according to your best recollection?

A. Yes, to the best of my recollection he was.

Q. According to your best recollection—yes or no—was Mr. Shearer at the meeting?

A. Yes.

Q. And according to your best recollection—yes or no—did Mr. Avery appear at the meeting at some time?

A. Yes, at some time during the meeting.

Q. Now, I would like to ask you what Mr. Blagden or Mr. Shearer or yourself may have said to Mr. Avery concerning the licensing agreement.

Mr. BROMLEY. Could I ask this preliminary question, Your Honor?

Justice STEPHENS. Yes.

Mr. BROMLEY. Is your recollection based on the document, or outside the document, the letter, I mean?

The WITNESS. This letter here, do you mean?

Mr. BROMLEY. Yes.

The WITNESS. No, I have a very distinct recollection that they were at that meeting, and this was evidently the meeting that they were present at.

Justice STEPHENS. I don't understand you, Mr.
758 Griswold. I thought you had been testifying all along, up until these last three questions, that you had no independent recollection of who was present, except that wall board manufacturers were present, but that you took it from this writing in front of you that those persons were there. Now you say you have a recollection.

The WITNESS. Well, naturally, Your Honor, in reading these papers they bring back things to my mind. It is pretty hard for me to remember without something to refresh my memory, and after reading them it occurs to my mind that these gentlemen were there, and if they were

not there I wouldn't have so reported to the president of our company.

Mr. BROMLEY. I move to strike out the answer. It is perfectly apparent what the basis of his answer is.

Justice STEPHENS. I am sorry, Mr. Steffen, but it seems to me perfectly clear that this witness is not testifying from his own recollection; that he honestly wants to remember if he can, and he believes that the letter states the facts, but that he has no independent recollection of who was there at all, except possibly as to Avery and Blagden. I think the answer ought to go out.

Mr. STEFFEN. Well, as to Avery and Blagden, it may be, I should think, admitted.

Justice STEPHENS. It may remain as to Avery and Blagden—otherwise, not.

759 Mr. STEFFEN. Now might I interrogate the witness further in regard to Mr. Shearer's presence?

Justice STEPHENS. Yes.

By Mr. STEFFEN.

Q. When you first answered concerning Mr. Shearer, Mr. Griswold, you said "evidently" that he was there. Can you now, after reading your answers, and the reading of this paper, independently, apart from the paper entirely, remember anything that transpired which would fix Mr. Shearer as having been present at that meeting?

A. There is one instance that I remember that I am sure was at this meeting, and that was the fact that we got Mr. Shearer and Mr. Avery to meet. They hadn't been meeting very often in the past, on account of a certain feeling that they had toward each other, and this was the first time they had gotten together, and that impressed itself on my mind.

Q. Now I ask you, what did Mr. Blagden, or Mr. Shearer, say to Mr. Avery in regard to the licensing agreement, if you remember?

A. I do not remember.

Q. Did you ask Mr. Shearer or Mr. Blagden, or any other representative who might have been present, what their attitude toward taking out a license with Mr. Avery might be?

Mr. ADAMS. I respectfully object to that on the same grounds that I mentioned before, insofar as the
760 question refers to any other representative present.

Justice STEPHENS. I am sorry, I don't understand that objection; Mr. Adams.

Mr. ADAMS. Well, as I recall the question I think he said: Did you ask Mr. Blagden or Mr. Shearer, or any other representative, what their attitude would be?

Justice STEPHENS. The question may be stricken as to that particular phrase.

Do you recollect anything said by Mr. Shearer, Mr. Avery, or Mr. Blagden on this subject, and if so, state it?

Mr. STEFFEN. I think he has answered that question, that he does not remember.

Justice STEPHENS. I am sorry.

The WITNESS. No, I do not remember at this time.

Justice STEPHENS. Perhaps I did not understand your question correctly.

Mr. STEFFEN. My next question was whether he polled the members present, and I will restrict that to Mr. Shearer and Mr. Blagden, as to their attitude toward taking out a license agreement with Mr. Avery and the United States Gypsum Company.

Mr. BROMLEY. I object to that as calling for a conclusion.

Justice STEPHENS. I think that objection is well taken. You should ask what the witness said to these gentlemen.

Mr. STEFFEN. May I say, Your Honor, that he
761 has testified that he does not recollect what they said.

Justice STEPHENS. Well, I don't mean that he is required to repeat the words, but he should tell the substance and effect of what was stated by him on that subject, if anything.

By Mr. STEFFEN.

Q. Can you answer the Court's question, Mr. Griswold? To the best of your recollection, what was the substance and effect of anything that Mr. Blagden may have said to Mr. Avery concerning the possibility of taking out a license agreement?

Mr. BROMLEY. I object to that.

Mr. OLIVER. I object to that also. There is no showing that he was present when such a discussion may have taken place.

Mr. STEFFEN. I am asking whether he recollects that there was anything said to Mr. Avery, and the substance and effect of what was said.

Justice STEPHENS. Well, I think in that particular question you asked what was said. Of course if he wasn't present at the conversation between Mr. Avery and Mr. Blagden, he couldn't tell it.

Were you present at a conversation between Mr. Blagden and Mr. Avery on this subject?

The WITNESS. I could not remember of being actually present when any conversation between the two took place.

Justice STEPHENS. Then that will have to go out.

762 By Mr. STEFFEN.

Q. I will refer you again, Mr. Griswold, to paragraph 2 of the exhibit, and ask you if that refreshes your recollection concerning what took place at the meeting, and ask this specific question: Did you poll the members present, Mr. Blagden and Mr. Shearer, as to whether they would take out a license agreement with Mr. Avery?

Mr. BROMLEY. That is objected to as calling for a conclusion.

Justice STEPHENS. What do you mean by "poll"?

Mr. STEFFEN. I mean——

Justice STEPHENS (interposing). Did he ask them?

Mr. STEFFEN. Did he ask them what their attitude would be as to taking out a license with Mr. Avery? It does not seem to me to be asking for a conclusion. Perhaps every question does in some measure.

Justice STEPHENS. Well, it depends upon whether the witness understands what you mean by the word "poll", I suppose. But I should think you might better ask the question, whether or not he asked these gentlemen, whether or not he remembers asking them.

By Mr. STEFFEN.

Q. Do you remember having asked the members present, or polled them, as to what their attitude would be toward taking——

763 Mr. ADAMS (interposing). Are we just limiting that to these two members?

Mr. STEFFEN. I should like to ask that it have to do with the two members that are fixed as being there. We have also

fixed that there were other members present whose names Mr. Griswold does not remember, but which would become important. It would indicate that a number of members in the industry were apparently all together in one meeting with Mr. Griswold. We have not been able to fix the names of those members present.

Justice STEPHENS. I think the Court is obliged to rule, Mr. Steffen, according to orthodox principles of examination, that you cannot ask this witness to testify as to what was said by people or to people whom he can't even, in the most indefinite manner, identify or remember as having been present. Adverse parties are utterly helpless under those circumstances to meet such testimony. You may ask him if he recollects asking Mr. Blagden or Mr. Shearer, whom he now says he does remember as being present, questions on the topic of this license agreement, but I will have to rule against you on the balance.

Mr. STEFFEN. Well, I will ask my question, then, limiting it to Mr. Blagden and Mr. Shearer.

By Mr. STEFFEN:

764 Q. Do you recall—and will you state to the Court —whether or not you asked Mr. Shearer and/or Mr. Blagden, or polled them, as to their attitude upon taking out a licensing agreement with Mr. Avery and the United States Gypsum Company?

Mr. BROMLEY. I object——

Justice STEPHENS (interposing). For the benefit of the Court, won't you tell me what you mean by the word "polled"?

The WITNESS. Whether I asked them the question, and whether they were in favor of it or not.

Justice STEPHENS. I see. The witness understands it, and he may answer if he recollects.

By Mr. STEFFEN.

Q. Did you ask Mr. Blagden or Mr. Shearer what their attitude would be toward taking out a licensing agreement with United States Gypsum?

A. I don't think I did; it wasn't necessary. Mr. Blagden already had the matter up with United States Gypsum Company, and I think Mr. Shearer did at that time. I might have asked them what their opinion was at the time, but I don't remember, as to those particular people.

Q. I refer particularly with regard to the time at which you testified Mr. Avery was present at the meeting. Was there an expression of opinion, of which you can now recall the substance and effect, by either Mr. Shearer or Mr. Blagden, as to what they would do, or whether they would take out a licensing agreement, what their attitude would
765 be toward taking out licensing agreement?

A. Well, I don't remember with reference to those two, because they already had negotiations with the United States Gypsum Company.

Q. Had Mr. Shearer at that time?

A. I think he had. At that time I think the Universal was under some kind of a discussion with the U.S.G., I am not too sure, it is too far back.

Q. Do you recall whether you prepared a letter, addressed to Mr. McCrady, in which you set down what transpired at the meeting at Chicago? You can answer that yes or no.

A. Yes, I did.

Q. Have you examined Government's Exhibit 103, and is that a letter which you wrote?

A. Well, it is an unsigned letter. There is a stamp on it with my signature, but my initials are over in the corner, placed there by the stenographer.

Q. Will you state whether or not you can identify that as a letter which you wrote?

A. I would say that it was, yes, sir, that I wrote this letter.

Q. Could you state whether or not the second paragraph of that letter was a correct statement of facts as you understood them?

Mr. ADAMS. I object to that. There is nothing in
766 evidence, there has been no offer as yet, with respect to this letter, and in any event such a statement would not be binding on any of the persons referred to therein, if any.

Justice STEPHENS. Well, the Court is not advised as to what counsel for the Government are attempting now. Perhaps this is an offer of something under the doctrine of "past recollection recorded," as distinguished from "present recollection refreshed." If so, the witness can state whether it is a correct statement of his recollection at that time, if he has any. I don't know, myself, what is in the document.

By Mr. STEFFEN.

Q. Can you state now to the Court whether or not you correctly recorded the facts as you understood them when

you wrote or prepared the second paragraph of that letter?

A. Yes.

Mr. BROMLEY. I object to that as incompetent and move to strike the answer. How can he possibly say that when he says he has no recollection?

Mr. STEFFEN. I would say that he now testifies, and has answered yes, that that was a correct statement. He may have no present recollection of those facts.

Mr. OLIVER. May I observe that he simply said that that was an unsigned letter, with his initials on it, and that they had undoubtedly been put there by the stenographer, and that is all he said.

Justice STEPHENS. Let me see this exhibit, please.

767 (The exhibit referred to was handed to the Court.)

Mr. STEFFEN. Your Honor, may we have a brief recess at the moment?

Justice STEPHENS. Is there any objection to a recess?

Mr. BROMLEY. No, sir.

Justice STEPHENS. We will recess for five minutes.

(At this point a five-minute recess was taken, after which the proceedings were resumed.)

Justice STEPHENS. Let the Court confer informally with counsel.

(There followed an informal conference between counsel and the Court at the bench, not recorded.)

By Mr. STEFFEN.

Q. Mr. Griswold, I want to refer again to the meeting to which you have testified as having been held at Chicago, at which Mr. Blagden and Mr. Shearer and Mr. Avery and yourself were present, and I will ask you this question. Did you ever prepare a report of what transpired at that meeting?

A. As I remember, I reported to Mr. McCrady, the president of the company.

Q. You reported to Mr. McCrady, the president of the company?

A. Yes, sir.

Q. And did you do that soon or at some later

768 time after the meeting?

A. Well, I couldn't say without referring to some letters, but I imagine it would be very soon after the meeting.

Q. Can you say, without using the word "imagine," whether it was soon? Will you look at the letter?

A. I would say it was soon after the meeting.

Q. I show you Government's Exhibit 103, and ask you if you can identify that as the report which you made to Mr. McCrady.

A. My opinion is that that is a copy of the report I made. This is evidently a copy of the letter, but my signature is not on it. That is my recollection or my opinion, that this is a copy, because I did report to Mr. McCrady as to such a meeting, I remember that distinctly.

Q. Can you say whether or not you made a correct report to Mr. McCrady of what transpired at the meeting, as you understood the facts at the time you made the report?

A. As I understood the facts at that time, and as I remember, I did make a correct report of it.

Q. And have you examined Exhibit 103, and does that state the facts as you understood them, or does it not?

A. You mean the whole report, the whole letter?

Q. That is correct.

A. I would say yes.

Mr. STEFFEN. I offer Government's Exhibit 103 in
769 evidence.

Justice STEPHENS. The rule which I referred to, of "past recollection recorded," requires the production of the original if it is available. You should produce the original, if you can, or else show that it is unavailable.

By Mr. STEFFEN.

Q. Is Mr. McCrady alive, Mr. Griswold?

A. No, sir.

Q. When you prepared your report and letter to Mr. McCrady, was there a carbon copy made?

A. Well, that was the custom. Of course I couldn't say in this particular case, but I presume there was, that was the rule, the way we handled the correspondence.

Q. And in the ordinary course, what would become of the carbon copy?

A. Well, it would be put in the files of the company, showing the correspondence with each individual.

Mr. STEFFEN. I make the point, Your Honor, that if it is a carbon copy and an actual recording, I should think this would record the evidence of what transpired as clearly

as the original, and we have been unable to get the original, and we have subpoenaed all the defendant companies for all papers.

Justice STEPHENS. You have tried to get it?

Mr. STEFFEN. Yes.

Mr. BROMLEY. You haven't subpoenaed McCrady
770 Brothers Company, who might have the original, have you, sir?

Mr. STEFFEN. We have not subpoenaed the McCrady Brothers.

Justice STEPHENS. The rule I was referring to states that "where the witness adopts the memorandum as a record of past memory, the original memorandum, if available, must be produced and not merely a copy of it." Of course that is the "best evidence" rule.

I raise the point because the events are so long ago that it is only proper that, for the protection of the Court and all concerned, we should be sure we are dealing with dependable evidence. The witness may not be in a position to verify the correctness of that copy, since he has no independent recollection of what occurred, but he is just simply saying that he supposes that it is a true copy, he does not know that it is a true copy.

Mr. STEFFEN. Your Honor, may I say something on that score?

Justice STEPHENS. Yes.

Mr. STEFFEN. He has testified to the meeting in Chicago; he has identified many of the things that are in the body of the agreement; he has testified that he made a report to Mr. McCrady, and he has testified that the carbon copy would be filed; he has identified that as a carbon copy of the report that he made.

Mr. OLIVER. May I add that he has not.

771 Justice STEPHENS. One at a time, gentlemen; I can't hear two people at once.

Mr. STEFFEN. The letter is addressed to Mr. McCrady, not to McCrady Brothers, and Mr. McCrady has long since been deceased.

Justice STEPHENS. Now Mr. Oliver?

Mr. OLIVER. The witness has not yet said that the document in front of him is the report he made. He said it was his opinion that it was.

Justice STEPHENS. I am afraid that is true, Mr. Steffen.

Mr. STEFFEN. I think, at one or two places, he has already said that that was the report that he made.

Justice STEPHENS. Read the last two or three answers, Mr. Reporter.

Mr. STEFFEN. I can ask him now, if you would like.

Justice STEPHENS. All right, that possibly will save time.

By Mr. STEFFEN.

Q. Mr. Griswold, we want to know whether or not that is a correct copy of the report which you testified you made to Mr. McCrady.

A. I could not say that that was a correct copy. It contains many of the things, in fact, all of the things, I said to Mr. McCrady in the report, but there is nothing on this to indicate that it was my letter or a copy.
772 Usually a carbon copy of a letter isn't filed that way, on that kind of paper. Somebody has made this, apparently.

Q. For purposes of refreshing your recollection, Mr. Griswold, I refer you to page 36 of your testimony taken out at Port Clinton, when this letter was presented to you.

A. My answer then was practically what I say now, that this is a copy. The contents of the letter I remember in a general way, and my opinion is that that is a copy, but I cannot swear that that is an exact copy of my original letter, because there is nothing here to indicate it, and this is not a carbon copy, that has been made from some other, because with our records, the way they were kept, the original sheets were not like that. But the contents I am willing to admit, it was practically the substance of my report to Mr. McCrady, but that is as far as I can go.

Q. And would you say whether or not that report to Mr. McCrady accorded with the facts as you understood them, at the meeting at Chicago?

Mr. ADAMS. I object to that.

Justice STEPHENS. Well, he has already answered that he doesn't recollect what happened. We are now in the field of past recollection recorded. I am afraid, Mr. Steffen —the Court wants to give the Government every proper opportunity to develop its case, and realizes the difficulty the Government is under with respect to aged wit-
773 nesses, and that long years have elapsed, but we, as presently advised, think it would be clear error to admit this exhibit, even under the doctrine of past rec-

ollection recorded, because he can't identify it even as a carbon copy.

Mr. STEFFEN. Would Your Honor care to recess for the noon hour.

Justice STEPHENS. If you have no other testimony that you can go on with at the present time.

Mr. STEFFEN. I would like to come back to this matter of this paper that we just had, Government's Exhibit 103, but I can go on with another matter if you like.

By Mr. STEFFEN.

Q. Mr. Griswold, after this meeting to which you have testified, at Chicago, in about May, May 21, did you report the matter back to the Board of Directors of the American Gypsum Company, do you recollect?

A. Yes, I did.

Justice STEPHENS. Did he do what, Mr. Steffen?

Mr. STEFFEN. Did he report the matter back to the Board of Directors.

Justice STEPHENS. Thank you.

By Mr. STEFFEN.

Q. You recall having reported it back to the Board of Directors of the American Gypsum Company?

A. Yes.

774 Q. What in general was the substance of the report back to the Board of Directors?

Mr. BROMLEY. I object to that unless it appears that it was not in writing.

Justice STEPHENS. Unless it appears what?

Mr. BROMLEY. That it was not in writing.

Justice STEPHENS. You should inquire into that Mr. Steffen.

By Mr. STEFFEN.

Q. Did you report orally to the Board of Directors at a meeting?

A. Orally, yes, sir.

Q. What was the substance of your report back to the Board of Directors concerning your meeting at Chicago with Mr. Avery and Mr. Blagden and Mr. Shearer?

Mr. BROMLEY. I object to that as highly incompetent.

Mr. STEFFEN. It is highly competent.

Mr. BROMLEY. It certainly does not come within the rule of past recollection recorded.

Mr. STEFFEN. We are on a new matter now.

Mr. BROMLEY. I don't see under what rule it comes.

Justice STEPHENS. It seems to the Court—I will be glad to hear you, Mr. Steffen—but it seems to the Court that his report to the Board of Directors of the American Gypsum Company is hearsay as to any of these de-
775 fendants, even if he recollects clearly what he reported, and it is doubtful, in view of his past testimony, that he can be thought to recollect what happened up there, because he says he doesn't know who was present except Shearer, Avery, and Blagden. It seems to me that the objection is well taken, but I will be glad to hear you.

Mr. STEFFEN. Well, it would seem that a report by Mr. Griswold, who was, as we have shown, a representative of the American Gypsum Company, concerning a meeting between Mr. Griswold, Mr. Blagden, Mr. Shearer, and Mr. Avery, having to do with a licensing agreement which is the matter which we are going to discuss throughout this trial, would be a very pertinent matter.

Justice STEPHENS. Well, we always must draw the distinction as to what is pertinent and what is competent. It may be very pertinent, it may be relevant to your case, but the question is whether it is competent. It may be that if you are offering it as a declaration of a co-conspirator, that it will come within the rulings made earlier this morning, but I didn't understand that you were offering it in that category.

Mr. STEFFEN. I definitely am offering it as a declaration of a co-conspirator. I am endeavoring now to bring out the whole Board of Directors of the American Gypsum Company also were acquainted with that declaration, which would go to show their general statement of mind
776 in understanding and entering this conspiracy, and on that score also it would be admissible as not being hearsay. But I offer it directly as a declaration of a co-conspirator.

Justice STEPHENS. On that theory, it may be received, subject to the ruling this morning that it is not received to prove the existence of a conspiracy, and will not be con-

sidered unless a conspiracy is proved aliunde the declaration.

By Mr. STEFFEN.

Q. Now, Mr. Griswold, will you tell us what the substance of your oral report back to the Board of Directors of American Gypsum Company was, concerning this meeting at Chicago?

A. It is too long ago, I cannot remember without something to refresh my memory, what I reported in detail.

Q. I show you Government's Exhibit 103, and ask you if that will refresh you as to any matters that you reported back to the Board of Directors.

Mr. BROMLEY. Is this the same letter again, Mr. Steffen?

Mr. STEFFEN. Yes.

Mr. BROMLEY. I object to its use in that roundabout fashion.

Mr. STEFFEN. Well, we insist upon it, Your Honor. It is perfectly appropriate to refresh his recollection as to what he may have reported or did report to the Board of Directors following this meeting.

777 Justice STEPHENS. He has testified that it does not refresh his recollection, Mr. Steffen, and that he cannot verify it even as a carbon copy. He says that it is something that has been made up from the records of the company, but is not even a carbon copy. We want to give the Government every proper opportunity to present its case, but I think that would be clear error—objection sustained.

By Mr. STEFFEN.

Q. I show you what has been marked as Government's Exhibit 105 for identification, which purports to be a meeting of the Board of Directors of the American Gypsum Company under date of June 3, 1926, and ask you if you can identify the signatures.

A. Yes.

Q. Whose signature is the first signature?

A. J. H. McCrady, president.

Q. Is he alive?

A. No, he is deceased.

Q. What is the second signature?

A. J. B. Davis.

Q. Is he alive?

A. No, he is deceased.

Q. Upon examining that, can you recall having been present at the meeting?

A. I would say that I attended this meeting.

778 Q. And would you say whether or not that is a correct report of the meeting?

A. Well, I didn't keep the records, but I would suppose it was.

Q. Well, can you say whether it is or not—I don't care what you suppose?

Justice STEPHENS. Take your time and examine it, Mr. Griswold, and compare it with your own memory, if you have one, as to the events.

By Mr. STEFFEN.

Q. Particularly, Mr. Griswold, as to the last paragraph, is that part of the minutes correct according to your recollection?

A. The last two paragraphs of the letter I remember distinctly of the committee being appointed at a meeting to consult with and continue the negotiations they were already on with the United States Gypsum Company, to continue the negotiations still further.

Mr. STEFFEN. I offer Government's Exhibit 105 in evidence.

Justice STEPHENS. Submit it to counsel, Mr. Steffen.

(The document referred to was submitted to defense counsel for examination.)

Justice STEPHENS. We will take the noon recess at this time. The Marshal will announce the recess.

779 (Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

780 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice STEPHENS. Proceed, gentlemen.

Thereupon, FRANK J. GRISWOLD resumed the stand and testified further as follows:

DIRECT EXAMINATION (resumed)

Mr. STEFFEN. I believe we had offered Government's Exhibit 105, and it has not been ruled upon.

Justice STEPHENS. Has counsel inspected it?

Mr. OLIVER. I haven't seen it, I would like to see it.

Justice STEPHENS. Let counsel see it.

Mr. KNUFF. That is D-104, Mr. Oliver, in the photostats that were furnished you.

Mr. STEFFEN. We are offering merely the last paragraph. The signatures have been duly identified. Both signers are dead, and the witness has testified that he was present at the meeting and that the matters referred to in the last paragraph actually took place, which I think overwhelmingly verifies it. It is offered merely for purposes of showing the authority of Mr. Griswold to continue his actions as a negotiator for the American Gypsum Company.

Mr. BROMLEY. We have only our continuing objection, no other.

781 Justice STEPHENS. Is this to be offered as a declaration——

Mr. STEFFEN (interposing). Just as proof of authority on the part of Mr. Griswold to continue his negotiations for the American Gypsum Company.

Justice STEPHENS. Do you object to it in that respect?

Mr. BROMLEY. No, sir.

Justice STEPHENS. It may be received as offered, for evidence of authority on the part of Mr. Griswold to act for the company. So far as it is offered as a declaration of a co-conspirator, it is received subject to the ruling made this morning with respect to that class of testimony. The record shows that it is only the last paragraph you are offering?

Mr. STEFFEN. Yes, that is right.

(The document referred to was marked as Government's Exhibit 105 and received in evidence.)

By Mr. STEFFEN.

Q. Mr. Griswold, I show you Government's Exhibit marked for Identification No. 106, which purports to be a letter from you to Mr. S. L. Avery, under date of June 2, 1926, and will ask you to look it over carefully and examine your signature and tell us whether that is your letter?

Mr. KNUFF. That is D-6 in the photostats that
782 counsel have.

The WITNESS. Yes, I would say that that was a letter written by me to Mr. Avery. It is a stamped signa-

ture, a facsimile of my signature used by stamping the letters that I didn't sign in longhand.

Mr. STEFFEN. I offer Government's Exhibit 106 in evidence as a declaration of a co-conspirator.

Mr. ADAMS. We make the same general objection, and in order to expedite matters perhaps we could have an objection on that general ground, as I think Your Honor indicated this morning we might, to all of these documents as they are offered from time to time.

Justice STEPHENS. The record may show that counsel for the defendants, each of them if they wish, may have recorded an objection to the admissibility, at this stage of the case, of all documents offered as declarations of co-conspirators, and they are received not as evidence of the conspiracy, and subject only to ultimate prima facie proof of the existence of a conspiracy.

Mr. ADAMS. I take it if there are any other specific grounds that come up from time to time with respect to particular documents, we can indicate that to the Court?

Justice STEPHENS. Yes, you may feel quite free to do that.

Mr. FINCK. May I have a continuing objection to
783 this and all others, as I made it as to Exhibit 104?

Justice STEPHENS. Yes, you may, Mr. Finck.

Mr. JOHNSTON. I assume, if the Court please, that the record will show the same objection on the part of all the other defendants?

Justice STEPHENS. I think there was a stipulation at the outset that an objection made by any defendant would redound to the benefit of all.

Mr. STEFFEN. We agree to that.

Justice STEPHENS. It may be received subject to the ruling this morning on that class of testimony.

(The letter from Mr. Griswold to Mr. Avery dated June 2, 192[illegible] was marked as Government's Exhibit 106 and received in evidence.)

Mr. STEFFEN. I will read Government's Exhibit No. 106, which purports to be a letter from The American Gypsum Company to S. L. Avery, under date of June 2, 1926:

"MR. S. L. AVERY, *President*,
United States Gypsum Company,
205 West Monroe Street, Chicago, Illinois.

DEAR SIR: I have just returned from Buffalo and while there I had the pleasure of meeting Mr. Haggerty of the National Gypsum Company.

784 Mr. Haggerty apparently had not a very complete report on just what happened and was very much interested in hearing the details. When I left him, he admitted being personally sold on the proposition, but, of course, like the rest of us, stated he would have to take up the matter with his Board of Directors for further confirmation.

There is no question in my mind about his attitude, and as he and Mr. Williams control the National Gypsum Company, I feel very sure there will be no opposition from his directors.

While there I had the pleasure of an interview with Mr. Blagden, who reported that the contracts have been written up, but are being rewritten and it is expected they will be ready to submit in a very short time.

I shall be very glad to receive two copies of this contract, because I want to forward one to the Texas Cement Plaster Company with any comments I desire to make on it.

It would be very nice if this matter could come up at the time of the next meeting of the Industries, which is on July 13th and 14th.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY.
(S) F. J. GRISWOLD"

By Mr. STEFFEN.

Q. Do you recall, Mr. Griswold, whether you re-
785 ceived a reply to your letter of June 2 to Mr. Avery, Government's Exhibit No. 106?

A. I do not, without something to refresh my memory I couldn't say.

Q. I show you Government's Exhibit No. 107 for Identification, and ask you to examine it and then I will ask you a question.

Justice STEPHENS. What number is that here, Mr. Steffen?

Mr. KNUFF. In the photostats it is D-8.

Justice STEPHENS. Thank you.

The WITNESS. There is nothing on this letter to refresh my memory that I received it; and furthermore, this evi-

dently isn't an original, it has been copied from something else. Whether it is a copy of the original letter, I don't know, and if I did receive it I couldn't say.

By Mr. STEFFEN.

Q. I would like to direct your attention simply to the subject matter of the letter. Is there anything in there that refreshes your recollection as to whether you received a reply from Mr. Avery to your letter of June 2, which is Government's Exhibit 106?

A. Yes, I remember the question of the contracts that I had asked for, that Mr. Avery had advised that they would be mailed sometime later.

Q. What contracts were they, if you remember?

786 A. They were contracts that I had been advised were being drawn up between the Beaver Products Company, I think it was at that time, and the United States Gypsum Company, for a settlement of their license agreement contract that they were discussing, and I had asked for two copies to send to the Texas Cement Plaster Company, as I recall.

Q. You had asked for two copies, you say?

A. One or two, yes, I had asked for two copies to forward to the Texas Cement Plaster Company.

Q. State again what were those contracts?

A. They were contracts, as I remember it, a duplicate of the proposed contract or license agreement between the United States Gypsum Company and the Beaver Board Company, who had been in litigation and had been trying to settle their disputes, but at that time I don't think they had reached an agreement yet, but they had it under discussion at that particular time.

My object in asking for it for the Texas Cement Plaster Company—Mr. Gloyd either had at this time or was going into the plasterboard business, I do not remember just the dates, but I wanted to show him—he also knew of this litigation between the Beaver Board Company and the United States Gypsum Company—and I wanted to show him what had been done, if there had been anything, in the way of a settlement, or a proposed settlement, so that

787 if he wanted to do likewise he could do so.

Mr. STEFFEN. I offer Government's Exhibit No. 107 in evidence.

Mr. BROMLEY. No objection as to competency.

Justice STEPHENS. No objection as to competency?

Mr. BROMLEY. No, sir.

Justice STEPHENS. It may be received.

(The letter referred to was marked as Government's Exhibit No. 107 and received in evidence.)

By Mr. STEFFEN.

Q. Mr. Griswold, do you recall whether or not, about this time in June of 1926, you talked with Mr. Reeb concerning the licensing agreements?

A. I do not remember without something that would refresh my recollection.

Q. Who was Mr. Reeb?

A. He was President of the Niagara Gypsum Company, at Buffalo, New York.

Q. Do you recall whether you ever talked with Mr. Reeb concerning the licensing agreement?

A. Yes, I did.

Q. Will you state on what occasion?

A. Well, during 1926, I can't say just what date, but I think Mr. Reeb was in business at that time, and I
788 had helped him build his plant, and he was making a wallboard, I am quite sure, at this date. And when he first started up the plant, as I remember, he started to make an open-edge or a raw-edge board; and as usual, he had so much trouble with it, and the opposition in the trade in selling it, that he had told me about it. So I offered or volunteered to let him use this Clark patent, without a license, if he wanted to make what was afterwards claimed by the United States Gypsm Company to infringe on the Birdsey patent, but I offered to let him use this patent.

Justice STEPHENS. Let me see what the question is. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. Mr. Griswold, we appreciate your help here, but please pay a little more strict attention to the question, and answer just the question that is asked you. If counsel wants to find out about other things, he will frame a question; otherwise, we will get so much in the record that we may not need.

By Mr. STEFFEN.

Q. Do you recall on what occasion or on what time you met with Mr. Reeb and talked about the licensing?

A. No, I do not, I couldn't state any specific date.

Q. I show you what has been marked Government's Exhibit 108, which purports to be a letter from you to
789 Mr. Avery, under date of June 16, 1926, and ask you to read it carefully and examine the signature and tell the Court whether it is your letter?

Justice STEPHENS. What number is that, Mr. Steffen?

Mr. KNUFF. That is D-7.

The WITNESS. I would say yes, that is American Gypsum Company stationery, and that is my stamp, a facsimile of my signature.

By Mr. STEFFEN.

Q. Could you say whether or not you and Mr. Reeb went to Chicago, as recited in that letter?

A. I remember we went to Chicago, but I don't remember whether this was the date or not.

Q. Did you go down more than once with Mr. Reeb to see Mr. Avery?

A. Yes, as I remember it, we did, we were there more than one time.

Q. And the subject of your conference with Mr. Avery was what?

A. It was to try to get an adjustment between the Niagara Gypsum Company and the United States Gypsum Company for the damages for past infringement on this Birdsey type edge, which I had allowed Mr. Reeb to manufacture.

Q. Did you get a settlement with the United States Gypsum Company, or did Mr. Reeb?

790 A. Well, we didn't get it at this time, but later on it developed.

Mr. STEFFEN. I offer Government's Exhibit 108 in evidence.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. No objection.

Justice STEPHENS. This is offered, I suppose, as another declaration?

Mr. STEFFEN. Offered generally, as a declaration, and furthermore for the purpose of showing that Mr. Avery was acquainted with the negotiations that Mr. Griswold had been having with Mr. Reeb.

Justice STEPHENS. Well, technically I suppose to prove that you would have to show that the letter was mailed to Mr. Avery in the usual course, so that we can presume that he received it.

It may be received as a declaration, subject to the usual ruling. I do not think it is so far pertinent to prove that Mr. Avery received it.

Mr. STEFFEN. This is a matter, Your Honor, that will come up in a number of these cases. This letter is on Ameriman Gypsum Company stationery, it was taken from the files of the United States Gypsum Company under subpoena, and no objection has been made——

Justice STEPHENS (interposing). If that fact is
791 not disputed I think there would be no question. Do you dispute that this was received by Mr. Avery?

Mr. BROMLEY. No, sir.

Justice STEPHENS. Very well, the Court's objection may be withdrawn, and the letter may be received as a declaration and to prove notice to Mr. Avery of the contents thereof.

(The letter from Mr. Griswold to Mr. Avery, dated June 16, 1926, was marked as Government's Exhibit 108 and received in evidence.)

By Mr. STEFFEN.

Q. Mr. Griswold, did you ever examine the contracts which you wrote to Mr. Avery to obtain, either when he sent them to you or had you seen them previously?

A. Well, I would say yes, that I did, at some time or other, I don't remember the date that I received them or examined them.

Q. Did you ever receive a copy of the contract which was drawn up between Beaver Board and USG, the original Beaver contract?

A. Yes, I saw what was reported to me to be a copy and I presume it was a copy of the original.

Q. And did that copy refer to a number of patents?

A. I do not remember whether that particular one referred to a number of patents, but there were a
792 number of patents that were later referred to, but whether at this time or not I could not say.

Q. Did you familiarize yourself with the patents, any patents, that were included in the original contract between Beaver and USG?

A. I don't remember of any, in particular, outside of the Utzman patent and the Birdsey patent. Those are the ones that my company was primarily interested in. The rest of the patents were not involved in our case at all, and there had never been anything claimed on them. Whatever they were, I don't remember now, but we were not interested.

Q. Did you ever request to be furnished with a list of patents?

A. Yes, I did.

Q. I show you Government's Exhibit 109, which purports to be your letter to Mr. Avery under date of August 13, 1926, and ask if you can identify it as your letter?

Justice STEPHENS. Is that D-9?

Mr. KNUFF. That is correct.

The WITNESS. I would say that that is an original letter, it is American Gypsum Company stationery, and it is my stamp with my facsimile signature.

Mr. STEFFEN. I offer Government's Exhibit 109 in evidence.

Justice STEPHENS. It may be received subject to
793 the same restrictions as made this morning on this class of evidence.

(The letter from Mr. Griswold to Mr. Avery, dated August 13, 1926, was marked as Government's Exhibit 109 and received in evidence.)

By Mr. STEFFEN.

Q. Do you recall whether you received a reply from Mr. Avery to your request for the patents, made in Government's Exhibit 109?

A. I do not remember.

Q. I show you Government's Exhibit 110, which purports to be a copy of a letter to Mr. F. J. Griswold, with the typewritten word "President," only, at the bottom, and ask you to examine it carefully and state whether you received a letter of that character?

Justice STEPHENS. Is that D-10, Mr. Knuff?

Mr. KNUFF. D-10, yes, Your Honor.

The WITNESS. Yes, I would say that I received that letter.

Mr. STEFFEN. I offer Government's Exhibit 110 as a declaration of a co-conspirator.

Justice STEPHENS. Is there any objection except the general objection to this class of testimony?

That is a letter which purports to be from the United States Gypsum Company to Mr. Griswold?

794 Mr. STEFFEN. Correct.

Justice STEPHENS. It may be received subject to the objections and restrictions made this morning with respect to this class of testimony.

(The letter to Mr. Griswold referred to, purporting to be from USG, was marked as Government's Exhibit 110 and received in evidence.)

By Mr. STEFFEN.

Q. Now, Mr. Griswold, I believe you have testified that you received copies of these agreements. Do you recall whether they were ever presented to the Board of Directors of The American Gypsum Company?

A. Yes, they were.

Q. I show you Government's Exhibit 111 for Identification which purports to be a copy of the minutes of the Board of Directors of The American Gypsum Company held on August 16, 1926, and ask you if you can identify the two signatures at the foot thereof?

A. Yes.

Q. What are the signatures?

A. J. H. McCrady, President; J.B. Davis, Secretary.

Mr. KNUFF. That is D-105 in the photostats.

Mr. STEFFEN. I offer in evidence the next to the
795 last paragraph on the first page of Exhibit No. 111.

Justice STEPHENS. Submit it to counsel, unless they have it. Perhaps they have already seen it.

Mr. STEFFEN. I will read that paragraph:

"A copy of the proposed Licensing Agreement, as suggested by The United States Gypsum Company was read in detail and after a full discussion by the Board, Harry W. Benn moved that this entire matter be again referred to the Committee, consisting of J. H. McCrady, F. J. Griswold and J. B. Davis, for a general revision as to details, and that the Committee endeavor if possible to limit any licensing agreement to a three year period; and further, that C. F. Miller is by this motion appointed an alternate to serve upon the above Committee in case any one of those noted are unable to attend its sessions, motion seconded by Edward McCrady and unanimously carried."

Justice STEPHENS. It is received subject to the ruling made this morning with respect to this class of testimony.

(The paragraph of the Minutes of American Gypsum Company of August 16, 1926, read by Mr. Steffen, was

marked as Government's Exhibit 111 and received in evidence.)

By Mr. STEFFEN.

Q. Now, Mr. Griswold, the Minutes recite that
796 there was a motion made that the Committee "endeavor if possible to limit any licensing agreement to a three year period". Do you recall that action, or the reasons for that action, rather?

A. Well, as I remember the reason for it, it was that during the interim we had learned that the Utzman patent expired in about 3 years, and we didn't want to obligate ourselves at that time, at this particular time, to pay royalties beyond that time, and especially so since at this particular time the question of who had the final priority on the Birdsey and the Clark patents hadn't been decided, and so we didn't want to go beyond the expiration of the Utzman patent.

Q. Was there any other objection made to continuing the contract beyond 3 years?

A. Well, I don't remember offhand without something to refresh my mind, but I do remember that particular phase of it.

Q. And the Utzman—I think it is a matter of record that the Utzman closed-edge patent expired on August 6, 1929, which was almost 3 years from the time of this meeting.

A. Yes.

Q. I now show you Government's Exhibit 112 for Identification, which purports to be a letter from you to Mr. Avery, dated August 17, 1926, the day after the Board of Directors meeting, and ask you if you can identify
797 it as your letter?

A. Yes, I would say that that was the original letter, with my stamped signature.

Mr. STEFFEN. I offer in evidence Government's Exhibit 112.

Justice STEPHENS. Received, subject to the restrictions made in this morning's ruling with respect to this class of testimony.

(The letter from Mr. Griswold to Mr. Avery, dated August 17, 1926, was marked as Government's Exhibit 112 and received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 113, which purports to be a letter from you to Mr. S. L. Avery under

date of August 31, 1926, and ask you to read it and examine your signature, and state whether or not it was your letter?

A. That is my stamp, a mimeograph of my signature, but this isn't the stationery that we used in our office at that time. It is evidently a copy, copied on some different stationery, because I have no recollection of using any perforated stationery like that; and besides, this evidently was taken from the United States Gypsum Company's file, that might account for it, but that is a facsimile of my stamped signature.

798 Q. You say it is?

A. Yes.

Q. Do you remember anything concerning the contents of the letter which might help you to identify it?

Mr. BROMLEY. We received it, Mr. Steffen.

The WITNESS. The last paragraph here I remember. It says I met Martin Johnson. I remember that at some meeting, I couldn't say which, that I had met him at about that time, which is the first time that I think I had come in contact with him.

Mr. STEFFEN. I offer Government's Exhibit 113 in evidence.

Justice STEPHENS. That may be received in evidence, subject to the restrictions made on this class of testimony in the ruling this morning.

(The letter from Mr. Griswold to Mr. Avery, dated Aug. 31, 1926, was marked Government's Exhibit 113 and received in evidence.)

Mr. STEFFEN. I will read the third paragraph of Government's Exhibit 113:

"While at Buffalo I had an interview with Mr. Haggerty. At New York I also met Mr. Fuller of the Atlantic Gypsum Company. Had a very pleasant talk with him along the lines we are working on and expect another in-

799 terview with him in the very near future."

By Mr. STEFFEN.

Q. What Mr. Haggerty did you refer to, Mr. Griswold?

A. Connected with the National Gypsum Company, President at that time.

Q. And who was Mr. Fuller?

A. Mr. Fuller was the Secretary of a new company that had been organized to build a plant at Portsmouth—I don't

remember even in what State it was—but it was Portsmouth, New Hampshire, I guess.

Q. I show you Government's Exhibit No. 114, which purports to be a letter from you to Mr. S. L. Avery, under date of September 8, 1926, and ask if you will read it, please, and state whether or not it is your letter?

I might say that those perforations along the side were put in by us.

A. Well, that is my stamped signature with a facsimile of my signature on it. I remember of writing Mr. Avery that Mr. McCrady and I would be in Chicago, and afterwards we had to postpone the meeting on some account, I don't remember now.

Mr. STEFFEN. I offer Government's Exhibit No. 114.

Justice STEPHENS. Do you concede receiving that?

Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. It may be received, subject
800 to the ruling this morning with respect to this class of testimony.

(The letter from Mr. Griswold to Mr. Avery, dated Sept. 8, 1926, was marked as Government's Exhibit 114 and received in evidence.)

801 By Mr. STEFFEN.

Q. I show you Government's Exhibit No. 115, which purports to be a copy of a letter addressed to you under date of September 10, 1926, and ask you if you can identify it.

A. I have a recollection of receiving a letter from Mr. Avery advising us that he would be there to meet Mr. McCrady and myself on a certain date, but I don't remember whether this is the letter or not. It evidently is a copy of it.

Mr. STEFFEN. I offer Government's Exhibit 115 in evidence.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. None, other than the general one.

Justice STEPHENS. It may be received, subject to the general objections to this class of testimony.

(The document referred to, marked Government's Exhibit No. 115, was received in evidence.)

By Mr. STEFFEN.

Q. I show you Government's Exhibit No. 116 for identification, which is an unsigned copy of a letter addressed to Mr. J. H. McCrady, under date of September 17, 1926, and ask if you can identify it from reading it, that it is your letter?

A. There is nothing on this that I could identify it by, except as I remember some of the things that hap-
802 pened. Mr. McCrady was on this committee with me, and he and I did more than the other member who didnt' take much active part in it, and we were the ones that did most of the work in trying to arrive at a settlement with Mr. Avery; and apparently——

Justice STEPHENS (interposing). Just a moment, Mr. Griswold. You are going far beyond the limits of the question. We don't mean to be technical with you, but the reason we require witnesses to answer just the questions asked them is because the lawyers know what is really relevant under the issues of the case. Now, just listen to the next question and answer that question.

By Mr. STEFFEN.

Q. Are those your initials on the side, there?

A. Those are my initials in the corner there.

Q. And is it true that you had a talk with Mr. Shearer concerning the contracts, as expressed in the second paragraph?

A. I do not remember. This letter says that I did not see him, that he didn't come back to the hotel.

Q. You say he did not?

A. That is right.

Q. Do you have any recollection of it?

A. I have not; the letter states that he did not come back.

Q. Do you recall whether you talked to him over the telephone?

803 A. I do not recall that.

Q. Can you say now, Mr. Griswold, whether or not you wrote this letter, or whether you can identify this copy or not?

A. Well, I would say that I wrote the letter, but I couldn't positively identify that as a copy of it, but that I wrote a letter along those lines, I will say that I did that.

Mr. STEFFEN. I offer Government's Exhibit 116.

Mr. BROMLEY. In addition to the general objection, I object to it as incompetent, because of no proper foundation.

Justice STEPHENS. It seems to me that the letter is unnecessary. The witness testified that he wrote a letter along those lines.

Mr. STEFFEN. We will withdraw the offer.

Justice STEPHENS. It may be withdrawn.

(The letter referred to, marked Government's Exhibit 116 for identification, was withdrawn.)

Mr. BROMLEY. Does that still have a number for identification?

Justice STEPHENS. If an exhibit is withdrawn, the number ought to be released from the record, I should think, so that we will not have a lot of blanks in the record.

Judge Garrett is a little indefinite as to whether, if you wish the answer to remain that he wrote a letter
804 along those lines, the record will show, without the presence of the letter, along what lines he means. If he has an independent recollection you could bring that out, of course. Apparently the letter refreshes his recollection; therefore, you can have him testify as to that.

Justice GARRETT. "Along those lines" doesn't mean anything unless we know along what lines he means.

Justice JACKSON. The lines of your question, I take it.

Mr. STEFFEN. My question was very broad, just asking him if he wrote the letter, and he answered that he wrote one along those lines, but there is nothing in the record to show what the letter says.

We would like to re-offer Government's Exhibit No. 116 as showing, or as recording, Mr. Griswold's understanding at the time that the letter was written.

Mr. BROMLEY. Objected to as incompetent.

Justice STEPHENS. Is that the letter of September 17, 1926?

Mr. STEFFEN. Yes.

Justice STEPHENS. I don't see—the Court doesn't see—how it can come in as competent in view of the testimony of the witness that he cannot state whether that letter was sent or not. He says he remembers writing a letter along those lines, he doesn't say what lines, but he distinctly said that he couldn't identify that letter as having been
805 written by him. It would seem to me to be incompetent as not having been proved to be his letter, and it so ruled.

(The letter referred to, re-offered as Government's Exhibit No. 116 for identification, was excluded.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 117, which purports to be a letter from J. H. McCrady, addressed to J. B. Davis, under date of September 20, 1926, and ask you simply whether you can identify the signature.

A. Yes, I would say that was J. H. McCrady's signature.

Mr. STEFFEN. I offer Government's Exhibit 117 in evidence as the declaration of a co-conspirator.

Mr. ADAMS. I object to it on the ground that no proper foundation has been laid.

Mr. STEFFEN. It is in evidence, Your Honor, that Mr. McCrady is dead, and Mr. Davis is dead, and that Mr. McCrady was president of the company and a member of the committee, and that Mr. J. B. Davis was secretary of American Gypsum Company and a member of the committee.

Mr. ADAMS. All we have is a signature; we have no way of knowing whether he actually wrote the letter, and whether the letter is in the form in which he wrote it, or anything else about it. All we know about this letter is that it has the signature of a man that is now dead.

806 Justice STEPHENS. Are you familiar with the handwriting of Mr. McCrady?

The WITNESS. Yes, I knew Mr. McCrady's signature.

Justice STEPHENS. Is that an original letter?

Mr. STEFFEN. It is an original letter, taken from the files of The Celotex Company.

Justice STEPHENS. I should think the objection would go to the weight, Mr. Adams, if the witness can identify this as Mr. McCrady's signature.

Mr. ADAMS. But that is all he can do. All he can do is say that as far as that is concerned, it is the signature of a man now deceased. Whether or not that letter is the letter that the man wrote, we have no way of knowing whatever, we have no way of knowing whether it was ever communicated to the man to whom it was addressed. I raise no question about the signature at all, but——

Justice STEPHENS (interposing). Let me read the letter.

Mr. ADAMS. I am sorry.

Justice STEPHENS. Does the record show who Mr. Davis was?

Mr. STEFFEN. Yes, he was the secretary of the American Gypsum Company.

Mr. ADAMS. May I make this further observation, Your Honor?

Justice STEPHENS. The record shows, does it not, that Mr. McCrady was a member of McCrady Brothers
807 Company, but was also a director of the American Gypsum Company?

Mr. STEFFEN. Yes.

Justice STEPHENS. Go ahead, Mr. Adams.

Mr. ADAMS. I want to make this observation to emphasize my point. It may be, and no doubt is, true that Mr. McCrady's signature appears on this paper. He may have signed a blank piece of paper and someone else may have typed in everything that is above it; he may have never dictated it. He may, during his lifetime, have known nothing about it. There is no evidence whatever that this is the product of the mind of Mr. McCrady. The sole fact that we have in this courtroom is that Mr. McCrady's signature appears upon a piece of paper. Anyone could have put in what comes above the signature. Therefore, I say it is without any foundation whatever.

Justice GARRETT. Mr. Adams, I would like to ask you this. It seems to me you advance a somewhat novel proposition here. Here is a typewritten instrument, purporting to be the original, on the stationery of McCrady Brothers Company, whose existence has been shown here, and you say that, although conceding the signature, that is not sufficient to prove that it was actually his work?

Mr. ADAMS. Yes.

Justice GARRETT. Isn't there something novel about that? I am thinking now in terms of wills, just as an illustration, where the witnesses to a will have died and persons
808 are called—or at least in jurisdictions with which I am familiar—to prove the signature of the witnesses and the signature of the person signing it. Doesn't that always carry with it the idea that the document to which the name is signed was the document of the persons who signed it?

Mr. ADAMS. There is no question about it, Your Honor, but that, I think, is because of the special rule having to do with the law of wills, where the attestation clause recites that the testator, in the presence of the witnesses, declared that the will was his last will and testament; and then, because of the fact that people are not immortal, the law declares that you can later prove the signature of a witness to that attestation clause, and that that proves that it was the document of the testator.

Now, I don't purport to be an expert on the law of wills, but that is the way I understand the law.

Justice GARRETT. It may be that you are quite right, it just struck me as a bit novel, and that was the first illustration that came to my mind.

Mr. ADAMS. I don't, if I may respectfully differ from Your Honor, see anything novel here other than the Government has suggested that this should go into evidence without more proof. The rules of evidence with respect to documents, it seems to me, require that a document be identified by some person who made the document
809 or who created the document, or who is in a position to know that the document was created by someone else.

Now, all that we have in this courtroom is that this was signed by someone, and we concede the signature, but I think my illustration still holds good, that anyone might, for all we know to the contrary, have picked up a piece of stationery of this company and have typed something in above the signature. The stenographer is not called to say that Mr. McCrady dictated it to her. Mr. McCrady cannot be here. There is no way of knowing whether that is actually what he dictated or whether it is not.

Your Honors might speculate on that, I might speculate myself, but in the absence of proof, which is not present here——

Justice STEPHENS (interposing). Mr. Adams, as we are presently advised, we think your objection goes to the weight of the letter, rather than to its competency.

Now, we will not foreclose you from pursuing this further. If you can show us some authorities which will support your view, we will hear them, but here is a letter on which the signature of Mr. McCrady is identified by a man who knew him in his lifetime, and knew his signature. Of course a document must be identified, but it can be

identified by circumstances as well as by a witness, and it bears the letterhead of Mr. McCrady's company,
810 as testified to by the witness, and it deals with the subject-matter which the witness states he was on the committee with Mr. McCrady to discuss.

It seems to us that circumstantially it is given such credence as to be entitled to admission. Of course, if you can show that it was forged, you are entitled to show that.

Mr. ADAMS. I don't think, if I may say so, that there is any burden on me to show that it was forged. Your Honor is taking internal evidence, if I may say so, to prove the fact we are trying to prove. You say that because the letter relates to something that is in issue here, that therefore you can say that it is the letter that this man wrote. I seems to me that that is assuming the object of the debate, and I don't want to labor this further, but I cannot see how we can possibly admit in evidence here, accept anything here, which might be forged. It isn't my burden to prove that this might be forged. It is the burden of the Government to show that this is a letter written by Mr. McCrady, and the sole fact here is that it is Mr. McCrady's signature on the letter.

Justice STEPHENS. It seems to us that the fact that Mr. McCrady's name is on it, and that it is on the letterhead of his company, is some evidence that he wrote it, at least sufficient evidence to qualify it for admission. If you want to attack it, you are entitled to do so. If you want to present authorities tomorrow morning, to show that the
811 letter cannot be introduced in evidence, we will hear them. For the time being it is received.

(The document referred to, marked Government's Exhibit No. 117, was received in evidence.)

Mr. STEFFEN. I should like to read the second paragraph of Exhibit No. 117, just admitted by Your Honor:

"Now in regard to our conference in Chicago with Mr. Avery, I am not going to enter into details or even hit the high spots as I had C. F. Miller on the 'phone about an hour ago and he advised me that he had written you as to what transpired in our conference with Mr. Avery. He gave us to understand that for the next ten years, we, the American Gypsum Company, would have to eat out of his hand and that is just what we would have to do if we sign this contract. Now in regard to the Board meeting, we decided to postpone it until your return home from

your vacation. I am enclosing, herewith, a copy of the contract which you can look over at your leisure. You do not need to return this copy as I have another here."

Justice STEPHENS. It is understood that this letter is received, of course, subject to the general objection and ruling with respect to this class of testimony which was outlined this morning.

By Mr. STEFFEN.

812 Q. I now show you Government's Exhibit No. 118, Mr. Griswold, which purports to be a letter from you to Mr. J. B. Davis, under date of September 20, 1926, and ask you to examine it first, and then I will ask you some questions concerning it.

A. Yes, I would say this was the original letter, it is my stamped signature.

Mr. STEFFEN. I now offer Government's Exhibit 118 in evidence.

Justice STEPHENS. It may be received, subject to the general restrictions of this morning's ruling with respect to this class of testimony.

(The letter referred to, marked Government's Exhibit No. 118, was received in evidence.)

By Mr. STEFFEN.

Q. On the second page, Mr. Griswold, you refer to "Harry" and "Ed." Will you tell us who Harry and Ed are?

A. "Harry" had reference to Mr. Harry Benn, who was a director of the American Gypsum Company; and "Ed" had reference to Edward McCrady, a son of J. H. McCrady, who was also a director in the American Gypsum Company.

Q. I now show you Government's Exhibit No. 119, which purports to be your letter, under date of October 7, 1926, to Mr. S. L. Avery, and ask if you can identify it as

813 being your letter.

A. Yes, I would say that that was the original letter, with my stamped signature.

Q. I now show you Government's Exhibit No. 120 for identification, which purports to be a copy of a letter addressed to you under date of October 9, 1926, and ask if you can identify that as a copy of a letter which you may have received in reply to your letter to Mr. Avery.

A. Yes, to the best of my recollection, that is a copy of a letter that I received from Mr. McCrady, but I could, of course, not say it was word for word; but I would say it is a copy.

Mr. STEFFEN. I now offer Government's Exhibits 119 and 120 in evidence.

I will read the letters. Exhibit 119 has been identified as being a letter from Mr. Griswold to Mr. S. L. Avery, dated October 7, 1926.

"Dear Mr. Avery:

"Simply because you do not hear from me, do not think there is not being some work done on the matter of the licensing agreement.

"Two of our directors have been away and have just returned and we have a meeting scheduled for Monday of the coming week, at which time some definite action will be taken on the matter.

814 "On the matter about which you are familiar I simply report progress with the expectation that it will go thru as planned."

Mr. Avery's reply, being Exhibit 120, under date of October 9, 1926, reads:

"Dear Mr. Griswold:

"Thanks for yours of the seventh. To be frank with you, I have been a little disturbed about the slowness of our progress, although I have appreciated the burden of your efforts in other fields and assumed that this was the cause of the delay. I have been postponing a rather extensive trip in the expectation of a conclusion on the matter, and am pleased to know that the meeting scheduled for Monday may bring some development that will decide it.

"I am very glad to know of the progress you report in your last paragraph, and I very much hope you accomplish this for the satisfaction it will be to yourself and for the good I believe it will bring to the industry in general."

Justice STEPHENS. Is there any objection to that letter, purporting to be from Mr. Avery?

Mr. BROMLEY. No, no objection. We admit that it was written and that there was a reply. I think counsel should point out that when he emphasized in Mr. Avery's letter, "and am pleased to know that the meeting scheduled for Monday may bring some development that will de-

815 cide it," that the reference is obviously a reference to the meeting of the Board of Directors of the American Gypsum Company referred to in the first letter.

Justice STEPHENS. I so understood it and I think that is clear, is it not, Mr. Steffen?

Mr. STEFFEN. Yes.

Justice STEPHENS. Those exhibits may be received, the first subject to the ruling of this morning with respect to

declarations, and the other is received as such without that restriction.

(The two letters referred to, marked Government's Exhibits 119 and 120, respectively, were received in evidence.)

See modification of ruling—Tr. 1144.

Mr. STEFFEN. May I ask for a five-minute recess, Your Honor?

Justice STEPHENS. This Court will be in recess for five minutes.

(At this point a five-minutes recess was taken, following which the proceedings were resumed.)

Mr. STEFFEN. Your Honor, I should like to present Mr. Frank Shields, who will assist in the presentation of the case.

Justice STEPHENS. We welcome you, Mr. Shields. You are from the Department of Justice staff?

816 Mr. SHIELDS. I am, Your Honor.

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 121 for identification, which purports to be a letter from you to Mr. S. L. Avery, dated October 9, 1926, and ask you if you can identify it.

May I withdraw the question, Mr. Griswold, and ask you to also examine Government's Exhibit No. 122 for identification, which purports to be a reply to the letter written by you under date of October 9, 1926? Have you examined Exhibits 121 and 122?

A. Yes.

Q. Are you prepared to say whether Government's Exhibit 121 is a letter which you wrote?

A. Well, it is not the original, from anything that I can see, but it is my stamp, a facsimile of my signature that is there, and I remember writing a letter, and I would say that this, so far as I can remember, is probably, or is, a copy of what I wrote, but it is not on our stationery. As I said, it evidently has been copied from something else.

Q. And the carbon copy of a purported reply—can you say whether or not you received a reply to the letter which is Government's Exhibit No. 121?

A. I would say yes, that I received this reply.

Justice STEPHENS. Have you offered these letters?

817 Mr. STEFFEN. I have not. I will offer Government's Exhibit 122, which purports to be a reply to the letter of Mr. Griswold to Mr. Avery under date of

October 9. Mr. Griswold has identified the reply, but does not identify, at the moment, the copy which we have before us.

Justice STEPHENS. Exhibit 122 may be received in evidence.

(The letter referred to, marked Government's Exhibit No. 122, was received in evidence.)

By Mr. STEFFEN.

Q. Now, Mr. Griswold, let me ask you whether you recall having written a letter to Mr. Avery under date of October 9, in which you said that it might interest him to know that Mr. Fuller and Mr. Channing of the Atlantic Gypsum Company had been with you for the past two days.

A. Yes, I remember writing Mr. Avery to the effect that those gentlemen had called.

Q. Do you remember whether you wrote to Mr. Avery saying that you had considered it a very wise move to get pretty well acquainted with these gentlemen? "They claim they are going into the manufacture of Gypsum Wall Board as well as the manufacture of a pulp board"?

A. I think I wrote him to that effect, because naturally that would be the way I felt about it anyway, be-
818 cause I liked to know my competitors.

Q. Did you say to Mr. Avery in your letter, that you had talked earnestly with them on the matter of the licensing agreement, and that you thought that they were favorably disposed toward the licensing agreement?

A. I couldn't say that I talked with them about—well, I presume I did, too, talk to them about the license agreement, because at that time they were considering going into the board business, they were building a wall plaster plant——

Justice STEPHENS (interposing). You are only asked whether or not you remember writing Mr. Avery that you had talked to them.

The WITNESS. Well, I remember writing Mr. Avery.

By Mr. STEFFEN.

Q. That you had talked to them?

A. Yes.

Q. Do you recall whether or not you wrote to Mr. Avery asking whether or not you should give them a copy of the licensing agreement?

A. I remember asking Mr. Avery if he would send me a copy, so I could give it to them, if he had any objections.

Q. Did you write to Mr. Avery under this date, October 9, 1926, and state that both Mr. Channing and Mr. Fuller appeared to be very earnest in going into the business to make money, and to maintain a fair price? That is
819 a loose statement.

A. I don't remember, without something to refresh my memory.

(Exhibit No. 121 was handed to the witness.)

Mr. BROMLEY. It is not only a loose statement, Counsel, but it is an inaccurate one.

Mr. STEFFEN. He shouldn't recall it, then. I will withdraw the question.

By Mr. STEFFEN.

Q. Do you recall whether or not you wrote in your letter of October 9, 1926, to Mr. Avery, that Mr. Channing and Mr. Fuller assured you that "their experience in the business is such that they feel absolutely confident of their ability to get the same prices for their products as other companies get for their's, and intimated that they do not expect to follow any other policy than that of selling their materials at the market prices established by other concerns in the same line"?

A. I would say yes, that I wrote that to Mr. Avery.

Mr. STEFFEN. I offer Government's Exhibit No. 121.

Mr. BROMLEY. No objection except the general one.

Justice STEPHENS. It may be received, subject to the general objection to this class of evidence.

(The letter referred to, marked Government's Exhibit No. 121, was received in evidence.)

820 By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 123, which purports to be a copy of your letter to Mr. Avery under date of October 15, 1926, and ask you to examine it and state whether or not it is your letter.

A. Yes, I would say that was an original letter.

Mr. STEFFEN. I offer Government's Exhibit No. 123 in evidence.

Mr. OLIVER. May I ask, is that D-25?

Mr. STEFFEN. That is D-25, yes.

Justice STEPHENS. That is the letter signed by Mr. Griswold himself, to Mr. Avery, of October 15?

Mr. STEFFEN. That is correct.

Justice STEPHENS. It may be received, subject to the general ruling restricting this class of evidence.

(The letter referred to, marked Government Exhibit No. 123, was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 124 for identification, which purports to be a reply to your letter of October 15, Government's Exhibit No. 123, and ask if you recall having received that letter.

Mr. BROMLEY. What is the date of it, please?

Mr. STEFFEN. October 19, 1926.

821 Justice STEPHENS. That is D-26, Mr. Knuff?

Mr. KNUFF. Yes.

The WITNESS. I do not remember of receiving this particular letter; there is nothing on it to indicate that I did.

By Mr. STEFFEN.

Q. It is just a copy of a letter?

A. Well, I can't say at this time as to receiving that letter.

Q. I show you your letter of the 15th, October 15, for examination. My question, Mr. Griswold, is whether you recall having received a reply at all to your letter of October 15, Government's Exhibit No. 123.

A. This copy would indicate that, but I cannot recall it particularly at this time. There is nothing in the letter to indicate or to bring it to my mind that I did receive it. I undoubtedly did, but I cannot remember it at the present time.

Mr. STEFFEN. Government's Exhibit No. 123 has been admitted, has it not?

Justice STEPHENS. Yes.

Mr. STEFFEN. I offer Government's Exhibit No. 124 on the ground that it internally is connected with Mr. Griswold's letter of October 15, it purports to be a reply to that. It speaks of some of the matters that are referred to in Mr. Griswold's letter of October 15, and the copy
822 was obtained from the files of the United States Gypsum Company under subpoena.

Mr. BROMLEY. That copy?

STEFFEN. That copy.

ce STEPHENS. Is there any objection?

BROMLEY. No objection, except the general one.

ce STEPHENS. Received.
letter referred to, marked Government's Exhibit , was received in evidence.)

By Mr. STEFFEN.

now show you Government's Exhibit No. 125, which s to be a letter from you to Mr. Avery, under date ber 9, 1926, in reply to Mr. Avery's letter of the id ask you to read the letter and state whether or your letter.

ce STEPHENS. Is that a mistake in the date, or is it ent month?

STEFFEN. We cannot testify, that is what the letter

OLIVER. Is that Exhibit D-23?

ce STEPHENS. D-23, apparently.

STEFFEN. That is right.

BROMLEY. I would be prepared to stipulate, Mr. if you agree that it is correct, that that letter should bear the date of October 20.

Mr. STEFFEN. Which letter do you refer to, Mr. Bromley?

BROMLEY. The one that is now before the witness, October 9th, Exhibit 125 for Identification.

STEFFEN. Well, if it is your information that that orrect date, we will so stipulate.

BROMLEY. A study of the letter will indicate that it ly was dated October 20th or 21st.

ce STEPHENS. The stipulation may be recorded.

WITNESS. I would say that that was the original

By Mr. STEFFEN.

hat this was your letter?
es.

STEFFEN. I offer in evidence Government's Exhibit

Justice STEPHENS. It is again offered as a declaration of a co-conspirator, I take it?

Mr. STEFFEN. That is right.

Justice STEPHENS. It may be received, subject to the general ruling made this morning.

(The letter referred to, from Mr. Griswold of The American Gypsum Company, to Mr. S. L. Avery, was marked Government's Exhibit 125 and received in evidence).

824 Mr. STEFFEN. I would now like to read Government's Exhibit 125, which has been identified as a letter from Mr. Griswold to Mr. Avery under the corrected date of October 20, 1926:

"Dear Mr. Avery: Replying to your letter of the 19th, I regret to report that I was unsuccessful in getting all of the people interested to attend the meeting on the 21st. as planned, but some of them were unable to come on account of previous engagements.

I do not believe I will be able to get them together until after the first of the month, but all of them have expressed the desire to come as soon as they can arrange their affairs to do so.

I might add that the Atlantic Gypsum Company is very much interested, judging from a recent telegram I received from them.

I am quite sure you appreciate what I have to contend with and also appreciate the fact that if the original plan should fail of unanimous consent of all of the manufacturers, and if the other deal about which you are familiar should materialize, it will still leave the way open to bring the matter to a head in a much easier way. I am quite sure that one or the other will succeed by patient and persistent work."

By Mr. STEFFEN.

Q. Mr. Griswold, will you state to the Court what
825 you meant in the last paragraph by your reference to the "original plan" which was to receive unanimous consent of all of the manufacturers?

A. That had reference to the proposition of license agreements, as I remember it. This litigation, or threatened litigation, was going on, and a number of these companies either had been notified of an infringement or had suits against them, including ourselves, and we had discussed the matter at previous meetings, and that is what I am referring to here, and——

Q. (Interposing). Now will you tell the Court——

Mr. BROMLEY (interposing). Let him finish what he was saying.

By Mr. STEFFEN.

Q. Had you finished, Mr. Griswold?

A. That is the only thing that I refer to except this last——

Q. (Interposing). Now may I ask you concerning this, Mr. Griswold; you also refer to another plan, in that same paragraph. What did you have in mind there?

A. That was quite an extensive one.

Q. You say, "* * * it would still leave the way open to bring the matter to a head in a much easier way." Would you explain what you meant by that statement?

826 A. I had had under consideration for some time the merging of several of the smaller plants into one company, and among those contemplated in the merger were a number of these concerns that had been in these meetings—one was the Niagara Gypsum Company, another the Empire Gypsum Company, and as I remember it, at that time the Ebsary Gypsum Company was there, and at one time we had the Atlantic Gypsum Company——

Q. (Interposing). What about Texas, the Texas Gypsum Company?—A. And also the Texas Gypsum Company. This was a plan of my own for merging those smaller companies into one larger company which was to be under the name of The American Gypsum Company, and they were to be simply branches of The American Gypsum Company, subsidiaries, or whatever you want to call them. These people were all either at that time in the wallboard business, or were intending to go into it, and they would all be affected by this ultimate decision of the United States Gypsum Company if they were successful in establishing their patent claims.

And naturally, of course, I wanted to keep my own people out of trouble. I had had enough already, and Reeb already had a claim against him. So we were anxious to get those matters cleared up, and in connection with that, the longer the thing ran without clearing up, the more liability there was that accumulated against these companies.

827 And one of the most embarrassing things about it was the fact that in financing this merger we had not, as I remember it, at this time, arrived at any amount of damages, or the U.S.G. had not set any amount of damages

claimed against these companies, and consequently we couldn't set up any amount of liabilities, they were unknown, we couldn't establish what they were, and we had difficulty in financing the thing without we had that knowledge.

So I was anxious to get these matters settled so that I could go ahead with this merger proposition.

Q. What effect, if the merger went through, would that have upon the licensing agreement arrangements with United States Gypsum?

A. Well, if the license agreement went through, these companies—or if the merger went through, this licensing agreement that applied to these companies, they didn't need to take out a license agreement. Under the plan that we had at that time they were to become simply operating branches, like the Niagara Branch, and the Empire Branch, of The American Gypsum Company, and the license we were going to take out under the American Gypsum Company covered all the rest of the operating companies.

Q. Mr. Griswold, did you ever discuss with Mr. Avery this matter of the merger and the probability that if the merger went through it would take out a license?

828 A. Yes, I would say I did.

Q. Can you tell us when you first had a conversation with Mr. Avery?

A. No, I cannot.

Q. Can you name any time, any specific time, when you had such a conversation?

A. No definite date without something to refresh my memory with.

Q. Did you have one or more than one conversation with Mr. Avery upon that matter?

A. Well, I think I had more than one, but I can't say.

Q. Your letter is written under date of October 9, 1926—had you had a conversation with Mr. Avery prior to that?

Mr. BROMLEY. What exhibit is that, please?

Mr. STEFFEN. Exhibit 125.

The WITNESS. Now what is your question?

By Mr. STEFFEN.

Q. Can you tell whether or not you had a conversation with Mr. Avery prior to the date of that letter, concerning the fact that the merged companies, if it went through, if the merger went through, would take out a license agreement with the U.S.G.?

A. The fact that I was working on this merger was no secret, everybody in the business seemed to know
829 about it, and I had a talk with Mr. Avery because naturally he was in the gypsum business and I had no objection to him knowing about it, and also Mr. Avery knew that I very much favored the license agreement because I had approached him on the thing and favored it in that way. That was the only method that I could see of settling this dispute. The business was pretty well shot, the whole industry, with lawsuits and so forth, and I was trying to arrive at some way of settling the thing so as to do away with this litigation and trouble.

Q. Did you have any other reasons for favoring the licensing agreement besides the settlement of the litigation, infringement litigation?

A. Yes, I always wanted to make a closed-edge type of board.

Q. And the license agreement would allow you to do that?

A. The license agreement would allow me to make that board for the reason that the license agreement, if the prices of the license were not too high, I figured it wouldn't cost me anything because I could save it in the cost of manufacturing the board.

Mr. BROMLEY. When you say "price" you mean royalties, don't you?

The WITNESS. The royalties I have reference to, when I am talking about prices.

By Mr. STEFFEN.

830 Did you consider the matter of prices of the board with regard to the licensing agreements, the effects of the licensing agreements upon the prices of the board?

A. You mean the sale price?

Q. I will withdraw that question. In considering the licensing agreements did you consider their effect upon the price of the commodity, as well as the royalty question, whether they would have a stabilizing effect?

A. Well, I think I did, because I knew very well, and had consulted with my attorneys on the legal side of this question, and they had advised me that I had a perfect right to enter into a license agreement under the patent laws, and if Mr. Avery saw his way clear to grant a license, he had a perfect right to grant it; and in granting him the patent the law also gave him the right to tell us licensees, or whoever took out the license, the price at which

they should sell the product. There was no secret about that; everybody seemed to know it at that time; and naturally I figured that inasmuch as the price had already been stable for the past number of years, and they had been the people that had established it, and if they had the authority under the patent I supposed naturally they would maintain a fairly steady price.

Q. And that was agreeable to you?

A. I was perfectly willing to trust it to them, just on their past experience in the business.

831 Q. You say that they had maintained a fairly stable price; what do you mean by that?

A. Well, the price on wallboard had been $30 a thousand square feet, that was the sale price to the dealer, from the United States Gypsum Company.

Justice JACKSON. Was that on the raw-edge board?

The WITNESS. On the closed edge type. The raw-edge board always sold at quite a considerably less figure, and that price—well, it is pretty hard to remember, but I don't think there had been any disturbance in the price at this particular time; that price hadn't been disturbed since the manufacture of wallboard began, and——

By Mr. STEFFEN (interposing).

Q. Did it subsequently become disturbed?

Mr. BROMLEY. Don't interrupt him.

The WITNESS. Naturally, having remained steady for years past, I figured that if we acknowledged the patent of the U.S.G.—and at this time we had practically given up hopes of winning the suit against them and we were facing the proposition of either going out of business or else taking out a license agreement, so I was perfectly willing to leave the price situation to the United States Gypsum Company.

By Mr. STEFFEN.

Q. Were the other members of your Board of Directors similarly ready to leave the price situation to
832 the United States Gypsum Company?

A. Well, as I remember it there was some opposition among some of our directors.

Q. Can you name who opposed it?

A. Well, as I remember it now, Mr. Miller at that time was a director on the Board, and he represented the interests of John A. Kling of Cleveland, who held a very substantial interest in the stock of the company, and they

had some objection to that; but without something to refresh my memory, I have had other troubles since and I can't remember.

Q. Did the price on gypsum board remain steady after this time, which was in October, 1926, if you recall—during the years 1927 and 1928, I will say?

A. I think it possibly remained undisturbed during 1926, but in 1927, as I remember it, the prices began to be disturbed.

Q. And what do you mean by "disturbed"?

A. Well, there were lower prices being quoted by certain interests, especially on certain types of board.

Q. And which interests do you have in mind?

A. Some of the independent manufacturers.

Q. Could you name one?

A. Well, the Certain-teed Products was one.

Q. Were their prices lower or higher?

A. They made nothing at that time, as I remember
833 it, but an open-edge board, and they offered it at quite a low price.

Q. Did the other manufacturers attempt to meet that price?

A. Not with the closed-edge type board.

Q. How did they try, if they did?

A. They tried to meet it either by manufacturing an open-edge type board, or by selling what was known as culls or No. 2's, of covered edge board. There were some boards that were imperfect, that were thrown out, and had some blemishes on them, which were offered to the trade for the while as No. 2 board. They tried to meet this competition by that type of board.

Q. What was a No. 2 board in the industry?

A. Well, a No. 2 board was a board that was thrown out by the inspectors. These boards were all looked over when they came out of the dryer, and if they had some blemishes, an imperfect edge, or a spot where the paper did not adhere to the gypsum, it was put on a separate car and was thrown out as a No. 2 or a second. Those were afterwards re-sorted and some of the better ones were sold as No. 2 board, and some of the others were cut up into smaller sizes and sold as lath where people did not expect anything at that time except a raw edge on four sides, and inasmuch as they plastered over it, if there was some little spot where the paper didn't adhere, it didn't make
any difference anyway; so that they were cut
834 up into boards of that kind.

Q. Now as I understand your testimony, you say that in 1927 and 1928 the prices of wallboard became disturbed—is that correct?

A. Yes, as I remember it they were lower. That is, I think the price of No. 1 covered-edge board was disturbed to a certain extent in those years, as I remember it.

Q. And the price of the open-edge board was less than the price of the No. 1 board?

A. It was.

Q. And was sold in competition with the No. 1 board, is that right?

A. Well, they were not very successful; they sold it if they could, but it was not very successful competition to a closed edge type of board, which was always recognized as the better.

Q. Was there any quantity of open-edge board sold?

A. Yes, there was quite a lot.

Q. And it was sold at a lower price?

A. At a lower price, yes.

Q. Then explain, if you can, what was the difference between seconds and the No. 2 board, so-called?

A. Well, the terms meant the same thing. No. 2 board or seconds were the same thing.

Q. Did each of the companies in 1926 manufacture
835 a No. 2 board?

A. Well, I don't think—well, let me see, I don't think in 1926 they did.

Q. When did they commence manufacturing a No. 2 board?

A. Well, when the prices got so——

Justice STEPHENS (interposing). The Court is a little puzzled. As I understand the witness a No. 2 board wasn't manufactured as such, but it just happened; in other words it was the inferior product or culls which were normally produced in the general run of the making of the board. Am I mistaken about that, or did they manufacture, as such, a No. 2 board?

The WITNESS. No; in the early part of this period, in 1926, there was nobody that manufactured a No. 2 board. They were obtained, as I said, by the inspectors throwing them out as they came off the line. Later on, however, when the prices got so disturbed and the prices on this open-edge type board was so low, then, as I remember it, one or two of the manufacturers probably put out what they called a No. 2 board.

Justice JACKSON. With the main purpose of competing with the open-edge board?

The WITNESS. That is right.

Justice STEPHENS. How did it differ from the No. 1 board; how did the No. 2 board, which was thus manufactured as No. 2 board, differ from the other board?

836 The WITNESS. Well, to tell the truth I couldn't tell the difference very much in some of them. They were made thinner as a rule; it was a little thinner board that was offered. The standard wallboard and plasterboard was ⅜ of an inch thick; but they afterwards, when there was this competition, made some that was—I have seen some only 3/16 inch and quite a lot of it a quarter of an inch and 5/16 of an inch.

By Mr. STEFFEN.

Q. Was this competition between the No. 2 Board, and the open-edge board, and the No. 1 Board, and the variance in prices, was that one reason why you favored the license agreements, to eliminate competition?

A. Well, I figured that if these people elected to take out a license, naturally they would want to manufacture the best board they could, which it was pretty universally recognized was this closed edge type board; and if they did that, naturally that would have a tendency to eliminate these other boards from the market because they were only put out to compete with and raise a disturbance, as a rule.

Q. And that would eliminate competition in price, would it?

Mr. BROMLEY. I object to that as calling for a conclusion.

Justice STEPHENS. I think the questions are leading and conclusional. Sustained.

837 By Mr. STEFFEN.

Q. State whether or not it was your opinion that if the United States Gypsum Company were to fix prices under the license agreement, as they proposed, that would tend to make a uniform price and eliminate competition?

Mr. BROMLEY. That is leading, and I object to it for that reason; and it calls for a conclusion.

Justice STEPHENS. It is a very critical question in the case, of course, Mr. Steffen, and I think counsel ought not to lead, under those circumstances. Sustained.

Ask your witness to state what it was that was agreed upon.

By Mr. STEFFEN.

Q. Well, I refer you to the matter of the competition that you have just testified to, and the price differences be-

tween the open-edge board and the closed-edge board, and ask if that was a circumstance which you considered in favoring the license agreements under which the United States Gypsum Company would fix the price? Answer that yes or no.

A. I am not clear on that question. Repeat it again.

Q. I will rephrase the question.

I refer you again to what you have just testified to concerning the competition in the industry, and the difference in prices between the open-edge board and the closed-edge board, and ask if one of your purposes in favoring
838 the license agreements was to bring about a situation where the United States Gypsum Company could fix a uniform price?

Mr. BROMLEY. I object to that as leading.

Justice STEPHENS. It seems to me on a matter which is as critical under the issues in the pleadings as this, that leading questions shouldn't be asked.

This is an intelligent witness, he has a good memory, and understands what he is talking about. I don't see why you can't, Mr. Steffen, ask him to state what were the purposes, and all of them, which he had in entering into these license agreements. Let him enumerate from his own recollection, rather than you suggesting what they were.

By Mr. STEFFEN.

Q. Well, we will go back over the matter, Mr. Griswold, and I ask you to state what were the reasons, naming them all, that induced you to favor going into the licensing agreement with USG?

A. Primarily my reason was to get the right to make a closed-edge type board, which I wanted to make from the start but was prohibited from doing by this so-called Utzman patent.

Q. That was your first reason?

A. That was the first one. And a further reason, that from what I knew of the manufacturing end of the business, that was not only the better but the cheaper board of any
839 of them to make, from the cost of manufacture, because there was no waste about it, and very few seconds or culls.

Q. Well, were there any other reasons why you thought it would be better to have a licensing agreement than not to have one?

Justice STEPHENS. Take your time and state them all, that you actually had and can recollect, Mr. Griswold, and state them in your own way.

The WITNESS. One reason I had in mind was that this litigation that was either threatened or was actually going on at the time, was affecting a number of people whose plants I had built, and who were very good friends of mine; and having gotten tangled up in this license agreement the way we had—and perfectly honestly, so far as we were concerned, because we though we had an exclusive right to manufacture under our Clark patent—but having had the Patent Office decide, I don't know whether it was at this time or not, against us, and placing us in a position where we were liable for past infringements, and practically in a helpless position, we either had to take out a license or go out of business, or make an open-edge board.

I didn't want to see these people get mixed up in that, because they were friends of mine, and I figured that the sensible think to do, for them, was to avoid it, because sooner or later if they attempted to make any type of board outside of an open-edge, which I assured them they would soon find out they couldn't sell at a price where they could make anything on it, the price was so low that they would have to come to it anyway and make a closed-edge type of board, and the only way they could do that was to do as we were considering, taking out a license agreement with the United States Gypsum Company and save all this expense of litigation, which was running into a good many thousands of dollars per year.

Whether or not it would affect the price was a matter that I was perfectly willing to leave up to the United States Gypsum Company, they were the owners of the patent and they had the legal right to say what price that board should be sold at, and we had nothing to say about it. We would be compelled to sell at the price they said, or otherwise violate their license agreement, which gave them the right to cancel their license. So I was perfectly willing to leave that to them.

Mr. STEFFEN. Thank you.

Justice STEPHENS. We will adjourn at this time.

(Whereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Friday, November 19, 1943.)

841 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Friday, November 19, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances: (Same as heretofore noted), and the adtional appearance of Frank Shields, Esq., on behalf of the Department of Justice.

842 PROCEEDINGS

Justice STEPHENS. The Court will be in session. Mr. Adams, have you any authorities?

Mr. ADAMS. I will say, Your Honor, that I had some commitments last night that prevented me from looking into this matter other than very briefly. As far as I could find out from the very cursory examination, the position that I took that the letter does not prove itself, that there must be more than that, seems to be sound.

I have not, at this point, any cases which I can supply to the Court which are directly in point. I did look at Wigmore, and one or two other texts, and they seem to support my position, but I would not like to go farther at this point.

Justice STEPHENS. That was Exhibit 119, wasn't it?

Mr. ADAMS. As I recall it, it was.

Justice STEPHENS. That is the McCrady letter?

Justice GARRETT. It is Government Exhibit 117, on page 1103.

Mr. ADAMS. That is right, Your Honor.

I have another correction that I would like to make, if I may.

Justice STEPHENS. We will come to the corrections in a moment.

I think, Mr. Adams, that you are mistaken about the authorities on the subject. We interested ourselves
843 in it last night, my law clerk and myself, and I call your attention to the General Index Statement in Corpus Juris Secundum, at page 705, under the title Evidence. "Proof of the genuineness of the signature is sufficient authentication to warrant the admission of the letter. The genuineness of a letter or of the signature thereto may be sufficiently established by proof of the handwriting, but other evidence may be resorted to for this purpose." "* * * evidence which, if uncontradicted, would satisfy a reasonable mind of that fact, is sufficient to authorize the admission of the communication."

Examination of the cases which have been cited by the courts on the subject discloses very few in which letters have been introduced merely on the identification of a signature, but there are two such cases—Davis v. Fall, 288 SW 723 (Sup. Ct. Ark. 1926); and Burgess v. Burgess, 44 Neb. 16, 62 NW 242 (1895).

Then other cases, which indicate that identification of a signature plus circumstances of identification are sufficient, exist, such circumstances as the contents of the letter being of a character which would naturally be written by the alleged writer, and the use of a letterhead which is likely to be used by the writer. Flickema v. Henry Kraker Co., 252 Mich. 406, 233 NW 362 (1930); Galveston Railway v. Booth, 209 SW 198 (Texas Civil Appeals, 1919);
International Harvester Co. v. Campbell, 43 Texas
844 Civil Appeals 421; 96 SW 93 (1906); and Lundgren v. Union Indemnity Co., 213 NW 533 (Minn. 1927). That case indicates that the matter is generally within the discretion of the trial court in any event.

Now you have some corrections to the record to suggest, do you, Mr. Adams?

845 Mr. ADAMS. Do you want me to mention the correction I have now, Your Honor?

Justice STEPHENS. Yes. What page?

Mr. ADAMS. Page 1113. At that point Your Honor allowed in evidence Exhibits 119 and 120, after Mr. Bromley's objection; the first one was admitted subject to the ruling

with respect to declarations, and the other was received "as such without that restriction".

I take it that that was entirely proper in so far as Mr. Bromley's client was concerned. I, myself, did not hear the ruling, because it was my intention at that time to object with respect to both of the exhibits generally, so that we would have the protection of Your Honors' ruling during the morning.

Justice STEPHENS. Well, the ruling so far as declarations are concerned has been made in a manner which protects all defendants. All declarations of alleged co-conspirators are received in evidence at the present time subject to the ultimate establishment of a prima facie case of conspiracy.

Mr. ADAMS. I was a little concerned about the language that Your Honor used—"and the other is received as such without that restriction", and I wasn't sure that that did protect us.

Justice STEPHENS. The other one, I think, was a letter. What is Exhibit 120? A letter from Mr. Avery, I
846 think, and consequently, so far as USG is concerned——

Mr. ADAMS (interposing). Yes, 120 is a letter from Mr. Avery.

Justice STEPHENS. So far as the defendant United States Gypsum Company is concerned, it was not necessary to be received subject to the restrictions. So far as the other defendants are concerned, it may be received subject to the restrictions.

Mr. ADAMS. That is what I wanted to clear up.

Justice STEPHENS. The record may show, in reference to the ruling on page 1113 with respect to Government's Exhibits 119 and 120, that the ruling is modified as follows: The reception of Exhibit No. 120 is without restriction as to the United States Gypsum Company; with respect to the other defendants; it is received subject to the usual restriction which the Court previously announced concerning declarations of alleged co-conspirators.

855 Whereupon FRANK J. GRISWOLD the witness on the stand at the time of adjournment, resumed his testimony as follows:

Direct examination (resumed) by Mr. STEFFEN.

856 Q. Mr. Griswold, I would like to refer you to the matter that we were talking about at the end of the

session yesterday, that was Government's Exhibit No. 125, which was a letter from you to Mr. Avery under date of about October 19th or 20th, and I show it to you simply to refresh you as to the paper we were talking about at that time, and I have no more questions to ask you concerning it.

Justice STEPHENS. What is that in here?

Mr. KNUFF. D-23, Your Honor.

Mr. STEFFEN. It was admitted in evidence on page 1121 of the record.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 126, which purports to be a reply to your letter, under date of October 23, 1926, and ask you to examine it and state whether or not you received such a reply?

Justice STEPHENS. Before you answer that question, have counsel now sufficiently examined this file so that each of the Judges could have one of them without undue inconvenience to defendants' counsel?

Mr. FINCK. Here is one. (Handing file to the Court.)

Justice STEPHENS. Will that deprive you of one during the examination?

Mr. FINCK. We can get along without it. Mr.
857 Adams has one.

Mr. ADAMS. I can borrow a set from Mr. Oliver, so we are all right.

Mr. OLIVER. Will you indicate the D number on that, Mr. Steffen?

Mr. STEFFEN. That was D-24.

The WITNESS. I have no recollection of receiving it. There is nothing on the letter to indicate that I had seen the letter.

By Mr. STEFFEN.

Q. Do you recall whether you received a reply to your letter of the 20th?

A. I do not—at this time.

Q. And is there anything in that piece of paper which refreshes your recollection as to whether you did or didn't receive a reply?

A. Well, there is one part here where the writer says that "Charley tells me that he phoned you this morning,"

that he had phoned me. That is the only thing that I remember, "Charley".

Q. Who is Charley?

A. Mr. Henning, he went by that name, Charley.

Q. And who was Mr. Henning?

A. He was the Sales Manager of the United States Gypsum Company.

858 Q. Did you know him?

A. Yes, I was slightly acquainted with him.

Q. How long had you known Mr. Henning?

A. Probably around 1910 to the time of his death.

Q. When did he die?

A. I think it was in 1936 or somewhere around there. He was killed accidently.

Q. You knew him for about 26 years?

A. Off and on I was in contact with him.

Q. And do you recall whether Mr. Henning telephoned to you, as the letter recites?

A. Yes, I do remember that he telephoned something about Mr. Avery I think it was. wasn't able to—or was out of town, or something of that kind, it is an indistinct recollection, but I remember him telephoning.

Mr. STEFFEN. We offer Government's Exhibit No. 126 in evidence.

Mr. OLIVER. I object.

Mr. BROMLEY. No objection except a general one.

Justice STEPHENS. What is your objection, Mr. Oliver?

Mr. OLIVER. I object to it because the witness hasn't identified it at all, he said he had no recollection of ever receiving it.

Justice STEPHENS. We think the exhibit is not admissible, over objection, Mr. Steffen, except in the fol-

859 lowing informal way. It has apparently refreshed the witness' recollection as to a conversation with Charley Henning. Counsel may always exhibit to the Court a paper or object which has refreshed recollection so that the Court may be advised whether or not it is likely to have done so, but it doesn't become a part of the record as evidence. The witness has answered that he can't recollect receiving the letter, and can't identify it at all. It is not admissible as such.

Mr. STEFFEN. I would like the record to show that it was apparently dated October 22, instead of October 23, the

date is not too clear, as it appears on the typewritten copy that we have.

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 127, which is D-28, which purports to be a letter from you to Mr. Avery under date of November 1, 1926, and ask if you can identify that as your letter to Mr. Avery?

A. Yes, this is the original letter that I wrote to Mr. Avery.

Mr. STEFFEN. I now offer Government's Exhibit No. 127 in evidence.

Justice STEPHENS. It is received subject to the general restriction with respect to declarations announced yesterday.

860 (The letter from Mr. Griswold to Mr. Avery dated Nov. 1, 1926, was marked as Government's Exhibit 127 and received in evidence.)

By Mr. STEFFEN.

Q. Now, Mr. Griswold, could you tell the Court what letter you were replying to, in your letter of November 1, 1926, if you can?

A. I was replying to a letter written on October 22, directed to Mr. Avery.

Q. You say "directed to Mr. Avery" or written by Mr. Avery?

A. No, this letter here is the one you wanted me to identify.

Q. That is correct.

A. That is my original letter.

Q. Now the question is—what letter were you replying to in your letter to Mr. Avery?

A. The letter of October 22, the letter says. I have no recollection of it outside of this.

Mr. STEFFEN. I now again offer Exhibit No. 126, which I think has been connected by internal reference with the letter which the witness has just identified, and which has been admitted. The matter is not of any great moment.

Mr. OLIVER. I renew my objection for the same reason, it has not been identified.

861 Justice STEPHENS. I am afraid that is correct, Mr. Steffen, the letter has nothing on its face to identify it, and the witness says he has no recollection of it. All he is saying is that his letter was in answer to a letter of the

22nd, and not to that letter. If that letter had something on its face indicating that it was from Avery, I think you might be correct that it was then circumstantially identified, but I am afraid that the objection is correct. Sustained.

Mr. STEFFEN. There is a great deal of internal evidence, Your Honor, that would seem to connect the reply, the fact that the witness has identified the telephone call with Charley; the fact that in his letter of November 1 he refers to a letter of October 22 to which he is replying; and the fact that he says in his reply, on November 1, that "It will be impossible for me to be in Chicago this week, but will call and see you when I am there", while in the letter of October 22 there was an attempt to arrange a meeting for the first week in November.

I think that is sufficient to tie the two together, although the witness states that he is unable to identify this particular copy.

I might add the point that this copy was taken from the files of the United States Gypsum Company, under subpoena.

Justice STEPHENS. Is that conceded?

862 Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. That being the case, it seems to me that it ought to come in, Mr. Oliver.

Mr. OLIVER. If Your Honor please, it is not possible to tell from the date of this letter whether it is the 22nd or the 23rd. My copy certainly looks like the 23rd. Now armed with the two other letters that have been refrered to, it wouldn't be difficult for me, an outsider, to type this sheet of paper, Exhibit 126.

Justice STEPHENS. I think in view of the fact that it was found in the files of the United States Gypsum Company, that that circumstantial proof is so strong that we ought not to reject it, and the objection is now overruled. The letter is received, so far as defendants other than the United States Gypsum Company are concerned, subject to the usual restriction with respect to declarations.

(The letter to Mr. Griswold purporting to be from Mr. Avery, dated Oct. 22, 1926, was marked as Government's Exhibit No. 126 and received in evidence.)

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit

No. 128, which purports to be a letter from you to Mr. S. L. Avery under date of November 16, 1926, D-29.

863 A. Yes, that is an original letter by me to Mr. Avery.

Mr. STEFFEN. I now offer Government's Exhibit No. 128 in evidence.

Justice STEPHENS. Let us read it.

Is there any objection except the usual objection?

Mr. BROMLEY. That is all, sir.

Justice STEPHENS. Received in evidence, subject to the ruling with respect to declarations already made.

(The letter from Mr. Griswold to Mr. Avery dated November 16, 1926, was marked as Government's Exhibit 128 and received in evidence.)

Mr. STEFFEN. Your Honor, without reading this to the Court may I ask that these three short paragraphs appear in the transcript?

Justice STEPHENS. You mean the whole letter?

Mr. STEFFEN. Yes.

Mr. BROMLEY. I object to that as being improper practice, to place the emphasis which results from singling out any particular exhibit and reproducing it in the record.

Justice STEPHENS. All three of the Judges have read it, it doesn't seem to us necessary to put it into the record.

Mr. STEFFEN. Thank you.

Justice STEPHENS. By the use of the word "record", of course, Mr. Reporter, I mean the word "transcript". It is, of course, part of the record of the case as a whole.

864

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 129, which purports to be a copy of a letter addressed to you under date of November 22, 1926, in reply to your letter of the 16th to Mr. Avery. This is Government's Exhibit D-30.

Mr. ADAMS. Mr. Steffen, it would be very helpful, if you can, to refer to the D numbers when you are identifying them.

Mr. STEFFEN. I did, sir.

Justice STEPHENS. D-30, Mr. Adams.

Mr. ADAMS. Thank you.

By Mr. STEFFEN.

Q. The question is, Mr. Griswold, whether you can recognize that as a reply, by the contents or otherwise, to your letter of November 16, Government's Exhibit No. 128?

A. I remember some of the contents of the letter.

Q. Do you recall receiving a letter from Mr. Avery on the point?

A. I can not recall receiving this particular letter, and there are no marks on it indicating that I did so, or that it is an exact copy that I received.

Q. What are the matters that you remember in the content of the letter?

A. Well, one is that Mr. Avery at one time ex-
865 pressed himself as being disappointed that the American Gypsum Company had not given him a definite decision. Up to this time my own company, the American Gypsum Company, had not even signified their willingness, they were opposing this license agreement. I remember that part of it. But the letter itself I have no distinct recollection of having received.

Q. I now show you Government's Exhibit No. 130 for Identification, which purports to be a letter from you to Mr. Avery under date of November 29, 1926, in reply to Mr. Avery's letter of the 22nd.

Justice JACKSON. That is D-31?

Mr. STEFFEN. D-31.

The WITNESS. Yes, this is an original letter written by me to Mr. Avery.

By Mr. STEFFEN.

Q. And can you tell whether it is a reply to the copy of the letter which I showed you just a moment ago, Government's Exhibit No. 129?

A. I would say it was a reply to this letter of the 22nd.

Mr. STEFFEN. I now offer in evidence Government's Exhibits Nos. 129 and 130.

Justice STEPHENS. 129 is the November 22 letter?

Mr. STEFFEN. Yes; and 130, dated November 29, 1926, is a reply to that letter.

866 Justice STEPHENS. Was the letter of November 22 found in the files of the United States Gypsum Company?

Mr. STEFFEN. Yes, Your Honor.

Justice STEPHENS. Is that admitted?

Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. Then both exhibits are admitted in evidence.

(The letters marked as Government's Exhibits 129 and 130, respectively, were received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 131, which purports to be a reply to your letter of November 29, 1926, addressed to Mr. Avery. Exhibit No. 131 is dated December 30, 1926; and I ask if you can, upon examination of that paper, Government's Exhibit No. 131, identify it as a copy of a letter which you may have received from Mr. Avery in answer to your letter of November 29?

A. I can not remember receiving this particular letter, but the contents of the letter are information that I received in some letter, I don't remember whether it was this one or not.

Q. When you say you can't remember having received this letter, do you mean you can't remember having
867 received this piece of paper?

A. There is nothing on this to indicate that I did receive it. Usually I put some mark on them to indicate that I had received the letter myself, but I say I am familiar with and I had received information along the lines of this letter, but whether it was in this letter or not I couldn't say.

Q. You can not identify that piece of paper as a piece of paper which you ever saw before?

A. I can not say that I had seen it prior to this trial.

Justice STEPHENS. If these letters are received from the files of the United States Gypsum Company, which they apparently all are, they would not have reached this witness attention.

Mr. STEFFEN. Clearly so.

Justice STEPHENS. As far as the particular papers are concerned. The contents might have in the original.

Mr. STEFFEN. That is right.

By Mr. STEFFEN.

Q. And you remember, I think you have just testified, having received a communication from Mr. Avery along the lines of that communication?

A. I have the distinct recollection of receiving in some manner the information that is contained in this
868 letter, but just how it came I couldn't say.

Q. You don't remember whether you received a letter or not?

A. No, not at this time.

Q. I now show you Government's Exhibit 132, which is D-34, which purports to be a letter from Mr. Griswold to Mr. Avery under date of January 3, 1927, and acknowledges receipt of Mr. Avery's letter of the 30th.

I ask you to read it carefully and state whether or not it is your letter?

A. Yes, this is a letter I wrote Mr. Avery.

Mr. STEFFEN. I now offer Government's Exhibit No. 132 in evidence.

Justice STEPHENS. Received in evidence, subject to the announced restriction with respect to declarations.

(The letter marked as Government's Exhibit No. 132 was received in evidence.)

Mr. OLIVER. Your Honor, that same exception also went to the two previous exhibits? You didn't mention it.

Justice STEPHENS. Yes, I think the record clearly shows now that all of the letters which are in the nature of declarations of co-conspirators are admitted subject to the restriction that I have announced, that they must be connected by prima facie constitution of a case of conspiracy.

869 Mr. STEFFEN. I now offer Government's Exhibit No. 131, which is the copy of the letter of December 30, to which Mr. Griswold testified he replied on January 3, 1927.

Justice JACKSON. That came from the files of the USG?

Mr. BROMLEY. Yes.

Justice STEPHENS. It may be admitted.

(The letter marked as Government's Exhibit 131 was received in evidence.)

Mr. STEFFEN. Your Honor, I now would like to make a point of my right to read this letter of January 3 into the transcript. I would like to ask the Court to have this letter of January 3, 1927, appear in the transcript, and I may say that it is only one page and the expense is not going to be very great.

As respects the emphasis, it is a letter which should be emphasized, in our opinion. It is the culminating letter of about two years or a year and a half of negotiations between Mr. Avery and Mr. Griswold, and it is extremely important that the Court's attention be given to it.

I should therefore ask that I either be permitted to read it now and have it introduced in the transcript, or that the Reporter set it out in full in the transcript.

Mr. BROMLEY. Well, I have no objection to his reading it, of course, but I do object to its going in the
870 transcript. It seems to me that if he wants it in the transcript, then I am entitled to have all the letters in the transcript, a burden which I do not like to undertake, much as the Reporter might appreciate it.

Justice STEPHENS. We are agreed, Mr. Steffen, that it ought not to go into the transcript. You are at perfect liberty to read it to the Judges. We are glad to have the main points which counsel on both sides wish to bring especially to our attention and emphasize either now or in the argument, but it isn't the general practice, of course, to copy into the transcript of the record any exhibits, if for no other reason because of the expense; and it doesn't seem to us that it is quite fair to emphasize one particular letter upon the theory that if you put it into the transcript the Judges will give more attention to it than they will to exhibits not in the transcript. I hope we will not fall into that error. I hope we will read all the exhibits with extreme pains. But it seems to me that the announced purpose of it condemns it, I say that in good part, and we are all agreed that these letters may not go into the transcript. You may read them to us freely if you wish to. We have already read it ourselves, but we will be glad to have you do it, if you desire.

Mr. STEFFEN. I will read the letter, even though it takes a little additional time, Your Honor.

871 Justice STEPHENS. Very well, proceed to do so.

(At this point Mr. Steffen read Government's Exhibit No. 132 to the Court.)

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 133 for Identification, D-35, which purports to be a letter from you to Mr. Avery under date of January 31, 1927, and ask if you can identify it as your letter?

A. Yes.

Mr. STEFFEN. I now offer Government's Exhibit No. 133 in evidence.

Justice STEPHENS. It may be received subject to the usual restrictive ruling on declarations of co-conspirators.

(The letter marked as Government's Exhibit No. 133 was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 134, D-36, which purports to be a copy of a letter to you under date of February 2, 1927, in reply to your letter of the 31st, which you have just identified——

Justice STEPHENS (interposing). Before you answer that, let me make this inquiry, Mr. Steffen, in the interests of time. The Government seems to have possession of the file of letters written by Mr. Griswold to Mr. Avery,
872 taken, I assume, from the files of the American Gypsum Company or its successor in interest. Why haven't you, or can't you get possession of the original letters written by Mr. Avery to Mr. Griswold, such as this letter of February 2, and save all this difficulty of circumstantial identification of these unsigned copies?

Mr. STEFFEN. I would say that we have filed very, very comprehensive subpoenaes, which were served upon the Celotex Corporation, which took over the American, and in all of their records the originals were not found. These, therefore, were found in the files of the United States Gypsum Company.

Justice STEPHENS. I see. I can't ask you to produce the impossible. It would save a great deal of time. Of course, the Court can't exact it, but it would save a great deal of time, Mr. Bromley, if, to the extent that you are informed, you could concede that these copies were taken from your files; if you could make a concession with respect to a number of them that might be shown to you, it would save a great deal of time in this circumstantial identification.

If the witness can testify that he remembers receiving information such as is contained in the letter, and you admit that it comes from your files, I think that is sufficient circumstantial identification, regardless of the absence of signature; and my fellow Judges agree with me on the subject.

Couldn't you come to some stipulation? Have you
873 got a lot of letters of this sort?

Justice JACKSON. Why not ask the question as you tender each one to Mr. Bromley?

Mr. BROMLEY. That is the safest way.

Justice STEPHENS. That is a good idea.

Mr. STEFFEN. That applies to Mr. Oliver also, does it?

Justice STEPHENS. Mr. Oliver can't answer that question, because he doesn't have possession of the files of the United States Gypsum Company.

By Mr. STEFFEN.

Q. Mr. Griswold, do you recall having received that letter?

A. I do not recall having received that particular letter. There is nothing on it to indicate that I did receive it.

Mr. STEFFEN. Mr. Bromley, do you agree that this copy came from the files of the United States Gypsum Company?

Mr. BROMLEY. Yes, sir,

Mr. STEFFEN. I now offer Government's Exhibit No. 134 in evidence.

Mr. OLIVER. I object.

Justice STEPHENS. We think, in view of the concession of Mr. Bromley as to the sources of the copy, and in view of the internal contents of the letter, that it is circumstantially identified, and it is received in evidence.

874 Mr. OLIVER. And at the same time, may I have a running objection to this class of exhibits?

Justice STEPHENS. You may; you may note a running objection for Mr. Oliver to this class of exhibits for the Celotex Corporation.

This is received, of course, subject to the same general restriction with respect to declarations of alleged co-conspirators.

(The letter marked as Government's Exhibit No. 134 was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 135, which is D-37, and which purports to be a letter from you, Mr. Griswold, to Mr. Avery, under date of February 5, 1927, acknowledging receipt of a letter of February 2, and ask if you can identify that as your letter?

A. Yes.

Mr. STEFFEN. I now offer Government's Exhibit No. 135 in evidence.

Justice STEPHENS. Received in evidence, subject to the general restrictive ruling with respect to declarations of co-conspirators.

(The letter marked as Government's Exhibit No. 135 was received in evidence.)

875

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 136, which is D-41, which is in the form of a photostatic copy of what purports to be an original letter of March 24, 1927, from Mr. Griswold to Mr. Williams of the National Gypsum Company, and we also have put under the same number what purports to be a copy of Mr. Griswold's letter of that date.

Justice STEPHENS. This is March 24?

Mr. STEFFEN. March 24—D-41.

Justice STEPHENS. The only thing in this file is the purported copy, not the purported original.

Mr. STEFFEN. I would like to make a statement that the copy, Government's Exhibit No. 136, was taken from the files, under subpoena, of the American Gypsum Company. The photostatic copy which we have was taken from the files of the National Gypsum Company. Under our subpoena we asked, of course, for all original papers, and these are the papers that were furnished us, and no other papers were forthcoming.

Justice STEPHENS. I am sorry, Mr. Steffen, you will have to repeat that. I had my attention on this file, trying to find that letter. Judge Jackson's file has the purported copy of the American Gypsum Company's letter to Williams, and also the copy, and mine doesn't have the original.

Now will you just repeat that, if you will?

876

Mr. STEFFEN. We are offering both the copy which we obtained from the files of the American Gypsum Company, and we are offering a photostatic copy of the same letter which was taken from the files of the National Gypsum Company.

Justice JACKSON. As one exhibit?

Mr. STEFFEN. Yes, as Government's Exhibit 136. If more convenient we will offer it as two exhibits.

Justice STEPHENS. You had better mark them A and B, one 136-A and one 136-B.

Mr. STEFFEN. I will do that. The copy is 136-A, and the photostatic copy is 136-B.

We are offering the carbon copy which was taken from the files of the American and Celotex companies as 136-A, and the photostatic copy of the original which came from the files of the National Gypsum Company as 136-B.

By Mr. STEFFEN.

Q. Can you examine those Exhibits 136-A and 136-B and state whether or not you wrote such a letter?

A. I would say that that is a copy of it, a photostatic copy of the original letter which I wrote to Mr. Williams (indicating Government's Exhibit 136-B).

Q. And would you say that 136-A is a carbon copy of the same letter?

A. As far as I can see, they are exactly the same. One is a copy of the other. They apparently are the
877 same, the copy and the photostat.

Mr. OLIVER. Mr. Steffen, may I see the copy?

Mr. FINCK. We will admit that this letter came from the files of the National Gypsum Company.

Justice STEPHENS. Thank you. You are talking about 136-B?

Mr. FINCK. It is the photostat of the original letter.

Justice STEPHENS. That is 136-B, and Mr. Finck admits that that comes from the files of the National Gypsum Company.

Mr. STEFFEN. And the witness has testified that he signed and sent such a letter.

We offer Government's Exhibits 136-A and 136-B in evidence.

Justice STEPHENS. Let the Court read them, please.

Mr. STEFFEN. I will read them to the Court, if you wish.

Justice JACKSON. If you read one, you have read both, haven't you?

Mr. STEFFEN. Yes, I didn't intend to read both.

Justice STEPHENS. Let me glance through it first, so that I can make a ruling.

They may be received subject to the usual restriction with respect to the declarations of alleged co-conspirators.
878 (The letters marked as Government's Exhibits Nos. 136-A and 136-B were received in evidence.)

Mr. STEFFEN. The letter is of sufficient importance that I think I should read it.

(At this point Mr. Steffen read Government's Exhibit No. 136-B to the Court.)

879 By Mr. STEFFEN.

Q. I now show you Government's Exhibit 137 which purports to be a copy of a letter from the American Gypsum Company, addressed to the National Gypsum Company under date of April 22, 1927. This is D-43. I ask you to read it, Mr. Griswold, and state whether or not you may have sent an original letter of that type.

A. I cannot identify this as being a copy of the original letter. It has nothing on here to substantiate that.

Q. Will you say whether or not you wrote a letter containing those statements?

A. Yes.

Mr. STEFFEN. I offer Government's Exhibit No. 137 in evidence.

Mr. FINCK. If Your Honor please, I object to Exhibit 137 on the ground that there is no showing here that it was ever received by National Gypsum Company.

Justice STEPHENS. It was not taken from your files?

Mr. FINCK. No, it was not, and the witness says he cannot identify the letter. It seems to me that if he wants to take the testimony of the witness, that is all right, but I see no reason why his letter should be admitted.

Justice STEPHENS. Read the witness' answer to Mr. Steffen's question, please, Mr. Reporter. I missed
880 the first part of it. I was talking to one of my colleagues.

(The record was read as requested.)

Mr. STEFFEN. I would like to make the point, Your Honor, that if we don't offer this as having been received by National, it would still constitute a declaration of a coconspirator if, in fact, Mr. Griswold did write such a letter.

Justice STEPHENS. The Court thinks that the letter itself is not admissible for lack of any identification, but of course you may ask this witness to testify, and in fact he has already in effect testified, that he did, as president of the American Gypsum Company, or as an official of the American Gypsum Company, make such statements as are contained in that letter. You have then accomplished the same purpose, but the letter itself is not admissible.

Objection sustained.

Mr. STEFFEN. In order to let the transcript show what Mr. Griswold's testimony is, I will have to take the letter up, item by item.

Justice STEPHENS. You may properly use it to refresh his recollection as you see fit.

By Mr. STEFFEN.

Q. Did you, Mr. Griswold, under date of April 22, or thereabouts, write a letter to the National Gypsum Company, attention of Mr. J. F. Haggerty, in which you said, among other things, "For your information will say"——

881 Mr. ADAMS (interposing). We object to this kind of procedure, Your Honor. I don't think that he can just read the letter to him. I think he has to show him the letter and ask him if it refreshes his recollection. He previously testified that he can't identify the letter at all, and Mr. Steffen starts off and says, "Did you write a letter stating as follows"—and he has already testified that he cannot identify the letter.

Justice STEPHENS. It would save a great deal of time, and it is the usual practice in situations of this sort, to ask the witness if he did write a letter on or about that date, and let him see the letter, let him read it, and then ask him if it refreshes his recollection. If he says it does, ask him if he wrote a letter in substance and effect acquainting the National Gypsum Company with this information. You might just as well read the letter into the record; or offer it in evidence, as to do what you are doing now, and we can't permit that.

By Mr. STEFFEN.

Q. Well, Mr. Griswold, I believe you have testified that you wrote a letter on or about April 22, 1927, to the National Gypsum Company, is that correct, according to your recollection?

Mr. ADAMS. I don't think he testified that way; my recollection may be wrong, but I think he testified that he
882 wrote a letter.

Justice STEPHENS. We will see what he says. Take you time and read it, Mr. Griswold.

The WITNESS. Yes, I wrote a letter containing, as I remember it, the general statements that are made in this letter, but, as I stated before, I cannot identify this par-

ticular letter, I have no recollection of it. There is nothing on it to refresh my memory, or a check that I did receive it.

Justice STEPHENS. Do you remember about when you wrote it?

The WITNESS. I would say at about this time, because the evidence, if that is correct, is that I referred to a decision that had just been in the courts or the Patent Office, and that checks with what I remember of the decision as it came out. So I assume that it is correct.

By Mr. STEFFEN.

Q. Do you know what the decision is that you referred to, or between what parties the litigation was?

A. I am under the impression that there was some discussion, some legal matter between the Universal Gypsum Company and the National Gypsum Company, that had been up for argument before the courts or some place else, and had just been settled. I state here that I just learned of the decision, and I think that was the case it had reference to, it was their own troubles, nothing that I had anything to do with.

883 Q. I direct your attention to the last paragraph of the paper I have shown you, Exhibit 137, and ask you if you may have written a letter in which you stated that you were authorized to act as intermediary between the National Gypsum Company and Universay Gypsum Company, about this litigation.

A. Yes, I remember writing—Mr. Holland, who was receiver for the Universal Gypsum Company, had authorized me to discuss—I didn't want to dip into somebody else's trouble, trouble between two companies, and Mr. Holland authorized me to discuss with them the differences that they had.

Q. Did you write the National Gypsum Company that among your purposes was one of bringing about peace and harmony in the industry, in the wall board situation—do you remember that?

A. I would say yes, that is correct.

Q. Do you remember whether you mentioned in your letter to the National Gypsum Company that you had recently seen Mr. Palmer, president of the Universal Gypsum Company?

A. No, I do not remember, other than what the letter indicates here.

Mr. ADAMS. I move to strike out the answer. He has testified that he can't remember the letter.

Justice STEPHENS. Since the answer states that
884 he does'nt remember, the answer doesn't do any harm.

Mr. STEFFEN. If you want it stricken out, though, Mr. Adams——

Justice STEPHENS (interposing). It may go out.

Mr. BROMLEY. Could we have it brought out at this time, in the interest of clarity, that this letter has nothing to do with the United States Gypsum Company or the license agreements, whatsover?

Mr. STEFFEN. Your Honor, I think that is appropriate upon cross-examination, and I think it probably comes better on final argument.

Justice STEPHENS. I suppose, Mr. Bromley, unless the letter is to be introduced in evidence, about the only way you can do it is by cross-examination on it.

Mr. OLIVER. And along the same line, I would like to point out that it has nothing to do with American.

Justice STEPHENS. You should make a note of that, and bring it to the attention of the Court on cross-examination.

Mr. STEFFEN. May I say that we are forced, in a conspiracy case, to bring in one company after another, and that it will only appear, the relevancy in many of these instances will only appear, after we have put in a great deal of evidence. We propose to go through with each of the several companies, one after another, and the thing will tie in together at the conclusion.

885 By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit 138, which is D-56, which purports to be a letter from you to Mr. J. H. McCrady, under date of December 27, 1927, and I would like to ask you to read it carefully and state whether that is your letter.

Justice STEPHENS. Just one moment. The Court should have noted, in respect to Mr. Griswold's answers to the questions just preceding the one now asked, that they are also admitted, subject to the usual restriction with respect to declarations of co-conspirators. So far, the rulings have had to to only with exhibits, but the ruling applies also to oral testimony.

The WITNESS. Yes, this is an original letter written by me to Mr. McCrady.

Mr. STEFFEN. I offer Government's Exhibit 138 in evidence.

Justice STEPHENS. Received in evidence, subject to the general restriction on declarations, already announced.

(The letter referred to, marked Government's Exhibit No. 138, was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 139, which purports to be a copy of a letter from you to Mr. McCrady under date of March 16, 1928, which is D-58, and ask
886 you to read that and I will ask you one or two questions concerning it.

A. Well, I remember writing Mr. McCrady, he being president of the company, and reporting to him on conditions——

Q. (Interposing.) I don't ask you to identify the letter. I simply wanted to ask you one or two questions.

How did your company keep their records concerning the amount of gypsum mined, on a tonnage basis or was it on any other basis?

A. We kept it on a tonnage basis.

Q. Could you tell the Court roughly about what the tonnage of gypsum was that you were producing in 1927 and 1926?

A. Well, I would say between three and four hundred tons per day.

Q. I think you have so testified. Does that refresh your recollection in regard to the amount for the year?

A. This tonnage here refers to finished product, which contained other materials which we had added, and when it was put over the scales, that increased the tonnage. In other words, the tonnage of the finished product shipped might have been in excess of the amount of raw gypsum, for the reason that we were shipping ready-mixed sand and plaster, that contained two parts of sand to one part of gypsum, which increased our tonnage quite materially.

Q. Therefore your tonnage figures there covered
887 plaster and what other products?

Justice JACKSON. That is indefinite, isn't it?

Mr. STEFFEN. I think it is.

Justice STEPHENS. Are you talking about tonnage mined or shipped?

Mr. STEFFEN. If you will allow me to ask a question to straighten it out, I will do so.

By Mr. STEFFEN.

Q. Will you tell me whether, in figuring your tonnage records, did you include more than plaster, or did you include only plaster?

A. Every product that we manufactured and shipped was boiled down to a tonnage basis, so many tons, boards, blocks, every product that we put out, in my report to the company itself.

Q. Now, did your tonnage figures in 1927 compare favorably with those in 1926, or not?

Mr. BROMLEY. I object to that as immaterial. I don't understand the purpose of it at all.

Justice STEPHENS. What is the purpose?

Mr. STEFFEN. Well, the purpose is generally to show that the practice of the American Gypsum Company, and I think of all gypsum companies, is to treat their business as one of producing gypsum rock, and they sell it on a tonnage basis, and I want to follow this question up with
888 some question concerning the price situation in the territory at the time. This is a preliminary question, and not very material.

Justice STEPHENS. We think it is admissible, Mr. Bromley; it follows the general allegations in the complaint. The objection is overruled. You may answer the question.

Mr. STEFFEN. Will you read the question back, Mr. Reporter?

(The pending question, as above recorded, was read by the reporter.)

Justice STEPHENS. I may add, Mr. Steffen, that the Court hopes you will not have to go into any too great detail about it. The comparison of years may be connected with some other matter, but you are entitled to prove the general allegations of the complaint.

The WITNESS. Without referring to the letter, I would say that the tonnage compared very favorably with what we had had for the preceding year.

By Mr. STEFFEN.

Q. And by "the preceding year" you mean——

A. (Interposing.) The year before this, the year 1925. That is what I had reference to as the "preceding year."

Justice JACKSON. This question doesn't have reference to the tonnage mined, but refers to the tonnage of the finished products shipped?

By Mr. STEFFEN.

889 Q. When you speak of "tonnage"——

A. (Interposing.) I have made no reference in my report to the number of tons of rock mined, it was the tons of finished product, and every product we shipped was included in those figures given, no matter what it was.

Justice JACKSON. Now it is clear.

By Mr. STEFFEN.

Q. And did your tonnage of finished product increase or decrease in 1927 and in 1928, if you can tell?

A. Without referring to this letter, I don't remember, that is to far back.

Q. Well, let me ask you whether prices were stable at about the time of this letter, March 16, 1928, if you remember.

A. I would say they were not, that the disturbance in the price situation was in effect at that time. Just how long it had been going on, I cannot say, but I am sure there was considerable disturbance in prices by that time.

Q. And did that disturbance in price affect only one line of your production, or did it affect all lines?

A. Well, it affected more than one, but I don't think it affected all, as I remember it, but it did affect more than one line.

Q. Well, was it in effect as respects board, for example?

A. Well, the price of board was affected, I am
890 very sure, in 1928, at the time this letter was written.

Q. Was the price of plaster affected in 1928?

A. Well, I could not say offhand, Mr. Steffen, without referring to something that would refresh my memory, because that is too many figures, but on general conditions, I imagine——

Q. (Interposing.) I don't want you to state what you imagine, but what you recollect.

A. I can't say offhand without reference to something to refresh my memory.

Q. Thank you. I now show you Government's Exhibit No. 140, D-59, which purports to be a letter from you, Mr. Griswold, to Mr. McCrady, under date of April 2, 1928, and ask you to read it carefully and state whether or not it was a report you made to Mr. McCrady.

Justice STEPHENS. The Court will be in recess for a few moments.

(At this point a short recess was taken, at the conclusion of which the proceedings were resumed.)

Justice STEPHENS. The Court is in session. Proceed, gentlemen.

By Mr. STEFFEN.

Q. Mr. Griswold, I would like to now call your attention to Government's Exhibit No. 141, being D-61, which purports to be another report made by you to Mr. McCrady, this time under date of April 12, 1928, and would
891 ask you to examine it and state whether or not it is your report.

A. I cannot——

Justice STEPHENS (interposing). Just a moment, please. Let me finish reading it, please, Mr. Griswold.

The WITNESS. Certainly.

Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Have you had an opportunity to examine Government's Exhibit No. 141, Mr. Griswold?

A. I am just reading it.

Q. Have you completed reading it?

A. Practically so, I am nearly finished.

Q. Take your time and read it all clear through.

A. I cannot say that that is a copy of the letter I wrote, because there is no signature, that is, my signature is not on it.

Q. Do you recognize the initials there on the left?

A. Yes, my initials are on the left corner of the letter.

Q. What do the initials "AS" stand for, if you know?

A. Those were the initials of the stenographer.

Q. Upon examining the contents of the memorandum, can you state whether or not you wrote a memorandum concerning those matters?

A. Yes, I remember writing Mr. McCrady, who was president of the company, with regard to some of
892 the matters that are mentioned here in this letter.

Q. Which ones do you have in mind, when you say that?

A. I was telling him with reference to the proposed license agreement. The word used in a lot of this correspondence is "agree" to do certain things, which is improper. It was a meeting of these different manufacturers to consider whether that was the best thing to do to correct all this trouble and litigation and expense that there was in the company, and I remember writing him along those lines.

Q. And when you used the word "agree" what did you mean by that?

A. By "agreement" it is usually something that people are willing to sign; it was simply a talk of these different manufacturers over the troubles they were having among themselves, and whether or not the fact that Mr. Avery of the United States Gypsum Company had at this time, I think, been awarded the decision over us, especially in the Patent Office, and he had started suit against—either had or threatened to start suit against—the Niagara Gypsum Company and any of those manufacturers who were making board either under the Birdsey patent, or trying to make a closed-edge type of any kind, he threatened to start injunction suits against them, or infringement suits.

Q. Now correct me if I am wrong, and state whether or not by the use of the word "agreed" you meant
893 simply that they had come to a general understanding, but that there was no contract signed.

A. Well, I wouldn't say "come to a general understanding." It was the result of a conference in which they thought it was the best thing to do for their individual companies, to allow them to go ahead and manufacture the board, without litigation, which was costing us a lot of money, and the decision had gone against us at that time, as I remember it.

Q. Now, do you recall having reported to Mr. McCrady that you were in New York about this time and saw Mr. Brown of the Certain-teed people?

Mr. BROMLEY. I would like to add to the general objection with respect to both Exhibits 140 and 141 for identification, and their contents, if he is seeking to prove them this way, the further objection that these statements were not made in furtherance of any conspiracy, and constitute at most a mere narrative of past or current events.

Mr. STEFFEN. If I may say, in reply to that, Your Honor, meetings of manufacturers of wall board at which they discussed license agreements with the idea of getting even litigation settled, or any of the other difficulties in the industry settled, looking toward a uniform contract under the license agreements, would seem to me to be highly promotive or favoring or furthering the conspiracy which finally, as we claim, took full flower in 1929.

894 Mr. BROMLEY. That is not the question. If he wants to ask this witness what transpired at meetings, I of course would not have this present objection to it.

He is asking this witness to state what he told McCrady, which is a mere narrative and of course not made in furtherance of any conspiracy.

Justice STEPHENS. It is difficult for us to determine at the present time whether this is in furtherance of the conspiracy. It may be, and it may not be, if a conspiracy is proved. But we think at the present time the objection ought to be overruled, and the statements of the witness may remain in as declarations of an alleged co-conspirator, subject to the usual restriction on that ruling.

Mr. STEFFEN. Now will you please read my pending question, Mr. Reporter?

(The pending question, as above recorded, was read by the reporter.)

The WITNESS. Yes, I have an indistinct recollection of writing——

Justice STEPHENS (interposing). I think you must have misunderstood the question. You were asked if you remembered having been in New York.

Mr. STEFFEN. No, of having reported as to that, Your Honor.

Justice STEPHENS. I beg your pardon, I misunderstood.

895 By Mr. STEFFEN.

Q. And your answer is that you have an indistinct recollection?

A. I do.

Q. Do you recall having reported to Mr. McCrady that you had discussed with Mr. Brown the licensing agreement?

A. As I remember it now, I did.

Q. Do you recall what Mr. Brown's attitude was at that time toward the licensing agreement?

Mr. ADAMS. We object to that as incompetent and immaterial and calling for a conclusion.

Justice STEPHENS. Ask what Mr. Brown stated in substance and effect.

By Mr. STEFFEN.

Q. Do you remember what Mr. Brown stated, in substance and effect, concerning the license agreement?

A. Not without something to refresh my memory on the proposition.

Q. Did you speak of the Ebsary Gypsum Company at that time, in talking with Mr. Brown?

A. I could not say, without something to refresh my memory.

Q. Will you look at the second paragraph of Government's Exhibit 141 for identification and see if that refreshes your recollection?

896 A. It does with reference to Mr. Brown, with reference to talking to Mr. Brown.

Q. Can you say now whether or not you and Mr. Brown discussed the Ebsary Gypsum Company?

A. I couldn't say whether we discussed it at that time or not.

Q. Do you recall having discussed it with Mr. Brown at any time?

A. I cannot recall any definite time, but I will say that it was discussed possibly at some time, with Mr. Brown.

Q. Well, I don't want you to say "possibly at some time," but do you or do you not recall ever having discussed with Mr. Brown, the Ebsary Gypsum Company and whether or not it might take out a license?

A. Yes, I think I did.

Q. All right, state what that conversation was.

Mr. ADAMS. May we first have it indicated when it was?

Justice STEPHENS. Can you tell about when it was and about where it was? You don't have to state the exact day, Mr. Griswold, we don't expect you to remember the impossible.

The WITNESS. Well, I would say that it was probably along about April 12, 1928, as I am writing Mr. McCrady the result of the meeting.

Mr. ADAMS. I respectfully move to strike out the answer as a mere speculation on the part of the witness.

897 Justice STEPHENS. I think the objection goes to the weight, Mr. Adams. I think the witness' answer may stand.

By Mr. STEFFEN.

Q. Now tell us, if you can, what your conversation with Mr. Brown was concerning Ebsary becoming a party to the agreement, the license agreement.

A. I couldn't say without refreshing my memory.

Q. Well, look at the second paragraph of Government's Exhibit 141 and see if that refreshes your recollection.

Perhaps you should also read the first paragraph of the letter in this connection, Mr. Griswold.

A. Now state your question.

Q. Now, the question is whether, at a meeting with Mr. Brown at some time, you discussed with Mr. Brown whether he woluld join the licensing agreement and whether he discussed whether Ebsary would become a party to the licensing agreement.

A. I discussed with Mr. Brown the advisability of his taking out a license agreement and manufacturing a closed-edge board instead of trying to make an open-edge, which he was making at the time, and, as I remember, was selling at a pretty low price, like all the rest of the manufacturers. As I remember it, Mr. Brown at that time stated that if all of the other manufacturers, or certain ones of them, took out a license, that he might possibly consider it,
898 but he felt that his competitors, especially since Ebsary and the Certain-teed Products were pretty hot competitors in that territory, he felt they should both be licensed.

Justice STEPHENS. Who is Mr. Brown connected with, Ebsary?

The WITNESS. He was president of the Certain-teed Products.

Mr. ADAMS. There were two Mr. Browns. He might indicate which one it was.

By Mr. STEFFEN.

Q. There was a Mr. George Brown and a Mr. C. O. Brown?

A. This was Mr. George Brown.

Q. Having read Government's Exhibit No. 141, can you identify it as a report which you made to Mr. McCrady?

A. Well, I can identify it as the substance of the letter, but I can't identify that as being a copy, an exact copy, of the original. There is no signature of mine on there, and the initials were copied by the stenographer, so I didn't put that there, but the substance of the letter was what I had reported to Mr. McCrady.

Mr. STEFFEN. We offer at this time Government's Exhibit No. 141, which was taken from the files of the American Gypsum or Celotex Company.

Mr. ADAMS. We object to it on the same grounds as we indicated yesterday with reference to a similar ex-

899 hibit. It is not identified as being a letter which he knows that he wrote, and it certainly is not sufficiently identified to be a letter within the rule of past recollection recorded.

Mr. BROMLEY. To the general objection and to Mr. Adams' objection, I would like to add the further objection that it was not written in furtherance of any conspiracy.

Justice STEPHENS. Well, as to the objection that it was not written in furtherance of the conspiracy, the Court will overrule that at the present time. We can't tell piecemeal what will or will not appear to be in furtherance of the conspiracy. You may and ultimately will move, I assume, to strike all of these declarations if, in your view, no proof of conspiracy has been made.

As to your objection, Mr. Adams, we think that the exhibit has now been sufficiently identified to make it proper to admit it as embodying the substance of a report which was made to Mr. McCrady by this gentleman who is now on the witness stand. He says that he did write such a report, he has read it carefully, and he remembers reporting those things to Mr. McCrady. It bears his initials and his stenographer's initials, and it seems to us that it is cutting it a little too fine to exclude evidence of that sort. It may be received in evidence as embodying—it is not received in evidence as having been identified as an original letter sent by this witness—but it is received in evidence as
900 embodying, as the witness states, the substance of a report which he made to Mr. McCrady.

Objection overruled. It is of course received subject to the usual restriction that unless there is prima facie proof of a conspiracy, it will not be considered; that the declarations themselves don't prove the conspiracy.

(The document referred to, marked Government's Exhibit No. 141, was received in evidence.)

Justice STEPHENS. We will now recess until 1:45. The Marshal will announce the recess.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pur-
901 suant to recess.)

Justice STEPHENS. The Court is in session.

Mr. Oliver and Mr. Adams, do you want to make some record of the matter concerning which you spoke to me?

Mr. ADAMS. I don't know that it is particularly necessary. There is certainly no objection to it. It is just that Mr. Oliver has to be away for two or three days next week, and asked me if I would, so far as I could, take over in his absence, and I suppose that will happen from time to time with respect to myself and perhaps other counsel. I just didn't want——

Justice STEPHENS (interposing). It is thoroughly agreeable to the Court that, in Mr. Oliver's absence, if it is agreeable to you two gentlemen and your clients, you speak for your client and Mr. Oliver's client; and vice versa, in the event of your absence.

Mr. ADAMS. Thank you very much.

Justice STEPHENS. Proceed, gentlemen.

Thereupon, FRANK J. GRISWOLD, the witness on the stand at the time of the recess, resumed his testimony as follows:

Direct examination (resumed).

902 By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, what has been marked for Identification Government's Exhibit 142, which is D-66, which purports to be a copy of a report you made to Mr. McCrady under date of June 18, 1928, and I would ask to have you examine it carefully and state, if you can, whether that is a copy of your report?

A. There is nothing about this——

Justice STEPHENS (interposing). Just a moment, let us read it, Mr. Griswold.

Very well.

By Mr. STEFFEN.

Q. I direct your attention to the subject matter of the report, and ask you if you recall having made a report in that form to Mr. McCrady?

Justice STEPHENS. What number is this exhibit?

Mr. STEFFEN. Government's Exhibit 142.

The WITNESS. Yes, I made reports to Mr. McCrady, but I can not identify this particular report.

By Mr. STEFFEN.

Q. Do you mean by that that you can not identify the paper you have in your hands, or you are not familiar with the subject matter discussed in that paper?

A. Well, in a general way I remember the subject matter in the letter.

903 Q. Can you say whether or not you ever made a report to Mr. McCrady in substance and effect as that paper is?

A. I say to the best of my recollection that I did make a report of this nature to him. Whether this is the exact copy of it or not, I couldn't say.

Justice STEPHENS. Are those your initials in the left-hand corner?

The WITNESS. Yes, FJG.

Justice STEPHENS. Did you have a stenographer at that time with the initials indicated there?

The WITNESS. We did.

Mr. STEFFEN. This paper was taken from the files of the American Gypsum Company under subpoena, and I offer Government's Exhibit No. 142 for substance and effect.

Justice STEPHENS. Mr. Oliver, do you concede this was taken from the files of American, which was acquired by Celotex?

Mr. OLIVER. No, because I don't know, Your Honor. I would like to ask a question, whether or not the paper Mr. Steffen has shows that the first sentence is incomplete?

Mr. STEFFEN. I don't get your question.

Mr. OLIVER. The question is whether or not the first sentence in that document is incomplete?

Mr. STEFFEN. It is, as we have it here.

Mr. OLIVER. You see, Your Honor, I don't know——

Justice STEPHENS (interposing). I understand
904 that, we don't expect you to stipulate if you don't know, but the Court has no reason to doubt the statement of Government counsel that it was so taken, and in the absence of that we think it may be received in evidence as embodying the substance of a letter written by Mr. Griswold.

Mr. ADAMS. May I have an objection to it, Your Honor? Your Honor has indicated that you are going to admit it, but I would like to have an objection to its admission.

Justice STEPHENS. You may object.

Mr. ADAMS. On all the grounds that we stated with reference to the previous exhibit on the same subject matter, and the further objection of Mr. Bromley that it merely amounts to a narrative. It couldn't conceivably be in furtherance of the conspiracy.

I would like to indicate for the record that the exhibit shows on its face that it is largely a matter of rumor, and I call the Court's attention to the sentence which says:

"There has not been to our knowledge any direct movement made in the way of raising prices, but there are rumors all over the country that salesmen of both the Certain-teed and the U. S. G. Companies within the last ten days or two weeks have been advising contractors on specific jobs to get their orders in as prices are going to be advanced. These rumors come from all parts of the country * * *", and so on.

It seems to me that that should be called to the
905 Court's attention as indicating the fundamental vice in receiving this type of evidence.

Justice STEPHENS. Well, the objection will be overruled, Mr. Adams. It may turn out that the exhibit has no weight; but it may, on the other hand, if connected with other exhibits and brought to the attention of other alleged co-conspirators, indicate a common knowledge and current talk which was in the direction of promoting a combination. We can't foresee that. I think the objection goes to its weight.

It may be received in evidence subject to the general restrictions which we are making upon this type of exhibit and testimony and evidence.

(The document marked as Government's Exhibit No. 142 was received in evidence.)

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit 143, which has been marked for Identification, and which is D-67; and it is a copy of a purported report which you made to Mr. McCrady under date of July 2, 1928. I would like to have you examine it carefully and I will then ask you some questions concerning it.

Justice STEPHENS. Of course, I take it, Mr. Steffen, that you are not offering this exhibit and the previous exhibits to prove the state of prices. That could be
906 testified to directly by this witness so that he could be cross-examined on it.

Mr. STEFFEN. That is right.

By Mr. STEFFEN.

Q. I want to ask you, Mr. Griswold, whether you recall having made a report to Mr. McCrady at about this time concerning the matters which are related in this memorandum, Government's Exhibit No. 143?

A. Yes.

Q. You have examined the exhibit throughout, have you?

A. Yes.

Q. And does it embody, in substance and effect, the report which you made to Mr. McCrady?

A. I would say yes.

Mr. STEFFEN. I offer Government's Exhibit 143 in evidence.

Mr. ADAMS. May I have the privilege of a brief preliminary examination?

Justice STEPHENS. Yes. You mean on voir dire of the witness himself as to his familiarity with the document?

Mr. ADAMS. That is the sole purpose of it, Your Honor.

By Mr. ADAMS.

Q. Mr. Griswold, this Exhibit 143 that you have in your hand, you don't remember that at all, do you, you don't remember the paper at all?

907 A. I can not identify the letter itself, the paper itself, as there is nothing on here to indicate that I did, no marks that I put on it or my office put on it.

Justice STEPHENS. What is this across the bottom of the exhibit before us, "signed FJG". Is that on yours?

The WITNESS. It is on mine.

Justice STEPHENS. Is that in your writing?

The WITNESS. No, that is not my writing.

By Mr. ADAMS.

Q. Now you said that you made a report to Mr. McCrady, but you can't tell us that this is the report, can you?

A. I can't what?

Q. You can't tell us that this is the report that you made to Mr. McCrady? I will put that again. You told us that you made a report to him, but you can't tell us that this paper that you have, Exhibit 143, is or is not the report, can you?

A. No, I can not.

Q. Now when you read it over, do some of the things come to your mind as being things that you knew at that time?

A. Yes.

Q. And are there many other things there that you don't have any recollection at all about, now?

A. Well, I would say yes.

Q. There can be no question about that, can there,
908 Mr. Griswold, that there are only a few of those things that are in that report that you remember now; isn't that right?

A. Well, I would say that I remember fairly well the different subjects that are commented on here as having been reported to Mr. McCrady.

Q. That is right, but you can't remember what the comment was, can you? You can remember the subjects but you don't remember what you said; isn't that the true way of putting it?

A. Not without referring to some letter or something.

Q. So that your position about this exhibit is, as I take it, that you can tell us that generally you reported to Mr. McCrady on the subject matter that is mentioned in the exhibit, but you don't know what the report that you actually made was, do you?

A. Only as indicated by this, and I can't identify that as being a definite copy of the original.

Q. And you can't identify this paper as being something which you prepared and dictated, can you?

A. No, I can not.

Q. Now, Mr. Griswold, if, in this letter, you referred to a conversation with some particular person, you have no present recollection about that conversation, have you?

A. You say if I referred——

Q. (Interposing.) Yes, if you referred to it.

909 A. Not without something to refresh my memory, I wouldn't.

Q. And this letter, you say you can't identify as being something which you dictated, which is the product of your mind?

A. Not by the paper that it is written on, there is nothing to indicate that this came from our office even; it may have, but I don't know.

Q. I want to state this, if I can, as fairly as possible, but as I see it, you are in the position where you tell us that you recall that you made a report to Mr. McCrady, is that correct?

A. That is correct.

Q. You can't tell us that this is the report at all, can you, we are agreed about that?

A. Well, in substance I have already said that I remember having reported, but whether it was at this time and whether this is a particular copy of it, I can not say.

Q. All you can tell us is that you covered the subjects that are mentioned here?

A. In my report to Mr. McCrady, that is right.

Q. But you can't tell us that what is contained in that letter is what you told Mr. McCrady, can you?

A. I would say I couldn't say that I remember all of it, there are some of the parts of it that I remember.

910 Q. And others that you do not?

A. Others that I do not remember now.

Q. Well now, Mr. Griswold, when you have been talking here to day about other exhibits, suppose we take the one that went in just before, Exhibit 142——

Mr. STEFFEN (interposing). I think we might stay with this exhibit.

Mr. ADAMS. I am not trying to cross-examine on the subject matter which is contained in the letters, I am trying to——

Justice STEPHENS (interposing). I understand what you are doing, and you have a right to see whether the witness' recollection of this exhibit is such as to make it properly admissible in evidence, as such, rather than calling upon him to testify. But I don't think we had better go back to the other exhibits. The Court has ruled upon those, and the Court is satisfied concerning those.

You may proceed with respect to this one, if you want to.

Mr. ADAMS. Well, I am debating, Your Honor, the desirability of asking for an opportunity to reconsider those exhibits, in the light of the testimony of this witness with respect to this exhibit. I think that under the circumstances of his answers with respect to this exhibit, and also Exhibit 103, I think it was, concerning which we had some discussion yesterday, that while I am reluctant to trouble

911 the Court in that respect, I think I must apply for that permission.

Justice STEPHENS. Well, you are at perfect liberty to trouble the Court whenever your client's interests, in your opinion, require it; but the other exhibits are different from this one. The Court has some question about this one, but the other exhibits had something about them, physically,

that helped the witness to identify them as having been written by him. This has nothing of that sort. Of course, when you get to cross-examining this witness, you can go over all of these exhibits again, and if you can bring out at that time that he doesn't remember anything about them, you can move to strike them; but I think we ought not to reopen all these other exhibits that we have just gone through.

Mr. ADAMS. I agree that there is that difference with respect to most of the others, as I recall it. Of course, here he says that these initials are not put on by him, and that does make a difference in that respect.

That is all the questions I have at this time, Your Honor. Thank you.

Mr. STEFFEN. To clarify the matter, Your Honor, I can further ask the witness concerning the particular matters that he has in mind and has remembered.

Justice STEPHENS. Let me state what I think are the views of both of my colleagues and myself with respect to this exhibit and this class of testimony. Of course,
912 we realize the difficulties you are under with these events far in the past, and the witnesses can't be expected to remember everything. On the other hand, the case must be proved according to the rules of evidence.

Now so far as the rulings past are concerned, we think they are correctly made. In respect of this letter, we have a grave question as to whether this letter could come in itself, because the witness can't say that he wrote it, and there is nothing on it to indicate that he wrote it.

If you put the whole letter in, then you put your opponents to the disadvantage that they can't cross-examine a letter. To the extent that he can't identify it as having been written by him, it is a form of hearsay.

However, if he can, by reading that letter, refresh his recollection as to having told Mr. McCrady of particular items referred to therein, you can call his attention to those portions of that letter and let him testify himself concerning them, and then he can himself be cross-examined on them.

By Mr. STEFFEN.

Q. Well, Mr. Griswold, you have testified that this report, Government's Exhibit No. 143, which I showed you, embodies in substance and effect matters which you reported to Mr. McCrady, and in answer to Mr. Adams' ques-

tions you have said that some of the things you didn't remember and some other things you have remembered.

913 I would like to ask you now to tell us which of the matters in this report are matters which you now remember having included in a report to Mr. McCrady?

Justice STEPHENS. Take your time, Mr. Griswold, don't be hurried about it. Look through the letter carefully and find out what portions you do now remember having told Mr. McCrady about, either orally or otherwise.

By Mr. STEFFEN.

Q. I would ask you to consider the first paragraph, and ask you if you remember the things in the first paragraph as having been included in a report to Mr. McCrady?

A. Yes, I am sure I made that first paragraph of that report to Mr. McCrady.

Q. Now let's look at the second paragraph, and see if there are any things in there that you do not remember having made or any things that you remember having made in a report to Mr. McCrady?

Mr. ADAMS. Do I understand that the question is whether he reported on the subject matter of the paragraph?

Justice STEPHENS. No, the question is whether he reported that matter which is contained in the paragraph.

Mr. ADAMS. Whether he said that to Mr. McCrady?

Mr. STEFFEN. In substance or effect.

Justice STEPHENS. Whether he said it or wrote it to him.

The WITNESS. Yes, the second paragraph I would

914 say that I had reported to Mr. McCrady.

By Mr. STEFFEN.

Q. Well, let's take the third paragraph, do you recall having reported that you were in Chicago on or about this time, to Mr. McCrady?

A. No, I do not remember that, except as it refreshes my mind here that I probably discussed with him at some time that matter. Mr. McCrady used to be up to the office quite frequently, and I had, of course, frequent conversations with him.

Q. You have no recollection of having reported to Mr. McCrady as to the third paragraph, concerning Harris Brothers?

A. No.

Q. Now let's take the fourth paragraph, and I ask if you can recall making a report, in substance, to Mr. McCrady as covered by that paragraph?

A. Yes, I remember reporting the information contained in that paragraph, but just whether it was in this letter or some other one, I couldn't say now.

Q. Will you look at the paragraph at the bottom of the first page, and the top of the next page, and tell the Court whether you remember having reported to Mr. McCrady, in this report or in a conversation, that Mr. Avery would be interested in having everyone in the license agreement
100 percent, in substance and effect, as you have re-
915 ported it in this paragraph?

Mr. BROMLEY. I object to the form of that question, if the Court please. It seems to me the only proper procedure is to ask him whether he recollects reporting, and if he says yes, have him state what he reported. All he is doing now is reading the letter and saying "yes," having said he didn't remember the letter.

Justice STEPHENS. I was about to suggest, Mr. Steffen, that it seems to me we are getting again pretty far afield of the rules on this subject. Either this exhibit is admissible as past recollection recorded—under previous rulings it isn't admissible as that because it is a copy, it isn't identified as an original or authenticated—or it is usable, not admissible, but usable to refresh the recollection of the witness.

Of course, where he can identify it, as in the previous exhibits which have had his initials on them and stenographers' initials and letterheads, where he can identify the contents and say that he sent those as an officer of the company, then it is admissible as a declaration. But this exhibit isn't authenticated in any manner.

It seems to me that in clear obedience to the rules that you are using this as an item to refresh his recollection, that when he has had a chance to read it, as he has now, two or
three times, you ought to ask him what he reported
916 to Mr. McCrady. Let him tell about it, and then de-
defendants' counsel have an opportunity to cross-examine. Otherwise, you are really indirectly getting this in evidence, and it isn't really admissible in evidence.

Mr. STEFFEN. Well, I would expect to offer this as a report which embodied, in substance and in effect, the matters which——

Justice STEPHENS (interposing). The rulings thus far have admitted those reports because they were identified in some official manner as reports. All this witness says now concerning this item is that he remembers making some such report on the subjects of the various paragraphs which he has thus far described. He doesn't say when he made it. For the purposes of the Government, in any event, it is equally effective to have this witness state orally, if he can, what he told Mr. McCrady; and if he can't tell that, then I don't think the Government is entitled to put this in as an exhibit, since it isn't authenticated.

Mr. STEFFEN. If this was not to be admitted as an exhibit, I would expect, of course, Mr. Griswold's testimony to the effect that he did make such a report as being his present recollection that he made such a report, and as being evidence of the fact that he recites.

Justice STEPHENS. You are entitled to examine him further, you are entitled to ask him: "Now having
917 looked at this exhibit, Mr. Griswold, and refreshed your recollection as to what you reported to Mr. McCrady, what was it you reported?"

By Mr. STEFFEN.

Q. Well, Mr. Griswold, I want to ask you what you did report to Mr. McCrady, and I want to direct your attention particularly to your conversation with Mr. Avery, which you have already testified you had, in Chicago; and what did you report as a part of your conversation with Mr. Avery, as you recollect it now?

Mr. BROMLEY. And quite apart from the letter, if the Court please.

Justice STEPHENS. We don't want you to read us the letter, Mr. Griswold. We want you to tell us as far as you can, we don't expect the impossible of you, we don't any o us remember back in 1926 with perfect accuracy. You have an excellent memory, but if you can refresh your memory by reading each paragraph of that letter, and it brings to your mind that you told Mr. McCrady something or Mr. Avery something, then tell us about it, but don't read the letter to us.

The WITNESS. I have already passed on the first four paragraphs of the letter, that that was substantially what I reported to Mr. McCrady. But generally those four paragraphs were what I had reported to Mr. McCrady as

to what had happened, and Mr. McCrady being the
918 President of the company I had to report to him.

Justice GARRETT. Except as to the third paragraph.

Mr. STEFFEN. That is right.

By Mr. STEFFEN.

Q. I would like to ask if you can say whether you reported to Mr. McCrady the substance of the fifth paragraph?

Mr. BROMLEY. I object to that on the same ground. If he wants to take the letter away and have the witness tell us what he remembers about an item, that is one thing. But I don't think it is proper to have him read out of a letter.

Justice STEPHENS. We think that is true, Mr. Steffen. The Government is really trying to get in between the edge of past recollection recorded and present recollection refreshed. If you can identify the exhibit as a record of past recollection and authenticate it as an original, it can go in itself; if it refreshes his recollection it may be put in as illustrative of the material which he is refreshed upon; but it can't come in as an exhibit itself, it can't be considered as evidence, and when you ask the witness to read or to state merely that he told the substance and effect of paragraphs 1, 2 or 3 to Mr. McCrady, then you are reading that into the record, and that is an evasion of the rule.

I am sure you don't intent to evade, I don't mean that, but I think you will have to ask this witness to tell us what he told Mr. McCrady.

919 Mr. STEFFEN. I would like to show Mr. Griswold his testimony in the deposition out at Port Clinton, by way of refreshing his recollection on the matter, and I refer to page 148 of the deposition where the Government had asked the question whether he recalled having made such a report.

The WITNESS. I still admit I made a report, but what I am trying to confine it to is if that was exactly what I reported at that time. I admit there that I did make a report to Mr. McCrady.

By Mr. STEFFEN.

Q. And you have testified that you recall the first two and the fourth paragraphs as being part of the report?

A. So far, those first four paragraphs I remember.

Q. As having been included in a report to Mr. McCrady?
A. Yes, I think they were in a written report.

Mr. BROMLEY. I don't think he says that at all, if the Court please. He doesn't say he remembers paragraph 4.

Mr. STEFFEN. I think that was the testimony.

Justice STEPHENS. We understood him to testify that he remembers in a general way making some such report as is described in those paragraphs of the letter, but he doesn't say that he wrote those paragraphs to Mr. McCrady.

If the recollection of the witness can be refreshed in any way, you are entitled to refresh it, even by asking for a recess to talk to the witness informally, because
920 I am sure counsel's efforts are honest, and I am sure the witness is entirely honest. But we can't have introduced here what really isn't past recollection recorded, and if we can't introduce it in that form, then he has got to do the testifying.

By Mr. STEFFEN.

Q. Well, I want to ask some questions, then, concerning your interview with Mr. Avery, which I understood you testified as having had. That is, you did have an interview with Mr. Avery, is that correct, at about this time?

A. I couldn't say right now as to a particular date, I had a number of them.

Q. Did you have one on or about July 2, with Mr. Avery, at which you discussed the license agreements, July 2, 1928, being the date of the letter that I have been showing you, Exhibit No. 143?

A. I do not remember any more than as that letter brings it to my memory. That date is too far past, I couldn't establish any date.

Q. That is, you don't remember the date, but do you remember that you did have a discussion?

A. I remember that I had a discussion with Mr. Avery, several of them.

Q. And did you have a discussion with Mr. Avery at any time at which Mr. Avery signified that he would want to grant no more license agreements unless you could get 100 percent——

921 Mr. BROMLEY (interposing). I object to that as leading.

Justice STEPHENS. The matter is critical, and I think the Court is bound to rule that counsel ought not to lead in this aspect of the examination.

The WITNESS. What is your question?

Justice STEPHENS. Can't you just tell us in your own way, Mr. Griswold, what you talked with Mr. Avery about? You can't remember the words, of course, but just tell us in your own way. You have read this letter, and you say it refreshes your recollection that you made a report, and that you had talks with Mr. Avery. Now just forget you are in a court room and don't be under any pressure or fear at all. Just take your time and tell us in your own way, if you remember, what you talked to Mr. Avery about, and what was said by you, in substance and effect.

The WITNESS. As I remember, I had this interview with Mr. Avery to discuss the license agreement particularly for the reason that this was getting pretty late, during the term of this patent litigation, and it was about the time my merger was either going across or was not going across, that is, going to be successful.

At this time it was considered that it was going to be successful, and I wanted to get from Mr. Avery a promise to continue this until I could get at least my own fellows in on this license agreement, or get my own company to
922 sign up a license agreement.

As I have already testified, the understanding was that if the new company in this merger took out a license agreement, that covered any of the other companies that I took in on the merger, like Niagara, Empire, Atlantic Gypsum, or whoever manufactured board, that covered any subsidiaries or companies of that kind that we controlled under this merger; and Mr. Avery having withdrawn the proposition for settlement placed me in a kind of embarrassing position; and the further threat that he made, that he wouldn't consider any more, placed me still in more of an embarrassing position, because I was faced with a possibility that if they couldn't get any license agreement, some of these plants that we were taking over in the merger, spending a good many thousands of dollars in building wallboard plants, would not show any returns from the money, because we wouldn't be allowed to make any closed-edge wallboard unless we took a risk of suits from the USG, and if we made anything else we were at a disadvantage to market it.

So I was vitally interested in trying to persuade Mr. McCrady to hold off on the thing until I at least got my own——

Justice STEPHENS (interposing). You said "Mr. Mc Crady". Did you mean Mr. Avery?

The WITNESS. Mr. Avery.

923 Justice STEPHENS. What did you say to him on that subject of holding off, if anything?

The WITNESS. That was my idea at that time. Of course, this extended over a considerable period, and there were a number of discussions, and it is pretty hard to remember; but this recalls, what else is said here reminds me of what happened at that time, and it is so late, the date, the middle of 1928, that my merger deal at that time, as I remember it now, the audits had all been passed on by the different companies, and the contracts with most of the companies had been signed up to go into the merger; and of course I was vitally interested, because this was going to disturb my arrangements materially unless he held off and took these other companies in. And if he granted us a license, which, as I was informed by my own counsel and others that I consulted, he had a perfect right to do if he saw fit, and we had a perfect right to take out a license if we saw fit, that cleared the way for me to go ahead with the merger and operate these plants, which were scattered around over the country, and gave me a national distribution of wallboard, which I was handicapped on before, because in trying to ship from Port Clinton to the Atlantic Coast I had to pay a terrific high freight rate.

924 Justice STEPHENS. I am afraid the Court in attempting to aid the progress of the examination, is getting the witness to tell much more than anyone wants in the record. Won't you tell us what you said to Mr. Avery, if you remember it, on this subject?

The WITNESS. Well, as I remember it, I argued with him that it would work a hardship on me unless he would continue to hold forth his offer to license these companies.

Justice STEPHENS. Unless he would do what?

The WITNESS. License these different companies that we proposed to merge, at least.

Mr. BROMLEY. He said "continue to hold forth."

The WITNESS. At this particular time, the Universal Gypsum Company, as I remember, had already signed up a license agreement, and the Atlantic Gypsum Company—I couldn't say if they had, but if they had not signed it, they

were considering signing it at this time; and the National Gypsum Company I think at this time had signed their agreement, and I was anxious that he hold off to take in the rest of these companies.

Justice JACKSON. And that is what you told him, is it?

The WITNESS. Which left one company outside——

Justice JACKSON (interposing). Is that what you told Avery?

The WITNESS. Yes, as I remember it, and that left
925 only one company outside of that.

Justice JACKSON. What did he say, if you remember?

The WITNESS. Well, as I remember, it was that he insisted at that time, or stated that he wanted them all to come in, and of course I had no connection with the Certainteed Products, and very seldom called on them.

By Mr. STEFFEN.

Q. Did you testify that National had come in at this time, or did you mean Universal?

A. I said I didn't know whether they had or not, I wasn't sure whether they had come in. These negotiations extended over such a long period, that it is pretty hard to remember these dates.

Q. What was the status, if you know, of the suit which Mr. Avery's company had brought against your company at this time—this is on July 2, 1928?

A. Well, I could not say without something to refresh my memory now. It was getting pretty close to the date when we got a decision, if it had not already been rendered.

Q. Do you remember the date when you got the decision?

A. No, I do not remember—I remember the date I heard about it.

Mr. BROMLEY. We will stipulate it if you would like us to.

The WITNESS. I remember the date I heard it.

By Mr. STEFFEN.

926 What date is that, that is what I want?

A. July 7, 1928.

Q. Do you recall why you remember that?

A. Yes, it interfered with my golf game very seriously. [Laughter.]

Justice STEPHENS. Is that the suit, Mr. Griswold, that you said in one of your letters that you thought you could

win if you could get the judge to understand it? [Laughter.]

By Mr. STEFFEN.

Q. I want to go further into your discussion with Mr. Avery at this time. Did the subject of the prices of products come up in your discussion?

A. Nothing any more than the price on wall board.

Q. Did you discuss the price, perhaps, of plaster and of block? I show you your exhibit.

A. You are talking about reporting to Mr. McCrady?

Q. No, I am asking you if, in this conversation with Mr. Avery, you took up the prices of wall board and block and plaster.

A. With Mr. Avery, I do not remember, at that time. We tried to keep pretty well posted on the prices that were prevailing over the country on these different commodities, and the information that I was passing on to Mr. McCrady here was probably the information that I had secured from other sources.

927 Q. But I want to direct your attention particularly to the conversation you had with Mr. Avery. Did the matter of price concerning plaster and the price concerning block—this was in 1928—did that come up in your conversation?

A. No, no; it did not. The discussions of prices on those commodities never were had in connection with this. This was a patented article, wall board, and the other articles were unpatented. We knew we had no right to discuss other articles, any unpatented articles.

Q. I didn't mean to ask you whether you expected to have a license to fix prices on plaster, but I ask you if the price of plaster was discussed at all with Mr. Avery while you were discussing the board matter. I call your attention to the exhibit.

A. I couldn't say definitely, but it was usually customary that we did exchange information as to what prices existed over the country, there was no secret about it, and if Mr. Avery should ask me what price I was quoting, I had no hesitancy in tell him or any other of my competitors.

Q. Well, were plaster prices stable at this time, in 1928?

A. I think not, as I remember it. I think they were beginning to come down pretty low.

Q. Do you recall having discussed whether the board licensing agreement might have an effect on stabiliz-

928 ing prices concerning plaster?

A. With Mr. Avery?

Q. Yes.

A. Well, I do not remember it other than the possibility that he might—of course, we understood, or I understood, that the law would give him the right, under this patent, to tell me what price, or any other licensee, what price he must sell his stuff at——

Q. (Interposing.) That is as to board only?

A. Yes, but what price that was, Mr. Avery did not say at that time, or at any other time, as I remember it.

Q. Did you discuss with Mr. Avery whether a stable price for board would have an effect upon plaster or tile prices?

A. I would say that we probably exchanged views on the possibility of that being the case, because that naturally would follow, that if prices on one of the principal products of a company were at a fairly remunerative basis, and had been changed to that basis, and another article they sold was sold below the cost of manufacture, it was natural to figure that it would influence to a certain extent the lower prices, that a man wouldn't be trying to make all of his money on one product he was selling, and giving the other one away.

Q. I would like now to show you, to refresh your recollection, this paragraph of Government's Exhibit 143.

929 Justice JACKSON. Indicating what paragraph?

Mr. STEFFEN. The second paragraph on the second page.

By Mr. STEFFEN.

Q. I ask you to read that, Mr. Griswold, and see if that refreshes your recollection. Now can you tell us, Mr. Griswold, whether Mr. Avery said, in your discussion with him, anything concerning the effect that stabilization of the board market would have upon the plaster and block markets?

Mr. BROMLEY. I object to that as leading, and request that the letter be taken from beneath the witness' eyes when he answers.

Justice STEPHENS. Well, we think that the Court has been very liberal in allowing the examination of this witness, realizing the difficulties of the Government in making its case, but I think it is not proper to, in effect, ask the witness to read that paragraph. Sustained.

By Mr. STEFFEN.

Q. I don't believe I have yet an answer to my question, Mr. Griswold.

Can you now tell us whether or not Mr. Avery discussed with you at this time the effect which the board licensing agreements might have toward stabilizing prices on plaster and block, recognizing that he couldn't fix the prices on plaster and block, and that they could only be fixed legally on board, as you have testified?

930 Mr. BROMLEY. I object to it as repetition.

Justice STEPHENS. He has already answered that question.

The WITNESS. Well, I could not say that we discussed that feature.

By Mr. STEFFEN.

Q. Your testimony a minute ago, though, was that it would have the natural effect to stabilize——

A. (Interposing.) That would be the natural effect——

Mr. BROMLEY (interposing). I object to that as leading, and move to strike out the answer.

Justice STEPHENS. It may go out.

By Mr. STEFFEN.

Q. Will you say whether, in your opinion, a stabilized board market would have any effect toward stabilizing the prices of plaster or block?

Mr. BROMLEY. I object to that as calling for a conclusion.

Justice STEPHENS. Well, you are not objecting to that as leading, but only because it asks for an opinion?

Mr. BROMLEY. Well, I am objecting to it as leading and as repetitious.

Justice STEPHENS. It is already in the record. I doubt if it is objectionably conclusional. This witness has practically placed himself in the category of an expert; he has testified to long experience in the wall board and
931 plaster business, and I think he could testify as to what the effect would be, if he is being offered as an expert—I don't know that he is—but his answer is in the record. It is repetitious; objection sustained.

Mr. STEFFEN. I would like to offer—I am not clear whether Your Honors have ruled upon this—Exhibit No.

143 in evidence as embodying in substance and effect, as respects paragraphs 1, 2, and 4, the matter contained in a report which Mr. Griswold testifies he made to Mr. McCrady. That testimony, I think, is clear that far.

Mr. BROMLEY. Objected to as incompetent, because no proper foundation laid.

Justice STEPHENS. The Court has in effect ruled upon that. If you want a formal record on it, so that you may assert it as error in the event of an appeal, should this case ultimately go against you, you are entitled to make it, of course. The objection will be sustained; the exhibit is not received in evidence.

(The document referred to, marked Government's Exhibit 143 for identification, was rejected.)

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 144, which purports to be a letter from you to Mr. Eugene Holland, care of Universal Gypsum and
932 Lime Company, under date of September 10, 1928.

Justice JACKSON. What is the "D" number on that?

Mr. KNUFF. It would be D-78.

Justice STEPHENS. What is the date of it?

Mr. KNUFF. September 10, 1928.

The WITNESS. Yes, this is the original letter that I wrote Mr. Holland.

Mr. STEFFEN. I offer in evidence Government's Exhibit No. 144 as——

Justice STEPHENS (interposing). A declaration of an alleged co-conspirator?

Mr. STEFFEN. Yes.

Justice STEPHENS. Received subject to the general restrictions made upon that class of evidence.

(The letter referred to, marked Government's Exhibit No. 144, was received in evidence.)

Mr. STEFFEN. I will read the letter, if I may, to the Court.

Justice STEPHENS. We have all read it, Mr. Steffen, and it is not necessary to read it now. We have conferred upon

the matter of reading items into the record, and we think that that ought not to be done. It is not necessary. It is in effect a way of arguing the case during the trial, by bringing particular matters of emphasis to the at-
933 tention of the Court. We will read every letter, as you offer them; and we will consider them very carefully as you argue the case, but I think we ought not to waste this time or clutter up the record with so much expense.

By Mr. STEFFEN.

Q. I direct your attention to a statement in your letter which reads:

"Under the conditions as they are now, you, and licensees (that apparently refers to the Universal Gypsum Company) should be entitled to some protection which you are not getting, and we of course feel the same way, and I think the rest of the concerns do also."

Could you tell us what you meant by "protection"?

A. That, as I remember it, had reference to the assurance that if the prices on wall board got so low that it was working a hardship on the licensees, that they should be granted some relief from paying that royalty, and the contract contained no such clause in it, but such assurance had already been expressed verbally, but had not been included in the contract.

Q. You say it had been expressed verbally. When did that take place?

A. Well, I couldn't state the date—in some of the meetings we had been given an assurance.

Q. By whom?

934 A. I think it was by Mr. Avery, because he was the only one that we talked to, that should such a condition arise that he—well, while he never specified any amount, he intimated that he would grant some relief.

Q. I now show you Government's Exhibit 145, which purports to be a copy of a letter from Mr. Eugene Holland to the American Gypsum Company in answer to your letter of September 10, and ask if you recall having received the original of that letter.

Mr. KNUFF. There isn't any "D" number on that.

Mr. OLIVER. What is the date of it?

Mr. STEFFEN. September 13, 1928.

The WITNESS. Yes, I remember receiving a letter from Mr. Holland along about this time, but there is nothing on

this to indicate that that was the letter; but it deals with the matters that I had had correspondence with him on, and my judgment would be that this is a copy of the letter.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 146, which is a photostatic copy of a purported letter from the American Gypsum Company to Mr. Eugene Holland, under date of September 19, 1928, and which replies to the letter of the 13th, and ask you to read that and say whether or not that is a photostatic copy of a letter which you sent to Mr. Holland.

A. I would say that that is a photostatic copy of
935 a letter that Mr. Holland wrote me under date of September 19.

Justice STEPHENS. Is he talking about Exhibit 146?

Justice JACKSON. He just got it turned around; Holland didn't write that letter.

By Mr. STEFFEN.

Q. You say that this was a letter you wrote to Holland, or that Mr. Holland wrote to you?

A. This is a letter that I wrote to Mr. Holland.

Justice STEPHENS. Which one is that?

Mr. STEFFEN. That is Government's Exhibit 146, and it is the letter of September 19, 1928.

I will now offer Government's Exhibits Nos. 145 and 146. I might state that these three exhibits, Government's Exhibits 144, 145, and 146, are all exhibits which I believe were taken from the files of the National Gypsum Company. We have shown Mr. Finck Government's Exhibits No. 145, and he states that that was taken from the files of the National Gypsum Company.

Mr. FINCK. No, from the files of the Universal Gypsum and Lime Company, after we had taken over the Universal Company.

Mr. OLIVER. May I see Exhibit 145?

Mr. STEFFEN. Yes.

(Exhibit 145 for identification was handed to Mr. Oliver.)

Justice STEPHENS. What is Exhibit 144, Mr. Steffen?

936 Mr. STEFFEN. I can show you Exhibit 144.

Justice STEPHENS. Just tell me what it is.

Mr. STEFFEN. It is a letter of American addressed to Eugene Holland under date of September 10, 1928.

Justice STEPHENS. Have you anything to say, Mr. Oliver?

Mr. OLIVER. I object to Exhibit 145 as not properly identified.

Justice STEPHENS. Exhibits 144, 145, and 146, we think, are properly admissible, and so rule.

(Received subject to usual reservation. See Tr. p. 2729.)

(Letter of September 13, 1928, Holland to American Gypsum Company, marked Government's Exhibit No. 145, was received in evidence.)

(Letter of September 19, 1928, American Gypsum Company to Holland, marked Government's Exhibit No. 146, was received in evidence.)

By Mr. STEFFEN.

Q. I show you Government's Exhibit 147, Mr. Griswold, which purports to be a reply by Mr. Eugene Holland, addressed to you, under date of September 20, 1928. It is in reply to your letter, apparently, of September 19. I ask if you recall having received a letter to that effect.

A. I cannot identify this as having been received from Mr. Holland. However, I did receive information
937 from Mr. Holland along the lines contained in this letter, but I couldn't say that this is an exact copy, because there is nothing on this to identify it that I had seen it.

Q. No, that is a copy of a letter. The letter that you would have received would have been the original, and we do not have that here.

A. Well, I do not remember that, but I do remember the subject-matter of the letter, as having been in a letter from Mr. Holland.

Q. To the effect of the copy that I show you?

A. Yes.

Q. Which is Government's Exhibit 147.

A. Yes.

Mr. STEFFEN. We offer Government's Exhibit 147.

Justice STEPHENS. Mr. Holland was president of what company?

Mr. STEFFEN. Universal.

Justice STEPHENS. Which was in the background of National?

Mr. FINCK. Yes, he was the receiver of Universal Gypsum and Lime.

Justice STEPHENS. Was this letter taken from the files of Universal?

Mr. FINCK. I haven't seen it yet.

Mr. STEFFEN. We will say that it was taken from
938 their files, but if you would like to have Mr. Finck see it, that is all right.

May we ask for a recess while Mr. Oliver is examining this?

Justice STEPHENS. Yes, we will have a five-minute recess.

(At this point a short recess was taken, following which the proceedings were resumed.)

Mr. STEFFEN. I now offer Government's Exhibit 147 which the witness has identified generally as being a copy of a letter which he received, and Mr. Finck has stipulated that this copy was taken from the files of Universal Gypsum Company, which are now in the possession of National Gypsum Company.

Justice STEPHENS. It may be received subject to the usual restrictions on this class of testimony.

(The letter referred to, marked Government's Exhibit No. 147, was received in evidence.)

By Mr. STEFFEN.

Q. We now go back to some correspondence purporting to be had with the Texas Cement Plaster Company, and I show you, Mr. Griswold, Government's Exhibit 148 for identification, which is D-44, and purports to be a letter of yours to Mr. Gloyd under date of January 25, 1927, and ask if you can identify that as a copy of a letter which you sent to Mr. Gloyd.

939 A. There is nothing on this to indicate that I received it, and it is not——

Justice JACKSON (interposing). That you wrote it, you mean?

The WITNESS. That I wrote it—and it is not on our stationery. My initials are on it, but they were put on by my stenographer. In a general way I remember writing Mr. Gloyd, but I do not remember this particular letter.

By Mr. STEFFEN.

Q. Now I show you Government's Exhibit No. 149, which purports to be a reply from Mr. Gloyd, addressed to you

under date of February 17, 1927, in answer to a letter of yours dated February 10.

Justice STEPHENS. Is that D-45?

Mr. STEFFEN. Yes.

The WITNESS. Yes, I remember this letter.

Mr. STEFFEN. May I correct my statement? That does not purport to be a reply to the letter, Government's Exhibit 148.

By Mr. STEFFEN.

Q. Do you remember having received that letter?
A. I remember having received that letter.
Q. How do you know that?
A. This is my writing up here.
Q. Do you know Mr. Gloyd's signature?
A. Yes, I know Mr. Gloyd.
940 Q. Do you know his signature?
A. That is very indistinct. Usually I do, but I wouldn't say that that was his signature because it is so dim, but ordinarily I would recognize his signature if you have it on any other paper.

Mr. JOHNSTON. May I see Exhibit 149?
(The exhibit was handed to Mr. Johnston.)

Mr. JOHNSTON. I will say to the Court that as to these Gloyd letters I have no idea what they are, because I have not seen them.

Justice STEPHENS. Take your time and examine them.

Mr. KNUFF. There is a copy right next to Mr. Johnston, they have copies that have been furnished to Mr. Oliver.

Mr. JOHNSTON. Now, if the Court please, it takes a long stretch of the imagination to say that photostatic copies that Mr. Oliver came to the Department and got, and is using here, that I have had access to.

Justice STEPHENS. Well, if you haven't had actual access to them, take your time now and examine these letters.

Mr. KNUFF. I didn't mean to imply that Mr. Johnston had access to them. I meant that he already had, right next door to where he is sitting, copies of these, without taking them from the witness.

Justice STEPHENS. That is quite all right, Mr. Knuff. We We understand that you didn't mean any improper implications.

941 Mr. JOHNSTON. Now may I see Exhibit 148?
(The exhibit was handed to Mr. Johnston.)

Mr. STEFFEN. Has Mr. Johnston finished his examination?

Mr. JOHNSTON. Yes, I have seen them.

Justice STEPHENS. Have you seen the letters, Mr. Johnston?

Mr. JOHNSTON. Yes. I didn't understand that he had offered them yet.

Justice STEPHENS. Not yet.

By Mr. STEFFEN.

Q. I want to show you again Government's Exhibit No. 149, which purports to be a letter from Mr. Gloyd to Mr. Griswold, and ask if that writing at the top there is identified as being your writing.

A. Yes, I would say that that was my writing.

Q. I now show you a photostatic copy, another photostatic copy, of what I think you will regard as the same exhibit, and ask you if that shows Mr. Gloyd's signature a little more clearly than on the exhibit I showed you first.

A. Yes, this signature is very clear and I would say that that was Mr. Gloyd's signature.

Justice STEPHENS. Is there a magnifying glass available here?

(A magnifying glass was handed to Justice Stephens.)

Justice STEPHENS. Maybe the witness can tell if he uses that, about the signature on Exhibit 149.

942 (The magnifying glass was handed to the witness.)

By Mr. STEFFEN.

Q. You might see if that will show the signature on Exhibit 149 to any better advantage.

A. It does; I would say that that was Mr. Gloyd's signature.

Mr. STEFFEN. I now offer Government's Exhibit 149 in evidence.

Justice STEPHENS. Is there any objection?

Mr. JOHNSTON. The usual objection.

Justice STEPHENS. It may be received, subject to the usual reservation with respect to this class of evidence.

(The document referred to, marked Government's Exhibit No. 149, was received in evidence.)

Mr. STEFFEN. I now offer Government's Exhibit No. 148, which is a copy of the letter of the American Gypsum Company to Mr. S. M. Gloyd.

Mr. OLIVER. I object to that exhibit, Your Honor, for the reason that it is not properly identified. Specifically, the witness testified that he does not remember this particular letter, but remembers writing letters to Mr. Gloyd. I don't think that is sufficient identification.

Justice STEPHENS. In view of the fact that the witness stated that he cannot identify it and there is no
943 circumstantial identification on it, and no other letter has been introduced which seems to be a response to it, we are of the view that that letter cannot come in evidence as presently identified.

(The letter referred to, marked Government's Exhibit 148 for identification, was rejected.)

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 150, which is D-46, which purports to be a copy of a letter from the American Gypsum Company to the Texas Cement Plaster Company under date of February 21, 1927, in reply to Mr. Gloyd's letter of the 17th, and ask if you can identify that as a copy of a letter, not the original, which you may have sent to Mr. Gloyd. Do you remember having written that? Do you remember whether or not you wrote to Mr. Gloyd in reply to his letter of the 17th?

A. The reply is dated February 21. I remember writing Mr. Gloyd, but this is plain paper, and there is nothing here that I can say indicates that this is an exact copy. Those are my initials, but those were put on by the stenographer. There is no signature here.

Q. Will you tell us whether you wrote a letter to Mr. Gloyd, embodying the substance and effect of that letter which you have in your hands?

A. I would say yes.

944 Mr. STEFFEN. I will now offer Government's Exhibit No. 150 in evidence, with the observation that this copy was taken from the files of the American Gypsum Company.

Justice STEPHENS. It may be received, it is circumstantially identified, subject to the reservation with respect to declarations already made.

(The document referred to, marked Government's Exhibit No. 150, was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 151, which purports to be a letter from Mr. Gloyd to Mr. Griswold, under date of March 10, 1927, and ask if you can identify it as a letter which you received from Mr. Gloyd. That is D-47.

Justice STEPHENS. Who is the Mr. Johnson referred to in these letters? Will you bring that out?

Mr. STEFFEN. We will bring that out.

The WITNESS. Yes, I received this letter. This is my writing here in the corner.

By Mr. STEFFEN.

Q. Do you recognize the signature?
A. Yes, sir.

Mr. STEFFEN. I offer Government's Exhibit No. 151 in evidence.

Justice STEPHENS. Received in evidence subject
945 to the reservation already made with respect to this class of declarations.

(The document referred to, marked Government Exhibit No. 151, was received in evidence.)

By Justice STEPHENS.

Q. Will you tell the Court who was the Mr. Johnson referred to in Mr. Gloyd's letter of March 10?

A. Mr. Johnson was a gentleman in Chicago who was in the insurance business, I forget the name of his company, he had been with them a long time in Chicago. He also was in the business of the manufacture of varnishes. In some manner has was associated also with True and Webber, private bankers, in Chicago, and he became interested——

Justice STEPHENS (interposing). You have perhaps answered it as far as the Court needs to know, unless counsel wishes you to go further.

Mr. STEFFEN. I would like to have him answer in full.

The WITNESS. He became interested in this merger proposition, in trying to put this merger across, and it is referred to in this letter that Mr. Gloyd just received a letter from him. That is the connection. Mr. Johnson was trying to promote the merger and put it through.

By Mr. STEFFEN.

Q. Was that Martin Johnson?

946 A. Yes.

Q. And who were True and Webber?

A. They were private bankers in Chicago.

Q. And what did they have to do with the merger, if anything?

A. Well, they were the company that was going to finance the proposition originally.

Q. What was Martin Johnson's part in the matter, if he had any?

A. Well, he had done a good deal of work in getting these companies to agree to the merger, the Empire Gypsum Company and the Niagara Gypsum Company and the Texas Cement Plaster Company—we tried to get Ebsary Gypsum Company, but he was too hard to handle, Ebsary was.

Q. Would you call Mr. Johnson a promoter?

A. Well, yes, I would say he was, in addition to his other qualifications.

Q. Was there a check put up by either Martin Johnson or True and Webber in connection with this merger?

A. Yes, sir.

Q. What was that?

A. $50,000, certified.

Q. Whose check was that?

A. It was written by Elmer Webber, he signed it, of the firm of True and Webber.

947 Q. Was that delivered to your company?

A. Well, by way of explanation, we had been approached before on selling out the American Gypsum Company, and the thing fell through, after spending quite a little time and taking my time, and I got pretty much disgusted with it, and when this matter came up, I refused to have anything to do with it at all unless I had some evidence of good faith, that the fellows were going to go through with it without all of this talk. So I insisted on a certified check for $50,000 being put up as evidence of good faith that they would go through with the proposition, and put it through as they had agreed to.

Q. Did they put it through?

A. They did not.

Q. What became of the check?

A. I put it through. (Laughter.) Incidentally, I declared a dividend of 20 percent. (Laughter.)

Q. I now show you Government's Exhibit No. 152, being D-48, which purports to be a letter from the American Gypsum Company to Mr. Gloyd under date of March 14,

1927, in reply to the letter of March 10, which you have just identified, and I ask if that is a copy of your letter.

A. Yes, I would say that that was a copy of my letter, although it is not on a letterhead, but I would say it was a copy, because I remember writing Mr. Gloyd, because I was doing a little promoting work myself.

948

Mr. STEFFEN. I now offer Government's Exhibit No. 152 in evidence, with the observation that this copy likewise was taken from the files of the American Gypsum Company.

Justice STEPHENS. Have you seen it, Mr. Johnston?

Mr. JOHNSTON. I am just now looking at it. He says that he recognizes it as a copy of his letter.

Justice STEPHENS. It may be received, subject to the reservation already made with respect to this class of evidence.

(The document referred to, marked Government's Exhibit No. 152, was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 153, which is D-49, which purports to be a letter from Mr. Gloyd to Mr. Griswold, under date of March 25, 1927, and ask if you can identify that as a letter which you received from Mr. Gloyd.

A. Yes, I would say that that was an original letter from Mr. Gloyd. I recognize his signature.

Q. I now show you Government's Exhibit No. 154, which is D-50, and which purports to be a letter from Mr. Gloyd to Mr. F. J. Griswold, under date of March 28, 1927, and ask if you can identify that.

A. Yes, I would say that that was an original letter; I recognize Mr. Gloyd's signature.

949

Mr. STEFFEN. I now offer Government's Exhibits 153 and 154.

Mr. JOHNSTON. What are the "D" numbers?

Mr. STEFFEN. They are D-49 and D-50.

Justice STEPHENS. Have you seen those, Mr. Johnston?

Mr. JOHNSTON. No.

Mr. STEFFEN. I have the originals here.

(The exhibits were handed to Mr. Johnston.)

Justice STEPHENS. These last two exhibits referred to are received in evidence subject to the reservation already made with respect to this class of declarations.

(The documents referred to, marked Government's Exhibits Nos. 153 and 154, respectively, were received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 155, being D-51, which purports to be a letter from you to the Texas Cement Plaster Company under date of March 31, 1927. It is just a copy, a purported copy, of a letter, and I ask if you can identify it, from the subject-matter or otherwise, as being a copy of a letter which you sent to Mr. Gloyd.

Mr. JOHNSTON. What was the date of that?

Justice STEPHENS. March 31, 1927.

950 The WITNESS. There is nothing on this to identify it that I actually wrote it, but I remember distinctly writing Mr. Gloyd along the lines contained in the letter, and my initials are there, but they are put on by the stenographer.

Mr. STEFFEN. Would you like to look at this, Mr. Johnston?

Mr. JOHNSTON. Yes.

(The exhibit was handed to Mr. Johnston.)

Mr. JOHNSTON. We have no record of such a letter, and I object to it for lack of proper identification.

Justice STEPHENS. The Court thinks that letter is circumstantially identified by its subject-matter and the name of the American Gypsum Company, and the initials which have appeared on all of these letters, "FJG/AS"; and by the contents, their response to previous letters. It may be received in evidence subject to the reservation already made with respect to this class of declaration.

(The document referred to, marked Government's Exhibit No. 155, was received in evidence.)

951 By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 156, D-52, which purports to be a letter from Mr. Gloyd to you under date of April 5, 1927, and purports to reply to your letter of the 31st, and ask if you can identify that as a letter which you received from Mr. Gloyd?

A. Yes, I remember seeing this letter; those are my initials. I also remember that M. Gloyd elected to make his application to the U. S. Gypsum Company direct, and I knew nothing about it until after it was made.

Q. Can you identify Mr. Gloyd's signature?

A. That is Mr. Gloyd's signature, I would say.

Mr. STEFFEN. I now offer Government's Exhibit No. 156 in evidence.

Justice STEPHENS. Have you seen it, Mr. Johnston?

Mr. JOHNSTON. I have a copy.

Justice STEPHENS. It may be received in evidence subject to the reservation already made with respect to this class of declaration.

(The letter referred to, marked as Government's Exhibit No. 156 was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 157, being D-53, which purports to be a copy of a letter which
952 you wrote to Mr. Gloyd under date of April 9, 1927, in reply to his letter of the fifth, and ask if that is a copy of a letter, the original of which you sent to Mr. Gloyd; if you can identify it either from the substance or otherwise, you may do so.

A. There is nothing on it to indicate that this is a copy of the original, with the exception of the notation of the stenographer who has placed my initials on there, but I remember writing Mr. Gloyd after receiving his advice that he had made application for a license.

Q. Can you say whether your letter embodied the substance and effect of the copy that you hold in your hand?

A. I would say that it did, yes.

Mr. JOHNSON. May I see the letter?

(The letter was handed to Mr. Johnston).

Mr. JOHNSTON. We, at least for the record, object because of lack of proper identification, and call the Court's attention to the apparent subsequent typing——

Justice STEPHENS (interposing). Apparent what?

Mr. JOHNSTON. Apparent subsequent typing at the bottom of the first page. It isn't margined evenly with the other, and it was set in by somebody after it was written. I think that is wholly incompetent.

Justice STEPHENS. Well, we think it is circumstantially identified. It has reference to the letter to which it
953 it is an apparent response. Mr. Griswold testified that he remembers writing the substance and effect of this to Mr. Gloyd. I think your objection to the material which you describe as added, goes to its weight, and it may have been a short carbon. Of course, you may attack it in your defense or on cross examination. If you claim this is added, that would be a serious matter, and you have a right to attempt to show that. But in the present state of the record I believe the exhibit is admissible and it is received.

(The letter referred to, marked as Government's Exhibit 157, was received in evidence.)

Mr. ADAMS. May I add to the usual grounds of objection here, that with particular attention to the third paragraph of the letter, which begins, "It may be very interesting for you to know that Certain-teed Products Company has expressed indirectly a willingness to enter into a license agreement", that that is a kind of double hearsay, and it doesn't seem to me that even on the theory of declarations of a co-conspirator, it could possibly be admissible. I thought I should call that to Your Honors' attention.

Justice STEPHENS. I think that objection will be overruled; I think it goes to its weight. The exhibit is received subject to the usual reservation with respect to this class of declaration.

954 Mr. STEFFEN. Your Honor, Mr. Johnston raised a question concerning the typing. This is a letter, the original of which should be in the possession of the Gloyd company, the Texas Cement Plaster Company, and we would make the request that Mr. Johnston produce the original, if he has it?

Mr. JOHNSTON. Yes, I want to do that for my own inspection; I am going to do it and compare it and see if there has been any change. Counsel called my attention to something. I am not sure that we have it because in the criminal case we furnished our records to the Department, and I am not sure whether copies were sent back, or the originals, I just don't know, but I will look it up and see.

Justice STEPHENS. I call your attention, Mr. Johnston, to the fact that the portion which you describe as "added" is connected in context and wording. The lines in the paragraph which would not be described as "added" are: "Mr. Avery seems to be very appreciative of the work his friends

have done and will say that they do away with all troublesome and dis-" and then there is a hyphen and a drop, followed by "taseful litigation". So circumstantially it would seem to indicate that it was not added, but just dropped down as far as the sheet of paper is concerned.

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 158 for Identification, D-54, which purports to
955 be a letter from Mr. Gloyd, addressed to you, under date of April 11, 1927, and ask you if you can identify it as a letter which you received from Mr. Gloyd?

A. Yes, I would say that is Mr. Gloyd's signature.

Q. Is this writing at the top anything you can identify?

A. That is my writing, showing that I received it.

Mr. STEFFEN. I now offer in evidence Government's Exhibit No. 158, as a declaration of a co-conspirator.

Justice STEPHENS. Have you seen that, Mr. Johnston?

Mr. JOHNSTON. Yes.

Justice STEPHENS. It may be received, subject to the usual reservation with respect to this class of declaration.

(The letter referred to, marked as Government's Exhibit 158, was received in evidence.)

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 159, which purports to be a reply on your part to Mr. Gloyd, under date of April 13, 1927, a reply to the letter of the 11th, and I ask you to examine the contents and tell whether or not you sent Mr. Gloyd an original letter, of which this is a copy?

A. There is nothing on here to indicate that it is an original—it is really a copy—but I mean there is nothing on here to indicate that it is the same as the original.
956 My initials and the stenographer's are copied in the corner, the same as on the others.

Q. Can you tell from the contents whether that was a reply——

A. (Interposing.) From the contents I would say that it was a reply to the former letter from Mr. Gloyd.

Justice STEPHENS. Do you offer that?

Mr. STEFFEN. I offer that in evidence.

Justice STEPHENS. It is received, being circumstantially identified by its contents and reference to the previous

letter, subject to the usual reservation as to this class of declaration.

(The letter referred to, marked as Government's Exhibit 159, was received in evidence.)

Mr. STEFFEN. Your Honor, that brings to a close one phase of this testimony, and if it is the Court's pleasure we would ask to adjourn at this time.

Justice STEPHENS. We will make definite now, gentlemen, so that you can make your hotel reservations and Pullman reservations and so on, the plans of the Court. I have already stated this morning that we will have to adjourn on Friday, the third of December, and we will resume sitting on Monday, the 13th, and we will sit until the 21st or 22nd, depending upon the convenience of
957 counsel as then announced with respect to getting back to their respective homes. Of course, if we can sit to the 23rd we will be glad to do so. But when we approach that, you can let us know which date you would like to have an adjournment on, as far as your general, mutual convenience is concerned.

Now we will not ask counsel to return here during the Christmas week, the week between Christmas and New Years. That would only accomplish two or three days and make a very long trip for Mr. Johnston and for the lawyers from Chicago, and we will have to adjourn, therefore, just before Christmas, on the 21st, 22nd or 23rd, until the 17th day of January, 1944.

That time will not be lost so far as the judges are concerned because there is a great mass of material which we can't hope to keep up on, sitting in court so many hours, and with questions of law to look up from time to time in the evenings. We will use that time in going over these exhibits and going over the transcript, and that will not be lost as far as we are concerned, and perhaps not as far as counsel are concerned, and their future preparation.

Mr. JOHNSTON. If the Court please, because of the travel conditions, it is almost impossible even at this date to get accommodations for the holiday season, and if the Court could now fix the definite date of adjournment, then we would know——

Justice STEPHENS (interposing). The date of
958 adjournment before Christmas?

Mr. JOHNSTON. That is right.

Justice STEPHENS. We would like to set it as close to

Christmas as possible. Could you get back if we fixed the adjournment for the 22nd?

Mr. JOHNSTON. Well, I can get back if I can get transportation. What I mean is that I would like to know now the date of adjournment so I would know the definite date to ask for my transportation.

Justice JACKSON. How long does it take you to get back there?

Mr. JOHNSTON. Two days.

Justice STEPHENS. We will adjourn the evening of the 22nd of December.

Justice JACKSON. Any counsel for the defendants who desire to use this set of exhibits here is welcome to use it over the week-end.

Justice GARRETT. I have a set here also, to which counsel are welcome.

Mr. JOHNSTON. I wonder if I might borrow it?

Justice GARRETT. Certainly.

Justice STEPHENS. Here is another one that can be used.

One announcement further, and that is that when we adjourn next Wednesday for Thanksgiving recess, we will have to adjourn at about 3:15, as I have a meeting
959 of the Patent Interchange Committee, of which I am President. That might be convenient for you to know, if you are catching trains.

One other thing before I forget it? Mr. Griswold, if you would like, during the noon hours, to have a place to rest, the Marshal can take you into the Robing Room where there is a couch. We want to make it as convenient and comfortable for you as possible.

The WITNESS. Thank you very much.

Justice STEPHENS. Announce a recess until Monday morning at 10 o'clock.

(Whereupon, at 4:00 o'clock, p.m., the trial was recessed until Monday morning, November 22, 1943, at 10:00 o'clock).

960 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,
Washington, D. C., Monday, November 22, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances; (Same as heretofore noted.)

962 Page 1065, opposite line 12, it states: "(There followed an informal conference between counsel and the Court at the bench, not recorded.)"

The conference should have been recorded. It was not the intention of the Court to omit anything from the record, but only to inform counsel informally concerning the Court's views with respect to the rules of evidence. What the Court said at the time was, in substance and effect, that exhibits being used in the manner in which exhibits referred to at that time were being used, could be used either to refresh a present recollection, in which event the ex-

963 hibit itself was not in evidence except to show to the Court how the recollection was being refreshed; or as past recollection recorded, in which event the witness would be obliged to swear to his confidence in the correctness of the memorandum.

Unless there are other preliminary matters, the case may proceed.

Thereupon, FRANK J. GRISWOLD, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

DIRECT EXAMINATION RESUMED

By Mr. STEFFEN.

Q. I have some questions this morning, Mr. Griswold, concerning the suit which the United States Gypsum Company brought against you, and which was still pending as late as May, 1927. Do you recall whether or not that suit was dropped from the calendar at any particular time?

A. You mean the suit for damages?

Q. That is right.

A. There was one that was dropped, I don't know whether it was the suit for damages or not. I think it must have been the suit for damages, in the Court at Cleveland. I believe it was postponed or dropped.

Q. Do you remember about when that was?

A. No, I don't. It was prior to 1928.

964 Q. How do you know it was prior to 1928?

A. What is that?

Q. How do you know it was prior to 1928?

A. Because the final decision, the final trial, came in 1928.

Q. I show you Government's Exhibit No. 160, which is D-38, which purports to be a letter from you to Mr. Avery under date of May 31, 1927, and ask if you can identify that as your letter?

A. Yes, this is a letter written by me to Mr. Avery on that date.

Q. Does that refresh your recollection as to the time when this suit was dropped from the calendar in Cleveland?

A. Yes, it does.

Q. Did you have anything personally to do with that matter, did you go to Cleveland on the occasion when it was dropped from the calendar?

A. I don't remember of making any special trip for that.

Q. Can you tell us now about the date when it was dropped from the calendar?

A. Well, it was about May 31, 1927.

Q. Was this matter ever called to the attention of the Board of Directors of American Gypsum Company, this matter of dropping the litigation from the calendar?

965 A. Well, I can not remember that without something to refresh my memory——

Q. (Interposing.) What is your best recollection now?

A. I would say yes, that they were familiar with what was going on.

Justice STEPHENS. Is this letter in the record of photostats, Mr. Knuff? I don't find it here.

Mr. KNUFF. Yes, it is D-38.

Justice STEPHENS. I don't find that here.

Justice JACKSON. I don't seem to have it here.

Justice STEPHENS. If so, it is out of order, it is not in here after D-37.

Mr. STEFFEN. It follows the exhibits that we introduced at the end of the session, concerning Gloyd and the Texas company.

Justice STEPHENS. Well, we can look at the original after counsel has finished examining on it.

Mr. KNUFF. It should follow D-55 in your book, Your Honor, which was a letter to Mr. Gloyd.

Justice JACKSON. Yes, we have it.

Justice STEPHENS. Just let the Court read it.
Very well, proceed.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 160-A, which is D-106 in the folder and comes about 4 or 5 documents on, which purports to be the minutes of a meeting of the Board of Directors of American Gypsum Company under date of June 22, 1927, and I will ask you if you can identify the signatures at the foot of the document?

966

A. Yes.

Justice STEPHENS. Has that been given an identification mark?

Mr. STEFFEN. 160-A.

Justice STEPHENS. And the previous one is 160?

Mr. STEFFEN. Yes, 160.

By Mr. STEFFEN.

Q. Are you able to identify the signatures?
A. Yes.
Q. What are they?
A. J. H. McCrady, President; J. B. Davis, Secretary.
Q. Do you recall whether you were present at the meeting or not? Or what is your recollection?
A. My recollection is yes, and the record so indicates.
Q. Do you recall any discussion in the Board of Directors meeting at the time the stipulation was presented to them?

A. No, I can not recall any at this particular time, not any discussions.

Q. Well, it says here that Mr. J. H. McCrady was present. Can you recall anything that Mr. J. H. Mc-
967 Crady said in regard to the suit and the stipulation to drop the suit from the calendar?

A. No, I can not remember, at this time, anything particularly that he said.

Q. Can you remember anything that Mr. C. F. Miller, or Mr. J. B. Davis, said at this meeting concerning the license agreement or concerning the dropping of the suit from the calendar?

A. No, I can not.

Q. Was there any discussion when it was presented to the Board of Directors, that you recall?

A. I do not remember of any particular discussion. It is quite evident that some report had been made on the status of the license.

Q. Did you make a report?

A. I have no recollection other than the possibility of the postponement, if it hadn't occurred at that time, being discussed.

Q. Will you look at the stipulation at the end, and that may refresh your recollection.

Now I want to know, did you make any sort of a statement or report to the Board of Directors at the time that stipulation was presented before the Board of Directors and subsequently entered in the minutes?

A. I don't remember a thing any more than this
968 is a notice that we had received in the mails, or otherwise, because the wording here is copied from some legal notice we had received.

Q. What does it say?

A. It says:

"It is hereby stipulated by and between the parties in the above entitled cause with the consent of this Honorable Court that this cause be dropped from the Trial Calendar under Equity Rule 57 subject to reinstatement by either party within one year from the date hereof."

Q. Was there any discussion of that stipulation at this meeting, that you recall?

A. I do not remember of any, at this time.

Mr. JOHNSTON. If the Court please, may I inquire, have all copies of those exhibits been returned to the Court?

Justice GARRETT. I do not have mine.

Mr. JOHNSTON. I took Judge Stephens', and returned it. And there was another copy handed to somebody.

Justice JACKSON. Mr. Finck retuned mine to me.

Mr. ADAMS. It may be that Mr. Oliver took Judge Garrett's with him.

Mr. JOHNSTON. I wouldn't think so, because he had a photostatic copy.

Mr. ADAMS. Yes, that is true, he did.

Mr. JOHNSTON. I might suggest that counsel look around.

969 Justice GARRETT. I don't know what counsel received mine, I gave it to someone.

Mr. JOHNSTON. I do remember that two copies were handed out, and I borrowed one.

Justice STEPHENS. Are you lacking one for use this morning?

Mr. JOHNSTON. I don't need it, but I see Judge Garrett doesn't have one.

Justice GARRETT. On page 1256 of the transcript I made the statement:

"I have a set here also, to which counsel are welcome."

"Mr. JOHNSTON. I wonder if I might borrow it?

"Justice GARRETT. Certainly."

but I don't know who did get it.

Mr. JOHNSTON. It happened that I got Judge Stephens' copy, and I just now returned it.

Justice STEPHENS. Judge Garrett can use mine, and Judge Jackson and I can look at one together.

By Mr. STEFFEN.

Q. My question, Mr. Griswold, is whether or not you recall that there was any discussion at this meeting? I don't ask you to tell us what the discussion was. I ask you merely to tell us whether or not there was a discussion at this meeting concerning the matter of dropping this suit from the trial calendar?

970 A. Mr. Steffen, I don't remember any particular discussion.

Q. Was there a discussion, that is all I am asking you?

A. I could not say, I don't remember. But this notice had evidently been received of the postponement of this suit.

Q. That is right, and it is put in the minutes.

A. It was probably filed and read, and was acted on, or the Board were notified and a copy of the notice was copied here in the minutes by Mr. Davis, who was the Secretary. He did all that work.

Q. That is right, but that was a rather important matter if that case was dropped from the trial calendar, and I ask you, was there or was there not any discussion concerning it?

A. Well, I don't remember of any particular discussion about it.

Q. Did anybody ask why it was being dropped from the calendar, to your recollection?

A. Well, I would say that the probability was that the Board——

Q. (Interposing.) I want you to say what your recollection is.

A. That I might have made a report on the fact of this attempt to adjust our differences with Mr. Avery, but I can't remember these dates, gentlemen, you have got
971 it too far back; but there was this attempt of mine to get a settlement of our troubles, for damages for infringing on this so-called Birdsey patent, and whether we had reached an agreement at that time or not, the correspondence should show that. But if we had, I evidently reported to the Board of Directors the results of that meeting.

Q. Well, I now show you Government's Exhibit No. 161, which is D-40, and which purports to be a letter addressed to you, Mr. Griswold, in reply to your letter of the 31st, which is Government's Exhibit 160 addressed to Mr. Avery, and I will ask you if you recall having received a letter from Mr. Avery such as this letter that I show you, Government's Exhibit No. 161? This is a copy of the letter, and I ask you if you received such a letter? You probably didn't receive that copy, but I want to know if you saw the original?

Justice STEPHENS. This one isn't very clear.

Mr. KNUFF. Unfortunately, Your Honor, the photostat was from onion skin paper, and we will pass the original to you.

By Mr. STEFFEN.

Q. Please read that carefully.

My question is, do you remember having received an original letter signed by Mr. Avery, of which that is a copy?

A. Yes.

Q. I will pass this to the Court, and you may look at a copy, if you will, please.

972 Now, Mr. Griswold, having read Government's Exhibit No. 161, which is Mr. Avery's letter to you of June 2, can you say whether the settlement talked of in that letter was presented to the Board of Directors at their meeting on the 22nd?

A. I would say no, for this reason. The Board of Directors of the American Gypsum Company were not interested in this merger that I was proposing to make, that was a matter of my own. It was to be a new American Gypsum Company organized, and the old Board would probably not be interested in this except to the extent that if the merger failed and they went ahead, they would know of the proposed settlement.

Q. Now let's go to the letter of June 2, 1927, in which it says that you have had a conference with Mr. Avery. I would like to have you tell the Court now, in your own words, exactly what took place at your conference with Mr. Avery, spoken of in this letter? That is in Mr. Avery's letter of June 2.

A. This copy is so dim I can hardly read it.

Q. I will give you the original copy, but I want your recollection, not what appears in the copy.

A. I want to read this letter first.

Now state your question again, Mr. Steffen.

Q. I want you to state to the Court, in your own words, of your present recollection, just what took place in your conversation with Mr. Avery. Take your time and

973 tell the whole story.

A. Well, I had caused to be made a check of our records showing the amount of wallboard that we had made since we began manufacturing under this so-called Clark, or afterwards called Birdsey patent, to see just the amount we had made and shipped. And I reported that to Mr. Avery at this meeting, and told him that those were the figures that I had arrived at, and that he was perfectly free to send his own auditors, if he cared to, and check over our books to see whether the figures were correct.

Mr. Avery took the figures, as I remember it, and looked them over, and after doing some mental calculations or figuring he arrived at a figure, as I remember it, something slightly in excess of $50,000, we figured on a royalty basis.

And finally he said that he would call it $50,000 even money, and was willing to accept that as a settlement for the damages for using the so-called Birdsey patent up to that time, or the time of the settlement, as I think it developed afterwards, to the time of the Universal's license, I think that time was put in one of the letters.

Q. That time, I might say, was in September, 1926.

A. But whatever it was, at the time of this conference that was to be the amount of damages for past infringement, as he claimed; and from that time on, we were to pay a royalty of, as I remember it—it was based on
974 a percentage, 5 percent, which, as wallboard was selling at that time at $30 a thousand, would be $1.50 per thousand square feet. And that was the basis, as I remember it, on which this $50,000 was arrived at.

In other words, Mr. Avery charged us, according to my recollection, for the past infringement up to that time, at the same rate that he proposed to charge us for any future royalties for wallboard made under the patent.

Mr. JOHNSTON. If the Court please, I assume that we have our continuing objection to all of this testimony, it not being between Mr. Griswold and Texas or any of these other defendants outside of USG. If not, I would like to interpose an objection and move that what he has said regarding that proposed settlement be stricken.

Justice STEPHENS. Your objection may be noted. The Court is receiving all declarations of one co-conspirator as against others subject to ultimate prima facie proof of a conspiracy. The objection is overruled at the present time except for that restriction.

By Mr. STEFFEN.

Q. Now, Mr. Griswold, directing your attention again at this conference with Mr. Avery, what else was discussed at the time, if anything? Did you discuss the royalty provisions of the license agreement? Did you discuss the license agreement?

A. I do not remember of doing so at that time, at
975 this meeting. Without something to refresh my memory, I could not say, Mr. Steffen. I refer to, in the letter here, or Mr. Avery refers to the "other plan". That had reference to the proposed merger if it went through.

Q. And Mr. Avery states that he is favorable to that. Did he say anything about the proposed merger at the time of your negotiations with him here?

A. Not that I remember of it, at this time.

Q. Did you discuss with him at that time whether or not the merged companies might take out a license agreement?

A. I couldn't say, without something to refresh my memory of a discussion of that kind, and this doesn't mention that. But I did discuss it with him at some time, but I couldn't say the date.

Q. Did you discuss with Mr. Avery at this time the disturbed price conditions in the industry, or not?

A. Well, I couldn't say as to that, Mr. Steffen, without something to refresh my memory.

Q. We have shown you practically all of your correspondence for 3 or 4 years, and we are not able to refresh your recollection further. We want your present recollection as to whether, at this conference, there was any discussion of the disturbed price conditions then prevailing?

A: I don't remember of it at this time.

Q. Did you ever discuss with Mr. Avery disturbed
976 price conditions, do you now remember?

A. I would say yes, at some times, but I couldn't give the dates.

Q. I don't want the dates now.

A. Yes, I have discussed that.

Q. What did you say to Mr. Avery in regard to disturbed price conditions at any one of these meetings with Mr. Avery?

Mr. ADAMS. I think that ought to be limited somewhat, Your Honor. I appreciate that he can't give the dates, but I think we ought to have it reasonably placed with reference to time and the place where the conference took place. Otherwise, we can't meet it.

Justice STEPHENS. Could you say, Mr. Griswold—the Court doesn't expect you to remember just the date—but could you say about what time it took place, or could you identify the conversation by any circumstance or occurrence or other event, and attempt to place it in some way a little more definitely, when it took place or where?

The WITNESS. Well, I could not, of course, state the time, but it was probably along during this 1927 period, because it was at that time that the prices began to be disturbed on account of this litigation and threatened litigation over this patent infringement, and any discussion that I had with Mr. Avery was really not a discussion, it was just a talk about the conditions that existed as
977 as I had learned them and reported to him that we found existed in certain territories. And he possibly

might have given me some information of what they had learned about prevailing prices——

Justice STEPHENS (interposing). Where, ordinarily, did you have these discussions with him? Did he come to your place of business or did you see him at Chicago, or where?

The WITNESS. It was usually at Chicago, I usually called on Mr. Avery when I was in Chicago, if he was there, and if he wasn't too busy, at his office.

By Mr. STEFFEN.

Q. I think you testified—well, I will ask you a question this way: Did you ever report to Mr. Avery, or discuss with Mr. Avery, the names of any companies which were, as you thought, disturbing price conditions?

A. Well, I could not say definitely without something to refresh my mind, but I evidently did, because I considered it was simply a question of market quotations, and there was nothing about it that we didn't have a perfect right to do, to talk about the conditions as we knew they existed in this or that territory. They were selling all over the United States, they had a national distribution; whereas, in our case, we were local in certain territory, limited by freight rates.

Q. All right. Who were your competitors in your territory?

A. Do you have reference to board?

978 Q. Wallboard and wall plaster.

A. Plymouth Gypsum Company was one.

Q. They were plaster manufacturers, were they?

A. They were plaster manufacturers, and they also manufactured board.

The Acme Cement Plaster Company, after they acquired the plants at Grand Rapids, Michigan, were competitors of ours in that territory.

Q. Did the Acme continue to be a competitor of yours, or was it taken over by some company?

A. They were taken over by the Beaver Board Company later on.

Q. Was Beaver Board a competitor of yours?

A. Yes.

Q. All right. Mr. Griswold, are you correct in your testimony that Beaver took over the Acme? Was it not Certain-teed?

A. Possibly it was, it is too far back for me to remember all the details.

Q. Let me ask you, was Certain-teed selling in your territory during 1927 and 1928, to your knowledge?

A. From Grand Rapids, yes.

Q. Were they a competitor of yours?

A. Yes.

Q. Were they maintaining stable prices?

979 A. I want to amend that answer——

Justice STEPHENS (interposing). Just a minute, Mr. Griswold, before we have you answer there is an objection.

Mr. ADAMS. I object to the form of that question as calling for a conclusion and as not being the proper way to prove the prices.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Mr. STEFFEN. The question is whether or not the Certain-teed Products Company, in selling in your territory, were maintaining stable prices?

Mr. ADAMS. I renew the objection, which I think in his rephrasing of the question makes the reason for the objection more apparent. The question calls for a conclusion.

Justice STEPHENS. If the question is to be interpreted by the Court, Mr. Adams, as the conclusion of the witness on a legal question as to whether there was some illegal maintenance of prices being kept, it would be improper. But I take it that what the question means is—were the prices running along at about a given level at this time. Is that what you mean?

Mr. STEFFEN. Yes.

Justice STEPHENS. The objection is overruled.

Mr. ADAMS. Under those circumstances, I think the time should be specifically stated.

Mr. STEFFEN. It is clear enough, about the time
980 of this conference with Mr. Avery in June of 1927.

Justice GARRETT. The witness stated he wished to make a correction.

Justice STEPHENS You may state what you wished to do or say; we interrupted you.

The WITNESS. I was getting confused, being located out West in Des Moines, Iowa, and afterwards here, but my

answer is correct that the competition we had was with reference to the Ohio territory, it is all right.

Justice STEPHENS. And about what time are you speaking of now?

The WITNESS. 1927.

By Mr. STEFFEN.

Q. And did you discuss with Mr. Avery this competition in the Ohio territory?

A. I do not remember of discussing it particularly any more than, as I have said, possibly we might exchange information on what prices we learned were being asked at that time, and what the prevailing market was or about what it was; and outside of that I have no recollection.

Q. You have said that the market was disturbed. Can you give the Court a better idea of how disturbed it was at this time?

A. Not without something to refresh my memory, Mr. Steffen. That is too far back.

981 Q. Was No. 1 board selling at $30 at this time?

A. I couldn't say as to that, at this time.

Mr. STEFFEN. I would like the reporter to read the question to which Mr. Adams objected. I don't think it has been answered yet.

(The question referred to was read by the reporter as follows:

"The question is whether or not the Certain-teed Products Company, in selling in your territory, were maintaining stable prices?")

982 Justice STEPHENS. By that, the Court explained that it understood the question to mean whether or not the Certain-teed Products Company's prices were running along at about a certain level at about this time. If you don't understand at any time, you should not hesitate to say so.

The WITNESS. Well, I think I understand the question, your Honor, but there were so many dates and so much transpired that to fix any particular time it is very difficult. There was a time when there was a disturbance in prices, even by Certain-teed Products Company, from the information I got, but whether it was actually in existence at this time or not, without something to refresh my memory it is pretty hard to remember those things.

Justice STEPHENS. Would you say at about what time it was with respect to the year or period of years?

The WITNESS. As I remember it, the disturbance started sometime in 1927, possibly the latter part, and continued through until 1928, until after I had gotten out of the gypsum industry, or gypsum business, as I remember it now.

By Mr. STEFFEN.

Q. Now, I want to know how serious that disturbance was.

Mr. BROMLEY. I object to that as calling for a conclusion.

The WITNESS. Well, I couldn't answer——

Justice STEPHENS (interposing). Just a minute. Well, the witness has in effect stated that he didn't know.
983 However, you are entitled to a ruling on your objection. The question should properly be—state what the disturbance was, and then let the Court conclude how serious it was.

By Mr. STEFFEN.

Q. Will you state what the disturbance was, in terms of amount?

A. Well, there were a number of different commodities that were on the market at that time. When you say "prices", one particular line might be disturbed and another not.

Q. All right.

A. For instance, some of these manufacturers were manufacturing wallboard and manufacturing other lines, including blocks and wall plaster and other products. Now, when the disturbance did occur it might only apply to one particular line, and not to the whole general line of products that each one made. So, without something to fix it definitely in my mind, I can't give that information definitely.

Q. Was the Certain-teed Products Company selling board or plaster in your territory during 1927?

A. Well, after they got their Grand Rapids, Michigan, plant completed, they began selling board in our territory.

Q. And were they making an open-edge or closed-edge board at this time?

A. They were making an open-edge board, as I remember it.

Q. And did they charge the same price for their
984 open-edge board as you were charging for your closed-edge board, do you remember?

A. No, I do not remember at this time.

Q. Did they ever charge the same price for their open-edge board as you charged for your closed-edge board?

A. No, they did not. Sometimes we learned of Acme's quotations being lower than we were making, and possibly lower than some of the other concerns were making. They had opened up this new plant at Grand Rapids, Michigan, and we weren't so very much surprised at that, because they naturally wanted to get some business, and they were probably offering some inducement to get it, which was usual with new concerns or concerns in new territory.

Q. Do you recall whether you ever talked about Certain-teed's sales in your territory during 1927, with Mr. Avery?

A. No, I do not recall without something to refresh my memory on that, Mr. Steffen, that is too far back.

Q. I show you now Government's Exhibit No. 132, which is in evidence, and you have identified it. I would like to have you look at the third paragraph to refresh your recollection as of this period in January, 1927, the third paragraph; read it carefully and see if it refreshes your recollection. Does that refresh your recollection as to the time when these disturbed market conditions started, and as to who was disturbing the market?

985 A. Just a minute, I haven't finished this letter yet.

Justice GARRETT. What was the D-number of that exhibit, Mr. Steffen?

Justice STEPHENS. D-34.

Justice GARRETT. Thank you.

The WITNESS. Yes, this refreshes my mind about the time.

Mr. ADAMS. Will you read the question, please?

Mr. STEFFEN. There is no question. I simply asked him if it refreshes his recollection, and he said that it did.

Mr. ADAMS. What about?

Justice STEPHENS. About the time when conditions were disturbed.

The WITNESS. That there was disturbance at this time, January 3, 1927.

By Mr. STEFFEN.

Q. And did that disturbance continue during 1927 and 1928?

A. Yes, I would say it did.

Q. Did it grow greater or smaller?

A. Well, greater.

Q. Did you talk to Mr. Avery at any time about that price disturbance, during 1927, let us say?

A. Well, I could not say at this time either, without something to refresh my memory as to dates. 1927 is a long ways back, and I got out of the business and ran into some more trouble right immediately afterwards,
986 which took my mind off of it entirely.

Mr. STEFFEN. I would like to offer in evidence now Exhibits Nos. 160, 160-A and 161.

Justice STEPHENS. Let the Marshal hand them to the Court, please, let us look at them.

Mr. STEFFEN. I think you will find them on the witness' desk, Mr. Marshal.

(Exhibit No. 160-A was handed to the Court.)

Justice STEPHENS. What are those numbers?

Mr. STEFFEN. 160, 160-A and 161.

Justice STEPHENS. We have here only 160-A.

(Government's Exhibits Nos. 160 and 161 were handed to the Court.)

Justice STEPHENS. Is there any objection to these exhibits?

Mr. BROMLEY. No objection other than the usual one.

Justice STEPHENS. They may be received, subject to the usual reservation with respect to the declarations of one co-conspirator as binding upon another, without proof of a conspiracy.

(The letters referred to, marked Government's Exhibits Nos. 160, 160-A and 161, were received in evidence.)

By Mr. STEFFEN.

Q. I believe you testified, Mr. Griswold, that a
987 part of the market disturbance in 1927 was caused by the litigation concerning patents. Is that correct?

A. That is my recollection of it now.

Q. Was that the only reason why there was a price disturbance in 1927? I call your attention to the fact that

Certain-teed was not being sued at that time for patent violation—were they?

A. Well, I can't say that they were at that time.

Q. Were they making a closed-edge board?

A. No, they were making an open-edge board at Grand Rapids, and I understand also at Acme, Texas—that is my recollection.

Q. And you would say now that they were not being sued for patent infringement, because they were making an open-edge board, is that right?

A. That is my recollection; there was no suit on open-edge board.

Q. On two occasions it appears in the record so far that you saw Mr. George Brown, and you wrote to Mr. Gloyd in April, 1927, in which you said that you were about to go to New York and would, with some others, see Mr. Brown.

A year later, you wrote to Mr. J. H. McCrady, Government's Exhibit No. 141, and told him that you had just spent two and a half hours in New York talking to Mr. George Brown. He was the president of the Certain-
988 teed Products Company. They were not being sued for patent infringement. Now, I would like to know what you discussed with Mr. Brown, particularly concerning the price disturbances which were prevailing, as you have told us, in 1927.

Mr. BROMLEY. Of course, the fact is that they were being sued on the second occasion referred to by Mr. Steffen in his question.

Mr. STEFFEN. They were not being sued for patent infringement at that time.

Justice STEPHENS. Well, the Court can't resolve that question, and statements are being made to refresh the recollection of the witness. If there is any issue in the case as to whether they were being sued, I think that the records will show. You should be guided by your own recollection finally, Mr. Griswold; these questions are only designed to help your recollection.

The WITNESS. State your question.

By Mr. STEFFEN.

Q. That you wrote Mr. Gloyd, in April 1927, that you were going to see Mr. Brown in New York; and you wrote to Mr. McCrady a year later that you had just spent two and a half hours in New York talking to Mr. Brown, the president of Certain-teed Products Company—and I call

your attention to the fact that, at least in 1927, Certain-teed was not being sued for patent infringement, and that they were, as you know, making an open-edge
989 board, and you have already testified that they had been making a disturbance in prices——

Mr. ADAMS (interposing). I don't think that is the testimony. I object to the question including that language.

By Mr. STEFFEN.

Q. Did you or did you not discuss price disturbances with Mr. Brown in New York?

Justice STEPHENS. The Court thinks the objection is well taken with respect to that portion of the question which said that Certain-teed had disturbed prices. The witness has not testified as to that. With that exception, answer the question, if you remember your conversation with Mr. Brown—what did you talk about?

By Mr. STEFFEN.

Q. About prices?

A. Well, I do not remember any discussions about prices. I had other business with the Certain-teed Products besides wallboard. They had taken over the Beaver Products Company and they had a paper plant over at Thorold, in Canada, and manufactured wallboard paper such as we used in covering this board, and for quite a time we used their paper, and we used paper from the old Beaver Products Company that we bought, and from the Consolidated Paper Company up in Monroe, I forget the name of the place now. But at times we had difficulty getting paper, as someone has already stated, satisfactory for our
990 work. We had trouble getting a bond, due probably to the finish on the paper surface, and we were trying all over the country to get the best paper we could get for that board, and the Certain-teed Products, having taken over the Beaver Products and the American Cement Plaster Company, the American Cement had had quite a lengthy experience in manufacturing board, they and the old Best-Wall, with which they were somewhat associated, and I felt that that plant over there ought to be pretty familiar with just what was the best thing to do i manufacturing paper of that type. In fact, we saw the samples of their products, and we bought quite a little paper. And another thing——

Justice STEPHENS (interposing). Are you telling what you talked about with Mr. Brown?

The WITNESS. Yes, sir. My dealings were principally with Mr. Brown. He afterwards might have referred me to somebody else, but at this time my dealings were with Mr. Brown.

And furthermore, they decided to go into the gypsum block business, the manufacture of gypsum block, as I remember it, at their plant at Grand Rapids, Michigan, and they were interested in rotary block machinery.

I had introduced the Payne machine that made continuous blocks by a rotary process, and also had put in one of the first rotary machines made by a concern at Sandusky, Ohio, that made blocks under a continuous rotary process, and I remember their engineers were down at our plant
991 to investigate those machines; and I remember at one time, I couldn't remember any date, we discussed whether these machines were a success or a failure, and knowing that I had had experience in that line, Mr. Brown naturally wanted to hear from me.

These other manufacturers whom I all knew, kind of picked on me, imposed on me. When anything new came out, usually I was the first one to try it and demonstrate it, and after I got it working——

Justice STEPHENS (interposing). Mr. Griswold, the Court doesn't want to stop you unduly, but what counsel is inquiring about is whether or not you discussed prices with Mr. Brown. Now in effect, you have been answering that in the negative, by telling us that you discussed other things. But come back to the question of prices. Did you discuss prices with him?

The WITNESS. I have no recollection——

By Mr. STEFFEN.

Q. (Interposing.) If I may, I would like to show you two letters, and I would like to ask you to look very carefully at the second paragraph of Exhibit 159. It says:

"I am leaving on this afternoon train for New York City where a number of us will meet in conference, and we hope to straighten out Mr. Brown of the Certain-teed Products Company. There is a little question in my mind but what we will be able to induce Mr. Avery to enter into the license agreement with them", et cetera.
992 That was in April, 1927.

In April, 1928, you say:

"You remember I reported when I was in New York I had a two and one-half hour conference with Brown, at which time he stated very plainly to me that they were

willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred per cent."

Now I ask you to tell the Court in your own words any conversation you can remember——

Justice STEPHENS (interposing). Judge Garrett raises the point, Mr. Steffen, that this is in violation of our ruling that these excerpts shall not be read into the record. They may be shown to the witness and shown to the Court.

Mr. STEFFEN. I had no intention of reading them into the record, but I wanted to get the witness clearly refreshed on those two paragraphs.

Justice STEPHENS. Take your time and read it, Mr. Griswold.

The WITNESS. I have finished.

By Mr. STEFFEN.

Q. Now, my question is, do you remember whether or not, on either of these two occasions, you discussed the matter of price disturbance with Mr. George Brown?

Mr. ADAMS. May I object here on the ground that as to the first of those occasions the letter just says that
993 he is going to New York, it does not say that he went there or that he had a meeting with Mr. Brown or anybody else when he got there.

Justice STEPHENS. Well, the question may, as phrased, technically assume a fact not in evidence, but I think it is fairly clear to the witness that he is being asked whether or not, at any conferences with Mr. Brown in New York, he discussed the question of prices, and whether or not these letters refresh his recollection on that subject. With that interpretation by the Court, the witness may answer.

The WITNESS. Restate your question.

By Mr. STEFFEN.

Q. The question is, to restate it—on either of these two occasions, state whether or not you discussed with Mr. Brown the matter of disturbed price conditions.

Justice STEPHENS. Let the Court understand what the question means by "either of these two occasions".

Mr. STEFFEN. The first one, which is mentioned in Exhibit 159, and the second in Exhibit 141. One was written

in April, 1927, and the other in April, 1928, and in both, as I read very carefully, the witness mentioned conferences or prospective conferences with Mr. Brown.

Justice STEPHENS. Very well, you may answer the question.

The WITNESS. I don't remember any discussion with Mr. Brown about prices any more than the possible markets that existed over the country at that time as
994 we had learned them, what his quotations were, and what other people were quoting. We probably discussed those, but I couldn't say definitely at this time.

By Mr. STEFFEN.

Q. Will you state whether or not you discussed the license agreements on either or both of these occasions?

A. I would say that we did.

Q. Now, I want to direct your attention to the statement in your letter to Mr. Gloyd, Government Exhibit 159, appearing at the end of the second paragraph, in which you refer to one hundred per cent.

I next want to direct your attention to your letter of January 3, 1927, Government Exhibit No. 132, addressed to Mr. Avery, in which you again refer to one hundred per cent of the manufacturers of wallboard, and ask you this question.

Was it your purpose, if possible, to have one hundred per cent of the wallboard manufacturers take out a license agreement?

A. I would have liked to have them take it out. The Certain-teed and the Universal and the National already had, at this stage, taken out their license agreements.

Q. Certain-teed had not, had it?

A. No, I guess I am wrong about that.

Q. Universal had?

A. Universal had, and National.

995 Q. And the Beaver Products had?

A. Yes.

Q. Had the National?

A. I think——

Q. (Interposing.) As a matter of record, the National didn't take one out until 1929.

A. They were talking like they were going to at that time, when they were talking with me. That left only the people that I was going to include in this merger, the Texas Cement Plaster, the Niagara Gypsum, the Empire Gypsum, and the Atlantic Gypsum Company. They went in

with Universal, and National. The only one that would be left out would be Certain-teed up to that time, and if they went in, that would make it one hundred per cent, which I had said to Mr. Avery that I was confident that I could convince them that it was the sensible thing to do from the standpoint of cost of manufacture, if nothing else. They could manufacture a closed-edge board cheaper than they could the open-edge board.

Q. What did Mr. Avery say to that?

A. I don't remember what he said.

Q. Did he object to having you talk with them?

A. I don't remember what he said.

Q. Was he favorable to it, would you say?

A. At first, Mr. Avery was opposed to this license agreement.

996 Q. At what time?

A. Well, at the early stages of the game, I remember, he didn't think very favorably of the license agreement. But later on I think he changed over and was in favor of the license agreement provided he got what he wanted.

Q. What did he want?

Mr. BROMLEY. I move to strike out that entire answer as speculative and as a conclusion.

Mr. STEFFEN. I think that answer is very much to the point. I would say that it is probably the best evidence that we could get as to what Mr. Avery's attitude was. Mr. Griswold has said that he had seen Mr. Avery on many occasions, and written to him on many occasions, and that he had discussed the board-licensing agreement with him, and he communicated to Mr. Avery that he wanted to get a hundred per cent, and I want to know whether Mr. Avery was favorable to that. Mr. Avery may have said he was favorable, or he may have given that impression, and the impression he gave is just as important as words.

Justice STEPHENS. Read the answer.

Mr. STEFFEN. May we have both question and answer?

(The question and answer referred to were read by the reporter as follows:

"Q. At what time?

"A. Well, at the early stages of the game, I remember, he didn't think very favorably of the license agree-

997 ment. But later on I think he changed over and was in favor of the license agreement provided he got what he wanted.")

Justice STEPHENS. The Court realizes the difficulties counsel is under, and realizes, of course, that counsel in the best of faith thinks these conversations took place, because there apparently are records here which would so indicate, and it is of course true, Mr. Steffen, that witnesses may testify as to certain types of impressions, such as hostility, or nervousness, and many inferences which we all make which can be testified to. But this witness has said on many occasions this morning that he can't remember having a conversation with Mr. Avery on these subjects, and it seems to us that this question as phrased and the answer as given, is simply a running conclusion on the part of the witness as to his interpretation of Mr. Avery's reactions to this situation during this period of years involved. And we think that it is not competent, and the objection is sustained.

Mr. STEFFEN. Might I make just a point?

Justice STEPHENS. Certainly.

Mr. STEFFEN. That I think I am entitled to Mr. Griswold's impressions and his interpretations of his conversations with Mr. Avery. They are just as relevant and just as material and just as competent. The Court may not weigh them very heavily in view of Mr. Griswold's difficulty in remembering, but the fact that he did regard
998 them as favorable is a fact which is provable.

Justice STEPHENS. Well, that depends on what they are being offered for. We understand your contentions clearly, you have made yourself very clear.

As to relevancy, there is no objection being made, but it is not competent, the rules are well settled that a witness cannot be asked to testify to his impressions or interpretations of a conversation. He is entitled to testify to the conversation. If he can't remember the words, he is entilted to give the substance of it and the effect. But it is the duty of the Court, not of witnesses, to put an interpretation upon things. If the witness had made a statement to Mr. Avery on the subject, then the witness of course could say that Mr. Avery did not object, because that is in the nature of describing a speaking silence.

If you want to have this witness testify that his view in dealing with Mr. Avery was that an agreement of this sort as described here could be reached, to indicate that this witness, as a member of a conspiracy, alleged, was himself favorable to an agreement, that would be, perhaps, com-

petent, but not to bind Mr. Avery. The law is well settled to the contrary.

Mr. STEFFEN. Then I would claim the answer as showing Mr. Griswold's state of mind, not for purposes of proving the truth of the assertion that Mr. Avery was favorable, and I have a number of cases that would establish that point.

999 Justice STEPHENS. It may remain in the record to indicate this witness' attitude towards the agreement, but not to bind the United States Gypsum Company or other defendants.

By Mr. STEFFEN.

Q. I again refer you to your letter of January 3, 1927, Government Exhibit 132, in which you told Mr. Avery that in the beginning you had started out to deliver one hundred per cent of the manufacturers of board. I will ask you why you started out to deliver one hundred per cent of the manufacturers of board.

Mr. BROMLEY. I object to that as incompetent and as calling for a conclusion.

Justice STEPHENS. Well, the Court cannot tell until it hears the answer. You may reserve the right to strike if it appears to be incompetent or irrelevant.

The WITNESS. Well, that simply had reference to the fact that at the beginning of this——

Mr. STEFFEN (interposing). I will show you some references later on.

Mr. BROMLEY. May he finish his answer, if the Court please?

Justice STEPHENS. Yes. What did you say, Mr. Griswold?

The WITNESS. That as I remember it, it simply had reference to the fact that at the beginning of efforts along this line, I voluntarily stated to Mr. Avery that I thought I could deliver one hundred per cent.

1000 Justice STEPHENS. I think you are not answering the question counsel is interested in now. He wants to know why you desired to have one hundred per cent.

The WITNESS. Well, as to that, I thought it would be the best thing for the industry, that is, this litigation and threatened litigation, was creating such an ill feeling, and

having seen what had happened in my former years when people got into litigation, I though it would wind up in a demoralized condition that probably would be very disastrous to me, especially, in its effects on this merger, and I was anxious to see the litigation wiped out, and I thought I could convince these people that they were making a mistake in not taking out a license, because they could make the board under the license as cheap, or cheaper, than they could make something that brought about a conflict.

By Mr. STEFFEN.

Q. Now, when you spoke about litigation——

Justice STEPHENS (interposing). The Court is bound to rule. Do you object to that question now, Mr. Bromley?

Mr. BROMLEY. No, sir.

Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Now, when you speak, as you did just now, of litigation resulting in demoralized conditions, what did you mean?

A. Well, as a usual thing, when concerns get
1001 mixed up in litigation over a patent, or something of that kind, they get so bitter at each other that they being trying to cause each other loss and damages by reducing market prices to such an extent that it would affect the other person. That was the result of this feeling engendered by the litigation, and that is what I had reference to, that if this litigation continued, it might wind up that way to demoralize the whole industry.

Q. Did that occur in the industry, the demoralization of the whole industry?

A. The prices were more or less demoralized, not totally, but they were in pretty bad shape.

Q. I now show you Government's Exhibit No. 162, Mr. Griswold, which purports to be—that is D-75—which purports to be a letter from J. H. McCrady to John A. Kling, under date of August 8, 1927, and ask if you can identify Mr. McCrady's signature.

A. Yes, I would say that is J. H. McCrady's signature.

Mr. STEFFEN. I offer Government's Exhibit No. 162 in evidence.

Justice STEPHENS. Is there any objection?

Mr. ADAMS. Do I understand that both these men are dead, Mr. Kling and Mr. McCrady?

Justice STEPHENS. Mr. McCrady is dead, it has been so testified.

By Mr. STEFFEN.

1002 Q. Is Mr. Kling living?
A. No, he is deceased.
Q. Do you recall about when he died?
A. It was after 1928, as I remember.
Q. It must have been. You don't recall?
A. No, I don't recall the date.

Justice STEPHENS. Who was Mr. Kling?

The WITNESS. Mr. Kling was one of the largest stockholders in the American Gypsum Company. He was with the Kelly Island Lime and Transport Company; also the Cleveland Builders' Supply Company.

Mr. BROMLEY. I assume this came out of the American's files, did it not, Mr. Steffen?

Mr. STEFFEN. Yes.

Mr. BROMLEY. Then I have only the general objection.

Mr. ADAMS. I would like to preserve my objection, that there is no proper foundation.

Mr. STEFFEN. Your Honors have overruled that objection on a previous case.

Justice STEPHENS. I think that has been ruled on, in effect. We think it is sufficiently identified. It is received subject to the general reservation with respect to declarations of co-conspirators, or alleged co-conspirators. The Court doesn't yet see its relevancy, Mr. Steffen, but it may be connected.

1003 Mr. STEFFEN. I think it is relevant purely as showing Mr. Kling's connection with this.

By Mr. STEFFEN.

Q. Who was Mr. McCrady? I think you have testified he was president of the company, have you not?
A. President of the American Gypsum Company.
Q. Was Mr. Kling a gypsum man?
A. Well, he claimed to be, but I never thought so.
Q. I now show you Government's Exhibit 163, being D-76, which purports to be a letter from Mr. Avery to Mr. Kling under date of September 20, 1927, and ask if you can identify Mr. Avery's signature.
A. Yes, I would say that that was Mr. Avery's signature.

Q. I now show you Government's Exhibit No. 164, being D-83, which purports to be a letter from Mr. Kling to Mr. Avery, under date of October 15, 1927, and ask if you can identify Mr. Kling's signature.

A. Yes, I would say that that was Mr. Kling's signature.

Mr. STEFFEN. I now offer in evidence Government's Exhibits 163 and 164. They were taken from the files of the respective companies, and one identifies the other as being a reply.

Justice STEPHENS. You are offering Exhibits 163 and 164?

Mr. STEFFEN. Yes.

Justice STEPHENS. The letter from Mr. Avery would seem to be admissible, subject to the general reser-
1004 vation with respect to declaration of an alleged co-conspirator so far as the other defendants than United States Gypsum are concerned. The Court would like to inquire, it isn't quite clear, how the statements of Mr. Kling could be binding upon American Gypsum, since he was only a stockholder.

Mr. STEFFEN. Was Mr. Kling at this time, which was in 1927, a member of the Board of Directors, do you recall, Mr. Griswold?

The WITNESS. I could not say without something to refresh my memory.

Mr. STEFFEN. Well, I think that we will fully show Mr. Kling's connection with this matter. We have a resolution of the Board of Directors later on which authorizes him to deal——

Justice STEPHENS (interposing). They may be received, subject to connection.

(The letters referred to, marked as Government's Exhibits Nos. 162, 163 and 164, were received in evidence.)

Mr. STEFFEN. He was, in fact, a Director all during this time, being a principal stockholder; and later he became Chairman of the Board.

Mr. BROMLEY. I don't think he was, Mr. Steffen, at all.

Justice STEPHENS. As stated, they are received, subject to connection.

1005 Mr. STEFFEN. We have a series of letters between Mr. Avery and Mr. Kling, and this is merely a preliminary letter.

Justice STEPHENS. The Court will be in recess for five minutes.

(Thereupon, a short recess was taken, after which the hearing was resumed.)

1006 Mr. JOHNSTON. If the Court please. In view of Judge Garrett's comment about those copies, and in order that I may be exonerated, if you will look on counsel table for the Government I think you will find Judge Garrett's copy.

Mr. STEFFEN. We have no recollection of that ever coming here, but it is here now.

Justice STEPHENS. Proceed, gentlemen.

By MR. STEFFEN.

Q. I now show you, Mr. Griswold, what has been marked for Identification Government's Exhibit No. 165, which is D-79, which purports to be a letter from Mr. Avery addressed to Mr. Kling, under date of October 27, 1927, and I ask you if you can identify Mr. Avery's signature?

A. Yes, I would say that that was Mr. Avery's signature.

Q. I now show you, Mr. Griswold, what has been marked as Government's Exhibit No. 166, which is D-84, and which purports to be a letter from Mr. Kling to Mr. Avery, under date of October 28, 1927, and ask if you can identify Mr. Kling's signature?

A. Yes—well, I think that is a stamp, but it is a facsimile of his signature.

Q. Will you examine it carefully?

A. I wouldn't say, but it is a facsimile, anyway. I would identify his signature from that.

1007 Q. Can you identify the handwriting at the bottom of Exhibit No. 166?

A. No, I can not.

Q. At the top?

A. No, I don't know whose writing that is, I don't recognize the writing.

Mr. ADAMS. I would like to record my objection, that no proper foundation has been laid.

Mr. STEFFEN. It hasn't been offered yet, Your Honor.

Mr. ADAMS. If it is offered. I thought it had been offered, Your Honor.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 167, Mr. Griswold, which is D-80, which purports to be a letter from

Mr. Avery to Mr. Kling, under date of November 16, 1927, in reply to Mr. Kling's letter of October 28, and ask if you can identify Mr. Avery's signature?

A. Yes, I would say that was Mr. Avery's signature.

Mr. STEFFEN. I now offer both Exhibits Nos. 166 and 167. I think 167 identifies 166.

Justice JACKSON. Have you offered 165, Mr. Steffen?

Mr. STEFFEN. I will offer 165 at the same time.

Justice STEPHENS. Are those all offered?

Mr. STEFFEN. All three, 165, 166 and 167.

Justice STEPHENS. Received in evidence, subject
1008 to the general reservation with respect to declarations.

(The letters referred to, marked as Government's Exhibits Nos. 165, 166 and 167, were received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 168, which purports to be a letter from Mr. Kling to Mr. Avery, under date of November 18, 1927, in reply to Mr. Avery's letter of the 16th. This is D-85. I ask if you can identify Mr. Kling's signature on that letter?

A. Yes, I would say that that was Mr. Kling's signature.

Mr. STEFFEN. I offer Government's Exhibit 168 at this time.

Justice STEPHENS. Received in evidence, subject to the same general reservation with respect to declarations of co-conspirators; and all of these last four exhibits are received subject to connection showing Mr. Kling's authority to act for the American Gypsum Company, so that these declarations would be binding upon it.

(The letter referred to, marked as Government's Exhibit No. 168, was received in evidence.)

Mr. STEFFEN. I would now call attention to the fact that we are going to break the chain of Kling-Avery letters, and I will have to come back to that.

1009 Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 169, which is D-68, which purports to be a letter from Mr. Griswold to Mr. Avery, under date of July 7, 1928, and ask if you can identify that letter?

Justice STEPHENS. Who does that purport to be signed by?

Mr. STEFFEN. It purports to be signed by Mr. Griswold.

The WITNESS. Yes, that is my original letter to Mr. Avery.

Mr. STEFFEN. I offer Government's Exhibit 169 in evidence.

Justice STEPHENS. It may be received subject to the usual reservation.

(The letter referred to, marked as Government's Exhibit No. 169, was received in evidence.)

By Mr. STEFFEN.

Q. Do you know whose initials those are, "C.H."?

A. I do not, but they might have been Mr. Henning's initials, I don't know.

Q. I now show you Government's Exhibit No. 170, which purports to be a letter from Mr. Griswold to Mr. Davis, under date of September 22, 1928. This is D-70. I
1010 I ask you to read that carefully and tell me if you can identify that as your letter?

A. Yes, that is my original letter to Mr. Davis.

Q. Will you state to the Court the type of board that you recite in the letter that you commenced making following the decision in 1928, which went in favor of the United States Gypsum Company?

A. Well, it was really an open-edge type board. To look at the edge of the board it would appear as an open-edge type, the paper ending at the edge of the board. But in between the top and bottom papers, and the gypsum sludge that we used to fill in between, during this process of going under the rolls, under the continuous process, we had inserted in each side, this side and this side, a tape. It was a very thin, open-mesh tape that we doubled and pressed in there, pressed it in and let the gypsum squeeze in around it under pressure, and it was smoothed down.

Justice STEPHENS. That was under the paper, between the paper and the slurry?

The WITNESS. Yes. It was a coarse-meshed tape, I forget what we called it. It was something we bought especially for that purpose.

Justice STEPHENS. Did it run across the board or along the edge?

The WITNESS. It ran along the edge. There was
1011 a paper top and bottom, but there was no paper over the edge, but this cloth tape that was pressed in to reinforce, in a way, the edge.

One of the difficulties with wallboard was, in shipping and handling the board, that the edge got mashed up.

Justice STEPHENS. Was that put on both sides of the board?

The WITNESS. Yes.

Justice STEPHENS. And around all four edges?

The WITNESS. No, it was made this way, in a continuous process, but where we sawed it off or cut it into lengths, 10 feet or 8 feet, those edges would be raw.

By Mr. STEFFEN.

Q. Do you recall whether you were able to hold your customers with that type of board?

A. Well, I wouldn't say we held all of them, but we held all we could.

Q. Could you tell us how many, roughly? Were you able to hold most of them, or did you lose most of them?

A. The greater part of them we held, who had been our customers for years. They were pretty loyal.

Q. Was that a satisfactory type of board to make, from a manufacturing standpoint?

A. I would say no.

Q. Why?

1012 A. Well, it was a very difficult matter to insert this tape in the edges of the board, and also very difficult to hold it there so that when the material set and hardened that both edges of the board showed a smooth appearance. Lots of times the gypsum slurry would squeeze over on the top or bottom of the board, and sometimes it didn't fill out and the edges were imperfect. The objection was that it was too expensive to make, we had too many culls or seconds, as we called them.

Q. Was it more expensive to make than a board with the Utzman closed edge?

A. Yes, I would say it was.

Q. Was it more expensive to make than a board having an open edge, a wholly open edge?

A. Yes, because we had all the paper on this board that an open-edge board would have, and in addition to that we had the expense of this tape on both sides.

Q. Do you have any figures as to the difference in cost of making your board and the Utzman closed-edge board?

A. No, I have not.

Q. What was your understanding as to the difference in cost between making an open-edge board and making a closed-edge board by the Utzman patent?

A. You mean in figures, what was the difference?

Q. Yes, about how much per thousand more would it cost, or less would it cost, either way?

1013 A. Well, that was pretty hard to determine, because it depended on the luck you had. If you didn't have so many seconds, or boards that you had to throw away entirely, your cost wouldn't be so high on the Birdsey type. But if, as did happen frequently, we had a very high amount of seconds, then your cost would go higher. I would say probably in the neighborhood of $1.50 or $2 a thousand, average, including what we lost by throwing away.

Q. That is, you could save that if you made a closed board under the Utzman patent?

A. Yes, because there was a lot of waste, we had to trim an open-edge board, and there was waste in that. And I would say the cost on that would run some place around there. It was a hard matter.

Q. Of course, it would vary with different companies, but your figures are roughly $1.50 to $2?

A. Yes, I would say somewhere around there.

Q. Having looked at Government's Exhibit 170, which is dated September 22, 1928, does that refresh your recollection as to the price of board and the price of plaster at that time? I call your attention to the second and third paragraphs. Please read them again, and I direct your attention to the matter of the price situation.

A. Yes, it does.

Q. You say in here that the price of board is
1014 getting down as low as $12 at the mill. Is that for first grade or seconds, open-edge, or what?

A. As I remember it, we had heard of quotations as low as $12 a thousand square feet on No. 1 board.

Justice JACKSON. Closed-edge?

The WITNESS. Closed-edge board.

By Mr. STEFFEN.

Q. Closed-edge board?

A. Yes. But it was only just probably rare occasions, maybe on some specific contract or something of that kind, but market conditions were not that low, as I remember now.

Q. All right. What was the prevailing rate for No. 1 closed-edge board at that time, what was your rate?

A. You mean in our territory?

Q. Yes.

A. Well, I can not——

Q. (Interposing.) We don't want to hold you to the precise penny, we want your general recollection merely.

A. I would say it was down somewhere around between $20 and $25 a thousand square feet at that time, but that is just my recollection of it.

Q. Now look at the third paragraph, and tell us what the average plaster prices were at about this time, if you can remember?

A. How do you mean, prices including paper bags,
1015 or jute bags?

Q. Any way, any way you remember it. Look at the third paragraph of your letter and tell us what you meant when you said that the average price of plaster was about $5? What does that mean?

A. I think that had reference to plaster in paper bags, as my recollection is that by the time mentioned in this letter the industry had changed over and was not using very many jute bags, they had changed over to paper bags.

Q. And was this sanded plaster or was this neat plaster?

A. No, this has reference to what we call neat plaster, unsanded.

Q. And was that the correct price, as you remember?

A. As I remember it; I so state here.

Q. Now you have been in the business for a long while. Did it always sell at that same price?

A. It did not.

Q. State in previous years, any one you wish, a different price?

A. The price for some time was $10 per ton, including bags, f.o.b. the mill.

Q. And that compares with this $5 price that you are mentioning here?

A. Yes.

Q. What time do you have in mind at which it was
1016 selling at $10 f.o.b. mill?

A. Prior to the time this disturbance came in here, and the litigation over the patent, as I remember it. I don't think in 1926 the price of plaster had had any change made in it, but prior to that time I think it had been selling along for about $10 a ton.

Q. Will you read the names and state how they were known to you?

A. Fairmont Wall Plaster Company. They were dealers in builders' supplies, located at Fairmont, West Virginia.

Q. Would you say they were jobbers or dealers?

A. They were dealers in some places, had retail yards; and at other places they did a jobbing business, they sold to other dealers.

Q. What is the next name?

A. Abbey—that is all it says here.

Q. What does that call to your mind?

A. Well, it is a common name, although I had a
1025 concern by that name located at Newark, New Jersey, which was also a dealer in builders' supplies. But I do not think they ran any retail yards, they sold wholesale.

Q. They were jobbers?

A. They were jobbers.

Q. All right, what is the next name?

A. Toledo Plaster Company, it looks like.

Q. Do you know that concern?

A. They were a concern located at Toledo, Ohio, who operated what we termed a mixing plant that would take this calcined gypsum and mix the sand and other ingredients with it and put it onto the market. They were retail dealers, and had yards in Toledo. But I think that they, as I remember, sold their own plaster some places around wherever they could, outside of Toledo.

Q. Did they handle board for you?

A. Well, I have no recollection of selling them any wallboard. We might have sold them some plasterboard, the small sizes, but I have no recollection of selling them wallboard. We might have, I don't remember it.

Q. How did you sell your plasterboard or wallboard to them, on a jobber basis or how?

A. Yes, if it was for resale we allowed them, of course, a certain discount over and above the regular retail price.

Q. What is the next name?

1026 A. Cleveland Gypsum Company. That was a concern located at Cleveland, Ohio, and they operated a mixing plant, also, at Cleveland, and sold their products, which were the same as the Toledo Plaster. They bought calcined gypsum or stucco and mixed sand with it and sold it at retail. I don't know whether it was later or before this, but I think it was before this, the American Gypsum Company made a lease or a contract with the Cleveland

Q. Now my question, which is unanswered, is—what sort of a decline took place between 1926 and 1928, was it a gradual decline or otherwise?

A. As I remember it, the decline was more or
1018 less gradual, the drop wasn't all at once.

Q. Now you say here you are meeting your competition where you think it advisable. What comprised your chief competition on plaster prices?

A. Is that in this letter that you are talking about?

Q. You say there you were meeting competition where you thought it advisable. I want to know who you were competing with?

A. Well, in meeting competition from some of the Grand Rapids, Michigan, plants, we refused to meet it, we did not recognize that certain mills in Grand Rapids produced a material equal to ours, and unless there was some specific reason for doing it we did not meet those quotations. In some cases we might do it if we had some particular reason, but to the dealer, our regular customers, we ignored those quotations.

Justice STEPHENS. What counsel asks you is—who were you competing with? Of course, it is proper to make a distinction that you weren't competing with the Michigan plants referred to, because you said they didn't make the same grade. But who were you competing with when you refer to competition in the third paragraph of this letter?

The WITNESS. Principally with the Grand Rapids mills, but whether the Certain-teed had——

By Mr. STEFFEN.

1019 Q. (Interposing.) There is nothing in there to refresh your recollection?

A. No, but I am thinking about the date. Certain-teed had the Grand Rapids plants at this time, and it was principally Certain-teed that was making the lower price.

Mr. STEFFEN. We offer Government's Exhibit No. 170 in evidence.

Justice STEPHENS. Any objection?

Mr. BROMLEY. Only the usual one.

Justice STEPHENS. Received subject to the reservation concerning declarations of alleged co-conspirators.

(The letter referred to, marked as Government's Exhibit 170, was received in evidence.)

Justice STEPHENS. We will take our noon recess.

(Whereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

1021 AFTERNOON SESSION

Justice STEPHENS. Proceed, gentlemen.

Thereupon, FRANK J. GRISWOLD, the witness on the stand at the time of recess, resumed his testimony as follows:

Direct examination (resumed) by Mr. STEFFEN.

Q. I show you Government's Exhibit No. 171, which is D-86, which purports to be a letter from Mr. Kling to Mr. Avery under date of November 20, 1928, and I ask you to examine it and see if you can tell whether that is Mr. Kling's signature?

A. Yes, I would say that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 172, which also purports to be a letter—this is, by the way, D-87—it purports to be a letter from Mr. Kling to Mr. Avery under date, this time, of February 7, 1929, and ask if you can identify Mr. Kling's signature?

A. Yes, I would say that that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 173, D-88, which purports to be a further letter from John A. Kling addressed to Mr. Avery, under date of February 13, 1929, and ask if you can identify Mr. Kling's signature?

1022 A. Yes, I would say that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 174, which is D-91, which purports to be a letter from Mr. Kling, Chairman, addressed to Mr. S. L. Avery, under date of April 30, 1929, and ask if you can identify Mr. Kling's signature?

A. Yes, I would say that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 175, D-92, which purports to be a letter from Mr. Kling, addressed to Mr. Avery, under date of May 1, 1929, and ask if you can identify Mr. Kling's signature?

A. Yes, I would say that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 176, D-94, which purports to be a letter from Mr. Kling addressed to Mr. Avery, under date of June 7, 1929, and ask if you can identify Mr. Kling's signature?

A. Yes, I would say that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 177, which purports to be a letter—that is D-99—which purports to

Mr. STEFFEN. And in view of Your Honors' decision the following morning, 101 and 102 would be automatically admitted?

Justice STEPHENS. I believe that is correct; 101 and 102 may be admitted, subject to the ruling of the Court with respect to declarations of co-conspirators.

(The documents referred to, marked as Government's Exhibits 101 and 102, were received in evidence.)

Mr. STEFFEN. With Your Honors' permission, I would like to show the witness Government's Exhibit No. 137, which was only imperfectly identified and was not
1030. admitted. I would like to show it to him again, and call his attention to one or two matters and ask if he can at present identify it. I have no other such exhibit.

Justice STEPHENS. What number is that?

Mr. STEFFEN. D-48.

Justice STEPHENS. You may do so.

By Mr. STEFFEN.

Q. Mr. Griswold, I again call your attention to Government's Exhibit No. 137, which is a purported copy, unsigned, of a letter from you to the National Gypsum Company, under date of April 22, 1927, and I would ask you to read it again and to note the initials at the bottom, and state whether or not this is a copy of a letter which you may have signed and sent?

A. There is no mark on this letter that would refresh my mind, or evidence that I had seen the letter. I do not recall receiving this. If this letter is a copy, which it purports to be, I do not remember of receiving the claimed original. But the items that are touched on in the letter, I have a general recollection of some of the things that happened, but just how I got it or what from, I couldn't say.

Q. Will you state what items you have a recollection of, which items?

A. Well, the last paragraph here, in which it
1031. says "I am authorized to discuss with you the troubles between your company and the Universal Gypsum Company", I remember that, as I testified. I don't know when it was now, but some time ago, that Mr. Holland, the Receiver for the Universal Gypsum Company, in talking with him, as I remember it, he told me it would be all right to discuss with Haggerty, if I saw him, their

Q. For how long a period?

A. I would say for 3 or 4 years.

Q. It was fairly stable at $10 a ton prior to 1925 or 1926?

A. We would occasionally hear of lower prices being quoted by somebody that wanted a particular order on which there was a large tonnage, but the average price was $10 a ton, as I remember it.

Q. State whether I am correct or not, but beginning in 1925 or 1926, it was around $10 per ton; and as late as September, 1928, it had reached $5. Was that a more or less gradual decline, or what was the variation?

Justice STEPHENS. Before you answer that question. The Court is a little puzzled. The Court understood the witness to be talking in terms of bags. Does each bag of plaster weigh a ton?

By Mr. STEFFEN.

Q. Will you explain to the Court how plaster is put up and sold?

1017 A. There were two ways of making shipments in wall plaster. One was in jute bags, which were returnable to us and redeemed by us at the price we charged, which was usually ten cents apiece. The other way was in shipping it in non-returnable paper bags. There was a difference in the quotations, usually, between in paper and in jute.

Justice STEPHENS. Now this figure of $4 to $6 a ton in Exhibit 170, the letter of September 22, that you testified to, referred to bag prices?

The WITNESS. I would like to amend that answer. I think this quotation did not include bags, because it doesn't mention whether paper or jute, and I think that was a bulk price, that is, if it had been paper it would have been $1 more——

Justice STEPHENS (interposing). Bulk price per what unit, per bag or ton?

The WITNESS. Per ton; including bags. But this was a bulk price, as I recollect it.

By Mr. STEFFEN.

Q. Now the similar bulk price per ton for plaster in 1925 or 1926 was about $10?

A. Those prices included paper bags, as I remember.

Gypsum Company, which was headed by John A. Kling, and we leased those plants and afterwards we operated those plants ourselves at Cleveland, Ohio, the American Gypsum Company operated them.

Q. Is there any other name on there?

A. There is one other, Wyman Allen, I think it is, Company at Boston, and that was a lumber company, as I remember it, located at Boston, Massachusetts, to whom we sold some wallboard. I don't remember of ever doing a very extensive business, but we did sell them some wallboard, I remember that.

Q. Did you sell them as dealers or jobbers?

A. We sold them as jobbers, allowed them a discount.

Justice STEPHENS. I didn't quite understand about the previous company, the Cleveland company. Did you say you sold them as dealers or jobbers?

The WITNESS. To the best of my recollection we sold them nothing but this stucco, which they made their
1027 wall plaster out of.

By Mr. STEFFEN.

Q. Did you sell them stucco as jobbers or as dealers?

A. No, not as jobbers. We sold them at a price that we had to such concerns over the country. We, of course, made a manufacturing concern like that a little better price. Well, ordinarily the stucco wasn't sold to builders' supply dealers, they didn't handle it at all, it had to be in some other form before they would handle it.

Q. I now show you Government's Exhibit No. 183, which is D-108, and which purports to be a copy of the Minutes of the Board of Directors of the American Gypsum Company under date of April 1, 1929, and ask if you can identify the signatures of the Chairman and the Secretary?

A. Yes.

Q. What are they?

A. It is signed by John A. Kling, Chairman; J. B. Davis, Secretary.

Justice GARRETT. Pardon me a moment. Do I understand that you had retired from the American Gypsum Company at that date?

The WITNESS. Yes, Your Honor, February 1, 1929, I retired. I only identified these signatures, I did not attend that meeting.

Justice GARRETT. I understood that, but I wanted
1028 to be clear on that other matter.

Mr. STEFFEN. I am only interested, Your Honor, in the second paragraph on the second page of Exhibit No. 183.

Justice STEPHENS. I see.

Mr. STEFFEN. And the third paragraph. In fact, I am not interested at all in the second paragraph, it should have been the third paragraph.

Justice STEPHENS. This is Exhibit No. 183?

Mr. STEFFEN. Yes, sir.

I now move the admission of Exhibits—or offer in evidence Exhibits Nos. 171 to 183, inclusive.

Justice STEPHENS. Is there any objection except the usual objection?

Mr. BROMLEY. That is all, sir.

Justice STEPHENS. They are received in evidence subject to the Court's reservation with respect to the declarations of co-conspirators. And an objection by Mr. Adams may be noted that they are not identified.

Mr. ADAMS. Thank you, Your Honor.

Justice STEPHENS. The Court ruling that they are identified by signature and circumstantially by their relation to each other.

(The documents referred to, marked as Government's Exhibits 171 to 183, inclusive, were received in evidence.)

1029 Justice STEPHENS. For the sake of the record, are you introducing in evidence, although you are only interested in the third paragraph of Exhibit 183, the entire exhibit? I suppose you will have to introduce the whole exhibit to make that exhibit explanatory.

Mr. STEFFEN. That is right.

Justice STEPHENS. Your reliance, the record may show, is on the third paragraph of the second page.

Mr. STEFFEN. That is right.

I believe, Your Honor, that Exhibits 101 and 102 were at first admitted, and then at the close of the session——

Justice STEPHENS (interposing). There was a reservation in order to allow objection with respect to declaration, I believe.

be a letter from Mr. Kling to Mr. Avery, under date of September 18, 1929, and ask if you can identify that letter as bearing Mr. Kling's signature?

A. Yes, I would say that that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 178, D-100, which purports to be a letter from Mr. Kling to Mr.
1023 Avery, under date of October 14, 1929, and ask if you can identify Mr. Kling's signature?

A. Yes, I would say that was his signature.

Q. I now show you Government's Exhibit No. 179, D-101, which purports to be a letter from Mr. Kling to Mr. Avery, under date of October 18, 1929, and ask if you can identify the signature?

A. Yes, I would say that was his signature.

Q. I now show you Government's Exhibit No. 180, D-81, which purports to be a reply by Mr. Avery to Mr. Kling, under date of October 22, 1929, and ask if you can identify Mr. Avery's signature?

A. Yes, I would say that was Mr. Avery's signature.

Q. I now show you Government's Exhibit No. 181, D-102, which purports to be a letter from Mr. Kling in longhand, addressed to Mr. Avery, under date of November 12, 1929, and ask if you can identify Mr. Kling's signature on the back of that, or his handwriting?

A. I would say that was his signature, but the letter itself, I wasn't familiar enough with his writing in regular correspondence, because I seldom saw it, but his signature I was familiar with.

Q. I now show you Government's Exhibit No. 182, D-82, which purports to be a reply from Mr. Avery to Mr. Kling, under date of November 16, 1929, and I ask if you
1024 can identify Mr. Avery's signature to that letter?

A. Yes, I would say that was Mr. Avery's signature.

Q. I now show you——

Justice STEPHENS (interposing). Let us read this. This is quite a long letter, Mr. Steffen.

Mr. STEFFEN. Very well.

Justice STEPHENS. Thank you. Go ahead, Mr. Steffen.

By Mr. STEFFEN.

Q. I call your attention to the second page of Government's Exhibit No. 182, and ask if you know what that writing means in the margin?

A. I don't know whose writing it is. The names mentioned there were people that were known to me.

from this time on, and I recommended to our Directors that they accept his proposition.

Q. Isn't it a fact that right from the beginning Mr. Avery's position was that the American Company, in order to settle and get a license, would have to acknowledge the validity of his patents, pay damages, agree to pay a royalty, and permit him to fix their prices?

A. I would say yes, that was his position.

Q. And wasn't that his position at all times subsequent to that time, at least until you got out of the industry?

A. So far as I remember, yes.

Q. And isn't it the fact, sir, that if your Directors had been willing, your company could have had a license on those terms at any time during the period from 1926 until you left the industry?

A. At any time after we had reached the $50,000 as the amount of the past infringement, any time after that, as I remember it, we could have taken out a license. But my own directors refused to do it.

Q. Well, at any time prior to the date when you reached the agreement on the $50,000, you could have taken out a license subject to your ability to get together on a
1039 proper figures for the damages, couldn't you?

A. As far as I remember, yes.

Q. Now while we are on the subject of this $50,000, which is referred to in Exhibit 161, that agreement which you made with Mr. Avery, referred to in the letter, Exhibit 161, which is dated June 2, 1927——

Justice STEPHENS (interposing). Can you give us the "D" number of that?

Mr. PAUL. D-40.

Justice STEPHENS. Proceed.

By Mr. BROMLEY.

Q. The arrangement which is referred to in that letter, Exhibit 161, is one which you made with Mr. Avery, you acting on behalf of the new merged company, should it ever come into existence; isn't that right, sir?

A. Well, it was for the benefit of the new company, or the merger, because as has been brought out before, up to that time there was no amount fixed for past infringement claimed by Mr. Avery that we could set up as a liability in our financial plans, and this was the first time that there had been any amount fixed on. And after it was settled, we, of course, know what the amount was to be, and also the

Cross examination by Mr. BROMLEY.

Q. Mr. Griswold, it was sometime in 1927 that Mr. Holland of the Universal Company authorized you to
1033 talk to Haggerty of the National Company, was it not?

A. Well, I can not state the date without something—it was somewhere around that time, but I don't remember the exact date.

Q. Will you look at Exhibit 137 for Identification, and tell me whether it wasn't in 1927 that Holland authorized you to talk to Haggerty?

A. Yes, prior to April 22, 1927.

Q. Now isn't it a fact that Mr. Holland didn't come with the Universal Company until 1928?

A. Well, I could not say, sir, as to the date.

Q. Don't you remember that if you were given this authorization in 1927, you were given it by some other person connected with Universal than Mr. Holland?

A. That is barely possible, but my recollection was that Mr. Holland was the one, because he has been injected into this picture. But prior to that, I think Mr. Shearer was there. I am not clear on that, though.

Q. Look at the second paragraph of Exhibit 137 for Identification, and see if that doesn't refresh your recollection that it was Mr. Palmer who was the President of Universal at this time?

A. You are correct, it was, and it so states in this letter that it was Mr. Palmer.

Q. Now having looked at that paragraph, is your
1034 recollection refreshed so that you can now say that it was Palmer who authorized you to take up with Haggerty the troubles between Universal and National?

A. Yes, I would say that is correct, because the letter so states.

Q. In connection with your testimony about that, I would like to have you bring out just what the nature of the trouble was between Universal and National, and for that purpose let me ask you this: It is a fact, isn't it, that at this time, in 1927, the Universal Company owned the Haggerty patent?

A. I believe that is correct.

Q. And the Haggerty patent covered the use of starch in the manufacture of board, whether used for purposes of getting a better bond between the paper and the core, or used to make a lighter weight board; isn't that so?

A. Yes.

Q. And the National Company, in 1927, it had been discovered by Universal, had been infringing that patent and using starch for one or both of those purposes; isn't that so?

A. I remember they had some trouble——

Mr. STEFFEN (interposing). I think I would object to that as calling for a conclusion.

Mr. BROMLEY. Isn't that what you were told by
1035 Mr. Palmer, that that was the nature of the trouble, that the National Company was infringing the Universal's starch patent?

Justice STEPHENS. Just a moment. I think technically the previous question did ask for a conclusion.

Mr. BROMLEY. I withdraw it.

Justice STEPHENS. But the present question, I think, is proper.

Mr. BROMLEY. Will you read the present question?

(The question was read by the reporter.)

The WITNESS. My recollection of the matter is that it was a dispute between them over the use of starch or dextrin. Some one or the other claimed the patent, but it is too far back and I don't remember the details.

By Mr. BROMLEY.

Q. But do you remember that at this time a lawsuit had been started by Universal against National in the Federal District Court in Buffalo, New York?

A. No, I can't say that I remember that. If I heard about it, it probably didn't register on my mind. I don't remember, Mr. Bromley.

Q. Do you remember that at this time, that is, April 22, 1927, a Federal judge, whose name was Hazel, had decided in Buffalo that the starch patent was valid and had been infringed by National?

A. In some manner, yes, I remember hearing of
1036 that case, but I had nothing to do with it and I had gotten the information from somebody else. I knew that much about.

Q. Look at the next to the last paragraph in Exhibit 137 for Identification.

Justice STEPHENS. Is that the one commencing "I am authorized to discuss with you"?

Mr. BROMLEY. Yes, sir.

Q. Yes, but Mr. Avery at all times said, "You have got to take a license under all of these patents if you take any," and that was one of the points of dispute between you; you wanted the 3-year and he wanted the one that lasted for many years; isn't that right?

A. Later on that was his position. I am speaking about the negotiations when they first started, that they only had to do, as I remember it, with the Utzman type edge and the Clark or Birdsey type edges, and possibly their formulas and so forth, that if we were to pay a license or royalty for the use of a patent, we were entitled to the benefits of their experience in making that product.

1044 Q. Well, at any rate, it soon came to be Mr. Avery's position that you must take a long-term contract if you wanted any?

A. Yes, later on he stated a term which was longer than what was at one time discussed.

Q. And he never receded from that position or offered you any concessions in that regard, did he?

A. After he had stated the term, that is, what you term the long-term period, I do not remember of him ever making any change in it.

Q. Now this Mr. McCrady, to whom you wrote some of the letters which have been received in evidence, he was one of your fellow directors, was he not, who was opposed to taking a license from USG?

A. Yes, Mr. McCrady was opposed to taking a license agreement.

Q. And it is a fact that the majority of your fellow directors were opposed at all times while you were with the company?

A. Yes, the majority was. Otherwise it would probably have gone into effect.

Q. And McCrady and the others who were opposed, objected not only to having to pay damages, but also objected to having to pay royalties and also objected to having their prices fixed by USG, did they not?

1045 A. They objected to paying damages if we could help it. If they had to pay a royalty at all, of course they wanted to get it as low as possible. But they were opposed to the proposition as was outlined at that time.

Q. Well, they were opposed to all of it, weren't they?

A. Well, I couldn't remember at this time whether they were opposed to all of it or not, but I remember they were opposed to the damages and to the amount of the royalty at that time.

troubles. I had expressed myself that I didn't want to dip into an argument between them, I had nothing to do with it; and that is what I meant when I said that there would be no objection to me discussing it with him, with Mr. Haggerty.

Q. Did you discuss it with Mr. Haggerty?

A. Well, I couldn't say at this time. I suppose I did, but it is too far back.

Mr. FINCK. I move to strike, if the Court please, that he "supposed" he did. He says he doesn't recall the letter, doesn't know anything about it, and I move that the answer be stricken.

Justice STEPHENS. It seems to the Court that the entire answer ought not be stricken. The letter isn't now being offered and he isn't assuming to say anything about the letter. He is stating that he was authorized to talk in respect to some troubles between Universal and National. The statement that he "supposed", that particular statement, may go out.

Mr. STEFFEN. I now offer the letter only as re-
1032 spects the last paragraph, which the witness has identified.

Justice STEPHENS. Let me read the ruling of the Court before on this.

We don't see how the matter presented is in any different light than it was when originally ruled upon, at which time the exhibit was excluded for lack of identification. Of course, the witness has now testified, his recollection apparently being refreshed, that he was authorized by someone to intervene between Universal and National, and that statement may stay in the record, because that is apparently from his own recollection, and the letter itself is usable to refresh his recollection. It has been examined by the Court as a basis to refresh his recollection. But unless you have something new to urge, it doesn't seem to us that the letter itself is admissible.

Mr. STEFFEN. We have no further questions at the moment, and the defense may cross-examine the witness.

Justice STEPHENS. The exhibit itself is not received in evidence, but the statement of the witness as to his own recollection does remain in the record.

You may cross-examine.

American Gypsum Company knew what they would either have to pay or else the new company would have to pay, so it would be passed along to the new company, ordinarily.

1040 Q. I noticed, Mr. Griswold, that in Exhibit 160-A, which was your Board of Directors minutes for June 22, 1927, it appears that you did not submit this offer to the American Board of Directors. Now the reason you didn't submit it was because it was an offer which was for the benefit of the new merged company should it ever come into existence, isn't that right?

A. Well, I wouldn't say that was the reason why it was not submitted to the directors.

Q. What was the reason that it wasn't submitted to your American directors?

A. The directors, I am very sure, were familiar with it, that I told our own directors of the proposition and recommended that they take out a license.

Q. Well, what was their reaction, if any, to the offer? Did they turn it down or were they favorable to it?

A. They turned it down.

Q. I see. So your present recollection is that you did submit the $50,000 offer to your American directors, and they refused the offer?

A. They refused to accept the offer that he had made.

Q. Now Mr. Avery had no interest of any kind in your merger plans, did he?

A. No.

Q. He was not to participate nor was USG to par-

1041 ticipate in any form, shape or manner?

A. No.

Q. Isn't it a fact, Mr. Griswold, that when you wrote to Avery, or talked to Avery, during this 1926 to 1929 period, that generally speaking you were trying to get from Avery concessions for the benefit of your company in the taking of a license under the USG patents?

A. Trying to get concessions?

Q. Yes.

A. Yes, I was trying to get as low an amount for past infringement damages, of course, and as low a royalty to govern the future manufacturing, as I could. I don't remember the exact details.

Q. Well, you hoped that if you could get Avery down low enough on damages, that you could induce your fellow directors to take a license, didn't you?

A. As I remember it, at that time Mr. Avery's demands for royalties were rather high, we thought, and I was trying

to get them down because some of the different companies objected, including our own company, objected to the amount of royalties that he was asking.

Q. So that you were trying, over these years, to induce Mr. Avery to be more lenient in his offer than he was being, weren't you?

A. I would say yes.

1042 Q. And one of the ways in which you sought to induce Mr. Avery to be lenient with you was to give him the idea that you were promoting his interest and the position of USG in the industry, isn't that right?

A. I don't get that question.

Mr. STEFFEN. I object to the form of the question.

Justice STEPHENS. Read the question.

Mr. BROMLEY. He didn't get it, so I withdraw it.

By Mr. BROMLEY.

Q. Didn't you seek to give Avery the impression that you were trying to help him out and his company out in its negotiations with other prospective licensees?

A. Well, I would say yes, at times I argued that way, that it would react to his benefit.

Q. Now the fact is that while Mr. Avery always met and talked to you, and you were friendly most of the time, he never at any time offered you any concessions by way of settlement or license terms, did he?

A. For past infringements he never made any other one than the $50,000, that was the only price he ever named. And on royalties which we were to pay in the future if we used the Utzman patent, after this 5 percent on the selling price was mentioned, which amounted at that time, with the price at $30, to $1.50 a thousand square feet, I have no recollection of that price every being changed after-

1043 wards, he always stood on that price.

Q. And he always stood on the proposition that you must recognize the validity of his patents, and take licenses under all of his patents, and that the license agreement must run at least until 1937, didn't he?

A. Well, at the beginning of my neg iations, the only patents we were discussing were these wallboard edges, that is, the Utzman type edge and later on the Birdsey type, which conflicted with the Clark type that we were making. Those were the only two that I remember especially at first, because we weren't interested in anything else particularly at that time.

By Mr. BROMLEY.

Q. Doesn't that refresh your recollection that there was litigation pending between the two companies at this time?

A. Yes, to this extent, that there was trouble of some kind. Whether there was an actual case in court, I could not say, at this time.

Q. Now as to that trouble, Mr. Griswold, you knew then, and it is the fact, is it not, that USG was not concerned in any way?

A. As far as I remember it, no, they were not concerned in that.

Q. And the efforts which you undertook in regard to this trouble between Universal and National were merely for the purpose of trying to get rid of what you thought were disruptive or disturbing conditions in the industry, is that right?

1037 A. That is correct, as I remember it, because I wasn't interested in their troubles except to try to smooth them out if I could.

Q. You had no other interest in attempting to smooth them out except you thought litigation of any sort in the industry was a bad thing for the industry, and thereby affected your company and your proposed merger adversely; isn't that right?

A. That is right.

Q. Now, sir, you told us, did you not, that you were offered a license for the American Company by Mr. Avery as early as 1926?

A. That I was what?

Q. That Mr. Avery offered you, on behalf of the American Company, a license as early as 1926?

A. I remember we were attempting to get a settlement with him and did, as has been brought out in the testimony here, get a proposition whereby $50,000 was paid to settle claims for past infringement.

Q. Well, isn't it a fact, Mr. Griswold, that at all times from 1926, at least, until you left the industry, Mr. Avery's position with respect to American and a license was always substantially the same position?

A. Yes, and I just remember now that he certainly did make an offer for a license, because I recommended to our

1038 stockholders, when he made this proposition, that they accept it and take out a license with the USG to do away with the litigation and settle it. Inasmuch as he had fixed the amount on the past damages up to that time, it was only a question of the royalty we were to pay

A. My recollection is that it had a strong resemblance to what you have in your hand.

Q. Are you able to tell us that it was on or about March 5, 1925, that Sidney C. Clark appealed to the Court of Appeals in the District of Columbia in the interference proceeding which had been won in the Patent Office by Birdsey prior to that time?

A. Yes, I remember there was an interference suit started.

1053 Q. Well, can you verify this date as on or about March 5, 1925, that Clark appealed to the Court of Appeals in the District of Columbia?

A. I cannot identify the date, I don't remember, but I remember that the case was appealed.

Mr. BROMLEY. Will you stipulate, Mr. Steffen, that it was on March 5, 1925, that Clark appealed to the Court of Appeals in the District from the decision of the Commissioner of Patents, awarding priority of invention to Charles R. Birdsey?

Mr. STEFFEN. May I see that, please?

Mr. BROMLEY. Yes.

(After examining record on appeal.)

Mr. STEFFEN. I think we will so stipulate. We would like to have access to this record, if he is not proposing to put it in evidence.

Mr. BROMLEY. I am not.

Mr. STEFFEN. We would like to have access to it.

Justice GARRETT. That is not an action under 4915, that is just a direct appeal from the Commissioner to the Court of Appeals under another section?

Mr. BROMLEY. Under sections 4912 and 4913.

Justice STEPHENS. At that time the Court of Appeals of the District had appellate powers over the Patent Office, and direct appeals were not taken, as they are now taken, to the Court of Customs and Patent Appeals. The 4915

1054 jurisdiction came later. It existed at the same time, but that appellate jurisdiction was taken away. At that time I think they had it.

Your stipulation may be recorded, and you may have access through the courtesy of counsel to this record, I assume.

favor of the license agreement, and I wanted to use
1047 this Utzman type edge.

Q. And you thought that he should have been in favor of it, didn't you?

A. Well, I think I thought that, but that didn't change him over, he had a mind of his own.

Q. But you tried to change him over?

A. I possibly might have argued and tried to change him, yes.

Q. And you tried to change him over when you wrote these letters to him, didn't you?

A. Well, wherever they show some argument, I would say yes.

Q. In some of them you use the word "agreed", that you had gone around and seen some of these competitors and that they had "agreed" to do something. Will you tell us what the fact was? Was there any agreement at any time that you knew of, between American and USG, or American and any other company, that they or anybody else would do anything with respect to taking or not taking these licenses?

A. As the word "agred" is usually used, I would say there was no such—it should not have been used in connection with these meetings such as are mentioned in the letters. All it was was an effort on my part to induce or convince these other manufacturers, practically all of whom were friends of mine, having built their plants and
1048 having consulted with them in their problems in the gypsum business, to convince them that it would be to their interest in the long run, individually, to instead of trying to manufacture an open-edge type board and trying to put it on the market against a product such as the United States Gypsum Company were making, on which they claimed a patent, that they would find it a very difficult proposition to do so and market it at a price that would make them any money, and in my judgment, knowing what I did about the manufacture of board, the best thing for them to do would be to not try to antagonize the United States Gypsum Company by making a closed-edge board, because it meant an experience just like we were having, they would be up against litigation, and that the sensible thing for them to do in my judgment, was to take out a license which would permit them to manufacture the Utzman type or closed-edge type board.

And in some of them I used the word "agreed", but some of them I probably convinced, what I meant by that, that

they thought probably that would be the wise thing to do. But as to there being any agreement as to what we should do, I never made an agreement with anybody else as to what we should do, an agreement that was binding. It was simply in a conversation in which you might say that I convinced them that that was the thing to do.

Q. During any of this period did you act as agent or emissary of Mr. Avery?

1049 A. No, I did not.

Q. Did you have any agreement or understanding with him that you were going out to act for him?

A. Not for Mr. Avery or for the United States Gypsum Company.

Q. Did you have any agreement with Mr. Blagden, or anyone else, that you were going out and act for him or anyone else?

A. No, I did not. As I remember it, I had never met Mr. Blagden until that first meeting, May 12, I think it was, the date mentioned in the correspondence.

1050 Justice STEPHENS. Which was Mr. Blagden's company?

Mr. BROMLEY. The Beaver.

By Mr. BROMLEY.

Q. Now, at any time, did Mr. Avery ever tell you to go out and act for him in inducing other companies to take a license from him?

A. No, he did not.

Q. And it is a fact, isn't it, Mr. Griswold, that at all these times you were acting solely for your own company, the American Gypsum Company, or on behalf of your contemplated merger?

A. Yes, I was acting to settle the disputes and litigation between our companies, and I was vitally interested in getting this thing settled on account of the new merger which was taking in a new number of these companies that would be involved in litigation if they tried to make anything except on open-edge board.

Q. You told the Court the other day that some time in 1920, as you recalled it, in a discussion with Mr. Avery, Mr. Avery had claimed $8 as an amount of money that he was seeking to recover from Best Wall on the basis of a thousand square feet of board. Now, as you recall it, was that $8 per thousand square feet of board the way Mr. Avery stated his damage claim on account of the Best Wall infringement?

Gypsum Company; and Mr. Blagden, whom I am sure I had not met, was the new general manager of the Beaver Board Company, and I was anxious to meet him and get the details of what he knew, or if the decision had been rendered, I wanted to get information as to what it was, because I was vitally interested in that decision. It was the first time that I had heard of it, that it had been rendered.

By Mr. BROMLEY.

Q. Isn't one of the reasons that you went to see Mr. Blagden to be found in the fact that the Court of Appeals had decided against you in February, 1926?

A. Yes, I saw, as I testified earlier, that if this decision was final, and we couldn't get anything else, we were up against it, not only the American Gypsum Company, but the merger that I had in mind; the different companies that I was trying to get in this merger would be up
1058 against the same difficulty. They either had to take out a license or make an open type board.

Q. And when you met Mr. Blagden, you asked him how the Beaver Company was handling the litigation with USG, did you not?

A. I don't remember that I asked him just that, but I would say I did, because that was my purpose in meeting him.

Q. You wanted to find out the precise status of the litigation, and any settlement negotiations, if there were any, did you not?

A. I did.

Q. Prior to the time you had this talk with Mr. Blagden in May, 1926, you hadn't had any negotiations or discussions with USG, either about a settlement or a license, had you?

A. Prior to this date?

Q. Prior to this time in May, 1926, when you went to Buffalo and talked to Blagden.

A. As I remember it, I had not had any talks with Mr. Avery, and that was another reason, if I was going to talk with him, I particularly wanted to hear what Mr. Blagden had to say for his company before I talked to Mr. Avery.

Q. And the fact is that you had never discussed the subject of settlement or license with anyone up to that time except that in 1920, when you first started to make board, you said that you went to Chicago and asked Avery about a license; but except for that incident in 1920,
1059 you had never talked to anyone about settlement of your troubles, or taking a license from USG, had you?

Q. Well, do you remember in Exhibit 117, that Mr. McCrady wrote to Mr. Davis under date of September 20, 1926——

Justice GARRETT (interposing). Do you have the "D" number there, Mr. Bromley?

Mr. BROMLEY. D-19.

Justice GARRETT. Thank you, that will aid us.

By Mr. BROMLEY.

Q. (continuing)—and stated that Mr. Avery had given them to understand that for the next 10 years American would have to eat out of his hand? Do you see that reference in the middle of the second paragraph?

A. I remember seeing this letter before.

Q. Isn't that a reference to McCrady's position as you knew it, that if you signed a license and gave USG the right to charge royalties and fix prices, that your company would have to eat out of USG's hand for as long as the license lasted?

1046 A. I would say that that is what he had reference to in that statement he makes here.

Q. By the way, these letters that you wrote to McCrady from time to time, which have been received here in evidence, you wrote for the purpose of attempting to induce him to change his views on this matter, didn't you?

A. Well, I presume I did. But Mr. McCrady, during a considerable part of this time, was on the committee to adjust, with me and Mr. Davis, to try and settle this litigation between ourselves and the United States Gypsum Company.

Q. But one of the purposes in writing letters to him was to get him, if you could, to change his attitude on the subject and agree with you that a license should be signed, wasn't it?

A. Well, I don't think I probably missed many opportunities to do that, but it was my duty to report to him, he was president of the company, and I probably had some meetings that he hadn't attended, so I was reporting to him what had transpired to keep him posted on the matter up to that time.

Q. And at the same time you were doing a little arguing to make it seem as attractive to him as you could, weren't you, Mr. Griswold?

A. Yes, I never changed my position. I was always in

Mr. BROMLEY. Certainly.

By Mr. BROMLEY.

Q. Now, it was sometime after this appeal to the Court of Appeals, which we have agreed occurred in March, 1925, that USG commenced two patent infringements against your company in the Federal Court for the Northern District of Ohio, isn't that right?

A. At about that time they started those suits.

Mr. BROMLEY. Will you stipulate, Mr. Steffen, that the suits were started on September 22, 1925? I am handing you the record on appeal to the C.C.A., from Judge Jones' opinion which was rendered in 1928.

Mr. STEFFEN. We will stipulate simply that one suit was started on September 22, 1925, and that was the suit brought on the Birdsey patent, No. 1,358,508. We also would like to have access to the record I just looked at.

Justice STEPHENS. That may be understood; the stipulation is recorded.

By Mr. BROMLEY.

Q. Now, Mr. Griswold, can you tell us that it was on February 1, 1926, that the Court Appeals of the
1055 District of Columbia affirmed the decision of the Patent Office in the interference proceedings between Clark and Birdsey, which resulted in final priority being awarded to Birdsey?

A. I remember such a decision, I don't remember the date.

Mr. BROMLEY. Will you stipulate, Mr. Steffen, that it was on the 1st of February, 1926, that the Court of Appeals affirmed the decision of the Commissioner of Patents, awarding priority of invention on the subject-matter of the interference, to Birdsey?

Mr. STEFFEN. May we take a few minutes' recess, your Honor?

Justice STEPHENS. Yes, the Court will be in recess for five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Mr. STEFFEN. I may say, your Honor, that we are very glad to stipulate that the Court of Appeals affirmed the decision of the Commissioner of Patents, awarding priority of invention to Birdsey, on the 1st day of February,

1926, subject to our being permitted to check the date more carefully, and subject further to being given access to the record on appeal.

Justice STEPHENS. That may be agreed.

Mr. STEFFEN. My stipulation covered both date and fact of the award.

Justice STEPHENS. Yes, the record may so show.

By Mr. BROMLEY.

1056 Q. Now, it was following this action of the final court in the Birdsey-Clark interference, that you first realized the necessity of getting a license from USG, or making some arrangements with USG, isn't that right?

A. Yes. So far as the success of my merger that I had in mind was concerned, I realized after the court's decision had gone against us, that it was necessary that we settle that litigation, and the only way to do it that I could see was by taking out a license agreement.

Q. Up to this time your chief hope in this situation had been that Clark would be awarded priority over Birdsey, isn't that right?

A. Yes.

Q. And if that happened, then you would have had a type of semi-closed edge, which you could have made free from any claim of infringement by USG?

A. Yes, we could continue to make the edge we had been making, if that court did not decide against us.

Q. But when the Court of Appeals went against you, then there was nothing that you could do except try to make your peace with USG so far as that edge was concerned, wasn't that true?

A. Either that, or make an open-edge board, which we did not want to do.

1057 Q. Yes. And isn't that the reason why you took occasion to talk to Mr. Blagden at the time mentioned in Exhibit 104, which is your letter to McCrady of May 12, 1926?

A. Will you restate the question, please?

Mr. BROMLEY. Will you read the question, Mr. Reporter?

(Whereupon, the pending question was read by the reporter.)

The WITNESS. The information I had was to the effect that some decision had been made or was about to be made in the case between the old Best Wall people, which had been assumed by the Beaver Board Company, and U. S.

A. I think, as I remember it, that $8 a thousand
1051 settled damage claims and everything for the board that they had made up until a certain time, I don't remember the date, but he figured, as near as I can remember, that it was around $8 a thousand square feet for damages. That probably included profits. I think he had it high enough. Anyway, that is what I recollect was the figure that he set.

Q. Well, that claim of $8 per thousand included damages to USG and the profits which Best Wall had made out of the infringement, isn't that the way he put it?

A. Yes, on the claimed infringement. It wasn't settled at that time, I don't think, but it was later on.

Q. Well, the point I wanted to make clear—Mr. Avery didn't ask you for a royalty of $8 a thousand feet, did he?

A. No, I don't think we ever got down to that. As I remember, Mr. Avery wasn't very anxious to talk about it, he didn't want to jeopardize his position in the other suit he had against Best Wall Company, and he wasn't anxious about talking license because I think that he realized that anything like that was entirely too high, but he didn't want to state any other figures probably at that time, on account of this litigation with the Best Wall Company which he had.

Q. Because if he stated some lower figure to you, that might be used against him in his claim against Best Wall, is that it?

A. That was his position, and if he made me any
1052 lower price than that, it would react against him because no court would allow him more for past infringements or damages than the royalties that he offered for the future rights to manufacture, and he didn't want to jeopardize his suit by making it a lower price.

Q. Now, you have talked, on your direct examination, about the interference proceedings which lasted for so many years between the Birdsey patent and the Clark application. Do you recognize what I hold in my hand, by the way, as a printed record in that interference proceeding?

A. Well, I don't recognize it, but I presume that is what it is.

Q. Did you ever see the printed record that went up to the Court of Appeals of the District of Columbia in that interference?

A. I think I did at one time, yes.

Q. Was it about as thick as what I hold in my hand, some three inches?

Q. This letter you wrote in 1926, didn't you?

A. Yes.

Q. And if you thought the Birdsey patent had issued in 1920, and had twenty years to run, it was just fourteen years from 1926 to 1940, wasn't it?

A. Yes.

Q. Now, isn't that what you had in mind when you referred to the possibility of holding the price steady on wallboard for the next fourteen or fifteen years?

A. Yes, I figured that if the different parties took out a license agreement with the United States Gypsum Company, and the law gave them the right to establish the price at which the licensee could sell the product, that the price on wallboard would remain fairly stationary unless it was disturbed by competition of other products. There were a number of other products on the market in competition with wallboard at that time, as I remember it.

Q. And you thought that because at the time that you wrote this letter, Exhibit 104, you thought that USG was going to fix the prices under the Birdsey patent, isn't that right?

A. Well, I assumed so. We understood they had the right to do it.

Q. Now, you did not mean by this last sentence
1067 to which I have just directed your attention, to tell McCrady that you had any understanding with Avery or anybody else that price control would be extended under some patent, after the expiration of the Utzman patent?

A. No.

Q. You never had any discussion with Mr. Avery or anyone else about his finding some patent other than the Utzman patent, to give a longer price control, did you?

A. No, my understanding was that the price control ended at the expiration of the patent.

Q. Now, will you look at Exhibit 106, which is your letter of June 2, 1926, to Mr. Avery, and particularly the fourth paragraph, Mr. Griswold?

At this time, that is, in June, 1926, the Beaver Company was proceeding with its settlement and license negotiations with USG without any regard to what other manufacturers were doing so far as you knew, isn't that right?

A. That is right.

Q. And you had nothing whatsoever to do with the negotiations between the Beaver Company and USG, did you?

A. I did not.

Mr. STEFFEN. Yes, I will; I think the witness has so testified in general.

Justice STEPHENS. That stipulation may be recorded.

By Mr. BROMLEY.

Q. You have told the Court that you took legal advice back in this period as to the right of a patent owner to fix prices. Were you advised, Mr. Griswold, that that
1061 right, that is, the right to fix the price of a patented article, only extended to the first sale, that is, sale by the licensee to the dealer, and did not extend to any subsequent sales?

A. Yes, I was.

Q. At any time in any discussion with Mr. Avery, on settlement or license, did he ever mention to you what price it was that he had in mind fixing if you took a license?

A. Not that I remember of.

Q. And on the contrary it is a fact, isn't it, that he told you several times that his decision was that that right must be exercised by USG alone, and that he would not have any discussion with anybody, or permit any discussion, as to what that price would be?

A. That is correct, as I remember it.

Q. And wasn't that one of the difficulties that you had in convincing your fellow Directors, that is to say, that you were not able to give them any assurance as to what Avery would do about prices, assuming that you took a license which gave him the right to fix them?

A. Yes, our Directors were a little bit—I don't know what to call it, probably suspicious. There had been a quite a lot of controversy and ill feeling in the industry, and when Mr. Avery demanded the right to reserve unto himself the right to establish the price, which according to law
he had the right to do as we understood it, under his
1062 license, it would be possible for him, without any protection in that written contract or license agreement, for him to put any price that he cared to into effect, and if he wanted to make it expensive for some of the licensees, he might put in a very low price, he might put a very low price into effect, and some of them brought up these points, it was open, it was up to him entirely, that they had nothing to say about it.

Q. So that what your Directors were afraid of is that if Mr. Avery got the right to fix the prices, he might fix the price so low that the royalty you had to pay of $1.50 at a $30 price, might become extremely burdensome on you and make the difference between profit and loss, is that right?

A. That is what they had in mind.

Q. In other words, if he fixed the price so low that the margin of profit was only a dollar above cost, and you had to pay a royalty of $1.50, that would result in your doing business as a loss, wouldn't it?

A. Yes.

Q. While Mr. Avery, not having to pay a royalty, could still make a small profit at that price?

A. That is correct.

Q. Now, did you ever take this matter up with Avery and have any discussion with him after your Directors suggested the possibility of the price being made so low that it would harm American?

1063 A. Yes, I would say that I did.

Q. I will come to them specifically later, but that is the meaning of these references in some of these letters to assurances that Mr. Avery gave you which he would not put in the contract, is it?

A. State that again, Mr. Bromley.

Q. I will withdraw it.

During some of your discussions with Mr. Avery, did he assure you that if he fixed the price so low that it hurt you, he would make some adjustment in the royalty rate so that you wouldn't be caused to suffer a loss?

A. Yes, he did.

Q. And did he also, however, refuse to put that in the license contract?

A. Yes, he refused.

Q. And are there some references in your letters to McCrady and others about that subject?

A. As I remember it, there are, yes, in some of the letters.

Q. Now, was there ever anything said by Mr. Avery at any time that you ever had a talk with him, directly or indirectly, that his control of prices that he wanted to get through the license agreement with you, would extend to anything but the first sale of the patented article?

A. No.

1064 Q. And did you ever at any time have any discussion with Mr. Avery as to what the prices for plaster or block or tile should or should not be?

A. You mean in connection with the license agreement or anything else?

Q. Yes.

A. Absolutely no connection with the license agreement. I might have expressed myself at some time as to what I

A. Yes, that was an American Gypsum Company matter.

Q. It didn't have anything to do with any other companies?

A. Not with the merger, no, sir.

Q. Or with any company outside the merger?

A. No.

Q. Now, Exhibit 118, your letter to Mr. Davis, describes the meeting, at about the middle of the first page——

Justice GARRETT (interposing). That is D—what?

Justice STEPHENS. D-20, the letter of September 20th.

By Mr. BROMLEY.

Q. Now, this is the only meeting, isn't it, that your Board of Directors committee ever had with Mr. Avery?

A. Reading this letter of September 20, which states that Mr. Miller was one of the committee, refreshes my memory to this extent, that Mr. Miller was an alternate to take the place of any other member who couldn't attend, and Mr. J. B. Davis, who was a member of the com-
1072 mittee, was unable to attend as he was up at his summer home, up in northern Michigan.

Q. But this is the only meeting, isn't it——

A. (Interposing.) So far as I remember it, that is the only meeting that committee had with Mr. Avery.

Q. I ask you that because in your earlier direct testimony in connection with Exhibit 102 which was the minutes of the Board of Directors' meeting held on August 19, 1925, a year before, you said something about a meeting between Mr. Avery and a committee which was appointed at that meeting, and I wanted to find out whether there was more than one meeting of any committee with Mr. Avery, or not.

A. I don't remember. This is the only committee I remember of which was appointed, but it has been so long ago that there might have been some other committee, but I don't recall at this time without something to refresh my memory on the proposition.

Q. Well, the minutes of the meeting of August 19, 1925, Exhibit 102, have reference to the appointment of the same committee, Mr. Griswold. The evidence shows that only one committee was appointed, and what I want to ask you is as to whether or not it is not your best recollection that that committee only ever had one meeting with Mr. Avery.

A. The committee was appointed, but I don't think they had a meeting for some time after they were appointed, and

A. I think that is correct, I don't think the subject was ever mentioned because he had gone on record, and the other case had not been decided, and I considered there was no use to talk to him until there was some decision in the case. In so far as our own company, the American Gypsum, was concerned, I don't think it was ever mentioned in any way up until that time.

Q. Now, in connection with Judge Jones' opinion, news of which you got on the golf course, do you recall that that patent infringement suit of USG against American had been tried before Judge Jones in January and February of 1928?

A. Before Judge Jones?

Q. In Cleveland, yes, that that suit, notice of the decision of which you got on the golf course, had been tried prior to that time and in January and February 1928.

A. I remember it had been tried, but I had forgotten about it being tried before Judge Jones. The record will show that.

Q. Well, you remember that it was Judge Jones who decided it?

A. I remember Judge Jones decided it.

Q. And therefore you remember that it was tried before him, don't you?

A. Well, the one that I got the decision on, on
1060 July 7, there is no question about that. If there was a trial before that, I have forgotten about it.

Q. In your exhibit, or rather in Exhibit 138, which is your letter to McCrady of December 27, 1927, will you look at the first paragraph, the second sentence, and see if that does not refresh your recollection that the trial of the USG infringement suit was held in January and February, 1928.

Mr. STEFFEN. What exhibit number is that, please?

Mr. BROMLEY. Exhibit No. 138, D-56.

The WITNESS. Now, what is your question?

Mr. BROMLEY. Will you repeat it, Mr. Reporter?

(Thereupon, the pending question was read by the reporter.)

The WITNESS. Yes, it does.

Mr. BROMLEY. Now, will you stipulate, Mr. Steffen, that Judge Jones' opinion came down on June 30, 1928, and that the final decree was entered on July 11, 1928, subject to verification?

Justice STEPHENS. What is the exhibit you are examining on now?

Mr. BROMLEY. Exhibit No. 106, being D-6. I have just called his attention to the fourth paragraph.

1068 By Mr. BROMLEY.

Q. The reference, Mr. Griswold, in the sixth paragraph, the next to the last one, about your wanting to forward one copy to Texas—what did you want to do that for?

A. Well, the Texas Cement Plaster Company was figuring at that time on going in on my merger proposition, and I had assisted Mr. Gloyd of Texas Cement Plaster Company, in building their wallboard plant, and I wanted to advise him what we were considering doing, and in order to do so, I requested this proposed license agreement to send him a copy, so he could see what we proposed doing.

Justice STEPHENS. Please read that question and answer.

(Thereupon, the last question and answer were read by the reporter.)

Mr. BROMLEY. The reference should have been to the fifth paragraph instead of the sixth, I counted them incorrectly.

By Mr. BROMLEY.

Q. In the last paragraph, does your reference to the next meeting of the Industries mean that the license matter was to be discussed at an Industries meeting?

A. No.

Q. Were these license matters, under USG patents, ever discussed at Industries meetings?

A. No, they were not.

Q. And you meant by that last paragraph, did
1069 you not, Mr. Griswold, only to suggest that if representatives were there from companies it would be a place where views might be exchanged on the situation existing with USG and its patents, and the litigation?

A. Yes. It was a pretty hard matter to reach all these fellows. There were only a few of them that manufactured board, but seeing them at a Gypsum Industries meeting, which they usually all attended, it was a convenient place to talk to those that were there that manufactured wallboard, and it would require no special trip.

Q. Will you look at Exhibit——

Justice STEPHENS (interposing). Before you leave the last exhibit, may I make an inquiry? In the second para-

graph, "Mr. Haggerty apparently had"—should the word "not" be inserted there?

Mr. BROMLEY. Yes, sir, "had not a very complete report".

By Mr. BROMLEY.

Q. Would you look at Exhibit 113, which is your letter to Mr. Avery, dated August 31, 1926, being D-12, and tell me whether or not the last paragraph refers to your merger plans solely?

A. Yes, it does.

Q. And it is a fact, isn't it, that from time to time you would tell Mr. Avery how your plans were coming along, as well as other people, because everyone was
1070 familiar with it anyway?

A. Yes, there was no secret about it. Everybody in the industry, I think, knew about it, and I used to talk to Mr. Avery about it the same as I would to any of the rest of my competitors.

Q. But as you have said, he was to have no interest in it or be any part of it?

A. He was not interested in the merger part itself.

Q. But you knew then, and this was the reason, was it not, for your mentioning your progress to him, that your success in connection with the merger depended in part on your ability to settle the infringement claims which USG was asserting against the proposed constituent companies?

A. I would say yes, and I was trying to keep him posted on the progress of the merger proposition, whether there was a chance of its going through or not, and at this particular time the merger, as I remember, was up, and as I said, I made no attempt to keep it a secret from Mr. Avery if he asked, or sometimes I probably volunteered what information I had with reference to it.

Q. Will you look at your letter, Exhibit 114, to Mr. Avery, and his reply, Exhibit 115, the first of which is dated September 8, 1926, and the second, September 10, 1926—D-15 and D-16, respectively—and will you also look at Exhibit 118, which is D-20? Do you see that
1071 those exhibits, 114, 115 and 118, refer to a meeting between the committee of the Directors of the American Gypsum Company, and Mr. Avery?

A. Yes, the September 8th letter refers to a meeting of the committee consisting of Mr. McCrady, Mr. Davis and myself.

Q. The purpose of that meeting was to discuss the matter of the American license only, and nothing else, isn't that it?

thought it ought to be, but that didn't mean that that is what is was.

Q. Did you ever have any agreement or understanding or arrangement of any kind at any time, either with Mr. Avery or anyone of your competitor licensees, about plaster or block or tile prices?

A. No, we did not. We understood that that was illegal, to make any agreement with your competitor or any of those products outside of the one covered by the license agreement, and that that was legal, but that otherwise it was absolutely illegal.

Q. And it is a fact, isn't it, Mr. Griswold, that at no time while you were with the American Company, did it take a license of any kind from USG?

A. It did not.

Q. Now, will you look at Exhibit 104, which is your letter to McCrady of May 12, 1926, and particularly the last sentence?

1065 A. Yes.

Q. At the time you wrote that sentence, Mr. Griswold, you thought a patent was good for twenty years, did you not?

A. That is what I understood, that a patent covered a period of twenty years.

Q. And at the time you wrote that sentence, you knew, did you not, that the Birdsey patent issued in 1920?

A. The Birdsey patent?

Q. Yes, sir.

A. Well, I would say yes, that at that time I knew the time of its issuance.

Q. So that under your then impression that a patent lasted for twenty years, at the time you wrote that sentence you thought that the Birdsey patent would not expire until 1940, isn't that right?

A. Well, I couldn't say just what I had in mind at that time. I don't remember, but I remember that we figured it had, I think, ten or twelve years to run, along about this time; and that a certain amount of the time had elapsed, but there was still that much of it left.

Q. Well, I am trying to develop, if I can, what you had in your mind. Do you see the reference there, "holding the price steady on wallboard for the next fourteen or fifteen years"—do you see that?

A. Which paragraph is that in?

1066 Q. At the very end of the letter.

A. Yes, I see that.

so far as I remember now, the only committee meeting I remember of was when Mr. Miller was there; I don't think Mr. Davis, the other member of the committee, was ever in Chicago on any business of that kind.

1073

Q. So your best recollection is that there was only one meeting of the committee with Mr. Avery?

A. So far as I know now, that is the only meeting of the committee with Mr. Avery; without something to refresh my memory, that is the only one that I can remember.

Q. The testimony shows that following the execution of the Beaver license in July, 1926, the Universal Company took a license in September, 1926. Now it is a fact, isn't it, that you had nothing to do with the negotiating of the license between USG and the Universal Company, which was signed in September, 1926?

1074

A. Yes, I had nothing to do with either one of them.

Q. However, it is a fact that on one or two occasions, as disclosed by the correspondence, you asked Mr. Shearer of Universal how he was progressing in his negotiations?

A. Well, I probably did, I don't remember offhand without something to refresh my mind, of any particular meeting where I asked him that.

Q. Well, the fact is that at this time, as well as later, you wanted to know how other negotiations were getting along so that you could get assistance from that, because you felt that the matter of negotiating and agreeing upon a contract was complicated, didn't you?

A. Yes, I always tried to keep as close track of what was going on as I could, and if I contacted somebody that I thought knew, I usually discussed the matter with them.

Q. Now look at Exhibit 118 again, your letter to Davis of September 20, 1926, D-20. In the next to the last paragraph on the first page, there is a reference to a Mr. John McLease. Although it is spelled that way in the letter, you meant to refer to Mr. John MacLeish, the general counsel for the U.S.G.?

1075

A. That is right.

Q. Now looking further at that paragraph, the second sentence, which reads, "They explained very fully why they could not incorporate in the contract things which they admitted they would have liked to put in but which they could not put in"—now that is an illustration of the reference to this assurance that you asked from Mr. Avery in case he fixed a price so low that the payment of royalties became burdensome, isn't it?

A. Yes. Mr. Miller, who was on the committee, acting for Mr. Davis, was particularly insistent on having the promise that had been made as I remember at that time, of relief in case the selling price got too low, incorporated in the contract. That was one of the things he stood on, and as I say he represented Mr. Kling, one of the larger stockholders of the American Gypsum Company.

Q. Now look at that sentence again. That sentence didn't have any reference to any sub rosa or secret agreement about fixing plaster prices, or standardizing manufacture, or doing anything else, other than this royalty situation that you have mentioned, did it?

A. It had nothing to do with any unpatented article.

1076 It referred particularly to the type edge, and that was the only thing covered in the wallboard license except, as I remember it, the license carried with it the right that the licensees should be entitled to the information as to the best methods of manufacture and so forth, that had been learned from the experience of the United States Gypsum Company. But it had nothing to do with other products.

Q. Now look at the second sentence in the last paragraph beginning, "It seems like this is a question of more faith in the other fellow". Again, isn't that simply a reference to this assurance which Mr. Avery gave you which he said he would not put into the contract?

A. Yes, I would say it was, because it is my recollection that Mr. Avery had made the statement that in case the price of wallboard got so low that the payment of a royalty was causing a loss to the licensees, that in that case he would grant some relief, and this was the question that I referred to, of having confidence in the other fellow that he would do what he promised to do.

Q. And your reference in that same sentence to the "good of the industry", isn't that a reference to your idea that settling the litigation would redound to the benefit of the industry?

A. Yes, that was my opinion of it, and always had been.

Q. And when you said in the next sentence, "From a legal standpoint it is a bad contract" and so forth,

1077 didn't you mean by that merely that you thought it was disadvantageous from American's standpoint, but did not mean to suggest that it was illegal?

A. I meant that the fact that there was no written agreement of the licensor to protect the licensee from a legal standpoint made it a bad contract.

Q. And when you went on to say, "but it is a good deal like the one that Frank Carpenter passed on and the one we had with the Cleveland Builders"—what did you mean by that reference?

A. Well, that was calling his attention to something that he was familiar with. We had leased from the Cleveland Builders' Supply Company, or the Cleveland Gypsum Company, these two mixing plants that they had in the City of Cleveland, and they were retailers, bought stucco from us or somebody else, and mixed it with sand and sold it as ready-mixed hard-wall plaster, we called it.

In negotiating these contracts, and in taking over their two mixing plants, the remuneration to the Cleveland Builders' and Cleveland Gypsum was based, as I remember it, on a tonnage basis, that we should pay them so much per ton for all the tonnage that we mixed and sold from those plants. The Cleveland Builders' Supply Company had a very large tonnage of their own, and I wanted them to incorporate in the contract that they would give
1078 us all their entire tonnage. They objected to that because they thought the condition might arise that in order to keep peace in the family they might have to give some of that to some of the other manufacturers of stucco or calcined plaster. And I was calling Mr. Davis' attention to the fact that he was familiar with those contracts and that these people had lived up to their agreement and did, as I remember it, give us practically all of their business. They claimed they would give us the major part of it, and while it wasn't in the contract, they lived up to their agreement and had done what they said they would do.

Q. So you felt that you could safely, based upon that experience among other things, rely on Mr. Avery's assurance, even though he refused to put it expressly in the contract, is that right?

A. Personally I had no question about Mr. Avery. When he promised to do a thing, so far as I knew he always kept his word, and I was perfectly confident that he would do as he had said he would do in this case.

Justice STEPHENS. We will suspend at this time. Do any of the lawyers need these photostats during the evening?

Mr. JOHNSTON. I might borrow Judge Stephens' copy this time.

Justice GARRETT. Mine is available here also.

Justice JACKSON. And mine also.

Mr. STEFFEN. We have one question that we would
1079 like to ask, if permissible?

Justice STEPHENS. Certainly.

Mr. STEFFEN. In view of the difficulty of getting hotel reservations and one thing or another, we would like to know if we could have any estimate of when defense counsel would be through with Mr. Griswold. We realize that it is possibly something we shouldn't ask, and we only do so because of the difficulty of getting hotel accommodations and transportation reservations.

Mr. BROMLEY. I won't be long. How long have I been already?

Justice STEPHENS. About an hour and a half.

Mr. BROMLEY. I think not more than another hour and a half.

Justice STEPHENS. You will be through with him tomorrow at any rate?

Mr. BROMLEY. Yes.

Justice STEPHENS. How about counsel for the other defendants; how much cross examination do they wish to add to that of Mr. Bromley?

Mr. JOHNSTON. Mine will be very short.

Justice STEPHENS. How about you, Mr. Finck?

Mr. FINCK. Mine will be very short, if any.

Mr. ADAMS. And the same with me.

Justice STEPHENS. Do you gentlemen think it
1080 likely that we can be through with Mr. Griswold tomorrow?

Mr. BROMLEY. I think so.

Justice STEPHENS. How about redirect examination?

Mr. STEFFEN. That will be short.

Justice STEPHENS. Very well, announce the recess.

(Whereupon, at 4:07 o'clock, p.m., the trial was recessed until Tuesday morning, November 23, 1943, at 10:00 o'clock).

1081 In the District Court of the United States
for the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,
Washington, D. C., Tuesday, November 23, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances: (Same as heretofore noted).

1084 FRANK J. GRISWOLD, the witness on the stand at the time of adjournment, resumed his testimony as follows:

CROSS-EXAMINATION (RESUMED)

Mr. BROMLEY. May it please the Court.

By Mr. BROMLEY.

Q. Mr. Griswold, we were looking at Exhibit 118 yesterday, D-20. Will you turn to the second page of that exhibit and look at the first paragraph on the second page at the top, beginning with the first line, "It is the same".

Justice STEPHENS. The second page?

Mr. BROMLEY. Page 2, at the top, the first sentence beginning "It is the same".

Justice STEPHENS. I see.

By Mr. BROMLEY.

Q. That sentence again is a reference to what we have talked about before, that is, to a promise by Mr. Avery orally referring to obtaining relief if hardship resulted from the

lowering of the price to such a figure that the payment of the fixed royalties might become burdensome; isn't that so?

A. Yes.

1085 Q. And that is all that was intended by that sentence, is it not?

A. Yes.

Q. Will you look at Exhibit 119, D-21, please, your letter to Mr. Avery of October 7, 1926. Is it true that the first paragraph of that letter refers to the matter of American taking a license, and was not intended to refer to any other companies taking a license?

A. Yes.

Q. And that is made plain from the letter itself, by reference to the next paragraph, isn't it, Mr. Griswold, which recites that two of your Directors have been away?

A. Yes. Two of the Directors had been away, and we had had no opportunity to discuss the matter further for some time.

Q. And finally, does the third paragraph of that letter, Exhibit 119, refer merely to the merger, and nothing else?

A. The last paragraph of the letter had reference to the merger.

Q. And nothing else?

A. Nothing else.

Q. Will you look at Exhibit 121, which is D-13, please, Mr. Griswold's letter to Mr. Avery of October 9, 1926. Will you read the first paragraph, please, and tell the Court whether that isn't a reference to a meeting

1086 which you had with Messrs. Fuller and Channing of Atlantic which was for the principal purpose of their obtaining advice from you as to the proper construction of the plant which was then being built for Atlantic?

A. Mr. Fuller and Mr. Channing were connected with the Atlantic Gypsum Company, which at that time were just beginning the construction of a plant at Portsmouth, New Hampshire. And in those days it was pretty hard to get information from other manufacturers, as most of them were rather backward about giving any information to someone that was considering entering the business. But I having been engaged in the building of these gypsum plants and furnishing machinery for them for years past, they rather thought that I was the person to come to; and furthermore, they had employed a Mr. Brown, as I remember it, to construct their plant, and he advised them to see me, I don't know for what purpose, he probably knew my experience in the gypsum business.

But anyway, they came out to Port Clinton to talk matters over with me, and to see what they could see. As I remember it, I showed them the plant at some time, I don't remember whether this was the time or not, but I showed them through and showed them the manufacturing process and the machinery as it was in actual use.

Q. Would you say, Mr. Griswold, that the prin-
1087 cipal purpose of the meeting was for them to obtain advice in connection with the construction of their new plant?

A. Yes, as I remember it that was the purpose of their visit.

Q. And were you told by one or the other of these two gentlemen that the Atlantic Company at that time contemplated making board, and that it was in their minds that they would make an open-edge board?

A. Well, I could not say as to that without reference to something to refresh my mind. I haven't read this letter, but if it refers to it, it might have been discussed at that time.

Q. No, I see no reference to this in the letter.

A. The first time they were out to our plant, that is referred to here, as I remember it it had to do at that time with the construction of the building and the machinery proper for making hard wall plaster and neat cement plaster; and I think that going into the board business, as I remember it, was something that came up after this. However, I might be mistaken.

Q. Do you notice in the body of the letter, in the fourth paragraph at least, that you ask whether Mr. Avery sees any objection to your giving them a copy of the license contract?

A. Well, that refreshes my mind to this extent,
1088 that there must have been something said about that, that they intended going into the wallboard business. Otherwise, I probably wouldn't have put that into the letter.

Justice JACKSON. Isn't that in the letter in the second paragraph?

The WITNESS. In the second paragraph?

Justice JACKSON. Yes, that "they claim they are going into the manufacture of gypsum wallboard".

The WITNESS. That has reference to a pulp board. That is made from paper products. They didn't use gypsum in that at all.

Justice JACKSON. Well, it says "as well as the manufacture of a pulp board".

The WITNESS. I beg your pardon, it does mention that. Well, they must have brought the matter up at that time, because it has been so long ago I really don't remember. As I remember it, there was more than one trip, and just what came up at the first trip, my recollection was that it was the construction of their plant.

By Mr. BROMLEY.

Q. Can you recall whether or not, in this conference, you pointed out to them that if they were going to make a gypsum wallboard, the closed-edge board was a cheaper product to make and was a better product to make, and had fewer manufacturing difficulties?

1089 A. Well, as I remember it, we had gone all through the plant, which would include the wallboard plant, and explained to them the process of manufacture. And while I have no distinct recollection now, the probabilities are we discussed the type edge we were making, the open type edge, and the type that the United States Gypsum Company were making under the Utzman patent. And at some time, I couldn't say it was just at this date, I explained to them—and it was probably at this time—the difficulties of manufacturing that we had under this Birdsey patent, what they would have if they tried to make it. And at one time I think they asked me whether we would allow them to make this Birdsey type—we called it the Clark type. Anyway, as I remember it, I explained to them the difficulties that we were having, and also our experience with the open type edge, and the advantages of making a closed type edge, which we were not making and had not made since we started, but with which I was quite familiar.

And as I remember it, I gave them the advice that the best thing for them to do, if they were going into the board business, was that they make a closed type edge, providing they could reach an agreement with Mr. Avery of the United States Gypsum Company, who held the patents. And whether they asked me to or not, I can not say, but this letter indicates that I sent them a copy, wrote

1090 to the United States Gypsum Company to send me a copy of their proposed license agreement which I was to forward on, as I remember it, for their inspection.

Q. Then it is a fact, is it, that about this time you gave the Atlantic Gypsum Company, in effect, an oral license to manufacture a semi-closed-edge board under your Clark application for a patent?

A. State that again, I didn't get that clear.

Mr. BROMLEY. Will you read it, please?
(The question was read by the reporter.)

The WITNESS. Well, we had never got that far along to give it to them, but I, as I remember it, gave them assurance that so far as we were concerned we would not object if they made that particular type edge, if they cared to do it.

By Mr. BROMLEY.

Q. Now you have said that thereafter you received a copy of a form of contract from Mr. Avery and forwarded it on to Messrs. Clark or Fuller; is that right?

A. Yes.

Q. And that, I believe, is shown in Exhibit 122, D-14, being Mr. Avery's letter to Mr. Griswold of October 11, 1926. That letter shows, does it not, Mr. Griswold, that Mr. Avery didn't know these gentlemen and therefore didn't think it proper for him to send the contract directly to them, and for that reason he sent it to you?

1091 A. Yes; and as I remember it, also, I had requested him to forward it to me so that I could forward it on to them.

Q. In other words, the request that the contracts go to these gentlemen was your request and not Avery's?

A. Yes.

Q. You never heard anything more about the matter subsequent to the time that you forwarded the copy of the contract to Atlantic, sometime in October, 1926, until sometime early in 1927 you heard, did you not, that Atlantic had taken out a license with USG?

A. I don't remember of hearing anything further about the matter until I learned—I don't remember now how I learned—that the Atlantic had applied to the United States Gypsum Company for a license agreement.

Q. Well, at least you had no part in the negotiations which resulted in the execution of the license contract between Atlantic and USG?

A. No, I did not.

Q. And you did nothing after October, 1926, by way of inducing or attempting to induce either Atlantic or USG to enter into a contract with one another?

A. I have no recollection of seeing them after that until I got this information that they had applied for a license agreement, I don't know whether they had taken it

1092 out at that time, but they had applied for it.

Q. By the way, this Mr. Channing referred to in

Exhibit 121 was the Boston lawyer for the Atlantic Gypsum Company, was he not?

A. Yes, he was their attorney.

Q. Will you look, please, at Exhibit 124, D-26, which is Mr. Avery's letter to you of October 19, 1926, and particularly at the last paragraph. Is it a fact, Mr. Griswold, that again that is a reference to your efforts to bring about your proposed merger, and to nothing else?

A. The last paragraph?

Q. Yes, sir.

A. That had reference to the merger.

Q. And nothing else?

A. Nothing else.

Q. Will you look, please, at Exhibit 125, D-23, your letter to Mr. Avery, the date of which is now stipulated to be October 20 instead of October 9. The first paragraph shows, does it not, that prior to the date of this letter there had been no meeting of prospective licensees such as you had planned prior to this date?

A. The letter so states, and that is my recollection of it.

Q. Now look at Exhibit 127, D-28, another letter of yours to Mr. Avery of November 1, 1926, and particularly to the third paragraph. That refers to your attempt to arrange another meeting, does it not?

1093

A. Yes.

Q. Now isn't it a fact that no meeting was held such as this letter indicates was contemplated as of November 1, 1926?

A. That is was——

Q. (Interposing.) That it was not held.

A. Well, I don't remember, without something to refresh my mind, whether it was held or not. It was anticipated, according to this letter.

Q. Well, as I read the correspondence, it is not shown that there was any subsequent meeting.

A. Oh, a subsequent meeting. I would say no, that there was not.

Q. Will you look at Exhibit 128, D-29, please, your letter to Mr. Avery of November 16, 1926. The last paragraph, Mr. Griswold, is again a reference by you to your efforts in connection with your proposed merger, is it not?

A. That had reference to the merger.

Q. Will you look at Exhibit 130, please, which is D-31, your letter to Mr. Avery of November 29, 1926. The first paragraph of that letter purports to give the reasons why

your company, the American, would not take a license, does it not?

1094 A. I would say yes.

Q. Now isn't it a fact that at this time you were trying to stall Mr. Avery to some extent, and avoiding a definite rejection to Avery's offer, if you possibly could?

A. That is rather a leading question, but I would say yes, to a certain extent, for the reason that we were anxious to get some decision, legal decision, on the matter before even my own company took any definite action on it, and at this time I don't think there had been anything that was considered definite. And as I stated, we wanted to know whether we were going to be compelled or forced by law to do this or not.

Q. Well, I put it in a slightly leading form because of the last sentence of that paragraph, in which you say, "The writer hopes to submit something for your consideration in the very near future." That seemed to suggest to me, and I ask you now whether it does'nt suggest to you, the fact that at that time you didn't want to break off negotiations, in spite of the opposition of your fellow Directors?

A. Well, I could not say at this time. I think it also had reference to or connection with this merger proposition, that if the merger went through I was to be in control and would have the say as to whether the new company took out license agreements that covered all of the companies merged, or not. Possibly I had that in mind, but I can not

1095 say at this time.

Q. Well, that may be so, because it is a fact, isn't it, that the reference in the next paragraph to proposition No. 2, you ~~can~~ clearly remember is a reference to your proposed merger?

A. Will you state that question again? Will you repeat the question?

(The question was read by the reporter.)

The WITNESS. The last paragraph there refers to the merger and to what I have just stated, that if it went through it would change the situation all around to this extent, that my own directors were opposing taking the license agreement under the conditions, and so far as the other companies that were going into the merger were concerned, the authority to take out a license agreement would rest with me in the new company which these companies would merge into.

By Mr. BROMLEY.

Q. And these fellow directors of yours in American, who were opposing the proposition, would be out of the business and have no connection with the merged company, isn't that a fact?

A. Well, the greater majority of the stockholders, those that controlled most of the stock, were directors in the company, and under this merger proposition a stockholder of any company had the right to either stipulate
1096 whether he wanted cash or to take stock in the new merged company. And our own people were getting pretty well along in years, most of them were older than I was, considerably, and I advised them that this was an opportunity for them to take their money out of the business in cash and retire while they had a chance. Mr. McCrady and all his family, several of whom were stockholders, and Mr. Kling and his associates, Mr. Davis, and the Gilleland Estate, they had all elected to take cash. And the minority interest, which was mostly held at Port Clinton where I lived, and where the plant was located, were willing to take stock in the new company for their interest, but the rest of them were to retire from the business entirely and have no connection with the American Gypsum Company.

Q. So that when the merged company came into existence, the directors of American who were opposing taking a license would not be in control of the Board of Directors of the new company, would they?

A. The new company?

Q. Yes.

A. No, the Board of Directors would be composed of entirely new people, and none of the old directors, with the exception of myself and I think a Mr. Tadsen was on at that time, a Port Clinton man, who would be connected with the new company representing the Port Clinton interests.

Q. Will you look at Exhibit 132, your letter to
1097 Mr. Avery of January 3, 1927, and will you please tell me whether, in the second paragraph, your reference in the first sentence as follows: "I started out to deliver 100 percent of the manufacturers of board that would be willing to sign up", represented any agreement that you had with Mr. Avery, or understanding with him, that you would go out and get 100 percent of the manufacturers to take his license?

A. No, we had no agreement to that effect.

Q. And you have told us heretofore, and yesterday, that he never asked you to do that. Is it a fact, then, that you were a mere volunteer in what you did?

A. I would say yes.

Q. In the third paragraph, Mr. Griswold, is it a fact that the second sentence, beginning "I regret to say", is a reference to the failure to settle the litigation and eliminate the dissension in the industry, and was not intended by you to refer to any failure to obtain a price-fixing arrangement in the industry?

A. No, it was simply a statement that what had happened in this territory was only what I expected would happen if they continued this litigation, with the feeling that attended it, and I haven't read all of this yet but apparently that is what had happened. That is all that I recall at the present time, except that the letter mentions the Atlantic Gypsum Company.

Q. Well, the letter mentions at the bottom of the
1098 page that the Atlantic Gypsum Company is willing to enter into a license, is that what you refer to?

A. Well, I state in the letter, which is clearer than my recollection without it, that the "Atlantic Gypsum Company are just about ready to start the manufacture of wallboard, and they too will manufacture an open-edge board unless some agreement can be reached on a shorter time contract."

Q. Now will you look at Exhibit 136-A and Exhibit 136-B, both of which are copies of your letter to Mr. Williams of National, D-41 and D-42, of March 24, 1927. It is a fact, isn't it, Mr. Griswold, that at the time of this letter, or thereabouts, you had had discussions with Mr. Williams of National with respect to National becoming a part of your contemplated merger?

A. Which exhibit are you referring to?

Q. They are both the same.

Justice STEPHENS. One is a photostat of the other, Mr. Griswold, or rather, both are photostats, one being of the original and one being of the carbon copy.

The WITNESS. I haven't read it.

Jusice STEPHENS. Take your time and read it.

The WITNESS. Now will you repeat the question?

(The question was read by the reporter.)

The WITNESS. Yes, I had talked with Mr. Williams. I
1099 do not remember any particular date or just where, but he used to come through Port Clinton on his way from Buffalo to Chicago, he had his headquarters at Chicago but he used to drive an auto most of the time, and

he usually used to stop and call on me as I had known him for a number of years.

By Mr. BROMLEY.

Q. Look at the last paragraph, particularly the portion beginning with the 7th line from the bottom, "I would like to urge upon you to discuss the matter with Mr. Haggerty" —isn't the reference which immediately follows "Haggerty"—"because our organization, when we get lined up, will soon reach an agreement, which, if the Certainteed comes in, and I am sure they will, will make it 100% with all manufacturers"—isn't that a reference again to your proposed merger?

A. Yes, because if this merger was consummated and I had the authority to take out a license agreement for all the companies that it represented, that would clean up the situation with the exception of certain other companies here that I mentioned in the letter, which would make 100 percent of the manufacturers that were making wallboard.

Q. What I wanted to know specifically was whether or not the two words, "our organization", in that sentence, did not refer to your proposed merger?

A. As I had in mind there, this Mr. Martin Johnson that I referred to, and Mr. Elmer Webber of the finance company, were taking some interest in this proposition,
1100 of course, because they were financing it, and the probabilities would have been that Mr. Johnson would have been a director in the new merged company if that had gone through, and as I remember it now "we" probably had reference to those two gentlemen—our new organization would include Mr. Martin Johnson and possibly Mr. Elmer Webber.

Q. Well, as used in this sentence, "our organization" referred to the proposed merged company, didn't it, Mr. Griswold?

A. That is my recollection now, that it referred to the new merger.

Q. Now in the next to the last line, beginning "do away with the legal complications", you will notice that you have changed the word "proceedings" to "complications". That is a reference to the patent litigation which was in existence throughout the industry, and was not intended to be a reference to price control; isn't that so?

A. Yes, it had no reference to price control. By taking out this license agreement it did away with all the litigation that had been going on, or would go on, over wallboard, as we all were advised, and I think everybody understood

that the granting of a license gave the right to the licensor, the owner of the patent, the right to tell us what price we should sell the product for.

Q. Now will you look at Exhibit 141, which is
1101 D-61, being your letter to McCrady of April 12, 1928. You weren't responsible, were you, Mr. Griswold, for the fact that the Beaver Company had taken out a license with USG?

A. No, nor I don't think I ever claimed I was. I had had very few meetings with anybody outside of a very few with Mr. Blagden.

Q. And likewise, you wouldn't say that you were responsible for the fact that the Atlantic Company took out a license, would you?

A. No, other than recommending to them that that was the best thing for them to do from a manufacturing standpoint, I had nothing to do with it.

Q. And you weren't responsible for the fact that the Universal Company had taken out a license prior to the time of this letter, either, were you?

A. No, other than trying to offer my services to help them settle their own troubles, which had nothing to do with this license agreement. I had nothing to do with or claim no credit for that.

Q. And you wouldn't say that you were responsible for the fact that the Texas Company took out a license, either, would you?

A. Further than recommending it; they went ahead of their own accord and took it out, without consulting me.

Q. And it is a fact, isn't it, that so far as you
1102 know, Mr. Blagden had absolutely nothing to do with the taking out of any of these licenses which I have mentioned except his own, that is, the Beaver license?

A. So far as I know, he did not have. If he did, I wasn't aware of it.

Q. Now in the 8th line from the end of the first paragraph, you see the reference to George W. Brown, President of the Certainteed Products Company, "and it was his own personal opinion that if"—naming some companies—"would all get together and agree".

Do you see that sentence?

A. Yes.

Q. Now that reference, "and it was his own personal opinion", that is a reference to Mr. Blagden's personal opinion, isn't it?

A. Mr. Blagden's opinion, yes.

Q. You say that it was Mr. Blagden's personal opinion that if American, National, Ebsary and Niagara would get together, and so forth. Now isn't it a fact that that reference was merely to Blagden's idea, and that you did not mean to suggest that there was any arrangement or understanding among these companies that they would all get together and take a license?

A. There was no agreement to do so. They only arrived at this after a careful consideration of what was
1103 the best thing to do for the industry.

Q. And it is a fact, isn't it, that at no time did these companies ever agree with one another that they would take out licenses?

A. Not to my knowledge, they never agreed to do so.

Q. Now will you look at Exhibit 144, which is D-78, your letter to Mr. Holland of September 10, 1928, and the last part of the first sentence in the second paragraph, after you have said there is not a ghost of a show of your Board taking a license, the next sentence reads: "If they will amend the agreement to give their licensees some protection and consideration for the money they get paid, I am inclined to think our people would consider", and so forth.

Now isn't that a reference to the subject which you have mentioned many times, that is, relief if royalties became a hardship in view of the fixing by USG of a low price?

A. I would say yes. My memory is also refreshed by this letter to this extent, that at this date, September 1928, Mr. Kling had again become a Director in the American Gypsum Company, and he was also Chairman of the Board, and he was always opposed to this license agreement unless he could get certain things incorporated in it that he wanted. And I had become convinced—and I was getting a little disgusted with my own company—I had become convinced, apparently, that there wasn't much chance, unless there was some change made in the
1104 agreement and something to satisfy them, that there wasn't any chance of the American Gypsum Company taking out a license agreement.

Q. Now look at the last paragraph of this letter, Exhibit 144, and particularly to that part of it which says, "but we are just coming on the market with a new closed edge Board, which we think will prove very satisfactory"—that is a reference to the type of board which you talked about yesterday as having the porous tape inserted on the raw edges, isn't that so?

A. Yes. Prior to this time the decision of the court had been rendered which compelled us to discontinue making

the Birdsey type, and furthermore to dispose of all we had in stock. And if we wanted to stay in the board business we either had to make an open-edge board or plan something new that we were sure did not infringe on the Utzman type, or else go out of the board business.

Q. Well, in this letter you say, "which we think will prove very satisfactory to the trade." Now as you said yesterday, it didn't prove to be satisfactory to the trade at all, did it?

A. Well, not entirely. It was satisfactory probably to some of them, but not as satisfactory as we hoped it would be. This, bear in mind, was before we started to manufacture it, we were just beginning. After we got
1105 into it, we learned some things that probably we didn't know at the time we first started in.

Q. Well, at least it is the fact, isn't it, that it turned out to be very unsatisfactory to you?

A. Yes, from a manufacturing standpoint alone it was too expensive to make.

Q. And did you soon give it up?

A. Well, I left the company on the 1st of February, 1929. This letter is dated September 10, 1928. My recollection is that we were still making that type board up to the time I left, but what happened after that I couldn' say because I had nothing to do with it.

Q. Will you look at Exhibit 146, which is D-73, your letter to Mr. Holland of September 19, 1928. Referring to the second sentence of that letter, Mr. Griswold, it is a fact, isn't it, that as you reported to Mr. Holland, USG never changed its position, and as of this time in 1928 was still insisting on the same terms for any license as had first been granted to the Beaver Company several years before in 1926?

A. I think that is correct. I have no recollection of the United States Gypsum Company ever changing any of the conditions or terms of the original patent agreement with the Beaver Board Company.

Q. Now at the end of the first paragraph, will
1106 you notice your reference to the phrase in the fourth line from the end to "what might be quite a siege in warfare". Was that intended by you to be a reference to the litigation and consequent dissension in the industry?

A. What part of the letter is that?

Q. The fourth line from the end of the first paragraph. I ask you whether or not, by the use of the phrase "quite a

siege in warfare", you intended only to refer to the litigation and resultant dissension in the industry?

A. Yes, it had reference to the litigation, because if they controlled the patent they would evidently stand on it until the expiration of the patent date, whatever that was, it would continue for some time.

Q. And two lines down, the next to the last sentence of that paragraph, where you say, "it will not be long before an armistice of some kind is agreed upon", was it your intention to refer to possible settlement and disposition of the litigation?

A. That was the hope, that these different companies would arrive at the conclusion that that was the sensible thing for them to do, to take out a license agreement, and that would end all the trouble that existed and had existed over it in the past.

Q. Now will you look at Exhibit 147, and there seems to be no "D" number for this one, which is Mr. Hol-
1107 land's letter to you of September 20, 1928. In the second paragraph of this September 20, 1928, letter is a reference by Mr. Holland to a proposed meeting, and he says: "I was in hopes that you would be in a position to attend such a meeting in case the others were so disposed."

Having looked at this letter, are you able to tell me, if it be so, that as a matter of fact no meeting was held subsequent to this time, at least to your knowledge?

A. With the Universal, you mean?

Q. No meeting of representatives of any proposed licensees, or others, about the license matter.

A. I could not say as to that definitely without something to refresh my memory. I do not remember of any meetings, but there possibly might have been. But if there was, the correspondence would probably show it.

Q. I do not think the correspondence shows it. And is it your answer that you have no recollection now that there was any meeting subsequent to this date?

A. I have no recollection of any meeting later than this date. One explanation of that is the fact that after Mr. Kling became Chairman of the Board of the American Gypsum Company, which was prior to this date, I do remember this, that I made up my mind at that time that unless this merger deal went through, and the bankers didn't seem to be making any progress with it, that
1108 I was going to leave the employ of the American Gypsum Company for the reason that I didn't feel that Mr. Kling and I could ever get along, we had different views on business.

Q. A minute ago, in talking about Exhibit 146, your letter to Holland of September 19, 1928, you said, as I recollect, it something about disposing of the trouble in the past. Did you mean by "trouble in the past", the litigation to which you have so often referred?

A. Which letter was that?

Q. That was in your answer when you were talking about Exhibit 146. You said something about disposing of trouble in the past. You meant by that, I take it, the patent litigation which——

A. (Interposing.) Presumably I did, I do not recall of any other, because this litigation had been going on since —it originally started with the Best Wall Board Company around 1918 or somewhere along there, and this was several years after that, it had been going on for some time.

Q. It is a fact, isn't it, Mr. Griswold, that as of January, 1927, your own company, American, had not made any agreement to take any license from USG of any kind?

A. Yes, that is a fact.

Q. And that was likewise true of the Certain-teed Company as of January, 1927, was it not?

A. Yes, I am sure that they had not.

1109 Q. And likewise, it was true of the National Company, as of January 1927, was it not?

A. Well, you are asking me simply with reference to dates, and it is pretty hard for me to remember the exact dates. There have been a few questions prior to that asked. I would say that they were negotiating, but whether they had actually entered into the agreement or not, I can't say. But the record will show.

Q. What I wanted to find out from you if I could, and you could remember it, was whether, as of January, 1927, the National Gypsum Company had agreed to take a license. Of course, we all know that they didn't take one until 1929.

A. My recollection is that at that stage in the game they had agreed to, anyway, because I think I had that knowledge; on account of this merger, I was keeping pretty close tabs on what concerns were going in.

Q. Well, as of January, 1927, the Texas Company hadn't agreed to take a license, had it?

A. No, I don't believe they had taken out a license at that time.

Q. And neither had the Ebsary Company as of January, 1927, agreed to take a license, had it?

A. No, I am quite sure Ebsary hadn't taken out any license at that time.

Q. And as of that date, January, 1927, neither
1110 had the Atlantic Company agreed to take out a license?

A. Well, I couldn't say as to Atlantic without some reference to it, some letters, I mean.

Q. And can you remember about Niagara as of this date, January, 1927?

A. I don't think that had taken out a license. They had talked settlement for past infringements up to a certain time, but I don't remember of the Niagara having actually taken out a license agreement.

Q. And you don't remember that as of January, 1927, they had agreed to take out one, either, do you?

A. No, I don't think they had agreed, for this reason: If the Niagara Gypsum Company went into this merger that I was agitating at that time, Mr. Reeb had elected to take cash for his interest in the Niagara and he was to drop out, and I imagine, or rather I know that he felt that the merger was going to go through, and I don't think he had gone ahead with his license agreement. He might have been willing to do it, but I am sure he hadn't done it at that time.

1111 Q. Now will you look at Exhibit 150, which has no "D" number, your letter to Texas of February 21, 1927, the second sentence, reading, "My guess is that everything is going to come out all right on this deal, because it looks now like the proposition Johnson has been working on is almost sure to go thru, and it will be decided the coming week". That is a reference simply and solely to your proposed merger, again, isn't it?

A. That had reference to the merger exclusively.

Q. Now that is true as to the next two sentences, isn't it? "I expect all contracts to be signed up by that time ready to proceed with the business". That is the next sentence; that has reference to the merger, does it not?

A. That has reference to the merger because there were contracts with each company as to just what was to be done.

Q. And the next sentence—"If this occurs, I feel sure we will be able to get along with Mr. Avery * * *". That again is a reference to the merged company, isn't it?

A. Yes, that had reference to the new company that would be formed after the merger.

Q. And finally, the last sentence of that paragraph, "All of us I think will be willing to go in on the long time contract if he will give us some assurance that what he has told us verbally will be carried out by someone else in case he

should not be on the job". That is, again, merely a
1112 reference to this assurance that you wanted that he wouldn't let the royalty obligation cause you a hardship in the event he set a low price on the product, is that right?

A. Yes, someone had raised the question as to what would happen if Mr. Avery should be out of the picture, or suppose he should die very suddenly. There was nothing in this contract about what he had proposed verbally, and they had raised that question as one of the arguments that something should be in there.

Justice STEPHENS. The Court will take a recess for five minutes before you proceed with the next exhibit, Mr. Bromley.

(Whereupon, a five minute recess was taken, after which the hearing was resumed).

By Mr. BROMLEY.

Q. Will you look at Exhibit 152, D-48, your letter to Mr. Gloyd of March 14, 1927. The third paragraph of that letter again is a reference to your proposed merger, isn't it, Mr. Griswold?

A. Yes, that is a reference to the merger.

Q. And the fifth paragraph shows what you testified to, I believe, that Atlantic had signed up as of this time directly with USG and that you had had no connection with, or nothing to do with, that negotiation; isn't that true?

A. At this writing I had evidently heard that the Atlantic Gypsum Company had signed up their license
1113 agreement with the United States Gypsum Company, but I had nothing to do with it, other than what I have already testified.

Q. And finally, the last paragraph is again a reference to your work in getting your merger into shape, is it not?

A. The last paragraph has reference to the merger.

Q. Will you look at Exhibit 153, please, for which there is no "D" number——

Justice JACKSON (interposing). It is D-49 on the copy I have here.

Mr. BROMLEY. Thank you.

By Mr. BROMLEY.

Q. That is Gloyd's letter to you of March 25, 1927. Doesn't the first paragraph of that letter refresh your recollection so that you can now testify that Gloyd had decided to apply for a license independently, and that you had no connection with his decision to take a license?

A. Other than the first interview to which I testified, I had nothing to do with it.

Q. And the second paragraph of Mr. Gloyd's letter, Exhibit 153, you understood to be a reference by Mr. Gloyd to this assurance of Avery that he would not permit royalties to work a hardship on the licensees, did you not?

A. Yes, that had reference to his verbal statement, and my own company was objecting to the proposed agreement without something of that kind.

1114 Q. When you say "his verbal statement", you mean Mr. Avery's verbal statement?

A. Yes, that he would grant some relief.

Q. And that relief was that he would grant some relief in the amount of the royalty if the price got down so low that the royalty payment became a hardship on the licensees?

A. That is correct.

Q. Will you look at Exhibit 155, please, D-51, your letter to the Texas Company of March 31, 1927. In the third paragraph of that letter, the words "our deal" in the second line, are a reference to the merger, are they not, sir?

A. That has reference to the merger.

Q. Now the last paragraph of that letter is a reference merely to the fact that you had chanced to meet someone from National and inquired from that someone as to National's position on the license matter, isn't that so?

A. I would say yes, that that is correct.

Q. You did not mean those words to be interpreted that you were telling the Texas Company that you were acting as agent for National, did you?

A. No. I am sure that Texas understood that, that I was only acting in my own behalf in the interest of these merged companies. Texas Cement Plaster Company was one of the companies that was supposed to be included in the merger.

Q. Now don't you see from this paragraph, Mr.
1115 Griswold—and doesn't it refresh your recollection in connection with the matter I ask you about before recess—that as of this date, which was subsequent to January, 1927, as a matter of fact the National Company had not agreed with anyone to take out a license?

A. Apparently they had not signed up their license agreement, and I so state in this letter, that that was the information I had received.

Q. Doesn't this last paragraph go farther than that in refreshing your recollection, so that you can now state that as of January, 1927, they hadn't even made up their

minds or told anybody that they had decided to take a license agreement, and that therefore they had not, of course, agreed with anybody that they would take one?

A. Well, the only thing I remember is what I indicated here in the letter, that they apparently had advised me that they were thinking of it favorably, that they had not taken it out but were considering it favorably, and that is what I was reporting to Mr. Gloyd.

Q. Doesn't that refresh your recollection that as a matter of fact they had not, as of this time, made up their minds yet as to what they would do?

A. Well, I could not say what they had made up their minds to do any further than what the information they gave me was, that they were considering it favor-
1116 ably, which indicates that they had evidently not made up their minds at that time but were only considering it.

Q. Now, sir, will you look at Exhibit 156, which is D-52, Mr. Gloyd's letter to you of April 5, 1927. The last paragraph again is a reference to Martin Johnson, the Chicago insurance man, and your proposed merger, is it not?

A. Yes, that had reference to the merger.

Q. Will you look at Exhibit 157, please, which is D-53, your letter to Gloyd of April 9, 1927. Isn't it a fact that the third paragraph of that letter is a recitation of mere rumor and that you do not purport to set forth any facts in that paragraph, Mr. Griswold?

A. Repeat the question, please.

Mr. BROMLEY. Will you read it?

(The reporter read the pending question.)

The WITNESS. I would say it was a rumor. I have no recollection of personally interviewing the Certain-teed Products, which is the company mentioned in the letter.

By Mr. BROMLEY.

Q. Now likewise, in the fourth paragraph, the fifth line, which says, "because I was able to induce the Atlantic Gypsum Products Company to take out a license" and so forth, in view of what you have already told us, that statement is not entirely correct, is it?

A. Well, I think I was probably taking more
1117 credit than I was entitled to. As I have testified, my only talk that I had with the Atlantic Gypsum Company was the one referred to, where I recommended and explained it to them why I thought it was to their best interests from a manufacturing standpoint to manufacture a closed-edge type board.

Justice STEPHENS. Will you read the answer, please?
(The answer was read by the reporter.)

By Mr. BROMLEY.

Q. In the fifth paragraph, the opening sentence, "Mr. Avery seems to be very appreciative of the work his friends have done, which will do away with all the troublesome and distasteful litigation"—it is a fact, it is not, that one of the things you were striving to obtain was Avery's appreciation, so that you might get a more favorable deal with him?

A. Well, I was trying to impress Mr. Avery with the fact that through this merger, if it was successful, it would do away with at least that many of the companies that were manufacturing board, and do away with any of the litigation, so that you might get a more favorable deal with him? appreciate the efforts that I made along that line, naturally, and wouldn't make it any harder for me on the merger, or wouldn't make it any harder on the American Gypsum Company, if the merger did not go through.

Q. Wouldn't make it any harder for you to take out a license, you mean.

A. Yes.

1118 Q. And settle the damage claim which he had against you, is that right?

A. The settlement would mean of the damage claim for past infringements, and also the amount of royalties which we were to pay for the use of the Utzman or Clark patent, whatever it was we were going to use, the Clark patent, known afterwards as the Birdsey patent.

Q. Now, sir, the rest of the letter has to do exclusively with your merger, does it not?

A. What paragraphs are you referring to?

Q. The rest of the letter, beginning with the fourth line from the bottom of page 1, "It might interest you also to know"—and from there on to the end.

A. Yes, that had reference to the merger.

Q. Now, will you look at Exhibit 159, which is D-55, please, your letter to Gloyd of April 13, 1927. It is a fact, isn't it, that the conference to which you refer in the second paragraph as a matter of fact was never held?

A. I couldn't say without reference to some letter as to whether it was held or not. This states that I was leaving on an afternoon train for New York and hoped to see Mr. Brown, but whether I actually had a conference or not, I don't remember at this particular time.

Q. Well, I have no such letter, and isn't it a fact that

your best recollection now is that there was no such
1119 meeting held, either with Mr. Brown or any others in April, 1927, or is it the fact that you have no recollection as to whether one was held or not?

A. I have no recollection that one was held. Mr. Brown, I remember, on one or more occasions when I called, was absent from his office. He probably did considerable traveling, like myself. The Certain-teed Products were manufacturing and selling other goods besides gypsum products.

Q. Now, you didn't take this trip that is referred to in the second paragraph of this letter, Exhibit 159, for the purpose of meeting Mr. Brown and these other gentlemen, did you, but the fact is that you went on other business for your own company?

A. I would say that I did not make any special trip to meet Mr. Brown for the reason that there is nothing here to indicate that I had any date set for a conference. My business required me to make a trip as far as New York and Boston at least usually once every thirty days. We did quite a large business in New York City on gypsum partition blocks especially, and I would always meet the salesmen that I had in this territory, that is, we would meet in New York, and incidentally I called on several of my own customers while I was there. So I am sure that the meeting referred to here was not any special meeting, but simply the fact that I was going to New York, and if so, I would contact Mr. Brown.

1120 Q. And you were going there to talk, if you could, to Mr. Brown in your own interest and not in Avery's interest or on his behalf, were you?

A. No, it wasn't for Mr. Avery's interest, it was for my own because of this merger proposition.

As I have stated before, I was very anxious to have this litigation done away with, it was a big stumbling block to me, and until it was settled definitely, I didn't know what I was getting into. But with the merger completed, and the license agreement entered into, that eliminated all questions, so that it apparently would be smooth sailing as far as litigation went.

Q. And in this same paragraph, in the fifth line from the end of it, the phrase "and Johnson and I will then sign up the other companies, which will make it 100%"—is again a reference to Martin Johnson, the Chicago man, and to your proposed merger?

A. That had reference to Martin Johnson, and also to the proposed merger.

Q. Now yesterday, in answer to some questions from the Court, you were talking about plaster and bags. It is a fact, isn't it, that plaster is sold in paper bags, and that each bag holds one hundred pounds of plaster?

A. That is true now, but in those days as I remember it, the paper bags held only eighty pounds of plaster originally. Later on, they got to making stronger bags and put in one hundred pounds.

1121 Q. And when the jute bag was used, for which you said a charge of ten cents was made, the jute bags likewise held eighty pounds as of the time that you were speaking?

A. No, the jute bags held one hundred pounds; they were strong enough to carry that.

Q. So that if a ton of plaster was sold in jute bags, back in those days, there would be twenty jute bags to the ton.

A. That is right.

Q. And there was a charge made of ten cents per jute bag, as you remember it?

A. Yes, $2 a ton.

Mr. BROMLEY. That is all.

Justice STEPHENS. Is there further cross-examination by counsel for other defendants?

Mr. FINCK. May we have just a minute, your Honor?

Justice STEPHENS. Yes, you may consult informally with your associates, if you wish.

Mr. FINCK. National will not cross-examine.

Justice STEPHENS. Cross-examination by any other defendant?

Mr. JOHNSTON. No cross-examination by Texas.

Mr. ADAMS. None by Certain-teed.

Mr. O'DONNELL. None for Newark Plaster Company.

Mr. VARIAN. And no cross-examination by Ebsary.

Mr. ADAMS. I speak, in this case, for Celotex also.

Justice STEPHENS. Does that complete all of the defendants?

1122 (No response.)

Justice STEPHENS. Redirect examination?

Mr. STEFFEN. May I have just a moment, your Honor?

Justice STEPHENS. Yes, certainly.

REDIRECT EXAMINATION

By Mr. STEFFEN.

Q. I would like to refer the witness to Exhibit No. 136-B.

Justice STEPHENS. That is the letter of March 24, 1927, is it not?

Mr. STEFFEN. Yes.

By Mr. STEFFEN.

Q. The last sentence, Mr. Griswold, of the last paragraph. I think you testified that the words "our organization" there referred to the merger, is that correct?

A. That is my recollection, that they referred to the new merger, the company, or the organization which consisted of Mr. Martin Johnson, he would be included in it, and possible True and Webber, the financial people.

Q. Did your plans contemplate that the Certain-teed Company would join that organization?

A. No, at no time did we include Certain-teed Products.

Mr. STEFFEN. We have no further questions.

Mr. BROMLEY. No questions.

Justice STEPHENS. May this witness then be ex-
1123 cused from the trial?

Mr. STEFFEN. Yes.

Justice STEPHENS. Apparently counsel have concluded their examinations, Mr. Griswold, and the Court thanks you for your patience in helping us in this case.

The WITNESS. And I thank the Court and all the attorneys on both sides for their consideration and courtesy.

(Witness excused.)

Mr. STEFFEN. I have got to make a short explanation concerning our next witness. Our next witness was to be Mr. Augustus Blagden. He appears with Mr. Griswold through these early years. He is a very important executive, engaged in war work, and while he has been under subpoena and was to come here on the 15th, we have successively, at his request, excused him, and we wanted, in view of hotel-reservation problems and travel restrictions, and his war work, to cut this as closely as we could so that we could bring him here and put him directly on the stand. The other wit-

nesses that we have subpoenaed are from Georgia and from distant parts; he comes from Elizabeth, New Jersey, and we are faced with a situation now that we can't get him, can't get in touch with him and get him here, certainly not this afternoon and probably not tomorrow.

We would like to have, therefore, a recess until Monday.

Justice STEPHENS. Have you any other witnesses that you could put on?

1124 Mr. STEFFEN. No, we have not. I regret exceedingly that this has come up, and it will not come up again.

Justice STEPHENS. Have you any exhibits you could put in, or any way in which we could use the time?

Mr. STEFFEN. No, your Honor.

Justice STEPHENS. Wouldn't it be possible, by telegraph or telephone, to get Mr. Blagden here tomorrow?

Mr. STEFFEN. We will make every effort, and if you will recess until tomorrow morning we will do what we can. Already we have wired him and telephoned, and we have a message from his secretary saying he is out on the road, on a trip, and that she will get in touch with him—this is a wire from her to Mr. Berge—and if possible, get him back; but he is not expected back until Thursday.

Justice JACKSON. Is he going to be a long witness?

Mr. STEFFEN. He will be about a day.

Justice JACKSON. Tomorrow is going to be a short day anyway, and you probably wouldn't finish with him in one day even if you could get him here.

Mr. STEFFEN. That is right.

Justice STEPHENS. Well, the Court realizes that these things happen. We hope you will guard against it as much as possible, because we do want to make as much progress as we can while we are in session. But the Court will, in view of the exigency in which the Government finds
1125 itself, and tomorrow being a short day in any event, adjourn until next Monday at ten o'clock.

MOTION FOR CORRECTION OF RECORD

Mr. STEFFEN. I would like to make just one motion at this time, and I do that with some misgivings, but I think

it is essential from the Government's standpoint for purposes of preserving our record. I would like to read it and then I will file copies in the usual way.

The motion is a motion for correction of the record: "Comes now Roscoe T. Steffen, and upon his affidavit annexed hereto, and prayed to be considered as a part hereof, and upon all the proceedings herein, hereby respectfully moves this Court to make its opinion upon defendant's motion to strike, etc., paragraph 46a of the complaint, a part of the record in this proceeding, and, further, to modify its said opinion, or to take such other appropriate action as the Court may deem proper, to conform its opinion to the fact that the Government did not concede either in its brief or upon the oral argument as recited in the opinion (transcript, p. 691) that the question before the Court was whether the Commissioner of Patents had erred in issuing the five Roos patents mentioned in paragraph 46a of the complaint."

I have an affidavit supporting that, which I will simply file, which goes merely to the fact, as I understand it——

Justice STEPHENS (interposing). Read the affidavit so that the Court will be advised of its contents.

1126 Mr. STEFFEN (reading:)

"Roscoe T. Steffen, being duly sworn, deposes and says:

"As counsel for the Government, I presented the argument on October 18, 1943, in opposition to the defendants' motion to strike or in the alternative for partial judgment upon paragraph 46a of the complaint and, with Edward Knuff, Esq., I prepared the Government's brief filed with the Court on that date.

"I have carefully examined the transcript of the argument (Tr. Oct. 18, 1943, pp. 539 to 661) and can truthfully say that at no place in the brief or in the oral argument or otherwise did the Government concede, as stated in the majority opinion, that the question before the Court was whether the Commissioner of Patents had erred in issuing the five Roos patents named in paragraph 46a.

"The question briefed and argued by the Government (Brief p. 6) was whether the plaintiff might introduce evidence in an antitrust proceeding to show that one or more of the five named patents is invalid upon all or any of the grounds stated in paragraph 46a.

"The Court's attention is respectfully invited to the fact that the Government at no place discussed the propriety of

the Commissioner's ruling, or suggested that any action of his should be reviewed. The burden of the argument was that the validity of a patent is not a matter of discretion for the Commissioner to decide but of strict compli-
1127 ance with statute; that a patent regularly and properly issued by the Commissioner may nevertheless not comply with the statute and may be invalid because of facts which the Commissioner did not know and in the nature of the case could not find out (Tr., Oct. 18, 1943, pp. 604-606); and, that the courts, when shown such facts in a proper case, have consistently refused to regard the patents to which such facts pertain as being valid and subsisting grants (Trial Brief, pp. 47 to 49)."

I would present that as a motion and ask the Court to rule upon it.

Justice STEPHENS. It may be presented and filed as a part of the record. The opinion has already been made a part of the transcript of the testimony, on the order of the Court.

Mr. STEFFEN. I see.

Justice STEPHENS. Have you anything to say on this subject, gentlemen for the defendants? If you have not, the Court will make a statement.

Mr. BROMLEY. No, sir, I haven't anything.

Justice STEPHENS. The understanding of the Court in respect to the matter now at issue is this, that the Court stated in its opinion which now appears at page 691 of the transcript:

"It is also to be borne in mind that, while this is not an independent cancelation proceeding, but anti-trust suit in which the Government contends that the patents are invalid, nevertheless the Government is seeking a judicial
1128 determination that the Patent Office erred in issuing the patents and that they are for that reason invalid. This was conceded in the oral argument".

Is that the statement to which you object?

Mr. STEFFEN. That is the part that bothered me, your Honor.

Justice STEPHENS. The statement of the Court was based upon a number of considerations.

It was the impression of the Court at the time of the argument, and after very careful consideration of the Government's brief, that the contention of the Government

was, not that the patents had been obtained by any fraud or wrongful act or over-reaching of the Government but that they had been issued by the Patent Office as a result of erroneous judgment in respect of the matters set forth in paragraph 46 (a) of the complaint.

The Court calls attention to the fact that in paragraph 46 (a) of the complaint—and the Court I think mentioned that in the opinion—there was nothing stated about fraud, that all of the allegations concerning the alleged invalidity of the patents had to do with considerations not touching fraud or over-reaching, but touching erroneous action on the part of the Patent Office, to-wit: that there was no real invention, or novelty; that the claims disclosed no patentable invention in view of the prior art; that the alleged inventions described in the claims were shown and de-
1129 scribed in printed publications in the United States more than two years prior to the filing of the respective applications; that the alleged inventions described in the claims of the patents are inoperative and devoid of novelty or utility; that the alleged inventions described in the claims of said patents were abandoned by the inventor and he was guilty of laches before the respective applications were filed; that the alleged inventions described in the claims of the patents were not reduced to practice until after other inventors had invented and reduced the same to practice and applied for patents thereon; that the alleged inventions are described in ambiguous and not in properly clear, concise and exact terms; and, finally, that the defendants have been informed of the invalidity of the claims of the said patents and have unreasonably failed to file in the United States Patent Office any disclaimer of said claims.

Now, the understanding of the Court of the oral argument and of the brief, which was very carefully examined, including a very careful examination of the authorities, was that the Government was asserting that the Patent Office had erred for the reasons set out in paragraph 46 (a), in issuing these patents, and that an issue, therefore, was presented such as would be presented in an infringement proceeding where no fraud in the obtaining of the patents was charged.

The Court's impression was in part based upon the statement in the brief of the Government at page 19,
1130 where the Government states:

"Needless to say the authorities cited by the defendants do not support their argument. The first *United*

States v. *American Bell Telephone Co.*, (1897) 167 U. S. 224, has already been considered; it held simply that, apart from statute, the United States may cancel or set aside a patent for fraud, a matter not now in issue here."

It is that phrase in particular, "a matter not now in issue here" used in respect of the Government's distinction of the case of *United States* v. *American Bell Telephone Company*, from which the Court among other things, got the understanding of the Government's argument which it did. It will be remembered that the case which I have just referred to—and this is explained in the opinion—was a case in which the Government sought, in a direct cancelation proceeding, to cancel the Berliner telephone transmitter patent, on two grounds: first, that it had been obtained by fraud, or fraudulent delay in the proceedings; and, second, that the Patent Office had erred in issuing the patent because it was the same as a previous telephone-receiver patent.

The Court calls attention to the fact that in the transcript of the oral argument at page 607, Mr. Steffen said, in answer to a question by Judge Garrett, beginning at line 23 and running over to the next page:

"I might point out, Judge Garrett, that the other ground is that we are not proceeding on any question
1131 of fraud, which was granted in the American Bell Telephone case as being a proper means of proceeding."

The Court calls attention also to the fact that nowhere in the complaint of the Government is it charged that the patents were obtained by fraud or over-reaching. It is the Court's view that the contentions now made by Government's counsel are contentions not based upon a misstatement by the Court, as the Government asserts, of its position, but upon a different interpretation which the Government puts upon its own argument than that which the Court put upon it.

It is the view of the Court that there are two general classifications of attack, or categories of attack, upon the proceedings in the Patent Office—attack for action obtained by fraud, or attack for action taken quite beyond the jurisdiction, or action taken arbitrarily, on the one hand; and on the other hand, attacks such as arise in infringement cases for erroneous exercise of the discretion or judgment of the Patent Office in respect of issuing a patent.

It was the clear understanding of the Court, and the Court thinks its understanding was correct, that the Government was dealing with the second category, and not

the first, and that that was made perfectly clear to the Court in the oral argument and in the brief.

In the statement just completed by the Presiding Judge, the Presiding Judge is authorized to say that both
1132 Judges Garrett and Jackson agree.

The motion, therefore, to correct the record is denied, with a proper exception noted to Mr. Steffen for the Government.

Mr. STEFFEN. May I make just one brief notation for the record at this point?

Justice STEPHENS. Yes.

Mr. STEFFEN. That is, that while we stated that there was no fraud involved in paragraph 46 (a), we did not want to be understood as saying there was no fraud in the general case, but on the pleadings as they had been presented to your Honor, there was no question of fraud as you correctly state.

I would like to say one other thing, that our argument was that there were three categories, one of fraud, one of failure on the part of the Patent Office as an administrative office, and thirdly, where the Patent Office made no failure, but couldn't, because of invention elsewhere or prior art elsewhere, know whether or not the patent was properly issued.

Justice STEPHENS. That point was also commented upon in the Court's opinion, and I think sufficiently not to require additional statement.

The adjournment may be taken until next Monday at ten o'clock. (The Marshal announced the adjournment.)
1133 We will now adjourn until next Monday at ten o'clock.

(Whereupon, at 12:10 o'clock p.m., the proceedings were adjourned until Monday, November 29, 1943, at 10:00 o'clock a.m.)

1134 In the District Court of the United States
for the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,
Washington, D. C., Monday, November 29, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted).

1136 My clerk calls my attention to the fact that although the Opinion of the Court on the motion to strike Paragraph 46(a) had been copied into the transcript, there is nothing in the record indicating that it was ordered to be put into the transcript. That order is made.

The Court has given some attention during the recess to the affidavit and motion filed by Government's counsel, and may have something to say in writing on the subject of that affidavit and motion later.

At the moment, the Court will say only this, that the affidavit and motion seems to charge the Court with a misstatement or misapprehension of the Government's position in its oral argument and brief on the motion to strike Paragraph 46(a). As the record now stands, there would be nothing in the record from which an appellate tribunal, should this case ultimately go against the Government and an appeal be predicated in part upon that point, could determine whether or not the Court had correctly stated or apprehended the Government's brief and oral argument, because the brief is not a part of the record. The opinion is a part of the record, and there is now a part of the record an affidavit and motion charging that the Gov-

1137 ernment's argument has been misstated or misap-

prehended. The Court thinks, in fairness to the Court therefore, that the brief of the Government in opposition to the motion to strike Paragraph 46(a) should be made a part of the record. The Court regrets to add the expense to the record of printing that in the record, but it seems that if a point is to be made, as is apparently intended by Government's counsel, in the event of an appeal, should this case go against the Government, of the asserted misstatement, that the appellate tribunal should have before it the whole of the proceedings which are pertinent to that assertion.

Therefore, the Court will order the Government's brief submitted in opposition to the motion to strike Paragraph 46(a), also made a part of the transcript of record in this case, and it may be obtained from me at the reporter's convenience.

(The Government's Memorandum in Opposition to Defendants' Motion to Strike Paragraph 46a of the Complaint is as follows:)

1138 In the District Court of the United States
for the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,
v.
UNITED STATES GYPSUM COMPANY, ET AL., DEFENDANTS.

Memorandum in opposition to defendants' motion to strike paragraph 46a of the complaint

PRELIMINARY STATEMENT

The complaint in this action was filed on August 15, 1940. In November 18, 1940, the defendants, by motion, asked for an order directing the plaintiff to file a more definite statement and on May 15, 1941, the plaintiff filed its bill of particulars. Thereafter, on August 1, 1941, the defendants filed their answers.

On October 15, 1942, the defendants were granted leave to amend in order to set up two supplemental answers alleging that on November 19, 1941, a verdict was directed for certain of the defendants in *United States* v. *United States Gypsum Company, et al.*, (Criminal No.
1139 66008). Thereafter, on or about November 16, 1942, each of the defendants moved for summary judgment upon the ground that the matters pleaded in their supplemental answers were *res adjudicata* of the present action. The Court, on August 10, 1943, denied defendants'

motion and set the case down for trial on November 15, 1943.

In the meantime, and on February 24, 1943, plaintiff filed its motion for leave to amend the complaint by adding paragraph 46(a) by which it is alleged that certain patents owned by the United States Gypsum Company and used by it as the basis for fixing prices of gypsum board are invalid and void. Plaintiff's motion was granted on March 12, 1943, without prejudice to the defendants to move in writing for a bill of particulars. On August 16, 1943, the defendants filed a motion for a bill of particulars and its disposition is now pending.

On August 10, 1943, at the suggestion of the Court, counsel for the defendants undertook to file a motion to strike paragraph 46(a) of the complaint upon the ground that the Government is estopped to offer any evidence at the trial showing the invalidity of the defendants' patents. The Court set October 18, 1943, as the day to hear argument on the defendants' motion, if and when filed.

On September 28, 1943, the defendants served a motion to strike paragraph 46(a) of the complaint or, in the alternative, for partial judgment on the issue framed by that paragraph and paragraph 35 of the U. S. G. 1140 answer. The plaintiff, on October 4, 1943, filed its opposition to this motion.

ANALYSIS OF THE PLEADINGS

The complaint in this case alleges that the defendants are engaged in a combination in restraint of trade in the manufacture and sale of gypsum board and other gypsum products throughout the territory east of the Rocky Mountains. Specifically it is charged, in paragraph 44, that the defendants have violated Secs. 1, 2, and 3 of the Sherman Act. It is further alleged, in paragraph 46, that the said combination is being carried out *in part* under the guise of numerous patent license agreements which "are not bona fide patent license agreements reasonably designed to secure to U. S. G. the pecuniary rewards for valid patent monopolies. . . ."

The nature of the restraints with which defendants are charged is described in part in paragraph 45 of the complaint. Briefly stated, it is there alleged that the defendants have combined (1) to fix arbitrary and non-competitive prices for the sale of gypsum products, (2) to standardize the products which they manufacture, (3) to control distribution, for example, by eliminating sales to jobbers, and

(4) to require manufacturing distributors upon resale of products purchased from the defendants to conform to arbitrary and non-competitive prices set by the defendants.

Each of the defendants has in its answer formally denied the matters so charged in the complaint. At the
1141 same time, counsel for the defendants have admitted in argument before this Court (Transcript, October 15, 1942, pp. 34, 152) that, since 1929, the defendant, United States Gypsum Company, has arbitrarily set the price at which the defendants have sold gypsum board. The defendants, moreover, have admitted going to considerable lengths to police the industry in order to make sure that uniform prices and conditions of sale were being maintained. (Transcript, October 15, 1942, p. 152). Next, it has been admitted (Transcript, October 15, 1942, p. 153) that beginning in 1929 the defendants adopted a royalty provision requiring payment based on both patented and unpatented board. The purpose of this provision was to drive open-edge unpatented board from the market and standardize production. (See, 3rd Whereas, May, 1929, license agreements, complaint p. 48.) Moreover, it is admitted that jobbers were virtually eliminated from the industry in about the year 1932 when U. S. G. fixed identical prices for sales to jobbers and dealers. (See Answers to paragraph 95 of the complaint. Transcript, March 11, 1943, p. 207.) And, finally, while defendants have not admitted that they have controlled the resale prices charged by manufacturing distributors, there is no doubt that such prices have conformed to the defendants' prices throughout.

It is submitted that this showing makes out a violation of the Sherman Act. Defendants admit to having
1142 combined to control the manufacture, sale, and distribution of gypsum products in interstate commerce. *United States* v. *Standard Sanitary Mfg. Co.* (1912) 226 U.S. 20. Nothing is better settled than that a combination to fix prices is alone and *per se* a violation of the Act, regardless of whether the prices so fixed might be fair or equitable. As said by Mr. Justice Douglas in *United States* v. *Masonite Corp., et al.*, (1942) 316 U.S. 265 at p. 276:

"Prices are fixed when they are agreed upon. *United States* v. *Socony-Vacuum Oil Co., supra*, . . . p. 222. The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action. *Id.* Since there was price-fixing, the fact that there were business reasons which made the arrangements desirable to the

appellees, the fact that the effect of the combination may have been to increase the distribution of hardboard without increase of price to the consumer or even to promote competition between dealers, or the fact that from other points of view the arrangements might be deemed to have desirable consequnces would be no more a legal justification for price-fixing than were the 'competitive evils' in the *Socony-Vacuum* case."

By way of confession and avoidance, the defendant U.S.G., in paragraph 35 of its answer, has sought to justify this restraint by alleging affirmatively that it operates under the protection of "valid patent monopolies."

1143 The court construed defendants' patent pleading as "one in confession and avoidance" in *United States* v. *Motion Picture Patents Co.* (1915) 225 Fed. 800 at 803. Its alleged right to fix prices is averred to be "an entirely proper and legal restriction within the purview of the patent laws and the decisions of the Supreme Court." The licensee-defendants have more or less tacitly rested their defense in part on the same averment.

The principal decision upon which the defendants must rely to support this pleading is *United States* v. *General Electric Co. et al.* (1926) 272 U.S. 476. It is submitted that the defendants are afforded no protection by that decision for several reasons, principally because the court there had no charge before it that the entire industry was being controlled under the guise of patent license agreements, as is the charge here. But, aside from this, it is submitted that, in order to bring themselves within such protection as the *General Electric* case affords, the defendants must show affirmatively:

"1. That they have valid patents completely covering modern gypsum board;

"2. That in fact the board made by them and controlled by the license agreements is covered by their patents; and,

"3. That the price fixing and other restraints imposed by their license agreements are a reasonable exercise of rights conferred by their patent monopolies."

1144 Upon this analysis, no affirmative pleading by the plaintiff to deny the validity of defendants' patents was necessary. Rule 7, Federal Rules of Civil Procedure. In order to narrow the issues, however, and to avoid surprise at the trial (Transcript, March 12, 1943, pp. 358-62), the plaintiff was permitted to amend its complaint by adding paragraph 46(a), designating the particular patents whose validity it proposed to challenge at the trial, and the

grounds upon which such patents are asserted to be invalid. Paragraph 46(a) reads as follows:

"46a. Many of the patents mentioned and described in said license agreements by which the said combination has been, and is being carried out in part, are process or machine patents. The article and product claims of Roos patents No. 2,017,022, No. 2,079,338, No. 2,080,009, No. 1,914,345, and No. 1,938,354 mentioned and described in said license agreements, and said patents, are each invalid and void for each of the following reasons: (a) there is no real invention or novelty in the claims of said patents; (b) the claims of said patents disclose no patentable invention in view of the prior art at the time the respective applications were filed; (c) the alleged inventions described in the claims of said patents were shown and described in printed publications in the United States more than two years prior to the filing of the respective applica-
1145 tions; (d) the alleged inventions described in the claims of said patents are inoperative and devoid of novelty or utility; (e) the alleged inventions described in the claims of said patents were abandoned by the inventor and he was guilty of laches before the respective applications were filed; (f) the alleged inventions described in the claims of said patents were not reduced to practice until after other inventors had invented and reduced the same to practice and applied for patents thereon; (g) the said alleged inventions are described in ambiguous and not in properly clear, concise and exact terms and; (h) the defendants have been informed of the invalidity of the claims of the said patents and have unreasonably failed to file in the United States Patent Office any disclaimer of such claims. The said patents mentioned and described in the said license agreements, even assuming they are valid, are not basic article or product patents and do not singly or all together cover completely the business of mining and selling gypsum, or cover completely gypsum board, which is one of the forms in which unpatented gypsum is sold by the defendants, but at most constitute minor additions to the established and unpatented art of making gypsum board and afford no legal justification for the said combination."

Whether this pleading of the patent validity issue is proper under Rule 7, Federal Rules of Civil Procedure, and, secondly, whether the plaintiff or the defendant has
1146 the burden on the issues raised, are questions being separately briefed in connection with defendants' motion for a bill of particulars filed August 16, 1943.

QUESTON PRESENTED

The board question here presented is whether the plaintiff may introduce any evidence in an antitrust proceeding to show that one or more of the five patents named in paragraph 46a is invalid upon all or any of the grounds stated.

Before taking up the legal argument, certain observations may be made to clarify the question. In the first place it is the plaintiff's contention that, as a matter of substantive law, the defendants can only claim such protection as the *General Electric* case affords them if, in fact, their patents are *valid* article patents covering the products which they sell under their license agreements. This would seem to be a self-evident proposition. Certainly the court in the *General Electric* case assumed that the patents before it were valid.

In further support of the basic proposition that, as a substantive matter, invalid patents will not support the practices sanctioned in the *General Electric* case, the court is referred to the recent decision of the Supreme Court in *Sola Electric Co.* v. *Jefferson Electric Co,* (1942) 317 U.S. 173. That was a suit by licensor v. licensee to recover royalties and to require the licensee to sell only in conformity with a general price-fixing scheme existing between
1147 the licensor and its several licensees, similar to that obtaining in this case. The lower court held that the defendant, as licensee, was estopped by contract to question the validity of plaintiff's patents and, hence, to question the legality of the plaintiff's price-fixing agreement under the Sherman Act.

It will be noted first that this was not an infringement suit, where one recognized means of testing patent validity has been established, but an ordinary suit for breach of contract. Secondly, and of fully as great significance here, is the reason assigned by the court for granting *certiorari*, namely, that the question is one "of importance to the administration of the patent laws and the Sherman Anti-Trust Act." Finally, the holding, that the defendant might show the invalidity of the plaintiff's patents in order to make out a violation of the Sherman Act, and then to invalidate the plaintiff's contract, would seem to set at rest any question whether a price-fixing scheme in restraint of trade can be based on invalid patents. It is clear that only valid patents will suffice.

The noteworthy feature of the *Sola Electric Co.* case is the stress which the court put on the public interest involved, even although the action was merely a private one.

In such circumstances it held ordinary rules of estoppel must give way. As the matter was stated by Chief Justice Stone at p. 177:

1148 "Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements. Cf. *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, 492-93."

It may be assumed that the defendants do not challenge the foregoing propositions in principle. They rest their case on the narrow ground that the Government stands in a different position and, having issued the patents, that it cannot now be heard to question their validity, even in an antitrust proceeding. In other words, the defendants' case comes down to the blunt proposition that, even although their patents are not worth the paper they are written on, and would not afford any justification for their actions if the true facts could be shown, they will nonetheless suffice to justify an otherwise illegal and continuing control of the gypsum industry.

The wholly artificial character of the defendants' position is made more apparent when the general license agreements are examined. It is there provided that the "licensee hereby acknowledges the validity of the Letters Patent, granted and to be granted, forming the subject-matter of this license." (May, 1929, license agreement, page 53 of complaint. Also, see complaint, pp. 75, 117, 125.) The

1149 net effect of these provisions is that all the makers of gypsum board in the territory east of the Rocky Mountains have agreed not to test the validity of the patents named in the license agreements. (See admissions of defense counsel, Transcript, October 15, 1942, pp. 154-5). On the one hand they contend that the Government can not test validity; on the other, they bind themselves not to raise the question.

Of the many patents listed in the various license agreements, it is submitted the five named in paragraph 46a are the principal if not the only, article patents upon which the defendants can at all rely to justify their price-fixing combination. They are, respectively, the three Roos "foam process" patents, Nos. 2,017,022, 2,079,338, 2,080,009; the "metalized board" patent No. 1,914,345; and, the "perforated lath" patent, No. 1,938,354. The first three of these were merely in application form at the time the October, 1929,

license agreements were signed and were not issued for several years thereafter.

It is admitted in the pleadings (Answers to complaint, par. 120) that the validity of one of these five patents, No. 1,938,354, has never been litigated in court. It is a fact, tacitly admitted by defense counsel, that the validity of the three Roos "foam process" patents has never been tested in court. (Transcript, October 15, 1942, pp. 160-162). Moreover, it is fair to say in view of the self-
1150 imposed restrictive clauses in the license agreements, that in all probability none of these patents will ever be tested by an infringement suit. Certainly not by these defendants, and they have been the only makers of gypsum board in the territory east of the Rocky Mountains since 1929. (See answers to complaint, par. 20).

The narrow question presented, therefore, is whether the Government, in the enforcement of the antitrust laws, can be estopped to question the validity of the defendants' patents, where the defendants themselves have combined to prevent a usual and normal test of their validity.

SUMMARY OF ARGUMENT

The broad proposition which the plaintiff maintains here may be stated as follows: The Government may introduce evidence in an antitrust proceeding directed against an alleged price-fixing combination in restraint of trade to show that patent licensing agreements, pleaded by the defendants as an affirmative defense, are based upon invalid patents, and hence constitute no defense, particularly where the defendants have themselves combined to prevent a test of their validity by infringement suits.

In the argument to follow it will be convenient to discuss under separate headings the principal grounds upon which the plaintiff's contention is based. These may be stated as follows:

1151 "1. The Government in an antitrust suit acts in its sovereign capacity pursuant to Congressional mandate and is not subject to local rules of estoppel.

2. The present proceeding is not a collateral attack to set aside or to nullify the defendants' patents, but is a direct attack upon the defendants' price-fixing activities, in which the *fact* of the invalidity of the defendants' patents may be shown.

3. Patents for inventions are merely *prima facie* valid, and the courts have always permitted a party in a proper case to show their actual invalidity in the respects mentioned in paragraph 46(a) of the complaint.

4. Assuming that in an ordinary antitrust proceeding the Government would be estopped to question the validity of the defendants' patents, nevertheless, on the facts of this case, the defendants are themselves estopped to insist upon the point.

ARGUMENT

Point I

The Government in an antitrust suit acts in its sovereign capacity pursuant to Congressional mandate and is not subject to local rules of estoppel.

The most essential point to be made in this discussion is that the present proceeding was instituted by the Attorney General to make effective a Congressionally declared
1152 policy to provide a free and competitive market for goods. It is not a private litigation. It is not instituted to favor one individual at the expense of another. It is an action to enjoin monopoly and restraints of trade in the gypsum industry. In bringing such a suit, the Government acts in its sovereign capacity for the public welfare.

The condemnation of restraints of trade and monopoly is very old in our law. It has been more than 300 years, in fact, since the English crown lost its asserted right to grant to favored persons, in aid of the royal exchequer, the exclusive right to manufacture and sell goods in England. This bit of English history leading up to the passage of the Statute of Monopolies (21 Jac. 1, ch. 3) in 1623 is adequately reviewed in Walker, Patents (Deller's Ed., 1937) pp. 1-16.

Nor are the reasons for this hostility hard to find. They were fully stated in *Darcy* v. *Allen* (1602) 11 Coke, R. 84-b, where the court, in holding void a monopoly to manufacture playing cards within the realm as being contrary to the "common-law" said in part:

"And therefore there are three inseparable incidents to every monopoly against the commonwealth; that the price of the same commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases; that after the monopoly granted the commodity is not so good and merchantable as it was
1153 before, for the patentee, having the sole trade, regards only his private benefit and not the commonwealth; and that it tends to the impoverishment of divers artificers, and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be restrained to live in idleness and beggary."

From almost the beginning an exception was made, however, in favor of the actual inventor. As stated by the court in the case of *The Clothworkers of Ipswich* (1615) Godbolt 252:

"But if a man hath brought in a new invention and a new trade within the kingdom, in peril of his life, and consumption of his estate and stock, etc., or if a man hath made a new discovery of anything, in such cases the King, of his grace and favour, in recompence of his costs and travail, may grant by charter unto him, that he only shall use such trade or trafique for a certain time, because at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it . . ."

Very briefly stated these cases contain the germ of our present law. The colonies inherited an even more lively distrust of monopolies than prevailed in the mother country. See Hamilton, *Patents and Free Enterprise* (1941) Monograph 31, T.N.E.C. pp. 18-27. At the same time there seems to have been full approval of the Consti-
1154 tutional provision giving Congress power "to promote the progress of science and useful arts" by giving exclusive rights to writers and inventors for limited times.

Though patent laws were one of the early concerns of Congress, it was not until 1890 that serious attention was given to the large scale trusts and combinations then operating in interstate commerce. The Congress at that time passed the Sherman Act, not so much to make monopolies and restraints of trade illegal, as to give the Federal Courts jurisdiction to declare them illegal according to the common law. Congressional purpose was stated by Senator Hoar as follows:

"The common law in the States of the Union of course extends over citizens and subjects over which the State itself has jurisdiction. Now we are dealing with an offense against interstate or international commerce, which the state cannot regulate by penal enactment, and we find the United States without any common law. The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States. 21 Cong. R. 3152 (1890)."

By the terms of the Sherman Act, 26 Stat. 209; 15 U.S. C.A. 4, not only are the Federal courts given jurisdiction to prevent and restrain violations of the Act, but "it *shall*

be the duty of the several district attorneys of the
1155 United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restain such violations."

Against this background, it is submitted that two things are obvious. In the first place there can be no question that the present action is brought by the United States in its proprietary or sovereign capacity. It is not a private litigation. In the second place, it is apparent that monopolies generally are prohibited; valid patent monopolies for limited times are permitted only as an exception in order to promote the progress of science and the useful arts. See *Standard Oil Co.* v. *United States* (1911) 221 U.S. 1; *United States* v. *Standard Sanitary Mfg. Co.* (1912) 226 U.S. 20.

At no place is it so much as intimated that the United States might be estopped in the enforcement of its antitrust laws by the existence of *invalid* patents. In fact the justification for the patent monopoly has always assumed validity as a matter beyond question. One of the most quoted rationalizations in justification of making an exception in favor of the patent monopoly, was stated by the court in *Allen* v. *Hunter*, (1855) 6 McLean 303, 305, 306:

"Patentees are not monopolists. This objection is often made and it has its effect upon society. The imputation is unjust and impolitic. A monopolist is one who by the exercise of the sovereign power takes from the public
1156 that which belongs to it, and gives to the grantee and his assigns an exclusive use. On this ground monopolies are justly odious. It enables a favored individual to tax the community for his exclusive benefit, for the use of that to which every other person in the community, abstractly, has an equal right with himself. Under the patent law this can never be done. *No exclusive right can be granted for anything which the patentee has not invented or discovered.* If he claims anything which was known before, his patent is void. So that the law repudiates a monopoly." (Emphasis supplied.)

May the United States nevertheless be estopped in an antitrust proceeding to show the true facts? The question was elaborately examined in the series of *Bell Telephone Company* cases ending with *United States* v. *American Bell Telephone Company* (1897) 167 U. S. 224, and, it is submitted, answered in the negative. In the latter case the United States sought to set aside a patent upon the ground that it had been wrongly issued: particularly (1) in

that there had been a delay of some 11 years in the Patent Office, which was charged as being a fraud on the public; and (2) in that the patent in suit was said to be covered by a prior patent issued to the same inventor.

While the court found upon the merits that no fraud had been shown, it reaffirmed in positive terms the right of the United States to bring an action to cancel a patent
1157 in such circumstances. The language of Mr. Justice Brewer at pp. 264-5 is very pertinent to this case:

"Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also *when it is necessary in order to enable it to discharge its obligations to the public*, and sometimes when the purpose and effect are simply to enforce the rights of an individual. In the former cases it has all the privileges and rights of a sovereign. The statutes of limitation do not run against it. The laches of its own officials does not debar its right. *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *United States* v. *Nashville, Chattanooga &c. Railway*, 118 U. S. 120; *United States v. Insley*, 130 U. S. 263. But when it has no proprietary or pecuniary result in the setting aside of the patent; *is not seeking to discharge its obligations to the public*; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants." (Emphasis supplied.)

The court was equally clear that the Attorney General had no authority, by statute or according to the common law, to bring an action to set aside a patent upon the bare allegation that in his opinion the Patent Office had failed
1158 to give proper weight to a prior patent. While fully affirming its prior ruling in *United States* v. *American Bell Telephone Co.* (1888) 128 U. S. 315, 373, that Sec. 4920, Rev. Stat. had no bearing on the problem where the issue was fraud, the court went on to say, at p. 269:

"It was not affirmed that proof of any fraud, or deceit, or the existence of any error on the part of the officers as to the extent of their power, or that any mistake in the instrument was sufficient to justify a decree of cancellation. Least of all was it intended to be affirmed that the courts of the United States sitting as courts of equity, could entertain jurisdiction of a suit by the United States to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would

be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred."

It is obvious that the present action is in no sense an attempt by the Attorney General to set up an appellate jurisdiction over the Patent Office. In the first place, the present complaint does not ask to have the defendants' patents cancelled or set aside. The defendants may keep their patents for what they are worth. In the second place, as pointed out above, the Attorney General here pro-
1159 ceeds in accordance with explicit Congressional authority and direction to enforce the antitrust laws. The case, therefore, falls in the same category with the fraud proceedings in the *Telephone Company* cases; in both the Government acts in its sovereign capacity for the public welfare and cannot be estopped by ruled obtaining between private litigants.

There have not been many cases squarely on the point. In the first which we have found, *United States* v. *Porcelain Appliance Corporation, et al.* (U.S. D.C. N.D. Ohio, E. Div., Sept. 9, 1926) (unreported) the court affirmed the right of the Government to introduce evidence of patent invalidity in an antitrust suit. Judge Westenhaver, in ruling on a motion, said:

"Obviously, this is not a suit by the United States to cancel patents. It is probably beyond the scope of all possible issues to decree certain patents or certain claims thereof to be void. The issue here is whether or not the defendants have organized and are members of an illegal conspiracy and a final decree can probably not have any broader scope. These expressions are not to be taken as the final determination of any such question. However, assuming they correctly state the law, it would still appear that the allegations of the bill are proper and that the testimony in support thereof might be received . . . I can perceive many combinations, in violation of the Sherman antitrust
1160 law, in which patents or claims thereof, invalid in view of prior art, or limited in nature, may be wrongfully used in building up or maintaining such an illegal conspiracy . . ."

Shortly after this in the "Oil Cracking Case," *United States* v. *Standard Oil Co., et al.* (1929) 33 F. (2d) 617, reversed on other grounds, 283 U. S. 163 (1931), the question was again presented. There the petition alleged a conspiracy to restrain trade and commerce in gasoline by

means of a pool of patents covering the cracking process and a cross-licensing system. It was further averred that there was no basic patent covering the process of manufacturing gasoline by the application of heat under superatmospheric pressure, and that the minor patents, if valid at all, constituted no improvement or but slight improvement in the art. The defendants denied that there were no valid patents covering the basic feature.

The Government offered in evidence two patents to show that certain of the defendants' patents were anticipated and to show that defendants' patents were granted through error or mistake on the part of the Patent Examiner. There was an objection to this offer. Counsel for the Government and for the defendants then made statements in order to present to the Court the question of whether this type of evidence was admissible. The Master said (Supreme Court Record, October Term, 1930, vol. 34, p. 411):

1161 "The main question is to get this fairly before the court for decision, in all its aspects—as to whether the Government has a right to attack either the validity or the scope of these Letters Patent and whether this attack is collateral or whether it is direct. . . ."

Among the objections made by the defendants, both to the competency and admissibility of the two patents, were the following: (1) that there was no allegation in the petition that the two particular patents attacked or any of the patens owned by the defendants were invalid and that there was, therefore, no issue of validity under the pleadings; (2) that there was no allegation that the scope of the patents was narrower than appeared on the face of the patents; (3) that any attack either upon the validity or the scope of the patents was collateral to the issue involved in the case; (4) that the Government as grantor of the two patents attacked and of the other patents owned by defendants, was estopped to deny their validity in the proceedings; (5) that in a proceeding under the Sherman Antitrust law the validity and scope of the patents owned by the defendants was not in issue.

These questions were thereupon certified to the District Court for a decision and, upon argument, its order was as follows:

"The Master having certified questions to this Court respecting the admission of evidence, and this Court,
1162 having heard counsel and being fully advised, is of the opinion that the objections should be over-ruled and the evidence received." (Supreme Court Record, *supra*, pp. 423-4.)

In making this ruling that the evidence was admissible, the District Court made no distinction as to whether the evidence was to be received for the purpose of questioning the validity of the patents or in order to limit their scope. It should be noted, however, that the defendants were overruled on all their objections, some of which were based solely on the argument that the Government could not attack validity.

In the further proceedings before the Master the latter came to the conclusion not only that evidence to show the invalidity of defendants' patents should be excluded, but that it was not permissible for the Government to introduce evidence to show their proper scope. That is, in the Master's opinion the patents must be assumed to be valid and their claims must stand as they read when issued by the Patent Office. This was reported to the court. The Master further reported that the inventions covered by the patents in question were of great utility and that the field covered by the patents held by each company was so close to the field covered by patents held by other companies that there was a sufficient likelihood of wasteful litigation to justify pooling.

When the Master's Report came before the Court
1163 for disposition, *United States* v. *Standard Oil Co., et al.* (1929) 33 F. (2d) 617, two of the questions presented by the Government's Exceptions were: "(2) May petitioner in this suit question the validity or the scope of the patents which it issued? (3) If the preceding questions be answered in the affirmative, are the patents valid?" The Court's opinion on these points was as follows, pp. 623-4:

"Respecting queries 2 and 3, little need be said in view of our ultimate conclusion as to the validity of the patents. This Court is divided respecting the right of the Government to attack the validity of the patents in these proceedings. We are satisfied, however, that we may inquire into the prior art to ascertain the scope of the claims of the various patents involved . . .

"Without discussing each patent at length and in detail, we will content ourselves with a statement of our conclusion. For the purposes of this suit we are not willing to disturb the Master's finding that the patents are valid."

The holding of the District Court was for the plaintiff that the defendants' system of licensing agreements *did constitute* an unreasonable restraint of trade. The defendants appealed to the Supreme Court, where the case was reversed, *United States* v. *Standard Oil Co., et al.* (1931) 283 U.S.

163, the present question being disposed of as follows, p. 181:

"Inasmuch as the Government did not appeal from
1164 these findings, we need not consider any of the issues concerning the validity or scope of the cracking patents, and we accept the finding that they were acquired in good faith. Neither the findings nor the evidence on this issue supply any ground for invalidating the contracts."

The foregoing cases, though not controlling, certainly afford a measure of support to the Government in this case. In addition, there have been a number of recent dicta in Supreme Court opinions which indicate rather clearly the present attitude of the Court on the question. These, too, are not conclusive, but that are, it is submitted, entitled to great weigh.

For example, in *Ethyl Gasoline Corp.* v. *United States* (1940) 309 U. S. 436, an antitrust proceeding in which the defendants were found to have extended their patent monopoly illegally in violation of the Sherman Act, Mr. Justice Stone said, p. 456:

"In considering that question we assume the validity of the patents, *which is not questioned here.*" (Emphasis supplied.)

Again in *United States* v. *Masonite Corp.* (1942) 316 U.S. 265, which involved a conspiracy in restraint of trade in the marketing of patented hardboard, Mr. Justice Douglas said, p. 276:

"We assume *arguendo* that the patents in ques-
1165 tion, owned by Masonite, are valid."

It is a fair inference from the language used in these two opinions, as of the language of Mr. Justice Brandeis in the *Standard Oil Co.* case, discussed *supra*, that had the question of validity been raised, the Supreme Court would have considered evidence relating thereto. Certainly had Mr. Justice Stone been persuaded to the defendants' contention here, he would have said: "which *may not be* questioned here", instead of, "which *is not* questioned here".

A still more positive expression of the Supreme Court's attitude appears in the recent case of *United States* v. *Univis Lens Co., Inc. et al.* (1942) 316 U. S. 241. In holding that the defendants had violated the Sherman Act by using their limited patent monopolies to control general trade in lenses, the Chief Justice said, p. 248:

"The Government has not put in issue the validity of the lens patents, but argues that their scope does not extend

beyond the structure of the lens blanks and consequently affords no basis for the Corporation's restrictions on the sale of the finished lenses which the wholesalers and finishing retailers fashion from blanks purchased from the Lens Company. . . .

"The record gives no account of the prior art and does not provide us with other material to which, if available, resort might *appropriately* be had in determining the nature of an alleged invention and the *validity* and *scope* of
1166 the patent claims founded upon it." (Emphasis supplied.)

This statement by the Supreme Court is too recent and too pointed to leave much room for argument. In effect the court says that *it is appropriate* in an antitrust proceeding brought by the Government to show that the defendants' combination is illegal because based on *invalid* patents. When read with the Court's still more recent declaration in the *Sola Electric Co.* case, discussed *supra*, that even in a private litigation local rules of estoppel must yield "to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements," it is submitted, there can be no question left. When the Government acts in its capacity as sovereign, it too is not to be thwarted by "local rules of estoppel". *United States* v. *American Bell Telephone Co.* (1897) 167 U. S. 224, 264-5. And see, *United States* v. *Socony-Vacuum Oil Co.* (1940) 310 U. S. 150, 225-8.

Point II

The present proceeding is not a collateral attack to set aside or to nullify the defendants' patents, but is a direct attack upon the defendants' price-fixing activities, in which the *fact* of the invalidity of the defendants' patents may be shown.

The argument here is an elaboration of the first point of distinction noted above, which differentiates this
1167 case from the *Telephone Company* cases. There the action was brought by the Attorney General out of a clear sky, so to speak, to cancel or set aside the patents in suit. Here the action is to enforce the Sherman Act, and the *fact* of patent invalidity is to be shown only incidentally. The present action is not one brought to cancel the defendants' patents.

The prayer of the present complaint, as amended on October 30, 1942, asks the Court as one item of relief to enjoin the defendants (a) from bringing any action for infringement of their patents, or (b) from collecting royal-

ties, "until it is made to appear to the Court that all improper practices have been abandoned and the consequences of all misuses of patents have been dissipated." This is a far different thing than to ask that the defendants' patents be cancelled. It is based on the simple proposition that if the defendants have used their patents illegally to restrain trade, as alleged, they are not entitled to relief in equity. As the matter was put by Chief Justice Stone in *Morton Salt Co.* v. *Suppiger Co.* (1942) 314 U. S. 488 at 491:

"But a patent affords no immunity for a monopoly not within the grant, . . . and the use of it to suppress competition in the sale of an unpatented article may deprive the patentee of the aid of a court of equity to restrain an alleged infringement by one who is a competitor."

The defendants, in their Statement of Points and
1168 Authorities, base their argument on the broad proposition that the only possible way of putting the validity of a patent in issue as respects "novelty, utility, and form" is as provided by statute. Presumably the provisions of statute they have in mind are R. S. Sec. 4920, specifying how an alleged infringer must plead certain defenses and, R. S. Sec. 4918, setting up the procedure whereby an interference suit may be brought. Aside from these two means of raising the question of validity, it is their contention that the "determination" of the Patent Office is "final and conclusive."

Needless to say the authorities cited by the defendants do not support their argument. The first, *United States* v. *American Bell Telephone Co.* (1897) 167 U. S. 224, has already been considered; it held simply that, apart from statute, the United States may cancel or set aside a patent for fraud, a matter not now in issue here. It recognized, moreover, that, apart from statute, the United States might set aside one of its patents whenever "necessary in order to enable it to discharge its obligations to the public." Thus, so far from being authority for the limitation suggested by the defendant, the *Telephone Company* case is authority for the exact opposite.

Only two other patent cases are cited by the defendants
under Point I. The first, *Butterworth* v. *Hoe* (1884)
1169 112 U. S. 50, decided merely that the Secretary of the Interior had no authority to review the determinations of the Patent Office, a matter about which there should be no controversy here. The second, *Wayne Mfg. Co.* v. *Coffield Motor Washer Co.* (C.C.A. 8th, 1915) 227 Fed. 987, was an infringement suit based on a reissued patent.

The principal question sought to be raised by the defendant was as to the sufficiency of the oath. On this point the court said, p. 991: "This patent recites that the required oath was taken, and this, in the absence of fraud, is conclusive, in a suit against an infringer."

These are obviously very slender authorities upon which to argue that the United States may not in an antitrust case show that the defendants' patents are invalid. The opinion in the *Wayne* case is based in part on some very broad language by Mr. Justice Miller in *Mahn* v. *Harwood* (1884) 112 U. S. 354 to the effect that a patent "cannot be impeached collaterally." No mention is made that Mr. Justice Miller dissented in *Mahn v. Harwood.*

The majority opinion in *Mahn* v. *Harwood, supra,* stated, contrary to the defendants' contention, that "the statutory defenses are not the only defenses which can be made against a patent." The court then proceeded to hold, on the facts before it, that the plaintiff's reissue patent was void. It is now well established in infringement
1170 suits that patents may be declared invalid not only where it is apparent on the face of the patent that the Patent Office has erred, but where in the court's view the claims do not describe an invention, and this regardless of the fact that such defenses are not mentioned in R. S. Sec. 4920. *Slawson* v. *Grand Street R.R. Co.* (1882) 107 U. S. 649; *Oswald* v. *Bloomfield* (7th Circ. 1940) 113 F. (2d) 377.

It is also well settled that the "determinations" of the Patent Office are not "final and conclusive" on the question whether the patent describes the alleged invention in properly clear and concise terms. *General Electric Co.* v. *Wabash Appliance Corp.* (1938) 304 U. S. 364. Such matters are always open to question in infringement cases, notwithstanding they are not mentioned in R. S. Sec. 4920. These cases and those mentioned in the last paragraph are all authority for the proposition, to be discussed in greater detail in Point III, that the determinations of the Patent Office are not "final and conclusive", except possibly as they concern the regularity of matters of procedure before the Patent Office.

The relevance of these infringement cases here is that they afford illustration of the point that a distinction is to be drawn between an action to cancel a patent and one where the fact of invalidity is shown incidentally. No one may sue to cancel a patent, as for example upon a
1171 showing of fraud, except the Government. *Mowry* v. *Whitney* (1871) 14 Wall. 434. But the *fact* of invalidity may be freely shown by the alleged infringer and,

it is submitted, by any party, including the Government, when validity becomes a material issue, as in the present case.

One of the leading cases illustrating this point is *Pratt* v. *Paris Gas Light & Coke Co.* (1897) 168 U. S. 255. That was a suit on a contract, brought in a state court, to recover the cost of a gas works erected by the plaintiff in accordance with a certain patent. At the trial the defendant was permitted to show that the plaintiff's patent was an infringement of a prior patent and void. The Federal question presented, on the appeal to the Supreme Court, was whether the state court might properly hear evidence on the point of patent invalidity. In sustaining the lower court, Mr. Justice Brown said, pp. 258-9:

"Had the action been in the Circuit Court of the United States defendant would obviously have had the right to show that the plaintiffs' patents were void; and an infringement upon prior patents as an excuse for rescinding the contract . . .

"The state court had jurisdiction both of the parties and the subject-matter as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of these defenses, the defendant claimed the invalidity of a certain patent. . . . There is a
1172 clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such questions is not beyond the competency of the state tribunal."

Further illustration is afforded by the case of *Becher* v. *Contoure Laboratories, Inc., et al.* (1929) 279 U. S. 388, 391-2. There an action was brought in a state court to have Becher declared trustee *ex maleficio* of a patent upon the ground that not Becher but the plaintiff was the true inventor. This action was then brought in the District Court by Becher to enjoin the state action for the reason that to permit the fact to be shown that Becher was not the first inventor would be to sanction a collateral attack which would show the patent to be invalid. This argument was effectively answered by Mr. Justice Holmes in these words at p. 391:

"That decrees validating or invalidating patents belong to the courts of the United States does not give sacrosanc-

tity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is true an important patent is void—and, although
1173 there is language here and there that seems to suggest it, we can see no ground for giving less effect to proof of such a fact than to any other. A party may go into a suit estopped as to a vital fact by covenant. We see no sufficient reason for denying that he may be equally estopped by a judgment."

These cases would seem to establish the point that a party may show the *fact* of patent invalidity, in any case where that *fact* would be material to the litigation. Certainly the right to do so is not limited to those cases only where it is conferred by statute, as the defendants contend. While these cases arose between private individuals, there is no substantial reason why they should not apply equally where the Government is a party. It is true the Government may not intervene to cancel an invalid patent, merely to aid one individual at the expense of another; the defect there is lack of power; but, where the action is properly brought, any seeming impropriety in showing the true facts, where they are material, must yield in the broad interest of the public welfare.

One of the cases to illustrate this point most clearly is *United States* v. *Bradford*, 148 Fed. 413 (1905); (aff'd. C.C.A. 5th, 152 Fed. 616; cert. den. 206 U.S. 563). There an indictment was returned charging that the defendants had conspired to defraud the United States by obtaining the issuance of land-scrip in satisfaction of a confirmed
1174 private land claim, which scrip, when isused, could be located on public lands of the United States. The indictment further charged that the conspiracy was carried out by fraudulently procuring the appointment of an administrator of the succession of the true claimant on whose application the scrip was issued. The defendants objected that the case involved a collateral attack on the appointment of the administrator, which attack the Government must be debarred from making. In denying this contention the court said (p. 426):

"If, in a civil suit, the party seeks to attack collaterally the appointment of an administrator, he is told that his remedy is a direct attack in the court which made the appointment. But in this cause no remedy has been or could be suggested to the Government. It has not been even pretended that the Government would have had a standing in

a civil suit in the court of Washington parish to ask the annulment of the appointment. The proposition means therefore that whenever a criminal fraud is committed on the United States, they are absolutely powerless to prosecute the offenders, if the fraud has been committed by means of a state court judgment. Such a proposition is self-refuting.

"But I repeat that there is no collateral attack on the appointment of the administrator involved in this cause. A collateral attack on the appointment of an administrator in a civil suit has invariably for its object his re-
1175 moval, or the denial or disregard of his authority, or the recovery of some property or property right. The appointment of the administrator McCants—such as it is—has in no manner whatever been disturbed by this prosecution or its result."

Finally, the Court's attention is again called to *Sola Electric Co.* v. *Jefferson Electric Co.* (1942) 317 U. S. 173, discussed *supra*, which, it must be stressed, was not an infringement proceeding, but a counterclaim raising some of the same questions of Sherman Act violation as are here presented. In refusing to allow the defendant to show that plaintiff's patent was invalid (and hence that plaintiff's activities were in violation of the Sherman Act), Judge Sparks for the lower court made this statement: "Generally speaking, appellant as licensee is estopped to deny the validity of the patent under which he is licensed. This is elemental, and the citation of authorities in its support is unnecessary. This counterclaim is really an effort to override that principle, and it is sufficient for us to say that we cannot approve the effort." *Jefferson Electric Co.* v. *Sola Electric Co.* (C.C.A. 7th, 1942) 125 F.(2d) 322 at 324.

1176 It was in reply to this language that the Chief Justice said: "Local rules of estoppal *which would fasten upon the public* as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful. . . ." (Emphasis supplied.) That is, the matter of paramount importance to the Court was that the public policy declared by the antitrust laws should not be defeated. It is very unlikely that the Supreme Court would now hold that, in a direct proceeding properly brought to enforce the Sherman Act, the Government may *not* show the same type of *facts* concerning patent invalidity as were allowed in the *Sola* case. To do so would "fasten upon the public" in this

case until 1954 the burden of an alleged illegal agreement in restraint of trade. .

Point III

Patents for inventions are merely *prima facie* valid, and the courts have always permitted a party in a proper case to show their actual invalidity in the respects mentioned in paragraph 46a of the complaint.

The defendants' effort to show that the "determinations" of the Patent Office are "final and conclusive" must prove futile; all of the authorities are the other way, certainly as respects the matters raised by paragraph 46a
1177 of the complaint. It may be true that "determinations" concerning the regularity of patent office procedure; i. e. whether a proper inventor's oath was duly filed, the requisite fee paid, and so on, may not be inquired into collaterally, *Wayne Mfg. Co.* v. *Coffield Motor Washer Co.* (1915) 227 Fed. 987, discussed *supra.* But matters of that sort are not in issue here; the charges made in paragraph 46a deal with invalidity because of lack of invention, anticipation by prior use, publication or invention, lack of utility, failure to state claims with proper clearness and conciseness, and, on such matters, the patents are at most only *prima facie* valid.

Consultation of the Congressional debates fails to disclose any intention to make patents "final and conclusive" when issued by the Patent Office. It does appear from Senator Ruggles' select committee report to the 24th Congress on April 28, 1836 (12 Cong. Debates, pt. 4, app. p. 101), that an effort was made to give them greater certainty. Therefore, patents had been issued somewhat casually as a mere ministerial act by the Secretary of State, or some other cabinet officer, with the result that a considerable number of the patents so issued were worthless and void, giving rise to a great number of patent suits. As said by Senator Ruggles: "The country becomes flooded with patent monopolies, embarrassing to bona fide
1178 patentees, whose right are thus invaded on all sides, and not less embarrassing to the community generally. . . ."

It is fair to say that the Act of 1836, therefore, was designed to meet this evil, primarily by setting up a patent office capable of stopping much of it at the sources. At the same time the bona fide patent holders' position was strengthened by requiring that the infringer plead specially all matters of anticipation, as is still provided by R. S. Sec. 4920, at least 30 days before trial. As said by the

Committee, p. 103: "The present law waits till infringements and frauds are consummated—nay, it even aids them; and then it offers an inadequate remedy for the injury, by giving an action for damages. It ought, rather, by refusing to grant interfering patents, to render prosecution unnecessary."

The court, in *Reckendorfer* v. *Faber* (1875) 92 U. S. 347, made it very clear, however, that the acts of the Commissioner of Patents were not to be final and conclusive. The patent before the court, one having to do with a combination drawing pencil and eraser, was held void for lack of invention. Mr. Justice Hunt stated the matter as follows, p. 351:

"Before the commissioner is authorized to issue a patent, it must appear to him that the claimant is justly entitled to a patent; i. e., that his art, machine, or manufacture, possesses all the qualities before mentioned. The commissioner must also be satisfied, that, if it possesses
1179 these qualities, it is sufficiently useful and sufficiently important to justify him in investing it with the *prima facie* respect arising from the governmental approval. . . . It is nowhere declared in the statute that the decision of the commissioner, as to the extent of the utility or importance of the improvement, shall be conclusive upon that point; . . ."

The case of *Dunbar* v. *Myers* (1876) 94 U. S. 187 affords further illlustration. The question there was whether the addition of a second deflecting plate on a circular saw constituted invention. Testimony of various witnesses was introduced to show that the device was old and that the addition of an extra deflecting plate did not involve invention. In dismissing the case, the court said, p. 196:

"Persons seeking redress for the unlawful use of letters-patent must allege and prove that they, or those under whom they claim, are the original and first inventors of the alleged improvement, and that the letters-patent have been infringed by the party against whom the suit is brought. *Prima facie* support to the first requirement is derived from the patent, if it is introduced in evidence and is in due form, provided the alleged improvement is one which in its nature is patentable. Evidence to overcome that presumption, however, is always admissible, if due notice is given by the opposite party, as required by law; and the question is now well settled, that the question
1180 whether the alleged improvement is or is not patentable, is in an equity suit, a question for the court."

In the often cited case of *Slawson* v. *Grand Street R. R. Co.* (1882) 107 U. S. 649, the question was whether it constituted invention to put a second glass in a fare box, so that the passenger, as well as the operator, could see what fare was paid. The lower court discissed the case on the ground that the patent did not disclose invention and was void, although the defendant had not pleaded the particular point. The Supreme Court in affirming this holding made the following comment, p. 652:

"We think the practice thus sanctioned is not unfair or unjust to the complainant in a suit brought on letters-patent. If they are void because the device or contrivance described therein is not patentable, it is the duty of the court to dismiss the case on that ground, whether the defence be made or not. *It would ill become a court of equity* to render a money decree in his favor for the infringement of letters-patent which are void on their face for want of invention." (Emphasis supplied.)

It is not necessary to cite further cases; they are collected in 48 *Corpus Juris*, (1929) Sec. 258, where it is said: "The decision of the patent office is not conclusive upon question of patentability, such as novelty, utility, invention, prior use or sale, and abandonment." To this list
1181 may be added the equally well settled point that the "determinations" of the Patent Office are not "final and conclusive" on the question whether the claims describe the alleged invention in properly clear and concise terms. *General Electric Co.* v. *Wabash Appliance Corp.* (1938) 304 U. S. 364.

Further evidence of the *prima facie* character of a patent is shown by a consideration of the purpose and effect of the Act of June 25, 1910 (35 U. S. C. A., Sec. 68), by which jurisdiction was conferred upon the Court of Claims to hear cases when the United States is itself an alleged infringer. Prior to this statute recovery could not be had against the United States, except as it was possible to prove an implied contract. *United States* v. *Burns* (1870) 12 Wall. 246. As a consequence a great many special bills were being presented to Congress for relief. It was to put such matters on an orderly basis that the statute was passed.

This statute provides that: "In any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in this chapter, or otherwise." This is a very broad provision; it neither recognizes that

patents are "final and conclusive" nor suggests that there is any impropriety in giving the Government full right to question validity in a proper case.

1182 The debate before Congress when the statute was passed had chiefly to do with whether Congress or the Court of Claims was the better tribunal to dispose of such cases. The provision just quoted was inserted more or less as a matter of course, not as one conferring special rights, but to make sure that the Government would not be denied all usual defences in a matter concerning its "proprietary" interests. That Congress considered all patents to be merely *prima facie* in character is apparent from the comments of Mr. Lenroot in the course of the debate where he said:

"Mr. LENROOT. Mr. Chairman, it is not, as I have said two or three times on the floor during this debate—it is not competent, in my opinion, for Congress to settle these questions of compensation for torts to patentees. In the first place, the first question in nine cases out of ten of this character is, Has the inventor a valid patent? The patent granted in the first instance gives the inventor only a *prima facie* right. Anyone can go into court and test the validity of a patent because of a prior patent covering the same subject, or for many other reasons. That is the first question and a most serious question. Then, if that be decided in favor of the inventor, comes the question of damages, and in every case the damages are unliquidated. These are not easy of ascertainment. * * * I submit that the Committee on Claims is not competent, with the limited time at its disposal, to dispose of and decide these ques-

1183 tions, the validity of the patents and the amount of damages which should be awarded. 45 Cong. Rec. Pt. 8, p. 8771, (June 12, 1910)."

The defendants have relied upon a number of land cases in their statement of Points and Authorities. For example, in *United States* v. *Coronado Beach Co.* (1920) 255 U.S. 472, a condemnation case, the Government sought to question and limit the extent of the original grant. In refusing to give weight to such a contention the court, by Mr. Justice Holmes, said, p. 488:

"It is said that field notes, not put in evidence at the trial, show that the deep water line was not surveyed, but was taken from the Coast Survey maps. But however arrived at it was adopted by the United States for its grant and it cannot now be collaterally impeached."

It is submitted that holdings of this sort have little relevance to the present discussion. The function of the Govern-

ment in issuing deeds for land is very different from that involved in passing upon applications for patents for inventions. The facts necessary to a determination in the land cases can be ascertained in advance and the grant should be final, just as are the determinations of the Patent Office in passing upon the procedural aspects involved in issuing a patent for an invention. But the matters in issue here: i.e., as to whether the purported invention involves that "flash of genius" which entitles it to recognition, whether some one else in this country may have first conceived the idea and put it in practice, whether some
1184 publication, somewhere, may have disclosed the idea, whether the invention actually possesses utility, whether the patent as claimed by the inventor properly describes his invention, are all matters on which in varying degrees the Patent Office is neither equipped nor expected to make a final determination.

The upshot of the matter is that so far from being "final and conclusive" letters-patent are merely *prima facie* valid. Being entitled to nothing more than a presumption of fact, the actual validity of the patent is always subject to examination before the courts. As the Supreme Court said in *Palmer* v. *Corning* (1895) 156 U.S. 342:

"There is no doubt that in this, as in all similar cases, the letters patent are *prima facie* evidence that the device was patentable. Still, we are always required, with this presumption in mind, to examine the question of invention vel non upon its merits in each particular case."

It is well established, moreover, that the presumption of validity can on occasion be rather easily dispelled. Of course, where a showing is made that the prior art was carefully and fully reviewed by the Patent Office before the patent was issued, the presumption of validity is given added weight. In *Smokador Mfg. Co.* v. *Tubular Products Co.* (C.C.A. 2, 1929) 31 F. (2d) 255, where that was the situation, Judge Hand said, p. 257:

"All the patents of the prior art which we have discussed were cited against the patent in suit during
1185 its progress through the Patent Office, and it was granted over these references. The regular presumption of validity accompanying a patent thus gains added weight."

But the converse is equally true, namely, that the presumption of validity is greatly weakened or disappears altogether where it appears that the facts relied upon in the infringement suit to show anticipation of the patent sued upon were not before the Patent Office at the time of grant-

ing the patent. One of the leading cases on this point is *American Soda Fountain Co.* v. *Sample* (C.C.A. 3, 1904) 130 Fed. 145, where the court said, pp. 149-150:

"We do not agree with the contention that the fact that the file wrapper discloses the patent to have been granted as first applied for, without any references, adds any force to the presumption of novelty arising from the grant. On the contrary, *we think the force of that presumption is much diminished, if not destroyed by the lack of any reference by the Examiner to, or consideration of, the 'Clark' patents. It does not seem likely that an expert examiner would pass them by, without notice or consideration, if they had been called to his attention. We feel compelled, therefore, to the conclusion, that the first and fifth claims of the invention are invalid for want of patentable novelty.*" [Italics supplied.]

In *International Flatstub Check Book Co.* v. *Young & Selden Co.* (C.C.A. 4, 1922) 284 Fed. 831, the court
1186 described the effect of the failure of the Patent Office to cite another patent, as follows, p. 832:

"The presumption of validity from the issuance of the patent ought generally to have great weight, but in this case *it is greatly weakened by the fact that the file wrapper does not contain any reference to the Loewenbach patent. This fact indicates that the Loewenbach patent was overlooked by the Patent Office.*" [Italics supplied.]

See also *Maibohm v. RCA Victor Co.*, 89 F. (2d) 317, 320 (C.C.A. 4, 1937).

In *Westinghouse Electric & Mfg. Co.* v. *Toledo, P. C. & L. Ry. Co.* (C.C.A. 6, 1909) 172 Fed. 371, the court stated, p. 392:

"It should be noted that it appears from the record that neither Wightman nor the Potter patent was cited to the examiner in the Patent Office and were overlooked by him. This circumstance affects the presumption in favor of the validity of the patent from its issuance."

See also *McClintock* v. *Gleason*, 94 F. (2d) 115 (C.C.A. 9, 1938.)

In *Mettler* v. *Peabody Engineering Corp.* (C.C.A. 9, 1935) 77 Fed. 56, the court described the effect of a showing of anticipation not considered by the Patent Office as follows, p. 58:

"The presumption of validity which attends the issuance of letters patent by the patent office is overcome in this case by the clear evidence of anticipation in the prior art
1187 which was not cited or considered by the Patent Office when the application for appellant's patent was passed on."

See also *Alexander Anderson, Inc.* v. *Eastman*, 16 F. Supp. 513, 515 (D.C. S.D. Calif., 1936).

Where the evidence shows that the matter covered by the patent in the infringement suit has been in public use for some time prior to the date of application, the presumption that the patentee was the prior inventor no longer exists, and the burden is on him to show that he is the original inventor. This principle is expressed in *Graham Paper Co.* v. *International Paper Co.* (C.C.A. 8, 1931) 46 F. (2d) 881 as follows, p. 885:

"That there is a presumption of validity, utility, and invention from the fact that a patent has been issued by the Patent Office is well settled. *Tropic-Aire, Inc.* v. *Sears, Roebuck & Co.* (C.C.A.) 44 F. (2d) 580. How strong this presumption of validity may be is debatable, in view of the multiplicity of patents being issued. It is referred to by the trial court in its opinion as follows: 'The case is made troublesome because of the many patents in evidence, which together constitute a glaring example of issuing patents for the merest shade or shadow of inventive advancement. The situation casts doubt upon the wisdom and logical truth of ascribing presumptive validity in even a close case, from the fact of the grant. This statement does not refer to Patent No. 1,377,566, so particularly, because I am constrained to the view, if I follow the evidence offered, 1188 as I must, that the above patent is valid.' We have considerable sympathy with the trial court's expression on this subject. If patents are to be issued for every trifling device, the presumption of validity will be greatly weakened. The Supreme Court has referred to this in *Atlantic Works* v. *Brady*, 107 U.S. 192, 2 S. Ct. 225, 27 L. Ed. 438; also in *Dunbar* v. *Meyers*, 94 U.S. 187, 24 L. Ed. 34. The Supreme Court in *Eibel Co.* v. *Paper Co.*, 261 U.S. 45, 63, 43 S. Ct. 322, 328, 67 L. Ed. 523, said: 'In administering the patent law, the court first looks into the art, to find what the real merit of the alleged discovery or invention is, and whether it has advanced the art substantially. If it has done so, then the court is liberal in its construction of the patent, to secure to the inventor the reward he deserves.'"

In *Carson Inv. Co.* v. *Anaconda Copper Mining Co.* (D.C. Mont. 1927), 17 F. (2d) 815, rev. other grounds 26 F. (2d) 651 (C.C.A. 9, 1928), (holding on reversal that fraud could not be set up as a defense in an infringement suit) there was an element of fraud in the case in addition to the fact that the prior art had not been considered in

the Patent Office and the court made the following statement as to the effect of these circumstances on the monopoly, pp. 826-27:

"A principle not urged, and yet which might have been of weight, is that patents which issue without due consideration of the prior art are entitled to little, if any,
1189 presumption of validity. See *American, etc., Co.* v. *Sample* (C.C.A.) 130 F. 149. To which, is ventured, might be added those patents issued because of misrepresentation, fraud, or mistake. As in frauds generally, proof of it ought to shift the burden of evidence. Although none but government can maintain suit to cancel the patent, any of the public from whose domain the intangible right in common possession is sought to be monopolized should be free to expose the fraud to that end."

Point IV

Assuming that in an ordinary antitrust proceeding the Government would be estopped to question the validity of the defendants' patents, nevertheless, on the facts of this case, the defendants are themselves estopped to insist upon the point.

In the foregoing discussion it has been pointed out, first, that the United States did not bring this action as a mere volunteer, but in its sovereign capacity to enforce the antitrust laws. Second, in such a proceeding, where the purpose is not to have the defendants' patents declared invalid, the *fact* of their invalidity may be shown incidentally to disprove the defendants' plea that they are privileged to fix prices under "valid patent monopolies." Thirdly, the established cases have been discussed showing that the determinations of the Patent Office upon matters of patentability are never "final and conclusive"; the issuance
1190 of a patent gives rise merely to a *prima facie* presumption of fact.

It is submitted that the right of the plaintiff in an antitrust case to introduce evidence of patent invalidity is clearly established. Assuming, however, for purposes of argument, that a contrary view were to be taken, it is submitted that upon the admitted facts of this case the defendants are in no position to insist upon the point. This is an action in equity and, as shown above, the defendants' argument that the Government may not dispute patent validity rests, at best, on certain notions of propriety; as a matter of substantive law there can be no question that the defendants may not assert a monopoly based on invalid paper

patents. It is contended here that before considerations of supposed propriety will be allowed to defeat substantial public rights, it must most certainly appear that the defendants have themselves observed the proprieties.

Attention is first invited to the nature of a prosecution for a patent before the Patent Office. It is an *ex parte* proceeding. Moreover, the sporting theory of justice prevails; the applicant makes a showing at arms length that the requirements of R. S. 4886 have been met. It is then for the patent examiner, upon such study as he can make of the application and of the prior art, to determine whether a patent should issue. The proprieties do not require that any references to the prior art known to the applicant be submitted to the examiner.

1191 A patent issued in such circumstances could not well be "final and conclusive" upon matters of patentability. The patent examiner is neither equipped to make the searching examination which would be necessary, nor could business be done if he took the time that a full examination of prior art, utility, and so on would require. The Commissioner issues a patent which is *prima facie* valid. *Reckendorfer* v. *Faber* (1875) 92 U.S. 347. And, in doing so, he relies heavily upon the oath and the affidavits submitted by the applicant himself. Without the inventor's oath the patent is void. *Kennedy* v. *Hazelton* (1888) 128 U.S. 667.

By his oath, the inventor assures the Patent Office that he does verily believe that he is the original and first inventor of the article for which he solicits a patent, and that he does not know and does not believe that the same was ever before known or used. In addition, to satisfy the statutory requirement that the article is both new and useful, 35 U.S.C.A. Sec. 31, it is usual to show by affidavit the commercial success of the product. In the case of the Roos "foam" patent, No. 2,017,022, patent counsel submitted an affidavit stating that more than 3,000,000,000 square feet of wallboard embodying the Roos invention had been manufactured and sold during the preceding ten-year period. It was further pointed out that seven manufacturers, that is, the present defendant or their predecessors, had taken licenses, and were producing the

1192 board in large quantities.

This was an impressive showing and no doubt influenced the Patent Office. It is well established that evidence of commercial success may properly be considered in such case. The following excerpt from *Paramount Publix*

Corporation v. *American Tri-Ergon Corp.* (1935) 294 U.S. 464, Mr. Justice Stone writing for the court, states the accepted reasoning upon which the rule is based, p. 474:

"Evidence of great utility of a method or device, it is true, may in some circumstances be accepted as evidence of invention. Where the method or device satisfied an old and recognized want, invention is to be inferred, rather than the exercise of mechanical skill. For mere skill of the art would normally have been called into action by the generally known want."

The point to be noted here is that the Patent Office had no practical means of checking the Roos figures or the Roos affidavits; it evidently assumed them to be true. Moreover, no mention was made to the Patent Office that U.S.G. and its above mentioned licensees comprised *all* of the manufacturers east of the Rocky Mountains and that the license agreements under which they operated provided for price fixing and had the effect, here alleged, of driving unpatented board from the market.

Such matters, if known to the Patent Office, might 1193 obviously have had a bearing upon its determinations. *McClain* v. *Ortmayer* (1891) 141 U.S. 419; *Thropp's Sons Co.* v. *Seiberling* (1924) 264 U. S. 320. In other words the primary purpose of the industry in adopting the Roos patents may not have been so much because of their novelty or utility as because they afforded a ready means of bringing erstwhile competitors together in a combination in restraint of trade. Such was the situation before the court in *American Equipment Co.* v. *Tuthill* (C.C.A. 7th, 1934) 69 F. (2d) 406, at p. 409, where Judge Evans said:

"The oral testimony of different witnesses, who spoke for different licensees, leaves no doubt as to the intent of the contracting parties. They entered into the agreement to control prices and regulate the number of brick each should manufacture, not to secure the advantages which flowed from the use of the patented machine or article. It is possible that both results were desired, but the dominant thought, purpose, and plan were to control brick production and brick prices in the Chicago area."

In other words the point can be made in this case that some of the data furnished the Patent Office as a basis for issuing Roos patent, No. 2,017,022, may have been the result of the present combination. It would be a strange perversion of law if the defendants could combine to provide the evidence of novelty and utility upon which a patent is

issued, and then be allowed to estop the Government
1194 from showing the true facts in an antitrust proceeding, since it had issued the patents in reliance on that evidence.

There is an ancient principle of law that: "An estoppel against an estoppel, as Lord Coke says, setteth the matter at large." 11 Am. and Eng. Ency. of Law (2d ed.) 392. In the light of this principle, it would seem that whenever the Patent Office has issued a patent in reliance upon the oath and affidavits of the applicant, he and his assigns should be estopped to insist as against the Government that his patent is "final and conclusive" upon the matters as represented to be true. That, in fact, is the very purpose and significance of the inventor's oath; the defendants' contention, that the oath loses its significance the moment the patent issues, has no support in either reason or authority.

The case of *Commonwealth* v. *Brierly* (1908) 37 Pa. Superior Ct. 496, decided by a unanimous court, affords a good illustration. There a patent for land was issued by the commonwealth upon an application alleging that the land was vacant. Subsequently the commonwealth acquired the land for forestry purposes from a holder by a prior patent, also issued by the commonwealth. The action was for trespass to try the title, it being contended by the defendant that because his warrant and patent were issued to him by the commonwealth, for a valuable consideration, the latter was estopped from afterwards acquiring, by purchase, the older title and setting it up to
1195 defeat its own later grant. To this the court said, pp. 500-1:

"Upon the filing of such an application, the land laws of the state neither required nor authorized an independent investigation by the land office to ascertain the truth of the basic fact asserted in it. The warrant issued, as of course, and the responsibility for the result that, if the land had been previously appropriated no title passed, was left and properly left to rest with the applicant who had voluntarily assumed it. Under such circumstances we cannot see how Strouse could have successfully invoked the aid of the doctrine of equitable estoppel to ward off the consequences *that necessarily flowed from his own mistaken or false representation* that the land applied for was vacant land. If he could not, the defendant, whose rights in this respect rise no higher than his, cannot." [Italics supplied.]

It is true that in a patent case the Patent Office does make an investigation. But it is even more true that, with

the thousands of applications and the increasing intricacy of alleged inventions, it becomes less and less possible to make a "conclusive" investigation of utility or patentability before a patent is issued. Moreover, it is literally *impossible* to check up on matters of anticipation. The Patent Office cannot be expected to say finally that someone, somewhere, may not have first conceived the idea in question and reduced it to practice. Obviously the examiner must
1196 rely on the applicant's oath and representations in issuing a patent. Under such circumstances, it is submitted, the inventor may not invoke the doctrine of equitable estoppel against the Government, as said in the *Brierly* case, *supra*, "to ward off the consequences that necessarily flowed from his own mistaken or false representations."

But the argument does not end there. The usual check upon the determinations of the Patent Office is the infringement suit. In ordinary course the invalid patent will either not be used at all by the inventor, or, if used, will be quickly challenged by others interested in the art. So obvious was this to the court in *United States* v. *Bell Telephone Company* (1897) 167 U.S. 224, 266, discussed *supra*, that it did not consider the point that the Government might *properly* bring an action to relieve "the public of the burden of a monopoly charged to have been wrongfully created" as sufficiently important to discuss. The matter would be disposed of in private litigation. Since R. S. Sec. 4920 fully recognized the rights of an alleged infringer, the court reasoned that there was no occasion for the Government "to maintain a suit in equity to cancel that against which the individual has a perfect legal defence available in any action brought by or against him."

In this case, however, the five named patents have never been litigated. In fact, it is provided in each of the
1197 license agreements that the licensees, who with U.S.G. comprise all the manufacturers east of the Rocky Mountains, *will not contest* the validity of the U.S.G. patents. By the October, 1929, agreements, moverover, the licensees, in addition to acknowledging the validity of the patents already issued, purport to acknowledge the validity "of any letters patent which may be granted or issued for or upon said applications." (See, Complaint, p. 75.) It was stated by counsel for the defendants before the court at the argument on October 15, 1942, that no reason was apparent to him why the agreements went so far. (Transcript, October 15, 1942, p. 155)

Not only, therefore, has the defendant U.S.G. asked the Government to issue the patents in suit upon its representations of fact, but it has combined with the licensee defendants to stop any normal test of their validity. Of course it is true that anyone interested might if he saw fit infringe one or more of the patents in suit and so provoke a test. But the answer is first that as a matter of practical business sense no one is going to hazard the thousands of dollars necessary to make an effective challenge against a powerful combination carefully fenced in behind, not one, but many patents in the art.

The better answer is to point out that, even were a test by infringement suit a practicable possibility, still the defendants do not appear in a favorable light before an equity court. Assuming that they have *only partially*
1198 closed the door to a fair test of the validity of their patents, by what standard of propriety do they now demand that the Government, in the enforcement of the Antitrust laws, should be wholly estopped to set up the true facts. It is submitted that the shoe is on the other foot, the defendants have estopped themselves to insist that the Government is estopped, and the matter is now at large.

The policy which should prevail in the situation under consideration would seem to be that which was expressed by the Supreme Court in *Pope Mfg. Co.* v. *Gormully* (1892) 144 U.S. 224, where it refused to enforce a contract whereby the defendant had agreed not to dispute numerous patents of a licensor after the license was terminated. There the court said, p. 234:

"*It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly;* and it is a serious question whether public policy permits a man to barter away beforehand his right to defend unjust actions or classes of actions, though, in an individual case, he may doubtless assent that a judgment be rendered against him, even without notice." [Italics supplied.]

Defendants' agreements not to contest the validity of patents already issued may be valid when viewed singly and in the abstract. When taken together and con-
1199 sidered in the light of the allegations of the present complaint, it is submitted they are void as being against public policy. Their agreement not to contest the validity of patents if and when issued on pending applications, which in this case refers to the three Roos "foam"

patents, is plainly void. Agreements of that kind, designed to build a monopoly regardless of the true facts, estop the defendants from objecting to the introduction of evidence by the Government to show the actual truth of the matter.

CONCLUSION

For the reasons above stated, it is respectfully submitted, that the defendants' motion to strike paragraph 46 (a) of the complaint, or, in the alternative, for partial judgment upon the issue framed by that paragraph and paragraph 35 of the U.S.G. answer, should be denied.

ROSCOE T. STEFFEN,
EDWARD KNUFF,
Special Assistants to the Attorney General.

WENDELL BERGE,
Assistant Attorney General.

October 18, 1943.

1200 Justice STEPHENS. You may call the next witness.

Mr. KNUFF. May it please the Court, before I call the next witness, Mr. Steffen has been ill ever since the Court has adjourned. He talked to my wife yesterday on the long distance telephone. His temperature has subsided somewhat, and he expects to be in Washington sometime today. However, I will proceed with the case.

Justice STEPHENS. You may do so, Mr. Knuff.

Mr. KNUFF. May it please the Court further, in view of the fact that some of the Government's exhibits are on very thin paper and are liable to become torn or mutilated, we would like to have permission of the Court to substitute, in lieu of the original, a photostatic copy thereof. We have the originals in Court, we will show the originals to counsel for the defendants, but we would like to have a photostat substituted.

I assume that counsel for the defendants can have no objection to that.

Mr. JOHNSTON. If the Court please, in doing that I would suggest that we have them compared by the reporter, because I have withdrawn the exhibits and have had photostatic copies made of them as they were introduced, so I would be sure they were the same.

Mr. KNUFF. We will substitute, at the time of the offering of the exhibit, the photostat itself. In other

1201 words, there will be no opportunity for any exhibit to be missing at all. We will substitute the photostat at the time we offer the exhibit.

Justice STEPHENS. What is the nature of these fragile papers?

Mr. KNUFF. Onion skin paper, Your Honor. We don't think this case will ever have to be tried again, but if it does we would like to have the papers in as good condition as we can possibly have.

Justice STEPHENS. It seems to the Court, Mr. Knuff, that no original exhibit, at least until after the case is finally disposed of, ought to be taken out of the possession of the Court. Of course, it ought not to be mutilated or thumbed over to the point where its original condition would be destroyed, but it seems to us that no original exhibit should be withdrawn from the custody of the Court until the case is finally disposed of. Of course, there are some occasions on which, after a case has been finally disposed of, exhibits which are necessary to the files of the parties are withdrawn and returned. But it would seem to us that the better practice would be for you to introduce your onion skin exhibit and file a photostat at the same time, with the understanding that both will remain in the record, but that the Judges and the Court Reporter and counsel will, so far as possible, use only the photostat, so as to preserve the originals.

1202 Mr. KNUFF. Offhand, I can't say that I object to that, but I will say to the Court that inadvertently I have violated that. I have taken the originals back to my office. It was a mistake of the head, however, and not of the heart.

Justice STEPHENS. The Court doesn't mean to suggest that it doesn't trust the officers of the Court. It is customary for counsel in the case to withdraw from the possession of the Court Reporter, during the trial, an original exhibit. There is no question about that, Mr. Knuff, at all. But the point was that we thought your proposal was that the originals should be introduced and then permanently withdrawn so that they would not come again into the custody of the Court, and that, I think, ought not to be done, and my colleagues agree with that.

Mr. KNUFF. I didn't mean to so indicate. We will at any time allow any attorney for the defendants to examine the originals at any time at all.

Justice STEPHENS. We think the originals ought all to remain in the custody of an officer of the Court, but in

order that the originals may not be destroyed or impaired, a photostat should be filed also in respect of those originals that are in a fragile condition. And the Court Reporter, if necessary, may keep the originals in a separate folder or file, and use the photostats for regular use.

You may proceed.

1203 Mr. KNUFF. In view of the fact that I am working somewhat under a handicap and haven't anybody to hand me any papers, and I have to do it all myself, possibly I had better use this lectern today.

Mr. A. S. Blagden!

Thereupon, AUGUSTUS S. BLAGDEN, called as a witness for and on behalf of the United States, having been duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. KNUFF.

Q. Your name, sir, is Augustus S. Blagden?

A. Correct.

Q. Would you spell your last name for the benefit of the Court Reporter?

A. B-l-a-g-d-e-n.

Q. Where do you live, Mr. Blagden?

A. Ambler, Pennsylvania.

Q. And with what company are you now employed?

A. American Type Founders Company, Inc.

Q. American Type Founders, Inc.?

A. Yes.

Q. And where is that located?

A. Elizabeth, New Jersey.

Q. How long have you been so employed?

1204 A. It will be a year or a year and a half last June.

Q. In what capacity are you employed with the American Type Founders?

A. Assistant to the President.

Q. And what is the business of the American Type Founders?

A. Before the war, making type and printing presses; now, 95 per cent guns and gun parts.

Q. Your company is now engaged in war work?

A. Yes, sir.

Q. What are your duties?

A. Assisting in the management.

Q. You were subpoenaed as a Government witness in this case, were you not?

A. Yes, sir.

Q. And you were likewise subpoenaed as a witness to appear before the additional Grand Jury in the District of Columbia, were you not?

A. Yes, sir.

Q. Do you recall when that was?

A. About two years ago.

Q. Would you say it was in May, 1940?

A. Yes, sir, that is about right.

Q. Were you formerly connected, Mr. Blagden, with the gypsum industry?

1205 A. Yes, sir.

Q. When did you first enter the gypsum industry?

A. About 1923.

Q. And how long did you stay?

A. To 1928.

Q. With what company or companies were you associated?

A. The Beaver Board Company was the holding company of the Beaver Products Corporation.

Q. The Beaver Products Company was the operating company?

A. Yes.

Q. And the Beaver Board Company was the holding company, is that correct?

A. That is right.

Q. And what was your position with that company?

A. President.

Q. And you were President of those two companies from 1923 until 1928?

A. Right.

Q. What were your duties as President?

A. The general management of the company.

Q. Did the Beaver Products Company manufacture gypsum products?

A. Yes, sir.

Q. What products did they manufacture?

1206 A. Plaster and plaster wallboard.

Q. When did you start to manufacture plaster wallboard—and by "plaster wallboard", sir, I mean wallboard, plaster lath, and plasterboard?

A. That was being manufactured when I came in the company.

Q. And it was manufactured all during the time you were with the company?

A. Yes, sir.

Justice STEPHENS. Which was the holding company?

Mr. KNUFF. The Beaver Products Company, sir, as I understand it, is the operating company. The Beaver Board Company is the holding company. Mr. Blagden can correct me if I am wrong on that.

The WITNESS. That is right.

By Mr. KNUFF.

Q. Board was being made when you came with the company?

A. Yes, sir.

Q. What type edge did that board have, sir?

A. A folded edge.

Q. A folded edge?

A. Yes, sir.

Q. And where did you sell your products, over what area, I mean?

A. East of the Rocky Mountains.

1207 Q. Up and down the Atlantic Seaboard?

A. Yes, sir.

Q. And East of the Rocky Mountains?

A. Yes, sir.

Q. In all States?

A. Pretty much.

Q. What was the leading company in the industry at that time, sir?

A. U. S. Gypsum.

Q. And what position did your company occupy in the industry?

A. I should think we were the second.

Q. And do you know what position any other companies occupied, if you know?

A. I don't remember.

Q. All right. Now Mr. Blagden, were you familiar with other executives connected with other gypsum companies?

A. I met them from time to time.

Q. Will you name some of the companies and some of the executives with whom you were familiar?

A. The Certain-teed Products Company, Ebsary, and I don't remember any others.

Q. You have named Certain-teed and you have named Ebsary.

A. Yes, sir.

1208 Q. Was there a gypsum company known as the Atlantic Gypsum Company in business at that time?

A. The Atlantic were not making wallboard at that time.
Q. They were, however, in the gypsum business?
A. Yes, sir.
Q. Did you know a company by the name of American?
A. There was the American.
Q. Did you know of a company by the name of National?
A. Yes, they were just coming in.
Q. Did you know a company by the name of Niagara?
A. I don't remember that.
Q. You don't remember the name Niagara?
A. I am not sure.
Q. Is the name Reeb familiar to you?
A. Yes, sir; now I know, yes, sir.
Q. Did you know a company known as the Texas Cement Plaster Company?
A. That is right, yes, sir.
Q. Did you know a company by the name of Universal?
A. Yes, sir.
Q. And, of course, you knew of United States Gypsum Company?
A. I said so, yes, sir.
Q. So that American, Certain-teed, Ebsary, National, Niagara, Texas, Universal, and USG, are the companies that you knew were in business during the time
1209 that you were President of the Beaver Products Company, is that correct?
A. Yes, sir.
Q. Do you know of any other companies in the United States that were located East of the Rocky Mountains, that sold gypsum board?
A. I don't remember of any.
Q. Are the companies that I have named all of the companies in the United States East of the Rocky Mountains?
A. Right.
Q. Did you know any of the officials of any of those companies?
A. I met their Presidents and Vice Presidents.
Q. Let's take Atlantic. Did you know anybody in Atlantic?
A. Fuller.
Q. Anybody else?
A. I don't remember anyone else, he is the man that I saw most of.
Q. Mr. Fuller's name was Willard Fuller, is that correct?

A. I think so.

Justice GARRETT. Will you speak a little louder, Mr. Witness?

1210 The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. Did you know a gentleman by the name of Mr. Neale?

A. Yes, sir, I knew him.

Q. Did you know a gentleman by the name of Mr. Channing?

A. Yes, sir.

Q. With American, whom did you know?

A. You will have to mention the name first, and then maybe I can get it.

Q. Did you know any person by the name of Griswold?

A. I have met him.

Q. Did you know Arthur Black?

A. I don't remember him.

Q. Did you know John Kling?

A. I remember the name.

Q. Did you ever meet the gentleman?

A. I don't know.

Q. Your best recollection, sir?

A. I may have.

Q. Now with Certain-teed, who did you know with that company?

A. Mr. Brown.

Q. There were two Browns with Certain-teed.

A. Brown and his nephew, the sales manager.

Q. Who was the President of Certain-teed?

1211 A. George Brown.

Q. And his nephew's name was what?

A. C. O.

Q. Claude O. Brown?

A. Yes, sir.

Q. Did you know Mr. Whittemore?

A. Yes, sir.

Q. Did you know Mr. Warren Henley?

A. Warren Henley was in our company.

Q. He was with Certain-teed, wasn't he?

A. No, sir, Warren Henley was with the Beaver Board.

Q. He later was with Certain-teed, we will put it that way?

A. Yes, sir.

Q. At the time you were in the gypsum business, however, Mr. Henley was connected with the Beaver Products

Company, is that correct?
A. That is right.
Q. Did you know Mr. L. R. Walker?
A. Yes, sir.
Q. Did your know Mr. Elisha Walker?
A. Yes, sir.
Q. Were those two gentlemen connected with Certain-teed?
A. Elisha Walker was not.
1212 Q. He wasn't on the Board of Certain-teed?
A. He may have been, I don't know.
Q. Now with Ebsary, did you know Fred Ebsary?
A. Yes, sir.
Q. Did you know Mr. George Lenci?
A. I remember the name.
Q. Do you recall whether or not you knew him or just knew the name?
A. I can't remember him.
Q. You can't remember him?
A. No.
Q. You have, however, heard of the name Lenci?
A. Yes, sir.
Q. Now there was one other company that was engaged in the gypsum business at that time, by the name of Kelley Plaster Company. Did you know that company?
A. Kelley Plaster, I remember the name.
Q. Did you know Stephen Kelley, the president?
A. I don't remember.
Q. Now with National, did you know Mr. Haggerty?
A. Yes, sir.
Q. Did you know Mr. Williams?
A. Yes, sir.
Q. And did you know Mr. Baker?
A. Yes, sir.
1213 Q. Now with Niagara, were you acquainted with Mr. Reeb?
A. Yes, sir.
Q. And with Texas, did you know Mr. Chism?
A. I don't remember him.
Q. Do you remember the name Gloyd?
A. I remember him.
Q. You knew him?
A. I remember the name.
Q. Did you know him?
A. Yes, sir.
Q. With Universal, with whom were you acquainted—

Mr. Palmer?

A. I remember him.

Q. Do you remember Mr. Shearer?

A. Yes, sir.

Q. And do you remember Mr. Holland?

A. I don't remember him.

Q. You don't remember him?

A. No.

Q. And with USG, you of course knew Mr. Avery?

A. Yes, sir.

Q. And did you know any person besides that with USG?

A. Mr. Henning.

Q. Mr. Charlie Henning?

1214 A. Yes, sir.

Q. And the Chief Counsel of USG ——

A. (Interposing.) I knew him.

Q. Mr. John MacLeish?

A. Yes.

Q. Anybody else?

A. I knew several of them, but I can't remember their names.

Q. Are you familiar, in a general way, with the United States Gypsum litigation against Best Wall Manufacturing Company?

A. When I took hold of the company, they were in the middle of a second patent suit.

Q. Are you familiar with the first suit?

A. I wasn't up until that time. Naturally I familiarized myself with it.

Q. Do you know when the first suit was started by USG against the Best Wall Manufacturing Company?

A. I don't remember that.

Mr. BROMLEY. I stipulate that it was 1917, if that will help.

Mr. KNUFF. Thank you.

By Mr. KNUFF.

Q. Do you know when that litigation was decided by the District Court, sir?

1215 A. No, sir.

Mr. KNUFF. May it be stipulated also that the District Court's decision was on the 21st day of July, 1919?

Mr. BROMLEY. Yes, and in favor of USG.

Mr. KNUFF. And in favor of USG.

Justice STEPHENS. It may be stipulated.

By Mr. KNUFF.

Q. Do you know, sir, whether or not an appeal was taken to the CCA of the Seventh Circuit in that case?

A. We appealed and carried it to the next court.

Q. And do you know, sir, that the Circuit Court of Appeals affirmed the lower court?

A. I don't remember that.

Mr. KNUFF. May it also be stipulated that the Circuit Court of Appeals upheld the lower court on the 4th day of January, 1921?

Mr. BROMLEY. Yes, sir.

By Mr. KNUFF.

Q. Now, did Beaver acquire Best Wall?

A. Yes, sir.

Q. In what year?

A. I don't remember.

Q. Well, you came with the company when, sir?

A. It had been acquired.

Q. Do you know approximately how long before you came with the company?

1216 A. Two or three years.

Mr. KNUFF. May it also be stipulated that Beaver acquired Best Wall in 1920?

Mr. BROMLEY. Yes, sir.

By Mr. KNUFF.

Q. How did Beaver acquire Best Wall, did they purchase the capital stock of Best Wall or did they purchase the assets, if you know?

A. I don't remember.

Q. Did USG subsequently file a supplemental bill in 1921 against Best Wall and Beaver? Did they start a second suit?

A. Yes, sir.

Mr. KNUFF. May it also be stipulated, gentlemen, that a supplemental bill was filed by USG against Best Wall and Beaver on June 13, 1921?

Mr. BROMLEY. Yes.

By Mr. KNUFF.

Q. Do you know when that case was decided by the District Court?

A. That is the second case?

Q. The second case, sir.

A. I don't remember the date.

Q. Do you remember the year when it was decided?

1217 A. That was after I went in.

Q. That was after you went in, sir.

A. It was around 1924, I should think.

Mr. KNUFF. May it further be stipulated that the decree of the District Court was entered on the 17th day of August, 1925?

Mr. BROMLEY. Yes, again in favor of USG.

Mr. KNUFF. Again in favor of USG, yes.

By Mr. KNUFF.

Q. Now was an appeal taken by Beaver to the Court of Appeals in that case?

A. Yes, sir.

Q. Was that appeal finally decided or was it withdrawn?

A. It was withdrawn.

Q. Now between August, 1925, and December 1 of that year, were any attempts made to settle the USG-Beaver litigation?

A. As soon as I became thoroughly familiar with the case, I made up my mind that we wanted to settle it out of court if we could, and I tried to meet Mr. Avery. At first Mr. Avery didn't want to see me. Through mutual friends we met, and I kept trying to get him to settle the case out of court.

Justice STEPHENS. Mr. Knuff, let me enjoin the witness. We want you to feel free to make answers according to your own recollection and memory, of course, but

1218 it may get beyond the necessary issues unless you confine your answers strictly to the questions which are asked; so please bear quite carefully in mind the questions that are asked you, Mr. Blagden.

The WITNESS. All right.

By Mr. KNUFF.

Q. Can you fix the time when you made overtures to Mr. Avery, if you did?

A. I started before the second case was settled in favor of the United States Gypsum Company.

Q. Let me understand you. Is my understanding correct that even before the District Court had handed down its decision, you say you made overtures to Mr. Avery to settle the case.

A. Yes, sir.

Q. And did you continue to make overtures to Mr. Avery after the decree had been handed down, which was on the 17th of August, 1925?

A. Yes, sir.

Q. When you say that you made overtures to Mr. Avery, what did you do?

A. I told him that I thought there was some way we ought to get together and call it off, make some kind of a settlement.

1219 Q. Was that by personal contact or letter?

A. By personal contact.

Q. And where did you see Mr. Avery?

A. In Chicago.

Q. On one occasion or more than one occasion?

A. Several occasions.

Q. Now my question, sir, is directed to a period before the 17th of August, 1925.

A. On one or two occasions.

Q. On one or two occasions before the 17th of August?

A. Yes.

Q. And after the 17th of August, and before the 1st of December, did you endeavor to settle the litigation?

A. Yes, sir.

Q. With whom did you take up the question of settlement?

A. Mr. Avery.

Q. Was that by personal interview or was it by letter?

A. Both.

Q. On how many occasions did you see Mr. Avery?

A. I don't remember.

Q. Well, was it one ——

A. (Interposing.) Two or three.

Q. Two or three different times?

A. Yes, sir.

1220 Q. Mr. Blagden, I show you what has been marked for Identification as Government's Exhibits Nos. 184 and 185. No. 184 purports to be a letter dated December 12, 1925, written by you to Mr. Avery; and Exhibit No. 185 purports to be the memorandum enclosed in that letter of December 12. I want you to read both Exhibits 184 and 185.

A. I have done so. Do you want me to read them again?

Q. Have you read Exhibit 185, sir? It is a 12-page exhibit.

A. Well, I know what it is.

Q. That is your letter, sir?
A. Yes, sir.
Q. And is that the memo that was enclosed in it?
A. Yes, sir.
Q. Now, Mr. Blagden, in your letter of December 12, 1925, you make reference to a conference with Mr. Avery that was held on the preceding Thursday. Do you notice that?
A. Yes, sir.
Q. Who requested that conference?
A. I did.
Q. Who attended it?
A. I did.
Q. Who else?
A. I don't think anyone else did.
Q. Well, you couldn't confer with yourself, could you?

A. Well, Mr. Avery, it was with Mr. Avery, of course.

1221

Q. And where was it held, sir?
A. In Chicago.
Q. At whose offices?
A. It might have been at his office or it might have been at luncheon,—most likely at luncheon.
Q. Now then, what did you discuss?
A. Settlement of the suit.
Q. Will you relate, sir, your present recollection of that discussion ——

Mr. ADAMS (interposing). Your Honor, may we interpose a general and usual objection to this line of testimony for defendant Certain-teed?

Justice STEPHENS. The same objection as you have made heretofore, to declarations of alleged co-conspirators?

Mr. ADAMS. That is right, Your Honor.

Justice STEPHENS. The objection may be entered. Of course, the Court hasn't yet heard the statements, but if the statements are offered as statements of co-conspiraors, they are received subject to the proof of the conspiracy so far as all other defendants than USG are concerned.

Mr. ADAMS. And in order not to have to interrupt again, I take it that what is going to develop ——

Justice STEPHENS (interposing). Yes, I think your record is fully protected in that respect. The Court is

1222

receiving all declarations of alleged co-conspirators subject to the proof of conspiracy, prima facie proof of conspiracy, except as the declarations may apply against

the particular alleged conspirator who makes the declaration.

Proceed.

By Mr. KNUFF.

Q. Mr. Blagden, will you just relate in your own words your present recollection of what was discussed on the Thursday previous to the 12th of December? I might say, sir, if you care to use the memorandum to refresh your recollection, I believe you may.

A. I had talked to Mr. Avery several times about settling the suit, and at first we would have to pay him a million dollars, or that was his opinion. I told him that we would like to settle, and that brought out this memorandum. I had to convince my own people, the Board of Directors and others, that it was best to settle the suit. That was why this was gotten up, to weigh all sides to see what would be best. And my meetings with Mr. Avery were to come to terms to settle the suit.

Q. I don't believe you have answered the question that I have asked you. I asked you to relate, in your own words, just what subjects you took up with Mr. Avery on the Thursday preceding the 12th of December.

Justice STEPHENS. You want the witness to give the conversations, do you, as well as he can remember
1223 them?

Mr. KNUFF. Yes.

Justice STEPHENS. You don't have to remember the exact words, Mr. Blagden. Give the substance and effect of your conversation with Mr. Avery, if you remember it.

By Mr. KNUFF.

Q. Or the topics you talked about?

A. Well, we talked about—well, Mr. Avery felt that we had been using that edge, and therefore against his patent arrangement, and that we owed him quite a considerable amount of money for infringement of patents, and if we came to any settlement that that would have to be taken into consideration.

Q. That is, you would have to pay damages?

A. That is right.

Q. All right.

A. And it was entirely on that subject that we discussed the matter.

Q. Did you discuss anything further, other than damages?

A. No, sir.

Q. Did you discuss, on the Thursday preceding the 12th of December, the subjects covered by your memorandum?

A. We hardly mentioned the memorandum. I just said that these were different sides that my attorney, Mr. Mitchell, had drawn up and we had gone all over

1224 these.

Q. You say you hardly mentioned the memorandum. Did you mention the memorandum at all?

Justice STEPHENS. What was the date of this conversation?

Mr. KNUFF. The Thursday preceding the 12th of December ——

Justice STEPHENS (interposing). I only asked the question because one of my colleagues says that it appears that the memorandum wasn't in existence at that time.

Mr. KNUFF. That is what I was trying to bring out.

The WITNESS. I don't think we mentioned the memorandum at that time.

By Mr. KNUFF.

Q. Was the memorandum in existence at that time?

A. I don't think it was.

Q. Suppose you read your letter of December 12, and tell us whether it was.

A. We must have been—I told him that we had been going over all possible ways of what would be best for our company to do. We had to do that.

Q. Was it limited to what was best for your company?

A. Yes, sir. We had our own company in mind, and nothing but.

Q. And you say that at this meeting on the Thursday, you discussed the question of settlement of the suit that USG had against Beaver?

1225 A. Yes, sir.

Q. And you discussed the question of damages?

A. Yes, sir.

Q. What else did you discuss?

A. I don't remember.

Q. State whether or not you had any disscussion concerning the transfer of any patents to USG?

A. We held certain patents, and that they would have to be taken into consideration in the settlement.

Q. I still don't believe you have answered my question, Mr. Blagdon. Did you discuss the question of the transferring of any Beaver patents to USG?

A. I don't remember, I will have to say that.

Q. You don't remember whether you discussed transferring any patents or not, is that your best recollection?

A. Right now, I can't.

Q. Did you have any discussion concerning whether or not, in the settlement of this suit, you would acknowledge the validity of USG patents?

A. Yes, sir.

Q. What was that discussion?

A. We would acknowledge their patents and take out a license.

Q. You say you would take out a license. Did you discuss a licensing arrangement at this time with Mr. Avery?

1226 A. I can't remember the details, but we must have.

Q. What is your best recollection now, not the details?

A. That we did.

Q. That you did?

A. Yes.

Q. So that if I understand you correctly, you had two subjects under discussion at that time,—first, the settlement of the existing suit; and, second, the taking out of a license from USG; is that correct?

A. Yes, sir.

Q. Now concerning the license that you were to take out from USG, what did you discuss about that?

A. What do you mean?

Q. Well, did you discuss how long this license was to last?

A. It would be for the duration of the patents.

Q. And do you know how long the patent under which you were going to license had to go before it expired?

A. I don't remember.

Q. Do you remember the name of that patent?

A. The Utzman patent.

Q. The Utzman patent?

A. Yes.

Q. And the discussion that you had was concerning a license under the Utzman patent, is that correct?

1227 A. Yes, sir.

Q. Now under the licensing arrangement which you say you discussed, did you have any discussion as to who should fix the price of the product?

A. The USG.

Q. What was your discussion about that?

A. Well, that was just taken for granted; I mean, we didn't discuss that in detail.

Q. You didn't discuss that in detail?

A. No.

Q. Did you discuss, sir, what effect USG's fixing of prices would have upon the market?

A. I don't remember, we might have discussed it in a general way.

Q. Well, what was that discussion in a general way?

A. Well, the whole industry knew we were the guinea pig, so to speak, and that the USG was suing us, and if they won their suits all the way through it would affect the whole industry.

Q. In what way, sir? In what way would it affect the whole industry?

A. Their patents would stand, and no one could make a folded edge board unless they made it under their patent, or they would be subject to suit the same as we were.

Mr. KNUFF. Mr. Reporter, will you read back to Mr. Blagden the question that I originally asked him? I don't believe he has given me a responsive answer.

1228

(The question was read by the reporter.)

By Mr. KNUFF.

Q. We were talking about the fixing of prices, and the question I asked was—in what way would the fixing of prices affect the whole industry?

Justice STEPHENS. Let the Court understand, Mr. Knuff. Are you asking this witness whether he now recalls discussing that question with Mr. Avery, or are you asking him to state from his own knowledge what effect there would have been on the industry?

Mr. KNUFF. He said he had that discussion with Mr. Avery as to who should fix the price, and now my question is directed to whether or not he had any discussion with Mr. Avery as to what the effect of that fixing of prices would be on the whole industry.

The WITNESS. I don't remember the details of that.

By Mr. KNUFF.

Q. Well, in general, what did you say or what was discussed?

A. I don't remember. It would affect them in this way, that if they won the suit against us, all the others would be subject to that.

Q. My question, sir, is—how would the fixing of
1229 prices by USG affect the whole industry?

A. Now wait ——

Mr. BROMLEY (interposing). Objected to as incompetent.

Mr. KNUFF. If Your Honor pleases, the witness has stated that he discussed with Mr. Avery the question of USG's fixing of prices. My question now is—what discussion did you have with Mr. Avery as to how USG's fixing of prices would affect the whole industry, and he hasn't answered the question.

Justice STEPHENS. That is correct, Mr. Knuff, that he didn't answer that question. He has told you that he doesn't remember any discussion on that subject, and your question then was, following that, and I think the witness must have understood you to be asking him what, in his opinion, was the effect upon the industry.

Mr. KNUFF. I am not asking the witness' opinion.

By Mr. KNUFF.

Q. Mr. Blagden, I am not asking you what your opinion was. I am asking you what discussion you had with Mr. Avery as to how USG's fixing of prices would affect the industry?

A. I don't remember discussing that.

Q. You don't remember discussing ——

A. (Interposing.) At that meeting.

Q. Did you ever discuss it with him?

A. We must have discussed it in a general way, yes, sir.

1230 Q. Well, would you look at your memorandum, and would you look at your letter, and tell us what your best recollection is, sir?

Justice STEPHENS. You may take your time to refresh your recollection if you wish to, Mr. Blagden. You may look through this memorandum, if you wish to take the time to do so, and refresh your recollection. What you are being asked about, however, is your recollection of these conversations, in substance and effect, not your own judgment now, as to the effect upon the industry.

By Mr. KNUFF.

Q. Mr. Blagden, before you answer that question, suppose you take a look at that memorandum, will you, please?

Justice JACKSON. Your question refers to any conversations that he may have had with Mr. Avery at any time

subsequent to December 12?

Mr. KNUFF. The witness answered the question that he did not discuss it at that time, and then I said—did you discuss it at any other time?

Justice JACKSON. Then it goes to any time?

Mr. KNUFF. Any time, yes, Your Honor.

While the witness is reading this exhibit, may we suspend for a few minutes, please?

Justice JACKSON. Yes, the Court will be in recess for five minutes.

1231 (Thereupon, a short recess was taken, after which the trial was resumed as follows:)

By Mr. KNUFF.

Q. Mr. Blagden, just before the recess, you said that you hadn't talked to Mr. Avery at that time as to what effect price fixing would have on the industry, and I asked you then—did you talk to Mr. Avery at any other time. What is your answer to that?

Mr. BROMLEY. I don't think that properly represents the testimony. I don't think he said that.

Mr. KNUFF. Let's refer to the record.

Justice STEPHENS. Read the question which Mr. Knuff just asked the witness.

(The pending question was read by the reporter.)

Justice STEPHENS. I don't quite understand your objection, Mr. Bromley.

Mr. BROMLEY. I'm afraid I don't, either. I see the question is limited to this meeting.

Mr. KNUFF. Will you please read the question to Mr. Blagden?

(The pending question was read by the reporter.)

The WITNESS. In my judgment, and in the judgment of my associates, the best interests for us were to settle this suit, because we felt that we would ultimately lose out ——

Justice STEPHENS (interposing). Mr. Blagden, what you are being asked now is—did you talk to Mr. Avery

1232 at any other time than the time which you have just finished describing?

The WITNESS. And I brought up with Mr. Avery the points ——

Justice STEPHENS (interposing). Will you answer that question, Mr. Blagden? Did you talk with Mr. Avery at any other time?

The WITNESS. Yes, sir.

Justice STEPHENS. Very well. Now proceed, Mr. Knuff.

By Mr. KNUFF.

Q. What did you say?

A. I told him that for our interests it would be best to settle the suit, and that I thought that we had patents which, lined up with his patents, would give them further protection, and that I was trying to put the best possible foot forward for our own company to settle the suit and to get him to come to an agreement.

Mr. KNUFF. May it please the Court, I don't want to argue with the witness, and I am appealing to the Court to direct the witness to answer the question.

The question that I asked the witness originally was what effect the fixing of prices would have upon the industry, and he said at that time he didn't have any discussion. I then said—did you have any discussion at any other time, and my question now is directed as to what that other discussion was as to the effect that the fixing
1233 of prices would have on the industry. I submit that the answers that I have received from Mr. Blagden are not responsive to my question.

Justice STEPHENS. I think the witness is possibly confused by too many questions and too many rules. We don't wish to confuse you nor hold you down to a technical limit, Mr. Blagden. It is, of course, essential that the witness answer substantially the questions which are asked him. Otherwise we get into conversations that are outside of the issues in the case. But you don't have to remember the words of a conversation. However, you are being asked at the present time, if the Court may explain to you, not what your own judgment was then or is now as to the desirability of these arrangements, whatever they were, but you are now being asked what your recollection is. And at the moment what Mr. Knuff wants to ask you about is this—if you will just listen to this question, I think I can help the discussion forward—did you, at any of these conferences which you say you had with Mr. Avery, discuss with him the effect upon the industry of the proposed settlement? Just answer that yes or no, if you remember whether you had such a discussion.

The WITNESS. I don't remember any detail of such discussion.

Justice STEPHENS. I don't expect you to.

The WITNESS. I remember we did ——

1234 Justice STEPHENS (interposing). Did you discuss that subject?

The WITNESS. We must have discussed that subject.

Justice STEPHENS. Well, can you state in a general way the nature of that discussion?

The WITNESS. That by settling our suit with them, then the others in the industry would either have to take licenses or be sued; and he would have a much better chance, with our patents all together with his own, of winning the suit with other companies. That is as I remember it.

By Mr. KNUFF.

Q. I don't wish to labor the question, but my question is still this—what discussion did Mr. Blagden have with Mr. Avery as to what effect the fixing of prices would have on the industry, not the effect that the settlement would have but what effect the fixing of prices would have on the industry.

Justice STEPHENS. Let me ask the witness that question. First, let me ask you about your recollection. Do you remember having any discussion with Mr. Avery at any one of the meetings on the subject of what effect of fixing the prices under a license would have on the industry? Do you remember discussing that subject? If you don't, why frankly say so.

The WITNESS. I don't remember discussing it that way.

Justice STEPHENS. Well, do you remember discussing that particular subject in any way? I am not attempting to phrase it for you.

1235

The WITNESS. Yes.

Justice STEPHENS. Well, what was that discussion?

The WITNESS. Well, we discussed that if he settled our suit, that he would be in a much better position to settle with the other companies, and the price that he would have with us would be the same price with the others.

Does that answer your question?

Justice STEPHENS. Is that the subject you wish to go into?

Mr. KNUFF. I don't think it is responsive, but that is the subject I am trying to get into.

Justice STEPHENS. If you don't think it is responsive, you may move to strike it. You don't have to have in the record what the Government doesn't want to put in it.

By Mr. KNUFF.

Q. Well, let's see if we can bring out the conversation

that you had with Mr. Avery. Did you, at any time, sir, have any discussion with Mr. Avery as to what effect the fixing of prices would have on the industry? Do you understand my question, sir? If you don't, I will try to restate it.

A. I don't remember discussing it in that way at all.

Q. Well, how did you discuss it?

1236 A. I have just given you how I discussed it, that if he settled the suit with us, he would be in a better position to settle the suit with the others in the industry.

Q. And my question relates to the fixing of prices, Mr. Blagden.

Mr. JOHNSTON. May I inquire, if the Court please? I presume counsel is talking about the prices of wallboard under these license agreements?

Justice STEPHENS. I have assumed that.

Mr. JOHNSTON. He is using the term generally, and if he intends it generally, then I would move that he be restricted to that.

Justice STEPHENS. You are asking about the fixing of the prices of wallboard under the license agreements proposed, are you not?

Mr. KNUFF. That is right.

Justice STEPHENS. The Court so understood the questions, Mr. Johnston.

The WITNESS. If we settled our suit with the United States Gypsum Company, the price would be fixed by the USG with us, and if he won the suits with the other companies that the same price would prevail with them.

By Mr. KNUFF.

Q. What price?

1237 A. I don't know.

Q. Well, what do you mean when you say the "same prices"?

A. The price of wallboard.

Q. That is, that if other companies took out a license, they would also have to sell at the same price, is that what you mean?

Mr. BROMLEY. I object to that as leading, if the Court pleases.

Justice STEPHENS. Well, that is a very critical point, and we think the witness ought not be led on that point. The Court wishes to give you every proper latitude to probe the witness' recollection, but I think that objection should be sustained.

Mr. KNUFF. Well, I am still going to hammer at the conversation and see if I can get the answer to it.

By Mr. KNUFF.

Q. Mr. Blagden, you were first asked—did you have any conversation with Mr. Avery on the Thursday preceding the 12th of December, concerning the fixing of prices and what effect that would have on the industry?

A. I don't remember.

Q. And your answer to that was that you didn't at that time.

Now I ask you, at any other time did you have any
1238 conversation with Mr. Avery as to what effect the fixing of prices would have on the industry?

Mr. OLIVER. I am going to object to that question, Your Honor, for the reason that it assumes that there was a discussion concerning the fixing of prices, and the witness has never said there was.

Mr. KNUFF. I appeal to the record.

Justice STEPHENS. I doubt if the question assumes that. Read the question.

(The pending question was read by the reporter.)

Justice STEPHENS. Your objection is overruled.

The WITNESS. I don't remember discussing it that way.

By Mr. KNUFF.

Q. Well, what way did you discuss it?

A. I say at any time discussing it that way.

Q. Well, how did you discuss it at any time?

A. I told you that if we settled this suit, Mr. Avery and his company would have been in a much better position to settle with the others in the industry.

Q. Did you point that out to Mr. Avery?

A. We discussed that, surely.

Q. And can you recall just exactly what your discussion was, in a general way? I realize that that was in 1925.

A. Our company, being the next largest in the industry, and with our patents and his patents, if we could come to an agreement and settle the suit, he would be in
1239 a much better position to settle with the others making the board.

Q. State whether or not you pointed out to Mr. Avery how he would be in a better position?

A. By having our patents and his patents—they were practically all the folded edge patents.

Q. And you pointed that out to Mr. Avery?

A. Yes, sir.

Q. That if he had your patents and combined those with his patents, he would be in a better position to ——

A. (Interposing.) I was using everything I could to make the best arrangement I could make with the least cost.

Q. Now we will go back to the Thursday preceding the 12th of December, and when you talked about the license agreement what else did you talk about that that license agreement should contain? You have mentioned the term of the patent, and you have mentioned that the USG should fix the prices. Now what else did you talk about that should be in that license?

A. I don't remember anything else.

Q. Did you talk about a royalty, the amount of royalty?

A. Oh, we would have to pay a royalty, we understood that.

Q. Did you talk about whether or not the license agreement should contain a provision acknowledging the validity of USG's patents?

1240 A. Yes, we acknowledged the patents, yes, sir.

Q. Now between December 12, 1925, and June 1, 1926, did you have any further conferences with Mr. Avery?

A. I don't remember when it was, but we decided that we would get together and settle the suit; that was along about that time, as I recollect.

Mr. KNUFF. May it please the Court, as a part of the direct-examination of Mr. Blagden, I would like to offer in evidence as an admission of USG, USG's answer to Interrogatory No. 22. Interrogatory No. 22 reads as follows:

"So far as we have definite information there were two meetings between Sewell L. Avery, President of the United States Gypsum Company and Augustus S. Blagden, President of Beaver Products ——

Justice STEPHENS (interposing). Are you reading the Interrogatory or the answer?

Mr. KNUFF. I am reading the answer.

Justice STEPHENS. Read the Interrogatory so the Court can understand what the answer is responsive to.

Mr. KNUFF. I am sorry that I don't have the Interrogatory to read it verbatim.

Justice STEPHENS. I think that possibly I have it here. What Interrogatory is it?

Mr. KNUFF. Interrogatory No. 22.

1241 Justice STEPHENS (reading).

"State the dates and places of all conferences or meetings held during the period from September 1, 1925 to April 1, 1926, between your representatives and representatives of Beaver Products Company, Inc., and The American Gypsum Company, or of either of said companies, and the names of all such representatives present at each of such conferences or meetings, in any way relating to (1) settlement of pending litigation between you and Beaver or American, (2) the issuance of a license to Beaver or American or to any other company by you and state the substance of what was said by each person present at said conferences or meetings."

What is the answer you want to put in?

Mr. KNUFF. The answer of United States Gypsum Company served on the plaintiff on September 10, 1943, reads as follows:

"So far as we have definite information there were two meetings between Sewell L. Avery, President of the United States Gypsum Company and Augustus S. Blagden, President of Beaver Products, Inc., one in December 1925, and the other in February 1926, relating to the possibility of a settlement of litigation then existing between United States Gypsum Company and Beaver Products, Inc. and to the possibility of the issuance of a license by United States Gypsum Company to Beaver Products, Inc. The former meeting occurred in Chicago, Illinois, and

1242 the latter in New York, N. Y."

We are offering that as an admission of USG that there were conferences between Mr. Avery on the one hand, and Mr. Blagden on the other, at this particular time.

Mr. BROMLEY. I think the record should show that the last clause which Your Honor read from the Interrogatory, beginning, "and state the substance", was stricken out when this Court settled the Interrogatories. So it is not a part of the Interrogatory as addressed to us, and that is why there is no answer to it.

Justice STEPHENS. Yes, I think that is correct, and the record may so show.

Mr. KNUFF. That is correct.

Justice STEPHENS. I was reading the Interrogatory in the form originally presented to us. The record may show that correction.

Do you have any objection, Mr. Bromley?

Mr. BROMLEY. No, sir.

Justice STEPHENS. It may be admitted in evidence and may be marked as an exhibit.

Mr. KNUFF. I haven't any objection to having it marked as an exhibit. I don't know as it is necessary, but if the Court wants it marked as an exhibit ——

Justice STEPHENS (interposing). Perhaps it isn't necessary to mark it as an exhibit. It may be shown as an admission in the transcript of the record. I thought
1243 perhaps you wanted it marked.

Mr. KNUFF. No, Your Honor.

Justice STEPHENS. The Court doesn't require it to be marked. It has been sufficiently identified now, and the Court Reporter has taken the Answer, has he not?

The REPORTER. Yes, sir.

Justice STEPHENS. You might show it to the Reporter at the noon hour, to be sure he gets it correct.

Mr. KNUFF. Very well.

By Mr. KNUFF.

Q. Between December 12, 1925, and June 1, 1926, did you have any conferences with Mr. Avery concerning the settlement of the USG-Beaver litigation?

A. I don't remember.

Q. Mr. Avery admits that he had two conferences with you, one in Chicago and one in New York. With that in mind, can you tell us whether you had those conferences or whether you had more than those conferences?

A. I guess that is about right.

Q. That is correct?

A. Yes.

Q. Do you recall what was said at the conference in New York, in February?

A. I don't remember what we talked about.

1244 Q. Do you recall what you discussed?

A. We discussed settlement, most likely.

Q. Do you recall any of the conversations you had?

A. No, sir.

Q. During this period, that is from December 12, 1925, until June 1, 1926, did you have any correspondence with Mr. Avery concerning the settlement of this suit?

A. I don't remember.

Q. Did you have any telephone conversations with him?

A. I don't remember.

Mr. KNUFF. Would you show the witness Exhibit 104, please?

(Exhibit No. 104 handed to the witness.)

Justice GARRETT. What "D" number is that?
Mr. KNUFF. D-4.

By Mr. KNUFF.

Q. Mr. Blagden, that is a letter not written by you.
A. This is in 1926.
Q. It was a letter written by Mr. Griswold to Mr. J. H. McCrady. Would you read the first paragraph of that letter? You will notice, Mr. Blagden, that the second sentence states that you had had one or two interviews with Mr. Avery "on the matter of settling all disputes and litigations between the wall board manufacturers by entering into a licensing arrangement and the thing looks very favorable." Is that correct, that you had the inter-
1245 views?
A. With Mr. Avery?
Q. My question is, looking at the second sentence, did you have the interviews that are there referred to?
A. I only remember having interviews with him on discussing our own settlement. I remember that we had two or three meetings, several meetings in Chicago on other subjects, and naturally at some of them there we would discuss the board question.
Q. Then your answer to my question—or what is your answer to my question?
Mr. BROMLEY. He has answered it, if the Court pleases. I object to this as repetitious.
Justice STEPHENS. I think the witness has freely answered that he has had at least two and perhaps other conversations with Mr. Avery. He doesn't place them exactly. I think your record is fully protected, at least, by your answer.
Mr. KNUFF. I think the witness has said that. Now the question that I have directed to the witness is—did he have the interviews that are set forth in the second sentence of the first paragraph?
Mr. BROMLEY. I object to it as repetitious on the ground that he has answered it.
Justice STEPHENS. The Court calls your attention, Mr. Blagden, to the fact that this second sentence refers to "one or two interviews with Avery on the matter
1246 of settling all disputes and litigations between the wallboard manufacturers by entering into a licensing arrangement * * *"——
The WITNESS (interposing). I don't remember ——
Justice STEPHENS (interposing). Just a moment. Do

you remember discussions on that broad a subject?

The WITNESS. No, sir.

Mr. KNUFF. That is very responsive to my question.

By Mr. KNUFF.

Q. Look at the last sentence in the letter, Mr. Blagden, beginning with, "According to the plants",——

A. I don't remember anything like that.

Q. You haven't waited for me to ask the question yet.

A. I beg your pardon.

Q. Did you have any plan for holding the price of wallboard steady for the next fourteen or fifteen years?

A. No, sir.

Q. You didn't?

A. No.

Mr. KNUFF. We now offer in evidence Government's Exhibit 184 and Government's Exhibit 185, identified by the witness.

Justice STEPHENS. Any objection?

Mr. JOHNSTON. If the Court please, I am like the bad penny, I keep coming back. I don't know what these are, I have never seen them. Over the Thanksgiving re-
1247 cess I withdrew from the Reporter Exhibits 101 to 183, inclusive, and at an expense of $40 or $50 had photostatic copies made of them, and returned them this morning. I haven't yet had an opportunity to read those exhibits.

Now I come back to the same thing I raised earlier in the trial. I think the Government should, and I now so move the Court, furnish counsel for defendants with copies of these exhibits as they offer them, or before they offer them, so we may know what they are. I haven't the slightest idea in the world what is in these exhibits, and we are proposing now to pass on the admissibility ——

Justice STEPHENS (interposing). Well, the Court will interrupt you long enough to say, Mr. Johnston, that the Court is not going to pass upon the admissibility of any exhibit until defendants' counsel have had an opportunity to inspect it and read it and satisfy themselves whether they want to make an objection. And whether or not copies can be furnished as conveniently as desired, I will now have to inquire of the Government again.

Mr. KNUFF. I would like to say this, that when I identified the exhibit, I passed over at the same time to defense attorneys copies of Exhibits Nos. 184 and 185, and I believe that they are available for Mr. Johnston. Does that

answer your question?

1248 Justice STEPHENS. Mr. Johnston raises this point, Mr. Knuff, which was raised about a week ago, and that is that it might save the time of the Court and counsel and everyone concerned if the Government could get enough photostats of these proposed exhibits, and get them far enough in advance, so that we wouldn't have to interrupt the trial while counsel for the defendants inspect them. The same courtesy will be expected, of course, when the defendants are producing exhibits, for the Government. But the Government raised the question as to whether or not it could get enough priorities on photostat paper to be able to do that. Now if you can, and with not unreasonable expense, get the photostats and furnish them to the defendants in advance of the day when they are going to be offered, of course it would be a great convenience to all concerned, including the Court, and save court time. Of course, if you can't do that, we will have to adjourn from time to time so that the defendants can inspect these exhibits. They have got a right to inspect them.

What is the situation?

Mr. KNUFF. The situation is this, Your Honor: The day that you brought that subject up, as soon as I left Court I went to our Administrative Office in our Antitrust Division, and took up with Mr. Avery Johnson the question of furnishing additional photostats. I told Mr. Johnson that it

1249 was a source of very great inconvenience over here at the Court, not only to the Court but to ourselves and counsel for the defendants, not being able to have additional photostats, and I asked authority to have additional photostats made. And Mr. Johnson told me that he appreciated very much the dilemma that the Court was in, and he could appreciate very much the dilemma that the attorneys for the defendants were in, but he told me that in view of the fact that photostatic paper has a very high priority, that when he authorized five copies of the original exhibits to be photostated he felt that he had gone far beyond what he should have done, and he said that in the present state of the emergency it would not be possible to have additional photostats made.

I might state to Your Honor that, like Ivory soap, practically 99-44/100 per cent of all the exhibits that we will offer in this case have been taken from the files of the defendants. They know what is in their files, or should know what is in their files. There may be one or two, or a very small percentage of the exhibits that we will use

here, that did not come from the files of the defendants.

Justice STEPHENS. Well, that is true, Mr. Knuff, I assume. But nevertheless, these transactions are remote in time, and defendants' counsel may not be familiar with the detail of all of these exhibits. Some arrangement must be made; if you can't make them, if the Government can't get itself a priority on paper enough to make these
1250 additional exhibits, we will have to adopt some other expedient.

Mr. KNUFF. Does Your Honor have any suggestion? I will try to follow it through.

Justice STEPHENS. I am sure you will.

Mr. JOHNSTON. May I make the further suggestion, if the Court please. I take serious issue with this question about priority. I made inquiry here, and we have had this work done in New York. I have made inquiry at my home, and with commercial concerns there is apparently no question of sufficient paper to do their work. And if private concerns can get the paper, I don't see why the Government can't get it.

I presume that the Government has taken many of these records from the files of the defendants, but I have no access to the files of USG or the other defendants, and they might just as well all be in the hands of the Government originally, so far as my privilege prior to their being offered here goes, in the matter of inspecting them. And I think the Court has the power, and I ask that it be invoked, and that the Government be required to furnish us in advance of the offer of these several hundred exhibits, in the interest of economy of this trial. It is going to take us weeks and weeks longer. Here is an exhibit of 12 pages, this memorandum, and I am being asked in a few minutes to go through that and analyze it and determine whether or not I want to object to it ——

1251 Justice STEPHENS (interposing). The Court will have to interrupt you at that point, Mr. Johnston. You are not going to be asked to do that. The Court will not rule on any exhibit until counsel for the defendants have had an opportunity to inspect it, and a reasonable opportunity. The Court will suspend ruling on it until tomorrow if necessary.

Now you may proceed with any other statement you want to make.

Mr. JOHNSTON. I think that is about all I have to say. I am just in this predicament, and I think the Government should do it. I think they can get the paper, and I think

they should be required to do it.

Justice JACKSON. Would it help you, Mr. Johnston, to take my copy of these exhibits that are about to be introduced? You may do so. I can use Judge Stephens'.

Mr. JOHNSTON. I wouldn't do that for two reasons. First, I think it is just as essential, perhaps more essential, that the personnel of the Court have these before them while the matter is being discussed. And in the second place, examining them here at the moment they are being offered doesn't do me any good. If I could have them the day before, so that the night before I could work on them and come in ——

Justice STEPHENS (interposing). I was about to make that suggestion, Mr. Johnston, if I may interrupt again in the interests of speed. We are quite doubtful
1252 whether the Court has authority to compel the Government to furnish, to print and furnish photostats. Of course, it is going to be a grave inconvenience to the Court if the Court has to interrupt its proceedings, which are already interrupted too much because of the necessity of adjournments for the sitting of the Court of Customs and Patent Appeals. If we have to be interrupted in addition to that with the time for the study of exhibits, it will prolong this trial unduly. And it would be a great convenience to the Court, which we think the Government ought to comply with if it possibly can, if these exhibits could be printed in large numbers and distributed to defendants in advance. But we doubt whether we have the authority to compel the Government to do that. We haven't any control over the funds of the Executive Branch of the Government. We can make a serious and have made a serious and earnest request of the Government to do that, but I don't think we can compel it.

Now the other expedient would seem to be this, Mr. Knuff: You must have prepared this case, as you obviously have, very painstakingly. Can't you know a half a dozen days in advance what exhibits you are going to offer, and can't you lend the photostats of those exhibits to the defendants' counsel a half dozen days in advance? Or, for example, hand them at the beginning of a recess, hand them the exhibits which you are going to use
1253 after the recess—I mean a several days' recess. Can't that be done?

Mr. KNUFF. Well, I want to first assure the Court that I will cooperate in every way.

Justice STEPHENS. I am sure you will.

Mr. KNUFF. But I don't believe that we will know—and I am not splitting hairs—I don't think we will know a half dozen days in advance just what exhibits are going to be placed in evidence. We thought we would know that when we called Mr. Griswold. As a matter of fact, there are probably 20 to 25 exhibits that weren't used with Mr. Griswold, and some exhibits were used with him that we didn't anticipate at the time.

Now we will probably know maybe the day before what exhibits we are going to introduce, and I will say that we will give the defendants' counsel copies of the exhibits as we introduce them or, if it can be arranged, to allow counsel for the defendants to look at them the night before.

I am only a junior counsel in this case, and I would have to, of course, take that up with Mr. Steffen. I believe Mr. Steffen, of course, will accede to the Court's desires.

1254 Justice STEPHENS. In addition to that, will you please say for the Court to the Chief of the Anti-Trust Division, Mr. Berge, that the Court makes an earnest request of the Department of Justice to get additional photostatic copies of these exhibits and that the Court thinks that that ought to be done, as otherwise the inconvenience to the Court, as well as to all the officers of the Court, is such that this case will be unduly prolonged at consequent expense to all persons concerned, including the Government?

Mr. KNUFF. I will be glad to convey that to Mr. Berge, and I think probably if I do that, Mr. Berge will say, "Get them photostated."

Justice STEPHENS. Very well, then that is what we want.

So far as these particular exhibits are concerned, Mr. Johnston, the Court will not rule upon the admissibility of these two proposed exhibits until you have had an opportunity to inspect them, and other defendants' counsel have had a like opportunity. The record may show that they have been offered, but that no ruling is now made as to their admissibility.

Mr. KNUFF. I wanted, if your Honor please, to read Exhibit 185.

Justice STEPHENS. I think counsel for the defendants are within their rights not to have the matter presented formally to the Court until they have had an opportunity to make an objection. So if you feel that your case re-

quires—which one is that?

1255 Mr. KNUFF. That is the thirteen-page memorandum.

Justice STEPHENS. You mean you want to read that whole memorandum into the record?

Mr. KNUFF. I say it with some misgivings, that I may not be able to have it get into the record, but I was going to make the effort.

Justice STEPHENS. Well, you are entitled to make the effort, although the Court has ruled that exhibits as such, since they are in the record, need not be put into the transcript. That is an additional and unnecessary expense. The Court will read them very carefully itself. Now it seems to me that this matter can be disposed of at the present time, by a ten-minute recess, in which defendants' counsel and the Court can read this exhibit. Could you read it during that length of time, Mr. Johnston? I don't mean to limit you to that.

Mr. JOHNSTON. I don't know what it is yet.

Mr. KNUFF. It is almost approaching the noon hour ——

Justice STEPHENS (interposing). Have you any other testimony that you could proceed with until twelve-fifteen?

Mr. KNUFF. With this witness?

Justice STEPHENS. Yes.

Mr. KNUFF. I have a lot.

Justice STEPHENS. Then go ahead with the witness on some other subject until twelve-fifteen, and perhaps during the noon hour, by a quarter of two, we will all

1256 have been able to read this exhibit.

By Mr. KNUFF.

Q. Mr. Blagden, I would like you to look at Government Exhibit No. 1, please, and will you state, Mr. Blagden, if your signature appears on that? Government Exhibit No. 1 is the license agreement between USG and Beaver, dated the 29th day of July, 1926. I don't believe your Honors have a copy of that.

Justice STEPHENS. No, but I think the Clerk has. Isn't that the 1926 license agreement between USG and Beaver, printed in the appendix to the brief?

Mr. KNUFF. It appears in the complaint at page 38.

Justice STEPHENS. That is right, I have it.

The WITNESS. That is my signature.

By Mr. KNUFF.

Q. Where was that executed, Mr. Blagden?

A. I think in Chicago.

Q. State whether or not, prior to the execution of that agreement, you had conferences concerning it.

A. Yes, sir.

Q. Do you know how many conferences you had?

A. I can't remember, we had several.

Mr. KNUFF. As a part of the direct examination, your Honor, we offer in evidence as an admission of USG, USG's answer to Plaintiff's Interrogatory No. 23. Interrogatory No. 23 was as follows:

1257 "State the dates and places of all conferences or meetings held during the period from April 1, 1926 to May 1, 1927 between your representatives and representatives of any other companies manufacturing gypsum board at that time or any time thereafter, in any way relating to the issuance of licenses by you under any patent owned by you. State the names of all companies represented at each of said conferences or meetings, the names of the representatives of each of said companies, the names of all other individuals present at each of said conferences or meetings, and state the substance of what was said by each person present at said conferences or meetings."

Now that last portion, "and state the substance of what was said" your Honors have previously passed upon that, and have sustained the objections that the defendants have raised to that portion of the interrogatory.

The answer to Interrogatory 23 appearing as 23 (b) is as follows:

"As presently advised, there were the following meetings:

* * *

(b) June-July, 1926; Chicago, Illinois. Numerous meetings were held between Sewell L. Avery, President of the United States Gypsum Company and Augustus S. Blagden, President of Beaver Products, Inc., and/or their respective attorneys, John E. MacLeish and J. McC. Mitchell. The dates of such meetings were: June 15,

1258 June 16, June 17, June 21, July 7, July 8, July 9, July 10, July 22, July 23, July 24, and July 29, 1926."

I believe that that makes twelve different dates on which conferences were held.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. No objection.

Justice STEPHENS. It may be recorded as a part of the transcript.

By Mr. KNUFF.

Q. During those twelve days that you were in Chicago, what discussion did you have ——

Mr. BROMLEY (interposing). I object to that as assuming facts not in evidence. This interrogatory doesn't indicate that he was in Chicago during those twelve days.

Mr. KNUFF. I submit ——

Justice STEPHENS (interposing). Hand the answers to the interrogatories to the reporter, Mr. Knuff, and let the Court see them.

(The answer to the interrogatories referred to were handed to the Court.)

Justice STEPHENS. The answer does not state, Mr. Knuff, that this witness was present at each of the twelve meetings. The objection is sustained. You can ask him how many meetings he was present at, if he remembers.

By Mr. KNUFF.

1259 Q. How many meetings did you attend, of those meetings?

A. Two or three.

Q. And with whom did you confer?

A. With either Mr. MacLeish or Mr. Avery.

Q. And what was discussed at those meetings?

A. The drawing up of this contract.

Q. That is, when you point to "this contract", you are referring to the contract of the 29th of July, 1926?

A. Yes, sir.

Q. Will you look at paragraph No. 1 of that contract, and look at the first unnumbered paragraph following? It begins, "It is expressly agreed and understood".

Justice STEPHENS. Which paragraph do you mean?

Mr. KNUFF. It is the last paragraph, if your Honor pleases, at the bottom of page 39 of the complaint. It is the first unnumbered paragraph following paragraph No. 1.

Justice STEPHENS. It commences, "It is expressly agreed and understood"?

Mr. KNUFF. That is right. May I point out to the witness where that is?

Justice STEPHENS. Surely.

Mr. KNUFF. Apparently, your Honor, there is some discrepancy between Government's Exhibit No. 1 as intro-

duced here, and Government's Exhibit No. 2.

Justice STEPHENS. Well, it is important that the Court be advised of that, because we, not having photo-
1260 stats of this exhibit, are relying upon the exhibit printed in the complaint.

Mr. KNUFF. I can't understand the discrepancy, and I am somewhat surprised that there is any discrepancy here. I felt all along that Exhibit No. 1 that was introduced here was the license agreement that was entered into, and I felt that we had correctly set it forth in Exhibit No. 2.

Justice STEPHENS. Which is correct, the exhibit or complaint?

Mr. KNUFF. I don't know until I check on it, I am sorry. I think we have caught the discrepancy. Government Exhibit No. 1 is the paper of settlement, settling the dispute between USG and Beaver, and appended to that paper of settlement is the license agreement of the 29th of July, which is referred to in the complaint on page 38.

Justice STEPHENS. Well, that is Exhibit No. 2 on page 38 and following of the complaint, is that the license agreement itself, or is that the settlement agreement?

Mr. KNUFF. Exhibit No. 2 is the license agreement.

Justice STEPHENS. That is Exhibit No. 2 of the complaint?

Mr. KNUFF. That is right.

Justice STEPHENS. Then you can correct your record by offering only that part of Exhibit 1 which is the license agreement.

Mr. KNUFF. Well, I would like, if your Honor pleases, to amend the offer as to Exhibit No. 1, so as to include
1261 both the paper of settlement and the license agreement of July 29, 1926.

Mr. BROMLEY. There is no objection.

Justice STEPHENS. The offer may be amended and that may be received in evidence.

The WITNESS. Yes, sir, I have read it.

By Mr. KNUFF.

Q. You have read the paragraph, sir?

A. Yes, sir.

Q. What discussion, if any, did you have concerning that particular paragraph? Now, if you can detail the discussion, all right, but if you cannot, give us your best recollection.

A. Well, it was understood that the U. S. Gypsum Company would fix the price, the minimum price.

Q. When you say "it was understood", what do you mean by "it"?

A. I mean in discussing the settlement it was more or less taken for granted that USG would fix the price.

Q. And you took it for granted that they would fix the price?

A. Yes, we signed up with that understanding, that the licensor would set the price.

Q. And you were perfectly willing to allow the USG to fix the price, is that correct?

A. Right.

1262 Q. Well, was there any discussion then on this particular paragraph?

A. I don't remember any.

Q. Would you turn to paragraph 2, following that, beginning, "The licensee further agrees to pay five per cent", and so forth?

A. Yes, sir.

Q. Was there any discussion concerning that paragraph, Mr. Blagden?

A. I don't remember any. There must have been the regular sparring back and forth as to what it would be, but just what it was, I don't remember.

Q. You will notice, sir, that according to the terms of this paragraph, you were to pay five per cent of the selling price on all board manufactured by you, is that your understanding?

A. That is right.

Q. And did you desire at that time to manufacture anything else other than a close-edged board?

A. No, sir.

Q. You didn't desire to manufacture anything else?

A. No, sir.

Justice JACKSON. You mean any other kind of board?

Mr. KNUFF. Any other kind of board than a closed-edge board, yes.

1263 The WITNESS. No, sir.

By Mr. KNUFF.

Q. So it was your intention, then, that if you were granted a license, you would manufacture nothing but a closed-edge board?

A. Right.

Mr. BROMLEY. I object to that as leading and suggestive and move to strike the answer.

Mr. KNUFF. What was your intention ——

Justice STEPHENS (interposing). Just a moment, let the Court rule. Read the question, Mr. Reporter.

(The last answer was read by the reporter.)

Justice STEPHENS. It is leading and may go out. Ask him what the agreement was.

By Mr. KNUFF.

Q. What was your intention, sir, as to the type-edge board you were to manufacture?

A. By signing this, we intended to manufacture the closed-edge board.

Q. Would you look at paragraph No. 9, sir?

A. Yes, sir.

Q. What was the purpose of that paragraph?

A. That the board we manufactured was according to the license.

Q. Which license?

1264 A. Of this agreement.

Q. Well, according to the license "of this agreement"—I don't know as I understand what you mean by that.

Justice STEPHENS. Let the Court take time to read that paragraph. I am not sure we understand it yet.

Now proceed and ask the question again.

By Mr. KNUFF.

Q. What was the purpose of that paragraph, Mr. Blagden, paragraph No. 9?

A. That the board that we would manufacture thereafter would be subject to this patent arrangement that we entered into herewith.

Q. Who insisted upon this paragraph going in?

A. I don't remember.

Q. What was your understanding of paragraph No. 9?

Mr. BROMLEY. I object to that as immaterial and incompetent. The agreement speaks for itself.

Justice STEPHENS. Do you wish to be heard, Mr. Knuff?

Mr. KNUFF. I think that the state of mind here is quite material, your Honor, as to what his understanding was.

Justice STEPHENS. Well, he has answered it once, but of course you are entitled to go into the discussions and bring out what the parties were doing, attempting to accomplish, in these discussions. But this question asks really for an interpretation of this paragraph by the witness. I think the objection is well taken. Sustained.

1265 By Mr. KNUFF.

Q. What machine, sir, prior to the agreement of the 29th of July, was Beaver using to manufacture their closed-edge board?

A. We were using our own machine.

Q. Were you using the Birdsey machine patented under letters patent 1,330,413?

A. I don't remember. I don't remember whether the board we were making was folded exactly the same way as that.

Q. I am not asking about the board, I am asking about the machine.

A. Well, the machine directs the folding of the board, and the machine we were using, I am not exactly sure that it used the exact detailed way of making the board that the Utzman machine did.

Q. Will you look at paragraph No. 13, sir ——

Justice STEPHENS (interposing). Before we go into that, the Court will take the usual noon recess. Before announcing the recess, there are a number of exhibits in these books which have been furnished to the Court; in addition to this memorandum, there are apparently a number of letters. Are you going to examine this witness on those exhibits du ing the afternoon?

Mr. KNUFF. Very, very shortly. There are only twelve, I believe, altogether.

1266 Justice STEPHENS. I am asking the question to suggest that if you are, you submit them to counsel for defendants during the noon recess. They are short letters and counsel may be able to examine them during that length of time.

Let me say also, Mr. Knuff, that I think the episode of this morning, and the discrepancy between Exhibit 1 as originally marked and as it is now offered, indicate that the Court itself ought to insist upon having photostats for the Court, each member of the Court, of these license agreements. They apparently are critical aspects of the case.

So please include within the Court's urgent request of Mr. Berge, that the photostats include these license agreements for the Judges, so that we each can have one.

Mr. KNUFF. I probably should have told your Honor that I have authority to get the license agreements photostated for the Court.

Justice STEPHENS. Thank you very much.

(Whereupon, at 12:15 o'clock p.m., a recess was taken

to 1:45 o'clock p.m. of the same day.)

1267 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m. pursuant to recess.)

Justice STEPHENS. Proceed, gentlemen.

Whereupon, AUGUSTUS S. BLAGDEN, the witness on the stand at the time of the recess, resumed his testimony as follows:

Mr. JOHNSTON. May it please the Court, during the noon hour I obtained Exhibits 184 and 185. I would like to ask the witness a question or two on which to predicate an objection, if I may.

Justice STEPHENS. On voir dire as to his recollection?

Mr. JOHNSTON. Yes, on his examination.

Justice STEPHENS. You may do so.

Mr. KNUFF. Just a moment, as I understand Mr. Johnston, he said on my examination. It looks to me as if he was going to cross-examine this witness ——

Mr. JOHNSTON (interposing). May I ask have you offered these exhibits?

Mr. KNUFF. Yes.

Justice STEPHENS. I am not permitting you to cross-examine at this time except as to the qualifications of this witness to identify and recollect these exhibits.

Mr. JOHNSTON. I merely want to have him identify this Exhibit 185.

1268 Justice STEPHENS. That is proper, you may do that.

Mr. KNUFF. The witness has already identified it, your Honor. He said it was enclosed in the letter.

Justice STEPHENS. Well, the request is for an examination on voir dire, and that is not irregular at this time, Mr. Knuff. Proceed briefly, Mr. Johnston.

By Mr. JOHNSTON.

Q. Who was your attorney?

A. James McCormick Mitchell.

Q. Isn't it a fact, Mr. Blagden, that this Exhibit 185 was not prepared by you, but was prepared by this attorney?

A. That is right.

Q. And that was prepared after this Thursday meeting in Chicago with Mr. Avery?

A. That is correct.

Mr. JOHNSTON. On behalf of Mr. Gloyd we object to

Exhibit 185, reading it with 184. It is wholly apparent that it has no materiality whatsoever as to this defendant. It wasn't even prepared by this witness ——

Justice STEPHENS (interposing). You mean as to your client?

Mr. JOHNSTON. Yes, the Texas Cement Plaster Company.

It is merely what I assume purports to be a sales talk on the part of counsel to try to settle a lawsuit.

1269 Mr. KNUFF. I think that goes to the weight of the exhibit rather than to its admissibility.

Justice STEPHENS. Well, the Court has a little question —I will be glad to hear you on it before I resolve the question—I have a little question as to the relevance of 185. Are you offering it as an exhibit itself or merely as a basis of refreshing the recollection of the witness?

Mr. KNUFF. We are offering that, if your Honor pleases, as a declaration of a co-conspirator made in pursuance of the conspiracy.

Mr. JOHNSTON. If the Court pleases, it is not his declaration at all.

Justice STEPHENS. That may be true in one sense, Mr. Johnston, but on the other hand he has testified that it was prepared by his lawyer, that he knew of its contents and referred to it in his conversations, and I should think that it might be argued that your objection goes to the weight as a declaration, and that the evidence may be interpreted as meaning that he adopted it. I think that the objection should be overruled. The exhibit is received unless there are objections by other defendants, subject to the usual reservation that it is not binding on the co-conspirators unless there is prima facie evidence of the conspiracy otherwise proved. Have you offered Exhibit 184?

Mr. KNUFF. I offered both, your Honor, both 184 and 185, and ruling on both of those was deferred pend-

1270 ing Mr. Johnston's opportunity to examine them.

Justice STEPHENS. Are there any other objections by other defendants? If not, the same ruling with respect to 184.

(The documents referred to, marked as "Government Exhibits Nos. 184 and 185", were received in evidence.)

DIRECT EXAMINATION (resumed) by Mr. KNUFF.

Q. Mr. Blagden, just before the noon recess, I believe you testified that it was assumed that USG would fix the prices. Do you recall that testimony?

A. Yes, sir.

Q. Did you raise any objection as to USG's fixing of those prices?

A. No, sir.

Q. State whether or not you were agreeable to having USG fix the prices of the product covered by the patent.

A. We were.

Q. I also referred you to paragraph No. 13 of the license.

Mr. KNUFF. May I have just a moment, your Honor?

Justice STEPHENS. Yes.

By Mr. KNUFF.

Q. Would you please read paragraph No. 13, Mr. Blagden? I am particularly interested in the last half-
1271 dozen sentences.

A. Yes.

Q. Now at the time this license agreement was executed, did you have any discussion as to other companies becoming licensees of USG?

A. I don't remember.

Q. You don't remember whether you had any discussion or whether you did not, is that it?

A. Yes, at this time.

Q. At whose insistence was paragraph No. 13 inserted in the license agreement?

A. I don't remember that, I imagine at Mr. Mitchell's.

Q. Not what you "imagine", sir, but what is your best recollection?

A. I don't remember.

Q. Did you insist on it?

A. No, sir, I don't remember. I know that I wanted to be treated equally with anyone else.

Q. And was that discussed at the meeting?

A. It must have been.

Q. Is that your best recollection now?

A. I don't remember.

Q. All right, sir. At the time this licensing agreement was executed, you also settled the suit that USG had against you, is that correct?

1272 A. That is right.

Q. Will you tell the Court, please, briefly, just what the terms of that settlement were, how much cash was involved, and anything else?

Mr. BROMLEY. It is all in the settlement agreement, if the Court pleases.

Justice STEPHENS. Was that a part of the settlement agreement?

Mr. KNUFF. It was. I still would like to have an opportunity of having the witness explain it.

Mr. BROMLEY. I don't think it needs explanation. The settlement is perfectly clear from the agreement.

Justice STEPHENS. That is the portion of the agreement which was introduced this morning by modification of Exhibit No. 1, is it not?

Mr. KNUFF. Yes.

Justice STEPHENS. If that license agreement is before us, this witness' interpretation of it is not competent.

Mr. KNUFF. I am not asking him for that, I am asking him what the agreement was.

Justice STEPHENS. His interpretation of that would be incompetent.

Mr. KNUFF. What is the ruling of the Court on it, please?

Justice STEPHENS. Sustained.

By Mr. KNUFF.

1273 Q. Were any patents transferred at that time, Mr. Blagden?

Mr. BROMLEY. The same objection, that is also covered.

Mr. KNUFF. May I finish my question, please?

Mr. BROMLEY. Excuse me.

By Mr. KNUFF.

Q. Were any patents transferred at the time this license agreement was executed?

A. We transferred what patents we had.

Q. Can you tell us what patents were transferred?

A. I don't know, I can't remember the names of them. We had folding-edge patents, and it was in the agreement that we agreed to turn them over to the United States Gypsum Company.

Q. Will you look, sir, on page 13, under Exhibit B, and tell me if those were the patents that were assigned?

Justice STEPHENS. What is Exhibit B?

Mr. KNUFF. Exhibit B is a portion of Exhibit No. 1.

The WITNESS. On page 13?

Mr. KNUFF. On page 13, sir—does it mention Exhibit B there?

The WITNESS. Oh, yes.

Justice JACKSON. It is not in the complaint, your Honor. May I indicate to the witness what I have in mind?

Justice STEPHENS. Yes, you may.

1274 Mr. KNUFF. May I strike the last question, please?

Justice STEPHENS. Yes.

By Mr. KNUFF.

Q. Does Exhibit B, attached to Government Exhibit No. 1, contain the list of the patents that were transferred at the time the license agreement was executed?

A. They must be the ones.

Q. Did you own or did your company own Armstrong patent No. 1,278,821 at that time?

Mr. BROMLEY. I object to that question, not only on the ground that it relates to matter covered by the agreement, but on the ground that it is immaterial if it be directed toward showing that the transfer of these patents was in any way illegal, because as I understand the pleadings there is no charge in the complaint which could possibly cover any contention that it was wrongful because a patent pool or otherwise, to make as a part of this Beaver settlement in 1926 the transfer by Beaver to USG of certain patents which it owned. I think counsel should declare himself now as to whether he now contends that that is or is not one of the elements of illegality upon which he relies in his pleading, because as I read the pleading, it cannot possibly cover such a charge.

Justice STEPHENS. What is your contention, Mr. Knuff?

Mr. KNUFF. We do not contend at this time that any of the patents mentioned in Exhibit B were void, if they were patents that were owned by Beaver.

1275 Justice STEPHENS. The Court does not understand. The Court understood Mr. Bromley to object to your inquiry into the ownership of these patents upon the ground that there is no charge in the complaint that the transfer of them by Beaver to USG was illegal.

Mr. KNUFF. We do not so contend.

Justice STEPHENS. Then what is the materiality of it?

Mr. KNUFF. I want to find out the circumstances surrounding the execution of this license, what patents were transferred, at whose suggestion those patents were transferred, and what took place at that time.

Justice STEPHENS. Well, you are entitled to do that, but the objection to this question as to who owned them, in view of your statement that you do not charge that the transfer was illegal, seems to be well taken. The agreement speaks for itself as to what patents were transferred. The objection is sustained without prejudice to your right

to inquire into the circumstances which led up to the execution of the agreement and the discussion concerning it so far as that is relevant under the pleadings.

By Mr. KNUFF.

Q. At whose suggestion, sir, were the patents mentioned in Exhibit B of Government Exhibit No. 1, transferred?

A. I can't remember that. I know that we felt that these patents were very valuable and that by turn-
1276 ing them over, by putting them in with the settlement, it would cut down the cash settlement that we had to make.

Q. Can you tell us at whose suggestion they were included?

A. I know I was in favor of it.

Q. You were in favor of turning them over?

A. Yes, sir.

Q. And they were assigned?

A. Yes, sir.

Q. Now, Mr. Blagden, I call your attention, sir, to paragraph No. 3, on page 12, of Exhibit 185. Will you please read it yourself?

Following the execution of your license agreement in July, 1926, did you endeavor to induce manufacturers of closed-edge board, other than Beaver, to accept a license from USG?

Mr. BROMLEY. I object to that as incompetent, as calling for a conclusion.

Mr. KNUFF. If your Honor pleases, I framed my question in the identical words that paragraph 3 contains, and I am asking him if he did what he said he was going to do in that paragraph.

The WITNESS. There was no ——

Justice STEPHENS (interposing). Just a moment, do not answer before the Court has ruled. There is an objection before the Court, Mr. Blagden.

1277 The fact that it is based upon the agreement would not necessarily mean that it is not a conclusion. However, the Court thinks that the objection is not well taken. We think it is proper to inquire whether or not the witness did attempt to induce others to accept licenses. The objection is overruled.

By Mr. KNUFF.

Q. You may answer the question, Mr. Blagden.

A. That question did not come up in the settlement of

our suit, as I remember it.

Q. I said—following the settlement of your suit did you attempt to induce others to enter the license agreement?

A. I did not go out and make a specialty of getting others to come in, no, sir.

Q. Well; did you contact any other companies to have those companies take out a license agreement with USG?

A. Only when they asked me about the suit at any time.

Q. What companies did you contact, sir?

A. I did not contact them, they contacted me.

Q. All right, what companies did you talk to?

A. I cannot remember which ones.

Q. You testified before the Grand Jury in the District of Columbia, did you not?

A. Yes, sir.

Mr. KNUFF. For the purpose of refreshing the recollection of the witness I want to show him his Grand
1278 Jury testimony beginning on page 2205, and ask him to read it.

Mr. BROMLEY. And I object to this use of the Grand Jury minutes as improper, incompetent and immaterial.

Justice STEPHENS. Don't read it for a moment, Mr. Blagden, just lay it to one side.

Mr. BROMLEY. I do not understand that in a civil controversy Grand Jury minutes can ever be used for the purpose of refreshing the recollection of a witness. It seems to me that it is entirely improper.

Mr. KNUFF. I think your Honor indicated the other day that anything could be used, whether he wrote it himself, whether somebody else wrote it, or no matter who wrote it. It is offered for the purpose of refreshing his recollection.

Justice STEPHENS. Well, the Court was indicating that any document or object which refreshed recollection may be used for that purpose, but that ruling was not so all-inclusive as to forbid the objection that Grand Jury minutes are of a secret character. I will hear you on that.

Mr. KNUFF. We are not asking the witness to read aloud his testimony. This witness is asked to read what he testified to before the Grand Jury, for the purpose of refreshing his recollection. Of course we don't believe—in fact, if it was attempted here to have any person other than the witness read the Grand Jury testimony, we would strenu-
ously object to it, but in view of the fact that the
1279 witness did testify before the Grand Jury, in view

of the fact that we have the Grand Jury testimony of the witness here now, we are simply asking this witness to use that testimony as a basis of refreshing his recollection.

Justice GARRETT. Is it for the purpose of refreshing his recollection?

Mr. KNUFF. That is right, your Honor.

Justice GARRETT. Or for the purpose of trying to impeach what he is now saying?

Mr. KNUFF. Not at all, merely for the purpose of refreshing his recollection.

Justice STEPHENS. As presently advised, Mr. Knuff, the Court is of the view that the minutes of the Grand Jury proceedings ought not to be used in this manner; if they cannot be examined by anyone but the witness, obviously that would foreclose the Court from examining them or defendants' counsel from examining them and determining whether or not they do properly support a statement of refreshed recollection. However, if there is a large class of testimony of this sort involved, and if you expect to use the minutes of the Grand Jury in a number of instances, and feel that this ruling is of serious prejudice to the Government, the matter being somewhat novel, we will give you an opportunity to present authorities on it later, and you may recall the witness.

1280 Mr. KNUFF. May I, at the present time, say this, your Honor? The same question that is now presented came up in the Madison Oil case, in United States versus The Socony Vacuum Company, and the way the matter was handled there was that the witness was allowed to read his Grand Jury testimony; then, in order to see whether or not there was anything in there that could refresh the recollection of the witness, the Court itself examined the Grand Jury minutes. The Court itself is always permitted to examine the Grand Jury minutes. Now that has been the uniform practice in the Antitrust Division for a great number of years, and I think the courts have uniformly adhered to that practice; that is, that the witness can examine the Grand Jury minutes, and the Court can examine them to see whether or not there is anything in there that could or might refresh the recollection of the witness.

That, I say, was specifically raised, that question, in the Madison case, and that is exactly the way the court handled it in that case. The court allowed the witness to examine the Grand Jury testimony and then the Court

itself looked at the minutes of the Grand Jury testimony. We have no objection to that at all.

Mr. BROMLEY. The Madison Oil case was a criminal and not a civil case.

Mr. KNUFF. All the more reason why it should be allowed in a civil case.

1281 Mr. BROMLEY. I think not, I think it is just the distinction. I don't think the Antitrust Division can either point to an authority nor to any practice in which they have ever attempted to do this in a civil case.

Justice STEPHENS. Was the criminal case tried in Madison, the criminal case which resulted from the indictment of the Grand Jury whose minutes were then being consulted?

Mr. BROMLEY. It was, sir.

Mr. KNUFF. That is right. Some courts have done this, your Honor, instead of having the witness refresh his recollection on the witness stand, they have allowed the witness to retire to a separate room and examine the Grand Jury minutes. In view of the fact that there are only three or four pages relating to that, I see no reason why we should ask this witness to take these Grand Jury minutes into another room and examine them. The defendants cannot be prejudiced because the Court can take a look at those Grand Jury minutes.

Justice STEPHENS. I should think defendants' counsel would have a right to look at them also, because any item of any character which is submitted to a witness in open court ought to be open to the adverse counsel. As presently advised, we think the examination is not proper and will sustain the objection, but we will give you an opportunity tomorrow morning if you wish to do so, to present authorities on the subject, or later if you wish to do so, if that is too soon.

1282 Mr. KNUFF. My understanding is, then, that Mr. Blagden cannot use the Grand Jury minutes to refresh his recollection.

Justice STEPHENS. That is the ruling of the Court at the present time.

Mr. KNUFF. Very well.

Justice STEPHENS. But the Court makes that ruling subject to your right—the point is novel to the Court, and as the Court is advised all three members feel that ruling is correct—but you may have an opportunity tomorrow or later to recall the witness and to renew the offer to have him look at the minutes and present authorities to us.

Mr. KNUFF. Very well, your Honor.

What was my question, Mr. Reporter, before I asked the witness to look at the Grand Jury minutes?

(Whereupon, the reporter read the record as follows:

"Q. What companies did you contact, sir?

"A. I did not contact them, they contacted me.

"Q. All right, what companies did you talk to?

"A. I cannot remember which ones.")

By Mr. KNUFF.

Q. Well, did you talk to the Certain-teed Company?

A. I don't remember.

Q. Did you talk to the American Gypsum Company?

A. I can't remember whether I talked to them. I must have talked to some of them on this subject, but I can't remember who or which.

1283 Q. Did you talk to the Ebsary Gypsum Company?

A. I don't remember.

Q. Did you talk to the National Gypsum Company?

A. I don't remember.

Q. Did you talk to Niagara?

A. I don't remember.

Q. Did you talk to the Texas Company?

A. I don't remember.

Q. Did you talk to Universal?

A. I don't remember.

Q. Do you know George M. Brown?

A. Yes, sir.

Q. Did you ever talk to George M. Brown about this?

A. I have.

Q. What did you say to Mr. Brown?

A. He was ——

Mr. ADAMS (interposing). May we have it indicated when and where, with some reasonable degree of certainty?

Justice STEPHENS. Fix the time and place, approximately, if you can.

The WITNESS. I couldn't remember, it would be at some meeting.

By Mr. KNUFF.

Q. Well, you entered the gypsum industry in 1923 ——

A. (Interposing.) It wouldn't have been until

1284 after our settlement.

Q. That makes it a whole lot easier. You settled the case on the 29th day of July, 1928, and you left the

gypsum industry sometime in 1928.

A. It would be sometime between those dates.

Q. Now can you fix it a little bit more definitely than that, sir? Was it a matter of months or a matter of years or a matter of days ——

A. (Interposing.) It was some time, I can't recall, it would come up at some meeting at which I would advise him to take a license.

Q. Well, do you recall the meeting at which it came up?

A. No.

Q. Do you recall how it came up?

A. No, sir.

Q. Did you talk to George M. Brown on more than one occasion?

A. I can't remember that.

Q. Are you sure you talked to him on one occasion?

A. I must have, either he or his nephew, C. O. Brown.

Q. You say it is either Mr. George M. Brown or his nephew C. O. Brown that you talked to?

A. Yes, I can't remember now ——

Q. (Interposing.) I am not asking you to give us the conversation, I am asking if you talked to him.

1285 A. I must have talked to them, if we met at all, on this subject, because they were asking me, all the different ones of them ——

Q. (Interposing.) By the "different ones of them", what do you mean?

A. I mean the different companies.

Q. What companies asked you about it?

A. What did they ask me?

Q. You said different companies were asking you about it, and I say what companies were asking you about it?

A. I will have to explain. We had meetings out in Chicago, gypsum meetings, from time to time, and I attended one or two of those meetings, and the different ones would ask me naturally about this suit.

Q. Can you give us the date when you had those meetings out in Chicago?

A. No I cannot.

Q. Was it after the license agreement was entered into?

A. Yes, sir.

Q. And it was before you left the gypsum industry?

A. Yes, sir.

Q. And who attended these meetings, sir?

A. Almost all the companies were represented.

Q. Let's get down to names. Was American represented?

A. They generally were.

1286 Q. Was Atlantic represented?

A. No, I doubt if Atlantic was there.

Q. What is that?

A. The Atlantic Gypsum Company hadn't taken out a license and didn't attend those meetings, as I remember.

Q. Do you know when the Atlantic Gypsum Company took out a license, sir?

A. I do not.

Mr. KNUFF. Mr. Reporter, may I have the license agreement between USG and the Atlantic?

(The document was furnished Mr. Knuff.)

Mr. KNUFF. May it be stipulated by counsel for the defendants that the license agreement between Atlantic and USG was dated March 5, 1927?

Mr. BROMLEY. Yes, it is already in the record, Mr. Knuff.

By Mr. KNUFF.

Q. Atlantic, sir, took out a license with USG on the 5th day of March, 1927. Now, keeping that in mind, was Atlantic at any of these meetings?

A. I don't remember, I don't think they were.

Q. Was Certain-teed at any of these meetings?

A. I doubt it.

Q. Well, who was Mr. Brown with?

A. Certain-teed Products Company.

Q. Did you talk to Mr. Brown then at a place other than the meetings?

1287 Mr. ADAMS. I don't want to interrupt your witness, but he has testified to uncertainty as to whether he talked to C. O. Brown or George M. Brown. He said he talked to either one, and I would respectfully request that he indicate in his answer which one he talked to, and where, if he can.

Justice STEPHENS. Which Mr. Brown did you talk to, if you remember?

The WITNESS. I saw a great deal more of C. O. Brown, he would attend the meetings. Mr. George Brown never attended any meetings.

By Mr. KNUFF.

Q. Now, did Certain-teed ever attend any of the meetings in Chicago?

A. Yes, they attended some of the meetings.

Mr. BROMLEY. Could we have that date fixed, because

of course Certain-teed took over the Beaver Company at a date. I think it is important to find out whether it was before that or after that.

Justice STEPHENS. Can you say about when that was?

The WITNESS. I can't remember.

By Mr. KNUFF.

Q. Was it before you left the gypsum industry?

A. I am not sure, but they must have been at some of these meetings, yes, sir.

1288 Q. When did you leave the gypsum industry, sir?

A. 1928.

Q. Was it before that, the meetings that you attended?

A. I am not sure.

Q. Did you attend any after you left the gypsum industry?

A. No, sir.

Q. All the meetings you attended were before and while you were with Beaver?

A. Naturally.

Q. Now then, at any of those meetings that you attended ——

Justice STEPHENS (interposing). When was Beaver acquired?

Mr. KNUFF. Beaver was acquired in April, 1928.

Mr. ADAMS. We can agree that we acquired physical possession on April 1, 1928. My recollection is that the contract was dated in January, 1928.

Justice STEPHENS. Well, we now have the date fixed more definitely. At least these meetings apparently were before that date. Proceed.

By Mr. KNUFF.

Q. Did you see Mr. Audenreid Whittemore at any of those meetings?

A. I don't remember meeting him at any of those meetings.

Q. Did you ever talk to Mr. Audenreid Whittemore concerning a license agreement?

A. I don't remember.

1289 Q. Did Mr. Ebsary ever attend any of the meetings that you have reference to?

A. Yes.

Q. Did you talk to him at those meetings?

A. I must have talked to him at some of those meetings; I talked to all of those that attended the meetings.

Q. Did National attend any of the meetings?
A. Yes, sir.
Q. Did you talk to anybody from National there?
A. I can't remember now, sir.
Q. Are you certain that National attended any of those meetings? What is your best recollection?
A. I should think they would.
Q. Not what you "should think"; what is your best recollection?
A. I don't remember.
Q. Did Niagara attend any of the meetings?
A. I think so, but I can't remember.
Q. Did Texas, Mr. Gloyd, attend any of those meetings?
A. I think so.
Q. Did Universal?
A. I guess so.
Q. Not what you "guess".
A. I don't remember.
Q. What did you talk to Mr. Ebsary about at that meeting?
1290 Mr. BROMLEY. What meeting is this?
Mr. KNUFF. That he is referring to where he said he saw him.
Mr. BROMLEY. Could we have the time and the place?
The WITNESS. It would be at one of those Chicago meetings, I can't remember the time.
Justice STEPHENS. Was it before January, 1928, would you say?
The WITNESS. Oh, yes.
Justice STEPHENS. Could you estimate ——
The WITNESS (interposing). You see we had regular gypsum meetings and we would attend those meetings and we would talk about any subject that came up, and I can't remember 'way back there what I talked about.
Justice STEPHENS. I don't expect you to remember exact dates, and I don't expect you to remember anything that you don't remember, Mr. Blagden; but could you fix it within the year, do you think it would be within a year prior to 1928?
The WITNESS. Oh, I should think so, yes, sir.
Justice STEPHENS. Proceed.

By Mr. KNUFF.

Q. What did you talk about to Mr. Ebsary, or what did you say to Mr. Ebsary?
A. I don't remember.

Q. Well, would you again look at paragraph 3 on page 12 of Exhibit 185, and see if that will refresh
1291 your recollection?

A. That was written out by my attorney.

Q. I understand that.

A. It was written as a suggestion, and it had nothing to do with what we finally settled in the suit.

Q. Then your answer to that is that paragraph 3, on page 12, does not refresh your recollection as to what you said to Mr. Ebsary, is that correct?

A. That is right.

Q. Did you see Mr. Haggerty at any of those meetings?

A. I don't remember, I don't think he attended them.

Q. Did you see Mr. Williams at any of those meetings?

A. I don't remember.

Q. Did you see Mr. Baker at any of those meetings?

A. I can't remember.

Q. Did you see Mr. Gloyd at any of those meetings in Chicago?

A. I think I met him there.

Q. Did you talk to him out there?

A. I can't remember.

Q. Did you see Mr. Shearer at any of those meetings?

A. Yes, sir.

Q. Did you talk to Mr. Shearer about the license agreements?

A. That always came up.

1292 Q. And what did you say to Mr. Shearer to the best of your recollection?

A. Well, I can't remember.

Q. Well, what was the substance of the conversation?

A. Well, they would all ask me about the license. They may have asked advice about the license, and in almost every case I would advise them to take a license.

Q. Did you give any reasons to them why they should take out a license?

Mr. ADAMS. I object to that unless it be fixed as to the person to whom he was talking, the time and the place, with some reasonable degree of certainty.

The WITNESS. I can't remember ——

Justice STEPHENS (interposing). Just a moment, Mr. Blagden. Perhaps if your answer is that you do not remember, the Court need not rule. But the Court will rule, for the guidance of counsel. The Court is according to the Government all proper latitude with respect to these conversations because they are a long time in the past; yet, the

Court must require some reasonable fixation of the time and place of a conversation. Otherwise, it is against the rule that the defendants have the right to have that time and place fixed in order to prepare to meet the evidence introduced. You don't have to fix it in a particular day or month, but it is too indefinite at the present time, I fear.

1293 Mr. KNUFF. The testimony of the witness is that this conversation took place sometime before 1928, and after the license agreement between his company and USG was entered into.

The WITNESS. I can't remember talking to any one individual. I can remember advising somebody connected with some of those companies that were asking me about it. I would just recommend them to take a license. That is as far as my memory goes.

1294 By Mr. KNUFF.

Q. But you can't, as your memory is at the present time, give us the names of a single individual ——

A. (Interposing.) I couldn't pick out which individual it was, because it wasn't all of them. There may have been one or two. It probably was one or two, but as to which ones it was I could no more tell you than I could fly.

Q. Well, were the individuals that you talked to, sir, officials of the companies that were manufacturing gypsum board?

A. Yes sir.

Q. And what did you say to those officials?

A. I advised them ——

Mr. ADAMS (interposing). We object to that, Your Honor, unless the name of the persons is fixed so that we can have some opportunity to meet the testimony.

Justice STEPHENS. We will hear you, Mr. Knuff, as to the propriety of continuing to ask this witness to tell what he said to these officials, in spite of the fact that he has said a half a dozen times that he doesn't remember. Now he has testified that he remembers in a general way advising them to take a license, if they asked him about the subject, but when counsel continually asks the witness to say something that he says he can't say, it just takes up unnecessary time, it seems to us.

Mr. KNUFF. I am not trying to take up any unnecessary time of the Court, but apparently the memory
1295 of this witness is exhausted as to particular persons. Now, then, he does say that all these persons that

he talked to were officials connected with the companies that were manufacturing gypsum board.

I think, in view of the fact that his memory has been exhausted, that he can now tell us what he said to officials of companies that were manufacturing gypsum board, concerning the taking out of the license.

Mr. ADAMS. I press my objection, Your Honor, that we are entitled to have the person identified, At an earlier time in this case we made the same objection, because we can't meet this type of evidence unless we know who was on the other side of the conversation. There were hundreds of men in the gypsum industry and hundeds of officials.

Justice STEPHENS. The Court understands the witness to state, and to state on several occasions, that he cannot remember a particular conversation with any person or individual or official. He only remembers in a general way what he advised them when he was consulted about it or asked about it.

Now that being true, we think the last question asked is not proper and the objection is sustained.

It is in the record already, as my colleague suggests, that when asked about the license he advised them to take a license. That is in the record.

Mr. KNUFF. And what I am trying to develop is what he said to those people.

1296 Justice STEPHENS. Very true, Mr. Knuff, and the Court understands why the Government, in proving its case, desires to prove what he said, and I appreciate that your efforts in that direction are proper. But the witness has said a half a dozen times that he doesn't remember. So why take any more time on the subject?

Mr. KNUFF. I will not take up any more time, Your Honor, on that subject. May I have Exhibit No. 157, please?

By Mr. KNUFF.

Q. Mr. Blagden, Exhibit 157 is a copy of a letter written by Mr. Griswold to Mr. J. H. McCrady, and I call your attention particularly to Paragraph 3 of that exhibit.

A. Yes, sir.

Q. You will notice, sir, that the last sentence of the third paragraph refers to a meeting with Certain-teed Products in New York. Did you attend that meeting?

A. I don't remember.

Q. Did you ever attend a meeting with Mr. Griswold, with Certain-teed Products?

A. I don't remember, I don't think so.

Q. You don't think so?

A. No.

Q. Did you ever contact Mr. Avery, in company with Mr. Palmer and Mr. Griswold, on behalf of U.S.G. granting to Certain-teed a license?

1297 A. No, sir, I don't think so; I don't remember of it.

Mr. KNUFF. May I have Exhibit No. 141, please.

(Exhibit 141 was handed to the witness.)

By Mr. KNUFF.

Q. Mr. Blagden, Exhibit 141 is a copy of a letter written by Mr. Griswold to Mr. J. H. McCrady, and I call your attention particularly to the first paragraph of that letter.

A. That is dated April 12, 1928?

Q. That is right, sir. Have you read the letter, sir?

A. Yes, sir; I don't remember anything about that letter.

Q. Do you remember whether or not you talked to George W. Brown, as set forth in Exhibit 141?

A. I can't remember any conversation with anybody with the American Gypsum Company and Mr. Brown.

Q. Mr. Brown was connected with Certain-teed?

A. Yes, sir.

Q. Did you talk with Mr. George M. Brown as is set forth in this letter, sir?

A. I can't remember that, no sir.

Justice STEPHENS. That should be George W. Brown.

Mr. KNUFF. George W. Brown—I beg your pardon.

The WITNESS. I naturally advised Mr. Brown that I thought it was to his best interest to take a license.

By Mr. KNUFF.

1298 Q. When?

A. I can't remember that.

Q. The approximate date?

A. I can't remember that, sir.

Q. Well, you are certain, sir, that you advised Mr. Brown that it was to his best interests to take a license?

A. When we were selling the company to him, it was along about that time. That is as far as I can go.

Q. Would you say it was within two or three months of the date of his letters?

A. Somewhere along in there.

Q. Now what did you advise Mr. Brown, then, concerning that license?

A. I advised him to take a license with the U. S. Gypsum Company.

Q. Did you explain to Mr. Brown the benefits of a license?

A. Yes, sir.

Mr. ADAMS. I object to the form of the question.

Mr. KNUFF. He can answer that yes or no.

Justice STEPHENS. I think that question can be answered yes or no. Do you object to that, Mr. Adams?

Mr. ADAMS. Yes, Your Honor.

Justice STEPHENS. Why?

Mr. ADAMS. I suggest that he be asked to give the substance of the conversation without counsel suggesting it.

Mr. KNUFF. I haven't suggested anything.

1299 Justice STEPHENS. I don't think that is correct, Mr. Adams; that objection is overruled. If you remember the substance of what you said to Mr. Brown you may tell us.

The WITNESS. I can remember the substance of what I told anybody that asked me about this, and it would be the same with Mr. Brown.

By Mr. KNUFF.

Q. Well, what did you tell Mr. Brown, sir?

A. I told Mr. Brown that he couldn't afford to make a board without using the folded edge, that the cost was prohibitive.

Q. What else did you talk to him about?

A. And therefore advised him to take a license for his own best interests.

Q. Did you advise Mr. Brown that the folded-edge board was a superior product?

A. Yes, sir.

Q. Now did you give Mr. Brown any further advice as to the benefits of a license agreement?

A. I can't remember any.

Q. Did you talk to him about stabilizing prices under a license agreement?

A. I told him that, undoubtedly, if he were in with the others he would get the benefit of stabilization.

1300 Q. By "stabilization" what do you mean?

A. Stable prices.

Q. And by "stable prices" do you mean uniform prices?

A. He would get the benefit of the license price, which would be the same price.

Q. State whether or not you told Mr. Brown that that would be a benefit to the industry?

A. I can't remember that.

Q. But you do recall that you talked first about a superior product, and second, that you talked to Mr. Brown about stabilizing prices, is that correct?

A. Yes, sir.

Q. Now do you recall anything else that you talked to Mr. Brown about?

A. I can't remember.

Q. You can't?

A. No, sir.

Q. Now the same arguments that you used on Mr. Brown would you say that you told to the others in the industry?

Mr. BROMLEY. I object to the characterization "arguments" if the Court please.

Mr. KNUFF. The same reasons; may I correct the question?

Justice STEPHENS. You may correct it; the objection is sustained.

Mr. KNUFF. Did I understand that the objection would be sustained?

1301 Justice STEPHENS. As you changed the question, it was correct.

Justice JACKSON. Substituting "reasons" for "arguments," your question is proper.

Mr. KNUFF. The objection then is overruled?

Justice STEPHENS. The objection to the question as phrased was sustained, but you had changed the question so, I thought you understood you might proceed with the changed question.

Mr. KNUFF. Will you read the question, Mr. Reporter?

(The reporter read the question as amended, as follows:

"Q. Now the same reasons that you used on Mr. Brown would you say that you told to the others in the industry?")

The WITNESS. I can't remember.

1302 By Mr. KNUFF.

Q. Now I don't mean to quarrel with you, but if I understood your testimony correctly you said a moment ago that you told Mr. Brown the same thing that you told all the rest.

A. You must remember that we were selling the company to Mr. Brown.

Q. Do you recall any other person that you talked to?

A. No, sir.
Q. Mr. Gloyd?
A. I have answered that before, sir.
Q. All right, sir.
Mr. KNUFF. May I have Exhibit 103, please?
Justice JACKSON. What exhibit are you asking for now?
Mr. KNUFF. Exhibit 103, Your Honor.
May we suspend for a few minutes, please?
Justice STEPHENS. Yes, the Court will suspend for five minutes.
(Thereupon, a short recess was taken, after which the trial was resumed as follows:)
Justice STEPHENS. Proceed, Mr. Knuff.

By Mr. KNUFF.

Q. Mr. Blagden, Exhibit 103 for Identification purports to be a letter written by Mr. Griswold to Mr. McCrady. I would ask you to read that letter, please.
A. Yes, sir.
1303 Now in connection with that letter, I show you Government's Exhibit No. 186 and Government's Exhibit No. 187. Exhibit 186 purports to be a letter dated October 1, 1926, addressed to S. L. Avery and signed by A. S. Blagden. Government's Exhibit No. 187 is a copy of a letter enclosed with Government's Exhibit 186. It purports to be a copy of a letter dated September 27, 1926, addressed to A. S. Blagden, President, and signed by Audenreid Whittemore.
Justice STEPHENS. The first of those is October 1, 1926, and the other September 27, 1926?
Mr. KNUFF. That is correct, Your Honor.
Justice STEPHENS. 186 and 187?
Mr. KNUFF. 186 and 187.

By Mr. KNUFF.

Q. Mr. Blagden, is that your signature on Exhibit 186?
A. Yes, sir.
Q. And did you enclose that letter, dated September 27, from Mr. Whittemore, in your letter of October 1st to Mr. Avery?
A. That must be it.
Q. Now coming back, sir, to Exhibit 103, did you ever attend any meeting in May, 1926, where there was present a representative of every manufacturer of wallboard except those located on the Pacific Coast?

1304 A. I can only remember attending a meeting out there, a gypsum meeting, and afterwards discussing wallboard.

Q. And when was that, sir?

A. I should think it would be about this time.

Q. What manufacturers were present at that gypsum meeting?

A. There must have been the regular members, the manufacturers of wallboard.

Q. All the manufacturers of wallboard?

A. I can't remember.

Q. Can you remember any of them that were there?

A. I only in a general way remember that there was such a meeting, and that the wallboard representatives were there.

Q. And that you attended it?

A. Yes, sir, I think I attended it. I attended one meeting, I know.

Q. About May, 1926?

A. I should say so.

Q. Did you ever attend a meeting where representatives of Certain-teed were first opposed to entering into any license plan?

A. I don't remember.

Q. Would you say that at that meeting of May, 1926, that that was the attitude assumed by Certain-teed?

1305 A. I couldn't remember that.

Q. You can't remember that?

A. No, sir.

Q. Did you ever attend a meeting in 1926 where Mr. Avery was present?

A. I can't remember his being present at any of those meetings, for sure.

Mr. KNUFF. As a part of the examination-in-chief of this witness, we offer in evidence, as an admission of USG, USG's answer to Interrogatory No. 23(a), if Your Honor pleases. 23(a) reads as follows:

"23. As presently advised, there were the following meetings:

"(a) May 20, 1926; Chicago, Illinois. Sewell L. Avery, President of United States Gypsum Company, attended for a time a meeting of several representatives of other companies interested in the gypsum board business. The names of the representatives and their companies are not definitely known."

Justice STEPHENS. Any objection by any defendant?

(No response.)

Justice STEPHENS. It may be admitted.

Mr. JOHNSTON. That is admitted, I suppose, subject to the general objection?

Justice STEPHENS. This is an answer to an interrogatory.

1306 Mr. JOHNSTON. It is not our answer, though. It wouldn't be binding on Gloyd.

Justice STEPHENS. As to the defendants other than USG, you are correct, it is admitted subject to the usual reservation with respect to declarations.

Mr. KNUFF. It is only offered, if Your Honor please, as an admission of USG.

Justice STEPHENS. I understand that.

By Mr. KNUFF.

Q. Mr. Blagden, referring to paragraph 3 of Exhibit 103, did you ever attend any meeting of wallboard manufacturers where each representative was asked, in the presence of Mr. Avery, if he, the representative, was in favor of taking out a license agreement with USG?

Mr. BROMLEY. I object to that as leading and suggestive.

Mr. KNUFF. Read the question, Mr. Reporter, please. He can answer that yes or no, Your Honor.

Justice STEPHENS. Well, not every question that can be answered yes or no escapes the objection that it is leading. It may suggest the answer, and to that extent it is objectionable. Read the question.

(The pending question was read by the reporter.)

Justice STEPHENS. The Court thinks it is leading. If the answer were yes, it would be the words of counsel, not of the witness. But you may inquire whether

1307 or not, after directing his attention to that paragraph, he has any recollection of any discussion on the topic there referred to, and ask him to tell about it.

The objection is sustained in its present form.

By Mr. KNUFF.

Q. Will you read paragraph No. 3 of Mr. Griswold's letter, and state whether you have any recollection as to representatives being asked, in the presence of Mr. Avery, if they were in favor of taking out a license agreement?

A. I don't remember that.

Q. You don't, sir?

A. No, sir.

Q. State whether or not, sir, you attended any meetings of wallboard manufacturers about the time of the date of this letter, where Mr. Avery stated that a licensing arrangement seemed to be the best course for the industry as a whole to pursue?

Mr. BROMLEY. The same objection.

Justice STEPHENS. Objection sustained. Ask the witness to read the exhibit carefully, and then ask him if he was present at such a meeting as is referred to in the paragraph, and tell what he remembers about it, so we will have his independent recollection, if he has one.

By Mr. KNUFF.

1308 Q. Do you have any independent recollection, sir, of the contents of paragraph No. 4 of Exhibit 103?

A. I remember attending a meeting out there where wallboard was discussed. I can remember no details whatsoever.

Q. You can't remember whether Mr. Avery was there or not?

A. No, sir.

Q. And of course, if you can't remember whether Mr. Avery was there, you can't remember whether he said anything, is that correct?

A. That is right.

Q. Do you recall whether or not those present were to write you a letter concerning what was to be included in a license agreement?

A. I do not.

Q. Will you now, sir, refer to Exhibit 187, where Mr. Whittemore said, "which letter you have given", and so forth. It is the letter of September 27, 1926.

A. Yes, sir.

Q. Which letter you gave to Mr. Avery—does that refresh your recollection?

A. What is the question?

Mr. KNUFF. Read the question, Mr. Reporter.

(The question was read by the reporter as follows:

"Do you recall whether or not those present were to write you a letter concerning what was to be in-

1309 cluded in a license agreement?")

By Mr. KNUFF.

Q. Now I have asked you to refer to the letter of September 27, 1926. Does that refresh your recollection?

A. No, sir.
Q. It doesn't.
A. No.
Q. Do you know whether you received a letter from Mr Whittemore as he refers to in his letter to you of September 27?
A. I can't remember that.
Q. I show you, sir, what has been marked for Identification as Government's Exhibit No. 188, which purports to be a letter, dated September 24, 1926, and addressed to you.
A. Yes, sir.
Q. Did you receive that letter, sir?
A. Yes, sir.
Q. From whom did you receive it?
A. That is from Mr. Avery.

Mr. KNUFF. I now offer in evidence, if Your Honor please, Government's Exhibits 186, 187 and 188.

Justice STEPHENS. Is there any objection except the usual objection?

Mr. BROMLEY. No, sir.

1310 Justice STEPHENS. They are admitted. They are offered, I assume, under the general theory of declarations of an alleged co-conspirator?

Mr. KNUFF. That is correct, Your Honor.

Justice STEPHENS. They are admitted subject to the usual reservation that so far as they apply to other alleged co-conspirators than the one from whom they come, they must be connected by a prima facie establishment of a conspiracy.

(The documents referred to, marked as Government's Exhibits Nos. 186, 187 and 188, were received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 189, which purports to be a letter dated October 1, 1926, addressed to Mr. S. L. Avery, and signed by A. S. Blagden; and I will ask you if that is your signature to the letter, sir?
A. Yes, sir.
Q. In the second paragraph of that letter, you state: "I feel that the entente cordiale that has been started between our companies is only the beginning, and that if we play the game right it should bring about big things." Do you see that, sir?
A. Yes, sir.

1311 Q. What did you mean by that?

A. Well, that all our bickering and squabbling and fighting was over, and that from there on everything ought to be all right.

Q. What did you mean by "entente cordiale"?

A. The friendship between the two companies.

Q. Were the companies friendly before that, or not?

A. No, sir.

Q. They weren't friendly?

A. We hadn't been.

Q. And what did you mean by "playing the game right"?

A. Living up to the agreement.

Q. That is, obeying the published prices of USG?

A. Yes, sir.

Q. Now, at that time, how many companies had taken out a license with USG?

A. I don't remember; I was only referring to our own arrangement.

Mr. KNUFF. I offer in evidence, if Your Honor pleases, Government's Exhibit No. 189.

Justice STEPHENS. If there is no other objection, it will be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 189, was received in evidence.)

1312 By Mr. KNUFF.

Q. I now show you, sir, what has been marked for Identification as Government's Exhibit 190, which is a letter dated October 19, 1926, addressed to Mr. S. L. Avery, and signed by A. S. Blagden. I will ask you if that is your signature, sir?

A. Yes, sir.

Mr. KNUFF. I offer in evidence ——

The WITNESS (interposing). Wait a minute, I haven't read it yet.

Yes, sir.

Mr. KNUFF. I offer in evidence, if Your Honor pleases, Government's Exhibit 190.

Justice STEPHENS. Received, subject to the usual reservation with respect to this type of evidence.

(The letter referred to, marked as Government's Exhibit 190, was received in evidence.)

By Mr. KNUFF.

Q. Mr. Blagden, please refer to paragraph No. 2 of that

letter. Will you tell the Court just what was meant by, "I would rather make no change until we can get together and thresh out the point you brought up in regard to jobbers and the several other questions that should
1313 be settled at once."

A. I can't remember the detail. The price we made was to dealers, and all the prices we quoted and the prices that were established by the arrangement were for dealers; and where the jobbers came in, that brought up another question.

Q. What was that question that was brought up?

A. Well, there would be a difference in price there, and that hadn't been threshed out.

Q. Who brought that up?

A. I guess somebody in our company did.

Q. Well, what does your letter say, sir?

A. That there was some correspondence between the two companies, and rather than try and settle it by letter we would wait until we could sit down and thresh it out.

Q. Now who brought that point up about the jobbers?

A. I can't remember that.

Q. Well, look at your letter, sir.

A. Somebody in the United States Gypsum Company, I take it.

Q. The letter was addressed to Mr. Avery, and it states, "the point you brought up in regard to jobbers".

A. Yes, sir, Mr. Avery would bring it up.

Q. And what point was it that Mr. Avery brought up?

A. I don't remember, I don't remember the details. It had something to do with the price to jobbers.

1314 Q. Did it concern the elimination of jobbers?

A. I can't remember that. I think there was a discussion on between us about jobbers.

Q. Well, what was that discussion, your best recollection?

A. That there was a difference of price that existed, and that in some way it had to be worked out and threshed out to the best interests of all concerned.

Q. Well, were you going to make the price to the jobber the same as ——

A. (Interposing.) No.

Q. (Continuing.) The same as to the dealer?

A. We would have to live up to the understanding of the agreement. Now what the detail of that was, I can't remember.

Q. All that you know is that there was a discussion concerning jobbers?

A. Yes, sir.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 191, which is a copy of a letter dated October 19, 1926, addressed to A. S. Blagden, President, and I will ask you if you received that letter, and from whom you received it?

A. Yes, sir.

1315 Q. From whom did you receive it?

A. This is from Mr. Avery.

Mr. KNUFF. I now offer in evidence Government's Exhibit No. 191.

Justice STEPHENS. It may be received subject to the usual reservation with respect to declarations of alleged coconspirators.

(The letter referred to, marked as Government's Exhibit 191, was received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what have been marked for Identification as Government's Exhibits 192, 193 and 194. Exhibit 192 is a copy of a letter dated September 15, 1927, addressed to Beaver Products Company, and is unsigned, the copy is unsigned.

Exhibit 193 is a letter dated September 16, 1927, addressed to Mr. S. L. Avery, President, and is signed A. S. Blagden.

Exhibit 194 is a letter dated September 21, 1927, addressed to Mr. S. L. Avery, and is also signed A. S. Blagden.

Will you look at these exhibits, sir, and tell me if you received the first exhibit, and if you signed the other two exhibits?

1316 A. Yes, sir.

Q. Please look at the last paragraph of Exhibit No. 194, where Mr. Fuller's name is mentioned. Did you write a letter to Mr. Fuller that contained some plan, and if so what was the plan that it contained?

A. I don't remember of ever writing him what this would refer to. I think it was just a note from him, from reading this.

Justice JACKSON. From whom?

The WITNESS. From Mr. Fuller.

By Mr. KNUFF.

Q. I beg your pardon, I misinterpreted it. In Mr.

Fuller's letter to you, did he state what the plan was that Mr. Avery had written about?

A. I don't remember.

Q. You don't remember that, sir?

A. No, sir.

Q. Now the letters of September 21, September 16, and September 15, all refer to a meeting of board licensees, do they not?

A. Yes, I take it so.

Q. What is meant by "board licensees", what do you mean by a "meeting of board licensees"?

A. I wouldn't say board licensees; I would say those interested in the manufacture of board. I don't know whether they were licensees or not.

1317 Q. Look at Mr. Avery's letter of September 15, sir.

A. That is right, it would be licensees.

Q. Did the licensees hold meetings?

A. Yes, sir.

Q. And who were licensees at that time, sir?

A. I can't remember.

Q. It is in evidence, sir, that your contract or your license agreement with USG is dated the 29th of July, 1926; that the Universal agreement with the USG is dated the 17th of September, 1926; that Atlantic's agreement with USG is dated the 5th day of March, 1927; and that the Texas agreement with USG is dated the 18th of April, 1927. And this letter is dated September 15, 1927. Now did those companies, that is, yourself, Universal, Atlantic, and Texas, hold meetings with USG?

A. Yes.

Q. What was the purpose of those meetings, sir?

A. Just to discuss the license arrangement in its detail and iron out any difficulties that there might be.

Q. What was discussed at those meetings?

A. I can't remember the details. To see that everybody was lined up and was playing the game according to arrangements.

Q. What do you mean by the expression, "to see that everybody was lined up"?

1318 A. I mean to see that those that became licensees understood fully the agreement and were living up to it.

Q. And by "lined up", you mean that the meetings were held to see that the licensees lived up to the terms of the agreement, is that correct?

A. That is correct.

Q. Were you interested in manufacturing a different type board than that specified in the license agreement?

A. Were we?

Q. Yes.

A. No, sir.

Q. At any of these license meetings, was the question of prices discussed?

A. I can't remember what we talked about. The price was always set by the USG Company.

Q. At any of these meetings, did you ever complain to the USG concerning the price that was set?

A. I can't remember that we did.

Q. Would you say that it was or it wasn't discussed?

A. I don't remember.

Mr. KNUFF. I offer in evidence, if Your Honors please, Exhibits 192, 193 and 194.

Justice STEPHENS. They may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

1319 (The letters referred to, marked as Government's Exhibits 192, 193 and 194, were received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibits Nos. 195 and 196. Government's Exhibit 195 is a copy of a telegram dated February 27, 1928, addressed to Mr. S. L. Avery and signed A. S. Blagden. Government's Exhibit 196 is a copy of a telegram, undated, addressed to A. S. Blagden and signed by S L. Avery.

Did you send Exhibit 195, and did you receive the answer set forth in Exhibit 196?

A. Yes, sir.

Q. You sent the telegram designated as 195, is that correct?

A. Yes, sir.

Q. Who is Mr. C. O. Brown?

A. He is Mr. George Brown's nephew.

Q. And with what company was he connected, sir?

A. Certain-teed Products.

Q. In what capacity?

A. In charge of sales.

Q. In charge of sales?

A. Yes, sir, as I remember.

1320 Q. I notice that in the reply of Mr. Avery, that you had committed some breach of etiquette in the gypsum industry. Were you conscious of that when you sent Exhibit 195?

A. I don't think I thought anything about it.

Q. What did you go out to Chicago for on the 27th of February, 1928?

A. Did we go? I don't remember.

Q. Did you go?

A. I don't remember that. Mr. Avery said he wouldn't see us, that someone else would see us, and I don't remember having gone.

Q. Did Mr. Avery say that he wouldn't see you?

A. Yes, sir.

Q. How is that?

A. The telegram so states, that he would not see Mr. C. O. Brown.

Q. Did he say in that telegram that he wouldn't see you?

A. No, sir.

Q. Do you recall whether you went out there?

A. I can't remember whether I went at that time or not.

Q. What business did you and C. O. Brown have with Mr. Avery on or about that time?

A. Discussing the license arrangements.

Q. What license arrangement?

1321 A. Of the Certain-teed taking a license, as I remember.

Q. At that time was Certain-teed a licensee?

A. I don't think so.

Q. Now then, did you ever discuss with C. O. Brown the question of whether or not Certain-teed should take a license from USG?

A. I had advised them all along to take a license.

Q. I understood you to say that you had advised George Brown.

A. Well, I had advised O. C., likewise.

Q. You had? And what did you tell C. O. Brown?

A. I can't remember.

Justice STEPHENS. It is O. C. Brown, is it not? The record is being confused.

Mr. KNUFF. Claude O. Brown is the correct name.

Justice STEPHENS. It got turned around in the telegram. It is C. O. in one telegram and O. C. in the other. Which is correct?

The WITNESS. C. O. Brown is correct.
Mr. KNUFF. C. O. is correct.
Mr. ADAMS. Claude O. Brown.
Mr. KNUFF. What is my question?
(The question was read by the reporter.)

By Mr. KNUFF.

Q. Did you advise Mr. C. O. Brown that a licensing agreement would be beneficial for his company?

1322 A. I can only remember advising the Certain-teed Products Company that it would be to their best interests to take a license. Now just who the individuals were, I can't remember. It was mostly with Mr. George Brown.

Mr. KNUFF. If Your Honor pleases, I had quite a lot of other direct-examination of this witness, but in view of Your Honor's ruling as to my right to show the witness the Grand Jury testimony, I have gone at this time just as far as I care to go. I would be glad to prepare a memorandum or to bring in tomorrow morning authorities in support of my position. I don't like to turn this witness over for cross-examination until I have had an opportunity to present the Grand Jury matter thoroughly to the Court.

Justice STEPHENS. This witness is engaged in war work, is he not? I think you ought to be through with him as soon as possible.

Mr. KNUFF. I will.

Justice GARRETT. That next letter, have you introduced that?

Mr. KNUFF. Thank you, Your Honor; I don't believe I have as yet offered in evidence Exhibits 195 and 196. I am not offering the telegram dated February 20, 1928.

Justice STEPHENS. Well, Exhibits 195 and 196 may be received in evidence subject to the usual reservation with respect to declarations of co-conspirators.

1323 (The documents referred to, marked as Government's Exhibits 195 and 196, were received in evidence.)

Justice STEPHENS. Mr. Knuff, the Court Reporter called the attention of the Court t the fact that it apparently would be a useless expense, in printing the Government's brief in the record, to print the index and statement of cases. Unless you have some objection, the Court will direct just the substance of the brief to be printed, that is, the body of the brief as distinguished from the index.

Mr. KNUFF. No, I haven't any objection to that. It will

be perfectly all right.

Justice STEPHENS. The index and table of cases may be left out, but the body of the brief as a whole may be put in.

There will be a recess until tomorrow morning at 10 o'clock.

Before you announce the recess, will you gentlemen also be armed with cases with respect to your position?

Mr. BROMLEY. We will, Your Honor.

Justice STEPHENS. You may now announce the recess.

(Thereupon, at 3:48 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Tuesday, November 30, 1943.

1324 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., TUESDAY, NOVEMBER 30, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

1326 Mr. KNUFF. May it please the Court, Mr. Bromley has called to my attention the correction that I had made on page 1614, line 2, where I suggested that the change should be made from September 15 to September 16. The reporter had it correct, September 15, and I ask that

my proposed change be disregarded.

Justice STEPHENS. That may be done.

Are there any authorities to be presented with respect to the right to use the Grand Jury's minutes to refresh recollection, Mr. Knuff?

Mr. KNUFF. Yes, I have some very pertinent authorities, Your Honor.

With Your Honor's permission, shortly after the recess yesterday, and while Mr. Blagden was on the witness stand, I asked Mr. Blagden what companies he contacted, and his answer was, "I didn't contact any", and that "They contacted me."

I said, "Well, what companies did you talk to, then?", and his answer to that was, "I can't remember."

Then I offered to show Mr. Blagden his Grand Jury testimony beginning on page 2205, for the purpose
1327 of refreshing his recollection. That was objected to on the ground that the use of the Grand Jury minutes is improper, incompetent and immaterial.

I cited the *Madison Oil* case, and I cited another situation. Mr. Bromley's reply to that was that while that may be true in a criminal case, nevertheless this is a civil case and hence the *Madison Oil* case is no authority for the use of Grand Jury minutes to refresh a witness' recollection.

I submit that there are not different rules of evidence for criminal cases and civil cases. The rules of admissibility, the rules relating to refreshing the memory of witnesses, are the same both in civil and in criminal cases, and if it can be used in a criminal case, by the same token it likewise can be used to refresh a witness' recollection in a civil case.

Now the leading case, probably, on the question of refreshing the witness' recollection is *Hickory* v. *United States*, 151 U. S. at 303, where the Court said, at page 309:

"When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness."

1328 That is the general rule.

Justice STEPHENS. What is that citation?

Mr. KNUFF. The citation, sir, is 151 U. S. 303, at page 309.

The Courts have been rather liberal in allowing refresh-

ment data to be used by the witness for the purpose of arriving at the truth. The Courts have looked and have said that, "After all, what we are seeking is the truth", and they have been rather liberal.

In this connection—and this is very much in point—is the case of *Jelke* v. *United States*, 255 Fed. at 264, (C.C.A 7, 1918). The trial court there directed the attorneys for the Government to take certain witnesses into the adjoining room and to read the testimony of such witnesses given before the Grand Jury, and then recall them and renew certain questions that had previously been answered evasively. The Circuit Court of Appeals approved this procedure, saying, at page 289:

"Is this error? We think not. When a witness upon the trial of any case, whether criminal or civil, convinces the court that he is 'conveniently forgetful,' the trial judge is amply justified in taking matters into his own hands, and on his motion taking such steps as will lead to the ascertainment of the truth.

1329 "It is true that trials in criminal cases should be so conducted as to insure the acquittal of the innocent, but it must not be forgotten that they are also conducted for the purpose of convicting the guilty, and in all cases the court should endeavor to get the real facts—the truth. When the judge is convinced that a witness is conveniently hiding behind the answer, 'I can't recall,' or 'I don't remember,' which is tantamount to perjury, he fails in his duty if he does not take such necessary steps as will reawaken the witness' conscience and his memory."

Following that case the Supreme Court, in the *Madison Oil* case ——

Justice STEPHENS (interposing). That is the *Socony Vacuum* case?

Mr. KNUFF. Yes. The Supreme Court cited with approval the case of *Di Carlo* v. *United States*, 6 Fed (2d) 364 C.C.A. 2, 1925), and what the court said there was this—I am not quoting from the Supreme Court, I am quoting from 6 Fed. (2d) 364:

"The latitude to be allowed in the examination of a witness, who has been called and proves recalcitrant, is wholly within the discretion of the trial judge. Nothing is more unfair than to confine a party under such circumstances to neutral questions. Not only may the questions thus extend to cross-examination, but, if necessary to bring out the truth, it is entirely proper to inquire of such

1330 a witness whether he has not made contradictory statements at other times. He is present before the jury, and they may gather the truth from his whole conduct and bearing, even if it be in respect of contradictory answers he may have made at other times."

* * * * *

"The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court."

Now I say the Supreme Court cited that case and followed it in the *Madison Oil* case ——

Justice STEPHENS (interposing). Have you read *Metzler* v. *United States*, 64 Fed. (2d) 203, also cited in the *Socony-Vacuum* case?

Mr. KNUFF. I don't recall that I did, sir.

Now in the *Socony-Vacuum* case, the court had this further observation to make, in *United States* v. *Socony-Vacuum Oil Company*, 301 U. S. at 150, at page 233. Justice Douglas said this:

1331 "As in the case of leading questions, *St. Clair v. United States*, 154 U. S. 134, 150, such use of grand jury testimony for the purpose of refreshing the recollection og a witness rests in the sound discretion of the trial judge. See *Di Carlo* v. *United States*, 6 F. 2d 364, 367-368; *Bosselman* v. *United States*, 239 F. 82, 85; *Felder* v. *United States*, 9 F. 2d 872. He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not under all the circumstances the use of grand jury minutes is necessary or appropriate for refreshing his recollection. As once stated by Judge Hough, 'The bald fact that the memory refreshing words are found in the records of a grand jury is not a valid objection.' "

So I submit that we should be allowed in these proceedings to refresh the witness' recollection either by letting him read his grand jury testimony and then affording counsel for the defendants an opportunity to see that grand jury testimony, or we can do what was done in the *Madison*

Oil case, that is, I can read the minutes to the witness and then see whether or not they refresh his recollection. And if I am allowed, I propose to adopt the latter course. Thank you.

Justice STEPHENS. Mr. Bromley.

1332 Mr. BROMLEY. I should like at the outset to challenge counsel's statement that this witness has been recalcitrant or evasive. I mention it not only in what I deem to be fairness to the witness, but also because it seems to me that that indicates that counsel really is not attempting to refresh recollection at all but is attempting to do what we all agree should not be permitted to be done, and that is to impeach his own witness.

However, I shall argue the question on the basis on which he first posed it, and that is whether or not it is proper to use Grand Jury minutes in a civil proceeding for the purpose of refreshing recollection.

All will agree, I am sure, that the public policy is that grand jury minutes should be kept secret, their contents should not be divulged, and that that is a very high public policy and should not be violated or deviated from unless, as the *Metzler* case held, the ends of justice require it. And it is true that after the grand jury's functions are ended, disclosure sometimes may be proper where the ends of justice require it.

We have found at least three cases in New York which set very definite limitations on what disclosure should be permitted even after the grand jury proceedings have terminated and everything in relation to them is closed.

For instance, our Court of Appeals in New York has held that the plaintiff in an action for malicious

1333 prosecution is not entitled to an order directing the District Attorney to furnish the plaintiff the grand jury minutes of a grand jury which had indicted the plaintiff for extortion.

Now that is one limitation on the use of grand jury minutes.

Justice JACKSON. That was on a motion to inspect the minutes, I suppose, prior to the trial?

Mr. BROMLEY. Well, it was in a civil suit, if Your Honor pleases. The plaintiff was suing the defendant for malicious prosecution, and of course it was material to his cause of action to see what the grand jury had done about the prosecution, where the grand jury had indicted the plaintiff for extortion. And while it was akin to a motion for inspection, it was a little different because the plaintiff

in a civil suit wanted to get access to the grand jury minutes, and the court said, "You can't do that."

Justice JACKSON. I misunderstood you.

Mr. BROMLEY. That is 12 N.Y. Supp. (2d), 207, of 256 App. Div. 772.

Justice STEPHENS. What is the name of the case?

Mr. BROMLEY. Dworetzky v. Monticello Fish Company.

Justice JACKSON. That didn't go to the Court of Appeals, did it?

Mr. BROMLEY. It did not, sir.

1334 Now likewise, in the investigation which occurred in New York City of the acts of Magistrate Ewald, application was made for inspection of testimony taken before a grand jury. There the use sought to be made was in connection with a non-criminal investigation of the conduct of a clerk of a city court, a removal proceeding against the clerk of a city court, and application was made for inspection of the testimony taken before a grand jury in connection with the prosecution of Magistrate Ewald. Again that application was denied.

And finally, a motion in a civil action for inspection of a deceased person's testimony in grand jury minutes was denied, the ground being that the court had no jurisdiction to place the minutes of a grand jury at the disposal of a litigant in a civil action.

I think it is significant that counsel for the Government has not referred us to any case in which this precise question has been decided. I have not been able to find any,—I hope the Court has not,—because it seems to me very unusual, and to be significant, that it has never arisen.

This action in which we are concerned is, after all, a mere civil action. It seems to me to be violative of the well-established public policy for this Court to place the minutes at the disposal of the plaintiff here, even though the plaintiff be the Government.

Now there is a second ground ——

1335 Justice STEPHENS (interposing). What is that second case you cited?

Mr. BROMLEY. The second case is People v. Ewald, 259 N.Y. Supp. 314, again not to the Court of Appeals.

Justice JACKSON. It didn't go to the Appellate Division either, did it?

Mr. BROMLEY. That one I can't tell from this citation, and I have forgotten.

Justice JACKSON. I thought from your citation it did not. That is the reason I asked you.

Mr. BROMLEY. Now there is a second ground of opposition which is referred to in the *Socony-Vacuum* case. It seems to me that the law as laid down by the Supreme Court still is that unless a prior statement was made contemporaneously with the happening of the event to which it relates, it may not be used for the purpose of refreshing the recollection of a witness, and that this is true of grand jury minutes. The *Socony-Vacuum* case cites *Putnam* v. *United States*, 162 U.S., a decision by the Supreme Court in 1896, involving the use of grand jury minutes. The Supreme Court held that unless the testimony before the grand jury is nearly contemporaneous, there is no reasonable probability that the memory of the witness as impaired at the time of the trial was not equally so when his testimony on the prior occasion was committed to writing.

1336 Now what do we have here? We have Mr. Blagden, leaving the industry entirely in 1928, now being asked questions about what happened as far back as 1925, 1926, 1927 and 1928. Twelve years after he left the industry he appeared before the grand jury, that is, in 1940, and gave some testimony. Are not the observations of the Supreme Court in the *Putnam* case peculiarly appropriate to his situation? Is there any reason to think that his memory as it exists today, impaired as it is by the lapse of time, was not equally so when his testimony was given in 1940?

Now this precise question was raised in the *Socony-Vacuum* case. We have looked at the Government's brief in that appeal to the Supreme Court. They devoted 12 pages to an argument to try to induce the Supreme Court to overrule the *Putnam* case, saying that it was outdated and should be overruled. The Supreme Court, however, in Justice Douglas' opinion, did no such thing. It pointed out that in the *Madison Oil* case the witness whose recollection was refreshed was a man who had testified before the Grand Jury to events which had occurred only a year before his testimony was given before the grand jury, but that the charge was that he was a member of a conspiracy which had continued right up to the very time of the grand jury, and therefore, while the things that he testified to before the grand jury were a year old, nevertheless he was an active participant in the course of action which

1337 must have kept those events and all of them fresh in his mind. So the Court said that in the *Socony-Vacuum* case, the fact that a year has elapsed is not a rea-

son for applying the doctrine of *Putnam* v. *United States*. In *Putnam* v. *United States*, there was only 4 months' elapsed time between the event which was testified to and the grand jury proceedings.

Here we have a man who had no connection with any alleged conspiracy after 1928 because he got out of the industry, who was out and away from these events for at least 12 years, and it is now sought to say that his testimony given in 1940 should be used to refresh his recollection, in face of the fact that the Supreme Court has decided —and Mr. Wigmore acknowledges—that it is still the majority rule in this country that a prior statement can not be used, even testimony or deposition or grand jury minutes, can not be used unless the event testified to was reasonably contemporaneous with the grand jury testimony.

Now Mr. Wigmore, it is true, criticizes that, but he discusses the *Putnam* case and he discusses other cases, and he makes the definite statement that that is still the majority rule.

So it seems to me on that ground, in view of the extreme circumstances presented here, that is, the great length of time between the events to which he was testifying and the date of his testimony, that the rule of the

1338 Putnam case should be applied.

Mr. KNUFF. May I say a few words in reply, Your Honor?

Justice STEPHENS. Yes.

Mr. KNUFF. The three cases cited by Mr. Bromley I have no quarrel with. Those cases weren't decided on the question that one action was a civil case and the other action was a criminal case. They were decided on the well-recognized ground that private individuals have no right to inspect grand jury minutes.

In the *Madison Oil* case they tried to do the same thing, and it wasn't allowed there. In numerous cases defendants in Sherman Act cases have endeavored to have access to the grand jury minutes, and the courts have uniformly held that a defendant or no person else is entitled to have access to those grand jury minutes. That was the rule, that was the reason for the decision in those cases, not that the one case was criminal and the other case was civil.

Now in so far as *Putnam* v. *United States* is concerned ——

Justice STEPHENS (interposing). Do you contend that the Government has a higher right of access to the grand jury

minutes than defendants and private persons?

Mr. KNUFF. Not at all, but here we have a situation where the Grand Jury was investigating the gypsum industry. This isn't a case where we go out to someplace in the Middle West in an investigation not connected
1339 with the very matter on trial. This very matter that is now being tried was under investigation before that grand jury. This witness appeared before that grand jury and gave testimony concerning matters that are now on trial.

The *Putnam* case—I am very familiar with the *Putnam* case. It has been severely criticized not only by Mr. Wigmore, but it has likewise been criticized by Mr. Greenleaf, and I would like to refer, with Your Honor's permission ——

Justice STEPHENS (interposing). Did the Supreme Court sustain it as Mr. Bromley states?

Mr. KNUFF. They damned it by faint praise.

Justice STEPHENS. Did they apply its rule?

Mr. KNUFF. There was no occasion to apply that. Here is what the Supreme Court said about it, Your Honor. I am reading from page 236:

"*Putnam* v. *United States*, *supra*, held it was prejudicial error to use grand jury minutes to refresh the memory of a witness unless that testimony was contemporaneous with the occurrences as to which the witness was testifying. There the testimony before the grand jury was more than four months after the occurrence. This Court held that because of the lapse of time the testimony was not contemporaneous. Whatever may be said of the *Putnam* case on the merits (see Wigmore, *supra*, Sec. 761) it does not establish an inflexible four months' period of limita-
1340 tion. There the event was a single isolated conversation, not damaging to the defendant." ——

Mr. BROMLEY (interposing). "* * * most damaging to the defendant."

Mr. KNUFF. "* * * most damaging to the defendant. Here there was a continuing conspiracy extending at least up to the period when the witnesses were testifying before the grand jury. Much of the testimony related to events a year or more old. But in the main those matters were woven into the conspiracy, related to events in which the witness actively participated, concerned the regular business matters which which he was familiar, pertained to his regular employment, or constituted admissions against interest. On these facts we do not think there was an abuse

of discretion on the part of the trial judge in permitting the testimony to be used."

Here what we have is a continuing conspiracy, starting back in 1925 and existing up at least until the time of the filing of the bill. The witness is testifying to matters that occurred during the continuance of that conspiracy, although he was before the grand jury some years after the conspiracy had originally taken shape.

The courts that have considered the *Putnam* case, a number of the State courts, have not followed it, and have refused to follow it.

Wigmore criticizes it in Volume 2, Section 761, on page 42, second edition, 1923.

1341 Greenleaf criticized it in Volume 1, page 540, at page 544.

The State courts that had ignored or expressly declined to follow it are *Mahoney's Administrator* v. *Rutland R. R. Co.*, 81 Vt. at 210; *Folsom* v. *Apple River Log-Driving Company*, 41 Wis. 602; *Davis* v. *Field*, 56 Vt. 426; *Bank of Charleston National Banking Association* v. *Zorn*, 14 S. C. 444; and *Sagers* v. *International Smelting Co.*, 50 Utah 423.

The rule from the time the case was decided ——

Justice STEPHENS (interposing). I suppose you urge that case with particular vigor, Mr. Knuff. I noticed you smiled. (Laughter.)

Mr. KNUFF. Well, I thought I could be a little more subtle than that, Your Honor. (Laughter.)

So I say, if Your Honor pleases, that we think that we should be allowed to refresh this witness' recollection by calling his attention to what he said before the Grand Jury, and if the jury is allowed in a criminal case — and the court in the *Di Carlo* case said they could—to take into consideration the prior testimony before the grand jury, I see no reason why this Court couldn't do likewise.

Justice STEPHENS. How much of this class of testimony do you think you will have to use? I ask the question because if we are going to go into a large amount of

1342 testimony and it is going to be very important, perhaps we had better postpone the decision until we can get a chance to consider these authorities.

Mr. KNUFF. Very little. Frankly, I am surprised by the testimony of this witness. I don't use the word "surprise" in the common parlance, I also use it in legal aspects. I say that because yesterday morning Mr. Blagden was in my office. I told Mr. Blagden that he would testify along the lines that he testified to before the grand jury.

I asked Mr. Blagden if he cared to look at his grand jury testimony. Mr. Blagden sat in my office and read his grand jury testimony. I walked over to court with him yesterday, and at no time did Mr. Blagden indicate to me that his testimony would be any different than he gave before the grand jury.

Now it is true that he read that testimony rather hurriedly, and that possibly if he had an opportunity to consider and read it with some degree of care, probably there would be no necessity to today ask him if certain testimony does refresh his recollection. But as I say, he read it rather hurriedly yesterday, and his answers were a distinct surprise to me.

Now in answer to Your Honor's question, if we propose to do this a great number of times, I can't answer that question because I don't know the attitude that the Government witnesses will adopt. I would like to be able to say that we don't expect to use it again, but I can't say that.

1343 Justice STEPHENS. Does any other defendant wish to be heard?

(No response.)

Justice STEPHENS. Judge Garrett inquires how does the Government happen to be in possession of the grand jury minutes?

Mr. KNUFF. It was the Attorney General that conducted the investigation before the additional grand jury, it wasn't the United States Attorney. We had a letter of authority to conduct that grand jury investigation. The Antitrust Division conducted the investigation, and we were furnished, as we usually are furnished, a copy of the grand jury testimony.

Justice STEPHENS. Is there a Federal statute—we looked for it last night but didn't seem to discover it—permitting the presence of a stenographer before the grand jury?

Mr. KNUFF. There is no question about that. Yes.

Justice STEPHENS. We are all used to the old common law practice where not even a stenographer was present before the grand jury.

Mr. KNUFF. I know definitely there is authority for that.

Mr. BROMLEY. Does the Court refer to the presence of a stenographer or Government counsel?

1344 Justice STEPHENS. The stenographer. The old common law rule in the jurisdictions where I practiced was that not even the District Attorney could be present before the grand jury at the time of the taking of a true

bill. He might advise the grand jury during the proceedings and he might aid them in calling witnesses, but he couldn't argue to them and he couldn't be present during the taking of a bill.

Mr. KNUFF. I can, if Your Honors care to, give you chapter and verse on it. I can't do it right now, but I know definitely there is ——

Justice STEPHENS (interposing). I am sure there must be. Otherwise there would be no such person present.

Mr. ADAMS. I am sure now that there is such a statute. Previously it was the practice to have the stenographer designated as an assistant United States Attorney, and in that way it was accomplished, but I think now they have an actual statute on the subject.

Justice STEPHENS. The Court will be in recess for a few moments.

(Thereupon, a short recess was taken, after which the trial was resumed as follows.)

1345 Justice STEPHENS. We have given consideration to the arguments of counsel, which we appreciate, and have reached the following conclusions.

We are all agreed that the matter is generally within the discretion of the Court, subject to certain limitations which will be announced later.

That the rule of inviolability of grand jury proceedings seems, by virtue of the Socony-Vacuum case, to be ended in its application, at least so far as permitting the Court to exercise its discretion with respect to using them when the trial is over or the indictments are taken, or the functions of the grand jury ended.

We are agreed that there is no basis for a distinction between civil and criminal cases in respect to the use of grand jury minutes to refresh recollection.

We are agreed that any material ought to be used to refresh recollection which seems likely to be able to do so, subject to the limitations about to be announced

We are agreed that if the material is used to refresh recollection it must be shown to adverse counsel and to the court in order that the court and adverse counsel may have a right to test whether or not it does tend to refresh recollection.

My two colleagues are of the view that despite the Putnam case, which has been referred to in the argument, 162 U. S. 687, Putnam v. United States—that despite

1346 the Putnam case, the material which is now sought to be used is usable. I—with great respect to the

views of my colleagues—feel bound to disagree with that for this reason. As I understand the Putnam case, it rules that grand jury minutes may be used to refresh recollection in a subsequent proceeding only where the testimony at the grand jury proceeding was contemporaneous with the events which were described in the testimony. Now the witness here was testifying at the grand jury proceedings, as he is now testifying, to events which were not contemporaneous so far as is presently disclosed by his attorney, but to events which occurred in 1925 to 1928, or along in those years.

The distinction made in the Socony-Vacuum case, with respect to the Putnam case, seems to me not applicable here for the reason that in the Socony-Vacuum case the witness was testifying to not merely alleged conspiratorial events, whereas in the Putnam case it was an isolated event, but also to events in which the witness participated up to the time of his testimony before the grand jury. Whereas, so far as this witness' testimony now discloses, he stopped participating in the events of the alleged conspiracy along about 1928, and therefore was not testifying before the grand jury, so far as presently disclosed, to events contemporaneous with his then testimony.

I confess that I have some doubts concerning the propriety of the Putnam case rule for this reason, that
1347 if the witness was able to remember in his grand jury testimony three years ago, the events which he was then testifying about, the fact that he was then able to remember indicates that he had a memory at that time, and if he was now shown the minutes, the fact that he had a memory then might possibly refresh his present recollection. It seems to me, therefore, the rule of the Putnam case might be an unwise rule, but nevertheless, unless it is shown that this witness did participate, after he left the industry, in the license arrangements and conversations concerning them, and so on, so as to bring him within what seems to me to be the clear rule of the Putnam case, I feel myself bound by the Putnam decision, and therefore have to respectfully disagree with the views of my colleagues. But I defer to them of course, as the majority, as I am bound to do so far as the ruling of the Court is concerned, and therefore you may proceed with your examination.

Mr. KNUFF. Thank you.

Justice GARRETT. Are there copies of that grand jury testimony available?

Mr. KNUFF. We do not have any copies of the grand jury testimony except this one. I would be glad to have the portion that I am reading subsequently photostated, but we do not have any copies of it.

Justice STEPHENS. Very well, you may proceed with what you have.

1348 Mr. KNUFF. Because of the nature of the grand jury testimony, we only get a very limited quantity of those, and they are pretty well guarded.

Thereupon, AUGUSTUS S. BLAGDEN, called as a witness for and on behalf of the United States, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION (resumed) by Mr. KNUFF.

Q. Mr. Blagden, I believe you stated that you did appear as a witness before the additional grand jury in May, 1940, is that correct?

A. Yes, sir.

Q. I call your attention, sir ——

Mr. BROMLEY (interposing). I object to this practice of reading the grand jury minutes into the record.

Justice STEPHENS. We are all, I think, agreed on that point, Mr. Knuff, that you ought to show the witness the material which you think appropriate, rather than put it in here, because that in effect puts that testimony into the record.

Mr. KNUFF. I am following exactly the procedure in the Socony-Vacuum case, I am following exactly that procedure.

Justice STEPHENS. I realize that, but nevertheless we are all agreed that the matter is a matter of discretion, and we think the preferable way to do it is to show

1349 it to the witness.

Mr. KNUFF. I will be glad to do that.

Justice STEPHENS. We are all agreed on that. You may show it to adverse counsel also and to us.

Mr. KNUFF. I did not ask permission of the Court to come to the witness box, but I presume I have it.

Justice STEPHENS. It is understood that when counsel has to show an exhibit to the witness, he may come to the witness box.

Mr. KNUFF. Thank you.

By Mr. KNUFF.

Q. I show you, Mr. Blagden, your testimony before the

grand jury beginning at page 2205, where I have indicated with black pencil bracket, and I will ask you to read to and including the bottom of 2212, where I have likewise indicated with black pencil marks.

Mr. KNUFF. May I approach the bench, while the witness is reading that?

Justice STEPHENS. Yes.

(Discussion at bench—not reported.)

Justice STEPHENS. Let the record show that counsel for the Government, and Mr. Bromley, counsel for the defendant United States Gypsum Company, approached the bench and inquired what the pleasure of the Court was with respect to the procedure as to whether or not the grand
1350 jury minutes now being read by the witness should be first shown to the Court or first shown to defendants' counsel. The Court stated that it was immaterial, and that the minutes might be shown to defendants' counsel and then to the Court. The ruling of course is that the grand jury minutes shall be shown both to defendants' counsel and to the Court before the witness commences to testify concerning those minutes.

The WITNESS. Yes, sir, I have now read that.

Mr. KNUFF. May the record show that the transcript of the grand jury proceedings, beginning on page 2205, is now being shown to defense counsel for their perusal, to and including page 2212?

Justice STEPHENS. The record may so show. Would it be possible for other defendants' counsel to join the group and go into what, in football terms, is called a "huddle", so we won't have to distribute this to so many different lawyers, and take up unnecessary time? If it would be a little more convenient, we can declare a brief recess.

Mr. OLIVER. If we could read it to the group that would help.

Justice STEPHENS. The Court will be in recess for five minutes, or whatever length of time is necessary for defendants' counsel to examine the minutes.

(Thereupon, a ten-minute recess was taken, after
1351 which the trial was resumed.)

Mr. KNUFF. If your Honor pleases, may the record show that during the recess the Court has also examined the grand jury minutes from pages 2205 to and including 2212.

Justice STEPHENS. The record may so show.

By Mr. KNUFF.

Q. Mr. Blagden, yesterday, at page 1574 of the transcript, I asked you these questions, and you gave the following answers:

"Q. Well, did you contact any other companies to have those companies take out a license agreement with USG?

"A. Only when they asked me about the suit at any time.

"Q. What companies did you contact, sir?

"A. I did not contact them, they contacted me.

"Q. All right, what companies did you talk to?

"A. I cannot remember which ones."

I have subsequently shown you your grand jury testimony beginning on page 2205 and extending through 2212. Have you read that grand jury testimony?

A. Yes, sir.

Q. Is your recollection refreshed by reading that grand jury testimony?

A. I did talk to the different members ——

Q. (Interposing.) Just answer my question.

A. What was the question?

1352 Mr. KNUFF. Read the question, Mr. Reporter.

(The question referred to was read by the reporter.)

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. Now then, what companies did you talk to?

A. To the various ones present ——

Mr. BROMLEY (interposing). Wait a minute, give me a chance, Mr. Blagden. I object to this question as repetitious on the ground that these questions were answered at pages 1584 to 1586 of yesterday's record, and in precisely the way that they were answered before the grand jury.

Justice STEPHENS. It is our recollection, Mr. Knuff, that that is true, that the grand jury testimony differs from the testimony of the witness yesterday only in respect of one or two items.

Mr. KNUFF. That is right.

Justice STEPHENS. And not with respect to all the list of persons that he talked to.

Mr. KNUFF. That is right. My question at this time was just preliminary to asking him about the different persons in the various companies.

Justice STEPHENS. Well, if it is a preliminary question, you may proceed.

By Mr. KNUFF.

Q. What companies did you talk to, please?

1353 A. Right now I can't remember the various ones I talked to. I talked to different ones that were at the various meetings.

Q. I am asking you about companies.

A. I talked to, as I can remember them, Certain-teed ——

Q. (Interposing.) Just a second, stop there. With whom in Certain-teed did you talk to at that time?

Mr. ADAMS. I object to that as being already covered by the record, and as repetitious. I direct your attention to pages 1583 and 1584.

Justice STEPHENS. The witness testified that he talked to Brown of Certain-teed. In his grand jury testimony he mentioned, I think, one other person, however.

Mr. KNUFF. That is right.

Justice STEPHENS. Why don't you proceed directly to the points on which you think the testimony differs? It will take up much less time.

Mr. KNUFF. You may strike the last question, Mr. Reporter.

By Mr. KNUFF.

Q. Did you talk to Mr. Whittemore?

A. I don't think so, I can't remember.

Q. Now then, what other companies did you talk to, sir?

Justice STEPHENS. For the purpose of shortening the testimony you may lead in that aspect. Mention the name of each company and ask him as to the name of each person in that company that he talked to.

1354 By Mr. KNUFF:

Q. As to Ebsary Gypsum Company, state whether or not you talked to the president, Mr. Fred Ebsary.

Mr. BROMLEY. I object to that as repetitious. He has already so testified.

Justice STEPHENS. He testified that he talked to Mr. Ebsary and to practically everyone mentioned in the grand jury testimony. Why don't you proceed as follows, to save time? I don't want to interfere too much with your examination but if you would simply say—did you, in ad-

dition to talking to Mr. Ebsary whom you admitted yesterday talking to, also talk to somebody else?

Mr. KNUFF. My recollection was at fault. If it is in the record, didn't intend to be repetitious.

Mr. BROMLEY. It is at page 1586 of the record.

Justice JACKSON. Yes, at page 1586.

By Mr. KNUFF.

Q. Did you talk to Mr. Haggerty?

A. I may have, and probably did.

Q. What was your conversation with Mr. Haggerty?

A. I can't remember that.

Q. Well, can you recall the subject-matter that you discussed?

A. Whenever I met these gentlemen they would ask me were we going to take out a license, or had we
1355 taken out a license with U. S. Gypsum, and I would tell them we had, and if they would ask me, "Well, what do you think about it?", I would say, "I advise you to join up".

Q. And is that the conversation you had with Mr. Haggerty?

A. I can't remember that, but undoubtedly it was something along that line.

Q. Did you give Mr. Haggerty any reasons other than what you have mentioned?

A. No, sir; I couldn't remember.

Q. Did you ever talk to Mr. Haggerty about stabilizing prices?

A. I couldn't remember that.

Q. You don't recall whether you talked to him about it?

A. No.

Q. Did you talk to Mr. Fuller of Atlantic?

A. Yes, sir, I think that is in my testimony—excuse me.

Q. What was your conversation with Mr. Fuller, was it concerning the license agreement?

A. They hadn't started to make board, and they asked me if I thought it advisable for them to take a license, and I told them I did.

Q. Did you talk to Mr. Gloyd?

1356 A. I think I must have.

Q. And what conversation did you have with him?

A. I can't remember exactly, but he would ask me, just as I said with respect to Mr. Haggerty, "Are you going to take out a license?" or, "Have you taken out a license?"—

and I would say, "Yes."

Q. And did you talk to Mr. Griswold?

A. I can't remember.

Q. You can't remember?

A. No, sir.

Q. Now, then, so far you can remember talking to Mr. Brown, Mr. Ebsary, Mr. Haggerty, Mr. Fuller and Mr. Gloyd. Can you remember any other person that you talked to that was engaged in the gypsum wallboard manufacturing business?

A. I undoubtedly talked to some others, but I can't remember.

Q. You can't remember those?

A. No, sir.

Q. Now coming to Exhibit No. 189—I show you, sir, your grand jury testimony at page 2228 and would ask you to read from page 2228, beginning where I have indicated with a black pencil mark, and extending to the top of page 2229, where I have also indicated with a black pencil mark, for the purpose of refreshing your recollection.

A. Yes, sir.

1357 Justice STEPHENS. The record may show that the grand jury testimony, at the point shown the witness, has also been shown to the Court and counsel for defendants.

By Mr. KNUFF.

Q. Do you have Exhibit 189 before you, sir?

A. Yes, sir.

Q. What did you mean when you said, "I feel that the entente cordiale that has been started between our companies is only a beginner and that if we play the game right it should bring about big things."

Mr. OLIVER. I object to that, your Honor, as repetitious. That question was answered yesterday.

Mr. KNUFF. It was answered yesterday, but answered in quite a different manner than is indicated in the grand jury transcript.

Mr. OLIVER. I refer to his answer yesterday on page 1608 of the transcript.

Mr. KNUFF. It was answered yes.

Justice STEPHENS. Yes, it was asked and answered yesterday, but there is a divergence which perhaps Government counsel may have in mind, between the phrasing, and he has a right to proceed on that. Overruled.

Mr. KNUFF. May I have the question read to the witness?

The WITNESS. May I ask what I said yesterday?

Mr. KNUFF. I haven't any objection to telling you what you said yesterday, not at all.

1358 The question was asked:

"Q. What did you mean by 'entente cordiale'?

"A. The friendship between the two companies."

Mr. BROMLEY. I think you ought to read on.

Mr. KNUFF. I think that the question and answer that I have read is sufficient.

Mr. BROMLEY. I would like permission to read the next five or six lines, if the Court please.

Justice STEPHENS. I think the full answer of the witness to that matter should be brought out. Read the next several lines, Mr. Knuff.

Mr. KNUFF. All right, sir. About how many would you care to have me read? Would your Honor indicate that?

Mr. BROMLEY. Down to line 14.

Justice STEPHENS. Yes, down through line 14, I would say. I think that is fair to the witness.

By Mr. KNUFF.

Q. You were asked these questions and you gave these answers:

"Q. And what did you mean by 'entente cordiale'?

"A. The friendship between the two companies.

"Q. Were the companies friendly before that, or not?

"A. No, sir.

"Q. They weren't friendly?

1359 "A. We hadn't been.

"Q. And what did you mean by 'playing the game right'?

"A. Living up to the agreement.

"Q. That is, obeying the published prices of USG?

"A. Yes, sir."

Now I ask you, sir, what you mean when you said, "I feel that the entente cordiale that has been started between our companies is only a beginner, and that if we play the game right it should bring about big things"?

Justice STEPHENS. Where are you reading from?

Mr. KNUFF. That is the question I am now asking him.

Justice STEPHENS. I beg your pardon.

Mr. KNUFF. I am quoting from the letter, and asking him what he meant by that.

The WITNESS. I said in my previous testimony—stability, and I meant by that, that in addition to our taking out

the license, that undoubtedly others would take out licenses and that would tend toward stability.

By Mr. KNUFF.

Q. And by "stability", what do you mean, sir?
A. Stabilizing the prices in the industry.
Mr. KNUFF. You may cross-examine the witness.

CROSS-EXAMINATION by Mr. BROMLEY.

Q. Mr. Blagden, you were shown Exhibit 190 yesterday, your letter to Mr. Avery of October 19, 1926.
1360 Will you look at the first paragraph, please, and tell me what it was that the enclosed check for $11,752.45 covered?

A. The royalty on board that we had shipped, according to the license arrangement, as I remember it.

Q. And that royalty was computed at five or some other per cent of the selling price of the board which you had sold during the period covered by the accounting, is that right?

A. That is right.

Q. Now the second paragraph says, "I would rather make no change". Can you recall whether or not you wrote that second paragraph because of some letter which you had received from Mr. Avery prior to your sending Exhibit 190?

A. I cannot now remember the details, but there was some question as to the proper way of making out the price, and that we had better get together and sit down and thrash out all sides of it.

Q. And do you recollect that the question of the proper way of making out the price was a question raised by United States Gypsum as to whether or not you shouldn't pay royalty on the full price, even in those situations where you sold a jobber and gave him a discount—don't you remember if that was the dispute?

A. We could only sell, as I remember it, at one price, and that was to the dealer, and prices had to be adjusted accordingly.

1361 Q. But on that price you sold to the dealer, you had to pay a royalty, didn't you?

A. That is right.

Q. Now when you sold to a jobber, you sold at that price less a discount, didn't you?

A. I think so.

Q. And you wanted to pay a royalty only on the amount

of money represented by the price less the discount?

A. That is right.

Q. And USG wanted you to pay royalty, said you had to under the contract, on the full price, taking the position that the discount was your expense—do you remember that?

A. I can't remember that now.

Mr. BROMLEY. Mr. Knuff, isn't there a letter in your file that explains this whole thing, that preceded this letter, Exhibit 190?

Mr. KNUFF. I can't say that there is, and I can't say that there isn't.

Mr. BROMLEY. Will you take a look?

Mr. KNUFF. In this file here?

Mr. BROMLEY. Yes, the one you had yesterday up on the lectern.

Mr. KNUFF. If you will point it out to me I will answer your question.

1362 Mr. BROMLEY. Don't you know what it is?

Mr. KNUFF. I don't know what it is that you have reference to.

Mr. BROMLEY. Can I see your file?

Mr. KNUFF. Let the record show that the file was handed to Mr. Bromley.

Justice STEPHENS. It may so show.

Mr. KNUFF. If your Honor pleases, I was under the impression that counsel was to stand at a considerable distance from the witness.

Justice STEPHENS. Well, the Court has ruled, gentlemen, in respect to both sides, that counsel should stand at the lectern or near the lectern during the examination except when exhibits are being shown, but when exhibits are being shown to a witness, that obviously is not possible. I just accorded that privilege to you, Mr. Knuff, and we will have to accord it to Mr. Bromley.

Mr. KNUFF. That is all right.

Justice STEPHENS. Equal justice under law we strive to achieve. (Laughter.) These are not ceremonial rules, they are just because we hear better if you will stand farther away, when you can. The witness can lift his voice. Otherwise he carries on a conversation with counsel alone.

Mr. BROMLEY. I would like to ask Mr. Knuff if he hasn't a letter from Mr. Avery dated September 28, 1926.

1363 Mr. KNUFF. I don't know whether I do, and I don't know whether I don't have such a letter. If

counsel will indicate the contents of the letter I will make an effort to locate it.

Mr. BROMLEY. A letter to which Exhibit 190 was an answer.

Mr. KNUFF. May it please the Court, the series of exhibits that I handed to Mr. Bromley today is the same series of exhibits that was passed up to the Court yesterday. I used nothing else in my examination of Mr. Blagden yesterday.

Justice STEPHENS. We understand that, but counsel apparently is under the impression that maybe elsewhere you have a letter in your possession written by Mr. Avery to Mr. Blagden, to which the letter of October 19, Exhibit No. 190, is a response. If you do have it, it would perhaps aid the cross-examination.

Mr. KNUFF. I brought over with me the matters that were contained in the file that I gave your Honor, and the file that I used myself. I brought over no other letters. I did not introduce one exhibit which is attached to that file.

Justice STEPHENS. We understand that, and we do not assume that you are withholding anything at all. But the question is, if you haven't it here, do you think you have such a letter elsewhere, and could you produce it reasonably soon?

Mr. KNUFF. If I have it I will produce it.

Justice STEPHENS. You may perhaps be able to find it during the noon recess, or before tomorrow. Was such a letter subpoenaed from your files to your knowledge,
1364 Mr. Bromley?

Mr. BROMLEY. Yes, it was. We will look for it too, but I wish you would produce the original if you have it, Mr. Knuff.

Mr. KNUFF. I will, if I have it.

Justice STEPHENS. We will now recess.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

1365 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice STEPHENS. Proceed with the cross-examination.

Thereupon, AUGUSTUS S. BLAGDEN, the witness on the

stand at the time of recess, resumed the stand and testified further as follows:

CROSS-EXAMINATION (resumed).

Mr. BROMLEY. Have you found the letter, Mr. Knuff?

Mr. KNUFF. I haven't been out of the building since Mr. Bromley asked for it. I haven't found the letter.

Justice STEPHENS. Are you laying the foundation for producing a copy? Do you have a copy?

Mr. BROMLEY. We have a photostat of what they took, yes, Your Honor.

Mr. KNUFF. If Mr. Bromley will give me the photostat, I will see if I can produce the original, because our files are not set up according to date.

Mr. BROMLEY. May this photostat be marked for identification? May it be marked as Defendants' Exhibit 1?

Justice STEPHENS. I suggested that we use USG 1 and National 1, and so forth because I thought some of the defendants would have separate exhibits applying to them only, but of course I don't know as to that. The Court has no objection to your using Defendants' Exhibit
1366 1 and following.

Mr. BROMLEY. What do you say, Mr. Johnston? You are the expert on exhibits.

Mr. JOHNSTON. Because of the number of them, I would say to use the numbers instead of the letters, and just show it as Defendants' Exhibit 1, and so on, and if it is a particular exhibit that applies to just one defendant, attention could be called to it at that time.

Justice STEPHENS. That is agreeable.

Mr. KNUFF. I haven't any objection to how you are going to mark them, but I just thought that when you were compiling the record in this case there might be an appeal, and it served us a very useful purpose in the *Hartford-Empire* case to have indicated the name of the defendant, such as USG 1 and Texas 1, and what-not, so we would know by looking at the exhibit itself who introduced it.

Justice STEPHENS. The system suggested now is that unless otherwise indicated, each defendants' exhibit would apply to all defendants, that is much simpler and that is all right.

(The document referred to was marked as Defendants' Exhibit No. 1 for Identification.)

Mr. BROMLEY. Will you hand these three copies to the

Court, Mr. Marshal?

1367 (The copies were handed to the Court.)

By Mr. BROMLEY.

Q. Mr. Blagden, will you look at Defendants' Exhibit 1 for Identification, please, and read it?

A. Yes, sir.

Q. Doesn't that refresh your recollection so that you can now state that when you paid the royalties on the amount of the business that you had done, you deducted $1,114.22 out of the total price because that was the amount by which your sales price had been reduced due to the 15 per cent discount which you had given jobbers?

A. Yes, sir.

Q. And you did not, therefore, in your accounting, pay any royalty on the $1,114.22 which represented the amount of the discount which you had accorded to your jobber customers for the period?

A. That is right.

Q. And in Exhibit 190, you tell Mr. Avery that you would rather make the accounting on that basis until you could get together and discuss it with him?

A. That is right.

Q. It was a matter which concerned the proper interpretation of your license contract, wasn't it?

A. That is right.

Q. And you thought the license contract provided that you did not have to pay a royalty on jobber dis-

1368 count, and Mr. Avery thought that you had to pay a royalty on a jobber discount, is that right?

A. Yes, sir.

Q. Now isn't that all that is referred to in Exhibit 190 in connection with jobbers?

A. Yes, that would be all, in this case.

Q. And isn't it a fact that, contrary to Mr. Knuff's suggestion in his examination of you, it had nothing to do with the question of eliminating jobbers whatsoever?

A. That is right.

Justice STEPHENS. Mr. Bromley, let me be sure that I understand this. Is this $1,114.22 the amount which was deducted before the royalties were figured, or the amount deducted from the royalty check itself?

Mr. BROMLEY. It was the amount deducted before the royalties were figured. That is right, Mr. Blagden, is it not?

The WITNESS. Yes, sir.

Mr. BROMLEY. So the net result was that he did not pay his 5 per cent on $1,114.22, according to his contention.

Now, Mr. Knuff, will you make a search for the original of this, and see if you can produce it tomorrow, please?

Mr. KNUFF. I will.

By Mr. BROMLEY.

1369 Q. And therefore, I take it it is correct, Mr. Blagden, that neither these letters nor your subsequent discussion with Mr. Avery nad anything to do with making the price to the jobber the same as to the dealer, as was suggested by Mr. Knuff on page 1611?

A. That is right, they couldn't be the same.

Q. Mr. Blagden, Exhibit 184, your letter to Mr. Avery, refers to a settlement discussion which you had with Mr. Avery in Chicago some time in December, 1925, does it not?

A. Is that the settlement of the suit?

Q. I show you Exhibit 184, and ask you to look at the first paragraph.

A. Yes, sir.

Q. Do you recall that you met Mr. Avery in Chicago and you went over to a club called the Attic Club some few days before the letter, Exhibit 184?

A. Yes, sir.

Q. And that you had luncheon at the Attic Club with Mr. Avery?

A. That is right.

Q. And that you two were alone?

A. That is right.

Q. And it was at that meeting that you discussed settlement with Mr. Avery, was it?

A. That is right.

1370 Q. And Mr. Avery told you then, didn't he, the terms on which he would settle?

A. That is right.

Q. He told you that he would want you to pay damages, didn't he?

A. Yes, sir.

Q. And that he would want you to acknowledge the validity of his patents?

A. That is right.

Q. And that he would want you to pay a royalty for future use under the license, didn't he?

A. Yes, sir.

Q. And finally, that he wanted the right to fix your

prices if you took a license?

A. That is right.

Q. Now is it a fact that at that luncheon you finally got down to the terms of settlement so far as the quarter of a million dollars was concerned?

A. I don't remember that, whether we did it then or not. I couldn't remember whether we decided on the amount at that sitting.

Q. Then you don't remember whether you made, in effect, an oral agreement of settlement at that luncheon or not?

A. No, sir.

Q. And do you remember whether Mr. Avery made you any offer, in terms of dollars, for you to take back
1371 to your Board?

A. No, sir, I don't remember that.

Q. At any rate, you did not have with you, so you told Mr. Johnston, I believe, this memorandum, Exhibit 185?

A. No, sir, that came after.

Q. Therefore, I take it you did not discuss that memorandum with Mr. Avery?

A. Not at that sitting.

Q. Now when you got back to your office, did you find that your lawyer had prepared this memorandum?

A. Yes, sir.

Q. And you sent it to Mr. Avery with your letter of December 12, 1925?

A. That is right.

Q. You were not in favor of sending it to him, were you?

A. I can't remember it exactly. We discussed it at length, whether it would be a good thing to send it or not.

Q. Who discussed it?

A. I discussed it with Mr. Mitchell, our attorney.

Q. Well, you thought it was hardly the proper way to approach Mr. Avery, didn't you?

A. Yes, I had a very decided opinion on that.

Q. What was the decided opinion which you expressed to Mr. Mitchell with respect to this memorandum?
1372 A. I thought there was just too much of it.

Q. And that it would not appeal to Mr. Avery?

A. Yes.

Q. But you finally determined to send it, and you did send it; is that right?

A. Yes.

Q. Now you have testified, as I understand you, to two

sets of meetings, one that you have called industry or gypsum meetings, and the other you have called licensee meetings; is that right?

A. That is right.

Q. The meetings other than licensee meetings, to which you have referred throughout your direct-examination, were the general periodical meetings of all members of the gypsum industry, were they not?

A. That is right.

Q. And those meetings were not limited to board manufacturers, were they?

A. No, sir.

Q. There were there in attendance many companies that didn't make board at all?

A. That is right.

Q. That made only plaster or block or some other gypsum product?

1373 A. Yes.

Q. And in your testimony which you gave on direct, whenever you refer to a meeting without calling it a licensee meeting, you intend to refer to these general meetings of the entire industry, do you?

A. That is right.

Q. Now there never was an occasion, was there, Mr. Blagden, when the subject matter of wallboard licenses was taken up at a general industry meeting?

A. No, sir.

Q. And whatever discussion there may have been with respect to your situation, occurred after the meeting or before the meeting as individuals might approach you?

A. That is right. They might have approached me at the regular meeting, as individuals, and asked me about it.

Q. But of course, those meetings weren't called for the purpose of talking about taking licenses?

A. No, sir.

Q. And such discussions as you may have had with individual manufacturers were not a part of any formal meeting or the subject of any meeting?

A. No, sir.

Q. You said at page 1583, line 4, "The Atlantic Gypsum Company hadn't taken out a license and didn't attend those meetings, as I remember."

1374 Now as I understand that reference, you were talking about general meetings and not about licensee meetings?

A. That is right.

Q. Well, it didn't make any difference, did it, whether Atlantic had a license or not, in so far as attendance upon general meetings was concerned?

A. No, sir.

Q. So you were mistaken, were you not, if you were talking about general meetings, in saying that Atlantic didn't attend because it hadn't taken out a license? That wouldn't have had anything to do with it, would it?

A. That is right.

Q. Now coming to the second subject matter, that is, licensee meetings, the only people who ever attended licensee meetings while you were in the industry were such of the manufacturers as may have had licenses from USG?

A. That is right.

Q. And of course, during the time that you were in the industry, there were never more than four of such companies?

A. I don't remember the exact number.

Q. I think the record shows that there were Beaver and Universal and Atlantic and Texas, being the only ones who were licensees at any time while you were in the industry. Does that refresh your recollection?

1375 A. There were about that number.

Q. So when you talk about licensee meetings as distinguished from general meetings, it would only be those four, or some of them, who had representatives in attendance at licensee meetings, wouldn't it?

A. That is right.

Q. And those licensee meetings were called to discuss operations under the license?

A. That is right.

Q. And that is all?

A. That is right.

Q. From the time that you took your license in July, 1926, until the time you left the industry in 1928, isn't it a fact that there were very few of these licensee meetings?

A. That is right.

Q. Have you any idea how many?

A. Only two or three at the most, that I can remember, or maybe just two.

Q. Now I show you Exhibit 194, which is your letter to Mr. Avery of September 21, 1927, and ask you to look at the last paragraph. Do you see the reference to "and thought it an excellent plan"?

A. Yes, sir.

Q. You understood that, didn't you, Mr. Blagden, to be a reference by Mr. Fuller merely to the suggestion made by Mr. Avery that the licensees have a meeting?

1376

A. That is right, it couldn't be anything else.

Q. And it couldn't be anything else because the first paragraph of your letter to Mr. Avery says, "I have your letter of September 15 in regard to a meeting of the Board of licensees"—it means "board licensees", doesn't it?

A. Yes, sir.

Q. That word "of" is a mistake, isn't it?

A. It should be just the licensees.

A. Yes, "to a meeting of the board licensees"—isn't that the way it should have read?

A. Yes, sir.

Q. And you understood that Mr. Fuller's reference to an excellent plan to be merely his judgment of Mr. Avery's suggestion that the board licensees have a meeting, is that right?

A. That is right.

Q. You said in your direct testimony that you looked upon your company as a guinea pig, so far as settlement with USG was concerned. Now did the negotiation and execution of the Beaver license in July, 1926, have any connection with any other company, in any shape, form or manner?

A. No, sir.

Q. And what were your reasons for urging your company to take and finally taking a license as it did in 1926?

1377

A. Well, we had lost the patent suit on two occasions, that is, we had lost our case with the United States Gypsum Company on two occasions, and after studying the situation deeply I felt that we would lose in a higher court, and if we could possibly get together and settle the matter it would be best to do so.

Q. Did you also consider, Mr. Blagden, that it was very important to your company to get the right to make this closed-edge product in order to satisfy the demands of your customers?

A. We had definitely proven that the closed-edge board was the cheapest board to manufacture, and we had tried every other way, and even though we had to pay a royalty we thought it would save us money in the long run.

Q. And what about the demand of your customers for

this type of closed-edge board as opposed to open-edge?

A. They were emphatic about that.

Q. They wanted it, that is?

A. They wanted the closed-edge.

Q. And the fact, is, of course, that ever since you came with the company, and indeed ever since the Beaver Company had been in existence, the only type of board it had made was a closed-edge?

A. We made for a while a semi-closed edge.

Q. Yes, but some type of closed edge?

1378 A. That is right.

Q. And were you concerned, and was it a reason for your decision to take a license, about the contingent liability which was constantly hanging over the company's head by way of liability for damages?

A. Yes, sir.

Q. Was that a reason why you wanted to take a license?

A. That was a great big reason.

Q. And is it true to say, Mr. Blagden, that you were one of those business men who had a natural dislike for litigation?

A. Yes, sir. I tried to see if we couldn't settle it out of court as soon as I found out the true situation, after becoming president of the company.

Q. Now what can you say as to whether or not Mr. Avery's insistence on price-fixing was a factor in your determination to settle?

A. Say that again?

Q. Well, I will withdraw it. Was price-fixing an important element, to your mind, or would you have taken a license without it, or what was your attitude towards the fixing of prices which Avery insisted upon?

A. That wasn't important in my mind, not as I remember.

Q. Is it fair to say, then, sir, that you would have taken a license without such a provision?

1379 A. Surely.

Q. The record shows that the Universal Company took a contract next after you, in September, 1926. Did you have anything to do with their taking that contract?

A. No, sir.

Q. The record also shows that the Atlantic Company took their contract in March, 1927. Did you have anything to do whatsoever with their taking the license?

A. No, sir, except to answer questions that the individuals may have asked me from time to time.

Q. Did you have any part in the negotiations?

A. No, sir.

Q. The Texas Company, the record shows, took its license in April, 1927. Did you have any connection with the taking of that license?

A. No, sir.

Q. Now did the board license which you took in any manner, by way of understanding or agreement, have anything to do with the prices of plaster or other miscellaneous gypsum products?

A. No, sir.

Q. And it is a fact, isn't it, that you at no time had any understanding with Mr. Avery or anybody else as to the prices of plaster or other unpatented gypsum articles?

A. There was no understanding.

1380 Q. As a matter of fact, did you ever have any understanding or agreement or even discussion with Mr. Avery as to what the price would be which he should fix under the license if you took it?

A. No, sir.

Q. And after you took it, did you ever have any understanding or agreement or even discussion with him as to what price he would fix for the patented articles?

A. I can't remember. I may have questioned him on the price; I can't remember anything about it, though, now.

Q. Did you have any understanding with him as to what price he would fix?

A. No, sir.

Q. Is it a fact that according to your best recollection, if you did raise the subject matter with him, he told you he wouldn't discuss it with you?

A. I don't remember that.

Q. On page 1608 of your testimony, the part which was read to you this morning, and particularly beginning at line 11, all in reference to Exhibit 189, which is your letter to Mr. Avery of October 1, 1926, this question and answer appear:

"Q. And what did you mean by 'playing the game right'?

"A. Living up to the agreement."

Isn't it a fact that in that answer, when you used the word "agreement", you meant license agreement?

1381 A. That is right.

Q. Now wasn't your use of the phrase "entente cordiale" in the third sentence of the second paragraph of that letter, merely your expression of the better feeling that might result, probably would result, from the settle-

ment and license which you had taken?

A. Yes, sir.

Mr. BROMLEY: May I have Exhibit 189, please?

(Exhibit 189 handed to Mr. Bromley, and by him to the witness.)

By Mr. BROMLEY.

Q. You felt, didn't you, Mr. Blagden, that your company should live up to the agreement?

A. Absolutely.

Q. And there came a time, did there not, early in 1928, when the Certain-teed Company bought the Beaver Company, or its assets?

A. That is right.

Q. And you very soon found out after that occurrence that the management of the Certain-teed Company were not going to live up to your agreement, didn't you?

A. Yes.

Q. And it is a fact, isn't it, that you learned from Mr. George Brown, the President of Certain-teed, that he was not going to assume your contract, but to tell USG that he would not be bound by it?

1382 A. That is right.

Q. You did not agree with Mr. Brown in that position, did you?

A. No, sir.

Q. And you urged him to assume your license and to live up to the agreement, didn't you?

A. Yes.

Q. And for that purpose you had several talks with Mr. Brown, didn't you?

A. I can't remember how many. I at least had one or two.

Q. Well, don't you remember that you not only advised Mr. Brown to assume, on behalf of Certain-teed, the Beaver license, but that you arranged a meeting between Mr. Brown and Mr. Avery in Chicago, at the Chicago Club, in order to discuss the matter?

A. That is right.

Q. And isn't that the subject matter of Exhibits 195 and 196, the first one being your wire to Mr. Avery of February 27, 1928, and the second being Mr. Avery's reply?

A. Yes, sir.

Q. Now wasn't the purpose of the meeting referred to in Exhibit 195, so far as you were concerned, to bring Mr.

C. O. Brown and Mr. Avery together, in an effort to see if you couldn't work out an arrangement whereby
1383 the Certain-teed Company would assume the Beaver license?

A. Yes, sir.

Q. And that is the only purpose of the meeting referred to in Exhibit 195, isn't that so?

A. I would think so.

Q. And that telegram, Exhibit 195, is dated several weeks after there had been executed a contract for the purchase of the Beaver assets by the Certain-teed Company; isn't that right?

A. I don't remember the date.

Q. Don't you remember that that contract was in January, 1928?

A. That is right.

Q. So that you stayed on with the new Certain-teed organization from January, 1928, for a period of 3 or 4 months before you left, did you not?

A. I don't remember the exact time, but I was on for a while.

Q. I thought you said you left the industry in April, 1928.

A. Did I?

Q. I thought so.

A. I don't remember.

Q. I don't either, but I thought that was it.

1384 Well, at any rate, can you recall that you stayed——

A. (Interposing.) I was on for a while afterwards.

Q. And that meant you were on as an employee of the Certain-teed Company, didn't it?

A. Yes, sir.

Q. Now Exhibit 196, Mr. Avery's wire—can you remember whether, as a result of that, a meeting did occur between Mr. Avery and either Mr. Brown—either Mr. George Brown or Mr. C. O. Brown?

A. There was a meeting of Mr. George Brown and Mr. Avery and myself out in Chicago.

Q. There was?

A. Yes. I remember that well.

Q. And is the reference in the last sentence of Exhibit 196 a reference to this matter of whether or not Certain-teed should take over and assume the Beaver license?

A. That had to do with the license, yes, sir.

Q. The reference to "the license stand we have taken is

firm and unless Certain-teed wishes to propose action in practical accord with it, any conference is useless," is a reference to Mr. Avery's insistence that Certain-teed was bound to take over the Beaver license, is it not?

A. That is right.

Q. And did you know that thereafter Mr. Brown persisted in his refusal, and that resulted in another lawsuit between USG and Certain-teed?

1385 A. I heard that that was the case.

Q. Did you know that prior to the sending of Exhibit 195, the Certain-teed Company had received a formal notification from USG, or its lawyers, demanding that Certain-teed should assume the Beaver license?

A. I don't remember that.

Q. Now in connection with USG's answer to Interrogatory No. 22, there was a reference in the answer to a meeting of February 26, 1926, in New York, between you and Mr. Avery. Do you recall that in February, 1926, that is, after your Attic Club meeting in December, 1925, Mr. Avery went abroad for an extended trip?

A. I remember he was away for some time.

Q. Well, do you remember that in February, 1926, you went to the steamer to say goodby to him?

A. I don't remember that.

Q. Are you able to tell us whether, in February, 1926, you did see him in New York and say goodby to him?

A. I can't remember that now.

Q. Can you remember whether, in February, 1926, you had any discussion with him about the Beaver Company taking a license?

A. Was that before we had taken a license?

Q. Yes, you took the license in July, 1926, and you

1386 had the Attic Club meeting in December, 1925.

A. Well, that would have been the topic of conversation, all right.

Q. But don't you remember that as a matter of fact, you had no conversation with him except to bid him goodby because he was going abroad?

A. Well, that was the main subject of the meeting, naturally.

Q. It was?

A. Well, I can't remember it now.

Q. You don't remember anything about it?

A. No, sir.

Q. You said in your examination-in-chief that in your

negotiations with Mr. Avery it was assumed that USG would have the right to fix the price. Now as a matter of fact, it was only assumed because that was one of the terms that Mr. Avery laid down from the outset, wasn't it?

A. That is right.

Q. And when you said it was assumed, you meant that after he had laid that down as a term and you had agreed to it, that thereafter it was assumed that that would be in the contract?

A. That is right.

Q. You also said that by signing the license agreement you intended to make closed-edge board. Now I ask you, you didn't mean to say that under the agreement
1387 you were required to make only closed-edge board, did you?

A. Well, we wanted to make closed-edge board, and we signed the agreement so that we could make closed-edge board.

Q. But so far as any understanding with Mr. Avery or anybody else was concerned, you were always free, after you signed the agreement, to make open-edge board if you wanted to, weren't you?

A. I don't remember that.

Mr. KNUFF. Just a moment. The question is objected to because the agreement speaks for itself.

Mr. BROMLEY. I will withdraw it.

By Mr. BROMLEY.

Q. Did you have any understanding, outside of the agreement, that you would not be free to make open-edge board?

A. I don't remember.

Q. Well, don't you remember that as a matter of fact, at all times you knew you were free to make any type board you wanted to?

A. Well, I suppose that is all right, but I don't remember that. We only wanted to make the one board, and that was the closed-edge board, and that is why we signed the agreement.

Q. Put it this way: Did you ever promise Mr. Avery or anybody else that you would not make open-edge
1388 board?

A. No, I don't remember that.

Q. When you say "you don't remember that", you mean you never did promise him, to your best recollection, don't you?

A. I would think so.

Q. You also said in your direct-examination that in the second suit which USG brought against Beaver, at some time or other you caused the appeal to be withdrawn. As a matter of fact, that appeal was not withdrawn or dismissed until after you had made your settlement and signed up your settlement contract and your license agreement, Exhibit 1; isn't that right?

A. I am not sure about that.

Q. Well, you wouldn't withdraw your appeal before you settled your lawsuit?

A. That is right.

Q. So your recollection is that you didn't withdraw the appeal until after you settled the suit?

A. That is right.

Q. Coming to the subject matter of these patents which you assigned under the terms of the settlement agreement, don't you remember, Mr. Blagden, that in your settlement negotiations, Mr. Avery took the position that he was not concerned with your patents, and didn't care anything about them; but that after the patent lawyers for both companies got into the matter they insisted that
1389 your company make the assignment of your patents in order to avoid the possibility of future controversy between your patents and USG's patents?

A. I don't remember that.

Mr. BROMLEY. That is all.

Justice STEPHENS. Do any other defendants wish to cross-examine?

Mr. ADAMS. No.

Mr. FINCK. No cross-examination.

Justice STEPHENS. If no other defendants desire to cross-examine, do you have any re-direct?

Mr. KNUFF. No re-direct-examination, Your Honor.

Justice STEPHENS. Is this all that is desired of this witness?

Mr. KNUFF. As far as the Government is concerned, that is all we desire of this witness.

Mr. BROMLEY. That is all.

Justice STEPHENS. You may be excused, Mr. Blagden. Thank you for attending the court.

(Witness excused.)

Mr. KNUFF. I will have to crave Your Honors' indulgence for just a minute. Mr. Steffen, I might say, went over to the infirmary during the lunch hour. He is running

a high temperature, and he went home.

Justice STEPHENS. All right, take your time.

1390 Mr. KNUFF. May it please the Court, we had subpoenaed Mr. F. E. Davis, the Secretary of the National Gypsum Company, for the purpose of identifying the minutes of the National Gypsum Company. Mr. Finck and myself have agreed that Exhibits 197 to 201, inclusive, are the original minutes of the National Gypsum Company; that they were signed by Mr. Davis as it appears thereon; that Mr. Davis is the Secretary of the National Gypsum Company, and if he were here today he would identify these minutes as the minutes, and that he is the proper officer to have custody of them.

Am I correct in that, Mr. Finck?

Mr. FINCK. You are.

Justice STEPHENS. The stipulation may be shown.

Mr. KNUFF. We now offer in evidence, if Your Honor pleases, Exhibit 197, the same being the minutes of the meeting of the Board of Directors of the National Gypsum Company held at the principal office of the corporation, 409 Jackson Building in the City of Buffalo, on the 27th day of November, 1928, pursuant to notice.

Mr. FINCK. If the Court please, on these exhibits that are now being offered, I think that they should be offered by the Government submitting just such parts as are relevant and material. There are a great many things in the minutes that have no relationship or materiality to this case, and I think the Government should be limited to those parts which are material.

1391 Mr. KNUFF. I am agreeable to that, Your Honor, and I will indicate on each exhibit that portion of the exhibit that we desire to have the Court consider.

Justice STEPHENS. Very well.

Mr. KNUFF. On Exhibit No. 197, we think that the entire exhibit—it is a very short exhibit—should be received.

We now offer in evidence Exhibit 198, the same being the minutes of a special meeting of the Board of Directors of the National Gypsum Company held at the principal office of the corporation at No. 409 Jackson Building, in the City of Buffalo, on the 14th day of May, 1929, pursuant to notice. The part that we are particularly interested in at this time is the first two pages of the exhibit.

We also offer in evidence Government's Exhibit 199, the same being the minutes of the meeting of the Board of Directors of the National Gypsum Company held at the principal office of the corporation at No. 409 Jackson

Building, in the City of Buffalo, New York, on the 28th day of May, 1929, pursuant to notice. The portion that we are particularly interested in is the first paragraph on page 1, and the last paragraph on page 1.

Justice STEPHENS. Running over onto page 2?

Mr. KNUFF. Running through the enumeration of various products, Gold Bond, and so forth, which would be about one-third down the page, ending with "Seconds $15.00".

1392 Mr. JOHNSTON. If the Court please, may I make a suggestion in reference to that?

Justice STEPHENS. Yes.

Mr. JOHNSTON. The way you are putting it in, it almost becomes necessary then for the reporter to take these exhibits and copy into the record that part of them. Why not have counsel for the Government and counsel for National agree upon those parts of the minutes that would go in, and then copy those excerpts and just introduce them as exhibits. It will make the record much shorter and will be much more convenient.

Justice STEPHENS. If you are just introducing the excerpts, they won't identify themselves.

Mr. JOHNSTON. You would identify it by a memorandum at the top of the exhibit. Otherwise, you might just as well introduce the whole exhibits, because you have got them all in the record anyway.

Justice STEPHENS. These are not going to be copied into the record.

Mr. FINCK. I didn't understand that.

Mr. KNUFF. I didn't understand that either.

Justice STEPHENS. These aren't going to be copied into the transcript. As I understand it, we are following the plan already agreed upon, after some discussion, that these exhibits shall be marked and introduced in

1393 evidence as exhibits; and of course the whole exhibit physically is in the record.

Mr. JOHNSTON. That is what I am saying.

Justice STEPHENS. But counsel is calling attention to the fact that the Government relies upon special portions of the exhibit which are designated in the record. Do you see any objection to that?

Mr. FINCK. I see no reason for copying the two or three pages of the minutes of May 14, 1929, in the record.

Justice STEPHENS. I don't understand we are copying anything in the record.

Mr. FINCK. I mean, I see no reason for its being a part

of the exhibit. It has no relation to the issues in this case at all.

Justice STEPHENS. Very true; but it is quite difficult to segregate or strip out one part of an exhibit from another except by identifying it. The Court doesn't care, whatever is convenient to counsel, but it seems to us that the present method is reasonably convenient. When the exhibit is examined, if the case should ever reach an appellate stage, when the exhibit is examined in connection with the transcript, the reader will be able to tell what part of the exhibit is relied upon by the Government. What is your suggestion?

Mr. FINCK. I would be very glad to agree with Mr. Knuff on the parts of the minutes that he desires as exhibits, and then put in such part, so that the record
1394 will not contain a lot of immaterial matter.

Justice STEPHENS. How are you going to put in such parts, since they are not to be copied into the transcript, without cutting them out of this exhibit?

Mr. FINCK. That is what I thought we would do, cut them out of the exhibits.

Justice STEPHENS. You mean physically cut them out?

Mr. FINCK. Physically cut them out.

Justice STEPHENS. That seems undesirable to me, because the exhibit is identified now because of the legend at the top, and if you cut these portions out it is going to take a lot of labor and time in putting a new identification upon them. However, if the Government has no objection to that and counsel are all agreed that it is more convenient, the Court has no objection.

Mr. KNUFF. I agree with what Your Honor just said. I can't conceive how what I am now doing is in any way going to encumber this record.

Justice STEPHENS. Are there any portions of these exhibits which it is improper to have in the record, do you think, Mr. Finck?

Mr. FINCK. Oh, I think not. It is just matter that is sort of private.

Justice STEPHENS. The Court thinks that we had better go along as we are now going. You can identify,
1395 by telling the Court Reporter, in the record, carefully, as you are doing, Mr. Knuff, what particular portions of the exhibit the Government is relying upon. The Court will then be able to disregard the balance. It seems to me that if this case should ever reach an appellate stage, that when the ultimate record on appeal is pre-

pared the eliminations can be made then, if necessary, so that no more of the exhibit than is necessary will appear in the appellate record.

Mr. KNUFF. I offer in evidence Government's Exhibit 200, the same being the minutes of the meeting of the Board of Directors of the National Gypsum Company held at the principal office of the corporation at No. 409 Jackson Building in the City of Buffalo, New York, on the 23rd day of July, 1929, pursuant to notice.

In connection with this exhibit I offer everything in it except the last paragraph, beginning "Mr. Burkhardt suggested the advisability", and so forth—everything but that paragraph.

Justice STEPHENS. You don't offer the following paragraph, do you, the last two paragraphs you eliminate?

Mr. KNUFF. That is right, Your Honor.

I now offer in evidence Government's Exhibit No. 201, the same being the minutes of a meeting of the Board of Directors of the National Gypsum Company held at the Hamilton Golf and Country Club, Ancaster, On-
1396 tario, on the 27th of August, 1929, pursuant to notice.

In particular, I offer the entire exhibit except the last three paragraphs. That elimination would begin with, "Mr. Burkhardt recommended that the corporation insure the life", and so forth. From there on I am not interested.

Justice STEPHENS. Are you offering these all at once now?

Mr. KNUFF. I am, Your Honor.

Justice STEPHENS. Let the Court then take a moment to read them, so we will have them in mind.

Mr. KNUFF. May we have a recess while the Court is examining those?

Justice STEPHENS. Yes, the Court may be in recess. We will remain in the room.

(Short informal recess.)

Justice STEPHENS. You may proceed, gentlemen.

Exhibits 197 to 201, inclusive, have been offered. Are there any objections?

Mr. BROMLEY. Only the usual one, if Your Honor please.

Mr. JOHNSTON. We have the additional objection that these exhibits have no materiality as to Mr. Gloyd. They are minutes of meetings of Directors of the National Company, and I can't see where they would be admissible as to us at all.

1397 Justice STEPHENS. Are you offering them as declarations of alleged co-conspirators?

Mr. KNUFF. We are, Your Honor.

Mr. JOHNSTON. Well, could they be that, even?

Justice STEPHENS. Well, I will hear you further, Mr. Johnston, but I don't see why they are to be differentiated from letters or any other statements made by alleged co-conspirators. They, of course, will be received subject to the general reservation that the Court has made. But why are they any less declarations of alleged co-conspirators than any of these other exhibits?

Mr. JOHNSTON. Well, I don't want to take the time of the Court on an argument. It is merely equivalent to a man making a statement about himself and writing it down. If you could reduce the corporate entity to an individual, it would be equivalent to that.

Justice STEPHENS. You mean to draw the distinction that the other alleged declarations were uttered to other persons; whereas, these are uttered, so to speak to the company itself?

Mr. JOHNSTON. Yes.

Justice STEPHENS. We think that, of course, whether they are treated as declarations or admissions, they would be binding as against other co-conspirators than those by whom they are made, to-wit, National, only after the prima facie proof of a conspiracy has been made,

1398 and they are all received subject to that distinction.

But we think, Mr. Johnston, that the fact that they are not at the moment communicated to someone else would not necessarily declassify them as competent and relevant admissions or declarations.

The objection is overruled. The exhibits are received subject to the reservation which the Court has made.

(The documents referred to, marked as Government's Exhibits 197 to 201, inclusive, were received in evidence.)

Mr. KNUFF. Mr. Eugene Holland!

Thereupon, EUGENE HOLLAND, called as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. KNUFF.

Q. Your full name is what, sir?

A. Eugene Holland.

Q. H-o-l-l-a-n-d?

A. That is correct.

Q. Where do you live, Mr. Holland?
A. Glencoe, Illinois.
Q. By whom are you employed?
1399 A. The Florence Stove Company.
Q. In what capacity?
A. Vice President.
Q. How long have you been connected with the Florence Stove Company?
A. Approximately four years.
Q. And what are your duties with the Florence Stove Company?
A. I have the title of Vice President in Charge of Operations.
Q. The Florence Stove Company is a manufacturing concern, is it?
A. Yes, sir.
Q. And your duties include the direction of the manufacturing of that company, is that correct?
A. Yes.
Q. Were you subpoenaed as a Government witness, sir?
A. Yes.
Q. And did you also appear and testify before the Grand Jury, the additional Grand Jury, in the District of Columbia in 1940?
A. Yes.
Q. Were you formerly associated with any company that was engaged in the gypsum business?
A. Yes, sir.
1400 Q. With what company, sir?
A. The Universal Gypsum & Lime Company.
Q. When did you enter the employ of the Universal Gypsum & Lime Company?
A. In January, 1928.
Q. And how long did you stay in the industry?
A. I think until about August, 1935.
Q. State the position that you had with the Universal Company?
A. I was President and General Manager until the time that the company was placed in receivership, and at that time I resigned as President and General Manager and became the operating receiver.
Q. There was more than one receiver, was there not?
A. Yes, there were several.
Q. And your associates were whom?
A. Abel Davis, and then there were ancillary receivers.

1401 Q. When was the receivership terminated, if you know?

A. I don't know that.

Q. Can you give us the approximate date?

A. I think it was some time in 1935.

Q. And at about that time you left the Universal, is that correct?

A. Yes. I don't understand what you mean by "terminated"?

Q. When were the receivers discharged?

A. I don't remember what date.

Q. It was around, however, 1935, is that your best judgment?

A. 1934 or 1935, the latter part of 1934 or the early part of 1935.

Q. So that you were engaged in the gypsum business approximately seven years, from 1928 down to 1935?

A. That is right.

Q. How many plants did Universal have?

A. I think seven.

Q. Where were those plants located?

A. One of them was in Akron, New York; Fort Dodge, Iowa—do you want the lime plants too?

Q. Yes.

A. York, Pennsylvania. Then there was a lime plant in Virginia.

1402 Q. At Plasterco?

A. No, Arando, Virginia; and we had a plant in Texas. At one time we owned a subsidiary company at Newburgh, New York, with a plant there; and a quarry up in Nova Scotia. I think that is about all.

Q. What products did the Universal manufacture, sir?

A. Gypsum wallboard and gypsum plaster and lime.

Q. Will you name the plants where you manufactured wallboard?

A. Fort Dodge, Iowa; Akron, New York and Rotan, Texas.

Q. Did you manufacture any block?

A. Yes, at one plant.

Q. And what types of wallboard did you manufacture, as to the edge, I mean, an open-edge, or a closed-edge?

A. Closed-edge.

Q. Through what area of the United States did you sell your products?

Justice JACKSON. All of them?

Mr. KNUFF. Yes, sir.

The WITNESS. Well, East of the Rocky Mountains, although on our lime products, or some of those things, we didn't go very far away from the plant. We did not have complete coverage east of the Rockies.

By Mr. KNUFF.

Q. So far as your gypsum board and gypsum plaster were concerned, you had more or less general cov-
1403 erage throughout the entire United States east of the Rocky Mountains, is that a fair statement?

A. Well, I think that is a little exaggerated. There were some localities where it was pretty spotty.

Q. Will you then correct me?

A. Well, I don't know that I could; I don't believe that I could.

Justice STEPHENS. As a matter of curiosity—perhaps it is not material under the issues—but to satisfy the curiosity of at least one of the members of the Court why does this particular gypsum business seem to have been confined to the Eastern area, didn't the Western part of the United States use gypsum board and wall board and gypsum plaster and gypsum tile?

Mr. KNUFF. Probably they did, but the conspiracy only involved those board manufacturers that sold East of the Rocky Mountains. The famous perforated lath was of course sold on the West Coast and had been sold on the West Coast for quite a number of years. But the companies on the West Coast, as we view the conspiracy, were not involved in it, it was just the companies East of the Rocky Mountains.

Justice STEPHENS. I wasn't asking so much about the conspiracy, but as to how it happened that these particular companies dealt East of the Rockies, and possibly some others we don't know about dealt on the West Coast.
1404 Was there a natural cleavage at the Continental Divide, or something of that sort?

Mr. KNUFF. I am sorry, Your Honor, but I am not enough of an expert to know.

Mr. BROMLEY. The United States Gypsum Company, as I understand it, always operated West of the Rocky Mountains, and made no such distinction. I think this is a distinction created largely by the Government. I think other companies operated there too.

Justice STEPHENS. Thank you, gentlemen, I didn't mean to take much time on that, I was just curious. You may proceed.

1405 By Mr. KNUFF.

Q. Were you familiar with the executives of other companies that were also engaged in the gypsum business?

A. I became acquainted with them.

Q. Did you know any of the executives of Atlantic?

A. Yes.

Q. Did you know Mr. Fuller?

A. Yes.

Q. Did you know Mr. Channing?

A. Yes.

Q. Did you know Mr. Neale?

A. Yes.

Q. Did you know anybody connected with American?

A. Yes.

Q. Did you know Mr. Griswold?

A. Yes.

Q. Mr. Black?

A. Yes.

Q. Mr. Kling?

A. Yes.

Q. Did you know anyone connected with Certain-teed?

A. Yes.

Q. Would you name the people that you knew at Certain-teed?

A. Mr. George Brown, Mr. C. O. Brown, Mr. Whittemore and Mr. Walker.

1406 Q. Mr. L. R. Walker or Elisha Walker—there were two Walkers.

A. Yes, I knew both of them?

Q. Did you know Warren Henley?

A. Yes.

Q. Did you know anyone connected with Ebsary?

A. Yes.

Q. Will you name those whom you knew with the Ebsary Gypsum Company?

A. Mr. Ebsary and Mr. Lenci.

Q. Now as to Niagara, did you know the officials of that company?

A. Was that Mr. Reeb's company?

Q. Yes.

A. I knew Mr. Reeb.

Q. Did you know anybody with National?

A. Yes.

Q. Will you tell us the officials there that you were acquainted with?

A. Mr. Haggerty, Mr. Baker, Mr. Williams, Mr. Finck, and Mr. Burley.

Q. Ralph Burley?

A. Yes.

Q. Did you know anyone connected with Texas?

1407 A. Yes.

Q. Who?

A. Mr. Gloyd and Mr. Chism.

Q. And did you know your predecessor with Universal?

A. Mr. Palmer and Mr. Shearer.

Q. Was Mr. Palmer your immediate predecessor or was Mr. Shearer?

A. Mr. Palmer.

Q. Mr. Lowell Palmer?

A. That is right.

Q. And was Mr. Shearer living or dead at the time you came to Universal?

A. He was living.

Q. He has since died, is that right?

A. Yes, that is right, and so has Mr. Palmer.

Q. Mr. Palmer has also?

A. Yes.

Q. Whom are you acquainted with, connected with United States Gypsum?

A. Mr. Avery, Mr. Henning, Mr. Knode, Mr. MacLeish, Mr. Keady—and many more.

Q. Who were you acquainted with in Beaver?

A. Well, at the time I came into the industry there was no Beaver Company.

Q. Did you know Mr. Blagden?

1408 A. I think I met Mr. Blagden just casually at some time.

Q. When you came into the industry had Universal taken out a license with USG, or rather were they already a licensee of USG at the time you came with them?

A. Yes.

Q. I show you, sir, what has been marked for identification as Government Exhibit 202, the same being a photostat of a memorandum, dated May 18, 1928, addressed to the Executive Committee of Universal Gypsum & Lime Company, and I will ask if you can identify that photostat, sir. Probably the negative photostat, that is the dark one, would be more legible as far as your signature is concerned.

A. Did you want me to read this?

Q. Read it to yourself, to satisfy yourself whether you

can identify it. Can you identify that memorandum, sir?

A. Yes.

Q. That is your signature on it?

A. Yes, sir.

Q. And you dictated it, did you?

A. Yes.

Q. Mr. Holland, I direct your attention to the first page, the third paragraph from the bottom, beginning with the word, "negotiation".

A. Yes, sir.

Q. What were the competitive conditions in the industry at about that time?

1409 The market on gypsum products was very uncertain, and the products were being sold at a very low price as far as Universal was concerned.

Q. Do you know what the general conditions were in so far as prices were concerned?

A. Well, I think that that was pretty general. My point was that we couldn't make any money at the prices things were being sold at because of our costs.

Q. Would you say that competition at that time was keen, or was it not quite so keen?

Mr. BROMLEY. Objected to as calling for a conclusion.

Mr. KNUFF. Probably it does, but I thought ——

Justice STEPHENS (interposing). It is not an objectionable conclusion. You may ask the witness what the character of the competition was, and let him tell it in his own way.

By Mr. KNUFF.

Q. What was the character of the competition generally throughout the industry at about the time this memorandum was written, sir?

A. Well, I think it was very live competition, everybody was very active, and it was pretty hard for Universal to sell anything.

Q. What type of board were you making at that time?

1410 A. Closed-edge.

Q. A closed-edge board?

A. Yes.

Q. Now you say here that there were negotiations with competitors—what did you mean by that paragraph?

A. I don't know unless it would be to shame them out of selling stuff below our costs.

Q. What did you have in mind when you wrote that recommendation, or that memorandum to your Executive Committee

A. I don't know as to anything definite. One of the things was that there had been talk of a merger in the industry.

Q. Well, how did you expect to end the severe competitive situation that you speak of in that paragraph

A. I don't think I had any very good idea as to that.

Q. Well, you mean that you just put something down on paper without having any reason or rhyme for putting it down?

A. Well, no definite plan, I think that is right.

Q. Well, what indefinite plan did you have, then?

A. Well, I hoped that we could get more for our material.

Q. And how were competitors to contribute towards that?

A. By trying to get more for their material. We were having to meet low prices always.

Q. You weren't satisfied with your prices, is that correct?

A. That is right.

1411 Q. And neither were you satisfied with the prices of others?

A. No.

Q. By "no", you mean you weren't satisfied, or do you mean no to my question—which?

A. I mean that the reason that we had to quote such low prices is that we were having to meet low competitive prices in the market.

Q. Well, did you expect your competitors to raise prices?

A. I hoped they would, yes.

Q. You were hopeful of that?

A. That is right.

1412 Q. And what negotiations were you going to pursue towards that end with your competitors?

A. Well, I think that there was some talk in our company, that possibly we ought to have the Government see to it that we could make some profit and not sell stuff below cost.

Q. Well, what did you expect the Government to do, sir?

A. Well, at that time there was a practice, I think, where industries could organize under the Fair Trade Practice laws and come before the Federal Trade Commission.

Q. Were the Fair Trade Practice laws in existence in

the boom period of 1928?

A. I don't know, but at one period in my gypsum experience we did go before the Federal Trade Commission under the Fair Trade Practice laws.

Q. Are you referring to the Federal Trade Commission or are you referring to the Code Authority under the NRA?

A. The Federal Trade Commission.

Q. You are referring to the Federal Trade Commission?

A. Yes, sir, that is right.

Q. And what did you expect your competitors to do along that line?

A. Well, I hoped that they would cooperate.

Q. Did you contact any of your competitors with that in view?

A. Yes.

1413 Q. Whom did you contact?

A. Oh, I think I talked to everybody about it.

Q. Well, that is rather indefinite.

A. I mean all the people that I knew in the industry.

Q. The people that you have just named for me?

A. Well, I wouldn't say that I talked to all of them, but I would say that I probably talked to most of them.

Q. Do you recall any conversation that you had with any of them?

A. No. I don't think I could state definitely just what took place.

Q. Did you have any definite plan that you talked to them about?

A. Yes. At one of the first conversations, I don't know with whom, I was told that all the companies, or most of the companies, were under an injunction in the Federal Court for the District of New York, which meant that we couldn't even talk about the gypsum business with each other, and in talking to our lawyers about it they stated that a decision had been rendered after this injunction was handed down that probably would modify that, so one of my purposes was to get the injunction modified in order to be able to talk to my competitors without breaking the law.

Q. Do you know the name of that case, sir?

A. No.

1414 Q. What District was it in?

A. I think it was in New York.

Q. The Northern District of New York?

A. I am not sure.

Q. Do you know who the plaintiff was in that case? I am asking you for information because I know nothing about it, and I want to familiarize myself with it.

A. Well, I don't remember. You see, I have been out of the gypsum industry now for about eight years.

Q. Well, can you tell me the lawyer that you contacted?

A. Yes, I talked to Mr. Sidley of Chicago about it.

Q. Mr. Sidley?

A. Yes.

Q. How do you spell that name, sir?

A. S-i-d-l-e-y.

Q. Is he living today?

A. Yes.

Justice STEPHENS. Of Cutting, Moore & Sidley?

The WITNESS. That is right.

By Mr. KNUFF.

Q. Was that private litigation, sir?

Mr. BROMLEY. I object to that as immaterial, if the Court please.

Mr. KNUFF. I am trying to get some information about this case. I would like to check into it. I do not have any reason to doubt Mr. Holland's word, but I know
1415 nothing about it.

Justice STEPHENS. The Court thinks it is proper for you to inquire into it so far as is necessary to show a reason for the witness' conversations, if he had any, or actions, if he took any, which you claim are relevant. But if you want to go into the detail of this litigation, and inform yourself about it, I suggest you do it informally during a recess.

Mr. KNUFF. I simply want the witness to give me the name of the case and the District.

Justice STEPHENS. Do you know the name of the case and the court?

The WITNESS. No, it was before my time. It was merely cited as a reason for not talking industry affairs such as were normal in industry.

By Mr. KNUFF.

Q. Your best recollection is that it was in the Northern District of New York?

A. That is right.

Q. Is that the only negotiation that you had or that you were going to conduct, rather, with competitors, toward

ending the severe competitive situation, or did you have something else in mind, also?

A. Well, our firm, our company, had been exposed to merger possibilities ——

Q. (Interposing.) What do you mean by "exposed to merger possibilities"?

1416 A. Well, there was a deal on before I came there whereby several of the gypsum companies were to be merged, and some of the bankers that were interested in the Universal Company had taken an active part in trying to throw some companies together, including ours, and some of that effort was still being carried on.

Q. Well, if your company was merged with some other company, then your company would cease to exist, and there would be no reason why you would be interested in prices after it ceased to exist, would there?

A. No, but it might have been the means of keeping the company from going into receivership.

Q. At that time the company was not in receivership?

A. No.

Q. Are those the only two reasons now that you had to negotiate with competitors towards ending the severe price competition, that is, first, contacting the Federal Government concerning prices, and second, about this merger that you speak of?

A. Well, that is all I remember.

Q. That is your best recollection as of this time?

A. That is right.

Q. Now, sir, will you look at the next to the last paragraph on Exhibit 202, the first page, beginning "we now have Dr. Nelson", and so forth?

1417 A. Yes, sir.

Q. Now what licensing agreements with your competitors did you have in mind at that time, sir?

A. Well, I don't remember, but I think we only had one license agreement and that was on the closed-edge patent with the United States Gypsum Company, as near as I can remember now.

Q. Well, you say "* * * which involves license agreements with our competitors and settlements of lawsuits pending." Did you have any lawsuits pending at that time, or did your company have any lawsuits pending at that time?

A. Yes, there was one against the National Gypsum Company.

Q. And what had the licensing agreements to do with

the settlement of the lawsuit, sir?

A. Well, I think an effort had been made at one time before I was in the company—and I think this probably refers to that—as part of the settlement of the lawsuit against the National Gypsum Company, that they take out a license from Universal on the Universal-owned patents. I think that probably refers to that.

Q. That is, the Universal Company felt that National was infringing certain patents that Universal owned, and you felt that a license agreement should be entered into between Universal and National, is that correct?

1418 A. That isn't what I said. I said I think there had been an effort along that line before I came into the company.

Q. I misunderstood you, sir.

Now is that all that you had in mind when you wrote the next to the last paragraph on the first page of Exhibit 202?

A. That is all I can think of now.

Mr. KNUFF. May I have Exhibit 144, please?

(Government Exhibit No. 144 was handed to the witness.)

By Mr. KNUFF.

Q. I direct your attention to the second paragraph particularly, beginning with "The attitude of this company", and so forth. Did you know of any license agreement or any proposed license agreement between American Gypsum Company and United States Gypsum Company at that time, or did you know of any negotiations that were on at that time, sir?

A. I don't recollect any, I don't remember.

Q. Do you have knowledge, sir, at about that time, of negotiations concerning a proposed license agreement?

Justice STEPHENS. By whom?

Mr. KNUFF. Between various gypsum companies and USG.

The WITNESS. I am sorry but I don't remember.

By Mr. KNUFF.

Q. Do you know of any reason why Mr. Griswold would write this letter to you, sir?

1419 A. Well, at that time I would have liked to have had everybody making closed-edge board, and I think probably, or that you might, have suggested to Mr. Gristo take a license similar to ours with the United States Gypsum Company.

Q. You said that at that time you would have liked to have had every person make closed-edge board, and that you probably, or that you might, have suggested to Mr. Griswold that he take out a license, is that correct?

A. That might be what took place. You asked what might have occasioned this letter.

Q. Why did you want to see everyone making closed-edge board?

A. Well, that was a better board. Wallboard generally would get a black eye where it was sold with an open edge. That would be one reason, just a sound business reason.

The open-edge board usually sold for less than the closed-edge board, and yet, as you were meeting competitive prices, you would never know for sure whether you were meeting the price on an open-edge or a closed-edge board, and I thought it would be beneficial to the industry to have people making one kind of board.

Q. When you said you would have liked to have seen everyone take out a license, what did you mean by that?

A. Well, I thought it would be desirable ——

1420 Q. (Interposing.) And making a closed-edge board—you thought it would be desirable for every person in the industry to make a closed-edge board?

A. I thought it would be very desirable.

Q. In other words, a closed-edge board would be a desirable thing as an industry proposition.

A. That is right.

Q. Concerning any sales resistance, would closed-edge board eliminate any sales resistance if everybody was making closed-edge board? Would that eliminate any sales resistance in so far as open-edge board was concerned?

A. I don't quite understand the question.

Q. Well, would there be as much competition, sir, if all companies were making the same type board, as between products?

Mr. BROMLEY. I object to that as speculative and therefore incompetent.

Mr. KNUFF. This is just showing his state of mind, your Honor. He said it was his desire, and I am just trying to find out just what he had in mind.

Justice STEPHENS. I think the question is argumentative. The objection is sustained.

By Mr. KNUFF.

Q. What protection, sir, were you not getting, that is

referred to in Mr. Griswold's letter?

1421 A. I don't know.

Q. Had you ever complained to USG?

A. I don't remember that I had.

Q. You will note in the letter it says, "Mr. Avery has gone on record that he will not make any change", and so forth. Do you know what that referred to?

A. No, unless it referred to—it could refer to the fact that in considering any new licenses in the industry, I think the United States Gypsum Company had taken the position that they would not grant a more favorable license to one company than to another.

Mr. BROMLEY. I think the whole sentence ought to be read, if the Court please. It is perfectly obvious what it means if you read the whole sentence. Of course it isn't if you stop in the middle.

Mr. KNUFF. I haven't any objection to reading the whole sentence. I just didn't want to have the Court feel that I was trying to put something into the record indirectly that the Court suggested I couldn't get into the record.

Justice STEPHENS. Read the whole sentence.

Mr. KNUFF. The whole sentence reads, sir:

"If they will amend the agreement to give their licensees some protection and consideration for the money they get paid, I am inclined to think our people would consider the proposition, but so far Mr. Avery has gone on record that he will not make any change and there is not much

1422 chance of this Company being interested in his agreement."

Justice STEPHENS. What is the question?

Mr. KNUFF. What is the question, Mr. Reporter, please?

(The reporter read the previous question and answer.)

Justice STEPHENS. Do you want your answer to stand now as to the whole sentence?

The WITNESS. Yes, I think that is all right.

By Mr. KNUFF.

Q. I direct your attention, sir, to the last sentence of the third paragraph beginning, "I believe the National", and so forth. What was your information as to whether or not National was considering entering into a license agreement with USG at that time?

A. I don't know.

Q. My question is, sir, what was your information—and your answer is, "I don't know". It is hardly intelligible.

A. All right.

Q. I am not criticizing your English, I am just trying to get the question answered.

A. I don't know that I had any knowledge on that. Does that answer it?

Q. You didn't have any knowledge?

A. I don't know that I had any, I don't remember having any knowledge—I don't remember of any knowledge that I had on that.

1423 Q. You don't recall whether or not you knew at that time that National might have been contemplating entering into a licensing agreement with USG, is that correct?

A. That is right.

Mr. KNUFF. May I have Exhibit 145, please?

(Government Exhibit No. 145 was handed to the witness.)

By Mr. KNUFF.

Q. That is a carbon copy of a letter written by you to Mr. F. J. Griswold, is it not?

A. Yes, evidently.

Q. And it answers Mr. Griswold's letter of September 10, Exhibit 144, isn't that correct?

A. Yes, evidently.

Q. Now I direct your attention, sir, to the second paragraph of that letter beginning, "I think Mr. Haggerty and others interested", and so forth.

In view of the contents of that paragraph would you care to change your answer as to what your information was as to whether or not National was contemplating taking out a license with USG?

A. Well, that would indicate that there had been some conversation on it that I didn't recall when I answered your former question.

1424 Q. So apparently you knew at that time, sir, that National was contemplating some licensing agreement with USG, is that correct?

A. Well, this would indicate that there had been some discussion of that.

Q. Now referring to the second sentence in the first paragraph, "I wish you would give me definite information", and so forth—what did you want that information for, sir?

A. Well, I was interested in everybody's ideas of what a good license agreement should be. I was trying to learn

everything I could about the gypsum business, being an entire newcomer in it.

Q. And you said, "I would not expect to use this information received from you other than as a background in approaching this whole situation when the proper time comes". What did you have in mind there as to a "proper time"?

A. Well, I had hopes that some day these men would all sign the closed-edge license agreement, or a closed-edge license agreement.

Q. You did have those hopes, is that correct?

A. That is right.

Q. And what did you do, if you did anything, to bring about a realization of those hopes?

A. Do you mean at this time?

Q. Yes, approximately at this time.

1425 A. Well, I don't remember anything concrete.

Q. Did you talk to other gypsum-board manufacturers?

A. Oh, I suppose I did.

Q. Can you recollect any that you talked to? I realize, of course, that memory is sometimes faulty.

A. No, I couldn't be specific. I visited with everybody in the industry and tried to pump them for all the information I could get on everything, every phase of the business. I probably talked to all of them at different times.

Mr. KNUFF. May I have Exhibit 146, please?

(Government Exhibit No. 146 was handed to the witness.)

By Mr. KNUFF.

Q. I refer you particularly, sir, to the first paragraph of the letter, Exhibit 146, in which Mr. Griswold says, "* * * that there is not much use of your spending much time on the proposition," and so forth. What "proposition" did he have reference to, if you know?

A. Where does it say that?

Q. Well, let's see if you have the same exhibit that I have, possibly you might have a different exhibit. No, you have the same exhibit.

Justice STEPHENS. It is in lines 7 and 8.

The WITNESS. I don't know, I don't remember what might be referred to there except that I was pretty desperate as far as our company was concerned.

1426 By Mr. KNUFF.

Q. Well, you will notice, sir, that he mentions a "proposition" in the same sentence, with the United States Gypsum Company. Now does that kindle the embers of your recollection any?

A. No, it does not.

Q. Were you engaged in any proposition of an industry nature in which USG was also interested, and which American Gypsum Company apparently was interested in?

A. Well, outside of being in the gypsum business I don't think so. I didn't pay much attention to this man Griswold. He was kind of discredited by some of our own group.

Q. Will you keep your voice up, I can hardly hear you, and I am sure the Court can't?

A. Some of our Directors didn't think much of Mr. Griswold as representing his company or anything else. I think they had had some dealings with him. So I didn't take him very seriously.

Q. I see. Now will you notice the last paragraph of the letter, Mr. Holland, please.

A. Yes, sir.

Q. What license agreement was referred to there in the language "While we may not be in line with the license agreement," and so forth.

1427 A. I wouldn't know unless it was the closed-edge license agreement Universal had with the United States Gypsum Company.

Q. Now you will notice, Mr. Holland, that Mr. Griswold makes reference to certain market conditions in his letter. Were the conditions at that time, that is market conditions, the same as they were in May, 1928, when you dictated Exhibit 202?

A. Yes, I think so.

Q. Did you have a demoralized price situation in the industry at that time?

A. As I remember it, yes.

Q. And how could United States Gypsum correct those market conditions?

Mr. OLIVER. I object to that question as calling for an opinion—how could United States Gypsum correct it?

Mr. KNUFF. I think it is not an opinion—if he knows. If he doesn't know, he can say, "I don't know."

Justice STEPHENS. It seems to the Court that it is asking for his opinion on the subject. Not every opinion of course is an objectionable conclusion, but that seems to be

really speculative, Mr. Knuff. Perhaps you can rephrase your question in order to bring out what you had in mind.

Mr. KNUFF. All right, I will try to do so.

Justice STEPHENS. Ask him what he expected United States Gypsum Company to do, if anything.

1428 By Mr. KNUFF.

Q. What, if anything, did you expect the United States Company to do in order to bring about better market conditions?

A. Well, I didn't write that letter.

Q. I realize that.

A. Well, I think that if the United States Gypsum Company would raise the prices of their products, it was such a big factor in the industry that it probably would mean that the rest of us would have sense enough to get more for our products.

Mr. KNUFF. I notice that it is just about four o'clock, and I am going to start on another subject.

Justice STEPHENS. All right. I think all exhibits have been ruled upon up to 201, have they not? You have not offered 202, have you?

Mr. KNUFF. I thank you for calling that to my attention. I now offer in evidence Government's Exhibit 202, the same being a photostat of a memorandum dated May 18, 1928, addressed to the Executive Committee of Universal Gypsum & Lime Co., and signed by Eugene Holland.

Justice STEPHENS. Is there any objection, except the usual objection?

Mr. BROMLEY. No, sir.

Justice STEPHENS. It may be offered in evidence subject to the usual reservation which the Court has
1429 made with respect to this class of evidence.

(The document marked Government Exhibit No. 202 was received in evidence.)

Justice STEPHENS. Announce a recess until tomorrow morning at ten.

(Thereupon, at 4:00 o'clock p.m., an adjournment was taken to 10:00 o'clock a.m., Wednesday, December 1, 1943.)

1430 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., WEDNESDAY, DECEMBER 1 1943.

The above-entitled cause came on for further hearing at 11:40 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

1434 Thereupon, EUGENE HOLLAND, the witness on the stand at the time of adjournment, resumed his testimony as follows:

DIRECT EXAMINATION (resumed).

Mr. KNUFF. May it please the Court, pursuant to the notice by Mr. Bromley yesterday to produce the letter of September 29, I made a search of the files last night and I am unable to locate the letter and in addition to that, I have no recollection of ever seeing the letter.

Justice STEPHENS. Thank you for looking for it, Mr. Knuff.

Mr. BROMLEY. I can only say that it was submitted, under subpoena, by USG.

Mr. KNUFF. I have no doubt that it was submitted, but I just say I can't locate it.

Justice STEPHENS. You have established the foundation for secondary evidence, I assume, if you wish to use it, Mr. Bromley.

Mr. BROMLEY. Yes, sir.

Mr. KNUFF. May I have Exhibit 145, please?

(Exhibit No. 145 handed to the witness.)

By Mr. KNUFF.

Q. Mr. Holland, yesterday I referred to Exhibit 145, and I asked you this question:

"Now referring to the second sentence in the first paragraph, 'I wish you would give me definite information', and so forth—what did you want that in-

1436 formation for, sir?"

I am quoting from page 1721, gentlemen.

And your answer to that was:

"Well, I was interested in everybody's ideas of what a good license agreement should be. I was trying to learn everything I could about the gypsum business, being an entire newcomer in it."

Do you recall that, sir?

A. Yes, sir.

Q. Now will you please refer to the exhibit again, and in the 5th line, the 4th word in, you will notice that you use the demonstrative pronoun "this" rather than the article "a". Does that indicate to you anything, sir?

Justice STEPHENS. Which line is that?

Mr. KNUFF. The 5th line down, the fourth word in—"your idea of this".

Justice STEPHENS. I see, thank you.

The WITNESS. I don't remember, but I would think, in reading the whole paragraph, that it probably referred to his idea of a modified license agreement on closed-edge wallboard.

By Mr. KNUFF.

Q. A modified license agreement on what, sir?

A. On closed-edge wallboard.

Q. And why were you asking Mr. Griswold for his idea as to a modified license agreement?

1437 A. Well, I don't remember except as I recollect, or as I am guided by this letter, that he had stated that possibly his company could be interested in a modified license agreement.

Q. You say you think that he had stated that his company might be interested in a modified license agreement. Do you have any recollection of whether or not that is correct?

A. No, except the reference to it here.

Q. And is that your best recollection now, as refreshed by this exhibit, sir?

A. I think so.

Q. Now, Mr. Holland, I want you to look at the first sentence of the second paragraph: "I think Mr. Haggerty and others interested are still of the opinion that some time in the near future I should attempt to arrange a meeting". Do you notice that, sir?

A. Yes, sir.

Q. When you said, "I think Mr. Haggerty and others are interested", what did you base that assertion on, sir?

Mr. BROMLEY. I think you misspoke yourself. The letter says, "and others interested", not "and others are interested".

Mr. KNUFF. Yes, "and others interested". Do you understand my question?

The WITNESS. Yes. I don't remember.

1438 By Mr. KNUFF.

Q. Did you have any basis on which to predicate that assertion?

A. I don't remember of anything definite. As I circulated around, I got different impressions of what different people were thinking.

Q. And from those impressions you gathered the consensus of opinion in the industry, is that correct?

A. I wouldn't go that far, as to the whole industry. I think I gained impressions of what different managements of different companies were thinking.

Q. When you say "and others interested," to whom are you referring, sir?

A. I do not remember specifically.

Q. Well, what is your best judgment, what is your best recollection, sir?

A. I don't believe I could state anybody in particular.

Q. Would you say it had reference to Atlantic Gypsum?

A. No, I couldn't say that definitely.

Q. I direct your attention, sir, to the fact that at the time this letter was written on September 13, 1928, there were four licensees of USG: first, Beaver; second, Universal; third, Atlantic; and fourth, Texas. Now does the word "others" refer to any one of those four?

1439 A. I do not remember.

Q. What other companies, sir, were manufacturing board, other than the four I have named?

A. Well, Ebsary Gypsum Company.

Q. Ebsary is one?

A. I don't know for sure whether Atlantic was at that time.

Q. Atlantic was a licensee at that time.
A. Oh, they were a licensee.
Q. Well, was American?
A. Yes.
Q. And was National?
A. Yes.
Q. And was Certain-teed?
A. Yes.
Q. Now with that information, can you tell us what the words "and others" referred to, who they referred to?
A. Not specifically, I couldn't.
Q. You can't?
A. I don't remember, no, sir.
Q. You will notice also in that sentence the expression, "I should attempt to arrange a meeting." Do you notice that?
A. Yes, sir.
Q. Now what kind of a meeting did you have in mind, sir?

1440 Q. I don't remember.

A. Was it a meeting of persons interested in the gypsum board business?
A. I am sorry, but I wouldn't attempt to state.
Q. Well, could it be anything else but that, sir?
Mr. BROMLEY. I object to that on the ground it is speculative.
Justice STEPHENS. It seems to the Court argumentative, that you are asking the witness for his inference as to what it must have been, and that is a matter which, of course, you can argue from the exhibit itself.
The objection is sustained.
Mr. KNUFF. I realized that it was skating pretty close when I asked him.

By Mr. KNUFF.

Q. And your best thought now is that you haven't any recollection of what kind of a meeting it was?
A. That is right.
Q. Did you have in mind who was going to attend that meeting?
A. I don't remember now.
Q. You don't?
A. No, sir.
Q. Now, then, I direct your attention further to that same paragraph, and I call your attention to the lan-

guage, "that some time in the near future I should
1441 attempt to arrange a meeting; in order to be in a position to intelligently handle the situation.". Do you notice that, sir?

A. Yes, sir.

Q. What situation did you have in mind?

A. I honestly couldn't tell you.

Q. You haven't any present recollection of what you actually had in mind, is that correct?

A. No, I wouldn't be sure, it is too long ago.

Q. Well, Mr. Holland, would you say that you had some purpose in writing this second paragraph in the letter?

A. Undoubtedly.

Q. But what your purpose was presently escapes your recollection?

A. That is right.

1442 Q. You will notice further that you state that you "should have a very definite idea from everyone involved". Now whom did you mean by "everyone involved"?

A. I don't remember definitely. I would assume from the wording that it would mean wallboard manufacturers.

Q. You meant by that that you should have a definite idea from all the wallboard manufacturers, is that correct?

A. Well, that is an assumption on my part now.

Q. Well, is that your best recollection now?

A. No, it is not a recollection; it is an assumption, after reading this, that that might have been the case.

Q. Do you have any recollection at the present time?

A. No, I don't, I am sorry.

Q. Do you have any recollection at the present time as to what you hoped to accomplish at this meeting, as you said in the letter?

A. Not from a memory standpoint.

Q. Well, from any standpoint?

A. If I could discover something wrong with our license agreement I might have made some attempt to change it, to get it changed.

Q. Well, bear in mind, sir, that you were writing to Mr. Griswold.

A. That is right.

Q. And he was connected with American.

1443 A. That is right.

Q. And American was not a licensee at this time. Did you expect Mr. Griswold to point out some defects in your license agreement?

A. I take it from that letter that that was one of the things.

Q. And did you know that Mr. Griswold knew of your license agreement?

A. I don't know that I did; I think it was pretty generally known the type of agreement that was in the industry.

Q. When you say that it was pretty generally known, what do you mean by the indefinite pronoun "it"?

A. The type of contract.

Q. You say that it is your present recollection now that the industry knew that USG had made license agreements with the other four manufacturers?

A. I wouldn't want to say that I recollect that it was; I would say that I now assume that it was.

Q. You haven't any present recollection?

A. No, sir.

Q. What do you base that assumption on?

A. Well, everybody in the industry that was interested, through financial circles and all, had a pretty good opportunity to know the basis of operations of the respective companies, and what contracts they had. A lot of it was based on gossip, of course.

1444 Q. Pardon me?

A. Some of it was probably based on gossip; but I would assume that practically everybody knew that there was such a license agreement.

Q. Do you have any present recollection of anyone that didn't know that the USG had licensed Beaver, Universal, Texas and Atlantic?

A. No, I have no recollection.

Mr. KNUFF. May I have Exhibit 147, please?

(Government Exhibit No. 147 was handed to the witness.)

The WITNESS. Yes, sir, I have read it.

By Mr. KNUFF:

Q. Exhibit 147 has been identified by Mr. Griswold as a copy of a letter that he received from you. Do you recognize the letter?

A. Yes, sir.

Q. It is a copy of your letter?

A. I believe so.

Q. Now I call your attention, sir, to the first line in the first paragraph which reads, "I am afraid that nothing can be done towards stabilization" and so forth. What did you

mean by "stabilization"?

A. Well, I don't know for sure what I meant at that time. I would assume that it had reference to the hope that the downward spiral of prices in the gypsum
1445 industry would stop.

Q. You what, sir?

Justice STEPHENS. Read the answer, Mr. Reporter.

(The reporter read the preceding answer.)

By Mr. KNUFF.

Q. Will you define "stabilization" for me, sir?

Mr. BROMLEY. I object to that as immaterial.

Justice STEPHENS. Well, it is a form of asking the witness what he means by the term. I think it is technically not material. We could subpoena the dictionary, I suppose. But the Court will overrule the objection.

What do you mean by using that word, when you ordinarily use it yourself, Mr. Holland?

The WITNESS. Well, Your Honor, I don't know that I am very clear on that word. I think it is one of those vague words as to meaning. In ordinary commerce I think the word "stabilization" is often thought of as a situation where prices reach a certain level and stay there.

Justice STEPHENS. What the Court, and apparently counsel, are interested in, of course, is what you meant by that word in your letter, if you know now.

The WITNESS. At that time the market changed from one day to another, and no one knew, even the buyers didn't know what they were expected to pay, or what they were going to pay, and it was a very disastrous affair
1446 and a very difficult one to work with.

By Mr. KNUFF.

Q. Well, what were you afraid of when you say in that letter, "I am afraid that nothing can be done towards stabilization until the board matter is entirely out of the way".

A. I was afraid that they would continue down below our cost of production, and we would be out of business and lose the stockholders a lot of money.

Q. What did you mean by the expression "board matter"?

A. I am not sure but it was probably the litigation in the industry.

Q. "* * * until the board matter is entirely out of the way"—and your recollection is that that referred to litigation?

A. Well, I am not sure about that, but I say that it might have been that.

Q. Well, how was disposing of the "board matter" related to stabilization?

A. Well, I am not sure that it was.

Q. Well, you state in your letter, "I am afraid that nothing can be done towards stabilization until the board matter is entirely out of the way."

A. Well, that is where my memory fails me.

Q. Well, did the board litigation that was then going on—as you have said "board matter" referred to—
1447 did that stand in the way of stabilization?

A. I don't know, I couldn't say that it did; it might have been my impression that it could have been affected by that.

Q. You had something definite in mind when you related "board matter" to "stabilization". Now I want you to tell me what you had in mind? I realize of course, sir, that this is back some years and I just want your best recollection?

A. Well, the only thing I can think of now is that we were contemplating having the injunction modified whereby the people in the gypsum industry would feel that they could legally discuss matters with each other, possibly leading up to the Federal Trade Commission effort that we made, on Fair Practice, and so forth.

Q. Did Mr. Griswold know anything about that injunction matter?

A. I don't know, but I believe his company was under injunction.

Q. Well, if he didn't know anything about the matter would you write such a sentence as you did to him?

A. I don't know, I can't remember.

Q. It is your present recollection that the American Gypsum Company was under some form of injunction at that time?

A. It is my present impression that they were.

1448 Q. And that is the injunction that you spoke of yesterday?

A. Yes, sir.

Q. In New York State some place?

A. That is right.

Q. And with that injunction out of the way how were you going to stabilize prices?

A. I don't know that we were.

Q. Well, I take it, sir, that you do not write useless

letters. Now what did you have in mind in the way of stabilizing prices if you could get the injunction out of the way?

A. Well, I think with the injunction out of the way—I think one of the ideas of that was that some of us could get together to prepare to go before the Federal Trade Commission to see if some way could be worked out, some plan could be accomplished, whereby we would not be selling our products below the cost of production.

Q. Did you think that you could go before the Federal Trade Commission and have the Federal Trade Commission authorize your company and other companies to agree upon prices?

A. I don't believe so.

Q. You say you don't believe that you could do that?

A. No.

Q. Then if you didn't believe that you could do that, why were you going to go before the Federal Trade Commission, sir?

1449 A. As I stated before, to provide some relief from marketing stuff below cost or near cost of production.

Q. Well, you knew, if I understand you correctly, sir, that the Federal Trade Commission couldn't authorize any such sort of procedure as you had in mind. Now do you still want this Court to understand that you were going before the Federal Trade Commission on a useless mission?

Mr. BROMLEY. He didn't say that, if the Court pleases. Of course the Federal Trade Commission could authorize just what he had in mind, that is, could approve rules adopted by an industry providing that they shouldn't sell below cost.

Mr. KNUFF. That is a new way to modify the Sherman Antitrust Act and I would ask Mr. Bromley to give me some authority on that?

Mr. BROMLEY. When it comes my turn to examine, if ever, I will produce the rules approved by the Federal Trade Commission.

Justice STEPHENS. The question does incorrectly assume that the witness said he would do a useless thing, and the objection is sustained.

Mr. KNUFF. I am only saying what the witness said. He said he didn't believe that the Federal Trade Commission could authorize that. Now here we are examining into the state of mind of this witness; I am not cross-examining

him, I am trying to ascertain what his state of
1450 mind was. His answer to me was that he didn't believe the Federal Trade Commission could authorize the thing that he was going to take up with them. Now I ask him if he felt that he could go before the Federal Trade Commission and ask the Federal Trade Commission to do a useless thing.

Mr. BROMLEY. That doesn't correctly represent his testimony.

Mr. KNUFF. Let's appeal to the record, please.

Mr. BROMLEY. Let me state my view of it first, and see if you won't agree. All he said was that he didn't believe the Federal Trade Commission could authorize his company and the other companies to agree on prices. But he didn't mean to say, and he didn't say, that he didn't believe that the Federal Trade Commission could approve industry rules which would prohibit sales below cost.

Justice STEPHENS. The Court thinks no more discussion is necessary. The Court, by its ruling, does not intend to stop your examination of the witness. You are entitled to proceed and try to find out, if he has a recollection, what he knows, what his purposes were in writing these letters, and what his purposes were in going before the Federal Trade Commission, if he did that; but the particular question asked I think did incorrectly assume a statement which the witness has not made. That was the only reason for the ruling sustaining the objection.

1451 But you may proceed with the examination after the recess.

(Whereupon, at 12:20 o'clock p.m., the hearing was recessed until 1:45 o'clock p.m., of the same day.)

1452 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice STEPHENS. Proceed with the examination.

Thereupon, EUGENE HOLLAND, the witness on the stand at the time of recess, resumed his testimony as follows:

DIRECT EXAMINATION (resumed) by Mr. KNUFF.

Q. Just before the noon recess, Mr. Holland, we were looking at Exhibit 147. Just before we adjourned I was directing your attention to the first sentence, and if my

memory serves me correctly you said that by "board matters" you meant this litigation that was going on in the industry at the time; is that correct?

A. I didn't say it that way.

Q. Well, I don't mean to misquote you. Would you mind stating what you then meant by "board matter", please?

A. Well, I think my testimony was to the effect that I did not remember exactly what that "board matter" was; and I think I added further that on reading the letter, that it might have been the ending of the litigation on the board cases.

1453 Q. I direct your attention to the second sentence, which reads, "I believe that Mr. Avery has been very definite in a statement to that effect." Do you see that, sir?

A. Yes, sir.

Q. What do you base your belief on, sir?

A. You mean what did I at that time?

Q. Yes, sir.

A. I don't believe I remember it.

Q. Will you state whether Mr. Avery had made that statement to you?

A. I don't remember that he did.

Q. Did you have any basis for making the statement that you made in your letter there? The statement that you say Mr. Avery has been very definite on was that "nothing can be done towards stabilization until the board matter is entirely out of the way."

A. I don't remember. There must have been some talk to that effect around the industry, but I don't remember now.

Q. Well, I don't want you to think, Mr. Holland, that my next question implies any reflection upon you, or casts any aspersions, because I don't mean it that way. Did you write truthful letters?

A. To the best of my ability, yes.

Q. And was that statement that you wrote there correct, at the time.

A. I don't believe I would have written a thing like that unless I had heard something to that effect.

1454 Q. But at the present time you can not enlighten us as to what you based that statement on?

A. No, sir.

Q. Now you will notice in the next sentence, "Inasmuch as Certain-teed, National, and others are unwilling to negotiate any on the board proposition until your decision

is clearly defined, it would seem that the entire matter rests with your decision." Do you see that, sir?

A. Yes, sir.

Q. Now at that time, did you have any knowledge that Certain-teed and National were unwilling to negotiate?

A. I would think that I did, having read this now.

Q. And what were they going to negotiate for, sir, a license agreement?

A. I don't distinctly remember that, but I would assume so from reading this now.

Q. Now you will notice that the date of that letter is September 20, 1928, and you will notice, sir, that the date of the letter which is Exhibit 144—will you show the witness Exhibit 144, please—was just 10 days previous, or on September 10, 1928. Do you notice that?

A. Yes, sir.

Q. Now I want to call your attention, sir, to something that you said yesterday on page 1715 of the transcript. I there said to you:

1455 "I direct your attention to the second paragraph" —at that time I was referring to Exhibit 144— "particularly, beginning with 'The attitude of this company', and so forth. Did you know of any license agreement or any proposed license agreement between American Gypsum Company and United States Gypsum Company at that time, or did you know of any negotiations that were on at that time, sir?"

Your answer to that was:

"I don't recollect any, I don't remember."

My next question was:

"Do you have knowledge, sir, at about that time, of negotiations concerning a proposed license agreement?"

Justice Stephens said:

"Between whom?"

I then said:

"Between various gypsum companies and USG."

And your answer was:

"I am sorry but I don't remember."

Now in view of your letter of the 20th of September and your answers here today, do you care to change that former testimony, sir?

A. No, sir.

Q. Why did you want Mr. Griswold to clearly define his decision, as you state in Exhibit 147?

1456 A. I don't remember definitely, but reading this today I think that I would be interested in everyone's

idea as to the proper kind of a license arrangement.

Q. At that time your company was a licensee?

A. That is right.

Q. Then you say further: "* * * it would seem that the entire matter rests with your decision."

Now what matter rested with Mr. Griswold's decision?

A. Well, again, I don't remember. Taking that sentence today, it would indicate whether Certain-teed or National took out a license.

Q. That would depend upon the American Gypsum Company's decision, is that what you mean?

A. That is the way I would interpret that now, but it is not from memory.

Q. Now I direct your attention, sir, to the second paragraph of that letter, where you said: "* * * several of us have thought that maybe we could get farther by having a meeting of several representatives of firms who are involved in the board situation."

Do you see that sentence?

Justice JACKSON. If you will indicate the number of that exhibit it will be clearer in the record.

Mr. KNUFF. Thank you, Your Honor. That is taken from Exhibit 147.

1457 By Mr. KNUFF.

Q. Whom did you mean by "several of us have thought"?

A. I don't remember.

Q. Well, had you had any conversation with any person else in the industry, about that time, concerning the subject matter of this letter, if you recollect, of course?

A. I don't remember.

Q. Why did you think that "we could get farther by having a meeting of several representatives of firms who are involved in the board situation"?

A. Well, an exchange of ideas, I imagine, was behind that thought.

Q. You thought that a meeting of representatives would be conducive to promoting the license agreement, is that what you mean?

A. I am not sure what I meant by that, at that time. I know that I was active in getting an exchange of ideas in the industry on industry problems.

Q. Yes, but did you have in mind at that time an industry-wide licensing agreement?

A. Why, I think I hoped for a thing like that, yes.

Q. And would you say that that is what you had in mind?
A. I don't remember that it was in that instance.
Q. You say now that at that time you had hoped for that?
1458 A. Yes, I hoped for it right along, as I testified a while ago.
Q. Do you recall, sir, whether or not you received a reply from Mr. Griswold to this letter?
A. No, sir.
Q. On page 1719 of the testimony of yesterday, I direct your attention to the following question and answer:
"Q. I direct your attention, sir, to the last sentence of the third paragraph beginning, 'I believe the National', and so forth. What was your information as to whether or not National was considering entering into a license agreement with USG at that time?"
And your answer to that was:
"I don't know."
Justice STEPHENS. What exhibit did that concern, Mr. Knuff?
Mr. KNUFF. It was Exhibit 144.

By Mr. KNUFF.

Q. Did you understand my question, sir?
A. No, sir.
Q. Suppose I read it to you again, or have the reporter read it.
(The record was read by the reporter.)

By Mr. KNUFF.

Q. Now in view of what you have set forth in Exhibit 147, do you care to make any change in that
1459 answer?
A. I am a little bit confused. I don't quite get the connection.
Justice STEPHENS. The Court thinks the witness may be confused because as the question was asked on page 1719, he apparently had not the exhibit in front of him.
The WITNESS. I have Exhibit 144 before me now.
Justice STEPHENS. As I understand it, what you are being asked is this: You testified, apparently, at page 1719, in respect to the last sentence in the next to the last paragraph of Exhibit 144, which reads:
"I believe the National would consider the agreement providing they would have some guarantee as to what action

the Gypsum Company is going to take."

And your attention being directed to that sentence, you were asked, "What was your information as to whether or not National was considering entering into a license agreement with USG at that time?"

And your answer was: "I don't know."

Now Mr. Knuff apparently wishes to know, if I understand him correctly, whether you would alter that answer, in view of what you have stated today.

Mr. KNUFF. That is right.

The WITNESS. Isn't that the same question I answered a while ago?

1460 Mr. KNUFF. No, it isn't.

Justice JACKSON. I am confused, Mr. Knuff, frankly. Do you mean does he want to change his testimony in view of what he has seen here in Exhibit 147?

Mr. KNUFF. That is what I am asking him, sir. In view of Exhibit 147, and his answers on that exhibit, I called his attention to and gave him an opportunity to change his answer if he cared to, because National and Certain-teed are definitely mentioned in Exhibit 147.

Justice JACKSON. Well, possibly the witness may understand it more clearly now.

Justice STEPHENS. If you don't understand it, you are not required to answer, and you may take such time as is necessary to clear up your own mind about the question.

The WITNESS. Well, if I understand correctly, my answer would be no.

By Mr. KNUFF.

Q. And you want to let your answer stand?

A. Yes, sir.

Q. All right, sir.

A. But I admit that I am a little uncertain on the route of your questioning.

Q. Well, if you can tell me where your uncertainty exists, I will try to clear it up. I don't mean to confuse you, Mr. Holland.

1461 Justice STEPHENS. Let me suggest this to you, Mr. Knuff, if you care to do so, that you point out a little more definitely what you think—I assume you think there is an inconsistency between the questions and answers yesterday and the questions and answers today. If you can point that out to the witness and call specifically to his attention the apparent inconsistency, if you think that that is what it is, then perhaps he can be clear about

it. I am not entirely clear myself.

Mr. KNUFF. Very well. Then the fault is apparently on my part, and I will try to correct it.

Justice STEPHENS. Not at all. Perhaps the subject matter is complicated.

Mr. JOHNSTON. May I interrupt, if the Court please?

Justice STEPHENS. Yes.

Mr. JOHNSTON. In listening to the testimony of this witness, from his answers I got the impression that he had no personal recollection, and therefore answered no, and that looking at these exhibits didn't change his opinion as to his personal recollection.

Now these letters may indicate something else, but still his personal recollection is the same as it was. Now am I right or wrong about that?

Justice STEPHENS. You may ask the witness.

Is your personal recollection today just what is was yesterday?

1462

The WITNESS. Yes, sir.

Justice STEPHENS. However, I think it is not improper for Mr. Knuff to point out an apparent inconsistency which the witness may be given an opportunity to explain, if he can.

Mr. KNUFF. May I show the witness his testimony?

Justice STEPHENS. Yes, you may.

(Transcript of testimony handed to the witness.)

By Mr. KNUFF.

Q. Now, sir, in Exhibit 147, in the first paragraph, you mention both National and Certain-teed. Now my question is—do you care to change your answer as of yesterday when you said, "I don't know."?

A. My answer would be no. And if a witness is entitled to, I think maybe I might clear this thing up, if I am being accused of being inconsistent.

Q. No, I am not accusing you of being inconsistent.

Justice STEPHENS. You may clear it up.

The WITNESS. This is not from memory, again, but the information that Mr. Griswold gave me in the letter ——

Justice STEPHENS (interposing). Which letter?

The WITNESS. Exhibit 144. (Continuing.)—to the effect that National might be interested, might have attracted my attention enough to have found out, by the time I wrote my September 20 letter, that they might be interested.

1463

By Mr. KNUFF.

Q. Then state whether or not, at some time in September, 1928, you did find out that National was interested in entering into a license agreement with USG?

A. I am not sure. This is again not from memory, but the letter would indicate that I had found out.

Q. I think that clears it up very well, Mr. Holland.

Mr. KNUFF. Unfortunately, when I passed the exhibits up to the Court yesterday, I inadvertently left out an exhibit that was in another file at the time. I caught it last night, and would like to have the Clerk hand these to the Court.

Justice JACKSON. Was that in the second batch that you handed up yesterday?

Mr. KNUFF. The batch that I handed up yesterday, beginning with 202.

Justice GARRETT. You introduced 202.

Mr. KNUFF. That is right.

Justice GARRETT. That is the last one that you introduced.

Mr. KNUFF. Yes, sir.

This should be introduced into Your Honors' series of exhibits immediately following the May 18, 1928, memorandum.

Justice STEPHENS. You mean the memorandum which Mr. Blagden ——

1464 Mr. KNUFF (interposing). No, Your Honor, the first memorandum that Mr. Holland identified yesterday, which is Exhibit 202. And this should be marked Exhibit 203 for Identification.

Justice STEPHENS. Very well.

Justice GARRETT. I beg your pardon, now, Mr. Knuff. That confuses me a bit. Exhibit 202, which was introduced yesterday, is not a memorandum, it is a letter.

Justice STEPHENS. It is a letter to the Executive Committee of the Universal Gypsum & Lime Company, and Mr. Knuff is apparently describing it as a memorandum.

Mr. KNUFF. Yes, I am referring to it as a memorandum rather than as a letter.

Justice STEPHENS. Now this one of October 11, 1928, is to be marked for Identification as Exhibit 203, is it?

Mr. KNUFF. I am just going to have it marked.

I ask that there be marked for Identification at this time as Government's Exhibit 203, a letter dated October 11, 1928, addressed to Mr. John A. Kling, and signed by Arthur R. Black.

Justice STEPHENS. It may be marked for Identification as Government's Exhibit 203.

Mr. KNUFF. Just for Identification at this time.

(The letter referred to was marked as Government's Exhibit 203 for Identification.)

1465 (Government's Exhibit 203 handed to the Witness.)

By Mr. KNUFF.

Q. Will you please read that letter of October 11, 1928, Mr. Holland?

A. Yes, sir.

Justice STEPHENS. Just a moment, please, let me finish.

Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. Proceed.

By Mr. KNUFF.

Q. Did you attend such a conference in New York as described in this exhibit, sir?

Mr. ADAMS. I object to that use of the exhibit, Your Honor. It hasn't been identified as anything. It seems to me that at most he can ask him if it refreshes his recollection.

Justice STEPHENS. Well, the exhibit isn't offered in evidence yet, it isn't in evidence.

Mr. KNUFF. It isn't in evidence because we haven't Arthur Black here yet, and I am not going to offer it in evidence until Mr. Black is here to identify it. We have Mr. Black subpoenaed.

Justice STEPHENS. Well, I think Mr. Adams' suggestion, in the form of an objection, is a good suggestion. As the record now stands, the question won't mean anything in the record, because this exhibit not being in the record now, the record won't show what the examination

1466 is about. Why don't you just state, "I call your attention to the fact that in this proposed Exhibit 203, reference is made to a meeting in New York at such-and-such a time. You have read that letter. Now did you attend such a meeting?"

Mr. KNUFF. I think that was the purport of my question. I may be wrong.

Justice STEPHENS. I didn't so understand it. Maybe the witness did.

Mr. KNUFF. Would you read the Judge's question, please, to the witness?

(The question was read by the reporter.)

Justice STEPHENS. I was phrasing that question only in

general terms for the aid of counsel. You may refer to the particular time, if you wish to, to make it more definite in the record. Ask your own questions, Mr. Knuff.

Mr. KNUFF. I think the witness knows what we have in mind.

Justice STEPHENS. Yes, but the record ought to show what you are asking him about. When was this meeting in New York? I don't want to conduct your examination. I wish you would reask your question and refer more definitely to the New York meeting.

Mr. KNUFF. Very well, Your Honor.

By Mr. KNUFF.

1467 Q. You have read Exhibit 203, is that correct, sir?

A. Yes, sir.

Q. And the letter is dated October 11, 1928, is that correct?

A. Yes, sir.

Mr. ADAMS. I respectfully object to this procedure. Mr. Knuff, and with all due deference also the Court, are referring to this as a letter. It isn't anything, it is a piece of paper, and hasn't been identified by anybody as anything.

Secondly, the witness has not been asked whether he has any present recollection about the meeting. He hasn't been asked if he needs to have his recollection refreshed, nor has he been asked whether, if he needs to have it refreshed, this will refresh it. And I respectfully suggest that this is assuming too much, this procedure.

I don't intend to suggest that we should in each case be limited by the formal rules, but I think that on a matter of this importance we should go by what the witness says, of his own memory and recollection, and not by what is said in a paper which hasn't been identified in this court room as anything. Therefore, I object to that form of procedure.

Justice STEPHENS. I am sorry, Mr. Adams, but the Court doesn't yet quite see the objection, provided the witness is asked more definitely. "You will note that in proposed

1468 Exhibit 203, reference is made to a meeting in New York at which your presence is referred to, on such-and-such a date, or on or about such a date, and with such-and-such a person," making it sufficiently definite—"did you attend such a meeting?" If the witness doesn't remember it, all he has got to do is to say so.

Mr. ADAMS. The difficulty with that, Your Honor, is that I always understood you were supposed to ask a witness

whether or not a certain fact was or was not true. Now the fact is—was there a meeting? That is the question. Maybe I am wrong about this.

Justice STEPHENS. That is implied in the question, and if you are making an objection upon the ground that the question assumes a fact not in evidence, that might be different.

Mr. ADAMS. I don't want to raise that. I am simply raising the point that by this method of examination, what we are doing is departing from what I understood to be the proper procedure, which is to test the recollection of the witness. The question, as I understand it, is—was there a meeting or wasn't there? If he says, "I don't remember", then you can show him a piece of paper and ask him if that refreshes his recollection.

Justice JACKSON. I think Mr. Knuff is asking the witness' recollection, and then he is going to endeavor to refresh it, if he can, with this exhibit.

1469 Mr. KNUFF. That is right.

Mr. ADAMS. But so far, he has only shown him a piece of paper and said, "Did you go to the meeting that is referred to in that paper?"

Justice STEPHENS. You understand, do you not, Mr. Holland, that you are not asked to testify to anything that you don't remember, and you should protect yourself in that respect. If you don't remember something, say so.

Mr. KNUFF. Mr. Reporter, will you please read my question?

Justice STEPHENS. I am afraid you haven't got one now.

Mr. KNUFF. I don't know, I want to find out what the state of the record is.

Justice STEPHENS. All right.

(The record was read by the reporter as follows:

"Q. And the letter is dated October 11, 1928, is that correct?

"A. Yes, sir.")

Mr. KNUFF. Suppose we start all over again.

By Mr. KNUFF.

Q. Mr. Holland, did you attend a conference in New York in the month of October, 1928, whereat Mr. Reeb, Mr. Haggerty, Mr. Baker, Mr. Walker and Mr. Warren Henley were in attendance?

A. I couldn't say that I did or that I did not.

Q. Did you ever meet with the gentlemen that I have mentioned, at or about that time?

1470 A. That is the same question, isn't it?
Q. No.

Justice STEPHENS. It isn't quite the same question, Mr. Holland. The other question related to a particular date. He wants to know now whether you met with those gentlemen in New York at or about that time, if you remember.

The WITNESS. I would make the same answer, that I can't remember whether I did or I did not.

By Mr. KNUFF.

Q. Were you ever at a meeting in New York where Mr. Ebsary invited you to come to his room in the hotel?
A. I can remember of being in his room at a hotel one time in New York.
Q. And who else was present at that time?
A. The one time I remember, just Mr. Ebsary.
Q. Just Mr. Ebsary and yourself?
A. That is right.
Q. Did you ever meet with Mr. Reeb, Mr. Haggerty and Mr. Baker in the office of the Certain-teed Products Company sometime in the month of October, 1928?
A. I don't remember of meeting with them there.
Q. You haven't any recollection of any such meeting?
A. No, sir.
Q. Very well, sir.

1471 I show you, sir, what has been marked for Identification Government's Exhibit No. 204, the same being a letter dated January 7, 1929, addressed to Mr. J. F. Haggerty, President, and signed by Eugene Holland. I will ask you to look at that letter and tell us whether that is your signature on it?

(The letter referred to was marked as Government's Exhibit 204 for Identification.)

(Exhibit 204 handed to the Witness.)

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. That is your signature?
A. Yes, sir.
Q. And you dictated that letter?
A. Yes, sir.
Q. I direct your attention, sir ——
Mr. OLIVER. (Interposing.) May we see a copy of that?
Mr. KNUFF. They were passed down to counsel.

Mr. BROMLEY. Not this one.

Mr. JOHNSTON. We don't get to see these exhibits at all.

Justice STEPHENS. I thought they were handed to counsel yesterday.

Mr. KNUFF. That was my understanding, sir.

Mr. JOHNSTON. He handed one copy to Mr. Bromley, and I guess this one he didn't even get. We are not seeing any of these things that are going in.

1472 Justice STEPHENS. Well, that has to be stopped. You have got a right to see them. Is there another set of these somewhere that you can hand to defendants' counsel?

Mr. KNUFF. My recollection and Mr. Bromley's recollection apparently differ.

Justice STEPHENS. Have you seen the exhibits that came in yesterday, Mr. Johnston?

Mr. JOHNSTON. You say have I seen them?

Justice STEPHENS. Did you see the exhibits that came in yesterday?

Mr. JOHNSTON. I glanced at one or two just as they were being handed in. I have the exhibits that went in up to the Thanksgiving recess. I gave a receipt to the reporter and got them and had them photostated. Those are the only ones I have.

Justice STEPHENS. Well, something must be done to give the defendants an opportunity to see these exhibits. The Court spoke informally to Mr. Berge the other day — I happened to meet him socially—and told him of the Court's earnest desire that photostats be furnished. I assume that you have already yourself gotten that message to Mr. Berge?

Mr. KNUFF. No, I haven't, Your Honor. I haven't had an opportunity to get it to him.

1473 Justice STEPHENS. Mr. Reporter, will you write up that part of the record—it is around page 1534—where the Court directed a message to be delivered by counsel for the Government to Mr. Berge, the head of the Antitrust Division of the Department of Justice, indicating to him that while the Court didn't have power to order the photostating of exhibits, the Court did feel that the Government ought to furnish these exhibits in photostatic form, or some form, to the defendants' counsel; otherwise, we would have to take an adjournment long enough to give them a chance to inspect them.

The REPORTER. I will.

Justice STEPHENS. It would approach a denial of due

process, it seems to me, if the defendants can't be apprised of the evidence which is being offered against them in time to consider it and make possible objections.

If you will have that written up, Mr. Reporter, the Court itself will send it to Mr. Berge. I think that that ought to have been called to the attention, Mr. Knuff, of Mr. Berge before this. I have assumed that the Court's injunctions or requests were being complied with, and that defendants were getting these exhibits, or that otherwise we would have heard from them.

Mr. KNUFF. I don't want Your Honor to assume that I didn't make the attempt to get in touch with Mr. Berge. I did do that, Your Honor, promptly, the same day, when I left here. I don't want you for one minute to think
1474 that I have ignored it.

Justice STEPHENS. I understood you to say that you hadn't time to see him.

Mr. KNUFF. If I said that, I misspoke myself. I meant that I hadn't been able to see him.

Justice STEPHENS. I am sorry if I misunderstood you.

Mr. JOHNSTON. Economy of time is another thing of great importance. Yesterday I took it upon myself to hold my watch on the time that we were out examining these exhibits, and it was 42 minutes of yesterday's time that was occupied, that was wasted, I think. If we could have had these exhibits the day before so we could have examined them—it would be economy of time to have them.

Justice STEPHENS. There is no doubt about that, but the Court at the present moment is confronted with the proposition that the photostats are not yet in existence in sufficient numbers to distribute one to each lawyer. The only other thing we can do at the present time is to give you a recess, if you ask it, long enough to examine the exhibits which were introduced yesterday and are being examined on today. If you feel that your rights require that, the Court will grant you a recess for half an hour or for an hour, whatever time you need.

Mr. KNUFF. As I say, I was quite sure that I hand-
1475 ed them down to Mr. Bromley, and Mr. Bromley is just as sure that I didn't.

Mr. BROMLEY. Here is the document that he gave me. It is a photostatic copy of the document that has now been marked Exhibit 203 for Identification. I handed it promptly down the line so Mr. Johnston might see it.

Mr. KNUFF. The copy Mr. Bromley has in mind, I gave him just a moment ago. What I have reference to is the

series of exhibits beginning with May 18, 1943, which was handed over yesterday.

Mr. BROMLEY. I don't remember anything about them. I certainly haven't got them.

Justice STEPHENS. Well, do defendants' counsel ask for a recess in order to inspect the exhibits which Mr. Knuff has just referred to, and others now being considered?

Mr. OLIVER. I do, Your Honor, because what was handed to us yesterday ended up with Exhibit 201. Now we have never seen Exhibit 204. Exhibit 203 did come down just a moment ago.

Mr. KNUFF. Did you see Exhibit 202, sir?

Mr. OLIVER. No, Exhibit 201 is the last one in here.

Justice STEPHENS. The plot thickens. Apparently a long series of exhibits was handed to defendants' counsel. You have it in your hand, haven't you, Mr. Oliver?

Mr. OLIVER. These stop at 201.

1476 Justice STEPHENS. Very true, but I understood you were representing that you hadn't seen any of those at all.

Mr. OLIVER. Oh, no, I wasn't representing that at all.

Justice STEPHENS. Wasn't that your complaint, Mr. Johnston?

Mr. JOHNSTON. I represent that I haven't seen them, and I didn't know that Mr. Oliver had them until now.

Justice STEPHENS. Well, the Court will be in recess for 15 minutes, and the defendants' counsel may have the Court's copies of these exhibits.

(Thereupon, a 15-minute recess was taken, after which the trial was resumed as follows:)

Justice STEPHENS. Proceed, gentlemen.

Mr. KNUFF. May it please the Court, in the present state of the record I feel that there might be some reflection, not intentionally, cast upon the Department of Justice, and I would like the record to contain this statement, if I may.

I did endeavor to get in touch with Mr. Berge, as I said, and was unable to contact him.

Concerning the exhibits that I now have in my hand, which begin with 202, it is my recollection that I handed these exhibits to Mr. Bromley yesterday. I examined at some length as to the third paragraph from the bottom of that exhibit, that was about conditions tending to eliminate competition. Mr. Oliver has just told me that he saw this memorandum of the 18th of May, 1928, yester-

1477 day. They were all clipped together. Now I don't

know what happened to them, I can't explain it. Probably somebody gathered them up unintentionally yesterday and put them in their brief case.

Justice STEPHENS. Mr. Knuff, there is no intention on anyone's part to reflect on anyone. I am sure you have done your personal best to get the exhibits, but we will have to take some steps, the Court will consider some steps to get them in some way.

Mr. KNUFF. As soon as I leave the courtroom this evening I am going right over to Mr. Berge's office and camp on the outside of it until I get in. I will explain to Mr. Berge what I attempted to explain to Mr. Berge the other day but was unable to contact him, and I will assure Your Honor that I will make every effort.

The thought occurred to me that in case there is any objection to the Government paying for a set of 7 exhibits, I was going to suggest to Mr. Berge that possibly we might furnish one set of photostats the night before, to the defendants, that we were going to use the next day, and let the defendants then have that set of photostats photostated. Would that meet with Your Honor's approval?

Mr. JOHNSTON. May I be heard, if the Court please, when he is through?

Justice STEPHENS. You may be heard.

1478 Mr. KNUFF. I am through. I just wanted to know if that would meet with the Court's approval if I would do that.

Mr. JOHNSTON. First, I want to get everybody straightened out on what happened.

Yesterday afternoon there was handed down the line a batch of exhibits, 197 to 201, inclusive. Those were the minutes of the meetings, to which I objected, and the Court overruled my objection.

Yesterday evening, after the closing, there was handed to me, and it came down the line here from somebody, or I picked it up, what has been introduced—and I see received—as Exhibit 202, and which I want to object to on the same grounds that I objected to the minutes, for the record.

Now during the intermission, I received Judge Jackson's set of exhibits, the first one of which is Exhibit 202. Then there follows 203, 204, 205 and I think 206, 207 and 208.

Now I submit that all anybody saw yesterday afternoon of the second set of exhibits was the single Exhibit 202 that came down the line. We did not see the others in that series.

Now I address myself to the suggestion of counsel. You

can't get photostatic copies made on that short notice by delivering one set to counsel the evening before, and then expect all of counsel to examine that set that night and be back here ready to operate in the morning. It isn't
1479 fair, it isn't practical, and I don't think it is possible. It takes about 3 days to get photostating done here.

Now I can't see why counsel for the Government doesn't know today about what witnesses they are going to use and what exhibits they are going to use four or five days from now and if the Government is unwilling to furnish us with these copies and the Court feels that it does not have the power to compel the furnishing of them, then we are either going to have to adjourn from time to time and take up a third of the time of the Court here in examining exhibits, or we are going to then have to ask the Court to implore the Government to furnish us exhibits sufficiently far in advance that we may have them photostated, at a great expense. It is a most extraordinary circumstance, indeed.

Justice STEPHENS. The Court doesn't feel that it is lacking in power to compel the Government to show you the exhibits that it is offering in evidence. Of course, it has power to do that, and it hasn't been called upon to exercise that power. The Government has shown you the exhibits which it is actually offering in evidence. The Court doesn't have power to order a particular expenditure of funds by the Department of Justice. But the Court does think—the Court discussed the matter during the recess—that in view of the length of time which this case has been in the courts, the fact that it went through
1480 in some part a criminal trial and has been pressed for trial for a year or so, that the Government ought to know to some extent, in advance, the nature of its evidence so that it could get these exhibits to the defendants, if in no other way, a few days in advance of their actual use.

The Court isn't criticizing, Mr. Knuff. It may well be due to the fact that the responsibility of acting as trial counsel in this case has come suddenly upon you, and I am not criticizing you or anybody. But it does seem to us that something can be done. I don't think the Court can require the defendants to go to the expense of spending their funds any more than it can require the Department of Justice to do so. The usual way in simple cases, of course, that are not complicated, is for the Government to mark an exhibit and hand it over to defendant's counsel, there is usually only one lawyer. And in a few minutes

he can tell what it amounts to. There are usually only half a dozen exhibits in most cases.

But we will ask you to see Mr. Berge, and you are authorized to state to Mr. Berge that the Court requests him to see you on this subject. The Court really feels very seriously about it, Mr. Knuff, and you may say so to Mr. Berge.

If Mr. Berge feels that he lacks power to aid the Court in this respect, with all of the expense and difficulty
1481 and time we are all put to here, 3 judges and 8 or 10 lawyers, for Government and defendants both, the Court will apply to the Attorney General himself, if necessary, to get some help in this situation.

It is just a foolish waste of time to have to adjourn and adjourn this case in order to permit an inspection of exhibits. It wastes your time, the Government's time, and the defendants' time and the witness' time, to say nothing of the Court's time. Here we are, 3 judges from busy courts, all of us from another court than this three-judge court. We must move forward.

Thank you for your efforts so far, and please renew them with vigor.

1482 Mr. KNUFF. I certainly will, your Honor, I give you my assurance.

Justice STEPHENS. See if we can't return to business for a while.

By Mr. KNUFF.

Q. Do you have before you, sir, Exhibit No. 204?

A. Yes, sir.

Q. I call your attention, sir, to the second paragraph of that letter, the first sentence, in which you state, "It is my opinion that we should make an effort to hold another meeting of those interested in the board situation". Do you see that?

A. Yes, sir.

Q. When did you hold your first meeting concerning those interested in the board situation?

A. I don't remember.

Q. Well, had you held a meeting previous to the one that you were suggesting in your letter of January 7, 1929, Exhibit 204?

A. I don't remember.

Q. You will notice that first the words in the second line of that paragraph are "another meeting." Does that imply that there had been a previous meeting, sir?

A. I would think so, yes.

Q. But you don't recall whether or not a former meeting was held.

1483 A. No, sir.

Q. In the second sentence of the second paragraph you state, "Mr. Kling surely should consider the others involved to the extent of at least letting us know" and so forth.

Why did you think that Mr. Kling should "consider the others involved", sir?

A. Well, I really don't remember, but connecting it up with some of these other exhibits, no one interested in saving the company the way I was could do very much until he knew the attitude of the others.

Q. Pardon me, sir, I did not understand you.

Mr. KNUFF. Will you read the answer, Mr. Reporter?

(The last answer was read by the reporter.)

By Mr. KNUFF.

Q. Why was it necessary, sir, for you to know the attitude of the others?

A. Just to know what to expect in the future.

Q. And the attitude of the others on the board situation would guide your future conduct, is that what you mean?

A. I think that it probably was the thing I had in mind.

Q. What did you mean by "those interested in the board situation"?

A. I would think that it probably meant the manufacturers of wallboard.

1484 Q. And what "situation" was involved at that time?

A. You mean ——

Q. (Interposing.) What was the situation that you are referring to here, sir, the "'board situation"?

A. I don't remember exactly. Probably, or it could have been, the fact that part of the industry was licensed and was making a closed-edge board, and part of the manufacturers were not licensed, and were making an open-edge board.

Q. And is that what you mean by "board situation"?

A. I am not sure that it was, I say that might have been.

Q. How did you propose to correct that, then?

A. Well, as I testified before, I hoped that other board manufacturers would take out a closed-edge license, take out a license on the closed-edge patent.

Q. Now I call your attention, sir, to the third paragraph of the letter, the first sentence, reading, "Rather than initiate the move again myself, it would probably carry more weight if you and Mr. Brown would request me to call such a meeting". Had you previously initiated any move which you mentioned there in that letter?

A. Oh, I think I kept trying to talk these people into taking out a license.

Q. You think you did?

A. I think so, yes, sir.

Q. Can you recall whom you talked to?

1485 A. No, I imagine that I talked to all of them.

Q. And can you fix the time that you talked to them?

A. No, sir, I am sorry.

Q. I mean with reference to this letter.

A. No, sir, I am sorry.

Q. Well, you entered the gypsum industry in 1928; is that right.

A. That is right.

Q. And this letter is dated the 7th of January, 1929?

A. That is right.

Q. Now during the year 1928 is it your best recollection that you talked to all of the manufacturers in the board industry in order to interest them in a license agreement?

A. Not necessarily in order to interest them in the license agreement.

Q. Well, whom did you talk to concerning a license agreement?

A. Well, I don't remember definitely, but I would assume that I talked to everyone that had a license and everyone that didn't have a license.

Q. Why would you talk to those people that already had a license?

A. To learn what they thought of it, how it was working with them, what were the defects in it—anything to learn something about the business which I knew nothing about when I came in.

1486 Q. Did you feel that the manufacture of a closed-edge board was desirable for the industry?

A. I so stated yesterday.

Q. And what were your reasons for feeling that way?

A. Because it was a better product.

Q. That is, a better product from the consumer's point of view, or a better product from the manufacturer's point of view?

A. Both.

Q. From a manufacturer's point of view, was it as costly or a more costly product to manufacture than open-edge board?

A. I don't know for sure.

Q. You were associated with the industry for how many years?

A. Seven years.

Q. And what was your previous training—as an engineer?

A. No, sir.

Q. What was your previous training?

A. Retail lumber and building material.

Q. I see. In the manufacture of open-edge board was there any waste?

A. I think so, for most companies.

1487 Q. The edges of the board would have to be trimmed, is that correct——

Justice JACKSON (interposing). Did you ever manufacture any open-edge board?

The WITNESS. No, your Honor.

Mr. KNUFF. Would the edges of the board have to be trimmed?

Mr. BROMLEY. I object to it, then, as speculative. If he never made any board he doesn't know.

Justice STEPHENS. If he doesn't know about it, there is no use asking him about it.

Mr. KNUFF. If he doesn't know about it, yes, but here was the president of the Universal Gypsum Company and I suppose that the president of the Universal Gypsum Company knew something of their manufacturing processes.

Justice JACKSON. I understood from his testimony yesterday that he stated that when he came with Universal they were making a closed-edge board, or a partially closed edge board.

Mr. KNUFF. That is correct.

Justice JACKSON. But not an open-edge board.

Mr. KNUFF. That is right.

Justice JACKSON. I asked him if he ever made any open-edge board while he was there and he said no—isn't that your answer?

The WITNESS. Yes, your Honor.

By Mr. KNUFF.

1488 Q. Do you know whether there was any breakage in the manufacturing and handling of open-edge board?

Justice STEPHENS. Isn't that admitted in the case, and already in evidence? Is there any dispute as to the fact that it was more expensive? Mr. Griswold so testified that it was more expensive to make open-edge board.

Mr. BROMLEY. There is no dispute whatever.

Mr. KNUFF. That it is more costly to make open-edge board?

Justice STEPHENS. Yes.

Mr. KNUFF. If that is admitted, that is what I was trying to bring out.

Mr. BROMLEY. It is not only admitted, but it is asserted, sir.

Mr. KNUFF. That makes it doubly better.

By Mr. KNUFF.

Q. Now refer to the next to the last paragraph of Government's Exhibit 202, where you say ——

Justice JACKSON (interposing). Government's Exhibit 202?

Mr. KNUFF. I beg your pardon, Government's Exhibit 204—where you say, "Personally, I cannot see how the American can hope to gain anything at all by delaying the settlement because of the fact this delay is going to be the cause of demoralizing prices during most of 1929 unless the situation is handled promptly". Do you see that, sir?

The WITNESS. Yes, sir.

1489 By Mr. KNUFF.

Q. What prompt action on the part of American would relieve that situation?

A. I don't know that it would.

Q. You so state in your letter that it would, do you not?

A. I express an opinion, I guess.

Q. Well, what was your opinion, then, as to what prompt action of American was necessary to relieve this demoralized condition?

A. I don't remember exactly. There are two things that it might have meant. One of them is the same thing I mentioned yesterday, that the closed-edge board usually brought some premium in the market over the open-edge board, and yet it was a hard thing to sell against because of the difference in the prices and the quotations that you heard reported in the market. That always had a very demoralizing effect. You would hear of a competitive price on sup-

posedly closed-edge board, and you might find out, after you had met the price, that it was open-edge board and if there was only one type of board, the closed-edge, you would know that you were competing with a similar product.

The other thing had to do with the fact that while there was a lot of litigation and bad feeling in the industry, plus this injunction that I referred to before, it was very difficult to get the business men to sit down and even discuss industry problems, which usually has a demoraliz-
1490 ing effect if that cannot be done within the law.

Q. What prompt action did you want USG to take?

Mr. BROMLEY. USG?

Mr. KNUFF. I beg your pardon.

By Mr. KNUFF.

Q. What prompt action did you want American Gypsum Company to take?

A. Presumably I hoped that they would settle their litigation and sign a license agreement to manufacture the closed-edge board.

Q. I show you what has been marked for identification as Government's Exhibit No. 205.

Justice GARRETT. Are you introducing 204, or not?

Mr. KNUFF. Not yet, your Honor.

Justice STEPHENS. What is 205?

Mr. KNUFF. Exhibit 205 for identification is a letter, dated January 9, 1929, addressed to Mr. Eugene Holland and signed on the back, "President" and on the right-hand side of the page there is typed in the name "J. F. Haggerty: MP"——

Justice STEPHENS (interposing). That is on the left-hand side of the page, is it not? Perhaps you have a negative and we have a positive. It is on the left-hand side on the exhibit we have.

Mr. KNUFF. The left-hand side is right.

1491 (Government Exhibit No. 205 for identification was handed to the witness.)

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. You have read the letter, sir?

A. Yes, sir.

Q. Do you recall receiving the original of that?

A. No, but I evidently did.

Q. I direct your attention to the second paragraph of that letter reading, "The question now in my mind is whether or not the other four board makers, who are outside the license agreement, feel that it would be advantageous to go in without the American Gypsum Company".

Do you know why the other four board manufacturers would hesitate to enter into any license agreement unless the American Gypsum Company entered into a license agreement?

A. You mean can I think of a reason now?

Q. That you had at that time.

A. Well, I don't remember what reason I might have had at that time.

Q. You will notice that the last sentence speaks of a meeting to discuss that point, that is the last sentence of paragraph 2. Do you know whether that meeting was held?

A. No, I don't remember.

Q. Will you refer to the last paragraph of the letter where Mr. Haggerty said, "'I would like to hear
1492 from you", and so forth?

A. Yes, sir.

Q. Did you answer this letter?

A. I don't know.

Q. You have no recollection of answering it?

A. No, sir.

Mr. KNUFF. If your Honor please, we offer in evidence Government's Exhibits Nos. 204 and 205.

Justice STEPHENS. You are not now offering Exhibit 203?

Mr. KNUFF. It has not yet been identified by Mr. Black, the author of that letter.

Justice STEPHENS. That is right. You are offering now

Mr. KNUFF (interposing). Exhibits 204 and 205.

Justice STEPHENS. Exhibit 204 is admitted in evidence, subject to the usual reservation of the Court with respect to this class of declaration on the part of an alleged co-conspirator.

Mr. OLIVER. If the Court please, I object to the receipt of Exhibit 205. It has not been identified as ever having been received by the witness.

Justice STEPHENS. Well, the Court has some question about Exhibit 205. Are you going to call Mr. Haggerty or is he not living?

Mr. KNUFF. He is dead, your Honor.

1493 Justice STEPHENS. The Court's process will not reach that far. (Laughter.)

Mr. KNUFF. May I say a word, your Honor?

Justice STEPHENS. Yes.

Mr. KNUFF. Government's Exhibit No. 205 was obtained by us from the files of the National Gypsum Company under subpoena issued in this case. It was a record apparently that they kept in their files. Whether or not this witness ever received the original is immaterial, it is still a declaration, whether it was mailed, whether it was received, or no matter what happened. It came out of the files of National and I believe Mr. Finck will verify that statement.

Justice STEPHENS. Is that correct, Mr. Finck?

Mr. FINCK. Yes, that is correct.

Justice STEPHENS. It may be admitted in evidence subject to the usual reservation with respect to this class of declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 204 and 205, respectively, were received in evidence.)

Justice STEPHENS. The Court has an extra copy of what has been marked Exhibit 203 for identification. Will you hand that to counsel?

(Government Exhibit No. 203 for identification was handed to Government counsel.)

1494 By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government Exhibit 206, the same being a letter dated January 12, 1929, addressed to Mr. J. F. Haggerty, President, and signed, "Eugene Holland." I wish you would look at that letter and state whether or not that is your signature.

(Government Exhibit No. 203 for identification was handed to the witness.)

A. Yes, sir.

Q. Will you look, sir, at the first sentence of the first paragraph in Exhibit 206, and tell me what you meant by the term "wallboard proposition"?

A. I don't remember for sure. Reading it today I would think that it probably had to do with the settlement of the litigation and the taking out of a license.

Q. Would you look at the second sentence, "You will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available", and so forth.

Do you notice that, sir?

A. Yes, sir.

Q. What occasion were you calling to Mr. Haggerty's attention that Mr. Avery participated in?

A. May I hear that question again, please?

Mr. KNUFF. Will you read it?

1495 (The pending question was read by the reporter.)

By Mr. KNUFF.

Q. You will note you start off by saying, "You will remember".

A. I don't remember, for sure.

Q. You haven't any present recollection of what you were asking Mr. Haggerty to remember?

A. I haven't any recollection of it as to that time, no, sir.

Q. When you say that Mr. Avery "made it very clear to us", whom did you mean by "us"?

A. That I don't remember. I would say from reading this, however, that it sounds like it means that he made it clear to Mr. Haggerty and myself.

Q. Is that your recollection today?

A. No, sir, that is my interpretation of this statement here.

Q. I see. Well, again I want to say that I am not casting any aspersions on your truthfulness, and I don't want you to think that the next question does, but I want to ask you—did you write truthful letters?

A. Does the witness have any right to express himself on a thing like that?

Justice STEPHENS. Yes, you may express yourself.

The WITNESS. Well, I rather resent the implication, sir.

Justice STEPHENS. Well, Mr. Knuff has explained

1496 that he doesn't mean to cast an imputation upon your truthfulness, and the Court doesn't interpret his question that way, Mr. Holland. I think what counsel means—it is put in a little unusual form—is to indicate to you that since you wrote this letter it must likely be a reference to some events or conferences with individuals whom you knew of at the time, and the question is an attempt to probe your recollection.

The WITNESS. Well, I will answer the question this way, that I always try to write truthful letters.

By Mr. KNUFF.

Q. And your statement there that "Mr. Avery made it

very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available", and so forh—is that a truthful statement?

A. I would think so, yes, sir.

Justice STEPHENS. The Court will suggest to Mr. Knuff that just as much would be accomplished by asking if it is a correct statement. The Court can appreciate the feelings of the witness being constantly asked whether his statements are truthful. The examination is, I assume, being conducted upon the assumption that the witness' statements are truthful.

Mr. KNUFF. Throughout. I do not for one minute feel that Mr. Holland is giving any untruthful answers. I just wanted to make sure that he couldn't think that by my question I intended to imply that he was untruth-
1497 ful. I don't think so.

Justice STEPHENS. We realize that, Mr. Knuff.

By Mr. KNUFF.

Q. Now the question that is before you, sir, I believe, is what plan was going to be worked out? That is in the fourth line of the first paragraph.

A. I don't remember, exactly.

Q. Well, what is your best recollection, if you don't remember exactly? Give us your best recollection.

A. Well, there were several patents including one that the Universal owned, that were in the industry.

Q. I am referring to a "plan". My question is what plan did you have in mind?

A. Well, that is what I am not clear on.

Q. Your answer to that was that you are not clear exactly. Now I say—what is your best recollection of the plan?

Justice STEPHENS. If you have a recollection. If you haven't one, say so.

The WITNESS. I have no recollection.

By Mr. KNUFF.

Q. And you say further, in the first paragraph, "* * * and we were all agreed that the fact that the Utzman patent expires next August is not a practical reason for continuing the conflict". When you say "we were all agreed"—whom did you mean by "we"?

1498 A. I am not sure. Tied in with that letter, it would sound like Mr. Haggerty and I and possibly Mr. Avery, if we had talked to him about it.

Q. Well, did you have any plan, sir, based on the Utzman

patent, or did you have a plan based on some other patent?

A. Not that I remember. Was the Utzman patent the closed-edge patent?

Q. That is correct, sir.

A. Well, it would be a plan on that if everyone was licensed under it in the industry.

Q. Well, why were patents so necessary for the plan that you had in mind, or why did you think they were necessary?

A. Well, as I stated before, I thought the industry would be better off by a uniform and better product.

Q. Well, why were patents necessary for your plan?

A. Because there was a patent—I was going to say I thought it had been adjudicated, but I am not sure—but there was a patent there that made a better board which make a uniformly good board in the market.

Q. But apparently your plan here was based upon some patent. Now what I am asking you is this. Why was a patent necessary for the plan that you had in mind?

Mr. BROMLEY. I don't think that there is any evidence that he had any plan in mind. I object to it as assuming a fact not in evidence.

1499 Mr. KNUFF. The context of the second sentence clearly indicates that. "You will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the Utzman patent expires next August is not a practical reason for continuing the conflict."

Now evidently the plan was based either upon the Utzman patent or upon some other patent, your Honor.

Justice STEPHENS. That is argumentative, and while that may be the case, this witness has definitely stated he does not remember any plan. Therefore, the question just asked assumes that he had a plan in mind. The objection is sustained.

By Mr. KNUFF.

Q. At the end of the last paragraph you use the words, "continuing the conflict". What did you mean by that?

Justice JACKSON. That is at the end of the first paragraph.

Mr. KNUFF. At the end of the first paragraph, yes, I beg your pardon.

The WITNESS. I don't remember whether I was referring to the demoralized condition or to the patent litigation that

was prevalent in the industry.

By Mr. KNUFF.

Q. The market conditions were demoralized at this time, were they?

1500 A. As I remember it, yes.

Q. And there was also litigation going on in the industry at this time, and you are not quite sure what you had in mind, is that correct?

A. That is right.

Q. Now will you look, sir, at the first sentence of your second paragraph, "It is my opinion that if you and the others interested in the settlement of the wallboard controversy bring enough pressure to bear on the American crowd that something can be done". You say there, "if you and the others"—by "others", whom did you mean?

A. I don't remember, I imagine it would be people that thought the same as I did about it.

Q. You have no recollection of what you meant by that statement at that time?

A. No, sir.

Q. What pressure did you expect, or what pressure did you contemplate, if you contemplated any, would be brought on the American crowd?

A. Well, I don't remember, but I would connect that up with the next sentence. If Mr. Kling thought that the rest of them felt it was a good idea for themselves, it would probably influence his opinion, and it would be natural for me to argue with the others who thought the same thing as I did about it, to argue with Mr. Kling as to

1501 the value of taking out a similar license agreement.

Q. By "pressure" do you mean "persuasion"?

A. I would think so, yes.

Q. You state in the second sentence, in the second paragraph, "You will remember that Mr. Kling stated several times that they would be materially influenced by the attitude of the other men involved", and so forth. You notice that, sir?

A. Yes, sir.

Q. Now what were you calling to Mr. Haggerty's attention that you asked him to remember?

A. Well, just the thing that I have told you before, that evidently, according to this—I don't remember it—but evidently according to this, Mr. Kling had told us

at different times that he would be influenced by our opinion on the license agreement.

Q. Do you have any recollection on that?

A. No, I am merely being guided by what is in this paragraph.

Mr. OLIVER. If your Honor please, isn't it obvious that this witness does not recollect? Why isn't it the best thing to just introduce this letter and be done with it?

Mr. KNUFF. I think we have a right, if your Honor pleases, to ask the witness what he meant by certain things in the letter. If he doesn't remember them, of course he can say that. I am not trying to unduly
1502 prolong this examination, but I am just trying to get the witness to explain.

Justice STEPHENS. Well, we think the Government probably has a right to ask the witness, if it feels that it must, about each statement in the letter which he admits having sent, to see if he remembers it. Of course it is becoming pretty apparent, Mr. Knuff, that the witness does not remember anything about it. At the same time, the Court will not foreclose you the right which you probably have to ask him about each sentence in the letter, each idea in the letter. The witness understands, however, that if he doesn't remember, he is to say so. The Court can be informed by the letter, of course, as to what his declarations were; and as to what the letter means, it is the subject of argument and interpretation to be put upon it by counsel when the arguments are made in the case at the close of the case. What we are interested in now is what you remember about it, if you remember anything.

Mr. KNUFF. And I am not interested in the interpretations, I am interested in things that are not explained in the letter, like "plan", and "you will remember"——

Justice STEPHENS (interposing). We think you are entitled to examine upon that. Do so as rapidly as you reasonably can.

The WITNESS. Maybe I shouldn't try to interpret some of these things now.

1503 Justice STEPHENS. We are interested in your recollection, not in your interpretation.

By Mr. KNUFF.

Q. You say you are quite sure ——

Justice STEPHENS (interposing). Of course I might add this for the benefit of counsel and the witness, that if your

knowledge of the events, if your recollection of the events and conversations generally which you had at that time throws some light on the letter, you may properly be asked what you meant by a particular phrase in the light of these events or those things that you do recollect. But you are not here for the purpose of putting a bare interpretation of an argumentative character upon this letter. The Court can do that itself. The Court wants the aid of your recollection as far as you have it.

1504 By Mr. KNUFF.

Q. The next to the last sentence in paragraph 2 reads: "I am quite sure that Mr. Avery would not be interested in negotiating settlements unless everyone involved was included." What did you base that on, sir?

A. I don't remember.

Q. You have no recollection on that?

A. No sir.

Q. You will notice that in the last paragraph you say, "I am expecting to be East next week, at which time I will talk further with Mr. Brown" and so forth. Had you had a previous conversation with Mr. Brown?

A. I don't remember as to the dates, but I would say that if I put that in the letter it was a pretty good sign that I had a conversation with Mr. Brown.

Q. Which Mr. Brown did you have reference to? There were two Browns, C. O. and George Brown.

A. It probably meant George Brown.

Q. Do you recall when you had that conversation?

A. No sir.

Q. Do you recall anything concerning the conversation?

A. No sir.

Q. You will notice that in the last sentence you ask him to give you "any new information" he has. What information were you expecting to receive, and what did you have in mind?

1505 A. I don't know.

Mr. KNUFF. If Your Honor please, we offer in evidence Government's Exhibit 206.

Justice STEPHENS. Is there any objection other than the usual objection to this class of evidence?

Mr. BROMLEY. No sir.

Justice STEPHENS. It may be received in evidence, subject to the usual reservation of the Court with respect to declarations of alleged co-conspirators.

(The letter referred to, marked as Government's Exhibit No. 206, was received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 207, the same being a copy of a telegram dated 5–18–29, addressed to Mr. Eugene Holland, and signed S. L. Avery. Will you state whether or not you received this telegram, sir?

A. I don't remember receiving that telegram.

Q. Is that your address given there, sir, 5114 Dodge Street, Omaha, Nebraska

A. That was my mother's home; that address is my mother's home.

Q. But you haven't any recollection of receiving that telegram?

1506 A. No sir.

Q. Did you attend any meeting in or about May, 1929?

A. Yes, I think so.

Q. Where was that meeting held?

A. Now I am not sure as to the date, but I think there was a meeting in the Palmer House, at Chicago, Illinois.

Q. At about the time referred to in the telegram?

A. I would think so.

Q. That is your best recollection?

A. Yes, that is my general recollection.

Q. What was the character of this meeting, sir? Who attended the meeting?

A. Well, I attended a meeting there of board manufacturers to consider the proposition being offered by the United States Gypsum Company in the way of a license agreement.

Q. You say you attended?

A. Yes sir.

Q. Who else attended?

A. Well, I am not sure, but I think that representatives of the United States Gypsum Company were there; I think the Ebsary Gypsum Company was there; the Atlantic Gypsum Company was there—that is all I am sure of.

Justice STEPHENS. Where did you say this meeting was?

The WITNESS. I think it was in the Palmer House in Chicago, Illinois.

1507 By Mr. KNUFF.

Q. Was a representative of Texas there at that time?

A. I don't remember, I am sure.
Q. National?
A. Yes, I believe National was represented.
Q. Certain-teed?
A. Yes, I believe they were represented.
Q. Anybody from Kelly, the Kelly Plasterboard Company?
A. Not that I remember.
Q. Anybody from Niagara?
A. I don't remember of anyone from Niagara being there.
Q. Who represented USG?
A. As I remember it, Mr. Avery, Mr. Henning, and Mr. MacLeish.
Q. Was anybody else there from Universal besides yourself?
A. I don't believe so.
Q. Who represented Ebsary?
A. As I remember it, Mr. Ebsary.
Q. Was Mr. Lenci there at that time?
A. I am not sure.
Q. Who represented Atlantic?
A. As I remember it, it was Mr. Fuller and Mr. Neale.
Q. Who represented National?
A. Was Mr. Haggerty alive then?
Q. I don't know, sir.
1508 Mr. FINCK. What was the date?
Mr. KNUFF. In May, 1929.
Mr. FINCK. No, he was not.
Mr. KNUFF. I am informed by Mr. Finck that he was not living at the time.
The WITNESS. I didn't want to make a mistake and say he was there, if he was not living at the time. I think Mr. Baker was there.

By Mr. KNUFF.

Q. Anybody else
A. Not that I remember.
Q. And who represented Certain-teed?
A. I think Mr. Henley.
Q. Warren Henley?
A. Yes.
Q. Was there anybody else there from Certain-teed, either Mr. George Brown or Mr. C. O. Brown?
A. I am not sure on that.

Q. Do you know whether Mr. Gloyd of the Texas Cement Plaster Company was there?

Mr. JOHNSTON. That is objected to as repetitious; he has already stated that he didn't remember.

Mr. KNUFF. He said he didn't remember whether the Texas Cement Plaster Company was represented. I am now asking him as to a particular individual.

1509 Justice STEPHENS. You may answer the question.

The WITNESS. I don't remember.

By Mr. KNUFF.

Q. How long did this meeting last?

A. It is my impression it lasted just one day.

Q. A whole day or what portion of a day?

A. As I remember it, it started in the morning and ended some time in the afternoon, with a recess for lunch.

Justice STEPHENS. How much more direct examination do you expect to have of this witness?

MR. KNUFF. At least an hour and possibly an hour and a half, Your Honor.

Justice STEPHENS. Then we will have to ask you to return again tomorrow, Mr. Holland. The Court would be glad to sit longer, if necessary, inasmuch as the witness is engaged in war work, but we probably wouldn't accomplish anything, especially in view of the arduous hours of the court reporter. So we will adjourn at this time.

Before we adjourn let me make this statement, that even if Mr. Berge is able to get these photostats arranged for, it will take a day or so to get them, I suppose. Now what can we do tonight? Have you in mind any exhibits which you can informally show to counsel for the defendants after adjournment, and that they can examine during the evening, exhibits which you intend to use tomorrow, so

1510 that we won't have to interrupt the proceedings again tomorrow?

Mr. KNUFF. I had intended to contact Mr. Steffen, if he is in town, as soon as I leave here today, and find out exactly what Mr. Steffen's plans are. I have been under somewhat of a handicap here because I have neither a secretary nor any other assistant but myself, and I have been pinch-hitting, and am glad to stay in here and pitch as well as I can, but there is a limit to just how far I can go without some further preparation. I believe that Mr. Steffen had in mind putting on the witness stand Mr. C. O. Brown at the conclusion of Mr. Holland's testimony. I think that the exhibits for his testimony are in order over in the office.

Justice STEPHENS. Do you have any other exhibits upon which you will examine this witness?

Mr. KNUFF. No, Your Honor, other than those which they have already seen.

Justice STEPHENS. We appreciate your doing the best you personally can, Mr. Knuff. Thank you.

Announce the adjournment.

(Whereupon, at 4:00 o'clock, p.m., the hearing was adjourned until Thursday morning, December 2, 1943, at 10:00 o'clock).

1511 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Thursday, December 2, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearance. (Same as heretofore noted.)

1516 Thereupon, EUGENE HOLLAND, the witness on the stand at the time of adjournment, resumed his testimoney as follows:

DIRECT EXAMINATION (Resumed)

Mr. KNUFF. Before beginning the further direct-examination of Mr. Holland, and apropos of the Court's sugges-

tion of yesterday that I contact Mr. Berge, I was able to get in touch with Mr. Berge. Mr. Berge recalls the conversation that he had with one member of the Court, and he is very much concerned as to what can be done.

I endeavored to reach Mr. Berge yesterday afternoon as soon as I left here. He, however, was in conference at that time. I left word with his receptionist to call me at my office. I stayed there until after 6:00 o'clock. In the meantime I had placed several other calls to find out if he was free, and he wasn't free.

1517 At about 6:05 yesterday afternoon I made the last call, and I was advised that he was still in conference and that they didn't know when the conference would be concluded.

This morning just before coming over to Court, I was able to talk to him for a very short time. The conversation had to be necessarily short because I was due over in Court.

Something will be done. He is going to look into the matter of photostats, give it his personal attention. And in view of the fact that no matter what he wanted to do, it couldn't be done until after the Court recessed tomorrow, I am to take it up further with him as soon as I have an opportunity, which I will do.

Justice STEPHENS. Thank you, Mr. Knuff.

By Mr. KNUFF.

Q. Mr. Holland, at the conclusion of yesterday's testimony we were talking about a meeting or a conference that you attended in the Palmer House in Chicago, sometime during May of 1929, and you named the companies that were present, that is, the representatives of the companies. You recall the incident, do you not?

A. Yes, sir.

Q. What was the purpose of that conference, Mr. Holland?

A. As I remember it, it was to discuss a license agreement with the United States Gypsum Company that they were proposing, that it was proposing.

1518 Q. And do you know whether or not there were any minutes of that conference kept, any stenographic report?

A. I know of none.

Q. You don't remember of any?

A. No.

Q. Do you recall anything that was said at that conference?

A. I remember one thing that I said, I think, representing our company.

Q. Do you mind telling us what it was?

A. Well, I can't tell you exactly what I said, but in effect it was that I didn't think that we would be interested in the use of the patent because we owned a patent that served some of the same purposes as this other patent did.

Q. What patent did you have reference to? You owned some patent that served some of the purposes that this other patent did, you say?

A. Yes.

Q. What patent did you have reference to?

A. The Haggerty and the Hite patents, as I remember the names.

Q. You say that that was a meeting that took place in May of 1929?

A. I don't remember the date. It seems to me it was about that time, as I recollect it.

1519 Q. Didn't that conference take place sometime in July of that same year?

A. I am not sure.

Q. But the conference that you have reference to was concerning the "bubble" board patent license?

A. That was the thing I had in mind. That is the one I am talking about.

Q. You are talking about the "bubble" board arrangement?

A. Yes, sir.

Q. All right, let's go into that a little bit.

What was this so-called "bubble" board patent that USG had?

Justice STEPHENS. We are a little puzzled. Did you mean that USG had at that time?

Mr. KNUFF. USG had an application for a patent on the so-called "bubble" board, which is the first Roos foam patent.

Justice STEPHENS. We understood the witness to say that his company had it.

Mr. KNUFF. His company had the Hite and Haggerty patents. But the Hite and Haggerty patents and the first Roos foam patent are two different things.

Justice JACKSON. I know, but this witness was talking about the Hite and the Haggerty patents. Then you started talking about a "bubble" patent. Were either the

1520 Hite or the Haggerty patents "bubble" patents?

The WITNESS. Your Honor, no, but they served some of the same purposes.

Justice STEPHENS. We are clear now. Thank you.

Mr. KNUFF. What was my question, Mr. Reporter?
(The pending question was read by the reporter.)

By Mr. KNUFF.

Q. Before you answer that question, let's see if we can bring out something else.

At the time this conversation took place, whether it was in May or some other time in 1929, were National and Certain-teed licensees under a patent owned by USG?

A. I don't remember.

Q. You don't remember whether National and Certain-teed had taken out a previous license from USG?

A. No, I don't remember.

Q. All right, sir.

Now, let's go back. What was this "bubble" patent?

A. Well, I forget the details of it. It was a patent that created a foam in the stucco that made up the interior of the board, and one of its purposes was to make lighter weight board without affecting its strength.

Q. And your company was the owner of two other patents, one of which was known as the Hite patent and the other was known as the Haggerty patent; is that correct?

1521 A. That is right.

Q. Had your company at that time entered suit against National in the District Court in New York State?

A. Yes, sir.

Q. Was that for an injunction, or just what was the nature of that suit?

A. Well, I am not sure about the details of that, but when I came into the Universal Company, part of the historical record was to the effect that a suit had been started against the National Gypsum Company previous to my taking charge, and some of our people thought that it had been a terrible mistake to not continue the prosecution of that suit. I think that suit was a request for an injunction.

Q. And for an accounting for infringement?

A. Yes, sir, I think that is right.

Q. Now Mr. Haggerty, who was the inventor of the Haggerty patent, was he formerly connected with Universal?

A. Yes, sir.

Q. And had Mr. Haggerty assigned his patent to the Universal Company?

A. As I remember it, yes.

Q. And was Mr. Williams at one time connected with

the Universal Company?

A. Yes, sir, he was an officer, as I remember it.

Q. Now after Mr. Haggerty had assigned his
1522 patent to the Universal Company, did Mr. Haggerty separate from that company?

A. Yes, sir.

Q. And was there another company started in which Mr. Haggerty became financially interested?

A. Yes, sir.

Q. What was that company? Was that National?

A. Well, that is my remembrance.

Q. I think that is correct.

And was the subject of your suit against National brought up at this meeting that you said was attended by you, out in Chicago?

A. I am not sure what stage of development that suit was in.

Q. I say, was the subject of your suit brought up?

A. I don't remember.

Q. You don't remember that?

A. No, sir.

Q. Now what attitude did your company take with reference to becoming a licensee under the so-called Roos application?

Mr. BROMLEY. I object to that as calling for a conclusion.

Justice STEPHENS. Read the question.

(The pending question was read by the reporter.)

1523 Mr. KNUFF. It shows his state of mind, Your Honor. I am going to follow that by asking the witness if that attitude was communicated to Mr. Avery, and what Mr. Avery said, and what this witness said to Mr. Avery.

Justice STEPHENS. We think the question calls for a conclusion, which is objectionable, and that the witness should be asked what was said between the parties on the subject, if he knows. The objection is sustained.

By Mr. KNUFF.

Q. Did you have any conversation with Mr. Avery concerning the Hite and the Haggerty patents and the so-called "bubble" application?

A. I think so, yes.

Q. Do you recall what that conversation was?

A. Well, I have a recollection to the effect that I told Mr. Avery that I thought we could not be interested in the "bubble" patent, except that we would like to explore the thought of how the "bubble" patent would work with our

starch patent, whether there would be any advantage to us in the combination of the two processes.

Q. Did you communicate to Mr. Avery at that time that the "bubble" application infringed on the Hite and Haggerty patents?

A. I am not sure, the way you word that question. We were beginning to believe, or I was beginning to be-
1524 lieve at that time that there was more infringement going on in the industry against the Haggerty and the Hite patents than by the National Gypsum Company. Now as to whether that came out in those immediate conferences or whether it was the "bubble" patent that we thought was infringing, I don't remember.

Q. At any rate, what did Mr. Avery say to you when you called that to his attention? If you can't give the exact words, give the substance of what he said to you.

Justice STEPHENS. Where was this conversation? Was this at the Palmer House?

The WITNESS. I am not sure, Your Honor, I am confused about the time. Mr. Knuff thinks it was in July. I am not sure when this was.

By Mr. KNUFF.

Q. Well, what I am asking you about is the conference that took place in the Palmer House at which the representatives of these companies were present, and I believe you stated that the question was discussed as to some application for a license under certain patents, and you mentioned the Hite and the Haggerty patents, and it is my understanding that that came up in connection with the "bubble" board discussion. Now what I have particular reference to is the conversation that took place at the Palmer House in May or June or July. I think we will definitely place that conference at the Palmer House in July.

1525 Mr. BROMLEY. If the Court pleases, I don't think Mr. Knuff correctly summarizes the testimony. The witness said that Mr. Avery had offered a license under the foam patent, not under the Hite and Haggerty patents. Mr. Avery hadn't anything to do with the Hite and Haggerty patents.

Justice STEPHENS. The Court will not take Mr. Knuff's statement as evidence. Your suggested correction will show in the record. We will take the witness' statement.

The WITNESS. I would like to elaborate on the statement I made. I am not sure that the conversations that I referred to took place at that meeting. I was broadening out on the

events there. I remember that we did make a statement to the effect, in the meeting, that we were not interested in the "bubble" patent and not prepared to consider a license agreement on that. And I think it was subsequent to that that we threw in this other thought, that we would like to explore the possibilities of the combination. But I am not sure that that took place at that meeting.

By Mr. KNUFF.

Q. I see. I think I understand your correction.

Now did you at any time inform Mr. Avery that the "bubble" patent application infringed on the claims of the Hite and the Haggerty patents?

A. Well, I think I did, but I can't be too sure of that. I think we made the statement very definitely that
1526 we thought the USG, in the manufacture of their board, were infringing by the use of starch or carbohydrates.

Q. Can you recall, sir, what Mr. Avery replied to that?

Justice STEPHENS. One of my colleagues doesn't hear either counsel or the witness. Will you please lift your voices a little, gentlemen?

Justice JACKSON. He does hear, but I think you are both talking too low. My hearing is exceedingly keen. Today you seem to have a let-down in the timbre of your vocalizing.

Justice STEPHENS. Proceed.

Mr. KNUFF. Mr. Reporter, will you please read the question?

(The pending question was read by the reporter.)

The WITNESS. I don't remember exactly, but I think he said that it was not their policy to use other people's patents in the manufacture of their products, and that he would certainly investigate my claim.

Mr. KNUFF. Will Your Honor pardon me just a moment?

Justice STEPHENS. Yes.

By Mr. KNUFF.

Q. Did you subsequently, sir, or did your company subsequently, sir, sell the Hite and the Haggerty patents to the United States Gypsum Company?

A. Yes, sir.

Q. When?

1527 A. I am not sure, I think it was sometime in November of 1929.

Q. Do you recall the consideration for that assignment?

Mr. BROMLEY. May it please the Court, the contract is

in evidence, which recites a very complicated consideration, as I recall it.

Justice STEPHENS. Which exhibit is that?

Mr. KNUFF. I didn't recall that it was in evidence. If it is, I haven't any desire to press the question.

Mr. BROMLEY. It seems to me it is Exhibit 6.

Mr. KNUFF. May I have Exhibit 6, please?

I understand that that is out being photostated, Your Honor.

Mr. BROMLEY. We will look it up.

Justice STEPHENS. Since the exhibits are out being photostated, and the Court hasn't what it is sure are dependable copies of those particular exhibits, we can't rule on the matter. We will have to look at the agreement to see.

Mr. KNUFF. I haven't any desire to delay the Court, if Mr. Bromley will stipulate that if it isn't in evidence it may be put in evidence.

Mr. BROMLEY. It is in evidence, it is the settlement agreement in connection with the Universal license. It
1528 spells out the whole deal.

Mr. KNUFF. I haven't any recollection of it.

Mr. BROMLEY. Here, I will show it to you.

(Copy of agreement handed to Mr. Knuff.)

Mr. KNUFF. I am satisfied that the terms of the transfer are contained in Government's Exhibit No. 6.

Justice STEPHENS. Very well, then the objection is sustained. The exhibit will speak for itself and show the consideration.

Mr. KNUFF. We now offer in evidence Government's Exhibit No. 207, the same being the telegram dated 5-18-29, signed by S. L. Avery and addressed to Mr. Eugene Holland, 5114 Dodge Street, Omaha, Nebraska.

This copy of the telegram was turned over to us, and was taken from the files of the USG pursuant to the subpoena served upon them. The witness hasn't any recollection of ever receiving it.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. Only the usual one, sir.

Justice STEPHENS. It may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 207, was received in evidence.)

1529 By Mr. KNUFF.

Q. Did your company, Mr. Holland, subsequently become a licensee of USG ——

Justice STEPHENS (interposing). One thing I want to inquire about, for the purpose of the record,—this wire from Mr. Avery said, "Mr. Kling has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license". What do you claim the telegram proves?

Mr. KNUFF. The telegram will tend to prove that before any of these companies ever took out a license, in May, 1929, they came together at a meeting in Chicago, they discussed the proposed license, the terms of the license were all explained to them. Some of the companies signed the license on that particular day; others later signed. This is for the purpose of showing that at the time, or at approximately the time of the execution of the industry-wide licensing agreement, all companies knew that the other companies were going to take out a license, and all companies did take out a license at that time with the exception of American.

Justice JACKSON. That is a new license, is it?

Mr. KNUFF. Up until ——

Justice JACKSON (interposing). I thought you
1530 said four of these gypsum companies already had licenses.

Mr. KNUFF. Up until the May meeting, four of them had licenses. After the May meeting the remaining companies in the industry all took out a license except American, and this telegram refers to a meeting that was going to be held.

Justice STEPHENS. Very well, proceed.

Mr. KNUFF. I believe I had a question to the witness that was unanswered.

(The pending question was read by the reporter.)

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. And your company became a licensee under the Hite and Haggerty patents, which you had previously transferred?

A. I think that was part of our contract.

Q. I see.

A. Our contract of sale.

Q. I show you, sir, what is marked for Identification as Government's Exhibit No. 208, the same being a letter dated September 7, 1934, addressed to Mr. C. Henning, Vice President, and signed Abel Davis and Eugene Holland, Trustees

of Universal Gypsum & Lime Co., Eugene Holland, Co-Trustee. Will you look at that exhibit, sir, and tell me if your signature appears thereon?

(Government's Exhibit No. 208 was marked for identification.)

1531 Justice GARRETT. Before the witness answers that, I would like to ask, if I may, at the time the Universal took the license from USG, was it in receivership?

The WITNESS. At the time we made the sale of the patent, Your Honor, and took a license as part of the contract, we were in receivership, yes, sir.

Mr. BROMLEY. If I may interject there, you refer to the second license, taken in 1929, Mr. Holland?

The WITNESS. I am sorry, I was reading this exhibit. I didn't understand you.

Mr. BROMLEY. Because there are two licenses of the Universal Company, I wanted to make sure that your reference was to the second license, which you took out, you said, in November, 1929—you were then in receivership?

The WITNESS. Yes, that is right.

Mr. BROMLEY. The first license, which was taken out in 1926, at that time you were not in receivership?

The WITNESS. No, and I was not at that time connected with the company.

Justice STEPHENS. Very well.

Mr. KNUFF. That was my understanding.

The WITNESS. I have read this exhibit, yes.

By Mr. KNUFF.

Q. Did you subsequently become a licensee of USG under the so-called reflective backing patent that you re-

1532 ferred to in Exhibit 208?

A. I am not sure.

Justice STEPHENS. Is that what is referred to as the metalized board?

Mr. KNUFF. Metalized board, Your Honor, yes, sir.

By Mr. KNUFF.

Q. It is in evidence, sir, that on the 4th day of April, 1935, Universal did become a licensee of USG under the so-called metalized board patent. Were you with the company at that time?

A. What was the date, sir?

Q. April 4, 1935.

A. Yes, sir, I was connected with the company then.

Q. And did Universal, while you were with it, equip its plant to manufacture metalized board?

A. I don't believe so.

Q. Following this letter of September 7, did you buy metalized board from United States Gypsum Company, if you know?

A. I am not sure; I think we did, and possibly from others in the industry.

Q. And do you know what prices you sold that for?

A. No, sir.

Q. Did you follow the bulletin prices promulgated by USG?

1533 Mr. BROMLEY. I object to that as calling for a conclusion and assuming facts not in evidence. There isn't any proof that any bulletins were sent to this company.

Mr. KNUFF. All the bulletins are in evidence.

Mr. BROMLEY. But they do not show that any bulletin was ever sent to any company before it became a licensee, Mr. Knuff.

Mr. KNUFF. It doesn't make any difference whether the company received the bulletin or not. The question is—did they sell at the same prices, the same published prices, as USG.

Mr. BROMLEY. If you mean by "published prices" the prices set forth in the exhibits in evidence in this case, to-wit, the price bulletins, those bulletins show on their face that they only applied to such persons as were licensees, and only applied—and this is shown on the face of the bulletins—to the prices of goods manufactured by the licensee under the patents licensed. That is already in evidence here.

Justice STEPHENS. What exhibit is that?

Mr. KNUFF. It is the series of exhibits beginning with Exhibit 33.

I don't think Your Honors have copies of those, they haven't been photostated as yet.

1534 Justice STEPHENS. Well, we are under difficulties, you see, not having either the originals or a photostatic copy of those exhibits. It puts the Court under difficulties with respect to ruling. If those exhibits do show, as Mr. Bromley suggests, that they apply only to products manufactured under a license, the question would seem not to be relevant under the issues.

Mr. KNUFF. It makes no difference whether the bulletins themselves were sent only to licensees. My question is—were the Universal prices the same as the bulletin prices?

Mr. BROMLEY. If he didn't get a bulletin, how could he know?

Mr. KNUFF. He could say that. He hasn't answered the question.

Justice STEPHENS. Perhaps we can save time. Do you know?

The WITNESS. I don't know, sir.

Justice STEPHENS. Very well.

By Mr. KNUFF.

Q. Now let's go back to your original license agreement that was in existence when you came with the company in, I believe you said, 1928, is that correct?

A. That is right.

Q. Under that agreement did USG from time to time fix the prices at which you should sell the products covered by that license?

1535 A. I believe so.

Q. That is your present recollection, that they did?

A. Yes, sir.

Q. And they continued to fix those prices from time to time all during the period that your company was a licensee under the original Utzman patent, as well as under the Hite and Haggerty patents and the Roos application; is that correct?

Mr. BROMLEY. I object to that question because it assumes at least two facts that are not in evidence. There isn't any proof here nor any charge that we ever fixed a price under an application for a patent. We never did that. There isn't any charge that we ever did.

In the second place, there isn't any proof here that we fixed a price after August 6, 1929, when the Utzman patent expired, because under those licenses we only had the right to fix it up to August 6, 1929. We did not have the right thereafter, until the new foam licenses were approved by the receivership court and became effective on November 5, 1929.

Mr. KNUFF. Well, I will rephrase my question.

By Mr. KNUFF.

Q. During the period up to August 6, 1929, state whether or not USG fixed your prices for plaster board from the time you came with the company, under that license?

1536 A. As I remember the license arrangement, they had a right to fix minimum prices. You cover quite a period there.

Mr. BROMLEY. We will stipulate we fixed the minimum

prices under the Universal license from the date the license became effective until August 6, 1929.

Justice STEPHENS. The Court was going to ask if that wasn't an admitted fact under the pleadings.

Mr. BROMLEY. Yes, sir.

Mr. KNUFF. I believe it is.

Justice STEPHENS. There is no need of going into it, then.

Mr. KNUFF. The minimum prices that were so fixed—was any territory exempt from the application of those prices?

Mr. BROMLEY. The bulletins, I assume, and the license are the best evidence of that, and therefore I object. I don't know what the purpose of this question is.

Justice STEPHENS. Do you wish to be heard, Mr. Knuff?

Mr. KNUFF. It is our understanding that there were certain portions of the United States as to which USG did not exercise the right to fix minimum prices, that is, in areas in the Southwest, notably in Texas. I just want to find out what the witness' recollection is as to that.

Mr. BROMLEY. I don't believe there is any charge in the complaint about that. I never heard that mentioned
1537 before at any time in this proceeding. I do not think it is so.

Justice STEPHENS. The Court has no recollection of that being a part of the issues in the case.

Mr. KNUFF. The issue in this case, if Your Honor please, is—did United States Gypsum Company fix prices under a valid patent? They said they did fix prices. There are certain portions of the United States that we know of where prices weren't fixed. Now I want to develop from this witness, if I can, if he has any knowledge as to what portions of the United States were exempt, or what portions of the United States the USG did not fix their prices in.

Justice STEPHENS. Well, the Court understands the purpose of your question, but the Court doesn't understand the relevance of it, unless there is some charge here in the complaint, denied in the answers, that there was some deviation from a regular price fixing in some parts of the United States. If there is such a charge and it is alleged that it is illegal, then, of course, we must consider evidence on it, but I don't understand you have charged that.

Mr. KNUFF. There is nothing spelled out in so many words in the complaint, but we would like to have the whole picture before the Court. If they are fixing prices under the patent in New York State, what are they doing

in Texas and in some place else. We think that is highly relevant, Your Honor.

1538 Justice STEPHENS. Well, the Court doesn't see the relevance of it unless there is some charge that price fixing was not of uniform character. It has been admitted that price fixing was done under the licenses, and the licenses are in evidence and will show, themselves.

Answer this question yes or no—do you know whether there was any deviation, in localities, from the price-fixing provided for under the license?

The WITNESS. I do not remember, sir.

Mr. KNUFF. All right, that closes that question.

We now offer in evidence Government's Exhibit 208, Your Honor.

Justice STEPHENS. That is the letter you have just identified?

Mr. KNUFF. That is the letter I just referred to.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. None except the usual one, sir.

Justice STEPHENS. Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The letter referred to, marked as Government's Exhibit No. 208, was received in evidence.)

Mr. KNUFF. I am through with the witness, and I turn him over to my worthy opponents for cross-examination.

1539 I wonder if we could have a short recess before proceeding?

Justice STEPHENS. Yes, we will take a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

1540 Justice STEPHENS. You may cross-examine.

CROSS-EXAMINATION by Mr. BROMLEY.

Q. You told us, Mr. Holland, that when you came with Universal it owned both the Haggerty and the Hite patents, did you not?

A. Yes, I think I did.

Q. And isn't it the fact that after you came with the company you found out that sometime prior to 1928, by a couple of years, the National Company had started to manufacture plaster board and was using, in its manufacture, the Haggerty patent?

A. Yes, sir.

Q. And of course, when you came with the company as you have told us, there was already pending this infringement suit which your Universal Company had brought against the National Company in Buffalo, New York, in the Federal Court, isn't that right?

A. That is my recollection.

Q. And now, don't you remember that when you came to Universal and took charge of its affairs, that as a matter of fact Federal Judge Hazel in Buffalo, had already decided that the Haggerty patent was valid, and infringed, and issued a preliminary injunction against National?

A. Well, you freshen my memory on that as to the
1541 details. I think that is right. The injunction, however, I guess was never enforced. That is what I was thinking about.

Q. Wasn't the fact that the injunction, as you say, was not enforced, due to the fact that the court, as is frequently done, had provided by order that if National put up a large enough bond it could go ahead and manufacture the infringing board?

A. I think that is correct.

Q. So that it is a fact, isn't it, that when you came with the Universal Company, the National Company was making the infringing board using the Haggerty starch process, but was under a bond in lieu of temporary injunction?

A. I think that is correct.

Q. Now it is a fact, isn't it, that the result of your investigation into the gypsum industry, after you became Universal's president, disclosed to you that probably everybody in the industry was infringing your starch patent?

A. There were people in our company who advised me in that respect, and thought that that was true.

Q. And as you have said, the Universal Company was in a very precarious financial position, wasn't it?

A. Yes, sir.

Q. Did that have anything to do with the fact that at least prior to 1929 you instituted no other infringement suits than the pending National suit?

1542 A. It had very much to do with it.

Q. Just how bad was your financial condition with reference to the question of whether or not you were able at that time to institute other infringement suits?

A. Well, previous to the receivership proceedings we were trying to accumulate all of our cash resources to make a required payment of interest and principal on a bond issue that was outstanding, as I remember it something in the

amount of $55,000 semiannually. So that we were trying to accumulate all our cash for that payment to avoid a receivership.

After the receivership, we were limited in our funds and could only have provided them by the issuance of receivers' certificates, which we were trying to avoid.

Q. By the way, do you recall that you were appointed receiver on or about April 22, 1929?

A. Yes, sir.

Q. Now was it the fact that you did not institute other infringement suits on the Haggerty patent because you considered that your financial position was not sufficient to justify the expenditure of the money to sue others?

A. That was a major influence.

Q. How long—while I am on the subject—did the receivership last? You have said it started in April, 1929. When were the receivers discharged, do you remember?

A. I think in the early part of 1935. I answered
1543 that question yesterday, I think. I am a little uncertain as to the dates.

Q. So that when you went to this Palmer House meeting in May, 1929, you were a fully-qualified receiver of the Universal Company, weren't you?

A. If that was the date of the meeting, yes.

Q. Well, it certainly was sometime in the summer of 1929, and I thought you agreed with Mr. Knuff that it probably was in May, 1929, at the Palmer House?

Justice GARRETT. Mr. Knuff thought it was in July.

The WITNESS. That is right

By Mr. BROMLEY.

Q. Well, I guess your testimony was that you didn't know whether it was in May or July?

A. That is right.

Q. Well, whenever it was, isn't this the fact, that at that meeting the USG Company offered to your company and others a license under a new process called the "foam" process, which had not heretofore been licensed by USG to anybody, or indeed disclosed to anybody?

A. Yes, sir.

Q. And wasn't that the purpose of the meeting, that is to say, to disclose this new process called the foam process, and to offer to such persons as might be interested, a license under that new process?

1544 A. That is my remembrance.

Q. And do you recall that you were told at that

time that the invention was in the application stage, that Roos was the inventor, but that no patent had as yet been issued?

A. Yes, I think that is correct.

Q. Now you have told us that you told Mr. Avery, or whoever was there from USG, that your company wasn't interested in taking a license under that new invention—didn't you?

A. Yes, sir.

Q. And isn't it the fact, Mr. Holland, that you went to Mr. Avery and said, "I don't see any reason why I should take a license under one of your patents when I am convinced that your company is violating one of my patents"?

A. Well, I don't remember those exact words, but I think at that time I began confronting him with the idea that USG was infringing our patents.

Q. Can you recall whether you said that, or the substance of that, to Mr. Avery, at the meeting, or at some time subsequent to the meeting?

A. I cannot recall for sure.

Q. Well, subsequent to the time that you told him that, did you have other meetings with him with respect to this claim which you had asserted against USG that it was infringing your Haggerty patent?

A. Yes, sir.

1545 Q. And out of those negotiations there grew the agreement whereby USG was to purchase the Haggerty and Hite patents, didn't there?

A. Yes, sir.

Q. And when that contract, Government's Exhibit 6, was executed, it was by you submitted for approval to the Federal District Court which appointed you, as well as the six other Federal District Courts in which ancillary proceedings were pending, isn't that the fact?

A. That is right.

Q. And it was approved by all seven Federal District Courts on November 5, 1929, was it not?

A. I am not sure as to that date, but approximately, as I recollect, at that time.

Q. And that contract, then, became effective upon approval by the Federal Courts—do you remember that?

A. That is my recollection.

Q. And that contract provided for a license to your company under a number of patents listed in schedules annexed thereto, did it not?

A. Yes, sir.

Q. And it included the new foam invention as well as the Haggerty and Hite patents which USG had purchased from you as receiver?

A. That is my remembrance.

1546 Q. Now the negotiations which were carried on by you and Avery were not participated in, were they, by any representative of any other company in the industry—I am talking about the purchase of the Haggerty and the Hite patents, now.

A. No, I don't believe so.

Q. That was a matter which had to do with USG only, and the Universal Company only, was it not?

A. Yes, sir.

Q. Are you able to tell us whether or not the result of that purchase was or was not financially advantageous to Universal?

A. It is my opinion that the sale we made was a good one and provided Universal with substantial sums which were very helpful in bringing about a reorganization and a removal of the receivership.

Q. In other words, you considered at that time, and do now, that you made a very favorable deal for the sale of those patents, is that correct?

A. Yes, sir.

Q. And it yielded the company a very large sum of money, didn't it?

A. Yes, sir.

Q. I wasn't clear with respect to one of your answers. Mr. Knuff suggested that the charge that you made

1547 against Mr. Avery, as I recall it, was that his bubble process infringed your Haggerty patent. Now isn't it the fact that that wasn't what you complained of, but rather your charge against USG was that USG's use of starch infringed your Haggerty patent?

A. I think my answer merely stated that the USG was infringing the starch patents. I do not think that in my answer I referred especially to the bubble patent.

Q. Well, that is what I wanted to clear up because, as I understand it, while the foam process was for the purpose of obtaining a light-weight board, and starch had some effect in that direction, there was no conflict between the two patents, and that your claim was that USG was infringing because it used starch in its board which, it will later be developed I think, was for the purpose of getting a good bond between the paper and the core. At any rate, we now have it that your position was that USG was in-

fringing Haggerty because it used starch. That is right, isn't it?

A. That is my remembrance, yes.

Q. Now you have told Government counsel on your direct examination that you talked with various board manufacturers from time to time about the question of their settling with USG and taking licenses. You knew, did you not, from these talks, that some of the wallboard manufacturers who did not have licenses were trying to get a settlement of the damage and infringement claims which
1548 USG had against them, on a basis more favorable than the basis contained in your contract?

A. Well, I don't know that I knew that definitely. That was rumored in the industry that that was so, and that was one of the things that I was curious about in my prowling around among the members of the industry.

Q. In other words, you were curious to find out whether USG was going to accord these others a more favorable basis to settle the damage claim than you had been able to get in your license, is that what you mean?

A. Yes, I think that would have been interesting for me at that time.

Q. Did you also learn from your talks that some of these others who had not taken licenses were trying to avoid the obligation which you had assumed of paying royalties up to 1937?

A. Well, I am not sure that I knew that, I might have heard that.

Q. Well, you recall, do you not, that under your license agreement your company had to pay royalties up until the expiration of the Utzman machine patent which not expire until February 10, 1937?

A. I don't recall that now.

Q. I think the exhibit in evidence will show that.

Do you recall that your license had what lawyers sometimes call a most-favored-nations clause in it?
1549 A. I believe that is right.

Q. And the effect of that was, was it not, to provide that if anyone else in the industry got a more favorable contract, you should be entitled to it likewise?

A. Yes.

Q. Well, you know, Mr. Holland, as a matter of fact that at no time while you were with the Universal Company did USG ever recede from its position that anyone who wanted to take a license would have to pay the full amount of the damages, and take a contract which obligated it to pay royalties up to February, 1937?

A. I knew of no exceptions.

Q. Now did you know of, or ever obtain any knowledge of any kind, of any agreements or understandings which any of these new licensees who came in, in May, had with the USG in connection with the execution of the licenses which were signed by National, Certain-teed, Niagara, and Ebsary in May 1929?

A. You mean other than were in the agreements?

Q. Yes, sir.

A. No, sir.

Q. Did you ever have any understanding yourself, as a part of any May settlement, or as a part of the settlement of infringement claims, in addition to the provisions contained in your own license which was then outstanding?

1550 A. No, sir.

Q. When you became president of the Universal Company, did you learn of, or were you told of, any agreements or understandings which Universal had with USG or anyone else, which were outside of the existing written license agreement of 1926?

A. Not that I remember of.

Q. And were you ever told of any understanding or agreement with USG or anyone else with respect to plaster prices, or the prices of other unpatented products?

A. No, sir.

Q. Now you have told us that when you entered the industry in February, 1928, prices on all gypsum products were very low, is that right?

A. I think I said that the market condition was very chaotic, and that prices were going down rapidly. You ask as to February, 1928, and I don't remember just how low they were at that time.

Q. When you say "chaotic", you mean among other things that there was wide divergence in the prices as between various localities?

A. And dates.

Q. And dates?

A. Yes, sir.

Q. By the way, was that something of which your customers, the dealers, were complaining?

1551 A. Yes, very much so.

Q. And you also said that litigation in the industry, as of the time you came in and afterwards, was extensive, and you have referred to several pending suits. Did you make a report to your stockholders, can you recall, in connection with this situation in the industry?

A. Yes, I think in my annual report to the stockholders I did.

Mr. BROMLEY. Will you mark his document for identification, please, as Defendants' Exhibit No. 2?

(The document referred to was marked as Defendants' Exhibit No. 2, for identification.)

By Mr. BROMLEY.

Q. I show you Defendants' Exhibit No. 2 for identification, and ask you whether that is the original of a report signed by you to the stockholders of the Universal Company.

A. Yes, sir.

Justice STEPHENS. Let the Court have a little more time, Mr. Bromley, we haven't finished reading it yet.

All right, proceed.

By Mr. BROMLEY.

Q. In Defendants' Exhibit 2 for identification, on page 3, I notice a reference to a proposed consolidation of smaller interests, which is contained in the third whole para-

1552 graph from the top, beginning, "Perhaps, however".

Was it your view, Mr. Holland, that the Universal Company's position was uneconomic because of the nature of the business and the fact that it did not have a broad geographical coverage, plant-wise?

A. Yes, sir.

Q. And did you think there were other companies in the industry subject to the same handicap?

A. Yes, sir.

Q. And did you therefore interest yourself in the proposition of attempting to bring about a merger of various companies like yours in the industry?

A. Yes, sir.

Q. Reference is made in that paragraph to a substantial banking connection. To what did that refer?

A. Blair & Company of New York City.

Q. They were private bankers, engaged in the business of underwriting securities in industry, weren't they?

A. Yes, sir.

Q. And had you conceived, and were you working on, a plan in 1928 and 1929 at least, to bring about a consolidation of some of the companies in the gypsum industry, with the aid of Blair & Company?

A. Yes, sir.

Q. What companies had you approached or had you in mind?

1553 A. Any or all of them with the exception of the

United States Gypsum Company, that could be economically put together.

Q. Was your proposal or plan in anywise connected with a plan of merger which it has been testified here Mr. Griswold was interested in?

A. No, but it included his company, that is we were going to make an effort to include his company. I didn't pay much attention to Mr. Griswold because he really was not in control of the American Gypsum Company policies at the time, in my opinion.

Q. By the way, you said the other day something about some of your directors not thinking much of Mr. Griswold. Was one of your directors Mr. E. A. Webber?

A. Yes, sir.

Q. And was he a partner in the banking house, the name of which was True & Webber, of Chicago?

A. Yes, sir.

Q. And it is your recollection that some of Mr. Webber's feeling toward Mr. Griswold might possibly have been accounted for by the fact that Mr. Webber had to give Mr. Griswold $50,000 in connection with Mr. Griswold's merger plans?

A. I think, sir, the story that I heard on it was that Mr. Webber's company had paid $50,000 to the American Gypsum Company for an option to purchase, and the option was not exercised, and that they thereby lost $50,000 to
1554 the American Gypsum Company.

Q. And it thereby created some bad feeling between Mr. Webber and Mr. Griswold, is that right?

A. I think so.

Q. And that is what you had reference to the other day?

A. Yes, sir.

Q. Now for how long a time, if you can recall, were you concerned with your attempt to bring these companies together into a larger unit?

A. Well, I spent a great deal of time on it in the fall of 1928 and the early part of 1929, but at all times I was confident that that was the best "out" for the Universal Company, so I exposed myself to any opportunity for conversation along that time practically all the time I was in the industry.

Q. But these plans with which Blair & Company had a connection, did they come to an end with the financial collapse in 1929, or did they not?

A. Well, it seems to me that they came to an end before that. We had another reorganization plan at about the time

of the collapse, which fell through, which did not contemplate a merger. I am not sure when Blair & Company's interest stopped.

Q. Was Mr. George M. Brown active and interested in the working out of either one of these plans for a consolidation?

1555 A. Yes, he was interested in the Blair attempt.

Q. And there were several, if not many, meetings, were there not, in connection with this Blair plan of consolidation, during 1928 and 1929?

A. Between different ones of us or all of us together?

Q. Between different ones.

A. Yes.

Q. And the plan got far enough along, didn't it, Mr. Holland, so that you felt that if it should succeed you were reasonably assured of being placed in charge as president of the new consolidated company?

A. They had led me to believe that, yes, sir, meaning Blair & Company.

Q. And this Mr. Elisha Walker, whose name has been mentioned here as being connected with Certain-teed, was a partner in the firm of Blair & Company, was he not?

A. Yes, sir.

Q. And he was also on the Board of Directors of the Certain-teed Company?

A. Yes, sir.

Q. Now is it the fact, Mr. Holland, that in connection with this merger idea of yours, you concluded that it was advantageous, at least, to bring about a settlement of the lawsuits pending in the industry over patent infringements?

A. Yes, sir.

1556 Q. And did you also think that it was important in connection with your merger plans to eradicate the dissension in the industry and the bad feeling, if you could?

A. Yes, sir.

Q. I notice in Exhibit 2 for identification of the defendants, again on page 3, a reference in the first whole paragraph, near the top of the page, to the Federal Trade Commission.

A. Yes, sir.

Q. At that time is it the fact that you found out that the Federal Trade Commission had a definite and widely-publicized policy of calling conferences in industries, described as Fair Trade Practice Conferences?

A. Yes, sir.

Q. And you found out, didn't you, that that move was led by Commissioner William E. Humphrey, then a member of the Federal Trade Commission?

A. I believe so, yes, sir.

Q. And that for a considerable period of time prior to 1929, Commissioner Humphrey had been going around the country, presiding at industry meetings at which Fair Trade Practice rules were drawn up and approved by the Commission—didn't you learn all that in 1928?

A. Yes, sir. I am not sure as to the date, as to the time I got that information, but it was 1928 or 1929, somewhere along there.

1557 Q. Well, it was as early as the summer or fall of 1928, wasn't it?

A. I believe so.

Mr. BROMLEY. Will you mark this document entitled "Release" as Defendants' Exhibit No. 3 for identification?

(The document referred to was marked as Defendants' Exhibit No. 3, for identification.)

By Mr. BROMLEY.

Q. I show you Defendants' Exhibit No. 3 for identification and ask you whether you can identify that as a copy of the Fair Trade Practice rules which were adopted by the gypsum industry and approved by the Federal Trade Commission.

A. Yes, sir.

Q. Now it is a fact, isn't it, Mr. Holland, that as a result of your efforts a trade practice conference was held in the Waldorf-Astoria in March, 1929?

A. I took a lot of credit upon myself for bringing that about, yes, sir.

Q. And most everybody in the industry was there represented, isn't that so?

A. That is my remembrance.

Q. And the conference was presided over by Commissioner William Humphrey of the Federal Trade Commission, was it not?

A. I don't remember that, I remember Mr. Flannery.

1558 Q. And were these rules or similar rules adopted by the conference that was held in the Waldorf-Astoria in March, 1929?

A. Yes, I think so.

Q. And thereafter they were submitted to the Federal

Trade Commission and approved, with modifications which are indicated in the exhibit, isn't that so?

A. That is my remembrance.

Q. Now it is a fact, is it not, that among the rules, Rule 4 on page 3 is a rule which provides that, "The sale of certain products without profit for the purpose of injuring a competitor, or with the effect of lessening competition, is an unfair trade practice"?

A. Yes, sir.

Q. Now that was a very important rule, was it not, in your view?

A. Yes, sir, it didn't satisfy me but ——

Q. (Interposing.) And likewise, the same subject-matter is treated in Rule 7, is it not, on that same page, which provides that, "Selling of goods below own cost for the purpose of injuring a competitor and/or with the effect of lessening competition is an unfair trade practice"?

A. Yes, sir.

Q. Now isn't this what you were talking about on your direct examination when you made a reference to
1559 your efforts with the Federal Trade Commission?

A. Yes, sir.

Q. Mr. Knuff yesterday referred to Exhibit No. 203 for identification, a letter from Arthur R. Black to John A. Kling.

(Copy of Government's Exhibit No. 203 was handed to the witness.)

By Mr. BROMLEY.

Q. Will you look at the second page of that letter, in the eighth line, the sentence beginning, "as you know", and read that sentence, please?

A. Yes, sir.

Q. Now is it true, Mr. Holland, that either at that time or any other time you were a representative of USG?

A. May I hear the question again, please?

(The pending question was read by the reporter.)

A. No.

Q. And did you ever agree, or have an understanding with USG or anyone in that company that you would promote any plan looking toward the licensing of all the industry under price-fixing agreements?

A. No, sir.

Q. Isn't it a fact that on such occasions as you talked with Mr. Avery in 1928 and 1929, you found him somewhat disinclined to discuss the matter of settlement and license?

1560 Mr. KNUFF. The question is objected to as calling for a conclusion.

Justice STEPHENS. Conclusions are not always objectionable upon cross-examination, Mr. Knuff, if they tend to explain the questions and answers on direct examination. I think the question is proper. The objection is overruled.

The WITNESS. May I hear the question, please?

(The pending question was read by the reportre.)

The WITNESS. He was a very hard man to reach, he rather ignored me most of the time in my efforts to bring about a discussion.

By Mr. BROMLEY.

Q. Well, isn't it true, Mr. Holland, that throughout this period, 1928 and 1929, whatever you did in connection with license agreements you did acting on behalf of the Universal Company or yourself, and no one else, unless possibly it might be the proposed merger?

A. That is correct.

Q. I wanted you to tell the Court, if you would, please, briefly, what you have been doing since you left the gypsum industry in 1935.

A. Well, immediately following leaving the Universal Gypsum & Lime Company, besides paying some attention to a family-owned company, the Holland Lumber Company, out in Nebraska and Iowa, I did some professional

1561 work as an industrial engineer on my own, in an association with Sanderson & Porter of New York, which later led to my taking over the management of their western branch, with headquarters in Chicago. So that for about four years I was in the profession of industrial engineering.

Approximately four years ago I became what in most firms would be considered the executive vice president of the Florence Stove Company, and on the executive committee of two subsidiary companies, the Marshall Stove Company and the Newark Stove Company, and secretary of one of them.

I am president, and a director, of the American Rock Wool Corporation, an insulation company.

Since my brother's death last spring, I have been president of the Holland Lumber Company again.

Q. So that since 1935 you have had a very active life entirely away from the gypsum industry, isn't that true?

A. Very much so, sir.

Q. Now somewhere there is a reference to Dr. Nelson

in one of your reports to stockholders, or otherwise. In Exhibit 202, on the first page, near the bottom, the next to the last paragraph, reference appears as follows, "We now have Dr. Nelson clearing up our entire patent situation for us which involves license agreements with our competitors and settlements of lawsuits pending".

This document was written May 18, 1928, by you
1562 to your executive committee. Isn't it a fact that Nelson was hired on a month-to-month basis by you specifically for the purpose of preparing for trial your Haggerty patent infringement suit against the National Gypsum Company?

A. Well, I am not sure as to that. At the time I came with the Universal Company this man Nelson was in charge of our research department, and as of the date of this memorandum it was not at all certain that we were going to continue any activity in the way of research. But at that time, as I remember it, I did use Mr. Nelson to educate me on our patent situation. He took an extended leave of absence, took a trip to Europe, and sometime afterwards I think he came back and devoted most of his time to the National suit.

Q. He was a patent expert, was he not?

A. He was very familiar with patents.

Q. He had patents of his own, did he not, in the gypsum field?

A. Yes.

Q. And he was an engineer, was he not?

A. He was a chemical engineer, I believe.

Q. And a man highly skilled in the art of gypsum manufacture?

A. Yes. We later made him our production manager.

Q. On page 1706 of the record, line 22, in answer to a question as to the character of the competition gen-
1563 erally throughout the industry at or about May, 1928, you made this answer:

"Well, I think it was very live competition, everybody was very active, and it was pretty hard for Universal to sell anything".

Now isn't it the fact, Mr. Holland, that you were not troubled about "live competition" so much as you were with the unusual situation presented by the widespread practice of competitors selling below cost?

A. Yes, not only selling below cost or near cost, but the big divergency of quotations as to different dates. A contract, or an order, was never an order for sure.

Q. You didn't mean by that answer, did you, to express objection to normal competition such as exists in most businesses?

A. No, sir, I think that sort of competition is what has built America.

Q. Now it is a fact, isn't it, that after the execution of the November, 1929 licenses, competition in the gypsum industry and in the sale of the patented products was at all times, while you were in the business, keen and active?

A. Very much so.

Q. And isn't it a fact that even after November, 1929, at all times while you were in the industry, competition has been keen, license or no license, patents or no pat-

1564 ents?

A. That is right, very active competition.

Mr. BROMLEY. That is all, sir.

Justice STEPHENS. Is there any redirect examination?

Mr. KNUFF. I have no redirect examination.

Justice STEPHENS. Is there cross-examination by any other defendants?

(No response.)

May this witness be excused from the trial?

Mr. BROMLEY. Yes, your Honor.

Mr. KNUFF. Yes, your Honor.

Justice STEPHENS. You may be excused, Mr. Holland, and the Court thanks you for attending here.

The WITNESS. Thank you very much.

(Witness excused.)

Justice STEPHENS. Announce the recess.

Mr. KNUFF. I wonder if I can't probably save the Court a little time before the recess is announced.

At the time that Mr. Steffen and I started to prepare this case for trial, we had a very definite plan as to what participation he would take in it and what participation I would take in the trial.

When the Court adjourned a few days before Thanksgiving, Mr. Steffen left and he was confined to his home until Monday afternoon of this week, with a very severe attack of, I presume, influenza.

1565 Mr. Steffen had made all the preparation up until that time I have presented to the Court. I have about reached the limit of the preparation that I have taken over on the matters that he had intended to present to the Court.

I find that I cannot go forward any further. I have been working from eight o'clock in the morning until eleven

o'clock at night, and Saturdays, Sundays and holidays. I am tired, both mentally and physically. I think that was quite apparent yesterday when I was conducting the direct examination of Mr. Holland that I was slipping mentally when I couldn't remember right from left, and was calling "United States Gypsum", "National". There is just so much I can do, and I am not prepared to go ahead any farther.

However, if the Court feels that we should go ahead, I will make an effort to continue.

Justice STEPHENS. What is Mr. Steffen's condition of health?

Mr. KNUFF. Mr. Steffen's condition of health is not any better than it was when he came down here—well, I would say it is probably some better, but he is just not up to par.

Justice STEPHENS. Is he here, or is he in Connecticut?

Mr. KNUFF. He was leaving for Connecticut sometime this morning. He was at his home all day yesterday, in bed. My wife went over there yesterday afternoon, late in the afternoon, and he came to my home last night and
1566 had a little bit of something to eat. He is feeling miserable, he has this severe cold ——

Justice STEPHENS (interposing). You needn't go into the details. We wanted to know if he is so ill that he can't attend the Court.

Mr. KNUFF. He is very much indisposed. As I said, I will go ahead with the case if the Court desires. I will have to have a little more time to prepare. There are only twenty-four hours in a day.

Justice STEPHENS. Could you, without undue imposition upon your health, if we adjourned now, go ahead tomorrow so we wouldn't waste tomorrow?

Mr. KNUFF. I can attempt to do so. The next witness that we are going to put on is Mr. C. O. Brown, and here is the batch of exhibits upon which we expect to examine him, and I anticipate, of course, that we are going to have the same difficulty with defense counsel as we have had heretofore, and if there is a recess and we had these photostated, I think a great deal of that difficulty or dissension will be obviated during the recess.

However, I will make an effort. I know in a general way what is in that folder, your Honor, but I don't know sufficient about it to go ahead without some more intensive preparation.

1567 Justice STEPHENS. Well, the Court will announce its plan at the resumption of the session, if counsel

will return at the usual time for the afternoon session. We will discuss the situation during the recess.

Mr. BROMLEY. I don't know what Mr. Knuff means by "difficulty with defense counsel." I haven't meant to be difficult.

Mr. KNUFF. Well, probably "difficult" wasn't the correct word. I anticipate that there will be the same situation that has heretofore existed.

Justice STEPHENS. You refer to the need of defense counsel for seeing the exhibits?

Mr. KNUFF. Yes. Probably "difficult" was an ill-chosen word. I didn't mean to cast any reflection upon defense counsel.

Mr. ADAMS. If Your Honor pleases, I certainly sympathize with Mr. Knuff's position, but in considering the problem which is presented it would be very much appreciated if the Court would also consider the fact that Mr. C. O. Brown is here from Savannah, Georgia, and has been here all week, and naturally is anxious to make his plans, subject to whatever the convenience of the Court may be.

Justice STEPHENS. How many days do you think Mr. Brown's testimony will take?

1568. Mr. KNUFF. We couldn't possibly finish with Mr. Brown in less than from two to three days, and nearer three than two.

I suggested to Mr. Brown yesterday—and I will make the suggestion to the Court—that I think that Mr. Brown should probably be re-subpoenaed so that he will get at least two mileages, because we can't expect Mr. Brown to come up here and spend all of his money, and then go back to Savannah, and then come back again.

Justice STEPHENS. The point is, however, that even if he is put on this afternoon or tomorrow, you will not finish with him until after the recess which the Court is forced to take next week?

Mr. KNUFF. I can definitely assure you that we will not.

Justice STEPHENS. Thank you. Is there anything else to be said by any other counsel? If not, you may announce the recess.

(Whereupon, at 12:15 o'clock, p.m., the hearing was recessed until 1:45 o'clock, p.m., of the same day).

1582 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Monday, December 13, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

1585 You may proceed, gentlemen.

Mr. STEFFEN. Mr. Brown!

Justice STEPHENS. Take the witness stand, Mr. Brown.

Thereupon, CLAUDE OLIVER BROWN, called as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. STEFFEN.

Q. Will you state your full name, Mr. Brown, please, for the record?

A. Claude Oliver Brown.

Q. And what is your address, Mr. Brown?

A. Savannah, Georgia.

Q. What is your business address?

A. 1173 Post Office Box, Savannah, Georgia.

Q. Who are you connected with, Mr. Brown, with what company?

A. Dixie Asphalt Products Corporation.

Q. They are located in Savannah?

A. Yes, sir.

Justice STEPHENS. What is that name, Mr. Brown?

The WITNESS. Dixie Asphalt Products Corporation.

1586 By Mr. STEFFEN.

Q. You appear this morning pursuant to subpoena?

A. Yes, sir.

Q. Did you also appear before the Grand Jury in 1940?

A. Yes, sir.

Q. At that time pursuant to subpoena?

A. Yes, sir.

Q. How long have you been with your present connection, Mr. Brown?

A. Since July 1, 1938.

Q. Where were you before that, or with what company were you before that?

A. Up until January 1, 1937, with the Certain-teed Products Corporation.

Q. January 1, 1937?

A. Yes, sir.

Q. How long had you been with the Certain-teed Products Corporation?

A. Since approximately 1911.

Q. What were your duties with the Certain-teed Products Corporation beginning in 1911?

A. Trucker.

Q. You started as a trucker?

A. Yes, sir.

Q. What other things did you do for the company?

1587 A. Well, I worked in the plants, and then later joined the Sales Department.

Q. Along in the years 1925 to 1929, what was your office?

A. Sales Department, General Sales Manager.

Q. You say you were the General Sales Manager, or what was your title?

A. To my memory, it was around 1925 or 1926 that that was my title.

Q. General Sales Manager?

A. Yes.

Q. Who is Mr. L. R. Walker?

A. He was Vice President in Charge of Sales.

Q. Were you an officer during any of this period, 1925 to 1929?

A. I was made an officer somewhere around '28 or '29, I have forgotten the date.

Q. What title?

A. Vice President.

Q. And did you continue in that office—or for what period of time did you continue in that office?

A. Until I left the company.

Q. You were Vice President until you left the company on January 1, 1937?

A. That is right.

1588 Q. Will you tell us who were some of the other officers of the company during the period from 1925 to 1929?

A. Mr. George Brown was President.

Q. Is he related to you, Mr. Brown?

A. Yes, sir.

Q. What relation?

A. An uncle.

Q. Who else do you remember?

A. Mr. Audenreid Whittemore.

Q. What was his title?

A. Vice President.

Q. Anyone else?

A. Mr. D. C. Cale was a Vice President.

Q. Did you know Mr. Van Hagan?

A. Yes, sir.

Q. Who was he?

A. He was Gypsum Production Manager, as I remember his title.

Q. Did he come from the Beaver Products Company?

A. Yes, sir.

Q. Did you know Mr. Warren Henley?

A. Yes, sir.

Q. Who was he?

A. He was, I think, Merchandising Manager, Gypsum Division.

1589 Q. That was during the years 1925 to 1929?

A. That is my memory.

Q. Well, did he come from the Beaver Products Company?

A. Yes, sir.

Q. Do you remember when the Beaver Products Company was taken over by Certain-teed?

A. I think it was 1928, but I am not sure.

Q. So Mr. Henley would have come with your company, with Certain-teed, sometime after that?

A. Yes, sir.

Q. Did he continue with the company, to your knowledge, until you left?

A. Yes, sir.

Q. Is he still living, do you know?

A. I understand he isn't.

Q. You understand he is not?

A. Yes.

Q. Did you know Mr. Blagden?

A. Yes, sir.

Q. Did he continue with the company after it took over the Beaver Products Company?

A. To my memory, only a short time.

Q. Now I would like to get straight, if I can, the Presidents of the Certain-teed Products Corporation.

You say Mr. George M. Brown was President—

1590 up until how long?

A. I think late '35 or early '36, somewhere in that period.

Q. Who succeeded him, if you know?

A. Mr. C. E. Rahr.

Q. That is Mr. Chester Rahr?

A. Yes.

Q. Had he been with the company before he was made President?

A. Yes, sir.

Q. In what capacity?

A. He was Vice President.

Q. What type of business, what part of the business was he assigned to?

A. Well, more or less unassigned; I would say miscellaneous.

Q. How long was Mr. Rahr in office as President?

A. About a year, as I remember it.

Q. That would carry him to what date?

A. About January 1, 1937.

Q. That is the date that you left your connection with the company?

A. Yes, sir.

Q. Who succeeded Mr. Rahr?

A. I think it was a man by the name of Baum-

1591 hogger, but he came in after I left.

Q. That is, he came in on January 1, 1937, or thereabouts?

A. Yes, sir.
Q. Do you know how long he stayed in office?
A. No, sir, I do not.
Q. Do you know who succeeded him?
A. No, sir.
Q. Now let's go back to the business of Certain-teed. What were the principal lines of business of Certain-teed from the time that you first became connected with the company until you left in 1937?
A. Well, they originally started as an asphalt roofing manufacturer, but later added paints and varnishes and linoleum and gypsum products.
Q. Could you give us an idea of the relative proportion, when you left the company, of business done in the asphalt division and the gypsum division?
A. I couldn't give you any percentage, no. I don't remember.
Q. You started, however, as you tell us, in the asphalt business largely. What is that?
A. Asphalt roofing.
Q. What is that type of business?
A. Well, I don't know any other descriptive term
1592 except that. It is applied on houses all over the country, warehouses. It is a roofing material, waterproofing material.
Q. Did you make shingles, asphalt shingles?
A. Yes, sir.
Q. And how were the asphalt shingles sold?
A. Through dealers and distributors.
Q. Throughout the United States?
A. Yes, sir.
Q. Did you at some time commence making a fiber wallboard?
A. We acquired that business from Beaver.
Q. Did you make something called hardboard?
A. Not to my memory, no, sir.
Q. During the period when you were with the company?
A. No, sir.
Q. What do you mean by fiber wallboard?
A. It was a board manufactured from wood pulp and waste paper.
Q. How was it used, Mr. Brown?
A. For temporary partitions and things of that kind.
Q. Could it be used as a plaster base?
A. I never heard of it being used for that.
Q. Now can you tell us when the Certain-teed Company

got into the gypsum business, approximately the year?

A. I think about 1923.

1593 Q. You mean by that—well, explain that. How did you get into the business?

A. They acquired the Acme Cement Plaster Company first.

Q. Where was that located?

A. Well, they had several plants over the country.

Q. The Acme Cement Plaster Company?

A. Yes.

Q. Name one of them.

A. There was one at Acme, Texas.

Q. Now when you say they had several plants, did they manufacture board at several plants?

A. No, sir.

Q. What did they manufacture at the other plants?

A. Plaster.

Q. When did the Certain-teed Company, through its holdings of the Acme Plaster Company, commence making board?

A. I don't remember the date, but I think about '26. That is just a guess. I don't know, I don't remember.

Q. Perhaps I can refresh your memory. The date, I think—which is not particularly material—was much earlier. I think you acquired the company in 1921, and commenced making board in 1922 or 1923.

Justice STEPHENS. The pleadings show acquisition in 1923.

The WITNESS. That is my memory.

1594 Mr. STEFFEN. That you acquired the Acme Cement Plaster Company in 1923?

The WITNESS. Yes.

Mr. ADAMS. We acquired Acme in 1923. Acme at that time did not have any board plant whatever, and my own recollection is—and I think the witness has properly stated it—that we went into the business of manufacturing board in the latter part of 1926, after the construction of the board plant at Acme, Texas, and that was the only board plant we had.

By Mr. STEFFEN.

Q. Well, that is your recollection, that it was in 1926 when you commenced making board?

A. Yes, sir.

Q. At the Acme plant?

A. Yes.

Q. What type of board did you make at the Acme plant, if you know?

A. Open-edge board.

Q. And what was your sales territory for the production at the Acme plant?

A. I don't remember. They sold it, I guess, as far as they could reach at a profit.

Q. Can you tell us about how far that would be?

A. Well, it was sold mostly in the Southern territory.

1595 Q. Will you give us some of the States that that would include?

A. Texas, Oklahoma, Louisiana, Mississippi, and straight across to the Atlantic Seacoast.

Q. Would you reach up into Pennsylvania?

A. I think some board was sold that far north.

Q. Well, at some later period—I think you stated that it was in 1928—the Certain-teed acquired the Beaver Products Company. Were you familiar with that?

A. I wasn't familiar with the deal. I knew, of course, that we acquired them.

Q. Could you tell us what plants the Beaver Products Company had at which they were making board?

A. I think they were making it at Akron, New York; Fort Dodge, Iowa; I am not sure about Grand Rapids, and Sweetwater, Texas.

Q. Grand Rapids, Michigan?

A. Yes.

Q. Sweetwater, Texas?

A. I am not sure about Sweetwater, Texas. They had a Texas plant, but I don't know where it was.

Q. Was there a plant at Port Clinton, Ohio?

A. Yes, sir, I believe there was.

Q. Was there one in Virginia?

A. Yes, sir.

1596 Q. That made 6 plants, all told?

A. I think so.

Q. Do you know why the Certain-teed people bought out the Beaver Products Company?

Mr. ADAMS. I object to that. He has stated he doesn't know anything about the deal. Furthermore, I object to the form of the question.

Justice STEPHENS. It seems preliminary, Mr. Adams. It doesn't seem, offhand, to have any relevance to the issues.

What is the purpose of it, Mr. Steffen?

Mr. STEFFEN. Just a preliminary question.

Justice STEPHENS. Objection overruled.

The WITNESS. I assume to give a more general gypsum coverage, is all I would know.

By Mr. STEFFEN.

Q. Did it give you general coverage?

A. Pretty general, east of the Rocky Mountains.

Q. Can you tell us what type of gypsum board the Beaver Products Company was making at the time Certain-teed took it over?

A. They were making a closed-edge board.

Q. Do you recall whether they had a license with the United States Gypsum Company under which they were making a closed-edge board?

A. I never saw it, but I understand they did.

1597 Q. Do you know approximately when that license agreement was signed?

A. No, sir.

Q. I think I can state, in order that you may get your dates perfectly clear, that that license agreement was signed on July 26, 1926.

A. I would have no way of knowing.

Q. That is the license agreement between Beaver and United States Gypsum Company.

After the Certain-teed Company had contracted to take over the Beaver Products Company, did a question arise as to whether the Certain-teed Company would take an assignment of the original license between Beaver and USG?

A. I think it did, but I was not in on the negotiations.

Q. Could you tell us offhand what the nature of the question was?

A. No, sir. I don't know.

Q. Well, I will refresh you this far: You were making at your Acme plant an open-edge board, and the Beaver plants were making a closed-edge board.

A. Yes, sir.

Q. Now could you tell us whether a question developed as to whether you were going to make closed-edge board at your Acme plant, or whether you were going to go

1598 entirely to an open-edge board basis, or whether you would take some intermediate position?

Mr. ADAMS. I respectfully object to the question as suggestive and calling for a conclusion. Moreover, the witness has stated he had nothing to do with the negotiations. Moreover, I think it is desirable that the witness' recollec-

tion be tested on these specific points. Counsel I don't think should be permitted to make a general statement about what counsel thinks the facts are, and then ask the witness if that refreshes his recollection about something he says he doesn't know anything about.

Justice STEPHENS. Well, the Court is permitting certain latitude in leading on preliminary questions, as it sayes time. I will be glad to hear you, Mr. Steffen, but I think that this question does transcend the proper limit. It is getting into a controversial and important subject under the issues, and it seems to the Court that you ought to ask the witness the flat question as to what he remembers.

Mr. STEFFEN. I will be glad to withdraw the question.

Justice STEPHENS. Objection sustained.

By Mr. STEFFEN.

Q. I now show you, Mr. Brown, what has been marked as Government's Exhibit No. 209 for Identification, which purports to be a letter signed by you, addressed to Mr. Avery, under date of February 20, 1928, and ask
1599 if you can identify the signature?

A. Yes, sir.

Q. Is that your letter?

A. I don't remember the letter, but the signature is mine.

Justice STEPHENS. Just a moment; let us get these exhibits that the Clerk just brought up straightened out.

Justice JACKSON. Are there three sets of those?

Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. Exhibit 228, is that in this set?

Mr. STEFFEN. If you will skip that first photostat, it is the next letter, I think.

Mr. KNUFF. That is not our item number at all, that 228. I don't know whose it is.

Justice STEPHENS. That is No. JJ-228. Is it a letter of February 20, 1928?

Mr. STEFFEN. That is right.

Justice STEPHENS. Proceed.

Mr. STEFFEN. I offer Government's Exhibit No. 209 in evidence.

Justice STEPHENS. You identified that as your signature, did you, Mr. Brown?

The WITNESS. Yes.

Justice STEPHENS. Any objection?

Mr. BROMLEY. Only the usual objection, if the
1600 Court please.

Justice STEPHENS. It may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 209, was received in evidence.)

By Mr. STEFFEN.

Q. You state in your letter, Mr. Brown, that Mr. Blagden advises certain things. Did you talk with Mr. Blagden on that matter, do you recall?

A. I don't remember.

Q. I call your attention to the second paragraph of the letter, the second sentence, in which you say it might be "to our mutual advantage" if we were to talk the matter over, and ask you what you meant by "our mutual advantage"?

A. I don't remember.

Q. Let me ask you this, Mr. Brown: How did your company, or how did the management of your company reach decisions on matters of policy? Please describe the practice and technique.

A. I don't think there was any general practice. Mr. George Brown made most of them.

Q. Were there discussions among the officers?

A. Sometimes there might have been.

1601 Q. Do you recall whether there was a discussion concerning this matter of the Beaver license being taken over?

A. No, sir, I don't recall.

Q. When you wrote to Mr. Avery, did you write of your own volition, or had there been a discussion, can you remember?

A. As I read this letter, I think it was possibly written by Mr. George M. Brown and signed by me.

Q. Do you begin to remember that?

A. It is on his private stationery.

Q. It is also signed "Assistant to President". Were you Assistant to the President at this time?

A. For a short period. I don't recall the exact date.

Q. That is, you were Assistant to the President?

A. For a short time.

Q. For how long, a year?

A. I don't remember the exact time.

Q. What I want to get at, Mr. Brown, is whether or not you had any discussion with Mr. George Brown concerning this matter of the things that you were going to take up with Mr. Avery as related in this letter?

A. I don't recall it, and so far as I know that meeting never took place.

Q. Your testimony would be that you did not go to Chicago?

1602 A. That is right.

Q. How do you remember that?

A. Because I wasn't in on any of those negotiations.

Q. I am asking you how you remember whether you went to see Mr. Avery or not?

A. The statement just made, that I had nothing to do with it during any of the period.

Q. I would like to show you Exhibit No. 195, and Exhibit No. 196, in order to refresh your recollection on this point. Are you looking at Exhibit No. 195 now?

A. Yes.

Q. Does that refresh you as to whether or not you were in on this discussion?

A. I don't remember it.

Q. Would you look at Exhibit No. 196, which is a wire from Mr. Avery to Mr. Blagden, in which your name is mentioned?

Mr. BROMLEY. I object to the use of a telegram that was neither sent nor received by the witness, in an attempt to refresh recollection. Obviously it can have no such effect.

Justice STEPHENS. Well, we think that is not well taken, Mr. Bromley. It may or may not have such an effect. An event or a telegram, even though it doesn't go between these two parties, may possibly refresh his recollection.

1603 If it doesn't, he can say so. You understand, Mr. Brown, that if you don't recollect anything or if a particular thing shown you does not refresh your recollection, you are free to say so.

The WITNESS. Yes, sir.

Justice STEPHENS. Objection overruled.

By Mr. STEFFEN.

Q. Does that refresh your recollection, Mr. Brown, concerning your part in these negotiations?

A. I don't remember ever seeing this telegram before.

Q. Did you talk with Mr. Blagden about this telegram?

A. No, sir.

Q. Did you actually go to Chicago on this occasion?

A. I am quite sure I didn't.

Q. Why are you quite sure?

A. Because I never even saw the telegram.

Q. But I want to know why you are quite sure that you

didn't go to Chicago? You could go to Chicago whether you saw the telegram or not.

Mr. BROMLEY. I object to that as repetitious. He has told us several times why he remembers that he didn't go.

Justice STEPHENS. That objection is well taken. The witness has stated several times that he did not ever see Mr. Avery on the subject of these negotiations.

Objection sustained.

1604 By Mr. STEFFEN.

Q. I now show you, Mr. Brown, for purposes of refreshing your recollection, what has been marked as Government's Exhibit No. 210 for Identification. This purports to be a memorandum of a conference held in the offices of the Certain-teed Products Company on February 2, 1928 ——

Mr. ADAMS (interposing). May I inquire what his recollection is being refreshed about now?

Justice STEPHENS. Let me examine the exhibit, Mr. Adams.

Mr. ADAMS. If Your Honor please, before Your Honor completes the examination of that exhibit, I might have occasion to make some remarks with respect to that exhibit, also.

I would like to know what the purpose of the use of this memorandum is, and I respectfully request that the Court instruct counsel to answer both those questions now. First, what is his recollection being refreshed about? There is no question pending. Secondly, what is this memorandum going to be used for, and is it going to be offered in evidence?

Justice STEPHENS. Have you any objection to answering those questions, Mr. Steffen?

Mr. STEFFEN. The memorandum is being offered to refresh Mr. Brown's recollection concerning any part
1605 that he took in the negotiations. I perhaps should ask a question, and I will ask him if he attended the meeting described in this memorandum dated February 2, 1928?

Mr. ADAMS. Then may I be heard, Your Honor?

This witness is being shown a memorandum of a conference on February 2, 1928. As I understand it, the proper procedure—I have authorities that I would be glad to submit to Your Honor on this point—is this: First, as to any fact it is necessary that it be ascertained whether or not the witness could have a recollection, that is to say, whether

he was so situated at the time the alleged occurrence took place that he could have a recollection with respect to those facts. Next, whether or not he has a recollection. In other words, he has to be asked whether or not he knows the facts, without reference to anything. If he says he does, he is to be examined as to his recollection. If he replies that he does not recall, then he may be shown a document and asked if that document refreshes his recollection as to the facts. He may then reply as to whether it does or not. If it does not, that is the end of the inquiry. If it does, he may then state what his recollection is, so refreshed.

Now here—this is typical of the procedure followed by the Government in this case—Mr. Brown is shown a memorandum. He is asked—"Does that refresh your recollection as to whether you attended that conference?" You
1606 can see the vice in it at once.

He hasn't been asked if he was situated where he could have gone to the conference. He has not been asked whether the conference ever took place and whether he has any recollection of it. And he has not been asked anything along that line in order to qualify this document to be used, as a memorandum, to refresh his recollection.

Now the practice furthermore, it seems to me, puts an extremely unfair burden on this Court. The Court here are the triers of the facts. They are also the triers of the law. They are the jury and the judge. In this case they are being repeatedly handed up, in advance, documents which pertain to vital matters in this case which the Government knows are not admissible in evidence, and which can not be admitted in evidence. The Court then, as in this instance just before us, necessarily reads the document. That places the Court in the difficult position of having once read the document, absorbed into the minds of the Court what the facts are in the document, whatever statements have been made, then the document is not offered in evidence. The witness may testify it never refreshes his recollection and can not refresh his recollection, but nevertheless by an indirect method there have been placed in the Court's mind a number of statements which are not otherwise admissible in evidence.

Now the authorities are clear, and I would be glad
1607 to submit authorities, on that point, that that is a bad practice. Mr. Justice Holmes once observed that jurors are not psychoanalysts. The Court here is sitting in a capacity of jurors, and while this may be somewhat of a delicate position it seems to me that it is necessary for me

to state that in our judgment this is placing an extremely unfair burden on this Court, requiring, at the end of a case containing some 2,000 exhibits, the Court to try to separate in its mind, or in its collective mind, rather, a number of impressions with respect to facts which never went into evidence and which the Government knows can not go into evidence. I think that this method of endeavoring to get this type of material before the Court is unfair, contrary to law, and should be stopped.

Justice STEPHENS. Well, unless you wish to be heard, Mr. Steffen, the Court will rule as follows—do you wish to be heard?

Mr. STEFFEN. I would like to know which way you are going to rule. [Laughter.]

Justice STEPHENS. Well, you will have to take that chance unless you want to be heard. I want to give you an opportunity to be heard, but I can't prophesy as to my ruling. I might change my mind if I hear you.

Mr. STEFFEN. With that warning, perhaps I had better be heard.

1608 I would say that we expect to offer this memorandum in evidence, which will meet, of course, Mr. Adams' principal objection. And I will also say I think it is clearly admissible in evidence. We haven't asked the preliminary questions yet which will, of course, lay the groundwork. But I wish to use it as a preliminary matter in order to refresh the witness' recollection. I have asked a broad question, and he has already testified two or three times that he has no recollection of meetings or negotiations.

Justice STEPHENS. Well, the Court spoke as quickly as it did—it always wants to give counsel on both sides opportunity to argue any matter—but the Court spoke as quickly as it did because it seems to the Court that the matter is very clear. Mr. Adams is right in this respect, that you should first ask the witness, Mr. Steffen, if he has a recollection upon a particular subject. Sometimes it is desirable also to ask him, depending upon the circumstances, whether he was in position to be at a certain meeting, and indicate whether or not he could have a recollection. You should ask him preliminarily if he has a recollection, and if he has ask him for that, rather than use the document to refresh it, because if he has a recollection you don't need the document.

If he answers that he has no recollection, then you can use the document to see if it refreshes his recollection.

To that extent Mr. Adams is correct, and to that
1609 extent Mr. Adams' objection is sustained. You should probe the witness' own recollection before you presume to use the document.

Otherwise, Mr. Adams, the Court thinks your objection is not well taken. The Court is necessarily dependent to a large extent upon the good faith of counsel with respect to presenting matters to the Court which may never be admissible in evidence. So far it doesn't seem to the Court that the Government has transcended the proprieties in that respect. Practically all of the exhibits offered thus far have been received in evidence. There have been one or two which we have rejected.

In addition to that, of course, if the Court was sitting with a jury, any impressions which the Court received on the facts from offered evidence not received would be immaterial, but here we have to depend upon our own ability to discriminate between what has been offered and rejected, and what hasn't, because if we don't look at it we can't tell whether to receive it in evidence or not. Obviously we have got to read an exhibit before we can see whether it is admissible.

It may, true, create some impressions upon us that, if we reject it, perhaps we shouldn't have received; but we are supposed to be able, as experienced judges, to reject those, and we will do our best to do so.

1610 In addition to that, we expect to re-read, before this case is decided—we are reading the transcript as it goes along—and we expect to read an abstract of the transcript and of each exhibit. To that extent your objection is overruled.

Mr. ADAMS. I want to make it perfectly clear, Your Honor, that my objection did not go, and was not intended to be addressed, to any document which is to be offered in evidence. I quite agree that Your Honors can't, obviously, rule on whether a document is admissible ——

Justice STEPHENS. Even with respect to a document which is intended to refresh recollection, if adverse counsel object that it may not be able to refresh recollection, how can the Court rule on that without seeing it?

Mr. ADAMS. At that point the Court may look at it, and I think the cases so hold, may examine the document and make the ruling. But—I may be wrong here—but certainly in my experience the practice has always been that a document that was to be used to refresh the witness' recollection was simply something between the counsel and

the witness, and it never came to the Court's attention until some issue arose as to whether that matter contained in the document could or could not properly refresh the witness' recollection.

But I wish to reemphasize that I was not ——

1611 Justice STEPHENS (interposing). This is to be offered in evidence in any event, apparently.

Mr. ADAMS. That was the reason for my inquiry originally, and I don't make this objection with respect to anything that is to be offered in evidence. But I think counsel should be limited and not be permitted to say, "I intend to offer this thing in evidence", and thereby evade the rule.

Justice STEPHENS. Well, the Court has been in one sense, Mr. Adams, trying to save time here. This case has voluminous exhibits. As they have been handed up to the bench, the Court has assumed that they would be, most of them, offered in evidence or used for some legitimate purpose, and in the interests of saving time has tried to examine them in the course of the preliminary questioning of the witness. If you seriously object to the Court looking at a document which may not be offered in evidence, you will have to make your objection to each document as it arises.

I think the objection is strained, Mr. Adams. I don't think we are going to be harmed by considering these various exhibits as they are presented to us. We can't always differentiate, at the moment when we consider them, as to whether they are coming in or not.

Mr. ADAMS. No. I don't, of course, want to press this objection too far. The reason that I have taken the time that I have this morning is because I think the Government has fallen into a bad practice, and I thought it was

1612 time to call a halt. There is no question about my confidence, and the confidence of everyone, as to the Court's ability to examine the exhibits. What I have been objecting to is putting the Court in an unfair position with respect to them.

Justice STEPHENS. You are quite within your rights in making your objection, but I think the Government is now advised that it ought to conduct the examination in the manner in which we have indicated, and there will probably be no further trouble.

Ask this witness, if I may suggest, Mr. Steffen, whether he has any recollection of being at the meeting, or whether he was an officer of the company at the time of this alleged meeting and whether he recollects being at it. If he does

not, then try to refresh his recollection.

Mr. STEFFEN. I think we have developed that he was an officer at the time; and the question, then, Mr. Brown, is—do you recall having attended a conference on or about February 2, 1928, at which the question came up of whether the Certain-teed people would take over the Beaver board licenses and make a closed-edge board at your Acme plant?

The WITNESS. I don't remember such a meeting.

By Mr. STEFFEN:

Q. Would it have been possible for you to have attended such a meeting?

1613 A. This memorandum would indicate that I did.

Mr. ADAMS. I object to that, and just in passing indicate that that is ——

Justice STEPHENS (interposing). That may go out. Be careful, Mr. Brown, in answering questions, to answer those which you can correctly answer yes or no, by a yes or no answer. You can answer that last question yes or no. Of course, you are not required to do that where that would be an ambiguous or an unfair answer.

Read that question to the witness.

(The last question was read by the reporter.)

The WITNESS. It would have been possible.

By Mr. STEFFEN.

Q. Can you tell us what your position was, your personal position, upon the matter of whether Certain-teed should go to the manufacture of a closed-edge board at your Acme, Texas, plant?

A. It is my memory that I favored going to a closed-edge board.

Q. Sir?

A. It is my memory that I favored going to a closed-edge board. You asked me at the Acme plant, did you not?

Q. That is right.

A. That was a Certain-teed plant.

Q. That is right.

1614 What were your reasons for taking that position, Mr. Brown?

A. It was a better product.

Q. Do you recall what the royalty provision of the Beaver license agreement was, as respects the manufacturers of open-edge board?

A. No, sir, I don't know anything about their agreement.

Q. Well, the problem at this time, I believe you have

testified, was whether or not Certain-teed would take over their agreement; is that correct?

Mr. ADAMS. I don't believe there was any such testimony, Your Honor.

Justice STEPHENS. The witness testified that there was some question as to whether it would be taken over. I think the statement is not substantially incorrect.

What is the question, Mr. Reporter?

(The pending question was read by the reporter.)

Justice STEPHENS. Is that correct, Mr. Brown? Just answer from your own recollection, so far as you can, without reference to that exhibit. That has not been shown to you, as the examination is now proceeding. Just give us your own recollection, if you have one. If you haven't, say so.

The WITNESS. I remember none of the details, Your Honor.

1615 By Mr. STEFFEN.

Q. What do you remember, Mr. Brown?

A. The only thing I recall is that there were discussions.

Q. Could you tell us how many?

A. No, sir.

Q. Could you tell us over what period of time?

A. No, sir.

Q. But there was more than one discussion?

A. I don't know, sir.

Q. You stated that there were discussions, is that correct?

A. There possibly was more than one.

Q. How could you remember who held those discussions?

A. No, sir, I don't remember.

Q. Who did you have in mind when you said that there were discussions?

A. I assume the officers of the companies.

Q. Well, is that what you had in mind?

A. I don't remember a thing about the meeting.

Q. You are speaking now of this meeting of February 2?

A. Or any of these negotiations.

Q. I see.

I would like to ask you some questions now concerning the memorandum of February 2. I believe you have testified concerning Mr. Whittemore, or have you? Who

1616 was he?

A. He was a Vice President.

Q. And Mr. L. R. Walker?

A. He was a Vice President.

Q. And Mr. R. M. Nelson, I don't think you have spoken of him.

A. I think he carried the title Secretary and Treasurer at that time.

Q. And who is L. D. Adkins?

A. I think he was counsel.

Q. And S. W. Chaffee?

A. He was counsel.

Justice STEPHENS. Where does the date of that asserted meeting appear in that memorandum?

Mr. STEFFEN. Right in the heading, Your Honor, "Conference held February 2."

Justice STEPHENS. I see.

By Mr. STEFFEN.

Q. Did you prepare this memorandum?

A. No, sir.

Q. Do you know who did prepare it?

A. No, sir.

Q. Do you know what item number EE-5 means? You will notice it at the top in the upper right-hand corner.

A. No, sir, I don't.

1617 Mr. STEFFEN. I now ask Mr. Adams if he can enlighten the Court on what Item No. EE-5 means in connection with this exhibit?

Mr. ADAMS. Yes. That is an item number, which, as I understand it, was put on the document at the time it was subpoenaed by the Grand Jury. That is my understanding. I was not in this case at the time.

Justice STEPHENS. Put on by whom?

Mr. ADAMS. By either Certain-teed or its counsel, I don't know which.

1618 Mr. STEFFEN. That is our understanding, likewise.

I now offer Government's Exhibit No. 210 in evidence, as being a document prepared by, and taken from the files of Certain-teed Products Company.

Mr. ADAMS. I respectfully object. In the first place, the witness has stated that he did not prepare it and does not know who prepared it. Secondly, I can also state that neither do I know who prepared it, or anything about it,

and I suggest that it is not a document which has been identified in any other way except that it happened to be in the possession of Certain-teed.

Justice STEPHENS. Well, let the Court read it.

Mr. ADAMS. If your Honor please, might I ask a preliminary question of the witness about this document?

Justice STEPHENS. Yes.

Mr. ADAMS. Mr. Brown, do you have this Exhibit 210 before you?

The WITNESS. Yes, sir.

Mr. ADAMS. Mr. Chaffee was one of your lawyers?

The WITNESS. Yes, sir.

Mr. ADAMS. Mr. Adkins was another?

The WITNESS. I am not familiar with Mr. Adkins.

Mr. ADAMS. Well, Mr. Chaffee was the lawyer generally retained by your company to advise the company?

The WITNESS. That is right.

Mr. ADAMS. And if he was present at any such meeting, he was there in his professional capacity?

1619 Mr. STEFFEN. I object to that, your Honor. I don't know how this witness could even answer it in the first place.

Justice STEPHENS. Well, the witness, having been vice president of the company, may know or may not know whether or not this lawyer was called to these meetings in his professional capacity. Do you know?

The WITNESS. I do not know, your Honor. I assume so, that is all.

Mr. ADAMS. Was he consulted in any other capacity than a professional capacity?

The WITNESS. Not to my knowledge.

Mr. ADAMS. And he was the lawyer for the company?

Mr. STEFFEN. I object to that line of questioning on the ground that it calls for a conclusion. What is the submission of an item to a lawyer in his professional capacity, and in his business capacity, is a question for the Court.

Justice STEPHENS. What are you trying to do, lay a foundation to show that there is someone else who could identify this exhibit?

Mr. ADAMS. No, I am about to raise the objection, your Honor, that this document has to do with a conference between the Certain-teed Products Corporation and its counsel, that what went on at that conference is a privileged matter, and Mr. Chaffee, as the witness has stated, was counsel for the company and was there at the meet-

1620 ing. Mr. Adkins—may I ask one more question?

Does it refresh your recollection any if I suggest that Mr. Adkins was connected with the Cravath firm, as to who he was?

The WITNESS. No, it wouldn't.

Mr. ADAMS. You remember generally that there was a lawyer named Adkins?

The WITNESS. That is right.

Mr. ADAMS. I am in a position to prove, your Honor, that at that time Certain-teed was advised by the Cravath firm, and that Mr. Adkins was associated with that firm.

Now my point here is, and I will be very happy to submit authorities to your Honor on this point, that what went on at this conference comes within the rule of privileged communications between lawyer and client. The rule generally stated by Professor Wigmore is that where legal advice of any kind is sought from a professional, legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

The protection is not waived, and I here assert it on behalf of Certain-teed Products Corporation, the client in this case.

Justice STEPHENS. I would like to hear you a little further on one aspect of the matter, Mr. Adams. Do
1621 you contend that every discussion at which a lawyer is present, a lawyer for a company is present, is privileged?

Mr. ADAMS. It seems perfectly clear under the cases, your Honor.

Justice STEPHENS. Oh, no, that is not the rule, Mr. Adams. The character of the discussion must be of a confidential nature, it must be something that is not communicated to other persons.

Mr. ADAMS. That is right, it must be a discussion which is related to the business of the client, and which has to do with matters which are, or could be, confidential. Whether the client may later disclose it voluntarily, that fact may be proved, and what the client later discloses may be proved. But what happened between him and his lawyer can never be disclosed if the client objects.

Justice STEPHENS. It doesn't seem to me yet clearly to appear that this man was present for the purpose of

advising the client in respect to the matters set out in this memorandum.

Mr. ADAMS. If your Honor please, you will find, if you will continue to read it, that the third paragraph on the second page shows definitely that there was legal advice given right at that conference.

I just want to remind your Honors that in having this discussion I don't want to in any way suggest that this has been properly identified.

1622 Justice STEPHENS. The Court will be in recess for five minutes.

(Whereupon, a short recess was taken, after which the trial was resumed.)

Justice STEPHENS. We will hear you briefly, first, Mr. Steffen, on the question of whether or not this is sufficiently identified to be introduced in evidence.

Mr. STEFFEN. I will say that we have identified it as having the names of the officers of the Certain-teed Products Company who would normally handle matters of the sort that are discussed here.

We have, in addition, identified it as being a document which has come from the files of the Certain-teed Products Company.

Internally the document discloses that it has to do with matters concerning the Beaver license, a problem which the witness has testified was being discussed.

On the legal question, I don't think we have called your Honor's attention to it, but I assume that you are familiar with 28 U. S. C. A., Sec. 695, and that, it seems to us, is almost controlling in this matter. If your Honor would like, I will read it.

Justice STEPHENS. Read it.

Mr. STEFFEN (reading). "In any court of the United States ——"

1623 Justice STEPHENS (interposing). You are referring to the past recollection recorded statute?

Mr. STEFFEN. No, this refers to a document which is taken from the files or possession of another party having to do with a business transaction.

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business,

and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All of the circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of any kind."

And in the case of Ulm v. Moore & McCormack Lines, 117 Fed (2d), 222—the original citation is 115 Fed. (2d), 492, that was a rehearing at 117 Fed. (2d)—the court there said:

"The object of the statute providing for admissibility as evidence in any court of the United States of a memorandum or record of any act, transaction, occurrence
1624 or event made in the regular course of business was to do away with technical rulings which excluded records ordinarily used in business transactions, when not formally identified by the makers".

Then I would call your Honors' attention to Wigmore, Sec. 2160, Third Edition, 1940, in which he says:

"Documents produced from Private Custody: (1) opponent producing on Notice; (2) endorsements on Negotiable Instruments; (3) Sundry Documents. During the vogue of the attesting-witness rule, an unsound doctrine obtained a partial vogue that an opponent producing a document from his possession on notice admitted its genuineness, so that the attester need not be called. Obviously the mere possession of any document, especially one purporting to be signed by a third person, should not be treated as an admission of genuineness. But, apart from any principle of Admissions, and looking only at the circumstantial value of the party's possession, may it not fairly be said that a person's possession of documents purporting to be made by himself (in this case by Certain-teed) and, particularly, of documents used and acted on by him in the ordinary conduct of his business, is sufficient evidence of their genuineness to justify their reception? This rule would be justified, not only by the inference thus drawn from daily experience, but also by the fact that the burden of disproof of genuineness, if it is actually disputed, can the more readily be placed in such a case on the party him-
1625 self."

Wigmore cites some annotations to that. One

case, an Oregon case, was a case where letters were evidenced by carbon copies. They were found in the corporate offices of the defendant, and that was held alone to be sufficient to authenticate them under this statute. It wasn't under this statute, but that was at common law. That is 147 Oregon, 1; 31 Pacific (2d) 754.

So that upon that ground I believe we have shown that this is a document concerning a conference, that it was taken from the files of the Certain-teed Products Company, in fact it lay in the files of the Certain-teed Products Company apparently from 1928 until 1940; and that it recites that the leading officers of the management were present, and within the statute it seems to us that it is sufficiently authenticated and it goes simply to a question of weight, whether or not it is correct.

Justice STEPHENS. Read the statute again, Mr. Steffen, will you please?

Mr. STEFFEN (reading). "In any court of the United States and in any court established by Act of Congress, any writing of record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence or
event, if it shall appear that it was made in the
1626 regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All of the circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of any kind."

Justice STEPHENS. What is there de hors the instrument, to show that it was made in the regular course of business?

Mr. STEFFEN. Our first point would be the fact that it was in their file, and taken from their file, and that is sufficient in itself, according to Wigmore.

Justice STEPHENS. To show that it was made in the regular course of business?

Mr. STEFFEN. I think so, yes.

Justice STEPHENS. Do you wish to be heard further on the question of identification?

Mr. ADAMS. I wish to say on that point, your Honor, that it would be astonishing to me if Mr. Wigmore or anybody else would say that something is made in the regular course of business simply because it exists. As I have always understood the purpose of this statute, it was to liberalize the rules of evidence with respect to the use of records made in the regular course of business, but
1627 that it in no sense relaxed the requirement that there be a showing that the record or document was actually made in the regular course of business. There is no such showing here. This is an incidental, isolated paper which counsel is trying to pull himself up by his bootstraps with, by saying that because it exists it is admissible, and then he says that there is something in the memorandum which indicates that it has something to do with this case.

But it is important here to recall that Mr. Brown has testified that he never saw the memorandum before, he has no recollection of the conference, he did not make the memorandum, and he does not know who made it. It seems to me that if we simply say in this case that every document that happens to have been found in the files of any one of these numerous companies is admissible by that fact alone, that we are sweeping aside every rule of evidence.

I would also like to comment with respect to his statement that this was purported to have been made by Certain-teed, that there is no such evidence in here. This might have been made by any one of these lawyers.

Justice STEPHENS. We are of the view that the document is not sufficiently identified even within the statute. We are familiar with that statute but we do not think it is intended that that statute shall relax the rule requiring some showing outside the instrument, that it was made in the regular course of business and is a memorandum
1628 of the character described in the statute. You may be able to call somebody from the company who may be able to identify it as having been made in the regular course of business. In that event the other relaxations of the general rule would apply. But it is our view that it is presently not sufficiently identified, and we therefore sustain the objection to it upon that ground. If there is a large class of documents of this sort involved, and since the matter has been raised at this time, we will hear you further, Mr. Steffen, on the other question, since both questions have been raised. We are inclined to the view, although we hold our minds open to hear from you on the subject, that the document shows on its face that it is privileged.

It is true that not every communication between counsel and client is privileged, and there may be many discussions between counsel and client of a general nature which are not privileged; but this appears to be, and we have read it carefully, a long statement by agents or officers of the company in the presence of counsel—this witness has said that this man Chaffee was the lawyer for the company; this witness was a vice president and can testify to that—for the purpose of determining what action to take with respect to a proposed license agreement, with respect to the payment of royalties under it, whether or not on all products or on merely the patented products, and whether or not to continue to make open-edge board, and where; and
1629 it ends up with a statement by counsel on the subject. It seems to us that, unless the client waives the privilege, it is privileged. But we haven't necessarily reached a conclusion on that subject if you wish to argue it further. You need not argue on that now unless you intend to offer a lot of such testimony.

Mr. STEFFEN. There may be a lot of other items that will come up of this sort, and while I take it this is a moot argument, in view of the fact that the exhibit has been excluded, I would like to raise one or two questions to clear the situation from our viewpoint.

We feel that this memorandum rather clearly, from the Government's angle, is a discussion of the business views involved. The question is whether or not they should take over, or whether or not they should go to the manufacture of the closed-edge board in the Acme plant, and if you will look at the agreement that is a matter upon which the executives of Certain-teed would have to make the final decision. It does not involve any question of a lawyer's discussion in it, it has to do with sales questions, it has to do with whether they could market an open-edge or a closed-edge board better, and there is nothing to indicate in the document at all that they confided to counsel a professional matter upon which counsel was to advise.

And that is essential, as I understand it, before the
1630 attorney-client privilege can be called into question.

I have some cases here which your Honor may be quite familiar with.

I will call your attention particularly to the statement in 70 Corpus Juris, 412, at Sec. 554 ——

Justice JACKSON (interposing). Corpus Juris Secundum?

Mr. STEFFEN. No, it is the first.

"In order for a communication to be privileged not only must the relation of attorney and client exist between the parties but the communication must relate to professional matters and must have been made on account of the relation of attorney and client. The mere fact that at the time of the communication the relation of attorney and client existed between the parties does not make it privileged. It may or may not be privileged according to its nature. The privilege does not protect against disclosure every communication which the client may chose to make to his attorney under a pledge of secrecy; it protects only such communications as the client may make, not pending the attorney's professional employment, but in the course of it. That which is privileged is a confidential communication properly intrusted to the attorney in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual practice and discipline. The communication must be made by the client for the purpose of obtaining counsel, advice,
or direction with regard to his legal rights or obli-
1631 gations."

Now one of the leading cases is In re Fisher, 51 Fed. (2) 424, and there Judge Knox said:

'There is no privilege with regard to communications made to accountants. The information given to the witness and to the accountants in his employ for the purpose of making financial statements and doing other work characteristically performed by accountants is not privileged, despite the fact that the witness may also have rendered legal advice on the basis of such data."

Then he cites The Matter of Robinson—"where it was held that an attorney for a corporation, who was one of its directors, could not refuse to disclose information about corporate affairs by claiming his professional privilege.

"Furthermore, the privilege accorded to an attorney is the privilege of the client and not of the attorney. * * * For this reason the attorney cannot claim privilege where the client has already disclosed the substance of a communication. * * * Nor can he claim privilege where the communication was made with the understanding that it was to be imparted to third parties."

We have a number of other authorities.

Justice STEPHENS. I think the rules are pretty well settled on the subject. The question really is whether this comes within them.

1632 Mr. STEFFEN. And as I say, at the present moment it is a moot question, but we would like to reserve time, when the time comes, to discuss that in more detail.

Justice STEPHENS. You may do that. We will hear further from you also, Mr. Adams.

Mr. STEFFEN. I would say that the only reference to counsel in this exhibit is in the third paragraph at the bottom of the second page, where Mr. Adkins stated that they could not sign the license agreement, which in itself is rather a minor, nonconfidential type of business. It is not in his professional capacity, I think, in the sense that the rule contemplates, and if we should introduce it we could omit that paragraph.

Justice STEPHENS. We will hear from you again if that type of question arises again, and also from you, Mr. Adams. The rule is not, of course, that every communication between counsel and client is privileged. Communications between lawyer and client are not conclusively presumed to be privileged—that is well settled. It must be demonstrated that they are within the privilege, and confidential in character. That rule is well settled.

We will hear from both of you again if it becomes necessary. Thank you.

The objection to this exhibit is sustained because of lack of identification, without prejudice to the right to reoffer it if identification is later supplied.

1633 By Mr. STEFFEN.

Q. I would now like to show you, Mr. Brown, what has been marked Government's Exhibit for identification No. 211.

Justice STEPHENS. What is the date of that?

Mr. STEFFEN. That purports to be a memorandum with the initials "L. R. W.", addressed to Mr. Brown, under date of February 7, 1928.

Justice STEPHENS. What is that number, 211?

Mr. STEFFEN. Exhibit 211.

By Mr. STEFFEN.

Q. And I would ask you if you can identify that as a memorandum which you received, addressed to Mr. Brown?

A. I don't recall the memorandum, and in my opinion it was intended for Mr. George Brown, the president.

Q. Who would the initials "L. R. W." refer to?

A. L. R. Walker, vice president.

Q. You say you do not remember having received the memorandum?

A. No, sir, and the last paragraph would indicate it was not addressed to me.

Q. Do you recall any discussions with Mr. Walker concerning the matter of negotiations with USG upon the license agreement with Beaver?

A. No, sir.

1634 Q. Do you know what his position was upon the matter?

A. I don't remember.

Q. Could you identify this, Mr. Brown, as the form of memorandum which was prepared by officers of Certain-teed?

A. No, sir, I could not state that to be a fact.

Q. Are you familiar with the form of memorandum that officers of Certain-teed made from time to time?

A. I don't recall that they had any special form.

Q. Was it usual for officers in your company to sign the memoranda on general questions of policy?

A. I don't remember.

Q. Did you ever make any memoranda concerning meetings and negotiations relative to the license agreements with USG?

A. Yes, sir.

Q. Do you recall whether you signed them or whether they were merely initialed, typewritten?

A. I don't recall. Some maybe I did, and some maybe I didn't.

Mr. STEFFEN. I would like to offer Exhibit No. 211 and point out to the Court that the memorandum in the first place was taken from the file, which is established by the fact that it was item No. EE-4. It bears the initials "L. R. W." It is addressed to Mr. Brown who the witness says he assumes was Mr. George M. Brown, the president. There was a Mr. George M. Brown who was president. I also call your attention to the fact that the last para-

1635 graph says:

"As this is a matter of so much importance I recommend that Mr. C. O. Brown and Mr. Blagden go to Chicago", and so forth.

The memorandum was dated February 7, 1928, and Exhibit No. 209 is a letter written by Mr. C. O. Brown, the witness, in which he states that he will be in Chicago and would like to see Mr. Avery.

1636 Justice STEPHENS. Is 209 in evidence?

Mr. STEFFEN. 209 has been admitted in evidence, which would seem to be internal connection in addition to the other matters that I have mentioned, to sufficiently identify it.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. Objected to as incompetent, because of no proper foundation and no sufficient identification.

Justice STEPHENS. We are inclined to the view, in fact we have the view, Mr. Bromley, that this, while close to the line which we have been trying carefully to follow with respect to identification, is probably within it. We have admitted previous exhibits on the basis of their having been taken from the files, without dispute, of the defendant concerned, where there was an initial or other apparent circumstantial identification, and where there was a reference in the exhibit to a previously admitted exhibit or letter which connected the two circumstantially. We think it is getting pretty close to the line, but we do think this is admissible. It will be received.

(The document referred to, marked as Government's Exhibit No. 211, was received in evidence.)

Mr. ADAMS. May I ask one question about it, Your Honor?

Justice STEPHENS. You may.

1637 By Mr. ADAMS.

Q. Mr. Brown, there was another Brown in addition to yourself in this company, wasn't there?

A. Yes, sir.

Q. And who was that?

A. D. F. Brown.

Q. And as far as the face of this exhibit is concerned, you don't know whether this memorandum was addressed to him or to George M. Brown, do you?

A. I have no way of knowing.

Justice STEPHENS. We think that wouldn't make any difference, if both of them were members of the Company, Mr. Adams.

I thought there were only two Browns connected with your company.

Mr. ADAMS. No, there were three. This is the introduction, into the case, of Mr. D. F. Brown, who I will say was the son of Mr. George Brown.

Justice STEPHENS. Thank you.

By Mr. STEFFEN.

Q. What title did Mr. D. F. Brown carry, if any, do you know, Mr. Brown?

A. At one time he carried the title of Assistant to the President. I don't recall any other titles.

Q. Now I would like to ask you some questions concerning the second paragraph in Exhibit No. 211.

1638 Did you have any information concerning the amount of royalty that would be charged under the Beaver license agreement if you went to the closed-edge basis at your Acme plant?

Justice STEPHENS. Just answer that question yes or no, first. We don't want to get a lot of things into the record here, Mr. Brown, that are speculation. State in the first place whether you did know it.

Justice JACKSON. And reading that exhibit is not going to do you a bit of good.

The WITNESS. I would say no, according to my memory.

By Mr. STEFFEN.

Q. Did you at any time consider the possible savings that might be effected by using a closed-edge board rather than using the open-edge board, if you remember?

A. No, sir.

Q. Do you recall whether the Beaver license agreement provided that the licensees should respect the resale price in their sale of gypsum board?

Justice JACKSON. I don't understand that question, Mr. Steffen.

Mr. STEFFEN. Perhaps I had better rephrase it.

Justice JACKSON. Perhaps I am a little stupid this morning.

Mr. STEFFEN. Maybe I had better rephrase it.

1639 By Mr. STEFFEN.

Q. Do you recall whether the Beaver license agreement would require a licensee to respect resale prices?

Mr. BROMLEY. I object to that as incompetent and as not being the best evidence, the agreement being the best evidence. It speaks for itself, and it has no provision about resale price whatsoever, as Mr. Steffen must know by this time.

Justice STEPHENS. Unless you wish to be heard, we will rule on that. The objection is sustained. The exhibit itself should be consulted on that subject.

By Mr. STEFFEN.

Q. I would like to ask, Mr. Brown, whether or not you

understood that the licensor might fix prices on gypsum board, under the terms of the license?

A. Under the Beaver license?

Q. Or any license.

A. I don't know about the Beaver. When Certain-teed took it, I knew they could set the price.

Q. Do you know for what period of time the licensor could fix prices under the Certain-teed-USG agreement, the first one?

A. Which one, sir?

Q. Well, perhaps we had better take that up later, Mr. Brown. What I was referring to was the first license agreement, though we haven't developed that as yet.

1640 I think you have testified that you were in charge of sales, Mr. Brown, during the period from 1925 to 1929; is that correct?

A. I was connected with the Sales Department.

Q. And did you have to do with the sale of gypsum board?

A. Yes, sir.

Q. Do you know what other manufacturers there were in the field at that time, '25 to '29, who were manufacturing gypsum board?

A. Do you wish me to name the ones I remember?

Q. Yes, I wish you would.

A. United States Gypsum Company; Ebsary Gypsum Company ——

Q. (Interposing.) Do you know when they started making board?

A. No, sir, I do not.

Q. You don't remember?

A. No, sir.

Universal Gypsum; Beaver Products; I am not sure when National started to make board.

Q. Do you remember the Texas Company?

A. Yes.

Q. Niagara, do you remember that company?

A. I remember the company, yes, sir.

Q. Do you remember the Kelly Plasterboard Company?

A. Yes, sir.

1641 Q. American?

A. I don't think all of those made board, however, but I am not sure.

Q. Now among those companies which you have named, which ones do you think didn't make board?

A. May I have the question?

Q. You said you weren't sure which ones of those companies were making board. Do you recall which ones weren't making board?

A. I named originally the ones I thought were making board.

Q. Do you remember which ones were making closed-edge board? You have named USG—they, of course were; you have named Ebsary. Was Ebsary making a closed-edge board or open-edge board, as you remember it?

A. I don't remember. Certain-teed is the only one I would be sure of.

Q. What were they making?

A. Open-edge board.

Q. Do you remember whether they made an open-edge board at their Beaver plants?

A. I think they did make some.

Q. Could you tell us who your principal competitors were? Perhaps I should ask the question—was there competition during this period when you were in
1642 charge of sales?

A. Yes, sir.

Q. Was there price competition?

A. Yes, sir.

Q. Do you remember who your principal competitors were?

A. The four or five companies I mentioned just a minute ago.

Q. Well, you mentioned first USG—were they a competitor?

A. Yes, sir.

Q. Ebsary?

A. Yes, sir.

Q. Universal?

A. Yes, sir.

Q. Beaver Products, of course, we will pass over. National?

A. Yes, sir.

Q. Texas?

A. Yes, sir.

Q. Niagara?

A. I don't remember much about them.

Q. Kelly?

A. The same answer as to Kelly.

Q. American?

1643 A. The same on American.

Q. Now I would like to ask you to remember, if

you can, which of your competitors were selling a closed-edge board?

A. United States Gypsum and Beaver are the only ones I can remember.

Q. Do you know what sort of board Universal was making, Mr. Brown?

A. No, sir.

Q. Do you know what sort of board Texas was making?

A. No, sir.

Q. Do you know which companies were licensees of USG during this time, 1927, 1928 and 1929?

A. Beaver is the only one I know.

Justice STEPHENS. The Court will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

1644 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice STEPHENS. Proceed.

Thereupon, CLAUDE OLIVER BROWN, the witness on the stand at the time of recess, resumed his testimony as follows:

DIRECT EXAMINATION (Resumed).

Mr. STEFFEN. With reference to Government's Exhibit for Identification No. 210, I would like to ask that the United States Gypsum Company produce the carbon of the letter of January 27, 1928, referred to in the first paragraph of that exhibit; and that Beaver Board or Certainteed produce the original.

Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Mr. Brown, we were talking, before the recess, about the various companies that were manufacturing board in 1927, 1928 and 1929. I think I should state for your information that there were four licensee companies in 1926 and 1927. Those companies were the Universal, Beaver Board, Texas, and Atlantic. That is, four licensee companies at that time.

Could you tell us whether open edge board sold at the same or a different price than closed-edge board.

1645 A. It sold at a different price.

Q. What was the differential during 1927 and 1928, approximately, if you remember?

A. I don't know. It was lower than closed-edge board.

Q. Could you give us an approximation of the difference?

A. It might range from $2 to $6 a thousand.

Q. That would be on board, or on lath, or on what?

A. Board, I have in mind. I don't recall about lath.

Q. Do you recall whether your company at Acme, which was making an open-edge board, was producing to capacity, or what was their production?

A. I don't remember.

Q. Do you recall whether your company was making a profit on its sale of open-edge board during 1928?

A. I think they made some profit.

Q. Could you be more specific on that?

A. No, sir.

Q. Did they make a profit, would you say, on into 1929, in the sale of open-edge board?

A. I don't remember on the specific product. The company wasn't making much money at that time, as I remember.

Q. I see.

Now this morning we discussed Government's Exhibit No. 209, which you will recall was your letter to Mr. Avery suggesting a conference. I believe your

1646 testimony was that you did not at this time go to Chicago; is that correct?

A. Yes, sir.

Q. Do you know whether anyone from your company did go to Chicago to see Mr. Avery after February 20, 1928, or at about this time?

A. I don't recall as to any dates.

Q. Do your recall whether anyone went out to talk over with Mr. Avery the general question of taking over the Beaver Company license, which was mentioned in your letter of February 20?

A. Mr. George Brown made a trip eventually, but the date I don't recall.

Q. And his trip was to do what?

A. Presumably to work out their difficulties with USG on the Beaver contracts.

Q. And did you discuss that with Mr. Brown upon his return?

A. No, sir.

Q. Did Mr. Brown, to your knowledge, prepare any memorandum or report concerning his trip?

A. I don't remember such a report.

Q. Do you know what the result of the negotiations between Mr. Avery and Mr. Brown was?

A. It eventually, as I recall, resulted in Certain-teed taking a license.

1647 Q. Do you know the approximate date of that?

A. No, sir.

Q. In order to get this matter clear, I will show you Government's Exhibit No. 4 at this time. This is to show you the date.

Will you examine that, the signatures and the date, and determine whether that is the license agreement that you spoke of when you said they eventually took one out?

A. In my opinion, it is.

Q. What was the date?

A. The 22nd day of May.

Q. And the year?

A. 1929.

Q. Now we are speaking about the date of February 20, 1928. In other words, there was about a year and 2 months in between those two dates. Could you place any closer the time when Mr. Brown went out to Chicago?

A. No, sir, I don't remember the date.

Mr. STEFFEN. At this time, Your Honor, I should like to introduce in evidence the United States Gypsum Company Admission to Government's Interrogatory, and I will read the paragraph, Paragraph 32, to this effect:

"As presently advised, there were the following meetings: (a) February 29, 1928, Chicago. Present:

Sewell A. Avery, George M. Brown, President of

1648 Certain-teed, and Augustus S. Blagden, President,

Beaver Products, Inc., the assets of which latter company had been just purchased by Certain-teed."

Justice STEPHENS. That is the USG's answer, is it?

Mr. STEFFEN. Yes.

It would appear from that, Mr. Brown, that Mr. George M. Brown was in Chicago, talking to Mr. Avery on this matter, on February 29, 1928. Does that refresh your recollection on that matter?

The WITNESS. No, sir; I don't remember about the meeting.

By Mr. STEFFEN.

Q. Well now, can you tell us what Mr. Brown's attitude was on or about this date of February 29, when he was in conference with Mr. Avery, concerning taking out a license agreement to cover your Acme plant?

Mr. ADAMS. I respectfully object to this question, with respect to its form, it involving an inquiry into somebody else's state of mind. I think if he had a conversation with Mr. George Brown, that he possibly might be permitted to testify to it, provided, however, he can state with reasonable certainty when and where the conference took place, or the conversation took place.

Justice STEPHENS. Do you wish to be heard?

1649 Mr. STEFFEN. Yes. I think he is certainly competent to testify as to Mr. Brown's attitude on this matter, and it certainly is relevant and material to show the state of mind of the officers of Certain-teed Products Corporation at this time concerning what they would do under the license agreement.

Justice STEPHENS. Well, we think it is relevant and material, but the Court thinks that the question is improperly phrased in that it calls for a conclusion. Of course, it is not always possible to be exact with respect to the type of inferences that are admissible in evidence and those that are not; but here, when you are on a critical subject which has to do with the attitude and position taken by companies on license agreements, it seems to us that what counsel ought to ask for is the conversation that this man may have had, or the substance and effect of the conversation, reasonably fixing the time and place of it, with Mr. Brown, if he had such a conversation.

Objection sustained.

By Mr. STEFFEN.

Q. Did you have any conversation with Mr. Brown on or about March 1, 1928, concerning whether the Certain-teed Products Corporation would take out a license with USG or not?

A. I don't recall any such conversation.

1650 Q. Were you in a position where you could have talked with Mr. George M. Brown?

A. Well, I was not even an officer at that time.

Q. You signed letters as Assistant to the President?

A. That isn't an officer in that company.

Q. But as Assistant to the President, would you not talk

to Mr. Brown and the other officers?

A. Not necessarily, no, sir.

Q. He was also your uncle. Would that give you any opportunity to talk business matters over with him?

A. That would be a good reason why he wouldn't. (Laughter.)

Q. Did you talk with Mr. Whittemore on or about this time?

A. No, sir.

Q. Did you talk with Mr. Nelson on or about this time, to your recollection?

A. I don't recall any conversations with Mr. Nelson.

Q. Did you talk with Mr. L. R. Walker on or about this time?

A. We might have discussed the advisability of having closed-edge board. That would be the only thing I could recall.

Q. Well, let's have that discussion?

A. Purely from a sales standpoint,—we felt there was an advantage in the closed-edge board.

1651 Q. What was the advantage?

A. It was a better board.

Q. But from the sales standpoint, what was the advantage?

A. It was more acceptable to the trade.

Q. And did you discuss the matter of the price at which you would sell closed-edge board if you took out a license?

A. No, sir, not as I recall.

Q. If you took out a license, what would be the result as to price?

A. I understand that was set by United States Gypsum Company.

Q. And did you ever discuss that matter with Mr. Walker?

A. I don't recall any such discussion.

Q. Mr. Walker was your superior, was he?

A. Yes, sir.

Q. Well now, I will show you Government's Exhibit No. 212——

Justice JACKSON (interposing). Is that the item marked X318?

Mr. STEFFEN. That is right.

By Mr. STEFFEN.

Q. (Continuing.) Which purports to be a Memorandum

Regarding the Possibility of Making Plaster Board
1652 under the Royalty Basis, by George M. Brown, President, under date of March 1, 1928, which was one or two days after he had been out to Chicago talking to Mr. Avery.

Mr. ADAMS. May I ask what the purpose of showing this to the witness is?

Mr. STEFFEN. To ask if the witness has ever seen the memorandum and can identify it.

Mr. ADAMS. Is it proposed to offer this in evidence by this witness?

Mr. STEFFEN. If this witness can identify it, yes, sir.

The WITNESS. I don't remember the memorandum.

By Mr. STEFFEN.

Q. Did you see that memorandum before the Grand Jury, Mr. Brown?

A. I don't remember that, sir.

Q. Do you know who "DS" is, following the name "Geo. M. Brown, President", at the top?

A. I assume that it is the secretary that wrote it.

Q. Do you know what his or her name was?

A. There was a Miss Stevens that was his secretary. She might have written it.

Q. There was a Miss Stevens who was his secretary?

A. Yes.

Q. Were you familiar with the filing system at
1653 Certain-teed on or about March 1, 1928?

A. No, sir.

Q. Do you know what would become of a memorandum of this sort?

A. No, sir.

Q. Could you say whether or not this was a usual form of memorandum on matters of this sort? We have already had two or three.

Mr. ADAMS. I submit we haven't had two or three. He previously testified that he didn't know anything about people making memoranda; sometimes they made them and sometimes they didn't, and there wasn't any course of business or policy about them, and he so testified.

Mr. STEFFEN. We have had only one, Your Honor.

By Mr. STEFFEN.

Q. Could you answer the question, Mr. Brown?

A. There was no set system that I knew of.

Q. Could you say whether, from time to time, memo-

randa of this character were made and filed?

A. I would say that they were.

Mr. STEFFEN. I think we will now offer Government's Exhibit 212, and I should like to point out to the Court that George M. Brown is admitted to have been in Chicago on the 29th of February. He reports on the meeting held in Chicago, in this memorandum of March 1, 1928. It bears the initials "DS", which apparently are the
1654 initials of the secretary, Miss Stevens. It was taken definitely from the files of the Certain-teed Company because of the Item No. X318 which was put on by Mr. Adams or counsel or the Certain-teed people. It appears to be a memorandum of a sort which is made from time to time. It is, therefore, more or less in the regular course of business. Of course, it isn't in the regular course of business like a sales transaction, but in matters of this character there would be reports made, I gather, and they would be put on file.

Justice STEPHENS. Any objection?

Mr. ADAMS. Yes, we certainly have, Your Honor. In the first place, there is no statement in here that the meeting took place in Chicago. In the second place, there is no evidence, and the witness has no idea, who prepared this memorandum.

I might ask him ——

Mr. STEFFEN (interposing). I forgot to ask him. I don't think it is material.

By Mr. ADAMS.

Q. You don't know who prepared this memo, do you?

A. All I know is the signature.

Q. You mean the typed signature,—"Geo. M. Brown"?

A. Yes.

Q. But you don't know of your own knowledge whether George M. Brown wrote this or not, is that correct?

1655 A. That is correct.

Q. And you are not familiar with the matters that are contained in it, are you?

A. No, sir.

Mr. ADAMS. I might suggest to the Court further ——

Justice GARRETT (interposing). May I interject? Assuming that Mr. George M. Brown did write it, what was it for, what relationship has it? There may be subsequent papers that show something, I don't know.

Mr. STEFFEN. We have, of course, additional evidence. But this would be a declaration of a co-conspirator, Mr.

George M. Brown; and it would also show, as clearly, I think, as possible, what the state of mind and purpose and intent of the Certain-teed Products Corporation were at this time—both highly relevant and competent matters to produce in evidence.

Mr. ADAMS. May I say this, Your Honor, that there is no evidence here that George M. Brown wrote this memorandum. It says on it, "Geo. M. Brown, President". It may have been addressed to him.

Justice GARRETT. I realize that, but I said assuming that it was written by him. Of course, I didn't mean to say that it was, at all.

Justice STEPHENS. The Court thinks that we have heard enough on the subject. We have really discussed
1656 this thoroughly before.

We think the objection should be sustained, not upon the ground that it is irrelevant or immaterial, but on the ground that it has not been identified, even within Section 695. We think the testimony of this witness does not establish that this memorandum was made in the regular course of business.

Objection sustained.

By Mr. STEFFEN:

Q. I would like to ask you a question, Mr. Brown, about the Ebsary Company. Were you familiar with its business practices in 1928 and 1929?

A. I knew the company. What do you have reference to by the word "practices"?

Q. Well, would you regard the Ebsary Company as a company which might grant rebates, for example?

Mr. ADAMS. I object to that. I think it is a matter wholly of opinion, and calling for a conclusion on the part of the witness on a state of facts some 12 or 15 years ago.

Justice STEPHENS. Objection sustained. If he knows what the Ebsary Company did with respect to that matter, he may testify to it. Find out whether he knows.

By Mr. STEFFEN.

Q. Do you know whether the Ebsary Company was in the habit of granting rebates?

1657 Mr. ADAMS. I object to that. I think he should be required to state the facts with reference to a specific rebate, if any.

Justice STEPHENS. He can ask a preliminary question, Mr. Adams, as to whether he knows. That can be answered

yes or no. That can be followed up with a more specific question.

Mr. ADAMS. I objected to his asking whether he knows if it was their habit.

Mr. STEFFEN. He can still answer that yes or no.

Justice STEPHENS. Do you know, or don't you?

The WITNESS. I do not know.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. Do you know of any occasion when the Ebsary Gypsum Company may have granted a secret rebate, or a rebate?

A. I do not.

Q. What was your opinion of the dependability of the National Gypsum Company?

Mr. ADAMS. I object to that as calling for an opinion and a conclusion; and moreover, on the ground that it is not relevant to any inquiry in this lawsuit under the issues set forth in the complaint.

Mr. STEFFEN. I will answer that, Your Honor, by saying that the witness' opinion is material, because it is
1658 necessary to show the state of mind of the company and of its officers, and it is highly relevant for the reason that one reason for not going into a license agreement might be that certain members who would go in would not be dependable and would not maintain a fixed price. And I want to know whether this witness shared that opinion.

Justice STEPHENS. Of course, Mr. Steffen, it depends upon what you mean by the question. If you want this witness' opinion as to whether the National Company was a dependable company, it would seem to the Court that that was not relevant, and also not competent. If you want it to prove that this witness, as an official of the company, was or was not disposed to deal with the National Company, it may be relevant with respect to his state of mind, but we think that it ought to be shown by asking the particular items of conduct of the National Company which produced his unwillingness to deal with them. We are very doubtful whether counsel ought to be allowed to ask whether, in this man's opinion, the National Company was a dependable company. In the first place, he has testified that he wasn't dealing with them, that he had no authority to make these negotiations, and his relationship to the whole thing is so vague that it seems to us not proper.

Objection sustained.

1659 By Mr. STEFFEN.

Q. Do you recall any communications from the United States Gypsum Company after this time, after March 1, concerning the license agreement, and whether or not you would be permitted to take out a license?

A. No, sir, I don't recall ——

Justice STEPHENS (interposing). I am sorry, I didn't hear that question. Will you please read it for Judge Jackson and myself both?

(The question was read by the reporter.)

By Mr. STEFFEN.

Q. I show you now Government's Exhibit No. 213, which purports to be a letter from Mr. Henning, addressed to the Certain-teed Products Company, under date of March 20, 1928, and ask if you are familiar with that letter and can identify Mr. Henning's signature?

Justice STEPHENS. March 20, 1928?

Mr. STEFFEN. That is right.

The WITNESS. The signature, I would say, is Mr. Henning's. I don't recall the letter.

Mr. STEFFEN. I offer Government's Exhibit No. 213.

Justice STEPHENS. Any objection, Mr. Bromley?

Mr. BROMLEY. Only the usual one, sir.

Justice STEPHENS. Received in evidence, subject to the reservation with respect to declarations of alleged co-conspirators.

1660 (The document referred to, marked as Government's Exhibit No. 213, was received in evidence.)

By Mr. STEFFEN.

Q. It states in the letter, Mr. Brown, that the Certain-teed Company has "alleged that we refused to grant to you a license under our patents unless you would accept the same extended to 1937" and then further, "that it would not be acceptable to us if you assumed the license agreement as to the properties of The Beaver Products Company * * * exclusive of your other plants."

Are you familiar with that matter?

A. I don't recall it.

Q. Do you know whether or not your company did allege that they were not to be granted a license covering only the Beaver plants, not including the Acme plant?

A. I don't recall anything of that kind.

Q. Does this letter offer you a license covering Beaver and not covering Acme?

Mr. ADAMS. I object to that. The letter speaks for itself as to what it offers.

Justice STEPHENS. Objection sustained.

By Mr. STEFFEN.

Q. Do you understand this letter to permit you to take out a license covering Beaver but not covering
1661 Acme?

Mr. ADAMS. The same objection.

Justice STEPHENS. The question is not proper, Mr. Steffen. The letter speaks for itself. What he understands the letter to mean is not competent.

By Mr. STEFFEN.

Q. Did you understand that you could ever have a license from USG covering Beaver and not covering Acme?

Mr. ADAMS. That I object to.

Mr. STEFFEN. That, I think, is in point.

Mr. ADAMS. "Do you understand that you could ever have a license covering Beaver", and so on. What he understood on it from this letter certainly can't be stated in evidence here.

Mr. STEFFEN. I am not construing the letter. I am asking this witness his understanding of whether it was possible for Certain-teed to take out a license covering ——

Justice STEPHENS (interposing). Let me shorten it. Did you have any knowledge on the subject?

The WITNESS. I don't know, Your Honor.

Justice STEPHENS. That is all.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 214, purporting to be a letter from Mr. C. O. Brown addressed to the U. S. Gypsum Company, under date of March 23, 1928, in answer to Mr. Henning's letter of March 20.
1662 Please read that, Mr. Brown, and tell us whether that is your signature at the end?

Justice STEPHENS. What is the question?

Mr. STEFFEN. I want him to state whether that is his letter, and whether it is his signature.

The WITNESS. That is my signature.

Mr. STEFFEN. I offer Government's Exhibit 214. The signature has been identified. It is in reply to a letter of March 20, which has been admitted in evidence.

Justice STEPHENS. Any objection?

Mr. BROMLEY. Only the usual one, if the Court please.

Justice STEPHENS. Received in evidence, subject to the reservation concerning the declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 214, was received in evidence.)

By Mr. STEFFEN.

Q. I would now like to ask some questions concerning your letter, Mr. Brown, by way of further explanation.

In the second paragraph, you say: "We have had objections to your license agreement as we have understood it, and especially for the time covered after the expiration of the Utzman Patent."

What Utzman Patent did you have in mind there, do you know?

1663 A. As I remember it, the Utzman Patent was the basic, original patent.

Q. Covering what?

A. Covering closed-edge board.

Q. Do you know when that expired?

A. Not the exact date, no, sir.

Q. Well, the exact date is August 6, 1929.

Now your letter says that you had some objections to the time the license would run on and after August 6, 1929. What were your objections?

A. I assume they were from the people in the organization.

Q. All right. What were they?

A. They didn't want the license to run after the Utzman patent expired, presumably.

Q. Why?

Justice STEPHENS. Are you answering from your own knowledge?

The WITNESS. On opinion, Your Honor, only.

Mr. BROMLEY. I move to strike the answer out, then, if Your Honor please.

Justice STEPHENS. It may go out.

By Mr. STEFFEN.

Q. We want, Mr. Brown, your recollection of what the reasons were, if you have any recollection. Please

1664 do not answer on opinion at all. Do you have any recollection of what the reasons were why you were objecting to the license agreement on and after the expira-

tion of the basic Utzman Patent?

A. Well, it is my personal opinion that this letter was written by counsel, and I signed it, and I have no ideas on it, really, at this time.

Q. Do you have any ideas on the situation, on the agreement, concerning the possibility of controlling prices on and after August 6, 1929?

Mr. ADAMS. I object on the grounds that whatever ideas he may have had on the subject are immaterial. He wasn't even an officer of the company at this time.

Justice STEPHENS. I am inclined to disagree with you on that, Mr. Adams. The charge of the Government here is that there was an illegal agreement on price fixing. This man was the sales manager of the company, an official of the company. The question is perhaps somewhat generally phrased, but it is a preliminary question. He can answer it yes or no, and then it can be pursued further.

The WITNESS. Please state the question again.

(The question was read by the reporter.)

Justice STEPHENS. That is, after the expiration of the Utzman Patent.

1665 The WITNESS. No, sir.

Justice STEPHENS. His answer is no.

By Mr. STEFFEN.

Q. Do you know whether or not there was a possibility of maintaining prices after August 6, 1929, under the agreement?

A. It is my memory that there was not.

Q. Could you say whether or not that had a bearing upon the objections raised by officers of Certain-teed to taking a license?

A. I couldn't say.

Q. I want to refer you now to the next to the last paragraph on the second page of Exhibit 214, beginning: "In addition to the above matters", and so on. Please read that, and I will ask you some questions on that.

Now what, Mr. Brown, do you mean by the expression, "price to lineyard companies". You were in the Sales Department, I think you stated.

A. I don't remember.

Q. What is a "lineyard company"?

A. It is a string of yards owned by one central capital.

Q. And what was the Certain-teed practice in selling lineyard companies, do you remember?

Justice STEPHENS. What did he say a lineyard company was?

1666 The WITNESS. A string of yards owned by one central capital.

By Mr. STEFFEN.

Q. Were they all along one line? Or how did you get the term "lineyards"?

A. The same as chain stores was what they really were.

Q. Were they on a rail line?

A. Sometimes they were.

Q. All right. What was the Certain-teed practice in selling lineyard companies, as you used the term?

A. We sold them at the same price, as I remember, as we did to dealers.

Q. Now take the next sentence: "We also understand that you perhaps make your lowest price to some contractors." What was the Certain-teed's practice with regard to sales to contractors?

A. We didn't sell contractors.

Q. Your next sentence indicates that you sold dealers and distributors, is that correct?

A. To my memory, yes.

Q. And in selling distributors, how did you sell them, on a commission basis?

A. Are you speaking of gypsum products or some of the other products made by the company?

Q. I am trying to find out what you meant by this paragraph in your letter, Mr. Brown. What did

1667 you mean by it?

A. Well, we never had distributors, as I recall it, in gypsum.

Q. Note your sentence. You are talking about a gypsum license, this letter has to do with a gypsum license agreement.

In your next to the last paragraph, you said, "We could hardly work well under such a plan as we do business entirely through dealers and distributors. Where a line can be suitably handled by a distributor we like to give our distributor a commission for handling carloads or less." Now is that correct?

A. We had such a policy in roofing. I don't recall such a policy in gypsum.

Q. Let me have what your policy was with regard to roofing. What was your policy with regard to distributors

and dealers in the sale of roofing?

Mr. BROMLEY. I object to it as immaterial.

Justice STEPHENS. What do you claim for that, Mr. Steffen? There is no issue in this case about roofing.

Mr. STEFFEN. I agree with that. I want to know the policy, though, to determine what their sales organization was, what their distribution was. It is a preliminary question.

1668 Justice STEPHENS. With that understanding, the objection is overruled. If you wish to bring out what their general sales system was, and then ask whether or not it was applied to gypsum products, you may do that.

Mr. STEFFEN. That is what I have in mind.

The WITNESS. In roofing we had less-than-carload prices, carload prices to carload buyers and distributors, as we termed them, or jobbers, both, at a discount from carload prices.

By Mr. STEFFEN.

Q. How wide a coverage over the United States did you have in your roofing business?

A. The entire country.

Q. Did you carry that practice, as you recall it, over to your gypsum business?

A. No, sir, it is my memory that we did not.

Q. I want to show you what purports to be an audit report of Certain-teed Products Corporation, and particularly page 11 of that, and ask you if you can identify it as an audit report, whatever that means, and state whether you ever saw it before?

Justice STEPHENS. Is this to be identified as an exhibit?

Mr. STEFFEN. Just for the purposes of ——

Justice STEPHENS (interposing). Refreshing recollection?

Mr. STEFFEN. Yes.

1669 Justice STEPHENS. It need not be marked, then, unless it is to be later introduced.

Mr. ADAMS. What is the date of that?

The WITNESS. 1930 to 1931.

By Mr. STEFFEN.

Q. What is an audit report, Mr. Brown?

A. As I remember, at one time we made our wholesalers ——

Justice STEPHENS (interposing). Just a moment, Mr. Brown. Answer the question that is being asked you.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 15

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, CERTAIN-TEED PRODUCTS CORPORATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

FILED NOVEMBER 28, 1946

VOLUME II

(PAGES 1275-2510)

What is an audit report?

The WITNESS. Well, I don't understand the question, Your Honor, in reference to this.

Mr. ADAMS. May I look at it, please?

Justice STEPHENS. Yes, you may look at it.

Mr. ADAMS. I think it ought to be indicated that it is not our report.

Justice STEPHENS. It is being used, we understand, only to refresh recollection. Do you recognize this report, Mr. Brown?

The WITNESS. No, sir.

By Mr. STEFFEN.

Q. Did you have any familiarity with audits conducted by the U. S. Gypsum Company into your sales of gypsum board after you signed the license agreement?

A. I don't recall any.

1670 Q. Did you have anything to do with it, is my question?

A. No, sir.

Q. Do you know whether or not they did audit your sales?

A. I think they did.

Q. Might that be such an audit?

A. It might be, but I had nothing to do with it.

Q. I want you to look at page 11 there, and I want to ask you this question: Does that refresh your recollection at all concerning possible sales to distributors or jobbers during the years 1930 and 1931, of gypsum products?

A. No, sir, I don't remember.

Q. There is a whole list of names there. Do you know any of those concerns which are listed as distributors or jobbers?

A. Most of them seem to be on the Pacific Coast, which I wasn't familiar with.

Q. Look at the next page. What does it mean by "additional jobbers' commissions—Philadelphia," if you know?

Mr. ADAMS. I respectfully object. The question is whether or not his recollection is being refreshed by this document, not what this document says. It is not for him to interpret it, particularly since it is not a document which was prepared by him or isn't even an audit report of the Certain-teed Products Corporation.

1671 Justice STEPHENS. The Court thinks the witness understands that.

You are not asked to tell what the exhibit means, but whether or not the items that Mr. Steffen calls to your attention refresh your recollection with respect to the sales methods of the company with respect to gypsum products. If it does refresh your recollection, say so; and if it doesn't, say that it doesn't.

The WITNESS. I remember nothing about the Philadelphia and Buffalo area, and the Pacific Coast I had nothing to do with.

1672 By Mr. STEFFEN.

Q. What area did you have to do with?

A. East of the Rocky Mountains; we had a vice-president on the Pacific Coast.

Q. But Philadelphia and Buffalo would be East of the Rocky Mountains?

A. I testified that I didn't remember anything about those.

Q. Do you remember anything about the Southern or Southeastern area?

A. No, sir.

Q. Are you still sure that you did not sell through distributors?

A. That was my memory.

Q. Now in the last paragraph there on page 2 of Government's Exhibit 214 there is a discussion of the possibility of getting different prices in different areas in the Chicago district. What is your understanding of that?

A. I don't remember that.

Q. Now refer to Paragraph 4 on page 2 of your letter, Mr. Brown, where it says, "It has been repeatedly stated" that if the license agreement gets unduly burdensome, Mr. Avery or U. S. G. would release the licensee from the burden. Do you know anything about that?

A. No, sir.

1673 Q. Did you ever hear any discussion of that?

A. I don't remember.

Q. Do you know who is referred to by the word "others" —"It has been repeatedly stated to us by others"—?

A. No, sir.

Q. Did you ever have any conversation with Mr. Blagden about that?

A. None that I recall.

Q. With Mr. Griswold?

A. No, sir.

Q. Do you know Mr. Griswold?

A. I have met him.
Q. Did you ever talk with Mr. Griswold about the license agreement?
A. No, sir.
Q. Sir?
A. No, sir.
Q. Did you attend any of the Industries meetings?
A. Yes, sir.
Q. How often?
A. Pardon?
Q. How often?
A. I attended a good many of them, I don't know how often. I don't remember how many they had.
Q. How often would they be held, do you remember?
A. As I recall, there was no specific date for hold-
1674 ing them.
Q. Were they held as often as once a month?
A. I don't think that often.
Q. Who did you meet out there from American?
Mr. BROMLEY. Could we have an indication of when he is talking about?
Mr. STEFFEN. During the year 1928 and early 1929.
Mr. BROMLEY. I object to that as too general.
Justice STEPHENS. It is unduly general; unless it is purely preliminary——
Mr. STEFFEN (interposing). It is just preliminary, to find out who he met and who he talked to.
Justice STEPHENS. You may do that.

By Mr. STEFFEN.

Q. Did you meet Mr. Griswold during 1928 or early 1929 out in Chicago at one of these Industries meetings?
A. I can't be that specific. I met him in the gypsum industry.
Q. And did you meet Mr. Blagden out there perhaps during this period of time?
A. No, my contact with him was only a few months after we bought the Beaver company.
Q. Did you ever discuss the license agreements with Mr. Blagden?
1675 A. I don't recall any discussions.
Q. Did you meet Mr. Eugene Holland out at any Gypsum Industries meetings?
A. I have met Mr. Holland at Industries meetings.
Q. Do you recall what you discussed with Mr. Holland?
A. I don't recall anything specific with Mr. Holland; he

just attended the meeting.

Q. What was taken up at the meeting concerning the license agreement?

A. It wasn't discussed at the Industries meeting, as I recall it.

Q. Did you meet with any of these men after the Industries meeting?

A. Socially is all.

Q. Did you ever discuss gypsum matters at a social meeting?

A. I don't recall any.

Q. Would you say that you never mentioned gypsum matters at any social meeting?

A. The question, please?

Q. Would you say you never discussed the license agreement or gypsum matters socially with Mr. Holland or Mr. Blagden or Mr. Griswold?

A. I never discussed the license agreement with them that I remember, with any of those men.

Q. Do you recall discussing it with anybody at all?

A. No, sir.

1676 Q. Would you say that you never discussed it with anybody?

A. No, sir.

Q. You simply don't recall?

A. I don't recall.

Q. I want to now refer you to Paragraph 5 on Page 2 of Exhibit 214, in which you say, "Will you grant the license for the use of the Beaver plants only, excluding any other plants that we may have now or in the future"?—and ask if you ever got a reply to that?

A. I don't remember.

Q. Do you recall whether you ever took out a license covering Beaver and not Acme?

A. I don't think we did.

Q. I now want to show you Government's Exhibit No. 215 which purports to be a letter from Mr. Henning to the Certain-teed Products Corporation under date of March 29, 1928, in reply to your letter of March 23rd. I will ask you if you are familiar with that letter and can identify the signature?

A. I can identify the signature as Mr. Henning's, in my opinion.

Mr. STEFFEN. I offer Government's Exhibit No. 215 in evidence.

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. It may be received in evidence subject to the usual reservation with respect to declara-
1677 tions of alleged co-conspirators.

(The document referred to marked as Government Exhibit 215, was received in evidence.)

By Mr. STEFFEN.

Q. I call your attention to the initials at the top of the letter, Mr. Brown, and ask you who G. M. B. was?
A. Mr. George M. Brown.
Q. And C. O. B. was yourself, I take it?
A. That is right.
Q. And D. C. C., just to the right of your initials, or whatever those are?
A. That was Mr. Cale, vice-president.
Q. And who is A. W., following your initials?
A. Mr. Audenreid Whittemore.
Q. And L. R. W.?
A. Mr. L. R. Walker.
Q. And S. W. C.?
A. Mr. S. W. Chaffee.
Q. And R. M. N.?
A. R. M. Nelson.
Q. And what does "Copies sent Adkins & Jacobs" mean?
A. I assume those were our counsel.

Q. In the second paragraph of that letter, it says,
1678 "The questions you put in reference to the license conditions have been fully discussed by you with the president of our company," and so forth. Did that refer to you, Mr. C. O. Brown?
A. I don't think so, I think that referred to the company.
Q. Well, they would have to talk with somebody; who did they have in mind, do you know?
A. Mr. George Brown, in my opinion.
Q. I now show you Government's Exhibit 216 for Identification, which purports to be a copy of a letter written by Mr. C. O. Brown to the United States Gypsum Company under date of April 4, 1928, and ask if you can identify it?
A. I can identify the signature as mine.

Mr. STEFFEN. I offer Government's Exhibit No. 216 in evidence.

Mr. ADAMS. May I ask one question here?
Justice STEPHENS. Yes.

Mr. ADAMS. Is that an original that is being offered, or a copy?

Mr. STEFFEN. I think that is an original. He identifies it as his signature. It is an original, yes.

Mr. ADAMS. Thank you.

Justice STEPHENS. Is there any objection except the usual one?

1679 Mr. BROMLEY. No sir.

Justice STEPHENS. The letter is received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government Exhibit No. 216, was received in evidence.)

By Mr. STEFFEN.

Q. Do you know whose writing that is on the bottom, "Please make no reply"?

A. No sir.

Q. What are the initials?

A. It looks like S.H.A.

Q. Might it be S.L.A.?

A. I don't know, sir.

Mr. BROMLEY. It is Mr. Avery's writing.

By Mr. STEFFEN.

Q. Those are Mr. Avery's initials, S.L.A.?

A. Yes sir.

Q. I now show you Government's Exhibit 217 which purports to be a copy of Exhibit 216 which has just been introduced in evidence, and I ask you to identify those initials, if you can, at the top?

Justice STEPHENS. Where is that in this file?

Mr. STEFFEN. It is Item No. X-327. It follows this other one immediately. It purports to be a carbon

1680 copy of the letter just introduced, and I merely want to show that various members of the company were aware of it.

Justice STEPHENS. Thank you.

The WITNESS. Do you wish me to call the initials?

Mr. STEFFEN. Yes.

Mr. ADAMS. I object to any suggestion that these people were shown by this letter to be aware of anything. Their initials appear on the letter, and that is all.

By Mr. STEFFEN.

Q. Can you identify the initials?

A. Yes sir, I can identify them.

Q. Can you tell us whether it was the practice to circulate letters of this sort among the several members of the management?

A. Yes, at times.

Q. And what does this indicate?

A. It indicates that it was circulated to these men.

Q. And these men are who? Just name them, please?

A. Mr. D. C. Cale; Mr. George M. Brown; Mr. A. Whittemore; Mr. S. W. Chaffee; Mr. L. R. Walker; Mr. R. M. Nelson; and Mr. B. B. Watson.

Mr. STEFFEN. I offer Government's Exhibit No. 217 in evidence.

Mr. ADAMS. I object to it if it is offered as proof that a copy of this letter ever went to the men whose
1681 initials appear on it. I have no objection to it otherwise.

Justice STEPHENS. I think that objection goes to the weight of the document, Mr. Adams. The objection is overruled. Admitted in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 217, was received in evidence.)

Mr. STEFFEN. This concludes one branch of the testimony; may we have a few moments' recess?

Justice STEPHENS. We will take a recess of five minutes at this time.

(Whereupon, a short recess was taken, after which the hearing was resumed.)

1682 By Mr. STEFFEN.

Q. Mr. Brown, do you recall any further correspondence between Certain-teed and U.S.G. between the dates of April 4, 1928, and May 22, 1929, when the license agreement was signed, which you may have signed?

A. I don't recall any such letters.

Q. The letter of April 4 would seem to indicate that you were not going to take out a license with USG. Yet, in May, 1929,—May 22, 1929,—a license was taken out. I want to ask you some questions concerning that period of a year and a month, and particularly to find out what you know concerning the reasons why your company changed over.

First, I would like to direct your attention to sales conditions during that period. Are you able to tell us any-

thing concerning the price of gypsum board during that period?

A. Only open-edge. That was sold at a low price.

Q. Sold at a low price—what do you mean by that? Low with reference to what?

A. It was sold low with reference to closed-edge board.

Q. Was it sold at a different price in 1929 than it was in the beginning of 1928?

A. I don't remember that.

Q. You mean you don't remember whether the prices were changing in 1928?

A. No, sir; I don't.

1683 Q. Could you give us any idea at all as to whether there was price competition in 1928 and 1929?

A. It is my memory that there was price competition, but the trend, I don't remember.

Q. You don't remember whether the trend was up or down during 1929—are you sure of that, Mr. Brown?

A. I think it was down, but I am not positive.

Q. Do you know what the Beaver Products Company was selling board at in 1927, No. 1 board?

A. No, sir.

Q. Do you know whether they were changing their price in 1927 and 1928?

A. No, sir.

Q. I show you Government's Exhibit 218, which purports to be a memorandum from Warren Henley to Mr. Blagden, under date of December 13, 1927, and ask if you can identify Mr. Henley's initials there at the bottom of the letter?

A. I don't believe I am familiar enough with them to positively identify them.

Justice STEPHENS. Is that an original that the witness has, and are the initials in handwriting?

Mr. STEFFEN. That is right. Those are just the initials down at the bottom.

Justice GARRETT. Now what I have marked as Exhibit 218, is signed, "Warren Henley" in typewriting.

1684 Justice STEPHENS. That is right, but apparently the original has some initials at the bottom.

Justice GARRETT. I see.

Mr. STEFFEN. That circle at the bottom contains some initials.

By Mr. STEFFEN.

Q. Did you know Mr. Henley?

A. Yes, sir.
Q. For how long a period?
A. From about 1928 until I left the company.
Q. In 1937?
A. Yes, sir.
Q. Do those look like his initials or not?
A. I think they are his initials.

Mr. STEFFEN. I would like to offer Government's Exhibit No. 218.

Mr. BROMLEY. I object to it as incompetent because not sufficiently identified. I also make the usual objection to it; and in addition, I object on the ground that it is immaterial because it is not in furtherance of any conspiracy, and it seems to me that the latter objection is certainly good. Here is what looks like a memorandum relating to a conference among officials of the Beaver Products Company about what their sales policy should be in 1927. It seems to me that by no stretch of the imagination could it be said to be in furtherance of any illegal combina-
1685 tion such as is charged in the complaint, and therefore to be utterly immaterial to the charges in this suit.

Justice STEPHENS. Let the Court read it.

What is it offered for?

Mr. STEFFEN. It is not offered as a declaration of a coconspirator, but it is offered as having a bearing on the price situation in 1927, and establishing that prices were changing at that time.

Mr. BROMLEY. Well now, if that is the limited purpose for which it is offered, here we have a situation where they had Mr. Blagden on the stand as a witness, and Mr. Blagden is the gentleman to whom this letter is addressed, and they asked him no questions about it at all. Instead, they take a witness who had nothing to do with it, to-wit Mr. C. O. Brown, and attempt to get it in through him. It seems to me that under those circumstances the Court ought to be a little stricter in qualifying it on the ground of identification. If it is what it purports to be why wasn't Mr. Blagden asked about it so we could cross-examine him about it?

Mr. ADAMS. I have the further objection that it is not a proper method of proving anything with reference to price at that time.

Justice STEPHENS. Will you state again, Mr. Steffen, what you think it is relevant to? I don't quite understand.

Mr. STEFFEN. We offer it as a memorandum in which

Mr. Henley and Mr. Blagden are discussing prices,
1686 and it indicates that the price of board in 1927 was falling from $30 to $25, and we offer it for no other purpose.

As respects our failure to have Mr. Blagden identify it, that is simply a routine and rather minor matter. We never considered it necessary to have Mr. Blagden identify it.

Justice STEPHENS. First, on the subject of identification, let the Court ask the witness—do you recognize these as the handwritten initials of Mr. Henley, or do you not?

The WITNESS. In my opinion they are, your Honor.

Justice STEPHENS. I am not asking you about your opinion. Were you familiar with his initials?

The WITNESS. After this period, not at that time.

Justice STEPHENS. What contact did you have with him; how did you happen to see his handwriting?

The WITNESS. Correspondence, your Honor.

Justice STEPHENS. And based upon your correspondence with him, you do recognize these as his initials?

The WITNESS. Yes, sir.

Mr. STEFFEN. We have one other memorandum, I notice, here with Mr. Henley's initials on it.

Justice STEPHENS. We think, Mr. Bromley, your objection would have been well taken if the identification was insufficient, but inasmuch as the witness does apparently know these initials, it seems to us that it is not well taken as to the identification question; and we think the
1687 balance of your objection goes to the weight of the exhibit.

Mr. ADAMS. May I ask him one question as to identification? I don't think the witness is clear on it.

Justice STEPHENS. Yes.

Mr. ADAMS. Mr. Brown, is it your view here that these in your opinion are Mr. Henley's initials, or are you testifying as a positive fact that you now state that these are his initials? We want to know whether it is an opinion on your part or whether it is a positive identification by you.

Mr. STEFFEN. I think that is cross-examination, your Honor. There is always a measure of opinion in any identification, there has to be.

Mr. ADAMS. I asked the question because I honestly feel that the witness did not understand the purport of your Honor's last two or three questions. The witness first stated flatly that it was his opinion, and that is what I want

to get at, whether it is his opinion or whether he now testifies definitely from his own positive recollection that these are Mr. Henley's initials.

Justice STEPHENS. This isn't a question of recollection, but of recognition, Mr. Adams. We think it cuts too fine to make the objection. Every statement of a witness that a name or initial is—even if he states it in terms of a fact—an initial of someone else, is necessarily an inference and in that sense an opinion.

1688 Mr. ADAMS. I agree on that, but also I would like to know—in that sense I agree that your Honor can permit him to testify and perhaps receive the document—but I honestly don't know at this stage whether the witness is testifying to that kind of a factual opinion, if we might so describe it, or whether he is just venturing a speculation.

Justice STEPHENS. We think the answers of the witness to the Court's questions have made clear that he does recognize this on the basis of correspondence as the initials of Mr. Henley. Of course that is, as we all know, necessarily in a strict psychological sense an inference, but it is not an objectionable inference. Overruled.

By Mr. STEFFEN.

Q. I want to refer you, Mr. Brown, to paragraph 5 in which it says that there is "a decline in the market to a basis of $25.00 per thousand on No. 1 board in the $30.00 markets", and so forth. Can you tell us whether you remember that decline?

A. I would have no way of knowing about it because we were selling open-edge board and paying no attention to these things.

Q. Well, were you in competition with Beaver or not?

A. Yes.

Q. And would a price change on the part of Beaver have any bearing on your prices?

1689 A. We would find it out in the field possibly, but I would know nothing about this memorandum.

Q. That is right. Did you find out in the field that they were cutting prices from $30 to $25?

A. I don't remember on this specific date.

Q. Do you remember on any date? I merely want to get your general understanding on this matter.

A. Well, I have no memory of it except that prices of open-edge board were reduced during that period, as I recall it.

Q. By "that period", you mean what?
A. 1928-1929.
Q. And do you know what the prices of No. 1 closed-edge board were for the period prior to 1927 for two or three years?
A. No, sir.
Q. What do they mean by a "$30 market", do you know?
Justice STEPHENS. Which company was Henley with, refresh our recollection.
Mr. STEFFEN. He was with the Beaver Products Company, which was being taken over by Certain-teed within a month after this letter was written.
Mr. OLIVER. I object to that question asking this witness what he meant by that phrase.
Mr. STEFFEN. I want to know what his understanding is.
Justice STEPHENS. Let's hear the question.
1690 (Thereupon, the pending question was read by the reporter.)
Justice STEPHENS. Well, as the question is phrased it is objectionable. If the witness knows himself what was meant by a "$30 market" at that period of time, as a salesperson, he may state.

By Mr. STEFFEN.

Q. Will you answer the Court's question?
A. I do not know.
Q. Was there a usage of "$30 market" in the trade?
A. As I recall, closed-edge board sold at $30. Whether it was in this period or not, I don't recall, but I know nothing about special markets.
Q. Now what is the difference, if you know, between a No. 1 and a No. 2 board?
A. I don't know.
Q. Did you make a No. 1 or a No. 2 board at Certain-teed's Acme plant?
A. No, sir.
Q. What did you call it?
A. We just called it Certain-teed board.
Q. It was an open-edged board. Was it in competition with No. 1 or No. 2 board with a closed-edge, or do you know?
A. I don't know. It was in competition with gypsum board, that would be my memory.
1691 Q. Would it be in competition with the $30 board or the $25 board?

A. Both of them, I presume.

Q. Let me ask you if you know what National was selling board or plaster at during 1928.

A. No, sir.

Q. Do you know what the trade name of United States Gypsum board was during this period?

A. Sheet Rock.

Q. Did they have another name for another board that they sold during this period?

A. I don't remember.

Q. Did you ever hear of Crown board?

A. I don't remember.

Q. Would you know whether Crown board sold at the same price as Sheet Rock, if they made Crown board?

A. No, sir.

Q. I show you, then, Government's Exhibit No. 219, which purports to be a copy of a letter by Mr. Baker to Mr. Barrett, Mr. Baker writing under date of July 21, 1928, and ask you to look at the first paragraph and see if that refreshes your recollection.

Mr. ADAMS. As to what, please?

Mr. STEFFEN. As to whether the USG was making a board called Crown board, and as to the price of that board.

The WITNESS. It does not recall anything to me 1692 on Crown board.

By Mr. STEFFEN.

Q. Does the price "as low as $13" mean anything to you?

A. I don't remember what the prices were.

Q. Was that price higher or lower than the price mentioned by Beaver in the preceding memorandum of Mr. Henley's?

Mr. ADAMS. I object to that. That is a matter of arithmetic.

Justice STEPHENS. That is true, except that one of those exhibits is not in evidence, and the other is, and the record might properly show what the two sets of figures are. Counsel may state that, however, if he wishes to, for the record, if it is of any importance.

By Mr. STEFFEN.

Q. Does that refresh your recollection, Mr. Brown, as to whether prices may have been falling in 1928?

A. Well, I stated previously that in my opinion they were declining.

Q. I want now to show you Government's Exhibits Nos. 220, 221 and 222 ——

Justice STEPHENS (interposing). Has Exhibit 218 been offered?

Mr. STEFFEN. I believe so.

Justice STEPHENS. The objections were overruled, but I don't think the Court indicated any formal ruling on
1693 its introduction. It is received subject to the usual reservation as to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 218 was received in evidence.)

Justice STEPHENS. Do you wish this Exhibit 219, which was marked for refreshing recollection only, to continue bearing a number?

Mr. STEFFEN. It should be identified, yes, it may be sufficiently identified by a later witness to make it admissible.

Justice STEPHENS. Very well.

Mr. BROMLEY. May I remind your Honor that Exhibit No. 218 was not offered as a declaration? It is therefore my understanding that it is not in evidence against my client.

Mr. STEFFEN. It was offered only as indicating a price change about that time.

Justice STEPHENS. Then the reservation is withdrawn.

Mr. BROMLEY. As to Mr. Steffen's statement, our position is that it is no evidence as to price at all.

Justice STEPHENS. We think it may have some relevance and slight weight on the subject of an alleged price war.

Mr. FINCK. If your Honor please, I would like to make the same objection on behalf of National.

Justice STEPHENS. As to Exhibit 218?

1694 Mr. FINCK. Yes.

Justice STEPHENS. The record may show your objection.

Mr. JOHNSTON. If I may, if the Court please, I would like to state that I may want to object to it in the morning when I have had an opportunity to see it. Of course many of these exhibits we are not seeing at all down here. We were given, just before adjournment, a pad of proposed exhibits, but Exhibit 213, Exhibit 218 and Exhibit 219 and some others, are not in that bunch, and we have not seen them.

Justice STEPHENS. Mr. Berge told me Saturday that the exhibits proposed for one day were going to be submitted

to the defendants on the day before.

Mr. KNUFF. They were submitted on Saturday to Mr. Finck.

Justice STEPHENS. Why didn't you see them, Mr. Johnston?

Mr. JOHNSTON. I am just wondering, if the Court please, while we are on the subject, if one thousand proposed exhibits have been given to the Court, that is probably as many or more than will be offered these remaining eight days; and if one set is going to be given now for all the defendants the evening before, that means that all five or seven of us must, between the adjournment in the evening, and the convening of court the next morning, go through those and we are all living at different hotels scattered all over the city.

These exhibits must already be prepared. Why couldn't the Government give us these proposed exhibits in the same way that they are giving them to the Court?

1695 Justice STEPHENS. Mr. Johnston, the Court stated this morning that on each evening's recess the Court would, through Government counsel, let the defendants have the three copies of those exhibits which were submitted to the Court. So there will be four copies for the defendants.

Mr. JOHNSTON. I understand that, but that is not quite my point. My point is that they have already prepared this extra set that your Honors have. Now why do they want to wait until the evening before and hand out a few of those exhibits to us at a time? Why couldn't they let us have it in plenty of time before so we could pass it around among different counsel?

Justice STEPHENS. What about that, gentlemen?

Mr. STEFFEN. The answer is actually that we didn't have it prepared until very late on Saturday afternoon and it was a rush proposition even then. I would like to have the record also show, if it does not already, that we gave Mr. Adams a copy of most of these exhibits on December 1st.

Mr. ADAMS. Those are the ones that I turned over to Mr. Johnston, which he now has.

Mr. JOHNSTON. But that does not contain what you are offering.

Mr. STEFFEN. Not at the moment, that is correct.

Justice STEPHENS. The Court has used its very best efforts, gentlemen, to get some cooperation in this

1696 situation, including an offer this morning by the

Court to let counsel for the defendants have the files which are handed to the Court. The Court sees no objection at all to these exhibits being given to the defendants in substantial bulk as many days ahead as is possible for the Government to do so. The new rules certainly contemplate that there should be no "shooting from ambush", to use a term of the West. Each side is supposed to be advised with respect to the opposite side's case by interrogatories and the like, but I fear, Mr. Johnston, that the Court has exhausted its resources.

We cannot compel the Government, any more than we can compel the defendant, to print photostats if it hasn't got the money to print them. We have asked the Government and the Government has promised that it will get these exhibits to you as early as it can. If it still can't do that, using its best efforts, we will simply have to use the third alternative and adjourn. Do you wish an adjournment now to inspect this exhibit?

Mr. JOHNSTON. No; I don't want to interrupt the trial that way because I can have it overnight. I presume I will have the right to make a motion in the morning to strike it.

Justice STEPHENS. Yes, but it is preferable that we have all the objections to any one exhibit made at one time so they will be all together in the record.

1697 Mr. JOHNSTON. I would like to ask counsel for the Government this question. Do you not now have another set of these proposed exhibits that you are going to offer, just the same as those sets which you have given to the Court?

Mr. STEFFEN. I have a set that I am working with, yes, and that is all.

Mr. JOHNSTON. How about the set that you are going to let us examine overnight?

Mr. STEFFEN. Mr. Finck has it already, and he has had it since Saturday.

Mr. JOHNSTON. A thousand?

Mr. FINCK. No, I haven't a thousand, I just have forty.

Mr. STEFFEN. That thousand up there were the first forty-three exhibits which were introduced on the first day. They have now been all photostated at the Court's request, and are available, three full sets.

Mr. JOHNSTON. I suppose there is nothing much else that either the Court or counsel can do. I do want to say this, that the Court's remarks about "shooting from ambush" gets down to language that I can understand, coming

from the West, but I just don't like to be shot at that way, I like to have an equal chance.

Justice STEPHENS. Will you hand this Exhibit 218 to Mr. Johnston, Mr. Reporter, and you take five minutes now to look at it and then you won't be shot at from ambush.

1698 Mr. JOHNSTON (after examining Exhibit No. 218). I think Mr. Bromley's objection is sufficiently broad.

Justice STEPHENS. The objections to 218 are overruled. We think they go to the weight. It doesn't seem to us that the statement in there is of very much weight, Mr. Steffen, but it may tend to show a price war through the statements of one of the predecessors in interest of one of the defendants. Your objections are therefore overruled, Mr. Finck and Mr. Johnston.

While we are on the subject of these exhibits, couldn't you gentlemen for the Government turn these proposed exhibits for tomorrow—and by "tomorrow" I mean each tomorrow—over to the defendants at four o'clock, when we adjourn, so that they can, before they disperse to their respective hotels, look through them?

Mr. STEFFEN. Are you referring to the ones that the Court has?

Justice STEPHENS. Those that you were intending to turn over to them.

Mr. STEFFEN. We have turned them over to Mr. Finck.

Justice STEPHENS. I am talking about the future, each afternoon.

Mr. STEFFEN. Each afternoon we propose to do that. As to this witness, the exhibits have been in the hands of defense counsel since December 1st, in part, and since last Saturday, in full.

1699 Justice STEPHENS. Thank you.

While we are interrupted on the subject of exhibits, will the court reporter hand one of these to counsel for the Government and one to counsel for the defendants? These are charts which I have had prepared by my law clerk, which somewhat comprehensively show the alleged history and relationship of these corporations, and the dates when board was commenced to be manufactured.

They are made up from the statements in the complaint.

We would like to have counsel for the Government and the defendants look them over during the evening, if possible, and state whether or not they think they are correct.

If so, they are a great aid to us in listening to this examination, because we can picture in that way, much more easily than otherwise, the relationship of the companies and the dates when they were incorporated, and when they commenced making board, and so on.

You may proceed, Mr. Steffen.

By Mr. STEFFEN.

Q. Can you give us any idea, Mr. Brown, of the price of your open-edge board in the early part of 1929 as respects the price in 1928?

In my opinion it was lower, but the actual price I have no memory of.

Q. I want to show you Government's Exhibits Nos. 220, 221, 222 and 223. Please look at just the first
1700 one, No. 220, and see if that refreshes your recollection concerning the price of board in the early part of 1929?

Justice STEPHENS. What is Exhibit 220?

Mr. STEFFEN. That purports to be a competitive date record, your Honor, under date of March 1, 1929, with the name of Mr. Gallagher at the top.

By Mr. STEFFEN.

Q. Does that refresh your recollection at all concerning the prices of your board in 1929?

A. No, sir.

Q. Do you know who Mr. Gallagher is?

A. I assume he is the sales manager of United States Gypsum Company, or was at the time.

Q. Did you know him?

A. Yes, sir.

Q. Did you know the dealer mentioned there, A. H. Ringladen?

A. No, sir.

Q. Did you sell in the Hazleton, Pennsylvania, market, do you remember?

A. We sold in Pennsylvania, I can't specify the town.

Q. Could you tell us as to your plaster prices in 1929? At what price was plaster selling?

A. I don't remember.

1701 Q. Would you give us an idea of how your price for wallboard compared with the rock lath price? I don't mean wallboard, I mean your lath price as compared with the USG rock lath price, in 1929.

A. I think it was lower.

Q. Can you tell us whether the prices in early 1929 were lower than they were in the beginning of 1928? Does this refresh you at all in that regard?

A. No, sir.

Q. Well, Mr. Brown, let's change the subject.

Your company did take out, I think we have brought out, a license with USG on May 22, 1929. You have examined the agreement?

A. Yes.

Q. Were you present at the meeting when that agreement was signed?

A. No, sir.

Q. Did you have any discussions with Mr. George Brown, who signed the agreement, concerning why he signed it?

A. None that I recall.

Q. Do you know why he signed it?

A. No, sir.

Q. Do you recall, Mr. Brown, any meetings at the Certain-teed plant between officers of your company and officers of either Ebsary or National or any of the other companies, concerning the possibility of taking out a
1702 license, during this period between April 4, 1928, and May 22, 1929?

A. I didn't attend any such meeting.

Q. Are you familiar with whether there were any such meetings during that period at your offices?

A. None that I know of.

Q. Did you talk with Mr. Walker during this period concerning any possible meetings that were held?

A. I don't recall any such conversation.

Q. I want to show you Government's Exhibit No. 203, and ——

Mr. BROMLEY (interposing). That is for identification only.

Mr. STEFFEN. I think you are right, that is for identification only—and I will ask you to examine that signature. Are you familiar with that signature?

The WITNESS. I am not familiar with Mr. Black's signature.

By Mr. STEFFEN.

Q. Did you know Mr. Black?

A. I have met him.

Q. Now if you will refer to the third paragraph on the

first page it says that, "After the meeting"——

Mr. ADAMS (interposing). I respectfully object to this use of the document. There is no question pending as to whether the witness has any recollection.

Mr. STEFFEN. He has stated that he has no recollection concerning any such meeting.

1703 Mr. ADAMS. Then I think his attention should simply be directed to the letter and he should be asked if it refreshes his recollection on any specific point. I don't think that counsel should read the letter to the witness as he started doing. The letter, as counsel has stated, is not in evidence. This witness has stated that he cannot identify the signature.

By Mr. STEFFEN.

Q. I want to ask you, Mr. Brown, whether the last paragraph particularly serves to refresh your recollection, that is the last paragraph on the first page of the letter.

A. On the first page?

Q. Yes.

A. I don't recall anything about it. The Mr. Brown referred to is evidently George M. Brown.

Q. It did not refer to you?

A. No, sir.

Q. Do you recall anything concerning a meeting at which Mr. Walker and Mr. Ebsary were present?

A. No, sir, I do not.

Q. Do you ever recall having met with Mr. Ebsary upon the matter of the license?

A. No.

Q. Did you know Mr. Ebsary?

A. Yes, sir.

Q. Do you know Mr. Lenci?

1704 A. Yes, sir.

Q. Did you ever talk with Mr. Lenci?

A. No, sir, not that I remember.

Q. Did you know Mr. Haggerty?

A. I met Mr. Haggerty once. He died shortly after I became acquainted with him.

Q. Did you ever have any discussion with him concerning the possibility of taking out a license agreement with USG?

A. No, sir.

Q. Following the agreement in 1929, May 22, 1929, when the license agreement was signed, did you have any

correspondence with USG concerning any other license agreements?

A. I don't recall any correspondence. Discussions developed later on.

Q. Was there a proposal made concerning a so-called "bubble" system?

A. Yes, sir.

Q. I show you Government's Exhibit No. 224, which purports to be a letter from Mr. Avery to Mr. George M. Brown under date of May 29, 1929. Can you identify that letter, please?

A. In what way, sir?

Q. Do you know the signature?

A. It is Mr. Avery's signature; I would say.

Q. Do you know the initials at the top?

1705 A. Yes, sir.

Q. Did you see the letter?

A. The initials would indicate that I did not, due to the fact that they aren't scratched off.

Mr. STEFFEN. I offer Government's Exhibit 224.

Justice STEPHENS. Let the Court read it.

Is there any objection?

Mr. BROMLEY. None except the usual one, sir.

Justice STEPHENS. Received in evidence, subject to the reservation with respect to declarations of alleged co-conspirators.

(The document marked Government's Exhibit No. 224 was received in evidence.)

By Mr. STEFFEN.

Q. Do you recall, Mr. Brown, when you first heard about this "bubble" system?

A. No, sir, I don't recall the date.

Q. Would it have been on or about this time, would you say?

A. Sometime in 1929, possibly at a later date, when I heard of it, I think.

Q. I would like now to show you what has been marked for identification as Government's Exhibit No. 225, which purports to be a letter from Mr. George Brown to Mr. Avery under date of June 4, 1929.

1706 We skip one in the exhibits that are before your Honors. We are skipping the memorandum and offering the letter which follows.

Justice STEPHENS. Just a minute, let me get this correct. All right.

By Mr. STEFFEN.

Q. Can you identify that Exhibit No. 225, Mr. Brown?
A. In what way, sir?
Q. Do you know the signature?
A. Yes, it is Mr. Brown's signature.

Mr. STEFFEN. I offer Government's Exhibit No. 225.

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked Government's Exhibit No. 225 was received in evidence.)

Mr. STEFFEN. Our next exhibit, your Honor, will take I think a considerable amount of questioning.

Justice STEPHENS. Very well, we will take an adjournment at this time for the afternoon.

(Thereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a. m., Tuesday, December 14, 1943.)

1708 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., TUESDAY, DECEMBER 14, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and

Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

1713 Thereupon, CLAUDE OLIVER BROWN, the witness on the stand at the time of adjournment, resumed his testimony as follows:

DIRECT EXAMINATION (Resumed).

Justice STEPHENS. Mr. Johnston, did you have a satisfactory evening with the exhibits?

Mr. JOHNSTON. Yes, if the Court please, I did. I went through those. I had Judge Garrett's set, and I have examined all that are in that bunch.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. Mr. Brown, I would like to take you back to your letter of March 23, 1928, Exhibit No. 214, and call your attention to the next to the last paragraph on the second page.

Justice STEPHENS. What is the number of this exhibit?

Mr. STEFFEN. Exhibit 214.

By Mr. STEFFEN.

Q. I want to ask you one or two questions concerning how gypsum board was priced to the trade ——

Justice JACKSON (interposing). Which paragraph did you call attention to?

Mr. STEFFEN. The next to the last paragraph on the second page.

Justice JACKSON. The last one?

1715 Mr. STEFFEN. The next to the last.

By Mr. STEFFEN.

Q. My question is—how was gypsum board sold to the trade, or how was it priced to the trade during 1927, 1928 and 1929. What I am getting at is this: Did you sell on a delivered price or an f. o. b. mill price?

A. I think we sold on a delivered price.

Q. Would you say that was customary in the gypsum industry?

A. I don't know, at that period.

Q. But your recollection, you say, is that you did sell on a delivered price?

A. That is my memory.

Q. That your company did?

A. Yes.

Q. Do you know whether there was any custom in the industry during that period——

A. (Interposing.) I don't.

Q. (Continuing.) To sell either on a delivered or an f. o. b. mill price?

A. I don't, sir.

Q. When you say you sold on a delivered price, what does that mean?

A. The mill price plus freight.

Q. And the freight would be from what point?

1716 A. From the plant producing the material.

Q. For example, if you were selling from your Acme plant in Texas, where would the freight be calculated from?

A. It would be calculated from Acme to destination, that is my memory.

Q. And when you took over Beaver, I think you testified you acquired a North Holston, Virginia, plant; is that correct?

A. Yes, sir.

Q. And if you were selling from North Holston, you would calculate your freight from North Holston to point of destination, is that your testimony?

A. That is my memory.

Q. And the same thing would be true, for example, from your Akron, New York, plant?

A. Yes, sir.

Q. Now you testified, I think, that the Certain-teed Products Corporation sold its other products, asphalt shingles and things of that character, to dealers and also through distributors, is that right?

A. Yes.

Q. Will you tell us what the business of those dealers and distributors consisted of?

A. Well, a dealer is usually classified as a concern selling at retail to consumers.

1717 Q. And what lines would your dealers generally carry?

A. Almost every kind.

Q. Well, will you specify them?

A. Such as lumber yards, hardware stores, general stores.

Q. Would that include masons' supplies, or plasterboard and plaster?

A. Lumber dealers would handle that type of product.

Q. And among your Certain-teed dealers were lumber dealers, is that correct?

A. Yes, sir.

Q. And did your company, to your knowledge, continue selling your asphalt shingles and other products to distributors, granting them a commission, as you recite here in the second page of Exhibit No. 214 in the next to the last paragraph?

A. Yes, sir.

Q. And your testimony, I think, yesterday was that you did not recall that your company sold gypsum board to distributors on a commission basis?

A. That is right.

Q. Was that testimony having to do with the period after 1929 or before 1929?

A. Both, is my memory.

Q. Are you clearer on one period than you are on the other?

1718 A. No, sir.

Q. Could you say what the situation was when you left the company in 1937, as to whether you sold gypsum board to distributors on a commission basis?

A. To my memory, we did not at that time.

Q. You are pretty clear on that?

A. Yes, sir.

Q. Are you equally clear on the period prior to 1929?

A. I am not positive, but I don't think we ever did.

Q. That is your best recollection at the moment?

A. Yes.

Q. To refresh your recollection, yesterday you identified a letter from Mr. Avery to Mr. Brown under date of May 29, Government's Exhibit No. 224, and also Government's Exhibit No. 225, which was a letter by Mr. George M. Brown addressed to Mr. Avery, under date of June 4, 1929. I now want to show you Government's Exhibit No. 226, which relates to the same matters, and purports to be a memorandum from Mr. George M. Brown under date of June 4, 1929. I will ask you to state whether you can identify that as a memorandum which you saw?

Justice STEPHENS. What is that number, Mrs. Gillette?

Mrs. GILLETTE. No. 226.

Mr. STEFFEN. It is Item X279, dated June 4, 1929.

1719 It just precedes the letter of June 4, which was Exhibit 225.

By Mr. STEFFEN.

Q. I want to ask you some questions on it, if you have finished reading it, Mr. Brown.

A. I haven't quite finished yet.

Q. Thank you.

A. All right, the question?

Justice STEPHENS. Just a minute, let the Court finish reading it.

The WITNESS. Excuse me.

Justice STEPHENS. Go ahead.

By Mr. STEFFEN.

Q. I would ask you, Mr. Brown, whether you are familiar with the writing at the top of the memorandum, the word "Whittemore"?

A. I would say that was his writing.

Q. Is that Mr. Whittemore's writing, "Looks OK to me"?

A. "'Looks OK to me" is Whittemore's writing.

Q. And the initials "AW" are also his?

A. Yes.

Q. Do you know who wrote "Whittemore", which is scratched out, at the top?

A. I think Mr. Brown wrote it.

Q. That would be Mr. George M. Brown?

A. Yes, sir.

1720 Q. Do you recall having seen this memorandum?

A. No, sir.

Mr. STEFFEN. We offer Government's Exhibit 226 in evidence.

I will point out to Your Honors that the Item No. X279 indicates that it was taken from the files of the Certain-teed Company. The initials "AW" are the initials of a Vice President of the company, who says that it looks OK to him. The writing "Whittemore" is identified as being George M. Brown's writing. That is, he addressed it, apparently, to Mr. Whittemore, and Mr. Whittemore acknowledged it.

Mr. ADAMS. May I ask a question?

Justice STEPHENS. Yes.

Mr. ADAMS. Do you know who prepared this memorandum?

The WITNESS. No, sir.

Mr. ADAMS. I object on the ground that there is no proper foundation.

Justice STEPHENS. The objection is overruled. We think it has been sufficiently identified. It may be admitted in

evidence, subject to the usual reservation as to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 226, was received in evidence.)

By Mr. STEFFEN.

Q. Mr. Brown, you have read this memorandum. It has to do with Bundling License and a proposed
1721 license under the Bubble Plan.

Were you familiar with either of those matters at or after this time, in 1929?

A. I was familiar with them during that period. I can't say whether it was before or after.

Q. That is, you don't know whether it was before or after June 4, 1929?

A. I can't say whether it was before or after.

Q. But on or about June 4, 1929, you were familiar with the matter?

A. Yes, sir.

Q. Do you recall whether your company took out a license covering the so-called Bubble Plan?

A. It eventually did.

Q. Do you know the date, roughly?

A. I don't remember the date.

Q. Do you know who signed the contract?

A. I think Mr. Brown did, Mr. George Brown.

Q. Who else, for your company, would you know?

A. I wouldn't know who the co-signer was.

Q. I would like to show you, just for the purposes of refreshing your recollection on dates, the agreement which you said was eventually signed by your company, and ask you to examine it so that we can get the period——
1722 Justice STEPHENS (interposing). Is there any dispute about that date?

Mr. BROMLEY. No, sir.

Justice STEPHENS. Let it be stipulated. It will save time.

Mr. BROMLEY. I am not clear whether you are talking about the bubble license or the bundling license.

Mr. STEFFEN. The bubble license.

Mr. BROMLEY. I will stipulate that it was ——

Mr. STEFFEN (interposing). October 15, 1929.

Mr. BROMLEY (continuing). Executed on October 15, 1929.

Justice STEPHENS. Thank you, gentlemen.

Mr. STEFFEN. Do you stipulate that it was signed on that date, or signed as of that date?

Mr. BROMLEY. I thought it was executed on that date.

Mr. STEFFEN. For my present purposes, October 15, 1929, establishes the date.

By Mr. STEFFEN.

Q. Would that be a probable or possible date, according to your recollection, Mr. Brown, October 15, 1929?

A. Well, I have no memory on the date. I assume so, it is during that period.

Q. Do you recall whether you were present when that October 15, 1929, agreement was signed?

1723 A. I don't think I was.

Q. Now we will have some questions concerning the period between June 4, 1929, or thereabouts, and October 15, 1929.

I think you have testified that you were in Chicago at some time during that period?

A. Yes.

Q. Could you tell the Court how many times, roughly?

A. No, sir. It might have been a couple of times.

Q. Well, give us your best recollection?

A. Two or three is my best memory.

Q. Two or three times?

A. Yes, sir.

Q. Can you give us some idea of the circumstances under which you went out in the first case, to the first meeting?

A. No, I can't specify any particular meeting, as to details.

Q. I don't ask you at the moment as to the meeting. I want to know what your instructions were, or what your conversation with Mr. Brown, or whoever you talked with, may have been, when you went out to Chicago to the first meeting?

A. I don't know.

Q. Now, Mr. Brown, did you just put your hat on and walk out to Chicago?

1724 Mr. ADAMS. I object to that, Your Honor. The witness has testified honestly that he does not recall. This is not a proper way to probe his recollection. If counsel has something with which he can refresh his recollection, I think he should do so, and not insinuate, as he apparently is doing, that the witness is not telling the truth.

Justice STEPHENS. Well, of course, Government counsel

can't cross-examine his own witness, but the Court interpreted that more as a pleasantry than otherwise.

Mr. STEFFEN. It was.

Mr. ADAMS. I will take it that it was, Your Honor, and I will be happy to accept it as such.

By Mr. STEFFEN.

Q. I want you, Mr. Brown, to consider very carefully what your instructions were, and what your conversation, if any, was, before you went out to Chicago?

A. I couldn't possibly remember.

Q. Now can you tell us what your duties were to be out there?

A. I don't know what I was going on, at the meeting that you are referring to.

Q. To any meeting at all.

A. I could have gone to a gypsum meeting, an industry meeting.

Q. I am asking you with regard to the bubble license and the bundling license negotiations.

1725 A. That is the first I understood that, sir.

Q. I am sorry.

A. The only instructions I had were to go out there and listen for Mr. Brown, and report back to him.

Q. You speak of Mr. George M. Brown?

A. Yes, sir.

Q. And did you talk with Mr. Whittemore before you went out?

A. I don't recall any conversation with Mr. Whittemore.

Q. Did Mr. George M. Brown outline to you what his ideas were concerning the negotiations?

A. I don't remember any such outline.

Q. Will you tell the Court in detail, then, just what you understood your instructions were?

Mr. ADAMS. I respectfully object to that. I think he should state what the conversation was, and I think it should be placed with reasonable certainty, so that we can examine him on it.

Mr. STEFFEN. Your Honor, on that objection that Mr. Adams has been continually making, if the witness will answer in general we will get down to the specific and give them a full opportunity to cross-examine. I would like to ask, as a preliminary matter, what instructions he received from Mr. Brown.

1726 Justice STEPHENS. The objection is overruled.

The WITNESS. I don't see how I can elaborate on what I have just said.

By Mr. STEFFEN.

Q. Let me ask you this: Did you look at the files before you went out?

A. I don't remember that.

Q. Did you take any papers out with you?

A. If any, I don't recall them.

Q. Can you recall the first meeting you had out there, and the place of the meeting? I don't ask for the time, at the moment.

A. I can't remember the place, I think it was some hotel.

Q. But you do remember that it was probably at some hotel?

A. That is my memory, yes.

Q. And I would like now to ask you who was present? This was the first occasion on which you were out to negotiate concerning the bubble license agreement and the bundling license agreement, and to report back, as you said, to Mr. George M. Brown.

A. I can't testify who was present. The United States Gypsum Company was present.

1727 Q. Take it slowly and tell us in detail, I want you to remember as carefully as you can. One was the U. S. Gypsum Company. Tell us who was present for the U. S. Gypsum Company?

A. I think Mr. Avery was there.

Q. Mr. Sewell Avery?

A. Yes.

Q. Who else?

A. Mr. MacLeish, as I remember.

Q. Well, who else was present?

A. Mr. Henning might have been present.

Q. He was from what company?

A. The U. S. Gypsum Company.

Q. Who else was present?

A. I can't testify positively.

Q. Do you know Mr. Knode?

A. Yes, I know Mr. Knode.

Q. Could you say whether he was present at this first meeting?

A. I couldn't say for sure.

Q. Was there a representative from the Ebsary Gypsum Company there?

A. I can't remember that.

Q. Can you remember that there was no representative of the Ebsary Gypsum Company there?

1728 A. No, sir.

Q. Did you know Mr. Ebsary?

A. Yes, sir.

Q. Mr. George Lenci?

A. Yes, sir.

Q. Do you know who their counsel was?

A. I think it was a Mr. Rippey, or something like that.

Q. Do you recall his having been present at this meeting?

A. I think they were, but I am not positive.

Q. What we want is your recollection. We realize this was back in 1929. Give us your best recollection. You think that Judge Rippey was there, but you are not positive?

A. No, sir.

Q. Would you say the same with regard to Mr. Ebsary or Mr. Lenci?

A. I think Mr. Ebsary was there. I have no memory of Mr. Lenci at all.

Q. Now who, if anyone, was there from National?

A. I don't remember that.

Q. Did you know Mr. Baker?

A. Yes, sir.

Q. Was he there, perhaps?

A. He might have been.

Q. Did you know Mr. Finck?

1729 A. Yes, sir.

Q. Was he there?

A. He possibly was, if Mr. Baker was there.

Justice STEPHENS. Are you remembering, or are you telling what you think was probable?

The WITNESS. I am saying what is probable, Your Honor. I can't remember.

Justice STEPHENS. You are being asked for your recollection.

Mr. BROMLEY. I move to strike out both the answers then, about Finck and Baker.

Mr. STEFFEN. We want, Mr. Brown, not to have you give us the probabilities, but recognizing that a long period of time has elapsed, we are wanting you to give us nonetheless your best recollection at the moment.

Justice STEPHENS. The answers may go out.

Mr. BROMLEY. May the answers with respect to Ebsary, Lenci, and Rippey likewise be stricken?

Justice STEPHENS. They may be stricken.

Please understand, Mr. Brown, that the Court doesn't expect the impossible of you. If you can't remember, just say so. Don't speculate or give your reasoning as to who might have been there. Counsel can argue that to the Court, you see. All we want is your recollection.

The WITNESS. Yes, sir.

1730 Justice STEPHENS. If you don't have any recollection, frankly say so.

By Mr. STEFFEN.

Q. I would like to reask the question with regard to Mr. Ebsary and ask what your recollection is as to whether either Mr. Ebsary or Judge Rippey was present? I want your recollection, not the probability.

A. I don't know.

Q. Do you recall them having been present at some one or more meetings at which you were present?

A. I recall their having been present at some meeting.

Q. And do you recall Mr. Baker and Mr. Finck as having been present at some one or more meetings in Chicago during this period, at which the bubble license agreement was under consideration?

A. They attended some meetings I attended.

Q. Now was there a representative of the Universal Gypsum Company present at any of these meetings you attended?

A. My answer would be the same as in the other cases, I don't know.

Q. Well, in the preceding case you said that Mr. Baker and Mr. Finck were present at one or more of the meetings. Can you say the same with regard to any representative of Universal?

A. Yes, they attended some meetings.

1731 Q. Who do you have in mind?

A. Mr. Holland.

Q. Mr. Eugene Holland?

A. Yes.

Q. Was there anyone there from the American Gypsum Company, that you remember?

A. No, sir.

Q. Was there anyone there from the Kelly Plasterboard Company?

A. I don't remember anyone.

Q. Do you know Mr. Stephen Kelly?

A. I have just met him, that is all.

Q. How about the Niagara Gypsum Company, were they represented at any one of these meetings at which you were present?

A. I don't remember.

Q. Do you know Mr. Reeb of Niagara?

A. I have met him.

Q. Was he present at any one of these meetings, that you remember?

A. I don't remember him.

Q. How about the Atlantic Gypsum Company, did you know Mr. Fuller?

A. Yes, sir.

Q. Was he present at any one of these meetings, as you remember?

1732 A. He attended some of the meetings.

Q. Did you know Mr. Neale?

A. Yes, sir.

Q. Was he present at one or more of these meetings at which you were present, in the summer of 1929?

A. I don't know about Mr. Neale.

Q. You don't recall?

A. No.

Q. Do you know who Mr. Neale was?

A. I think he was their Sales Manager.

Q. That is the Atlantic Gypsum Company's Sales Manager?

A. Yes, sir.

Q. Was there anyone out there at the first meeting, that you recall, from Certain-teed, other than yourself?

A. I think I was the only representative.

Q. And at subsequent meetings, do you recall any other person from Certain-teed having been present?

A. I don't recall anyone at the meetings I attended.

Q. I now show you, Mr. Brown, Government's Exhibit No. 227, which purports to be a memorandum, or rather an inter-office communication between Mr. Whittemore and Mr. Van Hagan under date of June 11, 1929, to which is attached a memorandum dated June 6, 1929, and I want to ask you to read it first, and then I will have some questions.

1733 Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. I want to call your attention, Mr. Brown, to the initials, "C. O. B.", up at the top of Government's Exhibit

No. 227. Are those your initials? They are right at the top of the first page.

A. Yes. It was almost rubbed out, and I couldn't see it.

Q. Could you say who wrote them?

A. Mr. Whittemore, I would say.

Q. And what does the scratch through them signify?

A. It shows that I saw it.

Q. Is this a usual form of interoffice communication? I am asking as to the form.

A. You mean Mr. Whittemore's letter to Mr. Van Hagan?

Q. Yes.

A. Yes, sir.

Q. How do you describe it?

A. An interoffice letter.

Q. Letter or communication?

A. Yes, sir.

Q. Is that the usual form?

A. Yes.

Q. And I think you have testified as to who Mr. Van Hagan is, but will you state it again, please?

1734 A. He was manager of Gypsum Production.

Q. And Mr. Whittemore was senior Vice President?

A. Yes.

Mr. STEFFEN. We offer Government's Exhibit No. 227 in evidence.

Justice JACKSON. That includes the attached memorandum?

Mr. STEFFEN. Including the attached memorandum.

Mr. ADAMS. May I ask a question?

Justice STEPHENS. Yes.

By Mr. ADAMS.

Q. Mr. Brown, was the memorandum attached to this memorandum of Whittemore's when you saw it back in 1929?

A. I don't remember that.

Q. As far as you are concerned, the first paper indicates that you saw that, because your initials are on it and are scratched out; is that correct?

A. Yes, sir.

Q. You now have no idea whether the second 2 pages were attached then or were not, is that correct?

A. I couldn't swear that they were.

Mr. STEFFEN. Could you swear that they weren't, Mr. Brown?

The WITNESS. No, sir.

Mr. STEFFEN. I want to call Your Honor's attention to the fact that the item numbers indicate—X-273 and X-274
—that they were attached, and one follows the
1735 other in sequence. I also want you to note that the words "We are attaching copy of memorandum made by C. O. Brown", appear right in the first paragraph of the memorandum; and when Mr. Brown struck out the initials "C. O. B.," in indicates that he had seen that; and the probabilities are, although his recollection is now vague, that he saw the attached memorandum.

Mr. ADAMS. And may I make the further statement, Your Honor—if Your Honor cares to examine the original exhibit, you will see that there are paper clips that go through here, and you will also see that at some time there were other paper clips which have been removed, and some other document may or may not have been attached to this document, I don't know. The witness says he doesn't know whether this was the paper that was attached or whether it was not attached. I would like, if I may be permitted to, to hand this up to Your Honor so you can see exactly what I am talking about.

Justice STEPHENS. Hand it up.

(Document handed to the Court.)

Mr. STEFFEN. I would like to ask a question in that connection.

Did you or your law office, or the Certain-teed people, photostat these copies that are marked with "Item No.," before they were turned over under subpoena?

Mr. ADAMS. We did a lot of them.

1736 Mr. STEFFEN. Could you say how many?

Justice STEPHENS. I didn't hear that.

Mr. STEFFEN. Mr. Adams has just stated that on the Item No. exhibits, they photostated a large number of them before they were turned over to the Government under subpoena, and I may call Your Honors' attention to the fact that in photostating, of course, it might be possible to disengage the clips. But the Item Numbers show a direct sequence.

Mr. ADAMS. I would like to point out, Your Honor, two things: First, I would like to point out that this, from our view, may or may not have been the memorandum attached originally. We have no way of knowing. Secondly, this memorandum is supposed to refer to a meeting. The memo-

randum doesn't say anything about a meeting. It may be that this is an entirely different memorandum.

Now I wish to suggest, in connection with that, that Mr. Brown is extremely vague, necessarily, as to what took place at these meetings, or when they took place, or who was present at them. Now we can't say honestly that this is a memorandum about this meeting. We can't say that it has been identified by him as a memorandum that he made about the meeting.

Justice GARRETT. I don't think he has been asked about that, has he?

Mr. STEFFEN. He hasn't been asked at all. And I want to point out the inaccuracy of Mr. Adams' present
1737 remarks.

Justice STEPHENS. You needn't reply. We have to deal with probabilities, Mr. Adams. It may be, it is possible, that this memorandum wasn't attached to the letter, but we think the probabilities are sufficiently shown to warrant the Court concluding that the two items are identified.

The objection is overruled, and the exhibit is received.

(The document referred to, marked as Government's Exhibit No. 227, was received in evidence.)

Mr. STEFFEN. May I add one thought? The first sentence there says this is a "copy of memorandum made by Mr. C. O. Brown after the meeting at Chicago." It doesn't purport to be about the meeting necessarily, it doesn't say that it is.

Mr. BROMLEY. May the record show we make the usual objections?

Justice STEPHENS. Yes, it is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. STEFFEN. Would it be convenient to take a short recess at this time?

Justice STEPHENS. Yes, we may have a recess now of five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

1738 Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. I would like, Mr. Brown, to have you look at Government's Exhibit No. 227, please, and particularly the first paragraph of the memorandum dated June 6, 1929. Could you tell of the situation with regard to the bubble

patent or patents at the time that this memorandum was written?

A. It was stated in this memorandum ——

Q. (Interposing.) I would like your recollection, if you have one.

A. Yes, sir. My recollection is exactly the same as this, about the Rice situation, and so forth.

Q. Now will you refer to the next to the last paragraph on the first page of that memorandum, beginning, "Some things are now in the license that were brought up", and so on, and state what that situation was?

A. I don't know what the reference is to "Some things are now in the license that were brought up." The USG did say they would extend any improvements that were later developed.

Q. Was there any discussion that you remember concerning whether USG was making bubble board at any of its plants at this time?

A. It is my memory that they were.

Q. Had you seen bubble board out on the market in your capacity as sales manager?

1739 A. I don't say I had seen any of it, but I had heard of it, due to the fact of its being a lighter-weight board.

Q. Was it being advertised at this time?

A. It was being talked by word-of-mouth at least.

Q. At about this time, June 6?

A. Yes, sir.

Q. I want to call your attention to the date, June 26, appearing near the end of the fourth paragraph. Do you recall whether there was a meeting held later, on or about June 26?

A. I don't remember.

Q. I think you testified that there were meetings at subsequent times?

A. Yes, sir, but the dates I am not positive of.

Q. I now show you Government's Exhibit No. 228—I am skipping one exhibit—which purports to be a memorandum, dated July 3, 1929, with your name, C. O. Brown, vice president, appearing at the end, typewritten. I would like to ask you to examine that carefully and then I will ask you some questions.

Now I would like to ask you, Mr. Brown, if you can identify the initials at the top of Government's Exhibit No. 228.

A. Yes, sir, those are Mr. George M. Brown's initials.

Q. Can you say whether that is his handwriting, "O. K. to sign up"?

A. Yes, sir.

1740 Q. And the initials on the left margin are whose?

A. Mr. A. Whittemore's.

Q. Now turn the page and state, if you know, who made the interpolations in the writing?

A. I made them.

Q. Is that your handwriting?

A. Yes, sir.

Q. Is this your memorandum, this memorandum of July 3, 1929?

A. Yes, sir.

Mr. STEFFEN. We now offer Government's Exhibit No. 228 which has been beautifully identified, and in that we include the attached memorandum by Mr. Chaffee, which is identified in two ways.

It is identified by the opening sentence in the memorandum of July 3d where it states, "Attached is letter from our attorney, Mr. S. W. Chaffee, outlining certain legal reasons why it might not be desirable to sign these License Agreements." His memorandum outlines certain legal reasons why it might not be desirable.

And the second matter of identification Mr. Adams put on himself, or his firm did, and that is "Item No. X-270" which appears on the memorandum of July 3d. It also appears exactly the same on the Chaffee memorandum, Item No. X-270. You will also note that there is a little number on top of each page, 1, 2, 3, 4 and 5. Those

1741 numbers are usually put on when they are sent out for photostating, and Mr. Adams told the Court that they had a large number of these matters photostated for their own purposes before they were submitted under subpoena.

Mr. ADAMS. I object to the inclusion as part of this exhibit of Mr. Chaffee's letter to Mr. Brown. It was stated yesterday that Mr. Chaffee was counsel for the company. The memorandum of Mr. Brown, dated July 3d, states that there is attached a letter of Mr. Chaffee outlining certain legal reasons why they should not enter into the license agreement, and the memorandum itself, a most casual inspection will show, is a product of a lawyer's careful study. It seems to us that it is clearly a privileged communication.

There is no doubt that Mr. Chaffee was their lawyer, there is no doubt that this communication was something which dealt with a legal matter between attorney and

client. The cases are clear that a communication in writing, as well as an oral communication, from attorney to client, comes within the privilege. It is not waived, and we assert it on behalf of the Certain-teed Products Corporation.

Justice STEPHENS. We have considered, since yesterday, the confidential-communications rule.

We stated yesterday that we were inclined to the view that the document which was being discussed yesterday came within that rule. We are inclined to revise
1742 our views with respect to that document, although that is moot now because the document was excluded on other grounds, as being not identified.

We think that the rule is that the burden is upon the person exercising the privilege to demonstrate to the court that the communication was probably confidential. We think, with respect to the item yesterday, that that probably was not shown to be confidential. But we are agreed that this one is. We think that this letter by the lawyer, which is attached to the exhibit, is clearly a confidential communication by a lawyer to his client on the subject of a proposed license agreement. We think that the memorandum itself is sufficiently identified ——

Mr. ADAMS (interposing). I have raised no question about that, your Honor. My objection was to the communication from the lawyer.

Justice STEPHENS. The matter has been quite thoroughly argued already. Of course we will hear you further, Mr. Steffen, if you have any thoughts which you think we have not considered.

Mr. STEFFEN. I think there are two points that have not been quite adequately considered, which make this a little different, perhaps, than the matter we considered yesterday.

Justice STEPHENS. We think it is distinctly different, as we are presently advised.

1743 Mr. STEFFEN. I want to call your Honor's attention to one matter that has not been discussed.

I would first like to call your Honor's attention to the case of the United States versus Vehicular Parking, Ltd., which was decided December 3, 1943, by Judge Leahy, a District judge. We have copies of the opinion which we will supply to the Court.

That case raised a question on the matter of whether the particular information or data had been furnished by or to a lawyer in his professional capacity, or whether it had

been in his capacity as business adviser, and it would support your Honor's position as respects the memorandum that we had up yesterday.

There are also some statements in there concerning the admissibility of evidence which we will want to refer to later on under Rule 43-A of the Rules.

Now I want to call your attention to one item on this Chaffee memorandum. Clause 2 provides:

"Clause '3.', page 4, provides that the royalty shall be one per cent of the selling price"——

Justice STEPHENS (interposing). Which paragraph is that?

Mr. STEFFEN. That is the paragraph numbered (2) on the first page of the Chaffee memorandum. I don't need to read that into the record, but I want to call attention to the second paragraph of Paragraph (2); and then Paragraph (7) which covers the same point; and then to Paragraph (8) Clause 16, which makes the point con-
1744 cerning improvements.

Justice STEPHENS. Yes, we have noted that.

Mr. STEFFEN. And the final paragraph of Mr. Chaffee's memorandum in our opinion states that this agreement, if signed ——

Mr. ADAMS (interposing). I am reluctant to interrupt, but I respectfully suggest that counsel is now arguing to the Court the contents of a memorandum which we have argued, and which the Court has indicated, is a privileged communication.

If counsel sees anything in this memorandum which he says takes it out of the privilege, let him say so, without arguing this question as to what the memorandum contains, and what his interpretation and opinion may be of the contents of the memorandum.

Justice STEPHENS. The Court understands counsel to be in the process of arguing some point as to why it is not privileged.

Mr. STEFFEN. That is correct.

Mr. ADAMS. And also without reading it into the record.

Justice STEPHENS. It has not been read into the record. Counsel has taken pains not to read it into the record.

Mr. STEFFEN. My point is that the rule concerning privileged communications applies where a communication has been confided to an attorney in his professional capacity, where it is intended to be confidential, and thirdly, where it does not have to do with possible violations of a statute.

If an attorney recommends or suggests to his client
1745 that an action which the client might take would be in violation of a statute, it is no longer privileged, by all the authorities. We contend that his statement in the final paragraph there points out the whole vice in an anti-trust suit, and says that if you sign this you will be stifling improvements in the industry, which is the very essence of a monopoly—and on that basis we contend that irrespective of any other argument, Mr. Chaffee's memorandum is admissible.

Justice STEPHENS. What do you say to that, Mr. Adams?

Mr. ADAMS. I will first say at the outset, that it is an extraordinarily strained interpretation of a memorandum.

In the second place, I do not agree with counsel's statement that anything which a lawyer may have to say to his client with respect to a possible violation of the statute is thereby not within the protection of the privilege. Were that so there wouldn't be many lawyers that would be in business.

What counsel is talking about is where a lawyer advises with respect to the commission of a crime. I think the cases are clear on that point. But if a man may think that he has committed a crime, or may have violated a statute, and he consults his lawyer about it, if his lawyer can be called and made to testify concerning that, there is nothing left to privilege.

I know the cases which counsel is referring to, I think. They are the cases that came up more or
1746 less recently in connection with the wire-tapping statutes.

In those cases the lawyers were a part of the conspiracy and were counseling their clients with respect to the commission of a crime. Of course the privilege doesn't apply in those cases.

But if we are to take the rule to be where a client consults his lawyer and the lawyer says, "If you do this, you might possibly be violating X, Y or Z statutes", there is nothing left to the privilege.

Mr. STEFFEN. I think the matter is treated, your Honor, in Jones on Evidence, Fourth Edition, page 1360.

Justice STEPHENS. Is there anything in this case that you especially wish us to look at in this connection?

Mr. STEFFEN. No, your Honor. That had to do with the matter that we discussed yesterday.

Justice STEPHENS. We will read it and consider it later.

Do you wish to say anything more, Mr. Steffen?

Mr. STEFFEN. No, I think not.

Justice STEPHENS. We think the objection to the lawyer's communication should be sustained. The rule upon which you rely is well stated by Wigmore in his Code of Evidence, and is generally settled that, "The privilege does not cover a consultation seeking the aid of the attorney's legal skill to effect knowingly an unlawful act, in the nature (1) either of a future crime; (2) or of a future civil
1747 wrong involving moral turpitude".

It seems to us that that does not cover this situation. The advice of counsel was against the act which you claim to be illegal.

Mr. STEFFEN. Well, it would seem to be an a fortiori proposition that if the counsel's advice was respectable, and against the commission of a crime, that that should no longer be privileged if the client violates that.

Mr. ADAMS. That is putting the cart before the horse.

Justice STEPHENS. The memorandum itself, showing what the client did, is not being excluded. That is to be admitted in evidence. There is no objection, as a matter of fact, to the memorandum, proposed Exhibit 228.

Let me be sure I have this correctly marked. This is the July 3, 1929, memorandum?

Mr. STEFFEN. That is right.

Justice STEPHENS. I didn't mark it when I first saw it.

Exhibit 228, so far as that portion of it is concerned which comprises the memorandum itself, as distinguished from the communication from the lawyer, Mr. S. W. Chaffee, is admitted in evidence, there being no objection to it, and the Court thinks it is properly identified.

Mr. BROMLEY. We make the usual objection, of course.

Justice STEPHENS. Yet, it is received subject to the reservation with respect to the declarations of
1748 alleged co-conspirators.

(The memorandum of July 3, 1928, marked as Government's Exhibit No. 228, was received in evidence.)

Justice STEPHENS. The advice of the lawyers seems to the Court clearly privileged and not within the exception to which you refer, Mr. Steffen. Indeed, if the device were in the contrary direction, even if it advised what was being done here, advised accepting a contract which the Government contends is illegal, we would still be confronted with the unique situation which comes up from time to time in the course of rulings on questions of evidence, where the

preliminary question of fact also involves the ultimate substantial question in the case, as to whether there is a violation of law; and there, of course, the Court is forced to make the preliminary determination of fact as it best can at the time, even though its ultimate ruling might be inconsistent on the question of the substantive wrong involved. We think that this is a clear case of a confidential communication. So we reject the memorandum of the lawyer.

Mr. ADAMS. May the memorandum be removed from the exhibit before the witness and returned to counsel for the Government?

1749 Justice STEPHENS. Yes, that may be done.

As a matter of fact, the Court directed Mrs. Gillette, the assistant to the court reporter, yesterday, informally, and intended to acquaint counsel with the direction, that where an exhibit has been offered and rejected, it should be taken and returned to whoever has offered it. Otherwise it lies before the witness and the witness continues to glance at it, and it may modify his testimony in a manner which would not be intentionally on his part but actually legally improper.

Mr. ADAMS. Thank you, your Honor.

Justice STEPHENS. You will follow the instructions of the Court, Mrs. Gillette. Where an exhibit has been rejected it is to be taken from the witness stand and returned to counsel who offered it.

Mr. STEFFEN. We understand that this continues as an item under that number, for purposes of our records.

Justice STEPHENS. Oh, certainly, the record must contain the offered exhibit in order that, in the event that this case should be determined against the Government, you may take advantage of the adverse ruling if you see fit to do so, by urging it to be error. The Court is not ordering it out of the record in the legal sense of the term, but only off the witness box.

Mr. STEFFEN. We do not like to detach this, your Honor. Can we work out some system ——

Justice STEPHENS (interposing). If you are not through with your examination on the memorandum itself,

1750 you may represent it to the witness and the Court will instruct the witness to look at only that portion of it other than the lawyer's communication. I thought you were through with it, Mr. Steffen.

Mr. STEFFEN. The understanding is that you will not look at Mr. Chaffee's letter.

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. Now, Mr. Brown, this memorandum of July 3, 1929, Government's Exhibit No. 228, makes some references to bundling. Will you describe to the Court what bundling is? (Laughter.) I mean, as applied to the gypsum industry.

A. I don't know any other kind.

Justice STEPHENS. The Court will take judicial notice that counsel is not referring to the ancient New England custom. (Laughter.)

The WITNESS. Bundling, as referred to here, covers the method of binding a certain number of sheets of gypsum lath together for easy handling.

By Mr. STEFFEN.

Q. What was the method?

A. With a form of tape, as I remember it, that came over the edges.

Q. The long edge of the board? Take those two books and explain by the books on the witness box.

1751 A. The binding would come over like this (indicating), as I understand it.

Q. How many gypsum lath were put together in a bundle?

A. I don't remember, seven or eight, possibly, maybe more.

Q. Five or six, was it not?

A. I don't remember, I am just guessing. I said a certain number, in my original testimony.

Q. The paper would run along the long edges of the board, is that correct?

A. That is my memory.

Q. Was the discussion, as related here in your memorandum concerning the licensor's attitude in the event that someone should make a new form of bundling, correct?

Mr. ADAMS. I object to that.

Mr. STEFFEN. In substance and effect.

Justice STEPHENS. Read the question.

Mr. STEFFEN. I withdraw the question.

Justice STEPHENS. The exhibit speaks for itself.

Mr. STEFFEN. I think that is correct.

Justice STEPHENS. The objection is sustained.

By Mr. STEFFEN.

Q. You have read this memorandum of July 3d, Mr. Brown?

A. Yes, sir.

1752 Q. I want to take you to the second page, the first line. There you say, "Taking these things into consideration, plus other advantages", and so forth, and I would like to ask you what the "other advantages" are that you had in mind there.

A. There would be a stabilized market on gypsum lath.

Q. And by "stabilized" you mean what?

A. Price control.

Q. I now show you Government's Exhibit 229, which purports to be an interoffice communication between Mr. Chaffee and yourself under date of July 8, 1929, and ask if you recall having received that memorandum.

Justice STEPHENS. Where is that? We don't find that.

Mr. STEFFEN. That is immediately following.

Justice JACKSON. Immediately following is an agreement ——

Justice STEPHENS (interposing). Immediately following is a very long supplemental license agreement, and following that is a memorandum of ——

Mr. STEFFEN (interposing). Do you not have a short memorandum under date of July 8, 1929, bearing Item No. X-103?

Justice STEPHENS. I beg your pardon, I skipped that. It is a short three-paragraph memorandum?

Mr. STEFFEN. Yes.

Justice STEPHENS. Proceed, we now have it located.

By Mr. STEFFEN.

Q. I want to ask you, Mr. Brown, whether that is the usual form of interoffice letter used by Certain-

1753 teed during this period.

A. Yes, sir.

Mr. ADAMS. Maybe we can save some time by saying that I don't object—I don't know about other counsel—to the identification of this document, but I renew my objection on the ground that it is a privileged communication.

Justice STEPHENS. Do you wish to be heard?

Mr. STEFFEN. I wish to say simply that this is just a statement by Mr. Chaffee, concerning what he reads in the contract. It doesn't seem to me to be anything in a professional capacity of the sort which is entitled to privilege.

I might say, in addition, that there has been no showing at all here as to how this matter was handed to Mr. Chaffee. I point out that he is writing on the usual form of the

Certain-teed Products Corporation for interoffice communication, and he evidently was functioning as a house attorney, not as a lawyer, when he answered this, and in such cases, he must come under the usual rule that any communication that he makes, even though it does have to do with a legal matter, would be simply a business communication.

Justice STEPHENS. Do you contend that what is commonly referred to in the profession as "house counsel" are not such lawyers as are entitled to be within the privileged-communication rule?

1754 Mr. STEFFEN. I do, your Honor.

Mr. ADAMS. As a matter of fact, Mr. Brown, Mr. Chaffee was on general retainer from your company, was he not?

The WITNESS. Yes, sir.

Mr. ADAMS. And he had other legal business, did he not.

The WITNESS. Yes, sir.

Mr. ADAMS. As a matter of fact, he was a member of a law firm, wasn't he?

The WITNESS. Yes, sir.

Mr. ADAMS. I want to say also, your Honor—in the first place, there doesn't seem to me to be any question but what this is a matter which is, on its face, a product of a lawyer's consideration of a legal matter for a client, and his interpretation of a legal document. I can't think of anything that could be more clearly a matter of professional attention. But I should also like to make the further point, if I may, that on this question of what is or is not privileged, Mr. Wigmore seems to hold ——

Justice STEPHENS (interposing). We don't need to hear you further. All three members of the Court are clearly advised that this is privileged.

Mr. ADAMS. This point I have in mind I am sure I will have occasion to make later.

Justice STEPHENS. Very well. Objection sustained. The exhibit is rejected.

1755 Justice JACKSON. What number is that, Mr. Steffen.

Mr. STEFFEN. That is Exhibit 229.

By Mr. STEFFEN.

Q. I want to show you Government's Exhibit No. 230, which purports to be a contract between the Certain-teed Company and the United States Gypsum Company under date of July 3, 1929, and I would ask you to examine the

signatures, and then I will ask you some questions.

Do you identify the signatures, Mr. Brown?

A. Yes, sir.

Q. Whose are they?

A. Mr. Avery's for the United States Gypsum Company; Mr. C. O. Brown's for Certain-teed Products Corporation.

Q. That is your signature?

A. Yes, sir.

Q. I now call your attention to paragraph 2 of the agreement where there are some words underlined. Do you know who did that underlining?

A. I don't seem to see that. Is it on the first page?

Q. No, paragraph 2 on the second page.

A. Excuse me. No, sir, I do not know.

Q. Was that the clause referred to in your memorandum of July 3, under "bundling", the third paragraph, if you have that before you?

A. I haven't it before me, sir.

1756 Justice STEPHENS. Re-submit it to the witness.

(Government's Exhibit No. 228 was handed to the witness.)

Justice STEPHENS. Where is that asserted?

Mr. STEFFEN. In the third paragraph, under the heading of "bundling patent", on the first page of Exhibit 228.

The WITNESS. Yes sir, it refers to the same thing.

Justice STEPHENS. I don't quite understand that, Mr. Steffen.

Mr. STEFFEN. I am just asking him to connect that language with the third paragraph of his report, if that is what he had in mind.

Justice STEPHENS. What language in Exhibit 228 are you asking him to connect with the underlined material in Exhibit 230?

Mr. STEFFEN. The third paragraph, under the heading "bundling patent" on Exhibit 228, makes a reference to the matter which the witness has stated is covered in the second paragraph on the second page of Exhibit 230.

Justice STEPHENS. The third paragraph of that topic which has to do with bundling?

Mr. STEFFEN. Yes.

Justice STEPHENS. I see what you mean now.

By Mr. STEFFEN.

Q. Do you recall that a discussion, Mr. Brown, of

1757 this paragraph of Exhibit 230, paragraph 2 of the

second page of Exhibit 230, was had in your meetings at Chicago?

A. No, sir.

Q. What was the position of your company, could you state that?

A. Well, the position of the company, as I recall it, was that we knew of no better method for bundling lath, and as a consequence decided to take it.

Q. Did you understand whether it required you to make bundling, or to do bundling, according to this patent?

A. I don't understand the question.

Mr. BROMLEY. I object to that on the ground that the license speaks for itself, if the Court please.

Mr. STEFFEN. I am not trying to construe the license; I want to get the understanding of the witness.

Mr. BROMLEY. That is immaterial.

Mr. STEFFEN. It is highly material in showing what the attitude of mind of the Certain-teed Products Company was in entering into this agreement. We are not attempting to construe this agreement, but I want to know why they entered into the agreement.

Justice STEPHENS. You may probe the witness' recollection as to discussions which took place, but the objection to the question, as phrased, is sustained.

By Mr. STEFFEN.

1758 Q. Well, was there any discussion that you recall concerning the licensor's position that you could only bundle according to the licensor's patent, and in no other way?

A. I don't remember any.

Q. Was your position favorable to that, would you say?

Mr. ADAMS. May I have that question, please?

Justice STEPHENS. Read the question.

(Thereupon, the pending question was read by the reporter.)

Mr. ADAMS. I object to it, as to form ——

Justice STEPHENS (interposing). Well, that is perhaps pretty close to the borderline, Mr. Adams. Still, this man was an officer of the company. The intentions and motives of the company, in entering into this agreement, have some relevance and possible weight. I think that question is not objectionable. Objection overruled.

The WITNESS. I think I answered that a minute ago. We couldn't get the license with the clause excluded, we wanted

to bundle our lath, and we knew of no better or more economical way to do it.

By Mr. STEFFEN.

Q. You use the words in your letter here, "and in the interest of harmony in the industry". Was that a consideration?

A. No, sir, I don't think so.

Q. There in that third paragraph.

1759 A. I would like to correct that. I would say my answer would be the same as to your question, plus other advantages in working under the patent.

Q. Thank you.

I notice in the fourth paragraph, Mr. Brown, that you mention that "it was signed by all producers of gypsum lath and gypsum wallboard except the Atlantic Gypsum Company". Was that a matter of importance to Certain-teed in determining what its position should be?

A. I don't remember about that.

Q. Do you recall whether all of the producers ultimately took out a license under the bundling patent?

A. Will you state that question again?

Q. Do you recall whether Atlantic and all the producers ultimately ——

A. (Interposing.) I don't know.

Q. I think the documents will show that.

Mr. STEFFEN. Your Honor, we have reached the end of this exhibit and our next one is a long one.

Justice STEPHENS. We will take the noon recess at this time. How much longer will this witness be on the stand on direct examination, have you any idea?

Mr. STEFFEN. At least another day, I think, counting the cross-examination.

Justice STEPHENS. Announce the recess.

1760 (Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

1761 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice STEPHENS. You may proceed.

Thereupon CLAUDE OLIVER BROWN, the witness on the stand at the time of recess, resumed his testimony as follows:

DIRECT EXAMINATION (Resumed).

Mr. STEFFEN. May it please the Court.

By Mr. STEFFEN.

Q. Mr. Brown, at the adjournment we were talking about your memorandum of July 3, 1929, in which Mr. Whittemore and Mr. George M. Brown approved generally the signing of a license agreement under the bubble patent and a license under the bundling patent.

Do you recall any subsequent meetings after July 3, in Chicago, concerning either of those two license agreements?

A. There were some later meetings, but I don't recall the dates.

Mr. STEFFEN. At this time, Your Honor, I should like to read into the transcript the U. S. Gypsum Company's Answers to our interrogatories, which are offered as admissions, concerning a meeting of July 25, 1929, in Chicago, and a meeting of August 6, 1929, in Chicago; and I will read them as follows:

1762 "34. (b) July 25, 1929—Chicago. A meeting was held at which some or all of the following attended: Sewell L. Avery"—President of United States Gypsum Company—"and its attorney, John E. MacLeish; W. P. Fuller, President of Atlantic Gypsum Products, Inc., and its attorney, H. M. Channing; C. O. Brown, Vice-President of Certain-teed Products Corporation; Frederick G. Ebsary, President and/or George N. Lenci, Vice-President of Ebsary Gypsum Company, Inc. and/or its attorney, Harland W. Rippey; Melvin H. Baker, President of National Gypsum Company and its attorney, Elmer E. Finck; M. E. Reeb, President of Niagara Gypsum Company; and Eugene Holland, co-receiver of Universal Gypsum & Lime Company.

"(c) August 6, 1929—Chicago. A meeting was held at which some or all of the following attended: Sewell L. Avery"—President of United States Gypsum Company—"and its attorney, John E. MacLeish; W. P. Fuller, President of Atlantic Gypsum Products, Inc., and its attorney, H. M. Channing; C. O. Brown, Vice-President of Certain-teed Products Corporation; Frederick G. Ebsary, President and/or George N. Lenci, Vice-President of Ebsary Gypsum Company, Inc. and/or its attorney, Harlan W. Rippey; Melvin H. Baker, President of National Gypsum Company and its attorney, Elmer E. Finck; M. E. Reeb, President of Niagara Gypsum Company, and Eugene Holland, co-receiver of Universal Gypsum & Lime Company."

1763 By Mr. STEFFEN.

Q. Does that refresh your recollection, Mr. Brown, as to whether you attended meetings on those two dates, July 25 and August 6?

A. I don't remember the dates, but I attended those meetings.

Q. I now show you Government's Exhibit No. 231, which purports to be a memorandum from C. O. Brown, addressed to George M. Brown, under date of August 9, 1929, and attaching a memorandum of yours under date of July 30, 1929, and ask you to read them carefully and I will then ask you some questions concerning them.

Justice STEPHENS. You may proceed.

By Mr. STEFFEN.

Q. I want to call your attention ——

Justice STEPHENS (interposing). Do you want to offer 230, so as to get the record clear on that exhibit?

Mr. STEFFEN. Yes, I will offer Exhibit 230 at this time.

Justice STEPHENS. Is there any objection to Exhibit 230, the license agreement?

Mr. BROMLEY. No.

Justice STEPHENS. Received in evidence.

(The document referred to, marked as Government's Exhibit No. 230, was received in evidence.)

1764 By Mr. STEFFEN.

Q. Now, Mr. Brown, will you direct your attention to the bottom of the first page of Exhibit 231, and you will note the interlineation there?

A. Note which?

Q. Do you know in whose handwriting that interlineation is?

A. My handwriting.

Q. Over on the second page of Exhibit 231, do you know in whose handwriting the words "by" and "to" are?

A. Yes, sir, in mine.

Q. I also refer you to the 2nd page of the memorandum of July 30, and the words "Mr. Holland"—is that your interlineation?

A. Where was that, please?

Q. On page 2 of the July 30th memorandum.

A. Yes, sir.

Q. And was this a report that you were making to Mr. Brown?

A. Yes, sir.

Q. And the report of July 30 was referred to there in the first paragraph of your memorandum of August 9. That second sentence refers to the combined royalty under USG patents and Universal patents totalling 5%.

Justice STEPHENS. I don't see that.

1765 Mr. STEFFEN. If you will look at the first paragraph of the August 9 memorandum, the second sentence.

Justice STEPHENS. Yes.

Mr. STEFFEN. "In order that you may have a full picture, I am attaching"——

Justice STEPHENS (interposing). Oh, yes.

Mr. STEFFEN. We now offer in evidence Government's Exhibit No. 231.

Justice STEPHENS. Any objection?

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 231, was received in evidence.)

By Mr. STEFFEN.

Q. I want to ask you one or two questions, Mr. Brown, concerning your memorandum of August 9, 1929. On the second page of that memorandum you make the statement that all of the independent gypsum companies are willing to sign. Who did you mean by "independent gypsum companies", if you have found the place?

A. It is my memory that I meant board manufacturers.

Q. And why did you speak of "independent gypsum companies"?

1766 A. It is not a clear term, but that is the best answer I can give on it.

Q. Could you name them?

A. That would be National, Universal, Ebsary ——

Q. (Interposing.) Kelly, Atlantic?

A. Atlantic. I don't recall Kelly.

Q. Now was it a matter of importance to your company that all of the gypsum companies were willing to sign on this basis?

A. We preferred to see as many as possible sign.

Q. You were an officer of the company and had been talking with Mr. Brown. Would you say whether you would have been willing to have taken out a license if a substantial number had refused to sign?

Mr. ADAMS. I object to that as to form, and also as not having the time and place of the conversation fixed with some certainty.

Justice STEPHENS. I didn't hear the last part of your objection.

Mr. ADAMS. I am sorry. Also, the time and place of the conversation, if any took place, should be fixed with some certainty.

Justice STEPHENS. The Court thinks the objection is not well taken. Overruled.

1767 Mr. STEFFEN. Will you read the question, please, Mr. Grover?

(The question was read by the reporter.)

Mr. BROMLEY. I object to that on the ground that it is speculative, and therefore incompetent.

Mr. STEFFEN. Your Honor, I want Mr. Brown, who was an officer, who had been negotiating, to state what the company's position was, as he understood it.

Justice STEPHENS. You needn't go further. We think Mr. Bromley, that the question is not speculative. Of course, if the witness doesn't know, he understands that he is not to answer. But one of the charges in the complaint here is that the license agreements were entered into as a means of violating the law and as a cloak for violating the law. The Government is entitled to try to prove that. This witness was an officer of the company and was present at these conferences. If he knows what the motive of the company was as a result of being an officer and being at these conferences, we think the Government is entitled to bring that out.

Objection overruled.

Mr. STEFFEN. Read the question again, please.

(The pending question was reread by the reporter.)

The WITNESS. This report was made to Mr. Brown, the President, who had the final say. Anything I said would be my opinion, as I see it.

1768 By Mr. STEFFEN.

Q. We want your position as an officer of the company, Mr. Brown, and you are authorized to answer.

Justice STEPHENS. We are not asking for your present opinion as to whether the company would have done it. We are asking, or counsel is asking, and may properly ask only, we think, for the position you were then taking as an officer of the company. If you weren't taking any then, say so.

Mr. STEFFEN. Or that you would have taken on the assumption taken, that is, if a substantial number of your competitors had stayed out of the agreement.

The WITNESS. This report says that they were in, Your Honor, and that is what confuses me. It is something that has already happened.

By Mr. STEFFEN.

Q. Had they signed the agreements at this time, do you know?

A. I can't answer that. I don't think so.

Q. All your letter says is that they were willing to sign.

A. Yes.

Q. And I am asking you for your position as to whether your company would have been willing to sign at this time if a substantial number of the independent companies had refused to sign?

1769 A. They might not have signed.

Q. Now earlier in your testimony, yesterday, I think, you said that you favored the company taking out a license under the closed-edge patent. Was that your testimony?

A. Yes, sir.

Q. And I think you next said that one reason for favoring it was that you could sell a closed-edge board more readily than an open-edge board. Is that a correct statement?

A. Yes, sir.

Q. Could you tell us whether you would have favored, as you testified, taking out the closed-edge patent license in April, 1928, which is the period concerning which you testified, if a substantial number of your competitors at that time had been unwilling to take out a license under the closed-edge patent?

Mr. BROMLEY. The same objection.

Mr. ADAMS. Moreover, I think it assumes facts that aren't in evidence. I don't think he testified to that.

Justice STEPHENS. I can't hear you, Mr. Adams.

Mr. ADAMS. I am sorry, Your Honor.

I think it assumes facts not in evidence, and I don't think that is the way he testified.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. I don't have a clear recollection of whether the witness testified to that or not. If

1770 a serious point is made of it, we will have to look up the record.

Mr. STEFFEN. I will lay this much groundwork, Your Honor. He just stated that he testified that he was in favor of the closed-edge board in March and April, 1928. That appears in the record, and I think there is no question as to that. All I am asking him is whether he would have favored taking out the license if his competitors were unwilling at that time to take out a license.

Justice STEPHENS. But you have added to the question—and that is the subject of Mr. Adams' objection—a statement that he had already testified that a large number of them were unwilling to take it out.

Mr. STEFFEN. No, that doesn't appear in the question, or at least I didn't intend it to.

Justice STEPHENS. Maybe I misunderstood the question when it was read. If all that you are asking the witness now is whether or not, in effect, one of the conditions upon which his company desired to enter the license agreement, without which it would not have entered the license agreement, was that the others should also take it, you are entitled to go into that. I assume that is what you had in mind.

Mr. STEFFEN. Yes.

Justice STEPHENS. Objection overruled.

1771 The WITNESS. Conditions under the original license were very different than this. We were facing lawsuits, and I naturally favored getting out of that.

By Mr. STEFFEN.

Q. What lawsuits do you speak of?

A. Of United States Gypsum against Certain-teed under the Beaver purchase arrangement.

Q. Was there a bond in connection with that lawsuit, that you know of?

A. Yes, sir.

Q. What was it?

A. I think it was for a million dollars.

Q. Do you know who was on the line on that bond?

A. Yes, sir.

Q. Who?

A. Mr. George Brown and Mr. Elisha Walker.

Q. Is your testimony that that had a bearing, perhaps, in your opinion, on the willingness of the Certain-teed Company to take out a license in May, 1929?

A. I think it had some bearing, yes, sir.

Q. Do you know whether that bond was released at the time that license agreement was signed?

A. I don't know at what time it was released.

Q. I show you Government's Exhibit No. 232, which purports to be a release of a bond under date of May 22, 1929, and ask you if you can identify the signatures
1772 to that release?

Mr. STEFFEN. Unfortunately, Your Honors, we had not expected to introduce this, and we do not have photostatic copies.

The WITNESS. Mr. Avery's signature for USG, and Mr. George M. Brown's signature for Certain-teed Products Corporation.

By Mr. STEFFEN.

Q. Could you identify that as a release?

A. I can't identify it, I have never seen it before.

Mr. STEFFEN. I think the document speaks for itself. We offer Government's Exhibit No. 232, and unfortunately I will have to ——

Justice STEPHENS (interposing). Submit it to adverse counsel.

Mr. STEFFEN. We will have it photostated, Your Honor.

Justice STEPHENS. Thank you.

Mr. BROMLEY. No objection.

Justice STEPHENS. Have all counsel for the defendants seen it?

Mr. ADAMS. I have seen it, Your Honor. I have no objection.

Justice STEPHENS. Mr. Johnston, have you seen it?

Mr. JOHNSTON. Yes, Your Honor. (Laughter.)

1773 If the Court please, to relieve the tension a bit, when I came down I was very much confused. A week ago I went to Pittsburgh over the weekend, and I came into a situation there that was a mixture of fog and smoke, and they call it "smog".

Well, the best expression I could fit into my condition, coming down here into this atmosphere of a mixture of Yale and Harvard, was to call it an intellectual smog. It was language I just couldn't appreciate. But the Court came to my relief yesterday, and spoke my language, and I learned that ——

Justice STEPHENS (interposing). Perhaps it is only fair to warn you that the Court is from Harvard, or at least the presiding judge is.

Mr. JOHNSTON. I will limit it to Yale, then. (Laughter.)

When I found out what to look out for, being shot at from ambush, I then understood something of the language and procedure, and I refer to the often expressed statement, "Son; draw and drop him from the hip."

Justice STEPHENS. The Court is very much interested in your remarks, Mr. Johnston. The Court doesn't intend to have any shooting from ambush from any side of the case. The Court's inquiry as to whether you had seen this exhibit was seriously intended, to be sure that you did have an opportunity to see it.

1774 Mr. JOHNSTON. Yes, I saw it.

Justice STEPHENS. The detail of this, I assume, is not important. You merely want to prove that the bond was released?

Mr. STEFFEN. Yes, at the time that the license agreement was signed.

Justice STEPHENS. You may furnish photostats later. It may be received in evidence.

(The document referred to, marked as Government's Exhibit No. 232, was received in evidence.)

By Mr. STEFFEN.

Q. I would like to pursue the questioning that I was following just before I showed you this release, Mr. Brown. I think you testified that one of the reasons why you favored, in 1928, taking out a license under the closed-edge board patent, was that the product would sell more readily?

A. Yes.

Q. And you now have stated a second reason which perhaps actuated the company or Mr. Brown, that Mr. Brown was personally under a $1,000,000 bond; is that correct?

A. Yes, sir.

Q. Was there a further reason which you had at that time which would have made for taking out a license under the closed-edge board patent?

1775 A. Well, as I testified before, my other reason was having a more acceptable product for the trade.

Q. That was your first reason.

A. As I understood it, you cited the bond as the other reason.

Q. That is your second reason. Would there have been any other reason which you would have urged as a reason for taking out a license under the closed-edge patent in 1928?

Mr. ADAMS. I object to the form of that question on the

ground that he is asking the witness if there was an argument which he would have urged.

Mr. STEFFEN. I said "reason" that he would have urged.

Mr. ADAMS. Or reason that he would have urged back in 1928. I think that what he should be asked about is acts of the company ——.

Justice STEPHENS (interposing). Well, the objection is sustained as to the form of the question, but you are not foreclosed, Mr. Steffen, from pursuing this line of examination. This witness has disclosed, Mr. Adams, that he was an officer of the company. The memoranda introduced, which he has identified, indicate that he was closely in touch with these transactions, and was informing other officers of the company about it. In view of the charges in the complaint, the Government is entitled to try to prove the reasons why this agreement was executed, which we
1776 think may be gone into if the witness knows them. He is not to be asked to speculate, now, as to what might have been the reasons. He is to be asked what were the reasons which actuated the company for going in this agreement.

By Mr. STEFFEN.

Q. I am asking you particularly with regard to your testimony, Mr. Brown, in which you said that in 1928, you favored taking out a license under the closed-edge patent. You have now stated two reasons: one, that the closed-edge board would be more acceptable; and a second reason which I gather you feel would have actuated Mr. Brown. And I will ask you—was there another or any other reason which would weigh in your consideration on taking out a license under the closed-edge board patent?

A. I offered no other reason that I recall.

Q. Would the matter of patent control and price stabilization have been a factor?

Mr. ADAMS. I object to that. Again he says—"would price control have been a factor?" Adopting Your Honors' ruling, I object to that form of the question as being merely asking a hypothetical question.

Justice STEPHENS. The Court would think that the Government would be interested in whether or not it was a factor.

Mr. STEFFEN. That is what I asked.

1777 Justice STEPHENS. No, you asked whether it would have been, and the objection to the question

in its form is sustained. Ask him if it was a factor.

Mr. ADAMS. If he knows, Your Honor.

Justice STEPHENS. The witness has been thoroughly instructed that he is to answer nothing that he doesn't know. You understand that, don't you, Mr. Brown?

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. Let me get the question clear. When you testified yesterday that you favored, in 1928, taking out a license under the closed-edge patent, was it a factor that you would have patent control under the license, or price control?

A. Personally, that had no bearing on it.

Q. Well, speak as an officer of the company.

A. I can't do that, because I don't know.

Q. Well, you, as an officer of the company, had some opinion, because you testified that you favored it ——

Mr. ADAMS (interposing). I object to that.

Mr. STEFFEN. I want your reasoning.

Mr. ADAMS. I object on the ground that he did not so testify, and on the further ground—of course, this is my recollection of the evidence yesterday—that he testified that he didn't have anything to do with these negotiations whatever which led up to the signing of the May 22 contract, that he knew nothing about them, that he
1778 didn't go to Chicago.

By Mr. STEFFEN.

Q. Mr. Brown, you testified, I believe—I would like to have you correct me if I am wrong—that you, in 1928, favored taking out a license under the closed-edge patent; is that correct?

A. That is correct.

Q. And you have given us two reasons, one of which is that the closed-edge board was more acceptable to the trade; and, second, that there was a $1,000,000 liability hanging over Mr. Brown's head.

I am now directing your attention to the fact, to which you have testified and which is clear, that under the license agreement there was a provision for price control, and I ask if that was a factor in your consideration?

Mr. ADAMS. I object to it on the ground that it is repetitious. He has already testified that it was not a factor.

Mr. STEFFEN. He has not so testified, Your Honor.

Justice STEPHENS. Read the answer of the witness to

the question on that subject, if you can find it, Mr. Reporter. My recollection is that he did say that it was not a factor.

Mr. STEFFEN. Personally, he said, and I am asking him as an officer of the company.

(The record was read by the reporter as recorded on page 2074, lines 10 to 16, both inclusive.)

1779 Justice STEPHENS. He says as an officer of the company he can't speak because he doesn't know.

Objection sustained.

Mr. STEFFEN. I think the witness is a little confused in his two capacities.

Justice STEPHENS. If you think he is confused, you may interrogate him further, but we can't ask him to testify to things he doesn't know.

Mr. STEFFEN. Certainly not.

Justice STEPHENS. You were an officer of the company at that time?

The WITNESS. I think the record will show that I was Assistant to the President, which was not an officer.

Justice STEPHENS. You were not a Vice President at that time?

The WITNESS. No, sir, that is my memory. The record will show, no doubt, the exact date I was elected.

Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Well, may I ask the broad question: On the basis of your connection with the company, which covers a period of many years, on the basis of your being Assistant to the President in 1928 and having written several letters under that title, and on the basis of your knowledge derived from these many years of association with the company as to its policies, on the basis of your acquaintance

1780 with Mr. Brown and his policies, would Mr. Brown or the Certain-teed Company have taken out a license under the closed-edge patent if a substantial number of competitors, National, Ebsary, and others, had refused to take out a license?

Mr. ADAMS. I respectfully object on the grounds that the question is speculative, calls for a conclusion, assumes facts not in evidence, and is generally bad as to form. Also, I think that it isn't even competent. You can't ask a witness now, it seems to me, these many years later, to try to express an opinion as to what somebody else in the company

might have thought about a state of facts which isn't even in evidence.

Justice STEPHENS. We think the question as phrased is speculative, and asks for a speculative conclusion as to what someone else would have done. We think also, Mr. Steffen, that the record clearly shows that this witness has testified, in effect, in answer to proper questions on the subject, that stabilization was one of the factors which induced the November license agreement, and that one of the factors which was desired was, in effect, that all these companies should be under the November license.

Mr. STEFFEN. I will take up another line of questioning. Thank you.

Justice STEPHENS. Objection sustained.

By Mr. STEFFEN.

1781 Q. I now want to show you, Mr. Brown, Government's Exhibit No. 233. I believe ——

Justice STEPHENS (interposing). Have you offered the last exhibit?

Mr. STEFFEN. I thought that 231 was offered and received.

Justice STEPHENS. Yes; and the release was received, that is right.

Mr. STEFFEN. Yes.

By Mr. STEFFEN.

Q. Let's take 233, which purports to be a memorandum to you, Mr. Brown, from Mr. A. D. Redfield, concerning a Speer Patent. I ask you to read the memorandum, please, and I will then ask you some questions.

Justice GARRETT. Is that dated July 30?

Mr. STEFFEN. No, it is dated August 2, 1929.

Justice GARRETT. This purports to be from Mr. Redfield to Mr. Brown?

Mr. STEFFEN. That is correct.

Justice GARRETT. And Mr. Redfield was the patent ——

Mr. STEFFEN (interposing). I will ask the witness.

Justice GARRETT. Excuse me, I thought that had been shown already, but go ahead.

By Mr. STEFFEN.

Q. Who was Mr. Redfield, if you know, Mr. Brown?

A. He was an attorney.

1782 Q. Was he engaged in patent work, or what type of work, if you know?

A. He was in the firm that Chaffee was connected with. I can not give you the entire firm name. And I do not know his duties.

Q. And is this written on your usual interoffice form?

A. Well, it is a copy—I assume it was.

Q. Are you familiar with the Speer Patent?

A. No, sir, I don't remember this.

Q. Do you remember having seen the memorandum at all?

A. No, sir.

Q. Could you state whether or not it is a genuine memorandum?

A. It looks like a copy of a genuine memorandum.

Q. Do you have any means of identifying it as being Mr. Redfield's memorandum?

A. No, sir, I haven't.

Q. Do you know who made the writing in the lower left-hand margin?

A. No, sir, I don't recognize that.

Q. Are you familiar with Mr. Redfield's writing?

A. No, sir, I am not.

Mr. STEFFEN. Your Honor, we offer this in evidence on the ground that it is a copy of a memorandum, or interoffice communication, which came from the files of
1783 the Certain-teed Products Corporation, which is evidenced by the fact that they have the words, "Item No. X322", at the top. This witness has been unable to identify it as a memorandum which he saw.

Mr. ADAMS. We object to it, Your Honor, first on the ground that it has not been identified in any way. The sole fact before the Court is that it came from the Certain-teed Products Corporation's files.

Justice JACKSON. A little louder, please, Mr. Adams.

Mr. ADAMS. I am sorry, Your Honor.

It is said to have come from the Certain-teed Products Corporation's files, of which there can be no doubt. But this witness can not identify it in any way.

Moreover, it is, if anything, a copy of something of which there might have been an original sometime. We don't even know that.

Secondly, we object to it on the ground that it is a privileged communication. Mr. Redfield, as the witness stated, was an attorney employed by Mr. Chaffee, who was an attorney generally employed by the company. Mr. Redfield worked on matters for the company, didn't he, Mr. Brown?

The WITNESS. I think when Mr. Chaffee was overloaded, he handled some of the company problems.

Justice STEPHENS. Do you wish to be heard on the question of identification any further than you have
1784 been, Mr. Steffen? I think you have really stated your position, but I will be glad to hear you further.

Mr. STEFFEN. I would refer Your Honors to the case that I cited this morning, *United States* v. *Vehicular Parking, Ltd.*

Justice STEPHENS. That goes to the question of whether it is confidential.

Mr. STEFFEN. It also has very strong language in regard to the rules of evidence that should apply on the admissibility of documents, and I will refer you to the bottom of page 5 of the mimeographed opinion, in which the Court says—he speaks of several exhibits and then refers to Rule 43(a) of the Federal Rules of Civil Procedure, which, as stated in the opinion, provides: "* * * All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States", and so on.

Then quoting from the top of page 6, from Moore (3 Moore, Federal Practice), where it is summarized as follows: "But it is subdivision (a) of Rule 43 that revolutionizes federal evidence, and in general places admissibility upon the sole basis" ——

Justice STEPHENS (interposing). I have missed the place where you are reading from.

1785 Mr. STEFFEN. At the top of page 6 of the mimeographed copy.

Justice STEPHENS. I see it. Go ahead.

Mr. STEFFEN. Where the author says: " 'But it is subdivision (a) of Rule 43 that revolutionizes federal evidence, and in general places admissibility upon the sole basis of relevancy and materiality.' This rule is especially applicable to conspiracy cases—here, to restrain a monopolized trade in the parking meter industry—because it simply crystallizes established law, e. g., liberality has always been accorded to the admission of evidence in cases where conspiracy issues are present."

Now on this particular item, I would feel that the exhibit has not been identified by Mr. Brown. That is perfectly clear. The exhibit, however, has come from the files of the defendant, the Certain-teed Products, and that is admitted; and it definitely has a bearing upon the case,

it is relevant and material. And I think it is in the usual form and should be admissible upon that ground, under a liberal construction of 43(a).

Upon the second ground, which has to do with the fact of privilege, we, of course, would expect to show that the privilege had been waived, at a proper time.

Justice GARRETT. I want to ask you, Mr. Steffen, there is nothing in that rule that changes the ordinary rule of law about identification of a document? Doesn't
1786 the liberality begin after your document is identified?

Mr. STEFFEN. It rather shifts the burden, if I may say —at least that is my construction, or the Government's construction—it shifts the burden from what it formerly was.

You used to have to have explicit identification, and then it would be subject to being introduced. Your identification can be less now, and it goes to its weight; and it is up to the other party to show at the proper time whether it is or isn't genuine.

And as Moore states in the case I read: "* * * in general places admissibility upon the sole basis of relevancy and materiality".

This is clearly relevant and material, and it is sufficiently trustworthy in that it has come from the files of the Certain-teed people, and has been in their files for these many years.

Justice GARRETT. The question of materiality and relevancy, that arises after you get your document identified.

Mr. STEFFEN. It can be identified by circumstances, Your Honor, is our contention. And one of the circumstances is the place where it has been taken from.

Mr. ADAMS. The sole circumstance, I might say.

1787 Justice STEPHENS. So far as my own views are concerned, with all due respect to the writer of this opinion which you have handed me I certainly do not think that Rule 43(a) is intended to abolish the standards of competency with respect to evidence.

The writer says, "But it is subdivision (a) of Rule 43 that revolutionizes federal evidence, and in general places admissibility upon the sole basis of relevancy and materiality."

On that theory hearsay evidence could be used at large in any case in court.

We are of the view—I think I reflect the views of my associates, I have talked to both of them; if not, they will

please express themselves—that this is not sufficiently identified, and that it is not the best evidence.

It is obviously a copy rather than the original. The absence of the original isn't accounted for. The correctness of the copy isn't testified to. So it is not the best evidence and not introducible as secondary evidence. We think that it goes too far to say that merely because a document is found in the files of an adverse party, that that alone makes it admissible in evidence, so far as identification is concerned. There is no other circumstance but that here. In every other instance in which we have ruled, there has been some other circumstance. We have been trying to rule consistently and fairly on this subject, but we think this goes beyond the proper limits. The objection
1788 is sustained. The ruling is not based on the ground of privilege, we do not rule on that with respect to this exhibit.

Mr. BROMLEY. May it please the Court, I should like to be heard a moment, out of order, in connection with Your Honor's statement a little while back as to what the witness had testified to with respect to the desirability of securing stabilization, and the question of whether or not his company would have liked to have had others in the industry take licenses.

My recollection is that the testimony which the witness gave in that connection had relation solely to the November licenses, and that he always maintained that he had very little to do with the May, 1929, licenses. And in giving his reasons why he favored taking the May, 1929, license, which he did this afternoon, he limited them to two, that is, that it was a desirable product and that he wanted to settle the litigation. I just mention that now—perhaps we can take a look at the record tonight and see whether I am right or wrong, but I didn't want it to pass unchallenged when my recollection was that his testimony had no relation to the May licenses in the respects which your Honor mentioned a few moments ago.

Justice STEPHENS. You may be correct, Mr. Bromley. It is hard at times to hold all this testimony in mind. However, you may consult the record tonight, and if the Court has misstated the testimony it would be glad
1789 to be so advised so that it might make any necessary correction, although you can bring out the same matter on cross examination, I take it.

Mr. BROMLEY. Yes, Your Honor.

By Mr. STEFFEN.

Q. I now show you, Mr. Brown, Government's Exhibit No. 234, which purports to be an inter-office letter between yourself and Mr. Whittemore under date of October 3, 1929.

Justice STEPHENS. We don't find that in this file.

Mr. STEFFEN. I have skipped one, Your Honor.

Justice STEPHENS. After this Redfield memorandum, September 6th is the next in my file.

Mr. STEFFEN. We are skipping that.

Justice STEPHENS. I have it, thank you. Proceed.

By Mr. STEFFEN.

Q. Have you examined Exhibit No. 234, Mr. Brown?

A. Yes, sir.

Q. And is that written on your usual inter-office form?

A. Yes, sir.

Q. Can you identify the handwriting in the third paragraph, the word "but"?

A. Yes, it is my correction.

Q. Would you say this was your memorandum?

A. Yes, sir.

Mr. STEFFEN. We offer Government's Exhibit No. 234 in evidence.

1790 Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government Exhibit No. 234, was received in evidence.)

By Mr. STEFFEN.

Q. We now show you Government's Exhibit No. 235, which purports to be a letter written by the United States Gypsum Company to the Certain-teed Products Corporation under date of November 5, 1929, and ask if you can identify that letter as one which you received?

A. There is nothing to indicate that I received it, but I assume I did.

Justice STEPHENS. Just a moment.

The WITNESS. I am sorry.

Justice STEPHENS. What was the question?

(The reporter read the preceding question and answer.)

By Mr. STEFFEN.

Q. Do you know the signature of the secretary?
A. No, sir, I do not.
Mr. ADAMS. We will agree that we received it.
Justice JACKSON. Whose signature is that?
Mr. STEFFEN. Can you tell me, Mr. Bromley?
1791 Mr. BROMLEY. Mr. R. G. Bear.
Justice STEPHENS. Mr. Adams admits, for Certain-teed, that this was received, and the record may so show.
Mr. STEFFEN. We now offer Government's Exhibit No. 235 in evidence.
Mr. BROMLEY. We make only the usual objection.
Justice STEPHENS. It may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.
(The document referred to marked as Govt. Ex. No. 235, was received in evidence.)

By Mr. STEFFEN.

Q. We now show you, Mr. Brown, Government's Exhibit No. 236, which purports to be your inter-office letter addressed to Mr. Van Hagan under date of November 25, 1929.
Justice STEPHENS. What is that one?
Mr. STEFFEN. I think there has been a mistake, we have given the witness the wrong letter. We will proceed with the letter which the witness has.
Justice STEPHENS. Which is the letter of 12/3/29?
Mr. STEFFEN. December 3, 1929, yes—addressed to Mr. W. E. Coffin, purporting to be sent by Warren Henley.
1792 By Mr. STEFFEN.

Q. Mr. Brown, can you say whether this follows the usual form of inter-office communications of the Certain-teed people?
A. Yes, sir.
Q. And have you examined the initials down at the bottom of the exhibit?
A. I would identify them as Mr. Henley's.
Q. Do you recall having seen the memorandum?
A. No, sir, I don't recall itt.
Mr. STEFFEN. We offer Government's Exhibit No. 236 in evidence.
Mr. BROMLEY. We make the usual objection, and in addition, object on the ground that it is entirely immaterial and

irrelevant. I am aware of no charge in the complaint as to which this could possibly have any relevance.

Justice STEPHENS. It occurred to the Court while reading it, Mr. Steffen—I will be glad to hear you on it—that while you do charge in the complaint that there was a problem of price cutting and price war involving the use of "seconds" prior to the signing of the license agreement, and leading up to it, you do not charge anything with respect to that afterwards. What is the relevance of this?

Mr. STEFFEN. I would like to be heard at length upon the relevance of the exhibit.

Justice STEPHENS. Very well.

1793 Mr. STEFFEN. We charge in the complaint, first, an attempt to monopolize the business, and we charge restraint of trade under Sections 1 and 3. We are charging in the complaint that the defendants have endeavored to standardize the product which they were selling. One of the basic charges in the complaint is that the effort was made by virtue of these agreements to standardize the products which they were selling in order to facilitate price control.

If you will notice the very last paragraph of the memorandum it says, "I would suggest that Mr. C. O. Brown, at the next Licensor Meeting, bring this matter up for discussion, and if possible, develop a definite policy covering" it, as an industry policy.

Now the agreement of course is when they first reach their position. There are provisions in the agreement concerning "seconds" and open-edge board. Here is a showing, as we contend, after the agreements had been signed, where they are carrying them into effect, and we will have a great deal of evidence showing the effects of this conspiracy which have operated to standardize board and to work out a restraint of trade.

Justice STEPHENS. Do you wish to reply, Mr. Bromley?

Mr. BROMLEY. The last paragraph, of course, has no reference to an industry policy. It clearly means that the licensee will bring it up at a meeting with the licensor, and endeavor to have the licensor put something in his bulletin or make some provision about it.

1794 Mr. STEFFEN. That is right.

Mr. BROMLEY. Now as to Mr. Steffen's reference to open-edge board, I suppose he is talking about the first paragraph. Well, "Open Edge Recut Wallboard" is patented board. This product, "Recut Wallboard" is made by

taking the patented board and cutting it into definite shapes, and selling it as "cut stock", I believe it is called, and there are provisions in the bulletin about that, but it is all patented board. I don't believe there is a single charge in the complaint to which this could have any relevancy. I think my friend thinks that it bears on his charge that we fixed the price on unpatented board, but that is not so, because the reference in the first paragraph to "Open Edge Recut Wallboard" is to patented board, which the patents will show. I think he is laboring under that misapprehension.

Furthermore, as your Honor has said, the charge about "seconds" was before the license, and not afterward.

Justice STEPHENS. The Court thought you had in mind introducing it because of the charge concerning "seconds" and not with reference to the charge concerning standardization.

Mr. STEFFEN. We have both, your Honor.

Justice STEPHENS. With respect to standardization, if this open-edge recut wallboard is, as the bulletins are said to show, patented board, what does this prove with respect to articles not patented and the standardiza-

1795 tion of the industry?

Mr. STEFFEN. We expect to show, your Honor, that the industry endeavored to get rid of "seconds", as they tried to get rid of open-edge board, and they did it for the purpose of better facilitating a price stabilization, according to the Government's allegations.

This is very direct evidence of the conspiracy working out to bring about a standardization of product, and the elimination of "seconds", just exactly as was done in the Standard Sanitary case where they wanted to get rid of "seconds" and they proceeded by various devices to eliminate them.

The proof will show in this case that they did eliminate "seconds" and they eliminated them for the very reason that they did in the Standard Sanitary case, that it made it much easier to fix prices on one product than it did if they had to sell an open-edge board, and a "seconds" board, and one type or another in competition with their No. 1 board.

Justice STEPHENS. Well, counsel's argument, if I may interrupt you, Mr. Steffen, because I want to understand you thoroughly and be advised as to the contentions both ways, seems to be really a reiteration of the charges you make in the complaint.

Of course you charge standardization and the elimination of "seconds" and the like, and you are entitled to try to prove that. But the question we have here is how does this particular exhibit tend to prove it. That
1796 is what we don't quite get.

Mr. STEFFEN. Well, in a measure—this is of course a preliminary exhibit—it indicates that they are proposing to take up before a licensor meeting ——

Justice STEPHENS (interposing). Proposing to do what?

Mr. STEFFEN. To take up the question before a licensor meeting, and as Mr. Bromley said, a licensor meeting would be one at which licensor and licensees had got together, and where United States Gypsum Company would put the matter in their bulletin, and it would become a regulation for all the industry. That was what Mr. Bromley stated, and that is my understanding of it, and if it became an industry policy to eliminate "seconds", it would very clearly be an attempt to monopolize.

Justice STEPHENS. We think the exhibit is admissible, and that the objection goes to the weight. The objection is overruled.

Mr. ADAMS. May I record my objection, that there is no proper foundation, and on the same grounds that I argued with respect to the other Henley exhibit. Mr. Henley is dead and Mr. Van Hagan is dead ——

Justice STEPHENS (interposing). Mr. Henley was connected with the company, was he not?

Mr. ADAMS. That is right.

Justice STEPHENS. And the witness has identified these initials as his. We think it is sufficiently identified. Did this also come from the files of Certain-teed?
1797

Mr. ADAMS. Yes.

Justice STEPHENS. Your objection may be recorded, but it is overruled. The exhibit is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 236 was received in evidence.)

Justice STEPHENS. The Court will take its usual afternoon recess at this time.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

Justice STEPHENS. Proceed, gentlemen.

Mr. STEFFEN. Your Honor, I should like to go back to our Exhibit No. 233 for a minute. That is the Redfield memorandum to Mr. Brown, regarding the Speer patent.

Justice STEPHENS. Yes.

Mr. STEFFEN. I would like to make a brief statement, and then ask defense counsel to stipulate, if they will—if they don't care to, they need not. Mr. Redfield appeared before the grand jury and at that time he stated that he waived any privilege. He also stated that he identified that as being his memorandum. I will show defense counsel the excerpts from the grand jury minutes and also the Court, and ask defense counsel if they will stipulate
1798 that that is true. Otherwise we will have to ask to have Mr. Redfield subpoenaed and go through the usual procedure.

Justice JACKSON. Would his waiver affect his client?

Mr. STEFFEN. He recites that his client authorized him to waive it.

Justice JACKSON. I misunderstood you.

Mr. STEFFEN. If you like I will read the excerpt from the grand jury minutes.

Justice JACKSON. You needn't mind, not if you say that it so states. You had better get that straight in the record, though, Mr. Steffen. Judge Stephens understood just as I did.

Justice STEPHENS. That it was merely a lawyer's waiver ——

Justice JACKSON (interposing). Not the waiver of the client.

Mr. STEFFEN. Let the record show that the grand jury testimony of Mr. Redfield is to the effect that ——

Mr. ADAMS (interposing). Perhaps we had better look at it.

Justice STEPHENS. Let counsel look at it before you put it in. Maybe there will be some objections.

Mr. STEFFEN. I would like to have the record show that I am showing to defense counsel page 2373 of the grand jury minutes, beginning at the point marked, and continuing through the point marked on page 2374; and also the top paragraph on page 2375.

1799 Mr. ADAMS. I have read these excerpts from the grand jury minutes to which reference is made, and I cannot agree that it constitutes a waiver of the privilege, particularly in that all that happened was that the witness was told that he might identify a document.

Justice STEPHENS. Hand those minutes to the Marshal and let the Court inspect them.

(The grand jury minutes referred to were handed to the Court.)

Mr. ADAMS. And I also want to state that there is no showing that Mr. Dowd was authorized by the company to waive anything.

Justice STEPHENS. Mr. who?

Mr. ADAMS. Mr. Dowd, the man referred to in the testimony.

Mr. STEFFEN. Perhaps the Court had better read the testimony.

Justice STEPHENS. Let us read it, and then we will know better what you are talking about. It commences at page 2373, is that correct?

Mr. STEFFEN. Yes, at the point marked.

Mr. ADAMS. May I say this, your Honor, to finish my statement, that there is no showing there that Mr. Dowd intended to waive any privilege.

Secondly, there is no showing that Mr. Dowd was authorized to waive any privilege.

1800 Thirdly, my instructions in this case, as counsel for Certain-teed Products Corporation, are not to waive any privilege and that as soon as an attempt is made to use a document prepared by our counsel, which is the first time that we have had an opportunity to raise it, that I should raise the point.

Moreover, I wish to suggest to the Court that under no circumstances does the mere fact that a party was willing that a document be presented to a grand jury cause is to be construed as a waiver by the party of a privilege of this character. A grand jury procedure, as the Court knows, is a star-chamber proceeding, and is secret. The jurors are sworn to secrecy. A citizen is required to submit to such a grand jury such evidence as he may have in the interests of justice. A citizen can then, at the appropriate time, when it is attempted to use a document presented to a grand jury against that citizen in some other proceeding, raise the question of privilege.

There was no publication of this, this was produced before the grand jury under compulsory process, and we do not and did not intend in any way to waive any privilege, and if the Court wishes to be reassured on that point, I will bring Mr. Dowd here from Chicago and have him testify about it. Certainly my instructions are to that effect. If there had ever been any question about a waiver of privilege, I can assure the Court that Mr. Dowd would never have said what he is reported to have said by a former employee who unquestionably was relying upon the

1801 secret character of the grand-jury proceedings.

Mr. STEFFEN. Was Mr. Redfield a former employee or a former lawyer?

Mr. ADAMS. He was a former lawyer. It wouldn't make any difference whether he was an employee or not, he was acting here in his official capacity.

Justice STEPHENS. It would appear to us, Mr. Adams, that where a lawyer who it is now admitted was an attorney for the Certain-teed, at the time of the grand-jury hearing stated that he had consulted with his client, and the client was not insisting upon the privilege, as this seems fairly to indicate, that that would, prima facie, constitute, at least for that proceeding, authority to waive the privilege.

The Court always acts upon the presumption that a regularly-employed lawyer has the authority to act, and the burden is upon the opposing side to prove the contrary ——

Mr. ADAMS (interposing). I may ——

Justice STEPHENS (interposing). Don't interrupt me, I want to finish what I am saying.

That point seems quite clear to us, although we are not ruling finally upon the matter. It may be that at that proceeding Mr. Dowd might have been produced to repudiate the authority of his own lawyer, claimed by his lawyer, but we are not in that proceeding now. It looks to us as if that was a waiver for the purpose of that proceeding.

1802 But the other point you raise is a novel point. Our tentative impression is that a privilege once waived is waived, and that the document no longer is confidential, but it may be that waiver for the purpose of a grand jury hearing is not effective in a subsequent civil proceeding, and if counsel regard the matter as serious, and if this class of testimony is going to occupy the attention of the Court, we will give you an opportunity to present authorities on that subject.

What do you say on that subject, Mr. Steffen?

Mr. ADAMS. Could I just interrupt one moment, your Honor, to say that my recollection is quite clear that Mr. Redfield was not counsel for the company at that time: I may be wrong about it. I think he was a former attorney.

Justice STEPHENS. Very true, but he states that he had talked with Mr. Dowd about the identification of these documents. A client's privilege persists even after the relationship of lawyer and client has been terminated, Mr. Adams. Otherwise, the privilege wouldn't amount to any-

thing. As the record shows, he was the attorney for the company and this witness has testified that he was an attorney for the company at the time this document in question was prepared, and then he, in testifying before the grand jury, recognizing apparently that the client's privilege persists even though the client-attorney relationship was terminated, first stated that he ought to claim the privilege, and then later said that he had been in com-
1803 munication with Mr. Dowd and was not claiming the privilege.

Mr. ADAMS. The only thing I wanted to clear up was that your Honor seemed to base part of your statement here on the proposition that Redfield, at the time of the grand-jury proceeding, was an attorney employed by Certain-teed and acting for Certain-teed.

Justice STEPHENS. That is not material to the existence or non-existence of the privilege. If the privilege ever existed, it existed then.

Mr. ADAMS. I also place some reliance, your Honor, on the grand-jury testimony in which it was stated that he would identify the document. I don't take it that that meant that that was a waiver, and I don't construe it that way. Now your Honors may. But it seems to me—and I want to make it clear that I was not counsel for the company in that case at that time, and I am now required to act under the instructions of my client with respect to this class of testimony ——

Justice STEPHENS (interposing). We understand that.

Mr. ADAMS. I cannot but state to your Honors that it seems to me that since there is this question as to whether the client has or has not waived the privilege, as a matter of fact, that we should have an opportunity to produce a witness to testify on that subject.

Justice STEPHENS. Where is that document?

1804 Mr. STEFFEN. It is on your desk, your Honor.

Justice STEPHENS. Oh, yes.

Mr. ADAMS. If your Honor pleases ——

Justice STEPHENS (interposing). You needn't be heard any further at the moment. We have heard both sides on the subject.

The Court is of the view that this is still not identified. Counsel have not stipulated as to identification, as requested. It may have been identified before the grand jury, but it is not identified here. So the ruling still stands that the document is not identified and we therefore

need not at this time rule on the question of the waiver of privilege.

Mr. STEFFEN. We ask authority, your Honor, to subpoena Mr. Redfield if the defendants will not stipulate on the basis of that record, and we would like your reaction on that. Our thought is that we would save the Court time if the defendants would stipulate in accordance with the testimony before the grand jury.

Justice STEPHENS. You have the usual recourse to subpoena if you need to use it.

By Mr. STEFFEN.

Q. Getting back, Mr. Brown, to Exhibit No. 236 ——

Justice STEPHENS (interposing). Before you start with that, Mr. Steffen, if you are going to continue to press this document, in a further attempt to identify it, the Court will be glad if counsel on both sides, Mr. Adams who is objecting, and you who are presenting the document,
1805 would have your assistants search for any authority they may be able to find on the subject of waiver before a grand jury constituting a permanent waiver.

Mr. STEFFEN. We have authorities, I think, to indicate that a waiver at that time is a waiver at all times.

Justice STEPHENS. That is a novel point to the Court.

By Mr. STEFFEN.

Q. We now get back, Mr. Brown, to Exhibit No. 236. Do you have it before you?

A. Yes, sir.

Q. I want to ask you whether you attended any licensor meeting at which the matter of recut wallboard was discussed, if you recollect.

A. I don't remember such a meeting, I could have attended it.

Q. Do you know what is meant by a "licensor" meeting?

A. Yes, sir.

Q. What is meant?

A. A meeting called by the licensor of the licensees to discuss any problems that should be properly discussed.

Q. Having relation to the license agreement?

A. It could have reference to something as outlined in this letter.

Q. Do you recall whether your company was making "seconds" at this time, which were subject to this
1806 memorandum?

A. I think they were. Every company makes "seconds", it can't avoid it.

Q. Could you give me your opinion, as sales manager at one time of Certain-teed, whether the "seconds" had the effect described here in the second paragraph, that is, of demoralizing prices?

A. Well, a "second" sold of any manufactured product is not a good thing. It doesn't do the value of your product any good. What is referred to here is the method of reclaiming, which in my opinion does not hurt a product, but to just sell them as "seconds", does.

Q. Will you explain why selling as "seconds" does affect the market?

A. Well, a "second", in my definition, means a defective product.

Q. That is right.

A. And if you sell a defective gypsum board or defective roofing, or defective anything else, it doesn't do the reputation of the perfect grade material any good because you don't know where it is going to be used, or where it is going.

Q. Would it have any effect on price?

A. No, sir, I don't think so.

Q. Would you offer your "seconds" at the same price as your No. 1 grade?

1807 A. No, sir.

Q. Would that possibly tend to unstable prices?

A. Not a normal production in a plant, of "seconds", no.

Q. But a larger amount might, is that the point?

A. Naturally.

Q. Now perhaps I have asked you this question, but can you recall at all having discussed at one of these licensor meetings, anything to do with "seconds" or with recut wallboard?

A. I think it was discussed, but I don't remember any of the details.

Q. Now, at one of those licensor meetings who would be present? I am asking this question in general, and then I will try to get it in particular.

A. Representatives of the licensor would be present, and all licensees would be invited. Whether they would be there or not is another matter.

Q. Who attended, to your knowledge, from United States Gypsum Company, at any meeting that you attended?

A. Well, they weren't always attended by the same people.

Q. Name them.

A. Mr. Henning, Mr. Avery, Mr. MacLeish—they all attended at different times.

Q. And from time to time were members from all the other licensees present when you were there?

A. Yes, sir.

1808 Q. How often, do you know, were the licensor meetings held in 1929 and 1930?

A. I don't know how often. Usually sixty or ninety days apart, something like that.

Q. I now show you Government's Exhibit No. 237, which purports to be your letter to the United States Gypsum Company under date of January 2, 1930. Can you identify your signature?

A. Yes, sir.

Mr. STEFFEN. We offer Government's Exhibit 237.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. The letter is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 237 was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 238, which purports to be a letter from Scott, Bancroft, Martin & MacLeish, under date of January 18, 1930, addressed to C. O. Brown, and ask if you can identify that letter. Are you familiar with any of the writing at the top, Mr. Brown?

A. Yes, sir.

Q. What are you familiar with?

1809 A. The initials "AW" and "COB". "Better have Chaffee approve" in my opinion is in Whittemore's writing.

Q. And do you know whose writing that is in the body of the letter, "Avery resetting of calcined edge?"

A. No, sir. I don't recognize that.

Q. Or "Hoggatt edge heater"?

A. No, sir, I don't recognize that writing.

Q. Do you know the signature of Mr. MacLeish?

A. Yes, sir.

Q. Would you identify this as his signature?

A. I would.

Mr. STEFFEN. We offer Government's Exhibit No. 238

in evidence.

Mr. BROMLEY. And we object to it, not only on the usual ground, but also on the ground that it is immaterial to any charge in the complaint. The letter obviously refers to an exchange of licenses with respect to overlapping patents covering a feature of board manufacture. These patents were never put in any general license, and the license here referred to isn't related to and has nothing to do with, the licenses mentioned in the complaint.

Justice JACKSON. I was just wondering what that license was, it isn't identified in this letter.

Mr. BROMLEY. No, it is not.

Justice STEPHENS. What do you claim for it?

1810 Mr. STEFFEN. We claim that it has to do with the general license, and in the third paragraph it indicates that Mr. MacLeish has the purpose of writing these patents into the general back-log of patents in the October agreement, and he states rather explicitly, "as we might later want the right to fix prices included in our license to use this patent."

Mr. BROMLEY. But you know, Mr. Steffen, that it was never done, there was nothing ever done about it. It cannot have any relevancy.

Mr. STEFFEN. It is utterly immaterial whether anything was ever done about it. This shows a purpose and intent on the part of the United States Gypsum Company, and apparently with approval on the part of the Certain-teed people, that these patents should be interchanged, and that the agreement should be so drafted that the patents could be written into the general agreement to increase the back-log of patents upon which they proposed to fix prices. They did exactly the same thing in connection with the perforated lath patents, and those are now in evidence, I mean the license agreements are in evidence. They first issued license agreements, then they gave gratuitous licenses in which it was provided that they would be part of the general license agreement and would be subject to the price fixing thereby provided.

Mr. BROMLEY. You have alleged that in the complaint. There is no allegation that covers this subject at all in the complaint. It isn't mentioned or even sug-

1811 gested.

Mr. STEFFEN. We have a broad allegation of price fixing, and this is evidence of their intent and purpose to do that.

Justice STEPHENS. The Court is of the view that it is not admissible, Mr. Steffen, because you concede that whatever the intention may have been with respect to putting this license under what you refer to as the "back-log" of licenses, it wasn't done ——.

Mr. STEFFEN (interposing). I do not concede that, your Honor. Mr. Bromley asserted that, but I did not concede that.

Justice STEPHENS. Do you charge in the complaint that it was done?

Mr. STEFFEN. We make a very broad charge in the complaint. We haven't charged all the evidence that we expect to introduce, and of course are not required, as your Honor knows, to charge each little bit of evidence.

Justice STEPHENS. That is right.

Mr. STEFFEN. What we charged was a broad charge that the defendants sought to fix prices, and that they sought to monopolize the gypsum industry. We have introduced all of the basic agreements. We now show that in carrying out the conspiracy or combination, which we think was established by those agreements, that they took a resetting patent and exchanged it with the Certain-teed people, and provided that they would be permitted to write that
1812 into the general October agreement for the purpose, if they saw fit, of fixing prices.

Justice STEPHENS. You do not concede, then, that that was not done?

Mr. STEFFEN. No, I do not concede that it was not done.

Justice STEPHENS. Do you contend that it was done, do you intend to prove that it was done? If you intend to prove within your general charge of conspiracy and price fixing, that the exchange of licenses to which you refer, was accomplished, that is a different matter.

Mr. STEFFEN. I think the exchange of licenses was accomplished, yes. I think that all Mr. Bromley is stating, as I understood him, is that he thinks that they never actually did sign a second or additional agreement to carry out what Mr. MacLeish had in mind here, and that is a little provision providing that this agreement should be put in and should constitute a further basis for price fixing.

We offer it to show their intent and purpose, and we are prepared to go ahead ——

Justice STEPHENS (interposing). You offer it to show their intent and purpose, but Mr. Bromley's objection, which I thought you agreed to as he made it, was that it

was not carried out. Well, if it was not carried out, it wouldn't be entitled to any weight even if technically relevant. We have some doubt on the matter, however, because the exhibit is so vague that we can't tell what it is
1813 about.

Mr. BROMLEY. All of the license agreements alleged in the complaint and attacked in this suit are now in evidence. This letter gives the patent numbers in the first paragraph of the two patents which are talked about in this letter. A comparison of these patent numbers with the patent numbers in the licenses will disclose that they are not contained in the licenses, which would seem to end the matter, and Mr. Steffen knows that.

Justice STEPHENS. Is that correct?

Mr. STEFFEN. That is incorrect, your Honor, that is, the statement that I know that.

Justice STEPHENS. Is it correct or incorrect that these two patents, described in the first paragraph of the proposed Exhibit 238, are not in the license agreements which you have in evidence?

Mr. STEFFEN. I think that is correct, that these two patents, the Avery resetting patent and the Hoggatt patent, were not incorporated in the October agreements at the time that they were signed and executed by all of the members of the industry.

Mr. BROMLEY. Or in any agreement, sir.

Mr. STEFFEN. And this letter indicates, as the Government contends, that this process of using patents and using them for purposes of putting them in a general agreement, has continued. We are not bound by the patents
1814 that just happen to have been described in October 1929. If they had a purpose concerning any subsequent patents, to put them in that agreement, that would be relevant from the Government's standpoint to establish their intent and purpose in the fixing of prices, and if we can show that the defendants expected to use these patents at some future time, for purposes of forming a back-log or a stronger basis upon which they could fix their prices, that is highly relevant to show the sort of conspiracy and combination that we are dealing with. That is from the Government's standpoint.

Justice STEPHENS. Well, it is practically the adjournment time. We, as presently advised, have great difficulty in seeing any relevance in the document, and we are anxious to let both sides in the case prove everything that is prop-

erly relevant; but equally anxious not to have in the record things that are so remote as not to have any legal value, because the record is going to be large enough anyway.

Since it is not charged that these patents went into the license agreement, which is the principal predicate of your case, nor that they went into any other license agreement, we have difficulty in seeing its relevance, but we will consider the matter during the recess.

You may announce the recess until tomorrow at ten o'clock.

(Thereupon, at 3:55 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Wednesday, December 15, 1943.)

1815 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017.

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., WEDNESDAY, DECEMBER 15, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

1820 Mr. BROMLEY. Now may I go back to that matter of which I spoke yesterday, and call the Court's attention to page 2077?

Justice STEPHENS. Yes. The Court read the record on that subject last night.

Mr. BROMLEY. That is Your Honor's statement beginning at line 14.

Justice STEPHENS. Proceed, Mr. Bromley.

Mr. BROMLEY. A reference to the top of that page, to Mr. Steffen's question, on the third line on page 2077, shows that he was talking about the May, 1929, licenses, because he uses the phrase, "under the closed-edge patent".

Justice STEPHENS. That is the question that commences at line 20 on page 2076?

Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. Let me read it.

Yes, Mr. Bromley?

Mr. BROMLEY. And if reference is made to this line of questioning, which begins on page 2074 at line 10, it will be apparent that Government counsel was talking about the May, 1929, licenses all the way through. So that Your Honor's statement on page 2077, it seemed to me, was to the effect that you understood the testimony to be that stabilization, and the factor that all the companies would take a license, were reasons which Mr. Brown had testified to for entering into the May licenses. Now
1821 I think that is incorrect, because a reference ——

Justice STEPHENS (interposing). You think that is incorrect?

Mr. BROMLEY. Yes. I think he testified, with respect to price stabilization and the factor of all of them taking licenses, that those were reasons in connection with the November licenses, and not the May licenses.

Now I think I can establish that by referring to his testimony in which he mentioned ——

Justice STEPHENS (interposing). Stabilization?

Mr. BROMLEY. Yes.

Justice STEPHENS. That is on page 2049, isn't it?

Mr. BROMLEY. Yes, sir, 2048 or 2049 ——

Mr. STEFFEN (interposing). We might shorten this, Your Honor. We would be very glad to agree with Mr. Bromley that the witness' testimony had to do with the November license agreement; and that the May license agreement, he testified he had very little to do with, and knew very little about.

Mr. BROMLEY. I am not interested in what counsel's position is. I want to make sure that the Court understands it, and that I am right in my understanding of it, as far as the Court is concerned.

Justice STEPHENS. Thank you, Mr. Steffen, for your interjection, but the Court itself is interested in the
1822 statements made on the Court's part.

Where is this on page 2049 that you are referring to?

Mr. BROMLEY. It starts at line 24 on page 2048:

"Q. Have you read this memorandum of July 3d, Mr. Brown?

"A. Yes, sir."

Then over the page:

"Q. I want to take you to the second page, the first line. There you say, 'Taking these things into consideration, plus other advantages', and so forth * * * ".

Then the answer:

"A. There would be a stabilized market on gypsum lath.

"Q. And by 'stabilized' you mean what?

"A. Price control."

Now since he was talking about the contents of the July 3rd memorandum, his reference must be to the November licenses, because the prior license had been executed in May. So it seems to me that his testimony about price stabilization certainly refers to the November and not the May licenses.

Justice STEPHENS. Well, the Court will, then, order a change made in its statement at page 2077, where the Court says:

"We think the question as phrased is speculative, and asks for a speculative conclusion as to what someone else would have done. We think also, Mr. Steffen, that the record clearly shows that this witness has testified, in effect, in answer to previous questions on the sub-
1823 ject, that stabilization was one of the factors which induced the November license agreement * * *"—

after the word "induced" in line 19, insert the words "the November license", striking the word "this". Otherwise, the error would seem to be harmless, as counsel took up another line of questioning.

It is important that no incorrect statements as to what witnesses have testified to should be in the record, on the part of the Court.

Mr. BROMLEY. I did want to demonstrate that the reference to "all these companies should be under the license", in Your Honor's statement, likewise the testimony which the witness gave on that subject referred only to the No-

vember and not the May license, and I can demonstrate that by referring to page 2063, line 11:

"A. We preferred to see as many as possible sign."

I say that answer has reference to the November license, and I demonstrate that by going back to page 2062, the question beginning at line 18. Counsel is talking about the memorandum of August 9, 1929, which was after the May licenses.

Justice STEPHENS. Line 18 of what page?

Mr. BROMLEY. Page 2062.

Justice STEPHENS. That says:

"Q. I want to ask you one or two questions, Mr. Brown, concerning your memorandum of August 9, 1929."

1824 Mr. BROMLEY. Yes, sir. Now since counsel and witness are talking about the memorandum of August 9, 1929, when you go over the page the answer in line 11, "We preferred to see as many as possible sign.", must refer to the November license and not to the May license.

Justice STEPHENS. Is there any dispute about that?

Mr. STEFFEN. No, Your Honor.

Justice STEPHENS. Then in line 21, page 2077, before the word "license" at the end of the line, the word "November" will be inserted.

Mr. BROMLEY. Now I call the attention of the Court to this ——

Mr. STEFFEN (interposing). About that word "November", I think more of them are October licenses, are they not?

Mr. BROMLEY. They all became effective on November 5.

Justice STEPHENS. November will probably sufficiently identify them.

Mr. STEFFEN. So long as that is clear.

Mr. BROMLEY. I brought the subject up, if the Court pleases, not because I thought it had any great importance in itself, but I thought the time had come for defendants' counsel to state in the record that their silence did not indicate that they agreed with the Government's apparent position that if the Government succeeded in proving that these licensees signed license agreements with the hope or on the condition that all or a substantial number

1825 would likewise sign, and if one of the primary reasons for all of them doing it was to get stabilization through price control, that that made the resultant situation illegal. We do not admit that at all, we do not believe

it does. We think that all of these people, licensor and licensee, could, with perfect legality, have had as a reason for executing the November licenses the resultant price stabilization which price fixing would confer upon the industry, and that they all likewise could have determined that they wouldn't sign unless others signed, a substantial number or all.

And in that connection, I find no charge in the complaint that the mere fact that one of the compelling reasons was stabilization, and that another was that all would come under, made the resultant operation under the licenses illegal. That certainly was not the theory of the complaint, because the complaint, when it talks about price control, as I read it, only attacks price control in certain specific respects, that is, when there was no license in effect, no price-fixing provisions in effect, between August and November, 1929, when, as the Government alleges, the defendants attempted to fix resale prices; when, as the Government alleges, the defendants fixed prices when they weren't using the patents. So I find in the complaint only that kind of an attack upon our system, and not the attack which

Government's counsel now, it seems to me, is shifting
1826 to, that is to say, that the mere fact that all of them took a license, hoping to gain benefits from price stabilization and wanting all others to sign, made an illegal situation.

I just wanted to make it clear on the record now that we did not admit that if the Government proved that, it rendered the licensing system illegal. We do not think it is the fact that these people were motivated by a desire to get price stabilization or had any agreement whereby they would sign only on condition that all signed, we do not think that is the fact and we shall continue to resist that. But even if it were proved, we do not think that it would result in the establishmemnt of any cause of action by the Government against these defendants.

Justice STEPHENS. The Court has not interpreted the silence of counsel for the defendants on that subject as an admission of illegality.

Do you wish to say anything on this subject, Mr. Steffen?

Mr. STEFFEN. I think I will have to say a number of things to keep the record straight, Your Honor.

We, I take it, are not to argue at this time the law on the question of whether uniformity of action on the part of each defendant in taking out a license where they had in mind, individually, the idea of obtaining price control,

whether that does or does not constitute a violation of the Sherman Act. That is a matter which will be
1827 postponed until final argument.

I would like the record to show very clearly that under the *Masonite* case and under the *Interstate Circuit* case, uniformity of action on the part of competitors in going into a combination where each individually had an idea of accomplishing a particular purpose, did constitute a clean-cut showing of a violation, of a conspiracy. In proving conspiracies, as Your Honor knows, and I think the Government's evidence here will show, it is necessary largely to build a case on circumstantial evidence, on declarations made at one time or another, and that all fits together at the end, as the Government will contend, to show a purpose to accomplish one or another of the matters which are illegal under the Sherman Act.

Now Mr. Bromley said that we were shifting our ground. That is a favorite device of counsel to say that the Government, or the other side, is shifting. I would like to make very clear right now, in answer to that, what we conceive these pleadings to be, and what they have always been, in respect to that matter.

The pleadings charge, in Paragraph 44 of the Complaint, broad violations ——

Justice STEPHENS (interposing). Just a moment, let us get the Complaint so that we can read what you are referring to. Paragraph 44?
1828 Mr. STEFFEN. Yes, sir.

Justice STEPHENS. Proceed, Mr. Steffen.

Mr. STEFFEN. We state that the Complaint charges, in Paragraph 44, broad violations under the Sherman Act, and that that is the gist of the Complaint.

In Paragraph 45 we state the purposes of the combination. These purposes are stated to be of restraining, dominating, and controlling the manufacture and distribution of gypsum products in the Eastern area by (a), (b), (c), (d), and (e) in that paragraph.

(a) is the broad proposition that the defendants have conspired for the purpose of "Concertedly raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by said companies in the Eastern area".

And the bulk of our evidence will have to do with the concerted action on the part of the defendants to fix and maintain prices of gypsum board.

Now the defense in this case, as I think we are clear, is

that the *General Electric* case will protect the defendants from concertedly conspiring to fix prices and to restrain trade in that they had a patent, and that under that patent they had a license, and that under the license they had a price control feature, and that that will be a sufficient
1829 defense by way of confession and avoidance.

We met that, in anticipation, in Paragraph 46. Paragraph 46 says—Yes, you had a patent license agreement, but it was a mere subterfuge. Your real purpose in this case was to fix prices and not to exploit a patent in the normal and usual way, in which case price fixing, if properly carried out and with proper instructions, and so on, might be a reasonable means, on the part of one licensor and one licensee, of protecting the patent, but that it distinctly can be, and we charge that their affirmative defense is, a mere subterfuge.

Let's take one matter which we had up yesterday evening, and that is that we haven't alleged in the remainder of the Complaint all of the evidence that we expect to produce to establish that these defendants did combine to fix prices and to use their patent licensing agreements as a subterfuge.

From Paragraph 47 on, we have alleged in great detail the evidence, much greater detail than is necessary, the evidence which we think establishes the principal charges made in Paragraph 44.

Now as Your Honor well knows, under the Rules, Rule 8 provides that:

"A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction
1830 depends, * * *; (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled."

So that the framework of this complaint is very simple. We have alleged jurisdiction; in 44 we allege the offense, which is a plain and simple statement of the claim; and over in the prayer for relief we have asked or demanded certain relief. That is all that is necessary in order to make a sufficient complaint.

Therefore, the evidence that we will be offering from time to time is evidence that goes back to 44. In large part—95 per cent of it—it will be evidence which we have already detailed in some measure in the paragraphs be-

ginning with 47. Therefore, the charge that we are shifting is utterly wrong.

Now Mr. Bromley also intimated that all we were trying to do was to show that they were price fixing illegally between that little period when the license agreements expired on August 6, and the time when the November agreements, or the October and November agreements, took effect on November 5. That isn't our case at all. We expect to show that, among other things. We expect to show that from the time they entered into these license agreements they were illegally fixing prices, straight through, not just on an occasional time when there was no price-fixing
1831 agreement in the license, and not just a case where they were fixing prices on resale. We expect to show that this is illegal, cold, in that it provides for a control of prices on resale. But that is only a part of the case.

Now may I go back to the record for just a moment?

Justice STEPHENS. Have you anything more on this subject, Mr. Bromley? Do you wish to make a reply?

Mr. BROMLEY. Yes, if the Court pleases.

The last sentence on page 11 of the Complaint, at the end of Paragraph 46, says: "The formation and operation of said combination is more fully set forth in paragraphs 47 to 120 hereof."

Now if Your Honors will go back to paragraph 45, subdivision (a), on page 10, to which my friend adverted, just the opposite page, in which there is the general allegation, "Concertedly raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured * * *", now there is a general statement which is later in the Complaint made perfectly specific, and it is made perfectly specific by the sub-head above paragraph 96, on page 25, which is entitled, "Concerted control of prices and methods of distribution of unpatented gypsum products".

And over the page and down through paragraph 107, each instance of control of prices is specified and alleged in accordance with what I have said I believe. The
1832 little period is specifically alleged in paragraph 97, the period from May to November, 1929. And then in paragraph 100 it is alleged that from November 1929 to October 1935, the licensees weren't using the patents, and therefore the price fixing was illegal.

And in paragraph 102, it is alleged that from October 1935 to the date of the Complaint ——

Justice STEPHENS (interposing). Paragraph 102?

Mr. BROMLEY. That should be paragraph 101, I am sorry. (Continuing) that a substantial part of the board produced was not covered by the patents, and therefore, of course, price fixing wouldn't be lawful.

Now it doesn't do any good to refer to these general allegations at the beginning of the Complaint and say, "Well, that covers everything you can think of" when, as a matter of fact, the pleader was almost as meticulous in preparing the pleading as he would have been if he had been preparing a bill of particulars, and he alleged specifically just what concerted raising and fixing of prices he was talking about. And I don't believe that the allegation in paragraph 46, to the effect that the combination was entered into and carried out under the guise of numerous license agreements, in the light of what is alleged subsequently, was ever intended or can now be said to mean that because somebody thought price con-
1833 trol was a good thing, and somebody wanted other companies to come into it, that that made the scheme illegal. I think that allegation is one which has commonly appeared in other suits where there wasn't any intention to use the patents at all, where the patents weren't the thing that the companies wanted, they didn't amount to anything, but they just framed up a scheme to get a patent on something in order to fix prices.

Of course, they are trying hard to prove that, but I don't think that is the same thing as to say that because some of the licensees were thinking that they would like to go into this because it would stabilize their prices, and because others would go into it, that the Government intended to allege those two facts as a reason to make the whole scheme illegal. I don't think they have so alleged them.

Mr. STEFFEN. May I make just one statement? Practically all of Mr. Bromley's argument now, in its reference to page 25 and the paragraph following, of the Complaint, following paragraph 96, relate to unpatented gypsum products, and there is an allegation in here that the defendants not only have sought to fix the prices of all board, including and principally the patented board, but the paragraphs beginning with 96 contain allegations that they have attempted to fix the prices of unpatented board. That is what it says, for unpatented gypsum products. Therefore, all of that is a further allegation.

1834 I don't think there is any matter up at the moment ——

Justice STEPHENS. (interposing). There is nothing be-

fore the Court calling for a ruling at the moment. Nevertheless, the Court is glad to have these statements, which advise the Court of the contentions of the parties under the pleadings, and they may be helpful to the Court when a ruling is required.

The Court will make this statement, Mr. Steffen, with respect to your position, so that you may be advised of it: I, myself, speaking for myself at least, have grave doubt as to the correctness of your statement that you have pleaded a part of the evidence but weren't required to plead all of it. It doesn't seem to me that you either were allowed to plead evidence or that you did plead evidence, in the paragraphs of your Complaint which follow paragraphs 44, 45 and 46. As the Court read the balance of the Complaint, the Court understood it to be not allegations of evidence, but allegations of ultimate fact.

Mr. STEFFEN. I think that is correct, yes.

Justice STEPHENS. I don't raise that point captiously at all. I make the point for the reason that it seems to me there may be something to the contention of defendants' counsel that if those are the ultimate facts upon which you are relying, you are bound by them, in the absence of an amendment. The Court has understood the theory
1835 of the Government's case, generally stated, to be that the price fixing which is attacked had, in the large, two aspects: (1) the alleged price fixing during an interval when the licenses were not in effect, and (2) all of the price fixing which occurred under the licenses, on the theory that the licenses themselves were just subterfuge. And the Court has regarded the detailed statement of the Complaint following the paragraphs, that I mentioned, 44, 45 and 46, as a definition of the ultimate facts and not of the evidence.

There was, I think, one exhibit before the Court at the close of the session, on which some question was raised as to relevancy. Is there a suspended ruling on that, or are we ready to proceed?

Mr. STEFFEN. May I go to the record, and I think I can save time.

Justice STEPHENS. Yes.

Mr. STEFFEN. Your Honor stated this morning, in connection with one piece of testimony on page 2056, that you did not understand it.

Justice STEPHENS. Oh, yes.

Mr. STEFFEN. The witness there said: "I would say my answer would be the same as to your question, plus other

advantages in working under the patent."

Now Mr. Bromley has referred Your Honor back to the testimony where the witness said, "plus other ad-
1836 vantages", and that was on page 2049.

Justice STEPHENS. What puzzled me about it, Mr. Steffen—maybe I can shorten that—was this: The witness says:

"I would like to correct that. I would say my answer would be the same as to your question, plus other advantages in working under the patent."

Now looking back to your question, the second question from the bottom of page 2055, which is what the witness is apparently referring to, it says:

"By Mr. STEFFEN.

"Q. You use the words in your letter here, 'and in the interest of harmony in the industry'. Was that a consideration?

"A. No, sir; I don't think so.

"Q. There in that third paragraph.

"A. I would like to correct that. I would say my answer would be the same as to your question, * * *"—I don't know what he means by that.

Mr. BROMLEY. I suggest we ask him over again.

Mr. STEFFEN. I will ask him over again.

Justice STEPHENS. Very well.

Thereupon, CLAUDE OLIVER BROWN, the witness on the stand at the time of adjournment, resumed his tes-
1837 timony as follows:

DIRECT EXAMINATION (resumed).

Mr. STEFFEN. I would like to refresh him.

Justice STEPHENS. Yes, you will have to refresh him. I may be dull about this. My colleagues apparently understand the situation, but I don't.

Justice GARRETT. He was asked, "You use the words in your letter here, 'and in the interest of harmony in the industry'. Was that a consideration?"

He says: "No, sir, I don't think so."

And then you called his attention to that language there in the third paragraph, and after reading it he said, "I would like to correct that."

I interpret that to mean,—"I would like to correct the answer, 'No, sir, I don't think so.'"

Justice STEPHENS. Yes, I understand that he is correcting it, but I don't understand what he corrected it to mean.

Mr. STEFFEN. He goes on and says, "I would say my answer would be the same as to your question, plus other advantages in working under the patent."

Now I think we ought to get the witness' present statement on the matter.

Justice STEPHENS. Do you understand what this is all about, Mr. Brown?

The WITNESS. Your Honor, I think I do, yes, sir.

1838 By Mr. STEFFEN.

Q. I will show you, if you would like to see it to refresh your recollection, Government's Exhibit No. 228, which was the exhibit concerning "plus other advantages in working under the patent".

I first asked you what you meant by "plus other advantages in working under the patent", appearing at the top of the second page of that exhibit.

A. I referred to the answer being the same as to a previous question in which I stated that the answer was price stabilization and price control, and I corrected this to make the same answer in this case.

Justice STEPHENS. Very well.

Mr. STEFFEN. Thank you, Mr. Brown.

Justice STEPHENS. That clears it up. Thank you, Mr. Steffen and Mr. Brown.

You may proceed, gentlemen.

Mr. STEFFEN. I think Exhibit 238 was before the Court, and there was a question of ——

Justice STEPHENS (interposing). Relevancy.

Mr. STEFFEN (continuing). Of why we considered it admissible.

In part, I think we have cleared the air a little with our discussion just now concerning the Complaint, and the nature of the Complaint, but I think I must make a short statement to show why we consider this relevant.

1839 As I said earlier, we consider that the gist of the Government's Complaint is paragraphs 44, 45, and 46. Under paragraph 44 we allege violations of various sections of the Act; under paragraph 45 we allege that they were done with the purpose and intent of dominating and controlling the gypsum industry by: (a) fixing high and arbitrary prices; and in paragraph 46 we say that it was done under the guise of patent license agreements.

Now this, as we see it, is a declaration of a co-conspira-

tor. Mr. Bromley has told the Court that the two witnesses who represented USG from the beginning until today were Mr. MacLeish and Mr. Avery, they have been through this from the beginning to the end. They were not only conspirators but arch-conspirators, according to the Government's contention.

Now we have here, as we construe it, an allegation or a declaration by Mr. MacLeish, who is, as I say, one of the conspirators. Mr. MacLeish says what? He says that, "In drafting this agreement it seemed to me that the time might come when this patent should be included in our general license agreement"—we expect to explain that that would be in the general license agreements which were executed in May and November—"as we might later want the right to fix prices included in our license to use this patent."

1840 Now it is the Government's contention that the defendants have agreed and conspired and that they have fixed prices and they have restrained commerce. It is the defendants' contention that they were justified under the *General Electric* case. It is the Government's contention that that is a subterfuge. Now in order to show whether they were using their patents or not using their patents as a subterfuge, we are entitled to introduce all declarations of any conspirator which gives an inkling as to whether they were really wanting to license people under these patents and to protect the patents, which so far has not appeared very much, or whether they wanted to use the patents for the purpose of gaining price control. If that is what they wanted, rather than merely a legitimate exploitation of their patent privilege, then their case falls completely to the ground.

Here is a declaration by a co-conspirator which you may construe as you like, but which we construe to mean that his primary interest here was to get this patent so that it could later be incorporated into the agreements, if need be, and constitute a basis for price fixing.

Now Mr. Bromley suggested yesterday that we hadn't established that they did write it into the agreements, and of course we say that that is immaterial for the present purposes. The cases under the Sherman Act are very clear, that you need not show that they actually restrained commerce. All you need show is that they conspired,

1841 that they intended to.

I cite you the *Nash* case, which is a United States Supreme Court holding in *Nash* v. *United States*, 229 U. S.

373, where they said that the Sherman Act "does not make the doing of any act other than the act of conspiring a condition of liability * * *"

And that is settled law, so far as the Sherman Act is concerned. So that it wasn't necessary to show that they went on, wrote this into the agreement, and then thereafter fixed prices on it and restrained trade. What we want to do is to show what these defendants intended to do. If we could put on evidence showing that Mr. MacLeish made a declaration that he would like to get some more patents so that he could write them into the agreement and fix prices all the more surely, would defense counsel contend that that wasn't a declaration that would be admissible, and could he argue that merely because we didn't show that he did get those patents and did put them in the agreement, that it was immaterial?

Now as a matter of fact, in this case, and I think we ought to make it very clear, when they came to the perforated lath agreement they there had a patent, No. 1,938,354, covering the perforated lath invention, as Mr. Bromley says, and they issued patent license agreements, various of the defendants took out those licenses; then, in 1938, when difficulties developed and they found that
1842 they could no longer, or wanted no longer to collect a royalty on it, they granted gratuitous licenses to those licensees. They accepted those gratuitous licenses. Those gratuitous licenses, which are in evidence and will be construed by the Court, as we understand it, provided that those patents, that is, particularly Patent 1,938,354, became a part of the original agreement between the licensor and licensee, and was subject to all the terms and conditions of the original agreement, including price control, which, as we contend, indicates a very definite purpose to increase as much as possible the patent log in the back of their agreements to make it all the more sure that they could sustain a case of this sort, that they had strong patent backing.

Now we say this is a declaration. I think there can be no question but what it has some probative value. I think it is clearly relevant and clearly material, and I am very sure the Court could make no error in admitting it. The general rules today are to admit things that are properly identified, and that are relevant in some measure, or material.

I thank you.

Justice STEPHENS. Mr. Bromley, do you wish to be heard?

Mr. BROMLEY. Well, I have listened carefully, but I do not understand what his purpose can be. If you will read the third paragraph of the letter, it seems to me
1843 that it only states what any careful lawyer would be bound to state. The second sentence, beginning "This could not be done",—I should think a careful lawyer, who every time he licensed a patent, if he wanted to think about all future eventualities, might very well determine to reserve the right to fix prices, because if he didn't reserve it he couldn't do it thereafter.

Now here is a situation where we never did fix prices under the patent, and never put it in the general license. How can it be material to anything?

Mr. STEFFEN. I might say that that last statement is a matter not in evidence one way or the other.

Mr. BROMLEY. Well, it is in evidence, Mr. Steffen, as I demonstrated to you yesterday. All you have got to do is take your license contracts that are in evidence; each one of them has a schedule of patents, by number, which are licensed, they are specific schedules, they describe the patents and list the inventor's name and give the number; and you can tell whether Patents 1,725,243 and 1,709,475, referred to in the first paragraph of Exhibit 238 for Identification, are or are not in the November licenses. I say they are not.

Mr. STEFFEN. I would say clearly they were not there, but whether there were other agreements has not been established. You were asserting that, as I under-
1844 stood it.

Justice STEPHENS. On this particular point that you are now mentioning, Mr. Bromley, this idea occurred to the Court in thinking the matter over during the recess. Suppose, to take a simple illustration, defendants were charged with conspiring to incite a riot, and it was offered to prove that they had caches of ammunition at various places in the vicinity of the alleged riot; that they were put there for the purpose of being used in the riot. Would it be irrelevant to prove that one of those caches of ammunition did exist, even though it was not actually used in the riot?

Mr. BROMLEY. No, sir, it would be relevant.

Justice STEPHENS. Would it not be some evidence of an intent to riot that they had that additional cache of ammunition, even though it wasn't actually used?

Mr. BROMLEY. Yes, sir, I think it would be.

I think my position must be that that is not a good analogy, because certainly I can not quarrel with Your Honor's obvious conclusion that both of those facts would be relevant and material. I think they would be. But I don't see what relevancy it has to prove that this company, or its lawyer, for years prior to the licenses or subsequent to the licenses, every time it got a patent and licensed it to anybody, in a situation not under attack, reserved the right to fix prices.

1845 Now suppose this company had done that for years prior to these November licenses, and had done it for years afterward, as to inventions, however, which are not concerned in this suit. Can it be urged that Mr. MacLeish should be judged as to whether he is a conspirator or not, by the fact that he was of a price-fixing mind, because as a lawyer he always reserved the right to fix prices?

Now it seems to me that goes too far. I don't believe you could prove in the riot situation that years before, these people who were indicted for inciting a riot, talked about inciting other riots, or even had caches of ammunition stowed away for other riotous purposes, years before or afterwards.

I think that is just where the line should be drawn. You have got to show some connection with the riot in connection with which they are indicted. I don't believe that the Government would have any right to prove that it was Mr. MacLeish's practice to do this every time the company got a patent and it was referred to him and licensed to somebody else, if those situations were not being attacked by the Government, as they are not here.

Justice STEPHENS. In other words, you assert the proof asserted by the Government to exist in this Exhibit 238, to be somewhat like the attempt to prove in a criminal proceeding that a defendant had committed past crimes or had a tendency to commit past crimes; that that

1846 is really irrelevant to the present issue?

Mr. BROMLEY. Yes, sir, I do, and I think it is.

Of course, I am reminded that the riot analogy lacks this element of similarity: The riot is admittedly, per se, illegal. Here we have a situation, i. e., price fixing under a patent, which is, per se, legal. So that I don't believe you can convert price fixing under a patent, which is perfectly lawful and legal as the law stands today, into an illegal situation by attempting to prove that one of the

co-conspirators always desired to fix prices under every patent.

Justice STEPHENS. Well, of course, as to that, the analogy may have been a rough-cut analogy, but perhaps your response to it is not quite accurate either, Mr. Bromley, in that here it is charged that this price fixing is illegal because entered into as a subterfuge, and not really in protection of the patent monopoly; and each party, under familiar theories, is entitled to introduce evidence to prove his theory of the wrong involved. So it may be that there is some possible relevance in the exhibit.

Let the Court read it again.

The view of the Court is that the exhibit may have some slight logical relevance in view of the general charge that the license agreements were a subterfuge. The Court will state frankly, Mr. Steffen, that it seems that the exhibit is very close to the line of exclusion because
1847 of slight weight. Evidence may be technically relevant in the sense that it has a logical relationship to an issue, and yet has such very slight weight that its remoteness makes it inadmissible.

We are frank to say to Government counsel that we think that particular exhibit is very close to that line. Nevertheless, we think it does have possibly a technical relevancy, and we will not exclude it.

It is received in evidence.

(The document referred to, marked Government's Exhibit 238, was received in evidence.)

Mr. STEFFEN. I might say that occasionally an item having slight weight when it is introduced, becomes more significant as the trial proceeds.

Justice STEPHENS. It may be connected, we understand that.

Thank you gentlemen for the helpful statements you have made on all these topics.

Now shall we proceed to further examination?

By Mr. STEFFEN.

Q. I want to take up another subject, Mr. Brown.

Do you recall having had any negotiations with the USG on behalf of Certain-teed, concerning a plant at North Holston?

A. Yes, sir.

1848 Q. What was the plant at North Holston?

A. It was a gypsum plant.

Q. Do you recall about when you had negotiations with USG?

A. I don't remember the date, no, sir.

Q. What was the nature of the negotiations?

A. To purchase plaster from them.

Q. Did it include the purchase of any other items besides plaster?

A. I think it did, I think it included board and lath, but I am not sure of all of the items covered.

Q. Did the Certain-teed people have a mill at North Holston?

A. No, sir.

Q. Did they have a plaster mill there?

A. They had one at Plastergon, Virginia, as I remember the point. I have it down wrong, I am sorry.

Mr. BROMLEY. It was Plasterco, wasn't it?

The WITNESS. Yes.

By Mr. STEFFEN.

Q. What was the purpose of the agreement to buy plaster from USG, if you had a plant there?

Mr. ADAMS. I object to that. The agreement will speak for itself if it is introduced.

Mr. STEFFEN. We will introduce this agreement, but these continual objections that the agreement
1849 speaks for itself, of course, are out of place where we want to show purpose, and in a conspiracy case certainly we are entitled to show the purpose, intent and feeling of the individuals. The cases are many on that point. We are not construing the contract. We will introduce the contract in a minute.

Justice STEPHENS. The Court has ruled that where an agreement is in evidence, the meaning of the agreement must be learned from the agreement and not from the witness, but the Court has not ruled that counsel can not inquire into the reasons for entering into an agreement, so far as they may relate to alleged intent to violate the antitrust laws.

Mr. ADAMS. Even under those circumstances, Your Honor, we respectfully suggest that this question is bad as to form, and if counsel wants to prove the purpose of something I ask that he should be required to prove what happened.

Justice STEPHENS. Well, the Court thinks that interjection on the defendants' part may be correct, Mr. Steffen. The Court was going to suggest this morning, when an

opportunity arose, that it seems to the Court we could save a good deal of time in interruptions and perhaps in the examination if Government counsel, who will be examining witnesses a great deal from now on until their case is completed, would proceed a little more specifically. The Court does disagree with counsel in respect to this practice
—first, asking a general question, and then fol-
1850 lowing it up with a specific question. It seems to the Court that the conventional practice which we ought to follow here is, where you are dealing with conversations or discussions, to ask the witness if he had a discussion first, find out if he had one, and then find out approximately when it took place and who it was with; and then ask what was contained in it.

Here, also, it would seem to the Court that you might better, in a preliminary way, inquire of the witness whether or not he knows the purpose of going into the agreement, because if he doesn't know there is no need of taking your time or our time in pursuing the examination.

Objection sustained as to form; overruled as to substance.

By Mr. STEFFEN.

Q. Do you know the purpose of your negotiations with USG concerning the North Holston plant?

A. Yes, sir.

Q. What was the purpose?

A. We could buy it cheaper than we could make it.

Q. And what did you intend to do with the North Holston plant?

A. Shut it down.

Q. Did you shut it down?

A. Yes, sir.

Q. You stated, I think, that you didn't recall exactly the date of your negotiations with the USG?

1851 A. No, sir.

Q. I now show you Government's Exhibit No. 239, marked for Identification ——,

Justice STEPHENS (interposing). Is that in this file, Mr. Steffen?

Mr. STEFFEN. It follows the two contracts which I am passing over for the moment.

Mr. KNUFF. It is a telegram, Your Honor.

Mr. STEFFEN. It purports to be a telegram from C. O. Brown to Mr. Whittemore, under date of May 4, 1932.

Justice STEPHENS. I have it, thank you.

1852 By Mr. STEFFEN.

Q. Did you send that wire, Mr. Brown?

A. I don't remember, I assume I did.

Q. Are you familiar with the matter discussed in the wire or stated in the wire?

A. Yes, sir.

Q. Does that accord with your recollection of what took place?

A. Yes, sir.

Q. Do you recall whether you sent a wire at some time to Mr. Whittemore on this matter?

A. I don't recall the wire, no, sir.

Q. I now show you Government's Exhibit No. 240 ——

Justice STEPHENS (interposing). Who was Van Hagan, Mr. Steffen?

Mr. STEFFEN. Production man for Certain-teed.

Mr. ADAMS. In the Gypsum Division.

Justice STEPHENS. Thank you.

What is Exhibit 240?

Mr. STEFFEN. It has not been identified as yet, your Honor. It purports to be a handwritten memorandum signed, "Claude" and addressed to, "Dear AW".

By Mr. STEFFEN.

Q. I would ask you, Mr. Brown, if you recognize that handwriting, and do you know who "Claude" is?

1853 A. I wrote it.

Q. Could you tell about the date?

A. If it isn't on here I couldn't, no, sir.

Q. Well, look at the initials at the top and tell us if you know who those initials belong to?

A. It looks like Mr. Whittemore's writing.

Q. And do you notice the figures 5/2/32 appearing after Mr. Whittemore's initials?

A. Yes, sir.

Q. Could that have been the approximate date?

A. I would take it that would be approximately the date.

Q. I now show you Government's Exhibit No. 241, which purports to be a contract between Certain-teed and United States Gypsum Company under date of July 1, 1932, and I ask you to examine it and see if you recognize that as a contract which you signed.

A. Yes, sir.

Q. Is that the contract referred to in your communication to Mr. Whittemore?

Justice STEPHENS. The Court is a little confused, perhaps because I misunderstood one of the words of the witness. I understood him to testify that the purpose of the negotiation was to buy a plant at Plasterco. Did he say that?

Mr. STEFFEN. Will you explain that?

The WITNESS. To buy gypsum products, I should have said.

1854 Justice STEPHENS. I misunderstood you, that makes it clear.

By Mr. STEFFEN.

Q. And as I understood you, you were planning to close the plant, was that your testimony?

Justice STEPHENS. Close your own plant?

The WITNESS. Yes.

Justice STEPHENS. But to buy the products from someone else?

The WITNESS. Yes, sir.

Justice STEPHENS. From USG?

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. Will you examine the contract and see if that refreshes your recollection as to whether you were proposing to buy board also from USG?

A. Yes, sir, it indicates that we were going to buy board.

Q. Well, is that your recollection?

A. Yes, sir.

Mr. STEFFEN. I might state, your Honor, that there will be a series of exhibits next, and I would like to introduce them all after I have laid a foundation, all at one time.

Justice STEPHENS. You may.

Mr. ADAMS. May I inquire if this series of exhibits is going to have to do with this transaction only, because if the series of exhibits is going to deal with other

1855 transactions, I want to object to this now.

Mr. STEFFEN. It will have to do with this and related transactions. It will take me just a few moments, I think, to get them identified and lay the foundation.

Mr. ADAMS. Well, I don't want to interfere with counsel's presentation of the case, but I certainly want to object to him going into anything beyond this contract before it

is determined whether or not it has any relevancy or materiality to this inquiry at all. I do object, if it is proper to object at this time.

Justice STEPHENS. Well, this is largely a question of order of identification of items. We assume that Government counsel will not go beyond proper limits. If counsel has a series of exhibits which relate to each other and explain each other it might be well, in the interests of time and convenience, to have them marked and identified, and offered all at once. Otherwise they cannot be explained very well when the question of relevancy occurs.

You may proceed, Mr. Steffen.

By Mr. STEFFEN.

Q. Do you recall whether you had further negotiations with USG concerning this contract or the operation of your North Holston plant?

A. I recall no negotiations after the contract was signed.

Q. Did you have any further communications
1856 with USG concerning that matter?

A. I don't remember.

Q. Did a time come when you were accused of having reopened the North Holston plant, do you recall?

A. The time came ——

Mr. BROMLEY (interposing). Wait a minute. I object to the form of the question.

Mr. STEFFEN. The question is leading and purposely so.

Mr. BROMLEY. It is worse than that. I object to the conclusory word, "accused".

Justice STEPHENS. It would be more proper if counsel were to ask if there came a time when a question arose with respect to the reopening of that plant.

By Mr. STEFFEN.

Q. Will you answer the Court's question please?

A. There was such a question which came up later.

Q. Do you recall what the question was?

A. As I remember it, it was whether or not the plant was in operation.

Q. And who raised the question?

A. The United States Gypsum Company.

Q. What was their position?

Mr. BROMLEY. I object to this as entirely immaterial and incompetent and irrelevant, and I move to strike out all testimony with respect to the North Holston
1857 plant. It seems to me the examination has gone

far enough to indicate what the line of inquiry is, and it also seems to me that before counsel proceeds further he ought to state, if he can, what it is in the complaint to which this transaction could possibly have any relevance.

Here is a contract in writing, executed, between the parties, by which Certain-teed agreed to purchase materials in a certain area because it desired to close down its plant during a period of depression. And that is all there is to it. There is no price fixing in the contract. It hasn't anything to do with anything that is charged in the complaint, and certainly it is not mentioned in the complaint, even by the most indistinct indirection. It seems to me to be utterly and completely immaterial.

Justice STEPHENS. What is Government's contention as to the relevancy of this line of inquiry?

Mr. STEFFEN. I had expected, as I asked the Court's permission so to do, to introduce further contracts—this is not the only one, there were three others—where they closed down one mill or another of the Certain-teed Products Company, and contracted to buy, as I think the contracts establish, not only plaster but board from the United States Gypsum Company, and then of course to resell the board.

I am entitled, I think, to go into the question of their resale of the board which, as I understand it, was
1858 at bulletin prices, and it all fits in as a matter of resale price control.

Now if you would like to have my full statement on relevancy at this time, before I have gone into this additional matter, I will be glad to make it.

Justice STEPHENS. It would seem desirable that you do so, so that we will be advised as to the Government's position, since serious objection is raised by the other side.

Mr. STEFFEN. Well, I will call your Honor's attention—I think probably the quickest way of getting at it is to look at the complaint ——

Justice STEPHENS. Perhaps it would be advisable, Mr. Steffen, to take the usual recess at this time.

Mr. STEFFEN. Very well.

Justice STEPHENS. We will take a five-minute recess.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

1859 Justice STEPHENS. Proceed, gentlemen.

Mr. BROMLEY. May it please the Court, it seems to me that Exhibit 238 should have been objected to by me on the usual grounds, for the benefit of all defendants. I

failed to do that by inadvertence. May the record show that I do so now.

Justice STEPHENS. The record may so show, and the exhibit is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. STEFFEN. May it please the Court, our question, I believe, is as to the admissibility of certain contracts whereby the Certain-teed Products Corporation agreed to, in effect, close their mills and buy their necessary production of both plaster and wallboard from the United States Gypsum Company, and the question comes up as to whether that is proper under the complaint.

Now just as we were taking the recess, I was calling your Honor's attention to page 69 of the complaint. I do that because that is an agreement, and I can show you, if you wish, the Certain-teed-United States Gypsum agreement. But this is the October agreement between the licensor and all the licensees.

On page 69 you have the price-fixing provision of the contract, and I want to ask your Honor to give very careful attention to that price-fixing clause, because much of the relevancy of this evidence comes in under that clause. I will read very carefully the paragraph beginning
1860 with, "It is expressly understood and agreed"——

Justice STEPHENS (interposing). What license contract is this?

Mr. STEFFEN. This happens to be the Ebsary license, but it is admitted in the pleadings that the Certain-teed agreement is substantially the same.

Now if your Honor would prefer, we could get the original——

Justice STEPHENS (interposing). No, it is a license agreement between one of the defendants and the United States Gypsum Company, it is one of the group of license agreements of which the Government is complaining here.

Mr. STEFFEN. Yes, and in this respect it is identical with the license agreement between the United States Gypsum and Certain-teed.

Justice STEPHENS. You may read it.

Mr. STEFFEN. I will read, omitting certain parts:

"It is expressly understood and agreed that the * * * Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patent and so long as said license shall continue, the minimum price or prices at which

Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances * * * and which shall embody the inventions and improvements set forth and claimed in any of
1861 said patents which are presently issued (that is the first clause—now watch) or any of said plasterboard or gypsum wallboard manufactured by second parties * * *"

Justice STEPHEN. The "second parties" are who?

Mr. STEFFEN. That is a matter that we will discuss. In answer to your question I would say that "second parties" means, necessarily from the construction of the contract, any other manufacturer, obviously. The contract is drafted as a contract between licensor and licensee, there is no first party or second party. "Second parties" is in the plural. "Second parties" means, therefore, any second party and of course as a matter of construction, the parties understood that they would buy gypsum board either from USG, as they did in this case, or from any other manufacturer of gypsum board.

Now you will note that it contemplates that USG shall be entitled to fix prices on all board manufactured by licensees, and as well on all board manufactured by second parties which the licensee in this contract shall resell.

Now the defendants are not going to like this, but the cases are very clear and they know them, that a contract which provides for control of resale prices is illegal. There is no argument at all on that matter. In our trial brief, under the heading of "Resale Price Control", we cite the basic cases, the Dr. Miles case, and several cases, which provide that if your contract calls for a control of
1862 resale prices that you have a contract which is, per se, illegal.

Now this was not a single contract. I mean this same device appears in the perforated lath contract and in the metallized board contract, and in order to get this clearly before you I would refer you to page 123 of the complaint, having to do with the perforated lath contract. There the contract is very much broader. In other words, they weren't quite as explicit, but they covered even greater territory in allowing the licensor to control the price of the licensee, and I will call your attention to paragraph 2 appearing at the top of page 123 of the complaint, which relates to the perforated lath contract.

Now here the critical words appear about six or seven

lines down where it says that the United States Gypsum Company, the "Licensor reserves the right to determine, change and/or withdraw at any time and from time to time, during the term of this agreement, the minimum price or prices and/or terms and conditions of sale at which Licensee shall sell or offer for sale any such perforated plasterboard lath * * *"—and it doesn't say there, "manufactured by or purchased from second parties." It says that any board which you people sell we are going to fix prices on, at least we reserve the right to fix prices on it. The contract is, per se, illegal.

Let's look at the metallized board contract. If you will notice on page 112 of the complaint, paragraph
1863 (a), it states "that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights, licenses and privileges granted hereunder shall continue, the minimum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said Roos Patent * * *"

In other words, they may there fix the price on any plaster board which a licensee might sell.

Now we are going to offer, during the course of the day, evidence indicating that the licensees, under the metallized board license agreement, did take out a license, manufacture nothing, and then proceed to buy from USG or from National, their board, and then sell it at bulletin prices.

Now that is a clear-cut violation, as we see it, of the Sherman Act.

I will now go to the question of allegation. It seems to me beyond question that this complaint, which is based upon these agreements, which charges a price fixing in restraint of trade, has sufficiently charged those provisions of the contract as being in violation of the statute. The thing is right before everybody.

Now the evidence that we are now offering is evidence to show that they carried it into effect. As I said to your Honors this morning, the contract, whether they
1864 ever used it or didn't use it, can be illegal, and we will, at the proper time, ask to have the Court declare it illegal and have it cancelled, in that respect at least. Whether they used it or didn't use it, the contract is illegal in its terms.

Now if, in addition to that, the defendants proceeded to

buy from the licensor or another licensee, and then to sell at bulletin prices, we have a case, an aggravated case, where they not only had this contract, but they carried it into effect.

And I would call your Honors' attention to the fact that if, at the conclusion of this case, the decision is for the Government, it will be necessary of course to know the extent and how aggravated the conspiracy was, what it accomplished in the industry, and evidence of the sort here sought concerning the effect will be very material to your Honors in reaching a decision as to how far a decree for the Government should go, if you reach that decision.

Justice STEPHENS. Mr. Bromley?

Mr. BROMLEY. May it please the Court. I must say at the outset that I never expected to hear this argument made in this or any other court. This matter was all explained to Mr. Kelleher in the criminal case. This is a typographical mistake. On page 69, the phrase "second parties" should be "licensee". Mr. Kelleher knew that, the Government knew that. No contention of this sort was made in the criminal case because, of course, if made it would
1865 have ended the criminal case against us.

That was the case in which the indictment charged that we fixed resale prices, and if we had agreements which provided, as my friend seeks to say this one does, that we had the right to fix prices on wallboard manufactured by second parties, that would have ended the matter.

Now these contracts were copied from the Universal contract, or followed the Universal contract. There were three parties to the Universal contract, the company, the receivers and the licensor, and Mr. MacLeish will testify, and Mr. Kelleher was readily convinced, that in drafting this Ebsary contract, instead of saying "licensee" the phrase "second parties" was put in, but it never was intended to provide as it reads, it was a typographical mistake and the Government in the criminal case did not make this argument at all, and said, "Of course we make no contention that the contract is illegal on its face"—and we would be absurd to come in here contesting this if this provision meant the way it reads, and were it not that we know it is a typographical error, as the Government knows.

Now, as further evidence that they do know, where is there any charge in the complaint that the contract is illegal on its face? Well, if that were their contention, all they would have had to do is allege it. But you can search

the complaint from beginning to end and you can-
1866 not find any suggestion that when they drew it they relied on the theory that this little phrase, "second parties", meant what they now say it means. There is no charge in the complaint that covers it at all. That is why he didn't point to anything in the complaint, but chose rather to pick out this typographical mistake on page 69

Now he refers to page 123 of the complaint which is another license agreement. I don't know what he refers to it for, but I think he thinks it bolsters his argument. Of course he overlooks entirely the little word "such" which appears at the beginning of line 8 of paragraph 2, "the minimum price or prices and/or terms and conditions of sale at which licensee shall sell or offer for sale any such perforated plaster board lath * * *"

Justice STEPHENS. Where is that, Mr. Bromley?

Mr. BROMLEY. Page 123 of the complaint, line 8 of paragraph 2.

Justice STEPHENS. Yes, I have it.

Mr. BROMLEY. Now, "such perforated plaster board lath" is patented board manufactured under the patent. It plainly was meant to apply, and plainly does apply, only to the sale by somebody who has manufactured the board under the patent. It is perfectly simple and perfectly easy to interpret. Again, no contention is made in the complaint that this is an attempt to fix the resale prices, and therefore illegal, per se and on its face. If that conten-
1867 tion had ever been made, we wouldn't be here trying all these factors to show that there was something illegal about the license agreement. Nobody has ever, before today, suggested that these license agreements are illegal on their face because they attempt to extend price control beyond the price which the manufacturer shall charge when he sells patented goods. Now that is not alleged in the complaint and has never before been mentioned by the Government.

Likewise on page 112, where he makes the third and final reference in paragraph IV (a), he referred to the eighth line, "the minimum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said Roos Patent * * *" "Which is covered" means which is made by the person who sells it under the Roos patent.

Again there is no allegation in the complaint that the metallized lath license is unlawful on its face, or that its

provisions extended price control beyond the sale by the licensee who made it under the patent.

So I say I am shocked by any such argument as this at this time.

Justice STEPHENS. Where is this Universal agreement from which the Ebsary agreement was copied?

Mr. BROMLEY. It is Exhibit 6.

1868 Justice STEPHENS. That is the Ebsary contract. Where is the Universal contract from which this agreement was copied?

Mr. COLLINS. It is Exhibit 6, Government's Exhibit 6 in this case.

Justice STEPHENS. It isn't in the complaint.

Mr. BROMLEY. No.

Justice STEPHENS. I have it.

Where is that phrase, "second parties" in this complaint?

Mr. STEFFEN. On page 69 of the complaint, your Honor, which is the Ebsary agreement, the middle of the first full paragraph.

Justice STEPHENS. Will you point out to the Court, Mr. Bromley, the comparable language in the Universal agreement to the language in the Ebsary agreement on which counsel for the Government relies? The Court notes in the introduction to the Universal agreement with Holland, and the United States Gypsum Company, that there are three parties, first, second and third parties.

Now where is the language in the Universal agreement which parallels the language on page 69 of the complaint, in the Ebsary agreement?

Mr. BROMLEY. It is on page 14, paragraph 6.

Justice STEPHENS. Well, do you contend now, Mr. Steffen, that that is other than a typographical error?

Mr. STEFFEN. Yes, I do.

I will say I am just as much surprised as Mr.

1869 Bromley purports to be concerning the matter, because I have examined carefully the Certain-teed agreement which is in evidence, and which is the agreement which the Certain-teed Company and the United States Gypsum Company had been operating under, and it is identical, as I stated to the Court, in this respect, with the Ebsary agreement which I read.

Mr. BROMLEY. That is right.

Mr. STEFFEN. May I finish, Mr. Bromley.

And the pleadings, as I have examined them, make an admission that the Ebsary agreement is correct, but that

the defendants would like to revert to the original for purposes of examination at the trial. The original is now in.

The pleadings, as I understand them, are these. We have alleged that they entered into license agreements of the sort set out on page 69, that they do specify that they can fix prices on goods purchased from second parties, and that they have admitted it. The thing stands right there, as respects the pleadings.

Now I am frank to say I don't know of anything at the criminal trial that had anything to do with this. The criminal case, as I understand it, the indictment in that case, had to do with resale prices by jobbers and distributors. This question was not raised at the criminal trial, it had nothing to do with it, as I understand it, and therefore any statement—which I do not concede
1870 was made—that it may have occurred in Mr. Bromley's talk with Mr. Kelleher, I think has nothing to do with it.

The appropriate time, if there was any such question, was for defendants to have raised it in their pleadings. They have had three and one-half years to correct this matter if it is something that needs to be corrected.

Justice STEPHENS. What do you say to Mr. Bromley's contention that the pleadings nowhere charge that any of these agreements were illegal on their face?

Mr. STEFFEN. Well, your Honor, I would say as to that, that they don't have to. The Court can read the contracts, and if we say ——

Justice STEPHENS (interposing). Perhaps the Court's question wasn't quite correctly put. As I understand Mr. Bromley's contention it is this, that the theory of the Government in the case under all of its pleadings in the complaint, has not been that these agreements are illegal upon their face, but they are illegal because they were subterfuges and a cloak for alleged illegal price fixing.

Mr. STEFFEN. That is right, in general, but let me make it very clear that I do not accept Mr. Bromley's statement of the theory of the Government's case at any time.

Justice STEPHENS. Hasn't that been the theory, as the Court stated, of the Government's case?

1871 Mr. STEFFEN. I don't think so, I hope not.

Justice STEPHENS. I want to be clear about that, Mr. Steffen, because all three of the members of the Court have been clearly of the view from the beginning that the Government's charge here was that these license agreements, though on their face patent license agreements of an

orthodox type, were subterfuges and cloaks for an illegal price fixing and monopoly and conspiracy. Isn't that your charge?

Mr. STEFFEN. We definitely charge that, that is the bulk of this case, but note carefully in paragraph 46 it says, "said combination was entered into and has been, and is being, carried out by the defendant companies in part (in part) under the guise of numerous license agreements purporting to relate to the use of certain patents", and so on.

Now our complaint is very clear that we have a broad charge of price fixing. Paragraph 44 says in so many words that the defendants have entered into a contract in restraint of trade, and we set the contract out.

Secondly, if we didn't operate under Section 1, which says that any contract, combination or conspiracy in restraint of trade is illegal, we say—we have made a charge that these contracts are illegal. That appears in paragraph 44, we have set the contract out.

The contract provides on its face for resale price maintenance on the part of goods bought from second parties,

and that would seem to make a clean-cut case on
1872 the pleadings at this moment.

But thirdly, and this is probably more important, we have made the general charge that the defendants are in a conspiracy to fix prices. Now that is in paragraph 45 (a). That is as to prices of gypsum board manufactured by these defendants, any and all of them. And what we are endeavoring to do with this evidence is to show that this contract, and what they did under this contract, was an effort on their part, and succeeded in large measure, to fix and help stabilize prices in the gypsum industry. They closed down three or four mills, the licensee bought board from the United States Gypsum Company and resold it at bulletin prices.

Now that, I say, can be used to substantiate our charge in paragraph 45 (a) that they did combine for the purpose of fixing arbitrary and non-competitive prices on gypsum board. So that our case is perfectly clear on that point.

Now I must go back to Mr. Bromley's reference to the word "such". He said that we had overlooked that word "such". Now we are making no contention as regards the November license agreements or the metallized lath license agreements, or the perforated lath agreements, that the contract related to anything but patented—I do not want to make any concession that they were patented or that the

goods were made under the patent—but the contract refers to patented goods, and when they said "such" goods
1873 they meant patented goods.

But that doesn't pass on the question of whether the licensees made them or whether somebody else made them. And therefore, dealing with patented goods, we say—that is, assuming that they are patented and that the contract refers to them—we say that the licensees bought from licensor or some other licensee and resold at fixed prices. So that the word "such" hasn't any bearing at all on the matter.

We have here, I think your Honor has a copy of this chart, the admissions of the defendants, the admissions to paragraph 76 of the complaint, in which we set up the allegation that they signed license agreements, and they have, each of them, admitted fully, as we see it, the genuineness of the agreements, and we now have them introduced in evidence and the Certain-teed contract is Government's Exhibit 10.

If you have Government's Exhibit 10, your Honor, which is the basic agreement between Certain-teed and United States Gypsum Company, and which is, I might say, controlling here, and will refer to page 5 of the agreement, the middle of the full paragraph, you will find the words, "or any of said plaster board or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements", and so forth.

That indicates that it was a patented board, so-called, bought from other parties, but that the licensor reserved the right, expressly and definitely, to fix the price
1874 upon patented board bought by this licensee, Certain-teed, from second parties.

Mr. BROMLEY. That mistake was carried in almost all the licenses, and I think it was not caught until the Texas license, and then it was caught and corrected.

Justice STEPHENS. Were you in the criminal case, Mr. Knuff?

Mr. KNUFF. No, I was not, your Honor.

Mr. STEFFEN. Neither was I, your Honor.

Mr. BROMLEY. Another reason that I have never paid any attention to it is that if you read it as it is, it plainly has reference only to the licensee. The phrase "second parties" can't refer to anybody else. So it doesn't make any difference whether you correct the mistake or do not. All you have to do is read it to see that it clearly refers to price fixing on board manufactured by the licensee un-

der the patent. All you have to do is to read it and that is all it can possibly mean.

And furthermore, there is the complaint in which you find, in paragraph 114, under "metallized board agreements", a specific charge that we fixed the price on goods purchased from us by other licensees for resale, a specific charge under metallized board.

So you can hardly say that the Government made an inadvertence. They specifically charged it as to metallized board and they charged it as to nothing else. And
1875 if they had ever thought that this material that Certain-teed bought from us down in Virginia and resold, that we fixed the price on that, they would have charged it in the complaint. But they did not, they never charged that we fixed the price on any board bought from us by a single licensee for resale, except in this paragraph 114 which is confined to metallized board.

So they knew what they were doing at the time they drafted the pleadings, and they have known it ever since, and this is either an afterthought, or what I believe it to be, a complete misapprehension on the part of Government counsel.

Justice STEPHENS. Let me just ask one other question. Aside from this question of the use of the words "second parties", Mr. Steffen, I am not quite sure I get your second contention as to why this type of evidence is relevant.

As I understand your argument, you make two contentions, the first being that by the use of the words "second parties", this evidence is relevant; but also that for another reason it is relevant. I am not quite sure I understood that second contention.

Mr. STEFFEN. The first argument is as your Honor stated, that these contracts expressly provide for control of the sale of patented board by licensees from whatever source obtained, that is from second parties. A second party could do nothing else as we construe it ——
1876 Justice JACKSON (interposing). Why didn't they say "other parties" if they meant what you said?

Mr. STEFFEN. "Second parties" is an equally good form.

Justice JACKSON. In a contract between two people?

Mr. STEFFEN. Yes, it would be quite usual. A purchase from "second parties" or "other parties". It indicates that it is not the licensee, which is Mr. Bromley's contention.

First they have a provision saying that they can fix the prices on board manufactured by the licensee, and then they have a second clause in there saying that they can

fix the price on board manufactured by licensee—that is if you construe "second parties" as referring to licensee, which would be a duplication.

Justice STEPHENS. The term "third party" is frequently used by lawyers as referring to somebody extrinsic to the contract.

What is your second point?

Mr. STEFFEN. The second point is the broader point which says that irrespective of the illegality of the contract, that we make a charge in the complaint that the defendants have conspired to fix prices of gypsum board in interstate commerce.

Now that is stated broadly in paragraphs 44, and 45—45 (a). Now if there is a situation developing, as we can establish it was pretty widespread in the industry, of one licensee buying from another licensee, it becomes
1877 very important to that charge to determine how they resold that board.

We say they have an agreement or a conspiracy to fix prices. Now if it were possible for a licensee to buy from another licensee, or from United States Gypsum, and then to sell at a lower price, you would have a demoralized market.

We are endeavoring to show that this board bought by one licensee from another licensee or from United States Gypsum was sold at bulletin prices. Now that is very relevant to show that the defendants were fixing prices, high and arbitrary prices. They had an agreement among themselves that they, as licensees, would sell the board they manufactured. They actually, whichever way your Honors construe the clause in the contract, they actually were buying board from other licensees and selling it at bulletin prices, and they bought a very considerable quantity.

Now if we show—and we are entitled to do it—if we show that they did buy board from other licensees, and resold it at bulletin prices, that goes to establish our very clear contention that they conspired to fix and maintain high and arbitrary prices throughout the district east of the Rocky Mountains.

Mr. BROMLEY. But there is no charge in the complaint that covers that at all. It never was thought of before.

No charge is made even by indirection that we fixed
1878 the prices of board purchased from us. We never had the right to, we never tried to, we knew we hadn't that right and the Government has never charged before that we did.

Mr. STEFFEN. This is purely a matter of evidence, your Honor. We made a definite charge that they did fix and maintain prices on board throughout the eastern territory of the United States. Now here was one type of sale that could occur and we want to show that on this type of sale they maintained the high and fixed prices.

Justice STEPHENS. We will consider the matter during the recess.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

1879 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m.)

Justice STEPHENS. The Court would like to make one or two other inquiries before attempting to rule upon the issue presented by the offering of these exhibits which are now being marked.

I would like to make first one inquiry of you, Mr. Bromley.

Is there not somewhere within the pleadings here, an admission or assertion by the defendants that they did buy some materials or board from each other, and if so, where is it, and what does it relate to? It lies in my mind that somewhere in the answers or in the pleadings there are statements that some materials were purchased by one defendant from another. Now I may be mistaken, maybe it is by manufacturing distributors, but I would like to have my recollection refreshed on the subject.

Mr. BROMLEY. I think the only reference in the pleadings has to do with metallized board. There, admittedly, certain licensees for a time bought foil board from United States Gypsum because the licensees in question were not equipped to make it, so they bought it. And that, I think, is alleged in the complaint, indeed I know it is alleged in the complaint in the paragraph I referred to this morning, which is paragraph 113 and also paragraph 114. That is undoubtedly admitted in the answer.

1880 Mr. ADAMS. As far as our answer is concerned, your Honor——

Justice STEPHENS (interposing). Just let Mr. Bromley finish first, please.

Mr. BROMLEY. We don't admit the whole paragraph, but I think the answer admits that certain licensees did pur-

chase for resale metallized board, but it is limited to metallized board.

Justice STEPHENS. And how was that sold with respect to the alleged price fixing, as far as the pleadings show?

Mr. BROMLEY. As far as the pleadings show it is alleged in paragraph 114 in the sentence beginning in the second line, top of page 30:

"Throughout the period from the execution of said license agreements to the date of filing this complaint, USG has determined and fixed the minimum prices and terms and conditions of sale governing the sale by its licensees of metallized board, with the knowledge, and notwithstanding the fact, that a substantial part of the metallized board sold by its licensees, except National, during said period was purchased from National and USG."

That is the Government's allegation. That we deny, of course. We did not fix that price, had no right to, and never assumed to. The licensees could sell it at any price they wanted. Of course, as a matter of business, they probably sold it at the same price as the others were getting for it. But we didn't fix it, and we had no right to.

1881 I think that is the only reference in the pleadings to the purchase by a licensee of board made by another.

Mr. ADAMS. I could direct you specifically to our answer to paragraph 114 but it is substantially what Mr. Bromley has stated.

Justice STEPHENS. With respect to the Government's contention, the Court is somewhat puzzled, Mr. Steffen, as to exactly what your contention is. It appears to us, in considering some aspects of it, that you are contending now that you are entitled to prove—this has special reference to your argument with regard to the word "second parties" in one of the agreements—it seems to us that in considering your statement made this morning, that you are in one aspect offering to prove that the defendants bought board from what are ordinarily referred to as third parties, that is persons other than the licensees, strangers to the transaction entirely, and then sold that board at bulletin prices.

Are you contending that?

Mr. STEFFEN. No. The language that we referred to is language appearing in a contract between a licensee and the licensor, just two parties, and we are contending that when they used the phrase "second parties" there, they

meant anyone else who manufactured this type of board.

Justice STEPHENS. You mean any other licensee?

1882 Mr. STEFFEN. It would necessarily mean a licensee because licensees were the only people who could manufacture this type of board.

Justice STEPHENS. Then your contention narrows itself to this, does it not, that the defendants did buy board from each other—that is to say, to be specific, to take an example, that Ebsary would buy some board from Certain-teed, for example, I am using these names as examples merely for purposes of illustration, and that Ebsary would buy that board from Certain-teed necessarily under the license agreements at the price fixed by USG?

Mr. STEFFEN. Well ——

Justice STEPHENS (continuing). And then, as we understand it—let me state what the Court understood you to be contending—that it would buy that board from Certain-teed at, by definition, the prices fixed by USG because the licensee was bound to sell at those prices, and then Ebsary, after having bought it at such price, would also resell it at the same price under the bulletins. Is that your contention?

Mr. STEFFEN. I have made no contention as to the price that a licensee bought at. That will have to be developed in evidence. Ordinarily they would buy it at a lower price from USG or from another licensee, and then resell at bulletin prices, just as though they were reselling board which they had made themselves, and when you consider that they sell to dealers, it would be almost impossible

1883 for them to maintain two prices on the board they make and the board they buy from other licensees.

Now we wish to introduce that to show that they carried out this agreement to buy from second parties and that USG reserved the right—whether they exercised it or not, they reserved the right—we contend in the contract to control that price at which the licensees sold to dealers, board which they bought from other licensees.

Justice STEPHENS. In other words, your contention is that the complaint fairly charges that, and that therefore you are entitled to prove that when one of the defendants bought board from another defendant, and then resold it to a dealer, the price of that resale was within the power of USG to control under these license agreements, and that it did control such price?

Mr. STEFFEN. We say that they reserved the right in their agreement to control the price, and we will show also

that the actual fixing or the actual price at which they sold, was part of this general agreement to maintain and fix high and arbitrary prices throughout the industry.

So that there are two lines of argument.

May I call your Honor's attention to the May agreement where the parties were a little more explicit. There is a series of agreements here, and this clause on "second parties" that we have been talking about has been
1884 gradually refined until 1937 when they just omitted it entirely, as we contend. They didn't say that they would not attempt to fix prices on board purchased from others, but they said nothing on the point.

Now if you will look at the May agreement ——

Justice STEPHENS (interposing). Where is that?

Mr. STEFFEN. That appears in the complaint on page 47. That is the May, Ebsary agreement, which was modeled after the early Beaver agreement, and continued for all those years between 1926 and November 1929.

There the licensee expressly covenants. You will notice the last few lines of the middle paragraph on page 49, "and the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman Patent Number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale any plasterboard or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746 prior to the expiration thereof at a price or prices less than that stated by the Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices."

You see at that time the parties had an express covenant on the part of the licensee that they would not sell any plaster board. Now that "any" is not "any such" plaster board, but that is "any" plaster board.
1885 These are very careful attorneys; they knew what they were doing and they have drawn these provisions to express their intent. They have been examined by counsel for every licensee and the licensor, and it seems, beyond any question, that their intent and purpose was that as board, or any other so-called patented products, was bought from one licensee by another, that its resale was to be at bulletin prices.

When they moved into the November agreement, they would drop the licensee's covenant, but they put in a provision squarely that the licensor could fix the prices upon the board manufactured by the licensee, or upon any board

sold by a licensee, wherever obtained, obtained from second parties, and then when they go on into it later in their, shall we say conspiracy, when in 1937 they came to draft the Texas agreement, they dropped out any provision whereby the licensor could control the resale price of board purchased by a licensee and resold. They did not make any other change.

Of course, as the pleadings now stand, they have admitted these agreements, they have had three and a half years to amend if they had any doubt about them at all, and it seems to us that the contracts speak for themselves, as we have been told for a matter of weeks here.

Justice STEPHENS. The Court would like to ask you one or two other questions, which have to do with doubts that arise in the Court's mind.

1886 The question before it now is whether or not the class of evidence covered by these proposed exhibits, and covered by the statements that you have made, is admissible within the pleadings.

Now paragraph 45 of the complaint, section (a); says:

"(a) Concertedly raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold (not "or sold") by said companies in the Eastern Area".

It would seem to the Court, in the usual usage of terms, that that is contemplated as covering board manufactured and also sold by a particular licensee.

Then in subparagraph (c) it states:

"(c) concertedly raising, maintaining and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies", and so forth.

Now again, towards the end of the complaint, on page 22, where the charge of price fixing is especially made in paragraph 90:

"Throughout the period from the year 1929 to the date of filing this complaint, USG has determined and fixed the billing prices and terms and conditions of sale of its licensees for all gypsum board manufactured by said licensees."

1887 It doesn't say "sold by said licensees", but "manufactured" by them.

And then paragraph 91, with respect to the bulletins, seems to relate to prices, terms and conditions of sale of gypsum board; and construing that with the context of the

previous paragraphs, it would seem to relate to gypsum board manufactured and sold by the licensees.

With reference to the phrase in paragraph 46 of the complaint on page 10, "in part", where it reads:

"Said combination was entered into and has been, and is being, carried out by the defendant companies *in part* under the guise of numerous license agreements", and so forth, and which goes on and alleges that these are not bona fide license agreements but were entered into for the illegal purposes described, we had thought thus far, in reading the pleadings, that that phrase, "in part", was not intended to cover such an item as you now seek to prove, that is the purchase of products from each other, and the sale of those at licensor's prices, bulletin prices, but a charge that in addition to the licenses, there were separate understandings as a result of which it would appear that the licenses were not themselves bona fide.

I state those only because I wish counsel to have every opportunity to answer any doubts that have arisen in the Court's mind before it reaches a ruling.

1888 Mr. STEFFEN. I will endeavor to take up the Court's arguments, if I may call them arguments ——

Justice STEPHENS (interposing). They are not arguments, the Court is earnestly trying to understand counsel on both sides, and it seems only fair to the Judges that when doubts arise in their own minds as to what counsel are contending, that counsel should have an opportunity to answer such doubts.

Mr. STEFFEN. Very well, I will endeavor to take up the points in the order in which they were raised.

With respect to the first point that paragraph 45 (a) might be construed, as your Honor suggests, as applying only to board both manufactured and sold, I think that would be a possible and probably a probable construction. It is not a necessary construction, however. It could be either, because of the fact that it says, "manufactured and sold by said companies in the Eastern area". It isn't specific as to whether these companies both made and sold, or whether one made and sold to another. What I am getting at is this, that a transaction where USG sold to Certainteed, and Certainteed resold, would still be within 45 (a), it would be board "manufactured and sold by said companies", that is the defendant companies, "in the Eastern area."

Now that is, I think, a fair construction. I think the

more obvious construction is that it would be simply that one licensee made and sold, but the other is equally within the literal terms of the provision.

1889 I think your Honor then moved to paragraphs 90 and 91.

Justice STEPHENS. I also referred to the same phrase in paragraph 45 (c), "manufactured and sold", but you have really discussed that.

Mr. STEFFEN. Yes.

Justice STEPHENS. That is right, thank you.

Mr. STEFFEN. Now as to paragraphs 90 and 91—that was next, was it not?

Justice STEPHENS. I believe it was.

Mr. STEFFEN. The first sentence there, "Throughout the period from the year 1929 to the date of filing this complaint, USG has determined and fixed the selling price and terms and conditions of sale of its licensees for all gypsum board manufactured by said licensees",—that of course is a straight allegation. It doesn't say that we do not charge that they may have fixed the prices of licensees as respects board purchased from another licensee or the licensor.

Of course this is a matter of evidence, it is a matter of working out the whole case, and all we ask is that we be entitled to prove what is within the fair intendment of the pleadings.

You cannot construe this as a contract, as your Honor well knows, and say that inasmuch as you didn't agree to this, therefore you are not liable.

1890 Now in paragraph 91:

"From time to time throughout said period, USG has circulated among its licensees numerous bulletins setting forth the aforesaid prices and terms and conditions of sale for gypsum board. The licensees, throughout said period, have adhered to said prices and terms and conditions of sale. The prices and terms and conditions of sale contained in said bulletins will sometimes be referred to hereinafter as the bulletin prices".

What did the Court have in mind as to that?

Justice STEPHENS. In reading those two paragraphs together, it occurred to us that in reading them in the context of the whole complaint, and particularly in connection with paragraphs 45 (a) and 45 (c) they apparently referred to the fixing of prices, and the issuing of bulletins with respect to prices, upon board manufactured by

the licensees under these patents, and sold by them as manufacturers.

Mr. STEFFEN. I would like to say on that point, that so far as I have examined them, the price bulletins which USG has issued provide that they shall fix prices as respects board manufactured by the licensees. There is no provision that I have noticed in those price bulletins where they purport to fix prices at which the licensee will sell board bought from another licensee.

But that, as we contend, was perfectly correct on the surface. We wish to establish the fact, however,
1891 that they did do what they had a right to do, as we construe both their May—clearly their May—and their November contracts, which would be to fix or set the price at which licensees could sell board purchased from other licensees.

Now as respects the language, "in part under the guise of numerous license agreements purporting to relate to the use of certain patents owned by the defendant USG in the manufacture of gypsum board"—if I understood your Honor's statement, I think it would be substantially correct. We are alleging a very broad charge in paragraphs 44 and 45, and we come to paragraph 46 and say that those broad charges have been, in large part, carried out under the guise of numerous license agreements. We think that this language, "in part" carries notice that we did not expect to be limited in any measure to the license agreements themselves, and that the evidence under the broad charges should be admissible, irrespective of whether we introduced anything on patent license agreements.

Then the last language I think I have called your attention to before, on the top of page 11, is to the effect that, "the formation and operation of said combination is more fully set forth in paragraphs 47 to 120 hereof", and that does not expect at all to be all-inclusive, it is just "more fully set forth". That implies that we can bring in any evidence that would establish our broad charges.
1892 We needn't, as I say, have had anything from 47 to 120, and the complaint would still be good.

Justice STEPHENS. One other question that I forgot to ask you.

Do you contend that there is anything in the pleadings, except the allegations concerning metallized board or lath, which asserts or raises an issue as to the licensees, or defendants, buying from each other?

Mr. STEFFEN. Yes, decidedly.

Justice STEPHENS. What is there in the pleadings, in addition to that concerning the metallized board, on that subject?

Mr. STEFFEN. As to the metallized board, it is express and explicit. Note carefully that that discussion under the metallized board heading is merely a more full description of the combination which is charged in paragraphs 44 and 45. Note carefully that at the top of page 11 we say that we "more fully" set forth the way this conspiracy has been carried out, and when we get over to metallized lath, we set it out expressly and say, "here is a clear case." Mr. Bromley admits that they have done that, as I understand it.

Mr. BROMLEY. I do no such thing.

Mr. STEFFEN. Now that carries the argument that if we also establish, as we propose to do, that the licensees bought board from other licensees, not metallized board but board generally, and that they maintained the price of that board when a licensee sold it to a dealer,

1893 we have a case squarely within our broad charge of a conspiracy in restraint of trade for the purpose of concertedly raising and fixing prices. And I should think your Honor would almost be able to take judicial notice of the fact that unless these licensees sold such board at dealer prices, that their price situation would be demoralized and broken up. They had to sell it at the same price. And all we wish to do is to establish—I mean they had to as a business matter—all we wish to do is to establish that.

Justice STEPHENS. There is just one other point that occurred to us that I forgot to ask you about, and that is that in paragraph 45 (e) it states:

"(e) concertedly inducing and coercing manufacturing distributors to resell at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from such companies".

The thought that we had was that—and we had this question to deal with, you will remember also, when we were going into the question of the motion for summary judgment and comparing the causes of action in the criminal case and the instant case—it was brought out there in the Court's opinion that one of the incidental differences in charges which we thought did not vitally affect however the cause of action itself, as a whole, was that in the complaint there was a charge of concertedly inducing

1894 and coercing manufacturing distributors to resell.

In other words, there was a charge of resale price fixing and maintenance in the complaint, as distinguished from the indic ment.

And we had thought, Mr. Steffen, that that was the only charge, either expressly or impliedly within the complaint, which had to do with resale price fixing, and that the gist of the Government's charge in this case was that the initial prices fixed for sale by licensees were illegal. And it occurs to the Court that the evidence which you now seek to offer is evidence with reference to a resale price.

Mr. STEFFEN. I think it clearly is and it could have been charged both ways. We could have charged that they have controlled their own resale prices or, as we have done here, we could have charged that they maintained throughout the market, fixed and arbitrary prices. Now we could have charged it either way. The reason, as I understand it—I had nothing to do with making this pleading, but I think I can explain it—the reason for paragraph 45 (e) appearing as a separate paragraph is that it names different people. They could have put in there also that they controlled their own resale prices and the distributors'. That would have been appropriate. It wasn't necessary because of paragraph 45 (a) which says that they, among themselves, the licensees, were controlling their prices.

When they got to (e) they made the charge that they 1895 controlled third parties, and that is distributors' prices, not their own but distributors' prices, and therefore it was a perfectly appropriate separate charge.

I would like to say in that connection—this point having been brought up—that I read the indictment again this noon, that is Criminal Case 66,008, which Mr. Bromley tried, and it is very express upon the point that the only matter in issue was the resale prices of distributors, and that there was no charge whatever in the indictment having to do with resale price maintenance on the part of the licensor and a licensee; that this issue which we have presented here was clearly not within the indictment.

Justice STEPHENS. I thought there was no charge in the indictment of resale price fixing?

Mr. STEFFEN. That is all that was in the indictment, resale price maintenance.

Justice STEPHENS. Maybe my memory is serving me very badly.

Justice GARRETT. I think paragraph (e) was the prin-

cipal element in that criminal case. My memory may be at fault.

Mr. STEFFEN. I will refer your Honor to the indictment, page 8, paragraph 14.

Justice STEPHENS. Let me get the opinion on the motion for summary judgment.

Mr. STEFFEN. I can read the language that I have in mind, if you wish.

1896 Justice STEPHENS. Let me refresh my own recollection, Mr. Steffen, also.

Yes, the Court either misremembered or misspoke. The complaint charges not only the fixing of resale prices of manufacturing distributors, and the elimination of jobbers, as does the indictment, but also three additional consequences. So that it was charged in the indictment, you are correct about that.

Is there anything else, Mr. Steffen?

Mr. STEFFEN. I think not, your Honor, other than to say that this is a very important part of the Government's case.

Justice STEPHENS. We understand that, and for that reason we are anxious to be careful about our ruling.

Mr. Bromley?

Mr. BROMLEY. May it please the Court, the answer to the next to the last question which your Honor asked Mr. Steffen is that there is nothing in the complaint about resale prices charged by licensees who buy board from others. There is just nothing in the complaint about that, and I think the fact that he has made no attempt to refer to any part of the complaint, shows that.

Now that is the correct and short, simple answer to that question. The complaint does not mention that. It mentions only two types of resale control, these manufacturing distributors as one, and the purchase by some of the licensees of metallized board from the manufacturer

1897 is the other—and that is all.

Now in that connection I did not admit this morning—and I do not admit now, as Mr. Steffen indicated—that we did fix the resale prices of metallized board. We did not.

Now Mr. Steffen, it seems to me, passes over very lightly a new factor which he has evidently discovered over the noon hour, and that is this. As your Honor indicated, paragraph 90 and paragraph 91 of the complaint, page 22, allege that USG fixed prices over the period, and your Honor called his attention to paragraph 91, at the bottom

of page 22, and pointed out to him that there was an allegation that USG had circulated bulletins setting forth the prices.

Now that paragraph ends up on the top of page 23 with a reference to Exhibit No. 7 as having been annexed to the complaint, so there can be no doubt about what they mean, and Exhibit No. 7, which is the bulletin fixing the prices, is printed on page 85, and as my friend said, nothing could be clearer than the provisions contained therein, in the first sentence which says:

"Dear sir: Referring to our license contract with you, you are hereby notified that effective February 7, 1939, the minimum prices at which you may sell gypsum wallboard and gypsum plaster board manufactured by you and embodying inventions and improvements set forth and claimed in our patents under which you are
1898 licensed (not including applications for letters patent) are as follows:"

Now that phrase appears in that form, and no other form in every license bulletin sent out by the licensor, all of which I believe are now in evidence, and you can look at any one of them, issued at any time, from beginning to end, and you will find nothing other than this explicit provision that the minimum prices at which you, Mr. Licensee, may sell board, are to apply to the board manufactured by you, not manufactured by second parties or somebody else, and not bought by you, but only manufactured by you.

1899 So that if we needed anything more, it seems to me, than a construction of the contract itself, it is to be found in the undisputed evidence as to what it was that the Licensor fixed, and it only fixed the price of board manufactured by the licensees under the patent.

And finally, it seems to me that Mr. Steffen is guilty of a great unfairness when he picks out but a portion of a single sentence in the May, 1929 license, as he did on page 49 of the complaint. He picks out the concluding words of that paragraph, and that paragraph is one sentence. But if he had called Your Honor's attention to the opening of the sentence you would see how unfair his reference is. The paragraph begins:

"It is expressly understood and agreed that the indivisible and nonexclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves the right to determine and fix at any time and to change from time to time during the term of

said Utzman Patent Number 1,034,746, the minimum price or prices at which the Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee embodying the improvements" and so forth. That is the only right that was reserved in the contract, and all the rest of it just carries out what shall be done. The next clause is, "and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the price or prices at which the Licensee shall sell said patented product" and so forth. Now "said patented product" is a product manufactured by it under the patents. Continuing, "and thereafter shall give to the Licensee written or telegraphic notice of any change in such price or prices, and the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman Patent Number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale any plasterboard or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746 prior to the expiration thereof at a price or prices less than that stated" and so forth.

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Now that clearly all refers to the price which the Licensor fixes for the Licensee to charge when it sells the board which it has made, and I contend that that provision is equally clear in every license from then on, and prior thereto, during the whole period, and there wouldn't be any doubt about it except for this unfortunate use of the phrase "second parties" in the Ebsary contract, to which attention has been called, and in others. And I say again, even as to that, that even if you leave the "second parties" in there the reference is clearly to the licensee.

You will notice sometimes that that clause says "licensee" and sometimes "second parties." But the clear intent of it, as it stands, is "Licensee". All you have to do is read it, it seems to me, to come to that fair interpretation. And when you find that under that very contract the bulletins that were issued are all specifically limited to the board manufactured by the Licensee, it seems to me that all possible doubt is ended.

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Mr. STEFFEN. Your Honor, I have inadvertently not called your attention to a provision which is right in point, I think. We frankly didn't expect to have a discussion of this length on this point, but at Paragraph 85(c) of the complaint, on page 20—Paragraph 85, you will note, de-

scribes the agreements between U.S.G. and the various companies, and sets out a copy of Exhibit No. 6 in the Appendix. Mr. Bromley has referred to the exhibit concerning the price bulletins, and this is equally a part of the complaint, the October and November license agreements.

Paragraph 85(c) says broadly just what we have been contending here, that in that agreement, "U.S.G. reserved the right to determine and fix the prices at which the licensees sold board embodying the improvements claimed in the Hite and Haggerty patents, or in any patents subsequently issued on the applications relating to the foam process."

Now our construction of those agreements is that they reserve the right to fix the price on any board so long as it embodies those inventions.

1902 Now the question is embodying those inventions whether made by the licensee or any other licensee. And our contention is that the language is very explicit and clear that in the May agreement, and equally I think in the November agreement—in the May agreement the language is very explicit that U.S.G. reserved the right to control the price at which the licensee should manufacture any board and sell any board under these patents; and following upon that, the licensee covenanted that he would not sell any board at any other price than that fixed by the licensor.

Now I was surprised that I should be spoken of as being unfair. You are familiar with that whole sentence, and I think the more often you read it the more clearly it will be established that it relates to the patented board, but it expressly states that whether the licensee manufactures it or whether he gets it otherwise, that they will fix the bulletin price.

I think Paragraph 85(c) answers the question entirely, and I am very sorry to have taken the Court's time.

Justice STEPHENS. What do you say as to 85(c), Mr. Bromley?

Mr. BROMLEY. That is the sum and substance of Exhibit No. 6, that is all that is. Exhibit No. 6, in Paragraph 2, has a provision which I say is plainly limited to board manufactured by the licensee.

1903 Justice STEPHENS. Exhibit 6 is which one?

Mr. BROMLEY. The Ebsary agreement, starting on page 66, and the paragraph referred to is on page 69. That is the one we started out discussing this morning.

Justice STEPHENS. That is the one that contains the phrase "second parties"?

Mr. BROMLEY. Yes, Your Honor.

So I say that 85(c) is hardly any allegation that we are charged with fixing the resale prices of board purchased by licensees for resale. All that is a summary of the Ebsary agreement.

Justice STEPHENS. The Court will be in recess for a few moments.

(Whereupon a short recess was taken, after which the hearing was resumed.)

1904 Justice STEPHENS. The record will show the Court in session.

The Court has considered the contentions of counsel on the matter now before the Court, which is a question whether, within the pleadings, there is admissible evidence offered to prove the fixing of resale prices upon board, gypsum board, purchased by one of the defendant licensees from another.

The Court is of the view that within the fair intendment of the pleadings, such evidence is not admissible. The Government, in order to protect its record, is given an opportunity, if it wishes to do so, to make a formal offer of proof in writing, at your convenience, in order that a record may be made on the subject which would adequately protect you in the event of an adverse decision and appeal.

You may proceed, therefore, on another line of testimony.

Mr. STEFFEN. Would Your Honors' ruling also be made explicit that we are not entitled to introduce evidence of resale price for purposes of showing that the defendants have concertedly fixed and maintained uniform prices within paragraph 45(a)?

Justice STEPHENS. Yes, we think the ruling goes that far. You may make an offer broad enough to protect your record in that respect.

We are not intending to rule that you can not show that the purpose of these agreements, of course, was subterfuge and cloak. We are not intending to rule that

1905 you are forbidden to show that the consequences of the agreement and the intention of the agreement was to fix prices on gypsum board manufactured and sold under these licenses. But we do rule that the issue with respect to resale prices of board purchased by one licensee from another is out of the case, under the pleadings as drawn.

Mr. STEFFEN. May I have that latter part read, Your Honor? It seems to me that Your Honor's statement would indicate that this evidence would be admissible for purposes of showing that the defendants were fixing prices, not for purposes of showing that it was an illegal control of resale prices. Am I correct in that?

Justice STEPHENS. You may have the Court's statement read.

(The record was read by the reporter.)

Justice STEPHENS. The Court would have spoken more correctly if it had said, "is not in the case".

You may, at your leisure, consider the Court's ruling and prepare an offer of proof, Mr. Steffen, and if you are disconcerted by the Court's ruling in respect of your preparation, the Court will accord you a reasonable opportunity to take up another line of testimony by a recess, if necessary.

Mr. STEFFEN. I would like to have a 4 or 5 minute recess, if you please.

1906 Justice STEPHENS. The Court will be in recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice STEPHENS. Proceed, gentlemen.

By Mr. STEFFEN.

Q. I would now like to ask you some questions concerning metallized plaster board, Mr. Brown. But first, I will show you Government's Exhibit No. 242, which purports to be a letter from the General Manager of the Gypsum Division of Certain-teed Products, addressed to Mr. Henning of the United States Gypsum Company, under date of August 10, 1934, a carbon copy of the letter, rather.

Justice STEPHENS. Where is that, Mr. Knuff, in this file?

Mr. KNUFF. We have skipped quite a considerable number of exhibits, Your Honor. I think that would appear after the contract dated the 15th day of January, 1936.

Justice STEPHENS. What is the date of the letter?

Mr. STEFFEN. August 10, 1934.

Justice STEPHENS. I have it. It is a letter from Certain-teed to Mr. Henning?

Mr. KNUFF. That is correct.

Justice STEPHENS. Thank you. That will be Exhibit No. what?

Mr. STEFFEN. Exhibit No. 242.

1907 Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Have you examined Exhibit No. 242, Mr. Brown?
A. Yes, sir.
Q. Do you know whose initials those are at the top?
A. I would assume that they are Mr. Van Hagan's.
Q. Could you identify them?
A. They are his initials.
Q. Did you ever see this letter, Mr. Brown?
A. I don't remember, sir.
Q. Are you familiar with the subject matter of the letter?
A. I recall we attempted to buy some board, that is all, at one time.
Q. Do you recall whether you made an application for a license?
A. I don't recall as to that, no, sir.
Q. What do you recall with regard to the buying of board?
A. I think we bought some, but I am not sure of that.
Q. Do you recall who you bought from?
A. No, sir.
Q. Do you recall whether you approached the U. S. Gypsum Company for board?
A. I don't recall, but I think we did.
1908 Q. Do you recall whether they sold you any?
A. I testified that I don't remember for sure.
Q. I see.
I would like to show you Government's Exhibit No. 243 for Identification, which purports to be a memorandum of yours under date of August 28, 1934, to Mr. Van Hagan.
Justice STEPHENS. What company was Baker with, Mr. Steffen?
Mr. STEFFEN. National—president.

By Mr. STEFFEN.

Q. Have you examined Exhibit 243, Mr. Brown?
A. Yes, sir.
Q. Is it written on your usual interoffice stationery?
A. Yes, sir.
Q. And is Mr. Van Hagan living?
A. Pardon?
Q. Is Mr. Van Hagan living?
A. No, sir. My understanding is that he isn't.
Q. Can you identify that as your memorandum?
A. I don't remember it, but I assume it is my memorandum.

Mr. ADAMS. I respectfully move to strike out his assumption.

By Mr. STEFFEN.

Q. Will you please state whether or not it accords
1909 with your recollection?

Justice STEPHENS. It may go out.

The WITNESS. I don't remember the memorandum.

Justice STEPHENS. Do you remember writing him on that subject?

The WITNESS. No, sir, Your Honor, I don't.

By Mr. STEFFEN.

Q. Do you know who the initials "AGS", over to the right of your name, refer to?

A. That would be the secretary. I couldn't recall her name at this time. I don't recognize the initials.

Q. Now as you read the memorandum, does it refresh you concerning any transactions you may have had with the National Gypsum Company looking to the purchase of metallized board which you testified to?

A. No, sir, it does not.

Q. Could you tell the Court who you attempted to buy metallized board from?

A. I don't recall that I even handled the negotiations. I don't know who handled them.

Q. You recall simply that the company attempted it at one time or another?

A. That is my memory, yes.

Q. Could you give us any assistance at all as to who might have handled the purchase of metallized board for your company, at this time?

1910 A. No, sir. It could have been one of several people.

Q. Name them, please?

A. Mr. Van Hagan and Mr. Henley would have been two likely people.

Q. I now show you Government's Exhibit No. 244 for Identification and Government's Exhibit No. 245 for Identification and Government's Exhibit No. 246 for Identification ——

Justice STEPHENS (interposing). Do they follow seriatim?

Mr. STEFFEN. Yes.

Justice STEPHENS. Exhibit 244, then, is the letter from Mr. Henning to C. O. Brown, dated September 24, 1934?

Mr. STEFFEN. That is right.

I would like to state that 245 and 246 were enclosures in the letter which has been identified as Exhibit No. 244. The three items were together.

Mr. ADAMS. Well, I think that is an assumption.

Justice STEPHENS. That is what you contend they are, at any rate, is it, Mr. Steffen?

Mr. STEFFEN. At least we do that. They refer to each other.

Justice STEPHENS. You may proceed.

By Mr. STEFFEN.

Q. Have you examined the three exhibits, Mr. Brown?

A. Yes, sir.

1911 Q. Are you able to identify the handwriting on the left-hand side of Exhibit 244?

A. Yes, sir, it is a memorandum to A. Whittemore signed by myself.

Q. It was your opinion that you should take out a license?

A. Yes, sir.

Q. Are you familiar with Mr. Henning's signature?

A. Yes, sir.

Q. And do you recall having received Exhibit 244?

A. I don't recall it, but it is Mr. Henning's signature.

Q. Did you examine the two copies, the letter of Mr. Henning to Mr. Van Hagan and Mr. Van Hagan's letter to Mr. Henning, at the time you wrote your memorandum on the upper left-hand side?

Mr. ADAMS. I respectfully object to that. The witness has not testified that he ever saw Exhibits 245 or 246 before.

Mr. STEFFEN. He hasn't testified one way or the other. I am asking him ——

Justice STEPHENS (interposing). Let's hear the question. I had my attention on the letters and didn't hear your question. What is the question that is now objected to?

(The question was read by the reporter.)

1912 Justice STEPHENS. That does technically assume that he saw them at the time. I thought you were asking him if he had examined them now.

Objection sustained. Rephrase your question.

By Mr. STEFFEN.

Q. Do you recall whether you examined the copies be-

fore you now, at the time you wrote your memorandum?

A. I don't remember ——

Mr. ADAMS (interposing). I respectfully object. I make the same objection, Your Honor. The question is, I think, whether or not these are the letters, or copies of the letters, that were attached to Mr. Henning's letter of September 24. I think we are entitled to know that.

Justice STEPHENS. The Court thought that is what Mr. Steffen was really intending to ask the witness.

Mr. ADAMS. If it is, I withdraw my objection.

Justice STEPHENS. Do you remember seeing these two letters, marked 245 and 246, at the time you wrote the memorandum which you refer to?

The WITNESS. I do not remember.

By Mr. STEFFEN.

Q. I call your attention, Mr. Brown, to the fact that the letter speaks of an attached copy, that is, the letter you have identified as being Mr. Henning's letter. Do you recall that you did not see an attached copy at the time you wrote your ——

1913 Mr. ADAMS (interposing). I object to that question. That he did not see it is immaterial. The question is—did he see these letters or didn't he?

Mr. STEFFEN. I am wishing to test his recollection on the point, Your Honor.

Justice STEPHENS. Well, the last question is not correct. Objection sustained.

You may ask him if he has any recollection on the subject. But when he has once testified that he doesn't recollect seeing them, then to ask him if he recollects not seeing them seems to me to be pressing the bubble of logic to the bursting point.

By Mr. STEFFEN.

Q. Have you any recollection on the subject of these two copies, Mr. Brown?

A. No, sir.

Mr. STEFFEN. We offer Government's Exhibits Nos. 244, 245 and 246 in evidence. We offer Exhibit 244 as clearly identified by Mr. Brown, both by Mr. Henning's signature and his own note appearing on the side. The letter itself, in the opening paragraph, refers to attached copy of "my letter to Mr. Van Hagan", that is, Henning's letter to Mr. Van Hagan, and it would seem that that in itself would identify Mr. Henning's letter, that is, the copy of

Mr. Henning's letter, coupled with the fact that
1914 both the letter of September 24 and the two copies,
Exhibits Nos. 245 and 246, were received from the Certain-teed Products Corporation under subpoena, and of course, that matter is established by the Item No. appearing up at the top on the right-hand side of each of the three letters.

Justice STEPHENS. Do you wish to be heard, Mr. Adams?

Mr. ADAMS. Might I ask a question, Your Honor?

Justice STEPHENS. Yes.

Mr. ADAMS. Mr. Brown, it is a fact, isn't it, that Mr. Henning and Mr. Van Hagan had occasion to correspond quite frequently, didn't they?

The WITNESS. They had correspondence.

Mr. ADAMS. I object to the introduction of Exhibits 245 and 246 on the ground that no proper foundation has been laid. I do not object to Exhibit 244.

Justice STEPHENS. Do you concede that the Item No. at the top of the letters indicates that they are from your files, that is, from the files of Certain-teed, Mr. Adams?

Mr. ADAMS. Oh, yes.

Justice STEPHENS. The Court notes that the numbers are not serial.

Mr. ADAMS. There is no question that those were put on there by someone in the Certain-teed employ, Your Honor, but we do not agree in any sense that these are seriatim;
and even if they happened to be seriatim, I know
1915 enough about this filing system, which was devised by someone with a devious mind, to say the least, in the early days of this case, to know that there is no such thing as a serial system in the filing system which was set up, and I can assure Your Honor that that has no evidentiary value whatever.

Justice STEPHENS. We think the exhibits are admissible. The objection is overruled.

Mr. ADAMS. May I have the usual objection to the admission of all of them?

Justice STEPHENS. Yes, they are received subject to the usual reservation with respect to the declarations of alleged co-conspirators.

Exhibits 244, 245 and 246 are admitted in evidence.

(The documents referred to, marked as Government's Exhibits Nos. 244, 245 and 246, were received in evidence.)

Mr. STEFFEN. I now offer Government's Exhibit No. 242, which I think is identified by Mr. Van Hagan's initials

at the top, and the fact that it comes from the files of Certain-teed Products Company and is in all other respects apparently regular, and is a letter upon the subject that we are now taking up.

Justice STEPHENS. Is there any objection to 242?

1916 Mr. ADAMS. Yes, I object to 242, Your Honor, on the ground that no proper foundation has been laid. I would point out to the Court that this is, if anything, a copy of a letter. It doesn't purport to be the original. Nothing is shown here to indicate—the witness has testified, rather, that he has no recollection about the letter whatever. Mr. Van Hagan is dead, and Mr. Henning is dead.

Justice STEPHENS. I have forgotten what the witness said about Exhibit 242.

Mr. ADAMS. The witness said he could not identify it in any manner.

Mr. STEFFEN. He said he thought the initials up there were those of Mr. Van Hagan.

Justice STEPHENS. Maybe I am mistaken in my recollection. Which initials were you referring to?

Mr. STEFFEN. The pencilled initials at the top.

Mr. OLIVER. May I interject this: The witness said they were the initials of a certain individual, but he didn't say that that individual wrote them.

Justice STEPHENS. That is cutting very fine, Mr. Oliver, unless it is a forgery, or asserted to be such.

What do you say—refresh the Court's recollection, Mr. Brown. Look at 242 again. What do you say with respect to the pencilled initials up at the top, just over the word "Vice-President"? What do you say with respect to those?

The WITNESS. I don't recall, Your Honor, testi-

1917 fying on those.

Justice STEPHENS. It is my recollection, Mr. Steffen, that the initials which he identified were the initials of a secretary.

The WITNESS. No, "HHV", I identified.

By Mr. STEFFEN.

Q. At the bottom?

A. Yes.

Q. What I asked you, I thought, was what those initials were at the top.

A. I can't identify those. They don't look like anything to me.

Q. They look like "COB", don't they?

A. The "C" might be, but I would never figure out the other.

Justice STEPHENS. We think that 242 is not sufficiently identified. True, it is on the subject of metallized plasterboard, but that is a little too remote a circumstance.

The other two exhibits, 245 and 246, were admitted in connection with 244 because the circumstantial identification of the three is much stronger.

Mr. STEFFEN. I offer Exhibit 243, which has been identified only as being a memorandum taken from the files of the Certain-teed Company, which is in the usual form, and the initials "AGS" are the initials of the stenographer, as I understand it.

1918 Justice STEPHENS. He said they were the initials of a secretary, but he couldn't remember the secretary. He meant they were a stenographic designation.

Has there been a ruling on this exhibit, Mrs. Gillette?

Mrs. GILLETTE. No, there hasn't been any ruling on that.

Mr. ADAMS. I object to it, Your Honor, on the ground that there is no foundation.

Justice STEPHENS. We think there has been no foundation at all laid for that exhibit. Objection sustained. The exhibit is not received.

By Mr. STEFFEN.

Q. I now show you, Mr. Brown, Government's Exhibits Nos. 247 and 248, which purport to be your instructions to various people concerning the metallized board sales prices, one under date of December 3, 1934, and the other doesn't appear to be dated.

Justice STEPHENS. Is the first one marked Item No. JJ-110?

Mr. STEFFEN. Yes, and the second one is JJ-109.

Justice STEPHENS. We have two marked JJ-110 in our file.

Mr. STEFFEN. That is right, they are attached, I think. And then JJ-109 is the other.

1919 Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Have you examined both Exhibits 247 and 248, Mr. Brown?

A. Yes, sir.

Q. Taking up 247 first, can you state whether that was

a bulletin which you sent out to District Managers, Sales Managers, and Salesmen?

A. I don't remember the specific bulletin, but it is signed C. Brown, Vice President, indicating I did.

Justice STEPHENS. Signed?

The WITNESS. Typewritten, Your Honor, the signature, which is customary with the company.

By Mr. STEFFEN.

Q. Was it customary for the company to sign in ink its letters or memoranda between officers?

A. No, sir.

Q. Now referring to the December 3rd exhibit, do you recall having sent that out?

A. If you will pardon me, I think you asked me regarding 247, which is the one I just testified on.

Q. Well, is that also dated December 3, Mr. Brown?

A. 247 is December 3; 248 isn't dated.

Q. Then we have the thing reversed.

1920 A. That is according to my copies.

Justice STEPHENS. I don't have any date on the one marked 247, on the first page.

The WITNESS. Mine is 248, Your Honor, that is what is causing the confusion, on the one that isn't dated.

Justice STEPHENS. 248 is marked December 3. 247 has two pages.

Mr. STEFFEN. These are exactly reversed, Your Honor.

(Whereupon, the two exhibits under discussion were handed to Mrs. Gillette, who reversed the exhibit numbers and returned them to the witness.)

By Mr. STEFFEN.

Q. Now I would like to have you examine the exhibit marked presently 247, which is an undated memorandum, ——

Justice STEPHENS (interposing). Of two pages, is that right?

Mr. STEFFEN. Yes.

The WITNESS. I don't recall the memorandum, but it is signed C. O. Brown, Vice President, which was the method of sending out bulletins.

By Mr. STEFFEN.

Q. Do you recall the subject matter of the announcement?

A. Well, it is a memorandum to our sales organization outlining the possibility of selling metal lath, and asking

some of our men to secure certain information from
1921 the U. S. Gypsum Company.

Q. Do you recall that, presently?

A. No, sir.

Q. As being a memorandum that you sent out?

A. I don't recall it. I testified that I think I sent it out.

Q. You testified that you think you sent it out?

A. Yes.

Q. Now look at what has been marked Exhibit 248, the memorandum or announcement dated December 3, 1934, that purports to supplement the previous bulletin. Are those names up at the top, Van Hagan, Warren Henley, Phelps, and Laney, representatives of Certain-teed at that time?

A. Yes, sir.

Q. And was it customary to send out bulletins to your District Managers, Sales Managers, and Salesmen, from time to time?

A. Yes, sir.

Q. And is this on the usual form?

A. Yes, sir.

Q. Now do you recall having sent out a memorandum on this subject matter?

A. No, sir, I don't recall it.

Mr. STEFFEN. I offer at this time, Your Honor, Government's Exhibits Nos. 247 and 248. They have been
1922 identified this far, that they are in the regular order; that it was customary to send out bulletins from time to time giving price information to District Managers, Sales Managers, and Salesmen; they carry the name of Mr. C. O. Brown, Vice President—would you normally be the person, Mr. Brown, to send out bulletins of this character?

The WITNESS. At this time, yes, sir.

Mr. STEFFEN. And they carry the Item Nos. JJ-110 and JJ-109, indicating that they came from the files of the Certain-teed Products Corporation.

I think that is circumstantial identification.

Mr. ADAMS. Might I look at the exhibits themselves, Your Honor?

Justice STEPHENS. Yes.

Any objection, Mr. Adams?

Mr. ADAMS. May I ask a question, please, Your Honor?

Justice STEPHENS. The two exhibits are offered?

Mr. STEFFEN. Yes.

Mr. ADAMS. I wanted to ask the witness a question.

Justice STEPHENS. I am sorry. Proceed.

Mr. ADAMS. Mr. Brown, with respect to both of these exhibits, you don't have any recollection about them at all, do you, now?

The WITNESS. I think I so testified, Mr. Adams, that I have no recollection of these bulletins.

1923 Mr. ADAMS. And you can't tell us now that they are anything that you prepared yourself, can you?

The WITNESS. Well, my testimony was as explicit as I could make it.

Mr. ADAMS. And that was, as I understand it, that it is merely because your name appears on these exhibits that you believe that that would indicate you might have prepared them, is that it?

The WITNESS. That is the basis of my opinion.

Mr. ADAMS. It is merely an opinion, isn't it, sir?

The WITNESS. Well, I couldn't swear I sent them out.

Mr. ADAMS. You have absolutely no knowledge as to whether they were sent out, in fact, have you?

The WITNESS. No positive knowledge.

Mr. ADAMS. And you have no recollection of actually having sent them out?

The WITNESS. No, sir.

Mr. ADAMS. Of course, you had assistants in the department, didn't you, in your department, I mean?

The WITNESS. Yes, sir.

Mr. ADAMS. I object, Your Honor, on the ground that no foundation has been laid with respect to either of these documents; and I should like to observe in that connection that it seems to me that, to use Your Honor's phrase, we are getting pretty close to the line on the admis-

1924 sion of this type of document. The witness has no recollection about these at all, he is just saying that his name appears on them. He says, "I can't say that I prepared it; I can't say that I sent it out; I don't know whether I sent it out; and I haven't any recollection about what is in the document."

Justice STEPHENS. Let me ask the witness one or two questions.

Mr. Brown, you did testify with respect to 247 that you think you sent that memorandum out. Did you base that statement, or did you not, upon the nature of the contents and your recollection of your duties in respect of the subject matter of the exhibit?

The WITNESS. I based it on the nature of the contents,

and my position at that time was one where I would normally send out such information.

Justice STEPHENS. I will call your attention to the fact that 248 refers to "Supplementing my recent bulletin above subject.", and that the subject of the two bulletins is Metallized Board. What do you say with respect to 248? Do you or do you not think that you sent that out? I am not trying to get you to testify one way or the other. I just want to be sure whether you do have some recollection, or not.

The WITNESS. I have no recollection of it, Your Honor, and my statement is the same about this as the other, that it was information that I would normally develop
1925 that was being requested.

Justice STEPHENS. Well, do you think that you sent the second one out, 248, if you sent the first one out?

The WITNESS. I don't know, Your Honor.

Justice STEPHENS. Well, the Court, with some doubt, rules that they are circumstantially identified. We hesitate a little. We don't want to establish a precedent of letting in exhibits without some identification, but there probably is sufficient circumstantial identification here.

Can't you identify them by someone else better, Mr. Steffen?

Mr. STEFFEN. Most of these people have died, Your Honor.

Mr. ADAMS. That, exactly, is one of my difficulties, Your Honor. We are being faced in this case with exhibit after exhibit which are addressed to people who are now dead. We have no way of verifying them ourselves. I am not arguing Your Honor's ruling. I should like to record the usual objection.

Justice STEPHENS. You may do so.

Of course, it seems to the Court—we realize you are quite within your rights in making these objections, and all counsel must feel free at all times to make whatever objections they feel necessary in the protection of their clients' interests on either side of the case—but there
1926 is no dispute that they came from your files, and they do concern the subject, all of them, of metallized board; they bear the name of the person who would normally correspond on that subject, and the names of the persons to whom he would normally write. The likelihood of their being manufactured would seem to me to be very remote.

1927 Mr. ADAMS. I quite agree on that, Your Honor,

and still it seems to me that my objection would be sound for this reason, that in any organization, particularly ours, there are many matters which are produced which are changed, revised, and never used, and may never have gone farther than the desk of the man who produced them, and they can have no evidentiary value whatever.

The difficulty with us—and I indicated this to Your Honors when we were arguing the question of the interrogatories—is that in my own case, the case of my own company, the entire management of this company has changed since 1936, and we are not in the position of many of the other companies who can immediately confer with present employees and verify facts.

So that I don't know what lies behind many of these exhibits and that explains, perhaps, my unusual attention to these matters of identification and foundation.

Justice STEPHENS. The Court is in no sense criticizing you, Mr. Adams. You are entitled to make your objections.

Mr. ADAMS: I understand that, Your Honor.

Justice STEPHENS. However, they are overruled with respect to these two exhibits, and they are received in evidence.

(The documents referred to, marked Govt. Exhibits Nos. 247 and 248, were received in evidence.)

1928 Mr. STEFFEN. I now offer Government's Exhibits 249, 250, 251, 252 and 253 in evidence. Your Honors do not have these nor are there photostats made of them. They have been furnished to us as United States Gypsum Price Bulletins on metallized board. They come in in the same way that the original price bulletins did, and are necessary to establish what the prices were for the metallized board during the period since the licenses were signed.

We do not expect to have photostats made, if we can avoid it, but we can at least photostat copies for Your Honors, and of course this set goes in as the originals. They cover a series of years.

Justice STEPHENS. Submit them to counsel.

(The proposed exhibits were submitted to counsel for examination.)

Justice STEPHENS. The reporter kindly calls the attention of the Court to the fact that the last two exhibits admitted were not admitted with the usual reservation. The reservation is made and they are admitted subject to the

usual reservation as to declarations of alleged co-conspirators.

Mr. ADAMS. We are obliged to the reporter and to the Court also.

Justice STEPHENS. If these exhibits will require the attention of counsel for the defendants for some little time, we might as well take the afternoon adjournment at this time.

1929 Mr. BROMLEY. They won't, Your Honor.

Justice STEPHENS. We are not trying to hurry you; take such time as you need.

Mr. BROMLEY. I think we can act promptly on them. We have no objection to them; we would like to reserve the right to check them at some future time for accuracy, and I think in fairness to Government counsel I should state that our failure to object is not a concession that these bulletins were sent to any particular defendant or to any of the defendants, as to which there is no proof.

Mr. ADAMS. I would like to say, on behalf of Certain-teed, that we do not admit that we received any of these bulletins. I will accept the statement of the Government that these are bulletins, but I will not admit that they were sent out, or that we received them.

Justice STEPHENS. They may be received in evidence The statements of counsel made in their own protection may be shown of record.

Mr. OLIVER. I make the same objection on behalf of The Celotex Corporation.

Mr. JOHNSTON. I presume that goes for all parties.

Mr. VARIAN. And the same objection on behalf of Ebsary.

Justice STEPHENS. You make the same statement and reservation as Mr. Bromley?

Mr. VARIAN. Yes, sir.

1930 Justice STEPHENS. And that is what you mean also, Mr. Oliver?

Mr. OLIVER. I will adopt Mr. Bromley's and Mr. Adams' statements.

Mr. VARIAN. And I do likewise.

Mr. FINCK. I also adopt the statements of Mr. Bromley and Mr. Adams.

Mr. JOHNSTON. I am not sure, if the Court please, that Mr. Bromley went this far, but I don't think that we ever got any bulletins.

Justice STEPHENS. Of course Mr. Bromley did not admit receiving bulletins. He would not be admitting re-

ceiving them, but sending them, if they were sent.

Mr. JOHNSTON. We want the record to show that it is our contention that we didn't get them.

Justice STEPHENS. The exhibits are received in evidence but the record may show that the defendants other than U. S. G. do not admit receiving the bulletins. They are also received in evidence subject to the right of the defendants to check them as to accuracy.

(The documents referred to, marked as Govt. Exhibits 249, 250, 251, 252 and 253, were received in evidence.)

Mr. STEFFEN. We would like to make a short statement in connection with Exhibit 247. The attachment to Exhibit 247 appears to be an identical copy of a United
1931 States Gypsum bulletin appearing in Exhibit 250, on the last page of that book, and it is dated 10/30/34.

I think we will request the afternoon recess at this time, Your Honor. We are about to go into other subject matter.

Justice STEPHENS. Very well, we will recess until tomorrow morning at 10 o'clock.

Mr. KNUFF. If Your Honor pleases, may I take the last five exhibits out with me in order to check up on something?

Justice STEPHENS. Yes, Mr. Knuff, you may do so.

Announce the recess.

(Whereupon, at 3:50 o'clock p.m., the hearing was recessed until Thursday morning, December 16, 1943, at 10:00 o'clock.)

1932 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., THURSDAY, DECEMBER 16, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

1936 You may proceed.

Mr. BROMLEY. There is one other matter, if Your Honor pleases.

At page 2153, at the very bottom of the page, in connection with my objection, which was thereafter sustained, I moved to strike out all testimony with respect to the North Holston plant. There seems to be no ruling on that motion to strike in the decision of the Court on page 2201, which decision was limited to ruling on the objection to the exhibits.

I should like to call the Court's attention to the fact that if the objection was sustained, it seems to me the testimony with respect to the North Holston plant, which precedes pages 2153 for several pages, should be stricken out in response to the motion that I made at the bottom of page 2153.

Justice STEPHENS. Well, there were a number of exhibits marked—I am not sure that they were offered—in connection with that same line of testimony. The Court didn't

1937 make any announcement of a ruling on those particular items, because the Court thought counsel for the Government, in view of the importance of the question to the Government's case, would probably prepare an offer of proof to make a record.

Mr. STEFFEN. We will make an offer of proof this morning, Your Honor, and we would rather that the ruling on the testimony be deferred until that time.

Justice STEPHENS. That may be done.

Mr. KNUFF. There is one additional correction, Your Honor.

On page 2156, line 13, Mr. Steffen did say "mines", but I believe he meant to say "mills".

Justice STEPHENS. That should be changed to "mills". That change may be made.

At page 2201, perhaps the Court ought to call attention to one other matter, in order that there may be no possible

misunderstanding of the Court's ruling.

The Court said, it will be noted:

"The Court has considered the contentions of counsel on the matter now before the Court, which is a question whether, with the pleadings, there is admissible evidence offered to prove the fixing of resale prices upon board, gypsum board, purchased by one of the defendant licensees from another.

"The Court is of the view that within the fair intendment of the pleadings, such evidence is not admissible."

Then I said, in another sentence, that the Gov-
1938 ernment may protect its record by making a formal offer of proof.

That ruling, we thought, was entirely clear. But counsel for the Government then interpolated the question:

"Would Your Honors' ruling also be made explicit that we are not entitled to introduce evidence of resale price for purposes of showing that the defendants have concertedly fixed and maintained uniform prices within paragraph 45(a)?"

The Court understood counsel for the Government to mean, when he referred to "resale price", the resale price of board bought by one defendant licensee from another, and therefore answered:

"Yes, we think the ruling goes that far. You may make an offer broad enough to protect your record in that respect."

In case there is any possible misunderstanding, of course the ruling does not intend to forbid the Government from attempting to prove the allegations of paragraph 45(a). The ruling is that it is not within the fair intendment of the pleadings to prove, as a part of the Government's case, that there was price fixing upon board bought by one defendant licensee from another.

I suppose, perhaps, on the whole the Court's ruling is entirely clear, but the Court thought perhaps that would be a desirable explanation.

The Court notes with embarrassment and regret that most of the corrections are in the Court's portion
1939 of the record. Perhaps the Court doesn't talk clearly, or talks too much.

You may proceed, gentlemen.

Mr. STEFFEN. I might say, Your Honor, that we will proceed through this evidence concerning metallized board, and then come back to the matter of the offer of proof on the North Holston evidence, if that is agreeable.

Justice STEPHENS. That is quite all right.

Thereupon, CLAUDE OLIVER BROWN, the witness on the stand at the time of adjournment, resumed his testimony as follows:

DIRECT EXAMINATION (resumed) by Mr. STEFFEN.

Q. Yesterday, Mr. Brown, we introduced in evidence two memoranda concerning metallized board which were sent out on December 3, 1934, or thereabouts, one of them being marked Exhibit 248 and the other being marked Exhibit 247, which carried instructions to salesmen as to metallized board and as to the prices at which metallized board would be sold.

I now want to show you Government's Exhibit No. 254, which purports to be a memorandum from Mr. Van Hagan to various individuals, under date of November 26, 1934.

Justice JACKSON. What number did you give that, Mr. Steffen?

1940 Mr. STEFFEN. Exhibit No. 254.

Justice JACKSON. I thought the last one was 248.

Mr. STEFFEN. No, the two that I was calling his attention to were 247 and 248, and then we introduced, I believe, a series of exhibits concerning bulletins.

Justice JACKSON. Oh, yes, that is right.

Justice STEPHENS. Where is this Exhibit 254, in our file here?

Mr. STEFFEN. It follows the contracts in the folder.

Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Have you read Government's Exhibit 254, Mr. Brown?

A. Yes, sir.

Q. And are you familiar with the subject matter?

A. Not before reading this, no, sir.

Q. Could you tell us who the individuals are who are described in the left-hand upper portion of the letter?

A. I think they were plant managers.

Q. Certain-teed plant managers?

A. Yes, sir.

Q. At the points listed, Acme, Akron, Fort Dodge, Grand Rapids, and Gypsum?

A. Yes, sir.

Q. And who was Mr. Phelps, and who was Mr. Hoggatt?

A. Mr. Phelps was Advertising Manager, and Mr. Hoggatt was an assistant to Mr. Van Hagan.

1941 Q. And I notice that it says copy to C. O. Brown. Did you receive this copy, do you remember?

A. I don't remember.

Q. Would this be in the usual form for notices to go out to plant managers and to other persons?

A. Yes, sir.

Q. Do you recall whether the company had actually signed the contract at about this time?

A. No, sir, I do not.

Q. For your information, Government's Exhibit No. 20 is the contract, which was signed on November 2, 1934.

Mr. STEFFEN. Your Honor, we offer Government's Exhibit 254 as being circumstantially identified. It is the form of memorandum that would be used for transmitting information of this character; it is dated shortly after the contract with USG was signed; and it recites that the "company has recently signed" a metallized board contract. And it was, of course, taken from the files of the Certain-teed Products Corporation.

Justice STEPHENS. It may be received in evidence, subject to the usual reservation—I am sorry, Mr. Adams, I thought you had decided not to object.

Mr. ADAMS. No, I didn't want to interrupt you.

I have an objection on the ground that no proper foundation has been laid.

1942 Justice STEPHENS. The objection is overruled.

Mr. ADAMS. And also the usual objection.

Justice STEPHENS. The exhibit is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 254, was received in evidence.)

By Mr. STEFFEN:

Q. I now show you Government's Exhibits Nos. 255 and 256. Exhibit 255 purports to be a letter from the Assistant Auditor addr[illegible]o Mr. Irwin, of the USG, under date of March 26, 19[illegible] Exhibit 256 purports to be a reply by Mr. Irwin ad[illegible]d to the Certain-teed Products Corporation, under dat[illegible] April 4, 1935. I would ask you to examine those letters, and I will ask you a question or two concerning them.

Are you familiar with either of the letters?

A. No, sir.

Q. Do you know the signature of Mr. Irwin, on the U. S. Gypsum Company letter?

A. No, sir, I do not.

Q. Could you state whether or not the company was manufacturing metallized board, or metallized lath, at this time?

1943 A. I don't remember.

Q. Do you know when the company commenced making metallized lath?

A. I do not. I don't think they made it until I left.

Q. And you left when?

A. January 1, 1937.

Q. Did they sell metallized lath during the period that you were there?

A. Yes, sir.

Q. And do you know where they obtained it?

A. Some of it, from the United States Gypsum Company.

Q. Did they buy from anyone else?

A. I don't know.

Mr. STEFFEN. Will you stipulate that that is Mr. Irwin's signature, Mr. Bromley?

Mr. BROMLEY. Yes.

Justice STEPHENS. The Court didn't hear that.

Mr. STEFFEN. I asked Mr. Bromley if he would stipulate that that was Mr. Irwin's signature, and he replied that he would.

We now offer Government's Exhibits 255 and 256, as being circumstantially identified—that is, 255 as being circumstantially identified, and 256 has been stipulated to be a letter written by the Assistant Comptroller of the United States Gypsum Company to the Certain-teed Products Corporation. It is in reply to the letter of March 26,

1944 1935, which is Government's Exhibit 255.

Justice STEPHENS. They may be received.

Mr. BROMLEY. Subject to the usual objections?

Justice STEPHENS. Subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 255 and 256, were received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 257, which purports to be a memorandum from Mr. Flinn addressed to Mr. H. H. Van Hagan, under date of November 17, 1936, copy for Mr. Warren Henley.

Have you examined Government's Exhibit No. 257, Mr. Brown?

A. Yes, sir.

Q. Who is Mr. E. L. Flinn?

A. I think he was manager of the Fort Dodge plant.

Q. Are you familiar with the subject matter of the exhibit?

A. No, sir.

Q. Is it upon the usual form?

A. Yes, sir.

1945 Mr. STEFFEN. We offer Government's Exhibit No. 257 in evidence, as being circumstantially identified in connection with the two exhibits which have previously been admitted, 255 and 256. The name "Flinn" is that of a plant manager, and it is addressed in the usual form to the production manager, Mr. Van Hagan, copy for Mr. Warren Henley. It has to do with the amount of metallized board which was purchased by the Certain-teed Company during the two years in question, 1935 and 1936.

It has been testified that board was purchased outside from other parties during the same period.

Justice GARRETT. Does "reflective gypsum lath" mean the same as "metallized lath"?

Mr. STEFFEN. Yes, Your Honor.

Mr. ADAMS. We object to this, Your Honor. We don't see that it is identified by any circumstance. This witness knows absolutely nothing about this exhibit, and unless you can call it a circumstance that it happens to be on a form similar to the form used in other exhibits, there is nothing else that in any way identifies this exhibit. And I wish to call the Court's attention to the fact that it does not seem proper to us to try to identify an exhibit merely because the exhibit itself refers to something which might be relevant to this case.

Also, I wish to call to the Court's attention that this is not an original. I have, myself, just looked at
1946 the paper before the witness, and I see that it is a copy of an original, it is not an original paper, and we have no way of telling whether or not the original paper which actually may have been sent to other people, may have been changed on its face, as has happened with a number of exhibits in this case.

Therefore, it seems to us perfectly clear that we should not be bound by this type of exhibit, particularly, Your Honor,—and again I have to refer to the fact,—since we are dealing with a memorandum here addressed to somebody that is now dead, we don't have the original that the man got, and we have no way of knowing whether this is

an authentic exhibit or whether it isn't.

And I again think that I am warranted in saying that we not only have come close to the line, but it seems to me that we have crossed it, with respect to this exhibit.

Mr. STEFFEN. I would like to ask Mr. Adams what he meant by the statement that many of these exhibits have been changed on their face? I don't understand that.

Mr. ADAMS. Well, Mr. C. O. Brown, for example, with respect to a memorandum that he made, testified that there were a number of interlineations and changes made in his handwriting on the face of the exhibit.

Mr. STEFFEN. Is that what you referred to?

1947 Mr. ADAMS. Yes, that type of change, which may have been made at the time, by somebody in the company.

Mr. STEFFEN. That being immaterial, we will let it go.

Justice STEPHENS. Does the Government wish to be heard further?

Mr. STEFFEN. No, Your Honor.

Justice STEPHENS. We think this is not admissible, that the circumstantial identification is not sufficient. The previous exhibits have been fairly closely connected in time and subject matter to each other ——

Mr. STEFFEN (interposing). I think, Your Honor ——

Justice STEPHENS (interposing). Let me complete the ruling, please.

Mr. STEFFEN. Excuse me.

Justice STEPHENS. We think also that the objection, which in effect is an objection that it is not the best evidence, is well taken. It is a copy. The absence of the original is not accounted for, and the correctness of the copy is not testified to.

Did you have something further, Mr. Steffen?

Mr. STEFFEN. I would like to be heard later on that matter of the best evidence. Our contention throughout is going to be, of course, that whether it is a carbon or an original in the possession of the defendants, it is evidence concerning the matters recited in the paper. This is not a matter of suing upon a contract for purposes of de-

1948 termining whether or not the other party is liable. This is a question of showing what the defendants knew, and what they asserted, and a declaration can be made either in carbon or in original.

Therefore, while you have ruled upon that in this case, I would like to enter a caveat that in cases to come up later,

we do not wish to be bound by whether it is an original or a carbon.

Justice STEPHENS. We will not stand upon ceremony. If you wish to be heard on that objection on this exhibit, you may be heard.

Mr. STEFFEN. Not on this exhibit.

Justice STEPHENS. The Court realizes that these are not being introduced as copies of contracts are introduced. Yet they are being introduced as declarations, and their correctness as declarations is of some importance to the parties. The usual best evidence rule is that if the copy is to be introduced, in view of the fact that a copy may have been different from the original because of interlineations and changes in the original, that the correctness of the copy should be testified to.

What do you intend to prove by this, Mr. Steffen?

Mr. STEFFEN. What we wanted to establish by it was that there was a purchase of so much lath during the years 1935 and 1936. That comes in, as we see it, as admissions on the part of the defendant that they did buy it.

1949 Justice STEPHENS. If you hadn't said the purchase of "so much" lath, your argument would have been a little more convincing to me. When you say "so much", then you get into the exact correctness of the copy.

Mr. STEFFEN. We don't offer it as to the truth of the matter, but simply as to what they admit.

Justice STEPHENS. You offer it simply to show that some was purchased.

Mr. STEFFEN. That is right.

Justice STEPHENS. That has already been testified to.

Is there any dispute about that, Mr. Adams?

Mr. ADAMS. No, the witness has testified that they purchased some, and I certainly agree with his testimony.

Mr. STEFFEN. I will ask to have Mr. Adams produce the figures indicating just what metallized board or reflective lath was purchased by the Certain-teed Products Corporation from the time they signed their contract with USG until the present date.

Mr. ADAMS. I will reply that that is information which I can tell the Court now we can't produce. At the time we argued the question of the interrogatories. I went extensively into the facts with respect to the conditions of the records of our company. I might also say that in connection with the preparation of the trial itself, on this

1950 point, I endeavored to secure this information from my client, and was unable to do so.

Justice STEPHENS. Were you through, Mr. Adams?

Mr. ADAMS. That is all.

Justice STEPHENS. Of what importance, Mr. Steffen, is the amount? Isn't it the fact of purchase that is material?

Mr. STEFFEN. The fact is, of course, the material thing. I don't want to be met, as I perhaps will be met a little later, with an argument from Mr. Adams that it was just a small amount, not substantial, and the Government didn't prove it anyway, and therefore this is of no consequence. I do not want precise figures. I would like to have a statement from Mr. Adams that during the years that they have been buying board, from 1934 on to the present date, they have bought, each year, substantial quantities from USG or from National or from any other licensee.

1951 Justice STEPHENS. It would seem to the Court, speaking in the interest of time, that a good deal of time could be saved on much of the subject-matter that is being gone into through these exhibits and with these witnesses. There can hardly be any dispute, can there, Mr. Adams, as to the fact that there was a substantial amount of metallized lath purchased during the period of years in issue in the case?

Mr. ADAMS. Oh, yes, your Honor.

Justice STEPHENS. There is a dispute on that?

Mr. ADAMS. A very serious dispute. We do not concede that there was any substantial amount purchased. The best information that I have been able to get was that it was a decidedly small amount.

Perhaps I can explain that by saying that it is my understanding that this was a new product which was just coming in, and that during the period in which we were not actually in production, but were putting our plant in position so we could produce. As I understand it a quantity, which I am informed—I have no way of verifying it—was a small quantity of this merchandise, was purchased from time to time. But I am unable, unfortunately, to state that we purchased substantial quantities because my information is precisely to the contrary.

Justice STEPHENS. Do you have any knowledge on this subject, Mr. Brown, of how much or how little of this metallized board was purchased during the period of

1952 years which we are now discussing?

The WITNESS. I don't have any definite figures, your Honor. It was a new product, as Mr. Adams states, and had not been promoted to the trade, and I don't think

our sales were what you would call "substantial".

Mr. STEFFEN. I object to the answer, "substantial". What would you say was "substantial", Mr. Brown? Would $25,000 be substantial or not?

The WITNESS. I wouldn't think so——

Justice STEPHENS (interposing). A pleasantry will sometimes relieve the weary atmosphere of a courtroom.

Counsel's objection reminds me of an occurrence in a court in which I practiced some time ago, where a lawyer, in respect to a question asked by a judge, said, "If it is asked on our behalf, we withdraw the question, and if on our opponent's behalf, we object to it". (Laughter.)

In this instance the Court, in the interests of all persons, was trying to save time.

What do you mean by "substantial", Mr. Brown?

The WITNESS. I would say a million dollars would be substantial.

Mr. STEFFEN. I will agree with that, your Honor.

Justice STEPHENS. You may proceed with the witness, Mr. Steffen. You may interrogate the witness more closely than the Court cares to do, within his memory,

1953 as to the amount of this material that was purchased and shipped.

Mr. STEFFEN. As I understand the witness' response, $25,000 is not substantial, and $1,000,000 is.

By Mr. STEFFEN.

Q. Can you get any closer than that?

A. I don't think it would improve the record.

Q. I don't think so either.

Mr. STEFFEN. Your Honor, we have asked defense counsel, Mr. Adams, to produce the actual figures, and he has stated here, as he has stated elsewhere, that he is unable to get any figures. Now the fact of the matter is that they make reports, and did make reports, to the United States Gypsum Company of the amounts purchased, and those figures in general should be obtainable.

If your Honor will rule that they shall be presented, I think it will save time.

Justice STEPHENS. The Court will rule that they shall be presented if they can be presented. The Court is not in position to deny the assertion of Mr. Adams that he cannot get at them, so far as the records of his clients are concerned, there having been a change in management and ownership.

How about the United States Gypsum Company, can't

you produce them, Mr. Bromley?

Mr. BROMLEY. No, your Honor. In the first place, Mr. Steffen's statement is not correct. There were no
1954 reports of purchased foil board made by Certain-teed to us, or vice versa. If there had been, that would have been very easy for us to get the information and furnish it. But that is not the fact. When we answered the interrogatory, No. 44, with respect to this question, we said, "It is not possible to state without examination of the invoices the volume in board feet and the dollar sales value of metallized board sold by USG to each of the companies named as defendants in this action".

And as we argued on the motion to settle the interrogatories, that means an examination of all the invoices because the metallized board was not carried on separate invoices. That is the difficulty we are in and that is why we cannot do it.

Mr. STEFFEN. May I say that we of course respect Mr. Bromley's statement and Mr. Adams' statement fully, but on the other hand we doubt the accuracy of those statements, and we would ask that we be permitted to put an auditor in on the books of United States Gypsum Company and or Certain-teed to examine the books to determine just how much metallized lath was sold during those several years. I have no question but that in gross amounts they have some records, apart from their invoices, which show how much board, how much metallized board they manufactured and how much metallized board they sold, and how much metallized board they sold to Certain-teed, or how much Certain-teed bought, and we will be very glad to put a man in who I think can disclose that informa-
1955 tion pretty shortly.

Mr. ADAMS. I might observe at the outset, your Honor, that if this Court is going to wait until an auditor goes over the invoices of United States Gypsum and Certain-teed on this subject, I for one am going to have a long gray beard. This case is not going to be finished in that event for several years.

I don't mean, in saying that, that I should be deemed to agree that any such practice should be followed. The Government has had this case three years. They subpoenaed some 500,000 documents, including everything we had in the whole place, as far as I can find out. This information is not available. Mr. Bromley's statement is the fact with respect to our company. When we bought something we got bills that may have contained ten or fifteen items.

Secondly, we do not have those bills so far as I know. We have here in this courtroom everything that we have on this subject. It begins in 1935 when we began to manufacture board and shows from that time on. Up to that point we don't have anything.

Justice STEPHENS. The Court will of course hear you if you have any authorities to present on this subject, Mr. Steffen, but we, as presently advised, know of no power in the Court to order an audit into the office of a party to the case for an examination. Many audits are made of books of defendants in these cases.

1956 If I may refer to personal experience, when I was Assistant Attorney General, and head of the Anti-Trust Division, that was done by consent, it was done as a result of the fact that the courts had power to issue subpoenas, and ordinarily the defendants consented to have an examination of their books rather than have their books removed from their possession.

But, as presently advised we doubt whether we have the power to order an auditor into anyone's offices.

Maybe there is some special provision in the new Rules on the subject which gives us that authority, and if so we would like to have our attention called to it.

Mr. KNUFF. Would you let me have just a minute, and I think I can call your attention to the rule?

Justice STEPHENS. Yes. It sounds to me like search and seizure.

Mr. STEFFEN. You can see the situation we are in otherwise; we have to simply take the word of counsel on matters which we are very glad to do ordinarily ——

Justice STEPHENS (interposing). You can subpoena the invoices, can't you?

Mr. STEFFEN. We have a large number of invoices, but that is not the way to get your general information concerning the amount of board made and sold.

Justice STEPHENS. Well, the Court must ——

1957 Mr. ADAMS (interposing). I am not sure, your Honor, but I think they have got such invoices as we have right now. I am not clear about it but it seems to me they subpoenaed them, and I think they still have them.

Mr. STEFFEN. We have a few invoices, and they will come up immediately.

Mr. ADAMS. I think they got a good many thousand of them.

Justice STEPHENS. The Court is unable to determine this question of fact. One counsel says that these are easily

furnished by opposite counsel, and the other side gives us the word of counsel that they are not. We have no way of determining that issue of fact.

Mr. STEFFEN. I call your Honor's attention to Rule 34 of the Rules of Civil Procedure:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

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We say that within that rule your Honors can order the defendants to permit us to have an auditor inspect the books of the defendant companies, and to ascertain the fact of the matter which is in dispute here, whether or not those books show purchases of reflective board from United States Gypsum by the Certain-teed Corporation, and in what amount.

Justice STEPHENS. The Court is ready to rule on this matter unless counsel wish to be heard further.

The Court is of the view that Rule 34 does not cover the situation involved.

Rule 34 (1) provides that the Court may "order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control."

Now that is obviously that part of the rule which is intended to apply to documents such as invoices and records of the type which we are now discussing, and that gives the Court authority to order any party to produce and permit the inspection or copying of them,

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but it is well settled law that the Court cannot compel any party to do the impossible. It is a defense even in a contempt proceeding, to show that the party cannot perform the act ordered.

Now the Court it dealing with officers of the court whose word the Court must accept as correct. The Court has no reason to doubt the assurances of Mr. Bromley or Mr. Adams that they cannot produce this material without such undue effort in examining invoices that the Court cannot properly require it.

That whole matter was gone into on the interrogatories.

The second portion of the rule obviously does not apply to documents. It applies to "entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon".

That has to do, obviously, with physical things in the nature of property in the usual sense of the term, and the first part of the rule has to do with documents.

We do not think it would be proper for the Court to order the production of documents which counsel give their solemn assurance they cannot produce without such undue effort as goes beyond the reasonable requirements of the law.

1960 This may be one of those situations where the Government is confronted with an inability to produce or get at evidence. That sometimes occurs in any case and confronts every party, and it may be evidence which the party believes to exist but which nevertheless cannot be reached.

The motion is denied for the reasons stated by the Court.

Are there any other witnesses who might be called on this subject from Certain-teed, Mr. Adams, who might have more knowledge than Mr. Brown on this subject? We wish to give the Government every proper opportunity to get at its evidence.

Mr. ADAMS. If your Honor pleases, I took up with the man who had been in the company the longest ——

Mr. STEFFEN (interposing). What was his name?

Mr. ADAMS. Mr. Norman Muegger, and I think we have already furnished his name to the Government—and I also took it up with the head of his department, who was not in the company during this period, and they spent a long time trying to assemble this information and they told me that they didn't have it and couldn't get it.

I also took it up with Mr. Galloway, who was the head of the sales department, and Mr. Galloway gave me the same information.

As a matter of fact, at my special request a further search was made by Mr. Galloway's department just before this case began. I went to Chicago in connection with the preparation of the case, and we particularly went
1961 into this phase of it.

Now those men can be subpoenaed but they will testify, I am sure, to what I have already stated to the Court.

Of course I have no objection to their testifying on the subject. As far as I am concerned, if I can get this information for the Court I am glad to produce it. I don't think it is going to make much difference in the case anyway, and I don't think it is awfully important, but it is one of those things that we just haven't got and can't give you.

Mr. STEFFEN. I wonder if Mr. Bromley would make a similar statement to the effect that the United States Gypsum has no records indicating that they ever sold metallized board to Certain-teed Products in any quantity?

Mr. ADAMS. Just a minute, I don't want to be understood as having made the statement that we have no records. We have all said that this question of the invoices would require the examination of many hundreds of thousands of invoices. I can't say that there are no records, but I can say that there are no records that we can produce on the subject.

Mr. BROMLEY. All I know about it is what the interrogatory states, and I assume that a careful investigation was made at that time before that answer to the interrogatory was given.

I am willing to initiate another inquiry to see if there is not some way we can furnish either a gen-
1962 eralization or an approximation or an estimate, or something else.

Of course it must be remembered that this request now is only as to Certain-teed, but it undoubtedly will be followed by a request as to every company. So that I am undertaking a pretty heavy burden and I don't want anyone to think that it is just Certain-teed that it is confined to. But I am willing to reinitiate the inquiry and see if there is not some way in which we can arrive at a figure.

Justice STEPHENS. That is a fair offer, Mr. Steffen.

Mr. STEFFEN. I accept that as a fair offer, your Honor.

Justice STEPHENS. The Court cannot ask more than that, it seems to the Court, of the defendants, in view of the efforts they have already made.

The Court will take its recess at this time.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

Justice STEPHENS. Proceed, gentlemen.

Mr. STEFFEN. In view of the difficulty, your Honor, of obtaining any evidence at all concerning the amount of metallized board purchased during 1935 and 1936, would that have any bearing on making this Exhibit 257 now the best evidence?

Justice STEPHENS. There is still the question of identification and the question of correctness. The inability to produce the original lays the foundation for the introduction of secondary evidence, but the secondary evi-
1963 dence will have to be shown to be correct, and now that you lay emphasis upon the amount involved, that emphasizes the necessity of having correct copies. Also there is the question of identification. So the Court's ruling will stand.

Mr. STEFFEN. I want to make just one observation, that all of these documents were subpoenaed. This is all that was returned to the Government. We do not know where the original is, and the defendants did not supply the original under the subpoena.

Justice STEPHENS. That may be shown of record.

By Mr. STEFFEN.

Q. I will now show you, Mr. Brown, a series of exhibits which purport to be invoices of the Certain-teed Products Company to various buyers, and I will have them marked serially beginning with Exhibit 258.

Exhibit 258 is a purported invoice from the Certain-teed Products Corporation to Pinellas Lumber Company under date of 9–8–37.

Exhibit 259 purports to be an invoice from the Certain-teed Products Corporation to C. W. Kempkau & Company, under date of 8–12–37.

Exhibit 260 purports to be an invoice from the Certain-teed Products Company to the Witt Lumber Company, Knoxville, Tennessee, under date of 7/27/37.

1964 Exhibit 261 purports to be an invoice from the Certain-teed Products Corporation to Morris-Austin

Company, Asheville, North Carolina, under date of December 16, 1936.

Exhibit No. 262 purports to be an invoice from the Certain-teed Products Corporation to the Smith-Kelly Supply Company, Inc., of Mobile, Alabama, under date of September 27, 1937.

Exhibit 263 for identification purports to be an invoice from the Certain-teed Products Corporation to the Smith Kelly Supply Company, Mobile, Alabama, under date of August 17, 1937.

Exhibit 264 purports to be another invoice from the Certain-teed Products Corporation to the Smith Kelly Company under date of July 7, 1937.

Exhibit 265 purports to be an invoice from Certain-teed Products Corporation to the Campbell Coal Company, Atlanta, Georgia, under date of July 28, 1937.

Exhibit No. 266 purports to be another invoice from the Certain-teed Products Corporation to the Campbell Coal Company under date of July 15, 1937.

Justice STEPHENS. Mr. Adams, these appear to be invoices. Is there any possibility of stipulating as to the correctness of these, in order to save all this examination?

Mr. ADAMS. Well, I am perfectly certain that the witness cannot testify about them at all, because he had left the employ of the company at the time they were made. He left the employ of the company on January 1, 1937.

1965 Mr. STEFFEN. He can identify Certain-teed Products Corporation invoices whether he was there or not.

Mr. ADAMS. I don't quite understand how.

Justice STEPHENS. Well, at the moment the Court is asking if you couldn't stipulate as to the correctness of these.

Mr. ADAMS. I am really at a loss as to know what to say, your Honor. I would like to perhaps suggest this, that I have an opportunity to verify them. I have never seen them before this proceeding. Your Honor knows my difficulties in this case, and I cannot say whether they are valid or not because one difficulty that I have is that they may have been invoices which were subject to correction or change in some respect.

Justice STEPHENS. Where did you get them, Mr. Steffen?

Mr. STEFFEN. Under subpoena from the Certain-teed Products Corporation, and I have just gone through and picked out a handful of them.

Justice STEPHENS. Did you get these documents, or are these photostats of them?

Mr. STEFFEN. I got the originals which Mr. Brown has before him.

Justice STEPHENS. The Court must apply the rules of evidence. The Court would think that this type of exhibit which is an office form, if the originals are available for inspection of counsel, might possibly be stipulated to.

The Court does not require it, of course, but suggests
1966 it and hopes that it can be done.

Mr. STEFFEN. I call your Honor's attention to the fact that Exhibit 261 is a 1936 invoice, if that is important, and was issued during the time when Mr. Brown was still with the company.

Mr. ADAMS. I think your Honor's idea here is proper, that it is certainly desirable not to hold up the trial by a matter of this kind. I think that the best thing for me to do is to concede that these are copies of invoices which were taken from the files of Certain-teed.

I cannot concede, and do not wish to be understood as conceding, that they are accurate or that the amounts stated thereon represent the prices charged or the amounts received for the merchandise which is referred to on the face of the invoices.

I should also like to have the privilege, if possible, as we have had with respect to other exhibits, of having a further check if there is anything we can check them with.

Justice STEPHENS. Are they not originals?

Mr. ADAMS. These appear to be copies, your Honor. I take it that they would be copies.

Justice STEPHENS. The originals went to the customers, of course.

Mr. ADAMS. Yes. They had many different copies that went to different departments. I notice that this
1967 bears the stamp, "Received—Atlanta, Georgia—Certain-teed Products Corporation". This probably was a copy that went down to a local office from which the merchandise had been sold. I just surmise that that is the case.

But as far as the question of their being invoices and having come from our office is concerned, I raise no question about that at all.

Justice STEPHENS. Is there any one of your officers here with whom you can consult on the subject of their authenticity?

Mr. ADAMS. There is not any present officer of the company here. Mr. Whittemore is among the many other witnesses that are waiting to be heard, and I can take that up with him.

Justice STEPHENS. What do you offer to prove by these, Mr. Steffen?

Mr. STEFFEN. I would like to have them identified first, and then I will ask the witness a question.

Justice STEPHENS. Very well, proceed.

Mr. STEFFEN. I think it is fairly obvious that Mr. Adams doesn't know anything about the invoices, because they were company records, so that he can't concede their accuracy.

By Mr. STEFFEN.

Q. Now, Mr. Brown, I would like to ask you to examine these invoices, please.

Mr. STEFFEN. I would point out to your Honor that the defendants have been telling the Court that the
1968 way to establish these facts concerning purchases of board or sales of board would be to look at the invoice, and I think these invoices will disclose certain evidence concerning both the sale of reflective lath and also evidence concerning the source of the reflective lath.

By Mr. STEFFEN.

Q. Will you examine them, please, Mr. Brown, and tell us whether or not, examining first Government's Exhibit No. 261, which is the one dated December 16, 1936, showing a sale to the Morris-Austin Company, and then examining the others, you can identify them as being the usual form of invoices of the Certain-teed Products Corporation?

A. They appear to be the type of invoice used when I was with the company.

Q. And the company kept these in its permanent records, did it?

A. Naturally, yes, sir.

Q. The original goes to the customer?

A. Yes, sir, it is supposed to.

Q. You can identify each one as being in the form which the company employed ——

A. (Interposing.) I wasn't with the company when these were issued, except as to one, but I can identify them as appearing to be the form.

1969 Justice STEPHENS. You might ask the witness, if the Court might suggest, what sort of machine these

things were prepared upon, whether they were prepared upon a mechanical bookkeeping machine, or typed, or in what manner they were prepared. That might aid with respect to their authenticity.

The WITNESS. I think that the correct term is a Fan-Fold billing machine.

Mr. ADAMS. Of course, Judge, I have tried to indicate that I do not raise any question about their being copies of invoices taken from our files.

By Mr. STEFFEN.

Q. Now, Mr. Brown, I would like to ask you to look at Government's Exhibit 258 and explain the transaction that is evidenced there. That is the invoice of September 8, 1937.

Mr. ADAMS. To that I must object because he was not employed by the company at that time.

Justice STEPHENS. What is the question?

Mr. STEFFEN. I asked him to look at Government's Exhibit 258 and explain the transaction that is evidenced there. Mr. Adams knows well that anybody can explain it, whether he was employed or not employed at the time, if he has the information and knowledge.

Justice STEPHENS. If you know what transaction this invoice purports to describe, explain it. If you do not, say you do not.

1970 The WITNESS. I think that is a very broad question, your Honor, and you have men under subpoena, or the Court has, that were in charge during this period.

By Mr. STEFFEN.

Q. You were in charge of sales, were you, Mr. Brown?

A. Yes, sir.

Q. Was Mr. George M. Brown in charge of sales?

A. I wouldn't classify him as being in charge of sales.

Mr. STEFFEN. May I ask the Court to direct the witness to state whether he knows or doesn't know what this transaction ——

Justice STEPHENS (interposing). The witness has in effect answered that he doesn't know.

Justice JACKSON. Don't you know what that is, what that Exhibit 258 means?

The WITNESS. Yes, your Honor, that is an invoice.

Justice JACKSON. That is the question.

The WITNESS. He asked me to explain it in detail.

Justice JACKSON. No, he is asking you to explain what you mean by this.

The WITNESS. I misunderstood the question, I am sorry.

By Mr. STEFFEN.

Q. What is meant by, "Acme full freight allowed", if you know, appearing on the left, "FOB Acme full freight allowed"?

A. The products were sold on a delivered price, but the bill is usually on the basis of f.o.b. mill, freight
1971 allowed, which means that you deduct the freight from the delivered price and the customer pays it.

Q. Point out on this invoice what was the delivered price.

A. Apparently it was $158.94.

Justice STEPHENS. This is what, Exhibit 261?

The WITNESS. Exhibit 258.

By Mr. STEFFEN.

Q. $158.94, you say?

A. Yes, sir.

Q. Now it says, "Less freight—$65.61"—where do they get that item?

A. That was the freight from shipping point to destination.

Q. And the shipping point was Acme?

A. Yes, sir, it shows f.o.b. Acme.

Q. Therefore it would be from Acme, Texas, to St. Petersburg, Florida?

A. Yes, sir.

Q. What is meant by this "freight absorption" thing on the lower left-hand corner?

A. Well, gypsum products were sold on a delivered price, freight equalized with any other producing point. Some other gypsum mill evidently had a rate of $7 per ton into St. Petersburg, Florida.

1972 Q. All right, now explain the transaction ——

A. (Interposing.) Therefore, in buying from Certain-teed he had to pay $9.38, so in order to compete Certain-teed would absorb the difference of $2.38.

Q. Now that basic rate, the $7 was from some other plant, you say?

A. Yes, sir.

Q. And do you know what plant that might have been?

A. I don't remember without looking up the freight rates.

Justice STEPHENS. You mean some other Certain-teed plant?

The WITNESS. Any other plant, your Honor.

Justice STEPHENS. Any other plant?

The WITNESS. Yes.

By Mr. STEFFEN.

Q. Is it any other plant, or is it a specified plant?

A. Well, it would be any plant that made the lowest rate into there. It could be a Certain-teed plant.

Q. How do you happen to select the particular plant, is it specified in the United States Gypsum price bulletins?

A. It is shown in the freight bulletins.

Q. No, I am asking if it appears in the price bulletins which the U. S. Gypsum Company issued to licensees.

A. I don't know, I don't really get the question.

Q. Well, I wanted to know why you selected a particular plant here where there was a $7 rate.

1973 A. Well, if there was a plant at Plasterco, for example, that had a rate of $7 to destination, and that was the lowest rate in existence, that would be the rate you would use.

Q. You mean by "lowest rate in existence", the lowest rate between Plasterco and St. Petersburg?

A. The lowest rate from any gypsum plant to destination.

Q. This invoice No. 258, Exhibit 258, calls for 157 bundles of Beaver gypsum lath, and it is marked, "Metallize one side"—is that metallized board as we have been calling it?

A. I think so.

Q. And can you tell by looking at the invoice whether it was manufactured by Certain-teed or whether it was bought from outside parties?

A. No, sir, I cannot do that.

Q. What do the initials "O S P" mean appearing after "Metallized one side"?

A. I wouldn't know except from an exhibit you showed me during the recess.

Q. Well, I will show you the exhibit again which I showed you during the recess.

I show you for purposes of refreshing your recollection, certain documents, and ask you what they are, first, if you know.

A. They appear to be loading tallies.

Q. Do you find on those loading tallies the initials

1974 "O S P"?

A. Yes, sir.

Q. And is that followed by further language?

A. Yes, sir.

Q. State the language.

A. Purchased from ——

Mr. ADAMS. (Interposing.) I object to it, if your Honor please, until I have had an opportunity to see the exhibit.

Justice STEPHENS. You may look at it.

(Mr. Adams examines document.)

Mr. ADAMS. Thank you, your Honor.

Justice STEPHENS. You may proceed, gentlemen.

By Mr. STEFFEN.

Q. I asked you, I believe, if you could tell us what "O S P" means after having examined the plant or warehouse orders that I showed you.

Justice STEPHENS. You are asking what the letters "O S P" on Exhibit 258 mean?

Mr. STEFFEN. Yes.

The WITNESS. On this loading tally it reads, "O S P—purchased from USG."

Justice STEPHENS. Don't state what is on the loading tally, the loading tally is not in evidence and is not offered in evidence.

Mr. ADAMS. I move that that answer be stricken.

1975 Justice STEPHENS. That may go out.

State if you can, what the letters "O S P" on proposed Exhibit 258 mean, basing your statement on your knowledge and experience as a sales manager and businessman in this type of work. If you cannot answer, you do not have to. But if you can tell us what they mean that is what we want to know.

The WITNESS. I wouldn't have known what they meant without having had my memory refreshed by this loading tally.

1976 Justice STEPHENS. That is all right. Go ahead and tell us what they mean, as your memory is refreshed.

The WITNESS. Outside purchase.

By Mr. STEFFEN.

Q. Outside purchase would indicate ——

A. (Interposing.) That they were purchased from some other company.

Mr. STEFFEN. I call your attention, Your Honor, that O S P appears on each of the invoices that we have offered here, being Government's Exhibits 258 to 266. These are by no means all of the invoices that could be offered, but they are given as an indication of invoices during this period. We offer them in evidence at this time.

Mr. BROMLEY. Does that last statement mean that they are on all the invoices you have?

Mr. STEFFEN. Oh, no. We claim there are many others with this same O S P.

Mr. BROMLEY. I thought your statement was intended to indicate that all the invoices you have are of the character of Exhibits 258 to 266, that is, they bear these letters O S P.

Mr. STEFFEN. They are of the same character, in general form, but they do not all bear O S P, by any means.

Justice STEPHENS. They may be received in evidence.

Mr. ADAMS. May that reception be subject to the reservation which I requested, Your Honor?

1977 Justice STEPHENS. Oh, yes, you may inspect them for accuracy.

Mr. BROMLEY. We make the usual objection.

Justice STEPHENS. These are received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 258 to 266, both inclusive, were received in evidence.)

By Mr. STEFFEN:

Q. Now I want to ask you, Mr. Brown, some questions in regard to your salesmen. Could you tell us what the practice of the company was, during the years that you were with it, in giving prices to the salesmen at which they would quote products sold by Certain-teed?

A. We sent them a price list.

Q. And that price list covered your full line, the full line that the salesmen were selling?

A. Yes, sir.

Q. What other information of a price nature did you supply your salesmen with, if any?

A. Freight rates.

Q. What do you mean by freight rates?

1978 A. From shipping point to destination, and from

competing plants to destination.

Q. And how would the salesmen use the freight rates?

A. They would sell gypsum products on the basis of our price list plus the lowest freight rate to destination.

Q. And he would obtain that lowest freight rate from the freight rates which you supplied him?

A. From his freight rate bulletin.

Q. Did you have more than one set of prices for gypsum board or gypsum products?

A. I don't remember.

Q. I mean, when you sent out price lists, did you have a price list for one type of board, let's say 3/8 inch gypsum lath which you manufactured, and a different price list for any other board?

A. I don't think so.

Q. Single prices for your salesmen?

A. They were supposed to cover the lines, as I remember it.

Q. Coming to the metallized lath, could you say whether you quoted bulletin prices to your salesmen on metallized lath—and by "bulletin prices" I mean the prices that the United States Gypsum Company sent out in their bulletins?

Mr. ADAMS. I object to that. There has been no showing that we ever received the bulletins, and we very carefully made yesterday, when the bulletins were of-
1979 fered, the statement that we did not agree that we received the bulletins. I think it is assuming a fact that is not in evidence.

Justice STEPHENS. The question does, technically, assume a fact not in evidence. In other words, it asks him if he sent them out on the basis of bulletin prices received from USG. That assumes that they were received.

You may ask him whether they were received, and follow it up.

By Mr. STEFFEN.

Q. Do you recall, Mr. Brown, that you had a contract with the USG at this time, concerning metallized board?

A. I wasn't with the company at this time.

Q. I am speaking of from 1934 on through 1935 and 1936, when you were with the company.

A. I don't recall when that contract was signed.

Q. Well, I refreshed your recollection earlier here. It was on November 2, 1934. And under that contract, I will state the United States Gypsum Company reserved the

right to fix the prices on metallized board ——

Mr. ADAMS (interposing). On metallized board manufactured and sold by this defendant.

Mr. STEFFEN. All right, manufactured and sold.

By Mr. STEFFEN.

Q. Now do you recall, Mr. Brown, during the years 1934, 1935 and 1936, having received any bulletins
1980 from the United States Gypsum Company concerning the sale and the sales price of metallized board?

A. I don't remember.

Mr. STEFFEN. The witness, Your Honor, appears to be failing to remember matters which he certainly should remember, as sales manager of the company over a period of years. May we cross-examine the witness?

I will point out also that Mr. Brown, as all the other witnesses that we are forced to call, is a member of the industry,—Mr. Brown has been in it for 25 years, or thereabouts,—and their natural bias, of course, would be against the plaintiff in this case.

Mr. ADAMS. There has been no suggestion, Your Honor, on the part of this or any other witness who has testified in this case, of any bias or partiality whatsoever. These witnesses have come here, for the most part, at their own expense; they have been kept sitting in this court room day after day, and I, myself, have been surprised at the good temper with which they accepted the treatment they received.

I think that there is absolutely no call for any suggestion such as has just been made by counsel for the Government, that there is any basis whatever for deeming this witness to be a hostile witness or for suggesting that there should be any right to cross-examine. Insofar as I
1981 am concerned, I don't care whether they cross-examine him or not. I am perfectly satisfied that the witness is testifying to the whole truth as he knows it.

I think, however, that I am called upon to make this statement, particularly because of the suggestion here that this witness is connected with the industry, which he is not, and has not been since January 1, 1937, and particularly because during the time he was with the company he was general sales manager and vice president during this period, and he was required to handle a multitude of details in a company that was doing some $20,000,000 worth of business. I think that the suggestion by counsel, that because this witness can not remember whether he received price

bulletins during this period is the basis for cross-examining him, is frankly outrageous.

Justice STEPHENS. Does the Government wish to be heard further?

Mr. STEFFEN. We wish simply to say that we do not question Mr. Brown's good faith in the slightest. We think it might save time if we could go rather directly to some questions which he has shown that he has an unwilling or no memory upon.

Justice STEPHENS. There is a rule, of course, of which counsel are well aware, that counsel can not cross-examine their own witness, but that rule may be relaxed
1982 within the discretion of the Court if the witness indicates hostility.

The Court thinks this witness has not indicated hostility. If you do not object, however, as you stated, Mr. Adams, to leading questions, perhaps it will save time.

Mr. ADAMS. I am always glad to do that, Your Honor. It is simply my own sense of personal outrage at the suggestion of hostility on the part of this witness. They can go ahead and lead him all over the court room, as far as I am concerned.

Justice STEPHENS. You may lead the witness.

Mr. STEFFEN. May I say for the record that Mr. Adams' sense of personal outrage is immaterial.

Mr. ADAMS. It is extremely material to me.

Justice STEPHENS. We have had enough on that subject. Proceed.

Mr. Steffen has stated, Mr. Adams, that he intended no reflection upon the good faith of the witness.

Mr. ADAMS. I am very happy to hear that.

Justice STEPHENS. You have a right to raise your objection, but counsel for the Government has now indicated that he did not intend to indicate bad faith on the part of the witness, so that ought to end the difficulty. Let us be friends, now, and go forward.

By Mr. STEFFEN.

1983 Q. I would like to show you, Mr. Brown, Exhibit No. 247.

I now ask you, Mr. Brown, whether you at any time have ever seen any of the United States Gypsum Company price bulletins, of any kind at all.

A. Yes, sir.

Q. You are familiar with their form?

A. In a general way, I think so.

Q. I show you now Government's Exhibit No. 250, the final page in Government's Exhibit 250, under date of 10/30/34——

Justice STEPHENS (interposing). Is that one of the bulletins which was received in evidence yesterday?

Mr. STEFFEN. That is right.

By Mr. STEFFEN.

Q. (Continuing.) —And ask you to examine that and state whether you are familiar with that form?

A. I have seen them sent out in this form.

Q. Now I will ask you to examine the second page of Government's Exhibit 247. Comparing the two, the United States Gypsum Company bulletin and your notice to salesmen, do you see any difference?

A. They are both the same.

Q. Does that refresh your recollection as to whether you may have seen United States Gypsum Company bulletins upon metallized lath?

1984 Mr. ADAMS. I object to that. The question is whether or not they received the bulletins. He has testified that he has seen some bulletins.

Justice STEPHENS. The Court doesn't see the impropriety of the last question.

Read it.

(The question was read by the reporter.)

Justice STEPHENS. What is your point?

Mr. ADAMS. The point is that he has stated that he has seen them. There is no question about that.

Justice STEPHENS. You are objecting to it as repetitive?

Mr. ADAMS. That is one objection. As I understand it, what we are trying to get at with this witness is whether or not he received these bulletins.

Justice STEPHENS. The Court understood the witness to mean, when he said he had seen them, that he had seen them in the process of his business with the Certain-teed Company, but perhaps that should be brought out, Mr. Steffen.

By Mr. STEFFEN.

Q. When you said that you had seen bulletins covering metallized lath, was that in your capacity as an official of the Certain-teed Products Corporation?

A. Yes, sir.

Justice STEPHENS. The objection, for the record, is overruled. We think the question is proper. It is some

1985 evidence that they were received if this man, in his

official capacity in the business, saw them.

By Mr. STEFFEN.

Q. I want you to look at Government's Exhibit No. 248. That bulletin refers to the sale of what, Mr. Brown?

A. Metallized board.

Q. Is is board or lath?

A. Lath.

Q. And what sort of shipments does it cover?

Justice STEPHENS. The Court calls attention to the fact that it says both. The first sentence says:

"The U. S. Gypsum Company quote prices on metallized gypsum wallboard at the following points:"

Then it says:

"On gypsum lath they quote only at Oakfield * * *"

Then:

"The price on gypsum metallized lath is $20.00", and so forth.

By Mr. STEFFEN.

Q. Now I want to show you Government's Exhibit No. 249, which has been identified as a price bulletin on metallized board which the United States Gypsum Company prepared, and I would like to have you examine that and state whether or not, from that, it accords with the announcement that you sent out to salesmen which was Government's Exhibit 248?

1986 A. Apparently Exhibit 248 only makes mention of one price, which is $20 f.o.b. Oakfield, which corresponds to this bulletin.

Q. That is the U. S. Gypsum Company bulletin on metallized board?

A. Yes.

Q. Under date of 10/30/34?

A. That is correct.

Mr. STEFFEN. Have Government's Exhibits 258 to 286 been received in evidence?

Justice STEPHENS. Yes, they have been received in evidence.

By Mr. STEFFEN.

Q. Now I should like to show you Government's Exhibit which has been marked for Identification No. 267, which purports to be a letter from Mr. Van Hagan to Mr. Rahr, under date of June 15, 1934.

Justice STEPHENS. Is that in this file, Mr. Steffen?

Mr. STEFFEN. It follows immediately after the invoice material.

Justice STEPHENS. There is a great deal of this invoice material that you skipped.

Mr. STEFFEN. I introduced merely the invoices and not the telephone orders ——

Justice STEPHENS (interposing). This is a letter of June 15, 1934?

1987 Mr. STEFFEN. That is right.

Justice STEPHENS. Thank you, I have it.

By Mr. STEFFEN.

Q. Have you read Government's Exhibit No. 267?

A. Yes, sir.

Q. Is it on the usual form?

A. Yes, sir.

Q. And it is addressed by Mr. Van Hagan to Mr. Chester E. Rahr?

A. Yes, sir.

Q. It refers to you in the next to the last paragraph, on the first page. Are you thoroughly familiar with the matter there mentioned?

A. No, sir, because it apparently applies to the question of validity of a patent ——

Q. (Interposing.) No, I ——

Mr. BROMLEY. (Interposing.) Let him answer. Go ahead, Mr. Brown.

By Mr. STEFFEN.

Q. Complete your answer, Mr. Brown.

A. (Continuing.) —To the question of validity, and that was something that I didn't contact with our patent attorneys.

Q. That is, you would say you were not thoroughly

1988 familiar with the matter referred to in that paragraph?

A. That is right, except that it was questioned by some of our people.

Q. Did you have anything to do with negotiating a license agreement with USG concerning perforated lath?

A. Yes, sir, I think I did.

Q. Who did you talk with, if anyone, from USG?

A. I don't remember, but those things usually were discussed with Mr. Henning, Mr. Knode, or Mr. Avery.

Q. Did your company finally take out a perforated lath license agreement, do you know?

A. Yes, it is my memory that they did.

Mr. STEFFEN. Your Honor, we offer in evidence Government's Exhibit 267 as being circumstantially identified, not only in the respect that Mr. Van Hagan is a member of the company and Mr. Rahr is a vice president, but it has the Item No. on it, and it is taken from the files of Certain-teed.

May I ask one more question?

By Mr. STEFFEN.

Q. Are you familiar with this memorandum at all, Mr. Brown?

A. I don't remember it.

Q. Do you recall ever having seen it?

A. No, sir.

1989 Q. Are you familiar with the subject matter generally?

A. Not as to much of it; but where I am referred to here, that is about the only thing that I am familiar with. It is largely on production.

Mr. STEFFEN. We offer it simply as being circumstantially identified, and hope Mr. Adams can make his objections in a formal and brief manner, to save time.

Mr. ADAMS. I object to it on the ground that no foundation has been made.

Justice STEPHENS. You needn't argue it, Mr. Adams. The Court thinks this is across the line. Objection sustained. There is no identification of this.

By Mr. STEFFEN.

Q. Now I would like to show you Government's Exhibit No. 268, which purports to be a communication from Van Hagan to Mr. C. O. Brown, under date of December 26, 1934, and I ask you to examine that.

Have you finished reading Exhibit No. 268, Mr. Brown?

A. Yes, sir.

Q. That is on the usual form, is it?

A. Yes, sir.

Q. And it is addressed to you?

A. Yes, sir.

Q. Do you recall having seen it?

A. I think I saw it.

1990 Q. You are familiar with the matters discussed in the memorandum?

A. In a general way, yes, sir.

Mr. STEFFEN. We offer Government's Exhibit No. 268 in evidence.

Justice STEPHENS. Any objection?

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 268, was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 269, which purports to be a letter from Mr. Rahr addressed to Mr. H. Dorsey Spencer, under date of October 28, 1935, to which is attached a draft copy of a proposed letter under date of October 28, 1935, to Mr. Morton Knode; and attached further is a letter of Mr. Spencer, a purported letter to Mr. Spencer, addressed to Mr. Chester E. Rahr under date of November 1, 1935.

I ask you merely if you recognize Mr. Rahr's signature?

A. Yes, sir, I recognize his signature.

Q. Do you recall ever having seen the letter?

A. No, sir, I never saw the letter.

1991 Mr. STEFFEN. I now offer Government's Exhibit 269 in evidence. I point out to your Honor ——

Justice STEPHENS (interposing). Does that include ——

Mr. STEFFEN (interposing). Including the two attachments.

Justice STEPHENS. The two attached copies?

Mr. STEFFEN. Yes. There is a copy of a letter, plus a letter, or rather a copy of a letter, addressed to Mr. Rahr, referring to the proposed draft letter.

Justice STEPHENS. That is dated November 1, 1935?

Mr. STEFFEN. Correct.

Justice STEPHENS. Let the Court examine these a little more carefully, Mr. Steffen, please.

Mr. STEFFEN. All right.

Justice STEPHENS. Who was Mr. Rahr, Mr. Brown?

The WITNESS. Vice president.

Justice STEPHENS. Of Certain-teed?

The WITNESS. Yes.

Justice STEPHENS. And who was H. Dorsey Spencer, if you know?

The WITNESS. I think he was a patent counsel.

Justice STEPHENS. Now what is your statement con-

cerning identification, Mr. Steffen?

Mr. STEFFEN. The first letter has been identified positively as Mr. Rahr's letter. Attached to it is a copy of a proposed letter addressed to Mr. Knode.

1992 Justice STEPHENS. Is that referred to in the letter of October 28, 1935?

Mr. STEFFEN. That is referred to in the letter of October 28, 1935.

Justice STEPHENS. Yes, I see it.

Mr. STEFFEN. And if you will read the attached letter, you will see that it refers specifically to the matter mentioned in the letter of October 28.

Justice STEPHENS. What about the last one?

Mr. STEFFEN. The last letter states in the first paragraph, "Referring to your proposed letter to Mr. Knode", which is the attached copy, attached to the October 28 letter, "which accompanied your letter of October 28"—which has been identified, "I think the letter" and so on is in proper form. There is a straight internal connection between that opening paragraph and Mr. Rahr's letter to Mr. Spencer, it is a direct reply, in other words, and it is identified circumstantially by the subject-matter discussed in Mr. Spencer's letter.

Then I want to make the further point that these were all taken from the files of the Certain-teed Products Corporation, and you will note that the item number ——

Mr. ADAMS (interposing). We do not raise any question about that.

Mr. STEFFEN (continuing). Which was put on each of the three is identical, A-e-48.

1993 Justice STEPHENS. Is there any objection to the identification.

Mr. ADAMS. Yes, with respect to the letter of November 1, which I just examined, and see that it is only a copy. It is not signed by anybody, and we have no way of knowing whether the original which was delivered, we can assume, or if we assume it was delivered to Mr. Rahr, was the same as the copy, and there is no evidence with respect to that letter whatever as to what it is.

Justice STEPHENS. What is this handwriting on the left-hand side of the November 1 letter, if you know, Mr. Brown?

The WITNESS. I cannot identify it, your Honor.

By Mr. STEFFEN.

Q. Do you have in mind what the Court asked? It is on

the November 1 letter, Mr. Brown.

A. This handwriting here?

Q. Yes.

A. That is right.

Justice STEPHENS. It says, "license since taken by C.P."

Mr. STEFFEN. Meaning Certain-teed Products.

Justice STEPHENS. Where is the original of this letter, does anybody know?

Mr. STEFFEN. Your Honor, we subpoenaed all the papers from the Certain-teed Products Corporation,
1994 and if they had the original it should have been turned over to us. What they turned over to us was what they were keeping in their files, which was this letter of Mr. Rahr's, and attached to it a proposed letter to Mr. Knode, and attached to that this letter addressed to Mr. Rahr in reply to his letter of October 28, 1935.

Justice STEPHENS. Was it physically attached when supplied to you?

Mr. STEFFEN. Yes, and the proof that they were kept together in the files of the Certain-teed Products Corporation is the item number, A-e-48. They all came in one bunch when we received them.

Mr. ADAMS. I don't raise any question on that point.

Justice STEPHENS. There is a question being raised, as I understand it, about identification of the letter of November 1, but we think the exhibits are identified circumstantially and by reference to each other, and by identification of the signature of Mr. Rahr of the first letter. But the best evidence rule is raised that this letter, the letter of November 1, 1935, is obviously a copy and the original not being produced and not available, it must be shown that the secondary evidence is correct. Is there any way of showing that it is correct? There is no evidence that it is correct.

Mr. STEFFEN. Well, I need merely to account for the lack of the original, and the original simply was not
1995 presented upon subpoena. There is no other way for the Government to get it other than to subpoena it, and it was not furnished on subpoena.

Mr. ADAMS. Both Mr. Rahr and Mr. Spencer are alive and in New York today.

Mr. STEFFEN. That is utterly immaterial with respect to this item.

Justice STEPHENS. It is not immaterial with respect to the matter of correctness.

There are two different objections here. One is lack of identification. We think an objection on that ground would not be well taken. We think they have been identified. But whether they are identified, and whether they are correct, are two different things.

The best-evidence rule goes to the correctness of the letter, and that is the second objection invoked, and that is invoked only with respect to the letter to Mr. Chester E. Rahr, apparently sent by someone whose initials are HDS.

The correctness of it as a copy is now questioned under the best-evidence rule, and that rule is well settled that where you account for the absence of the original, you may introduce a copy, but you must show that the copy is correct.

Mr. STEFFEN. We have accounted for the absence of the original, I presume.

1996 Justice STEPHENS. Yes, surely.

Mr. STEFFEN. Now the evidence to indicate that it is correct is purely circumstantial, and it comes solely from the fact that it was taken from the files of the company and held by the company all of these years as a copy which had reference to Rahr's letter to Spencer of October 28.

Justice STEPHENS. It seems to the Court that that is perfectly equivocal as to whether it is correct. The company might hold an incorrect letter in its files and not know that it was incorrect.

Mr. STEFFEN. Let me make one short statement on that.

As I pointed out before, we are endeavoring to show that these defendants had a certain state of mind, a certain purpose and a certain intent when they went into what we allege to be the conspiracy. It wouldn't, for that purpose, make any difference as to who wrote this letter. The best-evidence rule is not in point, as I see it, as respects showing what these defendants had in mind. If they had kept a copy of a letter written by Mr. X, and they had it attached to this document, and they were informed of the matters appearing in that letter, regardless of whether Mr. X wrote it or not, it would be matter which they had in their files and about which we can assume they knew, and upon which we will ask your Honor to rule at a later date that they acted.

Justice STEPHENS. Mr. Steffen, you have now shifted your argument ——

1997 Mr. STEFFEN (interposing). I will grant that.

Justice STEPHENS. We were discussing first whether or not it was within the best-evidence rule, and correct, and you argued that it is correct because it was in their files. Now as I understand it, you have changed and now you argue that whether it is correct or not, is is relevant on the theory that they have possession of an incriminating document, so to speak.

Now that goes to the question of relevancy, not to the question of correctness.

What is the relevancy of the letter under the issues?

Mr. STEFFEN. The relevancy of the letter under the issues is to show what the Certain-teed Products Company understood concerning the patent situation at the time when they negotiated a patent license agreement under the perforated lath patent.

We have alleged in the complaint—I think the paragraph is 119, but I will have to check that paragraph—that the defendant Certain-teed Products Corporation was advised of the fact that patent 1,938,354, which is the Roos perforated lath patent, was invalid, and that notwithstanding that advice they proceeded to take out a license for business or other reasons.

Now it is very material, quite apart from the question of whether the patent is or is not invalid, it is
1998 very material to determine whether they had that information at the time that they negotiated the perforated lath license. We find in their possession what purports to be a letter from Mr. Spencer who was a patent counsel. Mr. Spencer tells them that the patent looks invalid, in fact he is very positive on that. We will show that, nevertheless, they proceeded to take out a license under that patent. Now that, we contend, is extremely relevant to the complaint. It shows the state of mind and the purposes of the defendant to take out a license irrespective of validity.

Mr. ADAMS. Well now, I must confess I am a little confused here ——

Justice STEPHENS (interposing). We will have to take our usual noon recess at this time.

(Thereupon, at 12:22 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

1999 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m.)

Justice STEPHENS. Mr. Adams, the Court will hear briefly from you, first, and will preface your statement by a question which may shorten the argument.

The Court is somewhat confused, and perhaps counsel have been confused by the Government's contentions, because the Government first argued, as we understood the Government, that after the question of identification had been passed, that this was circumstantially shown to be correct, and therefore the Government, we assume, felt bound to prove it was correct.

The Government also argued, as we understood it, that the best-evidence rule did not apply because this was not being relied upon as an operative document. But what the Court thinks the Government's argument really amounts to, when the whole of it is considered, is an argument that this really is an operative document, and therefore is not within the best-evidence rule, that it comes within the familiar statement of the rule in Wigmore, in respect to what are originals and what are copies, so far as the best-evidence rule is concerned:

"The production required is the production of the document whose contents are to be proved in the state of the issues".

The familiar illustration is, for example, in the law of libel. Suppose a person writes out a libelous paper in an original and a copy, and locks up the original in his desk, and publishes the copy. The copy would be intro-
2000 ducible in evidence without the introduction of the original because the copy is the document the contents of which are to be proved in the state of the issues.

Now laying questions of identification aside—and they have been passed—the Government here offers this proposed letter of November 1 as a letter taken from the files of the Certain-teed Products Corporation, connected circumstantially with letters concerning patents, and apparently written in response to a letter to a lawyer containing comments which indicate a possible invalidity of a patent which was later, so it is asserted, used by the defendants.

Now we think there is considerable merit to the contention that that document is admissible in evidence. It is introduced as showing some knowledge on the part of the defendant Certain-teed, that there was some doubt about the validity of this patent. What weight it may be entitled to is another question. But it seems to us that the Government is entitled to prove under the issues, although the ques-

tion of the actual validity of the patent is out of the case, that the defendants doubted its validity, because that would tend to prove that they were using them as a cloak. Is that your contention, Mr. Steffen?

Mr. STEFFEN. Yes, it is our contention, your Honor, and much better stated than I did.

2001 Mr. ADAMS. I would like, if I may, to pass that question for the moment.

In stating these objections we got off into another field of discussion, and I did not have an opportunity to state my full objection.

Justice STEPHENS. You may do that now.

Mr. ADAMS. I object to the introduction of these three documents, all three of them, on the ground that they are confidential communications between attorney and client.

Justice STEPHENS. That is another question. We will come to that, now that it has been raised. But let's dispose of these other questions first.

I state the Court's reaction, not to indicate that it is final, but because we want to give you the benefit of an opportunity to answer any questions which come to our mind.

Mr. ADAMS. It seems to me that there has been no showing, even though I might for the purposes of this argument agree that the Government is entitled to show our state of mind with respect to this patent, and I take it that that is what they are trying to do by offering this document, but it doesn't seem to me that that dispenses with the necessity for the Government proving that the document is an authentic document, and it does not seem to me to dispense with the necessity of compliance with the best-evidence rule.

The position that we find ourselves in is that here is a letter—I am referring to the letter of November 1, 1935—which is only a copy, it isn't even signed

2002 by the lawyer who the Government says wrote it. It doesn't seem to me that we should be charged with possessing a state of mind because somebody produces a letter which may or may not have been written by our lawyer.

I don't think that you can get around the best-evidence rule by simply saying that you are offering it for a substantive purpose.

Justice STEPHENS. What about the confidential aspect of it?

Mr. ADAMS. As far as it being a confidential communication is concerned, there is no doubt whatever, from the testimony here and the statements of Government counsel

as well as the witness, that Messrs. Newell, Spencer & Safford were counsel for the Certain-teed Products Corporation at that time, and Mr. H. Dorsey Spencer—perhaps I might ask a question of the witness at this point, if I may.

Justice STEPHENS. Yes.

Mr. ADAMS. You recall that law firm, don't you, Mr. Brown?

The WITNESS. Yes, sir.

Mr. ADAMS. And they were your advisers in patent matters, is not that correct?

The WITNESS. Yes, sir.

Mr. ADAMS. Now turning to the letter of October 28, 1935, from Mr. Rahr to Mr. Spencer, a most casual
2003 inspection of that letter, it seems to me, would demonstrate that Mr. Rahr was communicating to his counsel on a matter involving professional advice.

He says in the first place, referring specifically to the beginning of the second paragraph, "I talked with Mr. Morton Knode of the U. S. Gypsum Company and found him considerably annoyed because we had approached the infringement", and so on. That is a legal matter. There are other questions in there.

Then he submits to his lawyer a draft of a letter which he proposes to write. I don't know anything which could be more directly connected with the relations between lawyer and client than to have the client draft a letter and then call upon his legal adviser and ask him if the draft of the letter which he proposed to send out to the world, and publish, is a proper document, obviously soliciting legal advice.

And if we assume, which I do not admit, that the letter of November 1 is identified, we find that the lawyer has considered it, considered the questions submitted to him by his client, and replies, he does not reply as a businessman or as an accountant or as a friend, he replies as a lawyer, telling his client what he thinks he ought to do under the circumstances.

And specifically in the third paragraph he gives legal advice as to his opinion with respect to an extremely important legal matter. I cannot think of anything that could be more definitely within the privilege.

2004 Justice STEPHENS. What do you say on the question of its being confidential, Mr. Steffen?

Mr. STEFFEN. We say, your Honor, that the privilege has been waived and in the Certain-teed Products Corporation's answer, paragraph 119, they state that Certain-teed:

"Denies each and all the allegations of paragraph 119 of said complaint, except that this defendant admits that it was advised by patent counsel prior to the execution of said license agreement with U.S.G. that, in the opinion of such patent counsel, the claims embraced within said perforated lath patent did not rise to the dignity of an invention", and so on.

That is a complete waiver, as we see it, of any privilege in this matter.

Justice STEPHENS. That is Certain-teed's answer to which paragraph of the complaint?

Mr. STEFFEN. To paragraph 119 of the complaint.

Justice STEPHENS. Does paragraph 119 go only to the perforated lath?

Mr. STEFFEN. Yes, your Honor.

Justice STEPHENS. What do you say to that, Mr. Adams?

Mr. ADAMS. I say this, that it seems to me inconceivable that a statement in a pleading could constitute a waiver of a privilege. The cases are perfectly clear on this question of waiver of privilege, that the precise question
2005 of the waiver of the privilege must be before the client; that the client must take some affirmative action which constitutes a waiver of the privilege.

Now the statement in here that we were advised by patent counsel with respect to a matter alleged in the complaint, is merely our answer to the complaint, and does not in any sense, in our submission, constitute a waiver by us of the privilege, and if it is a waiver of the privilege, it certainly could, by no stretch of the imagination, be anything more than a waiver of the privilege to the extent of what we said about it in the answer.

But I do not see how it can be logically argued that this constitutes a waiver of the privilege with respect to our relations with our patent counsel under any and all circumstances.

It certainly was not intended to be so, and I state that because that is a very important consideration to a court in determining whether or not it is going to preserve inviolate this most important relationship between citizens and their counsel.

Justice STEPHENS. The point that puzzles me about your argument, Mr. Adams, is this.

It is perfectly elementary that the disclosure of confidential matter to a third party is a waiver and destroys the privilege. Now this answer seems to disclose

2006 that with respect to this very patent there was advice from counsel that it might be invalid. That is the very information contained in this letter, or statement contained in this letter in substance and effect. Unless there is some rule of law that the necessity of answering a complaint in an answer, and stating the facts, excepts it from the doctrine of waiver, it is difficult for me to see how you can escape it.

Do you know of any such rule?

Mr. ADAMS. No, I don't know of any such rule, your Honor, except this, that I do know that a defendant in answering a complaint may, under the rules, take as many alternative positions as he desires. He may deny the allegations of the complaint; he may allege as many inconsistent affirmative defenses as he may see fit; and then, upon the trial, he may elect to take whichever position will best sustain his case.

And as I look at this pleading, it seems to me that that is what was being done here.

Justice STEPHENS. Unless counsel for Certain-teed can show to the Court some authority that an admission in the pleadings of the receipt of legal advice to a certain effect, stated in the pleading, does not constitute a disclosure such as would be a waiver, the Court is of the view that it is a waiver.

Mr. ADAMS. I don't think I quite understand the Court. I think perhaps I might ask you to either
2007 restate it, if you will, or permit it to be read.

Justice STEPHENS. The Court's understanding of the privileged communications rule is that a communication ceases to be privileged if the asserted confidential contents thereof are disclosed to any third person.

Now this admission in the answer to paragraph 119, does disclose to many third persons, to the Court, to adverse counsel, and to anybody who may wish to read these pleadings, which are a public record, that advice had been received from counsel that the perforated lath patent was invalid, or might be invalid.

Unless there is some authority which you can call to our attention to the effect that a statement of disclosure of confidential material in a pleading is not within the rule that disclosure to a third party constitutes waiver, it would seem to us to be a clear waiver.

The point is a novel and unusual one, and we do not pretend to be infallible on the subject. If you regard it as seri-

ous, and wish to present authorities, we will defer ruling.

Mr. ADAMS. We regard it as very serious, and may I say that in your Honor's very statement of your views in the past, you have disclosed what I refer to, very respectfully, as an inconsistency.

What we are dealing with here is a communication between lawyer and client. Now your Honor has said
2008 that if you disclose that communication from the lawyer to the client, you waive whatever privilege you may have ——

Justice STEPHENS (interposing). Suppose, Mr. Adams, to make the Court's doubts as to the validity of your position clear, suppose that after a client receives a letter from a lawyer containing concededly confidential advice, he goes out and tells John Doe that he just received that advice, specifying it—is it any longer confidential?

Mr. ADAMS. Certainly not, but it is, in the very language that your Honor uses when you say that he just received that advice specified.

Justice STEPHENS. Well, let's eliminate the word "just".

Mr. ADAMS. No, "specified" is the word upon which I am relying in your Honor's statement. The question is whether or not, with respect to any given communication, whether or not with respect to that given or specific communication, there has been a waiver. Now there has not been any waiver under any possible construction of this pleading, of any communication, any given communication, including this one that is now before the Court, by this company.

Justice STEPHENS. On that question I think your contention does not convict the Court of inconsistency, although the Court does not claim to be infallible with respect to consistency.

2009 But here we have a letter with respect to this particular patent, and paragraph 119 of the complaint relates to the same patent, the perforated lath patent, and the answer relates to the same one. That seems to us to indicate that the admission has to do with this communication.

Mr. ADAMS. If I may point out to your Honor ——

Justice STEPHENS (interposing). That is a matter perhaps of probability.

Mr. ADAMS. That is one of the points which I was interested in making.

And secondly, you see that what the answer says is not

what the letter says. Now maybe the answer did waive something, but it did not waive the statements contained in this letter.

Now may I read this, your Honor? It states as follows:

"119. Denies each and all of the allegations of paragraph 119 of said complaint, except that this defendant admits that it was advised by patent counsel prior to the execution of said license agreement with U.S.G. that, in the opinion of such patent counsel, the claims embraced within said perforated lath patent did not rise to the dignity of an invention; but avers (and this is where I wish to interrupt myself to say that this is alleging an affirmative defense and that the statement that I have just made is part of the affirmative defense) that at the same time said patent counsel advised this defendant that said
2010 patent was presumptively valid and that some District Judge might sustain the patent and a Circuit Court of Appeals might affirm such a decision, that the patent had tremendous nuisance value and that it would be very costly for this defendant to attempt to make exactly what is shown in the patent; that, in order to avoid either extended and expensive litigation with U.S.G. with respect to the validity of said patent, which appeared probable in the event that this defendant declined to accept the license agreement tendered by U.S.G., or the expense and delay which would necessarily be involved in the development of a perforated lath possessing the desirable characteristics covered by said patent but avoiding the claim thereof, and because of the fact that U.S.G., by virtue of the provisions of the basic license agreement referred to in paragraph 85 of said complaint, was authorized to determine and fix the minimum selling prices and terms and conditions of sale for all perforated lath manufactured and sold by this defendant, this defendant, in good faith and in the exercise of its sound business judgment, entered into said license agreement with U.S.G. covering perforated lath manufactured in accordance with said perforated lath patent".

Now that seems to me, your Honor, to be an allegation of an affirmative defense, and it is not in any sense a waiver which could possibly be deemed to embrace the statements which are made in this letter of Mr. H. Dor-
2011 sey Spencer.

Justice GARRETT. Well, every argument that you make, based upon the latter part of that, you can make if this letter is admitted, can you not?

Mr. ADAMS. No, your Honor, I would not say that I

can, because this letter is not in accordance with the facts alleged in the affirmative defense. You see the statements contained in the letter have absolutely no relation to the facts stated in the affirmative defense.

Justice STEPHENS. What page of your answer is that on?

Mr. ADAMS. Pages 46 and 47, sir.

Justice STEPHENS. Now let's see paragraph 119 of the complaint.

Mr. ADAMS. That is at pages 30 and 31, sir.

Justice STEPHENS. Do you wish to be heard any further?

Mr. ADAMS. I should simply like to perhaps sum up my statement that on further consideration it seems perfectly clear to me that the admission here, read with reference to the proposed exhibit, demonstrates very clearly that the admission has no relation to the proposed exhibit.

Justice STEPHENS. Well, I am sorry, Mr. Adams, but we have a different view. We think that the admission is sufficiently specific to identify disclosure of the information contained in this letter. Perhaps other information was also disclosed in other communications, but the rules with respect to the client's waiver, or the waiver
2012 of the client's lawyer, are pretty well settled. I refer you to Wigmore's Hand Book, Third Edition, 1942, Sections 2464 to 2471. That has to do with testimony as distinguished from admissions, but there can be no difference in effect.

It is true that the particular communication which is alleged to be confidential must be waived, but the question is whether or not the admission in this answer isn't sufficiently a waiver of that communication, that is of the subject-matter contained therein, the advice contained therein. We think that it is. The exhibit is received in evidence.

Mr. ADAMS. Does your Honor rule also that the exhibit is identified as a letter of Mr. Dorsey Spencer's?

Justice STEPHENS. We have already ruled on that.

Mr. BROMLEY. May we make the usual objection?

Justice STEPHENS. Yes, it is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibit No. 269 were received in evidence.)

Mr. STEFFEN. I might call your Honor's attention, if you would like, to the very appropriate case of Tutson v. Holland, 50 Fed. (2d) 338, where Mr. Justice Groner

speaks on this general subject.

2013 Justice STEPHENS. Thank you.

Have you much more examination of this witness?

Mr. STEFFEN. I don't think so, your Honor.

Justice STEPHENS. I hope we can move forward rapidly. There are several other witnesses waiting.

Mr. STEFFEN. Yes, they are. I would like to introduce one further exhibit.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 270, which purports to be a memorandum dictated by Mr. Rahr for the attention of Mr. S. C. Straub, under date of November 15, 1935, and ask if you can identify it. Have you examined Exhibit 270?

A. Yes, sir.

Q. Can you identify the initials on the left-hand side?

A. A. Whittemore's; my own initials; and S. C. Straub's initials.

Q. This is the usual form of inter-office memorandum?

A. Yes, sir.

Mr. STEFFEN. We offer Government's Exhibit No. 270.

Mr. BROMLEY. We have never seen it, if the Court pleases.

Justice STEPHENS. Let counsel inspect it.

Mr. STEFFEN. Surely.

(Proposed Government's Exhibit No. 270 was handed to defendants' counsel.)

Justice STEPHENS. That is in this bound volume, the next to the last document.

2014 Mr. BROMLEY. We got a loose set, and it was not contained in that.

Justice STEPHENS. Very well.

Who is Mr. C. S. Straub, Mr. Witness?

The WITNESS. He was a production man, assistant to Mr. Whittemore.

Justice STEPHENS. In Certain-teed?

The WITNESS. Yes, sir.

Mr. BROMLEY. In addition to the usual objection we object to it as immaterial.

Justice STEPHENS. The Court does not see offhand what its relevance is, Mr. Steffen. It seems quite ambiguous. Maybe it can be connected with something else. What is your contention with respect to its relevancy and materiality?

Mr. STEFFEN. It will have to be connected, I think, with

some additional testimony, your Honor, concerning what is meant by the second paragraph.

Justice STEPHENS. The exhibit is received in evidence subject to the usual reservation with reference to the declarations of alleged co-conspirators. It has been identified sufficiently, but it is received subject to connection. The right to move to strike may be reserved.

(The document marked as Government's Exhibit No. 270 was received in evidence.)

2015 Mr. BROMLEY. I should like to say, if I may for the record, that it seems to me that the fact is that Exhibit 269, the letter of October 28, 1935, and the draft of the letter of the same date, the latter referring to the two firms of attorneys mentioned in Exhibit 270, indicate that all three of these documents have to do with Super Tomastone plaster, which is mentioned in the first line of the letter of October 28, 1935, and that this memorandum, Exhibit 270, probably has to do with the same thing. If that is so, that is the foundation for my objection as to materiality. I think it has nothing to do with any part of this dispute.

Justice STEPHENS. Well, if that appears, you may move to strike.

Mr. BROMLEY. Yes, sir.

By Mr. STEFFEN.

Q. Can you tell us what this Exhibit 270 refers to, Mr. Brown?

A. No, sir, I really don't know.

Q. You identified your initials on the side?

A. Yes, sir.

Q. Did it have to do with Super Tomastone plaster?

Justice STEPHENS. If you know.

The WITNESS. No, sir, I don't recall.

By Mr. STEFFEN.

Q. Do you know what is meant in the second paragraph by, "what is good, practical business for the

2016 industry"?

A. No, sir.

Mr. STEFFEN. We will withdraw the exhibit, your Honor.

Justice STEPHENS. It may be withdrawn.

(Government's Exhibit No. 270, previously received in evidence, was withdrawn.)

Mr. STEFFEN. Your Honor, we have a series of exhibits

which we would like to have identified, as I started to do yesterday, which we will make as our offer of proof in connection with the matter we discussed yesterday.

Justice STEPHENS. They may be identified.

Mr. STEFFEN. If we can have them numbered, and then identified by this witness, it will save time.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. Now, I show you, then, Government's Exhibit 271, which purports to be a letter from Warren Henley, addressed to Charles F. Henning, under date of August 25, 1931; I show you Government's Exhibit No. 272, which purports to be a letter from Mr. Knode, addressed to Certain-teed Products Company under date of August 18, 1932; also Government's Exhibit No. 273, which purports to be a letter from Mr. Knode, under date of August 26, 1932, addressed to Certain-teed Products Corporation; also Exhibit 274, which purports to be a contract between United States Gypsum Company and Certain-teed under date of May 7, 1930 ——

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Justice STEPHENS (interposing). Have we seen these?

Mr. STEFFEN. Yes, they are in your folders at one place or another.

Justice JACKSON. Except this first one that has just been handed to us.

Mr. STEFFEN. That is the only one that is not in the folders.

Justice GARRETT. Where is Exhibit 272 in this bound volume?

Justice STEPHENS. We haven't ever had any 272 before. We may have seen the document but it has a new number now, hasn't it?

Justice JACKSON. These that you are offering now were never tendered under any other number, were they?

Mr. STEFFEN. No, I am just now tendering them by number.

Justice STEPHENS. Then these are not documents that we had before the witness the other day when the ruling was made?

Mr. STEFFEN. No, your Honor, we had opened with one or two of these documents, and these are the remaining documents in that sequence.

Justice GARRETT. Just a moment, until I can identify this Exhibit 272. I suppose this is it. You say it is an agreement made the ——

Mr. STEFFEN (interposing). If I may, what I would like to do, your Honor, is to number them, hand
2018 them to the witness, and he can take them one by one and we can have them identified that way, and you can look at them at the same time.

Justice STEPHENS. Very well.

Mr. STEFFEN. I now show you Government's Exhibit No. 275, which purports to be a contract between Certain-teed Products Corporation and the United States Gypsum Company, under date of October 28, 1930.

I also show you Government's Exhibit No. 276, which purports to be another contract between the U. S. Gypsum Company and Certain-teed Products Corporation, under date of September 1, 1932, to which is attached an assignment under date of July 14, 1933.

I also show you Government's Exhibit No. 277, which purports to be an agreement between United States Gypsum Company and Certain-teed Products Corporation under date of January 15, 1936.

Now if you will examine those exhibits, starting with Exhibit No. 271, which is the Warren Henley letter addressed to United States Gypsum Company, under date of August 25, 1931, and tell us whether you can identify Mr. Henley's signature?

The WITNESS. That is Mr. Henley's signature.

By Mr. STEFFEN.

Q. Will you lay that letter to one side and take up
2019 Exhibit No. 272?

A. Yes, sir.

Q. Are you able to identify the signature at the foot of that letter?

A. It is Mr. Knode's.

Q. Can you identify the initials and the writing on the left-hand margin?

A. Yes, sir, A. Whittemore's. The writing is in my own handwriting, and signed with my initials.

Justice STEPHENS. I didn't hear the witness' testimony as to whether he could identify the signature, yes or no.

The WITNESS. Yes, sir, it is Mr. Knode's.

By Mr. STEFFEN.

Q. Will you take up Government's Exhibit No. 273 ——

Mr. ADAMS (interposing). If your Honor please, as far as I am concerned, I am willing to waive identification of these documents and save time in that way.

Mr. BROMLEY. I agree.

Justice STEPHENS. If that may be stipulated with respect to each of these exhibits marked, it will save a great deal of time.

Mr. ADAMS. Yes, sir.

Mr. BROMLEY. Yes, your Honor.

Justice STEPHENS. Thank you, Mr. Adams.

Mr. STEFFEN. Your Honor, I noticed this morning as I reread the transcript, that we were to make our
2020 offer of proof in writing ——

Justice STEPHENS (interposing). You may if you wish, you are not required to do so.

Mr. STEFFEN. I intended to do it orally.

Justice STEPHENS. You may make it orally if you wish.

Mr. STEFFEN. If I could have a couple of minutes ——

Justice STEPHENS (interposing). Of course, before we rule on so many complicated exhibits, we would want to look at them ourselves, and we may have to take a recess of a few minutes.

Mr. STEFFEN. Would it be more agreeable if I made the offer tomorrow morning?

Justice STEPHENS. That would be entirely agreeable to the Court.

Mr. ADAMS. It is certainly agreeable to us to do that tomorrow morning, and I trust that it will not be necessary to have the witness here. He is extremely anxious to leave here today if possible.

Justice STEPHENS. He is still subject to cross-examination.

Mr. ADAMS. Yes, but assuming we get through with his cross-examination ——

Justice STEPHENS (interposing). He will be released as soon as he can be.

Mr. ADAMS. Thank you.

2021 Mr. STEFFEN. We would like to introduce at this time Government's Exhibit No. 278 which purports to be a draft copy of a contract being negotiated between the United States Gypsum Company and licensees during the period of June 1929.

Justice STEPHENS. Is that in this group of exhibits?

Mr. STEFFEN. It is stipulated that this was a copy which figured in the negotiations at that time.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. Exhibit 278 is not in the group on the basis of which you are making an offer of proof, is it?

Mr. STEFFEN. No.

Mr. BROMLEY. Then there is no objection except the usual one to Exhibit 278.

Justice STEPHENS. It may be received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 278 was received in evidence.)

Justice STEPHENS. Have we that in this file, Mr. Steffen?

Mr. STEFFEN. Yes, sir.

Mr. OLIVER. May I ask if that is an unexecuted contract, something that was just proposed during that time?

Mr. STEFFEN. That is a draft which was discussed at that time.

2022 You need not look at it, Mr. Brown.

Justice STEPHENS. It has been admitted without objection, Mr. Brown, so we won't have to call upon you to identify it.

The WITNESS. Thank you, your Honor.

Mr. STEFFEN. I think that is all the questions we have at the moment, your Honor.

Justice STEPHENS. You may cross-examine, Mr. Bromley.

2023 CROSS-EXAMINATION by Mr. BROMLEY.

Q. George M. Brown was the chief executive officer of Certain-teed at the time of its formation in 1910, was he not?

A. Yes, sir.

Q. And he remained so at least up to the time that you left the company in 1937?

A. Yes, sir.

Q. Isn't it a fact that George M. Brown made all company decisions himself?

A. He was a very major factor.

Q. Wasn't he something of an individualist, Mr. Brown?

A. Yes, sir.

Q. And didn't he make his decisions practically by himself?

A. In the final analysis, I would say yes.

Q. You would not say, would you, that he relied upon your advice in deciding whether or not to take licenses from USG?

A. I don't know how much he would rely on it.

Q. Well, certainly prior to the taking of the first license, which was taken in May, 1929, he did not seek your advice, did he?

A. That is right.

2024 Q. And that likewise is true prior to the taking of the second license in November, 1929, isn't it?

A. I don't remember.

Q. Well, isn't it a fact that you had nothing to do with that decision, Mr. Brown, except to go to Chicago and report what you had heard?

A. That is right.

Q. It is a fact, isn't it, sir, that Mr. George Brown was strongly opposed to having the Certain-teed prices fixed by USG, or anybody else?

A. Yes, sir.

Q. Independence in price policy had been General Brown's policy for many years, had it not?

A. It had.

Q. And hereafter, in my examination, when I want to refer to the President of the company, George M. Brown, I shall call him General Brown, which is his present-day title, isn't that right?

A. His friends all call him that, yes, sir.

Q. In order to differentiate him from you, can we agree that I shall refer to him hereafter as General Brown?

A. Yes, sir.

Justice STEPHENS. Have you a title, Mr. Brown?

The WITNESS. No, sir.

Mr. STEFFEN. Let's make him a colonel. (Laughter.)

By Mr. BROMLEY.

2025 Q. Now as a matter of fact, at all times prior to the time that Certain-teed took the first license, wouldn't you say that it was true that the last thing in the world the General wanted was to have his prices fixed by USG?

A. Yes, sir.

Q. You testified that one of the factors which influenced you in feeling that it was desirable to take the November license was price control. Isn't it a fact, Mr. Brown, that that was your own view, and not the view of Certain-teed?

A. I think my testimony stated that it was my view.

Q. And that is your testimony now?

A. Yes, sir.

Q. The Certain-teed Products Corporation, and General Brown, were both in the industry as a company and an individual that pursued an individual price policy on all products, isn't that right?

A. Yes.

Q. And the Certain-teed Company had a reputation in 1929, and prior thereto, of pursuing independent price policies, did it not?

A. Yes, sir.

Q. Now you were engaged in a sales capacity during practically the entire time that you were with the company, were you not?

2026 Yes, sir.

Q. And you were engaged in a sales capacity from 1914 to 1936, were you not?

A. Yes, sir.

Q. The testimony which you gave the other day, that you had worked for a brief period at the beginning in another capacity, didn't mean that you were ever engaged for any length of time in production, did it?

A. No, sir, not a great length of time.

Q. You had nothing to do with production after 1914, isn't that the fact?

A. No, after 1914 I had nothing to do with production.

Q. And so, from that time on, your entire work concerned sales and sales promotion, did it not?

A. Almost entirely.

Q. Now since that was your primary if not your chief activity, wouldn't you say that it was a fact that you were naturally interested in the prices which the company got for its products?

A. Yes, sir.

Q. It is a fact, isn't it, that prior to 1923 the company had not been in the gypsum industry?

A. That is correct.

Q. Its business was to manufacture and sell roofing and floor-covering materials?

2027 A. And paints and varnishes.

Q. And the sales policy which it had followed prior to 1923 was to charge such prices as would permit the establishment of a large volume, isn't that right?

A. Yes, sir.

Q. After the company entered the gypsum industry in 1923, it pursued the same policy in that industry, did it not?

A. That is correct.

Q. And when I say "entered the gypsum industry in 1923", it was in that year that the company first started to sell gypsum plaster, was it not?

A. Yes, sir.

Q. And thereafter, and in 1926 when it entered the gypsum board business, it still pursued the same policy of obtaining volume by low prices, or independent prices, as it had practiced theretofore in the roofing business; is that right?

A. Yes, sir.

Q. Now with reference to Exhibits 213 to 216, consisting of correspondence in March, 1928, between Certain-teed and Mr. Henning, I show you what purports to be an original letter signed by you, dated April 4, 1928, addressed to United States Gypsum Company—I withdraw that.

2028 Mr. BROMLEY. I ask the Government, in connection with the exhibits which I have mentioned, to produce a letter dated April 7, 1928, from United States Gypsum Company by Mr. Henning, to Certain-teed Products Corporation, Attention Mr. George M. Brown.

Mr. KNUFF. I don't seem to have any letter of April 7, 1928, here. I will look in the office and see if I have it over there.

Mr. BROMLEY. Well, it is the last one in the series of which Exhibits 213 to 216 are four.

Mr. KNUFF. I still say I don't have it here.

Mr. BROMLEY. Would you recognize a photostat of it if I showed it to you?

Mr. KNUFF. I believe I have seen a letter of similar import, although I wouldn't say for certain, and I think I have it over in the office.

Mr. BROMLEY. I would like to have it marked for Identification. May I use the photostatic copy, with the understanding that when you produce the original we can substitute it?

Mr. KNUFF. Yes.

Justice STEPHENS. That may be done.

(The document referred to was marked as Defendants' Exhibit No. 4 for Identification.)

2029 By Mr. BROMLEY.

Q. Does that letter, Defendants' Exhibit 4 for Identification, refresh your recollection, Mr. Brown, so that you can now state that in April, 1928, because of the litigation between the two companies, the USG Company withdrew its offer to grant your company a license?

A. This would indicate so. I don't remember this situation.

Q. Don't you remember now that in 1928, the offer which had theretofore been made to your company by USG was, as a matter of fact, withdrawn?

A. No, sir, I don't remember that.

Mr. BROMLEY. Will you show the witness Exhibits 213 to 216, inclusive, please?

(The exhibits referred to were handed to the witness.)

By Mr. BROMLEY.

Q. Exhibits 214 and 216, being your letters to USG, you told us were written by your attorneys for you to sign and send, didn't you?

A. Yes, sir.

Q. Now at the time of this correspondence, Exhibits 213 to 216, it was a fact, wasn't it ——

Mr. STEFFEN (interposing). Your Honor, we don't have a copy of this before us, and we would like to have it for purposes of examination. It was not furnished
2030 to us the night before. (Laughter.)

Justice STEPHENS. Reciprocity must be required. (Laughter.)

Mr. BROMLEY. I didn't furnish it to him last night because they have had it for three years. (Laughter.)

Mr. STEFFEN. That sounds like something I have heard before. (Laughter.)

By Mr. BROMLEY.

Q. It was the fact, wasn't it, Mr. Brown, that at the time of this correspondence, Exhibits 213 to 216, General Brown was exceedingly reluctant to enter into any arrangement which gave anybody else the right to fix his prices?

A. That is correct.

Q. Indeed, wasn't it the General's view that price fixing by somebody else could be used by the licensor to injure the business of Certain-teed by making a price which was too low?

A. I don't know as to that point.

Q. By the way, the fact is, isn't it, that in all of your discussions with him and other officers of the company, and with others in the industry, the only price fixing that you were talking about was price fixing of a patented product manufactured by a licensee under the patent?

A. Yes, sir, that is correct.

Q. Do you recall that in the early part of 1928,
2031 General Brown had determined that the Certain-teed Company could continue successfully in the

gypsum board industry without making a closed-edge board?

A. I think that was his opinion for a time.

Q. That was against your business judgment, wasn't it?

A. Yes, sir.

Q. As of that time, that is, early in 1928, you had convinced yourself that your company, to remain in successful business, needed the closed-edge board; isn't that right?

A. Yes, sir.

Q. And it is a fact, isn't it, that in 1928 your customers were demanding the closed-edge product in preference to the open-edge?

A. Yes, sir.

Q. And isn't it correct to say that you felt there was considerable pressure upon you, from your associates in your sales department, to obtain the right to make the closed-edge product?

A. A great deal of pressure.

Q. That pressure manifested itself in the first instance, within your organization, from your salesmen in the field, did it not?

A. Yes, sir.

Q. And isn't it true that thereafter, and in 1929, General Brown himself became convinced that it was necessary, in order to remain in the gypsum board business successfully, to obtain a license to manufacture closed-edge board?

2032

A. I think that is correct.

Justice STEPHENS. The Court will take the usual afternoon recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice STEPHENS. Proceed, gentlemen.

By Mr. BROMLEY.

Q. You told us the other day, I believe, sir, that you did not participate in the Certain-teed decision to take the May license?

A. That is correct.

Q. And that you had nothing to do with the negotiations leading up to the execution of the May license?

A. That is right.

Q. However, prior to May, 1929, you had convinced yourself that Certain-teed needed the closed-edge product, had you not?

A. Yes, sir.

Q. And you also felt, as a matter of business policy, that the then pending litigation between USG and your company should be settled, did you not?

A. Yes, sir.

Q. Now isn't it a fact that you also knew that not-
2033 withstanding the fact that the closed-edge patent expired in August, 1929, the other patents covered by the then proposed form of license, which ran until 1937, were likewise necessary to the successful manufacture of the closed-edge product?

A. That was my opinion.

Q. And one of the very important patents in that group contained in the May license was the patent covering the machine which made the closed-edge product, wasn't it?

A. Yes, sir.

Q. That patent did not expire until 1937, did it?

A. That is my memory.

Q. As far as the litigation is concerned, isn't it true, Mr. Brown, that notwithstanding the expiration of the Utzman patent, the litigation involved the question of whether or not Certain-teed would have to assume the Beaver license, and the Beaver license by its terms ran until 1937?

A. I think that is correct.

Q. Would you say that the fact that price control under the May license, as it was proposed, ran only until August, 1929, was or was not a factor in the decision of Mr. George Brown to take the May license?

A. I don't know.

Q. Well, it was a fact that at the time he decided to take the May license under the form of the license as then proposed and as it existed with other companies, price fixing was only to run until August, a matter of
2034 some 3 months; do you remember that.

A. Yes, sir.

Q. And don't you recall that it was the decision of Mr. George Brown finally to take that license because he felt that no great harm could come from price fixing which lasted only for about 3 months?

A. I think that was his opinion.

Q. The testimony, which you gave the other day, that price control and the question of whether other companies took licenses were factors in connection with the taking of one or the other of the licenses, had relation only to the November 1929, license, didn't it?

A. That is right.

Q. And your testimony in that connection, in which you stated that it was your preference that there be price control, was intended, was it not, to reflect merely your own personal opinion?

A. That is right.

Q. And you did not purport to express in that testimony either the opinion of Mr. George Brown or the opinion of the management of the company as a whole?

A. No, sir.

Q. At page 2049, Mr. Brown, of the transcript, you testified that your reference, on the second page of Exhibit 228, to the phrase "plus other advantages", meant price control. It is the fact, isn't it, that the price control to which you referred in your testimony was price control only on the patented product to be manufactured by a licensee?

2035

A. That is right.

Q. At the top of page 2056 of the record, reference was made to the bundling license, Exhibit 230, and to the statement about that license in Exhibit 228; and you will recall, I think, that you said, "I would like to correct that. I would say my answer would be the same as to your question, plus other advantages in working under the patent."

Now as a matter of fact, Mr. Brown, at the time you gave that answer, did you realize that there was nothing in the bundling license about price control whatsoever?

A. No, I didn't realize that.

Q. The phrase which counsel for the Government was asking you to explain in Exhibit 228 was the phrase, "in the interest of harmony in the Industry", which appears in Exhibit 228 in the third whole paragraph under the heading "Bundling Patent".

Now isn't it true that that reference, "in the interest of harmony", didn't have anything to do with price fixing or price control at all, but on the other hand was intended by you, when you wrote it, to refer to the fact that the United States Gypsum Company had threatened to sue you, sue your company, for infringement of its bundling patent?

2036

A. I don't remember about that.

Mr. BROMLEY. Will you show the witness Exhibit 228, please?

(Exhibit 228 handed to the witness.)

By Mr. BROMLEY.

Q. On the first page, Mr. Brown, the second paragraph under the heading, "Bundling Patent"—will you read it, please?

A. Yes, sir.

Q. Doesn't that refresh your recollection that at the time you wrote this memorandum, the fact was that you had been accused by USG of infringing their bundling patent, and that they had the legal papers drawn preparatory to starting an infringement injunction and damage action against you therefor?

A. That is right.

Q. And doesn't this paragraph in Exhibit 228 also refresh your recollection that it was your view that you could avoid the litigation and get out of the damage claim if you took a license and agreed to pay royalties in the future?

A. That is right.

Q. And isn't that what you meant in the next paragraph when you used the phrase, "and, further, in the interest of harmony in the Industry."?

2037 A. I think, on second thought, that must be correct, especially in view of the fact that the license did not have the price control feature in it.

Q. The invention covered by the bundling patent was a valuable one which you thought would yield real advantage to your company, isn't that right?

A. That is correct.

Q. And as a matter of fact, that invention under that patent was used by your company on all of your board from that time until the time that you left the industry, wasn't it?

Mr. STEFFEN. I don't think the witness is qualified to testify whether he has used a particular patent or not. I object to that. That is a question that we are going to go into in considerable detail, as to whether any board was made under these particular patents or whether any board was bundled pursuant to these patents, and it is a matter which will take rather expert testimony.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. You are talking about the bundling patent?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. What is your position with respect to the objection?

2038 Mr. BROMLEY. I guess I had better withdraw the question.

By Mr. BROMLEY.

Q. As a matter of fact, you know, don't you, that at all times up to the time you left the industry, lath and board was bundled by this strip of paper along the side in bundles of 5 or 6?

A. In the case of lath, and 2 in the case of board.

Q. And that at all times, up to the time you left the industry, you know that your company paid, for the privilege of bundling lath in that fashion, 10 cents per thousand square feet for every thousand square feet of board sold and bundled?

A. Yes, sir.

Q. At page 2066 of the record, you stated, in effect, with reference to the November, 1929, license, that if all of the companies had not taken the bubble license, Certain-teed might not have taken it. Now did you intend that to be a reference to getting all companies together under licenses having price control?

A. I don't recall that I stated "all companies", but I might have.

Q. Well, I guess I am wrong. I see you said "if a substantial number". I see that the question was "if a substantial number"—so I will change my question. I will withdraw the question.

2039 You testified, in effect, that Certain-teed might not have taken the November license unless a substantial number of the other companies had likewise taken it. Now what did you mean by that testimony, what was the reason that you felt it would not be desirable for your company to take a license unless others took it?

A. Well, the more people in the business manufacturing the same type of board, the better it is, in my opinion.

Q. Well, wouldn't you, Mr. Brown, have thought that if USG offered a license under an invention and nobody was interested except one company, that that might constitute some reflection upon the value of the invention?

A. It would have a lot of bearing.

Q. And isn't that what you intended to state when you gave that testimony about others taking a license?

A. I think it is a fair assumption, yes, sir.

Q. In other words, was it your meaning that if a sub-

stantial number of companies took a license under which they were obligated to pay royalties, that would constitute an indication to you that the invention was a valuable invention and constitute a reason why you should think your company should have it?

A. Certainly I would feel it was more valuable than if nobody wanted it.

Q. And wasn't that the intent and purpose of your
2040 testimony, in so far as it referred to whether or not other companies took a license?

A. I think that is right.

Q. Now coming down to the period of time after the May, 1929, license, would you say that prior to November, 1929, you had become convinced that the so-called foam or bubble board, like the closed-edge, was a desirable product for which there was a customer demand?

A. Yes, sir.

Q. And did you reach the conclusion, in your own mind, prior to November, 1929, that there was a strong customer demand for foam or bubble, lightweight board?

A. There was.

Q. And were you, as sales manager, anxious to see your company obtain the right to manufacture that board?

A. Yes, sir.

Q. And was it your view that if Certain-teed did not get that right, they would be in the same position of competitive disadvantage which they had been in when they were selling open-edge against competitors' closed-edge board?

A. That is right.

Q. And is that why you concluded that it would be a desirable and advantageous matter, from a business standpoint, to take the November, 1929, foam, starch license?

A. Yes, sir.

2041 Q. I refer you to Exhibit 228 again, which you have before you, and particularly to the second sentence of that memorandum, and ask you whether or not what you have just stated isn't what you meant by the use of the phrase, "For the following business reasons, however, * * * it was decided to take a License * * *"?

A. What page is that on?

Q. The first page, the first paragraph?

A. Yes, sir, that is right.

Q. I direct your attention to the handwritten note at the top. Will you read it to me, please?

A. "O.K. to sign up—GMB".

Q. Is that in the handwriting of Mr. George M. Brown?

A. Yes, sir.

Q. And does that indicate to you, sir, that on or about July 3, 1929, Mr. George Brown, the President of your company, had decided that the company should take the November license?

A. That is right.

Q. And is that the written record of his decision to which you have just referred?

A. It is.

Q. And isn't it the fact, sir, that so far as this memorandum is concerned, Exhibit 228, prepared by you, the main reason, in your mind, why the company should take the November license, is set forth in the last para-
2042 graph on the first page of the exhibit?

A. That is right.

Q. Certain-teed had made its own investigation of the question of whether the process resulted in a cost saving, had it not?

A. I think it had.

Q. Your Mr. Van Hagan had conferred with USG's Mr. Knode, the latter being in charge of production for USG, and informed himself of the merits of the invention and the economies resulting from its use; isn't that right?

A. Yes, sir.

Q. And isn't it the fact that the fourth sentence in the last paragraph on page 1, beginning "Any known methods for getting this result", was intended by you to express your view that you didn't feel Certain-teed should be put in a non-competitive situation again, as had been the case with respect to your manufacture of open-edge board when others were making the patented, closed-edge board?

A. That was my desire.

Q. Turning over the page and referring once more to the first paragraph on the second page, "Taking these things into consideration, plus other advantages in working under the patent, we feel justified in taking a license", and so forth—didn't you intend by the phrase "plus other advantages in working under the patent", to mean
2043 not only the price control in which you were personally interested, but the elimination of litigation then existent between your two companies?

A. "Litigation" meaning on the bundling, I take it?

Q. Yes, I should have said threatened litigation and the possibility of litigation if you did not take a license.

A. There was no threatened litigation on the bubble, as I remember.

Q. No, sir. But there was threatened litigation on the starch patent, wasn't there?

A. I could have had that in mind. I really don't remember.

Q. And didn't you also feel that it would make a better market in general for a number of companies under license to be behind the production of a superior patented product?

A. Yes, sir.

Q. And wasn't that one of the matters to which you intended to refer by your use of the phrase, "plus other advantages in working under the patent"?

A. I don't remember as to that, sir.

Q. Will you look, please, at Exhibit 234, which is your memorandum to Mr. Whittemore of October 3, 1929, and will you please tell the Court, Mr. Brown, what you meant by that last sentence in the second paragraph, "We
2044 are all using enough Starch to say we are making Board under the Universal Patent."?

A. Well, it was sometime during 1929 when I first heard of the Haggerty starch patent, and on investigating the matter with our production men I found we were using starch, and that you couldn't make a satisfactory board without doing so; and at the same time, apparently we were infringing that patent.

Mr. STEFFEN. I would object to the statement as to whether they were infringing, Your Honor, on the ground that it calls for a conclusion. I don't think the witness is qualified to testify that they were infringing the Haggerty patent.

The WITNESS. I said "apparently".

Justice STEPHENS. Read the answer.

(The answer was read by the reporter.)

Justice STEPHENS. The objection is overruled. The question goes to the reasonableness of the witness' testimony as to the meaning of the exhibit.

By Mr. BROMLEY.

Q. Furthermore, hadn't you investigated the situation, and didn't you intend to indicate, by that sentence to which I have referred, that all manufacturers of board were infringing the Haggerty patent, and isn't that what you meant by the phrase, "We are all using * * *"?

2045 A. Well, I assumed they were if we were doing

it and found it necessary.

Q. Weren't you informed, Mr. Brown, that it was impossible to make board and secure a good bond between the core and the paper without the use of starch?

A. That is what our production men claimed.

Q. And weren't you informed that the infringement of which your company had been guilty was of such a character that it was either necessary to pay large damages and go out of business, or take a license in order to continue satisfactory manufacture of board?

A. Well, I don't recall any threats of large damages at that time.

Q. You had been using starch, however, for years, had you not?

A. Yes, sir, since we started making board.

Q. And as a result of the investigation of your production men, you became convinced that you had to continue to use starch if you wanted to make satisfactory board, didn't you?

A. That is right.

Q. In your discussions with officials of Certain-teed early in 1929, at or about the time that your company had decided to settle with the USG and take a license, did you ever hear it suggested by anyone that there
2046 was any understanding that USG would find some other patent to continue price control beyond August 6, 1929, the date of the expiration of the Utzman patent?

A. No, sir, I don't recall anything like that.

Q. Did you ever hear of, or have yourself, any understanding that the board license agreement of May, or of November, 1929, would be used to raise or fix prices of plaster or other gypsum products that were not patented?

A. No, sir.

Q. Did you ever, yourself, have any understanding with any competitor, or know of any understanding to which your company or others ——.

Mr. STEFFEN (interposing). I think, Your Honor, that this is going beyond the direct-examination. We asked nothing at all of this witness in regard to the negotiations which may have looked to a regulation of plaster prices.

Mr. BROMLEY. There is a charge in the complaint; if counsel want to withdraw it I would be glad to go to something else.

Mr. STEFFEN. There is a charge in the complaint, but the witness hasn't been asked any questions on it. This is cross-examination, and under the Federal rules must be

kept within the scope of the direct-examination, irrespective of what appears in the complaint.

2047 Justice STEPHENS. The Court doesn't recollect, Mr. Bromley, any examination of this witness on direct with respect to plaster and other products. Now the testimony has been voluminous, and the Court's memory is by no means infallible. There may be something on that subject. Can you refresh my recollection?

Mr. BROMLEY. What I had in mind was that Mr. Steffen had elicited testimony from this witness—I will withdraw that—Mr. Steffen had put in evidence declarations in the form of memoranda, through this witness, about the meetings in Chicago in connection with the negotiation of these licenses, and I had in mind that the charge was, in the complaint at least, that in those meetings some agreement was reached on price control on unpatented products.

Justice STEPHENS. As to that, Mr. Steffen, the Court does have some recollection that apart from this witness' oral statements, there were some exhibits introduced through him which, as the Court thought when you introduced them, you were relying upon to indicate that other products than board were contemplated as being within the alleged price fixing understandings—is that right or not?

Mr. STEFFEN. That is definitely part of the Government's case, Your Honor.

Justice STEPHENS. Well, yes, but I mean in the exhibits introduced through this witness.

2048 Mr. STEFFEN. I don't recall, really.

Mr. BROMLEY. You had better let me make sure about it, then, if you don't recall.

Mr. STEFFEN. If Mr. Bromley will point out ——

Mr. BROMLEY (interposing). I am pretty sure Your Honor's recollection is right, and that is why I made the note to ask him the question.

Justice STEPHENS. Suppose you take time to look into the exhibits a little. We would like to finish with this witness today if we can.

I do recollect that some of the exhibits were examined upon in a line of examination which indicated, as I thought, that Government counsel was contending that they indicated there was some idea of price fixing on products other than board. But whether they were the exhibits identified by this witness or not, I don't pretend to be able to say from recollection.

Mr. BROMLEY. Will you concede that there is no testi-

mony put in through this witness, in documentary form or otherwise, which in any way tend to support your charge that there was any agreement to fix prices on unpatented gypsum products?

Mr. STEFFEN. The answer is no.

Justice STEPHENS. Then you may proceed with the examination. It can not harm ——

2049 Justice GARRETT (interposing). I think perhaps Mr. Steffen was misunderstood.

Mr. STEFFEN. My answer was no, we did not concede the point made by Mr. Bromley, that we did not wish to have it understood that there was evidence brought out by this witness of the sort ——

Justice STEPHENS (interposing). What I thought Mr. Bromley was asking you—in fact, the Court had thought of asking you—was whether you claimed that any of the exhibits identified and explained by this witness are relied upon by the Government to prove price fixing on products other than board. If you claim that, then of course the defendants have a right to cross-examine on it. If you don't claim it, then that is out of the direct-examination.

Of course, if you have no memory, I am not trying to press you for too sudden an answer.

Mr. STEFFEN. I haven't any memory on that point. I honestly don't recall whether there was an exhibit introduced by this witness. I am sure there is no testimony by this witness. I am also sure that Your Honor is correct that there have been exhibits during the course of the trial which did take up that subject.

The WITNESS. I don't recall any, Your Honor.

Justice STEPHENS. Well, in the interest of time let us suggest this: There is no jury. Examine the witness on that subject, Mr. Bromley, and then by

2050 tomorrow morning counsel will have had an opportunity to find out whether there are exhibits on which the Government relies, through this witness, for that purpose. If there are, the examination may stand; and if not, it may be stricken. The Court wants to hold the cross-examination fairly within the limits of the direct, in the interests of time if nothing else.

Proceed.

By Mr. BROMLEY.

Q. Isn't it a fact, Mr. Brown, that so far as you know, never at any time was there any agreement or understand-

ing reached at any of these meetings, in Chicago or elsewhere, regarding the fixing of prices on plaster or other unpatented gypsum products?

A. That is right.

Q. You knew, didn't you, that price fixing under the May, 1929, license was applicable only to the patented articles made by your company?

A. That is right.

Q. And you further knew, didn't you, that it was applicable only to the first sale?

Mr. STEFFEN. As we have been told many times here, the document speaks for itself, and I see no reason for going into this question of what Mr. Brown knows. It is utterly immaterial. We have been told that hour after hour.

2051 Justice STEPHENS. I think that is not well taken, Mr. Steffen. This is cross-examination, and the Government is contending that the officers of the defendants had subterfuge and a cloak in mind with reference to the use of these patents. Now it seems to me proper to cross-examine and ask what the witness' understanding of the agreements was, not to prove what the agreements contained but to prove his state of mind with respect to the charges of the Government.

Objection overruled.

By Mr. BROMLEY.

Q. You knew, didn't you, Mr. Brown, that the price fixing under the licenses was applicable only to the first sale, that is, your sale of the manufactured product?

A. Yes, sir.

Q. And you knew furthermore, didn't you, that the price fixing provision did not extend to any open-edge board that was not patented under some other patent.

A. Yes, sir.

Justice STEPHENS. Do you have an objection?

Mr. STEFFEN. I will object to the preceding answer on the ground that it calls for a conclusion. We argued all day yesterday on whether the contracts provided for a resale price fixing, and Mr. Bromley asks this witness if he didn't know that that contract was such-and-such. It seems to me that that goes much beyond reasonable cross-examination.

2052 Justice STEPHENS. Now there are two questions here. I don't understand counsel now to be examin-

ing upon the question of resale prices upon anything other than board manufactured, are you?

Mr. BROMLEY. That is all.

Justice STEPHENS. By the defendants?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. And as to the conclusion aspect of it, Mr. Steffen, it seems to the Court perfectly clear that what the witness believed, what his own state of mind was with respect to these agreements and their restrictions, is fair cross-examination in view of the contentions of the Government as to the subterfuge and cloak use of the patents.

Objection overruled.

By Mr. BROMLEY.

Q. And you knew, didn't you, Mr. Brown, that under the May license, that price fixing did not extend to any product at all after August 6, 1929?

A. Yes, sir.

Q. Now did you at any time ever receive any knowledge or intimation from USG as to what it would do in the future with regard to establishing the minimum price, under the licenses, of any patented article?

A. No, sir.

Q. Did you ever hear Mr. Avery or anybody else from USG make any promise, or did you ever have
2053 any understanding with any of them, as to what price they would or would not fix under the licenses?

A. I did not.

Q. And isn't it a fact, sir, that you were given to understand by USG at all times that the fixing of the price was entirely in their discretion?

A. That is right.

Q. And isn't that, as a matter of fact, Mr. Brown, one of the reasons which made Mr. George M. Brown reluctant to take out the license?

A. I don't know.

Q. Did you ever have any understanding or agreement, or hear of any such, with respect to the disposition by your company of open-edge or second-grade board which you may have had on hand at the time of signing the license agreement?

The WITNESS. I think I will have to ask you to repeat that, if you will, or read it, please.

(The question was read by the reporter.)

The WITNESS. I don't remember anything about that.

By Mr. BROMLEY.

Q. Did you ever have any agreement or understanding that the manufacture of open-edge or second-grade closed-edge board would be discontinued after you took the license?

A. No, sir.

2054 Q. Did you ever have any understanding or agreement, or hear of any such, that you, as a licensee, would make and sell only board which came under the patents listed in the license?

A. No, sir.

Q. It was a fact, was it not, Mr. Brown, that at all times while you were with the company, closed-edge board was a superior product to open-edge board?

A. That is right.

Q. It also cost less to make, did it not?

A. I think that is correct.

Q. And it certainly was demanded by the trade, was it not?

A. Yes, sir.

Q. So far as you were concerned, did you ever see any reason, after you took the May license, why your company should make open-edge board?

A. No, sir.

Q. I refer you to Exhibit 236, which is Mr. Henley's memorandum to you. Will you look at the first paragraph?

A. Yes, sir.

Q. Notice that this memorandum is dated December 3, 1929, please. Do you see the reference to Open Edge Recut Wallboard?

A. Yes, sir.

2055 Q. Now isn't it the fact, Mr. Brown, that open-edge recut wallboard was patented board under the Haggerty starch patent?

A. Yes, sir.

Q. And isn't this memorandum a memorandum which merely has to do with the exercise of the licensor's right to fix a minimum price on patented board?

A. Yes, sir.

Q. Did you have anything at all to do with negotiations between Messrs. Avery and Holland as a result of which USG purchased the Haggerty and Hite patents?

A. I did not.

Q. So far as you knew, that was a matter solely between Messrs. Avery and Holland, wasn't it?

A. I knew nothing about it.

Q. And so far as you knew, no other company had any part in those negotiations, isn't that right?

A. I didn't know of any that did.

Q. And isn't it the fact that the first that you knew of the purchase of the Haggerty and Hite patents was when that fact was announced in Chicago by Mr. Avery?

A. That is right.

Q. Now, sir, did you ever make any agreement or understanding with anyone, or know of any such, that the use of adhesives to obtain bond between the core and the paper should be considered as falling within the scope
2056 of the Haggerty and Hite patents for the purpose of permitting price control?

A. No, sir.

Mr. STEFFEN. I object to that, Your Honor. I don't think that at all is within the direct-examination.

Mr. BROMLEY. That, as I understand it, was one of the purposes for your introducing one of the memoranda prepared by this man as to a Chicago meeting.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

2057 Justice STEPHENS. The Court has no recollection of any testimony or memorandum on that subject.

Mr. BROMLEY. Is it your position, may I ask, Mr. Steffen, that there is no such testimony through this witness?

Mr. STEFFEN. Decidedly not. What I am saying is that I don't recall any at all.

Mr. BROMLEY. Well, to shorten this, I think that can only be the purpose of the second paragraph in Exhibit 234, and I understood that that was the reason he put it in evidence.

Mr. STEFFEN. Let's take a look at Exhibit 234.

Justice STEPHENS. Read the question again, Mr. Reporter?

(Whereupon the question referred to was re-read by the reporter.)

Justice STEPHENS. The objection is overruled.

By Mr. BROMLEY.

Q. On page 2105 of the transcript you stated, Mr. Brown, that licensee meetings were held every sixty or ninety days, and I think your reference was to the years 1929 and 1930. Isn't it the fact that during those two years only one such meeting was ever held?

A. I think my testimony was that they might have been held every sixty or ninety days; it was not positive.

Q. Well, have you any recollection at all of any licensee meeting either in 1929 or 1930, sir?

2058 A. I can't remember as to the dates.

Q. Well, might your testimony with respect to the sixty or ninety day frequency have related to a period of time during the depression in 1932 to 1934?

A. It could have, I am not sure how many meetings were held in any given year.

Q. The fact is that you have no recollection at all that there was any such regularity as your sixty or ninety day answer created the impression?

A. It was purely a guess on my part.

Q. Now isn't it the fact, Mr. Brown, that the prices and terms and conditions of sale which you established on plaster and other unpatented gypsum products had no connection with the price bulletins issued by USG under the board licenses?

A. That is right.

Q. Your company was, was it not, free to, and did, sell these unpatented products at all times on such prices and on such terms as it chose?

A. We did that.

Q. Coming to metallized board, the testimony shows that you took a metallized license on November 2, 1934. Isn't it the fact that your company took that license in order to make the product?

A. That is what they intended to do at the time, as I remember it.

2059 Q. Well, as a matter of fact, sir, didn't they thereafter equip their plants and start to manufacture the product?

A. I think they did, but it was after I left the company.

Q. I show you what purports to be a memorandum from Mr. Laney to Mr. Irwin, dated December 6, 1935—will you give me that please, Mr. Steffen? It is one you have in your files that you didn't put in.

Mr. STEFFEN. Could you give us a description of it. I have no present recollection of it.

Mr. BROMLEY. It is from Laney to Irwin, dated December 6, 1935.

Having read that memorandum, sir, isn't your recollection refreshed ——

The WITNESS. I haven't the memorandum.

Mr. BROMLEY. I withdraw the question.

Mr. STEFFEN. I would like the record to show that we

have just now, for the first time, seen it. We have no copy of that, Your Honor, except the one just handed to us by Mr. Bromley.

Mr. BROMLEY. I assure you that it is in the file that was subpoenaed because you took it from us and have kept it ever since.

Mr. STEFFEN. And I assure you that we don't know anything about it; we haven't seen it.

2060 Justice STEPHENS. Proceed with the examination. This is just being used to refresh the witness' recollection for the time being, as I understand it, and has not been identified.

By Mr. BROMLEY.

Q. Have you read that memorandum?

A. Yes, sir.

Q. Doesn't that refresh your recollection so that you can now say that as a matter of fact the Certain-teed Products Corporation produced this metallized board in December, 1935?

A. No, sir, it doesn't refresh my memory.

Mr. BROMLEY. I will ask that this document be marked for identification as Defendants' Exhibit 5.

(The document referred to was marked as Defendants' Exhibit 5 for Identification.)

Justice STEPHENS. If there is a reasonable likelihood, without unduly restricting you, Mr. Bromley, of finishing with this witness tonight, we will be glad to hold over a little while longer than usual, although not very much longer because of the great pressure upon the court reporter's staff. We will hold over fifteen minutes.

Mr. BROMLEY. I should personally very much appreciate that and I can finish very shortly.

Justice STEPHENS. Will you have very much redirect, Mr. Steffen?

2061 Mr. STEFFEN. No, I do not think so, Your Honor, but I will have one or two questions.

Justice GARRETT. It will not be necessary for this witness to be here in connection with your offer of proof, as I understand it.

Mr. STEFFEN. That is my understanding.

By Mr. BROMLEY.

Q. Then you have no recollection that, as a matter of fact, you started to make this board at the end of 1935?

A. No, sir.

Q. And your recollection is that you didn't make it, and that it wasn't made up to the time you left the company?

A. That is my memory, yes.

2062 Q. Can you identify that as Mr. Laney's signature on Exhibit 5 for Identification?

A. Yes, I can identify that as his signature.

Q. Now will you look at Exhibits 247 and 248, sir. Looking first at Exhibit 247, aren't you able to say that this was a bulletin sent out by you after your company had taken the license to make the metallized board?

A. No, sir, I don't remember the date of the license.

Q. It was November 2, 1934.

A. Well, this doesn't seem to be dated, but I don't know for sure.

Q. Look at the bulletin, page 2 of that letter. Isn't it a fact, and didn't you know it at the time, that the bulletin only referred to metallized board manufactured by you?

A. Yes, sir, I knew that.

Q. Now the board that you bought from U.S.G. or from some other company you bought at a very small discount off the established price, didn't you?

A. That is right.

Q. Did you have any agreement or understanding as to what price you would fix for the resale of metallized board purchased from others?

A. No, sir.

Q. And you knew that the price bulletins sent out by the Licensor did not apply to such board, didn't you?

2063 A. Yes, sir.

Q. As a matter of fact, however, did you determine independently, and as a matter of your own policy, to sell the board that you bought at the same price as you did the board that you made?

A. We did.

Q. And after you got into production, if you still continued in isolated instances to buy board, it would have been impossible for you, or at least exceedingly ridiculous, to have fixed one price on the board you made, and another on the board of the same character that you bought, wouldn't it?

A. We priced them both the same.

Q. But the fact that you priced the purchased board the same as the board you made was a matter which you determined independently, without relation to any understanding with the licensor, isn't that right?

A. Yes, sir.

Q. Now at page 2104 of the record, in line 9, you testified that you thought that at one of the licensor's meetings something was discussed with regard to seconds or recut wallboard, but you said you didn't remember any of the details. Now isn't it a fact, Mr. Brown, that you have no recollection as to whether there was a discussion of seconds at a Licensor meeting, or not?

A. I think I have such a recollection.

2064 Q. Can you give us any idea as to the date of any meeting at which such a diccussion might have occurred?

A. No, sir.

Q. Or can you identify such an occasion in any other way?

A. No, sir.

Q. Will you look at Exhibit 254, please, which is Mr. Van Hagan's memorandum of November 26, 1934, on metallized board. Isn't the reference in the last sentence of the first paragraph a reference to the Certain-teed price list and not to any U.S.G. price bulletin or price list?

A. I would say the reference is to Certain-teed's price list.

Q. In Exhibit 247, the licensor's price bulletin which constitutes page 2, you identified for Mr. Steffen by reference to the metallized price builetins as being a bulletin dated October 30, 1934. Now having in mind that you executed and took your metallized board license on November 2, 1934, are you able to recollect that the bulletin dated October 30, 1934, was the then current bulletin in effect on November 2, 1934?

A. I don't remember.

Mr. BROMLEY. That is all.

Justice STEPHENS. Do any other defendants' attorneys wish to cross examine?

Mr. ADAMS. I don't think I have any questions but I would like about ten seconds to confer.

2065 Justice STEPHENS. Very well.

Mr. ADAMS. No questions.

Justice STEPHENS. Does any other defendant's counsel desire to cross examine this witness? If not, you may proceed with redirect examination.

REDIRECT EXAMINATION by Mr. STEFFEN.

Q. I think you testified, Mr. Brown, in regard to the use of starch, and stated that your company had been using starch since you started making board. Did you

make something of an investigation at that time, of the starch you were using?

A. Not until this Haggerty situation came up; so far as I know, we didn't.

Q. And what use of starch did you make, or rather, what use of starch did you find your company was making?

A. I think most of it was used as an adhesive.

Q. I want to know what type of starch you put in the board?

A. I don't know.

Q. Was it put in in dry form?

A. I can't answer that; I am not enough of a production man to know.

Q. Was it, perhaps, just some flour that was put in?

A. I have no way of knowing at all how they used it.

Q. Your investigation, then, didn't disclose anything concerning the type of starch?

2066 A. No, sir.

Q. Would you know whether you had machinery at that time for cooking starch at your plant which you would put into the board?

A. No, sir, I wouldn't know that.

Q. There was some testimony, in answer to Mr. Bromley's questions, in regard to whether there was any agreement or any discussion at your meetings in June and July and August, in Chicago, in 1929, concerning the discontinance of an open-edge board. I believe you testified that—or what was your testimony on that?

A. There was none that I know of.

Q. No discussion?

A. That is right.

Q. Was there any understanding on your part that any of your companies would continue to make an open-edge board?

A. I don't recall anyone expressing themselves on that.

Q. Would it have been good business to have made an open-edge board?

A. We didn't think so.

Q. And what would be the objections to making an open-edge board?

A. Well, we went into the closed-edge, and these other patents, to get us better board, and we could see

2067 no reason for making an inferior board.

Q. That is right. Would there have been price fixing of the inferior board?

A. No, sir.

Q. So that you could have sold it at a lower price?

A. Yes, sir.

Q. What would have been the disadvantages of making an open-edge board?

A. The trade didn't want it.

Q. That the trade didn't want it was one reason. Would you have had to pay a royalty on it?

A. Yes, sir.

Q. And would it have cost more to make?

A. I think it did cost more to make.

Q. So you would say that there was a tacit agreement that the open-edge board was out?

A. We didn't make it.

Mr. STEFFEN. We have no other questions, Your Honor.

Justice STEPHENS. Is there any recross?

Mr. BROMLEY. No, sir.

Justice STEPHENS. Mr. Brown may be excused then, may he, gentlemen?

Mr. STEFFEN. Yes, with our thanks.

Mr. BROMLEY. Yes, Your Honor.

2068 Justice STEPHENS. Thank you for attending court, Mr. Brown, and we are very sorry to have taken so much of your time.

The WITNESS. Thank you. (Witness excused.)

Justice STEPHENS. Is there anything further? If not, announce a recess until tomorrow morning at ten o'clock.

(Whereupon, at 4:17 o'clock p.m., the hearing was recessed until Friday morning, December 17, 1943, at 10:00 o'clock.)

2069 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Friday, December 17, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances: (Same as heretofore noted.)

2079 Mr. Neale, will you please take the stand?

Thereupon, LAURANCE I. NEALE, called as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. KNUFF.

Q. Will you please state your name for the record, sir?

A. Laurance I. Neale.

Q. I believe, sir, that you are the Minister of the Unitarian Church of All Souls, located at 80th Street and Lexington Avenue in the City of New York; is that correct?

A. That is correct.

Q. How long have you been Minister of that congregation, sir?

A. I have been there about, going into my fourth year.

Q. Were you ever engaged in the gypsum business?

A. Yes, sir.

2080 Q. With what company?

A. With three companies: first with the J. B. King & Company; then with United States Gypsum Company; and then with the Atlantic Gypsum Products Company.

Q. When did you enter the employ of the Atlantic Gypsum Products Company?

A. 1927.

Q. In what capacity?

A. As New York Division Sales Manager.

Q. And how long did you remain in the employ of the Atlantic Gypsum Products Company?

A. Until 1936.

Q. And is that the year that you entered the ministry?

A. No, I didn't enter the ministry immediately.

Q. Your first connection with the Atlantic Gypsum Products Company was as New York Division Sales Manager, is that correct?

A. That is correct.

Q. And how long were you employed in that capacity, sir?

A. About two years.

Q. Until 1929?

A. Yes.

Q. And from 1929 on, what was your office?

A. In 1929, as I recall it, I became General Sales
2081 Manager.

Q. In charge of all sales of Atlantic Gypsum Products Company?

A. Yes. In 1930 I became Vice President.

Q. And you remained as Vice President until you left the company in 1936?

A. Correct.

Q. And as Vice President, were you in charge of sales, also?

A. Yes.

Q. The Atlantic Gypsum Products Company, at the time you entered it, sir, was a licensee of United States Gypsum Company under the Utzman patent. Are you familiar with that?

A. Yes, it was a licensee.

Q. Now what products, what gypsum products, did the Atlantic Gypsum Products Company make?

A. Almost a full line.

Q. That is, board——

A. (Interposing.) Various kinds of board and plasters.

Q. And block?

A. Yes.

Q. And where were those products sold, sir?

A. In the Eastern part of the country, from Maine, let's say, to Virginia.

2082 Q. And extending west how far?

A. Not very far.

Q. As far as Pittsburgh?

A. No, about the middle of Pennsylvania.

Q. About Harrisburg?

A. Yes.

Q. What type edge board did your company make from the time you came with it until you left?

A. A closed-edge board.

Q. Do you know when the Utzman patent expired, sir?

A. Do I know now?

Q. Yes.

A. I heard, while I have been sitting around court here the last few days, that it expired in 1929, but I had forgotten that.

Q. As Sales Manager, in 1929, were you directly in charge of the sales of the company?

A. I don't know as I quite understand your question, Mr. Knuff.

Q. Well, what I meant was—were you the Sales Manager in fact as well as in name?

A. I think so, except that Mr. Fuller, who was the chief executive officer, had something to say about all features of the business.

Q. Now in your sales of gypsum board, did you
2083 ever receive from the United States Gypsum Company so-called bulletins?

A. Yes, sir.

Q. And were your sales made in accordance with the bulletins that you received?

A. Yes, sir.

Q. And you adhered to the bulletin prices?

A. As I recall it, we did our level best to.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 279, the same being a letter dated May 24, 1927, addressed to Mr. Sewell L. Avery, and signed by Willard P. Fuller. Who was Mr. Fuller?

A. Mr. Fuller at that time was Treasurer of the company. He later became President.

Q. Are you familiar with Mr. Fuller's handwriting?

A. Yes.

Q. Would you say that the letter you have before you was signed by Mr. Fuller?

A. I should.

Q. It was?

A. Yes, sir.

Mr. KNUFF. If Your Honor please, we offer in evidence Government's Exhibit No. 279.

Justice STEPHENS. The Court will read it. Is there any objection?

2084 Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 279, was received in evidence.)

By Mr. KNUFF.

Q. I also show you Government's Exhibit No. 280, the same being a letter of May 29, 1929, addressed to Mr. W. P. Fuller, with no signature appearing thereon, and the letter

of May 29 apparently being a copy of a letter that was sent to Mr. Fuller; also Exhibit 281, the same being a letter dated May 31, 1929, addressed to Mr. S. L. Avery and signed Willard P. Fuller. Will you please look at these two exhibits, sir?

A. Yes, sir.

Q. Have you read Exhibit No. 281, sir?

A. Yes, sir.

Q. Would you say that the signature, "Willard P. Fuller", is Mr. Fuller's signature to that letter?

A. I believe it to be.

Mr. KNUFF. We now offer in evidence, if Your Honor pleases, Government's Exhibits 280 and 281, Exhibit 280 being connected internally by reference to Government's Exhibit 281.

Mr. BROMLEY. Only the usual objection, sir.

2085 Justice STEPHENS. Received, subject to the usual reservation with reference to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 280 and 281, were received in evidence.)

Mr. KNUFF. For the time being, if Your Honors please, will you please skip the next two exhibits in the file, the one marked "Return to W.P.F." and the other headed "Gypsum Industry, 1929", and consider the letter of July 22, 1929.

By Mr. KNUFF.

Q. I show you, Reverend Neale, Government's Exhibit 282, the same being a letter dated July 22, 1929, addressed to Mr. W. H. Baker and purporting to be signed by L. I. Neale. Will you please look at it, sir?

Justice GARRETT. That is M. H. Baker, isn't it?

Mr. KNUFF. Yes, M. H. Baker.

Justice STEPHENS. Have counsel those charts which my law clerk prepared for our use?

Mr. BROMLEY. I have one here.

Justice STEPHENS. We need to have something of that sort before us to keep the relationship of all these predecessor companies in mind.

Justice JACKSON. Have you checked it, Mr. Bromley?

Mr. BROMLEY. I haven't completed my check.

2086 Justice STEPHENS. Well, we will only refer to it for the purpose of seeing the antecedent corporations.

Justice JACKSON. There is another one?

Mr. KNUFF. I have the other one.

Justice STEPHENS. Let us use it for the time being.

Mr. KNUFF. Unfortunately, it is over in my office.

Justice JACKSON. Bring it back the first time you are over there.

Mr. KNUFF. Yes, I will.

Justice STEPHENS. We will have to institute a system of issuing checks for these exhibits.

By Mr. KNUFF.

Q. Will you state, sir, whether the signature appearing on that letter is your signature?

A. It is.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 282.

Mr. BROMLEY. Only the usual objection, if the Court please.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 282, was received in evidence.)

2087 By Mr. KNUFF.

Q. In conection with Exhibit 282, you will notice that that is addressed to Mr. M. H. Baker. Do you know Mr. Baker?

A. Yes, sir.

Q. How long had you known him?

A. At that time?

Q. Yes.

A. I don't know.

Q. A matter of years?

A. Three or four years.

Q. And you will notice further, Mr. Neale, in the first paragraph, you ask to be pardoned for your delay in acknowledging the receipt of a letter from Mr. Baker dated July 12. Do you notice that?

A. Yes, sir.

Q. Do you recall what was in that letter of Mr. Baker's of July 12?

A. I have no idea.

Q. No idea?

A. That is right.

Q. In the second paragraph of that letter, you state that Mr. Fuller, Mr. Channing and yourself were planning to arrive at Chicago on Wednesday. Who was Mr. Channing?

A. He was, I think, at that time, the Secretary of
2088 the company, and the General counsel.

Q. And Mr. Fuller is the gentleman whose signature you have identified in the previous exhibits, is that correct?

A. Yes.

Q. Did you go out to Chicago at that time?

A. I don't remember.

Q. Do you recall any visits to Chicago in company with Mr. Fuller and Mr. Channing at or about that time?

A. I couldn't say that I recall any at or about that time. I have made numerous trips with them.

Q. The letter doesn't refresh your recollection as to any trip that you made then, is that correct?

A. It does not, no.

Q. At about that time, what would be your reason for going to Chicago, if you went there?

Mr. BROMLEY. I object to that as incompetent because calling for a conclusion.

Mr. KNUFF. The reason for going—it is a preliminary question.

Justice STEPHENS. It seems quite speculative to the Court, but since counsel states it is preliminary, the objection is overruled, and the answer may be received subject to a motion to strike.

Mr. KNUFF. Read the question.

(The question was read by the reporter.)

2089 The WITNESS. I don't know.

By Mr. KNUFF.

Q. Well, at or about that time, do you know whether or not there was a proposed license agreement for the manufacture of board by the so-called bubble process?

A. I should say at about that time, yes.

Q. Did you make any trips to Chicago in connection with that proposed license?

A. I may have, I don't recall now.

Q. You can't recall?

A. No.

Q. You will notice in the last paragraph of that letter you make reference to a foam board contract. Do you notice that?

A. Yes, sir.

Q. Does that refresh your recollection in any way?

A. Not in reference to any meeting.

Q. It doesn't?

A. No. The foam board contract is what you have just referred to as the bubble contract.

Q. And this third paragraph doesn't refresh you recollection?

A. It does not.

Q. I show you, sir, what has been marked for Identification Government's Exhibit No. 283, the same being
2090 a letter dated August 9, 1929, addressed to M. H. Baker, President, and signed Willard P. Fuller. Will you please look at that letter?

A. Yes.

Q. Will you state, Mr. Neale, whether or not you recognize Mr. Fuller's signature?

A. Yes, that is his signature.

Q. At the bottom of the letter, I notice the interlineation "Why not in Cape Breton—August 25-30?" Do you know whose writing that is?

A. I should say that was Mr. Fuller's.

Mr. KNUFF. We offer in evidence, if Your Honor pleases, Government's Exhibit No. 283.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation concerning the declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 283, was received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification Government's Exhibit 284, the same being a letter dated August 29, 1929, addressed to Mr. M. E. Baker, and purporting to be signed L. I. Neale. Is that your signature, sir?

A. It is.

2091 Mr. KNUFF. We offer in evidence Government's Exhibit No. 284.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 284, was received in evidence.)

By Mr. KNUFF.

Q. I notice that the addressee's name is written "M. E. Baker". Is that a typographical error?

A. I would think it must be, yes.

Q. It should be M. H. Baker?
A. Yes.
Q. The Mr. Baker that you had reference to in this letter was the same Mr. Baker that you wrote to under date of July 22, is that correct?
A. Yes.
Q. In Exhibit No. 282?
A. The same Baker.
Q. I call your attention to the statement, "I am a little out of touch with the board situation in Chicago". Do you notice that in the first paragraph?
A. Yes, sir.
Q. What does that have reference to, sir?
2092 A. I don't know to what, in particular.
Q. What is your best recollection as to what it has reference to?
A. I have no specific recollection as to what it may have reference to.
Q. Does it have reference to the foam board contract?
A. I would judge so, from what appears in the second paragraph, but I have no recollection of it.
Q. I notice that you state, in the first paragraph, that there was some difference between the National Gypsum Company and the Universal Gypsum & Lime Company.
A. Yes, sir.
Q. Do you know what that difference was?
A. No, I do not.
Q. In the second paragraph of your letter, you say, "I would appreciate very much if you would let me know promptly the present state of affairs in regard to the getting together of various manufacturers." Do you notice that?
A. Yes, sir.
Q. What "various manufacturers" did you have in mind at that time?
A. I don't know.
Q. Well, who were the gypsum manufacturers that were in business manufacturing board in August of 1929?
A. Well, I don't know that I can state them all, now.
2093 Q. Well, let's see if I can help you.
A. There was Atlantic, U. S. Gypsum, National Gypsum, Ebsary Gypsum, Certain-teed Products, Universal Gypsum & Lime Company, Kelly Plasterboard Company, and there may have been others.
Q. American?

A. Yes, American.

Q. Texas?

A. As far as I know.

Q. Would you say that those were the various manufacturers that you had in mind when you wrote this letter?

A. I would have no way of knowing now, Mr. Knuff.

Q. You haven't any recollection at all as to that?

A. I have no recollection of the letter or the matter to which it refers.

Q. I notice that there are some shorthand notes on the bottom of that letter. Do you notice those? At least I take them to be shorthand characters.

A. I see some scribbles there, yes.

Q. Do you write shorthand?

A. I do not.

Q. They are not your notes?

A. No, they are not. If you will turn it upside down, one of those looks like 284, which is your exhibit number.

[Laughter.]

2094 Q. I grant that it does, but that just happens to be a coincidence.

Justice STEPHENS. The witness apparently implies, Mr. Knuff, that your handwriting looks like shorthand. [Laughter.]

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit No. 285, the same being a letter dated May 2, 1932, addressed to the United States Gypsum Company, Attention of C. F. Henning, and signed by Atlantic Gypsum Products Company, Inc.—L. I. Neale, Vice President.

A. Yes, sir.

Q. Is that your signature?

A. Yes, it is.

Mr. KNUFF. We offer in evidence Government's Exhibit 285.

Mr. BROMLEY. And we have only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation as to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 285, was received in evidence.)

By Mr. KNUFF.

Q. Was Structural Gypsum Corporation a licensee of USG at this time?

A. I don't know, but I think not.

2095 Q. Well, your letter states that they were a non-licensee, does it not?

A. Yes.

Q. Now you were making inquiry of United States Gypsum Company to find out the price that Kelly Plasterboard Company was selling gypsum products to the Structural Gypsum Corporation at, were you not?

A. Yes, sir.

Q. What did you want that information for?

A. I must have had some suspicion that it was not, perhaps, a correct price. I don't recall the incident.

Q. And you will notice that you made inquire as to whether or not the minimum of 5,000 square feet for pick-ups was being enforced in regard to the sales of patented board by the Structural Gypsum Corporation. Now do you notice that?

A. Yes, sir.

Q. Will you tell us what the purpose of that inquiry was?

A. Well, I can't say, at this time, what was the purpose of the inquiry at that time. I would surmise that I felt it was information which was proper for me to have.

Q. What did you expect, if you expected anything, the United States Gypsum Company to do in case Structural Gypsum was selling less than 5,000 square feet?

2096 A. I don't know that I expected them to do anything.

Q. Do you want us to understand that you didn't expect USG to take any action at all on the letter?

A. I am sure I don't know, Mr. Knuff, at this remote period from that occasion, but I should imagine, as I read this thing, that I wanted to be informed of the facts in reference to the pick-ups.

Q. And can you tell us why you wanted to know about Structural's policy?

A. Structural was selling board in this area.

Q. Did you think that Structural, being a non-licensee, that you could get your information from the licensor?

A. I thought possibly, or I must have thought, that the licensor, through the party who had made the sale, could get the information. That was the natural place to look, I should think.

Q. You will notice that you are using the words, "the licensor's bulletin of May 12 is being enforced in regard to sales of patented board by Structural Gypsum". Did you expect the United States Gypsum Company to enforce that bulletin of May 12?

A. No, I wouldn't expect so.
Q. What is that?
A. I wouldn't expect so, as I look back at it now.
Q. Then all that you wanted was just information?
2097 A. Well, I don't know, Mr. Knuff, just what I may have wanted.
Q. Then do you mean to say that you haven't any present recollection of the purpose of that letter?
A. Other than I have stated.
Q. At that time there was a regulation in effect limiting or prescribing, rather, a minimum quantity of 5,000 square feet for pick-ups in the metropolitan area?
A. I assume so, from reading this letter.
Q. And did you have any information that Structural was selling quantities less than 5,000 square feet?
A. I don't know, at this time, Mr. Knuff. This happened 14 years ago, or something like that—11 years ago. It was my business, being in charge of sales, to know as much as I could about what all my competitors were doing.
Q. Well, why didn't you write to Structural? They would know their policy better than you.
A. One doesn't always find out about prices by writing direct to the company that makes the price.
Q. What is that?
A. One doesn't always find out about a competitor's prices by writing to that company. [Laughter.]
Q. It wasn't a question of price, was it? It was a question of quantity.
A. Well, of quantity, then.
2098 Q. Did you undertake to make any investigation, any other independent investigation? You were located in New York at that time.
A. I don't remember, Mr. Knuff.
Q. You don't remember?
A. No. It was just an incident in a busy life.
Q. I show you, sir——
Mr. BROMLEY (interposing). Before you leave the subject don't you have an answer to the letter, Mr. Knuff?
Mr. KNUFF. If I had it, I would have it here.
Mr. BROMLEY. I take it you mean you don't have the answer?
Mr. KNUFF. There may be an answer over in the Department of Justice someplace, but I have never seen the answer to it.

Justice GARRETT. What about this Structural Gypsum Corporation? That hasn't been referred to as a company engaged in this——

Mr. KNUFF (interposing). Structural was not a licensee. They were what we consider a manufacturing distributor, that is, they manufactured other gypsum products but bought board from licensees of USG at a discount.

Mr. BROMLEY. This was one of the manufacturing distributors whose prices were alleged to have been fixed illegally, and which issue was tried in the criminal
2099 case, and the letter to which I refer was an exhibit in the criminal case, as these gentlemen must know by this time.

Mr. KNUFF. Apparently there is some confusion as to Structural. Maybe this witness can clear it up.

Justice GARRETT. I think I understand it.

Justice STEPHENS. No, that is clear now. Go right ahead.

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit No. 286, the same being a letter or memorandum, dated March 30, 1933, having on the left-hand corner the typed names, "W. P. Fuller", and directly below that "L. I. Neale", and directly below that "Leon H. Fleming", and signed by Atlantic Gypsum Products Co. Inc., L. I. Neale, Vice President. Will you please look at that exhibit?

Is that your signature, sir?

A. It is.

Mr. KNUFF. I offer in evidence Government's Exhibit No. 286.

Mr. BROMLEY. We have only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 286, was received in evidence.)

2100 By Mr. KNUFF.

Q. Was Leon H. Fleming an employee of the Atlantic Gypsum Products Company, sir?

A. He was an employee of F. B. Lawton, Inc.

Q. And who was F. B. Lawton, Inc.?

A. He was a man stationed in Providence, Rhode Island, who sold our products.

Q. That is, Atlantic Gypsum Products Company had a dealer in Providence by the name of F. B. Lawton, Inc.; is that correct?

A. I should not describe him as a dealer, no.

Q. What was he?

A. He was a sales agent.

Q. Were the sales made to the F. B. Lawton Company?

A. No.

Q. Did he act as agent for Atlantic Gypsum Products Company?

A. He did.

Q. Was he on the Atlantic Gypsum Products Company payroll?

A. I don't recall the method of his remuneration. The goods he sold was the property of the Atlantic Gypsum Products Company.

Q. And were they consigned to him?

A. No, sir.

2101 Q. Were they shipped on his order?

A. He acted as order-taker for the Atlantic Company.

Q. Then he was an employee, F. B. Lawton, Inc., was an employee of the Atlantic Gypsum Products Company; is that what you mean?

A. Yes, I think that is the way to state it.

Q. And do you know how he was paid?

A. I just said that I don't recall the exact manner of his remuneration.

Q. Was it on a commission basis or on a salary basis?

A. I think it varied at different times, Mr. Knuff.

Q. What do you mean by "it varied at different times"?

A. I mean I think there were periods when he was on a salary basis, and there were other periods when he was on a commission basis.

Q. Now we are speaking of Mr. Lawton?

A. No, we are talking about F. B. Lawton, Inc.

Q. That is right. You said "he" was, and I assumed you were talking about an individual.

A. That was a slip, I meant the corporation.

Q. The corporation was the selling agent for the Atlantic Gypsum Products Company in Providence, Rhode Island, is that correct?

A. That is correct.

Q. And Leon H. Fleming was an employee of

2102 F. B. Lawton, Inc.?

A. That is correct.

Q. Do you know how he was paid?

A. I think he had a straight salary.

Q. Does this letter refresh your recollection as to what occurred at the licensee meeting that is referred to there?

A. It doesn't refresh my recollection of a particular meeting. It does call to mind, though, that this matter was brought up to me for an answer.

Q. At some meeting at or about this time, this matter was brought up, is that correct?

A. I would assume so, yes.

Q. And who attended the board licensee meeting, other than yourself and Mr. Henning, if you recall?

A. I don't even recall the meeting.

Q. Had you previously attended board licensee meetings?

A. I would say so, yes, sir.

Q. And do you recall who attended any of the previous meetings?

A. Not specifically, no.

Q. What companies were represented?

A. I can't say. I presume that the various licensees were represented by someone, but whether all were always present, I don't remember.

2103 Q. How often were these licensee meetings held?

A. I am sure I don't recall.

Q. Was it a matter of every month?

A. I doubt if it was as often as that.

Q. Would you say as often as once every 3 months?

A. I couldn't say.

Q. As often as once a year?

A. I would think oftener than that.

Q. Well, then, between once a year and once every 3 months, can you give us something definite as to that?

A. I am sorry, but I can't.

Q. I see. And do you recall whether representatives of USG attended those meetings?

A. I can't imagine a meeting of board licensees being held without them.

Q. That is right. And your company, of course, was represented by yourself, and was there any other person?

A. I think Mr. Fuller probably attended some of them. I don't know that the company was always represented at these meetings.

Q. When did you first begin to attend licensee meetings, if you recall?

A. I don't.

Q. Was it as early as 1929?

A. I couldn't say, Mr. Knuff. I don't remember
2104 when the first meeting was held.

Q. But you do say that you had attended meetings previous to the date of this memorandum?

A. It is my general recollection that I did, yes. I would say so.

Q. Was National represented at those meetings?

A. I don't remember who was there at any special meeting, any individual meeting.

Q. You can't recall whether any other companies, other than yours and USG, were ever at any of these meetings, is that correct?

A. I am sure other companies were represented.

Q. But you don't recall who they were?

A. No, I don't.

Q. No, I don't.

Q. Who was the Board Survey Company?

A. I am pretty hazy on that. As near as I can remember, it was an organization which sought to see if the license was being complied with.

Q. Now in the second sentence of the first paragraph, you say, "You will recall that some time ago the Board Survey Company asked us about Fleming's remuneration". What occasion were you recalling to Mr. Fuller's attention at that time?

A. I don't know that I was recalling any occasion. I was evidently reminding him of the request for informa-
2105 tion by the Board Survey Company.

Q. You will notice your words are, "'You will recall". Now what were you asking him to recall?

A. That we had been asked for information in reference to Fleming's status.

Q. And that you "replied that Fleming was an employee of F. B. Lawton, Inc."

A. Yes, sir.

Q. Now in the third paragraph of the letter, you say, "The question which was asked about Fleming is also asked about the salesmen of the Oakfield Gypsum Products Corp. and the Structural Gypsum Corp. both of which companies purchase board from Kelley." Do you notice that?

A. Yes, sir.

Q. Was that same question raised?

A. The letter so states.

Q. And is that your present recollection?

A. I have no recollection in reference to it.

Q. Well, do you care to make any correction, then, to the third paragraph?

A. How can I make a correction about something I don't recall?

Q. Then you don't care to make any correction to what is contained in that third paragraph?

A. I answered that, Mr. Knuff.

2106 Q. I don't believe you have answered the question.

A. Why should I wish to correct it? It is a letter that I wrote in 1933. Presumably what I said was correct.

Mr. KNUFF. If Your Honor pleases, I am not the witness, and the witness is asking me questions.

Justice STEPHENS. That is very true, but I think, Mr. Knuff,—and I think my colleagues agree with me,—that you have practically asked the witness to do that, because he has stated frankly that he has no recollection whatever of the facts stated in the third paragraph. Yet you ask him if he wants to correct it. He is almost bound to say to you, "How can I correct it if I don't have any memory about it?"

By Mr. KNUFF.

Q. Who was the Tomkins-Rockwall Corporation, sir?

A. That was a selling agency.

Q. Of what company?

A. Of the Atlantic Gypsum Products Company.

Q. Was board sold by the Atlantic Gypsum Products Company to the Tomkins-Rockwall Corporation?

A. No, sir.

Q. What were the arrangements that Atlantic Gypsum Company had with the Tomkins-Rockwall Corporation?

A. The Tomkins-Rockwall Corporation acted as a sales agency for the products of Atlantic.

Q. And how were they paid?

2107 A. I think on some basis of sales made.

Q. A commission?

A. I don't remember specifically, Mr. Knuff.

Q. Now in case the Tomkins-Rockwall Corporation sold board to an individual, and that individual failed to pay the bill, who stood the loss, Atlantic or Tomkins-Rockwall?

A. The Atlantic.

Q. The Atlantic Gypsum Products Company was the loser in a transaction of that kind, is that what you mean to say?

A. Yes, sir.

Q. And was the same thing true with the F. B. Lawton Company?

A. Yes, sir.

Q. In other words, it is your understanding that the F. B. Lawton Company and the Tomkins-Rockwall Corporation were not *del credere* agents?

A. Well, you will have to pardon my ignorance. I don't know the meaning of that word.

Justice STEPHENS. You are not expected to know legal terminology.

By Mr. KNUFF.

Q. Who was the Oakfield Gypsum Products Corporation?

A. That was a company located in Oakfield, New York.

Q. Were they sales agents for Atlantic Gypsum Products Company?

2108 A. No, sir.

Q. And did they sell Atlantic Gypsum Products Company board?

A. No, sir, not that I know of.

Q. Was Structural a sales agent for Atlantic Gypsum Products Company?

A. No, sir.

Q. And, as your letter states, both Structural and Oakfield, as was your understanding at that time, purchased board from Kelley Plasterboard Company; is that correct?

A. Both Structural and Oakfield?

Q. Yes.

A. I don't remember from whom Oakfield purchased board.

Q. The third paragraph of your letter—does that refresh your recollection as to where they purchased their board?

A. It so states.

Q. I show you what has been marked for Identification as Government's Exhibit 287, the same being a letter dated August 20, 1934, addressed to L. I. Neale, and signed by C. Henning, Vice President. Did you receive that letter, Mr. Neale?

A. I presume so.

Q. I notice on the upper righthand corner of the letter, there is a received stamp that says—"Received

2109 Aug 22 1934—A. G. P. Co.—New York Sales". Is that the receiving stamp that was used in your office at that time?

A. Yes, sir.

Mr. KNUFF. We offer in evidence, if Your Honors please, Government's Exhibit 287.

Mr. BROMLEY. And we make only the usual objection.

Justice STEPHENS. It may be received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 287, was received in evidence.)

Mr. KNUFF. I wonder if I may have about two minutes——

Justice STEPHENS (interposing). We will take a five-minute recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Mr. BROMLEY. May it please the Court, in so far as the past testimony in the record concerning resale price fixing is concerned, and so far as any future testimony that may be introduced into the record on that subject is concerned, may the defendants have a general objection to it on the ground that it is immaterial and irrelevant, because the precise issue has heretofore been determined as between the parties to this suit.

2110 Justice STEPHENS. Does that go to the class of testimony concerning which the Court ruled day before yesterday?

Mr. BROMLEY. No, sir, it only goes to the class of testimony as to which this witness has testified this morning, in so far as there has been a reference to the resale prices of manufacturing distributors, such as the Structural Gypsum Corporation.

Justice STEPHENS. You object to it on what ground?

Mr. BROMLEY. On the ground that it is immaterial and irrelevant, because it has heretofore been determined as between these parties.

Justice STEPHENS. You mean in the criminal proceeding?

Mr. BROMLEY. Yes, sir. I make the objection, being aware of the fact that we have an affirmative defense in the answer, but not being able to answer the legal question myself as to whether an objection is necessary. I believe it not to be necessary, but lest it be deemed at some future time that the defendants have waived something by not objecting to it, I ask permission for the record to show that the defendants, and all of them, may have a general objection to this line of testimony.

Justice STEPHENS. You have a right to make the objection. I just want to be sure I understand it before ruling on it.

Is it on the theory of *res adjudicata?*

2111 Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. Then it is overruled. The record may show the objection.

Mr. KNUFF. Will you show the witness Exhibit No. 286, please?

(Exhibit 286 handed to the witness.)

By Mr. KNUFF.

Q. Was F. B. Lawton, Inc., mentioned in Exhibit 286, on the payroll of the Atlantic Gypsum Products Company, or was F. B. Lawton as an individual on the Atlantic payroll?

A. It is my recollection that F. B. Lawton, Inc., was.

Q. F. B. Lawton, Inc., was on the payroll of the Atlantic Gypsum Products Company?

A. That is my present recollection.

Q. And that Mr. F. B. Lawton individually was an employee of F. B. Lawton, Inc.?

A. Yes, sir.

Q. That is your present recollection?

A. Yes.

Q. Now is that true, likewise, of the Tomkins-Rockwall Corporation?

A. I don't think it was quite the same, as I recall it.

Q. What is your recollection as to the status of the Tomkins-Rockwall Corporation?

A. As I remember it, the Atlantic Gypsum Prod-
2112 ucts Company had a controlling interest in that corporation.

Q. That is, they had a stock interest in the Tomkins-Rockwall Corporation?

A. That is my recollection.

Q. The Tomkins-Rockwall Corporation and the Atlantic Gypsum Products Company were affiliated corporations, would you say that is correct?

A. Well, in that sense of the word.

Q. The arrangemetns that the Atlantic Gypsum Products Company had with the F. B. Lawton, Inc., and the Tomkins-Rockwall Corporation, were they oral or were they in writing, if you know?

A. I think the one with the Tomkins-Rockwall Corporation was in writing. I don't recall as to the Lawton arrangement, whether it was in writing or verbal.

Q. What happened, if you know, to the Atlantic Gypsum Products Corporation? Are they in existence today?

A. No, sir.

Q. Do you know which of the defendants purchased the assets or the stock of the Atlantic Gypsum Products Company?

A. The National Gypsum Company.

Q. Do you know when that was?

A. In 1936.

Q. Now then, referring to Exhibit 287, I believe you did state that you received that letter from Mr. Henning?

2113 A. I think so, yes.

Q. Do you recall the licensee meeting of May 23, 1934, referred to in the first paragraph of Exhibit 287?

A. Not specifically.

Q. Do you have any recollection as to who attended that licensee meeting?

A. I don't recall the particular meeting, Mr. Knuff.

Q. You don't?

A. No, sir.

Q. I notice at the bottom of the letter the request for you to give to Mr. Henning your comments or criticisms; do you notice that?

A. Yes, sir.

Q. Did you comply with that request, if you remember?

A. I don't remember.

Q. You haven't any recollection of it?

A. No, sir.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 288, the same being a letter dated September 6, 1934, addressed to the Atlantic Gypsum Products Company, Attention L. I. Neale, and signed C. Henning, Vice President. Do you recall receiving that letter?

A. I don't recall receiving it, no, sir.

Q. I notice there is a receiving stamp on the upper right-hand corner of that letter. Is that the stamp that

2114 your New York office used on incoming mail?

A. It is.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 288.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received in evidence, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 288, was received in evidence.)

2115 By Mr. KNUFF.

Q. Does this letter serve to refresh your recollection of the matters that were discussed in this letter?

A. It serves to remind me of the proposition to license manufacturers to manufacture reflective board, yes, sir.

Q. You say your recollection to that extent is refreshed?

A. Yes, sir.

Q. Do you know who the contemplated licensees of this reflective board license were going to be?

A. I don't recall, but I think they must have been the licensees already in existence on other patents.

Q. Do you know whether or not your company did become a licensee of USG to manufacture the so-called metallized plaster board?

A. I don't remember.

Q. For your information it is in evidence in this case, Mr. Neale, that the Atlantic Gypsum Products Company became a licensee of United States Gypsum Company on the 30th of November, 1934.

Do you recall whether or not you had any conversation with other manufacturers concerning the metallized board license agreement?

A. I don't recall any specific conversation.

Q. Do you recall any general conversation?

A. I recall talks with Mr. Fuller about the mat-

2116 ter. I don't recall talks with other manufacturers.

Q. I show you what has been marked for identification as Government's Exhibit No. 289, the same being a memorandum, dated September 6, 1934, addressed to Mr. L. I. Neale, and typed thereon is the name "Willard P. Fuller". Will you please read that?

A. Yes.

Q. About this time did your company use, for inter-office communications, memoranda forms similar to the one that has been marked Government's Exhibit 289?

A. Yes, sir.

Q. And the form that this memorandum appears in is the usual form that was used for inter-office memoranda, is that correct?

A. Yes, sir.

Q. I notice after the name "Willard P. Fuller" there is a check mark—do you notice that?

A. Yes, sir.

Q. Do you know what that indicates?

A. No, I do not.

Q. Do you know where this memorandum originated, in what office, in your New York office or in some other office?

A. Presumably it was written in the Boston office.

Q. And it was addressed to you?

A. It is addressed to me.

2117 Q. And what was Mr. Fuller's habit as to signing memoranda of this kind, did he always sign them or sometimes have his name typed on them?

A. Frankly I don't recall. I imagine there were some of both.

Q. At that time you were the vice president in charge of sales?

A. Yes, sir.

Q. And the subject of this memorandum would come under your jurisdiction, would it not?

A. Yes, sir.

Q. Do you recall receiving this memorandum?

A. Not the receipt of this particular memorandum, no, sir.

Q. Do you notice the wording contained in the memorandum, and is that the style that Willard P. Fuller was accustomed to use?

A. I have no reason to doubt that he wrote this letter.

Q. You haven't any reason to doubt it at all?

A. No, sir.

Mr. KNUFF. If Your Honor pleases, we offer in evidence Government's Exhibit 289.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received in evidence, subject to the usual reservation concerning declarations of alleged co-conspirators.

2118 (The document marked as Government's Exhibit No. 289 was received in evidence.)

By Mr. KNUFF.

Q. I now show you what has been marked for identification as Government's Exhibit 290, the same being a letter dated November 30, 1934, addressed to L. I. Neale, vice president, and signed C. Henning, vice president. Will you please look at it?

A. Yes, sir.

Justice STEPHENS. What did you say the date of the metallized board agreement was?

Mr. KNUFF. The metallized board agreement was dated November 30, 1934.

By Mr. KNUFF.

Q. Did you receive Government's Exhibit 290, Mr. Neale?

A. I don't remember.

Q. You will notice on the upper right-hand corner the receiving stamp, "A. G. P. Co.—New York Sales". Is that the stamp that was used in the New York office for incoming mail?

A. It is.

Mr. KNUFF. I offer in evidence Government's Exhibit 290.

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received, subject to the usual
2119 reservation concerning declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 290 was received in evidence.)

Justice STEPHENS. You haven't identified Mr. Henning's signature. Do you want to do that?

Mr. KNUFF. I don't know whether this witness can identify his signature or not.

By Mr. KNUFF.

Q. Do you know Mr. Henning's signature?

A. In a general way.

Q. Would you say that that is his signature?

A. I couldn't swear that he actually wrote it. It looks familiar.

Q. Notice in the first sentence of the second paragraph where Mr. Henning says, "I expect to be in New York Wednesday, December fifth, and will go over this entire matter with you". Do you recall whether or not Mr. Henning did meet with you on or about December 5th, as he states in the last paragraph?

A. I do not recall.

Q. You haven't any recollection?

A. No.

Q. I show you what has been marked for identification as Government's Exhibit No. 291, the same being
2120 a memorandum, dated the 30th day of November, 1934, addressed to L. I. Neale, from Mr. R. H. Hallowell, on the subject of nickel-plated gypsum lath, and at the bottom of the memorandum appear the initials "R.H.H."

Justice STEPHENS. While the witness is considering the exhibit, let the Court make an inquiry, Mr. Knuff, concerning Exhibit 289, the third line, where there is a reference

to "Alfol patents". What is meant by "Alfol patents"? Is that a trade-name for the metallized board?

Mr. KNUFF. My understanding of "Alfol" is that that was——

Justice STEPHENS (interposing). It sounds like an abbreviation for aluminum foil.

Mr. KNUFF. I believe that was a separate corporation which, I think, owned the basic patent on metallized board, and USG was a licensee of Alfol—is that correct?

Mr. BROMLEY. Yes, exclusive licensee in certain fields, and there were several patents.

In other words, as I understand it at the moment, the reference to "Alfol patents" is a reference to the patents under which the so-called foil or metallized board was made, which patents were licensed by USG to some of the licensees.

Justice STEPHENS. Thank you.

Mr. BROMLEY. Plus some other patents.

By Mr. KNUFF.

Q. Have you looked over Exhibit 291, sir?

2121 A. Yes, sir.

Q. You will notice that the exhibit bears the receipt stamp of "A. G. P. Co.—New York Sales".

A. Yes, sir.

Q. Is there any doubt in your mind that that came to the New York office?

A. No, sir.

Justice STEPHENS. Who is Mr. Hallowell?

Mr. KNUFF. I was coming to that.

We offer in evidence, if your Honor pleases, Government's Exhibit No. 291.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 291 was received in evidence.)

By Mr. KNUFF.

Q. Mr. Neale, who is R. H. Hallowell?

A. New England Division sales manager.

Q. He was located in Boston?

A. Yes, sir.

Q. And the "Willard" that is referred to in the first paragraph of the letter is Mr. Fuller?

A. Undoubtedly.

2122 Q. Had you any conversation with Mr. Fuller at or about this time concerning the purchase of metallized board?

A. I don't recall any specific conversation.

Q. Well, do you recall any general conversation?

A. I can recall talking to him about board. Whether it was just at this time, or not, I don't remember.

Q. I am particularly interested at this time in the metallized board. Do you recall any conversation that you had with Mr. Fuller about purchasing metallized board either from National or USG or from any other company?

A. I don't recall any definite conversations about the purchase of metallized board. I do recall talking to him about the board license.

Q. The metallized board license?

A. Yes, sir.

Q. Can you state your best recollection as to what that conversation was?

A. It consisted of whether or not it was desirable to take such a license.

Q. And you haven't any recollection, then, as to whether or not you did talk about purchasing this board from USG, or National?

A. I don't recall anything specifically.

Q. Will you tell us why you felt it was desirable to take out a license for this metallized board? Probably
2123 that question is not worded the way it should be worded. Will you tell us what your conversation was concerning the advisability of taking out a metallized board license contract?

A. I can't report on my conversation. I can give you what I feel was my point of view in reference to it at that time.

Q. What was your point of view at that time?

A. That it was desirable to have such a license arrangement.

Q. There was a sales demand for it, was there?

A. There was an increasing sales demand for that type of board.

Q. Now did your company subsequently manufacture metallized board?

A. As I recall it, they did.

Q. When did they begin to manufacture it, if you recall?

A. I don't remember.

Q. Do you recall whether or not your company purchased metallized board from any other company?

A. I think there were some purchases made, yes, sir.

Q. From what companies?

A. I can't say definitely. They may have been from both USG and from National, I am not certain.

Q. I direct your attention to the fact that the metallized board license was signed on the 30th of November, 1934. Now subsequent to that time, did you receive
2124 bulletins from USG concerning the price at which this board should be sold?

A. I would say yes.

Q. And can you tell us when the Atlantic Gypsum Products Company started to manufacture board?

A. No, I cannot, I don't remember.

Q. Well, you left the Atlantic Gypsum Products Company in 1936?

A. Yes, sir.

Q. Now had they been manufacturing board for a year, or for two years, before you left the company?

A. I don't remember for how long, Mr. Knuff. I do recollect that they had difficulties in manufacturing.

Q. Difficulties in getting their plant into operation?

A. To manufacture this particular product, yes.

Q. And pending the elimination of those difficulties, did Atlantic Gypsum Products Company purchase board from other licensees?

A. I don't know that they ever did eliminate all of the difficulties.

Q. Well, pending your endeavor to eliminate the difficulties, did Atlantic Gypsum Products Company purchase metallized board from other licensees?

A. It is my recollection that they did, yes, sir.

Q. Can you tell us the approximate quantity that they bought?

2125 A. No.

Q. Now did you have more than one price list that you issued to your salesmen governing the sales of metallized board?

A. Well, if there were any changes in the price, the salesmen were of course advised.

Q. Well, at any one time did you have more than one price list in your salesmen's hands governing the sale price of metallzed board?

A. I don't recall.

Q. Did you have a price list for board that you manufactured and another price list for board that was purchased from other companies?

A. I don't recall that we did.

Q. What is your best recollection, that you just had one price list?

A. That would be my recollection.

Q. And that price list was the price that was fixed by the USG bulletins, is that correct?

Mr. BROMLEY. I object to that as calling for a conclusion, and incompetent, and leading.

Justice STEPHENS. Well, it is leading, and it is sustained as leading. I don't quite see the point of your objection that it is a conclusion that this price list they sent out was the USG price list.

2126 Mr. BROMLEY. He said, "was the price that was fixed by the USG bulletins".

Justice STEPHENS. I misunderstood the question.

Mr. BROMLEY. We didn't fix any resale price on board purchased by licensees and the bulletins in effect said so.

Mr. KNUFF. Read the question.

(The pending question was read by the reporter.)

Justice STEPHENS. Well, what I thought you were asking, and the reason I ruled or inquired as I did was that I thought you were asking whether or not this price list that you sent out was the USG bulletin.

Mr. KNUFF. That is what I meant.

Justice STEPHENS. Do you object to that?

Mr. BROMLEY. Not if the question is—was the price list which he sent out our bulletin? I don't object to that.

Justice STEPHENS. The question will be treated as such a question, and the objection is treated as withdrawn.

Mr. KNUFF. Suppose I rephrase the question.

Justice STEPHENS. All right.

By Mr. KNUFF.

Q. The prices that you sent out to your salesmen, were they the same as the prices contained in the USG foil board license bulletins?

Mr. BROMLEY. I object to that as incompetent because the bulletins are the best evidence. I don't think he

2127 can prove it that way.

Mr. KNUFF. I am asking now as to the price lists that he sent out to his salesmen. The bulletins themselves are in evidence, but I am directing the attention of the witness to the prices that he sent to his salesmen, and I am asking him if they were the same as the prices that were contained in the USG bulletins?

Mr. BROMLEY. As to that, the Atlantic Gypsum Products Company price bulletins are the best evidence.

Justice STEPHENS. If the best-evidence rule is invoked, that objection is well taken.

Mr. KNUFF. Here we have on the witness stand, if your Honor pleases, the sales manager of the Atlantic Gypsum Products Company. We are not asking to prove the contents of any specific bulletin——

Justice STEPHENS (interposing). As your question is phrased, you were.

Mr. KNUFF. Not any specific one. I am asking if the prices that he gave to the salesmen were the same as those contained in the price lists furnished under the bulletins of the U. S. Gypsum Company.

Justice STEPHENS. Well, if you are asking either with respect to a specific price list, meaning a document, or all price lists, meaning documents, containing the prices on products, sent out, then they should be produced
2128 under the best-evidence rule. If you are simply asking this witness whether the company made the same charges as were stated in the USG bulltins, if he knows, that is probably unobjectionable.

Mr. KNUFF. Then I will phrase my question that way.

Justice JACKSON. That is what you want to get at, isn't it?

Mr. KNUFF. Yes, exactly, your Honor.

Justice STEPHENS. Is there any objection to that, Mr. Bromley?

Mr. BROMLEY. No.

Mr. KNUFF. Will you read the Court's question to the witness, please?

(The reporter read the record as follows:

"If you are simply asking this witness whether the company made the same charges as were stated in the USG bulletins, if he knows, that is probably unobjectionable.")

Justice STEPHENS. Do you understand that, Mr. Neale?

The WITNESS. I think so.

I have no recollection of any specific sales lists or charges issued to salesmen at any given time on any product. Therefore I can't say that I have knowledge that they were identical with the U. S. Gypsum Company bulletins.

By Mr. KNUFF.

Q. Did I understand you to say that your salesmen were only given one price list for foil board at any one
2129 particular time?

A. Well, you mean by that question did they have two prices, and they could sell by either of two prices?

Q. I mean by that, sir, when you were telling your salesmen to sell 3/8 inch wallboard of a certain dimension, did they have more than one price that that board could be sold at in any one particular locality?

A. I would say not.

Q. Did your company adhere to the price bulletins that USG furnished you?

Mr. BROMLEY. I object to that unless it is limited to board manufactured by this company.

Mr. KNUFF. No, your Honor, if your Honor pleases, the license agreement that is contained in the complaint under Paragraph IV, at page 112, provides:

"It is expressly understood and agreed that the indivisible and non-exclusive rights, licenses and privileges aforesaid are granted, and they are hereby accepted, upon the express condition that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights, licenses and privileges granted hereunder shall continue, the minmum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said
2130 Roos Patent or any of the said patents set forth in Schedule A", and so forth.

Justice STEPHENS. Well, doesn't this raise the same question—perhaps you are making this examination to amplify and protect your record under your proposed offer of proof—but doesn't this raise the same question or does it not, that the Court ruled on day before yesteday with respect to the issue concerning resale prices of board purchased from each other by the various defendants?

Mr. KNUFF. I don't think it is quite the same question, your Honor. The question that your Honor ruled on the other day was concerning the resale of board manufactured under the so-called Hite and Haggerty patents. This is board that was sold under the metallized lath agreement.

Justice STEPHENS. In other words, the complaint does contain a charge that there was price fixing on metallized board sold by USG to the other defendants?

Mr. KNUFF. Well, the complaint in paragraph 44 definitely charges violation of the Sherman Act——

Justice STEPHENS (interposing). Please answer my question, Mr. Knuff. We all understand that. Does the com-

plaint charge price fixing on the metallized board not manufactured by the various defendants under licenses and sold under those licenses, but upon board purchased by the defendants from each other?

Mr. KNUFF. Under paragraph 44 we think that
2131 it does, but then at the same time there is a provision in paragraph 114, which Mr. Steffen has called to my attention, which reads as follows:

"At the time of the execution of said license agreements"——

Justice STEPHENS (interposing). What page are you reading from?

Mr. KNUFF. Page 29, your Honor.

"'At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board, but all of said licensees, except National, intended, as U.S.G. well knew, to purchase metallized board from U.S.G. or National for resale to dealers and consumers. Notwithstanding said facts, U.S.G. required its licensees to execute said agreements in order to be enabled to purchase metallized board for resale to dealers and consumers."

So there is that specific paragraph.

Justice STEPHENS. What do you say to that, Mr. Bromley?

Mr. BROMLEY. I have no doubt but what the complaint as to metallized board contains the direct charge that we fixed the price on board that was purchased from us by other licensees. The vice that I find in Mr. Knuff's position is that he picks out the license agreement from which he started to read, on page 112, and is now arguing that that license agreement is illegal, per se, on its face, and he is suggesting that its provisions expressly give us the
2132 right to fix the price on board which was purchased from us.

Now this Paragraph IV from which he read does not have the "second parties" point in it. That mistake is not carried into this. His argument is that under paragraph (a) the legal effect of the agreement is to give us the right to fix prices of metallized board sold by licensees regardless of whether they manufactured it or not. But he conveniently overlooks the very next paragraph, paragraph (b), which specifically covers it and says:

"In the event Gypsum Company shall exercise the right thus reserved, namely, to determine and fix at any time, and to change from time to time, such minimum price or

prices, it shall notify Licensee of its election to exercise such right, and shall include in such notice, or accompany such notice by, a statement of such minimum price or prices at which Licensee shall or may sell said plaster board having a metallized surface, manufactured by Licensee, and thereafter shall give Licensee written or telegraphic notice of any change in such price or prices; and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any plaster board having a metallized surface manufactured by said Licensee embodying the inventions and improvements set forth", and so forth.

2133 Now I say that in the face of that explicit provision, and especially in view of the fact that there is no charge in the complaint that the agreement is illegal per se because it attempts to fix resale prices, it is immaterial and improper to make that argument now.

Justice STEPHENS. What puzzles the Court is that we seem now to be arguing about what agreements mean, which is a legal question of interpretation of the agreements, whereas the question is as to whether or not the witness can answer the question. I confess that I am confused about the situation.

Ask the witness the question that you want answered.

Mr. KNUFF. Cannot we take that up after the noon recess?

Justice STEPHENS. I would prefer to have the question explicitly before us so that we can think about it during the noon adjournment.

Mr. KNUFF. Very well.

The prices that you furnished your salesmen, were they the same as the bulletin prices that were contained in the license bulletins of USG?

Mr. BROMLEY. I object——

Justice STEPHENS (interposing). That has already been answered "yes".

Mr. KNUFF. Well, if it has been answered "yes", that is all I want.

Mr. BROMLEY. No, your Honor, it has not been
2134 answered "yes". I objected to that under the best-evidence rule, and you sustained it.

Justice STEPHENS. You are correct, I am mistaken about that.

Mr. BROMLEY. Then you asked a question which was clearly proper and which I did not object to, and he said he couldn't recall.

Justice STEPHENS. Then there was a question following.

Mr. BROMLEY. Yes. If we could find that question we might reflect upon it over the lunch hour.

Justice STEPHENS. As I understand it, Mr. Bromley, you do concede that the complaint charges that:

"At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board, but all of said licensees, except National, intended, as U.S.G. well knew, to purchase metallized board from U.S.G. or National for resale to dealers and consumers. Notwithstanding said facts, U.S.G. required its licensees to execute said agreements in order to be enabled to purchase metallized board for resale to dealers and consumers", and so forth.

And yet you seem to argue that because of the second paragraph under IV in the Appendix, paragraph (b), page 112, that no such charge is made.

Mr. BROMLEY. No, I do not, I admit the charge
2135 is made. All I object to is the question which assumes that these prices, so charged, the prices of purchased board, were fixed either in the license agreement or in the price bulletins, because both the license agreement and the price bulletins are perfectly clear that the only prices which were fixed are the prices of metallized board manufactured and sold by the licensees, and these questions constantly assume that the licenses and the bulletins fixed the prices of purchased board, which they did not.

Justice STEPHENS. I see your point. Your contention is that the license agreements speak for themselves and show, so far as the license agreements are concerned, that they fix the prices only upon the board manufactured and sold by the licensee.

Mr. BROMLEY. And that that was true likewise by the bulletins.

Justice STEPHENS. I see your point. Perhaps the question can be looked up during the recess by the reporter, and then we can rule more clearly when we reconvene. I am afraid I haven't been able to understand the reasons for the objection until this moment:

(Thereupon, at 12:20 o'clock p.m., a recess was taken until 1:50 o'clock p.m. of the same day.)

2136 AFTERNOON SESSION

(The trial was resumed at 1:50 o'clock p.m.)

Justice STEPHENS. The Court forgot to inquire, Mrs. Gillette, whether these lost photostats of exhibits which we were discussing at the opening of Court this morning, should by any chance have gotten into the vault?

Mrs. GILLETEE. There is nothing on our shelf there, your Honor.

Justice STEPHENS. Have counsel on either side of the case been able to discover them during the noon hour?

Mr. BROMLEY. All we have been able to discover is one set of the George M. Brown exhibits which we had understood were given to us for our own use—and nothing else.

Justice STEPHENS. If I may be allowed to relate a personal episode—I was sitting in the Supreme Court room one time, waiting to argue a case in the United States Supreme Court, and another lawyer was on his feet arguing a case and trying to explain two conflicting regulations concerning a War Risk Insurance policy, and was not making much of a job of it. Chief Justice Hughes said, "We still don't understand these regulations; won't you try to make them clearer?"

And counsel said, "Frankly, your Honor, I am confused about them myself."

The Chief Justice said, "Well then, I suppose you submit the confusion to the Court". [Laughter.]

2137 And he, with all the other Judges, laughed.

Now we will reverse the process here, we will submit the confusion to you gentlemen. [Laughter.]

But before doing so, perhaps I can aid a little in clearing it up by stating what seems to us to be the difficulty.

Paragraph 114 of the complaint charges:

"At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board, but all of said licensees, except National, intended, as U.S.G. well knew, to purchase metallized board from U.S.G. or National for resale to dealers and consumers. Notwithstanding said facts, U.S.G. required its licensees to execute said agreements in order to be enabled to purchase metallized board for resale to dealers and consumers. Throughout the period from the execution of said license agreements to the date of filing this complaint, U.S.G. has determined and fixed the minimum prices and terms and conditions of sale governing the sale by its licensees of metallized board, with the knowledge, and not-

withstanding the fact, that a substantial part of the metallized board sold by its licensees, except National, during said period was purchased from National and U.S.G."

That seems to be a charge that there was a price-fixing agreement with respect to the resale price of purchased, as distinguished from manufactured board—and I
2138 am talking about metallized board.

It would seem to the Court that under that charge the Government would have a right to attempt to prove that the prices at which the purchased metallized board was sold, were identical in figures with the prices fixed in the bulletins, and to try to prove that that was as the result of some agreement or understanding.

The defendants, on the contrary, would have a right to try to defend upon the ground that even though the prices were identical they resulted not from an agreement, or price fixing, but from natural business conditions, and necessities, the purchased board and the manufactured board being, we assume, of the same grade.

Now it seems to the Court that probably the objection which is being made to your question, Mr. Knuff, is that it is phrased in a manner which would require the witness to pass upon a question which the Court ought to pass upon, to-wit, the question whether the identical prices, if they were identical, at which the purchased board was sold, with the prices in the bulletins, resulted from business and economic conditions, or from an illegal agreement.

Is that the difficulty?

Mr. BROMLEY. Precisely, your Honor, yes.

Mr. KNUFF. I think, if your Honor pleases, I can clarify this whole situation with just about one or two
2139 questions.

Justice STEPHENS. Thank you.

Mr. KNUFF. If I may.

Justice STEPHENS. It would seem to the Court that the question which seems now to be particularly in issue: "Did your company adhere to the price bulletins that USG furnished you?" is really asking this witness to pass upon the question as to both purchased board and manufactured board, which the Court ought to pass upon, and that probably the objection ought to be sustained. But the Court wants you to have an opportunity to be heard further if you desire it.

Thereupon, LAURANCE I. NEALE, the witness upon the stand at the time of the taking of the recess, resumed the stand and was examined and testified further as follows:

Direct examination (resumed) by Mr. KNUFF.

Q. Mr. Neale, I show you Government's Exhibit No. 18, which is the metallized board agreement between the United States Gypsum Company and Atlantic Gypsum Products Company, and I direct your attention to page 2 of that agreement, under Paragraph IV, subparagraphs (a) and (b), and I am going to ask you to read that portion that I have indicated. That is Paragraph IV, sections (a)
2140 and (b), and if I may, I will point out to the witness the paragraphs that I have reference to.

Justice STEPHENS. You may do so. Is that on page 112 of the complaint?

Mr. STEFFEN. Page 112, yes.

Justice JACKSON. This one being between USG and Ebsary, though.

Mr. BROMLEY. It is the same thing.

Justice STEPHENS. Is that the same as Paragraph IV (a) and (b) of the Ebsary agreement?

Mr. KNUFF. Yes, your Honor.

By Mr. KNUFF.

Q. Have you read it, Mr. Neale?

A. Yes.

Q. My question is this—did you sell board manufactured by your company at bulletin prices?

A. I don't remember, Mr. Knuff.

Q. Did you receive any bulletin prices?

A. Presumably.

Q. You say you don't remember whether you sold board manufactured by your company at those prices?

A. I don't remember specific instances.

Q. Well, I am not asking about specific instances. I am asking about your general practice. In the sales of your board did you adhere to the contract that you signed, and sell the board——

2141 A. (Interposing.) So far as I know, we did.

Q. Now did you sell the board that you bought from other manufacturers at bulletin prices also?

Mr. BROMLEY. I object to that question. There were no bulletin prices applicable to that board. Therefore, the question assumes facts not in evidence, and is incompetent.

Mr. KNUFF. My question doesn't assume anything, and if the reporter will please read it—it says, Did your company sell board that you purchased from other companies at bulletin prices?

Mr. BROMLEY. There were no bulletin prices for such board. Therefore it assumes facts not in evidence.

Justice STEPHENS. That objection is well taken, Mr. Knuff. Why don't you ask the witness what the prices were at which he sold the board, and whether the prices at which he sold purchased board were different prices from those at which he sold manufactured board?

Mr. KNUFF. I will ask him that.

Justice STEPHENS. Is there any objection to that?

Mr. BROMLEY. No, sir.

By Mr. KNUFF.

Q. Did you sell purchased board at different prices than you sold the board that you manufactured—and I am referring to the metallized board?

2142 A. I want to answer the question to the best of my ability, Mr. Knuff.

Q. That is right.

A. But I have no present recollection of prices at any given time on any given product, any more than the man in the moon. There were constantly being sent to salesmen, price lists on various products.

Q. I am not asking you, Mr. Neale, as to specific prices. I am asking you as to policy. Did you have a policy to sell purchased board at a price other than the price that you sold your manufactured metallized board at, or did you have the same policy with respect to both boards?

A. As nearly as I can recall, the price would be the same whether we manufactured the board or purchased it.

Mr. KNUFF. Now if your Honor pleases, we would like to have two or three questions answered by this witness, subject of course to being stricken if the Court sustains the objections to the offer of proof which we will make sometime next week. We recognize that these questions may be within the scope of the Court's ruling of yesterday.

It is our position that the trade and commerce involved in this case, and referred to in paragraph 44 of the complaint, includes all gypsum board and products, whether patented or unpatented, and whether included in the price-fixing clauses of the various licenses and agreements or bulletins, and that hence we may show the actual nature and extent of that commerce.

2143 The reason we want to do it at this time is this. We don't want to recall Mr. Neale, and as I say, we recognize that this may possibly be within the scope of your Honor's ruling of yesterday, but that can all be taken care

of. If your Honor sustains any objection, of course the answers will be stricken, and if your Honor allows the offer, then of course the answers will be perfectly pertinent and should remain in the record.

Justice STEPHENS. Well, the matter could be handled, I should think, by including within the offer of proof which you will make, the topics upon which you would like to examine this witness, subject to this possibility, that you may have some possible differentiation between those questions and these. If it is for the purpose of protecting your record on that subject, we have no objection to your doing that. Proceed.

Mr. KNUFF. Thank you.

By Mr. KNUFF.

Q. Mr. Neale, did Atlantic Gypsum Products Company also purchase non-metallized board from other companies during 1934, 1935 and 1936?

Mr. BROMLEY. I make the same objection, just for the record.

Justice STEPHENS. The objection may be recorded and the Court will make a ruling later. Answer the question.

2144 The WITNESS. I can't say as to the specific years, but other products were purchased at various times.

By Mr. KNUFF.

Q. Now were these products, that is, board and lath, sold by Atlantic at USG bulletin prices?

Mr. BROMLEY. I would like of course a continuing objection to this line of questioning, but I think this question assumes facts not in evidence. He didn't say they purchased board and lath, as I understand it.

Justice STEPHENS. The witness answered very generally by saying "other products". I thought you were going to ask him if they purchased non-metallized board.

By Mr. KNUFF.

Q. Did your company purchase non-metallized board and lath?

A. I think I recall instances of where we purchased what was called tile board.

Q. And did you purchase regular wallboard, if you recall?

A. I can't definitely recall in this period you are asking about.

Q. And did your company also purchase lath at this time?

A. It may have.

Q. Now the board and lath that your company purchased from USG or other licensees, was that sold at USG bulletin prices?

2145 A. It was sold at the same prices we were getting for our own board.

Q. Now I think just before lunch——

Justice STEPHENS (interposing). Is that all on that subject?

Mr. KNUFF. Yes, those are the questions, your Honor.

Justice STEPHENS. Then, in order that the record may be kept clear, and all at one point so that it is understandable, you can make your objection to those questions now, and the Court will rule on your objection, and leave it to you to make a further full offer of proof.

Mr. BROMLEY. I object to them, on the ground they are immaterial and irrelevant because there is no charge in the complaint covering the subject-matter of the inquiry.

Justice STEPHENS. The objection is sustained.

Mr. BROMLEY. I now move to strike the questions and answers on the same ground.

Justice STEPHENS. They are stricken.

Mr. KNUFF. Will your Honor defer ruling on that motion to strike until after we make the offer? I am just trying to look at the mechanics of the situation.

Justice STEPHENS. Well, there is no objection to deferring the ruling on the motion to strike until you make your offer, although I don't think, in the usual course of appellate practice, that you are harmed in any man-

2146 ner because when you make the reoffer you really are putting the same question before the Court again, and the Court is again ruling against you, so that you have two rulings rather than one. However, if you wish to have the ruling deferred on the motion to strike, there is no objection to that. The answers may stand until the offer of proof is made.

Will the reporter make a note in the index as to the pages of the record where these questions and answers appear, so we will know where they are?

It is better to have rulings on questions appear where the questions are, so far as possible, Mr. Knuff.

And while we are interrupted I would like to call the court reporter's attention to the fact—I should have done this earlier—that my secretary informs me that the page

numbers in the transcript jump from page 1396 to 1398, there being no page 1397. The continuity of the text appears coherent, and it is probably only an error in page numbering, but you had better make a check as to that, and a correction, so that it will not confuse some reader of the record later.

The REPORTER. Your Honor, that was discovered and checked back by the reporter with his notes, and it is just an error in page numbering. There is no page 1397.

A similar situation occurs with respect to the transcript of December 13, where the numbering skips from page 1976 to 1978, and in this instance also it was merely
2147 an error in page numbering and the continuity has been checked by the reporter with his notes.

By Mr. KNUFF.

Q. I show you, Mr. Neale, Government's Exhibit 292, the same being a memorandum, dated December 3, 1934, to L. I. Neale, from C. A. Warren, and signed—I presume that is C. A. Warren's signature there? Will you look at it, please?

A. Yes, sir.

Q. Is that Mr. Warren's signature?

A. As I recall it.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 292.

Justice STEPHENS. Is there any objection except the usual objection?

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received in evidence, subject to the usual reservation as to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 292 was received in evidence.)

By Mr. KNUFF.

Q. I show you what has been marked for identification as Government's Exhibit 293, the same being a memorandum, dated December 5, 1934, to R. H. Hallowell, from L. I. Neale on the subject, "aluminum covered gyp-
2148 sum lath", and signed by L. I. Neale. Would you please look at that?

A. Yes, sir.

Q. Is that your signature?

A. Those are my initials.

Q. You will notice in the second sentence that you state that you will not be in a position to manufacture this

product for some little time, and that you have made arrangements with USG for the purchase of aluminum covered gypsum lath, and have ordered a car shipped from Oakfield to your Portsmouth plant. Do you recall those arrangements?

A. No, I don't sir.

Q. You stated before the noon recess, I believe, that you were never able to manufacture this board without some imperfections in it. Do you recall that testimony?

A. Yes, sir.

Q. Were you ever able to produce aluminum covered board, while you were with the company, that went beyond the experimental stage?

A. I think I can recall seeing some board of our manufacture. Whether you would call it in the experimental stage or not, I don't know.

Q. You think you saw some?

A. Yes.

Q. I show you——

Justice STEPHENS (interposing). Is Exhibit 293 offered?

2149 Mr. KNUFF. I have not offered it, no, your Honor. Thank you for calling it to my attention. We now offer Government's Exhibit 293.

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Exhibit 293 is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 293 was received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 294, the same being a signed carbon of a letter, dated December 10, 1934, addressed to Mr. C. F. Henning, vice president, and signed by the Atlantic Gypsum Products Co., Inc., L. I. Neale, vice president.

A. Yes, sir.

Q. That is your signature, or your initials—which are they?

A. My initials, yes.

Q. And do you recognize your initials, sir?

A. Yes, sir.

Mr. KNUFF. We now offer in evidence Government's Exhibit 294.

Mr. BROMLEY. The usual objection.

2150 Justice STEPHENS. Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 294 was received in evidence.)

By Mr. KNUFF.

Q. I show you, Mr. Neale, what has been marked for identification as Government's Exhibit 295, the same being the original of a letter dated November 27, 1935, addressed to L. I. Neale, V. P., and signed, United States Gypsum Company, H. F. Sadler, assistant general sales manager. Will you please state whether or not that letter was received by you?

A. I don't recall the letter, but it bears all the earmarks of having been duly received.

Q. It bears on its face the receiving stamp of the Atlantic Gypsum Products Company's New York office, does it not?

A. It does.

Mr. KNUFF. We now offer in evidence, if your Honor pleases, Government's Exhibit 295.

Mr. BROMLEY. Just the usual objection.

Justice STEPHENS. The letter is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

2151 (The document marked as Government's Exhibit No. 295 was received in evidence.)

By Mr. KNUFF.

Q. Just above your name, Mr. Neale, you will notice that there is some small writing in pencil. Do you recognize the handwriting there?

A. No, I do not.

Q. It is not your handwriting?

A. No, that is not my handwriting.

Q. And you don't recognize that?

A. No.

Q. Do you recall, Mr. Neale, ever having attended a conference of licensees on March 11, 1936, called by Mr. Henning, at which Mr. Henning; Mr. Sadler; yourself; Mr. Black of American Gypsum Company; Mr. Burley of National; Mr. Price, one of the attorneys for USG; and Mr. Van Hagan and Mr. Henley of Certain-teed, attended.

A. I don't recall such a meeting.

Q. At which perforated gypsum lath was discussed—do you recall that?

A. No, I don't.

Q. I show you now, sir, what has been marked for identification as Government's Exhibit No. 296, and I want you to look at it and see if that refreshes your recollection.

2152 A. Do you want me to read all of it?

Q. I want you to read it, and see if it refreshes your recollection.

A. Yes, sir.

Q. Has your memory been refreshed concerning any of the items mentioned in this memorandum?

A. Frankly, no.

Mr. ADAMS. I object to that, your Honor. The question should be addressed to him to elicit a fact, and not as to whether he is refreshed as to something mentioned in some memorandum.

Justice STEPHENS. Well, he has answered "no".

Mr. ADAMS. I didn't hear him answer.

By Mr. KNUFF.

Q. After reading this memorandum, your answer is that you are not refreshed as to any of the items mentioned therein?

Mr. ADAMS. I make an objection now.

Justice STEPHENS. The objection is technically well taken, Mr. Knuff. You should first ask the witness whether he remembers any particular fact in respect of which the Government wishes to inquire under the issues, and then ask him if this refreshes his recollection on it. The objection is sustained.

By Mr. KNUFF.

Q. I show you, sir, what has been marked for
2153 identification as Government's Exhibit 297, the same being a carbon copy of a letter dated March 16, 1936, addressed to L. I. Neale, vice president, and signed National Gypsum Company—vice president, and then over on the left-hand side of the second page there are typed in the words "R. F. Burley: MM".

A. Yes, sir.

Q. Are you familiar with the subject-matter of th[illegible] letter, Mr. Neale?

A. In a general sort of way.

Q. Do you know who wrote the name "R. F. Burley" on the first page of that letter?

A. I don't recognize the handwriting, no.

Q. You knew Mr. Burley, did you?
A. Yes, sir.
Q. Did you correspond with him in a business way?
A. Yes.
Q. And you say that you recognize the subject-matter of the letter?
A. Yes.
Q. Do you know whether or not you had any correspondence with Mr. Burley on the subject of perforated lath at about this time?
A. I shouldn't have known of this if you hadn't put it before me.
Q. You have no recollection?
2154 A. No.
Q. Was your company at that time contemplating taking out a perforated lath license agreement with United States Gypsum?
A. I think the matter was under consideration.
Q. And did you discuss that agreement with any person else, if you recall?
A. I can remember discussing it with Mr. Fuller.
Q. When was that?
A. I can't say.
Q. Was it on or about the time of the date of this letter?
A. I wouldn't be able to guess, Mr. Knuff, I don't know whether it was in that year or in the preceding year.
Q. You left the company in 1936?
A. Yes, sir.
Q. What month in 1936?
A. The first of July.
Q. And this letter is dated March 16, just three months before you left?
A. Yes.
Q. Can you recall any discussion with Mr. Fuller on perforated lath shortly before you left the company?
A. I would say sometime within the preceding six or nine months.
Q. What discussion did you have with him, please?
2155 A. As to whether it was advisable to become licensees under the patent.
Q. And what was your position with respect to whether or not it would be desirable to become licensees under the patent?
A. I think it was questionable.
Q. Why was your position questionable? Do you mean your position was questionable?

A. I mean it was questionable whether it was desirable to do so.

Q. Why did you consider it questionable to take out this licensing agreement on the perforated lath?

A. As I recall it, there was some doubt in our mind if the patent covered the matter of perforations.

Q. You mean there was some doubt as to whether or not the patent was valid?

A. Well, I don't know that I would put it just that way, sir.

Q. How would you put it?

A. Just as I did, whether the patent covered the matter of perforation fully, so that the board could not be perforated except in the manner indicated by the patent.

Q. I don't know as I understand your position. There was some doubt as to whether or not—will you read the answer, Mr. Reporter?

2156 (Thereupon, the last answer of the witness was read by the reporter.)

By Mr. KNUFF.

Q. Was it your position that another board could be manufactured without infringing the USG perforated lath patent?

A. As I recall it, we considered that possibility.

Q. And what was your position on that?

A. I don't recall.

Q. You did canvass that possibility with Mr. Fuller?

A. We discussed it, yes, sir.

Q. On one occasion, or on more than one occasion?

A. I don't remember.

Q. And do you know whether or not your company ever did take out a license under the perforated lath agreement?

A. I——

Mr. BROMLEY (interposing). We will stipulate that it did not, Mr. Knuff.

By Mr. KNUFF.

Q. Did you ever discuss this same question with any person other than Mr. Fuller?

A. I don't recall any such discussion. There may have been such, but I don't recall it now.

Q. The only thing that you can recall is the discussion with Mr. Fuller?

A. Yes.

2157 Q. Were you advised by anyone that another board containing perforations could be made without infringing the perforated lath patent of USG?

A. Evidently I was, as is indicated by this letter addressed to me.

Q. I mean when you were talking with Mr. Fuller?

Mr. BROMLEY. Just a moment. May that answer be stricken? He misapprehended the question, as I understand it.

Justice STEPHENS. Read the question and answer.

(Thereupon, the portion of the record indicated was read by the reporter.)

Justice STEPHENS. The Court does not see the force of the objection, Mr. Bromley.

Mr. BROMLEY. He is answering from the letter. He has already told us that he remembers nothing about anything talked about in the letter.

Justice STEPHENS. Well, of course you are expected to answer, Mr. Neale—I assume you understand—from your own recollection, refreshed by the letter if it does refresh it. If you have no recollection of being advised by anyone except as indicated in the letter, then you should say that.

The WITNESS. That would be my answer, then.

By Mr. KNUFF.

Q. You haven't any recollection, then, of being advised by anyone that the board could be made without
2158 infringing the USG patent?

A. No.

Q. Although that was the position you did take when you were talking with Mr. Fuller.

A. That was one of the matters discussed with me as to whether or not the board could be made——

Q. (Interposing.) Now you say that was one of the matters discussed with him. That implies that there were other matters along the same lines that were discussed with him, is that correct?

A. There may have been, I don't know.

Q. Do you recall any other discussions that you had with Mr. Fuller?

A. No, sir, I don't.

Q. The only thing that you can recall that you discussed with Mr. Fuller was the fact that a board might be made with perforations that did not infringe the USG patent?

A. I do recall discussing that particular point with him.

Q. Up until the time that you severed your connections with the Atlantic Gypsum Products Company do you recall that the question of becoming a licensee with USG was ever considered?

A. You mean on this perforated lath?

Q. Correct, on the perforated lath.

A. Well, the discussions with Mr. Fuller to which
2159 I have just referred, had to do with that possibility.

Q. Now did you have before you the proposed form of contract?

A. I don't remember.

Q. You don't remember?

A. No.

Q. Do you recall whether or not in the proposed form of contract USG reserved the right to fix prices on perforated gypsum lath?

A. I don't recall seeing any proposed contract on this subject.

Mr. KNUFF. I offer in evidence Government's Exhibit 297.

Mr. BROMLEY. Objected to on the ground that there is no proper foundation because no identification.

Mr. FINCK. If the Court please, I would like to record our objection on behalf of National to this exhibit as being immaterial. National did not have a perforated lath agreement with USG, and all the matter contained in this letter refers to perforated lath, I believe.

Mr. KNUFF. Mr. Finck, was this letter, Government's Exhibit No. 297, obtained from the files of the National Gypsum Company?

Mr. FINCK. I believe it was.

Mr. KNUFF. Here we have a situation, your Honor,
where the witness was familiar with the subject-
2160 matter of the contents of the letter; the letter was addressed to the witness who at that time was the vice president of the Atlantic Gypsum Products Company. This is a carbon copy of a letter, and it bears upon the second page thereof in typewriting the name, "R. F. Burley", who at that time was connected with the National Gypsum Company; and as I say, it was obtained from the files, and admittedly obtained from the files, of the National Gypsum Company.

I think the letter is circumstantially identified.

Justice JACKSON. What does "Enc" indicate, right over the name?

Mr. KNUFF. An enclosure.

Justice JACKSON. Is that an enclosure to Burley or by Burley, or what?

Mr. KNUFF. I don't know.

Justice JACKSON. That is why I am asking the question.

Mr. KNUFF. In our correspondence we put, "Enc" at the bottom of a letter as meaning that we are enclosing something.

Justice JACKSON. But there is nothing in this letter to indicate that anything went with it.

Mr. KNUFF. That is right; I don't know what it means.

Justice STEPHENS. What do you say with respect to Mr. Finck's objection that it is not material, National never having taken out a license for perforated lath with USG, and this letter being a discussion of a perforated lath program?

2161 Mr. KNUFF. That is true, that National never did take out a license, as we understand it, for the perforated lath. Nevertheless, we think it is quite material and quite appropriate to have this letter considered, because it would tend to show at least the scope of the knowledge of the invalidity of the patent that the trade had at that time.

Justice STEPHENS. Well, as to National, if National never took out a license there would be no point in attempting to prove that it took one out in bad faith or as a subterfuge.

Mr. KNUFF. We are not offering it for that purpose to show that National took one out at all, because we know that National did not take one out.

Mr. BROMLEY. In that connection, paragraph 119 of the complaint, I see somewhat belatedly, does not mention any charge either against National or Atlantic. So neither side of this letter has anything to do with the charges in the complaint about perforated lath, neither Atlantic nor National.

Mr. KNUFF. I think we can clarify that by saying that we concede that National did not take out a license to manufacture under the perforated lath patent, and neither did Atlantic take out a license. Nevertheless, here are two companies which did not take out a license but which knew about—or felt or considered that the patent was invalid.

Justice GARRETT. We aren't trying the invalidity of the patents here, are we? I thought we had gotten be-

2162 yond that as far as this Court is concerned. If you are introducing it on the ground of somebody thinking it was invalid, what relevancy has it now in the state that the issues are?

Mr. KNUFF. We are not introducing it for that purpose, we are introducing it for the purpose of showing that the license agreements were not entered into in good faith but were mere subterfuges in order to control the price of th perforated board, not for the purpose of showing the invalidity of the patent.

Justice STEPHENS. Well, the Court has already ruled that you are entitled to show, if you can, that such license agreements as were entered into, were entered into as a subterfuge or as a cloak for a price fixing scheme as charged in the complaint, but here you apparently attempt to prove that USG and others entered into perforated lath agreements as a subterfuge by showing that Atlantic and National did not enter into any such agreements at all.

Mr. KNUFF. That is right.

Justice STEPHENS. It would seem to me highly remote, if material at all, and we think also that the letter has not been identified. This bears no receipt stamp, it is not identified by Mr. Neale, he doesn't remember receiving it. It isn't related to some other exhibit. The objections are sustained.

Mr. JOHNSTON. If the Court please, I would like
2163 to have the same objection there on behalf of Texas, the same objection as Mr. Finck makes, because we did not have a perforated lath license either.

Justice STEPHENS. Objection sustained as to Texas also.

By Mr. KNUFF.

Q. I show you, Mr. Neale, what has been marked for identification as Government's Exhibit 298, the same being a memorandum dated March 23, 1936, addressed to W. P. Fuller by L. I. Neale on the subject of "Neat Plaster in Metropolitan New York", and marked on the top thereof, "Confidential", and signed on page 4, "Atlantic Gypsum Products Company, Inc.—L. I. Neale, vice president". Will you please read that exhibit?

A. Yes, sir.

Q. Are you familiar with the subject-matter of the memorandum?

A. In a general sort of way.

Q. And the subject-matter is something that would normally come to your attention as vice president of the company, is that correct?

A. Yes, sir.

Q. And is the memorandum written in the usual form that your company adopted for inter-office communications?

A. This is a carbon copy that I have here, it is not on the office form.

2164 Justice STEPHENS. You say it is not on the office form?

The WITNESS. That is right.

2165 Mr. KNUFF. You mean by that that it is not on the original of the office form?

The WITNESS. Yes.

Mr. KNUFF. Would you show the witness Government's Exhibit 289, please?

(Exhibit No. 289 handed to the witness.)

Justice STEPHENS. Is that in this same set?

Mr. KNUFF. Yes, Your Honor, it is a letter of September 6, 1934.

By Mr. KNUFF.

Q. Do you have before you Exhibit 289?

A. Yes.

Q. You will notice that the original contains at the top of it the word "Memorandum".

A. Yes.

Q. And then on the left-hand side of the page, at the top, is printed thereon the word "To". Do you notice that?

A. Yes.

Q. That indicates the person that is to receive the letter?

A. Yes.

Q. And the next word is "From", indicating the person who wrote the letter?

A. Yes, sir.

Q. And then "Subject" is the third sub-head on

2166 the original of the form?

A. Yes.

Q. Now does this conform to the form of the original?

A. It conforms to the form of the original, yes.

Q. And you are acquainted with the subject matter, you say, in a general way?

A. Yes.

Q. Now you will notice on the last page of the memorandum, on the bottom, in the left-hand corner, the word or initials, I am not sure which, "LIN:M"?

A. Yes.

Q. "LIN", I take it, are your initials?

A. Yes, sir.

Q. And the "M" is the stenographer or the typist who wrote the letter, is that your understanding?

A. I think I see "MK" on this copy.

Q. Well, it is just "M" on the photostat that I have before me. You say it is "MK" on your copy?

A. Yes.

Justice STEPHENS. The "K" shows on this photostat.

By Mr. KNUFF.

Q. Does that indicate who the typist was?

A. I can't say. The woman who was my secretary for many years, about a year before this got married, and I had a series of girls in this period. I can't say positively.

2167 Q. Is there any doubt in your mind that you dictated this memorandum?

A. I think in all probability I did.

Mr. KNUFF. We offer in evidence Government's Exhibit 298.

Mr. BROMLEY. I object to it on the ground that it is immaterial. I don't understand the purpose of it.

Justice STEPHENS. What is it offered to prove?

Mr. KNUFF. Fixing the prices of plaster.

Mr. BROMLEY. The only charges in the complaint in connection with fixing the prices of plaster are contained in paragraph 77(b) on page 18, and are in connection with the license agreements, the allegation being:

"In addition to the agreements contained in the aforesaid license agreements, U. S. G. and its licensees mutually agreed among themselves as follows:

"(b) U. S. G. would advance and stabilize the prices for board immediately after the execution of said license agreements. As prices for board were increased, all companies would increase their prices for plaster and miscellaneous gypsum products."

That is repeated in connection with the November licenses in paragraph—no, it is not repeated. I guess that is the only place. As I understand it, there is no other charge about plaster prices.

2168 Justice STEPHENS. Why isn't the exhibit material under that charge, Mr. Bromley?

Mr. BROMLEY. Well, because the exhibit on its face, being dated in 1936, can have no relationship, it seems to me, to a charge that——

Justice STEPHENS (interposing). I thought you were objecting to the immateriality of the contents rather than the date.

Mr. BROMLEY. Yes, I was, sir, but I was trying to demonstrate that it is on its face immaterial, because it is

dated in 1936 and hasn't anything to do with any agreements that were entered into in connection with the licenses. It might be that it had some relevancy as to a separate little conspiracy between USG and Mr. Neale, covering metropolitan prices of plaster, in 1936. Possibly it could have been attacked in some proceeding. But it has not been attacked.

Mr. KNUFF. If Your Honor pleases, in order to get before you clearly the Government's contention, the charging portion of this complaint is paragraph 44. So that is the portion of the complaint which the Government relies upon to show the violation of the Sherman Act, and we set forth in paragraph 44 that the defendants have been parties to contracts in restraint of trade.

We have also set forth in paragraph 44 that the defendants have been engaged for many years past in a
2169 continuing conspiracy. Now if the Court desires to have pointed out an overt act, and that is all that the subject matter of this memorandum is, an overt act pursuant to the conspiracy set forth in paragraph 44, I think we have clearly set forth the overt act on page 26, where we say: "From time to time during said period, U. S. G. and its licensees have by concerted action controlled the prices and methods of distribution of plaster and miscellaneous gypsum products sold by U. S. G. and its licensees * * *"

That is in paragraph 96. But paragraph 96 is only a charge of an overt act. The conspiracy is set forth in paragraph 44 of the complaint.

Justice STEPHENS. Well, of course, Mr. Knuff, you can't quite hope to rest purely on paragraph 44, because that was so broadly phrased that it would include every act from the beginning of the world until the end of time; and the Court, in making its rulings with respect to the materiality of offered proof, has to consider the rest of the complaint.

However, it seems to us, Mr. Bromley, in view of the allegations of paragraph 77(b), and the one just referred to by Mr. Knuff, paragraph 96, that possibly this may have some materiality.

Mr. FINCK. If the Court please, I would like to record an objection on behalf of National Gypsum Company, however, on the ground that this offered exhibit is im-
2170 material as to National. There is absolutely nothing to connect National Gypsum Company with any plaster price conspiracy mentioned in this document, and

it seems to me that if it goes in as relating to National, it is a very prejudicial document.

Justice STEPHENS. Do you claim that it is relevant as to National?

Mr. KNUFF. We claim that it is relevant as a declaration of a co-conspirator.

Mr. FINCK. We may have been a co-conspirator in one conspiracy and not in another. This seems to be, as Mr. Bromley says, a little conspiracy all of its own, which we certainly were not connected with.

Justice STEPHENS. Well, we think it is admissible in evidence. It may have some materiality. It is received, subject to the usual reservation with respect to the declarations of alleged co-conspirators.

(The document referred to, marked as "Government's Exhibit No. 298", was received in evidence.)

By Mr. KNUFF.

Q. Mr. Neale, I notice on the bottom of page 1 of Exhibit 298, the initials "C. F. H." Will you indicate who you were referring to by those initials? I think I know, but I want the record to show it.

A. I would say Mr. Henning.

2171 Q. He was connected with what company?

A. United States Gypsum Company.

Q. And wherever, in this exhibit, the initials "C. F. H." appear, you want it understood that they refer to C. F. Henning of the United States Gypsum Company, is that correct?

A. I believe that would be a proper inference.

Q. I notice you use "Ebsary" on page 2. By that do you mean Mr. Fred Ebsary of the Ebsary Gypsum Company?

A. I don't know whether I meant the individual or the company.

Q. You meant one or the other?

A. Yes.

Mr. KNUFF. You may cross-examine the witness.

Justice STEPHENS. We will take the afternoon recess at this time.

(Thereupon, a five-minute recess was taken, after which the trial was resumed as follows:)

Justice STEPHENS. Proceed, Mr. Bromley.

CROSS EXAMINATION

Mr. BROMLEY. If it please the Court.

By Mr. BROMLEY.

Q. Mr. Neale, early in your testimony this morning you said, as I understood you, that your company adhered to the general license bulletin prices, so far as it was able to. Do you recall that?

2172 A. Yes, sir.

Q. Isn't it a fact that by that answer, you intended that adherence to extend only to such board as was manufactured by your company under the patents licensed to it?

A. Well, naturally.

Q. You also referred to meetings of licensees and licensor. Isn't it a fact that such meetings as were held were held at irregular rather than regular times?

A. I should say so.

Q. There was no regular schedule of licensee meetings ever, while you were in the business, was there?

A. Not that I recall.

Q. You also said that Board Survey Company was a company which sought to see whether the license was being complied with. Did you mean by that whether the licensees were observing the minimum prices fixed on the patented board manufactured by them?

A. I think it covered all matters contained in the license agreement.

Q. But in its efforts to secure compliance, those efforts were limited to discussion of provisions of the license with respect to patented products, were they not?

A. Yes.

Q. With respect to metallized board, Mr. Neale, it is the fact, isn't it, that your company, at the time it

2173 took the license, intended to manufacture the patented product?

A. Yes, sir.

Q. In connection with metallized board, and in your answers to questions with respect to the board which you purchased, you said, as I understood you, that the price would be the same, of the board that you sold, whether you made it or purchased it. Another way to express that, Mr. Neale, would be that you sold the board that you purchased, the metallized board, at the same prices as you sold the metallized board that you manufactured; isn't that right?

A. Yes.

Q. Now what can you say as to whether or not that was a price policy which you arrived at independently of any competitor?

A. I don't see how a company that was manufacturing or expecting to manufacture a product could, at various intervals, put out a similar product at a different price.

Q. And so it is the fact, isn't it, sir, that you determined, independently of any competitor, to charge the same price for purchased as you charged for manufactured metallized board?

A. I remember having no conference with anyone on that subject.

Q. And that policy which you pursued was not the result of any understanding to that effect which you
2174 had with USG or anybody else, was it?

A. I don't recall, as I just said, any conference on the subject.

Mr. BROMLEY. Will you hand the witness Exhibit 279, please?

(Exhibit 279 handed to the witness.)

By Mr. BROMLEY.

Q. This letter to Mr. Avery of May 24, 1927, refers to "seconds". Isn't it a fact, Mr. Neale, that after your company developed its new plant and its production, that the seconds problem took care of itself in that fewer and fewer resulted from your manufacture?

A. As we improved in the art of manufacturing, naturally there were fewer seconds.

Q. And isn't it the fact that at all times, from the date of this letter forward, you sold such seconds as resulted from your production without any restriction whatsoever?

A. As far as I can recall.

Q. And isn't it a fact that you never had any agreement or understanding with Mr. Avery, USG or anyone else, with respect to whether or not you should sell seconds?

A. I don't recall any.

Q. Will you refer, please, to Exhibit 282. In your letter to Mr. Baker of July 22, 1929, which is Exhibit
2175 282, isn't the reference in the last paragraph merely to a proposed meeting for the purpose of exchanging ideas on the proposed form of contract?

A. I would think so.

Q. It is a fact, isn't it, that at the meeting which was referred to in that paragraph, you had your lawyer with you?

A. I don't recall the meeting.

Q. Well, look at the second paragraph. Doesn't that refresh your recollection that at that time Mr. Channing, your lawyer, was probably with you?

A. I am sorry, but I don't remember the meeting. I don't know that it ever took place.

Q. Mr. Channing was your lawyer, wasn't he?

A. Yes, sir.

Q. Now you had nothing to do with the negotiation of either the May, 1929, or the November, 1929, license, did you, sir.

A. No, sir.

Q. Will you look at Exhibit 285, please.

A. Yes, sir.

Q. The Structural Gypsum Corporation, mentioned in the last line of that letter, was a plaster manufacturer which did not manufacture either wall or plaster board, isn't that right?

2176 A. That is my recollection.

Q. And you were a witness in the recent criminal case against the gypsum industry here in Washington, were you not, sir.

A. Yes.

Q. And you know that in that case, the Structual Gypsum Corporation, and other plaster manufacturers like it, were called "manufacturing distributors"?

A. I don't have any recollection of it.

Q. Did you know that they were called "manufacturing distributors" in the industry while you were in it?

A. Frankly, I don't recall the term.

Q. But there were a half a dozen or so companies like the Structural Gypsum Corporation and the Oakfield Company, which were plaster manufacturers but which did not manufacture either wall or plaster board, were there not?

A. There were a number of companies that did not manufacture a full line of products.

Q. And some or all of those companies purchased the board in order to fill out their line to satisfy customer demand, is that right?

A. That is true.

Q. And Structural Gypsum Corporation, referred to in Exhibit 285, was such a company?

A. Yes.

2177 Q. Did you ever receive a reply from Mr. Henning to the inquiry contained in this letter, Exhibit 285?

A. I don't recall.

Q. I show you what purports to be such a reply.

Mr. BROMLEY. Mr. Knuff, have you located, as yet, the letter?

Mr. KNUFF. I haven't even looked for it as yet, because I haven't been out of the building.

Mr. BROMLEY. It was Defendants' Exhibit 6 in the criminal case, to aid you in your search.

(A document was handed to the witness.)

Mr. KNUFF. May it please the Court, I don't know what the witness has in front of him, yet. We haven't been furnished any copies of it, and I think reciprocity ought to work both ways.

Justice STEPHENS. Will you hand a copy to Government counsel?

Mr. BROMLEY. Yes, sir.

(Copy handed to Mr. Knuff.)

By Mr. BROMLEY.

Q. Now isn't it a fact, Mr. Neale, that in answer to your letter, Exhibit 285, you were advised by Mr. Henning that price control did not apply to resales of gypsum board?

A. It is so stated in this letter.

Q. And isn't it a fact, Mr. Neale, that neither
2178 you nor your company, so far as you know, was ever a party to any understanding or agreement, at licensee meetings or otherwise, or ever a part of any conspiracy to control the resale prices of distributors?

A. I recall of no effort to do that.

Mr. KNUFF. If Your Honor pleases, the question is objected to because it asks for a conclusion concerning a conspiracy, and we ask that the answer first be stricken from the record until there is a ruling made by the Court.

Justice STEPHENS. Well, the question is objectionable in that one particular, Mr. Bromley. I think that it asks the witness to tell whether or not they were parties to a conspiracy. You are entitled to ask whether or not they were parties to any understanding or effort or agreement.

Mr. BROMLEY. Yes, sir——

Mr. KNUFF (interposing). May the previous answer be stricken?

Justice STEPHENS. It may be.

By Mr. BROMLEY.

Q. Were you ever a party, Mr. Neale, or your company, to your knowledge, to any understanding or agreement to control the resale prices of distributors?

A. No.

Mr. BROMLEY. May we have Exhibit 286, please?

(Exhibit No. 286 was handed to the witness.)

2179 Mr. BROMLEY. I ask that the exhibit to which I have just referred be marked Defendants' Exhibit 6 for Identification, that is, Mr. Henning's reply to Exhibit 285, which is Mr. Henning's letter to Mr. Neale of May 12, 1932.

(The document referred to was marked as Defendants' Exhibit No. 6 for Identification.)

Mr. BROMLEY. It is a coincidence that that letter is marked in this trial Defendants' Exhibit 6 for Identification, and was marked the same way, with the same number, in the criminal trial.

Justice STEPHENS. Are you offering it?

Mr. BROMLEY. Not at this time, sir.

By Mr. BROMLEY.

Q. Do you have Exhibit 286 before you, Government's Exhibit 286, your memorandum to Mr. Fuller of March 30, 1933, Mr. Neale?

A. Yes.

Q. Now you have told us, have you not, that F. B. Lawton, Inc., and Tomkins-Rockwall Corporation were merely selling agents of the Atlantic Company?

A. Yes.

Q. At this time, the licensor's license bulletins contained a prohibition against the licensee compensating its salesmen through commissions. Do you remember that?

2180 A. I think I do, yes.

Q. So that if F. B. Lawton, Inc., and Tomkins-Rockwall Corporation were your selling agents, you had no right to pay them commissions, under the provisions of the price bulletins issued under your license; isn't that right?

A. If it is as you have stated. I don't remember the details of those contracts.

Q. And is not that what Mr. Henning asked you about, that is to say, what you were doing about your selling agents, the Lawton Company and Tomkins-Rockwall Corporation?

A. As I recall it, somebody had made complaints about this man Fleming, as to how he was remunerated, and it had to do with that matter, he being an employee of F. B. Lawton, Inc.

Q. Now in the fourth paragraph of Exhibit 286, I call your attention to the first sentence: "The licensor feels . . .", and so forth. Can you tell me whether that was something that was told you at the meeting referred to in

Exhibit 286, or whether that was something which you concluded yourself?

A. I can't remember.

Q. Will you please direct your attention to the second sentence: "This seems to me to be fair for it would be foolish * * *", and so forth. Can you tell us whether or not that was your own conclusion, or was something that Mr. Henning or somebody else told you?

2081 A. Obviously that would be my own conclusion.

Q. Now isn't it a fact, sir, at the time you wrote Exhibit 286, it was your impression that Structural and Oakfield, like Lawton and Tomkins-Rockwall, were selling agents?

A. I think in all probability it must have been, from the way the letter reads.

Q. And you knew, of course, at that time, did you not, sir, that the licensor had no right to fix the resale prices of these plaster manufacturers if they bought the board instead of being selling agents?

A. If they were purchasers of the board and owned it in their own right, yes.

Q. If they were selling agents, then you felt that the right of price control extended to their activities, because they were, in effect, employees of a licensee; is that right?

A. Yes.

Mr. BROMLEY. May we have Exhibit No. 289, please?

(Exhibit No. 289 handed to the witness.)

By Mr. BROMLEY.

Q. Exhibit 289 is Mr. Fuller's memorandum to you of September 6, 1934, sir.

It is a fact, isn't it, that at this time, the new product, insulation board, was cutting in on plain gypsum

2182 board sales?

A. You mean the metallized board?

Q. No, sir, I was talking about insulating products made by others.

A. Yes, it was a competitor of gypsum board.

Q. There was commencing to be made at this time a product known as insulation board, wasn't there?

A. Well, I think it had been made previous to this time.

Q. And that product was cutting into the sales of wall board and plaster board made by USG and other members of the gypsum industry, was it not?

A. It was a strong competitor.

Q. And it was for the purpose of meeting the competition from this new insulation board that the metallized board was developed by USG, was it not?

Mr. KNUFF. Please don't answer that question yet.

If Your Honor please, we object to this line of cross-examination for the reason that in the examination-in-chief, we have not said anything about any insulation board at all. It therefore is going far beyond the scope of the examination-in-chief.

Justice STEPHENS. We think the objection is not well taken, that the direct-examination went into a discussion, through this exhibit, concerning the taking of a
2183 metallized board license and the reasons why it was taken. It would therefore seem to be proper cross-examination, as to why those discussions were held, at any rate.

Mr. KNUFF. I would say that that would be a matter for defense, that it would be proper for the defendant to use in his case-in-chief, but we have certainly not asked this witness a single question—and my memory is very clear—concerning insulating board.

Now if Mr. Bromley wants to make this witness his own witness in that respect, I haven't any objection. But I am objecting to him cross-examining on something that we have not covered at all by your examination-in-chief.

Justice STEPHENS. The mere fact that counsel, on direct-examination, does not mention particular words, to-wit, "insulation board", doesn't necessarily exclude it from a line of cross-examination if the subject is sufficiently related to the direct-examination to make it a subject which is proper to inquire into to explain the direct-examination.

The objection is overruled.

Mr. KNUFF. In connection with this exhibit, I didn't ask this witness anything except as to the identification of the exhibit.

Justice STEPHENS. Didn't you offer it in evidence?

Mr. KNUFF. Yes, but I didn't ask him any questions on it.

2184 Justice STEPHENS. Well, if it is in evidence, it is a part of the direct-examination.

Mr. KNUFF. I thought Your Honor understood that I questioned the witness in connection with this exhibit, and all I did was question him in connection with the identification, and after I established that I offered it in evidence.

Justice STEPHENS. But you rely on the exhibit for all that it is worth in the case, under your pleadings, do you not?

Mr. KNUFF. We certainly do, Your Honor.

Justice STEPHENS. Then counsel are entitled to cross-examine the witness on the subject of this exhibit, which he has identified as a communication between himself and Mr. Fuller. The witness has given authenticity to this exhibit and to its contents, and therefore counsel can not be forbidden to cross-examine on it.

We are agreed that the objection is not well taken. Objection overruled.

By Mr. BROMLEY.

Q. Mr. Neale, the application of this aluminum foil to one side of ordinary gypsum plasterboard or wallboard converted that wallboard into board having qualities of insulation, did it not?

A. It added to the insulation value, yes.

Q. And that was because the aluminum foil, being
2185 shiny and reflective, would reflect cold and heat, and retard its penetration; isn't that right?

A. Yes.

Q. Now isn't it a fact that Mr. Henning, of the USG Company, during this period was anxious for all companies in the industry to get behind this product in order that the increasing competitive threat of other insulating boards could be repelled?

A. I don't know what were Mr. Henning's motives. It would be a reason for our wanting to make reflective board.

Q. Don't you recall that that was the reason that Mr. Henning wanted to get as many members of the industry as possible behind this product, because he felt that it ought to be energetically pushed in order to meet the competition of insulating board?

A. I think I have answered that, Mr. Bromley. I don't know what was in Mr. Henning's mind, but I know that we felt it was desirable for us to get into it.

Q. Well, as a matter of fact, the brunt of the promotional work in this field was borne by USG and National, wasn't it?

A. Oh, yes.

Q. And it was Mr. Fuller's idea, as disclosed by paragraph 3, that it would be wise for your company to let the others go ahead and incur the expense, and
2186 then hop on the bus after it got running; isn't that right?

A. That is what he says. [Laughter.]

Q. Now, sir, as a matter of fact, foil board did not receive the customer demand, while you were in the industry, that it was anticipated it would, did it?

A. I can't say as to that.

Q. Well, isn't it a fact——

A. (Interposing.) I have no figures in mind at all.

Q. Well, isn't it a fact that up to the time you left the company, only a very small amount of board was purchased by your company from anybody, metallized board?

A. Yes.

Q. And wasn't that because it did not develop to have the customer appeal that Mr. Henning, at least, thought it would have?

A. I think it was handicapped by being a heavier board than the insulating board, and things of that kind, that didn't make it go so well as it might have.

Q. It didn't go well at all with your company, while you were with the company, did it?

A. We did not buy much of it.

Q. Will you look at Exhibit 292, please?

A. Yes, sir.

Q. Now in connection with the last paragraph, the fact is that Mr. Warren was mistaken, wasn't he,
2187 and that Paragraph X of your license, as a matter of fact, applied only to board manufactured by your company?

A. I don't recall this memorandum at all, Mr. Bromley. It probably passed through my hands, but I don't recall it.

Q. You don't recall whether or not you had any discussion with your lawyer about the matter?

A. No, I don't.

Q. Or with Mr. Fuller about the matter?

A. No, I don't.

Q. Did you know that the paragraph to which this memorandum referred, on page 3 thereof, provided that the "licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after the receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly sell or offer for sale any plasterboard having a metallized surface manufactured by said licensee, embodying the inventions . . .", and so forth.

Mr. KNUFF. That is a matter for the Court to construe, Your Honor, not for this witness.

Justice STEPHENS. The witness may be asked whether he knew that an agreement which is in evidence contained

a particular provision, as the basis for examining him with respect to the reasonableness of conduct or letters in respect of it. That is proper cross-examination, Mr. Knuff.

2188 Mr. KNUFF. He said he didn't recall this letter at all.

Justice STEPHENS. He is not being asked about the letter now. He is being asked as to whether he knew about that provision being in the contract.

The WITNESS. I have no present recollection of the matter.

By Mr. BROMLEY.

Q. You knew, however, as a general matter, Mr. Neale, that under the metallized board license the only prices of yours that could be fixed by USG were t'e prices of such board as you manufactured under the pa ent?

Mr. KNUFF. Just a moment, please.

The question is objected to as something that the Court will have to construe, not this witness.

Justice STEPHENS. I think, Mr. Knuff, that you misapprehend the nature of the Court's rulings on the difference between cross-examination and direct proof of the contents of exhibits.

Where agreements are being introduced in evidence and have been introduced in evidence, they must speak for themselves as to their meaning. The person introducing them is bound by them in that manner. He can't call someone else to tell what they mean. But this is cross-examination. The witness can be cross-examined upon his understanding of agreements, if that has a bearing upon

2189 his conduct under them or conduct apart from them, which is alleged to be illegal. Under the Court's understanding of the rules of evidence, it is orthodox cross-examination.

Mr. KNUFF. As to this exhibit, Your Honor, when he says he doesn't recall anything about it?

Justice STEPHENS. The question before us hasn't got to do with that exhibit yet.

Mr. KNUFF. Then it is immaterial.

Justice STEPHENS. We can't tell that until other questions are asked.

I can't forbid counsel from asking what the witness' understanding of the agreement was with respect to price fixing. It may be that his next question will indicate that it is immaterial. If so, you can move to strike.

Mr. KNUFF. Then it is not cross-examination, because we haven't asked this witness anything concerning these prices under the contract.

Justice STEPHENS. Aren't you intending to prove by this witness, among other things, that there was a violation of the Sherman Act through price fixing, through these agreements as subterfuges?

Mr. KNUFF. We asked this witness whether his prices were the same for metallized board that they manufactured as for metallized board which they purchased from another.

We asked this witness nothing concerning the con-
2190 struction of the contract at all.

Justice STEPHENS. That is very true, but we thought you were offering this witness, among other things, as a part of the Government's case to prove an illegal price fixing and illegal dealings under these agreements as subterfuges.

Mr. KNUFF. Of course, we have offered the witness for those purposes.

Justice STEPHENS. Then the witness can be cross-examined as to his understanding of the agreements in those respects. It is error, it seems to the Court, to deny cross-examination on that subject to bring out the full meaning and reasonableness of the witness' testimony.

The Court doesn't wish to argue the matter with counsel. However, the Court always feels under an obligation to state the reasons for its rulings. The Court shouldn't make rulings without reasons, and if it has reasons it likes to state them for the guidance of counsel. But it doesn't mean to argue the matter.

The objection is overruled, subject to a motion to strike if the future questions indicate that the examination is not material.

Mr. BROMLEY. Will you read the question?

(The question was read by the reporter as recorded on page 2485, lines 8 to 11, both inclusive.)

2191 The WITNESS. Yes.

By Mr. BROMLEY.

Q. Now, sir, will you refer to Exhibit 293?

A. Yes, sir.

Q. The last sentence reads: "Before that time, I shall expect to have in your hands a price filing on this material."

Now in that memorandum of yours to Mr. Hallowell, of the 5th of December, 1934, that reference to a price filing

was a price filing under the then existent and operative National Recovery Administration Code, was it not?

A. I don't remember.

Q. Don't you remember that as of this date, in December 1934, there was an NRA Code in the gypsum industry, and that your company was a member of that Code, sir?

A. I don't remember the dates that that was in effect. I certainly know there was an NRA Code.

Q. And that your company was a member, sir?

A. Yes, sir.

Q. And that under that Code, as approved by the NRA Administrator, all companies in the gypsum industry were required to file their prices with the Code Authority?

A. Yes, sir.

Q. Now look at that again, and aren't you able to tell me that that is the reference in the last sentence
2192 intended by you, by the use of the words "price filing"?

A. It may either have been that, I should think, or my own sales bulletin giving notice at what price the board could be sold.

Q. At least, sir, it had nothing to do with USG or any other competitor?

A. No, I didn't send to the Division Sales Managers the copies of the bulletins of the USG.

2193 Q. I show you what purports to be a letter from Mr. Willard Fuller, your president, to Mr. Knode, of the United States Gypsum Company, dated April 23, 1935, and I ask to have that marked as Defendants' Exhibit No. 7 for Identification.

(The document referred to was marked Defendants' Exhibit 7 for Identification).

By Mr. BROMLEY.

Q. I ask you to read that letter, please?

A. Yes, sir.

Q. Does that refresh your recollection that as a matter of fact it was early in 1935 that your company got into production in the metallized field?

A. Certainly at that time we were taking steps to get into the manufacture right away.

Q. Do you recall, sir, that it was only shortly after the date of this letter, Defendant's Exhibit 7 for Identification, that you commenced to produce the board commercially?

A. I don't remember, sir, when we started to produce.

Q. Will you look at Exhibit 295, please, which is Mr. Sadler's letter to Mr. Neale, that is to you, of November 27, 1935?

A. Yes, sir.

Q. Now the prices referred to in that letter are the
2194 prices which U.S.G. charged you and which you were to pay for board purchased from them, isn't that right?

A. It was telling us what would be our cost.

Q. That is, what you would pay to U.S.G. for what you bought?

A. Yes.

Q. Now will you look at Exhibit 298, please. In the last sentence of the second paragraph, when you used the phrase "This plan", you did not mean to suggest that U.S.G. and Structural had any agreement, did you, with respect to prices or anything else?

A. Let me read the whole paragraph please.

Q. Surely.

A. What was your question?

Q. In using the word "plan" you didn't mean to suggest that you had any knowledge of any agreement between U.S.G. and Structural, did you?

A. I wouldn't say that I had any knowledge of any agreement.

Q. And in using the word "plan" didn't you mean merely to refer to the course of action?

A. "Program" might have been a better word.

Q. And isn't that true so far as the use of the word "plan" is concerned at the beginning of the third paragraph of that letter?

2195 A. I would think so.

Q. And isn't it true also with respect to where you used the word "plan" in the fourth sentence of the third paragraph?

A. If the program, or course of action, there indicated were carried out, then what I mentioned would result.

Q. I find the word "plan" used again in the third sentence of the third paragraph. Would your answer be the same as to its use there?

A. Well, frankly, that is the one I guess I was looking at a moment ago when I made reply.

Q. So your answer would be the same, would it?

A. Yes.

Q. And would it be the same insofar as the use of the word "plan" is concerned at the very beginning of the fourth paragraph near the bottom of the first page?

A. I would think so.

Q. And likewise so far as concerns the use of the word "plan" in the fifth paragraph, over the page, in the first sentence beginning, "Ebsary"?

A. I would think so.

Q. Now turn back to the bottom of page 1, in the fourth paragraph, there you use the phrase, in the last line near the end, "This being so, it was utterly absurd to make a statement to the trade" and so forth. Now "This
2196 being so" is your comment and is not meant to be a quotation or summary of anything that Mr. Henning said, is it?

A. I think perhaps it goes back to the first part of the preceding paragraph where I stated that it was my opinion that the plan, or program, was not fair and was impractical.

Q. So "This being so" refers to your comment and not to what Henning said?

A. I would think so.

Q. Now isn't it a fact, Mr. Neale, that the price increase of U.S.G. was announced about March 1, 1936, to be effective April 1, 1936, and that the talk which you had with Henning referred to in the fifth paragraph, which is the first paragraph on the second page, was some two weeks after U.S.G. had announced its price increase?

A. It is hard for me to place when that might be.

Q. Well, the memorandum, Exhibit 298, is dated March 23, isn't it?

A. Yes, sir.

Q. And announcement of U.S.G.'s price increase occurred March 1, did it not?

A. Or close to that.

Q. And the second sentence of the fifth paragraph, "When I was in Chicago the week before last" and so forth, clearly refers to a date which is subsequent to March first, doesn't it?

2197 A. I think it must.

Q. Now isn't it a fact that in that interview with Henning you were merely inquiring as to what U.S.G. was doing in this respect?

A. I may have been merely inquiring, or I may have been protesting.

Q. Well, did you make any agreement with Mr. Henning or have any understanding with him, as to what you, or he, or anybody else should or should not do about prices?

A. No; I think that is borne out somewhere later in this memorandum. I hoped that the price might be higher than it was fixed by his company.

Q. Well, isn't it a fact, sir, that at no time did you have any understanding with him as to what the price should or should not be, or what he or you should or should not do?

A. I don't recall any understanding.

Q. Now look at the fifth paragraph, which is the first whole paragraph, on page 2, again, beginning, "Ebsary would have nothing whatsoever to do with this plan" and so forth. Did you intend to suggest that there was any agreement, or that Ebsary were merely expressing his opinion of the price situation?

A. I don't recall the details now, Mr. Bromley.

Q. Well, were you ever a party to any understanding or plan to which Ebsary was a party, with respect to plaster prices?

A. I don't recall any.

Justice STEPHENS. How much more cross examination have you?

2198 Mr. BROMLEY. I am nearly through. If Your Honors will indulge me I think I can finish very promptly.

Justice STEPHENS. Very well.

By Mr. BROMLEY.

Q. Now in the eighth paragraph, which is the first one at the beginning of page 3, in the first sentence beginning, "Last Tuesday C.F.H. was in New York * * * and while here I put up to him a plan which I felt at least had the chance of working", and so forth.

Does that mean that you made any suggestion to Henning for an understanding or agreement as to what prices should or should not be, or what action you should both take co-operatively?

A. His company being the largest company, I was in hopes that they would set a price for their material that would enable my company to make a little money, because I couldn't hope to get any higher price than they were getting. All I could do was follow along if they set a price.

Q. And therefore all that you meant to suggest by this paragraph at the top of page 3 was that you were suggesting something to Henning, but you do not mean to suggest that you had any understanding with him?

A. No, I do not.

Q. Isn't it a fact that all you were doing was suggesting to him a method by which, as you thought, all

companies could have a fairer basis to work on so far as protected job contracts were concerned?

A. I think that is a correct view of it.

Q. In the ninth paragraph, which is the next paragraph, on page 3, in the last sentence you say—or rather in the next to the last sentence—"In other words, they accepted the plan but felt that a dollar raise was better" and so forth. Now again, in your use of the word "accepted" you did not mean to suggest that you and Henning came to any understanding as to what he would do, did you?

A. No; and I think that is borne out by the action that followed, and about which I am reporting here.

Q. You refer to the fact that Mr. Henning did not accept your suggestion but did something other than what you suggested?

A. Yes.

Q. You suggested a $9.00 price and he came out later with a notice to the trade that after April 1st they would take specific job contracts only at $8.50, isn't that right?

A. That is what the letter says.

Q. And in the last reference in that paragraph where you say, "I followed the U.S.G. with a letter to the trade two days later", and so forth, the issuance of that letter was not the result, was it, of any understanding which you had with Henning that you would do that?

2200 A. No.

Q. Now in the next paragraph, in the second sentence, you say "Ebsary himself has just returned from the south and has not made up his mind whether he will follow or not". You had no understanding with Ebsary, did you, as to what he would or would not do?

A. No.

Q. In the next sentence you say, "It is my guess that the plan would appeal to him" and so forth. Is your answer the same with respect to the use of the word "plan" there as it has been heretofore?

A. I would see no reason to change it.

Q. Now in the last sentence on the last page, "* * * it will be at least six months before we can hope to raise the market price for stock deliveries"—by the use of the word "we" you intended to refer to Atlantic, did you not?

A. I think so.

Q. During the time that you were with Atlantic, Mr. Neale, isn't it a fact that the only prices which U.S.G. ever fixed were prices on patented board manufactured by your company, so far as your company was concerned?

A. So far as my company is concerned, yes.

Q. And isn't it a fact, sir, that you never had any agreement or understanding with anybody with respect to the prices of plaster or other unpatented gypsum products?

2201 A. That is true.

Mr. BROMLEY. That is all.

Justice STEPHENS. Is there any further cross-examination by counsel for other defendants? If not, is there any redirect examination?

Mr. KNUFF. We have no redirect examination, Your Honor.

Before the Court adjourns, we had intended to call Mr. George Brown today, and it is now a quarter after four. We would be willing to continue if it is satisfactory to the Court.

Justice STEPHENS. How long will he be on the witness stand?

Mr. KNUFF. I would say, on direct examination probably an hour or a little better.

Justice STEPHENS. The Court was about to say, Mr. Knuff, that it regrets that it cannot offer to sit on Saturday, but one of the members of the Court came here on Monday against his doctor's orders with respect to a cold that he had, Judge Jackson; and I have duties with respect to the Patent Interchange Committee, of which I am Chairman, which fall upon my shoulders tomorrow. Also, in view of the complications and length of the trial, we will probably run into this situation every week-end, in any event.

Mr. KNUFF. The only reason I mention it at this time is that Mr. Brown tells me that he is in the same situation as Judge Jackson. He feels that he should be in

2202 bed and we are not inclined to ask General Brown to come back on Monday. However, we wouldn't want to have the Court sit without any witnesses and we will have other witnesses on Monday, but he thinks he will have to go to bed when he gets home.

Justice STEPHENS. We cannot sit tomorrow, nor longer today. The difficulty of sitting beyond four o'clock is that the court reporter's service is necessarily pushed then. Last night the testimony didn't reach me until 9:30, and it makes such a long night of reading for the Court that it is almost impossible to keep it up. In an emergency it is all right, but we cannot do it regularly.

The Court would suggest that you excuse Mr. Brown until he has recovered from his cold, and then call him at a later time, and if you run out of witnesses we will not criticize you.

Mr. KNUFF. We will be glad to do that.

Justice STEPHENS. The Court hopes counsel for the defendants will be able to find the lost exhibits. If the Court could convict the defendants of having possession of them, the Court would urge the defendants to photostat a new set, but the matter seems to be one of accident, of course it is one of accidental misplacement, and we hope you will be able to find them by Monday because we must have three sets of these exhibits regularly for use of the Court at the end of the examination. Counsel for the defendants may have them before the examination but we need
2203 them at the end of the examination to read them with the testimony.

So please try to discover them by Monday.

Mr. JOHNSTON. I might suggest, in view of past experiences, that you might look on the table of counsel for the Government again. [Laughter.]

Justice STEPHENS. The Court requests all counsel, and the court reporter and all other persons connected with the Court, to look for these exhibits.

Announce a recess until Monday at 10 o'clock.

Just one moment. Are you through with this witness, gentlemen?

Mr. KNUFF. We are through with this witness for the present, and he may be excused, if it is satisfactory to the defendants.

Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. You are excused, Mr. Neale, and thank you for attending the Court.

(Witness excused.)

Justice STEPHENS. Announce the recess.

(Whereupon, at 4:17 o'clock, p.m., the hearing was recessed until Monday morning, December 20, 1943, at 10:00 o'clock).

2204 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M.

GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,
Washington, D. C., Monday, December 20, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances: (Same as heretofore noted.)

2209 With respect to Exhibit 298, the Court notices, Mr. Bromley and Mr. Knuff, in rereading that exhibit, for example, in paragraph 3:

"This plan to raise prices was utterly worthless for two reasons; (1) it was not fair; (2) it was impracticable." And going on to the sentence beginning with the word "Under", which I think is the fourth sentence in the third paragraph on page 1 of Exhibit 298, "Under the plan as soon as the price of $7.75 became effective, all of the contracts which Cyanamid and U. S. G. had signed would be validated."

Is that a correct word—"validated"—or does that need explaining? It seems to me the word should probably have been "violated".

Mr. KNUFF. No, "validated" is correct, Your Honor.

Mr. BROMLEY. It needs an explanation, I think. I think the explanation is that if there were outstanding specific job contracts at $7.50, those contracts wouldn't be any good if the market price were lower than $7.50, because the evidence shows—or it was referred to in the opening—that that protected job business doesn't work both ways. If a manufacturer protects a dealer, the manufacturer

2210 has to supply the goods at the price which he says he will supply them at, even if the market price goes higher. But if it goes lower, then the dealer can get the benefit of the power price. So that this is just a way of saying that when the market price became $7.75, then all those specific job contracts at $7.50 were binding on the manufacturer, and he would have to fill them at that price.

Justice STEPHENS. I see. Thank you for that explanation.

In that same exhibit, in the first full paragraph on page 2 of the exhibit,—still referring, Mr. Reporter, to Exhibit 298,—"You may recall that some months ago Fred Ebsary advanced the idea"—it is in the third sentence of the first full paragraph on page 2—"that a small raise of 25 or 50¢ would be a good idea provided that there was no protection at all."

What is the meaning of the word "protection" in that sentence?

Mr. BROMLEY. Provided that no manufacturer entered into arrangements with dealers whereby he agreed to protect the dealer on specific jobs at the lower price.

Mr. KNUFF. That is a correct explanation, Your Honor.

Justice STEPHENS. There is almost as much of a jargon in business terminology as there is in the law. Sometimes it needs explanation to mere lawyers and judges.

2211 One other question with respect to the meaning of the record, for the Court's information.

With respect to Exhibit 292, examination was being conducted in respect of that—this is cross-examination, I think, by Mr. Bromley—at page 2483, at the bottom:

"Q. Will you look at Exhibit 292, please?

"A. Yes, sir.

"Q. Now in connection with the last paragraph, the fact is that Mr. Warren was mistaken, wasn't he, and that Paragraph X of your license, as a matter of fact, applied only to board manufactured by your company?"

That reference was the second paragraph of Exhibit 292. That puzzled the Court, your cross-examination puzzled the Court, because the understanding, at least of the Judge speaking, was that this exhibit is talking not about prices but about royalties; and the Court thought that it was conceded in the case, indeed asserted by the defendants, that the royalties were upon not only the board manufactured but upon the board sold. Yet your cross-examination would seem to be correcting that.

I probably don't understand the situation, and I only call it to your attention because I want to be sure that I do understand it.

Mr. BROMLEY. I think the fact is that royalties under all of these license agreements are only payable on

2212 board manufactured and sold.

Justice STEPHENS. I thought I remembered you saying, in the opening of this case, that the royalties were fixed upon all of the products sold by the licensees, and that that did not constitute price fixing upon the products

not licensed because it was a mere measure of the royalty rather than anything else.

Mr. BROMLEY. Well, it is true that the general license agreements provide for the fixing of royalties on board whether patented or unpatented. That is the measure of the royalty. But I understood that to mean only board manufactured and sold, whether patented or not.

Justice STEPHENS. I see what you mean.

Do you have any comment to make on that, Mr. Steffen?

Mr. STEFFEN. I would say, in regard to the general license agreements of October and November, which appear in the Complaint on page 70, that the royalty is to be paid on all board, whether manufactured or not. It says specifically in paragraph 3:

". . . equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent . . .", and so on.

2213 Justice STEPHENS. Where are you reading from?

Mr. STEFFEN. In the middle of page 70, paragraph 3, of the Complaint, which, as I construe it, calls for payment of royalty on all board of whatever kind.

Justice STEPHENS. Well, perhaps that is a matter which the Court had better leave to general discussion in closing arguments in the case. We like to understand these things, as far as we can, as we go along, and perhaps it is better to ask questions. The Court always prefers to appear ignorant rather than to remain ignorant.

Mr. KNUFF. I think, if Your Honor pleases, what the memorandum had in mind appears on page 116 of the Government's Complaint under paragraph X:

"Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report, under the hand and verification of some officer or other duly authorized agent of Licensee, showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month and which was manufactured by Licensee under the rights, licenses and privilege herein granted. . . ."

Now it is entirely possible that a board could be manufactured, we will say, in January, but that board wouldn't be sold until February, and in a situation like that the licensee wouldn't have to pay the royalty until the

2214 time that board was sold, and I think that is what the letter had reference to.

Justice STEPHENS. Where were you reading from?

Mr. KNUFF. I was reading from page 116 of the Complaint, under paragraph X. I think that is what the memorandum had reference to.

It didn't have reference to this particular contract, because the contract we set out here is the Ebsary contract, but the Ebsary contract was identical, as I understand it, with the Atlantic contract.

Justice STEPHENS. Thank you, gentlemen.

Mr. BROMLEY. Could I say, before we leave that subject, if the Court pleases, that in connection with the memorandum, Exhibit 292, the second paragraph, it is plain from looking at the provision of the agreement to which Mr. Knuff has referred that Warren was mistaken, because paragraph X on page 116 uses the word "manufactured"; and that is what I developed on my cross-examination, that the royalties are payable only on board manufactured and sold. And that appears in the 6th line as read by Mr. Knuff, in paragraph X.

And before we leave that subject, Mr. Steffen's reference to page 70 of the Complaint, paragraph 3 of the general license agreement, you will see in the 8th line from the bottom, at the end of the sentence—that line beginning: "all such plasterboard and gypsum wallboard manufactured and sold . . ."

2215 Then up five more lines: ". . . letters patent or applications for letters patent, manufactured and sold . . ."

So that I think a reading of the whole paragraph rather than parts of it will show that even in those agreements, royalties were paid on board manufactured and sold.

Justice STEPHENS. We understand the contentions of counsel in that respect.

Mr. BROMLEY. That is the basis on which royalties were paid, anyway.

Mr. FINCK. Last week, metallized board and perforated lath were referred to in the testimony a great many times. Now inasmuch as defendants National and Baker are not charged in the Complaint with any violation under the antitrust laws because of National's manufacture and sale of metallized board and perforated lath, it seems to me that I would like to have the record show a continuing objection for National and Baker with respect to all evidence introduced by the Government relating to metal-

lized board and perforated lath, on the ground that such evidence is incompetent, irrelevant and immaterial, and has no bearing on the issues as between the Government and National and Baker.

Now it should be noted, as I say, that it is very difficult and impractical for us to ask that those answers be stricken, as to Baker and National, each time they are made. It seems to us if we have a continuing objection, then
2216 at the end of the testimony we can move to strike such portions of the testimony as refer to metallized board and perforated lath.

Justice STEPHENS. Was the testimony on that subject, the subject of perforated lath and metallized board, offered, Mr. Knuff, in reference to National?

Mr. KNUFF. I don't understand Mr. Finck's contention. I will say that National was not a licensee under the perforated lath license, but they definitely were a licensee under the metallized lath agreement. Their license is dated October 5, 1934, and is in evidence as Government's Exhibit No. 19. They were licensees under the metallized lath license agreement. They were not licensees under the special perforated lath license agreement.

Mr. FINCK. Well, if the Court please, we did have a license, but there is no charge made against National of any violation because of its manufacture and sale of metallized board. They except National in each instance in the charges in paragraphs 113 and 114 of the Complaint. In each case they say "except National". That is, there is some charge as to others of a violation of the antitrust laws because of certain sales of metallized board purchased from other licensees.

Justice STEPHENS. Where is the exception of National in the first paragraph, paragraph 113?

2217 Mr. FINCK. I am mistaken on that. There is no exception there. But in the charge under paragraph 114——

Justice STEPHENS (interposing). Do you charge National with a violation of the antitrust laws with respect to metallized board?

Mr. KNUFF. Definitely.

Justice STEPHENS. Where?

Mr. KNUFF. First, we charge them under the general charging paragraph, which is paragraph 44.

Mr. FINCK. What do you charge?

Mr. KNUFF. We charge them with entering into contracts in violation of the Sherman Antitrust Act and con-

spiracy to fix the price of the wallboard and various other gypsum products.

Mr. FINCK. We are talking specifically about metallized board, and I see no charge as against National. It says here:

"At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board, but all of said licensees, except National, intended, as U. S. G. well knew, to purchase metallized board from U. S. G. or National for resale to dealers and consumers. Notwithstanding said facts, U. S. G. required its licensees to execute said agreements in order to be enabled to purchase metallized board for resale
2218 to dealers and consumers. Throughout the period from the execution of said license agreements to the date of filing this complaint, U. S. G. has determined and fixed the minimum prices and terms and conditions of sale governing the sale by its licensees of metallized board, with the knowledge, and notwithstanding the fact, that a substantial part of the metallized board sold by its licensees, except National, during said period was purchased from National and U. S. G."

You see, we didn't do anything wrong.

Mr. KNUFF. The exception was that National didn't buy the board from somebody else. That is what we are excepting in there, that National didn't buy the board from some person else.

Mr. FINCK. But if we didn't buy the board from some other licensee, then we couldn't have violated your charge, could we?

Mr. KNUFF. Certainly.

Mr. FINCK. How?

Mr. KNUFF. Well, I think this can be taken care of—I don't care to stand up here and argue this morning on this thing—I think this can be very amply taken care of in two respects: (1) it can be taken care of on final argument, and (2) it can be taken care of very appropriately at the time we make the offer, which we intend to do, concerning the resale price and concerning all other
2219 charges that we have in this Complaint. We are going to clear up, once and for all, the matter of overt acts, and we will definitely clear that up.

Justice STEPHENS. Well, the Court thinks that there is no impropriety in counsel being asked to argue the matter now, Mr. Knuff.

Mr. KNUFF. We are not prepared, Your Honor.

Justice STEPHENS. Of course, the Court is confronted with an objection, and the Court is bound to rule on the objection. The objection is that under the Complaint there is no charge against National with reference to metallized board or with reference to perforated lath. You are certainly prepared as to what your Complaint charges?

Mr. KNUFF. Oh, yes.

Justice STEPHENS. If you think there is some other topic, however, raised by the objection, which you ought to have further opportunity to argue, the Court will not insist upon you arguing that now, if you think it is going to be covered by this offer. The offer, I thought, had to do with the resale of products other than metallized lath.

Mr. KNUFF. It will have to do with that, and with clearing up this whole situation, what we conceive to be the vice in the Court's ruling as to the whole situation.

Justice STEPHENS. What whole situation?

Mr. KNUFF. On the ruling on the excluding of
2220 evidence concerning the resale price, and on all rulings of that nature. We think we can point out very, very definitely, with abundant authority, as to what the Complaint should charge. We can point out with abundant authority that when we do specify certain overt acts, that those overt acts are not the only overt acts; and this question that Mr. Finck now raises, if I understand him correctly, will be covered in that offer and in the memorandum that we are going to submit at the time we make that offer. It has been passed upon very, very recently. For instance, in the *General Motors* case it was passed upon. We are going to have a complete memorandum for Your Honors' consideration at that time.

Justice STEPHENS. Can you postpone your objection until then, Mr. Finck?

Mr. FINCK. I would like to have a continuing objection to all that testimony. It does'nt seem to me that that would harm anything at this time.

Justice STEPHENS. The objection may be recorded. The Court will postpone a ruling upon it until the offer which the Government now refers to, and you may call the Court's attention to the objection at that time.

Mr. FINCK. May I make one other observation at this time. It seems to me that things ought to be cleared up by the Government as to what we are to defend against,
pretty soon. We have gone all through this from time
2221 to time, and each day we hear of something else that the Government is to clear up. Now it seems

to me we have had this Complaint for several years, and they understand what we interpret it to mean. But we are still in the dark as to the Government's position.

Justice STEPHENS. Perhaps this offer of proof that counsel for the Government intend making, and the memorandum submitted on it, will clear that up.

Mr. FINCK. Thank you.

Justice STEPHENS. It would be a very good thing, I think, from the standpoint of the efficient conduct of the trial, if all persons could know, including the Court, just what the Government is charging the defendants with, so that they may have an opportunity to prepare to answer it, and so that we may be advised better with respect to ruling. The rules contemplate no surprise, and the Court doesn't intimate that the Government is trying to effect any surprise, but we should have an understanding pretty soon, I should think, as to just what the various charges are that are to be met.

Mr. KNUFF. The charging portion of this Complaint is paragraph 44 of the Complaint. We have set forth in paragraph 44 in the language of the Sherman Antitrust Act, the various violations that we contend the defendants have committed in this case.

2222 Justice STEPHENS. Will you contend, Mr. Knuff, in your argument, that if that was the only paragraph in your complaint, the paragraph would be a sufficient complaint, in the presence of a demand for a bill of particulars to support the Government's cause of action? Can we ignore all the balance of your complaint?

Mr. KNUFF. We wouldn't want you to ignore anything that is in the complaint. But paragraph 44 is the charging paragraph, and since we have charged that in the language of the statute itself, irrespective of what the new rules say paragraph 44 would be sufficient.

Justice STEPHENS. You think that paragraph alone would be sufficient on which to try this entire case?

Mr. KNUFF. I don't think there is any doubt about it. I don't think there is a bit of doubt about it, and I think that we will be able to convince the Court of that when we submit this memorandum.

Justice STEPHENS. Very well, the Court will suspend its ruling and hold its mind open on that subject.

Mr. JOHNSTON. On behalf of Texas, I would like to adopt the same objection, and also call attention to the fact that Texas did not have a contract covering metallized or perforated board. I don't think the Government even charges that.

Justice STEPHENS. The objection may be recorded. The Court will rule on it at the time of this proposed offer.

2223 Mr. ADAMS. I have one matter affecting the personal convenience of counsel, Your Honor. Several of the counsel have been able to get transportation to New York on Wednesday at 4 o'clock, and it occurred to us that it might be possible for the Court to recess a little earlier on that day so that we can get down to the station. We were hopeful that we might be able to suspend at perhaps 3:15 or 3:30 on that date.

Justice STEPHENS. Yes, that can be done.

You may proceed, gentlemen.

Mr. KNUFF. If either Mr. Bromley or Mr. Finck will return to me the Arthur Black exhibits, I will be in a position to furnish each member of the Court with a copy of those exhibits.

Mr. FINCK. We are returning both the Black exhibits, the Whittemore exhibits, and the Miller exhibits.

Mr. KNUFF. Thank you.

Justice STEPHENS. I perhaps ought to say to counsel for the Government, in order that they may have an opportunity to argue upon doubts that arise in the Court's mind with reference to the subject we have just been discussing, that the thing that puzzles me, and I think my colleagues, about the Government's position is this: Assuming that a cause of action could properly be stated, under the new rules, by alleging nothing but paragraph 44

2224 in the Complaint, the fact is, nevertheless, that the Government has alleged more than paragraph 44. It is alleging paragraph 44 and a very large number of other paragraphs which specify in some detail the nature of the Government's case. It seems to the Court that when it has done that, the Court can't ignore all the other allegations of the Complaint and look only at paragraph 44. It has got to read the Complaint as a whole. And we thought that the Complaint had been drawn as specifically as it was for the purpose of advising the defendants and the Court of the exact nature of the charge.

What the Government is now contending is that it can do a third thing—it can allege paragraph 44, it can specify the detail of the charge as it is amplified in the balance of the Complaint, and then at the time of the trial it can come in with a third class of charges, not referred to.

That seems to us to be a very novel position for a pleader to take. The defendants are entitled at some time in the case to know, through the pleadings, what the items are

that they will be expected to meet; and the same rule would seem to be applicable to the defendants' pleadings, that the nature of the defenses having been specified, after general denials of violation of the Antitrust Laws, that those are the defenses upon which they will be expected to pitch their defense; and that in the absence of amendment allowed on one side or another, that that was where the case is made.

2225 The purpose of pleadings, both defendants' pleadings and Government's pleadings, is to advise not only counsel on both sides of the case, but the Court, as to what the issues in the case are, and with sufficient specificity so that preparation can be made.

I state that only because you may wish to argue a different point of view.

Mr. KNUFF. Thank you.

Mr. BROMLEY. So it won't be overlooked, if the Court pleases, I would like to say that just to guard against this very sort of a thing, all the defendants here went to a great deal of trouble and expense to make voluminous motions for bills of particulars. I remember we printed a chart about that big (indicating) lining up our demands —and we argued it very fully and we were granted a bill of particulars—just to guard against this sort of thing happening at the trial.

I just mention that now to show that the pleadings of this case have been supplemented by very carefully drawn bills of particulars in response to a careful decision by a District Judge in this District.

Justice STEPHENS. You may call your next witness, Mr. Knuff.

Mr. KNUFF. Arthur Black!

2226 Thereupon, ARTHUR R. BLACK, called as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. KNUFF.

Q. Where do you live, Mr. Black?
A. Port Clinton, Ohio.
Q. By whom are you employed?
A. At present?
Q. That is right.
A. The Celotex Corporation.
Q. In what capacity?
A. As a supervisor.

Q. Supervising what?

A. In gypsum products, of sales activities.

Q. And what is the nature of that work?

A. To go over the territory, particularly in the Cleveland Division, contacting the representatives of the Celotex Corporation with regard to their sales activities, and also contacting the customers in those different districts.

Q. By "representatives of the Celotex Corporation", do you mean salesmen?

A. That is right.

Q. And do you have general charge of the sales-
2227 men in that particular district under somebody else's jurisdiction?

A. The Cleveland Division is controlled by Mr. Dierking, and I work under his direction.

Q. And the Cleveland Division consists of what?

A. Part of Ohio, and Kentucky—part of Kentucky.

Q. What part of Ohio?

A. All of Ohio with the exception of a small portion of the eastern area running from up near the Lake down to the Ohio River.

Q. And part of Kentucky?

A. And a part part of Kentucky.

Q. And what part of Kentucky?

A. Principally the towns of Louisville and Lexington, and the territory between.

Q. That is, the towns of Louisville and Lexington, that is across the river from Cincinnati, is that what you mean?

A. No, Louisville is down the Ohio River 100 miles or more, and Lexington is south of Cincinnati some 60 or 70 miles.

Q. And you have general charge of the sales policies and have charge of the salesmen in and about the district that you have testified to?

A. Not quite correct, Mr. Knuff, because I work under the direction of Mr. Dierking, the Cleveland Divi-
2228 sion manager, who has charge of that Division.

Q. Are you his assistant?

A. As one of his assistants, as a supervisor, in contacting these different salesmen and the customers, and looking over their problems.

Q. Does Mr. Dierking have any other salesmen that he supervises, other than the salesmen that you supervise?

A. Not to my knowledge.

Q. In other words, you are more or less his assistant, if I understand you correctly. Mr. Dierking and you determine the policy that the salesmen shall pursue, is that correct?

A. No, Mr. Dierking outlines the policy, principally. I have been with him simply—recently the most of my activities have been in looking after the larger jobs under construction.

Q. You have nothing to do with the determination of policy?

A. No, sir.

Q. You have been with the Celotex Company since 1939, I would take it, is that correct?

A. Yes, sir, ever since then.

Q. Celotex took over the American Gypsum Company sometime in 1939, April 1, I believe, wasn't it?

A. 1938 or 1939.

Q. Before that, with what company were you associated?

2229 A. The American Gypsum Company.

Q. And when did you first enter the employ of the American Gypsum Company?

A. As I recall it, it was in 1907.

Q. In what capacity?

A. Sales Manager.

Q. And you were with the American Gypsum Company as Sales Manager from that time until the time Celotex absorbed American Gypsum; is that correct?

A. Not continuously. During the early 20's I was away from the American Gypsum Company for a period of about 2 or 3 years.

Q. And then you came back with the American Gypsum Company in the same capacity?

A. Correct.

Q. And you have been, then, say from about the middle of the 20's or the late 20's, you have been with the American Gypsum Company as their Sales Manager up until the time Celotex absorbed it; is that correct?

A. Correct, yes, sir.

Q. Who was the General Manager of American Gypsum Company after you came back with them in the middle 20's or late 20's, or in the 20's?

A. Mr. F. J. Griswold.

Q. Do you recall, sir, the situation in the gypsum
2230 industry beginning with the year 1926 and including 1927 and 1928—I have particular reference

to the demoralized price conditions. Are you familiar with that?

A. To a certain extent.

Q. Were prices demoralized in the gypsum industry during those years?

Mr. BROMLEY. I object to that as calling for a conclusion and therefore incompetent.

Justice STEPHENS. The objection is sustained. Ask him about the specific price changes, and the lowering of prices, and the price competition.

By Mr. KNUFF.

Q. Well, with reference to the prices of gypsum products in 1928, were they the same or higher or lower than the prices for the same products in 1926?

Mr. BROMLEY. The same objection.

Mr. KNUFF. I think that doesn't call for a conclusion. It calls for a comparison of prices.

Justice STEPHENS. We will overrule that objection, provided you know. Do you know the answer to the question?

The WITNESS. Your Honor, I don't remember exactly what the prices were in 1926——

Justice STEPHENS (interposing). You are not being asked for the exact prices. You are being asked, as compared with 1927 and 1928, whether in 1926 they
2231 were lower or higher on the type of products referred to.

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. I don't know as you have answered my question. Were the prices in 1928 higher or lower, or the same as during the period of 1926?

A. My recollection is that in 1928 they were some lower.

Q. By "some lower", what do you mean, sir?

A. Dollars and cents.

Q. Well, they were some dollars and cents lower—I don't know as I understand exactly what you mean.

A. Well, I don't know——

Q. (Interposing.) Can you give it to us in percentages if you can't in dollars? Were they 10 percent or 15 percent or 50 percent, or what percent?

A. I wouldn't recall.

Q. What is your best recollection?

A. My recollection is that were from 10 to 20 percent lower.

Q. When did the gypsum industry reach its peak in the 20's?

Mr. BROMLEY. I object to that as incompetent, because calling for a conclusion.

Justice STEPHENS. The question is so general,
2232 Mr. Knuff, that the answer won't mean anything. Objection sustained.

Mr. KNUFF. It was purely a preliminary question. I was going to follow that with other questions.

Justice STEPHENS. Objection sustained.

By Mr. KNUFF.

Q. Do you recall, sir, that the stock market crash occurred in 1929?

A. Yes, sir.

Q. Had the gypsum industry entered into a period of decline previous to that time?

Mr. BROMLEY. The same objection.

Justice STEPHENS. The question is so very general that it seems almost related to nothing under the pleadings—had the gypsum industry entered into a decline.

Mr. KNUFF. Of its very nature it has to be general.

Justice STEPHENS. You may ask this witness to tell what happened to the gypsum industry, in his own way, if he knows about it.

Objection sustained.

By Mr. KNUFF.

Q. You were Sales Manager of the American Gypsum Company in 1926, were you?

A. I think so, I am not positive of that date.

Q. Were you Sales Manager in 1928?

A. Yes, sir.

2233 Q. Were you with the gypsum company, the American Gypsum Company, in 1926?

A. As I recall, I was.

2234 Q. Well, if you were with the American Gypsum Company in 1926, in what capacity did you serve?

A. For a while, when I returned to the company, I was stationed in Detroit, looking after the Detroit area.

Q. And how long were you up in Detroit?

A. I don't recall.

Q. Was it a matter of years?

A. Yes, about a year, I think, or something like that. Then, later on, I was called to Port Clinton, and put in charge of sales, general sales.

Q. Can you fix that date with any approximate degree of certainty, when you came back to Port Clinton?

A. No, I can't, Mr. Knuff. I wouldn't be able to fix that even approximately.

Q. Was it before the stock market crash in 1929?

A. Yes, sir, I was in Port Clinton then.

Q. How long had you been in Port Clinton prior to the stock market crash of 1929?

A. I don't recall.

Q. A matter of years?

A. I had always lived there during those years.

Q. You live in Port Clinton——

A. (Interposing.) That was my home.

Q. (Continuing.) ——although your office was in Detroit?

A. Yes, sir.

2235 Q. Now what was the nature of your employment in Detroit?

A. Looking after, supervising, the salesmen, and contacting the trade in the Detroit area.

Q. Now during that period from, we will say, 1928, on, was there competition in the gypsum industry?

Mr. BROMLEY. Objected to as incompetent because calling for a conclusion.

Mr. KNUFF. Well, while it is true that almost everything that we say is a matter of conclusion, nevertheless competition is a fact also.

Justice STEPHENS. Well, it is probably preliminary. Overruled.

Mr. KNUFF. Will you read the question, Mr. Reporter?

(Thereupon, the pending question was read by the reporter.)

The WITNESS. Yes.

By Mr. KNUFF.

Q. Can you characterize that competition, sir?

Justice JACKSON. Do you understand the question?

The WITNESS. No, I don't, your Honor.

Justice JACKSON. I don't, either.

By Mr. KNUFF.

Q. Was the competition keen and sharp, or was the competition more or less languid?

2236 Mr. BROMLEY. I object to that as entirely improper and calling for a conclusion, and therefore incompetent.

Justice STEPHENS. Well, the questions are technically incompetent, and yet they probably can't do any harm. We don't see why you don't ask the witness about the particular situation, if he knows. That is what the other witnesses have testified to, and there isn't any dispute in the case, in fact it is conceded in the pleadings, that the answers to these general questions are "yes".

It would seem to be taking unnecessary time to continue these general questions.

However, if it is preliminary, in an attempt to direct the witness' mind to particular topics which you have in mind, the Court will overrule the objection.

Mr. KNUFF. I just wanted to bring out very definitely that there was keen competition in the industry at that time. I just wanted to be sure that it was understood. Now if that is the general understanding I will stop right there.

Justice STEPHENS. Is there any dispute about that, Mr. Bromley?

Mr. BROMLEY. There has always been keen competition in the gypsum industry, then as well as at all other times.

By Mr. KNUFF.

Q. Was there a price war on in the gypsum industry at that time?

2237 Mr. BROMLEY. I object to that as calling for a conclusion.

Justice STEPHENS. If the witness knows as a businessman engaged in the industry——

Mr. KNUFF (interposing). He was a sales manager at that time, your Honor.

Justice STEPHENS. The Court will treat that as preliminary and overrule the objection. But the witness must be asked eventually, Mr. Knuff, what the specific things are that you apparently have in mind. Whether or not price wars existed is a question that the Court must eventually pass upon to the extent that it is in issue, and therefore witnesses cannot testify to it unless they are produced as experts on the subject of economic conditions.

Overruled. Please try to make your questions more specific. This witness must know, if he has been in the industry so long as he testifies, what the practices were that were going on at the time in respect of an alleged price war, and you can direct his attention to those.

Mr. KNUFF. You may answer the question, Mr. Black.

Justice STEPHENS. The question is, was there a price war in the industry at the time that counsel referred to?

The WITNESS. It was considered a price war.

By Mr. KNUFF.

Q. How long did that condition prevail?

2238 A. As I recall, it was approximately two years.

Q. And when did it end?

A. As I recall, there was an improvement, I wouldn't say it ended——

Q. (Interposing.) You said it lasted for a period of two years. Now if you will tell me when it began, that is all I want to know; or if you will tell me when it ended, that is all I want to know.

A. I can't furnish you the exact dates, but according to my recollection, it extended through 1928 and 1929.

Q. And ended sometime in 1929?

A. About in 1930, as I recall.

Q. Now do you recall when American Gypsum Company became a licensee under the so-called Hite and Haggerty patents? It is in evidence, Mr. Black, that the license from USG to American under the Hite and Haggerty patents was dated November 25, 1929.

A. If that is the one you refer to in your question, I recall that.

Q. And about the latter part of 1929 or the first part of 1930, you say brought to a conclusion the competitive price war?

Mr. BROMLEY. He didn't say that, if the Court pleases. he said sometime in 1930.

Justice STEPHENS. That is correct, the objection

2239 is well taken.

By Mr. KNUFF.

Q. During this period that you are testifying about, concerning this price war, were the prices stable for plaster, board, and other gypsum products?

A. Not what I would term stable, they were quite uncertain.

Q. And by "uncertain" do you mean unstable?

A. Right.

Q. I show you, sir, Exhibit 203. Will you please look at it?

Justice STEPHENS. Is that the August 15th letter, Mr. Knuff?

Mr. KNUFF. That is the letter of October 11, 1928.

Justice JACKSON. It is already in evidence, isn't it?

Mr. KNUFF. It has been identified, but has not been offered yet.

By Mr. KNUFF.

Q. Would you look at this letter, Mr. Black? Is that your signature on it?

A. Yes, sir.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 203.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Let the Court refresh its recol-
2240 lection on the exhibit.

Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 203 was received in evidence.)

By Mr. KNUFF.

Q. Mr. Black, in 1929, who was Chairman of the Board of Directors of the American Gypsum Company?

A. As I recall it, Mr. John A. Kling.

Q. Of Cleveland?

A. Yes.

Q. You knew Mr. Kling?

A. Yes, sir.

Q. And had known him for how many years?

A. Approximately twenty years.

Q. At that time was Mr. Kling active in the affairs of the American Gypsum Company? I am talking about 1929. You can put that letter aside, if you will.

A. Yes, sir.

Q. He was active in the affairs of the American Gypsum Company in 1929?

A. Yes, sir.

Q. I show you, sir, what has been marked for identifica-
tion as Government's Exhibit 299, the same being
2241 a letter dated August 15, 1929, addressed to Mr.
A. R. Black, and signed John A. Kling. Will you please look at that letter and tell me whether or not that is Mr. Kling's signature that appears thereon?

A. Yes, sir.

Mr. KNUFF. We offer in evidence, if your Honor pleases, Government's Exhibit 299.

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received in evidence, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 299 was received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibits Nos. 300 and 300-A, the first being a letter dated June 23, 1934, addressed to Mr. Arthur Black, and signed M. H. Baker; and Exhibit 300-A being a copy of a letter addressed to National Gypsum Company and signed, or purported to be signed, by Elmer E. Finck. Will you please look at both of those exhibits? Exhibit 300-A is dated June 18, 1934.

Did you receive that letter from Mr. Baker?

A. As far as I know, I did.

2242 Mr. KNUFF. We now offer in evidence, if your Honor pleases, Government's Exhibits Nos. 300 and 300-A.

Justice STEPHENS. Let the Court read them.

Mr. FINCK. If the Court pleases, I object to 300-A——

Justice STEPHENS (interposing). Wait until we read them, Mr. Finck, and then we can tell more about the objections.

Mr. FINCK. Excuse me.

Mr. KNUFF. I wonder if we could have a short recess while the Court is reading these.

Justice STEPHENS. Yes, the Court will be in recess for five minutes.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

Justice STEPHENS. Now do you have an objection, Mr. Finck?

Mr. FINCK. Yes, your Honor.

I object to Exhibit 300-A. I have no objection to Exhibit 300; but Exhibit 300-A, the letter dated June 18, 1934, refers entirely to a metallized gypsum board license. Now it seems to me that that is immaterial. It only refers to the position that National Gypsum Company is to take regarding a metallized board license. It seems to me that National, not having been charged in the complaint with any violation of a metallized board license agreement, that this is immaterial as to National.

Justice STEPHENS. In other words, your objec-

2243 tion is the same as that which you made a short time ago?

Mr. FINCK. Yes; and furthermore, if it is offered as an admission of a co-conspirator, it seems to me it canont possibly be that because National cannot possibly be a co-conspirator in such case.

Justice STEPHENS. Well, this raises the same question?

Mr. FINCK. Practically, yes.

Justice STEPHENS. Do you wish to defer arguing this, Mr. Knuff, until your offer of proof is made?

Mr. KNUFF. Yes, your Honor.

Justice STEPHENS. When do you intend to make that offer?

Mr. KNUFF. We are preparing the offer at the present time, but we have not completed the writing of it. We want to make that offer in rather careful form.

Justice STEPHENS. Surely.

Mr. KNUFF. We could, in a more or less haphazard way, make it most any time, but we want to be very careful about that.

Justice STEPHENS. The Court is not assuming to hurry you. The Court only makes the inquiry because apparently a large number of these objections are going to accumulate, and since we cannot rule on them until you have had an opportunity to make your offer, it may be that the record will be somewhat dispersed, if that is the correct word.

Mr. KNUFF. We will make it at the earliest pos-
2244 sible date, probably the first day after the Court reconvenes in January.

Justice STEPHENS. The Court would suggest to counsel who make these objections that in reading the record they make a careful note of their position in the record so that when we get to the point of the offer, you can aid the Court in placing the various objections, so that the record may be made entirely clear.

Mr. FINCK. We will, your Honor.

Justice STEPHENS. The objection may be recorded, and the Court will defer its ruling until the offer of proof on this subject is made by the Government.

Mr. FINCK. If the Court please, it would be very helpful to us if we could have some indication as to the Government's position before we leave here for the holidays, so that during the interim before our next proceedings we can meet such objections as the Government might have.

Justice STEPHENS. Are you going to file a written memorandum, Mr. Knuff?

Mr. KNUFF. Yes, your Honor.

Justice STEPHENS. Perhaps you can send a copy of that to defendants' counsel early after the recess, so that they can have a chance to look it over.

Mr. KNUFF. Yes, we will.

Justice STEPHENS. I mean by that, early after
2245 the adjournment, I don't mean after the completion of the recess but early after the adjournment. Judge Jackson thought I hadn't made myself clear.

Mr. KNUFF. I understand what you mean, your Honor.

Justice STEPHENS. Is there any objection to Exhibit 300?

Mr. BROMLEY. I think that the same objection should be made to Exhibit 300, I don't see how they can be separated.

Justice STEPHENS. The Court calls your attention, Mr. Finck, to the fact that Exhibit 300 has no meaning except in connection with 300-A, and therefore perhaps, to protect your record, if you object to 300-A, and 300 will receive any meaning that it has in connection with that, perhaps that ought to be included within your objection. It is immaterial, of course, to the Court.

Mr. FINCK. I think that is perhaps a better way to handle it.

Justice STEPHENS. Objection may be recorded on the part of National to Exhibits 300 and 300-A, but the Court will defer its ruling until after the Government has made its offer of proof.

Mr. BROMLEY. And may all other defendants have the objection that these two documents are incompetent and immaterial because they are not declarations of alleged coconspirators?

Justice STEPHENS. The Court will have to record
2246 that objection also, and defer ruling until the Government makes its offer.

Mr. KNUFF. In connection with Exhibit 300-A, I particularly desire to call your Honor's attention to the next to the last paragraph on page 3:

"There are many other minor objections to the agreement as proposed, but I assume from our conversation that in the interest of harmony in the Industry, that you did not desire to have me make any objection to any matters contained in the proposed agreement", and so forth.

That is the paragraph that I particularly want to call your Honor's attention to.

Mr. FINCK. If the Court please, I think that such remarks should be stricken from the record. I think, before this is admitted into evidence, that the position of the Government counsel should not be stated in the record.

Justice STEPHENS. Well, we think that goes a little too far, Mr. Finck. We have read the exhibit, we have to read the exhibit to know what it means, and to see whether it is admissible. All three of us have read the exhibit and

noted that paragraph. Counsel is only calling attention to it as the principal paragraph upon which Government counsel relies.

The motion to strike counsel's remarks is denied.

By Mr. KNUFF:

Q. I show you what has been marked for identification as Government's Exhibit 301, the same being a letter, dated September 17, 1934, addressed to Mr. Arthur R. Black, signed by National Gypsum Company, "RFB" in pencil, vice president, and to the left of the words "vice president" appear the words, "RFBurley/B".

2247

Will you please look at this letter and tell us whether or not you received it, sir.

A. I don't recall its receipt, but I judge from the notation in the upper left-hand corner that I did.

Q. In the upper left-hand corner of the letter appears the legend, "9/18/34", and underneath that are your initials, is that correct?

A. That is correct.

Q. Those are in your handwriting?

A. Yes, sir.

Q. And does that indicate to you that you received that letter and answered it under date of September 18, 1934?

A. That indicates that.

Justice STEPHENS. Referring to the previous objection made by Mr. Finck, the Court thinks it perhaps did not fully understand the nature of the objection and that it should, in fair protection of the rights of the defendant, make this comment.

We thought Mr. Finck's objection was directed to a matter which arose some time ago in which it was objected to reading particular portions of the exhibit into the record so that they would assume an undue emphasis. That, we ruled, was not correct.

2248

We had thought that the objection just made by Mr. Finck to the reference contained in the next to the last paragraph of page 3 of proposed Exhibit 300-A was in that category of objections, and as the Court ruled it thought that the matter was really de minimis.

But it occurs to the Court now that Exhibit 300 is not in evidence and since it is not in evidence, the reading of the next to the last paragraph on the third page into the record gets it into evidence, and the Court will therefore indicate that that portion of the record which now con-

tains the next to the last paragraph on page 3 of Exhibit 300-A is not to be treated as a ruling by the Court that that exhibit shall or shall not be admitted, but that that ruling shall be deferred until the Government's offer of proof.

Mr. FINCK. Thank you, your Honor.

Mr. KNUFF. That was my recollection of what your Honor intended to do, but I just want to clear something up in my own mind. I believe that I have offered Exhibits 300 and 300-A in evidence, but that ruling thereon has been deferred, is that correct?

Justice STEPHENS. That is correct, you have offered 300 and 300-A, but the ruling has been deferred; the
2249 objections have been recorded and the ruling deferred until you make your offer of proof.

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Governments' Exhibit 302, the same being a carbon copy of a letter dated September 18, 1934, addressed to Mr. Ralph Burley, signed by the American Gypsum Co.—General Sales Manager, and on the left-hand side thereof appear the initials "ARB:IW"——

Justice STEPHENS (interposing). Before you answer that—have you offered Exhibit 301?

Mr. KNUFF. I was going to offer them both together, your Honor.

Justice STEPHENS. I am sorry. This is the letter of September 18?

Mr. KNUFF. That is correct, your Honor.

By Mr. KNUFF.

Q. Have you read Government's Exhibit 302, sir?

A. Yes.

Q. Is that a carbon copy of the answer that you made to Government's Exhibit 301, which is the letter of Mr. Burley dated September 17, 1934?

A. I assume that is.

Mr. KNUFF. We now offer in evidence, if your Honor pleases, Government's Exhibits Nos. 301 and 302.

2250 Justice STEPHENS. Was Exhibit 302 taken out of the files of the American Gypsum Company or National Gypsum Company?

Mr. KNUFF. The American Gypsum Company.

I don't know whether it appears clearly on the photostat—may I approach the bench?

Justice STEPHENS. Yes.

Mr. KNUFF. On the upper left-hand corner of this letter the Court will notice initials——

Justice JACKSON (interposing). That has been testified to.

Mr. KNUFF. I didn't know whether it appeared clearly on the photostat.

Justice STEPHENS. Yes, it is on the photostat.

Is there any objection except the usual objection?

Mr. FINCK. I object, your Honor, on the ground that they are incompetent and immaterial as to National, and that they have no bearing on any of the issues as between the Government and National or Baker.

Justice STEPHENS. The objection may be recorded and ruling deferred until the offer of proof on this topic has been made by the Government.

Mr. FINCK. And in the event that you rule against me, may we have the usual objection?

Justice STEPHENS. You mean the objection to their receipt as being declarations of alleged co-conspirators?

2251 Mr. FINCK. Yes.

Justice STEPHENS. The record may show that if these are received, they are received subject to the usual reservation with respect to declarations of alleged co-conspirators.

By Mr. KNUFF.

Q. I show you what has been marked as Government's Exhibit 303 for identification, the same being a letter dated February 25, 1935, addressed to Mr. Arthur Black and signed M. H. Baker, president.

Will you please look at that letter and tell us whether or not you received it? You will notice just about the words, "Office of the President", in the upper left-hand corner, there are some penciled notations. Are they in your handwriting?

A. Yes, sir.

Q. What do those notations mean?

A. "Answered 3/2/35 ARB".

Q. 3/2/35?

A. Yes.

Q. You received Government's Exhibit 303, did you not?

A. Yes.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 304, the same being a carbon copy of a letter dated March 2, 1935, addressed to Mr. M. H.

Baker, president, and signed the American Gypsum Company—General Sales Manager, and to the left of
2252 that appear the initials, "ARB:IW". Is that the reply that you made to Mr. Baker's letter to you dated February 25, 1935?

A. Yes, sir.

Mr. KNUFF. I now offer in evidence Government's Exhibits 303 and 304.

Mr. BROMLEY. And we object to these letters, if the Court pleases, on the ground that they relate to Metal A, which is a joint treatment involving zinc strips which are placed in the cracks or joints between two pieces of wallboard. There were no licenses ever granted under this invention, no sales ever made by USG to any licensees, no prices ever fixed on it, the matter has nothing to do with anything charged in the complaint; and I am under the impression that the Government thought that this related to metallized board, which it does not in any way whatsoever.

Mr. KNUFF. If your Honor pleases, this letter dated February 25, 1935, is in the same category as Government's Exhibit No. 238, the letter of Scott, Bancroft, Martin & MacLeish, and it is offered to show by this letter the state of mind or the mental attitude that the various parties had at this particular time, that is, to eliminate an undesirable competitive situation in the industry.

Justice STEPHENS. This is 303 and 304?

Mr. KNUFF. Yes, your Honor.

Justice GARRETT. Is it conceded that this is not in-
2253 volved in any of these transactions?

Mr. KNUFF. So far as we know it is not, your Honor, that is the Metal A is not involved.

Justice GARRETT. Is there a patent on it?

Mr. KNUFF. Yes, we are depending on this to determine the state of mind——

Mr. BROMLEY (interposing). The question of the Court was—is there a patent on it? That was the Court's question.

Mr. KNUFF. Oh, I misunderstood. I believe there is, although I am not certain.

Mr. BROMLEY. We do not know whether there was a patent on it or not; I think there was, probably.

Justice STEPHENS. We will have to send for the transcript which contains the ruling of the Court on Exhibit 238. It is not here and I want to see exactly what the Court ruled on that.

Mr. BROMLEY. It is at page 2144——

Justice STEPHENS (interposing). But we haven't that here.

Mr. BROMLEY. May I hand it up to the Court?

Justice STEPHENS. Yes.

(Thereupon, copy of transcript referred to was handed the Court.)

Mr. BROMLEY. I think it is perfectly clear that Exhibit 238 had something to do with the general license
2254 agreements, and that is why you admitted it.

Justice STEPHENS. I noticed that in reading it.

Do you wish to be heard on either side further with respect to either 303 or 304?

Mr. BROMLEY. No, your Honor.

Justice STEPHENS. Mr. Knuff?

Mr. KNUFF. Well, I believe not.

Justice STEPHENS. I think I understand the position of both counsel. It seems to be conceded that the reference to Metal A in both Exhibits 303 and 304 is a reference to a type of license agreement which was not entered into, and is not charged to have been entered into, in these pleadings. The Court thinks, therefore, that the exhibits are not admissible.

The Court thinks that they are not comparable to Exhibit 238 which was admitted. There the Court indicated that it thought the exhibit was very close to the line because it had to do with license agreements or proposed license agreements, or alleged license agreements which so it was asserted, were never entered into; but the Court let 238 into evidence because of the reference to the general license agreement.

Now it is true that there are some situations in which evidence which may have a technical remote relevancy, are nevertheless inadmissible. As Mr. Wigmore frequently phrases it, it is the rule of auxiliary policy.

Apparently what you are offering to prove here is
2255 that the defendants had a conspiracy-committing state of mind, so to speak, showing that they were in a conspiratorial attitude with respect to the licensing of Metal A, and the reasoning is that they were in a similar state of mind with respect to the agreements which are alleged to have been illegal and to have been entered into in this case.

The situation is a good deal like the situation in criminal law, where the evidence of other crimes is offered and there, subject to certain exceptions which are not ap-

plicable here, the evidence is not admitted althorugh, of course, in a technically logical sense if defendant commits one crime it may indicate that he is a crime-committing type of person and therefore lend some slight probability to the fact that he has committed another crime.

But the difficulty of admitting that type of evidence is that it raises collateral issues so that the Court would have to try out and the defendants would have to be heard upon the defense to these alleged separate conspiracies.

The Court thinks that Exhibits 303 and 304 cross the line of proper admissibility, and objection to them is sustained.

Mr. KNUFF. May I just point out what I conceive to be the reason why they should be admitted?

Justice STEPHENS. Yes.

Mr. KNUFF. Here is a letter, dated February 25, 1935, and it is just a few months subsequent to the Na-
2256 tional license of October 5, 1934, and prior to the perforated lath agreements of 1936. It seems to me to quite definitely show—which we have alleged in the complaint—that there was a conspiracy to eliminate the competitive situation in the market.

Justice STEPHENS. The Court nevertheless thinks the exhibits are not admissible and they are excluded.

By Mr. KNUFF.

Q. What is Metal A?

A. It is a perforated metal strip——

Mr. BROMLEY (interposing). I object to this as immaterial. There has been a concession on the record, as I understand it, as to what it is.

Mr. KNUFF. I am going to connect it with the gypsum industry by this witness.

Mr. BROMLEY. There isn't any doubt but what it is connected with the gypsum industry.

Justice STEPHENS. That is conceded.

Mr. KNUFF. I don't know what it is, and I want to find out what it is used for, and how it is used in the industry. I don't know what it is.

Justice STEPHENS. I say this facetiously, that it may be desirable for counsel to educate himself on the subject, but is it within the issues?

Mr. KNUFF. I think it is, your Honor. Here we have a conspiracy to fix and stabilize the prices of the
2257 gypsum industry——

Justice STEPHENS (interposing). Stabilize the prices of the gypsum industry?

Mr. KNUFF: Yes, We say that there is a conspiracy here to stabilize the gypsum industry, including wallboard, plaster, perforated lath, metallized lath, and everything else that is in the industry. We have set that forth so clearly that "all who run may read".

Justice STEPHENS. But it doesn't include Metal A, does it?

Mr. KNUFF. That is a part of the industry.

Justice STEPHENS. Then we get into the same difficulty that we are in with respect to the offer of proof you are going to make as to whether or not you may prove items which are not charged in your complaint.

Mr. BROMLEY. The complaint has an allegation which uses the words "miscellaneous gypsum products". Being afraid of the generality of that term in the complaint, we, in the bill of particulars, asked the Government to specify, and the Court ordered them to specify, what they meant by that general phrase, and they did specify and they said that they meant by that, gypsum block, gypsum tile and Keene's cement. They never made any reference to Metal A or anything else except those three products.

Justice STEPHENS. The objections are sustained.

2258 By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibits 305 and 306; Exhibit 305 being a photostat of a letter addressed to Mr. Eugene Holland under date of ctober 16, 1928, and signed by Arthur R. Black; and Exhibit 306 being a photostat of a letter dated October 17, 1928, addressed to Mr. Arthur R. Black and signed "President", and opposite the word "President", on the left-hand side of the letter, appear the initials, "EH W". Will you please tell us whether or not Exhibit 305 is a photostat of the letter that you wrote to Mr. Holland, and whether or not Exhibit 306 is the reply that you received from him?

A. Yes.

Justice STEPHENS. Are there any objections?

Mr. BROMLEY. I object to both exhibits on the ground that they are immaterial and irrelevant because there is no charge in the complaint which covers this subject. The only charge of the fixing of prices of plaster contained in the complaint is tied up with the license agreements, and is said to have commenced in 1929—paragraphs 103 and 104 of the complaint.

Justice STEPHENS. What is the date of these letters?

Mr. BROMLEY. They are both dated in 1928.

Justice STEPHENS. What is the Government's position with respect to these?

2259 Mr. KNUFF. The Government's position with respect to these exhibits, your Honor, is that they definitely show an attempt here to fix the prices of plaster. Here is a letter by Mr. Black to Mr. Holland, telling Mr. Holland what the price of plaster should be in the Cleveland market. Again, in the complaint, in paragraph 44, we do say that they have entered into contracts to violate the Sherman Act, and they have conspired to violate the Sherman Act, and they have done so for many years last past previous to the filing of the complaint—clearly within the complaint.

Justice STEPHENS. Well, you are not making your argument meet the issue raised by defendants' counsel. We would like to hear you on that, that the complaint charges that the illegal agreements which you rely upon were entered into in 1929, whereas these letters relate to a date in 1928. What is your answer to that?

Mr. KNUFF. We don't contend that that is the gist of the offenses alleged in the complaint. We say that the offenses alleged in the complaint are contained in paragraph 44.

Justice STEPHENS. Well, that isn't very helpful to the Court, Mr. Knuff, because the complaint certainly does charge that a certain conspiracy was entered into in 1929, does it not?

Mr. KNUFF. Look at page 10, your Honor, of the complaint——

Justice STEPHENS (interposing). The Court has
2260 read all of that several times recently. Where is the paragraph you were referring to, Mr. Bromley?

Mr. BROMLEY. Page 27, paragraph 103.

Justice STEPHENS. The Court will take its noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

2261 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock, pursuant to recess.)

Justice STEPHENS. We were discussing Exhibits 305 and 306. The Court has reread the Complaint during the noon hour, and calls the attention of counsel for both the

Government and the defendants to the following paragraphs.

It calls the attention of Government counsel to paragraph 103, at page 27, which says:

"Beginning in May 1929, as U. S. G. raised and stabilized the prices of gypsum board as aforesaid, U. S. G. and its licensees concertedly raised and stabilized the prices of plaster and miscellaneous gypsum products."

In paragraph 122, the Government charges:

"Said uniform and non-competitive prices have been throughout the period of the operation of the combination, substantially higher than those prices prevailing at the time of the formation of said combination in the year 1929."

So that there is one general allegation and one particular allegation indicating that the Government fixes the combination as having been entered into and formed in 1929.

On the contrary, the Court calls the attention of counsel for the defendants to paragraph 47, in which it says:

"The combination was formed during the period between the month of September 1925 and early in the year 1930."

2262 That is inconsistent with the allegations last referred to, that is, those in paragraphs 103 and 122.

Then paragraph 54, on page 12, states:

"The period from the latter part of 1925, after U. S. G. had obtained the judgment against Beaver and after the filing of the infringement suits against American and Universal, until the year 1930, was marked by efforts by all of the parties to settle the aforesaid litigation, expansion of these efforts into a comprehensive plan for stabilization of prices in the gypsum industry under the leadership of U. S. G. . . .", and so forth.

Then paragraph 59, at the bottom of page 13 and the top of page 14, the second sentence of paragraph 59:

"At said meetings and conferences,"—which are characterized as commencing in April 1926, in the first sentence —"U. S. G.'s proposal to license the industry as a whole under the Utzman patent and the resulting advantages of standardized production and uniform prices at stabilized levels under the control of U. S. G. were explained by Blagden and Griswold and discussed by the representatives of the companies in attendance."

Then in paragraph 74, on page 17, it is said:

"The vigorous competition of 1928 caused a revival of interest on the part of gypsum board producers in price.

stabilization for all gypsum products. Avery urged
2263 that those companies in the industry not yet licensees of U. S. G. reconsider his proposal for an industry-wide patent licensing plan covering board with price control by U. S. G."

The Court will hear counsel on both sides briefly.

Is there anything further from the Government?

Mr. KNUFF. I would like to call Your Honor's attention also to paragraph 45(c).

Justice STEPHENS. Yes, we have that in mind. We have in mind, of course, the general charges in paragraphs 44, 45 and 46, in addition to those that I specifically referred to, which latter have to do more particularly with the specific time alleged with respect to the commencement of the combination.

Have you anything further to say on this?

Mr. KNUFF. Nothing further, Your Honor.

Justice STEPHENS. Mr. Bromley?

Mr. BROMLEY. Our position is, if it pleases the Court, that so far as paragraph 47 is concerned, the indefinite allegation that it was formed sometime during the period between September 1925 and early in the year 1930, is made specific by paragraphs 103 and 122.

So far as paragraph 59 is concerned, I don't believe that has any relation to plaster at all, as I read it. But whatever that fact may be, it seems to me that both 59 and 74, to which Your Honor referred, are made perfectly
2264 definite by 77(b) on page 18, which, as you will see from the beginning of paragraph 76, talks about the the period between May 16 and May 22, 1929, and then alleges in 77 that in addition to the agreements entered into during that period, in (b) it was agreed that "U. S. G. would stabilize . . . the prices for board . . ." and "As prices for board were increased, all companies would increase their prices for plaster and miscellaneous gypsum products."

So I though both of those paragraphs were made specific.

Finally, paragraph 54, to which Your Honor referred, at the bottom of page 12, which talks about the period from 1925 until 1930, that was called to our attention when this pleading was served, and one of the things we asked for in the bill of particulars was whether or not it was intended by that paragraph to charge any offenses other than those thereafter made specific in the complaint. And the Court ordered the Government to answer that question. The Government did answer, and said the allegations of

paragraph 54 of the complaint are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint.

Because I was worried about the reference to 1925 in paragraph 54,—I still thought it was made specific that it started in May, 1929,—but I asked them that definite question, whether they intended to charge any acts other
2265 than those which they specified later, and they said no, they did not, that the allegations of 54 are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint.

Justice STEPHENS. Of course, the Government is apparently relying upon these exhibits not to prove, necessarily, illegal acts charged to have been committed prior to 1929, but to prove that illegal acts were committed in 1929 and following; is that right, Mr. Knuff?

Mr. KNUFF. That is correct, based on the *Tuthill* case as we cited in our trial brief.

Justice STEPHENS. The Court is of the view that the exhibits are admissible. In so ruling, it does not intend to indicate that it does not regard as having binding force the concessions made in answer to the request for a bill of particulars with respect to the charges relied upon. It understands that these exhibits are being offered as some evidence of the charges that are actually made in the complaint.

The Court has grave doubt as to their weight, since they relate only to two persons, two parties, but is inclined to think they are technically admissible. They will be received in evidence.

Mr. BROMLEY. I assume these are received subject to the usual reservation?

2266 Justice STEPHENS. They are received subject to the usual reservation with respect to the declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 305 and 306, respectively, were received in evidence.)

Mr. KNUFF. I am not sure whether I offered them or not, but since the Court has anticipated me, I will now make the offer.

Justice STEPHENS. They are received subject to the usual reservations, and for the reason stated.

By Mr. KNUFF.

Q. Mr. Black, I show you Government's Exhibit No. 307, the same being a letter dated October 16, 1930, addressed to Mr. Charles Henning, Vice President, and signed Arthur R. Black. Will you please state whether or not that is your signature, sir?

A. It is.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 307.

Mr. BROMLEY. The usual objection.

Justice STEPHENS. Let the Court read it.

The exhibit is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

2267 (The document referred to, marked as Government's Exhibit 307, was received in evidence.)

By Mr. KNUFF.

Q. I show you, Mr. Black, what has been marked for Identification as Government's Exhibit No. 308, the same being a letter dated August 20, 1934, addressed to Mr. A. R. Black, Vice President, and signed C. Henning, Vice President. Will you state whether or not you received that letter from Mr. Henning?

A. Judging from the notation in the upper left-hand corner, I did.

Mr. KNUFF. We offer in evidence, if Your Honor please, Government's Exhibit No. 308.

Mr. BROMLEY. The usual objection.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 308, was received in evidence.)

By Mr. KNUFF.

Q. Mr. Black, I call your attention to the fact that the American Gypsum Company's license with USG under the Hite and Haggerty patents bears the date of

2268 November 25, 1929, and I further direct your attention to the fact that under that agreement USG was given the right to determine the price at which you might sell board manufactured under the license.

Will you state, sir, whether you observed those bulletin prices? Did you sell board and lath in accordance with the prices prescribed in the license bulletins?

A. We did, to the best of our ability.

Q. When you say you did to the best of your ability, you mean from that point on to the present time, is that correct?

A. Yes, sir.

Justice STEPHENS. What is that question? I don't quite understand it. Read the question.

(The question was read by the reporter.)

Mr. KNUFF. The point of time that the previous question referred to was the 25th of November, 1929.

Mr. ADAMS. I think we should bear in mind that in answering that question, the witness may be speaking in two capacities here. I think Mr. Oliver might raise that point, that he is talking about American, and then American's assets were later sold to Celotex.

Justice STEPHENS. That is why the Court made the interjection. It thought perhaps the witness was confused. American couldn't be selling up to the present time, be-
2269 cause American is out of existence. Perhaps you had better bring that out.

Mr. KNUFF. That is true. Suppose I do.

By Mr. KNUFF.

Q. From 1929 up until the time Celotex took over American, did you sell board at the bulletin prices?

A. Yes, sir, as I replied. I assumed that that was what you meant.

Q. Now from the time Celotex took over American until the filing of this bill, which was on the 15th of August, 1940, did Celotex also sell board at the bulletin prices?

Mr. ADAMS. May I simply interpose a general objection there, because I am not familiar with Mr. Oliver's pleadings, I don't know whether he admitted it or he didn't. I would like to object on the ground that perhaps this witness isn't qualified to speak on that subject on behalf of Celotex, because he is only in one small territory of Celotex.

Justice STEPHENS. Perhaps you had better inquire as to whether the witness knows about the sales prices of Celotex generally, because the question is general with respect to all of their prices.

By Mr. KNUFF.

Q. In the territory that you are familiar with, which is, I take it, the Cleveland District, which comprises the greater portion of Ohio and some portions of Ken-
2270 tucky, did Celotex sell board at bulletin prices?

A. After Celotex took over, I didn't see the bulletins. I only acter under instructions of the managers of

the Celotex Corporation. So whether or not their sales were in accordance with the bulletins, I didn't see the bulletins and do not know.

Q. Did you have more than one sales price, did your salesmen carry more than one sales price in any one territory at any one time?

A. The only one I could speak of——

Q. (Interposing.) I am referring to the territory that you are familiar with.

A. On board, you mean?

Q. Yes, board and lath.

A. Just the one price.

Q. May I have Exhibit 143, please?

(Government's Exhibit 143 was handed the witness.)

By Mr. KNUFF.

Q. I am particularly interested, Mr. Black, in the third page of that exhibit, where it says, "Signed F.J.G.". Do you see that?

A. Yes.

Q. Do you recognize that handwriting——

Mr. BROMLEY (interposing). I object to that as incompetent and immaterial because Mr. Griswold testified that it was not his handwriting.

2271 Mr. KNUFF. I am asking this witness if he recognizes the handwriting.

Justice STEPHENS. Are you trying to impeach Mr. Griswold?

Mr. KNUFF. Not at all. Mr. Griswold stated that he did not recognize this handwriting. I want to find out if this witness recognizes it, to see whose handwriting it is.

Justice STEPHENS. What is the objection to that, Mr. Bromley?

Mr. BROMLEY. There is none at all; I misapprehended the question.

Justice STEPHENS. So did I. You may proceed.

The WITNESS. No, sir, I don't recognize it.

By Mr. KNUFF.

Q. Were you familiar with the handwriting of Mr. J. B. Davis, who was formerly associated with the American Gypsum Company?

A. Fairly so.

Q. Were you familiar with his handwriting?

A. Mr. Davis'?

Q. That is right.

A. Fairly so.

Q. Would you say whether or not this is in Mr. Davis' handwriting?

A. No, I would not say it was. I don't recognize it at all.

2272 Q. I show you, sir, what has been marked for identification as Government's Exhibit 309—I don't believe your Honors have a copy of that before you and if Mr. Finck and Mr. Johnston will return the photostats of the George Brown exhibits, I will see that you get a copy of it.

Mr. JOHNSTON. For the gentleman's information, I don't have a copy of those exhibits, and I haven't had any since I returned them to Mr. Justice Stephens.

Justice STEPHENS. Are those the ones that were so unhappily lost the other day?

Mr. KNUFF. No, the other day I gave Mr. Johnston and Mr. Finck copies of the George Brown exhibits, and at the time I gave them each copies of those exhibits, I wrote on the back of my envelope, "Finck" and "Johnston". I gave them to them.

Mr. JOHNSTON. If the Court please, I am getting kind of tired of so much of this. I took those exhibits and gave them to the bailiff, and he handed them to your Honor, and I don't want any more exhibits handed to me by counsel for the Government. I am getting tired of it.

Mr. FINCK. I also turned mine in, your Honor. They were bound together and I gave them to Mr. Knuff, as I remember it.

Justice STEPHENS. Let's preserve our good nature, gentlemen. Is it this group?

Mr. FINCK. I returned the three distinct groups
2273 to Mr. Knuff this morning.

Justice STEPHENS. Is this the group that you have in mind (indicating)? It starts off with——

Mr. KNUFF (interposing). Letter No. 1056.

Mr. FINCK. I returned those.

Mr. KNUFF. Not this morning you didn't, Mr. Finck.

Mr. FINCK. No, that is right, it was on Friday.

Justice STEPHENS. The Presiding Judge has one, but neither Judge Garrett nor Judge Jackson has any copy.

Mr. BROMLEY. I have a set.

Justice JACKSON. We haven't had them from the beginning, either. I know I haven't had them at any time.

Mr. KNUFF. I didn't indicate that your Honors did. I said that if they would return them to us I would see that your Honors got a copy of them.

Justice STEPHENS. Let me interrupt to ask what about this letter of August 20, 1934, the last of the letters in the Black exhibits?

Mr. KNUFF. If I haven't offered it in evidence, I meant to offer it in evidence.

Justice STEPHENS. I don't have any notation of a number on it.

Justice GARRETT. That is Exhibit 308.

Justice STEPHENS. Has that been acted upon?

Mr. BROMLEY. We make the usual objection.

2274 Justice STEPHENS. It may be received in evidence if the record does not show it already has been, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Admission of Government's Exhibit No. 308 is noted on page 2564 of this transcript.)

Justice STEPHENS. In view of the difficulties over the exchange of these exhibits, the Court suggests that hereafter, Mr. Knuff, in accordance with the promise of the Government that it will hand to the defendants for their use during the evening the series of exhibits to be introduced the following day, that you hand such exhibits to Mr. Grover, the court reporter, or his assistant, Mrs. Gillette, and let her distribute them to the defendants' counsel. Then let defendants' counsel give them back to Mrs. Gillette, and then we will not have these charges and counter-charges, I hope.

Mr. KNUFF. I will be very happy to do that.

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibit No. 309, being a letter dated January 25, 1929, addressed to Mr. George M. Brown and signed "CHAIRMAN", and to the left of the word "Chairman", is the name, "Jno.A.Kling". You will notice, sir, on the bottom of that letter there appears the name of "Mr. J. B. Davis". Do you recognize that handwriting?

2275 A. I do not.

Mr. KNUFF. You may cross-examine the witness.

Justice GARRETT. Then this is not offered?

Mr. KNUFF. Not at this time, your Honor.

CROSS-EXAMINATION

By Mr. BROMLEY.

Q. Mr. Black, you had nothing to do with the negotiations leading up to the taking of any license by American, did you?

A. No, sir.

Q. And in 1929, those negotiations on behalf of American were handled by Mr. Kling, were they not?

A. Principally.

Q. And Mr. Kling dealt chiefly with Mr. Avery, didn't he?

A. To the best of my knowledge he did.

Q. Will you look at Exhibit 203, please? Referring to the first paragraph of Exhibit 203——

Justice STEPHENS (interposing). Just a minute until the Court locates that exhibit. I have it now, proceed. Which paragraph are you inquiring about now?

Mr. BROMLEY. Paragraph 1, the first paragraph.

Mr. KNUFF. Will you just suspend until I get that letter, Mr. Bromley, please? All right, I have it.

By Mr. BROMLEY.

2276 Q. Referring to the first paragraph of Exhibit 203, Mr. Black, did you go to New York for the specific purpose of meeting with Mr. Ebsary and the others to talk about licenses?

A. Not that I recall, sir.

Q. Isn't it the fact that you were in New York because there was a slated meeting of the gypsum association which you desired to and did attend?

A. I don't remember that distinctly. As a matter of fact, I don't remember just why I was in New York. It may have been as you say.

Q. Well, isn't it your best recollection now, sir, that you didn't go there for the specific purpose of meeting Mr. Ebsary and the others to talk about licenses?

A. I had no authority, either from Mr. Kling nor the company, to discuss these negotiations or to further negotiations regarding any license.

Mr. KNUFF. We move to strike out the answer of the witness as not responsive to the question. He stated he had no authority, and——

Justice STEPHENS (interposing). The Court has already ruled that where answers are not responsive it is only the examining counsel who can move to strike. If you have some other objection, such as that it is immaterial or

incompetent or irrelevant, you may urge that, the Court several times, in the reverse situation, when defendants' counsel were objecting to answers as not responsive, overruled the objection because, as this Court
2277 has ruled, that objection lies only in the mouth of examining counsel for the reason that he can make it responsive by asking another question.

Mr. KNUFF. Then I shall amplify on the objection and object on the ground that the answer of the witness states a conclusion.

Mr. BROMLEY. It is one of those conclusions which the law regularly permits witnesses to make.

Justice STEPHENS. Well, it isn't quite that kind of a conclusion, Mr. Bromley. If there is any contention or issue here as to whether this witness was or was not authorized, he would have to state, I suppose, what his duties were and the evidences of his authority would have to be introduced so that the Court could conclude whether he had authority on that subject.

The objection is sustained on that ground alone. The answer is not responsive, of course.

I should think it would help the examination forward if counsel should ask for a responsive answer.

Mr. KNUFF. Did your Honor indicate that the answer should be stricken? You said that the objection was sustained.

Justice STEPHENS. The Court said that the objection was sustained. The Court treated the motion to strike as an objection to the question upon the ground that it called for a conclusion.

2278 Read the question to the witness.

(Thereupon, the last question was read by the reporter.)

Justice STEPHENS. My colleagues inform me that they disagree with my ruling with reference to its being objectionable as a conclusion, and the majority of the Court being of that view, the motion to strike is denied.

Justice GARRETT. I would be glad to know where we are now with that question and answer. I don't think the answer was responsive, but that of course, as the Presiding Judge correctly ruled, was not a matter for the Government to objection to. But I would like to hear that question and answer now and see where we are on this.

Justice JACKSON. I think the question is perfectly clear and susceptible of a responsive answer.

Justice STEPHENS. Can you find the question and answer and read them?

(Thereupon, the question and answer referred to were read by the reporter as follows:

"Q. Well, isn't it your best recollection now, sir, that you didn't go there for the specific purpose of meeting Ebsary and the others to talk about licenses?

"A. I had no authority, either from Mr. Kling nor the company, to discuss these negotiations or to further negotiations regarding my license.")

2279 Justice STEPHENS. Let me explain to you, Mr. Black, that sometimes it is very natural for all of us, when we are asked a question, to, instead of answering the question, give some reason as to what we think would support it, support an answer, one way or the other. But here we have to confine our answers pretty strictly to these questions so far as you can fairly do that, and all you are being asked now is the following question. Read that question again. You are not being asked what your authority is, you are being asked what your recollection is as to the purpose of your visit.

(Thereupon, the question referred to was reread by the reporter as follows:

"Q. Well, isn't it your best recollection now, sir, that you didn't go there for the specific purpose of meeting Ebsary and the others to talk about licenses?")

The WITNESS. If it is a matter of my best recollection, your Honor, I didn't go there. However, that is a number of years ago, fifteen.

Justice JACKSON. Did anybody hear the answer?

Mr. KNUFF. I didn't.

Justice STEPHENS. Read it.

(Thereupon, the last answer of the witness was read by the reporter.)

By Mr. BROMLEY.

2280 Q. When you say you "didn't go there", you mean that you didn't go there for the specific purpose of meeting with Mr. Ebsary and the other gentlemen to talk about licenses, don't you?

A. That is correct.

Q. As a matter of fact, Mr. Black, you have no recollection of what occurred at your meeting in Ebsary's room, except that the general subject of settling the outstanding litigation and taking a license was discussed, isn't that right?

A. That is correct.

Q. Now did you ever, yourself, go to Chicago and meet with Mr. Avery or anyone else as a result of this conference in Ebsary's room?

Mr. KNUFF. Just a moment, please. The question is objected to as not being proper cross-examination. We didn't ask this witness whether he went to Chicago or whether he didn't. The only thing we asked this witness concerning Exhibit 203 was as to the identification of his signature. Now I have some cases almost exactly on that point, your Honor, in connection with that.

Justice STEPHENS. The Court will hear you, of course, but since this objection has been raised before, the Court will state its understanding of the law with respect to that subject, and then if you disagree you can enlighten the Court further. But the Court has gone into this subject a great deal in this jurisdiction.

2281 The leading case in this jurisdiction in recent years is *Lindsey* v. *United States*, 133 Fed. (2d) 368, 77 U. S. Appeals, D. C. 1 (1942).—I have forgotten the Fed. (2d) citation. That case states the law. The Presiding Judge in this Court wrote the opinion.

In some courts cross-examination may be had on all the issues charged in the case. In the Federal courts the scope of the cross-examination is limited to the direct examination. But a very clear distinction has to be drawn between the extent and the nature of cross-examination, and the fact of cross-examination.

Some cross-examination is a matter of right, that is the right to cross-examine the witness to the extent that he has been called upon to testify to facts adverse to the examining counsel, is a matter of absolute right under the decisions of the United States Supreme Court.

The extent of it is a matter in the discretion of the Court.

Now so far as the scope of the examination is concerned, the scope of cross-examination under the Federal rules is not limited to the mere literal statements of the witness. It includes subjects and facts connected with the direct examination, and it includes also the right to cross-examine upon inferences which may be drawn from the testimony of the witness.

Now we had, in the Lindsey case, Mr. Knuff, al-
2282 most exactly this question. There the defendant was charged with murder, and the defense was insanity. The defendant called a doctor from a mental hospital

where this man had been confined, and put him on merely to identify the record of the hospital.

The Government thereafter sought to cross-examine that witness upon the subject of the defendant's insanity, and that was permitted because the witness, in identifying the records, had identified records which themselves were lent authenticity by his identification as an official of the hospital; and also the records indicated that he had examined this defendant.

Of course, if a witness is called merely to identify a document—for example, if a handwriting expert is called to the witness stand to identify a document, and knows nothing about its contents, and he is not offered to prove anything about the contents, and isn't examined upon the transactions to which the exhibits relate, he can't be cross-examined upon anything except his identification.

If this witness is called only for the purpose of identifying this exhibit, that objection might technically lie. But this is his own letter. In addition to that, all of these exhibits, as the Court understands it, which have been offered here and identified by this witness, relate to transactions to which he was, in one way or another, as sales manager of American, related, and as we have understood his testi-
2283 mony, the Government is relying upon it not merely for purposes of identification, but because it lends authenticity to the various transactions covered by these letters which the Government itself relies upon.

What is your position?

Mr. KNUFF. My position is not that the question itself is not material, or not that it is relevant. It is both material and relevant. But that is a matter of defense that should be brought out in chief, not by way of cross-examination. Whether this witness went to Chicago is a matter of defense for the defendants to show.

All I asked this witness was—is this your signature to the letter? I didn't ask him a single question concerning the letter. Now the materiality——

Justice STEPHENS (interposing). The Court hasn't been discussing any question of materiality or relevancy, the Court has been discussing your objection to it being improper cross-examination.

Mr. KNUFF. I haven't any objection as to materiality. I mention the impropriety of allowing this defense to be set up by way of cross-examination.

Justice STEPHENS. Well, that statement—and I say this with entire respect towards counsel—begs the question. The question is whether or not it is a matter of defense or

cross-examination. Do you wish to be heard, Mr. Bromley?

2284 Mr. BROMLEY. No, your Honor.

Justice STEPHENS. We are agreed that the examination is proper; objection overruled.

Mr. BROMLEY. Will you read the question, Mr. Reporter?

(Thereupon, the pending question was read by the reporter as follows:

"Q. Now did you ever, yourself, go to Chicago and meet with Mr. Avery or anyone else as a result of this conference in Ebsary's room?")

The WITNESS. To the best of my memory, I never did.

By Mr. BROMLEY.

Q. And isn't it the fact, Mr. Black, that as far as you know, no one from American ever went to Chicago to meet with Avery as suggested in Exhibit 203?

A. As far as I know, they did not.

Q. And isn't it the fact that your company didn't take a license for more than a year after the date of this Exhibit 203?

A. That is correct.

Q. And so far as you know, isn't it true, Mr. Black, that American signed its license over a year later without regard to what other board manufacturers did or would not do?

Mr. KNUFF. Just a moment, please. I again object to this question on the ground that it is attempting to introduce defense by way of cross-examination.

2285 Justice STEPHENS. Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice STEPHENS. I am sorry, Mr. Knuff, but we apparently have a different conception of the proper limits of cross-examination. It seems to us—although there is some doubt on the part of Judge Garrett in respect of this particular exhibit—that the Government would rely and the plaintiff would have a right to rely—upon Exhibit 203, signed by this witness, to prove that he was a party to conferences looking toward the signing of an alleged illegal agreement, and that the cross-examination goes to the reasonableness of his testimony as a whole, including this letter which he has now authenticated. The objection is overruled.

Mr. KNUFF. May I be heard for just one second?

Justice STEPHENS. Well, yes, you may. The Court would prefer it if counsel would make their arguments before the

rulings, so as not to have to reargue them, but we will hear you again.

Mr. KNUFF. I didn't want to interrupt you while you were reading.

Justice STEPHENS. I thought you had made your argument.

Mr. KNUFF. I want to call your Honor's attention to one of the very first questions Mr. Bromley asked this witness before he asked to have Exhibit 203 shown to the
2286 witness, and that was—You had nothing to do with negotiating these agreements—and his answer was, "No".

Now then, if his answer was "no", how can he answer this question that Mr. Bromley has now asked him? The question that Mr. Bromley now asks him is—So far as you know American signed in November, 1929, without regard to what other manufacturers did? Previously he had testified, in answer to the question, "You had nothing to do with the negotiation of any of these agreements?"—and his answer was "No".

Justice STEPHENS. I am sorry, Mr. Knuff, but we do not see the point of your objection. Overruled.

Mr. BROMLEY. Will you read the question, please?

(Thereupon, the pending question was reread by the reporter as follows:

"Q. And so far as you know, isn't it true, Mr. Black, that American signed its license over a year later without regard to what other board manufacturers did or would not do?")

The WITNESS. So far as I know, that is correct.

By Mr. BROMLEY.

Q. And further, isn't it a fact that at this meeting in Ebsary's room, there was no understanding or agreement reached that nobody would sign unless they all signed?

A. To the best of my recollection there was not.

Q. And isn't it true that there was no such
2287 understanding reached at the subsequent meeting referred to in the last paragraph on page 1, which is said to have occurred in the Certain-teed office?

A. Yes, if I understand your question correctly.

Mr. ADAMS. We all have a little difficulty hearing this witness.

Justice STEPHENS. The Court has also. Will you try to speak a little louder and also, if you do not understand the question, do not hesitate to say so. We want you to have a full opportunity to understand all questions.

The WITNESS. Thank you.

Mr. BROMLEY. Read the question and answer, please.

(Thereupon, the question and answer referred to were read by the reporter as follows:

"A. And isn't it true that there was no such understanding reached at the subsequent meeting referred to in the last paragraph on page 1, which is said to have occurred in the Certain-teed office?

"A. Yes, if I understand your question correctly.")

By Mr. BROMLEY.

Q. Now look at the last paragraph on the second page, I mean towards the last of this letter, where you say in the seventh line near the end, "and it seemed to me". Wasn't that your conclusion rather than anything that was told you by anybody, Mr. Black?

2288 A. Yes, that is entirely my own conclusion.

Q. And the next part of that sentence, "and I am inclined to think that he reports"—isn't that likewise just your own conclusion?

A. Entirely.

Q. You had no information as to whether he reported to USG or not, did you?

A. None whatever, sir.

Q. Or no knowledge of whether he did or not?

A. No, sir.

Q. Now will you refer to Exhibit 299, please, sir? Exhibit 299 was written, of course, before American executed or accepted any license from USG at all, was it not?

A. Yes, sir.

Q. The reference in the first sentence of the second paragraph to USG's refusal, was a reference to the position which USG took with respect to some clause in the proposed license agreement, was it not?

A. Yes, sir.

Q. Now isn't it the fact that the only question about jobbers, so far as the license agreement was concerned, was whether or not the licensee was to be permitted to give them a discount?

Mr. STEFFEN. If you know.

The WITNESS. That is correct, because without a

2289 special clause permitting the discount to jobbers, they would pay the same price as any other dealer.

By Mr. BROMLEY.

Q. There was no prohibition either in the license nor

as a result of any understanding outside of the license, which prohibited American from selling jobbers, was there?

Mr. KNUFF. That portion of the question that asks the witness' construction of what was in the license is objected to.

Justice STEPHENS. Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice STEPHENS. Well, since the question is phrased to ask what was in the license, that portion of it, we think, Mr. Bromley, is not proper.

You can ask, as the Court ruled the other day, what this witness' understanding as to the meaning and effect of the agreements was, as bearing upon the reasonableness of his testimony as a whole. But the objection to the question as phrased is sustained.

2290 Mr. BROMLEY. Will the Government now concede that there is no provision in the November 25, 1929 license with American which prohibits American from selling to jobbers?

Mr. KNUFF. I think that is something that the Court will have to determine later on.

Justice STEPHENS. Is the agreement in evidence?

Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. How can there be any question about it unless there is some question of the construction of the agreement?

Mr. BROMLEY. I didn't see how there could be, and I thought that perhaps the Government would concede it to help me along.

Justice STEPHENS. Well, apparently it is not conceded; proceed.

By Mr. BROMLEY.

Q. Isn't it a fact that subsequent to November 25, 1929 your understanding is that there was no prohibition in the U.S.G.—American license, against your company selling to jobbers?

A. That is correct.

Q. And you did sell jobbers subsequent to November, 1929, didn't you?

A. Yes, sir.

2291 Q. And wasn't it your understanding likewise that under the license U.S.G. had the same right to fix your price to jobbers as it had to fix your price to dealers?

A. Well, they had, according to my understanding of the license, the right to fix those prices.

Q. And when you say "prices" you mean prices to jobbers as well as prices to dealers?

A. That is correct, sir, the two prices.

Q. And isn't it the fact that for a while they fixed the jobber price at the dealer price less a discount, and later on they fixed the jobber price at the same figure as the dealer price?

A. That is correct.

Mr. ADAMS. If the Court please, I think I should say here, according to my recollection of Mr. Oliver's opening, that he takes a special position as far as Celotex is concerned. The witness happens to be testifying in somewhat of a dual capacity and I think it should be understood that he is testifying here as a former employee of American and not, in answer to these questions, in his capacity as an employee of Celotex, which is entirely different from that in which he worked for American. I take it that Mr. Bromley intends to make that clear.

Mr. BROMLEY. I will proceed to do so.

By M. BROMLEY.

Q. Your answers with respect to jobber prices were intended to relate only to what American did, were they not?

2292 A. That is correct.

Q. Will you refer, Mr. Black, please, to Exhibits 305 and 306? Exhibit 305, your letter to Holland, refers to the plaster market in the City of Cleveland, Ohio, does it not?

A. Yes, sir.

Q. At the time you wrote this letter was the American Gypsum Company supplying plaster to customers in Cleveland?

A. Yes, sir.

Q. And what can you say about the size of the business which you had in plaster in Cleveland at about this time—was it substantial, or otherwise?

A. Quite substantial.

Q. Where was the mill which manufactured the plaster which was shipped to Cleveland customers of the American company, located?

A. Port Clinton, Ohio.

Q. How far away from Cleveland?

A. 75 miles by automobile; 65 miles by rail.

Q. And were there any other of the defendants which had a mill located close to Cleveland that were supplying the Cleveland plaster market, as well as you?

A. Yes, sir.

Q. What company or companies?

A. The United States Gypsum Company.

Q. Where was its mill?

2293 A. At Gypsum, Ohio.

Q. How far away was Gypsum, Ohio, from Cleveland?

A. Seventy-four miles by automobile, and 64 miles by railroad.

Q. So that from the standpoint of freight rates the American and the USG enjoyed a preferred position so far as supplying plaster to customers in Cleveland was concerned?

A. That is correct.

Q. And that preferred position was over and above all other plaster manufacturers, at least defendants in this case, isn't that so?

A. Yes, sir.

Q. Now up to the time of this letter, or thereabouts, had the Universal Company done any plaster business in Cleveland?

A. To the best of my recollection they had not.

Q. Where were its plaster manufacturing mills located at that time?

A. The closest one was near Akron, New York.

Q. Which was how many miles away from Cleveland?

A. Approximately 225 miles.

Q. Now, sir, how did you come to write Exhibit 305? Had you received an inquiry from Mr. Holland or did you write it as a voluntary act?

A. I do not recall just how I came to do it. The only thing I can base it on is the assumption that Mr.

2294 Holland had inquired from me what our price was on plaster in Cleveland.

Q. And was it the purpose of your letter merely to respond to his inquiry and give him the information which he requested about your prices in Cleveland?

A. That is correct, sir.

Q. And where did you get the information which you refer to in the second paragraph when you say "It is my understanding the other Gypsum Companies" and so forth?

A. The only sources of information that I had were our own sales representatives in that territory, and information obtained from our customers.

Q. Was it customary in the business at that time, and indeed still, for your sales representatives to get what information they could from their customers as to the prices which your competitors were charging dealers and customers generally?

A. Yes, sir.

Q. And is that the way, and the only way, in which you got the information which you transmit to Mr. Holland in the second paragraph of Exhibit 305?

A. The information obtained from our representatives, as well as the information I obtained personally.

Q. Now did you intend by your letter, Exhibit 305, to solicit from Mr. Holland any agreement as to what he or your company should or should not charge for plaster?

2295 A. No, sir.

Q. Did he ever, orally, or in writing, seek to reach an understanding with you as to what either he should charge in Cleveland, or you should charge in Cleveland, for plaster?

A. He never did.

Mr. KNUFF. We would like to have a continuing objection, Your Honor——

Justice STEPHENS (interposing). To this line of cross examination?

Mr. KNUFF. Yes, on this particular exhibit, Your Honor.

Justice STEPHENS. The objection is overruled and the record may show that this line of examination is objected to.

The Court would say—and I make this statement only for the purpose of indicating the nature of the Court's ruling for the guidance of counsel in the hope of saving time with respect to future questions—that it seems to us, Mr. Knuff, that these exhibits clearly illustrate the propriety of this type of examination. You are offering them in evidence to prove—under the authenticity of this witness who signed this letter now under examination—a price-fixing agreement in 1929. These are the very exhibits which we were considering during the noon hour. It seems to us that it would be clear error to deny the right of cross examination as to the meaning of these exhibits. The objection is overruled.

We will take the afternoon recess at this time.

2296 (Whereupon a short recess was taken, after which the hearing was resumed.)

Justice STEPHENS. Proceed, gentlemen.

2297 By Mr. BROMLEY.

Q. Prior to the time that you wrote your letter, Exhibit 305, it is a fact, isn't it, that neither Mr. Holland nor the Universal Company had any salesmen operating in the Cleveland area?

A. To the best of my recollection they did not.

Q. Now look at Exhibit 306, which is Mr. Holland's reply. Isn't it the fact that that closed the matter, and that you never had any other discussions or correspondence with Mr. Holland about this subject?

A. As far as I remember, that closed it.

Q. And isn't it true, Mr. Black, that neither at this nor at any other time did you ever have any understanding or agreement with Mr. Holland or the Universal Company about plaster prices in Cleveland or elsewhere?

A. I never did.

Q. And isn't it a fact that all there was to this incident was the fact that Mr. Holland's company was coming into a new market with which he was unfamiliar, and he desired to find out what the prevailing market price in that territory was?

A. I assume, Mr. Bromley, that that is correct. My recollection at this time is not definite on that point, but my assumption, judging from the correspondence, is that that is correct, that he was just contemplating coming in there and wanted information.

2298 Q. And all you did, all you intended to do, was to give him that information as to what the prevailing price was, isn't that so?

A. That is so, yes, sir.

Q. Now referring to the subject of metallized board, did there come a time in 1934, or therabouts, when gypsum board and lath generally commenced to meet a new form of competition in the products known as insulating products?

A. Yes, sir.

Q. What were some of the insulating products which commenced to come on the market in 1934 or thereabouts, which were in competition with gypsum lath and gypsum wallboard?

A. The principal insulating products had come on the market several years before, and was manufactured in Louisiana by the Celotex Corporation.

Q. What was it?

A. It was made out of sugar cane fiber, and had been exploited very vigorously by them, and they had large sales of it.

Q. What was it called?

A. They simply called it insulation board, although they manufactured it in a number of different forms.

Q. Well, now, were there other insulating prod-
2299 ucts, like Rock Wool, which also had a competitive effect on gypsum lath and wallboard?

A. Yes, sir.

Q. And can you tell us whether or not you felt, in 1934, that there was a need in the gypsum board industry for the development of gypsum board which possessed some kind of insulating qualities which could be emphasized to meet the competition of this other material?

A. Yes, sir, I felt the need of it very strongly.

Q. At the time of which you speak, Celotex, of course, was not in the gypsum industry at all, was it?

A. Not to my knowledge.

Q. And no company defendant in this suit manufactured any of these insulating products of which I speak, do you know about that?

A. No, Mr. Bromley, I can't answer that positively for the reason that some of the gypsum companies built insulation board mills, and I don't know the exact year in which they built them.

Q. I see. But the fact is that you felt if you could get an insulating quality to gypsum board, it would maintain its sales position, or increase it, with relation to insulating products of a different character; isn't that right?

A. That is right, sir.

2300 Q. And isn't it a fact that Mr. Henning, of the USG Company, felt very strongly that you gypsum board manufacturers should get behind this new insulating product which was called metallized or foil board?

A. He did.

Q. And did you agree with him that it would be a good thing for your company to enter the field of marketing foil or metallized board?

A. I did, because it added to the insulation features of gypsum board, we were told.

Q. Now your company, the evidence shows, took a metallized board license. Can you tell the Court whether or not it was the expectation of your company to enter into the manufacture of this new product called metallized board?

A. Yes, sir, it was our expectation.

Q. And did you thereafter proceed to manufacture the product, that is, after you took the license?

A. Yes, sir, we manufactured it.

Q. Did you at any time, Mr. Black, ever have any agreement or understanding with USG or any other licensee to raise or fix or stabilize the prices of plaster or other unpatented gypsum products?

A. No, sir.

Q. And you knew, did you not, at all times subsequent to 1909, that the license agreements which your
2301 company had related only to patented gypsum board, in so far as their price-fixing provisions were concerned?

Justice STEPHENS. You said 1909. I think you meant 1929.

Mr. BROMLEY. 1929, thank you, sir.

The WITNESS. Yes, sir, I did.

By M. BROMLEY.

Q. And isn't it a fact that there was no agreement or understanding between your company and USG or any other licensee, having anything to do with price fixing of anything other than patented board manufactured by your company under the license?

A. That is correct, sir.

Q. Will you look at Exhibit 307, please? At the time you wrote Exhibit 307, which is dated October 16, 1930, your company was a licensee of USG under the license agreement of November 25, 1929, was it not?

A. Yes, sir.

Q. Isn't the reference in the first paragraph, the first sentence in the 5th line, to, "your letter, making the price on Seconds the same as Firsts, was dated April 7th . . ." a reference to a price notification sent out by USG under your existing board license?

A. Yes, sir.

Q. And wasn't it your understanding that under
2302 that license, USG had the right to fix your price on seconds as well as No. 1 or first-grade board?

A. It was.

Q. Wasn't it your understanding that there was no provision in that license which prohibited your company from selling seconds if you wanted to?

A. That is correct, sir.

Q. And isn't it a fact that there was no understanding or arrangement between your company and USG by which you agreed not to market seconds?

A. There was no understanding, sir.

Q. And isn't the reference in the first paragraph of Exhibit 307 merely to the fact that on April 7, 1930, the licensor, acting under the license, had set the price for seconds at the same figure as it had theretofore set for first-grade board?

A. That is correct, sir.

Q. You said in your direct-examination that prior to 1929, as I recollect, there was keen competition in the gypsum industry?

A. Yes.

Q. Isn't it a fact, Mr. Black, that at all times subsequent to 1929, as well as prior thereto, there has been keen competition in the gypsum industry, and particularly in the gypsum board industry?

2303 A. At all times.

Q. You told the Court, as I understood you, that after you took the November 25, 1929, license, you sold gypsum board in accordance with USG's price bulletins, at least from and after November 25, 1929.

Isn't it the fact that these sales to which you refer are sales of such board as was manufactured by your company under the patents licensed to you by USG?

A. Yes, sir.

Mr. BROMLEY. That is all.

Justice STEPHENS. Is there any cross-examination by other defendants?

(No response.)

Justice STEPHENS. Any re-direct-examination?

Mr. KNUFF. I think about two questions, Your Honor.

Justice STEPHENS. Proceed.

REDIRECT EXAMINATION

By Mr. KNUFF.

Q. With reference to the price of seconds that is mentioned in Exhibit 307, could you sell seconds for the same price that you sold No. 1 board?

A. Do you mean, may I ask, Mr. Knuff, if we were permitted by our license contract to do that, or was it a matter of being able to sell the trade?

Q. Being able to sell the trade, sir.

2304 A. No, sir, they didn't care for seconds when they could get firsts at the same figure.

Q. Now you testified that there was keen competition in the industry, in response to some questions of Mr. Bromley's; is that correct?

A. Yes, sir—witness my gray hairs.

Q. And with reference to board, was there any price competition, or was all board sold at the same price?

A. No, there were different kinds of board——

Q. (Interposing.) I mean 3/8 inch board of a particular dimension, was that sold at the same price by USG, American, National, and all the rest of them? For a particular type of board having particular dimensions, was there any price competition between the various companies?

A. Naturally I could only speak for the territory that we covered, Mr. Knuff, which, for the American Gypsum Company, was rather limited as compared with the other larger companies. But in that particular territory, our prices were quite uniform on the same type and class of board.

Q. Well, weren't all other prices uniform under the price bulletins?

A. To the best of my information.

Q. So that on a particular type of board, at a particular time, there wasn't any price competition?

A. Not to my knowledge, as I interpret your question.

2305 Mr. KNUFF. Will you read the last question that Mr. Bromley asked the witness:

(The question was read by the reporter as follows:

"Q. You told the Court, as I understood you, that after you took the November 25, 1929, license, you sold gypsum board in accordance with USG's price bulletins, at least from and after November 25, 1929.

"Isn't it the fact that these sales to which you refer are sales of such board as was manufactured by your company under the patents licensed to you by USG?")

Mr. KNUFF. The question is objected to because it calls for a conclusion.

Justice STEPHENS. Read the question again.

(The question was again read by the reporter.)

Justice GARRETT. Just how, if I may interrupt you a moment, does that call for a conclusion?

Mr. KNUFF. This man isn't a production expert, he is a salesman, he doesn't know how the board was made.

Mr. STEFFEN. He doesn't know what the patents were. And Mr. Bromley knew he didn't, too.

Mr. BROMLEY. What does that mean?

Justice STEPHENS. The Court wishes counsel could refrain from personalities. It only impedes the fair progress of the case.

Well, technically the question is probably objec-
2306 tion. Of course, there is no objection to the question.

The question has been asked and answered. All you can do now is to move to strike it. We will take your objection as a motion to strike. It may be stricken.

You may seek to obtain the information in another way, Mr. Bromley, if you can.

Mr. KNUFF. That is all the re-direct-examination I have, Your Honor.

RECROSS EXAMINATION

By M. BROMLEY.

Q. You understood, didn't you, at all times, Mr. Black, that the only prices of American's fixed by USG were the prices of board manufactured by you under the patents licensed to you by USG?

A. Yes, sir, that was my understanding.

Justice STEPHENS. Any re-direct-examination?

Mr. KNUFF. No, Your Honor.

Justice STEPHENS. Is this witness to be excused now?

Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. Thank you for coming here. You may be excused.

The WITNESS. Thank you for your consideration.

(Witness excused.)

Mr. KNUFF. Mr. C. F. Miller!

2307 Thereupon, C. F. MILLER, called as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. KNUFF.

Q. Your name is C. F. Miller, is that correct?

A. That is correct.

Q. Where do you live, Mr. Miller?

A. Cleveland Heights, Ohio.

Q. With what business are you connected at the present time?

A. The Darlington Brick & Mining Company.

Q. And how long have you been connected with that company?

A. Oh, a matter of 26 years, perhaps more.

Q. Were you ever connected with the American Gypsum Company?

A. I was.

Q. When did you first become associated with that company?
A. At the time of its organization.
Q. That was in about 1904, is that correct?
A. I think it was about 1907 or 1908.
Q. 1907 or 1908?
A. Yes.
2308 Q. And were you active, from its inception, in the management of that company?
A. No, sir.
Q. Did you at any time become active in the management of the American Gypsum Company?
A. Yes, sir.
Q. Were you always on the Board of Directors of the American Gypsum Company?
A. Except for a short term.
Q. When was that, Mr. Miller?
A. About 1928.
Q. For how long?
A. Several months, I couldn't tell you exactly.
Q. Then from 1907 to the time American Gypsum Company sold to Celotex, with the exception of a short period in 1928, you were always on the Board of Directors, is that correct?
A. That is my recollection, yes, sir.
Q. Do you recall when Mr. Griswold was the General Manager of the company?
A. Pardon?
Q. Do you recall when Mr. Griswold was the General Manager of the company?
A. I know he was General Manager for a term of years, yes.
2309 Q. Do you recall when Mr. Griswold ceased to be General Manager?
A. Sometime about 1927 or 1929.
Q. I think it was sometime in 1929.
After Mr. Griswold ceased to be associated with the American Gypsum Company, did you take a more active part in the management of the company?
A. Not for a year or two.
Q. When did you first start to take a very active part in the management of American Gypsum Company?
A. In 1932.
Q. In 1932?
A. Yes.
Q. And what was your title at that time?

A. I had no title in 1932.

Q. Well, you have indicated that you did take a more active part. Now in what capacity did you do that?

A. I was requested to go in and see what could be done towards stopping the losses that were occurring, to make a survey.

Q. You were requested by whom?

A. By Mr. John A. Kling.

Q. And did you become the General Manager?

A. I did.

Q. And how long did you hold that position?

2310 A. From February 1, 1933, until the Celotex took us over.

Q. You were, of course, familiar with Mr. Kling, who was Chairman of the Board of Directors in the late 20's and the early 30's, were you not?

A. I was acquainted with Mr. Kling, yes.

Q. And how long had you previously been acquainted with Mr. Kling?

A. Since about 1900.

Q. Mr. Kling was associated with the American Gypsum Company from what time?

A. From its inception.

Q. Was he always on the Board of Directors?

A. No, he was not.

Q. He was a stockholder for part of that time, and then subsequently he was elected a member of the Board of Directors, is that correct?

A. Well, he was a stockholder all the time.

Q. All the time?

A. Yes.

Q. But was on the Board of Directors only part of the time?

A. Yes.

Q. Do you recall when he became a member of the Board of Directors?

2311 A. I couldn't state definitely. Along about 1928 or 1929.

Q. And when did Mr. Kling sever his connection with the American Gypsum Company?

A. When he was killed?

Q. Do you know what year that was?

A. I couldn't state definitely. I think it was about '35 or '36.

Mr. KNUFF. We would like to offer in evidence, if Your Honor pleases, the answer of USG to the Interrogatory No.

23 heretofore filed by the Government, as an admission of USG, and in particular sub-paragraph (e) of that answer, which reads as follows:

"September 13, 1926; Chicago, Illinois; present: Sewell L. Avery, President of United States Gypsum Company, John E. MacLeish, its attorney, J. H. McCrady, President, Frank J. Griswold, Vice-President and C. F. Miller, director, of American Gypsum Company."

Justice STEPHENS. Well, now, that doesn't mean anything to the Court, because it is an answer to an interrogatory. What interrogatory is it?

Mr. KNUFF. Interrogatory 23, Your Honor, as I recall.

Justice STEPHENS. To USG?

Mr. KNUFF. Interrogatory No. 23 to USG. It states as follows:

2312 "State the dates and places of all conferences or meetings held during the period from April 1, 1926, to May 1, 1927, between your representatives and representatives of any other companies manufacturing gypsum board at that time, or any time thereafter, in any way relating to the issuance of licenses by you under any patent owned by you. State the names of all companies represented at each of said conferences or meetings, the names of the representatives of each of said companies, and the names of all other individuals present at each of said conferences or meetings; and state the substance of what was said by each person present at said conferences or meetings."

That portion—"and state the substance of what was said by each person present at said conferences or meetings",—there was an objection filed to, and the Court sustained the objection. That is, there was an objection filed to the entire interrogatory, and the Court sustained the objection as to that portion.

Justice STEPHENS. That is correct.

Now as I understand it, you are asking to read into the record only that part of the answer which is in answer to the question, "State the names of all companies represented at each of said conferences or meetings, the names of the representatives of each of said companies, and the names of all other individuals present at each of said con-
2313 ferences or meetings", is that right?

Mr. KNUFF. That is correct, and I am reading into the record the answer of USG, sub-paragraph (e), which is:

"September 13, 1926; Chicago, Illinois; present: Sewell L. Avery, President of United States Gypsum Company, John E. MacLeish, its attorney, J. H. McCrady, President, Frank J. Griswold, Vice-President and C. F. Miller, director, of American Gypsum Company."

Justice STEPHENS. Is there any objection?

Mr. FINCK. Only the usual objection, Your Honor.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

I am afraid I misled you, Mr. Knuff. I understood you to answer that you were only reading the answer to that portion of the interrogatory which begins with the words "State the names of all companies represented", and so forth. You are reading the answer to the entire interrogatory, aren't you?

Mr. KNUFF. I am reading the answer designated as (e) in the answer of USG.

Justice STEPHENS. Does that not apply to the whole of Interrogatory 23?

Mr. KNUFF. I don't believe it does, Your Honor.

Justice STEPHENS. Very well. You may make your own record. I was just trying to help you in the interest
2314 of time, and I apparently have impeded rather than than helped.

Mr. KNUFF. That is perfectly all right.

By Mr. KNUFF.

Q. It has been admitted, sir, by United States Gypsum Company, that Mr. McCrady, Mr. Griswold and yourself attended a conference in Chicago on September 13, at which Mr. Avery and Mr. MacLeish were present. Do you have any recollection of that conference?

A. I attended such a conference. I don't remember the date.

Q. Was that the only conference you ever attended down there?

A. It was.

Q. Do you have any recollection of the conference?

A. Not any clear recollection.

Q. I show you what has been marked for Identification as Government's Exhibit No. 310, the same being a letter dated September 16, 1926, addressed to Mr. J. B. Davis, and signed on the second page, "C. F." Will you look at that letter and tell me whether or not those initials "C. F." are your initials?

A. They are.

Q. Would you read the letter, please? Does this letter refresh your recollection?

A. I will acknowledge that I wrote the letter, but
2315 I don't know anything more than is stated in the letter.

Q. On the right-hand side of the letter, and apparently in black crayon, is that in your handwriting, "C. F. M."?

A. It is not.

Q. And at the bottom of the letter, in black crayon, "C. F. Miller", is that in your handwriting?

A. It is not.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 310, the same having been identified by the witness.

Mr. BROMLEY. The usual objection.

Justice STEPHENS. It is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 310, was received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit No. 311, the same being a long-hand letter dated September 26, addressed to "Dear Jim", and ask you if you recognize the handwriting?

A. It is addressed from "Old Fort Drummond", and that is where Mr. J. B. Davis spent his summers, and I think that is his handwriting.

2316 Q. Whose handwriting is this?

A. Mr. J. B. Davis', I think.

Q. You say this is in Mr. J. B. Davis' handwriting?

A. I think it is.

Q. You were familiar with Mr. Davis' handwriting, were you not?

A. To some extent.

Q. What was Mr. McCrady's first name?

A. James H.

Q. Would you say that this letter was written by Mr. Davis to Mr. McCrady?

A. I wouldn't say without reading the letter.

Q. Would you mind reading it? Now would you say that that is a letter that was written by Mr. Davis?

A. Knowing the circumstances, I would say yes.

Mr. KNUFF. We offer Government's Exhibit 311 in evidence, if Your Honor pleases.

Mr. BROMLEY. The usual objection.

Justice STEPHENS. Received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked Government Exhibit 311, was received in evidence.)

Mr. KNUFF. Will you let me have Exhibit 143, please?

(Exhibit 143 was handed to the witness.)

2317 By Mr. KNUFF.

Q. Will you please look at the third page of Exhibit 143 and tell us if you can, if you recognize the notation, "Signed F.J.G." Do you recognize that handwriting?

A. I do not.

Q. Is it Mr. Davis' handwriting?

A. It is not.

Mr. KNUFF. May I have Exhibit 309, please?

(Exhibit 309 was handed to the witness.)

By Mr. KNUFF.

Q. Do you notice that on the bottom of that Exhibit 309 the name "Mr. J. B. Davis" appears in pencil; do you notice that?

A. Yes, sir.

Q. Do you recognize that handwriting?

A. I do not.

Q. You don't know whose handwriting that is?

A. I do not.

Q. Did you stay with the American Gypsum Division of Celotex after Celotex took it over in—when did they take it over, 1939?

A. 1939.

Q. Were you with them after that?

A. I was.

Q. For how long?

2318 A. Until July, 1940.

Q. Do you know, sir, whether or not Celotex was selling board at Bulletin prices after they took over the American Gypsum Company?

A. So far as I know.

Q. They were?

A. Yes.

Mr. KNUFF. I think that is all the direct examination we have of the witness, Your Honor.

Justice STEPHENS. The Court will have to adjourn at this time, I am sorry to say, as we have appointments which will require that.

(Whereupon, at 4:03 o'clock, p.m., the hearing was recessed until Tuesday morning, December 21, 1943, at 10:00 o'clock).

2320 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Tuesday, December 21, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances: (Same as heretofore noted.)

2326 Thereupon, C. F. MILLER, the witness on the stand at the time of adjournment, resumed his testimony as follows:

CROSS EXAMINATION

By Mr. BROMLEY.

Q. In 1932, did you become the General Manager
2327 of the American Gypsum Company, Mr. Miller?

A. No, sir, in 1933.

Q. 1933?

A. Yes, sir.

Q. Did I understand that you were requested to assume that position and see what could be done towards stopping the losses that were occurring?

A. I wasn't requested to assume that position at that time. I was requested to make an investigation in 1932, but I did not become Manager until 1933.

Q. I see. Well, did you mean, by that answer which you gave yesterday, to indicate that the American Gypsum Company was losing money in 1932?

A. I did.

Q. And was it losing money prior to 1932?

A. It was.

Q. And did it continue to lose money subsequent to 1932 for some time?

A. For a year or two.

Q. Do you recall that back in August, 1926, or thereabouts, you were appointed an alternate member of a committee of the American board of directors for the purpose of deciding whether or not the company should take a license?

A. I don't recall that the committee was to decide that matter, but the committee was to investigate it.

2328 Q. I see. It is a fact, isn't it, that you were appointed, by the Board, an alternate member of that committee of three?

A. I was.

Q. And that committee was appointed by the board of directors after the Court of Appeals of the District of Columbia had decided the Birdsey-Clark interference proceeding in favor of USG, was it not?

A. I couldn't state that. I am not clear on when that decision was given.

Q. Do you remember that the Court of Appeals of the District of Columbia did render a decision in favor of USG in the Birdsey-Clark interference suit at about that time?

A. I remember that they rendered a decision, yes, sir.

Q. Do you remember that it was sometime in 1926?

A. Well, I know it was sometime along there, but I don't know anything about the dates.

Q. Well, do you remember, Mr. Miller, that as a result of that decision the board of directors of American appointed this committee of which you were an alternate member?

A. I do.

Q. Will you look at Exhibit 310, please? In the third paragraph, Mr. Miller, of Exhibit 310, do you see that you make reference to a meeting in Chicago with

2329 Mr. Avery, among others?

A. I do.

Q. And the "J. H." and the "F. J." referred to in that sentence are Messrs. McCrady and Griswold, aren't they?

A. That is correct.

Q. And it is a fact, isn't it, that the committee of which we spoke a minute ago, appointed by the board of directors of American, was composed of Messrs. Griswold, McCrady, and yourself?

A. That is correct.

Q. And this meeting which you speak about in the third paragraph is a meeting which took place as a result of your committee of three going to Chicago to confer with USG officials, isn't that right?

A. That is correct.

Q. And you three gentlemen, as indicated in the third paragraph of Exhibit 310, did have a meeting with Mr. Avery, did you not?

A. Yes, sir.

Q. Now were there representatives of any other companies present at that meeting with Mr. Avery?

A. No, sir.

Q. In the second sentence of the third paragraph of Exhibit 310, you will notice that you refer to "sessions . . . with our Attorneys, Bill Shearer, Mr. Avery
2330 and the Universal Company's Patent attorney." I want to find out whether or not it isn't the fact that those sessions, so far as Mr. Shearer and the Universal Company's patent attorney are concerned, were separate from the meeting which you had with Mr. Avery?

A. Absolutely separate.

Q. And Bill Shearer, referred to in that paragraph, was an official of the Universal Company, wasn't he?

A. Yes, sir.

Q. Now what did you talk about with Mr. Shearer and the Universal Company's patent attorney, in the separate meeting which you say you held with them?

A. That I can not recall.

Q. Don't you recall, Mr. Miller, that you and your fellow members of the committee, and your attorneys, consulted with Mr. Shearer and his patent attorney in order to find out just what it was in the way of terms which USG was offering to Universal?

A. My recollection is rather clouded, but it is that we went to the Universal's office and had this conference in order to clear up some matters with regard to the proposed contract, license agreement.

Justice STEPHENS. Speak just a little louder, if you can.

The WITNESS. All right.

2331 By Mr. BROMLEY.

Q. Isn't it a fact that one of the things you wanted to clear up was the question of whether or not Universal had been able to get an offer of more favorable terms than you gentlemen had been able to get?

A. That was one of the things that we discussed. I recall that.

Q. In other words, you wanted to find out whether you were doing as well in your negotiations with Avery as the Universal people were doing, didn't you?

A. That is right.

Q. And you wanted to find out whether Avery was insisting, with Universal, upon the same terms upon which he was insisting with you?

A. Yes, that is true.

Q. Have you any recollection as to what you found out as a result of your discussion with Shearer and his patent attorney?

A. We found that the offerings were identical.

Q. That is to say, that Mr. Avery was insisting upon the same terms for Universal as he was for American?

A. That is my recollection.

Q. Can you remember, when you gentlemen met with Mr. Avery, that the company's general counsel, Mr. MacLeish, was with him?

2332 A. Yes.

Q. And isn't it the fact that the only discussion you had with Messrs. Avery and MacLeish involved the terms upon which USG's claims against American could be settled, and the terms of the license, if you wanted to take one?

A. That is correct.

Q. And you were told by Mr. Avery or Mr. MacLeish, weren't you, that as of that time, that is, September 1926, the claim against you for infringement damages could be settled by your company by the payment of $50,000 in cash?

A. That is correct.

Q. Plus an agreement to take a license and pay 5 percent royalties in the future?

A. That is right.

Q. And that proposal made by Mr. Avery, you gentlemen and your board of directors rejected, didn't you?

A. That is correct.

Q. In the fifth sentence of the third paragraph of Exhibit 10, that sentence reads: "A few things have been modified, at the most objectionable things plus the payments stand." Can you recall that one of the things you and your committee thought was one of the "most objectionable things" was the length of time the proposed license agreement was to run?

333 A. I don't recall that.

Q. Now do you recall that another of the "most objectionable things", in your opinion, was that Mr. Avery would give you no assurance as to what USG would do in the event the prices became so low that the payment of royalties worked a hardship on your company as a licensee?

A. I recall there was some discussion on that point, and that we were given no assurance.

Q. Wasn't the thing that you objected to the fact that Mr. Avery would not give you any written assurance on that matter?

A. I couldn't answer that question.

Q. Well, do you remember anything else that you referred to in your clause "the most objectionable things plus the payments stand"?

A. That is 17 years ago, and I have handled a great many matters since, and I don't recall the details of that conference.

Q. Refer to the fourth paragraph of Exhibit 310, please, Mr. Miller, which is at the bottom of page 1, and particularly the second sentence beginning, "If we lose".

Now isn't it the fact that at the time you wrote that sentence, you felt that if no settlement was made and if the infringement suit was lost by American, that American would not be able to remain in the board business

334 for the balance of the term of the Utzman patents?

A. Well, we could have remained in the board business, but with open-edge board.

Q. And didn't you feel that for the balance of the term of the Utzman patents, your company could not successfully operate, making only open-edge board?

A. Yes, I did.

Q. The reference to the word "Master" at the end of the third line of that paragraph is a reference to what our attorney told you would follow an adverse decision against you on the issue of infringement, is it not?

A. A Master would have to check the records and determine how much damages we would have to pay, that is what I understood.

Q. Well, at any rate, subsequent to this meeting in Chicago with Mr. Avery, which your committee had in September, 1926, your company decided to go ahead and fight the litigation, didn't it?

A. It did.

Q. And you did go ahead and fight the litigation; and finally, in July, 1928, wasn't it, Judge Jones in Cleveland decided against your company and in favor of USG?

A. I couldn't testify as to the date, but I know that Judge Jones decided against us.

Q. Now will you look at this penciled note on the
2335 upper left-hand corner of Exhibit 310, and because it may be confused as to order, I would like to read it in the way that I think it was written. Do you agree with this reading:

"think over & write C.F.M. very general & do not give opinion without a full conference with all interests—Jno. A. K. included".

Is that the way you interpret that note?

A. That is the way I read it, yes, sir.

Q. And did you understand the reference to a "full conference with all interests" to mean only all interests within your own company?

A. Absolutely.

Q. And the interests within your company were the various important stockholders, weren't they?

A. Correct.

Q. Now, sir, can you recall that after Judge Jones' adverse decision in the USG infringement suit, the American Gypsum Company undertook to make a type of closed-edge board which had some cloth inserted along the raw core, on the edges of the board?

A. I know that the American made that type of board for a while, but I don't know when it was.

Q. Well, do you recall, sir, that whenever it was, the so-called cloth-edge type of board which your com-
2336 pany made was completely unsatisfactory to the trade?

A. I was not active in the business at that time; and I couldn't make such a statement.

Q. You told us yesterday, Mr. Miller, that so far as you knew, Celotex was selling board at bulletin prices after they took over the American Gypsum Company. Isn't it the

fact, sir, that the sales to which you referred in that answer were sales of such board as was manufactured by Celotex under the patents licensed to it by USG?

Mr. KNUFF. Just a moment, please. The question is objected to because the witness is not an expert on patent matters. He is only a sales manager, or an investigator, and the question calls for technical knowledge which this witness does not have.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. Well, the question as phrased does call for, technically, a determination by the witness whether or not the patents were being used in the manufacture of the board. You may obtain the information desired by a question phrased in another manner.

Objection sustained. We had that same question before.

Mr. BROMLEY. I am afraid my difficulty, if the Court pleases, is because Government counsel's question was so general. He said—Do you know whether Celotex
2337 was selling board at bulletin prices after they took over American?

Well, now, a question as general as that includes so much that I don't know what he means. Price control might have been discontinued. There might have been periods in which it wasn't applicable. There might have been products to which it wasn't applicable under the bulletins. It certainly wasn't applicable under the bulletins to purchased material. It wasn't applicable to all sorts of things. Yet he throws in this general question for me to disentangle, and my difficulty is that I don't seem to be able to disentangle it, because asking this man what he understood doesn't help me any as to what he did. So what I would like to bring out from him first is, if I might, as to what he understood, and then what he did, because they have got a general question in here that covers everything —whether the board was patented and whether it was proper to control the prices on it or not. He has got this witness to say that Celotex was selling board at bulletin prices.

Justice STEPHENS. Where is that question?

Mr. BROMLEY. At the top of page 2615.

Justice STEPHENS. Well, that is a very general question. The difficulty is that it seems to me, as I am presently advised, that the fact that that question is general, while that possibly might have made that question objectionable, doesn't permit the form of question which you are

2338 now asking. The Court isn't assuming to deny the defendants the right to bring out whether the board that they were selling was the board that they manufactured. But the question, as I understand it, as it is phrased, in effect asks the witness to tell whether or not it was manufactured under the patents. And whether it was manufactured under the patents apparently is a question in issue here, the Government contending that the patents weren't used. So the objection seems to be to the form of the question, not to the substance of it.

By Mr. BROMLEY.

Q. Isn't it the fact, Mr. Miller, that when you gave that answer—Celotex was selling board at bulletin prices after they took over American—you meant that Celotex was only selling at bulletin prices such board as was manufactured by Celotex?

A. That is correct.

Mr. KNUFF. We have no objection to that at all.

By Mr. BROMLEY.

Q. And further, isn't it the fact that Celotex only sold at bulletin prices such board as was manufactured by Celotex under the patents licensed by USG to Celotex?

Mr. KNUFF. That again is objectionable, as calling for a technical knowledge which this witness does not possess.

2339 Justice JACKSON. This witness may know that very thing. He can say, "I don't know." He may know this.

Mr. KNUFF. He hasn't been qualified, Your Honor.

Justice JACKSON. That isn't your objection, is it? You didn't say that.

Mr. KNUFF. Yes, that is our objection.

Justice JACKSON. He may be able to answer this question just as it is asked.

Justice STEPHENS. Judge Garrett suggests, Mr. Bromley, that you can properly ask what kind of board was being manufactured, whether open-edge board or closed-edge board. But we are all of the view that if the Government insists upon objecting to the question as phrased—it is just the same question as you asked a moment ago—that the objection is well taken. It is asking this witness whether or not the board that they did manufacture was manufactured under these patents, and that is a question which a person informed on the patents could answer, and not a lay witness. You may, however, qualify this witness.

It is possible that he knows. It is possible that he was informed on that subject. If you can qualify him, he can answer it.

I will be glad to hear you further if you think the Court's ruling is incorrect. But I don't quite see the answer to the Government's objection. The Government is making an issue in this case of the question whether or not these patents were really used to manufacture
2340 this board. They are contending that the board was manufactured without reference to the patents, and that the license was a subterfuge. Whether the patents were actually the governing, operative, scientific principle in the manufacture of the board, and whether the board was made in accordance with the patents, and whether the patents were discarded and it was made under some other scientific arrangement than these patents, is technically a patent question.

I should think you could bring out what kind of board this was, what its dimensions were, what the folds of the edge were, what the nature of the manufacturing process was, as a matter of fact; and then ask the Court, in examining the patents, to conclude whether or not the board as manufactured did conform to the specifications and processes of the patents. That there can be no objection to, it would seem to the Court.

But under the present issues, it does seem that the question as phrased is objectionable.

Justice JACKSON. I don't think it is a very abstruse question. This witness doesn't have to be a patent lawyer to know whether or not the board in question was made under the patent. He is a practical man. He may know it. Why don't you ask him? I don't think it requires a patent lawyer to tell you that. A layman can do it.

By Mr. BROMLEY.

2341 Q. Celotex made this light-weight foam board, didn't it, Mr. Miller?

A. Celotex made a light-weight board.

Q. Are you familiar enough with the USG patents to know whether this board was made under the patents or not?

A. I understood it was made under the patents.

Mr. STEFFEN. I ask that that be stricken.

Justice STEPHENS. I don't think that can be stricken. We have ruled consistently here that because this is cross-examination, it goes to the reasonableness of the witness'

conduct and good faith of his conduct and that of his company.

Mr. STEFFEN. If it be limited to his good faith and not to the truth of the matter asserted, all right.

Justice STEPHENS. What he understood was being done is proper cross-examination. The motion to strike that is denied.

By Mr. BROMLEY.

Q. And did you also understand, Mr. Miller, that Celotex, in the manufacture of gypsum wallboard and lath, used starch for purposes of securing adhesion between the core and the paper?

A. I did.

Q. And you know that as a fact, don't you?

A. I do.

2342 Q. And was it your understanding at all times after you were with Celotex that in manufacturing that board, using the starch, you were using USG's Haggerty patent?

Mr. STEFFEN. I object to that, Your Honor. He can testify as to the use of starch, and the next is a conclusion as to whether it comes within the Haggerty patent or not.

Justice STEPHENS. He has again only testified as to what his understanding was, not whether it came within it.

Mr. STEFFEN. And this is merely for the purposes of determining his understanding, and not as to the truth of the matter asserted?

Justice STEPHENS. That is right. It is proper cross-examination as to the intentions and purposes and good faith of the witness and his company.

Justice JACKSON. The question has not been answered.

The WITNESS. It was.

Mr. BROMLEY. That is all.

Justice STEPHENS. Any further cross-examination by other defendants?

Mr. FINCK. None, Your Honor.

Justice STEPHENS. And re-direct-examination?

Mr. KNUFF. Just a moment, Your Honor, please.

REDIRECT EXAMINATION

By Mr. KNUFF.

Q. Mr. Miller, I believe on cross-examination you
2343 testified that your company was losing money in 1932; is that correct?

A. That is correct.

Q. There was a depression in 1932, was there not?

A. There was.

Q. And other companies were losing money in 1932, were they not?

Mr. BROMLEY. If he knows.

The WITNESS. I don't know about other companies.

By Mr. KNUFF.

Q. You knew there was a serious depression in 1932?

A. We felt it.

Q. Now you said, in reference to paragraph No. 4 of Government's Exhibit No. 310, you felt that your company, in case the decision of the court went against you, could not successfully operate and make board. Do you recall that?

A. May I have that exhibit again, please?

(Exhibit 310 handed to the witness.)

Q. It is the last paragraph on the first page of Exhibit 310, the second sentence—"If we lose we will be at the mercy of the Master. . . ."

A. How was that question phrased?

Q. The question was—in response to a question by Mr. Bromley, as to whether you felt that your com-
2344 pany could not successfully operate and make board, your answer to that was yes. Do you recall that?

A. I do.

Q. As a matter of fact, your company did make board until 1929, and had made board from the date of this letter, 1926, to the present time, or as long as you were with the company?

A. That is true.

Q. And other companies were successfully making board, weren't they?

A. Well, we could not have profitably sold an open-edge board.

Q. You could not have profitably sold an open-edge board?

A. That is right, the trade would not accept it.

Q. The trade wouldn't accept it?

A. Yes, in competition with closed-edge board.

Q. But you didn't mean that if you were to lose this suit, you wouldn't be able to make any kind of board at all?

A. There wouldn't be any need of making board if you couldn't sell it.

Q. Do you recall whether Certain-teed was making open-edge board?

A. I do not.

Q. Do you recall whether Niagara was making
2345 open-edge board?

A. I do not. I knew nothing about the operation of any other companies at that time.

Q. But you felt that your company couldn't successfully compete in the market with open-edge board?

A. That is right.

Q. Was that your opinion or Mr. McCrady's opinion?

A. That was my opinion.

Mr. KNUFF. That is all.

Justice STEPHENS. Any re-cross-examination?

Mr. BROMLEY. No, sir.

Justice STEPHENS. Are you through with this witness?

Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. You may be excused, Mr. Miller. Thank you for attending the court.

The WITNESS. Thank you.

(Witness excused.)

Mr. KNUFF. I notice it is almost time for the 11 o'clock recess——

Justice STEPHENS (interposing). We will take a recess for five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2346 Justice STEPHENS. Proceed, gentlemen.

Mr. STEFFEN. Take the witness stand, Mr. Whittemore.

Thereupon, AUDENREID WHITTEMORE, a witness called for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Mr. STEFFEN. Mr. Knuff will examine the witness.

Justice STEPHENS. Have we the Whittemore exhibits?

Mr. KNUFF. No, you haven't them, your Honor, I have them in my hand.

Justice STEPHENS. Thank you.

(Thereupon, three copies of the Whittemore exhibits were handed to the Court.)

DIRECT EXAMINATION

By Mr. KNUFF.

Q. Will you please state your name, sir?

A. Audenreid Whittemore—A-u-d-e-n-r-e-i-d W-h-i-t-t-e-m-o-r-e.

Q. And where do you live, Mr. Whittemore?
A. Bronxville, New York.
Q. In what business are you now engaged?
A. Paper and Industrial Appliances, Inc..
Q. How long have you been with that firm, sir?
A. Since 1939.

Q. Were you formerly an official of the Certain-
2347 teed Company?

A. I was.

Q. In what capacity did you serve with the Certain-teed Company?
A. Do you mean when I started or when I finished?
Q. When you finished.
A. That is the question, when I finished?
Q. In what capacity were you with the Certain-teed Company when you left that company?
A. Executive vice president.
Q. When did you start with the Certain-teed Company?
A. January 15, 1910.
Q. And when did you leave the company?
A. November 30, 1939.
Q. And since that time you have been with the other company that you are presently with?
A. Yes, sir.
Q. Who was the president of the Certain-teed Company at that time?
A. At which time?
Q. When you left the company in 1939.
A. Mr. Hartley.
Q. How do you spell that?
A. H-a-r-t-l-e-y.

Q. Was George M. Brown formerly connected with
2348 that company?

A. Yes, sir.

Q. In what capacity?
A. President and chairman of the Board.
Q. In 1928, what was your position with the company?
A. First vice president.
Q. What did your duties consist of, sir, in 1928? Were you in charge of production; were you in charge of sales; were you in charge of accounting—just what were your duties?
A. I was in charge of production, and a lot of other things.

Q. It has been admitted, sir, that you were in Chicago with Mr. Brown on or about May 21, or 22, 1929. Do you recall that visit?

A. Mr. Knuff, if you will identify your questions more by other things than dates, you will help me greatly, because I try to erase dates and telephone numbers from my memory. I don't worry about such inconsequential things.

Q. Were you in Chicago with Mr. George M. Brown in 1929 for the purpose of entering into a license agreement with USG?

A. Yes, sir.

Q. Do you recall where that meeting took place?

A. I think it was at the Palmer House.

Q. Do you recall the conditions in the gypsum industry, the price conditions in the gypsum industry, just
2249 prior to Certain-teed taking the license in 1929?

A. Yes, sir.

Q. What were those conditions?

A. My recollection is that we were selling plaster at about one-quarter the price of a ton of coal, and we were selling board at somewhere between eight and ten dollars a thousand; and other items were more or less in proportion.

Q. What type of board were you selling at that time, an open or a closed-edge board?

A. An open-edge board.

Q. Were you selling any closed-edge board at all?

A. No, sir.

Q. And would you say that just previous to this meeting in Chicago there was a price war on in the gypsum industry?

A. There certainly was.

Q. Do you recall whom else you saw in Chicago at the time you and Mr. Brown went out there, and by that I mean, sir, what other persons connected with the gypsum industry did you see?

A. Mr. Knuff, it is difficult for me to remember individuals or even companies that I saw at that time; and, your Honors, I don't want to give any impression of lack of memory. It is a long time ago and I can't say.

Justice STEPHENS. We don't expect you to remember what you can't normally remember over a period of
2350 years. We all have difficulty in that same respect, and if you do not remember, you can frankly say so. If you have some recollection, give us the benefit of it.

THE WITNESS. Thank you.

By Mr. KNUFF.

Q. You you remember, sir, whether there were representatives of any other board manufacturers there, without specifying them?

A. Yes, sir, there were.

Q. Can you recall any, in particular, that you saw?

A. I believe Mr. Reeb was there.

Q. He was with the Niagara Gypsum Company?

A. I think so, but I couldn't be sure.

Q. Do you recall whether or not there was a representative of National there?

A. I don't know.

Q. Do you recall whether or not there was a representative of Texas there?

A. I don't know.

Q. Outside of Mr. Reeb, you haven't any definite recollection of any other person being there?

A. I am not sure even of my recollection on Mr. Reeb.

Q. Do you recall whether or not any person was there representing Ebsary?

A. I believe Mr. Ebsary was there, but again I
2351 am not sure.

Q. You don't want us to infer that the only persons that were at that conference were just the persons you definitely remember?

A. No, there were others, I know.

Q. Your company at that time did undertake to sign a license agreement with USG on the Utzman patent?

Mr. BROMLEY. I object to the use of the word "undertake"; I don't know what it means——

Mr. KNUFF (interposing). Probably it was an ill-phrased question.

By Mr. KNUFF.

Q. Your company did sign a license agreement with USG at that meeting, is that correct?

A. Yes, sir,

Q. And you were one of the officials that executed it on behalf of Certain-teed?

A. Yes, sir.

Q. And Mr. George Brown was the other?

A. I think so, but I couldn't be positive. The agreement will speak for itself.

Mr. ADAMS. We will agree that Mr. George Brown was the other signer.

Justice STEPHENS. The record may so show.

By Mr. KNUFF.

2352 Q. Did prices advance on board immediately following the execution of the May contract, May 1929 contract?

A. I cannot answer that question as it is put. What does "immediately" mean?

Q. By "immediately", I mean that same day or within a day or two after.

A. I can't answer that question. I think our price lists will show that.

Q. Did you expect that prices would be advanced?

A. That is another difficult question to answer. They couldn't decline any more. If they went any way they would have to advance.

Q. And do you recall whether or not prices did advance?

A. My recollection is that they did advance, but how soon I don't know.

Q. In the proposed license agreement that was subsequently signed, you knew there was a provision providing for the right of USG to fix prices, did you not, for board?

A. Yes, sir.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 312, the same being copy of a letter dated June 10, 1929, addressed to Mr. S. L. Avery, president, and signed, "President", and opposite the word "President", appear the initials, "GMB:LK".

Did you ever see that exhibit before, Mr. Whitte-
2353 more?

A. I must have seen it because my writing is on it.

Q. Those are your initials at the top, and writing?

A. The initials, "COB—Better take this file also", and then the initials, "COB" and "LRW" scratched out, and the initials, "DCC", and, "See letter below also. AW"—is all my writing.

Mr. KNUFF. We offer in evidence, if your Honor pleases, Government's Exhibit 312.

Justice STEPHENS. Will you let the Court see it, Mrs. Gillette?

(Thereupon, original proposed Government's Exhibit No. 312 was handed to the Court.)

Justice STEPHENS. Is there any objection, except the usual objection?

Mr. BROMLEY. No, sir.

Justice STEPHENS. Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 312 was received in evidence.)

Justice STEPHENS. Do you intend to bring out who wrote the letter, if the witness knows?

By Mr. KNUFF.

Q. Do you know who wrote that letter?

2354 A. I haven't read the letter. If you will pass it back to me maybe I can get some idea.

(Thereupon, Government's Exhibit No. 312 was handed to the witness.)

The WITNESS. Well, naturally, I presume the letter was written by Mr. Brown.

By Mr. KNUFF.

Q. George M. Brown?

A. Yes.

Q. I show you, sir, that has been marked for identification as Government's Exhibit 313.

In the photostats that your Honors have before you, please skip the next four exhibits, and come to the one marked in ink "Exhibit 459", which is the one that I am now referring to.

Justice STEPHENS. That is the one you have now had marked Exhibit 313?

Mr. KNUFF. Yes, your Honor.

By Mr. KNUFF.

Q. I show you what has been marked for identification as Government's Exhibit 313, the same being a memorandum dated 3/13/36, "Dictated by Warren Henley" and for the attention of "Mr. A. Whittemore, V.C"—whatever that means.

A. It should be "V.P."

Q. And I ask you to look at that and see if you

2355 recognize it, please.

A. That again is my handwriting at the top.

Q. Will you read the memorandum and tell us who wrote it?

Justice STEPHENS. Refresh my recollection—who is Mr. Warren Henley.

Mr. KNUFF. Mr. Warren Henley, I believe was merchandise manager for gypsum, connected with Certain-teed Products Company.

Mr. ADAMS. He had that title, if your Honor pleases, but he was not in fact the merchandising manager.

Justice STEPHENS. He was, however, connected with Certain-teed?

Mr. ADAMS. That is right.

The WITNESS. What is the question, Mr. Knuff?

By Mr. KNUFF.

Q. I just asked you to read that letter.

A. Read both the attachment and the letter?

Q. Everything that you have there, there are four pages, I believe, before you. Read those four pages.

Justice STEPHENS. Is item No. A-e-64 a part of this exhibit?

Justice JACKSON. That is the first page of the exhibit.

Justice STEPHENS. You said four pages?

Mr. KNUFF. The fourth page in my book is the reverse side of one of the pages that is written on the other side.

2356 Justice STEPHENS. There is something wrong in our exhibits. There are two pages here in the series of exhibits handed to the Court, which are marked with item No. A-e-64. That is the first long page which contains the memoranda, and handwriting which you apparently refer to; then there is another page containing certain listed paragraphs, "In favor of license"; then a page containing items under the heading "Against license", and then there is another page A-e-64.

Mr. KNUFF. The fourth page beginning with, "Your report of the 13th is most interesting", is the reverse of one of the pages before Mr. Whittemore.

Justice STEPHENS. On the back side of it?

Mr. KNUFF. Yes.

Justice STEPHENS. And that is part of the exhibit?

Mr. KNUFF. It is, your Honor.

Justice STEPHENS. Very well, I understand it now.

By Mr. KNUFF.

Q. Who was Warren Henley, sir?

A. He was called merchandise manager. He was originally with the American Cement Plaster Company, and then the Beaver Company and when we absorbed the Beaver Company he became one of our employees.

Q. And at the time he wrote this memorandum to you he was an employee of Certain-teed Products Company?

A. Yes, sir.

2357 Q. And the writing at the top of this memorandum is in your handwriting, is it not?

A. Yes, sir.

Q. And the writing on the reverse side of the first page, is that in your handwriting?

A. Yes, sir.

Mr. KNUFF. We offer in evidence, if your Honor pleases, Government's Exhibit 313.

Mr. BROMLEY. The usual objection.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 313 was received in evidence.)

Mr. FINCK. May I object to this on the ground that it is immaterial as to National? The memorandum refers principally to perforated lath, and I think we have a continuing objection with respect to such evidence——

Justice STEPHENS (interposing). That is correct.

Mr. FINCK (continuing)—however, I would like to have the record show it.

Justice STEPHENS. Your objection may be recorded. It will be within the group of deferred rulings which the Court will have to cover after the recess.

Mr. KNUFF. I think at this time we have hang-
2358 ing in the air Exhibit 296, and since 313 has now been identified, that will identify also Government's Exhibit 296.

Justice STEPHENS. Well, that is the same thing, is it not, except that it does not contain that fourth page or reverse side?

Mr. KNUFF. That is right, your Honor.

Justice STEPHENS. Do you need both of them?

Mr. KNUFF. It was used in connection with Mr. Neale's testimony. I don't think we need to use 296, but so that we don't have any exhibits that are more or less hanging, I thought I would get both of them in.

Justice STEPHENS. Is 296 in evidence?

Mr. KNUFF. I am now offering 296 in evidence. It was used to refresh Mr. Neale's recollection.

Justice JACKSON. It is identical with your present offer?

Mr. KNUFF. Practically identical.

Justice STEPHENS. It is identical except that it does not contain the handwriting referred to, and it does not contain the fourth page or reverse of one of the other pages?

Mr. KNUFF. Yes.

Justice STEPHENS. Well, if it was used only to refresh recollection, it isn't technically admissible in evidence, and

I should think it would be unnecessary to have it in the record since you already have all of it and more in, in Exhibit 313.

2359 Mr. KNUFF. Well, I raise no controversy one way or the other.

Justice STEPHENS. However, there is no objection to it before the Court.

Mr. ADAMS. We don't care either way.

Mr. BROMLEY. I object to it on the grounds just stated by the Court. I think it clutters up the record and there is no need for it.

Justice STEPHENS. It is rejected as redundant and unnecessary, since the identical material, and more, is contained in Exhibit 313 which has been admitted.

Mr. KNUFF. I take it that the ruling is that 296 is not received in evidence?

Justice STEPHENS. It is not received in evidence and the Court so ruled.

By Mr. KNUFF.

Q. I show you——

Justice STEPHENS (interposing). I am sorry, Mr. Knuff, to interrupt you, but so that the record all at one place will contain the items necessary to the explanation of any one exhibit, won't you have the witness read what the handwriting states on the top of that exhibit, unless it is quite clear in the original—I haven't seen the original. Is it clear enough so that it is legible?

The WITNESS. My writing is never legible.

2360 Justice STEPHENS. Suppose you translate that for us, as I have to do with mine.

By Mr. KNUFF.

Q. Mr. Whittemore, will you read the legend that appears at the top of Exhibit 313?

A. It has the following initials: "SCS"——

Q. (Interposing) Who does "SCS" stand for?

A. Sam C. Straub.

Q. All right.

A. "CER".

Q. Who does that stand for?

A. Chester E. Rahr.

Then "DFB".

Q. Who does that stand for?

A. Daniel Fisher Brown.

And my own initials, "AW". The first three are scratched.

The writing is, "Think the manufacturers are right in their objections to proposed license of USG, and that we should know as soon as possible what if any revision they will make in their ideas".

The initials, "AW" then appear.

Justice STEPHENS. Will you bring out what the handwriting is on the reverse side?

The WITNESS. The reverse side has following initials: CER; DFB; SCS; and AW—with the date after
2361 "AW"—3/18/36—all of the initials being scratched.

By Mr. KNUFF.

Q. What does that scratch mean, that they have seen it?

A. It meant generally that they had seen it, although sometimes initials were scratched when a letter was not read. I have done it myself. If it was an inconsequential matter, I might merely scratch my initials and not read the letter.

Justice STEPHENS. Proceed with the next exhibit. Thank you, Mr. Whittemore.

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. I now show you, sir, what has been marked for identification as Government's Exhibit 314, the same being dated 3/25/36, dictated by Warren Henley, and addressed to you.

Will you please look at that, Mr. Whittemore?

Justice STEPHENS. Is that the one that starts out, "In further reference my memo. March 23, above subject"?

Mr. KNUFF. Yes, your Honor.

The WITNESS. Do you want me to identify this?

By Mr. KNUFF.

Q. If you can.

A. I cannot, I don't know whose writing that is. It is not mine.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 315, the same being a
2362 memoranum dictated by Warren Henley, dated 3/23/36, and addressed to the attention of Mr. A. Whittemore, V.C.—will you please look at that memo?

A. Yes, sir, that is my writing on the top of it.

Q. And you received that memorandum, did you not?

A. I must have, I wrote on it.

Q. The form is the usual form used by your company in inter-office communications?

A. Yes, sir.

Q. And the form of Exhibit 314, is that the usual form of a carbon of a memorandum, inter-office memorandum?

A. I will have to look at 314.

(The document marked as Government's Exhibit No. 314 was handed to the witness.)

The WITNESS. That would appear to be, yes, sir.

By Mr. KNUFF.

Q. You will notice, sir, that in Exhibit 314 it states, "In further reference my memo. March 23, above subject"—— what was the "above subject"?

A. On this letter it is "perforated gypsum lath".

Q. And on Exhibit 315, what is the subject?

A. Perforated Gypsum Lath.

Q. And was that a subject that would normally come to your attention?

A. Yes, sir.

2363 Mr. KNUFF. If your Honor pleases, we now offer Exhibits 314 and 315.

Justice STEPHENS. Was Exhibit 314 taken from the files of Certain-teed?

Mr. KNUFF. It was, your Honor, taken from the files of Certain-teed, and they are connected by internal reference.

Mr. ADAMS. I don't see any objection to 315, but I am a little confused about 314. The witness stated that he could not identify it, and that the handwriting was not his.

Justice STEPHENS. Well, it is being offered under circumstantial identification as follows, that at the top of Exhibit 314 it says, "In further reference my memo. March 23, above subject", and the "above subject" is Perforated Gypsum Lath, as written on that exhibit—and that is also the subject of Exhibit 315 which bears the date March 23, 1936, and it is stated by counsel, and not denied, that Exhibit 314 was taken out of the files of Certain-teed.

It would seem to the Court that the circumstantial identification of Exhibit 314 is sufficient.

Mr. ADAMS. I may be wrong about this, but it seems to me that the mere fact that Henley wrote a memorandum to Whittemore which Mr. Whittemore can't identify at all, and the mere single fact that in that memorandum Henley says that he refers to a memorandum of March 23——

Justice STEPHENS (interposing). On the same subject.

2364 Mr. ADAMS. On the same subject, I agree—isn't enough.

Justice STEPHENS. We think your objection goes to the weight of the identification. The record, however, may show your objection and the exhibits are received, subject to the usual reservation with respect to declarations of alleged co-conspirators, unless there is objection by other defendants. Do you make the continuing objection that it is not applicable to National?

Mr. FINCK. Yes, your Honor.

Justice STEPHENS. The objection may be recorded.

Mr. JOHNSTON. And I would like to make the same objection for Texas, as it applies to perforated lath.

Justice STEPHENS. That may be noted also, and ruling will be deferred on those objections.

(Documents marked as Government's Exhibits Nos. 314 and 315 were received in evidence.)

By Mr. KNUFF.

Q. I show you what has been marked for identification as Government's Exhibit 316, the same being a letter, dated October 26, 1938, addressed to William L. Keady, vice president, and signed by Warren Henley. Were you familiar with Mr. Henley's signature, sir?

A. Not very familiar with it, no.

Q. Would you say that that is the signature of Mr. Henley?

2365 A. I couldn't say positively. I think it is.

Mr. KNUFF. We offer in evidence Government's Exhibit 316.

Justice STEPHENS. Is there any objection to the identification of this exhibit?

Mr. ADAMS. I have no objection.

Justice STEPHENS. Received, subject to the usualy reservation with respect to declarations of alleged co-conspirators.

Mr. FINCK. May I also record the continuing objection of National——

Justice STEPHENS (interposing). The continuing objection of National may be recorded.

Mr. JOHNSTON. And also for Texas.

Justice STEPHENS. Yes, also for Texas—and ruling will be reserved on those objections.

(The document marked as Government's Exhibit No. 316 was received in evidence.)

Mr. KNUFF. You may cross-examine the witness.

CROSS-EXAMINATION

By Mr. BROMLEY.

Q. Mr. Whittemore, prior to the time that you and Mr. George M. Brown went to Chicago in May, 1929, had you decided to take a license, or not?

A. We had decided to take a license.

Q. And is it the fact, then, that the purpose of
2366 your visit to Chicago which you have testified to on direct, was merely to work out the details of the contract which you had decided to make with USG?

A. It depends on what you call "details". I wouldn't call them details. We wanted to get a one million dollar bond cancelled. If that is a detail, all right.

It was for the purpose of working out a deal with USG on all matters involved including the payment of past royalties that we had not paid on board manufactured in the Beaver plant; it was to work out how that payment was to be made and what it was to be; and it was to work out the cancellation or whatever you legally call it, of the one million dollar bond that our directors had signed personally—and anything else that came up.

Q. And also to work out the form and substance of a license agreement that would enable you to operate in the future under their patents?

A. That is right.

Q. Before going you had decided to make the best deal that you could, is that right?

A. Correct.

Q. Before you went out there, had you in hand any proposition from USG involving how much money you would have to pay, or otherwise?

A. I can't answer that question, I don't remember.

2367 Q. Did the decision which you and your president and your management made prior to your going out there, to settle and take a license if you could, have anything to do with any other company in the business, or didn't it?

A. No, sir, it did not. We were in enough trouble ourselves without worrying about the other fellow.

Q. And is it the fact, sir, that your company would have taken a license if it could have gotten it without regard to what any other company did or did not do?

A. Yes, sir.

Q. What was the attitude of your company and yourself toward whether or not you desired to manufacture the Utzman closed-edge board?

A. We wanted to make it.

Q. Will you tell the Court the reasons why you wanted to make it?

A. Well, there were a number of reasons. The board was a better board than the open-edge board; it was less subject to damage in transit because of the edge coverage by paper; it was easier to manufacture; and it was decidedly more salable.

Q. Now when you say that it was "decidedly more salable", do you include in that answer the fact that as of this time, at least, there was a strong customer demand in the trade for closed-edge board?

2368 A. Yes. If you will let me answer that question in my own way, I think I can get at what you want to develop.

Q. I wish you would.

A. The Certain-teed Products Corporation made an open-edge board. At the same time, the Beaver Products were making a closed-edge board; when we took over the Beaver Products we immediately discontinued the manufacture of closed-edge board in the Beaver plant, and went to an open-edge board. We found that the customer demand precluded our selling an open-edge board at the same price as the closed-edge board, and prices declined, declined and declined.

Q. Then would you say that the primary reason for your taking this license from USG was to get the right to manufacture the product covered by the closed-edge patent?

A. That was one reason, and also to get rid of the possibility of future litigation. You referred to the Utzman patent. The Utzman patent was only one of some fifty to one hundred patents that we were licensed to use. Some of those patents were vital in the production of closed-edge board, and had we not had a blanket license to use all of the patents of USG, we would have been subject to possible litigation, and we wanted to avoid that—we had had plenty.

Q. Now the patents to which you have just referred, in addition to the Utzman patent, were the patents which the May, 1929, license from USG to your company

2369 covered, and they were listed on an exhibit to that license, were they not?

A. That is correct.

Mr. BROMLEY. Will you mark for me, please, a memorandum purportedly from this witness to C. O. Brown, dated May 27, 1929, as Defendants' Exhibit 8 for identification?

(The document referred to was marked as Defendant's Exhibit No. 8 for identification.)

By Mr. BROMLEY.

Q. I show you what has been marked Defendants' Exhibit No. 8 for identification. Can you identify this memorandum?

A. Yes, sir; there is a correction in that memorandum in my handwriting.

Q. Which one, sir?

A. In the paragraph under the paragraph marked "4", in the third line from the bottom, "open" is changed to "closed".

Q. So that you can identify it as a memorandum which you prepared?

A. Yes, sir,—it looks like mine anyway.

Q. And whose handwriting is it on the bottom?

A. George M. Brown's.

Q. And are those words, "this is correct"?

A. Yes, and they are written by Mr. Brown.

Q. In the next to the last paragraph, who is the
2370 Mr. Jacobs referred to?

A. I think Mr. Jacobs was a Chicago attorney who handled the final drawing of the license agreement, and the litigation for us through Cravath's office—I think, I am not sure of that.

Q. Mr. Jacobs was a member of the firm of Winston, Strawn & Shaw, was he not, at that time?

A. I think that was the firm, but I couldn't say positively.

Q. And at this time the Certain-teed Company was represented generally by the Cravath firm in New York, was it not?

A. That is correct.

Q. And the Cravath firm secured for Cerctain-teed the services of Winston, Strawn & Shaw to act as Certain-teed's counsel in consummating the license contract between USG and Certain-teed, did it not?

A. I think that is correct.

Q. In connection with the settlement, and the May 1929 license between USG and Certain-teed, was any suggestion made, or any understanding or agreement reached, between your company and USG, or anybody else, that USG would find a patent to continue price control upon the expiration of the Utzman patent?

A. Will you read that question, please, sir?

(The pending question was read by the reporter.)

2371 The WITNESS. Not that I have any recollection of. I am trying to clear my own mind as to when the question of the bubble patent came in, and frankly I don't remember. But I am quite sure it was not at that time.

By Mr. BROMLEY.

Q. Don't you remember that as a matter of fact there was no mention of the bubble situation until after——

A. (Interposing) That is exactly what I said, I am trying to clear my own mind as to when the bubble patent came up. I am quite sure it didn't come up at that time.

Q. Now as a matter of fact, Mr. George M. Brown, Certain-teed's president, was opposed to price control of his products being exercised by somebody else, was he not?

A. You state it mildly; he was violently opposed.

Q. And isn't it the fact that he was finally persuaded to take this license because the price control provided for in that license only lasted until August 6, 1929, when the main Utzman patent expired?

A. I don't think I can answer that question. You are asking me to answer what somebody else's opinion was, and I don't feel competent to answer that question. That certainly might have influenced his willingness to take the license, but I think there were many other considerations.

Q. Well, it occurred to me that there might be an inconsistency between your statement that he was vio-

2372 lently opposed to price control, and his action in finally signing a contract, Mr. Whittemore, which provided for price control.

A. Look, we were up against it.

Q. What do you mean by "we were up against it"?

A. I mean that we had a million dollar bond against us, and we were going to have to pay royalties we thought, and we might as well get some benefits from them.

Q. When you say "royalties", you mean damages, don't you?

A. I mean damages and future royalties.

Q. Now in connection with your taking of the May, 1929, license, was there any understanding or agreement reached on the part of your company with anybody that prices of plaster or other unpatented gypsum products would be raised or fixed?

A. No, sir, there was never any such agreement with anybody.

Q. You understood, did you not, Mr. Whittemore, that under the agreement, the license agreement that is, of May, 1929, the only prices which USG could fix were the prices of patented articles made by your company?

A. Yes, sir.

Q. And did you also understand that USG had no right to control any price even so limited, except the price of the first sale, that is the sale by your company to somebody else?

A. Yes, sir, I fully understood that.

2373 Q. You understood, then, that USG's right to fix prices did not extend to resales by such of your customers, for instance, as dealers or manufacturing distributors?

A. Yes, sir.

Q. And it is a fact, isn't it, that you understood further that the price fixing provided for in the license was not to extend to any open-edge board unless such board came under other patents, such as the starch patent?

A. That is correct. We had little interest in open-edge board, because we had had enough of it.

Q. And you understood, did you not, Mr. Whittemore, that USG had no right to and did not fix any prices, between May 1929—I mean under the May 1929 license, between August 6, 1929, and November 5, 1929?

A. I can't remember the dates, but I remember there was an intervening period there during which time they fixed no prices.

Q. And that period was the period between the expiration of price control under the May 1929 license, and its resumption under the subsequent bubble and starch license which your company, the record shows, took out sometime in the fall of 1929, and which became effective November 5, 1929; isn't that right?

A. I can't verify the dates, but that is my understanding.

2374 Q. Was there ever any understanding between your company and USG as to what USG would or would not do with respect to the prices which it might thereafter establish under the reserved right in the May 1929 license?

A. I don't just get that. What do you mean by "reserved right"?

Q. I don't either. I will withdraw it.

Was there any commitment made by USG as to what price it would fix, once the license became effective, whether it would be high or low or what it would be?

A. There was never any agreement by USG to do anything. They were meticulous in telling you what they had done after they had done it, and not before.

Q. So they made no commitment of any kind as to any figure at which they might fix the price of board after you took the license?

A. They never made such commitments.

Q. And furthermore, isn't it a fact that they never indicated to you whether they would fix the price under the license at $30 or $20 or $15 or $10, they never made any indication as to what they would do?

A. I have already stated that they never made any commitments.

Q. And I wanted to ask you if it isn't the fact not only that they never made any commitments, but they
2375 never made any statement with respect to what they intended to do—is that right?

A. Yes, sir, that is right. I think I answered it that way the first time.

Q. You probably did.

And is it further the fact, Mr. Whittemore, that there was no understanding or arrangement between your company and USG as to the disposition by Certain-teed of any open-edge or second-grade board which you might have had on hand at the time you signed the May 1929 license?

A. I can't answer that question. I haven't a very definite recollection, but what recollection I have is that we disposed of that board as we saw fit, without any agreements of any kind as to price or location or anything else. We just did the best we could in getting rid of it.

Q. And what can you say as to whether or not you had any understanding with USG that you would discontinue the manufacture of second-grade board or open-edge board, and would not manufacture it again after the license was signed?

A. Well, I am quite sure, although I can't answer that definitely, I am quite sure we had no agreement with USG that we would or would not manufacture open-edge board. It wasn't covered by the license.

Q. And at all times, it was your understanding that you were perfectly free to manufacture any board,
2376 whether it was patented or unpatented board?

A. Yes, that is correct. There was no restriction on our manufacturing open-edge board if we wanted to. We didn't want to, I will say that.

Q. And you didn't want to because you felt, as you have said, that closed-edge board was so much superior; isn't that right?

A. You couldn't sell it, that was all.

Q. Let me ask you this question, Mr. Whittemore: Did Certain-teed enter into its license agreements with USG for the purpose of rigging up a price-fixing scheme, or didn't it?

A. No, sir, it did not.

Q. And was it your purpose, or the purpose of your company, in taking these licenses, to get your prices on gypsum board fixed or controlled under the color of some patent which you didn't intend to use and didn't use?

A. No, sir, we intended to use the patent.

Mr. KNUFF. Just a minute, please. We will have to enter our objection to this question for the reason that it is not cross-examination, and is a matter of defense.

Justice STEPHENS. The record may show your objection. It is overruled. The Court thinks it is proper cross-examination.

By Mr. BROMLEY.

Q. And was your company induced to take these
2377 licenses by virtue of what other gypsum companies did in the premises, Mr. Whittemore?

A. No, sir. We made this agreement ourselves with USG because of the reasons I have outlined before.

Q. When you took the October 1929 license, is it the fact that one of the reasons for your taking it was because you knew you had been infringing the Haggerty starch patent?

A. Now wait, are you getting onto the starch patents now, and away from the USG original license?

Q. Yes, I am just starting.

A. All right.

Justice STEPHENS. Let the Court take its noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

2378 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice STEPHENS. Proceed.

Thereupon,

the witness on the stand at the time of recess, resumed his testimony as follows:

CROSS-EXAMINATION (resumed)

Mr. BROMLEY. If it please Your Honor, since we do not have the record of the morning transcript, I will withdraw the last question, because I can't recall accurately what it was.

Justice STEPHENS. Very well.

By Mr. BROMLEY.

Q. This morning, Mr. Whittemore, you made some reference, as I recollect, in connection with your testimony as to the reasons for taking the licenses, to some benefits, without describing what they were. Do you recall that testimony?

A. Yes. I had reference to getting a product that was a better product and a more salable product than the open-edge board that we had been marketing.

Justice STEPHENS. Mr. Bromley, if it will help to refresh your recollection, just at the recess you had changed
2379 the course of your examination to a discussion of the Hite and Haggerty patents.

Mr. BROMLEY. Oh, yes. Thank you.

The WITNESS. You were referring to the original license, were you not?

By Mr. BROMLEY.

Q. Yes.

A. That is what I was referring to.

Q. Am I correct in my understanding that the placing of price control in the licensor was not an inducement to Certain-teed to enter into the May 1929 license?

A. No, sir, it was not, and I think I have conveyed that idea by saying that Mr. Brown was bitterly opposed to price control.

Q. With reference further——

Mr. KNUFF (interposing). Just a moment, please.

We now move that the answer of the witness be stricken from the record for the reason that it is immaterial what the reasons were why they entered into the price-fixing arrangement. The Court, in the *Standard Sanitary* case, said that the Sherman Act is its own measure of right and wrong. So it is immaterial what their reasons were for entering into this license agreement.

Justice STEPHENS. Do you wish to be heard?

Mr. BROMLEY. Simply to say that I thought the
2380 principal charge here was one of subterfuge as a cloak to fix prices, and it seems to me to be material to show that the price fixing didn't figure in this witness' decision to take the license, but that other good and valid affirmative reasons were the motivating forces.

Justice STEPHENS. That seems correct to the Court. The objection is overruled.

By Mr. BROMLEY.

Q. In your testimony this morning, Mr. Whittemore, with reference to the Chicago meeting, the original of your license agreement, already in evidence, shows that it was executed on May 22, 1929. Is it your testimony that that agreement was executed at this or any meeting in Chicago attended by representatives of other companies than USG and yourself?

A. There were other companies' representatives present at Chicago. Our negotiations prior to signing that agreement were individual with USG individually and not with any of the other companies who were at that so-called meeting. In other words, there was no meeting of licensees who jointly—or manufacturers, rather, who jointly signed any agreement with USG. It was entirely individual.

Q. Now, sir, did you have anything to do with the negotiations and the taking out of the November 1929 license between USG and Certain-teed?

2381 A. That is the license on the bubble board?

Q. Yes, sir, and starch.

A. I don't think I had any direct contact, but I certainly had the final decision in taking out that license.

Q. Can you give us the reasons which motivated your company in taking out that license?

Mr. KNUFF. Just in order to keep our record straight, I object to this line of cross-examination for the reason that it is going beyond the scope of the examination-in-chief——

Justice STEPHENS (interposing). Was that subject gone into on direct, Mr. Bromley?

Mr. BROMLEY. It seems to me that it was, to this extent: He has been asked about the May, 1929, meeting. It is charged that at that meeting, or rather that that was the meeting at which there was hatched a plan to get a patent to fix prices in the future. Therefore, it seems to me I am entitled to go into that subject with this witness.

Justice STEPHENS. The record may show your objection is overruled.

Mr. BROMLEY. Will you read the question, please?

Mr. KNUFF. I didn't get a chance to state my objection.

Justice STEPHENS. I understood you to say that you rose to make a continuing objection to this line of cross-examination, and that you were making your record. I am
2382 sorry if the Court cut you off. Proceed and make your objection at length.

Mr. KNUFF. I first object to it on the ground that it is not covered by the examination-in-chief; second, that it is an attempt to introduce defense by the way of cross-examination; and, third, that it is immaterial and irrelevant.

Justice STEPHENS. The Court understood that all of those objections except possibly irrelevance and immateriality were the subject of your continuing objection. The objection is overruled.

Mr. BROMLEY. Will you read the question, please?

(The question was read by the reporter.)

The WITNESS. The prime reason was because the method covered by the license, of injecting soap air bubbles into the board, was decidedly cheaper in cost, and the resulting product could be made of much lighter weight, which meant savings in cost not only to us, but to all users of the board, on account of transportation.

By Mr. BROMLEY.

Q. That is to say, it made the freight charges paid by the purchasers less?

A. Yes.

Q. Now this soap air bubble introduced into the gypsum mix took the place of what you had theretofore used
2383 to bring about a similar condition, that is, sawdust; isn't that right?

A. Correct.

Q. And as of this time, had any problems arisen with respect to the availability or quality of the sawdust?

A. I can't answer that question, I don't remember.

Q. Did you investigate or cause to be investigated carefully, the subject matter of the foam invention, under which you were considering taking out a license?

A. I just don't understand that question. Do you mean did we investigate the legality of the patent, or——

Q. (Interposing) No, the merits of the invention disclosed by the patent.

A. Oh, yes.

Q. And did you make a careful investigation of the merits of the invention before you signed the license?

A. Yes, sir.

Mr. BROMLEY. Will the Government produce Mr. Whitalemore's memorandum of May 27, 1929, to Mr. Van Hagan?

Mr. KNUFF. What is your item number, Mr. Bromley?

Mr. BROMLEY. X-281.

(Document handed to Mr. Bromley by Mr. Knuff).

Mr. BROMLEY. May the Whittemore memorandum dated May 27, 1929, to Mr. Van Hagan, be marked for identification——

Justice GARRETT (interposing). By the way, that
2384 Exhibit 8 was only marked for Identification, I take it?

Mr. BROMLEY. Yes, Your Honor.

This May 27 memorandum will be marked Defendants' Exhibit No. 9 for Identification.

Justice JACKSON. This is Exhibit 9 for Identification?

Mr. BROMLEY. Yes.

(The document referred to was marked as Defendants' Exhibit No. 9 for Identification.)

By Mr. BROMLEY.

Q. Will you identify that memorandum, if you can, sir?

A. Oh, yes, I can identify it by my writing on it.

Q. Whose is it?

A. It is mine.

Q. And did you prepare it and send it to Mr. Van Hagan on about the time of its date?

A. Yes, sir.

Q. Referring to the first paragraph of that memorandum, let me ask you whether or not it does not refresh your recollection that the subject of a new bubble board, and a possible license therefor, was not brought up until after the execution of your May 22, 1929, license?

A. Frankly, I can't state positively. I don't think it was, but I couldn't swear to that.

2385 Q. You mean you think it was not brought up until after you executed your May 22, 1929, license?

A. That is right.

Q. And with this memorandum in mind, let me ask you again, was there ever any understanding between your company or your representatives and USG or anyone else, that as a condition for executing the May, 1929, license, USG would later find some patent on which to continue price control?

A. There was no such understanding, and I think this memorandum speaks for itself. It certainly indicates that on its face.

Mr. BROMLEY May I have the memorandum, Mr. Knuff, of June 5, 1929?

Mr. KNUFF. From whom, to whom, sir?

Mr. BROMLEY. From Mr. Whittemore to Mr. Van Hagan.

(Document handed to Mr. Bromley by Mr. Knuff).

Mr. BROMLEY. May this memorandum of June 5, 1929, from Mr. Whittemore to Mr. Van Hagan, be marked for Identification as Defendants' Exhibit 10, please?

(The document referred to was marked as Defendants' Exhibit No. 10 for Identification.)

By Mr. BROMLEY.

Q. Will you identify that memorandum, please, Mr. Whittemore?

2386 A. Yes, sir, that is my memorandum, as shown by my handwriting on it.

Q. And you dictated it and sent it to Mr. Van Hagan on or about June 5, 1929, did you?

A. Yes, sir.

Q. Now referring to the first paragraph of that memorandum, Defendants' Exhibit 10 for Identification, will you please explain the reference to "Thermocrete"?

A. Thermocrete was a trade name for a chemical bubble that we used in an insulating plaster. The chemical was added to the dry plaster, and when water was added it effervesced and caused bubbles to form. That patent was owned by us, and before we took out a license to use the soap air bubble process, we wanted to be sure that our own Thermocrete process was not adaptable to the manufacture of board.

Q. And did you experiment with it and see whether or not it was adaptable to the manufacture of a light weight board?

A. We did, and found out that it wasn't adaptable.

Q. And why wasn't it adaptable?

A. Because, unfortunately, the time element entered in, and if your material was used before the effervescence had ceased, you had your product all over the place. If it

2387 was used after the effervescence had ceased, and a long enough time, you didn't have enough product to fill the space that should be filled.

Q. Doesn't this memorandum refresh your recollection that as of this time, your company was working on the problem of finding something to replace sawdust?

A. Yes. The tendency in the manufacture of board was to decrease the weight and at the same time maintain all of the strength and other characteristics of the board. When you used sawdust in your board, it was a difficult problem. When the bubble process was suggested, the problem became comparatively simple to reduce the weight of your board.

Q. Now looking at the last paragraph of Defendants' Exhibit 10 for Identification, is it the fact that you took up the question very thoroughly before you signed the November, 1929, license, as to whether or not the foam invention of USG was a good or a bad thing, and as to whether or not you couldn't accomplish the same result with Thermocrete or in some other way?

A. We took up that question very thoroughly, and my recollection is that Mr. Van Hagan saw the process in operation at at least one of the USG plants before we signed any license agreement.

Mr. BROMLEY. Will you produce, please, Mr. Knuff, the Van Hagan-Whittemore memorandum of June 6, 1929?

2388 (Document handed to Mr. Bromley by Mr. Knuff).

Mr. BROMLEY. May this be marked as Defendants' Exhibit 11 for Identification, please?

(The document referred to was marked as Defendants' Exhibit No. 11 for Identification.)

By Mr. BROMLEY.

Q. Will you read it, please, Mr. Whittemore?

A. Yes, sir.

Q. Can you identify that memorandum, Mr. Whittemore?

A. Yes, sir, by my handwriting.

Q. And is it Mr. Van Hagan's memorandum to you of that date, which you received and read at about that time?

A. Yes, sir.

Mr. BROMLEY. Our photostatic copies do not show the handwriting very well.

Justice STEPHENS. It does not appear on ours. Read it, will you?

The WITNESS. Your Honor, the handwriting is: "Mr. Brown"; "D.F.B."—both of which are scratched; and "A.W.", which is not scratched. That meant to return it to me.

By Mr. BROMLEY.

Q. And does this memorandum further refresh your recollection, Mr. Whittemore, so that you can tell us if it be the fact that your research department was put
2389 to work in connection with the problem of finding a substitute for sawdust?

A. Yes, Mr. Van Hagan's memorandum so states—"in connection with possible use of Thermocrete to replace sawdust . . ."

Q. And thereafter, did the research department report that it was not a practical substitute?

A. Yes, sir, they did.

Mr. BROMLEY. May we have, Mr. Knuff, the Van Hagan-Whittemore memorandum of June 22, 1929?

Mr. KNUFF. Is that X-271?

Mr. BROMLEY. Yes.

(Document handed to Mr. Bromley by Mr. Knuff.)

Mr. BROMLEY. And may it be marked Defendants' Exhibit 12 for Identification?

(The document referred to was marked as Defendants' Exhibit No. 12 for Identification.)

By Mr. BROMLEY.

Q. Will you identify that memorandum, please?

A. Yes, sir. It has my handwriting on it, "Mr. Brown", "AW", "COB", "SCS"—all scratched; and below, "AW" written by, I think, Mr. Nelson, to return the letter to me.

Q. So that it is Mr. Van Hagan's report to you of a Chicago visit, which you received?

2390 A. Yes, sir.

Q. On page 2, the first sentence in the first whole paragraph——

A. (Interposing) Yes, sir.

Q. What is the reference in that sentence, "I believe I have advised you in the past that we have hopes of sometime getting a correct application of Thermocrete. . . ."?

A. Well, that was trying to make it work, which they were never able to do.

Q. Referring to the last paragraph on the second page of Exhibit 12 for Identification, can you recall that within a couple of weeks your company, through your President and yourself, concluded, on the basis of these reports, to negotiate for and secure, if possible, a license from USG?

A. Well again, Mr. Bromley, I can't identify the time.

Mr. BROMLEY. Please show the witness Exhibit 228?

Justice GARRETT. Government's Exhibit 228?

Mr. BROMLEY. Yes, sir.

(Government's Exhibit 228 handed to the witness.)

By Mr. BROMLEY.

Q. Do you see that that Exhibit 228, starting near the bottom of the page, under the heading "Bubble Patent", and continuing for the rest of the memorandum, has a discussion of the proposed bubble license agreement?

A. Yes, sir.

2391 Q. Now isn't the note at the top of that page, signed "George M. Brown", or with his initials, sufficient to refresh your recollection?

A. Yes, sir.

Q. And is it the fact, then, that on or about July 3, 1929, Mr. Brown finally decided and definitely decided to negotiate for and take a bubble board license if he could get one?

A. Yes, sir.

Q. And you concurred in that decision, did you not, as of that time?

A. My "O.K." is on the letter.

Q. You refer to what is written in ink at the left of the first paragraph, do you, on the first page?

A. Yes, sir.

Q. Now is there anything which occurred as of this time, Mr. Whittemore, which makes stand out in your mind particularly the degree of consideration which you gave to the proposed bubble and starch, or November 1929, license?

A. Yes, there is.

Q. What is it, sir?

A. We were considering some major changes in what is called the mixing belt. That is the point where the plaster is mixed with water and before it is made into wallboard. Those changes required building

2392 changes, and ran into a fairly substantial sum of money because of the number of plants involved. Mr. Van Hagan and I discussed the matter, and decided that irrespective of whether we decided to use the soap air bubble or not, that it would be advisable to make those changes, and we did make them.

Q. Did you learn, during your negotiations for the November 1929 foam license, that USG had purchased from Universal the Haggerty and Hite starch patents?

A. I think we did, but I can't say when I learned that.

Q. Well, did there come a time when USG offered to include in its proposed license of the foam process, a license under the so-called starch patents?

A. I think so.

Q. Now did you investigate the subject of starch in connection with your final decision to accept the proffered USG license?

A. We had already investigated and talked about the starch situation.

Q. Well, what was it that you had found out as a result of your investigation with respect to the starch situation?

A. Well, we thought that we might be subject to infringement because of our use of starch. So when opportunity to relieve ourselves of any past infringement was pre-
2393 sented, we were very glad to take advantage of it.

Q. And isn't it a fact that you found out as a result of that investigation that you had been using starch for a number of years?

A. We didn't have to find out, we knew it.

Q. Well, isn't it a fact that you also knew that you had been using starch for the purpose of securing a bond between the core and the paper?

A. That, we hoped, would be our "out" in case of infringement, but we weren't sure.

Q. Is it a fact that you concluded that you might be liable for a very large sum of money in case you were held to have infringed the Haggerty starch patent?

A. That was most certainly a possibility.

Q. Did you also conclude, or know as a fact, that a satisfactory gypsum board could not be made unless starch were used?

A. That is a pretty broad question, Mr. Bromley, and it leaves no degree. In other words, you say "satisfactory". That is an impossible question to answer.

Q. Would it be more accurate to say that you knew that starch was very important in the manufacture of a marketable gypsum board?

A. Much better, yes, sir, it was important.

Q. Did you know of any other way in which a
2394 marketable gypsum board could be made, that is, without using starch?

A. Well, there again, you get into the question of what is marketable and what isn't. I can't answer that question.

Q. Well, isn't it a fact that you knew that if you didn't use starch, your product would run with a very large number of peelers.

A. That is the reason we used starch, to prevent peelers.

Q. What does the industry mean by the use of the term "peeler"?

A. It means that you can just take the paper of a piece of board and if it sticks tight you will split the paper when you tear it off. If you have got a peeler, the paper will come entirely loose and clean from the plaster core.

Q. And you can tell immediately upon production whether your board is a peeler or not, cant you?

A. Well, sometimes it required pretty careful inspection.

Q. Well, I will put it this way: If it were a peeler, it would be fatally defective, wouldn't it?

A. Absolutely.

Q. It wouldn't be any good to anybody?

A. No, sir.

Q. It would be pure wastage?

2395 A. Yes, sir.

Q. Now wasn't the function of starch to prevent the manufacture of peelers and to secure firm adhesion between the paper and the core?

A. Yes, sir, that was the purpose of our use of it.

Q. When the proposed foam starch license was brought to your attention, isn't it the fact that USG asked your company to investigate the situation and make up its own mind as to whether it wanted the license or not?

A. Well, I can't answer that question, because I don't remember. But irrespective of what they had said, we would have done that.

Q. Mr. C. O. Brown testified, as I recollect, that Certain-teed might not have taken this bubble starch license if a substantial number of other companies had not done so. Now isn't it a fact that as in the case of the May license, Mr. Whittemore, Certain-teed took the November license without regard to what others were or were not doing?

Mr. KNUFF. May the record indicate our continuing objection, if Your Honor please?

Justice STEPHENS. Yes.

C. O. Brown was Mr. Claude Brown, was he not?

Mr. BROMLEY. Yes, he was Assistant to the President, and then the Vice President of Certain-teed.

Justice STEPHENS. Yes, I remember that.

2396 What is your view with respect to the propriety of this question?

Mr. BROMLEY. Well, I thought it was proper to ask his superior whether or not——

Justice STEPHENS (interposing). I mean as cross-examination. What is its relationship to the direct-examination?

Mr. BROMLEY. It has to do with the reasons for the company taking the November license, and is a defense against the charge that at the May, 1929, meeting, a conspiracy was hatched to take a license——

Justice STEPHENS (interposing). If it is directed to that purpose, the Court thinks it is proper.

Objection overruled.

The WITNESS. Will you repeat that question?

(The question was read by the reporter.)

The WITNESS. That is correct.

By Mr. BROMLEY.

Q. Was there any understanding between your company and USG or anybody else that you or they would consider, for the purpose of price fixing, that the use of starch fell under the Haggerty patent?

A. I don't get that. You mean our use of starch?

Q. Yes.

A. I frankly don't understand it.

2397 Q. I will withdraw it.

Was there any understanding among anybody in the industry, to which your company was a party, that the Haggerty starch patents would be used merely as a vehicle to obtain price control?

A. No.

Q. Was there any understanding entered into in November, 1929, or any other time, that the prices on gypsum board would be raised or stabilized after the licenses were entered into?

A. No, sir.

Q. Was there any promise or undertaking or statement by USG to the effect that it would establish a higher price for board than had theretofore existed?

A. I think I have previously testified that USG only told us after they had done something, and not before.

Q. And was there any understanding or agreement which had anything to do whatever with what the prices of plaster or unpatented gypsum products would be?

A. There never was any such agreement, or attempt.

Q. And was there any understanding or agreement that methods of production or manufacture would be standardized and made similar?

A. I can't answer that question. I don't know. There might have been minimum quality specifications, I
2398 don't remember. There were certainly no maximum quality specifications.

Q. Well, was there any understanding arrived at, outside of the license agreements, that you would all do the same thing with respect to how you made board or the kind of board you made?

A. No, no.

Q. Now coming to the subject of perforated lath, Mr. Whittemore, will you tell the Court what the reasons were which impelled the Certain-teed management to take a license from USG under the Roos perforated lath patent?

A. USG had proposed to make a perforated lath which would be used for what is termed a one-hour fire test. Ordinary gypsum lath, without perforations and the consequent mechanical key, would not stand the one-hour fire test. In most metropolitan cities, and some of the smaller cities, fire laws require certain areas in residential construction to be protected by materials that will stand a one-hour fire test, such as stairs and various places of that sort.

We felt that in order to protect our mixed-car business, we would undoubtedly have to supply perforated lath. We also felt that if we tried to find some other way of making a perforated lath, that we would have to have it tested by the Bureau of Standards to see whether it would stand the one-hour fire test or not. We felt that the volume of
2399 business would be small. And, not wanting to spend any money, we felt that the simple and easy thing to do, without undue expenditure, was to take a license.

We also realized that the statement that no patent is so strong that it can't be broken, and so weak that it can't be sustained, was pretty nearly true. We also realized that in litigated matters the attorneys are always 50 percent wrong——

Q. (Interposing) Sir? (Laughter)

Justice STEPHENS. That is quite all right, we are laughing in good part.

The WITNESS. Well, it is a fact, isn't it?

Justice STEPHENS. You remind me of a remark of one of my former colleagues, Mr. Vinson, the present Director of the Economic Stabilization Office. Someone asked him what sort of opinions he wrote, and how they were being received; and he said fifty percent of the bar thought they were wonderful. (Laughter).

Proceed, Mr. Whittemore.

The WITNESS. In view of all those things, and the fact that we were losing money and we didn't want to build up any expense account and any possible liability on future litigation, we decided that the best thing to do was to take a license, which we did.

Mr. BROMLEY. Now you have said——

2400 Justice STEPHENS (interposing). Are you an engineer?

The WITNESS. Yes, sir.

Justice STEPHENS. How far do you think engineers agree as compared with lawyers?

The WITNESS. Not quite as well as lawyers, I think.

Justice JACKSON. They lack the class solidarity, as it is sometimes called, I guess. (Laughter.)

Justice STEPHENS. Proceed.

By Mr. BROMLEY.

Q. You made some reference to the fact that it was anticipated that the volume of business would be small. How did that matter turn out?

A. We made a bum guess.

Q. And what was the fact as to how the business went?

A. Business increased very rapidly.

Q. And it became a very, very valuable product, did it not, from a business-getting standpoint?

A. I think it is worthless, myself, but other people don't agree. That is your engineers, Your Honor. (Laughter.)

Q. As a matter of fact, the demand in the trade increased by leaps and bounds until the volume became very considerable indeed, isn't that right?

A. Yes, sir.

Q. In some of these memoranda which have been received in evidence, there is some reference to the

2401 view of certain persons that the Roos patent owned by USG was flimsy or questionable. Now what impression did that kind of talk make on you in connection with your decision to take a license under the patent?

The WITNESS. Well, Your Honors, might I tell an experience?

Justice STEPHENS. You may.

The WITNESS. Many years ago, in one of our other lines of manufacture, the asphalt roofing business, we commenced blowing asphalt with air to oxidize it, and to replace a natural asphalt that was mined in Utah that we had been using, and after we had been using this process for several years, a patentor came along and said that we

were infringing his patent. So we investigated and decided that maybe he did have something, although we didn't think it was much, and we paid him $25,000.

A few weeks later another patentor came along with another patent, and we paid him $1,000, both of them for immunity from all past infringement, and an unlimited license in any plants that we then owned or thereafter acquired to blow asphalt in any quantity that we required.

The Barber Asphalt Company had the same approach from the same patentors, and undoubtedly had very good advice from their attorneys,—at least, they had very good attorneys,—but their advice was apparently dif-
2402 ferent than ours, because they decided to fight these patents, and they did fight them for 7 years. Representatives from the Barber Company used to call on me at least twice a year to get information on this matter, and they ended up with a judgment against them, after an accounting, of $750,000. We were about four times as big as the Barber Company, so on a corresponding basis we would have had to pay about $3,000,000.

They undoubtedly paid at least a half million dollars for attorney's fees and costs.

That was a lesson to us to be a little careful in building up possible patent infringements.

By Mr. BROMLEY.

Q. Now, sir, you said that one of your reasons was to protect your mixed-car business. Will you clarify that, please?

A. Yes, sir.

Most gypsum products are sold to building material dealers in mixed cars, that is, various kinds of board and lath, various kinds of plaster, blocks, joint filler, and any other items that are manufactured. If you are not able to supply all of the items that a dealer wants, you are apt to lose that business, because he would buy from the manufacturer who could supply him.

Q. That is, unless you could have a full line and satisfy all demands, you couldn't supply a mixed-car de-
mand?

2403 A. Correct. I think I said, Mr. Bromley, unless we could supply what he wanted, that we would be apt to lose the business.

Q. Now you said a minute ago that you thought perforated lath was useless. Will you clarify that statement, please?

A. It takes 5 percent more plaster, and the bond of plaster to paper lath is so much better than any mechanical key that you can have, that there is nothing to it. In other words, you get a little more holding of your plaster, but it is infinitesimal for many practical reasons.

Q. The plaster that will stick to any ordinary, plain lath, will adhere to the face of paper lath very strongly?

A. About ten times as strong as it will to wood lath.

Q. Was it, in the early days, very difficult to get the public and plasterers to accept that as a fact?

A. Most difficult.

Q. And was it a real problem, in the early days of this industry, to educate the trade that as a matter of fact plaster would adhere very firmly to this paper-faced product?

A. It was most difficult, and salesmen were equipped with samples of plaster board with plaster applied to it, and a handle on it so they could try and pull it off from the plaster board, and then the plasterers wouldn't believe it.

2404 Q. Now isn't it a fact that in spite of your personal view of the value of perforated lath, that it is absolutely necessary wherever the local laws require the use of a material which has a recognized one-hour fire test rating?

A. Yes, it is necessary there, because ordinary lath won't stand the one-hour fire test. Plaster will drop off with a certain amount of heat.

Q. And isn't it the fact that the function which the mechanical key provides, by letting the plaster go through the holes and then drop in the back a little and forming a key, isn't that the thing that enables a wall constructed with that lath to withstand the one-hour fire test?

A. Yes, the bond is destroyed between the paper and the applied plaster, but the key will hold the plaster in place.

Q. And the bond is destroyed between the paper and the plaster by reason of the fact that the fire, heating the plaster to such a high degree, calcines it and it loses all its strength; isn't that right?

A. Correct. Adhesion is caused by fine fingers of water with plaster dissolved in it penetrating the paper and crystallizing, really, as fingers in the voids of the paper. They are very fine, and as soon as you apply heat to it, you are going to destroy that bond.

Q. But these round plugs of plaster which go through the holes will withstand that calcining effect of fire for a much longer period than the tiny crystals?

A. Yes, it is purely mechanical, they hook over the back of the board like a finger.

Q. Now it is necessary in the gypsum industry, as a marketing proposition, to have gypsum lath of the one-hour fire rating in order to meet the competition of such fire retarding plaster bases as metal lath, isn't it?

A. Yes, sir.

Q. And when I say "metal lath", do you understand I don't mean metallized lath?

A. I understand.

Q. Metal lath is lath made out of steel, isn't it?

A. Yes, sir.

Q. And of course such lath to which plaster is applied will meet the one-hour fire test?

A. Correct.

Q. So that your characterization of perforated lath as "useless", Mr. Whittemore, doesn't tell the whole story, does it, as to its value in the industry?

A. No, what I meant was that in probably 95 per cent of the places that it is used, they could just as well use the plain lath and save themselves money.

Q. Well, your criticism is of the requirements in the municipal laws and ordnances, isn't it?

A. That is really where it should be used.

Q. No, I say your criticism, when you said it was useless, is a criticism directed at the requirements of the municipal authorities?

A. No, I don't mean that at all. I mean that to my mind there are many people that are using perforated lath where it isn't required, and where they would save money by using the straight lath.

Q. I see.

A. That is where I mean it is useless. In other words, any waste is useless.

Justice STEPHENS. I don't quite understand that yet, Mr. Whittemore. Will the straight lath withstand the fire test?

The WITNESS. No, but the fire test is only required, as a rule, where you have multiple dwellings and stairways that should be fireproofed.

Now then, many people in an ordinary frame house will use perforated lath and it is absolutely unnecessary.

By Mr. BROMLEY.

Q. And where people use perforated lath in ordinary houses, that is in situations where the law does not require it?

A. That is right.

Q. But the reason they do it is because they think that plaster will stick to that kind of lath better because of the mechanical key which the holes give it?

A. That is right.

Q. And with that assumption you disagree?

A. One hundred per cent.

2408 Q. But you do not mean to cast any aspersions upon the ability of perforated lath to live up to the requirements of the one-hour fire test?

A. Oh, no.

Q. It will do that, won't it?

A. Certainly.

Q. And that, ordinary plain lath will not do, will it?

A. No, sir.

Q. Is it the fact that at all times since your November license, sir, Certain-teed has consistently used both the foam invention and starch in its production of gypsum board?

A. Up to the time——

Q. (Interposing) When you left.

A. When I left.

Q. And that was when?

A. November 30, 1939.

Mr. STEFFEN. That, I take it, was not intended to be a technical question, "foam invention".

The WITNESS. Using soap bubbles.

Mr. BROMLEY. That is right, and starch.

The WITNESS. And starch.

We used starch before we had a license.

Justice GARRETT. Did you use starch before the Haggerty patent?

The WITNESS. Yes, sir, we did. You mean before we had a license, don't you?

2409 Justice GARRETT. I mean before the time the Haggerty patent issued.

The WITNESS. I can't say as to that, I don't know when it issued. But we used starch before we had a license under those patents.

By Mr. BROMLEY.

Q. Isn't it a fact that your use of starch, Mr. Whitte-

more, in connection with Judge Garrett's question, commenced only in 1926?

A. Well, we didn't make plasterboard before 1926.

Q. That is what I am coming to. So you couldn't possibly have used starch in the manufacture of board prior to 1926?

A. No, not in something we didn't make.

Q. And the Haggerty patent, Judge Garrett, is dated 1924, applied for in 1922, and issued in 1924. That is in evidence in this case and in the recitals in the licensing agreements, I take it, and alleged in the complaint and admitted—my friend tells me.

May the witness be shown Exhibit 316, please?

(Thereupon, Government's Exhibit No. 316 was handed to the witness.)

By Mr. BROMLEY.

Q. Will you look at the third paragraph, sir, and particularly the reference to the "definite verbal com-
2410 mitment on the part of Mr. Henning that licensor would undertake to maintain a 25¢ per M differential for perforated over plain".

A. Yes, sir.

Q. Was this question, that is the question of whether or not Henning had ever made such a commitment, considered by your company?

A. Yes, because in some way somebody got the idea that some commitment had been made to maintain a price. We tried to find out whoever heard that commitment, and we couldn't find anybody that had ever heard of such a commitment, and I personally am sure such a commitment never was made. Mr. Henning didn't make those commitments.

Justice STEPHENS. How much longer do you think this examination will take? I am not trying to hurry you, Mr. Bromley, but I just inquire for the purpose of figuring upon another engagement.

Mr. BROMLEY. I am nearly through. I have five documents I would like to identify, with one or two questions, and then I am all through, sir.

Justice STEPHENS. Very well.

Mr. BROMLEY. Will you produce, Mr. Knuff, please, Mr. Van Hagen's memorandum to Mr. C. O. Brown of May 25, 1936?

Mr. KNUFF. May 25, 1936?

Mr. BROMLEY. Yes, sir.

Mr. KNUFF. I don't have it in Court, Mr. Bromley.
2411 I don't know whether I have it over in the office or not.

Mr. BROMLEY. Can you tell from this photostat, that that is a photostat of Item X-91, Mr. Knuff?

Mr. KNUFF. I can tell that it is a photostat of Item No. X-91.

Mr. BROMLEY. That indicates that that is something you have in your files somewhere, doesn't it?

Mr. KNUFF. I wouldn't say that we have that in our files, because I haven't any recollection of it.

Mr. ADAMS. Well, it was subpoenaed.

Mr. KNUFF. That is some indication that somebody marked that X-91.

Mr. BROMLEY. You don't have any of these memoranda here now?

Mr. KNUFF. I haven't this one, Mr. Bromley, this is the one you have asked me about.

Mr. BROMLEY. Looking at the photostat, do you have any objection to our using the photostat?

Mr. KNUFF. Not at all.

Mr. BROMLEY. May this Van Hagen-C. O. Brown memorandum of May 25, 1936, be marked for identification as Defendants' Exhibit No. 13?

(The document referred to was marked as Defendants' Exhibit No. 13, for identification.)

2412 Mr. BROMLEY. May the memorandum from Warran Henley to Van Hagan of May 28, 1936, be marked for identification as Defendants' Exhibit 14?

(The document referred to was marked as Defendants' Exhibit No. 14, for identification.)

Mr. BROMLEY. And the letter of Warren Henley to Mr. C. F. Henning, of June 18, 1936—may that be marked for identification as Defendants' Exhibit 15?

(The document referred to was marked as Defendants' Exhibit No. 15, for identification.)

Mr. BROMLEY. And may Mr. Henning's reply to Mr. Henley of June 23, 1936, be marked as Defendants' Exhibit 16 for identification?

(The document referred to was marked as Defendants' Exhibit No. 16, for identification.)

Mr. BROMLEY. And may Mr. Henley's memorandum to Mr. C. O. Brown of June 24, 1936, be marked as Defendants' Exhibit 17 for identification?

(The document referred to was marked as Defendants' Exhibit No. 17, for identification.)

By Mr. BROMLEY.

2413 Q. Can you identify Exhibit 13 for identification?

A. Yes, sir, it has my initials on it. It says, 6/3/36—looks O.K. to me—A.W.

Q. And that is Mr. Van Hagan's memorandum sent to Mr. Brown, is it?

A. That is right, dated May 25, 1936.

Q. And can you identify Defendants' Exhibit 14 for identification?

A. Is there anything on the black photostat that might help me identify it?

Mr. BROMLEY. Do you have the original of that, Mr. Knuff?

Mr. KNUFF. Exhibit No. 14?

Mr. BROMLEY. Yes.

Mr. KNUFF. I haven't it in Court, I don't know whether it is in the office or not.

By Mr. BROMLEY.

Q. There is nothing on the photostat from which you can identify it, Mr. Whittemore?

A. No, there isn't anything by which I could identify it. Tell me this, this file seems to have A-4 on it. That might be a document file of Certain-teed's, I don't know.

Justice STEPHENS. Do you know anything about that, Mr. Adams?

Mr. ADAMS. I am not sure enough to be able to tell the Court as to the facts.

2414 By Mr. BROMLEY.

Q. Well, does that memorandum, Defendants' Exhibit 14 for identification, refresh your recollection?

A. About what?

Q. That, as of May 28, 1936, it was the opinion of your management that USG had the right to determine price changes up or down as they wanted to?

A. In perforated lath?

Q. Yes.

A. Yes.

Q. Now what is your recollection as to whether or not as of this time the proposed arrangements between USG and Certain-teed as to the license under the perforated lath patent did or did not give the licensor the unrestricted right to change prices up or down at any time he wanted to?

A. It did give him that right.

Q. Now can you identify Defendants' Exhibit 15 for identification, sir?

Justice GARRETT. What about Defendants' Exhibit 14, is that sufficiently identified?

Mr. BROMLEY. I am afraid not.

Justice STEPHENS. He hasn't offered any of these yet.

The WITNESS. I cannot identify Exhibit No. 15. I will have to explain that. It might seem funny not to be able to identify Warren Henley's signature, but most
2415 of his communications were inter-office, and were not signed, so I saw his signature very rarely. I think it is his signature, but I could not positively identify it.

Justice STEPHENS. Is he living now?

The WITNESS. No, he is dead.

By Mr. BROMLEY.

Q. Does the second paragraph of Defendants' Exhibit 15 for identification also serve to refresh your recollection that there was a discussion at the very time the license was signed, as to whether or not the licensor couldn't change the prices any time he wanted to?

A. Well, I understood always that the licensor could make any change any time he wanted to in any of the three licenses.

Q. And specifically——

Mr. STEFFEN (interposing). I should like to object to this whole line. The license agreement speaks for itself, quite obviously. There is no question of this witness' recollection being refreshed on the point, where the agreement is clear.

Mr. BROMLEY. Then, Mr. Steffen, do you withdraw all charges in this case, which are specifically referred to in the third paragraph of Exhibit 316, or otherwise, that Mr. Henning made a definite verbal commitment on the part of USG that it would undertake to maintain a 25-
2516 cent per thousand differential for perforated over plain lath prices at all times subsequent to the taking of the license?

Mr. STEFFEN. I would say, in reply to the question, that we do not withdraw such charges, and it is quite a separate matter. The license agreement may recite that USG may fix prices either way. There may be also an understanding apart from that, that they were going to maintain a differential, and I think that is substantially the charge made. But this evidence concerning what the agreement says is immaterial, I mean the written agreement.

Mr. BROMLEY. You understand, Mr. Whittemore——

Justice STEPHENS (interposing). Just a moment. The Court thinks the cross-examination is proper as going to the reasons why the agreements were entered into. The Government charges that they were entered into for price-fixing purposes. The defendants have a right to try to explain that. Objection overruled.

By Mr. BROMLEY.

Q. You understand, Mr. Whittemore, that any questions so far with respect to this matter have not been confined to what the license agreement provided—you understand that?

A. Yes.

Q. And it is your testimony, isn't it, that there were no commitments, either within or without the terms of the license agreement, by USG, as to maintaining
2417 any twenty-five cent differential in price of perforated over plain lath?

A. There was no commitment on the part of USG to maintain any differential, and incidentally we thought twenty-five cents was ridiculous.

Q. Ridiculous in what respect, sir?

A. Too low.

Q. It was your desire that a higher price be fixed for perforated lath, than was fixed by USG?

A. Exactly, we thought it should be a dollar.

Q. Was it ever made a dollar by USG?

A. No, sir.

Q. As a matter of fact, within a year or two they reduced the price so as to cut out the twenty-five cent differential in favor of perforated, didn't they?

A. Yes, sir, I don't know how long a period it was, but it was done.

Q. Now can you identify Defendants' Exhibit 16 for identification?

A. No, I can't identify that at all. Again, I have seen Mr. Henning's signature, and it looks like his signature, but I can't positively identify it.

Mr. STEFFEN. We would like to make the same objection to this as being utterly immaterial. It merely recites two sections from an agreement which is in evidence.

Justice STEPHENS. Well, it has not been offered in
2418 evidence, it is only being identified.

Mr. STEFFEN. The agreement is in evidence, your Honor, the agreement from which this exhibit quotes.

Justice STEPHENS. Let the Court see what this says, again.

Whether it will be admissible, the Court has not ruled. The Court is only now permitting identification. The objection to identifying it is overruled. Proceed, Mr. Bromley.

By Mr. BROMLEY.

Q. Doesn't the second sentence of the second paragraph of Exhibit 16 for identification also refresh your recollection that it was the position of USG and Mr. Henning at all times that there was no obligation upon USG to fix any prices at any specified figure, differential or otherwise?

A. My memory doesn't have to be refreshed on that point, Mr. Bromley. I know that they made no commitment. I have so stated, I think several times.

Q. Can you identify Defendants' Exhibit 17 for identification, please?

A. I can identify the handwriting on the top of it as Mr. C. O. Brown's.

Q. Can you tell whether or not it came to your attention?

A. No, I cannot.

Mr. BROMLEY. It was produced from the files of
2419 Certain-teed, wasn't it, Mr. Adams?

Mr. ADAMS. It was.

Mr. BROMLEY. And it was subpoenaed by the Government, was it not, Mr. Knuff?

Mr. KNUFF. Well, we subpoenaed a lot of things from Certain-teed. I presume that in answer to the subpoena probably Certain-teed did furnish something like this to the Government.

Mr. ADAMS. It was furnished in response to the subpoena.

Mr. BROMLEY. Will you, Mr. Knuff, see if you cannot produce all five of these exhibits when we reconvene?

Mr. KNUFF. Yes, I would be glad to. That is Defendants' Exhibits 13 to 17, both inclusive, for identification?

Mr. BROMLEY. Yes.

Justice GARRETT. Defendants' Exhibit 13 has been identified and the other four have not been identified, as I understand it.

Mr. BROMLEY. I think that is right.

Justice GARRETT. We had better return these to you, I guess, Mr. Bromley.

(The Court's copies of Defendants' Exhibits for identification Nos. 14 to 17, inclusive, were returned to Mr. Bromley.)

Mr. BROMLEY. May the witness see Exhibit 227 of the Government, please?

2420 (Government's Exhibit No. 227 was handed to the witness.)

By Mr. BROMLEY.

Q. Will you look at the second sentence of the first paragraph of your memorandum of June 11, 1929, Exhibit 227 of the Government's, and tell me whether the word "possibilities" in that sentence was intended by you to refer to price fixing possibilities or some other possibilities?

A. You are going a little too fast, Mr. Bromley, wait until I read it, will you? The second paragraph?

Q. The second sentence of the first paragraph.

A. Now is that my letter of June 11?

Q. This is your memorandum, as I understand it.

A. Yes, that is right. You mean, "From this memorandum you can easily see the possibilities of this bubble patent"?

Q. Yes.

A. There was only one thought there, and that was the possibilities of making as cheap a product and just as good a one.

Mr. BROMLEY. Will you show the witness Government's Exhibit 228, please?

(Government's Exhibit No. 228 was handed to the witness.)

Mr. BROMLEY. Never mind reading that, Mr. Whittemore, I find I have covered what I wanted to ask with respect to that.

2421 By Mr. BROMLEY.

Q. Could you tell the Court how much metallized board was purchased by your company from any other manufacturer in the business?

A. No, but I think you could wheel it out in a wheelbarrow, more or less.

Q. You mean by that, that it was a very, very small amount indeed?

A. Infinitesimal in proportion to the volume of business we did.

Mr. BROMLEY. That is all.

Justice STEPHENS. Cross-examination by other defendants' counsel?

Justice GARRETT. I wanted to be sure about these Defendants' exhibits. Mr. Bromley, Defendants' Exhibits 1, 2, 3 and 4 have been introduced, have they not?

Mr. BROMLEY. No, sir, none of the defendants' exhibits have been offered.

Justice GARRETT. All have been just marked for identification?

Mr. BROMLEY. Yes, your Honor.

Justice GARRETT. Thank you.

Justice STEPHENS. Is there any other cross-examination?

Is there any redirect examination?

Mr. STEFFEN. Well, there will be some. We would
2422 like to have a few moments' recess.

Justice STEPHENS. How long is it likely to take?

Mr. STEFFEN. It will be very short.

Justice STEPHENS. You have no other witness, I understand.

Mr. STEFFEN. No.

Justice STEPHENS. I inquire, because I have an engagement at the Patent Interchange Committee at four forty-five.

We will take a five-minute recess at this time.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

2423 Justice STEPHENS. Proceed.

Mr. KNUFF. May it please the Court, while the witness is still on the stand, we move to strike all of the testimony given by this witness in connection with exhibits marked for identification as Defendants' Exhibits 13 through 17, inclusive, for the following reasons:

First, the cross-examination was not proper since it went beyond the scope of the examination in chief.

Second, the cross-examination is an attempt to introduce by way of cross-examination the defendants' defense in this case.

Third, the testimony produced in connection with these exhibits is incompetent, irrelevant and immaterial.

We have no further redirect examination.

Justice STEPHENS. The motion is denied. The Court thinks it has already stated its reasons why it regards this type of examination as proper cross-examination. The Court thinks it would be error to limit the cross-examination as the motion and objections have sought to do.

The Court calls attention to the fact, however, that there has been no cross-examination upon the five exhibits which

were referred to, but merely a marking of those for identification.

Isn't that correct, Mr. Bromley?

Mr. BROMLEY. Yes, sir.

2424 Mr. KNUFF. No, there hasn't been any cross-examination in connection with those exhibits, as we normally understand cross-examination. My objection, in connection with those exhibits, was—or rather my motion in connection with those exhibits was—to strike out all testimony in connection with the examination conducted, based on Defendants' Exhibits 13 to 17.

Justice STEPHENS. Well, there were some excerpts from them read for the purpose of refreshing recollection. The exhibits are not offered in evidence yet. The Court has not ruled upon their admissibility. It may be that they will be offered for the purpose of showing what the understanding of the defendants was of the agreements, but the Court won't rule on that yet.

The motion is denied. So as to protect your record, your objection may be shown in full and the motion is denied.

Mr. ADAMS. If we have finished the proceedings for the day, I would like to inquire if the Court is able to tell us now approximately when we will adjourn in January, at the end of January? I understand we are to resume on January 17.

Justice STEPHENS. If someone can furnish a calendar, I think we can tell you that quite definitely.

We will resume on the 17th of January at ten o'clock; and unless my colleagues have a different understanding—and they will please correct me if they have—we

2425 will adjourn on Friday, January 28, because of the calendar which commences on Tuesday, February 1, of the Court of Customs and Patent Appeals. We will therefore probably resume thereafter, on February 8. That may, however, be changed if the convenience of my colleagues requires it. But we will sit from January 17, as presently planned, until January 28.

Mr. ADAMS. Thank you, your Honor.

Justice STEPHENS. I would like to ask the witness one question just to satisfy my scientific curiosity.

Mr. Whittemore, is the difference between a mechanical bubble, which has been referred to in the testimony as produced in the soap process, and a chemical bubble, referred to in the Thermocrete process, the result of the fact that the effervescent which you used in the Thermocrete process was the result of a chemical reaction, whereas the bubbles

in the soap process are due to surface tension in the water, with soap mixed?

The WITNESS. Yes. In other words, I can explain that very easily by saying that in the Thermocrete—I don't remember the chemical used, but that is added to the dry plaster. In the soap bubble process, your bubbles are manufactured and then put into the plaster after the water has been added to the plaster, and it becomes what is termed slurry, and that is mechanically mixed in there.

Justice JACKSON. The bubble is in existence in
2426 the soap before it goes into the slurry, whereas in the other it doesn't come into existence until after it is in the dry powder?

The WITNESS. That is right.

Justice STEPHENS. Is there anything else?

This witness, I assume, may be excused upon the adjournment of Court?

Mr. STEFFEN. Yes.

Justice STEPHENS. The Court has one comment to make that perhaps will be helpful to counsel. There have been now seven or eight reserved rulings which have been reserved in deference to the Government's request that the Court reserve its rulings until the Government presents a memorandum in connection with its offer of proof. As we understand the offer of proof, it is merely an offer to prove, for the purpose of protecting the record by the Government in respect to the Court's exclusion of the answers to questions which sought to go into the subject of the purchasing of board by one defendant from others, or by the defendants from each other, and the fixing of prices upon purchased board as distinguished from board manufactured and sold.

The Court gave the Government the opportunity to protect its record in the usual course by making an offer of proof on that subject. The Court thinks that that offer could be ordinarily made orally, but if the Government wishes to make it in writing, it may be done that
2427 way. But it seems to the Court that it could be quite briefly done.

The Court has suspended ruling upon these other questions which went to such subjects as Metal A, as the Court remembers, and certain other allied topics, because the Government requested the right to present a memorandum.

The Court wishes in the future, if it can, to avoid this reservation of rulings because it is very difficult to keep them all in mind, and it is necessary now to accumulate

them carefully and make a careful inspection of each one when a final ruling is made.

The Court hopes that we will not be asked to reserve rulings in the future.

The Court also hopes that the memorandum which is intended to be presented can be brief, and can be presented at a very early date, so that defendants' counsel can have an opportunity to see it and respond with any memorandum in reply, which they desire to present, because, at least so far as the Presiding Judge is concerned, who is not occupied with the work of another court, I wish to spend nearly all of the recess in reading exhibits and reading the record, and not have to occupy myself unduly with a consideration of briefs and memoranda.

And in aid of a possible shortening of that memorandum, the Court will make a brief statement as to what it considers the problem involved, and perhaps that will
2428 shorten the memorandum.

The question which seems to be concerning Government counsel is the right to prove items—I use that general term advisedly—which are not mentioned in the complaint, and the contention seems to be that under the new rules there is no restriction, or little restriction, in respect of such offers as had been made.

Now the Court of course recognizes that the new rules are liberal. It is true under the new rules that, for example, a cause of action in negligence can be stated, good against general demurrer, by stating that the defendant negligently struck the plaintiff and injured him with an automobile. But obviously that would inform the defendant in no manner at all as to how the alleged accident took place, whether by driving while intoxicated, or driving with loose brakes, or driving through a red light, or driving beyond the speed limit.

Therefore, the rules permit a demand for a bill of particulars. And it is the Court's understanding of the new rules that when a bill of particulars is furnished specifying the acts of negligence relied upon, the case then reaches a state of certainty under the pleadings such as existed under the old rules, and that the plaintiff would be bound by the acts of negligence enumerated in the bill of particulars, and could not prove others without amendment or further bill.

Now it seems to the Court that the confusion, if
2429 it be confusion, or misunderstanding, between the Court in its rulings thus far, and the contentions of

the Government, lies in that situation. It seems to be the contention of the Government that in a conspiracy case the Government is not thus limited.

Now the Court has not intended to rule thus far that the Government was limited in its presentation of evidence by the enumerations in the complaint, because neither the complaint nor the bill of particulars is a statement of evidence.

The Court has not intended to rule, and thinks it has not ruled, that the Government cannot introduce evidence, cannot offer and introduce, if it is relevant and competent and material, evidence of conspiracy or price fixing or combination charged, merely because it is not mentioned in the complaint, or the bill of particulars.

The doubt the Court has had about the Government's offers thus far has been that the evidence offered has seemed to be evidence which related to charges not made in the complaint.

Now it is true that a conspiracy at common law and under the Sherman Act, as I remember it, does not require the allegation of overt acts. The conspiracy lies in the agreement. The overt acts are evidences of the agreement, of carrying it into effect.

What the Court has been ruling thus far has been that the Government is limited in its proof, whether it
2430 is talking in terms of evidence or overt acts or what not, to the charges which may be fairly said to have been made in the complaint and the bill of particulars. It would seem to the Court that there could be very little doubt on that subject, and that the problem is more one of applying settled rules than it is of defining the rules.

The Court makes this brief statement for the purpose of clarification and hopes it will save the Government and defendants from any extensive discussion of the law, although we would be very glad to have the help of the Government and defendants on both sides.

Do you have anything, Mr. Johnston?

Mr. JOHNSTON. If the Court please, I would like to request that my copy of this written memorandum be furnished by the Government to me at Oklahoma City.

Justice STEPHENS. I assume that will be done.

The Court thanks counsel for their help in the case thus far, and wishes all counsel and witnesses a pleasant vacation and one free, we hope, from illness.

The Court thanks this witness for attending this Court.

Justice JACKSON. Not only a good vacation, but a good Merry Christmas if you can have one.

Justice STEPHENS. We will recess until the 17th of January, 1944, at ten o'clock.

(Thereupon, at 3:45 o'clock p.m., an adjournment was taken until Monday, January 17, 1944, at 10:00 o'clock a.m.)

2431 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,
Washington, D. C., Monday, January 17, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United Stated for the District of Columbia.

Appearances. (Same as heretofore noted.)

2436 Mr. STEFFEN. Mr. Brown, please.

Thereupon,

GEORGE M. BROWN

appearing as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Mr. STEFFEN. Has the Court, may I inquire, a full set of photostats of the George M. Brown exhibits?

2437 Justice STEPHENS. Is this what you have reference to? (indicating).

Mr. STEFFEN. No, there are only three or four.

Justice STEPHENS. Probably we have, but I may have misplaced them.

Mr. STEFFEN. I have two sets, and I think either Mr. Finck or Mr. Johnston have the third. So that the Court does not at the moment have any.

Mr. JOHNSTON. If the Court please, don't go blaming it on Mr. Johnston to start with. I have never seen them.

Justice STEPHENS. The presiding Judge has one set.

Mr. STEFFEN. Here are two sets.

(Documents handed to the Court.)

Justice STEPHENS. Then there is a mistake. What I had here was a set of he C. O. Brown exhibits. We haven't a third set. I have none myself.

I am mistaken. I do have a set. The sets you handed to Judge Garrett and Judge Jackson are identical with mine except that the one on top of the set handed to me has an extra letter of January 25. Perhaps that is not necessary.

Proceed.

By Mr. STEFFEN.

Q. Will you state your full name, please?

A. George M. Brown.

Q. What is your residence, Mr. Brown?

2438 A. Watch Hill, Rhode Island.

Q. Were you at one time connected with the gypsum industry?

A. Yes, sir.

Q. Were you connected with the Certain-teed Products Corporation?

A. Yes, sir.

Q. For what length of time, Mr. Brown?

A. I started the business.

Q. In what year?

A. 1904.

Q. 1904?

A. Yes, sir.

Q. And when did you leave the business?

A. 1936.

Q. What office did you hold during the time you were with Certain-teed Products Corporation?

A. President of the company, or Chairman of the Board at the end.

Q. For how long were you Chairman of the Board?

A. Between one and two years, if I remember correctly.

Q. That would be during 1935 and 1936, or 1934 and 1935?

A. No, 1936 and part of 1937—no, 1935 and 1936.

Q. You were President of the company from 1904 up until 1935?

2439 A. Yes, sir.

Justice STEPHENS. Mr. Steffen, if this witness is a little hard of hearing, we may vary the ruling and you may stand nearer. It will be very tiring to raise your voice constantly. That is, if you wish to.

Mr. STEFFEN. Thank you.

By Mr. STEFFEN.

Q. What was the business of the Certain-teed Company when you first started it, Mr. Brown?

A. Well, it started from the beginning, it had no business.

Q. I mean the day after you started, what business were you in?

A. In the manufacture of ready roofings.

Q. What was that?

A. Well, roofings that were put up in rolls or shingle form, ready to use, asphalt and coal-tar products.

Q. And did you expand that business from time to time?

A. Yes, sir.

Q. What was your next addition to your line?

A. If you would be willing to look up those records, it would be better than my trying to remember it, I am afraid.

Q. This is just a preliminary question. I want to find out the scope of the business generally.

2440 A. Well, building and insulating papers of various kinds, dry felts.

Q. And what next?

A. Well, offhand, I would say paints and varnishes and linoleums, floor coverings; and perhaps at that time, or a little later, gypsum.

Q. What time did you take on the gypsum business, do you remember?

A. I don't think I can answer that.

Q. Well, I think it was along in 1926, was it not?

A. Probably.

Mr. ADAMS. The record shows it was 1923.

The WITNESS. Well, I couldn't answer that, then.

By Mr. STEFFEN.

Q. We will agree on 1923.

A. All right.

Q. What plants or companies did you take over when you got into the gypsum business?

A. I don't believe I can tell you their actual names.

Q. Well, did you have a plant at Acme, Texas?

A. We began in the Southwest in Texas and Kansas and that area.

Q. Where was your plant located there, Mr. Brown?

A. Well, my memory is none too good for names, and I can't tell you. I don't think I can answer those
2441 things, but they are all matters of record.

Q. That is correct, but we want your recollection as nearly as possible. Did you have one at Acme, Texas?

A. Yes, Acme, Texas.

Q. And do you remember what sort of board you made there at Acme, Texas, an open-edge or closed-edge board?

A. In the beginning we made an open-edge board.

Q. Do you recall where you sold that open-edge board, what territory?

A. Wherever we could afford to sell it and could sell it. We shipped it over rather a wide area because that was our only supply for a time.

Q. And at a later time did you get other gypsum properties?

A. Yes.

Q. And what properties did you buy?

A. Later we acquired the Beaver properties.

Q. Do you recall about when?

A. I think that was in 1928. My recollection on these dates is not exact.

Q. That is right, your recollection is good. You acquired it, according to the testimony here, in the first of 1928.

A. Yes, I thought that was it.

Q. Now, do you know what type of board the
2442 Beaver companies were making?

A. They were making what they called the closed-edge board at the time that we took over the properties.

Q. And did a question arise as to whether you, in operating the Beaver companies, would continue to make a closed-edge board?

A. Yes, sir.

Q. Was there a discussion among the officers of your company about that matter?

A. Oh, yes.

Q. And did you ever take that matter to the United States Gypsum Company to discuss?

A. Well, I think we discussed those things among ourselves, primarily. We did, in the course of time, have some talks with the United States Gypsum.

Q. What was the United States Gypsum Company's position concerning whether you should make a closed-edge board or an open-edge board, do you recall?

A. I think they offered——

Mr. ADAMS (interposing). Could I interpose a suggestion here that this be fixed with some kind of reasonable certainty as to when they took this position, and who took it; if it was a conversation or a writing, so that we could be prepared to cross-examine on it?

Mr. STEFFEN. We will be glad to do that, Your Honor.

2443 Justice STEPHENS. If you please, that should be done.

Mr. STEFFEN. May we have the question answered that has been asked? Will you please read it?

(The record was read by the reporter.)

The WITNESS. They offered us a license under their patents, if that is what you mean.

By Mr. STEFFEN.

Q. That is what I mean, yes.

A. Yes.

Q. And when you say "they offered us", you mean they offered the Certain-teed Products Corporation?

A. Yes.

Q. And they offered a license which would be applicable to your Acme plant, and also your Beaver properties, is that what you mean to say?

A. To our entire properties.

Q. That was their offer?

A. As well as I remember it.

Q. Now do you recall an occasion when you discussed that offer with Mr. Avery in Chicago?

A. Well, I remember meeting Mr. Avery. The first time I ever met him was along about that time. I hadn't met him until—I can't recall the date—but it was along about that period, and we did discuss that question and all, but got nowhere.

2444 Q. Got nowhere?

A. No.

Q. What was your position at the time?

A. Well, I guess it was against it.

Q. What were your reasons, Mr. Brown?

A. Well, we had always handled our own affairs as far as we were able, and didn't like the idea of taking a license and having our prices set for us, for one thing.

Q. Was that required, that you should have your prices fixed if you took a license?

A. Under a patent license, yes, that is always required, within my knowledge.

Q. And that was discussed with Mr. Avery at the meeting in Chicago?

A. I don't know whether it was discussed or not, but we knew that would occur. We knew enough about the situation to know that was part of it, would be a part of it.

Q. You had a copy of the license agreement which the United States Gypsum Company was offering you?

A. I don't know that we did.

Q. Well, the Beaver Products Company had a copy, did it not?

A. I presume they did, they never showed it to me.

Q. They were licensees. And you understood, as you say, that under the license the United States Gyp-
2445 sum Company would fix your prices?

A. They would fix our prices on anything where a patent controlled the product.

Q. And you were opposed to that?

A. Yes, sir.

Q. Did you consider the possibility of continuing the Beaver license for the Beaver plants, and continuing an open-edge board at your Acme plant?

A. No, sir.

Q. What did you say?

A. No, sir.

Q. The question is—did you consider that as a possibility?

A. No, sir.

Q. Why not as a possibility?

A. Well, we didn't want two lines of board, and we thought if we continued with the Beaver properties it would obligate us in other ways, I presume.

Q. So, if I get your testimony, you either wanted to be free to make an open-edge board, without price fixing, at all of your plants, or to make a closed-edge board at all of your plants; is that correct?

A. Well, we weren't anxious at that time to go into the closed-edge board, because we would be amply provided for with an open-edge board.

2446 Q. Did you think you could make an open-edge board in competition with the closed-edge board?

A. We hoped we could.

Q. Was your company at Acme making a profit at this time, do you recall, on its open-edge board business?

A. Oh, yes, as far as I remember it. It was a plant that did make money. I don't know as to just that particular period.

Q. Do you recall, Mr. Brown, what companies were in the gypsum business during 1928 and 1929, who were your competitors?

A. Well, you call their names and I could tell you about them, I think, but I can't remember those names.

Q. All right. Do you remember the National Gypsum Company?

A. Yes.

Q. Were they a competitor of yours?

A. Yes.

Q. Do you remember the Ebsary Gypsum Company?

A. Yes.

Q. And were they a competitor of yours?

A. Yes.

Q. Do you remember the Niagara Gypsum Company?

A. Not very well. I think there was such a company.

Q. Operating in Buffalo or having its plant at Buffalo?

2447 A. Well, I never was at their place of business. I don't know who ran it, but I remember the name.

Q. Do you remember a Mr. Reeb?

A. Yes, I remember the name, Mr. Reeb.

Q. And did you know Mr. Fred Ebsary at the head of the Ebsary Gypsum Company?

A. Oh, yes, I knew Mr. Ebsary.

Q. And did you know Mr. Haggerty, who was at the head of National?

A. Yes.

Q. Did you know the American Gypsum Company at Port Clinton, Ohio?

A. Who was the head of that?

Q. Well, there were two men, Mr. Griswold and Mr.——

A. (Interposing) Oh, yes, I knew Mr. Griswold.

Q. (Continuing) —and Mr. Kling.

A. Yes, I knew Mr. Kling.

Q. And did you know the Universal Gypsum Company—and Mr. Holland was at the head of that, Eugene Holland?

A. Oh, yes, I knew Mr. Holland very well.

Q. And the Texas Cement Plaster Company?

A. Yes.

Q. Mr. Samuel Gloyd?

A. Yes, I knew Mr. Gloyd very well.

Q. And the Kelley Plasterboard Company, oper-
2448 ating in New Jersey?

A. I don't think I knew them.

Q. Mr. Stephen Kelley?

A. I don't recall.

Q. Well now, do you recall whether the competition in the board business was sharp in 1928 and 1929, or whether it was just——

A. (Interposing) Well, it was sharp at some time. I can't remember just what that date was. The price records of the companies will show that very clearly, however.

Q. I think that is true, I think the records show that there was price competition during the early years up until 1929; is that your recollection?

A. I think it began as more modest competition, but went to a rather extreme competition. Just what the dates were, I can't recall.

Q. Now it has been testified here that the prices got down so low in 1929 that they couldn't go any lower; is that your understanding?

A. I don't think that was ever true.

Q. But that they got very low?

A. They got very low.

Q. I want to come back, Mr. Brown, to the early part of 1928, right after you had taken over the Beaver Prod-
ucts Company.

2449 A. Yes.

Q. You had bought the assets, as I understand it, of that company?

A. I think that is it.

Q. And didn't come into possession until April, 1928?

A. The records would show.

Q. That is what the records show, I believe.

A. Yes.

Q. Now I want to ask you some further questions concerning your meeting with Mr. Avery in Chicago.

A. The first meeting?

Q. Yes, at which the discussion had to do with whether you would take out a license under the closed-edge board patent for all the Certain-teed Products Company's plants; and I would like to have you recall as well as you can what took place at that meeting, and who went out there?

A. I went out there, and somebody was with me, but I have forgotten who it was.

Q. Well, was it Mr. Blagden——

A. (Interposing) And we didn't get anywhere.

Q. Was it Mr. Blagden?

A. I don't think Mr. Blagden ever traveled with me, but I think he was there. But we hadn't taken that company over at that time, had we?

Q. You had bought the properties, but you hadn't
2450 gone into occupation or operation yet.

A. Along about that time, I know it was.

Q. Now it has been admitted here, I think, by the defendant United States Gypsum Company, that Mr. Blagden and yourself were out in Chicago on the 29th of February.

A. I think Mr. Blagden made the appointment for me to meet Mr. Avery on a visit to Chicago. That is my recollection.

Q. And do you recall whether there was anyone with Mr. Avery?

A. There was Mr. MacLeish, I think.

Q. So that the meeting was between the four of you, Mr. Blagden and yourself, Mr. MacLeish and Mr. Avery?

A. Let me qualify that, I am not positive that he was there, but I know that he was generally with Mr. Avery on occasions of that kind.

Q. That is right.

A. I have no recollection of his failing to be with him then.

Q. You testified that at your meeting you got no place with Mr. Avery at all?

A. No.

Q. And you came back to New York?

A. We didn't go out there with the expectation that we would, if you want to know the truth.

2451 Q. I would like to know the exact truth. What did you expect?

A. We were urged by the Beaver man——

Q. (Interposing) That is Mr. Blagden?

A. Yes. (Continuing)—to meet Mr. Avery. I never had met him, and up to that time he had probably heard some

bad stories about me, and I had about him, and we didn't get along very well. I don't think, if I could repeat all the conversations, that they would be at all interesting to you.

Q. I think they would be very interesting.

A. I doubt it.

Q. Won't you tell us a little more in detail what did take place?

A. Well, we disagreed on about everything.

Q. Name some of the things?

A. I don't believe I can.

Q. Well, may I refresh your recollection on the point?

A. If you can.

Q. Well, did you talk about the desirability of stabilizing the industry?

A. I don't think so.

Q. Did you talk about the matter of fixing prices under the agreement?

A. No, we didn't talk about things like that.

Q. Well, what did you talk about?

2452 A. We talked in more general terms about the open-edge board, I presume; that is my best recollection. Within my business experience, two business men meeting like that don't sit down and begin to talk prices, and things like that, which they both know very well isn't just the best way to do it.

Q. That is, you knew that the license agreement provided for price fixing?

A. Well, I knew that anything that was under the patent law did. I thought you meant talking about the price of gypsum.

Q. Oh, no, that was well understood, as I take it.

A. Oh, it was well understood by me, and I am sure it was by everybody there, that if we took a license there would be a price fixing under the license.

Q. Well, I am interested, Mr. Brown, in finding out just what two business men—you were at the head of a large company, and Mr. Avery was at the head of a large company—what did you talk about?

A. The desirability of making—I am assuming, now——

Q. (Interposing.) No, I would like to have your actual recollection.

A. I don't remember.

Q. I would like to have you remember, if you can.

A. I had better not try to tell you.

Q. Did you talk about the Utzman patent?

2453 A. Oh, no. That was for lawyers.

Q. I will show you, Mr. Brown——

A. (Interposing) I don't think two business men sitting down and talking talk about the things you think they talk about. (Laughter).

Q. How long were you talking, do you remember?

A. Well, as I remember it, I got in there and we met at, if I remember correctly, the Chicago Club, in the middle of the afternoon, talked for a time, and met the next morning, and I left on the noon train for New York, if I remember correctly. I think that is it.

Q. Well, that is quite a long talk. What did you talk about?

A. Well, how long ago was that?

Q. Fifteen years, sixteen years.

A. I have been out of business for some years; and I am not as young as I once was, and I can't recall those conversations.

Q. Well, let me show you, Mr. Brown, what purports to be a memorandum that you prepared when you got back to New York.

A. Now you are getting somewhere.

Q. And it has been taken from the files of the Certainteed Company.

A. All right, that is much more reliable.

2454 Q. I would like to show you Government's Exhibt 212.

Mr. BROMLEY. That is 212 for identification?

Mr. STEFFEN. That is correct.

Justice GARRETT. Is that the letter of May 15?

Mr. STEFFEN. That is a memorandum which purports to be prepared by Mr. George M. Brown, President, under date of March 1, 1928, entitled, "Memorandum Regarding the Possibility of Making Plasterboard under the Royalty Basis."

Justice STEPHENS. It is not in this set that you have before you, Judge.

Justice GARRETT. I see.

By Mr. STEFFEN.

Q. Will you read that, Mr. Brown, please? It has already been marked for identification.

Now, Mr. Brown, does that memorandum, in the second paragraph there, express your views, as you now recall it?

Mr. ADAMS. I object to that, Your Honor. It seems to me that that is not a proper way to inquire as to what the witness' testimony is. Let's find out what he knows about

the fact that counsel wants to know about, and then see if this refreshes his recollection. We have been over this same practice before, of showing the witness a piece of paper that is not in evidence, and asking him if it expresses his views.

Justice STEPHENS. It is not in evidence, is it?

2455 Mr. STEFFEN. No, Your Honor. It has been simply marked for identification.

Justice STEPHENS. Are you using it to refresh his recollection, or are you going to offer it in evidence?

Mr. STEFFEN. I was going to certainly offer it in evidence, but I was first going to use it to refresh his recollection concerning certain questions that I would like to ask him.

Mr. BROMLEY. But it has never been identified by anybody.

Mr. STEFFEN. It need not be identified for purposes of refreshing recollection.

Justice STEPHENS. The objection is well taken. If you are going to use this at the present time merely for the purpose of refreshing recollection, you should ask the witness if it does refresh his recollection, and then ask him to state what his recollection is, if his answer is in the affirmative. That is the conventional way of proceeding.

By Mr. STEFFEN.

Q. Well, Mr. Brown, you have examined Government's Exhibit 212 for Identification——

A. (Interposing) Is that this paper (indicating)?

Q. Yes.

A. Yes.

Q. Is it in the general form of memoranda pre-

2456 pared by your company, do you know?

A. It seems to be a typewritten sheet, and there were plenty of them around in our office, I guess, our office.

Q. I notice it says, "George M. Brown, President" in the upper right-hand corner. That is your name, and you were President at this time, were you not?

A. I always signed my mail. Why don't you get a signed one?

Q. This is not mail; this is simply an interoffice memorandum, is it not?

A. I don't know what it is.

Q. What would you say, from looking at it?

A. I wouldn't say.

Q. Did you have a stenographer whose initials were "D.S.", do you remember?

A. Were what?

Q. Notice that after your name there are the initials "D.S.". Do you know what those initials referred to?

A. I do not.

Q. Did you have a stenographer whose initials were "D.S.", or a secretary?

A. I can't even remember the names. I can't answer that.

Q. Well, you have testified that you talked with Mr. Avery and Mr. MacLeish for part of one afternoon
2457 and part of the next morning, concerning this matter. Did you by any chance mention the Ebsary Gypsum Company in that conversation, do you remember?

A. I haven't the least idea.

Q. Would this memorandum refresh your recollection on that point, the second paragraph?

A. Well, I wouldn't know.

Q. Will you read it, please, and see if it refreshes your recollection?

A. I have read it, and it does not.

Q. Do you recall whether you talked about the National Gypsum Company, as to whether they would maintain price fixing?

A. I am very sure that we didn't talk about whether the industry would maintain——

Q. (Interposing.) Maintain a fixed price?

A. I don't think we talked about those things.

Q. Why wouldn't you talk about them?

Mr. ADAMS. I object to that. That is not a proper question.

Justice STEPHENS. That really is in the form of argument or cross-examination. The objection is sustained.

By Mr. STEFFEN.

Q. Is there any reason why you wouldn't talk about it?

Mr. ADAMS. That is the same question, Your Honor.

2458 Justice STEPHENS. Sustained.

By Mr. STEFFEN.

Q. Are you real sure you didn't talk about price fixing.

A. I am quite sure we didn't, because that wasn't the principal interest in the matter.

Q. What was the principal interest in the matter?

A. To make a board that our trade was anxious to get hold of, that our sales department had found that our trade

wanted, and the sales department was even more anxious to get hold of it; our manufacturing department had reported that they could make it to advantage.

Q. Any other interest?

A. Well, that is a long time ago——

Q. (Interposing.) Would it result in stabilizing the industry on one form of board?

A. Well, I think it did that, but I don't remember that was the subject of the conversation.

Mr. BROMLEY. I move to strike out the answer as speculative, if the Court pleases.

Mr. STEFFEN. I think it is not a speculative answer; it is a positive answer, that it did that.

Justice STEPHENS. He said he thought it did that.

Mr. BROMLEY. A conclusion, perhaps I should have said.

Mr. STEFFEN. No, he stated that as a fact, that
2459 it did stabilize the industry.

Justice STEPHENS. Read the answer.

(The answer was read by the reporter.)

Justice STEPHENS. The motion is granted.

Mr. STEFFEN. The motion to strike is granted?

Justice STEPHENS. Yes. He said he thought. What the witness thinks happened in a situation is his conclusion.

The WITNESS. That is all I can say about it, I can't recall——

Justice STEPHENS (interposing). We don't expect you to recall any more than you can, Mr. Brown.

If the witness knows, the Court is not intending to rule that you can't ask the witness if he knows, as a member of the industry, what happened with respect to stabilization, which is the particular subject you were inquiring into at that time. But the motion is sustained for the reason that it was a mere expression of opinion.

You should understand, Mr. Brown, that while we like to have you answer the questions as directly and as fully as you can, we understand that neither you nor any of us can remember things in great detail that happened 15 years ago, and if you can't remember them you can frankly say so.

The WITNESS. I am sure you will understand, Your Honor, that when two men meet that way, and they disagree on about everything, you don't carry all that
2460 conversation in your mind.

Justice STEPHENS. You are not under criticism for not remembering. We can't any of us remember all that we have been through, of course, 15 years ago.

By Mr. STEFFEN.

Q. Do you recall whether suit had been filed against you by the United States Gypsum Company at the time you were out in Chicago talking with Mr. Avery?

A. No, I do not.

Q. Will you read the last paragraph of your memorandum and see if that refreshes your recollection on that?

A. Well, I don't know what this is.

Mr. BROMLEY. I object to the question on the ground that it assumes facts not in evidence, and I refer specifically to the question and that part of it in which Mr. Steffen refers to the memorandum as "his" memorandum. He hasn't identified it, and nobody has identified it.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. The question does assume, Mr. Steffen, that it is his memorandum.

Mr. STEFFEN. I didn't intend to assume that, of course.

Justice STEPHENS. Thank you. Rephrase the question. The objection is sustained.

By Mr. STEFFEN.

2461 Q. What we want to know, Mr. Brown, is whether the United States Gypsum Company started a suit against the Beaver Products Company in the spring of 1928, if you remember that?

A. It did.

Q. And had they started that suit prior to the time you went out to see Mr. Avery?

A. I can't remember.

Q. As a matter of fact, wasn't that the purpose of your going out to see Mr. Avery?

A. About the suit?

Q. Yes, sir.

A. No, I don't think so.

Q. Will you read the last paragraph of the memorandum before you, and see if that refreshes your recollection concerning one of the subjects which you may have talked to Mr. Avery about at this time?

A. What do you think should refresh my memory? I don't get it.

Q. To answer your question, I would say that you say in your first sentence, "We must prepare to answer the suit of the United States Gypsum Company."

Mr. ADAMS. I object to that,—I didn't want to interrupt the question. He didn't say any such thing in his first sentence. He said he doesn't know who wrote this
2462 memorandum, and he has no recollection. Counsel is saying again and again that it is his memorandum, and the witness says it is not.

Mr. STEFFEN. I didn't say that.

Justice STEPHENS. The record may show that the Court is not treating it, as previously referred to, as the memorandum of the witness, and Mr. Steffen has stated he doesn't intend to have it so regarded.

Mr. ADAMS. And I also object to counsel reading into the record what is contained in the memorandum.

Justice STEPHENS. The Court has already ruled that that should not be done in any substantial manner, but I think this is de minimis, Mr. Adams. Mr. Steffen was only asking the witness, in effect, to look at the first sentence of the second paragraph.

Let me explain to you, Mr. Brown, if you will just lay that down a moment. Perhaps you are not entirely familiar with what we are trying to do here. Sometimes if a witness, because events are a long while ago, doesn't remember them, we try to bring something to the attention of the witness which may possibly refresh his recollection.

The WITNESS. Yes, I understand.

Justice STEPHENS. Sometimes if we look at an old exhibit or an old memorandum or an old journal of some sort, whether or not we prepared it ourselves, it
2463 might possibly jog our memory, as we say. That is what is being done here. You are being asked to read this. Take your time to read it, if you haven't done so already, especially now the last paragraph on the second page, and see whether or not the items on that paper do happen to jog your memory about past events. If they do not, you may say so; and if they do, tell us what you remember.

The WITNESS. This refers to——

Justice STEPHENS (interposing). Never mind that. Just read it to yourself, and after you have finished reading it carefully to yourself, just lay it aside and tell us if it refreshes your recollection on any of these subjects.

The WITNESS. That doesn't refresh my recollection as to whether a suit had been filed at that time or not.

By Mr. STEFFEN.

Q. Does it refresh your recollection as to whether you talked about a suit with Mr. Avery?

A. Well, that would be the same thing, I think. No, it does not.

Q. You know, of course, that such a suit was filed?

A. I know such a suit was filed, yes, at some time, but whether it had been filed then or not, at the time of my call, I don't remember.

Q. The records will show that it had been filed previous to this talk.

2464 A. I don't know what the date of the talk was.

Q. Mr. Brown, do you remember the fact that a suit was filed by United States Gypsum Company against the Beaver Products Company? Do you remember that?

A. Oh, yes.

Q. And do you know what that suit was about?

A. Yes.

Q. What was it about?

A. They were trying to compel us to continue the manufacture of closed-edge board in the Beaver plants as they had been doing, and my recollection is—but you would again have to go to the records to be positive—that they wanted that extended to the other plants.

Q. That was your understanding at that time?

A. Well, that is my present recollection of it. It is not very reliable.

Q. And what was your position as to whether you would defend or not defend that suit?

A. Well, we would defend it.

Q. And did you actually put in an answ r and defend the suit?

A. I don't know just how far we went, but an order from a United States court was entered requiring us to give a bond in case we went ahead without taking that license, as I remember it.

2465 Q. And were you a party to that bond?

A. Yes.

Q. How much was it for?

A. My recollection is that it was for $2,000,000.

Q. I think it was $1,000,000.

A. Was it $1,000,000?

Q. Yes.

A. I thought it was two.

Q. Who else signed the bond with you, if anyone?

A. Elisha Walker and myself.

Q. Who was Elisha Walker?

A. I thought it was a million for each one, but I have forgotten.

Q. Now, Mr. Brown——

Justice GARRETT (interposing). The last question hasn't been answered. You asked him who was Elisha Walker.

Justice STEPHENS. Who was Elisha Walker?

The WITNESS. He was one of our Directors, head of Blair & Company.

Mr. STEFFEN. We would like a recess, Your Honor, at this time.

Justice STEPHENS. We will take a five-minute recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2466 Justice STEPHENS. Proceed, gentlemen.

By Mr. STEFFEN.

Q. Mr. Brown, we were talking about this litigation which the United States Gypsum Company had brought against the Certain-teed Products Company in connection with the Beaver licenses, and I think you testified that your company decided to defend and put in an answer, is that correct?

A. We gave a bond, and went ahead. I don't know just how far it went.

Q. And do you recall what the nature of your defense was?

A. No.

Q. But there was a decision, as you testified, to put in an answer?

A. That is my best recollection.

Q. And do you recall having told your counsel to put in an answer?

A. I don't recall telling him, but my best recollection is that we did.

Q. Do you recall what you may have told him to say in the answer?

A. No.

Q. Directing your attention to the fact that you were out in Chicago and talked with Mr. Avery, and nothing came of your discussion, and that you thereafter

2467 put in an answer, can you state what the nature of your answer was?

A. No.

Q. Can you state what you thought the purpose of the United States Gypsum suit was?

A. I suppose the purpose of any suit such as that would be to collect damages if we were infringing.

Q. Did they have any other purpose that you now remember?

A. I don't know.

Q. Well, I want your best recollection.

A. I don't know of any.

Q. You have no recollection at the moment?

A. Of what?

Q. Of what the probable purpose of the United States Gypsum Company's suit may have been for bringing an action against Certain-teed.

A. Well, such suits are generally to collect damages, aren't they?

Q. Well, will you look at the last paragraph of that memorandum which is Government's Exhibit 212, and see if that refreshes your recollection as to what you thought in 1928 was the purpose of the United States Gypsum Company's suit? Read the last paragraph carefully, and particularly the second sentence.

A. That doesn't refresh my mind. I don't know what that is.

2468 Q. Well, Mr. Brown, did you subsequently take out a license with the United States Gypsum Company?

A. I beg your pardon?

Q. Did you subsequently take out a license with the United States Gypsum Company under the closed-edge board patent covering all the properties of Certain-teed?

A. We did take one out, I don't know whether it was subsequently or not.

Q. Well, in order to get the dates clear, you signed your contract with the United States Gypsum Company on May 22, 1929. Now I want to ask you concerning that period between——

A. (Interposing) Please don't ask me about dates, I don't remember them.

Q. I understand that, but what I am getting at is that at the time in February, 1928, when you went to see Mr. Avery—that is established, and nothing came of it, that you have told us.

A. That was in February of 1928?

Q. Yes, let's get that fixed. It was in February of 1928.

A. I don't remember.

Q. But it is a matter of record. In February of 1928 you saw Mr. Avery.

A. All right.

Q. Then the next date to fix in your mind is May 22, 1929, a year and three or four months later, and at
2469 that time you signed a license agreement with USG.

A. Did we sign it then?

Mr. ADAMS. We will agree that it was signed on that date.

Mr. STEFFEN. I am merely trying to fix dates in order to inquire as to a period in between.

The WITNESS. I don't remember that.

Justice JACKSON. It has been admitted.

Mr. STEFFEN. May I show the witness the license agreement of May 22, 1929, to get that clear?

Justice STEPHENS. You may, yes.

Mr. STEFFEN. Will you show the witness Government's Exhibit No. 4, Mrs. Gillette?

(The document referred to was handed to the witness.)

By Mr. STEFFEN.

Q. Will you look at the last page of Government's Exhibit No. 4, which is page 25?

A. Yes.

Q. Is that your signature, Mr. Brown?

A. Yes.

Q. And if you will look at the first page of the agreement I think you will get the date.

A. The 22nd day of May, 1929.

Q. Now do you recognize that as your license agreement with the United States Gypsum Company?

A. It appears to be.

2470 Justice STEPHENS. Let me ask a question so as to get the mind of the Court clear. What is the approximate date which has been admitted in the record, of this conversation between Mr. Avery and Mr. Blagden and Mr. Brown?

Mr. STEFFEN. The 29th day of February, I believe.

Justice STEPHENS. 1928?

Mr. STEFFEN. Yes

To be explicit, I might read the United States Gypsum Company's answer, which is a short paragraph, to our interrogatory No. 32. It says:

"As presently advised there were the following meetings: (a)—February 29, 1928, Chicago, Illinois. Present: Sewell L. Avery, president of United States Gypsum Company; George M. Brown, president of Certain-teed Products Company; and Augustus Blagden, president, Beaver Products, Inc., the assets of which latter company had just been purchased by Certain-teed."

That fixes the two dates of February 29, 1928, when Mr. Brown was in touch with Mr. Avery, and May 22, 1929, when they finally signed the license agreement.

Justice STEPHENS. Have you got those two dates clearly in mind now, Mr. Brown?

The WITNESS. I think so.

By Mr. STEFFEN.

Q. Do you recall having been out in Chicago at
2471 the time you signed the agreement with United States Gypsum Company on May 22, 1929—do you recall that occasion?

A. I recall being there, I don't recall the date.

Q. No, we are not interested in the date, we want you to tell us if you recall the occasion, and you say you do.

A. I recall being there. I am surprised if it was signed on that date, but maybe it was.

Q. Why are you surprised, Mr. Brown?

A. All right.

Q. I say, why are you surprised that it was signed on that date?

A. I didn't remember going through any of the actual signing at that time, I thought we had notified them that we would take a license, and that it probably came through later, but I have no recollection on it.

Q. How did you notify them, Mr. Brown, do you recall, by telephone or wire or by letter, or what?

A. We were with them, we were in a meeting with them in Chicago.

Q. I see.

A. And I presume—I have no specific recollection of it—I presume that we told them we would take a license, and to draw up the papers.

Q. And when you say "them", whom do you mean?

A. I mean the United States Gypsum, I mean Mr.
2472 MacLeish, primarily, I should say. He is the man that would——

Q. (Interposing) Draw up the papers?

A. He is the man that was doing things.

Q. But you recall definitely being at a meeting in Chicago with Mr. Avery and Mr. Blagden, at which you said you would sign the papers, is that right?

A. I think so.

Q. And is this the paper concerning which you are testifying?

A. I don't recall this, I signed it, but I don't recall it.

Mr. ADAMS. If it will shorten it any, we will agree that Mr. Brown signed Government's Exhibit No. 4 in Chicago on that day.

Mr. STEFFEN. We are not wanting to prove the date, your Honor, but we are trying to get the witness' memory refreshed on things that are clearly a matter of record.

Mr. ADAMS. I am trying to help Mr. Brown, too. There is no question from the point of view of the defense, that the agreement was signed by Mr. Brown in Chicago on that date.

By Mr. STEFFEN.

Q. Do you recall whether the matter of your $1,000,000 bond came up at that time?

A. No, that was at a later time, I don't recall when that was.

2473 Q. Will you look at Government's Exhibit 232, which you have there?

A. This one?

Q. That is correct—and see if that refreshes your recollection as to the time when that bond was released.

A. Oh, when it was released?

Q. That is correct.

A. I think that the bond—my best recollection is that the bond was to be released when we took out the license.

Q. That the bond would be released when you took out the license?

A. That is my recollection.

Q. Will you look at that exhibit which you hold in your hand and see if that is your signature, and also note the date.

A. That is my signature.

Q. Now will you note the date of that exhibit?

A. The 22nd of May, 1929.

Q. That is the same date that the license agreement was signed?

A. Yes, it is.

Q. Now Mr. Brown, can you give us any reasons why you changed your position from that which you held in February and March, 1928, to the position you took on May 22, 1929, when you signed the license agreement and also got a release of your bond?

2474 A. I think I did tell you, but I will tell you again. In our original position we felt that we would rather not take a license, but in the meantime we had found

that the trade wanted a closed-edge board; and worse than that, our Sales Department seemed to become hypnotized with the idea that we should make a closed-edge board, as sales departments sometimes have a way of doing; and the Manufacturing Department, Mr. Whittemore, who was here the other day, was of the opinion that they would like it for manufacturing reasons.

Then, I wouldn't be sure about just the time, but we began to raise questions that there might be other patents, either granted or brewing, or something, and it is my recollection, not very definite, that we thought there would be other patents coming along, and that we were very sure that we would want to use some of them, like that bundling patent where we were sure we wanted to use that, and then the one making the——

Q. (Interposing) The bubble board?

A. That was another one. And there was a multiplicity of patents, and more seemed to be brewing, and we thought we might just as well start and get them—and all of that seemed sufficient reason to change our mind. We probably had made up our mind the first time more from wishful thinking in handling our own business, than from a sound judgment of what we should do, simply as a matter of business.

2475 Q. But by May, 1929, you had decided that you would take out this license and perhaps other licenses?

A. We made up our minds before we ever went to Chicago, at least I knew that we were going to take out the license.

Q. Was the amount of your settlement with the United States Gypsum Company on their suit against the Beaver Products Company fixed at the time you went out to Chicago?

A. The amount of the settlement?

Q. Yes, sir.

A. Did we pay them anything? I have forgotten.

Q. I am asking you.

A. I have no recollection.

Q. Was it agreed before you went out to Chicago that your $1,000,000 bond would be released?

A. I cannot recall, but I probably concluded that it was a safe assumption—I can't recall.

Q. That they would release the $1,000,000 bond and you would take out a license?

A. I thought that would be a part of it, if we took out a license. I didn't think there would be any room for litigation after that.

Q. And having taken out a license, what effect did that have on the price of gypsum board?

A. I can't recall any, but you can look up the records if you want to know. The books will show.

2476 Q. I think they do, but I would like your recollection.

A. I have no recollection on it.

Q. I don't want the explicit price, I want to know whether it stabilized prices or did not stabilize prices, do you know that?

A. I think in the end it had a tendency toward stabilizing some prices—but the records show those things.

Q. I now show you, Mr. Brown, Government's Exhibit No. 317——

Justice JACKSON (interposing). That is a new one, isn't it?

Mr. STEFFEN. Yes.

By Mr. STEFFEN,

Q. (Continuing)—which purports to be a letter signed by you under date of May 15, 1929, addressed to Mr. S. L. Avery.

A. That is my signature.

Mr. STEFFEN. We offer Government's Exhibit No. 317 in evidence.

Justice STEPHENS. If there is no objection, it is received in evidence.

Mr. BROMLEY. We make only the usual objection, if the Court please.

Justice STEPHENS. Subject to the usual reservation with respect to declarations of alleged co-conspirators, it

2477 is received in evidence.

(The document marked as Government's Exhibit No. 317 was received in evidence.)

By Mr. STEFFEN.

Q. In the last sentence there, Mr. Brown, you say that you were now prepared, or would like to be able to prepare yourselves "for prompt action whenever the matter may be ready for further consideration". Could you tell us what that means?

Justice JACKSON. You mean in the only sentence of the letter?

Mr. STEFFEN. Yes, I think you are correct.

The WITNESS. I presume we had made up our minds to sign this, and so notified them and wanted a copy of the agreement.

By Mr. STEFFEN.

Q. So you would be ready to sign when the matter was ready for further consideration?

A. So we would be able to take it up with the necessary people in our business.

Q. When you went out to Chicago on May 22, 1929, a matter of a few days after this letter was written, were there any other people besides the Certain-teed Products Company, present?

A. I think there were.

Q. Was Mr. Ebsary there? Could you name any-
2478 body that was there?

A. Mr. Avery.

Q. That was United States Gypsum Company.

A. Yes.

Q. Were any of your competitors out there?

A. Yes, I think so, but I can't recall who was there.

Q. You have stated that you knew Mr. Haggerty of the National Gypsum Company—was he there?

A. I don't know.

Q. Was Mr. Ebsary there, perhaps, from the Ebsary Gypsum Company?

A. Well, perhaps, but I don't know.

Q. You are clear, though, that there were some others there?

A. Yes.

Justice JACKSON. Some others besides yourself, do you mean?

The WITNESS. Yes. Mr. Avery was one, I know he was there.

Justice JACKSON. Do you mean there were others besides yourself and Mr. Avery?

The WITNESS. Yes.

Justice JACKSON. From other companies?

The WITNESS. Yes.

Justice JACKSON. All right.

By Mr. STEFFEN.

2479 Q. Could you tell us whether Mr. Kling was there?

A. No, I cannot.

Q. Could your recollection be refreshed on that point?

A. I don't think so, I don't know how it would be.

Q. If I were to show you a paper or a telegram or a letter of yours, would that refresh your recollection, perhaps?

A. I will look at it and see.

Q. I now want to show you Government's Exhibit No. 318 for identification, which purports to be a telegram, or rather a copy of a telegram, from Mr. S. L. Avery, addressed to Mr. George M. Brown, under date of May 18, 1929, which was just three or four days before you signed the license agreement, and I want to ask you to look at that and see if that refreshes your recollection as to whether Mr. Kling was out at that meeting.

A. It does not.

Mr. STEFFEN. We offer Government's Exhibit 318, for identification, in evidence, which is a copy of a telegram taken from the files of the United States Gypsum Company, addressed to Mr. George M. Brown, dated May 18, 1929, and which is identical in content and identical in so far as the paper is concerned, with a telegram addressed to Mr. Eugene Holland, which has already been introduced in evidence.

Mr. ADAMS. We object to it on the ground that no proper foundation has been laid, and I would like to point
2480 out that this paper did not come from the files of Certain-teed Products Corporation, and that there is no——

Mr. STEFFEN (interposing). We said United States Gypsum Company, your Honor.

Mr. ADAMS. I agree, but I am pointing that out to the Court in connection with the question of foundation, that there is no original telegram in so far as we have been able to ascertain in the files of the Certain-teed Products Corporation. I think the witness has merely testified that it did not refresh his recollection on the question of whether or not he saw Mr. Kling out there. He has not otherwise identified it.

Justice STEPHENS. Is there any objection by the United States Gypsum Company?

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Well, the Court thinks it should be received in evidence with the usual reservation with respect to declarations of alleged co-conspirators, that is, received in evidence as respects all defendants other than Certain-teed, but the Court has some doubt, Mr. Steffen, as to whether it is sufficiently identified to be binding on Certain-teed, since the witness hasn't at least as yet stated that he received it.

Justice JACKSON. Was Mr. Kling connected with Certain-teed at all?

Mr. STEFFEN. He was with American.

2481 Justice JACKSON. That is what I thought. There is nothing to indicate that this refers to the Certain-teed contract at all, in this telegram.

Mr. STEFFEN. This purports to be a wire from Mr. Avery to Mr. Brown, concerning the proposed meeting at Chicago, at which the licenses were signed, the license agreements, and it refers to Mr. Kling.

Justice STEPHENS. I think the contents of it are relevant under the issues. The question is whether or not it has been sufficiently identified to be binding upon Mr. Brown's company.

Justice GARRETT. I don't remember that the witness has been asked if he recalls the telegram, or not.

Mr. STEFFEN. Do you recall, Mr. Brown, whether you received this telegram?

The WITNESS. I do not.

Justice STEPHENS. Well, it will be received in evidence, except as against Certain-teed. It is rejected as to Certain-teed because not sufficiently identified, no foundation having been laid to make it binding upon Certain-teed, it not having been shown that it was received or sent. But the Government may, perhaps, be able to prove that otherwise.

Mr. JOHNSTON. Why wouldn't that objection be good as to these other defendants, Texas and the others?

Justice STEPHENS. Well, no other defendants

2482 made an objection, so far.

Mr. JOHNSTON. I was assuming that these objections, when made, were made for the benefit of all parties. That was the understanding.

Justice STEPHENS. The Court had not understood that Mr. Bromley's objections, on the part of United States Gypsum Company, as such, were made in behalf of the other defendants.

Mr. JOHNSTON. I am talking about Mr. Adams' objection.

Mr. OLIVER. Mr. Adams' objection would run to the rest of us.

Justice STEPHENS. I beg your pardon, I thought you were talking about Mr. Bromley's objection.

Mr. STEFFEN. We don't wish to make an issue out of it, your Honor.

Justice STEPHENS. We think, if the other defendants also object, that that is correct, that it is not identified suf-

ficiently to bind any of the defendants except United States Gypsum Company, which does not object on the grounds of lack of identification. So it is rejected except as against the United States Gypsum Company.

(The document marked as Government's Exhibit No. 318 for identification was received in evidence.)

By Mr. STEFFEN.

2483 Q. Do you recall having talked with Mr. MacLeish at the meeting in Chicago in May, 1929, when you signed the license agreement, Mr. Brown?

A. I do not recall.

Q. I want to show you, first, a letter which was addressed to you, Mr. Brown, under date of May 29, 1929, or rather a copy of a letter, and which has merely the word "President" at the foot. It is Government's Exhibit 319 for identification, and I will ask you to read it and state whether or not you recall having received it.

I would like to show you at the same time, Mr. Brown, Government's Exhibit No. 320 for identification, which purports to be a copy of a reply to Mr. Avery's letter of May 29, and ask you to read that in conjunction with Government's Exhibit 319.

A. Is this supposed to be from Mr. Avery?

Q. I want you to tell me what it is. It is supposed to be from Mr. Avery, yes, that is Government's Exhibit 319 for identification.

Will you read both Government's Exhibits 319 and 320, and state whether or not you recall either of those exhibits?

A. I don't recall. They have no marks by which I can identify them.

Q. They are copies of letters, in both instances, Mr. Brown. Are you familiar with the subject-matter

2484 of the letters at all?

A. I don't recall these.

Q. You testified——

A. (Interposing) They seem to be about certain matters, here, but I have no recollection of them, and they have no mark by which I can identify them.

Q. The initials on Government's Exhibit 320 for identification, which is a copy of a letter dated June 4, 1929, are your initials at the foot of the letter, "GMB"?

A. Yes—you mean the typewritten initials?

Q. That is right.

A. Yes, those are my initials.

Q. And do you recall who the initials "LK" refer to?

A. Well, I know there was a Miss Keith, one of the secretaries was Miss Keith, and I presume that is her, but I know nothing about it.

Q. And does the reference to Fisher's Island mean anything to you?

A. Well, I often went to Fisher's Island.

Q. Did you have a yacht, Mr. Brown?

A. Yes, sir.

Q. And on occasion you did cruise to Fisher's Island, is that correct?

A. Yes, sir.

Q. Were you interested in promoting harmony
2485 and friendship in the industry at this time?

A. I presume I was. I think we ought to have a "good neighbor" policy in lots of things.

Q. Do you have any doubt, Mr. Brown—this letter having been taken from the files of Certain-teed—that it is a copy of your letter?

A. I don't know anything about it.

Mr. ADAMS. Both of these letters are in evidence, I have just discovered, as Government's Exhibits 224 and 225.

Mr. STEFFEN. We have no further questions, then, your Honor. Thank you, Mr. Adams.

Justice, STEPHENS. I presume you need not offer them, then, if they are already in evidence.

Mr. STEFFEN. Yes.

Justice STEPHENS. 317 has been offered and received, has it not?

Mr. STEFFEN. Yes, your Honor.

Justice STEPHENS. That is the only one of that group that you kindly handed the Court this morning, except that 318 is in evidence as against United States Gypsum Company alone?

Mr. STEFFEN. Correct.

Justice STEPHENS. And the others are not?

Mr. STEFFEN. Yes, that is right.

Justice STEPHENS. Then they will be returned to you through my law clerk.

2486 CROSS-EXAMINATION

By Mr. BROMLEY.

Q. Don't you remember, Mr. Brown, that in connection with the settlement which resulted in your signing the May 22, 1929, license, that your company agreed to and paid as damages, somewhere around $64,000?

A. I don't remember that. Again the records would show those things.

Q. Referring now to the period of time prior to the occasion on which you signed the May 22, 1929, license agreement, isn't it a fact that you and your company would have taken a license under the Utzman and other patents long prior to May, 1929, if you could have gotten one without any price-fixing clause in it?

A. I think that that was one of the reasons for a great deal of criticism, but I am not sure, I don't think I could be sure as to what we would do.

Q. It is the fact, isn't it, that as you said you had made up your mind that Certain-teed should take the May 22, 1929, license before you went out to Chicago?

A. Yes, we did.

Q. Now, Mr. Brown, did you care at all what your competitors would or would not do with respect to taking out a similar license?

2487 A. I don't think so.

Q. And when you went out to Chicago, you went there for the purpose of negotiating the best possible terms that you could, didn't you?

A. Probably, but I think we knew what the terms would be. I think we had had the information about the license and all. Anyway, I am sure that we intended to go ahead with it.

Q. And you had determined, then, assuming that you did know the terms, to go ahead with it without regard to what other companies did about it?

A. Yes, sir.

Q. Referring specifically to Government's Exhibit 318, which is a copy of a telegram from Mr. Avery to you, you did not care whether Mr. Kling took a license or not, did you?

A. I don't remember anything about that telegram, but as nearly as I could define our attitude, we didn't care what others did, and we would have preferred, if we could have had the say about it, that some of them shouldn't have the right to make it, because we didn't think they would respect the obligations that we had to respect.

Q. You mean by that, that you thought that some of your competitors, if they took licenses, would not respect the prices which United States Gypsum fixed?

A. Yes, and that we would.

Q. And that you would?

2488 A. Yes, and it would be annoying.

Q. These Exhibits 224 and 225, one of which is Mr. Avery's letter to you of May 29, 1929, and the other your reply of June 4, 1929, refer, I believe, to the fact that your company took a second license which we here refer to as the October or November license, of 1929, do you recall that?

A. No, sir.

Q. Do you remember, Mr. Brown, that the Certain-teed Company took a license in or about November, 1929, under the starch or foam or bubble-board patents?

A. We took some additional licenses, and those were some of them.

Q. Now was it still your position, when you took those licenses, that you were opposed to having your prices fixed by USG or anybody else?

A. My best recollection is that we would always have opposed fixing the prices if we could have done so.

Q. And isn't it the fact, that you finally agreed to such a provision because that was the only basis on which you could get the license from USG?

A. Yes, sir.

Q. And it is the fact, isn't it, that with respect to the November, 1929, license, again you felt that it was highly desirable and beneficial to your company to have the right to use the Haggerty starch and the Roos bubble-

2489 board patents, as well as the others?

A. We had reached that conclusion.

Q. Now at any time prior or subsequent to your taking these licenses, did you have any understanding with Mr. Avery or anybody else that he would raise gypsum board prices?

A. No, sir.

Q. Did you ever have any discussion with Mr. Avery as to what he would or would not do with respect to the price that he fixed on the patented gypsum board?

A. We had nothing to do with fixing prices, and those things were not discussed.

Q. And isn't it a fact, Mr. Brown, that you never had any understanding with Mr. Avery or anybody else about the prices which you should charge for plaster?

A. We never had any understanding with anybody, and if there is anything in the record to indicate that anybody had an understanding with anybody else, I would like to see it.

Q. Well, your testimony is that you never were party to any understanding, or never knew of any understanding

or agreement about plaster prices, or block prices, or tile prices, or Keene's cement prices, or any other prices, isn't that right?

A. I never had any, and I don't think that the others did.

Q. And it is a fact, isn't it, Mr Brown, that you never had any understanding——

2490 Mr. STEFFEN (interposing). I would like to object to a portion of that last answer. I think what Mr. Brown thinks is probably subject to being stricken.

Justice STEPHENS That may go out. I refer to his statement—and I assume that you do—that he thinks that no one else did.

Mr. STEFFEN. Yes.

Justice STEPHENS. That may go out.

By Mr. BROMLEY.

Q. And it is a fact, isn't it, Mr. Brown, that so far as you are concerned you never had any agreement or understanding with Mr. Avery, or anybody in the United States Gypsum Company outside of those understandings that were contained in the written license agreements?

A. Those are the only agreements.

Q. Now I would like to show you Defendants' Exhibit 15 for identification.

(Discussion off the record.)

Mr. BROMLEY. Unless there is objection, I would like to show the witness a photostat of Defendants' Exhibit 15 for identification, and ask him merely if he can identify the signature to that letter.

The WITNESS. I cannot.

By Mr. BROMLEY.

Q. And likewise, I would like to show you a
2491 photostat of Defendants' Exhibit No. 17 for identification, and ask you if you can identify the handwriting on that exhibit as being the handwriting of Mr. C. O. Brown.

A. That is C. O. Brown's initial signature, that is the only thing I can identify.

Justice STEPHENS. Mr. Brown, are you sure you understood the question Mr. Bromley asked you? Judge Jackson thinks perhaps you did not understand the question with respect to Defendants' Exhibit 15, as to whether you can identify that signature on there.

The WITNESS. The one of Mr. Henley?

Justice STEPHENS. Yes.

The WITNESS. No, I could not identify it.
Justice JACKSON. You don't know his handwriting?
The WITNESS. No, I dont.
Justice JACKSON. Then you did understand the question.
The WITNESS. Yes.
Mr. STEFFEN. I would like to ask if he understood the question with regard to Defendants' Exhibit 17. Did he identify the handwriting?
Justice STEPHENS. He identified the initials, but not the handwriting.
The WITNESS. "COB" is C. O. Brown's initial signature.
Mr. STEFFEN. Thank you.
Mr. BROMLEY. That is all.
2492 Justice STEPHENS. Is there any cross-examination by counsel for other defendants?
(No response.)
Justice STEPHENS. Is there any redirect?
Mr. STEFFEN. No redirect, your Honor.
Justice STEPHENS. This witness may be excused, then, gentlemen?
Mr. STEFFEN. We will excuse him.
Justice STEPHENS. Do you need him further, Mr. Bromley?
Mr. BROMLEY. No.
Justice STEPHENS. You may be excused when we go into recess, Mr. Brown, and thank you for attending the Court.
You may announce a recess until one forty-five.
(Thereupon, at 12:12 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

2493 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)
Justice STEPHENS. You may proceed, gentlemen.
Mr. KNUFF. Mr. Robert M. Nelson.
Thereupon, ROBERT M. NELSON, appearing as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. KNUFF.

Q. Your name is Robert M. Nelson, is that not correct?
A. Yes, sir.
Q. With what company are you now associated?
A. With the Savannah & Atlanta Railway Company.

Q. Savannah Railway Company?
A. Savannah & Atlanta Railway Company.
Q. Were you ever connected with the Certain-teed Products Corporation?
A. Yes, sir.
Q. I believe you entered their employ in 1914, is that correct?
A. Yes, sir.
Q. And you left Certain-teed Products Corporation in 1936, is that correct?
2494 A. Yes, sir.
Q. And at the time you left the Certain-teed Products Corporation, what was your position?
A. I was Vice President and Treasurer.
Q. You are no longer associated with Certain-teed Products Corporation or any of its affiliates, is that correct?
A. Yes, that is correct.
Mr. KNUFF. May we have Government's Exhibit 210, please?
(Government's Exhibit 210 was handed to the witness.)

By Mr. KNUFF.

Q. Mr. Nelson, will you look at Government's Exhibit 210, and read it, please?
Mr. BROMLEY. That is for identification only, isn't it?
Mr. KNUFF. 210 for identification.

By Mr. KNUFF.

Q. You have read that document, have you not?
A. Yes, sir.
Q. The "A. Whittemore" in the first line is Mr. Audenreid Whittemore, is that correct?
A. Yes.
Q. And "C. O. Brown" is Mr. Claude O. Brown?
A. Yes.
Q. And "L. R. Walker" is the gentleman that was formerly connected with the Certain-teed Products Corporation and later with Sears-Roebuck & Company, is that correct?
2495 A. Yes.
Q. And of course, the next gentleman is yourself?
A. Yes.
Q. And Mr. Adkins and Mr. Chaffee were members of the Cravath firm, is that correct?
A. No, Mr. Adkins was, but not Mr. Chaffee.
Q. Mr. Chaffee wasn't, but Mr. Adkins was?
A. Yes.

Q. Do you recall that meeting, Mr. Nelson?

A. Well, only vaguely.

Q. Do you recall that Mr. Walker outlined briefly the history of the patent situation on the closed-edge board?

Mr. ADAMS. I object to that. In view of the witness' statement that he remembers the meeting only vaguely, I submit that he shouldn't be led, with respect to this line of questioning.

Justice STEPHENS. The objection is to the form of the question as leading?

Mr. ADAMS. Yes.

Justice STEPHENS. Read the question.

Mr. ADAMS. And suggestive as well as leading.

(The question was read by the reporter.)

Justice STEPHENS. Well, it is preliminary, I think. Objection overruled.

By Mr. KNUFF.

2496 Q. Do you recall that?

A. Well, all of that is only vague in my mind, any part of it.

Q. Well, will you read the paragraph beginning, "Mr. Walker stated"—would you read that paragraph, please?

A. Where is that?

Q. That would be on the first page, the third full paragraph,—"Mr. Walker stated", and from then on. Read that to yourself.

A. All right.

Q. Do you recall whether Mr. Walker took the position that if they switched to an open-edge board, Certain-teed would lose a substantial volume of business?

Mr. ADAMS. I respectfully object to that on two grounds: first, that there is no statement by the witness that he even recalls Mr. Walker being present at the conference, if there was one; secondly, that it suggests an answer from the memorandum, which the witness has not identified in any way.

Justice STEPHENS Objection sustained.

By Mr. KNUFF.

Q. Was Mr. Walker at any conference as indicated in Exhibit 210 for identification, or were those persons mentioned in the first line at any conference at or about that time?

A. Well, I don't recall definitely. I suppose they might have been, but I don't recall these circumstances.

2497 . Mr. ADAMS. I respectfully move to strike out what he supposes, on the ground that it is a mere speculation on the part of the witness.

Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. You testified before the Grand Jury on the 20th day of May, 1940, did you?

A. Yes, sir.

Q. Do you recall Mr. Haddock asking you this——

Mr. BROMLEY (interposing). I object to this use of the Grand Jury minutes. I don't think they should be read into the record.

Justice STEPHENS. You may display them to the witness, Mr. Knuff.

Mr. KNUFF. I was just following what had been done in the *Madison Oil* case.

Justice STEPHENS. Well, I am not entirely familiar with what was done there, and happily we are not trying that case in this Court.

Mr. KNUFF. The Supreme Court has approved of what was done in the *Madison Oil* case.

Justice STEPHENS. I don't deny you the right to use the minutes. I think the proper thing to do is to show them to the witness and see if they refresh his recollection.

By Mr. KNUFF.

2498 Q. I want you to read, Mr. Nelson, from the bottom of page 1988 through 1989.

Mr. ADAMS. While the witness is reading this, I should like to record an objection to the use of the Grand Jury minutes for this purpose.

Justice STEPHENS. For the purpose of refreshing recollection?

Mr. ADAMS. You have already ruled upon that, but this is with respect to this offer.

Justice STEPHENS. I think that objection is not well taken. I think the Courts have indicated that after the Grand Jury proceedings have been closed, so that the reason for secrecy is past, that they are properly usable. I think the way to use them is to show them to the witness rather than put them in the record.

Mr. ADAMS. May I also have an opportunity, Your Honor, to look at these minutes before the witness answers?

Justice STEPHENS. Yes, they will be shown to counsel and the Court before they are finally dispensed with.

Mr. ADAMS. Perhaps Your Honor did not hear exactly what I said. I should like to have an opportunity to see them before the witness answers.

Justice STEPHENS. Yes, that is correct.

Have you read them, Mr. Nelson?

The WITNESS. Yes, sir.

2499 Justice STEPHENS. Show them to counsel, and then to the Court.

Mr. KNUFF. Will the record show that they are being exhibited now to defendants' counsel?

Let the record show that they are now being handed up to the Court.

Mr. ADAMS. Might I hear the pending question, please, Your Honor?

Justice STEPHENS. Read the series of questions and answers leading up to the objection.

(The record was read by the reporter.)

Mr. ADAMS. I take it that the minutes were exhibited to him for the purpose of refreshing his recollection on some point, and it is that question that I wanted to find out about.

Justice STEPHENS. I don't want to conduct the examination, but it is the Court's understanding that the Grand Jury minutes are shown him for the purpose of asking him whether or not he recollects now a discussion which is mentioned in proposed Exhibit 210; is that right?

Mr. KNUFF. Yes.

Mr. ADAMS. If that is the case, Your Honor, his recollection hasn't been exhausted on that point, as I recall it. I thought we were talking about who was present at the conference. It was at that point in the questioning

2500 that he was shown the minutes.

Justice STEPHENS. Read back the last several questions.

(The record was read by the reporter.)

Justice STEPHENS. You may ask the question now, Mr. Knuff.

By Mr. KNUFF.

Q. Did you attend any conference on or about February 2, 1928, at which Mr. Walker, Mr. C. O. Brown, Mr. Whittemore, Mr. Adkins, and yourself were present?

A. This letter or memorandum would indicate that I did, but I have no present recollection of any of the details of it.

Mr. ADAMS. I respectfully move to strike out the witness' answer in so far as he refers to what some memorandum states as indicating who was present.

Justice STEPHENS. That may go out.

By Mr. KNUFF.

Q. Have you read your grand jury testimony?

A. Yes, sir.

Q. Does that refresh your recollection at all?

A. Well, that was some 3 years ago, I believe, and I may have recalled these situations then more than I do now. As I say, I recall that there were meetings, but I don't recall just what anybody said or just who was present.

Q. Do you recall any meeting that you attended
2501 with Mr. Walker where he outlined the history of the patent litigation on closed-edge board?

A. Well, it is rather vaguely in my mind that there were such meetings.

Q. And do you recall at the same meeting or at the same time you took the position that Certain-teed should not, as a matter of business policy, pay a royalty on an open-edge board.

Mr. ADAMS. I object to that as being suggestive. The witness has not been asked what took place at the meeting.

Mr. KNUFF. He says he has a vague recollection. Now I am just trying to search what his recollection is.

Justice STEPHENS. That is true, Mr. Knuff, but the place where leading questions are especially undesirable is where the witness does have a vague recollection, and there a leading question might be likely to suggest the answer to him. You are at liberty to probe the witness' recollection as far as reasonably proper, and ask him if he does recollect anything on that subject and what he recollects.

Mr. KNUFF. All right, suppose I put it this way:

By Mr. KNUFF.

Q. Did you ever take the position, sir, that Certain-teed should not pay a royalty on open-edge board?

A. I think I did.

Q. And did you ever take that position with Mr. Walker?

2502 A. I am not certain whether it was with Mr. Walker or others.

Q. Do you recall at any meeting that you, Mr. Whittemore, and Mr. Walker and C. O. Brown attended, that Mr.

C. O. Brown took the position that he was not in favor of giving up their right to make open-edge board?

Mr. ADAMS. I object, Your Honor. I think we are right back to the same point where we began. He is again suggesting answers to the witness. I mention that particularly in view of the fact that he says he can't remember who was present at these meetings.

Justice JACKSON. Did I get your former question right, Mr. Knuff, that his position was that he shouldn't pay royalties on open-edge board?

Mr. KNUFF. That is right, that was the position that this witness took.

Mr. ADAMS. I respectfully object to that, because I don't think that is the fact.

Justice JACKSON. On open-edge board?

Mr. KNUFF. On open-edge board.

Mr. ADAMS. I don't think counsel has stated the fact.

Mr. KNUFF. The agreement provides that they are to pay royalty on all types of board manufactured, not royalty upon just the closed-edge board.

Justice JACKSON. I wanted to be sure I understood you.

2503 Mr. ADAMS. I don't care what the agreement provides, counsel can refer to that, but I don't think he should refer to the witness' position.

Justice STEPHENS. The questions are leading, and we are bound to sustain the objection. Why don't you ask him, Mr. Knuff, what he remembers on that subject? It is in his mind now, and the harm has been done. Ask him whether he has any recollection on the subject we have been discussing, and what his recollection is.

If you have a recollection, say so; and if you don't, feel free to say you don't.

By Mr. KNUFF:

Q. Do you recall what took place at this meeting on February 2, 1928, and if you do recall, tell us what you do recall?

Mr. ADAMS. I object to that on the ground that it assumes a fact not in evidence, to-wit, that there was a meeting on February 2, 1928.

Justice STEPHENS. You see, Mr. Knuff, this exhibit isn't in evidence. There is nothing in the record that indicates there was a meeting on that date. The witness has not so testified. So again the objection is correct. I realize the difficulty you are under, and I want to give the Govern-

ment all proper latitude to find out what this witness knows, but we must sustain objections to clearly
2504 leading questions in respect of a vague recollection.

Objection sustained.

Let me ask the witness one or two questions.

Do you recollect any meetings at or about the date which Mr. Knuff has mentioned, at which the subjects he has been asking you about were discussed, or don't you?

The WITNESS. Not specifically, sir. As I stated, I just recall in a vague way that there were meetings, and this subject was discussed among the various officers and department heads.

Justice STEPHENS. Could you place approximately the time when those meetings were held, with reference to dates or other events?

The WITNESS. Well, probably meetings were held in this period.

Justice STEPHENS. What period? Don't look at the exhibit, testify from your own recollection. In what period?

The WITNESS. Well, in the period when we were negotiating for the purchase of the Beaver assets, and subsequent to that.

Justice STEPHENS. Do you remember about when that was?

The WJTNESS. That was in the early part of 1928.

Justice STEPHENS. Do you remember any persons that were present at such meetings?

The WITNESS. Not without looking at some min-
2505 utes or records that would refresh my memory.

Justice STEPHENS. Very well.

By Mr. KNUFF.

Q. Well, after you have looked at that Exhibit for Identification No. 210, does that refresh your recollection, sir?

A. In what way?

Q. As to who was present.

A. On this date?

Q. At or about that time.

A. I simply can not specifically, now, remember definitely who was at these meetings.

Q. Do you remember anybody that was at those meetings at about this time, that is, just about the time that Certainteed was negotiating to take over the Beaver properties?

A. Well, I am morally certain that Mr. Walker was present, and Mr. Adkins, and C. O. Brown, and Mr. Whittemore. But I can not place the circumstances and the time or the place.

Mr. ADAMS. I move to strike out the portion of the witness' answer concerning which he is "morally certain", as it is quite evident from his answer that he is not testifying from his recollection as to who was there, but merely from his assumptions.

Justice STEPHENS. Well, that is not quite clear.
2506 Probably it is his inference. But Mr. Knuff is about to ask another question which might possibly clear that up.

By Mr. KNUFF.

Q. I was going to ask—what do you mean by "morally certain"? Do you mean by that that you haven't any doubts?

A. No, I would mean that there was a probability that these gentlemen were present.

Mr. ADAMS. Then I move to strike out the answers to both questions.

Justice STEPHENS. They may go out.

By Mr. KNUFF.

Q. Did Mr. Walker ever state to you what his position was with reference to manufacturing closed-edge board at the Beaver plants?

Justice STEPHENS. Just answer that yes or no, if you recollect.

The WITNESS. I don't recall.

By Mr. KNUFF.

Q. Did C. O. Brown ever state to you what his position was as to whether or not Certain-teed should give up the right to make open-edge board without paying royalties?

A. I don't recall that now.

Q. Do you know what C. O. Brown's position was?

A. No, I don't remember.

Q. Do you know what Walker's position was?
2507 A. Well, I don't recall what those statements were, now. I know there were discussions pro and con. One was in favor of one thing and others were in favor of other things, but I can't think of the definite position that anybody took, at this time.

Q. Will you state what positions they did take?

Mr. ADAMS. I object to that. He has just stated that he is unable to.

The WITNESS. I don't recall that, now.

Mr. KNUFF. Will you read his answer to me, please?

(The answer was read by the reporter.)

By Mr. KNUFF.

Q. Will you just tell us what you can remember about those discussions?

A. Well, there were general discussions that we would like to keep our business on a basis which would not involve the fixing of prices, and especially on the open-edge board, because we had started that on our own account in 1926, I believe, and the suit that was brought on as a consequence of our taking over the Beaver assets brought up a number of questions as to what our policy ought to be. But specifically, I can't say, these many years later, just what position each one of us took.

Q. Was there any person in favor of taking out a license with USG for the Beaver plants as well as for the
2508 Certain-teed plants?

A. Well, I believe that that was discussed, but I don't know who talked about it.

Q. Do you recall what Mr. Brown's attitude was?

Justice JACKSON. Which Mr. Brown?

Mr. KNUFF. C. O. Brown.

The WITNESS. Well, he was generally in favor of trying to continue with the sale of the open-edge board, and not to take over the license on the closed-edge board.

By Mr. KNUFF.

Q. And what was George M. Brown's position?

A. Oh, I beg your pardon; I thought you asked me about George M. Brown.

Q. No, I asked you as to C. O. Brown. The answer that you gave, then, related to George M. Brown?

A. Yes.

Q. And what was C. O. Brown's position?

A. Well, frankly, I am not certain of it, at this time.

Q. I wonder if you would read your Grand Jury testimony from page 1990 through to the middle of page 1991, and see whether that refreshes your recollection.

Mr. BROMLEY. We would like to have the record show our general objection to the use of the Grand Jury minutes for any purpose.

Justice STEPHENS. The objection may be shown,
2509 and it is overruled.

The WITNESS. Yes, sir.

Justice STEPHENS. Hand it to counsel, Mr. Marshal.

(Grand Jury minutes handed to Government counsel.)

Mr. KNUFF. Let the record show that the Grand Jury minutes are being handed to defendants' counsel.

(Grand Jury minutes handed to defendants' counsel.)

Mr. KNUFF. Now let the record show that the Grand Jury minutes are being handed to the Court.

(Grand Jury minutes handed to the Court.)

By Mr. KNUFF.

Q. Now does that refresh your recollection, Mr. Nelson, as to what Mr. C. O. Brown's position was?

A. I think so, yes.

Q. What was his position?

A. Well, that he didn't want to give up the right of Certain-teed to make open-edge board without paying royalties.

Q. You mean he didn't want to pay royalties on open-edge board?

A. Yes.

Q. And that was the position that Mr. C. O. Brown took?

A. I believe so.

Q. And what position did you take?

A. Similar to that one.

Q. Did you ever see the exhibit that you have
2510 before you now? Did you ever see that before?

Justice STEPHENS. Which one is that.

Mr. KNUFF. Exhibit 210.

The WITNESS. I don't know if I have or not.

By Mr. KNUFF.

Q. Did it ever come to your attention while you were an officer of Certain-teed?

A. It probably did.

Q. Do you have any doubts as to whether or not it did?

Mr. ADAMS. I object to that, and I also respectfully move to strike out the last answer as being a mere speculation on the part of the witness, and respectfully suggest that the question is whether or not he recognizes it.

Justice STEPHENS. Let me ask the witness: Do you mean when you say that it probably came to your attention, that that is your inference as a matter of probability, or that you recollect it?

The WITNESS. I don't definitely recall it, but my statement means that I probably did see it. There is a familiarity to it, but I can not state positively that I have seen it.

Justice STEPHENS. Well, I suppose the answer will have to go out.

Of course you may show, Mr. Knuff, if you wish to, by interrogating the witness or calling other wit-

2511 nesses, that this would naturally have reached his attention as an officer of the company at or about this time, and then the Court may be asked to draw the inference that he probably did see it. But apparently he is only speculating as to whether he saw it.

By Mr. KNUFF.

Q. Well, as an officer of the company, would you see memoranda of this character, sir?

A. Yes.

Q. And that would normally come to your desk as one of your duties with the corporation?

A. Not in all cases. Some would and some would not.

Q. Is there any doubt that you saw that?

Mr. ADAMS. I respectfully object to that again, Your Honor.

Mr. KNUFF. Is there any doubt in this witness' mind that he saw that before—he can say there is or there isn't.

Justice STEPHENS. That is true, but if he says that, Mr. Knuff, on the theory that he infers that he must have seen it, that is not stating whether he did see it.

Mr. KNUFF. If there is no doubt in his mind, I think that that would be certainly evidence that he saw it.

Mr. ADAMS. It would be the basis of the question, as Your Honor pointed out. He may think, as a matter of probability, that he saw it, and therefore has no
2512 doubt; or he may have seen it. The issue is—did he see it or didn't he?

Justice JACKSON. Why not ask him that very question?

Mr. KNUFF. I did, and he said he probably did, and I meant to ask him what he meant by "probably", and asked him if he had any doubt.

Justice STEPHENS. We are now in the process of trying to identify a memorandum, and the objection is well taken.

The WITNESS. Well——

Justice STEPHENS. What did you start to say, Mr. Witness?

The WITNESS. If my name or initials were on it, or something, so that I could identify it, I would do so.

Justice JACKSON. Do you remember whether or not you ever saw that?

The WITNESS. No, sir.

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 321, the same being a mem-

orandum dated February 23, 1928, on the right-hand side of which appears "Robt. M. Nelson, Treas.", and on the left-hand side of which appears, "Mr. George M. Brown, Pres."

I ask you to look at that, and tell us whether you prepared that memo?

Justice STEPHENS. That is a new proposed exhibit,
2513 isn't it, Mr. Knuff?

Mr. KNUFF. Yes, it is one of those that I passed up to Your Honors.

Justice STEPHENS. This is the one which purports to bear what date, Mr. Knuff?

Mr. KNUFF. February 23, 1928, Your Honor.

Justice STEPHENS. I am sorry, but I am still confused.

Justice GARRETT. It is the second one in the set.

Mr. KNUFF. This is what it looks like. (Indicating.)

Justice STEPHENS. Thank you. Are there two pages?

Mr. KNUFF. Just one page, Your Honor.

By Mr. KNUFF.

Q. Did you prepare that memorandum, Mr. Nelson?

A. I am not certain, but the initials on the left-hand corner, "G.P.K." and "B.B.W.", are in my writing.

Q. That is your handwriting?

A. Yes, sir.

Q. And do you recognize the stenographer's initial, "S", after your name?

Mr. ADAMS. I think he has identified it sufficiently——

Mr. KNUFF (interposing). We offer it in evidence as Government's Exhibit 321.

Justice STEPHENS. Any objection?

Mr. BROMLEY. Only the usual one.

Justice STEPHENS. Received, subject to the usual
2514 reservation concerning the declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 321, was received in evidence.)

By Mr. KNUFF.

Q. I show you what has been marked for identification as Government's Exhibit No. 322, the same being a memorandum dated March 2, 1928, on which appears, on the right-hand side, "Robt. M. Nelson, Treas.—S.", and I want you to look at it and tell us whether or not you prepared that?

A. What did you ask me?

Q. Do you recognize that as a memorandum that you prepared?

A. I do. I find my memo here in my writing, "USG Suit".

Q. And you recognize that as a memorandum that you prepared?

A. Yes, sir.

Q. Now I want you to look at Government's Exhibit 212 for Identification, please.

A. All right.

Q. Now, Mr. Nelson, you will notice that the exhibit which you have in your hand, which is Government's Exhibit 212 for identification, bears date of March 1, 1928—do you notice that?

2515 A. Yes, sir.

Q. And Government's Exhibit 322 for Identification, which is the memorandum that you have identified, bears date of March 2, 1928, do you notice that?

A. Yes, sir.

Q. You will notice the heading on Government's Exhibit 212 for Identification is, "Memorandum Regarding the Possibility of Making Plaster Board under the Royalty Basis.", and you will notice that the same heading appears on Government's Exhibit No. 322. Do you notice that?

A. Yes, sir.

Q. And you will notice Government's Exhibit 322 for Identification starts out, "Answering yours of March 1st." Do you notice that?

A. Yes, sir.

Q. Government's Exhibit No. 322 was in answer, was it not, to Government's Exhibit 212?

Mr. ADAMS. I object to that.

Mr. KNUFF. Just a moment, he can answer that yes or no.

Mr. ADAMS. The answer is suggested to him by the question. The question is—does he know whether or not it is.

Justice STEPHENS. The witness will understand the question that way, I think.

You are being asked as to whether or not the Exhibit 322 was an answer to Exhibit 212 for Identification,

2516 if you know, if you recollect.

Mr. ADAMS. I think it is fair for me, in that connection, to point out, Your Honor, that Mr. Knuff described Exhibit 212 without stating that it was 212 for Identification.

Justice JACKSON. He since has corrected that. When he referred to it again he said "for Identification".

Mr. ADAMS. I am sorry.

Justice STEPHENS. You can take your time and read both of them carefully, if you wish. Don't be hurried.

See if you can answer whether or not 322 is in answer to 212.

The WITNESS. Must this be a yes or a no answer?

Justice STEPHENS. No, you don't have to answer yes or no if you can't answer that way. If you don't recollect, you can say that. State whatever is the truth.

The WITNESS. I can not positively state that the letter of March 2 is an answer to the letter of March 1.

By Mr. KNUFF.

Q. What is your best recollection?

A. I believe it is.

Q. That is your best recollection now?

A. Yes, sir.

Q. You believe that it is an answer?

A. Yes.

Mr. ADAMS. Well, I respectfully suggest that that
2517 is not a recollection, it is merely a belief, and I move to strike it out.

Justice STEPHENS. Well, I will hear you further, Mr. Adams, but that seems to me cutting it a little bit fine. Here is the Treasurer and Vice President of the company at that time. He identifies 322 as a letter or a memorandum which he wrote, and it seems to relate to the same subject matter as proposed Exhibit 212; and, whether you phrase it in terms of his best recollection or in terms of his belief, he ought to know as an officer of the company whether these two memoranda are related, I should think. And if he does, I think he could tell us so.

Mr. ADAMS. I can express a belief as to whether these two memoranda are in any way connected, as can Your Honor—apparently you do have a belief about it. But it seems to me that the important question here is what this witness recalls.

Justice STEPHENS. That is true in a highly technical sense, but it seems to me we are getting to the point where we are dealing with weight of identification rather than actuality of identification. It is true you might express a belief, or the Court might express a belief, but that would have to be based on the mere words written upon these memoranda; whereas, this witness brings to the question the knowledge of an officer of the company who dealt
2518 with this subject matter. If he thinks it is probable

that these memoranda related to each other, it would seem to the Court that that is some identification.

2519 Mr. ADAMS. I think that Your Honor has undoubtedly stated the situation accurately. My difficulty is with what the witness actually knows about it. It might be that at the proper time I will be able to clear that up by asking him some questions myself.

Justice STEPHENS. You may do that when it comes your turn to examine. The objection is overruled. You may proceed.

Mr. ADAMS. Well——

Justice STEPHENS (interposing). You moved to strike the answer, I believe.

Mr. ADAMS. Yes, that was my last remark.

Justice STEPHENS. The motion is denied.

Mr. KNUFF. We now offer in evidence, if Your Honor please, Government Exhibits 212 and 322, and in connection with both of these exhibits, in addition to the circumstances heretofore referred to, I want to say to the Court that these both have been received under subpoena from the Certain-teed Products Corporation, and they bear the Certain-teed Products Corporation's, or someone's identification number as X-324. Also, this witness is positive in his identification of Exhibit 322, and he believes that 212 is in answer—rather that 322 is in answer to Government's Exhibit 212.

Justice STEPHENS. Just so the record will correctly state the facts, the identification items which are on the

2520 photostats are not X-324, but X-318 on Exhibit 212——

Mr. KNUFF (interposing). And X-324 on Exhibit 322.

Justice STEPHENS. Thank you.

Mr. ADAMS. May I examine, Your Honor?

Justice STEPHENS. Yes.

Justice GARRETT. Had Mr. Knuff concluded?

Justice STEPHENS. No, Mr. Adams is asking on voir dire as to the propriety of introducing the exhibits.

Justice GARRETT. I see.

Mr. ADAMS. Mr. Nelson, you told us a little earlier that there were a number of discussions among the various officers of the company on this subject?

The WITNESS. Yes, sir.

Mr. ADAMS. And those included the department heads, is that correct?

The WITNESS. Yes, sir.

Mr. ADAMS. And I suppose that some of those department heads made various memoranda, is that right?

The WITNESS. Yes, sir.

Mr. ADAMS. And you were possibly concerned with some of those memoranda?

The WITNESS. Yes.

Mr. ADAMS. This was a pretty brisk situation right around that time, wasn't it, with the U.S.G. suit pending, and all that sort of thing?

2521 The WITNESS. Yes, it was.

Mr. ADAMS. And undoubtedly there were a number of memoranda that were exchanged among the various officers of the company, isn't that right?

The WITNESS. Yes.

Mr. ADAMS. Now you knew that George M. Brown couldn't identify that memorandum at all, didn't you, that is Exhibit 212 for Identification?

Mr. KNUFF. He wasn't asked to identify it.

Mr. ADAMS. He was shown the exhibit this morning, and I will refer to my own notes which I am sure may not be accurate, but what I took down was that he was shown the exhibit and he said that there were plenty of them around the office but that he didn't know what it was, and he was asked if those were his stenographer's initials and he said, "I can't recall, even, that it was my stenographer". I wrote in my notes that he said, "I don't know what it is".

Justice STEPHENS. The Court recollects Mr. Brown being examined on 210——

Mr. KNUFF (interposing). Yes, he was asked about 212. My recollection was faulty.

Justice STEPHENS (continuing) —and I believe also on Exhibit 212.

Mr. KNUFF. I confess that my recollection was faulty.

Justice STEPHENS. I read it at the time and I re-

2522 member certain statements in it.

Mr. ADAMS. So you knew that Mr. George M. Brown couldn't identify that as his memorandum at all?

The WITNESS. Yes.

Mr. KNUFF. It still is immaterial whether George M. Brown could identify it, and we are objecting on that ground.

Justice STEPHENS. The witness is being examined on voir dire to see whether or not he can identify the exhibit as he said he could on direct examination. I think thus far it is not improper.

Mr. ADAMS. As far as you are concerned as to that memorandum, Exhibit 212 for Identification, you don't have any recollection about that at all, do you?

The WITNESS. No.

Mr. ADAMS. And you can't recall ever having seen that paper before, isn't that true, that is Exhibit 212?

The WITNESS. No, I don't recall it.

Mr. ADAMS. And as far as your's being an answer to it, as far as you are concerned isn't this true, Mr. Nelson, that when you say that you believe that Exhibit 322 for Identification is an answer to 212, it is just a speculation on your part, isn't it?

The WITNESS. Well, that is hard to say whether it is a speculation.

Mr. ADAMS. Well, let's put it this way.

2523 Mr. KNUFF. Let the witness finish, please.

Mr. ADAMS. I thought he had finished. Had you completed your answer?

The WITNESS. Yes, I had.

Mr. ADAMS. Certainly as far as you are concerned you don't know anything about Exhibit 212 at all, do you?

The WITNESS. No.

Mr. ADAMS. And as far as Exhibit 322 is concerned the only reason that you can identify that at all is because it happens to have your handwriting on it, isn't that true?

The WITNESS. Yes, that is true.

Mr. ADAMS. You don't presently recall the statements that are made in 322, do you, which is the one you say has your handwriting on it and therefore you identified it?

The WITNESS. Yes, that is right.

Mr. ADAMS. But you don't recall the statements that are made in that memorandum, do you?

The WITNESS. No, not now.

Mr. ADAMS. And you don't know, when you said, "Answering yours of March 1st", you don't remember saying that at all at this date, do you?

The WITNESS. No, I don't recall the circumstances of it.

Mr. ADAMS. So that you can't say, from reading 322, that it is in answer to anything, can you, from your present recollection, Mr. Nelson?

2524 The WITNESS. Not to my present recollection.

Mr. ADAMS. Right. And that brings me back to the question that I was talking about before, which is that as far as you are concerned all you are actually doing in your effort to help here is guessing, isn't that true?

The WITNESS. Well, I am trying to state what I think is the situation, and there is the situation here where, in order to state it, there must be some assumptions made.

Mr. ADAMS. Exactly. Now, Mr. Nelson, your memorandum, Exhibit 322, as far as you are concerned, could have been in answer to any other memorandum supplied to you in the organization, could it not, and not necessarily in answer to this one that is before you, Exhibit 212?

The WITNESS. It might have been.

Mr. ADAMS. And as far as you are concerned, you can't tell us whether 322 is in answer to 212, or whether it is in answer to some entirely different memorandum that is not before you at all, isn't that correct?

The WITNESS. I can't testify absolutely that it is in answer to Exhibit 212.

Mr. ADAMS. And therefore, anything that you say about it, to get back to my original point, is an expression on your part of a mere speculation, isn't that correct?

The WITNESS. Well, it probably is that.

Mr. ADAMS. I respectfully object, your Honor, to
2525 the introduction in evidence of this memorandum. It seems quite clear that it has not been even circumstantially related. I object to Exhibit 212, not to Exhibit 322.

If your Honor pleases, there is one point I forgot to mention in making this objection, and that is that I am very much impressed here by the fact that Mr. George Brown was on the stand this morning and he could not identify it as being his, or as knowing anything about it, and if it is admitted in evidence now, we are in the strange position of having one witness called in the morning who cannot positively identify a document, and another witness called, and through a fabric of circumstances permitted to put in that same exhibit, and attribute it to the man who said he couldn't identify it, and whom we therefore could not cross-examine about it.

Justice STEPHENS. Well, we think you are mistaken, Mr. Adams, about that. We are not in the process of having one witness say that another witness' failure to identify was a mistake, or of having one witness attribute a memorandum to another. We are in the process of circumstantial identification. We think that even laying aside the testimony of Mr. Nelson, that there is circumstantial identification in the record now of Exhibit 212, because it is conceded that both of these exhibits are taken

out of the files of Certain-teed, and one of them is positively identified by Mr. Nelson.

I misspoke myself in one respect. I don't mean
2526 without reference to the testimony of Mr. Nelson with respect to Exhibit 322, but without reference to the testimony of Mr. Nelson on the subject of the relation of the one to the other.

Without reference to the testimony of Mr. Nelson on the relation of these two exhibits to each other, we think that 212 is circumstantially identified because it bears the date March 1st, it is on the same subject-matter as 322; Exhibit 322 says, "Answering yours of March 1st"; the titles of the two are the same; and it seems to us that probably without the testimony of the witness which you characterize as speculation, as to the relationship of the two exhibits to each other, that there is circumstantial identification within the rules we have been trying to follow with reasonable equality and accuracy heretofore.

But it seems to us that this witness' testimony is not mere speculation. He has been led into using that word once, but he denied it on another occasion. I think a fair construction of this witness' testimony is that he is saying that as an officer of the company, having dealt with this subject-matter and with this type of memoranda, the circumstances and the nature of the memoranda are such that it is probable that the two exhibits are connected, and that they relate to each other.

I do not understand it to be the rule that a witness cannot testify as to the probability of two papers
2527 being related to each other when he is in a position to know what the probabilities are.

We will admit Exhibits 322 and 212, and the record will show your objection.

Mr. ADAMS. Will the Court satisfy a curiosity of mine? Is this Exhibit 212 now in evidence as a memorandum of George M. Brown?

I call your attention in that respect to the fact that the memorandum of March 2, 1928, of Mr. Nelson's, is not addressed to anybody.

Justice STEPHENS. It is in evidence as a memorandum to which Exhibit 322 is an answer, and it is a memorandum found in the files of the Certain-teed Products Corporation. What weight is to be attached to it, we do not say at the moment.

Mr. ADAMS. It wasn't solely curiosity, because I am frankly perplexed as to what the situation is as to George

M. Brown, whether we are to regard that as something that he produced, or not, or how the Court regards it.

Justice STEPHENS. I don't know how to say any more than I have, Mr. Adams.

Mr. ADAMS. It is a difficult question.

Mr. OLIVER. May we have the usual reservation?

Justice STEPHENS. Yes. These exhibits are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

2528 (The documents marked as Government's Exhibits Nos. 212 and 322 were received in evidence.)

Mr. KNUFF. I have no further direct examination.

Justice GARRETT. The first in this set of three exhibits, you did not offer?

Mr. KNUFF. That is right, we didn't even identify it.

(Discussion off the record.)

2529 Justice STEPHENS. We will proceed, gentlemen.

What do you say, Mr. Knuff, to Mr. Adams' last objection which he put in the form of satisfaction of curiosity, but which I assume was an objection to the introduction of the exhibit, that it hasn't been attached to any particular person who might be able to bind the company?

Mr. KNUFF. I cannot refer definitely to the volume or the page of the testimony, but I think it has been identified by numerous witnesses that on the right-hand side of the paper always appears the writer of the memorandum, and on the left-hand side, if it is addressed to a particular person. I think that appears throughout in quite a number of cases, that the writer's name always appears at the top of the page. Sometimes they were signed and sometimes they were not. That was the custom with Certain-teed, sometimes they signed their memoranda, and sometimes they didn't sign them. We got it from Certain-teed's files; it was under subpoena; it is what they furnished us. They felt that it had some value, or they wouldn't have kept it in their files.

George M. Brown was president of Certain-teed at one time or another, and it appears to have been written by Mr. George M. Brown. Of course Mr. Brown is 77 years of age, and your Honors recognized of course that his memory was failing, and I think it was failing.

Mr. ADAMS. If the Court please——

2530 Justice STEPHENS (interposing). It seems to me, Mr. Adams, as a matter of circumstantial probability, that where the original of a memorandum, found in the files of a company, without any apparent irregularity upon its

face, is related by date and subject-matter and title to another identified memorandum, and bears the name of what purports to be the president of the company, a man whom the other testimony shows was the president of the company, that the likelihood of its being a forgery or a trumped-up paper is extremely remote.

Mr. ADAMS. Well, may I say this your Honor, first in an answer to Mr. Knuff's statement, I have a clear recollection that Mr. C. O. Brown testified that with respect to memoranda it wasn't in the form such as he just suggested. It is also quite significant that the memorandum is not in the usual form——

Justice STEPHENS (interposing). Not what?

Mr. ADAMS. Not in the usual form. We have any number of exhibits in this case, in the usual form, which I will indicate, as for example Exhibit 247, which happens to be a copy of one, and also Exhibit No. 248.

Justice STEPHENS. Well, we will take our afternoon recess at this time.

Announce a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice STEPHENS. Do you wish to say anything
2531 more, either of you two gentlemen? If not, we are ready to make a ruling on this.

Mr. ADAMS. I would like to call your Honor's attention to Exhibit 313. That is a typical memorandum of the company.

Justice STEPHENS. We are familiar with those forms.

Mr. ADAMS. And I also want to call your attention to my recollection of Mr. Whittemore's testimony, that it was the custom in the company to put initials on, and to scratch them off, neither of which appears on either of these memoranda.

Lastly, and I think the most important difficulty that I have, is our being placed in a position of being unable to have any cross-examination of George M. Brown with respect to a document which apparently is now attributed to him and which, if I understand the Court's ruling correctly, is to be taken by the Court as having been written by George M. Brown.

Justice STEPHENS. Well, that may be an unfortunate situation, but it isn't one which is always preventable. Suppose a witness should lose his memory completely, or should die, but another person could properly qualify a document

as having been written by him. You still could not cross-examine the author.

Mr. ADAMS. That may be true, your Honor, but that is not the situation here.

Justice STEPHENS. What I am trying to say is that it doesn't seem to us that the fact Mr. George M.
2532 Brown cannot remember that he wrote this document, necessarily forbids the Government from putting it in as his document, if it can otherwise prove it was his. Your contention is that it has not been proved, of course, but if the Government can prove that it was his document the fact that he can't remember it, and that you therefore cannot cross-examine him as to why he wrote it, would not seem to us to forbid the Government from putting it in.

Mr. ADAMS. I think we are being deprived here, since Mr. Brown was here, of what seems to me to be a substantial right with respect to cross-examination, which I agree falls in an entirely different category from the question of identification. Of course I am seriously troubled about this kind of identification. He says that it might have been in answer to a memorandum of any number of people in the company, and we happen to pick out one.

Justice STEPHENS. Judge Jackson and myself are of the view—or we are all three of the view—that it is properly admissible in evidence. The identification is not weighty, and yet we cannot say that it is so slight that we can disregard it. We think it is admissible in evidence as binding against the company, because it was found in the company's files. If the company keeps a memorandum in its files which contains subject-matter of this sort, it is some evidence that the company has knowledge of it, and that it has some bearing upon the company's affairs. Judge
2533 Garrett is not disposed to go beyond that. He is doubtful whether or not it can be said to be identified as a memorandum of George M. Brown. Judge Jackson and myself think that it is identified circumstantially as a memorandum of George M. Brown.

That being the majority view, it will be admitted in evidence for that purpose. We make no comment as to what weight we think is attachable to it.

Mr. OLIVER. On behalf of Celotex I want to object to it as to its relevancy, and I don't think it has been properly identified as far as the other defendants are concerned.

Justice STEPHENS. Well, as to relevancy, no question has ever been raised yet on that subject. We think it is

relevant, it has to do with the negotiations which led up to these license agreements. Again we say nothing as to its weight.

Justice JACKSON. The exhibits seem to me not to be of very great importance anyhow. I don't see much in them one way or the other.

Justice STEPHENS. The objections are overruled. Of course as to your client Exhibit 212 is received subject to the usual reservation with respect to declarations of alleged co-conspirators, Mr. Oliver.

Mr. JOHNSTON. I assume that applies to all the defendants?

Justice STEPHENS. That applies to all the defendants, yes. Both of these exhibits are received subject to the usual reservation with respect to declarations of alleged
2534 co-conspirators.

(Government's Exhibits 212 and 322 previously received in evidence at page 2824 of this transcript.)

Justice STEPHENS. Do you wish to cross-examine, Mr. Bromley?

Mr. BROMLEY. Yes, your Honor.

CROSS-EXAMINATION

By Mr. BROMLEY.

Q. As treasurer of Certain-teed, your duties did not involve any contracts with other gypsum board manufacturers at all, did they?

A. No, sir.

Q. And you never discussed the matter of taking a license from USG with any other company, or the representative of any other company?

A. No, sir, I don't think so.

Q. As treasurer, you had ultimate supervision of the Legal Department of your company, did you not?

A. Yes, but it was approved by Mr. Brown, as president, in case of important matters.

Q. Perhaps I should not have said "ultimate", but that you had direct supervision over the Legal Department, subject to the orders and directions of your president, is that right?

A. Yes, sir.

Q. And for that reason, Mr. Nelson, you consid-
2535 ered questions with respect to settling litigation and taking patent licenses as they came up for determination by the company, did you not?

A. Yes, to some extent.

Q. Your memorandum of March 2, 1928, now Exhibit 322, was intended, was it not, to represent your view that it was advisable for Certain-teed to assume and become bound by the outstanding Beaver license?

A. Yes, sir.

Q. And there was a division within the company as to whether Certain-teed upon its purchase of the Beaver assets should assume the liabilities under the Beaver license, or should not?

A. Yes, in the early stages.

Q. And you felt that it was advisable to settle the claim which USG had asserted against Certain-teed, to assume the Beaver license, and for Certain-teed itself to take a license, did you not?

A. Yes, sir.

Q. And that was the view which was ultimately decided upon by Mr. Brown as the president of the company, was it not?

A. Yes, sir.

Q. Now in addition to the statement of some of the reasons for your view as contained in Exhibit 322, there were many other reasons why you believed it advisable

2536 for Certain-teed to take a license for all its operations, were there not?

A. Yes.

Q. And isn't it a fact that in your view it was clear that this closed-edge board was a better and cheaper product for the company to make?

A. Yes, sir.

Q. And had you satisfied yourself as to whether or not there existed a strong demand in the trade for it?

A. Well, I had talked to our sales managers as they came into the office, and the subject was generally discussed, and all of our sales people were in favor of the closed-edge board.

Q. And after talking with them and hearing what they had to say, did you conclude that that was an important reason in support of your view that Certain-teed should take a license?

A. Yes, sir.

Q. Now, did you also give consideration to the question of the expense of the litigation which would fall upon the company in the event the decision to fight should be adopted?

A. Yes, sir.

Q. And did you think that expense should be avoided by settlement?

A. Yes, sir.

Q. And did you give consideration to the fact that if you fought and defended the litigation, you might ultimately be held in a large amount of damages?

2537 A. Yes, sir.

Q. And did you think it advisable for the company to take a license in order to get out of the damage claim as cheaply as possible?

A. Yes, sir.

Q. Do you now recall that Mr. Brown finally settled the damage claim which was asserted by USG in its suit, at a figure somewhere around $64,000?

A. I don't recall the sum, but I recall the payment of some amount that we thought at the time was fairly reasonable, in settlement of the litigation, and in connection with taking out this license.

Q. And did you also consider the fact that under the proposed license which you were asked by USG to take at this time, or offered by USG at this time, while the royalty provisions and the licensing provisions ran until 1937, the price-fixing provisions ran only until August, 1929, and that therefore price fixing under that license was to last only for a short period of time?

A. I don't recall those details, but I believe that is a correct statement.

Q. And do you recall, as was testified to by Mr. Brown this morning, that he had decided before he went to Chicago in May, 1929, that the company would take out a license?

A. I can't testify specifically as to that, but I
2538 know that after various conferences in that period, we all came to the conclusion, eventually, that it was the best thing for our company to take out this license.

Q. And did you conclude in that connection that it didn't make any difference to your company what other companies did in the premises?

A. None at all.

Q. Now did you at any time in your discussions with officers and representatives of your company, ever hear of any agreement or understanding as to what USG would do about board prices after you took your proposed license?

A. No, sir.

Q. Did you ever hear of any commitment on the part of USG that it would raise prices?

A. No, sir.

Q. And were you ever informed, or did you ever hear, Mr. Nelson, that any understanding had been had as between anybody, with respect to plaster prices, or the prices of other gypsum products, such as Keene's Cement, tile and block?

Mr. KNUFF. Just a moment, please. The question is objected to as not proper cross-examination.

Justice STEPHENS. We will hear you on that, Mr. Bromley. We have some question as to whether that topic, with respect to plaster and Keene's Cement, and the like, was gone into on direct examination, either by inference
2539 or otherwise. What do you say as to that?

Mr. BROMLEY. I am afraid it is not proper.

Justice STEPHENS. I think that is correct. Sustained.

By Mr. BROMLEY.

Q. Let me ask you, Mr. Nelson, did you ever hear of any agreement or understanding in connection with the May 22, 1929, license, that the price control provided for therein should extend to unpatented articles, such as plaster or Keene's Cement or tile or block?

A. No, sir.

Mr. KNUFF. Just a moment, may I have the same objection?

Mr. BROMLEY. I think that is a good question, probably, because he did go into the May, 1929, license, and the charge in the complaint is that that license was hooked up with a sub rosa understanding to extend it to include unpatented articles.

Mr. KNUFF. I don't believe I went into the May, 1929, license, I haven't any recollection of it, your Honor.

Mr. BROMLEY. That is what all these memoranda are about, as to whether they would take that license.

Mr. KNUFF. The memoranda are about that, yes.

Justice STEPHENS. If the memoranda are about that, then the question is proper. If a witness identifies and accredits a memorandum, he may be cross-examined upon it. The objection is overruled.

By Mr. BROMLEY.

Q. Let me ask you the same question with respect to open-edge board. Did you ever hear of any under-
2540 standing or agreement made or entered into by anyone in connection with the May 22, 1929, license, that price control would extend to unpatented open-edge board?

A. No, sir.

Mr. KNUFF. The same objection, your Honor.

Justice STEPHENS. Overruled.

By Mr. BROMLEY.

Q. You stated on direct examination, as I understood you, that Certain-teed Products Corporation during the course of your inter-company discussions preceding the May, 1929, license, was opposed to the fixing of prices on open-edge board. Was that a mistake, or did you mean to say that?

A. I believe that that was a mistake. I was under the impression at one moment here that the memorandum of C. O. Brown had had something to do with the setting of prices on open-edge board. If that was the situation, Mr. C. O. Brown was mistaken in his thought at the time that there was any question of prices that were to be fixed on open-edge board.

Q. As I recollect it, at the time, counsel was examining you about Mr. C. O. Brown's position of opposition to having the royalties fixed on open-edged board, and I wonder whether, in your testimony that Certain-teed was opposed to fixing of prices on open-edge board, you didn't mean that Certain-teed was opposed at that time to the payment of royalties on open-edge board.

2541 A. I should like to correct my testimony to show that the subject was on the payment of royalties.

Q. And not on the fixing of prices?

A. And not on the fixing of prices, I misunderstood that.

Q. The fact is, Mr. Nelson, is it not, that USG at no time made any proposal that it would or had the right to fix the prices of unpatented, open-edge board?

Mr. KNUFF. Just a second, please. The question is objected to as certainly not proper cross-examination.

Justice STEPHENS. I think that that objection is not well taken, Mr. Knuff. It goes to clearing up a doubt that was raised by the direct examination, or a statement made on the direct examination, on this subject of price fixing. I think that is proper. Overruled.

The WITNESS. May I have the question?

(Thereupon, the pending question was read by the reporter.)

The WITNESS. No.

By Mr. BROMLEY.

Q. When you said "no", you meant that USG never asserted that it had the right to fix prices on unpatented, open-edge board, and never did fix them?

A. That is correct.

Q. You testified on direct examination that it was your position that Certain-teed should not pay royalties
2542 on the basis of all board manufactured, which would include open-edge board?

A. Yes.

Q. Now, isn't it a fact, Mr. Nelson, that your position was that you desired that Certain-teed negotiate a license at as low a royalty as possible?

A. Yes.

Q. And you knew that if the royalty basis included all board manufactured, that that would result in a higher annual royalty payable by Certain-teed to USG?

A. Yes.

Q. And you therefore wanted to cut down the amount by limiting the basis merely to the closed-edge board, isn't that right?

A. Yes.

Q. You knew, however, did you not, that it was USG's position that since there were so many patents involved, there probably would be disputes over the years as to whether any particular board, whether it be open-edge or not, was covered by some patent, and as a result its offer was that the royalty basis should include all board manufactured by your company, no matter of what kind or type?

A. Well, I didn't know just what the policy of the USG might be, as I didn't have any direct contacts with them. But neither did we know at that time whether we
2543 would manufacture or try to make open-edge board along with the closed edge. These memoranda represented an exchange of views during a period when none of us had made up a final policy, so that eventually when it was settled that we would make only the closed-edge board under the license, the subject of a royalty or anything else on the closed-edge board disappeared.

Q. On the open-edge, you mean.

A. Yes, on the open-edge, that is what I mean.

Justice STEPHENS. If you have a number of other questions, the Court regrets that it will have to adjourn because there is a meeting of the Patent Interchange Committee this afternoon which I have to attend, which will require my discontinuing now. If you are within a moment or so of the end of your examination, we will continue for the convenience of the witness, but if you are likely to take as much as five minutes, I am sorry but I will have to leave.

Mr. BROMLEY. In view of the fact that the witness has to leave, I will ask one or two more questions within the five minutes, if your Honor will permit me.

Justice STEPHENS. I don't want to unduly restrict you in your examination. You are entitled to complete your examination and hold the witness over, if necessary.

Mr. BROMLEY. I think I can do it in a couple of more questions.

Justice STEPHENS. Very well.

2544 By Mr. BROMLEY.

Q. You understood there was nothing in the license as proposed by USG which would prevent you from making open-edge board, did you not?

A. That is right.

Q. And the company's decision to make closed-edge board was arrived at as a business proposition, was it not, because the company thought it was a superior product.

A. Yes.

Mr. BROMLEY. That is all.

Justice STEPHENS. Is there any other cross-examination?

(No response.)

Justice STEPHENS. Is there any redirect examination?

Mr. STEFFEN. I have about one question, your Honor.

Justice STEPHENS. Very well.

REDIRECT EXAMINATION

By Mr. STEFFEN.

Q. You stated that you thought the settlement with USG of $64,000 was reasonable, is that correct?

A. Yes, I think it was.

Q. Do you know what the probable or possible liability was under the USG suit?

A. No, sir, I don't know offhand.

Q. Then why did you say that this settlement was reasonable?

2545 A. We thought it was reasonable to pay that, at that time, in order to escape any possibility of future liability.

Q. George M. Brown was on a $1,000,000 bond, was he not?

A. Yes, sir.

Q. And was the claim anywhere around $1,000,000 or $4,000,000 against you at that time?

A. I don't recall the amount of the claim, but it was very large.

Mr. STEFFEN. Thank you.

RECROSS-EXAMINATION

By Mr. BROMLEY.

Q. Can you identify Warren Henley's signature on Defendants' Exhibit 15 for identification?

A. No, sir, I don't know it.

Mr. BROMLEY. That is all.

Justice STEPHENS. We will recess until tomorrow morning at ten.

(Thereupon, at 3:50 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Tuesday, January 18, 1944.)

2546 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Tuesday, January 18, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances: (Same as heretofore noted.)

2547 PROCEEDINGS

Justice STEPHENS. Corrections to the record.

At page 2730—this is not a correction, but a reference to a suggested reservation on a ruling, Mr. Steffen and Mr. Knuff.

At page 2729, Mr. Bromley said: ". . . we have noticed elsewhere in the record that there are three Government exhibits, Nos. 145, 146 and 211, as to which the record does

not show the usual reservation at the time they were received in evidence. Exhibits 145 and 146 were received at page 1234, and Exhibit 211 was received at page 1933.

"Unless there is objection, may the record be amended so that it will appear that those exhibits were received subject to the usual reservation with respect to the declarations of alleged co-conspirators?

"Justice STEPHENS. Is there any objection?

"Mr. STEFFEN. We haven't checked it, Your Honor. I would like to reserve the right to object after I check them. But I think it will be all right.

"Justice STEPHENS. Suppose you check it during the day and let us know . . .".

Have you checked it?

Mr. STEFFEN. We have no objection, Your Honor.

Justice STEPHENS. Then that reservation may be indicated with respect to those three exhibits. Specifically, Government's Exhibits Nos. 145, 146, and 211 are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

2548

2551 *Offers in evidence*

Mr. KNUFF. May it please the Court, just before the Christmas recess, on December 21, Mr. Bromley asked me to produce the originals of Defendants' Exhibits 13 to 17 for Identification.

I have made an effort to find those in our files, and we can not locate them.

At this time we offer in evidence Government's Exhibit 323, the same being the Bill of Complaint filed in the District Court of the United States for the Northern District of Illinois, the Eastern Division, in the case of *United States Gypsum Company, a Corporation*, v. *The Beaver Products Company, Inc., The Beaver Board Companies, and Certain-teed Products Corporation*, Equity No. 7907.

The copy of the Bill of Complaint, of which Exhibit No. 323 is a photostat, was furnished me by Mr. Bromley.

Do you have any objection, Mr. Bromley?

Justice STEPHENS. Is this the suit, Mr. Knuff, concerning which the witness George M. Brown testified —

Mr. KNUFF (interposing). Yes, sir, it is, Your Honor.

Justice STEPHENS (continuing) ——that an answer had been filed, and that the company had decided to contest the case?

Mr. KNUFF. Yes, it is, Your Honor.

Mr. BROMLEY. May it please the Court, we have no objection except the usual objection, but desire to
2552 point out that there was an amended complaint, which I also furnished to the Government.

Mr. KNUFF. I haven't any objection to putting it in. I didn't think it was material. If the defendants want it in, I will be glad to have it photostated and put it in.

Justice STEPHENS. What is the purpose of the offer? What do you offer it to prove?

Mr. KNUFF. Well, this is just one of a series, and I think that if the Court will bear with me until I get the rest of it in, it will be quite apparent.

Mr. BROMLEY. I had some doubt as to its materiality, but since both of us had asked questions of witnesses about the suit, it seemed to me probable that it was proper for the Government to put in the complaint, although I don't think there is anything in the complaint that has any materiality in addition to what has already been brought out,—that there was a suit.

Justice STEPHENS. It may be received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. FINCK. May the record show that National and Baker object to this being introduced in evidence and accepted by the Court, on the ground that it is incompetent, irrelevant and immaterial, and is not binding on Baker and National Gypsum Company.

2553 Justice STEPHENS. Do you raise any different question by that objection than you have usually raised with respect to the declarations of alleged co-conspirators?

Mr. FINCK. I don't know, I haven't seen the document. I would like to have the record show that.

Justice STEPHENS. Well, it will be received over that objection. It seems to the Court that the reservation protects you. Unless a conspiracy is shown, it would not be binding upon the persons who were not parties to the agreement. Of course, the rule is, as I understand it, that once a conspiracy is shown, the declarations and acts of one co-conspirator are binding upon the others.

Mr. FINCK. If Your Honor please, I don't know that this is an act or admission or what it is, and it is a very large, voluminous document, and I haven't time to read it at the moment.

Justice JACKSON. Did the amended complaint supersede this complaint, Mr. Bromley?

Mr. BROMLEY. Yes.

Justice JACKSON. Then that was really the complaint in the action, was it not?

Mr. BROMLEY. Oh, yes.

Mr. KNUFF. We haven't any objection to putting in the amended complaint, and I will have it photostated and put it in.

2554 Justice STEPHENS. This may be received subject to the reservations indicated.

(The document referred to, marked as Government's Exhibit 323, was received in evidence.)

Mr. KNUFF. I also offer in evidence, if Your Honor pleases, Government's Exhibit 324, the same being the Answer of the defendant Certain-teed Products Corporation to the Bill of Complaint. This was the answer filed to the original complaint. The amended complaint, as I say, I will have photostated and filed.

Justice STEPHENS. If you wish, Mr. Finck, to take time to read these documents, you may have leave to make such additional objection as you feel you should make after you have read them.

Mr. FINCK. Well, if I may reserve that right, I would like to very much, and I will read them tonight.

Justice STEPHENS. And the same applies to the other defendants' counsel.

Justice JACKSON. Is this the answer to the complaint as amended?

Mr. KNUFF. No, to the original complaint.

Justice JACKSON. Is there another answer?

Mr. KNUFF. No, this is the only answer of Certain-teed, I believe. I am not sure as to that.

2555 Justice STEPHENS. It may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 324, was received in evidence.)

Mr. KNUFF. Now in connection with the answer, I respectfully call the Court's attention——

Mr. BROMLEY (interposing). Just a moment, please, Mr. Knuff.

May it please Your Honor, may I have the record show that we object to the proffer of the answer not only on the ground which Your Honor has indicated, that is, the usual objection, but also on the ground that the answer is not material or relevant or competent because not in furtherance of the conspiracy charged in the complaint; and we also object to it as incompetent as against all defendants

other than Certain-teed on the ground that the statements contained therein are not binding on any of the other defendants.

Justice STEPHENS. What do you say to the objection that it is not in furtherance of the conspiracy?

Mr. KNUFF. I think as soon as I call Your Honors' attention to the paragraphs that I am going to call Your Honors' attention to, that it will be quite apparent.

Justice STEPHENS. Will you please do that, then,
2556 because the Court doesn't like to rule in the dark on the question raised.

Mr. KNUFF. We direct Your Honors' attention particularly to paragraphs 26, 27, 28, and the remaining paragraphs of the answer; and with reference to paragraph 27 of Certain-teed's answer, particularly that portion of the paragraph which states that the license agreements were entered into not for the purpose of securing royalties, but for the purpose of enabling the United States Gypsum Company to dominate the gypsum board industry, to control prices of said board, and to restrain trade in violation of the Anti-Trust Act.

We likewise direct Your Honors' attention to the fact that in this paragraph, Certain-teed said, "The purpose of United States Gypsum Company"——

Mr. BROMLEY (interposing). I object to stating the contents of a document not yet in the record, so fully.

Mr. KNUFF. I thought it was in evidence, Your Honor.

Justice STEPHENS. It isn't in evidence, Mr. Knuff, because, although I did receive it, I received it upon the assumption that there was no further objection to be made, and counsel did make an additional objection which they have a right to be heard on.

At the same time, Mr. Bromley, I don't see how the Court can rule on the materiality of it unless it hears about it.

2557 So make your statement, Mr. Knuff. If we don't receive it, this matter can go out.

Mr. KNUFF. With further reference to paragraph 27, we direct Your Honors' attention to the fact that in this paragraph Certain-teed said that the purpose of USG to restrain trade is shown by the fact that the royalty was to be paid not only on patented board but also on unpatented board. This was done, according to paragraph 27, for the purpose and with the intent of restraining trade by, in effect, preventing Certain-teed from manufacturing or selling open-edge board and eliminating competition between open-edge board and closed-edge board.

I also direct Your Honors' attention to the fact that this complaint is signed by Certain-teed Products Corporation——

Justice JACKSON (interposing). This answer, you mean?

Mr. KNUFF. Yes, this answer is signed by Certain-teed Products Corporation, by the firm of Cravath, Henderson and DeGersdorff.

Justice STEPHENS. Are there any other objections?

Mr. ADAMS. May I object on behalf of Certain-teed, on the ground that this is neither relevant nor material, and has no probative value in showing that Certain-teed was in any way connected with any conspiracy. It seems to me that it does not constitute in any sense, so far as Certain-
2558 teed is concerned, an act or declaration which could be deemed to be that of a conspirator. It does not connect Certain-teed with any conspiracy, and it certainly can not be in any sense construed, as far as Certain-teed is concerned, as an admission. Therefore, I can't see that it can be in any way binding upon Certain-teed as proving that Certain-teed was a party to any conspiracy. It is a mere assertion in a pleading which, as the Court knows, from the history of the litigation which is before it, was never tried.

Mr. BROMLEY. It seems to me the reason that this is not admissible is not only that it is a mere statement in an unsworn pleading, and not only that there was never any adjudication as to the validity of the defense, but certainly such a statement as this could not be binding upon the plaintiff to the suit, for instance, unless it could be considered to be a declaration of a co-conspirator.

Now the general rule about the declaration of a co-conspirator is that acts and declarations of one, in furtherance of a common purpose, are admissible as to all other alleged co-conspirators. The declaration must be one which is designed to, and which does, promote the common purpose. It seems to me that by no stretch of the imagination could this statement by Certain-teed, made as it was in the course of a contested lawsuit, be held to be a declaration for the purpose of promoting or with the effect of
2559 promoting any common purpose or any conspiracy. Therefore, I think on that ground it is immaterial and irrelevant.

Justice STEPHENS. What is your position in response to those objections, Mr. Knuff?

Mr. KNUFF. In 1928, USG instituted this suit against Beaver and against Certain-teed Products Corporation.

At that time Certain-teed filed an answer in which they set up the matters alleged in the defense. That was filed on the 14th of March, 1928.

On the 22nd day of May, 1929, in spite of what Certain-teed had said a year and two months previous as to the purpose of these license agreements, Certain-teed entered into a licensing arrangement similar to the one that they were contesting in 1928. Certainly it is an admission as to Certain-teed, and it is also a declaration in furtherance of the conspiracy.

Mr. ADAMS. May I say, Your Honor, with respect to Certain-teed, that that seems to me—the statement that we should be charged with having made a declaration here because a year and two months later we entered into a license—to amount to almost a perfect non sequitur. There may have been, and undoubtedly were—as I think the record clearly shows—many, many other reasons why Certain-teed entered into this license, and it also seems clear to me that Certain-teed may and undoubtedly did
2560 enter into the license agreement because the facts which it had originally asserted in its answer, it developed, it was unable to prove, and that they were not true.

Justice STEPHENS. Isn't that a matter of defense, in explanation?

Mr. ADAMS. No, on the record as it stands here. Moreover the logic of the Government's position doesn't seem to me to be clear, because they say, "First you say one thing in an answer; a year and two months later you settle a lawsuit; therefore, when you made that statement in your answer, you must have been acting as a conspirator."

It doesn't seem to me to follow, and it doesn't seem to me that it should be binding on Certain-teed for that reason.

Justice STEPHENS. What is your contention as to how it furthered the conspiracy? I understand your contention as to admission, but I don't quite understand your contention with respect to furtherance.

Mr. KNUFF. A year and two months later they entered into almost an identical contract, after stating that the purpose of this contract was in restraint of trade.

Justice STEPHENS. How would that promote the conspiracy? How would their statements in this answer promote the conspiracy?

Mr. KNUFF. Their actions promoted the conspiracy in 1929.

2561 Justice STEPHENS. But you are not introducing their actions. You are introducing their utterances;

and the objection is that this utterance didn't further the conspiracy.

Mr. KNUFF. It characterizes the whole conspiracy.

Justice STEPHENS. Now you are talking in terms of an admission.

Mr. KNUFF. No, I am talking in terms of a declaration, if Your Honor please.

Justice STEPHENS. Perhaps the Court doesn't make its question clear to counsel, but counsel doesn't seem to me to be discussing anything but the answer in terms of an admission. What counsel are objecting specifically to, on the defendants' side, is that it doesn't show any furtherance of the conspiracy, and therefore isn't evidence as a declaration, it isn't admissible as a declaration.

Mr. KNUFF. You will recall yesterday that George Brown was on the witness stand, and in his testimony he said he had talked with Mr. Avery, and that he later had talked with his attorneys and told them to file an answer. And this is the answer that George Brown apparently told his attorneys to file, and this is the answer that they did file, and in this answer they made certain declarations concerning the purpose of the license agreement. And we say that they are declarations in furtherance of that conspiracy.

2562 Justice STEPHENS. Well, I realize, Mr. Knuff, that that is what you say, but the doubt I have in my mind is that I don't yet see the logical nexus.

What did these utterances do which aided the conspiracy?

Mr. KNUFF. Get the whole picture, Your Honor. In 1926 Beaver entered into a license agreement with USG. In 1927 Atlantic and Texas and Universal entered into a similar agreement. Now at that time the conspiracy was formed, in 1927, it had body, it had substance.

In 1928 these defendants filed this answer, and in that answer they make certain statements that relate to the conspiracy that was already in existence.

Now, on the 3rd day of April, 1929, they settle this litigation—I beg your pardon, on the 22nd day of May, 1929, they settle this litigation, and enter into an identical licensing arrangement.

Now their conduct in settling this litigation, plus what they said in their answer, seems to me to be a clear-cut declaration of one co-conspirator against the other.

Justice STEPHENS. Well, the Court hasn't asked you to discuss that. The Court hasn't asked you to discuss whether it constitutes an admission. I think we are all agreed that

it may be regarded as in the ntaure of an admission. The only question I have in my mind—it may not exist
2563 in the minds of my colleagues—is whether it can be said to have been done in furtherance of the conspiracy.

Mr. KNUFF. I have two other exhibits. One is the paper of settlement, or the stipulation of settlement; and the other is the order of the Court that was entered on the 22nd day of May. Those two, in connection with what they said, seem to me to be certainly a declaration of one conspirator in furtherance of the conspiracy. They haven't been offered yet or identified.

Justice STEPHENS. I think, Mr. Bromley, that the rule is not quite as limited as you stated it. I think declarations of co-conspirators made either in furtherance or in execution of the conspiracy are admissible in evidence.

Mr. BROMLEY. I think that is so. On the other hand, a statement which is a mere narrative, and which serves no purpose toward either executing the combination or furthering its purpose, I believe has been uniformly ruled out. The most extreme example that I can think of, which has often been before the Courts, is where one co-conspirator, during the pendency of a conspiracy when it is first being investigated, is hauled up before the District Attorney and he makes some admissions about the nature or scope of the conspiracy, and then it is sought in the subsequent trial to introduce those as binding on his alleged co-conspirators. And the Courts say, "Well, that is an
2564 admission by that one man"; but certainly the principle of agency which lies behind the rule of admitting declarations of co-conspirators was never extended so far as to let anybody assume that parties to a conspiracy authorized one of their members to go in and confess before the District Attorney. That didn't further the conspiracy. That wasn't part of the scheme either in executing it or in furthering its purpose. And that is the first analogy that occurs in my mind.

Certainly here, for one of the parties to make a narrative statement about his views as to the Beaver license, executed some years before the answer was filed, could not possibly be said to have furthered the purpose of USG and the others, if they had one, to enter into an illegal conspiracy. If anything, of course, it is against, contrary to, the alleged purpose of the conspiracy.

Justice STEPHENS. We will take a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2565 Justice STEPHENS. The Court is agreed——

Mr. ADAMS (interposing). May I, Your Honor, add one further ground of objection?

Justice STEPHENS. Yes.

Mr. ADAMS. That is, that the admission contained in the pleading, if it be argued that it is an admission, can only be deemed to be an admission for the purpose of that litigation, and cannot be regarded as an admission in any other litigation except possibly between the same parties, covering the same subject-matter.

Justice STEPHENS. Read his statement, please. I didn't get all of it.

(Thereupon, the statement by Mr. Adams was read by the reporter.)

Justice STEPHENS. The Court is agreed that Exhibit 324 is admissible in evidence as an admission of Certain-teed, binding upon Certain-teed, for whatever weight it may be entitled to. It seems to the Court that in view of the nature of the statements in the answer, and the added fact that later Certain-teed did take a license, that it may be said to constitute an admission. But the Court is also agreed that it cannot, at least in the present state of the record, be admitted as binding upon the other defendants as a declaration either in furtherance of, or in execution of a conspiracy. It would seem to the Court that, if anything,

2566 it would be contrary to the furtherance or execution of the conspiracy. It may be that the exhibit, when connected with other evidence, will be entitled to some probative value, will display some probative value, in showing the history of the building up of the alleged conspiracy, and the Court will consider it for that purpose if, in connection with other evidence, it appears to have relevance and probative value for such a purpose.

(Government's Exhibit No. 324 previously received in evidence at page 2851.)

Mr. KNUFF. I wonder if I passed up to your Honors four copies of the bill of complaint and four copies of the answer, and four copies of the other exhibits that I am going to introduce. I brought over sufficient copies but apparently I do not have a copy for the record.

Justice STEPHENS. We each have only one copy of the answer, one copy of the complaint, and one copy of an order. Then we have four little pamphlets, and that is all.

Mr. KNUFF. If your Honor please, I offer in evidence Government's Exhibit 325, the same being an order of the

Court, dated April 2, 1928, in the case of United States Gypsum Company v. Beaver Products Company, et al., directing the defendant Certain-teed Products Corporation to post a bond in the sum of $1,000,000.

Justice STEPHENS. Is there any objection?

2567 Mr. BROMLEY. Only the usual objection, if the Court please.

Mr. FINCK. On behalf of National and Baker, I would like to make the same objection as to immateriality and irrelevancy of this document.

Mr. OLIVER. May we have the same objection for the other defendants?

Justice STEPHENS. Yes, the objection of all defendants may be shown as to relevancy and materiality, and the exhibit is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

It seems to the Court that it is admissible in evidence at least as illustrative of the testimony which has already been produced through witnesses as to the fixing of a bond and the reason for the bond, and the reason for the settlement, and the like.

(The document marked as Government's Exhibit No. 325 was received in evidence.)

Mr. KNUFF. I also offer in evidence Government's Exhibit 326, the same being a stipulation entered into by Scott, Bancroft, Martin and MacLeish, and Winston, Strawn and Shaw, attorneys, in the case of United States Gypsum Company v. Beaver Products Company, Inc., et al.

Justice STEPHENS. Is there any objection to this?

Mr. FINCK. The same objection, your Honor.

2568 Justice STEPHENS. This is received in evidence over the objection of the several defendants, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 326 was received in evidence.)

Mr. KNUFF. I also offer in evidence Government's Exhibit 327, the same being the order of the Court dated May —, 1929, in the case of United States Gypsum Company v. Beaver Products Company, Inc., et al.

Justice STEPHENS. It may be admitted in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators, and over the objection of the several defendants.

(The document marked as Government's Exhibit No. 327 was received in evidence.)

Mr. KNUFF. I offer in evidence Government's Exhibits 328 to 332, inclusive, the same being the annual reports of the United States Gypsum Company for the years ending December 31, 1925——

Justice STEPHENS (interposing). What number will that be?

Mr. KNUFF. Government's Exhibit 328.

Justice JACKSON. What is the date again, please?

2569 Mr. KNUFF. The report for the year ending December 31, 1925.

The next, which will be Government's Exhibit 329, is the report for the year ending December 31, 1926.

The next, Government's Exhibit 330, is the report of the United States Gypsum Company for the fiscal year ending December 31, 1927.

The next, which will be Government's Exhibit No. 331, is the annual report of the United States Gypsum Company for the year ending December 31, 1928.

The last one, which will be Government's Exhibit 332, is the annual report of the United States Gypsum Company for the year ending December 31, 1929.

In connection with Exhibit No. 332, I direct your Honors' attention to the second sentence appearing opposite the date February 13, 1930——

Justice STEPHENS (interposing). On what page?

Mr. KNUFF. The pages are unnumbered, your Honor. It is over the signature of Sewell L. Avery, and it is the second sentence from the top of that page.

Justice STEPHENS. Which page?

Mr. KNUFF. It is the right-hand page, this one (indicating).

Justice STEPHENS. How does it read?

Mr. KNUFF. "The returns to be received, while

2570 substantial, are relatively of a minor amount. The major benefits anticipated are a relief from the disadvantages of and incident to legal contention, and the increased consumption of wallboard products which should follow the quality improvements that a full and uniform use of the patented methods and products should assure".

Justice STEPHENS. This purports to be Mr. Avery's report to the stockholders, is that right?

Mr. KNUFF. Yes, sir.

Justice STEPHENS. Do you offer the entire book or just the report to the stockholders?

Mr. KNUFF. I am primarily interested in Mr. Avery's report to the stockholders. However, I am offering the entire book.

Mr. BROMLEY. We object to all of the exhibits offered on the ground that they are immaterial and irrelevant.

Justice STEPHENS. Do you wish to argue it?

Mr. BROMLEY. No suggestion, as I understand counsel, has been made that there is any relevancy as to the annual reports for the years 1925, 1926, 1927 and 1928.

I don't understand on what theory they are offered. They are prior to the time of the allegation of any conspiracy, as I read the complaint, and they would seem to me on their face to disclose nothing relevant to the charges in the complaint.

2571 Justice STEPHENS. We are dealing first with Exhibit No. 332, which is the annual report for the year ending December 31, 1929. Do you contend that that statement particularly, in the report to the stockholders, to which Mr. Knuff has directed attention, is not admissible against USG as an admission?

Mr. BROMLEY. I do not understand by what possible construction that could be deemed to be an admission of anything charged in the complaint. All it amounts to is, when read in the context, that the company has suffered for many years from general infringement of its patents, that it has incurred litigation expense, that finally the litigation has been settled, and damages paid and licenses granted, and that the returns from the licenses, while substantial, are of a relatively minor amount. Well, I suppose they are as compared with the amount of income and business that this company was doing. With a balance sheet balancing at $64,000,000 I don't see what difference it makes that the royalties which were stated in the opening—and I suppose agreed to by the Government—ran into hundreds of thousands of dollars, which is certainly a substantial sum, but a minor figure when compared to the income of the company. The major benefits are relief from litigation and the increased consumption of wallboard following the use of the patents.

I don't perceive anything that can be said to be
2572 an admission of any charge in the complaint.

Mr. KNUFF. In the complaint, if your Honor please——

Justice STEPHENS (interposing). You need not reply, Mr. Knuff. We think the stockholders' report introduced for the purpose particularly of the sentences read into the record, is admissible in evidence as an admission or a declaration by an alleged co-conspirator. It is received, subject to the usual reservation with respect to declarations of alleged co-conspirators. We think your arguments, Mr.

Bromley, go to its weight rather than to its admissibility.

I am not quite sure, Mr. Knuff, as to why the balance of it should be considered a part of the record unless you wish to show all of this financial report as confirming the statement that the income from the licenses is minor.

Mr. KNUFF. Well, I haven't any particular desire to have the rest of it put in the record.

Justice STEPHENS. Well, the only reason the Court raises the point is that it might save record copying at some time if you simply offer that portion of the exhibit consisting of the two pages which are the purported report of Sewell L. Avery to the stockholders of United States Gypsum Company.

Mr. KNUFF. I think probably we would like to have one of these in evidence, in full, although I don't care which one it is. It shows the size and the dealings of the company, and while of course size isn't any indication that
2573 they would be conspirators, nevertheless it helps to give substance and background to the whole case.

In so far as Exhibits 328 to 331 are concerned, the Reports to the Stockholders are the only things we are particularly interested in.

Justice JACKSON. How are they at all admissible? They are prior to 1929, aren't they?

Mr. KNUFF. Yes, but you see, this whole thing had its inception back in 1925 and the reports to the stockholders from 1925 through 1928 show the competitive situation in the industry.

Justice STEPHENS. Well, Exhibit 332 will be received in evidence in full, subject to the usual reservation with respect to declarations of alleged co-conspirators.

Now let us have time to look at the reports to stockholders in each of the other cases.

Mr. JOHNSTON. If the Court please, I would like to inquire if that is received as an admission against these other defendants.

Justice STEPHENS. I don't know how the Court can make itself any plainer. It has ruled time and again that the declarations of co-conspirators are not binding against each other unless a conspiracy is ultimately shown, that they are binding, if a conspiracy is ultimately shown, provided they are also shown to be in furtherance of or execution of the conspiracy; and the Court has received all of this
2574 class of testimoney under the same general reservation and protection of the defendants, that it is received subject to the ultimate proof of the existence of a

conspiracy. I think this is not different from any other rulings on that subject.

Mr. JOHNSTON. I would like the record, on behalf of Texas, to show the same objection that Mr. Finck made to the previous offer. I cannot see where there is anything here in furtherance of the conspiracy as to Texas. I think it is wholly irrelevant and immaterial.

Justice GARRETT. You are speaking now with respect to Exhibit 324, are you?

Mr. JOHNSTON. Yes.

Justice STEPHENS. Well, that is the answer, isn't it?

Mr. OLIVER. Yes, Exhibit 324 was the answer.

Justice STEPHENS. Exhibit 324 was received as binding only upon Certain-teed.

Mr. OLIVER. Yes.

Justice STEPHENS. That was perfectly clearly stated.

Mr. OLIVER. And Mr. Johnston and I think that Exhibit 332 should be admitted only as binding upon United States Gypsum.

Justice STEPHENS. Well, we are now back talking about Exhibit 324. Let's get that disposed of first. I understand that Mr. Johnston is now renewing an objection to 324?

Mr. OLIVER. No, he says that Exhibit 332 should
2575 be received subject to the same limitations as were enforced with respect to Exhibit 324.

Mr. JOHNSTON. I just wanted the same order made on this one as was made on Exhibit 324.

Justice STEPHENS. I beg your pardon.

Well, we think that the objection now raised by Mr. Johnston and Mr. Oliver as to Exhibit 332 presents exactly the same question as was presented concerning 324, and that we ought therefore to rule that Exhibit 332 is admissible as an admission of United States Gypsum, for whatever weight it may be determined to have, but not as binding upon the other defendants, for the same reason that we ruled that Exhibit 324 is not binding, that is, that the statements therein are not shown to be in furtherance or in execution of the conspiracy as far as the present state of the record is concerned. It may be, as the record develops, that other evidence will give it further relevance. If so, that can be called to our attention.

Now with respect to the others, we haven't had time to examine them yet.

Mr. KNUFF. From Exhibit 328 straight through to 331, inclusive, you will find that the competitive situation in the industry is discussed in each Report to Stockholders.

In Exhibit 328 you will find that on the second page, the next to the last paragraph, about two inches up
2576 from Mr. Sewell L. Avery's name, it states, "Competition in all important branches has been increasingly severe, and prices have continued to decline".

Then in Exhibit 329, the competitive situation is dealt with on the first page of the Report to the Stockholders, in the last paragraph, "Competition has been increasingly active throughout the year, and indications point to a continuation of this condition".

Then, in Exhibit 330, also on the first page of Mr. Avery's report, the last paragraph of that page, it states, "Competition has been increasingly severe throughout the year."

Then we come to 1928, and again it is on the last page of Mr. Avery's Report to the Stockholders, where it states, "Competitive conditions have been of a severity unknown in the industry for many years."

Then when we come down to 1929——

Justice STEPHENS. (interposing). Did you mean on the first page of the 1928 report?

Mr. KNUFF. Yes, your Honor.

Then when we come down to 1929 we don't find any discussion about competition, and it was in 1929 that the license agreements were entered into.

Mr. JOHNSTON. May I be heard just a second?

Justice STEPHENS. Yes.

Mr. JOHNSTON. I would like to reserve the right
2577 to interpose a formal objection to these other exhibits after we shall have had an opportunity to read them. We have never seen them.

Justice STEPHENS. You may do that.

Mr. JOHNSTON. If I can do that, then in the morning perhaps Mr. Oliver and I may want to make a further objection.

Justice STEPHENS. You may do that, you may make an objection later if you find that you want to do so, after you have read them.

Mr. FINCK. I assume that the rest of us have that privilege, too?

Justice STEPHENS. That privilege is always open to any defendant who has not had opportunity to read an exhibit at the time an exhibit is offered.

These exhibits, 332, 331, 330, 329, and 328, are received in evidence under the following ruling:

We think they are illustrative of the testimony thus far introduced; they are some evidence of the conditions in the

industry, and constitute something in the nature of an admission, for whatever weight it may have, on the part of USG competition ceased in 1929. We are still unable to see, with respect to these as with respect to the others we have just been discussing, that they are in execution or furtherance of the conspiracy, and consequently we receive them as binding only on USG, making this ruling consistent with the other rulings. But, subject to those reser-
2578 vations, they are received in evidence.

(The documents marked as Government's Exhibits Nos. 328 to 332, inclusive, were received in evidence.)

Mr. KNUFF. Mr. A. D. Redfield.

Whereupon, A. D. REDFIELD, appearing as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. KNUFF.

Q. Your name, sir, is A. D. Redfield, is that correct?

A. Yes, sir.

Q. By whom are you employed, Mr. Redfield?

A. The Crosley Corporation, Cincinnati, Ohio.

Q. How long have you been employed by the Crosley Corporation?

A. About four years.

Q. What is your profession?

A. Patent lawyer.

Q. Were you previously employed by the Certain-teed Products Corporation?

A. Not directly, I was employed by Chaffee, Dawson and Shealy, a law firm who were retained by the Certain-teed Products Corporation.

2579 Q. And that was a law firm retained by the Certain-teed Products Corporation?

A. Yes, sir.

Q. And what was your connection with that firm, sir?

A. I was merely a worker in the firm.

Q. Were you a lawyer at that time?

A. Yes, handling the patent problems that that firm had, including those of Certain-teed Products Corporation, or some of those of Certain-teed Products Corporation.

Justice STEPHENS. Will you repeat that answer, please?

(Thereupon, the last answer of the witness was read by the reporter.)

Justice STEPHENS. Raise your voice just a little, please.

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. You say you did handle some of the patent problems that the Certain-teed Products Corporation had at that time?

A. Yes, sir.

Mr. KNUFF. May we have Exhibit 233, please?

Justice STEPHENS. That is one that has already been marked, but not introduced, is it not?

Mr. KNUFF. Yes, your Honor.

(Thereupon, Government's Exhibit No. 233 for identification was handed the witness.)

By Mr. KNUFF.

2580 Q. Do you recognize Exhibit 233 as being a memorandum, dated August 2, 1929——

Mr. ADAMS (interposing). I respectfully object to the witness——

Mr. KNUFF (interposing). Let me finish my question, please.

Mr. ADAMS. I am sorry, I thought you had finished.

Justice STEPHENS. Complete the question, Mr. Knuff.

By Mr. KNUFF.

Q. Do you recognize Exhibit No. 233 as being a memorandum, dated August 2, 1929, which you prepared and which was addressed to Mr. C. O. Brown, who was connected with Certain-teed?

Mr. ADAMS. May I at this time object to any testimony of this witness with respect to this matter, on the ground that it is privileged, as being a communication from a lawyer employer by a law firm under general retainer by Certain-teed, to the company.

Mr. KNUFF. So far I have just asked him to state whether he recognized that as a memorandum that he prepared.

Mr. ADAMS. I object to any testimony about it in this case, in the absence of a showing of waiver of the privilege.

Justice STEPHENS. Do you think identification of a document constitutes an invasion of the privilege?

Mr. ADAMS. I do, your Honor, particularly under
2581 the circumstances of the testimony of this witness which was shown to me previously, as to what he testified before the grand jury. I agree, your Honor, that I may be premature in raising this question at this time. I just wanted to be sure that I raised it at the outset. It may be that I have raised it too early.

Justice STEPHENS. Is this the exhibit concerning which the question of privilege came up before?

Mr. ADAMS. That is right, your Honor.

Mr. KNUFF. Yes, sir.

Justice STEPHENS. Well, the Court understands the privilege rule not to forbid identification of a document, Mr. Adams. Now if the document is to be introduced in evidence, that is the place where the privilege arises, is it not?

Mr. ADAMS. Well, I think I am wrong about that, your Honor, I think I have raised it prematurely.

Justice STEPHENS. You may have leave to object at the proper time, but we think the objection is premature now, and that the witness may be interrogated as to whether he can identify the document.

By Mr. KNUFF.

Q. Do you identify this as a document that you prepared, sir?

A. Yes, sir.

Q. I notice on the left-hand side of the page there is some writing in small hand. Do you recognize that writing?

2582 A. Yes, sir.

Q. That is your handwriting?

A. Yes, sir.

Q. And you prepared this memorandum?

A. Yes, sir.

Mr. KNUFF. If your Honor please, we now offer in evidence Government's Exhibit 233.

Mr. ADAMS. At this point I object on the ground that on the showing before the Court—and I think the Court read the memorandum at the time it was offered previously, and probably has glanced at it this morning—it is apparent that it is a privileged communication and there is no showing that the privilege has been waived.

Justice JACKSON. Your contention, Mr. Knuff, is that the privilege has been waived?

Mr. KNUFF. Not only in the answer is there a specific waiver of the privilege, but this witness, before he testified before the grand jury on June 4, 1940, contacted Mr. Dowd, an officer of Certain-teed Corporation at that time, when he claimed the privilege, the attorney-client privilege, he contacted Mr. Dowd and Mr. Dowd told him to go ahead and identify the exhibit.

Mr. ADAMS. Well, in the first place, your Honor——

Mr. KNUFF (interposing). I had probably better bring that out by testimony, so that your Honors can rule

2583 on it directly.

Justice STEPHENS. Mr. Adams?

Mr. ADAMS. I want to point out at the outset that the waiver was merely with respect to identification, which your Honor says is proper, and did not waive any other privilege.

Justice STEPHENS. Let's not go at this piecemeal, gentlemen. Will you refresh the recollection of the Court, first, Mr. Knuff, as to what took place before the grand jury and as to the answer you referred to? My colleague, Judge Jackson, has forgotten and I have forgotten about the admission you are talking about in an answer. You will have to show us that and refresh our recollection about these grand jury proceedings, also, as it has been several weeks since this matter previously came up. Then you will have opportunity, full opportunity, to reply, Mr. Adams; we will have full discussion on the subject.

Mr. KNUFF. The answer, as I recall it, is Certain-teed's answer, paragraph 119.

Justice STEPHENS. In this case?

Mr. KNUFF. In this case, your Honor. I may be wrong on that, but it is my recollection that it is paragraph 119.

Justice STEPHENS. Let me get the answer so we will have it before us.

Mr. KNUFF. I am mistaken in my recollection as to the paragraph of the answer. That concerns perforated lath. I did not have it before me at the time. Suppose I develop it by this witness?

2584

Justice STEPHENS. All right.

By Mr. KNUFF.

Q. Did you appear before the grand jury on the 4th day of June, 1940?

A. Yes.

Q. And at that time, did you claim the attorney-client privilege?

Mr. ADAMS. May I respectfully object here on the ground that it is not proper to disclose proceedings before the grand jury?

Justice STEPHENS. That objection is overruled. We have got to determine whether or not this privilege was waived, and we cannot do that without hearing evidence on the subject.

By Mr. KNUFF.

Q. Did you, sir?

A. Yes, sir.

Q. And did you later contact any official of Certain-teed Products Corporation as to whether or not they would waive that privilege?

A. That is a little difficult to answer categorically. I spoke to the Assistant Federal Attorney and told him that it was my feeling that there was a privilege here and that I was in no position to waive it, but that I should assert it and, together, we called Certain-teed in New York.

2585 Q. Whom did you talk to in Certain-teed?

A. A fellow named Dowd.

Q. What was his position with Certain-teed at that time?

A. I don't know.

Q. Was he an officer of the corporation?

A. I was under the impression that he was.

Mr. KNUFF. Mr. Adams, will you admit that Mr. Dowd was an officer of the corporation at that time?

Mr. ADAMS. He was not.

Mr. KNUFF. He was not an officer of the corporation?

Mr. ADAMS. No.

Mr. KNUFF. What was his position with the corporation?

The WITNESS. I don't know.

Mr. KNUFF. I meant that for Mr. Adams.

Mr. ADAMS. I think that at that time he was comptroller, he was not an officer. That is not an officer of the corporation, it is merely a title of the man that heads up the accounting department.

Justice STEPHENS. Let me get clear on one thing, did you first claim the privilege for the document?

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. And did you contact Mr. Dowd?

A. Yes, sir.

Justice JACKSON. Is that D-o-w or D-o-w-d?

2586 Mr. KNUFF. D-o-w-d, as I understand it.

By Mr. KNUFF.

Q. What did Mr. Dowd tell you, sir?

Mr. ADAMS. I respectfully object at this point with respect to the telephone conversation between the person alleged to be Mr. Dowd, and this witness, on the ground that there has been no showing that this witness knew to whom he was talking. I would like the privilege of a preliminary examination on that point.

Justice STEPHENS. Very well, on voir dire briefly.

Mr. ADAMS. Thank you.

Mr. Redfield, had you previously ever known Mr. Dowd?

The WITNESS. No.

Mr. ADAMS. Have you ever since seen him, or have you ever seen him in your life, so far as you know?

The WITNESS. So far as I know, I have not.

Mr. ADAMS. At the time you talked to him you had never talked with him on the telephone before?

The WITNESS. Not that I know of.

Mr. ADAMS. And you had no way of identifying that person as being Mr. Dowd, had you?

The WITNESS. Not other than the fact that both the United States Attorney and myself called Certain-teed and this man answered, who we both believed was Mr. Dowd and who represented himself as such on the telephone.

2587 Mr. ADAMS. But you did not recognize his voice from any previous conversation with him?

The WITNESS. No.

Mr. ADAMS. And you have no way of telling the Court whether or not that was Mr. Dowd you talked to that day?

The WITNESS. No.

Mr. ADAMS. I respectfully object to any conversation with respect to Mr. Dowd on the telephone on the well-established rule that a witness may not testify with respect to a telephone conversation with a person otherwise unidentified, unless he can recognize the voice from previous conversations with that person, and that the statement——

Justice STEPHENS (interposing). Do you deny that he talked to Mr. Dowd?

Mr. ADAMS. I do, and I will produce Mr. Dowd in court, who will testify that until, within the last three weeks from today, when this matter came up the last time, he had never heard of Mr. Redfield in his life. I am also in a position to assert to the Court that I have canvassed every officer of Certain-teed who was with them at the time, and who is with them now, and have been unable to find anybody who talked with this witness.

I represent that to the Court because I want it clearly understood that I am not relying here on a mere technical position with respect to identification of voice, but

2588 that I am relying on a position of substance with respect to this waiver, particularly in that Mr. Dowd, as I am in a position to prove, states that he never had any such conversation and never even heard of Mr. Redfield prior to the time this question came up in this case; and, secondly, Mr. Dowd was not authorized at that time to make any statement with respect to waiver of the privileges of this company.

Justice STEPHENS. Well, speaking for myself alone, and subject to conference with my colleagues, I will say that it seems to me that we are going to undue lengths here. As I understand the law with respect to privileged communications, particularly those that consist of documents which are under subpoena duces tecum, the witness, the person who is served with an order to produce such documents, is required to come in and produce them; he cannot refuse to produce them; he cannot refuse to obey the order of the court. But if he wants to preserve a privilege, he must claim it at the first opportunity before a proper tribunal. What has the question of agency to authorize identification got to do with the matter if that is the law?

Mr. ADAMS. Are you addressing that question to me, your Honor?

Justice STEPHENS. Yes.

Mr. ADAMS. We are claiming the privilege now, I say, for the first time that we could claim it, in this Court.

2589 Justice STEPHENS. But the law also is that a privilege once waived is waived forever. If it was successfully claimed before the grand jury, and not waived in the answer, and it is also claimed here, and if the document is confidential, it is claimed and you have got your privilege. If it was waived before the grand jury, and if waiver before the grand jury is waiver for all purposes, then what has this question of agency got to do with it?

Justice JACKSON. You contend that there was no proper waiver?

Mr. ADAMS. I contend that there was never any waiver before the grand jury made by any authorized representatative of Certain-teed, and that this witness—I have no doubt about his good faith—was simply misinformed on the subject.

Justice STEPHENS. Well, I think the Court had better hear all that either side has to offer on the subject. It seems to be very important. The document seems to be one of a critical character in view of the vigor with which it is being offered and resisted, and we will hear this testimony subject to a motion to strike if it is determined later that it ought not to be in the record.

Proceed with your examination. We can't act until we know, and we can't know without listening.

Mr. ADAMS. I particularly want to reserve my objection concerning this telephone call.

2590 Justice STEPHENS. Your objection is shown.

By Mr. KNUFF.

Q. You did assert this privilege before the grand jury, did you not, the attorney-client privilege?

A. Yes.

Q. And later you identified the document dated August 2, 1929, is that correct?

A. Yes.

Q. And you did that after you had had a telephone conversation with the Certain-teed Products Corporation office in New York?

A. Yes.

Q. And whom did you ask for when you called the Certain-teed office in New York?

A. I don't think I asked for anyone. I think the Assistant United States Attorney called. I don't know who he asked for.

Q. Did you talk to the New York office?

A. Yes.

Q. And you say you didn't recognize the voice at the other end, is that correct?

A. That is correct.

Q. And what did they tell you to do, the New York office of Certain-teed?

A. I explained what I have just explained to you,
2591 and asked what they wanted me to do, and it is my recollection that Mr. Dowd said, "Well, I don't know, we have nothing to hide, we have thrown our records open to the Department of Justice, and so far as I can tell there is no reason that you should not testify."

Q. And you did identify the document?

A. Yes.

Mr. KNUFF. We now offer in evidence Government's Exhibit 233.

Justice STEPHENS. Show us those grand jury minutes, please.

(Thereupon, the minutes referred to were handed to the Court.)

Justice STEPHENS. Where does that end, Mr. Knuff, on page 2375 where Mr. Keller says, "I have no further questions"?

Mr. KNUFF. At the bottom of page 2375, the Exhibit 212 is referred to, and this is the exhibit.

Justice STEPHENS. What I was asking is, does the examination before the grand jury end on page 2375 where Mr. Keller says, "I have no further questions"?

Mr. KNUFF. Yes, your Honor.

Justice STEPHENS. Do I understand correctly, Mr. Knuff, that you were mistaken as to your contention that there was a waiver concerning this document in an answer?

Mr. KNUFF. Yes, that was a mistake.

2592 Justice STEPHENS. That had to do with some other document?

Mr. KNUFF. Yes.

Justice STEPHENS. We only have the question as to whether or not this privilege was waived as a result of this grand jury proceeding?

Mr. KNUFF. That is right, your Honor.

Justice STEPHENS. Do you wish to be heard?

Mr. ADAMS. On two phases of it; one, that there is nothing in this witness' testimony, it seems to me, that constitutes a waiver; and, secondly, that as he testified before the grand jury, with which we are directly concerned, he stated that he was being permitted to identify a document, and that is all, and there was no waiver, even under his grand jury testimony, of the privilege between attorney and client. Of course I contend that there is no legal proof here in the first place of any conversation with Mr. Dowd; in the second place, that the conversation, if it did take place, did not constitute a waiver; thirdly, that any waiver that took place at all was with respect to a mere matter of identity which, as your Honor says, is permissible; and, fourthly, that this proceeding is the first time that we have had the opportunity to assert this privilege. We do now assert it, and we contend that there is an absolute lack of showing by the Government that there was any waiver.

Justice STEPHENS. Mr. Knuff, do you wish to be heard?

2593 Mr. KNUFF. No, your Honor.

Justice STEPHENS. The Court will take its noon recess at this time and take this matter under advisement.

(Thereupon, at 12:05 o'clock p.m. a recess was taken to 1:45 o'clock p.m. of the same day.)

2594 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Thereupon, A. D. REDFIELD resumed the stand and testified further as follows:

DIRECT EXAMINATION (RESUMED)

Justice STEPHENS. The Court has examined the offered document, proposed Exhibit No. 233, during the recess, and given consideration to the authorities and the contentions

of counsel. The Court is of the view that on the record the document is privileged, and that there was no waiver; that there was a claim of privilege by Mr. Redfield in the Grand Jury proceedings, and that there is no showing before the Court that he was authorized to waive the privilege thereafter; and that identification of a document does not constitute a waiver.

Mr. KNUFF. You may cross-examine the witness.

Mr. BROMLEY. No questions.

Mr. ADAMS. We have no questions.

Justice STEPHENS. You are excused, Mr. Redfield.

(Witness excused.)

Mr. KNUFF. Mr. Baumhogger, please.

2595 Thereupon, WALTER G. BAUMHOGGER, appearing as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Mr. KNUFF. Do Your Honors have before you the photostats of the Baumhogger exhibits? They are identified as Item No. X-305, the first one.

Justice STEPHENS. Yes, thank you, I have them, and I think we all have them, Mr. Knuff.

By Mr. KNUFF.

Q. Will you state your name, sir, for the record.

A. Walter G. Baumhogger.

Q. Where do you live, Mr. Baumhogger?

A. Montclair, New Jersey.

Q. What is your present business?

A. President of the United Cigar-Whelan Stores Corporation.

Q. How long have you been President of United Cigar-Whelan Stores?

A. Since October, 1938.

Q. And before that, with what company were you associated?

A. Certain-teed Products.

Q. And when did you enter the employ, or when did you become connected with Certain-teed Products Corporation?

A. The last week in December, 1936.

2596 Q. And you stayed with Certain-teed Products until October, 1938, is that correct?

A. That is correct.

Q. And what was your position with Certain-teed?

A. President.

Q. Were you President all during that time?

A. Yes.

Q. Mr. Baumhogger, I show you what has been marked for Identification as Government's Exhibit 333. Will you please look at it?

Justice JACKSON. That is X-305, Mr. Knuff?

Mr. KNUFF. No, Your Honor, that is a memorandum dated May 10, 1938, and addressed to Members of Management Board.

Justice GARRETT. Is that the second one as arranged in this series?

Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. This witness was President of Certain-teed at the time he wrote this?

Mr. KNUFF. Yes, Your Honor. He was President of Certain-teed from 1937 to October, 1938, I believe.

Justice JACKSON. He succeeded George M. Brown, is that it?

Mr. KNUFF. Did Mr. Baumhogger succeed Mr. George M. Brown?

Mr. ADAMS. No, he succeeded Mr. Chester Rahr.

2597 The WITNESS. Yes, sir, I have read it.

Justice STEPHENS. Let the Court finish reading it, please.

All right, proceed.

By Mr. KNUFF.

Q. Do you recognize Government's Exhibit 333 for Identification as a memorandum which you dictated, Mr. Baumhogger?

A. Yes.

Q. And that was addressed to the Management Board of Certain-teed Products Corporation?

A. Yes, sir.

Q. And who comprised the members of the Management Board?

A. E. G. Roos, Vice-President and General Sales Manager——

Justice STEPHENS (interposing). What were his initials?

The WITNESS. E. G.

A. Whittemore, Manufacturing Vice-President; Homer Van Hagan, Manager of Gypsum Manufacturing; J. K. Norris, Vice-President and Treasurer; Thomas Dugan, Secretary and General Counsel; Owen Orr, General Purchasing Agent—I believe that is all.

Mr. KNUFF. If Your Honor pleases, we offer in evidence Government's Exhibit 333.

2598 Mr. BROMLEY. We have only the usual objection.

Mr. FINCK. If Your Honor please, defendants Na-

tional Gypsum Company and Baker object to the admission of Exhibit 333 on the grounds that it is incompetent, irrelevant and immaterial, and is not binding on the defendants National and Baker; further, that there is no charge in the complaint which complains of any violation of any law on the part of National and Baker in the mnufcture and sale of perforated lath.

Justice STEPHENS. The same objection, I take it, by Mr. Johnston for Texas?

Mr. JOHNSTON. Yes.

Justice STEPHENS. And by Mr. Oliver for Celotex?

Mr. OLIVER. Yes, Your Honor.

Mr. FINCK. If the Court please, this document only refers to perforated lath, and I believe the Government will stipulate that National Gypsum Company had no license agreement with USG to manufacture and sell perforated lath.

Justice STEPHENS. We will reserve ruling so far as the companies which did not have a license to manufacture perforated lath are concerned, National, and Celotex——

Mr. OLIVER (interposing). That is right, sir.

Justice STEPHENS (continuing). ——and Texas.

Mr. JOHNSTON. Yes.

Justice STEPHENS. Otherwise, the exhibit is re-
2599 ceived in evidence subject to the usual reservation with respect to the declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 333, was received in evidence, as noted.)

Justice STEPHENS. We hope to reach a time soon when, without inconvenience to the witnesses, we can pass on these various reserved rulings.

Proceed, Mr. Knuff.

Mr. BROMLEY. Will you excuse me, if the Court pleases? In the interest of saving confusion in the record, it was my understanding—and I would like to say so now—after perusal of the Government's written offer of proof and brief, that they had abandoned their position with respect to this class of testimony. There is contained in the brief no offer of proof with respect to this situation whatsoever, and no argument in the brief regarding it.

Isn't that right, Mr. Knuff?

Mr. KNUFF. That is not right, we do not abandon any position at all.

Justice STEPHENS. We needn't have our voices lifted, gentlemen.

The Court was puzzled itself about that. The Court expected your memorandum to apply to all the reserved rulings. It did not apply to perforated lath and metal-
2600 lized lath, and we ourselves were at a loss as to whether you were continuing to insist upon that. But if you are, you have a right to do so, of course.

By Mr. KNUFF.

Q. Mr. Baumhogger, I show you what has been marked for identification as Government's Exhibit 334, the same being a memorandum dated May 16, 1938, from H. H. Van Hagan, and addressed to yourself as President. I wish you would look at that memorandum and see if you recognize it, please?

Justice STEPHENS. I am puzzled about this, Mr. Knuff. It starts out, "Referring to your memorandum of May 10", and it is addressed to Mr. Van Hagan, is it not?

Mr. KNUFF. No, it is from Mr. Van Hagan, addressed to Mr. Baumhogger.

Justice STEPHENS. Oh, I beg your pardon. That is what puzzled me.

The WITNESS. May I, while this memorandum is being read, amend a previous statement?

Justice STEPHENS. No, don't, please, because we must listen to you and we can't listen and read at the same time. We will give you an opportunity later.

The WITNESS. Yes, sir.

(The Justices then examined the proposed exhibit.)

Justice STEPHENS. All right, what correction did you wish to make?

The WITNESS. On further reconsideration, I be-
2601 lieve I was mistaken in saying that Mr. Dugan was a member of the Management Board, although he occasionally attended its meetings.

Justice STEPHENS. Thank you.

Proceed, Mr. Knuff.

Mr. KNUFF. I don't believe Judge Garrett is through reading.

Justice GARRETT. Yes, I am.

Mr. KNUFF. All right.

By Mr. KNUFF.

Q. Do you recognize this, Mr. Baumhogger, that is, Government's Exhibit 334 for Identification, as a reply to your previous memorandum to the Management Board?

A. A reply from Mr. Van Hagan, yes.

Q. From Mr. Van Hagan, yes.

A. Yes.

Q. You recognize that as Mr. Van Hagan's reply?

A. Yes.

Mr. KNUFF. We offer in evidence Government's Exhibit 334.

Mr. BROMLEY. We have only the usual objection.

Mr. FINCK. And the same objection.

Justice STEPHENS. Ruling is reserved with respect to National, Texas, and Celotex. With respect to the others, it is received subject to the usual reservation with
2602 respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 334, was received in evidence, as noted.

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 335, the same being a memorandum from Warren Henley, dated 7/11/38, addressed to W. G. Baumhogger. Would you please look at that and tell me whether or not you recognize it?

A. Yes, sir.

Q. And you received that from Mr. Warren Henley?

A. Yes, sir.

Mr. KNUFF. If Your Honor pleases, in connection with Government's Exhibit 335 for Identification, we offer this exhibit in evidence. We do not offer the pencilled or penned longhand memorandum at the bottom of the page. We are just offering the typewritten portion. That portion at the bottom of the page is not offered.

Mr. BROMLEY. We make the usual objection.

Justice STEPHENS. Ruling is reserved with respect to National, Celotex, and Texas. Otherwise, the exhibit is received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

2603 Mr. FINCK. If the Court please, that is not on the usual objection; that is on our specific objection, is it not, that you are reserving decision?

Justice STEPHENS. I am reserving decision on your objection that this class of testimony or exhibit which applies to perforated lath doesn't apply to the three companies I just mentioned. That is what we have been reserving ruling on.

Mr. FINCK. Very well.

(The document referred to, marked as Government's Exhibit 335, was received in evidence, as noted.)

Mr. KNUFF. You may cross-examine the witness.

Mr. BROMLEY. Will you give the last three exhibits to the witness, please?

(Exhibits handed to the witness.)

CROSS EXAMINATION

By Mr. BROMLEY.

Q. Mr. Baumhogger, you had not been connected with the gypsum industry prior to the time you became President of the Certain-teed Products Corporation, had you?

A. No, sir.

Q. And since you left that company, you have had no connection with the gypsum industry whatsoever, is that right?

A. That is right.

2604 Q. Referring to Exhibit 333, and particularly to the second paragraph, you refer down near the middle of that paragraph to a commitment made by Mr. Henning at a meeting that USG would maintain the minimum price on perforated lath at a higher level over non-perforated lath, do you not?

A. Yes, sir.

Q. Now the alleged commitment to which you refer in that paragraph, if made at all, was made in 1936, wasn't it?

A. Yes, sir.

Q. And you refer to that at the end of the first sentence of the second paragraph of your memorandum, don't you?

A. May I have that question, please?

(The question was read by the reporter.)

The WITNESS. Yes, sir.

By Mr. BROMLEY.

Q. You there say, in effect, that the licenses on perforated lath were offered by USG early in 1936?

A. Yes, sir.

Q. Then in the next sentence, "Acting as our representatives, Messrs. Henley and Van Hagan attended a meeting called by Mr. Henning"—that was a meeting which, as you understood it, occurred in 1936?

A. Yes, sir.

Q. Therefore, am I correct in assuming that you had no personal knowledge whatsoever as to what transpired at this particular meeting in 1936?

2605 A. That is correct.

Q. You weren't there yourself, of course?

A. No, sir.

Q. And at the time you dictated this memorandum, as disclosed in the first sentence of the second paragraph, you didn't even have the file before you, did you?

A. Correct.

Q. So that whatever you recited in this memorandum, so far as it related to the contents of any documents or correspondence, was based on your recollection and not on a current inspection of the files at the time you wrote the memorandum; isn't that right?

A. That is correct.

Q. How was it, then, that you heard that in 1936 Mr. Henning had made a commitment that USG would maintain, under your license, perforated lath prices at a differential above the price for plain lath?

A. May I preface my reply by saying that this is my best recollection?

Justice STEPHENS. Surely.

The WITNESS. Well, this is my best recollection. When the notice was received from United States Gypsum reducing the price of perforated lath, I telephoned Mr. Van Hagan and told him that the notice had been re-
2606 ceived, and that this meant a further reduction in our gross profit on lath, on perforated lath. And I had understood from somebody—I presume it was from Mr. Whittemore—that Van Hagan had attended the meeting with Mr. Henning, and I asked Van Hagan what his understanding was at the time that he attended the meeting. I thought he said that Mr. Henning made a commitment that a price differential of at least 25 cents would be maintained.

At a later time, however, as a matter of fact, at the Management Board meeting that was held subsequent to my memorandum of May 10—and I think also in this letter of May 16—Mr. Van Hagan told me that I had misinterpreted his remarks over the telephone; that there hadn't been a commitment made; that there had been a differential established, and that he assumed at the time that at least a 25-cent differential would be maintained.

By Mr. BROMLEY.

Q. So that after you dictated and distributed your May 10 memorandum, Exhibit 333, in which you refer to Mr. Henning's commitment, you found out that as a matter of fact the people who attended that meeting said that Henning made no commitment, isn't that correct?

A. That is correct.

Q. Isn't it a fact, Mr. Baumhogger, that you wrote this memorandum, Exhibit 333, really in order to smoke
2607 out the facts from your subordinates, because you weren't quite sure as to what they were telling you or as to the accuracy of what they were telling you?

A. That is true, I was handicapped somewhat by the fact that Mr. Henley was in Chicago, and Mr. Van Hagan was in either Buffalo or Akron, and Mr. Whittemore was in New York, and Mr. Ernst was carting the file around with him; and there was a great deal of hearsay, and I didn't seem to be able to put all the facts together in a manner that satisfied me. And I had had an opinion from somtbody, either verbal or in writing—I think it may have been from Ernst—saying something about the doubtful validity of USG's patents on perforated lath. And I was concerned about the fact that we were paying a 10-cent royalty and National Gypsum was not; and it seemed to me time to present all of the factors in a rather strong way and call the Management Board together and thresh it out.

Q. And that is the reason why, in your memorandum, Exhibit 333, you made the definite statement in the second paragraph that Henning had made a commitment to maintain the differential; isn't that right?

A. I think that was only partially the reason. I wanted to present the factors, as I say, factors rather than facts, as strongly as possible in order to aid the smoking-out process. But I am quite sure that when I dictated
2608 this memorandum I was under the impression that in telephone conversation with Van Hagan he had said something about a commitment, which he later denied.

Q. Now I notice on page 2, starting near the bottom, of Exhibit 333, you propose that a letter be written to Mr. Knode, the President of USG.

A. Yes, sir.

Q. And you quote in your memorandum, in complete form, the wording of the letter which you suggest should be sent to Knode—is that right?

A. Yes, sir.

Q. That goes from the bottom of page 2, including all of page 3, and to the middle of page 4?

A. That is right.

Q. It ends with the sentence: "An early statement from you regarding your decision in the matter will be appreciated."

A. Yes, sir.

Q. That is the end of the letter, which you dictated in this memorandum, which you proposed should be sent to Knode?

A. Yes.

Q. Now look at the bottom of page 2, the sentence beginning, "For that reason, we are of the opinion that you are not acquainted with the assurance given us by Mr.
2609 Henning prior to our acceptance of a License for the manufacture of Perforated Lath, which assurance was to this effect:".

A. Yes, sir.

Q. And then you state definitely that the assurance was to maintain a differential above the price of plain lath, don't you?

A. Yes, sir.

Q. Now did you ever send that letter?

A. No, sir.

Q. And isn't it the fact that after you found out that your subordinates either had misinformed you or that you had not understood them, you concluded that of course you couldn't send the letter and make any such accusation as this against USG, because it wasn't true?

A. That is correct.

Q. Now will you look at the last page, page 5 of your memorandum, Exhibit 333, in the 6th line from the top, the sentence beginning, "We shall, of course, have to consult counsel to determine whether we are incriminating ourselves by admitting that we were party to an agreement to maintain the price of Perforated Lath at a higher level than Non-Perforated; . . ." Isn't it a fact, sir, that after you found out that Henning had made no commitment, there was no need to and you never did consult your attorneys about the matter?

A. That is correct. I was completely overruled by
2610 the Management Board on the contents of this letter. And an entirely different letter was sent to Mr. Knode.

Q. There was a different letter sent?

A. To my recollection. And I don't know whether I am going further than I am supposed to, but I think that Mr. Henley's letter of July 11 is in response to a request from me that he follow up Mr. Knode to ascertain why I didn't have an answer to that letter.

Justice STEPHENS. Please read that answer. I am sorry, I missed it.

(The answer was read by the reporter.)

By Mr. BROMLEY.

Q. I show you what purports to be a photostat of a letter from you to Mr. Knode, dated May 20, 1938, and ask you whether that is the letter to which you have just referred as the one which was actually sent to Mr. Knode?

Mr. BROMLEY. Before I show it to you—Mr. Steffen, do you have the original of that letter, dated May 20, 1938, from Baumhogger to Knode?

Mr. STEFFEN. May I see the letter?

(Photostat of letter handed to Mr. Knuff.)

Mr. KNUFF. I haven't any recollection of ever seeing that.

Justice STEPHENS. Do you wish to mark this for Identification?

2611 Mr. BROMLEY. Yes.

Will you please mark this for Identification as Defendants' Exhibit 18?

(The document referred to was marked as Defendants' Exhibit 18 for Identification.)

By Mr. BROMLEY.

Q. Can you identify that as your signature?

A. Oh, yes.

Q. And is that the letter which you dictated and which was sent to Mr. Knode on or about May 20, 1938?

A. I know it is. This is the letter that was sent as a result of our Management Board meeting at which this Exhibit No. 333 was discussed.

Q. You said a moment ago that at that meeting you were overruled by your Management Board. You meant, didn't you, that you were overruled as to your version of the facts as set forth in Exhibit 333, the memorandum of May 10?

A. Yes, sir.

Q. And you were convinced, weren't you, after that meeting, that the fact was that Henning had never made any commitment to maintain any price?

A. I was convinced that our people believed he had not.

Q. Did you know at the very time that you wrote

2612 this memorandum, Exhibit 333, that there was in your file, or should have been, a letter from Mr. Henning on this subject, dated June 23, 1936?

A. No, sir. I heard the letter referred to yesterday, and that is the first time I knew it existed.

Q. I show you a document which has heretofore been marked Defendants' Exhibit 16 for Identification, and ask

you whether you knew, back in 1938, when you prepared Exhibit 333, that this letter from Mr. Henning on this subject was in your company's files?

Justice STEPHENS. Just a minute, Mr. Bromley, until we locate this exhibit.

Mr. BROMLEY. I have here, if the Court pleases, Judge Garrett's and Judge Jackson's files, which both of the Judges returned to me, which contain this letter.

Justice GARRETT. I supposed that on all of these exhibits where they are just marked for Identification and not introduced, that they should be returned to you until they are introduced.

Mr. BROMLEY. Yes, sir, and I just wanted to hand them to you now.

Justice STEPHENS. I took the file home during the recess because I wanted to have all the exhibits before me which had been talked about. I have that here, yes.

Mr. BROMLEY. I would like to ask Judge Garrett
2613 if he doesn't think, due to the fact that we are constantly referring to these exhibits for identification, that it would be more convenient for Judge Garrett and Judge Jackson to keep these exhibits?

Justice GARRETT. I am perfectly willing to keep them.

No exhibit has as yet been introduced by the defendant. All have been marked for identification but none introduced. Am I right in that?

Mr. BROMLEY. Yes, Your Honor.

Justice JACKSON. What exhibit is before the witness now, Mr. Bromley?

Mr. BROMLEY. Defendants' Exhibit 16 for Identification.

By Mr. BROMLEY.

Q. I call your attention to the second paragraph of that letter. Will you read it, please?

A. I have read it.

Q. Do you now see, sir, that that states definitely that under the contract the licensor has the right to determine to change or withdraw the minimum price or prices at which licensee shall sell perforated lath?

Mr. KNUFF. Just a moment. The question is objected to as asking for a conclusion of the witness.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. The objection is overruled on
2614 the ground that even if it does seek a conclusion, it is the type of conclusion which can be asked on

cross-examination as testing the reasonableness of the witness' previous statements.

The WITNESS. Yes.

By Mr. BROMLEY.

Q. Nobody had showed you that letter before you wrote Exhibit 333, is that what you say?

A. I don't recall ever having seen this before. I think it may have been in the company's files in the Chicago office instead of in its New York office where I was located. I see it is addressed to Chicago.

Justice STEPHENS. Which office were you in?

The WITNESS. New York.

By Mr. BROMLEY.

Q. Where was C. O. Brown's office?

A. C. O. Brown wasn't with the company while I was there.

Q. Now referring once more, please, to Exhibit 333, your memorandum of May 10, and the first paragraph, that paragraph beginning "Effective May 2nd, the U. S. Gypsum Company eliminated the differential of 25¢ per thousand feet on Perforated Lath . . ."—that refers to the fact that prior to this time your company, as licensee, had received a price bulletin from USG which re-
2615 duced the price fixed by USG under the license, from $13.25 per thousand feet to $13.00 per thousand feet?

A. That is right.

Q. Now you didn't want the price reduced, did you?

A. No, sir.

Q. Do you recall that this was a second reduction in the price of perforated lath which USG had made prior to May 10, 1938?

A. It seems to me that there was a substantial reduction made in the price of all lath at some time, at some earlier date than 1938.

Q. I think that is right, and don't you recall specifically that so far as perforated lath was concerned, in 1937 you had received a bulletin from USG which reduced the price by $2 a thousand, that is, from $15.25 to $13.25?

A. No, I can't recall that specifically. My recollection is that at some date previous to May 2, 1938, a bulletin had been received from USG reducing the price of all lath by a substantial amount, probably $2 a thousand.

Q. I show you, Mr. Baumhogger, what has been marked Defendants' Exhibit 17 for Identification, and ask you if that isn't a memorandum from Warren Henley to C. O. Brown, dated June 24, 1936?

A. That was prior to my time. I don't see how I could be expected to recognize the memorandum.

2616 Q. Well, I call your attention to the fact that it recites that it is Henley's memorandum to C. O. Brown, dated June 24, 1936, and ask you——

Mr. KNUFF (interposing). May it please the Court, is this cross-examination?

Mr. BROMLEY. It is. It has further reference to Defendants' Exhibit 16, and in what file it was.

Justice STEPHENS. Proceed.

By Mr. BROMLEY.

Q. You will notice, Mr. Baumhogger, that this memorandum quotes Mr. Henning's letter to Mr. Henley of June 23, 1936, which is Defendants' Exhibit 16 for Identification, which I just showed you.

A. Yes, sir.

Q. And do you see the handwriting at the top of it?

A. Yes.

Q. And do you see that it reads, "For your file. I sent you part of file 5 days ago."?

A. Yes.

Q. Now doesn't that indicate to you, then, that so far as Henning's letter to Henley of June 23, 1936, is concerned, Defendants' Exhibit 16 for Identification, a copy of it, at least, was in the New York file all the time?

A. Well, sir, all I can say is that it seems so, but I don't know.

2617 Q. Coming back to Exhibit 333 again, please, Mr. Baumhogger, and particularly page 2, in connection with your comment in the second full paragraph to the effect that the USG's patent on perforated lath could probably not be sustained, the fact is that this perforated lath was lath made under other patents, such as the Haggerty starch and the Roos foam, and was patented board without regard to the perforated patent,—it was patented lath, I mean, in which holes were punched; isn't that right?

Mr. STEFFEN. I would like to ask, simply to get the witness' understanding on the matter, as to whether it was patented under some other patents,—I don't think he is qualified as an expert on patent matters to testify.

Justice STEPHENS. We don't understand the question. Will you read it?

Mr. BROMLEY. I guess I had better withdraw it, because I confused it so that I don't believe anybody can understand it.

By Mr. BROMLEY.

Q. Perforated lath was really ordinary lath with holes of a certain size and spacing punched in it, wasn't it?

A. That is correct.

Q. Now ordinary lath was made under the license which you held from USG which gave you the right to use
2618 the lightweight Roos foam board patent and the starch patents, and other patents, in its manufacture, wasn't it?

A. I don't know what patents it gave us the right to use. All I know is that we had a license from USG to manufacture ordinary lath.

Q. Well, the lath in which you punched these holes was the lath which you manufactured under your general license, wasn't it?

A. Oh, yes.

Q. And under your general license, USG had the right to fix the prices for lath made by virtue of its terms?

A. That is correct.

Mr. BROMLEY. That is all.

Justice STEPHENS. Is there any other cross-examination by Defendants' counsel?

Mr. ADAMS. No, sir.

Mr. FINCK. No, sir.

Justice STEPHENS. Any re-direct examination?

Mr. KNUFF. No re-direct examination, Your Honor.

Justice GARRETT. Mr. Bromley, I wanted to ask you, this batch here begins with Defendants' Exhibit No. 14? Have I returned to you the others up to Exhibit 13?

Mr. BROMLEY. No, Your Honor.

Justice JACKSON. I retained mine.

Justice GARRETT. Then I guess I retained mine.

2619 Justice STEPHENS. Is this witness to be excused, gentlemen?

Mr. KNUFF. As far as the Government is concerned.

Mr. BROMLEY. Yes, we have no further questions.

Justice STEPHENS. Then you are excused, Mr. Baumhogger, and thank you for attending the Court.

(Witness excused.)

Justice STEPHENS. We will take a recess of five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2620 Justice STEPHENS. Proceed, gentlemen.

Mr. KNUFF. May it please the Court, the next two witnesses normally wouldn't be here until some time later. They are called out of order because the witness that we had anticipated using at this time, Mr. Tomkins, was engaged in some defense activities and at the request of Mr. O'Donnell last week we hurriedly substituted these two witnesses for Mr. Tomkins. Mr. Tomkins, I understand, will be here in Court on Thursday morning.

The next two witnesses will testify as to an entirely different branch of the case from anything we have previously been considering.

Justice STEPHENS. Very well.

Mr. KNUFF. Orin F. Perry, Jr.

Thereupon, ORIN F. PERRY, JR., a witness appearing for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. KNUFF.

Q. Will you state your name, please, for the record?

A. Orin F. Perry, Jr.

Q. Where do you live, Mr. Perry?

A. Dobbs Ferry, New York.

Q. In what business are you now engaged?

2621 A. At the present time, with General Motors Corporation.

Q. In what capacity?

A. In the Purchasing Department.

Q. How long have you been with General Motors?

A. Three months.

Q. And before that what was your business?

A. Orin F. Perry & Son, Inc.

Q. And what was the business of Orin F. Perry & Son, Inc.?

A. Wholesale distributors of building material.

Q. And that building material consisted of what?

A. Gypsum, lime, board, roofing and clay products.

Q. How long had you been engaged in the wholesale distribution of building material?

A. Personally, since 1919.

Q. And how long had the corporation been engaged in that business?

A. Since that time, since its organization.

Q. The corporation was organized in 1919?
A. That is right.
Q. And it was engaged in the wholesale distribution of building materials?
A. That is correct.
Q. And engaged continuously from 1919 up until about three months ago.
A. No, up until March, 1942.
2622 Q. In March, 1942, the company ceased to engage in that business?
A. It ceased to engage in that business, that is correct.
Q. And from 1942 until you became connected with General Motors, what were you doing?
A. I was in Greenland.
Q. Greenland?
A. Yes.
Q. Now you say you were engaged in the wholesale distribution of building materials. Were you so engaged in 1930?
A. Yes, sir.
Q. Were you handling any gypsum lath and gypsum wallboard at that time?
A. Yes, sir.
Q. Were you handling that as a wholesaler?
A. Yes, sir.
Q. Now do you know what I mean by a "wholesaler"?
A. Well, a "wholesaler" distributes to dealers, as against a retailer distributing to contractors.
Q. Were your sales confined solely to dealers?
A. Dealers, yes, sir.
Q. You did not supply contractors?
A. No, sir.
Q. From whom did you obtain your source of supply of lath and board?
2623 A. At that time, from the Certain-teed Products Corporation.
Q. And for how long a period previous to 1930 had you been obtaining your board and lath from Certain-teed Products Corporation?
A. We started in 1930, I believe.
Q. You started to handle gypsum board and gypsum lath in 1930?
A. We had handled other manufacturers' materials previous to that, though.
Q. Had you handled any board and lath previous to that?

A. Yes.

Q. From whom did you obtain your source of supply previous to that?

A. American Cement Plaster Company; Beaver Products Company; Universal Gypsum and Lime Company—then I guess from Certain-teed.

Q. Now you say that you started to handle Certain-teed's products around about 1930?

A. Yes.

Q. At that time did Certain-teed tell you at what price you were to sell gypsum wallboard and gypsum lath?

A. Yes, sir.

Mr. ADAMS. Just a moment, sir, I object to this unless the time and place be fixed, and the identity of the
2624 individual with whom the conversation is alleged to have been had.

Mr. KNUFF. We will come to that in a very few minutes. This is preliminary to that. I will fix the time and the place and the person that told it to him.

Justice STEPHENS. Proceed.

Mr. BROMLEY. I object to the question on the ground that it is immaterial. There is no charge in the complaint that affects the resale prices of wholesale distributors.

Mr. KNUFF. There is a charge in the complaint that they did fix the price of plaster, that there was a conspiracy here to fix the resale price of plaster. There is a definite allegation in the complaint to that effect.

Mr. BROMLEY. Where is that?

Mr. KNUFF. Paragraph 45(c) says, "concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern area".

Mr. BROMLEY. The only charge about plaster in the complaint is that the defendant companies agreed on prices, and that they didn't have any right to because plaster was not patented. There isn't any charge anywhere in the complaint that these defendants controlled the resale price of plaster. That has never been suggested at any time, anywhere.

Justice STEPHENS. The charge concerning resale has to do with manufacturing distributors, does it not?
2625 Mr. BROMLEY. Yes, sir.

Justice STEPHENS. What paragraph is that in?

Mr. BROMLEY. Paragraphs 108 to 111.

Mr. STEFFEN. And also 45 (e).

Justice STEPHENS. Do you wish to be heard on this, Mr. Knuff?

Mr. KNUFF. If your Honor please, I think clearly that the question is certainly admissible under paragraph 44 of the complaint which states the offenses with which the defendants are charged, that is with violation of the Sherman Act, and one of the violations of the Sherman Act is the fixing of prices.

In paragraph 45 (c) we have set forth one of the effects of it, which was that they were, "concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern area".

Now it seems to me that that comprehends the fixing of prices for plaster. This doesn't approach the problem that our offer will cover later on. This isn't a question of it being manufactured and sold. This is a question of fixing the price of plaster by these companies, and we propose to show by this witness that the Certain-teed Products Corporation did fix the prices of plaster, as one of the effects of the conspiracy.

Mr. BROMLEY. There is no charge of that kind
2626 ever suggested in the complaint anywhere.

Justice STEPHENS. It seems to the Presiding Judge that the question really raises the same question that we had before us on the offers of proof, and the memoranda which have been submitted by the Government and defendants' counsel, as to whether or not when a complaint has been drawn as specifically as this one, and followed by a bill of particulars, the Government can, nevertheless, introduced evidence concerning alleged violations of the Sherman Act which are not mentioned in the complaint.

The Court is distressed to have this question raised again, because either we must hold the witnesses over, and have that question argued out and get a ruling on it, and get it decided, if it is going to have to be met from time to time, or we must take the testimony subject to a motion to strike.

How long will the testimony of this witness take?

Mr. KNUFF. I don't think over an hour.

Justice STEPHENS. And the next witness will be on the same subject?

Mr. KNUFF. Yes, your Honor.

Justice STEPHENS. And will take about an hour?

Mr. KNUFF. The next witness will probably be longer than an hour.

Justice STEPHENS. And what is the personal convenience of these witness with respect to their business?

2627 Mr. KNUFF. I have never——

The WITNESS. Mine is bad.

Mr. KNUFF. What do you mean by that, Mr. Perry?

The WITNESS. I would like to be back tomorrow, if possible.

Justice STEPHENS. What is the name of the other witness?

Mr. KNUFF. Mr. Higgins.

Justice STEPHENS. Does your business demand your presence right away, Mr. Higgins? I presume it does.

Mr. HIGGINS. I am at the convenience of the Court, sir.

Justice STEPHENS. Thank you.

Mr. STEFFEN. I had thought, if I might say a word, that we might finish with Mr. Perry this afternoon very shortly, and then adjourn until tomorrow, and we will have Mr. Higgins only, as an additional witness, before Mr. Tomkins goes on Thursday. Then, tomorrow, we might have such discussion as the Court might like on this broad question. I think we would like to be heard on the offers of proof.

Justice STEPHENS. That is a good suggestion, except for this, that the Government's memorandum came in so late last week that we didn't get the defendants' memorandum until Monday morning, and we have been sitting all day since then and reading the record in the evening, and we haven't had a chance to examine the authorities presented by the defendants.

I am afraid we are going to have to take a day's recess to determine this question which is becoming so important.

2628 Mr. STEFFEN. It is very important, your Honor, and I would favor that.

Mr. KNUFF. If your Honors didn't get the Government's memorandum until late last week, there is certainly something the matter with our mailing room, because it left our office a week ago last Saturday. I would certainly be glad to find out just exactly what is the matter with our mailing room.

Justice JACKSON. I didn't get mine until Wednesday.

Mr. BROMLEY. And neither did I.

Mr. KNUFF. They left our office, I think, a week ago last Saturday.

Justice STEPHENS. I am very glad to know that, Mr. Knuff, because we were much disappointed at what we

thought was the tardiness in its presentation, because we specifically asked the Government to present it early in the recess, so that we would have full opportunity to consider it, and the defendants' memorandum, during the recess, and not have to interrupt the witnesses or take the time of the Court out of session. I am glad to know that.

Mr. KNUFF. I am surprised at your Honor's statement.

Justice STEPHENS. It might have been in the office of the clerk of the court, so we will not blame anyone until we have further proof.

Mr. JOHNSTON. May I say in that connection, that I didn't get my copy until two hours before I left to
2629 come up here on the train. So I think, whatever the accident may have been, it must have been general. It was my understanding that these were to have been furnished us within a few days after the adjournment on the 21st of December. Of course counsel for the defendants had only a few hours to prepare and submit their response.

Justice STEPHENS. It is a matter we do not wish to rule on hurriedly because the Government states it is an important part of its case, and the defendants' objections are vigorous, and we wish to be sound in our ruling upon it, and soundly advised before we rule.

So I think we will have to again take the testimony of these witnesses subject to a motion to strike after we have an argument and have had opportunity to consider the memoranda and authorities contained therein. I fear we shall have to take a recess, if necessary, of a day to consider those authorities. So you may proceed, subject to the right of the defendants to move to strike this testimony in accordance with a later ruling if such a motion is then proper.

By Mr. KNUFF.

Q. I believe, Mr. Perry, I asked you whether or not Certain-teed ever told you the price at which you should sell plaster and board?

A. They did.

Q. When was that?

2630 Mr. BROMLEY. Just a moment. I didn't hear the question. May I have it read, please?

Justice STEPHNS. Read the question.

(Thereupon, the second preceding question was read by the reporter).

Mr. BROMLEY. I object to the form of the question as leading and suggestive, and as calling for a conclusion. That is not the proper way to develop testimony of that importance. I move to strike the answer.

Justice STEPHENS. The Court thinks, Mr. Knuff, it would be preferable if the reverse order were used because the testimony, if this is an issue in the case, is critical, and the conventional way of asking questions of that sort is to ask whether or not the witness had a conversation with such-and-such a person on or about such-and-such a date, and then ask what was stated. This witness needn't be led, apparently.

The motion is granted.

By Mr. KNUFF.

Q. Did you have a conversation with anyone connected with Certain-teed concerning the price at which you should sell board?

A. Yes, sir.

Q. When was that?

A. When we first started in with them in 1930.

Q. With whom did you have that conversation?

2631 A. Mr. Smith was the sales manager at that time. I talked with him and also with Mr. Turner, a salesman.

Q. Do you recall Mr. Smith's first name?

A. I think his initials were E. E.—but I am not sure.

Q. And he was the sales manager for what concern?

A. Certain-teed Products Corporation.

Q. And Mr. Turner was——

A. (Interposing.) Salesman in New York City for the same company.

Q. Mr. Smith was the sales manager for Certain-teed in New York City?

A. Yes, sir.

Q. Will you just relate to the Court the conversation that you had?

Mr. BROMLEY. I object to that as immaterial because there is no charge in the complaint which covers resale price fixing as to board, and he has now shifted, as I understand it, from plaster to board. There still is no charge in the complaint as to board price fixing to this class of trade.

Justice STEPHENS. Your objection may be recorded. It is overruled at this time, subject to the right to move to strike the testimony on the final argument on this question of the extent to which the complaint permits proof of this type of alleged violation of the Sherman Act.

Mr. BROMLEY. I would like to record my objection

2632 on the ground of incompetency also, because not binding on any defendant but Certain-teed.

Mr. KNUFF. I realized that the question I asked of this witness was different, and I did that in view of your Honor's ruling. Originally my question was as to plaster, which I didn't think there could be any question about.

By Mr. KNUFF.

Q. Will you relate just what you said to Mr. Smith, and what he said to you, concerning the resale price of plaster and board?

Mr. BROMLEY. May we have the same objections to this and all subsequent questions and testimony?

Justice STEPHENS. Yes. The defendants, each of them, may have an objection recorded as to this class of testimony, whether it applies to plaster, board or miscellaneous gypsum products, on the ground that as to the defendants other than Certain-teed, it does not bind anyone but Certain-teed. We will rule on the whole thing at the close.

By Mr. KNUFF.

Q. Will you answer the question?

A. When we started in with Certain-teed we took in a full line of gypsum products, and to be competitive in the New York market we had to know the resale price to meet competition.

Q. You had to know whose resale price?

2633 A. Certain-teed's resale price.

Q. Yes?

A. So we were given a price list as to what we were to charge for each kind of material.

Q. Who gave you that price list?

A. Mr. Smith, as I recall it.

Q. What did Mr. Smith tell you at the time he gave you that, if he told you anything?

A. He told us that we would have to sell material at those prices, and at those prices only.

Q. And did you agree to do that, sir?

A. Yes, sir.

Q. And did you receive one price list, or more than one price list?

A. There were revisions every month or so, and we would keep getting a new copy.

Q. And would the price list be a printed price list or an oral price list?

A. No, we received first an oral price list and later on a printed copy.

Q. And the instructions that Mr. Smith gave you, were they oral or written?

A. They were oral at first, and later on we received written price lists.

Q. No—the instructions as to at what price you
2634 should sell, were they oral or written?

A. The instructions as to at what price we should sell for, were oral.

Q. Always oral?

A. We were just told to follow the price list.

Q. And on how many different occasions were you told that?

A. As I recall it, only at one time. We always followed the price list.

Q. You were told that once, and that is the only time you were told that?

A. Yes.

Q. What did you tell Mr. Smith when he told you that?

A. I told him we would follow his instructions.

Q. Now how long did you sell plaster and board for Certain-teed under those circumstances?

A. I think our agreement came to a close on the first of January, 1933.

Q. And do you recall whether you had any conversation with Certain-teed at that time, when it was terminated?

A. No, the termination was due to the fact that Certain-teed opened their own metropolitan warehouse.

Q. After 1933 did Certain-teed sell you as a jobber?

A. No, sir.

Q. They didn't sell you as a jobber?

A. No, sir.

2635 Q. Did you make any effort to buy from them at a jobber's discount?

A. Well, when our contract terminated they told us at that time that they were going to eliminate jobbers.

Mr. BROMLEY. Who is "they"?

The WITNESS. Certain-teed.

Mr. BROMLEY. I move to strike out the answer as a conclusion.

Mr. KNUFF. That is not a conclusion, it is what they told him.

Mr. BROMLEY. Who told him? What did he say?

Mr. KNUFF. If you will just be patient, I will endeavor to find out.

Mr. BROMLEY. I move to strike out the answer as not the proper way to testify to a conversation.

Mr. KNUFF. I don't know of any more appropriate way than that, than for the witness to tell what was said.

Justice STEPHENS. Well, Mr. Knuff, the Court has been exceedingly patient with leading questions on the part of the Government because some of them were preliminary, and because you were dealing with witnesses whose testimony concerned events of long years ago; but with due respect to your view, you are not proceeding in the usual way in asking these questions. You should ask the question if he had a conversation with such-and-such a per-
2636 son, what the subject of the conversation was, and what was stated. Otherwise, you put the witness' characterization of the conversation in. Objection sustained.

Mr. BROMLEY. May the answer be stricken, if your Honor please?

Justice STEPHENS. It may be stricken.

By Mr. KNUFF.

Q. When did you say you ceased to buy board and plaster from Certain-teed?

A. January 1, 1933.

Q. Now at that time did you have any conversation with anyone in Certain-teed concerning that?

A. Mr. Smith came up to see us and told us that it was going to be their policy to eliminate jobbers, and that they were going to open their own warehouse in Jersey City to cover the New York Metropolitan area.

Q. He told you it was going to be whose policy?

A. Their policy.

Q. And from that time on were you able to purchase gypsum board and gypsum plaster at a discount from Certain-teed?

A. No, sir.

Q. Did you subsequently try to buy from Certain-teed?

A. Not that I remember.

Q. Did you have any warehousing arrangement with Certain-teed?

2637 A. Not after that date.

Q. Previous to that date, did you have?

A. Previous to January 1, 1933?

Q. That is right.

A. Yes, sir.

Q. And what was that arrangement?

A. It was an arrangement whereby they made us specific allowances for unloading carloads of their material, hauling to our waehouse, handling, rent, and trucking.

Q. And will you just tell us what that arrangement was?

A. Well, we carried a full stock of their material and

after it was unloaded in the warehouse, Certain-teed could sell that material out of our warehouse for their own account, or we could sell it out of our warehouse for our account, and we were allowed on all the material we handled a certain sum for handling.

Q. And how much were you allowed on all the material you sold?

A. The allowance came in the form of an allowance for trucking and warehousing and handling. There was no sales allowance distinctly.

Q. And how much were you allowed for trucking?

A. It was a set price of so much a ton, covering all products.

Q. And what was that price?

2638 A. Each product covered a different amount, and each territory was a different amount. For instance, Brooklyn would be, say, $1.25 a ton.

Q. For what?

A. Plaster products.

Q. Anything that you hauled to Brooklyn you would get $1.25 a ton on?

A. For trucking.

Q. For trucking?

A. That is right.

Q. And suppose you hauled something up to the Bronx, what would you get?

A. Possibly 75 cents a ton.

Mr. ADAMS. May I inquire whether this was pursuant to a written contract?

Mr. KNUFF. I think that can be brought out on cross-examination.

Mr. ADAMS. Well, if it is pursuant to a written contract, I don't think the witness ought to be permitted to testify. I think the contract ought to be produced or its absence explained.

Mr. KNUFF. That isn't a suit on the contract at all.

Justice STEPHENS. That is very true, but the Court was surprised that objection was not made earlier, because this witness is apparently stating his conclusions as to

2639 these arrangements, his own understanding of them, and since the Government is relying upon these prices and arrangements, it would seem to the Court that the best evidence ought to be introduced. Now that may be, of course, in the form of conversations with some sales manager. It may be in the form of bulletins or price lists. It seems to the Court that the objection is well taken, Mr. Knuff. You had better inquire more precisely as to where

the witness got these understandings, and then if they were, of course, from conversations with Mr. Smith or other persons, he can tell what was stated. If they were from written arrangements, then we should know what they are, under the best evidence rule.

Mr. KNUFF. My understanding, from what this witness said, is that Mr. Smith would give him the price list and tell him that these were the prices he must sell at, and that he told him that on one occasion——

Justice STEPHENS (interposing). We are not talking about that, Mr. Knuff, that is all in. We are talking now about these sales arrangements.

Justice JACKSON. The trucking charges.

Mr. KNUFF. I understand that.

By Mr. KNUFF.

Q. Were these trucking arrangements oral or verbal?

A. They were in an agreement.

Q. Do you have that agreement?

2640 Justice JACKSON. They were in writing, you mean?

The WITNESS. They were all in writing.

By Mr. KNUFF.

Q. Do you have that agreement?

A. I might be able to locate it; I haven't it with me.

Q. You don't have it with you?

A. No, sir.

Mr. ADAMS. Under the circumstances I move to strike out all the testimony with respect to these arrangements. It is apparent that the witness has not even been asked to produce the agreement. It may well be in existence. The witness says he might be able to produce it. If he can, I think he ought to.

Mr. KNUFF. Will Mr. Adams produce for us the agreement entered into between Certain-teed and Orin F. Perry?

Mr. ADAMS. I certainly will if I have it. I don't have it here in the courtroom, but I can assure you that if I have it I will produce it.

Justice STEPHENS. Do you have it accessible in Washington?

Mr. ADAMS. I did not know about this witness being called, your Honor, and I don't know whether I have it in the Washington office or not. I will have to look for it at the conclusion of the testimony today. It may be that I have it. Unfortunately, I haven't brought my files for the

years 1930 to 1933 here with me today. I have a pretty clear recollection, your Honor, that it was sub-
2641 poenaed. I am not sure about that, but I think it was.

Justice STEPHENS. The motion to strike is granted.

By Mr. KNUFF.

Q. Mr. Perry, you say that in 1933 you were told by Certain-teed that it was their policy not to sell through jobbers any more, is that correct?

A. That is right.

Q. Subsequent to that, did you make any attempt to buy, as a jobber, from any other gypsum manufacturer?

A. Yes, sir.

Q. From what company?

A. I tried the Ebsary Company.

Q. What conversation did you have with the Ebsary Company?

A. I was told that——

Mr. ADAMS (interposing). Just a moment, please. Mr. Varian is not here, but I object to this on the ground that he ought to identify or state with whom he talked and the time and place.

Justice STEPHENS. Mr. Knuff was about to ask that question, I believe.

Mr. ADAMS. I am sorry.

Justice STEPHENS. Whom did you talk to?

The WITNESS. Mr. Lenci.

Justice STEPHENS. About when did you do so?

2642 The WITNESS. About three years ago.

By Mr. KNUFF.

Q. What did Mr. Lenci say to you?

Justice STEPHENS. Where was your conversation?

The WITNESS. In New York City.

Mr. ADAMS. I object to any conversation subsequent to the filing of the complaint. The complaint was filed in August, 1940. A conversation three years ago with Mr. Lenci cannot have anything to do with this case.

Justice STEPHENS. Well, it might or might not. It might constitute an admission. We can't tell until we hear it.

By Mr. KNUFF.

Q. You said you had a conversation with Mr. Lenci?

A. Yes.

Q. What did you say to Mr. Lenci?

A. I asked him if it was possible for him to give us a distributor's allowance on gypsum board.

Q. What did Mr. Lenci say to you?
A. "No."
Q. Did he tell you why?
A. No.
Q. Did you make any efforts to buy board from any other manufacturer?

Mr. ADAMS. At this point I move to strike out the testimony with respect to the conversation with Mr. Lenci.

2643 Justice STEPHENS. What do you claim for this, Mr. Knuff, since the conversation relates to a time after this suit was commenced?

Mr. KNUFF. I don't think it makes any difference whether it relates to a time after the suit was commenced, or not. The conspiracy can exist right up to the present time, and we can show it existing up to the present time. The filing of the suit did not toll the time of the conspiracy. The conspiracy exists up until it is actually discontinued.

Justice STEPHENS. I think that is correct. The motion to strike is denied.

By Mr. KNUFF.

Q. Did you subsequently make any effort to obtain any board from other companies?
A. I tried the Adamant Company of New Haven, Connecticut.
Q. The Connecticut Adamant Company?
A. Yes, but they do not manufacture board and they couldn't help me any.
Q. Did you try to buy board from any other manufacturer other than Certain-teed and Ebsary?
A. I tried National Gypsum.
Q. When was that?
A. Since 1940.
Q. Who did you see at National Gypsum Company?
A. I think I talked to Mr. Cerruti.
2644 Q. And who is Mr. Cerruti?
A. He is the New York sales manager.
Q. When did you talk with Mr. Cerruti?
A. I used to talk with him quite often. I used to distribute their lime products, and I used to see him every two weeks or so.
Q. In connection with attempting to buy board, when did you talk with him?
A. I should say it was in 1940 or 1941.
Q. What did you ask Mr. Cerruti?

A. I asked him if there was any possibility of us getting a distributor's allowance on board.

Q. What did he tell you?

A. He said there was no possibility.

Q. Did you talk with any other companies?

A. I think that was all.

Q. Just the National, Ebsary, Certain-teed and Adamant?

A. Yes.

Q. Did any of these companies tell you why they would not give you a distributor's discount?

A. Well, I was led to believe——

Q. (Interposing.) Did they tell you why they wouldn't give you a distributor's discount?

Mr. ADAMS. I object to that unless it is specified as to each company, as to who he talked to and the time,
2645 with reasonable certainty, and the place.

Mr. KNUFF. I will fix that.

Mr. ADAMS. He is wholesaling it. I object to this method of asking this kind of a leading question and then trying to tie it down to a particular person.

Justice STEPHENS. The objection is sustained, but the ruling does not foreclose you from asking this witness with respect to each one of these conversations, what he was told on that subject.

By Mr. KNUFF.

Q. What, if anything, did National tell you as to why they would sell you at a distributor's discount?

A. Well, after my experience with Certain-teed, when they told me there would be no more jobbers——

Q. (Interposing.) Who told you there would be no more jobbers?

A. Mr. Smith of Certain-teed. I took it for granted that the others were all in the same boat.

Mr. ADAMS. I move to strike out the answer.

Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. Did National tell you why they wouldn't sell you as a distributor?

Mr. ADAMS. I object to that. It has already been answered. He said he had no conversation with them on that subject.

2646 Justice STEPHENS. Whom did you talk with, if anyone, in National?

The WITNESS. Mr. Cerrutti.

Justice STEPHENS. What did he tell you, if anything, on that subject?

The WITNESS. He told me that he couldn't sell me any gypsum board at a discount.

By Mr. KNUFF.

Q. Did he tell you why?

A. No, he did not.

Q. Now did Mr. Lenci tell you why he couldn't sell you any board at a discount?

A. No, he didn't.

Q. And the only person who told you why he couldn't sell you at a discount was Mr. Smith of Certtain-teed?

A. At the termination of our agreement, that is correct.

Q. And you had been selling board and lath, board and plaster, from 1930 to 1933, is that correct, that is Certain-teed Products Corporation board and plaster?

A. That is right.

Q. And this conversation that you had with Mr. Smith took place when?

A. Around the first of January, 1933.

Q. I am not sure whether the record is clear on this, Mr. Perry. You say that your company went into
2647 business in 1919, is that correct?

A. That is right.

Q. When did you start to job gypsum products?

A. Immediately.

Q. And what gypsum products did you job?

A. We started in with Canadian plaster products, imported.

Q. And you acted as a jobber from 1919 until when?

A. Until 1942, when we closed the company.

Q. Now when did you start to job board?

A. I think about in 1923, with the American Cement Plaster's open-edge board.

Q. And do you recall any other companies for which you acted as a jobber as to board?

A. Beaver Products Company and Universal Gypsum.

Q. I wasn't sure that that was in the record.

Mr. KNUFF. You may cross-examine the witness.

2648 CROSS EXAMINATION

By Mr. BROMLEY.

Q. Was the Mr. Smith you talked about E. W. Smith?

A. That is right.

Q. Known as Pat Smith?

A. Yes, a great big fellow.

Mr. BROMLEY. May it please the Court, do I understand this witness is going to be recalled to produce the contract?

Can you answer that, Mr. Knuff?

Mr. KNUFF. I haven't seen the contract yet, so I don't know just exactly whether he is going to be recalled or not, until I see the contract.

Mr. BROMLEY. As I understand it, there is nothing to cross-examine on as to this witness, as to his relations with Certain-teed, under Your Honors' ruling, since it now turns out that those relations, whatever they were, were embodied in written contracts.

Justice STEPHENS. No, that is not quite correct. The Court ruled on the motion to strike that portion of the testimony which had to do with these trucking charges and the like, but the testimony concerning his price arrangements was not stricken out. There wasn't any motion to strike that out, except the general objection that they were not within the issues; that is to say, the best evidence rule wasn't invoked with respect to them.

2649 By Mr. BROMLEY.

Q. Was there anything in the written contract or contracts that you speak of, with Certain-teed, about the prices you should charge?

A. No, sir.

Q. Now what commission did you get for selling Certain-teed board, 15 percent?

A. With trucking, it would amount to that.

Q. Fifteen percent commission?

A. Yes.

Q. So that you were a sort of a warehousing agent for Certain-teed?

A. That is right.

Q. And Certain-teed made inventories every 30 days, of its material in the warehouse?

A. At the end of every month.

Q. At the end of every month?

A. Yes.

Q. And the price lists that you say you got were the price lists which Certain-teed issued to its own salesmen and agents covering prices on its own products?

A. That is correct.

Q. And in 1932, or 1933, you got into litigation with Certain-teed, didn't you?

A. That is right.

2650 Q. You brought a suit against them for damages, didn't you?

A. Well, it wasn't damages. The contract was terminated without allowing us to continue to fill agreements we had made.

Q. So you sued them for some mon ?

A. Yes.

Q. And it was after that that they refused to do business with you?

A. No, the suit was 6 months after the contract was terminated, I believe, or 3 months afterward.

Q. Well, at any rate, after you brought the suit, Certain-teed didn't do any more business with you?

A. They didn't do any business before we brought suit.

Q. And they didn't do any business afterwards either, did they?

A. No, not afterwards, either.

Q. Did they send you a written notice of termination of your contract?

A. No, sir.

Q. Just an oral notice?

A. Mr. Smith came up and told us.

Q. By the way, were you the only warehouse agent that Certain-teed had in the New York metropolitan area?

2651 A. The only one that I know of.

Q. And after they discontinued with you, you said they opened their own warehouse?

A. In New Jersey.

Q. And they served the same area that you had served for them?

A. That is correct.

Q. Now at all times subsequent to 1932, you could buy board from any manufacturer, couldn't you?

A. Not the closed-edge board.

Q. Isn't it a fact that you could buy all the board you wanted to, of the closed-edge type, from any manufacturer, and your only inability was to buy at a discount?

A. That is correct.

Q. They would sell you at the dealer's price, wouldn't they?

A. Yes.

Q. All you wanted?

A. All you wanted.

Q. So your only complaint was that they wouldn't give you 15 percent discount?

A. Well, whatever the discount was, they wouldn't give us any.

Q. They wouldn't give you any?

A. That is right.

2652 Q. And they told you, didn't they, that under the license they had from USG, they were only permitted to sell you at the price fixed by USG, and that that did not include a discount?

A. That is what Mr. Smith told me at that time.

Mr. BROMLEY. That is all.

Justice STEPHENS. Is there any cross-examination by other defendants?

(No response.)

Justice STEPHENS. Any re-direct-examination?

Mr. KNUFF. No re-direct-examination, Your Honor.

Justice STEPHENS. Do you wish this witness to be excused subject to recall?

Mr. STEFFEN. Yes, subject to recall when we see the contract that he speaks of.

Justice STEPHENS. And you will notify him when you need him?

Mr. STEFFEN. Yes, we will.

Justice STEPHENS. You may be excused, then, subject to recall.

Mr. ADAMS. May it be understood that he be subject to recall by either side? I don't know how it is left up in the air here. Is he a witness still on the stand but temporarily excused, or is he going to be recalled——

Justice STEPHENS (interposing). He may be re-
2653 called by either side on reasonable notice to the witness.

Mr. ADAMS. Thank you. That would enable us to cross-examine further if we desired?

Justice STEPHENS. Yes, you may reserve the right to cross-examine further if you desire.

Mr. ADAMS. Thank you.

(Witness excused, subject to recall.)

Justice STEPHENS. When did you say you expected Mr. Tomkins to be here?

Mr. STEFFEN. Thursday morning.

Justice STEPHENS. How long will he be on the witness stand?

Mr. STEFFEN. About a day and a half or possibly two days.

Justice STEPHENS. This next witness will be on how long?

Mr. STEFFEN. Half or three-quarters of a day. I talked to Mr. Higgins and he said he could spare tomorrow. He has a plane reservation for Friday. Tomorrow is Wednesday. We could put his testimony on Thursday and postpone Mr. Tomkins' for an additional day.

Justice STEPHENS. The trouble is, we haven't had an opportunity to read these authorities. We will have to have a free half day for that in some way. Is this witness going to be one the same subject as the witness that has
2654 just left the stand?

Mr. STEFFEN. Mr. Higgins is a jobber. I don't think it will raise the question that was raised here in quite the same form.

Justice STEPHENS. Well, if that is true, probably we had better proceed and get through with that witness, and then perhaps we had better adjourn then and Mr. Tomkins can come down the first of the week. We are beginning to be fearful that we will bog down completely in these reserved rulings, and we would like to get a disposition of them and if necessary take a couple of day to do so.

Mr. STEFFEN. All right.

Justice STEPHENS. So we will resume again tomorrow morning, and you may call the next witness at that time; and when he is through we will adjourn until we get a disposition of these reserved rulings.

(Thereupon, at 3:57 o'clock p.m., the proceedings were adjourned until 10:00 o'clock a.m., Wednesday, January 19, 1944.)

2655 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Wednesday, January 19, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

2672 Justice STEPHENS. Call your next witness.

Mr. STEFFEN. Mr. Higgins, please.

Thereupon, CHARLES A. HIGGINS, appearing as a 2673 witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Mr. STEFFEN. I have to make one statement out of order, in regard to Mr. Bromley's statement concerning the Beaver answers. We do not agree with his version of what took place between counsel.

Justice STEPHENS. You do not what?

Mr. STEFFEN. Agree with Mr. Bromley's statement of what took place between counsel.

Justice STEPHENS. Very well.

Proceed, gentlemen.

By Mr. STEFFEN.

Q. Will you state your full name for the record?

A. Charles A. Higgins.

Q. And where do you live, Mr. Higgins?

A. Buffalo, New York.

Q. What business are you engaged in?

A. Jobber of building materials.

Q. What is the name of your business?

A. Quality Materials Company.

Q. How long have you been conducting that business, Mr. Higgins?

A. Since the fall of 1937.

Q. And what were you doing prior to that?

A. Immediately prior to that I was employed by 2674 the National Gypsum Company.

Q. For what period of time?

A. From the fall of 1928 until I started the Quality Materials Company.

Q. And what were your duties with the National Gypsum Company?

A. My immediate assignment was the education of the sales organization on finished lime products, which lasted

for a period of 90 days, after which I was appointed Central Sales Manager.

Q. For the National Gypsum Company?

A. Yes, sir.

Q. What territory did that cover?

A. That covered what was termed the Central Division.

Q. And could you give us an idea of the territory?

A. That ran from Florida over to Louisiana, up to and including half of the State of Michigan, running on a line, taking in Tennessee, Ohio, half of Michigan, east as far as Pennsylvania. It did not take in the Carolinas. It included Kentucky and West Virginia.

Q. Do you recall how many salesmen you had under your supervision during this period?

A. Well, the figures ranged as the business grew, and the volume, and the market was available. I would say that the number varied from 20 to 50. That is purely a guess.

2675 Q. Well, that is an approximation, as I understand it, of the number of men that were employed during that period?

A. Yes, sir.

Q. What products were the National people selling at that time, starting with 1928, when you came with the company, September, 1928, I believe?

A. When I first entered their employ, they were selling strictly gypsum products. By that I mean wall plaster and gypsum wallboards.

Q. What sort of a board were they making in the fall of 1928?

A. They were making a board that we referred to as a lighter and stronger board and a board that was somewhat thicker than the competitive boards on the market. I forget the exact caliber of the board, but it was a board that we referred to as lighter and stronger, and it still was somewhat larger in caliber.

Q. That sounds somewhat like sales argument, "lighter and stronger".

A. It was a very good one, too.

Q. What sort of an edge did it have?

A. The edge was a partially closed edge.

Q. It was not a completely closed edge?

A. No, sir, some of the core of the board was visible.

Q. Where did the National people produce board

2676 at that time?

A. When I entered their employ, they were manufacturing board at Clarence Center, New York, and at National City, Michigan.

Q. They had two board mills?

A. Yes, sir.

Q. Could you tell us as to competitive conditions in 1928, and early 1929, in the industry?

A. Well, of course, that is going back a long ways, but I know that competition within the gypsum industry has always been very keen, and I don't imagine it was any keener then than it is today, although I am not in it today.

Q. Can you give us an idea of the price competition in 1928 and 1929?

A. Well, naturally, it would be difficult for me to place my finger on prices existing at that time, because to the best of my knowledge there was quite a fluctuation in prices from the time that I went into the industry until the time I left the industry.

Q. Is that strictly accurate? Are you familiar with the license agreements?

A. I am familiar with the license agreements only as having heard such a thing referred to.

Q. It is of record here that the license agreements were signed in May and October, 1929. Could you state
2677 whether there was a wide fluctuation of prices after those dates?

A. I don't think that there has been, or that there was as wide a variance after those dates, and my knowledge before those dates is limited to the time that I started in the industry, which was shortly before those dates.

Q. But you would say that competition, whether price competition or otherwise, was very active all through your connection with the industry?

A. Yes, sir. I had no price competition on boards operating under what is referred to as the license agreement.

Q. That is, in fact, that you had a uniform price after 1929?

A. Well, we had a published price from which we in the Central Division of the National Gypsum Company did not deviate.

Q. And did your competitors use the same price?

A. Well, to the best of my knowledge, because I did not see their price lists and we knew that we were getting business from our dealers, so we naturally had to assume that we were getting it on a competitive basis.

Q. And by "competitive basis", you mean what?

A. The same price.

Q. The same price, and competing on a level of superiority of product or on service or what?

A. On service, superior product.

2678 Q. Friendship?

A. The personal acquaintance of the individual in the territory.

Q. During this period following 1929, did you hear of the Board Survey Company?

A. I have heard the words "Board Survey" referred to, and in some correspondence it has been mentioned to me, that is, company correspondence.

Q. Did you ever see or hear of representatives of Board Survey being in your territory?

A. I heard that they had been in my territory, but I have never met anyone that was connected with the Board Survey.

Q. Now, from——

Mr. BROMLEY (interposing). Just a moment. I move the Court that that part of the answer as to what he heard be stricken, on the gound it is hearsay.

Mr. STEFFEN. It is more or less immaterial, but it is simply an indication as to what he knows as a sales manager concerning competitive conditions and the regulation of prices. It would normally be hearsay except that it is a matter obtained in ordinary business channels.

Justice STEPHENS. I think the Court is bound to strike it. If it is hearsay, it is incompetent. The motion is granted.

2679 By Mr. STEFFEN.

Q. Could you state of your own knowledge, Mr. Higgins, that representatives of Board Survey had talked with your dealers, investigating cases?

A. In one instance my dealers, one of my dealers, or one of the dealers in my area, had been approached by someone checking a supposed deviation that we had made from the published price of board.

Q. Now I want to take up——

Mr. BROMLEY (interposing). Just a moment. May I ask the witness whether it isn't the fact that everything he has just said was the result of what somebody told him?

Mr. STEFFEN. We are not asking for the conversation, Your Honor, and if it were what somebody told him it would not be objectionable.

Mr. BROMLEY. It would be hearsay. That is why it is objectionable.

Mr. STEFFEN. It would be hearsay only if we asked for the conversation. We are asking whether or not he knew that his dealers had been approached, and he said he did.

Mr. BROMLEY. He now says all that he knows is what he was told.

Justice STEPHENS. We have to receive evidence from the knowledge of witnesses. If his statements are based on what he was told by someone else, then, though he
2680 doesn't phrase his answers in the form of hearsay, they are hearsay, because the person who actually knows isn't on the witness stand for cross-examination under oath.

Answer Mr. Bromley's question, Mr. Higgins.

The WITNESS. Would you state it again, Mr. Bromley, please?

Mr. BROMLEY. Everything that you have just told Mr. Steffen in your answer is based upon something that somebody told you?

The WITNESS. That is true.

Justice STEPHENS. Is there a motion to strike that answer?

Mr. BROMLEY. Yes, Your Honor, I move to strike it.

Justice STEPHENS. The Court will have to strike the answer. If you want to call the dealer or the person who interviewed the dealer to testify on his own knowledge, all right. But the foundation of the hearsay rule is elementary, and it seems not necessary to repeat it, it is that when a fact is to be testified to, it must be testified to under oath by a person on the witness stand, subject to examination, who has himself knowledge of it.

By Mr. STEFFEN.

Q. What dealer did you refer to, Mr. Higgins?

A. Dwight Hinckley Lumber Company, Cleveland, Ohio.

Q. I will come to the Dwight Hinckley Lumber
2681 Company again in a minute or two.

During this period from September, 1928, when you came with National, to May, or the summer of 1929, did the National Gypsum Company sell to jobbers in your territory?

A. When I first started with National Gypsum Company, we were selling, to the best of my knowledge, one jobber in the area that I was covering.

Q. What was the name of that jobber?

A. The Toledo Plaster & Supply Company.

Q. And did you at any time discontinue selling that jobber?

A. We discontinued selling the Toledo Plaster & Supply Company some time after I became Central Sales Manager.

Q. And could you give us an idea of the time?

A. That is still going back quite a ways. I would say somewhere around 1930. It was about a year or so after I started with the company.

Q. And do you know why you discontinued selling to the Toledo Plaster & Supply Company?

Mr. BROMLEY. I object to that as incompetent because calling for a conclusion.

Justice JACKSON. He can answer that yes or no.

Justice STEPHENS. Technically, that particular question can be answered yes or no.

The WITNESS. Yes.

2682 By Mr. STEFFEN.

Q. Will you state why?

Mr. BROMLEY. Objected to as incompetent because calling for a conclusion.

Justice STEPHENS. No, that is overruled. We can't tell, at least, until we hear the answer. It may be relevant. It may have to do with the charge in the complaint with respect to the alleged elimination of jobbers. The objection is overruled.

The WITNESS. I would say that the best answer that I could make to that question would be the fact that the Toledo Plaster & Supply Company, who continued to buy materials from the National Gypsum Company after that date, could no longer buy as a jobber because their jobber price and their dealer price were one and the same.

By Mr. STEFFEN.

Q. Did you talk with Mr. Burley or Mr. Baker about this matter?

A. My contact, field contact and my contact with the general office, was with Mr. Burley.

Q. And were you occasionally in Buffalo, or did you write to him only?

A. I would say that until I moved to Buffalo, I was in the Buffalo office at least once a month.

Q. And do you recall having talked with Mr. Bur-
2683 ley on one of those visits to Buffalo concerning the Toledo account?

A. I do not recall any specific conversation, but being an account of importance, necessarily there was some discussion. I couldn't say what the discussion was, other

than the fact that they were very unhappy about the fact that they could not buy profitably as a jobber.

Q. You are speaking of the "Toledo Plaster & Supply Company" being unhappy?

A. Yes, sir.

Q. Who did you talk with there, if anyone?

A. Harry Hanson.

Justice STEPHENS. Clear my mind. Who is this Mr. Burley that is referred to?

The WITNESS. He was Vice President in Charge of Sales of the National Gypsum Company.

Mr. BROMLEY. I would like to move to strike out so much of his answer as refers to the fact that the Toledo people were unhappy about the situation, on the ground that it is a mere conclusion.

Mr. STEFFEN. Well, Your Honor, I should say that that certainly is not hearsay, and if the man who is dealing with an account, and has over a period of time dealt with an account, can't state that the account was unhappy that it had been stricken off the list as a jobber, I shouldn't think any of this would be admissible.

2684 Justice STEPHENS. The objection is overruled.

By Mr. STEPPEN.

Q. Now on your trips to Buffalo, concerning which you just testified, you say you spoke to Mr. Burley. Did you ever talk with Mr. Baker at about this time concerning the Toledo Plaster & Supply Company?

A. No, sir, I do not recall any conversation with Mr. Baker.

Justice STEPHENS. Judge Garrett tells me that the matter before the Court was not an objection, but a motion to strike. Therefore, the motion to strike is denied.

That relates to the motion made by Mr. Bromley to strike the witness' statement that the Toledo account was unhappy.

Mr. STEFFEN. May I have the last question, please?

(The last question and answer were read by the reporter.)

By Mr. STEFFEN.

Q. You say you talked with Mr. Burley, Mr. Higgins. Can you tell us what, if anything, you told Mr. Burley concerning the Toledo account, the Toledo Plaster & Supply Company account?

A. That is why I qualified my last answer, that Mr. Bromley took objection to, for the simple reason that I

don't think that I could remember at this time any
2685 specific conversation that I had with Mr. Burley.

Q. Could you remember broadly whether you ever discussed the Toledo account with Mr. Burley?

A. Yes, sir.

Q. And can you remember anything that Mr. Burley told you in connection with that account?

A. Well, naturally, as a field man, my interest was in keeping as large a volume as possible, and not knowing and not being able to recognize this so-called license agreement if I saw it walking down the street, I didn't know whether it was just something that was temporary or something that we could cut corners on, or what we could do to keep Toledo Plaster as an important account, because the loss of that volume in my division, of course, affected my sales cost, and naturally I had conversations with Mr. Burley to see if we could not go back to the old order of things. But the details of those conversations I couldn't remember.

Q. Did he ever tell you that you could go back?

A. No, sir, he said that it was very emphatic, and that there was absolutely no basis on which Toledo Plaster could be sold except as a dealer.

Q. Now do you recall, Mr. Higgins, any other jobbers who were operating about this period, in 1928 and 1929, in the gypsum industry?

A. That would be hearsay, because my knowl-
2686 edge was limited to the Central area, and there was only one other jobber that I knew of in the Cleveland market, and that was the Teachout Company.

Q. And they were a jobber in that market?

A. They were a jobber on wallboards, which was somewhat different from the Toledo Plaster, who also were jobbing on plaster and gypsum boards.

Q. Could you say of your own knowledge that the Teachout Company is still selling, as a jobber, gypsum wallboard?

A. At my last contact with the market, which was 6½ years ago, I would say they were not.

Q. Did you know of the Abbey Company?

A. Only by name.

Q. Do you know where they are located, and whether they are jobbers?

A. They are located in New York City.

Q. Do you know whether they were jobbers?

A. I do not know whether they were jobbers of gypsum products. My contact and knowledge of their business was as to other products.

Q. Did you know of a company called Winslow & Company, in Portland, Maine?

A. I have heard of them, but never had contact with them except on other commodities.

2687 Q. Do you know whether they were jobbers of gypsum products?

A. I do not know whether they ever were.

Justice STEPHENS. The Court will take its usual morning recess at this time, for five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2688 Justice STEPHENS. Proceed, gentlemen.

Mr. BROMLEY. May it please the Court, because I am in some doubt about the state of the record, I should like to have it appear, if your Honors are willing, that all of the defendants may have the usual objection as not binding upon them in the absence of proof of a conspiracy, to testimony by this witness and other witnesses as to conversations with other persons, without the necessity of a specific objection in each case.

Justice STEPHENS. That may be shown. The evidence is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

By Mr. STEFFEN.

Q. I want to mention one other company, Mr. Higgins. Did you know the Oakfield Gypsum Products Corporation as a jobber?

A. Did I know them with my company as being a jobber?

Q. Yes.

A. Yes, sir.

Q. What connection did you have with the Oakfield Gypsum Products Corporation, if any?

A. For a short time we jobbed——

Q. (Interposing.) Just a moment, when you speak of your company, do you mean National?

A. No, I mean the Quality Materials Company.

Q. Well, let's take that up a little later. What I

2689 wanted to find out was whether during this period in 1928 and 1929 the Oakfield Products Corporation, the Oakfield Gypsum Products Corporation, was a jobber at that time of gypsum products?

A. I am sorry I misunderstood you. I had no knowledge or acquaintance with the Oakfield Gypsum Products during that time.

Q. They were not in your territory?

A. No, sir.

Q. Did you know of the Fairmont Wall Plaster Company?

A. I do know the factors connected with the Fairmont Wall Plaster Company.

Q. What do you mean by "factors"?

A. The men who owned the company, Mr. Black and Mr. Spies.

Q. Was the Fairmont Wall Plaster Company a jobber during the period from 1928 to 1929, to your knowledge?

A. That would be hearsay. I did not sell them as a jobber, but I understood they were jobbers.

Mr. BROMLEY. I move that that part of the answer beginning with "but I understood" be stricken as a conclusion.

Mr. STEFFEN. Your Honor, he is testifying concerning his knowledge of the industry and of the business, and he is not testifying concerning a conversation. Mr. Higgins or Mr. Bromley cannot say anything of their own knowledge, practically, they have to rely on reports and upon
2690 trade information. If we were endeavoring to prove a conversation, that would be entirely different.

Justice STEPHENS. This seems to be a critical issue in the case——

Mr. STEFFEN (interposing). It is not a critical issue, if I may say so, it is rather an immaterial one as respects the Fairmont Wall Plaster Company.

Justice STEPHENS. Isn't the issue as to whether or not jobbers were eliminated a critical issue in the case?

Mr. STEFFEN. I think that is admitted.

Mr. BROMLEY. Wait a minute, it is admitted that the United States Gypsum Company as licensor under its license, in 1930 levelled off the price at which its licensees could sell jobbers so far as patented board was concerned, the situation prior to that time being that the licensor permitted its licensees to sell patented board to jobbers at a discount. Then, in 1930, in the exercise of their right, as we believe, as the owner of the patents, they set the price at which their licensees could sell to jobbers at the same figure at which the licensees were permitted to sell dealers. Now that is all we admit.

The Government contends that that eliminated jobbers because, it says, it was an economic result that a jobber couldn't stay in business if he couldn't get a discount. We don't admit that.

2691 Mr. STEFFEN. You don't admit that a jobber cannot stay in business if he cannot get a discount?

Mr. BROMLEY. Certainly not. There have been jobbers ever since, and there are plenty of jobbers in the business because they render a service to the dealers, because they make readily available and quickly available odd-lot supplies of board and other materials when the dealers who want such products cannot afford to buy carload lots. Those jobbers have always been in business, they can stay in business, they charge a slight premium over the dealer price in return for the jobbing service which they render to the dealers whom they serve. There have always been jobbers since this price change in 1930, and there always will be, in the board field.

Justice STEPHENS. Read the question and answer.

(Thereupon, the last question and answer were read by the reporter.)

Justice STEPHENS. The Court does not rule, of course, Mr. Steffen, that you cannot put a witness on who, being thoroughly familiar with trade information may not make statemetns on the basis of trade information. That, of course, is customarily done by all of us, as you suggest. But here is a charge that jobbers were eliminated as a result of the license practices of the company. Whether or not a man was a jobber, and whether or not he was eliminated, are strict issues of fact, and interpretation of fact, in the case. If we permit this witness to

2692 testify that he understood someone was a jobber, and that is in the record as establishing that he was a jobber, there is no basis for cross-examination. This witness admits he doesn't know. It seems to us a clear violation of the hearsay rule and the motion is granted.

Mr. STEFFEN. Will Mr. Bromley admit that the Fairmont Wall Plaster Company was a jobber?

Mr. BROMLEY. No, because I don't know.

By Mr. STEFFEN.

Q. What was the basis of your information, if any, Mr. Higgins, in your reply that you understood that the Fairmont Wall Plaster Company was a jobber? You stated that it was hearsay, and I think that that is a matter for the Court to determine, whether it is hearsay.

A. Well, it was was hearsay based on discussions with the individuals, both Mr. Black and Mr. Spies—if that is hearsay—but I have never seen any invoices where they had been billed as jobbers. All I had was a verbal discussion with Mr. Spies and Mr. Black.

Q. And would you say that it was general trade information that they were jobbers, or that they were not?

Mr. BROMLEY. That is just another way of getting at the same result. I object to it as incompetent.

Justice STEPHENS. Isn't there any other way of proving or finding out whether these people were jobbers?

2693 Mr. STEFFEN. Certainly, we are going to put on Mr. Spies as a witness, and there is no question about it; and I would suspect that Mr. Bromley knows about it in the way we know most things. Of course he has never been in there and looked over their books, I don't suppose.

Justice STEPHENS. Let's not have personalities. If the objection is insisted upon it is sustained.

Mr. BROMLEY. All I can say is that after six and a half weeks, Judge Goldsborough said he didn't know what a jobber was, and I am likewise in the same situation.

Justice STEPHENS. Well, let's prove this by Mr. Spies. He ought to know, if he is available. Proceed with another subject with this witness.

By Mr. STEFFEN.

Q. Mr. Bromley says he doesn't know what a jobber is, Mr. Higgins. Will you give us your general notion of the term "jobber" when you use it? I would like to have the broad term defined and any qualifications or any discussion you have on what is a jobber.

A. Well, from a facetious standpoint, a jobber is the lowest form of animal life. (Laughter.)

But the terms "wholesaler", "jobber", and "distributor" have been footballed and kicked around, and they vary with different industries.

Q. Let's stay with the gypsum industry for a bit.

2694 A. Of course there are no jobbers in the gypsum industry. But a jobber is—and we are jobbers, we buy materials from manufacturers and sell to dealers, and bill those dealers, and carry our accounts and pay the manufacturer. So that we buy the material and we sell it, and pay the manufacturer.

Justice STEPHENS. What is the difference, if any, between a jobber and a wholesaler?

The WITNESS. Well, a wholesaler is a misnomer because, for instance, this Dwight Hinckley Lumber Company is both a wholesaler and a retailer. They sell to other dealers in carload lots. In other words, that is a wholesale transaction.

By Mr. STEFFEN.

Q. That would be a jobber transaction, would you say?

A. Yes, sir. Then they sell to dealers who pick up at their warehouse, and that is a warehouse operation, but they also sell retailers.

Justice STEPHENS. You say the word "wholesaler" is a misnomer because some of them sell to retailers. Whom would they sell to if not to retailers?

The WITNESS. Well, they could sell to jobbers. That is why, your Honor, the term "jobber" is a misnomer because——

Mr. STEFFEN (interposing). You mean the term "wholesaler" is a misnomer?

The WITNESS. Yes—the term is limited within the confines of the commodity that is in question.

2695 For instance, a distributor, say, for General Motors Products, could have the State of Ohio as a distributor, and sell jobbers in Cleveland and Cincinnati. So that your jobber would then be a local factor. But it depends on the industry or the commodity that is in question; and in the building materials industry there are so many different divisions that it is difficult to define the function of a jobber.

Justice STEPHENS. The Court as presently advised will adopt the remarks of Judge Goldsborough. (Laughter.)

The WITNESS. I might say this, that a jobber is sometimes created during a period of stress or when some manufacturer needs additional volume, he will take a large retail outlet and make him a jobber. That sometimes is temporary. So that the term "jobber" is not only limited to the commodity, but it is limited to the economic cycle.

Justice STEPHENS. Well, there is a chain of middlemen, so to speak, between the manufacturer and the ultimate consumer?

The WITNESS. Yes.

Justice STEPHENS. One of the ultimate consumers is the retailer in ordinary business merchandising; but if you talk in terms of a simple item like stoves, for example, the ultimate consumer is the homeowner who buys the stove. Then next is the retailer who retails that stove to him, and between the retailer and the manufacturer you itemize both the wholesaler and jobber?

2696 The WITNESS. Yes.

Justice STEPHENS. Could you, just laying aside the gypsum industry and talking as an experienced businessman, tell us what is the difference between a wholesaler and a jobber?

The WITNESS. The difference between a wholesaler and a jobber—the best way that I can describe it would be, assuming that you owned a stove plant (you mentioned stoves as a commodity), it is not economic for you to have contact, as a manufacturer, with too many field men. You therefore——

Justice JACKSON (interposing). Who would be the field men, the dealers?

The WITNESS. No, sir, the wholesalers or jobbers, let's say the jobbers.

But you would assign the State of Ohio to John Doe, and the State of Pennsylvania to Jim Brown, and so forth, so that you would be cutting down the necessity for you listening to all of the little detailed complaints that come in, or the field problems. You are assigning a responsibility to that wholesaler to save you the trouble of organizing too much check-up yourself. Then he, in turn, appoints his jobbers. He doesn't sell anything direct himself, except to a jobber. He is called either a wholesaler or a distributor.

Justice STEPHENS. In other words, a jobber is an intermediary between the wholesaler and the retailer?

The WITNESS. In a number of commodities, yes, sir.

2697 By Mr. STEFFEN.

Q. He may be an intermediary directly between the manufacturer and the dealer?

A. That is right, sir.

Mr. STEFFEN. If that is perfectly clear to the Court, I will proceed. (Laughter.)

Justice STEPHENS. It was until you asked the last question, Mr. Steffen, but that restored it to its former status. (Laughter.)

By Mr. STEFFEN.

Q. Well, Mr. Higgins, let's explain it in terms of your business. You started business in about what year, did you say?

A. The fall of 1937.

Q. And where are you located?

A. Buffalo, New York.

Q. What lines do you carry?

A. A full line of clay products, which means sewer pipe, flue lining, face brick, building tile, drain tile, lime products, insulation boards and rock wool; also metal products.

Q. Do you carry metal lath?

A. No, sir. By "metal products" I mean fireplace equipment and ash dump doors, and things like that. I guess that covers it.

Q. You omitted both plaster and plaster board.

A. We do not job plaster or plaster board.

2698 Q. I want to ask you this question—to whom do you sell?

A. We sell to dealers only, building material and lumber dealers.

Q. And I want now to have you tell the Court what line——

Justice JACKSON (interposing). May I interject a question?

Mr. STEFFEN. Certainly.

Justice JACKSON. And they, in turn, sell to contractors?

The WITNESS. That is right.

Mr. STEFFEN. I think that is the sequence.

By Mr. STEFFEN.

Q. What line or lines of products do your dealers ordinarily carry?

A. All dealers carry—and when I say "all dealers" I mean ninety per cent of our dealers—they carry everything that we handle.

Q. And do they sell additional products?

A. Yes, sir.

Q. For example?

A. Well, gypsum products and cement.

Q. And whom do they service, or whom do they sell to?

A. They sell to the contractor.

Q. And the contractor is engaged in what business?

A. He is engaged in building either for himself

2699 or for someone that gives him a contract to build for them.

Q. So that you could use the phrase "general builders' supplies"?

A. Yes, sir.

Q. Did you ever sell either plaster or gypsum board in your company, or rather did your company ever sell gypsum board or plaster?

A. The Quality Materials Company?

Q. That is right.

A. Well, we sell through our Detroit yard——

Q. (Interposing.) No, let's start at the beginning, please, and we will come to the Detroit yard later.

A. We have sold gypsum wall plaster as a jobber.

Q. What was your source of supply?

A. The Oakfield Gypsum Products Corporation.
Q. Did you ever buy from Ebsary?
A. No, sir.
Q. Do you recall how long you bought from the Oakfield Gypsum Products Corporation?
A. To the best of my knowledge, from three to four months.
Q. And did you buy both plaster and board from the Oakfield Products Corporation, or merely plaster?
A. Just plaster, sir.

Q. Did you attempt to buy board from the Oak-
2700 field Gypsum Products Corporation?
A. No, sir.

Q. What period was this when you were dealing with the Oaflfield Gypsum Products Corporation?
A. I would say from about the first of January, 1938, to about April, 1938. It might have been thirty days one way or the other, but I think that is pretty close.
Q. I want to show you Government's Exhibit No. 336 for identification, which purports to be an invoice of the Oakfield Gypsum Products Corporation to the Quality Materials Company under date of May 21, 1938.
Mr. STEFFEN. That is out of order, your Honor, but this examination is somewhat out of order.
Justice STEPHENS. That is the third from the last document in this set, apparently?
Mr. STEFFEN. That is right.
Justice STEPHENS. What number is that, Mrs. Gillette?
Mrs. GILLETTE. 336.
Justice STEPHENS. Thank you.

By Mr. STEFFEN.

Q. Do you recognize Government's Exhibit No. 336 for identification, Mr. Higgins?
A. Yes, sir.
Q. Will you tell the Court what it is?

A. That is an invoice to the Quality Materials
2701 Company from the Oakfield Gypsum Products Corporation, on a shipment made to the City Material & Coal Company at Cleveland, Ohio, for ten tons of Oakleaf neat plaster.

Q. That, "less 15% commission" would be your commission on the plaster.
A. Yes, sir.
Q. And that shipment went directly from Oakfield Gypsum to the City Material & Coal Company in Cleveland?
A. Yes, sir.

Q. Now what is meant by this language, "board billed direct to City Material & Coal Co. and freight deducted from their invoice"?

A. Ten tons of gypsum plaster is a half carload, which it is not economic to ship. The balance of the car was filled out with gypsum lath.

Q. And how was that billed, if you can tell the Court?

A. The Oakfield Gypsum Products Corporation billed the City Material & Coal Company for it.

Q. Who sold the order—if it was sold—to the City Material & Coal Company?

A. The Quality Materials Company.

Q. Why was that arrangement entered into in that way?

Mr. BROMLEY. I object to that as calling for a conclusion.

Mr. STEFFEN. I think it is one that he can properly give, your Honor.

2702

Justice STEPHENS. It is explanatory of the method of doing business. The objection is overruled.

The WITNESS. May I have the question, please?

By Mr. STEFFEN.

Q. Why was this transaction entered into in this way?

A. The City Material & Coal Company, taking on a new brand of plaster unknown to the Cleveland market, were reluctant to take a full or twenty-ton car, and agreed to take a half car, and would fill the balance of the car with gypsum lath.

Justice STEPHENS. Which they also purchased from you?

The WITNESS. We accepted the order.

By Mr. STEFFEN.

Q. Who sold the order?

A. We did not sell the gypsum lath, that is we contacted the dealer and filled the car out with gypsum lath, and we refused to bill any product on which we did not have a profit.

Q. Why wouldn't you have a profit on this, I am not quite clear, Mr. Higgins?

A. Well, our price was the same as the dealer price.

Q. That is, you tried to buy board from the Oakfield Gypsum Products Corporation?

A. Well, I didn't try very hard.

Q. Why not?

2703

A. Because I knew, after my experience in the gypsum industry, that I could not buy it and resell it in carload lots at a profit.

Q. Why not?

A. Because my price would be the same as the dealer price.

Q. That is, you would have to ship and pay the freight and still only get the same price as the dealer?

A. Well, the freight would be absorbed by the dealer, of course, but I would be out my overhead expense in connection with the transaction.

Q. Was it possible for you to buy from the Oakfield Gypsum Products Corporation at any discount from the dealer price?

A. Gypsum wallboard?

Q. Yes.

A. No, sir.

Q. And therefore, I understand, you resorted to this way of filling a car in order to make it an economic shipment?

A. That is right, sir.

Q. Now, how long did you continue jobbing plaster for the Oakfield people, do you remember, or does this refresh your recollection?

A. It is purely a guess when I say three or four months.

Q. I want to show you Government's Exhibits 337 and 338 for identification, the first being a document
2704 from the Oakfield Gypsum Products Corporation reciting a sale to Thomas Cox Company, Inc., under date of June 16, 1938, and the second one being a similar writing under date of June 20, 1938. Can you identify Government Exhibits 337 and 338, Mr. Higgins?

A. Yes, sir.

Q. What are they, please?

A. 337 is an acknowledgment of an order for a truckload of gypsum lath and wallboard to the Thomas Cox Company, Inc., Niagara Falls, New York.

Q. And are you familiar with that order?

A. I remember that we did receive the order.

Q. What do you mean by "we" received the order?

A. In our Buffalo office.

Q. And what became of the order?

A. We transmitted the order to the Oakfield Gypsum Products Corporation who, in turn, shipped the material and billed it direct to the Thomas Cox Company.

Justice STEPHENS. By "we" you mean the Quality Materials Company? When you said "we" received the order in the Buffalo office, you meant the Quality Materials Company?

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. And did your company receive a jobber's profit on that order?

A. No, sir.

2705 Q. What became of the Oakfield Gypsum Products Corporation; did they continue in business?

A. I don't know how to answer that.

Justice STEPHENS. Well, do you know?

The WITNESS. I don't know, sir, other than by hearsay.

Justice STEPHENS. If you don't know what became of them, just say so. You don't have to answer questions that you cannot answer.

Mr. STEFFEN. I would suggest to the Court that Mr. Higgins should not apply the hearsay rule, that he should state what he knows.

Justice STEPHENS. That is true. You must leave it to us to determine whether or not the matter is hearsay. You are expected to respond to the questions asked and if the questions or answers are thought to be improper, the opposing side will have an opportunity to object, and then we will determine whether it is hearsay or not. But nevertheless, we do not want you to feel restricted and ill at ease. If you think you cannot answer a question as asked, just frankly say so.

By Mr. STEFFEN.

Q. The general understanding in the trade is that the Oakfield people were bought out by National, isn't that so?

A. That is right, sir.

Q. And did you try to make any other connection to buy board on a jobber's commission after you had these

2706 transactions with the Oakfield people?

A. No, sir.

Q. Have you ever talked with either Mr. Baker or Mr. Burley in regard to the possibility of buying board?

A. I will withdraw that statement I just made. We purchased plaster products from the Grand Rapids—not the Grand Rapids Plaster Company, I am sorry—what is the name of that gypsum company in Grand Rapids? There are two plants, and I can't think of the name of this other plant—I have it, Alabastine.

Q. You did what?

A. We did purchase some plaster from Alabastine at Grand Rapids after we had done business with the Oakfield Gypsum Products people. That was some two or three years later.

Q. My question was directed largely to board. Did you attempt to get a board connection on a jobber basis?

A. No, sir.

Q. And why not?

A. Well, having been in the industry for a period of nine years, I knew that I could not buy board and resell it at a profit as a jobber.

Q. What is your present territory? I mean what territory does the Quality Materials Company service?

A. We have shipped into every State east of the Mississippi River with the exception of Louisiana, Mississippi and Alabama.

2707 Q. And you shipped into those States the various materials that you have told us about?

A. Yes, sir.

Q. Will you tell the Court whether you consider that a jobber serves an economic function in selling products under those circumstances?

A. Yes, sir.

Mr. BROMLEY. I object to that as immaterial and incompetent, and move to strike the answer.

Mr. STEFFEN. I would like, inasmuch as there is an uncertainty here as to who are jobbers and as to what their position is, to have the witness state very briefly—it will just take a moment or two—what he regards the economic function of a jobber to be.

Justice STEPHENS. Well, if you want to ask the witness what a jobber does in the business world, that is one thing, but if you want to ask this witness to state whether or not in his opinion a jobber discharges an economic function in the technical sense in which an economist would describe that, I think that is entirely different.

Mr. STEFFEN. I didn't want to ask that at all. I wanted to ask what function a jobber performed as a business matter.

Justice STEPHENS. You may answer that.

Mr. BROMLEY. Is it now understood that this is

2708 confined to the gypsum industry?

Mr. STEFFEN. No, this is just generally, because jobbers have been eliminated from the gypsum industry, we contend. I want to find out what the jobber function is.

Justice STEPHENS. In view of the previous experiment on this subject, I am not certain we will get anywhere, but you can try again.

Mr. STEFFEN. Thank you.

Justice STEPHENS. I don't say that in disrespect to the witness at all. I realize, Mr. Higgins, that there are overlapping relationships and overlapping functions between wholesalers and jobbers, and it is very difficult to give a precise definition, and I know that you are trying the best you can to help us out.

Tell us in your own way what a jobber does, what his business job is.

The WITNESS. Well, suppose, instead of taking that high-dive off of that jobber description board again, that I limit my statement to our own business.

By Mr. STEFFEN.

Q. All right.

A. We serve a very definite function in contacting, over a wide area, for smaller manufacturers who are not in a position to maintain a sales forces that could efficiently cover the area that would give them what we term
2709 healthy distribution. We are capable of doing that, based strictly on the fact that we carry a varied line of commodities that are considered volume commodities in different industries. That allows us to travel men across the country and to police the situation, and in addition to giving healthy distribution, relieve the small manufacturer of credit risks and responsibilities, and just let him continue his function of manufacturing.

Justice STEPHENS. Let's put it this way, if I may perhaps try to help a little here. Let's use first the general term "distributor" as a broad term which covers both jobbers and wholesalers. Isn't this what you are trying to tell us—that a manufacturer, as a matter of business convenience, limits his contact to that kind of a distributor that we generally speak of as a wholesaler, who buys in very large quantities, but who himself does not have an immediate contact with the dealer, ordinarily? This wholesaler has himself a contact with a group of other distributors known as jobbers, and they do have a direct contact with the dealers. So you are an intermediary, aren't you, between the wholesaler as you have described him, and the dealer?

The WITNESS. No, sir, we go direct from the manufacturer to the dealer.

Justice STEPHENS. You don't buy from the wholesaler?

The WITNESS. No, sir, all of our contacts are di-
2710 rect manufacturer contacts.

Justice JACKSON. And you are a jobber, you call yourself a jobber?

The WITNESS. Yes, sir.

Mr. STEFFEN. And you don't sell to contractors?

The WITNESS. No, sir.

Justice STEPHENS. How are you different from a wholesaler, then?

The WITNESS. Please! (Laughter.)

By Mr. STEFFEN.

Q. Let me get at this question, Mr. Higgins. Is the jobber as necessary to a large company as he would be to a small company?

A. A jobber to a large company would probably embarrass field sales efforts.

Q. Would that apply, for example, to a company like United States Gypsum Company?

A. I would say so.

Q. Do they have a very large line of products?

A. They have a very complete line of products.

Q. In the case of a small company, a one-plant company, making only one product, as for example, the Ebsary Gypsum Company, would, perhaps, a jobber be more necessary to that company?

A. Well, I am a jobber, but I wouldn't want to be a
2711 jobber for Mr. Ebsary, even though I would like to be a gypsum jobber. (Laughter.)

Q. Well, I think that gets a little beyond the record, your Honor.

The point I wanted to make was that with a small one-plant operator, where he hasn't the opportunity to cover the entire country or to distribute his efforts, a jobber in your opinion, as I understand it, would be more important?

A. Well, we feel that we could sell a good volume of products for a single gypsum plant, yes, sir.

Q. Have you ever made an estimate of the increase or possible increase in business that you might get if you were able to job gypsum board and plaster?

A. No, sir, and probably one reason is that we have been so busy with our other products. All we know is that we would like to have gypsum and cement which are both items which are not jobbed.

Q. Can you give us an idea of the general size of your business, Mr. Higgins?

A. We did, last year, about $1,115,000, worth of business.

Justice STEPHENS. That is gross sales?

The WITNESS. Yes, sir, after freights and discounts.

By Mr. STEFFEN.

Q. Now I would like to go back to Mr. Dwight
2712 Hinckley. Who was Dwight Hinckley?

A. Dwight Hinckley is a lumber wholesaler with headquarters in Cincinnati, Ohio, who maintains and operates wholesale pick-up yards and solicits carload business on lumber from lumber dealers, and maintains yards in Cincinnati, Detroit and Cleveland.

Q. And was there a complaint against the Dwight Hinckley people, or rather against the National Gypsum Company, back in 1932, do you recall, concerning Dwight Hinckley?

A. I don't understand the meaning of the word "complaint".

Q. Let me show you Government's Exhibit 339 for identification.

Mr. STEFFEN: This is the second item in your folders, your Honors.

By Mr. STEFFEN.

Q. This purports to be a letter from Board Survey Company, addressed to the National Gypsum Company under date of May 17, 1932.

I will ask you to read that, Mr. Higgins, and then I will ask you a question or two.

(Witness examines document.)

Can you identify Government's Exhibit 339 by the writing or in any other way, Mr. Higgins?

A. I can identify the reference to the Dwight Hinckley Lumber Company.

2713 Q. Are you familiar with the handwriting at the foot of the exhibit?

A. I wouldn't say that I was familiar with any handwriting, sir.

Q. Who would the initials "E.B.B." refer to, if you know? Was there anyone connected with National having those initials?

A. There was one man with whom I had correspondence who had those initials.

Q. Who was that?

A. His name was Mr. Biesinger.

Q. What was his position?

A. I don't know that he ever had any official title, I never heard of it, sir. He was an employee.

Q. Was he connected with the National Gypsum Company?

A. Yes, sir.

Q. You state that you are familiar with the transaction referred to in the letter, is that correct?

A. I stated that I was familiar with the name referred to, sir.

Q. With the name referred to?

A. Yes, sir, and the fact that there had been some discussion with Dwight Hinckley in reference to price conditions in the market.

Q. And would you regard this as a complaint from the Board Survey Company addressed to the National
2714 Gypsum Company in regard to those matters?

A. I would say, after reading it, that it would be, sir.

Q. Now I want to show you Government's Exhibit No. 340, which purports to be a memorandum from Mr. Burley to you under date of May 25, 1932, and ask to have you read that, please.

Justice STEPHENS. I suppose the letters, "LCL" mean "less than carload lot", do they not?

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. Can you identify Government's Exhibit 340 for identification, Mr. Higgins, by anything about the memorandum?

A. I identify it as bearing my handwriting.

Q. Is that your signature, "Higgins"?

A. Yes, sir.

Mr. STEFFEN. Would the Court like the witness—perhaps not at this time—to explain what this handwriting says, or shall we bring that up later? Is it reasonably legible to the Court?

Justice STEPHENS. Oh, yes, we can read it on our copies.

Justice JACKSON. It is fine handwriting.

The WITNESS. Thank you, sir. (Laughter.)

Justice JACKSON. Compared to what we usually see from lawyers. (Laughter.)

The WITNESS. There is just too much of it, that is all.

By Mr. STEFFEN.

Q. I show you Government's Exhibit 341 for iden-
2715 tification, which purports to be a memorandum from Mr. Burley to Mr. Higgins under date of May 25, 1932, and ask if you can identify the handwriting on that memorandum.

Justice STEPHENS. The Court will take its usual recess at this time, and it will be necessary today, I regret, to recess until two o'clock on account of another engagement which the Presiding Judge has.

Announce the recess.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same day.)

2716 AFTERNOON SESSION.

(The trial was resumed at 2:00 o'clock p.m. pursuant to recess.)

Justice STEPHENS. Proceed.

Thereupon, CHARLES A. HIGGINS, resumed the stand and testified further as follows:

DIRECT EXAMINATION (RESUMED)

By Mr. STEFFEN.

Q. I believe when we recessed, Mr. Higgins, you were looking at Government's Exhibit 341 for Identification, but had not yet identified it.

I would like to have you examine it again and state whether or not that is your handwriting on the foot of the exhibit?

A. Yes, sir, it is.

Q. Can you state to the Court what the nature of the complaint was against National as respects the Dwight Hinckley account?

Mr. BROMLEY. Whose complaint, may we have that, please?

Mr. STEFFEN. We have identified Government's Exhibit 339, and that purports, as the witness testified, to be a complaint by the Board Survey Company against National; and what I am asking is what the witness understands was the basis of that complaint as respects the

2717 Dwight Hinckley account.

Justice STEPHENS. You may answer

The WITNESS. The Dwight Hinckley Lumber Company was accused of selling plaster wallboard and gypsum lath below the dealer carload price.

Justice STEPHENS. Below what?

The WITNESS. The dealer carload price.

Justice STEPHENS. Thank you.

By Mr. STEFFEN.

Q. And who was that company selling to?

A. They were selling to dealers in Greater Cleveland.

Q. At less than the dealer carload price?

A. Yes, sir.

Q. Could you assign figures and give us an example of what that would mean?

A. The figures, as of today, would be strictly a guess.

Q. Just take an arbitrary figure, please.

A. I would say that the average delivered price of plaster wallboard in Cleveland at that time was around $28 per thousand, delivered. That probably varied——

Q. (Interposing.) That is sufficient to give us an illustration. Gypsum lath—let's take that as an illustration?

A. The Dwight Hinckley Lumber Company, for a period of about 30 days, was selling at about $1.50 per
2718 thousand below that price for delivery on dealers' trucks, picked up at Dwight Hinckley's warehouse.

Q. And why was there a complaint about that?

A. The complaint was that it appeared that the National Gypsum Company was giving the Dwight Hinckley Lumber Company a better price than the other dealers in the market.

Q. And that would be necessary in order to enable the Dwight Hinckley Company to sell at $1.50 below the carload delivered price?

A. I would say that that was the assumption, that it was apparent that he would have a better price to enable him to sell below what was the established or going dealer price.

Q. And that established or going dealer price was the USG bulletin price?

A. I don't know about that; it was the National Gypsum bulletin price, as I had received it from Buffalo.

Q. During that period?

A. Yes.

Q. And that was the uniform market price in that territory at that time?

A. Yes, sir.

Q. Now was that complaint investigated?

A. Someone called on Mr. I. C. Harris, who was manager of the Dwight Hinckley yard in Cleveland, and tried to——

2719 Justice STEPHENS (interposing). Manager of the Dwight Hinckley what in Cleveland?

The WITNESS. Lumber yard.

Mr. BROMLEY. Now you are telling what somebody told you, again, aren't you?

The WITNESS. Yes, sir.

Mr. BROMLEY. I object to it as incompetent.

Justice STEPHENS. Sustained.

Mr. BROMLEY. I move to strike out the answer.

Justice STEPHENS. That particular answer may go out.

By Mr. STEFFEN.

Q. Did you personally know who talked with Mr. Harris of the Dwight Hinckley Company?

A. Do I personally know who talked with him?

Q. That is right.

A. No, sir.

Q. Did you talk with Mr. Harris of the Dwight Hinckley Company concerning the matter?

A. Yes, sir.

Q. And what did you say to him?

A. I told him——

Mr. BROMLEY (interposing). I object to this as not binding on any defendant in this case, except possibly National.

Mr. STEFFEN. That is making the same objection that has been made before. What we are endeavoring to
2720 do is to find out what the basis of this complaint was, and what was done by National in connection with it.

Mr. FINCK. If the Court please, I object to it as not being binding on National. I don't see how it is binding on us any more than it would be on any other defendant.

Justice STEPHENS. Because it concerns National.

Mr. FINCK. I don't know that it does.

Justice STEPHENS. I understood that he said it does.

Mr. STEFFEN. Mr. Higgins was their sales manager in the field, and was responding to a request from Mr. Burley.

Mr. FINCK. It was not within his authority to tell Mr. Harris how to sell his goods. That is what he is talking about, Mr. Harris' sales, not National's sales. This question doesn't apply to sales by National. You asked if he talked to Mr. Harris about the sales that he made to consumers.

Justice STEPHENS. Who is Mr. Harris?

The WITNESS. He was the manager of the Dwight Hinckley Lumber Company, Cleveland yard, at that time.

Mr. STEFFEN. Let me get at it this way, Your Honor.

By Mr. STEFFEN.

Q. Did you investigate whether Mr. Harris or the Dwight Hinckley people were selling at $1.50 below the carload delivered price?

A. Yes, sir.

2721 Q. And what did you find out?

A. We found out he was selling below the carload delivered price.

Q. And did you report that to Mr. Burley?

A. Yes, sir.

Q. What was the outcome of your report to Mr. Burley?

A. The outcome of my report to Mr. Burley—it was purely a standard report, because the solution of the problem was strictly up to the sales manager in the field.

Q. Yourself, you mean?

A. Yes, sir. I just passed along information as I found it, to Mr. Burley.

Q. And did you continue to sell to the Dwight Hinckley Company?

A. Could I qualify that?

Q. You may, certainly.

A. I had a discussion with Mr. Harris, and smoked out the fact that he was using plaster wallboard as a leader to sell some of his other products, and that he considered it within his right to sell plaster wallboard for any price that he saw fit. My contention was that I was not qualified to tell him at what price he was to sell his merchandise, but that when his sale of a branded article that I was selling reflected that he was supposedly getting a better price than the competitors in the market, that we would
2722 refuse, I would refuse to sell him, for the simple reason that he represented one outlet as against about 30 or 40 outlets. We enjoyed a very nice board business in the Cleveland market, and it was a choice of the Dwight Hinckley account or the responsible accounts that we were selling in the market.

Q. And what did you do?

A. I told him that we would refuse to sell him.

Q. And you did refuse to sell him?

A. I refused to sell him, and he lowered his price still further until he had exhausted his inventory of Gold Bond boards.

Justice STEPHENS. Just a moment, please.

Justice JACKSON. You weren't sales manager of National, were you?

The WITNESS. I was Central Sales Manager for National, yes, sir.

Justice STEPHENS. I ask the question because I am puzzled, but perhaps this will clear it up—if this man was sales manager of National, you would think he would know whether National was selling at less than bulletin prices.

Mr. STEFFEN. Not that he would know, but he was checking up with the dealer to find out what the situation was, and also in order to make a report back.

By Mr. STEFFEN.

Q. Did you report your findings back to National?

2723 A. Yes, sir.

Q. I now show you Government's Exhibit No. 342, which purports to be a copy of a letter written by Mr. Burley, Vice President of National, to Mr. C. Henning, Vice President of United States Gypsum Company, under date of May 28, 1932, in relation to Dwight Hinckley, Cleveland, and ask you to examine that.

(Witness examines document.)

Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Are you familiar with the subject matter of that letter, Mr. Higgins?

A. I recognize it as a possible statement on the Dwight Hinckley account, undoubtedly.

Q. You stated, I think, that you did report to Mr. Burley?

A. Yes, sir.

Q. Is that consistent with your report to Mr. Burley?

A. Yes, sir.

Q. He would normally have gotten his facts from you on that matter, would he?

A. Yes, sir.

Q. You never saw that before, or the original of that letter, I presume?

A. No, sir.

2724 Mr. STEFFEN. I will now offer in evidence Government's Exhibits Nos. 339, 340, 341, and 342. Exhibit 342, I think, is circumstantially identified as being a response to a matter——

Justice GARRETT (interposing). What about 336 and 337 and 338?

Mr. STEFFEN. I am coming back to those later. What we are now offering are the four items on the Dwight Hinckley matter, the first three of which have been identified, I believe; and the fourth, I think, is circumstantially identified.

I might say to Your Honors that at least 3 and I think 4 of these were introduced in evidence in the criminal trial, and at that time they were sufficiently identified for purposes of that trial. If I am incorrect in that, I would like to have Mr. Bromley state so.

Justice STEPHENS. This first item is not yet introduced, signed by M. H. Baker?

Mr. STEFFEN. No, we haven't talked about that at all, Your Honor.

Justice STEPHENS. The items you are introducing or offering are 339, the letter of May 17——

Mr. STEFFEN (interposing). That is right; and 340, the letter of May 25; and 341, the memorandum of May 25; and 342, which is the letter of May 28 in regard to
2725 the same matter.

Justice STEPHENS. Exhibit 340 is the letter of May 25, and 341 is another memorandum of the same date?

Mr. STEFFEN. That is right.

Justice STEPHENS. And 342 is the letter of May 28?

Mr. STEFFEN. That is right.

Justice STEPHENS. What is your position with respect to the identification of 342?

Mr. STEFFEN. That the subject matter has been identified by Mr. Higgins. The letter on its face purports to be a reply to claims made concerning the Dwight Hinckley account.

The first letter, 339, is a letter addressed to Mr. Baker of the National Gypsum Company, in regard to Dwight Hinckley, and talks about the same subject matter.

Mr. BROMLEY. Now, if Your Honor pleases, we object to the identification of 342, and I desire to point out that an inspection of it shows clearly that it is not a reply——

Mr. STEFFEN (interposing). It is not a reply to the exact letter, Your Honor, but it is a reply on the subject matter.

Mr. BROMLEY. You said it was a reply to Exhibit 339, which it plainly isn't.

Mr. STEFFEN. I did not say that.

Mr. BROMLEY. You have got the answer to Exhibit 339, which you haven't put in here, which you have skipped.

2726 We object to the identification of Exhibit 342. It did not come from our files, it has not been identified at all, and we know nothing about it.

Mr. STEFFEN. It came from the National Gypsum Company files, I believe.

Mr. FINCK. Well, even if it did, I would not stipulate its admission.

Mr. STEFFEN. You will agree that it did come from your files?

Mr. FINCK. Yes, it came from the office, we sent it in.

Mr. STEFFEN. The identification is that this is a business letter received from National Gypsum Company's files. The subject matter of the letter is connected closely with the transaction which is discussed in the three preceding

exhibits, 339, 340, and 341. It accords with the witness' statement of what he found upon investigation at the Dwight Hinckley Company, and what he reported to Mr. Burley.

Mr. BROMLEY. I would like to ask counsel if he won't admit that he has in his possession a letter which is the reply to Exhibit 339, dated May 24, which is written by Mr. Baker to Mr. Miller in reply to Mr. Miller's letter to National of May 17, 1932, which latter is Exhibit 339.

That will show that this letter couldn't possibly be
2727 a reply to it.

Mr. STEFFEN. I will state that we do not seem to have that reply, but, whether we did or not, that this letter would still be an acknowledgment in response to that matter.

Justice STEPHENS. We think that Exhibits 339, 340, and 341 are sufficiently identified and may be received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators; but that Exhibit 342 is not sufficiently identified to be admissible, at this time, and it is consequently not received in evidence.

(The documents referred to, marked as Government's Exhibits 339, 340 and 341, were received in evidence.)

By Mr. STEFFEN.

Q. Do you recall, in your report to Mr. Burley, that you mentioned, concerning the Dwight Hinckley matter, that you stated the final action of refusing to sell any longer?

A. Yes, sir, I gave the full report.

Q. And did you report the amount of board that was on hand, as you understood it?

A. Yes, sir.

Q. Have you an estimate of how much that was?

A. I wouldn't have the slightest idea, at this time, sir.

Q. Was it your understanding that Hinckley was
2728 going to sell his inventory out?

A. At lower prices, in an effort to further embarras us for our action.

Justice STEPHENS. Is Mr. Burley living?

The WITNESS. Yes, sir.

Mr. BROMLEY. He was a defendant in the criminal case.

By Mr. STEFFEN.

Q. If I were to show you a document, would you perhaps have your recollection refreshed as to the amount of board that was on hand?

A. I don't think I would, sir.

Q. I don't think you should.

Mr. STEFFEN. I would like to ask the defendants to give me, if they have it, the purported reply to the letter of May 17.

Mr. BROMLEY. It was Exhibit 242 in the criminal case; you must have it, you subpoenaed it from us, and we gave it to you. We can give you a photostat of it. You certainly have got it.

(Photostat handed to Mr. Steffen.)

Mr. STEFFEN. May we show this to the witness?

Justice STEPHENS. Yes. Have it marked, if you wish, and show it to the witness.

Mr. STEFFEN. Will you stipulate that this is a genuine copy that was introduced in the criminal case as a
2729 copy of Mr. Baker's letter to the Board Survey, and was therefore probably a genuine letter?

Justice STEPHENS. Have you given it a number so that what you are saying will be identified in the record.

Mr. STEFFEN. I will have it marked as Government's Exhibit for Identification No. 343.

(The document refered to was marked as Government's Exhibit 343 for identification.)

Mr. STEFFEN. Did you stipulate——

Mr. BROMLEY (interposing). I stipulate it is a photostatic copy of reply to Exhibit 339.

Justice STEPHENS. Hand it to the witness, Mr. Marshal.

(Exhibit 343 for Identification handed to witness.)

(Witness examines Exhibit 343 for Identification.)

Justice STEPHENS. We have read it. Proceed.

By Mr. STEFFEN.

Q. Have you read Government's Exhibit 343 for Identification, Mr. Higgins?

A. Yes, sir.

Q. Does that indicate that the matter was closed at that time? I refer you to the last sentence.

A. Well, Mr. Baker was President of the company. I had no discussion with Mr. Baker on that matter. My discussions and reports were all with Mr. Burley.
2730 Q. And at this time, May 24, had the matter been settled as to whether you would sell Dwight Hinckley, or was it still subject to negotiation?

A. My reply on Government's Exhibit 341, dated May 25—I would say that I had been in telephone communication with Mr. Burley, and sent him this letter after my action.

Q. By "this letter", you mean what?

A. I would say that at that particular time I was operating without an office, and cleaned my correspondence up at the end of each week, so that this letter is dated the 25th, and my reply is dated May 27.

Justice STEPHENS. What do you mean by "this letter"—Exhibit 342?

The WITNESS. Exhibit 341, sir.

By Mr. STEFFEN.

Q. And your eply is in handwriting at the foot?

A. Yes, with the date of May 27. Mr. Baker's letter bears date of May 24.

Q. That is right.

Mr. STEFFEN. Now, Your Honor, I would make this point, simply that Mr. Baker's letter, which has been identified, Government's Exhibit 343, is obviously a reply to Mr. Miller's letter——

Justice STEPHENS (interposing). That is admitted, isn't it?

2731 Mr. STEFFEN. Yes. The point I am wishing to make is that the matter was apparently closed following Mr. Higgins' note on May 27, after this letter that Mr. Bromley handed me; and the letter which is Government's Exhibit 342 is dated the following day, May 28, and it seems that circumstantially it is very closely identified as a reply or as information given to the United States Gypsum Company.

May I ask one question further.

By Mr. STEFFEN.

Q. Would it be normal, in your understanding, to advise either USG or Board Survey on a matter of this sort?

A. I have never had any contact with Board Survey or USG.

Mr. STEFFEN. It has been stipulated or admitted by Mr. Bromley that Board Survey was a wholly-owned subsidiary of USG, and that they handled substantially the same matters. Mr. Henning would be the logical man to whom information of this character should be given.

Justice STEPHENS. The Court isn't clear what you are now trying to do. This letter, Exhibit 343, although not yet offered, has been identified by stipulation.

Mr. STEFFEN. I will offer it.

Justice STEPHENS. That may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

2732 (The document referred to, marked as Government's Exhibit No. 343, was received in evidence.)

Justice STEPHENS. Now what is your contention—I think the Court doesn't understand your further contention with respect to this proposed Exhibit 342.

Mr. STEFFEN. Let me make it very clear.

Mr. Bromley objected to 342 upon the ground that it was obviously not a reply to Mr. Miller's letter of May 17, which is Government's Exhibit 339. The reply has now been introduced. This is Mr. Baker's letter of May 24, which is Government's Exhibit 343. And by the last sentence of that Exhibit, 343, it appears that the matter is not yet fully adjusted, that they will either quit selling, as Mr. Baker says, or they will do something else.

We then have Government's Exhibit 341, which is dated May 25, and which contains a note at the bottom dated May 27, signed by Mr. Higgins, in which he says what he is going to do.

Justice STEPHENS. Let me get that so I can follow you. Which contains what, you say?

Mr. STEFFEN. Exhibit 341 contains at the foot of it a handwritten note by Mr. Higgins, under date of May 27. That is going back, you see, to Mr. Burley on that date.

Justice STEPHENS. Who is "Ralph"?

2733 The WITNESS. Ralph Burley.

Mr. STEFFEN. And Ralph Burley purports to write a letter on the 28th, in direct connection with this whole matter, which the witness testifies states substantially his understanding of the outcome of that whole maneuver. And this letter has been taken from the files of National, and it would seem to be about as well identified, circumstantially, as it could be.

Justice STEPHENS. Now there are two problems arising in the Court's mind. First, with respect to Exhibit 342, it isn't yet testified by anyone that it was written by Burley. It bears the printed name, R. F. Burley, Vice President. In addition to that, this handwritten material on Exhibit 341, which is now in evidence, says:

"Ralph—Should Dwight Hinckley send in an order I suggest writing them and stating that you do not understand—inasmuch as they have repeatedly informed me they would not give us any more business and that they had already made a connection from whom a car of lath had already been unloaded—Then that you are turning over to me to handle—

"This sharpshooter would start a suit immediately if he thought he could collect a thousand dollars.

"Ike and I are good personal friends and I intend to keep in touch. Higgins."

Now that apparently suggests that a letter should
2734 be written to Dwight Hinckley.

Mr. BROMLEY. That is right.

Justice STEPHENS. Does it not?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. Whereas, this letter, Exhibit 342, is written to Mr. Henning. What is the contention of counsel? Do they still object to this?

Mr. BROMLEY. Yes, on the ground that it has not been identified.

Justice STEPHENS. Do you still object, Mr. Finck?

Mr. FINCK. Yes, Your Honor, I know nothing about it.

Justice STEPHENS. I am not inviting objections, we have enough of them without invitation, but we want to know what the position of counsel is.

Mr. OLIVER. I think all the rest of the defendants object to it, too, on the same grounds.

Mr. STEFFEN. I think the only thing that I can say which would perhaps warrant the Court in changing its opinion from what its first ruling was, is that the letter of May 24 from Mr. Baker to Mr. Miller, under date of May 24, clearly indicates that the matter was not concluded at that time, that they were going to take one of two courses. It says at the bottom:

"We recognize that such a policy is detrimental to our interest with other dealers and for that reason we
2735 hope to either correct this policy or discontinue the sale of Gold Bond wallboard to this account."

Now the witness testified—I grant Your Honor's position that Exhibit 341 and the footnote does not add much to my case—but the witness has testified that immediately afterwards—and he fixes his dates by the letter, Exhibit 341, dated May 27, that is, his footnote is dated May 27—that he did make a report to Mr. Burley, who was his superior, and that he had in that interim taken a decision and had discontinued selling the Dwight Hinckley account, and that the only question then was what are they going to say if they put in another order, that is, what sort of a reply would you make to Dwight Hinckley if he puts in another order. That indicates that they had then taken their decision. And that is, I think, brought out in Exhibit No. 341.

Then in 342, we have a copy of a letter addressed to Mr. C. Henning, Vice President in charge of sales, USG,

which relates the exact position which the National people had determined to take, through Mr. Higgins and his report.

We then have identified each of those different paragraphs substantially as stating the substance of what Mr. Higgins had reported. It would be normal to report that; to write, at the conclusion of such a transaction, just such a letter as Mr. Burley did write. It is perfectly open that this is just a circumstantial identification. There is
2736 going to be no injustice done, the defendants have an opportunity to call Mr. Burley, he is one of their higher executives.

Justice STEPHENS. Sometimes, if I may make a remark in good part, sometimes I think that in these hotly contested trials where both sides push their cases with natural vigor, we ought to have a schedule with respect to the seriousness of objections. Are they very serious, or moderately serious, or just serious, or just pro forma? (Laughter.)

But we have no such schedule. An objection is an objection. We say this also, of course, as we hope we say everything, in good part, Mr. Steffen, that your statement that it is Mr. Burley's letter is the very point in issue; and whether it is Mr. Burley's letter is the question, whether it is circumstantially identified as his letter.

Mr. STEFFEN. I didn't want to lead the Court in that matter, Your Honor.

Justice STEPHENS. You have not misled us, I am sure.

I am sorry, Mr. Steffen, we all feel, after consultation, that while it may be close to the line of circumstantial identification, we will have to put you to the trouble of calling some other witness to identify it. Exhibit 342 is not received in evidence.

Mr. STEFFEN. I would now like to go back to the invoices, two of which I think we identified—those are Government's Exhibits 336 and 337; also 338. Will
2737 you show the witness Government's Exhibits 336, 337, and 338?

(Exhibits handed to the witness.)

Justice STEPHENS. Is Exhibit 338——

Mr. STEFFEN (interposing). I don't think it has been identified yet, has it?

Justice JACKSON. It has been marked.

Mr. STEFFEN. Yes.

I offer all three exhibits, 336, 337, and 338.

Justice STEPHENS. Is 338 the one which has Order No. 264 at the upper right-hand corner?

Mr. STEFFEN. Yes.

Justice STEPHENS. And has that already been shown to the witness?

Mr. STEFFEN. He has it before him, and I think has identified it.

Justice STEPHENS. Is there any objection to those? Those were clearly identified?

Mr. STEFFEN. Yes, but none of them have been admitted in evidence. I am offering all three at the moment, Exhibits 336, 337, and 338.

Mr. BROMLEY. The defendants object to them on the ground, first, that they are incompetent because not binding on any of the defendants, but in connection with the objection of incompetency we make no point as to lack of identification; and of course if admitted we make the usual objection to them.

2738 Justice STEPHENS. The Court thinks they are admissible in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 336, 337, and 338, were received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 344, Mr. Higgins, which purports to be a memorandum from Mr. Baker to Mr. Burley, under date of December 16, 1932. Will you please examine that, Mr. Higgins, and tell us if you recognize the writing on the bottom of it, or the initials at the top of it?

A. No, I don't think I do.

Q. Who, in National, if anyone, had the initials "EBB"?

A. Ed Biesinger.

Q. Could you say whether or not those are his initials?

A. I don't think I could positively, sir.

Q. Are they similar, or have you doubts as to that?

A. All I might say is that they are not dissimilar.

Justice STEPHENS. Had you seen his handwriting from time to time?

The WITNESS. Yes, sir, but I haven't seen it in 7 years.

2739 By Mr. STEFFEN.

Q. I show you Government's Exhibit 339, which I think has been identified, and ask if you will compare those?

Mr. BROMLEY. Of course, the witness refused to identify the writing on that exhibit, Mr. Steffen.

Justice STEPHENS. Yes, the witness said he could not identify that.

Mr. OLIVER. The witness is not a handwriting expert.

By Mr. STEFFEN.

Q. Are you able to say whether those are Mr. Biesinger's initials?

A. Well, EBB are his initials.

Q. Well, what would you say as to whether he wrote them?

A. I couldn't say.

Q. Now I would like to have you consider for a minute or two the situation in Detroit, in your company. Do you operate in Detroit under your firm name of Quality Materials Company?

A. Yes, sir.

Q. What sort of an operation do you have there?

A. We differ from our other operation in that we maintain a warehouse and yard for dealer pick-up in small quantities, that is, quantities less than our ordinary unit of sale of truck or carload.

2740 Q. And does that cover your whole line of sewer pipe and everything that you carry?

A. Yes, sir.

Q. And do you have added to your line there in Detroit any gypsum products?

A. Yes, sir.

Q. What do you have?

A. We have gypsum lath and gypsum wallboard.

Q. And where do you obtain them?

A. We have been buying those from the National Gypsum Company.

Q. And in what quantities?

A. In the unit of sale for the market which, in Detroit, is ordinarily truckload or carload quantities.

Q. And how do you sell those out?

A. We sell those out in small lots.

Q. What is your mark-up?

A. The mark-up runs about 12½ percent, it is strictly a convenience item, not a volume item, with us.

Q. And why do you carry that?

A. We carry that for the reason that a dealer coming to our yard to pick up refractory material, face brick, sewer pipe, or insulation materials, at times wants two or a dozen

or 20 pieces of wallboard, or a certain number of bundles of gypsum lath. He may be a small dealer, unable to
2741 carry a representative stock. And he uses our warehouse as a convenience for picking up those materials.

Q. And would you say that in handling gypsum board and gypsum plaster in that way, you were doing a jobbing business?

A. No, sir, we are doing a warehouse business.

Q. And about what would your sales on that sort of thing run per month, could you tell us?

A. I would say they average around $500 per month.

Q. And that would be a relatively small item with you?

A. That is the smallest item we have.

Q. That $400 or $500 is your gross sales for board?

A. That is net sales, that is probably our average payment on a net basis to the National Gypsum Company.

Q. For board and plaster?

A. For board, plaster, and lath.

Q. Now you left the National Gypsum Company in October, 1937, I believe?

A. Yes, sir.

Q. For a period just before you left, did you sell perforated lath in your territory?

A. Perforated lath had been introduced before I left the gypsum industry.

Q. And could you describe the perforated lath which National made?

2742 A. Well, in appearance it was similar to any other perforated lath on the market. I had never been told, or I had been told but I had never checked—I understood the spacing of the holes was different.

Q. What was the spacing?

A. The holes in competitive lath, or the perforations, were spaced on certain centers——

Q. (Interposing.) Approximately 4-inch centers?

A. I wouldn't know, sir. But I would say that that was the only difference, and I never checked that so I wouldn't know if it was a difference. I took Mr. Crandall's word, of National, for it.

Q. Did you sell the National gypsum lath as gypsum lath which would pass the one-hour fire test?

A. The tests on Gold Bond perforated lath showed that it would pass the one-hour fire test.

Q. Were the holes in the board in parallel rows or were they staggered, can you remember?

A. I would say that they were staggered, and that they may be parallel, but my mental picture now, right now, is that they were staggered.

Q. During this period did you sell National gypsum lath in competition with other manufacturers in the territory?

A. Yes, sir.

2743 Q. Do you recall whether you sold it at the same price as ordinary gypsum lath?

A. To the best of my knowledge, I think we had a 25-cent per thousand mark-up on perforated gypsum lath.

Q. Would you say that your price was the same as that of other manufacturers in the territory?

Mr. BROMLEY. I object to that as incompetent because calling for a conclusion.

Justice STEPHENS. Do you know?

The WITNESS. It must have been the same, sir. We got our share of the business.

Justice STEPHENS. Objection overruled.

Mr. BROMLEY. I move to strike out the answer as immaterial. On what charge does this bear? There is no charge in the complaint that we conspired with National to fix their price on a product which they manufactured and sold under their own patent.

Justice STEPHENS. We thought the examination had to do with lath made under the license agreement patent.

Mr. STEFFEN. This has to do with lath made by the National Gypsum Company, perforated lath, and I am merely getting the evidence to the effect that it was sold in the market in Mr. Higgins' territory at the same price as that of any other gypsum lath, perforated lath, at that time.

2744 Mr. BROMLEY. Your Honors will recall that National had no license under our perforated lath patent, they refused to take it, they went out and tried to design around our patent, and get a perforated lath of their own and they sold it, they were free to sell it at whatever price they wanted to. There is no charge that within the conspiracy with which we are charged in the bill of complaint, we had any understanding with them that they would sell their perforated lath at our price. We had nothing to do with it.

Mr. STEFFEN. Your Honor, this will raise, I take it—and this is the only question I have on the point—the matter that we are going to discuss when we take up our offer of proof. I would like to say for the record in reply to Mr. Bromley, that our charge in the complaint is that they have

conspired to restrain trade of all gypsum board, the prices of all gypsum board, and that includes perforated lath.

Now in paragraph 45(a), which I think we are all familiar with, we say that that was done for the purposes of dominating the market by fixing uniform prices on board manufactured and sold by these defendant companies.

Now there is no question but what this is board manufactured and sold by National, and we say that they are fixing uniform prices, and the witness has testified that the price was uniform on that board.

Now whether it comes under the license or not is
2745 utterly immaterial. I say that that is a matter that you can pass on now, finally, or which can be reserved if you think it best.

Justice STEPHENS. Well, the Court will reserve its ruling on the motion to strike as immaterial, in order that it may rule upon this with all of the other items of this class which are to be discussed when we get to the argument and the consideration of the authorities on these many reserved rulings.

Mr. BROMLEY. If that be the case, I now move to strike out all of this witness' testimony with respect to perforated lath.

Justice STEPHENS. That motion may be shown of record, and the ruling on it is reserved, for the reasons just stated.

Mr. STEFFEN. I think, if your Honor please, that we might take our afternoon recess at this point, if that is satisfactory.

I would like to introduce my friend and neighbor, United States Marshall Fitch, from New Haven.

Justice STEPHENS. The Court is glad to know the Marshall, and I will be glad to shake hands with him during the recess.

We will now take a five-minute recess.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

2746 Justice STEPHENS. Proceed.

Mr. STEFFEN. We have no further questions.

Justice STEPHENS. Cross-examination.

CROSS-EXAMINATION

By Mr. BROMLEY.

Q. Of your twenty to fifty salesmen which you had under your jurisdiction when you were central sales manager for National, how many worked the Cleveland territory?

A. Two.

Q. How large was the Cleveland territory when you had charge of it?

A. Cuyahoga County.

Q. And in miles that represented a radius around Cleveland of how much?

A. That is about forty square miles.

Q. Now National's customers in the Cleveland area were building material dealers, weren't they?

A. And lumber dealers.

Q. And lumber dealers?

A. Yes.

Q. And those dealer customers of National bought from National at what we have referred to as the dealer price?

A. That is right, sir.

Q. I am talking about patented gypsum board, now, do your understand that?

2747 A. Yes, sir.

Q. And those dealers who bought patented gypsum board from National at the dealer price, resold it to their customers who were building contractors and private consumers, is that right?

A. That is right, sir.

Q. Now at all times while you were there, the Cleveland area was a very competitive market indeed, wasn't it?

A. Yes, sir.

Q. And isn't it true that all the time while you were there, that there was the very keenest competition among board manufacturers in the Cleveland area?

A. Yes, sir.

Q. Among others, USG, Certain-teed and American were selling in that area to dealers?

A. Yes, sir, that is true.

Q. And you, of course, during all the time you were there, were out to get all the business you could from the dealers, weren't you?

A. Yes, sir, that is correct.

Q. Dwight Hinckley was a dealer, wasn't he?

A. Dwight Hinckley is and has been known as a wholesaler, but he does sell to industrials at retail.

Q. Now what do you mean by "industrials"?

A. The large manufacturing plants, or to large
2748 contractors, on a large housing job. He would take large jobs on a retail basis.

Q. When you say that Dwight Hinckley sells to large contractors at retail, or makes retail sales, you mean that Dwight Hinckley to that extent was acting as a dealer, don't you?

A. Yes, sir.

Q. So that one part of his business in patented board, during all this period, clearly was that of a dealer, wasn't it?

A. Yes, sir.

Q. Now you said he had another aspect of his business which you call wholesaling.

A. Yes, sir.

Q. And in that aspect of his business he was selling the patented board not to contractors but to other dealers?

A. That is true.

Q. So that isn't it the fact, Mr. Higgins, that Dwight Hinckley, during all the time you were there, was in competition, first with your National Gypsum Company?

A. Well, not while he was selling our products.

Q. Well, wasn't he selling your products to the very same class of trade that you were selling your products to?

A. Yes, sir, but we had a line of demarcation. There were certain types of dealers that we did not care to solicit, they were the so-called wrecking houses, and we solicited what we would call the large volume and better
2749 type of accounts, and Dwight Hinckley's place in the picture was to handle the wrecking companies because the larger dealers objected to being in competition with the same brand of merchandise that the wrecking companies were selling.

Justice STEPHENS. What do you mean by "wrecking companies", companies that tear down houses and resell the materials they find in them?

The WITNESS. Yes, sir, and to that they also add new merchandise. The average wrecking company in a large city today—the used lumber that they have in their yard is a very, very small part of their sales, and it is a lead. Most of the public thinks they are getting a better price whereas the price is about the same as that of a regular retail yard.

Justice STEPHENS. Proceed, Mr. Bromley.

By Mr. BROMLEY.

Q. So that the Dwight Hinckley Company in that aspect of its business as a wholesaler, sold your board really to a very limited market?

A. Yes, sir.

Q. Now in the aspect of Hinckley's business as a dealer, he was in direct and active competition with all other dealers in that area, was he not?

A. That is true.

Q. And therefore, he was in direct and active competition with those forty or fifty customers of yours to
2750 whom you sold National's board, who were dealers themselves?

A. That is right.

Q. So that in that aspect of the situation, National was selling its patented board to half a hundred dealers in the Cleveland area, of whom Hinckley, in that aspect of its business, was one?

A. That is true.

Q. Now isn't it a fact that there came a time in 1932 when Hinckley, as a dealer, began to sell patented board to his contractor customers at less than it cost him to buy it from you?

A. I don't recall the date, sir, but there was such a period.

Q. There was such a period?

A. Yes, sir.

Q. And you became aware of Hinckley's practice of selling your patented board at less than cost, did you not?

A. Yes, sir.

Q. And didn't you become aware of that by reason of the fact that your other dealer-customers complained to you about it?

A. That is right.

Q. Hinckley being in competition with your other dealer-customers, was underselling them to the same class of trade that they were selling the National patented board
2751 to, is that right?

A. That is correct.

Q. And they came to you and complained about it?

A. That is right.

Q. And that happened long before you ever heard anything from USG about this situation, didn't it?

A. I never heard anything from USG, sir.

Q. Now I would like to know just what the complaint was that these forty-nine or so other dealer-customers of yours made to you about what Hinckley was doing?

A. The fact that he was selling at $1.50 lower per thousand square feet to the same class of trade that we were soliciting, and they, on the same brand of board, were therefore out of line and unable to get the business.

Q. And didn't they come to you and say, "Hinckley is selling at this $1.50 lower figure—it looks to us as if you must be giving Hinckley some kind of a price concession that you are not giving to us"?

A. We were accused of that.

Q. You were accused of that by your other dealer-customers, weren't you?

A. Yes, sir.

Q. Now the price at which you could sell Hinckley as a dealer, and all of your other dealer-customers, you knew was fixed by USG under the price bulletins, didn't you?

2752 A. I knew it was fixed by the price bulletins I received from our Buffalo office.

Q. So far as board was concerned?

A. Yes, sir.

Q. That is to say, your instructions in your price bulletins were that your price to your dealer-customers, including Hinckley, must all be the same?

A. That is right.

Q. Now His Honor, Judge Stephens, said a minute ago, "Well, you would know, wouldn't you, Mr. Higgins, whether, as a matter of fact National was selling Hinckley at the correct price or not?" Now the answer to that question is that of course you would know, isn't it?

A. I certainly would, yes, sir.

Q. But your other dealer-customers who saw Hinckley selling at a low price suspected you of selling Hinckley at a cut price, didn't they?

A. That is correct.

Q. Now being faced with that situation, were you fearful that your other dealer-customers, other than Hinckley, would cease to deal with you because of their suspicions that you were favoring Hinckley?

A. Had I continued to sell Hinckley, yes.

Q. What proportion of your Cleveland business did the Hinckley business represent?

2753 A. I would say about six to eight per cent.

Q. And that means that your other forty-nine or so dealer-customers represented over ninety per cent of your total Cleveland business?

A. That is correct.

Q. And did you feel at that time that you were faced with a choice of either continuing to serve Hinckley and perhaps lose some substantial part of the other ninety per cent of your business, or cut Hinckley off and retain the other ninety per cent of your business?

A. I knew that I was faced with making a decision on that.

Q. And did you feel that you had to make a decision to cut Hinckley off and retain the ninety per cent of your customers, or else go on and sell Hinckley and lose a large part of the ninety per cent of your customers?

A. I knew I had to make the decision.

Q. And you did make it?

A. Yes, sir.

Q. Now did you make it in consultation or arrangement with any other manufacturer or anybody else outside of your own company, whatsoever?

A. Not even with anyone in my own company. Mr. Burley always operated on the basis that the division manager was responsible for sales and details in his territory, or his division.

2754 Q. So that was your decision and yours alone, was it?

A. Yes, sir.

Q. And did you make it without consultation, then, with anybody in the world?

A. Except the territory men.

Q. Except your own salesmen?

A. Yes, sir.

Q. You did consult with them?

A. Naturally.

Q. Now when you had reached that decision did you go to the Hinckley concern and tell them?

A. Yes, sir.

Q. And is this Ike Harris, whose name has been referred to, the president of Dwight Hinckley Company?

A. He was the manager of the Cleveland branch.

Q. And he was a good friend of yours?

A. Yes, sir.

Q. And did you explain to him the reasons, as you have told them here, for your decision?

A. Yes, sir.

Q. And did he thereupon, in response to your talk with him, lower his price still further?

A. Yes, sir.

Q. Now he was able to do that because he had a

2755 large stock of National board on hand, didn't he?

A. I don't remember what his exact inventory was. We took inventory at the time, but I don't recall what the figures were.

Q. Well, anyway he had board on hand so he was enabled to go into the market and still further cut the price, and that is what he did do, isn't that correct?

A. That is true.

Q. Now at that time did he tell you that he wouldn't do business with you any more?

A. Yes, sir, he did.

Q. And thereafter you know, do you not, that he bought his board from one of your competitors?

A. I do, sir.

Justice STEPHENS. Who was this man "Ike"?

The WITNESS. I. C. Harris—Ike Harris. "Ike" is a nickname.

Justice STEPHENS. And he was with what company?

The WITNESS. He was Cleveland manager of the Dwight Hinckley Lumber Company.

Justice STEPHENS. I thought that, but I wanted to be sure.

The WITNESS. Yes, sir.

Justice STEPHENS. Who was the person that you referred to as a "sharpshooter"?

The WITNESS. That was my friend Ike Harris.

2756 Justice STEPHENS. That was a term of endearment, then?

The WITNESS. Well, there are certain classifications of "friend", I might put it that way. (Laughter.)

Mr. BROMLEY. You remind me of the legal business, sometimes. (Laughter.)

By Mr. BROMLEY.

Q. Now, Mr. Higgins, you would have liked to continue to sell Hinckley if you could without damage to the rest of your customers, wouldn't you?

A. Yes.

Q. You wanted to sell all the board you could sell?

A. That is correct.

Q. But you were faced with a dilemma as to whether you would lose a large part or a small part of the business?

A. That is true.

Q. So would it be accurate to say that your conclusion was reached for the purpose of protecting your own market and not for the purpose of attempting to influence or maintain Hinckley's prices?

A. That is correct.

Q. Did you ever make any attempt to persuade the American or the Certain-teed or the USG not to sell Hinckley after you announced your decision to him?

A. During the period that I was connected with the National Gypsum Company I had no contact with

2757 any competitive company or any discussion of any sort.

Q. Then your answer to my question is "no"?

A. That is right.

Q. Now will you look at Exhibit 339, please?

A. Yes, sir.

Q. You have read that exhibit, haven't you?

A. Yes, sir.

Q. Will you look at the second sentence in the first paragraph? Isn't that letter a complaint by Board Survey against National, alleging that National's price to Hinckley must be lower than the USG bulletin price on account of the fact that Hinckley was selling at so low a price?

A. I would interpret this letter to mean just that.

Q. In other words, there was nothing strange in your business at that time for a competitor to view what one of your customers was doing, and then conclude that if your customer was selling at a low price, you must be furnishing him at a price lower than you were permitted to do under the USG price fixing bulletins—there was nothing unusual about that, was there?

A. No, sir, it would be a logical assumption.

Q. And if you saw a dealer in the Cleveland market, who was supplied by USG, selling at a very low price, you would suspect that USG was selling that dealer at a price less than it fixed under the licenses, wouldn't you?

2758 A. I would also accuse them of it.

Q. You understand that in all my questions I am talking about gypsum wallboard and plasterboard, don't you?

A. Yes, sir.

Q. So that it was a reasonable inference for one of your competitors, indeed for USG, to make, based on what Hinckley was doing, that the price which you were charging Hinckley might have been lower than the bulletin price, isn't that so?

A. Yes, sir.

Q. Now, you knew, however, that your price to Hinckley was correct?

A. I was certain of it.

Q. According to your own price bulletin, I mean.

A. Yes, sir.

Q. And when you went there you found out that what he was doing was deliberately selling below cost?

A. He admitted it.

Q. And he was using the product he bought from USG as a leader?

A. That is true.

Q. And that means that he was deliberately selling your product at a low price in order to induce prospective buyers to buy other products from him?

A. That is correct.

Q. And he hoped to make up his loss on your board
2759 by the profit he would make on other products?

A. That is true.

Q. And you didn't want any longer to supply a customer, to sell a customer of yours, who followed that policy, did you?

A. We couldn't afford to do so.

Q. And you couldn't afford to do so because of the adverse effect it would have on your other customers?

A. That was the reason.

Q. Now will you look at Government's Exhibit 343, please, and particularly at the second paragraph. Doesn't that confirm your recollection, the second sentence in the second paragraph, that the National Company had known about the Hinckley situation, having heard about it from its own dealer-customers, before they ever received any complaint from USG or other communication about the situation?

A. I don't know when or if they did receive any communication from USG.

Q. But it is true, as stated in the second sentence of the second paragraph, that the National Company had had its attention called to the Hinckley practice some months prior to May?

A. That is true.

Q. And the people who called their attention to it, as you have said, were National's dealer-customers?

A. And our own salesmen reporting the condition
2760 both to me, and I, in turn, to the Buffalo office.

Q. Now this writing at the bottom of Exhibit 339—whoever wrote it—is a summary of an investigation someone made into the National's books, supporting National's position that it had not violated USG's price bulletins in its sales to Hinckley—isn't that right?

A. I would say that that was true, sir.

Q. And this reference at the beginning, "There isn't a c/m"—that means a credit memorandum, doesn't it?

A. Yes, sir.

Q. (Continuing.)——"or allowance of any kind on our books for the past 8 months".

Let me ask you this. One way that a manufacturer could violate the USG price bulletins would be to sell a dealer-

customer at the proper price and then later, pursuant to an oral arrangement, give him a rebate by giving him a credit memorandum or an excessive allowance, isn't that right?

A. That would be one way, sir.

Q. I don't mean that you ever did that, but that would be one way?

A. That would be one way, yes, sir.

Q. So this gentleman who investigated the books reports that there wasn't any credit memorandum or any allowance of any kind made to the Hinckley Company, and that was evidence in support of the defense that National had never cut the price to Hinckley, wasn't it?

2761 A. Well, I knew that to be a fact.

Q. And you understand that in everything I have said, I am referring to gypsum board?

A. Yes, sir.

Q. And to nothing else.

A. That is right.

Q. And then the rest of that note is information about the recent invoices and the state of the account, to show that no price cut had been made in any direct way by extending undue credits or anything like that, isn't that right?

A. That is right.

Justice STEPHENS. What is meant by the phrase, "somewhat extended datings"?

The WITNESS. Well, with the small margin that existed in the handling of some materials, and in the eagerness of a newer manufacturer coming into the market to take an important account, and the Dwight Hinckley account was a good volume account—in the early days of our operation under the license agreement, and before it was understood very thoroughly, we would attract good-sized accounts with a dating, taking a discount at the end of ninety days. That was discontinued because it was a violation of the discount terms. That is what is meant by "dating". The only account that we had in our area where that was done

2762 was the Dwight Hinckley account, and there was a controversy for about sixty days on the discount that he took that he later paid because it was illegal.

By Mr. BROMLEY.

Q. What you mean is that this reference to which Judge Stephens has called to your attention of "extended datings" is a reference to granting a purchaser more than

usual discounts, so as to indirectly effect a reduction in price?

A. Not more than the usual discount, but longer discount terms.

Q. Longer discount terms?

A. Yes, on the theory that he would have his merchandise turned over and receive his money, and not have his money tied up it.

Q. Is it true in the board business that the usual period of the initial discount was ten days?

A. Or, in the large markets, a "prox." date.

Q. What was meant by a "prox." date?

A. Which could be either a tenth or fifteenth of the month.

Mr. STEFFEN. May we have that fixed as to time, whether the witness is speaking of a practice now or as of 1928, 1929, and 1930?

Mr. BROMLEY. I am asking him this question with respect to 1932, because Exhibit 339 is dated in 1932, and this handwriting, this handwritten note was made in
2763 1932. Is your answer as of 1932?

The WITNESS. Yes, sir. "Prox." dates were prevalent in the large major markets that I was operating in.

By Mr. BROMLEY.

Q. So that if National said to a dealer-customer, "You can get your discount even though you don't pay for ninety days", instead of the next tenth or fifteenth, that would be extending him a voluable consideration by giving him an extended period of credit before he had to pay?

A. That only happened once, and it is a happenstance that it happened in the Dwight Hinckley case. That was the only deviation and it was caused by a misunderstanding by the salesman in the teritory making the commitment after we received our first price bulletin after the license agreement was signed.

Q. I am merely trying to get an explanation of the phrase "extended datings". Now it is an extension of the discount period for an unduly long time so as to accord a greater period of credit to the customer. isn't it?

A. Yes, sir.

Q. And that is an indirect way of accomplishing a price reduction, in effect, isn't it?

A. It would be.

Q. Because a long extension of credit is a thing of value to the customer?

2764 A. Well, his competitor is using his money and the man getting the dating is not having to use his money, not having his money tied up.

Q. Now everything you have said about this is again related entirely to gypsum board, is it not, Mr. Witness?

A. Yes, sir.

Q. Now will you look at Exhibit 340, and to the first sentence of the exhibit, to the effect that Chicago will do nothing to stop Port Clinton pick-ups and trucking. That is a reference, is it not, to the fact that dealers were permitted at this time to pick up board at the Port Clinton plants of USG and American, and truck it back into Cleveland?

A. That is correct.

Q. Now that was a practice that was specifically provided for in the USG price bulletins issued to its licensees, did you know that?

A. Yes, I surmised that it was after checking to see why we could not be competitive on a similar situation in Cleveland.

Mr. STEFFEN. Your Honor, ought we not to have the price bulletins referred to, as they are the best evidence of what they contain?

Mr. BROMLEY. They are in evidence, and they do provide that as of this time.

Mr. STEFFEN. That is your testimony.

2765 Mr. BROMLEY. No, it is the testimony of the bulletins.

Justice STEPHENS. If they are in evidence, and it is without dispute that they do so provide, this seems to be immaterial; I mean to say that the objection is not well taken.

By Mr. BROMLEY.

Q. Now so far as the provisions of the bulletins issued to your company were concerned, you had the same right under the bulletins, didn't you?

A. I never saw any but our own bulletins, Mr. Bromley.

Q. Well, the reason that you were not competitive with USG and American was that you didn't have any plant in Port Clinton, is that correct?

A. That is true.

Q. Your nearest plant to Cleveland was what?

A. Clarence Center, New York.

Q. And that was several hundred miles away from Cleveland?

A. Two hundred and fifty.

Q. So that you thought that this provision permitting the licensor and the licensees, with mills at Port Clinton, to allow dealers to come and pick up by truck, put you at a competitive disadvantage, did you not?

A. That is true.

Q. And wasn't the purpose of your discussion about this matter merely to see if Burley couldn't induce USG
2766 to change its bulletin provisions so that dealers could no longer pick up at Port Clinton mills?

A. I told him it was necessary to do that or we would be out of the market.

Q. In other words, you wanted the licensor to change the price bulletins so as to make you competitive with USG and American?

A. That is correct.

Q. This practice of permitting dealers to pick up board at the Port Clinton mills and truck it back to Cleveland, was a privilege for which the manufacturer-seller made no charge to the dealer, isn't that correct?

A. That is correct.

Q. And it was of substantial value to the dealer because he was enabled to get his board back to his warehouse or his customer at a cost less than the railroad freight would have been, isn't that right?

A. No, I wouldn't say that, Mr. Bromley, because I don't think you can truck that distance and be competitive with railroad freight. It gave them the opportunity of buying in smaller lots because, to the best of my knowledge, there was no minimum requirement as to the quantity that could be picked up at the plants in the early days of pick-up. I may be wrong on that, but that is to the best of my knowledge.

Q. Well, whatever it was, it was an advantage to
2767 the dealer which was worth money to him?

A. I considered it more of an advantage to the American Gypsum and to the United States Gypsum.

Q. But the reason that you were non-competitive, sir, was that the dealer preferred to buy from USG and American and be enabled to go and pick up small quantities in his truck, rather than to buy a carload of board from you shipped from your far-distant mills, isn't that right?

A. Well, the date of the letter would prove that it was a low spot in the building cycle. May, 1932, was pretty close to our bank holiday. Building was at a very low ebb and dealers would pay a premium to have the privilege of keeping down their investment. So that we were faced

with the choice of being out of the market or setting up something that was competitive with the advantage enjoyed by them, not that the dealers preferred buying from American or USG, but they did enjoy the fact that they did not have an inventory tie-up of capital.

Q. Now was there anything that you could have done to make yourself competitive with USG and American in the Cleveland market?

A. There was, yes, sir.

Q. There were two things you could have done, were there not?

A. Yes, sir.

2768 Q. You could have gotten USG to change the bulletins so that dealers could no longer get their pick-up service in small quantities—that is the first thing you could have done if USG had been willing?

A. That is one, yes, sir.

Q. The second thing you could have done is to build, rent or establish a warehouse of your own in Cleveland?

A. No, sir, we would have had to establish a warehouse at Port Clinton.

Q. At Port Clinton?

A. Yes. We were not allowed, as I was told by Buffalo, to establish a warehouse in Cleveland and be on a competitive basis and sell at the same price as Port Clinton.

I shipped carloads of plaster to big jobs in Cleveland, and allowed a trucking allowance from cars to job, in order to precipitate the Port Clinton situation. That is what is referred to in the balance of my footnote.

But we were forced—and I checked into the warehousing situation in Port Clinton—where it would have been necessary to ship from National City, Michigan, to Port Clinton, unload the merchandise, put it into the warehouse, then put it back on the trucks and truck it into Cleveland. We couldn't unload from the cars to trucks in Port Clinton, and then truck it into Cleveland, according to a true interpretation of the license agreement.

2769 Q. If you had established a Port Clinton warehouse and done that trucking, it would have cost you a considerable amount of money?

A. Very much.

Q. So you didn't want to do that, did you?

A. I did, but Buffalo didn't.

Q. Buffalo would have preferred if it could, to have induced the licensor to change the bulletin practice, wouldn't it?

A. Yes, sir.

Q. Now isn't it a fact that at the time it was your opinion that USG was making this complaint against National regarding National's board prices to Hinckley, for the purpose of throwing a smokescreen over your request that USG make you competitive in the Cleveland area?

A. I think it must be getting late, I don't think I caught the early part of that, Mr. Bromley. (Laughter.)

Q. I don't blame you. Well, look at your note at the bottom of Exhibit 340, starting, "I prophesy".

A. That is the answer to your question. In other words, I felt that USG was not in a position where they had to follow the request of National in making the Cleveland market competitive, and that any promises were purely a smokescreen.

2770 Q. You didn't think that USG would change the Bulletin if National requested it to, as to this board pick-up, did you?

A. Well, I never took the promises of any competitor very seriously until he fulfilled them.

Q. And you thought that U.S.G. was accusing National of violating the price bulletin in its sales of board to Hinckley merely as a smoke-screen to give an excuse for not changing the pick-up situation in the bulletin?

A. I thought that the two would be related, yes, sir.

Justice STEPHENS. The two would be what?

The WITNESS. The two would be related.

By Mr. BROMLEY.

Q. Now will you read your handwriting at the top of Exhibit 340? It is not plain on my copy?

A. That is embarrassing.

Q. Not to me it isn't.

A. Well, it shows how over-ambitious a little fellow can be once in while.

Q. You are not a little fellow, Mr. Higgins.

A. Thank you. "Reply attached and I might say in cold blood that I am serious in the statement made that I would run USG out of Cleveland unless they quit their constant knocking of National and our policies."

2771 Q. Does that refresh your recollection, sir, that not only was there vigorous competition in your area, but there was pretty bitter competition?

A. Yes, sir, there was.

Q. And you had a real fight for business all the time you were there, didn't you?

A. Yes, sir.

Q. Now when you used the words, "run USG out of Cleveland", you meant by going in there with a concentrated and aggressive selling campaign and taking business away from them, didn't you?

A. My whole plan of attack was to put about six of our real high-powered operators into the Cleveland market, where we only then had two, to go out and solicit the industrials, solicit the users of board even the 100 and 200 and 300 foot buyers; force a demand for Gold Bond board and force the dealers to buy it, and thereby eliminate USG who at that time, in 1932, didn't have much more manpower in the market than we did. But by creating consumer demand, that was about the only way we could do it. It would cost a lot of money.

Q. That didn't mean that you contemplated entering into an agreement or understanding with American or Certainteed with report to board sales, did it?

A. They were still as much of a competitor as USG, sir.

Q. Will you look, please, at Exhibit 341. Your handwriting at the bottom of that exhibit represents
2772 a record of your decision no longer to sell board to Hinckley, doesn't it?

A. Yes, sir.

Q. And did this "sharpshooter" reference to Mr. Harris, or to Dwight Hinckley, express your view of that concern at that time?

A. Yes, sir.

Q. Did you mean by that that his business ethics were not very high?

A. His business ethics were all right, it was just the fact that he was using our product as a loss leader, with a bad reflection on National. His business ethics were all right with that one exception.

Q. And you felt that such a policy on the part of Hinckley would have been ruinous to the National's board business in that area?

A. It would have been, yes, sir.

Q. Now as I understand you, sir, your present mpany, the Quality Materials Company, has been dealing in board in Detroit right along up to the present time?

A. Yes, sir.

Q. Didn't I understand you to say, on direct, that a jobber was a man who bought board from a manufacturer and resold it to dealers at a profit?

A. That is true, sir.

Q. That is just what you do in Detroit, isn't it?

2773 A. I wouldn't say that we get a profit on board in Detroit.

Q. Isn't the mark-up which you charge dealers in Detroit just about the same as the discount which formerly you get in the board business?

A. Yes, sir, but in addition to that——

Q. (Interposing.) I haven't said anything about a "but", now. It is just about the same, isn't it?

Mr. STEFFEN. Let the witness finish his answer.

The WITNESS. The mark-up we get today is about the same as the carload discount that a jobber received.

By Mr. BROMLEY.

Q. So that do I understand you to say that a concern like yours, when it buys board from a manufacturer at 12½ per cent discount, and resells at the dealer price, is a jobber because it makes 12½ per cent; but when it buys from the manufacturer at the dealer price and sells at a 12½ per cent mark-up, although it makes the same profit it nevertheless is not a jobber?

A. There is a difference——

Q. (Interposing.) There seems, sir, to be no difference to me.

Mr. STEFFEN. Let the witness complete his answer to the question, please.

The WITNESS. The discount to a jobber is applied
2774 to carload and truckload lots. In small lots a warehouse charge was still placed on warehouse pick-ups. So that if we had a jobber's profit of ten per cent we would still, on small lots, charge 12 per cent, or approximately 12 per cent, to cover our handling and overhead out of our Detroit yard. If we had a lot of volume at 12 per cent we could make money. As a convenience item, 12 per cent just about breaks us even.

By Mr. BROMLEY.

Q. Isn't the reason that purchasers from Quality Materials Company, your company. in Detroit, pay a mark-up over the prevailing dealer price, because they get a real valuable service from you?

A. That is true, sir.

Q. And isn't the test of whether a man is a jobber or not, just that, that is to say, whether or not he renders a service to the dealer purchaser?

A. We wouldn't be in business very long, Mr. Bromley, if we handled all of our merchandise on that margin.

Q. Well, won't you admit that your Detroit operation is a kind of a jobbing operation?

A. It is a jobbing operation but on those particular items I would say that it is a warehouse operation. We buy at the same price as the dealer, but the dealer buys from us only because he doesn't want to take in a truckload or a carload.

2775 Q. Therefore you extend to him an accommodation which is of value to him and you can charge him more than the dealer price?

A. That is correct.

Q. And that "more" that you charge him is the profit which you make?

A. It is the gross profit, yes, sir.

Q. All right, gross profit, sure. Well, gross profit is always the difference between the price at which you buy and the price at which you sell, isn't it?

A. Yes, sir.

Q. Now if you bought that board at a discount of 12½ per cent, and sold it at the dealer price, your gross profit would be 12½ per cent, wouldn't it?

A. But we wouldn't do it.

Q. Won't you answer my question. You used to do it, didn't you?

A. Not on small lots.

Q. Well, on any lots?

A. That discount applied on carload or truckload lots.

Q. Well, if you bought board at a discount of 12½ per cent, your gross profit was the 12½ per cent, wasn't it?

A. That is correct.

Justice STEPHENS. Have you a number of other questions, Mr. Bromley? One of the judges, Judge Jack-

2776 son, has an appointment which he must keep promptly at 4:30. So if your examination is going to cover some moments, we had better adjourn now.

Mr. BROMLEY. I am not quite through.

Justice JACKSON. What time does your plane leave tomorrow, sir?

The WITNESS. I am leaving Friday, sir.

Justice STEPHENS. With respect to plans for tomorrow, you are not going to call another witness after this witness is completed, are you?

Mr. STEFFEN. We had Mr. Tomkins all arranged for tomorrow, but after our discussion of yesterday——

Justice STEPHENS. We stated last night that after these witnesses were disposed of—so that we wouldn't have to

postpone these reserved rulings any more—we would have an argument and then recess. What I was about to say is that we hope counsel will be prepared tomorrow, after the conclusion of the examination of this witness, to make an argument on this question of the reserved rulings.

You may announce a recess until tomorrow morning at ten o'clock.

Mr. O'DONNELL. Your Honor, do I understand that we will then adjourn until Monday morning, at which time Mr. Tomkins will be needed?

Justice STEPHENS. We will rule on that tomorrow.

2777 Mr. O'DONNELL. Mr. Tomkins is very actively engaged in war work——

Justice STEPHENS (interposing). He is not to be here tomorrow and it seems likely at the moment that we will not call him until Monday morning. I think that is probable, but we will be more definite after the argument tomorrow.

Mr. O'DONNELL. I would like to give him as much advance notice as I possibly can.

Justice STEPHENS. You will know tomorrow. I think the great probability is that he will not be needed until Monday because we will have to hear this argument and then we want to examine the authorities and have a conference among the judges on these reserved rulings, and there are a great many of them to go over—so I think the great probability is that he will not be needed here until Monday morning.

We will now recess until ten o'clock tomorrow morning.

(Whereupon, at 4:00 o'clock, p.m., the hearing was recessed until 10:00 o'clock, a.m., Thursday, January 20, 1944.)

2778 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY;

OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Thursday, January 20, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted, and the additional appearance of KENNETH R. LINDSAY, on behalf of the United States:)

2786 Thereupon, CHARLES A. HIGGINS, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

CROSS-EXAMINATION (resumed)

The WITNESS. What I meant to say or convey—it is hard to keep quiet—was that the results of my field contacts were cleared through Mr. Burley.

I think Judge Garrett had the point, that the sentence did not make sense because my field contacts could not have been with Mr. Burley, but the results of my contacts were cleared through Mr. Burley. That is what I meant to say.

Justice STEPHENS Thank you.

Make no correction besides his explanation. Leave his explanation in the record.

Mr. STEFFEN. At this time I would like to introduce my colleague, Mr. Kenneth R. Lindsay, who has worked with us in this case.

Justice STEPHENS. You are welcome here, Mr. Lindsay.

Mr. BROMLEY. May the Marshal hand the witness a copy of the transcript for yesterday afternoon?

(Transcript of afternoon session of January 19, 1944, handed to the witness.)

By Mr. BROMLEY.

2787 Q. Will you please turn to page 3047, Mr. Witness?

A. Yes, sir.

Q. I direct your attention to the question beginning at line 8:

"Q. Now I would like to know just what the complaint was that these forty-nine or so other dealer-customers of yours made to you about what Hinckley was doing?"

and to your answer:

"A. The fact that he was selling at $1.50 lower per thousand square feet to the same class of trade that we were soliciting . . ."—shouldn't that be "they"?

A. No, sir, that we, as the National Gypsum Company, were soliciting the other dealers, is what I meant to convey by that, the other dealers in the market.

Justice STEPHENS. That is, you meant to apply the word "we" to the National Gypsum Company and other manufacturers?

The WITNESS. To the same class of trade that we were soliciting. In other words, the National Gypsum Company was soliciting the business of the other 49 dealers, who had received a price bulletin from Dwight Hinckley quoting $1.50 lower price.

By Mr. BROMLEY.

Q. But look at the rest of your answer. Don't you see that you say: ". . . and they, on the same brand of board, were therefore out of line and unable to get the
2788 business." That "they" refers to the 49 or so other dealer-customers?

A. That is correct, sir. That is what I meant to convey.

Q. But having used the word "they" in the next to the last line of your answer, line 13, doesn't that indicate to you that you intended to use the word "they" instead of "we" in the preceding line?

A. No. We were soliciting those 49 dealers and they, in attempting to sell the same brand of board, were out of line.

Justice JACKSON. Does that "they" refer to Hinckley?

The WITNESS. No, sir, to the other dealers in the market.

Justice JACKSON. I see.

Justice STEPHENS. When you say the other dealers were out of line, you remind me of the story of the old lady who said that all the Army was out of step except her son. It was Hinckley who was out of line, wasn't it?

The WITNESS. Yes, sir.

By Mr. BROMLEY.

Q. Mr. Higgins, look at the bottom of page 3046, the last question. I said to you:

"Hinckley being in competition with your other dealer-customers, was underselling them to the same class of trade that they were selling the National patented board
2789 to, is that right?"

And your answer was:

"That is correct."

Now the reference in that question was to contractors. Your dealer-customers were selling contractors, weren't they?

A. That is true, sir.

Q. And as you told us yesterday, Hinckley was selling contractors?

A. And other dealers.

Q. You said house wreckers.

A. But they were in the dealer classification.

Q. I will come to that in a minute. But Hinckley and your 49 other dealer-customers were both selling contractors?

A. That is true, sir.

Q. Then at the top of page 3047, I said:

"And they came to you and complained about it?"

Now that means your 49 other dealer-customers, doesn't it?

A. That is right, sir.

Q. And then skipping the next question and answer, I then asked you:

"Now I would like to know just what the complaint was that these forty-nine or so other dealer-customers of yours made to you about what Hinckley was doing?"

Now isn't it a fact that what the 49 dealer-cus-
2790 tomers of yours were complaining about was that Hinckley was selling contractors at a price lower than the 49 could afford to sell at?

A. No, sir. What I meant to convey was that the dealers that were buying in, say, carload quantities, questioned our activities with Dwight Hinckley Lumber Company, and how he could quote other dealers $1.50 lower. His published quotation was not to contractors, it was to the other dealers in the market. And in order to make it embarrassing for the National Gypsum Company, he sent his quotation to all of the dealers, including the ones that he knew he had absolutely no chance to sell. That is what I meant to convey by that answer.

Q. So that he sent his quotations not merely to the house wreckers, but to all the dealers?

A. All the dealers in the Cleveland market.

Q. Now didn't he make the same low offer to his contractor customers?

A. I am not familiar with his contractor contacts.

Q. Now at page 3005——

Justice STEPHENS (interposing). That is in the morning session, isn't it?

Mr. BROMLEY. Yes, Your Honor.

By Mr. BROMLEY.

Q. (Continuing.) ——in line 4, near the end, there appears the word "police". Did you use that word in your answer?

2791

A. Yes, sir.

Q. What did you mean by it?

A. The word "police" is used, let's say, by sales managers, as a lazy method of explaining what their salesmen do. It refers to a policeman covering his beat, like the salesman is covering his territory.

Q. And you did not use it in any sense of discipline?

A. No, sir.

Q. Will you turn to page 3013, please?

Justice STEPHENS. That is in the afternoon session, Mr. Higgins.

The WITNESS. Yes, sir.

By Mr. BROMLEY.

Q. Rather, turn back to 3012, the question beginning at line 17, "Can you state to the Court what the nature of the complaint was against National as respects the Dwight Hinckley account?"

And then Mr. Steffen calls your attention to Exhibit 339, which was the Board Survey letter to National. And over the page, beginning at line 3, you said:

"The Dwight Hinckley Lumber Company was accused of selling plaster wallboard and gypsum lath below the dealer carload price."

2792

Isn't it a fact, as you said yesterday, that the complaint which USG wrote to National was an accusation against National, charging that National had violated the USG price bulletins in its sales to Dwight Hinckley?

A. May I have that question again, Mr. Bromley?

Mr. BROMLEY. Will you read it?

(The question was read by the reporter.)

The WITNESS. That is right.

By Mr. BROMLEY.

Q. And the reference to what Dwight Hinckley was doing was merely by way of pointing to evidence, that is to say, if Dwight Hinckley was selling at a low price, the reasonable inference was that National was selling to Dwight Hinckley at a price which was below the bulletin price?

A. That was the inference at the time, yes, sir.

Q. So that it is a fact, isn't it, that USG's accusation against National of a violation of the price bulletin, was based on the same kind of evidence which caused the dealers to come to you and complain, and accuse you of making a low price to Dwight Hinckley?

A. Well, I don't know what basis their letter was based on, Mr. Bromley. That would be an assumption on my part.

Q. Well, the letter, Exhibit 339, refers specifically to the fact that USG or Board Survey had been informed
2793 that Hinckley was selling at a low price?

A. That is true, sir.

Q. And that is what you and I have referred to as the evidence which caused USG to accuse National of violating the price bulletins?

A. That was the basis of my whole investigation of Dwight Hinckley's activities.

Q. That was the same evidence which caused your 49 dealer-customers to come to you and say, "What are you doing with Hinckley, selling him lower than you are to us?"

A. That is true, sir.

Q. And then on the same page, 3013, in line 11, still referring to Dwight Hinckley, you gave this answer:

"They were selling to dealers in Greater Cleveland."

Now as you said yesterday, the normal course of their business was to sell only to house wrecker dealers?

A. That is right, sir. The other dealers used Dwight Hinckley's facilities only in an emergency or when it was economic for them, being in a certain part of town, to pick up from their warehouse.

Q. And as you said yesterday, the other part, the bulk of Dwight Hinckley's business, was sales to contractors or consumers—you said industrials?

A. Yes, sir.

Q. That is consumers or contractors?
2794 A. That is true.

Q. At page 2973, beginning at line 16:

"Q. And did your competitors use the same price?"

"A. Well, to the best of my knowledge, because I did not see their price lists and we knew that we were getting business from our dealers, so we naturally had to assume that we were getting it on a competitive basis.

"Q. And by 'competitive basis', you mean what?

"A. The same price."

Now didn't you intend, by those answers, to indicate merely that since you were getting business from dealers

in that area, you assumed that no one of your competitors had a lower price to those dealers than you had, for if your competitors had a lower price you would not have been able to get the business?

A. That is right, sir.

Q. On page 3014, beginning at line 14:

"Q. And that established or going dealer price was the USG bulletin price?

"A. I don't know about that; it was the National Gypsum bulletin price, as I had received it from Buffalo.

"Q. During that period?

"A. Yes.

"Q. And that was the uniform market price in that territory at that time?

2795 "A. Yes, sir."

Now when you used the word "uniform", didn't you mean "current"?

A. Yes, sir; current, going price.

Q. You didn't know, as a matter of fact, what the prices of your competitors were. You just assumed that they were selling at the current price?

A. Well, I don't know whether it would be called an assumption, Mr. Bromley. The building materials dealers and the lumber dealers don't hesitate very long if your price is out of line, and they are buying from you, to let you know that you are out of line. Not having received any complaints of lower quotations, we assumed that our quotations were in line with those of our competition.

Q. Early in your direct-examination, you referred to the one jobber which National was selling in the Cleveland area when you came into the business, I think, back in 1930, and prior thereto, and you said that in 1930 National's price to Toledo, on board, was raised to the dealer price; do you recall that?

A. Yes, sir.

Q. It is a fact, isn't it, that after that time, in 1930, National continued to sell other gypsum products, including plaster, at a discount, to the Toledo Company?

A. That is true, sir.

2796 Mr. BROMLEY. That is all.

Justice STEPHENS. Any further cross-examination by other defendants?

Mr. ADAMS. No, sir.

Mr. FINCK. No, sir.

Justice STEPHENS. Any re-direct-examination?

Mr. STEFFEN. I have just a few questions, Your Honor.

Mr. STEFFEN. I would like to have the witness shown Government's Exhibit 340.

(Exhibit No. 340 handed to the witness.)

By Mr. STEFFEN.

Q. What is meant by the word "Chicago", Mr. Higgins, in the first line of that context?

A. In my correspondence I generally referred, when I mentioned the word "Chicago", to the United States Gypsum Company.

Q. And you would understand that to be a reference to the United States Gypsum Company?

A. That was undoubtedly what I meant when I wrote that note.

Q. Now I think you described yesterday something concerning the warehousing problem in Cleveland, and in Port Clinton, and testified that at this time the only way you, National, could establish a warehouse in that area
2797 would be to put one up in Port Clinton; is that correct?

A. Either put one up or rent one, sir.

Q. At Port Clinton?

A. Yes, sir.

Q. And unless you were to do that, you were at a competitive disadvantage with USG and the American Gypsum Company, who were selling in the Cleveland market?

A. At that time, yes, sir.

Q. And you predict here on the foot of the exhibit that 90 days after the Dwight Hinckley matter is settled, you will still have that Port Clinton matter.

Was that correct, or did the Port Clinton matter get straightened out?

A. Well, I don't probably understand your interpretation of "straightened out".

Q. Well, I will ask you this question: As I understand it, pick-ups were allowed at Port Clinton warehouses of the manufacturers at this time?

A. Yes, sir.

Q. And they were in what size of truckloads?

A. I don't think there was any restriction for a certain period of time, and I may be wrong in that statement. That is to the best of my knowledge.

Q. And that was what really put you at a competitive disadvantage, is that correct?

2798 A. That is the way I figured it, yes, sir.

Q. And was that pick-up practice abandoned following this Dwight Hinckley matter?

A. Well, the Dwight Hinckley matter may have been incidental, and have had nothing to do with it, but the pick-ups at Port Clinton were abolished sometime after—how long after, I don't know.

Q. About Dwight Hinckley, did he get another source of supply after you had discontinued selling him?

A. We didn't really discontinue selling Dwight Hinckley. Dwight Hinckley, in the final analysis, just refused to buy from us because we criticized his market activities.

Q. I see.

A. But he had another source of supply for which he got, or rather received, the going price, and continued to embarrass us as long as he could drag out our trade-name at a lower price.

Q. And did he, after this time, sell at the going price in the market?

A. Yes, sir.

Mr. STEFFEN. That is all, Your Honor.

Justice STEPHENS. Any re-cross-examination?

Mr. BROMLEY. Just one question, if the Court pleases.

RECROSS EXAMINATION

By Mr. BROMLEY:

2799 Q. You said just now that pick-ups were allowed at the Port Clinton mills. Isn't it a fact that what you meant to say was that no extra charge was made by those manufacturers for the privilege to dealers of being allowed to pick up at the mills?

A. Yes, sir. What I meant to convey was the fact that a dealer could pick up—and I do not remember as to quantity—but he could pick up at the going carload price at that time.

Q. That is, there was no price increase for that kind of a service, so far as the price to the dealer was concerned?

A. That is what I meant to convey, sir.

Q. And it would be usual, in the gypsum business at that time, for a manufacturer selling to a dealer to charge him more than the dealer price if the manufacturer permitted the dealer to come to the mill and pick up the material?

A. That is customary at most mills, in order to discourage small pick-ups.

Q. That practice on the part of manufacturers, of permitting dealers to come to the mills and pick up small quantities, is an annoyance to the manufacturer and a source of extra expense to him, isn't it?

A. I don't know, but they have always said it has been.

Q. Well, you can understand that if that kind of
2800 business gets to any volume, the manufacturer has got to have loading platforms, places for the trucks to come in to, and men on the loading platforms to service the trucks of the dealers that come in, can't you?

A. There is no industry that I know of that solicits or wants the small pick-up business at their plant.

Q. That is true of all industries, isn't it?

A. In the ones that I know of, it is.

Q. And isn't that because it is an additional annoyance and expense to the manufacturers in all industries?

A. Yes, sir.

Q. When you told Mr. Steffen, then, that sometime subsequent to this time pick-ups were abolished, what you meant to say was that they weren't abolished at all, but the price to the dealer was increased by a slight additional charge for this kind of pick-up business; isn't that so?

A. For the time being, there was a penalty placed to discourage the pick-up business, and the minimum quantity picked up, I think, was increased to a truckload.

Mr. BROMLEY. That is all.

Justice STEPHENS. I would like to ask you one or two questions, Mr. Higgins.

I don't quite understand yet—I am sorry if I am dull about it—the nature of this competitive disadvantage, be-
cause as I read your testimony in the record last
2801 night, I understood you to say that it was not due to the freight differential occasioned by the 250-mile haul which you had to undergo, or USG had to undergo,—which was it, USG or National?

The WITNESS. National.

Justice STEPHENS (continuing) —but if the competitive disadvantage you were at with respect to dealers in this Cleveland area wasn't due to the freight differential, why couldn't those dealers come and get from you as conveniently as they could from these pick-up mills at Port Clinton? I just don't understand. Perhaps I am dull about it.

The WITNESS. My understanding of our operation in the Cleveland area, operating under the license agreement, was that it did not allow National Gypsum Company to have a warehouse in Cleveland at which we could sell at the same

price that dealers could pick up at Port Clinton. We would have to ship into Cleveland and charge an in-and-out, or a warehouse charge; and that warehouse charge may or may not have been subject to examination where it would not come under the heading of, let's say, a finagler, which is a common term in selling. In other words, it would have had to have been a reasonable mark-up, that would still have made it more attractive for the dealers to pick up at Port Clinton.

Justice STEPHENS. In short, since you didn't have
2802 a warehouse there yourself, you would have had to warehouse the small-lot items and charge that warehouse charge to your dealers, and therefore would have charged them more than they could get the same material for at Port Clinton?

The WITNESS. That is true.

Justice STEPHENS. Why didn't you have a warehouse there?

The WITNESS. The interpretation, as I discussed it with Mr. Burley——

Mr. BROMLEY (interposing). I object to this as hearsay.

Mr. STEFFEN. I insist upon this.

Mr. BROMLEY. The bulletins are in evidence.

Justice STEPHENS. It depends on whether he knows.

The WITNESS. I asked to have a warehouse in the City of Cleveland, and I was told——

Justice STEPHENS (interposing). Don't say what you were told. All I am trying to find out is—was there some policy on the part of your company, business policy or other, as a result of which you didn't have a warehouse in Cleveland, if you know?

The WITNESS. Yes, sir. We did not have a warehouse in any of the area in which I operated.

Justice STEPHENS. The Court doesn't mean to touch upon subjects that perhaps aren't within the issues, but
2803 I am trying to get the whole thing clear in my mind.

The WITNESS. At any time, which was in the middle of 1932, the building cycle was in a very low ebb, and even the large dealers were attracted to the benefits of keeping a low inventory by having small pick-ups available where they could keep a balanced inventory without being subjected to, at that time, the penalty of buying in carload lots.

We were losing our customers due to the fact that their inventories were probably one-quarter of what they would carry in so-called ordinary times.

Justice STEPHENS. Your customers' inventories?

The WITNESS. Yes, sir.

Justice STEPHENS. Now one other question on a different topic.

You used the phrase several times, in answer to questions propounded by Mr. Bromley, that prices were out of line. What do you mean by that phrase?

The WITNESS. A price out of line is a price that is not as low as the lowest price or the lowest competitive price, all other things being equal, in a market. And by "all other things being equal", I mean quality and ability to service.

Justice STEPHENS. Thank you.

Perhaps counsel now each ought to be alowed to conduct a cross-examination of the Court's direct examination.

(Laughter.)

2804 Mr. BROMLEY. In connection with Your Honor's question to the witness, I want to make sure that the Court understands this to be the fact, and it is the fact, isn't it, Mr. Witness, that the Port Clinton mills of USG and American were very close to Cleveland in comparison with your National mill, which was very far away?

The WITNESS. Port Clinton being only about 60 or 65 miles from Cleveland, while our Clarence Center mill was almost 250 miles and our National City would be about 400 miles.

By Mr. BROMLEY.

Q. So that, while a dealer might send his own truck from the Cleveland area to Port Clinton, it was unthinkable that he could send his truck from Cleveland to your Clarence Center or National City mills?

A. That is correct.

Q. Because the expense to the dealer of sending his truck so much further than the distance from Cleveland to Port Clinton would have made the operation prohibitive for the dealer?

A. That is true.

Justice STEPHENS. Just one other question on the part of the Court.

I understand that you mean to indicate that during this depressed period in 1932, concerning which you are
2805 talking, your customers were trying to keep their inventories very low?

The WITNESS. Yes.

Justice STEPHENS. Do you mean to suggest by that, that that was one of the reasons why you didn't have a ware-

house, because you couldn't afford to have a warehouse stocking large quantities yourself because your dealers weren't calling on you for large quantities?

The WITNESS. No, sir, all I knew was that the policy of our Buffalo office would not alow me to open a warehouse in the Central Area.

Justice STEPHENS. I see.

Mr. STEFFEN. I want to ask one question on inventory.

REDIRECT EXAMINATION

By Mr. STEFFEN.

Q. You, as I understand it, sold in carload lots in the Cleveland territory?

A. Yes, sir.

Q. And were you allowed to sell in less than carload lots?

Mr. BROMLEY. I don't know what he means by the word "alowed". I object to that as calling for a conclusion.

By Mr. STEFFEN.

Q. Did you sell in less than carload lots?

A. Our sales were all in carload or pool-car lots.

2806 Q. What tendency did that have to build up a large inventory with the dealer?

A. Well, in plaster wallboard—at that time we were making a board ¼ of an inch thick and a board ⅜ of an inch thick, and it was sold in lengths of 6, 7, 8, 9, and 10 feet. A realer could buy a carload of ¼ inch board and ⅜. He had 8 different units or possibilities, 8 different piles.

Let's assume that he ordered a carload, and had a reasonable confidence in the crystal ball into which he had to gaze, to see which would move out first, and he found that his 4 x 8's had moved out and the rest of his inventory was still intact, and then he was forced to order a carload or a pool-car with someone else in order to bring his inventory up to balance.

Q. That is, if he were to order from National?

A. Yes.

Q. But if he could go to the mill and pick up 4 x 8's in small quantities, that would put you at a definite competitive disadvantage; is that right?

A. Yes, sir.

Justice STEPHENS. If there are no other questions, you are excused, Mr. Higgins. Thank you for attending the Court and helping us.

The WITNESS. Thank you, sir.

(Witness excused.)

2807 Justice STEPHENS. We will take a few minutes recess before proceeding with the argument.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2808 Justice STEPHENS. I suppose one may debate as to who should have the opening in such an argument as this. The Government is offering the evidence and in that sense possibly the burden is upon them to open. On the other hand, the defendants are making the motion to strike, and perhaps, as it is their motion, they should have the burden. But we will cut the Gordian knot and ask the Government to open and the defendants to reply.

You may proceed.

I may say, Mr. Steffen, in order not to interrupt you too much with questions, that I have read—and I think my colleagues have read—both briefs, now. We haven't had a chance to examine all the authorities yet in the defendants' brief. We have examined the authorities in the Government's brief.

There are one or two questions which come to my mind that I will mention at the outset so that you can discuss them as you go along, if you wish to.

As I understand the Government's argument with respect to this "bought and sold" board, as distinguished from board manufactured, or purported to be manufactured under the licenses, the Government's contention in the first place is that the fixing of prices on that "bought and sold" board is within the charges in the complaint, and would therefore be subject to restraint under the prayer.

But the Government makes the second contention
2809 that even if it is not within the charges in the complaint, the fact that prices were fixed on board which the defendants bought from each other is introducible in evidence to show that prices were fixed upon the board manufactured or purported to be manufactured under the licenses. That seems to be the second point that you make.

Now as to the first point, I have one question. As I understand the Government's argument, the contention is that although the complaint is rather specific in spelling out the means and effects and methods by which the alleged conspiracy was carried into effect, the Government need not be bound by that or by the bill of particulars, that that is a general guide only, and that the Government may introduce other items even though not mentioned.

One of the problems that arose in my mind in considering the Government's argument was that the Government cites authorities to the effect that a cause of action can be

stated under the Sherman Act in the words of the statute. I think the *Jelke* case doesn't quite hold that. It adds that the allegations must be sufficiently specific to inform the defendants what they are charged with. But assuming that to be the holding in the cases, that it is sufficient to describe the offense in the words of the statute, that doesn't seem to me wholly to answer the question because the question before us here is not whether the complaint states
2810 a cause of action, good as against general demurrer, but the question is whether or not, as a matter of fair pleading, the defendants have been advised of a specific conspiracy which they are expected to meet, and no other.

A second question that arises in my mind with respect to the Government's argument, concerning the bill of particulars, is that as I understand the contention being made now, the Government regards itself as not bound by the allegations in the complaint or in the bill of particulars; but, the Government argued, in a brief which it submitted in connection with this point, which brief was prepared and submitted by Mr. Kelleher, Mr. Haddock and Mr. Hickey, at the time the Government resisted the application for a bill of particulars, that a bill of particulars ought not be required because the Government would be bound by it, and it cited a number of authorities to that effect. They appear in this brief which you filed with us, and there is a substantial portion of the brief which contends that once a bill of particulars is filed, that specifically binds the Government to the statements made in the bill of particulars.

The two positions seem inconsistent and we are consequently puzzled by it. Consistency may be a bug-bear of small minds, but when we are dealing with a complaint we ought to know whether the law is this or that so far as this particular case is concerned.

2811 Another question that I would like to have you discuss is this. If I understand your contentions correctly, you assert that the defendants are charged with the natural consequences of their acts; that they could not sell board manufactured under the patents, or purported to be manufactured under the patents, at agreed prices unless they also sold their other board under the same price list; and that consequently, you are entitled to go into the whole thing and show all of the economic consequences and effects of the whole proceeding.

Now there again I am a little puzzled by this problem. This case is already a very complicated case, the issues are highly complex and detailed and we ought not extend

it unless it is necessary in fairness to the Government's case to do so.

If it turns out to be the view of the Court, after we have heard the whole case, that the price fixing under the agreements was illegal and must be restrained, it would seem to follow that the economic consequences of price fixing on board not manufactured under the licenses would also fall to pieces because if the defendants cannot fix prices on board manufactured under the licenses, obviously the competitive situation would be restored and all of the good that the Government claims it has a right to accomplish under the case would be accomplished by striking down the license agreements. Therefore it would seem that in that
2812 sense it would be unnecessary to go into the ramifications of these economic consequences.

On the other hand, if it should turn out to be the view of the Court that on the whole of the evidence in the case, the license agreements are not illegal, then the economic consequences which follow from that legal price fixing cannot be helped and would not be illegal.

So why is it necessary to carry the Court into this wide excursion into the agreement or alleged agreement to fix prices, or the actuality of "in line" prices on the "bought and sold" board or on perforated lath or on unpatented products, or all of these other items? Isn't it, after all, an unnecessary inquiry?

I shall have some questions to ask the defendants when they rise to their argument. I mention these in advance so that if you think they are of any pertinence, you may discuss them.

Mr. STEFFEN. It might help if you were to ask the defendants also at this time, or would you prefer to defer your requests as to them?

Justice STEPHENS. It doesn't make any difference to me. The reason I ask them at this time is because I did not want to interrupt you too much, and I think counsel are entitled to know the questions which arise in the Court's mind.

My mind is utterly free of any preconception on
2813 the question, we don't know what the answer is. We simply have these questions in our mind. We will ask the questions of the defendants later.

Mr. STEFFEN. All right.

We have a formal set of Offers of Proof, which are identical with the offers printed in the appendix to our brief.

Justice STEPHENS. We have read those.

Mr. STEFFEN. And if, as a matter of formality, they should be submitted, we have them here and will present them at this time.

Justice STEPHEN. Yes, they should be presented and made a matter of record.

(Thereupon, the document referred to was handed to the Clerk of the Court.)

Justice STEPHENS. The court reporter is directed to copy into the transcript the Offers of Proof which are in the possession of the Clerk, but they should also be filed with the Clerk.

(The document refered to is as follows:)

2814 In the District Court of the United States
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM CO. ET AL., DEFENDANTS

Offer of proof

Pursuant to the ruling of the Court heretofore made on December 15, 1943 (Tr. p. 2201), counsel for the plaintiff submits the following:

Offer No. 1

We offer Gov't. Ex. Nos. 241, 274, 275, 276, and 277 to show: that Certain-teed has contracted to buy substantial quantities of gypsum board and other gypsum products from U.S.G.; to be followed by proof that Certain-teed actually bought board and other gypsum products in substantial quantities from U. S. G. under such contracts; and this to be followed by proof that Certain-teed resold such gypsum board at prices fixed by U. S. G. under the license agreement of October 15, 1929, between U. S. G., and Certain-teed, Gov't. Ex. 10;—all this for the purpose of showing, or as tending to show, the nature and
2815 extent of the commerce which the parties have conducted under *contracts* in restraint of trade in violation of Section 1 of the Sherman Act as charged in par. 44 of the complaint.

Offer No. 2

We offer Gov't Ex. Nos. 241, 274, 275, 276 and 277 to show: that Certain-teed has contracted to buy substantial

quantities of gypsum board and other gypsum products from U. S. G.; to be followed by proof that Certain-teed actually bought board and other gypsum products in substantial quantities from U. S. G. under such contracts; and this to be followed by proof that Certain-teed resold such gypsum board and other gypsum products at arbitrary and non-competitive prices;—all this for the purpose of showing, or as tending to show, the *combination and conspiracy* in restraint of trade in violation of Section I of the Sherman Act as charged in par. 44 of the complaint.

Offer No. 3

We offer Gov't Ex. Nos. 241, 274, 275, 276, and 277 to show: that Certain-teed has contracted to buy substantial quantities of gypsum board and other gypsum products from U. S. G.; to be followed by proof that Certain-teed actually bought board and other gypsum products in substantial quantities from U. S. G. under such contracts; and this to be followed by proof that Certain-teed resold such gypsum board and other gypsum products at arbi-
2816 trary and non-competitive prices;—all this for the purpose of showing, or as tending to show, that the defendants have *monopolized* trade and commerce in gypsum board and gypsum products in violation of Section 2 of the Sherman Act as charged in par. 44 of the complaint.

Offer No. 4

We offer Gov't Ex. Nos. 241, 274, 275, 276, and 277 to show: that Certain-teed has contracted to buy substantial quantities of gypsum board and other gypsum products from U. S. G.; to be followed by proof that Certain-teed actually bought board and other gypsum products in substantial quantities from U. S. G. under such contracts; and this to be followed by proof that Certain-teed resold such gypsum board and other gypsum products at arbitrary and non-competitive prices;—all this for the purpose of showing, or as tending to show, that the defendants have *attempted to monopolize* and have been engaged in a *conspiracy to monopolize* trade and commerce in gypsum board and other gypsum products in violation of Section 2 of the Sherman Act as charged in par. 44 of the complaint.

Offer No. 5

We offer Gov't Ex. Nos. 241, 274, 275, 276, and 277 to show: that Certain-teed has contracted to buy substantial quantities of gypsum board and other gypsum products from U. S. G.; to be followed by proof that Certain-

2817 teed actually bought board and other gypsum products in substantal quantities from U. S. G. under such contracts; and this to be followed by proof that Certain-teed resold such gypsum board and other gypsum products at arbitrary and non-competitive prices;—all this for the purpose of showing, or as tending to show, the *combination and conspiracy* in restraint of trade in violation of Section 3 of the Sherman Act as charged in par. 44 of the complaint.

Dated: January 17, 1944.

/s/ ROSCOE T. STEFFEN,
/s/ EDWARD KNUFF,
Special Assistant to the Attorney General,
/s/ FRANCIS R. SHIELDS,
/s/ KENNETH R. LINDSAY,
Special Attorneys.

WENDELL BERGE,
Assistant Attorney General

Argument on behalf of the United States

By ROSCOE T. STEFFEN

Mr. STEFFEN. Your Honor spoke earlier this week, I think, concerning the fact that our offers had to do only with the C. O. Brown exhibits. We were quite aware that there were many other reserved rulings. However, in order to present the matter as simply and as clearly
2818 as possible, we took the case that had first come up, and would like to have it reasoned from that basis, and I think the decision there will control a number of the other reserved rulings.

The only one that occurs to me as being definitely different from the C. O. Brown situation is the one that came up yesterday afternoon in connection with Mr. Higgins, when he was asked concerning the sale of perforated lath by National in the Cleveland territory. That, I think, is a different case and should be argued separately.

If I may, your Honor, I should like to take up your Honor's questions, which I am grateful to have had you put to us, more or less as the argument proceeds, and I will endeavor to give our position on each of those points very carefully.

I want to say also that we regard the issue as rather an important one, not necessarily for this case, but inasmuch as it raises a close question on pleading, a pleading which the Department has thought was adequate over these many years, and that it is an issue which we would like to have

considered very carefully, because this complaint, as your Honors are quite well aware, is a complaint following the form which has been used by the Department substantially since the Sherman Act was adopted, about fifty years ago. We have used it both on the complaint side and on the indictment side, and the essence of a pleading, as we see it, on both sides is what we are charging an offense or a
2819 series of offenses under the Sherman Act and that, as Mr. Bromley has told the Court, is usually regarded as a criminal statute.

So that the indictment pleading and the civil pleading will naturally follow a very similar form.

Now the reason that we have made five offers of proof is to show sharply that there is a series of statutory violations charged, that is, that there is a violation of the Sherman Act in that there were alleged to be illegal contracts in restraint of trade in gypsum products among the several States.

There is also a charge of conspiracy in restraint of trade.

There is also a charge of monopoly; and a conspiracy to monopolize.

Those are separate, legal offenses, and in paragraph 44 of the complaint each one of those is related, and stated in full, and it is our contention that paragraph 44 states a cause of action growing out of each of these separate provisions of the statute.

Now the defendants have pointed to the fact that we use the word "combination" in subsequent paragraphs of the complaint, and by "subsequent paragraphs" I mean from paragraph 45 to the end of the complaint. In order to get our discussion clear, I want to call your Honors' attention to page 10 of the complaint, and to the concluding sentence in paragraph 44, and I would like to have that care-
2820 fully read so that we will understand what we are talking about.

It says that, "Said unlawful contract, combination, conspiracy, monopoly, and attempt to monopolize will be referred to hereinafter as the combination."

Now that is not a very artful word, but what that says literally, and I think beyond misunderstanding, is that the word "combination", as it appears throughout this complaint from paragraph 44 on, means that it is inclusive of each of the separate violations—there is not just one combination.

We may, for example, be able to establish a conspiracy, but might not be able to establish a monopoly. The word

"combination", though, wherever it appears subsequently in the complaint, will refer to each of the separate violations of the statute.

Now I don't think that is too material, but it is important to note that the word "combination" is a word of art in this particular complaint.

Now let's look at the facts in the case that we have here, I mean in this bit of offered evidence. We offered to show by C. O. Brown, the witness, that the Certain-teed Products Corporation closed down—let's take its North Holston mill—closed down that mill, and for a period of years bought plasterboard and lath, and wallboard, from the United States Gypsum Company, and that they sold that board to their trade at the ordinary dealer prices.
2821 That is not, perhaps, all established in evidence, but that is what the offer is. We wanted to show that that bit of merchandise which was described in the complaint was sold by the Certain-teed Products Corporation at regular dealer prices. That would be at the prices, the same prices, as United States Gypsum Company fixed upon their patented board, so-called, where they had a right to fix prices according to their contention.

Now let's get the proportions here. The probabilities are that ninety or ninety-five per cent of the board—and I say that for purposes of argument only—that ninety per cent of the board that is sold in the country, in the Eastern area, is sold by manufacturers who have made it and are selling it out as part of their regular business.

We wanted to show that there was some other board, in addition to that, that was sold by manufacturers, that board being board which they purchased from another manufacturer, and that it likewise was sold at the regular market price.

Now I think my first argument should be to point out very clearly why and where we think that comes very definitely within the complaint, just as a matter of pleading.

Note that the first sentence of paragraph 44 says, that "Defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in gypsum board, plaster, and miscelaneous gypsum products among the several States, in violation of Section 1
2822 of the Sherman Antitrust Act."

Now that is very broad language. It refers to gypsum board, plaster, and miscellaneous gypsum prod-

ucts, and there is no misunderstanding about that, about what is meant by that.

The defendants in their motions for a bill of particulars, did not ask anything concerning what commerce was covered in paragraph 44. At a later point, I believe, in their motions, they asked what was meant by "miscellaneous gypsum products", and we told them what was meant by "miscellaneous gypsum products". So there is no misunderstanding that paragraph 44, as drawn, relates to all gypsum products.

When you look at the second sentence of that paragraph—I think I should best argue this from the standpoint of a conspiracy in restraint of trade—when you look at the second sentence it refers back to that said "commerce", that is to say, "Defendants are, and have been for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products"—and the "said gypsum products" necessarily means what appears in the first sentence, that is, all gypsum board, plaster and miscellaneous gypsum products.

So that so far as the charge is concerned, of a conspiracy, it constitutes a charge that these defendants, all of them, have conspired to restrain trade in all gypsum products, and I might say parenthetically that that cov-
2823 ers, of course, perforated lath as well as it does ordinary lath. Perforated lath, as Mr. Bromley told you, is no different than any other lath excepting that they put some holes in it. No one, I think, will contend that this excudes perforated lath, but it includes all gypsum products, and that includes lath, plaster board, and wallboard. So I think there is no question at all but what our charge is that the defendants have conspired to restrain trade in all gypsum products and certainly, so far as the C. O. Brown matter is concerned, that is clearly within that because they were buying a large part of ordinary gypsum board and gypsum lath, and they were reselling that, as we contend, at conspiracy prices.

Now we have cases, your Honor, which say that that is an adequate pleading of the offense. It is a charge of the offense in the terms of the statute and, I think, in a criminal pleading, the indictment may be very short. Take a murder indictment, or any of the indictments, and they are practicaly just a short statement. This is a statement of a crime, or charge of a crime, if you wish, although it is coming up on the civil side, under the Sherman Act, and

that has been regarded and the courts consistently state, as you pointed out in the Jelke case, for example, which we have followed and always assumed to be the law, that a charge in the terms of a statute is an adequate charge——

Justice STEPHENS (interposing). Doesn't the
2824 Jelke case go a little beyond that?

Mr. STEFFEN. I think so. I was just saying that we don't have to stand on that because here we have gone to great detail to amplify and give, in a narrative form, the means and methods by which this particular charge was carried out. The Jelke case carefully points out that there is a distinction between charging the offense and the means and methods which are to be introduced in evidence to show how the offense was carried out. And if you will note carefully, this is the only place where we have made a charge. This is the gist of the complaint. Under the new rules this is a statement of our claim against the defendants. So that would seem to be a complete pleading at that point, subject, of course, to the addition of a prayer at the conclusion of the pleading.

But now, let's carry it on further——

Justice STEPHENS (interposing). Let me just ask you this, since you are now talking about the Jelke case, I have read it with some pains, and it seems to say on page 275:

"An indictment is generally sufficient which charges a statutory crime substantially in the words of the statute, except in such cases where other precedents have been firmly established in analogous offenses at common law, or where such a charge would not fairly inform the accused of the nature of the charge preferred against him."

And in the next paragraph there is also an ex-
2825 ception, "except also those cases where the conspiracy is to defraud the Government in a mnner that would not permit of the defendants being fairly and reasonably informed of the character of the offense without such detailed statement of the means and the time and place being set forth".

Do you really contend that if you had nothing in this complaint except paragraph 44, and specified no items of commerce, no dates or places, no effects, means, consequences, or methods, that that would be good pleading?

Mr. STEFFEN. I wouldn't want to answer that, as Mr. Higgins says, categorically. I am not really required to in this case, and I don't think that the Department has ever

been required to because we never make such a pleading, we always go on in more detail. We have many statements in the cases which would indicate that that would be a good pleading.

Justice STEPHENS. The reason that I asked you the question, and interrupted you to do so, is that it seems to me to present one of the most important questions in your argument, and that is this. It is true that you do charge more, but as I understand your argument, and your present contention, the fact that you charge more is immaterial as a matter of fair pleading, because you could have charged less, and therefore you are not bound by what you did by going further?

Mr. STEFFEN. I want to say that we are completely bound by what we did further, but I doubt if we are bound
2826 in the way that your Honor would construe it.

Justice STEPHENS. Well, as to how the Court would construe it is still an open question, Mr. Steffen.

Mr. STEFFEN. Well, I am sorry——

Justice STEPHENS (interposing). The Court doesn't know how it is going to construe it. The question is a baffling and difficult one.

Mr. STEFFEN. Well, I should have said, then, as to how I believe the defendants would like to have the Court construe it.

Justice STEPHENS. That would be much more tactful. (Laughter.)

2827 Mr. STEFFEN. If I can make that very clear, we contend that paragraph 44 is a complete statement of a charge in the words of the statute, and that there are many dicta in the cases that that is sufficient. We can't point to anything further, because there has never been a case come up where they had only a charge in the words of the statute under a Sherman Act case. They have always gone on and explained in more detail how the matter was handled, how the combination was formed, and what effect the combination had—and from the sum-total of that there is some indication, and we have always thought, that a sufficient notice is given to the defendants of what is meant by the broad charge that "You have conspired to restrain trade in gypsum products."

Now I want to carry the argument through just a little further on the pleadings, to show what we feel has given the defendants complete notice of what we think is the case, and of the relevancy of this evidence under the pleadings.

Let's read paragraph 45, which is also a part of the complaint. Now paragraph 45—I think the second sentence is the only one in point at the moment—states that:

"Said companies have entered into, have carried out, and are carrying out said combination for the purpose, and with the effect,"—note these words—"of restraining, dominating, and controlling the manufacture and distribution of said gypsum products in the Eastern area . . ."

2828 Now that is a further specification, if you wish, or explanation, of the type of restraint which is to be found in this case. It says that the defendants have, in very broad terms—but a little more specific, perhaps, than in the charge in paragraph 44—that the defendants "have carried out, and are carrying out said combination for the purpose, and with the effect, of restraining, dominating, and controlling the manufacture and distribution of said gypsum products".

And as I have reasoned with you, "said gypsum products" is definitely all gypsum products, and under a monopoly charge it would be impossible to really prove a monopoly if you are limited to only certain gypsum products. I mean, it would certainly be a limited monopoly; and our purpose here is, under the charge, to show that all gypsum products are monopolized, or, as we say, there is a conspiracy in restraint of trade with respect to all gypsum products.

We state in paragraph 45, in the second sentence, that these defendants, all of them—that is USG with the rest—have combined for the purpose of dominating the market and of restraining trade in all gypsum products.

But we have got a much stronger paragraph, which is of the same character as paragraph 45, and I now refer you to paragraph——

Justice STEPHENS (interposing). Before you go
2829 beyond that, I want to follow every step of your argument.

In paragraph 45, when you say they are charged with combining for the purpose of "restraining, dominating, and controlling the manufacture and distribution of all gypsum products", the word "all" is not there. You refer to the word "said", I assume?

Mr. STEFFEN. That is correct.

Justice STEPHENS. And contend that the word "said", referring back to paragraph 44, means gypsum board, gypsum plaster, and miscellaneous gypsum products?

Mr. STEFFEN. Yes, and the next reference, I think, will make it very clear, Your Honor.

Justice STEPHENS. Thank you.

Mr. STEFFEN. Refer to paragraph 121. Note that paragraph 121 falls under a heading stating "The Effect of the Combination", and is all that the second sentence of paragraph 45 said, that the effects of the combination are thus and so.

Now let's read, because this is, I think, very important, read the first sentence of paragraph 121:

"By means of the combination,"—and when they say "combination" there, they mean conspiracy or monopoly or whatever the charges are in paragraph 44—"the defendants have controlled and dominated, for more than ten years, the manufacture and distribution of 100%
2830 of the gypsum board and 80% of the plaster and miscellaneous gypsum products manufactured and sold in the Eastern area and the defendants will, unless restrained, continue to dominate and control the manufacture and distribution of said gypsum products, at least until the year 1954 when the last of the U. S. G. patents on the foam process expires."

Now there is no indication there that that has to do with only some one type of board; and if you credit us with having charged a monopoly here, which paragraph 44 clearly does, in all gypsum products, this paragraph says that that monopoly is with the effect of controlling the distribution of 100% of the board sold in the Eastern area.

Now it doesn't say only board made by one and sold by one, it says all board sold. And by that they are referring to sales to dealers—I think there is no question on that—all board sold to dealers, or all board sold in the Eastern area, has been controlled and dominated by these defendants, as a group. And I think Your Honor's chart will show you that since 1929 we have just a limited group, there are no other companies. In fact, there are fewer companies in the business now than there were in 1929. The Atlantic Company and the Niagara Company and the Universal Company have all disappeared, so we have now a close monopoly, as we charge, of 7 companies which, according to paragraph 44 and according to paragraph
2831 121, are controlling the distribution of 100 percent of the gypsum board and plaster and miscellaneous products manufactured and sold in the Eastern area.

But we have even a better sentence. Take the next one, and let's read that carefully. The next sentence in paragraph 121—this has to do with prices—reads:

"Since the year 1929, all gypsum board sold by all manufacturers"—there is where the word "all" comes in with a vengeance—"and all manufacturing distributors in the Eastern area has been sold at uniform and non-competitive prices dictated by U. S. G., with a resultant elimination of all price competition in the distribution of gypsum board from manufacturers to dealers."

Now let me point out again that the defendants had a bill of particulars which had, I think, 73 paragraphs, and 165 sub-paragraphs, or demands, and they never asked a thing about the first or second sentence of 121. That was understood by them. They asked something with regard to the third sentence, which is immaterial for our present argument, because we are now saying that we have made a very careful charge of a monopoly or of a conspiracy relating to all gypsum products, all gypsum board.

We have stated in paragraph 45 that it was done with the purpose and effect of dominating and of restraining the manufacture and distribution of said board, or said gypsum products. We have added to that in more
2832 detail in paragraph 121, and have said that they have dominated, since 1929, 100 percent of all board by whomever manufactured.

And in paragraph 121, the second sentence, that they have controlled the sale price of all board sold by all manufacturers throughout the Eastern area.

That seems to me to say, without any question, that we are able and entitled to show that this little bit of board that the Certain-teed people sold—maybe 5 percent of their business, we don't know how much—was sold by them as part of that 100 percent.

Now it isn't going to take much time, as we see it, to put that evidence on, because there isn't a great deal of it. But it is part of the Government's case, if we are going to show a general monopolization or a general conspiracy in restraint of all trade, to show that that board, along with all the other board, was sold at uniform prices.

Now when it is said that we can't point to any particular thing in the complaint which says that the North Holston plant was closed and that they bought some board from USG, and then sold that at bulletin prices, it is perfectly true we can't. There is nothing that specifically mentions North Holston in that transaction. But the defendants are under no doubts as to the fact that we have alleged that they have conspired to control 100 percent of the board marketed in the Eastern area. We have said that in
2833 words which they didn't think were at all ambiguous,

and we stand on that. They didn't ask for an explanation of paragraph 44 in their bill of particulars, and they didn't ask for an explanation of paragraph 121, or of the first part of paragraph 121. The thing is clear.

Now let's look for just a moment at the means and methods that are alleged. We could make an academic contention, Your Honor, that that is enough for a complaint. We didn't stop there, we went ahead and told them just when they formed their combination or how they went about forming their combination; and in the first part, on page 11, beginning with paragraph 47, we have many paragraphs describing much of the evidence that has been presented here, indicating all the little details as to how they went about forming the combination.

Now Mr. Blagden and Mr. Griswold, and others, were active in the early days, endeavoring to get people together under the license agreements, and we have had testimony that they thought it might stabilize the business. The first exhibit we offered by Mr. Griswold was one that said that "According to the plans we now have, it should be possible to stabilize prices for 15 years."

Now that was all, as we see it, giving the defendants very clear notice of how this combination and conspiracy,
or this monopoly, was brought about, and they
2834 haven't any doubts on how we intend to show that
it was brought about.

Now taking the next main subdivision of the complaint, on page 22, I believe——

Justice STEPHENS (interposing). What is that last one to which you referred?

Mr. STEFFEN. On page 11, the formation of the combination.

Now on page 22, we speak of the operation of the combination, and in the following pages. And then, of course, what I have just been speaking of, on page 31, the effect of the combination.

Now you will note that they are all, those sub-headings —the formation, the operation, and effect—are all introduced by the sentence appearing in the last part of paragraph 46 on page 11, "The formation and operation of said combination is more fully set forth in paragraphs 47 to 120 hereof."

Now I call your attention again to the words "said combination". What they are meaning there is that the said combination, which are the various charges made in paragraph 44 of the complaint—and when we say the "said combination" we mean the said charges of conspiracy and

of monopoly and of contracts in violation—are more fully set forth in the remaining part of the complaint.

Now that, I think, brings us pretty clearly—I mean this particular bit of evidence—clearly within the com-
2835 plaint as drawn, without referring to anything else that has been discussed heretofore.

I wonder if that discussion, so far, has met Your Honor's question concerning "bought and sold" board as distinguished from board manufactured and sold, and the Government's contentions with respect to that? We appreciate Your Honor's position that we don't want to drag this case out and go into a lot of ramifiations that are not necessary. We consider, however, that this is a relatively minor part of the case; so far as the commerce is concerned, it is only but a smaller portion, and it will not take much time.

But we insist, argumentatively, that the commerce with which this complaint is concerned includes all board, whether it is manufactured and sold by the particular licensee who sells it, or whether it is board which may be acquired one way or another.

I might say that we have some information that there has been perhaps a little—there may have been some borrowing back and forth between one and two, small amounts. That, of course, isn't described here, but it is still board.

But the gist of the complaint and the gravaman of the charge largely, I think, is that it is the dealer prices that have been fixed throughout this period. And it is prices on all board and all miscellaneous gypsum products. That is the price-fixing restraint, which we have made
2836 very clear in paragraph 121 when we say that all manufacturers have sold all board at fixed prices throughout the period.

Now on the matter of introducing other means which Your Honor spoke of, we would regard this proof of the board which the Certain-teed people bought as a small or relatively small amount of board bought by one company from another and sold at these prices. We don't think it will take long, and we don't regard it as going far afield—in fact, we feel it is squarely within the pleadings—it isn't going far afield to bring in something that constitutes a new charge. There are no new charges other than what appear in 44.

I think—well, I would like to stay with that set of facts, because I will get all tangled up if I go into a number of other purchases by companies. That gives a situation, though, which is indicative or typical of many others.

Now on Your Honor's question of fair pleading, we want this pleading to be absolutely fair, and I think that as far as my connection with this case is concerned, we have tried to be, straight through. And we don't feel that there has been anything at all—in fact, we have put our cards on the table absolutely from the very beginning——

Justice STEPHENS (interposing). By the use of the term "fair pleading", the Court was not suggesting that you had not intended to be fair. I was using that ex-
2837 pression as a term of art, fair pleading in the sense of giving due notice to the opposite party.

Mr. STEFFEN. Thank you.

Now perhaps I should take up this reference made in the defendants' brief.

At the foot of page 3 they say: "The present position of the Government is in contrast with its argument on defendants' motion for a bill of particulars to the effect that the complaint set forth with clarity and particularity the entire charge against defendants. The court accepted this argument, presumably upon the ground that it was made in good faith,"—this is an insinuation that we are now arguing in bad faith—"and denied many of the particulars which defendants requested."

I don't want to go into personalties, but I want to insist very clearly that the position that we now take, as I understand it, is exactly the position that Mr. Kelleher took 3 years ago, or whatever time it was when the bill of particulars was argued.

And I want to call Your Honors' attention, in that connection, to certain language in our brief which was filed at the time that motion was argued.

At the top of page 19, we said:

"For the same reasons advanced by Mr. Justice Holmes the combination and conspiracy involved in the pres-
2838 sent case is insusceptible to detailed particularization. The reason is obvious. The conspiracy charged is alleged to have been a continuing one extending over a period of approximately fifteen years and involving a multitude of incidents, agreements, understandings and transactions. . . ."

That was to state, we felt very clearly that our charge, which was in paragraph 44, was a complete charge of a statutory violation, and that we were unable—I think the courts have always recognized that in a pleading of this sort it is impossible to set forth all of the means and methods and details—the defendants had their opportunity for a bill of particulars, and they requested 165 items.

2839 Most of those items had to do with language, whether we meant, when we mentioned "miscellaneous products"—what products we meant, and things of that sort.

If Your Honors will look through that bill of particulars and notice what the Court granted them, only twelve out of 165 were granted, and those were on matters which were, as we see it, merely explanatory of some of the ensuing paragraphs, not charges of the complaint.

And the charges of the complaint are, as we say, exactly now what they were then. So there has been no change in the position of the Government on that score.

Do I get that point over?

Justice JACKSON. We understand you all right.

Justice STEPHENS. We understand your contention.

I still am a little puzzled about this. It seems to me that the specification of means, methods and effects in your complaint isn't a recital of evidence. In other words, that part of your complaint which follows paragraphs 44 and 45, describing operation, effect and the like, isn't a specification of evidence; it couldn't properly be that because you are not supposed to plead evidence. It seems to me it isn't evidence. Your allegations of what was done, at these various meetings which were held, and conferences, leading up to the formation of the alleged combination, are in terms of ultimate fact. If you had been describing them in

2840 terms of evidence, you would have had to have put in the words of the witnesses, and you would have had to describe the exhibits which you put in evidence. So what you have been alleging in the complaint and in the bill of particulars are ultimate facts descriptive of the combination or conspiracy which you are charging, and speaking for myself alone, what I had in mind was this—it is true that conspiracy is hard to define with particularity, it is true that a conspiracy at common law consists of the agreement, as far as the gravaman of the offense is concerned, but the human mind can hardly know what conspiracy one is charged with except as it is described by means, methods and effects.

Now as I studied the pleadings in the case, during all of the long period when we were having the preliminary motions and hearing the argument at that time, I got the impression that the conspiracy which you were charging was the conspiracy outlined in the complaint, and that it had to do only with price fixing through license agreements on board sold thereunder. Now that impression is not one which needs to prevail if I am mistaken about it.

The other problem that remains in my mind, if you wish to discuss it further—it would follow from the premise I have just made—if what you have described in the detail of your complaint subsequent to paragraphs 44 and 45 is not evidence, if it is a pleading of ultimate allega-
2841 tions of fact, then these new items, if to be treated as a part of your charge, if to be treated as a part of the conspiracy which you are seeking to restrain, would seem to be new items of ultimate fact, and perhaps if that were true, you ought to be asking to amend your pleading rather than to prove them before amending.

But, as I say, Mr. Steffen, I ask these questions only to be sure you have an opportunity to answer such questions as arise in my mind. I don't know what the answer is. We need help from both sides.

Mr. STEFFEN. I should like to make a reference to your first thought, that the conspiracy was restricted to price fixing under the licenses. I wouldn't be surprised but that, in some of our discussion, we casually referred to it that way, either the defense or the Government, and of course it is true, as I said here earlier, that the bulk of the board which was sold had been sold under the license agreements. So you could loosely say that that is the whole conspiracy.

But I want to make it very clear—and I think that paragraph 44, followed by paragraphs 45 and 121 indicate—that we intended to include all board whether under the license agreement or not.

Justice STEPHENS. Well, I think it is not unreasonable for me to have had that impression for this reason. We went through the motion to strike paragraph 46(a),
2842 and the motion for summary judgment, and during all that discussion as I understood it, the essence of the Government's contentions and the defendants' contentions came down to this—and we have stated this in the preliminary description of the case in the opinion of the Court on the motion for summary judgment—that the Government was charging price fixing, standardization of products, elimination of jobbers, under license agreements; that the defendants admitted the license agreements and the price fixing, but denied standardization and elimination of jobbers.

The Government made two rejoinders, first that the patents on which the license agreements were founded, were invalid; secondly, that even if they were not invalid, the terms and conditions of the license agreements were beyond the confines of the *General Electric* case. So it

seemed to me that the whole thing characterized itself in terms of those license agreements and price fixing and other arrangements made under them.

Mr. STEFFEN. Of course that, I think, is very understandable. We had not started with our basic case. We were meeting a defense which the defendants might put in when they pleaded the *General Electric* case. We said, "Even though you do plead the *General Electric* case as a defense, we don't think you come under that". That is where all our arguments under patents were concerned.

As we said, "In order to come within the *General*
2843 *Electric* case you ought to have a valid patent". Of course, if we could upset the license agreements we upset everything.

Now we start at the beginning of the case to show that the defendants have monopolized or attempted to monopolize or conspired to monopolize, or conspired to restrain all gypsum products.

Read paragraphs 45 (a), (b), (c), (d), and (e), and that indicates that we are referring to plaster and other products of that sort, particularly in 45 (c); and if you will look at paragraph 46, which is the one where we bring up this particular means, that is the use of the license agreements, we contend that that was merely a means whereby they stabilized and controlled the price on everything—and it says that. It says:

"Said combination was entered into and has been, and is being, carried out by the defendant companies in part under the guise of numerous license agreements purporting to relate", and so forth.

So that the case, I feel on the pleadings, is surely not one limited to showing that the license agreements are themselves illegal.

I think, as we state in our trial brief, that they are illegal, and if we fail to prove that they had been entered into, or that this whole conspiracy exists as to all commerce,

and we fail to prove that the agreements were en-
2844 tered into as a subterfuge, we come down to the basic question of whether or not they are valid on their face.

But it is essential for a full presentation of our case that we show the whole commerce that is involved here.

Justice STEPHENS. Perhaps this question will point up the argument a little.

Suppose that the Court should reach the conclusion at the close of the evidence and argument in the case, that

the license agreements are within the proper limits of the *General Electric* case and are therefore not illegal; and that therefore price fixing under them was not illegal. And suppose the Court should come to the conclusion on the issues of fact with respect to the elimination of jobbers, and the standardization of products, that there wasn't any elimination of jobbers or standardization of products. Assume all that, and then answer this question:

Would you still contend that under this complaint you would be entitled to an injunction restraining the fixing of prices on board bought and sold by the defendants from each other, but not manufactured under the licenses?

I put it that way because it seems to me that that way of putting it nicely tests the question as to whether or not that is a part of your charge.

Mr. STEFFEN. I think so, and I would include not only board bought and sold, but all board and all prod-
2845 ucts that come under the term "miscellaneous gypsum products".

Justice STEPHENS. I put it in terms of "bought and sold" because that points up the issue.

Mr. STEFFEN. That is right, that gives a good illustration. That is, we think the subject-matter of the commerce here is inclusive of all, and that the matter of the license agreements had to do merely with part of the commerce, a large part, true, but not all.

Justice STEPHENS. This is an appropriate point to take our noon recess.

(Thereupon, at 12:15 o'clock p.m. a recess was taken until 1:45 o'clock p.m. of the same day.)

2846 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m.)

Justice STEPHENS. You may proceed, Mr. Steffen.

Argument on Behalf of the United States (resumed)

By ROSCOE T. STEFFEN.

Mr. STEFFEN. I believe, your Honors, I have used forty-five minutes of my time, and I will only require a few more minutes.

Justice STEPHENS. In the course of your further comments, will you please comment upon your position with respect to the perforated lath manufactured by National, Celotex and Texas, who did not have, I think it was admitted, license contracts to manufacture that product? If you have any different contention with respect to that, than with respect to the other, we would like to know what it is.

Mr. STEFFEN. I will be glad to do that, your Honor. I thought that the defendants were making this motion to strike, and that perhaps they might have the honor of appearing first on that point.

Justice STEPHENS. Well, we can't be completely precise as to the order of opening and closing, this is all so interrelated.

Justice JACKSON. Your argument thus far, Mr. Steffen, is concerned with the offers to prove from 1 to 5, inclusive?

Mr. STEFFEN. Just that, and to show that, as we
2847 see it, it comes within the broad charges of paragraph 44, together with the explanations in paragraphs 45 and 121.

Justice STEPHENS. I think that there was also some reserved ruling with respect to Metal-A, was there not?

Mr. STEFFEN. I don't remember, your Honor.

Justice STEPHENS. I think so.

Mr. STEFFEN. We can check that on the record after your Honors' decision.

Mr. BROMLEY. That was ruled out.

Justice STEPHENS. Very well. There are some forty-seven reserved rulings and it is very difficult to keep them all in mind.

Mr. STEFFEN. I want now to state just very briefly the posture of the case as it appears from the decisions that we have read and cited in the brief filed by the Government, and also to consider very briefly the decisions in the defendants' brief.

We have stated that we believe that the pleadings charge broadly a conspiracy in restraint of trade dealing with this type of material, that is, any board or any plaster or any miscellaneous gypsum product, and without limiting ourselves, we have pointed out that in paragraph 121 we have alleged that the effect of this conspiracy, charged in paragraph 44, was to dominate, or in other words to monopolize, the entire market in board, one hundred per
2848 cent of board, and eighty per cent of the plaster market since 1929; secondly, in the second sentence of paragraph 121, that this conspiracy to restrain trade has had the effect of fixing prices on all board, all plaster, and all miscellaneous gypsum products in the Eastern area, since 1929.

And our contention was that the C. O. Brown exhibits would indicate, together with the accompanying evidence, that this conspiracy had to do not only with board under the license, where USG claims the right to control price,

but would have to do with board which was purchased by one licensee from another, and resold, where Mr. Bromley tells you he makes no claim of any privilege under the license agreements to control. That is a matter of defense.

Our charges are broad and include all products of whatever character.

Now I would like to speak concerning the ultimate facts which your Honor asked concerning just before the recess.

As we visualize the complaint, it is not to be treated as an ordinary negligence complaint, it never has been as far as we have been able to ascertain in the cases. The only authorities that the defendants have for their contentions here, are negligence cases and there, the authorities that they cite are where a person is alleging that another man was negligent and injured the plaintiff and cases where the court has said, "All you have alleged is, broadly,
2849 that the defendants were negligent, to-wit, 1, 2, 3, 4, 5, and 6; that the broad charge of negligence means nothing, and that you have to look at 1, 2, 3, 4, 5, and 6, to determine what the specific charge of negligence was".

I have read some of those cases cited in their brief. Those cases have nothing to do with the sort of transaction we have here. They have never been used, as far as we know, in any criminal case, or in any Antitrust case. These pleadings that we have here are pleadings of a charge under a statute and our pleadings are a sort of—they are not all on one plane—there is a pleading of violation of statute in paragraph 44, that is the gist of the complaint.

We don't purport to show all the details as to how that has been done, or as to when it has been done, but we show in what we have called, and what the courts have called, the means and methods, we show enough to give the defendants a complete idea of what the character and nature of the business is concerning which we have alleged there has been a restraint of trade.

Now that, I think, is carefully worked out in the decisions. We have cited the Jelke case as one case which has been regarded as a leading case, in which the very argument that the defendants are making here was urged upon the Court, that in determining the charge, which as I recall it had to do with the oleomargarine statute,
2850 selling illegally, and then there was a series of paragraphs from 6 to 20, which are like our paragraphs 47 to 120, which said how they sold it and when, and so on, the defense was arguing that you have got to

include all of those in order to determine exactly what the charge was under the statute.

And the Court there said that Antitrust pleadings are different, or that criminal pleadings are different from any other type of pleadings; that they are not just ordinary civil actions for damages upon a negligent suit; that your first allegation is your broad allegation of the statutory charge—and the Court said it might be done in the words of the statute.

We are not insisting upon that, although I think that is true—we have no authority to the contrary. That is a restraint of trade in gypsum products, all gypsum products.

We have particularized, or described it in more detail in paragraph 121 where we say that they have fixed prices, as one of the restraints, and that is all that is essential for this particular piece of evidence, that is that it has to do with all board, it has to do with the fixed price, and that is complete.

Then, in the intermediate part we have a large number of means and methods which say that there were meetings on certain days, that they were talking about patents, and various things of that character—all of which
2851 tell the defendants in detail as to how the matter came to be, but which do not affect, as we contend, the extent of the charges.

The charges are made in paragraph 44, and they are statutory charges and in the words of the statute.

Now as we understand it, it is not essential that we allege all the means and methods. One may allege as many as he feels are necessary, and that is a matter which will come up, and you can prove, if you can prove them, they are an allegation of the facts as we understand them at the time the complaint is drawn; you don't have to prove all of them, and you are never restricted to proving only the particular means and methods that are described in the complaint.

But that is a very different thing from your charges, which are very precise. You are charging a violation of statute, restraint of trade of all gypsum products, and for purposes of fixing the prices throughout the Eastern area since 1929. Those charges are fixed, and we are bound by them, that is what we are going to prove.

Our evidence to prove them will be whatever we can bring before your Honors to establish that. We are not, as we see it, limited in our evidence for the reason that we have alleged a number of means and methods. In fact, it

is to the defendants' advantage that we have alleged a number of means and methods; it acquaints them very clearly with the nature of the case.

2852 In a criminal pleading, as your Honors know, in a criminal pleading under the Antitrust Act, you allege in the terms of the statute the offense that you charge. Then the criminal pleading, being a rather special pleading, also contains an allegation as to the means and methods in order that the defendants may be acquainted with the nature of the case, and so that they may prepare for trial.

Secondly, you allege that, so in case of double jeopardy, the defendants may say that this was a different or was the same charge that was made in the prior case.

Now that is more specific, it requires that you be more specific, than in a civil case. In a civil case, under the new rules particularly, and under our practice, we contend that it would not be essential to go into any of those details concerning means and methods. But as I say, that is academic, we have already alleged a large number of them.

I want to meet your Honor's contention—excuse me—your Honor's suggestion, that because we have gone farther and been more detailed than perhaps would be true in some complaints, that therefore we should be limited to what we have stated by way of means and methods.

We have no authority for that, and it would seem, in our feeling, that where we have gone farther toward stating means and methods, that we should not be penalized for having gone farther than if we had pleaded fewer means and methods.

2853 Justice STEPHENS. I can see your point of view with regard to it, you are arguing that you have been more than fair—and I am using that term "fair" as a word of art in pleading—in specifying as much as you have. On the other hand, there is another point of view which can occur to the legal mind concerning it, Mr. Steffen, and that is this.

Take an extreme illustration. Suppose a complaint in conspiracy under the Antitrust laws had, in terms, said to the defendant and to the court, "We charge you with a violation of the Antitrust laws in the terms of the statute, and we specify the following means and methods, overt acts and effects by which the conspiracy was carried out; and we hereby, in terms, notify you that those are all that we rely upon".

One of the purposes of a pleading is to advise the opposite party how to prepare his case, and in telling him what

he must prepare on, you in effect tell him what he need not prepare upon.

Now if you had been so explicit as to say in the complaint, "These are the means, methods, effects and overt acts which we rely upon, and no others", then you would hardly be, I suppose, in a position to contend that you could still prove others, because you would have notified the defendants, and the court, in its understanding of the issues, that that was the beginning and the end of your charge.

Now the question is, have you, by your specificity
2854 in pleading means, methods, effects and overt acts, in effect told the defendants and the Court, "That is your conspiracy, and no other, and therefore you need not prepare on any other"—and are, therefore, the defendants in a position to claim surprise and lack of preparation? You can see that there is a possibility of two different viewpoints.

Mr. STEFFEN. I can see your Honor's argument. Let me point out first that we did not say that these are all the means and methods.

Justice STEPHENS. I understand that to be your position, I used that simply as an illustration.

Mr. STEFFEN. We rather carefully said that paragraphs 47 on were merely part of the means and methods. Then I think we can say—which was the argument made this morning—that we have given explicit notice of the particular transactions that we have here, that is, stating the ultimate fact, which is that they are charged with violating the Sherman Act, Section I, in that they conspired to restrain trade in all gypsum products; and secondly, for the effect of fixing prices upon one hundred per cent of the board sold in the Eastern area.

Now as I see it, there can be no uncertainty on that. In getting at that conspiracy, we went into a lot of detail concerning when they met, or whether Mr. Griswold and Mr. Blagden saw Mr. Avery, and whether they used the patent license agreements, and a lot of things, all of
2855 the paraphernalia that was used for making that clean-cut conspiracy effective.

That is the thing called means and methods, and it cannot be exhaustive. The cases all say that if you were to put everything in your means and methods which will show how your conspiracy was formed, recognizing that you are not now charging conspiracy, but assuming it has been charged, how it was formed and how it operated, those are all things that are merely means and methods, they are on a different

level from the charge which is in paragraph 44. And the cases say that a pleading under the Sherman Act is a unique and different pleading.

The best illustration of that is Justice Holme's statement in the Swift case where he says:

"The general objection is urged that the bill does not set forth sufficient definite or specific facts"—not that the charge was not clear enough—"This objection is serious but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even if the constituent parts alleged are and from their nature
2856 must be so extensive in time and space, that something of the same impossibility applies to them".

Then we cite in our brief one or two cases which indicate that if we had put in all of those means and methods to establish a charge which is clearly made, the thing would be so voluminous, probably, that it would have to be stricken. That is what the Court stated.

So that we feel that on the authorities we are pretty clear, as far as the means and methods are concerned, and I think that that is perhaps as accurate a term as any.

Now one of the most recent cases to come before us——

Justice STEPHENS (interposing): Where is that opinion of Mr. Justice Holmes?

Mr. STEFFEN. That appears, your Honor, in our brief filed on March 10, 1941, in opposition to the defendants' motion for a bill of particulars, on page 18 thereof. I might also call your Honor's attention at this time to page 42 of that brief where we clearly tell the defendants, as I see it, that we feel that the charges of the complaint are stated in paragraph 44, as to which they asked no particulars, and that the whole discussion on the bill of particulars before the District Court was on the matter of means and methods.

There the Court properly said, "Well, we will clarify your statement of means and methods, but we find no obligation on the part of the Government to make a fuller statement".

2857 In other words, the District Court said, "This is a good pleading" except for twelve minor things concerning wordings and slight ambiguities as to what we meant by "miscellaneous products", what we meant by

"manufacturing companies", and things of that sort, which are very incidental—the Court said, "This is a good pleading", and we cannot be prejudiced because we have a good pleading.

Now when the Court says, "This pleading is not subject to a bill of particulars in respects concerning which the defendants inquire", they don't say, "And that is all the pleading you can make"—they don't pass upon that question. It is implicit in those decisions that if you have made a good pleading you, within those pleadings, may put on what evidence you find will go to make out your case. Your pleadings, of course, are simply to give general notice and to state your charge, and the defendants have their opportunity, as they properly took it, to ask for a bill of particulars, and in that they got, out of 165 requests, twelve rather minor ones, which we take as a compliment to the Government, that our pleadings were good. That is res adjudicata so far as the pleadings are concerned in this case.

And the question is if we were now to say, having argued the question of the sufficiency of our pleadings, that we are bound now to put in nothing more than what was in the pleadings at that time, it would be going in the back
2858 door to do what Judge O'Donoghue said you could not do directly. That is, our pleadings are good—and to now say that we cannot put in any evidence because they didn't get a bill of particulars concerning it, is, I think, to subvert the whole process.

Now I want to refer your Honors, because I think the case is an important one, to the General Motors case. The language we have used in our brief is very much in point. They had there practically the same question that we have here coming up in a criminal case, and in a criminal case I think there will be many considerations why a court might be less inclined to allow evidence than in a civil case where our main purpose is to get at the essential truth of the matter, and the idea of protecting a civil defendant is not quite as strong as it would be in a criminal case.

In other words, this is a longer case, we haven't a jury, and the matter can be handled much more informally.

There they say:

"The appellants objected to the evidence in classes (3) and (4) on the ground that it had not been charged in the indictment. As a matter of fact, the evidence relating to losses upon liquidation was fully covered in paragraph 70 of the indictment, and the evidence pertaining to the forcing of unordered cars was admissible under paragraph 52

of the indictment. It is true that the forcing of tools,
equipment and accessories was not specifically al-
2859 leged in the indictment, but it is reasonable to con-
clude that this form of discrimination was sufficiently alleged in the catch-all clause found in paragraph 34 of the indictment."

It isn't as precise, that "catch-all" clause, I think, as is our paragraph 121 which I have spoken to you of, where we charge that they had dominated 100 per cent of the board business in the country, and had fixed prices throughout the period. Then the Court goes on to say:

"In any event this evidence would have been admissible on the theory that the Government is not necessarily limited in its proof of conspiracy cases to the particular means alleged in the indictment"—and they cite *United States* v. *Socony-Vacuum Oil Company* and *Patterson* v. *United States*—and that, as we understand it, is the prevailing and the only ruling on this matter of means and methods.

You allege your means and methods in such detail as the court feels is essential under a bill of particulars. You are not limited to your proof by those particular means and methods, and you don't have to prove all of those means and methods.

Now may I just say one or two words more? I want to refer to the defendants' brief, page 2, and it may clear up some of the discussion.

The opening sentence says, "The Government apparently
concedes that there is no specific allegation in the
2860 complaint to which the documents in question are
material". Of course we don't concede at all that there are no charges in the complaint, as we have argued this morning. This evidence is very material to establish the broad charge of a conspiracy in restraint of trade concerning all gypsum board for the purpose as alleged in paragraph 121, of fixing prices, and that they have fixed prices.

Then they conclude:

"The Government's argument, if upheld, would permit the introduction of any matter occurring in the gypsum industry prior to August 15, 1940, would make the pleadings purposeless and would require the defendants to stand trial without any conception of what the full charges against them are".

Well, I think I have met that. The full charges are stated in paragraph 44, and they are very broad, and the defendants understood that they were. So that the only

thing that the defendants are not advised of is what particular evidence we are going to put in to establish those charges, and it is not the function of a pleading to say that the North Holston plant was closed and some board was purchased from USG and sold by Certain-teed. We have said that they monopolized all board, and they fixed prices on all board. That happens to be some of it, and we would like to establish that, or show that in order to establish our charge, which is very precise, in paragraph 44, as explained in paragraph 121.

2861 I think that same error runs straight through the defendants' brief. They continually consider that there is no charge here, and that you only can find the charge by looking at the means and methods, which of course never purported to state the charge. They purported simply to broaden out the pleading.

I think I have already referred to the only authorities which the defendants have which would, if followed, be effective to reach their result. That is, if we were to use the negligence cases in this situation, that then they might have an argument to stand upon. They never have been used, and the distinction between a statutory charge and a common law negligence action, where you have to set up all of the ingredients of the negligence in order to make your charge, I think is perfectly obvious, that when you allege negligence you do not allege anything in and of itself, you have got to go ahead and state what was done and wherein the negligence lies.

When we allege a violation of Section I of the statute in that the defendants conspired to restrain trade in all gypsum products throughout a particular area, and couple that with a statement in paragraph 121 that it was for the purposes and with the effect of fixing prices on gypsum board throughout that area and for that period of time, we have made a very clear charge. That is a charge. Then there is nothing in the means and methods which
2862 makes charges or which takes away from the charges.

So I think that the negligence cases really haven't any bearing upon this.

Then the defendants in their brief recite the *United States* v. *Sugar Institute, Inc.* case, and one or two others, but their reference to those cases, as I see it, is beside the point. That is, they point out that we cited the case of the *United States* v. *Sugar Institute, Inc.* in our argument on the bill of particulars, and we did quite properly and we

now cite it here again for the same purpose, showing that our pleadings were adequate—and the question now is whether we can put in the evidence to support the pleadings.

May I have some additional time at the conclusion of Mr. Bromley's argument?

Justice STEPHENS. Yes.

Do you want to comment, before you close your opening argument, on the situation with respect to National, Celotex and Texas on the perforated lath, or do you think you have sufficiently covered that by your general proposition that they also, although they didn't have a license to manufacture perforated lath, are notified by the pleadings that they are nevertheless charged that they were participating in the conspiracy with respect to perforated lath?

Mr. STEFFEN. I am glad that your Honor called that to my attention. We feel that perforated lath is clearly
2863 within the terms of the general charge, paragraph 44, that is it calls for "all gypsum products". There can be no question here, I think, after Mr. Bromley's statement the other day, that perforated lath is no different from ordinary lath, particularly, when you put some holes through it; it is all gypsum lath, one way or the other. They can put on a different kind of paper and it would still be gypsum lath.

Our allegation is that these defendants, all of them, have conspired to fix the prices upon all gypsum products. Now we don't say that it makes any difference whether they were under the license or not under the license, that isn't a matter in the charge. That may be a matter of evidence. But in the charge we say that they have fixed the prices on all gypsum products, and that would include, I think necessarily, the gypsum lath made by National, perhaps not under the license, perhaps not patented, we don't care, and sold at a fixed price.

Mr. Higgins' evidence would indicate that they sold perforated lath even though they didn't have a license, at identically the same price that they sold the non-perforated lath, which would seem to me to bring it easily and clearly within the general charge.

Thank you.

2864 Justice STEPHENS. Many of the questions which I might have asked the defendants have been asked, in effect, by the argument of the Government which you will reply to, Mr. Bromley. But there is one question I would like to ask you.

Let us assume that the complaint, as drawn, does not, in terms or in fair intendment, charge the defendants with violation of the anti-trust laws in respect of board bought by one from another, as distinguished from board manufactured under the licenses and then sold—is not the evidence of fixing prices on board bought and sold between the defendants, as distinguished from manufactured and sold, introducible in evidence, not to prove that as a violation of the anti-trust laws, but to prove that there was price fixing under the license agreements? That is to say, if the price fixing under the license agreements, which is charged, is to be effective, board not manufactured and sold under the license agreements must also be sold at the same price. Otherwise, the price fixing under the license agreements would be ineffective.

The answer that suggests itself to my mind in debating pro and con on that question, is one which may interest Mr. Steffen to comment on when he replies, and that is that there isn't any denial in the case that there was price fixing under the license agreements. That is admitted, except so far as resale price fixing by manufacturing distributors is concerned. Therefore, the evidence is unnecessary.

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You may proceed.

Argument on Behalf of Defendants United States Gypsum Company, Sewell L. Avery, and Oliver M. Knode

By Mr. BRUCE BROMLEY

Mr. BROMLEY. May it please the Court, not only would such evidence be unnecessary, but what possibly could be its probative value? If you suggest that it has probative value, doesn't it follow that proof would likewise be introducible and receivable that this conspiracy encompassed the dealers, and that their prices to contractors were likewise fixed by agreement among everybody?

It seems to me that once you extend the scope of the charge even to this limited degree, there is no end to the process. If my friend's position has any soundness at all, under paragraph 44, if he really means what he says, that the conspiracy was to control the prices of 100 percent of the board, he states that without limitation. That must encompass "bought and sold" board as between the licensor and the licensees; as between the licensees; it must extend to the manufacturing distributors; it could extend to the dealers; it could extend to the contractors. What possible probative force would proof that the dealers' prices to the

contractors were controlled by the defendants have upon the charge in the complaint that these defendants used the licenses as a subterfuge? It seems to me that, there-
2866 fore, your question is susceptible to both answers,— that it is unnecessary, since we admit price fixing; and that it has no probative value for the reason that it is as foreign to the charge as would a charge that these defendants had had an illegal conspiracy to fix prices be.

Justice STEPHENS. On the pure question of probative value, Mr. Bromley, I don't quite yet see your point. Let's assume, for the purpose of illustration and discussion, a charge of price fixing on board manufactured under licenses. And let us assume a case in which that was denied, so we will eliminate the question of the necessity of having the evidence coming in. Assume that was denied. Wouldn't it be some evidence, if the defendants had fixed prices on manufactured board, that they had also fixed them on board not manufactured, of the same character and sold by them, because in order to make the prices stick on the manufactured board they would have to fix the prices on all similar board of similar quality? So that, to show the whole scheme, so to speak, both parts must be shown?

Mr. BROMLEY. Well, it seems to me that in the face of the charge, it has no probative value, because the complaint specifically alleges that in order to make this license conspiracy effective, this conspiracy went one step farther and controlled certain resale prices.

Justice STEPHENS. Well, that gets over into an-
2867 other question which it seems to me, with all respect to counsel on both sides, we ought to keep entirely clear of, for the purpose of clarity in our reasoning.

One place in the Government's argument that has left me confused is that when questions are asked about what is charged, the answer is, "Whether it is charged or not, it is admissible in evidence, because it is probative of what was charged."

But then when some question is raised as to whether it is admissible in evidence, the answer is, "Well, it was within the charge." And it seems to me that your answer here at this moment runs over into that same danger of shifting.

You come back and say that it isn't probative because it isn't charged, and I was trying to eliminate from the discussion, for the purpose of clarity in my own reasoning at the moment, the question of what is in the charge.

I am assuming that there is nothing in the charge which covers board bought by one defendant from another, and

sold; and I am assuming a charge of price fixing under licenses; and I am assuming that there was a denial of that price fixing. I am asking you, wouldn't there be some evidence that there was price fixing under licenses if it was shown that in the same quality of board, not made under the licenses, there was also price fixing by the
2868 same persons, because it would show a complete scheme, and to prove one part would also help to prove the other. And your last response to that was, "Yes, but it is within the charge."

I don't say that in criticism, but because I am trying to keep my own reasoning thoroughly clear, because this question of pleading isn't a mere technicality, as I once said in a dissenting opinion, which I understand has had some adoption by majority opinions. The adjective side of the law is far from a mere technicality. It is the channel through which we carry the substantive law into effect, and a pleading for the purpose of notifying courts and parties what they are charged with is very essential to substantive rights.

Mr. BROMLEY. To answer your question on the proper ground, as you have suggested, it seems to me the way to test the soundness of a negative answer is to say, "Why, that proof is utterly immaterial, and it can be demonstrated to be immaterial if one will assume that that was all of the evidence in the case."

Now suppose that were all the evidence in the case? Would it in any way establish that these defendants entered into license agreements and fixed prices as a subterfuge; would it at all establish that they did fix prices under patent license agreements? It wouldn't have any probative force whatsoever, it would be entirely immaterial. It
2869 wouldn't tend to prove the charge in any degree whatsoever. It is a separate inquiry.

I think that is the best answer I can give to the question.

Now, if Your Honors please, I have great difficulty in following my friend when he talks about paragraph 44. It seems to me that paragraph 44 might just as well have been entitled, "Statutes Violated", because if you look at each one of the sentences in paragraph 44, you will see that there is a reference to a numbered section of the Sherman Act. All paragraph 44, in effect, says is that defendants have violated Sections 1, 2, and 3 of the Sherman Act. Why, there isn't even a mention in paragraph 44 of price fixing.

If you stopped with paragraph 44, no one could tell whether the charge of the violation of the Sherman Act

was pure monopoly; whether it was engrossing all the product; whether it was running competitors out of business; whether it had any relation to price fixing or whether it didn't. It doesn't charge a conspiracy. It wasn't intended to. All it says, in effect, is that we violated 3 sections of the law, and it makes no mention as to how we violated them. It is just as though a plaintiff in a negligence suit started off and said defendant was guilty of negligence—period; or if plaintiff in a negligence suit said de-
2870 fendant violated the speed law, Section 44 of the Motor Vehicle Law, and stopped there. It doesn't state a cause of action whatsoever.

Now while that precise question is beside the point, it seems to me clear that no one could argue that it did state a cause of action. But suppose, for the purpose of the argument, that it be said that it does state a cause of action? If that complaint were served upon any set of defendants, their counsel would immediately, assuming they had been defeated in their demurrer, move for a bill of particulars. And if they moved for a bill of particulars, any court in the land would require the Government to state what the charge was—"What is the conspiracy?" "Has it to do with prices?" "If it has to do with prices, prices of what products?" "Whose prices?" "When?"

Now suppose that motion had been made under this paragraph 44, standing alone as a complaint—the Government would have returned, in answer to the court's order that it furnish particulars, just what it did furnish here in the complaint, plus what it furnished in its bill of particulars. And the defendants would have been protected, they would have ended up with a clear and concise statement of just what the charge was, that it was price fixing, that it had to do with board, plaster, and tile, and block, and cement, and nothing else; and just what the
2871 extent of the agreement was.

Now if that had been the result, as I understand my friend, he wouldn't argue today that the Government could go outside of the charges in the bill of particulars. For, as I understand him, he admits that he could not possibly urge that this court should receive any evidence as to price fixing on brick.

Of course, he is forced to admit that this conspiracy as it stands, in the face of the pleadings and the bill of particulars, today, is limited to board, plaster, block, tile, Keene's cement, and no evidence having to do with anything else would be receivable.

By the same token, it seems to me, he must admit that as the pleadings and the bill of particulars stand today, the charge is of a specific combination or conspiracy, the limits of which, not the means by which it was carried out the limits of the combination, are specifically described in the pleadings as they stand.

Now if that weren't so, then I think the statement in our brief is absolutely so, that the pleadings would then be purposeless, and he could introduce evidence of anything he wanted to that occurred in the gypsum industry, that he thought constituted a violation of law.

All paragraphs 44 and 45 do, as I read them, in this complaint, is to say that the defendants have violated the
2872 Sherman Act in that they have formed a combination for five purposes, which combination is as follows:— and then for 20 pages there is a description of what the combination is.

And just to make that beyond the possibility of any dispute, I call your attention to the fact that the concluding paragraph, concluding sentence, rather, of paragraph 44, says that the "contracts, combination, conspiracy, monopoly, and attempt to monopolize will be referred to hereinafter as the combination."

And then from paragraph 45 to paragraph 54, its objectives are elaborated; and at the end of 46 it is alleged that the formation and operation of the combination is more fully set forth in the remainder of the complaint, from 47 to 120.

When we get down to paragraph 54, we find that they shift their ground and talk about a comprehensive plan for the stabilization of prices in the gypsum industry under the leadership of USG. Then in the concluding clause of that sentence, "and eventual adoption of the plan by every important board manufacturer in the Eastern area."

Well, there my friend might have a broad allegation, because that allegation describes a comprehensive plan for the stabilization of prices in the gypsum industry, without any limitation as to what that plan was.

We saw that, and the court before whom we argued the motion for a bill of particulars saw that, and we
2873 were careful to ask a question about it, because we felt that was the only charge which could possibly be construed as a broad charge and might not be limited by what followed in the complaint. So we asked the Government to tell us whether or not that was so. And the court ordered them to tell us, and they answered it as follows:

"The allegations of paragraph 54 of the complaint are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint."

Now it seems to me it is just as though they had ended up a bill of particulars and said, "The above is a complete description of the conspiracy, and the Government does not contend that it is any broader than the description which precedes this statement."

So that it seems to me that the Government can not now argue that it is not strictly bound by the allegations of the complaint as amplified by the bill of particulars. And I see in no case anywhere any suggestion that the rule which is certainly applied in negligence cases, as my friend points out, is to be relaxed in anti-trust cases.

The citation of authorities which we have given for that proposition, appearing on page 7 of our brief, is a citation of cases not, however, limited to negligence cases. I recall for instance, that the very first case, the
2874 *Eddings* case, is a Fair Labor Standards Act case; and that the third case, against the Union Pacific Railroad, is a cause of action under a statute for a penalty for failure to water cattle.

Now the Government has not cited, even in that part of Justice Holmes' opinion which it read, that that rule that the parties should be bound by their pleadings or their particularization of the pleadings, should not apply or should be relaxed in anti-trust cases. The only case which they have cited, and which we can find, I may say, which even bears on the question, is the *General Motors* case, to which my friend has referred.

That case, it seems to me, supports our position entirely——

Justice STEPHENS (interposing). What volume is that in?

Mr. BROMLEY. 121 Fed. 2d.

Justice STEPHENS. Thank you.

Mr. BROMLEY. I say that case supports our position entirely, because the Court considered with great care this precise contention, that the Government in that case was bound by the indictment, and considered whether a certain class of evidence, to which no specific reference had been made in the indictment, was admissible; and concluded that the indictment covered it.

2875 Now if there had been any general rule in anti-trust cases that this doctrine that the Government should be bound by its allegations didn't apply, there would

have been no necessity for the careful consideration which the court gave the matter.

In that case the allegation was that the General Motors Company, its subsidiaries and officers, had conspired to refuse to do business with automobile dealers, except on condition that the dealers agree to take their financing from the General Motors Acceptance Corporation. That was the conspiracy charged.

Justice STEPHENS. Repeat that, please. Charged with what?

Mr. BROMLEY. That the General Motors Corporation, its subsidiaries and officers, had agreed among themselves not to do business with automobile dealers except upon the condition that the dealers agree to take their required financing from the General Motors Acceptance Corporation.

Now that was the scope of the agreement, that was the conspiracy alleged, and it is referred to by Judge Kerner in exactly those words in the opinion, at about the middle of the opinion.

The indictment alleged a very complete summarization of the specific conduct embraced within the illegal concert of action, and it alleged among other things that
2876 General Motors forced dealers to take an excessive number of new cars so that their requirement for financing would be great.

At the trial the Government proved that General Motors not only required them to take a large number of cars, but also required them to take tools and accessories as well, and the point raised upon the appeal by the defendants, after conviction, was that that evidence about forcing not only cars, but tools, on the dealers, was without the charge in the indictment, was not covered by the indictment. And that is the point to which the court addressed itself.

It seems to me a very narrow point, and one which would require a far stricter interpretation of a pleading than is here required.

Now the court reached the conclusion that that evidence was admissible because of the allegations of the indictment in paragraph 34; and because, after all, the allegation was only one of a means, and not a substantive part of the agreement.

The court said on page 408, under paragraph 30, in the middle of the paragraph:

"It is true that the forcing of tools, equipment and accessories was not specifically alleged in the indictment, but it is reasonable to conclude that this form of discrimination

was sufficiently alleged in the catch-all clause found in paragraph 34 of the indictment."

2877 Now the Government's brief would have you think that paragraph 34 of that indictment was like paragraph 44 of this bill of complaint. So I went to the indictment and copied it out, and here is what paragraph 34 was:

"And the Grand Jurors upon their oaths do further present that continuously for many years heretofore, to and including the day of the finding and presentation of this indictment within the Northern District of Indiana, said defendants and others to the Grand Jurors unknown have engaged in a conspiracy in restraint of trade and commerce among the several States in Cadillac, LaSalle, Buick, Oldsmobile, Pontiac, and Chevrolet automobiles, and the defendants have conspired to do all acts and things and to use all means necessary and appropriate to make said restraint effective, including the means, acts and things hereinafter more particularly alleged, and other means, acts, and things to the Grand Jurors unknown."

Now with that kind of an allegation, the Court said this proof that the articles forced upon the dealers included tools, as well as automobiles, although the precise allegation was only automobiles, entitles that evidence to be received.

Then it went on to point out: "In any event, this evidence would have been admissible on the theory that the Government is not necessarily limited in its proof,

2878 in conspiracy cases, to the particular means alleged in the indictment."

Now what is the distinction between a means and what I have been referring to as the point of this argument, the charge of the extent of the combination, conspiracy, or agreement? It seems to me that it can be illustrated this way: In this case, there is an allegation that so far as the conspiracy was concerned, the defendants agreed among themselves to charge the same prices for plaster manufactured by each defendant. That is the charge of the agreement, so far as plaster is concerned; and that conspiracy also includes tile, block, and Keene's cement. That is, that so far as that part of the conspiracy is concerned, their pleading charges that the defendants agreed to charge uniform prices, without the benefit of any patent, on plaster, Keene's cement, block, and tile.

Then the complaint goes on to allege that one of the means which they used to accomplish this was to file protected job contracts with the Gypsum Statistical Institute so far as plaster was concerned. That is the means which

they used to effectuate their common agreement to unify the prices of these named products.

Now suppose the Government should come in and prove that they used this Institute to file the prices of protected contracts on tile, as well as on plaster. That is not
2879 alleged in the indictment. I take it that under the General Motors case, because that is merely a means and is not part of the charged contract or conspiracy, that the Government is not limited and could prove that the Statistical Institute was used as a means to control tile prices as well as plaster prices.

But it does not go to the extent of saying that where the charge is that the only things the conspirators agreed upon were to control the prices of board, plaster, block, tile, and cement, that the Government can now come in and disregard that charging part of the complaint and try to show that they also agreed upon the price of brick.

Nor does it, I submit, entitle the Government now to come in and say, "The conspiracy was broader than what we alleged it to be, and includes not only price fixing of patented board under the license, manufactured and sold by the licensees, but includes board manufactured by one and sold to another." Because, I submit, if they can introduce that proof and so extend the conspiracy, they can say that in the field of that part of the conspiracy which deals with manufacturing distributors' resale prices, as a matter of fact, the agreement extended so as to include the 20,000 dealers in this country; and they could come in here and offer to prove that it was a part of the conspiracy that the resale prices of the 20,000 dealers were controlled by
2880 these defendants.

Now there must be an end to the extent to which they can now prove this conspiracy reached, and if you don't stop at the limits set by this charge, where are you going to stop? And that is why it seems to me that this question before us now presents the problem which governs all of these offers, to the extent that it is clear that they go beyond what the complaint charges, as amplified by the bill of particulars.

And what we meant in our brief when we said, at the outset, "The Government apparently concedes that there is no specific allegation in the complaint to which the documents in question are material.", is just that. In the list of specifications of the extent to which the unlawful conspiracy went, is there any reference whatsoever to the fact that the agreement among the defendants included the fix-

ing of prices on board manufactured by one manufacturer and sold to another, so far as the resales of that board are concerned?

Now that brings me to paragraph 121. My friend emphasizes that paragraph 121 says the effect of this conspiracy is that the prices of 100% of the board made were fixed. He overlooks the fact that that is merely a charge of the effect of the conspiracy which complaint charges. I mean by that, the complaint charges that the first sale of 100% of the board made in the industry, that the
2881 price of the first sale of 100% of the board made in the industry, was fixed.

Well, it was. This board which Certain-teed bought down here at North Holston from USG was sold to Certain-teed, it was made by somebody else. So far as the sale by the manufacturer of that board to Certain-teed was concerned, that price was fixed under the license.

Now the Government comes along and says, "Oh, we want to show that this conspiracy extended to the second sale of that board, to the sale by Certain-teed, the purchaser of that board."

Well, there is no charge in the complaint that suggests that, and there is no inadvertence about it, because there are lots of allegations in the complaint about resales, about second sales, of board manufactured by these defendants under the licenses and under the patents, and there is a bill of particulars about that.

They allege that so far as these plaster manufacturers who don't make board are concerned, they bought board. That sale——

Justice STEPHENS (interposing). Judge Garrett wants to see a copy of the bill of particulars. Will you get it for me, Mr. Cantor?

Mr. KNUFF. I have some extra copies of the Government's bill of particulars here, if you care for one. I don't have an extra copy of the motion for the bill of particulars.

2882 Justice GARRETT. The bill of particulars is what I want.

(Copy of bill of particulars handed to Justice Garrett.)

Justice GARRETT. Thank you.

Justice STEPHENS. If you have an extra one, let Judge Jackson have it, will you?

Mr. KNUFF. Yes, I will.

(Copy of bill of particulars handed to Justice Jackson.)

Justice STEPHENS. Proceed.

Mr. BROMLEY. So that the unlawful contract or conspiracy, as delimited by the complaint, has to do with resale prices as well as the prices of the first sale of the patented goods manufactured. But it is limited——

Justice STEPHENS (interposing). It specifies resale prices with respect to manufacturing distributors?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. Does it with respect to any others? What are the others?

Mr. BROMLEY. No, sir, so far as the resale prices of people who sell patented board are concerned, it is limited to about 8 or 9 named manufacturing distributors in the bill of particulars under paragraph 42 of the complaint.

There is only one other reference in the complaint
2883 to the resales of anything, and that is metallized board. And that is an allegation that although some of these defendants took licenses from us, they never intended to manufacture the product and they bought it from us; and they resold it, made a second sale of it, under a part of the conspiracy that they would nevertheless observe our fixed prices as their resale prices. So that this conspiracy encompassed not only—as alleged—not only 100 percent of all the board manufactured and sold the first time, but it was meticulous in alleging that it also encompassed the second sale of that board, but confined strictly and definitely to the second sale of that board, first by 9 named manufacturing distributors; and, second, by two or three licensees who bought metallized board instead of manufacturing it under the licenses. And there is no suggestion that the Government ever thought or ever had in mind or ever intended to charge us with the third class of resale price maintenance, to-wit, such board as, once having been manufactured by one manufacturer, was sold to another and then resold by the other. There is no suggestion that the Government intended to charge us with agreeing, in our conspiracy, to control the second price of such board.

There is no more suggestion of that in the complaint than there is a suggestion that they intended to charge that the
resales of all of our customers, the dealers, were
2884 controlled by us in combination with them.

Does my friend for a moment mean to suggest here that he could now produce on this witness stand numbers of these 20,000 dealers to testify that they were forced or coerced or voluntarily agreed with us to maintain our prices in their resales? I don't think Your Honors would

hesitate a moment about that, because that would open up a whole new field.

Would it have any probative value as to whether or not we used these licenses as a subterfuge? It seems to me clearly not. It is an entirely separate and distinct extension of the agreement charged.

This agreement, this unlawful conspiracy, might have reached down to the contractors, it might have reached into brick, it might have reached into all sorts of things, into paints and varnishes, just as easily as it might have reached where it is alleged to reach. But the controlling fact is that the Government limited it to the Eastern area of the United States, and limited it to four products, and limited it to the first sale, except for a very minor part of the resales, to-wit, the manufacturing distributors and the metallized board, and saw fit to stop there; and said that the plan which they were talking about is nothing other than charged in the complaint.

2885 So that it is just as shocking, from the standpoint of fairness—and I speak, of course, legally—to think that they can come in now and disregard, in this respect, as to bought and sold board, as it is to think that they could come in and disregard the limitation that this conspiracy agreement had to do only with the four named products.

And I think it is a question whether, within the charge as to the nature of the conspiracy, this proof can be said to be material. I don't think it can be said that this proof is only proof of means, because it is no more logical to say that proof that price fixing extended to bought and sold board is a means, than it would be to say that this conspiracy extended to brick is a means, to carry out the alleged combination, which is alleged to be one to fix the prices of certain articles in certain fields.

And now, I wanted to say a word about perforated lath.

Justice STEPHENS. Before we change the subject, we will take a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2886 Mr. BROMLEY. May it please your Honors, I come next to the question of perforated lath as that evidence was presented by the witness Higgins.

Let me at the outset, with respect to this matter, pose Your Honor's question to me at the very opening of my argument. Your Honor might well, with respect to this

subject matter, ask the same question in this manner:—Is not evidence of fixing of prices by National as to its perforated board introducible not to prove that as a violation but to prove that there was price fixing under the USG license?

Now the charge with respect to perforated lath is just as strictly delimited in my view as is the charge as to price fixing of board and lath generally, and I invite your Honors' to look at page 30 of the complaint, paragraphs 115 to 120.

As I understand those allegations, the charge of the unlawful agreement in this aspect is that USG had a patent on perforated lath, that it agreed as an inducement for taking out a license, to maintain the price at a differential above the price of ordinary lath—a contention which is immaterial to this argument; and secondly, in paragraph 119, that although it, and Certain-teed and American, who took licenses, were advised that the patent was invalid, they nevertheless entered into the licensee agreements as a subterfuge for the purpose of price fixing.

Now the last sentence of paragraph 118 says:

2887 "Throughout the period from the date of execution of the first of said agreements to the month of May, 1938, U.S.G. determined and fixed the prices of perforated lath at a differential above the prices of straight lath, and all of the licensees of U.S.G. sold perforated lath at said prices so determined and fixed by U.S.G.",—"all of the licensees of U.S.G. sold perforated lath at said prices so determined and fixed by U.S.G.".

Now that might include National, because while National was not a licensee under the perforated lath patent, it was a licensee. So in our motion for a bill of particulars we asked this question—or rather the Court ordered, in response to our demand, that the Government furnish particulars in answer to this question, Par. 10 on page 3 of the order:

"State whether it is intended by the use of the expression 'all of the licensees of U.S.G.' in the last sentence of paragraph 118 of the complaint, to refer to the licensees named in paragraph 89 of the complaint (that is, all of them) or whether it is intended by the use of such expression to refer to the licensees of the licenses to manufacture perforated lath referred to in the first sentence of said paragraph 118".

So we asked them specifically what they meant when they said the "licensees of U.S.G."—did they mean

2888 all the licensees or did they just mean the perforated lath licensees.

And they answered that question as follows, in Paragraph 10 of their bill of particulars:

"In compliance with the tenth paragraph of said order, the phrase 'all of the licensees of U.S.G.' appearing in the last sentence of paragraph 118 of the complaint, refers to the licensees of U.S.G. under the perforated lath patent as set forth in paragraph 117 of said complaint."

Now that excludes National and Texas and Celotex, the three that Your Honor mentioned.

Now the Government comes in and says, "oh, but we want to prove (in the face of this allegation, and in the face of this bill of particulars) that as a matter of fact National, Celotex and Texas observed the prices fixed by USG."

Not only is the charge now so delimited that they should not be permitted to do that, but has it any probative value whatsoever, if the Court pleases, on the charge that USG and its perforated licensees, having been advised that our patent was invalid, nevertheless used the license device as a subterfuge? It seems to me that the answer is clearly no, and that it, in turn, reflects the soundness of the same answer which I gave with respect to your Honor's question, as applied to the field of bought board, which we started out to talk about.

2889 In other words, the fact that National and its licensees saw fit to sell the National perforated lath at the same price that USG did, is no proof that USG and its perforated lath licensees were using the license under the USG patent as a subterfuge, not to gain the reward of the patent owner, but to unlawfully fix prices.

And your Honors will remember that that testimony of Higgins extended from page 2037 to page 3041 of the transcript, I think, and had to do wtih the prices that National charged for its particular kind of perforated lath.

Thank you.

Justice STEPHENS. We should like to have you particularly, in your reply, Mr. Steffen—we do not mean to limit your reply—but we should like to have you direct your attention to the argument concerning paragraph 54 of the complaint, as limited by the bill of particulars, and the effect thereof on paragraph 121 of the complaint.

Mr. STEFFEN. Its effect on paragraph 121, you say?

Justice STEPHENS. Yes.

Mr. STEFFEN. I think I can finish rather briefly, your Honors, although there are several questions, particularly on perforated lath, that I desire to cover.

Justice STEPHENS. You may take such time as you need, Mr. Steffen.

Mr. STEFFEN. I would like to take up the perforated lath question first because that happens to be fresher in my mind.

2890 Justice STEPHENS. You may do so.

Reply argument on behalf of the United States

By ROSCOE T. STEFFEN

Mr. STEFFEN. The argument is made that the bill of particulars on perforated lath, as addressed to paragraph 118, has limited the proof in this case.

If you will read it literally it says:

"Throughout the period from the date of execution of the first of said agreements to the month of May, 1938——

Justice STEPHENS. Where are you reading from?

Mr. STEFFEN. From paragraph 118, the last sentence. ". . . U.S.G. determined and fixed the prices of perforated lath at a differential above the prices of straight lath, and all of the licensees of U.S.G. sold perforated lath at said prices so determined and fixed by U.S.G."

Now it seems to me that all that says in effect, if I have apprehended the argument correctly, is that USG, under its license agreement on perforated lath did fix the prices of perforated lath, and they did so at a differential above the prices of straight lath. I think that that is a perfectly intelligent and consistent statement to make.

That is all we expect to prove that USG had done, that is, that under their agreement they had fixed the prices at a differential of 25 cents.

Now Mr. Bromley, I gather, treats this little group
2891 of paragraphs on perforated lath as being a separate charge and a separate part of the indictment, as though we had then said that the defendants violated the Sherman Act in the respect that they had restrained trade on perforated lath, to wit, that they had done these things.

These paragraphs on the perforated lath agreements are a part of the whole indictment, and perforated lath is like ordinary lath, or like wallboard, or plaster and the other products. And our charge is a very broad charge,

that they fixed the price on all products, inclusive of perforated lath.

Then, when we come to perforated lath, we specify that there were separate license agreements, and under those agreements they fixed the price at a 25 cent differential above what they were selling ordinary lath at.

So it doesn't seem to me to change the basic argument we made this morning, and that perforated lath, just like any other product which is comprised within our broad charge, is to be brought within the complaint.

Now I notice that Mr. Bromley made no attack on the essential position that we took this morning, and that is that paragraph 44 states that it relates to combinations and a conspiracy in restraint of trade concerning all gypsum products, and that in paragraphs 121, 122 and 123 we denominate those as price fixing and monopolization
2892 charges, and that they cover 100 per cent.

Mr. Bromley met that in no respect excepting to suggest that if our contention were correct, that they we would be able to prove price fixing in bricks under this conspiracy, or that we would be entitled to prove price fixing on the part of some 20,000 dealers. When he said that he was simply setting up a straw man.

Paragraph 44 isn't merely a recital that these are the statutes we are interested in. Paragraph 44 says that these defendants—and they are fully named in the preceding ten or fifteen paragraphs—conspired to restrain trade—which are the words of the statute—in gypsum products, which are carefully described in the preceding paragraphs, 43 of them more or less, and then goes on to say, as I think we argued very fully this morning, that it was done with certain purposes, which are stated in Paragraph 45, and then Paragraphs 45 (a), (b), (c), (d) and (e) are stated to be the means by which those purposes were effected.

That is to say, that you have conspired to restrain commerce in gypsum products for the purpose and with the effect of dominating the manufacture and distribution of those products by, (Par. 45-a), fixing prices on board made and sold by the defendant companies; (Par. 45-b), by concertedly standardizing gypsum board; (Par. 45-c), by concertedly raising the price of plaster; (Par. 45-d),
2893 by concertedly refraining from distributing gypsum board, plaster and miscellaneous gypsum products manufactured by said companies through jobbers; and (Par. 45-e), by concertedly inducing and coercing manufacturing distributors to resell at the raised and fixed prices.

Those are all means by which they have dominated the manufacture and distribution.

Now it seems to me that the argument is clean to this point and has not been shaken at all by Mr. Bromley's discussion. We are not talking about prices to 20,000 dealers, there is no question about that. We are not talking about bricks; we are talking about this particular industry. We have described the particular charge, we have described the fact that it has to do with fixing prices, and we know that it is fixing prices to dealers. It is that price which is involved.

It occurs to me—I think from Judge Jackson's question the other day that he may have had some question, because I recall him raising the point as to why we didn't allege in paragraph 45(e) that we were charging the defendants also with controlling the resale price where board was manufactured by one and sold by another, which is the case we have here.

Now as Mr. Bromley brought out, he says that there is no charge in the complaint that one manufacturer did make and sell to another who sold to the dealers, he says
2894 that the complaint merely alleges a fixing of the first price. I would like to dissent very definitely from that. There is nothing in the complaint at all which says that it is concerned with the first price. It is concerned only with the dealer price, that is the price from these defendants to these dealers. That is the price that is fixed throughout the industry.

Now it occurred to me that I might make it a little clearer if I could draw a short diagram on the blackboard. May I have that permission?

Justice STEPHENS. Yes. Mr. Marshal, will you get the board over where we can all see it.

(Whereupon, Mr. Steffen drew two sets of diagrams on the blackboard, and referred to these diagrams in the following discussion.)

Mr. STEFFEN. I don't want to go into too much detail, but this first diagram here, showing USG, and A, B, C and D, is what we visualize as the group of defendants. If there is a conspiracy to be proven, they are the conspirators and that is the conspiracy. That is a cross section of the conspiracy.

Now when this group, any one of them, sells to a Manufacturing Distributor, that is one sale from any one of this group of so-called conspirators.

The second sale, which is the one that is fixed in this case, is the sale to the Dealer. The USG bulletins
2895 fix the price, the dealer price, throughout the United States, and that is admitted.

Now we charge in Paragraph 45(e) that these people here, USG and the other licensees, have sold to the Manufacturing Distributor and have controlled the price at which he sells to the dealer, and we made a specific notation of that in 45 (e), that is, we say that they have dominated the industry by controlling the price at which the Manufacturing Distributor sells to the dealer.

That is what we would regard as resale price control, and we charged that, and the cases have always held that that would be an illegal matter, if proven, that it is a violation of the Sherman Act, and it would be one of the restraints which is charged in Paragraph 44, that the defendants have conspired to restrain trade; and we say in 45(e) that they have controlled this Manufacturing Distributor's price to the Dealer.

Now let's take the other situation, which is the case we have with C. O. Brown. USG has sold certain board to A. A, in turn, has sold that board out to the Dealer. This is an intra-conspiracy transaction. If A were the Newark Plaster Company, A would have bought, perhaps, some of its gypsum from USG, I mean its gypsum rock, or it would have bought paper, or it would have bought from the American Cyanimid perhaps some synthetic gypsum—all of which goes into the board.

2896 We are not interested in this transaction between USG and A, or between A and the American Cyanimid—I don't think that is illegal and we didn't charge that it was illegal and we don't now contend that that transaction was illegal. We do contend, however, that this whole group, however they got their board, whether they made it themselves or bought it from one another, have controlled the price to the Dealer.

And that is practically the whole distinction between the case of resale price maintenance, which we charge in 45(e), and the type of evidence which we put on here in the case of C. O. Brown.

It wouldn't be any more illegal if A sold to B and B sold to C and C sold to D and D sold to USG, and USG sold to A and then back to the Dealer. It would still be this price to the dealer which we have charged that they have controlled.

That is our position.

Justice STEPHENS. That is to say, in respect to this board bought by one defendant from another, you contend that the illegal transaction consists of, to take an example, Certain-teed buying from, we will say, USG, or Certain-teed buying from Celotex, just to take an illustration, board manufactured or purported to be manufactured under the licenses, and then reselling that to a dealer at a fixed price?

Mr. STEFFEN. And this evidence as to where they
2897 • obtained the products from which they made the board is merely preliminary evidence to show that all the board in the Eastern territory which this group has sold, has been sold to dealers.

Mr. BROMLEY. I used to be a school teacher——

Mr. STEFFEN (interposing). I haven't finished, Mr. Bromley.

Mr. BROMLEY. Can I just take this diagram and put it right?

Justice STEPHENS. Just wait, Mr. Bromley, and let Mr. Steffen finish, and then we will have further instruction.

Justice JACKSON. Am I clear on this, Mr. Steffen, or am I stupid—I don't know whether I understood you or whether I am dense. In your bottom graph there—looks like a chemical chain—did you mean to indicate that A, for instance, on the top there, bought board, we will say, from USG?

Mr. STEFFEN. Yes.

Justice JACKSON. And then in turn sold it to the Dealer?

Mr. STEFFEN. Yes.

Justice JACKSON. I thought I understood you to say that even if A had gotten the materials that entered into the board, and they made the board and then sold it to the Dealer that it would be the same—did you mean that?

Mr. STEFFEN. Yes, I meant it would be the same, that there are all sorts of transactions back of the sale
2898 from A to the Dealer, A being Certain-teed in this case, where they got their paper, their gypsum, their starch, or whether they bought the completed board from USG. Those are earlier transactions.

But when we make a charge of monopolizing one hundred per cent of the board sold to dealers, we have to show all of that evidence and we wish to show it for the purposes of, as I say, showing that we have a monopoly here on the sale of all board.

Now I want to make another point. The Presiding Justice also suggested, or rather asked the question to begin with, when Mr. Bromley started, whether or not this evidence might also not be evidence of subterfuge, that is, whether or not we can bring it within the charge. We think we can bring it within the charge directly as being the board that was monopolized.

But even though that was not true, it would still be evidence of subterfuge. That is, if this were to be limited to a conspiracy having to do with board manufactured under the license, which would be the defense that Mr. Bromley wishes you to accept, if they actually sold board which wasn't manufactured under the license at the same price at which they sold board under the license, it would indicate that they were intending to maintain and protect their bulletin price, and that probably the whole thing was
2899 put together, I mean the use of the license agreements was done, for purposes of, as we allege, monopolizing the entire business in gypsum board and plaster, and stabilizing the price on all gypsum board. So that it would be relevant, one way or the other, as I see it.

But as far as our main charge is concerned, it seems to me perfectly clear, and we are not to be criticized for not having alleged as a charge that USG sold to Certain-teed, and then Certain-teed sold to the dealer, because I don't think it is illegal. We don't charge that. We charge that the conspiracy fixed the prices on sales to dealers.

Now on paragraph 54, if I may.

In reading 54 literally, it seems to me to mean nothing more than a sort of introductory paragraph to the remaining paragraphs of the complaint. I think, if I ever have anything to do with drafting a complaint, I won't put in such a transition paragraph.

But all it says is that "The period from the latter part of 1926, after U.S.G. had obtained the judgment against Beaver and after the filing of the infringement suits against American and Universal, until the year 1930, was marked by efforts by all of the parties to settle the aforesaid litigation, expansion of these efforts into a comprehensive plan for the stabilization of prices in the gypsum industry under the leadership of U.S.G."—then there was
2900 temporary delay in it, and then an eventual adoption of the plan.

Reading the remaining paragraphs, you can see that we spell out in some detail what is referred to there as a sort of general or introductory paragraph.

The plan—Mr. Bromley in his brief, or the defendants in their brief, try to convert "plan" into "combination", that this is the combination. And that, as I pointed out this morning, is a technical word meaning the charges of the complaint.

The charges of the complaint are made over in 44, and this is merely a description of some of the means and methods.

Suppose we had said, "Now, we would like to introduce the following means and methods." That is about all it says. They ask us in their bill of particulars—"did you mean any other means and methods than you said you were going to use?" And we say, "No." And it hasn't changed or limited or expanded our pleadings in any way. It seems to me to be entirely beside the point.

Is that a clear statement?

Justice STEPHENS. We understand your position now.

Mr. STEFFEN. Did you ask concerning 121?

Justice STEPHENS. No, only in connection with 54.

Mr. STEFFEN. Paragraph 121 is met with about the same response. Of course, as I pointed out earlier,
2901 it was only the last sentence of 121 that the defendants asked for particulars upon. The first two, which I have stressed somewhat today, are not affected. They understood those and didn't ask for any particulars concerning the first two sentences.

Justice STEPHENS. It was the contention of Mr. Bromley, as I understood it,—the reason I referred to 121 in my question which I asked on behalf of all three of the Judges,—his contention was that when you read 54 as limited by the bill of particulars, and 121—121, in its reference in the beginning to the control and domination for more than ten years of the manufacture and distribution of 100% of the gypsum board and 80% of the plaster—it refers to the gypsum board manufactured and sold under the licenses, not to the board which was bought and then resold.

Mr. STEFFEN. Well, I think my position is clear on that.

Justice STEPHENS. In view of the introduction of new evidence on the blackboard, we will allow Mr. Bromley to make a further explanation.

Reply Argument on Behalf of Defendants USG, Avery, and Knode

By BRUCE BROMLEY

Mr. BROMLEY. This analogy isn't a good one, but before I show you what he should have drawn, I want to make sure

that it is understood, if the Court pleases, that this
2902 diagram indicates that USG, owning the patent, has licensed Licensee B to manufacture the patented article and sell it to the manufacturing distributor; and that in the license USG has fixed the price at which Licensee B can sell to the manufacturing distributor; and that so far as this diagram is concerned, the complaint alleges that this purchaser, having purchased the patented article from B, which was made by B, conspired with B to sell to the dealer at a price fixed by this little conspiracy of which this man became a member.

Now that is specifically charged in the complaint.

In order to make an analogy to this situation, I want to change the diagram so as to represent the true fact——

Justice STEPHENS (interposing). Don't rub that out, please. Turn the blackboard over to make a smaller sketch.

Get another blackboard so we can see them both at the same time.

Justice GARRETT. There is only one blackboard in here. I thought we had two blackboards.

Justice STEPHENS. Then turn it over, Mr. Bromley.

Mr. BROMLEY. I guess I can do it by dotted lines.

Justice STEPHENS. All right, if you can.

Mr. BROMLEY. Well, the complaint also charges, of course, that USG itself sells this manufacturing distributor, and that USG and the manufacturing distributor agree that when the manufacturing distributor re-
2903 sells to the dealer he will observe a fixed price. That is charged.

Now down here, USG, instead of—Mr. Steffen wants to prove—instead of selling a manufacturing distributor, sells one of its own licensees, B for instance. USG sells B. B buys the board just like the manufacturing distributor. Then B resells to a dealer. And the allegation is that B, having bought the material, observes the resale price. That is not charged in the complaint.

Mr. STEFFEN. We agree that that is not charged.

Mr. BROMLEY. Does proof of that, Your Honor, in any way tend to prove that this as done? Not at all. So that, not only is it not charged, but it has no probative value and is immaterial to the charge that these gentlemen, the licensor and the licensees, conspired with the manufacturing distributor to fix his resale price. And it won't do to say that because the resale was made by one of the licensees, it

is different from where the resale is made by a plaster manufacturer who doesn't make board, because this licensee here, B, when he buys the board, buys it because he is not making it at that time, at that place. He buys it just like that man does, and his sale to the dealer is just as much a resale as the manufacturing distributor's sale to the dealer.

This situation (indicating) isn't charged. My friend admits it.

This situation (indicating) is charged. It is one of the two instances in the complaint in which the fixing
2904 of resale prices is charged, manufacturing distributors and resale of metallized board are the two.

This situation (indicating) isn't alleged at all, and can have no bearing, it seems to me, upon whether or not this aspect of the conspiracy existed or was entered into. And, therefore, it must be immaterial.

2905 Justice STEPHENS. Well now, I was once asked by a lawyer who saw me reading books in a law library, when I was a young practitioner, why I read so many law books, and I told him that I couldn't seem to get along without them. He said that he didn't follow that practice himself, but that if he could find one case his way he always quit reading because if he went beyond that he was bound to get confused.

I am confused by having gone a little too far here. Either I have misunderstood a lot, or else I am astonished by Mr. Steffen's admission that this isn't charged, because I thought that this is what we have been arguing about for the last hour and a half, arguing that it was charged.

Mr. BROMLEY. I was equally astonished, but I was pleased as well.

Mr. STEFFEN. May I explain what I meant by that?

Justice STEPHENS. Yes

Mr. STEFFEN. I think I said, to begin with, that I didn't see any offense in the sale by USG, or anything that we should charge as a violation of the Sherman Act, when USG sells to A or to any other co-conspirator, that that is simply a preliminary matter, but when any one of the co-conspirators sells to a dealer at a price agreed upon by all the conspirators, then we say that that is a fixing of prices.

The preliminary transactions between USG and A, or between A and B, are not made an offense, or not
2906 charged as an offense. The basic offense here is the control of the price to the dealers.

Now Mr. Bromley looks at everything from the standpoint of USG, and he looks right out through the license agreement, and that is all he sees, and he doesn't recognize that USG is just one manufacturer here, from our standpoint. We are looking at them all as co-conspirators, USG included, and that the license agreement is merely a means whereby they have more or less covered up the transaction, as we see it.

And we think that the evidence of sale by USG to A is very important to show that the license agreements were in fact merely a subterfuge because the sales to the dealers are maintained even though they are not under the license agreements, at the same price.

Justice STEPHENS. Suppose we take board not sold by USG but by——

Mr. STEFFEN (interposing). Celotex to Certain-teed?

Justice STEPHENS. To still a third defendant—that is manufactured under the license agreement.

Mr. BROMLEY. Yes, and controlled under the license agreement, and the prices are fixed in the bulletins.

Mr. STEFFEN. We are not quarreling with a sale between Celotex and Certain-teed as such—we are not interested in what transpired between the co-conspirators—but all we are saying is that when they sell to the
2907 dealers they sold at fixed prices.

Mr. BROMLEY. Now that is a very important admission. If my friend admits the USG as the licensor had the right to say to Licensee A, "You may manufacture my patented board but when you sell it to Licensee B you must observe my price", if he admits that is lawful, then by the same token he must admit that when A sells to the dealer at a price fixed by USG, that that is lawful, because there is no difference between a sale by A, who manufactures the board under the patent, to another manufacturer, and a sale by A to a dealer. The prices in both instances are fixed under the license, and if he admits that the one is lawful, it follows automatically that the second must be lawful, there is no difference.

Mr. STEFFEN. Note carefully that I was not speaking of a fixed price between A and B, I didn't go into the question of what price A charged B. I said whatever transpired between the co-conspirators as to their obtaining the board at whatever price, whether they borrow it or whether they buy part from one and part from the other, that that only goes to show the board which they are selling

to dealers and we are interested, and this complaint charges, that when they get ready to sell it to dealers that they sell it at a fixed price.

2908 Justice STEPHENS. Is there anything further on either side?

Mr. OLIVER. I should like to make a very short statement, if I may.

Justice STEPHENS. Mr. Oliver.

Argument on behalf of defendants The Celotex Corporation and Dahlberg

By MR. ERNEST H. OLIVER

Mr. OLIVER. It is not my object to get into the general broad discussion. My remarks will be confined solely to perforated lath.

Mr. Bromley, in his argument, referred to the Higgins testimony. In order that the matter may not be overlooked, I do want to call the Court's attention to the fact that Exhibits 333, 334 and 335, which were offered at the time Mr. Baumhogger was on the stand, and referred to in the transcript starting at page 2894—that in so far as those three exhibits were concerned, ruling was reserved as to National, Celotex and Texas, on the question of whether they were binding on these three.

Now our objection at the time was to the fact that neither one of the three had a perforated lath license.

I also want to emphasize that under paragraph 118 of the bill of complaint, as amended by the bill of particulars, neither of these three companies is charged with any

2909 wrongdoing.

Justice STEPHENS. With any what?

Mr. OLIVER. With any wrongdoing.

Therefore, it seems very clear to me that the testimony concerning perforated lath, as well as those exhibits, could not be binding upon National, Texas and Celotex.

That is all.

Justice STEPHENS. Mr. Finck?

Argument on behalf of defendants National Gypsum Company and Baker

By ELMER E. FINCK

Mr. FINCK. If the Court please, on December 20, after I had made a motion on behalf of National and Baker at page 2512 of the transcript, Mr. Knuff stated that he was

not prepared at that time to argue the matter of metallized lath, metallized board, rather, and perforated lath, and your ruling was reserved on our objection, and I was asked to call your attention to it at the time they made their offer of proof.

Now no offer of proof was made regarding perforated lath or metallized board, but I presume that this is the time to renew my objection to all that evidence relating to perforated lath and metallized board, on the same grounds, that it is incompetent, irrelevant and immaterial, and not binding on such defendants; and to renew my motion to strike all such testimony as to such defendants.

2910 Now National was not a party to any perforated lath license agreement, and the complaint does not so charge. As we understand the Government's position with respect to perforated lath, it alleges that certain defendants took out perforated lath licenses, believing the patents to be of doubtful validity, and did so for the sole purpose of having USG control the price.

Now under the bill of particulars, in answer to the request of the defendants——

Justice STEPHENS (interposing). Will you repeat what you just read again, the portion that you read? I missed one point. You started out by saying. "As we understand the Government's position", and you were reading.

Mr. FINCK. I wasn't reading, it may not be accurate, but I will state it again.

Justice STEPHENS. Then let the court reporter read it. He has it.

(Thereupon, the portion of the record indicated was read by the reporter.)

Justice STEPHENS. Thank you.

Mr. FINCK. In the plaintiff's answer, the Government's answer to our request for a bill of particulars, they stated, as to paragraph 54 of the complaint, that they did not intend to charge the defendants with the commission of any acts other than acts referred to in the subsequent

2911 paragraphs of the complaint.

Now this charge regarding perforated lath agreements contained in paragraphs 115 to 120 of the complaint, specifically—or rather the Government specifically, in its bill of particulars, eliminates or excludes National. It is not a question here of extending or adding something to the charge or to the means by which this conspiracy was carried out.

In the case of perforated lath National and other defendants here who did not have a license from USG, were excluded or eliminated from that part of the charges. Now they characterize the paragraphs following paragraph 54 as "charges". Now we certainly haven't prepared to defend against such charges as we were eliminated from.

Finally, I see no reason why we should be involved with all the evidence concerning perforated lath, because even if all that evidence is put in as against us, in the final analysis any decree which this Court might make regarding perforated lath, would not affect us—it couldn't. We had no agreement with USG.

Furthermore, the Government said, "You are not involved in this matter, we except you and others who are not licensees of USG".

Now as to metallized board, National's position is likewise unique. There the Government makes certain accusations as to certain defendants who had agreed with
2912 USG under a license agreement to control the price of board sold by those licensees to others, but, they say, "except National". And we understand the Government's position on metallized board to be that it alleges that USG controlled the resale price of metallized board purchased by certain of the defendants and not manutured by them.

National, never having purchased any metallized board for resale, could not possibly be connected in any matter whatsoever with such a charge. The control of National's price by USG on metallized board, manufactured and sold by National, was perfectly legal. We had a license, and there certainly is no claim that National had anything whatsoever to do with the alleged control of resale prices of the other defendants. That price, they say, was controlled by USG.

Now in looking at paragraph 114 of the complaint—and this is very carefully drawn, apparently—it says:

"At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board (now that is the conspiracy they are talking about, their intent to sell this board, or control the price of board that they did not manufacture) but all of said licensees, except National, intended, as USG well knew, to purchase metallized board from USG or National for resale to dealers and consumers."

Now if they had wanted to include National in this
2913 phase of the case, it would have only taken two

words. They could have said, "as USG *and National* well knew". They don't say that we knew anything about this conspiracy or about this agreement to buy board from one of the manufacturers under the license agreement under which they did not intend to manufacture.

We went ahead, we equipped our plant, we took a license and spent a lot of money, equipped our plant, made metallized board, and sold it in the regular way, of course under the prices fixed by USG.

Now it seems to me that all the way through they except National. If you will read that paragraph very carefully there was a definite intention on the part of the Government not to include National in that provision, apparently because they thought that probably some evidence might hurt them if they included National.

This part of the case was gone into very, very carefully by the Government, they investigated every contract, every agreement, all of our documents concerning metallized board, and they came to this conclusion, and it is certainly giving it a fair reading, it seems to me, that the intention was to exclude National.

Now it seems very obvious to me that all this testimony relating to metallized board and perforated lath should be stricken from the record as to National and
2914 Baker, and that that evidence has no bearing upon the issues concerning them.

Now I have prepared a list showing the pages and lines of the record where such testimony appears, and I can present that to the Court if it is desired.

Justice STEPHENS. If you will, it will be very helpful.

Mr. FINCK. Otherwise it would take some time to go over it.

(The list referred to was handed to the Court.)

Mr. STEFFEN. May I say just a word?

Justice STEPHENS. Mr. Johnston, do you have something to say?

Mr. JOHNSTON. Yes, I do.

Justice STEPHENS. How many other defendants wish to be heard?

(No response.)

Justice STEPHENS. For how long do you wish to be heard, Mr. Johnston?

Mr. JOHNSTON. About three minutes.

Justice STEPHENS. I don't mean to restrict you, but I have an engagement which I cannot cancel. If you wish to

be heard for ten or fifteen minutes, I will have to ask you to come back tomorrow.

Mr. JOHNSTON. Will the Court be in session tomorrow, or were you going to adjourn until Monday?

Justice STEPHENS. We were going to adjourn at
2915 least until Monday. We prefer not to have a session tomorrow, because we wish to spend some time in reading, tomorrow.

Mr. JOHNSTON. I can say in a very few sentences what I want to say.

Justice STEPHENS I don't want to restrict you, but if you can finish in ten minutes, I would appreciate it.

Mr. JOHNSTON. Oh, yes.

Argument on Behalf of Texas Cement Plaster Company and Samuel M. Gloyd

By Mr. DAVID I. JOHNSTON

Mr. JOHNSTON. The brief that was filed, and what has been said by other counsel for the defendants, go largely also to the position of Texas, as well as other defendants.

In addition to that, and so that there may be no misunderstanding as to our position, on behalf of Texas I now move that all testimony offered on which any ruling has been reserved, and all evidence that has been admitted, both oral and documentary, covering in any manner metallized board and perforated lath, be stricken as not applicable in any way to Texas, not in furtherance of execution of any conspiracy in which Texas would be involved; and not relevant or material or within the issues in this case as to Texas.

And I call the Court's attention now to paragraphs 113 to 120, covering those two subjects, and that Texas is not included in any of those, and the Government
2916 won't even claim that we are.

We were not a licensee under metallized board, and did not handle it, as the Government well knows. And under the bill of particulars we were particularly excluded in both of those sub-heads, because we were not a licensee under perforated lath——

Justice STEPHENS (interposing). Now you are talking about metallized board?

Mr. JOHNSTON. It applies to both.

Justice STEPHENS. What answer in the bill of particulars excludes you from those allegations with respect to both metallized board and perforated lath?

Mr. JOHNSTON. They limit it to the licensees of USG on metallized board and perforated lath, and we were not a licensee, and I think that the motion should be sustained as to Texas on all references to metallized board and perforated lath.

Justice STEPHENS. I have just received notice from my secretary that the engagement which I had, is postponed. So if you have been unduly pressed, please take more time.

Mr. JOHNSTON. That is all I wanted to say.

Justice STEPHENS. Does any other defendant wish to be heard?

Mr. ADAMS?

Mr. ADAMS. I have nothing to add.

2917 Mr. STEFFEN. I can finish in just a moment or two.

Justice STEPHENS. You may take such time as you need. My engagement is postponed.

Further Reply Argument on Behalf of the United States

By Mr. ROSCOE T. STEFFEN

Mr. STEFFEN. In regard to Mr. Johnston's point that they did not take out a license under the perforated lath patent, nor one under the metallized board patent, and that therefore they are not in any sense implicated at this point, I think that would all be matter that should more properly be brought out at the conclusion of the case, because we expect to introduce evidence, before we finish, that will show that they did sell metallized board, and that they did sell perforated lath and that they did maintain what we call "conspiracy prices".

So that they are, as we see it, very definitely implicated in the broad conspiracy, and that they were even as respects metallized board and perforated lath.

Justice STEPHENS. You are talking now just about Texas?

Mr. STEFFEN. I am speaking of Mr. Johnston's objections and his motion to strike.

Justice STEPHENS. Will you concede that Texas did not have a license on metallized board or perforated lath?

Mr. STEFFEN. I think that is correct, but our charge, as we have argued, is that all gypsum products are

2918 brought within paragraph 44, which includes perforated lath, and I might point out that if they didn't have a license, and still maintained the price, that they are probably in a worse position because they don't

even have the defense of the *General Electric* case as applied to their sales of that board, if they followed the price that the conspirators followed.

Now I think that that applies to Mr. Finck's argument on perforated lath, and to sales by National, which Mr. Higgins handled in the Cleveland market.

Mr. Finck states that inasmuch as they did not have a license on perforated lath that therefore these paragraphs, 115 to 120, do not apply to them; and that therefore they are in no sense to be charged with maintaining prices on perforated lath.

Our contention starts the other way, that paragraph 44 includes all types, that they are charged with fixing prices on gypsum products, and even though they didn't have a license, this evidence indicates that they followed the license price, which we charge as being the conspiracy price. So that the exception from these paragraphs does not except them from the charges of the complaint. This paragraph is just a description and it couldn't accurately describe them as being under license because they weren't under license.

Justice STEPHENS. It all goes back, however, does it not, to what is charged in the complaint?

2919 Mr. STEFFEN. That is what we contend, yes, sir.

And the same argument can be made with respect to metallized board. Paragraph 114, which Mr. Finck calls our attention to, says that, "At the time of the execution of said license agreement, none of said licensees, except National, intended to manufacture metallized board", and so forth.

Well, National did manufacture metallized board and did sell it to various licensees, and it also sold to dealers; and National's prices to dealers, USG's prices to dealers, and these licensees' prices to dealers were all uniform, and we contend that that exception does not appear to have any bearing upon the broad charge that they maintained prices generally upon board, inclusive of metallized board.

Justice STEPHENS. It seems to the Court to get back to the same general proposition we have been hearing argument upon all day, as to whether or not the specifications in the complaint, subsequent to paragraphs 44, 45 and 46, limit the complaint.

Do you wish to be heard further, Mr. Finck?

Mr. FINCK. Just to say this, your Honor, that Mr. Steffen seems to think that Mr. Higgins made no distinction be-

tween selling at the same price and selling at a fixed price. I don't believe Mr. Higgins gave any such testimony.

Justice STEPHENS. Distinction between what?

Mr. FINCK. He seems to feel that Mr. Higgins
2920 stated that he was selling at a fixed price, at a price fixed by somebody else. I don't believe Mr. Higgins made any such statement. Mr. Higgins, as I remember his testimony, said that he sold perforated lath at 25 cents above the price of regular lath, and then he also stated that that was in line with the competitive prices in that district. That is all that he said.

Mr. STEFFEN. I think that is accurate, and that is what I intended to imply.

Justice STEPHENS. And I am correct, am I not, Mr. Steffen, that this argument of Mr. Johnston's and Mr. Finck's all goes back to the general question as to whether or not the charges in paragraphs 44, 45, 46 and 54 are limited by what follows, and the bill of particulars?

Mr. STEFFEN. We don't pick out 54 as making any charges at all.

Justice STEPHENS. Well, paragraphs 44, 45 and 46, then.

Mr. STEFFEN. That is right.

Mr. FINCK. I don't quite take that position. I say that whether that is a part of the charge or whether it is the means, that we have been excepted in either case.

Justice STEPHENS. I see.

Justice GARRETT. I am still perplexed somewhat about this statement in article 3 of the bill of particulars with respect to paragraph 54 of the complaint. I have tried to follow the argument of counsel closely because that
2921 had come under my observation several times in trying to study this case.

I take it that the meaning to be given to article 3 of the bill of particulars, or the statement in article 3, is to turn on the construction that is to be given paragraph 54. Now Mr. Bromley's argument on that impressed me at one time as being broad enough to mean that that language in article 3 wiped out everything in the complaint before paragraph 54 of the complaint. It was not intended, I suppose, Mr. Bromley, to make that argument, was it?

Mr. BROMLEY. No, sir, it merely limits it.

Justice GARRETT. We have got to construe paragraph 54, haven't we, in order to determine the meaning of the language in article 3 of the bill of particulars?

Mr. BROMLEY. Yes, sir, and I desire to point out to your Honor that the Court, in stating the question which he ordered the Government to answer, said:

"State whether or not the allegations of paragraph 54 of the complaint are intended to charge the defendants with the commission of any acts other than the acts referred to in other paragraphs of the complaint, and if the allegations are so intended, identify and describe each such act".

Now it was in answer to that order of the Court, that is to say, "Did paragraph 54 intend to charge any acts other than those alleged elsewhere in the complaint, whether before or after?"—that the Government answered, "The allegations of paragraph 54 of the complaint are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint".

2922

So I didn't mean to say that paragraph 54, or the bill of particulars, wipes out all the rest of the complaint. I meant to say merely that paragraph 54 did not enlarge the specifications of the complaint.

Justice STEPHENS. What I understood you to say was that when you read paragraph 54 with the bill of particulars, it confines the complaint to the acts enumerated subsequent to paragraph 54?

Mr. BROMLEY. That is exactly what I intended to say, yes, sir.

Justice GARRETT. That makes your position clear. I think I understand Government counsel's position on it.

Justice STEPHENS. Mr. O'Donnell, we have been expecting Mr. Tomkins on Monday——

Mr. O'DONNELL (interposing). I have stated to him that he would be called the first thing Monday morning.

Justice STEPHENS. In view of the fact that all of this day is gone, and that I have a Patent Interchange Committee engagement Saturday, and we have so much reading to do, and forty-seven reserved rulings to go through, and be sure we read all the proceedings in subsequent pages, we are very doubtful whether we can be ready to resume until Wednesday morning. Will that be all right with Mr. Tomkins?

2923

Mr. O'DONNELL. I will contact Mr. DeWitt this evening, and have him get hold of Mr. Tomkins just as soon as possible. Could I inform the Court sometime tomorrow whether or not Mr. Tomkins can be here on Wednesday? It is not a matter of personal convenience with him at all. It would only be a question of whether or not certain war commitments which are of great importance might have him tied up on those days.

Justice STEPHENS. Would his testimony involve some more reserved rulings?

Mr. KNUFF. Definitely

Justice STEPHENS. We are not going to get into them. We cannot get ready to rule on these matters by Monday morning, that is certain. We had thought, during the noon hour, that perhaps we might be able to resume on Tuesday morning. But I think you had better arrange with Mr. Tomkins to be here Wednesday morning, and if he cannot be here at that time, can you have another witness, Mr. Steffen?

Mr. STEFFEN. We may be able to, your Honor.

Mr. O'DONNELL. How soon would the Government like to be notified as to whether or not Mr. Tomkins can be here Wednesday?

Mr. STEFFEN. As soon as possible.

Mr. O'DONNELL. I will try to call you this evening.

Justice STEPHENS. It is immaterial, you do not need to let us know, we are not going to resume session until Wednesday morning. This apparently is an important matter, and we want to rule upon it soundly and advisedly. So either have Mr. Tomkins here Wednesday morning or notify the Government that he cannot be here so that they can get someone else.

2924

One other thing. I am not sure that we have in our possession, Mr. Bromley or Mr. Steffen, the motion for the bill of particulars. We have the answer.

Mr. KNUFF. I believe that was to be supplied by the defendants.

Justice STEPHENS. Yes, I think it was.

Mr. KNUFF. We have one copy and that is our only copy, our file copy.

Justice STEPHENS. We ought to have the motion for the bill of particulars and the Court's order and the answer.

Mr. KNUFF. I can give you all the answers you want, I have a lot of those.

Justice STEPHENS. We have those, too, plenty of them, thank you. Have you gentlemen for the defendants any of these documents?

Mr. BROMLEY. We have them all and we will furnish copies to each of your Honors tomorrow morning.

Justice STEPHENS. Thank you very much. If you can do so, we would appreciate it.

If there is nothing else, we will adjourn until Wednesday at ten o'clock.

2925

(Thereupon, at 4:25 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Wednesday, January 26, 1944.)

2935. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., MONDAY, FEBRUARY 7, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

2942 Going now to the reserved rulings; the Court calls Mr. Finck's attention to the fact that at Transcript 2539 his objection was made in terms of "any violation of a metallized board license agreement". The Court thinks he may wish to correct that to read, "violation of law in connection with a metallized board license agreement".

Mr. FINCK. I do, Your Honor.

Justice STEPHENS. You may wish to look at that and suggest a rephrasing of your objection.

Mr. FINCK. Thank you very much. I haven't my records with me.

Justice STEPHENS. Will you make a note of that?

Mr. FINCK. Yes.

Justice STEPHENS. Also, Mr. Finck's attention is called to the fact that at many places in the record—for example, Transcript 2539—his objection is phrased in terms of

National only, and not in terms of National and Baker; and Mr. Oliver's attention is called to the fact that his objections are frequently made only in terms of Celotex, rather than in terms of Celotex and Dahlberg.

Counsel for the defendants may wish to have the record show that wherever an objection has been made in behalf of a corporate defendant whose officer or officers are also defendants, the objection is to apply to the individual officer or officers as well as to the corporate defendant.

The Court is referring in this last statement to coun-
2943 sel for all the defendants.

Mr. BROMLEY. We should like, if we may, to have that understanding, if the Court please.

Justice STEPHENS. That may be the understanding.

The record will also show that wherever the Court has made a ruling in respect of any corporate defendant, the ruling applies also to the individual officer or officers of that corporate defendant.

The Court is of the view, Mr. Finck, that you ought to put into the record, in the form of a record of your objections or the basis of your objections, the list of questions and answers and exhibits relating to metallized board and perforated lath which you furnished to the Court and we assume also to counsel. The Court is making a ruling this morning in terms of it, and in terms, of course, of other reserved rulings, but it seems to the Court that it ought to go into the record so that the record will show you are calling the Court's attention to the exhibits and items of testimony referred to on this paper.

Mr. FINCK. I can do that, Your Honor. I haven't served the other counsel with a copy of that. I originally prepared that simply for the Court's convenience. I would be glad to put it in the record.

Justice STEPHENS. It is very true that it was prepared for the Court's convenience. Mr. Finck had a run-
2944 ning objection, you will remember, to certain lines of testimony, and the Court asked him, for the convenience of the Court, to furnish a list of the pages on which all of those rulings were made, and accordingly he did so, and we have used it to aid us in locating the places in the record at which the reserved rulings were made. But we thought it would be desirable to have it in the record so that the Court's reference to it in its rulings which are about to be made would appear to have a basis suggested by counsel.

Mr. STEFFEN. I should like the record to show that we

have not seen the memorandum, nor have we, therefore, had an opportunity, perhaps, to look at all of these things.

Justice STEPHENS. It is not a memorandum, but since the Government has not seen it—the Court supposed it had—the Court will hand it to the Government now. It would appear that it is merely a list of pages. If you wish, however, to examine them before the Court makes its ruling this morning, you may do so.

If it is copied in the record from this copy I have here, the Court Reporter is directed to copy it into the record without the penciled notations, because they are merely for the convenience of the Court.

I think you will find, Mr. Steffen, it is nothing you need to concern yourself about, but you are entitled to take time to reassure yourself on that subject if you wish
2945 to.

Mr. FINCK. If the Court please, if this is the time you desire to have me submit this statement, I would be very glad to submit it as a part of the motion which I made to strike out various parts of the testimony.

Justice STEPHENS. The record may show your offer to do so, and the Court will wait until Mr. Steffen has examined it before directing that it be copied into the record.

Mr. STEFFEN. I have looked at it, and it appears to be a list of pages at which there were reserved rulings. We have not, of course, had an opportunity to check back to see what rulings were in issue, and so on.

Justice STEPHENS. It is correct, Mr. Steffen. I have looked personally at every page, and it is a correct statement as far as it goes. There might be others, of course, that Mr. Finck might have missed, but the Court itself kept a record of every reserved ruling, and merely wanted to have it checked by counsel on either side if they wished to furnish a list. I think no possible harm can come to the Government by having it introduced as a basis for checking the record, which is all that it is; but if you wish to take an exception to it later, you may do so.

The Marshal will distribute to each of the counsel present one of these copies of rulings about to be announced, and then return any that are left over to me.

2946 (The documents referred to were distributed to counsel by the Marshal.

Justice STEPHENS. The Court will direct the reporter to copy into the record the list of questions and answers and exhibits relating to metallized board and perforated lath, presented by the National Gypsum Company through

Mr. Finck as a part of Mr. Finck's continuing objection or as a basis therefor.

(The list referred to is as follows:)

NATIONAL GYPSUM COMPANY

LIST OF QUESTIONS AND ANSWERS AND EXHIBITS RELATING TO METALLIZED BOARD AND PERFORATED LATH

Page 930—METALLIZED BOARD LICENSE received in evidence.

Page 932—PERFORATED LATH AGREEMENTS received in evidence.

Page 938—PERFORATED PRICE BULLETINS received in evidence.

Page 1828—lines 24, 25
" 1829 " 1 and 2, 7 through 25
" 1831 " 14 through 16
" 1835 Exhibit 208 received in evidence refers to Metallized Board.
" 2206 lines 12 through 25
" 2207 " 1 through 5
" 2212 Exhibits 244, 245 and 246 received in evidence. Refers to Metallized Board.
" 2217 lines 22 through 25
2947 " 2218 lines 1 through 9, 22 through 24
" 2224 Exhibits 247 and 248 received in evidence. Refers to Metallized Board.
" 2227 Exhibits 249 through 253 received in evidence. Metallized Board Price Bulletins.
" 2239 Exhibit 254 received in evidence. Refers to Metallized Lath.
" 2239 lines 23 through 25
" 2240 " 1 through 13
" 2241 Exhibits 255 and 256, relating to Metallized Lath, received in evidence.
" 2274 Exhibits 258 through 266, relating to Metallized Board Invoices Certain-teed Products Co., received in evidence.
" 2275 lines 20 through 23
" 2276 " 25
" 2277 " 1 through 4
" 2277 " 20 through 23

	Page	2282	lines 4 through 8, 20 through 25
	"	2283	" 1 through 8
	"	2309	Exhibit No. 269 relating to Perforated Lath, received in evidence.
	"	2406	Exhibit 287 received in evidence, refers to Metallized Board.
	"	2409	lines 24 and 25
	"	2410	" 1 through 17
	"	2411	Exhibit 288 received in evidence, refers to Metallized Board.
	"	2412	lines 2 through 25
	"	2413	" 1
2948	"	2415	Exhibit 289 received in evidence, refers to Metallized Board.
	"	2416	Exhibit 290 received in evidence, refers to Metallized Board.
	"	2416	lines 15 through 23
	"	2418	Exhibit 291 received in evidence, refers to Metallized Board.
	"	2419	lines 1 through 25
	"	2420	" 1 through 25
	"	2421	" 1 through 25
	"	2422	" 1 through 17
	"	2425	" 14 through 22, 24, 25
	"	2426	" 1 through 8
	"	2437	" 14 through 25
	"	2438	" 1, 22 through 25
	"	2439	" 1 through 13
	"	2444	Exhibit 292 received in evidence, refers to Metallized Board.
	"	2445	lines 5 through 23
	"	2446	Exhibit 293 received in evidence, refers to Metallized Board.
	"	2447	Exhibit 294 received in evidence, refers to Metallized Board.
	"	2448	Exhibit 295 received in evidence, refers to Metallized Board.
	"	2448	lines 13 through 22
	"	2450	" 20 through 25
	"	2451	" 1 through 25
2949	"	2452	" 1 through 25
	"	2453	" 4 through 14, 19 through 25
	"	2454	" 1 through 5, 24 and 25
	"	2455	" 1 through 25
	"	2456	" 1 through 11

Page 2564 Exhibit 308 received in evidence, refers to Metallized Board.
" 2653 Exhibit 313 received in evidence, refers to Perforated Lath.
" 2660 Exhibits 314 and 315 received in evidence, refers to Perforated Lath.
" 3037 through 3041—Testimony by Witness Higgins relating to Perforated Lath.

RESERVED RULINGS

" 2542 Exhibits 300 and 300-A, relating to Metallized Board.
" 2547 Exhibit 301, relating to Metallized Board.
" 2895 Exhibit 333, relating to Perforated Lath.
" 2898 Exhibit 334, relating to Perforated Lath.
" 2899 Exhibit 335, relating to Perforated Lath.

Justice STEPHENS. Now the Court will announce its rulings on the reserved rulings, and for the convenience of counsel the Court has had prepared, through the Court Reporter, a copy of what it is about to read from. The matters are of such importance and underlie so many of the rulings and classes of testimony presented that the Court has prepared its rulings in writing.

2950 The rulings consist first of a statement of the views of the Judges upon the various questions of law presented, and then it is followed by an actual ruling on each of the items on which rulings have been reserved.

For the convenience of counsel the Court has had three copies, which are now in your hands, prepared by the Court Reporter, and the Court Reporter will copy into the record what the Court is about to read.

The Court will read this out loud, announce the ruling out loud, in spite of the fact that it will take some little time to read it, because counsel ought to be advised of the rulings and of the reasons for the rulings in order that they may be guided with respect to the further testimony to be taken today and following in the case.

2951 RULINGS OF COURT ON RESERVED RULINGS

The Court will now rule upon all objections and motions in respect of which rulings have been reserved.

This does not include rulings as a result of which evidence was received subject to connection. There will first be stated the views of each of the judges upon the points argued. For convenience this statement will be made in terms of five topics. Following this statement of the views of the judges an announcement will be made of the actual ruling of the court, according to the majority view, on each of the reserved rulings.

STATEMENT OF THE VIEWS OF THE JUDGES

I.

Admissibility of evidence concerning gypsum board and other gypsum products asserted to have been purchased by one defendant from another and thereafter resold at bulletin prices (Offers of Proof Nos. 1 to 5 inclusive).

In the opinion of Judge Garrett and Judge Jackson the complaint is sufficient to warrant the introduction of such evidence. Their views are as follows: The broad charges in paragraphs 44, 45 and 46, together with paragraph 121, would render the complaint sufficient as against a general demurrer.

If, under the charges contained in the aforementioned paragraphs, it was not clear to the defendants as to everything they would have to defend against, their remedy was by a motion for a bill of particulars. In such a motion they requested particulars concerning paragraphs 44, 45 (c) and (d), and 121 of the complaint, among other
2952 paragraphs, as to the meaning of the term "miscellaneous gypsum products," and the bill of particulars specified such products to be and include gypsum block, gypsum tile and Keene's cement.

Further answering the motion concerning other allegations of paragraph 121 that "the defendants have standardized the manufacture of board, have limited said distribution of board to themselves and to certain manufacturing distributors, and have completely eliminated from the distributive system wholesale distributors who might fail to maintain said prices," the Government answered that such allegations were "not intended to charge the defendants with any acts in addition to the acts with the commission of which the defendants are charged in other paragraphs of the complaint."

The bill of particulars with respect to paragraph 54 is

confined to the allegations in that paragraph and in no way narrows the scope of the general charge.

The complaint fairly apprizes the defendants of the charges made against them as alleged violators of the Sherman Act, and the bill of particulars does not so limit the proof under the complaint as to render the evidence sought to be introduced by the Government in accordance with its Offers of Proof Nos. 1 to 5, inclusive, improper.

Judge Stephens is of the opinion that the charge of the complaint does not include an agreement to fix resale prices on purchased board and other gypsum products.

2953 His views are as follows: While there are authorities which seem to support the contention of the Government that it is the conspiracy as a whole that is charged and that all of its details may be *proved* as part of the charge so that they may be restrained, although they need not, indeed could not conveniently, be stated in a complaint, the detail of the present complaint when read in the light of the bill of particulars makes this theory and these authorities inapplicable. The bill of particulars states concerning paragraph 54 of the complaint that the allegations thereof (charging an expansion of the efforts of the parties "into a comprehensive plan for stabilization of prices in the gypsum industry under the leadership of U. S. G., temporary delay in the execution of this plan with a resulting intensification of price competition in the industry, and eventual adoption of the plan by every important board manufacturer in the Eastern area.") "are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint." The authorities cited by the defendants reflect a rule of pleading, applicable even under the new rules, that general allegations must be considered in the light of more detailed and specific ones and are limited thereby. Whether or not the general charging paragraphs preceding 54 may be said to state a cause of action good against general

2954 demurrer, they are limited by the detail of the paragraphs succeeding paragraph 54. The only resale price fixing in terms referred to in the complaint is that of manufacturing distributors and that in respect of metallized board. The bill of particulars in respect to paragraph 54 clearly told the defendants that they were not charged under the complaint with any acts other than those mentioned in the subsequent paragraphs.

Judge Stephens is of the further view, however, that evi-

dence of fixing resale prices on purchased products is admissible to prove the charge, or a part thereof, that in his view is made in the complaint although in his view, as above stated, the charge does not include such resale price fixing. Judge Stephens' views on this subject are these: The charge that is made in the complaint includes a charge that the defendants conspired and contracted with each other to fix prices, using patent license agreements as a cloak, on board purported to be manufactured under the patents. Such a conspiracy or agreement must, in the ordinary course, be proved out of circumstances. The defendants admit that the prices were fixed by U. S. G. on board manufactured under the patents, but they do not admit that they agreed or conspired together for such fixing of prices. The offered proof of price fixing upon purchased products may in connection with other evidence have some probative value as a circumstance to show a
2955 conspiracy to fix prices through license agreements as a cloak upon board manufactured under the patents—this on the analogy of proof of "other offenses" in a criminal case to show a common scheme or plan embracing the commission of two or more wrongs so related to each other that proof of one tends to establish proof of the others. See Martin v. United States, 75 U. S. App. D. C. 399, 402, 127 F. (2d) 865, 868 (1942). If the Government can show an agreement among the defendants to fix prices on purchased products, this may support an inference of an agreement with respect to the fixing of prices upon manufactured board. The inference may be alone far from conclusive proof but it cannot be said that it is so remote as to be immaterial and irrelevant and hence the evidence inadmissible. It may be urged by the defendants in this connection that purchased board, being the very board manufactured under the patents, would naturally take, for economic reasons, the same prices as the manufactured board in the market—that the price fixing by U. S. G. under the patents, on the manufactured board, was legal and hence the natural economic consequence is legal and is not evidence of anything illegal. But to the contrary the Government contends that it can show the whole arrangement charged to be not a lawful price fixing under patent license agreements but an agreement to use patents as a cloak, and that this is what caused the price stabilization on the manufactured board. To decide the admissibility of the
2956 proffered evidence of price fixing on purchased board by taking one or the other of these two posi-

tions would be to rule upon questions of substantive law and fact in the case before the close of the case. Each party is entitled to introduce evidence relevant under its own theory of the case and cannot be forbidden, upon the insistence of the opposite party that its theory of the case be accepted and the evidence in consequence shut out, to do this.

Therefore the evidence proffered by the Government of price fixing on purchased board and on other purchased products is admissible, in the view of Judge Garrett and Judge Jackson because resale price fixing on purchased products is within the charge; in the view of Judge Stephens because it is a circumstance which in connection with other evidence may support the charge, or a part of the charge, that he thinks is made even though in his view that charge does not include an item of resale price fixing on purchased products.

II.

Admissibility of evidence concerning perforated lath (motions to strike off National, Celotex and Texas).

In the opinion of Judge Garrett and Judge Jackson the motions to strike should be denied. Their views are as follows:

First, in respect of evidence relating to perforated lath manufactured under National's own patent. Even
2957 though National had a legal right to manufacture and sell under its own perforated lath patent, if the Government can show that it sold at the same price as that at which perforated lath generally was sold, that may be some evidence that National was a party to a conspiracy with reference to the sale of perforated lath at fixed prices. That is to say, the Government is entitled to try to prove that National violated the Sherman Act by joining a conspiracy in respect of perforated lath through the use of its own perforated lath patent although it did not itself have a license from U. S. G.

Second, in respect of evidence relating to perforated lath manufactured and sold by other defendants under U. S. G. licenses. As against National evidence generally concerning perforated lath manufactured and sold by other defendants, who did have perforated lath licenses from U. S. G., at bulletin prices is admissible on the theory that if there was a general conspiracy in respect of perforated lath, even though National did not have a license itself from U. S. G., still, if it was a member of the conspiracy,

it would be bound by the acts of the other conspirators. As against Celotex and Texas the same is true even though it is conceded that they had no perforated lath licenses from U. S. G. The Government is entitled to prove under the complaint a conspiracy by those defendants who did have perforated lath licenses from U. S. G., and if
2958 the Government can show that Celotex and Texas were parties to the general conspiracy, then they may be bound even though they did not have perforated lath licenses themselves.

Judge Stephens is of the opinion that the motions to strike of National, Celotex and Texas should be granted. His views are as follows: Paragraphs 115-120 of the complaint are the only ones which charge violations of law, in terms, concerning perforated lath. The bill of particulars answering paragraph 54 of the complaint states that it is "not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint." The court's order for a bill of particulars said: "TENTH: State whether it is intended by the use of the expression 'all of the licensees of U. S. G.' in the last sentence of paragraph 118 of the complaint to refer to the licensees named in paragraph 89 of the complaint or whether it is intended by the use of such expression to refer to the licensees of the licenses to manufacture perforated lath referred to in the first sentence of said paragraph 118." The bill of particulars, paragraph X, said: "The phrase 'all of the licensees of U. S. G.' appearing in the last sentence of Paragraph 118 of the complaint, refers to the licensees of U. S. G. under the perforated lath patent, as set forth in Paragraph 117 of said complaint." Paragraph 117 does not name Na-
2959 tional, Celotex or Texas. It names American, the assets and stock control of which are asserted to have been acquired by Celotex; but the complaint does not charge that Celotex assumed American's perforated lath license. At Tr. 3223-5 Mr. Oliver for Celotex asserted that Celotex had no perforated lath license, and the Government conceded this. And the Government conceded also at the same place in the transcript that Texas had no perforated lath license. The Government elsewhere conceded (Tr. 2513) that National had no perforated lath license from U. S. G.

Since National, Celotex and Texas are not mentioned in paragraph 117 and are therefore not within the licensees

referred to in the last sentence of paragraph 118, the Government has in its complaint not charged the defendants National, Celotex or Texas with any violation of law in respect of perforated lath either in terms or upon the theory that they might be bound by the acts of other defendants even though they had no perforated lath licenses themselves. In respect of National the foregoing applies so far as its manufacture and sale of perforated lath under its own patent is concerned.

III.

Admissibility of evidence concerning metallized board (the objection and motion to strike of National).

In the opinion of Judge Garrett and Judge Jackson the objection should be overruled and the motion to
2960 strike denied. Their views are as follows:

First. The bill of particulars does not so narrow the charge as to exclude National from that portion which concerns metallized board.

Second. Even if the complaint was construable as not specifically charging National as having participated actually in the metallized board transactions, nevertheless if National can be shown to have participated in the general conspiracy charged against the other defendants and if that can be shown to involve metallized board transactions, then it would be bound as a co-conspirator.

Judge Stephens is of the opinion that the objection and motion to strike of National should be granted. His views are as follows:

Paragraphs 113-114 of the complaint charge all of the defendants with taking licenses for metallized board but charge also that none except National intended to manufacture such board but on the contrary to purchase the same from U. S. G. or National; and further charge that this was well known to *U. S. G.*, and that U. S. G. nevertheless required the execution of those agreements and determined and fixed the price of resale of metallized board notwithstanding that it knew and that the fact was that most of the board was purchased from U. S. G. and National

National urges as follows: (1) The bill of particu-
2961 lars in respect of paragraph 54 of the complaint states that it is "not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint." (2) Paragraphs 113-114 do not include, but indeed except,

National. The gist of the charge is that there was an agreement to sell metallized board purchased from U. S. G. and National at prices fixed by U. S. G. But it is not charged that National purchased any board and it is not charged that it knew (as it is charged that U. S. G. did) that despite the licenses to manufacture board the board was actually to be purchased from U. S. G. and National for resale at U. S. G. prices. These contentions by National are correct. Accordingly National was not charged with any violation of law in respect of metallized board, and is indeed eliminated from complicity in any such violation.

IV.

Admissibility of evidence concerning metallized board (motions to strike of Celotex and Texas).

With respect to Celotex Judge Stephens, Judge Garrett and Judge Jackson all agreed that the motion to strike of Celotex should be denied. Their views are as follows: The allegations of paragraphs 113-114 do not exclude Celotex. Those paragraphs refer to "licensees." "Licensee" is defined in paragraph 89 so as to include Celotex. Paragraph 89 provides: "89. Where the word 'licensee' 2962 is used hereinafter it shall be deemed to include National, Certain-teed, Ebsary, and Texas throughout the period from the formation of the combination as aforesaid to the date of filing this complaint; American, Universal, Atlantic, and Kelley Plasterboard from the time of the formation of said combination to the respective dates of dissolution of said companies as aforesaid; the defendant Celotex from the date of its acquisition of American as aforesaid to the date of filing this complaint; and the defendant Newark from the date of its acquisition of Kelley Plasterboard as aforesaid to the date of filing this complaint." Therefore Celotex is, despite the answer to paragraph 54 of the bill of particulars, included within the charge of resale price fixing on metallized board—because the acts charged in respect of that are charged so broadly in paragraphs 113-114 (i. e., in paragraphs subsequent to paragraph 54) as to include Celotex. Moreover, Mr. Oliver for Celotex conceded at Tr. 3223-5 that Celotex had a metallized board license, that is, that it had assumed the obligations of American's license.

With respect to Texas. At Tr. 3224 Mr. Johnston for Texas asserted that Texas did not have a metallized board license and this was conceded by the Government. Judge

Garrett and Judge Jackson are nevertheless of the opinion that the motion to strike of Texas should be denied. Their views in respect of Texas are: For the reasons stated
2963 above in respect of Celotex the allegations of paragraphs 113-114 do not exclude Texas. And even though Texas did not have a metallized board license it might be bound by the acts of the other defendants concerning metallized board if shown to be party to the general conspiracy charged.

Judge Stephens is of the view that the motion to strike of Texas should be granted because of the concession of the Government that Texas did not have a metallized board license. His views are: A defendant not having a metallized board license is not within the charge in paragraphs 113-114 for that charge is that *licensees* took licenses but purchased from U. S. G. and National and then resold at prices fixed by U. S. G.; hence, if Texas had no license for metallized board it is outside the charge, i. e., is not charged with any violation of law in respect of metallized board.

V.

Admissibility of evidence concerning resale price fixing on plaster, board and other gypsum products by wholesalers, as distinguished from manufacturing distributors (the objection to, and motion to strike, the Orin F. Perry, Jr., testimony).

Judge Stephens, Judge Garrett and Judge Jackson all agree that the objection should be sustained and the motion to strike granted. Their views are: There is no charge in the complaint of resale price fixing on plaster, board and other gypsum products by wholesalers, as distinguished from manufacturing distributors.

2964 THE RULINGS OF THE COURT, BY VIRTUE OF THE MAJORITY VIEWS EXPRESSED, UPON THE RESERVED RULINGS

1. Gypsum products asserted to have been purchased by one defendant from another and thereafter sold at bulletin prices.

The testimony on this subject commences at Tr. 2144 in relation to the North Holston plant transaction. At Tr. 2148 Exhibit U. S. 239, at Tr. 2149 Exhibit U. S. 240, and at Tr. 2150 Exhibit U. S. 241 were marked and identified. At Tr. 2153-4 Mr. Bromley for the defendants ob-

jected to this class of evidence and moved to strike. At Tr. 2154-6 there is a statement by Mr. Steffen concerning the purpose of this evidence and concerning its asserted relevancy. At Tr. 2201 the court ruled that the evidence concerning the North Holston plant transaction was not admissible. At Tr. 2233 Mr. Bromley pointed out that the motion to strike (Tr. 2153) had not been ruled upon, and the court stated that it did not make a ruling on the exhibits (Exhibits U. S. 239, 240, 241) because the Government was proposing to make an offer of proof, and the court left the ruling on the motion to strike unacted upon until the offer of proof. At Tr. 2313-17 there are identified Exhibits U. S. 271, 272, 273, 274, 275, 276 and 277. All of these exhibits involve, including Exhibits U. S. 239, 240 and 241, the Government's contention that it has a right
2965 to prove as part of the charge in the case that the defendants by agreement bought gypsum products from each other and thereafter resold them at bulletin prices. The actual offers of proof which appear at Tr. 3110-13 inclusive, include, however, only Exhibits U. S. 241, 274, 275, 276 and 277. The court therefore treats all of the others as not offered. There remains for the court to make a final ruling upon the admissibility of the exhibits last listed, and upon the admissibility of the evidence concerning them and concerning the asserted purchase of gypsum products by the defendants from each other and the asserted resale thereof at bulletin prices. Exhibits U. S. 241, 274, 275, 276 and 277 all relate to the purchase of gypsum products from U. S. G. by Certain-teed at different places.

The ruling on these exhibits is as follows: Exhibits U. S. 241, 274, 275, 276 and 277 are received in evidence. The testimony relating to them is received in evidence. The objection of Mr. Bromley at Tr. 2153 is overruled and his motion to strike at that page is denied, the court reversing its ruling at Tr. 2201 as to Exhibit U. S. 241 and the testimony there referred to. As to Offers of Proof Nos. 1 to 5 inclusive, the court rules that the Government is permitted to make the proof described.

At Tr. 2439-42 in the examination of the witness Neale questions were asked and answered concerning the purchase by Atlantic from other companies during 1934-5-6
2966 of non-metallized board and lath. At Tr. 2442 the objection by Mr. Bromley to this testimony was sustained, and a motion to strike by Mr. Bromley was granted. Thereafter at Tr. 2443 it was ruled that the

answers might be allowed to stand, the ruling on the motion to strike being deferred until the Government's offers of proof were made.

Consistently with the previously stated rulings on this class of evidence, the action of the court is reversed, that is to say, the objection of Mr. Bromley is overruled and his motion to strike is denied.

2. Metallized board and perforated lath.

At Tr. 2512-19 Mr. Finck made a continuing objection for National and Baker to evidence concerning metallized board and perforated lath, the objection reaching all evidence introduced by the Government relating to such board and lath, upon the ground that it is incompetent, irrelevant and immaterial and has no bearing on the issues as between the Government and National and Baker. Argument on this topic followed and at Tr. 2517 the continuing objection was renewed and recorded and the ruling deferred.

At Tr. 2519 Mr. Johnston adopted the same objection for Texas in respect of both metallized board and perforated lath, and that objection was recorded and the ruling deferred.

The objections are overruled. This ruling applies
2967 both to the objection of Texas and to the objection of National and Baker.

Tr. 2538-46. Exhibit U. S. 300 (a letter from Baker to Black) and Exhibit U. S. 300a (a letter from Mr. Finck to National) concerning metallized board. These two exhibits were offered in evidence by the Government at Tr. 2539 and at that page Mr. Finck objected upon the ground that as to National, it not having been charged in the complaint with any violation of law in connection with a metallized board license agreement, the exhibits are immaterial. At Tr. 2541 the court recorded the objection and deferred the ruling until the Government's offer of proof. At Tr. 2542 the recording of the objection and the deferring of ruling were repeated and on that page Mr. Bromley objected for all of the other defendants, i. e., other than National, on the ground that the two exhibits were incompetent and immaterial because not declarations of alleged co-conspirators, the objection being upon the ground that neither National nor Celotex is charged so far as metallized board is concerned. Both objections are overruled, and the exhibits are received in evidence.

Tr. 2546-7. Exhibit U. S. 301 (a letter from National to Black of American concerning "foil license") and Ex-

hibit U. S. 302 (a letter from American to Burley of National on the same subject). The exhibits are offered on Tr. 2546. Mr. Finck objected for National at
2968 Tr. 2547 upon the ground that the exhibits are incompetent and immaterial and have no bearing on any of the issues as between the Government and National or Baker. The court recorded the objection and deferred the ruling until the offer of proof by the Government. The objection is overruled and the exhibits are received in evidence.

Tr. 2653. Exhibit U. S. 313 (a memorandum from Henley of Certain-teed to Whittemore of Certain-teed with reference to perforated lath). This exhibit was offered and received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators, but then Mr. Finck objected that it was immaterial as to National because it refers principally to perforated lath. The court recorded the objection and stated that it would be within the group of deferred rulings. The objection is now overruled.

Tr. 2657-60. Exhibit U. S. 314 (a memorandum from Henley of Certain-teed to Whittemore of Certain-teed concerning perforated lath) and Exhibit U. S. 315 (a memorandum by Henley of Certain-teed to Whittemore of Certain-teed concerning perforated lath). At Tr. 2657 these exhibits were marked for identification. At Tr. 2660 these exhibits were received subject to the usual reservation with respect to declarations of alleged co-conspirators. The continuing objection of Mr. Finck for National was recorded and a similar objection by Mr. Johnston for Texas,
2969 and the court deferred ruling on these two objections. The objections are overruled.

Tr. 2892-96. Exhibit U. S. 333 (a memorandum by W. C. Baumhogger of Certain-teed to the members of the management board of that company in relation to perforated lath). At Tr. 2892 this exhibit was marked for identification; at Tr. 2893 it was offered in evidence; at Tr. 2894 Mr. Bromley made only the "usual" objection, i. e., the objection that the exhibit is not binding on alleged co-conspirators unless a conspiracy is shown, and the declaration be in furtherance or execution of the conspiracy. Mr. Finck objected for National and Baker to the admission of the exhibit on the ground that it was irrelevant, incompetent and immaterial and not binding on the defendants National and Baker and that there is no charge in the complaint of any violation of law on the part of National

and Baker in the manufacture and sale of perforated board. The same objection was made by Mr. Johnston for Texas and by Mr. Oliver for Celotex. The court reserved the ruling so far as the companies which did not have a license to manufacture perforated lath are concerned, National, Celotex and Texas; otherwise the exhibit was received in evidence subject to the usual reservation with respect to the declarations of alleged co-conspirators. These objections are all overruled.

Tr. 2896-98. Exhibit U. S. 334 (a memorandum from Van Hagan of Certain-teed to Baumhogger of Cer-
2970 tain-teed concerning perforated gypsum lath). The exhibit was offered at Tr. 2897. Mr. Bromley made the "usual" objection for all defendants; Mr. Finck objected on the part of National on the basis of his continuing objection to testimony concerning perforated lath in respect of National and Baker and the court at Tr. 2897-8 reserved its ruling with respect to National, Texas and Celotex. With respect to the others the exhibit was received subject to the usual reservation with respect to declarations of alleged co-conspirators. The objections are overruled and the exhibit received as against National, Baker, Texas and Celotex.

Tr. 2898-9. Exhibit U. S. 335 (a memorandum from Henley of Certain-teed to Baumhogger of Certain-teed concerning perforated gypsum lath). The exhibit was offered in evidence at Tr. 2898 (except for the ink or penciled longhand memorandum at the bottom of the page of the exhibit): Mr. Bromley for all defendants made the "usual" objection. The court reserved ruling with respect to National, Celotex and Texas, otherwise received the exhibit in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators. At Tr. 2899 in response to a question by Mr. Finck the court made clear that it was reserving decision on his continuing objection to this class of evidence pertaining to perforated lath so far as the three companies, National, Celotex and
2971 Texas, were concerned. The exhibit is received in evidence as against National, Celotex and Texas and the objection is overruled.

3. Testimony of Orin F. Perry, Jr.—resale prices of wholesale distributors (other than manufacturing distributors) of gypsum products.

At Tr. 2916-30 there is testimony of the witness Orin F. Perry, Jr., concerning resale prices of plaster, board

and the like by Orin F. Perry & Son, Inc., as a wholesaler—not as a manufacturing distributor. At Tr. 2920 there is an objection by Mr. Bromley on the ground that there is no charge in the complaint that affects the resale prices of wholesale distributors. At Tr. 2925 the court indicated that the testimony would be taken subject to the right of the defendants to move to strike in accordance with a later ruling if such a motion was then proper. At Tr. 2927 Mr. Bromley again objected on the ground that the testimony was immaterial because of an absence of any charge in the complaint covering resale price fixing as to board, and the objection was overruled subject to the right to move to strike the testimony on final argument on this question of the extent to which the complaint permits proof of this type of alleged violation of the Sherman Act. At Tr. 2928 an objection was recorded by Mr. Bromley for all of the defendants to this and to subsequent questions and testimony on this subject, the resale price of plas-
2972 ter and board by a wholesaler, and the court allowed an objection to be recorded applicable to plaster, board or miscellaneous products, on the ground that as to the defendants other than Certain-teed it did not bind anyone but Certain-teed, and the court indicated that there would be a ruling on this class of testimony when all of the reserved rulings were finally disposed of. The motion to strike this testimony is granted.

4. Testimony of C. A. Higgins concerning perforated board made under National's own patent.

At Tr. 3037-39, inclusive, there is testimony by the witness C. A. Higgins in respect to perforated board made under National's own patent. At Tr. 3039 there was a motion to strike by Mr. Bromley upon the ground that the testimony was immaterial, there being no charge in the complaint that the defendants conspired with National to fix a price on board manufactured under National's own patent. At Tr. 3041 the ruling on this motion to strike was reserved. The motion to strike the testimony of this witness on this subject is denied.

5. Questions and answers and exhibits referred to in list presented by Mr. Finck in behalf of National.

Tr. 2564. Exhibit U. S. 308 (a letter from Henning of U. S. G. to Black of American concerning metallized board)—see page 3 of Mr. Finck's list. This exhibit was received in evidence at Tr. 2564 subject to the usual

2973 reservation with respect to declarations of alleged co-conspirators and is covered by the continuing objection of Mr. Finck for National and Baker made at Tr. 2512 and recorded at Tr. 2517. The continuing objection is overruled with respect to this exhibit.

The continuing objection of Mr. Finck for National and Baker to the receipt of evidence including exhibits relating to metallized board and perforated lath, on the following pages of the record is overruled:

Tr. 930—Metallized board license
Tr. 932—Perforated lath agreements
Tr. 938—Perforated price bulletins
Tr. 1828—Lines 24, 25
Tr. 1829—Lines 1 and 2, 7 through 25
Tr. 1831—Lines 14 through 16
Tr. 1835—Exhibit 208
Tr. 2206—Lines 12 through 25
Tr. 2207—Lines 1 through 5
Tr. 2212—Exhibits 244, 245, 246
Tr. 2217—Lines 22 through 25
Tr. 2218—Lines 1 through 9, 22 through 24
Tr. 2224—Exhibits 247, 248
Tr. 2227—Exhibits 249 through 253
Tr. 2239—Exhibit 254
2974 Tr. 2239—Lines 23 through 25
Tr. 2240—Lines 1 through 13
Tr. 2241—Exhibits 255, 256
Tr. 2274—Exhibits 258 through 266
Tr. 2275—Lines 20 through 23
Tr. 2276—Line 25
Tr. 2277—Lines 1 through 4
Tr. 2281—Lines 20 through 23
Tr. 2282—Lines 4 through 8, 20 through 25
Tr. 2283—Lines 1 through 8
Tr. 2309—Exhibit 269
Tr. 2406—Exhibit 287
Tr. 2409—Lines 24, 25
Tr. 2410—Lines 1 through 17
Tr. 2411—Exhibit 288
Tr. 2412—Lines 2 through 25
Tr. 2413—Line 1
Tr. 2415—Exhibit 289
Tr. 2416—Exhibit 290
Tr. 2416—Lines 15 through 23
Tr. 2418—Exhibit 291
Tr. 2419—Lines 1 through 25

Tr. 2420—Lines 1 through 25
Tr. 2421—Lines 1 through 25
Tr. 2422—Lines 1 through 17
2975 Tr. 2425—Lines 14 through 22, 24, 25
Tr. 2426—Lines 1 through 8
Tr. 2437—Lines 14 through 25
Tr. 2438—Lines 1, 22 through 25
Tr. 2439—Lines 1 through 13
Tr. 2444—Exhibit 292
Tr. 2445—Lines 5 through 23
Tr. 2446—Exhibit 293
Tr. 2447—Exhibit 294
Tr. 2448—Exhibit 295
Tr. 2448—Lines 13 through 22
Tr. 2450—Lines 20 through 25
Tr. 2451—Lines 1 through 25
Tr. 2452—Lines 1 through 25
Tr. 2453—Lines 4 through 14, 19 through 25
Tr. 2454—Lines 1 through 5, 24, 25
Tr. 2455—Lines 1 through 25
Tr. 2456—Lines 1 through 11

The continuing objection of Mr. Finck for National and Baker to the receipt of evidence including exhibits relating to metallized board and perforated lath, on the following pages of the transcript (see page 3 of Mr. Finck's list) has been ruled upon in that portion of the court's rulings preceding this topic 5:

Tr. 2653—Exhibit 313
Tr. 2660—Exhibits 314, 315
Tr. 3037 through 3041—Testimony by witness Charles A. Higgins
Tr. 2542—Exhibits 300, 300a
Tr. 2547—Exhibit 301
Tr. 2895—Exhibit 333
Tr. 2898—Exhibit 334
Tr. 2899—Exhibit 335

All testimony and exhibits which are in the nature of declarations of alleged co-conspirators and which under the foregoing rulings are allowed to remain in the record are received subject to the usual reservation with respect to the declarations of alleged co-conspirators, i. e., that they are binding upon co-conspirators only if a conspiracy is shown and the declarations be shown to be in furtherance or execution thereof.

(The documents marked as Government's Exhibits Nos. 241, 274, 275, 276, 277, 300, 300-A, 301, and 302, were

received in evidence.)

Justice STEPHENS. The Court will take a recess for 15 minutes.

(Whereupon, a 15-minute recess was taken, after which the trial was resumed as follows:)

2977 Justice STEPHENS. You may proceed, gentlemen.

Mr. STEFFEN. Your Honor, we at this time will offer, or reoffer, Government's Exhibits 239, 240, 271, 272 and 273, which are referred to in your Honor's opinion on page 14j as not having been offered.

I believe they are admissible on the same grounds stated by the Court.

Justice GARRETT. Why didn't you offer them with your offer of proof? Now we have to go and study those things all over again. They are excluded from our ruling here because they were not included in your offer of proof.

Mr. STEFFEN. I am very sorry, your Honor. I offered simply the five as being a simple way of getting before the Court the illustration that we would argue. If it is desirable, we can take this up tomorrow morning, but we would like to make the formal reoffer of those particular exhibits.

Justice STEPHENS. Well, the purpose of an offer of proof is to give the person offering a full opportunity to make a record on every item upon which he expects an adverse ruling.

I think if those exhibits are now offered, we will have to take a recess and look at them, because we assumed they were out of the case and we do not want to postpone any more rulings if it is possible to rule now.

Mr. STEFFEN. May I table my reoffer until tomorrow morning? I do not like to ask for a recess at this time because ——

2978 Justice STEPHENS (interposing). The difficulty with that is that it is really an excessively difficult job for the Court, after adjournment at four o'clock, to pass upon the incidental questions of law that usually arrive every day, and also read from one hundred to two hundred pages of transcript. We don't have any time in the evening to look up and examine exhibits. I guess we will just have to face the necessity of doing it now.

Mr. BROMLEY. May it please the Court, the offer of these exhibits raises an entirely new question, and I should like to object to them on the ground that they are immaterial and irrelevant, for the reason which has not heretofore been stated, that they have no relation to any charge in the

complaint at all relating as they do to a possible closing of a manufacturing plant, if anything. I assumed the reason they weren't offered before was because they didn't bear on the same subject-matter as your Honors' ruling has concerned itself with, that is, the possible fixing of prices on purchased board.

This has to do with the subject-matter of whether there was an agreement that the plant would remain closed, the Certain-teed plant would remain closed, and I think that clearly is beyond any charges in the complaint, and I think clearly that is why the Government did not offer them in their offer of proof, because they knew they had something to do with an issue clearly outside of the pleadings.

So I would like the record to show now my objec-
2979 tion to these offered exhibits on the additional ground that they are clearly immaterial to any charge in the complaint.

Mr. STEFFEN. Your Honor, we have not had—in the fifteen minutes' recess—an opportunity ourselves even to look the matters over. I would like to withdraw my offer at this time.

Justice STEPHENS. Very well; maybe you will find that it is not necessary to offer them.

Mr. STEFFEN. That is right.

Mr. FINCK. If the Court please, in making its ruling the Court is apparently of the opinion that National has a patent on its perforated board. It is my present information that National has no patent, and I would just like to call that to your attention. I will check that after recess today. I don't believe that I ever made that statement because I do not believe they have a separate patent; they simply manufacture perforated board in a different manner than USG does under its patent, and National has no license under that patent.

Justice STEPHENS. The Court was under the distinct impression, gained from the colloquies between counsel, I think, that National was manufacturing perforated board, not under a USG license but under its own patent. Of course it is not necessarily material, but nevertheless the fact ought to be shown, whatever the fact is, and if you can find out the fact and make it known to the Court, some correction may be made of that, if necessary.
2980 What is your understanding of that, Mr. Steffen?

Mr. STEFFEN. Our understanding is that they do not have a patent, but we don't know that as a fact. I think they made their board outside of the USG patent,

as they assumed.

Justice STEPHENS. Well, you may confirm that later, Mr. Finck, if you will, so that the record will be correct in that respect.

Mr. FINCK. Thank you.

Mr. STEFFEN. We have a little question which is bothersome with regard to witnesses, and I want to make a short statement to the Court.

I think at the time we adjourned it was rather assumed that Mr. Tomkins would be our first witness, and we so wrote Mr. Tomkins on January 28th, that we expected him here on the 7th of February, and he has come.

Following that, we got in touch with two other witnesses, making up the rest of our program, and found that Mr. Spease, for example, who is here, who is a necessary witness in the Government's case, has been ordered by his physician to take six weeks' time out, and accordingly the only way we could possibly get him in, as we saw it, was to put him on earlier.

We also have one other witness, Mr. Sensibar, who comes from Mexico, and we just happened to catch him here in the United States—and he also is a necessary witness.

2981 So that we now have arranged with Mr. DeWitt to have Mr. Tomkins to come on Thursday.

I want to say very clearly that we want to make every effort to cooperate with Mr. Tomkins for the reason that he is engaged, as I understand it, in war work, day by day, and has been for months. So we are endeavoring to make a firm engagement for Thursday. I don't know whether Mr. DeWitt would like to add anything to this statement of mine, or not.

Mr. DEWITT. I am Mr. DeWitt ——

Justice STEPHENS (interposing). Yes, I know you are.

Mr. DEWITT (continuing).—and appear all too infrequently here.

Mr. Tomkins, I might say to the Court, is Chief of the Industrial Division of the New York Ordnance District. In that capacity he has charge of an office of some twelve hundred persons, who are engaged in making contracts for the production and delivery of ordnance material for the Army.

He is devoting, and has been devoting, ten or twelve hours a day ever since Pearl Harbor to that work. He has been asked from time to time to come down here, and every time he is asked to come down, it means that he

has to arrange appointments which are vitally important in Government work, so that he can arrange to come here, and he has thus kept aside, I think, perhaps ten or twelve different dates, resulting in very serious inconvenience and interference with his work.

2982 Now we were definitely notified that today would be the day for Mr. Tomkins to testify, because the Court was considering questions of the admissibility of evidence and there would be no other witness.

Accordingly, Mr. Tomkins made all of his plans to come here today and is here. Now he gets here, and he finds that there are other witnesses ahead of him. I need hardly say that this is not a matter of Mr. Tomkins' personal convenience at all, it is simply a question of his participation in the war effort. It is interference not with him personally, but with the war effort.

Now the Army takes this quite seriously, and I think has made its position known to the Government. We had hoped that Mr. Tomkins could be put on this morning. Mr. Steffen tells me that that is impossible, and now says that he can definitely undertake, subject to the Court's approval, to put Mr. Tomkins on the first thing Thursday morning.

Justice STEPHENS. Did Mr. Tomkins come down here this morning to testify, especiallly?

Mr. DEWITT. He did, your Honor, he is here and he has arranged his appointments accordingly.

It is true—I think I should say in fairness to Mr. Steffen—that after writing the letter of January 28 which I have here, and I think perhaps I should in fairness to Mr. Steffen read this letter which was written to my associate, Mr. O'Donnell, of the local bar——

2983 This is dated January 28, 1944.

"This is to confirm our understanding that Mr. Tomkins will appear as a witness when court convenes on February 7, 1944. We have another witness who, because of ill health, we must put on first, but we should reach Mr. Tomkins by the afternoon of the 7th. Will you please ask Mr. Tomkins to inform himself regarding plaster prices"—and so forth—I think the rest of it is clearly immaterial.

Now all I can do is to submit this question to the Court. If the Court wishes to satisfy itself as to the importance of Mr. Tomkins' work, that is easily done, as he is here.

I do think that it is a serious interference with important Government work.

Justice STEPHENS. Well, speaking for myself, subject to the views of my brothers, Mr. DeWitt, it would seem to me that Mr. Tomkins ought to be put on immediately if it weren't for the representations that there is a man here who is seriously ill.

How long will his testimony take, Mr. Steffen?

Mr. STEFFEN. His testimony should take certainly the rest of today.

I might say also that Mr. Tomkins' testimony will take about two days, and he told us, in conference with Mr. DeWitt, that he has made appointments in New York for tomorrow, and that it would probably be most con-
2984 venient, all things considered, if we could put him on definitely Thursday morning. That will give him Thursday and Friday here.

Justice STEPHENS. Which is the gentleman who is ill?

Mr. STEFFEN. Mr. Spease.

Justice STEPHENS. Will you come forward where we can hear you?

Mr. SPEASE. Yes, sir.

Justice STEPHENS. What is your name, sir?

Mr. SPEASE. J. R. Spease.

Justice STEPHENS. Will it be seriously inimical to your health to postpone your testimony until day after tomorrow if Mr. Tomkins went on today?

Mr. SPEASE. Judge, I got up out of a sick bed to come here because I promised them I would, and I hardly know how to answer you. If I come out all right, it will be all right, but I am not able to stay here and I really felt that I should go home tonight, and with my promise uppermost in my mind, I got up and got a man who drove down here to be here this morning.

Justice STEPHENS. Where do you live?

Mr. SPEASE. In Fairmont, West Virginia.

Justice STEPHENS. How long a drive is that?

Mr. SPEASE. It should be ten hours, but we make it in about seven. We came across the ice and the snow, you know.

2985 Justice STEPHENS. This problem of the convenience of witnesses of course is one largely—and the witnesses themselves ought to understand that—within the control of counsel. Subpoenas are issued as a matter of course, and postponements are, some of them, inevita-

ble, but in the large, the witnesses' time of coming is governed by the wishes of counsel in the case, because they know the order of their own testimony.

Since the matter has been presented to the Court, however, the Court will say that it seems to the Court that Mr. Tomkins' convenience has been unhappily interfered with. The Court does not say that as a matter of blame upon anyone, perhaps it was inevitable, and the convenience of war work has apparently been interfered with.

At the same time, the Court doesn't like to take the position—which is Mr. Tomkins—(Mr. Tomkins arose) of endangering this gentleman's health, and I assume you wouldn't want that done?

Mr. TOMKINS. No, indeed.

Justice STEPHENS. We think, therefore, that this witness ought to be put on now, and Mr. Tomkins should either be kept here to go on tomorrow morning or, if he prefers, return here Thursday.

Mr. TOMKINS. I would prefer to return Thursday if I could be assured of going on Thursday.

Mr. STEFFEN. We will make a firm engagement, as far as we have any power.

2986 Justice STEPHENS. The Court knows of nothing that would prevent your going on Thursday, Mr. Tomkins. There are, of course, some matters beyond the Court's control. For example, Judge Garrett, one of my colleagues here, has got to appear before the House Appropriations Committee sometime this week——

Justice GARRETT (interposing). That will require only about an hour.

Justice STEPHENS. That committee may meet some time without much notice.

Justice GARRETT. That will be short. But I would like to ask this. Will you have witnesses, then, on Tuesday and Wednesday, so that we can go on with this trial?

Mr. STEFFEN. We think so, yes.

Justice STEPHENS. Very well. The Court regrets the inconvenience to which you have been put, Mr. Tomkins, but it apparently has been inevitable and you may, if you wish then, return here Thursday at ten o'clock.

And you, Mr. Spease, may take the witness stand.

Mr. ADAMS. Before Mr. Spease takes the stand, I have something that I would like to call to the attention of the Court—I don't know whether Mr. Bromley has anything further to state.

Justice STEPHENS. Mr. Bromley, have you anything?

Mr. BROMLEY. May it please the Court, I should like the record to show, and the Court to understand,
2987 that it is our position that one result of the Court's announced rulings this morning is that the Government probably should be required to recall some or all of the witnesses concerned for further cross-examination, and I want to point out that in so far as the Court sustained rulings during the course of the direct-examination of these witnesses, which rulings now have been reversed, I did not cross-examine. Indeed, I may not have cross-examined broadly enough on reserved rulings, thinking that probably the situation would be taken care of by an offer of proof.

Therefore, I should like to say now that we, defendants' counsel, desire carefully to examine the record and testimony, and the exhibits which were the subjects of this morning's ruling, in order to see whether we think it necessary that there be further cross-examination as to those items, and if we determine that there should be, we think that the Government should be required to get these gentlemen back so that the cross-examination can be completed.

Justice STEPHENS. Mr. Adams?

Mr. ADAMS. I don't know whether I should bring up this particular point at this time. I do so only because of the statements which have been made by the Court with respect to not having any more deferred rulings, and allowing the record to get into the state in which it has been in the past.

2988 What I am about to say has nothing to do with the point Mr. Bromley just mentioned, although I agree with him in what he stated.

Justice STEPHENS. If it has nothing to do with Mr. Bromley's point, we will discuss his point first.

Mr. ADAMS. Very well.

Mr. STEFFEN. As I understand it, Mr. Bromley has simply requested leave to look over the record and he will make a formal request later on.

Justice STEPHENS. Yes. The Court takes notice of your statement on that subject, Mr. Bromley, and after you have examined the record, if you wish to make an application for the recall of witnesses, we will give you an opportunity to do so.

Now, Mr. Adams, what have you?

Mr. ADAMS. May it please the Court, at pages 2861 and 2862 of the transcript—and also referring to Exhibit 324——

Justice STEPHENS (interposing). Exhibit 324 is the answer of the defendant Certain-teed Products Corporation to the Bill of Complaint in U. S. vs. Beaver Products, Equity 7907?

Mr. ADAMS. That is correct.

Justice STEPHENS. Now what is your point?

Mr. ADAMS. That was admitted in evidence as to the defendant Certain-teed, on the ground that it was an admission by Certain-teed. At the time that it was admitted in evidence I had, myself, never previously seen the exhibit, although I knew of its contents.

2989 After we recessed I had an opportunity to examine the exhibit and found that it is an answer which is not a verified answer. I have examined the law with respect to the question as to whether or not an unverified answer in an equity case in the Federal courts can be deemed to be an admission by the party on whose behalf the pleading is filed.

My examination of the law has convinced me that such a pleading cannot be construed as an admission against the party in a later and different lawsuit.

At page 2861, in the course of my objection—I noted an objection that it could only be deemed an admission for the purposes of that litigation and could not be regarded as an admission in any other litigation, except possibly between the same parties—but I did not have in mind at that time this point about it not being a verified pleading, because in the course of the argument, I had not personally examined the exhibit, and did not know what the fact was.

Now, I have not known exactly how to treat this, as a matter of presenting it to the Court. I should like formally to move to strike out that exhibit so far as it affects the defendant Certain-teed, and I have prepared here a little memorandum of law in which I have collected some of the leading cases on the subject. If the Court would like me to hand up that memorandum, I could do so, or I can, I think very briefly, give your Honor's the arguments

2990 with respect to this point which are contained in the cases. The point seems to be well-established in all of the Federal courts, including the Supreme Court.

Justice STEPHENS. Well, you are entitled to present the authorities, if you wish to have the Court examine them.

If you are content with stating the cases and what they hold, you may do that and do it now, if you wish to.

Mr. ADAMS. From my point of view, I would like to do it in the most convenient way for the Court, and the briefest way, whichever your Honors feel would be desirable.

Justice STEPHENS. You may submit your brief on the matter. There is a witness here who is ill, and we think we ought not to delay the proceedings, so if it is going to take any length of time, submit your brief, giving copies to adverse counsel, and after this witness has been examined and cross-examined, you may re-raise the point.

Mr. ADAMS. Thank you, your Honor.

Justice STEPHENS. You may call the witness.

Mr. KNUFF. J. R. Spease.

Whereupon, J. R. SPEASE, a witness, called for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

2991 DIRECT EXAMINATION by Mr. KNUFF.

Q. State your full name, please, for the record.

A. J. R. Spease.

Q. Where do you live, Mr. Spease?

A. Fairmont, West Virginia.

Q. Are you connected with the Fairmont Wall Plaster Company?

A. Yes, sir.

Q. How long have you been so connected with that company?

A. Nearly forty-four years.

Q. In what business is the Fairmont Wall Plaster Company engaged?

A. We are jobbers of plaster, or were jobbers of plaster, and board, doing a building supply business, manufacturing cinder blocks, and so forth, with two stores.

Q. And how long have you been engaged as a jobber of plaster and the other things that you mentioned?

A. Since about 1902.

Q. Where do you sell your materials?

A. We sell our material largely in five different States, Virginia, West Virginia, Pennsylvania, Maryland, and we have, in years gone by, done a good deal of business here in the District.

Q. You say that you are a jobber of plaster. Will you undertake to explain to the Court what you
2992 mean by that term?

A. Well, I mean as a jobber that we buy material from the manufacturer, or did, at a discount that enabled us to call on the dealer trade, and we had several different men on the road who saw people at frequent intervals, and performed the same function, I would say, that a manufacturer could do, that is, through our sales organization, but we did a better job because we saw our people often, and we had more men, and a manufacturer largely relies on broadcasts, I believe he calls them, or broadsides—they can't see their trade as often as we do, and we thought we had a pretty good arrangement for calling on the trade.

Q. How long have you been jobbers of plaster?

A. Since 1902.

Q. And specifically name some of the other materials that you act as jobber for.

Justice STEPHENS. Before you do that, let me ask a preliminary question.

Do you buy your material outright from the manufacturer, or take it on consignment?

The WITNESS. We buy everything we handle outright, and carry the account—I neglected to state that.

By Mr. KNUFF.

Q. First, before you answer the question that I asked you, as to what material you job, I want to ask you this question—are you still a jobber of plaster?

2993 A. No, sir, we are not.

Q. Since when haven't you been a jobber of plaster?

A. Since 1933, March 31st, the last car of plaster that American Gypsum had for us they held for ten days, it was 20 tons, to be shipped to Silas McQuain, at Elkins, West Virginia.

Q. What materials do you job?

A. We job roofing, insulation board, sand, lime, brick, and nearly every commodity that you would find around a building supply organization.

Q. Mr. Spease, were you a stockholder in the American Gypsum Company?

A. Yes, sir.

Q. Did you know Mr. Arthur Black?

A. Yes, sir.

Q. Were you related to Mr. Arthur Black in any way?

A. Yes, sir, he was my brother-in-law. I have been a widower for thirty-six years.

Q. That is, you were married to Arthur Black's sister?
A. Yes, sir.
Q. Was Arthur Black a stockholder in the Fairmont Wall Plaster Company?
A. Yes, sir, at the death of his father he had his stock, or part of it.
Q. Is he a stockholder today?
2994 A. Yes, sir.
Q. Is he on the board of directors?
A. Yes, sir.
Q. How long were you a stockholder of the American Gypsum Company?
A. From the time it was organized until they were sold out or taken over by Celotex.
Q. And that was in 1939?
A. Yes, sir, I think it was.
Q. From whom did you buy your plaster and your plasterboard?
A. We bought from American Gypsum Company for a number of years, until it was to our advantage to spread out a little, and then I bought a little stock in the Universal Gypsum Company when it was formed, and we had an arrangement with them.
Q. What did you buy from the American Gypsum Company?
A. Plaster and board.
Q. When did you start buying that plaster and board from the American?
A. When they were organized, in 1902, I think it was.
Q. And how long did you buy board from American?
A. We bought board up to 1930, I believe.
Q. Since 1930, did you buy board from American Gypsum Company as a jobber?
2995 A. No, sir.
Q. Did you have any conversation with Mr. Arthur Black on or about that time, concerning your purchase of gypsum board?

Mr. BROMLEY. I object to that, on the ground that it is incompetent and immaterial, and not binding on the defendants.

Justice STEPHENS. State whether or not you had a conversation with him, without answering as to what it was.

The WITNESS. Yes, I did.

By Mr. KNUFF.

Q. What did you have that conversation about?

Mr. BROMLEY. The same objection.

Justice STEPHENS. Did your question include naming the topic of the conversation?

Mr. KNUFF. I asked him if he had any conversation with Mr. Black concerning the purchase of gypsum board.

Justice JACKSON. That is not W. T. Black, that is Arthur Black?

Mr. KNUFF. That is Arthur Black.

The WITNESS. W. T. Black was his brother, and was with me for a number of years down there.

Mr. KNUFF. The question I have in mind does not pertain to this exhibit that your Honors are apparently looking at.

Justice STEPHENS. No, we haven't been examining the exhibit. I just happened to catch the name W. T. Black. Arthur Black was the Mr. Black who has been mentioned previously?

2996 Mr KNUFF. That is right, the sales manager for American.

Justice STEPHENS. I am not sure the Court understands the force of your objection, Mr. Bromley. This apparently is directed to the charge in the complaint which has to do with the elimination of jobbers.

Mr. KNUFF. That is right.

Mr. BROMLEY. Well, a conversation with Mr. Black would certainly not be binding on any defendant in this case.

Justice STEPHENS. Mr. Black was with American, and Celotex took over the stock and assets of American.

Mr. KNUFF. Correct, your Honor.

Justice STEPHENS. Of course we can't tell what the conversation is until we hear it, but we don't quite see why it would not be admissible like other testimony, subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. BROMLEY. That is my objection.

Justice STEPHENS. Very well, the objection is overruled. The testimony will be received, subject to the usual reservation with respect to declarations of alleged co-conspirators, and of course subject to our hearing the testimony. We can't tell until we hear it whether it is really material.

Mr. KNUFF. Suppose I rephrase the question.

Justice STEPHENS. Very well.

By Mr. KNUFF.

2997 Q. Mr. Spease, did you have any conversation with Mr. Arthur Black of the American Gypsum Company, concerning the purchase of gypsum board at a jobber's discount?

Mr. BROMLEY. The same objection.

Justice STEPHENS. Overruled, subject to the usual reservation with respect to declarations of alleged co-conspirators.

The WITNESS. Yes, sir, I did.

Mr. KNUFF. When was the last conversation you had with him?

Mr. BROMLEY. May I have a continuing objection?

Justice STEPHENS. Yes, you may, and it is overruled, subject to the usual reservation with respect to declarations of alleged co-conspirators.

By Mr. KNUFF.

Q. When did you have the last conversation with Mr. Black?

A. The last one-sided conversation I had with him was on March 31, 1933, the day he refused to ship our last car of plaster.

Mr. BROMLEY. I move that that part of the answer beginning, "the day he refused", be stricken out as a conclusion.

Justice STEPHENS. It may go out as a conclusion. Just state what the conversation was, and let us conclude ourselves whether or not it was a refusal.

By Mr. KNUFF.

2998 Q. Mr. Spease, please pay attention to the question I am asking you.

Justice STEPHENS. Perhaps I had better explain to the witness, he may not be used to the formality of court proceedings, and they are really not just formalities, Mr. Spease.

This is a very large and complicated case, and even in shorter cases it is very necessary that we confine the testimony exactly to the issues in the case. The only way we can do that is by having counsel ask questions which are directly relevant to the issues, and confining the answers to the particular questions asked. Otherwise, the witness, in entire good faith, may go into subjects which are not really relevant to the case.

We do not mean by that, that you need feel constrained or ill at ease, or that you are required to answer questions that you cannot fairly answer. If you don't feel that you can answer a question, you may say so, or if you can't answer a question "yes" or "no", you may say so. But so far as possible, just listen to the question and answer that question only.

By Mr. KNUFF.

Q. I am talking about plasterboard. Did you have any conversation with Mr. Black concerning your purchase of gypsum board, and when was the last conversation that you had with him concerning that?

A. In 1930, I think.

2999 Q. In 1930?

A. Yes.

Q. Now will you just relate ——

Justice STEPHENS (interposing). Fix the place of the conversation.

By Mr. KNUFF.

Q. Where did that conversation take place?

A. We talked it over so many times, I am sure that in 1930 it was on one of my trips to Port Clinton to see him.

Q. And it occurred at Port Clinton?

A. Yes, sir.

Q. Can you fix the time a little bit more definitely than in 1930; was it in the spring or the summer or the fall or the winter?

A. I don't believe I could just give you the date. I have it, we have a record in the office.

Q. It was, however, in Port Clinton?

A. Yes, sir.

Q. Where in Port Clinton?

A. At the American Gypsum Company's office.

Q. And what was the conversation that you had with him?

A. We had discussed it many times ——

Q. (Interposing.) Discussed what many times?

A. That we would have to stop jobbing both board and plaster.

3000 Mr. BROMLEY. I move that that be stricken as a conclusion.

Mr. KNUFF. I don't believe it is a conclusion, he is stating what the conversation was.

Mr. BROMLEY. He is summarizing the effect of it.

Justice STEPHENS. Well, he is summarizing the effect of

previous conversations, Mr. Knuff. I think that may go out. Ask him to state what took place at this conversation.

By Mr. KNUFF.

Q. In this particular conversation that you had in Port Clinton in 1930, can you tell us what you said to Mr. Arthur Black and what Arthur Black said to you?

Justice STEPHENS. Of course we don't wish to lay an impossibility upon the witness. Sometimes conversations are short and are had on the theory that both parties are discussing a previous subject. If that is true here, you can ask the witness about the previous conversations, but if you do that, you must fix the time and place of those as well as you can.

If you can tell what this conversation was without reference to the others, please do that, Mr. Spease. If you cannot, then you can tell what was stated in these other conversations, fixing first, if you will, please, the approximate time and place of them.

The WITNESS. In 1930, after many conversations, he told me that he could not sell us any more plaster-
3001 board at a discount, to sell to the dealers, and that he would have to stop it, and that he would not ship any more, but with that he did ship 70-some cars of plaster and board, on which we were promised that they would take care of us some way. They were afraid of the U. S. Gypsum Company and Mr. Avery, and they didn't know how to work it out, and they were going to take care of it, but we never got a cent of commission.

Mr. BROMLEY. This is obviously not a conversation, he is reciting what he feels.

Mr. KNUFF. No, he isn't, he is reciting what Mr. Black told him.

Justice STEPHENS. Read the witness' answer.

(Thereupon, the last answer of the witness was read by the reporter.)

Justice STEPHENS. The part beginning, "but with that he did ship 70-some cars" is a statement of what happened, and not what was said.

Mr. KNUFF. It is what was said; I know, and I will bring that out.

Justice STEPHENS. It may go out as presently appearing. You may bring it out as part of the conversation, if you can.

By Mr. KNUFF.

Q. Did he tell you why he wouldn't sell you any more plasterboard?

3002 A. Yes, he was not permitted to, that he would like to ——

Q. (Interposing.) Who wouldn't permit him?

Mr. BROMLEY. I object to that question ——

The WITNESS (interposing). The United States Gypsum Company.

Mr. BROMLEY. Just a moment. I object to that question, that is not asking for a conversation.

Mr. KNUFF. I am asking for conversations, Mr. Spease.

Justice STEPHENS. Ask the witness if Mr. Black said who it was that would not permit him, in his conversation. Did he say who wouldn't permit him?

The WITNESS. Yes, United States Gypsum Company.

By Mr. KNUFF.

Q. Give us the words of that conversation, or if you can't give us the exact words, give us the substance of it, please.

A. He said that all jobbers of board and plaster had been eliminated, and that we would have to go, and he was not permitted to sell us any more for resale to dealers. That was in 1930.

Q. Did he say who wouldn't permit him?

A. United States Gypsum Company, they controlled the situation and it was common gossip among us all ——

Mr. BROMLEY (interposing). I move that that be stricken, after the words "United States Gypsum Company".

3003 Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. Mr. Spease, did he say who wouldn't permit him to sell you plasterboard?

Justice STEPHENS. He has already answered that. He has stated that it was United States Gypsum Company.

By Mr. KNUFF.

Q. Is that all that was said at that time?

A. Every time we discussed it, it was coupled up with Mr. Avery and the U. S. Gypsum Company.

Q. I am only asking you about this last conversation that you had with Mr. Black in 1930. Now at that time, when he said he couldn't sell you any more gypsum board, and he told you why, is that all he told you at that time?

A. No, it is not.

Q. What else did he tell you?

A. That he would continue to ship it for a while, and would make it up to us, pay us a commission.

Q. He did say that he would continue to ship gypsum board to you?

A. Yes, sir, and did.

Q. And that in some way he would find a means of making it up to you?

A. Yes, sir.

Q. And did he continue to send you gypsum board?

A. Yes, sir.

3004 Q. When did they stop shipping gypsum board to you?

A. I believe it was in 1933. They sold us board, understand, at the dealer's price, but not so we could resell it to dealers as we had been doing for years.

Q. Now during that interval between 1930 and 1933, did you purchase plaster from the American Gypsum Company as a jobber?

A. Yes, sir.

Q. And you also purchased board, is that correct?

A. That is correct.

Q. Now, at what price did you purchase the board?

A. We purchased the board at the regular dealer's price, less our discount; it has always been figured that way, whatever the price of board was to any dealer, we bought it at that, and then there was so much discount on each car, depending on the kind and size.

Q. By "discount", do you mean a jobber's discount, or a cash discount, which?

A. I mean a jobber's discount. We paid our bills each month.

Q. I am talking about board, Mr. Spease. Did you buy board between 1930 and 1933 at a jobber's discount?

A. No, sir.

Q. And the discount that you referred to was the cash discount for the payment of the bills, is that cor-

3005 rect, in so far as board is concerned?

A. Yes, that is all we got.

Q. Now between 1930 and 1933, did you purchase plaster at a jobber's discount?

A. Yes, sir.

Q. And after 1933 were you able to buy plaster at a jobber's discount?

A. No, sir.

Q. Now, at that time, did Mr. Black tell you why he couldn't sell you plaster at a jobber's discount, in 1933?

Mr. OLIVER. Will you fix the time and place of that conversation in 1933?

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. Where did the conversation take place?

A. Arthur Black called me on the telephone at Fairmont, West Virginia. I was in Cleveland, Ohio, at the Cleveland Hotel. He located me there.

Q. Now you are talking about 1933?

A. Yes, sir.

Q. O. K.

A. Earl McWhorter was with me, a Fairmont man. Arthur Black said, "We can't ship you any more plaster." I said, "Well, I will see you", and I hung up, and we drove to Port Clinton.

3006 Q. From where?

A. From Cleveland, Ohio.

When I got down there and went in to see him, he said, "We can't ship you any more plaster or board, or anything for resale". I said, "Why, what is all this about, what does it mean?" He just stared at me. He said, "I said we couldn't ship you."

After I asked about a dozen questions, and got no answers, I went in to their manager, Charlie Miller, and I said, "Charlie, Arthur tells me that you won't ship us any more plaster, board, or anything else at a discount. What does that mean? You have done it for twenty-nine years and we have stock in the company."

He said, "Didn't Arthur tell you?" I said, "I am asking you." I couldn't get a word out of either one of them other than, "We have quit."

Q. And that was when?

A. March 31, 1933.

Q. March 31, 1933?

A. Yes, sir.

Justice STEPHENS. The Court will take a recess until five minutes to two.

(Thereupon, at 12:20 o'clock p.m., a recess was taken until 1:55 o'clock p.m., of the same day.)

(The trial was resumed at 1:55 o'clock p.m., pursuant to recess.)

Justice STEPHENS. Proceed.

Thereupon, J. R. SPEASE, the witness on the stand at the time of recess, resumed his testimony as follows:

DIRECT EXAMINATION (resumed) by Mr. KNUFF.

Q. Mr. Spease, just before the luncheon recess, you were telling us about a conversation that you had with Arthur Black in 1930. Did you have any conversation with Mr. Black prior to that in 1930, prior to the one that you have already told us about?

A. Yes, sir, I had a good many of them.

Q. Concerning what?

A. Our jobbing of plasterboard and plaster.

Q. And when did those conversations take place?

A. Practically every time we met, and I went up to see him frequently, and I would meet him once in a while in Pittsburgh—any time I would run into him.

Q. During what years?

A. Well, it was from 1930 to 1933.

Q. From '30 to '33?

3008 A. Yes, sir.

Q. Can you give us the details or the substance of any previous conversations, other than the one that you have told us about this morning?

Mr. BROMLEY. That calls for a yes or no answer, I assume, if the Court please.

Justice STEPHENS. Just answer that yes or no.

Mr. KNUFF. I have asked him for the details.

Justice STEPHENS. You asked him whether he could give any details.

By Mr. KNUFF.

Q. Can you?

A. State the question.

(The question was read by the reporter.)

The WITNESS: Yes.

By Mr. KNUFF.

Q. Will you tell us either the exact conversation or, if you can not give us the exact conversation, the substance of any conversations that you had with Mr. Arthur Black?

Mr. BROMLEY. I make the same objection on the ground that it is not binding on any defendant in this case, and also it seems to me that the witness ought to specify the time and the place before he starts.

Justice STEPHENS. Can you fix the time and place a little more definitely than you have, Mr. Spease?

3009 The WITNESS. Your Honor, if I had my records, yes. No, sir, not from memory, because when I would meet him I would say something to him, and then I wouldn't see him again ——

Justice STEPHENS (interposing). You do have at your office a record of those conversations, or something that would refresh your recollection?

The WITNESS. Yes, I would have a record as to the dates that I would meet him someplace, just like the time at Cleveland.

Justice STEPHENS. Is there anything in this series of exhibits here before us which might help to refresh this witness' recollection?

Mr. KNUFF. There is not, Your Honor.

Justice STEPHENS. We think, Mr. Knuff, that since it is within the power of the Government to fix the date of these conversations approximately ——

Mr. KNUFF (interposing). He has fixed them, if your Honor please ——

Justice STEPHENS (interposing). The witness states that he can fix each one of them by his records. That ought to be done. We don't see how we can properly reject the objection, because it is conventional practice to require the fixing of the time and place of a conversation, at least if it can be done.

3010 Mr. KNUFF. I didn't understand when I talked to Mr. Spease on two other occasions that he had anything that he could fix the dates of these conversations with. I didn't understand him to tell me that. Whether he means to say that he has notes on that now, I don't know.

Do you have any memoranda, Mr. Spease, that would refresh your recollection as to the dates when these conversations took place?

The WITNESS. Nothing other than every time we met, that I could go back to some records and see where we met, and I knew we talked about it, for I never saw him that I didn't say something to him about it.

Mr. KNUFF. I think that answers Your Honor's question. He hasn't anything specifically in mind except that he could thumb through all of his records and might find a

letter some place that said he was talking to Arthur Black on a certain day.

Justice STEPHENS. For how long a period of years did this go on?

The WITNESS. I would say from about 1930 up to 1933, when they turned us down flat.

Justice JACKSON. Is Mr. Arthur Black alive?

The WITNESS. Yes.

Mr. KNUFF. He was a witness here, Your Honor.

Justice JACKSON. Oh, yes, I had forgotten about it.

Justice GARRETT. And no inquiry was made of
3011 him with respect to these conversations with Mr. Spease?

Mr. KNUFF. No, sir, Your Honor, we did not. Mr. Black is now working for the Celotex Company.

Justice STEPHENS. Where did you see him, Mr. Spease, during that period?

The WITNESS. I met him at Pittsburgh and Port Clinton, Ohio, and two different times in Cleveland that I recall right now. I was trying to think of the name of the hotel that he stopped at. I went there twice to see him.

By Mr. KNUFF.

Q. Where, in Pittsburgh?

A. In Cleveland.

Q. The Hollanden?

A. No, it is about a block down from there. I know the name of it, but on the spur of the moment I can't recall it.

Q. Auditorium?

A. Well, I have stayed all night there several times.

Justice STEPHENS. Approximately how many conversations did you have with him over that period of 3 years, would you say, according to your best recollection?

The WITNESS. Six or eight.

Justice STEPHENS. We will overrule the objection. The testimony is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

3012 By Mr. KNUFF.

Q. Do you understand the question, Mr. Spease—the previous conversations that you had with Mr. Arthur Black, other than the one you testified to. Will you please give us the conversation, or if you can't give us the conversation give us the substance of the conversation, and tell us the time that that conversation took place?

A. Every time I met him between 1930 and 1933, there was common gossip that we were going to have to stop, everybody knew it.

Mr. BROMLEY. I move to strike that out.

Justice STEPHENS. Don't state what was common gossip. Just tell what took place between you and Mr. Black in the way of conversation.

That may go out.

The WITNESS. I just would start to talk to him, and I couldn't get him to say anything.

Justice JACKSON. What was the substance of what you said to him?

The WITNESS. "What am I going to do down there; how am I going to be able to continue my trade? We send you in that some company has cut a price to one of our dealers, and you used to get right after him and there was something done. Now you can't do anything."

3013 To make a concrete example of that, there was a case in Washington where the Gypsum Company was behind, there was a scarcity of cars——

Mr. BROMLEY (interposing). That is not a part of any conversation, I take it, and I move to strike.

Justice STEPHENS. That may go out. Tell us what you said. We, of course, don't expect you to remember what you can't remember, you are human like the rest of us and can't remember all of this in your mind. If you don't remember all these conversations and their substance and effect, just tell us you don't remember them. But don't argue the matter and give examples, unless you told them to Mr. Black.

The WITNESS. Your Honor, all we talked about was our ability to job and distribute plaster and plasterboard, and I knew it was common talk, as I already——

Mr. BROMLEY (interposing). I object to this.

Justice STEPHENS. That may go out.

The WITNESS. I saw him at different intervals, and the only way I would be able to tell when I saw him would be to refer to——

Justice STEPHENS (interposing). What did he say?

The WITNESS. I got very little out of him. He got so he was afraid to say anything, and the last day he just stared at me.

Mr. BROMLEY. I move that that be stricken about his being afraid and from there on.

3014 Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. With reference to your ability to buy as a jobber, can't you tell us what you said to Mr. Black, or if you can't tell us the exact words, the substance?

Mr. BROMLEY. When is this?

By Mr. KNUFF.

Q. Prior to the conversation that you have heretofore related.

A. When we put our money in the American Gypsum Company and bought stock, in 1902, we had a gentleman's agreement that we could job their plaster east of the Ohio River——

Mr. BROMLEY (interposing). I move that that be stricken out as stating a conclusion.

Justice STEPHENS. Mr. Spease, when you see one of the lawyers get up, please stop, because each side has a right to make an objection.

Mr. BROMLEY. I move that that whole statement be stricken.

Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. Do you recall the question I asked you?

Justice STEPHENS. Read the last question to the witness.

3015 (The question was read by the reporter.)

By Mr. KNUFF.

Q. Now can you do that?

Mr. BROMLEY. There are two conversations, one in 1930 and one in 1933.

Mr. KNUFF. He said he was talking to him 6 or 7 times between 1930 and 1933.

By Mr. KNUFF.

Q. I want all conversations that you had between 1930 and 1933, with Arthur Black, concerning your ability to sell as a jobber. You said you saw him in Cleveland on two different times. What did you talk about in Cleveland?

A. The same old thing, our jobbing of plaster and plasterboard.

Q. Won't you tell us what you said to him and what he said to you?

A. I said, "Arthur, what does it mean, what are you going to do?"

He said, "I can't do anything."

Q. When you said, "What are you going to do?", did you refer to what you meant by that?

A. Yes, sir, continue to sell us at a discount so that we could continue to call on the trade and the dealers that we had on our books, and sell the dealers we had on our books.

3016 Q. What did Arthur say to that?

A. Sometimes, towards the last, he didn't say anything, but just stared at me. At other times he would say, "I am doing the best I can, and I can't help it."

Q. Did he say why he couldn't help it?

A. The U. S. Gypsum Company, Mr. Avery, wanted to do away with the jobbers.

Q. Did he say that?

A. Yes, sir.

Q. Where did he say that, in Cleveland?

A. I can't be sure, but I would say every time I ever saw him, but maybe not.

Q. You say you had a conversation with him him in Pittsburgh?

A. Yes, sir.

Q. Whereabouts in Pittsburgh, the William Penn Hotel?

A. No, I think it was ——

Q. (interposing). The Fort Pitt?

A. No.

Q. The Pittsburgher?

A. (Interposing.) I think it was the Roosevelt Hotel.

Q. What was the conversation that you had at the Roosevelt Hotel?

A. Well, sir, I can't recall it in words, it was the same thing every time we met.

3017 Q. What was the substance of it?

A. Would they be able to continue to ship us plaster, pack plaster in our bags so we could continue to call on the dealer trade, plaster and board.

Q. What did he say?

A. Toward the last he continued to ship us 70 cars and didn't say much of anything other than he would work it out some way, which he never did.

Q. What did he say to you in Pittsburgh concerning the arrangement to job plaster?

Mr. BROMLEY. I move to strike out so much of the last answer as begins "which he never did", I think he said. That is no part of any conversation.

Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. Do you recall?

A. No, sir, the exact words I can't recall.

Q. What was the substance of it?

A. That we be permitted to buy plaster and board at a discount and sell to the dealers the same as we had done.

Q. And what did Arthur say to you?

A. "You know as well as I do that conditions have been changed, and we can't do it."

Q. Did he tell you why he couldn't do it?

A. No, sir, not each time.

3018 Q. Not each time?

A. Toward the last I couldn't get anything out of him at all.

Q. Now you have previously testified that you were purchasing board and lath from American in 1930. Previous to that time did National Gypsum Company solicit your business to act as your supplier of board and plaster?

A. Yes, sir, they did. They wrote us letters, called on us, and I went to Buffalo and called on Mr. Baker.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 345, the same being a letter of the National Gypsum Company dated September 20, 1927, addressed to W. T. Black, General Manager, and signed R. F. Burley, and attached to that letter is a letter dated September 8, 1927, addressed to W. T. Black, General Manager, and signed "Very truly yours, National Gypsum Company." Did you ever see those letters before, sir?

A. Yes, sir.

Q. Were they received in the Fairmont Wall Plaster Company?

A. Yes, sir.

Mr. OLIVER. If the Court please, may we see a copy of that exhibit?

Justice STEPHENS. Yes.

Mr. KNUFF. Copies were given to Mr. Johnston this morning.

3019 Mr. JOHNSTON. One set was given to me, and I gave it to Mr. Bromley.

Justice STEPHENS. Take your time and look at it, Mr. Oliver.

(Document examined by Mr. Oliver.)

Justice STEPHENS. Have you seen it, Mr. Oliver?

Mr. OLIVER. Yes, sir, thank you.
Mr. FINCK. I haven't seen it.
Mr. ADAMS. I should like to have a chance to see it.
Justice STEPHENS. Very well, look at it.
(Document examined by counsel.)

By Mr. KNUFF.

Q. Mr. Spease, I show you what has been marked for Identification as Government's Exhibit 346, the same being a letter on the stationery of the National Gypsum Company, dated October 12, 1927, addressed to W. T. Black, General Manager, and signed R. F. Burley. I wish you would look at that letter and look at the reverse side of it, and state whether or not that is a letter that the Fairmont Wall Plaster Company received from the National Gypsum Company, and whether the reverse side of that letter contains a copy of the reply that Fairmont wrote to National Gypsum Company?

Justice GARRETT. What date is that?

Mr. KNUFF. October 12, 1927. The reverse side, if Your Honor please, of that letter will appear as a
3020 separate sheet of paper in the exhibits that I have handed to you. The answer is dated October 14, 1927.

Justice STEPHENS. It might save time, if you are going to identify all of the items in this packet of photostats, for the Court's three copies to be loaned to defendants' counsel, for a recess of about 10 minutes to be taken, and let defendants read over all of them at once, and then we won't have to wait every time the witness is asked a question concerning them.

Mr. KNUFF. Any way the Court wishes is agreeable to me.

Justice STEPHENS. Are you going to offer all of them?

Mr. KNUFF. All of them, Your Honor.

Justice STEPHENS. Will that be any advantage to defendants' counsel, or do you think we would save time this way? Have you had a chance to see them before this at all?

Mr. ADAMS. No, we haven't had any opportunity. I think it would be helpful.

Justice JACKSON. If you read them all now, how are you going to keep them all in your mind?

Mr. FINCK. We can't.

Justice JACKSON. I think this is the best way to handle them.

3021 By Mr. KNUFF.

Q. Was Government's Exhibit 346 received by the Fairmont Wall Plaster Company, and does the reverse side thereof contain a copy of the reply that the Fairmont Wall Plaster Company sent to National?

A. Yes, it does.

Q. Mr. Spease, I show you what has been marked for Identification as Government's Exhibits 347, 348, 349, 350, 351, 352, 353, 354, and 355—347 being a letter dated September 27, 1929, addressed to Mr. J. R. Spease and signed M. H. Baker; 348 being dated October 3, 1929, addressed to Mr. M. H. Baker and signed Fairmont Wall Plaster Company, President; 349 being a letter dated October 7, 1929, addressed to J. R. Spease, and signed M. H. Baker, President; 350 being a letter dated January 11, 1930, addressed to M. H. Baker, President, and signed Fairmont Wall Plaster Company, President; 351 being a letter dated January 22, 1930, addressed to Mr. J. R. Spease, and signed M. H. Baker; 352 being a letter dated April 3, 1930, addressed to J. R. Spease and signed M. H. Baker, President; 353 being a copy of a telegram addressed to M. H. Baker, dated 4/7/30, and signed J. R. Spease; 354 being a copy of a telegram dated 4/7/30 addressed to J. R. Spease, signed M. H. Baker; and 355 being a letter dated May 23, 1930, addressed to J. R. Spease, signed M. H. Baker, President.

3022 Will you look over that series of correspondence, and will you state that the correspondence that was addressed to you was received by you, and as to the other correspondence which indicates that you sent it, will you tell us whether or not that was sent by you to the persons that it was addressed to?

A. Yes, sir, they are all familiar.

Mr. KNUFF. I now offer in evidence Government's Exhibits 345 to 355, inclusive.

Mr. ADAMS. I haven't read them yet.

Justice STEPHENS. Finish reading them.

(Documents examined by counsel.)

Mr. BROMLEY. May it please the Court, the defendants make the usual objection to all of these exhibits, and particularly point out that in so far as that part of Exhibit 346 which consists of the reply, dated October 14, 1927, Exhibits 348, 350 and 353, being letters of Spease, are concerned, they can not possibly be said to be declarations of a co-conspirator under any theory. In the second place,

we make the general objection as to incompetency as to all letters on the ground that there has not been any identification of any of the letters sufficient to make them admissible.

Justice STEPHENS. What are those numbers that you object to as being the declarations of Fairmont itself?

3023 Mr. BROMLEY. Exhibit 346, that half of it, the reverse side of it, which is the reply dated October 14, 1927; Exhibit 348, Exhibit 350, and Exhibit 353.

Justice STEPHENS. We have a little question about identification.

What has this witness said about identifying these various letters?

Mr. KNUFF. He said that the letters were received and that the replies which were sent out were sent out by the Fairmont Wall Plaster Company.

Justice STEPHENS. Do you know that of your own knowledge?

The WITNESS. Yes, I am quite familiar with them.

Justice STEPHENS. We think, gentlemen, that while, looking at them alone, Exhibits 346, the reply, and 348, 350 and 353, being letters or the like purporting to be from Fairmont to National, couldn't be binding alone as the declarations of a co-conspirator because Fairmont is not so charged, it seems to us that subject to the usual reservation with respect to declarations of alleged co-conspirators, as far as National is concerned, as distinguished from Fairmont, the letters might be admissible, Mr. Bromley, all of them, as a group of letters which, when read as a whole, are connected with each other and which tend to prove that there was a change of policy on the part of National in respect of the sale of its products. This,

3024 taken together with the testimony of this witness as to what Mr. Arthur Black said that Mr. Avery had told him, might make them relevant.

We think, therefore, they should be received in evidence under the theory the Court has just stated. If they do tend to prove a declaration by National, they are received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 345 to 355, both inclusive, were received in evidence.)

By Mr. KNUFF.

Q. Mr. Spease, did you avail yourself of the invitation that Mr. Baker gave you on September 27, 1929, and visit him at his office in Buffalo?

A. Yes, sir, I did.

Q. Can you tell us when you went there? Look at your telegrams or letters, and so forth; to refresh your recollection, if you care to.

A. I sent him a telegram on April 7, 1930.

Q. And did you go to Buffalo?

A. I did.

Q. When?

A. It was the Thursday morning after the 7th of April, 1930.

3025 Q. Did anybody go along with you?

A. I went up on a sleeper by myself.

Q. Did you see Mr. Baker?

A. I did.

Q. Did you have any conversation with Mr. Baker concerning jobbing arrangements that could be effected between National and Fairmont, for the jobbing of wallboard and plaster?

A. Yes, sir, I did.

Q. Will you relate to the Court, please, that conversation?

A. Mr. Baker and I discussed several matters first, and I brought up the matter of them packing plaster in our bags and selling us the board at a jobber's price so we could continue to call on the trade. He laughed and said, "Spease, you know as much about it as I do. Avery rules that we can't do it, and we can't do it. You might as well go home and forget it, you are going to have to do something else."

Q. Was that the only conversation you had with Mr. Baker?

A. That is the only one I recall.

Q. How long were you in Mr. Baker's office?

A. It was a very pleasant visit. I don't know, an hour and a half or two hours, maybe not quite that much.

3026 Q. Were you able to effect any arrangements for the purchase of plaster or lath ——

A. (Interposing.) Not a thing.

Q. (Continuing.)—from Mr. Baker?

A. Not a thing.

Q. And did you go home?

A. Yes, sir, that night.

Q. Now at that time, or shortly before that time, or shortly after that time were you buying lath and plaster from Universal?

A. Yes.

Q. Were you buying that at a jobber's discount?
A. We were, yes.
Q. Did you continue to buy lath and plaster from Universal?
A. Up until they shipped our bags back and quit.
Q. When did they ship your bags back?
A. I have that date.
Q. Can you give us the approximate time?
A. It just slipped my mind at the moment, but I have it here.
Q. Well, go ahead and refresh your recollection.
Do you have any memorandum, Mr. Spease, that will refresh your recollection as to when Universal ceased selling to you, at a jobber's discount, plaster and board?
3027 A. Yes, sir, we have a telegram in the office, and I have a copy of it, and they shipped our bags back and said nothing.
Q. Do you know what the date of that was?
A. I can't state.
Q. Was it before you went up to Buffalo to see Mr. Baker, or after you went up to Buffalo?
A. It must have been before.
Q. How long before, was it in the same year?
A. Just a short time.
Q. And did they ever give you any explanation as to why, did Universal ever give you any explanation as to why they wouldn't sell you plaster or board?
A. Never a word, just shipped them back.
Q. Did you owe them any money at the time?
A. No, sir, we discount all our bills ——
Q. (Interposing.) Always discounted your bills with them?
A. Yes, sir.
Q. Do you know of any reason why they shipped your bags back?
A. The only reason was that they couldn't ship us as a jobber any more and allow us a discount that we could sell to dealers.
Mr. BROMLEY. If this is not a conversation, I object to it as incompetent.
3028 Mr. KNUFF. I asked him if he knows any reason.
Mr. BROMLEY. Now he is giving a reason. That is his reason, I take it, nobody else's reason, and I object to it as incompetent.
Justice STEPHENS. Is this your opinion as to why they stopped?

The WITNESS. No, sir, I was told so.

Justice STEPHENS. By whom?

The WITNESS. Nobody in their company, but to practically everybody in the business it was common knowledge.

Justice STEPHENS. That may go out.

By Mr. KNUFF.

Q. Do you know Mr. Emil Hansen?

A. I do.

Q. With what company was he formerly connected in the gypsum industry?

A. The Oakfield Gypsum Company.

Q. Did you ever endeavor to buy plaster and board from Mr. Hansen, in 1933?

A. Yes, sir.

Q. Did you ever have a conversation with him at that time?

A. Yes, sir.

Q. Where?

3029 A. In Buffalo, New York.

Q. And what was that conversation?

Mr. BROMLEY. Just a moment. I object to that on the ground that it is immaterial and irrelevant, and this is more than the usual objection because there is no charge here that Mr. Hansen or the Oakfield Gypsum Company are co-conspirators, and therefore under no theory could any statement or declaration by them be binding at any time upon the defendants in this case.

Mr. KNUFF. If Your Honors please, if you will look at paragraph 45 (e), "concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies."

Justice JACKSON. Was Oakfield a manufacturing distributor?

Mr. KNUFF. Oakfield was a manufacturing distributor.

Justice STEPHENS. What do you say to that, Mr. Bromley?

Mr. BROMLEY. The charge is that these defendants concertedly induced and coerced the manufacturing distributors to resell, at fixed prices, gypsum board purchased from said companies.

Justice STEPHENS. Do you intend to prove, Mr. Knuff, that this Oakfield Company was acting at the instance of or under the coercion of a defendant?

3030 Mr. KNUFF. Definitely.

Justice STEPHENS. Anything further, Mr. Bromley?

Mr. BROMLEY. I object to it also on the ground it is incompetent because hearsay. I still do not understand this to be a charge that the manufacturing distributors were co-conspirators, so that their declarations can be said to be binding upon the defendants in this action.

Justice STEPHENS. Well, that objection raises a new point, Mr. Knuff.

We think, my colleagues and myself, that you are entitled to prove that there was, under paragraph 45 (e) of the complaint,—you are entitled to try to prove that defendants did stop manufacturing distributors, or did induce them and coerce them to resell, at the prices raised and fixed by defendant companies, gypsum board purchased from said companies, and if you can show that you are entitled to do so. But now you are asking the witness to testify what someone else told him, apparently, and that someone else is not a co-conspirator and not charged as a co-conspirator.

Mr. KNUFF. We don't agree with Mr. Bromley's theory at all, that the Oakfield Gypsum Company wasn't a co-conspirator. We think that they were co-conspirators in this case, and when Oakfield Gypsum Company fell under the domination of USG and did what the United States Gypsum told them to do, that that is proof positive
3031 that they were acting in an unlawful manner. It is our contention that in so far as a certain phase of this case is concerned, Oakfield was just as much of a co-conspirator as United States Gypsum Company.

Justice STEPHENS. Do you charge that they were co-conspirators? You said that they concertedly induced and coerced the manufacturing distributors. Is that a charge? Is one who is coerced a conspirator?

Mr. KNUFF. We don't spell it out in so many words, but I think it naturally follows that when a person is coerced and he does an illegal act, that is no excuse at all.

Justice STEPHENS. That isn't the question. The question is whether he is the kind of a co-conspirator whose declarations would be binding.

Mr. KNUFF. If he is a co-conspirator, Your Honor, there are no degrees of co-conspirators.

Justice STEPHENS. I am afraid I don't make my trouble clear to you, Mr. Knuff. The declaration of a co-conspirator is binding, if it is shown that he is a co-conspirator and that the declaration was in furtherance of or in exe-

cution of the conspiracy, upon other co-conspirators. But that is upon the theory that he was himself a voluntary actor in the conspiracy, and being such, and the others being voluntary actors, they are bound by each other's conduct.

3032 But here your charge is, is it not, that the manufacturing distributors were coerced, they were compelled to do this? If they were compelled to do this, can they be classified as conspirators?

Mr. KNUFF. Definitely.

Justice STEPHENS. If I put a gun to your head and compel you to do something, can you be charged as a conspirator?

Mr. KNUFF. I think you are carrying the analogy a little too far ——

Justice STEPHENS (interposing). I am putting it in those terms to test your position. I don't know what your position is, I am trying to find out.

Mr. KNUFF. My position is that whenever USG told Oakfield Gypsum Company that, "You can not sell to Fairmont", and they intimated that, "If you do sell to Fairmont Wall Plaster Company we will withdraw our permission from Kelley to sell you board", which they could do, that is a far different situation than putting a gun at your head. Here you had a situation where Oakfield was buying their board from the Kelley Plasterboard Company. USG says to Oakfield, "Don't you sell board to jobbers at a discount. If you do sell board to jobbers at a discount, we will withdraw our permission from Kelley Plasterboard Company to sell you board, and you will be left high and dry."

Justice GARRETT. And because they would be left high and dry, and acquiesced, that would make them a

3033 conspirator?

Mr. KNUFF. That is one of the evidences of a conspirator, that is right; I think that alone would be enough, Your Honor.

Justice GARRETT. I was asking it in the form of a question, not making a statement.

Mr. KNUFF. I think it would. When they followed through and did what USG said, I think it would.

Justice STEPHENS. Well, we think that the Government is entitled to try to prove, under paragraph 45 (e) of the complaint, that the defendant companies did concertedly induce and coerce manufacturing distributors to resell, at prices raised and fixed by the companies themselves, gyp-

sum board purchased from those companies, and you may offer such proof as you have on that subject. Whether or not you can make the declaration of Oakfield binding upon the other defendants depends upon whether you can prove that it was a co-conspirator in a proper sense of that term.

Counsel apparently misunderstood the Court's illustration. That is the common illustration to differentiate between coercion, which is one of the terms used in the complaint, and voluntary action. I suppose we will have to receive this conversation subject to connection. The Government can't be compelled to put in all of its testimony at one time to prove this conversation. But we will accept it subject to connection, and if the Government can later prove that Oakfield is a co-conspirator in
3034 the sense that it did act in concert with the others, and the declaration is shown to be in execution and furtherance, then I suppose it would be binding upon the other conspirators.

Mr. BROMLEY. I merely want to point out that we had the conspiracy shown diagrammatically on the board the other day, and in connection with that diagram, at page 3190, Mr. Steffen said, "* * * this first diagram here, showing USG, and A, B, C and D, is what we visualize as the group of defendants. If there is a conspiracy to be proven, they are the conspirators and that is the conspiracy."

My point is that it has never been charged that this man Hansen, or the Oakfield Company, was a conspirator, never before today. In fact, their position has always been that they were outside the conspiracy. It was drawn on the board, and illustrated by his argument, as to just what he meant by the conspiracy, and he put these people outside the circle. He didn't look at them then as co-conspirators.

Justice STEPHENS. We will take a recess for a few moments.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

3035 Justice STEPHENS. Where in the complaint, Mr. Knuff, if anywhere, did you charge that the defendants conspired with anyone other than each other?

Mr. KNUFF. I don't believe that you can find that in the complaint.

Justice STEPHENS. I think not.

Well now, the Court has agreed as follows: The ques-

tions which the Presiding Judge has asked, and the tentative ruling made, were asked and made upon the theory that in the view of the majority of the Judges, the complaint was drawn broadly enough to include a charge, even though it was not made, in terms that the Oakfield Company was a co-conspirator.

But upon conference with my colleagues I find that they do not—and I agree with them—believe that the complaint is drawn broadly enough to include the Oakfield as a co-conspirator.

Now paragraph 45 (e) charges that the defendants—meaning the defendant companies who were charged as being defendants—"concertedly induced and coerced manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies."

We think that the Government is entitled to prove that that happened, it is entitled to prove that the defendants did induce or coerce manufacturing distributors, whoever they were, "to resell, at the prices raised and fixed"
3036 by the defendant companies. But since we are agreed that the complaint does not charge Oakfield as having been a co-conspirator, a different question is presented with respect to its declarations, because the declarations are hearsay and can only come into evidence if they are shown to be declarations of a co-conspirator in furtherance of and in execution of a conspiracy, and if it is not charged as a co-conspirator, it cannot be proven to be a co-conspirator, and therefore its declarations are not admissible.

Therefore, the Court rules that the conversation with Mr. Hansen is not admissible. The Court does not rule that you cannot prove, by competent evidence, that Oakfield was induced and coerced by the defendants to resell at the prices fixed by them.

Mr. KNUFF. We are going to follow this by the testimony of Mr. Eldred, and Mr. Hansen, to the effect that they were told certain things by USG; and of course, like in all other conspiracy cases, we cannot put in our entire case just by one witness. We are going to connect this testimony up.

Justice STEPHENS. Well, that is very true, or that may be very true, Mr. Knuff, but as I tried to make clear, my original tentative ruling was on the theory that my colleagues' broad ruling this morning, to the effect that the complaint as drawn was not limited by the Bill of Particulars or the subsequent paragraph 54, was broad

3037 enough to permit the complaint to be construed as charging some persons to be co-conspirators not named as defendants.

But I find, in conference with my colleagues, that I misconstrued the breadth of their ruling on that; they do not think the complaint is that broad, and neither do I.

Therefore, we think the declaration of Mr. Hansen, the statement of Mr. Hansen, is not admissible, although you may call him to prove what he was told to do by USG or other defendant companies.

Mr. KNUFF. May we have this evidence taken at this time under the provisions of Rule 43 (c) of the Rules of Federal Procedure, and I particularly call the Court's attention to what appears at the top of page 57 in my book:

"The court may add such other or further statements as clearly show the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury, the same procedure may be followed except that the court, upon request, shall take and report the evidence in full unless it clearly appears that the evidence is not admissible upon any ground, or that the witness is privileged."

Justice STEPHENS. Where is that, again?

Mr. KNUFF. That is Rule 43 (c).

Justice STEPHENS. Let me read that.

3038 How much of this testimony will there be?

Mr. KNUFF. Possibly two or three more incidents.

Justice GARRETT. You mean with this witness?

Mr. KNUFF. Yes, your Honor.

Justice GARRETT. Are there any more exhibits in connection with such testimony?

Mr. KNUFF. Yes, your Honor.

Justice GARRETT. You mean additional exhibits?

Mr. KNUFF. Yes, your Honor.

Justice STEPHENS. They are in this file of exhibits, are they not?

Mr. KNUFF. Yes, your Honor.

May it please the Court, there is another theory under which this evidence is clearly admissible ——

Justice STEPHENS (interposing). Before you go to that, let me ask you if I clearly understand why you are invoking Rule 43 (c), which says that in actions tried without a jury the same procedure may be followed, except that the court, upon request, shall take and report the evidence in full unless it clearly appears that the evidence is not admissible upon any ground.

Now I suppose the reason you want to take it is because, in the event this case, after its conclusion should be decided against the Government, and you should take an appeal, you would attempt to convince the appellate court that the complaint is drawn broadly enough to
3039 charge Oakfield and others like Oakfield, as co-conspirators, and that therefore their declarations can come in, and that therefore the evidence ought to be allowed?

Mr. KNUFF. That is one reason, and another is because this witness is now ill, he is now going to Florida, we hope he is going to be alive for a great many years, but we don't know. We don't know what the ultimate outcome of this case will be. We would like to preserve this testimony.

Another reason is the fact that Mr. Hansen and Mr. Eldred will be called, and we will connect this up, but we would also like to have the testimony of this witness at this time.

I don't think that defendants can be prejudiced by it because the Court can always control that, and it is quite material to our case, as we see it, in view of the state of health of this witness, now.

Justice STEPHENS. You had another theory that you had in mind?

Mr. KNUFF. Another theory on which it is admissible is this, your Honor, that in proving coercion, it can be done in many ways.

The person who did the coercing could come into court and say, "Yes, I did that." The person that heard the coercion exerted, or the influence exerted, can say, "Yes, I overheard that conversation."

3040 Another way of proving coercion is to show the statements of the person coerced as showing the state of mind that he had.

Now that has been clearly ruled in the Nick and Weston case, as material.

In other words, the statements made by the person coerced are material, not for the purpose of showing the truth of that statement at all, but for the purpose of showing the state of mind of that person.

Justice STEPHENS. Well then, of course you get into the problem of the "spontaneous declaration and circumstantial utterance" rule.

Do you contend that Mr. Hansen's statements are so closely connected with the event of coercion, that they are in the nature of spontaneous declarations?

Mr. KNUFF. Well, I don't know how close the statement of Mr. Hansen was made after the coercion. I don't think that is material.

The material thing is, was he coerced, and we can show whether he was coerced by showing what he said as bearing upon his state of mind, not for the purpose of showing that it was true or false or anything else, but for the purpose of showing his state of mind. That was definitely raised in the Nick and Weston case out in St. Louis, and those statements were admitted.

Justice STEPHENS. Where is that case?

3041 Mr. KNUFF. The citation of the Nick and Weston case?

Justice STEPHENS. Yes.

Mr. KNUFF. Mr. Steffen participated in that case and he probably could give the Court the citation.

Mr. STEFFEN. I don't have the citation, it is in the Seventh Circuit.

Justice STEPHENS. Did it go to the Supreme Court of the United States?

Mr. STEFFEN. Certiorari was denied.

Justice STEPHENS. Have you the case in the Circuit Court of Appeals?

Mr. STEFFEN. I don't have it here. It was decided in 1941. I can get that for the Court.

Justice STEPHENS. That is an entirely new theory. We all think that this evidence is not admissible under the complaint as drawn, as the declaration of a co-conspirator, but in view of the health of this witness, and in view of Rule 43 (c), the Court is willing that you should make a record of the testimony as to that, so that in the event of an appeal, in which you wish to urge that the complaint is broad enough to permit it to come in as a declaration of a co-conspirator, it will be in the record.

So you may examine the witness on that.

In the meantime, if you wish to offer it upon this new theory which you have just spoken of, which we haven't discussed before, that it is admissible as a declara-

3042 tion showing the state of mind of the person alleged to have been coerced, you may present that case to us tomorrow morning.

I call your attention also to the case of Sanitary Grocery vs. Snead, in the United States Court of Appeals for the District of Columbia, which discusses the circumstantial utterance and spontaneous declaration rule.

Mr. KNUFF. My understanding is that we can take the testimony at this time?

Justice STEPHENS. The understanding is that at present the testimony is being taken under Rule 43 (c), but it is taken after a ruling that it is not admissible in evidence as the declaration of a co-conspirator, for the reason that the complaint does not charge the Oakfield Company with being a co-conspirator. But you are permitted to take the testimony in view of the witness' health, and under Rule 43 (c).

Mr. BROMLEY. May it please the Court, I take it then that it is not in the case, and that we do not have to assume the burden of cross-examination on it? Of course, having had no notice with respect to it, I am not prepared to cross-examine the witness on it, and couldn't possibly.

Justice STEPHENS. The only possibility of it being received is upon this additional theory. If the Government seriously insists upon the Court's considering its admissibility upon that theory, the Court is obliged, of course, to consider it, and the witness ought not to be released
3043 before you cross-examine him if it should be received upon such a theory.

Can't you get that case, perhaps, in a few moments, and let us see it?

Mr. KNUFF. I think we can.

Justice STEPHENS. We will take a recess then. The library has all the Federal Reports in it and we will take an informal recess—we will remain here.

(Whereupon, an informal recess was taken, after which the trial was resumed.)

Justice STEPHENS. We have read this case, and we think we understand your contention. We will be glad to have you state anything further you wish to, Mr. Knuff.

Mr. KNUFF. Well, I can only say, your Honor, that what I have in mind appears particularly on page 671, and has the Court read what is said there?

"Of course, this testimony is hearsay but it was admissible here for the purpose to which the evidence was expressly confined by the court. The court limited this character of evidence to the purpose of showing the state of mind of the committee representing the exhibitors as to why this payment of $6,500 was necessary. This money was raised subsequently by the committee from the exhibitors and paid over to Weston. The gist of the unlawful act is extortion. Extortion involves a state of mind as an

element of an offense under the Act. Unless there
3044 is some form of compulsion (either physical or fear)
there is no crime under this Act. If the exhibitors had paid this money of their own initiative and voluntarily there would have been no violation of the Act. It was, therefore, essential to show that such payment was under such compulsion. The existence of this compulsion might be proved in several ways but one proper way is to show the state of mind under which the committee acted. The purpose of this evidence, as repeatedly limited by the court, is not to prove what was said at the conference between Kaimann and appellants or that the situation thought to exist by Kaimann and other members of the committee really existed. It is to show the state of mind of Kaimann produced by the transaction and that his conclusion was communicated to other members of the committee. Whether Kaimann was justified in reaching such conclusion is an entirely different matter. Whether justified or not, that was the conclusion which he stated and which, undoubtedly, had its effect upon the minds and the future actions of the members of the committee in making this payment."

In other words, we have here a continuing conspiracy. At all times, Oakfield was under the compulsion to do what USG wanted them to do, because if they didn't do it, USG could immediately withdraw their consent from Kelley, and Kelley would not then be able to sell board to Oakfield.

So we have here a continuous compulsion on the part
of USG to impose their will upon the Oakfield Com-
3045 pany; and state of mind, we say whether justified or not, is material in this case.

Justice STEPHENS. Well, we are of the view, as already stated, that since the complaint is not broadly enough drawn, or even broadly drawn as it is, isn't drawn in a manner which charges the Oakfield Company with being a co-conspirator, that the testimony cannot come in as the declaration of an alleged co-conspirator.

We do not deny to the Government the right to put the testimony on, under Rule 43 (c), but we construe that rule to be in the nature of, in a non-jury case, an offer of proof, which does not require cross-examination, because the first part of the rule, it will be noted, says:

"In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court

may require the offer to be made out of the hearing of the jury. The court may add such other or further statements as clearly show the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury, the same procedure may be followed except that the court, upon request, shall take and report the evidence in full unless it clearly appears that the evidence it not admissible
3046 upon any ground, or that the witness is privileged."

But we think that the taking of evidence under Rule 43(c) means that in substance it is taken as an offer of proof in order that the appellate court may be fully advised as to the nature of the evidence excluded.
3047 Therefore, counsel for the other side are not called upon to cross-examine, although they are not denied that right if they wish to. The evidence is excluded so far as that theory is concerned.

Now so far as the other theory is concerned, you are offering the statement of a man named Hansen who was an officer, we understand your contention to be, of Oakfield, as a declaration on his part.

Now unless it can come in as the declaration of a coconspirator—and we have ruled that it cannot—it has to come in either as an exception to the hearsay rule, or as evidence to which the hearsay rule is not applicable.

The exception which you might possibly try to fit it under is represented by Sanitary Grocery v. Snead, 90 Fed. (2d) 374, where the United States Court of Appeals, in an opinion written by myself, discussed the spontaneous declaration theory where a statement is made in the very course of an act. That apparently is not the theory under which you are urging it. You are urging it under this case of Nick v. United States, 122 Fed. (2d) 660, at 671. That is a different theory.

That is the theory that where an act itself is of ambiguous character, the statements made by the actors may be introduced in evidence to characterize the act.

That is referred to in Wigmore's short book, Wigmore—Code of Evidence, Third Edition, 1942, under Rule
3048 171, and illustrations are there given.

Whether the evidence can come in under that theory, we can hardly rule on in advance of a showing as to when the alleged act of coercion occurred, and when the statements were made which tend to characterize it.

An act may or may not be one of a coerced character. It is conceivable that the declaration of the actor or the

party to the alleged coercion, or the person alleged to be the subject of the alleged coercion, might be admissible if made at the time or reasonably connected with the time pressure was being placed upon him, so that it characterized the act.

An illustration of that is given in Wigmore, where an issue of payment by P to J was involved.

"P handed money to J; P's words at the time of handing the money, 'this is the money I borrowed', are admissible, as indicating whether it is a loan or a payment or a deposit, because the act of handing the money is independently material in the case".

Where the act in issue is payment, and the act of handing is ambiguous because it might be payment or it might be further loan, a statement of the actor is admissible to characterize the ambiguous act.

Conceivably, this evidence is admissible, the statement by Mr. Hansen; if you also show that he was subject to coercion or subject to acts which you claim constitute coercion, but which might be otherwise construed, his statement might conceivably be admissible under that second theory as characterizing an ambiguous act.

3049

We will have to hear the statement, since you seriously offer it under that theory, then, subject to a motion to strike it unless it is shown that it is so reasonably connected with an ambiguous act that it can remain in to characterize it. The ruling is made in that manner.

Of course it is to be understood that if, under that theory, it is admissible, you ought to cross-examine to protect yourself.

Mr. BROMLEY. I would like to know from counsel what the ambiguous act is that he thinks he is going to prove.

Mr. KNUFF. We are going to prove that there was coercion.

Justice STEPHENS. Yes, but you have offered this under a theory of law, that a declaration which would otherwise be out, as hearsay, can come in because it is not subject to the hearsay rule, because it is a characterization by an actor of an act which is itself in issue, and which is ambiguous; and it is, I think, a fair question, as to what you contend is the ambiguous act.

Mr. KNUFF. We have said that Oakfield Gypsum Company was under compulsion by USG, and that is what we are going to endeavor to connect up, to show what pressure USG put upon Oakfield.

3050 Justice STEPHENS. Yes, but you must bring yourself fairly within the rule upon which you rely, and there must be some specific act which this declaration is alleged to characterize.

Mr. KNUFF. It would be what USG told Oakfield. I don't know what they told Oakfield.

Justice STEPHENS. That is not an act, that is another utterance.

Mr. KNUFF. Well, of course it was your Honor that used the term "ambiguous act"; I didn't use the term, I used the term to show the state of mind of this man that there was coercion here within the Nick and Weston case.

Justice STEPHENS. Well, the Nick and Weston case, while perhaps the language of the judge there isn't as technically stated as the language that I have been using, Mr. Knuff, is clearly under the theory which I have been announcing, because there the charge was extortion, and there was a payment of money which is an act, and the question was whether or not it was a payment under coercion, or a voluntary payment. The testimony which was allowed in was the testimony that this was another "picnic", or words to that effect, and the very theory upon which you rely is the theory which Mr. Wigmore states, and to which I have been referring.

Mr. KNUFF. And here we are going to show that Oakfield Gypsum Company refused to sell these people board. Now did they refuse to sell them board because they

3051 were under compulsion? Did they refuse to sell them board because their credit was no good? Those are the things that we are going to show.

Justice STEPHENS. Well, that hasn't been stated before, Mr. Knuff.

I wish you would bear in mind that this is a friendly discussion of the law, and not a contest between Court and counsel.

Mr. KNUFF. I don't mean, because I raise my voice, that I think it is a contest. I just can't help myself, that is all, when I get enthused, I do raise that voice of mine.

Justice STEPHENS. Very well, our hearing is excellent, Mr. Knuff.

We rule that if the evidence can be brought within that theory, that it may be received. Whether it can be brought within that theory depends upon what you prove with respect to some act, not with respect to some statement.

You may proceed to examine the witness.

Mr. KNUFF. Shall we go ahead at this time?

Justice STEPHENS. It is ten minutes after four. I understood you to say that this witness could not stay here beyond tonight. Did I misunderstand you? I hope I did.

The WITNESS. I said I did not want to stay if I could get away. I really ought to get back home.

3052 Justice STEPHENS. The defendants have a right to cross-examine you, Mr. Spease, and that would prolong the hearing so long today that I think we will have to ask you to come back tomorrow morning.

Do you have hotel accommodations?

The WITNESS. Yes.

Justice STEPHENS. Before we adjourn, Mr. Adams presented this morning a memorandum of authorities with respect to Exhibit 324. The Government will wish to present a counter-memorandum, I assume.

How much time do you wish for that?

Mr. KNUFF. I don't think we have even looked at this memorandum as yet. We don't know what is in it. I wonder if we could tell you in the morning.

Justice STEPHENS. Yes, let us know in the morning. We wish to fix a definite time, and we wish to hold you to it, so we will have a definite knowledge when we are going to get this material.

We will now adjourn until tomorrow morning at ten o'clock.

(Thereupon, at 4:10 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Tuesday, February 8, 1944.)

3053 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., TUESDAY, FEBRUARY 8, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

3057 Justice STEPHENS. With respect to the testimony which is now being offered, the Court cannot rule upon it without hearing it. We can't tell whether it is permissible within an exception to the hearsay rule without hearing it. So we will hear it, subject to a motion to strike.

Mr. BROMLEY. Might I, with the Court's permission, make a short statement, in view of Your Honors' position, as to what it seems to me the rule should be and is?

Justice STEPHENS. We would be glad to have your help.

Mr. BROMLEY. I submit that before the rule admitting statements of an actor to characterize an ambiguous act, referred to by the presiding judge at the close of court yesterday, can be applied, the ambiguous act must be a competent, material fact in the case. Thus, in Nick v. United States, the payment of the alleged extortion money was an issue in the case, and the state of mind of the party making the payment was, of course, an element of the offense under the anti-racketeering act.

3058 Similarly, in the illustration given in Wigmore's short book on Evidence, the act of handing the money over was independently material in the case.

Here, the particular issue involved is whether or not the defendants conspired to restrain trade by coercing Oakfield to sell the board which Oakfield bought, at USG bulletin prices. That is the charge in the complaint. Oakfield, not being an alleged co-conspirator, what it did or said to some other and third person, likewise not an alleged co-conspirator, is not binding on any of the defendants.

The Court yesterday recognized this to be so in its ruling that declarations by Mr. Hansen, an officer of Oakfield, were not admissible or competent as evidence of the alleged conspiracy.

How can the Government attempt to prove the alleged conspiracy by what Oakfield did, any more than by what Oakfield said? The fact that Oakfield refused to sell Fair-

mont, if that be so, is not admissible against these defendants. I would like to repeat that; The fact that Oakfield refused to sell Fairmont, if that be so, is not admissible against these defendants. It is not binding on them as any proof of the conspiracy.

Therefore, since evidence of the act—that is, Oakfield's refusal to sell—is incompetent, Oakfield's state of
3059 mind is immaterial and incompetent. The rule, it seems to me, must be limited to statements of an actor to characterize an ambiguous act which is a material issue in the case, or which is done with respect to one of the parties in the case.

Since, in my view, Oakfield's refusal to sell is not a material issue, because there is no charge with respect to it, Oakfield's state of mind must be incompetent and immaterial.

Mr. STEFFEN. May I make an equally short statement, Your Honor?

Justice STEPHENS. Yes, the Court wishes to hear from the Government.

Mr. STEFFEN. As to the first point, that the state of mind must be material, we perfectly agree. I think it was brought out by Mr. Knuff yesterday that under 45 (e) the charge is that the defendants, by conspiracy, concertedly coerced and induced manufacturing distributors to refrain from sales except at bulletin prices. Now that is a charge that the defendants, by a conspiracy, coerced or induced Oakfield, in this case, because of course we will tie it up by showing that Oakfield was buying board from the Kelley Plasterboard people at that time, and that the Kelley Plasterboard Company was a member of the general conspiracy which we have charged here. So that there is no question but what it comes within the charge that the
3060 defendants conspired to coerce or force Oakfield, to whom they were selling board, to resell it at bulletin prices or, in this case, not to resell it to jobbers at a discount, because under the regulations they had to sell jobbers at the same price as they sold dealers.

That makes it clearly material what the state of mind of the Oakfield Gypsum Products Company was at the time they were dealing with Mr. Spease.

Now how are we going to establish that they were coerced, or that they were forced to sell at bulletin prices and to abide by bulletin terms? As Mr. Knuff said yesterday, there are various ways of proving coercion. One would be to have a statement made by the defendants,

"Yes, we will coerce Oakfield." Of course, we can't show you that statement, because it is very rarely that conspirators sit down and say what they are going to do. What we have to do is to establish, more or less by the actions of Oakfield, what they did and why they did it; and the state of mind of Oakfield is, we contend, a very material matter which can only be established by, as I said, direct statements or by how they acted in dealing with Spease or anyone else. And as circumstantial evidence of what they were doing we can introduce what they said, which is, of course, the issue here.

3061 We have the Nick and Weston case, which has been cited here, which was argued on the basis of the Hillmon case, which is the leading United States Supreme Court authority and has been followed in all Federal Courts since it was decided.

The Hillmon case, which is 145 U. S. 285, had to do with a suit on an insurance policy. Mrs. Hillmon claimed that her husband had died. The insurance company claimed that there was a conspiracy whereby somebody else had been produced as the corpse, and that in view of that fact the insurance was not payable.

They had found, I might say, out in the hills, a corpse. The question was whether it was Mr. Hillmon or someone else.

Now the evidence that was presented by the insurance company was a letter written by a man named Walters, saying, "I am going up into the hills." He wrote it to his sister, and they were not parties at all to the transaction. And the evidence was introduced to show that a man named Walters had an intention of going up into the hills, and that the corpse might have been Walters'. And that was introduced before a jury, upon which they could base an inference that the corpse may have been Walters' and not Hillmon's.

Following that there have been a large number of Federal cases saying that where it is material, as in this case, to show the state of mind or the intention or the purpose of a person, as for example, in this case, Mr. Han-

3062 sen of the Oakfield Gypsum Products Company, then it is relevant and competent to show what they said, what their reactions were, as circumstantial evidence, not for the truth of the matter asserted, but as circumstantial evidence of why they acted.

And I may say, although it may be difficult to prove, I may say that throughout this industry each of these dis-

tributors has been in fear of business death if he violated any one of these instructions; and the best way we know of showing that fact, the fact of fear pervading the industry that if they didn't follow the rules they would be put out of business, is to simply introduce the assertion made, if it was made, by the Oakfield people at the time they were discontinuing selling to Spease.

The act is ambiguous, if you wish, because here is a man who comes in and says he would like to buy goods. His credit is all right and everything is all right, and they don't sell. Why don't they sell? We say that the state of mind of Oakfield, and, of course, of the representatives of Oakfield, is very material in determining whether they did it voluntarily or whether they were coerced as charged in the complaint.

Justice STEPHENS. Now you are not arguing, apparently, the theory which we were discussing yesterday, the introduction of a statement to explain an ambiguous act which itself is in issue. You are now arguing a
3060 different theory, a different exception to the hearsay rule, the admissibility of evidence to show a state of mind regardless of the ambiguity of the act to which it relates.

Mr. STEFFEN. I don't know whether that is different or not, Your Honor. I think it is a variation.

Justice STEPHENS. Mr. Wigmore says it is very different.

Mr. STEFFEN. I see.

Justice STEPHENS. He might be mistaken, of course.

Mr. STEFFEN. We would cite, in support of what I just said, Wigmore on Evidence, Third Edition, Section 1790 and also Section 1714, which seems to bear out or seems to approve of this line of reasoning.

Justice STEPHENS. They are the orthodox comments with respect to mental or physical condition.

The Court has been giving some consideration to this question itself during the recess, and, with the aid of Mr. Cantor, my assistant, has looked up some authorities.

We thought perhaps the Covernment was relying upon Lawlor v. Loewe, 235 U. S. 522, and upon such cases as Magruder v. Montgomery, 33 Appeals D. C. 133.

In Lawlor v. Loewe, the Circuit Court of Appeals for the Second Circuit held that evidence of a customer's statement that he had ceased to trade on account of threats by a union was improperly admitted because it could not tend to prove that the threats were made. The

3064 Supreme Court reversed, citing from Wigmore the section which has to do with proof of motive. And there have been some cases following that rule.

Other cases that seem pertinent, which counsel may wish to be advised about, are: Greater New York Live Poultry Chamber of Commerce v. United States, 47 Fed. (2d) 156; Johnston v. Yost Lumber Company, 117 Fed. (2d) 53.

In the case in this jurisdiction, assertions of motive for an investment were made to show reliance on a false representation alleged.

The Court thinks it had better hear this testimony. Is there much of this class of testimony in the case?

Mr. KNUFF. No, there is not, Your Honor. I don't think there is any after this witness.

Justice STEPHENS. The Court thinks it had better hear it. It is pretty difficult to rule in vacuo. We had better hear the testimony, and then perhaps counsel would like to look at these other cases to which the Court has referred, and we will hear you briefly on them and then make a ruling.

You may call the witness and put on the testimony, subject to a motion to strike it out.

Before that happens, apparently Mr. Adams has something.

Mr. ADAMS. If the Court please, with respect to the point that I raised on Exhibit 324, Your Honor was going to inquire of the Government when they wanted to
3065 deal with that.

This phase of the case that you are going into now does not directly affect my client, and I had planned not to be here for the balance of this week. Of course, if it is convenient to the Court for me to be here, I can.

Justice STEPHENS. How much time do you wish to reply in the way of a written memorandum, if you wish to present one, in reply to Mr. Adams' motion to strike out Exhibit 324 on the ground that he has now discovered, in looking at it since its admission, that it was not verified and that the Federal rule requires verification of a pleading if it is to be introduced in a subsequent action as an admission?

Mr. STEFFEN. We would be very glad to have until Monday, and that will allow us not to interfere with any witnesses.

Mr. ADAMS. That will be fine as far as I am concerned.

Justice STEPHENS. Then the Government will present a

memorandum on Monday, please.

Thereupon, J. R. SPEASE, the witness on the stand at the time of adjournment, resumed his testimony as follows:

DIRECT EXAMINATION (resumed) by Mr. KNUFF.

3066 Q. Mr. Spease, at the conclusion of yesterday's testimony, I was directing your attention to a visit you had with a Mr. Emil Hansen, in 1933. Do you recall —now don't tell me the circumstances—do you recall just exactly where we left off yesterday?

A. I think so.

Q. Did you meet Mr. Hansen?

A. I did.

Q. And it was in 1933?

A. Yes.

Q. Where did you meet Mr. Hansen?

A. At the Statler Hotel in Buffalo.

Q. What was the purpose that you had in going to Buffalo to see Mr. Hansen?

A. To arrange to buy plaster and board as a jobber.

Q. You say you went up there to arrange to purchase plaster ——

A. (Interposing.) To arrange to purchase plaster and board as a jobber, to take care of our trade.

Q. Did Mr. Hensen, as a representative of the Oakfield Gypsum Company, have plaster and board to sell?

A. He had both to sell to dealers. He said he could sell us plaster, but he was not permitted to sell us board.

Q. Was any question raised as to your ability to pay?

A. No, sir.

3067 Q. Did you buy board from Mr. Hansen at a jobbers' discount?

A. We did not.

Q. Will you state, please, just what Mr. Hansen told you?

A. "We don't have enough in it to divide with you, and if we did sell you at a discount and the United States Gypsum find it out, they will refuse to sell us board."

Q. Was the United States Gypsum Company selling board to Oakfield at that time?

A. No, they bought it through the Kelley people, and some from one other firm, I think.

Q. Is that all of the conversation that you had with Mr. Hansen at that time?

A. All of any importance.

Q. Were you able to buy plaster from him?

A. Yes, sir.

Q. And did you buy plaster from him at a jobber's discount?

A. We did until they sold out.

Q. And when did they sell out?

A. I just forget the date, but it is ——

Q. (Interposing.) In 1938?

A. I think so.

Q. And they sold out to National, is that correct?

3068 A. That is correct.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 356, the same being a letter dated April 24, 1933, addressed to the Fairmont Wall Plaster Company and signed Emil Hansen. Did you receive that letter, Mr. Spease?

A. Yes.

Mr. KNUFF. I now offer in evidence Government's Exhibit 356.

Justice JACKSON. Were the others all offered, Mr. Knuff?

Mr. KNUFF. Yes, Your Honor.

Justice JACKSON. And received?

Mr. KNUFF. Yes, Your Honor. I offered 11 at once, from 345 to 355.

Justice STEPHENS. I suppose what you are offering it for is primarily the last paragraph?

Mr. KNUFF. That is right, Your Honor.

Justice STEPHENS. And that is one of the statements by Hansen which is in issue under this question of evidence?

Mr. KNUFF. Yes.

Justice STEPHENS. It may be received subject to a motion to strike.

(The document marked as Government's Exhibit No. 356 was received in evidence.)

3069 By Mr. KNUFF.

Q. Do you know Mr. Eldred?

A. I do.

Q. Is he connected with the Oakfield Gypsum Products Company?

A. He was the Treasurer.

Q. In 1933, did you see Mr. Eldred in Washington, D. C.?

A. I did.

Q. Can you tell us about when that was, in the summer or fall?

A. It was at the time there was a Code meeting here

in Washington. I have the date somewhere here.

Q. Was it in the summer, would you say, the late summer or early fall, or when? The date in and of itself is not particularly material.

A. I think it was in the early winter.

Justice STEPHENS. If it was a Code meeting, it must have been after June, Mr. Knuff.

MR. KNUFF. That is right.

Justice STEPHENS. The Court can testify on that subject if necessary. (Laughter.)

By Mr. KNUFF.

Q. Mr. Eldred was connected with the Oakfield Gypsum Products Company, was he not?

3070 A. He was Treasurer, yes.

Q. At that time did you attempt to purchase board and plaster from the Oakfield Gypsum Products Company at a jobber's discount?

A. I did.

Q. And did they have board and lath for sale?

A. They did, to dealers only.

Q. Was there any question raised as to your ability to pay for that board?

A. At no time.

Q. Were you able to buy any board, and plaster, at a jobber's discount?

A. No, sir.

Q. Were you able to buy plaster at a jobber's discount?

A. In one or two instances, one instance, I think, yes.

Q. Now I am referring to the time when you met Mr. Eldred in Washington in the early winter of 1933.

A. Oh, no.

Q. Did you buy plaster from him at that time?

A. Yes, sir.

Q. You did?

A. Up to the day they sold out.

Q. You say that Mr. Eldred did not raise any question as to the credit standing of Fairmont Wall Plaster

3071 Company, is that correct?

A. That is correct.

Q. Now where did you have this conversation with Mr. Eldred?

A. I met him at the Washington Hotel, and we walked back and forth up to where there was supposed to be a Code meeting, I think, either at the Washington Hotel or the old Powhatan, which has had its name changed.

Q. The Powhatan is on 18th and Pennsylvania, and is now known as the Roger Smith, is that correct?

A. That is correct.

Q. What did you talk about?

A. About our ability to continue to sell our dealers, and purchase both plaster and board as jobbers.

Q. Will you relate, as nearly as you can, the exact conversation, or if you can't give us the exact conversation give us the substance of that conversation, Mr. Spease?

Mr. BROMLEY. I assume this is still in connection with the offer of proof?

Mr. KNUFF. It is.

Justice STEPHENS. Yes, it is all being received subject to a motion to strike.

The WITNESS. Eldred said, "Spease, you know we can't sell you board. I am not going to be able to sell you
3072 plaster at a discount."

By Mr. KNUFF.

Q. Did he say why he couldn't sell you board?

A. He did.

Q. What did he say?

A. He said, "You well know that the U. S. Gypsum Company won't permit us to, and the only thing I know to do with you, we are whipped, we can't sell you board, and we will have to stop selling you plaster. And we are a small concern, and have a lot of plaster to sell, and want to sell it, and the only way I know that we can sell you plaster is to give you a contract for 4 or 5 years, and that will take care of you for a while."

Q. And were you able to buy board from Oakfield Gypsum Products Company?

A. No, sir, not as a jobber, but as a dealer.

Q. Did he give you that contract, or did you enter into a contract with him for the sale of plaster?

A. I agreed to it, and did enter into the contract, and it was executed a short time afterward.

Q. I show you what has been marked for Identification as Government's Exhibit 357, the same being a letter dated December 17, 1933, addressed to the Fairmont Wall Plaster Company, and signed by Oakfield Gypsum Products Corporation, T. P. Eldred. Can you identify that, Mr. Spease?

3073 A. Yes, I can.

Q. And is that the contract that you referred to

that Mr. Eldred said he would be willing to enter into with you?

A. It is.

Mr. KNUFF. If Your Honor please, we offer in evidence Government's Exhibit 357. It is offered simply to corroborate the testimony of Mr. Spease and is not offered for the purpose of a declaration of a co-conspirator.

Justice STEPHENS. It is offered to confirm the fact that he did enter into a contract at that time as a circumstance indicating that he, as he testifies, couldn't buy otherwise?

Mr. KNUFF. That is right, Your Honor.

Justice GARRETT. The copy which I have, I don't know whether it is complete or not. It is just one page. It is dated December 17, 1933?

Mr. KNUFF. That is correct, Your Honor. You should have three pages of it. If you don't, there has been a mistake on our part.

Justice JACKSON. Page 2 is dated 12/1/33.

Justice STEPHENS. And so is page 3.

Justice GARRETT. That is what confused me.

Mr. KNUFF. I see that. Page 2 is dated 12/1/33, and page 3 is dated the same way.

By Mr. KNUFF.

3074 Q. The contract that you have before you is the contract that was accepted by you, is that correct?

A. It is.

Q. And you will notice that the second page bears the date 12/1/33, and the third page bears the date 12/1/33, while the first page bears the date December 17, 1933. Do you notice that?

A. Yes, sir.

Q. Can you explain that discrepancy at all?

A. We had some discussion about dating it back some. I don't know whether that entered into it or not.

Q. But nevertheless, this is the contract?

A. Yes, sir.

Justice STEPHENS. It may be received in evidence ——

Mr. BROMLEY (interposing). Is this still a part of the offer of proof?

Mr. KNUFF. This portion of the offer right now isn't. But I am just taking these up in chronological order. The next two will be a part of the offer.

Mr. BROMLEY. If it is not a part of the offer of proof, I object to it on the ground that it is incompetent, irrelevant and immaterial.

Mr. KNUFF. May we take it up out of order, Your Honor?

Justice STEPHENS. Just a moment.

3075 Laying aside, Mr. Bromley, the question of Mr. Hansen's and Mr. Eldred's declarations, and their admissibility, there is a charge in the complaint that jobbers were eliminated, and this witness has testified that this company declined to sell him as a jobber, and that in consequence he had to take out a different form of contract, a dealer contract. Is this not admissible under that issue of the complaint, as a circumstance tending to confirm his statement that he did buy on different terms from jobber terms?

Mr. BROMLEY. Well, the purpose of my objection is, of course, that it can not be binding on any defendant.

Justice GARRETT. If I may interpose, I don't quite get the point of your offer, Mr. Knuff. You stated that it was offered by way of confirmation.

Mr. KNUFF. To corroborate the witness' statement.

Justice GARRETT. In corroboration of Mr. Spease's oral testimony?

Mr. KNUFF. That is correct.

Justice GARRETT. Well, if it is even that, why doesn't it come within the class of this offer of proof, subject to being stricken? The verbal testimony is offered in that way. Wouldn't any corroborative testimony come in the same class?

Mr. KNUFF. I think the other comes in as hearsay, Your Honor, if it comes in at all, as an exception to the

3076 hearsay rule. I don't believe that this would come within the purview of the offer, and it is not offered as a part of the offer. Probably it is a little bit out of place, but I was just taking it up at the time because it seemed to me to be the logical place to put it in evidence because of the testimony of the witness.

Justice STEPHENS. I don't quite see yet the force of your objection, Mr. Bromley, laying aside this question of the admissibility of declarations. This isn't offered on that theory, this isn't offered to prove the contents of the contract. It is merely offered to show that a contract was entered into at this time to buy as a dealer rather than as a jobber.

Now it is only introduced as a circumstantial item tending to confirm the witness' testimony that he did stop buying as a jobber and start buying as a dealer. The complaint charges, and the Court has ruled—no, I think there has

been no issue on that subject within our previous reserved rulings—the complaint charges the elimination of jobbers. Isn't this man's testimony that he did no longer buy, as a jobber, the materials which are involved in this case, admissible in evidence as a part of the chain of proof which the Government is entitled to make that he was eliminated as a jobber? What he did may not alone prove the whole story, but if it can also be proved that he was
3077 eliminated because USG, and the other defendants who are charged with it, conspired to and did require his elimination, why isn't the fact of his elimination provable?

Mr. BROMLEY. Well, the force of my objection was just exactly what Judge Garrett said, it seems to me, that it can only be material in connection with the offer of proof. Our point is that this is merely an act or a declaration, at most, by someone who is not a party to the conspiracy, just as though the Government picked up a man on the street and tried to get him to testify that he wouldn't sell to a jobber, and tried to prove that jobbers were eliminated because somebody not connected, not alleged to be connected with any conspiracy, wouldn't sell a jobber.

This Oakfield Company is not a defendant, not a co-conspirator, and we say that both its declarations and its acts are entirely immaterial.

Justice STEPHENS. Well, I think the declarations are within the offer which is being received subject to a motion to strike; but laying aside that aspect of the case, do you contend that the Government is not entitled to prove that a jobber who had been a jobber did no longer act as a jobber, and thereafter connect that by other proof that the reason he didn't was because USG and the other defendants forbade it? The conduct of the alleged jobber, what he did or did not do, would seem to be a part of the Government's
3078 case, if it can prove it.

Mr. BROMLEY. I didn't understand that they could attempt to prove that this jobber was eliminated due to what the defendants did either by declaration of someone not a conspirator or by any act of someone not a conspirator.

Justice STEPHENS. Now you get back to the question of the admissibility of these declarations. It may be that the declarations will be determined to be not admissible. But as I understand you, laying quite aside the question of declarations, you are contending, are you not, that under the charge in the complaint the fact that this man did no longer, after

a certain time, act as a jobber can not be proved in evidence as a part of the Government's case? How can you prove that a man is no longer a jobber except by calling him and asking him whether or not he continued to act as a jobber? Is the Government required to call a third party to testify that they couldn't any longer buy from this man as a jobber?

Mr. BROMLEY. Isn't it clear that the fact as to whether he is or is not a jobber is not material under any charge in the complaint? The charge is that the defendants agreed to eliminate jobbers. The proof is that the licensor issued the bulletins which leveled off the jobber price at the same figure as the dealer price. Well, if that eliminated jobbers, that is a question of law, there isn't any dis-
3079 pute about the proof, it is already in the case.

Justice STEPHENS. I may be dull, Mr. Bromley, but I just can't get your point. If the Government charges that jobbers were eliminated, and that the elimination took place as a result of the bulletins and the prices fixed therein, it would seem to me that it would be required, as a part of its case, to prove two things: first, that the bulletins were of such nature as would be likely to eliminate jobbers; and, secondly, that jobbers were eliminated. How can it prove that jobbers were eliminated without calling the jobbers to testify that they no longer did business as jobbers?

Mr. BROMLEY. I should think it could call a jobber to say that after the USG issued the price bulletin, the witness jobber had to pay the defendants the dealer price for patented board. I should think they could do that. But where does it get us anywhere to call a jobber who isn't buying from any of the defendants, and who says, "I tried to buy from somebody else not a party to the conspiracy, and I found that I had to pay the dealer price."

Justice STEPHENS. That, I suppose, is a question of connection. Of course, if the Government doesn't prove that his having to start buying at a dealer price rather than a jobber price was the consequence of some pressure brought to bear by the defendants upon the Oakfield Gypsum
3080 Products Company, then the evidence means nothing.

Mr. BROMLEY. My point is that they are trying to prove the elimination of jobbers by the act or the declaration of someone not a co-conspirator. Now this rule applies to acts as well as it does to declarations, this agency theory which makes binding upon the defendants something that somebody else does. That applies to acts as well as to decla-

rations. And you have ruled that the declaration of Hansen of Oakfield is not admissible because Oakfield is not a co-conspirator. That was ruled yesterday.

Now by the same token, what Oakfield did is on the same level, isn't it, with what Oakfield said? I don't believe they can prove the elimination of jobbers by proving acts of companies, such as Oakfield, not alleged to be co-conspirators.

Justice STEPHENS. Unless, Mr. Bromley, it is shown that what Oakfield did was compelled by USG and the other defendants. Certainly if the Government can show that what Oakfield did it was caused to do by the other defendants, that kind of an act would be admissible as a part of the chain of proof that jobbers were eliminated.

Of course, the mere act of a person not a co-conspirator, looked at alone, would have no binding force, any more than the declaration, because it can't bind the co-conspirator since it is not the act or the declaration of a co-conspirator. The Court is not confused on that subject.

3081 But as I understand it, the Government is not offering this aspect of this witness' testimony to prove anything except the actual stoppage of jobbing on this person's part, and this item of evidence which has brought up this argument is merely a circumstance and confirmation of that.

It doesn't seem to the Court to go to the question of the admissibility of an act of or declaration of co-conspirators. It seems to go to the question whether or not he continued to act as a jobber or a dealer. Of course, there has to be other proof on the subject. Unless it is connected up by showing that his alleged elimination as a jobber was the result of some pressure brought upon him, through Oakfield, by USG and the other defendants, then the evidence means nothing.

But how can the Court deny one item of the evidence until the Government has had a chance to prove it all? I may be mistaken, I will have to confer with my colleagues about it.

Mr. BROMLEY. Here is the point that it seems to me I do not make myself clear on, and that is that I don't believe the proof that you say may be forthcoming, that the defendants compelled Oakfield to do this, is material. There is no charge to that effect because they are not alleged to have been co-conspirators. The allegation is

3082 that the defendants agreed to coerce them to observe our prices.

Justice STEPHENS. Where is that in the complaint?

Mr. STEFFEN. Paragraph 45 (e).

Justice STEPHENS. There is another paragraph with respect to jobber elimination. Paragraph 45 (d) says:

"Concertedly refraining from distributing gypsum board, plaster, and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern area, and concertedly refusing to sell said products to jobbers at prices below said companies' prices to dealers, for the purpose, and with the effect, of eliminating substantially all jobbers from the distribution of said gypsum products in the Eastern area;"

Now there is another paragraph on that subject, is there not, Mr. Knuff?

Mr. KNUFF. I am looking for it, Your Honor.

Justice STEPHENS. Paragraphs 94 and 95. Paragraph 94 reads:

"For the purpose of limiting jobber distribution by the licensees to those jobbers who sold only to dealers and who maintained bulletin prices in sales to dealers, the defendant companies agreed in their license agreements to sell to jobbers only with the express consent of U. S. G. Pursuant to said agreement, U. S. G., during the period
3083 from 1929 to 1932, permitted its licensees, including the defendant companies who were then licensees, to sell only to jobbers who sold to dealers and who maintained bulletin prices in said sales."

Paragraph 95 refers to meetings.

Apparently Mr. Bromley's point, Mr. Knuff, which I haven't until this moment perhaps understood, is that your charge is that the defendants agreed to sell to jobbers only with the express consent of USG, and therefore your proof must be limited to proving, that is, your evidence must be limited to proving that some defendant, charged as a defendant in this case, declined to sell to Mr. Spease's company as a jobber, but only as a dealer; whereas, what you are now proving is that some non-co-conspirator, some third person, the Oakfield Gypsum Products Company, refused to sell.

Mr. KNUFF. That is correct.

Justice STEPHENS. What do you say to that?

Mr. KNUFF. We are trying to show here ——

Justice STEPHENS (interposing). Of course, we have

definitely ruled about Oakfield—my colleagues, who construe the complaint more broadly than I do, as indicated in yesterday's ruling, nevertheless think that the complaint is not broad enough to include persons as co-conspirators not named as defendants. Now what do you say to Mr. Bromley's point?

3084 Mr. KNUFF. I say that the charge in the complaint is that jobbers were eliminated from the distributive system, and here we have a case where the man was unable to buy board at a jobber's discount; and in order to corroborate his testimony that he was unable to buy board at a jobber's discount, whether from the defendants themselves, we introduce in evidence the contract that he entered into with the Oakfield Gypsum Products Company as corroborative of his previous testimony, and also to prove that jobbers were eliminated from the set-up.

Justice STEPHENS. Well, of course, this contract which is now under discussion can't be raised to a higher level of admissibility than the act which it is introduced to confirm, and so the real question is whether or not—and this is quite apart from the question of declarations—you can show, under the charge in your complaint, that someone other than the defendants refused to sell Mr. Spease as a jobber. That, apparently, is Mr. Bromley's point, which I hadn't seen until your last statement, Mr. Bromley, until I re-read this Paragraph 94. That is a different question.

I understood you were contending, Mr. Bromley, that the Government was forbidden to show that jobbers were eliminated. I still can't see how that can be denied if

3085 it is shown that the defendants eliminated them.

And I thought what the Government was trying to show here was that the method of elimination was a chain, so to speak; that the defendants carried out their agreement alleged in paragraph 94 by refusing to permit those who dealt with them to sell to jobbers. But perhaps that is outside the charge.

What is the rest of your case on this subject, Mr. Knuff? We mustn't rule in the dark. How do you intend to connect this up with the defendants? Are you going to show that the defendants, or some one of the defendants, USG or someone else, declined to allow the Oakfield Company, which was not a licensee, to sell to Mr. Spease's company as a jobber?

Mr. KNUFF. The next two exhibits will show that, the one which I have before me, which will be marked 358, and

the next one, dated April 27, 1935, which will be marked Exhibit 359. There is definitely the statement in there as to what the USG did. We intend to call Mr. Eldred, who received the word from USG, and put Mr. Eldred on the witness stand, and have him testify.

Mr. BROMLEY. May I say, Your Honor, does Mr. Knuff mean by that that he intends to show that USG ever withdrew or cancelled a consent to sell to Oakfield which it had issued to any licensee at any time? I don't believe he means that, because that isn't the fact.

Mr. KNUFF. I didn't say that we will show that they did cancel. What I mean to say, and what I do say
3086 now, is that the threat to cancel was sufficient to induce Oakfield to obey the commands of USG.

Justice STEPHENS. Threats by whom to cancel what?

Mr. KNUFF. The threat by USG to withdraw their consent from Kelley to sell to Oakfield.

Here is the situation, Your Honor, and it is in evidence. Under the license agreements, before a manufacturer can sell to a manufacturing distributor he has to have the consent of USG in writing. We will show—probably tomorrow or the next day ——

Justice STEPHENS (interposing). We are mixing this all up by talking about three different classes of persons at one time, and that is one reason I think the Court is so puzzled. We were talking yesterday about resale price fixing of manufacturing distributors. This man isn't a manufacturing distributor, he is a jobber.

Mr. KNUFF. If you will just bear with me, I don't think there will be any confusion.

Justice STEPHENS. Very well.

Mr. KNUFF. Before a manufacturer like Certain-teed or Ebsary or Kelley or National or Texas could sell to a manufacturing distributor—and Oakfield was a manufacturing distributor—they had to have the consent of USG. That is in the license agreements executed between USG and the various licensee. It is on page 74 of the
3087 complaint, paragraph 9 ——

Justice STEPHENS (interposing). Let us look at that before you go on. Let's have each step in your reasoning before us as we go along.

(Complaint examined by the Court.)

Justice STEPHENS. All right, proceed.

Mr. KNUFF. Now when Kelley, or when any of the other companies, wanted to have USG's consent to sell to a manufacturing distributor, they would write to USG and

ask USG for their permission to sell. USG would come back, "This will acknowledge receipt of your letter of such-and-such a date. You have our consent to sell to the Connecticut Adamant Company at the following discount. It is understood that this consent may be withdrawn by us at any time."

Now there was a threat or there was a potential lever that USG could exercise against any manufacturing distributor. USG could say to this manufacturing distributor, "Don't you sell to Spease. If you do sell to Spease, we will withdraw the consent that we have given Kelley to sell to you." And that is exactly what we are going to show.

Justice STEPHENS. That is, you intend to prove that USG impliedly made a threat directly to the manufacturing distributor himself, not through the licensee defendant, that if it sold to jobbers it would no longer get products
3088 as a manufacturing distributor?

Mr. KNUFF. We are going to endeavor to show that USG contacted Oakfield Gypsum Company and told Oakfield Gypsum Company that if they went ahead and sold Spease, that USG would withdraw their consent from Kelley to sell to Oakfield.

Justice STEPHENS. The question Mr. Bromley still raises, I assume, is that you haven't charged that. You have charged in paragraph 94 that defendant companies agreed in their license agreements to sell to jobbers only with the express consent of USG.

Mr. KNUFF. We have specifically charged coercion, Your Honor.

Justice STEPHENS. Well, I suppose we get again into the question of how much the subsequent paragraphs of the complaint limit paragraphs 44, 45, and 46.

Mr. KNUFF. In paragraph 45 (e) there is a definite charge of coercion. I don't think there can be any mistake about that.

Justice STEPHENS. Do you wish to be heard further, Mr. Bromley, on this subject?

Mr. BROMLEY. I think I ought to say that I believe there to be a distinction between what I have been arguing about up to now, and what he says he is going to show. If he can show that USG withdrew from Kelley the consent which it had issued to Kelley to sell to Oakfield, or went to Oakfield and said, "Now, you do what I
3089 say or I will withdraw the consent", then I should

think that would be material, that is something we did.

Justice JACKSON. That is what he proposes to prove.

Mr. BROMLEY. That is what he says he proposes to prove.

Mr. KNUFF. And that is what I think I am going to prove, and I make that statement in good part.

Mr. BROMLEY. I don't think that aids him any in this class of proof which he is now offering, having to do solely with Oakfield and what Oakfield did or said.

Justice STEPHENS. Mr. Knuff's reply to that, I suppose, will be that what Oakfield did is some evidence to be looked at in connection with other evidence tending to prove what Mr. Knuff claims the Government can prove, that it all was inspired or coerced by U. S. G.

Mr. BROMLEY. I think that the answer to that is that it can only be binding on us if Oakfield was alleged to be a co-conspirator, which it is not.

Justice JACKSON. You are offering this contract merely to corroborate the testimony of Mr. Spease, aren't you?

Mr. KNUFF. That is right.

Justice JACKSON. To illustrate it?

Mr. KNUFF. That is right.

I thought I had made it clear that we weren't offering it as a declaration.

3090 Justice STEPHENS. The exhibit can't rise any higher than that which it is offered to confirm.

Justice GARRETT. Mr. Knuff, may I ask you this: If it should be held that the verbal testimony which Mr. Spease has given should be stricken, this would go with it, wouldn't it?

Mr. KNUFF. I think so.

Justice STEPHENS. Well, with great deference to my colleagues, both of whom have suggested that solution, it doesn't solve the problem for me, because as I understand it you are offering two things by this witness: You are offering what my colleagues have referred to as verbal testimony, by which I assume they mean the declarations of Mr. Hansen and Mr. Eldred as to why they did or did not do certain things. Of course, if this is only to confirm that, and that goes out, then of course this exhibit we are now discussing goes out. But also, you are offering it to prove not merely what Mr. Eldred and what Mr. Hansen said, but what Oakfield did or did not do, and as a result what Spease and his company did or did not do as jobbers. Now that is also objected to by Mr. Bromley on the ground that it is the act of a person not charged

as a co-conspirator, and therefore can not bind a co-conspirator.

Mr. KNUFF. But it seems to me that it all comes back to the fact that under paragraph 45 we have stated that jobbers were eliminated, and this would certainly
3091 tend to prove the elimination of the jobbers also.

Justice STEPHENS. Well, I think we will have to hear it all, subject to a motion to strike all of this witness' testimony, so we can have an opportunity to relate it together in our minds and have a conference on it at recess, and also hear a discussion of these cases to which the Court has referred this morning. So it will all be received, and this exhibit will be received, subject to a motion to strike.

(The document marked as Government's Exhibit No. 357 was received in evidence.)

By Mr. KNUFF.

Q. Mr. Spease, in 1935 were you submitting quotations or bids to the Government for plasterboard on Government work?

A. Yes.

Q. And from whom did you intend to secure your supply of plasterboard?

A. From the Oakfield Gypsum Company.

Q. And had you made arrangements with the Oakfield Gypsum Company to secure that board?

A. Yes, sir.

Q. I show you, sir, what has been marked for
3092 Identification as Government's Exhibit 358, the same being a telegram dated 4/27/35, signed T. P. Eldred, and also Government's Exhibit 359 for Identification, the same being a letter dated April 27, 1935, addressed to the Fairmont Wall Plaster Company and signed T. P. Eldred.

Did you receive the telegram?

A. Yes, sir, we did.

Q. Did you receive the letter, that is Government's Exhibit 359?

A. Yes, we certainly did.

Q. You say, sir, that you had arranged to purchase board from Oakfield in order to carry out, if you were successful, your bid to the Government; is that correct?

A. Yes.

Q. Was there any question raised as to your ability to pay for that board?

A. None whatever.
Q. Had you always discounted your bills with Oakfield?
A. Yes, sir.
Q. Did Oakfield have board to sell?
A. Yes, sir.
Q. Were you able to buy the board from Oakfield at any price?
A. Yes, sir, as a dealer.
Q. In 1935, Mr. Spease—will you look at Exhibit 359—were you able to secure that board in April, 1935,
3093 in order to complete your bid?
A. Yes.
Q. Were you able to get that board?
A. Yes.
Q. Did you get the board?
A. No, they sent us a telegram that we were withdrawn, and we couldn't do it.
Q. That is what I asked you, were you able to buy any board from Oakfield?
A. No, sir, the USG ruled we could not.
Mr. BROMLEY. I move that that be stricken out.
Mr. KNUFF. I think that should go out.
Justice STEPHENS. It may go out.
Mr. KNUFF. If Your Honor pleases, we now offer in evidence Government's Exhibits 358 and 359.
Justice STEPHENS. Let me read them.
Mr. KNUFF. I wonder if we could have a few moments recess?
Justice STEPHENS. Just a moment, let us read these first before we recess.
(Exhibits 358 and 359 examined by the Court.)
Justice STEPHENS. The Court will be in recess for five minutes.
(Thereupon, a short recess was taken.)
3094 Justice STEPHENS. Proceed.
Mr. KNUFF. I believe I had offered these exhibits in evidence.
Mr. BROMLEY. Are these offered, Mr. Knuff, in connection with the offer of proof, or aren't they?
Mr. KNUFF. They are.
Justice STEPHENS. These are declarations of Eldred, in other words, for Oakfield?
Mr. KNUFF. That is right.
Mr. BROMLEY. I think I should object to Exhibit 358 for identification on the special ground that it is incompetent because there is no identification of it whatsoever.

It doesn't make any sense to me. It is addressed to Utica, New York. It all seems to be in one handwriting, whose handwriting, we do not know. Where it came from has not been testified to; or what it is, has not been testified to really.

Justice STEPHENS. Judge Jackson would like to have you read the statement of the witness in connection with Exhibit 358 and see what he did say about identifying it.

(Thereupon, the reporter read the record as requested.)

Justice STEPHENS. It seems to us, that it is not identified, that is, Exhibit 358 for identification. The witness does not testify whose handwriting it is in. He doesn't say that he knows the handwriting of Eldred. He simply says that he received this message. Can you identify it better by this witness?

3095 By Mr. KNUFF.

Q. In whose handwriting is this, Mr. Spease?

A. Mr. Eldred's headquarters were at Utica, New York ——

Justice STEPHENS (interposing). Answer the question. Do you know whose handwriting this is in?

The WITNESS. The one I have is a copy.

Justice STEPHENS. Look at the original.

The WITNESS. Yes, that is T. P. Eldred's writing, I recognize it.

Mr. OLIVER. If your Honor please, he is looking at the letter.

Justice STEPHENS. I am referring to the telegram, not the letter.

The WITNESS. That is a telegram received by our office and O. K.'d by G. C.—Grace Cooper.

Justice STEPHENS. Answer the question—do you recognize the handwriting in that telegram?

The WITNESS. Yes, sir.

Justice STEPHENS. Whose is it?

The WITNESS. It is Grace Cooper's, a girl in our office that took it.

Justice JACKSON. When you say "took it", you mean received it over the telephone and wrote it down?

The WITNESS. Yes, sir. Western Union phones all our telegrams.

3096 Justice STEPHENS. Do you object to the identification of the letter, Exhibit 359, Mr. Bromley?

Mr. BROMLEY. No, your Honor.

Justice GARRETT. That letter says that a copy of the

telegram was enclosed with it. But what you have offered the witness there is something that was telephoned and received at their office.

Mr. KNUFF. That is right.

Justice GARRETT. You don't have the copy that was enclosed with the letter?

Mr. KNUFF. We do not, your Honor. He first sent a telegram, which is Government's Exhibit 358, as we understand it, taken by Miss Grace Cooper; and later on, on the same day as the letter will indicate, Mr. Eldred sent a copy of the telegram with this letter. We do not have it, we do not have a copy of the telegram, and I don't know as we ever had it. I am referring to the telegram that was enclosed with this letter.

Justice STEPHENS. Well, Judge Garrett and myself feel that there is no sufficient identification. Judge Jackson disagrees. Therefore, Exhibit 358 is excluded.

By Mr. KNUFF.

Q. Mr. Spease, was there a telegram enclosed in the letter of April 27, 1935, which is Government's Exhibit 359? Please look at that letter.

3097 A. According to the letter, there was a telegram enclosed.

Q. Will you look at Exhibit 358? Are you able to state that the telegram, which is dated 4-27-35, is a copy of the telegram that was enclosed with the letter of April 27?

Mr. BROMLEY. I object to that ——

The WITNESS (interposing). Yes, sir.

Mr. BROMLEY (continuing).—as incompetent, because it calls for a conclusion, and move to strike the answer.

Mr. KNUFF. I am asking if he is able to state, I don't believe that that is any conclusion at all. I am asking him whether he is able to state if this telegram, Exhibit 358, is the same telegram that he received in the letter of April 27, 1935.

Mr. BROMLEY. That is objected to as incompetent.

Justice STEPHENS. Do you remember the words of the telegram you received in that letter—do you now remember them? Answer that "yes" or "no".

The WITNESS. No, no, sir.

Justice STEPHENS. How can he state whether this is a copy or not, then?

Mr. KNUFF. Well, I think he may not know whether the exact periods are there, but here is a telegram received

in his office by Grace Cooper. He afterwards received a letter in which a copy of the telegram was enclosed. Now
I think that it is drawing the line pretty fine for
3098 an objection to be made that this telegram here cannot be identified by the witness as containing almost the substance of what was in the telegram, from Mr. Eldred.

If necessary, we can bring Grace Cooper up here. He recognizes her signature, and we can bring her up here. It seems to me just to be placing a premium on legal procedure. We can bring her up here and she will identify this telegram.

Justice STEPHENS. I don't see how that would improve the situation. I should think the one you need is Mr. Eldred.

Mr. KNUFF. If she gets the telegram from the telegraph office?

Mr. BROMLEY. I thought you said you were going to have Mr. Eldred here?

Mr. KNUFF. So what?

Justice GARRETT. Mr. Knuff, let me ask you—don't you have everything in the letter that is in the telegram?

Mr. KNUFF. I think we do.

Justice GARRETT. It seems to me we are taking up a lot of time over a very trivial thing here. You have everything in the letter that is in the telegram, it seems to me, and Mr. Bromley is not objecting to the letter on the ground of identification.

Justice STEPHENS. Well, the telegram is excluded as not identified. The letter is received, subject to the motion to
strike the testimony when we complete the argu-
3099 ment on the subject.

(The letter marked as Government's Exhibit No. 359, was received in evidence.)

By Mr. KNUFF.

Q. Mr. Spease, were you able to purchase board from the Fairmont Wall Plaster Company at any price to complete your bid with the Government, in 1935?

A. You say for the Fairmont Wall Plaster Company?

Q. Were you able to purchase board from the Oakfield Gypsum Products Company at any price to complete the contract or the bid, rather, that you had submitted to the Government?

Mr. BROMLEY. I object to that as incompetent ——

The WITNESS (interposing). No, sir.

Mr. BROMLEY (continuing).—because it calls for a conclusion; and I move to strike the answer. The question is—was he able to?

Mr. KNUFF. Did you?

Mr. BROMLEY. Do you withdraw the previous question?

Mr. KNUFF. No, I think that "were you able to" or "did you" connote the same thing.

Justice STEPHENS. If that is what you mean, he may answer the question.

The WITNESS. No, sir.

3100 By Mr. KNUFF.

Q. In 1938, sir, did you attempt to purchase gypsum board and plaster from National Gypsum Company?

A. Yes, sir.

Q. I show you what have been marked for identification as Government's Exhibits 360 and 361, Government's Exhibit 360 being a letter, dated July 23, 1938, addressed to Mr. M. H. Baker, president, and signed Fairmont Wall Plaster Company, President; and Exhibit 361 for identification being a letter dated July 26, 1938, on the letterhead of the National Gypsum Company, addressed to J. R. Spease, and signed M. H. Baker, President.

Did you write the letter dated July 23, 1938, to Mr. Baker?

A. Yes.

Q. And the exhibit that you have before you is your carbon copy of that letter, is that correct?

A. Yes, sir.

Q. Did you receive, in reply to that letter, Mr. Baker's letter of July 26, 1938?

A. Yes, sir.

Q. Were you able to purchase board and plaster from the National Gypsum Company?

A. No, sir.

Mr. BROMLEY. I object to that as incompetent and move to strike the answer.

3101 By Mr. KNUFF.

Q. Did you purchase any board or plaster from the National Gypsum Company?

A. No, sir.

Mr. BROMLEY. May the previous answer be stricken?

Justice STEPHENS. It may go out.

Mr. KNUFF. We offer in evidence Government's Exhibits

Nos. 360 and 361.

Mr. BROMLEY. We make only the usual objection. I assume that this is not under the offer of proof, and that the offer of proof was concluded prior to the identification of Exhibit 360.

Mr. KNUFF. That is correct.

Justice STEPHENS. They are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The letters marked as Government's Exhibits Nos. 360 and 361 were received in evidence.)

By Mr. KNUFF.

Q. Mr. Spease, will you tell the Court why you wanted to purchase gypsum board?

A. Yes, sir, to try to make a little money.

Q. What do you mean by that?

A. To sell the dealers that we had been selling for 29 years, other materials.

3102 Q. Would gypsum board aid you in any way in any other sales?

A. Very materially.

Q. How?

A. It would help sometimes to get the order for everything the man wanted by being able to sell him a few thousand feet of board.

Q. Well now, will you just explain that to the Court, please?

A. In either a straight or a mixed carload, sometimes there would be eight or ten different commodities used on one job, or used by one dealer, and if we could furnish them all, our men saw them often and we could perform a service that they were glad to have and they would give us the business in preference to giving it to different manufacturers.

Q. Was your business unique, that is, were you the only jobber that was jobbing gypsum board in 1930, or did you know of any other jobbers?

A. I think there were dozens of them.

Q. Can you name some of them?

A. Yes, I can. I have got a whole list of them. Teachout Company at Cleveland, Ohio ——

Mr. BROMLEY (interposing). I object to this as incompetent, because hearsay.

3103 Mr. KNUFF. That is not hearsay. Here is a man that is engaged in the gypsum business. He knows

what other people are doing in that business, he knows who are the other jobbers in that business. He is testifying from his own knowledge.

Mr. BROMLEY. He only knows because he has heard, I assume.

Justice STEPHENS. Well, it hasn't been developed yet, Mr. Knuff, whether he is testifying from his own knowledge or not. If he has done business with these people, and knows of his own knowledge from having worked with them, and having done business with them, or having seen their plants or warehouses, or something of that sort, that they are in the jobbing business, he can say so.

If he is simply giving a description from some list furnished by someone, that is obviously incompetent. Bring out what he is testifying from.

By Mr. KNUFF.

Q. Mr. Spease, as an official of Fairmont Wall Plaster Company, did you travel on the road for Fairmont Wall Plaster Company?

A. About twenty-five years, around all over the country.

Q. And through what sections of the United States did you travel?

A. Primarily about six or seven States, but I was everywhere, and we had conventions, I knew all of these people, and many of the older men are dead and gone from these building supply companies that I knew years ago,
3104 but their businesses are still there.

Q. What States did you travel in?

A. West Virginia, Virginia, the District of Columbia, Maryland, Pennsylvania, some parts of Ohio, and North Carolina, and whenever any general contractors had jobs in our State, which they did, or in our territory, I usually went to see them to New York, Chicago, or Cleveland, and I met these different men and met their sons. At one time I knew nearly all the jobbers in the country.

Q. And you say you traveled for a period of twenty-five years?

A. Yes, sir.

Q. Are you acquainted with other jobbers that jobbed plasterboard and plaster in the United States?

A. Yes, sir, many of them.

Q. Did you know them personally?

A. Some of them I did, and some I did not.

Q. And can you name some of those that you knew?

A. Yes, sir.

Q. Please do it.

Mr. BROMLEY. The same objection. He is again going to his list. It is obviously based on what he heard.

Justice STEPHENS. Are you using the list to refresh your recollection? Can't you tell us from your own memory?

3105 The WITNESS. Yes, sir.

Justice STEPHENS. Go ahead and do it, then.

The WITNESS. The Perry Manufacturing Company, down at Perryopolis, Pennsylvania; the old Crown Wall Plaster Company at Braddock.

By Mr. KNUFF.

Q. Pennsylvania?

A. Pennsylvania. The Cleveland Builders Supply, at Cleveland. The old Ruggles Company at Columbus, Ohio; Fisher Brothers, at Memphis. I am trying to think of one at New Orleans, I know him well. I would pretty near have to refer to my list for some of their addresses and names which have slipped my mind.

Q. Do you mean that you would have to refer to the list that you have there?

A. Well, I have a list of all of them at home.

Q. I mean, is that the list you want to refer to that you have there?

A. Yes, I have many on here.

Q. Who made that list?

A. I made it up myself, from time to time.

Q. When did you make that list that you have in front of you?

A. I sat down and wrote that this morning.

Q. Do you know any person in Cleveland besides ——

3106 A. (Interposing.) The Teachout Company.

Q. Now in New Orleans, did you know any jobbers?

Mr. BROMLEY. I object to his referring to his list. It seems to me this is still all incompetent because based on hearsay.

Justice STEPHENS. If the witness is using the list to refresh his recollection, and if he prepared it himself, and it was not given him by someone else, as I supposed was the nature of your original objection, I think that is not improper. The objection is overruled.

By Mr. KNUFF.

Q. Can you tell us somebody in New Orleans that was a jobber of plaster and board?

A. The Crescent Wall Plaster Company.

Q. Any others?

A. Yes, I have got a friend down there, a good friend, the head of a company, but I cannot recall his name. He jobbed the United States Gypsum plaster.

Q. Who is that?

A. I can't tell you.

Q. Where is he located?

A. In New Orleans.

Q. Did you ever hear of the Abbey Company?

A. Yes, but this is another one.

Q. Well, is the Abbey Company in New Orleans?

3107 A. That used to be the W. C. Abbey Company of Newark. Now that is in East Orange, I think.

Q. Did you know them?

A. Not Abbey, no, sir.

Q. You didn't know Abbey?

A. No, sir.

Q. Do you know whether or not he was a jobber?

A. He was a jobber. I went to conventions, builders' supply conventions, all over this country, for thirty years, and knew everybody in the business, and had a handshaking with all of them. Many of them are dead and gone.

Q. Do the people you have named still job plasterboard?

Mr. BROMLEY. I object to that as incompetent, because that must be based on hearsay.

Mr. KNUFF. I think he knows. Here is a man that has been in the business twenty-five years.

The WITNESS. Forty-four.

Justice STEPHENS. Well, if the witness knows of his own knowledge whether they are still jobbing plasterboard, he may say so, but it must be developed that he does know that of his own knowledge.

By Mr. KNUFF.

Q. Do you know of your own knowledge whether or not these people that you have named now job plasterboard?

A. None of them do, no.

3108 Q. Do you know that of your own knowledge?

A. Yes, sir.

Mr. KNUFF. You may cross-examine the witness.

Justice STEPHENS. These other items in this set of exhibits which you have handed to us ——

Mr. KNUFF (interposing). Are not going to be offered.

Mr. BROMLEY. I now move to strike out all of Mr. Spease's testimony with respect to the meeting with Hansen in 1933, and the meeting with Eldred.

Justice STEPHENS. You say the "meeting"—I didn't quite hear you.

Mr. BROMLEY. I said "meeting", I meant with reference to the meetings and conversations with Hansen and Eldred of Oakfield, which the witness said took place in 1933. That includes all of the testimony which he gave this morning, down to the point where Exhibit 360 was identified.

I make this motion on the ground that it is incompetent, immaterial and irrelevant; and of course I include in that motion, a motion to strike the exhibits offered during the course of that testimony.

Justice STEPHENS. Have you their numbers?

Mr. BROMLEY. They were Exhibits 356, 357 and 359.

Justice GARRETT. There is none of the testimony given yesterday that is included in your motion, is there?

Mr. BROMLEY. No, your Honor.

3109 Justice STEPHENS. Well, this motion presents the question we still have to determine, depending upon these authorities. The Court does not wish to rule upon it until it considers, and until counsel have had an opportunity to consider, these additional authorities.

We are, I think, agreed—I may say for the benefit of counsel—I think we are agreed here that neither the declarations nor the acts of a person who is not a co-conspirator and not charged as a co-conspirator, can be admitted as binding upon a person who is charged as a defendant conspirator.

But that isn't the problem here. As we understand it, the Government is now offering to prove that pressure was brought, and is offering this testimony as a part of a chain of evidence to prove that the United States Gypsum Company brought pressure through its licensees by threatening revocation of licenses if they did not control the actions of Oakfield as a manufacturing distributor, and its actions in respect of Fairmont as a jobber.

We still have the question, under that theory, whether or not the declarations of Eldred and Hansen may be admitted in evidence—because they are the statements of some person off the witness stand, not subject to cross-

examination, and therefore they are hearsay and therefore they must come in, if at all, under an exception to the hearsay rule.

We are back, therefore, to the question whether or not they are admissible as characterizing an ambiguous act which is legally in issue, an act which is legally ambiguous, or whether they are admissible under the authorities which the Court called counsel's attention to this morning, as showing state of mind.

3110

Do you wish to cross-examine this witness before a ruling, or do you wish to take the recess now so that you can have an opportunity to examine those authorities, gentlemen?

Mr. BROMLEY. I am perfectly willing to start the cross-examination and defer the argument.

Justice STEPHENS. If you will do that, then, we will suspend a ruling upon that motion.

You may cross-examine and then after we resume this afternoon we will hear the discussion of those authorities and make the ruling.

CROSS-EXAMINATION by Mr. BROMLEY.

Q. When you were buying plasterboard at a discount from American, your discount was $2 per thousand square feet on wallboard, wasn't it?

A. It has been a while ago, I don't recall.

Q. How much was it?

A. I would have to refer to our books.

Q. You don't remember now?

A. Not to be accurate, no, sir.

3111

Q. During that time your discount on lath was $1.25 per thousand, wasn't it?

A. I am not sure.

Q. And during that time your discount on plaster was 10 per cent, wasn't it?

Mr. STEFFEN. I am not clear as to the time, your Honor, that these questions are directed to.

Mr. BROMLEY. During all of the times that he was getting the discount from American.

The WITNESS. That goes back twenty-nine years, it changed with the market.

By Mr. BROMLEY.

Q. Well, your discount on plaster that you bought from American was about 10 per cent, wasn't it?

A. I don't dare hazard a guess now.

Q. And you wouldn't dare hazard a guess as to whether or not your discount on wallboard was or was not $2, would you?

A. It sounds like it was at one time, but I am not sure.

Q. You have got the figures right there in front of you, haven't you?

A. I will have to look.

Q. You really don't know, do you?

A. Not to be sure, no, sir.

Q. Didn't you write them down on one of the exhibits there in front of you which counsel did not offer in evidence?

3112 A. I don't think that I did.

Q. Well, look at it. You know what I am talking about, don't you?

A. Yes.

Q. Look at page 2 of the schedule of shipments.

A. If I wrote it down, I don't have it, I can't find it.

Q. Look at the schedule of shipments. You have got it in your left hand. Do you see it?

A. Oh, yes. It says $2 on one board, where we figured it up, $2 on one and $1.25 on another.

Q. All right, let's start over again.

During the time you were doing business with American you were getting a $2 discount on wallboard, weren't you?

A. That looks like it.

Q. And you were getting $1.25 on lath, as a discount, weren't you?

A. According to that figure.

Q. And you were getting 10 per cent on plaster, weren't you?

A. Well, I don't have that.

Q. Don't you remember ——

Mr. KNUFF (interposing). If your Honor pleases, the witness didn't testify that he got any discount at all on lath and plasterboard, but that he had some arrangement that he would be taken care of at a future time. Now Mr. Bromley is asking him about a $2 discount, and

3113 the witness didn't testify that he ever had a $2 discount.

Justice STEPHENS. Well, if the witness is informed as to his own business, he can so state. This is cross-examination. You understand, I assume, that you are only to answer questions truthfully, and according to your recol-

lection. If you didn't get any discounts, you are not required to say that you did.

The WITNESS. This is only a matter of figuring, we never got any discount on any of this that he is asking me about. It was written in there because we claimed it, but we never got it. That is not my writing.

By Mr. BROMLEY.

Q. It is not your writing?

A. No, sir.

Q. Didn't you tell us yesterday that you did business with American starting back in 1902?

A. Yes, sir.

Q. Isn't it a fact that for over twenty-five years you bought plaster from American at a discount of about ten per cent?

A. At a discount that permitted us to sell to the dealers, whatever it was. It changed with the market.

Q. Wasn't it about ten per cent?

A. I don't have that here.

3114 Q. I don't care whether you have got it here or not. Don't you know enough about your own business to remember about what discount you were getting from American?

A. It changed.

Q. Well, wasn't it around ten per cent?

A. Well, it was something that was satisfactory to us.

Q. Won't you tell us in figures, as to whether or not it was around ten per cent?

A. I don't believe I would hazard a guess, it goes back too far.

Justice STEPHENS. Mr. Spease, you are under an obligation to be just as frank in your answers to counsel on one side as to counsel for the other side. Of course if you cannot remember that, you may say so, but it seems extraordinary to the Court that you should not remember.

The WITNESS. Your Honor, I am trying to be as truthful as I can. Maybe you don't quite understand. Over a term of years the market was up and down, and we didn't get quite as much at times.

Justice STEPHENS. Counsel is not trying to bind you to the penny, he wants to know approximately what the discount is, if you remember. If you don't, you must feel thoroughly free to say so.

The WITNESS. I am truthful when I say that. We had

a profit on it. It was ten per cent sometimes and sometimes it was fifteen.

3115 By Mr. BROMLEY.

Q. It was never more than fifteen, was it?

A. No, and many times it was less than ten, based on freight rates.

Q. Isn't it a fact, Mr. Spease, that most of the time the discount that you got on plaster from American was ten per cent or less?

A. I would think so.

Q. Now you got that discount on plaster from American from 1902 until 1933, didn't you?

A. I think so.

Q. And you got your discount on board of about $2, on wallboard, and $1.25 on lath, from the time American commenced to make board until 1930, didn't you?

A. Yes, it seems we did.

Q. You told us yesterday, at page 3288 of the record, in answer to the question beginning at line 3, as follows:

"Q. Since when haven't you been a jobber of plaster?

"A. Since 1933, March 31st", and so forth.

Do you remember giving that answer?

A. Yes, sir, that is what I said.

Q. Now that answer was entirely and completely false, wasn't it?

A. No.

3116 Q. It wasn't? Didn't you go on jobbing plaster for years after March 31, 1933?

A. Yes; that must be a mistake if I made that statement.

Q. Was it a mistake, Mr. Spease?

A. It is bound to be, I wouldn't tell you anything else.

Q. Do you mean to tell me that you didn't realize, when you told this Court yesterday under oath that you hadn't been a jobber of plaster since 1933, March 31st, when the fact was that you went on jobbing plaster for years after 1933—do you mean to tell us now that you had overlooked that?

A. You say I said it. Read my answer, please.

Q. (Reading.) "A. Since 1933, March 31st, the last car of plaster that American Gypsum had for us they held for ten days, it was 20 tons, to be shipped to Silas McQuain, at Elkins, West Virginia."

A. They refused to sell us any plaster as a jobber after

that time, but only as a dealer.

Q. Well, Mr. Spease ——

A. (Interposing.) That was what I had intended to say.

Q. But you didn't intend to create the impression that you went out of the jobbing business in plaster, is that it?

A. Well, we were covering about six or seven States, and we are not doing it now, we don't have any of the dealers we had then.

Q. Did you go out of the jobbing business in plaster on March 31, 1933, or didn't you?

3117 A. Practically so, we lost all our dealers.

Q. Do you mean to say that you couldn't buy plaster at a discount after March 31, 1933?

A. Not to call on our trade at a profit.

Q. Do you mean, then, that you couldn't get a discount after March 31, 1933, on plaster, is that it?

A. We couldn't get a price that justified our traveling men, and we had to stop.

Q. Well, could you get a discount?

A. We couldn't get a thing from the American Gypsum Company.

Q. You know I am not limiting the question to American, don't you?

A. You mean the field, everybody?

Q. Didn't you buy plaster after March 31, 1933, at a discount, and resell it at a profit?

A. In a few instances, we did, but not to call on our trade. Our trade is all gone. We covered parts of seven States. That is all gone, and our dealers are all gone.

Q. Couldn't you buy plaster after March 31, 1933, at a discount?

A. Not to sell to dealers, no, sir.

Q. I don't know what you mean by "not to sell to dealers". My question simply is—couldn't you buy plaster after March 31, 1933, at a discount?

3118 A. Not to sell to our dealers, we lost them all. We were covering sections of seven different States, and those dealers have all been taken away from us, we lost all that business and had to stop.

Q. Won't you answer my question? Couldn't you, after March 31, 1933, buy plaster at a discount?

A. We bought it at a discount in a few instances, but not profitably to our business.

Q. What discount did you get?

A. Well, as you say ten per cent, around ten per cent.

Q. Now you understand I am referring to the period of time after March 31, 1933, don't you?

A. Yes, sir.

Q. After that time you continued to buy plaster at the same discount that you had before, is that what you say?

A. In a very small and limited way, so we could not call on our dealers and we lost all our trade.

Q. From whom did you buy it at the ten per cent discount?

A. We have bought it from Ebsary.

Q. And what discount would you get from Ebsary?

A. It is around ten per cent.

Q. Who else did you buy it from after March 31, 1933, at a discount, now?

A. After 1933?

3119 Q. Yes, that is what I am talking about, after March 31, 1933.

A. We bought some from Oakfield until they sold out. That was in 1938, I believe, wasn't it?

Q. Well now, you have known all the time that I have been asking you these questions, that in 1933 you got a written contract with Oakfield which gave you a fifteen per cent discount on plaster. You have known that all the time, haven't you?

A. Well, it would seem that I did, but you kind of twisted me up. No, I didn't, I do now.

Q. Do you mean to say that until this minute you didn't remember that you got a written five-year contract in 1933 from Oakfield with a fifteen per cent discount?

A. I will say that for the moment I didn't think of Oakfield and that contract.

Mr. BROMLEY. I move to strike out the witness' answers in which he said he was not able to buy plaster in order to sell to his dealer trade, as not responsive.

Justice STEPHENS. They may go out as not responsive. You must answer the questions which you are asked, if you can. You have been answering two questions at once; that is what you have been doing, without realizing it. You have been answering the question whether or not you could buy at a discount, and also whether or not you could do so and sell profitably. You are being asked on only one

3120 subject, and that is as to whether or not you could buy at a discount.

The WITNESS. Your Honor, I was a little confused.

Justice STEPHENS. Very well.

We will take a recess at this time until two o'clock in order to afford a little more time for a study of these authorities.

(Thereupon, at 12:15 o'clock p.m., a recess was taken to 2:00 o'clock p.m. of the same day.)

3121 AFTERNOON SESSION

(The trial was resumed at 2:00 o'clock p.m.)

Justice STEPHENS. Do you wish to proceed with the cross-examination, Mr. Bromley, or be heard upon authorities at the present time, or do you wish to postpone the authorities until after the cross-examination?

Mr. BROMLEY. I would just as soon go ahead with the cross-examination if that meets with your Honor's approval.

Justice STEPHENS. That is all right, go ahead.

Whereupon, J. R. SPEASE, the witness on the stand at the taking of the recess, resumed the stand and was examined and testified further as follows:

CROSS-EXAMINATION by Mr. BROMLEY.

Q. Well, you now remember that in 1933 you got a written contract for five years, at least, from Oakfield, don't you?

A. Yes, sir.

Q. That is Exhibit 357.

A. May I see it, please?

(Thereupon, Exhibit No. 357 for identification was handed to the witness.)

Q. By virtue of that contract, you were enabled to continue in business as a jobber of plaster, were you not?

A. Yes, sir.

3122 Q. And it provided that Oakfield would sell you all the plaster that you wanted to buy, put up in your bags, with your trade-mark on them, giving you $1 a sack allowance, and selling you at the dealer market price less a fifteen per cent discount from the net price, didn't it?

A. Did you say $1 a sack, or $1 a ton?

Q. $1 a ton allowance for sacks, excuse me.

With that amendment, the terms outlined in my question are correct, aren't they?

A. Yes, sir.

Q. You got a further concession in that contract, did you

not, by way of a very liberal provision for the absorption of freight on the part of Oakfield, your supplier?

A. I don't think so.

Q. Don't you remember this contract, Mr. Spease?

A. Yes, I do.

Q. Have you read it recently?

A. Yes, sir.

Q. Don't you remember that at the bottom of page 1, under the heading Freight Absorption ——

A. (Interposing.) Oh, yes, yes, sir.

Q. And the net effect of that provision was that Oakfield not only agreed to give you a fifteen per cent discount, but agreed to make you a further allowance up to somewhere around $1.50 or more a ton if the freight involved was double that amount?

3123 A. Yes, sir.

Q. Now that was a very favorable arrangement for you, wasn't it?

A. It helped.

Q. Didn't it help in this respect, that it enabled you to sell over a wide territory because Oakfield agreed to pay one-half of the excess freight which was involved in your selling a customer at some considerable distance from your place of business?

A. No, we were handicapped by not having mixed cars to sell at a profit.

Q. But so far as plaster was concerned, Oakfield agreed that they would absorb half the freight down to a net price to them of $5.50 a ton, didn't they?

A. Yes, sir.

Q. And they agreed that where it was necessary to absorb freight in excess of $1 a ton, they would bear one-half of that excess in every instance, didn't they?

A. That is what it says.

Q. And that is what they did?

A. They did what they said, yes, sir.

Q. Now on top of that, you got the usual discount for prompt cash payment, did you not?

A. Yes, sir.

3124 Q. This contract also obligated Oakfield to sell you plasterboard, didn't it?

A. Only as a dealer.

Q. Well, first didn't it obligate Oakfield to sell you plasterboard?

A. Yes.

Q. And it fixed, on page 2, near the bottom, as the price

for wallboard, $27 a thousand feet, didn't it?

A. Yes, sir.

Q. And it fixed the price for lath at $15?

A. Yes.

Q. Per thousand square feet, didn't it?

A. Yes, sir.

Q. Now it also provided that those prices would be changed in accordance with general market conditions, is that right?

A. Yes, sir.

Q. And Oakfield thereafter furnished you all the board you wanted at the prevailing market prices, didn't it?

A. At the prevailing dealers' prices.

Q. Well, at the price of $27 and $15, as specified in the contract, unless the market changed that to some other figure, isn't that right?

A. Yes, sir.

Q. So that when you told the Court yesterday that you hadn't been a jobber of plaster since 1933, that
3125 wasn't right, was it?

A. That must have been an error, if I said it.

Q. Well, you had an interest, Mr. Spease, in making it appear that you did not job plaster after 1933, didn't you?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Yesterday wasn't the first time during the course of this trial that you appeared in this courtroom, was it?

A. No, sir.

Q. You have been here several times, haven't you?

A. Yes, sir.

Q. And didn't you have your treble damage file with you yesterday, up there?

A. I don't understand the question.

Q. You don't know what the phrase "treble damages" means?

A. No, sir.

Q. You have got a lawyer, haven't you?

A. Not here, no, sir.

Q. Back home, haven't you?

A. Oh, yes, yes, at home.

Q. And you have a very great interest in seeing that the Government wins this suit, haven't you?

A. I am interested in continuing as a jobber of materials.

3126 Q. You are interested in seeing the Government win this suit, aren't you?

A. Well, if there isn't something done I have got to fold up and quit.

Q. You intend to bring an action for money damages against these defendants if the Government wins this suit, don't you?

A. I wouldn't say so, it is being considered.

Q. It has been considered by you and your lawyer, hasn't it?

A. Not by my lawyer, no, sir.

Q. It has been considered by you and your associates?

A. By myself individually.

Q. In fact, Mr. Spease, you are the man who started this whole Government prosecution, aren't you?

Mr. KNUFF. Wait a minute. If your Honor pleases, that is objected to as immaterial. We can definitely assure the Court that Mr. Spease didn't start this prosecution, and it isn't a prosecution.

Justice STEPHENS. Well, the examination is proper cross-examination. The word "prosecution" is intended, I assume, to mean prosecution of this proceeding.

Mr. BROMLEY. Yes, your Honor.

Justice STEPHENS. And if the witness did urge the Department of Justice to commence this proceeding I think counsel for the defendants is entitled to bring that
3127 out as bearing upon the interest of the witness, and therefore upon the credibility of his testimony.

Mr. KNUFF. If Mr. Bromley will follow that question up by proof, if he is going to prove by some person that Mr. Spease instigated this prosecution, all right. But it is unfair to cast aspersions on Mr. Spease unless Mr. Bromley follows that up. He knows very well that Mr. Spease did not instigate this suit.

Justice STEPHENS. Now I think your remarks are not in order, Mr. Knuff. It is the commonest and most conventional sort of cross-examination to ask a witness whether or not he instigated or commenced or secured the prosecution of a suit. If he didn't all he has to do is to say so.

Mr. STEFFEN. All he can do is say that he complained to the Department. He has no power to instigate a suit.

Justice STEPHENS. You can bring that out on redirect examination. The objection is overruled.

Mr. BROMLEY. Read the question, please.

(Thereupon, the pending question was read by the reporter.)

The WITNESS. I deny the charge, no, sir.

By Mr. BROMLEY.

Q. Didn't you come down to the Department of Justice in 1939, or thereabouts, and complain?

3128 A. No, sir, I did not.

Q. Didn't you ever come to the Department of Justice and complain?

A. I have been there many times. The first time I was there I was subpoenaed to come, and I didn't know anything else to do but come.

Q. Didn't you come down here before you were subpoenaed?

A. No, sir.

Q. At no time?

A. No, sir.

Q. Didn't you cause someone to come here in your behalf before you were subpoenaed?

A. I did not.

Q. Didn't you go around the country seeking aid from people to complain to the Department of Justice about these defendants?

A. I did not, no, sir.

Q. Well, you appeared before the grand jury, didn't you?

A. Yes, sir, I was subpoenaed.

Q. And as a result, in part, of your testimony, your own brother-in-law was indicted, wasn't he?

Mr. STEFFEN. He can't ask that question as to what transpired before the grand jury. It is an utterly unfair and improper question.

Justice STEPHENS. I suppose that asks for a conclusion that this witness is hardly in a position to state,

3129 Mr. Bromley.

Mr. BROMLEY. I will withdraw it.

By Mr. BROMLEY.

Q. Your own brother-in-law was indicted after your appearance before the grand jury, wasn't he?

A. Yes, sir.

Q. And you testified against him before the grand jury, did you not?

Mr. STEFFEN. I don't think he can ask this witness what he testified to before a grand jury.

Mr. BROMLEY. I withdraw the question.

By Mr. BROMLEY.

Q. The fact is that you hadn't spoken to your brother-in-law for ten years prior to the time he came down here, isn't that correct?

A. There has never been a time in my life that I haven't spoken to him and been friendly with him, and we are still friendly.

Q. Isn't it a fact that he doesn't speak to you?

A. It is not a fact. He speaks to me every time he sees me. If he would see me first, he would holler at me, and if I saw him first I would holler at him.

Q. Do you remember your appearance at the criminal trial?

A. Oh, yes.

Q. You saw him sitting in the courtroom, didn't you?

3130 A. Yes, sir.

Q. Did you speak to him?

A. I shook hands with him before he went in.

Q. Before who went in?

A. Before either one of us did. I met him on the street, he and I think Ralph Burley, I don't exactly recall, there were two or three, and Mr. Baker was there, I believe. I shook hands with all of them.

Q. Now, sir, you testified at page 3297 of the record, referring to a conversation with Mr. Black in 1930, that Mr. Black said, "that all jobbers of board and plaster have been eliminated, and that we would have to go, and that he was not permitted to sell us any more for resale to dealers."

Do you remember that?

A. Yes, sir, if that date is right, 1930.

Q. Your answer ends up with the words, "That was in 1930"—appearing on lines 19 and 20 of page 3297.

Now do you say now that in 1930 Mr. Black told you that he was not permitted to sell board or plaster to you on a jobber basis?

A. I said board in 1930, and it was in 1933 that he refused to sell me plaster, March 31st.

Q. So that this answer, to the extent that it hints that it includes plaster, again is incorrect, isn't it?

A. Well, that is the statement that you said I made. If it is against me, I made it, but I meant

3131 and should have said that it was on March 31st,

1933, that he said he couldn't sell us plaster, and in 1930 he refused to sell us board at a discount.

Q. All right. So this answer on page 3297 should be corrected to state that all that Mr. Black said was that he couldn't sell you plasterboard at a discount any longer. That is right, isn't it?

A. Yes, sir.

Q. Now at page 3299, at the top of the page, at line 2, you were asked this question:

"Q. When did they stop shipping gypsum board to you?

"A. I believe it was in 1933".

Now, you don't mean that either, do you?

A. Yes, in 1930 he said he would stop shipping us board for resale to dealers, but he continued to ship it, but not at a discount, until we had some 71 carloads shipped on which we never received any commission. Then in 1933 he refused to ship us ——

Mr. BROMLEY. I move to strike that as not responsive.

Justice STEPHENS. Finish the answer.

The WITNESS. Then in 1933 he refused to ship us plaster or board either.

Justice STEPHENS. Read the question.

(Thereupon, the pending question was read by the reporter.)

3132 Justice STEPHENS. That may go out as not responsive. Just answer that question.

Mr. STEFFEN. Your Honor, that question calls for a very broad answer—"You didn't mean that"—and he made an explanation very carefully.

Justice STEPHENS. He didn't answer the question.

Mr. STEFFEN. When he says, "you didn't mean that," that calls for an explanation as to what he did mean.

Justice STEPHENS. Read the answer to the question.

(Thereupon, the answer was read by the reporter.)

Mr. BROMLEY. Now I am talking about 1933, and he hasn't come anywhere near answering that question. I will withdraw the question and phrase it this way.

Justice STEPHENS. Very well.

By Mr. BROMLEY.

Q. At page 3299, you were asked this question:

"Q. When did they stop shipping gypsum board to you?" And you answered:

"A. I believe it was in 1933."

Now that is not true, is it?

A. Yes, I would say that it is.

Q. Isn't it the fact that American never stopped shipping board to you?

A. It is not a fact.

3133 Q. Isn't it the fact that American at all times was willing to sell and ship you all the gypsum board you wanted at the dealer's price?

A. From Arthur Black and Charlie Miller I gathered, on March 31, 1933, that they didn't want our business, and I never asked them for any business after that.

Mr. BROMLEY. I move to strike that out as not responsive.

Justice STEPHENS. It may go out.

Mr. BROMLEY. Now will you answer the question?

Justice STEPHENS. Read the question, please, to the witness. You understand, Mr. Spease, or you should understand, that counsel for the Government will be entitled to re-examine you on what will be called redirect examination, and bring out any explanations of your answers that they think are relevant in this case, subject to the rulings of the Court.

At the present stage of the examination it would save a great deal of time for all of us if you would just answer if you can the questions which are asked you.

Read the last question to the witness.

(Thereupon, the last question was read to the witness by the reporter.)

Justice STEPHENS. You can answer that "yes" or "no", can't you?

The WITNESS. I really don't know. I feel like saying "no", and yet any dealer can buy—who pays his bills—anything from anywhere. Without a good deal of

3134 explanation I don't know how to answer.

Justice STEPHENS. That question is a simple question, and as far as the explanation is concerned you can trust that to be brought out by the lawyers for the Government, don't worry about that.

The WITNESS. In that case, I would say "yes".

By Mr. BROMLEY.

Q. And it is the further fact, isn't it, that from 1930 to 1933 you bought all the board you wanted from American at the dealer price?

A. We didn't know it at the time.

Mr. BROMLEY. I move that that be stricken as not responsive.

Justice STEPHENS. It may go out.

Q By Mr. BROMLEY.

Q. Now will you answer the question?

A. We bought all the board we wanted at the dealer price, yes, sir.

Q. And you have before you a list of the footage of board that you bought from American between 1930 and 1933, and it adds up to nearly three-quarters of a million feet, doesn't it?

A. Yes, sir.

Q. Now do you still say, sir, that in 1933 American stopped shipping board to you?

3135 A. They shipped it as a dealer.

Mr. BROMLEY. I move to strike that answer out as not responsive.

Justice STEPHENS. It may go out.

Mr. BROMLEY. Will you answer the question?

Mr. STEFFEN. This is all irrelevant, your Honor, as to whether it was shipped or not. The question, to be material, has got to be a question of whether he was allowed to buy as a jobber. That is the issue here, and any question which is designed to trap the witness into an admission seems to be utterly out of place, and it seems to me that the witness should be entitled to explain.

The question that he is asking here, or the question concerning which he is asking here, Mr. Bromley does not state the full answer to. He just picks out the first few words. The answer is a broad answer. It says: "I believe it was in 1933. They sold us board, understand, at the dealer's price, but not so we could resell to dealers as we had been doing for years."

That is what he testified to; that is his whole answer, and I think he should be asked whether that is true or not.

Justice STEPHENS. Well, Mr. Steffen, we doubt whether we can properly prevent counsel on cross-examination from examining upon only a part of the answer. He did give a positive answer. He stated, "I believe it was in

3136 1933", in answer to your question, or Mr. Knuff's question, "When did they stop shipping gypsum board to you?"

Now, if on redirect examination you wish to read the entire answer to him and ask him if that would modify his statement, you may do that. But the questions go to the

correctness of the statement of the witness, and I think we cannot stop that examination. Overruled.

Mr. BROMLEY. May I have the question, please?

(Thereupon, the last question was read by the reporter.)

The WITNESS. I am confused, I don't know how to answer it. They would ship us all the board we wanted, but not so we could resell it.

By Mr. BROMLEY.

Q. Isn't it a fact that American didn't stop shipping board to you at all, but that you stopped buying board from them and went to another source of supply?

A. Yes, when we found out the fix we were in, we left them.

Mr. BROMLEY. I move to strike out everything but "Yes", as not responsive.

Justice STEPHENS. It may go out. Please, Mr. Spease, answer the questions.

The WITNESS. I will try to, Judge.

3137 Justice STEPHENS. Counsel are not trying to trick you or mix you up, but counsel on both sides of the case have an opportunity to ask the questions which are relevant to their theory of the case. Your lawyers, the lawyers for the Government, who called you here, will ask questions on redirect examination if they think your answers on cross-examination do not sufficiently and fully state the facts. But the defendants' counsel have the right to ask you particular questions.

If they can be answered without some other explanation, on a "yes" or "no" basis, you are expected to do so. There are some questions, of course, that cannot be answered "yes" or "no", but the last one could be.

The WITNESS. Your Honor, I am just a little confused.

Justice STEPHENS. Take your time, and be at ease, but pay attention to these questions and answer the questions. It will save a lot of time if you do, and you will get away on your vacation sooner.

By Mr. BROMLEY.

Q. Didn't you say a minute ago that in 1933 you concluded that Black and American didn't want your business any more, so you went over to Oakfield?

A. Yes, sir.

Q. And at the time you stopped buying board from American one reason was that you claimed they owed you $1,700, wasn't it?

3138 A. Some good amount.

Q. And Mr. Black said, "We don't owe you anything and we won't pay you the $1,700"—didn't he?

A. He said he couldn't pay it now.

Q. Well, he never did pay it, did he?

A. No, sir.

Q. Now you have got on that piece of paper before you the exact amount of the claim which you asserted against the American Gypsum Company on March 31, 1933, haven't you?

A. Yes, sir.

Q. What is that exact amount?

A. $1701.42.

Q. And they have never paid it from that day to this, have they?

A. No, sir.

Q. Now referring to the second sentence in your answer at page 3299, to which Mr. Steffen has referred, you went on to say: "They sold us board, understand, at the dealer's price, but not so we could resell it to dealers as we had been doing for years."

Now in that sentence did you refer to the period prior to 1933 or after 1933?

A. That must have been the period between 1930 and 1933.

Q. Now you had been buying board from Oakfield, and plaster too, I guess, as far back as 1930, hadn't you?

3139 A. That is substantially correct.

Q. You told us yesterday or this morning that you had a conversation with Arthur Black in 1930, and you testified about that conversation. Isn't it a fact that all that Mr. Black said to you in 1930 was that American no longer could sell you patented plaster board at a discount?

A. Substantially, yes, sir.

Q. And when you talked in your direct testimony about United States Gypsum Company not permitting a discount, you weren't testifying as to what Mr. Black said, were you?

A. In part.

Q. Well, isn't it the fact that Mr. Black in this conversation in 1930 didn't mention United States Gypsum at all?

A. I just don't remember just how his remark was phrased at this time.

Q. Aren't you thinking of what you referred to this morning as common rumor or gossip that you had heard

around, and not referring to what Mr. Black told you at all?

A. No, it was common knowledge, yes, that went along with it. But I went to Mr. Black for my information on what we could do.

Q. I ask you if it isn't the fact that Mr. Black in that conversation never mentioned USG at all.

A. I am not so sure.

3140 Q. And isn't it the fact that all he said was, "American can no longer sell you the patented board at a discount"?

A. He said that plenty of times.

Q. Isn't that all he said, sir?

A. I don't know about that particular time, I just don't recall.

Q. Isn't that all he said at any time?

A. I am not sure.

Q. Well, you testified about this in the criminal case, didn't you?

A. Yes, sir.

Q. Your memory was probably better then than it is now, wasn't it?

A. It should have been.

Q. Do you remember what you said in the criminal case?

A. No, sir, I can't say that I do.

Q. Well, at page 2629 in that case you were asked this question:

"Q. What was it that Mr. Black told you in 1930 about selling board to you?

"A. I think he told me that he could not make us a discount, that we could sell board for resale to dealers in different States in different places".

Do you remember that?

A. Yes, sir.

3141 Q. Do you remember that you were asked this question and gave this answer on the same page:

"Q. Did you know in 1930 that the price at which Mr. Black of the American Gypsum Company, and the discounts at which he could sell, were fixed under a license agreement?

"A. Well, I could not get anything out of him about that. He told me he would not sell us and that settled it".

Do you remember that?

A. Yes, sir.

Q. That was true, wasn't it?

A. It was true if I said it.

Justice GARRETT. Are you reading, Mr. Bromley, from the testimony on the trial of the criminal case?

Mr. BROMLEY. Yes, your Honor.

Justice GARRETT. Thank you.

By Mr. BROMLEY.

Q. And do you remember that I asked you at page 2630 this question:

"Q. I understand that, Mr. Spease. All I want you to tell me, if it be the fact, is what Mr. Black told you, if he told you anything about a discount?

"A. No, I could not get anything out of him, he was very careful not to tell me anything."

Do you remember that?

A. It sounds familiar to me.

3142 Q. And that was true, wasn't it?

A. Yes, sir.

Q. And do you remember that just to make it certain I asked you this question:

"Q. And you did not know that the reason that he could not give you a discount was because the United States Gypsum Company on the 6th of August, 1930, had changed its price bulletin so as to eliminate the 10 per cent discount to jobbers?

"A. He did not tell me anything."

Do you remember that?

A. That is the answer?

Q. Yes.

A. Yes.

Q. Do you remember that?

A. Since you have read it I kind of think I do.

Q. That was true, wasn't it?

A. If I have said it as you have it, I thought it was true, yes, sir.

Q. And isn't it likewise true that Mr. Black told you that he would sell you board at the dealer price, and went on selling it to you as long as you wanted to buy it, which was for at least three years more?

A. Yes, but we were to have it made up to us some way, and we never got it. That is from 1930 to 1933.

3143 Q. But you paid the dealer price for all of the three-quarters of a million feet that you bought during the three years, didn't you?

A. From 1930 to 1933?

Q. Yes.

A. Yes, sir.

Q. And so far as plaster was concerned during that interval, Mr. Black went right on giving you the 10 per cent discount, or thereabouts, which he had given you for the twenty-eight years prior to 1933, isn't that a fact?

A. They never shipped us any after that, I don't know.

Q. What?

A. We didn't ask them to ship us, or they never shipped us any after that, so I hardly know how to answer that.

Q. Well, when you say they didn't ship you and that you didn't ask them to ship you, you are talking about 1933, aren't you?

A. Yes, sir.

Q. I am talking about 1930, and have been right along in these last few questions. Isn't it a fact that after 1930, when Mr. Black told you that he could not give you a discount on board, that he went right ahead and sold you plaster and gave you the usual and customary discount?

A. That is substantially right, yes, sir.

Q. Now, how many conversations do you say now there were with Mr. Black in the three-year period be-
3144 tween 1930 and 1933?

A. Several, but I couldn't say how many.

Q. What is your best recollection as to the approximate number?

A. Well, it is only a guess, if you want me to hazard a guess, if that is permissible, I could do so.

Q. When you said six or eight or your direct examination, were you guessing?

A. Partially.

Q. Well, how many of the six or eight were a guess, and how many do you remember?

A. I met him twice in Cleveland, and a couple of times in Port Clinton, and once in Pittsburgh, I think.

Q. Now are those all the occasions that you can remember, five?

A. I just don't recall any others at this time.

Q. Now will you locate the five by dates, please?

A. Oh, I couldn't do that.

Q. You couldn't do that?

A. No, sir.

Q. All you could say is that they were between 1930 and 1933, is that right?

A. Yes, sir.

Q. Now you have testified about these conversations in the criminal case, haven't you?

3145 A. If you have the evidence there, I think that I did.

Q. Well, you have already seen that I have the evidence here—you know that, don't you?

A. Yes.

Q. Well, isn't it the fact that the subject of your conversation with Mr. Black at each and all of these five occasions was merely whether or not he would give you a discount on patented board?

A. We talked and discussed many subjects. We talked about plaster and board, and then back to plaster—I suppose we 'most always did.

Q. Isn't it a fact that your conversations with Black about which you testified on direct during this period were confined to your attempts to get Black to give you a discount on board?

A. Naturally.

Q. You were getting your discount on plaster all of this time, weren't you?

A. Yes, sir.

Q. So you didn't have any occasion to talk with him about that, did you?

A. Well, I thought I did.

Q. But he was giving you your discount all the time on plaster wasn't he?

A. Yes.

3146 Q. He never made any promise to take care of you on plaster, did he?

A. No, sir.

Q. Because he was giving you your discount on plaster, wasn't he?

A. Yes, sir.

Q. Do you remember that you told this Court at page 3311, near the top of the page, at line 5, referring to these conversations in this period, as follows:

"Q. Did he say why he couldn't help it?

"A. The U. S. Gypsum Company, Mr. Avery, wanted to do away with the jobbers.

"Q. Did he say that?

"A. Yes, sir.

"Q. Where did he say that, in Cleveland?

"A. I can't be sure, but I would say every time I ever saw him, but maybe not."

Do you remember that you testified to that?

A. Yes, I think I do.

Q. Now isn't it the fact that all Black ever said to you at any of these conversations was that under his license with USG his company had to sell board to you at a fixed price, and that fixed price did not include a discount?

A. Well, substantially that is correct, either one of them.

3147 Q. Well, when you say that you meant that, you mean that what you say now is what you intended to say on page 3311, is that right?

A. There has been so much said on both sides and so many names quoted that I don't believe I can tell you.

Q. You don't really remember what Mr. Black said, if anything, do you?

A. Oh, yes, I do.

Q. Well, isn't it the fact that all he ever said to you was that under American's license agreement, American had to sell patented board at a price which was fixed by USG, and that price did not include a discount?

A. I don't think he ever went into that much detail about it.

Q. Did he just say he couldn't give you, any longer, a discount—would that be a fair statement?

A. Of course, that is what he meant.

Q. Well, isn't that what he said?

A. I wouldn't say so.

Q. Wasn't there another reason for the fact that you talked with Mr. Black at least five times during this period of time between 1930 and 1933?

A. Nothing, only business. I have talked to him on many subjects that would come under the head of gossip, when we would get together.

3148 Q. And wasn't it an important reason that you were constantly pressing him to pay the money that you said American owed you?

A. No, sir, I don't think we ever pressed it very much because we thought we were going to get it eventually.

Q. When did you start pressing the claim?

A. Too late. At that time they were taken over by Celotex.

Q. And you knew, during this period from 1930 to 1933 that American was losing money, didn't you?

A. I can't say that I did.

Q. Don't you remember that Charlie Miller was put in there during this period in order to make a study to find out why it was that American was operating at a loss?

A. I didn't understand so.

Q. You didn't know that Mr. Miller had testified here that that was the fact, did you?

A. No, I don't think that I did.

Q. During this time Charlie Miller and Arthur Black and the officials of American knew that you were dealing with the Oakfield Company, didn't they?

A. By rumor and hearsay I would think so, yes.

Q. And the fact is that as a result of all of these factors, you took your business away from American in February, 1933, isn't that so?

3149 A. No, it was after March 31, 1933.

Q. No, before March 31, 1933?

A. In order to reach out in the East where we had a more favorable freight rate, we bought some plaster from the Universal Gypsum Company and the Oakfield Gypsum Company some years before.

Q. Didn't you make your arrangement with Oakfield which finally eventuated in a long-term contract, prior to March 31, 1933?

A. In 1930 I think we bought our first plaster, that is in the testimony.

Q. I am talking about the written contract, Exhibit 357, which is dated December 17, 1933, on the first page thereof, and I am asking you whether it isn't the fact that you made the arrangements which are there expressed in writing with Oakfield, prior to March 31, 1933.

A. I don't recall the date. If it is there in writing, we did.

Q. You don't recall it now?

A. Not the exact date.

Q. Have you got the contract there?

A. Yes.

Q. What does it say in the very opening paragraph, Mr. Spease?

A. Do you refer to the plaster contract?

3150 Q. The contract covering plaster and board and Keene's Cement and white goods, dated December 17, 1933. Now look at the first paragraph and tell me whether that doesn't refresh your recollection that you made your arrangements with Eldred and Hansen as early as February, 1933?

A. That is what he states, yes.

Q. That is what he states—what do you mean by that?

A. Confirming our conversation.

Q. You signed the contract, didn't you?

A. Yes, sir.

Q. And when it says, "confirming our recent conversation with regard to continuing our sales agreement with you which has been in effect since February 14, 1933", that was right, wasn't it?

A. Yes, sir.

Q. You testified at page 3320 that in 1930 you had a conversation with Mr. Baker. At the bottom of page 3319 it shows that you were talking about the Thursday after April 7, 1930, and you were asked this question and gave this answer beginning at line 10 of page 3320:

"Q. Will you relate to the Court, please, that conversation?

"A. Mr. Baker and I discussed several matters first, and I brought up the matter of them packing plaster in our bags and selling us the board at a jobber's price so we could continue to call on the trade. He laughed and
3151 said, 'Spease, you know as much about it as I do. Avery rules that we can't do it, and we can't do it. You might as well go home and forget it, you are going to have to do something else.'"

Do you remember that?

A. Yes, sir.

Q. Now isn't it the fact, Mr. Spease, that that conversation you had with Mr. Baker had only to do with the subject-matter of patented gypsum board?

A. Well, it was board and plaster and all these other products.

Q. I ask you whether or not it isn't the fact that the only thing that you and Baker talked about in that conversation in April, 1930, was patented board.

A. No, we talked about the whole line.

Q. Do you say now to this Court that in April, 1930, Mr. Baker told you that Avery had ruled that he couldn't give you a discount on plaster?

A. I just forget how it was worded.

Q. Well, you remember now, don't you, Mr. Spease, that for three years after this conversation the American Gypsum Company gave you a discount on plaster?

A. That is true.

Q. And you know that the American Gypsum Company was a licensee, just like National, their position was the same with respect to USG, don't you?

3152 A. That didn't keep me from trying to buy it.

Mr. BROMLEY. I move that the answer be stricken as not responsive.

Justice STEPHENS. It may go out.

By Mr. BROMLEY.

Q. Will you answer the question?

A. Please state the question.

Justice STEPHENS. Read the question, Mr. Reporter.

(Thereupon, the question indicated was read by the reporter.)

The WITNESS. Your Honor, I can't answer that without an explanation.

Mr. BROMLEY. I will withdraw it.

By Mr. BROMLEY.

Q. All I am trying to get out of you, sir, is this. Don't you realize that to say the least you were mistaken when you testified at page 3320 that Baker told you that Avery had ruled that National couldn't give you a discount on plaster?

A. No, sir, I don't think so.

Q. Well, isn't it a fact that American went right ahead for three years after this conversation, giving you a discount on plaster?

A. Until 1933?

Q. Yes.

3153 A. Yes, sir.

Q. Now do you know of any reason why, if American could give you a discount on plaster, National couldn't, so far as USG was concerned?

A. Well, I can give you my thoughts. I suppose they were nearly organized and ready to do what they wanted to do to eliminate us.

Mr. BROMLEY. I move to strike that out as not responsive.

Justice STEPHENS. What was the answer?

(Thereupon, the last answer was read by the reporter.)

Justice STEPHENS. The answer seems meaningless to the Court, I don't understand it. It may go out. Ask the question again, Mr. Bromley.

By Mr. BROMLEY.

Q. Well, isn't it the fact that all that Baker said to you was that he couldn't give you a discount on board?

A. No, it isn't. All I was interested in was the whole line.

Q. Well now, you remember pretty clearly, do you, that Mr. Baker said what you stated on page 3320, "Avery rules that we can't do it, and we can't do it"?

A. Yes, sir, if I said it.

Q. You haven't just injected that in this case because you want the Government to win, have you?

A. I can't answer that without an explanation.

3154 Q. Well, you didn't say anything about this when you described the conversation with Baker at the criminal trial, did you?

A. I don't recall at the moment.

Q. Don't you recall that you never mentioned a thing about USG or Avery when you were describing, before the criminal jury, what Baker said to you in April, 1930?

A. It is possible.

Q. And don't you recollect that you there said that Baker's reply covered gypsum board?

A. It is bound to have covered the whole line.

Q. Don't you remember that you limited it to gypsum board before the criminal jury?

A. I just don't recall.

Q. Well, your recollection was better back in 1941 than it is now, wouldn't you say?

A. It should be.

Q. You had a very pleasant talk with Baker, didn't you?

A. Oh, yes, yes, sir.

Q. You were very friendly with him?

A. Yes, sir.

Q. You had known him for many years?

A. Yes, sir.

Q. Now when did it first occur to you that Mr. Baker, in his conversation, mentioned Avery's name?

3155 A. I don't recall.

Q. Did you have a talk with Mr. Knuff or Mr. Steffen about it before you took the stand?

A. Yes, sir, I have talked with them since I came here this time.

Q. And is that when it first occurred to you that Baker mentioned Avery's name?

A. No, sir.

Justice STEPHENS. We will take a recess of five minutes.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

3156 Justice STEPHENS. Proceed.

By Mr. BROMLEY.

Q. Isn't it the fact that you didn't want to do business with National on any basis unless National would give you a discount on board?

A. That is substantially right. It would be of no account to us.

Q. Now this conversation in which you say Mr. Baker said that Mr. Avery had ruled that National couldn't sell you except at dealer's prices was in April, 1930, wasn't it?

A. I just made the one trip there. Is that the date?

Q. You said it was the Thursday after April 7, 1930. Don't you know that the USG change in the license bulletin which eliminated the jobber discount did not come out until sometime in August, 1930?

A. I can't recall that.

Q. In April, 1930, any licensee would have been free to give you a 15 per cent discount on patented board, did you know that ——

Mr. STEFFEN (interposing). I don't see, Your Honor, how the witness could possibly know what the bulletin says.

Justice STEPHENS. If he doesn't know, he can say so. Did you know or didn't you?

The WITNESS. No, sir, I didn't know.

3157 By Mr. BROMLEY.

Q. Nobody ever told you that it was the bulletin that leveled off the price so that the jobber's price became the dealer's price, as far as the licensees' sales were concerned?

A. I never understood it that way.

Q. Nobody ever told you that?

A. No, sir.

Q. Now at this time in April, 1930, you were getting a discount on board from American, weren't you?

A. No, sir, we weren't.

Q. Well, you were thinking way ahead of me when you looked at that schedule, weren't you?

A. No, sir.

Q. What did you look at the schedule for?

A. I looked at those shipped cars, I supposed I had a right to. I had these 70 cars here before me to see what the date was.

Q. You wanted to see when it was that your claim for a $1700 c. nmission started, didn't you?

A. Yes, sir.

Q. And you looked at the list and you saw that it didn't start until August, 1930, didn't you?

A. I didn't look at the month ——

Q. (Interposing.) Well, look at it now.

3158 A. August, 1930, yes.

Q. That means that you got your commission from American up until August, 1930, doesn't it, on board?

A. I would think so.

Q. All right. So that in April, 1930, when you say that Baker told you that Avery ruled that you couldn't get a commission, you were actually getting your commission on patented board from American, weren't you?

A. Yes, but we were supposed to know that it was soon all over.

Mr. BROMLEY. I move to strike out that answer as not responsive.

Justice STEPHENS. It may go out except for the word "Yes", which I think was the first word in the answer.

Justice JACKSON. Do you mean the word "commission" to mean "discount"?

Mr. BROMLEY. Yes, sir, excuse me.

Justice STEPHENS. You understood that, did you not, Mr. Spease, that when Mr. Bromley was using the word "commission" he meant "discount"?

The WITNESS. Yes, sir.

Justice STEPHENS. If you don't understand any question, you are entitled to say so, and take your time in answering it.

The WITNESS. Thank you.

3159 By Mr. BROMLEY.

Q. Now, Mr. Baker never refused to sell you board at the dealer's price, did he?

A. I don't think so.

Q. And on the criminal trial, isn't it the fact that when you testified to this conversation with Mr. Baker, you placed it just as occurring sometime in 1930?

A. I really don't recall.

Q. Well, at page 2632, I asked you this question:

"Did you go to any other manufacturer except American in 1930 to see if you could get a discount?

"A. Did I say that I went to see the National?

"Q. I believe you did, yes, sir. Any other than National, then?

"A. No, I do not recall that I did. I believe Mr. Baker told me I might as well go home and forget it, and I kind of stopped after he and Arthur Black, Mr. Eldred and Mr. Hansen, let me down, refused me."

Do you remember that you gave that testimony?

A. It sounds familiar.

Q. And do you remember that in describing your conversation with Mr. Baker, I asked you this question, at page 2633, line 4:

"Q. And didn't Mr. Baker explain to you that the licensor, by a price bulletin, had leveled off the price as be-
3160 tween dealers and jobbers so that the only price that he could give you was the dealer's price?

"A. Well, I think I made that statement. He said I might as well go home and forget it, we could not do business any more."

Do you remember that?

A. It sounds familiar, yes, sir.

Q. Now isn't it the fact that all that Baker ever said to you at any time was that after August, 1930, he could not give you a discount on patented board?

A. I can't answer that question without a little explanation.

Justice STEPHENS. Make your explanation.

The WITNESS. We sat there and talked, we knew each other pretty well, and he looked at me and said, "Spease, you know Avery has ruled you got to quit, you can't job plaster and board, and you might as well go home and forget it." We chatted a little while, and I left him. That was in his office, the only trip I ever made to see him. He knew that I knew, or he thought that he knew that I ought to know I couldn't buy plaster and board at a discount.

Mr. BROMLEY. I move to strike out that answer as not responsive, and as certainly no explanation.

Mr. STEFFEN. We ask that it be retained as an explanation. He asked for an explanation.

3161 Justice STEPHENS. Read the question Mr. Bromley asked which the witness said he couldn't answer without an explanation.

(The question was read by the reporter.)

Mr. BROMLEY. He can answer that yes or no.

Justice STEPHENS. Do you wish to be heard further?

Mr. STEFFEN. I wish to say simply that although it is possible for a person to answer yes or no, there is no regulation that requires him to do so, and if he asks for permis-

sion to make a fuller answer, that answer should go in if he is granted permission; and in the interests of getting at the truth of the matter, I think it ought to be encouraged for a witness to state fully what he has in mind. It saves a lot of time.

Justice STEPHENS. Well, counsel on both sides of the case are entitled to have the exact question which they ask answered, if the witness can in fairness to himself and truthfully answer the question which has been asked.

Now the Court, in a desire to be fair to the witness, and to be sure that the witness was not confused, gave the witness an opportunity to explain his answer to a question which could have been answered yes or no truthfully, but the explanation was not an explanation of the answer, it was a volunteering of additional material. You may wish to bring out, possibly, on re-direct-examination, something as to that. I think we do get at the truth better if
3162 we confine the answers to the questions, where they can be answered categorically.

The answer is stricken out.

Mr. BROMLEY. Will you read the question?

(The question was read by the reporter as follows:

"Q. Now isn't it the fact that all that Baker ever said to you at any time was that after August, 1930, he could not give you a discount on patented board?")

Justice STEPHENS. There are some questions, Mr. Spease, that can't be answered fairly yes or no. The commonest jocular illustration of that is if I asked you if you have stopped beating your child, you couldn't answer that fairly yes or no, because it would assume you had been beating your child and probably you hadn't. But this kind of a question can be answered yes or no. It is a clear question. If the answer is yes, you can say so; and if the answer is no, you can say so, clearly within the truth.

Read that again. If it is not a fact, all you have got to do is say "no".

Read the question.

(The question was read by the reporter.)

The WITNESS. Your Honor, I can't answer that ——

Justice JACKSON (interposing). Why can't you? Did he talk to you about that, or something else ——

3163 The WITNESS (interposing). I wouldn't be interested in buying the board unless I could get the plaster and the whole line at a discount.

Justice STEPHENS. All you are being asked is what you

talked about. Did you talk about that only, or did you talk about the board and something else?

The WITNESS. The board and the plaster, everything coupled together.

Justice JACKSON. What is your answer, "No."?

Justice STEPHENS. Read the question again.

Mr. Spease, you are an intelligent man, you can see that the question can be answered yes or no. If you can't truthfully answer it yes, all you have got to say is no.

Read the question again to the witness.

(The question was read by the reporter.)

The WITNESS. No, that wasn't all.

By Mr. BROMLEY.

Q. Now at no time in the criminal trial did you ever mention that Baker said anything about Avery, isn't that right?

A. I don't recall.

Q. You don't recall?

A. No, sir.

Q. Do you recall that at the criminal trial you were asked this question and gave this answer:

3164 "Q. And didn't Mr. Baker explain to you that the licensor, by a price bulletin, had leveled off the price as between dealers and jobbers so that the only price that he could give you was the dealer's price?

"A. Well, I think I made that statement."

A. If it is in there that way, yes, sir.

Q. That was the truth, wasn't it?

A. Read that again, please, sir.

Q. (Reading.):

"Q. And didn't Mr. Baker explain to you that the licensor, by a price bulletin, had leveled off the price as between dealers and jobbers so that the only price that he could give you was the dealer's price?

"A. Well, I think I made that statement."

Mr. STEFFEN. What is the full answer?

Mr. BROMLEY. "He said I might as well go home and forget it, we could not do business any more."

The WITNESS. I remember that.

By Mr. BROMLEY.

Q. That is the truth, isn't it?

A. Yes, sir.

Q. Now what are these two stores that you talked about

in your direct-examination that are operated by the Fairmont Company?

A. The two stores we had at Fairmont?

3165 Q. I don't know—what are they?

A. Hardware stores, builders' supplies, electrical appliances, and so forth.

Q. Those are retail stores, are they?

A. Yes, sir.

Q. Did you sell board and plaster and lime and cement at retail out of those stores?

A. Yes, sir, some.

Q. So that the Fairmont's business, in so far as those stores are concerned, was that of a dealer, wasn't it?

A. Yes, sir.

Q. Are both those stores in Fairmont, West Virginia?

A. Yes, sir.

Q. Now when you sell board as a dealer, you sell it above the dealer price, don't you?

A. Those are retail stores. Anybody that comes in there pays the retail price for anything and everything that we sell. Our dealers try to buy things through the store, and we won't sell it to them.

Mr. BROMLEY. I move to strike that out as not responsive.

Justice STEPHENS. It may go out.

By Mr. BROMLEY.

Q. Will you answer the question?

Justice STEPHENS. Read the question.

3166 (The question was read by the reporter.)

The WITNESS. Yes, sir.

Justice STEPHENS. You see how much you would help us, Mr. Spease, if you would just listen to those questions and answer them directly. If further explanation of your answers is needed, counsel for the other side have an opportunity to examine you.

The WITNESS. I beg your pardon, sir, but I am doing the best I can.

Justice STEPHENS. Thank you, that is all any of us can do.

By Mr. BROMLEY.

Q. In addition to your business as a dealer, the Fairmont Company has a mixing plant down in Fairmont, West Virginia, hasn't it?

A. Not now, no, sir.

Q. Well, it did have?
A. Yes, sir.
Q. During what period of time?
A. Up until some few years back.
Q. Well, beginning when?
A. 1900.
Q. And lasting until when?
A. Oh, probably 15 or 20 years ago.
Q. How long?
3167 A. Probably 15 or 20 years ago. We had one there for 20 or 25 years.
Q. Now at that plant, you manufactured sanded plaster, didn't you?
A. Yes, sir.
Q. And you sold that at retail?
A. Yes, sir, and wholesale.
Q. Oh, were you a wholesale distributor, too?
A. Yes, sir.
Q. So that it was a part of your business to buy board at the dealer price and charge a mark-up and resell the board at a price higher than the dealer price, wasn't it?
A. In the retail end, yes, sir.
Q. And you could get that because a customer was willing to pay a mark-up on the dealer price for the service which you rendered him through the facilities of your two stores, isn't that right?
A. That would help, yes, sir.
Q. It would help whom?
A. It helps both ways. It helps him and it helps us to get more business. As I say, we sell nothing out of the stores only at retail.
Q. But when you sell the board at retail, you get a price that is higher than the dealer price, and that difference is called a mark-up, isn't it?
3168 A. Yes, sir.
Q. Now as a wholesale distributor, you sell to other people like yourself, that is, dealers, don't you?
A. Yes, sir.
Q. And when you sell a dealer a carload of plaster, you sell him at the prevailing dealer price, don't you?
A. Yes, sir.
Q. Doesn't it help you, to sell plaster to a dealer, to be able to furnish board to that dealer in a mixed carload?
A. Yes, sir, everything helps.
Q. So that it would be good business for you to be able

to furnish your dealer customers mixed cars of board and plaster, even though you did have to pay the dealer price for the board, wouldn't it?

A. No, sir, it wouldn't.

Q. You would make your money from your plaster, wouldn't you?

A. Not and keep men on the road, nowadays, you wouldn't.

Q. But you would make 15 percent off your plaster, wouldn't you?

A. Yes, sir.

Q. And if you were able to furnish board, you would be able to get more plaster business, wouldn't you?

3169 A. Yes, sir.

Q. Now there are plenty of people in business today who buy board at the dealer price and resell it to people at a mark-up, aren't there?

A. Yes, sir.

Q. They are jobbers, aren't they?

A. No.

Q. Well, do you draw a distinction between a man who makes his profit on resale by discount, and a mark-up?

A. Unless you can get profit enough from your carload to pay you, you might as well quit. Nearly every car is a mixed car with something else in it besides plaster. Consequently, if you had a profit on the plaster, or a profit on the board and no profit on the plaster, you couldn't afford to sell it and call on dealer trade.

Mr. BROMLEY. I move to strike the answer as not responsive.

Mr. STEFFEN. I think it is highly responsive. In his reference to dealer trade, it indicates his idea of a jobber, and the jobber business.

Justice STEPHENS. The question was whether or not he drew a distinction between one who sold at a discount and one who sold at a mark-up, and whether he did draw such a distinction can be answered yes or no.

If you wish to bring out the reasons why he drew or did not draw the distinction in mind, on re-direct-examination, you may have the opportunity to do that.

3170 The answer must go out as not responsive.

By Mr. BROMLEY.

Q. Will you answer the question, please?

Justice STEPHENS. Do you understand the question? Do

you draw a distinction between a dealer who sells at a mark-up and a dealer who buys at a discount?

The WITNESS. Yes, sir, I do.

Justice STEPHENS. Perhaps you had better rephrase the question yourself, Mr. Bromley.

By Mr. BROMLEY.

Q. Now you call a man who buys at a discount and sells at the dealer price, a jobber, do you?

A. The man that buys at a discount and sells to the dealer?

Q. Yes.

A. Yes, sir.

Q. But you do not call a man a jobber who buys at the dealer price and sells at a mark-up, is that it?

A. No, that would be retail business, that is what all dealers sell at.

Q. Now suppose the sale in the second hypothesis were to another dealer, would the seller be a jobber or wouldn't he?

3171 The WITNESS. Your Honor, I can't answer that without a little explanation.

Justice STEPHENS. That question may be answered yes or no, but if you think that yes or no answer doesn't adequately give your reason, you may state your explanation, subject to a motion to strike if it is not in the nature of an explanation. What you are being asked, as the Court understands it, is whether or not you would call a man who buys at the dealer price and sells at a mark-up to another dealer, a jobber. Can't you tell us whether or not you would call such a person a jobber?

The WITNESS. No, he is not a jobber. That is just accommodation.

By Mr. BROMLEY.

Q. He is not a jobber, that is accommodation?

A. Yes, sir, there is no dealer that sells to a dealer at a mark-up, only in extreme cases.

Q. When he does, what do you call him?

A. He is still whatever he is.

Q. He is a jobber, isn't he?

A. I don't know how to answer that unless I would say that the dealer that bought it was a darned fool, because he could go someplace else and buy as a dealer. We don't have any cases like that.

Q. You have never heard of a case where a dealer sold at a mark-up ——

3172 A. (Interposing.) To a dealer?

Q. (Continuing.) —where a jobber sold at a mark-up to a dealer?

A. I beg your pardon, I thought you said a dealer to a dealer.

Q. No, a jobber sold at a mark-up over the dealer price to the dealer. You never heard of such a case?

A. Oh, there have been some of them, yes, sir. Nowadays everyone is posted on the market, you can't do that and get away with it.

Q. When was it that that was done?

A. It seems to me everybody knows the prices and always has a lower one than you can quote.

Mr. BROMLEY. I move to strike that out as not responsive.

Justice STEPHENS. It may go out.

By Mr. BROMLEY.

Q. Will you answer the question?

A. I can't answer it.

Q. You can't answer it?

A. I don't believe I can.

Q. Now isn't it a fact that a jobber merely does what a manufacturer with a sales department does?

A. That is part of it only.

3173 Q. And you said on your direct-examination that you thought your jobber organization could do that work better than a manufacturer?

A. Yes, sir.

Q. And you said that was because you were able to see the customers more frequently than a big manufacturer was able to, is that right?

A. That is one reason, yes, sir.

Q. Now how many salesmen did you have, the Fairmont Company have, covering the five states that you mentioned, during the period from 1930 to 1940?

A. I don't think we had more than one.

Q. And, of course, you know that during that period the United States Gypsum Company, for that territory, averaged 25 to 30 salesmen, don't you?

A. I didn't think they did.

Q. How many did you think they had?

A. Well, I knew they had a man in West Virginia.

Q. A man in Washington?

A. They always did have a man in Washington, I suppose so, yes, sir.

Q. A man in Tennessee?

A. I would think so, yes, sir, in every state they
3174 had a man, as far as I know.

Q. Didn't you know as a matter of fact that they had a sales office in every one of those states, with an average of four to five salesmen out of each office, during this entire period?

A. I can't say that I did, I haven't followed that part of it.

Q. Don't you know that the other companies, like National, had probably, during the same 10-year period, another 25 or 30 salesmen covering that 5-state territory of yours?

A. Yes, they all had men.

Q. You told us that you jobbed board and plaster for American since 1902. Now so far as board is concerned, that is quite incorrect, isn't it?

A. Yes, sir. I should have said from the time they started making board.

Q. That was in about 1920, wasn't it?

A. I can't say.

Q. Don't you remember that it was about 1920?

A. That is substantially correct.

Q. As a jobber, getting a discount, you sold many other jobbers, didn't you?

A. No, sir, we didn't.

Q. Do you mean to say that as a jobber, you wouldn't sell another jobber and split your commis-
3175 sion with him?

A. No, sir, we wouldn't do that.

Q. That would be bad business, wouldn't it?

A. Yes, sir.

Q. This Oakfield Company that you talked about, of which Messrs. Eldred and Hansen were officers, they didn't manufacture gypsum board, did they?

A. No, sir.

Q. They bought the gypsum board from manufacturers, and were given a discount of 15 percent, weren't they?

A. Yes, sir.

Q. So far as board was concerned, this Oakfield Company was a jobber, wasn't it?

A. I would think so.

Q. Now you said you went to see Mr. Hansen and had a

talk with Mr. Hansen. Do you remember that?

A. Yes, sir.

Q. And Mr. Hansen was an officer of the Oakfield Company, wasn't he?

A. Yes, sir.

Q. Now isn't it a fact, Mr. Spease, that all Mr. Hansen said to you about your request that you buy board from him, was that he would not split his discount with you, but would charge you the dealer price?

A. He said that, substantially, and a good deal more.

3176 Q. You knew he was getting 12½ percent on lath, didn't you?

A. I think that I did, yes, sir.

Q. And at $15 a thousand, 12½ percent is $1.65, about, isn't it?

A. Yes, sir.

Q. So that he was paying $13.35 for the lath and reselling it at $15, wasn't he?

A. Yes.

Q. And you went to him and said, "Sell it to me at something less than $15", didn't you?

A. Yes, I guess I did.

Q. And he said, "No, if I sell it to you, I sell it to you at $15", didn't he?

A. He didn't say it that way, but substantially that is what he said.

Q. Now he said, "I will give you 15 percent on plaster because I manufacture the plaster," didn't he?

A. Yes, sir.

Q. And thereafter, the Oakfield Gypsum Products Company sold you plaster, as evidenced by the written contract, Exhibit 357, at a 15 percent discount plus freight absorption, didn't it?

A. Yes, sir.

Q. You testified that in 1933, you met Mr. Eldred in Washington and had a talk with him; do you

3177 remember that?

A. Yes, sir.

Q. Mr. Eldred was an officer of the Oakfield Company, wasn't he?

A. Yes, sir.

Q. Didn't Mr. Eldred tell you that while he would give you a generous discount on plaster, he would not share his discount on board?

A. Yes, but he didn't put it that way.

Q. Well, you testified about that in the criminal case too, didn't you?

A. Yes, sir.

Q. Didn't you there say that Eldred told you that he couldn't afford to pass on any of the 12½ percent, because that was all he got out of his purchase of wallboard from a licensee?

A. Yes, sir, that is part of it.

Q. Mr. Eldred told you that he would give you a 15 percent discount on plaster, didn't he?

A. Yes, sir.

Q. And he did?

A. Yes, sir.

Q. Now let me look at Mr. Eldred's letter of April 27, 1935, which is Exhibit 359.

(Exhibit 359 handed to the witness.)

3178 By Mr. BROMLEY.

Q. You remember receiving that letter, don't you?

A. Yes, sir.

Q. And you know what it refers to, don't you?

A. Yes, sir.

Q. It refers to figure-head or multiple bidding, doesn't it?

A. Yes, sir.

Q. Now you knew that all the time during your direct-examination, didn't you?

A. You mean here or in the criminal court?

Q. Here in this court. Can't you answer that?

A. Not without an explanation, I can't answer yes or no.

Q. You can't answer it yes or no?

A. No, sir.

Q. Well, the situation that this letter concerns itself with has to do with a Government building project, does it not?

A. Yes, sir.

Q. And bidding on Government building projects is a very common occurrence in the gypsum industry, isn't it?

A. Yes, sir.

Q. And was in 1935, wasn't it?

A. Yes, sir.

3179 And it is the custom of the Government on such building projects to award the contract for gypsum board to the lowest bidder, isn't it.

A. Yes, sir.

Q. And depending on the importance of the work and

its location, there are many or few bidders in the gypsum industry, isn't that right.

A. Yes, sir, as you say, depending on location.

Q. And those bidders are sometimes dealers and sometimes jobbers and sometimes companies like your company, the Fairmont Company, and like the Oakfield Company, aren't they?

A. Yes, sir.

Q. Now you knew, didn't you, that the Oakfield Company was owned by 3 parent companies in the building material business, one called the American Hardwall Company, one called the Paragon Company of Scranton, and the other, the Paragon Company of Syracuse?

A. Yes, sir.

Q. The particular Government job referred to in Exhibit 359, so far as your bid was concerned, called for gypsum board, didn't it, either lath or wallboard?

A. I think so.

Q. And you bid on that job, the Fairmont Company, didn't you?

3180 A. Yes, sir.

Q. And the Oakfield Company bid on the job, too, didn't it?

A. Yes, sir.

Q. And its 3 parent companies bid on the job too, didn't they?

A. I can't say.

Q. Don't you remember?

A. No, sir, if I ever knew.

Q. Well, look at the letter, Exhibit 359, the first sentence in the second paragraph.

A. Oh, yes, it says that they did.

Q. Yes.

Now isn't it the fact, Mr. Spease, that what Mr. Eldred was referring to in Exhibit 359 as having been objected to by USG, was that all five of you fellows put in bids at the same price, and under the prevailing custom of the Government, identical price bids are put in a hat and pulled out by choice, the result being that your little group had five times the chance of any other bidder?

A. That wouldn't do me any good.

Mr. BROMLEY. I move to strike that out as not responsive.

Justice STEPHENS. It may go out.

By Mr. BROMLEY.

Q. Will you answer the question?

3181 Justice STEPHENS. Read the question to the witness.

(The question was read by the reporter.

The WITNESS. I don't know.

By Mr. BROMLEY.

Q. Did you get the award of the contract?

A. No, sir.

Q. You did not?

A. No, sir, we did not.

Q. I thought you told us this morning that the Oakfield Company would not furnish you the board to carry out this contract. Didn't you say that this morning?

A. Yes, after we put in a bid ——

Q. (Interposing.) Just a minute, didn't you say that this morning?

A. If I did I was a little confused. We withdrew our bid.

Q. You never got the award of the contract, then, did you?

A. No.

Q. And you didn't have any need for board to fill an order from the United States Government on this job, did you?

A. No, we didn't get it, we didn't bid on it.

Q. Well, you bid on it and withdrew your bid?

A. Yes, sir.

Q. When you got this letter, Exhibit 359, didn't you understand that the objection which USG had was

3182 to all five of you putting in identical bids under the custom of drawing the bids from a hat, by the Government?

A. No, sir, I didn't.

Q. Didn't you know that that was contrary to the provisions of the NRA Code in the Gypsum Code, then in full force and effect?

A. No, sir.

Q. You were a member of the Code; weren't you?

A. Yes, sir.

Q. You went to Code meetings, didn't you?

A. Yes, sir.

Q. Didn't you ever read it?

A. Yes, sir.

Q. Don't you remember that this practice of figurehead or multiple bidding was an unfair practice under the Code?

A. I don't recall.

Q. Well, think a minute. Wasn't it a common practice prior to the adoption of the Code?

A. I can't answer that.

Q. And you can't think whether the Code prohibited it or not?

A. No.

Justice STEPHENS. The Court will suspend at this time until tomorrow morning at 10 o'clock.

3183 Before we adjourn, Mr. Finck, you made inquiry yesterday about the 22nd day of February. Unless it is quite an inconvenience to counsel in the case, the Court would prefer to hold court on that day, because we are anxious to move forward in this case as rapidly as we can, and there will have to be quite an extensive adjournment in March on account of the Patent calendar. So we will hold court on the 22nd.

Mr. Johnston, we are not yet able to answer your question as to when we will adjourn. I will have to check into some of my own engagements, and that will take a day or so to do that. I will let you know, however, sometime this week.

Mr. STEFFEN. Your Honor, may I ask, if there are only a few more questions on cross-examination, we would like very much to let Mr. Spease go home if he may.

Justice STEPHENS. How much more have you, Mr. Bromley?

Mr. BROMLEY. Quite a lot.

Justice STEPHENS. I think we had better not attempt to hold over, because the Government will undoubtedly have some re-direct-examination, and there is so much transcript to read. I am sorry, Mr. Steffen.

(Thereupon, at 4:05 o'clock p.m., a recess was taken until 10:00 o'clock a.m., February 9, 1944.)

3184 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., WEDNESDAY, FEBRUARY 9, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

3192 Thereupon, J. R. Spease, a witness, having been previously duly sworn, resumed the stand and was examined and testified further as follows:

CROSS-EXAMINATION (Resumed) by Mr. BROMLEY.

Q. In connection with your testimony yesterday, have you thought of the name of the man in New Orleans?

A. Walter Jahnche—J-a-h-n-c-h-e, I believe it is; it is a French name and I am not sure of the spelling.

Q. Isn't it spelled—J-a-h-n-c-k-e?

A. I think you are right.

Q. Now the Jahncke Service Company is the name of a very large building supply dealer in New Orleans, isn't it?

A. Yes, sir.

Q. And the Jahncke Service Company owns the Crescent Wall Plaster Company, did you know that?

A. Not to be sure, no. If I did, I had forgotten it.

Q. Well, you mentioned the Crescent Wall Plaster Company in your testimony yesterday when you were giving what you called a list of jobbers, do you remember that?

A. Yes, sir.

Q. Now the Crescent Wall Plaster Company is a concern which manufactures sanded plaster, isn't it?

A. They did at one time, I have lost all track of them, I don't know.

3193 Q. You don't know what they do?

A. Not now, no, sir.

Q. Do you remember that the Crescent Wall Plaster Company was managed by a man named McCausland?

A. No, sir, I forget all about it. As I say, I was going back a good many years when I was trying to recall people, and I have forgotten them, and they have forgotten me by now.

Q. But you do know that the Jahncke Service Company is one of the biggest dealers, building supply dealers, in New Orleans?

A. Yes, sir, they always have been.

Q. Do you remember that the Crescent Wall Plaster Company had a manufacturing plant?

A. No, sir.

Q. Don't you remember that in 1928, and prior thereto, the Crescent Wall Plaster Company was manufacturing sanded plaster?

A. No, sir.

Q. Don't you remember that after 1928 the Crescent Wall Plaster Company was manufacturing sanded plaster?

A. No, sir.

Q. Then you really don't know what they were doing after 1928, do you?

A. No, sir.

3194 Q. You mentioned the Crown Wall Plaster Company—do you remember that?

A. Yes, sir.

Q. Where did you say they were?

A. Braddock, Pennsylvania.

Q. Do you remember who the owner of that business was?

A. He is dead now, he and his sisters. I knew him pretty well, yes.

Q. What are their names?

A. My memory is going back a good many years for all of these people, and I don't believe I can state.

Q. How long ago did the owner of this business die?

A. Maybe five years or ten.

Q. Would it surprise you to know that he died over twenty-five years ago, Mr. Spease?

A. It usually turns out that way. I knew him pretty well. I have known him back a number of years.

Q. You don't really know whether he did five years ago or thirty years ago, do you?

A. No, sir. Do you refer to the old man, Mr. Bromley, or the young man?

Q. What one were you referring to?

A. Well, sir, I can't recall his name.

Q. So you don't know which you were referring to, do you?

A. He and his sisters had been there for many
3195 years, I knew them all. A fellow by the name of Elsasser, I think his name was, managed the company thirty years ago. He passed out of the picture. I can think of that man's name in a few minutes. He and his sisters carried it on.

Q. Well, there came a time when this man whose name you can't remember, who is now dead, and his two sisters, sold out the business to somebody else. Do you remember that?

A. No, sir, it is too far back.

Q. Don't you remember that twenty years ago this man and his two sisters sold this business to a man named Rutter?

A. No, sir, I have forgotten.

Q. Don't you remember that the Crown Wall Plaster Company in Braddock has been operated by the Rutter brothers for nearly the last twenty years?

A. I forget, sir.

Holmes is the man I was trying to think of. They were down at McKees Rocks, in the wind-up of the business, and either sold it or moved, I don't know what the story is, I forget.

Q. That man's name was Wesley Holmes, wasn't it?

A. Yes, sir.

Q. Now that you have thought of his name, don't you remember that it is the fact that he has been dead for more than twenty-five years?

A. I am surprised to hear you say it, but if you say so, it must be true.

3196 Q. It must be. Now the Crown Wall Plaster Company was a manufacturer of sanded plaster, wasn't it?

A. Yes, sir.

Q. And since at least 1925, the Crown Wall Plaster Company in Braddock, Pennsylvania, has been a large building supply dealer, hasn't it?

A. I can't say.

Q. Now you mentioned next, as I remember, the Perry Manufacturing Company at Perryopolis, Pennsylvania, is that right?

A. Yes, sir.

Q. The town of Perryopolis, Pennsylvania, is just outside Uniontown, isn't it?

A. Yes, sir.

Q. And the Perry Manufacturing Company is a brick manufacturing company—do you remember that?

A. Yes, sir.

Q. And for more than five years the Perry Manufacturing Company has not been in business at all, has it?

A. I don't recall. Their manager, Fred Ruppert, died, but I don't know what the outcome was, I have lost track of it.

Q. How long ago did the manager die?

A. I don't know.

Q. Don't you remember that it was over ten years ago that the manager died?

3197 A. No, sir, I do not.

Q. Don't you remember that this brick manufacturer had a lot of labor trouble more than five years ago?

A. No, sir.

Q. As a result of which the business was closed down and has never since been operated.

A. No, sir, I have lost track of it.

Q. Did you hear of the Charles F. Eggers Company in Uniontown, Pennsylvania?

A. Yes, sir, I understand they owned the Perry Company.

Q. And the Charles F. Eggers Company was one of the biggest building supply dealers in Uniontown, wasn't it?

A. One of them, yes, sir.

Q. And as you say, the Eggers Company owned this

Perry Manufacturing Company which manufactured brick?

A. I have always understood that it did.

Q. The next company that you mentioned, as I remember it, was the Ruggles Company, is that right?

A. That was one of them, I said the old company, yes, sir.

Q. What did you mean by that?

A. Well, I simply meant it was one of the companies, the building supply firms, that I knew of years ago, and I don't think they are in Columbus any more, but I am not sure about that.

3198 Q. They haven't been in Columbus for twenty years, have they?

A. I don't know.

Q. They never were in Columbus at any time, were they?

A. Well, when I knew them, yes, sir that is where they were.

Q. Weren't they in Kingston?

A. No, sir, Columbus.

Q. Well, how long ago did they go out of business?

A. I can't tell you.

Q. Now the Ruggles Company, when you knew it, was a large building supply dealer, wasn't it?

A. They were dealers, too, yes, sir.

Q. You mentioned the Teachout Company, do you remember that?

A. Yes, sir.

Q. The Teachout Company is a large retail dealer, isn't it?

A. I don't know anything about them, they are at Cleveland, Ohio.

Q. Then you mentioned the Cleveland Building and Supply Company, do you remember that?

A. Yes, sir, the Cleveland Builders Supply.

Q. The Cleveland Builders Supply, yes.

Now this company owns and operates the biggest retail yard in Cleveland, doesn't it?

3199 A. I think they do, I am not sure. Goff-Kirby is one of the other big companies there.

Q. Is that a dealer, too?

A. I think they are both dealers and jobbers, but I am not sure that I know.

Q. Now you mentioned Fisher Brothers, do you remember?

A. Yes, sir.

Q. The correct name of that firm is the Fisher Lime & Cement Company, isn't it?

A. Yes, sir.

Q. And the Fisher Lime & Cement Company operates perhaps the biggest retail building material supply yard that is in the City of Memphis, doesn't it?

A. I think so.

Q. And likewise it operates a very large retail building supply yard in Little Rock, Arkansas, doesn't it?

A. I don't know.

Q. You don't know that?

A. No, sir.

Q. Well, do you know that the Fisher Lime & Cement Company are dealers?

A. I suppose they are, yes.

Q. Isn't it a fact, Mr. Spease, that a good deal of the plasterboard which you purchased from American during the three-year period from 1930 to 1933, was shipped
3200 directly to your headquarters at Fairmont, West Virginia, for resale by you in your two retail stores?

A. I can't, your Honor, answer that question "yes" or "no".

Mr. BROMLEY. Well, I will withdraw it and ask you this.

By Mr. BROMLEY.

Q. Isn't it a fact that a large number of the cars of plasterboard which you bought from American during that period were shipped to you at Fairmont?

A. If you mean in proportion, I would say no.

Q. Were there any cars shipped to you at Fairmont?

A. Oh, yes. We have a good many small dealers that come in there from small communities and haul out board.

Q. And that board you furnished to them out of your retail stores?

A. Out of our warehouse, but we sell it to them as a dealer.

Q. Out of your retail stores?

A. No, it doesn't go through the stores at all, they are separate.

Q. You have a warehouse in addition to the stores?

A. Warehouse and office, yes, sir, on Tenth Street.

Mr. BROMLEY. That is all.

Justice STEPHENS. Is there any redirect examination?

3201 Mr. KNUFF. Is there any other cross-examination?

Justice STEPHENS. I am sorry. Is there any other cross-examination by other defendants' counsel?

(No response.)

Apparently not, Mr. Knuff. You may proceed.

REDIRECT EXAMINATION by Mr. KNUFF.

Q. Mr. Spease, yesterday on cross-examination Mr. Bromley asked you this question, and I am reading from page 3449:

"Q. Don't you remember that you limited it to gypsum board before the criminal jury?"

Mr. Bromley at that time was referring to the conversation that you had with Mr. Baker in 1930. Do you recall that question yesterday?

A. I think I do.

Q. You did testify in the criminal case in the District Court that was tried before Judge Goldsborough, did you not?

A. I did.

Q. Mr. Kelleher, who represented the Government, asked you the following questions and you gave the following answer ——

Mr. BROMLEY (interposing). Where?

Mr. KNUFF. On page 2616.

"Q. With whom in the—I will withdraw that. Whom in the National Gypsum Company did you contact to purchase gypsum board from National?

3202 "A. Mr. Baker.

"Q. That is Mr. Melvin H. Baker?

"A. Yes, sir, the President, I think.

"Q. Will you state the conversation which you had with Mr. Baker?

"Mr. BROMLEY. The same objection.

"The COURT. Overruled.

"Mr. LEAHY. Will you place the time, please.

"By Mr. KELLEHER.

"Q. Will you place the time?

"A. Around 1930.

"Q. Will you state the conversation you had with Mr. Baker?

"A. We had several of his men calling on us at Fairmont to solicit our business, both for plaster and plasterboard and we were pretty well satisfied. We did not pay a great deal of attention. I think I missed their man several times by being absent from home myself. So, we decided we would use some place else and would try National.

"I wired Mr. Baker 'Can I see you at your office tomorrow?' I think he wired back 'Yes,' but he was busy. I went up to Buffalo and had a very pleasant visit with him because I have known him for many years, but I think he said, 'Spease, you might as well go back home and forget it; you are not going to be able to buy from us or
3203 anybody else,' and I returned home.

"Q. At that time did you try to purchase gypsum board from National?

"A. Yes, sir.

"Q. And Mr. Baker's reply covered gypsum board?

"A. Yes, sir."

Do you recall that testimony, Mr. Spease?

A. I think so, yes, sir.

Q. At the criminal trial were you asked any questions concerning the purchase of plaster?

A. No, I don't think I was.

Mr. BROMLEY. Wait a minute. I object to that. The very question that Mr. Knuff read was, "Will you state the conversation you had with Mr. Baker," in 1930.

Now that called for the conversation, and if there was anything said about plaster it called for the conversation about plaster.

Mr. KNUFF. There is nothing inconsistent at all about his answer. That is all I want to bring out. If Mr. Bromley will stipulate that he doesn't regard his testimony on the witness stand yesterday, that is Mr. Spease's testimony on the witness stand yesterday, as inconsistent with the testimony that he gave before the criminal jury, I will pursue it no further.

Mr. BROMLEY. That is entirely and completely inconsistent. He testified here that Baker told him that
3204 he wouldn't sell him plaster. He testified there that the conversation had to do with board. I think it is a fair inference to say that his testimony was, there, that it only had to do with board because he was asked by Mr. Kelleher to state the conservation, and he stated it.

Then Mr. Kelleher asked if that covered board, and he answered yes, that it did.

Justice STEPHENS. It seems to the Court that the matter reduces itself to a question of argument between counsel, and conclusion by the Court, as to whether or not the testimony is inconsistent in view of what Mr. Knuff has read out of the record, and it is not helpful to ask the witness whether he remembers whether he was asked about plaster, although possibly you are entitled to do that, Mr. Knuff, as indicating what his memory of that conversation was.

What he was asked about is in the record of the criminal proceeding, and that is the best evidence of it, I suppose.

Mr. KNUFF. That is what I wanted to get before this Court, and I haven't any other way to get it before this Court than to read the questions and answers.

Justice STEPHENS. You have done so.

Mr. BROMLEY. May the answer of the witness be stricken, please?

Mr. KNUFF. I think not, your Honor.

3205 Justice JACKSON. What was the question and answer?

Mr. KNUFF. Suppose I rephrase the question.

Justice STEPHENS. Very well.

Mr. BROMLEY. May the answer go out, then?

Justice STEPHENS. Yes, if it is to be rephrased.

By Mr. KNUFF.

Q. Mr. Spease, were you specifically asked by Mr. Kelleher anything concerning the purchase of plaster?

Mr. BROMLEY. I object to that as calling for a conclusion, because the record shows he was asked the question, "Will you state the conversation which you had with Mr. Baker?" This is an argumentative question.

Justice STEPHENS. We are inclined to think that it is proper redirect examination, upon consideration, as the answer may tend to indicate that the witness in the questions and answers at the criminal proceeding didn't understand that he was being asked specifically about plaster. What the questions and answers actually were, of course, and whether or not he might reasonably have understood that he was being asked about plaster, is a conclusion for the Court to reach. But we will overrule the objection.

Mr. KNUFF. Will you read the question to Mr. Spease so that he can answer it?

(Thereupon, the pending question was read by the reporter.)

The WITNESS. No, sir.

3206 By Mr. KNUFF.

Q. Mr. Spease, Mr. Bromley yesterday asked you if you testified in the criminal court that you had a conversation with Mr. Baker in 1930, and your answer was that you did.

Mr. KNUFF. May I have Exhibit 352, please?

(Exhibit 352 handed to the witness.)

By Mr. KNUFF.

Q. Your testimony yesterday was to the effect that this conversation which you had with Mr. Baker in 1930 was in April, 1930. Do you recall that?

A. Yes, sir.

Q. When you were interrogated at the criminal case by Mr. Kelleher, did you have before you the exhibit which you now have, Exhibit 352?

A. I don't recall that I did.

Q. And does Exhibit 352 enable you to fix that date more specifically than "in 1930"?

A. Definitely.

Q. On page 3468, Mr. Bromley asked you this question:

"Q. And you said on your direct-examination that you thought your jobber organization could do that work better than a manufacturer?"

And your answer was: "Yes, sir."

Mr. Bromley at that time was referring to the sales that your organization could make of plasterboard to a better advantage than some of the manufacturers.

3207 Do you care to make any explanation as to what you meant by that answer?

A. I simply meant that we saw our people so much more often, and were closer to them, and gave them more assistance than the average manufacturer could.

Q. Do any of the small manufacturers have salesmen traveling the same territory that your salesmen do?

A. Yes.

Q. Did Ebsary have a salesman down there?

A. I think they had a man in Virginia, I don't think they had anyone in West Virginia.

Q. And did Kelley have any person traveling that territory?

A. None to my knowledge, no, sir.

Q. Did Certain-teed have anybody down there?

A. Yes, they had a man; maybe two men, I don't know.

Q. Did American have any person?

A. They had a man who came into West Virginia once in a while.

Q. Now what service does a jobber perform for a small manufacturer?

A. Well, we call on them often, and a small manufacturer that does not have many salesmen can't see his customers very often. We, for them, are selling so many different things that we job to these small dealers that we see them frequently; they get us on the phone,
3208 our man goes out there in a few hours and goes out with their men and helps them; and they can send to Fairmont, to our warehouse, and pick up a ton of plaster of Paris, something that they run out of and can't afford to buy in carloads—they buy at a dealer's price, of course—they buy plasterboard from us at a dealer's price and send in and get a little. There are so many, many things that I could name.

Q. A small gypsum manufacturer like Ebsary—are his products limited?

A. I would say yes.

Q. What products would you say Ebsary salesmen would have to offer?

A. Plasterboard, plaster lath, plaster, and plaster of Paris.

Q. And what products would your salesman offer? Would he offer those same products?

A. He would offer those same products.

Q. And in addition, what would he add?

A. Metal lath, roofing, insulation board, lime, sewer pipe, drain tile, brick, cement—no, I beg your pardon, not cement—I would say dozens of things.

Q. Roofing material?

A. Roofing material, waterproofings.

Q. Tile?

3209 A. Tile, drain tile, sewer pipe.

Q. And would you say that a jobber performs a definite service for the small manufacturer?

A. I would, indeed. They send in to our retail stores and

get acquainted with us, and buy paint at a retail price sometimes, something that they don't have and are out of, rather than wait for it they send in and get it from us because we buy it in carload lots, but they pay the retail price for paint.

Q. Now, Mr. Bromley yesterday brought up the subject of multiple bidding. Do you recall that?

A. Yes, sir.

Q. Did the Fairmont Wall Plaster Company have any financial interest in the Paragon Plaster Company, the Paragon Plaster & Supply Company of Scranton, or the American Hardwall Plaster Company?

A. Nothing in any of them.

Q. Did the Fairmont Wall Plaster Company have any financial interest in the Oakfield Gypsum Products Company?

A. They did not.

Q. Did you, as an individual, have any financial interest in any of those four companies, that is, Oakfield, American Hardwall, Paragon Plaster, and Paragon Plaster & Supply?

A. I did not.

3210 Q. Did any of those four companies have any financial interest in the Fairmont Wall Plaster Company?

A. No, sir, they never did.

Q. Mr. Bromley also brought up the question of profits, or the commissions that you make on plaster, and I want to go into that a little bit with you, Mr. Spease.

In your sales of plaster, how is that sold, in a straight car or in a mixed car? How is it generally sold?

A. Nearly always in mixed carloads.

Q. And what else would be in that carload?

A. There would be plaster, plasterboard, lath, lime, and plaster of Paris, and Keene's cement.

Q. And you would call that a mixed car, would you not?

A. Yes, sir.

Q. And it is so called because the car is not made up of any one particular product, but the products in the car are mixed; is that correct?

A. Yes, sir.

Q. And a car that is made up entirely of one product is considered in the trade as a straight car, is that correct?

A. That is true.

Q. Now what would you say would be a fair average

amount of plaster that would be in any one car that your organization sold?

3211 A. Three, five, eight, to ten tons.

Q. Anywhere from 3 to 8 or 10 tons of plaster would be in that car, and the other portion of the car would be made up of Keene's cement or board or lath or anything else that took the same freight rate; is that correct?

A. That is correct.

Q. And what would you say would be the average sales value for a mixed car, in dollars and cents.

A. $400 or $500.

Q. Would it be that much, do you think?

A. In those big 40-ton cars, yes, sir. But if you want an average car——

Q. (Interposing). Yes, an average.

A. Probably $300 to $400.

Q. $300 to $400?

A. Yes.

Q. What was your profit on a ton of plaster?

A. I believe it was a dollar.

Q. A dollar a ton?

A. Yes.

Q. So that in a car having a value of $300, that contained 10 tons of plaster, you would have a gross profit of $10, is that correct?

A. Yes, sir.

Q. Could you stay in business long on that basis?

3212 A. Not and feed some of the people we have to, no, sir.

Q. And if the plaster went down to the prices that prevailed around 1927 or 1928, when plaster was selling at around $4 a ton, what would be your gross profit?

A. The more we sold the sooner we would quit.

Q. Were prices low for plaster in 1928 and 1927?

A. Yes, sir.

Q. Was there a price war on at that time?

A. I think that was the time that we had it down to where, as we say, they gave plaster away, $2 or $3 at the mill.

Q. When you say they gave plaster away, do you mean that facetiously, or do you mean that they actually gave it away?

A. I meant they did give it away.

Q. Gratis?

A. I don't see how they could put it on the cars at $2 and $3 at the mill.

Q. Let's understand one another. Do you mean they actually gave it away, or do you mean that as a facetious statement?

A. Well, I guess I mean it the other way.

Q. Did the prices stiffen after 1928 and become more stable?

3213 A. Yes, sir, they did.

Q. What are the prices for plaster now, if you know?

Mr. BROMLEY. I object to that as not proper re-direct-examination.

Justice STEPHENS. Well, it is a new topic. It is not within the original examination, and therefore is not re-direct-examination. It doesn't tend to explain the cross-examination because it goes to an entirely new subject. However, if you regard it as material to your case you may ask the witness questions, and then there will be cross-examination upon it.

Mr. KNUFF. We will withdraw the question.

May we take a recess at this time, Your Honor?

Justice STEPHENS. Yes, we will take a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice STEPHENS. Proceed.

By Mr. KNUFF.

Q. This morning, Mr. Spease, Mr. Bromley asked you about the Jahncke Company at New Orleans, and the Crown Wall Plaster Company at Braddock, Pennsylvania, and the Perry Manufacturing Company at Perryopolis, Pennsylvania, and the Ruggles Company at Columbus, Ohio, and the Teachout Company at Cleveland, Ohio, and the Fisher Lime & Cement Company in Memphis, and he asked

3214 you if they were dealers. Your answer was that they were. Did you mean to imply that before 1930 they were not also jobbers?

A. No, sir. They were dealers and jobbers.

Mr. KNUFF. That is all the re-direct-examination we have.

Justice STEPHENS. Re-cross?

Mr. BROMLEY. Yes, Your Honor.

RECROSS EXAMINATION by Mr. BROMLEY.

Q. In connection with your testimony about straight and mixed cars, isn't it a fact that due to some rule or regulation of the Interstate Commerce Commission, shippers are not permitted to mix in one car anything other than gypsum products?

A. Yes, sir, I think it is.

Q. That is to say, you could not buy a mixed car made up of plaster and plasterboard and Keene's cement, to which there could be added any of these other things such as you have mentioned, like brick or lime or insulation board or cement or sewer pipe—that is right, isn't it?

A. That is true, yes, sir.

Q. I notice in going over the list of the products that you said you jobbed, you mentioned cement, and then withdrew it. You have never jobbed cement, have you, at
3215 any time?

A. No, sir, not in recent years.

Q. How far back does that go? I said, "You never have at any time, have you?"

A. I don't recall.

Q. At least you haven't jobbed cement for a great many years, will you say that?

A. Yes, sir.

Q. That is true, is it?

A. Yes, sir.

Q. You remember the excerpt from your testimony in the criminal case which Mr. Knuff read you, beginning: "Whom in the National Company did you contact?"

A. Yes, sir.

Q. And it is the fact, isn't it, that in the criminal trial at page 2616, you were asked this question:

"Will you state the conversation you had with Mr. Baker?"

A. Yes; yes, sir.

Q. And you answered that question, didn't you?

A. I tried to, yes, sir.

Q. Now do I understand you to intimate that you thought you were only being asked to state such part of the conversation as had to do with gypsum board?

A. At that time, yes, sir.

3216 Q. And therefore, you intentionally left out any mention of plaster, is that it?

A. I wouldn't think so.

Q. And the reason you wouldn't think so is because you remember very clearly that when you were asked to give the conversation that you had with Mr. Hansen, you proceeded to tell the jury all about what Mr. Hansen said about plaster; isn't that right?

A. If that is in the evidence.

Q. Don't you remember?

A. Yes, sir.

Q. It is in the evidence, isn't it?

A. I think so, yes, sir.

Q. In fact, it is in the evidence right after the part that Mr. Knuff read to you, isn't it?

A. I don't have that with me, my testimony.

Q. Don't you remember at the criminal trial that right after you were asked to state the conversation you had with Mr. Baker, and at the bottom of page 2617, you were asked, "Will you state the conversation which you had with Mr. Hansen?"

A. I looked it over.

Q. Do you remember that?

A. I looked it over, but I don't recall.

Q. Don't you recall now that beginning at the top of page 2618 and going down that whole page, you
3217 answered that question by stating what Mr. Hansen had said to you, and you answered it this way:

"I asked him if he would take our empty sacks, Fairmont Wall Plaster bags, and fill them with plaster and sell us plaster and wallboard so that we could continue to ship our materials into seven or eight states which we had been covering for a period of years. He said 'I would like to. We can pack your plaster but cannot sell you any wallboard.'"

Now when you answered that question, you didn't think that it was intended that you should leave out such part of Mr. Hansen's conversation as referred to plaster, did you?

A. No, sir, I suppose not.

Mr. BROMLEY. That is all.

Justice STEPHENS. Any further re-direct-examination?

Mr. KNUFF. No, Your Honor.

Justice STEPHENS. Do the defendants wish to be heard further with respect to the admissibility of this testimony which has been received subject to a motion to strike?

There were some cases called to the attention of counsel yesterday which you may wish to be heard on.

Mr. BROMLEY. May it please the Court, I would like to be heard on Lawler v. Loewe, chiefly so I can perhaps develop ——

3218 Justice STEPHENS (interposing). I will not require you to be heard at the moment. I was planning with respect to the rest of the day. About how long will you likely wish to be heard?

Mr. BROMLEY. Only a very short time.

Justice STEPHENS. Do you wish to be heard further, Mr. Steffen?

Mr. STEFFEN. We would like to reply to Mr. Bromley.

Justice STEPHENS. Are you through with this witness?

Mr. STEFFEN. That is what I wish to say, that if possible we would like to excuse the witness.

Justice STEPHENS. Judge Garrett inquires, Mr. Bromley, whether or not, if this evidence should be ruled, all of it, to be admissible, you have fully protected yourself by cross-examination on all of it?

Mr. BROMLEY. I have, sir.

Justice STEPHENS. Then this witness, I suppose, may be excused?

Mr. STEFFEN. Yes, Your Honor.

Mr. BROMLEY. Yes.

Justice STEPHENS. Have you another witness here?

Mr. STEFFEN. No, we have not.

Justice STEPHENS. Then you may be excused, Mr. Spease. Thank you for attending the court.

The WITNESS. Thank you, sir. (Witness excused.)

3219 Justice STEPHENS. We will hear you briefly now, gentlemen. I do not mean by that to limit you unduly. We will be glad to hear you as fully as you need to be heard to protect your rights.

Mr. BROMLEY. May it please the Court.

Justice STEPHENS. Proceed, Mr. Bromley.

Mr. BROMLEY. As I understand the holding, in the opinion of Justice Holmes in Lawlor vs. Loewe, it is this. That was a treble damage action brought under the Sherman Act, brought by the Loewe Company, a hat manufacturer, against the officials of a union. Being a treble damage suit, the charge was that the officials of the union had conspired in restraint of trade to damage the plaintiff's business, and the proof showed that the union officials had com-

bined and agreed to put into operation both a primary and a secondary boycott against the Loewe Company, and in execution of that unlawful combination had circulated to the customers of the Loewe Company lists described as "unfair" lists or "do not patronize" lists.

The proof showed that the union had sent those lists out to the customers of the Loewe Company, that is, I assume, to the wholesalers or retailers who bought hats from the Loewe Company, which manufactured the hats.

In a single sentence, near the end of the opinion, Justice Holmes said that it was competent for the court to receive testimony from these customers to the effect that they ceased dealing with Loewe because they had received the
3220 "unfair" list, and letters from customers to the Loewe Company were likewise ruled to be admissible.

Now it seems to me that the significant fact about that is that of course it was necessary for the plaintiff to prove that he was damaged, and the plaintiff had to prove that the reason his customers refused to buy hats from him was because the defendants had sent out an "unfair" list to them, and they had received it and read it and acted on it. So that on the simple doctrine of causation, it was not only material and competent, but it was necessary that the plaintiff establish that the reason the customers of Loewe stopped doing business with Loewe was because of what the defendants had done, i. e., had sent them an "unfair" list which caused them to deem it wise not to deal with Loewe any more.

So I say that was a material fact in issue in the case, and was both material and competent on the theory of causation of proof of damage.

Now you can call it proof of a state of mind, and say that that is a ruling that the state of mind of an actor in connection with an ambiguous act, is admissible. But in essence, it seems to me nothing but a holding that it was a part of plaintiff's cause of action, that he must prove that the customers ceased to give their custom to the plaintiff because of what the defendants had done.

Now I have difficulty in finding an analogy be-
3221. tween that situation and the present one. I think it clear that your Honor's statement is entirely correct that if it be received, it is of course subject to two separate steps by way of connection.

If it be received it must be received subject to the usual connection that independent proof of a conspiracy be some time offered; secondly, and more important in this instance, it certainly must be received subject to proof that the defendants exercised coercion upon Oakfield in some manner.

I agree with what I understand to be the statement of the Court in those two respects. I also agree with the statement of the Court that Hansen's and Eldred's statements cannot be received as evidence of the truth of what they said.

The difficulty that I have is in seeing the materiality in this case of the state of mind of Oakfield, because it seems to me, in this case, that state of mind is immaterial, it not being a necessary element in the proof of any cause of action, the necessary element being merely that the defendants combined to coerce these people, and in execution of that combination brought pressure to bear upon them in some way.

Therefore, it seems to me that this proof as to state of mind is immaterial.

Justice STEPHENS. Will you read that portion of Mr. Bromley's statement where he referred a few moments ago to the two items which must be proved in order to
3222 connect the testimony.

(Thereupon, the reporter read the record as requested.)

Justice STEPHENS. Do you wish to be heard, gentlemen? Perhaps I ought, in fairness to Mr. Bromley, to ask a question before you proceed.

Mr. Bromley, the thought that I had, and I think perhaps my colleagues have shared it with me in our discussions, is this: I am pretty well convinced that this isn't a case for the ambiguous act doctrine, but there does seem to be a distinction drawn in the authorities, I think it is probably the distinction that Mr. Justice Holmes in his single sentence had in mind, but it is the distinction which is mentioned in other cases and in Wigmore, between statements brought into evidence and permitted in evidence because they tend to explain an act which is legally in issue and which is legally ambiguous, and statements which do show a state of mind regardless of their truth.

It has seemed to us that perhaps there is an analogy here in this situation. The charge in the complaint is that there was elimination of jobbers, and the claim of the Gov-

ernment is that it will prove that jobbers were eliminated, to be specific in this instance by pressure brought upon Oakfield as a result of its knowing or being caused to know that Kelley's license might be withdrawn if Oakfield sold to jobbers.

3223 Now it has occurred to the Court that possibly under the second theory that I mentioned, the one that seems to be illustrated by the Lawlor case, the remarks of Hansen and Eldred may tend to prove that they were in a state of mind of being under duress or coercion because of their knowledge of what might happen if they did sell to Fairmont, subject of course to the two items of connection which Mr. Bromley indicated and which the Court referred to.

Mr. BROMLEY. It seems to me that in this cause of action the only material thing is our state of mind, not theirs.

Justice STEPHENS. Wouldn't it tend to show, if the remarks of Eldred and Hansen indicated that they were in a state of fear—wouldn't it be a circumstance tending to show the effectiveness of your alleged compulsion? In other words, to put it colloquially, if the victim squeals, isn't that some evidence that he at least thinks he is being pinched? (Laughter.)

Mr. BROMLEY. Well, I think, to answer the question as you put it, I must say yes, but where the squeal is a hearsay conversation, I am not sure that it can be proved that way.

Justice STEPHENS. Well, of course that is the question in the case, as to whether it is hearsay or whether it is a circumstantial utterance of some type, either admissible because the hearsay rule is not applicable, or because it is a recognized exception to the hearsay rule.

We have ruled definitely that the declarations—
3224 and I think we have indicated or should have indicated that the acts as well as the declarations—of Oakfield and its officers, are not admissible as declarations and acts in the usual sense, to bind the defendants, because Oakfield is not charged as a co-conspirator. So that is out. The only point here is, and perhaps it is whittled down to a very fine point as far as its real worth in the case is concerned, especially in view of the fact that we are assuming that the Government will call Hansen and Eldred to the witness stand, and perhaps aid its case in that way—it seems to us that there may be something to the contention—

and I do not state this as an advance ruling—that the remarks of Hansen and the remarks of Eldred, although not binding as declarations of co-conspirators, may be utterances of a circumstantial character tending to indicate that they were in a state of duress or that they had knowledge or were in a state of mind that they couldn't sell to Fairmont, as a circumstance indicating that there was a chain or series of coercive acts which ultimately lodged themselves against Oakfield, and found their source in the defendants in the alleged conspiracy.

You said yesterday, Mr. Bromley, at page 3383 of the record at the bottom of the page:

"I think I ought to say that I believe there to be a distinction between what I have been arguing about up to now, and what he says he is going to show. If he
3225 can show that USG withdrew from Kelley the consent which it had issued to Kelley to sell to Oakfield, or went to Oakfield and said, 'Now, you do what I say or I will withdraw the consent', then I should think that would be material, that is something we did."

Of course that is not a concession as to the admissibility of these statements, but it would seem to me to indicate that you recognized that the Government might be entitled to prove a succession of coercive acts impinging eventually upon Oakfield, and through it, upon Fairmont, under the charge.

Mr. BROMLEY. I think that is so, where *we* do it.

Justice STEPHENS. Mr. Steffen!

Mr. STEFFEN. I only want to say a very few words, your Honor, largely in reply to Mr. Bromley's discussion of the Lawlor v. Loewe case.

I gather from his remarks that his difficulty, as he states it, with the Government's argument, is that he does not see, first, that it is material what the state of mind of Oakfield might be at the time of these transactions, and that I think calls for just a brief analysis of the pleadings and a reference again to our paragraph 45 (e).

3226 Paragraph 45 (e) says that the defendants, all of them, as a conspiracy—and of course we recognize that we must establish a conspiracy—but that the defendants as a conspiracy were dominating and controlling the manufacture and distribution of gypsum products by:

"(e) concertedly inducing and coercing manufacturing

distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies."

Now that is followed, if you will notice, by a sentence in Paragraph 121, which has already been brought to your Honors' attention. The second sentence says: "Since the year 1929, all gypsum board sold by all manufacturers and all manufacturing distributors (that is, all manufacturing distributors have sold gypsum board, as the sentence reads) * * at uniform and non-competitive prices", and so forth.

Now what I wanted to make clear was this, that the United States Gypsum Company, under their license agreements, in August, 1930, and again in 1932, made uniform the dealer price, that is, that the price to jobbers should be the same price as the price to dealers. I will have some remarks, at the proper time, on the ethics of that procedure. But what they did, in effect, indirectly and rather subtly, was to say, "We won't say you can't sell to jobbers, we will say that you have to sell to jobbers at the same price that you do to dealers."

3227 So when they dictated to Oakfield, as we allege, that they must sell all board at dealer prices, that meant that if they sold to a jobber they had to sell to a jobber at the dealer price, and it meant the elimination of the jobbers.

So that our Paragraph 45 (e) indicates the two things, that is, that they controlled the price, and that they also, by controlling the price, eliminated the jobbers. That, we say, is a matter of coercion, that is, that the defendants coerced and induced Oakfield, by forcing them to sell only at a uniform price to both dealers and jobbers fixed the price, and in addition eliminated the jobbers, all in one fell swoop.

Now as to the question of materiality. We say that it is material to show the state of mind of Oakfield as respects whether they were forced or induced to make a uniform price to dealers and to jobbers, and I cited yesterday the Hillmon case which is the grandfather of this line of authorities, I believe, and which has never been shaken, and which, I think, sustains the Government's position.

I would like to comment now on the Lawlor vs. Loewe case.

As Mr. Bromley stated, that case was a Sherman anti-trust case, and the question had to do with whether or not there was a secondary boycott, that is, if the defendants, the labor union, conducted a secondary boycott, that is, boycotted the dealers who were selling hats made by the Loewe Company ——

3228 Justice STEPHENS (interposing). The Loewe Company was the plaintiff?

Mr. STEFFEN. Yes, they were suing for treble damages, and the labor union was the defendant.

One of the issues was whether or not there had been a secondary boycott and whether the dealers had been coerced and prevented from buying from the Loewe Company.

Now of course the difference between the two cases is that there was coercion to prevent the purchase, in the Loewe case, and here it is coercion to prevent the sale. But in both cases the same theory would apply. There the court admitted letters from those dealers, unsworn letters, hearsay statements, from the dealers to the manufacturer, to establish that in fact the dealers were being coerced by the defendants. That is, the labor union was alleged to have coerced, by secondary boycott, and forced them not to buy from the Loewe Company.

So, it seems to me that the two cases come very close together on the question of coercion, and clearly, I think, the state of mind of Oakfield is a material factor to the plaintiff's case. In fact, we have got to establish one way or another, if we expect to establish 45 (e), that the manufacturing distributors were forced or induced to maintain uniform prices.

As you appreciate, there was an outright sale from the manufacturers to Oakfield, and ordinarily they
3229 would be free to do anything they saw fit on the resale. If, however, they were restrained or coerced in their resale, in any manner, that constitutes a restraint of trade. And in order to establish that they were coerced, we ask—what did they say and what did they do.

Mr. Bromley has suggested that the reason Oakfield didn't sell to Mr. Spease was because their commission was so low. Now we suggest that what he said also is material to determine whether that is the real reason, or was the real reason. We think the real reason was that

Oakfield was afraid, they knew that they would lose their source of supply if they failed to sell at the prices which were prevailing to dealers.

I might say, Your Honors, that that concludes my argument on this point. I have one or two little matters that we might take up.

Justice STEPHENS. Just a moment, please. You haven't anything further to say on this topic?

Mr. BROMLEY. No, your Honor.

Justice STEPHENS. Then we will make our ruling at the present time.

We have discussed the matter quite thoroughly. We appreciate the arguments which have been made. We have read Lawlor v. Loewe, and one or two other cases, and we might as well rule now and have the matter disposed of.

3230 We are of the view that the motion to strike—which, for convenience of counsel, appears at page 3403 of the record—should be denied.

In effect, the reasons for our ruling have already been indicated, but to make them a little more explicit we will state that the complaint charges, in Paragraph 45 (e), fixing of prices, that is, "concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies."

In Paragraph 45 (d) the charge is: "concertedly refraining from distributing gypsum board, plaster, and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern area" and so forth.

Now those two paragraphs are made more specific later in the complaint. In respect of the elimination of jobbers, Paragraphs 94 and 95 detail the charge; and in respect of manufacturing distributors, Paragraphs 108 to 111 detail the charge.

So far as the charge in respect of jobbers is concerned, it is true that Paragraph 94 charges, in terms, specifically acts of the defendant companies as distinguished from acts of intermediate persons such as Oakfield, but under the broad construction of the complaint taken by the majority of the Court, wherein it is held that the means and methods and details need not all be alleged, and

3231 that the detail in the complaint does not limit the general charge, it would seem to be material to show

pressure upon Oakfield through the Kelley Plasterboard Company, the pressure originating in the defendants, and it would seem to be material to show under the charge with respect to manufacturing distributors, where, in those paragraphs, 108 to 111, the defendants are charged with themselves bringing pressure upon manufacturing distributors to resell at bulletin prices—to indicate that there was pressure upon Oakfield.

Now we reiterate the ruling that we do not receive in evidence the declaration of Oakfield, nor of Hansen and Eldred as officers or agents of Oakfield, as the declarations of co-conspirators, and we do not receive the acts of Oakfield or its officers as the acts of co-conspirators, binding upon other co-conspirators, for the reason that Oakfield is not charged with being a co-conspirator.

But we do receive the declarations of Hansen and Eldred as showing the state of mind of Oakfield, or as tending to show the state of mind of Oakfield, as a link in the chain of alleged pressure brought upon Oakfield by the defendants through its relationship with the licensees, and particularly the Kelley Plasterboard Company.

The evidence is received subject to the connection which the Court has previously commented upon, that a conspiracy must first be shown. Also, it must be shown
3232 . that the pressure originated in the defendants.

We rely upon the case of Lawlor v. Loewe, which we think is in point, and also the case of Magruder v. Montgomery, 33 Appeals (D. C.) 133.

We think that if the Government proves by other evidence that the defendants did have a policy and conspiracy to eliminate jobbers, or to compel manufacturing distributors to sell at bulletin prices, and if it can be shown that this manufacturing distributor, Oakfield, acted with knowledge of or in fear of that policy, in cutting off trade, that that would be evidence, or a circumstance tending to prove the effectiveness of the conspiracy, and would have some bearing on the monopoly charge, and that the state of mind, on this theory, would be an independent fact, that is to say, the state of mind of Oakfield, material in the case or in the chain of evidence in the case, and as such would be provable by the statements of the officers or agents of Oakfield, under Lawlor v. Loewe, and similar authorities, and under Section 1729 of Wigmore.

The motion to strike is therefore denied.

There is one other little point that I wanted to call to your attention, Mr. Bromley, which I perhaps should have called to your attention before this Witness Spease left.

In reading Exhibit 357 last night I noted that the next to the last paragraph on the third page states:

3233 "Acceptance of this proposition, you will realize, puts your company in position to act during the duration of the contract as our selling agents."

I thought that perhaps needed some explanation, and I am sorry that I didn't call it to your attention before the Witness Spease left. I thought perhaps both sides might be interested in it. It seemed to me that that phrase was somewhat inconsistent with the theory that I understood the witness to be testifying under, with respect to his relationship with Oakfield, that he was buying outright from them. In fact, he answered a question that I asked him by stating that he did not take on consignment but bought outright. Perhaps it is of no materiality in the case, but I call it to counsel's attention because it struck my curiosity as I read that exhibit over. Perhaps it can be explained by Eldred or Hansen, if they are called to the witness stand, or perhaps there is no dispute at all but what this was not an agency but a mere outright purchase and sale relationship.

Mr. BROMLEY. As far as I am concerned I didn't go into it because it is my position that it was an outright purchase and sale, in spite of that provision.

Mr. STEFFEN. I think that is correct.

Justice STEPHENS. It may be that it is not important, but I thought I ought to call it to your attention since it struck the Court's attention.

3234 Mr. BROMLEY. May I say to the Court that as I understand the ruling just made, the Court does not mean to intimate that it is receiving this evidence as evidence of the truth of the facts therein stated?

Justice STEPHENS. It is not. It is not offered as such, as I understand it. At any rate it is not received as such.

Mr. BROMLEY. Thank you.

Mr. STEFFEN. I have a matter concerning Exhibit 233 which I would like to present. We are going to ask to be permitted to reoffer that and I am bringing it up now, your Honor, for the reason that we have prepared a memorandum on the matter, and I suggest that it be brought

up at the same time as Exhibit 324 is brought up on Monday.

Exhibit 283 is the Redfield memorandum, and it has to do with whether Mr. Dowd had authority to waive the privilege or not. The reason that we bring it up is that we have made something of an investigation, and it appears that Mr. Dowd was Vice President and Comptroller, at the time. I have some reluctance in stating this because Mr. Adams is not present, but our thought is that we would send him copies of our memorandum, and if it is agreeable to him we can take up both memoranda at the same time on Monday.

Justice STEPHENS. Which is the exhibit as to which the memorandum already presented by Mr. Adams, refers?

Mr. STEFFEN. Mr. Adams has moved to strike Ex-
3235 hibit 324.

Justice STEPHENS. Exhibit 324 is the answer, and the memorandum of Mr. Adams presents the question as to whether or not it must be verified in order to be binding as an admission, or in any event, whether it states a mere conclusion.

I have forgotten about Exhibit 233. Please explain that a little further?

Mr. STEFFEN. That is the Redfield memorandum which he had sent to Certain-teed concerning the Speer Patent, I believe, and the question was whether or not Certain-teed had waived their privilege with respect to attorney-client matters, and the issue turned on whether or not Mr. Dowd had authority to ——

Justice STEFFEN (interposing). Oh yes, this was the one that had to do with the grand jury proceedings.

Mr. STEFFEN. Yes, and Mr. Adams made the flat statement that Mr. Dowd was not an officer, and of course on that there was no authority to proceed. so we made no further argument. We now find that Mr. Dowd was an officer and we would like to re-offer the exhibit.

Justice JACKSON. How will you get past the barrier that the Witness Redfield had never talked to Dowd and couldn't recognize his voice.

Mr. STEFFEN. We have something in our memorandum, I think, which covers that.

Justice STEPHENS. How do you get past the bar-
3236 rier that the Court based its ruling—as the Court remembers—in part on the fact that the mere iden-

tification of a document before a grand jury did not constitute a waiver?

Mr. STEFFEN. We have two paragraphs also on that, your Honor.

Justice STEPHENS. Very well, we will consider your memorandum. You may re-offer Exhibit 233 on Monday, subject to Mr. Adams' convenience in replying, if he is not ready at that time, in view of his absence.

On the other matter, please have your memorandum ready on Monday. We will expect you to have it at that time. If you could present it earlier to us it will help the Court. If you could give it to us a few days before that, we would like to have a chance to read it, and then we can hear the argument on Monday.

Mr. STEFFEN. I will try to do so.

(Government's memorandum as to Exhibit 233 handed to Court.)

Justice STEPHENS. Is this the memorandum on Exhibit 233?

Mr. STEFFEN. Yes, sir.

Justice STEPHENS. Thank you.

I suppose it has become known to counsel that informally last night—and if it hasn't it must be made known now to counsel—Mr. Knuff presented to Judge Jackson and myself, after adjournment—Judge Garrett was away—the difficulty he was in with respect to his witness
3237 Sensibar. Mr. Sensibar had a Mexican Government contract appointment in Mexico City which he had to fulfill on Saturday, and if he was put on today we would have had to again discommode Mr. Tomkins. Therefore the Court excused Mr. Sensibar so that Mr. Tomkins could go on promptly tomorrow. But it left the Government without witnesses for this afternoon. Therefore we are bound to adjourn at this time.

The Court took the responsibility of excusing Mr. Sensibar because it seemed unfair to hold him, when he can come back later, and we did not want to again discommode Mr. Tomkins.

So the Court regrets the necessity of it, but we will have to adjourn now until tomorrow morning at ten o'clock.

(Whereupon, at 12:00 o'clock, noon, the hearing was recessed until Thursday morning, February 10, 1944, at 10:00 o'clock.)

3238 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., THURSDAY, FEBRUARY 10, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

Thereupon, FREDERICK TOMKINS, a defendant
3242 herein, called as a witness by the United States, having been first duly sworn, testified as follows:

Justice STEPHENS. Mr. Tomkins, have you been on the witness stand before?

The WITNESS. Yes, sir, I was on the stand when this case was tried before.

Justice STEPHENS. I assume you are familiar with the practices of the court room. You should, as far as you can, answer just the question and only the question which is asked you, since counsel will direct the questions to the issues in the case. Where questions can be answered fairly "yes" or "no", you should answer them in that manner. Of course, you are not forbidden to protect yourself where you can't answer fairly in that way.

If you see the non-examining counsel rise to make an objection, just halt your answer until the objection is made so that the Court will have time to make a ruling.

The WITNESS. Yes, sir.

Justice STEPHENS. Proceed, Mr. Steffen.

DIRECT EXAMINATION by Mr. STEFFEN.

Q. State your full name, Mr. Tomkins, please?

3243 A. Frederick Tomkins.

Q. And where do you reside, Mr. Tomkins?

A. West Orange, New Jersey.

Q. You spell "Tomkins" without a "p", I believe?

A. Yes, sir.

Q. And were you at one time connected with the Newark Plaster Company?

A. Yes.

Q. Are you now connected with them?

A. Yes.

Q. What is your position?

A. President of the Newark Plaster Company.

Q. Where are they located?

A. Newark, New Jersey.

Q. Are the Newark Plaster Company and yourself defendants in the present action?

A. I believe we are.

Mr. STEFFEN. I call your attention to Rule 43(b), which provides that a defendant may be called as if upon cross-examination, and we are calling this witness as if upon cross-examination.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. What business is the Newark Plaster Company in, Mr. Tomkins?

3244 A. The Newark Plaster Company is in the business of manufacturing white plaster, and gypsum board products, and a few miscellaneous items.

Q. By "white plaster", what do you mean?

A. Plaster of Paris.

Q. Do you make ordinary plaster for walls?

A. What do you mean by "ordinary"?

Q. Ordinary neat plaster.

A. We do not manufacture neat plaster.

Q. Do you make sanded plaster which is ordinarily used

by building contractors?

A. No, we do not.

Q. Simply white plaster?

A. Simply white plaster.

Justice GARRETT. Will the witness kindly raise his voice a little? It is difficult for me to hear.

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. How long has the Newark Plaster Company been in that business of making white plaster?

A. Since 1911.

Q. And was that the date when the Newark Plaster Company was incorporated?

A. Yes.

Q. In what State?

3245 A. New Jersey.

Q. And what was the predecessor company, if any?

A. The Newark Lime & Cement Manufacturing Company.

Q. How long had that been established, Mr. Tomkins?

A. That was chartered in 1840.

Q. It was a corporation?

A. It was.

Q. And the Newark Plaster Company is a direct successor, is that correct?

A. That is correct.

Q. All during that 104 years, your company has been selling plaster?

A. No, sir. We have been manufacturing white plaster since, I think, about 1854 or 1860.

Q. And from then on, you have been selling plaster?

A. Yes, we have sold what we have manufactured at all times, of course.

Q. Does your company sell directly to the dealer trade?

A. No, it does not.

Q. Did it at any time sell directly to the dealer trade?

A. I don't think the Newark Plaster Company has at any time sold directly to the dealer trade.

Q. What is the Calvin Tomkins Company?

3246 A. That is a wholly-owned subsidiary of Newark Plaster Company.

Q. Is it a corporation?

A. Yes, organized under the laws of the State of New York.

Q. And when was it incorporated?

A. I would have to look that up.

Q. Do you know approximately?

A. No, I would have to guess. It was around 1910 or 1912, I believe.

Q. It is a matter of record, and the exact date I don't believe is important at the moment.

Now are you an officer of the Calvin Tomkins Company?

A. Yes, sir.

Q. What office do you hold with that company?

A. Vice President of Calvin Tomkins Company.

Q. And it has sold all of the white plaster that your company has made for many years, is that correct?

A. That is correct.

Q. And since your company, the Newark Company, has made board, it has also sold the board which the Newark Company made, is that correct?

A. Yes, since the Newark Company made board, it has been sold by the Calvin Tomkins Company, or to the Calvin Tomkins Company.

3247 Q. I don't want to go into the details as to how you sold it, but it has sold the board which Newark has made?

A. That is correct.

Q. At what time did the Newark Plaster Company commence making board?

A. I think the date is January, 1939.

Q. Is that the date that you took over or merged with the Kelley Plasterboard Company?

A. Yes, sir, the Newark Plaster Company merged with the Kelley Plasterboard Company on January 3, 1939.

Justice STEPHENS. 1929?

The WITNESS. No, 1939.

By Mr. STEFFEN.

Q. And prior to that, had the Newark Plaster Company obtained the stock of the Kelley Plasterboard Company?

A. Yes.

Q. And do you recall what date you purchased that stock?

A. That stock was purchased May 1, 1937.

Justice STEPHENS. The transaction of 1939 was an acquisition of the assets?

The WITNESS. It was a merger of the two companies.

By Mr. STEFFEN.

Q. Prior to January 3, 1939, and on May 1, 1937, you had acquired the stock ——

3248 A. (Interposing). The Newark Plaster Company had.

Q. (Continuing.) —of the Kelley Plasterboard Company?

A. Yes.

Q. At the time that you acquired the stock of the Kelley Plasterboard Company, did you have any negotiations with the United States Gypsum Company?

A. Did the Newark Company?

Q. Yes.

A. Yes, it did.

Q. I have here a contract which I will show you, which purports to be an agreement made on the 29th day of April, 1937, between the United States Gypsum Company, the Kelley Plasterboard Company, and the Newark Plaster Company.

Mr. STEFFEN. That is Government's Exhibit 362 for Identification.

Justice JACKSON. Is that in this set of exhibits?

Mr. STEFFEN. No, it isn't, Your Honor. There will be two or three exhibits that we didn't get photostated, by mischance. I don't think there is anything very crucial on this.

Justice JACKSON. No, I was just wondering. It was curiosity, that is all.

Justice GARRETT. This is Exhibit 362?

Mr. STEFFEN. Yes, Your Honor.

3249 (The document referred to was marked as Government's Exhibit 362 for Identification.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit 362, Mr. Tomkins?

A. I have.

Q. And do you recognize the signatures?

A. I do.

Q. The first one is W. L. Keady?

A. That is right.

Q. And Mr. S. J. Kelley?

A. Right.

Q. And your own signature as President of the Newark Plaster Company.

A. That is right.

Q. Do you recall where this contract was signed?

A. No, I don't recall.

Q. Where were your negotiations with USG carried on, where did they take place?

A. They were carried on by our attorney, and I believe by correspondence.

Q. Did you ever talk with Mr. Keady?

A. Did I ever talk with Mr. Keady?

Q. At or about the time this contract was signed.

3250 A. Yes, I believe I did.

Q. Do you know whether it was in Chicago or Newark or New York, or where?

A. I don't recall. It might have been by telephone. I don't believe it was in Chicago. It might have been in New York.

Q. Did you advise him that you were buying the stock of the Kelley Plasterboard Company?

A. Well, I don't recall whether I advised him or whether he received the information from the attorneys.

Q. Did Mr. DeWitt handle that matter for you?

A. Mr. DeWitt handled that matter for our company, yes.

Q. Before you bought the stock of the Kelley Plasterboard Company, did you have certain conferences with Mr. S. J. Kelley?

A. Yes, I had many conferences with Mr. Kelley.

Q. Where did they take place?

A. They took place in New Jersey, in Mr. Kelley's office or in the office of our company.

Q. And did you acquaint yourself with the affairs of the Kelley Plasterboard Company?

A. We did.

Q. Did you know that they were operating under a license from the United States Gypsum Company?

3251 A. Yes, sir.

Q. Did you examine that license?

A. We did.

Q. And did you look over the books and papers of the Kelley Plasterboard Company?

A. We did.

Q. After you—and by "you", now, I mean Newark—

after Newark bought the stock of the Kelley Plasterboard Company, was there any change in the management of the Kelley Plasterboard Company?

A. Well, Mr. Kelley, who had been President, resigned and was no longer connected with the company.

Q. He took no further active part?

A. He took no further active part in the business.

Q. And who became President?

A. I became President of the Kelley Plasterboard Company.

Q. Who were the other officers, if you remember?

A. I am not sure. I would have to refer to the records.

Q. Mr. Miles was Treasurer?

A. Yes.

Q. Was he also connected with the Newark Plaster Company?

A. Yes, he was also Treasurer of Newark Plas-
3252 ter Company.

Q. And Mr. Villiard?

A. Mr. Villiard was an officer, he was Secretary or Assistant Treasurer, I am not sure which.

Q. Secretary, I think you testified before.

And Mr. Calvin Tomkins, Jr.?

A. I believe he was also an officer.

Q. And was he also an officer of Newark Plaster Company?

A. He was.

Q. Now as to the directors, do you recall who were directors of the Kelley Plasterboard Company after you purchased the stock?

A. The officers of the company were directors, and I don't recall whether there were any other directors.

Q. And were they also directors of Newark?

A. I am not sure that all of them were. There were directors in common, but all of the directors of one company were not directors of the other company.

Q. Well, now, were you actively in charge of the affairs of Kelley after you became President?

A. I was.

Q. And concerned yourself with the general details of the business, that is, the policy-making operations?

A. Well, I concerned myself with as few details
3253 as possible.

Q. During this period from May 1, 1937, to Jan-

uary 3, 1939, I take it, the Kelley Plasterboard Company was making board, is that correct?

A. That is correct.

Q. And was the Calvin Tomkins Company selling the board made by the Kelley Plasterboard Company?

A. No, sir.

Q. So during that period the plaster made by the Newark Company was sold by Calvin Tomkins?

A. That is correct.

Q. And the board made by Kelley Plasterboard was sold by Kelley Plasterboard?

A. That is right.

Q. Did they sell to the same customers?

A. Oh, they sold to some customers, they sold board to some customers who also purchased white plaster from the Calvin Tomkins Company. They sold board to many customers who did not purchase white plaster.

Q. Well, now, you have testified that on January 3, 1939, the two companies merged?

A. That is right.

Q. I want to show you Government's Exhibit No. 363 for Identification, which purports to be a contract between the Kelley Plasterboard Company and the

3254 Newark Plaster Company, under date of the 16th of December, 1938, and ask if you can identify that?

Mr. STEFFEN. This, Your Honors, is the first contract in the file that you have there.

(The document referred to was marked as Government's Exhibit No. 363 for Identification.)

By Mr. STEFFEN.

Q. Do you recognize the signatures to Government's Exhibit 363?

A. I do.

Q. I notice that Mr. Villiard had become President at this time.

A. It shows that he was Vice President on my copy.

Q. It shows, on my copy, the "Its" stricken out.

A. I don't know which he was at that time.

Q. And the next signature is that of yourself?

A. That is right.

Q. I now want to show you Government's Exhibit 364, which purports to be a copy of a contract between the

United States Gypsum Company and the Newark Plaster Company, under date of January 3, 1939, and ask you to examine that and state whether or not you recognize the signatures?

(The document referred to was marked as Gov-
3255 ernment's Exhibit 364 for Identification.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit 364, Mr. Tomkins?

A. I have.

Q. And are the signatures genuine?

A. Yes, I identify the signatures.

Q. Do you recall having had any conversation with Mr. Keady at the time this contract was signed?

A. Yes, I discussed this with Mr. Keady before the contract was drawn.

Q. Where, at Newark or Chicago, or where?

A. I think we met in Mr. DeWitt's office in New York, and subsequently in Mr. MacLeish's office in Chicago.

Q. And what did you state to Mr. Keady in your conversations?

Mr. BROMLEY. I object to this as immaterial and incompetent because merged in the contracts.

Justice STEPHENS. Do you wish to be heard on that, Mr. Steffen?

Mr. STEFFEN. No, Your Honor. I can rephrase the question and make it simpler, perhaps.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. Did you discuss with Mr. Keady the purpose
3256 of your merger with the Kelley Plasterboard Company?

Mr. BROMLEY. That calls for a "yes" or "no" answer, I assume, if the Court pleases.

The WITNESS. May I have that question again?

By Mr. STEFFEN.

Q. Did you discuss with Mr. Keady at either of these conversations the purpose of your merger with the Kelley Plasterboard Company?

A. The purpose of the merger?

Q. Yes.

A. I don't recall that we did discuss that.

Q. Well, was there any discussion concerning the reasons for your transaction with the Kelley Plasterboard Company?

A. I have no recollection of discussing our reasons. We were interested in finding out whether the United States Gypsum Company would have any objections. We believed we had the right under the original license agreement to do this, but our attorneys felt it was advisable to check with the United States Gypsum Company before we actually made the assignment. This transaction was handled by the attorneys rather than by Mr. Keady and me.

Q. But you were present at the ——

A. (Interposing.) I was present, yes.

Q. And did they have any objections?

3257 A. They gave us their consent.

Q. Did they state any objections?

A. Not that I recollect, no, sir.

Q. What did you have in mind that they might object about?

A. We didn't know. That was our reason for approaching them.

Q. You didn't know whether they would have any objections at all or not?

A. That is right.

Q. Did the matter of sales by the Calvin Tomkins Company come up in that discussion with Mr. Keady?

A. Yes, it did.

Q. And what was the discussion?

Mr. BROMLEY. I object to that as immaterial. That question raises, I believe, a very important objection to this line of testimony and to these documents, if and when they are offered. Since it comes up this way, I think I had better state my position, with the Court's permission, now.

To the extent that this question calls for an answer for the purpose or with the effect of attempting to show, on the part of the Government, that there was anything illegal about Newark Plaster Company agreeing with USG

3258 that its wholly-owned subsidiary, Calvin Tomkins, which was merely the selling end of the Newark business, would be bound by the provisions of the license between USG and Newark, it seems to me that the matter is immaterial and irrelevant. Obviously the Newark Plas-

ter Company, upon becoming a licensee, could not defeat the provisions of the USG license by selling the patented product through its wholly-owned subsidiary and claiming that the subsequent sale by that subsidiary was a second sale or a resale and therefore not subject to the price restrictions in the license.

This question and the documents which will be offered in connection with it, I assume, merely spell out the rights and liabilities of the parties that the law would imply even if the formal agreements had not been drawn. The business of the Calvin Tomkins Company, that company being a 100 per cent owned subsidiary of the Newark Plaster Company, was under the complete control of the Newark Plaster Company by reason of stock ownership, substantial identity of officers and directors, and there could therefore be no restraint of trade while the patented product was still owned and controlled by the parent company.

The Government has already admitted this, and in the criminal case, in response to this objection by me, specifically stated that it did not contend that there was anything unlawful about this agreement or arrangement
3259 which required Newark's wholly-owned subsidiary to be bound by the provisions of the license, so far as the sales by that subsidiary were concerned, of the patented board made by Newark.

Mr. STEFFEN. Do you have the page of the transcript where that alleged admission is supposed to be?

Mr. BROMLEY. I have.

Mr. STEFFEN. It is page 886, I believe.

Mr. BROMLEY. Page 939. During my cross-examination of this witness, I asked this question, at page 938, of this witness:

"Q. Didn't you have a discussion with the lawyers about the matter of whether or not this transaction couldn't take the form of an agreement by Calvin-Tomkins expressly to charge, as to resale prices, those fixed by Newark ——"

Then I was interrupted by the Court, who said:

"Just one minute, Mr. Bromley. That wouldn't throw any light on the inquiry because it seems that the Government and defense, both, agree that as the Calvin-Tomkins was a wholly-owned subsidiary the Government is raising no question about the control of the Calvin-Tomkins Company so your question doesn't raise the point at issue at all.

"Mr. BROMLEY. I didn't appreciate that the Government was raising no question about it.

"The COURT. That is my understanding.

"Mr. KELLEHER. You were at the bench this
3260 morning, Mr. Bromley.

"The COURT. Sir?

"Mr. KELLEHER. That is correct, your Honor, you stated it this morning.

"The COURT. That is my understanding."

Mr. STEFFEN. Well, if we are going to raise this discussion, I suppose we may as well go into it right now, Your Honor.

I want to call Your Honors' attention also to the discussion which was had at the bench in the morning, and to which this particular reference applies.

On page 886, the Court said—this is Judge Goldsborough:

"I want to learn a little law. I am sure you gentlemen can furnish the law.

"Is it agreed between counsel for the defense and the Government counsel that licensors and licensees were protected in their control of the price made by their wholly owned subsidiaries?

"Mr. KELLEHER. I can explain that in this way: In the indictment we charge that sales, the control of the selling price of Calvin Tomkins was illegal, and made no reference to that charge in the opening to the jury. I am now prepared to tell the Court that we do not intend to press that as illegal because the question is a doubt-
3261 ful legal question."

Now that doesn't contain any concession of the sort that Mr. Bromley is stating here, nor do I find anything in the subsequent colloquy between Mr. Bromley and the Court which affects us at this point.

Perhaps I should very clearly state what our position is here. We expect to show that the Newark Plaster Company has been selling its goods to the Calvin Tomkins Company, which operates in New York—is that not correct, Mr. Tomkins?

The WITNESS. Its operations are not limited to New York.

Mr. STEFFEN. But that is its principal place of business?

The WITNESS. It has its office in New York.

By Mr. STEFFEN.

Q. And the Newark Plaster Company's office is in Newark?

A. That is right.

Q. And the Calvin Tomkins Company is a wholly-owned subsidiary?

A. That is correct.

Q. Now do you sell to the Calvin Tomkins Company?

A. The Newark Plaster Company sells to the Calvin Tomkins Company.

Q. Those are outright sales?

3262 A. Those are sales, made in New Jersey, yes.

Q. And the Calvin Tomkins Company in turn sells out to the dealer trade?

A. That is right.

Mr. STEFFEN. We are not charging here that there is any illegal control of the resale price by the Calvin Tomkins Company. Our charge is the very broad charge that the prices which are charged to dealers by all of these defendants are uniform. We wish to put in this evidence to show what the actual situation is between Kelley at the time, Newark, and Calvin Tomkins; and until we get it before Your Honors, it is hardly possible to rule exactly what the situation is.

The next exhibit which I think I should present to you will perhaps clarify the issue a little more, and I would like to do that; and then I would like to be heard further in response to Mr. Bromley's contention.

Justice JACKSON. How is it material if you say it is not illegal?

Mr. STEFFEN. It is very material, Your Honor, because I think there is a very definite question of whether the matter comes under the license agreement. In other words, it is a matter of defense. Mr. Bromley's whole defense, as I see it, here has been that the license agreements give

3263 him, or the United States Gypsum Company, the right to fix prices. That is defense. If we can show that any substantial amount of board is sold outside of that shelter of the license agreements, then to that extent his defense is washed away. And in this case it will be our very definite contention that the board sold by Newark to Calvin Tomkins, as Mr. Tomkins just told you, is not under the protection of the license agreement.

We don't charge that that is illegal, but we do say that it doesn't have the defense which Mr. Bromley is going to claim for it. What we are saying is illegal in this case — and that is all we have ever said—is that the control of prices to dealers by these defendants has been uniform and has constituted a restraint of trade. And that, I think, makes a complete charge of dominating and controlling the sale and distribution of board throughout the area.

Now let's make this point very clear. Merely
3264 because the defendants choose, between themselves, to treat Newark and Calvin Tomkins as one, certainly doesn't make them one. But I will also say that if they see fit to treat each other as one, we are entitled to offer the evidence upon the assumption which they make. Both of them say that they are one, that is, both Newark and United States Gypsum Company say that Calvin Tomkins and the Newark Plaster Company are one organization, and if so, it is simply a sale by one organization. That is their contention.

Our contention is that it doesn't necessarily make them one, and we want to lay the facts before this Court to decide whether they are or are not, for purposes of determining whether the license agreement gives them the protection which they are going to claim for it.

The next exhibit will show, I think, what I have in mind.

By Mr. STEFFEN.

Q. I would like to show you ——

Justice STEPHENS (interposing). Before you do that, Mr. Steffen, state briefly what the effect of each of these agreements you have introduced or presented, so far, is. The first one is Exhibit No. 362.

Mr. STEFFEN. The first agreement, Exhibit 362, was to show the general consent on the part of United States Gypsum Company to the acquisition by Newark of the Kelley plasterboard stock, and it also contains some pro-
3265 visions, some warranties, on the part of the United States Gypsum Company as to what claims, if any, they may have against Kelley on account of back royalties.

Justice STEPHENS. Did you say "warranties"?

Mr. STEFFEN. Yes, I think that is correct.

Mr. BROMLEY. Isn't all that Exhibit 362 is, what is sometimes known as an estoppel certificate?

Mr. STEFFEN. I think that is correct.

Mr. BROMLEY. So that when Newark bought the stock of Kelley, it could have a binding statement from United States Gypsum, who had this important contract with Kelley, that Kelley was not in default, and did not have any undisclosed liabilities to United States Gypsum.

I think that is all there is in it except that on page 3 there is a reference which bears on this question, in paragraph 3, a little below the middle:

"Without in any way limiting the generality of the foregoing, it is expressly agreed that any sale by Newark or by any subsidiary or affiliated company, of materials or products manufactured or sold by Kelley and embodying any of the inventions and improvements which are covered by or included within the provisions of said license agreements, or either of them, and any dealings of any kind in any such materials or products by Newark or by any subsidiary or affiliated company, shall, at the option of
3266 Gypsum (that means United States Gypsum Company) be deemed to be the act of Kelley for all purposes of said license agreements; PROVIDED, HOWEVER, that nothing herein contained shall be deemed or construed to give Kelley the right to sell or otherwise dispose of such materials or products in any way to Newark, except upon the prior written content of Gypsum as provided in said license agreements."

Justice STEPHENS. What is Government's Exhibit 363?

Mr. STEFFEN. Government's Exhibit 363, your Honor, is simply an agreement between Kelley and Newark, constituting the agreement of merger.

Then Exhibit 364 is a further agreement between United States Gypsum Company and Newark, consenting to the merger and stating certain conditions regarding the sale of board by the Newark Plaster Company.

I might say that Exhibit No. 364 is already in evidence.

Mr. BROMLEY. I don't think that summary is right at all.

Exhibit 363, which you offered in evidence, is a three-page document which is merely an assignment, and nothing else, of the license agreement by the Kelley Plasterboard Company to the Newark Plaster Company, dated December 16, 1938.

Justice STEPHENS. It seemed to the Court that that is what it was, as the Court read it.

Mr. STEFFEN. I think that is correct, your Honor.

Justice STEPHENS. It isn't an agreement of
3267 merger, is it?

Mr. STEFFEN. No, but it is one of the agreements in connection with the merger.

Justice STEPHENS. I had understood you to say it was an agreement of merger.

Mr. STEFFEN. If I did, I did not mean that.

Mr. BROMLEY. It is a simple assignment.

Justice STEPHENS. Of the license agreement.

Mr. BROMLEY. Yes, your Honor. That exhibit, standing by itself, is probably material. For what it is worth, it shows that Newark got a license by the assignment route.

The next exhibit, No. 364, is the January 3, 1939, agreement, which, in paragraph 3, on page 3, raises the question which I have been arguing.

Justice STEPHENS. What is the purport of the whole agreement, Mr. Bromley?

Mr. BROMLEY. The purport of the whole agreement is that United States Gypsum consents to the assignment to Newark of the Kelley license. Newark agrees to be bound by the license, and in case Newark shall make its sales through a subsidiary, as it intended to do, then this agreement provides that the sales or acts of such subsidiary shall, for all purposes of the license agreement, be construed as the sales or acts of Newark, as such licensee, and Newark shall be responsible therefor.

Here was a somewhat unusual situation when
3268 Newark, a manufacturer, didn't sell anything; for some reason of its own, and I think Mr. Tomkins will tell us that that reason was a tax reason, it had a 100 per cent owned subsidiary which acted as its selling agency. I mean by that, that its 100 per cent owned subsidiary performed the entire selling function for Newark, Newark did not sell anything to any customer. It transferred all of its products to the Calvin Tomkins Company.

Now it did that by way, as Mr. Tomkins has said, of a sale, for tax reasons. It didn't want Calvin Tomkins, for tax reasons, to be an agent, because then the separation wouldn't have done any good, tax-wise. It wanted to maintain the form of purchase and sale, and when we were confronted with that, we said, "Well, how is our license going to be observed if Newark is going to do the selling through this instrumentality?"

I suppose we might have rested on the doctrine of "piercing the corporate veil", if we had wanted to, and I suppose that we could have successfully contended that no licensed manufacturer could avoid the provisions of a license by forming a 100 per cent owned subsidiary and selling all of its products to that subsidiary, and letting it resell them. That would be a clear evasion, and I suppose any court would hold the subsidiary to be an instrumentality for the purpose of the license agreement.

So, in order to make the situation clear, this
3269 agreement was entered into, and I still insist, when it was called in the criminal case and explained this way to the court there, that my reference to pages 938 and 939 shows that Mr. Kelleher, after he understood it, said, "That is correct—the Government makes no contention that the sale by Newark to Calvin Tomkins, and then the resale, with the price control still attaching, is illegal". And I think it plainly was not illegal.

Justice STEPHENS. What is the next agreement you wish to explain to the Court—so we will have this matter fully before us.

Mr. STEFFEN. I should like to show you, Mr. Tomkins, Government's Exhibit 365 for identification, which purports to be a consent, under date of January 3, 1939, by the United States Gypsum Company, signed by Mr. Keady, that Newark could sell to the Calvin Tomkins Company.

Justice JACKSON. May I ask one question, Mr. Steffen?

Mr. STEFFEN. Yes.

Justice JACKSON. Is it your idea that if, as Mr. Bromley has argued, there was a concession on the part of the Government in the criminal case, that it is binding on the Government here?

Mr. STEFFEN. We would be willing to abide by it if it has been made. I don't know that we are required to, but I think that in good faith we should do that.

Justice STEPHENS. You are contending now that
3270 despite the concession, if there was a concession ——

Mr. STEFFEN (interposing). I don't think there was such a concession—certainly not as Mr. Bromley construes it.

Justice JACKSON. And your thought is, that if there were such a concession, you are bound by it here?

Mr. STEFFEN. I am perfectly willing to be bound by what Mr. Kelleher said.

Mr. BROMLEY. Didn't you hear what he said when I read it?

Mr. STEFFEN. Just a minute. I want to make it clear that in the criminal case, under the indictment there was only a very limited charge which had to do with control of resale prices by manufacturing distributors, and Calvin Tomkins Company was not a manufacturing distributor.

Mr. BROMLEY. You know that in the Bill of Particulars that Calvin Tomkins Company, in answer to our question, was designated as a manufacturing distributor—erroneously, that is true, but that is the way the point arose. So there was a definite charge on this Calvin Tomkins matter, both in the indictment and in the Bill of Particulars, and that is why we had the conference at the bench, and that is why I raised the point, and I never could get Kelleher at the bench to withdraw the charge, and it wasn't until my cross-examination at pages 938 and 939 that he finally withdrew it. But it was directly in issue under the indictment, as amplified by the Bill of
3271 Particulars.

Mr. STEFFEN. My point, prior to being interrupted, was that the Calvin Tomkins Company, as a fact, was not a manufacturing distributor. As Mr. Tomkins has said, they have simply sold, and were acting either as a selling agent for the Newark people, or they bought from the Newark people and resold.

The situation here is that Mr. Bromley would like to treat them as though they were a selling agent. The Newark Plaster Company has treated them as though they were a company to whom they sold, and then there was a resale.

I say that our position at this moment is that we are interested in the control of the price of board sold to dealers and we don't care, for the moment, whether it has been sold through Calvin Tomkins, as an agent, or sold to Calvin Tomkins and resold to dealers. For the purpose of introducing this testimony, however, we are going to take Mr. Bromley's position, and say that they are estopped to deny, as I see it, both Newark and USG, that Calvin Tomkins and Newark are one and the same; whatever evidence of control there is certainly comes in.

On the other hand, when we come to final argument, and there is a question of whether or not Mr. Bromley's license

agreement covers and affords protection to sales of this character, we will argue very clearly that it does not. A licensor may not, by virtue of just saying, "We have
3272 licensed A, and we are going to treat B as though A and B were one"—say that we can control in any fashion the resale price of B.

It seems to me that that type of transaction is completely out from under the license agreement. But it is not an issue at this moment.

For the purposes of this discussion, we are prepared to treat the Newark people and the Calvin Tomkins people just as both the defendants have, as though they were one company.

I want to point out, however, that Exhibit No. 365 very definitely says that they also had in mind the idea of selling, that is that Newark would sell to Calvin Tomkins. The first paragraph there says, "Which includes the right to effect sales of said gypsum plasterboard or gypsum wallboard to your said wholly owned subsidiary at a maximum discount of twelve and one-half per cent (12½%) from your regular price to your dealer trade f. o. b. mill."

Now it is subterfuge, one way or the other.

All that I ask is that the whole facts be presented to the Court, and I think it is the Court's decision, when the time comes, as to what the actual relationship is, and what the effect is to be.

I therefore now offer in evidence Government's Exhibit 362, 363, and 365. Exhibit 364 has already been admitted as Exhibit 16.

Mr. BROMLEY. I renew my objection to all of them
3273 on the ground that they are immaterial and incompetent, and move to strike Exhibit 16.

In that connection it seems to me it might well be that these documents would have some materiality as showing the general situation, and all I am trying to get from Government counsel is a statement whether, in connection with the offer of this testimony, he is going to claim, and therefore is offering these exhibits to prove, that the sale by Calvin Tomkins of patented gypsum board was unlawful because it was, in effect, a resale at prices unlawfully controlled by United States Gypsum?

I still don't know whether he contends that or not.

Justice STEPHENS. Well, it seems to the Court that he is contending that it is illegal, and that is what he intends

to contend at the close of the case, and yet he states that he is willing to abide by the concession that it was not illegal, if there was a concession to that effect made on the criminal trial.

Mr. STEFFEN. The concession was not that broad.

Justice STEPHENS. I said "if there was a concession."

The Court thinks it ought to read the material at pages 938 and 939 in the criminal proceeding, and also the material referred to by Mr. Steffen at page 886.

Will you hand them to the Marshal, please, and let the Court take its usual morning recess and look
3274 at them? If it won't harm the record, mark where the material in question commences and ends, if you will?

Let the Court be in session for a moment. What do you say, Mr. Bromley, to Mr. Steffen's contention that the issues in the criminal case were much more limited than here, and therefore the concession may not be applicable?

Mr. BROMLEY. I say that both the indictment and the Bill of Particulars directly charged that the resales by Calvin Tomkins were illegal because they constituted the same kind of resale price fixing as was the heart of the indictment.

(A copy of the transcript of testimony in the criminal trial, containing the matter referred to by counsel, was handed to the Court.)

Justice STEPHENS. The first passage is at page 858?

Mr. BROMLEY. 886 is where Mr. Steffen quoted from.

Justice STEPHENS. 886 is one of them?

Mr. BROMLEY. Yes, beginning at line 6 and running to line 18.

Justice STEPHENS. What is the other?

Mr. BROMLEY. Page 938, beginning at line 13, and ending on page 939, at line 8.

Justice STEPHENS. Thank you. We will be in recess ——

Mr. BROMLEY (interposing). May I, before the recess, call your Honors' attention to the fact that although Mr. Steffen has only marked a few lines on page 886,
3275 the discussion which we had at the bench runs over for several more pages.

Justice JACKSON. Subsequent to page 886?

Mr. BROMLEY. Yes, your Honor, right along, and the court took the view, strangely enough, that the thing was

illegal, but since the Government didn't press it, it went out of the case.

Justice STEPHENS. We will now be in recess.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice STEPHENS. The Judges have read the material in the criminal record, the record of the criminal case, handed up by counsel, references to which are already in the court reporter's notes, and it seems to all three of us, Mr. Steffen, that there was a clear concession there by Mr. Kelleher that there was nothing illegal under the Sherman Act in respect of the sale by Newark through Tomkins, whether it was a wholly-owned subsidiary, agent, or what-not.

Since you have stated that you feel bound by that concession, it seems to us that that takes that issue out of the case.

We think, however, that these exhibits may be received in evidence to show the general relationship of all of the parties, subject to that concession.

That is the ruling of the Court.

3276 The motion to strike Exhibit 16 is denied in order that the exhibit may remain in the record as Exhibit 364, for the purpose of showing the general relationship of the parties; otherwise it is in the record subject to the concession.

(The documents marked as Government's Exhibits Nos. 362 to 365, inclusive, were received in evidence.)

Justice STEPHENS. I might add that we have noted, Mr. Steffen, and considered your contention that the issues in the criminal case were more limited, but the charge in the criminal case, although it was limited to resale price fixing by manufacturing distributors, was nevertheless a charge of resale price fixing, that is the charge of the illegal fixing of prices to dealers; and that is the charge here. It seems to us that the concession is really on all fours with the situation here.

Mr. STEFFEN. If I might, I should like to make a very short statement.

We have visualized the complaint in paragraph 45 (a), as stating broadly a control of prices to dealers, and that is the principal charge which we find in the complaint. This is a control of dealers' prices.

In paragraph 45 (e), we say, "concertedly inducing and

coercing manufacturing distributors to resell," and so forth, and that is a separate type of restraint. That
3277 is, A can sell to B, and if he coerces B to resell at a given price, that is a restraint in itself.

If A sells to B at a fixed price, that is the type of restraint charged in paragraph 45 (a).

Now what we say as respects this testimony is that these exhibits are clearly admissible for purposes of showing a violation of 45 (a), a control of prices to dealers. All the board manufactured by Newark has been sold, and it would be a peculiar circumstance if they could get a wholly-owned subsidiary, and then sell through that and then say, "Well, as far as our control of prices to dealers is concerned, there is no violation." Of course, obviously that is a violation.

Now the narrow question of whether there was a control of the resale price of the Calvin Tomkins Company as being a company that had bought from Newark and then resold, is charged in 45 (e), and it does not apply to the Calvin Tomkins Company—we are agreed upon that. That is, we do not regard the Calvin Tomkins Company, for the purposes of this case, as a manufacturing distributor, which is what paragraph 45 (e) says.

But whether it is charged or isn't charged, I think it is essential that we get the evidence before the Court, as we have attempted, as to just what the relationship between the three parties is.

Justice JACKSON. Well, the Court has ruled that
3278 you may do that.

Mr. STEFFEN. And I think we should proceed on that score.

Justice STEPHENS. Well, the Court has ruled that you may show what the general relationship of the parties was for the purpose of the entire case, but the Court is of the view clearly that there was a concession in the criminal case that there was nothing illegal under the Sherman Act about the sale by Newark to or through Tomkins.

Mr. STEFFEN. I would like to draw this one distinction, that as I understood Mr. Kelleher, it was that he was not pressing it in that case. Secondly, that there is a difference between saying that it is illegal and saying that it is protected under the license agreements.

Mr. Bromley's defense, of course, is that this board was sold under the license agreements, and that the General

Electric case permits them to fix prices, resale prices, or prices of any sort. Whether or not this is the type of case contemplated in the General Electric case I very gravely doubt, and wish to reserve the privilege of arguing that at the conclusion, as a matter of law.

Justice STEPHENS. Well, the Court isn't ruling now on the question of whether or not the license agreements were used as the Government charges, as a cloak, or were used in a manner which takes them beyond the purview of the ruling of the Supreme Court in the General Elec-
3279 tric case.

Of course there is a distinction between what might be legal between the parties to a license agreement, as to who would be bound by it, as to whom it might be said to apply—that is a private agreement that can be entered into by the parties to license agreements—and, on the other hand, the question of whether or not those arrangements violate the Sherman Act.

But the point that it seems to us the Government has bound itself on is that the Government, knowing in the criminal case, as it knows here, what these contracts between these parties were, the United States Gypsum Company, the Newark Company and the Tomkins Company, nevertheless conceded that so far as the Sherman Act was concerned, there wasn't a violation of law, at least the Government was not going to contend that there was a violation of law in the sale by Newark to or through Tomkins.

Mr. STEFFEN. I think that it was the latter that the Government was not there contending, and as I have explained we are not here contending that that is a direct violation.

What we are contending is that it is not protected under the license agreements.

But I will proceed with the examination.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. I now wish to refer you, Mr. Tomkins, to
3280 Government's Exhibit 365, the next to the last paragraph thereof, stating, "It is agreed that this consent may be withdrawn by us at any time, by giving you written notice to that effect".

Are you familiar with that?

A. Yes.

Q. And it was your understanding that the United States Gypsum Company could withdraw their consent at any time?

A. Yes, we signed this agreement.

Q. And is that the usual way that they gave you consent to sell through manufacturing distributors?

Mr. BROMLEY. I object to that as calling for a conclusion, and as incompetent.

Mr. STEFFEN. I am asking for the practice, your Honor, as to whether they ordinarily conditioned their consent by the proposition that it could be withdrawn by them at any time.

Justice STEPHENS. Well, if the objection is insisted upon, it does seek a legal conclusion. The question of what method they used in providing for a consent or withdrawal of consent would have to be shown by each contract. The witness cannot testify to the general practice. That is a legal conclusion. The objection is sustained.

By Mr. STEFFEN.

Q. Is it your understanding that the United States Gypsum Company could withdraw its consent not only with respect to your sales to Calvin Tomkins, but with
3281 respect to your sales to any other manufacturing distributor?

A. I would have to see those consents to answer that question.

Q. At the time, Mr. Tomkins, that Newark took over the Kelley Plasterboard Company, did you have any discussions with Mr. Kelley concerning sales to so-called manufacturing distributors?

Justice STEPHENS. Will you read that question?

(Thereupon, the pending question was read by the reporter.)

By Mr. STEFFEN.

Q. Do you know what I mean by the term "manufacturing distributors"?

A. Yes, I think I am clear on that.

Q. Now will you answer my question?

A. Prior to the time we took over the Kelley Plasterboard Company I had had discussions with Mr. Kelley in

the course of which he had disclosed the agreements or understandings he had with some of the so-called manufacturing distributors to sell them board.

Q. And what was your understanding of that arrangement, or of those arrangements?

Mr. BROMLEY. Were they in writing, may I inquire, if the Court pleases?

The WITNESS. I am not sure that they were, Mr.
3282 Bromley. I know that Kelley was selling, prior to our acquisition of the company, certain manufacturing distributors. Whether it was a matter of written contract or not, I don't know.

Justice STEPHENS. By a "manufacturing distributor", you mean, I assume, Mr. Tomkins, a person or company who made plaster but bought board and then sold both of them?

The WITNESS. That is right.

By Mr. STEFFEN.

Q. Could you name the distributors that Kelley was selling to when you took over the Kelley Plasterboard Company?

A. Kelley was selling to the Oakfield Gypsum Products Company, the Paragon Plaster Company, and the Structural Gypsum Company.

Q. Were they selling to the Connecticut Adamant Plaster Company at that time, do you remember?

A. No, I do not think they were.

Q. Now what did Mr. Kelley say to you concerning those transactions?

A. Well, I don't remember specifically what he said to me as to any of those transactions. The understanding I had ——

Mr. BROMLEY (interposing). Just a moment, I object to his understanding, if the Court pleases.

Mr. STEFFEN. I insist upon his understanding, your Honor. Mr. Tomkins has purchased the Kelley
3283 Plasterboard Company and his understanding is very relevant as to that type of business.

Justice STEPHENS. The question is not as to its relevancy, but as to its competency.

You are not required or expected to remember, Mr. Tomkins, the very words which you said or exchanged with Mr. Kelley.

The WITNESS. I understand that.

Justice STEPHENS. If you can remember the substance and effect of the conversations, you should state that. But if what you mean is exactly what you say, that you don't remember the substance and effect of the conversations, but that you remember only what your understanding was, in the sense of an inference from them, that is not competent.

Do you remember the substance and effect of the talks you had with him?

The WITNESS. Yes, I remember the effect, I don't remember the conversations.

Justice STEPHENS. Tell what the substance and effect were.

The WITNESS. Simply that Kelley had arrangements with these manufacturing distributors for which he had secured consents from the United States Gypsum Company, and which permitted him to sell under the license agreements to these companies at certain discounts.

By Mr. STEFFEN.

Q. The discounts were 12½ and 15 per cent?

A. 12½ per cent for lath, and 15 per cent for
3284 wallboard.

Q. Did he state whether that was good business or not? It provided an additional tonnage, did it?

A. It increased his volume of sales, yes.

Q. And was it your understanding that the manufacturing distributors would resell at any given price?

Mr. BROMLEY. I object to that as incompetent.

Justice STEPHENS. Will you read that?

(Thereupon, the pending question was read by the reporter.)

Justice STEPHENS. Well, I believe, Mr. Steffen, that that is incompetent.

By Mr. STEFFEN.

Q. Did you have any conversation with Mr. Kelley as to the price at which the manufacturing distributors would resell?

A. I don't recall any such conversation, no, sir.

Q. And what was your understanding?

Mr. BROMLEY. Same objection.

Justice STEPHENS. The objection is sustained.

By Mr. STEFFEN.

Q. In this period between May, 1937, and January 3, 1939, did you write to the United States Gypsum Company for further consents, do you recall?

A. I believe such letters were written. Whether I wrote them or not, I don't know.

3285 Q. I show you now Government's Exhibit No. 366 for identification, which purports to be a copy of a letter, under date of July 8, 1937, addressed to the United States Gypsum Company, and signed G. A. Wileman.

Justice JACKSON. Is that in our file here?

Mr. STEFFEN. Yes, if you will just skip one.

Justice STEPHENS. That will be what number, Mrs. Gillette?

Mrs. GILLETTE. Exhibit 366.

By Mr. STEFFEN.

Q. Who is Mr. G. A. Wileman, if you know?

A. Mr. Wileman was the office manager of the Kelley Plasterboard Company.

Q. Is he still with your company now?

A. No, he is not.

Q. Do you recognize that letter as a copy of a letter that Mr. Wileman sent to United States Gypsum Company?

A. I cannot recognize this letter, it has no signature or identifying marks, but I believe such a letter was sent.

Q. Now I want to show you Government's Exhibit No. 367, which purports to be a carbon copy of a reply to the letter of July 8, 1937, this letter being addressed to Mr. Fred Tomkins, under date of July 14, 1937.

Do you recognize that letter?

A. The same answer applies as to the last letter. It is unsigned. I believe this letter was received.

3286 Q. I now show you Government's Exhibit 368 for identification, which purports to be a copy of a letter signed by you, addressed to Mr. Keady, under date of July 21, 1937.

Do you recognize that, Mr. Tomkins, as a copy of a letter which you sent Mr. Keady?

A. Yes, I recognize that.

Q. Do you recall whether you got consents from Mr. Keady to sell to the Structural Gypsum Division of the American Cyanamide & Chemical Company, and the Oakfield Gypsum Products Company, as requested in the letter?

A. Yes, we did receive those consents.

Q. I now want to show you Government's Exhibit No. 369, which purports to be a letter, or rather, a copy of a letter, signed by you, addressed to United States Gypsum Company, under date of September 23, 1938, and ask if you can identify that letter.

I have shown you, I find, the carbon copy. I also have the original and I would like to show you that. This is the original of Government's Exhibit No. 369.

Justice STEPHENS. Do you wish to substitute it for the copy?

Mr. STEFFEN. Yes, I do.

Justice STEPHENS. Then withdraw the copy, Mrs. Gillette, and return it to counsel, and mark the original as Government's Exhibit No. 369.

3287 (Thereupon, the original of Government's Exhibit No. 369 for identification was substituted for the carbon copy thereof.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit 369?

A. Yes.

Q. And is that your signature, Mr. Tomkins?

A. It is.

Q. I now show you Government's Exhibit No. 370—this is not in your files, your Honors. I find I have the original of the consent. Government's Exhibit 370 purports to be a consent given by Mr. Keady of the United States Gypsum Company, addressed to the Kelley Plasterboard Company under date of October 3, 1938, in answer to Mr. Tomkin's letter of September 23, 1938.

Justice STEPHENS. Do you have photostats of that?

Mr. STEFFEN. I do not have photostats of that, but I will obtain them.

Justice STEPHENS. Will you please furnish them later so that the Court may have them?

Mr. STEFFEN. Yes, your Honor, we will.

Justice STEPHENS. Will you hand to the Court, Mrs. Gillette, so that the Court can see it, that exhibit?

Mr. BROMLEY. If we could see it—we may have photostats that we can furnish to the Court.

3288 Justice STEPHENS. Thank you.

(The document marked as Government's Exhibit No. 370 was handed to the Court for inspection and then handed to Mr. Bromley after examination by the Court.)

Justice STEPHENS. Did I understand you to say, Mr. Bromley, that the defendants might have photostats of this exhibit.

Mr. BROMLEY. Yes, your Honor, we find that we now have three photostats of Government's Exhibit 370 for identification.

Justice STEPHENS. That will save you the necessity of having to make them, then, Mr. Steffen. Thank you, Mr. Bromley.

(Photostatic copies of Government's Exhibit No. 370 for identification were handed to the Court and Government counsel by Mr. Bromley.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit 370 for identification, Mr. Tomkins?

A. I have.

Q. Do you recognize it as a letter which you received?

A. Yes, sir.

Q. That is your signature at the foot, is it?

A. It is.

Mr. STEFFEN. We now offer in evidence Government's Exhibits 366, 367, 368, 369 and 370.

Justice STEPHENS. Is there any objection?

3289 Mr. BROMLEY. May I see the original exhibits?

Justice STEPHENS. Yes, hand them to Mr. Bromley, Mrs. Gillette.

(Thereupon, the originals of the exhibits referred to were handed to Mr. Bromley.)

Mr. BROMLEY. May it please the Court, I make no objection as to competency, in the sense of lack of identification. I do, however, under the "complete evidence" rule, object to Exhibits 366, 367 and 368, on the ground that these letters were all answered, and consents given, and that it is unfair and improper to offer these exhibits without the answers, and especially in view of the fact that Exhibit 368 has a penciled note on it, "No answer as yet", leaving the inference that these requests for consents were never acceded to.

Therefore, unless the Government will stipulate, or produce the answers, all of which it has, to these requests, I object under the "complete evidence" rule.

Justice STEPHENS. Will you produce those, Mr. Steffen?

Mr. STEFFEN. I don't think we have them. I would like to ask Mr. Bromley to produce them.

Mr. BROMLEY. I will be glad to hand them to you to produce.

I now hand you photostats of the documents which were returned to the Government under subpoena, these photostats having been made at the time we delivered
3290 the originals of these documents to the Department of Justice, several years ago.

Mr. STEFFEN. In the course of those years, they may have disappeared, we don't have them, your Honor.

Mr. BROMLEY. Mr. Collins says I have been too generous in giving you all of our copies—give us some back.

Mr. FINCK. If the Court please, on behalf of Baker and National, I object to Exhibits 368, 369 and 370 in so far as they relate to perforated lath.

Justice STEPHENS. Well, in view of the ruling of the majority of the Court, that objection will be overruled.

Mr. FINCK. I just wanted to record it.

Justice STEPHENS. Surely, you are entitled to do that.

Mr. JOHNSTON. I take it, if the Court please, that there isn't any necessity of continuing with these objections in view of the ruling made, because our exception will be saved all the way through.

Justice STEPHENS. The record may show that Celotex, Texas and National have their continuing objection to evidence concerning perforated lath and metallized board.

The objection now made with respect to perforated lath is overruled, consistent with the Court's ruling on the reserved objections.

Mr. STEFFEN. As I understand it, the only objection now made is as to the completeness of these documents, and Mr. Bromley has handed us copies of certain
3291 documents.

If we might take the noon recess at this time, we will examine them and clear that up after we reconvene.

Justice STEPHENS. Yes, that may be done.

Justice GARRETT. Perhaps you might like to change the numbering of the exhibits already offered, in order to keep them in chronological sequence.

Justice STEPHENS. That might be done by giving "A" numbers to these additional exhibits.

The Court will now take its noon recess.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

AFTERNOON SESSION

3292 (The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice STEPHENS. Proceed.

Thereupon, Frederick Tomkins, the witness on the stand at the time of recess, resumed his testimony as follows:

DIRECT EXAMINATION (Resumed).

Mr. STEFFEN. At recess we had offered Government's Exhibits 366, 367, 368, 369, and 370.

Mr. Bromley supplied us with certain letters which we have examined during the recess, and the first of these is a letter dated July 16, 1937 ——

Justice STEPHENS (interposing). Perhaps, Mr. Steffen, we had better wait until Mrs. Gillette gets here so we can have these marked in regular order.

Mr. KNUFF. I believe she was here, Your Honor. I think I saw her going down the hall a minute ago.

Justice STEPHENS. Well, we will wait just a moment, that is to say, if you have something to mark. If you haven't, go ahead.

Mr. STEFFEN. All I have is a photostatic copy supplied to me, and it was supplied upon the basis of being a genuine letter from the United States Gypsum Company addressed to Mr. Frederick Tomkins, under date
3293 of July 16, 1937, and in reply to Mr. Wileman's letter of July 8, 1937.

Justice STEPHENS. Here is Mrs. Gillette now, if you wish to have that marked.

Mr. STEFFEN. We are very glad to offer that as Exhibit 366-A, as a reply to Mr. Wileman's letter which is Exhibit 366.

Your Honors do not have copies of it unless Mr. Bromley has supplied you with them.

Justice STEPHENS. It may be marked Exhibit 366-A. That will be the most convenient way of marking, because otherwise the Court Reporter's records of this morning will not be correct.

(The document referred to was marked as Government's Exhibit No. 366-A for Identification.)

Justice JACKSON. That is in answer to Exhibit 366, is it?

Mr. STEFFEN. Yes, Your Honor.

We were also furnished with a photostatic copy of a letter dated July 26, 1937, from the United States Gypsum Company to Mr. Frederick Tomkins, in reply to his letter of July 21, which is Government's Exhibit 368. We ask that that letter of July 26, 1937, be marked Exhibit 368-A.

Justice STEPHENS. It may be so marked.

(The document referred to was marked as Gov-
3294 ernment's Exhibit No. 368-A for Identification.)

Justice STEPHENS. Are there copies of that for the Court?

Mr. COLLINS. Yes, sir.

(Copies of Exhibit 368-A handed to the Court.)

Mr. STEFFEN. I would like now to offer 366, 366-A, 367, 368, and 368-A. The one objection that was made to those exhibits, of lack of completeness—which we doubt is a valid objection—has now been met, and we are offering all five exhibits.

Justice STEPHENS. Do you have any objection now, Mr. Bromley?

Mr. BROMLEY. Only the usual one.

Justice STEPHENS. Exhibits 366, 366-A, 367, 368, and 368-A are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 366, 366-A, 367, 368, and 368-A, were received in evidence.)

Mr. STEFFEN. The objection was further made that the letter of September 23, 1938, which is Exhibit 369, was incomplete, and Mr. Bromley supplied us with another letter dated September 23, 1938, signed by Mr. Tom-
3295 kins, addressed to the United States Gypsum Company, which has to do with the same matter. He further supplied us with a letter, a second letter dated October 3, 1938, which has to do with the same matter as Government's Exhibit 370, which is dated October 3, 1938.

I don't believe that the Government's exhibits, as offered that is, 369 and 370, can be criticized for being incomplete. Exhibit 369 is a request for a consent to sell. Exhibit 370 is a letter granting a formal consent to sell. It seems to me, while we have no serious objections to the two letters offered by Mr. Bromley, I think they are more properly a matter for his case.

Justice GARRETT. And so you do not offer them?

Mr. STEFFEN. We do not, at this time, offer the two additional letters which Mr. Bromley furnished us.

Justice STEPHENS. Was one of them a response to the letter of September 23, Exhibit 369?

Mr. STEFFEN. Yes, I think it is, Your Honor.

Justice STEPHENS. Well, it probably would be more convenient for the Court if they were all in at this time, if you have no serious objection.

Mr. STEFFEN. I have no objection, Your Honor.

Justice STEPHENS. Let that be marked Exhibit No. 369-A.

3296 (The document referred to was marked as Government's Exhibit No. 369-A for Identification.)

Mr. STEFFEN. I see no grounds for offering 369-A, which we will call the letter of September 23, 1938, which Mr. Bromley gave me. It raises a discussion which is more appropriate to Newark and USG than to any issues in this case.

Justice STEPHENS. Perhaps I misunderstood you. I asked you if you had a response to the September 23, 1938, letter, Exhibit No. 369, and I understood you to say yes, and I suggested that you offer that.

Mr. STEFFEN. What I thought, Your Honor, was that the letter of October 3, 1938, or the consent, is a response.

Justice STEPHENS. And the letter of October 3 is Exhibit 370?

Mr. STEFFEN. That is right.

Justice STEPHENS. Have you any objection to 369 as incomplete, Mr. Bromley?

Mr. BROMLEY. Yes, Your Honor. An inspection of the second letter of September 23, 1938, shows that Exhibit 369 was but an enclosure. Therefore, Exhibit 369, which he is now offering, is nothing but an enclosure in another letter. What I handed him was the chief letter, to which Exhibit 369 was annexed as an enclosure.

3297 Justice STEPHENS. I see.

Do you object to offering that, Mr. Steffen?

Mr. STEFFEN. I don't know what Mr. Bromley wants it in for, and I am suspicious, to be perfectly frank. I don't think it is a serious matter one way or the other.

Mr. BROMLEY. I do. I think where a letter is enclosed with another letter, and you offer merely the en-

closure, that you ought to offer the covering letter along with it.

Mr. STEFFEN. The letter we have marked Exhibit 369 is a complete letter, and it doesn't make any difference whether it was enclosed with a dozen letters or was simply a single letter.

Justice STEPHENS. If it is an enclosure referred to in some other letter with which it was sent, it seems that the Court ought to be informed.

Mr. STEFFEN. We will be very glad to inform the Court, and will offer at this time as Exhibit 369-A, a copy of a letter from Kelley Plasterboard to USG, dated September 23, 1938, which encloses the request, which is Government's Exhibit 369, of the same date.

Justice STEPHENS. This says, in the first paragraph, "We enclose herewith copy of your letter of September 16".

Mr. STEFFEN. Do you have that, Mr. Bromley? If we are going to start enclosing, we might as well put them all in.

Mr. COLLINS. That is already in evidence, I be-
3298 lieve.

Justice STEPHENS. Does that refer to the one of September 23?

Mr. STEFFEN. I think that is in evidence, as Mr. Collins points out.

Justice JACKSON. That is, that 369-A is in evidence?

Mr. STEFFEN. No, the letter referred to in Exhibit 369-A as being dated September 16.

Justice STEPHENS. But what we were talking about a moment ago was the letter of September 23, Exhibit 369. Mr. Bromley objects on the ground that that is an enclosure, and you have offered 369-A as the letter in which 369 was enclosed; and it refers, in the first paragraph, not to the letter of September 23, Exhibit 369, but to a letter of September 16.

Mr. STEFFEN. You will find in the second paragraph, the second sentence ——

Justice STEPHENS (interposing). I thank you, I am sorry. I find it now.

Exhibits 368-A, 366-A, and 369-A are offered in evidence. Is there any objection to them?

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. The exhibits are received, subject to

the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit
3299 No. 369-A was received in evidence. Government's Exhibits 366-A and 368-A were previously received in evidence.)

Justice STEPHENS. Is this letter of September 16, which is referred to in the first paragraph of Exhibit 369-A, in evidence?

Justice GARRETT. That seems to be Exhibit 366-A.

Justice STEPHENS. That is right.

Justice GARRETT. The identification of these exhibits that you have now offered is waived, I suppose?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. There is no objection made on the ground of identification.

Exhibit 369 is received in evidence, subject to the same reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 369 was received in evidence.)

Justice STEPHENS. Exhibit 370 has apparently not yet been offered.

Mr. STEFFEN. To make the record entirely clear, the letter of September 23, 1938, which is 369-A, and a
3300 photostatic copy of which was supplied to me by Mr. Bromley, refers to a letter of September 16 as being enclosed, and I have a copy of the letter of September 16, 1938, which was enclosed. I am not clear whether it was admitted in evidence to begin with, as one of the very early exhibits, or not.

At any event, I now also show the letter of September 16, 1938—and I have the original of the letter of September 23, 1938, which is Exhibit 369A—I can show both of those to the witness.

Justice STEPHENS. You may do so.

Mr. STEFFEN. And I would like to substitute the original of Exhibit 369-A for the photostat of Exhibit 369-A, and have the enclosure of September 16, 1938, marked as Exhibit 369-B.

Justice STEPHENS. That may be done.

(The document referred to was marked as Government's Exhibit No. 369-B for Identification.)

By Mr. STEFFEN.

Q. Will you look at Exhibit 369-B, Mr. Tomkins, and state whether or not you recognize Mr. Knode's signature?

A. Yes, I do.

Mr. STEFFEN. I think that Exhibit 369-B is substantially the same as Exhibit 32, which was admitted in evi-
3301 dence on the first day, but Exhibit 32 is dated January 3, 1939. This is offered simply for the purposes of completeness.

Justice STEPHENS. Very well. Will you furnish the Court with photostats of it so our file will be complete?

Mr. STEFFEN. We will.

Justice STEPHENS. Will you hand us that, Mr. Marshal?

(Copies of Exhibit 369-B handed to the Court.)

Justice STEPHENS. Exhibit 369-B has not been acted upon, is that correct?

Mr. STEFFEN. Exhibits 369-B and 370 and 370-A have not been acted upon yet.

Mr. Bromley suggests that I offer Exhibit 369-B alone, first.

Mr. BROMLEY. We make only the usual objection to that exhibit.

In the interest of clarity of the record, I should like to state that Exhibit 369-B is a royalty-free perforated lath license, dated September 16, 1938, running from USG to the Kelley Company. That license was not assignable. Since it ran to the Kelley Company, after the merger it was necessary to execute another license. That was done in exactly the same terms, only the second license ran to the Newark Company instead of the Kelley Company. That second license is Exhibit 32.

Justice STEPHENS. Thank you for that state-
3302 ment.

You are now offering Exhibit 369-B?

Mr. STEFFEN. Yes.

Justice STEPHENS. It may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 369-B, was received in evidence.)

Mr. STEFFEN. And we offer Exhibits 370 and 370-A.

Justice STEPHENS. Has Exhibit 370-A been identified?

Mr. STEFFEN. It was handed to us by the defendants.

Justice GARRETT. Exhibit 369-B is to be supplied for our records?

Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. Is there any objection to Exhibit 370-A?

Mr. BROMLEY. Only the usual one.

Justice STEPHENS. And you make only the usual objection to Exhibit 370 also?

Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. Exhibits 370 and 370-A are received in evidence subject to the usual reservation with respect to the declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits 370 and 370-A, were received in
3303 evidence.)

By Mr. STEFFEN.

Q. I would like to ask you some general questions about your business, Mr. Tomkins, now that we have gotten the various corporations straightened out.

As I understand it, the Newark Plaster Company has been in business for around a hundred years, either the present company or its predecessor?

A. That is right.

Q. Where did you get your raw gypsum?

A. We secured it from several sources, principally in Nova Scotia and New Brunswick and Provinces in Canada.

Q. Do you still have those sources?

A. No, we have no sources owned by the company, for gypsum rock, at the present time.

Q. When did you dispose of them?

A. We disposed of the gypsum property owned by the Newark Plaster Company in about 1934 or 1935.

Q. And where are you getting ——

A. (Interposing.) I am not sure of that date, it may have been later.

Q. Where do you buy your raw gypsum now?

A. Well, we are unable to buy any raw gypsum now.

Q. Where have you bought your raw gypsum
3304 since 1934 or 1935?

A. We have bought some from the Canadian plants of the United States Gypsum Company, some from the plants of the National Gypsum Company in Canada.

Justice GARRETT. Just a little louder, Mr. Witness, please.

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. How long has it been since you have been unable to buy any gypsum?

A. I believe the last gypsum rock we were able to bring in by steamer was in 1941.

Q. The Government has taken over the vessels, or what is the reason?

A. At that time we were unable to secure vessels at a price that we could afford to pay.

Q. Do you buy any gypsum from the American Cyanimid Company?

A. We buy calcium sulphate from the American Cyanimid Company.

Q. What is the difference between calcium sulphate and gypsum?

A. Calcium sulphate is calcined gypsum.

Q. And your gypsum rock becomes calcined gypsum, does it not, after it goes through the initial process?

3305

A. After it is processed, yes, sir.

Q. So that the two are substantially the same commodity in the calcined form?

A. No, the material we buy from the American Cyanimid Company is a completely finished, processed material. The material we bring in from Canada is a crude rock, a mineral.

Q. They have the same chemical content, once the rock has been calcined?

A. Well, if you process the rock from Canada, you come out with approximately the same chemically-composed material.

Q. That is what I was getting at. Are they the same price?

A. The rock and the calcined gypsum?

Q. The calcined gypsum that you make from the Nova Scotia rock, and the calcined gypsum that you procure from the American Cyanimid?

A. The price we pay American Cyanimid is substantially less than the price we would have paid for plaster if we had bought it from other companies.

Justice STEPHENS. Just a moment. Perhaps this is not important, but the Court wants to keep clear on the mat-

ter. The chemical constituents of the raw gypsum rock are not the same, are they, as the calcined gypsum, because one contains water and the other does not?

3306 The WITNESS. One contains more water than the other. They are quite different.

Justice STEPHENS. But the material you buy from the American Cyanimid Company, which you refer to as calcium sulphate, that is substantially the same as the material you make out of the raw gypsum rock when you can get it?

The WITNESS. That is correct. After we process the rock it is substantially the same.

Justice JACKSON. In other words, calcined rock is calcined rock, no matter where you get it?

The WITNESS. Yes, although the material we buy from American Cyanimid is synthetic.

By Mr. STEFFEN.

Q. And you say it is materially cheaper than that made from the rock?

A. No, I say that we are buying it at a lower price than we could purchase plaster, calcined gypsum made from rock.

Q. That is what I thought I asked you.

Now where did the Kelley Plasterboard Company obtain its source of supply for making plasterboard?

A. It obtained it from various sources. It purchased some plaster which was called stucco, for board manufacture from the Oakfield Gypsum Company. It purchased some, I believe, from the United States Gyp-

3307 sum Company. It purchased some from time to time from Structural Gypsum Company.

Q. And Structural Gypsum Company is what concern?

A. It is a division or subsidiary of American Cyanimid.

Q. And the gypsum that they bought, or the calcined gypsum they bought from Structural, was this synthetic product that you speak of?

A. That is correct.

Q. Now in May, 1937, when you bought the stock of the Kelley Plasterboard Company, were you at that time selling any plaster to the Kelley Plasterboard Company?

A. The Newark Plaster Company, I believe, was selling some white plaster to the Kelley Plasterboard Company at that time.

Q. Did you buy any board from the Kelley Plasterboard Company?

A. We did not.

Q. And did the Calvin Tomkins Company buy any board from them?

A. No, it did not.

Q. Then as I understand it, the Newark Plaster Company and Calvin Tomkins Company were not in the board business at all, up until—when was it?

A. The Newark Plaster Company was not in the board business directly until it merged with the Kelley
3308 Plasterboard Company in January of 1939.

The Calvin Tomkins Company was not in the board business until after that merger, when it received the consent or when Newark received the consent from United States Gypsum to sell to the Calvin Tomkins Company.

Q. What were the considerations that moved you to go into the board business?

A. We wanted to expand our business and to increase our volume in our Newark calcining plant.

Q. And your plant is at Delawanna, New Jersey, or was?

A. Which plant do you mean by "your plant"?

Q. The board plant.

A. The board plant of the Kelley Plasterboard Company was located at Delawanna.

Q. And your plaster manufacturing plant was at Newark, is that correct?

A. That is correct.

Q. Now did Calvin Tomkins, or did you for Calvin Tomkins, consider buying board from USG or National or any of the other concerns, prior to May 1, 1937, on a basis of 12½ percent discount, or whatever you could arrange?

A. We never gave that any consideration.

Q. That was never considered at all?

A. Never.

Q. So that when you decided to go into the
3309 board business, you decided to go in and become a manufacturer, is that correct?

A. That is correct.

Q. What products did the Calvin Tomkins Company sell during 1936, 1937, and 1938?

A. The principal product sold by the Tomkins Company was white plaster.

Q. That was made by Newark?
A. By Newark, yes.
Q. Did they handle any other products?
A. No, at that time I don't believe the Calvin Tomkins Company was selling any other products, except in minor quantities.
Q. What products were they?
A. They may have sold some cold-water paint products manufactured by the United States Calcimine Company. We may have sold some neat plaster, which Newark would have purchased from other manufacturers, or possibly a small amount of sanded plaster, but nothing that was of any importance to the Newark or the Calvin Tomkins companies.
Q. You didn't handle a general line of fiber boards and insulating boards?
A. Not at all.
Q. Now since January 3, 1939, has Calvin Tomkins broadened its line of sales?
3310 A. Well, Calvin Tomkins, subsequent to January 3, 1939, has been engaged in the sale of gypsum board as well as white plaster.
Q. And by "board", you mean gypsum lath, gypsum board, and gypsum block ——
A. (Interposing.) Not gypsum block.
Q. You don't make gypsum block?
A. Not now, we formerly did. We have not made gypsum block since 1929.
Q. You stated that the Kelley plant was located at Delawanna, and that is where they made board?
A. Yes.
Q. Did that plant burn down?
A. Yes, it did.
Q. When?
A. During March of 1940.
Q. And has it been rebuilt?
A. The Newark Plaster Company has built another gypsum board plant, but not at Delawanna.
Q. Where did they build it?
A. In South Kearny, New Jersey.
Q. How far is that from Newark?
A. About 7 or 8 miles.
Q. And when was that plant completed?
A. In December of 1940.

3311 Q. December, 1940?

A. Yes.

Q. And since that time, you have been making board and lath at your new plant?

A. The Newark Plaster Company has, yes.

Q. Do you also make perforated lath there?

A. Yes, we do.

Q. And metallized board?

A. Yes.

Q. That is, since December of 1940?

A. Yes. We haven't made that for a couple of years, though.

Q. I understand that. That is because of war conditions, is it not?

A. Yes.

Q. You can't get the foil to make the board?

A. That is correct.

Q. Now during the period from March, 1940, to December, 1940, where did you procure your board that you sold through Calvin Tomkins?

A. We purchased some board from National Gypsum Company, some from United States Gypsum Company, some from the Ebsary Gypsum Company.

Q. And that included perforated lath and metallized board?

3312 A. Yes.

Q. All three?

A. I don't know that we purchased any metallized board, I rather doubt that we did.

Q. Now since the Calvin Tomkins Company has been selling board, it has been selling board according to bulletin prices, is that correct?

A. That is correct.

Q. And they have sold all their lath and board according to the terms and conditions of the price bulletins, is that correct?

Mr. BROMLEY. I object to that unless that be limited to lath and board manufactured by the Newark Company.

Mr. STEFFEN. I am asking the broad question as to what they have been sellir , at.

Mr. BROMLEY. You said "under the terms and conditions of the bulletins". Now the bulletins only apply to board manufactured by the licensee.

Mr. STEFFEN. I will rephrase my question.

By Mr. STEFFEN.

Q. Calyin Tomkins has been selling board and lath on the same terms as are provided under the license bulletins, has it not?

A. Well, there have probably been exceptions to that. There has been no requirement to sell board at bulle-
3313 tin prices for some time.

Q. What are you referring to when you say that?

A. A letter that we received from the United States Gypsum Company to the effect that no further price bulletins, selling bulletins, were going to be issued.

Q. Do you have the date of that?

A. I don't recall the exact date, no, sir.

Mr. STEFFEN. What was the date of that, please?

Mr. BROMLEY. July 8, 1941.

By Mr. STEFFEN.

Q. Since July 8, 1941, you have not been receiving bulletins from the United States Gypsum Company, is that correct?

A. That is correct.

Q. Prior to that time, from the time that Calvin Tomkins began selling board, it sold board at the same terms and upon the same conditions as were provided in the bulletins, with some possible exceptions, you say?

A. Yes, with some exceptions. During the period when we were purchasing board from other manufacturers, we followed the bulletin prices as a list of prices at which we sold. We were under no requirement to sell purchased board at bulletin prices.

Q. And when you say that, that is your construction of the law on the subject, is that correct?

3314 A. Yes, that is what I was advised.

Q. That is, by your counsel, Mr. DeWitt?

A. By my attorney, yes.

Q. In general terms, Mr. Tomkins, what amount of business do you do in board, a year, or were you doing in 1937, 1938, 1939 and 1940?

A. I have no recollection of our sales by years.

Q. You can give us generally your volume, can you not?

A. Generally. In 1937, we probably sold 30 million feet of board, all kinds of board.

Q. And in 1938?

A. About the same, that would be about the production of the Kelley plant.

Q. And you sold about the same amount in 1940?

A. In 1940 we sold less.

Q. That was because of the fire?

A. That was because of the fire.

Q. And in 1939, about the same as in 1937 and 1938?

A. I would say approximately. This is pure speculation on my part.

Q. You have only one mill, have you not? That is, you have the board mill and the plaster mill, but do you have any others?

A. The Newark Plaster Company has only those two manufacturing plants.

3315 Q. You have no mills throughout the country, as do the United States Gypsum Company and some of the larger producers?

A. No, sir.

Q. Why did you want to buy board, Mr. Tomkins, or go into the board business, in 1937?

A. We wanted to expand our business and increase the volume of gypsum produced at the Newark mill.

Q. Was it not difficult to sell plaster all alone?

A. We had never found it so.

Q. You sell a special grade of plaster, do you not?

A. I don't believe it is a special grade. We sell white plaster.

Q. And it is a high grade plaster, is it not?

A. Yes, you could call it a high grade plaster, I suppose.

Q. Do you find that you have increased your sales by being able to sell both plaster and board?

A. No, our sales of white plaster, I think, have steadily shrunk.

Q. Is that so?

A. Yes.

Justice JACKSON. Have what?

The WITNESS. Have shrunk.

By Mr. STEFFEN.

3316 Q. Your sales of board have been satisfactory, have they?

A. Not since the war, they have not.

Q. Well, now, certain of these consents that we were talking about in the last hour, had to do with perforated lath. Do you know why you were asking for consents concerning perforated lath in 1938?

A. I believe it was due to the change in the perforated lath license that we had. When we were notified of that change, I think the consent to sell was restricted, and we then felt we had to again write for a consent to sell these manufacturing distributors.

Q. I notice that each one of these consents states, "This consent may be withdrawn by us at any time", or "good until further notice", or something like that. It was true, was it not, that any of these consents were subject to immediate withdrawal if USG wanted to, at any time?

A. The ones I have seen in these exhibits were.

Q. That is correct.

Mr. BROMLEY. That is not correct.

By Mr. STEFFEN.

Q. Now in your sales to Structural and to Adamant and to Oakfield, did you furnish them with the prices at which they were to resell—I believe you testified that you did?

A. We sent price lists, price bulletins.

3317 Q. To each of the concerns I have mentioned, that is Oakfield, Structural, and Connecticut Adamant?

A. Yes.

Mr. O'DONNELL. Can we have the record clear as to by whom those bulletins were supposed to have been sent?

Mr. STEFFEN. Yes.

When I say "you sent prices to Structural and Oakfield and Connecticut Adamant", did you mean that during the period from May 1, 1937, to January 3, 1939, they were sent in the name of the Kelley Plasterboard Company?

The WITNESS. Yes, they would have been sent in the name of the Kelley Company.

Mr. O'DONNELL. And by the Kelley Company?

Mr. STEFFEN. And by the Kelley Company?

The WITNESS. Yes, they would have been sent by the Kelley Company only, during that period.

By Mr. STEFFEN.

Q. And thereafter, they were sent by and in the name of the Newark Plaster Company, is that correct?

A. No, the Calvin Tomkins Company.

Q. Excuse me, the Calvin Tomkins Company after that.

A. That is correct.

Mr. BROMLEY. I move to strike out the answer in so far as the Kelley Company is concerned. You don't
3318 know what the Kelley Company did, do you?

Mr. STEFFEN. He was President for two years while they were doing it.

The WITNESS. I understood that I was only testifying about the period from 1937 to 1939.

Mr. STEFFEN. That was the question.

Mr. BROMLEY. Do we have what price lists you are talking about?

Mr. STEFFEN. I will develop that, if I may, in some detail.

Justice STEPHENS. You were an officer of Kelley during those two years, were you not?

The WITNESS. I was President of Kelley during those two years.

Justice STEPHENS. The motion to strike is denied, then, so far as that part of the testimony is concerned.

By Mr. STEFFEN.

Q. I would like to show you Government's Exhibit 371, which purports to be a letter from Mr. Kelley addressed to Charles F. Henning, Vice President, United States Gypsum Company, under date of September 21, 1936. I would like to have you read that, and then I will ask you some questions concerning it.

(The document referred to was marked as Gov-
3319 ernment's Exhibit No. 371 for Identification.)

By Mr. STEFFEN.

Q. How long had you known Mr. Kelley, Mr. Tomkins?

A. I had known him for a number of years prior to 1937.

Q. And when you took over—you bought the stock from him—did you?

A. The Newark Plaster Company bought it.

Q. From Mr. Kelley.

A. I believe Mr. Kelley delivered the stock to us, he owned most of it.

Q. And did you take over the files of the Kelley Plasterboard Company when you took over the business?

A. Yes, all the books and records were left.

Q. And did you ever see that letter before, Mr. Tomkins?

A. Not to my knowledge. I may have seen it, but I have no recollection of it.

Q. Did you see a reply to that letter?

A. I don't recall seeing any reply.

Q. Is that Mr. Kelley's signature?

A. Yes, that is Mr. Kelley's signature.

Q. What was the practice at the time you came in and took over the Kelley Plasterboard Company, did USG at that time send prices directly to Oakfield and
3320 Structural and Connecticut?

A. Not to my knowledge, no, sir.

Q. And therefore you testified a minute ago that it was necessary for you to send the prices, is that right?

A. I don't ——

Mr. BROMLEY (interposing). I object to that question as incompetent. However, if the witness says he didn't testify to that, I withdraw the objection.

Mr. STEFFEN. I think I can develop it more clearly, Your Honor.

I will now show the witness Government's Exhibit 372, and also Exhibit 373, which purport to be carbon copies of letters signed by G. A. Wileman and addressed, one to Paragon Plaster & Supply Company, under date of June 7, 1937, and the other to the Structural Gypsum Division of the American Cyanimid and Chemical Corporation under the same date.

(The documents referred to were marked as Government's Exhibits Nos. 372 and 373, respectively, for Identification.)

By Mr. STEFFEN.

Q. You identified, I believe, both of those letters before the criminal court? Do you now do so?

A. There is no identification on them. I assume
3321 these letters were sent by Mr. Wileman of the Kelley Plasterboard Company.

Q. Who was Mr. Wileman?

A. He was the Office Manager of the Kelley Plasterboard Company.

Q. And will you state to the Court what prices were being enclosed in the letters of June 7?

A. I don't know just what prices were being enclosed. Presumably they were the prices at which we were selling wallboard to ——

Q. (Interposing:) Was that your practice ——

Mr. BROMLEY (interposing). Let him finish the answer. He started to say to whom.

The WITNESS (continuing). —at which we were selling wallboard to dealers at the locations referred to in these letters.

By Mr. STEFFEN.

Q. And when you say "we", you mean Calvin Tomkins?

A. No, I mean Kelley Plasterboard.

Q. That is, that Kelley Plasterboard was selling directly to dealers?

A. Yes, in 1937 Kelley Plasterboard was the only one selling directly to dealers.

Q. You have me all confused. So that the prices you have in mind there are the prices that the Kelley
3322 Plasterboard Company was charging to dealers in the sales area in question?

A. I assume that that is what the prices were.

Q. I think you have testified that that was your practice, did you not?

A. I don't know that I testified that it was our practice. I assume that it was done. I have these letters here showing it was done. Whether it was a practice that was followed consistently or not, I don't know.

Q. What we want to get clear is that the prices you sent to Oakfield and to Structural would be the prices at which you yourselves were selling?

A. Surely.

Q. And those prices were the prices specified in the United States Gypsum Company's price bulletins?

A. That is right.

Q. Did you have any conversation with Mr. Kelley concerning this matter of supplying prices to the manufacturing distributors at the time you took over the Kelley stock?

A. There again, I have no direct recollection of a conversation. I am sure that Mr. Kelley and I discussed it, and that he told me that he was making these sales to these manufacturing distributors, and that he felt it was good business to do so.

3323 Q. And he told you that they sold at the same prices that you were selling?

A. I don't follow you.

Q. That Kelley was selling?

A. He told me that these distributors sold at the same prices that Kelley was selling?

Q. Yes.

A. I don't know that he told me that.

Q. Was that your understanding, that they did?

Mr. BROMLEY. I object to that on the ground that it is incompetent as to what his understanding was.

Mr. STEFFEN. Mr. Tomkins is a defendant, and his understanding is very material.

Justice STEPHENS. Well, of course, you are proceeding under Rule 43, but where you are proving a fact you must prove it by competent evidence. Understanding is frequently the subject of cross-examination where there has been a prior direct-examination, as testing the reasonableness of a witness' answer. But that is not the theory on which you are proceeding here. You are here proceeding to establish the facts yourself. You are being permitted to ask leading questions under Rule 43. But where you seek to establish a fact, it can't be done by the witness' understanding. It must be done by items from which the Court can draw a conclusion.

3324 Mr. STEFFEN. Your Honor, this is a defendant, and if a defendant can't state what his understanding was, nobody could. I am prepared, however, to refresh his recollection on this point.

Justice STEPHENS. If you will, please.

By Mr. STEFFEN.

Q. I think you testified before the criminal court—and I show you page 871 of your testimony, and ask you to read the last two questions and answers.

Does that refresh your recollection?

A. Yes, this says that my recollection at that time was that "they sold board they purchased from Kelley at the established bulletin prices to the dealer trade."

Q. And is that your present understanding?

A. Well, as I said before, I have no recollection of these conversations. I would assume that I did have that understanding.

Q. Well, would you say from your present recollection

that that is a substantially correct statement?

A. Yes.

Justice STEPHENS. Who do you mean by "they" in that answer?

The WITNESS. The manufacturing distributors that the previous testimony referred to.

3325 Mr. STEFFEN. In order to make it clear on the record, Your Honor, the question which was asked Mr. Tomkins was:

"Q. What were those discussions?

"A. Mr. Kelley explained to me that his company had been selling board at a discount to the Oakfield and Structural companies, and that in his opinion it was desirable business; it gave tonnage to the Kelley plant which needed it and did not offer any competition that had bothered him in any way.

"Q. What did he say about their prices?

"A. My recollection is he said that they sold board they purchased from Kelley at the established bulletin prices to the dealer trade."

By Mr. STEFFEN.

Q. I would like to ask you a question or two concerning Exhibit 372, Mr. Tomkins.

Mr. STEFFEN. Before I ask him the questions, may I offer Exhibits 371, 372 and 373 in evidence.

Mr. BROMLEY. I object to Exhibit 371 for Identification as immaterial, irrelevant and incompetent, and on the ground that it only partially presents the transaction in question and therefore violates the complete evidence rule. This letter, by itself, would indicate that USG and Kelley sent licensee bulletins to these manufacturing distributors. There is a reply to the letter which the Government has in its possession, which these attorneys know

3326 or should know about, which completes the transaction. Without that reply this letter is completely misleading, and it is therefore incompetent and immaterial.

So far as the other two exhibits are concerned, I object to them on the ground that they are incompet .t because incomplete, since the price lists referred to in each letter are not attached. These documents, in my judgment, should not be admitted unless the Government concedes that the price lists referred to, and attached, are the price lists showing the Kelley prices which Kelley charged these manu-

facturing distributors, because that is what they were.

Mr. STEFFEN. There are two objections, Your Honor.

As respects Exhibit 371, this complete evidence rule, which is a new one if it exists at all, I think can be met if Mr. Bromley or the defendants will produce the answer. We do not have the answer to that. And we do not, under any notion of the complete evidence rule, propose to put their answer in. This shows that Mr. S. J. Kelley had, at the date of the letter, an understanding that it would be more convenient for the United States Gypsum Company to send the price lists direct, the bulletin prices direct to the Structural and Adamant and Oakfield companies, and as an admission it would be strictly relevant without any answer or whether there was any answer. If
3327 Mr. Bromley has an answer and wants to offer it at the proper time, it is his pleasure to do it.

Mr. BROMLEY. I object to this practice of putting in half the story when the Government has these original documents in its possession. I don't think it is fair.

Mr. STEFFEN. It is the same thing as with cross-examination. When you ask a question we have to go back and look it up.

Mr. BROMLEY. I would like the Court to look at this letter so they will know what we are talking about.

Justice STEPHENS. You are talking about Exhibit 371?

Mr. BROMLEY. Yes, and the answer thereto.

(The reply to Exhibit 371 referred to was handed to the Court.)

Mr. STEFFEN. I object to the Court's looking at that, at least until we have had a ruling on this matter. We might as well have a ruling on this matter now, of whether we must put in the whole story when we decide to put in certain exhibits.

Justice JACKSON. The Court wants the full story, Mr. Steffen.

Mr. STEFFEN. I am very glad to let the Court have it.

Justice STEPHENS. The objection to the Court's looking at the letter is overruled. We are not going to blind our eyes to what is going on.

3328 Mr. STEFFEN. I would like to make one concession; we concede that the Court may do that.

Justice JACKSON. Thank you.

Justice STEPHENS. The court is of the view that if the Government has available letters which complete a transac-

tion, the Court ought to have the whole transaction before it at once. It is true that the defendants might be able to put this in as a part of their defense, but the difficulty with that is that we get a part of the story at one time and a part later. Since there can be no dispute between the parties, apparently, as to this reply having come in, to Exhibit 371, under date of September 29, 1936, it seems to the Court that it is only fair that it should be put in with Exhibit 371. If you read Exhibit 371 alone, it gives the transaction a certain cast. If you read Exhibit 371 and the answer of September 29, not yet marked, it gives it a different cast. We don't quite see the Government's desire to give the Court a half story when it has the whole story.

Mr. STEFFEN. We have no purpose, Your Honor, of giving the Court half the story. We, however, are proceeding according to the traditional way of putting our case. It is then for the defendant to put in his case. When the defendant puts their man on the stand, whoever he may be, to identify this letter, we then have an opportunity to ask him whether it was a subterfuge. On the face of it, it looks as though it might be, that is, that they want to avoid the appearance of fixing prices. If we put it in now, Your Honor may take it literally as being a letter which says that, "we are all aboveboard, we have no idea of controlling prices," when I think we could establish, with their witness on the stand, that they were pretty sure that they were going to control the prices of the manufacturing distributors; otherwise, they wouldn't allow them to sell.

3329

But they wanted to avoid the appearance of doing what Mr. Kelley suggested, which would be the straightforward way to do it, that is, to send the prices direct. And so they write this letter, which is a self-serving declaration.

We have no objection to this coming in at the proper time, properly identified by a witness on the stand whom we can cross-examine.

It is the same thing as the other day. Mr. Bromley asked questions of Mr. Spease. Mr. Spease wanted to qualify his answers, and Your Honor properly told him that he should say yes or no, and that we in our turn would have an opportunity to clarify the answers.

Justice STEPHENS. We don't mean to put the Government at any improper disadvantage with respect to its case, or to require it to put in the defendants' case by way

of defense. If that is the difficulty here, perhaps
3330 that puts a little different light on it.

What do you say to that, Mr. Bromley?

Mr. BROMLEY. I say it is going to make it difficult when we come to our case, with the Government having the original of that document, and we therefore not being aware where it is, and the writer of the letter, Mr. Henning, being dead. He talks quite boldly about our putting the witness on the stand who wrote the letter. He knows he died in 1936, and that I can't put him on the stand. I am afraid I can't get the letter, even; and although we gave it to him, and you can see from these letters that they were stapled together, as is the custom, they just show up with one of them.

I think that puts me at a disadvantage where I may not be able to identify it on my case. If they don't produce the original, I don't know what I am going to do. They certainly have got it, because these are photostats made at the time we gave them the originals.

Mr. STEFFEN. We will make a search for the copy. As far as Mr. Henning being dead is concerned, I am sorry, but Mr. MacLeish is here and he was the attorney who gave the advice, as I understand it.

Mr. BROMLEY. You can see the numbers, 221 and 222, on the bottom of these photostats. We numbered them at the bottom prior to having them photostated; and
3331 you can also see the holes at the top where they were stapled together, but still the Government only presents one of them.

Justice STEPHENS. We will take the afternoon recess now.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

3332 Justice STEPHENS. It would be easier for the Court to understand these transactions if all of the connected documents could be put in at one time, and upon that theory the connected documents thus far admitted, were received. The Court suggested that they be offered, and the Government acquiesced in offering the connecting portions.

The Court wants to try this case as simply and as fairly as it can. It is a complicated, difficult case, and the separation of evidence into parts, especially where there are so many documentary letters, is likely to be a little confusing. But we do not understand, Mr. Bromley, that the "com-

plete evidence" rule goes so far as to compel, where there is objection raised to doing it as there is now, the proponent of a part of a declaration or admission to put in all of it.

We do not think there ought to be maneuvering on either side to put the opposite side into a difficult position, and we do not, by that statement, suggest that there has been or is any such maneuvering.

We can see some disadvantages to the defendants if they are required to actually offer in evidence at the present time the explanatory document. They might possibly be under the difficulty of having waived their right to make a motion, at the close of the Government's case, to dismiss, if they saw fit to make such a motion.

On the other hand, Mr. Bromley, perhaps the Government would be put to a disadvantage if it is required
3333 to put the second part of the declaration in, that is the reply letter in this instance, because the defendants might be in a position then to contend that the Government was bound by it, because it had introduced it, and therefore could not call witnesses to show that the whole transaction was what the Government claims it to be, a guilty transaction.

The only authority we find on the subject is in Jones on Evidence, which reflects what I personally—and I think my colleagues join me in this—have always thought to be the rule that:

"It is the settled rule that the whole of a declaration or statement containing an admission should be received. 'Every admission is to be taken as an entirety of the fact which makes for the one side with the qualifications which limit, modify or destroy its effect on the other side.' The reason for this practice is that, where part of a statement of a party is used against him as an admission or declaration against interest, the jury should consider and weigh any other portions of the statement which tend to neutralize or explain the portion which is against interest. In other words, the probative value of the evidence is to be determined from the statement as an integrated unit and not from a part which is disassociated from the other parts. * * *

"However, it does not follow that the one offering the admissions is compelled to offer in the first
3334 instance the whole conversation or statement. He offers that part which he considers advantageous

or which the witness remembers, and his adversary has then the right to bring out the remainder by cross-examination or otherwise as he may see fit."

We think there is no doubt but what you have a right, Mr. Bromley, eventually, to put in such statements as complete the whole correspondence. In other words, it is certainly relevant and material to show to the Court the entire transaction. But we do not understand the "complete evidence" rule to go so far as to authorize the Court to require the Government, as a part of its case, to put in the whole of the correspondence.

Mr. BROMLEY. My understanding was that Mr. Wigmore, in Section 2014 of his Third Edition, Volume 7, at page 502, was of the opinion that it was a ground of objection that the "complete evidence" rule not only made, of course, the subsequent part of the transaction not offered, competent and material, but it was a ground of objection to the offer of the first part. I understood it to be his opinion that that did not apply to all testimony, but did apply to documents where there was a reference, for instance, in a first document which is offered by the proponent, to another document.

It was a ground of objection to that first document under this rule that it should not be received until and unless the second document were offered. And he certainly
3335 does not limit it to those instances where there is a reference, because he also says, "The same principle would apply to another writing not expressly referred to but necessary by the nature of the documents to a proper understanding of the one offered."

So, contrary to what Professor Jones seems to say, the reason I made the objection on that ground was that I understood Wigmore to say it was a ground of objection. Of course I understand, if I can ever get the letter, that I can offer it in evidence when my turn comes.

Justice STEPHENS. You can also cross-examine this witness with that as a basis, can you not?

Mr. BROMLEY. No, I cannot.

Justice STEPHENS. You don't have to offer it, you can cross-examine on it, can you not?

Mr. BROMLEY. No, I cannot possibly do so.

Justice STEPHENS. Why not?

Mr. BROMLEY. Because it isn't his letter.

Justice STEPHENS. If he knows about it ——

Mr. BROMLEY (interposing). It is long before he had anything to do with the situation. This is back in 1936 when he had nothing to do with this business at all. It is written by Kelley to Henning, and Henning answers it, and Henning is dead. So I cannot cross-examine this witness about it at all. He knows nothing about it whatsoever.

3336 Then they come along, having put this letter, dated in September, 1936, in evidence, with this suggestion, that United States Gypsum price bulletins would be sent to manufacturing distributors, and they produce two letters, dated in 1937, one of which goes to Oakfield, and which says something about a price list, and they don't produce the price list.

They seek to create the inference in your minds that after this letter of September, 1936, this Kelley Company actually sent these bulletins.

Well, I say that the whole thing is so unfair that it ought to be stopped, because Mr. Steffen knows as well as I do that the price lists which he does not produce, were Kelley's own price lists showing the prices that Kelley charged to these people to whom he sent them. I think the whole thing is so unfair that the Court in its discretion ought to sustain objection to it, and I thought it had the power to do so under the law as expounded by Mr. Wigmore.

Justice STEPHENS. What do you say to the proposition that concerns the Court, in your argument, that if the Government offers these as a whole, they are bound by them?

Mr. STEFFEN. I think we are.

Mr. BROMLEY. I will waive that. I never thought that was the doctrine. Let me go back.

Isn't it a principle that any party can offer con-
tradictory evidence on any subject? If I am a
3337 plaintiff and put a witness on the stand to prove that the defendant's car was going forty miles an hour, I can contradict my own testimony thereafter, I am not bound by the testimony I put on. Any party can offer evidence in his case, even though it is contradictory. If he claims ——

Justice STEPHENS (interposing). You can't impeach your own witness.

Mr. BROMLEY. Oh, no, but that is not my proposition. If he claims that this is a subterfuge and that I would

object, after the receipt of the letter of September 29, 1936, not yet marked, on the ground that he is bound by it, I will say now that I will make no such contention.

Mr. STEFFEN. Your Honor, it is a broader proposition than that, and I should like to speak about that for just a moment.

Justice STEPHENS. Very well.

Mr. STEFFEN. I think the rule that Mr. Bromley has in mind, the Wigmore rule, is not inconsistent.

Where I have a contract to purchase, and then I also have a secret contract or release, and I offer that contract and do not offer the rest of it, it would be perfectly appropriate to insist that I put both in, or none.

But we are not doing anything of that sort. Here is a case where we have a letter coming from one side, and a reply which is a self-serving declaration, coming from the other. We put in the statement which is made
3338 by Mr. Kelley, which we think has a certain amount of truth in it. We are handed here a photostatic copy of what purports to be a letter by Mr. Henning, which we will assume for purposes of argument is a true letter. I will say frankly that I hadn't seen it.

I say that it is for them to put that in as part of their case, and when they put the letter in, if they do, I would then have an opportunity, which otherwise I am going to be utterly deprived of, to question the man who identifies the letter or knows about the transaction, as to whether or not they were not merely trying to cover up the transaction, which is the way I regard it; and to put it in now would be having us put in the defendants' case.

Now so far as Mr. Henning being dead is concerned, it doesn't injure Mr. Bromley any more than it does me, because how am I going to cross-examine Mr. Henning if and when the letter is offered?

So that I don't see that there is any objection on that score.

Now there were certain statements made concerning Exhibits Nos. 372 and 373, as respects price lists.

Three times now Mr. Bromley has tried to get the idea before you that those prices mentioned in those letters are —if I may attribute to him that statement, and I think he said it—that those prices are prices at which Kelley
3339 sold to Structural, and inasmuch as we do not have the price lists, which of course we don't have—oth-

erwise we would be delighted to present them—he says that we ought not to offer them at all.

I propose to show by the witness, in fact have already shown by this witness, that the prices included in Exhibits 372 and 373 were the prices at which Kelley sold to dealers, similar dealers to whom the Structural and the Oakfield people would themselves sell.

So that his effort, as I see it, to say that it is unfair to him, is unfair to us in that respect, and I should like to proceed to question the witness about several things concerning those two letters, and it is then open—we will probably call Mr. Eldred—to ask Mr. Eldred or anyone else, or it is open to the defendants to call Mr. Eldred and ask whether or not they did sell at bulletin prices.

We have no desire, let me make it very clear, to hide anything, but on the other hand we want to have, as I think your Honors do, we want to have the case presented as fairly and clearly as possible.

Mr. BROMLEY. Now if your Honor pleases, so far as Exhibit 372 is concerned, I will add this to my objection: That letter was sent to a company which is not a manufacturing distributor, and which the evidence shows was a dealer. That is Exhibit 372 for identification.

3340 Justice STEPHENS. Excuse me until I get that. I seem to have misplaced it. That is a letter to the Paragon Plaster Company from Wileman?

Mr. BROMLEY. Yes, your Honor.

Justice STEPHENS. What do you say about that?

Mr. BROMLEY. I say first that if Mr. Steffens is right—and I think he is—that the price list sent with that letter was a price list of Kelley's prices to dealers, the prices that Kelley charged dealers. Paragon was a dealer, and that was merely a supplier sending to his customer the prices which the supplier was asking the customer to pay.

Now the evidence in this case shows that Paragon was a dealer. There is no charge in the complaint anywhere, either in this case or the criminal case, that these defendants ever conspired to control dealers' retail prices. Therefore that exhibit must be entirely immaterial to the charge. Nobody from the Government has ever suggested that these defendants ever attempted to control the resale prices of the 20,000 dealers in this country. Paragon is one of these dealers.

Of course the Kelley Company would send to Paragon a

list of dealers' prices, because Kelley was trying to sell Paragon at those prices.

Now so far as Exhibit 373 is concerned, that is a letter from Kelley to Structural. Now Structural is a manufacturing distributor, not a dealer. The evidence already in the case shows that the price which Kelley was obligated under its license to charge to a manufacturing distributor like Structural, was the dealer price, less a discount. And my friend knows that these price lists which Wileman sent to Structural were merely the prices which Kelley was going to charge Structural, the prices to which the discount should be applied, and that is all they were, and this witness has testified that they were the dealer prices. That is what they were.

3341

Mr. STEFFEN. I might say as to the Paragon situation, that the facts are not all in as yet. Paragon was one of the shareholders in Oakfield, and I would like to ask the witness a question or two as to what his understanding of the reasons for sending this to Paragon might have been.

Mr. BROMLEY. Don't you concede that in your Bill of Particulars you have listed the manufacturing distributors, in response to my demand, and you did not mention anything about a company called Paragon?

Mr. STEFFEN. I think that is utterly irrelevant, your Honor.

Justice STEPHENS. What is the citation in Wigmore to which you referred?

Mr. BROMLEY. Volume 7, page 502, Third Edition, Section 2104.

3342

Justice STEPHENS. What do you say, Mr. Bromley, as to the difficulty the Government finds itself in, that if it puts in this document, rather than having it introduced by its opponent, in the course of the opponent's case, it is denied the right to cross-examine as to the circumstances under which the document was written?

The Government charges, and is entitled to endeavor to prove, that the transactions involved were cloaks and subterfuges. How is the Government going to be able to cross-examine, even if you waive any claim as to the Government being bound by the document as a part of its case because it introduced it—how is the Government going to have an opportunity to cross-examine to bring out the circumstances under which the letter was written, if you introduce

it, assuming you could introduce it through a witness who knew something about ?

Mr. BROMLEY. Well, of course I suppose all I could do is produce a witness who knew Mr. Henning's signature, if I have the original letter. I haven't any other witness who knows anything about it. If I can identify his signature, that is all I can do. So they won't have any bigger chance when I get this letter than they do now. We have nobody that knows anything about the letter.

Justice STEPHENS. Of course that is an academic illustration in the present situation on account of Mr. Henning's death, but we are laying down a rule which
3343 we suppose will guide Court and counsel for the balance of the case, if there are episodes of this sort again.

If you are going to have a lot of this class of testimony, Mr. Steffen, we will have to make a ruling. Of course, if you are not, if this is a sporadic, exceptional situation, it would seem to us that the denial of your right to cross-examine is more or less academic in view of the fact that Mr. Henning himself isn't available, the man who wrote the letter.

Mr. STEFFEN. We would like a general ruling for the reason that there will be other illustrations.

Justice STEPHENS. It would be very much preferable from the standpoint of the Court if the Court could see all this correspondence at one time. You gentlemen have been working on this case for years. You are familiar, on both sides, with all of these documents because you have had a long time to examine them. I think you can hardly realize the task upon the Court of getting clearly in its mind this tremendous mass of correspondence and documents. To read it as constantly as we do, and examine it as carefully as we do, is a very difficult job, and it would be very much easier for us if we could have whole impressions at one time rather than half impressions.

Nevertheless, if you insist upon a ruling, we shall be obliged to make one.

3344 Since the matter will affect other items of testimony, as the Government suggests, and because we want to make a sound and proper ruling, as we want to do in deciding every point, as far as it is within our capacity, strictly according to the law, could you not perhaps take up some other line of examination with this witness at this

time, so as not to keep him here any longer than necessary? Then we will go on until four o'clock, and we will think about this during the evening and rule in the morning on the subject.

Before you go to that, let us be perfectly sure just which documents we are discussing at the moment.

Mr. STEFFEN. As I understand it, it is Exhibit 371, and the question of whether a reply, dated September 29, must be introduced as a condition of having 371 introduced.

Justice STEPHENS. The letter is the letter of September 29th, not yet marked?

Mr. STEFFEN. Yes.

Justice GARRETT. And also Exhibit 372 is involved in the argument?

Mr. BROMLEY. Yes, and Exhibit 373, your Honor.

Justice STEPHENS. 372 and 373?

Mr. BROMLEY. Yes, your Honor.

Mr. STEFFEN. As to Exhibits 372 and 373, as far as I know there are no price lists, and I don't have any replies, and I don't know whether defense counsel have any.

3345 Justice STEPHENS. Exhibits 372 and 373 have to do with price lists?

Mr. STEFFEN. That is right.

Justice STEPHENS. Proceed then, if you can, on another line for the remainder of the session.

By Mr. STEFFEN.

Q. I show you, Mr. Tomkins, Government's Exhibit No. 374 for identification, which purports to be a letter from Mr. Wileman, addressed to the Oakfield Gypsum Corporation, under date of April 2, 1938, and ask you to read that, please, and state whether or not you can identify that as a copy of a letter that Mr. Wileman sent. You identified that, I believe, at the criminal trial, Mr. Tomkins.

A. Yes. There is no signature on it, but I assume that it was sent from Kelley's office.

Q. Do you recall having received a reply?

A. I have no recollection of a reply, no, sir.

Mr. STEFFEN. I think Exhibit 374, your Honor, is in the same bracket with Exhibits 372 and 373, probably.

By Mr. STEFFEN.

Q. At this time, Mr. Tomkins, the Kelley Plasterboard

people were selling gypsum board and gypsum lath to Oakfield, were they not?

A. Yes, they were.

Q. And they were selling on a basis that Oakfield received a discount of 12½ per cent on lath, and 15 per cent on board?

3346 A. From the dealer prices, yes.

Q. From the dealer prices?

A. That is right.

Q. And the information given in this letter of April 2, 1938, would be material to Oakfield if Oakfield was reselling at the dealer prices, would it not?

A. Well, it would be material to Oakfield in any event.

Q. Yes; and it would also be material if they were selling to dealers the board they bought from you, is that not correct?

Mr. O'DONNELL. That is argumentative, your Honor, and I object to the question.

Justice STEPHENS. Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice STEPHENS. Read the question and answer before that.

(Thereupon, the record was read as requested, by the reporter.)

Justice STEPHENS. Which letter are you asking about, this Exhibit 374?

Mr. STEFFEN. That is correct. It is simply a direct question, your Honor.

3347 Justice STEPHENS. I don't understand it yet, that is the difficulty. I have had my mind on this other topic, and I am a little behind you, I am afraid.

Now will you read the last two questions?

(Thereupon, the record was reread as requested, by the reporter.)

Mr. BROMLEY. I don't understand what he is talking about.

Mr. STEFFEN. If the witness does, that is all that is strictly material.

Mr. BROMLEY. It seems to me that this letter is completely immaterial. I don't see how it could possibly have anything to do with resale price fixing.

Justice STEPHENS. I don't understand it myself, yet. It doesn't seem to me argumentative, however, which is the

objection Mr. O'Donnell raised; I just don't understand it. Maybe you can clear it up for us.

Mr. STEFFEN. I would like to ask the witness some questions.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. At about this time, Mr. Tomkins, was there an increase in freight rates?

A. Well, I presume there was; otherwise this letter would not have been written.

Q. You are familiar with the business, and there was an increase in freight rates at about that time,
3348 was there not?

A. Yes.

Q. And in selling board, how is board sold to the dealer, how do you invoice it?

A. I don't know just what you mean.

Q. You have a mill base, plus freight, do you not?

A. Yes.

Q. And if Oakfield were selling board which they bought from Kelley, how would they price it?

A. They would price it on the same basis; if they were selling to a dealer, they would price it at the mill base, plus freight to destination.

Q. And they were buying board from you which they were reselling to dealers?

A. Yes.

Q. So that this information was very material to them in their resale of board purchased from Kelley, was it not?

A. Well, yes, otherwise they would have sold board at a lower price.

Q. And they would have been then underselling other companies which were selling direct and selling at the higher freight rate?

A. Well, if they did not add a freight increase, and other companies did, they would have been selling below the prices of the other companies.

3349 Q. That is correct, and therefore you were giving them the information so that they wouldn't be underselling, isn't that right?

A. I don't know that the information was given to them for that reason, it had that effect. That is the reason that I said that this was material to Oakfield in any event.

Q. That is, it would apply upon your sales to Oakfield for Oakfield's own use?

A. Yes, I should think so, because their price, i. e., what Oakfield had to pay Kelley, depended upon the dealer price. It was 12½ per cent less than the dealer price. Consequently, if the dealer price increased, their price would increase, and if they took business from a dealer that did not give effect to the freight increase, they would be at some disadvantage, it would be taken out of their 12½ per cent.

Q. That is right. Now I call your attention to the last part of the letter which says, "if you do not know the new price, you take orders subject to a slight increase in price due to this freight raise."

That had to do with Oakfield's sales to dealers, did it not?

Mr. BROMLEY. Wait a minute, you didn't read that right, did you?

Mr. STEFFEN. I tried not to read it all. Will you read that last part and tell me if it necessarily had to do with Oakfield's sales to dealers?

3350 The WITNESS. Shall I read the whole letter?

By Mr. STEFFEN.

Q. No, read the last sentence.

A. Now may I have the question?

Q. My question was—doesn't that sentence apply directly to sales made by Oakfield to its dealer trade, of board which it purchased from you?

A. Yes, this means that we are putting Oakfield on notice that there is going to be an increase in the price.

Q. That is right.

A. Consequently, we suggest that if they don't know how much the increase is, they take orders subject to such increase.

Q. That is right. And the orders are for board which you are going to sell to them?

A. No, "you take orders" would be orders from dealers, not for board that we were going to sell them.

Q. Well, what was Oakfield selling? They were buying board from Kelley, were they not?

A. That is right.

Q. And reselling that board to dealers?

A. Correct.

Q. And in reselling it to the dealers they resell at the dealer price, do they not?

A. Yes, they usually do.

Q. And that dealer price is the mill price, plus
3351 freight, is it not?

A. Yes.

Q. So that it was necessary for Oakfield to know that there was an increase in price so that they would get the right price to the dealer?

A. Yes, otherwise they would be at a disadvantage.

Mr. STEFFEN. Is that perfectly clear?

Justice JACKSON. No, it isn't. Doesn't this mean that there is a new price because there is an increase in freight?

The WITNESS. Yes, that is exactly what it means.

Justice JACKSON. It isn't a price increase per se?

The WITNESS. No, it is simply a freight addition added to the price.

Justice JACKSON. Now I am clear on it.

By Mr. STEFFEN.

Q. That is, your price to dealers is the mill price plus freight, is it not?

A. Yes.

Q. And in invoicing to dealers you would have to know both items, the mill price to dealers, and the freight?

A. Yes.

Q. And this indicated that in selling at the prevailing price to dealers, they would have to know both items, freight plus mill price?

A. Yes, they would have to know that in order to know what they were going to have to pay for
3352 board.

Q. And therefore it was very largely a matter of informing Oakfield as to prices which they would charge dealers?

A. Well, it was a matter of informing Oakfield what the dealer prices were, that was our basis of doing business with Oakfield, it was based on dealer prices.

Q. And it was in order that Oakfield would sell at dealer prices?

A. Not necessarily ——

Mr. BROMLEY (interposing). Wait a moment.

By Mr. STEFFEN.

Q. That was so that Oakfield would be selling to dealers at the prevailing price?

A. This information was given to Oakfield so that Oakfield would know what the dealer price was.

Q. And I followed that question up with—so that when they sold to the dealers, they would sell at the right price?

A. They could if they wanted to.

Q. So when your letter says, "you take orders," and so forth, that referred to taking orders from dealers, didn't it?

A. Yes.

Q. And they would have to know what the prevailing price to dealers was, isn't that right?

A. Surely.

Q. And that price is made up of the freight rate, plus the base price?

3353 A. That is right, which was the basis of their discount.

Q. That is right.

A. Correct.

Q. I think we are all straight.

Mr. BROMLEY. It is clear to you, is it?

Mr. STEFFEN. Well, it will be much clearer when we get through with the cross-examination.

Do you wish to adjourn at this time?

Justice STEPHENS. Yes. But before we adjourn let me make an inquiry.

About how long do you anticipate the direct examination of this witness will occupy?

Mr. STEFFEN. Until about noon tomorrow, your Honor, and maybe a little bit longer.

Justice STEPHENS. Will you hand back to the Court—I think you have it, Mr. Finck—the criminal record that we read from this morning.

(The record in the criminal trial was returned to the Court.)

Mr. STEFFEN. We should be very glad, your Honor, to have an expression of the Court's views on that with reference to the points in the record, if you propose to do that.

Justice STEPHENS. An expression of the Court's views as to what?

Mr. STEFFEN. Upon the matter that was dis-
3354 cussed this morning, having to do with the concession, or alleged concession on the part of the Government.

Justice STEPHENS. We have already ruled on that.

Mr. STEFFEN. You don't propose to extend your remarks at all?

Justice STEPHENS. No, we had in mind only that there ought to appear in the record all that the Court examined.

Mr. STEFFEN. I see.

Justice STEPHENS. Part of it was read into the record, but not all of it. There was one passage commencing at page 938, and going to page 939, and another one commencing at page 886.

Let the record show that, in connection with its ruling this morning on the question whether or not the Government had conceded at the criminal trial, and was therefore now conceding, in order that its position in both instances might, in good faith, be consistent, that sales by Newark to or through the Calvin Tomkins Company were not illegal under the Sherman Act, the attention of the Court was called to the material in the record of the criminal case commencing at page 938, line 13, and ending on page 939, including line 7. The mark is under line 9, Mr. Bromley, but the actual text of that subject-matter ends with line 7 on page 939.

Mr. BROMLEY. That is right, your Honor.

Justice STEPHENS. Let the record also show that
3355 the Court examined in connection with that same question, the transcript in the criminal proceeding commencing with line 6, page 886, and extending to and including line 14, on page 892.

In order that the basis of the Court's ruling shall fully appear in the record, the Court directs that all of that material be copied into this record. A part of it was read informally, but it is not all in the record, and we wish it there.

(The portions of the criminal trial record directed to be incorporated in this record by the Court are as follows:)

(Page 938, from line 13 to and including line 7 on page 939:)

Q. Didn't you have a discussion with the lawyers about the matter of whether or not this transaction couldn't take the form of an agreement by Calvin-Tomkins expressly to charge, as to resale prices, those fixed by Newark ——

The COURT. Just one minute, Mr. Bromley. That wouldn't throw any light on the inquiry because it seems that the Government and defense, both, agree that as the Calvin-Tomkins was a wholly-owned subsidiary the Government is raising no question about the control of the Calvin-Tomkins Company so your question doesn't raise the point at issue at all.

Mr. BROMLEY. I didn't appreciate that the Government was raising no question about it.

3356 The COURT. That is my understanding.

Mr. KELLEHER. You were at the bench this morning, Mr. Bromley.

The COURT. Sir?

Mr. KELLEHER. That is correct, your Honor, you stated it this morning.

The COURT. That is my understanding.

(Page 886, line 6, to page 892, line 14, both inclusive:)

The COURT. I want to learn a little law. I am sure you gentlemen can furnish the law.

Is it agreed between counsel for the defense and the Government counsel that licensors and licensees were protected in their control of the price made by their wholly owned subsidiaries?

Mr. KELLEHER. I can explain that in this way: In the indictment we charge that sales, the control of the selling price of Calvin Tomkins was illegal, and made no reference to that charge in the opening to the jury. I am now prepared to tell the Court that we do not intend to press that as illegal because the question is a doubtful legal question.

The COURT. It is not in my mind, but if you think it is, it is all right with me. Don't misunderstand me, I am not going to press my opinion; if it is not the opinion of Government counsel. But I don't think that the permission

3357 which the Supreme Court gives—because they really made the law—to a licensor to fix the price that the licensee should make, extends to the wholly owned subsidiary, the licensee. But, if that is your view that is all right. That settles it, that disposes of the matter, as far as this case is concerned.

Mr. KELLEHER. I would like to say this, though, we are in a peculiar position this morning. Kelley Plasterboard—Mr. DeWitt wants to take the position that Newark was not responsible for Kelley Plasterboard from 1937 to 1939; then he wants to take the contrary position from 1939 on, the other position that Calvin Tomkins Company was an independent company and therefore, the acts, if any, in the conspiracy, were the acts of Calvin Tomkins and not the acts of the Newark. Now, I think we should get straightened out on that. I think we are entitled to show that Calvin Tomkins was a wholly owned subsidiary controlled by their price dictated as a result of the contract by Newark.

If they are going to take that position I think we have

got to go into it. We cannot do anything else, we have got to show they were controlled by contract and that they did fix their prices, and that whatever Calvin Tomkins did it did as the result of this contract by the U. S. Gypsum Company.

The COURT. As far as I know from that testimony—and I don't know what you can do—I understand that a wholly owned subsidiary can virtually act as an agent would act.

3358

Mr. BROMLEY. The contract so provides.

The COURT. I know, but your contract doesn't extend your right, as a contract, a licensor may make—doesn't extend his legal privileges.

Mr. BROMLEY. Extends to agents.

The COURT. Sir?

Mr. BROMLEY. Extends to agents.

The COURT. I say, do you contend that a wholly owned subsidiary, as a matter of law, acts as an agent?

Mr. BROMLEY. Under this contract which says that, yes, sir. It would not have to be in this situation.

The COURT. What contract?

Mr. BROMLEY. Under the contract of January 3, 1939.

The COURT. Between whom?

Mr. BROMLEY. Between U. S. G. and the Newark Company, which says, "The acts of the Calvin Tomkins shall be considered to be the acts of Newark."

Now, that is pure agency, I claim.

The COURT. You mean that by that contract Newark legally notified Gypsum that this other concern, Tomkins, was its agent, is that what you mean?

Mr. BROMLEY. Yes, sir, and I concede to the position that that is the way we would consider it.

The COURT. It is not a question of how you consider it, it is a question of whether you had a right to consider it that way.

3359

Mr. BROMLEY. I think clearly the Supreme Court doctrine extends to agents.

Mr. KELLEHER. If they were agents.

The COURT. If they were agents. You can't make them agents by saying so.

What I want to know is this, whether or not Gypsum had the right, because of the contract which Newark entered into with them, to assume legally that Tomkins was Newark's agent until you had notice to the contrary. Is that what you mean?

Mr. BROMLEY. I think we had the right to assume that Tomkins was Newark's agent in view of the statement in the contract.

Mr. KELLEHER. No, but the contract ——

Mr. BROMLEY. The statement to that effect.

Mr. KELLEHER. Even in the contract, the contract recites the sale.

Mr. DEWITT. I think we all agree with you that the Calvin Tomkins Company was a subsidiary of Newark during ——

The COURT. Of itself?

Mr. DEWITT. Of itself.

The COURT. That is all I wanted.

Mr. BROMLEY. I agree with you.

Mr. DEWITT. We agree with that.

The COURT. There has been so much talk about
3360 it I didn't know what was in your minds.

Mr. DEWITT. It is very confusing, I grant you, because of the succession of events, but I think we would all agree with you on that point.

The COURT. This question of agency will have to be developed, you know.

Mr. KELLEHER. But, here is my point now, I am put in this position, that one of counsel contends it is their agent, the other says, "Oh, no, they are not, they are wholly owned subsidiaries." That changes my conception of the whole thing.

The COURT. If you are between the upper and the lower strata the Court can't do anything.

Mr. KELLEHER. I merely point that out, those two conflicting planes necessarily make me reconsider my position as to any claim we make concerning this Calvin Tomkins Company, and any claims we might want to press under this indictment.

The COURT. Now, gentlemen, in order for me to rule intelligently I felt as if I ought to understand the conception of counsel as to the relationship of this subsidiary and that is all the information I wanted. You have given me the information. I have got what I wanted.

Mr. DEWITT. I agree with your Honor, but ——

The COURT. You claim an agency existed?

3361 Mr. DEWITT. The contractual relations between the parties ——

The COURT. Constituted an agency.

Mr. DEWITT. Yes, and put it in the position of a licensee.

The COURT. These various conversations rather indi-

cated to the Court that it was conceded on all sides that a wholly-owned subsidiary was an agent and I just couldn't swallow that and that is the reason I called counsel up.

Mr. BROMLEY. I would like the record to show this: I do not believe the licensee of a patent could form a wholly-owned subsidiary and have it do all the selling free of the restrictions of the licenses.

The COURT. You think as a matter of fact, as I understand it, that legally speaking the subsidiary must be considered as the agent. That is what you virtually say, isn't it?

Mr. BROMLEY. Yes, or must be bound by the license if it sells all the patented product that is made by its parent.

The COURT. Well, that seems to make sense.

Mr. HADDOCK. May I ask if that is your attitude also towards the Newark Plaster Company for the period during which Kelley was a wholly-owned subsidiary of Newark?

3362 Mr. BROMLEY. That question doesn't arise. Kelley made the board, Kelley manufactured the board.

The COURT. Of course, I am not ruling on it now, but Kelley was controlled by Newark, Newark owned all the stock of Kelley.

Mr. KELLEHER. Yes, they were the same companies for all practical purposes.

The COURT. All right.

(End of quotation from criminal record.)

Mr. STEFFEN. For our protection, your Honor, I should like to make a very brief statement, that we do not concede that it was admitted at the criminal trial by Mr. Kelleher, that the sales of gypsum board to or through the Calvin Tomkins Company were not illegal under the Sherman Act.

It is our position that that was very broad, and that at most what Mr. Kelleher did was to state that they would not press the charge made in the indictment, which charged the Calvin Tomkins Company with being a manufacturing distributor whose resale prices had been controlled.

We visualize a number of different charges, and all that was before the court in the criminal case was the matter of resale price control. Here there are a number of other charges, and those sales may be illegal, as brought up under the other and different charges, such as price fixing, standardizing, and many others.

3363 Justice STEPHENS. Well, I think you made that

same statement, in effect, this morning, Mr. Steffen.

Mr. STEFFEN. I wish to save my exception.

Justice STEPHENS. Very well.

The Court understands that you did concede this morning, clearly, Mr. Steffen, that if Mr. Kelleher made the concession which the defendants are contending that he made, you would, in good faith, feel bound by it here in this case.

Mr. STEFFEN. I stated, and am glad to state again, that we will be bound by any admissions that Mr. Kelleher made.

Justice STEPHENS. Thank you.

We will recess until noon tomorrow morning at ten o'clock.

(Thereupon, at 4:10 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Friday, February 11, 1944.)

3364 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., FRIDAY, FEBRUARY 11, 1944.

The above-entitled cause came on for further hearing at 10.00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances (Same as heretofore noted.)

3371 Mr. STEFFEN. I would like to state just a word, I think.

I last night read Wigmore, Section 2104, which Mr. Bromley referred to, and I don't find that it has any particular bearing on this issue. Note carefully that the exhibit which we were offering was a letter written by Mr. Stephen Kelley. That was offered as an admission or a declaration on the part of Stephen Kelley, who was the President of one of the conspirators or alleged conspirators in this case. It was entirely complete as an admission, and required no further explanation at all. Therefore, the rule as stated in Wigmore would simply not apply, because it refers to a document which refers to another or which, for sake of completeness, must have another document presented.

Now so far as it constituted a declaration—and that is all it is being offered for—it was a complete statement.

Secondly, so far as the fairness is concerned, I think Mr. Bromley misconceived the situation. It isn't essential that he put in his letter in order to clarify the declaration. If he wants to question the declaration he should call Mr. Kelley,—and he, of course, can do that,—to determine whether or not Mr. Kelley's statement was made and what his understanding was. That puts him at no disadvantage at all.

Thirdly, we do not have the original of the letter, the carbon copy of which was offered.

3372 Justice STEPHENS. Did you say "do not" or "did not"?

Mr. STEFFEN. I said "do not," and we have never seen it.

Mr. BROMLEY. The Government has got it. It was returned by subpoena, by the Newark Plaster Company and by us, too.

Justice STEPHENS. The Court has given this matter consideration and has looked at such authorities as are available on the subject. They are not very helpful. There is no authority in this jurisdiction, and there seems to be no practice in this jurisdiction which is of an established character, so far as I can determine from discussing the matter with one of the trial judges here who has had extended experience in this jurisdiction.

In the statement in Jones I read yesterday, I omitted

to read one portion which should be called to the attention of counsel, and that is the portion at the bottom of page 551 under Section 293, in which the author states: "Of course, a party offering admissions of this character is not bound by statements favorable to the declarant." That is consistent with the concession Mr. Bromley made, that if you were required to introduce or did see fit to offer the reply to Exhibit 371, that is, the letter of September 29,
1936, purporting to be from the United States
3373 Gypsum Company to Kelley, you would not be bound by it.

If counsel are interested in the cases, the cases which seem to have some bearing upon the subject are *Fleishbein* v. *Thorne*, 193 Wash. 65; 74 Pac. (2d) 80; an English case, *Watson* v. *Moore*, 1 C & K 626. There a letter was offered which appeared to be an answer to one of the offerors. The latter was required to be offered with it.

In the *Thorne* case just referred to, "a party who attempts to establish a contract by correspondence can not put in evidence his letter to the adverse party purporting on its face to answer one from him without producing the previous communication or showing its loss and its contents."

There are other cases of some interest. *New Hampshire T Company* v. *Korsmeyer P & H Company*, 57 Neb. 784; 78 NW 303, where the Court held that "In offering a reply letter of opponent, the answered letter need not be offered where the former 'is fairly self-explanatory'."

The cases are not especially helpful, because they do not touch exactly the situation which we have here. We think the law is this: We think that in the orthodox situation where, for example, a contract is offered in evidence by a plaintiff, and the plaintiff has in his possession also a release of the contract, the contract and the release ought both come in at the same time, because otherwise the Court
gets an untrue picture of the situation, there being
3374 no dispute as to the authenticity of the release. As to connected items of correspondence, or a contract consisting of two letters, both of the letters or both items of the correspondence ought to come in at the same time, there being no dispute that they do constitute the whole of an integrated legal act.

But we think, Mr. Bromley, that this situation is different from that. While it is true, as stated in Jones, and

while you conceded that the Government wouldn't be bound if it put in the answering letter, it would be denied the right to cross-examine with respect to the circumstances under which it was written,—in view of the charge of the Government that the price fixing arrangements are in the nature of a subterfuge, that the license agreements and the transactions connected with them are in the nature of a subterfuge.

Now the extent of cross-examination is within the Court's discretion, but the right of cross-examination is not. The right to cross-examine is absolute. It seems to us since the Government in this case charges that the agreements, license agreements, and transactions related to them are in the nature of a subterfuge, that to require it to put in this reply at the present time rather than having it come in through the defendants would, technically at least, deprive the Government of the right of cross-examination. The situation is different from
3375 the ones I have mentioned of a more orthodox character, because there there is no dispute as to the connected portions of correspondence or as to two parts of a contract, or a contract and its release, being of an integrated nature and both being written in good faith.

Here there is a charge by the Government that the reply is not in good faith, and the Government is entitled to try and prove that. Now in this particular situation, the insistence upon the right of cross-examination seems quite attenuated because, with Henning dead, it seems unlikely that the letter could come in through the defendants by anyone who might have personal knowledge of the circumstances under which the reply was written by Henning. But we can't speculatively say that the letter might not come in under circumstances which would give the Government a substantial advantage of cross-examination to which it is legally entitled.

Therefore, we think that we can not insist upon the Government putting in this reply of September 29, 1936, as a part of its case, even though it wouldn't be bound by it. But we want to add this, that we think where the Government takes documents, as it is asserted here that it has, out of the possession of the defendants, it is under very solemn responsibility to keep possession of them and
3376 see that they are returned to the defendant if they are a necessary part of the defendant's case. Other-

wise, the Government would be in a position to deprive a party of what it is entitled to with respect to the trial of its own case, and we do not intend to have this case presented—and we don't suggest that the Government is trying to present it, but we certainly do not intend to have it presented—in a partial manner. We are going to look at the whole truth before we get through with this case, and we expect the Government to produce the original of that document or, if it can't do that, to take some fair steps towards aiding in the getting in of a copy of the reply, because we are not going to be bound by technical rules to the point where we look at this case in a partial fashion. We must know the whole facts upon which both sides rely before the case is closed.

Has Exhibit 371 been offered?

Mr. STEFFEN. Yes, I believe so.

Justice STEPHENS. And have Exhibits 372 and 373 been offered?

Mr. STEFFEN. Yes, they were offered, I am sure.

3377 Justice STEPHENS. The Court now rules that the Government may now introduce Exhibit 371, and it is received in evidence without the necessity of putting in, at the same time, the letter of September 29, 1936, purporting to be Kelley of the Kelley Plasterboard Company from the United States Gypsum Company.

(The document marked as Government's Exhibit No. 371 was received in evidence.)

Justice STEPHENS. The Court wishes to hear a little further discussion with respect to Exhibits 372 and 373.

You contended, Mr. Steffen, that Exhibit 371 was fully self-explanatory upon its face, and therefore was entitled to come in. But that is not true with respect to Exhibits 372 and 373. They both say, "We are enclosing a copy of our price list," or something to that effect, and in neither of them is the price list shown. So the letters are not clear on their face. What do you say with respect to that?

Mr. STEFFEN. I will make this statement, your Honor, that the Government subpoenaed, back in 1939 and 1940, documents from the Newark Plaster Company, and I think they also subpoenaed documents from Oakfield Gypsum Products Company, or from National, which had taken over Oakfield, and that particularly applies to Exhibit 373.

I think also the Government served a subpoena on the Paragon Plaster & Supply Company, which ap-

3378 plies to Exhibit No. 372.

As far as we have been able to find, we have not seen those price lists.

I am offering the witness here on the stand to testify as to what those price lists may have been, and what the practice of his company was in sending out price lists, which gives to defendants all the opportunity which I think the case permits of, to determine what the price lists were.

I want to say with regard to your Honor's other and earlier suggestion, that we will do everything we can to supply the defendants with all the papers we have received.

Justice STEPHENS. Thank you, Mr. Steffen.

We will defer ruling on Exhibits 372 and 373 until you have finished examining the witness.

Do you wish to be heard on 372 and 373 further, Mr. Bromley?

Mr. STEFFEN. I might suggest that Exhibit 374, [redacted] I said yesterday evening, is in the same bracket, and I would like to offer it, to be ruled upon in conjunction with Exhibits 372 and 373.

Justice JACKSON. You were examining on Exhibit 374 yesterday, were you not?

Mr. STEFFEN. That is correct, but it has not yet been received in evidence.

Justice STEPHENS. Exhibit 374 is in still a different category. Our attention has not yet been called to
3379 any explanatory answer to Exhibit 374. Exhibit 374 does not seem to contain a reference to some other item such as a price list.

Mr. BROMLEY. No, it is not in the class of Exhibit 371 at all.

Justice STEPHENS. What do you say about Exhibits 372 and 373, Mr. Bromley—do you think they are distinguishable from the ruling we have made with respect to 371?

Mr. BROMLEY. Oh, yes, I think they clearly are, because both of them are letters with enclosures. There is a dispute between us as to what the enclosures were. I think it is probably plain from a reading of the letters themselves—at least from the way I interpret them—that what was enclosed was the usual price list which Kelley would send to any customer, notifying the customer what the customer would be called upon to pay for goods.

Both those letters say, "We are enclosing", as I remember, "our prices", and so forth.

Justice STEPHENS. That is right.

Mr. BROMLEY. Now I suppose the Government would contend, since it has offered these two exhibits right after Exhibit 371—Exhibit 371 being dated some six or more months prior to 372 and 373—that Exhibit 371 creates the inference that what Kelley sent to these manufacturing distributors was our USG price fixing bulletins. Now of course that should not have been done. It never was
3380 done by us. We wouldn't send them to anybody who was not a licensee. It should not have been done by Kelley because Oakfield was not a licensee, and had no business with our bulletins.

So there is a dispute here as to what the enclosures were. I say they were perfectly proper enclosures. Mr. Steffen is going to argue that they were improper. So he produces the letters, without the enclosures, and the witness has stated that he doesn't know anything about it, and of course he doesn't. It is Wileman's letter.

Mr. STEFFEN. The witness has not stated that.

Mr. BROMLEY. The witness may know about the practice of the company, but he doesn't know what these enclosures were, and I think they ought to be produced before the letters go in.

Justice STEPHENS. Well, my colleagues, I think, would like to hear more from the witness upon the subject before we rule, and I think I share their views, with respect to Exhibits 372 and 373. So the witness may take the stand and you may renew your objection to Exhibits 372 and 373 at the conclusion of the testimony of this witness.

Mr. BROMLEY. Before we proceed, I respectfully ask that the letter of September 29, not yet marked, which has been the subject, in part, of the Court's ruling as to Exhibit 371, be now marked as Defendants' Exhibit No. 19 for identification.

Justice STEPHENS. It may be so marked.

(The letter referred to was marked as Defend-
3381 ants' Exhibit No. 19, for identification.)

Justice STEPHENS. If there is nothing further in the way of discussion, you may proceed to examine this witness.

Mr. BROMLEY. I should like the record to show, in connection with the marking of Exhibit 18 for identification, that I now formally call upon the Government to produce the carbon copy of that exhibit which it subpoenaed sometime in 1939, and which was turned over in response to that subpoena, from the files of the United States Gypsum Company.

Mr. KNUFF. I might answer Mr. Bromley ——

Justice STEPHENS (interposing). The record may show that demand.

Mr. KNUFF. I might answer Mr. Bromley in the language that he used with me on the 19th, but I am not going to do so, in which he said that he was tired of preparing the Government's case. We could say that we are tired of preparing the defendants' case. But we will make every effort to get that.

Justice STEPHENS. Well, that seems uncalled for to the Court, Mr. Knuff, because if the Government is in possession of this document, the defendants cannot prepare their case unless it is returned to them.

Mr. KNUFF. They can subpoena it the same way as they suggested to us.

Justice STEPHENS. They ought not to be under
3382 the necessity of subpoenaing it if it is in the possession of the Government. The conventional practice, where parties are in possession of each other's documents, and where both parties are present in court, is for counsel to give formal notice to produce. Why put the Court to the trouble of sending out subpoenas in such a situation?

Mr. KNUFF. I agree with that, but when we made a request, he answered ——

Justice STEPHENS (interposing). Let's not get into any tit-for-tat argument.

Proceed with this witness.

Whereupon, FREDERICK TOMKINS, a witness, having been previously duly sworn, resumed the stand and was examined and testified further as follows:

DIRECT EXAMINATION (Resumed) by Mr. STEFFEN.

Q. May the witness be shown Government's Exhibit 374 for identification?

(Government's Exhibit No. 374 for identification was handed to the witness.)

By Mr. STEFFEN.

Q. Exhibit No. 374, Mr. Tomkins, was the exhibit we were discussing when the Court recessed yesterday, and I had asked you some questions as to what goods
3383 the Oakfield Products Corporation was selling, and I think you stated that they were buying board and lath from you, and selling it to the dealer trade, is that correct?

A. That is correct.

Q. And in the course of selling to the dealer trade, it is of course necessary for Oakfield to quote prices to dealers?

A. I don't think you can sell anything without quoting prices.

Q. I asked you this question on page 3645 of the record:

"Q. And that dealer price is the mill price, plus freight, is it not?"

And you said, "Yes".

Then my next question was:

"Q. So that it was necessary for Oakfield to know that there was an increase in price so that they would get the right price to the dealer?"

I suggest that you might have meant to say, or that you did say, "So that they would quote the right price to the dealer?" Can you tell us what you meant to say there?

Justice STEPHENS. What page is that on?

Mr. STEFFEN. On page 3646, I believe. It starts on page 3645 and goes over to 3646.

I will show you the transcript, Mr. Tomkins.

(A copy of the transcript was handed to the witness.)

3384 The WITNESS. What I meant to convey in my answer and the way I understood the question, was that it would be necessary for Oakfield to know the dealer's price so that they would receive from the dealer the correct price that would still leave them their 12½ per cent discount intact, because if they did not add the freight increase to the dealer price, their commission or discount would have to absorb it, and they would then be at a disadvantage.

By Mr. STEFFEN.

Q. And, therefore, how would you like that sentence to read, "get the right price to the dealer", or "quote the right price to the dealer"?

A. I would like to have it state, "get the right price from the dealer".

Q. And that would entail that they would have to quote the correct price to the dealer, would it not?

A. In order to maintain their full discount, they would have to notify the dealer that his price would be increased by the amount of the freight rate raise.

Q. So that it would be correct to say that they would have to quote the correct price to the dealer, would it not?

A. In order to maintain their same margin of gross profit.

Q. Therefore you could say either, "quote to the dealer"

or, "get the price to the dealer"—is that correct?

A. Well, their interest was in getting the price from the dealer. In order to get a price from a
3385 dealer you have to tell him what price you are going to get.

Q. You have got to quote one to him?

A. Yes.

Justice STEPHENS. When you say "get a price from a dealer" you don't mean to get the mention of a price, but you mean to get money from a dealer?

The WITNESS. That is right, that is what I meant.

Justice STEPHENS. I wish you would explain this, if counsel have no objection, in terms of a concrete illustration. It is very difficult for me to understand it in these terms because it seems to me that the word "dealer" perhaps is being used in more than one sense.

Mr. STEFFEN. I will ask some further questions, but for purposes of clearing the record as respects the fourth and fifth lines of page 3646, the word "to" in the fifth line should be stricken, and the word "from" inserted; and the correction which I suggested this morning, in line 4, changing "get" to "quote", should not be made.

Justice STEPHENS. What correction do you suggest should be made in the fourth line?

Mr. STEFFEN. The witness has now stated that this sentence should be corrected by changing the word "to" in the fifth line to the word "from", so that the sentence would read: "So that it was necessary for Oakfield to know that there was an increase in price so that they would
3386 get the right price from the dealer".

Justice STEPHENS. Is that what you meant to say?

The WITNESS. Yes, sir.

Justice STEPHENS. That correction may be made.

Mr. BROMLEY. It seems to me this is not an example of a correction of the record. It is just like any subsequent examination in which the previous testimony is changed. I don't think the record should be changed, or else the subsequent testimony won't mean anything.

Justice JACKSON. His former testimony is merely clarified by what he says now.

Mr. BROMLEY. That is correct.

Justice STEPHENS. If we could all agree without reference to the witness, that the word "to" should be changed

to the word "from", then we could change the record. But since the record now shows the witness' own interpretation and correct construction of his own answer, there is no need of making any actual change in the record.

Let the record stand in its original words. It is perfectly apparent from a further examination what the witness means.

Mr. STEFFEN. Yes, your Honor.

By Mr. STEFFEN.

Q. I want to ask you some general questions, Mr. Tomkins, about the situation to which Government's
3387 Exhibit No. 374 pertains. The Court is interested in who you mean by the word "dealer." I don't know that "dealer" appears in the letter. But whom do you mean by "dealer"?

A. Well, a "dealer" would be—with reference to this letter—a customer of Oakfield Gypsum Products Company.

Q. And "dealers" would be what sort of people?

A. They would be building material supply firms.

Q. And mason supply firms?

A. Yes, mason supply or building material supply firms.

Q. And they would sell at retail?

A. Yes.

Q. To contractors and builders?

A. And consumers, yes.

Justice STEPHENS. What I would like to have the witness do, if counsel have no objection, is to take a particular example. The price, as I understand it, at which Kelley or Newark, when Newark took over Kelley, sold to Oakfield, was the price determined in the bulletins received from USG, is that right?

The WITNESS. Yes, sir, less a discount.

Justice STEPHENS. Yes.

The WITNESS. Yes, sir.

Justice STEPHENS. Now I would like to have you take a supposititious example, if you will, of a bulletin price, less a discount, and carry it through in terms of that
3388 freight increase, so that the Court will understand it by a concrete example—if no one has any objection to that.

Mr. BROMLEY. I think that is a fine idea. When the witness starts out he might make it plain that the United States Gypsum Company bulletin price was the dealer price, and work in the word "dealer" right along, so we will know what that means too.

Justice STEPHENS. That is a little confusing, I think. You continue to speak of the bulletin price as the dealer price, and you are talking about the Oakfield price as the dealer price, and it seems to me that the term is being used in two different senses, and that might be explained by a concrete example.

Mr. BROMLEY. I think that is correct. I think the dealer price is the same price that is charged to the dealers and to manufacturing distributors, like Oakfield, except that the latter get a discount from the dealer price.

Justice STEPHENS. Have you any objection to having a concrete example given by the witness?

Mr. STEFFEN. No, I would be glad to have that done. I suggest that I might take up, out of order, some of the invoices that I have in the file, and we can get not only a hypothetical case, but an actual case.

Justice STEPHENS. Very well.

3389 (A document was marked as Government's Exhibit No. 375 for identification.)

By Mr. STEFFEN.

Q. I accordingly show you, Mr. Tomkins, what has been marked as Government's Exhibit No. 375 for identification, which consists of some five papers, the first being under date of September 27, 1937, purporting to be an office voucher; the second and third, being apparently office memoranda; and the fourth being an invoice to the Oakfield Gypsum Products Company, under date of September 27, 1937; and the fifth being an order under the same date, September 27, 1937.

I will ask you to examine these, Mr. Tomkins ——

Justice JACKSON (interposing). So that we will have our numbers correct here, does the first one of those documents bear the figure "25" down in the lower right-hand corner?

Mr. STEFFEN. Yes.

Justice JACKSON. And the others follow in succession?

Mr. STEFFEN. That is right.

Justice JACKSON. You are not marking these separately, or are you?

Mr. STEFFEN. I am suggesting that we mark the first one, the office voucher, as Exhibit 375; the next memorandum as Exhibit 375-A; the next one as Exhibit 375-B; the invoice as Exhibit 375-C; and the fifth document as Exhibit 375-D.

Justice JACKSON. And the last one bears the small

3390 figure "29" in the lower right-hand corner?

Mr. STEFFEN. That is correct, your Honor.

Justice STEPHENS. Proceed.

(The documents referred to were marked as Government's Exhibits Nos. 375-A, 375-B, 375-C, 375-D, respectively, for identification.)

By Mr. STEFFEN.

Q. Will you tell the Court what these papers are, Mr. Tomkins—I am referring to Government's Exhibits 375, 375-A, 375-B, 375-C and 375-D.

A. Well, these are all the working papers in connection with a sale of gypsum lath, with the Oakleaf label, made to Oakfield Gypsum Products Corporation, and shipped to the United Clay Products Company in Washington.

The first document, marked with the figure "25" ——

Q. (Interposing.) That is Exhibit 375?

A. Yes—it is just a shipping ticket. The next is the memorandum ——

Justice STEPHENS (interposing). That bears the figure "26"?

The WITNESS. Yes.

Justice STEPHENS. I think it would be well to note that Exhibit 375 bears the figure "25" in the lower right-hand corner and that Exhibit 375-A bears the figure

3391 "26" in the lower right-hand corner. And hereafter it would facilitate matters if you referred to them by their exhibit numbers.

The WITNESS. Yes, sir.

Exhibit 375-A is a memorandum giving the car number in which the shipment was loaded; Exhibit 375-B is apparently a notice of shipment, giving the car number, the date, and the material; Exhibit 375-C is the invoice of Kelley Plasterboard Company to Oakfield Gypsum Products Corporation, billing the amount of the shipment; and Exhibit 375-D is the order received by Kelley Plasterboard Company from Oakfield Gypsum Products Corporation for this shipment to be made.

By Mr. STEFFEN.

Q. Now let's look at Exhibit 375-C. The name "Oakfield Gypsum Products Corp." indicates the concern to whom the sale was made, does it not?

A. It does.

Q. And over at the right-hand side it says, "shipped to United Clay Products Co., University Station, Washing-

ton, D. C." That indicates the firm to whom the shipment was made and also the firm to whom Oakfield sold the shipment, is that correct?

A. United Clay Products is Oakfield's customer for this shipment.

Q. And they would be a dealer, would they not?

3392 A. They are a dealer.

Q. They are a dealer?

A. Yes.

Q. I notice the initials "F. T." after the word "Salesman"—what does that refer to?

A. Those are my initials and I believe they were put on to mark it as a "house account", not attributed to any salesman.

Q. The terms there, "2%—20 days on net after freight"—will you explain that?

A. That means that the discount of two per cent for cash payment within ten days was applicable only to the amount of the invoice covering the lath, and not to the freight.

Justice STEPHENS. In other words, you didn't give them a discount figured on the freight charge as well as the charge for the lath itself?

The WITNESS. No, your Honor.

By Mr. STEFFEN.

Q. Does "2%—10 days on net after freight" refer to ten days after date of invoice?

A. Yes.

Q. Not ten days after the first of the next month?

A. Well, I am not positive of that. We had that arrangement with some customers, but in this instance I am not sure whether it was ten days after date of invoice, or

3393 ten days after the first of the following month. I think this was ten days from date of invoice. We would express it differently if it were ten days after the first of the following month.

Q. Would you say that your discount terms were fairly uniform, or did you make many exceptions?

A. We had two general discounts for cash payment. One was ten days from invoice, and one ten or fifteen days after the first of the following month.

Q. Now did this represent a carload shipment, Mr. Tomkins?

A. Yes—938 bundles is a carload of lath.

Q. And what is the weight of the shipment, can you tell from the invoice?

A. 41,022 pounds.
Q. What was the billing weight?
A. The billing weight?
Q. Yes.
A. It wasn't billed on a weight basis.
Q. What was the mill base price?
A. The mill base price was $13 per thousand square feet.
Q. And what was the basing point?
A. Delawanna, New Jersey.

Justice STEPHENS. Before you go any further, explain what you mean by a "mill base price".

3394 The WITNESS. The mill base price was the price charged to the customer, to which the freight to destination was added, in order to make the delivered price.

Justice JACKSON. The price at the mill?

The WITNESS. The price at the mill, the f. o. b. mill price.

Mr. BROMLEY. In the interest of clarity, may I suggest to the witness that Delawanna was not the basing point. If you look at the invoice you will see that it is Philadelphia.

The WITNESS. That is a correction I accept, Mr. Bromley.

Mr. BROMLEY. That only makes it harder, I regret that I had to mention it, but there is no use in getting it wrong. (Laughter.)

By Mr. STEFFEN.

Q. Now will you explain the point Mr. Bromley raised, concerning Philadelphia as the basing point?

A. There was a gypsum board mill in Philadelphia, operating at that time, and the freight rate from Philadelphia to Washington was less than the freight rate from Delawanna to Washington. Consequently, the bulletin price for board delivered in Washington would be the Philadelphia mill base, plus freight from Philadelphia to Washington. Consequently, when a shipment was made ——

Justice STEPHENS (interposing). Even though the board was actually made at Delawanna?

The WITNESS. That is correct.

By Mr. STEFFEN.

3395 Q. That is done in order that whoever ships into the Washington market would ship in and quote to dealers as identical price?

A. I don't know why the mill base prices are set up.

Q. It does result in that, does it not?

A. I don't think I understand the question.

Q. My point is that anyone selling to this customer, the United Clay Products Company, would have to make the same quotation, would they not?

A. Any licensee under the license agreement would have to abide by it in making this or any other sale.

Q. So that if National were selling to this same customer, and National has one of its mills at Clarence Center, New York, it would have to quote the same mill base price of $13, and add to that the freight from Philadelphia to Washington, is that correct?

A. Well, National would quote the Washington delivered price as shown in the bulletins.

Q. Wouldn't it be the same price as you quoted?

A. The bulletin prices in Washington are all the same. It is a uniform price.

Q. What I am getting at is that National's invoice would be written the same as this invoice, so far as the first item is concerned, would it not? That is, they would say, "Less 12½ per cent on $13" as a base, and
3396 they would put in there as the price $14.96 per thousand?

A. I am not sure that they would.

Q. Wouldn't it be required under the bulletins?

A. I am not clear whether the bulletins require that 12½ per cent be taken from the mill base, or whether it can be taken from the delivered price. I don't know how National would make up its invoice for this shipment. It might simply quote a delivered price basis, less 12½ per cent.

Q. Well, I recognize that you probably don't know how they would quote. You are clear, however, that they would reach a price of $14.96 per thousand in quoting to the dealer in Washington?

A. If they observed their bulletin prices, they would come out with the same price.

Q. Now I want to know how you reach $14.96, assuming you start with a base price of $13.

A. I haven't calculated this. I imagine the $14.96 is the $13 price, plus the freight.

Q. From —— ?

A. Philadelphia to Washington.

Q. And on what weight of board, that is what I am getting at next?

A. On 41,022 pounds of board.

Justice STEPHENS. Where do you get that fig-
3397 ure?

Justice JACKSON. It is right on this exhibit, "Less Freight:—41022#".

Justice STEPHENS. Oh, yes, I see it.

Mr. BROMLEY. Isn't that $1.96 per thousand feet?

The WITNESS. $13 plus $1.96—does that figure 19 cents per hundred pounds?

By Mr. STEFFEN.

Q. I think the calculation may work out that way.

A. It should. I am not sure—these shipments were all made under a weight agreement.

Q. All right, explain that.

A. Instead of having the railroad weigh every car of gypsum board that was shipped from the plant, the railroads would, from time to time, come in to our plant and weigh up samples of board in our warehouse, and we would come to an agreement with the railroad as to what the shipping rate would be on all cars shipped.

Q. That is on the actual weight of the board which you shipped?

A. On the actual weight, the average actual weight, I will say, of the board shipped. Some cars might actually weigh more than others. But it would average out.

Q. On ⅜-inch lath—and "Oakleaf" lath is simply the trade name that you put on for the Oakfield people, is it not?

3398 A. That is right.

Q. It is the same lath as your lath?

A. Exactly the same.

Q. What does 1,000 square feet of your ⅜-inch lath weigh, or what did it weigh back in 1937, could you say?

A. I don't recall what the weight was, somewhere in the neighborhood of 1,250 or 1,450 pounds per thousand square feet. I am not sure what the actual figure was.

Q. Well, isn't it true, Mr. Tomkins—I think it is—that you have two weights, one being the actual weight, which is what you are going to have to pay freight on when the shipment is made, and the other being an arbitrary weight which all the manufacturers have agreed upon as the billing weight; and that the $1.96 is calculated on an arbitrary weight—is that correct, is that your understanding?

Mr. BROMLEY. I object to that as assuming facts not in evidence. There is no such agreement as that.

Justice STEPHENS. Well, if the witness knows whether there is or not, he may say so.

Mr. STEFFEN. I may say that the facts are in evidence; Exhibit 33, page 306, would be one example of where they are using an arbitrary weight for billing purposes.

Justice STEPHENS. If the witness knows that he may say so.

By Mr. STEFFEN.

3399 Q. Are you familiar with that?

A. I am not familiar with that personally, Mr. Steffen. I do know that we did use the same billing weight on our sales of board, in all cases, that is on our 3/8" board, regardless of the amount each car might actually weigh. It was always billed at a flat rate per 1,000 pounds.

Q. And was that what the freight was actually paid on, that weight?

A. I am not sure as to that. I don't know whether those weights were questioned or not, by the railroad.

Q. Let me give you this example—or let me ask you this question, rather—does your board weigh exactly the same as does the board made by National or USG or Certain-teed?

A. No, sir.

Q. There is a variance, is there?

A. Certainly.

Q. How do you quote your prices to dealers?

A. Our prices to dealers are usually quoted on a delivered basis.

Q. And you take a mill base price, in this instance here $13, and you add to it the freight from Philadelphia to Washington, do you not?

A. I don't believe we do that in quoting to a dealer.

Q. In this case ——

A. (Interposing.) In this case we were not quoting a dealer. Our invoice was going to a distributor.

3400 Justice STEPHENS. When you use the phrase "quoting to a dealer", what do you mean?

The WITNESS. If a dealer in Washington sent in an inquiry for board, we would give him a quotation which would be the delivered price in Washington, the price that he would pay for the board.

By Mr. STEFFEN.

Q. That would be $14.96 per thousand here, would it not?

A. I assume so, yes.

Q. Well, what I am getting at is that if that price—and your bulletins all show that the price is the mill base, plus freight from basing point to destination—in order that you may get a uniform price to your dealer, you have to have a uniform billing weight?

A. Surely.

Q. And isn't it true, therefore, that there is an
3401 agreement in the industry that all board of a particular kind shall be priced on a uniform billing weight?

A. I know of no such agreement. We never had any such agreement.

Q. But you have always used a pricing agreement such as this in making sales through Oakfield, is that correct?

A. We have always billed the mill base at Oakfield. Now how much freight we have billed Oakfield, I am not sure. I believe it varied in many instances. In some cases Oakfield would want to sell board where there would be too great a freight absorption that we would have to make in order to make it attractive. In that case we would not assume all that freight absorption; we would make a special arrangement with Oakfield, possibly. We made no guarantee that we would pay the freight anywhere in the United States that Oakfield wanted to ship board to.

Q. I appreciate that. Can you tell us where you get that $1.96 per thousand which is added to the mill base of $13.00?

A. Obviously we get the $1.96 a thousand to bring the $13.00 mill base up to the bulletin price of $14.96 for board delivered in Washington.

Q. You might explain at this time what you mean by "freight absorption".

3402 A. Well, there is freight absorption in this instance.

Q. I would like to have you explain, on the basis of this invoice, what you mean by "freight absorption".

A. The freight from Delawanna to Washington is higher than the freight from Philadelphia to Washington. The price that is ultimately paid for the board in Washington is based on the lower rate from Philadelphia. Consequently, a mill shipping from Delawanna would have to absorb the difference between the freight from Philadelphia and the freight from Delawanna.

Q. And that is what you mean by the statement "less freight—$77.94", is it?

A. No. That $77.94—I don't know, I haven't figured that out. I don't know what that refers to, except the 41,000 pounds that were shipped, less the 19 cents a hundredweight freight charge. Now that was deducted from the amount of money that Oakfield had to pay us, because we assumed that freight expense.

Q. You assumed the difference in the freight between a shipment from Philadelphia to Washington and a shipment from Delawanna to Washington, is that correct?

A. As I say, I am not sure whether we did or not in this instance.

Q. That would be a normal illustration of freight
3403 absorption, would it not?

A. I think on shipments to Washington we probably absorbed the difference ourselves.

Q. The difference between the freight from Philadelphia to Washington and the freight from Delawanna to Washington?

A. That difference, yes.

Justice STEPHENS. Who actually paid the freight bill first, Oakfield?

The WITNESS. No, we paid the freight bill.

Mr. BROMLEY. Wait a minute, Mr. Witness. On this shipment United would pay the freight bill when it got the goods in Washington, wouldn't it?

The WITNESS. I would like to correct my answer. I am not sure whether we paid the freight bill, whether United Clay paid the freight bill, or whether Oakfield paid the freight bill.

By Mr. STEFFEN.

Q. It is possible that United Clay Products paid $77.94 to the carrier, which would constitute the freight, apparently, from Delawanna to Washington, and that would be deducted from the invoice?

A. I don't know that that is the freight from Delawanna to Washington.

Justice STEPHENS. Actually, eventually the person to whom you sold, Oakfield, would pay such freight
3404 as you charged it, I assume? That is, I mean such freight as you required it to bear in view of your absorption of a part of the freight due to the difference in the basing points?

The WITNESS. Apparently in this instance Oakfield paid the $77.94, because that is deducted from the $400.

Justice STEPHENS. Oakfield paid it?

The WITNESS. Oakfield or United Clay.

Justice STEPHENS. I don't understand that.

The WITNESS. I am not clear ——

Justice STEPHENS (interposing). I don't understand that. I should think if they paid it, it would not be deducted.

Mr. STEFFEN. It would be deducted.

The WITNESS. Yes, sir, if they had paid it ——

Justice STEPHENS (interposing). You mean if they had first paid it?

The WITNESS. Yes. Then we would have to take it off the bill.

Justice STEPHENS. You mean you would be giving them a credit for it here?

The WITNESS. Yes. On the other hand, if they were not required to pay it, we would also take it off the bill.

By Mr. STEFFEN.

Q. I want to get one matter clear, Mr. Tomkins, and that is that whoever was selling to United Clay
3405 Products Company in Washington, if he abided by the license agreement, would have to charge the buyer the $449.04; is that correct?

Mr. BROMLEY. I object to that unless the question means the licensee, that it is limited to the licensee.

Mr. STEFFEN. I mean any licensee abiding by the terms of the license agreement.

Justice STEPHENS. The question will be so interpreted.

The WITNESS. Yes, I have already answered that.

By Mr. STEFFEN.

Q. And that is a price made up of the base price at Philadelphia, in this case apparently $13.00, plus freight from Philadelphia to Washington?

A. Yes, I believe that is it. I don't know how the prices are set.

Q. And you agree that in order for that to be a uniform price, it has to be a uniform billing weight?

A. Yes, if it is billed on the basis of $13.00 plus freight.

Mr. STEFFEN. I think we might take a recess at this time, unless you have some questions right at the moment.

Justice STEPHENS. Very well, the Court will be in recess for five minutes.

(Thereupon, a short recess was taken.)

Justice STEPHENS. Proceed.

3406 By Mr. STEFFEN.

Q. Coming back now to Exhibit 374, Mr. Tom-

kins, in the light of the illustration that we have in 375 and 375-A, B, C, and D, can you tell us whether that would be a transaction which would make it necessary for the Oakfield Gypsum Products Company to be aware of the increase in freight mentioned in the letter of April 2, 1938?

A. Well, an increase in freight would change the price at which we billed the Oakfield Company.

Q. And it would also change the price at which the Oakfield would want to sell United Clay Products in Washington?

A. If it intended to retain its full discount.

Q. And the practice on the part of Oakfield and Structural and Connecticut would be to retain their full discount where possible, would it not?

A. I assume it would, I don't know.

Q. Would it not also be necessary for Oakfield to know the increase in price so that they would not be undercutting the price at which other licensees, or licensees would be selling in Washington.

A. If Oakfield did not know what the dealer price was at any given time, it might either undersell or attempt to oversell.

Mr. BROMLEY. It is not crystal clear to me.

3407 Justice JACKSON. You mean the answer?

Mr. BROMLEY. Yes, sir.

The WITNESS. By "oversell", I mean charge more or less than the bulletin price. Unless it knew the bulletin price, it might charge any price.

By Mr. STEFFEN.

Q. And it was your purpose to keep Oakfield informed, for the benefit of Oakfield, and also to make sure that Oakfield was not undercutting prices; is that correct?

A. We didn't know what Oakfield was selling at to these dealers. We made no inquiry as to Oakfield's prices to its dealers.

Q. Do you keep fairly well versed on the prices to dealers?

A. Yes.

Q. And how many salesmen do you have in the field?

A. Well, at this time ——.

Q. (Interposing.) Or did you have at that time?

A. At this time we had maybe 10 or 15.

Q. And if it came to your attention that Oakfield or Structural or Connecticut were underselling yourselves, would you not call that to their attention?

A. Whenever such a question arose, we did ask Oakfield or Structural whether or not they were underselling.

Q. And it would be very important to you, and
3408 to the other licensees, to make sure that they were not undercutting the market price to dealers, would it not?

A. Well, it would be important if it were being done on a large scale.

Q. What would be the consequences, Mr. Tomkins, if Structural or Oakfield should persistently undersell USG or your own company?

A. They would get the business.

Q. They would get the business?

A. Yes.

Q. And how long would they stay in business?

A. I can't answer that.

Q. You mean that if Structural, for example, were selling in Philadelphia at 10 or 15 cents below the price at which USG was selling the same product, that you think they would continue to receive a source of supply?

Mr. BROMLEY. I object to that as speculative.

Mr. STEFFEN. There is very little speculation involved in that, Your Honor. We have a defendant on the stand, and I would like his opinion on it.

Mr. BROMLEY. How can he speculate what USG would do with regard to whether it would sell Oakfield or not?

Mr. STEFFEN. He can speculate as to what his own company might do or he can state what his own company might do.

Justice STEPHENS. Objection sustained. The
3409 question is speculative.

By Mr. STEFFEN.

Q. What would your company do if Oakfield or Structural were to buy from you at 12½ per cent discount and then sell below your dealer prices?

A. That would depend on the effect, if any, it had on our business, and by "our" I mean Kelley business. If it interfered with our business if they quoted a lower price to a dealer than we were selling directly, and took that dealer's business away from us, I don't think we would continue selling them very long.

Q. I don't think you would, either.

A. If it were not in connection with one of our own dealers, I don't think we would know about it unless it were brought to our attention.

Q. And wouldn't it be brought to your attention by USG if it was a sale to a USG dealer?

Mr. BROMLEY. I object to that as speculative again.

Justice STEPHENS. Objection sustained. The Court doesn't foreclose you from asking if particular items of that sort were brought to the attention of Kelley by USG, but as to what USG would do is a purely argumentative question.

Mr. STEFFEN. We will have some further testimony upon that same subject, and I will defer further questioning until then.

3410 By Mr. STEFFEN.

Q. But it is pretty clear, as you stated, that if Oakfield or Connecticut or Structural were selling to your dealers at a lower price, you don't believe they would stay in business very long?

A. Whether it was board or anything else, no one would.

Q. That is right, I think "no one" is a proper answer. And it is clear that Structural and Oakfield knew that, do they not?

Mr. BROMLEY. I object to that as speculative, too.

Mr. STEFFEN. The witness can answer. He has been in business a long while.

Justice STEPHENS. The Court will instruct the witness that if he had some communication or dealings with Oakfield or Structural which puts him in a position to know that they know it, he may answer; but if he is just speculating and reasoning from the general facts, that is a conclusion for the Court to reach, not the witness.

The WITNESS. My answer would be a speculation. I have no knowledge.

Mr. STEFFEN. I have certain further invoices that I would like to bring up at this time, Your Honor.

I now would like to show the witness Government's Exhibit No. 376, which purports to be an office
3411 voucher under date of December 10, 1937, with the figure "30" in the lower right-hand corner; and 376-A, which is a memorandum; and 376-B, which is another memorandum; and 376-C, which is an invoice from Kelley Plasterboard Company to Oakfield Gypsum Products Corporation, under date of December 10, 1937.

(The documents referred to were marked as Government's Exhibits Nos. 376, 376-A, 376-B, and 376-C for Identification.)

By Mr. STEFFEN.

Q. Have you examined Exhibits Nos. 376, 376-A, B, and C, Mr. Tomkins?

A. I have.

Q. Can you tell us what they are?

A. Exhibit 376 is a list of materials covering an order from Oakfield Gypsum Products Company to ship a carload of lath to United Clay Products Company.

376-A is apparently a memorandum from Oakfield, instructing the Kelley Plasterboard Company to make such shipment.

376-B is the mill memorandum showing the shipment loaded in the car, with the car number given.

376-C is the invoice of Kelley Plasterboard Company to Oakfield Gypsum Company covering the shipment.

3412 Q. Do you recognize them as documents of the Kelley Plasterboard Company?

A. Yes, sir.

Q. I note that in Exhibit 376-C the f. o. b. term is "your yard", while in 376-C the f. o. b. term was "destination". Can you explain that?

A. No, sir, I don't understand what "f. o. b. your yard" means in this instance. This was a freight shipment, and I presume the "your yard" is the same as "destination". It meant the plant of the United Clay Products Company.

Q. This invoice, 376-C, calls for perforated lath, as well as Oakleaf lath. Was your company a licensee under license from USG to make perforated lath, do you remember, at this time?

A. Well, I am not sure of the time. We did have a perforated lath license.

Q. The Kelley perforated lath license is Exhibit 31 under date of June 23, 1937.

A. Then the answer is yes.

Q. Do you recall whether you were making perforated lath at this time?

A. Yes, sir, we were.

Q. When did you start making perforated lath?

A. I think Mr. Kelley had started perforating lath just before we took the business over. My recol-

3413 lection is that he had built a machine for perforating.

Q. He built a machine?

A. Yes.

Q. You don't know the date?

A. I don't know the date, and I am not sure that the machine was finished.

Q. What date did you take over?

A. May 1, 1937.

Q. The license agreement with USG is dated June 23, 1937.

A. That would have been at approximately that time that we began.

Q. That is, your testimony is that Kelley may have been making perforated lath before they took out the agreement with USG?

A. As I say, I am not sure whether he was or not.

Q. You recall that perforated lath, under the agreement, was selling at a 25-cent differential?

A. Yes, at one time it was.

Q. It indicates here that the perforated lath is sold on a basis of $13.25, and ordinary lath on a basis of $13.00.

A. That is correct.

Q. I now wish to show you Government's Exhibit No. 377, which purports to be an office voucher dated
3414 November 18, 1937, with the figure "34" in the lower right-hand corner; followed by a memorandum, marked Exhibit 377-A; and a second memorandum, dated November 9, 1937, with the number "36" in the lower right-hand corner, marked Exhibit 377-B; and a third memorandum or paper, with the figure "37" in the lower right-hand corner, marked Exhibit 377-C; and a uniform straight bill of lading under date of November 18, 1937, marked Exhibit 377-D; and an invoice, under date of November 18, 1937, marked Exhibit 377-E.

(The documents referred to were marked as Government's Exhibits Nos. 377, 377-A, 377-B, 377-C, 377-D, and 377-E for Identification.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibits for Identification 377, 377-A, B, C, D, and E, Mr. Tomkins?

A. I have.

Q. And are they papers issued in the regular course of your business?

A. They are.

Q. What is the subject matter of the shipment?

A. These papers cover the shipment of a carload consisting of both plain and perforated lath to George H. Robinson & Sons in Alexandria, Virginia, for the account of Oakfield Gypsum Products Company. They in-
3415 clude the order from Oakfield Gypsum Products

Company, the loading list, the bill of lading, and the invoice from the Kelley Plasterboard Company to Oakfield Gypsum Products Company.

Justice STEPHENS. Perhaps, for the convenience of later readers of the record, you had better designate what each paper is, Mr. Tomkins.

The WITNESS. Exhibit 377 is the itemized list of materials.

Exhibit 377-A is a memorandum giving the car number.

Exhibit 377-B is the order from Oakfield Gypsum Products Corporation.

Exhibit 377-C is the memorandum giving the car number, the date, and the quantity of material shipped.

Justice STEPHENS. That is a mill memo?

The WITNESS. That is a mill memo.

Exhibit 377-D is the uniform straight bill of lading covering the shipment.

Exhibit 377-E is a copy of the Kelley Plasterboard Company's invoice to Oakfield Gypsum Products Corporation.

By Mr. STEFFEN.

Q. Now referring to 377, Exhibit 377, and also Exhibit 377-E, can you tell us more clearly how the price was arrived at?

A. Well, that is shown clearly on 377. The plain
3466 lath was priced at $15.07 destination. From that was deducted the 12½ per cent discount on the $13 mill price.

On the perforated lath, the destination price was $15.32. The mill price was $13.25, from which the 12½ per cent commission was deducted.

Q. And that price of $226.17 appearing at the top of Exhibit 377 was the mill price of $13 plus the freight from Philadelphia to, in this case, Alexandria, Virginia?

A. Well, the $15.07 price was the bulletin price for board sold in Alexandria, Virginia.

Q. I see.

And that bulletin price was arrived at by the addition of the base price of $13.00 plus the freight from Philadelphia to Alexandria, Virginia?

A. I don't know that it was. That was the price that the bulletin called for.

Q. You don't mean that the bulletin had a price for lath delivered in the City of Alexandria, Virginia, of $15.07? It had to be a calculation, did it not?

A. Yes, it would be a calculation made in the bulletin.

Q. The bulletin would tell you how to make the calculation, but it wouldn't make the calculation?

A. What I am trying to bring out is that the bulletin would specify the weight on which the calculation would be based.

Q. There would be a uniform billing weight?

3417 A. There would be a weight, stated in the bulletin, that we were required to use, multiplied by the freight rate.

Q. And all licensees used the same weight for purposes of calculating this price?

A. Yes, it was a part of the bulletin price.

Q. Now on Exhibit 377-D, you have a weight given of 41,022 pounds. That is the actual weight or the stipulated weight of the shipment made, is it not?

Mr. BROMLEY. Which do you mean, actual or stipulated?

Mr. STEFFEN. I think it is either one or the other.

The WITNESS. I don't know which it is.

By Mr. STEFFEN.

Q. When you testified earlier, you stated that ordinarily when you make a shipment by carrier they weigh up your shipment and it appears on the bill of lading; or, where you are making a number of shipments as you do, the carrier will take a sample of your board and reach an average weight; is that right?

A. That is correct.

Q. So that this 41,022 was either the actual weight or the average actual weight of the board that you were shipping, is that correct?

A. Yes, I think it would have to be.

Q. They charge freight on actual weight?

3418 Mr. BROMLEY. Who does?

Mr. STEFFEN. The carrier does.

The WITNESS. They charge freight on the average weight.

By Mr. STEFFEN.

Q. That is the carrier?

A. Yes.

Justice STEPHENS. What is meant by the term "dunnage" on Exhibit 377-D?

Mr. STEFFEN. Yes, I might ask that, Mr. Tomkins.

The WITNESS. Dunnage would be the bracing material or packing material that is loaded in the car to keep the board from breaking. It is usually broken or imperfect board.

Justice STEPHENS. And you have to pay on the weight of that, also?

The WITNESS. Yes, the railroad charges for that.

By Mr. STEFFEN.

Q. I believe the amount of your dunnage, in terms of board, is fixed by the bulletins, is it not?

A. I don't recall.

Mr. STEFFEN. I would like to ask that the witness be shown Government's Exhibit No. 37, page 536. That is Bulletin 5 under date of February 24, 1939.

(Exhibit 37 handed to the witness.)

Mr. KNUFF. May I check and see that the witness
3419 has the right exhibit in front of him, please?

Justice STEPHENS. Yes.

(Exhibit checked by Mr. Knuff.)

By Mr. STEFFEN.

Q. That is a provision, Mr. Tomkins, of the bulletin regulating the size of the dunnage and how you should use it, and so on. Are you familiar with it?

A. I am now. This regulates the size of the dunnage and states that an excessive amount shall not be used.

Q. And does it define "excessive" at any point, do you know?

A. I have read it very hurriedly, and I don't see any definition of "excessive".

Mr. STEFFEN. I now wish to show the witness Government's Exhibit 378 ——

Justice JACKSON. Has that a mark "55" down at the lower right-hand corner?

Mr. STEFFEN. Yes, sir. It purports to be an office voucher under date of August 14, 1937.

Justice JACKSON. If you will give us the connecting number, we can get it quickly.

Mr. STEFFEN. Very good.

Also Exhibit 378-A, which is numbered "56"; 378-B, which is numbered "57"; and 378-C, which is numbered
"58", and which purports to be an invoice of the
3420 Kelley Plasterboard Company dated October 14, 1937.

(The documents referred to were marked as Government's Exhibits Nos. 378, 378-A, 378-B, and 378-C for Identification.)

Mr. STEFFEN. Would Your Honors care to recess at this time?

Justice STEPHENS Yes, the Court will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m., of the same day.)

AFTERNOON SESSION

3421 (The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice STEPHENS. Proceed, gentlemen.

Thereupon, FREDERICK TOMKINS, the witness on the stand at the time of recess, resumed his testimony further as follows:

DIRECT EXAMINATION (Resumed).

Mr. STEFFEN. Will you show the witness, Mrs. Gillette, the documents which have been marked as Government's Exhibits 378, 378-A, 378-B, and 378-C?

(The exhibits referred to were handed to the witness.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit No. 378?

A. Yes, sir.

Q. And the attached papers?

A. Yes, sir.

Q. Are they papers from your company?

A. Yes, they are.

Q. Could you explain to the Court what Exhibit 378 is?

A. Exhibit 378 is an itemized list of materials of the Kelley Plasterboard Company, showing the shipment of a mixed car of perforated lath, plain lath, and neat
3422 plaster, to United Clay & Supply Corporation, to their Baltimore yard, for the account of the Oakfield Gypsum Products Corporation, in October, 1937.

Q. And 378-C is the invoice?

A. Yes.

Q. Now I notice that on these papers you have sold a certain amount of plaster. Is that what you meant by white plaster, or is this a different type of plaster?

A. No, sir, this is the neat plaster, which was purchased by the Kelley Plasterboard Company.

Q. Is it handled any differently than if you were selling white plaster, which you manufactured?

A. Well, I don't know what you mean by "handled any differently".

Q. I mean, you sold mixed cars of board and plaster, did you, on occasion?

A. Yes.

Q. And would you have invoiced any other plaster in the same way, except as to the price, perhaps?

A. I think we would. In some instances we would separate our invoices, showing shipments of board products on one invoice and shipments of plaster or other products on a separate invoice.

Q. In this case, I notice it says "Less freight—
3423 $69.81", appearing on the invoice, which is Exhibit 378-C. That freight is for the whole car, is it?

A. I would assume so, yes.

Q. Could you say positively?

A. Well, I can't say positively. That appears on the material ticket. Apparently it is the entire freight charge that we made to Oakfield. Whether or not it covers the actual freight paid, I don't know. I assume it does.

Q. Do plaster and perforated lath take the same freight rate?

A. I don't know that they do in all cases. I am not sure.

Q. Do you handle all these matters of detail in your office?

A. No, sir, I do not.

Q. Who is the man with the Newark Plaster Company who does?

A. All of these calculations were made by Mr. Wileman.

Q. By Mr. Wileman?

A. Yes, sir.

Q. Is he still with you?

A. No, he is no longer with us.

Q. When did he leave?

A. He left in 1942, I believe, the summer of 1942.

Q. Could you tell us where he is, please?
3424 A. No, I don't know where he is now.

Q. I will now show you Government's Exhibit No. 379——

Justice JACKSON (interposing). Does that bear the number "89" in the lower right-hand corner?

Mr. STEFFEN. Yes, Your Honor.

It purports to be an invoice from the Kelley Plasterboard Company to Oakfield Gypsum Products Corporation under date of April 16, 1937.

I will also show you Exhibit 379-A ——

Justice JACKSON (interposing). That bears the little figure "90", does it?

Mr. STEFFEN. Yes.

Also Exhibit 379-B, with the figure "91" in the margin; Exhibit 379-C, bearing the figure "92" in the margin; Exhibit 379-D, with the figure "93" in the corner; and Exhibit 379-E, with the figure "94" in the corner.

(The documents referred to were marked as Government's Exhibits Nos. 379, 379-A, 379-B, 379-C, 379-D, and 379-E for Identification.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit for Identification 379, and the attached exhibits, Mr. Tomkins?

A. I have.

Q. And what are they, please?

3425 A. Exhibit 379 is an invoice from Kelley Plasterboard Company to the Oakfield Gypsum Products Corporation, covering the shipment of a car of plain gypsum lath, perforated gypsum lath, and metallized gypsum lath, to George H. Robinson & Sons, at Alexandria, Virginia, on April 16, 1937.

Mr. BROMLEY. Is that for the account of Oakfield?

The WITNESS. Yes, the bill is to invoice, it is an invoice to Oakfield.

By Mr. STEFFEN.

Q. That evidences a sale by Oakfield to the George H. Robinson & Sons Company?

A. This evidences a sale by us to Oakfield of lath which was consigned to George H. Robinson & Sons, Alexandria, Virginia, on Oakfield's order.

Justice STEPHENS. By "consigned," I assume you mean sent?

The WITNESS. Shipped, yes, sir.

By Mr. STEFFEN.

Q. And these do not show whether Oakfield actually sold to Robinson, but that would be the normal course?

A. I assume they did.

Q. Now what is meant by "Freight allowed to destination?"

A. That means that the Oakfield Gypsum Products Corporation would receive a credit for the amount of freight to destination, the amount of the freight

3426 shown on the invoice, which, in this instance, is $90.35.

Q. And does that indicate that you, or Kelley Plasterboard Company, was absorbing that amount of freight?

A. That means that Kelley Plasterboard Company, or the customer, was paying that amount of freight. It had been paid, and Oakfield was not required to pay it on this invoice.

Q. I note, Mr. Tomkins, that there are certain bundles of perforated lath mentioned there. Was the Kelley Plasterboard Company making perforated lath at this time, April 16, 1937?

A. Yes, sir, I believe they were.

Q. And do you know how long they had been making perforated lath—this was just about the time that you took over the company?

A. Yes. I testified this morning that I thought they began making perforated lath just about the time we took the company over. Whether it was a little before or a little after, I am not sure.

Q. And you subsequently took out a license with the United States Gypsum Company to make perforated lath?

A. We did.

Q. That was dated—I think we brought out this morning —June 23, 1937. Do you remember that?

3427 A. Yes.

Justice STEPHENS. That was the license to Newark?

The WITNESS. No, that would have been a license to Kelley Plasterboard.

By Mr. STEFFEN.

Q. So for some period prior to the signing of the license, they were making perforated lath without a license?

Mr. BROMLEY. If he knows.

The WITNESS. I am not sure. Yes, I believe they were. I would like to check on that.

By Mr. STEFFEN.

Q. I will show you Government's Exhibit No. 31 to refresh your recollection on that.

(Government's Exhibit 31 handed to the witness.)

A. This is the agreement dated the 23rd day of June.

Q. And will you look at it to verify the signature?

A. Yes, this is correct.

Q. Is that signed by you?

A. It is signed by Mr. Keady for the Gypsum Company and by me for Kelley Plasterboard Company, and is dated June 23, 1937.

Mr. BROMLEY. I move to strike out the answer "Yes", which I think the witness gave to the question, "Then Kelley was making perforated lath without a license?" I don't think he knows that.

3428 The WITNESS. That is the point that this does not clear up. I don't know whether, prior to the 23rd of June, the Kelley Company was making perforated lath. I would have to look that up. I can find out. But I am not clear on it.

Justice STEPHENS. Then the answer "yes" may go out as not being a correct indication of the witness' answer.

By Mr. STEFFEN.

Q. The invoice that I show you, Government's Exhibit 379, would indicate that Kelley was selling perforated lath prior to that time?

A. Yes, there is no question as to that.

Q. And could you tell from looking at the invoice whether they bought that perforated lath from some other place, or made it themselves?

A. There is no way of telling from the invoice.

Q. There would be no other way of them selling it unless they bought it?

A. They either bought it or manufactured it, yes, sir.

Q. And the price, I notice there, is $13.25 mill price, which is maintaining the 25-cent differential which was obtaining at that time?

Mr. BROMLEY. I object to that as incompetent because calling for a conclusion. I don't think the

3429 word "maintaining" is a proper word to put in the question.

Justice STEPHENS. Let us have the question.

(The question was read by the reporter.)

Justice STEPHENS. You mean—which was the price obtaining at that time—I assume?

Mr. STEFFEN. That is correct.

Justice STEPHENS. That word may go out, the word "maintaining."

By Mr. STEFFEN.

Q. We have perforated both license bulletins for this particular period. Could you tell from looking at those what the bulletin price was?

A. Yes, I can read the bulletin prices. (Laughter.)

Q. That is what I mean.

Justice JACKSON. Is there any question but what this is the bulletin price?

Mr. STEFFEN. I don't think so.

Mr. BROMLEY. No.

Justice JACKSON. Why take up so much time, then?

By Mr. STEFFEN.

Q. In regard to metallized gypsum lath, this invoice also calls for a certain amount of that ——

Mr. BROMLEY (interposing). I should have said, in response to Judge Jackson's question, that there is no question but what this price is the same as the
3430 bulletin price.

Justice JACKSON. That is what I meant to imply by my question.

By Mr. STEFFEN.

Q. Now refer to the 157 bundles of metallized gypsum lath on the invoice, Exhibit 379. Was the Kelley Plasterboard Company making metallized board or lath at this time?

A. Not at this time.

Q. Do you know when they first started making metallized board or lath?

A. I don't know the exact date. I believe it was later in the summer of 1937.

Q. And when you took over the Kelley Plasterboard Company, did you ascertain how long they had been making metallized board, how long prior to the time that you took the company over?

A. The Kelley Company had not been making metallized lath.

Q. Excuse me—how long they had been selling it?

A. No, I don't believe I did.

Q. Where did they procure the metallized lath which they were selling?

A. I know that after the Newark Company took the Kelley Company over, that Kelley purchased some metallized board from United States Gypsum Company.

3431 Q. And that ran on until you started making it yourself, which you say was sometime in 1937?

A. I believe it was sometime in 1937, yes.

Q. And this price of $22.00 mill base, is that the same as the license price?

A. Well, I haven't the license price here—I assume it is.

Mr. STEFFEN. Will you stipulate that that is the license price?

Mr. BROMLEY. I don't know what it was.

By Mr. STEFFEN.

Q. May I ask you one or two questions concerning metallized board.

Do you sell a great quantity of that?

A. No, we sell a very small quantity of it.

Q. It is sold at a proportionately high price, is it not?

A. Yes, sir.

Q. The sale of it right now is discontinued on account of the difficulty of getting foil?

A. We have been unable to get foil.

Q. Metallized board is used for insulation purposes?

A. That is correct.

Q. Is it ever used simply for decorative purposes?

A. I believe it has been used for decorative purposes.

3432 Q. For example?

A. In a playroom, or something of that nature.

Q. By turning the foil inside instead of toward the air space, it gives you a metallized surface having a decorative value.

A. (No response.)

Q. Now, Mr. Tomkins, you signed Government's Exhibit No. 31, which was the license to make perforated board?

A. I did.

Q. Did you make any examination of the patent situation covering perforated lath at the time you signed this agreement?

A. No, sir, I did not.

Q. Did you know at the time that the Schumacher Wallboard people out in California were making a perforated lath?

Mr. BROMLEY. I object to that as immaterial and irrelevant.

Justice STEPHENS. The Court doesn't see the materiality of it. It may be subject to some connection.

What is the point of it, Mr. Steffen?

Mr. STEFFEN. Well, the connection will be to show whether the witness, or the Newark Plaster Company, had made an investigation of other possible boards at the time. We will make a legal argument on two or three scores at the appropriate time. At the moment I wish to show sim-

ply—which I think is the fact—that Mr. Tomkins
3433 took out the license, as he has just testified, without any particular investigation, simply because it was almost necessary to do so in view of the dominant position of the United States Gypsum Company, and that they were offering a uniform license.

Mr. BROMLEY. Well, he hasn't said anything like you said after the word "because", I am sure.

Mr. STEFFEN. Your Honor asked me what the relevancy ——

Justice STEPHENS (interposing). We merely wanted to know the materiality. He answered definitely that he did not make any investigation of the patent situation.

Mr. STEFFEN. I understand that to mean ——

Justice STEPHENS (interposing). Then you asked him about the Schumacher Company of California, if he knew they were making perforated lath, and we didn't see the relevancy or materiality of that; but it may have some relevancy, and I was trying to find out what you claimed it was.

Mr. BROMLEY. It seems to me he trespasses upon the rule as to validity already made by this Court.

Mr. STEFFEN. I would say that we are not offering it to test the validity.

Mr. BROMLEY. Then it can have no materiality.

Justice STEPHENS. We will receive it subject to a motion to strike, because we can't tell whether it is material until we hear it, apparently.

3434 By Mr. STEFFEN.

Q. Did you know at the time you signed Government's Exhibit 31, the perforated lath license agreement, that the Schumacher Wallboard Company was making a perforated lath on the Pacific Coast?

A. No, sir.

Q. Will you state, Mr. Tomkins, why you signed the perforated lath license agreement?

A. Well, I understood that other licensees had signed the perforated lath agreement ——

Q. (Interposing.) Do you know just which ones you then understood had signed this agreement?

A. I think at that time I understood that the Ebsary Company, the Certain-teed Company, I am not sure about National—I think there was a question as to National ——

Q. (Interposing.) I think they did not sign it.

A. I think my understanding at the time was that the National Company was the only company that had not signed it.

Justice STEPHENS. Had you finished your answer?

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. And you derived that understanding from talks, did you, with people in the industry?

A. Yes, that was general knowledge in the industry.

3435 Q. And did you talk with Mr. Keady, for example, of United States Gypsum Company?

A. I think I discussed this at one time with Mr. Keady.

Q. And did you understand that there was to be a price differential maintained on perforated lath?

A. I don't recall whether I understood that at the time, or not. At this time, in June, apparently there was a price differential. At no time did we ever have any assurance that there were going to be price differentials. We knew what the fact was at the time.

Q. Then on January 3, 1939, the agreement between Kelley and USG concerning the perforated lath license was assigned to the Newark Plaster Company, is that not true?

A. Yes, that was assigned as of that date to the Newark Plaster Company.

Q. And you have since been making perforated lath, up until the time of the fire, is that correct?

A. That is correct.

Mr. BROMLEY. That license wasn't assigned, Mr. Steffen. That is why they took out a new license, it wasn't assignable.

Mr. STEFFEN. I think that is correct, Mr. Bromley.

By Mr. STEFFEN.

Q. Now that new license you took out on January

3436 3, 1939, provided for no royalty, did it?

A. I don't believe it did.

Q. It was a gratuitous license?

A. I would have to refresh my recollection on it.

Mr. STEFFEN. I should like now to offer in evidence Government's Exhibits 375 through and including 379-E.

Justice STEPHENS. That means 375, 375-A, B, C, D; 376, 376-A, B, C; 377, 377-A, B, C, D, E; 378, 378-A, B, C; and 379, 379-A, B, C, D, and E.

Is there any objection?

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. The exhibits are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 375, 375-A, B, C, D; 376, 376-A, B, C; 377, 377-A, B, C. D, E; 378, 378-A, B, C; and 379, 379-A, B, C, D, E, were received in evidence.)

Mr. STEFFEN. Now I would like to go back to Government's Exhibit 375-C for a moment. Please show it to the witness.

(Exhibit 375-C handed to the witness.)

By Mr. STEFFEN.

Q. This is the invoice we were talking about this
3437 morning.

Can you tell from looking at that invoice what the actual weight of your board was, at that time, per thousand square feet?

A. No, I couldn't tell from looking at this invoice. I can tell the amount of freight that was credited against the price to Oakfield, but ——

Q. (Interposing.) I think all you have to do is to divide 41,022 pounds, which is the actual weight, by 30, and that gives you the weight per thousand square feet.

A. I am not sure that 41,022 is the actual weight.

Q. You said this morning it was either the actual weight or a very close approximation to your actual weight, which was agreed upon between you and the carrier as the average rate; isn't that correct?

A. Yes, but as I say, it may not have been the actual weight of this shipment. There were substantial variations in weight on different cars. But that, for practical purposes, I would say would give you the weight, by that division.

Q. It divides out to about 1350 or 1355 per thousand board feet—is that approximately right?

A. You mean 1350 pounds per thousand square feet?

Q. Yes.

3438 A. I would say that was somewhat lighter than the board actually was.

Mr. BROMLEY. The division gives 1365.

The WITNESS. I believe at this time our board weighed nearer 1400 than 1350 pounds. This may have been actual weight, I don't know.

By Mr. STEFFEN.

Q. If it were actual weight, it was 1360 or 1365?
A. Yes, and that sounds very light to me.
Justice STEPHENS. Didn't you say 1365, Mr. Bromley?
Mr. BROMLEY. It divides out as 1366.
Justice STEPHENS. Do you get a different figure, Mr. Steffen?
Mr. STEFFEN. No, that is correct, or roughly so.

By Mr. STEFFEN.

Q. Now let's for a moment assume that that is the correct figure,—and that the invoice would indicate that it was the correct figure,—can you tell by looking at the price bulletins what the arbitrary billing weight as of this time was, Mr. Tomkins?
A. Well, I haven't got the price bulletin. If I had, I could tell what the billing weight was.
Q. I will show you Government's Exhibit No. 33, at page 229.
A. This doesn't ——
3439 Q. (Interposing.) If you will look in that box on over about half way ——
Justice JACKSON. Half way through that big volume?
Mr. STEFFEN. No, across the sheet.
The WITNESS. This shows a billing weight for 3/8 inch wallboard of 1850 pounds per thousand feet that prevailed on March 21, 1931.
Justice STEPHENS. Where is that figure?
The WITNESS. Under the 3/8 inch gypsum wallboard.
Mr. KNUFF. May I get the right one for the witness to refer to?
Mr. STEFFEN. The witness has looked at the wrong page, Your Honor.
Justice STEPHENS. Yes, you may, Mr. Knuff.
Justice JACKSON. It is the middle of the book, then. (Laughter.)
Mr. KNUFF. That is page 299, Your Honor.
Justice STEPHENS. We have it.
The WITNESS. Yes, sir, that shows a billing weight of 1400 pounds per thousand square feet, and that is dated June 12, 1937.
Justice STEPHENS. That is 3/8 inch gypsum plaster lath, is that right?
The WITNESS. That is right.
Justice STEPHENS. That is in the 7th compartment of the second box from the top, is it not?

3440 The WITNESS. That is correct, yes, sir.

By Mr. STEFFEN.

Q. Refer to the text material in the box on page 299 of Government's Exhibit 33, and state, if you can, how the price is figured upon a sale of gypsum board in carload lots?

A. I am not familiar with figuring these prices. I assume that ——

Justice STEPHENS (interposing). If you are able, from your knowledge of the business, to answer, do so. But if you are answering upon a pure assumption and inference, then you shouldn't answer, because we must know this accurately. Someone ought to be able to explain it who has had detailed familiarity with it. Perhaps your familiarity with this business is such that you could do it.

Justice JACKSON. I don't think the witness understands your question, Mr. Steffen. You asked him to refer to the text, didn't you? He is down at the table.

Mr. STEFFEN. I asked him if that text would enable him to tell how to arrive at the delivered price.

The WITNESS. That is exactly how it is arrived at.

Justice STEPHENS. Which part of the text are you referring to? Let the record show.

Mr. STEFFEN. That part of the text between the heavy lines on page 299, which reads that the "De-
3441 livered price is lowest combination of mill price plus freight from that mill to destination."

Justice STEPHENS. I see where you mean now, thank you.

By Mr. STEFFEN.

Q. Can you tell from that, Mr. Tomkins, how these prices on Government's Exhibit No. 375-C were arrived at —and by "these prices" I refer to the price of $14.96 per thousand?

A. Yes, the lowest combination—which in this instance would be the Philadelphia mill price—plus freight from Philadelphia to destination, would be the delivered price at which the board was required to be sold.

Q. And that would give you, apparently, in this case, if these figures applied, it would give you the $14.96 per thousand?

A. That is correct.

Justice STEPHENS. What does this phrase mean: "Delivered price is lowest combination of mill price plus freight from that mill"—what mill?

The WITNESS. That would be the nearest mill to the destination.

By Mr. STEFFEN.

Q. Mr. Tomkins, are you sure it would be that, or would it be the nearest basing point mill?

3442 A. It would be the nearest mill that is listed on the price bulletin, or it would be, rather, the mill that carried the lowest freight rate to that destination.

Q. The lowest combination of mill based price plus freight rate from the basing point mill?

A. That is correct.

Q. And the basing point mills are listed here on page 299 of Exhibit 33?

A. That is right.

Q. Beginning with Acme, Texas, Boston, Massachusetts, and so on?

A. Yes.

Justice STEPHENS. If you read along to Philadelphia, where do you get the figure $14.96?

Justice JACKSON. $13.00 plus $1.96.

Mr. STEFFEN. The $13.00 is the mill base price.

Justice STEPHENS. And you add to that the freight from Philadelphia?

Mr. STEFFEN. On an arbitrary weight of 1400 pounds per thousand square feet.

Justice JACKSON. Does "arbitrary" there mean guesswork, or that it is an agreed weight?

Mr. STEFFEN. Agreed weight.

Justice JACKSON. When you say "agreed", is it something that the railroad accepts as being the average weight?

3443 Mr. STEFFEN. No.

Justice JACKSON. I don't know what "arbitrary" means, then.

Mr. BROMLEY. I don't think "arbitrary" is a good word. It is a weight which we agree upon with the railroad, and then put in our bulletin, and we impose that on the licensees. We say, "You have got to bill on that weight." Now, you will notice here that on a billing weight of 1400 pounds, if the freight rate were 14 cents from Philadelphia to Washington, it would work out $1.96. Now we know that the freight rate, as shown by the invoice from Delawanna to Washington, was 19 cents, so the freight rate from Philadelphia to Washington was probably 14 cents, and that

works out exactly—1400 pounds billing weight, 14 cents freight rate, which makes $1.96 per thousand feet.

Justice JACKSON. When you say 14 cents, you don't mean that the freight per thousand isn't $1.96, do you?

Mr. BROMLEY. No ——

Justice JACKSON (interposing). That is what I mean.

Mr. BROMLEY. The 14 cents is per hundred.

Justice STEPHENS. That is $14 per thousand.

Justice JACKSON. That is not weight, that is feet.

Mr. BROMLEY. Let me start over again. The rate is 14 cents per hundredweight. A thousand feet of board weighs 1400 pounds ——

3444 Mr. STEFFEN (interposing). That is an arbitrary weight.

Mr. BROMLEY. Not at all, it is the weight we set in the bulletin. 1400 pounds times 14 cents a hundredweight is $1.96 per 1400 pounds, or $1.96 per thousand feet.

Justice STEPHENS. I see.

This 1400 pounds is the bulletin figure which you set?

Mr. BROMLEY. Yes.

Justice STEPHENS. You say you impose that. Will you explain that? What do you mean when you say you "impose that"?

Mr. BROMLEY. In order to fix the delivered price at which these licensees must sell their customers, we, as licensor, say: "You must charge a price which is made up of a mill base price"—in this case $13.00—"plus the freight from the nearest basing point mill to the destination."

Now if we allowed each licensee to base his price on the actual weight of his board, each one of the prices of our licensees would be different. So we tried to arrive, ourselves, at an arbitary weight figure, which is what we judge is about what the board that is being made at the time weighs, in the industry, and we say, "In order to calculate the delivered price, in order to arrive at that part
3445 of it which is freight, use 1400 pounds as the weight. Then if you all do that, you will all come out with the same price, which we are trying to fix."

And that is about what the railroads do, too. They don't weigh every car. They arrive at an approximate weight. They do that by agreement with all of us.

Mr. STEFFEN. I move that those last remarks be stricken out as argument.

Justice STEPHENS. They are just illustrative. We are trying to find out what the system is.

Mr. BROMLEY. So that the delivered price in this case is $13.00 per thousand feet, plus freight of $1.96 per thousand feet, and the thousand feet weighs 1400 pounds, for the purpose of determining a price.

By Mr. STEFFEN.

Q. Well, in this particular case, Mr. Tomkins, it would seem that the actual weight of the board was about a thousand pounds less than the weight at which it was billed. If it were billed on a basis of 1400 pounds, it would be 42,000 pounds for the shipment.

A. Correct.

Q. And the actual weight was, according to the railroad and the Kelley Plasterboard Company, who agreed upon that weight, 41,000, approximately, including dunnage.

A. I don't know whether there was any dunnage. There is no bill of lading with this shipment.

3446 Q. We don't have that. There ordinarily would be dunnage, would there not, in a car?

A. Not necessarily in a straight carload of lath.

Q. I want to ask a question, Mr. Tomkins—did your board ever exceed 1400 pounds?

A. In actual weight?

Q. Yes.

A. Oh, yes, I imagine it did.

Q. And to your knowledge, do some of the other manufacturers make a board, or were they making in 1937, a board weighing more than 1400 pounds?

A. Yes, I think some board weighed over 1400 pounds at that time.

Q. And it is your understanding that Mr. Bromley's statement is correct, that in order to get a uniform delivered price it was necessary to agree upon an average or arbitrary billing weight for 1,000 square feet of board?

Mr. BROMLEY. I didn't say it was necessary to agree upon it. It was something we imposed as a condition.

Mr. STEFFEN. All right, it was necessary to have a uniform weight which all licensees and the licensor would use as a billing weight?

The WITNESS. It don't know whether it was necessary to have it. We had it.

3447 By Mr. STEFFEN.

Q. I see.

Now in the case of this particular shipment, the customer was paying a price greater than he needed to have paid if

the price were calculated on the actual weight; is that not correct, as a mere matter of mathematics?

A. Well, the customer was paying a delivered price.

Q. That is right. If you had charged him, the customer, the mill base price of $13.00, plus, we will say, a rate of 14 cents from Philadelphia to Washington based on actual weight, the price would have been lower than it was in this case, would it not?

A. You mean the credit for freight would have been higher?

Q. No, I mean if you could have been permitted to charge mill base price plus 14 cents per hundredweight on the actual weight of the board, instead of on this arbitrary weight?

A. Yes, if the bulletin price, in other words, had been lowed ——

Q. (Interposing.) Just a moment, the bulletin price is fixed at $13.00, mill base.

A. That is part of the bulletin price.

Q. The rest of it to be freight.

A. That is right.

3448 Q. And the freight is based upon an arbitrary weight of, in this case, 1400 pounds?

A. Yes, that is correct. We were required to add freight at the rate of 1400 pounds per thousand feet of board.

Q. Even though your board didn't weigh that much, didn't weigh 1400 pounds.

A. It didn't make any difference what the board weighed. It might have weighed less or more.

Q. That is what I wanted to get clear. In this case the freight was charged from Philadelphia to Washington, D. C.?

A. That is correct.

Q. And somebody had to absorb the difference, because the freight from Delawanna to Washington, D. C., was greater?

A. Right.

Q. Suppose that your mill had been in Baltimore, and you were shipping into Washington, would you have based it again on the same place, Philadelphia?

A. I think I would have trucked it in.

Q. Probably, but let's assume, for this illustration, that you ship a carload from Baltimore to Washington, what would be your basing point?

A. If I had a mill in Baltimore, I would expect to have

that mill serve as a basing point. I don't know what
3449 the price would be.

Q. By what right would you expect to have that?

A. I wouldn't build a mill in Baltimore if I knew I was going to be at a freight disadvantage in shipping to Washington.

Q. Who stipulates the freight situation?

A. The licensor.

Q. And is there any control on your part as to that?

A. Well, there is the control as to whether or not I would build the mill.

Q. That is right. Are you familiar with the list of basing points?

A. Yes, sir.

Q. Are those basing points all places where USG has mills?

A. I don't know.

Q. Well, do you see Clarence Center among them?

3450 Mr. BROMLEY. I object to this as immaterial. It commences to sound to me as an attack on the basing point system which has been the subject of vast litigation, and still is, but which I believe not to be in issue in this case.

Justice STEPHENS. What is the purpose of this examination, Mr. Steffen?

Mr. STEFFEN. We think the basing point system is in issue in this case.

Justice JACKSON. What is your theory as to that?

Mr. STEFFEN. Well, your Honor, our contention is that the licensor has imposed upon the licensees, as Mr. Bromley would put it; or that the licensees agreed to have the licensor impose upon them, as we would state it, a whole system of marketing gypsum board. I am just barely getting into the details of how they price and how they base upon one point rather than another. The whole matter is, to our way of thinking, a complete restraint of trade going much beyond anything that is permitted under the pricing that is recognized in the General Electric case.

The General Electric case provided, as we saw it, in a fairly simple way, that a single licensor could license a single licensee to make Mazda lamps, and the court said that in conjunction with that there could be price fixing.

In this case we are contending that the defendants have gotten together to regulate the entire business of manufacturing and distributing gypsum board, and gyp-
3451 sum products; and they have imposed, as Mr. Bromley says—or the group have gotten together and

agreed upon—a number of practices such as an arbitrary basing point system, which we wish to call to your Honors' attention as being a definite restraint of trade, and as being a regulation going much beyond anything permitted in the General Electric case which, as I have said, is the defense relied on here.

I would like to make the further point ——

Justice STEPHENS (interposing). You needn't do so. We think the examination is not improper for the reason that the charge in the complaint is that the bulletins were sent out under the license agreements, and the prices were based on the bulletins, or the prices followed the bulletins, and the bulletins are in evidence and show some sort of basing point system. We think the Government is entitled to explain to the Court what it is—and that is what you are apparently doing?

Mr. STEFFEN. I am trying to do so, your Honor.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. For purposes of illustration, Mr. Tomkins, assume that your mill was between Philadelphia and Washington, located in Baltimore or at some point between Washington and Philadelphia—would you base then on Philadelphia?

3452 A. Let me answer that this way. If I were a licensee, obligated to sell at bulletin prices, I would base it on whatever those bulletins required me to base at that time.

Q. That is correct. And under the bulletins as they were in effect on June 12, 1937, Philadelphia would have been the closest basing point provided?

A. Philadelphia was the basing point in 1937.

Q. That is right.

A. Correct.

Mr. BROMLEY. Closest to what?

Mr. STEFFEN. Closest to Washington.

The WITNESS. To Washington.

By Mr. STEFFEN.

Q. What I am getting at is that in such event you would charge the customer in Washington the $13.00 mill price, plus the freight from Philadelphia to Washington, notwithstanding that your mill was closer to Washington and the freight might be less?

A. Well, if this bulletin ——

Q. (Interposing.) If this bulletin had applied?

A. If this bulletin were exactly the same as it is now, that would be the nearest basing point to Washington still.

Q. That is right. The point I am trying to make, if you agree, is that if your mill were closer to the point of destination than the basing point mill, you would still have
3453 to pay freight, or charge the customer freight, from the basing point mill to destination, even though the actual freight were less.

Justice STEPHENS. That is assuming that there was a mill between Baltimore and Washington?

Mr. STEFFEN. Between Philadelphia and Washington.

Justice JACKSON. And assuming that you had the same bulletin?

The WITNESS. Yes, and assuming there was no other basing price on the bulletin.

Mr. STEFFEN. We have other illustrations, your Honor, which are perhaps more in point. I just wanted to get Mr. Tomkins' idea on this.

By Mr. STEFFEN.

Q. Now I would like to show you, Mr. Tomkins, Government's Exhibits 372 and 373 for Identification which we were talking about yesterday afternoon.

I gather from looking at Exhibits 372 and 373 that these have to do with trucking sales rather than with carload shipments, is that correct?

A. They deal with both. They eliminate certain counties from the trucking area, which would mean that they would then be in the railroad freight area.

Q. You have said a lot of things there. What do you mean by "trucking area"?

3454 A. The area in which the bulletins quote delivered prices by truck.

Q. Well, is this the situation, that around New York, around Boston, around Buffalo, and around Chicago, and such metropolitan centers as those, there are certain areas in which there is a delivered price for truck deliveries?

A. That is true as to the New York City area, that is the only one I am familiar with.

Q. And you don't go through this performance of having a mill base price and then adding freight from the mill to destination; the license bulletins provide a fixed delivered price by truck, in those instances?

A. Correct.

Q. And do those license buildings stipulate just how far that truck area extends?

A. I believe they do, I think they give it by counties.

Mr. KNUFF. I think the exhibit you have before you Mr. Tomkins, is only Exhibit 33, isn't it?

The WITNESS. Yes.

Mr. KNUFF. I don't believe that will show it.

The WITNESS. No, I don't think this does show it. My recollection is that trucking areas were defined in certain price bulletins.

By Mr. STEFFEN.

Q. And they were defined, you would say, by counties?

3455 A. By counties; and I think in New York by boroughs in addition, possibly.

Q. Then the area around New York, for example, is all marked out geographically, each zone or area having a fixed price, is that correct?

A. A delivered price, yes.

Q. A delivered price—by truck?

A. By truck.

Q. And when you say here, therefore, that you are "eliminating Berks and Lancaster Counties, Pa., and Delaware, Greene, and Columbia Counties, New York, from the trucking area on Gypsum Board," you mean you are restricting somewhat that delivered price area?

A. Well, those areas in New York State would be served by up-State mills, not by New York City plants.

Q. Well, were they formerly in the truck delivered price area?

A. I assume they were; otherwise this letter wouldn't have been written.

Q. And they would be served from the Buffalo area?

A. Presumably; and Berks and Lancaster counties, in Pennsylvania, presumably would have been served from the Philadelphia mills.

Q. And when you say that you are eliminating those counties from the trucking area, you mean that you are no longer trucking into those areas, and that there-

3456 fore, if you are selling to Oakfield and making shipments to Oakfield's customers, that they couldn't be handled on the former delivered price basis, is that correct?

A. I don't believe we ever trucked into these areas.

Q. What was the purpose in saying that they were being eliminated, then?

A. I can't answer that ——

Justice STEPHENS (interposing). Just a moment before you go any further. Do you mean Oakfield? Neither of these exhibits refers to Oakfield.

Mr. STEFFEN. Let me clear that up.

By Mr. STEFFEN.

Q. Referring to the Paragon Plaster & Supply Company, do you know any reason why you should send a letter of this sort to them?

A. I don't know anything about either of these letters.

Q. Was not the Paragon company affiliated with the Oakfield company?

A. The Paragon Plaster & Supply Company in Scranton owned some stock in the Oakfield Gypsum Products Corporation, I believe.

Q. And the Oakfield Gypsum Products Corporation sold plaster to the Paragon Plaster & Supply Company?

A. Yes, they did at one time.

3457 Q. And the Oakfield Gypsum Products Corporation bought board from Kelley?

A. That is right.

Q. And did they sell it to Paragon Plaster & Supply Company?

A. They did, they sold board to them.

Q. And did Paragon act as a jobber or a dealer, or do you know?

A. Paragon Plaster & Supply acted in some cases as a jobber and in some cases as a dealer.

Q. So it would be pertinent to them, in their jobber capacity, to know what the prices were to be to dealers in this area, would it not?

A. Well, yes, they would be interested in dealer prices in the area in which they were selling, on all products.

Q. Surely. Now let's take the next sentence, Mr. Tomkins. It says: "The prices as shown for these respective Counties are still the prices which apply when delivered by carload, mixed car or pool carload lots only."

Now that is the sort of thing that we were just talking about, is it not, where you take the mill base price and add the freight to destination?

A. Well, that means that in the future, prices would be based on the regular mill basing point plus freight method.

Q. Which we have just discussed?

3458 A. That is correct.

Q. What is meant by "minimum quantity 7500 sq. ft."?

A. Well, that, I assume, applies to the minimum quantity permitted to be shipped in a pool carload.

Q. Do you mean a pool carload?

A. Yes, I mean a pool carload.

Q. The minimum was much higher than that, was it not, for a carload?

A. I am talking about a pool carload. That is a carload going to several dealers.

Q. For purposes of the record explain what a "pool car" is, Mr. Tomkins?

A. A pool car is a full carload of board, carrying the full carload price, which is consigned to several dealers, so that each dealer gets the benefit of the lower freight rate without being required to take a full carload of material.

Q. And it is a requirement, is it not, of the licensor, that licensees must sell in full carload lots, whether straight, or mixed or pool?

A. On freight shipments?

Q. That is right.

A. I am not sure that that is a requirement; I don't believe that it is.

Q. I think the bulletins will bear out that it is in most areas.

3459 Mr. BROMLEY. That is a question of freight rates, Mr. Steffen, not a question of bulletins.

By Mr. STEFFEN.

Q. Let me get this clear for my sake and for the Court's sake. That 7500 square feet, as you understand it now, is the minimum quantity that any one dealer might take in a pool car, is that right?

A. That is the only bearing I can see that the 7500 square feet has to this letter, that it would apply to the minimum quantity he would have to take in a pool car.

Justice STEPHENS. Do you mean that he must take that much, or might not take more?

The WITNESS. He could not take less than 7500 square feet.

By Mr. STEFFEN.

Q. Let me now ask you with regard to trucking generally. During 1937, 1938 and 1939 what was the minimum truck load that you sent out of your Newark board mill?

A. Our board mill was in Delawanna, and I believe the

minimum quantity was 7500 square feet.

Q. Now let's explain what that means. Was that a regulation of the licensor?

A. Yes, I believe it was.

Q. And what does it mean, exactly.

A. It means that we could not make a delivery to a dealer of less than 7500 square feet, at one time.

3460 Q. And if he only wanted to get 5000 square feet you had to tell him that you were sorry but that you couldn't deliever it by truck?

A. He would have to increase the quantity or we would not make the delivery.

Mr. BROMLEY. That was all subject to that price, at that price.

The WITNESS. I don't recall whether there was a provision that we could make a surcharge for a lesser delivery, or a higher price.

Mr. STEFFEN. There is no provision in the bulletins fixing that surcharge, is there?

The WITNESS. It is not fixed, and I am sure it could not be collected.

By Mr. STEFFEN.

Q. It boils down to the fact that in making truck deliveries the licensor had required you to deliver, whenever selling a dealer, not less than 7500 square feet.

A. I believe that is correct.

Justice STEPHENS. Let us take the afternoon recess.

(Whereupon, a short recess was taken, after which the hearing was resumed.)

3461 Mr. STEFFEN. I believe Exhibits 372, 373 and 374 have been offered, but have never been passed upon. I would like to reoffer them at this point.

Justice STEPHENS. Are they objected to?

Mr. BROMLEY. Exhibits 372 and 373 for identification are objected to as immaterial and incompetent, for the reasons heretofore stated.

Justice STEPHENS. On the ground that they are incomplete because they lack the enclosed price lists, is that what you mean?

Mr. BROMLEY. Yes, sir.

We object to Exhibit 374 only on the usual ground.

Justice STEPHENS. Exhibit 374 is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Governments Exhibit No. 374 was received in evidence.)

Mr. STEFFEN. I would like to point out, your Honor, that Exhibits 372 and 373 were each introduced in the criminal trial, so there is no question as to their genuineness, their identification.

Justice STEPHENS. There is no objection on the ground of identification.

What price lists do you claim they refer to, the bulletins?

3462 Mr. STEFFEN. Let me ask the witness.

By Mr. STEFFEN.

Q. Mr. Tomkins, these letters, Exhibits 372 and 373, say, "Prices as shown for these respective counties", and so on—those are prices at which the Kelley Plasterboard Company would sell in those particular areas, are they not?

A. I don't know, Mr. Steffen. I don't know what it meant in either of these letters by "our price list." I don't know what lists were sent.

Q. Let me ask it this way. You were sending price lists to Structural and to Oakfield and to Connecticut—you testified to that yesterday.

A. From time to time price lists were sent to those companies.

Q. And those prices were what prices, Mr. Tomkins?

A. Those prices were the prices at which we were selling our products to dealers.

Q. That is right. And if Oakfield were to sell to their dealers in those localities, you wanted them to know what your prices would be to those dealers, is that not right?

A. Well, they would want that information, they would want to know what the dealer prices were.

Q. And those prices that you were sending them then were the bulletin prices for sales to those dealers in those areas.

A. The bulletin prices were the dealer prices.

3463 Q. That is right. And you were sending them, therefore, to Oakfield and to Structural and to Connecticut?

A. Yes, but I don't believe we were sending them the actual bulletin prices. I believe we were sending, as these letters state, our price lists.

Q. Now let's get clear how you made up your price lists which you sent to Structural and Oakfield and Connecticut.

A. Our dealer price list would show our prices to dealers for all products. Now our prices to dealers for board products were bulletin prices. Consequently, our dealer price list, as to board products, would be bulletin prices for board sold to dealers.

Q. And therefore, the only prices that could be referred to here in Exhibit 372 and Exhibit 373 would be your bulletin prices to dealers?

A. Yes, they would be the bulletin prices to dealers.

Justice STEPHENS. Do you mean by that that you sent the bulletins out to them, or the prices which were the same as the prices in the bulletins?

The WITNESS. I don't know which we sent. I believe as these letters state, they are "our price lists", and that they were not actual bulletins which were sent. I believe they were Kelley Plasterboard Company's price lists.

By Mr. STEFFEN.

Q. As a matter of fact, it would be very difficult for Oakfield to know what to do with the bulletins
3464 if they received them, would it not?

Mr. BROMLEY. I object to that as speculative.

Justice STEPHENS. Sustained.

Mr. STEFFEN. I think, your Honor, that the witness has clarified it sufficiently so that we can say that the prices, or the price lists, rather, referred to in Exhibits 372 and 373, are prices referred to in the bulletins, and would be the prices at which the Newark people would sell to dealers. They obviously didn't go through the calculation of having a base price, and then adding to it the freight from a basing point, and so on.

By Mr. STEFFEN.

Q. You gave simply the delivered price to the dealer, is that correct?

A. Yes, because that was the price that we were going to charge Oakfield, less a discount. It was the only way we could advise them what their price was.

Justice STEPHENS. We think the exhibits should be admitted in evidence. They are sufficiently explained to be admissible. The defendants may cross-examine with respect to them, or offer contrary material.

They are received in evidence, that is, Exhibits 372 and 373.

Mr. BROMLEY. Subject to the usual objection.

3465 Justice STEPHENS. Yes, subject to the usual reservation again, with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 372 and 373 were received in evidence. (Not admissible so far as declarations of Oakfield and Paragon because neither Oakfield nor Paragon were charged as being co-conspirators.))

By Mr. STEFFEN.

Q. I now show you, Mr. Tomkins, Government's Exhibit No. 380, which purports to be a letter from you to Mr. Eldred under date of November 17, 1937.

Justice JACKSON. Bearing the figure "65" in small figures down at the bottom of the page?

Mr. STEFFEN. I don't find that, your Honor.

Justice JACKSON. It appears on mine.

Justice STEPHENS. Was that Exhibit 207 in the criminal proceeding?

Mr. KNUFF. It was Grand Jury Exhibit 207.

Mr. STEFFEN. And Exhibit 157 in the criminal proceeding.

Justice STEPHENS. This is going to be numbered what?

Mr. STEFFEN. Exhibit No. 380.

(The document referred to was marked as Government's Exhibit No. 380, for identification.)

By Mr. STEFFEN.

Q. Do you recognize Government's Exhibit 380 for identification as a copy of a letter which you sent to Mr. Eldred?

3466 A. Yes.

Q. Who was Mr. Eldred?

A. Mr. Eldred was the president of the Oakfield Gypsum Products Corporation.

Q. Had you known him for some time?

A. Yes, I had known him for some years.

Q. The first sentence in the letter refers to a Harry McCormick—who was he?

A. Harry McCormick was sales manager for the Structural Gypsum Division of American Cyanamid.

Q. And had you known him for some time?

A. Yes, I had known him for some time.

Q. Did you have a luncheon with Mr. McCormick at or about this time?

A. Yes, I did.

Q. The letter referred to a shipment of Oakleaf Lath delivered directly to a job. Did you discuss the matter with Mr. McCormick?

A. Yes. I have no recollection of this, other than what is stated in the letter. I undoubtedly did.

Q. Well, did he make a complaint about the matter?

A. I don't know that he made a complaint. He informed me that there had been some excitement or discussion among Philadelphia dealers, owing to the fact that a shipment of Oakleaf lath had been delivered directly to a job.

3467 Q. Why would there be any excitement among the dealers if there was a shipment made directly to the job?

A. Well, that would put the dealers who had to make their own deliveries to the job at a disadvantage, as compared with a dealer for whom the manufacturer or distributor was bearing the cost of delivery.

Q. And your conversation indicated that someone from the Oakfield Gypsum Products Corporation had made such a delivery?

A. All Mr. McCormick stated was that some Oakleaf lath had been delivered. He didn't say in his conversation with me who delivered it.

Q. Now if this were in a truckload, the orthodox way of handling it would be for the truck to deliver the material to the dealer, put it in his warehouse, and then have it trucked out to the job, is that the correct procedure?

A. That was the normal procedure.

Q. And although you were selling board and going right by the job at which it was to be used, your trucks would have to go clear to the dealer and then have the dealer ship the stuff back to the job?

A. Yes, sir, our trucks ——

Mr. BROMLEY (interposing). Just a moment. I object to that as incompetent, and calling for a conclusion in so far as the use of the phrase, "your trucks would have to go" is concerned.

3468 Mr. STEFFEN. Leave out the "have to" and make it they would go.

Justice STEPHENS. That correction may be made.

By Mr. STEFFEN.

Q. Now under the bulletins do you understand that you have to make deliveries to the dealer and not directly to the job?

A. To the dealer's warehouse.

Q. And you would not be permitted under the United States Gypsum Company license bulletins to deliver directly to the job, is that correct?

A. I believe that is in the bulletins. I am not clear as to all these bulletin provisions.

Q. And that is what caused the excitement here in Philadelphia back in November, 1937?

Mr. BROMLEY. I object to that as incompetent, because I don't know what "that" means.

Mr. STEFFEN. The fact that there was an alleged delivery made directly to the job.

By Mr. STEFFEN.

Q. Is that correct?

A. Well, what Mr. McCormick told me was that a delivery of Oakleaf lath had been made directly to a job, and that it had upset some of the dealers in Philadelphia.

3469 Justice STEPHENS. Delivered by whom?

The WITNESS. He didn't say.

By Mr. STEFFEN.

Q. But to cause excitement it would have to be delivered either by Oakfield or Structural, or someone of the licensees?

A. Any manufacturer, yes.

Q. And you took it upon yourself to write to Mr. Eldred concerning the matter?

A. That is correct.

Q. Did you subsequently talk with Mr. Eldred about it?

A. Yes, I believe I did have a conversation with him at a later date.

Q. Do you recall when you had that conversation?

A. I don't recall the date, no, sir.

Q. Do you recall where?

A. I believe it was in New York City.

Q. And it was sometime after November 17, 1937?

A. That is right.

Q. Will you relate what your conversation with Mr. Eldred was?

A. My recollection of it is that Mr. Eldred said he had inquired of his salesman in Philadelphia as to whether this delivery had been made directly to the job, and that his salesman had denied it.

Q. He made that investigation after your conversa-

tion, or had he already made it when you talked
3470 with him?

A. Well, I think he had my letter before I spoke to him. I think at the time of our conversation he had made an investigation and told me that the delivery had not been made to the job. That is my recollection.

Mr. BROMLEY. May it please the Court, I think I should have objected to that question on the usual ground, since it appears, I now see, to be a declaration of a third party and therefore not binding on the defendants. I make, therefore, only the usual objection in so far as the conversation between this witness and Eldred is concerned, and ask that that testimony be received subject to the usual reservation.

Justice STEPHENS. Is it being offered as a declaration of Newark or Kelley?

Mr. STEFFEN. On one part, yes.

Justice STEPHENS. It is received, subject to the usual reservations with respect to declarations of alleged co-conspirators.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 381, to which is attached Government's Exhibit No. 382, the first being a letter from Mr. Bartlett to Mr. Tomkins, under date of December 27, 1937; and the second, Exhibit 382, being a complaint.

(The documents referred to were marked as Gov-
3471 ernment's Exhibits Nos. 381 and 382, for identification.)

By Mr. STEFFEN.

Q. Have you examined Exhibits 381 and 382, Mr. Tomkins?

A. I have.

Q. And did you receive Exhibit 381?

A. Yes, sir.

Q. And what is Exhibit 382, if you know?

A. Exhibit 382 is a copy of a compaint on the sale of patented gypsum wallboard, in violation of the license to manufacture and sell.

Q. And what was the nature of the charge?

A. The nature of the charge was that the "Frankford Coal & Supply Company, Philadelphia, through Oakfield Gypsum Products salesman, has offered Plastering Contractor Sam Levin a price of $14.00 per M, delivered to

job. Material is trucked direct from Delawanna, N. J. by local trucking contractor. Licensed price on Plaster Lath delivered in truckload quantity to dealers in Zone 1 is $14.10 per M."

Q. That was a complaint emanating from the Board Survey Company, was it?

A. That is correct.

Q. And who is the Board Survey Company?

A. I don't know who the Board Survey Company is. This letter was written by Mr. Bartlett, the executive secretary.

3472 Q. And did you ever talk with Mr. Bartlett?

A. Yes, I did.

Q. Where?

A. I have talked with Mr. Bartlett in a number of places.

Q. Did you, at or about this time, talk to him about this complaint?

A. I believe we had some conversation about this complaint at or about this time.

Q. In New York?

A. I think it was in New York.

Q. And can you relate the conversation?

A. No, I simply have a recollection that he spoke to me about this complaint. I don't know whether at that time I had the answer to it, or not, from Oakfield Gypsum Products Corporation, and I don't remember any result of our conversation.

Q. Well, as a result of your conversation, did you make any further investigation of this matter?

A. Well, as a result of receiving this complaint, I did.

Q. Well, was it as a result of receiving this complaint that you got in touch with Mr. Eldred?

A. Yes. That, I am quite sure I did after I received this complaint.

Q. I will show you Government's Exhibit No. 383, which purports to be a letter of yours to Mr. Eldred,

3473 or a copy of a letter, under date of December 29, 1937, and ask if you can identify that?

A. Yes, this is a copy of my letter of December 29, 1937, to Mr. Eldred in connection with the complaint of the Board Survey Company, dated December 27.

(The document referred to was marked as Government's Exhibit No. 383, for identification.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 384, which

purports to be a letter from Mr. Eldred to you, under date of December 30, 1937.

A. Yes, that is the reply I received from Mr. Eldred, dated December 30, 1937.

(The document referred to was marked as Government's Exhibit No. 384, for identification.)

By Mr. STEFFEN.

Q. Now, did you ——

Justice STEPHENS (interposing). Just a moment, let the Court read it.

Mr. STEFFEN. Excuse me.

Justice STEPHENS (after reading Exhibit No. 384). Proceed.

By Mr. STEFFEN.

3474 Q. Did you have any further talk with Mr. Eldred after this letter of December 28, 1937, concerning this matter?

A. Well, I saw Mr. Eldred frequently. I assume I did have some conversation with him.

Mr. BROMLEY. You mean about this matter, may I inquire?

The WITNESS. I have no recollection of any specific conversation about this matter, with him.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 385, which purports to be your report to the Board Survey Company under date of January 3, 1938, and also a copy of your letter of January 3, 1938, addressed to Mr. Eldred, which is marked as Government's Exhibit 386.

(The documents referred to were marked as Government's Exhibits Nos. 385 and 386, for identification.)

By Mr. STEFFEN.

Q. Have you examined Exhibits 385 and 386, Mr. Tomkins?

A. Yes, sir.

Q. And that is your signature on Exhibit 385?

A. That is my signature on Exhibit 385.

Q. And Exhibit 386 is a copy of a letter which you sent to Mr. Eldred?

A. It is.

3475 Mr. STEFFEN. I now offer in evidence Governments Exhibits 380 to 386, inclusive.

Mr. BROMLEY. We made only the usual objection.

Justice STEPHENS. They are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked Government's Exhibits Nos. 380 to 386, inclusive, were received in evidence.)

By Mr. STEFFEN.

Q. At about this time, Mr. Tomkins, it was your understanding, was it not, that you were under some obligation or duty to see that Oakfield and Structural and the manufacturing distributors to whom you sold, should maintain prices?

A. Yes, I was under that impression at that time.

Q. And you therefore were endeavoring to see that the Oakfield Gypsum Company was maintaining prices and was also following out the conditions of the bulletins?

A. As to job deliveries, and maintenance of price, I was interested in seeing that Oakfield Gypsum Company observed the same requirements that we, as a licensee, were under.

Q. And did you, subsequent to this occurrence, take the matter up with your counsel?

A. I did.

Q. As to whether you had the right to require Oakfield, for example, to maintain the bulletin prices?

3476 A. Yes, sir, I did.

Q. And what did your counsel advise you?

A. He advised me that we had no such right, and from that time we no longer attempted to exert any influence.

Q. When you say that you have no longer attempted to exert any influence upon what Oakfield or Structural or Connecticut might do, do you mean to imply that you were not interested any longer in whether they maintained prices or not?

A. No, sir, the only time I ever took this matter up with any of them was where instances had been brought to our attention of violations. We never at any time inquired as to the prices at which they were selling, or made any effort to see that they sold at any particular prices, except for the occasions on which we had been put on notice that the violations had occurred.

Q. When you were put upon notice, who put you upon notice?

A. The Board Survey Company, in this instance.

Q. And the Board Survey Company acts as an investigating agency, or did at that time, for the United States Gypsum Company?

A. As to these instances, it did, yes.

Q. Do you know who made the reports to the Board Survey Company concerning alleged violations?

3477 A. I do not.

Q. Would it normally be other licensees?

A. I don't know.

Q. It wouldn't be dealers, would it?

A. I don't know; I should doubt it.

Q. Have you had occasion to report other licensees for not abiding by bulletin prices?

A. No, sir. To the best of my knowledge we never made any such report.

Q. I notice in the letter of Mr. Eldred that he suggests that perhaps the United States Gypsum Company itself is subject to criticism. Have you ever been acquainted with any violations of that sort?

A. No more than by this sort of a statement.

Q. I now show you Government's Exhibits Nos. 387 and 388, which purport to be, one an original letter addressed to Mr. Tomkins under date of May 17, 1938; and the other, a reply from Mr. Tomkins addressed to Mr. Bartlett, under date of May 20, 1938.

(The documents referred to were marked as Government's Exhibits Nos. 387 and 388, for identification.)

By Mr. STEFFEN.

Q. Have you examined Exhibits 387 and 388 for identification, Mr. Tomkins?

3478 A. Yes, I have.

Q. Do you identify the letter of May 17, which is Exhibit No. 387?

A. Yes, I do.

Q. And is Exhibit 388 a copy of your reply?

A. Yes.

Mr. STEFFEN. I offer Government's Exhibits 387 and 388 in evidence, your Honor.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. They are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 387 and 388 were received in evidence.)

By Mr. STEFFEN.

Q. I note on Government's Exhibit 388, Mr. Tomkins, that in the middle of the second paragraph you refer to

certain irregularities in connection with the sale of lath by Structural to dealers. Can you explain what those irregularities were?

A. I suppose those irregularities were either in connection with price or delivery, or both.

Q. You still, at that time, felt that you were under an obligation to see that Structural or Oakfield
3479 should maintain bulletin prices, and the terms and conditions of sale, did you not?

A. That is true, but that was not the reason for our discontinuing the sale to Structural. In fact, the irregularities were ones that interfered with our own business. They had nothing to do with the license bulletin requirements.

Q. Will you state what kind of irregularities they were?

A. Well, the Kelley Plasterboard Company at this time was selling its products in Philadelphia to certain dealers, and we were also selling to Structural Gypsum Company, which was selling our lath to dealers in Philadelphia. Where Structural Gypsum Company would sell lath below our regular dealer price in Philadelphia, it would interfere with our own business.

In addition to that, the sale of lath in Philadelphia to Structural, at a discount, was unprofitable because of the high cost of trucking. In effect we were absorbing the haul from Delawanna to Philadelphia, and when we added the expense of a long haul to the cost of the discount, it made the business unprofitable. So on both counts we considered it was bad business to continue selling Structural in the Philadelphia market.

Q. Looking at the first one, that is that there were irregularities in that they were underpricing or undersel-
ling you to dealers in Philadelphia, what you actually did was simply to take their business away from them
3480 in Philadelphia, is that it?

A. Well, we stopped them from taking our business away from us.

Q. In other words, you refused to sell them for delivery in Philadelphia?

A. That is true.

Q. And I think you testified this morning that if they had undercut prices in any other area, you would have refused to sell them in that area?

Mr. BROMLEY. I don't think he said that at all, if the Court pleases.

Mr. STEFFEN. I think very definitely he said this morning that if Structural or Connecticut or Oakfield were to undercut pri.es, he would discontinue selling to them.

By Mr. STEFFEN.

Q. Didn't you say that this morning?

A. No, sir, not in that way.

Q. What did you say?

A. I don't remember my exact words, but what I meant to convey was that if we were selling to any manufacturing distributor or any jobber at a discount, and that jobber or distributor took our material and sold it at a lower price than we were willing or able to sell, to our own customers, we would not continue selling him.

3481 Q. And that is exactly what the Structural was doing in Philadelphia?

A. Exactly.

Q. So you refused to sell them any longer?

A. That is correct.

Q. Now, I show you Government's Exhibit 389, which purports to be a letter from Mr. Kelley to the Board Survey Company under date of July 11, 1932; and also Government's Exhibit 390, which purports to be a copy of a letter to the Kelley Plasterboard Company from Board Survey Company, under date of July 1, 1932, and ask you to examine them, and then I will ask you some questions on them.

(The documents referred to were marked as Government's Exhibits Nos. 389 and 390, respectively, for identification.)

By Mr. STEFFEN.

Q. Have you examined Exhibit 389, Mr. Tomkins?

A. Yes, I have.

Q. And is that Mr. Kelley's signature?

A. That is Mr. Kelley's signature.

Q. Do you recall having seen this letter before?

A. No, sir, I don't recall seeing this letter.

Q. And you are not familiar with the matter that is being discussed in the letter?

3482 A. No, sir. This was five years before we had anything to do with the Kelley Plasterboard Company.

Q. I understand that.

Does your company now sell to the Dussol Company?

A. I don't believe so, I don't believe Dussol Company deals in wallboard now.

Q. I notice that the complaint is that George Dussol is hired on a commission basis by Mr. Kelley. Is that permitted under the price bulletins, do you know, Mr. Tomkins?

A. I don't know, I would have to look them up to see.

Q. Do you have any salesmen hired on a commission basis?

A. No, sir, we have not.

Q. Do you sell to jobbers?

A. To jobbers?

Q. Yes.

A. What do you mean by "jobbers"?

Q. By a "jobber" I mean, Mr. Tomkins, a man who buys in carload lots, or in quantities, from the manufacturer, at a discount, and sells to dealers at dealer prices—and I want to exclude either Oakfield or Structural or Calvin Tomkins Company.

A. I know of no one in that classification that we sell to.

Mr. STEFFEN. We now offer Government's Exhibits 389 and 390, your Honor.

3483 Justice STEPHENS. Is there any objection?

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. They are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. STEFFEN. For the record, Exhibit 390 is a copy of a letter from Board Survey, addressed to the Kelley Plasterboard Company, dated July 1, 1932.

Mr. O'DONNELL. Did the witness identify Exhibit 390? I didn't hear him do so.

The WITNESS. No, I did not.

Mr. STEFFEN. It is circumstantially identified as being the letter to which Exhibit 389 is a reply.

Mr. O'DONNELL. I object to it, then, as not being properly identified.

Justice STEPHENS. Does the record show where you obtained these letters?

Mr. STEFFEN. Yes, sir, they came from the files of the Board Survey Company.

Justice STEPHENS. That is Exhibit 390, the letter of July 1st?

Mr. STEFFEN. Exhibit 389, which is the original letter addressed to Board Survey Company and Exhibit 390,

which is a copy of the letter sent to Kelley Plasterboard Company by the Board Survey Company, came from the files of the United States Gypsum Company.

3484 Justice GARRETT. Well, the witness stated that he didn't know anything in the world about them.

Mr. STEFFEN. The witness identified the signature on Exhibit 389.

Justice GARRETT. Yes, that is correct, Mr. Kelley's signature.

Mr. STEFFEN. And it is on the regular letterhead of Kelley, is it not ——

Justice STEPHENS (interposing). Let us see the original exhibits, Mrs. Gillette, Exhibits 389 and 390.

(Thereupon, the documents in question were handed to the Court.)

Justice STEPHENS. The objection is overruled. Exhibit 390 is received in evidence as circumstantially identified, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 389 and 390 were received in evidence.)

Mr. STEFFEN. Your Honor, it will probably not be possible for the Government to finish the direct examination tonight. We have about fifteen or twenty minutes more, probably, and that of course will leave no time for cross-examination.

Justice STEPHENS. How extensive is the cross-examination going to be?

3485 Mr. BROMLEY. I should think a couple of hours.

I see no reason why Mr. Steffen can't finish out until four o'clock, and put in a full day, however.

Mr. STEFFEN. My reason is strictly personal. I am leading a double life. I have to get to New Haven. (Laughter.)

Mr. BROMLEY. I didn't appreciate that.

Justice STEPHENS. Well, it will be impossible for us to sit tomorrow in any event. We cannot sit on Saturday as all of us have other engagements. If you have to catch a train, we will not ——

Mr. STEFFEN (interposing). I will carry on until four o'clock, if you desire.

Justice STEPHENS. If you can, we will be glad to have you, but if that will inconvenience you in catching a train, we will of course accommodate you.

Mr. STEFFEN. I think it might, your Honor.

Justice STEPHENS. Then we will adjourn at this time.

I am sorry that we will have to ask you to return, Mr. Tomkins.

Mr. STEFFEN. I want to make one statement. We have a brief to prepare, or a memorandum to prepare, in connection with Mr. Adams' memorandum, and I wanted to state to the Court that we won't have it ready before Monday.

Justice STEPHENS. Very well.

3486 Mr. STEFFEN. I am sorry, but we simply have had no time to get it together.

Justice STEPHENS. You will have it here Monday?

Mr. STEFFEN. Yes.

Justice JACKSON. That bears on the answer in the Beaver Products suit?

Mr. STEFFEN. Yes.

Justice STEPHENS. Is there anything else?

(No response.)

Justice STEPHENS. If not, you may announce the recess until Monday at ten.

(Thereupon, at 3:55 o'clock p.m., an adjournment was taken until 10:00 o'clock, Monday, February 14, 1944.)

3487 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., MONDAY, FEBRUARY 14, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

3492 Justice STEPHENS. You may proceed, gentlemen. Mr. Tomkins, take the witness stand.

Thereupon, FREDERICK TOMKINS, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Resumed).

Justice STEPHENS. I omitted one item, gentlemen, a correction, which I had better make before we proceed.

In the pages immediately preceding page 3760, discussion was being carried on in respect of Exhibits 372 and 373. Objection was made to the receipt of those exhibits, which had to do with the Paragon Plaster & Supply Company and the Structural Gypsum Division of the American Cyanamid Company. Objection was made to the introduction of those exhibits, so far as they were declarations of Kelley or Newark, unless subject to the reservation which is usually made, that they were received subject to the usual
3493 reservation with respect to declarations of alleged co-conspirators. The Court did make that reservation, but the Court omitted to make the ruling that those exhibits were not admissible so far as they were declarations of Oakfield or Paragon, because neither Oakfield nor Paragon were charged as being co-conspirators, and that statement should appear in the record as far as those two exhibits are concerned.

Now you may proceed.

By Mr. STEFFEN.

Q. Will you state for the record, Mr. Tomkins, what war work you are now engaged in?

A. I am employed by the Ordnance Department, which is under the Army Service Forces, in the War Department.

Q. Your company is still manufacturing gypsum board and gypsum plaster, is it not?

A. Yes, sir.

Q. I now want to show you Government's Exhibit No. 391, which purports to be a letter signed by Mr. Kelley

addressed to Mr. Henning, under date of June 1, 1932.

(The document referred to was marked as Government's Exhibit No. 391 for Identification.)

By Mr. STEFFEN.

Q. Is that Mr. Kelley's signature, Mr. Tomkins?

3494 A. Yes.

Q. I now want to show you Government's Exhibit No. 392, which purports to be a letter from Mr. Kelley addressed to the Board Survey Company, under date of May 23, 1932.

(The document referred to was marked as Government's Exhibit No. 392 for Identification.)

By Mr. STEFFEN.

Q. Is Exhibit 392, Mr. Tomkins, written on the Kelley Plasterboard Company stationery, and signed by Mr. Kelley?

A. It is.

Q. I now want to show you Government's Exhibit No. 393 for Identification, which purports to be a copy of a letter from the Board Survey Company addressed to Mr. Kelley, under date of May 17, 1932.

(The document referred to was marked as Government's Exhibit No. 393 for Identification.)

By Mr. STEFFEN.

Q. Are you familiar with the letter of May 17, 1932, Government's Exhibit for Identification 393, Mr. Tomkins?

A. Only by having read it just now.

Q. You have not seen it previously?

A. I don't recall seeing it, I may have seen it.

Q. I now wish to show you Government's Exhibit No. 394, which purports to be a letter from Board

3495 Survey Company addressed to Warren Henley, under date of May 9, 1932.

I also show you Government's Exhibit No. 395 for Identification, which purports to be a copy of a letter from Warren Henley, addressed to Mr. Frank Miller of the Board Survey Company, under date of May 2, 1932.

(The documents referred to were marked as Government's Exhibits 394 and 395 for Identification.)

By Mr. STEFFEN.

Q. Are you familiar with Mr. Warren Henley's signature, Mr. Tomkins?

A. No, sir, I am not.

Q. I now show you Government's Exhibit No. 396 for Identification, which purports to be a copy of a letter addressed to Mr. Kelley under date of March 22, 1932.

(The document referred to was marked as Government's Exhibit No. 396 for Identification.)

By Mr. STEFFEN.

Q. Are you familiar with the matter mentioned in Government's Exhibit 396, which you have just read?

A. No, sir.

Q. I now show you Government's Exhibit No. 397 for Identification, which purports to be an original letter from Mr. M. H. Baker addressed to Mr. F. M.
3496 Miller, Board Survey Company, under date of March 21, 1932, and referring also to the Reserve Lumber Company situation.

(The document referred to was marked as Government's Exhibit No. 397 for Identification.)

By Mr. STEFFEN.

Q. Are you familiar with Mr. Baker's signature?

A. Yes, sir.

Q. Do you identify the signature to Exhibit 397 as being Mr. Baker's signature?

A. Yes, that is Mr. Baker's signature.

Mr. STEFFEN. We now offer in evidence, Your Honor, Government's Exhibits 391, 392 and 393, the first two as being expressly identified by Mr. Tomkins, and the third, No. 393, as being circumstantially identified in that it is a copy of a letter to which the letter of May 23 is an answer.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Have defendants' counsel seen these letters?

Mr. OLIVER. I haven't.

Mr. STEFFEN. I will say, Your Honor, that this whole file was left with the Clerk, last week sometime, in the usual way.

Justice STEPHENS. Do you wish to take time to look at them right now, Mr. Oliver?

3497 Mr. OLIVER. Not right now, but I will object to Exhibit 393 as not being properly identified.

Justice STEPHENS. They are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits 391, 392 and 393 were received in evidence.)

Mr. STEFFEN. I should now like to offer Government's Exhibits 394 and 395. The argument in favor of their admission is perhaps a little slender. There has been no identification of Mr. Warren Henley's signature, and in fact I doubt if that is his signature. It seems to have been written by somebody else. The only identification is that it has been written on Certain-teed Products Corporation's stationery, I think there is no question about that ——

Mr. ADAMS (interposing). As far as I am concerned, I will consent to their admission in evidence, subject to the usual objection.

Mr. OLIVER. I object to them on the ground that they haven't been identified at all.

Mr. BROMLEY. We make only the usual objection.

Mr. JOHNSTON. I want to join in Mr. Oliver's objection. It would certainly take a long stretch of
3498 imagination, under any rule of evidence, to say there has been any identification at all of these two exhibits, Exhibits 394 and 395. The witness has said he didn't know anything about them.

Mr. STEFFEN. I think that is correct. Mr. Adams has stated that he makes no objection to them. I don't know that that goes so far as to say that he will recognize the letter of May 2 as a letter written by the Certain-teed Products Corporation and, if so, that the letter of May 9 is a reply. They were taken from the files of United States Gypsum Company, and it makes no objection to their identity.

Justice STEPHENS. Do you concede, or do you not, Mr. Adams, that they are letters, Exhibit 395 written by Certain-teed Products Corporation, and 394 a reply thereto? Or do you simply make no objection on the ground of identification?

Mr. ADAMS. I think I can safely say that 395 is unquestionably a letter of Certain-teed Products Corporation. With respect to the reply, I can not say, because there is no copy in our files, and we understand that this copy came from the files of the United States Gypsum Company. But as to 395, I am quite sure that I can say it is a letter of Certain-teed. As to the other, I can not, but it appears, apparently, to be the reply.

3499 Justice STEPHENS. Mr. Oliver and Mr. Johnston, will you let us hear you a little further? If Mr.

Henley's signature had been identified by this witness or by anyone else familiar with it, then, consistently with previous rulings, that exhibit, No. 395, would have come into evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

Now here is counsel for Certain-teed admitting that that letter was written by Henley. Why isn't that entitled to the same dignity in identification as a statement of a witness that this is Henley's signature? What do you say on that?

Mr. OLIVER. I think it is, Your Honor.

Justice STEPHENS. What do you say, Mr. Johnston?

Mr. JOHNSTON. If the Court please, I think it makes little difference to my client, and for the sake of harmony and so we might get along, I will withdraw my objection.

Justice STEPHENS. Very well. The exhibits, then, are received in evidence subject only to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits 394 and 395 were received in evidence.)

Mr. STEFFEN. We now offer Exhibits 396 and 397. Exhibit 397 has been positively identified, and there can be no question about that. Exhibit 396 is only cir-
3500 cumstantially identified. It is written the day after the letter of March 21, which is Government's Exhibit 397. It has to do with this whole matter of the warehousing situation with the Reserve Supply Company of Long Island. The copy came from the files of the United States Gypsum Company, and I think under the complete evidence rule, or whatever we might have along that line, it tends to give a picture of the whole transaction more clearly than if it were to be omitted.

Justice STEPHENS. It is not referred to in any other letter, is it?

Mr. STEFFEN. No, sir.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Is there any other objection by any other defendants' counsel to Exhibits 396 and 397?

(No response.)

Justice STEPHENS. Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits 396 and 397 were received in evidence.)

By Mr. STEFFEN.

Q. Government's Exhibits 391 to 397, which you have read, Mr. Tomkins, refer to a warehousing situation with the Reserve Supply Company of Mineola,
3501 Long Island. Are you familiar with that situation at all?

A. No, sir, not at all.

Q. Could you tell us what the nature of the complaint was?

Mr. BROMLEY. I object to that as incompetent. He says he doesn't know anything about it.

Justice STEPHENS. Do you know anything about it except as you have read in these letters?

The WITNESS. That is my only information.

Justice STEPHENS. Objection sustained.

By Mr. STEFFEN.

Q. Do you have any similar warehousing arrangements today with any dealers?

A. I don't know that this one was.

Q. As you have read it from the correspondence?

A. No, sir.

Q. Do you have any warehousing arrangements with dealers whereby you give them a certain amount of money if they will warehouse goods for you which you subsequently deliver to the trade?

A. No, sir, we do not.

Q. Is it your understanding that you may not have those under the bulletin regulations?

Mr. BROMLEY. I object to that as incompetent, because the bulletins are the best evidence.

3502 Mr. STEFFEN. I think the bulletins are the best evidence, Your Honor; but on the other hand, we have a defendant on the stand, whose understanding is very material, and I should like to have him state whether or not he understands that he is permitted to have warehousing arrangements.

Justice STEPHENS. I am of the view, Mr. Steffen, that although you are permitted to cross-examine this witness because he is a defendant or the officer of a defendant company, that doesn't make it proper for you to ask him questions the answers to which would violate the best evidence rule. As I understand the rule under which counsel can ask leading questions of an adverse witness, all it intends to do is to permit the asking of leading questions.

Now it is proper, after a witness has testified on direct-examination to certain items, to ask what his understanding is in respect to them, because that goes to the reasonableness of his actions or his testimony. But I think the best evidence rule is not set to one side by Rule 43, which permits leading questions of a witness whom you have called. Since the bulletins are the best evidence of what warehousing arrangements were permitted, and they are in evidence, I should think that would be sufficient.

I would be glad to hear you further.

Mr. STEFFEN. I will make this one statement, that we are not asking the witness, note carefully, for a
3503 construction of the bulletins, which of course would be within the best evidence rule. We would then have to refer to the bulletins to find out what they said. But where we have charged a conspiracy among several manufacturers, that they have all agreed to fix prices and to have uniform conditions and terms of sale, the understanding of the witness to the effect that special warehousing arrangements might constitute a violation of the bulletins in that it would perhaps work a price reduction, and that therefore his conduct has been changed by that understanding—he has testified that they have no such warehousing arrangements—and I think that his understanding would be not within the best evidence rule and that it would be material.

Justice JACKSON. Well, I am just wondering as to the materiality of his understanding of the rule laid down in the bulletins.

Mr. STEFFEN. The rule may or may not be laid down in the bulletin.

Justice JACKSON. I understood from you that it was.

Mr. STEFFEN. Mr. Bromley stated, I believe ——

Justice JACKSON (interposing). You don't contend that it is?

Mr. STEFFEN. I grant that it is the best evidence, if you are going to construe the bulletin. But where we are charging a conspiracy, there I think we are en-
3504 titled to show the intent and understanding of the members of the conspiracy, because their conduct, irrespective of what appears in the bulletin, their conduct is really the gist of what we are getting at.

If he understood either that it was in the bulletin or if he understood generally, either in or out of the bulletin, that he might not—and he may have erroneously understood it—I think he is permitted to state.

Justice STEPHENS. We are agreed that the best evidence rule is applicable. The objection is sustained. We do not foreclose the Government from asking the witness what he did or did not do.

Mr. STEFFEN. The witness, I believe, has already testified that he has no warehousing arrangements.

Justice STEPHENS. The ruling probably ought not foreclose the Government from inquiring into the subject, as to what relationship, if any, there was between his conduct and the requirements of the bulletin. I suppose it would be competent for the Government to ask whether or not his having or not having warehousing arrangements was because of any requirement of the bulletins, if he relied upon the bulletins, or anything to that effect. What you asked was his understanding of the meaning of the bulletins, and I think that is barred by the best evidence rule.

3505 Mr. STEFFEN. May I have a moment or two to consult with Mr. Knuff?

Justice STEPHENS. Yes.

(Mr. Steffen consults with Mr. Knuff.)

Justice STEPHENS. We do not foreclose the Government, Mr. Steffen, from inquiring into the reasons for this man's conduct. You can bring out that he would have had a warehouse except for bulletin requirements, or except for the existence of bulletins. But as your question was phrased, it violates the best evidence rule. You asked him the meaning of the bulletins, and of that the bulletins are the best evidence, and they are in evidence. But we are not foreclosing the Government from proving as a part of its case that the action of the defendants was the result of the bulletins.

By Mr. STEFFEN.

Q. Do you know, Mr. Tomkins, of any other warehousing arrangement in the industry similar to that which is described in Government's Exhibit 391?

A. No, sir, I am not aware of any.

Q. And when you say that, do you refer to Ebsary and National and Certain-teed, and the other companies?

A. I have no knowledge of any warehousing arrangement ——

Q. (Interposing.) Similar to the arrangement discussed in Exhibit 391?

3506 A. That is right.

Mr. BROMLEY. May I ask, do you mean by that

that you don't know whether or not there is any?

The WITNESS. That is exactly what I mean.

By Mr. STEFFEN.

Q. And if there were any similar arrangement which would have any effect upon obtaining business, as was apparently the effect here, would your salesmen, from your general knowledge of the trade, bring that information to you?

Mr. OLIVER. I object. That question is pure assumption.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. That is pretty speculative, Mr. Steffen. I think the objection should be sustained. I think you had better ask him more simply whether or not he would likely have known, in the business, if such arrangements as this existed.

By Mr. STEFFEN.

Q. Answer the Court's question—would you likely have known, through general trade information and your salesmen, of any such warehousing agreement if one had existed?

A. If it had existed in the territory that we covered, it is likely that it would have been reported to us by
3507 a salesman. That is not certain.

Q. It is a fact, isn't it, Mr. Tomkins, that through your salesmen and through your own knowledge of the trade, you keep in very close touch with prices and price conditions, do you not?

A. Yes, sir, we expect to.

Q. And it is a fact that you do, or certainly try to?

A. How close the touch is, I am not able to say. It is as close as we can make it.

Q. I now show you Government's Exhibit No. 398, Mr. Tomkins, which purports to be a letter from Mr. Pellett addressed to the Board Survey Company, under date of October 25, 1933; and I also show you Government's Exhibit No. 399, which purports to be a reply of the Board Survey Company addressed to Kelley Plasterboard Company under date of November 7, 1933.

(The documents referred to were marked Government's Exhibits 398 and 399 for Identification.)

By Mr. STEFFEN.

Q. Have you read Government's Exhibits 398 and 399, Mr. Tomkins?

A. Yes, sir.

Q. Do you recognize Mr. Pellett's signature?

A. I do.

3508 Q. Is he still with the company?

A. No, sir, Mr. Pellett is dead.

Mr. STEFFEN. We now offer Government's Exhibits Nos. 398 and 399.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Are these offered for the purpose of proving the charge of what has been referred to as "policing" in the complaint?

Mr. STEFFEN. Yes, Your Honor.

Justice STEPHENS. The exhibits are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked Government's Exhibits 398 and 399 were received in evidence.)

By Mr. STEFFEN.

Q. I now show you what has been marked as Government's Exhibit 400, which purports to be a copy of a letter from the Newark Plaster Company addressed to the Ebsary Gypsum Company, under date of January 20, 1937, and which bears the initials "FT" in the lower left-hand corner.

(The document referred to was marked as Government's Exhibit No. 400 for Identification.)

By Mr. STEFFEN.

3509 Q. I will ask you if you can identify that as a carbon copy of a letter which you wrote?

A. (No response.)

Justice STEPHENS. Can you answer the question, Mr. Tomkins?

The WITNESS. Yes, sir, I identify that as a copy of a letter written by me to the Ebsary Gypsum Company.

Mr. STEFFEN. We offer Government's Exhibit No. 400. I might say, Your Honors, that we do not have the reply.

Mr. BROMLEY. This is objected to, may it please the Court, on the ground that it is immaterial and irrelevant, for the reason that there is no charge with respect to which this letter has any possible relevancy. That is to say, the letter appears to involve a resale transaction in plaster, as to which there is no charge in the complaint whatsoever.

Justice STEPHENS. Do you raise any question about the fact that the letter goes to white plaster as distinguished

from neat plaster? White plaster, Mr. Tomkins, is a term you applied, is it not, to the plaster of Paris that you dealt in?

The WITNESS. Yes, Your Honor, that is what it means.

Mr. STEFFEN. I might develop that further.

By Mr. STEFFEN.

Q. White plaster has substantially the same content of stucco, has it not, as neat plaster?

3510 A. The chemical composition is substantially the same.

Q. And your neat plaster is used as your scratch coat or your first and second coats, and the white plaster is used as a finishing coat?

A. That is right.

Mr. BROMLEY. Well, isn't it true that the term "plaster" in the trade is understood to refer to what we call cement plaster and not white plaster?

The WITNESS. Generally, plaster means cement plaster in the trade, because it is used in much greater volume. Ordinarily white plaster is designated as white gauging plaster or plaster of Paris or finishing plaster.

Mr. BROMLEY. Or white goods?

The WITNESS. Or white goods.

Mr. BROMLEY. I don't believe there is any charge in the complaint that covers white plaster.

Justice STEPHENS. Is white plaster used in the building trade, or is it limited to medical uses?

The WITNESS. It is used to a limited extent in the building trade. It is also used for medical purposes, the manufacture of pottery molds, and fine casting work.

By Mr. STEFFEN.

Q. Is there any white plaster used on the ceiling

3511 of this room?

A. No, sir.

Q. What would you say they did use here?

A. That is either a sand finish or it may have some acoustical plaster in it.

Q. When you put a white coat of plaster over a scratch coat, or the first and second coats, isn't it this type of white plaster which you speak of which is used?

A. It is about one-third white plaster and two-thirds lime.

Justice JACKSON. That is the old hard-wall finish, is it?

The WITNESS. That is right.

By Mr. STEFFEN:

Q. And whenever they make a white finished coat of plaster, they would have to use your white plaster?

A. They wouldn't have to use ours.

Q. I mean that type of plaster.

A. Yes, sir.

Mr. STEFFEN. I think, Your Honor, that white plaster is well within the definition.

Justice STEPHENS. What do you say about the objection raised by Mr. Bromley that there is no charge in the complaint with respect to the fixing of resale prices on plaster?

Mr. STEFFEN. I don't think this has anything to do with resale prices, Your Honor, and we are not
3512 offering it on that basis at all. We are offering it on the basis of showing that there were arrangements between the different defendants whereby the price to the dealer trade would be established, and of course as a preliminary there have to be negotiations between, for example, Newark and Ebsary. If Ebsary, in this case, was buying from Newark, the price at which Ebsary bought was important in order to determine whether they could sell at the dealer price.

Justice STEPHENS. The objection is overruled. The exhibit is received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 400 was received in evidence.)

Mr. STEFFEN. I have perhaps 10 or 15 minutes more with Mr. Tomkins. Would you like to continue or take a recess at this time?

Justice JACKSON. How do you feel about it?

Mr. STEFFEN. I want to conform to the Court's wishes.

Justice STEPHENS. You had better proceed for 15 minutes. We are anxious to make the case move forward just as rapidly as possible, gentlemen.

By Mr. STEFFEN:

Q. Referring to Government's Exhibit No. 400, Mr. Tomkins, it says there that the resale price,
3513 which I understand to be the dealer price, is being held at a ridiculously low level. What did you mean by that?

A. Well, I presume I meant that ——

Q. (Interposing.) We would like to have your best recollection at this time, if you can?

A. (Continuing.) —that the prevailing dealer price for white plaster was unusually low and did not offer an adequate margin of profit to the Newark Plaster Company.

Q. And therefore, in selling Ebsary, you couldn't sell Ebsary at a lower price?

A. That is correct.

Q. Now have you refreshed your recollection concerning plaster prices generally over the period from 1925 up to the present day, before coming here?

A. To the best of my ability. I had some notes made on prices during that period.

Q. I would like to have you refer particularly to the period between 1925 and 1929. What was the trend of prices, during that period, of plaster?

A. I have no information on 1925 ——

Mr. BROMLEY (interposing). Just a moment. I make the same objection, if these prices apply only to white plaster.

By Mr. STEFFEN.

3514 Q. Are your prices relative to white plaster or plaster generally?

A. White plaster only. They are the only prices we have any information on.

Q. White plaster was what your company was making and selling at that time?

A. That is true.

Mr. BROMLEY. I object to this as immaterial.

Justice STEPHENS. Did you sell your white plaster at the same prices stipulated in the bulletins?

The WITNESS. No, sir, there were no bulletins on plaster prices.

Justice STEPHENS. That puts a different light on this question. The reason we overruled Mr. Bromley's objection to the white plaster evidence was because we thought you brought out from the evidence that white plaster was used in the trade, at least to some extent, in walls and wall plaster work, but we assumed that you were contending this was within the bulletins. What is your position, Mr. Steffen?

Mr. STEFFEN. No, I had gone on from the bulletins. What I am contending is that it comes squarely within the complaint. Paragraph 45 (c) says that we have charged the defendants in this case with: "concertedly raising,

maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products
3515 manufactured and sold by said companies in the Eastern area."

Here is a situation where we have white plaster which is used in the building trade, and I wanted to get from Mr. Tomkins just a statement as to the prices which the plaster had been sold at during the period prior to 1929 and following 1929.

Justice STEPHENS. In other words, you contend that the complaint is so broadly phrased in paragraph 45 that it includes price fixing arrangements outside the bulletins?

Mr. STEFFEN. Oh, yes, Your Honor. In fact, our whole charge is that they have used the bulletins and the license agreements simply as a subterfuge whereby to fix the prices not only of board under the agreement, but of board and plaster generally.

Justice JACKSON. Wasn't there a reference to that in the Bill of Particulars, as to what the "miscellaneous products" were?

Mr. STEFFEN. That had to do with miscellaneous products. I regard white plaster as plaster. There are several different types of plaster.

3516 Justice STEPHENS. In view of the broad construction put upon the complaint by the majority of the Court, we think the objection should be overruled, unless there is some further contention by you, Mr. Adams —what is your contention?

Mr. ADAMS. I would like to suggest that this is not the proper way of proving prices under any circumstances, and object on that ground.

Justice STEPHENS. It depends on what the witness is doing. If he is reading items which he has copied from some statistical book or record, you are correct, but if he has simply made up an itemization himself from his own recollection, and is using these notes to refresh his recollection, I don't see the objection to that.

By Mr. STEFFEN.

Q. Was your memorandum there made up from your office records, Mr. Tomkins?

A. It was made up by someone in my office from any sources that they could find that threw any light on what prices had been in this past period.

Q. And those sources would be your office records?

A. Yes, they might be correspondence ——

Justice STEPHENS (interposing). Are you using those notes to refresh your recollection so that you now have a recollection of your own, or are you simply reading the notes to us as a reflection of your office records?

3517 The WITNESS. A reflection of my office records. I have no recollection of any prices in those years.

Mr. ADAMS. It appears, your Honor, that he did not prepare the data himself. It also appears that it comes from a lot of different sources.

Justice STEPHENS. Well, you needn't go further, Mr. Adams. We will hear you further, Mr. Steffen, if you wish, but it would seem clear that the witness cannot testify except from his own recollection as refreshed by these notes.

By Mr. STEFFEN.

Q. I want to get at, generally, the prices in 1926, 1927, 1928 and 1929. Would you be able to say that the prices were chaotic and that there was a price war in plaster during that period?

Mr. ADAMS. I object on the ground that that calls for a conclusion. It seems to me that the word "chaotic" is pretty much of a conclusion.

Mr. STEFFEN. This is on cross-examination and he can answer "yes" or "no".

Justice STEPHENS. Read the question, please.

(Thereupon, the pending question was read by the reporter.)

Justice GARRETT. I don't know what he means by "chaotic". I know the dictionary definition of "chaotic" but I don't know the meaning as applied here.

3518 Mr. STEFFEN. I will be glad to bring that out, your Honor.

Justice STEPHENS. The objection is overruled, Mr. Adams. It seems to the Court that subject to clearing up the use of the word "chaotic" for Judge Garrett, as applied to this situation, that an experienced businessman in this business can testify of his own knowledge as to the nature of price conditions, and use such terms as "price war" and "chaotic", if explained correctly. Though it does involve an inference, it is the kind of an inference that can be properly drawn by this witness. The objection is overruled.

The WITNESS. I have no recollection as to plaster prices generally. I had no interest in any plaster other than white plaster; during that period from 1926 through 1929

I would not say that white plaster prices were chaotic.

By Mr. STEFFEN.

Q. Were they stable during that period?

A. During that period they had about the same degree of stability that they have had for the entire period 1926 through 1940.

Q. Could you say whether prices of white plaster were falling from 1927 to 1929?

A. No, sir, I couldn't say.

Q. Well, were they increasing?

A. I can only answer by referring to these notes which I understand I am not permitted to use. I have no recollection from year to year in 1926 or 1927 as

3519 to what the white plaster prices were.

Q. But could you not give the trend as to whether it was up or down?

A. No, sir, white plaster prices have changed from year to year. I cannot separate two years, back in 1926 and 1927, and recall whether the price in 1927 was higher or lower than in 1926.

Q. Well, are you unable to testify as to the trend one way or the other in those three or four years?

A. Completely unable to testify.

Q. Has there been any change or trend since 1929 that you could testify concerning?

A. No, sir, no trend. I can't testify to any trend in white plaster prices during the entire period.

Q. What does white plaster sell at now? I notice in one of the invoices here that it was selling at $10 a ton.

A. I don't recall any price as low as $10 a ton for white plaster.

Mr. BROMLEY. The reference you just made was to neat plaster, and not white plaster.

By Mr. STEFFEN.

Q. What was the going price for white plaster in, let us say, 1940, 1941 and 1942?

A. Today white plaster is selling at our mill at $14.70 per net ton.

3520 Q. Has that been a fairly stable price over the last three or four years?

A. To the best of my recollection it has. There has been very little white plaster business for the last three or four years.

Q. In 1940, and for the years prior to that, can you

recollect whether it then also sold at $14.70 per ton f. o. b. your mill?

A. The price varied a dollar or two. Some years it would sell for $15.70 or $16.50.

Q. And was it ever below $14.70 during the years preceding 1940?

A. Any year preceding 1940?

Q. That you can recollect—had the price gone below $14.70?

A. Oh, yes. The lowest price I have any present recollection of is $11 a ton.

Q. What other companies sell white plaster in your market?

A. Of their own manufacture?

Q. Let's stay with that, first, yes.

A. United States Gypsum Company, the National Gypsum Company, Certain-teed Products Corporation; Connecticut Adamant Plaster Company—those are all I can recall.

3521 Q. And are you the largest producer in that market?

A. No, sir.

Q. Who would be, or who is, rather?

A. Well, I have no knowledge as to that, but I believe the United States Gypsum Company is.

Q. And would you say that National sold more white plaster than you? What I am trying to get at is that I want to find your relative position in the industry.

A. I don't know whether National sold more white plaster than we did. I would doubt it. But I have no figures to base my statement on.

Q. When you say in your letters that the prices had been established, you didn't mean that there was any agreement, did you, among the producers to establish the price on white plaster?

A. No, sir, I meant that was the market price for white plaster.

Q. And the market price would be fixed by the dominant selling interests, such as United States Gypsum?

A. Not necessarily.

Q. They would have a very important influence in setting the market price, would they not?

A. Any manufacturer would. The lowest price set by any manufacturer would very quickly become the market price.

Q. And did you feel perfectly free, or have you

felt perfectly free up until, let us say 1937, to
3522 change the white plaster price, your white plaster price?

A. Yes, sir.

Q. Any way you saw fit?

A. Yes, sir, any way we wanted to.

Mr. BROMLEY. Did you mean to stop at 1937?

Mr. STEFFEN. No, I was just taking 1937 as a date. From 1937 on to the present time, I would like to take up in a separate question.

By Mr. STEFFEN.

Q. In 1937, the Kelley Plasterboard Company, or your company, rather, took over the Kelley Plasterboard Company, and in 1939, your company merged with the Kelley Plasterboard Company and took an assignment of the license agreement with USG—I think you have testified to that.

A. By "your company" you mean Newark Plaster Company?

Q. Yes.

A. That is correct.

Q. And when I say "your company" I also refer to the Calvin Tomkins Company. I think we have been treating the two as one company?

A. I don't regard them as one company.

Q. I know you don't regard them as one company, but the Court, I think, and the Government now is obligated to regard them as one company.

3523 Justice STEPHENS. Nevertheless, for the purpose of clarity in the examination, whatever the conclusion is with respect to the identity of the companies, perhaps if you mean Calvin Tomkins Company you had better refer to it, because the witness apparently does differentiate in his own mind.

Mr. STEFFEN. Very well.

By Mr. STEFFEN.

Q. To make the record clear, Calvin Tomkins has observed bulletin prices throughout the period 1939 to date, has it not?

A. It has.

Mr. BROMLEY. On what, if the Court pleases?

Mr. STEFFEN. On board and all products coming within the bulletin provisions.

Mr. BROMLEY. That is only board, Mr. Steffen. There

isn't any bulletin price on anything except patented gypsum board manufactured by the licensees.

Mr. STEFFEN. I simply want the record to show that Calvin Tomkins Company has been abiding by bulletin prices on products which come within the terms ——

Justice STEPHENS (interposing). Is that in dispute?

Mr. BROMLEY. No.

Justice STEPHENS. That may be admitted, I should think.

Mr. BROMLEY. I don't know what he means by "abiding", but I assume he means selling at ——

Justice STEPHENS (interposing). Bulletin prices.

3524 Mr. BROMLEY. Yes.

Justice STEPHENS. You had better reform that question and bring that out.

By Mr. STEFFEN.

Q. It is the fact, is it not, Mr. Tomkins, that the Calvin Tomkins Company in selling board and lath has been conforming to bulletin prices and the terms and conditions of sale of the bulletins in selling such board and lath?

A. During the period that the Kelley plant was being rebuilt, the Calvin Tomkins Company sold board purchased from other companies at bulletin prices. It was not required to observe bulletin prices. During the balance of the period, the Calvin Tomkins Company sold board manufactured by Newark Plaster Company at bulletin prices.

Q. And during that period when your mill was burned down, you had the bulletins, did you, and the Calvin Tomkins Company got the bulletins?

A. We received the bulletins during that period, yes.

Mr. OLIVER. When you say "we" do you mean to include Calvin Tomkins?

The WITNESS. I mean Calvin Tomkins.

By Mr. STEFFEN.

Q. I want now to show you, Mr. Tomkins, Government's Exhibit No. 37, at page 531. After reading that, Mr. Tomkins, would you say that you would be privileged to price-cut on plaster if you were selling board and

3525 plaster together?

Mr. BROMLEY. I object ——

Justice STEPHENS (interposing). I don't understand the question. Please read it.

(Thereupon, the pending question was read by the reporter.)

Justice STEPHENS. Just a moment, let us read this exhibit.

Mr. STEFFEN. I want to refer your Honors particularly to the last paragraph on that page.

Justice STEPHENS. What is the nature of your objection, Mr. Bromley?

Mr. BROMLEY. It is incompetent because it asks for an interpretation of or a conclusion as to a written document, the provisions of the bulletin.

Mr. STEFFEN. I think, your Honor, that we now have a defendant on the stand, and we have certainly met the best evidence rule by showing the witness the particular bulletin, and we now want a construction as to what he understands by that bulletin. It is fairly clear what it provides, but it is important to know whether the defendant understood it that way.

Justice GARRETT. Isn't that, Mr. Steffen, a matter for the Court to determine? What he did under that contract —isn't that the question—not whether he thought he was at liberty to do something.

3526 Mr. STEFFEN. I think maybe your Honor is quite right. I will be very glad to rephrase my question.

Justice STEPHENS. I think we are not confronted merely with the best evidence rule, but we are also confronted, under the objection, with the proposition that the Court must determine, not the witness, what these bulletins mean, and what they required of parties to whom they were sent, and who were bound or purported to be bound by them.

For the guidance of counsel the Court will reiterate that it seems to the Court that Rule 43 (b) doesn't permit cross-examination of an adverse witness in the usual sense of the term that he is being cross-examined as if he had already testified upon direct examination, and is therefore to be examined with respect to his understanding of items referred to on direct examination.

What the rule says is not that he should be cross-examined, but that he may be asked leading questions. You may ask, and we do not at all assume to foreclose the Government from bringing out, what this witness did in view of the bulletins, or what he might have done except for the bulletins, but I think the point raised by Judge Garrett is correct. The objection is sustained.

Mr. STEFFEN. I would like to make a brief statement on that to this effect, that these bulletins are by no means self-explanatory and we would like to get a construction of them from the people who are actually operating under

3527 them from time to time. I think that in this present instance I can ask the witness a question which will bring out what I want to develop.

By Mr. STEFFEN.

Q. As a matter of fact, Mr. Tomkins, your company has never cut the price of plaster for purposes of facilitating the sale of board, has it?

A. No, sir.

Q. Referring now to Government's Exhibits 398 and 399, which are the letter signed by Mr. Pellett, and the reply from the Board Survey Company, respectively, those were charges there that the Ebsary Gypsum Company was shaving or cutting the price of plaster in order to sell more board ——

Mr. O'DONNELL (interposing). I object to that, the exhibits speak for themselves.

Mr. STEFFEN (continuing). Were they not, Mr. Tomkins?

Justice STEPHENS. Just a moment, let us look at the exhibits.

Well, it may be in a highly technical sense that your objection is well taken. As to what the letter means, the letter must itself show. But if the witness knows, as this is a letter from the company which he took over, what the nature of the complaint was, it would seem not seriously objectionable and perhaps helpful.

Mr. O'DONNELL. May I add, your Honor, that this letter is dated about five years prior to the time
3528 Mr. Tomkins had any connection with the company.

Justice STEPHENS. Did you have anything to do with writing this letter?

The WITNESS. No, it was long before we had any connection with the Kelley Plasterboard Company.

Justice STEPHENS. Then we think that the objection should be sustained.

By Mr. STEFFEN.

Q. Now I have just two or three questions, Mr. Tomkins, which are necessary to clear up the record. You testified, I think, that you buy gypsum rock from the United States Gypsum Company, or were doing so up until recently.

A. Well, we have bought gypsum rock from the United States Gypsum Company and also from the National Gypsum Company.

Q. And you obtain the rest of your supply, or some additional part of your supply, from the American Cyanamid Company?

A. That is where we are presently obtaining it, yes, sir.

Q. Can you give us the difference in cost between the American Cyanamid product and the rock product?

Mr. BROMLEY: I object to that as immaterial.

Justice STEPHENS. What is the ——

Mr. STEFFEN (interposing). I think it is informative, your Honor, in order to get before the Court the general situation. There will be just one or two ques-
3529 tions.

Justice STEPHENS. It may well be informative, but since counsel objects on the ground that it is immaterial and not related to the charge, let me hear you briefly as to why you wish to show it.

Mr. STEFFEN. I think that the American Cyanamid Company, which has been making synthetic gypsum, has been a rather disturbing element in the board and plaster prices for the reason that it sold at a very low price and the gypsum rock, on the other hand, sold at a very high price. I should like to develop that.

Justice STEPHENS. Well, it may have some bearing upon the general charge. The objection is overruled.

By Mr. STEFFEN.

Q. I want the price at which you buy synthetic, and the price at which you have been buying gypsum rock.

A. The gypsum rock we purchased from the United States Gypsum Company we purchased for about $2.25 a ton. The synthetic material we are purchasing from the Structural Gypsum Division of the American Cyanamid Company, and that is purchased for about $5.50 a ton.

Mr. OLIVER. May I inquire if those prices are as of today, or when?

The WITNESS. The price from American Cyanamid, or the Structural Gypsum Division of American Cyanamid, is as of today. The price from the United States
3530 Gypsum Company is as of about 1940, or 1941.

By Mr. STEFFEN.

Q. Now are those comparative prices, Mr. Tomkins? One is of rock and the other is of stucco, is it not?

A. That is correct.

Q. And they are not comparative, are they?

A. No, sir.

Q. Could you give us comparative prices?

A. Well, I don't know how I can compare crude gypsum rock with plaster manufactured from a synthetic material.

Q. No, I understand that, and I would therefore like to get, if I could, a comparison of the two stucco prices.

A. By the time the gypsum rock is freighted to our plant, unloaded and made into calcined plaster, it should cost approximately the same as the price we are now paying the Structural Gypsum Division.

Q. Is that price you are now paying Structural the same price that you paid back through the preceding five or six years?

A. We have only been purchasing it for about two or two and a half years.

Q. Are you familiar with the price that Kelley paid during the time when you were taking over Kelley?

A. No, I am not.

3531 Q. You were there from 1937 to 1939?

A. Correct.

Q. And do you know what price they were paying?

A. Kelley was not buying it then, and we did not purchase material from Structural.

Q. I see. One other question which has to do with paper. Where do you procure your paper for making the board?

Mr. BROMLEY. I object to that as immaterial.

Mr. STEFFEN. I simply would like to round this out and show what goes into making board. I think it is very material.

Justice STEPHENS. Overruled.

The WITNESS. We are purchasing paper from the Federal Paper Company, in New Jersey; the Ohio Box Board Company and the Schmidt & Ault Company in Pennsylvania.

By Mr. STEFFEN.

Q. Can you give us an estimate of the cost of the paper that goes into a thousand square feet of gypsum board?

Mr. BROMLEY. The same objection.

The WITNESS. No, sir, I can't ——

Justice STEPHENS (interposing). Just a moment. You don't know?

The WITNESS. I don't know.

By Mr. STEFFEN.

Q. Can you tell us whether it is greater or less than the cost of the gypsum that goes into the board?

3532 A. No, sir, I would have to look up the figures. I don't know the number of pounds of paper used per thousand feet of board.

Q. It is true that it is around 150 to 175 pounds, is it not?

A. I don't know.

Q. Is it a substantial item in the manufacture of board?

A. It certainly is.

Mr. STEFFEN. I think that concludes the direct examination, your Honor.

Justice STEPHENS. We will recess for five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice STEPHENS. You may proceed, Mr. Bromley.

CROSS-EXAMINATION by Mr. BROMLEY.

Q. May it please the Court—Mr. Tomkins, you just told us a moment ago, in answer to a question, that you never cut the price of plaster for the purpose of inducing the sale of board. Isn't it a fact that at all times, both before ——

Mr. STEFFEN (interposing). Your Honor, I think I should make an objection now. I regret to interrupt Mr. Bromley's examination, but he has started to ask a leading question. Mr. Tomkins is a defendant, and as I understand the rule, the Government may ask leading questions as if upon cross-examination, but it does not follow

3533 that everybody else may.

When this matter was up before the criminal court, Judge Goldsborough instructed the defense counsel not to lead the witness.

Justice STEPHENS. Rule 43 (b) says:

"A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject-matter of his examination in chief."

Mr. STEFFEN. I call your Honor's attention to the fact that when speaking of the right of the Government, in this case, to interrogate him by leading questions, that that is explicitly stated. When it comes to the cross-examination

they very carefully leave out the matter of leading questions and simply say that the witness may be contradicted or impeached, and the omission of the right to direct leading questions, when the other party is examining his own witness, or the defendant in this case, is to my mind a full statement of the rule.

3534 That is, that we may call Mr. Tomkins as if upon cross-examination, and we may direct leading questions to him, and we may impeach him. The defendants, when they cross-examine are privileged to impeach him, but not to direct leading questions to him.

Justice STEPHENS. The Court will hear counsel on both sides on this matter if it is necessary. You present a conception of the rule, Mr. Steffen, that is, frankly, quite foreign to my understanding of it. This witness is called by the Government, he is a Government witness. It is true he is the officer of a defendant company and therefore these rules provide, as was not the case under the old rules, that leading questions may be asked of him, notwithstanding that he is your own witness.

But as I understand your contention at the present time, the opposite party is forbidden to cross-examine a witness called by you, is that right?

Mr. STEFFEN. He is definitely privileged to cross-examine within the scope of the direct examination.

Justice STEPHENS. There is no question about that.

Mr. STEFFEN. That is all that the rule states, as I understand it. He is forbidden to ask leading questions of a defendant. The rule concerning leading questions, as I understand it, is very clearly that where the witness is

3535 friendly, leading questions should be forbidden. I mean that is the basis, the principle, upon which the whole thing rests.

Justice STEPHENS. The basis of the rule is that with a defendant, leading questions should be permitted by the party who has to call an officially hostile witness.

Mr. STEFFEN. The basis, may I state more fully, because this is apparently important.

Justice STEPHENS. Yes.

Mr. STEFFEN. The basis of the rule, as I understand it, concerning leading questions, is that if a counsel puts into the mouth of a friendly witness an answer, that we don't produce the truth before the court, and the court is interested in getting trustworthy testimony.

We called Mr. Tomkins out of turn, as if upon cross-examination. We have to go to the defendants for some

of our facts. If we had waited for Mr. Bromley to call Mr. Tomkins, we then could have put most of the questions to him, and we would have then done it by way of cross-examination and could have directed leading questions to him.

But in this case we have called him out of turn, we have used the same type of examination that we could have used had Mr. Bromley called him in his part of the case, and we now ask simply that the defendants and defendants' counsel use exactly the same form of examination that they would have, had they put him on as part of their case.

3536 It seems to me that that is a pretty well recognized matter. It certainly was recognized when Mr. Tomkins was on the stand in the criminal case. Judge Goldsborough there stated to defense counsel that after all Mr. Tomkins was a defendant, and he was friendly, and it was not permitted for defense counsel to put words into his mouth by leading questions and augment the record in that way.

I think I have a very good technical argument on 43 (b), because you will note that when we call a witness for cross-examination we are entitled to interrogate a witness by leading questions, and to contradict and impeach him in all respects as if he had been called by the adverse party. Then when it comes to the cross-examination it says that he "may be cross-examined by the adverse party only upon the subject-matter of his examination in chief." And it says that the witness thus called may be contradicted and impeached by the adverse party.

But it does not say, and they carefully omit saying it, that he may be interrogated by leading questions.

Justice STEPHENS. Are you through?

Mr. STEFFEN. Yes, your Honor.

Justice STEPHENS. As you have stated the matter—I want to be quite frank with counsel as to my understanding of this rule to which I have given some attention—it presents an entirely new view with respect to the rule, that I know of no authority for. The old rules were that

3537 the matter was wholly within the discretion of the judge, that a witness had to be shown to be actually hostile before he could be cross-examined by the party calling him. Now that, as I understand the point of view of the rule makers, was perhaps a hardship upon parties who had to call for their own witnesses members of the adverse side of a case, and it was thought, therefore, that it was desirable to give an absolute right to ask leading ques-

tions of a witness who was an adverse party, or the officer of an adverse party, even though he was not actually hostile, or shown to be actually hostile.

But I have never understood that rule to go so far as to deny to the opponent in his examination of that witness, the right to cross-examine him, including the right to ask him leading questions.

If you have any authorities on this, if you are going to insist upon it throughout the balance of this case, we will hear you. What do you say, Mr. Bromley?

Mr. BROMLEY. I say first that the precedent established by Judge Goldsborough hasn't any persuasive value whatsoever here because these rules did not apply in that case, that being a criminal case.

I take it there is no purpose in discussing whether Judge Goldsborough was right or not. He seemed to think that Mr. Tomkins was my client, and so stated when he made his ruling.

3538 After I straightened him out, and told him that he was not my client, he relaxed the rule, it seemed to me, and let me conduct the examination in the usual way. However, I don't think that that has any bearing here by way of precedent whatsoever.

It seems to me that the rule is too clear to permit a discussion of whether, in this situation, I can cross-examine this witness.

I would like to know what Mr. Steffen thinks constitutes cross-examination if you take out of it the element of being permitted to lead a witness. I say the rule on its face is perfectly clear that when it says that you can contradict, impeach and cross-examine, it means that you can cross-examine in the ordinary way, which is by leading the witness.

Mr. STEFFEN. I think "cross-examination" was apparently the only word they could use there to indicate that after I had finished with the examination, as if upon cross-examination, then the next counsel would have to do something, and they called it "cross-examination". It seems to me that the Court should not lose sight of the basis of the rule concerning leading questions——

Justice JACKSON (interposing). How in the world can you cross-examine except by asking leading questions?

Mr. STEFFEN. By asking non-leading questions.

Justice JACKSON. I never heard of such a thing. That is the great underlying principle of cross-examina-

3539 tion, the asking of leading questions. And what

do you consider the examination in chief of this witness, your examination, isn't it?

Mr. STEFFEN. No.

Justice JACKSON. Then whose is it?

Mr. STEFFEN. We are now listening to Mr. Bromley as if it were examination in chief.

Justice JACKSON. This isn't examination in chief now. How could it possibly be?

Mr. STEFFEN. Will your Honor let me make this clear?

In the first place, we should not have to call him at all, according to the old rules. But under the new rules, we are permitted to call a defendant in anticipation, and we, in this type of case, practically have to develop all of our evidence from defendants, or people related to the industry.

Under the present rules we can call a defendant, and we are entitled as of right, to question him as if upon cross-examination. Now that doesn't mean that he is, in the full sense, our witness. He is still a defendant and the reason why we may direct leading questions to him is whether he is actually hostile or not, he is a technically hostile witness. So that we may ask him leading questions to develop the truth of the matter.

Now the basis for denying a party from asking leading questions is that he will, by asking leading questions, put the answers into the mouth of the witness.

3540 Now I think that Mr. Tomkins is the most honest witness that we have had here throughout, and I doubt if he will be led. But the principle of the thing is very important, and if Mr. Bromley or the defense throughout the rest of the trial are to be permitted to put the answers into the mouths of their own defendants, it is going to greatly prejudice the Government in the case, and it seems to me that it violates the whole basis of the notion of leading questions.

Leading questions are permitted only where it would not be possible otherwise to get a fair presentation of the facts.

Justice STEPHENS. The Court does not lose sight, Mr. Steffen, of the purpose ——

Mr. STEFFEN (interposing). I didn't mean to suggest that you had.

Justice STEPHENS (continuing). —of the purpose of permitting leading questions. The reason that leading questions are permitted of an adverse witness, if he is actually hostile, is that it aids in getting the truth out of him, but

it seems to me that it would be the clearest sort of error, of a reversible character, to deny the defendants in this case—or, if the situation were reversed, to deny the Government, if it could be reversed; of course it can't, because the Government isn't a corporation or a party who has officers in the usual sense—but it seems to me that it would be the clearest sort of error to deny any party the
3541 right to cross-examine, including the asking of leading questions, a witness who has been called by the opposite side.

You have called this witness to prove a part of your case. You could have called him under the old rules. You might not have done so because you might have thought him hostile, but you have called him, you have put him on to prove a part of your case.

We are, all three of us, fully agreed, Mr. Steffen—I am sorry—that your position is not well taken, and your objection is overruled.

Mr. STEFFEN. May we be privileged to submit any authorities that we have on this?

Justice STEPHENS. Well, it seems so elementary to us, Mr. Steffen—if you have authorities, if you know of authorities on the subject, of course we will receive them, but we ought to receive them now because we cannot go back and undo all of this, and it seems to us that where you ask so radical a change from the accepted procedure of courts, that you ought to have the authorities here now, if you have any authorities on the subject. Do you have any?

Mr. STEFFEN. I have none at the moment, your Honor.

Justice STEPHENS. Do you know of any?

Mr. STEFFEN. I have thought that Mr. Wigmore in his discussion of the matter would take the position that we are taking, but I do not have the reference right
3542 here.

Justice STEPHENS. I think we had better make our ruling now. The objection is overruled.

Mr. BROMLEY. I will withdraw the question, and may the record show, if it please the Court, that I am cross-examining this witness and have no purpose or intent to make him the witness of my client or of any defendant.

Justice STEPHENS. The Court might add that it seems in a way, at least so far as this witness is concerned, that the matter is a tempest in a teapot. This witness is obviously an honest witness and obviously a witness who discriminates carefully as to his answers. It seems to me very

unlikely that any words can be put in his mouth by either side.

Mr. STEFFEN. From the Government's side I want to agree with that, that we believe he is most honest.

Mr. BROMLEY. I will reserve my opinion until the close of the cross-examination. (Laughter.)

By Mr. BROMLEY.

Q. As I understood you, Mr. Tomkins, you said a few moments ago that you never cut the price of plaster for the purpose of inducing the sale of board. I ask you now whether it isn't the fact that at all times right down to date, you have felt perfectly free to charge any price for plaster you wanted to.

A. Yes, sir.

3543 Q. And isn't it the fact that the only effect that the bulletins had upon your understanding was that you knew you should not make a fake or false price for plaster in order to directly give a rebate to a board purchaser?

A. That is correct, yes, sir.

Justice STEPHENS. Read back the question and answer, please.

(Thereupon, the last question and answer were read by the reporter.)

By Mr. BROMLEY.

Q. By way of illustration, Mr. Tomkins, if the board price under the bulletins were $13, and the going market price for plaster were $10, it would be possible, would it not, to accomplish a rebate on the board price by selling board at $13, but saying to the purchaser of the board, "Now if you want plaster, I will give it to you for $2" 'way below any reasonable price or going market price?

A. Yes, sir, it would have been entirely possible.

Q. And if that were done that would merely be a way of giving a rebate on the $13 price on board, wouldn't it?

A. Yes, sir.

Q. And did you know from your experience in the business, that sometimes manufacturers did just that sort of thing with the intent and for the purpose of cutting the bulletin price on board?

3544 A. I know of no specific cases. I suspect it was done on occasion.

Q. You also said this morning that your received licensor price bulletins during the period that the Kelley factory was closed due to the fire. Do you recall that?

A. Yes, sir.

Q. Well now, isn't it the fact, sir, that right after the fire, which was in March, 1940, I believe you told us, you no longer received the price bulletins from USG, and therefore had to write for them?

A. On one occasion we apparently had not received a change in bulletin prices, and we did write to the United States Gypsum Company requesting that the bulletin be furnished us.

Q. And the fact is that the United States Gypsum Company refused to send you the bulletins, isn't that so?

A. At first it did, yes, sir.

Q. And then they were induced to send you the bulletins only because of some explanation that you made to them, do you recall that?

A. I do.

Q. And do you remember what that explanation
3545 was?

A. I have recently seen the letter that set it forth, yes, sir.

Q. And what was the explanation?

A. That the Kelley Company, after its fire, had a quantity of board left on its hands, of its own manufacture prior to the fire, and that it was as to the sale of that board that bulletin prices were requested so that the license agreement would not be violated by the sale of board manufactured by Kelley under the patents at prices other than bulletin prices.

Q. You have said Kelley two or three times. You meant Newark, didn't you?

A. Manufactured by Newark, yes. This was 1940.

Q. So wherever you said "Kelley" in the prior answer, you meant to say "Newark"?

A. That is correct.

Q. So that the fact was that during the period your factory was closed because of the fire, and you weren't making board, you nevertheless had in your warehouse board which had been made by Newark under the patents?

A. That is true, yes, sir.

Q. And it is likewise true that during that period you were selling not only the board which had been manufactured by Newark, but also board which you had purchased from others?

3546 A. Yes, sir.

Q. And so far as the board which you had manufactured was concerned, you were obligated to follow the

USG bulletin prices, weren't you?

A. Yes, sir.

Q. But you have told us, and it is the fact, isn't it, that you knew you had no such obligation with respect to the board that you purchased?

A. No, we knew there was no such obligation as to that board.

Q. And the reason, then, that USG resumed sending you the bulletins was because you informed them that you had board which had been made by you and which was lawfully subject to price control even during this period; isn't that right?

A. Yes.

Mr. STEFFEN. I don't believe the witness can answer what the reason was. It seems to me that it is simply out of his domain.

Justice STEPHENS. Answer what? I didn't hear you.

Mr. STEFFEN. Give the reason that Mr. Bromley is asking him about, which is USG's reasoning.

Justice STEPHENS. Read the question and the answer.

(The question and answer were read by the reporter.)

3547 Mr. STEFFEN. I move that the answer be stricken on the ground that he is not qualified to state what reason USG may have had for sending the bulletins.

Justice STEPHENS. That depends upon whether he knows. If he doesn't know, of course, he can't testify to it, and then your objection is well taken.

Answer this question yes or no: Do you know why USG did send you the bulletins?

The WITNESS. Yes, sir.

Justice STEPHENS. Then he may answer.

Mr. STEFFEN. I would like to ask him how he knows.

The WITNESS. Because they told us.

Mr. STEFFEN. Who told you, Mr. Tomkins?

The WITNESS. The United States Gypsum Company.

Mr. STEFFEN. What person?

The WITNESS. By letter, I believe it was signed by Mr. Sadler.

Mr. STEFFEN. And he stated the reason why they could not furnish you with bulletins?

The WITNESS. The reason why they could, that is my best recollection.

Mr. STEFFEN. I think that is hearsay, Your Honor. I don't see how Mr. Tomkins can give an answer as to the reasons. He is surmising from a letter, which is not in

evidence, that the reasons may be what appear in that letter.

3458 Justice STEPHENS. Well, the objection seems a little extreme, but if counsel insists upon it, it is well taken and the objection is sustained.

By Mr. BROMLEY.

Q. What was your reason, Mr. Tomkins, for wanting the price bulletins during the period that your plant was closed?

A. We were still selling board during that entire period. We had to know what the prices were as to the inventory of board of our own manufacture, so that we would not violate our license agreement. As to board that we purchased, we were interested in knowing what the dealer prices were, because it was important to us to get the highest price that we could, as we had a small margin to work on, and we knew we could not get a price higher than other manufacturers were selling at, which meant that the bulletin price was the high price.

Q. At all times you realized that you had no legal obligation to sell the board that you purchased from others, at the bulletin prices?

A. That was perfectly clear to us.

Q. And you had no agreement with anyone that you would sell that board that you purchased at any price whatsoever, did you?

A. No, sir, we did not.

Q. Now if you sold the purchased board at the same price that you sold the board of your own manu-

3549 facture during this period, isn't it the fact that you did so by reason of your determination that that was a matter of good business policy?

A. Yes, sir. We couldn't sell, at different prices, the same commodity to the same trade. It would have been impossible.

Q. It was a matter of good business, then, was it not, to sell both classes of board at the same price?

A. That was our opinion, yes.

Q. And you did that entirely voluntarily, and not pursuant to any arrangement or agreement with anyone, didn't you?

A. As to the purchased board, that is true, yes, sir.

Q. By the way, this purchased board you bought at the dealer's price less a small discount, didn't you?

A. We purchased it at the dealer's price less 12½ per

cent on lath and 15 per cent on wallboard.

Q. So that even if you had wanted to make a difference in price as to the purchased board, your margin of profit was very small anyway, wasn't it?

A. We thought it was.

Q. Now you expected, during all of this period, to be back in production with a new plant within a short period of time, didn't you?

3550 A. Yes, sir.

Q. And of course, once you got back into production with a new plant, then the prices of all board that you manufactured, and therefore all the board that you sold, would have been again subject to USG's determination in the bulletins, wouldn't they?

A. They would.

Q. And was that another reason why, during this short period that you were building the new factory, you didn't want to make any differentiation as between the price of purchased board and manufactured board?

A. Well, during this period we wanted to maintain our position as manufacturers of board as nearly as we could. We didn't want to destroy the price structure that we would expect to work under when we were again in operation.

Mr. BROMLEY. Will you hand the witness Exhibit 400, please?

(Exhibit No. 400 handed to the witness.)

By Mr. BROMLEY.

Q. Will you look at that exhibit, Mr. Tomkins, please?

A. Which exhibit?

Q. Exhibit 400, the letter of January 20, 1937, from yourself to George Lenci.

A. Yes, I have it.

Q. You were talking about the price that you were going to charge the Ebsary Company for white

3551 plaster which it might buy from the Newark Company, were you not?

A. Yes, sir.

Q. And in the first sentence, the reference to the resale price means the price which dealers were paying in the market for white plaster, doesn't it?

A. That is correct. That word "resale" refers to the resale that the Ebsary Company would make to a dealer.

Q. And the resale was to a dealer, wasn't it?

A. Yes, sir.

Q. So it is the fact, then, that you thought at that time that the dealer price for white plaster was low?

A. Extremely low, yes.

Q. And it is the fact further, isn't it, that you thought it was so low that you could not sell white plaster to Ebsary at very much below the dealer price?

A. Yes, that is right, we could not put him in a position to make a profit on a resale because the resale price, the dealer price, was too low to permit it.

Q. And you were telling him, weren't you, that if you made him any sale at all, you would have to sell him at a price so near the dealer's price, that is, the price that he could get on the resale, that there wouldn't be any profit in it for him?

A. That is it, it would not be profitable to him.

3552 Q. Now did you mean to intimate in that letter, in your use of the word "held" in the first sentence, that there was any arrangement or agreement among any class of the white plaster trade with respect to any price on white plaster, whether original sale or resale?

A. No, sir. By "held" I simply meant that so long as any manufacturer of white plaster was willing to sell it at this low price, it would be impossible to sell at a higher price. The sale by one manufacturer at a low price would tend to hold the white plaster price in that market at that level.

Q. When you said, in the last sentence, "We are hoping that something will be done in the near future to increase the resale price", did you mean by that to refer to any agreement or arrangement among anybody whereby the resale price would be increased pursuant to concerted action?

A. No, sir, there never were any agreements as to the resale price of white plaster, that I knew of.

Q. And what did you mean when you said you were hoping that something would be done to increase the price?

A. I was hoping that other manufacturers would find it as unprofitable as we were finding it, and raise their prices.

Q. So that neither at this time, the time of the writing of this letter, Exhibit 400, nor at any other time, were you or your company a party to any arrangement

3553 or agreement of any kind with anybody, as to what the price of white plaster would or would not be?

A. No, sir, at no time.

Q. Mr. Tomkins, prior to the time that the Newark Company bought the Kelley stock in May, 1937, had the Newark Company ever had anything to do with gypsum board?

A. No, sir, nothing.

Q. And had the Newark Company, or you yourself, had any connection with licenses from USG with respect to gypsum board, prior to May, 1937?

A. None.

Q. Can you remember whether or not, prior to May 1937, you knew that there were such things as gypsum board licenses running from USG to others?

A. Yes, I had always known, in the industry, that gypsum board was manufactured under patents and sold under license agreements. Early in 1937, in January, the Newark Company took an option on the Kelley Plasterboard Company and made an examination of the business, extending up until May of 1937, and during that examination, of course, the license agreement was presented and the Newark Company became familiar with it, and I did. That was the first time I had seen a license agreement.

Q. Prior to that time you had never seen a USG license bulletin?

3554 A. No, sir.

Q. And prior to that time, prior to 1937, had the Newark Company ever operated in any field under a patent license arrangement?

A. No, sir, never.

Q. After January, 1937, down to the present time, did you ever attend any meeting of the USG board licensees?

A. No, sir, I did not.

Q. So that you have never attended a licensee meeting of the gypsum board licensees, or a meeting attended by the licensor and the licensees, at any time in your entire life, have you?

A. No, that is correct.

Q. As a result of the examination which you say you made of the assets and liabilities of the Kelley Plasterboard Company, can you tell us whether or not you concluded that this Kelley-USG gypsum board license was a valuable asset of the Kelley Company ——

Mr. STEFFEN (interposing). I object to that. I don't see that it has anything to do with the direct-examination, and I don't see where it is tending.

Mr. BROMLEY. It has to do with the purchase of the stock.

Justice STEPHENS. It seems to the Court, Mr. Steffen, that it is proper cross-examination to bring out the
3555 reasons for taking over the license and taking over the Kelley Company. Is that your purpose, Mr. Bromley?

Mr. BROMLEY. Yes, Your Honor.

Mr. STEFFEN. I have no objection, then, Your Honor.

Justice STEPHENS. The objection is overruled.

Mr. BROMLEY. Will you read the question?

(The question was read by the reporter.)

The WITNESS. Yes, we felt it was extremely valuable, and that on it the ability to manufacture board rested.

By Mr. BROMLEY.

Q. And is that a reason why you went to the extent of obtaining from USG the estoppel certificate, Exhibit 362, about which you testified?

A. That is correct. We believed, our attorney advised us, that we had the right under the license agreement to take it over with the stock, but on his advice we wanted that confirmed by the licensor. For that reason we wrote to the United States Gypsum Company, and they did confirm it.

Q. And in Exhibit 362, you secured a statement from USG, in binding form, that Kelley was not in default under the license, didn't you?

A. We did.

Q. You wanted to make sure of that, too?

3556 A. We did.

Justice STEPHENS. The Court will suspend at this time.

(Thereupon, at 12:30 o'clock p. m., a recess was taken until 1:45 o'clock p. m., of the same day.)

AFTERNOON SESSION

3557 (The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice STEPHENS. For the information of counsel, especially Mr. Johnston, who made inquiry on this subject, the Court will adjourn at the close of the session on Friday, the 25th of February, and it will not resume session until Monday, the 20th day of March, as there will be the better part of two weeks spent on patent hearings and conferences which my colleagues must have in the Court of Cus-

toms and Patent Appeals. We will therefore adjourn at the end of the session on the 25th of February, and resume on Monday, the 20th of March.

How many more witnesses have you, Mr. Steffen, for the Government?

Mr. STEFFEN. I couldn't tell you positively. Ten or fifteen, maybe.

Justice STEPHENS. Have you any estimate as to how much more time you will take? We have had about 30 days of actual hearings.

Mr. STEFFEN. I think we can finish in from 3 to possibly 4 weeks of actual testimony.

Justice STEPHENS. Have you any estimate as to the number of witnesses that the defendants will call, Mr. Bromley?

3558 Mr. BROMLEY. No, sir, not at the present time.

Mr. STEFFEN. I want to make the point that I made at the beginning of Mr. Bromley's cross-examination. The reference that I had in mind, which is referred to by the Committee on Rules, is Volume 4 of Wigmore, Second Edition, Sections 1885, 1886 and 1887, and particularly subparagraph (d) of 1887.

Justice STEPHENS. What does it say?

Mr. STEFFEN. I can read it to you, but it is not explicit upon the point. It says substantially what I said this morning, that the purpose of leading questions is to enable a person to interrogate a hostile witness; and that, conversely, where the witness is friendly, that leading questions would not be permitted for the reason that it would permit the examiner to put answers in the witness' mouth.

Of course, under the rule, Mr. Tomkins is technically hostile to us, and technically friendly to Mr. Bromley, and on that line of reasoning leading questions are permitted by us and not by Mr. Bromley.

I will say to the Court that we have no construction of 43 (b) ——

Justice STEPHENS (interposing). Does this refer to 43 (b)?

Mr. STEFFEN. 43 (b) refers back to Wigmore as a general reference, which presumably was what the Committee had in mind in drafting 43 (b).

3559 If Your Honors continue with the position that the Court has taken, I would like to ask to have a

continuing exception to leading questions, for the purpose of the record.

Justice STEPHENS. Will you hand that book to the Marshal and let the Court examine it?

(The book referred to was handed to the Court.)

Justice STEPHENS. Do you wish to consider this, Mr. Bromley?

Mr. BROMLEY. No, Your Honor.

Justice STEPHENS. It doesn't seem to the Court, Mr. Steffen, that that changes the situation as presented this morning. Apparently Mr. Wigmore, at the place where you cite him, is discussing the advantages and disadvantages of the so-called Federal rule which limits the cross-examination to the direct-examination, the subject matter of the direct-examination, as distinguished from the English rule which permits cross-examination on all matters in issue in the case.

In the course of that discussion he mentions the function and purpose of leading questions. But his reference there, it seems to me, is a reference to the discretion of the Court with respect to leading questions. We didn't understand at all this morning that you were invoking that. We understood that you were asserting, under Rule 43 (b),

3560 that the Court has no right to permit that, and that rule forbids leading questions put to a witness called by you if that witness was a party or the officer of a party,

We still are of the view that that is not the function of 43 (b), nor the effect of Rule 43 (b). Of course, we have not ruled, because such a matter was not presented to us as we understood it this morning, that the Court has no discretion to limit the manner of examining a witness by your opponent if the witness actually seems to be unduly friendly to your opponent's side of the case. The Court's discretion still exists under those circumstances, as we understand it. But we didn't understand you were invoking any such rule as that.

Mr. STEFFEN. We did not intend to raise the question of discretion, and I suppose, as Your Honor states, that at a proper time, if occasion warranted, that you would, of course, exercise your discretion.

Justice STEPHENS. You have a right to ask us to exercise our discretion, yes.

Mr. STEFFEN. I, however, want to raise the point which I spoke of, and would like, for the purposes of the record, to have a continuing exception to all leading questions,

addressed by Mr. Bromley or other attorneys, to witnesses that we call as if upon cross-examination.

Justice STEPHENS. You are entitled to that, and the record may show that your objection is overruled, so
3561 that your record is perfected.

Thereupon, FREDERICK TOMKINS, the witness on the stand at the time of recess, resumed his testimony as follows:

CROSS EXAMINATION (Resumed) by Mr. BROMLEY.

Q. You said this morning, Mr. Tomkins, in answer to a question by Mr. Steffen, that up to 1937, you felt free to charge any prices for plaster you wanted to. Now what is the fact with regard to the period after 1937? Did you or did you not feel that you had the same freedom to make any charge for plaster that you wanted to?

A. Yes, sir, we had exactly the same freedom.

Q. You were also interrogated this morning with respect to warehousing arrangements. Let me ask you this: In connection with your testimony that you never made any warehousing arrangements, did you refrain from making warehouse arrangements because of any provisions in the USG bulletins, or for your own business reasons?

A. Well, the question never actually came up. To the best of my recollection, we never even considered making a warehousing arrangement with any dealer.

Q. And did you ever consider doing business through warehouses of your own?

3562 A. Yes, we had given that consideration, but had decided against it because it was expensive. We did not feel that the cost justified it.

Q. And that decision, then, was a matter of business policy, was it?

A. Yes. We made one exception. For a time we did maintain a warehouse in Philadelphia, but the cost was excessive and we discontinued it after a comparatively short period.

Q. And was that discontinuance due to anything that was in the bulletins?

A. No, sir, the bulletins had nothing to do with it.

Q. Is it the fact, Mr. Tomkins, that when Kelley merged with Newark in the latter part of 1938, that that merger was put through in order to simplify the manufacturing operations of the business?

A. Yes; it was January, 1939, that the merger took place, and the purpose of it was to integrate the management and reduce administrative costs.

Q. You told us this morning that you obtained an estoppel certificate from USG. That was in May, 1937, when you bought the Kelley stock, wasn't it?

A. When the Newark Company bought the Kelley stock, yes.

3563 Q. And in 1939, the record shows that a consent to assignment of license from Kelley to Newark, from USG, was obtained, and that is Exhibit 16 and Exhibit 364—do you recall that?

A. Yes, I do.

Q. And it is the fact that you got that consent just out of an abundance of caution in order fully and completely to protect your license rights?

A. Yes, our attorneys felt that we should have that consent over and above the consent that appeared to lie in the license agreement itself.

Q. Is it true, Mr. Tomkins, that at all times, a majority of the Directors of both the Calvin Tomkins Company and the Newark Company were common, were the same persons, I mean?

A. At all times since 1937, yes.

Q. And is that fact likewise true with respect to the officers of the Calvin Tomkins and the Newark Plaster Companies?

A. I am not sure that that is exactly true. I believe the officers of the Newark Company were also officers of the Calvin Tomkins Company. I don't believe they were identical; that is, I don't believe they held the same positions in both companies, necessarily.

Q. My question was merely—were a majority of the officers of Newark at all times a majority of the

3564 officers of Calvin Tomkins Company?

A. Yes.

Q. Now the Calvin Tomkins Company was in the business of selling building material products, wasn't it?

A. It was.

Q. And all of its stock was owned by the Newark Company?

A. That is true, yes, sir.

Q. And all the products manufactured by the Newark Company were sold by the Calvin Tomkins Company, weren't they?

A. They were.

Q. So that, is it accurate to say that Calvin Tomkins Company, a wholly-owned subsidiary of the Newark Company, was the company through which Newark conducted the selling end of its business?

A. What actually took place was a sale of products manufactured by the Newark Company to the Calvin Tomkins Company. Those products were subsequently sold by the Calvin Tomkins Company, a wholly-owned subsidiary.

Q. But forgetting the form which it took, isn't it the fact that the selling end of the Newark business was conducted by the Calvin Tomkins Company?

A. That was the effect, yes.

3565 Q. With respect to the testimony and exhibits relating to the consents to sell manufacturing distributors which were requested by Kelley and the Tomkins Company, and which were granted by USG, in accordance with your direct-examination, are you able to tell us whether any request by any one of your companies for a consent to sell a manufacturing distributor was ever refused by USG?

A. No, no such request was ever refused.

Q. And was any such consent, once granted by USG, ever withdrawn?

A. It was not.

Q. At any time were any conditions, oral or written, ever attached to the grant of any one of these consents by USG?

A. No, I believe the only condition was that the consents were revocable, if that is a condition.

Q. Aside from that, were there any conditions attached to the granting of the consents?

A. I believe not, no, sir.

Q. Were any threats ever made by USG to withdraw any consent, once granted?

A. No, sir.

Q. Will you look at Exhibits 372 and 373, please.

(Exhibits 372 and 373 handed to the witness.)

It is a fact, isn't it, that both of these exhibits,

3566 in the first sentence of each, state, "a copy of our price list" is enclosed?

A. They do.

Q. Now at page 3612 of your testimony, you said that your company sent price lists to Oakfield, Structural and Connecticut Adamant, and that this was done by Kelley up until January, 1939, in the instances in which it was done,

and by Tomkins, whenever it was done, after that time. And by "Tomkins" I mean Calvin Tomkins Company.

Now isn't it your testimony that ——

Justice GARRETT (interposing). Just a moment, please, Mr. Bromley. That is page 3612?

Mr. BROMLEY. Yes.

Justice GARRETT. In your question you summarized what you understood the questions and answers to mean, did you?

Mr. BROMLEY. Yes, sir, the top of the page mentioning Oakfield, Structural and Connecticut Adamant, and the bottom of the page making it clear that if that was done, it was done by Kelley up to January, 1939, and thereafter by the Calvin Tomkins Company.

Justice GARRETT. Very well.

By Mr. BROMLEY.

Q. Now those price lists that you were there referring to were price lists showing the prices which the Kelley Company, or the Calvin Tomkins Company, as the case might be, would charge to the Oakfield, the Struc-
3567 tural, or the Connecticut Adamant, isn't that right?

A. I believe those were dealer's price lists. We never figured out the prices that we would charge to these manufacturing distributors. That is, we never figured the dealer's price and deducted from it the allowed commission or discount and sent a net price to these companies. We advised them of their prices by sending them the dealer's prices, which enabled them to arrive at their own prices by making the deduction in each instance, at every destination.

Q. In order for Structural, Oakfield and Connecticut Adamant to know what they would have to pay to Kelley or Calvin Tomkins for board, they would have to know the dealer price in effect at the time, wouldn't they?

A. They would, unless we made the deduction, which we never did.

Q. And that was because they could not tell, these manufacturing distributors, what they had to pay Kelley or Calvin Tomkins unless they knew the precise amount of the dealer price from which their discount was to be deducted; isn't that right?

A. That is correct, yes.

Q. So this information in these price lists, although they gave dealer's prices, was absolutely necessary for
3568 these manufacturing distributors to have in order

to know how much they would have to pay from time to time for board purchased from Kelley or Calvin Tomkins; isn't that right?

A. That is true, yes, sir.

Q. Did you ever have any agreement or understanding of any kind with any of these manufacturing distributors to whom you sent these lists, or otherwise, that they would resell the goods bought from you at those or any other prices?

A. No, sir, we never had any agreements with them to that effect.

Q. And you testified to that effect at the criminal trial, didn't you?

A. Yes, I believe I did.

Q. Now at page 3644, line 7, you were asked this question by Mr. Steffen:

"Q. That is, it would apply upon your sales to Oakfield for Oakfield's own use?"

And you answered:

"A. Yes, I should think so, because their price depended upon the dealer price."

Now when you said "because their price depended upon the dealer price", you meant the price which they had to pay Kelley or Calvin Tomkins, did you not?

A. Yes, sir.

3569 Q. And again, at page 3647, beginning in line 12:

"Q. That was so that Oakfield would be selling to dealers at the prevailing price?

"A. This information was given to Oakfield so that Oakfield would know what the dealer price was.

"Q. And I followed that question up with—so that when they sold to the dealers, they would sell at the right price?

"A. They could if they wanted to."

Now when you used the word, "right" price, didn't you mean their price to their customers in view of their cost?

A. Did I use the word "right" price?

Q. I am afraid you did, I just read it to you.

A. I thought it was Mr. Steffen who used it.

Q. I am sorry, Mr. Steffen used that, and you answered: "They could if they wanted to."

Justice STEPHENS. Perhaps Mr. Steffen, it is not inappropriate to remark that you might have put a word in the witness' mouth. (Laughter.)

Mr. STEFFEN. I think it is very appropriate to use that word.

By Mr. BROMLEY.

Q. When you said, "They could if they wanted to.", in answer to the question, "* * * when they sold to the dealers, they would sell at the right price?", what did you mean?

3570 A. Obviously I meant that if they wanted to sell at the bulletin price, they would have the bulletin price and they could sell at that.

Q. In their sales to their customers, wasn't it important to know, for each manufacturing distributor to know, what his cost was?

A. Surely, of course it was.

Q. Because the price at which he sold to his customers, that is, the price at which the manufacturing distributor sold to his customers, might be influenced or determined by what price the manufacturing distributor had to pay to the manufacturer, mightn't it?

A. That could be the reason, yes.

Q. And isn't it a simple matter of business that before a manufacturing distributor took an order from one of his customers, he would want to know what the dealer price was that the manufacturer was going to charge him from which his discount was to be deducted?

A. Yes, that is perfectly true.

Q. So that it was important that the manufacturing distributors were informed promptly by their suppliers, of any change in the dealer price, wasn't it?

A. It was.

Q. Because any change in the dealer price would affect the cost of the manufacturing distributor's goods

3571 purchased from the manufacturers?

A. Yes.

Q. And so at page 3646, beginning in line 3, this question, as corrected, was asked you:

"Q. So that it was necessary for Oakfield to know that there was an increase in price so that they would get the right price from the dealer?"

and you said:

"Yes, otherwise they would be at a disadvantage."

Mr. STEFFEN. I don't think that line was ever corrected. It finally eventuated that it was left as it stood.

Justice STEPHENS. My records show that after a considerable debate between counsel on the subject, it was decided that the answer was the answer which the witness gave, or that the question was the question which Mr. Stef-

fen asked, and that any possible correction of the answer should be left to cross-examination.

Mr. BROMLEY. Yes, sir. So I will withdraw that question.

Justice GARRETT. And it was subsequently corrected on a reexamination the next day, I believe.

Justice STEPHENS. I think the reexamination the next day brought out the idea of the word "from". I think this particular question wasn't changed.

Mr. BROMLEY. Yes, sir.

3572 By Mr. BROMLEY.

Q. I will withdraw the question and ask you this: At page 3646, you testified as follows:

"Q. So that it was necessary for Oakfield to know that there was an increase in price so that they would get the right price to the dealer?

"A. Yes, otherwise they would be at a disadvantage."

Then you later gave the same answer to the same question, except that the words "to the dealer" were changed to "from the dealer." Do you remember that?

A. Yes, sir.

Q. Didn't you mean by that, when you answered "Yes" to this question saying "the right price", didn't you mean merely that this information was necessary for the manufacturing distributor to get from his customer a price based upon the cost to the manufacturing distributor as it existed at the time?

A. Yes, sir. If the price were increased, if the dealer price were increased, it naturally followed that the cost to the distributor would be increased, and unless he gave effect in his sale to his increased cost, he would be at a disadvantage. So that it worked both ways. That is, it permitted him to charge the dealer a higher price if he wanted to, to cover his higher cost, and it put him on notice that his cost was going to be increased.

3573 Q. So that if, when a manufacturing distributor like Structural took an order from a customer, and the manufacturing distributor thought the price was $13 to the dealer, not knowing that your company, pursuant to a USG bulletin, was obligated to charge $14, the manufacturing distributor would find that he had sold goods for $13 which cost him $14 less 12½ per cent?

A. Yes, sir, we had to notify them immediately if there was a change in price, because their costs depended on it.

Q. And if the manufacturing distributor, not knowing of the price increase, charged the old price, his transaction might result in a loss to him because his increased cost might more than wipe out his discount; isn't that right?

A. That is true, that is what I meant by stating that he would then be at a disadvantage.

Q. Now at page 3619, in the middle of the page, you testified about a talk you had with Mr. Kelley prior to your purchase of the stock, I think, and you said that Mr. Kelley told you that manufacturing distributors sold board they purchased from Kelley at the established bulletin prices to the dealer trade. Do you recall that?

A. Yes, sir, I do.

Q. In that conversation, did Mr. Kelley make any statement as to whether or not that was done pursuant to an agreement between the Kelley Company and the

3574 manufacturing distributors?

A. No, sir, I know there was no such agreement.

Q. And he didn't tell you that he had any understanding between his company and the manufacturing distributors which resulted in their reselling the goods at the dealer's price, did he?

A. No, sir, he told us that he had disclosed to us all agreements and understandings that he had, and that was not among them.

Q. And you understood, didn't you, that the prices at which the manufacturing distributors resold the goods was a matter entirely within their own determination?

A. No, sir. At that time I was under the impression, after we took over the Kelley business, after Newark did, that the Newark Company as a licensee did have an obligation to see that the manufacturing distributors to whom it sold board, resold it at bulletin prices to dealers.

Q. Did you get that impression from anything that was ever said to you by anybody from USG?

A. No, sir, that was my own opinion.

Q. Did you get that impression from anything that was ever said to you by anybody?

A. I don't believe I did, no, sir.

Q. Did you ever do anything, Mr. Tomkins, toward attempting to see to it that your manufacturing dis-

3575 tributors resold at any price or prices?

A. No, sir. I made inquiries on several occasions as to what their selling policies were in certain instances that our company had been asked to report on.

Beyond that there was nothing that we ever did to attempt in any way to control distributors' prices.

Q. Now those instances to which you have just referred are the two instances brought out in your direct-examination, as to which there was some correspondence, aren't they?

A. Yes, sir.

Q. And you now know, don't you, that in both of those instances, the complaint which the Board Survey Company made was a complaint against your company with respect to a charge that you had not charged the bulletin prices to your manufacturing distributor customers?

A. Well, I don't know that, Mr. Bromley. The complaints of the Board Survey Company are addressed to the Kelley Company, or should have been addressed to the Kelley Company, and I interpreted them to mean that we were to investigate and report back as to the prices at which the distributors were selling board, prices and delivery terms—which is what we did.

Q. And is that all you did?

3576 A. That is all we did.

Q. And isn't it a fact that those are the only two instances, in the entire period of time, where this question was raised with you or your company?

A. Those are the only instances of which I have any knowledge.

Q. Will you look at those two complaints ——

Justice STEPHENS (interposing). What numbers are those exhibits?

Mr. BROMLEY. Look at Exhibit 382, please. That is Board Survey complaint dated December 27, 1937.

By Mr. BROMLEY.

Q. In the first place, that is addressed to the Newark Plaster Company, Licensee, isn't it?

A. It is.

Q. Now by what you said a minute ago, you meant to suggest that it should have been addressed to the Kelley Company?

A. Undoubtedly. The Newark Plaster Company was not a licensee.

Q. Because the merger had not yet occurred?

A. No, sir.

Q. So, subject to that correction, looking at it now, do you see that the complaint is addressed to a licensee?

A. Yes, sir.

3577 Q. And do you see that in the first line of the text it says, "A complaint has been filed against your company as follows:"—do you see that?

A. I do.

Q. And then the complaint goes on to give the name of the customer involved, and gives the customer as Oakfield, doesn't it?

A. It does.

Q. Now coming down to the text underneath "Facts Concerning Complaint", it states: "Is reported that Frankford Coal & Supply Company, Philadelphia, through Oakfield Gypsum Products salesman, has offered Plastering Contractor Sam Levin a price of $14.00 per M, delivered to job. Material is trucked direct from Delawanna, N. J., by local trucking contractor. Licensed price on Plaster Lath delivered in truckload quantity to dealers in Zone 1 is $14.10 per M."

From that it is apparent, isn't it, first, that Frankford Coal & Supply Company is a dealer?

A. It is.

Q. And, second, that Frankford Coal & Supply Company was offering patented lath to a contractor at $14.00?

A. Correct.

Q. Now that lath which Frankford Coal & Supply was offering to a contractor for $14.00 was lath which it had bought from Oakfield, wasn't it?

3578 A. That is implied, yes, "through Oakfield Gypsum Products salesman".

Q. And Oakfield bought the lath from Kelley?

A. It did.

Q. And under the license bulletin, Kelley was obligated to charge Oakfield $14.10 less 12½ percent, wasn't it?

A. Yes, I believe that covered the sales in Philadelphia.

Q. That is apparent from the last line of that quotation, isn't it?

A. That is correct.

Q. So that if Sam Levin, clear down the line of those transactions, was only paying $14.00 for this lath, it was a permissible inference that you, the Kelley Company, must have been selling Oakfield at a price lower than the bulletin price, wouldn't you say that?

A. Well, that certainly could be inferred.

Q. And indeed, if you had been given information that

Frankford was making this low price to a contractor, you would have thought, in turn, that Oakfield was selling at a low price, wouldn't you?

A. Yes, that was the basis of our inquiry.

Q. And do you now see that so far as USG was concerned, its inference was that your company was selling Oakfield at a low price, or else this transaction would not have been possible?

3579 A. As I say, that is a possible inference, certainly.

Q. Now the only other instance appears in Exhibit 387, which is a letter from Mr. Bartlett to you. Mr. Bartlett was the man in charge of the activities of USG in seeing that its license bulletins were observed, wasn't he?

A. That is the connection in which I had an occasion to know him.

Q. And do you notice in the second sentence that the charge is that Structural and Newark "are making a regular practice of delivering material direct to jobs"?

A. Yes, sir.

Q. Now the reference to Structural and Newark is explainable by the fact that the delivery to those jobs was made in Kelley trucks, is it not?

A. Yes, Newark should not have been mentioned here, for the same reason that we were not properly charged in the previous complaint.

Q. You mean the reference should have been to Kelley?

A. Yes.

Q. Because the merger hadn't yet taken place?

A. That is correct.

Q. But the fact is that in this instance to which reference is made in this complaint, the Kelley Company had sold goods to Structural and the Kelley Company was making the delivery in Philadelphia?

3580 A. Well, this letter claims that both Structural Gypsum Company and the Newark Plaster Company, which means Kelley, were making a regular practice of delivering material direct to jobs.

Q. But the fact is, at that time, that the deliveries were being made by the Kelley Company's trucks, whether it was a direct sale by Kelley to a dealer or a sale by Structural to a dealer?

A. Yes. I believe Structural was also making some deliveries in Philadelphia.

Justice STEPHENS. You mean that Kelley was delivering for Structural?

The WITNESS. Yes, for Structural's account.

By Mr. BROMLEY.

Q. So that even if Structural had made the sale in this instance referred to, the delivery would have been made by a Kelley truck?

A. Yes, I believe that is what this letter referred to, that it was a delivery made for Structural's account by a truck hired by the Kelley Company.

Q. So that, so far as USG or any outsider was concerned, the transaction would look like a Kelley transaction because of the delivery in the Kelley truck, isn't that right?

3581 Mr. STEFFEN. I think, Your Honor, that this goes quite a long way. Using the rule which the defendants used this morning, the letter speaks for itself. The witness hasn't shown that he can construe it any better than Mr. Bromley, on this point.

Justice STEPHENS. The Court has tried to make plain, before, that it is the view of the Court, and the Court thinks it is a settled rule, that there is a different practice on cross-examination. On direct-examination if you want to prove the contents of a document, you must show the document. On cross-examination it may be that the witness' understanding of a document explains his direct-examination concerning his conduct under it. We think the objection is not well taken.

Mr. BROMLEY. Will you read the question?

Justice STEPHENS. That merely reraises the question on which we ruled under your continuing objection, as to whether you were not examining your own witness this morning, notwithstanding the fact that you were permitted to lead him. But we think this is cross-examination of a Government witness, and that that permits going into the reasons for his conduct and his understanding of these documents.

Mr. BROMLEY. Will you read the question?

(The pending question was read by the reporter.)

The WITNESS. It would look like a Kelley transaction, but the statement is made that the practice was
3582 directed by a salesman of the Structural Gypsum Company.

By Mr. BROMLEY.

Q. That means, does it not, that the Kelley Company would start its truck out from Delawanna for Philadelphia, with directions to that truck to go to the Structural Warehouse in Philadelphia?

A. Or to the dealer's yard.

Q. Or to the dealer's yard?

A. Correct.

Q. And that unbeknownst to you, a salesman of the Structural Company would intercept the truck and divert it direct to the contracting job; is that right?

A. That was the basis of their complaint, apparently.

Q. Yes.

A. That is correct.

Q. So that I say again, to an outsider not familiar with what was going on, it would look as though the Kelley truck was making a direct job delivery, direct from Delawanna?

A. It would.

Q. Now coming back to Exhibits 372 and 373 again, at page 3750, at the bottom of the page, referring to these exhibits, you were asked this question:

"Q. And when you say that you are eliminating those counties from the trucking area, you mean that
3583 you are no longer trucking into those areas, and that therefore, if you are selling to Oakfield and making shipments to Oakfield's customers, that they couldn't be handled on the former delivered price basis, is that correct?

"A. I don't believe we ever trucked into these areas."

Now that answer isn't right, is it?

A. No, sir, I was in error.

Q. In the first place, do you notice that the question refers to the Oakfield Company?

A. Yes.

Q. And the Oakfield Company had its place of business at Oakfield, New York?

A. Yes, sir.

Q. And Oakfield, New York, is way over toward Buffalo, isn't it?

A. It is.

Q. And when Mr. Steffen asked you that question, weren't you under the impression that the three counties mentioned in Exhibit 372, to-wit, Delaware, Greene and Columbia Counties, were up near Oakfield?

A. Yes, I assumed they were.

Q. And you now know as a matter of fact, they are down near New York City?

A. I do, yes, sir.

3584 Q. So that your answer, "I don't believe we ever trucked into these areas," was quite wrong, wasn't it?

A. Entirely so.

Q. And the fact is that your company did truck into Delaware, Greene and Columbia Counties?

A. Yes, we trucked into all of the counties where trucking was permitted under the license bulletins in the New York area, and to many in the Philadelphia area.

Q. When you gave that answer, you thought that Berks and Lancaster Counties were out in Western Pennsylvania?

A. I did.

Q. And you now know, don't you, that Berks and Lancaster Counties are just outside of Philadelphia?

A. I do.

Q. So that the answer which you gave at line 5, on page 3751, was completely wrong, wasn't it?

A. Yes.

Q. And you change it now, do you not, so as to state that your company did truck into those areas?

A. Yes, I would like to make that correction.

Q. So that with respect to these counties mentioned in Exhibits 372 and 373, the Kelley Company was notifying its customers of a change in the type of service which Kelley would render to them in those localities, was it not?

A. Yes, we were putting them on notice that we

3585 would no longer make truckload deliveries in those counties.

Q. And that thereafter your deliveries would have to be made, if at all, by rail; isn't that right?

A. That is correct, yes, sir.

Q. Now these price lists, and this notification of this change, were sent by the Kelley Company to the Paragon Company and the Structural Company because the Kelley Company hoped to sell products to these companies for delivery in these areas, isn't that right?

A. Yes, we hoped we would be able to sell both the Structural Company and the Paragon Company in carloads in these areas.

Q. In these areas, in these five counties?

A. That is correct.

Q. And when you testified in the criminal case, you testified that you hoped to sell the Paragon Company and the Structural Company in these areas—do you remember that?

A. I don't remember it.

Q. But that is the fact, isn't it?

A. I believe it is.

Q. Now the Paragon Company, to which this letter Exhibit 372, is addressed, is the Paragon Company of Scranton, Pennsylvania, is it not?

A. Yes, sir.

3586 Q. And the Paragon Company of Scranton, Pennsylvania, never was a manufacturing distributor, was it?

A. No, sir, except through its ownership of stock in the Oakfield Gypsum Products Corporation.

3587 Q. Well, when you say "except through its ownership", you know, don't you, that the Paragon Company had only a minority stock interest in the Oakfield Gypsum Products Corporation?

A. I don't know what the interest was, but it did have a stock interest.

Q. But so far as the business of the Paragon Company of Scranton, Pennsylvania, is concerned, it did not manufacture plaster, did it?

A. No, sir.

Q. Therefore, isn't it correct to say that it is not a manufacturing distributor in the sense in which that term has been applied to such companies as the Structural and the Oakfield companies?

Mr. STEFFEN. I object to that, your Honor, as calling for a legal conclusion.

Justice STEPHENS. Is there a dispute between the Government and the defendants as to whether Paragon was a manufacturing distributor?

Mr. BROMLEY. Do you concede, Mr. Steffen, that it was not?

Mr. STEFFEN. I should like to make a continuing refusal to concede, and I would also like to say that I think the facts will develop that Paragon was as much a manufacturing distributor as was the Calvin Tomkins Company. The three companies that owned Oakfield were very closely related and had an identity of officers and directors, and they were run for each other's bene-

3588 fit.

It seems to me that if we are forced to take a position we would take the position that the Paragon Plaster & Supply Company is a manufacturing distributor as much as Calvin Tomkins Company, and for the same reasons.

Justice STEPHENS. The Court asked the question for this reason. Of course in a highly technical sense, whether this company was a manufacturing distributor within the terms used in these pleadings, if it is a matter of dispute in this case, is something that the Court will have to finally pass upon. But nevertheless that term is apparently a term of art in this trade, and it has been used by the Government in its examination of witnesses, and by the defendants. If this witness knows how this company was regarded in the trade, or if he is called upon to testify as to how he regarded it, on this cross-examination, it would seem to the Court not unreasonable, with the understanding that the Court will not be bound by his statement when it comes to a determination of the actual fact, if that is in issue.

We think, therefore, that the objection should be overruled, with the understanding that the Court is not receiving this testimony of this witness on that subject as binding as to the exact nature of this company. You may still contest that. That will protect you sufficiently. It would greatly convenience the examination if the term could be used, on both sides.

3589 Mr. BROMLEY. I point out that they do not claim it to be a manufacturing distributor in their bill of particulars.

Justice STEPHENS. That is true.

Mr. BROMLEY. And if it weren't for the fact that they had offered this letter, this Paragon letter, Exhibit 372, and I had objected because Paragon was not a manufacturing distributor—but the Court admitted it—I wouldn't go into this subject. But it seems to me that it is too clear for words that this company is not a manufacturing distributor and the only thing I can do now is develop it through this witness.

Mr. STEFFEN. I think Mr. Bromley has developed no facts which were not before the Court last Friday afternoon when this same question came up and was duly ruled upon.

Mr. BROMLEY. It did not appear then that Paragon didn't manufacture plaster.

Mr. STEFFEN. I think the whole thing appeared just as clearly then as it does now, that the Oakfield Gypsum Products Corporation is the plaster manufacturing unit, and that the Paragon Plaster & Supply Company is a shareholder, along with the Hard Wall Plaster Company and the other Paragon Company, and own and run the Oakfield Company.

Justice STEPHENS. You may develop what the Paragon actually did in its manufacturing business. The Court will not interpret the use of the term "manufacturing distributor" in the mouth of this witness as being conclusive on the subject of what it is, if there is later to be a contest on the subject. It would seem to be difficult to me, Mr. Steffen, to have a contest on this subject in view of the fact that your bill of particulars did not name this company as a manufacturing distributor.

3590

Mr. STEFFEN. My original objection was to the question which asked Mr. Tomkins what his understanding of the matter was, where Mr. Tomkins' understanding cannot help but be a legal conclusion. It seems to me that it is an immaterial or improper line of questioning.

Justice STEPHENS. The Court has ruled that it will not receive his answer as a legal conclusion. You may proceed.

By Mr. BROMLEY.

Q. I will ask you again—the Paragon Company of Scranton, you have said, was a dealer and a jobber?

A. Yes.

Q. It did not manufacture plaster the way Structural or Oakfield did?

A. No, sir.

Q. Therefore would you not say that Paragon of Scranton was not a manufacturing distributor in the sense that Oakfield or Structural were?

A. No, sir, not at all in that sense.

3591

Q. I will call your attention, Mr. Tomkins, on page 3771, to this question:

"Q. When you say that you have no longer attempted to exert any influence upon what Oakfield or Structural or Connecticut might do, do you mean to imply that you were not interested any longer in whether they maintained prices or not?

"A. No, sir, the only time I ever took this matter up with any of them was where instances had been brought

to our attention of violations."

Now when you said "violations" you meant instances in which USG had complained against your company, did you not?

A. Well, all the complaints that came up in connection with us were addressed to our company.

Q. And when you used the word "violations" there you referred to those complaints addressed to your company, did you not?

A. Yes. My feeling was that our company was being charged with a violation for something that one of these distributors had done.

Q. Now the only instances in which that occurred were these two, in evidence as Exhibits 382 and 387?

A. Yes, to the best of my knowledge, those were the only two occasions.

Q. And you meant the same thing when you used the word "violations" in the second sentence of that answer to which I have just referred, reading as follows:

3592 "We never at any time inquired as to the prices at which they were selling, or made any effort to see that they sold at any particular prices, except for the occasions on which we had been put on notice that the violations had occurred."

A. Well, we interpreted the violations as violations of bulletin prices that had been perpetrated by these other companies, but the violations themselves were chargeable against us, it was our duty to investigate them.

3593 Q. Did you do anything more than investigate and report the facts as disclosed by the exhibits?

A. No, sir. In each case the facts were denied.

Q. And when you used this word "violations" in the second sentence, again you referred only to the two instances disclosed in Exhibits 387 and 382, did you not?

A. Yes, sir, they were the only violations that were ever referred to us.

Q. In your answer just given about the nature of those documents, you meant only to say what your interpretation was at the time you received them, and not what you realize now they actually are, isn't that right?

A. Well, I haven't testified as to what they actually are, Mr. Bromley. At the time, as I have made it clear, I took them to mean that we were to investigate the circumstances and report to United States Gypsum Company. We did just that.

Justice STEPHENS. Mr. Bromley, before you go to another topic, the Court would like to call your attention, and the attention of Mr. Steffen also, in connection with Exhibits 372 and 373, to a statement in the record which puzzled the Presiding Judge when he was reading the record last night. Perhaps it will be cleared up by you in this examination, or by Mr. Steffen later.

At page 3752, beginning with the question at line 16:

"Q. Surely. Now let's take the next sentence, Mr. Tomkins. It says: 'The prices as shown for these re-
3594 spective Counties are still the prices which apply when delivered by carload, mixed car or pool carload lots only.'

"Now that is the sort of thing that we were just talking about, is it not, where you take the mill base price and add the freight to destination?

"A. Well, that means that in the future, prices would be based on the regular mill basing point plus freight method."

Now, if you will turn to page 3795, you will see a statement there by Mr. Steffen commencing at line 5:

"Mr. STEFFEN. I think, your Honor, that the witness has clarified it sufficiently so that we can say that the prices, or the price lists, rather, referred to in Exhibits 372 and 373, are prices referred to in the bulletins, and would be the prices at which the Newark people would sell to dealers. They obviously didn't go through the calculation of having a base price, and then adding to it the freight from a basing point, and so on."

Mr. Steffen's statement concerning the witness' testimony, and the witness' own testimony as just read from page 3752, are in conflict, it seems to me, and it occurred to the Court that that should be cleared while you are on the subject of Exhibits 372 and 373. It need not be done at this moment, but may be done later. I am merely calling it to your attention.

3595 By Mr. BROMLEY.

Q. Look at the second paragraph of Exhibit 372, please. The prices referred to in that paragraph are the prices made up of the mill base price plus freight to destination, are they not?

A. I would interpret this to mean that these prices are the same as the prices that were previously posted for truck deliveries, and that all the change in the price list

covered was the elimination of these counties from a trucking area. Then the letter goes on to say that the prices shown for these counties are still the prices which apply in carload lots.

In other words, there seems to have been no change in the prices, but simply the elimination of this territory from the trucking area.

Q. We are interested in knowing how those prices were calculated, and you said at page 3752:

"A. Well that means that in the future, prices would be based on the regular mill basing point plus freight method."

That is right, is it?

A. Yes. That would mean that the old truck delivered prices must have been based on a freight rate pricing basis, because they haven't changed.

Mr. BROMLEY. It is true that the trucking delivery prices and the carload prices in some areas are the same, isn't it?

3596 The WITNESS. I imagine they are.

Justice STEPHENS. The Court will take the usual afternoon recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice STEPHENS. Proceed.

By Mr. BROMLEY.

Q. The manufacturing distributors, such as Oakfield and Structural, to whom you sold patented board at a discount, were in direct competition with you, were they not?

A. In some instances they were, yes.

Q. They solicited, these manufacturing distributors, and sold to the same class of trade that you did, did they not?

A. They did, they sold to dealers.

Q. And having purchased from you, they sold to the same class of trade as you solicited, the same product as you sold?

A. Exactly.

Q. So that in a very real sense, by selling them your patented board you enabled them to stay in business and compete with you, didn't you?

A. As to board products, yes.

Q. And therefore you testified, isn't it the fact, that if one of these distributors took away your customers by underselling you, you would feel free to refuse to supply him that material any longer?

3597 A. Well, the occasion never arose. I think I testi-

fied that that would have been given consideration.

Q. And that would have been true, wouldn't it, Mr. Tomkins, without regard to whether or not your prices were fixed by some licensor?

A. Yes, without regard to that.

Q. You, as a matter of independent business judgment, would stop supplying any distributor who, as you said, consistently and in large volume, undersold you to your customers on the product which you were selling him?

A. Unless I were advised that it was illegal to do it, I would, yes.

Q. Well, you never were advised, were you, that it was illegal for you to do that as a matter of individual action?

A. Not so far, no, sir.

Q. And when you said on page 3705, beginning at line 3:

"Q. But it is pretty clear, as you stated, that if Oakfield or Connecticut or Structural were selling to your dealers at a lower price, you don't believe they would stay in business very long?

"A. Whether it was board or anything else, no one would."

there you did not mean, did you, that any company other than your own would have anything to do with the decision as to whether or not you would sell such a distributor?

3598 A. No, sir, I never implied that.

Q. And you never had any agreement or understanding with USG or anyone else that you would stop selling any manufacturing distributor who sold below dealer prices, did you?

A. No.

Q. You were asked some questions about excessive dunnage. A licensee who was so intentioned could make a present of perfectly good wallboard or plasterboard, by including in a car of board a large amount of what he called dunnage, could he not?

A. Yes, that is possible.

Q. You said that it was the practice to use defective or broken plasterboard or wallboard to brace the load of good wallboard or plasterboard, did you not?

A. Yes, that is the practice of my company.

Q. Now if a manufacturer used a large amount of perfectly good board, and said he had put it in there for the purpose of bracing the other board, it would be possible for him to give a concession to a purchaser by making him

a present of a substantial amount of perfectly sound board, wouldn't it?

A. Yes.

Q. And you understood, did you not, that this provision that excessive dunnage would be considered to be a violation of the license, referred only to the possible prac-

3599 tice of a manufacturer rebating on the price by making a present of a considerable amount of good board, calling it dunnage, when it was not required as dunnage?

A. Yes, it would constitute a rebate.

Q. At page 3729, in talking about the perforated lath, when you were asked why you signed the perforated lath license, you said:

"A. Well, I understood that other licensees had signed the perforated lath agreement ——"

Then you were interrupted, and finally Justice Stephens asked you if you had finished your answer, and you said that you had.

Isn't it the fact that it was also a reason for your taking out that license, that you desired to be made competitive with the other licensees, who were competing with you?

A. Yes, I understood, as I stated, that other licensees had taken out that license. We found it necessary to sell perforated lath, and I felt that we had to be in a position to produce it.

Q. And you thought you had to have a license so that you could be in a position to produce it in order that you could compete with the licensees who were operating in your territory, did you not?

A. Well, I made no inquiry as to whether or not the license was necessary, but assumed that it was, inasmuch as the other companies had agreed to it.

3600 Q. By this time, that is the time you took this license, perforated lath had become a very valuable product, much sought after in the market, hadn't it?

A. Yes, and the sale was increasing rapidly.

Q. And you wanted to be in a position, if you could, to sell it lawfully, didn't you?

A. Yes, indeed.

Q. And as you said, Kelley had already, prior to that time, started the manufacture of a machine to accomplish the perforations?

A. Yes, sir, he had started that prior to the Newark Company's acquisition of his stock.

Q. It wasn't Mr. Keady, was it, who told you that all of

the licensees in the business, except National, had a perforated lath license?

A. I believe it was Mr. Keady.

Q. I ask you that because the fact is that they all did not have. Did you know that?

A. I didn't know it. My understanding was that the licensees, particularly those in the East, with the exception of National, had signed this license agreement for perforated lath.

Mr. STEFFEN. I think it ought to appear that that is the fact, isn't it Mr. Bromley?

3601 Mr. BROMLEY. What is the fact, that all the licensees in the East except National had a perforated lath license agreement?

Mr. STEFFEN. Yes.

Mr. BROMLEY. I meant by my statement that Texas never took one, or National.

Mr. STEFFEN. He testified as to National, and he limited his answer to the Eastern manufacturers.

Mr. BROMLEY. All right.

By Mr. BROMLEY.

Q. Now you gave some testimony about minimum quantities, and referring again to Exhibit 372, and the last words in the second paragraph, "minimum quantity 7500 sq. ft.", you said that you understood that the United States Gypsum bulletins at that time set that minimum for pool cars, do you remember that?

A. Did I say that I understood that the bulletins so stated?

Q. That is the way I remember it.

A. In reading this letter I assumed that the bulletins provided for the elimination of the trucking area, and also noted that in specifying the territories for carload and pool carload shipments, it limited the quantity to 7500 square feet. My assumption that that was a limitation of the license agreement was simply because it appears in this letter with the other license agreement limitations.

3602 Q. Did you know that the bulletins in effect at this time did not make any such requirements?

A. No, I didn't know one way or the other.

Q. If you, on the other hand, for the Kelley Company, had determined to make such a requirement, it would not violate the bulletins, would it?

A. Oh, no.

Q. Because the bulletins all the way through only make

provision for minimum requirements—you knew that, didn't you?

A. Yes, sir.

Q. So you were free to place any limitation on the minimum quantities that you would deliver in pool cars that you wanted to, weren't you?

A. Yes, sir, if it was not in the bulletin as a limitation, it was one that we imposed ourselves.

Q. Then you were asked some questions about minimum quantities in truck loads: If a manufacturer should agree with a dealer to sell him 7500 square feet of board at a price, at the truckload price, and then should deliver that over a period of time, as required, in small quantities, say 500 or 1000 feet at a time, would that be rendering a service to the dealer which would be of value to the dealer in dollars and cents?

3603 A. Yes, it would eliminate the cost of warehousing and handling to a large extent, and provide the dealer with a great convenience, and make it possible for dealers with inadequate financial assets to purchase board in small quantities.

Q. So that the 7500 square feet is a normal truckload of board?

A. Usually we deliver board in larger quantities by truck, today.

Q. And if you made a practice of making small deliveries to a dealer, you would normally, in the normal course of business, expect to charge him more?

A. If the delivery costs us more, we would expect to be paid at a higher price.

Q. So that if a manufacturer would agree with a dealer to sell him 7500 feet of board at the price specified for a truckload in a United States Gypsum bulletin, and then proceed to deliver it in dribbles over a period of time, he would in effect be giving the dealer a price concession, would he not?

A. Yes, I would consider that an indirect price concession.

Q. At page 3726 you testified in line 16 that metallized board sold at a proportionately high price. You meant merely, did you not, that metallized board sold at a price higher than plain board or lath?

3604 A. Yes, high in relation, high relative to plain board or lath.

Mr. BROMLEY. May I have the letter from Mr. Tomkins to Mr. Eldred of November 17, 1937?

Justice STEPHENS. Is that in evidence, Mr. Bromley?

Mr. BROMLEY. Yes, sir, it is Exhibit 380.

(Government's Exhibit No. 380 was thereupon handed to the witness.)

By Mr. BROMLEY.

Q. Will you look at that, please, Mr. Tomkins?

A. Yes.

Q. The writing of this letter was initiated by you yourself, and not by anyone from the United States Gypsum, is that correct?

A. That is correct.

Q. And the situation referred to in the letter had to do with a shipment made direct to the contractor's job, which by-passed the dealer's yards, didn't it?

A. That is correct, yes, sir.

Q. Now if any manufacturer such as your company made a practice of delivering, for some dealer, direct to the contractor at the job, that was a business practice which would antagonize dealers generally, wasn't it?

A. Yes, that apparently was what happened in this case.

Q. And when you say, in the second sentence of Exhibit 380, "as I think it possible we may be called upon
3605 for some explanation", you were referring to the fact that you were afraid the dealers would ask you to explain why you were violating that business practice, weren't you?

A. I am not sure at this time exactly what I had in mind other than apparently this transaction had received some publicity. Whether I had in mind we might receive a question from the Board Survey Company, or that we might be called to account by our dealers in Philadelphia, I don't know, at this time.

Q. Well, in the first sentence you say that the publicity, or "excitement" was among the dealers in Philadelphia.

A. Yes, sir.

Q. And they were the buyers?

A. They were the buyers.

Q. And it was that excitement, because they were your customers, which primarily concerned you, wasn't it?

A. Yes, sir, that was our chief concern.

Q. At the bottom of page 3764, in relating your conversation with Eldred, beginning at line 21, you said:

"A. My recollection of it is that Mr. Eldred said he had inquired of his salesman in Philadelphia as to whether

this delivery had been made directly to the job, and that his salesman had denied it."

As in the prior instance, isn't it the fact, Mr. Tomkins, that what you suspected was going on was that your
3606 truck, making the delivery presumably to a dealer in Philadelphia, had been met by an Oakfield salesman on the way, who had diverted the truck to the contracting job?

A. Yes. I believed, if the truck had made a job delivery, which was denied, that it could only have been made at the instance of a representative of the Oakfield Gypsum Products Corporation.

Q. And isn't that why you went to Mr. Eldred and asked him about it?

A. Yes, that is the reason I asked him to investigate it and find out what the facts were.

Q. Because only Mr. Eldred or his salesman would know whether, as a matter of fact, the Oakfield salesman had diverted your truck?

A. Yes, that is correct.

Q. And so far as the dealers in Philadelphia were concerned, all they would know about it was that a Kelley truck had made a direct job delivery, isn't that true?

A. If this delivery had been made, that would have been true, yes, sir.

Q. So that even though, if it had been done, the diversion was the result of an Oakfield act, nevertheless, the Kelley Company would get the blame so far as the dealers were concerned, isn't that right?

3607 A. Yes, the Kelley Company was getting the blame.

Q. Now in the Bartlett letter to you of December 27, 1937, which is Exhibit 381, you have already explained that the letter should have been addressed to Kelley instead of Newark, because Kelley and not Newark was the licensee, have you not?

A. Yes, sir.

Q. Can you explain to us why it was that dealers were opposed to job deliveries?

A. Well, basically it takes the control of the dealer's business away from him. If a dealer does not purchase materials, warehouse them and subsequently deliver them to jobs, he has no real function, he becomes more in the nature of a broker than a dealer.

Q. And it is the fact, isn't it, that it is and always has been the attitude of these dealers in this country that manu-

facturers who sell to dealers should deliver the goods to the dealer, and not to the dealers' customers?

Mr. STEFFEN. I object to that as being entirely too broad. No witness can answer what all dealers in this country object to, or how all deliveries are made.

Justice STEPHENS. Well, if the phrase "this country" is to be construed as being used with all dealers, it is too broad. I thought the witness would understand the question to mean dealers in this trade in the area which we are discussing.

3608 If the witness doesn't understand that, you had better rephrase the question, Mr. Bromley.

Mr. BROMLEY. I will withdraw the question.

By Mr. BROMLEY.

Q. Isn't it true that as far as you know the situation, that the dealers in your area with whom you are acquainted object to a manufacturer making a delivery direct to a job, on a sale to a dealer?

A. Yes, sir, all of the dealers with whom I have had experience feel very strongly on that question. They do not want manufacturers delivering to their customers directly to the jobs.

Q. And therefore it is and always has been your business policy to deliver goods sold to dealers, to the dealer's place of business?

A. Yes, sir, for that and other reasons.

Q. Now, coming to the second instance, the Structural situation in Philadelphia, and particularly Mr. Bartlett's letter to you of May 17, 1938, which is Exhibit 387, again this letter, you say, was erroneously addressed to Newark because Kelley at the time had the license, and not Newark, isn't that right?

A. That is right, yes, sir.

Q. And again, in the instance referred to here, Kelley was making the deliveries to Structural in Kelley trucks. That is right, isn't it?

3609 A. Well, in trucks either owned by Kelley or hired by Kelley.

Q. Now will you look at the answer of May 20, 1938, which is Exhibit No. 388. In the second paragraph there is a reference to "irregularities". You have told us, have you not, that that referred to reports that you had that Structural was selling board bought from the Kelley Company at prices below Kelley's prices, to dealers?

A. Yes, that or deliveries to jobs.

Q. Now isn't it the fact that you had decided that the Kelley Company would not sell in Philadelphia prior to the time that you received Exhibit 387?

A. We had decided not that the Kelley Company would not sell in Philadelphia, but that it would not continue to deliver for the account of Structural in Philadelphia.

Q. I see. And you had decided that prior to the time that you had received Exhibit 387, hadn't you?

A. Yes, simply on the basis of cost.

Q. And didn't you discontinue making sales to dealers in that area, yourself?

A. No, we reduced our volume of business in Philadelphia. We did not discontinue all sales in Philadelphia, then or at any time.

Q. And isn't it the fact that in your use of the word "irregularities" in Exhibit 388, you meant only to
3610 indicate that your discontinuance was a matter of business policy so far as Kelley was concerned, and had nothing to do with the performance of any obligation which you may have assumed that you had under the license?

A. No, there had been no question raised. We had discontinued the sale in Philadelphia to Structural several months before we were put on notice that Structural was believed to be quoting low prices for delivery direct to the job.

Q. Is it the fact that in localities other than the Philadelphia area, you went right ahead selling Structural as before?

A. Yes, always.

Q. So that then it is the fact that so far as this complaint is concerned, Exhibit 387, you never went to anybody representing Structural with respect to it?

A. To the best of my knowledge we did not. We were not doing business with Structural in the territory covered by this complaint, and we so advised the United States Gypsum Company.

Q. How much of your business, during this period of time, up until say 1943, was represented by sales to manufacturing distributors?

A. It would be a very rough estimate that I could give you on that.

3611 Q. How much?

A. Maybe at the rate of five or six million feet per year, to all distributors, out of a total of roughly thirty million feet.

Mr. BROMLEY. Now may I have the United Clay Products invoice, Exhibit 375-C?

(Thereupon, Government's Exhibit No. 375-C was handed to the witness.)

By Mr. BROMLEY.

Q. Will you please look at that, Mr. Tomkins?

Before I go to that, Mr. Tomkins, did you ever have any agreement or understanding of any kind with respect to the prices of gypsum products other than white plaster?

A. We never had any as to white plaster or any other gypsum product, except board.

Q. Now I want you to assume for the moment, if you will, in connection with Exhibit 375-C, that the Kelley Company had a mill at Delawanna, New Jersey, which was a basing point mill, and that Oakfield Gypsum Products Corporation had a place of business in Washington, and that you were selling patented plasterboard to Oakfield.

Justice STEPHENS. Please read that question. The Court's attention was on this exhibit, and I missed it.

(Thereupon, the pending question was read by the reporter.)

3612 By Mr. BROMLEY.

Q. The price which Kelley would charge Oakfield would be the mill base of $13, plus the freight from Delawanna to Washington, would it not?

A. That is correct.

Q. And in the instance on Exhibit 375-C, that price would be $14.96 in Washington, if the freight there represented the freight between Delawanna and Washington?

A. Yes, that is correct.

Q. Now isn't it the fact that it is the universal practice for customers of manufacturers to be charged a price made up of the mill base price, plus the freight to destination?

Mr. STEFFEN. I object to that, your Honor, on the ground that the word "universal" calls for so much information ——

Mr. BROMLEY (interposing). I will withdraw the question.

By Mr. BROMLEY.

Q. In this business, isn't it the usual custom for the manufacturer to charge the customer a mill base rate to which the freight to destination has been added?

A. Yes, that is the usual custom.

Q. And isn't it the usual practice for the customer, when he gets the shipment, to go to the railroad and pay the freight bill?

A. Yes, that is customary.

Q. So that at that point, if the customer had paid the manufacturer, he would have paid the freight twice,

3613 wouldn't he?

A. Yes, if the manufacturer included it in his invoice.

Q. Therefore, the invoice always shows on its face a freight credit to the customer, doesn't it?

A. In that instance it does, yes, sir.

Q. And the freight credit which is shown to the customer is always the amount of freight which the customer actually pays the railroad, isn't it?

A. Yes, it would have to be.

Q. It would have to be?

A. Yes.

Q. Now since the invoice is generally sent after the event, at the time the customer receives the invoice he has already paid the railroad freight, and sent his freight bill to the manufacturer, and the manufacturer has put on the invoice a credit in the sum represented by the amount of the freight bill, isn't that right?

A. Well, I think sometimes our invoices beat the shipments to the customers. They should. The invoices are made on the day of shipment, and usually get there ahead of the shipment.

Q. But whatever the fact is, the credit which you give the customer is always the freight which he pays to the railroad?

A. Yes, I believe that is correct?

3614 Q. Now in this instance the freight which was a part of the price was $1.96, was it not?

A. Yes, it was.

Q. That was the freight from Philadelphia to Washington, wasn't it?

A. Yes.

Q. That was because Philadelphia was a basing point and Delawanna was not?

A. That is correct.

Q. And the reason that you only charged your customer $1.96 was that since USG had a mill at Philadelphia, it could undersell you unless you charged the customer in Washington the same freight rate that USG would charge the customer, isn't that so?

A. Yes, that is correct.

Mr. STEFFEN. The reason is that the bulletins provided for that price.

By Mr. BROMLEY.

Q. That would have been true without any bulletins, wouldn't it? You couldn't have competed with USG if it had a mill in Philadelphia and you had one in Delawanna, without some such arrangement?

A. We either would have had to sell at a lower price at our mill, or absorb some of the freight so as to equalize our price with the United States Gypsum Company's price.

Q. Coming back to Exhibit 375-C, the fact is that
3615 the $1.96 is the freight from Philadelphia to Washington which goes into the price of $14.96?

A. Yes, that is the rate.

Q. That is the rate from Philadelphia to Washington?

A. That is correct.

Q. Now the freight credit that you gave Oakfield is the amount of freight which was actually paid by the customer that received the goods in Washington, isn't that correct?

A. Yes, that was figured at 19 cents.

Q. And that was because the actual freight paid to the railroad was the freight from Delawanna?

A. That is right.

Q. Now of course in this instance Oakfield did not pay the railroad, did it?

A. No, in this instance probably Oakfield's customer, the United Clay Products, paid the railroad.

Q. The United Clay Products paid the railroad $77.94, but it would be the fact, wouldn't it, that Oakfield on its invoice to United Clay Products, would give United Clay Products a credit in the same amount—that is, the freight actually paid by United?

A. Yes.

Q. And that would be because Oakfield would probably charge United $13 plus $1.96, the going dealer price, is that right?

3616 A. That is correct.

Q. So that at that moment of time, the customer, United, would have paid the freight twice, once in the price to Oakfield, and once to the railroad?

A. If that had been done.

Q. And that is the reason that on the invoice from Oakfield to United, Oakfield would give a credit of $77.94, the

amount which United had paid the railroad for freight?

A. Presumably it would.

Q. And since Oakfield had given that credit to United, Kelley in turn would give credit to Oakfield in the same amount, is that right?

A. That is right.

Q. That would result in Oakfield giving United a credit of $77.94, which was $17 more than the freight in the delivered price?

A. Yes, $17 more than the 14-cent freight rate would be.

Q. And Kelley would give Oakfield, likewise, a credit for $77, which was $17 more than the amount of the freight which Kelley got in the delivered price?

A. That is right.

Q. So that it would end up by the Kelley Plasterboard Company absorbing $17 of freight?

A. Yes, that is the difference between the freight from Philadelphia to Washington and the freight from
3617 Delawanna to Washington.

Q. And it would end up with Oakfield paying $13 plus the Philadelphia freight of $1.96, less 12½ per cent on $13?

A. That is correct.

Q. And it would end up with United paying for that, $13 plus $1.96, or the Philadelphia freight?

A. Yes.

Q. Now with relation to Exhibit 374, which is the letter notifying the Oakfield Gypsum Corporation of a freight increase, look again at that Exhibit 375-C. If, at the time that this transaction was accomplished, the freight rate from Philadelphia to Washington had been increased from 14 cents to 15 cents, and Kelley had known about it but Oakfield had not, it would have resulted in a loss to Oakfield, wouldn't it?

A. Yes.

Q. Because if Oakfield had not known that the freight from Philadelphia to Washington was 15 cents, instead of 14, Oakfield would have charged United $14.96?

A. Yes.

Q. And then when Oakfield had come to get its bill from Kelley, it would have been charged, for the same board, $15.10, or 15 cents times 1400, instead of 14 cents times 1400, is that right?

A. That is correct.

3618 Q. A 15-cent freight rate on 1400 pounds, instead of $1.96, would be $2.10.

A. That is right.

Q. So that the price which Kelley would charge Oakfield, based on the new increased 15-cent rate, would be $13 plus $2.10, or $15.10, whereas Oakfield, not knowing of the increase, would have accepted an order from United at the old price of $14.96?

A. That is true; yes, sir.

Q. And Oakfield would then be out 14 cents per thousand feet because of its ignorance of the freight increase which went into the price, is that correct?

A. That is correct.

Q. So do you now say that Exhibit 374, the freight notification sent to Kelley to Oakfield, was information which Oakfield should have in connection with its purchases of patented board from the Kelley Company?

A. Yes, it was information which Oakfield would have to have.

Q. Because any company would want to know its cost before accepting an order from a customer at any price, wouldn't it?

A. It is a good practice, yes. (Laughter.)

Mr. BROMLEY. That is all.

Justice STEPHENS. How much redirect examination do you have, Mr. Steffen?

3619 Mr. STEFFEN. I will try to make it very brief, your Honor, because I think Mr. Tomkins wants to get away.

Justice JACKSON. Will you be finished by four o'clock?

Mr. STEFFEN. Possibly.

Mr. O'DONNELL. If the Court please, I have a few questions on cross-examination which I don't believe will take more than five minutes at the most.

Justice STEPHENS. Very well, proceed.

CROSS-EXAMINATION by Mr. O'DONNELL.

Q. Mr. Tomkins, I believe you testified that the Newark Plaster Company had been engaged in the manufacture of white plaster for a great many years. What was the date of the incorporation of the company?

A. The Newark Plaster Company was incorporated in 1911.

Q. And from 1911 down until the purchase of the stock of the Kelley Company, it had never sold its plaster to the dealer trade, or thereafter, as far as that goes?

A. It made all its sales to the Calvin Tomkins Company.

Q. The Newark Plaster Company was, as I understand it, a New Jersey corporation.

A. Yes.

Q. And the Calvin Tomkins Company was a New York corporation?

3620 A. Yes.

Q. Was the Newark Plaster Company, throughout the period that it was engaged in the manufacture of this white plaster, known to the dealer trade for the product which it manufactured?

A. No, it was not. The dealer contacts were all made by Calvin Tomkins Company.

Q. Now with reference to the Kelley Plasterboard Company, at the time the Newark Plaster Company purchased its stock, was the Kelley Plasterboard Company known to the dealer trade for the products which it manufactured?

A. Yes, it was.

Q. And throughout the period from 1937 through to 1939, that is, to January 1, 1939, at which time the Newark Plaster Company merged the Kelley Company, wasn't it to your interest to maintain the two companies as separate and distinct legal entities?

A. We believed there was an advantage in continuing the operation of the Kelley Plasterboard Company as nearly as possible in the same way that it had operated prior to our acquisition of the company.

Q. After the Newark Plaster Company had acquired the stock of the Kelley Plasterboard Company, did the Kelley Plasterboard Company continue to maintain its own office, separate and distinct from that of the Newark Plaster Company?

A. It did. It operated in exactly the same way it had prior to the change in stock ownership.

3621 Q. And where was the office of the Kelley Plasterboard Company located?

A. Delawanna, New Jersey.

Q. Did the Kelley Plasterboard Company have a plant superintendent, separate and apart from the plant superintendent of the Newark Plaster Company?

A. It did.

Q. And who was he?

A. Mr. Loeffler.

Q. And had Mr. Loeffler been the plant superintendent of the Kelley Plasterboard Company prior to the time that the stock was purchased by the Newark Plaster Company?

A. He had, for many years.

Q. Did the Kelley Plasterboard Company have a different office plant manager from that had by the Newark Plaster Company?

A. Yes, it did.

Q. And they had that office plant manager throughout the period from 1937 to January, 1939?

A. Correct.

Q. Who was he?

A. Mr. Wileman.

Q. And he had been the office plant manager of the Kelley Plasterboard Company prior to the time when the Newark Plaster Company purchased its stock?

3622 A. That is right.

Q. And did the Kelley Plasterboard Company also have a sales manager separate and apart ——

A. (Interposing.) It did. Mr. McGrath was the sales manager who continued in that capacity.

Q. And he had been sales manager of the Kelley Plasterboard Company prior to the purchase of its stock by the Newark Company?

A. Yes.

Q. Were the employees of the Kelley Plasterboard Company, as far as possible, maintained intact as those who had previously worked for Mr. Kelley?

A. Yes, the same employees were retained, and as few changes as possible were made.

Q. Now I think you testified that the Newark Plaster Company had larger facilities for the manufacture of white plaster than it found necessary to use in furnishing the dealer trade with white plaster?

A. That is correct.

Q. And after the purchase of the Kelley Company stock, did the Newark Plaster Company use those facilities for the manufacture of stucco?

A. It did.

Q. Was that stucco manufactured by the Newark Plaster Company throughout the period from 1937

3623 through to the early part of 1939, sold by the Newark Plaster Company to the Kelley Plasterboard Company?

A. Yes, it was sold by Newark to Kelley.

Q. And paid for by the Kelley Plasterboard Company?

A. It was.

Q. Which keeps its own books—or rather, kept its own books of account in reference to these transactions?

A. That is right.

Q. After the merger of the two companies on January 1, 1939, did the Newark Plaster Company sell patented board or lath direct to the dealer trade?

A. No, it did not. It sold board to the Calvin Tomkins Company.

Q. As it had done when it was a manufacturer of white plaster, from that time on the Newark Plaster Company likewise sold all of its board to the Calvin Tomkins Company?

A. Yes, sir.

Mr. O'DONNELL. If the Court please, there is one matter that I think might be cleared up by this witness.

On page 3765 of the transcript, line 13, your Honor asked this witness, or perhaps the question was addressed to Mr. Steffen:

"Justice STEPHENS. Is it being offered as a declaration of Newark or Kelley?"

3624 I find that the witness did not make it clear as to which company this letter was written by.

Justice STEPHENS. What letter?

Mr. O'DONNELL. Exhibit 380, to which your Honor was referring at the time that question was asked. Mr. Steffen's reply was merely:

"Mr. STEFFEN. On one part, yes."

Justice STEPHENS. That is the letter relating to the alleged excitement among dealers in Philadelphia, and the one which referred to Harry McCormick?

Mr. O'DONNELL. That is right, your Honor.

Justice STEPHENS. What is your point?

Mr. O'DONNELL. It appeared that your Honor was addressing that question to Mr. Steffen, I believe, as to whether or not this particular letter was being offered as a declaration of Newark or Kelley and there was no reply by Mr. Steffen to your Honor's question.

Justice STEPHENS. Mr. Steffen said:

"On one part, yes."

I am not sure that I understand what your point is, Mr. O'Donnell.

Mr. O'DONNELL. As I understand your Honor's question, I believe you asked Mr. Steffen if this letter was being offered as a declaration of Newark or Kelley. The response of Mr. Steffen does not appear to answer that question.

3625 Justice STEPHENS. Do you wish to expand your answer, Mr. Steffen? The answer is not clear. It

says: "On one part, yes." I don't quite see what that means.

Mr. STEFFEN. I don't either, your Honor. I think what I should have said was—yes, and that we regard Newark and Kelley at this time as being substantially one concern. Certainly Mr. Tomkins was acting for—he was president of Newark, I believe, and was also acting as president of Kelley. So that as far as I know, there is no issue on the responsibility for the actions of Kelley, and I had not intended to draw any distinction.

Mr. O'DONNELL. Could the witness be shown a copy of Exhibit No. 380?

The WITNESS. I have it here, Mr. O'Donnell.

By Mr. O'DONNELL.

Q. Mr. Tomkins, in writing the letter identified as Government's Exhibit 380, were you writing that letter as president of the Kelley Plasterboard Company, a licensee of USG Gypsum Company?

A. Yes.

Mr. O'DONNELL. I wish to make an objection to this letter being offered by the Government as an admission against the Newark Plaster Company.

I have no further questions.

Justice STEPHENS. Let the Court see the original letter, Mr. Marshal.

3626 (Thereupon, Government's Exhibit No. 380 was handed to the Court.)

Justice STEPHENS. Do you wish to be heard on that, Mr. Steffen? The witness having testified that he was writing Exhibit 380 as an officer of Kelley, Mr. O'Donnell objects to it being received in evidence as a declaration of Newark. What is your contention with respect to that?

Mr. STEFFEN. Our contention is that Newark was responsible for what Kelley was doing during the period after they purchased the stock of Kelley. The letter is certainly binding upon Mr. Tomkins because he was acting in both capacities. The evidence has developed that the directors, or a majority of them, were the same, and that the officers, or a majority of them, were the same, and that the business was under the almost complete control of Mr. Tomkins, who was also president of Newark.

It seems to me that that is sufficient to show that the letter is admissible against Newark and Kelley, and of course against Mr. Tomkins.

Justice STEPHENS. The objection will be overruled, with

the understanding that how far this exhibit binds Newark is a matter which will ultimately be determined when the argument is made at the close of the case with respect to all the evidence as binding against any defendant.

3627 Mr. STEFFEN. I should like to ask two or three questions.

Justice STEPHENS. You may.

REDIRECT EXAMINATION by Mr. STEFFEN.

Q. I think you testified, Mr. Tomkins, in answer to a question of Mr. Bromley's, that you were free to sell plaster at any price you saw fit. Isn't that correct?

A. That is correct.

Q. And that you have been, even after you became a licensee of USG?

A. Yes, sir, we can set our own prices for the sale of plaster.

Q. Now Mr. Bromley made an illustration of a case where a manufacturer had sold board, and also had sold plaster which at that time was selling at $10 on the market, at a $2 price. You would regard that as a subterfuge or a rebate, would you not, on the sale of board?

A. I certainly would, yes, sir.

Q. And would you think that you were free to sell plaster at that price under the bulletin regulations?

A. Not if I considered it a rebate. If I were establishing a price for plaster, I can do that in my own discretion, but if I am doing it as an evasion of a contract I have made, I would consider that to be improper.

Q. Now you testified that you regard the license agreements as very valuable assets, and that you

3628 considered that when you bought the Kelley stock. Do you remember that?

A. I do.

Q. Did you make any investigation at that time of the patent situation?

A. I did not, no, sir.

Q. What did you base your understanding on to the effect that those were very valuable assets?

A. The fact that gypsum wallboard in the East had been manufactured under these patents for a substantial period of time.

Q. That is, it was your understanding that it had been manufactured under those patents?

A. That was my understanding. I did not feel that we would be justified in undertaking to manufacture a

board without a license agreement, and consequently find ourselves entangled in a lawsuit. I didn't feel that it was necessary for my company, which was a small one, to investigate the validity of the patents, or the legality of the license agreement, when it had been established in the industry and apparently had been unquestioned for a number of years.

Q. In other words, you took the license agreement and the patents at face value?

A. Exactly.

Mr. STEFFEN. I have no further questions.

3629 RECROSS EXAMINATION by Mr. BROMLEY.

Q. Did you submit to your counsel, Mr. DeWitt, the matter of an opinion on the legality of the license?

A. He investigated the legal features of the entire transaction, in acquiring the Kelley Company. I know he read the license agreement, and I assume it met with his approval, as he made no objection to it.

Justice STEPHENS. Is there any other recross?

(No response.)

Justice STEPHENS. Mr. Adams, the Court will have to ask you to come back tomorrow morning to be heard on the Redfield matter and on Exhibit 324, I believe, which is the answer in the Beaver Products case.

May this witness be excused now?

Mr. STEFFEN. Yes, your Honor.

Mr. BROMLEY. Yes, sir.

Mr. JOHNSTON: If the Court pleases, before we adjourn I would like to inquire if a set of the exhibits that are to be used tomorrow is available, so that we can have them tonight?

Mr. STEFFEN. They are available with the clerk.

Justice STEPHENS. And you may obtain them from the clerk.

You are excused, Mr. Tomkins. Thank you for attending the Court.

(Witness excused.)

Justice STEPHENS. Announce the recess.

(Thereupon, at 4:15 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Tuesday, February 15, 1944.)

3632 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS-CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., TUESDAY, FEBRUARY 15, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

3640 ARGUMENTS ON QUESTIONS OF LAW

Justice STEPHENS. We will next hear argument on the two questions of law which have been raised. One was with respect to Exhibit 324, the Beaver Products answer, and the other was with respect to the al-

3641 leged waiver of privilege with respect to the exhibit identified in the Grand Jury proceedings by Mr. Redfield. What number was that?

Mr. ADAMS. Exhibit 233.

Mr. STEFFEN. I am handing the Court mimeographed copies of our brief, and I wanted to call Your Honors' attention to the fact that we made one typographical error. Paragraph 27 was listed as 28.

Justice STEPHENS. Where is that?

Mr. STEFFEN. On the first page, and it has now been corrected.

Justice STEPHENS. Exhibit 324 is the answer of Cer-

tain-teed in the Beaver Products case, is it not?

Mr. ADAMS. That is right.

Justice STEPHENS. And Exhibit 233 was the letter from Mr. Redfield?

Mr. STEFFEN. Yes.

Justice STEPHENS. Mr. Adams, since you are the moving party as to Exhibit 324, you may proceed on that topic.

Mr. ADAMS. I think the record shows that this argument is in support of a motion by Certain-teed Products to strike out Exhibit 324, on the ground that it should not originally have been received in evidence since the exhibit is the answer of the defendant Certain-teed Products Corporation in this suit in the Northern District of Illinois between it and the United States Gypsum Company,
3642 and is not a verified answer. Consequently, in our view, it is not admissible in evidence in this trial as binding upon the defendant Certain-teed Products, or as constituting an admission by it.

As I see this problem, there doesn't seem to be any substantial difference between the Government and ourselves as to what the rule is. I think probably this question rather turns on the application of this rule, as is so frequently the case, particularly when you are dealing with matters of evidence.

The rule has become firmly imbedded in the procedural cases in the Federal courts, and in our brief—I won't refer to them now specifically—we have set out the cases which seem to us to say that where a pleading is not under oath, and is not signed by the party but is only signed by counsel, it is not competent to prove an admission by the party unless there is a showing, on the part of the person offering the document, that the facts contained in the pleading were known to the party, communicated by the party to his counsel, and the counsel was instructed by the client to put the facts or the statements in the pleading.

It seems to me that that is a very wise rule. I don't want to slander the entire profession. It does seem to me, however, that it is very sensible that counsel
3643 should not be permitted to commit their client merely in a pleading, where such commitment would affect the client's rights in a subsequent and other proceeding.

During the course of the first proceeding where the pleading is offered, the client has a right to change its position

in the course of the proceeding, as the facts may develop. Therefore, it can't be harmed particularly by what statements counsel may have made, in perfectly good faith, in behalf of the client.

When we come to a later and other proceeding, it seems to me that you should not permit counsel, in the absence of a clear showing that the client knew about the facts that are alleged and that the client authorized counsel to put those facts in the pleading, to put that pleading in evidence in the later and other proceeding.

Moreover, as I will touch on later, it is important that the client should not be bound by the assertions or conclusions of law of his counsel. That seems to me to be a very practical and at the same time important reason for the rule. If counsel wish to take a legal position, as in an answer as they did in this case, they are stating legal conclusions which the client doesn't know anything about, and wouldn't understand if he did.

Now when you look at this case—the complaint is in evidence, it was a suit by the United States Gypsum
3644 Company which sought fundamentally to restrain Certain-teed, or rather, Certain-teed and Beaver, from going through with this transaction whereby Certain-teed was acquiring the Beaver assets, on the fundamental ground that to do so would deprive the United States Gypsum Company of important rights under this license agreement—a completely different issue faces this Court here. Certain-teed's counsel put in an answer. In the course of the answer, particularly in paragraphs ——

Justice STEPHENS (interposing). Will you please restate briefly—I missed one or two words that broke the connection—please restate briefly the nature of the suit by United States Gypsum against Beaver Products?

Mr. ADAMS. As I understand the suit, the purpose of the suit was permanently to restrain Certain-teed and Beaver from consummating the transaction.

Justice STEPHENS. What transaction?

Mr. ADAMS. Whereby Certain-teed was about to acquire the assets of Beaver, it being contended that that would deprive the United States Gypsum of substantial rights under the license agreement, it being apparent that Certain-teed did not intend to follow the provisions of the agreement and that would be a way for Certain-teed and Beaver to evade the license agreement.

3645 It would seem to me that the issues were different than they are in this case. However, I don't want

to go into the question of the issues, here.

We are particularly interested in the paragraphs of the answer which are paragraphs 27, 28 and 29. I do not now propose to argue whether or not those statements constitute an admission, except in one limited sense, as I think that has already been determined by the court in its previous ruling. I merely call attention to it so that Your Honors may see now the reason why the document was offered.

The pleading itself was signed by counsel, it was not signed in any way by the client, not verified. Verified pleadings, as the Court of course knows, constitute, in a sense, a solemn admission and are admissible. This was not verified. Therefore, the question arises as to whether or not the Court can properly say whether the filing of this pleading was authorized—I don't think that perhaps is a proper word—whether or not, under these cases, the client knew about it and instructed the counsel to make this defense on these facts in its behalf.

We say that there is absolutely no evidence upon which this Court can find that fact. The Government, on the contrary, says that circumstantially—a favorite device of the Government when it knows that there isn't any
3646 direct evidence and can't obtain any such evidence, to say that circumstantially something is so.

Well, in this case we say that isn't even any circumstantial evidence which would amount to compliance with the rule, showing a connection and knowledge and understanding by the client of what was being done.

Justice JACKSON. Where in the world did counsel for Certain-teed secure knowledge of the things that are set out in those paragraphs, particularly paragraph 28?

Mr. ADAMS. They might have secured knowledge of those facts in almost any number of ways.

Justice JACKSON. And that is what skillful counsel would do?

Mr. ADAMS. He certainly would. I think certainly that in any case, counsel gets his facts where he can and puts in those facts.

But when it comes down to a point of binding his client by those facts, I think it is a wholly different question.

Now in this case, the Government starts out by saying—I must say to my surprise—referring to page 2 of their memorandum, that "Members of the Cravath firm were present at conferences of the Certain-teed officers when the matters alleged in Exhibit 324 were being considered, as

Mr. Adams admitted before this Court (Tr. p. 1917)." That is not so. The transcript at page 1917, which I have before me, shows that we were discussing an exhibit
3647 which was excluded from evidence and is not before this Court, and all I said was:

"I am in a position to prove, your Honor, that at that time Certain-teed was advised by the Cravath firm, and that Mr. Adkins was associated with that firm."

I ask Your Honors to place that statement against the statement in the Government's memorandum, which says specifically: "Members of the Cravath firm were present at conferences of the Certain-teed officers when the matters alleged in Exhibit 324 were being considered, as Mr. Adams admitted before this Court (Tr. p. 1917)."

I think that disposes of that suggestion by the Government.

Justice JACKSON. Well, your alleged admission here pertains to what exhibit? You said it didn't pertain to Exhibit 324.

Mr. ADAMS. My alleged admission referred to Government's Exhibit No. 210, which was a document having to do with a conference which the Government said took place on February 2, 1928. We had an argument there about privilege on that document. The Court finally held that the document wasn't properly identified. The Court didn't finally hold that it was to be excluded on the ground of privilege, but the Government has never yet produced a witness who could identify the document, and it isn't in evidence.

3648 So the Government is taking the liberty of talking about a document which is not in evidence, and trying to commit me to a statement about that document which isn't true. So that statement, as far as the Government is concerned, is wrong.

Now the next point that the Government makes is that there was an exhibit which was introduced in evidence as No. 212, which is quoted on page 3 of the Government's memorandum, dated March 1, 1928. I think the important part of it is quoted by the Government, and it is not necessary for the Court to look at the whole exhibit. However, that was a memorandum that George M. Brown made and has identified in this case.

Now the Government says that the wording of paragraph 27 is almost a paraphrase of the last paragraph of that memorandum, which they then quote. We don't agree.

Nor do we agree that the statements contained in paragraphs 28 and 29 of the answer have anything to do with the suggestions contained in that paragraph of the memorandum. However, I think that it is very important, and the Government has wholly failed, to call to the Court's attention what Mr. Brown's testimony was.

He was asked, at page 2762 of the record:

"And do you recall what the nature of your defense was?

"A. No."

3649 He was referring to this lawsuit that we are now discussing.

"Q. But there was a decision, as you testified, to put in an answer?

"A. That is my best recollection.

"Q. And do you recall having told your counsel to put in an answer?"

3650 I don't know exactly what the old gentleman meant by that. He first says, in answer to a question:

"Q. And do you recall having told your counsel to put in an answer?

"A. I don't recall telling him, but my best recollection is that we did."

Then the next question is:

"Q. Do you recall what you may have told him to say in the answer?

"A. No."

So the Government picks out an exhibit which contained some statements which relate to the answer, and says that it has complied with this rule by merely having shown the Court that someone in the Certain-teed Company knew some of those facts, when that same individual testified in this case that he didn't know what, if anything, he told his counsel.

Now I wish to call to the Court's attention my own position in this case with respect to this client, as I have pointed out to this Court on other and numerous occasions. We have had a complete change in the management of Certain-teed since 1936, and I think that fact is important when the Government tries to bind us by an admission made by a previous administration, if it were an admission. I think we are entitled to have all the rules of evidence carefully complied with.

3651 Now your Honors may have noticed that from time to time during this trial I have been forced to take positions with respect to matters of evidence, which may have seemed to be going quite a ways in being tech-

nical, but that is because of my unusual position with respect to the change in ownership, control and administration of this business.

Now in this case we have an attempt here to foist upon us an admission made in 1928, if it was an admission. What I say is that there is no evidence at all that the facts which are pleaded in the answer, except in a very vague way, were ever known to the client, and as far as the record shows, were never communicated by the client to counsel, and which counsel may have gotten from any source and which, so far as this record is concerned, were not in the answer at the instructions of the client.

That last seems to me to be the most important fact because if you are going to bind a client, and this is on the agency theory, it seems to me that you ought to have more than this to show that the agent was acting within the scope of his auhority.

There is another phase of the matter which I think I should call to your attention. As I look at these paragraphs of the answer, they seem to me to constitute conclusions of law by the pleader. They are arguments of law as to the legal effect of the license agreements and the position which the parties find themselves in under
3652 the license agreement, and it seems to me ——

Justice STEPHENS (interposing). Do you think you could get the gentleman that drew that answer to concede that?

Mr. ADAMS. I think I could get him to concede that, all right.

Mr. BROMLEY. I had nothing to do with it. (Laughter.)

Mr. ADAMS. As a matter of fact, I think that should be stated.

But I believe that the paragraphs of this answer are nothing more than arguments of law in an equity suit where it was proper pleading to plead in that way. Naturally counsel wanted to take advantage of whatever arguments of law they could make, and they did so. But in so far as saying that this argument of law is something which is binding upon Certain-teed as an admission, it seems to me that in the state of this record we are going a very, very long ways.

I don't know whether I should take the time of your Honors to go over this in full, but I would call to your attention that paragraph 29, for example, says:

"This defendant further alleges, on information and belief, that the complainant has unlawfully sought to dom-

inate and monopolize the wallboard industry, in substantial restraint of trade, and in violation of said final decree entered June 3, 1923, and of the Anti-Trust Laws of the
United States, not only by controlling prices under
3653 its license agreements or otherwise, but also by
granting rebates to customers and by other unfair practices, in violation of the Federal Trade Commission Act of the United States," and so on and so on.

It seems to me that that is nothing more nor less than an able presentation of a legal argument which was properly found in an equity suit. I don't think we ought to be bound by it in any sense as expressly or impliedly constituting an admission on our part.

I have cited in our brief, under Point II, some cases generally on this proposition.

In particular there is one of them there where the question had not to do with a pleading, but rather with testimony which was given by a witness in a lawsuit. That is Sturm v. Boker (1893), 150 U. S. 312, at pages 335-337.

The Supreme Court said:

"What the complainant said in his testimony was a statement of opinion upon a question of law. Where the facts are equally well known to both parties, such statements of opinion do not operate as an estoppel. If he had said in express terms that by the contract he was responsible for the loss, it would have been, under the cases, an opinion as to the law of contract, and not a declaration or admission of fact which would estop him from subsequently taking a different position."

3654 It seems to me that that is all that this can be said to constitute as far as this case is concerned.

That is all I have to say on this point, your Honor.

I have, as you know, filed a brief some time ago, or rather the Government filed a brief some time ago, on Exhibit 233.

Justice STEPHENS. That is the Redfield matter?

Mr. ADAMS. That is right.

Justice STEPHENS. We will dispose of them separately, and have all the argument on this topic at the one point in the record.

Proceed, Mr. Steffen.

Mr. STEFFEN. I propose to make a very brief argument, your Honor.

It seems to me, in looking over the brief or memorandum submitted by Mr. Adams, that he goes back for his

authorities to some rather early cases such as Combs v. Hodge, which is a Supreme Court case, and the Diebold Safe Company case, and that those cases did assert, as one ground of their decision, that pleadings not signed or verified by the client, would not be admitted in evidence as admissions.

Those are very old cases, they have been repeated in a number of decisions, but there has been no very careful analysis, as I have found, in the decisions, of the reasons why they might be good law. On the contrary, I think I can say that those cases are, for the most part, dic-
3655 tum, and on a very limited set of facts, and that it is generally recognized that whenever there is anything to show the authority of the attorney, or anything to show—which is the simpler way—that he was acquainted with the facts of the matter concerning which he pleads by the complaint, that those matters which are put in the pleadings are admissible on the same basis as any other admissions.

That is to say, an attorney in signing a pleading is no different than an officer of the corporation. They are both agents in a sense, and they can both be authorized in the same way.

The older cases had to do with an individual client, and there might be greater sanctity in having an individual client sign the agreement. This case came up in a more modern situation, where you have a corporation, the Certain-teed Products Corporation, and when they engage counsel, as your Honors know full well, counsel are perhaps better conversant with many of the facts involved than are the officers of the company. It would be more or less waste motion to ask an officer of the company to sign in order to make the papers binding upon the corporation. The officers of the corporation engage counsel, competent counsel, and ask them to prepare their pleadings, and they prepare their pleadings, the facts are laid before counsel, and it seems to me that in this day and age a statement by counsel
3656 appearing in pleadings as to facts, must constitute an authorized admission on the part of the client.

That is the position which I think Mr. Wigmore would sustain, that we have moved on from the day of Combs v. Hodge.

That takes us to the question of what authority was given to counsel in this case. Mr. Adams has made a point that Mr. George M. Brown on the stand was unable to remember just what he told counsel.

Referring to page 2762 of the transcript—I think Mr. Adams referred to that—I asked the question:

"Q. And do you recall having told your counsel to put in an answer?

"A. I don't recall telling him, but my best recollection is that we did.

"Q. Do you recall what you may have told him to say in the answer?

"A. No."

He didn't recall what he had told counsel to put in the answer, but he did very clearly recall that there was to be an answer filed, and there was an answer filed, which I take it is a direct engaging of counsel to put in an answer in this case.

And while Mr. Brown may have been unable on the stand here to recall what he instructed be put in the answer, the fact that he instructed counsel to put in an
3657 answer is the significant thing.

I think that Mr. Brown—I defer to your Honors' judgment on this—was unable to remember much of anything that took place. We had him on the stand all morning, and he couldn't tell us what took place in his meetings with Mr. Avery on March 1st or February 28th. He was there for two or three hours with Mr. Avery on an afternoon, and two or three hours the next morning, and he couldn't remember anything excepting that nothing came of it.

Then he gets back to New York, and he writes our Exhibit 212 which is his own memorandum, and in Exhibit 212 he outlines exactly, as we see it, what was subsequently put in the answer by counsel for Certain-teed.

He says, "We must put in an answer"; "We must assert that USG is mainly interested in domination and not interested primarily in royalties"—and while it may not be an exact paraphrase of the answer, as we have said in the memorandum, a comparison indicates that the matters placed in the pleadings are substantially identical with the position which Mr. Brown stated should be taken by his company, and the fact that he doesn't remember it on the stand I think is a circumstance to be considered, but is not controlling at all.

Now we have cited, in our brief under Point II, some of the rulings which have held that where counsel is given access to facts by a client, and could, in fact,
3658 only get those facts from his acquaintance with the

client's business, that that constitutes a sufficient showing of a submission to the attorney of the facts, and an authorization to prepare what is necessary by way of an answer.

As to those cases that I refer to, the leading one, probably, in the State court, is Johnson v. Russell—an old case—(1887) 144 Mass., 409.

That case, though, I might point out, was referred to by the Court in the Redfield case, and was regarded as stating a sound proposition for purposes of the Federal courts, that where counsel are given access to information concerning the nature of the case, and they put in an answer in accordance with that, that that constitutes an admission on the part of the client as respects the matters pleaded.

Now we have a third point here, which I think ought to be considered rather carefully by the Court.

On page 9 of the memorandum we set out what the rules of procedure, or rules of practice were, obtaining in the equity courts in 1928, when this pleading was filed, and it there states that where counsel—and I might point out that verification was waived in the complaint, verification by the client—it there states that where counsel signs a pleading, as was done in this case, that that constitutes a certificate on his part "that he has read the pleading, so signed
3659 by him; and that upon the instruction laid before him regarding the case, there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay."

Now we take a rather serious view of that. It seems that when counsel signs his name to a pleading under a rule of court of this character, that he makes a representation, or makes a statement that he has received instructions, that his pleadings are in accordance with those instructions, that there is nothing in there that is intended to be scandalous or for the purposes of constituting delay.

In this case, it was Mr. Bromley's firm, although as Mr. Bromley stated he had nothing to do with the case, and I don't think the Court should lightly assume that that firm put in an answer on facts which were purely fabricated.

Justice GARRETT. Would it make the slightest difference, as a matter of law, as to whether it was the same firm that was then representing the client?

Mr. STEFFEN. No, your Honor.

Justice GARRETT. It wouldn't make the slightest difference as a matter of law?

Mr. STEFFEN. No, we are just bringing that out in order to embarrass Mr. Bromley, for fun, if we may. (Laughter.) It was Mr. Bromley's firm, but that has no bearing on the case.

Justice JACKSON. We used to say, when I practiced law in New York, that that firm was so big it was
3660 a law factory. (Laughter.)

Mr. STEFFEN. I may say that it is a very trustworthy firm ——

Justice JACKSON (interposing). There is none better.

Mr. STEFFEN. And when they signed a pleading, as they did in this case, and when they certified that they did receive instructions from their client, I submit that they meant what they said, and there has been no showing by Mr. Adams that these pleadings were not authorized, and that they were ever disavowed. They went ahead for over a year and Mr. Brown finally settled it by signing the license agreement. So there seems to me there is almost nothing to Mr. Adams' argument.

As to conclusions of law, this is a court in equity, and when it examines the exhibit, if there are any improper conclusions in there, I think the Court can be trusted to give due weight to that fact.

Justice STEPHENS. Do you wish to comment, Mr. Steffen, upon Mr. Adams' statement with respect to the reference on page 2 of your brief to his alleged admission?

Mr. STEFFEN. That may have been error. We have checked the record this morning right here. It was our assumption, on reading it, that Mr. Adams in making his statement certainly recognized that members of the Cravath firm were present during the conferences. Exhibit
3661 210, which was referred to, recited that lawyers were present. Also I recall, although I haven't yet put my finger on it, that C. O. Brown told us that he thought it was prepared by counsel, or someone said he thought it was prepared by counsel.

Our evidence is not very good on that, as you can see.

I didn't mention Exhibit 211, which I think is further make-weight argument, but it indicates that the Cravath, De Gersdorff firm was in communication with Certain-teed during this period, and concerning these matters.

Justice STEPHENS. Do you mean Exhibit 211 or 210?

Mr. STEFFEN. I mean Exhibit 211, which is still another exhibit.

Justice STEPHENS. Do you wish to reply?

Mr. ADAMS. Your Honor, I see in Mr. Steffen's argument what seems to me a fundamental weakness.

His cases, I think, where they have allowed these pleadings as admissions, where they are unverified, rely very heavily on the proposition that counsel could only get these facts from the client and that therefore, by some inference, the client is bound.

Well, that certainly couldn't be true in this case. Counsel could have certainly gotten all the facts that are in this answer practically out of Moody's or Standard Statistics or any place like that.

3662 The second thing is that, as the cases show, it must be shown that counsel was given access to these facts by the client, and the record is absolutely sound on that point. There is no showing of any kind that Certain-teed ever made any facts, with reference to this lawsuit, available to the Cravath firm, or to Winston, Strawn & Shaw, of Chicago, their other counsel.

I think it should be brought out here, since there is such a wholesale delivery of orchids to the Cravath firm, that we also had lawyers in Chicago.

Justice JACKSON. Was that Silas Strawn?

Mr. ADAMS. Yes.

Justice JACKSON. We will give him an orchid, too. (Laughter.)

Mr. ADAMS. I agree with all the kind things that have been said about these eminent lawyers, but it doesn't seem that that helps any.

There is an old equity rule about the certificate of counsel amounting to nothing more or less than a certificate that he had been retained in the case, and in New York practice it is called an affidavit of merit, indicating that the lawyer thought it was a meritorious defense.

But that is a very far cry from saying that the client placed him in possession of specific facts contained in a pleading, and authorized him to plead them in that way.

3663 The last thing I have to say is that Mr. Steffen says that there is no showing that the statements contained in this pleading were ever disavowed. It seems to me they were disavowed in a very practical way. The Certain-teed Products Corporation settled the lawsuit and took a license, and I think it is important that this Court should recall that this is not a case which went to litigation and was tried, but this is a pleading which was put in at an early stage in the case, a case which was later settled, constituting an admission or disavowal, if

you want to put it that way, of the position taken in the answer.

Justice STEPHENS. We will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice STEPHENS. Mr. Adams, on the second point—or is this the Government's motion on the second point?

Mr. STEFFEN. Yes, your Honor, it is.

Justice STEPHENS. Will you refresh me on it, briefly?

Mr. ADAMS. Exhibit 233 was offered in evidence as a memorandum of Redfield, a lawyer for Certain-teed. It was excluded from evidence.

Justice STEPHENS. And the Government is asking to re-offer it?

Mr. ADAMS. Yes.

3664 Justice STEPHENS. Then we will give the Government the opening in this matter.

Mr. STEFFEN. May it please the Court, this is a reoffer of Government's Exhibit No. 233 which, as you will recall, was a memorandum written by Mr. Redfield who is connected with patent counsel for the Certain-teed Products Corporation, and it was duly identified by Mr. Redfield when it was presented here, and the question was raised at the time as to whether or not the memorandum was privileged, and the grounds upon which your Honor excluded the evidence are stated at page 2890 of the transcript, and they included the ground that it was privileged and that the privilege had never been waived.

I call your attention to page 2 of the Government's brief, where Justice Stephens makes the following statement:

Justice STEPHENS. The Court has examined the offered document, proposed Exhibit No. 233, during the recess, and given consideration to the authorities and the contentions of counsel. The Court is of the view that on the record the document is privileged, and that there was no waiver; that there was a claim of privilege by Mr. Redfield in the Grand Jury proceedings, and that there is no showing before the Court that he was authorized to waive the privilege thereafter; and that identification of a document does not constitute a waiver."

In order to establish waiver it was necessary, of course, for the Government to introduce the telephone conversation between Mr. Redfield, on the one hand, and Mr.

3665 Dowd, who was a representative of Certain-teed Products Corporation, and at the time that that

conversation was offered, we asked Mr. Adams whether Mr. Dowd was an officer of the corporation.

We have set out on page 2 of the memorandum the colloquy which resulted, as follows:

"Mr. KNUFF. Mr. Adams, will you admit that Mr. Dowd was an officer of the corporation at that time?

"Mr. ADAMS. He was not.

"Mr. KNUFF. He was not an officer of the corporation?

"Mr. ADAMS. No.

"Mr. KNUFF. What was his position with the corporation?

"The WITNESS. I don't know.

"Mr. KNUFF. I meant that for Mr. Adams.

"Mr. ADAMS. I think that at that time he was comptroller, he was not an officer. That is not an officer. That is not an officer of the corporation, it is merely a title of the man who heads up the accounting department."

And of course when it appeared, as it did then, that Mr. Dowd was not an officer, and apparently therefore not one who would be authorized to waive the attorney-client privilege, we proceeded no further, practically, except to get the evidence in concerning the conversation, for the purposes of making a reoffer later.

After that, we proceeded to find out whether Mr. Dowd was or was not an officer, and we have checked cor-
3666 respondence which appears as an appendix to the brief. We also went to the Securities and Exchange Commission and the Securities and Exchange Commission's files showed that he was reported as an officer; and of course Moody's shows him to be an officer; and Mr. Adams now admits that he was an officer during the time when this conversation took place, that is in June, 1940.

Now I take it, therefore, that it is an established fact that Mr. Dowd was an officer. He was the vice president and comptroller, and the correspondence which we have had with Mr. Dowd establishes that he was in charge of the matter of supplying documents under the subpoena which the Government had served some weeks before.

There is a series of letters between the Government and Mr. Dowd indicating various discussions concerning the compliance with the subpoena.

Justice STEPHENS. Is that without dispute?

Mr. STEFFEN. I have the record here.

Mr. ADAMS. Yes, there is no question about that, your Honor. I may say, your Honor, that when I made that statement I knew that Mr. Dowd had been originally the

comptroller of the company, and I knew that he later had become an officer and director; it was my understanding that he had become an officer and director at the same time, that is, sometime in 1941. I know Mr. Dowd, and I knew about his promotion, and I thought that he had
3667 come up to be an officer at the same time that they made him a director. That is why I made the statement to the Court.

I find now, since I have checked it up, that actually he had become a vice president in March, about three months before this incident took place, that is to say, in March of 1940.

So when I made that statement to the Court I was relying on a recollection which it turns out was wrong.

Justice STEPHENS. Well, is it without dispute that he was the officer in charge of responding to the subpoenas issued by the Government for the production of documents?

Mr. ADAMS. As to that, I am not prepared to say. I am certainly prepared to admit that he wrote the letters to which Mr. Steffen refers.

Justice STEPHENS. I see.

Mr. STEFFEN. Having established that Mr. Dowd was an officer at the time, and in charge of the matter of supplying documents, or apparently in charge of the matter of supplying documents under the subpoena, the next question becomes one of whether or not there was an actual waiver by Mr. Dowd of the attorney-client privilege.

That turns on the conversation that Mr. Redfield and Mr. Kelleher had with Mr. Dowd.

As it appears from the evidence, when Mr. Redfield was called upon to identify or to testify concerning
3668 Government's Exhibit No. 233, he raised the question informally that that was a privileged document. Mr. Kelleher then said, "If that is privileged, let's see whether we may or may not introduce it." And between the two, Mr. Kelleher and Mr. Redfield, they proceeded to call up Certain-teed in New York.

Now I think we must get those facts clear. Mr. Adams, in his memorandum at page 11, says:

"In this case no such proof exists and, in fact, the contrary was shown. Thus Mr. Redfield testified as follows:

"Q. And whom did you ask for when you called the Certain-teed office in New York?

"A. I don't think I asked for anyone. I think the Assistant United States Attorney called. I don't know who he asked for."

Now Mr. Adams states that as being all the evidence that there is in this very brief record to show how that conversation took place, and that is also false.

I will read you from page 2880 of the testimony where the question was asked:

"Q. And did you later contact any official of Certain-teed Products Corporation as to whether or not they would waive that privilege?

"A. That is a little difficult to answer categorically. I spoke to the Assistant Federal Attorney and told him that it was my feeling that there was a privilege
3669 here and that I was in no position to waive it, but that I should assert it and, together (note the word "together") we called Certain-teed in New York."

Now that is a far cry from the short excerpt that Mr. Adams would have this Court rely upon as being all that transpired when they called the office of Certain-teed.

Now, look at page 2882, also, at the bottom of the page. Mr. Adams is questioning the witness:

"Mr. ADAMS. And you had no way of identifying that person as being Mr. Dowd, had you?

"The WITNESS. Not other than the fact that both the United States Attorney and myself called Certain-teed and this man answered, who we both believed was Mr. Dowd and who represented himself as such on the telephone."

Those are statements that are unchallenged in the transcript, and they indicate that both Mr. Redfield and Mr. Kelleher called up Certain-teed; that a man answered, who said he was Dowd; and that then the conversation occurred which constitutes the waiver.

Now if you will look at page 8 of Mr. Adams' brief, he insinuates that there wasn't any waiver. At page 8 he says:

"The statement attributed to Mr. Dowd by the witness Redfield before the Grand Jury was limited to permission to identify the documents. It is most significant that the Government in its memorandum fails to state
3670 this controlling fact to the Court."

Well, let's read about that. From page 2886 and 2887 of the transcript let us find out what the witness said:

"Q. And what did they tell you to do, the New York office of Certain-teed?

"A. I explained what I have just explained to you, and asked what they wanted me to do, and it is my recollection that Mr. Dowd said, "Well, I don't know, we have nothing to hide, we have thrown our records open to the Department

of Justice, and so far as I can tell there is no reason that you should not testify."

That goes much beyond the excerpt which Mr. Adams put in his brief, and which he would ask this Court to rely upon as being all that transpired by way of waiver.

The fact is that Mr. Kelleher and Mr. Redfield together called up Certain-teed, got Mr. Dowd on the phone, stated the situation to Mr. Dowd, and Mr. Dowd then made this statement, "Well, I don't know, we have nothing to hide * * * so far as I can tell there is no reason that you should not testify."

Justice JACKSON. What is that page?

Mr. STEFFEN. That is from pages 2886 and 2887.

That, we consider, is a complete waiver. The waiver occurred right then.

Now let's see whether they understood it the way that wording would imply that they did. They then
3671 proceeded to go in to the grand jury, as Mr. Redfield testified, and we have shown you the grand jury minutes. He then was shown Government's Exhibit No. 233 and he identified it. The exhibit was given a grand jury number and it became evidence upon which the grand jury was then entitled to rely in determining whether or not to vote an indictment.

There is no requirement, in the case of a grand jury, for the item to be offered in evidence; there is nobody to receive it; you simply present it to the grand jury, it is duly identified, it is a very serious and solemn proceeding, and when the grand jury is offered evidence, the Government's attorney must use every care to see that the evidence that the grand jury may act upon is evidence which subsequently could be used to sustain the charges made in the indictment.

In this case, they very carefully procured a waiver from the Certain-teed Products Corporation, and they then proceeded to place it before the grand jury; the grand jury could and did apparently rely upon it as evidence upon which it could vote a true bill.

It seems to me that the matter of waiver is completely established in the case. I think your Honor's statement that identification of a document by counsel is not in itself a waiver, is perfectly correct in the situation which we have before us.

3672 Identification before a law court is simply identification of a paper. There is no testimony required and it is not evidence. But when you present it before a

grand jury, the matter becomes, then, evidence upon which the grand jury can act.

The cases which Mr. Adams has cited upon telephone conversations do not sustain his position so far as I can ascertain. We have cited a series of cases where it appears that the person calling a business house, who does not know the name of the person who answers, or is not acquainted with him and does not know his voice, but if, in fact, you have called the business house, and if in fact you got, as is apparent in this case, someone who is quite familiar with the matter in question, judging by the answer made, those are circumstantial matters which completely identify or are deemed to identify the speaker as being the man whose name he claims to have—and in this case that would be Mr. Dowd.

There are no cases cited in Mr. Adams' brief which recite anything to the contrary. The closest one, as far as I can make out, is the case of Smithers v. Light, over on page 12 of the brief, which is a Pennsylvania case, and I can take up those facts briefly.

The broker in that case received a telephone call from somebody who said his name was Light, telling the broker to sell certain stock. An hour later that same company called up and said to sell it at a different price, and
3673 the broker thereafter sold the stock.

Now as the transaction stood, at that point they didn't know who Light was.

That is the reverse of this transaction. In this case we were calling up and asking for Certain-teed, and getting a man who said his name was Dowd, who was a representative of Certain-teed, and when the conversation starts that way, the cases recognize that that is circumstantial identification of Dowd, but that when the conversation starts the oher way, the man calling up is not circumstantially identified.

There was a third conversation in this Smithers v. Light case, where a clerk in the afternoon of that day called up Mr. Light, or somebody at that number, and Light got on the phone, presumably. The clerk then wished to give a notification to him that they had sold the stock. The witness thereafter went on the phone and talked to whoever was on the phone, and the question was whether or not he could testify that he had talked with Light.

The Court, in a rather close decision, said that he might not, that Light had not been circumstantially identified

because he didn't place the call, that is because the witness didn't place the call, and that somebody else, some clerk, had placed the call, and it was left open as to whether he had properly called Light or somebody else.

3674 In this case the testimony is perfectly clear that Mr. Redfield and Mr. Kelleher together called up Certain-teed, so that there is no question about the matter. I can say that the way that is usually handled is that the attorney, in this case Mr. Redfield, will say to the United States Attorney, Mr. Kelleher, "I think this is privileged", and they will say, "Well, let's call up" and they will go into an office and one or the other will call up. They can't both talk at the same time, and probably Mr. Kelleher would do it because it was probably at Government expense. They will say, "We will get Certain-teed." Then the phone will be turned over right there to Mr. Redfield. The conversation goes on and, as Mr. Redfield said, "We both understood it was Mr. Dowd, and both believed it was Dowd."

So that as far as we can see, on the matter of privilege, which is the matter which we are discussing here, the privilege was completely waived and we would say that it was waived at the time of the conversation. The subsequent actions in placing the evidence before the grand jury are corroboration of that waiver.

Now on the point of whether or not this is the first occasion upon which a waiver could be asserted, I think the facts display to the contrary.

Justice STEPHENS. You mean that this is the first occasion on which the claim of privilege could be asserted?

3675 Mr. STEFFEN. Yes, your Honor,—for the reason that the claim of privilege was clearly and carefully brought to the attention of the officers of Certain-teed at a point of time when that evidence could have been refused. In other words, they had a very clear-cut and well-presented opportunity to say, "We wish to claim our privilege," at that time.

Mr. Redfield knew, certainly, that if it was going to go before the grand jury, that it would become evidence. So it seems to me that they then had their opportunity.

I want to say further, on that score, that it is always open to a person who has documents subpoenaed, to move to quash the subpoena. You have an opportunity, earlier than the subsequent trial, to assert the claim of privilege, and at that time they had a definite opportunity to assert

their claim of privilege, and refused to do so. On the contrary, they said, "We waive our privilege", or words to that effect.

Mr. Knuff points out that Mr. Kelleher is in the South Pacific, and of course we are unable to call him.

Mr. ADAMS. If the Court please, it seems to me that one very important thing that I should state at the outset, and which the cases indicate is of importance, is that we assert here, as I have stated earlier, that we are in a position to prove, through Mr. Dowd, we believe, that Mr. Dowd never had any such telephone conversation.

3676 Justice STEPHENS. Will you repeat that, please?

Mr. ADAMS. I say that we regard it of importance here that we assert, as I stated when we originally raised this point, that we can produce Mr. Dowd to testify that he never had any such telephone conversation.

Justice STEPHENS. Do I understand that you are asking now to produce him to testify to that effect?

Mr. ADAMS. No. I mentioned that only because it seems to me that it is important in considering this question.

This is not a question where we are merely trying to prevent this document from going in evidence on a technical rule of law. We have a position here of substance. As to whether or not this Court thinks it is necessary, or will think when we get through with this argument, to call Mr. Dowd on this point, I will defer consideration of that.

But I want to make it clear at the outset here, as I have tried to previously, that as far as we are concerned, we believe that Mr. Redfield was mistaken ——

Justice JACKSON (interposing). Well, do you think that privilege was claimed by Certain-teed?

Mr. ADAMS. I do.

Justice JACKSON. Where?

Mr. ADAMS. I will answer that in this way. Before I answer that, if I may, your Honor, I should like to have an opportunity to see the grand jury minutes again.

3677 (Thereupon, a copy of the grand jury minutes in question were handed to Mr. Adams by Government counsel.)

3678 Justice JACKSON. Mr. Adams, if, in fact, it were Mr. Dowd who spoke over the telephone from New York, would your situation be different?

Mr. ADAMS. I really don't think so, under the circumstances of this case. I think I can bring that out.

Justice JACKSON. Well, it was just an inquiry. I was

wondering as to that, if in fact he had talked over the telephone.

Mr. ADAMS. Getting back to that phase of the argument, the Government, it seems to me, as Justice Stephens pointed out when we argued this before, has rather confused these two things: First, we have to see whether or not, on a fair construction of what happened in the Grand Jury, whether what happened in the Grand Jury constitutes a waiver. I don't think there can be any question but that the mere fact that a witness is asked to identify a document does not constitute a waiver. That is all he was asked to do, and that is all that he did. There is no question about that. The cases are perfectly clear that identification of a document does not constitute a waiver. There are any number of them cited in the brief.

Then you come to this question—Well, now, what was he authorized to do? The question of authorization, I say at the outset, has nothing to do with it, and I say for that reason that whether he was an officer or wasn't an officer
3679 has nothing to do with it. The question before us here is what actually happened. Was that document divested of its confidential character by any act of Certain-teed? It seems to me perfectly clear that it was not.

Justice JACKSON. Aren't you taking the wrong way around? Was the claim of privilege ever asserted by Certain-teed, after it was delivered in response to a subpoena that turned it over to the Government?

Mr. ADAMS. The claim of privilege was asserted by Certain-teed at the first time it could assert it, which is here in this court room.

Justice STEPHENS. Couldn't it have asserted it by moving to quash the subpoena, going before a United States District Judge at the time of the Grand Jury proceeding and objecting to having that document put in before the Grand Jury?

Mr. ADAMS. I suppose I can answer that by saying that it could have, but we had no reason to believe that this case was ever going to be tried, for that matter. We could have asserted it, I have no doubt, at some earlier time.

Justice STEPHENS. I don't see the force of that. If the waiver of a privilege or the failure to assert a privilege is conditioned upon the client's pre-vision as to whether, at some time later, it would have been valuable to him to claim the privilege, there would be no way of ever determining the question of privilege. I thought the law

3680 was that in order to claim a privilege, since one must respond to a subpoena unless the subpoena duces tecum is quashed in some manner, he must assert the privilege at the first reasonable opportunity or else be taken to have waived it.

Mr. ADAMS. Well, it seems to me that under the facts in this case, this is the first reasonable opportunity, because you want to consider that what Mr. Dowd—if there was any such conversation—was asked was whether or not he would permit the witness to identify the documents, and he said that that is what he would do.

Mr. Steffen has suggested that we haven't put the whole conversation, which took place in this court room, in the brief. As a matter of fact, we did set the whole thing out. And I say that the conversation before the Grand Jury, to which the Government made no reference, read in the light of the statements in this Court, boils down to this; that the witness was authorized to identify the document, that that is not, and could not be by any stretch of the imagination, a waiver of the privilege; that before the Grand Jury he was told he could identify the document, and that he did so.

Justice JACKSON. Then it was before the Grand Jury, was it?

Mr. ADAMS. Yes. But the client had not authorized him to waive any privilege, the client had simply authorized him ——

3681 Justice JACKSON (interposing). The client didn't claim any privilege, that is the thing I am getting at. When was the claim made, not whether they waived it particularly? You waive it if you don't claim it.

Mr. ADAMS. It seems to me that the answer to that would be this: They call up and say, "Are you willing to waive this privilege?"

He answers by saying, "We are willing to have you identify the document." In other words, we are willing to have you go that far, but no further. Therefore, we waive nothing further.

Mr. STEFFEN. I insist Mr. Adams stay with the record. The witness stated here that he was told he could testify regarding the document, not merely identify it.

Mr. ADAMS. He was asked this ——

Mr. STEFFEN (interposing). I am talking about the testimony before the Court.

Mr. ADAMS. I am talking about it, too. He said that before the Grand Jury he was told he could identify the document.

Now as far as Judge Jackson's question is concerned, the client was asked, "Will you waive the privilege?"

He said, "You can identify the document." In other words, we reserve whatever rights we have.

3682 In this court room it seems his testimony was entirely consistent with that. Testifying 3½ years later, he testified that he called up and asked what they wanted him to do, that is to say, identify the documents. That is as he testified before the Grand Jury. Then he said:

"Mr. Dowd said, 'Well, I don't know, we have nothing to hide, we have thrown our records open to the Department of Justice, and so far as I can tell there is no reason that you should not testify.' "

And then Mr. Knuff said, consistent with the Grand Jury position:

"Q. And did your identify the document?"

And the answer was:

"A. Yes."

In other words, his testimony here is entirely consistent with his testimony before the Grand Jury, that all he was ever authorized to do was to identify the document. To that extent the waiver of the privilege never became operative, there never was any waiver of the privilege. We were asked, "Will you waive?" We said, "You can identify". "Identify," under the cases, is clearly not a waiver. Therefore, we have not waived.

Now that is my position on that point. I don't know whether I have made it clear.

Justice JACKSON. You have

3683 Mr. ADAMS. Now on this question of the telephone call, I want to repeat that we have taken the position that there never was any such telephone call as far as Mr. Dowd was concerned.

Now we get to ——

Justice STEPHENS (interposing). Before you go to that question, clear up one other point. It seems to me that it is something more than a matter of words, whether we talk in terms of waiver or claim. Of course, a privilege once acquired exists until it is waived.

But one of the rules is, as I understand it, that when you are called upon to produce a document, you do waive the privilege unless you claim it at the first reasonable opportunity. When was the privilege claimed here?

You say the first opportunity to claim privilege was before this Court. That seems a strange position, Mr. Adams.

Certainly there must be some way in which a person who is served with a subpoena duces tecum in a Grand Jury proceeding can protect himself against having a confidential document disclosed before awaiting some theoretical trial which may follow years after a Grand Jury proceeding. Why can't the person who is the subject of a subpoena go before the United States District Judge who issued the subpoena and claim that this document is privileged and therefore he is not obliged to produce it?

3684 Mr. ADAMS. It seems to me that the complete answer to Your Honor on that phase of it is that Mr. Redfield did claim the privilege.

Justice STEPHENS. That doesn't seem to me to be an answer to my question, because my question is: How do you justify your position that this Court is the first time they ever had a chance to claim privilege?

Mr. ADAMS. Maybe I am wrong about that, and I ought to say that we have ——

Justice STEPHENS (interposing). Whether they did claim it down there is another question, but I understand your contention is that he couldn't waive it down there under any circumstances because this Court is the first chance he had a right to claim it.

Mr. ADAMS. Maybe I should state that this way,—that we are continuing to claim the privilege. Mr. Redfield claimed it, there is no question about that. Mr. Redfield was not authorized to waive it, and he didn't waive it. Nothing he said in the Grand Jury waived it. He merely identified the document, which the Government agrees does not constitute a waiver.

Justice STEPHENS. Thank you, I see your point.

Now proceed to the next topic, about the telephone conversation.

Mr. ADAMS. The telephone conversation—we are

3685 discussing here the question of the so-called business house rule. That rule has developed, as I understand it, as the modern business methods have included a wider use of the telephone. But the fundamental rule still remains which was introduced by the courts at the time the telephone began to be used for business, and that is that you have to have identification of the voice.

Now the question here, when you apply the business telephone rule, is this: If you call up a business house and someone answers the 'phone, that is a common occurrence, and it is said to be reasonable to suppose that you got the man that you wanted to talk to.

But that is an extension of the ordinary rule requiring identification of the voice, and therefore the courts have very carefully protected that by saying: It is necessary that when you call up, when you want to prove a business telephone call, you show clearly and distinctly and unequivocally that the person who says he made the call actually made that call himself.

Now the cases have said, for example, that where a man in his office says to his stenographer, "Get me Jones, of the Smith Company, on the telephone", in the absence of the telephone records or proof of the 'phone operator, you can not introduce that telephone call, because there is an intervening agency there which is necessary to complete the chain of proof.

3686 Now in this case, there is no such evidence. Mr. Steffen points out that on a couple of occasions the witness said that "together we called up Certain-teed", but the only evidence in the case—and upon this I believe I can not be challenged—as to who actually made the telephone call, is the evidence which I quoted in my brief, as follows:

"Q. And whom did you ask for when you called the Certain-teed office in New York?

"A. I don't think I asked for anyone. I think the Assistant United States Attorney called. I don't know who he asked for."

Now there is no evidence, even, that it was Mr. Kelleher, in this record. It might have been any number of the men across the street there who were present. But it seems to me, in view of the fact that we so vigorously assert that Mr. Dowd did not talk on the telephone, that they have got to ——

Justice JACKSON (interposing). Of course, that is not evidence. Are you going to bring Mr. Dowd down here, if necessary, to testify?

Mr. ADAMS. Yes.

Justice JACKSON. Then it will be a question ——

Mr. ADAMS (interposing). Then it would be a question of fact. I don't think we need to go that far, Judge, because I said that on the state of this record, it is

3687 perfectly clear that while he said they made the telephone call together, when you get down to the vital point of voice identification, which is what we are talking about here, someone other than the witness picked up the telephone and made a call to another point, the witness didn't do that. Someone else, an Assistant United

States Attorney, did that. Now the witness may have been in the room or he may not have been in the room.——

Justice STEPHENS (interposing). I don't understand that the Government is relying upon voice identification. There isn't any claim, is there, that either Mr. Kelleher or Mr. Redfield knew Mr. Dowd's voice? The contention is that they asked for Certain-teed and got a man who said he was Dowd, and it is now conceded that Dowd was an officer, and therefore there is circumstantial proof that they were talking with someone representing the company with authority to act.

That is your position, isn't it, Mr. Steffen?

Mr. STEFFEN. Yes, and the man who spoke was obviously familiar with the transaction.

Mr. ADAMS. When I speak of voice identification, Your Honor, I am speaking of this whole rule, and this call to a business house is merely an extension or a relaxation of the voice identification rule. It is in that sense that I
3688 referred to voice identification.

But the rule requires that in order to come within what you might call this exception to technical voice identification, you must show that the party wanting to introduce the conversation and testify to it actually himself made the call to the business house, and you can't have proof that someone else did, as in this case. The proof is clear that no matter whether he said, at two or three places, "Together we made the call", the fact is, when you get down to actually showing who made the call, it was not made by Mr. Redfield but was made, according to his testimony: "I think the Assistant United States Attorney called. I don't know who he asked for."

Justice STEPHENS. Now the voice identification rule, as I understand it, isn't any different from an eye identification rule. A person seeking to rely upon a conversation with an alleged agent of a mercantile institution, of course, must show that he was talking with some authorized person. He might show that by saying that he had a conversation with him in which he saw him and recognized his features. He might show it by saying that he talked to him and recognized his voice, whether over the telephone or otherwise. Now the present rule is simply another form of identification, isn't it? It proceeds upon the theory that if a telephone call is put in to a mercantile firm, and a voice responds, a person responds stating that he
3689 is with that firm, and giving a name, and appar-

ently being familiar with the subject matter of the conversation, that is taken as evidence that one is talking to some representative of that firm. What difference does it make—I don't see the point of your fine distinction—what difference does it make whether the call is put in by A or by A's stenographer or by A's cooperator, as it is asserted here?

Mr. ADAMS. I don't regard it in any sense as a fine distinction, Judge.

Justice STEPHENS. That is what I am trying to understand. What is the distinction?

Mr. ADAMS. It seems to me that it is important because of the widespread opportunities for fraud if you relax this rule—not that I am suggesting any fraud here—but because of the widespread opportunity at least for misunderstanding, as undoubtedly occurred here.

Justice JACKSON. You might extend that to the telephone exchange girl, mightn't you? She might ring the wrong number.

Mr. ADAMS. The cases are perfectly clear on that, Your Honor, that in order ——

Justice STEPHENS (interposing). Suppose I pick up a telephone and call up a mercantile institution, and that institution responds and some person purporting to represent it talks to me. That is what, as I understand it, Wigmore talks of under this new rule of telephonic circumstantial identification. Suppose I tell my secretary to do that in my presence, is it any less worthwhile, circumstantially?

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Mr. ADAMS. It seems to be perfectly clear—and I think the cases are perfectly sound in holding ——

Justice STEPHENS (interposing). What is the distinction?

Mr. ADAMS. The distinction is this, that when you call up on the telephone yourself, you put the number in, or dial it, and go through that operation of getting that company. When you tell someone else to do it, we have no proof, and you don't know, whether that other person actually did it.

Now let me read on that point ——

Justice STEPHENS (interposing). Suppose the other person did it in one's presence? That is the contention here, that Mr. Kelleher and Mr. Redfield were acting together.

Mr. ADAMS. It could very easily be done in someone's presence and still a misunderstanding arise.

Just let me speculate a minute there, Your Honor. Sup-

pose, as may well have happened in this case, Mr. Kelleher gets on the phone and says to his operator, "Get me Certain-teed Produets Corporation in New York." The call comes back, "I have Certain-teed Products Corporation on the phone."

3691 "Who is this?"

"This is an Assistant United States Attorney in Washington. We want to talk to somebody about waiving a privilege."

They explain in detail what they want.

The operator says, "Well, Mr. Dowd will be in charge of that." They say, "Wait a minute."

Dowd then turns out to be busy, or something else, and some entirely different person in the Certain-teed organization gets on the phone.

Kelleher, or whoever it might be, may think he is talking to Dowd, and he isn't talking to any such person.

Mr. STEFFEN. He says he is Dowd.

Mr. ADAMS. It may be of fundamental importance that we have evidence in this case by the person who actually did the telephoning and who got Dowd on the wire, to state that that is who it was.

Justice STEPHENS. Do you want to call Mr. Dowd down here to testify that he did not have that conversation?

Mr. ADAMS. If Your Honors think it is necessary.

Justice STEPHENS. It isn't for us to say whether it is necessary. You must make your own foundation for your motion, or for resisting the Government's motion, rather.

Mr. ADAMS. Well, it seems to me, according to the tenor of Your Honor's questions, that I am required to answer that I want to call Mr. Dowd.

3692 Justice STEPHENS. If you draw any conclusive inferences from what you call the tenor of our questions, you make quite a serious mistake. The only reason we ask questions is to give counsel the opportunity to resolve questions that come up in our mind. I don't know how in the world we are going to decide these questions. I can't forecast and speculate as to whether it will be necessary to call Mr. Dowd or not, and you are certainly not entitled to draw any inferences from my comments as to what my state of mind is on that particular point.

Mr. ADAMS. I didn't mean to suggest that, of course. What I meant to make as a point there was that the evidence was once excluded, and it was not necessary at that point to call Mr. Dowd. Now it may have been excluded,

as the Government believes, because of my error in stating to the Court what Mr. Dowd's position was. That may be true.

Now my position here is that the telephone call is not admissible, do you see? If the Court believes that on the state of the record the telephone call is admissible, that is what I meant to get at when I was asking my question.

Justice STEPHENS. Well, we can't rule on the thing piecemeal very well, Mr. Adams. I don't see how we can do that. We have to read these briefs and read these cases, and under your theory, then we have got to come back to the court room and announce how far we agree and how
3693 far we disagree on the ruling. It would seem to us better to get this whole matter before us at once. If you feel that it is an essential element in your case to prove that this conversation never occurred, and that Mr. Redfield and Mr. Kelleher were entirely mistaken, that they didn't have any such conversation, I suppose that is a preliminary question of fact which may bear upon the ultimate decision on this question.

Mr. ADAMS. The only reason I raised it here, Your Honor, was because, if the telephone call is admissible—and I don't want to suggest that Your Honors should rule at any time on that point except in your discretion—if it is admissible, obviously I think I should call Mr. Dowd to testify with respect to that telephone conversation.

Justice GARRETT. Mr. Adams, may I ask you—I don't have the record containing Mr. Redfield's testimony before me, and my recollection is a bit hazy; of course, it has been refreshed by the reading here this morning—but isn't it a fact that Mr. Redfield did testify that he talked, himself, with someone there who represented himself to be Dowd?

Mr. ADAMS. There is no question about that.

Justice GARRETT. And so the mere fact that Mr. Kelleher might have been the one who made the call, if Mr. Redfield actually talked with the man and if he was the proper person with whom to talk, what difference does it
3694 make who went through the mechanics of putting in the call for the man?

Mr. ADAMS. Answering your question, the first question, there is no question about it that Mr. Redfield testified that he did talk with someone who said he was Dowd. There is no question about that.

Answering the other portion of your question, it seems to me that it is still important that the fundamental require-

ment be complied with, that the person who wants to put in the conversation should testify that he made the telephone call.

Justice STEPHENS. I didn't mean to suggest by my statement, Mr. Adams, that we wish to put you to unnecessary trouble and expense in these busy days and days of difficult transportation. If we can reach a conclusion with respect to whether the telephone conversation is or is not admissible, perhaps we can find a way of announcing that so, if it is not necessary for you to call Mr. Dowd, you will not have to go to that trouble. Perhaps that can be arranged.

My point is that I don't want you, representing your client, to omit to put anything in here that you think may be necessary to your client's protection because of any speculative ideas you have as to how the Court is going to rule on the admissibility of a telephone conversation.

Mr. ADAMS. That is a responsibility that counsel has to assume, and I certainly do assume it, Your
3695 Honor. I don't want to suggest that I am trying to evade that. As far as Mr. Dowd is concerned, I assume that he is now in Chicago ——

Justice STEPHENS. I will say very frankly to you that I was much influenced, in the decision which I, as far as I was personally concerned, reached on this point when it came up before, by the statement of yours, undenied by the opposite party, that Mr. Dowd was not an officer of the company and had no authority, in consequence, to make a waiver. But that has entirely a new light now. There was no contest on that point before, and we took your statement for it. The thing that is before us now is in an entirely different light.

Mr. ADAMS. I am very sorry that that error crept in.

Justice STEPHENS. I am not criticizing you at all. We all make those mistakes in the course of busy practice, I realize that.

But that was, it is only fair to say to you, one of the important grounds of my decision, and I think that is true with my colleagues.

Mr. ADAMS. I quite agree. It was important to me when I based my argument on it.

I don't know exactly how I should leave this with Your Honors: I assume that you will defer taking any steps today with respect to this point?

3696 Justice STEPHENS. We won't make any ruling today, because we want to read these briefs and these

cases much more carefully than we have been able to—two of them this morning are entirely new to us—and we want to consider it and have a conference on it. There is no other testimony hanging upon these rulings, so we would prefer not to do it in a rush, because it is important to both sides that we rule upon these matters soundly. We don't have very much time during the busy days of taking testimony to go into extensive case reading. There is so much of the record reading to do in the evening.

We will not put you at a disadvantage, however. If we reach a conclusion, Mr. Adams, that this telephone conversation is admissible, knowing that you do want to call Mr. Dowd in such event, we will not foreclose you an opportunity of doing that before a final ruling.

Mr. ADAMS. I appreciate that very much, and that was all that I was referring to earlier.

Justice STEPHENS. Thank you.

Mr. Steffen?

Mr. STEFFEN. I have another matter, if I may present it very briefly.

Justice STEPHENS. Do you want to reply to Mr. Adams?

Mr. STEFFEN. I don't think a reply is necessary, Your Honor, other than to say that if it becomes
3697 important to have Mr. Dowd, we would suggest that he be put on as part of the defendants' case, at that time, rather than at this time.

Mr. ADAMS. Of course, in answer to that, I have no understanding that there will ever be a defendants' case.

Justice STEPHENS. Isn't that a preliminary question of fact bearing upon the Court's ruling on the admissibility of evidence which is being put on now?

Mr. STEFFEN. It could be done either way. We feel we have made a prima facie showing. If Your Honors agree with that, it would still be open to them, either now or at some later point, to put Mr. Dowd on. I think it would be more convenient, from the Government's standpoint, to go ahead with our regular case and not go into a collateral matter than can be put on properly on rebuttal.

Mr. ADAMS. I would like to make my position clear. I am sure the Court, on this one point of evidence, is not intending to put me in any position where I would be waiving any motion to dismiss at the end of the Government's case.

Justice STEPHENS. No.

Justice JACKSON. Of course not. It will be handled in

the usual way. When the Government is finished, then if the motion is denied you will call your witnesses.

Justice STEPHENS. But this is a different situation. Here we have evidence offered, and whether
3698 or not it is admissible depends upon a preliminary question of fact. It seems to us that ought to be determined, at least it seems to me that that ought to be determined now, if it depends upon a question of fact. It is like offering a confession in evidence. You ought to hear voir dire testimony as to whether or not the confession was voluntary, and hear both sides of that testimony on the voir dire.

I should think, if we have to get into the question as to whether or not this conversation occurred, that we ought to hear from Mr. Dowd now, if he is going to testify, and not later.

Mr. STEFFEN. My other matter will take about four or five minutes, and I think I should call it to Your Honors' attention.

Justice STEPHENS. Just a moment, please.

Mr. BROMLEY. I wanted to be heard on this matter for just a moment, if I might, if Mr. Steffen does not wish to reply.

Justice STEPHENS. Which matter?

Mr. BROMLEY. Exhibit 233.

Justice STEPHENS. You may.

Mr. BROMLEY. Let me say first, although I do not care to inject myself into the argument, it seems to me I might be helpful if I called to the Court's attention the questions which some of you have asked with regard to
3699 waiving the privilege.

I think Mr. Adams' position is unsound where he says that this is the first time Certain-teed could assert the privilege. I think there have been at least three occasions on which that privilege could have been asserted. First, he could have moved to quash the subpoena on the ground that the documents called for were privileged. Second, he could have asserted it before the Grand Jury. And third, he can assert it now.

But does the fact that he failed to move to quash waive the privilege? It seems to me clearly it does not. Suppose the Government served USG today with a subpoena duces tecum calling for the production here of documents which were privileged. Would the fact that we did not immediately rush into court with a motion to quash deprive us of

our right to assert the privilege when the witness took the stand with the documents in hand? It seems to me the answer is clearly no. We could claim, the company could claim that privilege when the witness took the stand, because all that had happened in response to the subpoena duces tecum was that a representative of the company brought the documents to court. I think that witness on the stand would have to identify the documents and could make no claim of privilege up to that time. The claim would properly be assertable when it was sought by
3700 the Government to introduce those papers in evidence; and the fact that, the claim being made at that time, the Government contended we hadn't prior thereto moved to quash the subpoena, would never by any court be construed as a waiver of the assertion of the privilege on the stand.

Now it seems to me here that Certain-teed, not having moved to quash the subpoena, the Grand Jury subpoena, didn't waive anything. Its representative still had the right to claim the privilege before the Grand Jury. That, Mr. Redfield did. He claimed it. That is what caused the telephone conversation. As a result of the telephone conversation, he went in before the Grand Jury, still not waiving his privilege, merely identifying the document, so that the privilege was not waived then. Therefore, it follows it can be now asserted by Certain-teed.

Mr. ADAMS. I thought that I had, in answer to Judge Stephens' question, said that I didn't think there was any waiver by Redfield before the Grand Jury.

Mr. BROMLEY. You did, yes.

Mr. ADAMS. Maybe I didn't make that clear.

Justice STEPHENS. Well, what I understood you to say was that there was never an opportunity to claim privilege until you got to this Court.

Mr. ADAMS. I think I did say that originally, and I
3701 later changed my position.

Justice STEPHENS. Yes, that is right. That is what caused me to ask these questions.

Mr. ADAMS. I thought I made my position consistent with what Mr. Bromley is now saying, although I am grateful to him for raising it again.

Mr. BROMLEY. Now I go to another point.

In paragraph 1 of the Government's memorandum upon the admissibility of Government's Exhibit 233 for Identification, the third sentence of the first paragraph says:

"No question was raised as to its relevance or materiality."

If that be so, it was only because we had no opportunity to raise it, since all of the argument took the form of an objection on the ground of privilege. I desire to say now that it is our position that this document is immaterial and irrelevant, and I should think now probably was the proper time for us to note that objection. It hasn't anything to do with any charge in the complaint, and clearly is not in furtherance of any conspiracy charged in the complaint, and I think it is clearly immaterial.

If both objections, however, be overruled by the Court and the document be received in evidence, then the defendants certainly desire that the Government be ordered to recall Mr. Redfield so that we can cross-examine him upon the contents of the memorandum, an oppor-
3702 tunity to do which has not yet been accorded us.

So I would like the record to show, if I may, please, that we now object to the reception of this document on the ground that it is immaterial and irrelevant because not in furtherance of any conspiracy charged in the complaint; and, secondly, that if it be received, Mr. Redfield should be produced in order to be cross-examined by the defendants upon the document.

Justice STEPHENS. What do you say, Mr. Bromley, to the apparent contention of the Government that although Mr. Redfield did claim the privilege, he was later told by Mr. Dowd—if we take the telephone conversation as proved and as legally dependable—that they had nothing to conceal, that they had turned their documents over to the Government, and that he could go ahead and testify?

Mr. BROMLEY. I listened carefully to the reading of that testimony. I thought that testimony was qualified by his specific testimony in which he said: "You may identify the document." I thought the words "go ahead and testify, we haven't anything to conceal", merely meant that he was at liberty to go in before the Grand Jury and testify to anything they asked him, but with respect to this privileged document he must stop with its identification.

Mr. STEFFEN. If there is any doubt on that, Your Honor, the witness, Mr. Redfield, said:

3703 "I explained what I have just explained to you"—that is, that there was a claim of privilege concerning this particular exhibit, and then Mr. Dowd replied, as it appears in the transcript, "* * * we have nothing to hide, we have thrown our records open to the Department of Jus-

tice," and you are permitted to go ahead and testify.

Before the Grand Jury, as Mr. Adams also pointed out, he also said that he was authorized to identify, and the two things are not dissimilar and not in conflict. He was authorized, with regard to this particular document—this was the occasion of the telephone call—to go ahead and present it before the Grand Jury and identify it and testify concerning it, if necessary. It so happened that we asked him no questions. The document spoke for itself and it was duly identified and became a Grand Jury exhibit.

Mr. ADAMS. I think I should make one statement there. We think that the conversation sums up to being an authorization only to identify.

I would like to add one further thought, that if it is believed that there is any continuing authorization to Mr. Redfield, that that does not exist, and if we have power to revoke, if it was ever given, we do revoke it.

Justice STEPHENS. What is this other matter you wish to present, Mr. Steffen?

3704 Mr. STEFFEN. It is a matter with regard to witnesses, and I perhaps should present it just now. It will take just a moment.

Justice STEPHENS. If it will take only a moment.

Mr. STEFFEN. After Your Honor's statement of the recess, we looked over the different witnesses we were going to call, and we have not called either Mr. Gloyd or Mr. Chism from the Texas Company. You will recall that Mr. Gloyd was supposed to be here in December of last year, then he was excused until January; and in January Mr. Johnston, I believe, stated that he was unable to travel. The situation now is that he has not testified.

Our suggestion is this: In view of Mr. Gloyd's health and his advanced age—I think he is 79—that we co-operate with Mr. Johnston and take Mr. Gloyd's deposition. We suggest March 7 as the date; and while we are down there taking the deposition of Mr. Gloyd, we might also take Mr. Chism's deposition. If that is agreeable to all parties, we will give the necessary notices and that can be taken during the Court's recess.

3705 Mr. JOHNSTON. Now if the Court please, as to Mr. Chism, he is awaiting the call of the Government. He has been under subpoena, but is about the only one left there to run that business, and I asked that we be given at least a week's notice when they wanted him. If they would rather take his deposition in Oklahoma, and

not have him come here, that would be entirely satisfactory.

As to Mr. Gloyd, the story is quite different. He is in bad health, and getting worse instead of better. The Government knows this ——

Justice JACKSON (interposing). What is wrong with him, Mr. Johnston?

Mr. JOHNSTON. He has a bad heart condition and arteriosclerosis of the brain. His doctors refuse him the privilege of going anywhere or doing anything. The FBI, at Government counsel's suggestion I presume, have been making an investigation, and have made a report on him. FBI representatives recently talked to his doctors, and the doctors tell me that it would be extremely hazardous to put him on the witness stand either for a deposition, or to bring him here, that they wouldn't take the responsibility for the results.

He has had two or three attacks, one very serious one, and his private physician told me that he might drop over dead on the witness stand. Now under these circumstances, if necessary we will make a showing—maybe before this case nds he might show an improved condition, but
3706 his doctors say no, that his condition will gradually get worse instead of better.

Now in that connection, I stated to counsel a few days ago that as to all of the documents they may want to identify if they had Mr. Gloyd on the witness stand, if they would designate them I would go over them with counsel, and I thought we would have no trouble about the identification of any documents that he could identify if he were on the stand.

For the Court's information in that connection, our documents and records were not subpoenaed. The Government requested that we furnish them, and thus avoid a subpoena, which we did.

Then the Government made photostatic copies of all of those records, and returned the originals to us, or the copies, whichever the case may have been.

So that the Government now has a complete file of such documents and records and correspondence as we had through the years.

Therefore, my suggestion to counsel is that we might sit down and go through all of these documents and see which ones they want to use that Mr. Gloyd could identify if he were on the stand.

I think perhaps that is the best way to reach this thing,

because I say to the Court, seriously, that I am not going to take the responsibility of suggesting that Mr. Gloyd, in his present state of health, take the witness stand.

3707 Mr. STEFFEN. Mr. Johnston has referred to an FBI report, and we have asked for information concerning Mr. Gloyd's health.

As we get it, he spends from two to three or more hours a day in his office, daily, and from the standpoint of a layman he looks to be in very good health.

He has, I think, two or three doctors. One, Dr. Langston, advised that he believed Gloyd was physically able to make a trip to Washington, but felt that the emotional upset of a trial would be worse than the trip. However, Dr. Langston saw no objection to taking a deposition if Gloyd would not be subjected to grueling examinations. Both doctors, that is, I believe, Dr. Langston and Dr. Fishman, believed that Gloyd would make an unsatisfactory witness due to his failing memory in the past two years.

Our thought on the matter of taking depositions was that we have some matters in addition to simply identifying documents, that we would like to have Mr. Gloyd's testimony on, if he still remembers such matters, and we feel that we should have an opportunity to develop that. Our purpose would be to conform as nearly as possible to Mr. Gloyd's requirements, maybe interrogating him one or two hours a day. In fact the entire examination will be short.

On the other point, of making a stipulation, we have had very poor success in getting any stipulations on the facts in this case, at all, and while I am sure Mr.

3708 Johnston would be glad to co-operate, our experience is that the result finally turns out to be that we don't agree, and that we have wasted a lot of time.

It occurred to us, purely as a matter of cooperation, that if we could go down and take Mr. Gloyd's deposition, conforming it to his health requirements, that we could also take Mr. Chism's deposition at the same time, and we would do that of course recognizing that we are perhaps losing the advantage of having the Court see Mr. Chism and determining whether his testimony is good or bad. But we had thought that we would do that.

Justice STEPHENS. Well, there is nothing before the Court that the Court can rule upon. The Court will say that if there is a showing made by Mr. Johnston, through dependable physicians, that it would injure the health or threaten the life of Mr. Gloyd, the Court would hesitate

very much to order a deposition taken. I assume the Government would not want to take it under those circumstances?

Mr. STEFFEN. That is correct, your Honor.

Justice STEPHENS. If there is a dispute between doctors on the subject, then the Court will have to make the usual determination of fact. The Court urges counsel on both sides to work this matter out by cooperation rather than by Court order, if that is possible of accomplishment. That is all we can do at the present time. If you cannot
3709 come to an agreement during the next day or so, upon this matter, or before we adjourn for the recess the latter part of this month, then you will have to make your motion, I suppose, for the taking of depositions, and serve the same, and Mr. Johnston will have to take such steps as he sees fit to proceed to protect himself.

Mr. STEFFEN. We will give him due notice as to the time, so there will be no question as to the dates.

Justice STEPHENS. Have you a witness for this afternoon?

Mr. STEFFEN. Oh, yes.

Justice STEPHENS. We will then recess until two o'clock.

(Thereupon, at 12:30 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same day.)

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TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 15

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, CERTAIN-TEED PRODUCTS CORPORATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 26, 1946.

VOLUME 3

Pages 2451-3700

AFTERNOON SESSION

3710 (The trial was resumed at 2:00 o'clock p. m., pursuant to recess.)

Justice Stephens: Proceed, gentlemen.

Mr. Knuff: George N. Lenci!

Thereupon, GEORGE N. LENCI called as a witness herein by the United States, having been first duly sworn, testified as follows:

Mr. Knuff: May it please the Court, do Your Honors have before you the exhibits that Mr. Lenci will identify? The first one is a letter of the Universal Gypsum & Lime Co., dated May 9, 1927.

Justice Stephens: Yes, we have them.

Direct Examination

By Mr. Knuff:

Q. Your name, sir, is George N. Lenci, and you spell your last name L-e-n-c-i; is that correct? A. That is correct.

Q. Where do you live, Mr. Lenci? A. In Summit, New Jersey.

Q. My understanding is that you are Vice President of the Ebsary Gypsum Company; is that correct? A. Yes, sir.

Q. And you have been connected with the Ebsary
3711 Gypsum Company for how many years? A. Since 1911.

Mr. Knuff: If Your Honors please, we are now calling Mr. Lenci as if on cross-examination, under Rule 43(b).

Justice Stephens: Very well.

By Mr. Knuff:

Q. When was the Ebsary Gypsum Company organized? A. 1911.

Q. In what state? A. New York State.

Q. And who are the officers of the Ebsary Gypsum Company? A. Mr. F. G. Ebsary is President; I am Vice President; we have two other Vice Presidents, C. M. Winslow, who is Vice President in charge of Operations, and Frederick Hermansen, who is in charge of Transportation and warehousing.

Q. Mr. C. E. Hough is connected with the company, is he not? A. He is Treasurer.

Q. Who is the Secretary? A. The Secretary is Frank W. Allen.

Q. The Ebsary Gypsum Company manufactures and sells gypsum products consisting of plaster, both neat and sanded, is that correct? A. That is correct.

3712 Q. And gypsum board? A. Yes.

Q. And lath? A. Yes.

Q. Perforated lath? A. Yes.

Q. Metallized lath? A. Yes.

Q. Gypsum block? A. Yes.

Q. What other gypsum products? A. I think you have covered them all.

Q. The Ebsary Gypsum Company has a mine and a board plant at Wheatland, New York, is that correct? A. That is correct.

Q. And Wheatland is on the B & O Railroad, formerly the Buffalo, Rochester & Pittsburgh, is that correct? A. That is correct.

Q. You also have a sanding plant at Newark, New Jersey, is that correct, a mixing plant, rather? A. Yes, a mixing plant.

Q. The mixing plant that you have in Newark, New Jersey, and the plant at Wheatland, New York, are they the only two plants that the Ebsary Gypsum Company has? A. They are, yes.

3713 Q. Into what states do you ship your products, Mr. Lenci? A. Well, we ship into all of the Northeastern part of the United States.

Q. The so-called New England States? A. Well, including the New England States and down as far South as the Carolinas, and West to Ohio, Indiana and occasionally into Illinois. Generally speaking, it is in just the Eastern part of the country.

Q. When did Ebsary begin the manufacture of board? A. In 1928.

Q. And at that time, Ebsary manufactured what is known as an open-edge board, is that correct? A. Yes.

Mr. Knuff: What is our next exhibit number?

Mrs. Gillette: No. 401.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit No. 401, the same being a letter dated May 9, 1927, addressed to Ebsary Gypsum Company and signed Universal Gypsum & Lime Company, W. G. Stromquist, Eastern Sales Manager. That letter was received by the Ebsary Gypsum Company, was it not? A. Yes, sir.

Q. Now at the time you received—

3714 Justice Stephens: (Interposing) Let the Court read it, please.

Mr. Knuff: I beg your pardon.

(The document referred to was marked as Government's Exhibit No. 401 for Identification.)

Justice Stephens: Proceed.

By Mr. Knuff:

Q. At the time you received this letter, you were not manufacturing any kind of board, is that correct, either open or closed-edge board? A. That is right, yes.

Q. You say you did start to manufacture the open-edge board in 1928? A. Yes.

Q. You did purchase open-edge board from Universal Gypsum & Lime Company, did you not? A. Open-edge board?

Q. Open-edge board. A. I don't think this was an open-edge board.

Q. You purchased closed-edge board from them? A. I believe so, yes.

Q. And the board that is referred to in the letter of May 9 is a closed-edge board? A. I believe it is.

3715 Q. You will notice that in the second paragraph of this letter, it states:

"It is understood—"

Mr. Bromley: Just a moment. I object to any examination on the letter prior to the time it is received in evidence, if it is received.

Mr. Knuff: We now offer in evidence, if Your Honors please, Government's Exhibit No. 401.

Mr. Bromley: I object to it on the ground of no proper foundation, and therefore incompetent; and also immaterial because it has no relevancy to any charge in the complaint, for the following reasons: First, it is dated prior to the time that any conspiracy is charged in the pleadings; secondly, there is no charge that Ebsary is a manufacturing distributor; and, of course, at this time Ebsary was not a licensee, although Universal was. So I don't see what relevancy it has to any charge in the complaint.

Justice Stephens: What have you to say, Mr. Knuff, first as to identification?

Mr. Knuff: That it was received by Ebsary Gypsum Company, as Mr. Lenci has testified.

Justice Stephens: Well, the statement that a piece of

paper has been received doesn't necessarily identify it. He hasn't testified who he received it from, or whether it was sent by this company to his knowledge, or as to the
3716 signature of Stromquist.

Mr. Knuff: I didn't hear the last.

Justice Stephens: He has only stated that he received this piece of paper, as I understand his testimony. I didn't understand that you asked him to identify the signature or to state who he received it from.

By Mr. Knuff:

Q. Mr. Stromquist was at one time employed by your company, was he not? A. He was, for a short time.

Q. When? A. In 1930.

Q. That is after the date of this letter? A. Yes.

Q. In what capacity was he employed? A. Sales Manager.

Q. And for how long was he so employed? A. I think about 6 or 8 months.

Q. And you believe that this is the signature of W. G. Stromquist, do you not?

Mr. Bromley: I object to what he believes as incompetent.

Justice Stephens: Objection sustained.

Are you familiar with Mr. Stromquist's signature, Mr. Lenci?

3717 The Witness: Your Honor, I haven't seen Mr. Stromquist's signature in probably 12 or 14 years.

Justice Stephens: The signature can't be proved by belief, Mr. Knuff. You can ask this witness whether or not he has seen signatures of Mr. Stromquist, is familiar with his writing, and ask him whether or not he is able to testify whether this is his signature. That is the orthodox way, if there is objection on the ground of identification.

By Mr. Knuff:

Q. You have testified that Mr. Stromquist was employed by the Ebsary Gypsum Company, have you not? A. Yes.

Q. And you are familiar with his signature, are you not? A. I was at that time.

Q. And this letter, the letter that has been marked as Government's Exhibit 401, came from the files of the Ebsary Gypsum Company, did it not? A. It did.

Q. And you furnished it to us under subpoena? A. Yes.

Q. And it came into the Ebsary Gypsum Company in the usual course of business, did it not? A. I believe it did.

Q. And you acted upon the contents of this letter,
3718 did you not? A. I don't quite understand.

Q. Did you buy board from the Universal Gypsum & Lime Company as suggested in this letter?

Mr. Bromley: I object to that as calling for a conclusion —"as suggested in this letter"—and therefore as incompetent.

Justice Stephens: Objection sustained.

Mr. Knuff: If Your Honor please—

Justice Stephens: (Interposing) I don't quite see why, Mr. Knuff, the Government doesn't go at this thing in the orthodox way. Why do we need to take so much time on all these debates between counsel on the matter of identifying signatures? Can't you call Stromquist?

Mr. Knuff: I don't know where he is.

Justice Stephens: Can't you call somebody who knows his signature?

Mr. Knuff: We were under the impression that Mr. Lenci knew his signature, because he worked for the Ebsary Company for 6 or 8 months. Here we have a letter that came out of his files.

Justice Stephens: Haven't you had an opportunity to examine this witness, before you put him on, as to whether he could identify this signature?

Mr. Knuff: Yes, and Mr. Lenci told me last night
3719 that it was his signature.

At least, Mr. Lenci, that is the way I understood you, that you felt this was his signature.

The Witness: May I repeat what I said?

By Mr. Knuff:

Q. Certainly. A. I said, "I believe it is his signature," but I would not say for sure that it was, because I was not absolutely certain. That I would have to say anyway.

Justice Stephens: Mr. Varian, is there any dispute about this?

Mr. Varian: I had never known anything about Mr. Stromquist but it was a letter that was in the files of the Ebsary Gypsum Company.

Justice Stephens: It seems too bad to take up so much time, in this long and complicated case, in debating about things that ought to be stipulated to, if they can be. There probably is no doubt about the authenticity of this letter, and yet if objection is made the Court is bound to apply the rules of evidence.

This witness testifies to nothing but a belief or an opinion as to whose signature this is.

Mr. Knuff: If Your Honor pleases, may I go further?

Justice Stephens: Yes.

By Mr. Knuff:

3720 Q. Did you buy board from the Universal Gypsum & Lime Company, sometime after May 9, 1927? A. My recollection is that we bought a small quantity of board from the Universal Gypsum & Lime Company shortly prior to the time we went into production ourselves.

Q. And you went into production when? A. In 1928.

Q. In what part of 1928? A. I don't recall, but I think it was either the spring or very early summer.

Q. Is there any doubt in your mind that this is Mr. Stromquist's letter and Mr. Stromquist's signature, Mr. Lenci?

Mr. Bromley: I object to that as repetitious.

Justice Stephens: Let me hear the question.

(The question was read by the reporter.)

Justice Stephens: He has just said that there is.

Mr. Knuff: He said he believed that it was Mr. Stromquist's signature.

Justice Stephens: Let me examine the witness a minute. Perhaps it will save a little time, perhaps not.

How long was Stromquist with you?

The Witness: I think about 6 or 8 months, Your Honor.

Justice Stephens: Did you have a day-to-day association with him?

3721 The Witness: Yes, more or less.

Justice Stephens: Did you exchange memoranda with him?

The Witness: No, because, being in the same offices, there wasn't very much occasion for that.

Justice Stephens: Did you see any of the letters or memoranda that he wrote?

The Witness: Yes.

Justice Stephens: Did you ever see his signature?

The Witness: Yes.

Justice Stephens: Well, are you able to state whether or not this is his signature? Just answer that yes or no.

The Witness: I couldn't without a qualification.

Justice Stephens: What causes you to doubt it?

The Witness: Because there are other letters in this group of exhibits which also are signed W. G. Stromquist, which are not written the same as this, and I am not sure which is which.

Justice Stephens: You think possibly it might have been written by his secretary for him?

The Witness: I think possibly it might have, yes.

Justice Stephens: It seems to the Court, Mr. Knuff, that the witness is being properly careful.

Mr. Knuff: Well, here is the position that the Government takes, Your Honor. We filed and served upon the Ebsary Gypsum Company a subpoena calling upon
3722 the Ebsary Gypsum Company to produce certain documents. The Ebsary Gypsum Company, before they could produce certain documents, had to undertake to determine what documents were called for in that subpoena. They undertook to and they did determine what documents were called for. They came in with the documents, and among the documents that they came in with was Government's Exhibit 401.

In effect, Ebsary Gypsum Company said to us, "You have served us with this subpoena. We now comply with this subpoena. We give you this document. We think that this document answers the description in the subpoena. We have taken it from our files; we have kept it in our files from 1927 to 1940; we regarded it as a paper of some importance or we wouldn't have kept it in our files. We are therefore complying with your subpoena and we are giving you the paper that you asked for."

It seems to me, in view of those facts, that this is a proper identification. They certainly wouldn't have kept something in their files that they didn't believe was an authentic document; and by their keeping it in their files and by their handing it over to us, they expressed their belief that the document was authentic.

Justice Stephens: It seems to the Court, Mr. Knuff, at least to two members of the Court, Judge Garrett and myself—I think Judge Jackson has a doubt on the sub-
3723 ject; and in fairness to him I must state that—that you are arguing two different things. You are arguing that the possession of this document might be some evidence that the company regarded it as having some value. But we don't think that you have shown it to be a letter of the Universal Gypsum & Lime Company. It probably is, but you haven't proved it, and under objection we have got to rule according to the rules of evidence. This witness very carefully and painstakingly says that he can not identify this signature because it differs from other signatures of Stromquist, and he thinks it might have been written by some secretary.

Mr. Knuff: It was received in the regular course of business and acted upon, Your Honor.

Justice Stephens: That is a mere assumption on counsel's part, that it was received in the regular course of business. That assumes that it was started out from the Universal Gypsum & Lime Company's offices. I don't want to debate upon it any more. The objection is sustained.

By Mr. Knuff:

Q. I notice, Mr. Lenci, in the upper left-hand corner of this document there appears "Copy sent to"—and then what is that word? A. It says, "Copy sent to C. M. Winslow".

Q. And in whose handwriting is that? A. That is
3724 the handwriting of one of the girls in that office.

Q. Do you recognize that handwriting? A. I recognize her writing, yes.

Justice Stephens: Is that on the photostat?

Mr. Knuff: Yes, Your Honor, up in the upper left-hand corner.

By Mr. Knuff:

Q. And that would indicate, sir, that this letter did come into your office? A. Yes, certainly.

Justice Stephens: There is no dispute about that. You needn't take any more time up on that. He has already testified it came to his office, but you haven't shown where it came from.

Mr. Knuff: Well, if Your Honor pleases, I don't want to labour the point, but here you have the stationery of the Universal Gypsum & Lime Company. You have a letter on that stationery; and it came, as I interpret the witness' testimony, in the usual course of business; and the girl in the office puts a notation on it, "Copy sent to C. M. Winslow"; and Mr. Lenci did testify that they did buy some lath, or some board, or whatever the subject matter of this letter was, from the Universal Gypsum & Lime Company sometime prior to their going into production in 1928.

Now here you have got a letter coming in—if it
3725 isn't a letter of the Universal Gypsum & Lime Company, it seems to me that the Universal Gypsum & Lime Company can come into court and say that it isn't—but at least we have established a prima facie case that a letter, in the usual course of business, coming into a business house, was received in that business house. It prima facie comes from the person whose name appears on it.

Justice Stephens: I am sorry, Mr. Knuff, but it seems to me and Judge Garrett that you are arguing contrary to the most elementary rules of evidence with respect to the identification of documents. The objection is sustained.

By Mr. Knuff:

Q. You stated, Mr. Lenci, that you did buy some board from Universal Gypsum & Lime Company a short time prior to the time when the Ebsary Gypsum Company got into production at their plants? A. Yes, sir.

Q. How much did you pay for that board? A. I don't remember, now.

Q. Well, will you look at the letter and see if that letter refreshes your recollection?

Justice Garrett: What letter? This letter that has not been identified?

Mr. Knuff: Yes, Your Honor.

Mr. Bromley: If the Court pleases, I object to his
3726 using this exhibit, 401 for Identification, for the purpose of refreshing his recollection.

Justice Stephens: Well, I don't see the force of that, Mr. Bromley. Anything that refreshes recollection, if it does, can be used, whether a stick or a stone or a loose piece of paper. One's memory may be refreshed by an event or a letter or a postscript or a scrap of paper, if it is so refreshed. Of course, he can't read from that.

That objection is overruled.

You are not supposed to read from this letter, because it hasn't been identified yet, but if it does refresh your recollection so that you can testify from your own memory, state first whether or not it does—does it?

The Witness: It does in a general way, Your Honor, yes. I think I can answer the question and save a little time.

By Mr. Knuff:

Q. Since your memory has been refreshed, do you recall how much you paid per thousand square feet for that board? A. My best recollection is that we paid the $30 price, less a commission which amounted to about 10 percent. That is my recollection.

Q. That would be 10 percent on $30, is that correct?

A. Approximately that. As I remember it, we had
3727 about a 10 percent margin on that board.

Q. And that would indicate that you paid $27 for the board, is that correct? A. Yes.

Q. Now had you any conversations or any correspondence with Mr. Stromquist as to how you should sell this board? A. I don't remember anything about that, sir, it is so long ago I don't remember. I read the letter, but that doesn't refresh—

Q. (Interposing) Does the letter refresh your recollection? A. It honestly doesn't refresh my memory. There was very little of it, you see what I mean, very little of that board bought.

Mr. Knuff: So that we will not lose any time, I now here make a motion for permission to subpoena W. G. Stromquist. I don't know where he is, but I assume that he lives more than 100 miles beyond the jurisdiction of the District of Columbia. May we have that permission, and I will make every endeavor to get Mr. Stromquist here.

Justice Stephens: Do you know where he is?

The Witness: The last I heard, I understood he was in Chicago. I think he was with the Masonite Company, although I am not certain.

Justice Stephens: You think there is no possibility,
3728 Mr. Varian, in the proper protection of your client, of stipulating to this?

Mr. Varian: What was that, Your Honor?

Justice Stephens: You think there is no possibility of your stipulating to this? I don't require you to do so, of course. You must use your own judgment. But it seems too bad to bring a witness, in these days of difficult transportation, from as far as Chicago if there is any possibility of stipulating to the identity of this signature or to this letter having been sent to you by Universal Gypsum & Lime Company. The practical probabilities are, of course, that it was.

Mr. Varian: I haven't any doubt, finding that letter in the Ebsary papers, that it was a letter that was received by the company from Mr. Stromquist. But I can not speak for the other defendants who are interested in this.

Justice Stephens: I understand that.

Mr. Varian: I have no objections to conceding, for the purposes of the Ebsary Gypsum Company, that that is Mr. Stromquist's signature and that he was an employee or officer of Universal.

Justice Stephens: I want you to be quite clear that the Court is not requiring you to do that at all. You must do it thoroughly of your own accord. I am just trying to save time.

3729 Mr. Varian: Yes. Well, I am very anxious to save time.

Justice Stephens: If that stipulation is made, that is as high a level of identification as the identification of the witness, if he knew the signature. That being true, we reach the question of materiality.

Mr. Knuff, what do you say as to the objection of Mr. Bromley that this is not material or relevant, there being no charge that this company was a manufacturing distributor and there being no license at this time? What is the relevancy and materiality of the letter?

Mr. Knuff: If Your Honor will turn to paragraph 47 of the complaint, you will note we say there that "The combination was formed during the period between the month of September 1925 and early in the year 1930."

Now here is the situation as applies to the materiality. Beaver took out a license with USG on July 29, 1926. Universal took out a license with USG on September 17, 1926. Atlantic took out their license on March 5, 1927. Texas took out their license on April 18, 1927. And, of course, at this time USG was the licensor.

Now here you have five companies that were operating under a license agreement. Four of them were licensees, and one was the licensor. Under this license agreement it was provided that USG had the right to fix the price of gypsum board.

3730 Here we have one of the companies who was a licensee of USG selling board to another company, and at the same time they told this other company, "You will respect our price policy, you will sell this board at a certain price, you will base your freight not from Wheatland but from our plant at Oakfield, you will use the weight of 1850 pounds.

We think that is evidence of the conspiracy that has already been formed, going back at least to 1925 and probably back beyond that.

Here you have the Universal telling another company, which later became a licensee of USG, "Yes, we will sell you board, but we want you to respect our price."

We think it is very material, Your Honor, and very relevant.

Justice Stephens: What do you say to that, Mr. Bromley?

Mr. Bromley: In paragraph 47, to which he has called the Court's attention, the statement merely is that the combination was formed during the period between September 1925 and early in the year 1930. Now that could be any time between 1925 and 1930.

If you will turn over to paragraph 121, you will see that the second sentence says: "Since the year 1929, all gypsum board sold by all manufacturers and all manufacturing distributors in the Eastern area has been sold at

uniform and non-competitive prices dictated by U. S.
3731 G., with a resultant elimination of all price competition in the distribution of gypsum board from manufacturers to dealers."

Then in paragraph 122, the first sentence reads: "Said uniform and non-competitive prices have been, throughout the period of the operation of the combination, substantially higher than those prices prevailing at the time of the formation of said combination in the year 1929."

Now that, to me, makes the generality of the allegation in paragraph 47 specific, and shows clearly that they don't contend that there was any combination prior to 1929, or that there was any price uniformity prior to 1929.

Mr. Knuff: Of course, we can't let that statement of Mr. Bromley go unchallenged, that we don't contend that there was any conspiracy before 1929. We do contend that there was a conspiracy in existence before 1929.

Justice Stephens: Well, where in the complaint do you charge it?

Mr. Knuff: In paragraph 47 we say that, Your Honor.

Justice Stephens: Yes, but that is in conflict with the statements in paragraphs 121 and 122, that it was formed in 1929.

Mr. Knuff: The completed combination covering all board probably occurred in 1929, but it didn't have its genesis in 1929.

Mr. Bromley: I would like to raise the further
3732 point that—

Justice Stephens: (Interposing) Just a moment, Mr. Bromley.

(The Justices conferred among themselves.)

Justice Stephens: All right, we will hear you further now, Mr. Bromley, but while you are speaking, please speak on this subject: There is some doubt in the minds of the Judges, under the very broad construction of the complaint taken by the majority of the Court, as to whether this is admissible, in view of the allegations of paragraphs 121 and 122; but there is another point of view, it seems to me, which can be urged, and which I assume is what Mr. Knuff is really contending, and that is this: It is true the complaint alleges that the combination was formed in 1929—paragraphs 121 and 122—but the defendants deny there was any combination at all, and the Government doesn't contend that the combination came into existence as the result of

one act or one conference or one agreement, it claims that it developed gradually out of roots reaching back into relationships and litigations and associations and trade transactions, over quite a long period of time. The complaint alleges a good many of those items. Isn't the Government entitled to try to prove the combination by proving that circumstances antedating 1929 are of such a character as lend an inference to the existence of a combination by
3733 1929?

Is that what you contend, Mr. Knuff?

Mr. Knuff: Yes, Your Honor, and I have particular reference to page 24 and page 25 of our trial brief. While I didn't call Your Honors' attention to those specific pages, those are the cases that I had reference to, the American Equipment Company v. Tuthill Building Material Company, and those cases.

3734 Justice Stephens: Well, this isn't so much a question of cases; it is a question of the nature of the conspiracy.

What do you say, Mr. Bromley, as to the point just made by myself?

Mr. Bromley: Well, I should be willing to accept that as a general statement. But here this proffered testimony hasn't any materiality even as a root, because it can best be illustrated, it seems to me, by the ruling of the majority the other day when you permitted, although not specifically alleged, the Government to prove that one licensee sold board to another, and that that board was resold by the purchasing licensee at a certain price.

Now here Ebsary was not a licensee. So that that, at the outset, distinguishes this situation from that. Ebsary was only a plaster manufacturer. Ebsary, if it was anything, in 1927, was a manufacturing distributor because it was neither a licensee nor a manufacturer of board; it made only plaster.

Now the paragraph that has to do with manufacturing distributors, Paragraph 108, on page 28 of the complaint, says:

"Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for
3735 sales of board by its licensees to dealers and consumers, as described in paragraph 91 hereof."

We asked them who they were talking about and they gave us a list of names, and the Ebsary Gypsum Company does not appear on that list. So I don't see how it is possible to apply the general rule, the soundness of which I think is clear, to this situation where they now want to show some background, true, but the background hasn't anything to do with any manufacturing distributor whom they allege was subject to the control of these defendants in his resale policies.

And it is because Ebsary—if it was written and received—at the time it got the letter was neither a licensee nor a manufacturer of board, but was merely a plaster manufacturer, and therefore by definition was a manufacturing distributor, and there is no charge to which this could be relevant. That is why it seems to me that the thing is clearly immaterial and not covered by the Court's ruling of the other day, even in principle.

Mr. Knuff: We don't contend—and this is one of the few times that you will hear me say that we admit something—we don't contend that the Ebsary Gypsum Company was a manufacturing distributor. What we say the Ebsary Gypsum Company was, is that it was a manufacturer. Here you have four companies who had entered into this license agreement with U.S.G., and under the license agree-
3736 ment, U.S.G. was fixing the prices. One of those four companies was fixing the price of board on the resale.

Now here we have a continuing conspiracy, and we contend that what one of these companies did during this period is certainly relevant and competent testimony to explain, and to high-light, just exactly the extent and the scope of this conspiracy.

Justice Stephens: Did Universal have a license at the time this letter was written?

Mr. Knuff: Yes, Your Honor.

Mr. Bromley: Ebsary did not.

Mr. Knuff: There were four licensees at this time—Beaver, Universal, Atlantic and Texas. Under Mr. Bromley's argument, if the Ebsary Gypsum Company was a manufacturing distributor then this is certainly evidence that they were controlling the prices to manufacturing distributors—on his own argument.

Justice Stephens: But you don't charge that.

Mr. Knuff: We don't charge that, but even on his own argument it would be evidence of that.

Justice Stephens: Well, if you don't charge it, why are you entitled to prove it?

Mr. Knuff: We don't say that they are, and we don't think they were.

Justice Stephens: And you excluded them from
3737 your bill of particulars by not naming them.

Mr. Knuff: And we still say they aren't.

Justice Stephens: Still you say you can prove they were.

Mr. Knuff: I say it would be evidence, merely on Mr. Bromley's own statement.

Justice Stephens: Is there a substantial amount of evidence of this type to come in?

Mr. Knuff: Yes, I would say that there is quite a bit of it, your Honor.

Justice Stephens: We will take a recess for five minutes.

(Whereupon, a five minute recess was taken, after which the hearing was resumed.)

3738 Justice Stephens: Mr. Knuff, what resale price fixing do you charge in the complaint? You charge resale price fixing in respect of manufacturing distributors and on metallized board—anything else?

Mr. Knuff: Well, under the broad conspiracy charge we say that there was a resale price fixing for all board. I think that came within the ruling of your Honors in the broad construction of the complaint the other day, and I think that under that ruling we would be allowed to show it.

We say in paragraph 121—

Justice Stephens: (Interposing) Isn't it a little misleading—I don't mean intentionally of course—to speak of that class of transactions with which we dealt in the reserved rulings in which the Court by a majority ruled that the complaint was broad enough to charge the fixing of prices upon purchased board, as distinguished from board manufactured under the licenses, isn't it a little confusing to describe that as a resale price fixing, and put it in the same category as the metalized board and the manufacturing distributors' resale price fixing alleged?

Mr. Knuff: Well, I don't attribute any magical significance to that, and I don't think the Court means to infer that I do by the use of the word "resale". I say that if you have price fixing, you have price fixing, it can be resale price fixing, original price fixing, or what not. Here is the situation in this case, and I think it is important that the
3739 Court get it.

Beaver was a licensee at the time, at the date of this letter; Atlantic was a licensee; Texas was a licensee and Universal was a licensee.

United States Gypsum Company was the licensor.

You have five companies there, all having the same price policy. That is, USG was fixing the price for five companies, themselves and four other companies. Here you have one of the companies whose prices were fixed, fixing the prices for Mr. Ebsary's company, the Ebsary Gypsum Company.

I think that that is evidence that there was a conspiracy to fix prices. It is a declaration of one of the co-conspirators in furtherance of the conspiracy. This co-conspirator says, "Yes, I will sell you board, but if I do sell you board, you must observe my price policy", and on that basis, the board was sold.

This is not just an independent, isolated transaction, it is a transaction by one of the original four licensees, and as I say—and I cannot emphasize it too strongly—at this time you had five companies who had an identical price policy, and you have one of those five companies imposing that price policy on the Ebsary Gypsum Company.

Mr. Bromley: Now let's test the soundness of that. Where would my friend draw the line? Suppose, instead of being what it is, this letter was a letter from Uni-
3740 versal, a licensee, to a dealer, in which Universal said, "Now I am going to sell you my material, but, Mr. Dealer, you observe the prices I tell you."

Would my friend say that that, under any construction of the pleadings, would be material? There isn't any charge here that dealers' resale prices were fixed, and yet a dealer's price is a resale price, is a resale transaction, in the same sense that this is. We have got to stop somewhere. We couldn't, it seems to me, possibly permit testimony that this conspiracy, as alleged in these pleadings, was broad enough to include the 20,000 dealers.

Now they have said what it was, and it seems to me that that is an attempt to go as far beyond it as it would be if they came in with a sudden claim that the conspiracy encompassed the fixing of dealers' prices, or contractors' prices. It hasn't any relevancy to what they say was the unlawful combination.

I am not certain now but what my friend would take the position that he would think it competent and material to try to prove a fixing of dealers' resale prices. I would like to hear him say whether he would or not.

Mr. Knuff: No.

Mr. Bromley: Well, I think that that tests it, then. Of course you have got to draw a line somewhere. You have got to draw it, as they drew it in the pleadings, and
3741 in the Bill of Particulars.

Justice Stephens: Well, we have discussed the matter thoroughly and heard counsel, and we are agreed that the objections are well taken.

We think that this evidence could be relevant only, that is this item of evidence, Exhibit 401 for identification, it could be relevant and material only to prove resale price fixing by manufacturing distributors only, or by some person in some such position.

The complaint limited that charge, as explained by the Bill of Particulars, to certain companies, and this company was not one of them.

The Court does not, by this ruling, restrict the Government from proving the genesis of the conspiracy, and the dealings between the licensees, and the litigations and transactions and tradings alleged, but we think the objections to this particular exhibit are well taken.

Sustained.

Mr. Knuff: If I understand your ruling, your Honor, and assuming the correctness of it, we feel that this evidence, although it only goes to the question of fixing the resale price of manufacturing distributors, is likewise competent because, although we do not charge the defendant, Ebsary Gypsum Company, with being a manufacturing distributor, yet Mr. Bromley says that apparently that is what
3742 Ebsary Gypsum Company was, a manufacturing distributor.

Assuming that that is correct, you have here then a situation where—

Justice Stephens: (Interposing) You are rearguing this question, are you, Mr. Knuff?

Mr. Knuff: No, I want to see what my limitations are in so far as getting this letter in evidence. I wish your Honor would bear with me for just one moment.

Justice Stephens: The Court doesn't want to seem not willing to bear with you, Mr. Knuff, but sometimes the Court gets the impression that because it is sufficiently patient and sufficiently anxious to make all of its ruling very clear to counsel, and state the reasons why it acts as it does upon every class of evidence that doesn't just involve a routine ruling, that counsel get the impression that they are entitled to keep arguing these things after the rulings, and

that isn't a good way to make the trial move along. We have to come to an end of the argument at some time.

Mr. Knuff: I appreciate that, your Honor, but I want to make this one point, and then if I may, I won't say any more.

Justice Stephens: Thank you.

Mr. Knuff: After 1929 we charge in our complaint that the defendants fixed the price of the manufacturing distributors. Now taking Mr. Bromley at his own word,
3743 that the Ebsary Gypsum Company was a manufacturing distributor in 1927, what they did in 1927 would be some evidence of what they were doing in 1929, and on that basis, if for no other reason, we think this exhibit is competent.

Here you have the manufacturing distributors' price being fixed after 1929. Mr. Bromley says that in 1929 Ebsary was a manufacturing distributor. All right, we say that if their prices in 1927 were fixed as a manufacturing distributor, that that is evidence of what was done after 1929.

Justice Stephens: With other manufacturing distributors?

Mr. Knuff: With other manufacturing distributors.

Justice Stephens: Well, haven't you evidence to prove what was done in respect of other manufacturing distributors, without going into that with respect to this one?

Mr. Knuff: We have other evidence, but we certainly think that this is competent to prove that, on that theory.

Justice Stephens: What do you say to that, Mr. Bromley, if anything?

Mr. Bromley: In the first place, it must be remembered that after 1929 Ebsary was not a manufacturing distributor because it became a licensee. If, after 1929, Ebsary were a manufacturing distributor, there might be something to his argument, but the fact that away back in 1927, if it be the fact, there is some evidence that this company was controlled, is no evidence that after 1929 other companies
3744 were controlled. It hasn't any relevancy to it, and it hasn't because the status of this company changed in 1929, when it became a licensee.

Justice Stephens: His contention is something like the "other crimes" argument, as I get it, in a criminal case, that because Universal was willing to dictate the price to Ebsary as a manufacturing distributor in fact, though not so called in the complaint, in 1927, that that is some evidence that

Universal was committing that kind of act, that there is a common design and scheme running through this situation, so that evidence of this act is evidence of another one of the same quality.

Mr. Bromley: It seems to me to be too remote, and in view of the charges in the complaint, to have no relevancy to the charges contained in the complaint.

Justice Stephens: Well, thank you for your further argument, but I am sorry, we are still unconvinced on this particular item of evidence.

It is excluded.

By Mr. Knuff:

Q. Do you recall, Mr. Linci, at what price you sold the board that you purchased from Universal, and by the "board you purchased from Universal", I mean the board that you testified you purchased from them just a short time before your company got into manufacture.

Mr. Bromley: That is objected to as immaterial.

3745 Justice Stephens: What is the purpose of that?

Mr. Knuff: That hasn't anything to do with this exhibit, your Honor. The purpose of that is to—

Justice Stephens: (Interposing) I take it for granted that it hasn't—you are going to another line of testimony?

Mr. Knuff: Yes. The purpose of that is to show the resale price fixing by one of the original conspirators in this case.

Justice Stephens: The resale price fixing through Ebsary?

Mr. Knuff: That is right. Ebsary observed this price policy under an agreement, as we understand it, with Universal.

Justice Stephens: Well, that is the very same question over again, isn't it?

Mr. Knuff: I thought we were arguing on this letter, your Honor, the admissibility of Exhibit 401. I may be wrong on that.

Justice Stephens: I thought that had been ruled upon.

Mr. Knuff: That was ruled upon before. Now my question is not directed to the introduction of this exhibit, but my question is directed to the resale by Ebsary Gypsum Company of board purchased by them from Universal.

Justice Stephens: You mean under the general charge of purchases of board?

Mr. Knuff: That is right.

Justice Stephens: And selling board at prices
3746 fixed by a licensee?

Mr. Knuff: That is right.

Justice Stephens: In other words, you are going to the general ruling of the majority of the Court that there was a buying and selling of board between the various defendant licensees, and the selling of that board under the bulletin prices, even though it wasn't manufactured and sold by a particular one?

Mr. Knuff: Well; at the time I have reference to, your Honor—I want to be perfectly frank with your Honor—Ebsary Gypsum Company was not a licensee. My question is directed to a time preceding the time when Ebsary signed the license agreement.

Mr. Bromley: It is covered by the ruling just made. It is the same question all over again.

Justice Stephens: I think it is exactly the same question as was presented by the arguments on Exhibit 401. The objection is sustained.

By Mr. Knuff:

Q. Mr. Lenci, I show you what has been marked for identification as Government's Exhibit No. 402, the same being a copy of a letter dated May 29, 1927, addressed to the Ebsary Gypsum Company, Caledonia, New York, and signed W. G. Stromquist.

3747 (The document referred to was marked as Government's Exhibit No. 402, for identification.)

By Mr. Knuff:

Q. That is Mr. Stromquist's signature, is it not, Mr. Lenci? A. My answer to that would have to be exactly the same as to the other one.

Mr. Knuff: Mr. Varian, will you admit that Government's Exhibit No. 402 for identification is a copy of a letter that was received by Ebsary Gypsum Company from the Universal Gypsum & Lime Company?

Mr. Varian: I cannot stipulate that, because I do not understand that this came from Ebsary's files. You told me so last night.

Mr. Knuff: That is correct, it did not.

Mr. Varian: So I cannot stipulate anything about it, because I don't know anything about it.

Mr. Knuff: Mr. Finck, will you state that the letter marked for identification as Government's Exhibit 402,

was received by the Government from the National Gypsum Company?

Mr. Finck: I don't know whether it was or not.

Mr. Knuff: Didn't you furnish that to us under the subpoena?

Mr. Finck: I don't believe so. There is no indication on it as to our mark.

3748 By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit No. 403, the same being a photostat of a letter dated January 8, 1930, and signed W. G. Stromquist, Eastern Sales Manager.

(The document referred to was marked as Government's Exhibit No. 403, for identification.)

By Mr. Knuff:

Q. Are you able to identify that as Mr. Stromquist's signature, Mr. Lenci? A. No, sir.

Mr. Knuff: Mr. Finck—

Mr. Finck: (Interposing) I haven't seen the letter; I don't know anything about it.

Justice Stephens: Mr. Marshal, hand it to Mr. Finck.

(Thereupon, Government's Exhibit No. 403 for identification was handed to Mr. Finck.)

Mr. Knuff: Is it correct, Mr. Finck, that that letter, Government's Exhibit 403 for identification, was furnished to the Government by the National Gypsum Company from the files of the National Gypsum Company, and that the attached bulletin was likewise furnished by the National Gypsum Company at the same time?

Justice Stephens: Furnished by National?

3749 Mr. Knuff: Furnished by National, yes, your Honor.

Mr. Finck: It came from the files of the National Gypsum Company and was submitted subject to the subpoena.

Justice Stephens: You mean it was furnished to the Government?

Mr. Knuff: Yes, furnished to the Government from the National Gypsum Company, from the files of the National Gypsum Company, in response to a Government subpoena.

Justice Stephens: Do you concede, Mr. Finck, that the letter, Exhibit 403, with its accompanying bulletin, was received from Universal?

Mr. Finck: No, I do not. I cannot stipulate its authenticity, or that it came from Universal.

Justice Stephens: Proceed.

Mr. Knuff: May we have permission, if your Honor please, to subpoena W. G. Stromquist?

Justice Stephens: I am not sure, Mr. Knuff, offhand, whether that application for a subpoena has to be in writing or not. Of course if you need the witness, you are entitled to get him here, but your applications heretofore have been made in writing, and I have forgotten the rule for the moment.

Mr. Knuff: We made one application, not in writing, and that was for Mr. Redfield. However, we have no objection to making the application in writing.

Justice Stephens: I don't want to put you to
3750 that trouble unless it is necessary, of course. Let me look up the rule.

Mr. Knuff: I don't think you will find it in the rules, it will be under the Sherman Act.

Justice Stephens: There is a provision in the rules, I think, with respect to witnesses living beyond one hundred miles.

Mr. Knuff: Well, it is the Sherman Act provisions that govern, as I recall. The Sherman Act says that the permission of the Court must first be had to obtain the attendance of a witness who lives beyond the jurisdiction of the court a distance of more than one hundred miles. I believe that is Section 22 or 23 of the Sherman Act.

Justice Stephens: But there is a rule on the subject also.

(After examining Rules.)

It is a combination of the statute and the rule, I find. There seems to be no requirement for a written application when the application is made in open court, and the Court will order the clerk to issue the subpoena upon the showing thus far made by the Government of its need of the witness W. G. Stromquist. You may obtain the subpoena at your convenience.

Mr. Knuff: Thank you, your Honor.

By Mr. Knuff:

Q. Mr. Lenci, you attended a meeting at Chicago in May, 1929, at which other manufacturers of gypsum
3751 board were present, is that correct? A. That was the time of the license meeting, in 1929, yes.

Q. And the date of that meeting in Chicago was May 22 or May 23—I believe it was May 22 and May 23, is that correct? A. Well, I thought it was May 21 and May 22.

Q. Well, it was sometime in the latter part of May, 1929? A. That is right.

Q. Now before you went out to Chicago it is a fact, is it not, that you knew that such a meeting was going to be held? A. My recollection on that is not too clear. I do know that we were going out there in connection with a proposed license, board license.

Q. And you had gone to Chicago pursuant to a previous arrangement, had you not? A. There must have been something to bring that about, yes. I don't know the exact circumstances.

Q. And at the time you went there Mr. Fred Ebsary accompanied you? A. Yes.

Q. And Mr. Harlan Rippey accompanied you? A. Yes, Judge Rippey.

Q. When you got out to Chicago you did attend the meeting of the manufacturers at the Palmer House
3752 in Chicago, did you not? A. Yes.

Q. And there were present at that time, Sewall L. Avery, representing the United States Gypsum Company—is that not correct? A. Yes.

Q. And Charles F. Henning, representing USG, is that correct? A. Yes.

Q. And Mr. John MacLeish, representing USG? A. I believe so.

Q. And Niagara Gypsum Company was represented by M. A. Reeb, is that correct? A. Yes.

Q. And National Gypsum Company was represented by M. H. Baker, isn't that correct? A. Yes, sir.

Q. Do you know whether or not Mr. Ralph Burley, the vice president of National, was out there at that time? A. I don't remember.

Q. You do remember Mr. Baker being there? A. Yes.

Q. Do you remember whether Mr. Finck was there? A. I don't.

Q. Do you remember that Mr. C. O. Brown repre-
3753 sented Certain-teed at that meeting? A. I believe that Certain-teed was represented, but I do not remember who was their representative.

Q. Was George M. Brown there? A. I am not sure.

Q. You are not sure whether George M. Brown was there, or you are not sure whether C. O. Brown was there? A. No, sir.

Q. Could your memory be refreshed on that? A. It probably could, yes.

Q. Was Warren Henley there? A. I am not sure.

Q. Are you sure that somebody from Certain-teed was there? A. Yes, I believe there was.

Q. But you are not sure who that person was? A. No.

Q. Was the Universal Gypsum & Lime Company also represented at that meeting? A. Who was the representative—

Q. (Interposing) My understanding is that Eugene Holland— A. (Interposing) He was the president or receiver at that time, was he not?

Q. Yes, he represented Universal. A. He might have been there, I am not quite sure.

Q. Do you know whether Stephen Kelley was out
3754 there? A. I think he was.

Was Atlantic Gypsum Products Company represented at that meeting? A. I think so.

Q. They were represented by L. I. Neale, vice president, is that correct? A. I think so.

Q. And was Mr. Willard B. Fuller there at the time also? A. I am not sure whether Mr. Fuller was at that meeting or not. I do recall having seen him at one of the meetings in Chicago.

Q. But you are sure of Mr. L. I. Neale? A. I think Mr. Neale was there.

Q. How about Mr. Channing, the secretary and counsel of the Atlantic Gypsum Products Company? A. I believe he was, because I think that is the first time I met Mr. Channing.

Q. Was any person representing Texas Cement Plaster Company at that meeting? A. I don't think so.

Q. And as to American Gypsum Company, did any person represent American Gypsum Company at that meeting, or were they represented? A. I don't recall, I don't recall.

Q. You did testify before the Grand Jury down
3755 here in the District, did you not? A. Yes, sir.

Mr. Knuff: I thought I had Volume 2 of the Grand Jury testimony here. It happens that I do not have that volume here but I will have it here tomorrow, your Honor.

By Mr. Knuff:

Q. Now the meeting was held at the Palmer House in Chicago? A. That is right.

Q. And it lasted two days, is that correct? A. Yes.

Q. Do you recall that Mr. Sewell Avery, at that meeting, outlined the history of the patent litigation over the closed-edge board? A. I have not a very clear recollection of what he said.

Q. Well, do you recall whether or not he did outline or speak about the patent litigation over the closed-edge board? A. I think so.

Q. When you say you "think so", do you mean by that, that that is your best recollection at the present time? A. Yes, it is.

Q. You don't mean that you are just deducing that, you mean that it is your present recollection, is that correct? A. Yes.

3756 Q. And do you recall that Mr. Sewell Avery explained that certain companies in the gypsum industry had undertaken to manufacture a closed-edge board, and in the manufacture of that closed-edge board they had infringed the United States Gypsum Company's patents—do you recall that? A. I don't remember how far he went into that because it was all general knowledge, and whether he would take the time to go over that again or not, I don't remember.

Q. Well, I wonder if you, instead of my asking you these questions, could give me your best recollection of just what you recall Mr. Avery said at that meeting in Chicago. A. Well, I don't think he said very much except that we were all there, he welcomed us as prospective licensees, and—

Q. (Interposing) Were you all in one room? A. Yes.

Q. Those people you have mentioned? A. Up to this point, yes.

Q. Go ahead. A. Then we broke up to discuss our individual licenses.

Q. Outside of the fact— A. (Interposing) I am speaking for our own company.

Q. Yes, I understand that. Your recollection is that Mr. Avery made a short statement in which he welcomed all the prospective licensees, is that correct?

3757 A. Yes.

Q. Don't you recall that Mr. Avery made the statement that it would be a good thing for the industry if all the companies manufacturing board did become licensees of the United States Gypsum? A. I rather think he did, but I don't remember his wording.

Q. When you say you "rather think he did", you mean

by that, do you, that that is your best recollection? A. I have no definite recollection as to what he did say or what he did not say.

Mr. Bromley: Then I move to strike out the previous answer.

Justice Stephens: It may go out.

Mr. Knuff: Just on that particular point, your Honor.

Justice Stephens: That is right.

By Mr. Knuff:

Q. Do you recall that Mr. Avery and Mr. MacLeish both discussed the demoralized price conditions in the gypsum industry for the years 1927, 1928 and 1929? A. No, I don't remember that.

Q. You say you don't remember any such discussion? A. No.

Q. And do you recall that Mr. Avery and Mr. MacLeish stated that this demoralized condition could be cor-
3758 rected by the industry taking out licenses from the United States Gypsum Company whereby United States Gypsum Company would fix the price on gypsum board? A. No, I don't remember that.

Q. You don't remember that now? A. I remember that he spoke about the advantage of taking the board license, but as to carrying it to other products, I don't remember that.

Q. I am talking about the board itself. A. Yes.

Q. Do you recall that Mr. Avery told you that if all companies would take out a license from USG, that that would correct the demoralized condition which the board industry now found itself in? A. The board industry, yes.

Q. That is what I meant to say, and if I didn't say that, I meant to. Do you recall Mr. Avery saying that? A. Yes.

Q. Do you recall Mr. MacLeish also saying that? A. I don't remember whether he repeated that or not.

Q. Do you recall at that time that Mr. MacLeish, or Mr. Avery, illustrated their point by saying that under the General Electric case it was permissible for the owner of a patent to fix the price of a patented product? A. I remember that was mentioned by either one or
3759 the other, yes.

Q. And do you know whether or not the license agreement was gone over, item by item, and the principal points of that license agreement explained either by Mr. Avery or Mr. MacLeish? A. No, not in that way.

Q. Well, how do you recall it? A. We apparently had a draft of a license, to the best of my knowledge, that is as I recall it, and we immediately protested because that draft contained the statement that Ebsary Gypsum Company had infringed the patents of the United States Gypsum Company, and also it had a clause providing for us to pay damages to United States Gypsum Company. We had never been a manufacturer of the closed-edge board up to that point. We had no cases against us, we were not infringers, and we could not sign that contract.

So Judge Rippey and Mr. MacLeish left the group, and between the two of them they thrashed out a license which was applicable only to the United States Gypsum Company and the Ebsary Gypsum Company, and was satisfactory to both companies, which we signed.

That is the history of that. There was not a general discussion as to—would you like to sign this, or would you like to have this in? We went into a session with Mr. MacLeish and Judge Rippey, and thrashed out our troubles, and signed the license.

3760 Q. Isn't it a fact that either Mr. Avery or Mr. MacLeish did discuss the salient features of this proposed new license agreement before the entire assemblage there? A. I don't recall definitely, no.

Q. You don't recall that definitely? A. No.

Q. Do you recall whether or not there was a discussion in the meeting as to abandoning the manufacture of open-edge board? A. No, I don't. Speaking for our own company, we were most anxious to abandon that.

Justice Jackson: Were you making it then?

The Witness: We were making open-edge board, and we had been for just about a year, probably eight to ten months.

By Mr. Knuff:

Q. Did you state that you did intend to abandon the manufacture of open-edge board? A. I don't know whether we made the statement or not, but it was quite evident that we wanted to, because we didn't like it.

Q. I see. It is true that you did cease manufacturing the open-edge board after you became a licensee of USG, is that correct? A. We had a certain quantity of paper left on our hands, in our inventory, at that time, the

3761 time we signed up, which was only suitable for making open-edge board, and as soon as we were

able to use that type of paper up, we abandoned the open-edge board and have never made any of it since.

Q. I see. Did Ebsary Gypsum Company sign the license agreement at that time? A. We signed it in Chicago, yes.

Q. And you signed on the 22nd day of May, 1929, is that correct? A. I believe it was on the 22nd, it was in May, anyway.

Q. Did you sign that the first day of the meeting, or the second day of the meeting? A. It would be my impression or my recollection that the license was talked over between Judge Rippey and Mr. MacLeish on the first day, and a fair copy made which was executed on the second day.

Q. And after you signed the license agreement did USG submit to you a bulletin showing the prices of closed-edge board? A. After we signed. It wasn't immediately upon delivery of the signed license, but it may have been the next day, although I am not certain, or the same afternoon. It wasn't immediately upon its signature, anyway.

Q. I show you, sir, what has been marked for identification as Government's Exhibit No. 404, the same
3762 being a letter, dated May 23, 1929, addressed to George N. Lenci, vice president, and signed by C. Henning, vice president in charge of sales.

(The document referred to was marked as Government's Exhibit No. 404, for identification.)

By Mr. Knuff:

Q. Will you please look at that exhibit, Mr. Lenci? That letter, dated May 23, 1929, is the letter that you refer to as having been given you at the conclusion of the meeting on May 23, is that correct? A. I believe it is, yes, sir.

Mr. Knuff: We now offer in evidence, if your Honor please, Government's Exhibit 404 for identification.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 404 was received in evidence.)

By Mr. Knuff:

Q. Now at that time, Mr. Lenci, if my understanding is correct, your company was not manufacturing a closed-edge board—is that correct? A. Not at that time.

3763 Q. And the United States Gypsum Company knew that your company wasn't manufacturing a closed-edge board, is that not correct? A. I believe so.

Q. Didn't you tell them that you were not manufacturing a closed-edge board? A. Well, it was common knowledge that we were not.

Q. Didn't you specifically tell them that you were not manufacturing a closed-edge board? A. Well, I don't know whether we told them so or not. They knew it.

Q. Let's see whether you didn't tell them. The original draft of the proposed license had a clause in it that said that Ebsary Gypsum Company had been infringing the United States Gypsum patents, did it not? A. Yes, that is right.

Q. And didn't you tell the United States Gypsum Company that you were not infringing the United States Gypsum Company patents because you were not manufacturing a closed-edge board? A. Yes, that is probably true, yes.

Q. As a matter of fact, it took you some time before you were able to get into production on the closed-edge board, did it not? A. It was a short time, I don't remember just how long.

3764 Q. It was sometime in July, was it not? A. Probably.

Q. Well, wasn't it sometime in July? A. I haven't got a record of the date, but it was probably about a month or so later.

Q. When you say "probably", do you mean by that, that that is your best recollection now? A. I believe so.

Q. That was sometime in July? A. I think so, yes, sir.

Q. And when you received this bulletin, did you price your open-edge board to follow the prices that were contained in Government's Exhibit 404?

Mr. Bromley: I object to that question on the ground that it assumes facts not in evidence. First, the bulletin on its face in the third line applies only to board manufactured by this company. Second, as I read it, there are no prices set for open-edge board.

I may say, in explanation of what I started out to say, that paragraph 1 refers only to the prices at which the licensee may sell board manufactured by them, embodying the improvements set forth in the Utzman patent, No. 1,034,746. That is the closed-edge patent.

Mr. Knuff: Will you please read my question, Mr. Reporter?

Justice Jackson: I don't believe Mr. Bromley is
3765 through yet.

Mr. Knuff: I am sorry, I thought he was.

Mr. Bromley: Therefore, it seems to me that the question is incompetent because it assumes that the bulletin applies to the board that is not manufactured, which is a fact not in evidence, and it assumes that it also applies to open-edge board, which is also a fact not in evidence.

Mr. Knuff: Now, Mr. Reporter, will you please read my question?

(Thereupon, the pending question was read by the reporter.)

Mr. Knuff: That is all I have asked him, whether the prices of his board followed these prices in here.

Justice Jackson: Do you mean were they the same?

Mr. Knuff: That is right, your Honor.

Mr. Bromley: I think that is a different question.

Mr. Knuff: That is the exact question.

Justice Stephens: Well, if you want to inquire whether the prices at which open-edge board was sold were the same prices as the prices stipulated in this bulletin with respect to the board manufactured and sold under the license, we have already ruled that you can ask that; but the question which you did ask was phrased in a manner which assumed two facts not in evidence. Objection to that is sustained.

You are not foreclosed from inquiring as to what
3766 I just spoke of.

By Mr. Knuff:

Q. The price at which you sold your open-edge board was what, Mr. Lenci? A. I don't remember the exact prices, but they were lower than the prices in the first bulletin.

Q. Isn't it a fact, Mr. Lenci, that you priced your open-edge board to sell at the same price USG had fixed for their "seconds"? A. I don't remember. I know it was much less than the regular price, than the other prices in here—

Q. (Interposing) Much less than what?

Mr. Bromley: Might he finish his answer, please?

Justice Stephens: Finish your answer.

The Witness: Because no matter whether we had a license or not, it didn't overcome the customers' objection to buying open-edge board.

The mere fact that we had a license didn't make him look, didn't make the customer look on the open-edge board with the feeling that he wanted to pay more money for it. We still continued to sell the open-edge board for any price we could get for it.

By Mr. Knuff:

Q. Well, isn't it a fact, Mr. Lenci, that you testified before the grand jury down here that you priced
3767 your open-edge board at the same price that USG specified for their "seconds"? A. I don't remember, I could have my memory refreshed on that, but I do not recall it now, sir.

Q. Isn't that what you did? A. I don't remember.

Q. Well, didn't you price your open-edge board at the same price that USG specified in their bulletins for "seconds"? A. I don't remember.

Justice Jackson: Don't you have those minutes there?

Mr. Knuff: Unfortunately I do not have them. I thought I had, but I am making a note now to be sure to have them here tomorrow, your Honor.

By Mr. Knuff:

Q. Mr. Lenci, gypsum board has always been sold on a delivered price basis, has it not? A. By that you mean a price at destination, instead of a price at the mill?

Q. That is right. A. To my knowledge, yes.

Q. It has always been sold that way? A. Yes.

Q. Say in April 1928, if you had a customer in Rochester who wanted to buy board from you, you would determine the price to that customer by taking your mill price and adding to your mill price the amount of freight
3768 from Wheatland to Rochester, and that would give you the delivered price into Rochester? A. In 1928?

Q. Say in April, April 1, 1929. A. In April of 1929?

Q. That is right. A. No.

Q. How would you do it? A. We would find out what the price was in Rochester, and endeavor to meet that competing price in Rochester.

Q. You would meet the competing price in Rochester? A. Yes. In other words, we were quite new in the business, and we had to meet the conditions as we found them in these various markets.

Q. And if you were selling board in Buffalo, you would find out what the price was in Buffalo, and meet that price, is that correct? A. Yes.

Q. And if you were selling board in Utica, you would find out what the price was in Utica, and you would meet that price, is that correct? A. Yes.

Q. In other words, you didn't determine your price in Rochester or Buffalo or Utica by first taking your mill price and then adding to it the freight from your
3769 mill to Rochester or Buffalo or Utica? A. No, we had to take what the customers were already paying.

Q. I see.

On August 1, 1929, if you were selling board in Rochester, how would you determine that price, or how would that price be determined?

Mr. Oliver: What kind of board are you talking about?

Mr. Knuff: Closed-edge gypsum board that Ebsary was manufacturing under the license.

Justice Stephens: Is there any dispute about that at all?

Mr. Bromley: None.

Mr. Knuff: I just want to get it clear how that price was determined.

Justice Jackson: It was mill price, plus freight, was it not?

Mr. Knuff: Not from Mr. Lenci's mill, however.

Justice Jackson: No, it wouldn't be.

Justice Stephens: Proceed.

The Witness: That is the reason I was looking through here. (Witness referring to Exhibit No. 404) At that time I believe it would be from Oakfield, plus the freight from Oakfield to Rochester.

By Mr. Knuff:

Q. Let's take a specific illustration. Suppose you were selling a 3/8-inch No. 1 grade wallboard in Rochester,
3770 and suppose, further, that that wallboard was a closed-edge wallboard that you manufactured under the license. Now you would take the $20 base price, would you not? A. That is right, that is the mill price.

Q. And to that you would add the freight from Oakfield to Rochester? A. That is right.

Justice Stephens: What Oakfield is this, the town of Oakfield?

Mr. Knuff: Oakfield, New York, your Honor.

Justice Stephens: Where was your plant?

The Witness: At Wheatland, New York.

By Mr. Knuff:

Q. Oakfield is located in Genesee County, is that correct? A. Yes, sir.

Q. And your plant is located in Monroe County? A. Right.

Q. Oakfield is on the New York Central? A. Yes.

Q. And Wheatland is on the B. & O.? A. Yes.

Q. Wheatland is about eighteen miles south and west of Rochester, is that not correct? A. That is correct.

Q. And Oakfield is west and a little bit to the
3771 south of Rochester, is that correct? A. Approximately, yes.

Q. About thirty-six miles from Rochester? A. Yes, sir.

Q. Now in determining the price that you would quote in Rochester, you would take your mill price of $20 a thousand square feet, and to that add the freight rate from Oakfield to Rochester, would you not? A. That is right.

Q. Although the board that you shipped came from Wheatland? A. Yes.

Q. You would ship your board from Wheatland to Rochester, but you would add the freight from Oakfield to Rochester, is that correct? A. At that time, yes.

Q. And if you were selling board in Buffalo, you would likewise quote the mill price, plus freight from Oakfield, is that not correct, from Oakfield to Buffalo? A. Yes, that is the opposite illustration.

Q. And if you were selling in Utica, you would take your mill price of $20, plus your freight from Oakfield to Utica? A. Yes.

Justice Stephens: We will take an adjournment
3772 at this time.

It occurs to the Court to suggest, in respect of the testimony of the witness Gloyd, the possibility of counsel considering agreeing upon written interrogatories which could be presented to Mr. Gloyd and answered without the formality of putting him on the witness stand or having him examined and cross-examined orally. Would that be possible?

Mr. Steffen: We will consider that, your Honor. I want to point out that his memory is apparently bad, and we are entitled to ask leading questions, and it might be very important that we refresh him on something or other in order to obtain an answer.

Justice Stephens: Well, the Court hopes that counsel can work the matter out by some cooperative arrangement which

will get the necessary testimony and at the same time not interfere with his health.

You may announce the recess until tomorrow at ten.

(Thereupon, at 4:00 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Wednesday, February 16, 1944.)

3773 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.
Wednesday, February 16, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

3778 Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. Mr. Lenci, I believe yesterday we were talking as to who attended the meeting in Chicago at the Palmer House on the 21st or the 22nd of May, 1929, and I asked you whether or not Certain-teed had attended that meeting, and you said you felt that they had but you were not sure who represented Certain-teed at that time. Do you remember that? A. Yes.

Q. Have you had occasion now to refresh your recollection as to who did represent Certain-teed at that meeting? A. Yes.

Q. Will you tell us who it was, please? A. I believe Mr. C. O. Brown and Mr. Whittemore.

Q. Mr. Audenreid Whittemore and Mr. C. O. Brown, or was it George M. Brown? A. C. O. Brown.

Q. C. O. Brown, you think? A. Yes.

Q. I also asked you yesterday, with reference to
3779 the same meeting in Chicago at the Palmer House, this question:

"Don't you recall that Mr. Avery made the statement that it would be a good thing for the industry if all the companies manufacturing board did become licensees of the United States Gypsum?"

And your answer was:

"I rather think he did, but I don't remember his wording."

Have you had occasion to refresh your recollection since yesterday as to that? A. Yes.

Q. What, if anything, did Mr. Avery say at that time, sir? A. Well, I have given a good deal of thought to that during last evening, to try to put the facts together as I could remember them. And as I recall it, when we met, Mr. Avery made a very short, informal talk, said he was glad to see us all there, and that we were all familiar with the long, drawn-out litigation which had existed in the gypsum industry; and that now that we had the right, following the General Electric decision, to sign a license of this type, or they had the right to issue a license of that type, that he felt that that was a very good move in the industry.

Q. And Mr. Avery did, at that time, talk about the demoralized price conditions in the industry? A. I don't
3780 remember that he mentioned the demoralized price conditions, I really do not.

Q. Before the Grand Jury, sir, you were asked the following question—

Mr. Bromley: (Interposing) May it please the Court, I object to this use of the Grand Jury minutes.

Justice Stephens: Is this for the purpose of refreshing recollection?

Mr. Knuff: That is right, Your Honor.

Mr. Bromley: Then he should be shown the minutes, if anything, and they should not be read to him.

Mr. Knuff: I would like to have the record show just exactly what he did testify to before the Grand Jury, and the only way I can get that in the record is to read it into the record.

Justice Jackson: Are you trying to impeach him or refresh his recollection?

Mr. Knuff: Both.

Justice Jackson: Which are you going to do first?

Mr. Knuff: I am going to try to refresh his recollection—

Justice Jackson: (Interposing) Then why don't you show him the minutes?

By Mr. Knuff:

Q. Mr. Lenci, I want to show you Volume 2 of the
3781 testimony taken before the additional Grand Jury in the District of Columbia on the 18th of April, 1940, and I want to call your attention to page 93 of that testimony, and I want you to read between the places on that page where I have indicated with pencil marks, please. A. (After reading) Yes, I have read it.

Mr. Knuff: Let the record show that I am submitting the volume of the Grand Jury minutes referred to, to counsel for the defendants.

(Grand Jury minutes handed to and examined by defendants' counsel.)

Mr. Knuff: Does the Court care to see it?

Justice Stephens: Hand it to the Court, Mr. Marshal.

(Grand Jury minutes handed to and examined by the Court.)

By Mr. Knuff:

Q. Mr. Lenci, since reading the excerpt from your testimony before the Grand Jury, has your memory been refreshed as to whether or not Mr. Avery did speak about the demoralized price conditions in the industry? A. Yes,

to this extent, that I will have to answer practically the same as I did in that, that probably he did discuss it.

Q. And by "probably" you mean that that is your best recollection? A. Yes.

3782 Q. And when you say that you will have to answer as you did in that, you mean that you will have to answer the same way as you answered before the Grand Jury, is that what you mean? A. That it probably took place, yes.

Q. And again, by "probably" you mean that that is your best recollection? A. Yes, but I can't say, "Yes, he did say this."

Q. You can't give his exact words, is that what you mean? A. I can't give his exact words because I honestly do not remember the wording.

Q. We realize that. But it is your best recollection now, after your memory has been refreshed, that there was some discussion at that meeting about the demoralized price conditions that existed in the board industry; is that correct? A. I don't like to quibble, but I think there probably was. I can't say that there definitely was, because I honestly am not sure.

Q. Do you mean by that that it is your best recollection? A. Yes, all right.

Justice Jackson: Do you realize what you are say-

3783 ing?

The Witness: Yes, sir.

Justice Jackson: You say first that you can't remember; then you say it is your best recollection by saying "probably". Which is it?

The Witness: I mean it is my best recollection that there probably was that discussion.

Justice Jackson: But you don't mean, when you say "probably", that it probably is your best recollection?

The Witness: No.

Justice Stephens: Mr. Lenci, let me say this to you: We don't want you to draw inferences as to what you think, as a matter of probability, happened, because that is the Court's job. What we ask witnesses to do is to testify what did happen, or what was said. Now that doesn't mean that you have to remember or are expected to remember exact words, but it does mean that we are asking you at least to remember, if you can, the substance and effect of a conversation or statement. If you don't remember that, and if you mean by "probably" that you are drawing

an inference as to what occurred, then you shouldn't say that you recollect it. If you do recollect, if you have a recollection at the present time as to what, in substance and effect, was said, then it is all right for you to say so. But please keep that distinction in mind.

The Witness: I understand.

3784 Justice Stephens: In other words, counsel aren't permitted—and I am not suggesting that counsel are trying to—to argue you into a position of saying what probably did take place or probably did not take place, on the basis of an inference. If you don't remember that, say so. You are not guilty of any offense if you don't remember.

Mr. Bromley: I move to strike out all of his testimony on the ground that it is perfectly apparent that he doesn't remember, that all he is doing is inferring.

And in connection with those Grand Jury minutes, I would like to ask him now: You haven't any recollection, now, as to what Mr. Avery said or didn't say on this subject, have you?

The Witness: Not the exact words, no, sir.

Mr. Bromley: I am not talking about the exact words. You haven't any recollection as to whether he said anything about this subject or not, have you?

The Witness: Only so far as I have answered before. I believe that he did.

Mr. Bromley: I move to strike out all of his testimony on the ground that all this witness does is believe or infer, and he doesn't recollect anything.

Mr. Knuff: I think that his answer is perfectly consistent. He said he believed, and when I asked him about that he said he meant that that was his best recollec-

3785 tion. I think his answer is perfectly consistent.

Justice Stephens: Well, the Court thinks it may stand, but the Court will frankly state, Mr. Knuff, that the Court will give practically no weight to it because it is so obviously close to the line of pure speculation or inference.

By Mr. Knuff:

Q. As a matter of fact, Mr. Lenci, the board prices in the industry were at that time demoralized, were they not? A. That is correct.

Justice Jackson: What do you mean by "demoralized"?

The Witness: They were very low. We were selling our materials below cost.

By Mr. Knuff:

Q. And at that time, open-edge board sold on the market at from $6 to $7 a thousand square feet less than the closed-edge board, did it not? A. Yes.

Q. How did USG meet the competition of the open-edge board at that time?

Mr. Bromley: Objected to as incompetent because calling for a conclusion.

Mr. Knuff: This is on cross-examination—

Justice Jackson: (Interposing) Why don't you ask him if he knows?

3786 Mr. Knuff: He does know.

Justice Jackson: Ask him that.

Mr. Knuff: This is cross-examination.

Justice Jackson: I know it is, but you can't call for a conclusion like that on cross-examination.

Justice Stephens: This isn't cross-examination as if the witness had already been examined on direct. These are leading questions.

By Mr. Knuff:

Q. Do you know how USG met the competition of open-edge board? A. Yes, I do.

Q. How did they meet that competition? A. If I might explain, which would possibly make it clearer, they had two grades of board, one which was known as Sheetrock, which was always their first line of material—

Justice Stephens: (Interposing) Who do you mean by "their"?

The Witness: The United States Gypsum Company. And in order to meet competition from other cheaper boards, or open-edge boards, they established a second board, which I believe they called the Crown board, and used that, selling it at a lower price, to meet competition.

Justice Jackson: Competition with what?

The Witness: With the open-edge boards on the market.

3787 By Mr. Knuff:

Q. The Sheetrock that USG was manufacturing at that time was their first quality board, is that correct? A. Yes, sir.

Q. And that board was a highly advertised board, is that correct? A. That is correct.

Q. At that time, the United States Gypsum Company

put on the market a board of inferior quality to the Sheetrock, known as Crown Board, did they not? A. Yes.

Q. And that is what the USG considered their No. 2 board, isn't that correct? A. I believe so, yes.

Q. Did USG at that time mark it second grade board, or second? A. No.

Q. Now what is the difference between a No. 2 board and a second? A. Well, a No. 2 board is a board which is actually manufactured to meet competition, but it is a perfect board in its class, I might say. A "second" is a board of either the first or second grade, which is actually defective in manufacture, has some real imperfection in it, and is not of first class material.

3788 Q. The No. 2 board was a board that was manufactured to certain specifications, while a "second" was an imperfection of a manufactured board; is that right? A. That is correct.

Justice Jackson: I wish you would clear up for me, Mr. Witness, the difference between the Sheetrock, or the No. 1 board, and the No. 2 board. In what way do they differ? A. As I understand it, the Sheetrock board—and when I say "Sheetrock" I mean the first grade board—was made of the very highest class of materials. The paper was perfect, the caliper of the board was perfect, the width was perfect, and it had thorough inspection all the way through and was strictly of first class material. It was like a Cadillac car.

Then, in order to make this competing board, they used a slightly lighter weight of paper. The inspection was not quite as careful. If the board was a 1/32 or 1/16 off in width, it was still usable on the job; it was not imperfect, but it was not absolutely standard. And there were differences of that kind. There might be slight specks in the paper, which would keep it from being used without being painted, or something of that kind.

By Mr. Knuff:

Q. Carrying your analogy with the Cadillac car
3789 further, would you say that the LaSalle might be an illustration of the No. 2 board? A. Yes.

Justice Jackson: Oh, no. (Laughter). I happen to have had both, so I know. (Laughter).

The Witness: I will put it this way: The first grade board was the Cadillac; the second grade board was the Chevrolet; and the "seconds" were the Buick of 1941, where they had to change all the spark plugs.

Justice Jackson: That is right, that had a poor engine. (Laughter).

Mr. Knuff: Will you show the witness Government's Exhibit 404, please?

(Government's Exhibit 404 handed to the witness)

By Mr. Knuff:

Q. Concerning Government's Exhibit 404, I believe you testified yesterday that you received this exhibit on the second day of the meeting that was held at the Palmer House; is that correct? A. Yes.

Q. And that was handed to you? A. Yes.

Q. Did you attend a party at Sewell Avery's home after that meeting? A. Yes.

3790 Q. And who were at that party?

Mr. Bromley: I object to this as immaterial. What is this, some social occasion?

Mr. Knuff: I am not going into what happened at the party other than to see who was at the party. Here you have all the board manufacturers—

Justice Jackson: Is this preliminary to something?

Mr. Knuff: Just to show that they all got together out there.

Justice Jackson: After the licenses were signed?

Mr. Knuff: That is correct.

Justice Stephens: And you are not intending to show any conversations concerning the issues in this case?

Mr. Knuff: I think definitely that it has a bearing on the issues in this case.

Justice Stephens: Are you intending to show what took place at the party, or what was said there, in respect of any issues in this case? If not, how can the fact that these gentlemen attended a social affair have any bearing whatever upon this situation?

Mr. Knuff: I want to show exactly that the only persons that were at that party were the people that were in attendance at the previous meeting at the Palmer House. I am not going to ask this witness to violate any rule of guest and host.

3791 Justice Stephens: We are not thinking that you are going to do that at all, Mr. Knuff, but we are trying to keep the record down to the material issues. It is big enough as it is. How can the fact that these men went to a social party, that circumstance, have any bearing

upon the issues in this case? He has already testified what they did, and there is no dispute about it, anyway.

Mr. Knuff: I think it has a material bearing, but if Your Honor thinks otherwise, I will abide by Your Honor's ruling.

Justice Garrett: In other words, you feel that the Court should conclude, because they had a social party following the business meeting, that—well, what do you ask the Court to conclude from that?

Mr. Knuff: That that was the end of the price war.

Justice Stephens: It seems to the Court a non sequitur. Objection sustained.

By Mr. Knuff:

Q. After you received the bulletin of May 23, 1929, did you telegraph your New York office as to the prices that your New York office should quote on board and lath? A. Yes.

Q. And did you instruct Mr. Diegel to advise the members of your firm as to the prices that should be quoted on gypsum board and gypsum lath?

3792 Mr. Oliver: May I ask what board you are talking about?

Mr. Knuff: Gypsum board and gypsum lath that was sold by Ebsary Gypsum Company.

Mr. Varian: Open-edge or closed-edge?

Mr. Knuff: The witness has clearly answered that at this time they were not manufacturing a closed-edge board. Now it can only mean the open-edge board.

Justice Stephens: Then state it, Mr. Knuff, so that the record will show it.

Mr. Varian: They were purchasing the other board outside, so we might as well have the whole story.

Mr. Knuff: Thank you very much, I am glad to know that.

What is my question?

(The question was read by the reporter as follows:

"Q. And did you instruct Mr. Diegel to advise the members of your firm as to the prices that should be quoted on gypsum board and gypsum lath?"

By Mr. Knuff.

Q. (Continuing) —either open or closed-edge? A. I wired Diegel to notify our salesmen to quote these prices.

Justice Jackson: On what, closed or open-edge board?

The Witness: On our open-edge board?
3793 Justice Jackson: Your open-edge board?
The Witness: Yes, sir.

By Mr. Knuff:

Q. Did Mr. Diegel prepare a letter that was signed with your name? A. Yes.

Justice Stephens: I don't quite understand you, Mr. Lenci. You say you wired Mr. Diegel to quote these bulletin prices on open-edge board?

The Witness: To quote prices on open-edge board. He didn't ask me what the prices were, yet.

Justice Stephens: I understood he was referring to these bulletin prices in Exhibit 404, and I thought you testified yesterday that you couldn't get bulletin prices on open-edge board because the trade wouldn't take it at those prices.

Mr. Knuff: If your Honor pleases, this is preliminary to clearing that up.

Justice Stephens: Very well.

Mr. Bromley: I don't think the record should be left this way. It seems to me that the record looks as though the witness had been talking about bulletin prices; whereas, he said yesterday that, of course, he wasn't talking about bulletin prices.

Justice Stephens: That is the Court's understand-
3794 ing, because he is being examined on Exhibit 404.

Mr. Knuff: I think if Your Honors will bear with me just a minute, we will have this whole thing cleared up.

Justice Jackson: All right.

By Mr. Knuff:

Q. Mr. Lenci, I show you what has been marked for Identification as Government's Exhibit 405.

(The document referred to was marked as Government's Exhibit No. 405 for Identification.)

By Mr. Knuff:

Q. Will you look at that exhibit and state whether or not that is the letter that was prepared pursuant to the telegram that you sent? A. Yes.

Justice Stephens: Will you identify that for us so we can tell what you are talking about?

Mr. Knuff: It is dated May 23, 1929, Your Honor, addressed to the Ebsary Gypsum Company, Newark, New

Jersey, Attention Mr. Ed. A. Niel, Jr., and signed Ebsary Gypsum Company, George N. Lenci, Vice-President.

Mr. Oliver: I would like to see a copy of it.

Justice Stephens: Have defendants' counsel a copy of it?

Mr. Bromley: We have just been handed a copy
3795 of it now. We have never seen it before.

Justice Stephens: Take your time and examine it.

Mr. Knuff: We now offer in evidence, if Your Honors please, Government's Exhibit No. 405.

Mr. Bromley: We make only the usual objection to it.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 405 was received in evidence.)

By Mr. Knuff:

Q. Now, Mr. Lenci, will you please refer to Government's Exhibit 405, and also refer to Government's Exhibit 404. In Government's Exhibit 405, you quoted, did you not, "3/8" Gypsum Lath (16x48—16x32—32x48) @ $13.50 per M ft. F.O.B. Mill"? A. That is correct.

Q. And will you refer now to Government's Exhibit 404. That is the same price that Government's Exhibit 404 contains for closed-edge lath, is that not correct?

Justice Stephens: Where is that?

Mr. Knuff: That will be found, Your Honor, right after the word "SECONDS", about a quarter of an inch below the word "SECONDS" you will see that.

3796 Justice Jackson: Is that lath?

Mr. Knuff: Plasterboard is lath.

It is the paragraph that begins: "1/4" and 3/8" Gypsum Plasterboards"—

Justice Stephens: (Interposing) "either bundled or unbundled"—

Mr. Knuff: (Interposing) Yes, "all sizes—$13.50 per M sq. ft."

By Mr. Knuff:

Q. The price that is mentioned in Government's Exhibit 405 for gypsum lath, open-edge gypsum lath, was the same price that was furnished you in Government's Exhibit 404 for closed-edge lath, is that not correct? A. Yes.

Justice Stephens: Now I don't understand that, because this item "3/8" Gypsum Lath", which you refer to, in Exhibit 405, doesn't say whether it is open-edge or not.

Mr. Knuff: Mr. Lenci has testified that that is what he was telling his salesmen to quote on open-edge lath.

The Witness: That is correct, we were not making closed-edge board at that time.

By Mr. Knuff:

Q. And the lath mentioned in Government's Exhibit 405 is open-edge lath, is that correct? A. Yes.

3797 Mr. Knuff: Is that clear to Your Honors now?

Justice Stephens: Yes, thank you.

Justice Jackson: Yes.

By Mr. Knuff:

Q. Now refer to Government's Exhibit 405, and the price of open-edge wallboard "4x6-12' long 15.00 per M ft. F.O.B. Mill"—do you see that? A. Yes.

Q. And that was the price for open-edge wallboard, is that not correct? A. Yes.

Q. Now refer to Government's Exhibit 404—"3/8"—Gypsum Wallboard SECONDS—$15.00 per M sq. ft."

Mr. Knuff: Do your Honors see that? It is just above the paragraph in which 1/4" and 3/8" Gypsum Plasterboards are mentioned. It immediately follows the #1 and #2 Grade Gypsum Wallboard quotations, and there is probably a space of a quarter of an inch—

Justice Jackson: (Interposing) It says there, "Gypsum Wallboard SECONDS"?

Mr. Knuff: That is right.

By Mr. Knuff:

Q. Now the price that you mentioned in Government's Exhibit 405 was the same price that was furnished

3798 you for closed-edge gypsum wallboard Seconds in Government's Exhibit 404, is that correct? A. That is correct.

Q. I show you what has been marked for Identification as Government's Exhibit 406, the same being a copy of a letter dated May 23, 1929, addressed to "All Salesmen", and signed "George N. Lenci". Will you please look at that exhibit, sir? A. Yes, sir.

(The document referred to was marked as Government's Exhibit No. 406 for Identification.)

Mr. Knuff: Before taking up Exhibit 406, there is an item on Exhibit 405 that I inadvertently overlooked.

By Mr. Knuff:

Q. Mr. Lenci, will you get before you Government's Exhibit 405, please? A. I have it.

Q. You will notice on the left-hand side of that exhibit there are some notations in longhand. Do you recognize that writing? A. Yes, it is mine.

Q. It is your writing? A. Yes.

Q. And as I read it, it says: "To be discontinued
3799 as soon as new board is ready", is that correct? A. Yes.

Q. What did you mean by that? A. If you will notice, right to the right of that the open-edge has a black mark alongside of it.

Q. I notice it. A. And I believe that I intended to say that the open-edge board would be discontinued as soon as the new board was ready.

Q. And this reference here meant that as soon as you got into production on your closed-edge board, you were going to discontinue the production of your open-edge board, is that correct? A. Yes.

Q. Now then, Exhibit 406 for Identification is a memorandum to your salesmen prepared for your signature, is that correct? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibit 406.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit
3800 No. 406 was received in evidence.)

By Mr. Knuff:

Q. And Government's Exhibit 406 contains the instructions that were sent out to your salesmen in order that they would be able to quote on open-edge lath, and open-edge wallboard; is that correct? A. That is right.

Q. And the prices mentioned in Exhibit 406 are the same prices that were mentioned in Government's Exhibit 405, is that correct? A. Yes.

Q. Now will you get before you, sir—

Justice Stephens: (Interposing) What is this handwriting at the bottom of Exhibit 406? If that has any bearing, since it is all in evidence we ought to have it read to us, because some of it I don't understand. What does that say, Mr. Lenci?

The Witness: Well, the series of figures there are, I think, the weights of the board. And then the comment at the bottom is "Joint Filler $3.60 per case F. O. B. Mill".

Mr. Knuff: I was going to take that up later, Your Honor.

Justice Garrett: Mr. Knuff, will you pardon me if I ask the witness to return a moment to Exhibit 405?

3801 Mr. Knuff: Certainly.

Justice Garrett: I didn't quite understand this. In explaining the handwriting on the left side of the page, I understood the statement in the question put to you to be that it was your intention to discontinue the manufacture of open-edge board when the new board was ready.

The Witness: That is correct.

Justice Garrett: And it had reference, then, not to the prices named here, but to the discontinuance of the manufacture of open-edge board?

The Witness: Yes. If I might explain, if you care for it, it is impossible to make both an open-edge board and a closed-edge board at the same time. You have to make one or the other, because your equipment is different for the two types of board. And when we stopped making the open-edge board we were through with it for good.

Justice Garrett: I would have interpreted that, myself, to mean that they were to discontinue the quotation of prices on open-edge board when the new board went into production. But, of course, I take your interpretation.

The Witness: If you have in mind if we had any open-edge board still in stock, of course we would have to sell that at this price.

By Mr. Knuff:

Q. Isn't Judge Garrett's understanding the correct
3802 understanding, Mr. Lenci, that is, that after your closed-edge board machine was put in operation, you were going to cease quoting on your open-edge wallboard? A. If we had any stock, we would have to sell it. After we had sold our inventory of open-edge board—

Q. (Interposing) And you had your new—

Justice Stephens: (Interposing) Let him finish his statement.

The Witness: After we had sold our inventory of open-edge board we would be through with that, and naturally that price would cease.

Justice Stephens: You would make no more of that board?

The Witness: We would make no more of that board.

Mr. Knuff: Does that clear it up for you, Judge Garrett?

Justice Garrett: I think so.

So long as you had any open-edge board to sell, you were going to sell it at these prices?

The Witness: If we could get that much for it.

Justice Garrett: Yes, if you could get it.

The Witness: That is right.

Justice Garrett: In other words, those were the prices that they were authorized to quote, that your salesmen were authorized to quote?

The Witness: That is right.

Justice Garrett: So long as you had any open-edge
3803 board on hand, no matter whether you then had discontinued its manufacture or not?

The Witness: That is right, that is correct.

By Mr. Knuff:

Q. Mr. Lenci, Mr. Varian has said that at this time you were buying closed-edge board; is that correct? A. We had bought a few cars, I don't know how many, but very few cars of board, and I don't know whether it was wallboard or lath.

Q. But you had bought either lath or board, is that correct? A. We had bought some, yes.

Q. And from whom did you buy that?

Mr. Bromley: I object to this as immaterial. This is the same matter that was ruled on yesterday.

Mr. Knuff: This is not the same matter that was ruled on yesterday. Here we have now a licensee buying board, apparently from another licensee, and this comes, I think, within the charge of the conspiracy in the complaint.

Justice Jackson: Why don't you phrase your question that way? You didn't ask him whether it was after he took the license or not.

By Mr. Knuff:

Q. After you took the license, and before you got your plant in operation, did you buy any closed-edge board
3804 or lath? A. Well, now, I want to answer that very clearly so that all will understand me. Before we took

our license, our plant had been in operation for about 8 or 10 months.

Q. That is right.

Justice Jackson: Making what?

The Witness: Making open-edge board.

And after we started making open-edge board, we did not buy any board from anybody else, because we had our own board. So consequently, we were not buying board from another manufacturer either during the time when we were manufacturing an open-edge board or after we took the license.

By Mr. Knuff:

Q. I understood Mr. Varian to say that after you took the license you had purchased some closed-edge board? A. No, that is not correct.

Mr. Varian: I was only referring to his testimony as to what he bought from Universal, which he testified to yesterday.

By Mr. Knuff:

Q. You now say, Mr. Lenci, that you were not—and did not, after you became a licensee of USG—purchasing closed-edge board from any other manufacturer? A. To the best of my recollection, we didn't.

3805 Q. Did you sell any closed-edge board to any other manufacturer after you became a licensee? A. Well, very much later on.

Q. Very much later on? A. Yes. I have in mind when the Newark Plaster Company had their fire, and we sold some board to them at that time.

Mr. Bromley: That was in 1940, you mean?

The Witness: Yes. And in order that the record may be complete, I think we sold a small quantity to the Atlantic Gypsum Company.

By Mr. Knuff:

Q. That is what I was coming to. You secured permission from the USG to sell to Atlantic at a discount, did you not? A. Yes.

Q. And you did sell to Atlantic at a discount? A. Yes.

Q. And for how long a period did you sell to Atlantic? A. Not very long, they did not take very much from us.

Q. I realize, of course, that it is almost impossible to fix dates, but can you give us an approximate date when this

board was sold to Atlantic? A. I would say it was probably a year or two prior to the purchase of the Atlantic by
3806 National, somewhere in the middle 30's.

Q. Somewhere in the middle 30's? A. Yes.

Q. Now did you sell board to any other board manufacturer, other than Newark and Atlantic? A. I don't remember.

Q. Either metallized, perforated or plain? And by "board", I mean wallboard and lath. A. I don't recall any.

Justice Stephens: The Court will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

3807 Justice Stephens: Proceed.

By Mr. Knuff:

Q. Will you get before you, Mr. Lenci, Government's Exhibit No. 404, please? A. Yes, sir, I have it.

Q. Turn to page 3, of that exhibit, if you will. You will notice at the bottom of that page, this statement:

"The following are billing weights used at all basing points:"

Do you notice that? A. Yes.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 407, being a letter dated May 24, 1929, addressed to the Ebsary Gypsum Company, Newark, New Jersey, attention of Mr. Ed. A. Niel, Jr., and signed Ebsary Gypsum Company, Inc., by George N. Lenci, vice president.

(The document referred to was marked as Government's Exhibit No. 407, for identification.)

By Mr. Knuff:

Q. Is that a letter, Mr. Lenci, that was sent out over your signature to your Newark office? A. It was sent out. I don't know that I signed it because I think Diegel wrote the letter in my absence.

Q. But you had previously authorized him, in your
3808 telegram, to do so, had you not? A. I don't remember.

Justice Stephens: Who did you say you thought wrote it?

The Witness: Mr. Diegel, who was my assistant. But I don't remember.

By Mr. Knuff:

Q. You do know that this letter was sent out from your office, do you? A. Oh, yes.

Q. And you know that your name was signed to it? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibit No. 407.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 407 was received in evidence.)

By Mr. Knuff:

Q. Now the weights that are mentioned in Government's Exhibit 407 are the same weights that are mentioned at page 3 of Government's Exhibit 404, is that correct? A. Yes, they are the same.

3809 Q. And the weights that you used in Government's Exhibit 407 were those that you used for open-edge board, is that correct? A. Yes.

Q. In figuring the billing on your open-edge board, Ebsary Gypsum Company used the weights mentioned in Government's Exhibit 407, is that correct? A. Yes, with this exception, that I don't think we were able to get the full price that we mentioned.

Q. I am not asking you about the price. I said—in sending out quotations and in billing your customers for open-edge board, you used the weights that are mentioned in Government's Exhibit 407?

Mr. Bromley: It seems to me that that question ought to be separated, in fairness, between sending out quotations and billing, because they are two entirely different things.

Justice Stephens: Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice Stephens: The question is double. Ask first about quotations, and then about billing. Sustained.

Mr. Knuff: All right.

By Mr. Knuff:

Q. In sending out quotations on open-edge board, you used the weights that are mentioned in Government's

3810 Exhibit 407, is that correct? A. Yes, sir.

Q. And in billing your customers for open-edge board you used the weights mentioned in Government's Exhibit No. 407, is that correct? A. I can't say "yes" to that.

Q. You can't? A. I don't know.

Q. Before you became a licensee, was it your practice to use arbitrary or fictitious weights in quoting on board, or did you use the actual weights? A. We didn't use either one.

Q. What did you use? A. We had to meet conditions as we found them in each market we went into. In other words, we met the condition as we found it. We didn't make up a price of our own and say, "That is our price." We were only a small producer, and we had to take conditions as we found them, and if we were able to sell at those prices, all right.

Justice Stephens: I thought the question was about weights, Mr. Lenci.

The Witness: It was. He wanted to know if we took a mill price and added an arbitrary weight to figure the cost to destination.

Justice Stephens: I see. You are talking about the
3811 time before the license?

The Witness: Yes. That was the question.

By Mr. Knuff:

Q. You say that you had to meet the competition prior to the time you became a licensee, is that correct? A. Yes.

Q. And in quoting on board, you met that competition by quoting the prevailing price, or by quoting a lower price, isn't that correct? A. Yes.

Q. You couldn't cut the price on the freight, could you, that was established by the railroad? A. We had nothing to do with the freight.

Q. So that whenever you did meet that competition, you met it by cutting on the price of board, isn't that correct? A. Yes.

Q. On your mill price of board? A. It eventually worked back to the mill price, because we took the selling price, less the actual freight which had to be paid, leaving the price at the mill.

Q. Now turn to Government's Exhibit No. 404 again, please. On page 2 you will notice that it says:

"Truck deliveries from New Brighton Mill add $3.00 to New Brighton base prices, or $2.00 to Oakfield delivered carload prices."

3812 Do you notice that? A. Yes.

Q. Can you tell us what the business reason was, if you know, for having the truck prices increased over the New Brighton price, or over the Oakfield carload price?

Justice Stephens: Will you please read the last two questions to me, Mr. Grover?. I don't quite clearly get what you are asking about, Mr. Knuff:

(Thereupon, the record was read by the reporter as requested.)

The Witness: I don't know what the reason for that was.

By Mr. Knuff:

Q. On that same page you will notice this statement:

"Truck deliveries from New York and Newark Warehouses, add $2.00 per M sq. ft. to warehouse prices."

Do you notice that? A. Yes.

Q. Can you tell us, if you know, what the business reason was as to why truck deliveries were increased $2 over the warehouse price? A. Well, the material was brought by rail to New York and Newark, and if an additional service had to be given by way of trucking, $2 was added for that additional handling, warehousing and delivery by truck.

Q. I see. In other words, this $2 represented an

3813 additional service that was performed— A. (Interposing) For the customer.

Q. For which the customer was charged $2 over the warehouse price, is that correct? A. Over the price at the warehouse, or f. o. b. cars.

Q. I notice on page 2, on the right-hand side of that page, that there are some notations such as "22.15", and then I can't make out what that other writing is. Can you interpret that for us? A. I wrote it. I could speculate on what that is, but I don't know whether it would be true.

Q. I don't want you to speculate. If you haven't any present recollection— A. (Interposing) I don't have.

Q. You don't have any? A. No.

Q. I also notice just following the statement:

"Truck deliveries from New York and Newark Warehouses, add $2.00 per M sq. ft. to warehouse prices", that there are some penciled notations such as "3/8—15 1/2; 1/2—" and then I don't know whether that is "17" or "170"; and then following the 17 or 170, whichever it is, there is "23.10".

All that is bracketed and to the right of the bracket you

will notice what looks to me like the word "trucks". A. It is "trucked".

3814 Q. Trucked? A. Yes.

Q. What does that mean? A. If I might explain, in the early stages of the plasterboard business, in New York, the customers bought it at so much per board, and those prices there are for 15-1/2 cents on 3/8-inch board, and 17 cents on 1/2-inch board, represented as the price per unit, per board, rather than the price per thousand square feet.

Q. And what is that $23.10, what is that figure? A. That would be $23.10 per thousand square feet.

Q. Delivered how? A. Delivered by truck.

Q. From where? A. That is what that memorandum would mean, I believe.

Q. From where, from the Newark and New York warehouses? A. I think so, because it follows immediately after that.

Justice Stephens: That "15-1/2" means what?

The Witness: 15-1/2 cents per board.

Justice Stephens: What does the figure "17" mean?

The Witness: 17 cents per board for 1/2-inch board.

By Mr. Knuff:

Q. Was that practice of quoting "per board" abandoned? A. It eventually was.

Q. It eventually was abandoned? A. Yes.

3815 Q. It was a recognized practice in the industry before this time, and at this time? A. Yes. It goes back a great many years. The custom in New York had always been to buy what they called "plasterboards" on a unit basis. It goes 'way back even before the time that any so-called gypsum board was made. It goes back to the early stucco board.

Q. And the 15-1/2 cents represented the price per board for 3/8-inch board, is that correct? A. Yes.

Q. And the 17 cents represented the price per board for 1/2-inch board? A. That is right.

Q. Mr. Lenci, I show you what has been marked for identification as Government's Exhibit No. 408, the same being a letter addressed to Mr. George N. Lenci, dated May 24, 1929, signed United States Gypsum Company by C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 408, for identification.)

Justice Stephens: Is that in this additional set?

Mr. Knuff: It came in with the list you had yesterday, and it should follow the letter of May 23, 1929, Gov-
3816 ernment's Exhibit 404, which was the first bulletin issued by USG after the license was signed.

Justice Stephens: What is the date of the letter?

Mr. Knuff: The date of Exhibit 408 for identification is May 24, 1929. On the left hand side of this letter, your Honor, you will find a grand jury exhibit number "8". Maybe that will help you to locate it a little more expeditiously.

Justice Stephens: I will find it eventually. It is not in this set.

Mr. Knuff: I will see that your Honor gets a copy of it.

Justice Stephens: Excuse me, I have it now. I am sorry to have delayed you.

By Mr. Knuff:

Q. Mr. Lenci, did you receive Government's Exhibit 408? A. Yes.

Q. Was that handed out at the meeting in Chicago, or did that come to you by mail, if you know? A. I think it came by mail.

Q. It came by mail? A. Yes.

Mr. Knuff: If your Honor pleases, we now offer in evidence Government's Exhibit No. 408.

Mr. Bromley: We raise only the usual objection.

Justice Stephens: Let me read it, please.

Mr. Knuff: Pardon me.

3817 Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 408 was received in evidence.)

Mr. Knuff: I call your Honors' particular attention to paragraphs 2 and 5 of that letter, paragraph 2 starting, "Minimum Prices to Manufacturers and Jobbers", and so forth; and paragraph 5 beginning with, "You will please send us a list of the jobbers", and so forth.

By Mr. Knuff:

Q. Mr. Lenci, on May 24, 1929, you were selling gypsum board and lath to jobbers, were you not? A. I don't remember.

Q. You say you don't remember whether or not you had any jobbers? A. I don't remember at that time. We never

had very many, and unless you refresh my memory, I can't remember.

Q. Do you remember a firm by the name of Coeyman? A. Yes.

Q. Were they jobbers? A. Yes.

Q. And were you selling gypsum products to Coeyman at this time? A. I don't remember whether it was
3818 just at that time, or not.

Q. Well, at approximately that time. A. We had sold him as a jobber.

Q. You had? A. Yes.

Q. You can't think of any others? A. Sometime prior to that I think we sold the Abbey Company. I don't remember any others just now.

Q. But your best recollection is that you were selling to jobbers at or about this time, but the number of jobbers you cannot now tell us, is that correct? A. They were very few.

Q. Very few? A. Yes.

Q. In the phrase, "Minimum Prices to Manufacturers and Jobbers", you notice the word "Manufacturers" there? A. Yes.

Q. What was your understanding as to the meaning of "Manufacturers"? Did you understand that that meant that that was the price that you could sell the manufacturers who were manufacturing gypsum products but not manufacturing board, or did you understand by the word "manufacturers" that that meant that you could sell to a manufacturer who was also manufacturing board? A. I
3819 don't remember whether there was any distinction made or not.

Q. I see. You will notice that the last paragraph of the letter states:

"You will please send us a list of the jobbers to whom you are selling patented board."

Do you notice that? A. Yes.

Q. Did you send that list to Mr. Henning? A. I think so.

Q. You are not sure at the present time? A. I am not sure, but I think we did.

Q. Do you know, Mr. Lenci, whether other manufacturers were selling through jobbers at this time, or about this time?

Justice Stephens: By "other manufacturers", do you mean other licensees?

Mr. Kniff: Other than Ebsary.

Justice Stephens: Other licensees?

Mr. Knuff: Other licensees, yes, sir.

Justice Stephens: You can answer that "yes" or "no", whether you know or not.

The Witness: I am not sure, no.

By Mr. Knuff:

Q. You are not sure whether they were? A. No. The reason I hesitate on that is that we were doing busi-
3820 ness in a very limited territory.

Q. Did you have any trade information on it at all? A. I don't recall any.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 409, the same being a letter, dated May 25, 1929, addressed to Mr. George N. Lenci, and signed United States Gypsum Company by C. Henning, Vice President in Chg. Sales.

(The document referred to was marked as Government's Exhibit No. 409, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibit 409.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 409 was received in evidence.)

By Mr. Knuff:

Q. You have before you Government's Exhibit No.
3821 404? A. Yes.

Q. You will notice in Government's Exhibit 409 the words, "Acme, Texas"? A. Yes.

Q. That was an addition to the basing points mentioned in Government's Exhibit 404, was it not? By that I mean that Acme, Texas, was added to the list of basing points that were contained in Government's Exhibit 404, is that correct? A. Yes.

Q. Now will you look at the same paragraph where the towns of Oakfield, New York, Gypsum, Ohio, Plasterco, Virginia, and so forth, are mentioned. Do you notice that? A. Yes.

Q. Are these places where the United States Gypsum Company, if you know, had mills? A. I know that they had mills in several of those places.

Q. In what places? A. Well, there is no question about Oakfield, or Gypsum, or Plasterco, or Fort Dodge, Iowa, or Southard, Oklahoma.

Q. What about Grand Rapids? A. I am not sure.

Q. What about Acme, Texas? A. I don't remember.

Q. And Sweetwater, Texas? A. I don't know as
3822 to that.

Q. I show you what has been marked for identification as Government's Exhibit 410, the same being a letter dated June 7, 1929, addressed to George N. Lenci, and signed by C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 410, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Mr. Knuff: I now offer in evidence Government's Exhibit 410.

Mr. Bromley: The usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 410 was received in evidence.)

By Mr. Knuff:

Q. On the first page of that letter there is a penciled notation at the left-hand side, at about the middle of that page. Can you tell us what that means? A. Well, it reads, "#2 & Seconds".

Q. What is the meaning of that, sir? A. I be-
3823 lieve that was just to call attention to the fact that the prices on No. 2 board and seconds had been changed from the previous bulletin.

Q. Now at that time do you know whether United States Gypsum was selling seconds? A. No, I don't know.

Q. You don't know whether they were or not? A. No.

Q. Do you know what their policy was as to the sale of seconds? A. No, I couldn't state that, I don't know.

Q. You don't know? A. No.

Q. I show you what has been marked for identification as Government's Exhibit 411, the same being a letter dated

June 19, 1929, addressed to George N. Lenci, Vice President, and signed United States Gypsum Company, C. Henning.

(The document referred to was marked as Government's Exhibit No. 411, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Mr. Knuff: I now offer in evidence Government's Exhibit No. 411.

3824 Mr. Bromley: The usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 411 was received in evidence.)

By Mr. Knuff:

Q. Will you look at the last paragraph of that letter, reading, "For shipment in straight or mixed cars delivered to dealers in Grand Rapids, Mich., switching limits, add $1.00 per M sq. ft. to prices listed above."

Do you notice that? A. Yes.

Q. Can you tell us what the business reason was, if you know, why $1 was added to the prices listed above in that letter? A. Well, the prices listed above are the prices f. o. b. cars, Grand Rapids mill, and in order to make the price to the customer within the switching limits of Grand Rapids, $1 was added to cover the cost of loading and the switching charge, the handling by the railroad, to the customer's yard, the customer's siding.

Q. Was that an average cost, Mr. Lenci, if you know? A. I have no way of knowing.

Q. You haven't any way of knowing? A. I have

3825 no way of knowing.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 412, the same being a letter, dated June 19, 1929, addressed to Mr. George N. Lenci, Vice President, and signed, United States Gypsum Company, C. Henning.

Did you receive that letter? A. Yes.

(The document referred to was marked as Government's Exhibit No. 412, for identification.)

Mr. Knuff: I now offer in evidence Government's Exhibit 412.

Mr. Bromley: The usual objection.

Justice Stephens: Received in evidence, subject to the usual declaration with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 412 was received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, will you look at the block on that letter, on the first page, dealing with the minimum prices to dealers' warehouses in Brooklyn, Queens, Manhattan, and Bronx Counties. Do you notice the block that I refer to?

3826 A. Yes.

Q. You will notice that there is a minimum truckload of 10,000 square feet mentioned. Do you notice that? A. Yes.

Q. And going down the page into the block relating to the delivered price in truck loads in Nassau County, Long Island, and Westchester County, New York, you will notice that there was a minimum truckload of 8,000 square feet. A. Yes.

Q. And going down to the next block, you will notice that there was a minimum truckload of 7,500 square feet—do you notice that? A. Yes.

Q. Now Government's Exhibit 412 was the first price bulletin in which USG had prescribed minimum truckload quantities, is that correct?

Mr. Bromley: I object to that question as assuming a fact not in evidence, or contrary to the evidence, because this prescribes a price for a truckload.

Mr. Knuff: My question has only been directed as to the minimum truckload requirements. I haven't asked the witness anything about price.

Mr. Bromley: My objection is that there is no minimum truckload requirement. There is a specification of a price for a minimum truckload.

3827 Mr. Oliver: I object on the ground that he is asking the witness—

Justice Stephens: (Interposing) Just a moment. Let us read this so we can pass on one objection at a time.

I suppose it is a matter of interpretation, Mr. Bromley, whether that is a price on a minimum truckload basis, or whether it is a minimum truckload. That being true, the question might be objectionable, Mr. Knuff, as being double. You may have to have some explanation as to which this is.

By Mr. Knuff:

Q. Mr. Lenci, this is the first bulletin—

Justice Stephens: (Interposing) Just a minute, Mr. Knuff. Did you have something, Mr. Oliver?

Mr. Oliver: My point was that the question called for a conclusion. He is asking if this was the first bulletin issued by United States Gypsum covering that. How does the witness know?

Justice Stephens: The question meant—issued to him, as I understood it. Did you understand this question to mean, Mr. Lenci, the first bulletin you received in which the subject of minimum truckloads was mentioned?

The Witness: That is the way I understood it. That is the reason I was looking at these other papers to see if truckloads were mentioned in there.

By Mr. Knuff:

3828 Q. Mr. Lenci, this was the first bulletin you had received from the United States Gypsum Company which prescribed a minimum truckload quantity at a prescribed price, is that correct? A. I believe it is.

Q. Can you tell us what the business reason was, if you know, why there was a minimum so prescribed? A. Well, I could only speculate as to what their thoughts were when they issued this.

Q. You don't know, do you? A. We had nothing to do with the issuance of it.

Q. Would your answer be the same with reference to what the business reason was as to why an 8,000 square foot minimum truckload was prescribed? A. It would have to be the same.

Q. Now at this time were you manufacturing closed-edge board? A. I am not sure. We must have been very close to it. We may have been.

Q. Did you comply with the United States Gypsum price bulletins, did your company comply with the United States Gypsum price bulletins, as to price, terms and delivery requirements? A. Only if we were making the closed-edge board.

3829 Q. In other words, if you were not delivering a closed-edge board you didn't have a minimum truckload requirement, is that what you mean? A. Only as we established one, due to our own economic conditions.

Q. Were you shipping into Brooklyn and Queens and Manhattan by truck? A. Yes.

Q. And what size trucks were you using at that time? A. What do you mean by "what size"?

Q. Well, two-ton or a truck on which you could load 5000 or 10,000 square feet? A. We didn't own any trucks, we hired trucks.

A. And we hired the heavy trucks, large trucks.

Q. On the second page of Exhibit 412 you will notice that the name "Middlesex County, N. J." appears, and underneath it a block of towns. Do you see that? A. Yes.

Q. Could you deliver—

Justice Jackson: (Interposing) Did you say "would" or "could"?

Mr. Knuff: Could.

By Mr. Knuff:

Q. Could you deliver at the prices specified on page 1 of this bulletin, and in the minimum quantities specified
3830 on page 1 of this bulletin, at the bottom of the page, by truck, into any towns in Middlesex County, New Jersey, not mentioned on page 2 of this bulletin?

Mr. Bromley: I object to that unless he means to call for his understanding of the bulletin.

Justice Stephens: What he could do—

Mr. Knuff: (Interposing) Well, I meant of course whether he understood that he could only deliver into the towns mentioned, or whether he could deliver to any towns in Middlesex County which were not mentioned.

Justice Jackson: By reason of this bulletin?

Mr. Knuff: That is right. Suppose I start over again.

By Mr. Knuff:

Q. There were certain towns mentioned on page 2 of Exhibit 412 as being in Middlesex County, New Jersey. Now those towns were not the only towns in Middlesex County, New Jersey, were they? A. No.

Q. There were other towns in that county? A. I believe so.

Q. Was it your understanding that you could not deliver into those unnamed towns, by truck, the minimum quantity of board at the specified price? A. No, I think these towns were merely named here as a matter of convenience. There was no limitation. If there was any town in
3831 Middlesex County that was not on this list, we still could deliver to it.

Q. You still could deliver to it? A. Oh, yes. This was merely a matter of convenience, I believe, and there was no limitation on it.

Justice Stephens: What is the handwriting on the left-hand side of page 2 of this exhibit, if you know?

The Witness: I haven't any idea as to whose writing that is. It isn't mine. It is bad, but it isn't mine.

Justice Stephens: Very well.

By Mr. Knuff:

Q. Is it your understanding that you were not limited by the bulletins to the towns and territories specifically covered by the license bulletins? A. Yes. You are referring to these—

Q. (Interposing) I am referring generally, sir, to your understanding of the bulletins.

Suppose that the license bulletin mentioned delivery by truck into Monroe County, New York, and that was the only county that was mentioned in the license bulletin. Is it your understanding that you could deliver by truck at the same price and in the same quantities, into Genesee County? A. No, not if they specified Monroe County.

Q. In other words—

Justice Jackson: (Interposing) Are they con-
3832 tiguous counties, by the way?

Mr. Knuff: Yes, they are, as I understand it.

Justice Jackson: I just wanted to know.

By Mr. Knuff:

Q. In other words, the license bulletins, when they placed a definite price, and a definite limitation as to loads, and a definite area, precluded you from delivering at the same price and the same minimums, to any other area than that specified in the license bulletin?

Mr. Bromley: I object to that unless he calls for the witness' understanding.

Mr. Knuff: That is what I am asking for, as I recall.

Justice Stephens: Very well.

Justice Jackson: That is intended by the question.

Justice Stephens: Give your understanding as to the effect of the bulletins, as you dealt with them, in respect of the matter inquired about.

The Witness: In all of these bulletins they mentioned lists of counties in which we could make deliveries. We could quote and could sell into those counties mentioned, but if a certain place was not mentioned, if a certain county was not mentioned as being open for trucking deliveries, we could not establish it on our own account.

By Mr. Knuff:

Q. Now in Exhibit 412 you will notice at page 2
3833 that it says, "Hudson County, N. J.—all towns".
A. Yes.

Q. And for Middlesex County they list some towns. Do you notice that? A. Yes.

Justice Stephens: That is on page 2?

Mr. Knuff: Page 2, your Honor.

By Mr. Knuff:

Q. You say it is your understanding that you could ship into the unnamed towns in Middlesex County at the same price and the same minimums as you could ship into those named towns? A. That would be my interpretation.

Q. What would be the reason, if you know, for naming these specific towns? Why not say, "Middlesex County, New Jersey—all towns"? A. I don't know. Take Hudson County, for instance, that is practically all one city, Jersey City. So there would be very little point in covering it any other way.

Essex County is Newark and The Oranges, and very little else.

Union County is Elizabeth and a couple of other towns.

Then when you get out into the country, as a matter of convenience I think these others were listed.

But there never was any limitation that we could
3834 sell a town in Bergen County because it was listed and if there was a town next door to that, which didn't happen to be listed, that we could not sell that.

Q. That was your understanding? A. That was my understanding.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 413, the same being a letter dated June 21, 1929, addressed to George N. Lenci, and signed by C. Henning, Vice President in Charge of Sales.

Did you receive that letter?

Justice Jackson: It is not in my file.

Mr. Knuff: I am sorry, I will see that you are furnished with a copy of that.

Justice Stephens: That is Exhibit 413?

Mr. Knuff: 413, your Honor.

In order to expedite the case, I am going to withdraw that exhibit.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has now been marked as Exhibit No. 413, the same being a letter dated June 26, 1929, addressed to George N. Lenci, and signed by C. Henning. Did you receive that letter, Mr. Lenci? A. Yes.

(The document referred to was marked as Government's Exhibit No. 413, for identification.)

3835 Mr. Knuff: We now offer in evidence Government's Exhibit No. 413.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 413 was received in evidence.)

By Mr. Knuff:

Q. What is the meaning of the penciled notation appearing at the top of that letter just under the address? A. Seconds and #2.

Q. Can you tell us what is meant by that? A. That is a memorandum I put on there calling attention to the fact that this was a change in the price of seconds and No. 2 board.

Q. Now you notice when you come down to 3/8-inch No. 2 grade gypsum wallboard, that the price changed from $18.75 per thousand square feet to $20 per thousand square feet?

Justice Jackson: I haven't that one either.

Mr. Knuff: I am sorry, your Honor, that you don't have it. I will furnish you a copy.

Justice Garrett: I have the letter which you de-
3836 scribe, but I can't find that item that you have just referred to.

Mr. Knuff: It is immediately following the list of towns listed on the first page.

Justice Garrett: Yes, I have found it now. Thank you.

Mr. Knuff: I now offer in evidence Government's Exhibit No. 413.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reser-

vation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 413 was received in evidence on page 4129 of this transcript.)

Justice Stephens: That is quite a long exhibit, and if you are going to have a substantial amount of examination on that, we might as well take the noon recess at this time.

(Thereupon, at 12:15 o'clock p.m. a recess was taken until 1:45 o'clock p.m. of the same day.)

3837 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Proceed, gentlemen.

Mr. Knuff: Judge Jackson, during the lunch hour I sent over to the Department, and I have obtained a negative photostat of Exhibit 413. We didn't have any more positives over there.

Justice Jackson: Well, in good business, particularly banking, there is always a "yes" window and a "no" window. I guess this is the "no" window. (Laughter.)

Thank you. What is the number of that again?

Mr. Knuff: Exhibit 413, Your Honor.

Justice Stephens: You may proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed his testimony as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. Mr. Lenci, I call your attention to the item on Exhibit 413 immediately following the basing points, that is, 3/8" #2 Grade Gypsum Wallboard—price changed from $18.75 per M sq. ft. to $20.00 per M sq. ft. Do you notice that? A. Yes, sir.

3838 Q. That is an increase in your #2 Grade Gypsum Wallboard of $2.50 over the original bulletin price of May 23, is it not? A. It is an increase of $1.25—not in our price, it is in the USG's price.

Q. That is what I say. It is an increase, is it not, of $2.50 over the May 23 price? A. Yes.

Q. And likewise, on your 3/8" Wallboard SECONDS, the price of $17.50 per M sq. ft. is an increase of $2.50 over the May 23 USG bulletin prices? A. That is right.

Q. I show you what has been marked for identification as Government's Exhibit 414, the same being a letter dated July 9, 1929, addressed to George N. Lenci, Vice President, and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 414 for Identification.)

By Mr. Knuff:

Q. Did you receive that bulletin, Mr. Lenci? A. Yes.

Mr. Knuff: I now offer in evidence Government's Exhibit 414.

3839 Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 414 was received in evidence.)

By Mr. Knuff:

Q. You will notice, Mr. Lenci, that in Government's Exhibit 414 no mention is made of No. 2 board in that bulletin? A. That is right.

Q. That means that a licensee who was manufacturing board would be unable to sell a No. 2 board, is that not correct?

Mr. Bromley: I object to that as incompetent because it calls for an interpretation of the bulletin, the interpretation in the question being obviously unsound.

Mr. Knuff: I think, if Your Honor pleases, that is proper cross examination.

Justice Stephens: I don't seem to be able to get counsel to understand the Court's view of that type of examination, Mr. Knuff. I have ruled twice, now, that while the rules permit you to lead, they do not permit you to cross examine as if this witness had been called on direct

3840 examination and is therefore a witness whose understanding might be gone into as bearing upon the meaning of his direct testimony. Whether the effect of these license bulletins was to prevent a particular item of conduct, I should think we would have to determine, as a matter of law, from the bulletins.

Mr. Knuff: I don't think that these bulletins are clear enough so that the Court can, without any further explanation, determine what they do mean.

Justice Stephens: The Court very carefully indicated to you yesterday or the day before that it does not assume or intend to restrict the Government from proving what was done or what was not done after receiving the bulletins. You are entitled to show that, of course, and if the bulletins are ambiguous it may well be that we will get to a point where the interpretation by conduct might be shown. That is a matter we might have to have argument upon before we made a ruling.

What is the question which is objected to?

(The pending question was read by the reporter.)

Justice Stephens: The defendants have not been objecting, this morning, to your examining this witness upon the understanding he had as to the requirements of the bulletins, but you don't even ask that in this question.

Mr. Knuff: I will rephrase my question, Your
3841 Honor. I accept that correction. I assumed that my question had included that. That is what I meant to convey by my question.

By Mr. Knuff:

Q. Mr. Lenci, you understood, did you not, by the bulletin of July 9, that when there was no quotation given for No. 2 board in that bulletin, that you would not be permitted to sell a No. 2 board? A. It was my understanding that this July 9 bulletin indicated that the price was established for a 3/8" wallboard, not specifying, any longer, a difference between No. 1 grade and No. 2 grade. That was my interpretation of it.

Q. If, at that time, you were manufacturing a No. 2 wallboard, and this bulletin had been issued, could you have continued to sell your No. 2 wallboard?

Mr. Bromley: That is the same question. I object to it on the same ground.

By Mr. Knuff:

Q. Is it your understanding that you could have continued to sell that wallboard? A. Well, we never made a No. 2 wallboard.

Q. I understand that. A. If we had, and had sold it, it would have to have been sold at this price in here, which represents the price of 3/8" wallboard, without classification.

Q. And heretofore, there had been a difference
3842 in price between the No. 1 wallboard and the No. 2 wallboard, is that correct? A. That is correct.

Q. And it is your understanding that if you had manufactured a No. 2 wallboard, you would have had to sell that No. 2 wallboard at the same price as for the No. 1 wallboard, is that correct? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 415, the same being a letter dated July 24, 1929, addressed to George N. Lenci, Vice President, and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 415 for Identification.)

Mr. Knuff: I offer in evidence Government's Exhibit 415, Your Honor.

Mr. Bromley: We make the usual objection.

Justice Stephens: Did you ask him if he had received it?

Mr. Knuff: No, I say I am offering it now.

Justice Stephens: Did you ask the witness if he had received this letter?

Mr. Knuff: I beg your pardon, I guess I didn't.

3843 By Mr. Knuff:

Q. Mr. Lenci, did you receive this letter? A. Yes, I did.

Mr. Knuff: We now offer it in evidence.

Justice Stephens: The exhibit is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 415, was received in evidence.)

By Mr. Knuff:

Q. Do you notice, Mr. Lenci, in the third paragraph, it says:

"$16.46 per M sq. ft. in 20-ton minimum cars.

"$15.91 per M sq. ft. in 30 or 40 ton minimum cars."

Do you notice that? A. Yes.

Q. What was the business reason for making a differential in price between a 20-ton and a 30 or 40-ton car, if you know? A. I know. At that time we were not doing business ourselves in the Chicago area, but I do know that a great

many Western railroads had one freight rate for a 20-ton car but a slightly lesser rate if the car was loaded to a heavier weight. Is that clear? In other words, the
3844 freight rate would be less on a 40-ton car, per ton, than it would be on a 20-ton car.

Q. Well, what has the freight rate to do with a differential in price, if you know? A. Well, these prices here represent a mill price plus freight or switching charge to these various destinations mentioned in these first four or five paragraphs.

Q. Well, your price was always a delivered price, was it not, the price that you quoted? A. Yes.

Q. Now then, what would the difference in freight rate have to do with the differential in the size of the car, per thousand feet? A. That is quite simple. If the material cost so much at the mill, and it cost a certain amount to deliver a 20-ton car to a certain destination, but a 40-ton car could be taken to that same destination at a lesser cost per ton; the corresponding delivered price would be less by the difference in the cost of transportation.

Q. Is it your understanding that the business reason was to try to equalize the delivery price so that a 20-ton car could be delivered at the same price as a 30-ton car? A. No. It is just the opposite. It was giving the customer the benefit of the lower price if he bought a larger quantity.

3845 Q. Well, is this $16.46 per thousand square feet a delivered price? A. Yes.

Q. That is a delivered price? A. Yes.

Justice Stephens: Let the Court understand that. How can that be unless it was known exactly what the freight rate was?

Justice Jackson: They evidently knew what the freight rate was, didn't they?

The Witness: They must have known what the freight rate was when they established this, and that probably represents an average to these various points in the Chicago suburbs.

Justice Stephens: I see.

The Witness: Can I make that clear for you?

By Mr. Knuff:

Q. It isn't clear to me. A. These prices are fairly arbitrary. I am not familiar with the exact prices, but suppose the price at the mill was $15.00, and the freight rate on a

20-ton car was $1.50 a thousand. That would be a price, delivered, of $16.50. But suppose the railroad says, "If you ship a 40-ton car we will give you a correspondingly lower freight rate, and your freight will only be $1.00
3846 a thousand." It would be $15.00 at the mill plus only $1.00, which would make $16.00 at destination, in return for the customer buying a larger quantity.

Justice Stephens: Those freight rates were sufficiently stable so that you could depend upon them as guiding your price on a delivered price basis?

The Witness: Yes, they were all I. C. C. published rates, and this represents probably the average to these points.

By Mr. Knuff:

Q. What do you mean by "average costs" within that area? I think you used the words "average cost". A. Yes.

Q. What do you mean by that? A. I didn't write these bulletins, you understand.

Mr. Bromley: He didn't say "average cost".

Justice Stephens: You mean average freight rate, do you not?

The Witness: Yes.

By Mr. Knuff:

Q. What do you mean by that? A. I didn't write these bulletins, as I say, and I am only speculating. I am trying to explain it to the Court.

Justice Stephens: Don't speculate about it if you don't know how these prices were figured out. I think it is
3847 clear now.

By Mr. Knuff:

Q. What do you mean by "average freight"? A. Let's use Washington as an example, to make it clear. Suppose Washington downtown had a rate of $1.25 to Bethesda, and $1.30 to Silver Spring, and $1.35 to Chevy Chase. The average of those would be $1.30. That would be the average rate which might well be established for deliveries to various suburban points around the center of Washington.

In other words, if you didn't do that you would have a dealer in Chevy Chase getting one price, and right next door you would have a dealer getting still a different price, and over at Silver Spring you would have a dealer getting another price. You have got to keep the people who are doing business in the same area, more or less on the same price basis.

Q. I see. And the purpose of this was to assure everybody in Chicago, whether he was on the North side of Chicago or the South side of Chicago, that they could get their board at the same price; is that correct? A. Yes, because they were all competing in the same little suburban towns.

Q. They were competing in what way, in price or
3848 in service? A. I am speaking now of the dealers.

Q. There was no price competition, was there? A. I am speaking of the customer; the dealer, who had to sell to the ultimate consumer, had to be able to buy at the same price as his next-door neighbor.

Q. I show you what has been marked for Identification as Government's Exhibit 416, the same being a letter of the United States Gypsum Company dated July 25, 1929, addressed to George N. Lenci, and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 416 for Identification.)

By Mr. Knuff:

Q. Did you receive that letter? A. Yes.

Mr. Knuff: We offer in evidence, if Your Honor pleases, Government's Exhibit 416.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 416, was received in evidence.)

3849 By Mr. Knuff:

Q. On Exhibit 416, Mr. Lenci, do you see any price on that bulletin for Seconds? A. No, this appears to be only a plasterboard bulletin.

Q. Well, is there any price on there for Seconds of plasterboard? A. No.

Q. There never was a price for Seconds on plasterboard under the bulletins? A. I don't think there was, no.

3850 Q. I show you what has been marked for identification as Government's Exhibit 417, the same being a letter dated July 26, 1929, addressed to George N. Lenci, and signed by Mr. Henning.

(The document referred to was marked as Government's Exhibit No. 417, for identification.)

By Mr. Knuff:

Q. Did you receive that, Mr. Lenci? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibit 417.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 417 was received in evidence.)

By Mr. Knuff:

Q. The last paragraph of that letter reads:

"Plasterboard not delivered by our trucks to dealers warehouses. Please disregard the minimum price for delivery by truck given in our letter of July 25."

Can you explain what that means? A. That is a
3851 correction of the July 25th bulletin, of the second paragraph on the third page. That paragraph reads, "for truck deliveries to dealers warehouses". This letter of July 26th is apparently correcting that, by saying that plasterboard is not delivered by trucks to the dealers' warehouses. It is merely a correction in the wording of the previous bulletin.

Q. Is it your understanding that this meant there would be no truck deliveries to the dealers' warehouses out of Charlestown, Massachusetts? A. That is right.

Q. I show you Government's Exhibit 418, for identification, the same being dated August 3, 1929, addressed to George N. Lenci, and signed by Mr. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 418, for identification.)

By Mr. Knuff:

Q. Did you receive that, Mr. Lenci?

Justice Garrett: Just a moment, please. The next one in order here is the one of July 31st.

Mr. Knuff: I am omitting that, your Honor.

Justice Garrett: You are not offering it?

Mr. Knuff: I am not identifying it or offering it.
3852 Justice Garrett: All right.

The Witness: Yes, I received that.

Mr. Knuff: I now offer in evidence, if your Honor please, Government's Exhibit 418 for identification.

Mr. Bromley: I make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 418 was received in evidence.)

By Mr. Knuff:

Q. By this time, I take it, Mr. Lenci, the Ebsary Gypsum Company was making closed-edge wallboard and plasterboard, is that correct? A. I would say so, yes.

Q. And you had been making it for some little time prior to the receipt of this exhibit? A. I believe so, yes.

Q. Did you know when the Utzman patent expired? A. In August 1929, I forget the day.

Q. August 5th or 6th, 1929. And you received a bulletin from the licensor on August 3, 1929, is that correct? A. Yes.

Q. Now after August 6—

Justice Stephens: (Interposing) That is not
3853 exactly correct, is it? Did you receive it on August 3d, or was it dated August 3d?

The Witness: It was dated August 3d.

By Mr. Knuff:

Q. It was dated August 3d? A. Yes.

Q. And you received it within a day or two after that, would you say? A. Yes.

Q. Now then, did you ever receive a bulletin, after August 6, 1929, advising the Ebsary Gypsum Company that you were not required to follow the previous bulletins that were sent you? A. No.

Q. You never received such a letter? A. No.

Q. After August 6, 1929, you continued to sell board, and lath, at the same prices that you had sold it previous to August 6, did you not? A. To this extent. This was a transition period. We still were closing out our old materials and working ourselves up to the new basis. Without reference to some other records I could not say whether we were actually securing these prices, at this time, or not. You see what I mean? We had commitments, we had closed orders ahead.

3854 On your closed-edge board that you were selling after August 6th, did you observe bulletin prices?

Mr. Bromley: I object to that as incompetent, as assuming facts not in evidence. There weren't any bulletin prices after August 6. Every one of these notices is limited, in the opening paragraph, to the Utzman patent, and the contract specifically provided that there should be no right to fix prices after the expiration of this patent on August 6, 1929.

Justice Stephens: The objection is sustained. You may ask him what prices he charged after August 6, 1929, and you may ask the Court to compare them with the previously announced bulletin prices.

By Mr. Knuff:

Q. On your closed-edge board and on your closed-edge lath, did you comply with all the terms and conditions of the bulletins that were sent you prior to August 6, and on those products which were sold by you prior to August 6, 1929?

Mr. Bromley: I object to that as calling for a conclusion.

Justice Jackson: I wish you would break up that question a little bit, Mr. Knuff. It involves too many things.

Mr. Knuff: I will try to do that.

By Mr. Knuff:

Q. Mr. Lenci, I am referring now to the period prior to August 6, 1929. You understand that? A. Yes.

3855 Q. And I am also referring to closed-edge board. Do you understand that? A. Right.

Q. On your sales of closed-edge board, did you comply with the terms and conditions of the USG bulletins? A. Prior to August 6?

Q. That is right. A. I can't tell you, I don't know.

Q. You don't know? A. I don't know. I say that honestly because, like everyone in the business, we all had orders and contracts taken ahead, and we had to fulfill our prior obligations. Now whether we had cleaned up those obligations and gotten into these new prices, and were securing these new prices, or not, I cannot answer, I do not know.

Q. Those commitments you had were on open-edge board, were they not? A. We had to fill them with something.

Q. I am just referring, Mr. Lenci, to closed-edge board. A. I know that.

Q. Did you comply with all the terms and conditions of the USG bulletins that were issued prior to August 6, 1929?

Mr. Bromley: He has answered that and said that he can't possibly tell. I object to it as repetitious.

3856 Justice Stephens: Sustained. You are not foreclosed from asking what terms and conditions he did sell on, if he knows.

By Mr. Knuff:

Q. Did you comply with any of the USG price bulletins on closed-edge board prior to August 6th? A. We probably made some sales on the higher basis, but we had a great many that we had to clean up at older and lower prices.

Q. Now what are you referring to when you say you had to "clean up"; are you referring to open-edge or closed-edge board? A. We had orders for board—

Q. (Interposing) What kind of board? A. Any kind of board; and if we couldn't fill them with open-edge board, our customers expected us to make deliveries and we had to make deliveries with whatever board we had, and that towards the last, up near this period, was closed-edge board. We moved from one type of board to another in completing these orders. So I can't honestly say that we were fulfilling the terms of these bulletins in full.

Q. You probably were complying with some of those bulletins as to some of the orders, is that correct? A. That is quite possible.

3857 Q. And after August 6, 1929, did the Ebsary Gypsum Company change its sales policy on closed-edge board? A. No.

Q. Do you know if other licensees, after August 6, 1929, sold board at the same price that they had sold it prior to August 6?

Mr. Bromley: That calls for a "yes" or "no" answer.

Justice Stephens: Do you know about that?

The Witness: I don't know that, no, sir.

By Mr. Knuff:

Q. If they had sold it, would you have known?

Mr. Bromley: I object to that as speculative.

Mr. Knuff: I think it was brought out very clearly by Mr. Higgins that this is a very competitive industry, and the minute there was a change in price it was known throughout the industry.

By Mr. Knuff:

Q. Isn't that true, Mr. Lenci? A. Yes, but you must remember—

Justice Stephens: (Interposing) Yet it is a speculative question. The objection is sustained.

By Mr. Knuff:

Q. Did you have any trade information that after August 6, 1929, there was any difference in price policy in the industry than there was before August 6th, with reference to closed-edge board and lath? A. I don't remember.

3858 Q. You don't remember? A. No.

Q. Prior to May 22, 1929, the board situation was in a demoralized condition, I believe you have testified. A. It was in a very bad condition.

Q. Now after August 6, 1929, did the industry return to that condition? A. No.

Q. I show you what has been marked for identification as Government's Exhibit 419, the same being a typewritten sheet of paper headed, "June 6th Discussion."

(The document referred to was marked as Government's Exhibit No. 419, for identification.)

By Mr. Knuff:

Q. Will you look at that, Mr. Lenci?

Justice Stephens: Have we that before us?

Mr. Knuff: You should have that, your Honor.

Justice Jackson: Is it this paper that has a lot of numbered sentences on it?

Mr. Knuff: That is right, your Honor.

Justice Jackson: There is no date on mine.

Mr. Knuff: The date is probably under the clip at the top.

By Mr. Knuff:

3859 Q. The paper that you have before you, Mr. Lenci, was prepared by you, was it not? A. Yes.

Q. And it was prepared after you had attended a meeting in Chicago on the 6th of June, 1929, is that correct? A. Yes.

Q. And it was prepared a few days after that meeting, is that correct? A. Yes.

Mr. Knuff: We offer in evidence, if your Honor pleases, Government's Exhibit 419.

Mr. Bromley: I object to it as incompetent. I am not sure what it is, yet. It seems to me that no proper foundation has been laid for it.

Justice Stephens: We don't understand what it means, Mr. Knuff, and unless we do we cannot very well tell whether it has any bearing on the issues in this case. Can you have it explained a little further?

Mr. Knuff: Yes, I can have it explained.

By Mr. Knuff:

Q. Mr: Lenci, the paper that you have before you purports to contain notes of a meeting that you attended in Chicago on the 6th of June, 1929, does it not? A. Yes.

Q. And these are notes of the discussion that was
3860 had at that meeting, is that correct? A. Yes.

Q. And you attended that meeting? A. Yes.

Q. And you prepared the notes shortly after that meeting was held, is that correct? A. Yes.

Mr. Knuff: I think, if your Honor pleases, that it is now properly identified.

Mr. Bromley: I don't understand that these notes would be competent in the absence of an attempt to develop from the witness what happened at the meeting.

Justice Stephens: You don't show what the meeting was, and who was at the meeting. For all we know, it might have been a meeting of the Board of Directors of the Elks. (Laughter.)

What was the meeting, and who was there? You can perhaps tell us that informally.

Mr. Knuff: All right. I was under the impression that I could refer to the items—

Justice Stephens: (Interposing) Ordinarily that is true, but there are exceptions. We cannot rule upon exhibits as to their materiality and competency unless we know what they mean, and as to competency here, we can't tell yet whether this is offered to refresh his recollection,
3861 or as past recollection recorded, and if so, what—and until the word "what" is explained, we don't know whether it is relevant to any issue in the case.

Of course there are words on it which indicate that it has some relevancy, some relationship to the issues in the case, at least. It refers to "board" and "bubble board", and other things that we have heard of before.

We will permit you to examine the witness on this a little further, subject to a motion to strike if you do not develop that it is competent and material—in order that we may understand what it is.

By Mr. Knuff:

Q. There are sixteen items on this exhibit, are there not, Mr. Lenci? A. Yes.

Q. And they represent sixteen topics that were discussed at the meeting of June 6, 1929, which you attended, do they not? A. Yes.

Q. Who was present at that meeting that you can recall? A. I don't remember the individuals, but I think most of the licensee companies were represented.

Q. Was the United States Gypsum Company represented at that meeting of June 6? A. Yes.

3862 Q. Who attended for United States Gypsum Company, Mr. Avery, or Mr. MacLeish, or both? A. I don't really remember who attended for them. I know that Mr. Henning attended.

Q. Was Certain-teed represented there? A. I think so.

Q. Was National represented there? A. I think so.

Q. And of course you were present. A. Yes.

Q. And who else was present for Ebsary? A. I don't know whether anyone else was present at that meeting, or not. I have no record here to refresh my memory.

Q. Was any person there representing the Kelley Plasterboard Company? A. I don't think so.

Q. Was there anybody representing Atlantic Gypsum Company, present? A. I believe there was.

Q. That was Mr. Neale? A. It probably was Mr. Neale.

Q. When you say "probably", do you mean that that is your best recollection? A. Yes, I believe Mr. Neale was there.

Q. Was Mr. Channing there? A. I don't know, I
3863 don't remember.

Q. Was Texas Cement Plaster Company represented there at the meeting? A. I don't remember. I would say that Mr. Chism attended one of the early meetings, but I do not remember whether it was this individual meeting or not.

Q. Where was this meeting held? A. In Chicago.

Q. At the Palmer House in Chicago? A. I think so, I think so.

Q. On May 22nd and 23rd, 1929, when you were in Chicago, and at the time Ebsary signed the license agreement, was June 6 fixed as the date for a meeting of the licensees? A. I don't recall.

Q. Who called the meeting of June 6th? A. Charlie Henning—Mr. Henning.

Q. And what did he tell you the purpose of this meeting was? A. I don't remember that.

Q. How did he notify you that there was going to be a meeting held on the 6th of June? A. Well, sometimes we would get a telephone call, or a telegram, or a letter. It might come in either way.

Q. You don't know whether you received a telephone call, or a telegram, or a letter from Mr. Henning?

3864 A. No, I don't recall.

Q. But you know it was Mr. Henning that conveyed the information to you that there would be a meeting on the 6th of June, 1929? A. Yes, he acted as the chairman, and he was the usual one who called the meetings, in fact he always called the meetings.

Q. And do you recall what information was conveyed to you as to who would be present at that meeting? A. As to the few notices which I do remember getting, the letter would simply say, "There will be a meeting of the licensees" on such-and-such a date at such-and-such an address, and no agenda was given, or anything of that kind.

Q. You don't recall, Mr. Lenci, if I understand you correctly, whether or not you received a telephone call, or a telegram, or a letter advising you that a meeting was going to be held? A. That is right.

Q. But you did go to Chicago on the 6th of June? A. Yes.

Q. And you attended a meeting there? A. Yes.

Q. And the various companies that you have mentioned attended that meeting also? A. Yes.

3865 Q. Now what was discussed at that meeting? A. Well the first thing mentioned on this memorandum is bubble board contracts and—

Justice Stephens: (Interposing) Don't read from the memorandum. You were asked what was discussed at the meeting. If you remember yourself, tell us from your own memory.

The Witness: I was using this purely as a reminder.

Justice Stephens: That is all right. Have you no independent recollection of what took place at the meeting, without that memorandum?

The Witness: Not completely, no. I would have as to one or two of the items.

Justice Stephens: And this proposed Exhibit 419 does refresh your recollection as to what took place?

The Witness: Yes.

By Mr. Knuff:

Q. Will you state what did take place at that meeting of June 6th, with reference to bubble board? A. At the June 6th meeting Mr. Henning asked us to be sure to have our lawyers check up on the bubble board contracts which had been, as I recall it, submitted just prior to this time.

You see—going back to the May meeting—Mr. Avery told us about the bubble board invention or patents, rather—.

Q. (Interposing) Did he tell you that at the May
3866 meeting or at the June meeting? A. At the May meeting. And following that meeting there were contracts, as I recall it, mailed to the various licensees, to be submitted to our attorneys, for them to check. Mr. Henning asked us to please get after our counsel to look over these licenses, these proposed licenses, and to send them in or make comments upon them.

Q. You say that Mr. Henning told you to get after your attorneys to have them check over these agreements, is that correct? A. Yes.

Q. What was Mr. Henning's hurry about that, do you know? A. I don't know.

Q. You don't? A. No.

Q. At the meeting where Mr. Avery told you about this bubble board arrangement, do you recall that Mr. Avery stated to you that he had been in Europe a few months previous for the purpose of purchasing ships to haul gypsum from Nova Scotia to the United States, and while he was in Europe he had contacted the inventor or the owners of the Bayer patent, and that he had found out from the owners or the inventor that the United States was going to be thrown open for the use of their patent in two respects: One, as to gypsum; and two, as to cement; and that Mr. Avery had received the American rights
3867 for the gypsum business. Do you recall that? A. I recall the greater part of it. I don't remember his reason for going to Europe to buy a ship, I don't remember anything about that part of it. But I do recall what he said about the Bayer patent being thrown open for use in the United States for cement and gypsum, and Mr. Avery said he had secured the rights to use the Bayer patent in gypsum. I do remember that.

Q. Do you recall that Mr. Avery told you that the reason why he had secured the rights for the Bayer patent was because Mr. Roos had an application in the Patent Office

for a patent, and that there was an interference proceedings in the Patent Office between Mr. Roos and Mr. Bayer? Do you recall that? A. I don't remember all of that. I do remember that there was a Roos application. I don't remember whether Mr. Avery explained that or not.

Q. You are not sure of that? A. No.

Q. Now the so-called American application for the bubble process was known as the Roos application, is that correct? A. That is, the American applicant was Mr. Roos.

Q. Carlisle K. Roos? A. I don't know his first name.

Q. He was connected with the United States
3868 Gypsum Company? A. I believe so, yes.

Q. Did Mr. Avery at that time, that is at the May meeting, explain the advantages of the Roos process? A. I don't remember that he differentiated between the Roos and the Bayer processes. He did speak on the advantages of the bubble system, as we have always called it.

Q. And what were the advantages that Mr. Avery spoke of? A. Well, the great advantage was the saving in weight.

Q. Did he specify as to how much weight could be saved by the use of the so-called bubble board process? A. I don't know that he put it in figures, but we realized it was quite a large amount. We could understand from his explanation that a lot of this dense matter in the board would be supplanted by these bubbles, and the board's strength would not be lessened at all, but it would reduce the weight.

Q. And Mr. Avery explained all that to you at this May meeting? A. Yes, at the May meeting.

Q. That is your recollection on that? A. Yes.

Q. And subsequent to that, the United States Gypsum Company had sent you and the other licensees a license agreement covering the use of the bubble process,
3869 is that right? A. It is my recollection that that was sent between the May meeting and the June meeting, which was the reason for the memorandum here that the bubble board contracts were to be considered by various counsel.

Q. So that when you got to Chicago on the 6th of June, Mr. Henning called your attention to the fact that the licensees had received a tentative draft of the bubble license, and Mr. Henning asked you, and asked all the rest of the gentlemen who were present, to have their attorneys hurry up and check into that application, is that correct?

Mr. Bromley: I don't think he said anything about hurrying up in his answer.

Justice Stephens: The witness did not use the words "hurrying up". That is not a correct statement of his answer. But you may ask him what was said.

The Witness: I am sorry Mr. Bromley said that because I was going to say the same thing, and I wouldn't want you to think that he led me, because I don't recall that he hurried us.

Mr. Bromley: I withdraw the objection.

By Mr. Knuff:

Q. What did he say? A. He simply mentioned that they had been sent out—I think they were sent directly to counsel and not to the companies—and for us to see whether they were going to go through or not.

3870 Q. Now at that meeting on the 6th of June, was there any discussion as to whether or not the American Gypsum Company would be offered a license similar to the license that Ebsary had signed in May? A. Yes, it is my recollection—may I refer to this to refresh my recollection?

Justice Stephens: If it refreshes your recollection you may do so. He wants your best recollection, but there is no objection to your using that to refresh your recollection.

The Witness: I don't want you to think I have an artificially good memory, because I haven't, but this does refresh my memory.

Justice Stephens: Very well.

The Witness: It was stated at the meeting that American hadn't taken a license, but that they would later.

By Mr. Knuff:

Q. Who said that, if you recall? A. My recollection is that Mr. Henning made the statement, but I am not sure.

Q. Did any of the other persons present make any comment as to whether or not it was desirable for American to become a licensee? A. I don't recall.

Q. You don't recall that? A. No.

3871 Q. What was your own attitude on that, or the attitude of your company? A. We were not too directly interested, because we operated in different areas. We did not overlap.

Q. So it didn't make any difference to you whether or not American did become a licensee? A. Not too much, no.

Q. Now at that meeting on June 6th, was the question of jobbers in the industry discussed? A. Yes.

Q. Who discussed that? A. Mr. Henning.

Q. What did he say about it? A. He asked all the licensees to send to him a list of the companies they were selling as jobbers.

Q. And did he say anything else other than for you to send the list? A. I don't recall. The idea was to see how many of them there were.

Q. Did Mr. Henning at that time state that the United States Gypsum Company did not market their products through jobbers, their gypsum products? A. I don't remember.

Q. You don't recall that? A. I don't recall that.

3872 Q. Did any of the licensees make any comment as to jobbers at that time? A. I don't recall that.

Q. You don't have any recollection at all about it? A. I have no recollection.

Q. But you do know that Mr. Henning made the suggestion that all the licensees were to send in a list of their jobbers? A. Yes.

Q. Or was it just your company, which? A. I think they were all asked.

Q. They were all asked, that is your recollection? A. That is my recollection, yes.

Q. Now you have noted on this exhibit, "Dealer Distributors—send list." What do you mean by that? A. I am sorry now but I could not tell you at this late date what the difference was between a dealer distributor and a jobber.

Q. You haven't any recollection? A. I don't really know.

Q. You haven't any recollection as to the meaning of that item on this list?

Justice Stephens: Well, the question strictly speaking is whether that item on the list refreshes his recollection. This isn't in evidence. But you can ask him directly, of course, since he is an experienced businessman,

3873 about those distinctions, if he wishes to adventure upon them.

Mr. Knuff: I am only asking him as to his recollection of the things that are on this list.

Justice Stephens: Well, I think—and I say this only in the interest of saving time—that the list should be used.

to refresh his recollection, and not his recollection used to identify the list. Perhaps we mean the same thing. I thought the witness understood that he was entirely free to testify as to what he recollected, independently of this, and he is entirely free to consult this list, which has been marked Exhibit 419 for identification if it refreshes his recollection, and if it does, he may testify to his refreshed recollection. But this isn't in evidence yet, and therefore he could not testify as to what the list means. That is what you last asked him, with respect to one item.

Mr. Knuff: Probably your Honor is correct. I didn't mean to do that.

Justice Stephens: Thank you. Proceed.

By Mr. Knuff:

Q. At the meeting of June 6, 1929, was there any discussion concerning manufacturers and carload and less-than-carload manufacturers? A. Well, if there was, I cannot remember now what it was.

Q. Was there any discussion at the meeting of June 6 concerning mail-order houses as an outlet for gypsum
3874 products? A. Yes, I do remember that.

Q. I believe you brought that up yourself, did you not? A. I may have.

Q. What is your recollection concerning that, Mr. Lenci? A. Well, there was a question as to whether the large mail-order houses should be sold at a cheaper price than the builders' supply yards in their same towns, and I believe the custom in the past had been to sell them at a 10 per cent discount below the usual dealers' price in each particular town. We thought that was not quite right, that they should not have the advantage over the outfit with its own yard.

Q. What is that again? A. That they should not have the advantage over the builders' supply yard in the same town.

Q. In other words, you brought up the question as to whether or not the mail-order house should have a price advantage over the building supply dealer, is that correct? A. That is correct.

Q. And it was your thought that the mail-order house should not be sold on any more favorable basis than the building supply dealer, is that correct? A. That is correct, yes.

Q. And whom did you make that statement to, or did you make any such statement at the meeting, let me put

it that way? A. I don't know whether I started it or
3875 whether someone else spoke about it, but I believe I expressed my views along the same lines as I have just now.

Q. Did you specifically ask whether Mr. Avery was selling to Montgomery, Ward & Company at that time? A. I don't know.

Q. You don't recall that? A. No.

Q. You knew at that time that Mr. Avery was on the Board of Directors of Montgomery, Ward & Company, did you not? A. I don't know just when his connection did start. I know that he has been, for a number of years, but whether it went back as far as 1929 or not, I don't remember.

Q. Wasn't it your thought that if United States Gypsum Company was selling to Montgomery, Ward & Company, the other dealers should be in a position to sell to Sears, Roebuck & Company? A. Well, no, I think we were looking to protect the local dealer.

Q. You were entirely against favoring the— A. (Interposing) The mail-order house.

Q. The mail-order house? A. Yes.

Q. And you so expressed yourself at the meeting? A. Yes.

Q. Did any other persons express themselves at
3876 that meeting, also, in that respect? A. I have really forgotten now, but I believe some of them did.

Q. But you can't tell us now who did? A. No.

Q. At the meeting of June 6th, was there any discussion concerning the price at which gypsum products should be sold to house wreckers? A. Yes.

Q. Your use of the words "house wrecker" is synonymous with the term "bathtub yard", is it not? A. Yes, they are practically the same thing.

Q. Just what is a bathtub yard? A. Well, a bathtub yard, or a house wrecker, is a dealer that sets up to buy second-hand material from buildings that are wrecked, or in some cases he may do the wrecking himself. That gives him a nucleus of second-hand lumber and second-hand plumbing equipment. With that as a basis, he calls himself a dealer and puts in a line of other new materials, and they were known throughout the trade as house wreckers or bathtub yards.

The question came up as to whether they were considered dealers or not, and they are dealers, and were so considered.

Q. And that was discussed at the meeting of June 6? A. Yes.

3877 Q. And at that meeting what position did you take on that? A. I don't remember whether I took any position on it or not. I can't remember it, but I do remember it was discussed, and if I took any position it would be that they were dealers.

Q. These so-called bathtub yards are quite numerous in the State of New Jersey, are they not? A. There are plenty of them, but there are not as many as there were.

Q. Now was there any discussion as to whether these bathtub yards should be sold at dealer prices, or not? A. No, the question was as to whether they were to be recognized as dealers.

Q. And was there any decision made at that time? A. And they were, yes.

Q. And who made that decision? A. Mr. Henning.

Q. Mr. Henning? A. We didn't make decisions.

Q. And what did Mr. Henning tell you about that, that the USG would recognize these wreckers or bathtub yards as dealers? A. Yes.

Q. And that they could be sold on a dealer basis?

3878 A. Yes.

Justice Stephens: We will take the afternoon recess.

(Thereupon, a short recess was taken, after which the trial was resumed.)

3879 Justice Stephens: Proceed.

By Mr. Knuff:

Q. At the June 6 meeting that we have been previously discussing, was there any discussion concerning the price which the Government was to be charged for gypsum board and lath? A. Yes, there was.

Q. What was that discussion? A. The discussion was that on any direct sales to the Government departments, they were to have the benefit of the dealer's price.

Q. And do you recall who participated in that discussion? A. I don't know whether it was a discussion or a statement by Mr. Henning. I don't think it was a discussion, I think it was merely a statement which he made.

Q. Do you recall whether any of the persons in attendance at the meeting commented on Mr. Henning's statement? A. I don't remember what the comments were, but I believe everybody felt that was the right thing to do.

Q. Everybody felt that it was all right to sell the Government gypsum board and gypsum lath at— A. (Inter-

posing) Yes. You see, at that time the Treasury Department was purchasing, and to a certain small extent
3880 the Army, and on direct purchases we felt they were entitled to the lowest price.

Q. And by "direct purchases", what do you mean? A. When they placed orders with any of the gypsum board producers.

Q. Like National or Certain-teed or yourself? A. Yes.

Q. Any of the people that were manufacturing gypsum board, you felt it was perfectly all right for the Government to buy that board directly from the manufacturer? A. Yes.

Q. And it didn't necessarily have to go through a dealer? A. That is right.

Q. And that the price the Government would get would be the dealer price? A. That is right.

Q. And Mr. Henning told you that that would be done? A. He told us that that was to be what was done.

Q. And you all agreed that that was the fair and right thing to do? A. We didn't agree that it was, but we felt that it was.

Q. At the meeting of June 6, was there any discussion concerning whether or not there should be a differ-
3881 ential on the purchases of wallboard when it was picked up by a truck at a mill or at a warehouse? A. I believe there was. I believe the statement was made that it cost more at the mill, for instance, when a customer's truck backed in to be loaded with a small quantity of material, than would be the case in our usual course of business to take the material right from our kilns to the boxcar and load the cars.

Q. Do you recall who made that statement? A. No, I don't.

Justice Stephens: Will you please read that answer? I didn't understand it.

(The answer was read by the reporter.)

By Mr. Knuff:

Q. Now when you say it cost more, you meant by that, Mr. Lenci, did you not, that you could handle a large order for gypsum board or gypsum lath cheaper than you could handle an order for, we will say, a thousand square feet? A. Yes.

Q. In other words, if a man came in and bought 1,000 square feet of gypsum board, and there were 30 such customers, it cost you more to handle that 30,000 square feet

of gypsum board than it would cost you to handle 30,000 feet sold to one customer? A. That is right.

3882 Q. And that would be because of the amount of the bookkeeping involved, and the additional service, and so forth? A. Yes.

Q. And you felt that on these small purchases at the mill, or it was felt, rather, that there should be a differential over and above the price that you would get for quantity purchases? A. That is right.

Q. What had been the practice of your company before that? Did you sell a thousand square feet of board at the same price that you would have sold 30,000 square feet of board, before, that is, at the same unit price? A. I don't really remember.

Q. You don't recall what the practice was? A. No.

Q. Do you recall what the practice of the industry was? A. No, I don't.

Q. When you put wallboard on the studding, the joints between the two boards, as a general rule, are imperfect, or not perfect; is that correct? If you take two pieces of wallboard and put them on the studding like this (indicating), the joint is not a perfect joint, is that correct? A. No, there is a visible joint there.

3883 And in order to get that joint to a certain degree of perfection, you fill that crack in there with so-called finisher, is that correct? A. We call it joint filler.

Q. Joint filler? A. Yes.

Q. Now at the June 6 meeting, was there any discussion as to this filler? A. I believe there was. There had been a badly abused custom of giving away filler, which in a way was a rebate, they would give any quantity of filler.

Q. You say there had been a custom in the gypsum industry to supply filler on an order of wallboard, is that correct? A. In some cases, yes.

Q. And that filler was supplied free of charge, is that correct? A. It sometimes was charged for and at other times given away.

Q. And you say that that custom of either selling it or else giving it away, had been prevalent in the gypsum industry for some time, is that correct? A. Yes, as I recall it.

Q. Was there any discussion as to the advisability of discontinuing the giving away of filler with board or-

3884 ders? A. I don't know whether it was a discussion or whether it was a statement made by Mr. Henning

that a gift of filler would be considered a rebate. It was more in that light.

Q. Was there any general discussion concerning that? A. I don't think so.

Q. You don't believe there was any discussion about that? A. I don't think so.

Q. At the June 6 meeting, was there any discussion as to the amount of protected board that USG had on hand? A. Yes.

Q. Now what do you mean by the term "protected board"? A. Well, all of the companies had orders booked ahead. I mean, that is the usual way of doing business. Your dealer would buy, at that time, not for a specific job but he would buy 400,000 feet or 500,000 feet at a fixed price—

Q. (Interposing) For future delivery? A. Yes, so he would know what that was going to cost him.

Q. Yes. A. And we were all caught with these unfilled orders on our hands. And Mr. Henning, I remember, said that their company alone had 3 million feet for which they were obligated at lower prices, which was a business obligation that would have to be fulfilled. We had the same
3885 thing, on a smaller scale, and I imagine the other companies had.

Q. In other words, the dealer in gypsum board or gypsum lath might order 50,000 feet of board today, from a producing company, for future delivery; is that correct? A. Well, at that time there were two or three dealers around New York, and I think the same thing existed in other large cities—we had one particular dealer who would buy in 500,000 foot lots. He would place an order for a half a million feet to be delivered on call, and when we signed the license agreement we had several of these orders on our books; and that was the reason this morning, when you were asking me if we secured the high price immediately, I had to say no, because these orders ran along for a period of months.

That brings up the next question, that before these orders were completed we ran out of open-edge board and had to complete the low-price orders with the board which we were making at that time, which was a closed-edge board. That ran over a period of maybe 3 or 4 months.

Q. In other words, you explained to Mr. Henning that you had orders on hand for a considerable amount of open-edge board for delivery, is that correct? A. Yes.

Q. And that you didn't have the open-edge board to deliver to cover those orders? A. Yes.

3886 Q. And you asked Mr. Henning if you could sell closed-edge board to take care of your open-edge board commitments, is that right? A. That is right.

Q. What did Mr. Henning tell you? A. He said that that was all right.

Q. Now on this protected board question, when a dealer buys board for future delivery, what was the custom as to the maximum time at which delivery could be made? A. Well, I think those delivery dates were very loose.

Q. Well, now, what do you mean by "loose"? A. I mean that at that time—you are getting into 1929 and 1930—if an order was offered to us, we would take it and be glad to have it on our books, knowing that eventually it would be filled. In other words, we were not too tight with our final delivery dates.

Q. In other words, if somebody came in and ordered 10,000 feet of board from you, to be delivered on demand, you would take the order; is that correct? A. Well, 10,000 feet is—

Q. (Interposing) A small order? A. It is only a part of a carload. But the usual way is that the dealer would
3887 say, "Well, I am figuring on such-and-such a job, which will need a certain quantity of board. I am placing my order with you for this material." That job might not be completed for 2 or 3 or 4 months, and he was protected with us, and he knew that his board was going to cost him so much. That is what this protected board item is.

Q. To make this specific, on the Pentagon Building down here, when the contractor took the job to construct that Pentagon Building, in order to protect himself he placed with the manufacturer an order for so many million feet of gypsum board—would that be correct? A. He bought some gypsum board, yes.

Q. And it may have been a year before that gypsum board would have been used; is that correct? A. Yes.

Q. And in the meantime, if prices went down, would he be given the advantage of the decline in that price? A. He would take it.

Q. He would take it? A. He would take it. The customer is always right.

Q. But if prices went up, the manufacturer was obligated to sell at the price that the dealer contracted for? A. That is right.

Q. And is that the discussion that was held out in
3888 Chicago on the 6th of June? A. No, that is slightly different.

Q. What was the discussion out there? A. The discussion out there was that these orders were to be filled at the price at which they were booked. It didn't go into the question of whether, if the price went down, then the contractor was going to buy it at a less price, or anything of that kind. It wasn't as full as that.

Q. Was there any discussion as to the length of time you would be permitted to protect a contractor on his purchases? A. I don't remember any.

Q. You don't recall any? A. I don't recall any at all.

Q. Was there a bulletin ever issued concerning that? A. I think much later on there was. In fact, I am quite sure there was.

Q. By "much later on", do you mean a year or two years? A. I would say probably 2 or 3 years later.

Q. Two or three years later? A. Yes. The later bulletins, I think, provided that—I am not sure of the language—but the idea was that only on specific jobs could orders be booked ahead, and that we couldn't take orders for unlimited quantities unless some particular building was involved.

3889 Now at your meeting on June 6, did you have any discussion concerning the patent markings that you would put on the board? A. No, that wasn't a discussion. I remember that quite well, because we were new in the business, and we didn't know how to mark our board, and I saw Mr. Henning in his office and asked where to buy labels similar to those that they were using at that time, which contained the patent numbers, and he gave me the address of a label printing house in Chicago that I visited that same afternoon, and I placed an order for labels.

Q. Then at the meeting of June 6, there was no general discussion concerning— A. (Interposing) That wasn't a general discussion, that was something I took up with him personally.

Q. At the June 6th meeting, was there any discussion as to what the price of No. 1 gypsum board was going to be on the 7th of June? A. No, this memorandum—I beg your pardon, I can't refer to that.

Justice Stephens: You can use it to refresh your recollection. But answer the question, if there was any such discussion, if you do remember such discussion.

The Witness: No, I don't remember.

By Mr. Knuff:

3890 Q. There wasn't any discussion as to the price that was to be made the following day? A. I don't think so.

Q. Was there a price change made the following day? A. I think there was.

Q. On No. 1 board or No. 2 board, or on both? A. Well, I haven't got the exhibit here before me. I think I had it this morning.

Mr. Knuff: May I have Exhibit 410, please?

(Exhibit 410 handed to the witness.)

Justice Stephens: Of course, the Court does not forbid you to use parts of this exhibit as past recollection recorded if there is any part which is the record of a past recollection. But I suppose you can clear this up by looking at these bulletins, can't you?

Mr. Knuff: That is the reason I asked for Exhibit 410, and I am going to ask him to refer to that.

Justice Stephens: Go ahead.

By Mr. Knuff:

Q. Do you have that exhibit before you? A. I have it, yes.

Q. Now on June 7, was there a price change? A. There was on June 7, yes.

Q. And what item was changed? A. That was the 3891 change in the price of No. 2 board and Seconds.

Q. Was it an increase or a decrease in price? A. It was an increase.

Q. No. 2 board was increased from what to what? A. No. 2 was increased from $17.50 to $18.75 per thousand square feet.

Q. And your Seconds were increased from what to what? A. From $15.00 to $16.25 per thousand square feet.

Q. Did the price of lath remain the same? A. Yes.

In order to clear up the record, it may be that this was handed us as we left, I am not certain.

Q. When you say "this", you have reference to Exhibit 410? A. Exhibit 410. It may have been handed to us, although I do not remember that circumstance.

Q. This morning, I understood you to say that you received it through the mail. A. That is what I thought, because it is dated a day later, and I don't think it was handed to us. You see, my memorandum was made up

after I got home, and it may have included this information which I would have gotten by the time I got back to New York.

Q. Was there anything said at the meeting of June 6 with reference to when another meeting was going
3892 to be held, of the licensees? A. Yes.

Q. When was the next meeting going to be held? A. June 26.

Q. At the June 6th discussion was there anything brought up about the Hite and Haggerty patents, do you recall? A. I don't think so, I don't remember that at all.

Q. Do you know what I mean by the so-called Hite and Haggerty patents? A. Yes.

Q. The Haggerty patent is the patent that has starch in it? A. That is correct.

Q. And you have no recollection of a discussion at the June 6 meeting concerning the Hite and Haggerty patents? A. No.

Mr. Knuff: If Your Honors please, we now offer in evidence Government's Exhibit 419. This is a memorandum made by the witness from the meeting that was held in Chicago on June 6, 1929, and as I understand this witness he made this memorandum himself and it purports to give a resume of the matters that were discussed at that meeting.

Justice Stephens: Have you any objection?

Mr. Bromley: Do I understand it is only being
3893 introduced because it was used to refresh recollection?

Mr. Knuff: It is being introduced for several purposes. One is that it is past recollection recorded; and, second, it is offered as a declaration of a co-conspirator.

Mr. Bromley: Well, I object to it, if that is the ground of the offer. Since it has been used to refresh recollection, I suppose it could be offered and received on that ground, but on that ground only.

Justice Stephens: Well, the Court has always been of the view, Mr. Bromley, that items which are used to refresh recollection, while they may be exhibited to the witness, and should be exhibited to counsel and the Court so that there may be a determination of whether or not they could reasonably be used to refresh recollection, are not themselves evidence, and are therefore not admissible.

Mr. Bromley: Well, I object to it on that ground, then.

Justice Stephens: But past recollection recorded is another thing. If the witness has forgotten the transaction, but at the time of it made a statement of what took place

at the transaction and can now testify that it is a correct statement of what took place at the transaction, then under the doctrine of past recollection recorded it can come in itself. But this witness has given full testimony as to what did take place in this meeting of June 6, and
3894 therefore there is no need of having it in as past recollection recorded.

So far as it being a declaration is concerned, it is no different as a declaration from the statement he has made, which is more extended.

Why do you need this?

Mr. Knuff: Well, I certainly think that this exhibit, as an exhibit, is certainly corroborative. I think it is a declaration, and for that purpose I would like to have it in the record.

Justice Stephens: We are all three of the view that it is not admissible in evidence as evidence, and it is excluded.

The declarations which you claim it to be have really been made by this witness himself in his description of the conversation. And it isn't an intelligible declaration, as such, it is simply an itemization of points which were discussed at this meeting; and the witness has stated that it does refresh his recollection.

But as I have stated, it isn't necessary as past recollection recorded, because the witness has a present memory. So it is excluded from evidence and not received.

Mr. Knuff: I don't know, but possibly we are going to have quite a considerable number of declarations of this kind.

3895 Justice Jackson: We will rule on them as they occur.

Mr. Knuff: Very well.

By Mr. Knuff:

Q. I show you, Mr. Lenci, Government's Exhibit 420, the same being a letter dated June 21, 1929, addressed to Mr. H. W. Rippey, Powers Building, Rochester, New York, signed George N. Lenci, Vice President.

(The document referred to was marked as Government's Exhibit No. 420 for Identification.)

By Mr. Knuff:

Q. Do you recognize that, Mr. Lenci, as a copy of a letter that you sent to Mr. H. W. Rippey? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibit 420.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 420, was received in evidence.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked
3896 for identification as Government's Exhibit 421, the same being a letter dated June 21, 1929, addressed to the United States Gypsum Company, and signed George N. Lenci, Vice President.

(The document referred to was marked as Government's Exhibit No. 421 for Identification.)

By Mr. Knuff:

Q. Do you recognize that, Mr. Lenci, as a copy of a letter that you sent to the United States Gypsum Company? A. Yes.

Q. Now at that time, that is, on June 21, 1929, were you in production yet on your closed-edge board? A. I can't tell you, I don't know.

Q. What is your best judgment on that?

Mr. Bromley: I object to his judgment. If he can't tell, he can't tell.

Justice Stephens: Objection sustained.

By Mr. Knuff:

Q. Your license agreement was signed on May 22, 1929? A. That is right.

Q. How long did it take you to equip your plant to get into production on closed-edge board?

Mr. Bromley: I object to it as repetitious. He has already said a month, about.

Justice Stephens: It has been answered.

3897 Mr. Knuff: I don't believe that question has been answered.

Justice Jackson: Is that correct, a month?

Mr. Knuff: He didn't say any such thing as "a month".

Justice Jackson: Did you say "a month"?

The Witness: I don't know the exact time.

Justice Stephens: I thought you testified this morning that it took you about a month to get into operation.

The Witness: Mr. Knuff asked me yesterday, and I said somewhere between a month and two months. It was a very short period. We had to change the equipment to turn the edge.

Justice Stephens: It has been answered, then. He did testify either yesterday or this morning to that effect.

By Mr. Knuff:

Q. Was that on big board or lath that it took you from a month to two months to get into production? A. Yes, it would apply on both, because the machinery for turning the edges was similar for both products.

Q. And do you know when you finally completed your change-over completely so that you were manufacturing nothing else but closed-edge board? A. I don't know the exact time, no, sir.

Q. Can you approximate that time? A. It would be a pure guess.

3898 Q. What? A. It didn't take long, but I don't know how long.

Q. Did you replace your entire board machine? A. No.

Q. You just changed your old board machine over to meet the new conditions? A. Can I explain what the change involved?

Q. Yes.

Mr. Bromley: I object to it as immaterial. What has that got to do with the case?

Mr. Steffen: It may refresh his recollection as to how long it took him to get into production. We would also like to know where he got his machinery.

Justice Stephens: Read the last two or three questions and answers.

(The record was read by the reporter.)

Justice Stephens: What do you wish to prove by it, Mr. Knuff?

Mr. Knuff: I want to refresh this witness' recollection, if it can be refreshed, as to whether or not the extent of the changes would indicate to him when the change-over was completed.

Justice Jackson: Hasn't he already testified it was between one and two months?

Mr. Knuff: Yes.

3899 Justice Stephens: What is the importance of the exact date of the change? I am not saying that it

is not important, I just want to know so I can make a sensible ruling.

Mr. Knuff: Look at the first paragraph of this letter, please: "* * * * we are changing our price list immediately in accordance with this information."

Justice Stephens: Is this Exhibit 421?

Mr. Knuff: This is Exhibit 421, Your Honor.

Justice Stephens: Let me read it again.

Now, what do you want to prove by the question in connection with the equipment?

Mr. Knuff: I want to know whether or not, at that time, they were pricing their open-edge board, or whether this change related to the price of closed-edge board. Obviously if the change-over hadn't been made, what they were doing at this time was pricing the open-edge board in accordance with the information that the bulletin contained.

Justice Stephens: Then you may have an answer to the last question, if it is preliminary to trying to fix the witness' memory on the time of the actual commencement of manufacture of closed-edge board. The objection is overruled.

By Mr. Knuff:

Q. You started to answer the question by making an explanation, and at that time Mr. Bromley made an
3900 objection. The Court has said that you may make the explanation. Will you proceed, Mr. Lenci? A. The only change involved was—when you make an open-edge board, the board is made wider than necessary and at the far end of the machine there are saws that cut off the raw, damaged edges. When you make a closed-edge board, you use a wider paper and that paper is turned at the beginning of the process. In other words, the paper goes into the machine and the plaster goes on top of it, and the edge is turned over and tucked under the top sheet of paper. The only changes in the machine were the elimination of the cutting saws, the trimming saws, at the far end; and the substitution of the little machine for turning the edges at the near end of the machine.

Q. There would be another change also, and that would be that you would have to secure a wider width of paper in order to turn it over, would you not? A. Yes, that is true.

Q. Now then, do you recall how long it took to make these change-overs? A. It wouldn't take very long. I

couldn't give the exact time, but it was just a question of a few weeks, 2 or 3 or 4 weeks, probably.

Mr. Knuff: If Your Honor pleases, we offer Exhibit 421 in evidence.

3901 Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 421, was received in evidence.)

By Mr. Knuff:

Q. Will you look at the next to the last paragraph of that exhibit, Mr. Lenci, and see whether or not that refreshes your recollection as to whether or not you were distributing your products through jobbers on or about June 21, 1929?

You mentioned Coeyman this morning, and you also mentioned the Abbey Company this morning, do you remember that? A. Yes.

Q. Now I notice in here the name G. B. Raymond & Company. Do you see that? A. Yes.

Q. Were they jobbers? A. Yes.

Q. And I notice the name Eastern Builders Supply Company, Baltimore, Maryland; were they jobbers? A. Yes.

Q. In addition to those three, and the Abbey
3902 Company, can you recall any other jobbers that you were distributing your products through? A. I don't remember.

Q. Do you know the Teachout Company in Cleveland? A. No.

Q. Did you ever hear of them? A. I have heard of them.

Q. You weren't distributing through the Teachout Company? A. No.

Q. Did you know the name of Orin Perry in New York? A. Yes.

Q. Were you distributing through Mr. Perry? A. No.

Q. Do you know whether or not Mr. Perry was a jobber?

Mr. Bromley: I object to that as incompetent. Mr. Perry has already told us what he was.

Justice Stephens: What is the opinion of this witness worth in the face of Mr. Perry's own testimony as to what he did?

Mr. Knuff: Mr. Perry told us what he did—

Justice Jackson: This man's opinion wouldn't make any difference, would it, since Mr. Perry told the Court what his business was? It couldn't change it.

Mr. Knuff: That is probably right.

3903 Justice Stephens: Objection sustained.

By Mr. Knuff:

Q. Mr. Lenci, I show you what has been marked for Identification as Government's Exhibit 422, the same being a letter of July 3, 1929, addressed to the Ebsary Gypsum Company and signed John E. MacLeish.

(The document referred to was marked as Government's Exhibit No. 422 for Identification.)

By Mr. Knuff:

Q. Did you receive that letter? A. Did you say from the United States Gypsum Company?

Q. No, signed John E. MacLeish. A. Oh, yes.

Q. You say you did receive this letter? A. Yes.

Mr. Knuff: We offer it in evidence, if your Honor please, as Government's Exhibit 422.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to the declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 422, was received in evidence.)

3904 By Mr. Knuff:

Q. In this exhibit, Mr. Lenci, I notice that there was to be a meeting held on July 9, 1929. Did you attend that meeting? A. I don't remember.

Q. You did attend a meeting on the 22nd of May, and you attended one on the 6th of June? A. Yes.

Q. Now between the 6th of June and the 9th of July, did you attend any meetings? A. I don't remember.

Q. And by "meetings", I mean meetings with other gypsum manufacturers, concerning a proposed license agreement. A. Yes.

Q. You don't remember? A. I don't remember.

Q. And you don't recall whether or not you attended this meeting on the 9th of July? A. No.

Q. You have no recollection about that? A. No.

Q. Were you at a meeting on the 26th of June? A. No. While you were asking about this, I was trying to think back about the 26th of June, and I was wondering
3905 if that meeting hadn't been put off until July 9th.

Q. Do you recall whether it had or not? A. No, I don't. I am just trying to think. I don't remember.
3906 Q. I show you what has been marked for identification as Government's Exhibit 423, the same being a copy of a letter dated the 17th day of July, 1929, addressed to H. W. Rippey, and signed Ebsary Gypsum Company, by George N. Lenci, Vice President.

(The document referred to was marked as Government's Exhibit No. 423, for identification.)

By Mr. Knuff:

Q. Would you state, Mr. Lenci, whether or not you wrote that letter? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibit No. 423.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 423 was received in evidence.)

By Mr. Knuff:

Q. You will notice in the second paragraph of that letter, Mr. Lenci, that there was a meeting to be held on July 25, at the Palmer House—do you notice that? A. Yes.
3907 Q. Do you know whether or not you attended that meeting? A. I don't recall, but I do recall making a trip to Chicago during that summer with Mr. Rippey. Whether it was for that meeting, or the one before, or one after it, I don't know. It might have been this one.

Q. When you say you made a trip to Chicago with Mr. Rippey, can you tell us whether that trip was between the meeting that you attended on June 6th, and July 25th, as mentioned in the second paragraph of this letter? A. I don't really know.

Q. You can't place the date between the 6th of June and the 25th of July? A. No.

Q. Mr. Rippey was not with you at the meeting on the 6th of June, was he? A. I don't think so. No, he was not at that meeting.

Q. Now at this meeting that you said you went out to attend, that you went out to Chicago to attend, with Judge Rippey, who else attended that meeting other than yourself and Mr. Rippey? A. I don't remember.

Q. Did any person? Were any other companies represented? A. I really have no recollection of it at all.

Q. All that you can recall now is that at some time, you believe in the summer of 1929, you did go to Chicago
3908 to attend some meeting with Mr. Rippey? A. Yes.

Q. And that is the extent of your present recollection? A. Yes, that is right. I don't have anything to place it in my mind.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 424, the same being a letter dated April 5, 1930, addressed to yourself and signed by C. Henning.

(The document referred to was marked as Government's Exhibit No. 424, for identification.)

By Mr. Knuff:

Q. Will you state whether or not you received that letter. A. Yes.

Q. Now the date of that letter is April 5, 1930—do you notice that? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibit 424.

Mr. Bromley: The same objection.

Justice Stephens: Let the Court read it.

(After reading proposed Government's Exhibit No. 424.)

Received, subject to the usual reservation with re-
3909 spect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 424 was received in evidence.)

By Mr. Knuff:

Q. Now on April 5, 1930, was the Ebsary Gypsum Company manufacturing an open-edge board? A. No.

Q. They had completely changed over their plant so they were then manufacturing a closed-edge board, is that correct? A. That is right.

Q. Do you know at that time whether the United States Gypsum Company was manufacturing an open-edge board? A. No.

Q. Do you mean that they weren't, or do you mean that you don't know, which? A. I don't think anybody was making an open-edge board.

Q. No person was making an open-edge board in the industry at that time? A. No.

Q. You will notice on the left-hand side of this letter a memorandum. Can you translate that for us? A. I think it reads, "See correction in letter of April 15th".

Q. Is that your handwriting? A. Yes, that is my
3910 handwriting.

Q. "See correction in letter of April 15th"? A. Yes.

Q. What does that mean? A. I imagine that later there was another letter written by United States Gypsum Company under date of April 15th which corrected something in this. I don't know.

Q. You will notice in Exhibit 424 that it states, "Sizes only of 16″x48″ and 16″x32″ bundled".

Do you notice that? A. Yes.

Q. Can you tell us what the business reason was for confining the size to 16″x48″ and 16″x32″, if you know? A. Yes, I know what it was.

Q. What was the reason? A. The whole point of this bulletin is that in manufacturing gypsum board there are a certain number of boards which are not perfect, and they are cut up into small sizes which we call "recuts", and this bulletin was setting a price for these recut boards made from the big boards which were made in the usual way, with a closed edge.

Q. That was called an open-edge board? A. They were called recuts, not open-edge. Everybody knew them as recuts.

Q. They were an open-edge board? A. They might
3911 be open-edge or closed-edge. One side, if it happened to be that it came with a finished edge on one side of the board it was cut from, might have a finished edge, or it might have an open edge. But they were known as recuts, and this bulletin was to tell us that we could sell recut board in certain territories, which recuts where made from board made under the license.

Q. And you could sell that in certain territories and you could also sell that only in certain sizes, is that correct? A. That is correct.

Q. What was the business reason why those sizes were limited, if you know? A. I don't know.

Q. And this bulletin only applied to certain designated areas, is that correct? A. That is correct.

Q. And what is the reason, what is the business reason, if you know, why only certain designated areas were prescribed as a recut market? A. Well, if you will look over the list of cities there you will see that they are mostly the larger cities in the Eastern part of the United States.

Q. What is the business reason? A. And the dealers in these larger cities could dispose of these recut boards much easier than a dealer in a small country town who
3912 bought board and had to keep it a long while in that town.

Q. And you would say that the business reason for that, then, was that this recut board could be disposed of in larger cities to a greater advantage than it could in smaller communities? A. That is right.

Q. And you could only sell this board in certain designated areas, is that correct? A. Yes.

Q. And the areas were all designated in the license bulletins? A. That is right.

3913 Justice Stephens: The Court will take the afternoon recess at this time.

Just a moment, however, before we adjourn.

I would like to call the attention of counsel on both sides of the case, but especially of Government counsel who raise this question so frequently, to the little text-book called "Hughes on Evidence", which is based on Thayer's "Cases on Evidence", and is one of the best books that I know of. I don't do this in any school-teaching sense of the term, but only to illustrate how the Court is making its rulings and why it is making its rulings as it is on past recollection recorded and present recollection refreshed. I have found in my experience as a judge that this little statement here is as clear and definite and well-founded a statement of the rule as exists. It will perhaps save a lot of time if counsel understand the basis of the Court's rulings.

Section 21, at page 336, states:

"For the purpose of refreshing his present memory a witness may examine memoranda. Where the examination is made for this purpose it is immaterial by whom, or when, the memoranda were made. In this case, the memoranda themselves are, as a rule, inadmissible. After making the examination, the witness testifies independently of them.

As said by Lord Chief Justice Ellenborough, 'If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient, and it
3914 makes no difference that the memorandum is not written by himself, for it is not the memorandum that is evidence, but the recollection of the witness.'"

In Section 22 it is pointed out that:

"Although a memorandum which is used by a witness merely to refresh his memory is not, as a general rule, admissible in evidence, the opposing counsel have the right to inspect it and to cross-examine him upon it. Moreover, the jury (in this instance the Court) also have the right to inspect it" in order "to test the veracity of the witness." • • • "'The other party had a right to know what the memorandum was on which he relied, and whether it had any legitimate tendency to bring the fact in controversy to mind. It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which was permitted here'."

That makes perfectly clear—and it is supported by a substantially unbroken line of authorities—that where you are refreshing a present recollection, while the memorandum is inspectable by Court and counsel, it is not evidence itself and it isn't admissible in evidence.

On the other hand, when you get to past recollection recorded, there the rule is, as set forth in Section 23:

"Not only may a witness use memoranda to refresh his present memory, but he may also adopt memoranda as a record of past recollection. In the former case he
3915 testifies independently of the memoranda, in which case the memoranda themselves, as previously stated, are usually inadmissible. In the latter case his testimony is based upon the memoranda which are themselves admissible. In the former case he swears to an actual present recollection. In the latter case he swears to recorded facts because of his confidence in the correctness of the memoranda. As said by Chief Justice Simpson, 'The rule upon this subject, in its broadest outline, embraces two classes of cases: first, where the witness, after referring to the paper, speaks from his own memory and depends upon his own recollection as to facts testified to; second, where he relies upon the paper and testifies only because he finds the facts contained therein'."

It is essential, in the second case of past recollection recorded, "that the memorandum was made at or about the time the events recorded therein occurred, and that it be verified and adopted by the witness as a record of past recollection"—in which event the witness is not testifying to his present memory, he is only testifying to the correctness of the memorandum, and his oath as to that makes the memorandum, since he states it was made at or about the time of the events which it purports to describe, and since he states that it describes them correctly—makes the memorandum itself admissible in evidence.

Now I apologize for taking the amount of time I
3916 have on this, but we have been debating, ever since the beginning of this case, as to whether these little items are admissible in evidence, and I state this for the guidance of counsel so that they will understand the rules the Court has followed and which it believes are well settled.

Now Exhibit 419 for Identification, since you state it is typical of a large class of evidence, seems to have been used by the witness to refresh a present recollection, and is not past recollection recorded. It doesn't even purport to be a past recollection recorded, in any sense of being a completed declaration. It is merely an itemization of disconnected statements which the witness himself did not say was a complete record of what took place at the meeting to which it is alleged to relate. He states merely that it refreshes his memory.

We are not assuming to rule that the Government cannot introduce declarations which are partly oral and partly in writing, if they are in the nature of declarations. But it was made perfectly clear through this witness that this was merely a memorandum being used to refresh recollection.

I hope I have made the Court's rulings clear.

Did you want to say something, Mr. Knuff?

Mr. Knuff: I guess I had better not.

Justice Stephens: Feel quite free to do so if you don't understand the Court's statement.

Mr. Knuff: I understand your Honor's statement.

3917 (Whereupon, at 4:10 o'clock, p. m., the hearing was recessed until Thursday morning, February 17, 1944, at 10:00 o'clock).

3918 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Thursday, February 17, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

3922 Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. Mr. Lenci, I show you what has been marked for identification as Government's Exhibit 425, the same being a letter dated April 15, 1930, addressed to George N. Lenci, and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 425 for Identification.)

By Mr. Knuff:

Q. Did you receive that letter?

Justice Jackson: That is in this second group of exhibits?

Mr. Knuff: I believe it is in the second group of letters that I furnished the Court. It is dated April 15, 1930. It is on the letterhead of the United States Gypsum Company and is dated April 15, 1930, Judge Jackson—a one-page exhibit.

Justice Jackson: I have it.

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

3923 Mr. Knuff: We offer in evidence Government's Exhibit 425.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 425, was received in evidence.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 426, the same being a letter addressed to Mr. Fred Ebsary, President, and signed C. Henning, Vice President in Charge of Sales. That is dated June 3, 1930.

(The document referred to was marked as Government's Exhibit No. 426 for Identification.)

By Mr. Knuff:

Q. Was that letter received at the office of the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibit No. 426, Your Honor.

Mr. Bromley: We make the usual objection.

3924 Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 426, was received in evidence.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 427, the same being a letter dated February 11, 1931, addressed to Mr. Fred Ebsary and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 427 for Identification.)

By Mr. Knuff:

Q. I ask you whether or not that letter was received at the offices of the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibit No. 427.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

3925 (The document referred to, marked as Government's Exhibit No. 427, was received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, referring to Government's Exhibits 425, 426 and 427, is it your understanding that these bulletins refer to the price of recut gypsum board, known as recuts? A. Yes.

Q. Is it your understanding that that is the same class of board that was covered by the bulletin offered in evidence as Government's Exhibit 424? A. May I see that exhibit?

(Government's Exhibit 424 handed to the witness.)

By Mr. Knuff:

Q. If I understand your testimony correctly, you said that it was your understanding that Exhibit No. 424 applied to recut gypsum lath, and I want to know whether Exhibits 425, 426 and 427 are bulletins covering the same character of lath? A. Yes, it is.

Justice Stephens: In other words, where the words "open-edge gypsum board" are used in those exhibits, it doesn't mean board manufactured as open-edge gypsum board but board manufactured as closed-edge board

3926 and then recut?

The Witness: That is correct.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what have been marked for identification as Government's Exhibits 428 and 428-A, 428 being a carbon copy of a letter dated January 20, 1930, addressed to Mr. C. F. Henning, and signed George N. Lenci, Vice President; and 428-A being the original of a letter which purports to be a reply to your letter of January 20, 428-A being dated January 22, 1930, addressed to you and signed C. Henning, Vice President in Charge of Sales.

(The documents referred to were marked as Government's Exhibits 428 and 428-A for Identification.)

By Mr. Knuff:

Q. Did you write the letter of which Exhibit 428 is a copy, and did you receive the reply which is marked Government's Exhibit 428-A? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibits 428 and 428-A, Your Honor.

Mr. Bromley: And we make only the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Govern-
3927 ments Exhibits 428 and 428-A, were received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, in exhibit 428 you wrote to the United States Gypsum Company and asked them whether or not the Teachout Company of Cleveland, Ohio, may be considered as a wallboard jobber. What was your purpose in writing that letter? A. Well, at the present time, I have not the slightest recollection of why I asked for that information. We were not selling in Ohio, as I remember it, at that time, and I don't really know. We might have had an inquiry, but that would be purely suppositious.

Q. You haven't any present recollection as to the purpose in writing this letter? A. Not the slightest.

Q. After you received the reply from Mr. Henning, advising you that the Teachout Company was not considered a jobber, do you know whether or not you sold the Teachout Company? A. No, we never had previously, nor have ve since, sold to the Teachout Company.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 429, the same being a copy of a letter dated February 13, 1930, addressed
3928 to Mr. C. F. Henning and signed Ebsary Gypsum Company, George N. Lenci, Vice President.

(The document referred to was marked as Government's Exhibit No. 429 for Identification.)

By Mr. Knuff:

Q. Will you tell us whether Exhibit 429 is a copy of a letter that you did write Mr. Henning? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibit No. 429.

Mr. Bromley: And we make only the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 429, was received in evidence.)

By Mr. Knuff:

Q. You will notice in the first paragraph of that letter, you are asking the United States Gypsum Company whether Winslow & Company, of Portland, and John Varick, of Manchester, New Hampshire, are considered as jobbers. Can you tell us the purpose or the reason why you wrote that letter to Mr. Henning? A. I think
3929 that we had an inquiry from our New England salesman—

Q. (Interposing) When you say you "think", do you mean by that that that is your present recollection? A. That is my present recollection.

Q. Go ahead with your answer. A. That finishes it. The inquiry asked if we could sell these two companies as jobbers.

Q. You had an inquiry from your New England representative asking whether the Ebsary Gypsum Company would be in a position to sell them as jobbers? A. Yes.

Q. And why did you write to Mr. Henning? A. Well, I wrote to him because at that time the question of jobbers was still open.

Q. By that, what do you mean, Mr. Lenci? When you say "the question was still open", what do you mean? A. As I remember—you might correct me if I am wrong—I

think this is prior to the time when the bulletins specified that jobbers were to be sold at the dealer price.

Mr. Bromley: That is right.

Mr. Knuff: That is correct.

The Witness: And we, being new in the business, did not know whether or not these people were jobbers, and I was asking for this information.

3930 By Mr. Knuff:

Q. Well, didn't your company determine for itself as to their policy as to who was and who was not a jobber? A. Yes, but I was asking for whatever information I could get.

Q. Well, did you think, at that time, that Mr. Henning could give you some information as to whether or not they were jobbers, these firms? A. Yes.

Q. And do you recall whether or not he did give you the information? A. That I don't remember, whether we got a reply or not.

Q. Do you recall whether or not you sold Winslow & Company of Portland, Maine, and John Varick of Manchester, New Hampshire, as jobbers? A. My recollection is that we did not sell either of those companies at that time, but very much later—and by that I mean 10 years later—I think we sold John Varick.

Q. As a jobber? A. No, as a dealer.

Q. What was the sales policy of the Ebsary Gypsum Company, at that time, as to selling through jobbers? Was it favorable to having its products sold through jobbers? A. No, it was not.

3931 Q. It was not? A. That is right.

Q. The policy of the Ebsary Gypsum Company at that time was to distribute their products through dealers rather than through jobbers, is that correct? A. Yes.

Q. And has that been a consistent policy from that time up to the present time—and by that I mean, has it been the consistent policy of the Ebsary Gypsum Company to sell through dealers rather than through jobbers? A. That has always been our policy.

Q. Now can you tell us what reasons you had for adopting that policy? A. Well, the primary one was that we got more money for our material.

Q. Is that the only reason? A. That is the principal reason.

Q. Were there any other reasons? A. The other reason would be that if you were selling a jobber in a large town, and then you had other dealers there, this jobber very often would take the material which he bought at the jobber's discount and sell it to the ultimate consumer in competition with our own dealers that were paying us our usual dealer's price, and we set up an artificial competition against ourselves.

3932 Q. By saying that you "set up an artificial competition against yourselves", did you mean that the person that you sold as a jobber would be in a position, probably, to cut the price, and since you were furnishing the material you would be more or less competing with yourself; is that what you mean? A. That is exactly it.

Q. And you didn't want the jobbers, you didn't want any person to be in a position to be able to cut the price of the product, is that correct? A. That is correct, yes.

Q. Because if they did, they would compete with you? A. Yes.

Q. And you would be furnishing— A. (Interposing) Furnishing the material at a cheaper price.

Q. I see.

Now when you say that they would be in a position to cut the price, do you also mean that they would be in a position to cut the price to dealers? A. I can only speculate on that.

Q. Well, what do you mean by that? A. Well, they would have a commission as a jobber—

Justice Stephens: (Interposing) Do you mean a discount?

3933 The Witness: Yes, a discount. They would have a jobber's discount. Say, for argument's sake, it was 10 percent. They could split part of that commission and keep, say, 5 percent, and undersell us with one of our dealers by the other 5 percent.

By Mr. Knuff:

Q. Now you say that they could "split" that 10 percent. Split it with whom, the dealer? A. Yes, they would keep 5 percent and quote the dealer 5 percent less than we would quote the dealer.

Q. And that is another reason why you were opposed to jobber distribution of your products? A. Yes.

Q. You wanted the good will of your dealers? A. That is correct.

Q. And you wanted to sell those dealers at a uniform price, is that correct? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 430, the same being a letter dated August 8, 1930, addressed to Mr. Fred Ebsary and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 430 for Identification.)

3934 By Mr. Knuff:

Q. Will you state whether that letter was received at the office of the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: We offer in evidence, if Your Honors please, Government's Exhibit 430.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 430, was received in evidence.)

By Mr. Knuff:

Q. Prior to the time that you received Government's Exhibit 430, what was the jobber's commission or discount, in percentage? A. I think it was 10 percent.

Q. Ten percent? A. Yes.

Q. That is, the person who was acting as a jobber, if lath was selling at $13.00 a thousand, they bought it at a discount of 10 percent, or $1.30 off that price? A. That is my recollection.

Mr. Bromley: That appears in Exhibit 408 as 10 percent.

3935 By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 431, the same being a memorandum dated 9/22/30, addressed to you and signed George P. Turner.

(The document referred to was marked as Government's Exhibit No. 431 for Identification.)

By Mr. Knuff:

Q. You received this memorandum from Mr. Turner, did you not? A. Yes.

Q. At that time, Mr. Turner was the Sales Manager for the Ebsary Gypsum Company? A. At that time, yes.

Q. And Mr. Turner directed the sales policy of your company at that time, did he not? A. I would like to correct that. He was the City Sales Manager for the New York City area.

Q. For the New York City area? A. That is right.

Q. And he performed a function similar to that performed by Mr. Gallagher of the United States Gypsum Company —do you know Mr. Gallagher? A. Yes, I do.

3936 Q. Mr. Gallagher is the City Sales Manager for the United States Gypsum Company? A. Yes, except Mr. Turner never had the authority that Mr. Gallagher does.

Q. In the City of New York, Mr. Turner directed the sales policy of the Ebsary Gypsum Company, is that correct? A. I would say he followed out the sales policy of the Ebsary Gypsum Company.

Mr. Knuff: We offer in evidence, if Your Honors please, Government's Exhibit 431.

Mr. Bromley: And we make only the usual objection.

Mr. Oliver: I object to it, Your Honor, on the ground that it is only binding on Ebsary and not on the other defendants.

Justice Stephens: That raises no new point, Mr. Oliver. All of these declarations of individual defendants are offered to bind all the defendants, but are received subject to the usual reservation with reference to the declarations of alleged co-conspirators, that a conspiracy must ultimately be shown and the declaration be shown to be in execution or furtherance of the conspiracy. Are you raising any point different than that?

Mr. Oliver: I think it is in the same category as that answer of Certain-teed in the Beaver case, and when you ruled on that, you ruled that it was only binding on

3937 Certain-teed. This seems to be a declaration of the same kind, to me.

Justice Stephens: That was offered as an admission, was it not, rather than a declaration?

Mr. Oliver: That is possible, Your Honor.

Justice Jackson: That is what it was, as I remember it.

Justice Stephens: I don't see any difference, Mr. Oliver, between this and any other class of declaration we have had. The objection is overruled. The exhibit is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 431, was received in evidence.)

Justice Stephens: It may be, of course, that the Court misunderstood the nature of the offer of the answer in the Beaver Products case. The Court is trying to keep all of its rulings strictly consistent. It is very difficult, in such a complicated case as this. But I thought that was in a different category than the general declarations which have been offered.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked
3938 for identification as Government's Exhibit 432, the same being a letter dated March 4, 1932, addressed to Mr. F. G. Ebsary, President, and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 432 for Identification.)

By Mr. Knuff:

Q. Did the Ebsary Gypsum Company receive that letter? A. Yes.

Q. I show you what has been marked—

Justice Stephens: (Interposing) Let the Court have time to read that, Mr. Knuff, so that we can understand your examination.

Mr. Knuff: I am sorry.

(Exhibit 432 examined by the Court.)

Justice Stephens: Proceed, Mr. Knuff.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 433, the same being a letter dated February 16, 1934, addressed to Mr. George N. Lenci, and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 433 for Identification.)

By Mr. Knuff:

3939 Q. Was Government's Exhibit 433 received in the office of the Ebsary Gypsum Company? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 434, the same being a letter dated December 3, 1934, addressed to F. G. Ebsary, President, and signed C. Henning.

(The document referred to was marked as Government's Exhibit No. 434 for Identification.)

By Mr. Knuff:

Q. I will ask you if that letter was received at the office of the Ebsary Gypsum Company? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 435, the same being a letter dated October 29, 1935, addressed to Mr. F. G. Ebsary, and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 435 for Identification.)

By Mr. Knuff:

Q. I will ask you if that letter was received in the office of the Ebsary Gypsum Company? A. Yes.

3940 Mr. Knuff: We offer in evidence Government's Exhibits 432, 433, 434, and 435.

Mr. Bromley: We make the usual objection to these last four exhibits.

Justice Stephens: They are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked Government's Exhibits 432, 433, 434 and 435, were received in evidence.)

By Mr. Knuff:

Q. If I understand these exhibits correctly, Mr. Lenci, Mr. Frank Miller was the first Executive Secretary of the Board Survey Company, and he was succeeded by Mr. H. F. Sadler in 1934; and Mr. Sadler, in turn, was succeeded by Mr. E. W. Carey as the Executive Secretary of the Board Survey Company; is that your understanding? A. That is correct.

Q. And these three gentlemen, that is, Mr. Miller, Mr. Sadler and Mr. Carey, were the only Executive Secretaries of the Board Survey Company? A. They are the only ones I ever heard of.

Q. And after October 29, 1935, complaints, if any, were sent to the office of Scott, MacLeish & Falk, the attorneys for the Board Survey Company; is that correct? A. 3941 I don't think that letter of October 29 reads just that way. The second paragraph says that the complaint shall be filed in the usual way with the Board Survey Company, who in turn will refer the complaint to Scott, MacLeish & Falk.

Q. I accept that correction. A. Yes.

Q. What was the Board Survey Company, Mr. Lenci? A. I don't know.

Q. You don't know what it was? A. I think it was merely a subsidiary of the United States Gypsum Company. That is all I know about it. I don't know anything about it.

Q. When you had any complaint as to any violation of the license agreement, that is, if you felt that another licensee was not complying with the license agreement, you would send that complaint to the Board Survey Company? A. That is right.

Q. And the Board Survey Company would, in turn, if you know, investigate the merits of your complaint, and would take such steps as were necessary to correct the complaint, if the complaint was justified; is that correct? A. Yes.

Q. Mr. Lenci, I show you what have been marked Government's Exhibits 436 and 436-A, 436 being a letter 3942 dated April 20, 1932, addressed to Mr. Hough and signed Ted Ehrlicher; and 436-A being a typewritten copy of Exhibit 436.

Mr. Knuff: If Your Honors please, in order to expedite the reading of this exhibit, we had 436-A typed. That is an exact copy of 436.

Justice Stephens: Thank you.

(The documents referred to were marked Government's Exhibits 436 and 436-A for Identification.)

By Mr. Knuff:

Q. Mr. Lenci, who was Ted Ehrlicher? A. He was one of our New Jersey salesmen.

Q. And who was Mr. Hough? A. Mr. Hough was our Treasurer.

Q. The Treasurer of the Ebsary Gypsum Company? A. Yes.

Justice Stephens: Ehrlicher, you say, was one of your salesmen?

The Witness: Ehrlicher was our New Jersey salesman.

By Mr. Knuff:

Q. Do you identify Government's Exhibit 436 as a letter that was received by Ebsary Gypsum Company from Mr. Ehrlicher? A. Yes.

3943 Mr. Oliver: May I see that for just a moment?

Justice Stephens: Yes.

(Thereupon, Government's Exhibit No. 436 for identification was handed to Mr. Oliver for examination.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 437, the same being a letter dated May 5, 1932, addressed to the Ebsary Gypsum Company and signed C. E. Hough.

(The document referred to was marked as Government's Exhibit No. 437, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Q. I show you—

Justice Stephens: (Interposing) Just a moment, let the Court read it. We must be familiar with each of these as we go along.

Mr. Knuff: I am sorry.

Justice Stephens: Proceed, Mr. Knuff.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 438, the same being a copy of a letter dated May 6, 1932, addressed to the Board Survey Company, and signed George N. Lenci.

3944 (The document referred to was marked as Government's Exhibit No. 438, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether that is a copy of a letter which you sent to the Board Survey Company? A. Yes.

Justice Garrett: Mr. Knuff, does that have more than one page?

Mr. Knuff: Yes, your Honor, it is a two-page letter.

Justice Garrett: Yes, I see it now, thank you.

Justice Stephens: Proceed.

Mr. Knuff: Will your Honors indulge me for just a moment, please?

Justice Stephens: Yes, certainly.

Mr. Knuff: If your Honors please, will you skip, in your sets of the exhibits, the letter dated May 16, 1932, and the letter dated May 17, 1932, and then go to the next letter.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 439 for identification, which is a letter dated June 9, 1932, addressed to the Ebsary Gypsum Company and signed by C. E. Hough.

(The document referred to was marked as Government's Exhibit No. 439, for identification.)

3945 By Mr. Knuff:

Q. I ask you whether or not that letter was received. That bears in ink, the notation, "Government's Exhibit 36", which was the exhibit number used in the criminal case.

I wonder if we can take the morning recess at this time.

Justice Stephens: Yes, we will take our morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice Stephens: Proceed.

By Mr. Knuff:

Q. Mr. Lenci, did you receive Government's Exhibit 439? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 440, the same being a carbon copy of a letter dated June 9, 1932, addressed to Mr. C. F. Henning, Vice President, and signed George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 440, for identification.)

By Mr. Knuff:

Q. I ask you if that is a copy of a letter that you sent to Mr. Henning. A. Yes.

3946 Justice Stephens: Referring to Exhibit 439, so that it will be clear in the record whom it refers to, one cannot tell from the face of it whom it refers to—

Mr. Knuff: (Interposing) You mean "Gypsteel"?

Justice Stephens: Yes, what does that mean?

The Witness: Let's start from the beginning. The Structural Gypsum Corporation—

Justice Stephens: (Interposing) Just answer briefly. To whom did Mr. Hough refer, if you know, in his use of the word "Gypsteel"?

The Witness: The Structural Gypsum Corporation.

Justice Stephens: That is all.

The Witness: That was their trade-mark. "Gypsteel" was the trade-mark of another product manufactured by the Structural Gypsum Corporation, and the company became generally known as "Gypsteel". For the record, they became later a part of the American Cyanamid Company.

Justice Stephens: Thank you.

Let us read this June 9th letter.

All right, you may proceed.

Mr. Knuff: Will your Honors please skip the next two letters, the one dated June 17, 1932, and the one dated June 25, 1932, and I will take up the next letter.

By Mr. Knuff:

Q. I now show you, Mr. Lenci, what has been marked
3947 Government's Exhibit 441 for identification, being a copy of a letter dated June 25, 1932, addressed to C. F. Henning, and signed Ebsary Gypsum Company, George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 441, for identification.)

By Mr. Knuff:

Q. I will ask you, Mr. Lenci, if that is a copy of a letter, the original of which was sent to Mr. Henning. A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 442, the same being a letter dated July 16, 1932, addressed to the United States Gypsum Company and signed George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 442, for identification.)

By Mr. Knuff:

Q. I will ask you if that is a copy of a letter, the original of which was sent to the United States Gypsum Company. A. Yes.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 443, the same being a copy of a letter, dated July 26, 1932—

Justice Stephens: (Interposing) Are you skipping
3948 this longhand memorandum?

Mr. Knuff: Yes, I am not going to offer that.

Justice Stephens: This one you are now referring to is dated July 26, 1932?

Mr. Knuff: Yes. It is addressed to the United States Gypsum Company and signed Ebsary Gypsum Company, George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 443, for identification.)

By Mr. Knuff:

Q. I will ask you if that is a carbon copy of a letter, the original of which was sent to the United States Gypsum Company. A. Yes.

Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 444 for identification, the same being a letter, dated August 1, 1932, addressed to George N. Lenci, and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 444, for identification.)

By Mr. Knuff:

Q. I ask you if that letter was received. A. Yes.

3949 Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 445 for identification, the same being a carbon copy of a letter, dated August 10, 1932, addressed to Mr. Ebsary, and signed George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 445, for identification.)

By Mr. Knuff:

Q. I will ask you if that is a copy of a letter, the original of which was sent to Mr. Ebsary. A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 446, the same being a letter, dated August 16, 1932, addressed to the United States Gypsum Company and signed Ebsary Gypsum Company, George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 446, for identification.)

By Mr. Knuff:

Q. I ask you if that is a carbon copy of a letter, the original of which was sent to United States Gypsum Company. A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibits 436, 436-A, 437, 438, 439, 440, 441, 442, 443, 444,
3950 445, and 446.

Mr. Bromley: May it please the Court, we make the usual objection, and in addition thereto we would like the record to show that we object to all of these exhibits on the ground that they are immaterial because they relate solely to an issue already heretofore determined adversely to the Government in the criminal case.

Justice Stephens: You are protecting your record in the matter of res adjudicata?

Mr. Bromley: Yes.

Justice Stephens: That objection is overruled.

The exhibits are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 436 to 446, inclusive, were received in evidence.)

Justice Stephens: This might be an appropriate time to say, Mr. Oliver, in respect to the objection you raised this morning as to Exhibit 431, that I think I made a statement which might be a little confusing and I ought to correct it.

Exhibit 324, which was the answer of Certain-teed in the Beaver Products case, was received in evidence, and at page 2861, the Court made the following statement:

3951 "Justice Stephens: The Court is agreed that Exhibit 324 is admissible in evidence as an admission of Certain-teed, binding upon Certain-teed, for whatever weight it may be entitled to. It seems to the Court that in view of the nature of the statements in the answer, and the added fact that later Certain-teed did take a license, that it may be said to constitute an admission. But the Court is also agreed that it cannot, at least in the present state of the record, be admitted as binding upon the other defendants as a declaration either in furtherance of or in execution of a conspiracy. It would seem to the Court that, if anything, it would be contrary to the furtherance or execution of the conspiracy."

That was the distinction we had in mind with respect to that, and not the distinction which has been suggested, that

it was different from other declarations because it was an admission. That, I think, would be a false distinction because all of these declarations are admissible so far as the hearsay rule is concerned, on the theory that they are admissions.

The rule that makes them binding, if made by one conspirator, as against others, is not a rule of evidence, it is a rule of substantive law that holds one conspirator to the acts or declarations of another conspirator if a conspiracy is shown, and if it is shown that the acts or declarations are in furtherance or execution of the conspiracy.

So the distinction there was not between an admis-
3952 sion and a declaration. There is no distinction really between the two. It is between an admission, which appears not to be in furtherance or execution of the conspiracy, and one which may be shown to be of such nature.

Proceed, Mr. Knuff.

By Mr. Knuff:

Q. Mr. Lenci, under date of August 16, 1932, did you write a letter to the Board Survey Company concerning Orin F. Perry of New York City? You don't have anything in front of you regarding that, Mr. Lenci.

Justice Stephens: Read the question, please. I was looking for something in these letters also.

(Thereupon, the pending question was read by the reporter.)

The Witness: I don't recall.

By Mr. Knuff:

Q. Could your memory be refreshed as to whether you did write such a letter? A. I believe it might be.

Q. I would like you to look at this paper and see whether or not this paper does refresh your recollection.

Mr. Knuff: The paper I am handing to the witness is in the books of exhibits that your Honors have before you, and the letter is dated August 18, 1932. I am not having it marked as an exhibit at this time because I do not
3953 know whether or not we want to use it as an exhibit.

Justice Stephens: Thank you. Where does it occur with reference to these last exhibits?

Mr. Knuff: Immediately following Exhibit 446, your Honor.

Justice Stephens: Thank you. Have counsel for the defendants seen it?

Mr. Bromley: Yes.

Justice Stephens: Very well, proceed.

By Mr. Knuff:

Q. Does that letter, Mr. Lenci, refresh your recollection as to whether or not you did write a letter to the Board Survey Company concerning Orin F. Perry? A. I think it does.

Q. Do you have the carbon copy of that letter, Mr. Lenci? A. No, sir, I haven't got it.

Q. You turned over to us— A. (Interposing). We turned over everything we had.

Mr. Knuff: I might say, if your Honor pleases, that we don't have the carbon copy of this letter.

Justice Stephens: Ask him if he remembers the episode, and what the complaint was.

The Witness: I remember the circumstances, yes, I don't remember the identical letter referred to that I wrote. But my complaint was that the Certain-teed were still con-
3954 tinuing to sell Orin F. Perry as a jobber.

By Mr. Knuff:

Q. And what was your complaint as to that? A. I believe that this took place after the time that the jobbers were to be sold only at the dealer's price, and not with a special commission to jobbers.

Q. And you complained to the United States Gypsum Company that Orin F. Perry was being sold by Certain-teed as a jobber, is that correct? A. Yes.

Q. You did receive a letter from the Board Survey Company acknowledging your letter of the 16th of August, 1923, did you not? A. Yes.

Q. In addition to the paper that you have before you, did you ever receive anything further, any other letter, from the United States Gypsum Company, with reference to this same matter? A. I don't remember.

Q. Do you know what the ultimate disposition of the matter was? A. Well, I do know that eventually—when I say "eventually" I mean after a period of time—

Q. (Interposing) How long a period of time? A. I would say sometime probably during that year, or 1933—
3955 the practice was discontinued of giving him a special discount.

Q. Mr. Orin F. Perry was unable, then, to buy the board at the dealer discount?

Mr. Bromley: Dealer discount?
Mr. Knuff: I beg your pardon—jobber discount.
The Witness: So far as I know, yes.

By Mr. Knuff:

Q. And you say that that took place sometime after August 18, 1932, or early in 1933. A. I couldn't say the exact time because it is such a long time ago, but it was sometime thereafter.

Q. Did you have any occasion to make any further complaints concerning Mr. Perry other than the complaint that you made under date of August 16?

Mr. Bromley: I object to that as assuming facts not in evidence. The complaint wasn't against Perry, it was against Certain-teed, because Certain-teed sold at a discount.

Justice Jackson: To Perry?
Mr. Bromley: To Perry, yes.
Justice Stephens: That objection is well taken.
Mr. Knuff: What was my question?
Justice Stephens: Read the question.

(Thereupon, the pending question was read by the reporter.)

3956 Justice Stephens: The point of the objection, Mr. Knuff, is that the complaint was not against Perry but against Certain-teed.

Mr. Knuff: I don't believe my question said it was, it said "concerning".

Justice Jackson: Why don't you rephrase your question?

Mr. Knuff: Very well.

By Mr. Knuff:

Q. Did you have any further occasion to complain that any licensee was selling Orin F. Perry and giving Mr. Perry a jobber's commission? A. I don't recall. I mean at the present moment I do not remember.

Q. If you did have an occasion to make such a complaint, do you think you would remember now? A. Well, it is hard to pick out—

Justice Jackson: (Interposing) How can you know?
The Witness: I don't know.

Mr. Knuff: Now there is a series of letters, if your Honors please, that I am going to have marked at this time

only for identification. I do so because Mr. Lenci is the person who can identify them, and I don't think that this would be the proper time to offer them in evidence because it would just break the continuity.

Justice Garrett: Well, you do not offer that letter
3957 of August 18th?

Mr. Knuff: No, your Honor, I do not. It hasn't even been identified as far as I know.

Justice Stephens: Yes, that is not necessary.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 447 for identification—and if your Honors please, Government's Exhibit 447 will appear immediately following Government's Exhibit 438 in the books of exhibits which you have—this being a letter dated May 16, 1932, addressed to the Board Survey Company and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 447, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether or not that exhibit is a carbon copy of a letter, the original of which was sent to the Board Survey Company? A. Yes.

Justice Garrett: Pardon me, that is the letter of May 16, 1932?

Mr. Knuff: That is correct.

Justice Garrett: To Board Survey from Ebsary?

Mr. Knuff: Yes, and the first paragraph of the letter reads:

3958 "Please let us have a reply to our letter of May 6th".

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 448, the same being a copy of a letter, dated May 17, 1932, addressed to George N. Lenci, and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 448, for identification.)

By Mr. Knuff:

Q. In connection with the word "signed", Mr. Henning's signature is typed, and Exhibit 448 is apparently a typed copy, not a carbon copy, of a letter bearing date of May 17. It appears in your Honor's books immediately following the letter of May 16.

Mr. Lenci, the original of the letter marked Government's Exhibit 448 for identification was received by you, was it not? A. I don't remember it. Oh, yes, I beg your pardon.

Q. Do you wish to change your answer, that it was received by you? A. Yes.

Q. And is this a copy of a letter that was received by you? A. We received the copy, I have no record of the original.

3959 Q. I understood that you had made this copy—

Mr. Bromley: (Interposing) I don't dispute it, if the Court please. It was received in the criminal case.

Justice Stephens: You don't raise any question as to its identification?

Mr. Bromley: No, sir.

Justice Stephens: The record may show that.

Mr. Knuff: Do any other defendants raise any question as to the identification of this document?

(No response.)

Justice Stephens: It may be taken as identified, then.

With respect to that previous letter of May 16, what was the answer of the witness as to that?

Mr. Knuff: My understanding is that it was a carbon copy of a letter, the original of which was sent to the Board Survey Company.

Justice Stephens: Very well.

Mr. Knuff: Will your Honors now turn to the next two exhibits following Exhibits 439 and 440, which are the next two exhibits that I want to have marked.

By Mr. Knuff:

Q. I show you, Mr. Lenci, Government's Exhibit 449, the same being a copy of a letter, dated June 17, 1932, addressed to Mr. C. F. Henning, Vice President, and signed George N. Lenci, Secretary.

3960 (The document referred to was marked as Government's Exhibit No. 449, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether that is a carbon copy of a letter that you sent to Mr. Henning? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 450, the same being a letter, dated June 25, 1932, addressed to George N. Lenci, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 450, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Mr. Knuff: Can we stipulate, Mr. Bromley, that that is Mr. Miller's signature?

Mr. Bromley: Yes.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 451—which will follow in your Honors' books immediately after Exhibit 446—it being a letter, dated August 18, 1932, addressed to
3961 George N. Lenci, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 451, for identification.)

By Mr. Knuff:

Q. Was that letter received, Mr. Lenci, by you? A. Yes.

Mr. Knuff: I don't presume, as to these letters that are signed by Frank M. Miller, that there is any question as to Mr. Miller's signature, is there, Mr. Bromley?

Mr. Bromley: No, there is no question as to his signature.

By Mr. Knuff:

Q. I show you what has been marked for identification as Government's Exhibit 452, the same being a letter, dated May 26, 1932, addressed to Mr. C. F. Henning, Vice President, and signed George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 452, for identification.)

By Mr. Knuff:

Q. I will ask you if that is a carbon copy of a letter, the original of which was sent to Mr. Henning. A. Yes.

Q. I show you, Mr. Lenci, what has been marked
3962 for identification as Government's Exhibit 453, the same being a letter dated May 31, 1932, addressed to the Board Survey Company, and signed Ebsary Gypsum Company, George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 453, for identification.)

By Mr. Knuff:

Q. I ask you if that is a carbon copy of a letter, the original of which was sent to the Board Survey Company? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 454, the same being a letter, dated June 9, 1932, addressed to the Ebsary Gypsum Company, and signed C. E. Hough, Treasurer.

(The document referred to was marked as Government's Exhibit No. 454, for identification.)

By Mr. Knuff:

Q. Was that letter received by you, Mr. Lenci? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 455, the same being a letter dated June 11, 1932, addressed to the Board Survey Company and signed Ebsary Gypsum Company, George N. Lenci.

3963 (The document referred to was marked as Government's Exhibit No. 455, for identification.)

By Mr. Knuff:

Q. I will ask you if that is a carbon copy of a letter, the original of which was sent to the Board Survey Company. A. Yes. In connection with that, there are some penciled memoranda of names in the corner which were not made by our office or by our company.

Q. Can you tell us what you refer to? A. There is one word, "Beatty", and under that it says "Tomkins Rockwall".

Q. Those were not made by your company? A. Those have been added since this carbon left our office.

Q. Do you recognize the handwriting? A. No, I don't.

Mr. Knuff: In connection with the handwriting that Mr. Lenci has referred to, I want to state to the Court that I don't know whose handwriting it is, and I don't attribute any particular significance to it.

Justice Jackson: There isn't any.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 456, the same
3964 being a carbon copy of a letter, dated June 21, 1932, addressed to the Board Survey Company and signed Ebsary Gypsum Company, George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 456, for identification.)

By Mr. Knuff:

Q. I ask you to state whether or not that is a carbon copy of a letter, the original of which was sent to the Board Survey Company. A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 457, the same being a letter, dated June 23, 1932, addressed to George N. Lenci, Secretary, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 457, for identification.)

By Mr. Knuff:

Q. Was that letter, Mr. Lenci, received by your company? A. Yes.

Mr. Knuff: I assume, Mr. Bromley, that there is no question as to Mr. Miller's signature.

Mr. Bromley: On this one, no, sir.

By Mr. Knuff:

3965 Q. I show you what has been marked for identification as Government's Exhibit 458, the same being a letter, dated September 21, 1932, addressed to George N. Lenci, Secretary, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 458, for identification.)

By Mr. Knuff:

Q. Will you state whether that letter was received by your company, Mr. Lenci? A. Yes.

Q. I show you—

Justice Stephens: (Interposing) Do you stipulate that signature also, Mr. Bromley?

Mr. Bromley: Yes, your Honor.

Mr. Knuff: Thank you.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 459, the same being a letter, dated September 24, 1932, addressed to the Board Survey Company and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 459, for identification.)

By Mr. Knuff:

3966 Q. Will you state, Mr. Lenci, whether that is the original letter that you sent to the Board Survey Company? A. Yes.

Q. I show you what has been marked for identification, Mr. Lenci, as Government's Exhibit 460, the same being a carbon copy of a letter, dated September 27, 1932, addressed to the Ebsary Gypsum Company and signed United States Gypsum Company—Vice President.

(The document referred to was marked as Government's Exhibit No. 460, for identification.)

By Mr. Knuff:

Q. Can you tell us, Mr. Lenci, whether or not you received the original of this letter? A. Yes.

Q. You will notice that Exhibit 460 is a carbon copy of a letter that we obtained from the United States Gypsum Company's file. Do you now state that you received the original of that letter? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 461, the same being a letter, dated December 6, 1932, addressed to the United States Gypsum Company, and signed George N. Lenci, Secretary.

(The document referred to was marked as Govern-
3967 ment's Exhibit No. 461, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether that is the original letter that you sent to the United States Gypsum Company? A. Yes.

Q. I show you, Mr. Lenci, Government's Exhibit No. 462 for identification, the same being a carbon copy of a letter, dated December 23, 1932, addressed to F. G. Ebsary, and signed United States Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 462, for identification.)

By Mr. Knuff:

Q. Can you tell us whether you received the original of the letter of which Government's Exhibit No. 462 is a carbon copy? A. I don't remember receiving the original, but I do know that we were given that consent, which was probably in that letter referred to.

Mr. Knuff: I wonder if Mr. Bromley will stipulate that this a carbon copy of a letter, the original of which was sent by Mr. Henning to Mr. F. G. Ebsary.

Mr. Bromley: Yes.

By Mr. Knuff:

3968 Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 463, the same being a letter, dated May 8, 1933, addressed to Ebsary Gypsum Company, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 463, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether you received that letter? A. Yes.

Mr. Knuff: Can it be stipulated, Mr. Bromley, that that is Mr. Miller's signature?

Mr. Bromley: Yes.

By Mr. Knuff:

Q. I now show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 464, the same being a letter, dated May 11, 1933, addressed to the Ebsary Gypsum Company and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 464, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

3969 Mr. Knuff: May it likewise be stipulated, Mr. Bromley, that that is Mr. Miller's signature to that letter?

Mr. Bromley: Yes.

By Mr. Knuff:

Q. I notice on the upper left-hand corner of the letter of May 11, 1933, there is some writing in longhand. Can you

translate that writing? A. It was for that reason that I was able to say at once that I had received that letter, because the handwriting in the upper left-hand corner is mine, and it reads, "Copy to New York—5/13".

Q. I show you what has been marked for identification as Government's Exhibit 465, the same being a letter, dated May 29, 1933, addressed to the Ebsary Gypsum Company and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 465, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether that letter was received by the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: And I presume it can likewise be stipulated, Mr. Bromley, that that is also Mr. Miller's signature?

Mr. Bromley: Yes.

3970 By Mr. Knuff:

Q. Now on the lower left-hand corner I notice some longhand writing. Will you translate that for us? A. That is in my handwriting also, and it reads, "Copy to EHD & Ask for reply".

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 466, the same being a letter, dated May 31, 1933, addressed to the Ebsary Gypsum Company, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 466, for identification.)

By Mr. Knuff:

Q. Can you tell us whether that letter was received in the office of Ebsary Gypsum Company? A. Yes.

Mr. Knuff: And likewise, Mr. Bromley, may it be stipulated that that is Mr. Miller's signature?

Mr. Bromley: Yes.

By Mr. Knuff:

Q. On the lower left-hand corner I also notice some longhand writing. Will you translate that for us? A. That is in my handwriting, and it reads, "Copy to EHD—ask him to please write so that I can reply".

Q. And who is "EHD"? A. "EHD" was E. H.
3971 Diegel, who was my assistant.

Q. He was your assistant? A. Yes.

Justice Stephens: There is also some handwriting just to the right of the letters "EHD" in ink, on the photostat which the Court has, reading, "Sent 6-2". Is that your handwriting?

The Witness: No, that is the handwriting of my secretary, it being a memorandum of the date that she sent that.

Justice Stephens: Thank you.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 467, the same being a letter, dated June 13, 1933, addressed to the Board Survey Company and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 467, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, if that is the original letter that you sent to the Board Survey Company? A. Yes, it is.

Justice Stephens: How many more of these have you, Mr. Knuff?

Mr. Knuff: Well, I have quite a number more—

Justice Stephens: Then we might as well take our
3972 recess at this time.

(Thereupon, at 12:20 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

3973 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: You may proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit No. 468, the same being a copy of a letter dated June 13, 1933, addressed to the Board Survey Company and signed G. N. Lenci.

(The document referred to was marked as Government's Exhibit No. 468 for Identification.)

By Mr. Knuff:

Q. Will you tell us whether the original of that letter was sent to the Board Survey Company? A. The letter, or rather, the body of the letter is a copy of a letter sent to the Board Survey Company. The memorandum at the top did not go to the Board Survey Company.

Q. That was put on for your own office information? A. That is an inter-office communication.

3974 Q. And who put that on? A. I dictated it.

Q. I show you what has been marked for identification as Government's Exhibit 469, the same being a letter dated June 15, 1933, addressed to the Ebsary Gypsum Company and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 469 for Identification.)

By Mr. Knuff:

Q. Will you state whether you received that letter, Mr. Lenci? A. Yes.

Mr. Knuff: May it be admitted, Mr. Bromley, that that is Mr. Miller's signature?

Mr. Bromley: Yes.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 470, the same being a letter dated November 21, 1932, addressed to George N. Lenci and signed Edward H. Diegel, Sales Manager.

(The document referred to was marked as Government's Exhibit No. 470 for Identification.)

3975 Justice Jackson: Are we supposed to have a copy of that up here? Where does it fit in? That last exhibit, Exhibit 469, completed this last set.

Mr. Knuff: I am sorry. The Clerk has them. It is not the Clerk's fault, however, as I put those over there late today.

Mr. Johnston: I would like to remind the Court that we haven't seen any of those that he is offering now, and we want the privilege of looking at them before they are offered.

Justice Jackson: You are entitled to do that.

Mr. Knuff: I suppose that that is because I have been going so fast that I caught up with myself this morning.

Justice Garrett: Mr. Knuff, may I interrupt you here? This morning you began offering, here, with what number, I don't recall?

Mr. Knuff: Exhibit 447.

Justice Garrett: You began offering them for the purposes of identification.

Mr. Knuff: That is right.

Justice Garrett: You stated at that time that this witness was the one by whom these letters could be identified.

Mr. Knuff: That is correct.

Justice Garrett: And that they were not being
3976 introduced as evidence. You are not introducing them—as I understand it, you are not going to introduce them today as evidence?

Mr. Knuff: We have changed our opinion since I made that statement. We are going to introduce them today, Your Honor.

Justice Jackson: Do you have to get such a long, long list before you offer them all? Does that fit in with your plans? I am just wondering how we can keep them all in mind if there are separate objections made to several of them.

Mr. Knuff: They logically fall into three separate and distinct categories. One will begin with Exhibit 451 and will take in certain exhibits; then another category will begin with Exhibit 447 and end with 457, exclusive of 451—

Justice Jackson: (Interposing) Well, you can do your own grouping as you make the offer.

Mr. Knuff: That is what I intended to do, Your Honor.

Justice Stephens: We should know, however, whether you are marking them merely for identification or otherwise, because if you are marking them for introduction we must read them very carefully so we can understand them for the purpose of understanding objections.

Mr. Knuff: I didn't think we would reach them today.

Justice Garrett: So far, there has not been the
3977 slightest objection on the matter of identification. In fact, counsel for the defendants have agreed to the identification of signatures.

Now suddenly we are confronted with the proposition that you are going to introduce them as evidence. It is very trying to have to—it is all right, of course, if you are going to introduce them as evidence, but there could have been so much time saved by having them identified and then taking them as evidence at the same time.

However, proceed as you like.

Mr. Knuff: We have, I believe, only about two more to be marked, and then the three groups, as I have indicated, will be introduced.

By Mr. Knuff:

Q. Did you receive Government's Exhibit 470 for Identification from Mr. Diegel, Mr. Lenci? A. Yes.

Q. Mr. Edward Diegel is Sales Manager for the Ebsary Gypsum Company? A. Yes, my assistant.

Q. And generally, he is in charge of the sales of the Ebsary Gypsum Company, under your direction? A. Yes.

Q. He is not a local sales manager? A. No.

3978 Q. I show you what has been—

Justice Stephens: (Interposing) Just a moment. Since you are going to offer these, we will have to read each of them.

Mr. Knuff: Excuse me. I just have one more before I will offer the three groups in evidence.

(Exhibit 470 examined by the Court.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 471, the same being a copy of a letter dated November 28, 1932, addressed to the Board Survey Company, signed Ebsary Gypsum Company, G. N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 471 for Identification.)

By Mr. Knuff:

Q. Will you state whether or not that is a carbon copy of a letter the original of which was sent to the Board Survey Company? A. Yes.

Q. This morning, I asked you concerning a letter that you wrote to the Board Survey Company, dated August 16, the reply to which was marked Government's Exhibit 451.

Mr. Knuff: Will you please show Mr. Lenci that 3979 exhibit, please?

(Government's Exhibit 451 handed to witness.)

By Mr. Knuff:

Q. Do you have before you that letter, Government's Exhibit 451? A. I have the Board Survey letter of August 16, yes.

Q. Do you recall that this morning I asked if there were any further complaints sent to the Board Survey Company concerning the sale by any licensees to jobbers, and your reply was, as I recall it, that you didn't think there were any further complaints? Do you remember that? A. Yes; and didn't I follow that up, in response to a question from the bench, by saying—

Q. (Interposing) As I recall your testimony, you said the condition was corrected later that year or in the first part of 1933. A. Yes.

Q. Now do you have before you Government's Exhibit No. 471? A. Yes.

Q. In view of what you have before you now, do you care to make any change in your previous testimony? A. Well, we were still complaining up to as late as November of 1932.

3980 Q. Of 1932? A. Yes.

Mr. Knuff: Now, if Your Honors please, we offer in evidence Government's Exhibits 451, 470, and 471.

Justice Stephens: Since you stated that you were not offering these exhibits at this time, I didn't read two or three of them, because I didn't want to hold you up. I assumed if you offered them later I would have a chance to read them before then.

(Exhibits 451, 470 and 471 examined by the Court.)

Justice Stephens: Is there any objection to these exhibits? Have counsel for the defendants seen them?

Mr. Johnston: I am a little like counsel for the Government, I am getting so mixed up on these exhibits I don't know whether we have seen all of them or not.

Mr. Knuff: I am not mixed up.

Mr. Johnston: As I understand it, they are offering 451 but nothing before that; then they skip over to 470?

Justice Stephens: They are offering 451, 470, and 471. Just those three, now.

Mr. Bromley: We make the usual objection.

Justice Stephens: If there is no other objection, they will be received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 451, 470, and 471, were received in
3981 evidence.)

Justice Stephens: The Court Reporter has kindly offered, the record may show, to save the Court the use of

so many words in this particular situation, and wherever the Court uses the phrase "the usual reservation", the Court Reporter will write out the entire statement that the Court has been using.

Mr. Knuff: I now offer in evidence Government's Exhibits 447, 448, 449, 450, 452, 453, 454, 455, 456, and 457.

Justice Stephens: That is 447 to 457, inclusive, serially?

Mr. Knuff: Yes, except 451, which has previously been offered in evidence and received.

Justice Stephens: Oh, yes.

There is attached to Exhibit 448, Mr. Knuff, a little slip which reads—a typewritten slip, attached to it by a staple—I can't quite see it all, but it reads—

Mr. Knuff: (Interposing) "Attached is a copy of USG's acknowledgment to our letter of May 6. This for your information. GNL."

Justice Stephens: And then there are two words at the top, the names of Ebsary and Hough.

Mr. Knuff: Yes.

Justice Stephens: Is that part of the exhibit?

3982 Mr. Knuff: Yes, Your Honor.

Justice Stephens: Were you aware of that when you identified it?

The Witness: Yes.

Justice Stephens: Is there an attached copy? Oh, I see. The little slip is an office memo, and 448 is the copy to which it refers.

Mr. Knuff: That is my understanding of it, Your Honor.

Justice Stephens: Is there any objection except the usual objection?

Mr. Bromley: I do not understand what the Government has in mind by grouping these exhibits as it has. Will the Government at some future time attempt to rely upon some inference that because I haven't said anything about it I admit that all these letters relate to one subject matter, or that they are complete with respect to one or more subject matters? Because I don't make any such admission. They are obviously incomplete. There are letters that are not here, and the letters as they are grouped by Government counsel have no understandable scheme, they don't relate to the same subject matter, they relate to a whole variety of different things. I don't know why he groups them this way, if he has any reason.

Mr. Knuff: I have a very definite reason for

3983 grouping them in this way.

In the first place, it was more convenient for us to

do it—at least, we thought it was more convenient for us to do it this way. And the letters relate to the policing of the industry, which is specifically charged in the complaint. There are various different types of policing.

Mr. Bromley: Well, is it your contention that these exhibits which you now offer in a group, relate to one type of policing?

Mr. Knuff: No, there are various types of policing in here, various phases of policing.

Mr. Bromley: I didn't understand that there was any issue in this case about policing, by the licensor, of the licensees' prices. I had supposed that that was admitted.

Mr. Knuff: It is the extent and character of the policing, and what they did pursuant to the policing.

Justice Stephens: Well, is there any objection except the usual objection?

Mr. Bromley: No, sir.

Justice Stephens: Then Exhibits 447, 448, 449, 450, 452, 453, 454, 455, 456, and 457 are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Govern-
3984 ment's Exhibits Nos. 447, 448, 449, 450, 452, 453, 454, 455, 456, and 457, were received in evidence.)

Mr. Knuff: We now offer in evidence Government's Exhibits 458 to 469 inclusive.

Justice Stephens: Is there any objection except the usual objection?

Mr. Bromley: May I have just a minute, if the Court pleases?

Justice Stephens: Yes, certainly.

(Exhibits examined by defendants' counsel.)

Mr. Bromley: We make only the usual objection, but in making it I do not admit that these letters are either complete or relate to the same subject matter or to one or more subject matters. It seems to me that, again, they are hopelessly confused and mixed up and quite incomplete.

Justice Stephens: The exhibits are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 458 to 469, both inclusive, were received in evidence.)

By Mr. Knuff:

Q. In 1932, Mr. Lenci, the Ebsary Gypsum Com-
3985 pany was selling board and lath to the Connecticut Adamant Plaster Company at a manufacturer's discount, is that correct? A. Yes.

Q. And before you could sell that board and lath to the Connecticut Adamant, you had to have USG's permission to do so, is that correct? A. Yes.

Q. And did you secure USG's permission to sell the Connecticut Adamant Plaster Company at a manufacturer's discount? A. Yes.

Q. The Connecticut Adamant Plaster Company is a plaster manufacturer located in New Haven, Connecticut, is it not? A. Yes.

Q. And they manufacture plaster and plaster products, but do not manufacture board? A. That is correct.

Q. And were you the supplier of that company's needs—or your company, rather, was the supplier of that company's needs for board and lath, is that correct? A. Only in a very small way.

Q. You didn't sell them their entire needs? A. Oh, no.

Q. They bought from other manufacturers than
3986 yourself? A. They did.

Mr. Knuff: May I have Exhibit 467, please?

(Government's Exhibit No. 467 handed to witness.)

Mr. Knuff: May I also have Exhibit 463?

(Government's Exhibit No. 463 handed to witness.)

By Mr. Knuff:

Q. The Board Survey Company had filed a notice or had written you a letter to the effect that the Connecticut Adamant Plaster Company was offering patented board, manufactured and sold by you, to the New Haven Reserve Supply Company and other New Haven dealers in quantity, at the licensor's minimum price to you; do you recall that? A. Yes.

Q. Now subsequent to receiving that letter, did you have an occasion to go to New Haven in connection with some other business that you had? A. Yes.

Q. And at that time did you see Mr. Kellogg, who was the principal stockholder of the Connecticut Adamant Plaster Company? A. Yes, I saw Mr. Kellogg.

Q. And did you ask Mr. Kellogg whether or not he was selling to the New Haven Reserve Supply Company at

prices less than dealer prices; do you recall that? A. My recollection is not absolutely clear on that.

3987 Q. Well, what is your best recollection? A. I would take it from my letter of June 13 that I did do that.

Mr. Bromley: I move to strike that answer out as merely a statement of conclusion.

Justice Stephens: Read the answer.

(The answer was read by the reporter.)

Justice Stephens: Do you have any recollection of doing it?

The Witness: Not an independent recollection.

Justice Stephens: It may go out.

Justice Garrett: I don't know whether it is important or not, but embraced in your question, Mr. Knuff, was the statement that Mr. Kellogg was the principal stockholder. That was embraced in your question. Were you testifying, or is that in evidence anywhere, or is it of any importance? You asked him if he had gone there to see about other business, and if he then talked with Mr. Kellogg, the principal stockholder. I don't know whether it is of any importance at all, but if so, have we any evidence that Mr. Kellogg was the principal stockholder?

Mr. Knuff: I don't think it would be seriously questioned. As I understand it, the Connecticut Adamant Plaster Company was a concern that was what you might call a family-owned concern; and Mr. Kellogg, who recently died,

3988 and who was the gentleman that I had reference to, I believe was the principal owner of the Connecticut Adamant Plaster Company.

Do you know, Mr. Lenci, whether Mr. Kellogg was an officer of the Connecticut Adamant Plaster Company?

The Witness: I believe that he was, and that was the reason I answered that question as I did, that I saw Mr. Kellogg.

I don't know whether he was the principal stockholder or not.

Justice Stephens: You should take pains, Mr. Lenci, when these leading questions are asked you which contain a recital of facts, if you don't understand or agree to that recital of facts to say so. Otherwise, we get matters in the record which ought not be in the record.

The Witness: Thank you.

Justice Garrett: Upon my own responsibility, and not on the responsibility of my associates on the Court, I would

like to ask this: We are dealing with these letters now, many of them to the Board Survey Company. The witness stated earlier in the day that the Board Survey Company—I think I quote the idea, though probably not his language, accurately—was a subsidiary of USG. For my information, I would like to know if it was a subsidiary of USG or if it was an organization formed after these licenses had
3989 been taken, and was an organization in which every licensee had an interest? I suppose it took some money to support it. Did the licensees support it or contribute to it, or was it purely a subsidiary of USG?

Mr. Bromley: Well, it was an agency of USG, all of the stock of which was owned by USG, and the money to run which was loaned to it by USG. The licensees had no interest in it whatsoever. It was formed after the licenses were taken for the purpose of bringing about compliance with the licenses in situations where one licensee would complain against another. It was set up as a separate organization, really a separate department of USG, and its sole function as a corporation was to receive complaints of license violations by licensees, from other licensees; investigate them, and call them to the attention of the offending licensee.

Justice Stephens: Is that the understanding of the Government?

Mr. Knuff: Well, it is my understanding that the Board Survey Company was a wholly-controlled agency of the United States Gypsum Company, and that they did receive complaints. I will go along that far with Mr. Bromley's statement.

Mr. Bromley: I think the reason for it was that the licensor didn't feel that complaints ought to be handled by its own sales department, which was in active competition for business with these licensees; and that it would
3990 be fairer if it could get an organization that had some element of impartiality in it, and was completely divorced from USG's own sales activities.

Justice Stephens: Now, you seem to halt, Mr. Knuff, at agreeing that the licensees had no interest in it. Do you claim that they had a financial interest in it?

Mr. Knuff: I don't believe that the licensees had any interest in it at all. I think that the financial interest was entirely in the USG Company. I don't think any of the licensees had any financial interest in it.

Justice Garrett: These exhibits that you are now offering, and which have been offered and received in evidence,

and the examination which you are now proceeding with, relate to this so-called policing that is referred to here in the complaint, and one instrumentality, at least, of what you charge, was this Board Survey Company; is that correct?

Mr. Knuff: That is correct, Your Honor.

Justice Garrett: And that was entirely a subsidiary of USG, and the licensees had no interest in it and contributed nothing to its support—it was not, in other words, a creation of the licensees after taking the licenses?

Mr. Knuff: I don't know how it was created. I don't think the licensees had any financial interest in it. I think the licensees had an interest—not financial, how-
3991 ever—in the maintaining of the policing agency, but I don't believe they had any financial interest in it at all.

Justice Garrett: All right.

Mr. Bromley: Or any stock interest.

Mr. Knuff: Or any stock interest,—I don't believe they did, but I don't know. Maybe Mr. Lenci could enlighten us as to his company.

Justice Garrett: Was that incorporated, Mr. Bromley?

Mr. Bromley: It was an Illinois corporation, formed after the licenses were signed.

Justice Stephens: What you mean, I suppose, Mr. Knuff—if I don't state this correctly you are at liberty to disagree—is that you claim the licensees had an interest in such an agency as the Board Survey Company being in existence and carrying on its activities because it was in the interest of the licensees, and each of them, that there should not be violations of the licenses by others?

Mr. Knuff: Yes, I would agree heartily with that statement.

Justice Jackson: That is really obvious, isn't it?

Mr. Knuff: I thought it was.

Mr. Bromley: What we said about it, at the time we formed it, is contained in Exhibit 432, a letter of March 4, 1932, which Mr. Henning wrote to the Ebsary Gypsum Company.

Justice Garrett: I read that, but it didn't explain
3992 it quite fully enough for me to thoroughly understand it.

Justice Stephens: You may proceed.

By Mr. Knuff:

Q. I wonder, Mr. Lenci, if your recollection could be refreshed as to how you received your information concerning the sales of Connecticut Adamant Company to the New Haven Reserve Supply Company. Do you think it could be refreshed? A. It might be, yes.

Q. I would like to have you read your testimony that you gave at the trial in the District Court here on the 20th of October, 1941, beginning at the bottom of page 558 and going over to the middle of page 560.

(The testimony referred to was handed to the witness.)

Justice Stephens: While the witness is reading that, will you read me Mr. Knuff's question, please?

(The record was read by the reporter.)

The Witness: Yes, I have read it.

Justice Stephens: Mr. Marshal, hand to counsel, and then let us see, the testimony referred to.

Justice Jackson: I think counsel have their own copies.

Justice Stephens: All right, let us see it, then.

(The testimony referred to handed to the Court.)

Justice Stephens: What pages is this between?

Mr. Knuff: From the bottom of page 558 to the
3993 middle of page 560.

By Mr. Knuff:

Q. Since reading this testimony, has your memory been refreshed, Mr. Lenci? A. Yes.

Q. Did you go up to New Haven? A. I went to New Haven, as I said before, to see Mr. Kellogg, regarding gypsum block. We were selling gypsum block to the Connecticut Adamant Company. That is a different product entirely. And I believe in the course of the conversation—

Mr. Bromley: (Interposing) I object to what he believes, if Your Honor please.

By Mr. Knuff:

Q. When you say "believe", do you mean by that that that is your best recollection? A. My present recollection is that I asked Mr. Kellogg if he were selling the New Haven Reserve Supply Company.

Q. And what did Mr. Kellogg tell you? A. He said no.

Q. At the top of Exhibit 468, I believe you testified that you dictated the memorandum that appears on the top of that exhibit, and that what is dictated there did not appear on the original; is that correct? A. Yes.

3994 Q. Will you just tell the Court what is meant by that memorandum, please?

Justice Stephens: Let us hear what it contains, first. Since it is in evidence, it is all right to read it. We can't see it the way these exhibits are bound. Read it to us, will you, please?

The Witness: It is addressed to E. H. Diegel. "Please note reply. You will note that I have avoided making a justification of the right of the Connecticut Adamant to sell any quantity at the carload price as I feel that it will weaken our case against the Paragon and American Hardwall. They only asked us how Connecticut Adamant could resell our board at the dealer's price, and this I have explained."

By Mr. Knuff:

Q. Will you explain what you meant by "weakening your case against the Paragon and American Hardwall"? A. At the present moment, I can't remember just what that was.

Q. Well, did it have reference to the trucking situation around Syracuse, the trucking area? A. I don't remember exactly what it was.

Q. What is the reference to the carload price there, what does that mean? A. Well, the Board Survey Com-

3995 pany's inquiry was—how could our board be sold by the Connecticut Adamant Company to the New Haven Reserve Supply Company if we were not selling the Connecticut Adamant Company at less than the dealer's price, and in making that inquiry they had overlooked the fact that they had granted us the right to sell the Connecticut Adamant Company as a manufacturing distributor.

Q. You had previously called their attention to that fact, had you not? A. Yes, but apparently they had forgotten it.

Q. Well, what is the meaning of "sell any quantity at the carload price"? I just don't understand what you mean by that. A. Well, they couldn't understand how the Connecticut Adamant Company could pay us the full dealer's price, f.o.b. cars New Haven, and resell it to anyone else at the dealer's price, which would represent no profit, having forgotten that the Connecticut Adamant Company at that

time was either getting the 10 percent or the 12-1/2 percent manufacturing distributor's discount.

Q. And you say that the Board Survey had overlooked the fact that you had the licensor's permission to sell them at a discount? A. Yes.

Q. And how would that fact weaken any case that
3996 you had against Paragon or American Hardwall, if you recall? A. I have been trying to place that in my mind, and honestly I can't remember.

Q. Maybe we can stir up some of the embers of your memory.

The Paragon Plaster Company, and the Paragon Plaster & Supply Company, and American Hardwall Plaster Company, were the three owners of Oakfield Gypsum Products Corporation; is that correct? A. I can't say that they were the three owners. They were interested in the ownership.

Q. They were interested in the ownership? A. Yes.

Q. Does the fact that they were interested in Oakfield revive your memory to any extent? A. No; I know that, I know that.

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 472, the same being a letter dated July 29, 1929, addressed to George N. Lenci, and signed C. F. Henning, Vice President in Charge of Sales—and then opposite and below the "g" in Mr. Henning's name is a small "m".

(The document referred to was marked as Government's Exhibit No. 472 for Identification.)

3997 By Mr. Knuff:

Q. Was that letter received by you, Mr. Lenci? A. I think it was, there is nothing on it to identify it.

Q. You supplied that to us from your files? A. Yes.

Mr. Knuff: I wonder, Mr. Bromley, if it can be stipulated that the signature to the letter was an authorized signature?

Mr. Bromley: I don't know anything about it.

Mr. Knuff: It is definitely not Mr. Henning's signature, I can see that.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 473, the same being a letter dated March 26, 1930, addressed to George N. Lenci

and signed C. Henning, Vice President in Charge of Sales. Was that letter received in your office? A. Yes.

(The document referred to was marked as Government's Exhibit No. 473 for Identification.)

By Mr. Knuff:

Q. I show you what has been marked for Identification as Government's Exhibit 474, the same being a letter dated March 4, 1931, addressed to George N. Lenci, Vice
3998 President, and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 474 for Identification.)

By Mr. Knuff:

Q. Was that letter received in your New York office? A. Yes.

Mr. Knuff: In the books of exhibits that are now before Your Honors, you will find that the next exhibit is dated March 17, 1931. Just skip that for the time being, please.

By Mr. Knuff:

Q. I show you what has been marked for Identification as Government's Exhibit 475, the same being a letter dated June 4, 1936, addressed to George N. Lenci and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 475 for Identification.)

By Mr. Knuff:

Q. Was that letter received by you? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 476, the same being a letter dated February 7, 1936, addressed to George N. Lenci, and
3999 signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 476 for Identification.)

By Mr. Knuff:

Q. Was that letter received by you? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibits 472, 473, 474, 475, and 476.

Justice Stephens: Is there any objection on the grounds of identification as to any of them?

Mr. Johnston: We haven't had an opportunity to go over them.

Justice Stephens: Take your time, gentlemen.

(Exhibits examined by defendants' counsel.)

Mr. Bromley: We make only the usual objection.

Justice Stephens: There is no objection as to identification of any of them, even 472?

Mr. Bromley: No, sir.

Justice Stephens: They may be received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits 472, 473, 474, 475, and 476 were received in evidence.)

4000 By Mr. Knuff:

Q. The five exhibits that you have just identified, Mr. Lenci, relate to meetings that were held on the days specified, and were what might be designated as meetings of licensees; is that correct? A. Yes.

Q. The dates on which these meetings were held were not the only dates on which meetings of licensees were held, is that correct?

Mr. Oliver: We object to that question on the ground that it assumes that the witness has testified that meetings were held on these dates. I recognize that the letters are notices of such meetings, but that is all.

Mr. Knuff: I will clear that up.

By Mr. Knuff:

Q. Were meetings held on those dates, if you know? A. I don't know.

Q. You received the notices of the meetings? A. We did.

Q. Did you receive notices of meetings other than those notices? A. I can't recall.

Q. Did you attend a meeting on August 6, if you know?

Mr. Bromley: What year?

Mr. Knuff: 1929.

4001 The Witness: I don't recall.

By Mr. Knuff:

Q. Did you attend a meeting on April 3, 1930? A. I don't remember.

Q. And did you attend a meeting on March 10, 1931? A. No.

Q. And did you attend a meeting on June 10, 1936? A. I don't remember.

Q. Did you attend a meeting on February 19, 1936? A. I don't remember.

Q. Did you attend any licensee meetings? A. Yes.

Justice Stephens: Did I understand you to say that you did not attend one on March 10, or that you didn't know?

The Witness: I did not attend the March 10th meeting.

Justice Stephens: If there was one then, you didn't attend it?

The Witness: That is right.

By Mr. Knuff:

Q. Was there a meeting held in the Commodore Hotel on October 17, 1932, if you know?

Justice Jackson: At the Commodore Hotel in New York?

Mr. Knuff: In New York City, yes.

The Witness: I don't remember.

By Mr. Knuff:

4002 Q. Could your memory be refreshed as to that? A. Yes.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 477, and I ask you to look at it, please.

(The document referred to was marked as Government's Exhibit No. 477 for Identification.)

Justice Stephens: That consists of three pages—

Mr. Knuff: (Interposing) The October 17th meeting is just one page, Your Honor.

Justice Stephens: I see. They are differently dated. What number is this going to be?

Mr. Knuff: Exhibit 477.

By Mr. Knuff:

Q. Have you looked at Government's Exhibit 477 for Identification, Mr. Lenci? A. Yes.

Q. Does that refresh your recollection as to whether or not you attended a meeting of licensees in the Commodore

Hotel on the 17th of October, 1932? A. Yes, I did attend that meeting.

Q. And the exhibit that you have before you is a memorandum in your own handwriting, is that correct? A. That is correct.

4003 Q. And when was that made, Mr. Lenci? A. Very shortly after the meeting.

Q. The same day or the next day? A. Within the next two or three days.

Q. Within the next two or three days? A. Yes.

Q. Who was present at the meeting on the 17th of October, 1932? A. For the United States Gypsum Company—

Q. (Interposing) Who represented them? A. Mr. Henning and Mr. MacLeish.

Q. Was Atlantic represented? A. Atlantic Gypsum Company was represented by Mr. Neale.

Q. Was the Kelley Plasterboard present at that meeting, or represented, rather? A. The Kelley Plasterboard Company was represented by Mr. Kelley.

Q. And was the Ebsary Gypsum Company represented? A. We were represented by Mr. Ebsary, Mr. Hough, Mr. Diegel, and myself.

Q. You had four there? A. Yes, it was in our own home town.

Q. And was National represented at that meeting? A. Yes, National was represented by Mr. Baker.

4004 Q. That is Mr. M. H. Baker? A. Yes.

Q. The President of National? A. Yes.

Q. And was Certain-teed represented at that meeting? A. Yes, by Mr. C. O. Brown and Mr. Roos.

Q. And was American represented at that meeting? A. American was represented by Mr. Black.

Q. That is Arthur Black? A. Arthur Black.

Q. And was Universal represented? A. Universal was represented by Mr. Eugene Holland.

Q. Texas was not at that meeting, is that correct? A. I have no record of Texas being there.

Q. How long did the meeting last? A. Well, just that one day. I don't remember whether it lasted a morning and afternoon, or just a single session. I don't remember.

Q. You don't remember whether it started in the morning and finished later in the afternoon, or whether it was an afternoon session and finished late in the afternoon—your recollection is not sufficiently clear as to that? A. No.

Q. At that meeting, was there any discussion as to the results of an audit that the United States Gypsum
4005 Company had made of the books of the various licensees some time previous to that? A. Yes.

Q. And who led that discussion? A. Well, as I recall it, the meeting was called as the result of the audit.

Q. Do you know who called the meeting? A. Well, the United States Gypsum Company called it.

Q. United States Gypsum? A. Yes. And as I remember, Mr. MacLeish had a record of the audit that had been made, and he was very much perturbed at the number of violations of the terms of the license bulletins.

Q. And did Mr. MacLeish point out that American had allegedly violated their agreement in 361 different ways, involving $45,000, which represented about 4 million feet of board? A. No, Mr. MacLeish did not use any names.

Q. He didn't use any names? A. He did not use any names. We knew our own when we came to the figure, because we had already been given a copy of our audit.

Q. I notice that on Exhibit 477, you have noted "1", "2", "3", and so forth, and then on the outside of that margin you have indicated "2", "5", "4", "6", "3", "1", and
4006 "7", and I was just corresponding— A. (Interposing) That was purely in the realm of speculation on my part.

Q. That was just speculation on your part? A. Yes.

Q. You were No. 4, is that correct? A. I was No. 4, yes.

Q. And according to Mr. MacLeish, the Ebsary Gypsum Company had allegedly violated the licensing agreement 711 times, to the extent of $50,000, and involving about 6,700,000 feet of board; is that correct? A. That is correct.

Q. Is that your recollection as to that? A. I remember the 711.

Q. Did Mr. MacLeish say what possible alternatives there were in case the situation didn't improve? A. Yes, he made the statement that if the situation did not improve, there were only three things to do: either to cancel the licenses; or for the United States Gypsum Company to institute damage suits against the licensees; or to eliminate the price control feature entirely from the licenses.

Q. Was there any discussion by any of the licensees as to what course of action USG should pursue? A. No.
4007 Q. That was just a statement made by Mr. MacLeish, that there were three things open for the licensor: either to cancel the license, or to bring an action for

damages, or to waive the price control feature in the license agreements? A. That is correct.

Justice Stephens: We will take the afternoon recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4008 Justice Stephens: Proceed.

By Mr. Knuff:

Q. At this meeting of October 17, 1932, Mr. Lenci, after Mr. MacLeish had said that the United States Gypsum Company had three courses to pursue, that is, either to cancel the agreement, bring an action for damages, or to remove the price control feature from the licenses, what expression of opinion did any of the licensees make as to that statement of Mr. MacLeish's?

Mr. Bromley: I object to that as repititious. He has already said, "None".

Mr. Knuff: I didn't so understand him.

Justice Jackson: Is that right?

The Witness: Yes, we were just told what they would do if we didn't behave ourselves.

By Mr. Knuff:

Q. What was that, you were told what would happen if you didn't behave yourselves? A. We were told that if we didn't improve this condition they would take either one of these steps.

Q. Did you use the word "behave"? A. Maybe I did.

Mr. Knuff: Will you read the answer, Mr. Reporter?

(Thereupon, the record was read by the reporter.)

The Witness: That is my wording and not theirs.

4009 By Mr. Knuff:

Q. That is the way you understood their language, is that correct? A. To put it more correctly, we were told that we would have to abide by the license and the license bulletins, or that otherwise they would take one of these three courses of action.

Q. Your license wasn't cancelled, was it? A. No.

Q. And USG didn't bring a suit against Ebsary Gypsum Company for damages, did they? A. No.

Q. And the price control feature of the license wasn't abrogated in so far as Ebsary was concerned? A. No.

Q. Do you know of the license of any other licensee that was cancelled after this meeting? A. No, I don't know of that.

Q. Do you know of any lawsuit brought by USG for contributory infringement of the patent, after this meeting, against any other licensee? A. I don't know of that.

Q. Do you know of any license having the price control feature removed after this meeting of October 17? A. I do not know that.

Q. Now at this meeting there was a discussion con-
4010 cerning low prices, is that right? A. No, that was not a discussion, that was part of Mr. MacLeish's statement.

Q. What was his full statement? A. He gave us first the tabulation of the results, and then following that he said, "These violations fall into these various classifications".

Q. What were those classifications? A. They were low prices—do you want me to explain this as I go along? There is no point in my reading them all off and then going back to them again.

Q. I want you to explain, Mr. Lenci, your present recollection of just what Mr. MacLeish said at that meeting, and you can use the exhibit that you have before you marked for identification as Exhibit 477, to refresh your recollection. A. Well, the first item was low prices. That was very simple to understand. Those were prices at which board products had been sold at less than the bulletin prices.

Q. Yes? A. The next item is old prices—

Justice Stephens: (Interposing) Are you telling us what Mr. MacLeish said?

The Witness: Yes, not in his words, though.

Justice Stephens: I understand.

4011 By Mr. Knuff:

Q. Did Mr. MacLeish indicate what he meant by "low prices"? A. Yes, prices below the bulletin prices.

Q. I see, prices that were below the minimum prices fixed in the bulletins? A. Yes.

Mr. Bromley: Could we have it stated—prices by whom?

The Witness: By the licensees.

By Mr. Knuff:

Q. Did he discuss the extent of the low price variations, that is did Mr. MacLeish discuss that? A. No, there was no breakdown given.

Q. If I understand you correctly, he simply undertook to catalog the various violations into certain sub-heads, is that correct? A. That is correct, yes.

Q. And in that catalog, or as one of the headings in that catalog, there was the subject of prices that were below the minimum price established by the United States Gypsum Company? A. Sales by the licensees at prices below those established in the bulletins.

Q. Did he talk about what the old prices were? A. Well, a great many of these violations fell into this classi-
4012 fication because the audit started with the date of the very beginning of the price control.

Q. That was in May of 1929? A. May of 1929—and consequently, there were a great many orders on all of the companies' books at prior prices, and those naturally were below the bulletin prices, or a great many of them were below the bulletin prices, which were in effect after the licenses were granted.

Q. Are you explaining what is meant by "old prices", or are you relating what Mr. MacLeish said? A. That is what he said.

Q. That is what he said? A. Yes.

Q. In other words, Mr. MacLeish was excusing the low prices, is that correct? A. He understood what they were.

Q. He understood that? A. Yes. The accountants, in making their audit, made no attempt to edit the matter at all, they simply made a transcript in their own form, of the figures.

Q. Did Mr. MacLeish talk about the excessive discounts, the alleged excessive discounts? A. He did. I have just forgotten what that discussion was. I don't remember just what that was.

Q. Was there any discussion by Mr. MacLeish as
4013 to rebates, that is, that a licensee would sell board at a price, and then make a rebate to a customer later on? A. I have forgotten just what that discussion was.

Q. There was some discussion concerning rebates? A. When I say "discussion" I mean that Mr. MacLeish made some statement regarding that, but I have forgotten what it was—

Q. (Interposing) Had you finished your answer? A. I have forgotten just what it was.

Q. Did Mr. MacLeish discuss the matter of culls in the industry? A. Yes.

Q. What is the meaning of the term "cull"? A. Well, a cull is a board which is not fit for sale, fit for use.

Q. It is an imperfect board? A. It is an imperfect board, and they were used for dunnage.

Q. And what did Mr. MacLeish say about that? A. That some of the complaints were due to the fact that the licensees were putting in an unusual number of boards as culls, for packing, which in reality were first-class material and in a way were a rebate.

Q. And did Mr. MacLeish say that that practice
4014 would have to cease? A. Yes.

Q. Now what about seconds, was there any talk about seconds there? A. No, I don't think so.

Q. Would you say that seconds were the same as culls? A. No.

Q. They are not the same as culls? A. No.

Q. What is the difference between a second and a cull? A. Well, a second is a poor board which is usable, but an honest cull is no good for use in building.

Q. That is an imperfect board that hasn't any use— A. (Interposing) That hasn't any use, yes.

Justice Jackson: It is so imperfect that it hasn't any use?

The Witness: That is right.

By Mr. Knuff:

Q. And a second is an imperfect board that can be used? A. That is right.

Q. Did Mr. MacLeish discuss the advertising policies of the various licensees? A. Yes.

Q. What did he say about that? A. The complaint was that at that time a great many of the dealers were demanding that the licensees buy advertising matter, or
4015 paint fences for them, or decorate their offices, or furnish materials with which to fix up their offices, and things of that kind—

Q. (Interposing) And Mr. MacLeish— A. (Continuing)—without charging for it.

Q. Let me understand you. Some of the dealers had been asking the licensees to defray the cost of billboards, is that what you mean? A. Yes, among other things.

Q. And some of the licensees were doing that? A. That had been done to an excessive extent which was, in effect, again a rebate.

Q. That is what Mr. MacLeish said? A. Yes.

Q. And did Mr. MacLeish say that that advertising policy would have to be corrected? A. Yes.

Q. Now suppose a dealer wanted to advertise Ebsary Gypsum Company's products in a newspaper, would you be

allowed, under your understanding of what transpired at the meeting of October 17, 1932, to defray any of the cost of that advertising? A. I don't remember that that sort of advertising came up for discussion.

Q. That wasn't discussed? A. No.

4016 Q. It was just billboard advertising, and the painting of dealers' offices, and what other kind of advertising was discussed? A. Well, those were the principal items. A dealer would decide that he wanted to repaint his whole place, fences and everything else, and on the fence there would be a small sign of one of the manufacturers, but the manufacturer would have to spend the money to do the whole job.

Q. And it was Mr. MacLeish's thought that that was, in effect, a rebate, is that correct? A. Yes.

Q. How about carpenters' aprons, were they discussed by Mr. MacLeish at that time? A. I don't think they were.

Q. They weren't discussed? A. I don't recall that they were.

Mr. Knuff: That isn't meant to be facetious. Later on we will show something concerning carpenters' aprons.

By Mr. Knuff:

Q. Was there anything said by Mr. MacLeish as to the freight that might have been deducted from bills rendered the dealers? A. No, that isn't what that memorandum on here means. It means that in making up—

Justice Stephens: (Interposing) State what Mr.

4017 MacLeish said, if anything.

The Witness: That is what I am trying to do—that the licensees, in figuring their delivered prices, did not use the proper freight rate from the mill to destination, which resulted in making a lower delivered price than should have been made.

By Mr. Knuff:

Q. Was there any discussion as to switching charges? A. Yes.

Q. What was the discussion that Mr. MacLeish brought up? A. The statement there was that in certain cities the cars would be placed for two different yards to unload, and the Interstate Commerce Commission would provide a switching charge for that service; and that that should not be absorbed by the shipper, or the licensee.

Q. If I understand you correctly, on a car coming into Washington, a pool car coming into Washington, D. C., con-

signed to two different consignees, under the tariffs of the railroad company there is a switching charge for moving the car after it is first placed, is that correct? A. That is my understanding, yes.

Q. And Mr. MacLeish told the licensees that if any of the licensees were absorbing that switching charge, that that was improper under the license? A. Yes, that in effect it reduced the price.

4018 Q. And did Mr. MacLeish say that that practice would have to stop? A. That that would have to be corrected, yes.

Q. Now do the railroads charge anything, in addition to the regular rate, on a stop-over car? A. Yes, that again applies to pool cars.

Q. What is meant by a "stop-over" car, first? A. Well, using this as an example, suppose a car is shipped from Philadelphia to Washington, but contains material for a dealer in Baltimore, which is an intermediate point. The railroad, for what is known as a "stop-over charge" will permit that car to be stopped in Baltimore for partial unloading, and then continue on to the ultimate destination.

Q. And some of the licensees had been paying that stop-over charge, is that correct? A. That is correct.

Q. And Mr. MacLeish said that that practice would have to stop? A. Yes.

Q. Now was there anything discussed concerning warehousing? A. As to warehousing, that has reference to cases where a licensee would make an arrangement with a dealer, and pay that dealer a warehousing charge, which merely was a cover for paying that dealer to buy his material, in effect a rebate.

4019 Q. According to Mr. MacLeish? A. Yes.

Q. If you wanted to rent warehouse space in, let us say Brooklyn, to warehouse your board, you were not permitted, under the license bulletins, according to your understanding, to rent that space from a dealer? A. No, and we wouldn't want to do it either.

Q. Well, in the first place, you weren't permitted to do it under the license bulletins? A. That is correct.

Q. According to your understanding? A. Yes.

Q. That is your understanding? A. That is my understanding, yes.

Q. If you wanted to warehouse your board in Brooklyn you would have to patronize some person other than one of your patrons, according to your understanding? A. Not necessarily other than one of our patrons, but we could not

patronize any building supply dealer who might be a customer of any licensee.

Q. What was the business reason for that, Mr. Lenci? A. The reason for that would be that if you were anxious to influence your sales to a specific dealer, you could go to that dealer and say, "I will pay you $50 a month", or "I will pay you $100 a month if you will put my material in
4020 stock", and theoretically somebody else would come and pick it up.

Q. Well, suppose you wanted to, bona fide, rent warehouse space, what was the business reason for preventing you from renting warehouse space as you understand it? A. Because the thing was not for the purpose of renting space, it was done for the purpose of influencing sales.

Q. Now my question asked concerning a bona fide warehouse arrangement. Suppose you wanted, honestly, without any thought of making a rebate, to warehouse goods in Brooklyn. What was the business reason why you couldn't rent warehouse space from a dealer, if there was any business reason, according to your understanding?

Mr. Bromley: Do you contend there is anything in the bulletins that would prevent a bona fide transaction, as distinguished from a fake or false rebate transaction, from being consummated?

Mr. Knuff: We do.

Mr. Bromley: Well, there wasn't, and the bulletins already in evidence show that.

Mr. Knuff: There is a blanket order under those bulletins, a blanket prohibition under those bulletins, that is quite apparent if you will examine the bulletins. We will bring that out later on and show the blanket prohibition against renting warehouse space from a dealer.

Justice Jackson: We will read the bulletins, I suppose.

4021 Mr. Knuff: That is right.

Justice Stephens: It seems to the Court that perhaps we could save some time here. No objection is being raised to your asking this witness his understanding of the bulletins, but doesn't the last question really become argumentative? Isn't it one for argument as to what the bulletins mean, and as to what they may or may not prevent?

Mr. Knuff: I didn't think it was, but if your Honor thinks so, I won't pursue it any further because we are going to develop it in just a little more orderly fashion, later on.

Justice Stephens: Very well.

By Mr. Knuff:

Q. There was a discussion at that October 17th meeting concerning jobbers, was there not? A. Yes.

Q. What was that discussion? A. I don't remember. There were so many discussions regarding jobbers, that I don't know.

Q. You mean that the matter of jobbers, the subject of jobbers, was a matter of very frequent discussion between licensees and the licensor? A. Well, you can see that from the letters that we had here this morning.

Q. I referred to two letters this morning. A. Yes.

4022 Q. Do you say that it was a matter of frequent discussion, the jobber situation? A. Yes.

Q. And you cannot tell us what the discussion was at this meeting of October 17, with reference to jobbers? A. Well, as I recall it, my best recollection is that the discussion was that a bulletin had been issued which put jobbers and dealers on the same basis, but that in spite of that, some of the licensees had continued to sell jobbers at a discount below the dealer price.

Q. And was there a discussion at that meeting that the manufacturers should discontinue that practice? A. I don't think that there was a discussion of it, I think Mr. MacLeish made a statement that it was one of the things that would have to be corrected.

Q. That the jobbing situation would have to be corrected? A. Yes.

Q. And that the licensees would not be permitted to sell a jobber at a discount? A. They would have to sell jobbers according to the bulletins.

Q. Which means that they wouldn't be able to sell them at a discount? A. Yes.

Q. Was there any discussion concerning the freight

4023 rates at that meeting? A. Well, I think the discussion on freight rates there is the same as I have already explained.

Q. That is, with reference to your using too low a freight rate or absorbing the switching charge, or paying the stop-over charge? A. Primarily in not using the correct freight in figuring the price to destination.

Q. Could it also mean using a wrong basing point? A. No.

Q. Not a wrong basing point? A. No.

Q. Was there any discussion concerning the freight and allowances at that meeting? A. There is no "and" in my

notes, that is a "t". It is "freight allowances". I don't recall just what that was.

Q. Do you recall that there was some discussion concerning freight allowances? A. Yes, otherwise I wouldn't have made the memorandum, but I don't remember what it was.

Q. Was there any discussion concerning the f. o. b. mill price? A. I don't remember what that was.

Q. You don't recall that? A. No, I don't.

4024 Q. Do you recall that Mr. MacLeish brought up the fact that at the Fair at Chicago, the National Gypsum Company had accepted some of the World's Fair bonds in payment for goods that were sold out there, and that Mr. MacLeish said that that practice would have to stop, that you could only sell for cash. Do you recall that? A. I do remember something of that kind, yes.

Q. Do you know how much material the National Gypsum Company sold to the Chicago World's Fair? A. No, I don't.

Q. And do you know what justification National Gypsum Company gave for their action in accepting these World's Fair bonds? A. No, I don't.

Q. But Mr. MacLeish was rather insistent that that practice should not continue in the future, is that correct?

Mr. Bromley: Just a moment. That assumes that he said anything about it. The witness says he doesn't remember.

Mr. Knuff: He says that there was some discussion about that, but that he does not recall just exactly what the discussion was.

Justice Stephens: Well, of course under Rule 43 (b) you are entitled to lead the witness, but even in leading the witness, you may not assume facts not in evidence. You

4025 may interrogate the witness as to what Mr. MacLeish did say on that subject, if he remembers anything.

Mr. Knuff: I will limit my question in accordance with your Honor's suggestion. What was my question?

Justice Stephens: Re-ask the question. Ask what Mr. MacLeish said, if anything, on this subject of taking bonds in payment for material by National. Answer that question.

The Witness: I don't really remember.

By Mr. Knuff:

Q. You don't recall what it was? A. No, I remember that the statement was made by Mr. MacLeish, but as to what the details were, I really don't remember.

Q. Well, do you recall whether Mr. MacLeish said that that practice couldn't continue in the future, that it would have to stop? A. I don't remember.

Q. Was there a discussion at the October 17th meeting concerning commission men being employed by the licensees? A. There weren't really any discussions on these matters. These were all statements made by Mr. MacLeish, that such-and-such a violation fell into this class or into that class. And he said, to go back, that the question of rebates came about through the employment of men selling on commission, and that the audit showed that these commission men, if they didn't have a good month, would be
4026 very apt to give part of their commissions away to the customer, and that therefore the employment of commission men was a bad practice.

Q. That the employment of commission men was a bad practice? A. Was a bad practice, yes.

Q. And that that practice would have to cease? A. That that would have to be discontinued.

Q. Now I get the impression—I don't want to get it erroneously—but I do get the impression from what you have said that Mr. MacLeish was the only person that did any talking up there, and that the licensees just sat there and didn't say anything. Am I wrong in that impression? A. No, I wouldn't say that, but the whole meeting was to present this audit, and Mr. MacLeish's or the United States Gypsum Company's reaction to the audit, and to explain what caused the differences, and to suggest methods to improve conditions.

Q. And when Mr. MacLeish said it was a bad practice for the industry to employ salesmen on a commission basis, what did the other members who were present at that meeting, say about that? A. Well, there were very few commission men employed, and the ones who had them said that they would be glad to rearrange them and put them on a salary basis.

Q. You say that there were very few commission
4027 men, commission salesmen, employed in the gypsum industry? A. Yes.

Q. And the licensees that did employ commission salesmen said that they would be very glad to discontinue their employment, that is the employment of commission men, and put the commission men on a salary basis? A. Yes.

Justice Jackson: Mr. Knuff, is it necessary that you repeat the answer to the question, just to have him say "yes"?

Mr. Knuff: No, I don't think so.

Justice Jackson: You have been doing that. I think on actual check yesterday you did it thirty-two times, and you have been doing it all day today. You are piling up a tremendous record, and the witness' answers are his answers. Then if you repeat his answers to him, and say, "Is that right?" that doesn't add anything to the strength of his answer.

Mr. Knuff: I quite agree with your Honor, and I was not conscious that I was doing it, and will try not to do it in the future.

Justice Stephens: We don't want you to be self-conscious, we want you to be at ease in this examination. We all have our individual methods. But it is a fact of which we have all been aware for several days, that you have been following the practice that Judge Jackson has just
4028 spoken of, and in the course of ten days' examination, it does take a lot of time and energy.

Mr. Knuff: I accept that as a criticism that is worthwhile, and I will try to correct it. I wasn't conscious that I was doing it.

Justice Stephens: We all fall into habits, of which we are not aware.

Justice Jackson: If we were in your place, we probably wouldn't do as well as you are doing.

Mr. Knuff: Well, I am not so sure that you probably wouldn't do better.

By Mr. Knuff:

Q. Now was there any discussion as to meetings of licensees that were to be held in the future? A. Well, in the period from 1929 to 1932 there had been a tremendous number of bulletins issued, piecemeal, and honestly none of us could be blamed for making mistakes. Mr. MacLeish said that the only way to handle that would be to have meetings a little more frequently, and that when these different misunderstandings as to the meaning of a bulletin came up, we should get them straightened out at these meetings, instead of going on and creating a record such as we had been doing in the previous three years.

Q. And was there anything said concerning a more comprehensive return that the licensees should file with
4029 the royalty statements? A. Yes. I believe up to that time the statements had been very brief, and the United States Gypsum Company felt that that should

be itemized in a little greater detail, and include with it an affidavit signed by a responsible officer of each licensee when it was submitted, and that they should be turned in once a month.

Q. Do you recall what the form of the affidavit was? A. Well, the affidavit was itemized as to the type of board, whether it was wallboard or plasterboard or lath, and the price was carried across, and the total taken, and the amount of royalties, which was on a percentage basis, figured, and the amount carried at the bottom as being the amount of royalty due from each licensee to the licensor.

Q. I don't believe you understood my question. I believe you are giving me the form of the return, but I don't believe— A. (Interposing) I thought that was what you asked for.

Q. No, my question was—was there any suggestion as to what the affidavit should contain, that is such as that the affiant had observed the bulletin prices, and that this was a correct return, and so forth—do you understand what I mean by that? A. Yes.

Q. Was there any discussion, or was there any
4030 suggestion from Mr. MacLeish, as to the form that that affidavit should take, if you remember? A. I don't remember.

Q. You don't remember that? A. No.

Mr. Knuff: If your Honor pleases, we offer in evidence Government's Exhibit 477, and I am not unmindful of your Honor's ruling of yesterday. I am offering it in good faith—

Justice Stephens: (Interposing) I am sure you are. Is there any objection to it?

Mr. Bromley: That is objected to as incompetent.

Justice Stephens: What is your theory of its admissibility?

Mr. Knuff: My theory of its admissibility in this case, your Honor is this.

It is certainly a written declaration. It is perhaps not a complete declaration, but nevertheless it is a declaration and on that basis it should be admitted.

On the other hand, I think it should be admitted to corroborate the oral testimony that Mr. Lenci has given today. He has here said what was discussed out there, or rather at that meeting. Now I think if the exhibit itself is in evidence, it will corroborate that testimony. Here is the memorandum that was made, here is the way it was

testified to today, and I think it corroborates rather
4031 fully Mr. Lenci's testimony.

In addition to that, I think that it is admissible on the theory of past recollection recorded.

Now I realize that there are statements in the text which say that a document that is offered on the theory of past recollection recorded is only admissible because the witness doesn't have any present recollection. But it seems to me that even if the witness does have a present recollection, that that fortifies what he said, and it should be doubly admissible on that basis.

This document was made by Mr. Lenci, it is in his own handwriting, it was made within a few days after the meeting was held, and we think that it is relevant, we think it has probative value, and we think that it should be admitted.

If your Honor recalls—Mr. Steffen has just called this to my attention—there were certain items on this exhibit where Mr. Lenci didn't recall just exactly what was said about them. And on that basis, or at least to that extent, I think it is unquestionably past recollection recorded.

Justice Stephens: He hasn't yet testified that it is a record of his past recollection.

Mr. Knuff: He has testified, as I understood this witness, that he made this memorandum within a few days after the meeting was held. I understood him to say that it was a correct resumé of the matters that were brought up
4032 at that meeting. Now I may be wrong on that.

Justice Stephens: I don't think he testified to that. It is possible that it is admissible, or that part of it might be admissible, as past recollection recorded if he would qualify it as such.

The Court doesn't mean to make an over-strict or extreme application of these rules. The Court does wish to keep the record down, and the Court also wishes to apply the rules, it is the Court's duty to apply the rules strictly in every case to the best of its ability.

It seems to me, although I will be glad to hear you further, and hear adverse counsel, that all this amounts to is an itemization of topics which were discussed, and that the witness has so fully stated all that was discussed, that there isn't any problem of confirmation or corroboration or refreshing or recording recollection any further.

4033 By Mr. Knuff:

Q. Mr. Lenci, is Government's Exhibit 477 for Identification a correct resumé of the matters that were discussed at the meeting in the Hotel Commodore on October 17, 1932? A. To the best of my knowledge it is a record of the various topics which were discussed.

Q. And is it a correct record? I am not asking you if it is a full record, but is it a correct record of the topics that were discussed? A. It is a record of the topics, without explaining what each one was.

Q. And this is in your own handwriting, is it not? A. Yes.

Q. And it was made within a few days after the meeting? A. Yes.

Justice Stephens: Do you wish to be heard, Mr. Bromley?

Mr. Bromley: I think that still doesn't qualify it under the theory of past recollection recorded. It doesn't help us to have a list of the topics, once counsel has gone over it and had him explain what happened at the meeting.

Justice Stephens: If I may illustrate the way it strikes me, for the purpose of aiding counsel, if this witness, when called to the witness stand, had said he did not remember what topics were discussed at that meeting, but that he did remember that after the meeting he had made a list
4034 of those topics, and that he had made that list correctly, and that he had made it at or about the time of the meeting—if it was material then to show what topics were discussed there you would have a clear case of past recollection recorded.

But the witness himself has testified, with the aid of this document to refresh his recollection, as to everything in it and a great deal more. So it ish't a record of his past recollection which he has no memory of now. It is a mere statement of topics which he does have a memory of now.

It seems to me that your contention would abolish the rule of past recollection recorded, Mr. Knuff, and present memory refreshed, because on your theory every such item or every such document should come in, whether you call by one name or another, to confirm what the witness has said, when what the witness has said doesn't need any confirmation.

I don't understand that there is any dispute about what he has said. Do you dispute the witness' statement, Mr. Bromley, as to what went on at this meeting?

Mr. Bromley: No, your Honor, I think what he said is substantially true.

Justice Stephens: You may, I assume, wish to qualify or modify his statement through cross examination, but there isn't any denial that such a meeting was held?

Mr. Bromley: No.

Justice Stephens: Or that Mr. MacLeish was there?

4035 Mr. Bromley: No, your Honor.

Justice Stephens: And that he discussed these topics?

Mr. Bromley: Oh no, there isn't any denial of that.

Justice Stephens: We do not mean to restrict the Government so narrowly that it can't put in items which really amount to declarations, or records of past memory, but it seems to us that this is a mere case of present recollection refreshed, and such documents are not admissible.

I will say frankly to you that it seems to us that you do not need it; the witness has testified to everything in it. How can your case be harmed if it isn't in evidence? It is already in evidence that he did make a record of these topics.

Mr. Knuff: I don't believe the middle portion of this is in evidence, your Honor, that is beginning with where the figures 1, 2, 3, 4, 5, 6, 7 and 8, and so forth, appear. I don't think he discussed those because he said he could remember his because of the "711", but that he couldn't remember anything about the rest.

Justice Stephens: If you take those Items 1, 2, 3, 4, 5, 6, 7 and 8, and the columns of figures and items and notations which follow them, and put them in alone, as a record of topics which were mentioned at this meeting by Mr. MacLeish, on the theory that he cannot remember those, and that they do constitute a list of topics, what do they mean? A document to be admissible must be intel-

4036 ligible.

Mr. Knuff: I didn't ask him what they meant because I know what they mean and I know that he can explain what they mean. I didn't ask him what they meant because—

Justice Stephens: (Interposing) If you want to develop by further inquiry—

Mr. Knuff: (continuing) —because I knew that he couldn't exactly remember 4,000,000 feet, or 6,700,000 feet, and so forth. I know exactly what they mean and I know that the witness knows what they mean—

Justice Stephens: (Interposing) Just a moment. If you can develop by further inquiry that those items are a designation of topics mentioned by Mr. MacLeish, which this witness cannot remember now but knows that he did truly record, that part of the document might possibly be admissible as past recollection recorded.

Justice Jackson: Maybe my recollection is faulty, but I thought the witness testified as to what those things meant, in the first column, after the 1, 2, 3, 4, 5, 6 and 7, that there were shown the number of violations, involving a certain amount of money and involving a certain number of square feet. Now he doesn't know to which of the licensees any of these applies, except as to his own. But as far as what they mean is concerned, I think he has told that. Maybe that is just my imagination, though.

Mr. Knuff: No, I don't think it is your imagina-
4037 tion, your Honor. I think there was an imperfect development of that because I knew that Mr. Lenci couldn't remember 3,500,000 or 2,800,000, and that is the reason I didn't go into it. I know that Mr. Lenci can explain what the figures 2, 5, 4, 6, 3, 1 and 7 on the left hand margin of the paper, mean in relation to the figures 1, 2, 3, 4, 5, 6, 7 and 8 which are inside the margin line. I know that he can explain that.

By Mr. Knuff:

Q. Mr. Lenci, the figure "1" under the word "Result" refers to what company? A. You asked me that before—

Justice Jackson: (Interposing) That has already been answered.

The Witness: Those figures on the left I can only answer by saying that I was speculating that they did apply to those companies.

Justice Jackson: Didn't you say that the names of the companies were not mentioned?

The Witness: Correct.

Justice Stephens: We will take the recess at this time until tomorrow morning at ten o'clock.

(Whereupon, at 4:05 o'clock, p.m., the hearing was recessed until Friday morning, February 18, 1944, at 10:00 o'clock.)

4038 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Friday, February 18, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4040 Last night before we adjourned, we were discussing the admissibility of Exhibit 477, and during the evening I read the exhibit over very carefully, and compared it very carefully with the testimony of Mr. Lenci. It seems to the Court that it is not admissible in evidence except possibly in part.

It is used to refresh present recollection, and the recollection being refreshed, the exhibit is not needed in evidence and is not admissible in evidence.

To offer it as a whole, past recollection recorded, is to offer it on a factual theory completely conflicting
4041 with the theory that it refreshes present recollection.

There is one part of the exhibit which might possibly be admissible as past recollection recorded, and that is the four-column portion which commences in the middle of the exhibit. The first column has the figures 1 to 8, inclusive. The second column commences with the figure 361 and ends with the figure 172. The third column commences with the figure 45,000 and ends with the figure 35,000. The fourth column commences with the figure 4,000,000 and ends with the figure 2,800,000.

Now the witness testified that he could not himself independently remember those figures, but that he did record them as figures mentioned by Mr. MacLeish at this meeting to which the exhibit relates, of October 17. He testified that he could not allocate those figures to any particular licensee except the figure in the fourth line, 711, which he attributed to the Ebsary Gypsum Company.

Now if it is material and relevant in this case, under any of the issues, to show that Mr. MacLeish, for the United States Gypsum Company, charged that the defendants as a group had been guilty of the numbers of violations involving the numbers of dollars and the numbers of square feet described in those columns, I suppose those items would constitute a past recollection recorded, as those figures were testified to as having been stated by Mr. MacLeish.
4042 I will hear the Government very briefly on its contention that they are relevant to any issue in this case. How can they be relevant? What do they prove? The charge here is not violation of the license agreements, but violation of the Sherman Act.

Mr. Knuff: I think they are relevant, but I don't think it is a matter of great importance, and we are not going to urge it.

Justice Stephens: The Court wants to be liberal and fair in respect of the introduction of the case of both the Government and the defendants. We want to err on the side—if there is any error—of giving both parties a full opportunity to present their case.

What do you claim the relevancy of the figures is?

Mr. Knuff: It would show, if Your Honor please, that the bulletins themselves were not clear, and that there was regulation here; and that the regulations, the bulletins that were doing the regulating, were anything but clear, because

here you have the amount of violations that are set forth in this exhibit, and I think it was Mr. MacLeish's contention that possibly the regulations weren't clear and that is the reason they did have so many violations; and to overcome that they felt that there should be more frequent meetings of the licensees so that that wouldn't happen in the future.

4043 Justice Stephens: And if it is proved that there had to be frequent meetings of the licensees, and that the bulletins were not clear, and that that occasioned the numbers of charged breaches of the licenses, what does that prove? It may prove something, but I don't understand it yet. What does it prove as far as the Government's case is concerned?

Mr. Knuff: Well, as I say, Your Honor, in so far as the Government's case is concerned, that, in and of itself, doesn't prove anything, those figures don't prove a thing.

Justice Jackson: You don't attach any importance to it?

Mr. Knuff: Not at all, Your Honor.

Mr. Bromley: May I be heard, Your Honor?

Justice Stephens: Certainly, Mr. Bromley.

Mr. Bromley: It seems to me that this question which Your Honor has raised, raises a fundamental question. Over the recess I have been trying to find out, if I could, just what it is the Government thinks it has a right to prove in this case by either the provisions of the price bulletins, or these meetings, or these complaints that were made to the Board Survey Company, and I can not find any ground on which they are material or relevant, particularly in view of the fact that in the criminal case, in Mr. Kelleher's

4044 opening, at page 188, he said:

"At the outset, you should understand that we make no contention in this case that there was anything illegal in the way these companies sold and determined the price at which they would sell the board which they manufactured, to dealers."

And he reiterated that concession again and again. For instance, at page 197, he said:

"As I said before, no contention is made that USG or its licensees violated the law in selling at prices fixed by USG, to dealers."

There are 10 pages of his opening, between pages 188 and 198, in which it seems to me that he concedes, without any reservation, the entire legality of every provision in the price bulletins, the entire legality of what Mr. Knuff has referred to as policing.

That matter came up time and time again while this very witness was on the stand and these very exhibits were being offered, things like this would happen—

Justice Jackson: (Interposing) Were they received in evidence, these exhibits, in the criminal trial?

Mr. Bromley: Only a very few of those that are now being offered, and those that were received had to do not with policing the licenses, but with a charge of the fixing of the resale prices of manufacturing distributors.

4045 Justice Jackson: Were they offered in evidence, the others?

Mr. Bromley: They are all mixed up, some of them were and some weren't.

Justice Jackson: That is just a matter of curiosity.

Mr. Steffen: I can answer your question specifically. They were offered, and Mr. Bromley insisted that they be admitted.

Mr. Bromley: Yes, in so far as they had to do with resale price fixing.

What I started to say was that Mr. Kelleher would frequently make statements like this, at page 671 of the testimony:

"Of course, we don't charge that the elimination of commission men among the licensees was illegal."

Then at the bottom of page 672, I said to him:

"So that you will concede, Mr. Kelleher, that this bulletin in provision"—meaning commission men—"was not made as a result of any unlawful understanding or agreement between the licensor and the licensees?

"Mr. Kelleher: I have made that concession so often, Mr. Bromley, that I don't see any necessity for it again."

Justice Stephens: Read that again, will you, please?

Mr. Bromley: (Reading):

"Mr. Bromley: So that you will concede, Mr. Kelle-

4046 her, that this bulletin provision"—commission men—

"was not made as a result of any unlawful understanding or agreement between the licensor and the licensees?

"Mr. Kelleher: I have made that concession so often, Mr. Bromley, that I don't see any necessity for it again."

Justice Stephens: That has to do with the provisions of the license which forbade the payment of commissions?

Mr. Bromley: Yes.

Justice Stephens: That is, rebate in the form of commissions?

Mr. Bromley: Rebating through commissions.

I only used this reference on page 672 as illustrative of the fact that the 10 pages to which I referred, beginning at page 188 in his opening, can be, it seems to me, readily demonstrated as being a binding concession that all these price bulletins, all these licensees' meetings, all of the complaints—and mind you, there were many, many complaints involving the prices at which licensees sold to dealers, where USG would find a dealer selling at a low price or some other licensee would find a dealer selling at a low price, and they would think that was evidence that the supplying licensee must have been cutting his price to the dealer, and there were many, many of those transactions—were not illegal.

And we find the exhibits about to come up now. In
4047 other words, we find here, it seems to me, an attempt to attack every provision in the price bulletins and every attempt of the licensor to try to secure adherence to those provisions, on the ground that all of those provisions and all of those attempts were illegal; whereas, in the criminal case, Mr. Kelleher conceded without reservation that they were all lawful and legal and not the result of any conspiracy, and that the only illegal thing about them was that when these defendants attempted to control the resale price of the manufacturing distributors, then that overstepped the limits of lawful price control and that activity became unlawful.

So it seems to me that we are again faced with the same situation as we were in the Calvin Tomkins matter, where the Government has made a specific concession, without any reservation of any kind, that this whole price fixing scheme and its enforcement was entirely lawful and legal, except so much of it as attempted to extend price fixing beyond its lawful limits. And we admit this, that we can not control resale prices.

So I say that the Government has conceded that up to the point where they say we attempted to extend price control too far, and attempted to bring into that control resale prices, the Government concedes that all of our activities were lawful.

4048 So I think this question raises a fundamental proposition as to whether any of this evidence is material.

I thought my friend, when he introduced the subject of this first meeting, was probably going to try to prove that at this first meeting something was said or done which would be material to the charge that the license agreements were

a mere subterfuge; or that something was said or done at this first meeting about trying to control the resale prices of manufacturing distributors. And, of course, he would have a right to do that, to go into every one of these meetings and prove, if he could, that something was said or done which supported the charge of subterfuge, or supported the charge of resale price fixing.

But now we are through with this first meeting, and there is no suggestion of anything of that kind. Rather do we find it proffered on the basis that it is material to attack price fixing by the licensor of the licensees' prices, a position which the Government not only abandoned before but conceded was perfectly lawful under the *General Electric* case.

So I say that on that ground, this evidence is entirely immaterial.

Justice Stephens: I was puzzled, I will say to the gentlemen for the Government as well as the defendants, as to why the Government was proving all of this detailed
4049 matter.

It occurred to me, Mr. Bromley, that perhaps the Government's theory was along the line of showing that the pattern of the license agreements, the complication thereof, the manner of carrying them into effect, with respect to area limitations and limitations on the amount of board which must be sold, and the like, carried the price fixing plan beyond the limits of the *General Electric Company* doctrine.

But that, I would think, could be shown by the bulletins.

Mr. Bromley: That is just what Kelleher conceded it did not do, that is my point. He conceded that this plan, as we worked it out, was protected by the *General Electric* case, and that there was nothing unlawful about it, nothing unlawful about such a provision as commission men, or any of the other provisions—

Justice Stephens: (Interposing) Provided it was in good faith and not a subterfuge.

Mr. Bromley: Provided it was not a subterfuge. That is the very point I am trying to make. And in these 10 pages to which I referred, Mr. Kelleher lists these provisions about trucking areas, and minimum quantities, and pick-ups, and commission men, so there can't be any doubt as to what he was talking about and as to what he conceded.

And I call those pages to Your Honors' attention in
4050 the hope that you will read them—they are too long for me to read now—but I make the point that he

takes up these very things, jobbers, and those items, that the Government now seems to be attacking as illegal. So that there is no confusion as to the extent of Mr. Kelleher's concession of legality. And he takes up these very meetings.

So that it seems to me that under the principle established in this trial with regard to the Calvin Tomkins concession, and its binding effect, that the Government is foreclosed to level an attack now on the provisions of the price bulletins as being illegal, or on the activities of the Board Survey Company in securing adherence to the contractual obligations of the licensees.

Justice Stephens: Let us hear from the Government.

Mr. Steffen: I am rather surprised at the argument that Mr. Bromley is making. Obviously, we don't have here the references to the pages in Mr. Kelleher's opening, and are not prepared to give the Court chapter and verse on what we have to say, at the moment.

Justice Stephens: If you would prefer, the Court will take a recess and let you read that, and the Court can read it.

Mr. Steffen: I would prefer to give you at the moment a brief statement, with a reservation of the right to cite chapter and verse later.

4051 Justice Stephens: Very well.

Mr. Steffen: Mr. Bromley has made this point, which he tried to make when we first started this discussion back on the question of interrogatories, the first day in this court room; and at that time I challenged Mr. Bromley, and he took to water, as I think he will have to now.

Mr. Bromley, in the course of the criminal trial, kept insisting that Mr. Kelleher conceded, as he has been doing here all the time, various things. And he wanted Mr. Kelleher to concede that the patent license agreements were legal, and that all the regulations under the patent licensing agreements were legal.

I brought out at the time we first brought this thing up, a year and some months ago, that Mr. Kelleher did not make that concession, and we do not make that concession; and the sections or the paragraphs which Mr. Bromley has cited to you must be read in the context in which they took place in order that you can get any notion of what the issues were and what the concessions or arguments were before the criminal court.

Let's get down to facts.

I have the indictment here in the criminal action, and

I think I ought to read it in order to make it perfectly clear, for purposes of this discussion.

On page 8 of the indictment the charge is made, in
4052 Paragraph 13:

"Beginning in the year 1929, the exact date being to the Grand Jurors unknown, and continuing to the date of the presentation of this indictment, the defendants and the corporations hereinbefore named as co-conspirators, and others to the Grand Jurors unknown, have been continuously engaged in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in gypsum board between the States and the District of Columbia in violation of Section 3 of the Act."

Paragraph 14 says:

"Throughout the period of time aforesaid the manufacturers, including each of the defendant corporations and the distributors, acting in part through the individuals named as defendants herein, were engaged within the District of Columbia in an unlawful combination and conspiracy"—this is the essential part—"to establish, fix and make uniform and non-competitive the distributors' resale prices to dealers and consumers for gypsum board purchased from the manufacturers by the distributors and resold by the distributors in commerce between the States and the District of Columbia as aforesaid."

That was the issue, that was the charge that was before the Court in the criminal case, that is, that the Government
charged the defendant USG and the licensees with
4053 having fixed and controlled the resale prices of distributors to dealers. And that was all that was involved, that was the issue.

And Mr. Kelleher—I don't have the section at hand—but Mr. Kelleher very carefully, in his opening statement, and I cited it to Your Honors a year or more ago, said that as respects the other violations—and those are the violations which we are now raising this morning, in this case—as respects the other violations we make no point one way or the other, we make no concessions. And he made no concessions, and I don't make any concession that Mr. Kelleher made any concessions, that those matters were legal. They weren't in issue, that is all that was involved, they weren't in issue in the criminal case. The only things that were in issue in the criminal case—

and it was a very narrow question—are what we have charged here in Paragraph 45(e), I think:

"concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid. * * *"

That is the charge which was tried in the criminal case, and that was all that was charged in the criminal indictment, and there was no relevance to most of the matters which we have brought up here.

These exhibits, the one that Your Honors ruled upon just a moment ago, the memoranda of meetings at which Mr. Lenci was present, were introduced only as respects one or two items, those having to do with resale price maintenance by distributors. All the rest of the matter was certainly not conceded as being legal, nor was it conceded or stated to be illegal. The matter was not in issue and wouldn't have been relevant before that Court, and we most positively are going to stand on that.

Now if I can take up the constructive argument as to why we do think this evidence is relevant, granting that we made no concessions to exclude it,—and I certainly want to be heard at length before any ruling to the contrary is made on that point,—we consider that this evidence concerning all of the meetings that took place after 1929, between licensees and licensor, is perhaps almost conclusive evidence to show what the purpose of the defendants was when they went into the agreement in 1929, that is, it is very strong evidence from which the Court can infer that their purpose was not simply to take out a license and to be permitted to make a closed-edge board; their purpose was to control and to stabilize the entire industry in all respects.

And as you have seen this evidence as it is coming on, they have gone into great detail as to how you are going to handle switching charges, and advertising; as to whether you can or can not have a commission man; as to whether you can sell through jobbers; as to what the price should be for switching charges in Grand Rapids, Michigan—and I could go on in great detail—as we said yesterday, as to whether or not you can give away carpenter's aprons in order to promote the sale of board, and as to what sizes of board you may have, or what the standardization of the board should be.

That is, in the first instance, an indication of what their real purpose was when they entered into the 1929 agreements, that is, to end the price war and stabilize the industry. And all that sweep of evidence is certainly admissible for that purpose.

4056 It is next admissible for purposes of showing that they have gone completely beyond the protection afforded them by the General Electric case.

The General Electric case said that it is permissible, where you have a patent completely covering a product, and a valid patent, to fix the price at which a licensee may sell the article which he manufactures.

The agreements here, made in 1929, in Paragraph 2 specify that this license—and you may notice that that Paragraph 2 comes just immediately after they open their contract, and that is the thing they had in mind—that this license is given upon the condition that the licensor may fix the minimum price or prices at which the licensee may sell the patented board, or so-called patented board.

Now on that one little provision—and there are none other such in that long agreement—they have to build this entire system of trade regulation. They couldn't go any farther because the General Electric case said that they had only a right to fix prices. Under that right to fix prices they tell you whether you can warehouse your goods in a dealer's warehouse; they tell you whether you can ship less than 7500 square feet in a truck; whether you can go beyond this county and into the next county—they tell you everything you can do about your business under the "right to fix prices" as they say.

4057 Now if they have gone too far they have no defense in this case, and that is all charged in great detail in this complaint, and I think I should bring it out in order that we will have this perfectly clear.

We charge, in Paragraph 45, that:

"Said companies have entered into, have carried out, and are carrying out said combination for the purpose and with the effect, of restraining, dominating, and controlling the manufacture and distribution of said gypsum products in the Eastern area."

This evidence is certainly evidence concerning the control of distribution of products in the Eastern area, so-called.

Now that is carried on—and if you will refer to Paragraphs 89, 90, 91 and 92 of the Complaint you will see

the whole set-up of policing and control which has been established—all within this one little paragraph giving them the right to fix prices. Within that they set up the Board Survey Company. They look down each other's collars with great care to determine whether they may have cut the price ten cents at some point or other. If they have, then there is an investigation—and they carry that out to the point of investigating what the manufacturing distributors have done. As I say, that is all charged in the complaint in very great detail.

4058 Paragraph 91 says:

"From time to time throughout said period, U.S.G. has circulated among its licensees numerous bulletins setting forth the aforesaid prices and terms and conditions of sale for gypsum board. The licensees, throughout said period, have adhered to said prices and terms and conditions of sale. The prices and terms and conditions of sale contained in said bulletins will sometimes be referred to hereinafter as the bulletin prices. Said bulletins, copies of forms of which are set forth as Exhibit No. 7 in the appendix hereto, have contained the following limitations and regulations upon sales of gypsum board by the licensees".

That follows the general provision in paragraph 90 that:

"Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. has determined and fixed the selling prices and terms and conditions of sale of its licensees. Throughout said period the licensees of U.S.G. have sold all gypsum board manufactured by them at the prices and on the terms and conditions of sale determined and fixed by U.S.G. as aforesaid."

Then we list the whole series of terms and conditions from (a) to (u), covering everything.

You have to have an arbitrary billing rate. Even though your board doesn't weigh the exact amount, you still have to bill at an arbitrary weight.

4059 Then in subparagraph (e) it says:

"(e) minimum quantities of gypsum board for: (1) Carload sales; (2) delivered truck sales; (3) pickups at mills or warehouses; (4) mixed carload and truckload sales; and (5) pool car sales".

Then we get over to paragraph 121, which states in general terms the effect of the combination:

"By means of the combination, the defendants have controlled and dominated, for more than ten years, the manufacture and distribution of 100% of the gypsum board and 80% of the plaster and miscellaneous gypsum products manufactured and sold in the Eastern area", and so forth.

So that the charge of an unreasonable regulation of the distribution of products, that is regulation which constitutes a restraint of trade, is completely made in the complaint, and this evidence all comes in, first, to show that their real purpose was to control, that it was subterfuge; second, to show that whether it was subterfuge or not, they have gone completely outside of any provisions or protection which might be afforded them under the General Electric case, and that it is a straight case of regulating an industry from beginning to end.

Therefore, it is necessary for us to show in detail just what they have been doing in order to show how unreasonable this is. Many of these things that we are offer-
4060 ing you are picayune, but being picayune is, itself, evidence of the detail and care with which they have gone into the matter of regulation, and that is charged in the complaint as being a restraint, and we propose to prove just that, and I think there is no question but what we can.

I must say, in closing, that Mr. Kelleher did not concede, and I do not concede, that he at any point ever said that these matters were legal or were not to be brought up at a proper time. Mr. Kelleher said that so far as the case before the District Court was concerned—we didn't look at the patent licenses—he was not looking at the patent licenses, he didn't test those at all.

So far as the regulation of all these matters was concerned, so far as price fixing by licensees was concerned, which is the gist of this case, I mean general fixing of prices under the license agreements, that was not at issue; it was a little narrow issue of whether these licensees had controlled the resale price of manufacturing distributors and therefore, everything else, practically all of the matter that we have in this case, was over to one side.

I don't know that there is any issue up. I would suggest that we proceed with the evidence.

Justice Stephens: Well, that is true. Nevertheless, this is a clarifying discussion, and it is helpful to have at the present time because the Court was going to make
4061 a suggestion to counsel for the Government, if there

is to be a great deal more of this type of evidence, as to how it perhaps can be put in with much less consumption of time. Since it is obvious that objection will be made to the introduction of this evidence on the ground that it is irrelevant under the charges in the complaint, we might as well hear from Mr. Bromley, in reply, and look at these statements of Mr. Kelleher, and then we will be in a position to rule on such an objection if it is made.

What do you say, Mr. Bromley, in response to Mr. Steffen's argument?

Mr. Bromley: May it please the Court, it seems to me that it is not a question of what the charges in the complaint are, but it is a question of whether or not the Government has waived them in the criminal case in such fashion that it ought not to be permitted to contend that those charges are illegal.

I don't know what my friend means when he says that Mr. Kelleher did not waive them; I cannot understand any clearer language, picking out one of these little points, than the first language that I read on page 672.

There I was examining this very witness, Mr. Lenci, and trying to go into the purpose and effect of the bulletin provision about commission men, and Mr. Kelleher objected, and the court wanted to know why he objected.

Then I said, after Mr. Kelleher had made some 4062 statements to the judge:

"So that you will concede, Mr. Kelleher, that this bulletin provision was not made as the result of any unlawful understanding or agreement between the licensor and the licensees?"

Justice Jackson: Was that really a matter in issue in the criminal case? As I understood Mr. Steffen, the indictment in the criminal case was narrow, and it centered just on one subparagraph in the present complaint.

Mr. Bromley: Well, of course that argument by Mr. Steffen is just the reverse of what he is making here. He says that under paragraph 44 or paragraph 45 he is entitled to prove anything. Now the indictment had a paragraph as broad as his paragraphs 44 or 45, and that was paragraph 13 of the indictment, reading:

"Beginning in the year 1929, the exact date being to the grand jurors unknown, and continuing to the date of the

presentation of this indictment, the defendants and the corporations hereinbefore named as co-conspirators herein, and others to the grand jurors unknown, have been continuously engaged in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in gypsum board between the States and the District of Columbia", in violation of the Sherman Act.

So there was the broad charge there. True, it
4063 was followed by other paragraphs which narrowed it, perhaps, but that is not the important thing. The important thing is that I was trying to get him there to take a position as to whether the indictment was broad or narrow, and that this question was up there just as it was here, as to whether this charge was a broad one or a narrow one.

And in connection with that argument, and in order to support his position, he made concessions with respect to this broad conspiracy alleged in paragraph 13, that I needn't bother about litigating that because he conceded that all of it was lawful; and that took it out of the case although charged in broad language, he took it out of the case by conceding that it was lawful.

I don't think it makes any difference whether that determination was res adjudicata or was litigated or not, or could have been litigated or not, so far as the point which I am now arguing is concerned, because all I am now arguing is that in connection with the dispute between us at the criminal trial as to whether this indictment was broad or narrow, he convinced the court that it didn't make any difference, even if it were broad, because the Government conceded the legality of everything that we did up to the point of trying, as he said, to fix resale prices.

So I don't think it makes any difference whether those issues were litigated there or not. In connection
4064 with that question, a concession was made just exactly in the same fashion that the concession was made with respect to Calvin Tomkins.

Now it didn't make any difference whether the indictment charged that this Calvin Tomkins device was lawful or unlawful. The fact is that, the point having been raised there, Mr. Kelleher conceded that the pricing by Calvin Tomkins was lawful, and this Court has ruled that that should be binding on the Government.

Now this situation is precisely the same, and all I argue is that there was a binding concession made as to the legal-

ity of everything we did up to the point of the charge that we attempted to fix resale prices, and the Government ought now to abide by it and not try to go back on it.

That is why I wanted the Court to read the ten pages in Mr. Kelleher's opening because that serves as the foundation from which these other concessions flowed later on.

Mr. Steffen: I want to say as to the Calvin Tomkins matter, that we did, quite cheerfully, concede that we would be bound by anything that Mr. Kelleher said concerning the Calvin Tomkins matter.

But note carefully that the Calvin Tomkins matter was as to manufacturing distributors. It had to do with the very issue that was before the court in that case—and I, quite decently, I thought—said that we would be
4065 bound by anything that Mr. Kelleher had agreed to in that case.

I didn't think that he had actually agreed as far as your Honors went, but we have made no point of that. But note carefully that it is a very different situation.

Whateyer Mr. Kelleher conceded as to whether the Calvin Tomkins Company was to be identified with the Newark Company and that there was no illegality in the fact, as testified to here, that Newark actually sold the Calvin Tomkins Company and the Calvin Tomkins Company actually sold at bulletin prices, Mr. Kelleher took that out of the case. So, as far as that transaction is concerned, we haven't anything to do with it.

But that concession only had to do with the very issue that was before the Court.

As far as our paragraph 45 (e) is concerned, that concession will hold, but there is no binding concession, or any concession, by Mr. Kelleher that the whole civil case is out of consideration, because he stated explicitly, and we will cite you the point, that the civil case was to come on later and at that time the whole question of the legality of the patent license agreements and of everything that was done under those agreements, would be tested out, and that is what we are doing here in so far as we have charged it in the complaint.

As I pointed out, the whole matter of distribution has been charged in the complaint as being a restraint
4066 of trade, and completely beyond the scope of the protection, if any, afforded by the General Electric case.

Justice Stephens: Did your complaint charge both? Is it the theory of your complaint to charge, first, that the

agreements are illegal because they go beyond the proper limits of the General Electric case; and, second, that they are mere subterfuge?

Mr. Steffen: Yes. Let me make that clear, your Honor.

In our paragraph 44 we charge broadly restraints of trade. Then we have provided in the remainder of the complaint a series of different illustrations of restraints. One of them is price fixing; another one is standardizing products; another one is eliminating jobbers; and another one is control of distribution—such as we have here.

Then in paragraph 46 we say that all of this was done by subterfuge.

Now in so far as we put in evidence to show subterfuge, what we are doing is to negative the defendants' answer, and their defense. Their defense is that everything they did was legal because they had a patent license agreement, and that everything could be done under the patent license agreement.

We just say that in so far as we can show that it was subterfuge, that defense is out of the case.

Justice Stephens: You say that even if it were
4067 legal, still it wasn't bona fide?

Mr. Steffen: We would say that, yes.

Mr. Bromley: In answering your Honor's question, there certainly is no charge in their equity complaint that these provisions of the bulletins were unreasonable. All you have to do is look at paragraphs 90, 91, and 92 of the complaint. They are just recited as background and there is no charge that they are unreasonable or unlawful, by any stretch of the imagination.

Mr. Steffen: We don't have to use the word "unreasonable", your Honor, if we recite what they were doing, and if what they were doing is clearly beyond what anybody is permitted to do, which was the case here. The Court itself determines whether or not it was unreasonable, as a conclusion of law.

Justice Stephens: Well, the Court will first make one or two other corrections of the record, my transcripts now having been brought to me.

I have no corrections to suggest in the morning.

In the afternoon session, at page 4280, Mr. Knuff, in your question commencing at line 7, you say:

"Q. The Board Survey Company had filed a notice or had written you a letter to the effect that the Connecticut Adamant Plaster Company was offering patented board,

manufactured and sold by you, to the New Haven
4068 Reserve Supply Company and other New Haven dealers in quantities", and so forth.

I think that should be singular, "in quantity". That is the phrase used in the previous questioning or the answers by the witness on that subject, as I remember it, and I think there is an exhibit also which refers to "in quantity". I don't know whether it is especially material, but I call it to your attention, it is your own phrase. You can make it show what you think it should, of course, but I thought you said "in quantity".

Mr. Knuff: I think that that is the way the question should have been phrased, "in quantity".

Justice Stephens: That may be changed then to "in quantity".

Page 4295, line 14, I think the word "that" should be stricken out after the word "attend".

Mr. Knuff: That is correct.

Justice Stephens: Page 4315. Mr. Knuff, your question, commencing at line 24, says:

"Q. I saw two letters this morning".

Did you mean that? I didn't quite understand what you meant by that. Perhaps it is correct, I don't know.

Mr. Knuff: I probably should have said that "I referred to two letters this morning", which is correct. I referred
to the letter of August 16th and the witness had
4069 before him the reply of the 18th acknowledging the letter of the 16th.

Justice Stephens: Then that is all right. I thought probably you meant to say "*you* saw two letters this morning", but if you said "I", we will leave it as it is.

Mr. Knuff: I didn't see the two letters, I only saw one. The letter of August 18th said that it was in reply to a letter of August 16th. It should be, "I referred to two letters this morning".

Justice Stephens: Then that change may be made.

Mr. Bromley, will you mark in that record the pages of Mr. Kelleher's alleged concession, and also the ten pages that you referred to, and we will take the morning recess and look at it. Perhaps you had better make a list of those references for our information.

Mr. Bromley: Yes, your Honor.

Justice Garrett: Mr. Bromley, I think you had there also a printed copy of the indictment from which you read, did you not?

Mr. Bromley: Yes, your Honor.

Justice Garrett: I wonder if we may borrow that also?
Mr. Bromley: Yes, your Honor.
Justice Stephens: You may announce a recess for fifteen minutes.

(Whereupon, at 11:00 o'clock a.m., a fifteen-minute recess was taken, which was later extended to 1:45 o'clock p. m.)

4070 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock, p. m., pursuant to recess.)

Justice Stephens: Strictly speaking, there is nothing before the Court upon which to rule. The last exhibit which was offered was finally excluded.

The Court has read with care the statements of Mr. Kelleher in the criminal trial, and has also read the complaint. The two questions which seem to be raised, informally—first, as to what the complaint charges; and, second, as to what was conceded in the criminal case—will be passed upon, if necessary, when some objection is made which actually raises them, so that the ruling will not be in the nature of an advisory opinion.

You may proceed, then, with the Government's case until some objection arises which presents these two questions, or either of them.

The Court has a suggestion to make to Government counsel in respect of the manner of presentation of the case and this class of testimony. It is merely a suggestion, and it may be it is not feasible to carry it out because, in the first place, we all have to try cases our own individual way, in the large, and every man has somewhat different methods of workmanship; and, second, it may be that the nature of the exhibits and the difficulties
4071 under which you are working won't make this possible.

But it has occurred to us, gentlemen for the Government, that much time could be saved in the court room with reference to three classes of exhibits, or rather, with respect to exhibits which affect three classes of testimony:

A very large number of bulletins have been put in evidence, sent to Ebsary; a substantial number of notices of meetings have been put in evidence, sent to Ebsary; and a great deal of evidence of complaints of infractions of the license agreements have been put in evidence—all of these being in the form of documentary exhibits.

Now, of course, where exhibits are, so to speak, unique and present some individual problem which the Court must rule on or understand with respect to each exhibit, it is highly desirable, then, that each exhibit shall be presented separately so that the Court can rule on it and have it in or out of the record and a ruling clearly made on it at the time.

But it has occurred to us that, for example, if you have 25 bulletins to introduce in evidence, you might have them marked all at one time, serially, by the Court Reporter, and present them to the witness—or to the defendants, if the defendants are willing to admit that they were sent—have the witness identify all of them, after looking at them, by an answer to one question which
4072 mentions them inclusively, then offer them all at once, except that you might, of course, wish to particularize by asking the witness a particular question about one exhibit as to whether it dealt with the alleged elimination of jobbers; another, whether it dealt with the area in which trucking could be done; another, whether it dealt with the basing points; and another, whether it dealt with commissions.

But where exhibits all follow a pattern, where notices all follow a pattern or notices of infractions all follow a pattern, it occurs to us that if you could introduce them in groups that way, it would save the time of the Court Reporter having to mark them all separately, the lawyers examining on them separately, and examining each signature separately, and perhaps we could accomplish in an hour what might otherwise take two or three hours.

That, I repeat, is just a suggestion that may not be feasible. I assume it will not be feasible at the moment, because you would have to rearrange your exhibits, and you are not expected to follow it now, even if it is a good suggestion.

Mr. Knuff: I think it is a good suggestion, Your Honor.

Justice Stephens: Now you may proceed.

Mr. Knuff: Mr. Lenci, will you take the stand, please?

4073 Thereupon, GEORGE N. LENCI, recalled as a witness, resumed the stand and testified further as follows:

Direct Examination (resumed)

Justice Stephens: Which is the next set of exhibits?

Mr. Knuff: The memorandum beginning November 15, 1932, a long memorandum.

Justice Jackson: In longhand?

Mr. Knuff: Yes, Your Honor.

Justice Stephens: Right next to the one we have just been discussing?

Mr. Knuff: That is correct, Your Honor.

Justice Jackson: Next to Exhibit 477.

Mr. Knuff: Yes.

My understanding is that Government's Exhibit 477 was objected to and the objection was sustained; is that correct?

Justice Stephens: Yes. You finally stated, at the close of the discussion this morning, that you didn't regard those four or five items in the middle of the page as of any importance, and therefore that exhibit was excluded. The Court thinks you have really presented in evidence everything by the oral testimony of the witness that is material to your contentions under this aspect of the case. Even if the fact that he wrote the exhibit tends to confirm
4074 his statements that the meetings were held, the record already shows that he wrote the exhibit because he testified that he did.

Mr. Knuff: I was just trying to conform my action here to what Mr. Bromley suggested in the criminal case. Mr. Bromley there suggested that they be offered, in the criminal case, and I was just following that.

Justice Stephens: You are entitled to offer anything you want to and get a ruling on it and make your record.

By Mr. Knuff:

Q. Mr. Lenci, did you attend a meeting—you understand, of course, that you are still under oath? A. That is right.

Q. Did you attend a meeting, Mr. Lenci, of licensees on the 15th of November, 1932, at the Hotel Commodore in New York City? A. I don't remember.

Q. I show you what has been marked for Identification as Government's Exhibit No. 478.

(The document referred to was marked as Government's Exhibit No. 478 for Identification.)

By Mr. Knuff:

Q. I will ask you to take a look at that and see if that refreshes your recollection? A. Yes.

4075 Q. Your answer to my previous question, then, is that you did attend a meeting at the Commodore

Hotel on November 15, 1932, and I take it by that you mean the Commodore Hotel in New York City; is that correct? A. Yes.

Q. Who was present at this meeting?

Justice Stephens: Have you had time to look that over?

The Witness: I have just glanced at it.

Justice Stephens: Suppose you read it over carefully and see if it refreshes your recollection, and perhaps you can then tell us.

Justice Jackson: It is all in your handwriting?

The Witness: Yes.

(Exhibit examined by the witness and the Court.)

Justice Stephens: Proceed.

Br. Mr. Knuff:

Q. Mr. Lenci, Government's Exhibit 478 for Identification is a memorandum that is made in your handwriting, is that correct? A. Yes.

Q. Did you make it at the time of the meeting? A. I made it at the time of the meeting or very shortly thereafter.

Q. And does it purport to list the various subject matters that were discussed at that meeting? A. Yes.

4076 Q. And the list that you have made there, is that a correct list of what was discussed at the meeting? A. I think so.

Q. When you say you made it a short time after the meeting, do you mean a matter of days or a matter of weeks or a matter of hours? A. It was probably within the next day or so.

Q. The next day or so? A. Yes.

Q. Who was present at that meeting? A. The United States Gypsum Company was represented by Mr. Henning and Mr. MacLeish.

The Atlantic Gypsum by Mr. Neale and Mr. Fuller.

The Kelley Plasterboard Company by Mr. Kelley.

The Ebsary Gypsum Company by Mr. Ebsary and myself.

The National by Mr. Baker.

The Certain-teed by Mr. C. O. Brown and Mr. Roos.

Q. What Roos was that, Edwin G. Roos or Carlisle K. Roos? There are two Rooses, Carlisle K., who was employed by the United States Gypsum Company, and— A. (Interposing) This was Ed Roos of the Certain-teed.

Q. I see. A. American was represented by Mr.
4077 Black, and the Universal by Mr. Holland.

Q. Texas was not at that meeting? A. Texas was not there.

Q. Who acted as chairman of the meeting, if any person? A. There was no formal set-up to the thing at all.

Q. How long did the meeting last? A. I don't remember now, but it was not over the one day.

Q. Were notes of the meeting formally taken, that is, by a stenographer or secretary? A. No, it was entirely informal.

Q. An informal meeting? A. Yes, sir.

Q. And you say no person acted as chairman? A. There was no formal set-up at all. The meeting was called by the United States Gypsum Company, and that was all there was to it.

Q. Now at that meeting, were any complaints discussed? A. I believe there were.

Q. What complaints were discussed?

Mr. Bromley: I object to that on the ground that it is immaterial and irrelevant to any issue in this case.

Justice Stephens: Are you raising the question which was informally argued this morning?

4078 Mr. Bromley: Yes, sir, I think I am.

Justice Jackson: In other words, it is immaterial and not relevant because of the concession that you argued about?

Mr. Bromley: Yes, sir.

Justice Stephens: And also, I assume, because you contend the complaint does not charge that these agreements were illegal?

Mr. Bromley: Yes, Your Honor.

Justice Stephens: And the practices under them?

Mr. Bromley: Yes, Your Honor.

Justice Stephens: Well, that presents the questions which were informally argued this morning.

We have reached the conclusion, gentlemen, so far as the concession is concerned, that the contentions of the Government in respect of that are correct.

We think Mr. Kelleher's concessions were limited to the case which was on trial. Pages 188 to 198 of Volume 1 of the transcript of the criminal proceedings handed to the Court by Mr. Bromley, and also pages 671 to 673 of Volume 2, have been carefully read by the Judges, and it is true therein, as you point out, Mr. Bromley, that Mr. Kelleher gave a very careful discussion or statement or

description of the provisions of the license agreements, and of the practices thereunder, which are the sub-
4079 ject of description in the present complaint. But we think in three instances it was made clear by Mr. Kelleher, two or three instances, and once by the Court, that Mr. Kelleher's concession was limited to that case.

At page 188 of Volume 1, he said:

"At the outset, you should understand that we make no contention in this case that there was anything illegal in the way these companies sold and determined the price at which they would sell the board which they manufactured, to dealers. Instead, as I have already explained, the indictment charges the defendants with inducing distributors who bought gypsum board from them, to resell that board at the same prices and on the same terms and conditions upon which the defendant companies themselves sold it. Therefore, you will see that in order for you to understand how they fixed these distributors' prices, it is necessary for you to know how they determined their own prices."

Then he refers to the contracts, the license agreements of 1929 and 1930, and very fully describes the practices under the license agreements, as well as the terms and conditions thereof.

At page 197 he said:

"Now, let me again stress this so it will be perfectly clear. As I said before, no contention is made that USG or its licensees violated the law in selling at prices fixed
4080 by USG, to dealers. You may therefore assume, for the purposes of this case, that in so far as USG controlled the prices of its licensees to dealers, it was merely exercising that unusual privilege accorded by the law to a patentee. That, however, does not mean that the licensees' scheme and operation was not unlawful."

Then after that he went on to describe the alleged illegality charged in that criminal case, of control of resale prices.

Now in the other volume, Volume 2, Mr. Kelleher said, at page 671:

"Your Honor, I wouldn't raise this objection, because I understand the reason Your Honor has admitted that testimony about commission men. Of course, we don't charge that the elimination of commission men among the licensees was illegal."

Then Judge Goldsborough said, at page 672:

"Of course, I am sure that the jury understands that there is no issue between the Government and the defendants in connection with the defendants' relation to the licensees; no issue in this case at all."

We think, reading the whole of the statement of Mr. Kelleher, that it is clear he was not making a concession except for the purposes of that case, and was limiting the attention of the jury to the issues in that case.

4081 Now, however, on the second question, as to whether or not this complaint charges that these agreements and the practices thereunder are illegal, we would like, if possible, to defer ruling upon that.

I will state frankly that I am still in some doubt upon that subject. My colleagues, perhaps, have reached a conclusion, but I am in some doubt upon it, and I would like to hear a little further from the Government, and perhaps briefly from the defendants, to help me clear up my doubt.

I will say first to the defendants that the contention made by the defendants this morning came to me as somewhat of a surprise. Perhaps I have been obtuse about understanding the defendants' contentions. I do recollect the defendants contending in one or two instances heretofore that the complaint didn't charge these agreements to be illegal upon their face, and yet I have had the impression throughout this case that it was pretty generally understood there were two issues here, two outstanding issues: (1) whether or not these agreements, and the practices under them, transcended the proper limitations of the General Electric doctrine; and, (2) whether, even if they did not, they were mere subterfuges.

As I understand the General Electric case, it is that a patentee may, in a license agreement, impose conditions and terms of sale, including prices, but not necessarily

4082 restricted to prices, provided they are within the reasonable limits of the patent monopoly protection. And I supposed that one of the issues of law in this case was whether or not the terms and conditions of these license agreements, including these bulletins, including the various practices such as limitation of area and basing point provisions, freight charges and limitation of quantities sold, and amounts to be loaded into trucks, and the like, were within or without the proper limits of reasonable protection of a patent monopoly, and that therefore we would have to

hear what these practices were in operation, so as to test their reasonableness.

But then I thought that the second contention of the Government was that even if these practices were technically legal, they were all entered into merely as a subterfuge and cloak, and not in good faith, for a general stabilization scheme.

It seems to me—my memory may have failed me—that the license agreements came into evidence without objection, and that the bulletins and these various other practices we have been hearing about here, have come into evidence without objection, except the usual objection. I therefore had the understanding thus far, Mr. Bromley, that there wasn't any question as to those two issues being in the case.

But I can see how I may have been misled—and I
4083 don't use that term, of course, invidiously—I may have been obtuse or I may have been inadvertently misled. It may be that the defendants' theory was that this evidence was all coming in only under the subterfuge issue, and not under the illegality issue.

But since your informal argument was made this morning, Mr. Bromley, I will say to the Government that my mind has been cast into some doubt on the question whether or not this complaint does charge illegality in the license agreements and the practices thereunder.

4084 Paragraph 45, it is true, charges a general conspiracy in violation of the Anti-Trust Laws, and in paragraphs (a) to (e) in general terms is stated the manner and effects of the combination and conspiracy charged.

But paragraph 46 says that, "Said combination was entered into and has been, and is being, carried out by the defendant companies in part under the guise of numerous license agreements purporting to relate to the use of certain patents owned by the defendant USG in the manufacture of gypsum board. To give color of legality to such combination, the defendant companies, and other companies hereinafter named, concertedly agreed among themselves to enter into, and did enter into, said license agreements. Said license agreements are not bona fide patent license agreements reasonably designed to secure to USG the pecuniary reward for valid patent monopolies, but were entered into and executed for the illegal purposes described in paragraphs 44 and 45 hereof".

Now it would seem to me that fair pleading—and I use that term as a term of art, and not with any reflection upon

whoever may have drawn this complaint—it seems to me that fair pleading might arguably have required the Government, if it is charging two things, to have said those two things in terms, and to have said, "We charge not only that these were not bona fide patent license agreements, but also
4085 that they were illegal agreements, and that the practices under them were illegal, even if they were entered into without subterfuge".

Upon examination of paragraph 91 of the complaint, where the control of prices and terms and conditions of sale for gypsum board are stipulated and set out in detail, I fail to find any place in that paragraph, or in subsequent paragraphs in the complaint, exclusive of the prayer, which, in terms, anywhere says that those conditions and practices under the license agreements were illegal.

As to the prayer, paragraph 3 asks the court to adjudge and decree that each of the license agreements is in violation of Sections 1, 2 and 3 of the Sherman Act, but that is a prayer which would be proper even if the sole charge was that the license agreements were entered into as subterfuges.

Of course the sixth paragraph of the prayer, as amended, and the fifth paragraph, asking cancellation of the provisions of the aforesaid license agreements which authorize price fixing and royalties, and contain the other prohibitions and conditions referred to, and which restrain or seek to restrain the defendant companies from entering into any license agreements containing those provisions, smack more of illegality than of subterfuge.

But it seems to me that the complaint, in terms, does not charge these license agreements as being a violation of the Sherman Act so far as the General Electric case is concerned.

4086 Now of course you can argue to the contrary, that the Government is entitled to prove what is alleged in its complaint. There has been no motion to strike out of the complaint anything as surplusage, and the Government is entitled, therefore, to prove the allegations of paragraph 91 and the practices under it, since it has charged those practices, and then ask the Court to draw the conclusion that they are illegal, for any reason.

It may well be that the complaint is broad enough, when you read paragraph 91, and the prayer, and paragraph 45, all together, to fairly advise the defendants that they are charged with these two things, illegal agreements and illegal practices under them; and subterfuge.

I confess that my mind is somewhat in a state of doubt on this, and I don't like to make a ruling when it is in a state of doubt.

I don't mean to say that I have any doubt—Judge Jackson thinks I have misspoken—I don't mean to say that I have any doubt that the complaint does charge that the agreements were subterfuges. The complaint charges that in terms.

But I have some doubt myself as to whether the charge is made in the complaint that the agreements were, aside from the question of subterfuge, illegal because they went beyond, and the practices under them went beyond, the protection accorded under the General Electric doctrine.

4087 I have some question also—perhaps this is a little academic before we get to the actual ruling—I have some question also, if this complaint does not charge that these agreements are themselves illegal, and the practices under them are illegal because going beyond the proper limits of the General Electric doctrine whether or not this evidence that is being offered now, if it must be looked at purely in terms of the subterfuge charge, is any evidence of subterfuge.

It seems to me—I say this with reservation because it may be connected with other evidence which might put a different light upon it—but it seems to me it would prove the opposite of subterfuge. It seems to me the evidence that there were detailed bulletins sent out, and that there were constant corrections and changes of those bulletins, the evidence that there many meetings held at which the United States Gypsum Company insisted that the terms of these agreements be kept, and at which it complained about large numbers of violations of the agreement, and the evidence that a great many complaints were made by the defendants against each other—would tend to prove that they were taking these agreements very seriously and insisting that they be abided, rather than treating them as a sham and a cloak.

But it may well be, of course, that I am looking at the matter too partially; it may be that your claim of
4088 subterfuge is based upon some other evidence that the Government has to offer with respect to the attitude of the defendants towards these agreements, and my mind is entirely open upon that subject. I am not ruling that the evidence is not admissible at the present time on

the theory of subterfuge, and my colleagues are both agreed that it is. I am inclined to think it is, subject to connection.

Looking at it alone, without connection, it would seem to me to be doubtful proof of subterfuge, but more inclined to be proof to the contrary.

I state these things very frankly because I always want to open my mind to counsel on both sides, so that they can have a full chance to convince me of my errors, if any. I would like to avoid a ruling for a few days, if possible.

(Justice Jackson conferred with Justice Stephens.)

I have made it perfectly clear, I think, that we all agree, and I don't understand that there is any contention by the defendants, Judge Jackson, that the complaints do not charge subterfuge; we are agreed that they do. Clearly the complaint does charge, in paragraph 46, that these agreements were subterfuge.

Justice Jackson: And the exhibits are properly admissible under that charge.

Justice Stephens: I think they are properly admissible, provided they are properly connected with other
4089 evidence which will show subterfuge.

Justice Jackson: Of course the evidence has to come in piecemeal.

Justice Stephens: That is right.

As to the other question, as to whether or not this complaint charges a violation in the license agreement, if there is some way to avoid an immediate ruling on the subject so that I can think about it further, and have a little more discussion on it by counsel, I would like us to do that, because I think counsel are entitled to a vote by all three of the Judges on the subject.

Will there be any difference between this evidence that you are now offering, so far as it relates to subterfuge and the evidence so far as it relates to illegality? If not, we can hear it all and then we can later hear whether or not it is applicable to the illegality charge if the complaint is ruled to contain an illegality charge, and the defendants could be protected if we take it all in now, by reserving the right to move to strike it out so far as it applies or may be said to apply to the charge of illegality, if the Court should rule that the complaint does not contain a charge of illegality.

Do you see any objection to that, Mr. Bromley?

Mr. Bromley: No, sir, I think not. It seems to me that that can be done all right.

While our minds are on the precise point, I would
4090 like to say something that I didn't say this morning.

My position has always been that under paragraphs 90 to 92, inclusive, the evidence contained in the license contracts and in the bulletins, to which I did not object, was material because, while there is no charge of any illegality so far as price fixing by the licensor upon the licensees is concerned, the theory of this bill of complaint is that these lawful controls, exercised by the licensor upon the licensees' prices, were carried over into unlawful fields.

Now if you look at paragraph 96 you will see that it says at the very outset:

"The control by USG of gypsum board manufactured by its licensees, described in paragraphs 90 to 95 hereof, has been exercised from time to time throughout the period from the year 1929 to the date of filing this complaint upon gypsum board of the licensees not covered by valid patents involved in the license agreements", and so forth.

There is one charge that has directly to do with these bulletin provisions, not that they were unreasonable to the extent that they affected the licensees' price, but that they were carried over to material not covered by the license agreements. The same thing appears in paragraph 103 where it is alleged, in the second sentence, that from time to time we carried the terms and conditions in the bulletins to plaster and other products that were not properly, of course, subject to price control, because unpatented.

4091 Also, in paragraph 108 it is alleged that:

"Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for sales of board by its licensees to dealers and consumers, as described in paragraph 91 hereof".

So that I conceived of the license agreements and the bulletins as being quite material, because the Government was going to prove, not that it attacked them because they controlled the licensees' prices, or because they were unreasonable, not that they did that at all, but that the conspiracy was to carry those lawful terms and conditions into fields where the law didn't protect us, like purchased board, like the resale price of manufacturing distributors, like the

sale prices of plaster and miscellaneous products that were not covered by any patent.

Now if the complaint had charged what I say it does not charge, that these terms and conditions in our price bulletins went too far in themselves, vis-a-vis the licensees, wouldn't the complaint have said, in terms, "Well, USG, you had the right to fix the price"—when the Govern-
4092 ment listed all these things from (a) to (u) on page 23, and paragraph 91, where they list all these prohibitions of the bulletin—wouldn't you have thought that any fair pleader would have said, "Why it is all right for USG to fix a price, that is contained in subparagraph (a) here, but when we get down to (d), specified areas in which dealers may pick up, that is unlawful because it is unreasonable."

But the pleader doesn't make any differentiation in any of these things from (a) to (u). He says, "Here is what USG did, it fixed the price and the terms and the conditions of sale".

Of course, all you have got to do is to read these things to see that they all have to do with price, they all affect price, they all are prohibitions against ways in which licensees could evade a fixed price by rebating or doing something else that would affect the price fixed by USG.

Justice Stephens: You contend, I assume this is dehors the present argument, but just to be clear—I suppose you contend that even if the complaint does charge those things to be illegal, that they were legal for that reason—because they relate to price.

Mr. Bromley: That would be our fundamental legal argument, and the General Electric case said that you could fix any term and condition that had a reasonable relation to price.

So that first I find no charge that these specific
4093 things that were regulated by the bulletins went beyond price. The pleader doesn't draw any line, he lumps them all together. He says, "Here is what USG did under its asserted right to control prices". As I read the complaint, the Government doesn't attack that at all. But it does go on to say that having set up this lawful scheme to control the licensees' prices, the licensees who manufactured these goods under the patents, these defendants got together and extended it into several fields which were plainly unlawful, and that they tried to extend it into resale price fixing.

Well now, of course our position is that we had no right to control resale prices. We don't dispute the Government about that. If we did control them, we were wrong. We say we did not control them and we never attempted to exercise any control except upon the price of our licensees. Now the complaint definitely charges that we did try to control resale prices. It definitely charges that we tried to control plaster prices and prices of other unpatented products. It definitely charges that we tried to control the price of board that wasn't subject to the licenses in the sense that it was purchased by the seller, and not manufactured.

So the reason I didn't object to the licenses and to the bulletins, was that I thought they were material to what was the heart of this complaint.

In all that I have said now, I have left out of con-
4094 sideration the subterfuge argument which I think is perhaps as important a charge as this.

I agree that they did charge us with setting this thing up as a phoney scheme, not intending to exercise our legal rights, but setting it up as a subterfuge, and that we never carried it out.

The reason that I may sometimes in my statement have been confused about the existence of the issue of which your Honor speaks, is that I sometimes think that when the Government gets into the Supreme Court it may say, and it may have a right to say, "Well, let's forget about all the evidence in this case, we want you to overrule the General Electric case", and if the Supreme Court overruled the General Electric case, whether we had this complaint or any other complaint I guess our whole defense would fall.

But I have been confused between whether they could do that because it is charged in the complaint, which I do not think to be the fact, or whether they could do it just anyway, saying that the General Electric case was wrong and that a patent owner hasn't the right to control prices at all.

I sometimes have not drawn the distinction clearly because I have always felt that they probably could argue that some day and probably would. But I don't think that changes the fact that the complaint does not charge that

these regulations of ours are unreasonable in any
4095 particular whatsoever, and all that the complaint charges is that they were unlawful because they were extended into fields where we had no right to extend them, like the resale price field.

Justice Garrett: Mr. Bromley, may I ask you this. Referring to paragraph 91 of the complaint, and the detailed statements under that, in so far as those detailed statements relate to board manufactured under the patents I suppose the defendants would admit that, wouldn't they, in so far as it relates to board?

Mr. Bromley: Yes, I think we admitted it in our answers.

Justice Garrett: I thought so.

Justice Stephens: That is, you admit that you did apply these terms and conditions of the license agreements set out in paragraph 91 to the sale of board manufactured under the license?

Mr. Bromley: Yes, those are summaries of them. We admit them as set out in the bulletins.

Justice Garrett: That is the way I understood it.

On the question of subterfuge, I expressed myself with my colleagues when we were consulting this morning, and I would like to say this in justice to myself.

I am somewhat doubtful about the relationship of subterfuge to the question of the legality of the license agreements. In other words, I don't quite understand just what may be meant by the term "subterfuge" if that be
4096 separated from the question of legality of the license agreements. That is a doubt in my mind that I would like to hear Government counsel on.

I agreed, as the Presiding Judge said, that the testimony was admissible here under the subterfuge ground, but I should like to say that I agreed to that with the understanding that the question of whether subterfuge, as a matter of law, would affect the legality of the license agreements, was a question to be determined as a matter of law by this Court eventually at the end of the case.

Now I perhaps have not made myself clear, and I do not know that there is any particular disagreement between us about that, but I felt—

Justice Stephens: (Interposing) I would be glad to hear argument of that sort myself. I have understood, Mr. Steffen, that the drafter of this pleading was intending to charge subterfuge. Perhaps I should say it this way. It seems to me that it would have been possible for the drafter of a pleading like this to charge two things: First, that these agreements and the practices under them were illegal because they went beyond the reasonable protection of a patent monopoly; but second, that even if they did not go

beyond the reasonable protection of a patent monopoly, they were not entered into in good faith, that the defendants did not regard them as binding, for one reason or
4097 other, did not regard them as having any real foundation, and the defendants extended them to fields beyond the fields which are within the proper purview of the General Electric doctrine.

As I said, I had been under the impression that the parties on both sides of the case were trying this case on both of those issues, but as I reexamine the complaint now, in the light of this morning's argument, my mind has doubt as to whether or not there is a charge of illegality in the agreements themselves and the practices under them by the licensees themselves, on their manufactured board, as distinguished from extending the application of the agreements to resale price fixing, purchased metallized board, and such other items.

I would like to hear you briefly, on the Government's side, on the doubts that arise in my mind.

It does seem to me, frankly, that it would have been fairer—and I use the term as a term of art in pleading, and not as a term of criticism—to make the complaint much more specific or explicit than it is, so we could all be advised more explicitly than we have been.

It may well be that the complaint is broad enough as a matter of law, to support both charges.

Mr. Bromley: I made an error in my statement which I had better correct now, if I may, if the Court pleases.

When I talked about the complaint charging an illegal extension of the bulletin provisions to the field of
4098 purchased board, I should have said purchased metallized board, so far as the complaint is concerned.

Mr. Steffen: I would like to talk very briefly, your Honor, and I hope I will be able to get our position rather clearly stated.

On the matter that came up just now, that the particular issue was a fairly narrow one of whether Mr. Lenci could testify concerning some complaints that were registered at the time of a licensees' meeting at which all of the licensees and the licensor were present, there is no question I take it, in anybody's mind, but what that is literally stated, I will not say charged, but literally stated in paragraph 92 of the complaint:

"The licensees frequently have filed complaints with U.S.G. of alleged violations of bulletin prices by other licensees and U.S.G. has, through the aforesaid agencies, regularly investigated said complaints. U.S.G. and its licensees have held numerous meetings at which the prices and terms and conditions of sale prescribed by U.S.G. in said bulletins and at which complaints of violations by licensees of said bulletin prices were discussed for the purpose of obtaining adherence by the licensees to said bulletin prices."

Now the question that seems to be causing trouble is whether or not there is any charge of illegality in connection with that recital, and whether that can come in
4099 as evidence on any issue which is properly within the terms of the complaint.

Clearly we have given notice of that particular matter, and there is no question on that score.

Now that gets to the question of what are the charges in the complaint, and why would that be relevant to establish or prove a charge in the complaint.

Now in the discussion so far we have not mentioned what the Government has consistently regarding as being the charging paragraph of the complaint, which is paragraph 44. That is the only place where we say that anything is wrong. I mean that you can search the complaint all the way through and you will find that is the only place.

Take resale prices, we don't say that that is wrong; we don't say that standardization is wrong—I mean with adjectives.

We said that it was wrong in paragraph 44, we said that these defendants have conspired to restrain trade, and that these defendants have conspired to monopolize the gypsum industry.

Those are the charges, those are the assertions of wrongdoing.

Then we have related in considerable detail the particular wrong-doing in which we find the defendants engaged, and among them, as Mr. Bromley has said, is that there is price fixing, which of course is the essential charge
4100 here; there is resale price control on the part of the manufacturing distributors; there is standardizing of the product for the purpose of, in effect, monopolizing it; there are a number of matters, such as we are developing here, concerning the means of sale, the amount of board

you can put in a truck, the territory where you can sell, and all those matters are related as things which constitute, we believe, restraints within the charge of the complaint that the defendants have restrained trade.

Then we have related the whole series of different things which constitute restraints. Take the basing point matter, for example, that alone is almost enough to base this whole complaint on.

These defendants, under paragraph 44, are charged with restraining trade in violation of Section 1; under paragraph 45 we say they are doing it for the purposes of dominating and controlling the distribution of gypsum products throughout the Eastern area.

Then we proceed to say, in paragraphs 47 to 119, in detail, what they did by way of carrying out or effecting those charges which are made in paragraph 44, the charges of wrong-doing.

And this evidence here that we are offering is extremely relevant, it seems to me, for purposes of showing that the defendants were going to great lengths to control
4101 the pricing, the discount terms, and everything, practically, having to do with the business. That is a control of distribution as we see it within the general charge of the complaint.

Now let's take the matter of the license agreements, You can see from that, that the license agreements are subordinate. They are one of the means by which the defendants have been enabled to control the whole industry that, we say, they have controlled.

We don't say that that is, per se, an offense. The offense is charged in paragraph 44.

I can give you an example. Suppose the defendants all got together and they said, "Now what we want to do is dominate this industry, we want to stabilize prices, we want to standardize goods, we want to eliminate competition, and so on—how can we do it?"

Well, somebody says, "We have got a General Electric case that says if you can find a patent, and you can all agree to take out a license under that patent and pay nominal royalties, then we are within the law".

That, looked at all alone, might well be within the General Electric case. I mean it might be a nice little patent licensing agreement. Yet the whole thing might be done for purposes of subterfuge, for purposes of controlling the entire industry as we have charged here.

Therefore, it isn't the subterfuge which is, per se,
4102 wrong, it is the fact of what they did with their subterfuge, the license agreements.

That covers getting into the agreements. We will now take a look at what they did. They didn't even get into a valid agreement, as we see it, they got into license agreements that, as we see them, go much farther than anything allowed in the General Electric case.

The agreements provide here, as we relate in paragraph 91, that they can fix minimum price, they can specify delivery zones, they can do anything from (a) to (u), and there is nothing in the General Electric case, as I read it —that is a matter of law for the Court to decide—which would say that that is a valid license agreement within the protection afforded by the General Electric case.

Note that this is a matter of defense. We make our charge that they have violated the Sherman Act by doing various things, and that the license agreement was a subterfuge to that end.

Then the defendants come in, as part of their affirmative defense, and say "But we have got the General Electric case, we have got valid license agreements".

We then say, more as an argument to meet their affirmative defense—maybe it is out of turn here, it might be a criticism—but in order to meet that defense we say that that same evidence is useful to show that they
4103 didn't even come within the General Electric case, that it doesn't even allow them to get such protection as the General Electric case might provide.

So far as any effort on our part to upset the General Electric case is concerned, we have said, and I would like to reiterate it again, because Mr. Bromley brought it up, we have said very explicitly that we do not seek to upset or overrule or to change the General Electric case. That is said on page 45 of the trial brief to the Court. We said there:

"The Government in the present case has no purpose to overthrow the General Electric holding. But it is respectfully submitted that the pattern of the present combination of manufacturers is much more clearly akin to that held illegal in the Masonite case than it is to the situation in the General Electric case".

That is, that the General Electric case, as we see it, doesn't apply to this situation at all.

If it did apply to this situation, I mean if they had kept within the allowances given them under the General Elec-

tric case, still they could have used a perfectly nice looking patent and patent licensing agreement, well within the terms of the General Electric case, for the purpose of getting general control.

All our evidence up to the present time, or pretty nearly the present time, as to demoralized conditions and
4104 everybody getting together on May 22nd and May 23rd, all coming in on the same agreement, was all designed to show that their main interest there was to get under the shelter of something or other so that they could get price fixing, and not because they were primarily interested in the particular patents. They were interested in closed-edge board, certainly, but they were also interested, and much more so as we contend, in getting under the shelter of price control, so that they could stabilize their business.

That is the evidence of subterfuge, not the only evidence but the first evidence of subterfuge.

Now as to Judge Garrett's statement as to subterfuge and illegality, have I made myself clear, Judge Garrett, that the agreements might be legal in some sense, and still they might be used as a subterfuge?

Justice Garrett: I think I understand your position.

Justice Stephens: I have had a little difficulty with that myself, unless you spell it out on this theory.

If you say the agreement is legal—assume that for the moment, assume that there is, to use your phrase, a little agreement sufficiently narrow to be within your contention with respect to the General Electric case; and you say, "Let's assume that that is legal".

Now how can it be legal and also be a subterfuge unless one of two things has occurred: (a) it is carried
4105 beyond, in actual practice—though legal on its face—it is carried beyond in actual practice its face, and is applied to items which are clearly beyond the proper limits of a patent licensing agreement under the General Electric document; or (b), unless, although it is legal on its face, it was just a fixed-up agreement in which no one had any really serious intentions, that the parties went through a mere form of signing an agreement which, though legal on its face, was regarded by all of them as a mere form and without any proper foundation.

Now except in those two ways how can you think of a legal agreement as being subterfuge?

Mr. Steffen: I see your Honor's question, certainly.

Justice Jackson: That would be enough, to come under either one of those two situations, to make it subterfuge.

Mr. Steffen: Yes, but we still have a third.

The American Equipment Company case, which we cite on page 24 of our trial brief, had to do with this sort of a situation.

The brick people in Chicago decided that they wanted to stabilize their industry, and allocate certain quotas to different people. So they said, "Well, let's all take out a license under a particular patent having to do with a loading device". One of the conditions of that loading device patent agreement was that they should not load more than a certain amount in certain territories.

4106 The Court said that looked at all alone, the patent might have been all right, but when used for the purpose of allocating territories between the brick people, that it was being used for purposes which the Sherman Act condemns. The Court said "We will disregard the patent and the license under it, and say that what you really are doing is trying to stabilize and regulate your industry."

Justice Stephens: That is my category (a).

Mr. Steffen: All right, that is a good category. What was your category (b)?

Justice Stephens: That although the defendants entered into a license agreement which, on its face, was legal, they entered into it merely as a matter of form and without any good faith, and without a belief that it had a proper foundation.

Mr. Steffen: And the third, I think, your Honor, is one of the things that we are faced with here. A third category would be when they have entered into it and have gone completely beyond the license agreement by their bulletins and regulations under it.

If you will read the license agreement it just says that the licensor reserves the right to fix minimum prices, and that sounds simple enough.

Justice Stephens: Don't you regard the bulletins as really a part of the license agreement?

4107 Mr. Steffen: We regard them as going completely beyond the price terms in the license agreements.

Justice Jackson: Don't they refer to the license agreement in the opening paragraph of each bulletin?

Mr. Steffen: Yes. They are an outgrowth of it, certainly, but I think they go beyond—

Justice Stephens: (Interposing) You mean if considered a part of the license agreement or if considered as separate, beyond the proper limits of the General Electric case; but you do consider, don't you, from a factual standpoint, that the bulletins and the directions sent out in connection with the bulletins, were really part and parcel of the license agreement?

Mr. Steffen: I don't know what is tied up with that. I say they are an outgrowth of the agreement. I think they are an extrusion that got 'way off from the agreement, and it is certainly not, as Mr. Bromley says, a simple exercise of the fixing of prices. It seems to me that they went much beyond that, although they did it under the cloak of having a license agreement and a provision to fix prices.

The question is of great importance to us, certainly, and I hope that we may be heard again in more detail, if necessary.

Justice Stephens: Well, thank you, Mr. Steffen.

Do you wish to reply, Mr. Bromley?

4108 Mr. Bromley: No, your Honor.

Justice Stephens: Well, we thank counsel on both sides.

We will then proceed to take this evidence.

The Court rules that the class of evidence which we have been dealing with is admissible, subject to connection, on the theory of subterfuge, and will receive the evidence so far as it may be said to apply to a charge of illegality, as distinguished from subterfuge, subject to a motion to strike if the Court should later determine that the complaint does not involve a charge of illegality.

(Justice Stephens and Justice Jackson conferred off the record.)

Justice Stephens: One of my colleagues has some doubt as to the clarity of that ruling. I will therefore add that it is not intended to indicate that if the evidence be stricken out to the extent that it is offered as applicable to the charge of illegality, it would also be stricken out as far as the charge of subterfuge is concerned.

4109 Mr. Steffen: Mr. Knuff points out that I neglected to state to the Court that Paragraph 44 expressly states that the defendants are parties to illegal contracts, and of course, in our prayer we are asking for either the cancellation or the modification of the contracts. The very first sentence in Paragraph 44 is squarely on that point.

Justice Stephens: What do you say to that, Mr. Bromley?

Mr. Bromley: I say that that is the same thing all over again. I assume that if they prove we carried our lawful price restrictions into unlawful fields, that we would all be parties to unlawful contracts.

Justice Stephens: Well, we will proceed, gentlemen.

By Mr. Knuff:

Q. Mr. Lenci, at the November 15th meeting, the meeting of November 15, 1932, was there a complaint discussed at that meeting concerning certain dunnage that was sold by either Tomkins, Tomkins Rockwall, or some Tomkins company? A. Yes.

Q. What was the nature of that complaint? I am very sorry that I can't make my question any clearer, but I can't do it because the memorandum that I have in front of me doesn't indicate whether the dunnage was sold by Tomkins Rockwall, or what Tomkins company it was. Now, can you clarify that for us? A. Well, it happens I can, in that case, because that was m own particular complaint.

4110 Q. What is that? A. That was our own complaint. We were complaining that the Atlantic Gypsum Company—you will see the reference there to Mr. Neale, he was their manager—that the Atlantic Gypsum Company were including in shipments to either Tomkins Brother or Tomkins Rockwall Company, dunnage board of a quality which enabled Tomkins to resell it, which was in effect a rebate or a cut in the price, and which put us at a disadvantage.

Q. The Atlantic Gypsum Products Company was selling to the Tomkins Rockwall Company, is that correct? A That is correct.

Q. And in turn—I don't want to transgress and repeat—

Justice Jackson: (Interposing) Go ahead, you have your own style, Mr. Knuff. Don't feel that you are circumscribed at all.

Justice Stephens: We don't want you to feel self-conscious, Mr. Knuff. Just try and save what time you can.

Justice Jackson: I just made that as a suggestion.

Mr. Knuff: I do want to have the record clear.

By Mr. Knuff:

Q. Tomkins Rockwall in turn were reselling that
4111 to customers, is that correct? A. Yes, but that isn't what we were interested in.

Q. What were you interested in? A. We were interested in the fact that the Atlantic Gypsum Company, a licensee,

was shipping dunnage board which was, in effect, first-class board, at no cost to the customer, which was a violation.

Q. And who referred the problem to Mr. Neale to investigate, if it was referred to him? A. Well, my recollection is that I made my complaint, of course, to the United States Gypsum Company, and that Mr. Henning asked Mr. Neale to investigate it.

Q. And Mr. Neale said he would investigate it? A. Yes.

Q. Now was there any discussion as to how this problem of dunnage was to be handled in the future? A. Well, that first complaint led to the second notation which I have on my list, that all of the licensees were asked by the United States Gypsum Company to mail to the Board Survey Company the details of just how much dunnage they were putting in these cars, and what kind of dunnage it was, whether it was really dunnage which was board which was no good, or whether they were overloading their cars with good board and calling it dunnage, which was, in effect, a cut in price,

4112 Q. And Mr. Henning suggested, is that correct, that all the companies that were present there mail to him the details as to their practice concerning the use of dunnage; is that correct? A. That is correct, except that he said to mail it to the Board Survey Company.

Q. The Board Survey Company? A. Yes.

Q. Did he assign as his business reason for that, that the licensor would be guided by the practice as it would be detailed in the letters that they would receive? A. I didn't hear the first part of your question.

Q. I don't believe the question is very clear.

Did Mr. Henning say that the licensor desired this information so that it could formulate a consistent policy concerning dunnage? A. I don't recall whether Mr. Henning said he would do that or not, but I think he was anxious to get the information and possibly do something of that kind later.

Q. He made no statement as to that? A. No. In other words, he was collecting information.

Q. Now then, was there a complaint made by someone that the National Gypsum Company sold Maftex below their regular established price for Maftex, in con-

4113 nection with a sale of board?

Justice Jackson: What is Maftex?

Mr. Knuff: I was going to ask this witness. I don't know, myself.

The Witness: Suppose I answer that first. Maftex is an insulating type of board, a fiber board like Celotex or Insulite.

Justice Jackson: It is not a gypsum product?

The Witness: It is entirely outside of the gypsum industry.

There also was a complaint made by our company that the National Gypsum Company, in trying to make a sale of gypsum board to Axinn Brothers, were maintaining the price on gypsum board but quoting an unusually low price on the Maftex board which was, in effect, unduly influencing the sale.

By Mr. Knuff:

Q. And your complaint was that you wanted National Gypsum Company to maintain their established price for Maftex, is that correct? A. That would be the effect of it, yes. In other words, we didn't feel that they should take a material such as Maftex, which had a reasonably stable price—I am not familiar with the exact details—and suddenly make a low price on that to influence a com-
4114 bination sale of Maftex and gypsum board.

Q. What happened to that discussion? A. I see that there is a question mark after that. I don't know what disposition we made of that. I think we merely made the complaint, and Mr. Neale was to investigate.

Q. Mr. who? A. Mr. Neale. Mr. Baker, I mean.

Q. Mr. Baker was going to investigate that? A. Yes.

Q. You don't know whether Mr. Baker said that if National was selling Maftex below the established price, that he would see that that was discontinued? A. I don't recall what his statement was, if any.

Q. Was there any discussion concerning a man by the name of Sol Bloom? A. That isn't Sol Bloom.

Justice Jackson: He is in Congress.

The Witness: This is another S. Bloom.

By Mr. Knuff:

Q. This is an "S. Bloom"? A. Yes, this is S. Bloom. It probably was Solomon, but I am not sure.

Q. What was the discussion? A. That was a complaint—I don't know whether we made it or not, but it was one
that we were familiar with, because it happened two
4115 or three times. At that time there was a differential in effect between the price of board in straight carload lots and in truckload lots, and we made the complaint

that the National Gypsum Company had shipped a carload of board to Brooklyn, and on arrival had trucked it to these three different customers of theirs, without any additional charge, which was, in effect, below the bulletin price.

Q. It was your understanding at that time that the license bulletin did not permit the manufacturer to pay for the transportation from the car to the dealer's warehouse? A. Not when the product was sold at the carload price.

Q. In other words— A. (Interposing) The carload price was lower than the truck price, and if the manufacturer included trucking and did the trucking service, he was, in effect, making a donation of the cost of the trucking, which was a violation of the price established by the bulletins, at that time.

Q. Between what points was the trucking being done, between the railroad car and the dealer's warehouse or between the plant of the manufacturer and the dealer's warehouse? A. The car was shipped from the National Gypsum Company's plant in Upper New York State, by rail, to Brooklyn, and sold f. o. b. car Brooklyn and billed at that price, and that is where the sale should have stop-
4116 ped. But in addition to that, they took the contents of this car and delivered it to three different dealers' yards, without further charge.

Q. I think I understand that now.

Justice Jackson: Does that mean from the railroad yards in Brooklyn over to Corona, Long Island?

By Mr. Knuff:

The Witness: Yes, sir.

Q. Was there any discussion concerning National donating some boards to Feldman Lumber Company? A. There was, but I don't remember that that was our complaint. That was a complaint in connection with the matter of advertising, that is, giving away boards for completing work in a customer's office. This happened to be a very small one, it was only 7 boards involved.

Q. Was there a complaint concerning the—I am sorry, I can't make out your writing any better, Mr. Lenci— A. (Interposing) The Cinder Products Company.

Q. (Continuing) —Cinder Products Company of Syracuse, and if there was any complaint who made it and what was the nature of the complaint? A. I don't recall who made the complaint.

Q. Do you recall the nature of the complaint? A. It is

my recollection that at that time—no, I am not sure, I don't want to say that, because I am not certain. The gist
4117 of it is that there was a sale below the minimum established at that time by the bulletins, by Certain-teed.

Q. That is not a sale below the minimum price, but a sale—A. (Interposing) Of a smaller quantity.

Q. Of a quantity less than the minimum quantity? A. Less than the minimum established at that time.

Q. Was there any discussion concerning the Structural Gypsum Company selling some board to S. Bloom? A. That was a complaint that we made, that the Kelley Plasterboard Company must be selling Structural at a price which would permit them to make very small deliveries.

Q. What do you mean by that? A. Well, the complaint was that the Structural delivered 2970 square feet of board to S. Bloom. Well, of course, these things aren't complete. These are merely headings on this exhibit. But we felt that if Kelley had charged the correct price to Structural, there would have been no margin in it for them to make such a small delivery.

Q. Well now, wasn't your complaint along this line, Mr. Lenci, that under the license bulletins the licensor prescribed certain minimums that could be sold, and your complaint was that the Structural Gypsum Company was not complying with those minimums, and that the Structural Gypsum Company sold 2970 feet to S. Bloom? A.
4118 Yes, that is to a certain extent correct, but it goes back to the fact that they must have had some special concession from Kelley to enable them to do that.

Justice Jackson: You mean they couldn't have sold such a small quantity?

The Witness: Yes.

By Mr. Knuff:

Q. You say that you objected to Structural selling less than the minimum quantity provided in the bulletins? A. No. My complaint was against the Kelley Company for permitting Structural to get themself that advantage.

Justice Stephens: We will take a recess at this time for five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice Stephens: You may proceed.

By Mr. Knuff:

Q. Mr. Lenci, at the trial in the District Court on October 16, 1941, with reference to Structural selling 2970 feet to S. Bloom, do you recall that you were asked concerning that down there? A. Yes.

Q. And you explained the meaning of that transaction in this language, and I am reading from page 509, Mr. Bromley—

4119 Mr. Bromley: (Interposing) It seems to me that this ought to be shown to him, if it is being used to refresh his recollection.

Justice Stephens: Show it to the witness. Mark it out and show it to the witness.

Mr. Knuff: This isn't Grand Jury testimony.

Justice Stephens: That is very true, but you are just using it to refresh recollection, so it isn't coming into evidence itself.

Mark the beginning and the end so that we can see it.

Mr. Knuff: The witness is being handed his testimony before the District Court, given on October 16, 1941, and has been referred to page 509 of his testimony, beginning with line 16 and ending with line 23.

Will you read that, Mr. Lenci, please, to yourself?

Justice Stephens: Show it to Mr. Bromley.

Mr. Knuff: Mr. Bromley, I believe, has it in front of him.

Justice Stephens: Then show it to the Court.

(Testimony handed to the Court for examination.)

Justice Stephens: Proceed with the examination.

Mr. Bromley: I object to showing only this particular excerpt from page 509, and ask that the witness be permitted to read the rest of page 509 and down to line 10 on page 510.

4120 Justice Stephens: The witness should be allowed to read the whole of his testimony on that topic, and he may do so.

Mr. Knuff: I haven't any objection at all.

Justice Stephens: I am sure you haven't.

Mr. Knuff: I thought that was a complete statement.

(Witness handed testimony for examination of additional portion.)

By Mr. Knuff:

Q. You have seen your previous testimony, Mr. Lenci, have you not? A. Yes.

Q. Does that refresh your recollection any more definitely? Has your recollection been refreshed? A. Yes.

Q. Now what was the complaint that was registered as to Structural selling 2970 feet to S. Bloom? A. Well after reading that testimony there—you must realize that I was the first witness in the criminal case, and naturally I couldn't go through the 6 weeks of that case without picking up additional information and having my memory refreshed in various ways; and with what I know now, I believe the statement I made today is more nearly correct than the one I made in the criminal case.

Q. You think, then— A. (Interposing) And if I might go a little farther, I think if you will see what is on
4121 the following page there, it ties it up with Kelley, which is what I said in my answer a few minutes ago.

Q. In the fall of 1932, were you not under the impression, Mr. Lenci, that the owner of a patent could fix the terms and conditions under which that patented article could be disposed of at resale? A. At one time I was, and I don't know up to what time that impression lasted, but I will be honest and say that I believe at a certain point that the ownership of a patent carried right through. I am not a patent lawyer, so I didn't know any different.

Q. And you were under the impression at one time that the owner of a patent could fix the price at which the patented article could be sold, and the terms and conditions under which it could be sold, down to the ultimate purchaser; isn't that correct? A. At one time I did believe that, yes.

Q. And at that time, didn't you believe that since the United States Gypsum Company was the owner of the patent, and that they had licensed Kelley to make the board, and Kelley in turn had sold it to Structural, didn't you believe at that time that that gave Kelley and the USG the right to determine the price and the terms and conditions at which Structural could resell that board? A. I
4122 don't know whether my misinterpretation of the patent law carried along to that late date or not. I don't know just when I learned better.

Q. You don't know whether it was at that time or not? A. I don't know whether it was before that or afterwards.

Q. But at one time you did believe just that? A. I did.

Q. I notice in the next to the last line on Government's Exhibit 478 for Identification, the word "Dusol" appears. That is the last word in the next to the last line. Did you have any discussion at that meeting concerning the L. A. Dusol Company—or is that "Dusol"? A. Unfortunately, there are two Dusols.

Q. There is a George Dusol, is that correct? A. I don't know.

Q. And an L. A. Dusol? A. "L. A." sounds familiar. I know there were two of them.

Q. And George Dusol was a salesman employed by the Kelley Plasterboard Company—don't you recall that? A. One of the Dusols worked for Kelley.

Q. And L. A. Dusol was a jobber in Brooklyn, isn't that correct? A. I am not sure whether he was a jobber
4123 or a lumber dealer.

Q. You are not sure? A. I am not sure.

Q. Can you tell us what the word "Dusol" refers to here? A. In this particular case, it was a complaint made by one of the licensees—I don't remember now which one, or whether it was a combination of several—that the Atlantic Gypsum Company's salesman, Mr. Grossman, had been handing out cash rebates to the various companies, lumber companies, mentioned here. Do you want me to say who they are?

Q. Yes. A. It was the Wagman Lumber Company, the Kings Highway Lumber Company, the Astoria Lumber & Trim Company, the Feldman Lumber Company, the Dusol Lumber Company, the Southern Lumber Company, the Williamsburg Lumber Company, and S. Skoblisky. And as part of the same complaint, someone made the complaint that Certain-teed and the Ebsary Company also were rebating to S. Skoblisky.

Q. This Dusol, then, appears just as one of the receivers of the rebate that was made by Grossman of Atlantic? A. That is correct.

Justice Jackson: You say those were cash rebates?

The Witness: Those were actually cash rebates.
4124 That is, the claim was that they were cash rebates.

By Mr. Knuff:

Q. Now, was there any discussion at this meeting on the 15th of November concerning the discount that should be allowed to manufacturing distributors? A. I don't know that there was any discussion. I think the licensor simply

said that there would be a change made, establishing the rate of discount at which gypsum board could be sold to other manufacturers of plaster products who were not manufacturers of board. Up to that time, I believe the discount had been 10 percent, and they now established a basis of 12-1/2 percent discount on lath and plasterboard, and 15 percent on wallboard.

Q. And previous to that, the discount had been 10 percent? A. As I recall it, up to that time it had been 10 percent. I don't know whether it was slightly higher on wallboard, or not.

Q. You don't recall whether or not there was any discussion concerning that? Your present recollection now is that USG made the announcement that there would be a change in that discount rate? A. Yes. I don't think there was any discussion.

Q. Now was there any discussion concerning the Upstate New York trucking situation? A. There must
4125 have been, because I have a memorandum here that the United States Gypsum Company was to make a recheck of that situation. But I don't remember what it was.

Q. You don't recall the discussion? A. I do not.

Q. I see our old friend Dusol is again mentioned in your memorandum. Was there any discussion concerning whether Mr. Dusol had ceased to do business as a jobber? A. I don't know if there was any discussion. Mr. Kelley made the statement that this particular Dusol—whichever one he was—was no longer a jobber being sold at a special discount as a jobber, but was being sold as a dealer.

Q. Was there any discussion concerning commission men? A. Yes. I am just trying to interpret my reference here. The reason I say that is that some of these names mentioned were not really commission men, but were jobbers. Abbey, Coeyman, Perry and Elhyde were in the classification of jobbers, and Colonel Lawton and Blanchfield were commission men.

Q. Can you tell us whether or not there was a discussion that thereafter there would be no more commission men employed in the gypsum industry? A. Subject to correction, I think that it was at about that time that the
4126 United States Gypsum Company issued a bulletin that the employment of commission men would be taken as a violation of the license agreements.

Q. That it would be considered by the United States Gypsum Company as a violation of the license agreements? A. Whatever the wording was in the bulletin.

Q. And your present recollection is that there wasn't any general discussion about that? A. I don't think so.

Q. Simply that Mr. Henning made the announcement at this time that commission men— A. (Interposing) Must be cleaned up.

Q. Blanchfield was a salesman employed by the Ebsary Gypsum Company on commission, was he not? A. He was employed by us with a substantial salary, and a bonus above that. By that, I mean he was not just a nominal commission man, but he had a real salary, and if he made sales above that he was entitled to a commission.

Q. And wasn't it the understanding at that meeting that your arrangement with Blanchfield should not be terminated until after Colonel Lawton's employment was terminated?

Mr. Bromley: I object to the question as incompetent so far as the use of the word "understanding" is concerned.

Mr. Knuff: I am asking as to his understanding of the discussion.

4127 Mr. Bromley: No, you said "wasn't it the understanding at the meeting".

Justice Stephens: Read the question.

(The question was read by the reporter.)

Justice Stephens: Objection sustained.

By Mr. Knuff:

Q. Was it your understanding, Mr. Lenci, that your arrangement with Mr. Blanchfield should not be terminated until after the company that employed Colonel Lawton terminated his services? A. It went a little further than that. We made the very definite statement that we would not make any change in our arrangement with Mr. Blanchfield until Colonel Lawton's situation was cleaned up.

Q. And Colonel Lawton was employed by whom? A. At that time, I believe he was representing the Atlantic Gypsum Company.

Q. On a commission basis, is that your understanding? A. That is my understanding.

Q. And in spite of the fact that USG had said that from now on the commission men would no longer be permitted under the license agreements, nevertheless you were not going to discharge Mr. Blanchfield until after Colonel Lawton's services with Atlantic were terminated? Is that

4128 correct? A. Yes.

Q. Was there any discussion concerning how Paragon of Syracuse and the American Hardwall Plaster Com-

pany were to be sold, that is, were they to be sold as jobbers or were they to be sold on a dealer basis? A. I am not altogether clear on that, but it is my recollection that Mr. Kelley, representing the Kelley Plasterboard Company, said that he would sell the Paragon Plaster Company of Syracuse, the Paragon Plaster & Supply Company of Scranton, and the American Hardwall Plaster Company of Utica, as dealers and not as jobbers.

Q. Is that quite correct, Mr. Lenci? Were the Kelley people selling Paragon of Syracuse or the American Hardwall Plaster Company or the other Paragon Company at all—weren't all those sales to Paragon and American Hardwall Plaster and the Paragon Plaster & Supply made by Oakfield? A. Not necessarily. I am quite certain that a great many sales were made directly from the manufacturer, in this case Kelley, to the ultimate consignee.

Q. You mean that the board was shipped by Kelley to the— A. (Interposing) Yes. And so far as I know, it was sold to them. The reason I say that, if you want to know why I say it—

4129 Q. (Interposing) Yes. A. (Continuing) —is because we did sell, at one time, one or two carloads to the Paragon Plaster Company in Syracuse, and the Oakfield Gypsum Products Company never entered into the matter at all, it was a direct sale from our company to Paragon. And I think maybe Kelley did the same thing.

Q. When you say you think that, you mean that that is you best recollection? A. That is my best recollection and information, yes.

Q. Now at that time, there was a man in Providence, Rhode Island, by the name of Cartier, was there not? A. Yes.

Q. And he was a jobber there, was he not? A. Yes; yes, he was a jobber.

Q. And there was some discussion that Mr. Cartier should no longer be continued as a jobber, but he should be sold as a dealer? A. I think at that time the Kelley Plasterboard Company were selling Cartier, and Mr. Kelley made the statement that he would sell Cartier, from that time on, as a dealer and not as a jobber.

Q. Well, there must have been some discussion concerning Mr. Cartier before Mr. Kelley got up and said, "I am going to sell Cartier now as a dealer." What was that

4130 previous discussion? A. I don't know, sir. Probably someone said, "What is the situation regarding Cartier?"

Q. When you say "probably", do you mean that that is your best recollection? A. Yes.

Q. And Kelley said, "I am now selling him as a dealer, not as a jobber"? A. Yes.

Q. The 7th line on the 2nd page has reference to exchanges or sales between manufacturers at less than the established minimum for Eastern territory. What was that discussion, Mr. Lenci? A. We had a warehouse in Newark, New Jersey, and the United States Gypsum Company also had a warehouse in Harrison, New Jersey, which was just across the river about a mile from ours. I believe at one time we were short of one particular size, and we asked the USG if we could go down to their warehouse and pick up a small quantity of this particular size in order for us to fill out a load to a customer. Mr. Henning said that he did not feel they wanted to make any exchanges between themselves or us, or to permit any exchanges between any manufacturer, of less than the minimum truckload that was in effect at that time.

4131 Q. And was the whole question of exchange, the policy with reference to exchanges, was that made the subject of a general discussion? A. I don't think so; I think that is simply something I asked him and he said, "That is what we are going to do."

Q. Then this notation that you have here didn't come up for a general discussion at that meeting? A. No, a lot of these things were not the subject of general discussions. They were matters where I would ask him, or someone else would ask him, and he would say, "This is what you have to do."

Q. You said that Coeyman and Perry and Elhyde were jobbers, is that correct? A. Yes.

Q. What was the discussion concerning them? A. Well, as I think I said before, it was just about at this time that the USG issued a bulletin to the effect that jobbers were to be sold at the same price as dealers.

Q. Well, that bulletin was issued in August of 1932 and this meeting took place in November of 1932? A. Yes.

Q. What was the discussion; why were they brought up at this time? A. I don't remember, unless the licensor asked some of the licensees whether or not they

4132 were still selling those people at the jobber price.

Q. You haven't any recollection, any definite recollection, as to what this note means? A. No; they were probably checking up on violations.

Q. I notice that there is a note here concerning Plastergon, Weyman and Allen—and I can't make out the next two words. What are those next two words? A. Central Plumbing Company.

Q. Was there a discussion concerning those? A. There must have been, but I don't remember what it was, now.

Mr. Knuff: We offer in evidence, if your Honor pleases, Government's Exhibit 478.

Mr. Bromley: Objected to as incompetent.

Justice Stephens: We think the witness has been testifying from presently refreshed recollection, and that the exhibit is not necessary in evidence. It is not received in evidence, it is excluded.

By Mr. Knuff:

Q. Did you attend a meeting at Chicago on December 13, 1932, Mr. Lenci? A. I don't remember.

Q. Could your memory be refreshed? A. I believe so.

Q. I hand you what has been marked for identi-
4133 fication as Government's Exhibit 479.

(The document referred to was marked for identification as Government's Exhibit No. 479)

By Mr. Knuff:

Q. Have you examined Government's Exhibit 479 for Identification? A. Yes.

Q. Does that refresh your recollection? A. It does.

Q. That is a four-page memorandum, is it not? A. Yes.

Q. In whose writing is it? A. In mine.

Q. When was it made, Mr. Lenci? A. Within a day or two after the meeting, I believe.

Q. That is, within a day or two after December 13th? A. Yes.

Q. Where was that meeting held? A. In Chicago.

Q. At the Palmer House? A. I am not sure, I don't remember whether it was or not. A good many of the meetings were held at the Palmer House but I don't recall whether they all were, or not.

Q. Was USG represented at that meeting?
4134 A. The United States Gypsum Company was represented by Mr. Henning and Mr. MacLeish.

Q. And what other companies were represented there, and who represented them? A. The Universal Gypsum & Lime Company was represented by Mr. Holland and Mr. Krumholtz; the Atlantic Gypsum Company was rep-

resented by Mr. Neale; the Kelley Plasterboard Company, by Mr. Kelley; the Ebsary Gypsum Company, by Mr. Ebsary and myself; Certain-teed Products Corporation, by Mr. Henley; the National Gypsum Company, by Mr. Baker; and the American Gypsum Company, by Mr. Black.

Q. And no person represented the Texas Cement Plaster Company? A. No.

Q. I believe at that meeting there was a discussion concerning the policy of the industry regarding sales of gypsum products through commission men? Am I correct in that assumption? A. I don't believe there was a discussion of it. I think Mr. Henning made the statement that now all of the commission men had been cleared up, or the situation regarding all commission men had been cleared up, with the exception of Blanchfield and Parker, and both of those men were our men. We said that we would now see that they were taken care of.

Q. And by "taken care of" you meant that you
4135 would change their status from commission men to men working on a straight salary, is that correct? A. Yes.

Q. And was that done? A. We did it with Blanchfield, and let Parker go.

Q. There was a complaint made by Mr. Kelley concerning the United States Gypsum Company soliciting Cartier of Providence, Rhode Island, was there not? A. Yes.

Q. What was that complaint? A. Well, you will recall that at the previous meeting Mr. Kelley said that he did not consider that Cartier was a jobber and that he would sell him as a dealer. Now at this present meeting Mr. Kelley made the statement that after he discontinued selling Cartier as a jobber, the United States Gypsum Company approached Cartier to make him a jobber.

Justice Jackson: Violations all around. (Laughter)

The Witness: Yes.

Justice Stephens: We will take the recess at this time until Monday morning.

(Whereupon, at 4:00 o'clock, p.m., the hearing was recessed until Monday morning, February 21, 1944, at 10.00 o'clock).

4136 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Monday, February 21, 1944.

The above entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4142 Justice Stephens: That may be stricken.

I should like to have it explained to me, either by the witness or by counsel, why it was contended to be a violation of the license agreements if there
4143 were exchanges of small lots of board between the licensees. It was testified by Mr. Lenci that one of the complaints made at one of these meetings was that one of the licensees was exchanging, with another, small lots of board. It wasn't clear to me why that was asserted to be a violation of the license agreement.

I don't know that it is material, but it is one of the things I didn't understand.

Mr. Bromley: Has Your Honor the place in the record where that appears?

Justice Stephens: I am afraid I didn't make a note of that. I think there were two places where Mr. Lenci testified that one of the companies would be out of a certain class of board and he would trade some other board for a small lot of the board that he was out of, and that that was complained about as a violation of the agreement.

Mr. Lenci: Page 4424?

Justice Stephens: Yes, there it is. Starting at line 9 it reads:

"Q. The 7th line on the 2nd page has reference to exchanges or sales between manufacturers at less than the established minimum for Eastern territory. What was that discussion, Mr. Lenci? A. We had a warehouse
in Newark, New Jersey, and the United States Gyp-
4144 sum Company also had a warehouse in Harrison, New
Jersey, which was just across the river about a mile from ours. I believe at one time we were short of one particular size, and we asked the USG, if we could go down to their warehouse and pick up a small quantity of this particular size in order for us to fill out a load to a customer. Mr. Henning said that he did not feel they wanted to make any exchanges between themselves or us, or to permit any exchanges between any manufacturer, of less than the minimum truckload that was in effect at that time.

"Q. And was that whole question of exchanges, the policy with reference to exchanges, was that made the subject of a general discussion?"

I didn't understand why that was alleged to be a violation of the license agreement. Perhaps it is not important. You may call the witness and proceed with the case.

Thereupon, GEORGE N. LENCI, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination (resumed)

Mr. Bromley: As I understand it, if the Court pleases, I don't think there was anything in the bulletins about this, nor do I think it was a complaint of a violation. Rather, it was something that Mr. Lenci asked Mr. Henning

about, and Mr. Henning expressed himself as Mr.
4145 Lenci testified. But I don't believe that there was anything in the bulletins about it, nor was there any claim by Mr. Lenci that there was any violation of the license agreement or any of the bulletins.

Justice Stephens: There was one other reference to it, in the testimony, by this witness. So I thought there was some importance attached to it by Mr. Lenci.

Mr. Knuff: Maybe I can bring it out.

By Mr. Knuff:

Q. Mr. Lenci, you stated that you desired to make some exchanges on board or lath of particular sizes that your warehouse was out of, and that you had sent your truck over to Harrison to the United States Gypsum Company warehouse for those boards. And I infer from that that the USG did not give you the particular boards or the small quantity of boards that you wanted; is that correct? A. That is correct.

Q. And then you took that up with Mr. Henning at a later time, and Mr. Henning told you that on all exchanges of board, the exchanges should be based upon the minimum truckload; is that correct? If not, you straighten me out. A. They were not exchanges, they were proposed to be outright purchases by one licensee from another licensee, or from the licensor. In other words, if one particular
4146 licensee was out of a particular type of board at the moment, he could go to one of the other manufacturers and buy, as a favor, a small quantity to fill out the missing quantity.

Justice Stephens: That is what you meant by the use of the word "exchange"?

The Witness: I didn't know I used the word.

Justice Stephens: Yes, you did.

The Witness: I should not have used the word "exchange" in connection with that. It was purely a favor that we were asking to be granted.

By Mr. Knuff:

Q. It was an accommodation? A. Yes.

Q. You were short a particular type of board, and you wanted to buy enough board to make up that shortage? A. Yes.

Q. And that accommodation was at first refused you, and you took that up with Mr. Henning. And Mr. Henning said that in the future, all sales between manufactur-

ers should be based upon the minimum truckload; is that correct? A. That is correct.

Q. Was there a provision in the license bulletins with reference to that, if you know? A. I don't recall whether there was or not.

Mr. Knuff: I think when we adjourned on Friday,
4147 we had before us the question of Government's Exhibit 479, which is the meeting of December 13, 1932.

(Government's Exhibit 479 handed to witness.)

By Mr. Knuff:

Q. I believe we had just finished a discussion concerning USG soliciting a man in Providence by the name of Cartier. At that meeting in Chicago, on the 13th of December, 1932, was there a discussion concerning the trucking situation in Upstate New York, and if there was any such discussion will you tell us just exactly what the discussion was? A. As I recall it, at this time there was no provision for the licensees to truck into the areas surrounding the plants of the Paragon Plaster Company in Syracuse and the American Hardwall Plaster Company in Utica—

Q. (Interposing) Let me interpose one question. There was a provision, it is your understanding, that in the counties adjacent to the mills in Western New York, the license bulletins did permit trucking into certain counties adjacent to those mills; is that correct? A. They did so provide, yes.

Q. And you might consider that as the zone nearest the mill, and then there was a zone farther away from the mill in which trucking was not permitted; is that correct? A. That is correct.

4148 Q. Now go ahead with your answer. A. But it was the practice of both the Paragon Company and the American Hardwall to make truck deliveries throughout the territory adjacent to their mills, and we were anxious to be put in a position to compete with those two companies.

Q. You could only ship into that area by railroad? A. We could only ship into that area in carloads.

Q. And you wanted that area opened up so that truck shipments could be made into the counties in which Oakfield and Paragon, and so forth, were delivering by truck? A. Paragon and American Hardwall.

Q. And you took that up with Mr. Henning at the meeting? A. Yes.

Q. And what did Mr. Henning say about that? A. As I recall, he said he would give it consideration, and might make some arrangement for that.

Q. Were you the only person that brought that question up for discussion, or did other manufacturers also bring that up for discussion at that time? A. I don't recall. I know that I brought it up, but I don't remember whether anybody else advocated it or not.

Q. You don't recall whether there was any discussion or not? A. No.

4149 Q. Now at Linden, New Jersey, the Structural Gypsum Company had their mill, is that correct? A. Yes.

Q. And was there any discussion at the meeting on December 13, 1932, concerning the fact that Structural had a dealer at their mill, and if there was any such discussion what was it, please? A. Well, there was such a discussion, yes. You will recall that at that time the Kelley Plasterboard Company was selling the Structural Gypsum Board Corporation. We could not understand how, if Kelley was getting the correct price for his material from Structural they could make an arrangement to have a dealer located in their plant and put out material in competition with the licensees who were doing business directly without all this intermediate expense.

Q. When you say "they couldn't do that", whom do you mean, Structural or Kelley? A. Kelley.

Justice Stephens: What do you mean by "having a dealer located in their plant"?

The Witness: It was a complicated arrangement. Of course, we couldn't get the details of it. Here they have a manufacturing plant, and then they have in one end of it a dealer's yard set up—

4150 By Mr. Knuff:

Q. You are referring to Structural? A. I am referring to Structural.

Justice Stephens: Who was the dealer?

The Witness: He was a local dealer in the territory there, I forget what his name was. It put the rest of us at a disadvantage.

By Mr. Knuff:

Q. And the matter was referred to Mr. Kelley to straighten out; is that correct? A. Yes.

Q. Mr. Kelley was at that meeting, wasn't he? A. Yes.

Q. Did you ask Mr. Kelley whether or not they were selling at the regular bulletin price to Structural? A. I don't remember whether Mr. Henning asked that or not, but I do know that he told Kelley to investigate it and see that it was taken care of.

Q. Now at that meeting, Mr. Lenci, was the discount to manufacturing distributors discussed, that is, the amount of the discount to manufacturing distributors? A. Yes, it was.

Q. Who brought that up? A. Mr. Kelley.

Q. Now, at that time what was the discount to
4151 manufacturing distributors? A. At that time there was a discount of 15 percent on the wallboard, and 12-1/2 percent on the lath and plasterboard. And Mr. Kelley thought that that was too much of a discount to allow these other manufacturers, and wanted to reduce it to 10 percent.

Q. What, if anything, did the other manufacturers say about that? A. I don't think anybody made any comment on it, and Mr. Henning said that so far as he was concerned, he thought that the 15 percent and 12-1/2 percent were all right, and he would not make any change in the bulletins.

Q. Was there any question brought up at the meeting on December 13th concerning National having a warehouse with the Trygar Lumber Company? A. Yes, there was. I don't remember who brought that question up.

Q What was the discussion? A. The complaint was that the Trygar Lumber Company, at Perth Amboy, New Jersey, was renting warehouse space to the National Gypsum Company. I sort of put that backwards. The National Gypsum Company was renting space from the Trygar Lumber Company. That was a violation of the bulletins under the license agreement, which provided that no manufacturer should have these warehousing arrangements with
4152 dealers, which were in effect a price concession or rebate.

Q. And National reported that their previous arrangements with the Trygar Lumber Company no longer existed —is that the significance of that? A. Yes.

Q. Was there any discussion at that meeting concerning the Elhyde Lumber Company delivering as a jobber? A. That was a complaint made by the Atlantic, and I don't remember the details of that at the present time.

Q. Do you recall the attitude that the Certain-teed people took concerning that complaint, and by "Certain-teed people" I mean Mr. Henley, who represented Certain-teed at that meeting? A. The Certain-teed people denied the complaint, denied that this condition existed.

Q. Do you mean by that that Certain-teed denied that they were selling Elhyde as a jobber? A. That is correct.

Q. I notice our old friend Perry was up for discussion at this meeting on December 13—do you recall what that discussion was? A. I don't remember what that was.

Q. Did someone complain—let's see if I can refresh your recollection—did someone complain that Mr. Perry was still continuing to sell board as a jobber, and did Certain-
4153 teed say that they hadn't sold Perry since May 12?
A. Yes, but I don't remember the details.

Q. Was there any question about the Downs Lumber Company in Boston acting as a jobber? A. Yes, there must have been, because I made a memorandum of it; but that wasn't my complaint, and I don't remember it.

Q. You don't remember that? A. No.

Q. Was there any discussion at that meeting as to whether or not Certain-teed was renting space, warehouse space, in the Elhyde Lumber Company's yard? A. Yes, that goes back to the Elhyde complaint we mentioned just a few minutes ago. Certain-teed denied that they had any arrangement with Elhyde, but someone developed the information that Mr. Elhyde was president of what was called the Cambridge Terminal Warehouse, and that the arrangement was by Certain-teed with the Cambridge Terminal Warehouse.

Q. And what was the discussion concerning that? A. It was just a statement of fact, I believe.

Q. Do you know what position Mr. Henning took about that? A. No, I don't remember.

Q. You will recall, Mr. Lenci, at one of the pre-
4154 vious meetings at the Commodore Hotel in New York, that you were requested, or the manufacturers were requested to send the detail of the dunnage that they put in their cars. Do you recall that? A. Yes, I do.

Q. Now was the amount of dunnage, and the reports that these other manufacturers sent in, discussed at the meeting at Chicago on December 13? A. Yes. Mr. Henning said that the Board Survey had received the information asked for at the earlier meeting, and that the 8 companies had reported the average amount of dunnage each of them was using.

Q. The 8 companies had reported the average amount that each was using? A. Yes.

Q. Or the 8 companies reported the amount that each was using, which? A. In our own case, we reported the average amount we were using, and I believe each company did the same thing.

Q. And after Mr. Henning got that report, did Mr. Henning make any statement as to what they would consider a fair amount of dunnage to be put in each car? A. Well, he took the total of the 8 companies and from that reached an average of 610 square feet per car, which repre-
4155 sented an average figure of all the figures turned in; and he said that in view of that, and as most of the companies were using between 500 and 600 square feet, that that would be considered a fair amount of board, a proper amount of board to be used as dunnage to properly pack the car.

Q. Was there a general discussion by other manufacturers on this subject of dunnage at this meeting? A: There may have been some slight discussion, I don't think it was very much. There was some question, I know, as to American saying they only used 156 square feet per car, and we couldn't see how they could safely pack a car with such a small amount.

Q. American said that? A. No, the rest of us. At least, I will say that I could not understand how they could safely pack a car with only 156 square feet of dunnage.

Q. And you haven't any present recollection that there was any general discussion at that time? A. No.

Q. Did Mr. Henning say or indicate the size of the boards that would be considered proper to be put in a car for dunnage, that is, the width or the length, how the boards should be marked, and so forth? A. We were asked to use, as far as possible, narrow strips, that is, boards not
4156 over 12 inches wide, and these would be unusable on the job, and therefore could not be considered in any way as a gift or refund or rebate; and if it was necessary, especially with the wall board, which is the large board, to safely protect them, that whatever dunnage used wider than 12 inches would be stamped "dunnage" so it would be definitely identified as such.

Q. It was to be stamped in red letters 3 inches high with the words "Dunnage—not to be sold"? A. It didn't say "not to be sold", but as I recall it it was a big stamp marked "dunnage".

Q. I see. Did the other licensees agree to follow the suggestion of Mr. Henning as to this? A. I don't know that there was an agreement. I think he just said that that was what we would have to do.

Q. Did any person remonstrate as to that? A. No, we all felt that that was a good thing to do.

Q. You all felt it was a good thing to do? A. Yes, that the thing had been badly abused.

Q. On the third page, Mr. Lenci, of the memorandum that you have before you, on line 3, I just don't know what that means. Can you tell me?

That was simply a continuation of the explanation of the use of dunnage board. The first part that I have been talking about applies to the boxcars. Now, of course, all
4157 of us were doing trucking out of our various warehouses—

Justice Stephens: (Interposing) This won't mean anything in the record, because you have called the witness' attention to certain words in line 3, but they don't appear in the record.

Mr. Knuff: I will bring that out.

By Mr. Knuff:

Q. Are those initials "DA"—"DA trucks"—and what do they stand for?

Justice Stephens: I don't see that, Mr. Knuff.

Mr. Knuff: The third line on page 3. It looks to me like "DA trucks".

The Witness: No, it is "On—O-n"—"On trucks large board on bottom (if required) and nothing on top." The words "if required" are in parenthesis.

Mr. Knuff: Is that clear to the Court? It is clear to me.

Justice Stephens: Yes.

The Witness: That is a continuation of the dunnage matter, and it meant that on truckloads of wallboard, the big board, we could put a large damaged board for dunnage on the floor of the truck to protect the bottom board of the load.

Justice Stephens: You mean that was a statement by Mr. Henning as to what could be done?

4158 The Witness: Yes. The reason for that is that if you put a number of 12-inch strips on the bottom, and then put a good board on top of that, that good board would be immediately damaged by all these little pieces.

By Mr. Knuff:

Q. Now at that meeting, there was a long discussion as to who should pay the stop-over charges on stop-over shipments, was there not? A. Yes. That applied to the West and Southwest parts of the United States, and I was not interested in it because we did not make any shipments to the West and Southwest.

Q. Can you give me in detail a little more about that discussion? A. I do not remember it, because I was not interested and had no reason to remember it.

Q. Gypsum board manufacturers sell to at least two classes of dealers. One you might consider as mason supply dealers, and the other type of dealer that the manufacturers sell to is lumber yard dealers—is that correct? A. That is correct, yes.

Q. Now the terms in the lumber trade were what, Mr. Lenci? A. It goes way back into history, apparently. The local dealers, the lumber yards, were always able to buy from the lumber producers on very long discounts, 4159 long-term paper. In other words, they got a carload in, and a great many of them would pay in 60, 90, or 120 days. That had been a custom built up through the past years.

Q. In other words, the payment on a carload of lumber wouldn't be due, maybe, for 60 or 90 days? A. And sometimes longer than that.

Q. And sometimes 120 days? A. Yes. But on the other hand, materials such as gypsum products had gotten into a different group, such as cement and lime and products of that kind, which had always been paid for on a much more prompt basis.

Q. That is, on a 30-day basis? A. Usually on a 30-day basis, and a discount of 2 percent was allowed for cash payments in 10 days; or, in the case of larger purchases, 2 percent on the 10th of the following month. And we didn't want to have—you see, at this time this was in the low part of the depression—we didn't want to have all our money let out on these long terms if we could avoid it, and we wanted to hold the gypsum end of the business into the 2 percent 10-day group, or 30 days net, rather than have it drop into the lumber classification. We were asked by the licensor not to offer these long terms as an inducement in order to make sales.

Q. There was a discussion concerning the propriety or

adequacy of both classes of terms, was there not?
4160 A. I think the thing came about as a topic which Mr. Henning brought up and felt that that would be a good thing for us to do, and it was.

Q. And there was a discussion concerning it? A. There was a discussion, like I have just given it to you, more or less in the nature of an explanation. We all felt it was a good thing.

Q. And Mr. Henning said, then, that you were to stress payment within 30 days? A. Yes.

Q. Two percent cash in 10 days, and payment in 30 days? A. Yes.

You see, those had always been the gypsum terms, way back long before there was any wallboard or gypsum block or anything. It went back to the beginning of the gypsum industry.

Q. And were you to accept trade acceptances in payment for gypsum board? A. We were not to voluntarily offer to take notes, or offer to take trade acceptances, or offer to take bonds or other securities, in lieu of cash. But we were, of course, not prevented from accepting those in case a customer got in bad condition financially and we had to take whatever we could to secure the account. But they
4161 were not to be offered as an added inducement to make the sale.

Q. Now I notice—

Justice Stephens: Is that on the theory that that would be a kind of price concession?

The Witness: Yes. You see, this was in 1932.

By Mr. Knuff:

Q. That is when there was a depression? A. Yes.

Q. I notice that you have a note to the left of the margin, and I take it that that note means "notified Diegel"—I can't read the rest of it. A. It says, "Notified Hough, Diegel, Regan"—those were three of our men.

Q. That was something you put there to call something to your own attention; is that correct? A. Yes.

Q. In other words, you were to notify those three men as to the attitude that USG and the other licensees had concerning payment; is that correct? A. Yes, and that that was our policy.

Q. Was there any discussion at that meeting concerning the manufacturer being responsible for hired truckmen? A. Yes.

Q. Now I frankly don't know what I meant by the question "a manufacturer being responsible for hired
4162 truckmen", and I don't think it is a very intelligent question, but I didn't know what else to ask you in order to bring the discussion before the Court. What was that discussion? A. This applied in the territory where we were making truckload deliveries, and as you know, the license bulletins provided that we were to make truckload deliveries to the dealers' yards. In some cases we found that these dealers, when the truck got there, would give the driver a dollar or half a dollar or $2.00, and he would then go on from their yard and make a delivery to a job, which would be in violation of the license agreement. We were told by the licensor that if we had hired trucks, we would have to see that they abided by our regulations just as though they were our own trucks.

Q. Now, as I understand it, the deliveries were made not in your own trucks, but in hired trucks; is that correct? A. In our case, and in a good many of the other cases, they were in hired trucks.

Q. Now, what was wrong with a dealer re-hiring that truck to make the delivery to the job?

Mr. Bromley: May it please the Court, I am not always sure whether what the witness is answering he intends to indicate were things that happened at the meeting or
4163 didn't happen at the meeting. I have some difficulty in drawing the line. Can we have that made clear?

Justice Stephens: Yes, it should be made clear.

Was there any discussion on the subject of why that practice that you have just described, constituted a violation of the license agreements?

The Witness: Well, it was my understanding—

Justice Stephens: (Interposing) Was there any such discussion?

The Witness: Yes.

Justice Stephens: Tell what it was, then. Make clear in your own mind, Mr. Lenci, what you are being asked to tell us now; unless specific questions are asked on that topic, without objection, you are being asked not what your own opinion of these things is, but what Mr. Henning said and what discussions took place.

The Witness: Well, it first started with a complaint. One of the licensees—I don't remember which one it was—claimed that certain of the other licensees were permitting

practices by hired truckmen which were in violation of the license agreement.

Justice Stephens: You have explained that that alleged violation consisted of the hired truckmen being in effect re-hired by the dealer to go out to a particular job and deliver a part of the load.

4164 The Witness: Yes.

Justice Jackson: Did I understand you to say "re-hired", or "slipped a dollar or two"?

The Witness: They weren't re-hired. This was a bribe to the driver.

Justice Stephens: I said re-hired, in effect, by the dealer.

The Witness: Yes.

Justice Stephens: That is what you meant, wasn't it?

The Witness: Yes.

Justice Stephens: Was there any statement by Mr. Henning or others there, as to why that was in violation of the license agreement?

The Witness: Yes. He said that the license bulletins provided that we were to make delivery to the dealer and not to the job, and this bribe to the driver merely made us make a job delivery.

By Mr. Knuff:

Q. Mr. Henning construed the additional payment to the truckman as a bribe, is that correct? A. That is what it was, there is no question about it.

Q. There is no question about it at all? A. No.

Q. And he took the position at this meeting that the
4165 dealer couldn't re-hire the truckman to deliver those goods to the job; is that correct? A. Well, it was not a re-hiring—

Q. (Interposing) Just answer my question.

Justice Jackson: Say yes or no.

By Mr. Knuff:

Q. Did he take that position? A. No.

Q. He didn't take that position? A. Not that they couldn't re-hire the truck.

Q. He took the position that the giving of a dollar or $1.50 wasn't adequate compensation for the truckman to haul the goods from the dealer's warehouse to the job; is that correct? A. That is correct, yes.

Q. In other words, he objected to the amount more than to the practice, is that correct? A. Yes.

Q. What did he say would be a fair amount of money to give to these truckmen to take the goods from the warehouse to the job? A. I don't think he got into that; but on the face of it, a great many of these truckloads were 10 or 12-1/2 ton loads, and our average trucking price around New York would be $1.50 a ton, which would mean
4166 that that truckload represented a cartage charge of about $15 or $20. On the face of it, giving a man a half a dollar or a dollar was purely a bribe, and nothing else.

Justice Jackson: I suppose these were just truck drivers?

The Witness: Yes.

By Mr. Knuff:

Q. Mr. Henning took the position that that was a violation of the license bulletins; is that correct? A. Yes. In other words, it was just a bribe, and actually the manufacturer was making the job delivery.

Q. Now at that time, you actually hired these trucks to make the deliveries, or the manufacturers hired some of the trucks to make the deliveries; is that correct? A. We hired the trucks to make deliveries to the dealers' yards.

Q. And they were independent contractors? A. Yes.

Mr. Knuff: Would you like to take the morning recess at this time?

Justice Stephens: Yes, we will take our morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4167 Justice Stephens: Counsel for the Government has handed up to the bench this morning a copy of a notice to take depositions. Is that merely for the information of the Court? I don't know of any action the Court is required to take on it, under the rules.

Mr. Knuff: I had understood, your Honor, that the Court wanted four copies of everything that we filed with the Court. We always file the original with the clerk.

Justice Stephens: Yes, we are glad to have it. This is not the original, however, it isn't signed.

Mr. Knuff: That is a copy, the original has been filed with the clerk.

Justice Stephens: You are not asking for any action on it?

Mr. Knuff: Not at all.

Mr. Johnston: If the Court please, I assume they are proceeding under Rule 30. I should like to discuss the matter with counsel and the Court off the record, preferably in chambers, to see if we can come to some understanding.

I am satisfied that we will not be able to take Mr. Gloyd's deposition. I have here a report from his doctors, and since the matter came up the other day I arranged to have two other very eminent doctors examine him. I have letters addressed to your Honor.

Now I wouldn't like to have these get into the rec-
4168 ord, if there is any way of avoiding that, but I would like counsel to see them, and I would like the Court to see them, because there isn't any question but what Mr. Gloyd's condition is such that it would endanger his life to attempt to give a deposition or to appear on the witness stand.

Justice Stephens: We will be glad to take it up informally, although unless there is something actually before the Court I don't know that the Court has any authority.

Rule 26 provides:

"By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules."

That would seem to indicate that the matter is one between counsel unless there is some objection filed before the Court to the taking of the depositions on the ground of the physical incapacity of the proposed witness.

Mr. Johnston: Yes, we would move under Rule 30 (b),
but before I filed that motion, I wanted to have this
4169 informal discussion to see if we could avoid the necessity for it.

Justice Stephens: You may do that informally, during a recess if necessary. Perhaps you can show these letters to counsel and come to some informal agreement on the subject.

Mr. Johnston: Yes, your Honor.

Justice Stephens: Proceed with your examination.

By Mr. Knuff:

Q. Was there any discussion at the December meeting in Chicago, Mr. Lenci, concerning the position that the gypsum manufacturers should take with their salesmen regarding pool cars? A. Someone must have brought that up, but I have no present recollection as to what it was.

Q. 32"x 48" wallboard would be what is known as "cut stock" wallboard, would it not? A. Yes.

Q. And do you know whether it was the practice of dealers to sell this 32" x 48" cut stock as regular wallboard? A. I believe that was a matter that affected principally the Middle West at that particular time.

Q. And was there any discussion? A. (Interposing) I don't think there was any discussion. I think Mr. Henning made the statement that certain of the dealers in that area were buying boards which were 32" x 48", at the price for cut stock, and that they were selling it and calling it
4170 wallboard, which had the effect of reducing our sales of wallboard.

Q. And Mr. Henning called that to your attention, is that correct? A. He called it to the attention of someone, I don't know who it was. It was not us, we had no part in it.

Q. What was the discussion about that? A. I don't know that there was a discussion.

Q. It was just simply a statement that it was cutting into the sales? A. Yes.

Mr. Bromley: Did you intentionally skip the note about patent markings?

Mr. Knuff: I did, I intentionally skipped it.

By Mr. Knuff:

Q. Since Mr. Bromley has called it up, what was the discussion concerning patent markings? A. I think Mr. Henning said that his attention had been called by some of his salesmen to the fact that certain boards were coming through, plaster board I think at that particular time, with no identification on them.

Justice Jackson: No patent markings?

The Witness: No identification or patent markings.

By Mr. Knuff:

Q. Now coming back to the 32"x 48" cut stock, did
4171 Mr. Henning suggest that the manufacturers do anything to stop this practice of the dealers selling this as regular wallboard? A. No, I don't remember anything like that.

Q. On the last page of this exhibit, Mr. Lenci, concerning the December 13th meeting, there is a reference to sales tax. Was the question of sales tax discussed at the December 13th meeting? A. It must have been. As I recall it, that was one of the times when there was agitation for a national sales tax, and if such a tax had gone into effect, which of course it did not, that it should have been added to the price and not absorbed by the manufacturer.

Q. In other words, the representatives at that meeting were all agreed that in case sales tax legislation was enacted, that the manufacturer should not absorb the sales tax but should add that to the invoice for which the dealer should pay, is that correct? A. I don't remember just the details of that. I think the matter was brought up by the licensor just in case it did happen.

Q. And was it the licensor's position that the sales tax should be passed to the dealer rather than have the manufacturer absorb it? A. Yes.

4172 Q. And that sales tax applied not only to gypsum board, but it applied to plaster and all other gypsum products, is that correct? A. Yes.

Q. And that was discussed at the meeting? A. I don't know that it was discussed—

Q. (Interposing) But that was the position— A. (Interposing) That was the position of the licensor.

Justice Stephens: You said that the sales tax "applied" to gypsum products. There wasn't any sales tax, was there?

The Witness: It never did go into effect, but there was some agitation concerning it.

Justice Stephens: What you meant was that if there was a sales tax, and if it applied to all of these products, then it should be passed on to the dealer?

The Witness: Yes.

Mr. Bromley: Does he mean that there was discussion at the meeting as to things other than patented board?

The Witness: Well, I have a memorandum here, in parenthesis, which would indicate to me that that was my own interpretation added to that.

By Mr. Knuff:

Q. That is, your recollection now is that the sales tax, if enacted, would apply not only to the patented board, but that the sales tax should be passed on to the

4173 dealer on all other products that you were selling, is that your recollection? A. Well, it is my recol-

lection that that was my interpretation of what we would do on other products.

Mr. Knuff: We now offer in evidence Government's Exhibit 479.

Mr. Bromley: The same objection as heretofore made concerning this type of exhibit.

Justice Stephens: The objection is sustained on the ground that the exhibit is used to refresh a present recollection.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 480 for identification, the same being a copy of a letter dated December 7, 1932, addressed to the United States Gypsum Company, and signed G. N. Lenci.

(The document referred to was marked as Government's Exhibit No. 480, for identification.)

By Mr. Knuff:

Q. Was the original of that letter sent to the United States Gypsum Company? A. Yes, it was.

Mr. Knuff: We now offer in evidence Government's Exhibit No. 480, your Honor.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of al-
4174 leged co-conspirators.

(The document marked as Government's Exhibit No. 480 was received in evidence.)

Mr. Knuff: While we are on the subject of the Structural Gypsum Company, will you show the witness Governments Exhibits 443 and 445, please?

(Thereupon, Government's Exhibits Nos. 443 and 445 were handed to the witness.)

By Mr. Knuff:

Q. In the first paragraph of Government's Exhibit No. 445, you make reference in the last line of the first paragraph to "Gyp Steel"—do you notice that? A. Yes.

Q. By that you meant the Structural Gypsum Company, is that correct?

Justice Jackson: That is already clear in the record.

By Mr. Knuff:

Q. Now in the second paragraph, the second line, there is a reference to a Mr. Williams, do you notice that? A. Yes.

Q. Mr. Williams was connected with the Structural Gypsum Company, is that correct? A. That is correct, yes.

Q. I show you, Mr. Lenci, what has been marked
4175 for identification as Government's Exhibit No. 481, the same being a letter, dated December 19, 1932, addressed to Ebsary Gypsum Company and signed G. N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 481, for identification.)

By Mr. Knuff:

Q. That letter was sent for the attention of Mr. E. H. Diegel, by you, was it not? A. Yes, sir.

Q. And that carries into effect the discussion that took place in Chicago on December 13, 1932, is that correct? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibit 481.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 481 was received in evidence.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 482, the same being a copy of a letter, dated February 16, 1933, ad-
4176 dressed to the Board Survey Company and signed Ebsary Gypsum Company, G. N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 482, for identification.)

By Mr. Knuff:

Q. Was the original of that letter sent to the Board Survey Company, Mr. Lenci? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibit No. 482.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 482 was received in evidence.)

By Mr. Knuff:

Q. I show you what has been marked for identification as Government's Exhibit 483, the same being a memorandum dated March 3, 1933, addressed to George N. Lenci, Secretary, and signed Ed. H. Diegel, Sales Manager.

(The document referred to was marked as Government's Exhibit No. 483, for identification.)

4177 By Mr. Knuff:

Q. Did you receive that memorandum, Mr. Lenci? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit No. 484, the same being a copy of a letter, dated March 24, 1933, addressed to the Board Survey Company and signed G. N. Lenci Secretary.

(The document referred to was marked as Government's Exhibit No. 484, for identification.)

By Mr. Knuff:

Q. I will ask you if the original of that letter was sent to the Board Survey Company. A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 485, the same being a letter, dated March 28, 1933, addressed to the Ebsary Gypsum Company and signed Board Survey Company, Frank M. Miller, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 485, for identification.)

By Mr. Knuff:

Q. Was that letter received at the Newark office
4178 of the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibits 483, 484 and 485.

Mr. Bromley: We make the usual objection.

Justice Stephens: All three exhibits are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 483, 484 and 485 were received in evidence.)

Justice Stephens: Are you skipping the March 17th letter, the first of this series? We have a letter in this series which you handed to the Court, on the top of the series, addressed to John A. Kling. Are you skipping that?

Mr. Knuff: Yes, your Honor. Mr. Lenci has said that he didn't attend that meeting on March 10th, and I was going to use it for the purpose of refreshing his recollection if he had been there. But he said he didn't attend that meeting.

Justice Stephens: I see.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit No. 486, the same being a letter, dated April 13, 1933, addressed to the Board Survey Company and signed Ebsary Gypsum Company, George N. Lenci, Secretary.

4179 (The document referred to was marked as Government's Exhibit No. 486, for identification.)

By Mr. Knuff:

Q. Is that the original letter that was sent by you to the Board Survey Company? A. Yes.

Q. I also show you what has been marked for identification as Government's Exhibit 487, the same being a copy of a letter, dated April 17, 1933, addressed to the Ebsary Gypsum Company, and signed Board Survey Company—Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 487, for identification.)

By Mr. Knuff:

Q. Did you receive the original of that letter, Mr. Lenci? A. Yes.

Mr. Knuff: I would like to have this letter marked for identification as Government's Exhibit 488. It is a copy of a letter, dated April 17, 1933, addressed to Mr.

Arthur R. Black, and signed Board Survey Company—Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 488, for identification.)

Mr. Knuff: I would now like to offer in evidence
4180 Government's Exhibits 486 and 487. These two letters have been identified by Mr. Lenci as being—Exhibit 486, the original of the letter that he sent to the Board Survey Company; and 487— a copy of the letter that the Board Survey Company addressed to Mr. Lenci.

Government's Exhibit 488 was obtained from the files of the United States Gypsum Company—

Justice Jackson: (Interposing) You are not offering Exhibit 488?

Mr. Knuff: Yes, your Honor, I am going to offer that. Exhibit 488 is connected, by internal reference, to Exhibits 486 and 487.

I am now offering Government's Exhibits 486, 487 and 488.

Justice Stephens: Where did you say you obtained 488?

Mr. Knuff: Exhibit 488 was obtained from the files of either the United States Gypsum Company or the Board Survey Company, I am not quite sure which, at the present time, but it was furnished to us in response to subpoena.

Justice Stephens: Is it an original, or a copy?

Mr. Knuff: It is a carbon copy, your Honor. We do not have the original of the letter. It was not turned over to us by the American Gypsum Company.

Mr. Bromley: We make only the usual objection to Exhibits 486 and 487.

We make the usual objection to Exhibit 488 and
4181 also object to it as incompetent because there is no proper foundation. The Government had Mr. Black here and could have identified this letter when he was here, it seems to me.

Justice Stephens: Exhibits 486 and 487 are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits No. 486 and 487 were received in evidence.)

Justice Stephens: As Exhibit 488 is objected to as incompetent, that raises every objection under the topics of competency, including the best evidence rule. You have not yet accounted for the original or shown that this is

a true copy. The objection is not upon the ground of relevancy or materiality, except the usual objection, but it isn't shown by this witness to be a true copy of a letter from the Board Survey Company to Black, nor is the absence of the original accounted for.

Mr. Knuff: In that connection, we contend first that the letter is sufficiently identified because it relates to a subject-matter that was brought to the attention of the Board Survey Company by Mr. Lenci's letter of April 13, 1933, where he says:

"These people as you know were jobbers of American Gypsum Company board and were supposed to have
4182 been put on dealer's basis."

Then, on the 17th of April, 1933, the Board Survey Company wrote a letter to the Ebsary Gypsum Company acknowledging the receipt of the letter that I just referred to; and on the same day, that is on the 17th of April, the Board Survey Company wrote a letter to the American Gypsum Company on the same identical subject.

Now that letter of April 17, 1933, Government's Exhibit 488 for identification, was furnished to us by the Board Survey Company, or the United States Gypsum Company. The original of that letter, we of course subpoenaed from the American Gypsum Company. The American Gypsum Company did not turn it over to us.

As I say, the carbon came from the files of the Board Survey Company or USG, whichever furnished the letter to us. It was, to all intents and purposes, a document that they believed came within the terms of the subpoena. It came from their files.

It is connected both as to subject-matter and as to date, by internal reference, and I think that it is circumstantially identified. If we had the original we would give it to you. We don't have it.

Justice Stephens: The question isn't whether it is identified, as I understand it. It may be internally identified in the sense that it is shown to be connected with,
4183 and a probable part of, this correspondence. But the objection as to competency includes the objection that it is not the best evidence, and how can internal connection show that it is a true copy?

Mr. Knuff: We subpoenaed the best evidence; we haven't got it; they didn't turn it over to us.

Justice Stephens: I understand that, but the best evidence rule says that you must produce the best evidence

available, which in this case would be the original, and that if that is not available, you must prove that the secondary evidence is a copy of the original. What proof is there of that?

Mr. Knuff: The proof is that whenever USG turned it over to us we had a right to assume that this document is what it purports to be, a copy of the letter. They have said, "Here, Mr. Assistant Attorney General, is a copy of the letter that you have subpoenaed from us, we have had this in our files." And I think it would be safe to assume that the United States Gypsum Company, or Board Survey Company, must have tacitly said, "This is a copy."

Justice Stephens: Do you admit turning this over as a copy of the original letter from Board Survey to Black, Mr. Bromley?

Mr. Bromley: We only admit turning it over.

Justice Garrett: Did the subpoena which ran to
4184 these various companies for these papers specify particular papers or was it a blanket subpoena calling for everything?

Mr. Knuff: In certain instances it did specify particular things. In other instances, the subpoena was, of necessity, very broad.

Justice Garrett: You don't know, of course, as related to this particular item here, whether it was specified or whether it was included in the broad provisions of a subpoena?

Mr. Knuff: I would hazard a guess on it, your Honor, and say that we didn't say "Give us the original of the letter of April 17, 1933". I am quite sure we didn't do that. We subpoenaed all the letters relating to certain classes of transactions. We asked the various people to go through their files and give us what they considered were the documents that fitted those classifications.

This was turned over, as I say—and as Mr. Bromley has now admitted—by either USG or Board Survey, as meeting the description that was contained in our subpoenas duces tecum.

Justice Stephens: Well, I can imagine that if a subpoena was specifically drawn and served upon an opponent to produce either the original or an exact copy, if available, and the copy was produced, that that might be taken by the Court as proof to the Court of an admission that it was an exact copy.

But there is no showing to that effect here.

4185 Is the letter really of grave importance to your case?

Mr. Knuff: I am not going to argue any further on it—

Justice Stephens: (Interposing) We are bound to apply the rules of evidence when they are invoked, and there really isn't any evidence to the effect that this is a correct copy. The probabilities are that it is.

The objection is sustained to Exhibit 488.

You may, however, reoffer it, if you can call someone to prove that it is an exact copy of the original.

Mr. Knuff: We are not going to take the time of the Court to do that. I didn't think they would raise such a tempest in a teapot concerning this letter. I think you can see the difficulty that we probably would run into in trying to get any stipulations concerning letters.

Mr. Bromley: I still can't understand why counsel didn't ask Mr. Black about it when he had him here on the witness stand.

Justice Stephens: We cannot assume, Mr. Knuff, that the defendants do not have some good reason for urging an objection, and therefore we must rule according to the rules of evidence when an objection is made.

Mr. Knuff: Yes, your Honor.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 489, the same

4186 being a letter dated March 31, 1933, addressed to the Ebsary Gypsum Company and signed Board Survey Company, Frank M. Miller, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 489, for identification.)

By Mr. Knuff:

Q. Was that letter received by the Ebsary Gypsum Company? A. Yes.

Q. I also show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 490, the same being a letter, dated April 10, 1933, addressed to George N. Lenci, Secretary, and signed E. H. Diegel, Sales Manager.

(The document referred to was marked as Government's Exhibit No. 490, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Q. I show you what has been marked as Government's Exhibit No. 491 for identification, the same being a copy of a letter dated April 12, 1933, addressed to the Board Survey. Company and signed Ebsary Gypsum Company, Inc., G. N. Lenci, Secretary.

4187 (The document referred to was marked as Government's Exhibit No. 491, for identification.)

By Mr. Knuff:

Q. Did you send the original of that letter to the Board Survey Company? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 492, the same being a letter, dated April 14, 1933, addressed to the Ebsary Gypsum Company and signed Board Survey Company, Frank M. Miller, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 492, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit No. 493, the same being the carbon copy of a letter dated April 20, 1933, addressed to the Board Survey Company and signed G. N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 493, for identification.)

4188 By Mr. Knuff:

Q. Did you send the original of that letter to the Board Survey Company? A. Yes.

Mr. Knuff: I now offer in evidence Government's Exhibits 489, 490, 491, 492 and 493.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declaration of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 489 to 493, inclusive, were received in evidence.)

Mr. Knuff: In Government's Exhibit 489, if your Honors please, I particularly call your Honors' attention to the second paragraph of that letter.

Justice Stephens: Yes, we have read that.

The Witness: May I ask if it is proper at this time to bring up a typographical error in Exhibit 493?

Justice Stephens: Yes, you may comment on that.

The Witness: You will notice in the center of the second paragraph the word "board" is ruled out after "plaster." The word "board" should have been eliminated from the word "plasterboard" in the next to the last line of the letter, also.

4189 By Mr. Knuff:

Q. Was the correction made on the original of the letter as it was sent out? A. I am not sure, but it should have been, because that is the question and that is the correct answer.

Q. In other words, in the next to the last line, the word "board" should be deleted from the word "plasterboard"? A. Yes.

Justice Stephens: What you mean is that when you wrote the letter you were intending to talk about plaster and not about plaster board.

The Witness: Yes, their question was—did we intend to give plaster away?

Justice Stephens: Very well. The exhibit itself cannot be altered, but your explanation of what you intended to discuss in the exhibit will appear of record.

Mr. Bromley: While we are on the subject, may I ask the witness if there is some mistake in the second paragraph of Exhibit 491?

The Witness: Yes, that is right.

Justice Stephens: What is the mistake there?

The Witness: The word "board" should not be there either.

Justice Stephens: Are you sure of that? I thought the charge here was that when you were selling board you were giving away plaster as a kind of rebate.

4190 The Witness: Well, the second paragraph should read:

"Whatever sales of plaster have been made to this firm have been made at the prevailing price and no special price made to induce board business."

Mr. Knuff: I don't believe, in Exhibit 491, your Honor, that that should be changed, because I think that the use of the word "plasterboard" there was the reason for the Board Survey letter of April 14, 1933, which is Exhibit 492.

The Board Survey Company, under date of April 14, 1933, Government's Exhibit 492, in the second paragraph say:

"We asked that you advise us as to whether or not you had donated to this firm plaster so as to reflect to it a rebate on its purchases of patented board from you". I think the reason for the second paragraph in Government's Exhibit 492 was occasioned by the use of the word "plasterboard" in Government's Exhibit 491.

Justice Stephens: The Court will have to refer it to the witness who wrote the letter.

The Witness: If there hadn't been this typographical error in the letter of April 12, 1933, there would have been no necessity for the letter of April 14.

Mr. Knuff: In other words, the letter of April 12 went out just as it is here, that is Exhibit 491?

The Witness: Yes.

Justice Stephens: I see what you mean. Proceed.

4191 By Mr. Knuff:

Q. I show you what has been marked for identification Government's Exhibit 494, the same being a letter, dated June 15, 1933, addressed to the Ebsary Gypsum Company, and signed Board Survey Company, Frank M. Miller, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 494, for identification.).

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether Government's Exhibit 494 was received at your Newark office? A. Yes.

Q. I show you what has been marked for identification, Mr. Lenci, as Government's Exhibit 495, the same being a letter, dated June 20, 1933, addressed to the Board Survey Company and signed Ebsary Gypsum Company, G. N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 495, for identification.)

By Mr. Knuff:

Q. Is that the original letter that you sent to the Board Survey Company? A. Yes, it is.

Mr. Knuff: I would like to have marked for identification as Government's Exhibit 496, a memorandum dated
4192 June 13, 1933, addressed to Mr. F. M. Miller, and signed H. F. Sadler.

(The document referred to was marked as Government's Exhibit No. 496, for identification.)

Mr. Knuff: At this time I will now offer in evidence Government's Exhibits 494, 495 and 496.

Exhibit 496 was furnished to us under subpoena by the United States Gypsum Company or the Board Survey Company. It is dated June 13, 1933, which is two days previous to the date of Government's Exhibit 494, and it relates to the subject-matter contained in Government's Exhibits 494 and 495.

We contend that it is connected by internal reference with Government's Exhibits 494 and 495.

Justice Stephens: Who is H. F. Sadler?

Mr. Knuff: Assistant to one of the Vice Presidents of the United States Gypsum Company.

Justice Stephens: Is that correct?

Mr. Bromley: That is correct. He is here in the courtroom and we are showing it to him.

Mr. Knuff: At that time he was assistant to one of the Vice Presidents.

Mr. Bromley: We make only the usual objection to these exhibits.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of al-
4193 leged co-conspirators.

(The document marked as Government's Exhibits Nos. 494, 495 and 496, were received in evidence.)

Mr. Knuff: In connection with Government's Exhibit 494, I call your Honor's attention specifically to the third paragraph of that exhibit, beginning—

Justice Stephens: (Interposing) We have read it.

Justice Garrett: I suppose in connection with that paragraph we should also read the third paragraph of the reply.

Mr. Knuff: Yes, your Honor, the third paragraph of the reply, Government's Exhibit 495. Thank you, Judge Garrett.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 497, the same being a

carbon copy of a letter, dated June 15, 1933, addressed to the Ebsary Gypsum Company and signed Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 497, for identification.)

By Mr. Knuff:

Q. I will ask if you received the original of that letter. A. I don't remember this one specifically.

Q. I show you what has been marked for identifi-
4194 cation as Government's Exhibit 498, the same being a letter, dated June 20, 1933, addressed to the Board Survey Company and signed by you.

(The document referred to was marked as Government's Exhibit No. 498, for identification.)

By Mr. Knuff:

Q. I will ask you if that is the original of the letter that you wrote to the Board Survey Company. A. Yes.

Q. Will you look at Government's Exhibit 497, in connection with Government's Exhibit 498, and I will ask you if Exhibit 498 is not a reply to the letter dated June 15, 1933, Government's Exhibit 497. A. That is correct.

Q. So that you would now say that you did receive the original of the letter dated June 15, 1933? A. That is right.

Mr. Knuff: I would like at this time to have marked for identification as Government's Exhibit 499, a memorandum dated June 13, 1933, addressed to Mr. F. M. Miller, and signed H. F. Sadler, Assistant to the Vice President.

(The document referred to was marked as Government's Exhibit No. 499, for identification.)

4195 Mr. Knuff: At this time I offer in evidence Government's Exhibits 497, 498 and 499. Government's Exhibit 499 is in the same category with, and what I have said concerning Government's Exhibit 496, equally applies to Government's Exhibit 499.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 497, 498 and 499 were received in evidence.)

Mr. Knuff: In Government's Exhibit 497 I call your Hon ors' attention specifically to paragraph 3 of that exhibit; and in Government's Exhibit 498, I call your Honors' attention to the last paragraph of that exhibit.

I should have—but through inadvertence I overlooked—called your Honors' attention to the last paragraph of Exhibit 499.

Justice Stephens: Very well.

Mr. Knuff: Mr. Bromley has called my attention to the fact that it is twelve-fifteen, and I wonder if you would care to adjourn at this time.

Justice Stephens: Yes, we will adjourn at this time until 1:45.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

4196 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice Stephens: You may proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 500, the same being a letter dated April 24, 1934, addressed to George N. Lenci, and signed H. F. Sadler.

(The document referred to was marked Government's Exhibit No. 500 for Identification.)

By Mr. Knuff:

Q. Will you tell us, Mr. Lenci, whether or not that letter was received at your Newark office? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 501, the same being a letter dated May 3, 1934, addressed to the Board Survey Company and signed George N. Lenci.

4197 (The document referred to was marked as Government's Exhibit No. 501 for Identification.)

By Mr. Knuff:

Q. I will ask you if that is a reply to the letter identified as Government's Exhibit 500, if that is your reply? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibits 500 and 501.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits 500 and 501, were received in evidence.)

Q. I show you what have been marked for Identification as Government's Exhibits 502 and 502-A, Exhibit 502 being a telegram dated November 8, 1934, addressed to Mr. C. F. Henning and signed by the Ebsary Gypsum Company; and Exhibit 502-A being a pencilled notation attached to Government's Exhibit 502.

4198 (The documents referred to were marked Government's Exhibits 502 and 502-A for Identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether or not Government's Exhibit 502 is a telegram that was sent to Mr. Henning, and will you explain what Government's Exhibit 502-A is? A. Exhibit 502-A is a memorandum which was given to me by, I believe, Mr. Diegel—I think that is his writing—and serves as a basis for the complaint which we make in our telegram dated November 8, 1934, to the United States Gypsum Company.

Q. In other words, Exhibit 502-A is the memorandum that occasioned the telegram which was sent to Mr. C. F. Henning, which has been marked for Identification as Government's Exhibit 502; is that correct? A. That is right.

Mr. Knuff: We offer in evidence Government's Exhibits 502 and 502-A.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits 502 and 502-A, were received in evi-
4199 dence.)

Mr. Knuff: If your Honors please, the next three photostats—one being dated March 10, 1933 addressed to Mr. C. F. Henning; another dated March 11, 1933, to Mr. Lenci; and the third being dated March 14, 1933—while we believe they are material and probably are admissible, yet we do not feel that we are going to offer them in evidence, so I will ask the Court to just omit the next three exhibits and we will come to the exhibit which is dated April 22, 1932.

Justice Garrett: And numbered?

Mr. Knuff: It will be marked as Government's Exhibit 503 for Identification.

(The document referred to was marked as Government's Exhibit No. 503 for Identification.)

Mr. Knuff: Mr. Finck, will you stipulate for the record, please, that Government's Exhibit 503, being a letter dated April 22, 1932, addressed to Mr. M. H. Baker, National Gypsum Company, was received by National Gypsum Company?

Mr. Finck: No, I couldn't do that.

Mr. Knuff: Did you not furnish the exhibit marked 503 for Identification to us by virtue of a subpoena?

Mr. Finck: This came from our files.

Justice Stephens: Is that the original?

4200 Mr. Finck: It apparently is an original letter signed by Frank M. Miller. I believe that that is the number that we put on there, but I know nothing else about it. I don't know who received it or anything about it.

Mr. Knuff: Will you stipulate that it came from your files?

Mr. Finck: Yes.

Mr. Knuff: Will you stipulate, Mr. Bromley, that the signature of Frank M. Miller is Mr. Miller's signature?

Mr. Bromley: Why don't you ask the witness about it?

Mr. Knuff: This letter wasn't addressed to this witness. It was a letter addressed to Mr. Baker.

I have no objection. I thought we could save a few minutes by getting a stipulation on the record.

Will you show the witness Government's Exhibit 503 for Identification, please?

(Government's Exhibit 503 handed to witness.)

Justice Stephens: Is that 503 the witness has?

Mr. Knuff: Yes.

Justice Stephens: I thought the one you handed Mr. Finck was the original.

Mr. Knuff: I didn't hand any to Mr. Finck. Someone at the counsel table did so.

Justice Stephens: I see.

By Mr. Knuff:

4201 Q. Is that the signature of Mr. Frank M. Miller?

A. This is the first time I have been asked to identify Mr. Miller's signature. Heretofore all the letters have been submitted to Mr. Bromley.

Q. That is right. You have received communications from Mr. Miller, have you not? A. Yes.

Q. Would you say that that is his signature? A. I think it is the same as the others, but I never saw him write it, so I don't know.

Mr. Knuff: We again ask Mr. Bromley if he will stipulate that that is Mr. Miller's signature?

Mr. Bromley: Yes.

Mr. Knuff: We now offer in evidence Government's Exhibit 503.

Justice Stephens: Is there any objection?

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 503, was received in evidence.)

Mr. Knuff: In connection with this exhibit, if Your Honors please, I call Your Honor's attention to Govern-
4202 ment's Exhibit No. 38, page 122, the third paragraph from the bottom, reading:

"The establishment or continuahce of warehouses, consigning of stocks," and so forth.

In the same exhibit, that is, Government's Exhibit 38, I also call attention to page 119, the fourth paragraph from the bottom, beginning: "The establishment or continuance of warehouses", and so forth.

Justice Stephens: We have looked at those now. Have you something to urge or offer concerning them?

Mr. Knuff: I want to call your Honors' attention to the last paragraph in Government's Exhibit 503 in connection with Government's Exhibit 38, page 122, the third para-

graph from the bottom, and Government's Exhibit 38, page 119, the fourth paragraph from the bottom, and Government's Exhibit 38, page 117, the fourth paragraph from the bottom. Those are license bulletins referred to in the last paragraph of this letter:—the one of April 12, 1932, the one of April 14, 1932, and the one of April 16, 1932.

Justice Stephens: What do you want us to do about it?

Mr. Knuff: I am making a cross-reference.

Justice Stephens: For the purpose of the record to show the relationship of the exhibits?

Mr. Knuff: Yes, for the purpose of the record, I am making a cross-reference at this time so that if Your
4203 Honors care to look up the reference in that paragraph of Exhibit 503, you will have a ready cross-reference for it.

Justice Stephens: Thank you very much.

By Mr. Knuff:

Q. I show you, Mr. Lenci, Government's Exhibit 504 for identification, the same being a letter dated March 30, 1933, addressed to George N. Lenci, Secretary, and signed George F. Neal.

(The document referred to was marked as Government's Exhibit No. 504 for Identification.)

By Mr. Knuff:

Q. Was that letter received by you, Mr. Lenci? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 505, the same being a letter dated April 12, 1933, addressed to the United States Gypsum Company and signed Ebsary Gypsum Company, F. G. Ebsary, President.

(The document referred to was marked as Government's Exhibit No. 505 for Identification.)

By Mr. Knuff:

Q. Is that a copy of a letter that was sent to the United States Gypsum Company, Mr. Lenci? A. Yes.

4204 Justice Stephens: Before you proceed, who was the Mr. Neal referred to in the previous letter?

The Witness: Neal was our New York State salesman.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 506, the same being

a letter dated April 17, 1933, addressed to the Ebsary Gypsum Company and signed Board Survey Company, Frank M. Miller, Secretary.

(The document referred to was marked as Government's Exhibit No. 506 for Identification.)

By Mr. Knuff:

Q. Was that letter received in your Newark office? A. Yes.

Mr. Knuff: I now offer in evidence Government's Exhibits 504, 505, and 506.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits 504, 505, and 506, were received in evidence.)

4205 By Mr. Knuff:

Q. Mr. Lenci, did you attend a meeting of the licensees in the Hotel Commodore on April 17, 1933? A. I don't recall. April 17?

Q. Either April 17 or April 27, 1933. A. I don't remember.

Q. I show you what has been marked for identification as Government's Exhibit 507, and I will ask if that memorandum refreshes your recollection concerning a meeting held in April, 1933, in the Hotel Commodore? A. Yes. The date is April 27.

(The document referred to was marked as Government's Exhibit No. 507 for Identification.)

By Mr. Knuff:

Q. The date of the meeting was April 27, 1933? A. Yes.

Justice Jackson: Where do you get that?

The Witness: Up near the top, the third line from the top.

Justice Jackson: I see it, thank you.

By Mr. Knuff:

Q. Who attended that meeting, Mr. Lenci? A. Well, the United States Gypsum Company was represented by Mr. Henning and Mr. Gallagher.

4206 Q. And who is Mr. Gallagher? A. Mr. Gallagher—I don't know his exact title, but he was what corresponded to the Eastern Sales Manager.

Q. Of USG? A. Yes.

Q. Was National represented? A. Yes, by Mr. Baker and Mr. Burley.

Q. And what position did Mr. Burley have with National? A. Vice President in Charge of Sales.

Q. Was Atlantic represented? A. Yes, by Mr. Fuller and Mr. Neale.

Q. Was Certain-teed represented? A. Yes, by Mr. Brown and Mr. McCausland and Mr. Roos.

Q. Was it C. O. Brown or George M. Brown, if you can recall? A. I am quite sure it was C. O.

Q. And Mr. Roos was Edwin G. Roos, is that correct? A. Yes.

Q. And was Universal represented at this meeting? A. Universal was represented by Mr. Holland.

Q. And was Kelley Plasterboard Company represented there? A. Yes, by Mr. Kelley. And the Ebsary Gypsum Company was represented by Mr. Diegel and myself.

4207 Q. Neither American nor Texas were represented at that meeting, is that correct? A. No, they were not.

Q. Was there any discussion at that meeting concerning plywood? A. Yes.

Q. What was the discussion? A. Well, first of all, to explain what plywood is,—which might make it a little simpler,—plywood is a lumber product, made of thin laminated sheets of lumber which are put together under pressure and make a wood sheet which is known in the trade as plywood. At that time they were selling a great deal of plywood in competition with gypsum board. It was used generally for the same purposes.

Mr. Henning made the statement that if they continued to encroach on the gypsum business, he might have to make some change in our prices,—in other words, lower our prices in order to meet this anticipated competition from an outside product.

Q. What did the licensees say about that? A. I don't know that we said anything about it. We naturally hoped that it wouldn't happen.

Justice Stephens: What do you mean by "they continued to encroach"?

The Witness: The plywood manufacturers.

4208 Justice Stephens: I see.

By Mr. Knuff:

Q. Was there any discussion at that meeting concerning the Quaker City Supply Company? A. Yes, there was. Someone made a complaint—I don't know just which company it was. The Quaker City Supply Company was a customer of the Kelley Plasterboard Company, in Philadelphia. Whoever made the complaint made it on the basis that Kelley was selling Quaker City, who are dealers, at less than the dealer price.

Q. Well, was the complaint made that Kelley was selling them at a low price, or was the complaint that Quaker City was selling at a low price? A. Well, maybe I took a little short-cut on that. The Quaker City were putting out prices which showed that they must be buying at a low price from Kelley in order to quote the prices which they did.

Q. That is, someone made a complaint and referred to the low prices at which Quaker City was selling that board? A. That is right.

Q. And from that, that person inferred that Kelley must be selling Quaker City at a low price? A. At less than the dealer price.

Q. Was the matter referred to anyone for in-

4209 vestigation, if you know, Mr. Lenci? A. I don't recall.

Q. Was there any discussion at that meeting concerning the Watertown— A. (Interposing) That would be the Watertown Builders Supply Company.

Q. Was there any discussion concerning them at that meeting? A. Well, their name was brought up, but at the present moment I don't remember what that was.

Q. Was that in connection with the low price at which they were selling material? A. Yes, but I don't remember the details.

Q. You don't remember the details? A. No, I don't.

Q. You recall, however, that it was in connection with some low price that the Watertown Company was using? A. Yes.

Q. Was there any discussion concerning the Atlas Builders Supply Company of Brooklyn? A. There must have been, but at the present moment I don't recall what it was.

Q. You don't recall? A. No.

Q. Was our old friend Perry again discussed at
4210 this meeting? A. There is a memorandum that Perry was not jobbing, but I don't know whether it was the company that was selling Perry said he was not, or whether the consensus of opinion was that he really had stopped—I don't know.

Q. All you can recall at this time is— A. (Interposing) That his name was brought up.

Q. Before the licensees, is that correct? A. Yes.

Q. Was Colonel Lawton's name brought up also, at that meeting? A. Yes, and my answer would be the same as to Colonel Lawton as with regard to Perry.

Q. Was there any discussion concerning the Oakfield Gypsum Company at the meeting on April 27, 1933? A. Yes, we complained about them.

Q. What was the nature of your complaint? A. Well, our complaint was that we could see no reason why these various subsidiaries of the Oakfield Gypsum Company should be sold when they, in actual practice, were dealers, or very close to it. We felt that the Oakfield Gypsum Products Company was the company which should be sold, and that the material should be shipped to them at Oakfield.

Q. That is, you complained that the American Hardwall Plaster Company, the Paragon Plaster Company,
4211 and the Paragon Plaster & Supply Company—that any orders for board that they might place should not be delivered from your mill, but should only be delivered to Oakfield; is that correct? A. Yes, our claim was that these three companies were using their ownership of the Oakfield Gypsum Company merely as a subterfuge to get material for themselves at their destinations at a manufacturing distributor's discount when, as a matter of fact, the largest part of their business was as dealers.

Q. And the position that you took was that board should only be delivered by Ebsary to Oakfield; is that correct? A. That is correct.

Q. And that it should not be shipped from the Ebsary plant for the account of Paragon, or Paragon Plaster & Supply, or American Hardwall? A. Yes, that was our argument.

Q. What disposition was made of that complaint at that time? A. I think Mr. Henning said that he was going to consider it, and would make that change.

Q. And would make the change? A. Yes.

Q. Do you know whether the change was ever made? A. I don't think it was.

4212 Q. You don't? A. I don't think it ever was.

Q. Now, if you were selling the Connecticut Adamant Plaster Company at a manufacturer's discount, and the Connecticut Adamant Plaster Company told you to ship to some dealer in Lower New York State, would you have made the shipment to the dealer direct, or would you have sent it up to Connecticut? A. First of all, we had no orders of that kind from the Connecticut Adamant Plaster Company. Our experience with the Connecticut Adamant was entirely different from what it was with the Oakfield Gypsum Company. Any sales that were made to the Connecticut Adamant Company, they did all of their business with dealers; whereas, sales to the subsidiaries of the Oakfield Gypsum Company, these subsidiaries were really dealers. Do you get the difference that I am trying to explain there?

Q. I am afraid I don't. I wonder if you can make it any clearer? A. In the case of the Connecticut Adamant Company, sales to them were made on the basis that they were manufacturing distributors and their sales were not to the consumer but to a dealer; but when we sold the various subsidiary companies of the Oakfield Gypsum Company, their sales were direct to the consumer. In other

4213 words, they were using the manufacturers discount to give them an unfair advantage over corresponding dealers in the same territory.

Justice Stephens: They were really dealers, in other words?

The Witness: They actually were dealers. In each of these places they maintained warehouses and distributing plants, and bought as manufacturers, but sold as dealers, which we felt gave them an unfair advantage.

By Mr. Knuff:

Q. Well, now, the board that was ordered by the Paragon companies was all placed for the account of Oakfield, was it not? A. Not always, no.

Q. Well, on board that was placed for the account of Oakfield, what was your position on that? A. You must understand that I don't know, because we did not sell any of these companies at that time. So I can't tell exactly

who placed the orders, whether they were placed by Oakfield or placed by their branches.

Justice Stephens: Just a minute. In order that this record may be clear and have continuity, unless the Court misunderstood you, there is a conflict in your statement. As I understood you to say not long ago, you said you thought Ebsary ought not sell these three alleged subsidiaries of Oakfield because it would give them an
4214 unfair advantage. You have just stated now that you didn't sell them at all.

The Witness: We made the complaint that others were selling them on that basis, which we thought was not correct.

Justice Garrett: Let me interpose for a moment. I had obtained the impression from past testimony that Paragon and American Hardwall and the other one, were not the subsidiaries of Oakfield but the parents of Oakfield—which is right?

The Witness: I can't answer that exactly. Theoretically, that is, it has been stated from time to time that those three companies were the owners of the Oakfield Gypsum Company, but I don't know.

Justice Garrett: I don't believe it is in your testimony, but it is in the testimony of other witnesses here that Paragon and American Hardwall and Paragon Plaster & Supply Company were the parents of Oakfield.

Mr. Knuff: It has been my understanding, Judge Garrett—and I don't know whether there is any dispute about it or not—that those three companies, the two Paragon companies and the American Hardwall, were the owners of the Oakfield Gypsum Products Company. In other words, Oakfield and the two Paragon companies and the American Hardwall Plaster were at least affiliated interests.

Now as I say, I understand that the parent companies were the two Paragons and the American Hardwall Plaster.

Justice Garrett: That would be the impression I
4215 had obtained from past testimony.

Mr. Knuff: That is my understanding.

Justice Garrett: But now there is some intimation—and I don't want to get confused about it—that Oakfield was the parent company of those other three companies. I think we ought to have that cleared up. I don't see any reason why it shouldn't be cleared up. I don't believe

the complaint charges the relationship. I looked through it the other day to find if it does.

Mr. Knuff: It doesn't.

I would be willing to stipulate that the three companies, that is, the American Hardwall Plaster Company, the Paragon Plaster Supply Company of Scranton, and the Paragon Plaster Company of Syracuse, were the owners of the Oakfield Gypsum Products Company.

Justice Jackson: Owners of the stock of the Oakfield Gypsum Products Company?

Mr. Knuff: Yes. I don't know whether my brothers on the other side would so stipulate or not.

Mr. Bromley: That is my understanding, except that I don't know how much stock in Oakfield each one of the three owned, nor do I know that the three together owned all the stock. But my understanding is that the three together owned either all or a substantial part of the stock of Oakfield.

Mr. Knuff: That was my understanding.

4216 Justice Garrett: I think that is sufficient for the time being, at least.

By Mr. Knuff:

Q. Your complaint was that the Paragon companies and the American Hardwall—

Justice Jackson: (Interposing) I think that is just as clear as crystal, the witness' testimony so far.

Mr. Knuff: I think that is correct. I am just falling into that bad habit that I have, Judge Jackson. I am unconsciously falling into it.

Justice Jackson: I know it is clear to me, and I assume it is to everybody up here.

By Mr. Knuff:

Q. Was there any statement made at that meeting concerning perforated lath being used on the West Coast? A. Yes, I believe there was.

Q. What was the statement, and who made it? A. As I recall it, Mr. Henning—you see, up to this time we, I believe, had not had any experience with perforated lath—

Justice Jackson: (Interposing) You mean Ebsary, do you, when you say "we"?

The Witness: Yes.

Mr. Henning was explaining that on the Pacific Coast they had been using perforated lath for some time,
4217 and that it had worked out very successfully there through one or two of the earthquakes.

By Mr. Knuff:

Q. Through one or two of the what? A. Earthquakes.

Q. That was back when? You don't mean the San Francisco Earthquake?

Justice Jackson: Oh, they are having earthquakes out there all the time.

Q. It didn't go back as far as the 1908 quake? A. No; but as I recall it, it was around the Southern California district, either in the late 20's or the early 30's. And they found out that the perforated lath held the plaster on the ceilings much better than the plain lath, and they thought that it might be a good thing to introduce it in the East.

Q. And what was the reaction, if there was any reaction? A. I think that was merely a statement that they were going to investigate it further.

Q. Do you recall if Mr. Henning said how long perforated lath had been in use on the West Coast? A. No, I don't know that he said that, but I do know from personal experience—

Justice Stephens: (Interposing) Just state what
4218 he said. That is what you are being asked about now.

The Witness: No, I do not.

By Mr. Knuff:

Q. Do you recall whether Mr. Henning said that the perforated lath had better fire-resisting qualities than the straight lath? A. I don't remember that he mentioned that, at this time.

Mr. Knuff: We offer in evidence Government's Exhibit No. 507.

Mr. Bromley: I object to it on the grounds heretofore stated with respect to other similar exhibits.

Justice Stephens: The objection is sustained on the ground that the exhibit is used to refresh a present recollection.

By Mr. Knuff:

Q. I show you what has been marked for Identification as Government's Exhibit 508, the same being a letter dated

May 8, 1933, addressed to the Ebsary Gypsum Company and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 508 for Identification.)

By Mr. Knuff:

Q. Will you state whether or not that letter was received, Mr. Lenci? A. Yes.

4219 Q. I show you what has been marked for Identification as Government's Exhibit 509, the same being a letter dated May 17, 1933, addressed to George N. Lenci and signed George F. Neal.

(The document referred to was marked as Government's Exhibit No. 509 for Identification.)

By Mr. Knuff:

Q. Was that letter received in your Newark office, Mr. Lenci? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 510, the same being a copy of a letter dated May 22, 1933, addressed to the Board Survey Company, Chicago, Illinois, and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 510 for Identification.)

By Mr. Knuff:

Q. Will you state whether that is a copy of a letter the original of which was sent to the Board Survey Company, Mr. Lenci? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 511, the same being a copy
4220 of a letter dated June 1, 1933, addressed to the Board Survey Company and signed G. N. Lenci.

(The document referred to was marked as Government's Exhibit No. 511 for Identification.)

By Mr. Knuff:

Q. Is that a copy of a letter the original of which was sent to the Board Survey Company? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibits 508, 509, 510, and 511.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked Government's Exhibits 508, 509, 510 and 511, were received in evidence.)

Mr. Knuff: The next 16 pages in your book of photostats we will omit.

Justice Jackson: Does that bring us to the telegram?

Mr. Knuff: Yes, Your Honor.

Mr. Bromley: Do you mean 16 pages or 16 exhibits?

Mr. Knuff: I mean 16 pages. Some of the ex-
4221 hibits would be more than one page.

That brings us down to the telegram of June 3, 1935. Then beginning with that telegram of June 3, 1935, omit the next 8 pages, which will bring us to the letter dated March 28, 1936.

(Discussion off the record.)

Justice Jackson: The letter of March 28th will then be Exhibit 512?

Mr. Knuff: Yes.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 512, the same being a letter dated March 28, 1936, addressed to C. F. Henning, Vice President, and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 512 for Identification.)

By Mr. Knuff:

Q. Will you state whether that is a letter that you signed? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 513, the same being a letter dated May 9, 1936, addressed to the Ebsary Gypsum Company and signed Charles M. Price.

4222 (The document referred to was marked as Government's Exhibit No. 513 for Identification.)

By Mr. Knuff:

Q. Was that letter received by your company? A. I think it must have been, although I have no separate recollection of it.

Q. I show you what has been marked for Identification as Government's Exhibit 514, the same being dated April 1, 1936, signed Kelley Plasterboard Company, Inc., by S. J. Kelley, President. It is on a complaint form.

(The document referred to was marked as Government's Exhibit No. 514 for Identification.)

By Mr. Knuff:

Q. Was that complaint form enclosed in the letter of May 9, 1936, Mr. Lenci? A. Yes, I believe it was.

Mr. Knuff: I would like to have marked for Identification as Government's Exhibit 515, the original document, of which, as Your Honors can perceive, Government's Exhibit 514 is a copy. Exhibit 515 was obtained by the Government under subpoena from either the United States Gypsum Company or the Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 515 for Identification.)

4223

Mr. Knuff: I now offer in evidence Government's Exhibits 512, 513, 514, and 515.

Justice Stephens: Where is the letter of April 1st to which Exhibit 513 refers?

Mr. Knuff: There isn't any letter of April 1st that we have been able to locate, and I think I can clear that up by this witness here.

By Mr. Knuff:

Q. You will notice in Exhibit 513, Mr. Lenci, that Mr. Price refers to your letter of April 1st. Do you notice that? A. Yes.

Q. Do you have any recollection of writing to the Board Survey Company under date of April 1st? A. No, my letter is dated March 28.

Q. Can you offer any explanation as to the reference to April 1st in Mr. Price's letter? A. No.

Mr. Knuff: If Your Honors will please notice, it was apparently a mistake in Mr. Price's letter, and the complaint is dated April 1st, 1936, and that is Government's Exhibit 514. Apparently that is what Mr. Price referred to as a letter. The letter of Mr. Lenci that should

4224 have been referred to was dated March 28, 1936.

Justice Stephens: Is there any objection, except the usual objection, to these exhibits?

Mr. Bromley: I don't understand—may I have the last statement of counsel read?

(The record was read by the reporter.)

Mr. Knuff: You can call the paper of April 1, 1936, either a complaint or a licensee's explanation—I don't mean to place any wrong catalog on that document.

Justice Stephens: Where is this letter of March 28?

Mr. Knuff: That is Government's Exhibit 512, Your Honor.

Mr. Bromley: To these four exhibits we make the usual objection; and in addition, it seems to me that this is another illustration of a completely erroneous impression created by the omission of a vital step in this correspondence. Exhibit 513 makes reference to a letter of April 1. Now we know from the criminal case that the letter of April 1 was the complaint of the Ebsary Company against the Kelley Company, to which complaint Exhibit 514 is an answer. Exhibit 514 has been referred to here by counsel as a complaint form. It isn't. It is a licensee's explanation form. Exhibit 514, the original of which is Exhibit 515, are both Mr. Kelley's answer to the complaint which Ebsary made against him on April 1, 1936.

4225 Justice Jackson: How can it be dated the same date? They are dated April 1, these so-called complaint forms.

Mr. Bromley: You see, the date of the explanation is not April 1, but May 1. It is dated April 1 at the top. I suppose that is a reference, again, to the complaint. But the date of the explanation is a month later. This whole series doesn't mean anything unless and until we can have the complaint which Ebsary made against Kelley, which is dated April 1, and which the Government has.

Justice Stephens: Can't the Government produce this letter of April 1?

Mr. Knuff: I will make an attempt to get it. I am frank to say that in the file that I was using for the preparation of this testimony, the letter of April 1 wasn't in there, or at least if it was I overlooked it. I will make an effort to find that letter of April 1, and see if we have it.

Mr. Bromley: Don't you have a file of the exhibits in the criminal case?

Mr. Knuff: Yes, we do.

Mr. Bromley: Does your file disclose the exhibit number of Exhibit 515, the exhibit number in the criminal trial?

Mr. Knuff: Exhibit 515 is Government's Exhibit No. 62 in the criminal trial.

4226 Justice Stephens: And it so shows on this photostat.

Mr. Bromley: Then this missing document will probably be Government's Exhibit 60 or 61 in the criminal trial.

Justice Stephens: It will be better, I think, to suspend a ruling on that offer until you find it, because these do not seem related and consequently do not seem intelligible, and we don't want to get anything in the record here that may cause a misunderstanding.

Mr. Knuff: I have here the testimony in the criminal case, and it may be that—

Justice Stephens: (Interposing) Have you the exhibits in the criminal case in the court room?

Mr. Knuff: I don't have the exhibits themselves, but I have the testimony.

Justice Jackson: Have you an index of them?

Mr. Knuff: That is what I am looking at now.

Justice Stephens: We will take a recess for five minutes at this time, and maybe you can find it in the meantime.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4227 Justice Stephens: Proceed.

Mr. Knuff: The ruling on Exhibits 512 to 515, inclusive will be held in abeyance?

Justice Stephens: Yes.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 516, the same being a letter, dated September 11, 1936, addressed to George N. Lenci, and signed United States Gypsum Company, C. Henning—

Justice Stephens: (Interposing) Mr. Knuff, those rulings which were held in abeyance are on Exhibits 512, 513, 514 and 515, is that right?

Mr. Knuff: 512, 513, 514 and 515, your Honor.

Justice Stephens: What is the next one?

Mr. Knuff: This will be Government's Exhibit 516. It is a letter dated September 11, 1936.

(The document referred to was marked as Government's Exhibit No. 516, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibit 516.

Mr. Johnston: Now if the Court please, I understand that these exhibits that the Government is starting
4228 on now have not been handed around so we haven't seen any of them.

Mr. Knuff: They were put on the clerk's desk this morning.

Mr. Johnston: That doesn't do us any good. We were supposed to receive them the day before. What we have been working on up to date are those that were given to us last week. Now these I have not seen.

Justice Stephens: Where is the set for defendants' counsel; are they still on the clerk's desk?

Mr. Bromley: We have one set here.

Justice Stephens: Then take your time and look at them.

Mr. Knuff: I might say that the reason that they weren't furnished before was because of the twenty-four exhibits originally proposed, which we have now eliminated this afternoon. We didn't tailor our case exactly the way it should have been tailored.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 516 was received in evidence.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, Government's Exhibits 517 and 518 for identification, Exhibit 517 being a copy of a letter dated September 14, 1936, addressed to Mr.
4229 C. F. Henning, and signed Ebsary Gypsum Company, George N. Lenci, Secretary; and Government's Exhibit 518, being dated September 18, 1936, addressed to George N. Lenci, Secretary, and signed United States Gypsum Company, C. Henning, Vice President. Exhibit 518 apparently is a reply to your letter of September 14, 1936, which is marked for identification as Government's Exhibit 517.

(The documents referred to were marked as Government's Exhibits Nos. 517 and 518, for identification.)

By Mr. Knuff:

Q. Did you send the original of Government's Exhibit 517, and did you receive in reply thereto, Government's Exhibit 518? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibits 517 and 518.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 517 and 518 were received in evidence.)

By Mr. Knuff:

Q. On Government's Exhibit 518, Mr. Lenci, I notice
4230 opposite the last paragraph, and to the left there, a notation in pencil. Is that in your handwriting? A. Yes, it is.

Q. Will you translate that, and explain what it means? A. Well, it reads, "Did this before writing".

Q. And by that, what do you mean, Mr. Lenci? A. That refers to the last paragraph in Mr. Henning's letter of September 18, in which he suggested that I get in touch with Mr. Gallagher, of the United States Gypsum Company, so as to get more information from him as to the competition from other materials.

Q. And your notation, "Did this before writing" indicates that you had already done what Mr. Henning suggested in his letter, is that correct? A. Yes.

Q. Now in the last paragraph of the letter, the fourth line down, Mr. Henning refers to Ecod wood lath. What is Ecod? A. Well, Ecod was a combination lath made up of a wire mesh, with very large meshes, backed up with a paper.

Q. It wasn't metal lath? A. It was not metal lath, it was a very cheap product that came in rolls and it was used in what we call, around New York, the speculative apartment houses.

Q. Was it used as a base for plaster? A. Yes.

4231 Q. And it was a trade name of what lath, or what base—or was it a trade name? A. It was a trade name.

Q. And by whom was Ecod put out? A. I was going to say Reynolds, but I am not certain of that.

Q. I show you what has been marked for identification as Government's Exhibit 519, the same being a letter dated July 20, 1938, addressed to Mr. Lenci, and signed E. J. Blanchfield.

(The document referred to was marked as Government's Exhibit No. 519, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Justice Jackson: Who is Mr. Blanchfield?

The Witness: Blanchfield was our Boston representative.

By Mr. Knuff:

Q. I show you what has been marked Government's Exhibit 520 for identification, the same being a copy of a letter, dated July 22, 1938, addressed to United States Gypsum Company, and signed Ebsary Gypsum Company, George N. Lenci, Vice President.

4232 (The document referred to was marked as Government's Exhibit No. 520, for identification.)

By Mr. Knuff:

Q. Will you state whether or not that is a copy of a letter, the original of which was sent to the United States Gypsum Company? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 521, and also what has been marked for identification as Government's Exhibit 522; Government's Exhibit 521 is a copy of a letter, dated August 30, 1938, addressed to United States Gypsum Company, signed Ebsary Gypsum Company; and Exhibit 522 is likewise a copy of a letter, dated September 15, 1938, addressed to the United States Gypsum Company and signed George N. Lenci.

(The documents referred to were marked as Government's Exhibits Nos. 521 and 522, for identification.)

By Mr. Knuff:

Q. Will you state whether or not the originals of those two letters were sent to the United States Gypsum Company? A. Yes, they were.

Mr. Knuff: I offer in evidence Government's Exhibits 519, 520, 521 and 522.

4233 Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 519 to 522, inclusive, were received in evidence.)

By Mr. Knuff:

Q. I show you what has been marked for identification as Government's Exhibit 523, the same being a letter, dated July 31, 1939, addressed to Mr. Fred Ebsary, and signed Ezra Sensibar, President, Cardiff Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 523, for identification.)

By Mr. Knuff:

Q. Was that letter received at your company's office? A. Yes.

Q. I show you a copy of a letter which is marked for identification as Government's Exhibit No. 524, the same being a carbon copy of a letter dated August 3, 1939, addressed to the Cardiff Gypsum Company, and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 524, for identification.)

By Mr. Knuff:

4234 Q. Was the original of that letter sent to the Cardiff Gypsum Company? A. Yes, it was.

Q. I show you what has been marked for identification as Government's Exhibit 525, the same being a letter, dated August 3, 1939, addressed to George N. Lenci, and signed Cardiff Gypsum Company, M. Gutman.

(The document referred to was marked as Government's Exhibit No. 525, for identification.)

By Mr. Knuff:

Q. Was that letter received by your company, Mr. Lenci? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 526, the same being a copy, of a

letter, dated August 10, 1939, addressed to the Cardiff Gypsum Company, and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 526, for identification.)

By Mr. Knuff:

Q. Was the original of that letter sent to the Cardiff Gypsum Company? A. Yes.

Q. I show you what has been marked for identifi-
4235 cation as Government's Exhibit No. 527, the same being a copy of a letter, dated September 18, 1939, addressed to the Cardiff Gypsum Company and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 527, for identification.)

By Mr. Knuff:

Q. Was the original of that letter sent? A. Yes.

Q. I show you—

Mr. Bromley: (Interposing) May it please the Court, I now notice that there are some thirty-five, approximately, of these documents, and I recognize them as having been introduced in the criminal case.

It is our position that they are entirely immaterial to any issue in this case, and I would like to state that now to save, if possible, the reading of all these documents, since it seems to be Mr. Knuff's intention to mark them, but not offer them until he gets all through.

I think Mr. Knuff will agree that the documents have only to do with the refusal of the United States Gypsum Company to grant a consent to the Ebsary Gypsum Company to sell this company board.

Now, as I read the complaint, there is no charge in the complaint that has anything to do with this. This
4236 company was not named in the Bill of Particulars as a manufacturing distributor, and there is no charge, as I see it, to which any of these letters could possibly have any relevancy.

Mr. Knuff: The letters are being offered for two reasons, your Honor. In the first place, it will be shown by either these letters, or by Mr. Sensibar himself, that Mr. Sensibar—

Justice Garrett: (Interposing) Would you mind facing the Court, Mr. Knuff? I can't hear you.

Mr. Knuff: I am sorry—that Mr. Sensibar's company, the Cardiff Gypsum Company, was a plaster manufacturer; that his company endeavored to purchase board from various companies, including this defendant; that his company had a reputation for cutting the price of plaster; that United States Gypsum refused permission to the Ebsary Gypsum Company to sell board to the Cardiff Gypsum Company.

These letters will not show that, but other testimony will show that. Likewise, that the United States Gypsum Company refused American, National and Certain-teed permission to sell board to the Cardiff Gypsum Company.

These are being offered for two reasons; first, we contend that they were trying to control the plaster prices, and because Ebsary had the reputation for cutting price on plaster—

Justice Stephens: (Interposing) Do you mean Ebsary?

Mr. Knuff: Cardiff Gypsum Company—because Cardiff had the reputation for cutting the price on plaster,
4227 they wouldn't make the board available to Cardiff when board would aid Cardiff in selling plaster.

These are also offered under paragraph—

Justice Stephens: (Interposing) Before you get to the second part. What charge in the complaint covers the first item you have referred to?

Mr. Knuff: That is in 45 (c), "concertedly raising, maintaining and stabilizing the general level of prices for plaster", and so forth.

Here you have a negative stabilization of the plaster prices in the refusal of the United States Gypsum to give their consent to their licensees to sell board to a manufacturer who had the reputation of cutting the price of plaster.

The second theory on which these are offered is contained in paragraph 121 of the complaint, that they "have completely eliminated from the distributive system wholesale distributors who might fail to maintain said prices". That is the last part of the last sentence of paragraph 121.

Justice Garrett: You wish to show, do you, that there was an effort on the part of some dealers or jobbers, or whatever you want to call them—we will cut out those names for the time being—by reducing the price of plaster upon which there was no patent, and which was not included in the license agreements, that they avoided the effect of

the price fixed under the license agreements upon the
4238 patented products, by selling plaster at a low rate and thereby violated the license agreements, and that the defendants objected to that and prevented it. Is that what you intend to prove?

Mr. Knuff: No, your Honor. The defendants themselves have tied the price of plaster to the price of board by their license bulletins. In their license bulletins it says that although board may ostensibly be sold at a certain price, nevertheless, if plaster or other products are sold at a less price in order to influence the sale of the board—

Justice Jackson: (Interposing) Less than what, less than the market price?

Mr. Knuff: Yes,—that that would be considered a violation of the license agreements.

Now here we have a plaster manufacturer who had the reputation for selling plaster at cut prices—

Justice Garrett: (Interposing) What do you mean by "here"?

Mr. Knuff: In the Cardiff Gypsum Company case.

Justice Jackson: At less than the market price?

Mr. Knuff: Yes. The Cardiff Gypsum Company had the reputation of selling plaster at reduced prices. The Cardiff Gypsum Company, in order to aid their plaster sales, wanted to have a board line. The Cardiff Gypsum intended to get board from the Ebsary Gypsum Company.

The Ebsary Gypsum Company under the license agree-
ment could not sell to another manufacturer without
4239 the consent of the licensor. Ebsary endeavored to get that consent from the licensor, and the licensor refused to give that consent.

That is the only case we know of where a manufacturer was refused permission to buy board, and we contend that the reason why they were refused was because USG knew of their sales policies with reference to plaster, and because they had a reputation of being a price cutter on plaster, USG refused to give Ebsary the consent to sell board to them.

This would be evidence, certainly, of the allegations contained in paragraph 45 (e), that is, of, "concertedly inducing and coercing manufacturing distributors to resell at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies".

Justice Jackson: They wouldn't have much of a market, would they, if they sold to many people like you say this

Sensibar outfit is? If they could indulge in what is sometimes called a "gift enterprise" and sell them ostensibly the board at dealer's price, and give them, as a gift, the gypsum, where would their market be? They would be just cutting their own throats, wouldn't they?

Mr. Knuff: That may be the case, but nevertheless we would like to show all the facts in this case.

Justice Stephens: Mr. Knuff, I am misled now. I thought a moment ago you said you were offering this evidence under paragraph 45 (c), but now you are
4240 talking about 45 (e). Cardiff wasn't a manufacturing distributor, were they?

Mr. Knuff: Yes, they were a manufacturing distributor.

Justice Stephens: Was it one of the manufacturing distributors mentioned in the Bill of Particulars, or complaint, as having its resale prices fixed?

Mr. Knuff: It is my best recollection that we have specifically mentioned the Cardiff Gypsum Company in the Bill of Particulars.

Justice Stephens: Is that correct?

Mr. Bromley: No, that is not correct.

Mr. Knuff: I may be wrong as to that.

Mr. Bromley: We have got the Bill of Particulars right here. You can look at it.

(Whereupon, copy of the Bill of Particulars was handed to Mr. Knuff.)

Mr. Knuff: Cardiff is not mentioned; I thought it was.

Justice Stephens: Then you do not rely on paragraph 45 (e), but simply on 45 (c).

Mr. Knuff: Well, it would still be evidence, not to prove that that particular company's price was fixed, but it would still be evidence from which the Court could infer that the United States Gypsum Company was fixing the prices of manufacturing distributors.

Justice Stephens: I thought that we ruled, in these reserved rulings of which we had so many not long
4241 ago— (after referring to the rulings of the Court) —no, I had in mind the ruling under Topic V, where we all agreed that the objection to the Perry testimony should be sustained, and the motion to strike granted on the ground that there was no charge in the complaint of resale price fixing on plaster, board and other gypsum products by wholesalers, as distinguished from manufacturing distributors.

You claim that this company is a manufacturing distributor and you claim that you have a right to show that the defendants fixed the resale price of this manufacturing distributor, in order to prove that they fixed it on someone else's products that someone else being a manufacturing distributor, although Cardiff is not so charged?

Mr. Knuff: That is right, your Honor.

Justice Jackson: That is for plaster, not patented board?

Mr. Knuff: For both.

Justice Jackson: Under 45 (c)?

Mr. Knuff: That only applies to gypsum board, but it is evidence to—

Justice Jackson: (Interposing) Paragraph 45 (c) applies to gypsum board?

Mr. Knuff: I beg your pardon, I was looking at 45 (e). 45 (c) applies to plaster.

Justice Jackson: 45 (e) is out, isn't it, because Cardiff is not included—

4242 Mr. Knuff: (Interposing) We are not offering it to show the truth or falsity of their refusal to sell board to Cardiff, but we say, from the fact that they did refuse to sell them, that the Court could infer that they also refused to sell other manufacturing distributors whose names are mentioned in the Bill of Particulars, unless they maintain prices.

Justice Stephens: Well your first argument was, as I understood it, that you have a right to show, by these letters, and other letters, and other testimony, that USG refused to permit Ebsary and other licensees to sell gypsum board to Cardiff, because Cardiff was known to be a price cutter on plaster, and that that tends to prove the allegations of paragraph 45 (c), "concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern area".

And you also offer the same evidence under paragraph 121, the last sentence of which charges the elimination, "from the distributive system (of) wholesale distributors who might fail to maintain said prices".

Well, the whole of paragraph 121 refers to plaster, miscellaneous gypsum products, and board. The last sentence merely says, "For the purpose of maintaining said uniform and noncompetitive prices, the defendants have

standardized the manufacture of board, have limited
4243 said distribution of board to themselves and to certain manufacturing distributors, and have completely eliminated from the distributive system wholesale distributors who might fail to maintain such prices."

I suppose that might be broad enough to apply to plaster prices.

Now what do you say, Mr. Bromley, as to their admissibility under those two paragraphs of the complaint?

Mr. Bromley: I think it should be borne in mind first, that the indictment in paragraph 18 specifically charged that:

"Pursuant to the combination and conspiracy, USG refused to permit manufacturers to sell, and manufacturers refused to sell, gypsum board to companies selling gypsum products at wholesale other than those named as co-conspirators named herein, because of the reputation of said companies for selling gypsum products at prices below prevailing prices".

And the Bill of Particulars that we got under that section named Cardiff. Now there is nothing like that section in the bill of complaint. This time, when we asked for a list of the manufacturing distributors, Cardiff was not named.

So against that background it seems to me there should be considered the thought now of whether it is covered by the complaint. I think that is a plain afterthought, and the two documents show very clearly that it was never intended to cover this situation by the complaint, but to cover it solely by the indictment.

4244 It seems to me that paragraph 45 (c) is plainly out, as Judge Jackson has said, because it does not refer to board, but just refers to plaster and other gypsum products than board.

In 45 (e) there is an allegation that the conspirators coerced the manufacturing distributors to maintain resale prices. I don't see how it is possible to assert that because USG did a perfectly lawful thing, it seems to me, in refusing to grant its consent to Ebsary to sell someone not named to be a manufacturing distributor, although very probably in fact a manufacturing distributor, that that is necessarily support to a charge that we conspired to force these manufacturing distributors to maintain prices on board—and that is the only charge, there is no charge that we conspired

to force manufacturing distributors to maintain resale prices on plaster.

How does our refusal to sell Cardiff tend in any way to prove the charge that we agreed to coerce the manufacturing distributors to maintain resale prices on board?

As far as paragraph 121 is concerned—

Justice Stephens: Before you go to paragraph 121, repeat your statement as to 45 (c), in which you referred to Judge Jackson's point, please. I didn't clearly get that.

Mr. Bromley: The only allegation there is that the conspirators agreed to maintain the prices of plaster and miscellaneous plaster products other than board.

4245 I don't see how evidence that USG refused to permit Ebsary to sell board to Cardiff could in any way support a charge that the defendants agreed among themselves to stabilize the price of plaster.

Justice Stephens: Well, the argument of the Government, as I understand it, was that Cardiff was trying hard to get some board and couldn't get it, and that the Government has a right to try to show that the reason Cardiff couldn't get it was because it was a price cutter on plaster, and that that is circumstantial evidence tending to prove that the defendants were conspiring to keep the price of plaster up, i.e., they wouldn't sell to people who kept it down, wouldn't even sell board to them.

Mr. Bromley: Now as we have all agreed, there is no charge in the complaint that the defendants fixed the resale price of plaster, or fixed any other price of plaster than their own.

So that even on that theory, it seems to me to be remote to try to prove that we refused our consent to Ebsary to sell board to Cardiff, even though Cardiff was manufacturing plaster and even though Cardiff may have had a reputation as a price cutter.

Justice Stephens: Well, wouldn't it be some evidence tending to prove that the defendants kept their own prices on plaster up, if they tried to get rid of the fellow who

4246 cut the prices on plaster, because a lower price on plaster, by whomsoever sold, would tend to make it difficult to keep the price on plaster up, that is, of the plaster sold by the defendants themselves.

Mr. Bromley: Well, that might possibly be.

Justice Garrett: As a matter of fact, did this Cardiff Company manufacture plaster?

Mr. Bromley: Yes, sir.

Justice Garrett: They manufactured plaster, sold their own plaster manufactured by them, at a price which they fixed?

Mr. Bromley: Yes, sir. Of course when you get through with the whole line of testimony, all it shows is that the United States Gypsum Company refused to give its consent, which I assume anybody would say was perfectly lawful.

Ebsary was trying hard enough to get it, and we just told them no, that they couldn't have it. So again it doesn't prove a conspiracy. It proves the opposite. Ebsary would have very much liked to sell this company board, and we didn't want to give our consent, and we didn't.

Justice Stephens: What about paragraph 121, Mr. Bromley?

Mr. Bromley: Paragraph 121 is under the effect of the combination. It is not a charge of the combination or its scope. The last sentence to which counsel refers, or the last part of the last sentence, "have completely eliminated
from the distributive system wholesale distributors
4247 who might fail to maintain said prices", I think
plainly refers to jobbers. I think a reading of the whole complaint shows that reference is to the allegations in paragraph 94 that we conspired to sell only to jobbers who sold to dealers, who maintained bulletin prices.

I did not before understand that the use of the words "wholesale distributors" was ever intended to broaden the scope of the allegations of the conspiracy, and I think all of us have understood that to mean merely jobbers.

Justice Stephens: Do you wish to be heard, Mr. Knuff?

Mr. Knuff: No, your Honor, I think not.

Justice Stephens: Of course there is no offer before the Court, but the Government states that exhibit numbers—

Mr. Knuff: (Interposing) Beginning with Exhibit 523 and going to 527, so far.

Justice Stephens: (Continuing) Exhibits 523, 524, 525, 526, and 527 are to be offered—do you offer them at this time?

Mr. Knuff: We will offer them, but we have not offered them yet. There are probably nine or ten other letters in this series—

Justice Jackson: (Interposing) Is Mr. Bromley correct, that there are approximately thirty-five documents, beginning with Exhibit 523, all dealing with the refusal of USG to permit Ebsary—

4248 Mr. Knuff: (Interposing) Yes, all dealing with that general subject.

Justice Stephens: There is nothing before the Court to rule on, but for the guidance of counsel we may say that if these letters, Exhibits 523 to 527, inclusive, are to be offered on the theory that the Government states—which I need not repeat because it is clearly stated on the record—that all of us are agreed, all of the Judges, that they are not admissible under paragraph 45 (e).

Judge Jackson and I are of the view that they are admissible under paragraph 45(c), where it is charged that the defendants concertedly raised, maintained and stabilized the general level of prices for plaster and miscellaneous gypsum products.

We think the proffered evidence may possibly support an inference that the defendants were trying to keep their own prices on plaster up, by keeping the prices of other people up, although it seems to Judge Jackson and myself that it might support a different inference, that it was a kind of indirect rebating or gift enterprise.

Judge Garrett is doubtful, I think, whether the evidence is admissible on any theory. In fact, I think it is his view that is not admissable under any theory of the complaint.

But since the majority of the Court think it is admissible, without commenting on its weight, this sugges-

4249 tion is made by Judge Jackson, which seems to me worthy of your consideration, Mr. Knuff.

If you have got thirty-five, or any such large number of letters of this sort, since there seems to be no dispute by the defendants, why cannot it be agreed or stipulated that the United States Gypsum Company did decline to permit Ebsary and other licensees, if that is the fact, to sell board to the Cardiff Gypsum Company? That, at least, I should think could be stipulated to if it is true, and if it cannot be stipulated to that the Cardiff Company was a price cutter on plaster, you could prove that by someone else. By this method I think we could probably save half a day's work.

Mr. Knuff: If Mr. Bromley is willing to stipulate to that effect, all right.

Mr. Varian: Do these exhibits only apply to Ebsary's application, and the refusal of USG to give Ebsary the necessary consent to sell Cardiff at a discount?

Justice Stephens: That is my understanding.

Mr. Varian: They only apply to the Ebsary Company?

Justice Stephens: Yes.

Justice Jackson: But our understanding is that this is part of a chain of proof by which the Government would attempt to show that the other licensees were prohibited from selling to Cardiff.

Mr. Varian: All I know is what transpired in the
4250 criminal case, and my recollection is that there was no such evidence of refusal by USG. I think there, the other companies on their own account refused to sell to Cardiff.

Mr. Bromley: I will stipulate now that USG refused to grant the consent which Ebsary requested from it, under its license, for permission on Ebsary's part to sell patented board, manufactured by Ebsary, to the Cardiff Gypsum Company.

Justice Stephens: Thank you, Mr. Bromley. That stipulation, I should think, would save a great deal of proof.

Mr. Knuff: I think it will. You can see why we couldn't charge these people with regulating the price of the board sold by Cardiff, because Cardiff never sold any.

Mr. Bromley: I think I should add to that statement, that this occurred in October, 1939.

Justice Jackson: That is, the final refusal?

Mr. Bromley: Yes.

Justice Stephens: Now the Court has held in abeyance the ruling on Exhibits 512, 513, 514 and 515, in order for the Government to try to produce the letter of April 1st—

Mr. Knuff: (Interposing) That is Government's Exhibit 61 in the criminal trial, I believe.

Justice Stephens: See if you can have that here in the morning so that we can get that ruling cleared up.

In view of this stipulation by Mr. Bromley, you can perhaps, during the evening, eliminate a lot of these exhibits.

4251 Mr. Knuff: Yes, sir.

Justice Stephens: Announce the recess until tomorrow.

(Thereupon, at 4:05 o'clock p.m., an adjournment was taken until 10:00 o'clock a. m., Tuesday, February 22, 1944.)

4253 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Tuesday, February 22, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4259 You may proceed with the examination.

Mr. Steffen: I should like to make a short statement in the nature of a correction of the record.

I think yesterday, in connection with the Cardiff letters that were being offered in evidence, the question arose concerning who was a manufacturing distributor, and the nature of our bill of particulars in connection with who was a manufacturing distributor.

It was called to our attention by Mr. Bromley that the Cardiff people were not named as manufacturing distributors, and I gathered from Your Honors' action that maybe

that entered into your calculations in reaching the conclusion that perhaps that evidence was not admissible under our Paragraph 45 (e).

The bill of particulars, and the answer to the bill of particulars, were addressed to Paragraph 42 of the complaint, and Paragraph 42 of the complaint is a general statement concerning the distribution of gypsum board through plaster manufacturers. What it says is that:

"The defendant companies sell in interstate commerce a substantial part of the gypsum board manufactured by them to various small manufacturers of calcined gyp-
4260 sum and plaster not engaged in the manufacture of gypsum board, sometimes referred to hereinafter as manufacturing distributors."

Now in answer to the question posed by the motion for a bill of particulars as to who we meant by manufacturing distributors, it is true that we did not mention the Cardiff Gypsum Company; and it is obvious that we couldn't have mentioned the Cardiff Gypsum Company, because they never sold to the Cardiff Company, it was not a manufacturing distributor. It is true, on the other hand, that it was a plaster manufacturer to whom, in ordinary course, these defendants should have sold gypsum board just as they did to the other plaster manufacturers who have become distributors.

Our contention is, and this evidence is offered upon the ground, that their refusal, the defendants' refusal to sell to a plaster manufacturer who satisfies credit requirements, who is in the same category as are the other plaster manufacturing distributors to whom they did sell, is very strong evidence of their purposes to maintain prices; and that when we offer this evidence, coupled with further evidence, indicating that their refusal was upon the ground, largely, that the Cardiff people had a bad reputation in the past for cutting prices on plaster, and therefore, of course, affecting the plaster market, it is very strong evidence, as we see it, to establish that they were attempting to maintain prices under paragraph 45(a) and also 45(e)
4261 of the complaint, as well, of course, as 45(c), upon which Your Honors stated that the evidence was admissible.

I might call Your Honors' attention to the case of the Ethyl Gasoline Corporation v. United States, which is in 309 U. S., and is our general authority for the proposition that where defendants gather together and refuse to sell, or refuse to consent to a sale to jobbers, for the reason

that the jobbers may not maintain prices, that that is a straight violation of the Sherman Act.

But what I wanted to say primarily was to clear the record on the matter of our not having named the Cardiff people as a manufacturing distributor. In the nature of the case, we could not name them as a manufacturing distributor, because USG refused to allow them to be a distributor at all. They were, however, plaster manufacturers.

Justice Stephens: Mr. Steffen, paragraph 45(e) charges: "concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies."

Mr. Steffen: That is right.

Justice Stephens: Now whether or not you named Cardiff as a manufacturing distributor, how could the evidence which you offered, which is evidence that the defendants refused to sell board to Cardiff, prove that they fixed its price?

4262 Mr. Steffen: We don't, of course, wish to say that they fixed the price of the Cardiff people, because they did not. What we offer it for is as evidence from which Your Honors could infer that they did fix and control the prices of manufacturing distributors because, when they were offered an opportunity to sell to a plaster manufacturer whose prices they were afraid they couldn't control, they refused to sell to him.

This is the one example that we have of where they have refused to sell to a plaster manufacturer, and we expect to establish that they refused to sell to this plaster manufacturer on the same basis that they were otherwise selling to manufacturing distributors, for the reason that this plaster manufacturer had a bad reputation for cutting prices; and that therefore it is evidence, we feel, from which the Court could infer that as respects those who were manufacturing distributors, they could control and did control the resale prices.

That is the argument that we wish to advance.

Justice Stephens: I want to be sure I understand it, because I thought we ruled that the proffered evidence was not admissible under paragraph 45(e). I am sure we did.

Mr. Steffen: I think so, but I think it was on a misconception concerning our bill of particulars.

Justice Stephens: I understand why you are making the statement, and therefore I want to understand your statement.

4263

I don't yet understand how evidence that the defendants refused to sell board to Cardiff could tend to prove that they were fixing the price of other manufacturing distributors on board, since this company was only a plaster price-cutter.

Mr. Steffen: On that I will say this, that the defendants' contention is that when there is a cutting of prices on plaster sold in conjunction with board, that that constitutes a cutting of the price of board,—we pointed that out in Bulletin No. 5,—and that therefore, when they are faced with the problem of whether they want to sell to Cardiff, and they have this reputation of Cardiff cutting the price of plaster, they say that that constitutes an indirect rebate or cut on the price of board and therefore he wouldn't be maintaining the established bulletin prices on board as they see them; and, therefore, it seems to us to be very strong evidence that as respects those distributors to whom they do sell, they sell to them for the reason that they will maintain the prices, the resale prices on board. And I think our evidence will be overwhelming that they all have maintained the resale prices on board, and there was the possibility that Cardiff would not do that which, according to their own contentions, constitutes an indirect cutting of the price on board by virtue of their refusal to maintain the "established" prices on plaster.

4264

Justice Stephens: Do you wish to be heard, Mr. Bromley?

Mr. Bromley: No, Your Honor.

Mr. Steffen: I might say that the bulletin provision to which I referred is Government's Exhibit 37 at page 531, and it appears in the complaint at the top of page 96; and that is the provision that any lowering of the price of other commodities sold in conjunction with board will, according to the licensor, constitute a reduction in price of the board and will be contrary to the agreement.

Justice Stephens: Well, I confess, Mr. Steffen, that I am completely at sea as a result of your statement this morning, and the Court is in a state of unhappy division on the subject, because Judge Garrett doesn't think this evidence is admissible at all, and so ruled yesterday. Judge Jackson and I thought yesterday that it was admissible under 45(c).

Mr. Steffen: I think it is admissible under 45(c)—

Justice Stephens: (Interposing) But we ruled definitely yesterday that it was not admissible under 45(e). I can't see yet how it is admissible under 45(e). It seems to me that Mr. Knuff and Mr. Steffen are arguing contrary in-

ferences. It seems to me that Mr. Steffen is arguing
4265 that it is admissible on the "gift enterprise" theory under the bulletins, which theory has been discussed here very frequently and with which I am thoroughly familiar,—that a refusal to sell to a plaster manufacturer who cuts plaster prices might be evidence that the defendants didn't want a gift enterprise operating which would be an indirect rebate on the price of board. Well, that is one inference which may possibly be drawn from the refusal to sell a plaster manufacturer who is supposed to be a price cutter on plaster.

But Mr. Knuff is offering the evidence, as I understood it yesterday, on the theory that the refusal to sell a plaster manufacturer who was reputed to cut plaster prices supported an inference that the defendants were trying to keep the price of plaster up.

Mr. Steffen: I think they are both consistent, Your Honor.

Justice Jackson: That is your theory now, isn't it?

Mr. Steffen: Yes. Both are consistent. The same evidence as respects price cutting on plaster comes in under 45(c) for the reason that the defendants are charged with attempting to fix a price on plaster; and this evidence would indicate that they were not willing to sell to a plaster manufacturer, sell board to him, where that would increase his strength and where they would like to really
4266 eliminate him. I don't think it is highly essential, so long as it comes in under one or the other. I wanted to clear the record on the manufacturing distributor question.

Justice Stephens: You are entitled to do that.

But the Court has now ruled by a majority vote that this evidence is not admissible under 45(e). If that ruling stands, I take it you will assert it as error if the Government does not prevail in the case, but I confess that I can't see it under 45(e). It may be that I am obtuse about it.

Mr. Steffen: I want to make it clear also that we think it is relevant under 45(a), which has to do with the general control of prices to dealers.

The principal thing, or let us say the most important thing in this complaint is the control of prices from manufacturers to dealers, and this evidence would indicate that they were unwilling to sell to any plaster manufacturer who would not maintain the regular dealer prices, either directly upon the board, or indirectly by cutting the price of

plaster. And we consider that the evidence, therefore, is admissible on that score, as well.

Justice Garrett: Let me ask you there—you say that they were unwilling to sell to a manufacturer of plaster who cut prices—

Mr. Steffen: (Interposing) On plaster.

4267 Justice Garrett: Yes, on plaster. I don't know, of course, what the cutting of the price of plaster meant. There was no fixed price. But you say they were unwilling.

Now so far as I get this, Ebsary wanted to sell to them?

Mr. Steffen: That is right.

Justice Garrett: And USG said, "No, you can't sell, we will exercise the control we have under our contract based upon the patents, and you can't sell."

Well, if Ebsary was trying to sell, and USG, in the exercise of a lawful right, assuming it was lawful, refused permission, how, then, would that bring Ebsary into a conspiracy?

Mr. Steffen: It doesn't look like a voluntary conspiracy, does it?

I would like to answer that, because I think Mr. Bromley stated yesterday that it was lawful, and I think Your Honor stated this morning that it might be regarded as lawful.

Justice Garrett: I said "if lawful".

Justice Jackson: "Assuming it was".

Mr. Steffen: Yes, "assuming it was". And I want to state that we do not grant that it is lawful for a group, USG and the other licensees together, to refuse to sell to any person for the reason only, as we expect to

4268 develop here, that he is a price cutter.

Now, reaching your direct question, how does it constitute a conspiracy? The fact is this, as we will establish, that Mr. Sensibar tried not only with Ebsary, but with a number of other manufacturers, to procure a supply of board. I believe the American, early in the game, were willing to sell to the Cardiff Company, and USG refused to grant consent, presumably for exactly the same reason, that is, that they were afraid Cardiff would cut the price on plaster, and therefore on one side depreciate the plaster prices and on the other give a rebate on their board, which was a double violation, as they saw it.

Now let's carry it on farther. Actually what happened is that each of these licensees and the licensor all refrained

from selling to Cardiff. Now it may not be a voluntary conspiracy. It is true that Ebsary wanted to sell to begin with, but when the chips were down Ebsary didn't sell. In other words, they are in an agreement, the whole industry is in an agreement not to sell to Cardiff. It is the same proposition you have in your bank robbery—conspiracy. Here are four or five robbers that want to rob a bank, and they want somebody to drive a car, and they grab him and he says, "I don't want to go with you people." But nevertheless, if he drives the car and takes the robbers away from the scene of the robbery, you have a conspiracy
4269 and he is part of it.

These people are, we contend, conspirators, because that is what they actually did. And from the standpoint of the policy of the Sherman Act, which is to free the sale of commodities, we have a situation where we have a plaster manufacturer, with sufficiently good credit, who would normally be a proper person to buy board, who is refused a supply; and he is not refused a supply by one single person, he is refused a supply, when it adds up, by all of them.

And as I think we have said many times, and as the cases have said many times, what one person might do individually, that is, perhaps USG might refuse to sell individually and that would not constitute an offense—but a group of individuals may not combine to refuse to sell. And it becomes an offense when they all conspire or all agree together, however unwillingly, not to sell to a particular person. That is brought out by, I think, the Ethyl Gasoline case which we cited; and the principal authority to the contrary is the Colgate case, which is a single trader case, and that simply says that one trader may refuse to sell his products to a person whom he thinks is likely to cut prices.

But this is an agreement on the part of the total source of supply in the country, in effect, not to sell to
4270 Cardiff.

Justice Stephens: Well, are you asking for some further ruling?

Mr. Steffen: Not at the moment. We will proceed to offer certain evidence, and the ruling will come up at that time.

Justice Stephens: Then such rulings as we have made will stand.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination (resumed)

Mr. Bromley: May I, before Mr. Knuff starts, make this statement in connection with my stipulation on page 4544?

Justice Stephens: Just a minute, let me locate that.

Mr. Bromley: I should like the record to show that I make that stipulation subject, of course, to both of my objections: first, to the testimony on the ground that it is immaterial to any change in the complaint; and, second, subject to the usual objection.

Justice Stephens: Your stipulation is this:

"I will stipulate now that USG refused to grant the consent which Ebsary requested from it, under its license, for permission on Ebsary's part to sell patented
4271 board, manufactured by Ebsary, to the Cardiff Gypsum Company."

The record may show that your stipulation is made subject to those two objections; and that the objection as to immateriality is overruled, consistently with the reception of the evidence indicated yesterday; and that the evidence is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Bromley: Thank you.

Mr. Knuff: I believe Your Honor referred to Exhibit 516 and said there was a word or phrase used in that exhibit that wasn't quite clear, and as I understood the Court, the word was "cut-back"—is that correct?

Justice Stephens: I believe that is it.

Mr. Knuff: I can't see the word "cut-back" in the exhibit. I see "cut stock" in there, but I don't see "cut-back".

Justice Stephens: I am sorry, "cut stock" is the word. What is "cut stock"?

The Witness: Cut stock is the board which is cut up from the larger boards which have been damaged in manufacture.

Justice Stephens: I see. Cut stock is what I intended to ask about.

What is a purlin?

The Witness: In a steel building, there are the
4272 heavy girders that carry the main load, and then there are smaller beams running in the opposite direction, and those are generally spoken of as purlins.

Justice Jackson: In the opposite direction or at right angles to the heavy beams?

The Witness: At right angles to the heavy beams, and they are the support for the gypsum board.

Justice Stephens: Thank you.

Mr. Knuff: Yesterday, if Your Honors please, the question came up, in connection with Exhibits 512, 513, 514 and 515, that there was an exhibit referred to in Government's Exhibit 513, a complaint dated April 1, that probably should be included. We have found the complaint that was referred to in Government's Exhibit 513, and Mr. Bromley, I understand, is willing to stipulate that what I now ask to be marked as Government's Exhibit 513-A is the complaint that is referred to in Government's Exhibit 513.

Is that correct, Mr. Bromley?

Mr. Bromley: Yes.

(The document referred to was marked as Government's Exhibit No. 513-A for Identification.)

Justice Jackson: Have you copies for us?

Mr. Knuff: I haven't had an opportunity to get them photostated, but they will be photostated sometime
4273 today, and we will have them over for the Court just as soon as we possibly can get them over.

Justice Jackson: All right.

Justice Stephens: What is Mr. Bromley's stipulation?

Mr. Knuff: That Government's Exhibit 513-A for Identification is the complaint referred to in Government's Exhibit 513 for Identification.

Justice Stephens: Ruling was suspended on Exhibits 512, 513, 514 and 515. Are you offering 513-A?

Mr. Knuff: Suppose, for the purpose of clearing the record, I re-offer Government's Exhibits 512, 513, 513-A, 514 and 515.

Justice Stephens: Well, 513-A is not a re-offer. It has never been offered yet. You are now offering that?

Mr. Knuff: I re-offer all but 513-A, and offer 513-A.

Justice Stephens: Is there any objection now except the usual objection?

Mr. Bromley: No, sir.

Justice Stephens: They are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 512, 513, 513-A, 514, and 515, were received in evidence.)

4274 Justice Jackson: I wonder if you used the correct word. There is no "complaint" mentioned in Exhibit 513. It is the word "letter".

Mr. Knuff: Well, while they do use the word "letter" in Exhibit 513, I think they referred to the complaint.

Justice Jackson: You mean that the letter referred to in Exhibit 513 is Exhibit 513-A?

Mr. Knuff: That is right.

Mr. Bromley: And I so stipulate.

Justice Stephens: Very well. And please furnish the Judges the usual photostats.

Mr. Knuff: Yes, sir.

Mr. Bromley called the Court's attention to the fact that there were quite a number of letters concerning this one transaction, and we have gone through these letters, last night, and we have culled from them quite a number, and Mr. Grover tells me that Government's Exhibits 523 to 527 have been marked for Identification.

We would like at this time to have marked for Identification—

Justice Stephens: (Interposing) Just a moment, 523 to 527?

Mr. Knuff: That is what Mr. Grover tells me.

Justice Stephens: They have been marked but not yet offered.

4275 Mr. Knuff: That is right.

Now we would like to have marked for Identification Government's Exhibit 528, the same being a letter dated September 18, 1939, addressed to Mr. George N. Lenci, and signed M. Gutman.

(The document referred to was marked as Government's Exhibit No. 528 for Identification.)

Mr. Knuff: Also, we would like to have marked for Identification as Government's Exhibit 529—

Justice Stephens: Just a minute. Before you go any further, I thought the effect of the stipulation was to be that you would not have to introduce those letters.

Mr. Knuff: That wasn't my understanding.

4276 Justice Stephens: If you will read the last statement of the Presiding Judge appearing at page 4544 of yesterday's record, you will note that the idea was to save time.

There I stated:

"In view of this stipulation by Mr. Bromley, you can perhaps, during the evening, eliminate a lot of these exhibits."

The suggestion was made prior thereto, I believe by Justice Jackson, that if possible a stipulation might be entered into to the effect that the United States Gypsum Company did decline to permit Ebsary and other licensees to sell board to the Cardiff Gypsum Company, and the purpose back of that suggestion was to avoid the necessity of introducing the thirty-five letters that Mr. Bromley stated were in the series then under discussion. I thought, Mr. Knuff, that you agreed that the stipulation would save putting in a considerable amount of this evidence.

Mr. Knuff: We did eliminate some last night, and I am not going to offer the ones that we have eliminated.

Justice Stephens: Very well. Thank you.

Where is Exhibit 528?

Mr. Knuff: That is a letter, dated September 28, 1939—

Justice Jackson: (Interposing) You mean September 18, 1939?

Mr. Knuff: No, if you will skip three, you will then come to the letter of September 28, 1939.

4277 I am sorry, I misunderstood Justice Jackson's question. Exhibit 528 is the letter dated September 18, 1939, to George N. Lenci from the Cardiff Gypsum Company.

I now ask that there be marked for identification as Government's Exhibit 529, a letter dated September 28, 1939, or rather a copy of a letter addressed to the United States Gypsum Company and signed George N. Lenci. That will be found by passing over the next three letters.

(The document referred to was marked as Government's Exhibit No. 529, for identification.)

Mr. Knuff: I also would like to have marked—

Justice Stephens: (Interposing) Let us have a chance to read this as they are presented. We must understand them all; otherwise, we cannot rule intelligently on them.

Proceed.

Mr. Bromley: May it please the Court, I don't understand the purpose of marking these letters, in view of the stipulation. For instance, this last one is just a request of United States Gypsum to grant permission to sell board to Cardiff. I have already agreed that we refused permission.

Mr. Knuff: The stipulation of Mr. Bromley in and of itself is colorless. He is stipulating to the obvious. If Mr. Bromley will stipulate that the refusal of USG to grant this consent was based upon the fact that the Car-
4278 diff Gypsum Company had a reputation as a price cutter, then we will not bother with any of these exhibits relating to Cardiff Gypsum Company. But as I say, the stipulation that Mr. Bromley gives, that his company refused to grant the consent, is in and of itself meaningless. We have to show the color and the meaning of what USG did by the exhibits that we are now offering.

Mr. Bromley: I won't stipulate that because I don't think it is the fact.

Justice Stephens: Well, apparently the Court has wasted time in its attempt to save time.

Proceed and introduce your exhibits.

Mr. Bromley: Could I, with the Court's permission, ask counsel with respect to Exhibit 528 whether he is making a part of that exhibit the enclosure which, in my copy at least, is annexed to the letter and referred to in the first paragraph of the letter? I don't understand whether he is including that, or not.

Mr. Knuff: We are.

Justice Stephens: Very well.

Justice Garrett: Is that enclosure the list of points?

Justice Stephens: Yes.

Justice Garrett: So that that then—

Justice Stephens: (Interposing)—has to be treated as part of Exhibit 528.

Mr. Knuff: We would like at this time to have
4279 marked for identification as Government's Exhibit 530, a letter, dated September 29, 1939, addressed to George Lenci and signed Cardiff Gypsum Company, M. Gutman.

(The document referred to was marked as Government's Exhibit No. 530, for identification.)

Mr. Knuff: We would like to have marked for identification as Government's Exhibit 531, a copy of a telegram

dated October 3, 1939, addressed to United States Gypsum Company and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 531, for identification.)

Mr. Knuff: We would like to have marked for identification as Government's Exhibit 532, a letter, dated October 3, 1939, addressed to the Ebsary Gypsum Company and signed United States Gypsum Company, S. F. Bartlett.

(The document referred to was marked as Government's Exhibit No. 532, for identification.)

Mr. Knuff: In order to arrive at the next exhibit to be marked, just pass the next two pages.

I now ask that there be marked as Government's Exhibit 533 for identification, a memorandum dated October 7, 1939, signed F. W. Allen, Secretary.

4280 (The document referred to was marked as Government's Exhibit No. 533, for identification.)

Mr. Knuff: We would like to have marked for identification at this time as Government's Exhibit 534, a copy of a telegram, dated October 11, 1939, addressed to the United States Gypsum Company and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 534, for identification.)

Mr. Knuff: We would also like to have marked for identification as Government's Exhibit 535, the original of a letter dated October 12, 1939, addressed to the Ebsary Gypsum Company and signed by the United States Gypsum Company, S. F. Bartlett.

(The document referred to was marked as Government's Exhibit No. 535, for identification.)

Mr. Knuff: We would also like to have marked for identification as Government's Exhibit 536, a copy of a letter dated October 13, 1939, addressed to the Cardiff Gypsum Company and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 536, for identification.)

4281 Mr. Knuff: We would also like to have marked for identification as Government's Exhibit 537, a

letter dated October 14, 1939, addressed to George N. Lenci, and signed Cardiff Gypsum Company, M. Gutman.

(The document referred to was marked as Government's Exhibit No. 537, for identification.)

Mr. Knuff: We would also like to have marked for identification as Government's Exhibit 538, a copy of a letter dated October 16, 1939, addressed to Mr. S. F. Bartlett, and signed Ebsary Gypsum Company.

(The document referred to was marked Government's Exhibit No. 538, for identification.)

Mr. Knuff: We would like now to have marked for identification as Government's Exhibit 539, a copy of a letter dated October 16, 1939, addressed to the Cardiff Gypsum Company and signed Ebsary Gypsum Company, George N. Lenci, Vice President.

(The document referred to was marked as Government's Exhibit No. 539, for identification.)

Mr. Knuff: We would also like to have marked for identification as Government's Exhibit 540, a letter dated October 17, 1939, addressed to George N. Lenci, and
4282 signed M. Gutman, Cardiff Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 540, for identification.)

Mr. Knuff: I would like to have marked for identification at this time as Government's Exhibit 541, a copy of a letter dated October 21, 1939, addressed to the Cardiff Gypsum Company, and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 541, for identification.)

Mr. Knuff: I also would like to have marked for identification as Government's Exhibit 542, a telegram addressed to the Ebsary Gypsum Company, dated October 21, 1939, and signed United States Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 542, for identification.)

Justice Stephens: We will take the morning recess at this time, gentlemen.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

Justice Stephens: Proceed.

Mr. Knuff: I have just one more exhibit that I want to offer in connection with this Sensibar, or Cardiff.

4283 Gypsum Company, matter.

I ask that there be marked for identification as Government's Exhibit 543—and this will be found immediately following the letter of October 24, 1939, which I am omitting.—

Justice Jackson: (Interposing) It is a copy of a telegram?

Mr. Knuff: Yes, a copy of a telegram, your Honor, dated October 25, 1939, addressed to the Cardiff Gypsum Company and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 543, for identification.)

Mr. Knuff: I assume, Mr. Bromley, that there is no question as to the identification of Government's Exhibits 523 to 543 for identification, inclusive?

Mr. Bromley: I don't know anything about them, about most of them.

Mr. Knuff: They were all introduced in the criminal trial; they were all marked as exhibits in the criminal trial, and were all received in the criminal trial.

Will you show Mr. Lenci Government's Exhibit 523 to 543, inclusive, please?

(Thereupon, Government's Exhibits Nos. 523 to 543, inclusive, for identification, were handed to the witness.)

4284 By Mr. Knuff:

Q. Mr. Lenci, will you examine those exhibits, Government's Exhibits 523 to 543, inclusive, and tell us whether or not those exhibits represent the correspondence, telegrams, and a memorandum that was prepared in your office, all of which were occasioned by the offer of Cardiff Gypsum Company to purchase board from the Ebsary Gypsum Company?

Justice Stephens: You might clarify your record, Mr. Knuff, if the Court may suggest, by asking the witness to answer this question, as to whether or not each one of the items which purports to have been sent by the Ebsary Gypsum Company to the Cardiff Gypsum Company was sent; whether each one of the items purporting to have been sent by the Cardiff Gypsum Company to Ebsary, was received by Ebsary; whether each one of the items pur-

porting to have been sent by Ebsary to United States Gypsum, was sent by Ebsary; and whether each one of the items purporting to have been sent by United States Gypsum to Ebsary was received—and then you will have to examine particularly—if he answers those questions in the affirmative—only on Exhibit 533, which does not explain itself.

Mr. Knuff: I will adopt your Honor's suggestion.

Justice Stephens: Thank you. Will you answer that question?

The Witness: I would say "yes" to your Honor's question.

By Mr. Knuff:

4285 Q. With reference to Government's Exhibit 533, will you state, Mr. Lenci, who Mr. F. W. Allen is? A. Mr. F. W. Allen is our Secretary, and he is also in charge of our Credit Department.

Q. And was this memorandum, Exhibit 533, a memorandum that was prepared by Mr. Allen concerning the credit of the Cardiff Gypsum Company? A. Yes.

Mr. Knuff: We now offer in evidence, if your Honor pleases, Government's Exhibits 523 to 543, inclusive.

Mr. Bromley: In addition to the usual objection which I make, the defendants object to these exhibits on the ground that they are immaterial to any charge contained in the complaint, and also immaterial in view of the stipulation made at page 4544 of the transcript.

Justice Stephens: The general objection as to immateriality is overruled.

What do you say as to the objection that they are immaterial in view of this stipulation, Mr. Knuff? The Court asks this question only in the interest of saving time. It does seem to the Court, Mr. Knuff, that all these letters prove is that Cardiff wanted to buy board from Ebsary, and that Ebsary wanted to sell board to Cardiff, and that Ebsary tried to get consent from USG, and failed.

Mr. Knuff: They prove the circumstances sur-
4286 rounding the asking of that consent from USG. In the first place, USG's consent was asked in late September, 1939, I believe. Numerous telegrams passed between Ebsary and the United States Gypsum Company in connection with that application for a consent. In addition to that, the letters indicate clearly that there was an unusual situation in this case, because as shown by Exhibit 540, the United States Gypsum Company not only didn't act according to the usual manner in which they had

heretofore acted, that is to pass upon applications rather promptly, but instead of that, they sent Mr. Bartlett and Mr. Spray, Cranston Spray, down to see Mr. Lenci, and Mr. Cranston Spray and Mr. Bartlett did contact Mr. Lenci, and Mr. Lenci asked Mr. Spray and Mr. Bartlett when the matter would be disposed of, and the reply was, I believe, that it would be taken care of shortly.

Now the usual procedure that the previous consents indicate, is that a manufacturer would ask permission of the licensor to sell a manufacturing distributor. In the course of possibly one, two or three days, that consent would be forthcoming. Here it took a matter of six weeks or over. In the meantime the investigation that USG was making was going on. The failure of USG to give their consent is absolutely meaningless without the background that highlights that consent.

That background is contained in Exhibits 523 to
4287 543, inclusive, coupled with other evidence that will follow.

For instance, the next exhibit will show that when Ebsary telegraphed the U. S. Gypsum Company for permission to sell the Structural Division of the American Cyanamid Company, on the same day that Ebsary sent that telegram the United States Gypsum Company answered that telegram and gave their consent.

Justice Jackson: I don't think that proves a thing at all, except that they were slow in one case, and fast in another, that is all.

Mr. Knuff: Well, as I say, we are going to try to develop from Mr. Lenci that sending Mr. Spray, a member of the Scott, MacLeish & Falk firm in Chicago, was certainly something unusual.

Justice Jackson: Oh, yes, and I think it is also unusual to grant credit to people who have gone through bankruptcy, which is what one of your exhibits shows. Naturally they wanted to make an investigation. But it is immaterial, as I see it, whether it was slow or fast. They eventually refused permission. You say that they had no right to do that, and Mr. Bromley says that they had. So that is all there is to that.

Mr. Knuff: Mr. Bromley says that they had a right to do that under the "single trader" doctrine—

Justice Jackson: (Interposing) That is a matter
4288 for argument later on.

Mr. Knuff: That is right. That is the reason we want these exhibits in now.

Justice Stephens: Well, they are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

The Court of course does not wish to assume to control how counsel on either side of the case shall try their case, but we are so shorthanded with judges in this jurisdiction that it seems a pity to take days of time going into matters that seem obvious, especially in view of the stipulation which covers most of the things that are proved by the exhibits; but perhaps we would save time by not making any suggestions about saving time.

These exhibits are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 523 to 543, inclusive, were received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, will you refer to Government's Exhibit—

Justice Stephens: (Interposing) Judge Garrett calls my attention to the fact that I should have stated that these were received in evidence consistently with the ruling on exhibits of a similar character offered yesterday.

4289

Mr. Knuff: There weren't any such rulings yesterday.

Justice Garrett: That is sufficient. I just do not agree with the ruling.

Justice Stephens: I am referring to the ruling in which Judge Jackson and myself indicated that this class of evidence was admissible under paragraph 45 (c) of the complaint, but not under 45 (e), to which Judge Garrett dissented, thinking it inadmissible at all. That is clear now, I think.

By Mr. Knuff:

Q. Mr. Lenci, will you refer to Government's Exhibit 540?

At or about that time did you have any conversation with Mr. Bartlett, and with Mr. Spray, concerning your application, or the application of the Ebsary Gypsum Company, for permission to sell board to the Cardiff Gypsum Company? A. I believe I did, because there is a memorandum to that effect on this Exhibit No. 540.

Q. Do you remember what the conversation was? A. Well, first of all—

Mr. Bromley: (Interposing) If he is going to state it, I object to it as immaterial.

The Witness: First of all—

Justice Stephens: (Interposing) Just a minute. When there is an objection made, don't answer until we get
4290 a chance to rule on it.

The Witness: I am sorry.

Justice Stephens: The objection is overruled.

By Mr. Knuff:

Q. Will you state, if you can remember, what the conversation was? A. What I was going to say was this. I have known Mr. Bartlett for thirty years, and it was his habit, when he was in New York, to drop in and have a little visit with me. I have known him since about 1907 or 1908—

Justice Stephens: (Interposing) Mr. Lenci, I don't want to stop you from stating anything that you think is necessary to make a complete answer to the question, but in your good will with reference to making this whole thing clear, you are sometimes taking an unnecessary amount of time. If you will just answer the question as to what that conversation was, then if counsel on either side of the case wish to bring out the habit of Mr. Bartlett to drop in on you, they can do so. If they don't think that is material or necessary, we can save that much time.

The Witness: I was trying to show that this visit was not specifically on this matter.

By Mr. Knuff:

Q. You did have a conversation with Mr. Bartlett
4291 and Mr. Spray? A. Yes.

Q. Will you tell us what the conversation was? A. The conversation regarding this was very short, to the effect that they had not had time to consider it, and that they were waiting for the Chicago office to pass on it, and as soon as they did, they would let me know.

Q. You had previously made an application to sell the Connecticut Adamant Plaster Company at New Haven, Connecticut, and the Atlantic Gypsum Company, had you not? A. Yes.

Q. Now in connection with those applications, did anyone from the United States Gypsum Company come around and talk to you about those applications? A. No.

Q. Or, as to any other application that you made for permission to sell, had the United States Gypsum Company,

on any other occasion, except this case, sent a representative around to see you? A. No.

Mr. O'Donnell: I object to that. I think the witness testified that the United States Gypsum Company did not send a representative there to talk to him on this matter, but that Mr. Bartlett just dropped in.

Justice Stephens: Read the last question and answer, and the objection by Mr. O'Donnell.

4292 (Thereupon, the reporter read the record as requested by the Court.)

Justice Stephens: I think that is a matter for cross-examination, Mr. O'Donnell. The objection is overruled.

By Mr. Knuff:

Q. Mr. Lenci, did you know the reputation of the Cardiff Gypsum Company in 1939 as to its price policies? A. No, I didn't.

Q. You say that you didn't know what its reputation was? A. No, we didn't operate in the same territory that they did, and we had no occasion to come in contact with them. They worked in the Middle West, and we worked in the East.

Q. At the criminal trial you were asked this question—

Mr. Bromley: (Interposing) What page is that?

Mr. Knuff: Page 618.

Mr. Bromley: I object to his reading from the record. If he wants to refresh his recollection, that is all right.

Justice Jackson: Maybe he is impeaching him, I don't know.

Mr. Knuff: I am going to use this for two purposes, first to refresh his recollection, and then to impeach his testimony.

Justice Jackson: Why not show it to him first, and see if his recollection is refreshed? After that, if you desire to impeach him, that is another thing.

(Thereupon, the transcript referred to was handed to the witness for examination.)

4293 Justice Stephens: Mr. Marshall, show it to defendants' counsel.

Mr. Knuff: I think they have a copy.

Justice Stephens: Thank you. Then show it to the Court, please.

(Thereupon, the transcript referred to was handed to the Court for examination.)

Justice Stephens: Very well, proceed.

By Mr. Knuff:

Q. Mr. Lenci, you have read the excerpt from your previous testimony before the court down here, given on October 20, 1941? A. Yes.

Q. Has your memory been refreshed by that? A. Yes.

Q. Now in 1939 did you know the reputation of the Cardiff Gypsum Company concerning its price policies?

Mr. Bromley: That calls for a "yes" or "no" answer, I assume.

Justice Stephens: Just answer that "yes" or "no".

The Witness: That is a hard question to answer "yes" or "no".

Justice Stephens: You can answer "yes" or "no" as to whether you knew the reputation of the Cardiff Gypsum Company with respect to its price policies.

4294 The Witness: Yes, I knew it.

Justice Stephens: Very well.

By Mr. Knuff:

Q. Will you state whether or not that company had a reputation as being a price cutter?

Mr. Bromley: I object to that as immaterial and incompetent because hearsay.

Mr. Knuff: Of course all testimony as to reputation is hearsay.

Justice Stephens: You are trying to prove his reputation as a price cutter, as a circumstance, whether true or not, bearing upon the action of the United States Gypsum Company in refusing permission to Ebsary to sell to the Cardiff Gypsum Company?

Mr. Knuff: Yes.

Justice Stephens: Do you intend to introduce additional evidence which will connect this with United States Gypsum Company's knowledge of this reputation?

Mr. Knuff: Here is a man that knows the reputation of that company—

Justice Stephens: (Interposing) I understand your theory of all of this evidence is to prove that the reason that USG refused its consent was because it thought Cardiff was a price cutter, is that right?

Mr. Knuff: We will bring that out—

4295 Justice Stephens: (Interposing) I am asking you—do you intend to add evidence which will connect this with USG's knowledge?

Mr. Knuff: Yes, your Honor.

Justice Stephens: Objection overruled.

Mr. Knuff: Will you read the question, Mr. Reporter?

(Thereupon, the pending question was read by the reporter.)

The Witness: Well, as I said, I had no direct information on it whatever, we never came in contact with them before this time, but through purely hearsay evidence I did know in the past that this company had had some reputation of that kind.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 544, the same being a telegram, dated November 8, 1935.

(The document referred to was marked as Government's Exhibit No. 544, for identification.)

By Mr. Knuff:

Q. I also show you, Mr. Lenci, what has been marked for identification—

Justice Stephens: (Interposing) Just a moment, Mr. Knuff. I am sorry to interrupt you again but the Court wishes to be sure that its rulings are correct.

4296 Judge Jackson and I, who are in the majority with respect to the admissibility of this class of evidence, have some question as to whether your inquiries as to the reputation of Cardiff go to the item which you sought to prove, to-wit, plaster. I don't think your questions embraced anything about plaster.

Mr. Knuff: That is what they were selling.

Justice Stephens: Why don't you ask the witness what the reputation of this company was with reference to price cutting on plaster, rather than as to its general reputation?

By Mr. Knuff:

Q. Mr. Lenci, when you said that the Cardiff Gypsum Company had a reputation as a price cutter, did you mean that they had a reputation as a price cutter on plaster?

Mr. Bromley: I make the same objection as to materiality and competency.

Justice Stephens: Overruled.

The Witness: Yes.

Mr. Knuff: You see at this time, your Honor, Cardiff wasn't selling board at all.

Justice Stephens: I understand that, but we are trying to keep this record as succinct and clear as we can, and I understood that the entire theory of all of this evidence which we have let in, was that Cardiff had a reputa-
4297 tion for price cutting on plaster, and your questions didn't go to plaster.

Mr. Knuff: I accept your Honor's suggestion.

By Mr. Knuff:

Q. You have before you, Mr. Lenci, Government's Exhibit 544, which purports to be a telegram dated November 8, 1935, addressed to United States Gypsum Company and signed Ebsary Gypsum Company.

I also show you what has been marked for identification as Government's Exhibit 545, which likewise purports to be a copy of a telegraph dated November 8, 1935, addressed to the Ebsary Gypsum Company, and signed United States Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 545, for identification.)

By Mr. Knuff:

Q. I now want to show you what has been marked as Government's Exhibit 546 for identification, which is a letter, dated November 8, 1935, addressed to the Ebsary Gypsum Company, and signed United States Gypsum Company, C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 546, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, if the exhibits which
4298 you have before you are copies of telegrams sent or received, as well as the original of a letter that you received from the United States Gypsum Company? A. We received the telegram which is marked Exhibit 544, and we also received the letter which is marked Exhibit 546.

Justice Stephens: You say you received the telegram marked 544?

The Witness: I beg your pardon, we sent the telegram marked 544, and received the letter marked 546.

By Mr. Knuff:

Q. And did you receive the telegram, a copy of which is marked for identification as Government's Exhibit 545? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibits 544, 545, and 546.

Mr. Bromley: In addition to the usual objection, which I make, I object on the ground that they are immaterial to any issue in the case, and call attention to the fact that they are dated four years prior to the last series of Cardiff exhibits.

Justice Stephens: What do you say to that, Mr. Knuff? Doesn't that make them pretty remote if they were four years before the Cardiff episode?

Mr. Knuff: I don't think so, your Honor. They haven't any relation to Cardiff except to show how fast the
4299 United States Gypsum Company acted before this. In connection with that, I think it is quite significant. Maybe their weight is not very much, but I think they are entirely relevant.

Justice Stephens: Well, the objection is overruled; they are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits No. 544, 545 and 546, were received in evidence.)

Justice Stephens: The record may show, in the interests of saving time, Mr. Bromley, that you have a continuing objection to all of this class of testimony and evidence, although I do not foreclose you from raising special objections, as you see fit.

Mr. Bromley: Thank you, your Honor.

4300 By Mr. Knuff:

Q. Now, pursuant to the consent that was given you in 1935, you did sell board to the American Cyanamid Company, to their Structural Gypsum Division; is that correct? A. Yes.

Q. Did you know Mr. Bartlett of the United States Gypsum Company? A. Yes.

Q. In 1938 or in 1939, did Mr. Bartlett complain that the Structural was selling board and lath to dealers at prices that were below the minimum prices specified by USG for its licensees? A. He made an inquiry of that kind at one time. I can't place the date.

Q. Would you say it was in the year 1939, or 1938? A. It was in the latter part of the 1930's.

Q. And pursuant to that did he tell you what to do? A. I think he asked me to investigate—

Q. (Interposing) He asked you to investigate and see

whether that was correct or not; is that it? A. I believe so, yes.

Q. And where did this conversation take place, in your office in New York City, that is, the conversation that you had with Mr. Bartlett? A. It was in New York. I
4301 don't remember whether it was in person or whether it was a telephone conversation, I don't remember as to that.

Q. Did you investigate and make inquiry from Structural Gypsum Company as to whether or not Structural was selling below the minimum prices specified by USG for its licensees? A. I asked Mr. McCormick, as I recall it.

Q. When you say you "asked Mr. McCormick", do you mean that you asked him personally, or do you mean that you called him on the telephone? A. I think it was a telephone conversation.

Q. And Mr. McCormick was who? A. He was in charge of sales for the Structural Division of the American Cyanamid Company.

Q. And what did Mr. McCormick tell you, if anything? A. As I recall it, he told me that they were not selling below the board prices which were in effect at that time.

Q. Did you ask Mr. McCormick as to what his future policy would be? A. I don't think so.

Q. Now after Mr. McCormick told you that they were not selling below the prices, did you communicate that information to Mr. Bartlett? A. I don't remember.

Q. Do you recall whether you called Mr. Bartlett
4302 on the telephone? A. I don't remember, at the present time.

Q. Could your memory be refreshed as to that? A. It could be yes.

Q. I want to show you, Mr. Lenci, the testimony that you gave before the Court in the District of Columbia on the 20th day of October, 1941, at page 570, beginning with line 13, and ending with line 4 on page 571.

(Testimony referred to handed to the witness for examination; then handed to the Court for examination.)

By Mr. Knuff:

Q. Since reading that testimony, Mr. Lenci, has your recollection been refreshed? A. Yes, it has.

Q. And can you state now that you did communicate the results of your talk with Mr. McCormick, to Mr. Bartlett—is that correct? A. Yes, I did.

Q. Now that is one conversation that you had with Mr. Bartlett in the latter 1930's, as you said. Did you have a second conversation with Mr. Bartlett where Mr. Bartlett complained that Structural was likewise selling board and lath to dealers at prices that were below the minimum prices specified by USG for its licensees? A. An-
4303 other conversation separate from this one?

Q. About four months apart. A. I don't remember but one. There might have been two, but I don't remember any other.

Q. I would like to show you, Mr. Lenci, the testimony that you gave before the Grand Jury on April 22, 1940, at page 370, and I will ask you to read from the bottom of page 370, where I have indicated with a pencil mark, down to page 371 where I have likewise indicated with a pencil mark.

(Testimony referred to handed to the witness for examination; then handed to the Court for examination; then handed to Mr. Bromley for examination.)

By Mr. Knuff:

Q. Mr. Lenci, I wonder if, by chance, your recollection has been refreshed as to whether you had more than one conversation with Mr. Bartlett, or a representative of the USG, wherein they complained that the Structural was selling board and lath to dealers at prices that were below the minimum prices specified by USG for its licensees? A. I am sorry, but at the present time I really can't recollect any other time.

Q. Do you recall, Mr. Lenci, that at that time, Structural Gypsum had a salesman employed by the name of
4304 Stremble? A. Yes.

Q. And do you know how he was paid by Structural? A. Well, I learned that he was a commission salesman.

Q. He was paid on a commission basis? A. Yes.

Q. Did you ever complain to Mr. McCormick concerning Mr. Stremble's employment, and ask Mr. McCormick to have Mr. Stremble withdrawn as a commission salesman or do something else about it? A. I know that I complained about him. I don't know that I told him what to do with him, but I did complain about Mr. Stremble's practices.

Q. Can you tell us what you told Mr. McCormick? A. You see, at that time we were selling the Structural Divi-

sion our gypsum board and lath, and this Mr. Stremble was located in Brooklyn and Long Island, and at the same time we had our own salesmen in that same territory, and we were selling our material to Structural and Stremble was selling our material to our own dealers and rebating to them, and I complained about that.

Q. Can you fix the time when this occurred, approximately? A. I would say in 1938 or 1939.

4305 Q. And did Mr. McCormick communicate further with you as to what happened to Mr. Stremble? A. Yes, he had a talk with Stremble and Stremble admitted that he was giving cash rebates.

Q. And did Mr. McCormick subsequently call you and tell you that? A. He told me that, yes.

Q. And did he further tell you that he had discharged Mr. Stremble? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 547, the same being a letter dated August 20, 1934, addressed to George N. Lenci and signed C. Henning.

(The document referred to was marked Government's Exhibit No. 547 for Identification.)

By Mr. Knuff:

Q. Did you receive that communication, Mr. Lenci? A. Yes.

Q. Do you recall when the Ebsary Gypsum Company signed the foil board agreement? A. It is my recollection, subject to correction, that it was in the latter part of 1935.

Q. I think it is in evidence, Mr. Lenci, that the
4306 metallized or foil board agreement which the Ebsary Gypsum Company signed was dated August 14, 1935. A. Yes.

Q. Now prior to the time that you signed this foil board agreement, did you purchase foil board, or metallized lath, from any other companies—and I particularly refer to the National Gypsum Company? A. To the best of my recollection, we bought possibly 3 or 4 carloads.

Q. And did you buy from any company other than the Ebsary Gypsum Company? Did you buy from the USG— A. (Interposing) Other than National, you mean?

Q. Yes, other than National, I beg your pardon. Did you buy from USG? A. No, I don't think we did.

Q. When did you start to manufacture foil board, Mr. Lenci? A. Right at the beginning of the year following. That would be 1936.

Q. In 1936? A. Yes.

Q. Now, Mr. Lenci, at what prices did you sell the board that you purchased from the National Gypsum Company? A. Well, I have no record of that, at the present time,—here, rather.

4307 Q. Well, did you sell the board for more or for less than the price specified by USG in its license bulletins?

Mr. Bromley: I object to that on the ground that he says he doesn't know, and it is repetitious.

Mr. Knuff: I am asking if he sold it for more or less.

Justice Stephens: Do you know whether you sold it for more or less?

The Witness: No; I don't know, even, if we had received the USG bulletins at that time.

Justice Stephens: Then the objection is sustained, if he doesn't know.

By Mr. Knuff:

Q. Could your memory be refreshed as to the prices on that? A. It might be.

Q. I would like to have you refer to a letter, that may subsequently be offered in evidence—it is not now marked for identification—but it is a letter dated March 16, 1935. Will you please look at that letter and see whether or not your recollection could be refreshed as to what prices this board, this foil board, was sold at? A. No, I am sorry, that wouldn't help me. This only gives—

Mr. Bromley: (Interposing) I object to his stating—

4308 The Witness: (Interposing and continuing)—the selling price to us.

Justice Stephens: Don't state what it says; if it doesn't refresh your recollection, that is enough.

Mr. Bromley: May the witness' answer be stricken in so far as it gives the contents, or purports to, of the letter?

Justice Stephens: It may go out.

The Court will take the noon recess.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m., of the same day.)

4309 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice Stephens: You may proceed, gentlemen.

Mr. Steffen: Your Honor, I should like to make a brief statement in regard to the Gloyd deposition—

Justice Stephens: (Interposing) I have just returned to you the papers.

Mr. Knuff: Yes, we have them.

Mr. Steffen: We have examined the letters which Mr. Johnston gave us yesterday, concerning the doctors' reports of Mr. Gloyd's condition, and I want to make one or two statements concerning them.

I may say at the outset that we are a little bit surprised that the first one of these letters, being dated January 8, was not turned over to us at that time; and, secondly, the letters of February 18th we did not see until just yesterday.

At the time of the second investigation, or second examination of Mr. Gloyd, if we had had any opportunity at all we would, of course, have had a physican present so that we could have made some sort of a free examination as to his condition. I would say it seems to me that that is shooting from ambush, as Mr. Johnston says, to give us no information at all concerning either the original letter
4310 until just now, or the second examination of Mr. Gloyd's condition.

Now on the matter of Mr. Gloyd's condition, we want to assure the Court that we have no desire whatever to imperil his health, and I think I should say that if we were to take his deposition we would use every effort to save him from any excitement or grueling examination.

I will say that I think these doctors' examinations have probably been more grueling and have taken more time than anything we would do. Mr. Knuff has a very nice bedside manner, and will ask these questions politely and take such time and give him such time as is necessary for the answers.

I want to point out that in these letters, no one said that a deposition, as such, is not to be taken. They say if it is grueling or if it is to be under excitement, and things of that sort; and the doctors don't know what the nature of the examination is going to be. Therefore, they couldn't say that he could not withstand a deposition.

I want to say that one doctor, who we think ranks highest among these doctors, is Dr. Langston, who is a heart specialist, and his opinion is rather clear that the man is 79 years old, that he is, of course, having a failing memory in some degree, but that if the examination was conducted

decently and in an orderly manner. he could un-
4311 doubtedly answer the questions put to him, giving him necessary rest periods and what-not.

So that, on the evidence that Mr. Johnston submits, it seems to us right there that there is no clear showing that we shouldn't be permitted to take the deposition.

The statement as to failing memory, I notice that each of the doctors explain that his memory on recent events is poor. We don't want recent events. If we can get one witness that can tell us what happened in '25, '26, '27, '28, and '29, we will be very glad.

Justice Jackson: Was Mr. Chism connected with the company then?

Mr. Steffen: That is right.

Justice Jackson: During those years?

Mr. Steffen: Yes.

Justice Jackson: Why can't you get all the information from him that you could from Mr. Gloyd?

Mr. Steffen: Because he didn't handle some of the transactions directly with the USG officials. Our thought on this is that we can save time for the Court. I want to assure you that we would like to finish in two more weeks, and I would like to get this deposition in, in the interim, during the vacation—that is, the one of Mr. Gloyd and the one of Mr. Chism. We can handle them both if we go to Oklahoma City and take them.

4312 Justice Jackson: Couldn't you get the same result with written interrogatories?

Mr. Steffen: Frankly, I would say no. I think written interrogatories are the most hopeless way of getting information that is possible, particularly with a man that perhaps has a failing memory and we might have to prompt, one way or the other.

You will notice that he is a defendant, and we can ask leading questions, and we would like to have the opportunity to prompt and refresh him as the examination would proceed. And written interrogatories simply wouldn't work along that line,—he would say, "I don't remember", and that is all there would be to it. We couldn't say, "We would like to show you such-and-such a paper, and from that does that not refresh your recollection that this happened"—with the idea that we would get the information that we need from a deposition, and I don't see how it is possible under any other basis.

His testimony, I think, is essential to our case, particularly as it pertains to the Texas Company.

I am making that statement simply to indicate that our present disposition is to ask that we be permitted to take the deposition. If Mr. Johnston wants to move to have our motion for a deposition quashed, that is his privilege.

Justice Stephens: Do you wish to be heard, Mr. Johnston?

4313 Mr. Johnston: If the Court please, I will prepare and file a motion so that it can come before the Court.

I had hoped, and still hope, that in considering this motion these letters might be kept out of the record.

Justice Stephens: I don't see how that is possible, Mr. Johnston. The Government has a right to apply for the taking of the deposition. If you want to object to it, you will have to file a motion supported by the usual affidavits and evidentiary matters upon which the motion is based. They may not have to go into the transcript of testimony, but I don't see how they can be kept out of the formal records of the Court. I have read them all, as you kindly submitted them to me, and so have my colleagues read them. There is nothing in them discreditable to Mr. Gloyd at all.

Mr. Johnston: May I say a word off the record?

Justice Stephens: Yes.

(Discussion off the record.)

Justice Stephens: You may proceed, Mr. Knuff.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed his testimony as follows:

Direct Examination (resumed)

Mr. Knuff: May it please the Court, yesterday I inadvertently led Mr. Lenci into making an erro-

4314 neous statement that I had not the intention of leading him to make, and I know that Mr. Lenci didn't have the intention to give the answer which he did, and I would like to correct that.

This is on page 4504, Your Honor. Justice Stephens called my attention to it this morning.

Justice Stephens: Yes.

Mr. Knuff: I don't think this needs to be taken for the record, because I am just going to read the questions and answers of the witness to bring back his recollection.

(Discussion off the record, in which Mr. Knuff read certain questions and answers to the witness from the testimony on February 21, 1944.)

By Mr. Knuff:

Q. Do you recall that testimony? A. Yes.

Q. Now as a matter of fact, at that time, of course, Ebsary was not delivering—

Justice Stephens: (Interposing) This isn't going to correct the record, Mr. Knuff, since you didn't have the record show your last few questions in the reading of this. The only way you can correct the record now is to call the attention of the witness, of record, to pages 4504 and 4505 of the transcript.

Mr. Knuff: I think that is correct.

By Mr. Knuff:

4315 Q. Mr. Lenci, I have read to you from your testimony appearing on page 4504 of the transcript beginning with line 14, and extending over to page 4505, line 12.

As a matter of fact, Ebsary was not selling anything to the Paragon Plaster & Supply or to Oakfield or to any of those companies at that time; isn't that correct? A. That is correct.

Q. And when you used the word "Ebsary", you meant to use that as an illustration? A. Yes.

Q. So that what you meant by that was that as to any company who was selling Paragon or those companies, the delivery should be made by that selling company to the Oakfield Gypsum Products Company? A. To them at their plant, that is correct, yes.

Mr. Bromley: I don't think that clears it up. The last answer—"to them"—I don't know who "them" means.

Justice Stephens: Who did you mean by "them"?

The Witness: To the Oakfield Gypsum Products Company at the Oakfield Gypsum Products Company's plant in Oakfield, New York.

Justice Jackson: Does that clear that to you, Mr. Bromley?

Mr. Bromley: No, sir.

Mr. Knuff: Well, let's see if we can clear it up, 4316 then.

By Mr. Knuff:

Q. In 1932, or in 1933, Ebsary was not selling either to Oakfield Gypsum Products Company, nor were they selling

to the American Hardwall Plaster Company, the Paragon Plaster Company, or the Paragon Plaster & Supply Company, were they? A. We were not.

Q. But you did make a complaint on April 27, 1933, to the effect that when any company, any manufacturing company which manufactured gypsum wallboard, sold board to the American Hardwall Plaster Company and the two Paragon companies, your complaint was that that company should deliver the board to Oakfield; is that correct? A. Yes.

Q. And when you said yesterday that Ebsary should deliver the board to Oakfield, you meant by the term "Ebsary" any other company which was supplying board to either Oakfield, the American Hardwall Plaster, the Paragon Plaster, or the Paragon Plaster & Supply Company; is that correct? A. Yes, I was just using the name "Ebsary" as an illustration.

Mr. Knuff: Now that is clear to me. I don't know if it is clear to everyone else here.

Justice Jackson: I understand what he said.

Mr. Bromley: I don't want to have my silence
4317 taken as agreement that it is clear, and I will try to have another go at it on cross-examination.

Mr. Knuff: In the list of photostats that Your Honors have before you, the last exhibit that we had identified and offered, I believe, was Exhibit 547, which is a letter dated August 20, 1934.

The next exhibit, which will be 548, appears following the next two photostats, and it is a letter dated April 1, 1935, addressed to George Lenci and signed National Gypsum Company, R.F.B., Vice President. I will ask that it be marked for Identification as Government's Exhibit 548.

(The document referred to was marked as Government's Exhibit No. 548 for Identification.)

By Mr. Knuff:

Q. I will ask you, Mr. Lenci, if Government's Exhibit 548 was received by the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibit 548 and the attachment attached thereto.

Justice Stephens: Mr. Burley was with National, was he?

Mr. Knuff: Yes, Your Honor.

Mr. Bromley: May I see the exhibit? We do not seem to have a copy of the enclosure.

4318 (Exhibit 548 handed to Mr. Bromley.)

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 548, was received in evidence.)

Justice Garrett: Just a moment, please. The letter of April 1, 1935, is Government's Exhibit 548?

Mr. Knuff: Yes.

Justice Garrett: Is the attachment Exhibit 548-A, or what?

Mr. Knuff: It doesn't have any number at all, and possibly the attachment should be numbered 548-A. I thought not, I thought it should be just attached to 548.

Justice Stephens: Has Exhibit 547 been acted upon?

Mr. Knuff: I was under the impression that it had been.

Justice Stephens: How about it, Mrs. Gillette?

Mrs. Gillette: I have no record of it.

Justice Stephens: I think there are a half a dozen exhibits not yet acted upon.

What do your records show?

Mrs. Gillette: Exhibit 546 was received.

Mr. Knuff: I would like to have Government's
4319 Exhibit 548, with the attachment, as one exhibit, but if the Court has any objection to it—

Justice Stephens: (Interposing) Do as you see fit about it.

Mr. Knuff: We also offer in evidence Government's Exhibit 547.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 547, was received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, up until the time your company signed the foil board agreement, which was in August, 1935, were you able to purchase foil board at a manufacturer's discount?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

Justice Stephens: Yes, that objection is well taken. You should ask him to state at what price he did purchase it, if he knows, and the Court will conclude whether it was at a manufacturer's discount under the terms of the bulletins.

4320 By Mr. Knuff:

Q. Did you buy board, Mr. Lenci, from the National Gypsum Company, foil board? A. We did buy a small quantity from them.

Q. And did you get a discount from the purchase price of that board? A. It is my recollection we got it on some of those purchases.

Q. I mean at the beginning, were you able to buy it at a discount? A. No, by referring to this—may I refer to this?

Q. Yes. A. By referring to the copy of the letter attached to Exhibit 548, I would say we did not get a discount in the beginning.

Q. And later, after the agreement was signed, you were able to get the manufacturer's discount; is that correct? A. I believe so, I am not certain. I don't remember just when it became effective.

Q. Well, let's see if we can refresh your recollection, Mr. Lenci, on that.

I want to show you a letter dated October 8, 1935.

Mr. Knuff: That is in Your Honor's sets of exhibits, being the fourth item following Government's Exhibit 548.

4321 By Mr. Knuff:

Q. I want you to read the pencilled notation which that letter bears, and see if your recollection is refreshed, Mr. Lenci? A. Yes.

Q. And what is your answer to the question now, as to whether or not you were able to get the discount only after the foil board license was signed? A. My answer would be that prior to the time we signed the license, we had to pay the full dealer's price.

Q. And after you signed it, you were able to get the discount? A. I believe we were, yes, sir.

Mr. Knuff: Counting the letter of October 8 as the first letter, if you will leaf forward 8 letters you will come to the next exhibit, which will be Government's Exhibit 549, and

which is a letter dated December 28, 1934. I ask that it be marked for Identification as Government's Exhibit 549.

(The document referred to was marked as Government's Exhibit No. 549 for Identification.)

By Mr. Knuff:

Q. Mr. Lenci, I want to show you Government's Exhibit 549, which is a letter dated December 28, 1934, ad-
4322 dressed to George N. Lenci and signed E. W. Carey, Executive Secretary.

Will you state whether or not that letter was received at the office of the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: Mr. Bromley, will you admit that that is Mr. E. W. Carey's signature?

Mr. Bromley: No; that did not come from our files, did it?

Mr. Knuff: No, that came from the Ebsary Gypsum Company's files.

Mr. Bromley: I don't know anything about it.

By Mr. Knuff:

Q. Do you know Mr. Carey's signature? A. Not very well, no, I am sorry.

Q. Was that letter received in the usual course of business? A. I believe so, it has our "Received" stamp on it.

Mr. Knuff: We offer in evidence Government's Exhibit No. 549.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Govern-
4323 ment's Exhibit No. 549, was received in evidence.)

Justice Jackson: Does that include the list which follows?

Mr. Knuff: Yes, Your Honor.

Justice Jackson: Then that exhibit consists of three pages?

Mr. Knuff: Yes, it consists of three pages.

Justice Stephens: Proceed.

Mr. Knuff: The next exhibit, if Your Honors please, is Exhibit No. 550, which is a letter dated December 28, 1934, addressed to Mr. Arthur R. Black, and signed E. W. Carey.

I ask that it be so marked for Identification as Government's Exhibit No. 550.

(The document referred to was marked as Government's Exhibit No. 550 for Identification.)

Mr. Knuff: I now ask that there be marked for Identification as Exhibit 551—

Justice Stephens: (Interposing) Has Exhibit 550 an attachment?

Mr. Knuff: Exhibit 550 is the identical letter, in so far as the substance of the letter is concerned, as Exhibit 549, but it is addressed to Mr. Black.

4324 Justice Stephens: But do you include in the exhibit the attachment?

Mr. Knuff: We do, Your Honor.

Justice Jackson: Then let the record show that Exhibit 550 consists of three pages.

Mr. Knuff: Yes.

I would like to have marked for Identification Government's Exhibit 551, consisting of three pages, being a letter dated December 28, 1934, addressed to Mr. F. G. Krumholtz, Treasurer, and signed E. W. Carey.

(The document referred to was marked as Government's Exhibit No. 551 for Identification.)

Mr. Knuff: I would like to have marked for Identification as Government's Exhibit 552, a one-page letter, dated December 28, 1934, addressed to Mr. M. H. Baker and signed E. W. Carey, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 552 for Identification.)

Mr. Knuff: I now offer in evidence Government's Exhibits 550, 551 and 552.

Justice Stephens: What is the last one received, Mrs. Gillette?

Mrs. Gillette: Exhibit 549.

4325 Mr. Bromley: We make the usual objection; and in addition, we object because they are incompetent, on the ground that there is no identification.

Justice Stephens: Exhibits 550, 551 and 552 have not yet been identified. There is no testimony that this is the signature of Mr. Carey. Exhibit 552 is addressed to Baker of National Gypsum Company; 551 to Krumholtz of Universal; and 550 to Black of American—

Mr. Knuff: (Interposing) In connection with Government's Exhibits 550 to 552, inclusive, I think the exhibits identify themselves. Government's Exhibit 549 was offered in evidence and was received, subject to the usual objection. If you will note Government's Exhibit 549 and compare it with Government's Exhibit 550, they are identical, word for word. Government's Exhibit 550 was obtained by us, under subpoena, from the files of the American Gypsum Company, and as I say, it is word for word, signature and everything else, identical with Government's Exhibit 549.

The same is true as to Government's Exhibit 551. It is likewise identical, word for word, with Government's Exhibit 549.

Exhibit 552 is identical, word for word, with Government's Exhibit 549. Government's Exhibit 552 differs from Government's Exhibits 550 and 551 only to the extent that in 552 we do not have the attachments that
4326 were attached to Government's Exhibits 550 and 551. Otherwise, it is identical with 549.

Justice Stephens: What are you offering to prove by them, that they were received by Mr. Black and by Mr. Krumholtz, and by Mr. Baker?

Mr. Knuff: We are offering them to prove that they were sent by the Board Survey Company to the persons mentioned in the letters themselves, and came from their files.

Justice Stephens: Let me make an inquiry. American is in the background of Certain-teed. Who is speaking for Certain-teed here today? Is there anyone representing Mr. Adams?

Mr. Knuff: American is in the background of Celotex, if I may correct you.

Justice Stephens: That is right, I was looking at the American Cement Plaster. I misspoke myself.

What do you say to that, Mr. Oliver, concerning Celotex? Are you in a position to admit that Exhibit 550 was received by American?

Mr. Oliver: No, Your Honor.

Justice Stephens: You are not?

Mr. Oliver: No.

Justice Stephens: Are you in a position to admit that it was taken from the files of American or of Celotex?

Mr. Oliver: I don't know that. They were taken
4327 long before I had anything to do with the case.

Justice Stephens: What about National? Mr. Finck, what about this letter to Mr. Krumholtz?

Mr. Finck: I am only in a position to state that that did come from the files of the National Gypsum Company.

And also, the letter addressed to Universal, I believe, came from our files. No, it did not, I am sorry.

Justice Stephens: No, that wouldn't be likely.

How about 552, Mr. Finck, addressed to Mr. Baker?

Mr. Finck: That is the one I was speaking about. That came from the files of the National Gypsum Company.

Justice Stephens: I was asking you about 551, addressed to Krumholtz.

Mr. Finck: That did not come from our files.

Mr. Knuff: We got that from the files of National. It came from the files of National on May 3, 1940. It was in Container Box No. 12. It was Item No. 20, and it was taken out by Mr. Wise.

Justice Stephens: Let's pass on these one at a time.

The first one is Exhibit 550. Mr. Oliver, for Celotex, refuses to concede that this was received by or that it was found in the files of American Gypsum Company, and there is no identification of the signature as that of E. W. Carey, and therefore no proof that it was sent or received, or who it was sent or received by.

4328 I don't see how you expect the Court to pronounce that identified.

Mr. Knuff: Whether it was sent or received makes no difference. It is still a declaration of the person who wrote it.

Justice Stephens: But it isn't proved that it was written by Mr. Carey. There is no evidence before the Court to that effect.

Mr. Knuff: There is no question as to Mr. Carey's signature on the previous document, Exhibit 549.

Justice Stephens: You are asking the Court to sit as handwriting experts and making witnesses out of the Judges. You can't do that. You will have to identify it.

Isn't Mr. Carey living, or is he not?

Mr. Bromley: Yes, he is, and is under subpoena. He has been here for days and days.

Mr. Knuff: He has not been here under subpoena for days and days at all.

Justice Stephens: Let's not have any acrimonious debate. We can make our affirmances and denials in a temperate way. Is he under subpoena?

Mr. Knuff: He is under subpoena, but he is not here under subpoena.

Justice Stephens: Is he in the court room?

Mr. Bromley: Not now.

4329 Justice Stephens: Is he in the city?

Mr. Bromley: Not now.

Justice Stephens: If he is under subpoena, he can be obtained, undoubtedly, and these things can be put in in the regular way. There certainly is no identification as to Exhibit 550. The objection to that is sustained.

Now as to Exhibit 551, that, you say, you are not prepared to admit, Mr. Finck, was taken from the files of Universal?

Mr. Fink: There is nothing on the letter to indicate that it came from our files, but if Mr. Knuff says that we sent it to them, I will agree to that.

Justice Stephens: We are of the view that none of these three exhibits are identified, 550, 551 and 552. You can call Mr. Carey to identify the signatures and testify, if he can, that they were sent out as they purport to have been sent out. You may re-offer them when they are properly identified.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 553, the same being a letter dated December 31, 1934, addressed to George N. Lenci, and signed E. W. Carey, Executive Secretary.

Will you state whether or not that letter was received at the office of the Ebsary Gypsum Company? A.

4330 Yes.

(The document referred to was marked as Government's Exhibit No. 553 for Identification.)

Mr. Knuff: I would like to have marked for Identification as Government's Exhibit 554, a letter dated December 31, 1934, addressed to Mr. Arthur R. Black and signed Board Survey Company, E. W. Carey, Secretary.

(The document referred to was marked as Government's Exhibit No. 554 for Identification.)

Mr. Knuff: I am not unmindful of Your Honors' former ruling, but in order to get this on the record and to keep the numbering consecutive, I now offer in evidence Government's Exhibits 553 and 554.

Justice Stephens: Is there any objection to Exhibit 553 except the usual objection?

Mr. Bromley: No, sir.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 553, was received in evidence.)

Justice Stephens: Do you object to Exhibit No. 554?

4331 Mr. Bromley: Yes, sir, as incompetent, and the usual objection.

Justice Stephens: The objection is sustained on the ground that it is not yet identified. It may be re-offered if it can be identified. Let me read it, Mr. Knuff.

Mr. Knuff: It is the same as Exhibit 553, Your Honor.

Justice Stephens: You may proceed.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 555, the same being a letter dated December 31, 1934, addressed to George N. Lenci, and signed E. W. Carey, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 555 for Identification.)

By Mr. Knuff:

Q. Was that letter received in the office of the Ebsary Gypsum Company? A. Yes.

Justice Jackson: Are you offering that?

Mr. Knuff: I am going to offer 555, 556, and some more, later on.

Justice Jackson: All right.

Mr. Knuff: I would like to have marked for Identification as Government's Exhibit 556, a letter dated De-

4332 cember 31, 1934, addressed to Mr. Arthur R. Black, and signed E. W. Carey, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 556 for Identification.)

Mr. Knuff: I would also like to have marked for Identification as Government's Exhibit 557, a letter dated December 31, 1934, addressed to R. F. Burley, and signed E. W. Carey, Exhibit 557 has attached to it a carbon of a reply, dated January 5, 1935, addressed to Mr. E. W. Carey and signed National Gypsum Company, Vice President.

(The document referred to was marked as Government's Exhibit No. 557 for Identification.)

Mr. Knuff: I would like at this time to offer Government's Exhibits 555, 556, and 557.

Mr. Bromley: We make the usual objection to Exhibit 555.

Justice Stephens: Exhibit 555 is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 555, was received in evidence.)

Mr. Bromley: With respect to Exhibits 556 and
4333 557, we make the usual objection, and also object on the ground that they are incompetent because not identified.

Justice Stephens: The objection with respect to incompetency is sustained. The exhibits may be re-offered if they can be identified.

Mr. Knuff: If Your Honors will please turn over five photostats, you will come to a letter dated May 10, 1935, which is a letter addressed to George N. Lenci and signed Board Survey Company, E. W. Ca[illegible] Secretary. I will ask that that be marked for Identifica[illegible] as Government's Exhibit 558.

(The document referred to was marked as Government's Exhibit No. 558 for Identification.)

By Mr. Knuff:

Q. Mr. Lenci, was that letter received in the office of the Ebsary Gypsum Company, and did it come from the Ebsary Gypsum Company's files? A. Well, it is a copy of a letter, and, there isn't anything to show that we did receive it. There is no identifying stamp on it.

Mr. Knuff: I don't know whether the Court would take my word for it or not, but I can say that according to the system that we use in the Department, the markings we use in the Department, that letter was received from
4334 the Ebsary Gypsum Company, and came from their files. That is evidenced by the reverse side of the letter, where it is marked "E-9". That indicates to us that it came from the Ebsary Gypsum Company's files, and it was in the 9th container.

I don't know whether that will be satisfactory to the attorneys for the defense or not.

Justice Stephens: The Court has no question, of course, about your word, Mr. Knuff, but we can all be mistaken,

and if there is a dispute about it the Court has to rule upon it on the basis of the dispute.

Are you still in the state of mind of not knowing whether that came from your files or not?

The Witness: I didn't have a chance to read the letter itself. I just looked for the identification marks.

Justice Stephens: Read it.

(Exhibit examined by the witness.)

By Mr. Knuff:

Q. Would you say, Mr. Lenci, in view of what I have told you, that that was received from your company—

Justice Stephens: (Interposing) By your company, you mean?

Mr. Knuff: It was received by us from his company.

By Mr. Knuff:

Q. (Continuing) —that that was received from
4335 the Ebsary Gypsum Company's files? A. I really don't remember the letter itself, but I am willing to take your statement that it did come from our files.

Mr. Knuff: We offer in evidence Government's Exhibit 558.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 558, was received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, I want to direct your attention now to some practices that were probably governed by the license bulletins, and in particular I want to inquire as to what was the practice of the Ebsary Gypsum Company.

When you sell a truckload of board f.o.b. dealer's warehouse at the minimum price, do you hire the dealer's truck to haul the board from your mill? A. No, we do not.

Q. Do you know what the practice of other companies is under the same situation? A. Only just by observation.

Q. Do the other companies have the same practice?

4336 Mr. Bromley: I object to that as incompetent because based on hearsay and calling for a conclusion.

Mr. Knuff: He said "by observation".

Justice Jackson: I am wondering how many of the other companies' activities he observed?

Justice Stephens: What do you mean by saying you knew it "by observation"?

The Witness: Well, the biggest trucking area is the metropolitan New York area, and I have seen trucks delivering products of the other manufacturers.

Justice Jackson: All of the other manufacturers?

The Witness: The two principal competitors, in fact three of our competitors.

Justice Stephens: If you have seen it personally, you can tell about it.

The Witness: Yes.

By Mr. Knuff:

Q. Do they have the same practice? A. Yes, they all contract with the trucking companies.

Q. Was that practice o ours based upon any provision in the license bulletins of USG? A. No.

Q. Well, now, suppose we take a look at Government's Exhibit 37, and look at page 531.

(Government's Exhibit 37 handed to Witness.)

4337 By Mr. Knuff:

Q. It is the last paragraph on the page, under "Rebates", and at about the 6th line down.

Mr. Lenci, will you look at that bulletin and see if you care to change your answer? A. No.

Justice Stephens: Just a minute, please. Do not answer until we read it.

The Witness: I am sorry.

(Exhibit examined by the Court.)

Justice Jackson: You answered the question "No."?

The Witness: Yes.

By Mr. Knuff:

Q. I don't know what you mean by "no". A. You asked if I wanted to change my answer after looking at this exhibit.

Q. Yes. And you say you don't care to—

Justice Jackson: (Interposing) The answer was no; isn't that what you said?

The Witness: Yes.

Justice Jackson: Go ahead.

By Mr. Knuff:

Q. When you say that your answer is no, do you mean by that that you never desired to hire the customers'
4338 trucks? A. The question of desire didn't enter into it. We had an established practice in our own business, in our own company. We had warehouses for years before we ever signed a board license contract, and we had continuing arrangements with trucking companies in Newark and in New York, and when we took on the board business we simply continued on with these same trucking contractors, or similar trucking contractors. So the bulletin made no change whatever in our practice.

Q. Mr. Lenci, when you sell board to a dealer at the minimum prices and that board turns out to be of poor quality, do you make any adjustment on the price of that board before you refer it to USG and get their consent?

Mr. Bromley: I object to that as assuming facts not in evidence, to-wit, that he did refer it to USG.

Mr. Knuff: I am asking him for his practice, Your Honor, the practice of this company.

Justice Stephens: Read the question.

(The question was read by the reporter.)

Justice Stephens: The question assumes that he does refer it to USG. Therefore, it assumes a fact not in evidence. You can ask him whether he does.

Mr. Knuff: Suppose I break the question down.

Justice Jackson: That is it.

By Mr. Knuff:

4339 Q. Do you ever make any adjustments on board of poor quality? A. We have had to from time to time.

Q. Now then, whenever you make those adjustments, is it your practice to get the consent of USG before the adjustment is made? A. No, the way we actually—

Mr. Bromley: (Interposing) I object. That is an answer—"No".

Mr. Knuff: He is entitled to explain his answer.

Justice Jackson: I think he is.

Of course, you can get his explanation by just another question.

Justice Stephens: I suppose it goes back to the previous practice, Mr. Bromley, that a non-responsive answer is only objectionable—unless upon the ground of incompetency, irrelevancy and immateriality—in the mouth of the examining lawyer; so that objection will be overruled. But you should, so far as possible, in the interest of time, answer the questions directly, and you can be quite sure, Mr. Lenci, that either Mr. Knuff or Mr. Steffen or Mr. Bromley will bring out the whole truth before you are let off the witness stand.

Justice Jackson: You are doing a remarkably fine job anyway.

4340 The Witness: I was trying to give some additional information that would throw light on both sides.

Justice Stephens: We are not criticizing you at all.

The Witness: I will try to keep quiet.

By Mr. Knuff:

Q. What is your practice? A. At the end of each month when we filed our royalty reports, if there were any settlements during the month for bad material, we attached to that a copy of the credit memorandum which was given to our customers, which showed an explanation as to why the credit was necessary.

Q. Do you know whether USG ever investigated the accuracy or the correctness of that credit memoranda? A. I have no way of knowing.

Q. Did they always allow your claims? A. Yes.

4341 Mr. Bromley: Just to make that clear, didn't this have to do only with royalties?

Justice Jackson: That is what you meant, isn't it? You didn't have to pay a royalty on the board, or so much of the board as was required to make the adjustment?

The Witness: That is right, but we had to file this information to show if we had made any credits for damaged material.

Justice Jackson: Would that make your royalty less?

The Witness: It would also affect our royalty, yes.

Mr. Knuff: My question, if your Honor please, was based upon the provision in Government's Exhibit 37, at page 534, beginning at the third line from the bottom of that page, "or through allowance or adjustments on board which the customer", and so forth.

Justice Jackson: Well, he is telling you what they did.

Mr. Knuff: That is right.

By Mr. Knuff:

Q. Mr. Lenci, when you sold board in pool or mixed cars in certain areas, for instance the Metropolitan New York-New Jersey area, was it your practice to specify the minimum amount that would be sold to anyone in the pool car? A. No.

Q. You didn't specify the minimum amount? A. No.

4342 Q. Mr. Lenci, if you had knowledge that orders for less than straight carload quantities of board had been pooled for the purpose of obtaining the carload price, would you have sold the board at the carload price?

Mr. Oliver: I object to that question as speculative.

Justice Jackson: Do you understand that question?

The Witness: No.

Justice Jackson: I don't understand the question either, Mr. Knuff.

Mr. Knuff: I will repeat it.

By Mr. Knuff:

Q. If you had knowledge that orders for less than straight carload quantities of board had been pooled for the purpose of obtaining a carload price, would you have sold that board to the persons pooling the order, at the carload price?

Justice Stephens: Do you understand the question?

The Witness: It isn't very clear.

Justice Jackson: I don't understand it.

Justice Stephens: Pooled by whom, Mr. Knuff?

Mr. Knuff: The purchasers of board. Under the license bulletins, if three persons pooled their purchases to buy a carload of board, and if the manufacturer had knowledge that that was done for the purpose of obtaining the carload price, then that was considered by the licensor as a violation of the bulletins.

4343 Justice Jackson: Now your explanation is quite clear. Ask the witness.

Mr. Knuff: That is what I have done.

Justice Jackson: Not that way.

The Witness: Well, that is just a little different.

Mr. Oliver: I object. I think it is asking entirely for speculation. The question involves two assumptions. It seems to me that here we are trying to get the facts, not assumptions.

Justice Stephens: The objection is sustained to the question as asked. In view of all this explanation, possibly

you can re-ask the question and the witness will understand it.

Mr. Knuff: Mr. Lenci, if three people pooled their orders—

Justice Stephens: (Interposing) Can't you get at it in a shorthand way, by asking this witness what the practice was that he observed with respect to pooled cars, if he knew about them?

Mr. Knuff: I can.

Justice Stephens: Do that.

By Mr. Knuff:

Q. What was the practice that you observed in the industry with respect to pooled cars? A. That depends on what territory the pooled car was going into, and during what period of time, because the rules were different in different territories, and they varied during this fifteen-
4344 year period.

Justice Stephens: Can you take any particular period and give an illustration of it to counsel?

The Witness: Yes. Early in the period, when there was a differential between carload prices and less than carload prices, which were either delivered by truck or mixed cars in the metropolitan areas, there was a differential of $2. Therefore, if three customers got together and fixed up a carload between them, and if we knew that those three customers were doing that for the purpose of taking advantage of the $2 differential, I would look upon that as a violation.

By Mr. Knuff:

Q. And you wouldn't have sold them the car? A. No.

Q. And did you base your action upon the provisions of the license bulletins as you understood them? A. As I recall it, there was something to that effect in the early bulletins.

Q. Was it your practice, Mr. Lenci, to sell and deliver board in pool truckloads, or is there such a thing in the gypsum industry as a pool truck? A. Yes.

Q. There is? A. As I recall it, the rule is that the truckload had to have the minimum quantity specified for
4345 truckloads during whatever period of time it took place. In other words, the bulletins changed their minimums from time to time. If the minimum truckload

was 7,500 square feet, and if you had a pool truckload, you could have 7,500 feet of board on it, and you could fill out with other materials. But you could not go below the 7,500 feet, as I recall it.

Q. Isn't that a mixed truck that you have in mind there? A. Speaking for our company, we never shipped any pool truckloads.

Q. Is there such a thing under the license bulletins—can you sell a pool truckload of gypsum board?

Mr. Bromley: I object to that as incompetent, because calling for a conclusion. The bulletins speak for themselves.

Justice Stephens: Sustained. You may ask him what his practice was, and what his understanding was.

By Mr. Knuff:

Q. What was the practice of the Ebsary Gypsum Company with reference to selling pool truckloads of gypsum board?

Mr. Oliver: I object because the witness has already answered that he didn't sell pool truckloads.

Justice Jackson: He can answer it again, although he did say that.

The Witness: I don't think we ever sold pool truckloads.

Justice Stephens: Announce the recess.

(Whereupon, a five-minute recess was taken, after which the trial was resumed.)

4346 Mr. Knuff: I have here, your Honor, four samples of board that I would like to have marked for identification as Government's Exhibits 45, 46, 47 and 48, respectively. That is not a misstatement—I mean 45, 46, 47 and 48.

Justice Stephens: Are they vacant numbers?

Mr. Knuff: We left the numbers from 1 to 100 to be used for certain classes of things such as contracts and exhibits of this nature. Then from 100 on are the letters and so forth which the witnesses are identifying.

Justice Stephens: All right.

(The samples of board referred to were marked as Government's Exhibits Nos. 45 to 48, inclusive, for identification.)

Mr. Knuff: I would also like to have marked for identification two strips of tape, as Government's Exhibits 49 and 50, respectively.

(The strips of tape referred to were marked as Government's Exhibits Nos. 49 and 50, respectively.)

By Mr. Knuff:

Q. Mr. Lenci, I show you what has been marked for identification as Government's Exhibit 45. Will you tell us what that is, please? A. That is a sample of our wallboard.

4347 Justice Stephens: A sample of what?

The Witness: Wallboard.

Justice Jackson: Made by the Ebsary Company?

The Witness: Made by the Ebsary Gypsum Company.

By Mr. Knuff:

Q. Can you tell us when that sample was made? A. No, because I took that out of our stock. It was made within the last year or so.

Q. Is it from your regular production? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit No. 46, and ask you if you will tell us what that is. A. That is a sample of our metallized lath, or foil lath made by the Ebsary Gypsum Company.

Q. Can you tell us when it was made? A. About the same time as the other.

Q. And it is from your regular production? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit No. 47. Will you state for the record what that is, please? A. That is a sample of the regular gypsum lath made by the Ebsary Gypsum Company.

Q. Can you tell us when it was made? A. Within
4348 the last two or three years.

Q. And is it from your regular production? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 48. Will you state for the record what that is? A. That is a sample of the perforated gypsum lath made by the Ebsary Gypsum Company.

Q. And made within the last one or two years? A. Yes.

Q. And it is from your regular production? A. That is right.

Q. I show you what has been marked for identification as Government's Exhibit No. 49. Will you tell us what that is? A. Exhibit 49 is a sample of the tape—

Justice Jackson: (Interposing) Tape?

The Witness: Tape—that we use to bind our wallboard in pairs for shipment.

By Mr. Knuff:

Q. And does that tape have on it any patent markings? A. Yes, it has.

Q. And how long have those patent markings, how long have those same patent markings, been on that tape, or tape of that character, Mr. Lenci? A. Well, I have forgotten when they were revised the last time, but
4349 they have been on for six or eight years, approximately.

Q. The same markings? A. These markings, yes. Prior to that I believe there were different ones, and then they were corrected at some date during the latter 1930's.

Justice Jackson: You mean that the patent numbers were changed?

The Witness: Yes.

By Mr. Knuff:

Q. Are those numbers that appear on that tape the only patent numbers that you are using? A. That I don't know; these are the patent numbers which we show, and I believe they were given to us by the United States Gypsum Company as being the proper patent numbers to put on the tape.

Q. Mr. Lenci, I show you what has been marked for identification as Government's Exhibit No. 50. Will you tell us what that is? A. Exhibit 50 is the tape that we use to bind our lath together in bundles of six, for convenience in handling.

Q. That tape has on it certain patent numbers, does it not? A. Yes.

Q. And how long have those— A. (Interposing)
4350 My answer to that would be the same as to the previous question.

Justice Stephens: You bundle your board in 2's and your lath in 6's?

The Witness: That is right.

Mr. Knuff: We can obtain photostats, if your Honor

pleases, of the tape. I don't know how we can get photostats of the board.

Justice Jackson: You needn't mind that, we can see them.

Mr. Knuff: Would you like to have photostats of the tape?

Justice Stephens: I don't think that is necessary, we can look at them.

Mr. Knuff: We are not offering these at this time, we are simply having them marked for identification.

You may cross examine the witness.

Justice Stephens: Are you ready to cross examine now, Mr. Bromley?

Mr. Bromley: Yes, your Honor.

Could I see the samples of the board and the tape, please?

(Thereupon, Government's Exhibits Nos. 45 to 50, inclusive, for identification, were handed to Mr. Bromley.)

Justice Stephens: Before you proceed—it occurs to the Court, Mr. Knuff, that unless there is some good reason why you don't want to offer these exhibits, the two pieces of tape and the four pieces of board, at the present time, that it might be well to offer them now because otherwise the witness might have to be recalled for further cross examination.

4351

Mr. Steffen: We would rather not offer them now, your Honor.

Justice Stephens: Very well.

Cross Examination

By Mr. Bromley:

Q. Mr. Lenci, your company has a trade name for its wallboard, doesn't it? A. Yes.

Q. What is that trade name? A. Wallrite.

Q. One word, is it? A. One word.

Q. And Government's Exhibit 45 for identification is a small sample of your wallboard which, as marketed, comes in much larger sizes? A. That is correct.

Q. And the sizes in which you market it are shown on the red, blue and white advertising which is pasted on Government's Exhibit 45 for identification? A. There are sizes mentioned on there; I don't know whether that is a complete list, or not. I haven't checked that recently.

Q. Well, at least the product that is marketed as Wall-rite by your company, comes in lengths of 6, 7, 8, 9,
4352 10 and 12 feet, doesn't it? A. That is correct.

Q. And is either 32 inches or 48 inches wide? A. That is right.

Q. And it is either a quarter of an inch or three-eighths of an inch in thickness? A. Or one-half inch, yes.

Q. Or one-half inch? A. Yes.

Q. And it is made so that there is a side to be turned into the room, that is which would constitute the wall, the room side of the wall, and that is the side on which the exhibit number appears, isn't that so? A. That is correct.

Q. And that is the side which stands either as a finished wall, after it is erected, or which is painted for purposes of decoration, isn't that right? A. That is correct, yes.

Q. Now they don't ever put wallpaper over this, do they? A. Sometimes.

Q. Sometimes they put wallpaper over it? A. Yes.

Q. But it is so manufactured that it can constitute the finished wall itself without any wallpaper and without any paint? A. That is correct.

4353 Q. Although it can be either painted or wallpapered? A. That is right.

Q. Do you make this wallboard with a recessed edge so that the seams can be concealed? A. Yes, we do.

Justice Jackson: Is that a tongue-and-groove or a lap?

The Witness: It is neither one. Taking the cream face of the board, there is a slight depression parallel with the long edges, and that is filled with a thin plaster composition and a tape over it, which finishes flush with the surface of the board. That is known as a recessed-edge board.

Justice Jackson: I see.

By Mr. Bromley:

Q. And when that tape and finisher is applied, the eye cannot detect any seam at all in the finished wall? A. We hope not.

Justice Jackson: That is the intention anyhow, isn't it?

The Witness: Yes, that is the intention.

By Mr. Bromley:

Q. Coming to Exhibit 46 for identification, that is a sample of metallized lath, you say? A. That is correct, yes, sir.

Q. And again this product, as well as plain lath, is sold

under your trade name, in this case, Lathrite? A. That is correct.

4354 Q. One word? A. Yes, sir.

Q. And that is a sample of the product which, as marketed, comes in a larger size? A. That is correct, yes.

Q. And about what is the size in which it is marketed? A. The standard size for gypsum lath is 16 inches by 48 inches.

Q. This Exhibit 46 with the foil backing, is designed for the purpose of, in ordinary usage, having the foil backing next to the studding, isn't it? A. That is correct.

Q. This gray paper surface underneath the advertisement is on the inside or room side of the wall, and is the surface to which the plaster coat is applied? A. That is correct.

Q. And the purpose of the foil is to reflect both heat and cold so as to achieve an insulating result, isn't that so? A. That is correct.

Justice Stephens: How can you reflect cold? Cold is the absence of heat.

The Witness: I had rather not go into that. (Laughter.) There is a perefectly good answer for that, but I am not enough of an engineer to give it to you.

Justice Stephens: It sounds to me like reflecting dark.

4355 The Witness: Well, it doesn't reflect—maybe I had better not start this. (Laughter.)

Justice Stephens: Very well.

Mr. Bromley: When I said "reflect"—you are familiar with the simple test, as you not, where, if you hold this surface up towards the sun or toward a blast of cold air, and hold your hand in front of it, you can feel it come back at you, can't you?

The Witness: That is true.

By Mr. Bromley:

Q. Very definitely? A. Yes.

Q. The theory is that this foil will not let either a blast of cold air or a blast of hot air through the foil because it reflects it back in the direction from which it came? A. Yes.

Q. Now Exhibit 47 for identification again is marked Lathrite, but this is a sample of ordinary lath which is used generally in a size larger than this sample, for the purpose of serving as the plaster base, is that correct? A. That is right.

Q. And is it true that this ordinary lath, of which Exhibit 47 for identification is a sample, again comes in a size, generally, 16 by 48 inches? A. Yes, sir.

4356 Q. And with respect to this ordinary lath, it doesn't make any difference which side is toward the interior of the room? A. They are both the same.

Q. Plaster will adhere to either side with equal facility? A. That is right.

Q. And is it true that this lath, when it is erected on the studding, is nailed so that the four-foot dimension runs horizontal to, or parallel with the floor? A. That is correct.

Q. Exhibit 48 for identification is another sample of your product, Lathrite, but this time in perforated form? A. That is right.

Q. It comes in the same size as the plain lath, does it not, 16 by 48 inches? A. Yes.

Q. And its use is similar, in that plaster will adhere to either side? A. Yes.

Q. And it is nailed up on the studding with the four-foot dimension in a horizontal position? A. That is right.

Q. And the holes through which the plaster goes, give the plaster coat added strength so that it can resist fire? A. It gives an additional key to the plaster.

4357 Q. When a dealer, having purchased these products from you, resells to the contracting or consuming trade, does he sell this board under your trade name? A. I don't quite get your question. Do you mean does the consumer ask for it by name?

Q. Well, does the consumer ask for it, or the dealer offer it, by name? A. It may be either way. Some dealers will feature our particular line. Other dealers will carry a line of several manufacturers. On the other hand, there are certain customers who will demand one particular manufacturer's product from the dealer.

Q. When you say "customers" you mean contractors or consumers? A. Yes.

Justice Stephens: What I understood to have been asked of you was whether or not, if this board was sold by you to a dealer, and the dealer resold to a consumer, he sold it in this form under your trade name?

Justice Jackson: Does he sell it under the name of Lathrite when he sells your product?

The Witness: The chances are he just calls it gypsum lath.

By Mr. Bromley:

Q. Well, you conduct advertising, don't you, to advertise your trade names, Wallrite and Lathrite? A. To a
4358 certain extent. We don't do a great deal of advertising.

Q. Now when you commenced to manufacture this board, back in 1928, you made it with the edges open or raw all the way around, didn't you? A. Yes.

Q. And it is true, is it not, that in 1928 and 1929 you found this so-called open-edge board to be an unsatisfactory product for several reasons? A. That is correct.

Q. One of those reasons was, was it not, that it was expensive to make, and it was expensive to make because it was wasteful to make, isn't that so? A. That is correct.

Q. And the waste came from the fact that after it had been fabricated and spread out on this traveling belt of the board machine, a portion of it had to be trimmed off by these revolving saws, of which you spoke, on each side? A. That is correct.

Q. And that resulted in the accumulation, with some rapidity, of great piles of raw edges that were sawed off from the sides, did it not? A. Yes.

Q. That waste was unreclaimable, wasn't it? A. We couldn't use it for anything else whatever.

4359 Q. Didn't you also find, in 1928 and 1929, that the dealer trade demanded the closed-edge board, which was then being manufactured by certain of your competitors? A. Yes, we did.

Q. And therefore wouldn't you say that it became increasingly difficult, after you started to manufacture open-edge board, to sell it? A. It was extremely hard.

Q. At page 4045 of the record, between lines 9 and 17, you testified with respect to a meeting in Chicago in May, 1929, which you attended.

You received a draft of the proposed license from USG prior to the time that you went out to Chicago in May, 1929, did you not? A. Yes, that is my recollection.

Q. Now isn't it the fact that before you left to go out to Chicago in May, 1929, Mr. Ebsary and the rest of the responsible officers and directors of your company had determined and decided to take a license from USG? A. We very definitely realized that we would have to have a license in

order to make a board which we could manufacture economically and which we could market.

Q. Hadn't you reached that decision, however, before you left for Chicago in May, 1929? A. Yes.

4360 Q. When you went out there, didn't you take your lawyer along with you for the purpose of attending to the legal details and putting the contract into a form acceptable to your company? A. That is correct.

Q. Now your lawyer was Harlan W. Rippey, was he not? A. Yes.

Q. He later was United States District Judge for the Western District of New York, wasn't he? A. Yes.

Q. Prior to that time he had his office and practice in Rochester, New York, didn't he? A. Yes.

Q. And later on he became, and is at the present time, a judge of the Court of Appeals of the State of New York? A. Yes.

Justice Stephens: Is that correct?

The Witness: Yes.

Justice Stephens: Mr. Bromley, I don't find on page 4045 any reference to a license agreement. I call your attention to that only for the purpose of keeping the record straight.

Mr. Bromley: I inferred that from the fact that in line 6 the answer refers to a meeting of May 21st and May 22nd, 1929, the testimony being that at that time the license agreement was signed, that is on May 22nd.

4361 Justice Garrett: Also, lines 12 and 13 speak of the proposed license.

Mr. Bromley: Yes, as Judge Garrett says, lines 12 and 13 do refer to the proposed license.

Justice Stephens: I had understood you to say that his testimony showed, at page 4045, that the license contract had been presented to them before they went out there, and I don't find anything to that effect on that page.

Mr. Bromley: I was in error if I said that. I meant to ask him, independent of that testimony, if it wasn't the fact that prior to the time that he went out there a draft of the contract had been sent to his company.

By Mr. Bromley:

Q. That is right, isn't it? A. That is right.

Q. You would say, wouldn't you, Mr. Lenci, that the primary reason for the Ebsary Company taking a license was its desire and need to manufacture a closed-edge type of board? A. Yes.

Q. You knew, did you not, at some time in May, 1929, at least, that the license which was offered, covered many patents other than the Utzman closed-edge patent? A. Yes.

Q. For instance, you knew, didn't you, that it covered the machine for the making of the patented closed edge?

4362 A. Yes.

Q. And you knew, didn't you, that that patent did not expire until sometime in 1937? A. I knew it was much later, I don't remember the date.

Q. So far as you were concerned, were you satisfied that your company needed the right to use all, or a substantial number of, these patents, in order especially to make the closed-edge type of board? A. Yes.

Q. Do you recall that the license agreement which you say was executed on May 22, 1929, specifically provided that price control should expire with the expiration of the Utzman closed-edge patent, that is to say, on August 6, 1929? A. Yes.

Q. Now at any time during the course of your conferences in Chicago on May 21 and 22, 1929, or at any time prior thereto, did you have any knowledge as to what the prices would be, should they thereafter be fixed by USG? A. No, we did not.

Q. Did you have any discussion with Mr. Avery, or did you hear any, or with anyone else from USG, as to what the price or prices would be which would be fixed after you took a license? A. I never knew, and Mr. Ebsary didn't know, what those prices would be until after the licenses were signed and the first of the price bulletins was handed to us.

4363 That was our first knowledge, and I remember very well opening those letters to see what the price was going to be.

Q. Now at page 4047, in testifying as to who was present on May 21st and May 22nd, 1929, you said that Mr. Kelley was there. Isn't it a fact that Mr. Kelley did not attend at that time in connection with these negotiations at all, Mr. Lenci? A. I believe that was a mistake. I had no record to check myself with.

Q. And you now wish to correct your answer which appears at the top of page 4048, which was given to this question:

"Q. Do you know whether Stephen Kelley was out there? A. I think he was".

Do you want to correct that so as to say that your present recollection is that he was not there at all? A. Yes.

Q. At page 4048 you testified that you did not recall as to whether anybody was there representing American. Isn't it the fact, sir, that you have thought about that and your present recollection is that American was not represented by anyone, either on May 21st, May 22nd or May 23d, 1939? A. I don't believe they were represented.

Q. At page 4072 you testified, still with respect to the May 21-22 meeting, that Certain-teed was represented by Mr. C. O. Brown and Mr. Wittemore. Did you know that Mr. Brown has heretofore testified in this case and told us that he was not present at that meeting, Mr. Lenci? A. Yes, I have seen that in the record since. I believe it was George Brown who was there at that meeting.

4364

Q. And do you wish now to correct your testimony so that it will appear that your recollection now is that Certain-teed was represented out there by George M. Brown and Mr. Whittemore, and not by Mr. C. O. Brown? A. That is right.

Q. At page 4052 you testified that you recalled that Mr. Avery said that if all companies would take out a license, that that would correct the demoralized condition which the board industry found itself in. Do you recall that testimony? A. I don't remember that exact wording, no.

Q. Well, you said "yes" to a question which had all those words in it, do you remember that? A. I didn't think that that was my wording. Yes, I probably did say that.

Q. Now isn't it the fact, sir, that you couldn't really recall anything that Mr. Avery said? A. It is a long time ago to remember the exact details of a meeting of that kind.

Q. Well, is it your recollection that Avery said anything in the way of a sales talk to the men who were out there at that time? A. Well, as I remember it, Mr. Avery didn't do anything to try to sell us the license. We had come out there, speaking for ourselves, anxious to take the license. He didn't have to convince us of the necessity for taking it.

4365

Q. Don't you now remember that the other companies that were represented there also had determined to take licenses before they came there? A. I believe they had.

Q. Well then, wouldn't you say, Mr. Lenci, that there was no reason whatsoever for Mr. Avery to attempt to sell the proposition to anybody there present? A. I don't remember what he said, Mr. Bromley.

Q. Well you said, further on down the page—that is page 4052, in answer to the question:

"Q. Do you recall at that time that Mr. MacLeish, or Mr. Avery, illustrated their point by saying that under the General Electric case it was permissible for the owner of a patent to fix the price of a patented product? A. I remember that was mentioned by either one or the other, yes."

Now isn't it a fact, sir, that there was no discussion of the General Electric case at all until you and Mr. Rippey and Mr. MacLeish got off in a side room, and commenced to work on the form of the license which was to be offered and taken by Ebsary? A. Well, that might be, I don't
4366 remember whether it was in the general group or when we talked separately over our specific license. All I do remember was that it was mentioned while we were in Chicago on that trip.

Q. When you say "it", do you mean the General Electric case? A. The General Electric decision.

Q. That mention didn't take the form of saying, "Now we can correct this demoralized price condition because of the Supreme Court's decision in the General Electric case", did it? A. You say it did not take that form?

Q. It did not take that form, did it? A. I don't think it did.

Q. You said on direct examination that Mr. Avery made some reference to the litigation which was then in existence in the industry between his company and other companies. Do you recall that? A. Yes.

Q. Well now, isn't it the fact that if Mr. Avery said anything about "demoralized conditions in the industry", he said it with reference to his mention of the many lawsuits which were then pending between USG and its competitors? A. Well, I think he laid a great deal more stress on the litigation feature than he did on the price feature.

Q. I am trying to find out from you, Mr. Lenci, if I
4367 can, whether it isn't the fact that you don't remember that Mr. Avery said anything about price control at all? A. Well, I think it must have been mentioned at one time, possibly in the meeting that we had with Mr. MacLeish and Mr. Rippey, because that was in the contract and would be one of the things which would be spoken about and talked over.

Q. Well, aren't you confusing the discussion between those two lawyers, MacLeish and Rippey, in your own nego-

tiations, and what was said there, with what Mr. Avery said when he gave this little speech of greeting to the members of the industry assembled on May 21st? A. That may be, I don't remember at which meeting it took place.

Justice Stephens: We will have to take the afternoon adjournment at this time.

Before we do so, I would like to change my mind, Mr. Knuff, about one matter. If you can do so, without undue trouble, I would like to have photostats of those two pieces of tape. I would like to have a complete file, if possible, with every exhibit in it which is feasible to be in it, for the Presiding Judge.

Also, if you could, without undue difficulty, furnish me with duplicates of those samples of board and lath, when you offer them, I would like that also.

The Witness: I can do so, but it might take a few days.

4368 Justice Jackson: It would probably also be better if Mr. Lenci would furnish additional pieces of tape for us.

The Witness: I was going to say that when I got these additional samples, why not also send along extra pieces of tape? It would be much cheaper than trying to make photostats.

Justice Stephens: Yes, we would greatly appreciate that if you could do so. Just send them to the Government and they can deliver them to us.

(Thereupon, at 4:05 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Wednesday, February 23, 1944.)

4369 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Wednesday, February 23, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4371 You may proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed his testimony as follows:

Cross Examination (resumed)

Mr. Knuff: If your Honor pleases, I gave to the Clerk the photostats of Exhibit 513-A. I don't know whether you have them or not.

Justice Stephens: Thank you very much.

Mr. Steffen: Your Honor, I should like to make a
4372 short statement before Mr. Bromley begins.

I should like at this time to renew our objection to the right of defense counsel to ask leading questions upon their examination of a witness called by the Government as if upon cross-examination under Rule 43(b). And in this connection, I wish to base it, first, upon the ground that Rule 43(b) does not permit Mr. Bromley to ask leading questions, as we construe it; and, secondly, upon the ground that I think the Court might, as a matter of discretion, consider that it is improper for Mr. Bromley to ask Mr. Lenci leading questions in view of the examination as it proceeded yesterday, which disclosed that defense counsel have been in conference with Mr. Lenci and have taken up various matters with him, and in no true sense is he the Government's witness. He is represented here by Mr. Varian; on our first talk with Mr. Lenci, Mr. Varian came over as his counsel; and therefore, I think we must say that he, in all respects, is defense counsel's witness, although called by the Government, out of turn, as if upon cross-examination.

And on that matter of whose witness he might be, I would refer Your Honors to page 122 of the Proceedings of the Institute held here in Washington in 1938. The point was not very completely answered, but the Committee at that time stated, in effect—

4373 Justice Stephens: (Interposing) you mean the American Law Institute?

Mr. Steffen: No, the Institute which prepared these rules. The committee which prepared these rules stated, in response to a direct question, that the person calling a witness as if upon cross-examination was entitled to do with him everything which he might do if the defendant had first called him and he was then being cross-examined; and that therefore, the question of whose witness he was was an academic question. In other words, they refused to say that he was the witness of the person calling him as if upon cross-examination.

I would like to have a continuing objection, in the event Your Honors overrule me.

Justice Stephens: The record may show your continuing objection, and that it is overruled. We think it would be error to deny the defendants the right to cross-examine this witness. The witness seems to us a fair witness towards both sides in the case, and we do not think the rule contemplates that because the plaintiff calls a witness, the opposite party is denied the right of cross-examination.

By Mr. Bromley:

Q. You said yesterday, on cross-examination, Mr. Lenci, that you thought price control must have been men-
4374 tioned in May, 1929, in Chicago, "because that was in the contract and would be one of the things which would be spoken about and talked over."

In connection with that answer—

Justice Garrett: (Interposing) That is on page—

Mr. Bromley: (Interposing) Page 4660, near the top.

By Mr. Bromley:

Q. Isn't it now your best recollection that if price control, or the General Electric case, were mentioned at all by anybody, it was mentioned in the conference between your lawyer, Judge Rippey, and Mr. MacLeish, and not by Mr. Avery? A. That may be right.

Q. Well, can't you give us your best recollection? A. Well, it is a long time ago, and it is awfully hard to place it exactly, but I do know that those things were discussed between Mr. Rippey and Mr. MacLeish.

Q. Well, isn't it the fact that you just do not have any recollection, so far as what Mr. Avery did or did not say on this subject is concerned? A. My recollection is not too clear.

Q. Well, isn't it more than that? Isn't it the fact, the true fact, that you have no recollection about it at all, and you merely think that the subject must have been mentioned by someone? A. Well, I know it was mentioned by someone.

4375 Q. And you know that because price control was in the contract? A. Yes.

Justice Stephens: What page are you referring to?

Mr. Bromley: Page 4660, the first answer at the top of the page, on cross-examination.

Justice Stephens: Page 4660?

Mr. Bromley: Yes, sir, that is in yesterday afternoon's session, near the end.

Justice Stephens: Oh, yes.

By Mr. Bromley:

Q. You were in Chicago in May, 1929, in connection with license matters, on May 21, May 22, and May 23, weren't you? A. Yes.

Q. And how many occasions, on those three days, were there on which all of the representatives of companies there

present assembled in a room together? Did that happen once, twice, three times, or how many times? A. Well, to the best of my recollection, they all assembled there on May 21, on arrival,—I mean, that was the first day. I believe they all met on that morning. I don't believe there was another complete assemblage that afternoon, I am quite sure there wasn't, and I don't think there was the second morning. But I think during the second afternoon they
4376 were probably all there.

Q. Well, what was that occasion? A. Well, to make it a little clearer, after they met on the first day, they all broke up to consider their individual problems under the proposed licenses, to get their licenses straightened out and signed; and to the best of my recollection, that was done during the afternoon of the first day and the morning of the second day. And after that was completed, then they met during the afternoon of the second day.

Q. What was that meeting about? A. When the ones who were going to sign had signed up, I think they just naturally drifted back together again.

Q. Was anything done or said at that meeting? A. The reason I say I think they were mostly all there is because that was the time that the price bulletins were given out, the first bulletins.

Q. Well, is that all that transpired at this afternoon meeting on May 22, so far as you can remember, the giving out of the price bulletins? A. I don't think there was very much.

Q. You mean very much else? A. That is right.

Q. Now the next day, on May 23, there was a third occasion when all the representatives came together in
4377 a common place, was there not? A. Yes. That must have been in the morning, because most of us left on the trains leaving around noontime.

Q. And that was the occasion, was it not, at which the bubble invention was explained by Mr. Avery? A. That is correct, yes.

Q. Up to that time, had any mention been made by anyone from USG of the fact that there was a bubble invention covering the manufacture of light-weight board, so far as you can remember? A. That was the first I ever heard of it.

Q. And, of course, there was nothing in the license contracts that were executed on May 22, that covered the bubble invention? A. No.

Q. Now let me ask you this: At any of these meetings in Chicago in May, 1929, at any time, whether you were all together or whether you weren't, were there any understandings reached among you, or agreements, other than those expressed in the written license contracts, one of which you signed? A. No.

Q. And to make that specific, were you a party to or did you know of any agreement or understanding to the effect that the licensees would discontinue the manufac-
4378 ture of open-edge board and no longer make it? A. Was there an agreement to that effect?

Q. Yes. A. No.

Q. Now you have told us, as I remember it, that so far as your company was concerned, it was your policy to go over, once you get the license, to the production of closed-edge board? A. We were very anxious to.

Q. And you determined, yourself, no longer to make open-edge board, didn't you? A. Yes.

Q. Now was that a matter which was determined by you and your company officials, independently of anyone else? A. Yes, very much so. We were very anxious to get into it, to make the closed-edge board.

Q. And at that time, in Chicago, or at any other time in 1929, did you have any understanding or agreement with anyone with respect to the prices which you would either quote or charge on such open-edge bo. d as you might sell after May 22, 1929? A. No.

Q. Did you have any understanding or agreement with anyone with respect to the prices which you would quote or charge for second grade board, or No. 2 board,
4379 which you might have on hand and offer for sale, and sell?

Mr. Steffen: That refers to open-edge?

Mr. Bromley: Open-edge, yes, not covered by the license.

The Witness: No, not any that wasn't covered by the license, no.

Mr. Bromley: Will you show the witness Exhibits 405, 406, and 407, please?

(Government's Exhibits Nos. 405, 406, and 407 were handed to the witness.)

By Mr. Bromley:

Q. Will you tell us what prices those figures are that are mentioned in that exhibit, Exhibit 405? First, tell us whose prices they are? A. They are prices that we estab-

lished, our company established, and sent to our salesmen for use, for quoting on our open-edge board as long as it lasted, and then you will note a reference to the new covered-edge wallboard, when ready.

Q. In the next to the last paragraph? A. Yes.

Q. Is it to be inferred from this Exhibit 405 that your company received these prices from its customers on any sales that were made of open-edge board? A. I doubt—

4380 Mr. Steffen: (Interposing) That asks for a conclusion, Your Honor, that you can't draw from this particular exhibit, certainly.

Mr. Bromley: I will withdraw it.

By Mr. Bromley:

Q. Can you tell us whether or not, as a matter of fact, your company received these prices from its customers to whom it may have sold open-edge board at or after this time?

Mr. Steffen: If you know.

By Mr. Bromley:

Q. If you know, yes. A. Well, I was going to say I doubt very much if we did.

Mr. Steffen: I move to strike that, Your Honor. He simply states his doubts. He knows or doesn't know.

Justice Stephens: It doesn't seem to the Court that it ought to be stricken. You have asked this witness dozens of questions of this sort in the course of your examination, or Mr. Knuff has. Why should the defendants be denied the right to probe into what the defendant recollects?

Mr. Steffen: I have no objection to his probing. He just simply says, "I doubt", and that is what I want to have stricken.

Justice Stephens: I am of this view, and I think
4381 my colleagues share it, Mr. Steffen—I have announced it before in the course of similar objections—while it is true you have been asking leading questions of this witness, you examined him on direct-examination and you will rely, and you have a right to rely, upon the statements that he made as a foundation for the Government's case.

Now the defendants, as we understand the rules, are entitled to cross-examine him and to try to weaken the force of his direct statements. And one of the ways in which they can do that is to test the reasonableness of his

direct statements, just as you could if you were cross-examining a witness who had been relied upon by your opponent on direct-examination. For that reason, to ask for conclusions or inferences, on cross-examination of witnesses who have been called on direct-examination, is permissible because it goes to the dependability or reasonableness or credibility or accuracy of his statements on the examination on which you rely.

This particular answer isn't of very great importance one way or the other, but since it does present that question we want counsel to be fairly advised upon it. It is not our view that it is forbidden, upon cross-examination, to go into the witness' state of mind, including his reasons, his doubts, his conclusions, his inferences, if to do so has a bearing upon the dependability, correctness, ac-
4382 curacy or truthfulness of his statements on direct-examination. On direct-examination you often can't go into conclusions, because you are required there, if you are proving contracts, to show what actually happened, what was said, and there you are calling the witness as your own witness and you are accrediting him, you are relying upon him.

The fact that you lead this witness under Rule 43 doesn't alter the fact that you are relying upon him as the Government's witness, you are presenting his testimony with the hope of convincing the Court that it constitutes a part of the case of conspiracy and combination and unlawful price fixing.

It seems to us it would be error to deny to the opposite side the opportunity to attack the force of his testimony.

Mr. Steffen: I would like to say that we, of course, rely on any testimony, whether elicited on direct or upon cross-examination, and I don't think that goes to the question of whether he is our witness, or defendants' witness, or just a stray witness, which I think largely he is at this particular juncture.

My objection was not to the question, which I think was appropriate, but simply to the answer, which I thought was purely speculative and ought, therefore, to be stricken.

Justice Stephens: The objection is overruled. The motion to strike is denied.

4383 I might add that it seems to us, Mr. Steffen, the premise of your objection is unfounded. You say—I know you speak in good part and colloquially—"a stray witness", that he is neither your witness nor the other side's

witness. But the plain fact is that you call him to prove your case, in part, and when you call him you rely upon his statements, you accredit them, you offer them to the Court. Therefore, the opposite party has a right to attempt to modify them, or qualify them, or indicate that he misunderstood your questions, or to vary them in any way in which it properly can; and we think this is not improper. You surely rely upon this witness' testimony, don't you?

Mr. Steffen: We most positively do rely upon this witness' testimony, but we rely upon it as we would upon any other evidence which we elicit upon cross-examination. And if I might state, without going into any lengthy talk and all in good part, we rely upon it as coming under Section 43(b), which says that "a party may call an adverse party, or an officer"—and Mr. Lenci is an officer—"of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects"—it doesn't say "in some respects"—, "as if he had been called by the adverse party."

This rule has the force of statute, and it is bind-
4384 ing upon any and all trial courts. That seems literally to say that it is as though Mr. Bromley had first called Mr. Lenci and we are then, under the rule, entitled to interrogate him by leading questions, to qualify and impeach in all respects as though Mr. Bromley had first called him. Of course, that goes to our basic objection, which Your Honor has kindly permitted us to have as a continuing objection, to all this line of testimony. But I think, in fairness to our case, we will have to insist upon that in order to protect our record.

Justice Stephens: You may make your record, and your record is fully protected, and we have no objection to your doing that. But I might say informally that I had something to do with the formulation of these rules. Indeed, I was the person, as Assistant Attorney General, who advised the introduction of the statute as a result of which the Supreme Court was given power to compile these rules. It was I and one other who selected Major Tolman, who later became Secretary of the committee at the time, to commence the work and I kept in close touch with it. And I may say that the rules have been a considerable disappointment to me. They seem to me to be very unfair to defendants. I don't think they were calculated to be so, but I

think it is the almost universal judgment of the bar that the rules are extremely unfair to defendants and give an extreme advantage to plaintiffs.

4385 Of course, we are bound by them, and we realize that. And we are a trial court in good faith trying to obey them. I do not believe, and I do not believe the Supreme Court will take the extreme position, that they go so far in their advantage to plaintiffs and disadvantage to defendants as to deny to a defendant the right to ask leading questions of a defendant on whose testimony the opposite party relies. I think that would be extremely unfair, and I do not think the Supreme Court would sustain any such position.

Proceed with your examination.

By Mr. Bromley:

Q. Isn't it your best recollection now, Mr. Lenci, that as a matter of fact, your company did not receive, in the majority of instances, for its open-edge board, the prices which you directed your salesmen to quote in Exhibit 405? A. Yes, that is the reason I said I doubted very much if we did receive those prices, because at that time we had orders taken below these prices, and we were selling below these prices, had to sell below these prices.

Q. Well, isn't it the plain fact that in the market at that time, with closed-edge board being offered and sold by competitors, it was completely impossible for your company to get prices as high as these contained in these three

43[illegible] exhibits, for open-edge board? A. Yes, the customers wouldn't pay for it.

Q. And isn't it the fact that so far as your supply of open-edge board was concerned, in 1929, you had to take what you could get for it from your customers? A. We tried to get as much as we could for it. We didn't throw it away, because we couldn't afford to, but we did try to get as much as we could and to get out with the least amount of loss.

Q. And would you say that that resulted in a wide variation in the amount of the price which you received from different customers, over this period, for open-edge board? A. Yes, it did.

Q. Some reference was made on your direct examination to the fact that the prices contained in Exhibits 405, 406 and 407 were the USG bulletin prices. You understood, didn't you, at this time, that USG was not fixing your price for open-edge board? A. That is correct, yes.

Q. And it is the fact, then, that these prices in these three exhibits, 405, 406 and 407, while they may have been the same in amount as the prices fixed by USG for closed-edge board, were not USG bulletin prices? A. No, they were not.

Q. And did you have any understanding with
4387 USG or anyone else, that following your signing of the license you would direct your salesmen to quote for your open-edge board the same price that USG had fixed in its first bulletin for closed-edge board? A. No.

Q. Can you tell the Court what your reason was, if any, for sending these prices out to your salesmen? A. Well, we naturally were trying to get our price—get as much for this open-edge board, that we had left on our hands, as we could—and we sent these prices out to our salesmen as a sort of a standard to get up to. We knew we couldn't get any more than these prices, and we hoped we would get as near them as we could.

Q. And likewise, did you issue the instruction to your salesmen contained in the first paragraph of Exhibit 407, with respect to billing weights, as a matter of your own independent policy? A. Yes.

Q. And is it true that you had no agreement or understanding with USG or anyone else as to what, if any, billing weight you would use on open-edge board? A. No, there was no understanding or discussion about the weight of open-edge board.

Q. I said a minute ago, impliedly, in one of my questions, that the prices contained in these three ex-
4388 hibits were the same, in amount, as those contained in the USG price bulletins for patented, closed-edge board. Is that true, do you know? A. I believe that to be true. I would like to check it before I could say yes or no to it.

Q. Will you look at Exhibit 404, please? A. I don't think that my prices are as complete as the bulletin prices.

(Exhibit 404 handed to the witness.)

By Mr. Bromley:

Q. Now looking at Exhibit 405 and Exhibit 404, the price of $13.50 which you sent on your 3/8" lath, open-edge, is the same figure as Exhibit 404, the USG price bulletin of May 23, sets for 1/4" and 3/8" plasterboards which are seconds—isn't that right? A. No—

Justice Garrett: (Interposing) Pardon me, Mr. Bromley. Exhibit 404 is a 3-page exhibit. Would you mind giving the line there?

Mr. Bromley: Yes, sir, on the first page, right in the middle of the page, the prices read starting at $20.00, $17.50, $17.50, and $22.50, and then $15.00. And then below the next paragraph you see a price of $13.50.

The Witness: That $13.50 price is for 1/4" and 3/8" plasterboards, but not seconds. That is a new
4389 paragraph starting there. The paragraph reading "SECONDS" refers to the line above it. It says 3/8" gypsum wallboard SECONDS—

Justice Stephens: (Interposing) $15.00?

The Witness: Yes, sir.

By Mr. Bromley:

Q. Well, turning to Exhibit 405, we find that you have instructed your salesmen to quote $15.00 for open-edge wallboard. A. Yes.

Q. There is an instance in which you set as your price, for the purpose of quotations for open-edge, first-grade wallboard, the same figure which USG had set for second-grade wallboard; is that true? A. For seconds.

Q. Seconds, closed-edge wallboard? A. That is correct.

Q. That $17.50 price in Exhibit 405 is a price which you instructed your salesmen to quote covering the sale of your new covered-edge wallboard when and if you should get into production of it and have it made? A. That is right. The first two words of the third paragraph, "When ready", should be attached at the end of that sentence which reads, "New covered-edge wallboard"—giving the sizes—"$17.50 per M sq. ft. f.o.b. mill, when
ready." If you will notice, that correction was made
4390 in all of the copies at the time.

Q. And is that likewise true in the middle of Exhibit 406? A. Yes, you will notice a pencilled correction was made in that a long time ago.

Q. Looking again at Exhibit 405, the handwritten note on the left-hand margin, "To be discontinued as soon as new board is ready", I ask you again, was your decision to discontinue the manufacture of open-edge board your own determination and not the result of any understanding with anyone else? A. Yes.

Q. You said at page 4095 of the record that you couldn't make open-edge and closed-edge board at the same time.

You merely meant that as a matter of mechanical possibility or practicability, didn't you? A. Oh, yes.

Q. You had no understanding that you would not make them both at the same time, or any other time? A. No.

Q. Then on the same page, lines 21 to 23, in answer to a question of Judge Garrett you said, "If you have in mind if we had any open-edge board still in stock, of course we would have to sell that at this price."

4391 What did you mean by that answer? A. I don't get enough of the context there to recall.

Q. Judge Garrett said:

"I would have interpreted that, myself, to mean that they were to discontinue the quotation of prices on open-edge board when the new board went into production."

And you said:

"If you have in mind if we had any open-edge board still in stock, of course we would have to sell them at this price."

A. Well, I meant at the prices mentioned in my letter of May 23, 1929, Exhibit 405.

Q. When you said you would "have to sell" it at this price, you meant merely as a matter of business policy? A. Yes, that we couldn't get any more than that.

Q. You did not mean by that answer to indicate that you were compelled or bound to sell open-edge board at any specified amount, did you? A. No.

Q. Now, did I understand you to say that the Ebsary Company had never made a second-grade board? A. That is correct.

Q. At any time? A. That is right.

Q. Either open or closed-edge? A. That is right.

4392 Justice Garrett: Going back to that matter there, in view of the fact that I asked some questions about it,—I mean on page 4095,—in my questions I was seeking the interpretation of those notes on the side, and the witness stated that they meant they would discontinue the manufacture of open-edge board. The question of mine which you read was to the effect that I, independent of his explanation, would have interpreted them to mean that he would discontinue the quotation of those prices.

Mr. Bromley: And he said no, that wasn't so.

Justice Garrett: No, he said that meant they would discontinue the manufacture of the board after they began the manufacture of closed-edge board. That is the way I understand it.

The Witness: That is right.

By Mr. Bromley:

Q. But would continue, Mr. Lenci, quoting prices on open-edge board until you had sold it all? A. That is right.

Q. And in your answer to Judge Garrett, you meant that you would go ahead quoting prices, such as are contained in Exhibit 405, getting what you could for the board, until it was all disposed of? A. That is correct.

Q. And, of course, after you ran out of your
4393 supply of open-edge board on hand, you discontinued quoting prices? A. Yes.

Q. You didn't have any to sell? A. That is right.

Q. Now, did you have any understanding or agreement with anyone with respect to standardizing your methods of manufacture, outside of any license agreement, I mean? A. As to the machinery to be used or the product to be made, which do you mean?

Q. Well, as to machinery to be used, first, outside of the license agreements. A. Well, there wasn't any understanding. There was only one place to go, that I know of, to buy a board machine.

Q. Where was that? A. That was the Ehrsam Manufacturing Company in Kansas. You see, there are not very many board machines sold, so you can't go around and buy a board machine like you can a LaSalle, and this was the only place we knew to go to buy a board machine, and we went to these people and they gave us a price on the board machine, and we bought one.

Q. This Ehrsam Company is no part of USG, is it? A. Oh, no.

Mr. Steffen: May I have that related as to time? When was that board machine purchased?

The Witness: It was purchased in 1928. It was
4394 in operation about the middle of 1928, so I would say it was purchased probably in the early spring of 1928. It took some time to install it.

By Mr. Bromley:

Q. Did you have any understanding or agreement that if you took the license, USG would raise or stabilize prices on patented board covered by the license? A. No.

Q. And you said yesterday, didn't you, that you never had any discussion at any time with Mr. Avery, or anyone else, as to what price he would establish after the execution of the license? A. That is correct.

Q. Did you have any understanding or agreement with anyone with respect to what price you should quote or charge for plaster? A. No.

Q. Or for other unpatented articles, such as tile block and Keene's Cement? A. No.

Q. And did you enter into or know of any agreement or understanding that jobbers would be eliminated from the distributive system of gypsum board? A. No.

Mr. Steffen: Those questions are all outside of
4395 the license agreement, as I understand it.

Mr. Bromley: Yes.

Mr. Steffen: Does the witness understand that?

The Witness: Yes.

Mr. Bromley: Well, inside the license agreement. You don't contend that there is any agreement in the license agreement that jobbers will be eliminated?

Mr. Steffen: We not only contend it, but I think we have proven it. The license agreements, followed by the bulletins.

By Mr. Bromley:

Q. Did you have any understanding or agreement with anyone else that at any time in the future a jobber discount would be discontinued, and the price to jobbers made the same as the dealer price? A. We had no understanding on it at all.

Mr. Steffen: That question also is outside of the license agreement and the bulletins?

Mr. Bromley: No, either out or in. However, I will limit it first to outside the license agreement.

By Mr. Bromley:

Q. You didn't have any understanding that the jobber price would be, at some time in the future, subsequent to 1929, raised to the amount of the dealer price? A. No.

4396 Q. Now, was it your understanding that there was anything in the license agreement, or in the bulletins, which prohibited your selling your goods to jobbers? A. No.

Q. There came a time, in 1930, did there not, when you received a bulletin which fixed the jobber price at the same figure as the price for dealers? A. That is correct.

Q. Now, did you have any part in that determination, or did it come as a surprise to you when you got it? A. It

came as an order, as a direction in the form of a bulletin. We had no part in making that up.

Q. You said yesterday that you knew the Utzman closed-edge patent expired on or about August 6, 1929. At any one of these occasions in May, 1929, when you were in Chicago, did you have any understanding, or did you know of any understanding or agreement, with anybody, that if you would sign your license and the others would sign theirs, USG would find some patent or find some way to continue price control after August 6, 1929? A. No.

Q. And after Mr. Avery disclosed to you gentlemen present on May 23 the scope and nature of the foam or bubble board invention, did you gentlemen, in your company, decide that you wanted to obtain the right to
4397 use that invention? A. Yes, we did.

Q. Do you recall what Mr. Avery said with respect to the matter of offering your company, and others, a license under the foam or bubble invention? A. I don't remember his exact wording, but I remember that he explained what it was, and that the USG had secured the American rights for it, and that it was going to be offered to us.

Q. Do you recall that he said the invention was in the application stage in the Patent Office? A. Yes.

Q. And you testified, at page 4161, in a manner similar to your present statement, that Mr. Avery said the USG had obtained the American rights to the Bayer invention. Now don't you recall that as a matter of fact, Mr. Avery told you that at this time there were three inventors of the foam or bubble system, each one of whom had filed an application for a patent in the United States Patent Office? A. I remember only two, I remember the Bayer patent, the Bayer application, and the Roos application. The other I don't recall.

Q. Don't you remember there was a man named Rice, who had also filed an application—R-i-c-e? A. I have heard that name, but I don't remember it.

4398 Q. Do you recall that Mr. Avery told you, on May 23, that these applications were all in interference proceedings at that very time in the Patent Office? A. Yes.

Q. Do you recall further that so far as what you have called the American rights are concerned, what Avery said was that USG had a contract which provided that if Mr. Bayer won the interference proceedings then pending, USG would get exclusive United States rights, so far as

gypsum was concerned, under any patent which might thereafter be issued to Bayer? A. Yes, that is right.

Q. And you know, don't you, Mr. Lenci, that, of course, Mr. Roos eventually was given priority, and in 1934 or 1935, the foam-bubble invention patents were issued to Roos and not to Rice or to Bayer? A. That is right.

Q. And Mr. Roos, Carlisle K. Roos, was an inventor in the employ of the United States Gypsum Company at that time? A. That is right.

Q. What was the advantage, as Mr. Avery explained it, if he did, of the foam or bubble invention? A. Well, the primary advantage was that it would make a very much lighter board. This decrease in the weight
4399 would be a great saving in our freight charges, and it did have that result.

Q. Do you mean by that that it lowered the delivered price, made up of mill base plus freight, which the dealer-customer had to pay for board? A. Yes.

Q. That was because, weighing less, the freight that he had to pay was less? A. That is right.

Q. This system also did away with the necessity of using sawdust in the board, did it not? A. Yes.

Q. Up to this time, had it been your practice to introduce a certain amount of sawdust in the board in order to get lighter weight? A. Yes.

Q. And it was the fact, wasn't it, that due to the demand of the gypsum companies, sawdust was getting very difficult to obtain? A. It was hard to get, and you couldn't tell what kind of wood you might get, you would get all sorts of stains from the resin or the liquid in the sawdust.

Q. You mean the various chemical substances in sawdust would adversely affect the appearance of the
4400 board after it was made? A. Yes.

Q. And would those same chemical substances, present in the sawdust, also affect such things in production as the set of the gypsum? A. I don't recall that we had that trouble.

Q. In connection with Mr. Avery's disclosure of the foam or bubble invention, you took out a license sometime in October, 1929, I believe? A. Yes.

Q. Now, did you have any arrangement or agreement or understanding with anyone, outside of that license agreement, to the effect that you would take a license only if someone else did? A. No.

Q. And was it the independent decision of the management of your company to take a license under the bubble or foam inventions, and others specified in the license, because you desired to get the right to use the patents in your manufacturing processes? A. That is correct.

Q. You told the Court on direct that you went back to Chicago on or about the 6th of June—that is at page 4171—and that a meeting was held on that date in Chicago, and you were asked a great many questions, commencing at page 4170, and following, as to what discussions
4401 there were at that meeting concerning prices for patented board, and other matters.

Isn't it a fact that so far as prices and terms and conditions of sale were concerned, everything that was said there was limited to patented gypsum board, and did not extend to unpatented products? A. That is right.

Q. And isn't it true, Mr. Lenci, that that statement applies to your testimony with respect to all these meetings about which you have testified, from June 6, 1929, right on down through the licensee meetings? A. That is correct.

Q. Right down to the present time, if any have been held this late? A. Yes.

Q. That is to say, that the matters brought up there, and the questions asked and answered, had to do only with patented gypsum board and not unpatented products? A. That is right.

Justice Stephens: We will take the morning recess.

Before we do so, I should like to add to the Court's statement, concerning the objection of the Government to the asking of leading questions of this witness, the following:

The Court is well aware of the fact that Rule 43 provides that an opposite party or the officer of an
4402 opposite party, if it is a corporation, may be called, and that leading questions may be asked, and that he may be impeached or contradicted. But as the Court understands the reason for that rule, it was this,—that under the old rule, if a party plaintiff called a defendant to testify, or the officer of a corporate defendant, such party couldn't impeach him, or couldn't contradict him, even though he was very hostile actually, unless in the discretion of the Court it was permitted that he be cross examined.

That was unfair to the party calling such a witness. So I understand the purpose of the rule-makers was to relieve the party calling an adverse witness of that disadvantage. It doesn't seem to me to follow at all, from

that, that the purpose of the rule-makers in drawing 43(b) was to strip the opposite party of all of the rights with respect to cross examination which the opposite party had always had with respect to a witness called by its opponent. It seems to the Court that the Government is asking the Court to construe this rule as if it read, in terms, not only that the plaintiff, speaking in terms of the present situation, may call an adverse witness, an adverse party, or the officer of an adverse party, and lead him, but as if the rule also explicitly stated that the defendant in such a situation was forbidden to cross examine the witness relied upon by the plaintiff because leading ques-
4403 tions are a necessary part of cross examination.

It seems to the Court that the rules, although they do—I think it is universally accepted by all experienced judges and lawyers—operate, as drafted, unfairly in favor of plaintiffs, were certainly intended by the rule-makers to be fair to both sides, and it seems to the Court that they ought to be administered fairly to both sides except where they explicitly require an unfairness which the Court cannot escape because there is an explicit statutory direction, in effect, in the rules.

Mr. Steffen: May I say one word on the matter of fairness?

Justice Stephens: Yes.

Mr. Steffen: In this case, as Your Honors have observed, we have had to make out our entire case from gypsum men. We have no witnesses that can be looked at as plaintiff's witnesses in that they are favorable witnesses, and it is only because of that fact that we had to resort to the defendants, or officers of the defendants.

As I visualize the rule, it was intended to work either way, that a defendant likewise can call a plaintiff and put him on the stand. So it would seem to be, on that score, on paper at least, a perfectly fair rule.

Justice Stephens: Well, I think, Mr. Steffen—and I say this entirely in good part—that if you were in
4404 one of the very many cases in which the Government is a defendant—there are lots of them—you would find, if the opponents urged this rule, you would be very much disturbed by it.

We will now take the morning recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4405 Justice Stephens: Proceed.

By Mr. Bromley:

Q. During your direct examination, Mr. Lenci, about this meeting of June 6, 1929, in Chicago, you were asked many questions similar to the one appearing on page 4170, as follows, beginning on line 6:

"Q. At the meeting of June 6th, was there any discussion concerning the price at which gypsum products should be sold to house wreckers?"

And you answered: "A. Yes."

Now at this meeting of June 6th, was there a discussion about prices? A. No, I think the thing was an inquiry as to how house wreckers should be classified under the bulletins.

Q. And when you say that you think the thing was an inquiry, you mean an inquiry from one of the licensees, made of the licensor? A. Yes.

Q. And was that inquiry in effect a question as to the interpretation, or provision, or lack of it, in the existing price bulletins? A. Yes.

Q. Was there any "give and take" in the sense of a discussion, as to what should or should not be the prac-

4406 tices or prices, followed by a vote or a decision in any form? A. Oh, no, no.

Q. And when you answered these questions which were addressed to you so frequently, in the affirmative, that this and that was discussed at the meeting, isn't it a fact that you meant merely to say that these matters were brought up by way of questions from the licensees, and answers given by the licensor? A. Yes. You must realize that those bulletins were entirely new to all of us, and we couldn't always understand what they meant, and we would make the inquiry and United States Gypsum Company's representative would say that this means so-and-so, or that this is interpreted in this way. We were looking for information.

Q. But you did not mean to suggest by your direct testimony that any agreement or understanding was reached with respect to what should or should not be in the bulletins? A. No.

Q. And did USG make any commitments or promises or undertakings as to whether it would make changes in the bulletins, or add new provisions to the bulletins in the future? A. No. If it was a simple question, like that question of house wreckers, I believe that was answered immedi-

ately by Mr. Henning, or whoever represented the USG. Sometimes we would ask questions which they would
4407 have to think about, and those would come out in later bulletins.

Q. You testified in this connection at page 4177, beginning at line 20, as follows:

"Q. And you say that that custom of either selling it or else giving it away, had been prevalent in the gypsum industry for some time, is that correct? A. Yes, as I recall it."

You were referring to the giving away of filler. Do you recall that? A. Yes.

Q. Now the giving away of filler by the manufacturers was not a custom in the sense that it was a generally accepted or approved practice in the industry, was it? A. It was decidedly not approved.

Q. It was what the industry— A. (Interposing) It was a bad habit.

Q. It was what the industry regarded as an unfair trade practice, wasn't it? A. Yes.

Q. And all you meant to say by that testimony with respect to that, was that it was an unfair practice which was indulged in frequently by many companies? A. That is right.

Q. Is it a fact that the giving away of filler, as you discussed it in your direct testimony, was merely an-
4408 other way for a manufacturer to give a rebate in connection with the sale of his patented board? A. Yes.

Q. Do you recall that at this very time, that is in June, 1929, there was in existence a set of fair trade rules adopted by the industry under the guidance of the Federal Trade Commission, for the gypsum industry? A. Yes, I believe that was in 1929.

Q. And do you recall that among such rules was what was known as Rule 13, entitled, "Unfair specific practices", which provided that included within the practices prohibited, where they constitute rebates or where they are indulged in for the purpose and with the effect of discriminating in prices, and terms among purchasers of the same class purchasing under like conditions, are, among other things, the furnishing of materials without charge? A. Yes.

Q. So that at this very time, at the time of this discussion at the June 6th meeting, in your industry the Fair Trade Practice Rules prohibited, as an unfair trade practice, the giving of rebates in indirect fashion, among others

such as the giving away of free materials with an order of materials which were sold at a price? A. That is correct.

Q. And in connection with that meeting you tes-
4409 tified at page 4182, that some questions were asked with respect to protected jobs—do you recall that? A. Yes.

Q. And you gave the illustration on page 4181 of the contractor on the Pentagon Building who, in order to protect himself under his contract, would place an order with a manufacturer for a large amount of gypsum board. A. That is right.

Q. And you said that in connection with the meeting of June 6th there was some discussion about the taking of unlimited orders at a price, didn't you? A. Wasn't that, that we had taken orders which were not completed at that time? In other words, they had been taken without a limitation as to date of delivery by our company?

Q. Yes. You said there was some talk as to the length of time you would be permitted to protect a contractor on his purchases—no, I see you said you didn't remember any such discussion. A. That is right.

Q. Then you said that much later on a bulletin was issued by the licensor which provided that orders could be booked ahead only on specific jobs, and that the licensees couldn't take orders for unlimited quantities unless some particular job was involved. Was that right? A. That is my recollection, yes.

4410 Well, isn't it a fact that the only discussion that was had with respect to this matter, at that meeting, was that some of the licensees asked questions as to whether there was any restriction in the bulletins, or not? A. Yes, I think that we asked the same question ourselves.

Q. And the answer was that at that time there was no restriction in any of the bulletins? A. That is right, as I remember it.

Q. However, there was again another rule, do you recall, among the Fair Trade Practice Rules, Rule 16, which provided that a contract of sale which permits the buyer to cancel, or provide for a reduced price in the event of a market decline, and which does not permit the seller to cancel, or provide for an enhanced price in the event of a market rise, is lacking in mutuality and tends to induce controversy and breach of contract, and is therefore condemned by the industry? A. Yes.

Q. Now will you look at Exhibit 421, please?

(Thereupon, Government's Exhibit No. 421 was handed to the witness.)

Justice Garrett: Was the last provision you read one adopted by the Federal Trade Commission, or was it one of the regulations that was recommended—

Mr. Bromley: (Interposing) I was quoting from the regulations themselves, as adopted and approved.

4411 Mr. Steffen: May we have the date and also by whom they were adopted, please?

Mr. Bromley: June 10, 1929, is the date.

Mr. Steffen: And they were adopted by whom?

Mr. Bromley: They were adopted by the gypsum industry in March, 1929, and approved by the Federal Trade Commission thereafter on June 10. They are Defendants' Exhibit No. 3 for identification in this case.

By Mr. Bromley:

Q. Will you look at the first paragraph in Exhibit 421, please? A. Yes.

Q. You testified with regard to this exhibit that you could not precisely give the date when your new production facilities were in operation, but that it was sometime around a month or so after May 22, 1929. Do you recall that? A. Yes.

Q. Isn't the reference in the first paragraph of Exhibit 421 to your changing your price list, a reference to a change in your price list so far as it affected orders for patented board which you might thereafter produce? A. Yes, sir.

Q. And you understood at that time, did you not, that the price bulletins which you had received from the licensor up to June 21, 1929, applied only to patented board

4412 manufactured by your company? A. Yes.

Q. But is it the fact that prior to the time that you got into production, your company was nevertheless taking orders for patented board which you expected very shortly to produce yourselves? A. That is correct.

Q. And this Exhibit 421, and the reference to prices therein, is a reference to the prices which you were quoting for the patented board which you hoped to sell after you got into production? A. Yes.

Q. Of course, you are not sure as to whether or not by June 21, 1929, you were not, as a matter of fact, already in production, are you? A. We may have been at that time. We did it as quickly as we could.

Q. But at any rate, prior to the time that you got into production, and after you took the license, you did take

orders for patented board for future delivery? A. That is correct.

Q. Now at the June 6, 1929, meeting in Chicago, there was some reference to the proposed bubble or foam license, was there not? A. Yes.

4413 Q. And do you recall what you did, if anything, after that meeting, with respect to taking the matter up with your lawyer? A. Well, as I recall it, the proposed contract had been sent or was sent either just before June 6th or just after June 6th, and as soon as we got it we sent our copy immediately to our lawyer.

Q. And by June 6th nothing had happened, you had not heard from your lawyer, which was the reason for the inquiry made by Mr. Henning at the June 6th meeting, wasn't it? A. That is right.

Mr. Steffen: I think that should be—if he knows. I don't see how he can state what Mr. Henning's reason was.

Mr. Bromley: Well, I thought the exhibit showed that Mr. Henning said he hadn't heard from the proposed licenses which had been sent out to the various licensees, and wanted to know what they were doing, if anything, about it.

Justice Stephens: Which exhibit is that—are you still on Exhibit 421?

Mr. Bromley: Exhibit 420, I think it is.

Will you show the witness Exhibit 420, please?

(Thereupon, Government's Exhibit No. 420 was handed to the witness.)

Justice Stephens: I am not sure that I get the point. Will you read the question and answer?

4414 (Thereupon, the record was read by the reporter, as requested.)

Justice Stephens: This letter is dated June 21, 1929—Exhibit 420. It has nothing to do with June 6th.

Read the previous question, the one to which objection was made.

Mr. Steffen: The one that the reporter read is the one to which I objected.

Justice Stephens: I am sorry, I seem to be lost.

Mr. Steffen: I said "if he knows". This witness couldn't have known what Mr. Henning's reason might have been for raising the question concerning bubble board, as far as I can determine, and I would like to have the witness

simply answer if he knows that that was Mr. Henning's reason.

Justice Stephens: Do you wish to be heard, Mr. Bromley?

Mr. Bromley: No. I had better start over again. I was under the impression, although I have lost the reference—that there was testimony indicating that Mr. Henning seemed to be in a hurry to get the bubble license agreement signed by Ebsary, or a question along that line.

Do you recall that, Mr. Lenci?

The Witness: There was a question of that kind, yes.

By Mr. Bromley:

Q. Now isn't it the fact that after June 6, 1929, after the June 6, 1929, meeting, that you referred the draft
4415 of the bubble board license to Mr. Rippey for consideration? A. Yes.

Q. And you heard nothing from him, at least up to June 21, 1929, because on that date you wrote him a letter asking him about it, Exhibit 420, didn't you? A. That is right.

Q. And you did that among other reasons because you wanted to be able to be entirely familiar with the situation when you got to Chicago on June 26, 1929, if you should be asked any questions about it? A. That is right.

Q. Now do you recall that in connection with Exhibit 420—

Mr. Steffen: (Interposing) I don't think there is any evidence that he was there at the June 26th meeting. Isn't that calling for facts not in evidence?

Mr. Bromley: I haven't said that he was.

Mr. Steffen: The question assumed that he wrote to Judge Rippey on June 21st in order to have information, I think you said, at hand when he attended the meeting on June 26th.

Mr. Bromley: In expectation of attending that meeting. It is shown by the letter that he expected to be there.

Justice Stephens: I think that is clear.

Justice Jackson: That is just a paraphrasing of
4416 the words in the letter.

By Mr. Bromley:

Q. Do you recall that at or about this time Judge Rippey informed you that he had had a talk with Mr. MacLeish, and that Mr. MacLeish had told Mr. Rippey that your company should decide whether or not they wanted

to take this license before any consideration was given to the form of it?

Mr. Steffen: I object to that as hearsay, and not proper cross examination.

Justice Stephens: Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice Stephens: You are asking that not for the truth of the statement, but as a circumstance indicating the reasonableness of this witness' conduct?

Mr. Bromley: Yes.

Justice Stephens: The objection is overruled.

Mr. Bromley: Will you read the question again?

(Thereupon, the pending question was reread by the reporter.)

The Witness: Yes.

By Mr. Bromley:

Q. And you thereafter did decide to take the bubble license, did you? A. We did.

4417 Q. And it was signed on or about October 18, 1929, wasn't it? A. Yes.

Q. Now in connection with the negotiation and execution of that license, did you have any understanding with any one that you would take the license in order to induce USG to purchase the so-called starch patents of Haggerty and Hite? A. No.

Q. Can you recall when you first heard that USG had bought the Haggerty and Hite patents? A. No, I don't. It was sometime prior to October of 1929, that is as near as I can place it.

Q. And in connection with those patents were you ever a party to an understanding or agreement, or did you have any knowledge of any, whereby it was agreed among some or all of the gypsum manufacturers that they would, in the future, consider the use of the starch adhesive for bond as falling within the scope of the Haggerty or Hite patents, whether it did or not?

Mr. Steffen: I object to that, your Honor, as completely outside the direct examination, and it hasn't any basis or bearing to show the state of mind of Mr. Lenci.

Mr. Bromley: I can only say that it is charged in the complaint that as a part of the execution of the license

which he has examined this witness upon, Exhibit
4418 11, the starch-foam-bubble license—there was an extraneous understanding to the effect which I have just mentioned.

Justice Stephens: Well, I understand that, but the objection here, Mr. Bromley, is that this ought to be brought out as a part of your case and not on cross examination because not covered by the direct. Now how do you connect it with the direct examination?

Mr. Bromley: Well, I only connect it because he has examined this witness about the exhibit concerning which it is charged there was an extraneous oral understanding.

Justice Stephens: Which exhibit is that?

Mr. Bromley: Exhibit 11. I appreciate that he has not examined about this oral understanding, and my position must be that I am entitled to go into it although he didn't mention it, simply because he went into the written license, and it seems to me that that is proper cross.

Mr. Steffen: We have no recollection of having made any examination on Exhibit 11 which would admit of this type of cross examination, or any examination at all with respect to Exhibit 11.

Mr. Bromley: You can see right in the memorandum of the June 6th meeting, and the testimony with respect to it, counsel for the Government asked questions as to whether Henning wasn't trying to hurry these people up to get them to sign Exhibit 11.

4419 Justice Stephens: Asked questions of this witness?

Mr. Bromley: Of this witness, yes, sir, and I refer particularly to page 4163 of the transcript, at which point questions were asked about the June 6th meeting and the bubble license—and the bubble license is Exhibit 11.

Mr. Steffen: He is now going, your Honor, into the Hite and Haggerty patents, which we were not discussing at all. They had to do with starch.

Mr. Bromley: But they were covered by Exhibit 11.

Mr. Steffen: A lot of other things were covered by Exhibit 11 which haven't any bearing upon our examination.

Mr. Bromley: Perhaps I can get at it this way. Does the Government withdraw the charge—

Mr. Steffen: (Interposing) We do not withdraw the charge.

Justice Stephens: What charge? Let Mr. Bromley finish.

Mr. Steffen: Any one that he asks.

Justice Stephens: That won't help the Court much. I want to know what Mr. Bromley is asking. He was asking whether you withdraw the charge, or a charge, and you interrupted him. Complete your statement, Mr. Bromley.

Mr. Bromley: Does the Government now withdraw the charge that in connection with the execution of the foam-bubble board licenses there was an extraneous oral understanding among the licensees, with the licensor,
4420 that they would all consider the use of adhesive for bond as falling within the scope of the Haggerty and Hite patents, whether it did or not?

Mr. Steffen: I distinctly do not, your Honor, and I am surprised that the question should ever be asked.

Mr. Bromley: On page 4186 he asked the witness about these very starch patents.

Justice Jackson: What did he say?

Mr. Bromley: (Reading)

"Q. At the June 6th discussion was there anything brought up about the Hite and Haggerty patents, do you recall? A. I don't think so, I don't remember that at all.

"Q. Do you know what I mean by the so-called Hite and Haggerty patents? A. Yes.

"Q. The Haggerty patent is the patent that has starch in it? A. That is correct.

"Q. And you have no recollection of a discussion at the June 6th meeting concerning the Hite and Haggerty patents? A. No."

Justice Stephens: Are the Hite and Haggerty patents the patents covered by Exhibit No. 11?

Mr. Bromley: Yes, among others.

Justice Stephens: Where is the examination of
4421 this witness on Exhibit 11?

Mr. Steffen: There was none, your Honor.

Justice Stephens: Well, I understand that there is a dispute between counsel concerning that, and I am trying to find out whether there was or not.

Mr. Bromley: At page 4163. It starts at the bottom of page 4162.

Justice Garrett: That relates to the bubble patent.

Mr. Bromley: The bubble license, Exhibit 11, yes, sir.

Justice Stephens: Well, the Haggerty and Hite patents are starch patents, aren't they?

Mr. Bromley: Yes, and they are licensed under Exhibit 11, as well as the Roos patent.

Justice Stephens: Both the bubble and the starch patents are included in that exhibit?

Mr. Bromley: Yes, sir.

Mr. Steffen: That is correct.

Justice Stephens: Do you contend that the Government made any examination of this witness in respect of the Hite and Haggerty patents?

Mr. Bromley: Yes, sir.

Justice Stephens: At what point?

Mr. Bromley: At page 4186.

Mr. Steffen: I think, your Honor, that that testimony which has been referred to on page 4186 simply
4422 has to do with whether or not at the June 6th meeting there was anything said about the Hite and Haggerty patents, and the witness said that he didn't remember that there was, and the discussion ended there. There was no examination upon Exhibit 11, no examination as to the Hite and Haggerty patents.

The witness simply said that there was no discussion as to those at the June 6th meeting, and that ended it. If he wanted to cross examine—if there had been any discussion at the June 6th meeting—as to that matter, it would be, under the Federal rules, proper. But to take it to the June 26th meeting, and all subsequent meetings, and to go into a general discussion of Exhibit 11, is completely beyond the scope of our examination.

Justice Stephens: The examination of the witness, on page 4186, does not seem to include a reference to this exhibit, Mr. Bromley.

Mr. Bromley: No, it does not.

Justice Stephens: Read the pending question, please.

(Thereupon, the pending question was read by the reporter, as follows:

"Q. And in connection with those patents were you ever a party to an understanding or agreement, or did you have any knowledge of any, whereby it was agreed among some or all of the gypsum manufacturers that they would, in the future, consider the use of the starch adhesive
4423 for bond as falling within the scope of the Haggerty or Hite patents, whether it did or not?")

Justice Stephens: Well, the point seems to be a very close one, but we are inclined to view that the defendants

are entitled to examine the witness in respect of the bubble patents in the form that the question was asked; but not, Mr. Bromley, with respect to the Hite and Haggerty patents, because this witness wasn't examined in respect of Exhibit 11, on the Hite and Haggerty patents.

We do not foreclose you, however, from cross examining with respect to the testimony appearing at page 4186, where the witness said, in answer to the question:

"Q. And you have no recollection of a discussion at the June 6 meeting concerning the Hite and Haggerty patents? A. No."

You are not foreclosed, of course, from examining, on cross examination, as to whether he had a recollection at any other time on that subject.

The objection is sustained in part to the extent indicated, and overruled in part to the extent indicated.

Mr. Bromley: I feel that I haven't stated my position very clearly about the matter, and I would like, if your Honors will permit me, to say this.

The Government examined about Exhibit 419 for identification, which contained Mr. Lenci's notes of the
4424 June 6th meeting; and the very first item, you will see, refers to these bubble board contracts.

Now as I understand the Government, while they somewhat tentatively admit that a price fixing patent license, if done by a single trader, is lawful, as I understand their position it is, among other things, that our license contracts were unlawful because they were somehow arrived at as a result of concerted action taken at a meeting.

In the complaint they charge that there were a great many side understandings arrived at at these meetings, which themselves rendered the license contracts a subterfuge and a sham and unlawful.

Where Government counsel examines a witness about one of these meetings at which these license agreements were discussed, it does seem to me that I ought to be able to ask the witness on the stand who has testified, although it was very briefly, about the fact that this bubble license was discussed at the meeting, that I ought to be able to ask him any question with respect to whether or not any so-called understandings, outside of the contract, were reached or were not reached, because when my friend comes to the argument he is going to argue that there was something wrong about these license agreements because they were discussed at a meeting.

The complaint charges, in very great detail, just what the Government alleges transpired among these
4425 people by way of sub rosa agreements.

I had thought that the right to cross examine was very broad, springing from the mere fact that the Government has opened up this June 6th meeting, as well as the subsequent meetings, which had to do with the negotiation and final execution of these license agreements which they so vigorously attacked.

Justice Garrett: I don't suppose, Mr. Bromley, that you would concede that up to now the Government has made any proof respecting the Hite and Haggerty patents that would support the allegations of the complaint, would you?

Mr. Bromley: No, sir, I don't think they have, but I think they may argue—

Justice Garrett: (Interposing) Then you are fighting something—

Mr. Bromley: (Interposing) I may well be, I may well be fighting a shadow, but I think they will argue that from the fact that these matters were discussed, as they interpret the testimony, at meetings, they became illegal.

Now I agree with your Honor, I don't see how, up to this moment, they can argue that they have produced any evidence that there was any sub rosa agreement to consider the use of adhesive for bond as falling within the scope of the Haggerty and Hite patents.

Mr. Steffen: I think this is now getting the matter
4426 into the record in another way, by argument.

Mr. Bromley: My statement is not testimony—I wish it were.

Justice Stephens: There is no testimony on the subject. Do you wish to be heard, Mr. Steffen?

Mr. Steffen: I have to be heard. Mr. Bromley has now got us into a "tentative" concession regarding the single trader doctrine. We make no tentative concession as to that.

The single trader doctrine is referred to, and it is referred to as coming up in the Colgate case, but we make no concessions on that score.

On the matter of what is the proper scope of cross examination, I think that Mr. Bromley is limited, as Rule 43.(b) provides, to the scope of our examination, and our examination, I think, opened up certainly the question as to whether at the June 6 meeting there was any dis-

cussion of bubble board, and I think that in so far as Mr. Bromley wishes, he can cross examine at length on bubble board.

The only point that we have at all as to the starch patent occurs at page 4186, and all that the witness said was that there was no discussion of the Hite and Haggerty patents at that meeting.

Justice Jackson: I was just wondering, Mr. Steffen, where, if one side, as the Government has in this case, opens up a meeting, and has a witness on the stand
4427 who purports to tell everything that occurred at that meeting, why adverse counsel cannot ask whether or not other things were discussed or were not discussed.

Mr. Steffen: At that meeting, yes, we would be glad to have that, but I don't think that opens up the whole sweep of negotiations in the next ten years. If he wants to stay with the June 6th meeting, fine.

Justice Jackson: Or at any other meeting wherein this witness testified that this was discussed.

Mr. Steffen: At any other meeting where he raised that topic. The Federal rule on cross examination is fairly strict—

Justice Jackson: (Interposing) Oh, yes.

Mr. Steffen: (Continuing) —that you may not go beyond the bounds of the direct, and it is perfectly open to Mr. Bromley to bring on Mr. Lenci as his own witness at the proper time.

Justice Stephens: Well, the Federal rule on cross examination is strict in the sense that the Federal rule is not the old English rule that you could examine on anything charged in the complaint, or cross examination on anything charged in the complaint, within the issues.

At the same time the application of the rule as to what constitutes cross examination within the scope of the direct, inevitably involves, to a certain extent, the
4428 discretion of the Court.

Judge Jackson and I, in view of the further discussion with reference to Exhibit 419, are of the view that it is not improper for the defendants to cross examine this witness as to what happened at both the June 6 and June 26 meetings, or at any other meeting—

Mr. Steffen: (Interposing) He wasn't at the June 26th meeting at all, and he testified as to that.

Justice Stephens: I had understood you to admit that he was.

Mr. Steffen: No, we didn't say that.

Justice Stephens: Did this witness not testify about the June 26th meeting, Mr. Bromley?

Mr. Bromley: As I remember it, he said he was at "other meetings", the dates of which he could not remember, and that appears at page 4201.

Justice Jackson: He said he did not attend the March 17th meeting—I remember that. Isn't that correct, Mr. Lenci?

The Witness: That is right.

Justice Stephens: Well, it seems to me frankly, gentlemen of the Government, that it is cutting it too fine, unfairly fine, as against the defendants, to restrict the cross examination as narrowly as you insist. Certainly you are relying upon the testimony of this witness concerning the bubble patents, and the Hite and Haggerty pat-
4429 ents, to the extent that he gave any. He has testified that he attended the June 6th meeting. Whether he attended the other meeting he doesn't know, but he testified that he went to some other meetings.

We will take the noon recess and consider it during the recess.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

4430 AFTERNOON SESSION

(The trial was resumed at 2:00 o'clock p.m.)

Justice Stephens: Since these questions of the proper scope of cross examination seem to be constantly arising, we have gone into this matter with some pains, and I will try to state very briefly the understanding of the law as we have it, so that counsel may be guided in the future, and perhaps time will be saved.

We understand that the distinction between the so-called American, or Federal, and the so-called English rule, is that the English rule permits cross examination on any subject within the issues, whether or not it was gone into on direct examination. That is not the American or Federal rule. The Federal rule limits the cross examination to the scope of the direct. But that means the subject of the direct examination, it means the topics gone into on direct examination, and inferences to be drawn, as well as explicit statements, from the direct examination.

Cross examination within the subject of the direct examination is a matter of right, and it is error to deny it. The extent to which it may go is discretionary.

What involves the subject of the direct examination of course is, to a certain extent, inevitably discretionary. Except where time is of the essence of an issue, the topic or subject, rather than the mere date on which it was
4431 discussed, is of primary importance.

The rules are as well stated, I think, and in as succinct form as they can be, in Jones on Evidence, Volume 3, Fourth Edition, Section 821.

I will not read the whole of the section, although I will ask the court reporter to copy it as the basis of the ruling of the Court. I will refer to one or two sentences which particularly apply to the situation we have here.

(Section 821 of Jones on Evidence, Volume 3, Fourth Edition, is as follows:)

Relation of Cross Examination to Direct Examination.—The American rule does not require that the cross examining counsel be confined to the phases of a subject that have been introduced in the direct examination. Where a general subject has been entered upon in the examination in chief, the cross examining counsel may ask any relevant question on the general subject; he is not bound to follow the line of examination pursued by the adverse party. Even as to matters which are purely defensive, some of the authorities hold that it rests in the sound discretion of the court to allow the defendant to cross examine the plaintiff's witnesses. Although there are instances in which it has been held to be error in a civil action to allow cross examination as to matters which are not connected with the examination in chief, yet the prevailing rule is that very much must be left to the discretion
4432 of the presiding judge in the determination of this question. It has been said: "Unless a trial court shall so far overstep the bounds as to admit that in cross examination which clearly has no connection with the direct testimony, an appellate court would not be justified in reversing a judgment for such cause, especially where the cross examination is upon facts competent to be proved under the issues in the case."

However, the rule limiting the inquiry to the general facts which have been stated in the direct examination must not be so construed as to defeat the real objects of the cross examination. One of these objects is to elicit the

whole truth of transactions which are only partly explained in the direct examination. Hence, questions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross examination. Even in those states where the American rule is applied, it has been frequently held that, in cases involving fraud, the general rule may be properly relaxed in the discretion of the court.

Although the court may exercise a reasonable discretion in regulating or limiting the cross examination, yet it is clearly error to exclude cross examination upon subjects which have been included in the examination in chief. So far as cross examination of a witness relates either
4433 to facts which are in issue or facts which are relevant to the issue, it may be pursued by counsel as a matter of right.

It is not an uncommon practice for the cross examiner to call for a repetition of the statements which have been made by the witness on direct examination. Although such a course of examination generally confirms and strengthens the testimony of the witness, it is permissible, and occasionally develops a conflict of testimony.

Justice Stephens: Now applying that to the situation which we have before us at pages 4162 and 4163, this witness testified that at the May meeting the advantages of the bubble system or process were explained, and then, subsequent to that, the United States Gypsum Company had sent Ebsary and the other licensees the license agreement covering the use of the bubble process.

At page 4163 the witness testified that his recollection was that that was sent between the May meeting and the June meeting, which was the reason, as he said, for the memorandum here that the bubble board contracts were to be considered by various counsel, that is the memorandum, Exhibit 419 for identification.

Now the bubble board contracts which were the subject of the witness' testimony, were not merely bubble board contracts, they were Hite and Haggerty patent contracts also—

4434 Mr. Steffen: (Interposing) Not at that time, your Honor.

Justice Stephens: Please don't interrupt me, Mr. Steffen. Give me an opportunity to state my views once, and then I will hear you again, if necessary.

Mr. Steffen: Yes, your Honor.

Justice Stephens: Exhibit 11, which was signed apparently on the 18th of October, 1929, and is the bubble board contract, is, as we read it, also the Hite and Haggerty contract. Both of these patents are referred to therein, and are the subject-matter of that license agreement. It seems to us, therefore, that the testimony of Mr. Lenci on direct examination goes to the negotiations and representations and discussions between the parties with reference to the adoption, ultimately, of those contracts, and that the mere fact that he didn't mention or remember, as he says on page 4186 that he did not, a discussion of the Hite and Haggerty patents, does not forbid cross-examination on the whole subject of the negotiations since they entered into a contract with respect to both the bubble board and the Hite and Haggerty patents.

Now those are the views of the majority of the Court, and that the cross-examination is therefore proper.

Judge Garrett, I think, is of a different view with respect to the examination, so far as it touches the Hite and
4435. Haggerty patents, of this witness.

Justice Garrett: I am of a different view, but I do not complain of the admission of it under the discretionary authority of the Court.

Justice Stephens: The objections are therefore overruled. You may proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of the recess, resumed the stand and was examined and testified further as follows:

Mr. Bromley: Will you read the pending qusetion?

(Thereupon, the pending question was read by the reporter, as follows:

"Q. And in connection with those patents were you ever a party to an understanding or agreement, or did you have any knowledge of any, whereby it was agreed among some or all of the gypsum manufacturers that they would, in the future, consider the use of the starch adhesive for bond as falling within the scope of the Haggerty or Hite patents, whether they did or not?")

Mr. Steffen: I object to the question, your Honor.

Justice Stephens: Do you wish to be heard further?

Mr. Steffen: As to the form of the question, yes. I of course have objected to it as not being proper cross-examination, but I abide by your Honor's ruling on that.

4436 Justice Stephens: You are entitled to your exception, of course.

Mr. Steffen: Now as to the form, I think the form of the question is faulty. It goes into questions as to whether there was an adhesive bond faculty in this starch patent, and whether it has that feature or not is a matter not in evidence. It is an involved and not easily understood question.

Justice Stephens: Can you rephrase your question to eliminate that objectionable feature, or do you insist upon it?

Mr. Bromley: It seems to me vital since I am only attempting to ask him whether or not he had an understanding.

Justice Stephens: Read the question again which he is objecting to.

(Thereupon, the pending question was reread by the reporter.)

Justice Jackson: The question seems to me quite involved, Mr. Bromley. It isn't clear to me.

Mr. Bromley: I will withdraw it and start over again.

By Mr. Bromley:

Q. Did you have any understanding or agreement with anyone that in the manufacture of gypsum board under the so-called foam license, the licensees would consider the use of adhesive to secure bond as falling within the scope of the Haggerty and Hite patents?

Mr. Steffen: I object to that still, upon the ground

4437 that there is nothing that I know of in the record, and certainly nothing in the direct examination here, about adhesive to secure bond. I don't know what he means.

Mr. Bromley: That was all covered by the testimony of Mr. Holland and Mr. Whittemore who explained just how starch was used, and how it was vital in the manufacture of board in order to secure the bond between the paper and the gypsum core.

Justice Stephens: The objection is overruled.

Justice Jackson: Do you remember the question?

The Witness: I would like to have it asked again, please.

(Thereupon, the pending question was reread by the reporter.)

The Witness: No, sir.

By Mr. Bromley:

Q. It is the fact, isn't it, Mr. Lenci, that your company was anxious to get into the production of board under the foam or bubble patents, prior to the effective date of your contract? A. Yes.

Q. And you sought permission from the licensor to use these patents prior to November, 1929, did you not? A. Yes.

Q. And you were told by USG that you could not have that permission because the transaction was subject
4438 to the approval of seven or eight Federal courts in the Middle West so far as the transfer of title of the Haggerty patent was concerned? A. Yes.

Q. And you did not get into production of this patented bubble-starch board until on or after the first of November, 1929, did you? A. That is right, it was very shortly after that date.

Mr. Steffen: I object to the answer, your Honor, if by that he is to testify that he was making a board that was satisfied by the terms of the patents. If he is speaking just generally that it was his understanding that they were making such a board, that is O. K.

Justice Stephens: The Court will not construe the answer to be binding as to the question of whether or not the board was technically within the patents. That is what you had in mind, isn't it?

Mr. Steffen: That is correct.

By Mr. Bromley:

Q. Now I should like to ask you some questions with respect to the operations of the Ebsary Company under the USG license.

Could you tell the Court briefly what factors are involved in price, other than the usual dollar amount, if any?

Mr. Steffen: I object to that as so far it is too
4439 generalized at the moment, as to "what factors are involved in price." If he wants to get it to a particular product at a particular time, I will still object, I think, on the ground that it calls for a conclusion.

Justice Stephens: Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice Jackson: Do you understand what that means?

Justice Stephens: Do you understand the question?

The Witness: I think I know what he means, yes.

Justice Stephens: It seems to me that the question is not improper, Mr. Steffen, for the reason that the direct examination went very fully into the practices of the Ebsary Gypsum Company under the license agreement with respect to basing points, areas, the size of truck loads, carload lots, stop-over charges, switching charges, and the like, and as I understand it, the contention of the Government is that those are beyond the limitations of price fixing under the General Electric case, and are not within the reasonable protection of the patent monopoly.

Aren't the defendants entitled by cross-examination, if they can, to bring out that those practices do have some relation to price? Isn't that what you are trying to bring out, Mr. Bromley.

Mr. Bromley: Yes, sir.

4440 Mr. Steffen: I think, your Honor, that that calls for a legal conclusion. I think your Honors are going to have to decide, ultimately, whether the matter of standardizing board or telling the companies as to how they are to assume switching charges, and matters of that sort, are not largely matters of regulation, and not of price.

I think it is obvious so far that the defendants have attempted to stretch this price term just to the limit, and it isn't for any witness—and I think Mr. Lenci is as competent as any—to give the legal result as to whether or not a particular function is price, or whether it is regulation. That is for this Court to determine.

Justice Stephens: Well, that is quite true, we will have to determine eventually whether these regulations are within or without the proper limitations of the General Electric doctrine, but the direct examination went into the reasonable basis and business reasons for all these practices. If an additional business reason, in the view of this witness, was that they had some effect on price, or price protection, or price control, isn't that proper cross-examination since you went into that subject yourself?

Mr. Steffen: I have no objection to Mr. Bromley going into that subject at all. I object to having this witness say that this is price. I think he can ask this witness what

4441 he did and why he did it, and whether it was for business reasons, and as to whether they were good business reasons. But I object strenuously to permitting the witness to state a conclusion.

Justice Stephens: Judge Jackson has doubt as to what the question means. I think that we are all agreed that the line of examination which you are apparently entering into is a proper line of examination. Perhaps you can rephrase this question so that it will satisfy Judge Jackson's doubt a little bit, as to its meaning.

Justice Jackson: I haven't any doubt, I just don't understand the question. The witness thinks he does, however, and possibly the answer might clarify the question.

Mr. Bromley: I will withdraw the question and ask him this.

By Mr. Bromley:

Q. Isn't it a fact that many factors are involved in the price of gypsum board other than the actual dollar amount per thousand feet? A. Yes.

Q. For instance, if you were told that you could sell gypsum board at $13 per thousand square feet at your mill, would that enable you to operate as a commercial business matter? A. No.

Mr. Steffen: I object to that. How can the witness say whether he would be enabled to operate on a $13 price
4442 f. o. b. mill. What does he mean by "operate" or "be able to operate"—at a profit, or at a loss, or at $13 today, or tomorrow?

Justice Stephens: I understood the question to mean—was that a sufficiently practical definition or statement of price, or would it have to be attended by other limitations in order to make that price effective.

Mr. Bromley: That is what I meant.

Justice Stephens: Is there any objection to that?

Mr. Steffen: I don't understand what you mean by "to make that price effective".

Justice Stephens: To make $13 the price.

Mr. Steffen: As I get the question, Mr. Bromley starts out with a hypothesis that there is a $13 price f. o. b. mill, and from then on I am lost. I don't know what follows. Start with that, though, that suppose you had that price f. o. b. mill, today, I suppose, relating to gypsum lath.

Justice Jackson: That is just an arbitrary figure, I take it?

Mr. Bromley: That is all.

Justice Stephens: I think that the examination is entirely proper. It is, at any rate, obviously preliminary to a discussion of these various other factors which it is contended relate to price.

Mr. Steffen: We have no objection to his going into this line of questioning, but I think the questions ought to
4443 be intelligible.

Mr. Bromley: Can you answer the question?

The Witness: May I have the question?

Justice Stephens: The objection is overruled.

(Thereupon, the last question and answer were read by the reporter.)

By Mr. Bromley:

Q. In other words, you mean by that, that you would have to know whether that price applied to a large quantity or a small quantity, wouldn't you? A. Yes.

Q. And you would have to know whether that price applied to a situation where you were expected to make a free delivery, or whether the customer was to pay for the delivery, wouldn't you? A. Yes.

Q. Now you told us some time ago that in the gypsum industry for years, dealers were accustomed to pay a price made up of two factors, the mill price plus the cost of freight to destination, didn't you? A. Yes.

Q. Now a switching charge, to which reference has just recently been made, is a part of the freight charge made by the railroad, isn't it? A. That is correct.

4444 Q. For delivery by freight, by car? A. Yes.

Q. And if you were told by a licensor that your price that you must sell to a dealer at was the mill base price plus the carload freight, and you shipped to a customer where a switching operation was involved, if you bore the switching charge that would be cut in the price which the licensor had fixed, wouldn't it? A. That is right.

Q. It would be cut in the price in the same way that it would be if you bore the whole freight charge yourself? A. Yes.

Q. That is to say, if the price is made up of the price at the mill, plus the freight, then that price, instead of being $13, might be $14.50—and that is the price which the dealer is to pay you, is it not? A. At destination.

Q. At destination, yes. A. Yes.

Q. And that is the price which is fixed by the licensor in the bulletin to you? A. That is right.

Q. So that if you reimbursed him for a part of that $1.50, you would be selling the goods to him at less than
4445 $14.50, wouldn't you? A. That is right.

Q. And likewise, if you sold less than a carload

to a dealer, at this $13 mill price, that would be a cut of the price that was fixed in the bulletin for less than a carload lot, would it not? A. Well, on our less than carload lots there was a specified price at the mill.

Q. Yes. Now if you delivered less than a carload lot to a customer, at the carload price, that would be a cut in the less than carload price, wouldn't it? A. That is correct, yes.

Justice Stephens: I don't understand that. I should think that would be a cut in the carload price.

By Mr. Bromley:

Q. Well, Mr. Lenci, if you sell a man less than a carload of gypsum board, and the price for that is fixed at $15 per thousand feet, and if you give him the carload price, you would sell it to him at $13, wouldn't you? A. Yes.

Justice Stephens: I see what you mean.

By Mr. Bromley:

Q. And that would be less than the price which you should have charged? A. That is right.

Q. Most of these factors, of which I have spoken,
4446 are factors which involve the rendition of some kind of service to the dealer, do they not? A. Yes, they go beyond the mere freight item—they cover, in a great many cases, warehousing and truckload deliveries beyond that point.

Q. For instance, free trucking to a dealer-customer is a service to the customer, is it not? A. Yes.

Q. It is a service to the customer which is worth money to the customer? A. Yes.

Q. And it costs money to render it, doesn't it? A. It certainly does.

Q. So that it has been the fact, over the years, has it not, that when the licensor fixed a price for delivery by truck, that that price was generally higher, in terms of dollars per thousand feet, than the carload price was? A. It was until recent years.

Q. Well, it was until recent years for the reason that, if you delivered goods purchased by a dealer to that dealer in a truck at your cost, you were rendering him a service which was worth money to him? A. Yes.

Q. And if you made a truck delivery to a dealer,
4447 of gypsum board, and charged not the price that was set for truck delivery, but the price that was set

for carload delivery, that accommodation to him directly affected the price which he paid, and you realized, did it not? A. Yes.

Q. By the same token, if you deliver a small quantity of board to a dealer, say one thousand feet, instead of a carload to a dealer, the fact that you are willing to, and do, make frequent small deliveries to him constitutes a service to him which is worth money to him, doesn't it? A. The trucking item is much higher on a part load than it is on a full load, per square foot.

Q. And therefore, in the normal operation of your business, if you made small quantity deliveries by truck, you would expect to charge and receive more per thousand feet from any customer, wouldn't you? A. Yes.

Q. And if you had a price fixed for that, which defined a certain area within which you could make those deliveries, and you delivered to somebody outside of the area, at the price fixed for deliveries within the area, you would be serving that customer with a service which was worth more to him than it would be to people within the area, wouldn't you? A. Yes.

Q. Now was it the fact that you quickly found out, 4448 under the license agreement, that a licensee who lived up to the bulletin restrictions in good faith lost customers if another licensee violated the price provisions of the bulletins? A. Yes.

Q. And would you say that there are many ways of cutting the fixed prices, other than reducing merely the amount of dollars charged per thousand feet? A. Yes.

Q. Well, can you tell us some of those ways? A. Well, making small deliveries, or allowing very small pickups at warehouses; or making special arrangements with dealers for warehousing, and paying rent for warehousing in a dealer's warehouse. There are any number of ways. We made a great many complaints.

Q. Would granting an imaginary or unfounded damage claim be a way of making a rebate on the fixed price of board? A. Yes.

Q. Would it constitute a rebate on the price of board if you gave the purchaser other products for nothing? A. Yes.

Q. And would that same principle apply where you gave him other products at prices below prevailing market prices? A. Yes.

Q. Your memorandum of the first licensee meeting as I

remember it indicates that for the first two years
4449 or so after November, 1929, there were a great many violations, according to USG, of the minimum prices which it fixed on the patented board—is that right? A. Yes.

Q. And you have testified that Mr. MacLeish said that your company violated the license agreement 711 times in a two-year period, is that right? A. That is right.

Justice Garrett: The memorandum to which you refer was excluded, was it not?

Mr. Bromley: Yes.

Justice Stephens: But the witness did testify from his own recollection as refreshed by that, that there were a large number of violations charged by Mr. MacLeish, and that 711 applied to his company.

Mr. Bromley: And the memorandum that he used was Government's Exhibit 477 for identification, I think, being his notes.

4450 Mr. Steffen: I think the record should show, Your Honor, that we object to all this testimony as to violation of price terms, as being testimony having to do with a conclusion of law, whether it is a price term or whether it is a regulation of the industry in general.

Justice Garrett: As I understand, you are not asking for a ruling. You just want the record to show the objection.

Mr. Steffen: That is correct.

Justice Stephens: The record may show a continuing objection, and that it is overruled.

By Mr. Bromley:

Q. Didn't you find out, after you had been in operation under the license for a couple of years, that all kinds of ways were being devised by your competitors, either directly or indirectly, to violate the minimum prices that were set by the licensor? A. Yes.

Q. And you understood, did you not, that it was because of the great number of violations, and for the purpose of attempting to enforce adherence to USG's price bulletins, that Board Survey was formed? A. Yes, that was my understanding.

Q. You knew that Board Survey was a part of the
4451 USG organization, did you not? A. Yes.

Q. Did you or your company have anything to do with its formation? A. Nothing whatever.

Q. Did you have any interest in it of any kind, direct or indirect—I mean financial interest? A. Not financial or otherwise.

Q. And you had no voice nor any part in its management or operation, did you? A. No.

Q. And at no time did anybody from your company ever participate in its management or operation? A. No.

Q. And that is likewise true as to its organization, is it not? A. That is correct.

Q. And you understood, didn't you, Mr. Lenci, that the meeting of October 17, 1932, to which you have testified, was called by the licensor because of the licensor's contention that the licensees were guilty of almost wholesale violations of the price bulletins? A. Yes.

Q. And according to Mr. MacLeish, the number of violations of the price provisions on patented board ran into the tens of thousands of dollars, and the millions of
4452 square feet of board, did it not? A. Yes.

Q. Did I understand you to say that Mr. MacLeish mentioned all of the items to which you have testified as appearing on your notes, Exhibit 477 for Identification, or only some of them? A. It is my recollection that he mentioned all of them.

Q. And is it a fact that he did that by way of illustrating the more frequent ways in which these alleged violations were accomplished by the licensees, according to his contention? A. Yes.

Q. And such things as you testified to, as advertising allowances, and switching charges, and stop-over charges, and warehousing arrangements, Mr. MacLeish stated, did he not, were regarded by the licensor as rebates when employed in connection with the purchase and sale of patented board? A. Yes.

Q. And all of these things, if used for the purpose, were ways of cutting the fixed board prices, were they not? A. They were, yes.

Mr. Steffen: I object to that, Your Honor, as a conclusion. He is asking for a construction of the li-
4453 cense agreement from this witness, that this was a violation of the agreement.

Justice Stephens: How would you suggest that the defendants prove their defense except by questions like this?

Mr. Steffen: I would say, Your Honor, that this is distinctly not the way to prove their defense. They have the contract, as they have been telling us, in evidence. It has

been in evidence since last November. And the construction of the contract, with the facts before the Court, is for the Court. It is not for this witness to say, "We think that constituted a violation of the contract", and they don't need any further proof.

Justice Stephens: You see the problem of the Judges, Mr. Steffen. We try to make these rulings in a fair and equitable way, and to give both sides a full chance to prove their case. I don't understand this testimony to be coming in at all to prove what the license agreement was.

Mr. Steffen: The question was—"Do you regard this as a violation of the contract?"

Justice Stephens: Oh, no, he didn't say anything like that.

Read the question.

(The question was read by the reporter.)

Mr. Steffen: I am sorry, I withdraw my objection.

4454 Justice Stephens: Of course, we are not going to permit witnesses to tell us what these license contracts mean, but I don't see how the defendants can be forbidden from showing what, under their business explanations, were the reasons for these practices which you condemn as a pattern of price fixing, illegitimate under the terms of the General Electric case. It seems to me that it would be clear error to stop this type of examination.

You may proceed.

By Mr. Bromley:

Q. As I remember your testimony, you said that Mr. MacLeish, after going over these types of alleged violations, said many times that these practices would have to stop. Isn't it a fact, Mr. Lenci, that all he said was that these practices which he had listed and catalogued, in his opinion constituted violations of the minimum price bulletins on patented board? A. Well, he certainly did say that, yes.

Q. You also said, at page 4318, that he said only cash sales would be permitted. Didn't that statement to which you testified have reference to some question that was asked him as to the propriety of a company taking bonds of a customer corporation at their face value which, as a matter of fact, at the time they were taken, were worth only

4455 30 cents on the dollar? A. That question came up in connection with the Chicago Fair, and at the date of that meeting no one expected the Chicago Fair ever to

pay out on those bonds, and we felt that that was taking an unfair advantage to sell material and take bonds in payment, which bonds were not worth their face value, their par value. We thought that that was a rebate or a cut in price.

Q. Well, don't you now say that you were in error when you said that MacLeish said that you could only sell your goods for cash? There was no such requirement as that, was there, in the bulletins? A. Well, possibly I didn't mean cash, but I meant for the equivalent in dollars of the prices specified in the bulletins.

Q. Well, none of your sales, as a matter of fact, were for cash, were they, or very few of them? A. No, not in the strict sense, no.

Q. You always extended credit to your customers, and the bulletins permitted that, didn't they? A. Oh, yes.

Q. Now subsequent to this meeting of October 17, 1932, the Board Survey Company, at least until 1937, investigated complaints which were filed with it by various licensees against other licensees or the licensor, did it not?

4456 A. Yes.

Q. Will you look at the following exhibits, please: 438, and 447 to 450, inclusive, and 452 to 457, inclusive?

(Government's Exhibits 438, 447 to 450, inclusive, and 452 to 457, inclusive, handed to the witness.)

By Mr. Bromley:

Q. Would you say that these exhibits, Mr. Lenci, were examples of the kind of complaints which your company made to the Board Survey Company and which were considered by the Board Survey Company? A. Yes, they are.

Q. What is the fact as to whether or not all of your complaints with respect to alleged violations of USG bulletins, which you made to USG or to Board Survey Company, were limited to matters having to do with the price or the sale of patented gypsum board?

Mr. Steffen: We object to that on the ground that it calls for a conclusion as to what is meant by "price". I think that the question should be broken down into separate items so as to get the facts before the Court.

Justice Stephens: Read the question.

(The question was read by the reporter.)

Justice Stephens: We don't construe that question, and will not construe it, Mr. Steffen, as calling for a con-

clusion on the part of this witness that this board
4457 which he is asked about in the question was technically manufactured within the patent processes. What I understand the question is directed to, and my colleagues share my view, is the board which, in this witness' understanding, was being manufactured and sold by them under the patent, as distinguished from some other board.

Mr. Steffen: My objection didn't go to that point, although it appropriately might have gone to that point. I assume that Your Honors understood my objections on that score.

As I listened to this question, it seemed to me that Mr. Bromley is asking Mr. Lenci whether all of his objections had to do with matters of price under the bulletins or under the license agreements. Now when you ask that question—and it is undoubtedly in relation to these matters which we have been taking up, and probably some others which may be in the mind of the witness—you are asking for a construction of "price".

Now the license agreements provide that the licensor may fix the minimum price or prices, and under that contract stipulation they have issued all these bulletins; and they have construed it, or considered, perhaps, that whether it was price or not, they would make it look like price for purposes of getting within the contract.

Now when you ask the witness whether or not all
4458 of his complaints had to do with price, you are asking whether or not these complaints were properly within the price terms of the contract.

It seems to me that Mr. Bromley should ask him—"What did you do; what was your complaint about; was it about a rebate; was it about switching charges; was it about this, that or the other thing?"

With that all developed, then there is nothing further for him to talk about. It is for the Court then to determine whether that has to do with price or doesn't have to do with price as it comes up under the contract.

But when he asks a very omnibus question here which says, "Did all of your complaints have to do with price?" he is expecting to write into the record a conclusion by this witness that everything they ever did was a proper thing under the price terms of the contract, and that is a very obvious conclusion of law which it seems to me the Court must make and not the witness. It is very, I should think, improper cross-examination.

Justice Stephens: Well, the Court is certainly not going to conclude from this witness' testimony that he is testifying that these complaints were proper complaints in respect of price, because the question doesn't even include that term. It seems to me the objection that the question is of an omnibus character goes to its weight. You
4459 have a right to bring out on re-direct-examination, if you can, that he is mistaken when he says all the complaints went to price.

As I understand, the term "price" is not being used in the technical, legal conclusional sense—and it doesn't seem to me that the witness understands that it is—of what is proper under the General Electric case, but I thought the question was directed to bringing out whether or not the witness' complaints had to do with matters which, according to his understanding of the complaints, would affect the amount they would get paid for their product.

Isn't that what you are trying to find out about, Mr. Bromley?

Mr. Bromley: Yes, sir.

Justice Stephens: I don't think that is objectionable, and the objection is overruled.

The Witness: My answer is certainly "Yes" to that question.

Mr. Steffen: Your answer was to the Court's question?

The Witness: Yes, and Mr. Bromley's question,—Mr. Bromley's question with the Court's interpretation of it.

By Mr. Bromley:

Q. Now, it wasn't very often, was it, Mr. Lenci, that you secured evidence that some one of your competitors had made a sale at a dollar figure less than the
4460 prescribed mill base price? A. No, it was usually in the form of some special service or some concession of some kind.

Q. Would you say that what you usually found out about and what you were usually complaining about was some indirect price cut? A. Yes, a great many of these were cases of indirect price cutting.

At one time, on the record there, there was a complaint of cash rebates, but that wasn't the largest complaint. The largest complaint we had was this type of thing.

Q. When you say "this type of thing", you refer to the exhibits before you, the numbers of which I mentioned a little while ago? A. Yes.

Q. You felt that this indirect price cutting was as much of a price reduction as though the board had been sold at a figure less than the mill base figure, did you not? A. Yes.

Q. And you were perfectly sincere in making these complaints, weren't you? A. We certainly were.

Q. Did violations of this kind, during the years subsequent to 1929, mean much to your company in amount
4461 of business which you lost or which you felt you might otherwise have secured? A. Yes, they did.

Q. In other words, if one of your competitors violated his contractual obligations under the license and made an indirect price cut, that fact alone might mean the difference between your getting the business and his getting the business, is that right? A. It very definitely did.

Q. And in 1932, how important had this matter of violations of price bulletin terms by your competitors become? A. Well, it had become extremely important.

Q. And what can you tell us as to how you felt with respect to the extent to which it was affecting your own volume of business, if any? A. Well, if you will notice, a great many of our complaints are around the New York and New Jersey metropolitan territory, and we had a warehouse in New York and a mill warehouse in Newark, and those two operations were dependent upon this New York-New Jersey territory, and they were very seriously affected by the competition from the other companies, especially those named in these complaints.

Q. Is it true that generally speaking, a building supply material dealer will buy, from the manufacturer,
4462 products like gypsum board at the lowest price offered to him? A. Yes.

Q. As you said the other day, in 1932 and in 1933, the country was suffering from a very severe depression? A. Yes.

Q. Would you say that during those years particularly, business was hard to get for your company? A. It was extremely hard to get.

Q. And what is the fact as to whether or not there was a great deal of competition with respect to each new construction job as it came along, particularly during those years? A. Well, there was competition not only for every job, but for every carload and every truckload order.

Q. I take it, Mr. Lenci, that you felt your company was

living up to its contractual obligations under the license? A. We did, we took a great deal of pride in it.

Q. On the other hand, it is the fact, is it not, that your company was accused by your competitors of a very large number of violations during this period? A. We were.

Q. Wouldn't you say that your competitors were
4463 about as suspicious of you as you were of them? A. Well, I don't know what their state of mind was, Mr. Bromley.

Q. Well, it is the fact, isn't it, that over the years from 1932 to 1939, you complained a great many times, about the practices of your competitors, to Board Survey Company? A. Yes.

Q. And, of course, those complaints were limited, were they not, to licensees doing business in the area which you served with your products? A. Yes.

Q. And what is the reason that so many of these complaints seemed to have to do with the Kelley Plasterboard Company, can you tell us? A. Well, Kelley had a plant in Delawanna, which is quite close to the New York and Newark area where we were operating, it is within about 5 or 6 miles of our Newark plant, and they were very aggressive in the New York-New Jersey markets; and you can see from the nature of these complaints that they had men out on commission, and jobbing arrangements, and also they made a great number of sales through the Structural Gypsum Division.

Q. Would you say that Kelley was one of your most vigorous competitors? A. Yes, I would say—I
4464 would like to modify that, I would say that he was one of our most troublesome competitors.

Q. What about the Certain-teed Company? A. They, at that time, were not active in that area.

Q. Was there a time when they were a vigorous competitor of yours in that area? A. Not for any long period, no.

Q. What was another vigorous competitor, in that area, of yours? A. The United States Gypsum Company and the National Gypsum Company were both active there.

Q. Now, there was nothing secret about these complaints, was there, Mr. Lenci, so far as you were concerned? A. Not a thing.

Q. And you meant what you wrote to Board Survey, didn't you, when you complained? A. Yes, we certainly did.

Justice Stephens: The Court will take the afternoon recess at this point.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice Stephens: Proceed.

By Mr. Bromley:

Q. Will you look at Exhibit 438, please?

In the first paragraph of that letter, Mr. Lenci,
4465 you were complaining merely that a discount was being given to jobbers by some licensee, were you not? A. Yes, that should have been stated in there.

Q. What you said was "Referring to the recent bulletin of the United States Gypsum Company advising the licensees that selling through Jobbers had been eliminated."

You knew when you wrote that that all the bulletins had done was level off the price as between jobbers and dealers, didn't you? A. That is correct. It is merely shortened up there, because that is the way I understood it, and everybody else understood it the same way.

Q. Well, what is the way you understood it? A. The letter should have read, "advising the licensees that selling through jobbers at a discount had been eliminated".

Q. And when you said that you understood it, and that is the way everybody else understood it, you meant that they all understood that all that had been eliminated was the right of a manufacturer to sell a jobber at a discount, is that right? A. That is correct, yes.

Q. Referring to the second paragraph of Exhibit 348, what does that paragraph mean, Mr. Lenci? A. That means that Daniel Duskis, who was a dealer in Long Island,
was buying Certain-teed board through Orin F.
4466 Perry. Daniel Duskis is a dealer, and he certainly would not buy from Mr. Perry if Mr. Perry was paying Certain-teed the dealer's price, which would indicate to me that Perry was still getting a jobber's discount from Certain-teed.

Q. Then it is your testimony, is it, that in the second paragraph, you were complaining to Board Survey about a price cut on the part of the Certain-teed Company? A. Yes.

Q. And you were complaining specifically that, based on the evidence of what Duskis was doing, that is, buying board from Perry, you felt Certain-teed was giving Perry a

discount, which was prohibited by the USG bulletins then in effect; is that right? A. That is right.

Q. And you would admit, wouldn't you, that anyone unfamiliar with what you were talking about would not be able to say right offhand whether that paragraph was a complaint against Duskis or a complaint against Perry or a complaint against Certain-teed? A. They might not, if they were not familiar with the background.

Q. But you have no doubt, have you, but what it was your intention and purpose to complain about the price which Certain-teed was charging Orin F. Perry? A. That is our complaint.

4467 Q. And you felt that that price which Certain-teed was giving Perry was a cut price in the sense that it was lower than the price which the bulletins fixed for sales to dealers and jobbers? A. Yes.

Q. The third paragraph contains a reference to a USG price bulletin establishing a $2.00 differential between board shipped in mixed cars and full cars, for the metropolitan New York area, does it not? A. Yes.

Q. Now the effect of that bulletin provision was merely to permit a licensee to charge a higher price on a smaller quantity purchase, wasn't it? A. Yes.

Q. That is, the differential of $2.00 was a price $2.00 a thousand higher where the sale which a licensee made was a mixed carload sale rather than a full carload sale, wasn't it? A. That is correct.

Q. And that is merely a way of saying that where a licensee sells a smaller quantity of board than a full carload, he must charge a higher price per thousand feet, under the bulletins, isn't it? A. Yes.

4468 Q. And, of course, if a licensee sold a mixed carload of gypsum products, there would be contained in that mixed carload a smaller quantity of board than would be contained in a full carload, wouldn't there? A. That is correct.

Q. Now in the third paragraph, you make reference to that bulletin provision establishing the $2.00 per thousand higher price for a quantity of board less than a full carload, and in the next paragraph you talk about what the Tisdale Lumber Company of Flushing had done, do you not? A. Yes.

Q. Now the Tisdale Lumber Company of Flushing was a what? A. They were a dealer.

Q. And they had purchased less than a full carload of board from the Structural people? A. That is right.

Q. But they had only paid for it, per thousand square feet, the carload price? A. That is right.

Q. Now against whom were you complaining in that paragraph? A. I was complaining against the Kelley Plasterboard Company.

Q. And what was your complaint against the Kelley Plasterboard Company? A. I was complaining that
4469 the Kelley Plasterboard Company must have made some concession to the Structural Gypsum Corporation, below the bulletin price, on this board contained in the mixed carload shipped to the Tisdale Lumber Company.

Q. Now, at the time you made that complaint, you had no evidence whatsoever as to what actually was charged by the Kelley Company to the Structural Company, did you? A. No, we had no access to that.

Q. You knew, however, that under the bulletin provisions Kelley must charge Structural the dealer price less a specified discount of 12-1/2 percent for lath, didn't you? A. Yes.

Q. You knew that much? A. Yes.

Q. That is to say, if the price for lath at that time was $13.00, the bulletin provided that Kelley must charge Structural the dealer price of $13.00 less 12-1/2 percent of $13.00? A. If it was in a full carload.

Q. If it was in a full carload? A. Yes.

Q. So that the only margin of profit for the Structural Company in that transaction was approximately
4470 $1.60 a thousand, or 12-1/2 percent of $13.00, wasn't it? A. That is right.

Q. Now, you found out that the Tisdale Company, a dealer, had bought, at the carload price, less than a carload quantity from Structural, did you not? A. That is right.

Q. And what did you conclude from that piece of evidence which you say you had? A. I concluded that the Kelley Company had not charged the $2.00 differential to the Structural Gypsum Corporation.

Q. And is that what you were complaining about in this paragraph of Exhibit 438? A. Yes.

Q. Now, the Tisdale Lumber Company, the dealer, of Flushing, New York, which had purchased this board from the Structural Company, was a prospective customer of yours, was it not? A. Yes.

Q. Under the USG bulletins, if you had sold 16,000 square feet of board to the Tisdale Lumber Company, you

would have had to charge that company the dealer's price fixed for less than carload lots in the bulletins? A. That is correct.

Q. So that Kelley's cut price to Structural resulted in Structural being able to take away from you the
4471 Tisdale Company, one of your prospective customers? A. That is right.

Q. And you felt that you were, therefore, being injured in your business by the violation, on Kelley's part, of the prices fixed for its sales by USG, didn't you? A. That is right.

Q. And you felt, didn't you, that you were losing customers which you might otherwise have sold, because of price concessions which Kelley was making to Structural and others, below the proper prices set for Kelley in the USG bulletins? A. That is right.

Q. Now, look at the 6th paragraph of this letter. That is, I believe, the second mention of the subject of exchanges, to which the Presiding Justice referred the other day.

Will you please explain to us why you felt, if you did, that this business of exchanges was an indirect violation of the price bulletin provisions? A. Well, the price bulletins at that time provided for a price for a 5,000 foot minimum pick-up, and it was our feeling that if these dealers, as they ran short of material, could constantly go in and pick up a few boards, and maybe return others in place of them, that they were getting a special service in there which was hurting the rest of us, and they
4472 were doing something which was not contemplated in the price bulletins.

Q. And when you say "they" were doing something, you mean the Kelley Company? A. I mean the Kelley Compan in this case, yes.

You see, Ebsary Gypsum Company naturally established a 5,000 foot minimum pick-up on the basis of the bulletins, and if any of our customers ran out of a certain size they would come to us and buy a new truckload, putting in a larger quantity of the size they ran short of, and we would get a truckload order. But if they could go up to Mr. Kelley's plant and take back a few boards that they didn't happen to need, and get a few more of a different size, we just lost that sale, and that was giving them a considerable amount of extra service without any extra charge, and was a price cut, price concession.

Q. Well, let's see if I understand it. Suppose I bought you a full carload of gypsum board at the carload price of

$30 per thousand. Now if I thereafter desired to buy from you a thousand feet of that same board, under your license you would have to charge me more than $30 per thousand feet, wouldn't you? A. Yes, there was no price set for a thousand feet.

Q.-All right. Say I wanted to buy 5,000 feet of board, under your bulletins you would have to charge me
4473 more than $30 a thousand, which was the full carload price per unit? A. That is correct, yes.

Q. And that is a normal business practice, isn't it, to charge less for a large quantity, per unit, than for a small quantity, per unit? A. Yes.

Q. There is nothing strange about that, is there? A. No.

Q. Now, if I took some of my board that I received in a full carload, and for which I paid $30 a thousand, and came around to your plant and exchanged it for 5,000 feet of the same kind of board, I would, in effect, be making a purchase of a small quantity at the carload price, wouldn't I? A. Yes.

Q. And that, in effect, would be a cut in the price, of $32, say, set for 5,000 foot quantities? A. That is right.

Q. Is that what this reference in the 6th paragraph, to exchanges, means? A. Yes.

Q. You looked upon the practice of permitting exchanges as an indirect price cut in the price of the small
4474 quantity exchanged, didn't you? A. That is right.

Justice Stephens: There is one phase of that type of transaction that I still don't quite understand. I understand now your point of view with respect to going in and buying 5,000 feet, which is a large amount. But I understood you to testify on your direct-examination by Mr. Knuff that there would be exchanges of a few boards made.

The Witness: That was in connection with exchanges between manufacturers.

Justice Jackson: That is not what you are talking about now?

The Witness: No, we are not talking about that now.

Justice Stephens: I see.

By Mr. Bromley:

Q. Well, let's talk about it. Suppose I am USG, and you are Ebsary. The same principle would apply, wouldn't it? If I took my own board and exchanged, for some of your board, a small quantity, that still might constitute a price cut in the small quantity of the board which you gave me, mightn't it? A. Yes.

Justice Stephens: That is for the reason, if I may inquire, that an exchange is a form of purchase, and therefore, if you exchange a small amount it would be outside the bulletin provisions?

4475 The Witness: Yes. And besides that, it is quite an expense to the person who has the warehouse to handle these small quantities. The trucks would come in at unexpected times, and they would demand this special service, and it cost just as much to invoice a dozen boards as it does a carload.

By Mr. Bromley:

Q. Now, following out the suggestion of the Presiding Justice, if I purchase board from you, I can either pay for it in money or in goods, can't I? A. Yes.

Q. And if I— A. (Interposing) Well, to clear up this thing, these exchanges between manufacturers were not really exchanges. We wouldn't take a certain number of our boards to the USG's warehouse and trade them for their boards. We would go to their warehouse and ask them to give us a few boards of a type we happened to be short of at that particular moment, and we would pay for them in the usual course of business. That is what we were asking them to permit us to do, and they said they could only do that if we would take a straight truckload, they didn't want us to come in there and pick up a few boards as a matter of convenience. In other words, they weren't anxious, any more than we would be, to help out the competitor.

4476 Justice Stephens: So you weren't using the word "exchange" in the sense of barter?

The Witness: No.

Justice Stephens: You were using the word "exchange" to describe a transaction whereby you purchased from some other manufacturer less than the amount prescribed in the bulletin, and they, in turn, purchased from you in a similar manner?

The Witness: That is right.

Justice Stephens: I got the impression you were talking about trading board for board.

The Witness: It was known as exchanges between manufacturers, but it was not a true exchange.

By Mr. Bromley:

Q. As a matter of fact, Mr. Lenci, you know, don't you, that at the time you wrote Exhibit 438, there was nothing

in the bulletins that prohibited this practice or bore on the practice at all? A. No, I don't believe there was.

Q. And all you did in this letter, Exhibit 438, was to ask the question? A. Yes.

Q. Now, do you know whether you ever got an answer? No answer is here among these letters. A. I don't think we did.

4477 Q. And you remember, don't you, that no provision was ever put in the bulletins about this subject, at any time? A. I don't think there was, I don't recall any.

Q. Now, will you look at Exhibit 447, please?

This letter of May 16, 1932, was a follow-up of Exhibit 438, wasn't it? A. Yes.

Q. You wanted Board Survey to take some action with respect to stopping the alleged Kelley violations, didn't you? A. That is right.

Q. And in addition, in Exhibit 447 you make some more complaints, do you not? A. Yes.

Q. In the second paragraph, do you see a reference to Dusol? A. Yes.

Q. Now what was that complaint? A. Well, that was a complaint that Dusol, who was their Brooklyn salesman, was offering the lumber dealers over there the right to come and pick up quantities of board from the Kelley Plasterboard Company less than the 5,000 foot minimum in effect at that time, but Kelley was charging them at the 5,000 foot price.

Q. So that he was selling board, at a price set for 4478 a large quantity, in small lots or quantities? A. Yes, that is right.

Q. And you considered that to be a violation of the price provisions of the USG bulletins? A. That is correct.

Q. And that is why you complained? A. Yes.

Q. Was that practice of the Kelley Company detrimental to your business at that time? A. Yes, very definitely.

Q. And did you lose, or were you afraid that you would lose, dealer-customers because of what Kelley was doing through its salesman, Dusol? A. Yes.

Q. Now in the fourth paragraph of that letter, what was the complaint against Kelley referred to there? A. That was a complaint that the Kelley Plasterboard Company was selling Robert S. Green, who was a dealer in Baltimore, board below the bulletin price. That was a straight complaint of a price cut.

Q. That was a straight complaint of a direct price cut, wasn't it? A. Yes.

Justice Stephens: What do you mean by "small board"?

The Witness: Gypsum lath. We usually spoke of
4479 the wallboard as big board, and the lath as small board.

By Mr. Bromley:

Q. And in the next paragraph you refer to the fact that your fear is that you are losing customers by these violations on the part of the Kelley Company? A. Yes.

Q. In Exhibit 449, you were complaining about Kelley again, were you not? A. Yes.

Q. In the fourth paragraph, you are referring to a situation in which one of Kelley's salesmen is splitting his commission, and therefore giving a rebate to the purchaser on board, are you not? A. Yes.

Q. And that is made clear, is it not, in the last sentence of that paragraph: "We believe that the only way L. A. Dusol can work on this basis is through some split with George Dusol who is working as a salesman for the Kelley Plasterboard Company."? A. That is right.

Q. You believed at that time, did you not, that Dusol was a commission salesman of Kelley? A. Yes.

Q. And so far as you know, he was? A. I believe he was.

4480 Q. And your charge was that the price which Kelley was charging to its customers was indirectly cut below the stipulated figure by a refund, by this salesman Dusol, out of his commission, to the customer? A. That was our complaint.

Justice Stephens: Do you mean by that, by a "split commission", that the salesman for Kelley who was working on a commission basis, would therefore get paid a certain number of dollars as a commission on a sale, and would take some of those dollars and give them over to the dealer?

The Witness: That is right. You see, the dealer was his brother.

Justice Stephens: That would, in effect, reduce the price to the dealer?

The Witness: That is right.

By Mr. Bromley:

Q. In connection with that question, Mr. Lenci, the use of commission salesmen by licensees, in connection with

their board sales, gave rise to a great many abuses, in the period from 1929 to date, didn't it? A. Yes.

Q. You referred, in your answers to the questions just asked you by the Presiding Justice, to an actual return of cash to a customer, by a licensee's salesman, out of the commission paid by the licensee to his salesman, did
4481 you not? A. Yes.

Q. Well, there were other ways, weren't there, to accomplish commission splitting? A. Well, I think I had some complaint here where—no, that wouldn't be a commission split—of a direct cut in price, and also where a refund was made by salesmen other than commission men.

Q. But I refer to this situation: Wasn't it a common practice of some of these licensees to sell to a dealer, and then name one of the officers or employees of that dealer, or a relative of the dealer, as a commission salesman for the manufacturer, and pay him a commission, which he in turn gave to the dealer company? A. It seems to me there is a case of that kind. It doesn't come to mind just at this moment.

Q. But that was a practice which was frequently used, according to your information, in your area, wasn't it? A. Well, this Dusol matter is an outstanding example of that.

Q. Well, is that because there was some connection between the salesman Dusol, and the customer Dusol? A. They were brothers.

Q. They were brothers? A. Yes.
4482 Q. Well, is that an example of what I just said? Didn't the salesman Dusol give to the customer Dusol a part of the commission? A. Yes.

Q. Well, I am not talking about that situation at all, and I am trying to find out from you whether there wasn't another analogous situation in which a licensee-manufacturer would sell a dealer, and say to the dealer, "Now, if you will buy from me, I will make you or one of your employees, for the purpose of this transaction, a commission salesman of mine, and pay you a commission."? A. I don't recall, at the moment. I think there was something of that kind, but it has slipped my mind for the moment. Can you give me something to refresh my memory with?

Q. Weren't you active in the formulation of the NRA Code of Fair Practices? A. Yes.

Mr. Steffen: I think that comes up somewhat later, Your Honor. This is 1932 that we are inquiring about.

Mr. Bromley: I am trying to refresh his recollection.

Mr. Steffen: As to subsequent events?
Mr. Bromley: Yes.

By Mr. Bromley:

Q. You were a member of the Code Authority,
4483 weren't you? A. Yes.

Q. Don't you remember that in formulating that Code, you considered this problem? A. I think we did. I haven't seen the Code since 1935, and I don't remember.

Q. I refer you to Rule 10 of the Code of Fair Competition for the Gypsum Industry, which provides:

"No member of the industry shall permit splitting of commissions or other compensation"—

Mr. Steffen: (Interposing) I don't think that should be read into the record, Your Honor.

Justice Stephens: You may show it to the witness, Mr. Bromley.

Justice Jackson: Mark the portion you want him to read.

Mr. Bromley: It is Rule 10. It is marked in pencil.

(Document referred to handed to the witness.)

By Mr. Bromley:

Q. Mr. Lenci, having read that rule, does it bring back to your mind at all that this very man, George Dusol, mentioned in the fourth paragraph of your letter, Exhibit 449, was really connected with dealer Dusol, and as a matter of actual fact wasn't a commission salesman
4484 for Kelley at all? A. Well, we had a pretty good idea that that was the case.

Justice Stephens: Hand that to the Court, please, Mr. Marshal.

(The Code referred to was handed to the Court.)

Justice Stephens: Hand it to counsel for the Government, if they wish to see it.

(The Code was handed to Government counsel.)

Justice Stephens: Proceed, Mr. Bromley.

Mr. Bromley: I will withdraw the last question.

By Mr. Bromley:

Q. Isn't it your recollection now, Mr. Lenci, that the George Dusol referred to in the fourth paragraph of Exhibit 449, was really connected with dealer Dusol and was not an employee of the Kelley Company at all? A. I

certainly believe that he was connected with the Dusol Lumber Company.

Q. Isn't that an example of what I have been asking you, to-wit, an example of where a licensee-manufacturer—

Mr. Steffen: (Interposing) Your Honor, I would like to object to the last answer, which was answered in the form of "I believe", and I don't believe that that can be introduced as proof, if that is what Mr. Bromley wishes to do, that George Dusol was hired by Dusol & Son.

Justice Stephens: Your objection is well taken.
4485 What the witness believes is not to be retained in the record.

State what your recollection is, if it is refreshed, unless you mean by the word "believe" that that does reflect your recollection.

The Witness: Well, it was always our understanding that he had a financial connection with the Dusol Company.

Justice Stephens: Very well.

By Mr. Bromley:

Q. Was it also always your understanding that he had no employment by the Kelley Company as a salesman at all? A. No, I think he had some employment by the Kelley Company, too, on commission.

Q. Well, did he work for the Dusol Company or did he work for the Kelley Company, or for both? A. I would say for both.

Q. For both? A. Yes, because I know he was soliciting orders from other customers besides Dusol.

Q. Well, then, it was your understanding, at the time you made the complaint in the fourth paragraph of Exhibit 449, that he was paid a commission by Kelley, and gave some of it to Dusol, the dealer, for whom he also worked; is that right? A. That is correct, yes.

Q. And you were complaining because you thought
4486 that was a rebate by Kelley? A. That is right.

Q. Now the situation would have been just as objectionable, in fact perhaps more so, if Dusol had been employed solely by Dusol, dealer, and not at all by Kelley, wouldn't it? A. Yes.

Q. Well, is it your recollection now that that sometimes happened, that is, that licensees would pay commissions, ostensibly salesmen's commissions, to men connected with the customer and not connected with the manufacturer at all? A. I have at the moment no definite recollection of certain individuals.

Q. Wasn't it your understanding that the license bulletins of USG did not outlaw commission men, as such, but merely were aimed at prohibiting the practice of splitting commissions with customers to effect a reduction in the price? A. Yes.

Q. Will you look at the February 6, 1939, bulletin, No. 5, which appears, for the Court's convenience, at pages 95 and 96 of the complaint, beginning at the bottom of page 95.

(The bulletin referred to was handed to the witness.)

4487 By Mr. Bromley:

Q. Now, do you see that provision under "Rebates, Allowances, Etc."? A. Yes.

Q. And do you see that that provides that:

"Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price by"—and then down four more lines—"splitting of salesmen's compensation or commissions with customers"? A. Yes.

Q. Now, wasn't it your understanding that that is all that was ever prohibited, at any time, by the licensor, so far as the activities of commission salesmen were concerned? A. Yes.

Q. You had commission salesmen in your company right through this entire period, didn't you? A. Well, I wouldn't say that we did, because we never liked commission salesmen.

Q. Well, as a matter of fact, from 1929 up until the present time, haven't you more or less without interruption had one or more salesmen compensated either partly or wholly by commission, on your payroll, whose time
4488 was devoted to the selling of patented gypsum board? A. Not continuously, no.

Q. Well, most of the time? A. A part of the time, yes.

Q. Now in Exhibit 450, the Board Survey Company acknowledged your complaints, and said that the matters were being investigated; is that right? A. Yes.

Q. Exhibit 452 is dated prior to Exhibit 450, do you notice? A. Yes.

Q. Now in Exhibit 452, you were explaining to the United States Gypsum Company, the licensor, that you did not

have any jobbing arrangement with the Abbey Company, which meant a cut price; weren't you? A. Yes.

4489 Q. And in the fourth paragraph of Exhibit 452, in which you say that you "had no warehouse or trucking arrangement with Abbey and have no jobbing, warehousing or trucking arrangement with anyone else at the present time", you merely meant to deny some accusation that had been made against you that you were guilty of an indirect price cut to Abbey by means of some warehousing or trucking or jobbing arrangement, did you not? A. Yes.

Q. You understood, didn't you, Mr. Lenci, that there was no prohibition on the part of USG against your having a warehouse wherever you wanted one? A. That is right.

Q. But that the only prohibition was that you should not use a warehouse arrangement as a secret or indirect way to lower the price of the board which you were selling to the dealer from whom you leased warehouse space? A. That is correct.

Q. But you understood that if you had a bona fide lease of warehouse space, and you paid full value for it and you used it, that you could have that arrangement with anybody, including a dealer, didn't you? A. Yes. It happens that we didn't do that, but I understood it that way.

Q. In Exhibit 452 not only did you deny the accusation which had been made against you with reference to

4490 your sales to the Abbey Company, but you again called the attention of the licensor to the fact that you thought that some of your competitors had been guilty of this type of indirect price cutting, didn't you? A. Yes.

Q. Did you feel at that time that these warehousing, jobbing and trucking arrangements of which you felt your competitors were guilty, had a seriously adverse effect upon your own business? A. Yes.

Q. Will you look at Exhibit 453, please? In the first paragraph you refer to sales of board on a consignment basis, do you not? A. Yes.

Q. Would you say that the practice of shipping board to a dealer on consignment, at the price fixed in the bulletin say for a carload sale, was a device to effect a price cut? A. Yes.

Q. Will you please explain that? A. Well, using your example, if a dealer were shipped a carload of material and he could keep that in stock and not pay for it until he sold it, which might run over a period of months, that certainly was taking an unfair advantage of anyone else who would

sell him and expect to be paid on the usual credit terms—

4491 Q. (Interposing) Well, if you shipped a dealer a carload of board on consignment— A. (Interposing) I hadn't quite finished my answer.

Q. Excuse me. A. Furthermore, in shipments on consignment, when that car is finally sold, the dealer will go to the manufacturer and say, "Well, there were 30,000 feet in that carload, but we only managed to sell 28,000, the car must have been short or the board was not up to quality, and we can't pay for the balance of the material"—which was a direct price concession, if allowed.

Justice Stephens: By shipping "on consignment" do you mean retaining title in the manufacturer until the price is paid?

The Witness: Yes. This was a practice that we did not follow ourselves, but I know how it worked. The manufacturer kept title, but put his goods in the hands of the customer and whatever the customer stated at the end of the period, the manufacturer had to accept in the way of payment.

By Mr. Bromley:

Q. Now of course the consignment relieved the customer of expense such as investment expense, didn't it? A. Yes.

Q. He had the use of his money and didn't have to pay for the board promptly, like other customers did?

4492 A. That is right.

Q. Wouldn't you say that if board were delivered by a licensee, a carload of board, on a consignment basis, to a dealer, that that was just as much a rebate to that dealer as it would be if the manufacturer had actually paid to the dealer in cash some sum such as $1 or $2 per thousand square feet of board? A. Yes.

Q. And do you remember that at this time Rule 17 of the Fair Practice Rules of the Federal Trade Commission had some relation to this consignment business? A. I believe there was something in the Fair Trade Practice Rules.

Q. Will you look at Defendants' Exhibit 3 for identification, page 5, Rule 17? Is that the rule which condemns the consignment business in the gypsum industry under the Fair Trade Practice Rules, Mr. Lenci? A. I don't think that that related to consignment.

Q. You don't? A. I think that that had to do with shipping cars without any order whatever from a customer; simply sending a car to a customer and expecting him to take it without an order.

Q. Well, if that had been done—

Mr. Steffen: (Interposing) Your Honor, I object to this. This document is handed to Mr. Lenci for the
4493 purpose of refreshing his recollection, and we are not here to construe the rules.

Justice Stephens: Well, I didn't understand, Mr. Bromley, that you were using this to refresh recollection. Are you or are you not?

Mr. Bromley: No, I am not.

Justice Stephens: If he is not, it seems to me—I will be glad to hear you, Mr. Steffen—that it is probably not improper cross-examination because it goes to the witness' understanding, and the alleged reasonable basis of these consignment rules.

Mr. Steffen: Well, the item that he has there, Defendants' Exhibit No. 3, is not in evidence, and I don't think it can be admitted in evidence, and we don't want any testimony concerning what that rule means, or concerning that rule even.

The witness can testify concerning his understanding of these matters that were being investigated upon in the light of it, but I don't think he can get that rule in indirectly.

Justice Stephens: We are not intending to get the rule in evidence, and I didn't understand that it was. I thought the examination was along just the lines that you stated, that he is being examined "in the light of" this rule, as shown him in this Defendants' Exhibit 3 for identification.

Mr. Steffen: For purposes of refreshing his recol-
4494 lection, yes.

Justice Stephens: I suppose for more than that, I suppose the cross-examination is directed to showing the witness' understanding of the consignment rule.

Mr. Steffen: That is not in issue, his notion of the consignment rule in the Federal Trade Commission's Rules.

Justice Stephens: I am talking about the consignment rule in the bulletins.

Mr. Bromley: I am trying to cross-examine him to show that a consignment was an unfair trade practice, and a rebate.

Mr. Steffen: I think that question has been answered.

Justice Stephens: Rule 17 of the Fair Trade Practice Rules of the Federal Trade Commission is not being received in evidence, and if it has been read into the record it may be excluded. But the cross-examination itself we think is not improper.

(Thereupon, there was a conference between the Judges.)

Justice Stephens: My Brother disagrees with me and I of course will abide by any ruling the majority makes. I didn't understand that this examination was upon Rule 17 of the Federal Trade Commission Rules, but that it was only a reference to that for the purpose of testing the man's reasonableness and recollection with respect to the purpose of the consignment rule.

4495 Mr. Bromley: That is all I was intending to do.

Justice Jackson: I thought you were going to question him on Rule 17, and I don't think that would be proper, if it has only been marked for identification.

Justice Stephens: Re-ask your question. That will present the matter more clearly to all of us. Judge Garrett would like to be better informed.

By Mr. Bromley:

Q. Well, as of this date, the practice of shipping board on consignment was condemned by the gypsum industry as an unfair trade practice, wasn't it? A. Yes.

Mr. Steffen: We object to that, your Honor, as being completely outside the direct examination and not proper, and for the reason, further, that the rule appears in the bulletins as respects commissions and I don't see—as far as I know that may be made up in part because of the rule that appears in the bulletin—in other words, I don't think that a reference to Rule 17 and a discussion as to what the gypsum industry's policies were, based apparently upon some notion of Rule 17, is material to this line of examination.

Justice Stephens: This last question didn't mention Rule 17.

Mr. Steffen: I thought the "gypsum industry" was a reference from the paper which Mr. Lenci had before him.

Justice Stephens: I didn't so understand the question.

4496 Justice Jackson: I didn't understand it that way.

Justice Stephens: The objection is overruled.

By Mr. Bromley:

Q. In your judgment, as of that time, that is as of May 31, 1932, the practice of shipping board on consignment constituted a rebate to the dealer who got that accommodation, did it not? A. Yes.

Q. And that is what you were complaining about in your Exhibit 453? A. That is correct.

Justice Stephens: We will suspend at this time for the afternoon.

Before we adjourn, let me say to Mr. Steffen or Mr. Knuff, whoever has charge of it for the Government, that we received this morning a motion with respect to the proposed deposition of Mr. Gloyd, with an affidavit and attachments. If you wish to file counter affidavits, please do so tomorrow, if you can, so that we can get a chance to consider them, and then have a brief discussion, if necessary, on Friday, so that we may make a ruling before we adjourn in order that you may know where you are going to be, both of you.

Mr. Steffen: We will file an affidavit tomorrow morning, your Honor.

Justice Stephens: Thank you.

4497 (Thereupon, at 4:10 o'clock p. m., an adjournment was taken until 10:00 o'clock a.m., Thursday, February 24, 1944.)

4498 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Thursday, February 24, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4502 Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed his testimony as follows:

Cross Examination (resumed)

By Mr. Bromley:

Q. With reference to what the Presiding Justice said a minute ago, Mr. Lenci, will you look at your answer beginning at line 5 on page 4784, and clear up for us your use of the word "short", in view of the fact that you
4503 seem to have assumed that the dealer said to the manufacturer, "Well, there were 30,000 feet in that carload * * *"? A. I have already seen the answer, just a moment ago.

What I intended to say there was this: Suppose we shipped a car with 30,000 feet, on consignment. The dealer would claim, when that material was all sold, that while we said there was 30,000 feet, there was only 28,000 feet or less, and that there was consequently a shortage there which he was not responsible for.

Justice Jackson: And he wouldn't pay for it?

The Witness: That is right. And there might be breakage that he wouldn't have to pay for, and it would leave the whole thing in a good deal of a mess when you got through.

Justice Stephens: I see what you mean.

By Mr. Bromley:

Q. So if you allowed his claim when, as a matter of fact, his claim was a false one, you would be making him an allowance which would reduce the price; is that right? A. That is correct.

Q. Now will you look at page 4740. Will you read to yourself from line 13 to line 25, please? A. (After examining testimony). Yes, I have read that.

Q. I would like to re-ask my question beginning at
4504 line 18, Mr. Lenci, in this form:

The USG bulletins at some time or other fixed a price at which a licensee could sell gypsum board to a dealer and make the delivery by truck, did they not? A. Yes.

Q. And in so fixing that price, the bulletins would frequently define the area within which a licensee could deliver board to a dealer-customer at that price, would they not? A. Yes.

Q. And assume that the bulletins fixed a price of $15 for lath, if delivered by truck, within New York County, in metropolitan New York City. If your company made a truck delivery at the price of $15 to a dealer in Bronx County, you would be rendering a service to the Bronx dealer which might cost you more than $15, would you not? A. Yes.

Justice Jackson: Isn't Bronx considered part of the metropolitan district?

Mr. Bromley: It is, sir, but I was making a distinction between New York County and Bronx County.

Justice Jackson: You said the metropolitan district, I thought.

Q. Well, I will make it plainer. Let me ask you this:

4505 If the bulletin provided for a $15.00 price for deliveries within the five metropolitan boroughs of New York, and you made a delivery in Westchester County at $15.00 to a dealer, you would be rendering a service to that dealer which might cost you more than $15.00; isn't that right? A. That is correct, yes.

Q. In other words, if you made deliveries outside of the area specified in the bulletins, at the prices specified in the bulletins for deliveries within the area, you would be cutting the price which should apply to deliveries outside the area, wouldn't you? A. Yes.

Q. Now, we were talking, at the close yesterday afternoon, about rebates in the indirect form of sales of small quantities at a price fixed for a larger quantity, and sales on a consignment basis.

You recall, don't you, that in 1934, when the Code of Fair Competition for the Gypsum Industry was approved and adopted, that it was one of the requirements under that Code that all members of the gypsum industry file with the Code Authority their prices? A. Yes.

Q. And as you said yesterday—

Mr. Steffen: Your Honor, I object to this investigation of the Code Authority. It seems to me that that is
4506 certainly not within the direct-examination, and it is introducing a matter here which hasn't any bearing, as I see it, upon the examination as it has proceeded.

If Mr. Bromley, on his case-in-chief, wishes to introduce the NRA Code, it is his privilege to do so; but I don't think it should be brought in backhanded this way.

Mr. Bromley: Well, my purpose in doing this is because I conceive that the Government's direct-examination went into the field of inquiry of this witness as to whether or not things like consignment really affected price or didn't.

Now I would like to cross-examine this witness in an attempt to show things like the fact that consignment basis selling did affect price. And for that purpose I would like to develop that during some of the time these bulletins were in effect and provided for trucking areas and for minimum quantities, the NRA Code was in effect which, I hope to be able to show, recognized that a sale on a consignment basis was a way of cutting the price, and that other practices which appear in our bulletins, both before the Code, during the Code and after the Code, were, during the Code days, recognized by everybody as matters which directly affected price.

Justice Stephens: Do you wish to reply, Mr. Steffen?

Mr. Steffen: I do, Your Honor.

4507 It seems to me, from Mr. Bromley's present statement, that the error in his examination is apparent. He says that he wishes to develop from the NRA Code that matters of shipping on consignment, for example, affect price. That is definitely going into the NRA Code, which has not been introduced before the Court and we have no information before the Court as to whether the NRA was designed to affect price.

As a matter of fact, the NRA was designed to affect everything, and therefore his reference to the NRA Code would certainly not establish the point that he wishes to establish, and it would be introducing, as I have stated, some extraneous matter here which we have had no opportunity to present and which we would strenuously object to if it were offered directly.

It is irrelevant to a discussion as to what the gypsum industry was doing, and it is no excuse, whatever the NRA may have done is no excuse for anything that these defen-

dants may have done. As a matter of fact, many of the regulations which were approved under the NRA—which, as Judge Garrett pointed out yesterday, was subsequently held unconstitutional—would have been direct violations of the Sherman Act. Therefore, he can not refer to what would be a violation for purposes of attempting to justify an action here. This case comes up unembarrassed
4508 by the NRA Code, and we are, I think, to listen to this evidence strictly on its own merits.

Justice Stephens: Of course, the NRA wasn't declared unconstitutional on any grounds touching the Sherman Act, but on the ground that it was an unconstitutional delegation of legislative authority, and the NRA contained exemptions with respect to the Sherman Act.

Now the Court is not of the view—is not assuming to hear these references to the NRA as any proof of what the NRA required, but the Court, as presently advised, is of the view, Mr. Steffen, that this is not improper cross-examination, for this reason: The Government has gone into these various bulletins and all the provisions thereof, which are so clear to all of us now that we don't need to mention them specifically, for the purpose of showing that they are illegal restrictions upon commerce.

Now the defense has a right to try to prove by cross-examination, if it can, that they were not illegal restrictions upon commerce, but that they were methods recognized in the trade as safeguards against price cutting.

In our understanding of the proprieties of cross-examination, where the witness has been presented by the plaintiff to prove a given theory, references may be made, in the course of cross-examination, to items of ever so varied a character, not introducible in and of them-
4509 selves, as tending to prove a contrary theory, or to make reasonable the answers which the witness is being sought to give, on the cross-examination.

It seems to us not improper cross-examination, and is not an attempt to introduce into the record directly the NRA provisions. It is ordinarily a convention, in cross-examination, to try to call the attention of the witness, who has been called by the opposite party, to items which would tend to cause him to contradict or to modify his previous testimony, if that can be accomplished by the cross-examination.

Mr. Steffen: If that were the purpose, I think there might be little objection to it, but I think the attempt is

to attempt to excuse what was done by the defendants by showing that under the NRA they had some regulations concerning consignment, and in so far as that is concerned, I think the whole scope of the evidence is immaterial and irrelevant, and I think it is misleading in that we have had no evidence here concerning the NRA Code, or whether the NRA Code would be legal under the Sherman Act. And I state to you that in many respects it would not. Therefore, he is appealing to an illegal practice for purposes of justifying what we contend here is also an illegal practice.

The whole scope of the evidence would be to clutter
4510 up the record and get a lot of irrelevant and misleading testimony before Your Honors, and it does nothing toward determining whether the witness has been telling the truth or not. We have no doubt on that score but what he has been.

Justice Stephens: It seems to the Court that it is not an attempt to put the NRA Code in evidence as either legal or illegal, but it is an attempt to refer to a circumstance which may cause the witness to put a construction upon his direct-examination of an opposite or qualifying character.

Is that your purpose, Mr. Bromley?

Mr. Bromley: Yes, Your Honor.

Justice Stephens: The objection is overruled.

By Mr. Bromley:

Q. Under the NRA Code, all members of the gypsum industry—

Mr. Steffen: (Interposing) I object to reading this into the record. Do you want to show the witness the NRA Code?

Mr. Bromley: I am not reading it in.

Mr. Steffen: We object to having statements of the NRA Code in evidence, either by reading from them or quoting from them or summarizing them. If you want to test the witness concerning the NRA provisions, I should think they might be shown to him.

4511 Justice Jackson: This man was a member of the Code Authority of the Gypsum Industry, wasn't he?

Mr. Bromley: Yes, he has so testified.

Justice Jackson: I think you can ask him what he understood.

Justice Stephens: The record may show your objection. It seems to the Court that you would restrict the cross-

examination to a point where it would make it very difficult to conduct it. If the cross-examiner can not refer to items and describe items in sufficiently clear terms to bring them to the attention of the witness' mind, whether he reads them, summarizes them or shows them to the witness, I don't see how he can refer to items which may tend to change the direct-examination.

Of course, if this witness' recollection were being refreshed, we would certainly consistently enforce the ruling that anything which was offered to refresh his recollection should not get into the record. I don't understand that that is the purpose here.

The record may show a continuing objection, to protect the Government's objection in this matter, and that it is overruled.

By Mr. Bromley:

Q. Under the NRA Code, Mr. Lenci, each member of the industry was required to file with the Code Authority
4512 its complete price lists, was it not? A. Yes.

Q. And under that Code, each member was required to file with the Code Authority any change that it made in its prices? A. Yes.

Q. And under that Code, each member of the industry was forbidden to sell at prices other than those—

Mr. Steffen: (Interposing) Your Honor, I object to this. It is simply a direct reading into the record of the NRA Code. Why not put it in as an exhibit, or offer it? If he wants to ask the witness some questions as to what they did—that is all we asked—go ahead, but don't read the whole NRA Code into this record, for whatever purpose.

Mr. Bromley: This is all only preliminary.

Justice Stephens: The Court has carefully considered your objection, and understands that this is preliminary to asking the witness a question directed towards attempting to modify his testimony on direct-examination.

Mr. Steffen: May I move to strike the entire testimony, then, if it is for any other purpose than to attempt to modify?

Justice Stephens: I don't think you have a right to move to strike testimony which proves to be unsuccessful on cross-examination.

4513 Mr. Steffen: All right.

Justice Stephens: You may make such motions as you feel advised that you ought to make, of course, at any time, but the present objection is overruled.

By Mr. Bromley:

Q. And under the Code, no member of the industry was permitted to sell at a price or prices below those filed, isn't that right? A. That is correct.

Q. Now, isn't it a fact, sir, that under the operation of the Code, if a member sold a small quantity of his product at the price fixed for a carload quantity, it was considered to be a price violation? A. Yes.

Q. And isn't it a fact, sir, that under the Code, if a member made a sale on consignment to a customer, it was considered to be a violation of his filed prices?

Mr. Steffen: I must ask, Your Honor—Mr. Bromley is obviously not asking or expecting that this witness is going to change his testimony. He is trying to explain and confirm his testimony, and under Your Honor's ruling this course of examination is utterly improper.

Justice Stephens: Mr. Steffen, the Court doesn't wish to argue the point with you. It has made its ruling as clear as it can. It tries to state the basis of its rul-
4514 ings so that counsel will be advised that the Court has reasons for its rulings, and for the guidance of counsel. The Court was using the term "modify" in the conventional sense with respect to cross-examination. It seems to the Court that it would be error to deny to the opposite party the right to make reference to these matters for the purpose of asking the witness to make statements concerning the practices which the Government has examined upon, and which statements might be construed by the Court as modifications, qualifications, or reconstructions or different constructions of these practices than those put upon the witness' testimony and these practices by the Government.

The Government's contention under the direct-examination, as I understand it, is that the witness' testimony supports the inference that these bulletins, and all of the items under the bulletins which we have been discussing, are illegal restrictions upon trade, upon commerce.

Now the defendants have a right to try to prove, either by direct or cross-examination, that the actual effect of them was to protect price, not to regulate commerce. And the practice of the industry in respect of them is an item, it seems to me, which the defendants are entitled to call to the attention of the witness in order that they may contend that his testimony leads to a different construction of the practices than the Government insists upon.

4515 Mr. Steffen: I have no objection to their going

into the practices of the industry, but when they appeal to an extra-legal matter, such as the NRA Code, for justification for anything that was done in the industry before or after the Code, the matter is not relevant to this proceeding and it seems to me to be improper cross-examination—

Justice Stephens: (Interposing) You have made your position very clear upon that, Mr. Steffen, and I think your record is adequately protected. It may be that Government counsel has an entirely different view of what is proper cross-examination than the Court has, and we want you to feel free to urge your differences and to make your record.

If this case, at the close, should be decided against the Government, you may urge upon the Supreme Court, of course, that our conception of cross-examination is incorrect. We want you to be fully within your rights in doing that.

The objection is overruled.

By Mr. Bromley:

Q. And you recall that you testified the other day, on direct-examination, that under the bulletins you felt your company was prohibited from making gifts of free materials to your dealer-customers? A. Yes.

Q. Well, that same thing was expressly provided
4516 in the NRA Code as being a rebate to the dealer from the seller, wasn't it? A. Yes.

Q. And the Code prohibited a gypsum manufacturer from making a gift to a purchaser in connection with the sale of his goods, whether in the form of money or gifts or otherwise, didn't it? A. Yes.

Q. And the NRA Code also prohibited a member from indirectly reducing his price by furnishing other materials without charge to the customer? A. Yes.

Q. And the Code referred specifically, did it not, to this subject matter that you talked about the other day—advertising allowances? A. Yes.

Q. And provided that if a member of the gypsum industry should make a customer an allowance for advertising not actually placed, that that should be considered a rebate? A. Yes.

Q. And it also had a provision that allowing false or inflated damage claims should be considered a rebate, did it not? A. Yes.

4517 Justice Garrett: Mr. Bromley, I am not sure that

I have understood as clearly as I should. Are you bringing this matter out here from that Code for the purpose of arguing that that Code was justification for the activities of these defendants?

Mr. Bromley: No, I am certainly not bringing it out for the purpose of arguing that the price fixing by USG was lawful because prices were fixed under the NRA Code. I am not doing that.

I am, however, seeking to bring it out to show that not only in the industry as a matter of practice and custom, but in a more formalized way, with the approval of the Government, provisions were considered by everybody as having a direct relation to price, of precisely the same nature which this witness' direct-examination has shown were contained in our bulletins, and interpreted by him in the way in which he has testified.

In other words, to make a specific example, this witness was asked a lot of questions about whether he could rent warehouse space from a dealer, with the obvious purpose on the part of the Government to show that that didn't have any relation to price and that that was a restriction that was unreasonable, that went way beyond the holding in the General Electric case.

Now it does seem to me to be material and per-
4518 suasive if I can show to this Court, by cross-examination of this witness, that in the NRA days the NRA Code prohibited members of the industry from making warehouse arrangements with dealer-customers, for the reason that everybody knew that that was a dishonest sort of an arrangement which covered a hidden rebate. That is all I am seeking to develop this line of testimony for.

Justice Jackson: And you are seeking to do that in its proper relation to what were considered to be correct or incorrect practices prior to the NRA and subsequent to the death of the NRA?

Mr. Bromley: Yes, I am.

Mr. Steffen: I think I should be permitted to make a short statement in reply to Mr. Bromley.

Justice Stephens: You may.

Mr. Steffen: That is, I take it that he has stated the basis upon which he intends to argue upon this evidence at the closing, and he indicates that a warehousing arrangement, as he says, as everybody knew, was a dishonest arrangement, and that it constituted a rebate, and that therefore it should be abolished as an improper trade practice.

Now I think if it is permissible for Mr. Bromley to make use at all of these regulations, it is necessary to show that they were price regulations, and there is no show-
4519 ing at all that these matters of warehousing, these matters of commission men, and all of the other things that were brought up in the NRA, were necessarily related to price at all. They didn't hesitate to regulate anything that they thought was an improper practice, price or no price, and it seems to me, therefore, that the appeal to the NRA, as a justification,—for that is exactly what Mr. Bromley's argument boils down to,—is not a proper appeal by way of cross-examination, that it introduces matters which have no probative value to establish his ultimate purpose—that is, that what the USG did was justified. We still object.

By Mr. Bromley:

Q. Can you recall, Mr. Lenci, what provision, if any, was made in the NRA Code having to do with warehousing or warehousing arrangements? A. Well, I think it was along this line, that it would be considered a price concession, a price cut, for a manufacturer to make an arrangement with a dealer to pay him rental for space, which was, in effect, a rebate.

Justice Jackson: In the dealer's warehouse?

The Witness: Yes. In other words, if the dealer bought a car of material, was buying material right along, and the manufacturer paid him rent in excess of what the value of that space might be if the manufacturer ever made
4520 use of it himself, but purely for the purpose of giving him a concession, that was a cut in price, it was a cash consideration for placing the business with that manufacturer.

By Mr. Bromley:

Q. Well, in that connection, do you recall that the NRA Code provided that the rental of warehouse space owned or leased by manufacturers, to dealers, at a rental less than what the fair value would be for other similar property in adjacent territory, shall be considered to be a rebate? A. If the rental was less—

Justice Stephens: (Interposing) I am sorry, I missed that question. Will the Court Reporter read it?

(The question was read by the reporter.)

The Witness: That is the opposite form of it, that is rental of space by a manufacturer to a dealer at less than the value of the property.

By Mr. Bromley:

Q. That is the reverse? A. That is the reverse situation.

Q. I see.

Well, do you recall that there was a provision in this Code as to the situation which I have been asking you about, namely, the rental by a manufacturer of warehouse space from a dealer? A. I think there must have been,
4521 because that was always a matter before us.

Q. And do you remember that so far as the NRA Code was concerned, that provision took the form of an absolute prohibition, and said that no member of the industry shall hereafter rent or lease or extend any existing lease for warehouse space for industry products from lumber or building material dealers? A. I believe there was a clause to that effect in there.

Q. Wasn't the purpose of that prohibition in the NRA Code because of the fact that the abuse was recognized to be so widespread that it was thought by the Code Authority and the members that the only way to stop the rebate was to prohibit the renting of any space at all? A. Yes.

Q. As between seller and buyer in this field? A. Yes.

Q. You were asked some questions with respect to the provisions of the USG bulletins which provided that it should be considered to be a rebate if you sold a mixed car, to a dealer, of board and plaster, and fixed your plaster price at a figure below your current price, or something to that effect.

Do you recall those questions and your answers? A. Yes, I do.

4522 Q. During all of this period, it is a fact, so far as your company was concerned, that you knew from day to day what your current market price for plaster was; isn't that right? A. Yes.

Q. I mean, you had every day—which changed from time to time—a published price for plaster, at which you would sell plaster? A. Yes.

Q. And do you recall that among the provisions of the NRA Code was one which provided that no industry member should offer for sale other commodities at prices below the member's current prices for such other commodities,

for the purpose of influencing the sale of industry products? A. Yes.

Q. Now that is the same kind of a thing, is it not, as the provision in the USG bulletins to which you were testifying the other day? A. Yes.

Q. That practice of selling gypsum products of different kinds to one purchaser is known in the industry as a combination sale, isn't it? A. Yes.

Q. And it is also known as mixed car business? A. That is the commoner name for it.

4523 Q. But the type of order which is filled by a mixed car shipment is a combination order of board and plaster and other gypsum products, isn't it? A. That is right.

Q. And, of course, under the NRA Code it was specifically provided that there should be no splitting of commissions as between the seller's commission salesmen and the buyer of the products, isn't that right? A. Yes.

Q. Now, all of the things which I have mentioned to you in my questions this morning were, under the NRA Code, considered to be rebates or price cuts, weren't they?

Mr. Steffen: I should like to object to that. That asks for a construction of the NRA Code, and it is an attempt to make the witness testify that these matters were regularly construed, under the NRA Code, as constituting a price cutting or rebate, and it seems to me that he is not qualified to make that deduction. The NRA Code is not in evidence.

Justice Stephens: Read the question.

(The question was read by the reporter.)

Justice Stephens: Considered by whom, Mr. Bromley?

Mr. Bromley: By the Code Authority.

Justice Jackson: Of which you were a member?

The Witness: Yes.

4524 Justice Stephens: Are you objecting to this, Mr. Steffen, on the ground it is not proper cross-examination, or on the ground that this witness is not qualified to say what these practices were considered to be by the NRA Code Authority?

Mr. Steffen: I thought I had a continuing objection on the matter of whether it was proper cross-examination.

Justice Stephens: You have.

Mr. Steffen: My specific objection, and the only reason I spoke at this moment, was that as I construe the question, it calls for a construction of the NRA Code. The

NRA Code is not in evidence, and I don't think it ever will be; and I don't see how the witness could be qualified in any event to construe the Code or what was in the Code Authority's mind.

Justice Stephens: Since he was a member of the Code Authority, we think that objection is not well taken. Overruled. Judge Garrett dissents from that point of view.

Mr. Bromley: Do you remember the question, Mr. Lenci?

The Witness: You had better read it.

(The question was read by the reporter.)

The Witness: Yes.

By Mr. Bromley:

Q. Wasn't it generally considered, Mr. Lenci, in
4525 the industry, before, during, and after the NRA period, that these practices about which I have been inquiring of you this morning were methods of cutting prices by a manufacturing seller? A. Yes, looking at it from a business standpoint.

Mr. Steffen: I object, because the question calls fc conclusion as to what the industry considered. I should think that that is entirely too broad.

Justice Stephens: If he knows that—and it would seem clear that he must, because of his experience in the industry—it would seem not to be the type of conclusion which is objectionable. My theory, and I thought it was shared by Judge Garrett and I know it is shared by Judge Jackson, of the propriety of this examination, Mr. Steffen, I apparently still haven't made clear.

You have conducted the direct examination of this witness to try to show that the purpose of these bulletins, and the regulations under them, was restraint of trade. It seems to Judge Jackson and myself—

Justice Garrett: (Interposing) On this question I am not in disagreement—

Justice Stephens: (Interposing) Very well.

(Continuing)—and also, then, to Judge Garrett, that the defendants have a right to try and show that the purpose
of these regulations was not restraint of trade but
4526 was the prevention of unethical and improper and unfair practices.

Now, it would be proper cross-examination, it seems to us, to refer to items, whether in the NRA Code or in any other code, formal or informal, industry understandings, and the like, which might influence the purposes of the in-

dustry, which might tend to clarify or show what the purposes of the industry were. It should be as open to one side as the other.

Now surely the Court can be trusted, as Judges sitting here without a jury, not to be bound by the provisions of the NRA Code, and to look upon them only as items referred to in cross-examination to help bring out what was the real purpose of the gypsum industry in making these regulations.

The recess this morning will have to be for 10 minutes, rather than five minutes. It may be announced at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4527 Justice Stephens: Proceed, gentlemen.

By Mr. Bromley:

Q. At page 4687 of the transcript I asked you some questions, Mr. Lenci, as to whether you had any understandings, outside of the license agreement, and then at line 5 on page 4688, I said, "Well, inside the license agreement".

Now in connection with those questions, I would like to ask you now—did you understand that there was anything in your license contract, or in the bulletins, which provided that USG should raise or stabilize the prices of gypsum board? A. No.

Q. And did you understand that there was anything in your license contract or in the bulletins issued thereunder, which provided that USG should fix or control the prices of plaster, or the prices of other unpatented products, such as Keene's cement, block and tile? A. No.

Q. And did you understand that there was anything in the license contract or the bulletins which provided that USG should or would eliminate jobbers from the distributive system? A. No.

Q. At page 4709 of the transcript, beginning at line 3, I asked you a question about Mr. MacLeish and Judge Rippey, which I have now concluded did not express
4528 my intention. What I meant to ask you was this.

Do you recall that prior to the time you executed the bubble board license, you had been informed by Judge Rippey that Mr. MacLeish had said that the Ebsary Gypsum Company should decide first whether or not they were interested in the savings and the other benefits to be derived from the bubble invention, before they should proceed to the question of taking up with USG the form of

the proposed license contract? A. That is, that Judge Rippey said that?

Q. Yes. A. Yes.

Q. And before you proceeded to negotiate the October, 1929, license, your company had decided that it did want to avail itself of, and use, the so-called bubble or foam board invention? A. That is correct.

Q. Now will you look at Exhibit 453, please?

(Government's Exhibit No. 453 was handed to the witness.)

By Mr. Bromley:

Q. Exhibit 453 is a complaint by you against what you considered to be an improper action by USG itself, isn't that so? A. Yes.

4529 Q. Now if it were true that USG, or a licensee, was making consignment sales to dealers in your territory, would that affect your ability to sell to those dealers to whom the consignment privilege was accorded? A. Yes, it would.

Q. And how would it affect your business? A. Well, if we sold these particular people we would expect to be paid on the usual terms; whereas, if some other company went in there and put the material in their warehouses, and said, "You don't have to pay for it until you sell it," that is a distinct concession—to our advantage.

Q. And might cause you to lose that customer, or a sale or sales to that customer? A. Yes.

Q. Will you look at Exhibit 454, please?

(Thereupon, Government's Exhibit No. 454 was handed to the witness.)

By Mr. Bromley:

Q. In that exhibit your treasurer was reporting to you, was he not, that the Ebsary Company had lost a sale to a prospective customer because some licensee had not lived up to the minimum price requirements applying to a certain quantity sale of board? A. Yes, to that territory.

Q. Now the customer was Louis Brooks, of Wash-
4530 ington, New Jersey? A. Yes.

Q. And Tomkins Brothers, the concern which made the sale, was acting as an agent for the Atlantic Company, according to your understanding? A. Yes, Tomkins Brothers, Tomkins Rockwall Company, and the Atlantic, were all very closely associated.

Q. And if Tomkins Brothers was making a sale at a price and delivering by truck to Washington, New Jersey, that meant to you, did it not, that the Atlantic Company was not living up to the bulletin requirements? A. Yes.

Q. And that is what you were complaining about in this exhibit, isn't it? A. Yes, we were complaining that Washington, New Jersey, was not in the trucking area at all, and by Atlantic permitting the delivery of a truckload to this outside area, that was a price concession to this customer—to our disadvantage.

Q. Do you know what the price was which Brooks was charged for the truckload delivery? A. I don't remember the amount in dollars, but he was charged the price which was in effect in the nearest county to him, to which truckload deliveries were permitted.

Q. Now what was it, according to your contention,
4531 that Brooks should have been charged? A. Well, my contention was that he should have been sold only in carload lots because that was specified by the bulletins, and the fact that they sold a truckload in there was a concession, they gave Brooks a truckload shipment at less than it would have cost him to buy it from us in carloads, and deliver it and truck it, unload it.

Q. This situation is the same kind of a situation as was covered in your answers to my questions with respect to Metropolitan New York truck deliveries, and deliveries in Westchester County, is that right?

Mr. Steffen: If you understand that. I think the reference is a little vague.

Mr. Bromley: I will withdraw the question.

By Mr. Bromley:

Q. Do you remember earlier this morning I asked you to assume an illustration in which truck deliveries had a price fixed for Metropolitan New York, but not for Westchester, and the licensee made a truck delivery in Westchester at the New York price? A. Yes.

Q. Well, the thing that Mr. Hough was calling to your attention in Exhibit 454 was that kind of a situation? A. Yes.

Q. Now again, this complaint was one in which you felt
that you had lost some business because of the At-
4532 lantic Gypsum Company's violation of its agreement with USG, did you not? A. Yes.

Q. Will you look at Exhibit 457, please?

(Thereupon, Government's Exhibit No. 457 was handed to the witness.)

By Mr. Bromley:

Q. That is a reply by the Executive Secretary of Board Survey Company to your complaint against Atlantic, is it not? A. Yes.

Q. By the way, your formal complaint to Board Survey Company is contained in Exhibit 455, is it not?

(Thereupon, Government's Exhibit No. 455 was handed to the witness.)

The Witness: Yes.

By Mr. Bromley:

Q. Now referring again to the second paragraph of Exhibit 457, doesn't that paragraph spell out the correct price which Atlantic, through its agent Tomkins, should have charged Brooks? A. That is correct.

Q. And that correct price is $36.28, according to Exhibit 457, isn't it? A. That is right.

Q. And that price is figured on the basis of the delivery of a less-than-carload lot, at the less-than-carload
4533 price fixed in the bulletins? A. Yes.

Q. And if Atlantic had charged the correct price under its license and the bulletins, to Brooks, Atlantic should have charged the less-than-carload price for this truck delivery? A. That is right.

Q. Now the less-than-carload price fixed by the bulletins for a sale of a less-than-carload quantity outside of the trucking area, was mill base plus the less-than-carload freight to destination, wasn't it? A. Yes.

Q. And in Exhibit 457 the Board Survey Company says, in effect, that Atlantic was guilty of a violation because it charged a price less than $36.28 for the delivery? A. That is right.

Q. By the way, is it the fact that under the published freight tariffs, as approved by the Interstate Commerce Commission, generally less-than-carload freight rates per unit of 1000 feet are very much higher than carload rates, freight rates? A. Yes.

Q. There is a very substantial difference per unit of a thousand feet, is there not, between the carload freight rate and the less-than-carload rate? A. Yes, there is.

4534 Q. So that as I understand you, Mr. Lenci, you were not complaining against Tompkins Rockwall, but

your complaint was against the Atlantic Company, a licensee, is that correct? A. Yes.

Q. And is it true that the usual way in which you learned about an alleged violation by a licensee was information as to what some third party was doing, generally a customer of a licensee? A. Yes.

Q. For instance, if you found that one of your dealer-customers was buying board from the Certain-teed Company, and in the sales to the consumer or the contractor by the dealer, he was getting a price at or about his cost from Certain-teed, you would be suspicious of that transaction, wouldn't you? A. Very.

Justice Stephens: Read that question, please.

(Thereupon, the reporter read the pending question as follows:

"Q. For instance, if you found that one of your dealer-customers"—)

Justice Stephens: (Interposing) That is far enough. I am not quite sure what you mean, do you mean "dealer-customers" or "dealer's customers"?

Mr. Bromley: "Dealer customers".

Justice Stephens: Very well, I didn't understand
4535 clearly what you meant, and therefore the question wasn't entirely clear to me.

By Mr. Bromley:

Q. Now under the bulletin provisions, if Certain-teed sold to a dealer, Certain-teed was obliged to charge that dealer the price fixed in the bulletins which was generally called the dealer price, isn't that right? A. Yes.

Q. And at one time, for lath, the dealer price would be $13 mill base, plus the freight to destination, wouldn't it? A. Yes.

Q. Now suppose you found that a dealer was selling that board to a contractor at or about that price, that is, at or about the mill price to the dealer, plus the freight to destination—you would conclude that the dealer wasn't doing that as a matter of good business if he was paying the proper price to his supplier? A. That is right.

Q. Because you would expect a dealer, generally speaking, to resell the board that he bought at a figure higher than his cost, wouldn't you? A. Yes.

Q. Now if you found that a dealer was selling contractors or consumers at about the figure which should have rep-

resented his cost from the Certain-teed Company,
4536 what would you conclude with respect to Certain-teed,
if anything? A. I would conclude that Certain-teed had cut the price to that dealer.

Q. And you would conclude, wouldn't you, that the dealer was making his profit out of the cut which Certain-teed was giving him, below the bulletin price? A. That is right.

Q. And that would lead you, would it not, to complain not against the dealer, but against Certain-teed? A. Yes.

Q. But the basis of your complaint would be the evidence reported to you generally by your salesmen as to the price at which the dealer was selling the contractor? A. That is right.

Q. And it is true, isn't it, that you frequently were advised of what dealers were doing in the way of selling at low prices, not only by your salesmen, but by other dealer-customers who were in competition with the first dealer? A. That is right.

Q. If you were selling to two dealers in Astoria, Long Island, whose yards were adjacent to one another, and one of those dealers was undercutting the other, the man who was being undersold would complain to you that the supplier of his competitor must have been cutting the
4537 price to the other dealer, isn't that right? A. Yes.

Q. And the dealer who complained to you would complain because he would want you to meet the cut price? A. Yes.

Q. And that is the way you generally found out that some one or more of your competing licensees were probably violating the price bulletins, is that right? A. That is right.

Q. And isn't it a fact, Mr. Lenci, that over the years most of your complaints against licensees came up in that way, that is, through some reports to you by a salesman or a customer of what some customer of your competing licensee was doing, price-wise? A. Yes, they practically all would come that way.

Q. In other words, would it be fair to say that the evidence on which you generally based a complaint against a licensee was circumstantial? A. Yes, naturally.

Q. Because it was, generally speaking, impossible for you to know with any certainty exactly what the price was which a licensee had charged any particular customer of that licensee? A. That is right.

Q. In other words, these violations, and these price cuts by licensees, were generally concealed transactions,
4538 were they not? A. Yes.

Q. So that, generally speaking, the basis of your complaint against a licensee for violation of a bulletin, resided not in what the licensee was doing, but more generally in what his customer was doing? A. That is right.

Mr. Bromley: May the witness be shown Exhibits 431, 438, 449, and 454 and 455?

(Thereupon, the exhibits referred to were handed to the witness.)

By Mr. Bromley:

Q. Look at the third paragraph of Exhibit 431, beginning "Astoria Lumber Company".

Isn't it a fact, Mr. Lenci, that from the attitude of the Astoria Lumber Company you concluded that the Kelley Plasterboard Company must have been cutting the price so far as that proposed business was concerned, in its sale to Astoria? A. Yes.

Q. You had no information at all as to what the Kelley Company actually was doing, did you? A. No, except that we didn't get the order, and we had fully expected to get it, it had been promised to us.

Q. But you inferred from the circumstance that
4539 you did not get the order from Astoria, that Kelley must be guilty of a license bulletin violation in its price to Astoria, didn't you? A. That is right.

Q Will you look at Exhibit 438, the second paragraph thereof? A. Yes, sir.

Q. Now all you knew about that transaction was that a dealer named Duskis, was buying board from Orin F. Perry, which must have been sold to Perry by Certain-teed? A. Yes.

Q. That was the only information you had? A. Yes.

Q. From that you concluded, did you not, that Certain-teed must have been cutting the price to Perry below the dealer price? A. Yes.

Q. And in this instance you concluded that Certain-teed must have been selling Perry at a jobber's discount? A. Yes.

Q. In face of the fact that as of this time the correct price which Certain-teed should have charged Perry, even though he were a jobber, was the dealer price? A. That is right.

Q. So you concluded that Duskis could not have
4540 been buying from Perry—

Mr. Steffen: (Interposing) Your Honor, I make the objection that I think, as respects this exhibit, it is repetitious and I think that was all gone over yesterday.

Mr. Bromley: Not in this sense, I don't think.

Justice Garrett: In what way does it differ? It seems to me you went over all this yesterday, but you say now that you are going over it in a different sense.

Mr. Bromley: I was seeking to use it as an example of how the evidence of violations by licensees was circumstantial, in the sense that it needed a consideration on the part of the complainer of what the licensee's customer was doing, rather than what the licensee was doing. Perhaps I have sufficiently developed that.

Justice Jackson: You are abandoning that question, are you?

Mr. Bromley: I thought it was answered.

Justice Stephens: The answer may stand.

Mr. Bromley: However, I had not finished the question that I was asking, when Mr. Steffen raised the objection. Will you read my question as far as I had gone, Mr. Reporter?

(Thereupon, the pending question was read by the reporter as follows:

"Q. So you concluded that Duskis could not have been buying from Perry—")

4541 Mr. Bromley: (Continuing)—unless Certain-teed had been cutting its bulletin price to Perry?

The Witness: That is right. I might say, to clear that up, that we had sold a very large quantity of material to Daniel Duskis in years prior to this time, and on an equal basis we would unquestionably have received the business.

By Mr. Bromley:

Q. You mean by that, that if the price had been the same he would have given you his trade? A. I fully believe so, yes.

Mr. Bromley: May the witness see Exhibit 486, please?

(Thereupon, Government's Exhibit No. 486 was handed to the witness.)

By Mr. Bromley:

Q. Isn't Exhibit No. 486 another example of an instance where your information on which you based your complaint to the Board Survey Company, initially came from a dealer? A. Yes.

Q. And is it correct that the phrase, "one of our dealers" in Boston means that this was a Boston dealer who had been, up to this time, or was at this time, a customer of yours? A. Yes.

Q. And he informed you, did he not, that he had been offered a carload of lath at the dealer price by Wy-
4542 man & Allen? A. Yes.

Q. And of course you knew that Wyman & Allen had been jobbers of American Gypsum's board? A. That is right.

Q. Now what did you conclude from the information given you by this dealer-customer, as set forth in Exhibit 486? A. I concluded that the American Gypsum Company was continuing to sell Wyman & Allen Lumber Company at the dealer price, less a discount.

Q. And as of the date of this letter, Exhibit 486, the price which American should have charged Wyman & Allen was the dealer price without any discount, wasn't it? A. That is correct.

Q. So your complaint then was against American for a price violation? A. Yes.

Q. And the basis of your complaint was what Wyman & Allen were doing with respect to this Boston dealer who reported the instance to you? A. Yes.

Q. And it is a fact, isn't it, Mr. Lenci, that Exhibit 486 is a complaint against American for violation of its license, and the bulletins issued thereunder, and not a complaint against Wyman & Allen? A. Oh, no, it is a complaint
4543 against the American Gypsum Company.

Q. You knew that Wyman & Allen were not licensees, and that their price was not controlled by USG, didn't you? A. Certainly.

Q. Now didn't the same situation apply so far as these half-dozen or so manufacturing distributors are concerned? A. Yes.

Mr. Bromley: May the witness be shown Exhibits 440 to 446?

(Thereupon, Government's Exhibits Nos. 440 to 446 were handed to the witness.)

By Mr. Bromley:

Q. During the period of time covered by these exhibits, which was in the summer of 1932, isn't it the fact that you found that Structural was selling customers which you might otherwise have sold, in a way which left you non-competitive with Structural? A. Yes.

Q. And in Exhibit 440, you refer, do you not, to the fact that Structural was selling by truck in small quantities, and I refer you to the second paragraph of that letter? A. Yes.

Q. Now you knew, didn't you, that that kind of a delivery service in small quantities was a service to Structural's customers which cost Structrual money, and gave
4544 the dealer receiving that service a distinct advantage over his competitors? A. Yes.

Q. You were prohibited under the USG bulletins from giving that kind of service to those dealers, weren't you? A. Yes.

Q. You couldn't sell small quantities in truckloads at the price at which Structural was making the sale? A. That is right.

Q. And that caused you to lose prospective sales? A. Yes.

Q. And you were being very materially hurt by that kind of competition from the Structural Gypsum Company which was a manufacturing distributor, weren't you? A. Yes.

Q. Did you know, Mr. Lenci, that if Kelley were abiding by the bulletin restrictions on Kelley, so far as its sales to Structural were concerned, that Structural was receiving or should have been receiving only a small discount? A. Yes.

Q. Isn't it the fact, referring specifically to Exhibit 440, that you concluded from what you knew about Structural's practice, that Kelley must have had some deal with Structural which resulted in Kelley cutting its price, otherwise Structural could not consistently and regularly ren-
4545 der this special type of service to its customers? A. Yes, that was our feeling about it.

Q. And what was your attitude during these years with respect to the Kelley-Structural relationship generally, if you can tell us? A. We had a feeling right along that Kelley was giving Structural a very much larger distributor's discount than was permitted by the bulletins.

Mr. Steffen: I object to that, your Honor, as simply the witness' feeling. I don't know on what basis that could be admissible.

Justice Stephens: Technically the use of the word "feeling" is incorrect. I assume you are trying to find out the witness' understanding of these relationships, and the attitude of Kelley?

Mr. Bromley: Yes, sir, and the basis of his complaints.

Justice Stephens: The objection is sustained to the use of the word "feeling", but you may rephrase your question.

By Mr. Bromley:

Q. What was your understanding with respect to the Kelley-Structural relationship? A. We knew very well, from the result, that such an excessive discount must be given by Kelley to Structural to enable them to put out the prices and indulge in the practices which they did—

4546 Q. (Interposing) When you say "them" and "they"— A. (Continuing) That came right back to customers that we were selling, so I should not have used the word "feeling". It was a very definite loss to us.

Q. When you used the words "them" and "they", you meant Structural, didn't you? A. Yes.

Q. And in so far as this situation is concerned, you wanted somebody to do something about it which would stop the practice so far as the Kelley Company was concerned, didn't you? A. Yes.

Q. You knew that Kelley's sales to Structural were made by virtue of a written consent or permission running from USG to Kelley, didn't you? A. I assumed they had that consent, I never saw.

Q. You were familiar with the provisions of your license which provided that you couldn't sell a manufacturing distributor without USG's consent? A. That is correct.

Q. And you knew that Structural at that time was a manufacturing distributor? A. Yes.

Q. And it was your position that USG could withdraw that consent if it wanted to, was it? A. Yes.

4547 Q. And it was also your position that Kelley could stop selling Structural if it wanted to? A. Certainly.

Q. Did you have anything in your mind in making these complaints, of which Exhibit 440 is one, about the possibility that USG might be induced to change its bulletins so that you could become competitive with Structural? A. No, I don't think so.

Q. Wouldn't it have been possible for USG to have changed its bulletins at that time so that you could have made, to Structural's customers, the same kind of minimum quantity delivery by truck that Structural was doing? A. Well, if that was done we would not have been in favor of that, because that would be adding to the cost of our doing business.

Q. You wouldn't have wanted that change? A. No.

Q. By the way, speaking of trucking areas generally, was your attitude, and that of your company, in favor of extending trucking areas or restricting them? A. We were not in favor of trucking at all, for the reason, if you wish it—

Q. (Interposing) Yes, I would like to have it. A. Our plant is located in Upstate New York. The greater
4548 part of the business is around the Metropolitan areas of New York, Philadelphia and Boston, and unfortunately for our company, other manufacturers had plants in those three centers where they manufactured board, and they were able to take material directly from their plants, by truck, and make truckload deliveries throughout these areas. If we wanted to meet that condition we had to ship material from Upstate New York to the destination, warehouse it, and then truck it to meet that competition, and it meant a considerable cost to us, and our price was not made up of a price at the mill, plus freight to destination plus trucking. That isn't what we got paid. We got paid what the other company which was located in that area figured was its cost at the mill, plus a trucking charge.

Justice Stephens: Then if I understand you, your answer to Mr. Bromley's question is that you did not favor the extension of trucking areas, is that right?

The Witness: We did not.

By Mr. Bromley:

Q. Now that was true, generally, as to all licensees, wasn't it, Mr. Lenci? A. Well, I can't speak for the others, because some were in the same situation that we were in, and others were in the position of having plants in one or more of the metropolitan areas.

4549 Q. But at least so far as you were concerned, if you could have made the determination you would have abolished trucking altogether? A. Yes.

Q. At the prices fixed by USG? A. Yes.

Q. Because you felt that the prices fixed did not properly reimburse you for the expense of the trucking service? A. That is correct.

Q. Now in connection with your testimony the other day that you were confused as to the rights which the owner of a patent had, to control the patented product, wasn't your confusion due to the fact that you then believed that USG could withdraw the consent to Kelley, and that Kelley could refuse to sell Structural, but you did not appreciate that those actions could not have been taken as the result of a concerted agreement among the companies concerned? A. I didn't quite understand that.

Q. Well, I will withdraw it.

You told us the other day at page 4415 that you thought that the ownership of a patent carried the right in the patent owner to control the product even to a resale, do you remember that? A. Yes, at that time I did believe that.

Q. Well, you thought therefore, then, did you not,
4550 that not only could USG withdraw its consent to Structural, I mean not only could USG withdraw its consent to Kelley to sell Structural, and not only could USG stop selling Structural, but USG and anybody else could agree that that could be done? A. Yes.

Q. And I ask you again, you did not appreciate the distinction that while USG had a perfect right to withdraw its consent, and Kelley had a perfect right to refuse to sell, that that could not be done as a result of a concert of action among those companies? A. That is true.

Q. Now did this impression of yours, to which you testified on page 4415, arise because of anything that was said to you by anyone connected with USG? A. No, it was a fixed idea, apparently, that I had in my own mind, and had had for years, regarding patents. I must have read something that misled me, at some time, about it, and I had that idea.

Q. You didn't get that impression as the result of anything that was said or done at any licensee meeting, did you? A. No.

Q. And you didn't get that impression as the result of any understanding or agreement that you felt you
4551 had with USG or anybody else, did you? A. No.

Q. Now when was it that your mind was disabused of that impression, if it ever was? A. Well, it must have been early in the 1930's. As to who did it, I don't know. I must have learned better, that is all.

Q. Wasn't it specifically, Mr. Lenci, at one of the very first licensee meetings held in 1932? A. It may have been. You see the first 1932 meeting was that one with the long list of complaints, wasn't it?

Q. Yes. Don't you remember that it was Mr. MacLeish who told you what the law was in this respect? A. I think maybe he did mention it.

Q. And don't you remember that Mr. MacLeish explained that to you shortly after this first licensee meeting which occurred in October, 1932, as I remember it? A. I think maybe he did.

Q. And don't you recall that you had a discussion with Mr. MacLeish about this matter at a licensee meeting, late in 1932? A. I had forgotten it, but now that you mention it, it does seem familiar, it does recall it to my mind.

Q. Well, my information is that it was at the time of a licensee meeting, but either before or after the meet-
4552 ing itself—does that accord with your recollection, or doesn't it? A. I don't remember it that far, Mr. Bromley.

Q. You will note, Mr. Lenci—again coming back to Exhibit 440, in the second paragraph—that you refer to Structural's practice of selling board in small quantities. Do you see that? A. Yes.

Q. Isn't it the fact, sir, that from the time of the date of this letter, on, and as long as Structural was in business, it continued this practice and always sold board in small quantities where desired by its customers? A. I believe they did. We had continual reports from our salesmen.

Q. And don't you know, sir, that USG as a matter of fact, never withdrew its consent which it had issued to Kelley to sell to Structural? A. That is true.

Q. And don't you know, furthermore, that Structural during the entire period of its business existence continued to buy and sell gypsum board? A. Yes.

Q. Your company and you, yourself, sold board to Structural, did you not? A. Yes.

Q. You testified in the criminal trial at page 689
4553 that your company continued to sell Structural during this entire period, and right down to the date of the indictment, at least? A. That is correct. The "entire period" referred to there doesn't go back as far as 1932.

Q. When does it start? A. It takes up, I think, after they stopped buying from Kelley, and I think for a while

they bought from the U. S. Gypsum Company. I think we came in following that.

Q. That would be 1934 or 1935, then? A. It would be even later than that.

Q. So, for a period of years prior to 1940, at least, you continued to sell Structural? A. Yes, we sold them for three or four years at least.

Q. And they continued their sales practices and policies during that time just as they had existed prior thereto? A. That is right.

Q. I do not mean to create the impression that you stopped selling them in 1940. What is the fact, did you go on after 1940? A. We stopped selling them whenever it was that the American Cyanamid Company decided to discontinue their gypsum division; which was known as the Structural Gypsum Corporation.

Q. So that you continued to sell Structural right
4554 down to the time that Structural went out of the gypsum business? A. That is right.

Q. During the time that you did business with the Structural Company, did you ever have any understanding or agreement with them as to their resale prices for material purchased from you? A. No, we did not.

Q. And did you ever refuse to sell Structural at any time? A. No.

Q. Did you ever threaten them that you would refuse to sell them? A. No.

Q. And did you sell them in the Philadelphia area? A. Yes.

Q. I notice now that you testified in the criminal case that you sold Structural in the Philadelphia area beginning at the time that Kelley stopped selling them there, which was in the latter part of 1937—does that refresh your recollection as to the date? A. Yes, that is about right.

Q. Now when you were making the complaints to Board Survey which appear in Exhibits 440 to 446; inclusive, you knew that the Structural Company was aware of the fact that it was not bound by the provisions of any license
4555 bulletin, isn't that right? A. Yes.

Q. As a matter of fact, your salesmen reported to you that the Structural Company was publicizing the fact in order to get business, isn't that right? A. That is correct.

Q. In other words, they were publicly stating that their

situation was different from that of the licensee manufacturers because Structural's price was not controlled, and they could sell to a dealer at any price they wanted to? A. They made that statement to our salesman.

Q. Of course that hurt your business, didn't it? A. That is right.

Q. And isn't it the fact that you complained to Board Survey about it because you didn't at all trust the good faith of Kelley in making sales to Structural? A. Yes.

Q. Will you look at Exhibits 436-A and 437, please?

(Exhibits Nos. 436-A and 437 were handed to the witness.)

By Mr. Bromley:

Q. Do you see in the last paragraph of 436-A that your salesman Ehrlicher reports that Structural's salesman remarked that they now had the other manufacturers where they wanted them as they were not governed by any
4556 ruling set up by USG? A. That is correct.

Q. And in Exhibit 437, in the second sentence of the fourth paragraph, that fact is reported again to you, this time by Mr. Hough, is it not? A. That is right.

Q. Now will you look at Exhibit 463 and 464?

(Thereupon, Government's Exhibits Nos. 463 and 464 were handed to the witness.)

By Mr. Bromley:

Q. Look first at Exhibit 464. That letter, dated May 11, 1933, is a complaint by Board Survey against your company, isn't it? A. That is correct.

Q. And that complaint has to do with your sales to Connecticut Adamant Plaster Company, doesn't it? A. Yes.

Q. And Connecticut Adamant Plaster Company was one of these manufacturing distributors, like the Structural Gypsum, wasn't it? A. That is right.

Q. Now do you notice that in this document, in the last sentence, the situation is spelled out by Mr. Miller as follows: "This would hardly seem possible if your sales of patented board to the Connecticut Adamant Plaster
4557 Company, New Haven, Connecticut, had been made at the licensor's minimum price to you".

What Mr. Miller is talking about is the same type of thing as you and I have been discussing with respect to Structural, isn't it? A. That is correct.

Q. In other words, the evidence in support of this complaint, whoever made it, was that Connecticut Adamant had been selling board to Southbury Lumber Company at the licensor's minimum price, which was the dealer price, isn't that right? A. Yes.

Q. Now Southbury Lumber Company was a dealer, was it not? A. Yes.

Q. If Connecticut Adamant was selling to Southbury Lumber at the dealer price, that would cause one of your competing licensees to suspect that your price to Connecticut Adamant was lower than it should have been, isn't that right? A. That might have been.

Q. That is the precise nature of this complaint, isn't it? A. That is the nature of the complaint, yes.

Q. I am not trying to get you to admit that it was true. I am only trying to get you to admit that its nature was that it was inferred by whoever complained against you on the basis of what Connecticut Adamant was doing, that you must have been giving Connecticut Adamant a cut
4558 price. A. Yes.

Q. And that is the same kind of an inference which you were making against the Kelley Company as far as the activities of Structural were concerned, isn't it? A. Yes.

Q. Now look at Exhibit 463. This is another complaint by Board Survey against your company. It also involves the Connecticut Adamant Plaster Company, does it not? A. Yes.

Q. And it states that the Board Survey is advised that the manufacturing distributor, Connecticut Adamant, is offering patented board to a dealer, the New Haven Reserve Supply Company, f. o. b. their warehouse, in any quantity, at the dealer price—isn't that the nature of that complaint? A. Yes.

Q. Now in that letter the inference is not spelled out, is it? A. No.

Q. But you understood, didn't you, that that was a complaint, not against what Connecticut Adamant was doing, but against what you were charged with doing in your price to Connecticut Adamant? A. Yes.

Q. And anyone in the industry, including Mr. Miller, would so construe Exhibit 463, wouldn't they? A.
4559 That is right.

Q. Look at Exhibit 465, which I think you said was a follow-up of Exhibit 463.

(Thereupon, Government's Exhibit No. 465 was handed to the witness.)

By Mr. Bromley:

Q. Exhibit 465 is another letter from the Executive Secretary of Board Survey addressed to your company, isn't it? A. Yes.

Q. And do you notice that there Mr. Miller says, "May we have a reply to our May 8th letter in regard to your sales of patented board to the Connecticut Adamant Plaster Company, New Haven, Connecticut"? A. That is right.

Q. Now the letter of May 8th, referred to in Exhibit 465, is Exhibit 463, isn't it? A. Yes.

Q. But even without the letter of May 29, 1933, Exhibit 465, you would have understood, wouldn't you, that Exhibit 463 was a complaint against you in so far as your price to your customer, Connecticut Adamant, was concerned? A. Yes.

Q. And was not a complaint against what Connecticut Adamant was doing with respect to its customer,
4560 New Haven Reserve Supply? A. That is right.

Justice Stephens: We will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

4561 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed his testimony as follows:

Cross Examination (resumed)

By Mr. Bromley:

Q. Mr. Lenci, do you recall that you testified, in connection with the Connecticut Adamant Plaster Company, that you had a talk with Mr. Kellogg, who was the head of that company? A. Yes.

Q. And do you recall that you said, at page 4287, your present recollection was that you asked Mr. Kellogg if he

were selling the New Haven Reserve Supply Company? A. Yes.

Q. Do you remember that at the criminal trial Mr. Kellogg was produced as a witness by the Government, and denied that anyone ever asked him about his prices or his practices? A. Yes, I remember that.

Q. Well, in the light of that testimony, do you still
4562 say that you, upon one occasion, did ask him about whether he was selling the New Haven Reserve? A. Well, as I recall it, when I first made that statement in the criminal case, I knew that I had talked to Mr. Kellogg about gypsum block, which was the occasion of my visiting him several times. He was selling our gypsum block for some work at the Yale University, and I thought it quite possible that I might have asked him that question about the New Haven Reserve Supply Company.

Q. Well, isn't that all you meant by your testimony on page 4287, that you thought it quite possible you might have asked the question? A. Yes.

Q. Well, that means, does it not, that you now have no recollection as to whether you did or not? A. I am not sure, no.

Q. Well, do you remember anything about the conversation at all, Mr. Lenci? A. Nothing at all definite as to the conversation, no.

Q. Well, if you did ask him whether he sold New Haven Reserve or not, you are pretty sure that you didn't mention USG in the conversation? A. I don't believe I did.

Q. Did you at that or any other time ever threaten
4563 to stop selling gypsum board to the Connecticut Adamant Plaster Company? A. No.

Q. Did you at that or at any other time ever suggest that USG might cancel its consent to your company to sell the Connecticut Adamant Company? A. No.

Q. Now these questions have had to do with the New Haven Reserve Supply Company—you realize that, don't you? A. Yes.

Q. And you remember, don't you, that among the exhibits there was a complaint made against you based on what Connecticut Adamant Plaster Company was doing with regard to its customer, the Southbury Lumber Company? A. Yes.

Q. Did you ever say anything to anybody from the Connecticut Adamant Company about their prices or sales or

practices with respect to the Southbury Lumber Company? A. I don't think I did.

Q. At page 4779, and running over to 4781, you were asked some questions, concerning the bulletin provision with respect to rebates, about the splitting of salesmen's commissions—do you recall discussing that topic? A. Yes.

Q. And your attention was called to the provision
4564 in the licensor's bulletin of February 6, 1939.

At page 4320, beginning in line 3, you testified that Mr. MacLeish said, at the October 17, 1932, licensees' meeting, that the employment of commission salesmen was a bad practice and that it would have to be discontinued. Do you remember that testimony? A. Yes.

Q. Now, isn't it a fact that all that Mr. MacLeish said was that rebating through the device of splitting commissions payable to manufacturers' salesmen was a bad practice and was prohibited by the bulletin? A. Yes. If you want a further illustration of that, we had two examples of it in our own company.

Q. Two examples of what? A. Of the two types of commission men. We had one by the name of Blanchfield, and another by the name of Parker. Blanchfield was paid a very substantial salary and a bonus for sales above a certain amount. Parker was on a nominal salary and was really mostly paid by commissions.

Now with Parker we had difficulty, and I think the evidence shows, either in this case or the other, that we were charged with rebating through Parker, and when we asked Parker about it he finally admitted that he had given cash rebates to certain dealers. Now that was the
4565 type of men that we didn't want in the industry.

Q. Now, when you say "we" do you mean the Ebsary Gypsum Company? A. The Ebsary Gypsum Company I am speaking of.

Q. When you testified, then, as you did at page 4429, that you let Parker go, you didn't mean that Parker was discharged because you understood that the bulletin required you to dispense with the services of commission salesmen, did you? A. We fired him because he admitted at that time, when we dismissed him, that he had given cash rebates to a customer, and we immediately let him go for that reason.

Q. Well, you did that, then, because you determined, as a matter of your own company policy, that that was what you wanted to do? A. We sure did, yes.

Q. And you did not do it because you thought you were required to do it by any provision of the bulletin? A. No.

Q. You now say, do you, that it was your understanding that no licensee had to discharge these commission men, and that their only obligation was to see to it that they did not rebate on the USG fixed prices by the device of splitting a part of their commission with the customer of the licensee?

A. I believe that was the intention.

4566 Q. I have noticed throughout the course of the trial that whenever testimony has been received about jobbers, or at least generally so, according to my recollection, it has appeared at some time or another that the particular company that was designated as a jobber was also engaged in the dealer business. Is that generally true of these jobbers as to whom you have been asked questions by Mr. Knuff? A. Some of them were, and some were not.

Q. At pages 4225 to 4227, you gave an illustration of why you would not sell a jobber at a discount in a large town where you had other dealer customers, and made reference to the fact that you found that a jobber would often take material which he purchased from you at a discount, and sell it as a dealer to the ultimate consumer, in competition with your own sales. Do you remember that? A. Yes.

Q. Now, am I correct in understanding that at the times when the USG bulletin permitted licensees to sell jobbers at a discount, the understanding in the trade of the word "jobber" was that they were a class of distributor whose customers were not contractors or consumers, but whose customers were dealers? A. Yes.

Q. And it never was intended, was it, or so understood by you, that a licensee could give a discount to a

4567 dealer under the bulletins? A. No.

Q. So that where you had a jobber who did two types of business, that is, jobbing in so far as his sales to dealers were concerned, and retailing in so far as his sales to consumers were concerned, it was always a difficult matter to know whether or not that individual was or was not entitled to a discount, wasn't it? A. Yes.

Q. And was it true that many of these jobbers would buy on the representation that their business was jobbing; then, having gotten the board from you or some other licensee at a discount, they would proceed to engage in business as a dealer and sell to consumers and contractors? A. Yes.

Q. And, of course, if they did that, since they received a discount on the dealer's price, they were enabled to under-

sell other dealers in competition with them for the same class of consumer trade? A. That is correct.

Q. And that resulted in complaints being made to you from those of your dealer customers who, not being jobbers, did not get a discount from you? A. That is right.

Q. In one of my questions, I think I said that these
4568 jobbers, when they resold to consumers, would make those resales in competition with you. That isn't correct, is it? A. In competition with the local dealers.

Q. In competition with the local dealers? A. Yes.

Q. And in situations where those local dealers were your customers, that would cause the local dealers to feel resentful at you because you had permitted the particular dealer to whom you gave the discount to receive a competitive advantage? A. Yes.

Q. You told us at one time, as I remember it, that as far as your company was concerned, you did business with very few jobbers? A. Yes, we had very few.

Q. Was one of the reasons for that this reason which I have just mentioned, that it was difficult to find out whether the so-called jobber to whom you gave a discount confined his business to the jobbing business? A. Well, it wasn't so much that as a policy with us that we felt we wanted to do business directly with the dealers. We were not particularly interested in selling to jobbers at all, because in the territories in which we did business we had our own salesmen, and a jobber had very little to offer
4569 us. We felt that we would much prefer to do business directly with the dealers' yards.

Q. Well, is it true, then, that you found, in the operation of your business, that a jobber, so far as gypsum board was concerned and gypsum products generally, performed no function which was of any value to you? A. He usually got in our way.

Q. And, of course, since his customer was the consumer or the contractor, he was in direct competition with you all the time, wasn't he? A. Yes.

Mr. Bromley: I withdraw that question, I misspoke myself.

By Mr. Bromley:

Q. And since the jobber to whom you sold at a discount sold dealers as his customers, he was in direct competition with your company in the selling of board? A. That is correct.

Q. And you felt, didn't you, that to give him a discount, in your situation, would be, in effect, giving him money for nothing? A. Yes.

Q. Did you ever find that your sales coverage of your territory was so slender that you needed your sales efforts to be supplemented by jobbers' activities? A. Not in the areas where we operated.

4570 Q. You said that there came a time when USG, in its price bulletins, eliminated the jobber's discount, and fixed the price to jobbers at the same figure as the dealer's price, didn't you? A. Yes.

Q. And you have told us, I believe, that you never knew of any understanding or agreement with USG, or anyone else, at any time, that this would be done? A. They did it on their own initiative, and notified us through the bulletins.

Q. Now, of course, that bulletin, you understood, applied only to patented board? A. That is correct.

Q. And it is the fact, isn't it, that your company has always, to some extent at least, given a jobber discount to real jobbers, so far as plaster and other gypsum products which were unpatented are concerned? A. That we did give discounts to dealers?

Q. Yes. A. Only in an extremely limited way, because as I said before, we had very little business with jobbers, through jobbers.

Q. I should have made it plain to you that my question was that you have always, during this period, sold plaster to jobbers, whenever you have done so, at a dis-

4571 count? A. Yes.

Q. I think you inadvertently, or I, perhaps, used the words "sold to dealers"—you meant jobbers? A. Yes.

Q. And isn't it the fact, Mr. Lenci, that right up to the present time you have given a jobber discount on plaster to Mr. Spease of the Fairmont Wall Plaster Company? A. Yes.

Q. And when did you start to do business with Mr. Spease, do you remember? A. It was when the Oakfield Gypsum Company was taken over by National, whatever the date was.

Q. About 1937 or 1938, wasn't it? A. Yes.

Q. Do I understand you to say now that ever since that time you have sold plaster to the Fairmont Company at a discount? A. That is correct.

Q. And that discount has been about 15 percent, hasn't it? A. About that, yes.

Q. Will you look at Exhibit 431, please?

(Government's Exhibit 431 handed to the witness.)

By Mr. Bromley:

Q. Will you look at the second paragraph of Ex-
4572 hibit 431, please? A. Yes, sir.

Q. Now when Mr. Turner, the writer of this memorandum, your sales manager, wrote you that it was his understanding that there were not to be any more jobbers, didn't you understand by that sentence merely that under the bulletin the discount to jobbers had been eliminated, so far as your sales to jobbers were concerned? A. Our sales of board.

Q. Your sales of board? A. That is correct, yes.

Q. And you did not understand Mr. Turner to be advising you that he understood that you couldn't sell to jobbers any more on any basis, did you? A. No.

Q. At page 4316 of your direct testimony, beginning at the top of the page:

"Q. Do you say that it was a matter of frequent discussion, the jobber situation? A. Yes."

You only meant by that answer, did you not, to say that price cutting by licensees, in their sales of board, by giving to jobbers discounts not permitted by the bulletin, was a matter of frequent discussions? A. That is correct, yes.

4573 Q. And in that same exhibit, Exhibit 431, will you look at the last two paragraphs?

In those two paragraphs you were complaining about USG, weren't you? A. No, in the fourth paragraph from the top I am complaining about USG.

Q. That is the one I mean, the last two paragraphs. Oh, I see what you mean. A. In that paragraph only.

Q. You were complaining about USG? A. Yes.

Q. What was the complaint? A. Our complaint was that Mr. Baxter, who was connected with the Samson Plasterboard Company of the USG, had made a cut price on a sale of 2 truckloads of board to the New Broadway Lumber Company. That was a straight complaint about a cut in price, that he had sold the board at $30.61 instead of whatever the correct price should have been at that time.

Q. Now the correct price for that transaction would be

the price set in the applicable bulletin for delivery by truck in that area, wouldn't it? A. Yes. I see a pencilled memo at the side there, reading "$33.25", and I would take it that that was probably the correct price for a transaction of that kind at that time.

4574 Q. And by "correct price", you mean— A. (Interposing) The established bulletin price.

Q. And the $30.61 that is mentioned in typewriting in that paragraph was the carload price, wasn't it? A. That is correct.

Q. That is to say, it was the price applicable if Baxter had sold a full car of board? A. That is correct.

Q. Then the price would have been $30.61 per thousand square feet? A. That is right.

Q. But if the sale, as is alleged here, was merely of two truckloads of board, under the bulletin USG should have charged the customer $33.25? A. Yes.

Q. So you say that that is an instance of a straight price cut, a sale below the price fixed in the bulletin? A. That is correct.

Q. Not by any indirect means, but by a direct means? A. Very direct.

Q. You testified, I believe, that up until the bulletin change in the jobber price in August, 1930, it was the practice of the industry to give jobbers a 10 percent discount? A. I think that is what it was.

4575 Q. Will you look at Exhibit 428, please?

(Government's Exhibit No. 428 was handed to the witness.)

By Mr. Bromley:

Q. When you wrote that letter, Mr. Lenci, to Mr. Henning, isn't it the fact that you didn't know whether the Teachout Company, of Akron and Cleveland, was considered by the trade as a jobber or not? A. That is true, I didn't know anything about them at all.

Q. And for all you knew, they might have been a dealer exclusively, and therefore not entitled to any discount at all from you; isn't that right? A. Yes.

Q. Now your information was, as expressed in the last paragraph of Exhibit 428, that Teachout was a wholesaler and sold only to lumber dealers? A. Yes, that apparently was the information that was given to me, and I am asking Mr. Henning for his experience or interpretation or understanding as to whether Teachout was a jobber or not.

Q. Now, if Teachout had been a wholesaler and confined his sales to lumber dealers, then he would have been considered a jobber, wouldn't he? A. Yes.

4576 Q. The answer, Exhibit 428-A, in the last paragraph, you understood that sentence to mean that while Teachout had formerly acted as a jobber, he was no longer doing so because his supplier had ceased selling him at a discount?

(Exhibit 428-A handed to witness.)

A. Yes.

Q. Did you know, Mr. Lenci, that that was because Teachout had gone into the retail business? A. I didn't know anything about them at all.

Q. Did you ever sell Teachout at any time, either as a dealer or as a jobber? A. Never, before or after.

Justice Stephens: Before or after what?

The Witness: The inquiry.

By Mr. Bromley:

Q. The inquiry contained in Exhibit 428, is that what you mean? A. Yes.

Q. And will you look at Exhibit 429, please.

(Exhibit 429 handed to the witness.)

By Mr. Bromley:

Q. The purpose of your inquiry of Mr. Henning in that exhibit was to find out whether the Winslow and Varick companies, as a matter of fact, were in the jobbing business and therefore entitled to a discount, wasn't it?

4577 A. Yes.

Q. And you also wanted to know the same information with respect to the Culver Company in Brooklyn, did you not? A. That is right.

Q. Now, at some point in your testimony you mentioned the name Coeyman & Company, do you remember that? A. Yes.

Q. And you testified, or some exhibit shows, that you made an inquiry about Coeyman, or stated that you were selling Coeyman as a jobber? A. His name was included in that list of three or four jobbers which we said we were selling at the time.

Q. And will you look at Exhibit 421?

(Exhibit No. 421 handed to the witness.)

By Mr. Bromley:

Q. In that letter you list Coeyman and Raymond and Eastern Builders Supply as three companies which your company considered as jobbers, don't you? A. Yes.

Q. Wasn't this man Coeyman a man who was considered in the trade as a broker? A. Well, it is hard to draw the line between one and another.

Q. Did he have a warehouse, do you know? A. No, he had no warehouse.

4578 Q. Well, a man couldn't perform a jobbing function without a warehouse, could he, Mr. Lenci? A. Not very well, no.

Q. And wasn't that same thing true of the Eastern Builders Supply of Baltimore, weren't they merely brokers, without warehouse facilities? A. I believe they are.

Q. Weren't they in 1929? A. I believe they were.

Q. And the G. B. Raymond Company of Long Island City, as a matter of fact that company was a dealer, wasn't it? A. Yes.

Q. That means that they were engaged in the retail business? A. Yes, they were.

Q. And as a matter of fact, the Raymond Company never was interested in the sale of gypsum products, was it? A. They were primarily sewer pipe people, clay products.

Justice Garrett: That term "broker" is a new term here, isn't it?

Mr. Bromley: That is a new term.

Justice Garrett: It hasn't been introduced here before?

Mr. Bromley: That is right.

4579 By Mr. Bromley:

Q. Will you tell us, please, what a broker is in the gypsum board business? A. Well, you could use Coeyman as an illustration. He had no yard, but he had certain friends among the dealers and he could go to them and get an order, and then turn it in to a manufacturer. In some cases he carried the credit himself; in others, he merely turned it over to the manufacturer and then got his discount on the sale, his commission on the sale.

Justice Jackson: And the delivery was made by the manufacturer to the dealer direct?

The Witness: Yes, that is correct.

Justice Garrett: Now in that letter, Exhibit 421, going to the third paragraph, you state:

"At the June 6th meeting in Chicago you asked me to send a list of customers who we consider as Jobbers or Distributors and these are as follows"—and then you list those three which you just mentioned.

Now you state in your testimony that Coeyman was a broker and that Raymond & Company were brokers?

The Witness: No, the Eastern Builders Supply Company were brokers.

Justice Garrett: When you wrote this letter which did you regard these people as, jobbers or distributors? We have this new expression here, "broker".

4580 The Witness: I am sorry to hear the word "broker" brought up, because that means one more thing to try to explain.

I honestly can't tell the difference.

Justice Jackson: Didn't you mean those were the men to whom you were selling at a discount?

The Witness: That is it, exactly. In other words, they were an in-between party between the manufacturer and the dealer, under whatever title they might be considered.

By Mr. Bromley:

Q. Well, so far as the bulletins were concerned, Mr. Lenci, the only term ever used in them was "jobbers", isn't that right? A. Yes.

Q. Neither the term "broker", nor the term "distributor", according to your best recollection, was ever used in a USG price bulletin, was it? A. I am very sure that the term "broker" was never used, and I don't think the term "distributor" was used, except in connection with "manufacturing distributors".

Q. At pages 4125 and 4126 of the record, you were asked, and answered, some questions about the bulletin provisions governing trucking and trucking areas. The only provisions ever set up by USG in its bulletins, concerning these matters, applied solely to patented gypsum board,

4581 according to your understanding, isn't that so? A. Yes.

Q. And wasn't it your understanding that so far as these bulletins were concerned, in their limitation of trucking areas, that is their definition of trucking areas, that they merely prescribed those areas in which, at that time, it had been found by the industry to be economic to incur extra trucking expense in order to make sales? A. Yes, that that was the United States Gypsum Company's under-

standing that it was economic in those territories. We didn't agree with them.

Q. And you never had any understanding or arrangement with USG as to whether the bulletins would define trucking areas or trucking charges, did you? A. No.

Q. And whatever the bulletins contained with respect to those matters from time to time, was determined by USG wholly independently of you? A. Absolutely.

Q. And wasn't the fixing of a price in the bulletins for a truckload delivery in a so-called trucking area, in all respects similar to the fixing of a specific price for a carload, for instance? A. Yes. Let me use a specific example.

The USG, say in 1940, established a price of $14.10
4582 on gypsum lath delivered in the New York City area, and if they got beyond that, farther up the Hudson River, it would jump to $14.25. Now that did not represent a mill price plus freight to destination, but a price below that. So wherever these trucking areas were established they meant a cut in what we would normally secure for that business.

Q. I thought you testified—or at least you created the impression in my mind—that you construed the bulletins as prohibiting you from trucking into counties or areas not specified in the bulletins. A. Yes, I did understand them that way.

Q. Well, didn't you understand that the result of the fixing of the price for trucking areas merely meant that if you saw fit to truck outside of those areas, you were obligated to charge the customer a price which should be composed of the mill price, plus the LCL freight for the quantity delivered by truck? A. Well, that would be purely an academic question, because we did not like this trucking, and we did not want to do it. So I don't know how we would have interpreted it.

Q. Well, it would be purely an academic question because the less-than-carload freight rates fixed by the Interstate Commerce Commission were so high that nobody would pay that for trucking service, is that what you mean? A.

I meant that our company wasn't interested in devel-
4583 oping business of that kind.

Q. Well, I still am unable to understand why you construed the bulletins as prohibiting you from making a delivery by truck if you wanted to, into an area for which a price was not established by the bulletins, in the manner which you have described. A. Well, suppose we had made a

price outside of the trucking area, that would have been a cut below the prices which were established for the carload shipments into that specific territory and would have been construed, I think, by the licensor, as a price cut on our part.

Justice Jackson: Unless you charged, for your trucking service, the same as you would charge by freight?

The Witness: That might be so.

Mr. Bromley: That is all I am trying to find out.

The Witness: That is correct, then, yes.

Justice Stephens: Let me get your state of mind clearly. Did you understand that the effect of the bulletins was to legally prohibit you from trucking into these areas, or that in view of the price arrangements for trucking, as compared with carload or less-than-carload deliveries, as an economic matter you could not successfully truck into those areas?

The Witness: That is correct, we could not economically do it.

By Mr. Bromley:

4584 Q. Will you look at Exhibit 457 again, please, Mr. Lenci?

(Thereupon, Government's Exhibit No. 457 was handed to the witness.)

By Mr. Bromley:

Q. Don't you remember that the dealer, Louis Brooks, referred to in that exhibit, was located in Washington, New Jersey, which place was outside of any area designated as a trucking area for which a price was fixed by the USG bulletins? A. Yes.

Q. Now there was, in the bulletins, a price for a carload of board fixed which would cover Brooks in Washington, New Jersey, wasn't there? A. Yes.

Q. But a truckload was less than a carload, wasn't it? A. That is correct.

Q. So that the price for the delivery to Brooks in Washington, New Jersey, of less than a carload, whether delivered in a freight car or a truck, would be the price provided for in the bulletin as the less-than-carload price, wouldn't it? A. Yes.

Q. And that is the reference in the second paragraph of Exhibit 457? A. That is right.

Q. That is $36.28 per thousand square feet is the
4585 price fixed by the bulletins for sales of less-than-carload lots? A. That is my understanding.

Q. And in this letter of Mr. Miller's to you, he points out to you that this is the price which should have been charged under the bulletins for a truckload delivery? A. Yes.

Q. And didn't you understand, then, that that principle applied to all areas not specified in the bulletins as trucking areas? A. Yes.

Q. In other words, if you were permitted to sell lath at $15, delivered by truck in Metropolitan New York, and no price was set for delivery by truck in Westchester County, the bulletins nevertheless required you to charge mill base, plus less-than-carload freight for the delivery of a truckload into Westchester County? A. That probably would have been the case if no price had been established for Westchester.

Q. You mean by that, if no truck price had been established for Westchester? A. Yes.

Q. And when you said at page 4145, beginning at line 8, in answer to this question:

"Q. Is it your understanding that this meant there would be no truck deliveries to the dealers' warehouses out
4586 of Charlestown, Massachusetts? A. That is right."

When you said that, that answer was either inaccurate or not complete, wasn't it? A. What was that in connection with?

Q. That was in connection with Exhibit 417, Mr. Henning's letter to you of July 26, 1929, which was a price bulletin, and which set a price for truck deliveries to dealers' warehouses.

(Thereupon, Exhibit No. 417 was handed to the witness.)

By Mr. Bromley:

Q. In the last paragraph of Exhibit 417 you will notice it says:

"Plasterboard not delivered by our trucks to dealers warehouses. Please disregard the minimum price for delivery by truck given in our letter of July 25".

Didn't you understand that to mean that the licensor was fixing no price for truck deliveries in Charlestown, Massachusetts? A. Yes, they established, for Charlestown, Mas-

sachusetts, which was the location of their Boston mill, these pickup prices.

Q. What prices are you talking about when you
4587 mention "pickup" prices? A. The next to the last paragraph reads:

"Minimum prices for material picked up at Charlestown Mill by dealers".

Q. That meant that the licensor established by this bulletin a price per unit of a thousand square feet, where a customer came to the mill and got the material himself, is that right? A. That is right.

Q. Didn't the bulletins also provide that there should be no special price for truckload deliveries to Charlestown, Massachusetts, in the sense in which trucking prices had theretofore been established in the bulletins? A. That is right.

Q. Now you told us, didn't you, that the price that was established for trucking deliveries was not mill base plus freight, but was calculated on a more or less arbitrary basis of mill base, plus some arbitrary figure designed, partially or wholly, but only in a general way, to cover the trucking costs? A. That is right.

Q. Didn't you understand this bulletin, Exhibit 417, to notify you that there was no special price set for truckload deliveries in Charlestown, Massachusetts? A. Yes.

Q. And didn't that result in notifying you that if
4588 you, nevertheless, wanted to deliver by truck in Charlestown, the price which you were obligated to charge the customer for that delivery should be made up of the mill base price, plus the freight calculated at the less-than-carload freight rates on the quantity delivered by truck? A. Yes.

Q. I notice that at page 4441 of the transcript, at the bottom of the page, you were asked this question and you gave this answer:

"Q. And you might consider that as the zone nearest the mill, and then there was a zone farther away from the mill in which trucking was not permitted; is that correct? A. That is correct".

Didn't you mean by that merely that trucking was not permitted at the price fixed for the area nearest the mill? A. You are speaking of Upstate New York now?

Q. Yes. A. Yes, that is right.

Q. And when you said on page 4442 as follows:

"A. But it was the practice of both the Paragon Company and the American Hardwall to make truck deliveries throughout the territory adjacent to their mills, and we were anxious to be put in a position to compete with those two companies"—you merely meant that you wanted the bulletin to set a price for truck deliveries in those
4589 areas which would enable you to sell on that basis in competition with these Paragon and Hardwall companies? A. That is correct.

Q. At page 4411 you testified with respect to a complaint made against the Certain-teed Company which involved the sale at the truckload price of an amount of board less than the minimum quantity specified in the bulletins for that price. Now isn't the situation with respect to the minimum quantity provisions of the bulletins similar to the situation which we have just been discussing regarding trucking areas? A. Yes, the bulletins provided for such-and-such a price on a specific quantity.

Q. And those minimums generally, over the years, were either 7,500 square feet, or 10,000 square feet, or 5,000 square feet, somewhere in that neighborhood? A. They roughly represented a truckload, yes.

Q. And the price that was fixed was a special price fixed for that amount of material delivered in a truck, wasn't it? A. That is correct.

Q. Now you realized, didn't you, that at all times you could deliver less than that if you wanted to, but you were subject to the restriction that you had to charge a higher price for it? A. That is right.
4590 That price being the price which would result from adding the less-than-carload freight to the mill base applicable to the transaction. A. Yes.

Q. You said at page 4638, in answering a question of Mr. Knu[illegible]s with respect to the 7,500 foot minimum, as follows:

"But you could not go below the 7,500 feet, as I recall it."

Now in giving that answer you meant to say that you could not deliver less than the 7,500 feet at the price fixed for the 7,500 feet in the bulletin, did you not? A. That is right.

Q. Now so far as the pricing system in the gypsum board business is concerned, isn't it true that all that the bulletins

did in providing for a price made up of a mill base plus freight, was to continue to use the practice which had been common in the industry for many, many years? A. Yes.

Q. Do you remember that Mr. Knuff referred to this as a "basing point system"? A. Yes.

Q. Well, isn't it the fact that over the years the mill base provisions were extended to all mills, not only USG mills, but to all mills? A. Yes. It always seemed to me that that phrase, "basing mills" was very misleading,
4591 because most people think, when you speak of a "basing mill", of the Pittsburgh steel basing point where, no matter where anybody ships from, they base it on Pittsburgh. But this is the exact opposite. We base it on the nearest mill to the destination, the lowest price to the customer, rather than an arbitrary high point.

Q. So that the system, rather than being a basing point system, is really nothing but a freight equalization system? A. It is freight equalization based on the mill having the cheapest freight rate to the destination in question, at the time.

Q. And that merely results in the customer always getting the lowest possible price, no matter from whom he buys? A. Yes, and that worked very much to our disadvantage, but it was the way it was done.

Q. Well, sometimes that would work to your advantage, wouldn't it? A. Not in one time out of a hundred, because our plant in Upstate New York was in the immediate area where National, USG and Certain-teed had plants. So we had no advantage there. If we shipped into Boston we had to meet the prices established by the companies basing their prices on Boston. If we went into Portland,
4592 Maine, we had to meet the competition arising at Portsmouth, New Hampshire. If we went into Philadelphia or eastern Pennsylvania, we had to meet the producers in Philadelphia. If we came to Washington, we had to meet the prices established by Philadelphia. If we went into Ohio, we had to meet the producers who had plants at Gypsum and Port Clinton, Ohio.

In other words, we were in the spot of always meeting a lower price established by the companies who happened to have a mill nearest to that destination.

Q. So that the situations were very few in which you got the advantage of this freight equalization system? A. Yes.

Justice Stephens: Weren't your competitors, or some of them, at the same disadvantage, when they had to ship from territory which was near your mill?

The Witness: The one which suffered the most was Certain-teed, because their situation was about the same as ours, they had a plant in Upper New York State, and none near the seaboard. The National and USG had mills on the seaboard.

By Mr. Bromley:

Q. Now at pages 4105 and 4106 your attention was called to Government's Exhibit 404, which again was a price bulletin, I believe, and particularly to the provision on page 2 thereof, which stated: "Truck deliveries from New
4593 Brighton Mill add $3.00 to New Brighton base prices, or $2.00 to Oakfield delivered carload prices."

On page 4106 of the transcript you said that you did not know what the business reason for that differential was. Now isn't it a fact, Mr. Lenci, that obviously the $3 surcharge which was added on to the New Brighton Mill price was to enable the licensee making a sale and delivering by truck, to recover some part or all, of the trucking cost and the cost of the additional service in loading and handling quantities as small as truckload quantities? A. Yes.

Q. That provision on page 2 of Exhibit 404 is an example of the way trucking area prices were established generally by the bulletins, isn't it?

Justice Jackson: Do you mean page 2 or page 3 of that exhibit?

Mr. Bromley: I thought it was at page 2.

Justice Jackson: I believe it is on page 3, right at the end of the exhibit.

Mr. Bromley: No, your Honor, it is at page 2.

Justice Stephens: What line from the bottom? I haven't been able to place it yet.

Mr. Bromley: The sixth line from the top. It reads:

"Truck deliveries from New Brighton Mill add $3.00 to New Brighton base prices, or $2.00 to Oakfield
4594 delivered carload prices".

Justice Stephens: This is Exhibit 404?

Mr. Bromley: Yes, page 2, about six lines from the top.

Justice Jackson: You were previously examining on truck deliveries from Philadelphia, weren't you?

Mr. Bromley: I don't think so.

Justice Jackson: I guess I had it all twisted, that is all.

Justice Stephens: I have it now.

The Witness: If I can explain it, I think I could make it clear.

Take, for instance, #1 gypsum wallboard—at the bottom of page 1—the price f.o.b. New Brighton is $22.60.

Turning to page 2 it says to add $3 to this in order to make the truck delivered price, or, to take the similar price on #1 wallboard of $20 f.o.b. cars Oakfield, plus freight to destination, plus $2—

Justice Stephens: (Interposing) Where is the $20?

The Witness: The $20 is near the top of the first page of the exhibit.

Justice Stephens: I see.

The Witness: Then the customer would be quoted the lower combination of the two. That was the intention of that.

Justice Stephens: What do you mean by "the lower combination of the two"?

The Witness: If $20.60, plus $3 was less than $20,
4595 plus freight, plus $2, you would quote that, you would quote whichever was the lower of the two.

Justice Stephens: To what point?

The Witness: To whatever point the delivery was to be made.

Justice Stephens: I see.

By Mr. Bromley:

Q. I believe you made a mistake in your answer. You said $20.60 when you meant $22.60, did you not? A. Yes, I should have said $22.60 in referring to New Brighton.

Q. So that this paragraph on page 2 meant that you were permitted to sell board, and deliver it by truck, at $25.60—that is the first effect of the provision, isn't it—$3 plus $22.60? A. That is right.

Q. Or, if you had a plant up near Oakfield, and you wanted to, you could charge the customer the Oakfield price of $20, plus the freight to New York, if your customer was in New York, which would be approximately $3, or so, plus $2? A. Yes.

Q. So that, as it worked out, the price on both bases would be about the same? A. In that particular case, yes.

Q. There might be some instances where, to figure
4596 it out on the Oakfield base would be lower than the New Brighton base? A. That might be so.

Q. And you were permitted to charge whichever you

wanted to? A. Yes, we were permitted to charge the lower of the two.

Q. Now you said at page—

Justice Stephens: (Interposing) Where does the exhibit say that you are permitted to charge the lower of the two?

The Witness: Well, naturally—

Justice Jackson: (Interposing) That word "or" does it—that is an alternative and not a connective.

The Witness: Naturally, we would quote the customer the lower combination of the two, and would be forced to do so for business reasons.

By Mr. Bromley:

Q. I started out to call your attention to the fact that at page 4106 you said you did not know the business reason for the $3 or $2 surcharges. You do know what that was, do you not? A. I do know what it was, yes. My memory is working a little bit better than it did the first day when we started out.

Q. What was the business reason? A. To give the customer the benefit of the lowest price.

Q. I am not talking about the alternative prices,
4597 Mr. Lenci. You were asked if you knew the business reason why a $3 surcharge was set by the licensor for truck deliveries, and you said you didn't know. A. Well, I don't know what was in USG's mind.

Q. Well, it cost the manufacturer some money to make delivery by truck, didn't it? A. Naturally.

Q. And it cost him some money to load the goods in the truck, didn't it? A. Yes.

Q. It cost him money to handle the goods, didn't it? A. Yes.

Q. Wouldn't you expect, if you were going to sell a customer and deliver by truck, that you should get a higher price than the mill base price? A. Certainly.

Q. Wasn't the $3 established by the licensor as a differential over the mill base price, to enable the licensees, in making sales by truck, to recover some of their delivery costs? A. Yes.

Q. Wasn't that the business reason for the $3 differential? A. I believe it was, yes.

Q. Now at page 4064 you were describing the
4598 situation in connection with your mill which you said was located at Wheatland, New York. And you told us that there were plants at Oakfield, and that Oakfield was about thirty-six miles from Rochester, and Wheatland

was about eighteen miles from Rochester; that Oakfield was on the New York Central, and Wheatland on the B. & O.—do you recall that? A. That is correct.

Q. And you were asked these questions and gave these answers:

"Q. You would ship your board from Wheatland to Rochester, but you would add the freight from Oakfield to Rochester, is that correct? A. At that time, yes.

"Q. And if you were selling board in Buffalo, you would likewise quote the mill price, plus freight from Oakfield, is that not correct, from Oakfield to Buffalo? A. Yes, that is the opposite illustration."

Do you recall what you meant by that? A. Well, that meant that our freight from our mill at Wheatland to Buffalo was higher than the freight rate from Oakfield to Buffalo, and we were absorbing a considerable difference in the cost of transportation, and that was opposed to the question there that from Wheatland to Rochester we had a slightly lower rate than the companies at Oakfield had to Rochester.

4599 So when you sold in Rochester you charged the dealer the mill base, plus the freight from Oakfield to Rochester? A. At the very start, but it wasn't long before that dropped back to the rate from Wheatland to Rochester.

Q. I am not interested in when it dropped back, I am trying to get an explanation of what you meant by, "that is the opposite situation". A. That is my explanation of that.

Q. Well, I still don't understand it. You meant, didn't you, that when you shipped to Rochester, you were paid by your customer, in the price, more than the actual freight? A. Yes.

Q. So that you made money in that instance? A. Yes.

Q. And from the bulletin requirement that your price to the dealer should be mill base, plus freight from Oakfield to Rochester, that resulted in an advantage to you? A. That is correct.

Q. And instead of having to absorb freight, you made some money? A. Yes.

Q. Over and above the freight that was paid? A. Yes.

Q. Isn't it true that as between Oakfield and Wheat-

4600 land, in the majority of instances the freight rates

are the same? A. They are identical, with very few exceptions.

Q. That is because Oakfield and Wheatland are close together? A. They are classified together as a rate base point.

Q. And being classified together, the freight rate from each place to most destinations is the same? A. To very nearly all, yes.

Q. So that the fact that the bulletin provided that the price to the dealer should be composed of the mill base plus the freight from Oakfield, did not seriously injure or prejudice you, did it? A. No.

Justice Stephens: The Court will take the afternoon recess at this time.

(Thereupon, a five-minute recess was taken, after which the hearing was resumed.)

4601 Justice Stephens: You may proceed.

By Mr. Bromley:

Q. At page 4407, Mr. Lenci, do you remember you testified about a complaint which you made against National, having to do with the sale by National of Maftex along with gypsum board? A. Yes.

Q. And you told us that Maftex was a fiber board like Celotex? A. Yes.

Q. And do you recall that you said there that your complaint was that National, in selling gypsum board to Axinn Brothers, a dealer, sold the board at the correct bulletin price but quoted an unusually low price on the Maftex board? A. Yes.

Q. Now so far as you were concerned, it was the fact, wasn't it, that National could sell Maftex at any price it wanted to? A. Sure.

Q. The thing that you objected to was their practice of selling it below their current market price in order, in that fashion, to effect an indirect rebate on the price of the gypsum board? A. That was my complaint.

4602 Q. You considered the abnormally low price to be, in effect, a partial gift made for the purpose of cutting the board price, didn't you? A. Cutting the gypsum board price, yes.

Q. And at page 4410, you testified with respect to another complaint that you made against National, having to do with the matter of advertising, you said, that is, the

giving away by National of boards for completing work in a customer's office.

What relationship did the gift of boards by National, to a dealer-customer, have to advertising? A. Well, it probably is an indirect connection, but we felt, that is, the Ebsary Gypsum Company felt, that anything in the nature of a gift of that kind was advertising, for the reason that the dealer finished up his office with these boards, and they would stand up there as being National Gypsum Company's boards. That, in a way, was advertising. In another way it was a gift, and in effect a cash rebate. So it was really two counts.

Q. Do you mean if a dealer finished the interior of his office with board manufactured by National, that a visitor to the office could read the trademark National on the board and would know that the dealer was using National board?

A. I wouldn't be surprised if the boards were iden-
4603 tified so that that would be true.

Q. And did you mean, then, that the manufacturer who made a gift of that kind for that purpose, to a dealer, might seek to justify it on the basis that he really was only paying the dealer for permitting an advertisement of his product to be made in the dealer's office? A. Well, in a way; but if they hadn't made him the gift, the dealer would have had to have used board for which he paid cash, and here he was using board that didn't cost him anything.

Q. Well, was it your position that the value of the board given to the dealer was worth more than the value of the advertising which the manufacturer supplying the board received? A. It was our feeling that the value of the board represented a rebate. That was the first thing in my mind when I made the complaint.

Q. And I wasn't quite clear about your explanation having to do with the painting of a dealer's buildings and fences. You said that that was sometimes done by licensee-manufacturers, and in your judgment accomplished an indirect price rebate on board sold to the dealer, didn't you? A. Yes.

Q. I thought you made some reference to the fact that sometimes the manufacturer would put a little sign
4604 on the fence advertising his particular products. A. That is correct.

Q. Was it your position that that little sign was put up there as a pretext for justifying the expenditure of the cost of the paint and the painting by the manufacturer? A. Yes.

I have one particular dealer in mind, and I am not going to mention the name, who had a good sized plot of ground. He had his office in the corner of the lot. He had a fence all along this side and all along this side (indicating). That whole fence was painted, and he charged that expense to one of the gypsum manufacturers, and the only thing the gypsum manufacturer got out of it was a small section of that fence that bore this manufacturer's name; and the dealer had previously asked us if we would do that for him, and we refused.

Q. And you thought that the cost incurred by the manufacturer, of painting that long fence on two sides of the lot, greatly exceeded the value of the advertising which the manufacturer got from the little sign on it? A. Yes, it certainly did.

Q. And you, therefore, construed that as an indirect way which the manufacturer was using to accomplish a rebate on the price of board purchased by that dealer? A. Yes.

4605 Q. You testified at pages 4443 and 4444, with respect to the relations between the Kelley Company and the Structural Company, that in 1932 Structural made an arrangement to have a dealer locate himself in their plant and sell material to contractors or consumers, and that you thought, as I understood you, that that was a violation, by the Kelley Company, of the price bulletins. Do you recall that? A. Yes.

Q. Do you remember that you testified about this instance during the course of your examination in the criminal case, Mr. Lenci? A. I believe so, yes.

Q. Didn't you there testify as follows, with respect to this instance, beginning at page 681:

"Q. Well, let's see, Kelley had the permission of the licensors to sell a distributor at a discount only if the distributor were acting as a wholesaler and not a retailer, isn't that right. A. That is true, yes."

That is correct, is it not? A. Yes.

Q. The next question:

"Q. Now Kelley was a licensee, wasn't he?"

And you answered:

"Yes."

4606 "Q. And Structural was a manufacturing distributor, wasn't he?"

And you answered:

"Yes."

That is correct, isn't it? A. Yes.

Q. Now it is the fact, isn't it, at this time, and in fact at all times during which Structural was in business, that Structural's normal business was that of a distributor selling to dealers? A. Yes.

Q. So that if Structural should suddenly go into the dealer business and commence to sell contractors, then your position was that Kelley had no consent from USG to sell Structural at a discount; is that right? A. That is right.

Q. Now, let's illustrate that by an extreme case. Suppose Structural, in 1932, was a manufacturing distributor, its customers would be dealers, wouldn't they? A. Yes.

Q. And it would get a 12-1/2 or 15 percent discount off the dealer price from whatever licensee-manufacturer was selling to Structural? A. Yes.

Q. Now, suppose Structural overnight should
4607 change the character of its business so that it no longer sold as a distributor to dealers, but commenced to sell to the ultimate consumer, the contractor or the consumer; it was your position, wasn't it, that if that happened, Kelley had no more right to give Structural a discount than Kelley would have the right to give any dealer a discount, under the bulletins? A. That is right.

Q. And the thing that you were complaining about in 1932 was that Kelley, in effect, was changing the character of its business to a partial extent through the device of going into the dealer business and selling contractors and consumers?

Justice Jackson: You didn't mean Kelley, did you?

Mr. Bromley: I should have said Structural.

The Witness: Structural, yes.

By Mr. Bromley:

Q. That is what your complaint was, isn't it? A. Yes.

Q. Now, I was under the impression that what Structural had done was to go into the business of selling as a dealer at its manufacturing plant, by utilizing one of its own employees to make retail sales. A. Well, they used a dummy name, I don't know whose it was, I don't remember what it was at the time.

4608 Q. They used a dummy name? A. They marked off, as I was told, a part of their warehouse with a name, and who that party was, I haven't any way of knowing.

Mr. Steffen: Is this all based on hearsay? Do you have any other information but what you were told, Mr. Lenci?

The Witness: I was told by our salesman.

Mr. Steffen: We object to that as hearsay, Your Honor.

Mr. Bromley: It seems to me it is material in connection with the complaint which he made, according to his testimony at page 4443, in this case, against that situation.

Justice Stephens: In other words, you are showing his knowledge or understanding of what Kelley did, as bearing upon the meaning of his previous testimony?

Mr. Bromley: Yes, sir.

Justice Stephens: The objection is overruled.

Mr. Steffen: It is not offered for the truth of the statement that the dealer was a dummy dealer? He may have been a bona fide dealer, so far as this testimony goes.

Justice Stephens: Well, I understand the cross-examination is merely referring to this information based upon hearsay, to show what the state of this witness' mind was as bearing upon the nature of his complaint. That
4609 is proper.

Mr. Steffen: That is right.

By Mr. Bromley:

Q. Well, whatever the true facts were, your information was, and your complaint was, that in some fashion, direct or indirect, Structural was changing the character of its business from that of a distributor to that of a dealer? A. That is correct.

Q. And your position was that if that was the fact, Kelley was violating his license if Kelley gave Structural a discount? A. Yes.

Q. Now I believe in one of your notes at licensee meetings, you wrote down the words, "Kelley to straighten out." Do you recall that, in connection with this complaint—and I refer specifically to Exhibit 479 for Identification, and your testimony with respect to this note of yours, "Structural dealer at mill—Kelley to straighten out at once". Do you recall that? A. Yes.

Q. That is something you said you brought up at the licensee meeting of December 13, 1932? A. That is right.

Q. Now, when you said "Kelley to straighten out
4610 at once", didn't you mean merely that Kelley was to find out whether, as a matter of fact, Structural had changed the character of its business to the extent indicated? A. Yes.

Q. You didn't mean, did you, that Kelley was to straighten it out by coercing or compelling Structural to go out of the dealer business? A. We couldn't expect to do that.

Q. All you meant was that Kelley was to find out what the fact was, and if it turned out that Structural was operating as a dealer, then it was up to Kelley to cease giving the discount to Structural? A. Yes.

Q. And in the same exhibit, Exhibit 479 for Identification, there was, as I recall it, a mention of the sales tax, and you testified that some questions were asked about the then pending proposal for a national sales tax? A. Yes.

Q. Isn't it the fact that the only thing you wanted to find out was how your price on patented board, under the bulletins of USG, would be affected if a sales tax law were passed? A. That is what I wanted to know, yes.

Q. You also testified, I believe, that you had made a note at this time in connection with the contemplat-
4611 ed sales tax, "All sales to be subject to the addition of national or other sales tax if passed (this also applies to all products, and orders taken should so specify)."

You didn't intend to indicate by that that you thought the licensor had any right to make any provision as to the price of any product other than patented gypsum board, did you? A. No.

Q. I notice this last note "this also applies to all products, and orders taken should so specify", is in parenthesis. Doesn't that indicate that that was something you put on for your own information, and was not discussed at the meeting? A. That is correct. In connection with that sales tax, the reason it was in my mind is that for a number of years we had a plant in Canada, and did business under the Canadian sales tax, and it was the custom there, well understood by both the manufacturer and the customer, that the tax was to be added onto the face of the invoice; and what I had in mind, when I was asking about that, was if that would be the same practice in the United States, if the other people understood it the same as I did, if the tax came through.

Q. Now, at page 4505, you testified with regard to selling the Paragon companies and the American Hardwall,
4612 and you were asked these questions and gave these answers:

"Q. And the position that you took was that board should only be delivered by Ebsary to Oakfield; is that correct? A. That is correct.

"Q. And that it should not be shipped from the Ebsary plant for the account of Paragon, or Paragon Plaster & Supply, or American Hardwall? A. Yes, that was our argument.

"Q. What disposition was made of that complaint at that time? A. I think Mr. Henning said that he was going to consider it, and would make that change.

"Q. And would make the change? A. Yes.

"Q. Do you know whether the change was ever made? A. I don't think it was."

Now when you used the word "change", you only meant by that to indicate that USG was going to check with its licensees to make sure that no licensee was giving a manufacturing distributor's discount on board to these three companies, the Paragon companies and American Hardwall; isn't that right? A. Yes, but I believe that all three of those companies were getting a discount.

4613 Q. Well, you thought that was wrong, under the bulletins? A. Yes.

Q. And you thought it was wrong because it was your position that these three companies were not manufacturing distributors? A. Yes.

Q. But, on the contrary, were dealers? A. Yes.

Q. And you didn't think the fact that they, together, owned the stock of Oakfield, which was a manufacturing distributor, entitled any company other than Oakfield to get from a licensee a manufacturing distributor's discount? A. That is it.

Q. Now isn't it true that your complaint was not that board should be delivered to Oakfield, but that board should not be sold to these three companies, the Paragon companies and the American Hardwall Plaster, at a manufacturing distributor's discount? A. We felt originally that the Oakfield Gypsum Company should only be sold at Oakfield.

Q. And you thought that some of your competing licensees were selling these three owning companies at a discount? A. Yes.

4614 Q. And you thought that was a violation on the part of the licensees? A. Yes.

Q. Will you look at Exhibit 481, please, Mr. Lenci?

(Government's Exhibit 481 handed to witness.)

By Mr. Bromley:

Q. When you used the phrase "It was decided", in the first paragraph, you didn't mean that it was decided by the persons there present that in the future they would do business only upon the usual terms of the gypsum business so far as cash discount was concerned, did you? A. No.

Q. You did mean, didn't you, that that is what Mr. Henning said the licensor would impose as one of the terms upon which you should sell, and the price which you should charge for the patented product? A. That is correct.

Q. Will you look at Exhibits 483, 484 and 485, please, Mr. Lenci?

(Government's Exhibits Nos. 483, 484 and 485 handed to witness.)

By Mr. Bromley:

Q. In exhibit 484, you wrote a complaint to Board Survey with respect to the Eastern Builders Supply Company situation in Richmond, didn't you? A. Yes.

4615 Q. Now against whom was that complaint? A. The Universal Gypsum & Lime Company.

Q. And when you said, in the last paragraph, "We have every reason to believe that Mr. Smith is still working on a commission basis contrary to the License Agreement", what did you mean? A. That he was getting a jobber's commission.

Q. From whom? A. From Universal.

Justice Stephens: Do you mean a jobber's commission?

The Witness: Well, he was called a jobber. He really comes under the broker classification, but it is the same thing, practically.

By Mr. Bromley:

Q. When you say Jim Smith was getting a jobber's commission, you mean that his company, the Eastern Builders Supply Company, was receiving from the Universal Company a jobber's discount on sales by Universal to Eastern Builders Supply, don't you? A. That is right.

Q. And at the time you wrote this letter, that is, in March, 1933, the bulletins provided that Universal should charge, in its sales to jobbers, the dealer's price, and should not give any discount to jobbers? A. That

4616 is right.

Q. And wasn't that the nature of your complaint against the Universal Company? A. Yes.

Q. Wasn't it a simple instance, again, of where you thought that Universal was selling to Eastern Builders at a price less than the dealer's price; whereas, the bulletin provided that in sales even to jobbers, they should be charged the dealer's price without a discount? A. That is right.

Q. I believe you told us a little while ago that as a matter of fact, the Eastern Builders Supply Company was not a jobber at all, at any time? A. They were not a jobber in the sense that they had a yard or a warehouse, so far as I know.

Mr. Bromley: May the witness be shown Exhibits 489 to 501, inclusive?

(Government's Exhibits 489 to 501, inclusive, handed to witness.)

By Mr. Bromley:

Q. All of this correspondence has to do, hasn't it, Mr. Lenci, with the charge that your company was guilty of rebating on board prices through the indirect method of selling plaster along with board, and charging for the plaster an abnormally low price? A. That is their com-
4617 plaint in connection with Exhibits 489 to 493.

Justice Stephens: What do you mean by "their complaint"?

The Witness: The licensor is complaining that we sold —well, the first claim is that we gave away plaster in order to influence the sale of board.

Exhibits 494 to 496 cover the Waltham Lime Company. That is a complaint from the Board Survey Company that we must have been selling plasterboard to that dealer below the bulletin prices, because the dealer in turn was making an unusually low delivered price to the customer.

By Mr. Bromley:

Q. Even in connection with the Waltham Company, as shown by the last paragraph of Exhibit 496, the charge also was, wasn't it, that you were rebating on your board price by selling plaster at an abnormally low price? A. Yes, they add that to it.

Q. Now, what are the rest of the exhibits? A. Exhibits 497 to 499 have reference to the Liberty Coal Company.

Q. And is that complaint also to the effect that you were cutting the price of board by means of the device of

an abnormally low plaster price to that customer? A. Yes, it is.

4618 Q. And what are the rest of the exhibits? A. Exhibits 500 and 501 have to do with the Service Masons Supply Company.

Q. Again, the same kind of a charge, that you were rebating to them by means of the device of selling plaster at an abnormally low price? A. No, there it is a direct charge that we were making a low price on the plasterboard itself.

Q. Doesn't it also include the charge that you were selling other of your materials at abnormally low prices, and I direct your attention to the last paragraph of Exhibit 501? A. Well, that is my reply, and in there I add the statement that we were not selling other materials below our usual selling price.

Q. You stated that— A. (Interposing) I volunteered that additional information.

Q. Although that charge was not covered— A. (Interposing) I don't think it was included in their charge.

Q. Now, in connection with these Exhibits 489 to 501, Mr. Lenci, you understood that USG was not attempting to fix or control your plaster prices, didn't you? A. Yes, sir.

4619 Q. And you at all times felt perfectly free to charge for plaster any price that you saw fit, didn't you? A. Yes.

Q. And you understood that the only complaint against you was that you were attempting to cut the board price by, in effect, giving away plaster, in the sense that you charged for it an abnormally low price? A. Yes.

Q. And you understood that to mean that you were charging this particular customer, or these particular customers, for plaster, a price lower than you were currently getting from your other customers in the market? A. That is right.

Q. And that you were doing it for the purpose of giving that customer, or those customers, a rebate on the board price? A. That is the way I understood these complaints.

Q. So that you understood that you were being accused merely of using a subterfuge to accomplish a board price reduction? A. That is right.

Q. Now, will you look at Exhibits 502 and 503, please, Mr. Lenci?

(Government's Exhibits Nos. 502 and 503 handed to witness.)

4620 By Mr. Bromley:

Q. In Exhibit 502, near the end of the telegram, you will notice there appear these words: "Lee Story must be eliminated immediately as a jobber". A. Yes.

Q. Against whom did you intend that telegram to complain? A. The Kelley Plasterboard Company.

Q. And when you said that "Lee Story must be eliminated immediately as a jobber", did you not mean merely that Kelley must cease giving Lee Story a jobber's discount on its sales to Story? A. Yes.

Q. And in Exhibit 503, the Executive Secretary of the Board Survey Company made a reference to warehousing arrangements. Do you see that? A. Yes.

Q. And that is the same kind of a complaint as to which you have heretofore testified, isn't it, that a warehousing charge was merely a device to grant a rebate to the purchaser of board? A. Yes.

Q. Now will you look at Exhibits 504 to 511, please, Mr. Lenci.

(Government's Exhibits 504 to 511 handed to wit-
4621 ness.)

By Mr. Bromley:

Q. Isn't it the fact, Mr. Lenci, that all of these exhibits have to do merely with a complaint which you were making against the Kelley Company as to its prices, based upon what you had been informed Kelley's customers—in this instance the Paragon companies and the American Hardwall Company—were doing in the board market? A. Yes.

Q. And isn't it true that in Exhibit 508, in the fourth paragraph, the correct nature of your charge is spelled out in words? A. Is it the fourth paragraph or the third?

Q. The fourth, at the bottom of the page, starting out with "We have no information". A. Yes.

Q. In other words, what you were doing in your part of this correspondence was calling the licensor's attention to what the Paragon companies and the American Hardwall Company were doing in the board market in their areas, and asking Board Survey to infer from that that the Kelley Company must be selling at prices less than the bulletin prices? A. That is right.

Q. And in the third paragraph of Exhibit 508, reference is made to the price list of the American Hardwall
4622 Company, isn't it? A. Yes.

Q. And Mr. Miller, for Board Survey, took the position that that price list showed that American Hardwall, as a matter of fact, wasn't selling at prices low enough to justify an inference that their cost, that is, the amount that they paid Kelley, must necessarily have been less than the bulletin price? A. That is correct.

Q. These exhibits, 504 to 511, inclusive, Mr. Lenci, are merely an illustration of what you testified to this morning,—that in most instances, the evidence on which you relied, in your complaint against the licensee, you had to find in the activities of the customers of that licensee, isn't that so? A. That is correct, yes.

Q. And in the third paragraph of Exhibit 504, Mr. Lenci, I notice that you again state:

"At no time are we allowed to truck into Syracuse, nor the surrounding towns. At no time are we allowed to truck less than 5000 sq. ft. into certain counties. But, the dealers in the vicinity of Syracuse, Utica, and Scranton can call at these various warehouses and obtain any amount they desire."

A. That isn't my statement, that is a statement made
4623 by our salesman.

Q. Oh, yes, in a letter to you. A. Yes.

Q. You understood Mr. Neal's reference to be merely that under the bulletins the Ebsary Gypsum Company could not truck into Syracuse or surrounding towns at the price at which companies such as Paragon were actually selling the board delivered by truck; isn't that right? A. Yes.

4624 Q. Now will you look at Exhibits 512 to 515, please?

(Thereupon, Government's Exhibits Nos. 512 to 515 were handed to the witness.)

By Mr. Bromley:

Q. Before we go to those exhibits, I neglected to ask you, with respect to Exhibit 510, if it isn't the fact that in the fifth paragraph of that letter you suggested to Board Survey that one way to give you relief on your complaint would be for the licensor, in its bulletins, to establish a price for truck deliveries in that area which would enable you to compete with such dealers as Paragon and American Hardwall? A. That is right.

Q. But as a matter of fact, no change was ever made

in the bulletins in that respect, was there? A. No, it was not.

Q. Now in Exhibits 512 to 515, can you tell us against whom you were complaining? A. The Kelley Plasterboard Company.

Q. In Exhibit 512 I notice that you do not mention the Kelley Company at all, Mr. Lenci. A. Well, I should have, but I took it for granted that they knew what I meant from the reference to the Oakleaf gypsum board whicl is made by Kelley for the Oakfield Gypsum Company.

Q. Well, just what was the transaction which
4625 resulted in the Delaware Clay Products Company jobbing Oakleaf board to dealers in western Pennsylvania—will you spell it out for me? A. The board was manufactured by the Kelley Plasterboard Company.

Q. And sold by it to whom? A. And sold by Kelley to the Oakfield Gypsum Company.

Q. At a discount? A. At a discount, yes.

Q. And what did Oakfield do with it? A. Oakfield, in turn, sold it to the Delaware Clay Products Company, of Pittsburgh, and they in turn were quoting to the dealers a price the same as though they were buying directly from one of the manufacturers. In other words, they were quoting the dealers' price to the dealer in spite of the fact that there were two other intervening parties there who must have had some commission, which would indicate to us that Kelley was giving Oakfield a much larger discount than was permitted, a much larger manufacturing distributors' discount than was permitted.

Justice Stephens: When you say that there were two other intervening parties who might have had a commission, whom do you mean?

The Witness: Oakfield Gypsum Company and the Delaware Clay Products Company. You see this is one step farther than most of the complaints.

4626 By Mr. Bromley:

Q. And that is because you found out that the Delaware Clay Products Company was offering Kelley Plasterboard Company board to dealers at the dealer price? A. That is right.

Q. Now that is the price which these dealers would have had to pay if they had bought the board directly from Kelley? A. Yes.

Q. And you didn't see how the Delaware Clay Products Company could quote that price to a dealer, in view

of the fact that the board had to pass from Kelley to Oakfield—and presumably Oakfield made some profit—and then from Oakfield to Delaware—and presumably there was a profit for Delaware—and finally Delaware could sell it at the dealer price and make a profit? A. That is right.

Q. And you inferred from that, that Kelley was violating the license bulletins, didn't you? A. Yes.

Q. Because you knew that if the license bulletins were being observed that the margin of profit to Oakfield was limited to 15 per cent of the dealer's price? A. Yes.

4627 Q. And it is the fact, is it not, that generally speaking that 15 per cent margin would be used up by a manufacturing distributor in paying its proportion of its overhead and in handling charges on the board which it bought at that discount? A. Yes.

Q. It is the fact, isn't it, that this discount of 15 per cent and 12-1/2 per cent was given by licensees to these manufacturing distributors not to enable the manufacturing distributors to make a profit, but to enable them to avail themselves of the accommodation of being able to offer the board in mixed carloads to their dealer customers? A. That was the basic reason for the manufacturing distributors' discount.

Q. It never was designed to permit the manufacturing distributors to make a profit, was it? A. No, it was designed to give them board which they could ship to their customers along with their other products.

Q. And that margin of 15 per cent and 12-1/2 per cent would be used up just in the expense to the manufacturing distributor involved in the handling, the loading and unloading, and warehousing of the board, wouldn't it? A. In that and the selling expense, overhead and all the rest.

4628 Justice Stephens: The Court will take the afternoon adjournment at this time.

Mr. Bromley: Before we adjourn, may we have permission to file, tomorrow morning, an affidavit in connection with Mr. Johnston's motion? We find in the answering affidavit something which we think affects our position, and we would like permission in the morning to file a short affidavit of our position in the matter.

Justice Stephens: You may do so.

(Thereupon, at 4:00 o'clock p.m., an adjournment was taken until Friday, February 25, 1944, at 10:00 o'clock a.m.)

4629 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Washington, D. C.,
Internal Revenue Building,
Friday, February 25, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4634 You may proceed. Will you take the stand, Mr. Lenci?

Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed his testimony as follows:

Cross Examination (resumed).

Mr. Bromley: May the witness be shown a copy of the minutes for the morning session of February 24?

(Copy of transcript handed to the witness.)

By Mr. Bromley:

Q. Will you turn, Mr. Lenci, please, to page 4797, and read to yourself the question and answer beginning at line 11 and running down to line 18? A. Yes, I have read it.

Q. You will notice in the question I used the words "cost you more than $15". A. Yes.

Q. Will you please explain your affirmative answer with especial reference to my use of the word "cost"? A. Well, what I thought you meant there was that it would cost us more to make the delivery to the Bronx than it would to downtown New York, the expense of delivery would be greater.

Q. And so, if you charged the dealer in the Bronx $15, that might be a price so low as not to yield you any
4635 profit? A. Yes.

Q. Therefore, if you made a truck delivery to a dealer in Bronx County, under the assumption in my question, normally the price to that dealer would be more than as though you sold a dealer by truck in New York County; is that right? A. Yes.

Q. Now, the cost of the trucking service to the manufacturer, of course, becomes greater, the longer the distance from the manufacturer's point of loading the truck to the point of destination at the dealer's warehouse? A. That is correct.

Q. So that if a price of $15 was fixed by the bulletins for a truck delivery within New York County, and that price was limited to a delivery in New York County, and if you delivered by truck into Westchester, you would feel that you should receive more than $15, wouldn't you? A. Yes.

Q. And if you delivered up into Bridgeport, Connecticut, you would feel that the price should be still higher? A. Yes.

Q. That would be because the cost of the trucking would be greater, the longer the haul, would it not? A. That is correct.

Q. And by the same token, the value of the service
4636 rendered to the dealer would be worth more to the dealer, the longer the haul? A. Yes.

Q. Will you turn, please, to page 4840, and will you read the answer beginning in the last line at page 4840, to yourself, please? A. Could I suggest a correction in that?

Q. Yes. A. On page 4841, line 7, the first word is "had". If that was changed to "wanted", it would clear that partially.

Justice Stephens: The witness may make that change in his answer if he indicates that that is what he meant to say.

The Witness: That is what I intended to explain.

By Mr. Bromley:

Q. Now, in line 10, still in the same sentence, you said, "and our price was not made up of a price at the mill, plus freight to destination plus trucking." When you said "our price was not made up", you meant the price fixed by USG in the bulletin was not calculated upon the basis of a mill price plus the actual freight to destination plus the actual trucking cost, did you not? A. No, that is right.

Q. You say you didn't mean that? A. Well, that is one of those questions that you can't say "Yes" or "No"
4637 to. Their price was not made up on that basis.

Q. Whose price? A. The USG's bulletin price.

Q. The USG's bulletin price was not calculated on the basis as indicated in lines 10, 11 and 12 of your answer, is that what you mean? A. That is right.

Q. How was it calculated? A. It was based upon their bulletin price at their local mill, plus what they thought would be a fair trucking charge for delivery to the destination.

Justice Stephens: By "their", do you mean USG's mill?

The Witness: Yes. Or, should it be in a territory where they had no mill, but one of the other licensees did have a mill, it would be based upon that mill.

By Mr. Bromley:

Q. You are talking about the method which you understood USG used in arriving at the dollar figure which was specified in its bulletins for truck deliveries in the areas of New York, Philadelphia, and Boston, aren't you? A. Yes.

Q. And you mean by that answer to indicate merely that in calculating that price, USG did not take the mill base price at the mill nearest destination and add to it
4638 the actual freight to destination and then add to it the actual cost of trucking from the end of the freight haul to the dealer's warehouse, but merely took the mill base price and added to it an arbitrary figure which was intended generally to cover freight, if any, and actual trucking cost? A. That is right.

Q. But which did not represent either the actual freight or the actual trucking cost? A. That is correct.

Q. When you said, in the last sentence of that answer, "We got paid what the other company which was located in that area figured was its cost at the mill, plus a trucking charge.", what did you mean by that? A. That we could charge what the other company used as the nearest mill base—

Justice Jackson: (Interposing) You mean you had to do that to meet their price?

The Witness: We had to do that in order to meet their competition.

By Mr. Bromley:

Q. You got paid what was specified by USG in the USG price bulletins, didn't you? A. Yes.

Q. And by that sentence, you meant merely that that bulletin price was fixed on the basis that you have
4639 heretofore indicated, that is, the mill price at the mill nearest to the particular destination, plus some round figure amount added to the mill base to cover generally trucking and freight, if any? A. That is correct.

Q. Now to give an example, if a USG bulletin fixed a price for truckload deliveries in Philadelphia, it would take the Philadelphia mill base price of, say, $13 a thousand for lath, and add to it some figure like $2 or $3, and make the price $15 or $16 for truck deliveries in Philadelphia, wouldn't it? A. Use the actual figures—$13 mill, plus $1.10, makes a price of $14.10, which is the bulletin delivered price for lath in the Philadelphia area.

Q. By truck? A. By truck.

Q. And, of course, if you sold in Philadelphia for delivery by truck, you got paid $14.10? A. That is correct.

Q. And you were trying to point out, weren't you, that in your instance, since your mill was not in Philadelphia but was in Oakfield, you had to pay the cost of the freight from Oakfield to Philadelphia, plus the actual trucking charge from your warehouse in Philadelphia, or the end of the freight line in Philadelphia, to the dealer's
4640 warehouse? A. That is right.

Q. And in that instance, the total of the freight which you had to pay, plus the total of the actual trucking charge, would exceed this differential of $1.10 a thousand which the bulletins provided should be added to the $13 price to make the delivered truck price? A. That is correct. You said "from Oakfield to Philadelphia". We would figure the freight from Wheatland to Philadelphia, which in this case happens to be the same.

Q. Yes, I should have said wheatland, because I realize that that is where your mill was located, and not Oakfield.

Now what you have said, Mr. Lenci, with respect to these answers concerning your previous testimony at pages 4797 and 4841, is all based on your understanding of the way USG determined the price, isn't it? A. Yes.

Q. And you did not mean to intimate that you had any part in calculating or determining either the amount of the price or how it was arrived at? A. No, we had nothing whatever to do with that.

Q. USG did that by itself? A. That is right.

Mr. Bromley: May the witness be shown the
4641 minutes of the afternoon session, please?

(Copy of transcript handed to the witness.)

By Mr. Bromley:

Q. Will you turn to page 4863, Mr. Lenci? A. Yes, I have it.

Q. Read to yourself, please, the question and answer from lines 14 to 19. A. Yes.

Q. In line 18, you should have said, "That we did give discounts to jobbers?", shouldn't you? A. That should be "jobbers".

Justice Garrett: That is in the form of a question by the witness—

Justice Stephens: I suggest, Judge Garrett, that you don't change the word, because the correction will be shown by the witness' testimony. If you change the word, then the purpose of the correction won't be shown.

Mr. Bromley: It is in the form, however, of a question by the witness of counsel, Judge Garrett.

By Mr. Bromley:

Q. Now, will you look at Exhibit 516, please, Mr. Lenci?

(Government's Exhibit No. 516 was handed to the witness.)

By Mr. Bromley:

4642 Q. The word "cutstock" refers to a certain kind of gypsum lath, does it not? A. Yes.

Q. It has no application to wallboard whatsoever, has it? A. No, it is board which is cut down from wallboard which was not fit to be shipped due to, possibly, breakage around the edges, or something of that kind; and instead of throw-

ing the board away, it can be recut into smaller sizes and sold as cutstock lath or plasterboard.

Q. When it is so cut, it is cut down, isn't it, to the usual sizes in which the lath is made? A. Yes.

Q. Therefore, it would not be practicable to cut down defective pieces of lath into cutstock lath, because the sizes would be too small; is that right? A. There wouldn't be anything left.

Q. There wouldn't be anything left? A. That is right.

Q. So the phrase "cutstock" means that the manufacturer takes wallboard which is in some respects defective, and of course which is generally in a much larger size than lath, and cuts it down to the lath size? A. That is correct.

Q. And sells it as lath? A. Yes.

4643 Q. And did the bulletins generally provide for a lower price for cutstock lath than for plain, ordinary lath? A. As I recall it, they did.

Q. Because it wasn't as good a product, was it? A. No, it was more like the original open-edge board that we wanted to get away from.

Q. And subsequent to 1929, and as the years went by, was it the fact that the amount of cutstock which was produced by the manufacturers steadily dwindled? A. Yes.

Q. Why? A. In one way, we all learned how to make better board and not have this damaged material. That was the principal reason for it. As a matter of fact, speaking for ourselves, we don't have enough dunnage, hardly, to pack our cars with.

Q. You mean your production results in so little defective board that it is difficult for you to even get enough defective board to use as dunnage? A. To use as packing, yes.

Q. Then at some time subsequent to 1929, it is your understanding, isn't is, that USG no longer set a price for the sale of cutstock? A. That is correct.

4644. Q. And as a matter of fact, no cutstock was produced, due to the reasons that you have said, not only by your own company but by other companies generally? A. That is right.

Q. Will you look at Exhibits 517 and 518, please?

(Government's Exhibits Nos. 517 and 518 were handed to the witness.)

By Mr. Bromley:

Q. In Exhibit 517, you were suggesting merely, weren't you, to Mr. Henning, that it might be good business if the

licensor should announce a price change by way of reducing the price of gypsum lath? A. I think Mr. Henning made that move first.

Q. He suggested it first? A. As I recall it, he suggested at this meeting, which I did not attend, that if a lower price were made on gypsum lath, it would put the gypsum lath manufacturers in a position to better compete with wood lath.

Q. Was wood lath at this time selling at a lower price, on a comparable basis, than the price fixed for gypsum lath? A. Well, it was then, and it always is selling at a lower price than gypsum lath is selling at.

Q. It is today? A. Yes. Of course, there are other factors that have to be taken into consideration be-
4645 sides the original cost of the wood lath.

Q. What are those? A. Well, with wood lath you have got a great number of small pieces that have to be handled individually, and the cost of application is higher. With wood lath you use much more plaster to secure a finished wall than you do if you plaster over gypsum lath.

Q. Why is that? A. Because with gypsum lath you have got a solid base; whereas, with wood lath, every inch and a half you have about a half inch space between the two pieces of wood lath, and the plaster goes through each one of those joints. Then besides that, there are questions of quality and matters of that kind.

Q. And, of course, where gypsum lath is used, in a sense as soon as the lath is erected the wall is partially plastered, isn't it? A. Yes.

Q. Because the gypsum core in the gypsum lath is practically the same as the gypsum plaster which is applied to the gypsum lath? A. That is right.

Q. Now, was your suggestion, contained in Exhibit 517, of a reduction in price to $14 on a carload basis,
4646 adopted by USG, if you know? A. No, it was not.

Q. As a matter of fact, a few months later, and in March, 1937, USG sent out a bulletin which reduced the price to $13, did it not? A. That is correct.

Q. Up to March, 1937, the bulletin price had been $15, had it not? A. I believe so.

Q. So that the reduction was a $2 reduction? A. That is correct.

Q. And are you able to state as to whether or not that resulted in your selling more gypsum lath in competition with wood lath—did it have that effect? A. Well, what-

ever I say in connection with that would be purely speculative, because I believe we would have sold just as much lath at $15 as we did at $13, because conditions were changing in the market.

Q. Will you look at Exhibits 519 to 522, inclusive, please?

(Government's Exhibits Nos. 519 to 522, inclusive, were handed to the witness.)

By Mr. Bromley:

Q. All four of those letters, Mr. Lenci, had to do only with the fact that you were complaining to the li-
4647 censor that the licensee Certain-teed was cutting the price to one of its customers by giving that customer a jobbing discount, which cut price was not permitted by the USG bulletins; isn't that right? A. That is correct.

Q. And the customer of Certain-teed which you alleged received the discount was the Building Material Wholesalers, Inc., of Charlestown, Massachusetts, wasn't it? A. That is right.

Q. Now, will you look at Exhibit 540, please?

(Government's Exhibit No. 540 handed to the witness.)

By Mr. Bromley:

Q. Do I understand your testimony to be that the meeting referred to in the pencilled note on Exhibit 540 was not held for the purpose of discussing the Cardiff situation? A. No, it was not, that was purely incidental. As I recall it, when Mr. Bartlett came in we talked about other matters, and in the course of conversation I asked him if they had made any decision in Chicago yet about Cardiff.

Q. And what did Bartlett say? A. He told me that it was being considered, and he hoped soon to have a reply for us.

Q. And did either Mr. Bartlett or Mr. Spray ask
4648 you any questions concerning your request to USG for consent to sell Cardiff? A. No, I don't think they did.

Q. And you did not understand, did you, that USG had sent a lawyer down there to interview you about the situation? A. Oh, no.

Q. At page 4593 of your testimony, you said that subsequent to 1935 you sold Ebsary board to the Structural Gypsum Division of American Cyanamid—do you remember that? A. Yes.

Q. And you also said that in 1938 or 1939, Mr. Bartlett inquired of you as to whether Structural was selling board and lath to dealers at prices below the minimum prices specified in the USG bulletins for its licensees—do you remember that testimony? A. Yes.

Q. And you said further that Bartlett asked you to investigate and see whether that was correct. Do you recall that? A. Yes.

Q. Now, did you understand that Bartlett was making a complaint with respect to this matter, or not? A. I wouldn't say it was a complaint as much as it was an
4649 inquiry.

Q. But you understood, didn't you, that if the inquiry had developed the fact that Structural was regularly selling at low prices, it might be the basis for a complaint against the Ebsary Gypsum Company? A. Yes.

Q. Because at this time referred to in your testimony, 1938 or 1939, the Ebsary Company was selling Structural, wasn't it? A. That is right.

Q. You said, at page 4595, that on the telephone you asked Mr. McCormick of the Structural Company about the Structural prices, and he told you they were not selling below the board prices in effect at that time. Now, in that conversation did you tell McCormick that he must resell at the dealer price? A. No.

Q. Did you make any statement of that kind at all? A. No, I did not.

Q. Did you threaten that if he didn't sell at the dealer price you would no longer continue to sell him? A. No.

Q. Now, at this time, as at all times during which you sold the Structural Company your board, Structural was competing directly with you for the trade of the
4650 same class of customers to whom you sold board, was it not? A. They certainly were.

Q. Can you tell us whether or not, after this conversation with McCormick, you did or did not continue to sell board to Structural as you had prior thereto? A. Yes. As I said yesterday, we continued to sell the Structural Company until their business was discontinued by the American Cyanamid Company.

Q. You will remember that at page 4597, you were asked some questions and gave some answers with regard to a man named Stremble, who you said was a salesman on commission in the employ of the Structural Company? A. That is right.

Q. And you testified at that page that you complained to Mr. McCormick of the Structural Company about Mr. Stremble's practices? A. Yes.

Q. Now, what were the practices of Stremble about which you complained? A. Mr. Stremble was a salesman for the Structural Gypsum Company, and he sold principally in Brooklyn and Long Island. In that same territory we had two salesmen of our own, and we had a great number of complaints from our own men that Stremble was selling the same customers, the same dealers that our men were selling, or attempting to sell, and who were our
4651 customers whom we had previously sold, and was actually giving them cash rebates to influence them to buy our lath through the Structural Gypsum Division of American Cyanamid.

Q. And did you think that that was unfair competition on Structural's part? A. Yes.

Q. You knew that rebating of this kind had long been condemned as unfair competition in the gypsum industry, didn't you? A. Yes.

Q. Now you said, in your testimony at page 4598, that later on Mr. McCormick told you that he had discharged Mr. Stremble? A. That is correct.

Q. Did you know at that time that on one occasion prior to this, Mr. McCormick had fired Stremble because of his persistent rebating? A. I didn't know that he had discharged him before that, but I know that Mr. McCormick afterward told me that long before we made a—

Mr. Steffen: (Interposing) We object to what Mr. McCormick afterwards told him, as pure hearsay.

Mr. Bromley: I think it is important as bearing on this witness' state of mind as to the situation which led
4652 him to complain to the Structural Company about something that a Structural employee was doing.

Justice Stephens: If you can bring out, Mr. Bromley, that it was brought to his attention before he made his complaint, then I think you would be correct. But as I understood his testimony, he learned it after this was all over.

The objection is sustained to the answer given, but you may rephrase the question if you can bring out the other matter.

By Mr. Bromley:

Q. Before you talked to McCormick about Stremble, what information did you have about Stremble and his

activities? A. Well, as I said, our salesmen in that same territory where Stremble was operating, reported to us that Stremble was giving cash rebates to the dealers that we had sold and hoped to continue to sell.

Q. Now, did you know or have any information about Stremble's reputation in the trade, as to whether or not he was a rebater? A. Yes.

Q. What information did you have as to his reputation? A. Well, our men said that he was not only giving rebates on lath, gypsum lath, but also on Gypsteel plaster
4653 manufactured by the Structural Gypsum Company.

Q. And did you have any information as to whether he had ever been discharged by Structural prior to this time, on account of his rebating conduct? A. At that time, I didn't know that.

Q. Did you have any information as to whether Mr. McCormick had ever sought to discipline him in any way for rebating, prior to the time that you had your talk with Mr. McCormick? A. Not prior to that time, no.

Q. Now, in connection with your testimony that McCormick did discharge him after your conversation with McCormick, did you ask McCormick to fire him? A. No.

Q. Did you make any suggestion to McCormick of that kind, in any form? A. No, I did not.

Q. And was your talk with McCormick initiated in any sense by USG? A. Not at all.

Q. Was it initiated in any manner by any other gypsum board manufacturer? A. Not at all, no.

Q. Then it was entirely and completely your own independent act, wasn't it? A. Yes.

4654 Q. In connection with your inquiry of Mr. Bartlett to which I referred a moment ago, and to which you testified at page 4593, do you recall that I asked you whether or not you didn't understand that if Structural was selling at low prices, that might be the basis for a complaint against the Ebsary Company with relation to the Ebsary prices to Structural? A. Yes.

Q. Now, the nature of that complaint, based on that evidence of what Structural was doing, would be a charge against your company that your company cut the price to Structural, wouldn't it? A. The inference would be that we were giving Structural a larger manufacturing distributor's discount than we should have.

Q. And based upon your experience, you knew that Structural's activities might raise that inference as against your company? A. That is right.

Q. And that therefore, some other licensee might complain against your company, and that the nature of the complaint would be that your price to Structural violated the bulletin because it was a cut price? A. That is right.

4655 Q. Now at any time, Mr. Lenci, did you or your company ever have any understanding or arrangement or agreement, with anybody, to the effect that you would control or attempt to control the resale prices at which these manufacturing distributors, or any of them, sold board purchased from you? A. We did not.

Q. You testified at page 4598 and page 4599 with respect to metallized board.

At or before the time that you took your metallized board license, can you tell the Court what, if any, effect was being exerted upon the gypsum board business by the manufacturers of so-called insulation board? A. Insulation board is not a gypsum product, it is a fiber board made either from a fibered wood product or fibered sugar cane refuse, or material of that kind. It is a porous board. And they had become very active in competition with gypsum, and were pushing this board for insulating purposes. And in order for the gypsum manufacturers to meet this competition, this board with the foil face was developed as a form of insulation to try to retain some of the insulating business for ourselves which we had been losing.

Q. Well, was it the fact that you had been losing gypsum board and lath business because of the competition offered by the manufacturers of insulating board?

4656 A. Yes.

Q. This insulation board, of which you have spoken, manufactured by others and not a gypsum product, was it used as a lath or a wallboard, or how was it used? A. It was used in both ways, in both sizes. It was made both as a lath and as a wallboard.

Q. So that plaster could be applied directly to it, couldn't it? A. Yes.

Q. Now, what was responsible for its insulating qualities, just generally, if you know? A. Well, with the insulating boards, they were rather soft, porous boards, and I believe they counted on the air spaces in the board to have an insulating value.

Justice Stephens: There wasn't any foil on that board, was there?

The Witness: No.

By Mr. Bromley:

Q. Now, you understood that so far as Mr. Henning of the USG was concerned, he was very anxious for the entire industry to get into the manufacture of an insulating product in order to meet this threat from the insulation industry? A. Yes.

Q. And did you agree, and consider that the insulation board threat was a dangerous one to the gypsum
4657 board industry? A. Yes, we were feeling the competition from it.

Q. And you felt it was a matter of some importance for the gypsum board manufacturers to be able to offer a board and a lath which possessed insulating qualities, didn't you? A. Yes.

Q. Now, at the time you took the license, what can you say as to whether it was your desire to manufacture the product covered by the license? A. Well, that is what we took the license for. As I recall it, we took the license in the fall of 1935, and were making shipments in January of 1936.

Q. Did I understand you correctly that you do not recall whether you received from USG any price bulletins on this product prior to the time you actually went into production? A. I am quite sure—I have been thinking about that—I am quite sure that we did not get price bulletins until we signed our license.

Q. Now I am asking you as to whether or not you got price bulletins before you started to manufacture the product? A. I don't remember.

Q. You don't remember? A. I don't remember that.

4658 Justice Garrett: Is that limited to the metallized board?

Mr. Bromley: Yes, Your Honor, I intended to limit that to the metallized board.

The Witness: That is the way I understood your question.

By Mr. Bromley:

Q. Whatever the fact is as to whether you received metallized board bulletins before you actually got into production, or not, you understood, didn't you, that the provisions of those bulletins applied only to such board as you manufactured and sold? A. Yes.

Q. And did you have any understanding or arrangement or agreement with USG that you would observe those prices prior to the time that you got into production? A. No.

Q. What happened to the development of this metallized gypsum board, was it a success or was it not? A. It was a success, not as great as we had hoped for, but it developed into a very considerable tonnage of board, and continued right along until the war, when it became impossible, due to Government restrictions, to get any more aluminum foil.

Q. Now, did you have any understanding or ar-
4659 rangement or agreement with anybody other than USG that you would maintain any price or prices as to metallized board? A. No.

Mr. Bromley: May the witness be shown Exhibit 37?

(Government's Exhibit No. 37 handed to the witness.)

By Mr. Bromley:

Q. I call your attention, Mr. Lenci, to page 531 of that exhibit which, as I understand it, is page 2 of Board License Bulletin No. 5 of February 6, 1939.

Justice Stephens: This is Exhibit 37?

Mr. Bromley: Yes, Your Honor.

Justice Garrett: Isn't that reproduced in the complaint?

Mr. Bromley: Yes, it is at pages 95 and 96 in the complaint.

By Mr. Bromley:

Q. Now there was nothing in the bulletins, as you understood them, was there, Mr. Lenci, which had any relationship to any requirement that licensees must hire trucks from trucking companies? A. No.

Q. And the only provision about hiring trucks, as you understood these bulletins, was the provision contained in the 6th line of the last paragraph on page 531, under the heading "Rebates and Allowances", which re-
4660 ferred to an indirect price cut or rebate by means of the device of hiring customers' trucks? A. That is right.

Q. Well, now, how could the hiring by a manufacturing seller, of a customer's truck, result in a rebate? A. Well, suppose we needed a truck to make a certain delivery, and that the fair trucking charge for that particular service

would be $1.50 per ton; suppose, further, that we wished to make a rebate to that particular dealer. It would be quite easy for us to go to that dealer and say, "You pay us the full price for our board, but we will hire your truck on the basis of $3 per ton." That would be a very simple and clear way of making a rebate, and that is what this paragraph has reference to.

Justice Stephens: The Court will take the morning recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4661 Justice Stephens: Proceed, gentlemen.

By Mr. Bromley:

Q. With respect to your testimony about licensee meetings, Mr. Lenci, when was the last such meeting held, if you recall? A. The last meeting was held—correct me if I am wrong—I believe Mr. Henning died in the fall of 1936, and the last meeting was held in the spring, I should say in March, of 1937, and that was the time we met Mr. Keady, who took over Mr. Henning's duties, Mr. Keady of the United States Gypsum Company.

Q. And since that time there never has been a meeting of licensees? A. That is correct.

Q. Now at any time did you ever know of any representative of any one of these manufacturing distributors to be in attendance at any of these licensee meetings? A. No, they were strictly licensee meetings, there were no visitors or outside interests of any kind; they were limited to the licensees and the licensor.

Q. And would you say that the questions and answers, and the topics discussed at these licensee meetings, were always limited to matters having to do with patented gypsum board? A. Yes.

4662 Mr. Steffen: I object to that as a conclusion. I think there is a lot of detailed evidence in the record. The question is too broad and asks for a very general conclusion.

Justice Stephens: I suppose, in a highly technical sense, that it may again raise the question which has been raised by the Government so often, that the witness is not to testify as to whether or not the board was manufactured strictly in accordance with the patent process. But it seems to the Court that the witness understands that the questions refer to board which they were purporting to

manufacture, or understood they were manufacturing, under the patents.

Technically the objection is well taken and is sustained; but you may rephrase the question, Mr. Bromley.

By Mr. Bromley:

Q. It is a fact, isn't it, that there never was any discussion about prices except as they related to gypsum board which you understood was being manufactured by the licensees and the licensor under the patents and the license agreements? A. That is right.

Q. Now at any time was there ever any agreement reached among any of the representatives in attendance at these meetings as to what would or would not be done? A. No.

Q. And what is the fact as to whether or not the
4663 prices of plaster or other unpatented gypsum products were discussed at any of these meetings? A. I don't recall that they were.

Q. And so far as you know were there ever any Board Survey complaints or investigations which had to do with the prices of plaster or other unpatented gypsum products? A. No.

Q. Except for the instance relating to the Cardiff Gypsum Company, to which you have testified, was there ever an occasion when you or anyone from your company requested from USG a consent to sell a manufacturing distributor under the provisions of your license, where such consent was refused? A. That was the only case.

Q. And is it a fact that in all other instances, all consents which you requested for permission to sell manufacturing distributors were issued to you without question? A. Yes.

Q. Were there ever any conditions, written or oral, attached to the granting of consents issued to your company by USG for permission to sell these manufacturing distributors? A. No.

Q. And did you ever have an arrangement or understanding or agreement with USG, or with anyone else, that with respect to these consents, the Ebsary Gypsum Company would police or supervise or seek to control
4664 the manufacturing distributors' resale prices or practices? A. No.

Q. Was there ever an instance in which a consent, issued by USG to Ebsary to sell a manufacturing distributor, was ever withdrawn? A. No.

Q. Was there ever a time when USG or anyone connected with it ever threatened to withdraw a consent issued to you to sell manufacturing distributors? A. No.

Q. Was any statement ever made to you by anyone connected with USG that if you did not control or seek to control the resale prices of these manufacturing distributors to whom you sold under the consents, that the consents would be withdrawn? A. No.

Mr. Bromley: That is all.

Justice Stephens: The Court has just one question to clear up its recollection.

As I remember your testimony, Mr. Lenci, it was that the license agreement was signed up on or about the 6th of June, is that correct?

The Witness: The original license agreement?

Justice Stephens: Yes.

The Witness: The 22nd of May, 1929.

4665 Justice Stephens: Oh, the 22nd of May.

The Witness: Yes.

Justice Stephens: What was the date of the meeting that you attended, at or about that time, at which, as you said, Mr. Avery outlined the terms of the license agreement?

The Witness: The original license agreement?

Justice Stephens: Yes.

The Witness: We arrived in Chicago on the 21st of May.

Justice Stephens: What was the date of the meeting at which the so-called bubble board contract advantages were discussed?

The Witness: That is what I thought you were asking about before. That was on the 23rd of May.

Justice Stephens: Of that same year?

The Witness: Yes, sir.

By Mr. Bromley:

Q. That was after the licenses covering the Utzman folded-edge patent, and other patents of that nature, were signed, wasn't it? A. Yes.

Q. Those licenses were signed by the four companies that took them at that time, either on May 22nd or prior to May 22nd? A. Ours was dated the 22nd of May, and I believe the others were about that same time. Of

4466 course I have not seen them, so I don't know.

Q. It was not until after those licenses were executed and delivered, and indeed not until the day after,

that any reference was made by Mr. Avery to the so-called foam or bubble board invention? A. That is my recollection, yes.

Q. And it was on that day, the day after, that he told you that the company had applications for this invention and that you licensees could take a license under it if you wanted to? A. That is correct.

Mr. Bromley: That is all.

Justice Stephens: Is there cross examination by counsel for other defendants?

Mr. Varian: I would like to ask a few questions, your Honor.

Justice Stephens: You may do so.

Cross examination

By Mr. Varian:

Q. Mr. Lenci, did the Ebsary Gypsum Company, or any of its officers, during any part of the period mentioned in the complaint in this action, or since, have any contract, agreement or understanding, either oral, in writing, or otherwise, with any one or more of the defendants or any of the respective officers of the defendant
4667 corporations, or with any other person, firm or corporation, to control, fix or influence the price or prices, or terms or conditions of sale, or of resale, by you or by any other person, firm or corporation, of gypsum board—other than such agreements as are specifically set forth in the original license agreements between Ebsary Gypsum Company and USG, set forth in the complaint and in evidence in this action?

Mr. Steffen: I object, your Honor, upon the ground first that it is a horrible question—

Justice Stephens: (Interposing) It is a what?

Mr. Steffen: A horrible question, in length.

Secondly, it asks for a conclusion which I think that the witness ought not to be expected to give without laying a further foundation.

Justice Stephens: What was your first objection?

Mr. Steffen: That it was a horrible question. My objection on that score is that it covers nearly all the material in the case in one question, and expects a yes or no answer, and the answer, I should think, would be of almost no weight. That is, of course, an objection that goes simply to weight and form.

The principal objection is that it calls for a legal con-

clusion and there has been no proper foundation laid for asking for a legal conclusion, if the witness could give such a conclusion, and I don't think he is qualified
4668 to give such a conclusion.

Justice Stephens: Mr. Varian, what do you say?

Mr. Varian: I think there is a proper foundation. We have gone into all of these matters that are referred to in this question. They have all been gone into by Government counsel and Mr. Bromley has, I believe, quite exhaustively specifically cross examined this witness in regard to the details.

I think it is a perfectly proper question, he is well qualified, he knows exactly what the company did, and he has been in control of the sales policies of this company for all of this period.

Mr. Steffen: Your Honor, Mr. Varian asks, if I can remember the question, if the Ebsary Company or any officer or anybody connected with the company, had any agreements, oral, written or otherwise, at any time, or at any place, with anybody, concerning anything having anything to do with the gypsum industry—and it is impossible for the witness to answer that question yes or no. He couldn't, in the nature of the case, know, for example, whether Mr. Ebsary may not have had an agreement.

The question is phrased, as I got it, "did they have?"

Mr. Varian: Mr. Lenci would know whether Mr. Ebsary had such an agreement with anybody, and the question did not include any representative of the company,
4469 it included the Ebsary Gypsum Company or any of its officers. Now there were very few officers in this small company, and while Mr. Ebsary was President, yet Mr. Lenci conducted the sales policy of this company and was familiar with everything that was going on with regard to the sales, in all the details.

Justice Stephens: We are of the view, Mr. Varian, that the question is proper except in one respect. We think that it ought to be so phrased or qualified as to indicate that you are asking for facts within the knowledge of this witness. Except for that, Mr. Steffen, we are agreed that the question is not improper, for this reason—the Government has asked the witness to go with great detail into a very large number of transactions and relationships and business items, from which the Government is asking the Court to conclude that there were such agreements and contracts and transactions as are charged here to be illegal.

Now the defendants, in cross examinaton, can only meet that, since they have to prove a negative, by asking questions which are in conclusional form in the technical sense, but are actually questions which are intended to go to, and which the Court interprets as relating to, facts. Otherwise, the defendants can do nothing except go over the same detail that you have gone over.

It is conventional upon cross examination to ask such questions.

4670 Now the Court will not take the answer to the question, or treat the answer to the question, as a legal conclusion. It understands that the question only goes to this witness' knowledge of the transactions which he may refer to as contracts, agreements or understandings, and which we understand, as judges, he is referring to in the factual sense as distinguished from the legal sense.

We are of the view that if you rephrase the question, therefore, Mr. Varian, or add to the question in some such manner as to indicate to the witness that you are only asking him to testify as to facts within his knowledge, that the question is proper.

Mr. Varian: I will ask you the question again, Mr. Lenci, in accordance with the modifying suggestion of the Presiding Justice.

By Mr. Varian:

Q. Did the Ebsary Gypsum Company, or any of its officers, to your knowledge, during any part of the period mentioned in the complaint in this action, or since, have any contract, agreement, or understanding, either oral or in writing, or otherwise, with any one or more of the defendants, or with any of their respective officers, or with any other person, firm or corporation, to control, fix or influence, the price or prices, or terms or conditions of

4671 sale, or of resale, by you or by any other person, firm or corporation, of gypsum board—other than such agreements as are specifically set forth in the original license agreements between Ebsary Gypsum Company and USG, set forth in the complaint, and which are in evidence in this case?

Mr. Steffen: I would like to raise one objection as to the form of the question. He says, "any sales by you". Could that be clarified to indicate whom he means?

Mr. Varian: "To control, fix or influence, the price or

prices or terms or conditions of sale by you or by any other person".

Mr. Steffen: I didn't understand what he meant.

Justice Stephens: You meant the Ebsary Gypsum Company?

Mr. Varian: To control Ebsary Gypsum Company's price, or the price at which they sold to other persons.

Justice Stephens: Do you know what time is referred to by the "time mentioned in this complaint"? Have you read the complaint?

The Witness: Yes.

Justice Stephens: Do you know what time it covers?

The Witness: Yes.

Justice Stephens: Very well, then you may answer the question.

The Witness: My answer to that is "no".

Mr. Steffen: I move that that answer be stricken, your Honor, as being purely a matter of defense, and
4672 improper at this time.

Justice Stephens: We think it is proper cross examination and the motion is denied.

By Mr. Varian:

Q. Now I want to ask you another question in regard to—

Justice Stephens: (Interposing) I might call your attention, Mr. Steffen,—of course you are not estopped, but dozens of such questions have been asked with respect to particular transactions in this case, without objections by the Government. They are conventional questions on cross examination of this type.

Proceed, Mr. Varian.

By Mr. Varian:

Q. Did the Ebsary Gypsum Company, or any of its officers, to your knowledge, during any part of the period mentioned in the complaint in this action, or since, have any contract, agreement or understanding, oral or in writing, or otherwise, with any one or more of the defendants, or any of their respective officers, or with any other person, firm or corporation, to control, fix or influence the price or prices, or terms or conditions of sale, or of resale, by you or by any other person, firm or corporation, of plaster, or any other miscellaneous gypsum products?

Mr. Steffen: I make the same objection as to the word "you" in that.

4673 Justice Stephens: Do you take that word to mean the Ebsary Gypsum Company?

The Witness: I do.

Mr. Steffen: And I make the same objection that it calls for a conclusion and is not proper cross examination.

Justice Stephens: The same ruling.

The Witness: My answer to that is "no".

By Mr. Varian:

Q. Except as Ebsary Gypsum Company's operations were subject to the provisions of its said several written license agreements with USG, Ebsary's prices, terms and conditions of sale of gypsum board were exclusively fixed and determined by the officers of Ebsary Gypsum Company independently and without aid, urging or suggestion of any other defendant or any other person, firm or corporation—is that correct? A. Yes.

Mr. Steffen: We have an objection—

Justice Stephens: (Interposing) You are asking that question again, I assume, subject to the condition that the witness is answering as to what he knows?

Mr. Varian: As to his knowledge, yes.

Justice Stephens: Your answer to the question is, I understand you, yes, so far as you know.

The Witness: That is right.

Mr. Knuff: That takes care of our objection.

4674 By Mr. Varian:

Q. And the same would be true with regard to the prices, terms and conditions of sale of plaster and of other miscellaneous products, is that correct? A. Yes.

Q. Mr. Lenci, is it not a fact that the interest and purpose of the Ebsary Gypsum Company in obtaining a license from USG to manufacture closed-edge board, and to be permitted to use the patented machinery to manufacture same, was exclusively due to the fact that it was necessary for Ebsary Gypsum Company to manufacture and sell closed-edge board in order for Ebsary to profitably continue in the board business? A. Yes.

Q. And was it a fact that Ebsary Gypsum Company's continuance in the gypsum board business was becoming increasingly urgent in order for you to sell your other gypsum products profitably? A. Yes.

Mr. Steffen: I object to that, your Honor. In the first place, it raises a business question concerning whether or not the company could continue in business, and it

seems to me that it would ask for a conclusion and is a manner of bringing into evidence, or attempting to bring into evidence at this time, matters which are proper as defense, but not proper as cross examination—and, also, it is immaterial.

4675 Justice Stephens: The Court thinks that that objection is not well taken. You have, for the Government, attempted to show by your questions of this witness, that his purposes, that is, the purposes of the company, were of an illegal character.

The defendants have a right to cross examine to show that they were actuated by business objectives. So far as the phrase "continue in business" is concerned, that goes to the weight of the question.

The objection is overruled. The question and answer may stand.

Mr. Steffen: If I may say just one word further. We have no objection to the cross examination going into detail, but as you may say, we have alleged that their activities are illegal and it seems to me that simply to ask the question of the witness, in effect, "Were all of your activities legal?"—is asking for a conclusion that is almost of no weight.

Justice Stephens: This question didn't go to that, this question went to what purpose they had in entering into these agreements, whether it was for business reasons or otherwise. At any rate, your record is fully protected and the Court is fully aware that you object to the questions as calling for a legal conclusion, and the Court is receiving the answers not as legal conclusions, but

4676 as factual statements.

By Mr. Varian:

Q. Mr. Lenci, was it also the fact that if Ebsary took a license from USG to manufacture closed-edge board, that Ebsary was obliged to accept such form of license as USG exacted?

Mr. Steffen: I object to that, your Honor. I don't think that the witness can testify to that. It assumes things, many things, not in evidence. It is not proper cross examination and it is immaterial.

Justice Stephens: Read the question, please.

(Thereupon, the pending question was read by the reporter.)

Justice Stephens: I am inclined to think, Mr. Varian, and I think my colleagues share my view—that that ques-

tion is probably across the line, because it seems to me that the question at least sought to ask him what his understanding was as to whether the only license which was offered was a license with these terms in it.

As to whether they were forced to take this particular license would, I suppose, be a question which the Court ought to pass on.

Mr. Varian: I will reframe my question.

Justice Stephens: The objection is sustained to this question as phrased.

4677 By Mr. Varian:

Q. You were out at Chicago with Mr. Ebsary and Judge Rippey? A. Yes.

Q. When the final negotiations for this contract were entered into? A. Yes.

Q. And one of the provisions of the original license agreement, which is also in the subsequent agreement, was a provision in regard to price control.

Isn't it a fact, Mr. Lenci, that USG insisted on having the provision for price control in this license agreement? A. Yes.

Mr. Varian: That is all. Thank you, your Honor.

Justice Stephens: Is there any cross examination by other defendants?

(No response.)

Is there redirect examination?

Mr. Steffen: We move to strike all of the witness' answers to Mr. Varian's questions except the last one.

Justice Stephens: The motion is denied.

Mr. Steffen: There will be some redirect examination, yes.

Justice Stephens: Would you prefer to take a short recess before the commencement of redirect examination?

Mr. Steffen: I would like to, your Honor.

4678 Justice Stephens: Are counsel ready at this time to present any brief arguments they may care to make on the question of the motion to vacate the notice of taking of deposition of the witness Gloyd? Might we not occupy the next few moments on that?

Mr. Johnston: We are ready.

Mr. Steffen: Yes, that is agreeable.

Justice Stephens: Now the Court will hear argument of counsel on the question of whether or not the deposition

of Mr. Gloyd should be taken, in view of his physical condition, and since you are moving to vacate the notice, Mr. Johnston, you have the opening.

Mr. Johnston: I would merely want to say to the Court that in filing the motion, with the affidavit attached, I delivered to the clerk the doctors' letters so that they might be presented to the Court.

Justice Jackson: They are made, by reference, part of your affidavit, are they not?

Mr. Johnston: That is right, and they are in the record.

Now this notice to take depositions goes to both Mr. Gloyd and to Mr. Chism. The motion is only as to Mr. Gloyd. Mr. Chism has been on call, under subpoena, since November 15, 1943.

Mr. Chism has been with Mr. Gloyd in this business since about 1920, all through the period involved in this
4679 action. Since about 1930, or 1931, he has been the sales manager and has practically run the business. Prior to that time he was assistant to Mr. McGahan, who is now dead, and then to Mr. Jacobs, who is now dead.

So that during the entire period covered by this litigation Mr. Chism was there, and familiar with the matters, and is ready to testify.

Now what I would say in argument is presented in my motion, and I think it is not necessary for me to say anything further at this time.

Justice Stephens: Do I understand that this notice of taking depositions includes both Mr. Chism and Mr. Gloyd?

Mr. Johnston: Yes, sir.

Justice Stephens: And that your motion goes only to Gloyd?

Mr. Johnston: Yes, sir. I think, if I may say this, that it would be much better for Mr. Chism to come here, much less expense.

Justice Jackson: Why shouldn't he come here?

Mr. Johnston: There is no reason that I know of why he shouldn't come here, and he is ready to come at any time.

Justice Stephens: Why do you prefer to examine Chism by deposition rather than orally? It is much more satisfactory to the Court to hear and to see witnesses, than it is to read their testimony.

4680 Mr. Steffen: I agree with that, and I so told the Court, and I think Mr. Johnston understands it, that when we first served the notice our purpose was to kill two birds with one stone, if we were going to make the trip down

there. But if our right to take the deposition is denied as to Mr. Gloyd, then there would be no purpose in going to Oklahoma.

Justice Stephens: And you might just as well bring Mr. Chism up here in that event.

Mr. Steffen: That is right.

Justice Stephens: Mr. Bromley, you filed a motion. Do you wish to be heard?

Mr. Bromley: The defendants represented by me also join in the application to vacate the notice to take Mr. Gloyd's deposition, and for this reason.

This trip is going to be a very expensive matter for my clients. It is perfectly obvious to me that if we go there to take Mr. Gloyd's deposition, and end up by taking Mr. Chism's deposition, that those of us who go are going to be away for the better part of a week or ten days. That is expensive to our clients. It is a long and expensive trip from the mere standpoint of transportation expense and living expense.

The Government seeks to do this in face of the fact that in Mr. Knuff's affidavit they say:

"The testimony has to do simply with the matters
4681 of Mr. Gloyd's business, going back to about the year 1925, and with which Mr. Gloyd has long been fully familiar. There will be nothing developed in this testimony which should result in any shock to Mr. Gloyd or which could create any pressure or excitement".

Now it does seem to me that it would impose a tremendous hardship on the defendants in this case represented by me, to ask them to bear the expense which certainly will run into several thousand dollars, of going down there to have Mr. Gloyd examined, simply on matters of his business going back to the year 1925, in face of the fact that there is no showing whatsoever that Mr. Chism, whose connection antedates 1925, cannot cover fully and completely, everything about the business of Mr. Gloyd, at least from 1925; nor is there any showing whatsoever why, if they still insist they have a right to take Mr. Gloyd's testimony, they cannot cover so simple a matter as they call it, and so obviously a routine matter as it seems to me their answering affidavit shows it to be by written interrogatories.

I see no purpose, and indeed it seems to be an unjust and unfair hardship, to impose on USG and its officers, the expense involved in counsel going down there so far, for a period of time which will be so substantial, on this

showing that all they want to do is ask Gloyd about his business. Certainly Mr. Gloyd can tell them about
4682 his business in answer to written interrogatories, if it is as simple as all that.

Justice Stephens: Now Mr. Steffen, or Mr. Knuff?

I might say, Mr. Steffen, that the Court has read all of these affidavits and all of the doctors' letters, and looked up all the words, but the only one we couldn't find in an ordinary dictionary—I didn't put my hand quickly upon a medical dictionary—Is the word "geriatrics". Could anyone tell me what that means?

Mr. Steffen: I couldn't.

I will say that they practically all come down to the proposition that Mr. Gloyd has a heart condition, and a man at his age—he is seventy-nine—might normally have some heart condition.

Justice Jackson: I thought he had a sclerotic condition which affected his brain, as well as his arterial system—from those letters. I deduced that he had a general sclerotic condition.

Mr. Steffen: I think perhaps that is a more accurate statement.

We have had before us two witnesses, Mr. George M. Brown, who is seventy-seven as I recall it, and Mr. Griswold, who was around seventy-five or seventy-six, or something of that sort. Mr. Gloyd is two or three years older, seventy-nine.

So that I think, as I look over the medical testi-
4683 mony, which your Honor has stated has been read, it is undoubtedly true that he is a man of seventy-nine; that he couldn't travel and couldn't be put under the stress of a day and a half trip coming here, and getting a hotel, and all of that—and that was our reason for asking permission to take a deposition.

I want to say, going back to the history of this thing a little bit, that we asked Mr. Johnston to have Mr. Gloyd here in December, the week I think of the 20th or the 21st. We also had Mr. Tomkins scheduled at that time, following immediately after the Certain-teed people, and Mr. Johnston and Mr. Knuff, at Mr. Johnston's request, went to your Honor's chambers and talked the matter over.

At that time the only thing that was stated was that Mr. Gloyd couldn't very well make the trip, that he was not in very good health, and that it would be hard to get hotel reservations, and train reservations, just before Christmas. So the thing was put over until January.

On January 17th the Court reconvened and at that time Mr. Johnston said, informally to us or Mr. Knuff, that Mr. Gloyd was not feeling so well, and it got worse and worse according to Mr. Johnston's statement to us.

Then it appears that Mr. Johnston got these doctors' letters in early January, and they were sent in and we were not advised of that at all until February 16th or 18th, after we had made our motion for privilege to take
4684 a deposition, more or less as an accommodation to Mr. Johnston, the idea being that we could better go down there if Mr. Gloyd was really in the condition where he couldn't travel, and we assumed that that was true.

Then Mr. Johnston got additional letters which have also been submitted with this affidavit. Those additional letters, the Dr. Fishman letters at least—and that is the principal group of letters—do not add anything substantially to what was stated in the first letter.

The letter of Dr. Langston, which I think is perhaps most entitled to credit, is simply a statement that he does have a heart or brain condition, and that he is seventy-nine years old, and that he should not be put under the stress or excitement of a trial or under grueling cross-examination. That, I think, is no doubt true. We have no way of checking that.

What we say in our affidavit is that we do not expect to put Mr. Gloyd under any grueling cross-examination.

I think you have observed the way we conduct our examinations here, and they have been very decent straight through.

We understand that if Mr. Gloyd needs to have a doctor or a physician present, that that can be arranged, and that if he can only be there for an hour or two at the office where the deposition is taken, that that would be a very
4685 slight strain.

I might say in that connection that Dr. Langston saw no reason why a deposition could not be taken. Dr. Langston is, as I have said, perhaps the leading physician of the group who have written letters for Mr. Johnston.

Now coming to the nature of the testimony that we should get, we say in our affidavit, or Mr. Knuff says in his affidavit, that all that Mr. Gloyd will be asked about will be matters of his business, running back to about 1925. That covers the period of the alleged conspiracy.

Now I don't think that Mr. Bromley is entitled to construe that to mean that it hasn't anything to do with this case.

We are asking, or would want to ask, Mr. Gloyd concerning the original signing of the license agreements in 1926, we have some correspondence on that; we would want to ask him concerning the matters of pricing; following that, we would like to ask him concerning his negotiations with Mr. Avery at any time, and with Mr. Knode at any time. We would like to ask him concerning his signing of the bubble license in 1927. We would like to ask him why he did not sign the first perforated lath license agreement and also ask him in connection with the metallized board license agreement.

In other words, when we said "matters of his business", we covered everything practically that has been developed in the testimony here. I think that the affidavit, if
4686 it did not say that specifically, should be so understood.

In the concluding paragraph of the affidavit we make the general statement that his testimony, as we see it, would be necessary to a proper presentation of the Government's case.

Now Mr. Bromley makes the suggestion that perhaps we should have written interrogatories. I have already stated that written interrogatories would be very unsatisfactory, particularly with a man of Mr. Gloyd's age. We would ask a question, and he would say that he doesn't remember, and then it will be necessary to ask a number of related questions in order that we can perhaps refresh his recollection and get to the point in question. Now that simply cannot be handled on written interrogatories to any advantage.

Now secondly, the matter of written interrogatories is of no advantage anyway. Mr. Bromley is too familiar with these procedures to make such an argument seriously.

Under Rule 31, where there is described the means of taking depositions of witnesses upon written interrogatories, you have, in Rule 31 (b) this statement:

"A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or
4687 mail the deposition, attaching thereto a copy of the notice and the interrogatories received by him".

That contemplates that the witness will be brought before an officer who will propound questions, and we don't know

how, to the witness. The witness will then have to answer yes, no, or otherwise, and those answers will be written down. The whole procedure is a much more onerous procedure than what we propose, which is for ourselves to go down and simply ask our questions, and to allow the defendants to ask such questions on cross-examination as they think necessary.

Now as respects Mr. Chism, as I stated to begin with, it is a matter of no moment to us whether we take Mr. Chism's deposition at this time or not. We would prefer to have him here. We thought it might be more convenient, if we were to take one at Oklahoma City, to take both. But if Mr. Bromley would prefer to have Mr. Chism here, we would likewise, and in that event the examination of Mr. Gloyd would not take more than one day.

Justice Stephens: Mr. Johnston, do you wish to reply?

Mr. Johnston: Yes, sir. I merely want to say this, if the Court please. Mr. Steffen knows very well that in December, when he spoke to me about having Mr. Gloyd here, that I said that he had been ill and I thought it would be very unwise to try to bring him up here just at the last of that session because, with many witnesses ahead
4688 it would appear that they wouldn't get through with him anyway.

Now at that time I knew Mr. Gloyd had had a stroke in August, in California, and I told Mr. Steffen about that. I knew also that he had had a slight stroke coming back from New York in October, and I told him about that. Then when I went home during the Christmas holidays I talked to Dr. Fishman about his situation, and he told me that he didn't think that he was in any condition to testify.

Then I asked that Dr. Fishman examine him and also have Dr. Langston examine him as to his heart, Dr. Langston being a heart specialist, and that he also write the doctor in California. Then these letters came to me after I got back here.

Nothing further was said by counsel for the Government about bringing him up here. Consequently I was waiting until the question was raised again. Then, when they spoke about his coming, or about taking his deposition there, I took it up with my office and they then went to Dr. Fishman, and, so he would not be relying upon his own judgment, he referred him to these other two doctors, who are two of the highest-standing physicians in that section of the country, Dr. Riely and Dr. vonWedel. That accounts for the subsequent examination and report here on the 18th.

Now these are all men of the highest standing in the profession. They have all known Mr. Gloyd for
4689 many years, and I don't think you could find doctors anywhere that could give this Court a more correct picture of his condition and the danger of submitting him to examination, than these doctors have given this Court.

When you reduce this to language that a layman can understand—I looked up the terms also—it means this. Dr. Fishman, Dr. Riely and Dr. vonWedel specifically state that to put him under any emotional strain such as an examination, might very definitely result in a stroke that would kill him. When men have had one or two strokes, as he has had, with a sclerotic condition, at his age, nearly eighty years of age, and a heart condition which they say he has, any emotional disturbance might bring that about, particularly when a man who is eighty years of age goes on the witness stand, under examination, even with the bedside treatment that Mr. Steffen says Mr. Knuff would deliver. I have been in this case now for ninety days, and I see what kind of bedside treatment these gentlemen give witnesses.

I just appeal to this Court now to protect this old man who at best has only a few years, and I don't want to take the responsibility, in the face of what these doctors say, of having him subjected to this examination, either here in this courtroom, and traveling up here, or down in Oklahoma City by deposition.

If interrogatories can be written so that they may
4690 be submitted to him without excitement, I think with some doctor present he might be able to answer those questions. I assure the Court I want to do everything in the world to get the facts here. I have sat in this case now for these ninety days, and heard these witnesses on the stand, and the Court has heard witness after witness, when it was asked if Texas was in any of these meetings, or connected in any way with these various matters, the answer has been "no", "no", "no"—all down the line.

Now they want to drag this old man in, with failing memory, with a health condition that might be the cause of ending his life, and try to get something in this record that they don't have in here yet, and try to connect him with this case in some way. I see their purpose and I am not surprised that Mr. Steffen is insisting upon this examination, but I say to the Court that it is not fair, it is not fair to this old man, and it is within the discretion of this Court and I

just appeal to this Court not to subject this old man to that ordeal.

Justice Stephens: What do you say, Mr. Johnston, to Mr. Steffen's suggestion that under Rule 31 (b) an officer will have to go to Mr. Gloyd and ask him these questions so that he will be in a position of having been asked the questions?

Mr. Johnston: I understand that rule, but there
4691 is a difference. In that event the question is written out and I presume the District Attorney's office down there would handle it unless the Government is going to, at Government expense, send somebody down from here to do it. But the questions would be written out and the old man could take his time and could think them over, and he could determine then what he wanted to say. There wouldn't be somebody coming back with a question right at him like they do on cross-examination. At best that would be some excitement, but it wouldn't be anything like putting him under oral examination. I have not said at any time, and I do not now say, that we wouldn't attempt to have him answer questions on interrogatories. I just want to be fair about the thing, but I don't want to jeopardize this old man's life, because that is more important to him, after all, and these few years he has left, than this case.

Justice Jackson: Is there anything that Mr. Gloyd can testify to that Mr. Chism cannot?

Mr. Johnston: No.

Justice Jackson: You have talked to Mr. Chism about this case, haven't you?

Mr. Johnston: Yes, and Mr. Chism was before the grand jury in this case. All the records we have, have been before the Federal Trade Commission, have been before the Department of Justice, and they have talked to Mr.
4692 Chism both before the grand jury and in the grand jury, and Mr. Gloyd has been before the grand jury, and there isn't a thing about this case that I know of today, which Mr. Gloyd would know that Mr. Chism doesn't know.

Justice Stephens: Do you wish to be heard further, Mr. Bromley?

Mr. Bromley: No, your Honor.

Justice Stephens: Mr. Steffen?

Mr. Steffen: Our answer to the latter is that Mr. Chism does not know many of the things that Mr. Gloyd does

know. Of course we have examined his grand jury testimony and we know what the limitations are.

I don't think we should be accused of doing anything unworthy by having asked the witness to testify concerning his activities. It is true that our purpose is to get evidence that would implicate the Texas Cement Plaster Company along with the other defendants.

Justice Stephens: The Court does not construe Mr. Johnston's remarks as charging you with anything unworthy, Mr. Steffen.

Mr. Steffen: We know that Mr. Chism, at least unless he tells a different story than he did before the grand jury, is not in possession of all the facts that Mr. Gloyd is in possession of.

Justice Stephens: We will now take the noon
4693 recess until two o'clock.

(Thereupon, at 12:20 o'clock p.m., a recess was taken until 2:00 o'clock p.m., of the same day.)

4694 AFTERNOON SESSION

(The trial was resumed at 2:00 o'clock p.m., pursuant to recess.)

Justice Stephens: The Court is prepared to rule now upon the question of the taking of Mr. Gloyd's deposition.

In order to save the expense and trouble of copying into the transcript all of these papers that have been filed, the Court will try to summarize them in its ruling.

The record may show that the question is whether or not the Court shall enter an order, under Rule 30(b), that the proposed deposition of Samuel M. Gloyd shall be taken, or whether it may be taken only on written interrogatories.

There have been filed with the Court the notice of the taking of deposition; a motion by Mr. Johnston, in behalf of Mr. Gloyd, to vacate the notice of the taking of deposition, and that is supported by an affidavit which, by reference, makes a part of it the letters of several doctors,—specifically, a letter, or more particularly a report or history, dated December 30, 1943, of Dr. Fishman, C. J. Fishman; a letter of January 11, 1944, of Dr. C. J. Fishman; a letter of February 16, 1944, of Dr. Fishman; a letter of September 28, 1943, of Dr. Herbert S. Nauheim; a letter of January 11, 1944, of Dr. Herbert S. Nauheim; a letter

of February 18, 1944, of Curt von Wedel, M.D., and Harry A. Daniels, M.D.; and a letter of February 17, 1944,
4695 of Lea A. Riely, M.D.; also a letter of January 8, 1944, of Dr. Wann Langston.

There is also before the Court the opposition filed by the Government, supported by an affidavit filed by Mr. Knuff to which is appended a Federal Bureau of Investigation report.

There is also before the Court an affidavit of Bruce Bromley.

The Court has carefully examined each of these papers, and they will be filed as a part of the Clerk's files as a record of the basis of the Court's ruling.

The Court reaches the following conclusion, for the following reasons:

First, the FBI report does not seem to us in conflict in any essential particular with the reports of the doctors filed by Mr. Johnston. It is true that the FBI report does include a statement that Mr. Gloyd attends to his business several hours each day, or a statement to that effect. But that is explained by one of the doctors as a mere mechanical attendance at his office, his real business affairs being taken care of by his wife and associates.

There is a statement in the FBI report also, purporting to be the result of a conversation with Dr. Langston, to the effect that he saw no objection to taking the deposition if Mr. Gloyd were not subjected to a grueling
4696 examination. But that, we think, when read in connection with the statements of all of the doctors, indicates that he is not to be subjected to excitement.

Now the papers as a whole submitted by the doctors, and various reports, show, we think, clearly that this man has general arteriosclerosis, localized in the brain and aorta; that he has unstable blood pressure; that he has had two attacks already of either brain shock or heart shock of some sort, not exactly diagnosed by the doctors; and that his memory is confused as between present and past events, so that his testimony would be unreliable; and that in the view of the doctors, certainly the great majority of their statements, any excitement might cause his death.

It appears also that Mr. Chism, his office associate, has been connected with the business since 1925, or theretofore, and ought to be in a position at least to give some of the facts with which Mr. Gloyd might be thought to be familiar.

Now we take into consideration, of course, the promise of the Government that the examination will be conducted in a mild and proper manner, but it seems to us that it is impossible to have a man on the witness stand, whether he be in the court room or in an office, subjected to questions, in a case in which he knows he is a defendant,
4697 with several lawyers necessarily asking him questions, on direct and cross-examination, without exciting him. The mere fact of being a witness, under those circumstances, however kindly the investigation is conducted, would cause excitement.

We think, under these circumstances, the Court ought not permit this deposition to be taken except upon written interrogatories. The Court regrets the necessity of reaching such a conclusion, because it is loath to deprive any party of a witness whom the party believes to be material and important. But on the showing made here, we think it would be a grave responsibility, indeed, for the Court to order this man to be subjected to an oral examination, with the attendant possibility of his immediate death.

So the Court will order that the deposition not be taken except upon written interrogatories.

You may proceed with redirect examination.

Mr. Steffen: May we have an exception, for the sake of the record?

Justice Stephens: I think the rules give you automatic exceptions to everything, Mr. Steffen, but the record may show an exception.

Mr. Steffen: I think the record should also show that we will not press our notice for a deposition in the case of Mr. Chism.

4698 Justice Stephens: And that you will expect Mr. Chism here?

Mr. Steffen: We will bring him here in due course.

Justice Stephens: By subpoena, at some later time?

Mr. Steffen: Yes.

Justice Stephens: Very well.

Mr. Johnston: I understand, in that connection, that since Mr. Chism is the responsible head of the business, that we should have a week's notice as to the time they expect him here so we may make the necessary arrangements.

Mr. Steffen: We will be glad to give him a week's notice, as we have with all of our witnesses.

Justice Stephens: Thank you.

4699 Thereupon, GEORGE N. LENCI, the witness on the stand at the time of recess, resumed his testimony as follows:

Mr. Knuff: May it please the Court, out of an abundance of caution, and in order to keep our position clear, in so far as the record is concerned, we want to make a motion now concerning the cross-examination of Mr. Lenci by Mr. Varian.

While we are quite satisfied there is merit to our motion we are now making, we are simply making it in order to keep our record clear, and we don't intend to argue it at all.

Justice Stephens: Very well.

Mr. Knuff: We now move that all the testimony of Mr. Lenci, brought out by the cross-examination of Mr. Varian, except the answer to Mr. Varian's last question, be stricken, for the following reasons:

(1) The answers were to questions that went beyond the scope of the examination-in-chief; and therefore, the questions being improper, the answers were improper and should be stricken.

(2) The answers were to questions that were improper in that the questions assumed facts and circumstances about which the witness was not shown to have any knowledge; and therefore, since the questions were im-
4700 proper, the answers were improper and should be stricken.

(3) The answers were to questions that were improper in that the questions were directed to matters of defense, and improper at this stage of the proceedings. Therefore, since the questions were improper, and were but an attempt to introduce, by way of cross-examination, the defendants' defense in this case, the answers should be stricken.

(4) The answers were incompetent, irrelevant and immaterial.

Justice Stephens: The motion is denied.

Mr. Knuff: Mr. Steffen will conduct the redirect examination.

Redirect Examination

By Mr. Steffen:

Q. I want to take you back, Mr. Lenci, to your testimony on page 4651 of the transcript, and the pages following. That has to do with your beginning in the board business in 1928 and 1929, and your meeting, particularly, in Chicago on May 21, May 22, and May 23, 1929.

On page 4651, you testified to the effect that the open-edge board was found unsatisfactory. That is correct, is it not? A. Yes.

Q. And you said, I think, that it was wasteful to
4701 make? A. Yes.

Q. Now, wherein was the principal waste, Mr. Lenci? A. You had to make a board wider than the finished width, and every bit of that extra width had to be cut from each side of every board and thrown away. That material had no salvage value. All of the gypsum companies, at one time or another, tried to take this refuse and recalcine it, or work it back into their process, and they found that it was a dead waste and was absolutely unusable. That was one of the losses in manufacturing.

Another loss in manufacturing was that there was nothing to protect the edges of these boards, and after they were trimmed to the proper size, in handling the edges would crumble and there would be nothing to keep the plaster in between the paper from sliding out.

Q. Was it also wasteful in handling and shipping? A. That was in the manufacturing and handling. When it went into the freight cars and was unloaded at the far end, at the destination, there was still further breakage involved. And then again, when the dealer trucked it to his warehouse, he had breakage. And when he took it still further, to his customer, there was breakage and loss.

Q. And about what differential was open-edge selling at
in comparison with closed-edge, at this time, 1928
4702 and 1929, do you remember? A. I don't remember exactly, but it was quite a little under the closed-edge board price.

Q. Two or three dollars a thousand? A. Oh, yes, at least.

Q. Did you ever make an estimate, in dollars and cents, of how expensive it was to make open-edge board as compared with closed-edge board? A. I don't recall whether we did or not, as to putting it into exact figures, but we did know by observation that it was a considerable item.

Q. Was it as much, perhaps, as a dollar a thousand? A. Oh, it would be much more than that.

Q. And what was the royalty that you were charged under the May, 1929, license; do you remember? A. I would rather have the license speak for itself. I am not sure, because I don't remember the exact percentage.

Q. I believe it was a 5 percent royalty. A. I don't remember. I don't know whether that was our royalty or not.

Q. Assuming that it was a 5 percent royalty, and board was selling at, say, $13 a thousand, or lath at $13 a thousand, that would make your royalty cost about 75 cents, would it not? A. Sixty-five cents.

4703 Q. That is right, my arithmetic isn't very good. A. Yes.

Q. So that financially, the saving was such that it was very much to your advantage to take out your license and pay a royalty, was it not? A. It was, yes.

Q. Now, you also testified, I think, that you had difficulty in selling, that your dealers refused to buy open-edge board as readily as they would buy closed-edge board; is that correct? A. That is correct.

Q. And was that entirely due to the fact of the difference in the board, or were there other reasons? A. Well, it was due to differences in the board which I have mentioned so far this afternoon; and in addition, when they delivered it to the building where the ultimate consumer was going to use it, he didn't like the open-edge board any better than we did.

Q. And that was one of the reasons why the dealers were slow to buy open-edge board when they could get closed-edge board, is that right? A. Yes.

Q. And why you had to have a differential in price? A. Yes.

Q. Isn't it true also that it was difficult to sell

4704 either open or closed-edge board during this period, 1928 and 1929? Weren't market conditions, in other words, such that it was becoming more difficult to sell board at all? A. Well, we had no closed-edge board to sell, so I couldn't answer that part of your question.

Q. Well, you knew from your conversation with dealers that they were presumably buying closed-edge board? A. Oh, yes.

Q. What I am getting at is—wasn't it more difficult to sell any kind of board during this period? A. It was, to

a certain extent, because there was not a great deal of business then.

Q. That is, the construction business was falling off at this time? A. It had just begun to drop, yes.

Q. Did you also find it difficult to sell plaster during this same period? A. Yes, but not so much, because we were more established in the plaster business. We had been in the plaster business for about 10 or 11 years at that time; but here we were absolutely a new company coming in, in 1928.

Q. And what time of the year was it, did you testify, that you started your board mill? A. I think it was in the latter part of 1928.

Q. That would be along in September or October
4705 of 1928? A. Somewhere along in there, yes.

Q. And you were making an open-edge board from the very beginning? A. Yes.

Q. Now, let's go to your testimony concerning this meeting out at Chicago. Tell me how you went out—you went out by train? A. Yes.

Q. And did you go out with Mr. Ebsary and Mr. Rippey? A. I don't remember, for this reason: At that time I was in New York, as I recall it, and Mr. Ebsary was in Rochester, that is, at the plant, I should say; and I think we took trains which got us into Chicago about the same time in the morning. That is my recollection, I am not sure.

Q. And you had received a draft of the agreement, I think you testified, before you went out to Chicago? A. I believe we did.

Q. I mean, you personally had seen one? A. Yes.

Q. And you must have received that at your New York office? A. Well, you see, it might have been sent to me in New York, or it might have been sent to Mr. Ebsary at the mill.

4706 Q. But you personally saw one of the draft copies?

A. But in any event, it was turned over by either Mr. Ebsary or myself to Mr. Rippey, prior to going to Chicago.

Q. Prior to going to Chicago? A. Yes.

Q. And you were familiar with the terms of the agreement? A. Yes. The reason I say that, or what brings it to my mind, was that Mr. Rippey immediately noticed the clause in that contract providing that we should pay damages for past infringements, which, of course, was not the case.

Q. And in your opinion, you hadn't been infringing the USG patents? A. It wasn't only in our opinion, but we knew it, and so did they.

Q. And they conceded that, I take it, in the final license? A. They conceded it immediately.

Q. And the first people that you met, of the other companies, that were out there, do you remember who they were? A. No, I couldn't tell you that.

Q. Did you go out on the train with any of them, Mr. George Brown or Mr. Whittemore—did you see
4707 them before you went out? A. I did not go with any of them.

Q. You were with Mr. Reeb? A. Mr. Reeb would come from Buffalo, so I wouldn't see him.

Q. And your testimony is, apparently, that you may have gone out by yourself? A. That, I believe, is the case.

Q. Now you testified, I think, that you had all made up your mind to take out a license before you went out there; is that correct? A. That is, all in our company.

Q. That is right. A. Yes.

Q How was that agreement reached? A. Well, we had been so firmly of the idea for some time that we wanted to get permission to make a closed-edge board, that we were glad of the opportunity to be able to do it.

Q. Well, what I was getting at is—did you have a meeting with Mr. Ebsary or talk with Mr. Ebsary and Mr. Rippey concerning whether you should or shouldn't take out the license? A. Mr. Ebsary and I had discussed it a great many times before.

4708 Q. All during the preceding year? A. Yes, and probably ever since we started making board.

Q. And what was your discussion with Mr. Ebsary, generally? I would like to know. A. The gist of it was that we wanted to make a closed-edge board, but that we did not see our way to make it unless we could get a license, because we saw what had come about through the courts with the Universal and Beaver and American and Reeb. All had attempted to make closed-edge boards of one kind or another, and the courts had upheld the USG patents, and we were in no position to start a fight with those conclusions against us.

Q. And did you ever make application to USG for a license during that time? Did you discuss that? A. I don't think we did.

Q. Do you know what their attitude was on that? A. I don't recall, no.

Q. You, I think, are saying that you and Mr. Ebsary were in agreement that you wanted to get a closed-edge board, a license for a closed-edge board, or at least be permitted under some device to make a closed-edge board? A. Yes.

Q. And did you talk with anybody else in the company, was there a meeting of the Board of Directors, or
4709 anything of that sort, any action taken on the matter? A. At that time there were only three directors, and Mr. Ebsary and I usually talked things over. We had no directors' meetings at any time concerning that. We weren't as formal as that.

Q. Therefore, it was a sort of mutual agreement that you had been reaching over the course of the preceding years? A. Yes.

Q. Well, now, did you discuss the matter with anyone else than Mr. Ebsary, as to whether or not you should make a closed-edge board? A. No.

Q. Mr. Ebsary, during this time, had been talking with other manufacturers, for example Mr. Baker and Mr. Reeb and others, is that not true? A. I don't recall whether he did or not.

Q. Did you attend any meetings at all, with the representatives of any other manufacturer? A. I don't think so.

Q. You were not in that end of the business, were you? You were in the sales end? A. Principally, yes.

Q. And any negotiations that would have been had concerning the taking out of a license would have been
4710 handled by Mr. Ebsary? A. Not necessarily, we worked pretty close together on that.

Q. On page 4652, you said you had made up your mind, before you went out to Chicago, to take out a license with the USG people if it could be arranged; and I think on page 4658 you say that the other companies out there, you believe, had also made up their minds before they went out to Chicago—is that right? A. Yes, I believe they did.

Q. That is, that is your best recollection— A. (Interposing) Yes. Otherwise, they wouldn't have gone there.

Q. I think that is a good deduction.

Do you know how it was arranged that they all got out there at the same time? A. No, I don't, because it is indefinite in my own mind how we got out there.

Q. Did you see a wire sent to Mr. Ebsary stating that the other companies, with the exception of American, would come on such-and-such a date? A. I don't think so. Personally, I never saw it, and I don't think we got such a wire. I don't remember.

Q. There has been a wire introduced in evidence which was sent to several companies by the United States
4711 Gypsum Company, stating that Mr. Kling of American had stated that he was unwilling to sign the license at that time, but that if the others came out the meeting could be held in May, 1929. You don't remember having seen that? A. No. Would that possibly have been sent to Mr. Rippey?

Q. I think it was sent to Mr. Ebsary. A. It might have been.

Mr. Steffen: May the witness be shown Government's Exhibit 207?

(Government's Exhibit No. 207 was handed to the witness.)

By Mr. Steffen:

Q. Do you recall, Mr. Lenci, seeing a similar wire addressed to Mr. Ebsary or to Mr. Rippey? A. No, I don't.

Mr. Steffen: Will you stipulate, Mr. Bromley, that such a wire was sent to Ebsary?

Mr. Bromley: No, I believe the contrary to be the fact.

Mr. Steffen: We have an identical copy of that wire there, addressed to Mr. Ebsary.

Mr. Bromley: You mean in evidence?

Mr. Steffen: No, but which we received from the United States Gypsum Company's files.

4712 Mr. Bromley: I just don't know about it. I didn't suppose there was any.

Mr. Steffen: That is our understanding at the moment, that we have such a wire. We will disclose that at the proper time.

By Mr. Steffen:

Q. Now you say, though, Mr. Lenci, that you all got out there on May 21, and you didn't receive the wire or didn't receive any notice as to when the meeting was to be held? A. I imagine, if any notice was sent, it may have been sent to Mr. Ebsary, and then he would tell me about it over the telephone, and I would arrange to meet him out there.

Q. And when that notice was received, you were all prepared to go out and sign the agreement, is that right? A. We were prepared to sign an agreement.

Q. And you had a draft copy of the agreement, you knew what the general terms were? A. Yes.

Q. Now, you have been stating that you were very anxious to get into production on a closed-edge board, and on page 4654 of the transcript, in response to Mr. Bromley's question, you stated that the primary reason for the Ebsary Company taking out a license was its desire
4713 to manufacture a closed-edge type of board—is that correct? A. Yes.

Q. Now, I want, for a moment, to see whether or not that was your primary reason, and to consider certain other reasons.

Did you have other reasons also for wanting to take out a license with USG at this time? A. Well, as I say, the principal reason was that we wanted to make a closed-edge board.

Q. And what were your other reasons? A. We did hear that there would be a price control feature in the license, and that was not unattractive to us.

Q. What were the reasons why it was not unattractive? A. Well, we would be very glad to get a better price for our material.

Q. Well, your prices for material here in 1928 and 1929 were getting pretty low, were they not? A. They were low, yes.

Q. And it has been described here at various times as being a demoralized condition. Would that be a fair characterization of prices at that time? A. I don't know whether you would want to call it demoralized at that time, but it was very soft.

Q. What do you mean by that, Mr. Lenci? A.
4714 Well, I don't know how better to describe it. The volume of business was falling off, and we were suffering due to the fact that we had the open-edge board, and the other companies that were not licensees were competing for the business.

Q. And it was difficult to sell board; that is, your open-edge board, in competition with the closed-edge board, made it difficult to maintain a price? A. Yes.

Q. That, in effect, resulted in a price spiral at that time, did it not; as the price for open-edge would be cut the price for closed-edge would follow, and then open-edge would go still lower? A. Yes.

Q. And that had reached a point, in 1928, where your business was in a rather serious financial situation? A. Yes.

Q. Let me change that to 1929, particularly in 1929? A. Yes.

Q. So that it was extremely important to you, from a business standpoint, to get on the one hand a closed-edge board, and on the other hand to make sure that the price conditions were going to be corrected so that you could make a profit? A. Yes.

4715 Q. And you would say that that was another reason for wanting to take out a license with the United States Gypsum Company? A. I would say that that was a secondary reason, yes.

Q. Did you have any other reasons besides those two, Mr. Lenci, for wanting to take out a license with the United States Gypsum Company? A. Nothing that I can think of at the moment.

Q. You were not disturbed, or were you, at having USG control your prices, as to whether they would control them fairly or not? A. No.

Q. You further testified, on page 4654 of the transcript, that the license covered a large number of patents? A. Yes.

Q. Was that possibly a third reason why you wanted to take out a license? A. Yes.

Q. Now as respects those patents, did your company make any investigation of them? A. No, we did not.

Q. Did you know that perhaps 10 or more of them were all having to do with different types of closed-edge board? A. Yes, I did know that.

Q. And did your company make 10 or 12 different
4716 types of closed-edge board? A. No, but to go back a little in your questioning this afternoon, we did know that besides this one patent on closed-edge board, the Utzman patent, we believed they had other patents on closed-edge board that we might be attacked under if we started to make a closed-edge board.

Q. But you knew the Utzman patent on closed-edge board expired on August 6, 1929, within 2 months, or thereabouts, after you signed your agreement? A. Approximately, yes.

Q. And you testified, on cross-examination by Mr. Bromley, that your company was satisfied that you needed to use all, or a substantial part, of those various patents. Was that a strictly correct statement, Mr. Lenci? A. You must

realize I am not a patent lawyer, so I can't answer technically, but I realized that a great many of those patents covered different types of edges; other patents covered the method of turning the edges; and I believe certain of the other patents covered the type of machine to make the board.

Q. But you made no investigation, particularly, of the patents? A. No.

Q. And your company made none? A. No.

4717 Q. And who told you that they covered all those things? A. I think they are partially described in that schedule attached to the original license.

Q. There are about 50 of them appearing in Exhibit A, and all that appears there is the name of the inventor, the patent number, and the date, with no description of the patent. A. Well, somewhere, I don't know where it was, I saw a further description of what those patents were.

Q. Is it possible that USG advised you concerning them? A. I think maybe they did, I think maybe I asked, when I was out there, what those other patents covered.

Q. You had, of course, made up your mind to take a license before you went out there, though? A. Yes.

Q. Now, on page 4655 of the transcript, you said that you never had any knowledge of what the prices were going to be until the United States Gypsum Company announced them. Is that correct? A. That is correct.

Q. And on page 4656, you said that you very well remembered when you first received your prices out at the Chicago meeting in May, 1929? A. That was the first bulletin, yes.

4718 Q. They were handed to you in an envelope? A. I believe they were.

Q. And that was on the second day of the meeting, in the afternoon, on May 22, 1929? A. Yes, it must have been.

Q. And the whole group of licensees were present at that time? A. I don't remember whether they were all there at that time, but I would say the great majority were there.

Q. You had all signed up your license agreements by that time, and USG then handed out their prices? A. Yes, after that.

Q. Now, were you surprised when you opened the envelope and saw what the prices were? A. We were surprised, because we hadn't any idea of what they were going to be.

Q. Were they higher or lower than the prevailing prices at that time, Mr. Lenci? A. I am not sure, but it is my recollection that they were about what the USG Company was getting for their board at the time.

Q. And that was higher than you were getting for your board? A. Yes.

Q. So that were you displeased with the prices
4719 that they handed out at that time? A. I don't think I was, no.

Q. As a matter of fact, wasn't everyone there present rather well pleased with the prices? A. I couldn't speak for others, I don't know.

Q. Did anybody say that they were too low or too high or anything about it? A. The only comment I recall was that somebody made the remark that they hoped they would get $30 wallboard, that is the only remark I remember.

Q. Do you know who made that remark? A. I haven't the ghost of an idea.

Q. And $30 wallboard would have been putting wallboard back to the position where Sheetrock had been for a number of years? A. Yes.

Q. Now, as a matter of fact, Mr. Lenci, the prices of gypsum board couldn't very well go any lower and permit companies to stay in business, could they, at that time? A. It would have been very difficult.

Q. So that an honest answer would be that your expectation, and that of every other licensee there, was that they were going to be stabilized and raised? A. We were all human enough to hope that, yes.

4720 Q. And you weren't disappointed? A. No.

Q. Now, these price bulletins that were handed you there on May 22, 1929, set-up a rather full system of price control, did they not? A. Yes.

Q. They set up a series of basing points and gave you an arbitrary billing weight for your shipments, and then gave prices for different boards at different places? A. Yes.

Q. And you knew at that time, did you not, that the price control could only last until August 6, 1929? A. Yes.

Q. And did you have any expectation that this price control would all be abandoned at that time? A. I hadn't personally any idea of it, I didn't know what would happen.

Q. You mean you didn't know whether it would or not? A. We had no reason to believe that it would continue beyond August 6.

Q. And did you think that it was going to discontinue on August 6? A. We didn't know. Personally, I was not familiar enough with their patents to know whether they had other patents which would take the place of the Utzman patent or not, I did not know.

4721 Q. But the reasons which induced you to take out the license in May, 1929, would still be persuasive in August, 1929, to take out another license with price control, if that were possible? A. Well, as I go back, our primary reason for taking it was to get the closed-edge board.

Q. But your secondary reason, as you have described it, was to get a stabilized condition so that you could begin making profits again? A. Yes.

Q. And that reason would obtain in the summer of 1929 after the Utzman patent had expired, wouldn't it? A. Yes.

Q. You testified at page 4656 of the transcript, Mr. Lenci, that you had been incorrect in saying that Stephen Kelley was out at the meeting? A. Yes, I believe I was mistaken.

Q. And what caused you to decide that he wasn't there? A. I think either you or Mr. Knuff called my attention to the fact that he wasn't there.

Q. I think that that is the fact.

And you are sure, are you, that it was Mr. George Brown and not Mr. C. O. Brown that was out there at that

4722 meeting? A. Yes, I think that is correct.

Q. And how did you reach that conclusion? A. Well, you refreshed my memory in connection with that, and on thinking it over myself, I know that to be the case.

Q. You said, on page 4657, that "I have seen that in the record since. I believe it was George Brown who was there at that meeting."

By the "record", you meant something we had shown you? A. Yes.

Q. Now, let's go to the first day when you arrived out there, Mr. Lenci. This was at the Palmer House, the meeting? A. Yes.

Q. And you have testified as to who was present? A. Yes.

Q. And at the first meeting there, on May 21, 1929, you said that Mr. Avery, and I believe also that Mr. MacLeish, spoke to the group that was present? A. Either one or the other spoke to us very briefly.

Q. Might it have been that Mr. Avery spoke to you when you first arrived, and that Mr. MacLeish talked with you

and Mr. Rippey at the side meetings that you speak of? A. It might have been that.

Q. Is your recollection unclear now as to whether
4723 Mr. Avery spoke to you at that first meeting? A. The only clear recollection I have of Mr. Avery is a personal conversation I had with Mr. Avery in the room, but not in the way of a speech.

Q. What did he say, Mr. Lenci? A. He and I were sitting sort of in the corner of the room, and that is the time, as I recall it, that he spoke about the General Electric patent.

Q. What did he say? A. Not very much. He said that that Supreme Court decision had been made, and that it was his understanding that that would permit them to issue a license such as they were offering.

Q. Did you talk over the price conditions at that time with him, or was he quite familiar with them? A. No, the conference broke up very suddenly.

Q. Well, in speaking of the General Electric case, Mr. Bromley told us, at page 838 of the transcript, that the General Electric case had come down in 1926, and that that was the very year when they made their first license and put the very first price fixing into effect. That, by the way, he said was why they did it, because the General Electric case came down at that time.

You understood, did you, that the right to fix prices was based on the General Electric case? A. Yes.

4724 Q. And your understanding was that it was perfectly legal for all of the licensees to meet there and take out a license under which the United States Gypsum Company could fix the prices, as was done? A. Yes.

Q. Did your attorney, Judge Rippey, advise you to that effect? A. Yes.

Mr. Steffen: Would Your Honors care to take the 3 o'clock recess at this time?

Justice Stephens: Yes, we will do so.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4725 Justice Stephens: Proceed, gentlemen.

Mr. Steffen: Your Honor, I would like to say at this time that it is not going to be possible to finish the redirect examination of Mr. Lenci in less than a day, and

therefore he will have to come back at the end of the recess.

I wonder if your Honors would indulge me by fifteen minutes at the end of this hour, that is, adjourn at quarter of four.

Justice Stephens: We will do that.

Justice Jackson: You have to catch your usual train, do you?

Mr. Steffen: Yes, I catch the four-ten train.

Justice Jackson: That won't give you much of a margin.

Mr. Steffen: That is right, your Honor.

Mr. Varian: May I say a word, your Honor?

Justice Stephens: Yes.

Mr. Varian: Do I understand that it is proposed to adjourn today and have Mr. Lenci back here on March 20th?

Justice Stephens: Yes.

Mr. Varian: Well, it seems that that is quite unfair to Mr. Lenci, bearing in mind what the facts are here.

He has been under subpoena at all times since November 15th. He was told to come down here on November 15th, and then they told him that he needn't be here on the 15th or 16th, but that he was to be here positively on the 17th day of November.

4726 He came down here and spent all of that week. Then he was temporarily excused, but held on twenty-four hours' notice until the Court adjourned in the early part of December.

Then on the 11th of January, before Court reconvened, I telephoned to Mr. Knuff and asked him whether he was going to need Mr. Lenci on the 17th of January, and after discussing the matter with Mr. Steffen he told me that he wouldn't need him on the 17th or 18th of January, but that he must be ready to come down here on the 19th. Ever since that time he was held on twenty-four hours' notice.

Now he has been down here two solid weeks, and his business is being very much interfered with, and if this goes over he cannot make the necessary trips around the country that he is supposed to make.

It seems to me that it is a very unfair imposition upon this witness.

Justice Stephens: Well, the Court regrets it, Mr. Varian. What treatment, fair or unfair, may have been accorded Mr. Lenci prior to the time he got on the witness stand in the courtroom here, we know nothing of, we have no control

over that, it not having been brought to our attention in any manner.

We cannot sit tomorrow, it is impossible for the members of this Court to do that. I have a war job myself, which I have some obligations towards, which may take me some time tomorrow, although it may not. But we all of
4727 us have other obligations and engagements. The Court never sits upon Saturdays because there are other things that have to be attended to of an administrative character.

Counsel for the Government have a right to conduct redirect examination. The cross-examination has extended for a couple of days. I don't see how we can refuse to ask Mr. Lenci to come back for whatever time is necessary to complete the redirect examination, and any recross examination which you or Mr. Bromley may wish to indulge in.

Mr. Varian: Well, the only thing is that his business is being interfered with, and this is a small company and they are trying to do some business. He is the principal man there who is active in the business.

Justice Stephens: We are fully aware of that, and we are aware of the inconvenience and difficulty it is to all busy businessmen, especially at this time. But the Court has to get at the facts, and can only get at them through the witnesses.

Mr. Varian: Well, so that he might not be detained too long here after the 20th of March, I would suggest that we proceed as far as we can this evening, so as not to unduly take him away from his business after March 20th.

Justice Stephens: I am sorry, Mr. Varian, but we cannot agree to that. We do not wish to be arbitrary or unfair, but the Court has its regular time of adjournment
4728 because there are other duties we have to perform. Also counsel have their various engagements which they have made.

Q. How long do you think you need on redirect examination, Mr. Steffen?

Mr. Steffen: About a day, your Honor.

Justice Stephens: Well, that being true, it wouldn't save any particular time if you have us sit for another half-hour this afternoon, as Mr. Lenci would have to come back anyway.

Mr. Steffen: And Mr. Bromley may have further examination.

Mr. Varian: We want to save every bit of time we can so that Mr. Lenci can get back to his business.

Justice Stephens: Well, I quite agree with that, but my experience, Mr. Varian, is that we don't save any time in the long run by breaking away from the usual court hours. The court hours which we sit, from ten to four, are by no means the hours the judges put in, and are by no means the hours the lawyers put in. There is a great deal of outside preparation and I think we had better adhere to our schedule.

I am sorry, but I think there is no other alternative.

Mr. Varian: We are simply continuing until four o'clock today, is that right?

Justice Stephens: Until three-forty five.

Mr. Steffen: I want to say from our standpoint that we certainly apologize for any inconvenience we have
4729 caused Mr. Lenci, and I think he has had a legitimate complaint on one or two occasions.

On the other hand, we have been trying to be very decent with Mr. Lenci and not to call him down here but to have him on twenty-four hours' notice, as we say, so that he could go about his affairs and not be any more inconvenienced than was necessary. But it has been an inconvenience and we are sorry.

Justice Stephens: Thank you for that statement.

By Mr. Steffen:

Q. Now Mr. Lenci, I notice in your testimony that there is some confusion about this first meeting out in Chicago as to whether Mr. MacLeish or Mr. Avery, or both, or neither, addressed the meeting when you all first assembled. Have you had any opportunity to refresh your recollection on that, or to consider that more carefully? A. I have given a good deal of thought to it since I have been down here, and I cannot recall anything in the nature of a formal address, or an informal address to the group.

Q. I believe that there appears in your testimony a statement that at some time there was a discussion of the patent infringement suits, of the demoralized price conditions, the General Electric case, and the possibility of price
4730 control—and it was my understanding that you had said that that was either by Mr. MacLeish or Mr. Avery at the opening of the meeting.

Could your recollection be refreshed upon that? A. From some source other than my own testimony?

Q. Do you recall having testified before the grand jury upon that point? A. I have forgotten now what it was. But my recollection is, as I said a little while ago, that I think most of this information was given to me by Mr. Avery when I was talking to him in that short meeting I had with him.

Q. Might I show you your grand jury testimony and see if that will refresh your recollection? A. Yes, surely.

Q. Your memory in 1940, that date being closer to the event, may have been a little better than it is today? A. I would be glad to see it.

Q. I therefore want to show you your testimony beginning at page 92, at the point marked with an "X", and continuing over to page 94, at the point marked with an "X"—and I will ask you to read that.

(Thereupon, the grand jury minutes referred to were handed to the witness and thereafter to defendants' counsel and thereafter to the Court, for examination.)

By Mr. Steffen:

4731 Q. Have you examined your grand jury testimony, Mr. Lenci? A. Yes, I have.

Q. Does that refresh your recollection on the matter of whether Mr. MacLeish or Mr. Avery, one or the other of them— A. (Interposing) I wish I could say that it did, but I honestly can't separate that in my mind so that I could say that it was or was not that way.

Q. Can you say there was a discussion, though, at the time when everyone gathered together there on the morning of the 21st? A. Well, I am not so sure that there was a discussion, or whether Mr. Avery simply greeted us all and—I am trying to reconstruct it—I know we broke up very promptly because Mr. Rippey and Mr. MacLeish started right that morning to rewrite our contract, and the trains from New York don't get into Chicago until about ten o'clock, and probably by the time we got our rooms there it must have been eleven, so we would have had very little time for that, and it broke up right that same morning to get to work on the contract.

Q. It couldn't have been more than a five-minute talk, could it? A. It must have been a very short time.

Q. Can you say whether either Mr. MacLeish or Mr. Avery spoke of the patent infringement suits; the demora-

lized price conditions, and such other matters? A. I
4732 would say that there probably was some mention of that, yes.

Q. In the welcome that you received? A. I don't know whether it was in the welcome, or in the individual discussion. I cannot separate it in my mind, honestly.

Q. Let us go, then, to the morning of May 23d. You testified, I believe on page 4670, that there was a general get-together on the morning of the 23d, and that it was at that time that Mr. Avery spoke about the bubble patent. A. That is correct.

Q. And you said also that that was the first time that you had heard at all about the bubble patent? A. Yes.

Q. Now see if you can recall in a little more detail what Mr. Avery said about the bubble patent. Did he state whether or not the patent had been issued? A. No, he definitely said it had not been issued.

Q. He said it had not been issued? A. Yes.

Q. Did he say that it covered a process of making board? A. As I recall it, the way he explained it was this, that he had recently made this trip to Europe, and during that time
4733 he had come across what was known as the Bayer process; that Bayer had filed an application for a patent in the United States; and that Mr. Avery had secured from Mr. Bayer the right to use Bayer's patent, which might be granted on the basis of that application, in so far as it applied to gypsum; and he further explained that his process also could apply to cement, and if I am not mistaken he said that someone in Pittsburgh had taken over the cement rights to the Bayer patent, or Bayer application.

Then he explained that Mr. Roos had also filed an application for a patent for a similar process, with the Patent Office, and that it was in the hands of the Patent Office as to which would be granted the patent.

Q. Did he say when Mr. Roos had filed his application? A. I don't recall whether he did or not.

Q. I think it was in 1924. Did Mr. Avery say anything concerning their manufacture, at that time, of bubble board, so-called? A. If I am not mistaken he said that they had tried it out in one of their plants to see how it worked, and that they were very well satisfied with the results.

Q. And what did he say the results were? A. Well, primarily that it made a much lighter board, and actually by

experience it lightened the board anywhere from 17 to 18 per cent.

Q. I am more interested in what Mr. Avery said. Did he say it was possible to reduce the weight 17 or 18 per cent? A. I don't think he specified the amount, but he explained to us—and we could readily see the reason for it—that it would materially reduce the weight of the board.

Q. Well, your board was weighing about how much at that time? A. Our board at that time was weighing well over 1800 pounds, 1800 or 1900 pounds per thousand square feet.

Q. And the reduction of 17 to 18 per cent would mean a sizeable reduction in weight, would it not? A. Yes, and that would not only mean a saving in handling, but it would mean a corresponding saving in the cost of freight and in the cost of trucking, all of which are on a ton basis.

Q. And did Mr. Avery say anything concerning the savings in cost of manufacture, or were there any mentioned? A. Well, indirectly, that if we used the bubble system we would not have to put in either wood fiber or sawdust, which was the custom at that time, and they were not only expensive, but the source of supply was very uncertain. Sometimes you could get all the sawdust you wanted, and sometimes you couldn't find it anywhere in the Eastern United States.

Q. Did Mr. Avery, in his explanation which you mentioned on page 4670 of your testimony, say that it would be possible to dry out the board faster, and that therefore it would save money in that respect? A. Yes, sir, that that was another advantage, it would come through the drying kilns much more quickly.

Q. And that might make a sizeable saving in the cost of manufacture? A. Yes.

Q. Did he make any mention of a possible royalty? A. I don't remember whether he spoke of the royalty or not, at that time.

Q. The royalty on the Roos patent was only one per cent, wasn't it? A. I would rather the contract spoke as to that, I don't want to quote royalties because they changed at various times, and I don't know.

Q. What royalty are you paying now? A. I believe it is only one per cent.

Q. And the patent that it is being paid on is the Roos foam patent, is it not? A. Yes.

Q. One per cent of $13 would be 13 cents, wouldn't it? A. Yes.

Q. And at a mill base price of $13 for lath, your royalty on that would be one per cent? A. That is correct.

Q. Your royalty is payable on the mill base, is it
4736 not? A. Yes.

Q. And not on the delivered price? A. No.

Q. So that what Mr. Avery was offering you, or what he explained to you, was a patent which might make a very considerable saving in your cost of manufacturing, and which would cost you, for royalty, about 13 cents on a $13 board? A. That is right.

Q. Now did Mr. Avery say anything concerning why he was offering this to the industry? A. I don't remember that he did.

Q. If he had retained the patent it would have meant a very distinct competitive advantage, would it not, for USG? A. Yes, it would have.

Q. Isn't it a fact that Mr. Avery was as much interested in letting the industry have it under a price control basis, as the licensees were to receive it? A. I don't know what his reason was.

Q. Would you say that it was to their advantage, as it was to your advantage to have a stabilized market where they could specify the prices? A. Yes, it would be.

Q. At page 4670 of the transcript, Mr. Bromley asked you this question:

"Q. And to make that specific, were you a party to
4737 or did you know of any agreement or understanding to the effect that the licensees would discontinue the manufacture of open-edge board and no longer make it?"

That is a broad question. Then you said, in effect, that there was no such agreement. A. That is right.

Q. That is correct, is it? A. Yes.

Q. Now you did subsequently, though, and very shortly thereafter, as soon as you could get your machinery in place, abandon the making of the open-edge board, did you not? A. That is right.

Q. And was that not true of all of the other manufacturers who were out there? A. Oh, yes.

Q. That is, open-edge board went off the market? A. Yes.

Q. Were you familiar with the license agreement which you signed—which I believe is Government's Exhibit 11—in which there is a provision to the effect that it is the pur-

pose of the licensee to abandon the manufacture of open-edge board? A. Well, I have read that agreement a great many times, but not very recently.

Q. I will show you the third "whereas" clause in
4738 your contract of May 22nd, 1929, with the United States Gypsum Company, which appears on page 48 of the complaint.

(Thereupon, a copy of the complaint was handed to the witness.)

The Witness: Yes, I notice that.

By Mr. Steffen:

Q. How did you understand that, Mr. Lenci, that you were going to discontinue the making of open-edge board? A. Well, yes.

Q. And that was the understanding of everybody that took out a license, was it not? A. I imagine so because as far as I know the licenses were all similar.

Q. And it is true, is it not, that under the terms of your agreement, as you understood them, royalty was payable on either open-edge or closed-edge board at the same rate? A. I am not sure about that first agreement. I would rather check with the agreement.

Q. I think it can be agreed that royalty was payable on any board manufactured, whether closed-edge or open-edge. Then it is a fact, would you not say, Mr. Lenci, that if you had to pay a royalty on open-edge board, and it also cost more to manufacture open-edge board, that it was a business impossibility to continue making open-edge board?

A. Well, it would be, on that assumption, yes.

4739 Mr. Bromley: I think the Court's attention ought to be called to the fact that on page 48 of the complaint, bearing a recital of the license contract to which counsel has called the witness' attention, in the third paragraph it states:

"Whereas, Licensor has been unwilling to grant a license except upon the express condition that Licensee will manufacture plaster board or gypsum wallboard only with a folded or protected edge similar to that manufactured by Licensor", and so forth, and that in the very next paragraph the recital is:

"Whereas, Licensor has agreed to waive the express condition aforesaid", and so forth.

So that the recital was only made so as to make it clear that there was no such condition—and it isn't fair to call attention to only half of it and create the opposite impression when, if both paragraphs are read, it is perfectly plain that there was no such condition.

Justice Stephens: Well, we will have to suspend at this time.

Before we adjourn, the Presiding Judge wishes to make a statement, very briefly.

I am sorry I can't refer to the exact page of the transcript, but counsel will remember that during the examination by the Government of this witness the question arose upon the objection of the defendants, to the introduction of evidence concerning the practices under the bulle-
4740 tins, specifically those referred to in paragraph 91 of the complaint. The Government offered the evidence to prove two things: First, that the license agreements were being used as a subterfuge or a cloak for illegal practices; and second, that they went beyond, or took the license agreement beyond, the proper limits of the General Electric case.

Mr. Bromley objected, saying that there was no charge in the complaint that the license agreements were themselves illegal, or that the practices under them were illegal, pointing out that in paragraph 91 there was no charge that these various bulletin provisions were unreasonable.

Judge Garrett and Judge Jackson expressed themselves at that time, through me, as of the view that the complaint did charge illegality in the license agreements, as going beyond the proper limits of the General Electric case, but I deferred an expression of my views on that subject until I could give further consideration to it, and we made a ruling that if the Court should ultimately determine that the complaint did not charge that the license agreements were illegal as going beyond the reasonable limits of the General Electric doctrine, the evidence would be considered by the Court only under the subterfuge charge, and that it could be stricken so far as it might relate to the alleged illegality charge.

Since that time I have gone through the complaint
4741 again with great pains and I have reached the conclusion, and I think I ought to announce it so that counsel will be advised, that the complaint does charge that the license agreements are illegal.

I think it could have been much more clearly charged if paragraph 91 had explicitly said that the bulletin provisions and the license provisions were not in reasonable protection of the patent monopoly. But I think in paragraph 46, Mr. Bromley, on page 11 of the complaint, in the next to the last sentence, where the Government charges:

"Said license agreements are not bona fide patent license agreements reasonably designed to secure to USG the pecuniary reward for valid patent monopolies, but were entered into and executed for the illegal purposes described in paragraphs 44 and 45 hereof." —that that is, in effect, a charge that they did go beyond the reasonable limits of the General Electric case. That, therefore, is the ruling of the Court in its construction of the complaint.

I announce that so that counsel on both sides will be advised.

I ought to say also that although I have reached that view with respect to a charge as to the illegality of the license agreement as going beyond the proper limits of the General Electric case, the fact that I reach that view leaves me in still further doubt as to what the Government means
4742 by the subterfuge charge in this case.

I have never been able to get it clear in my mind, and this decision which I have just made, or announced, as I say, makes me still less clear, as to what the Government means by its subterfuge charge.

I had been under the impression from the beginning of this case that the Government had two distinct and in a sense, separate charges: First, that the license agreements were illegal as going beyond the proper limits of the General Electric case, that is, as containing provisions and permitting practices which were not in reasonable protection or reward of patent monopolies; but second, that if they were legal on their face, they were entered into as a subterfuge or cloak.

I had supposed the Government was intending to prove under that, that they were not bona fide agreements, that they were entered into with the intention not of being agreements under the General Electric doctrine, but not of being agreements at all, but just cloaks or pretenses of agreements.

I am still at a loss to understand what the Government's theory of subterfuge is, and I think my colleagues are in the same doubt. It would clear up the case, and would help the Court a great deal in making consistent and clear rul-

ings on the admissibility of evidence, if we knew more definitely what the Government's charge is on the subterfuge theory. Perhaps you can clear that up later.

4743 Mr. Knuff: Is there any specific suggestion that your Honor would care to make, either in the form of a memorandum on it, or what not?

Justice Stephens: No. I thought perhaps it might be brought out at the next discussion on this topic.

Mr. Knuff: I would be glad to prepare a memorandum for the Court's consideration.

Justice Stephens: If you wish to do that, you may, we would be very glad to have you do that, and to have you serve copies on the defendants; but you are not required to do that and perhaps you would prefer to state it orally when we resume session. Suit yourself on that.

Justice Jackson: I don't mind telling you what my understanding of this complaint was.

It was, that the complaint charged two things: One, that the licenses were, per se, illegal; but two, even if the licenses were legal, that the things done under them made them a sham and a cloak, and made them illegal.

Mr. Knuff: I think that is correct, but I think we went just a little farther than that, and I would like to have an opportunity to consult Mr. Steffen on that. There is no doubt that we meant those two things.

Justice Stephens: But you also say in paragraph 46 that they are not bona fide license agreements, and you say that the combination was carried out in the guise of

4744 numerous license agreements purporting to relate to the use of certain patents to give color of legality to the combination, and that smacks as if all this thing was a sort of a feint or a dodge, and that there weren't any contracts really executed at all in good faith, that they just went through the pretense of executing the contracts.

That is why I was surprised, as I have frankly indicated I was, at your going into all this evidence which seemed to me to tend to prove that the parties were taking these agreements very seriously and insisting upon abiding by them.

I mention this only because it does help the Court a great deal in making clear rulings, if it knows clearly what the charges and what the defenses in the case are.

Mr. Knuff: We will try to clear that up.

Justice Stephens: Thank you.

Justice Garrett: Since Judge Jackson has spoken his view I may say that that also was my view, that is the way I construed the matter from reading the complaint. But I made some inquiries concerning that at one time here, probably during the examination of this witness, or some other, and somehow I arrived at the conclusion that the Government, as was just now said by Mr. Knuff, meant something more than that, that that was his view about it, so I quit asking questions about it. It didn't add to my information, and I had plenty of ignorance already—so I just quit asking questions about it. I thought it would work out
4745 eventually. (Laughter.)

Mr. Knuff: Had I drawn this complaint I would have been able to tell you the reason for the third comma on line 6, page 17, but I didn't draw the complaint and I didn't participate in its drawing.

Justice Stephens: Very true, we are not charging you with negligence or lack of lawyer-like action in respect of drawing the complaint, when you didn't draw it, but still the Government is under an obligation, as are the defendants with respect to their defense, to make their theory clear.

Mr. Knuff: And we want to clear it up.

Justice Stephens: The record may show, to conclude this matter, that the evidence that was received at the time of the ruling to which I referred, is now ruled by the full Court as applicable to the charge that the license agreements are themselves illegal as going beyond the proper limits of the General Electric doctrine, as well as to the charge of subterfuge. That will make the record clear.

You may announce the recess.

(Thereupon, at 3:55 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Monday, March 20, 1944.)

4747 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Monday, March 20, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4763 Justice Stephens: Mr. Lenci, will you take the witness stand?

Whereupon George N. Lenci appearing as a witness herein, having been previously sworn, resumed his testimony as follows:

Justice Stephens: Mr. Finck, do you know when Mr. Adams will be here?

Mr. Finck: He will be here Wednesday, Your Honor.

Redirect Examination (resumed)

By Mr. Steffen:

Q. I want to take you back, Mr. Lenci, to the first price quotations that you gave to your salesmen, following the meeting of May 21 and May 22 and May 23, 1929.
4764 Those are Exhibits 405, 406 and 407, if you may be shown them for purposes of getting on the track again this morning.

(Exhibits 405, 406 and 407 handed to witness.)

By Mr. Steffen:

Q. I call your attention particularly, Mr. Lenci, to Exhibit 405, and the quotation of $17.50 per thousand, f.o.b. mill. That price, Mr. Lenci, was for the covered-edge board if and when you got into production, was it not? A. Yes.

Q. I think you testified concerning that on pages 4671 to 4679 of the transcript.

That price of $17.50, Mr. Lenci, was the same price as the price for No. 2 grade wallboard, was it not? A. Yes.

Q. Having a covered edge? A. Yes.

Q. Now your price of $15 per thousand square feet, f.o.b. mill, was on your open-edge board, was it not? A. Yes.

Q. Now that was your standard production, wasn't it? A. That is what we had been making up to that time.

Q. And that price is the same as the price for seconds which was put out by the United States Gypsum Company in their bulletin of May 23, 1929, Government's Exhibit 404?

A. Yes, that shows a $15 price for that item, too.
4765 Q. Now you testified at page 4679, and page 4680, that you had no understanding that the price for your board was to be—that is, your open-edge board—was to be the same as the price for seconds; is that correct? A. That is correct, yes.

Q. Prior to this time, Mr. Lenci, your open-edge board had been selling in competition, had it not, primarily with the No. 2 or seconds, particularly the seconds put out by USG and some of the other companies? A. Well, we had been trying to get business against any competition we had to meet. We were selling our board wherever we could, no matter what the opposition was.

Q. But your chief competitor was the No. 2 grade board or the seconds, let us say, which was being put out by certain of your competitors? A. To a certain extent it was.

Q. And it was a perfectly normal thing for you to have selected the $15.00, which was the price that USG fixed for its seconds, or fixed for seconds to be sold by licensees, as being the price at which you should sell, thereafter, your open-edge board? A. That was the price we would like to sell it for, because it meant a little improvement over what we had been doing.

Q. My question was that it was quite natural that
4766 you should select the same price, inasmuch as seconds were sold in competition, principally, with your open-edge board? A. It was governed by two factors: We couldn't get more than that price because they could buy that open-edge board, or the seconds, from one of the other companies at that price; and we didn't want to sell any lower than that because we were naturally anxious to get as much profit as we could.

Q. Do you recall any discussion concerning the price at which you should quote your open-edge board? A. No.

Q. Was there any mention at Chicago on May 23, 1929, as to what you should do concerning your open-edge board, to dispose of it? A. I haven't any recollection of it, no.

Q. Do you know what your competitors did with regard to their prices on open-edge board? A. Well, I think most of our competitors were not making an open-edge board. As I recall it, the only one that was making it was Certain-teed. The others were making a closed-edge board which was an infringement on the licensor's board.

Q. Was National making a closed-edge board? A. I think they were.

Q. Or a partially-closed edge? A. I think so. The American and Reeb were.

4767 Q. They were not, in 1929, were they? A. Well, they had been during quite a period before that, not of a board which they claimed was the Utzman board, but they had their own way of folding those edges which gave them, in effect, a closed-edge board.

Q. The testimony here indicates that in July, 1928, American abandoned the closed-edge or modified closed-edge board, and went to a different type of edge.

Well, you stated that this was arrived at as an independent matter on your part, Mr. Lenci, this matter of fixing a $15 price on your open-edge board; and you also stated, on page 4680, that you arrived at the matter of billing weights as an independent matter. Do you remember that? A. Yes.

Q. Now those billing weights which you selected were the same as those provided in the United States Gypsum Company bulletins, were they not? A. I believe they were. I have no present recollection of it, but my recollection is that they were, yes.

Q. And when you said that you arrived at it as an independent matter, you meant, of course, that you had to make your own decision— A. (Interposing) Yes.

Q. (Continuing) —but you were following the billing weights which were specified in the United States
4768 Gypsum Company bulletin? A. My present recollection is that our board, our 3/8 inch board, was weighing just about that amount at that time. As I recall it, our board weighed somewhere between 1800 and 1900 pounds.

Q. Prior to this time in 1929, you hadn't used an arbitrary billing weight, had you? You had used the actual weight, in making shipments? A. I think we did, I think we did.

Q. At page 4686 of the transcript, Mr. Lenci, you speak concerning the board machine which your company purchased. I think that was bought in 1928? A. Yes.

Q. And you bought it from a concern out in Kansas? A. Yes.

Q. Do you recall how much it cost? A. Why, approximately, yes. You see, a board machine is made up of two principal parts, the machine itself and the kilns. The board machine people don't furnish the kilns, the dry kilns.

Q. That has to do with making stucco, the dry kilns? A. No, the stucco kilns are an entirely different kind of a kiln. But the board is made on a machine and then it goes through the driers and is dried.

Q. By kilns, you mean the driers? A. Yes.

4769 Q. A board machine is about 100 or 150 feet long? A. Oh, no.

Q. How long? A. Our board machine in the beginning was about, I think it was 634 feet.

Q. That is including the kilns? A. No.

Q. Just the board machine alone? A. Yes.

Q. And if you take the machine alone, about how much did it cost? A. As I recall it, it was about $75,000, and that did not include—we had to set it up ourselves with our own labor. I believe they furnished all the machinery and a supervisor, or something of that kind, and we fur-

nished the labor and machinists to erect it and put it into operation.

Q. Now, you didn't wish to give the impression, from your testimony here on page 4686, that when you converted to make the closed-edge board, you had to replace that machine? A. Oh, no, we replaced certain parts of it.

Q. And those parts were at the wet end of the machine, at the head of the machine, particularly? A. At both ends; at the wet end of the machine, which you would call the head end, we put in the machinery for turning
4770 the edges. And at the far end, it was the elimination of the saws which trimmed the rough edges off of the open-edge board.

Q. So you could simply take those saws off and that would take care of that, and then at the wet end of the machine you had to put in a device which would turn the edges of the board? A. Yes.

Q. And do you recall whether that was purchased from the Ehrsam Manufacturing Company? A. I don't remember who we got that from.

Q. It was a rather minor matter? A. Yes, I don't really recall who furnished that.

Q. On page 4687, Mr. Lenci, Mr. Bromley asked you: "Did you have any understanding or agreement that if you took the license, USG would raise or stabilize prices on patented board covered by the license?"

And you answered: "No."

Do you remember that? A. That is correct.

Q. Now by "agreement", did you mean written agreement, or by "understanding", written understanding? A. No, I meant any understanding.

Q. Any understanding at all? A. Yes.

4771 Q. And by stabilizing prices on patented gypsum board, you understood, of course, that your license agreement itself would operate to stabilize prices, did you not? A. Yes.

Q. And you didn't mean to exclude that? A. No, of course not, but what I meant was that there was no prior understanding, oral or written, that certain prices would be established, and what those prices would be. We knew that the license agreement would cover the fixing of prices for the sale of patented board.

Q. And you knew that it would also result in stabilization? A. Yes.

Q. And you knew that, in the first place, because every-

body, practically, was signing the license agreement? A. Yes.

Q. And the license agreement also provided, you knew, that if any other or better license should ever be given, that each of the present licensees would be given substantially or exactly the same terms? A. I believe it was to be exactly the same terms.

Q. That is right. A. Yes.

Q. Then on the same page, Mr. Bromley asked
4772 you:

"Did you have any understanding or agreement with anyor , with respect to what price you should quote or charge for plaster?"

And you answered: "No."

Do you remember that? A. That is correct, yes.

Q. And by that you mean the same thing, that you never talked, at this May meeting for example, concerning an agreement regarding plaster prices? A. That is right.

Q. Is that right? A. That is right.

Q. You understood, of course, that you would not be permitted to sell plaster in order to influence your board prices? A. Yes.

Q. And you understood that that would, in a measure, stabilize your plaster prices, or rather, make them a little more fixed than they were before? A. It might have that effect, yes.

Q. Prior to this time, in 1927 and 1928, you were a free agent to sell your plaster any way you wanted to, and at any price? A. Well, both before and after.

4773 Q. What I am getting at is that prior to 1929, if you had cared to shade your plaster price 5 cents, for example, in order to get a contract including board, you would have been free to do that, would you not? A. Yes.

Q. After the 1929 agreement, and the bulletins concerning the board, you were not so free, were you? A. As I understood it, we were not free to give plaster away or to sell it at an extraordinarily low price to influence the sale of board. But there was nothing there that kept us from free competition in plaster, and our experience was that it was extremely free during the past 10 or 15 years.

Q. I think you testified, Mr. Lenci, that even a 5-cent reduction or a 10-cent reduction in plaster prices, or board prices, would be very influential to a prospective buyer in the building field; is that not correct? A. I don't remember of making that statement.

Q. Perhaps I am wrong on that. But that would be true, would it not? A. They wouldn't notice a 5-cent reduction in the price of plaster.

Q. What would be the first point at which they would begin to notice it? A. They usually talk 50 cents
4774 or a dollar when they talk about plaster.

Q. That is per ton, is it? A. Yes.

Q. And a 50-cent reduction in the plaster price would be a material reduction? A. It all depends on what the other companies were selling plaster for at the same time. In other words, we are competing on plaster against other plaster manufacturers. If they were all selling their plaster at, say, an arbitrary price of $10 at a certain place, we would be competing against that price, we wouldn't be competing against the board price. The plaster business is a separate business.

Q. Is that exactly true? Are not board and plaster sold together very largely? A. The wallboard is very rarely sold in connection with plaster.

Q. By "board", I mean gypsum lath as well. A. Lath may or may not be. The reason I say that is that it is the common practice in building construction to let a general contract. The general contractor then lets a sub-contract to a plastering contractor. The plastering contractor in turn sublets to a lathing contractor. Then the plastering contractor will buy his plaster through the dealer with whom he usually does business; and the lathing contractor will buy his lath through the dealer with whom he
4775 usually does business. So in a great many of the cases, especially in the larger cities and on the larger jobs, you are selling lath through one source, and plaster through another source. Do you understand?

Q. I think I understand perfectly.

To make the illustration simple, though, in the cases where you are selling to a dealer who in turn is selling both plaster and lath to a contractor, then in that case it would be very material to the dealer who was buying the supply for this entire contract to know what his prices on plaster and what his prices on board were, and if the price on plaster were shaded by, say, 50 cents, that would be a material element in determining whether or not he was going to buy board from you? A. That would be correct, yes.

Q. And prior to the agreements in 1929, you could make any adjustment that you saw fit, in your plaster prices, to influence the price of board? A. That is correct.

Q. And subsequent to that, you could not make an adjustment in the price of plaster for purposes of influencing the sale of board; isn't that correct? A. That is correct, but I don't know where you would draw that line as to how much of a cut in plaster was made in order to sell the plaster, and how much of the cut was for
4776 the purpose of influencing the board sale. I couldn't tell you where that point would be.

Q. Well, I wouldn't know, either. But the bulletin—and I refer to Government's Exhibit 37, page 923—doesn't make any distinction as to whether it is a large or a small reduction in plaster prices which might influence the sale of board? A. I know that.

Q. It simply says that whatever the reduction is, it may not be made if its purpose was for the purpose of reducing the price of board. A. That makes it a question of fact as to whether it was made for that purpose or not.

Q. I see.

Mr. Bromley: What is the date of that bulletin, please?

Mr. Steffen: That bulletin is dated February 6, 1939.

Justice Stephens: What is that exhibit number?

Mr. Knuff: Exhibit No. 37, Your Honor. In your book it will either be page 923 or 531. There are two numbers, because it has been photostated twice, and they have changed the number, and I don't know which one you have up there.

Justice Jackson: Is it reproduced in the complaint?

Mr. Knuff: I am inclined to think that that is in the complaint, Your Honor.

Mr. Steffen: Yes, it is in the complaint on page 96.

4777 Justice Stephens: I have page 531 of Exhibit 37. Was this the one on rebates and allowances?

Mr. Steffen: That is right.

Mr. Knuff: That is correct, Your Honor.

By Mr. Steffen:

Q. You also testified, Mr. Lenci, on page 4687, in reply to one of Mr. Bromley's questions, that you did not enter into or know of any agreement or understanding that jobbers would be eliminated from the distributive system. Do you remember that? A. Yes.

Q. And by that you meant what, that there was no agreement at this May meeting that you were going to then eliminate jobbers? A. Yes.

Q. And there was no provision in the license agreements which expressly provided for eliminating jobbers, was there? A. No.

Q. Nor was it provided at all for eliminating jobbers? A. No.

Q. Now, you did not wish to imply by your answer that there weren't many meetings between the licensees and USG at which jobbers were discussed? A. That there were not?

4778 Q. You didn't mean by your testimony to imply that there were no meetings between licensees and USG at which the matter of sales by jobbers was discussed? A. The question of jobbers was mentioned at several meetings, at two or three meetings anyway.

Q. You have testified concerning that, and your answer here didn't mean to change your testimony that there were several meetings at which sales by jobbers was discussed? A. No. Sales were discussed.

Q. And following those meetings, and those discussions, a bulletin was issued making the price to jobbers the same as the price to dealers? A. Yes.

Q. And the effect of that was to eliminate jobbers from the distributive system, was it not? A. More or less. As you know from the testimony which came afterwards, they were not eliminated.

Q. What do you mean by that? A. There were complaints all during this period that they still were buying at discounts from various manufacturers.

Q. That is, for a period of a year or two following the initial price bulletin? A. For a number of years, yes.

4779 Q. But they are substantially eliminated now, is that not correct? A. Yes—when you say "eliminated", I don't know just what you mean. You don't mean eliminated, you mean that they were put on the same basis as dealers?

Q. That is right. A. But there was no intention at any time to put them out of business, because they are still in business and doing a good business.

Q. Perhaps we had better go into that. By that you do not mean that they are getting a discount— A. (Interposing) No, but a jobber has gotten himself in a position where he is fulfilling a certain—not duty, but—

Justice Jackson: (Interposing) Function.

The Witness: Thank you, sir—function, in the business. He has the material in stock, and there are a lot of small

dealers who, for financial reasons, or due to the size of their warehouses, are not able to buy large quantities; and there are a great number of these jobbers who buy at the dealer price and then sell above the dealer price to these smaller dealers as a privilege to these smaller dealers, it helps them a great deal.

By Mr. Steffen:

Q. But there are no jobbers who buy at a discount from the manufacturer and sell to the dealer at dealer prices?

A. Not so far as our company is concerned.

4780 Q. And you don't know of any in the industry?

A. No, not at the present time.

Q. And in so far as that constitutes being a jobber, those jobbers are eliminated? A. Yes.

Mr. Steffen: We might take our recess at this time, if that is agreeable.

Justice Stephens: We will take a five-minute recess.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

Justice Stephens: The trial will be resumed.

In order that counsel may be definitely informed as to the program of the Court, the Court will sit this week and next week, closing on Friday, March 31st, and will reconvene on Tuesday, April 11, rather than on Monday, April 10th.

You may proceed, Mr. Steffen.

By Mr. Steffen:

Q. With further respect to jobbers, Mr. Lenci, on page 4689, Mr. Bromley asked you if it came as a surprise to you that the price to dealers and the price to jobbers was made the same, and you made the statement: "We had no part in making that up."

By that testimony you didn't mean to say that you had not had these various meetings at which jobbers and sales by jobbers, were being discussed? A. What date

4781 does that refer to?

Q. 1930. By that you didn't mean to exclude the fact that your company, as a licensee, and other licensees, had discussed with USG the matter of sales by jobbers? A. It wasn't so much a discussion by us, as a statement by USG that certain things were going to be done.

Q. That applies to the issuance of bulletins, or as to

what they were going to do by way of fixing prices, is that what you mean? A. Yes.

Q. And those statements in the bulletins followed these licensee meetings at which you licensees asked Mr. Henning or Mr. MacLeish questions concerning bulletins and conditions in the industry, is that not right? A. Well, these bulletins didn't follow the meetings.

Q. Not always? A. No. I mean we didn't have a meeting, and talk things over, and then have it confirmed by a bulletin. I don't want to ever get that into the record.

Q. I understand that perfectly. A. These bulletins came out entirely independently of anything we did or talked about.

Q. But they had to do with the matters which you did talk about? A. Which were brought up by the licensor, yes.

4782 Q. And which, on occasion, were brought up by the licensees? A. At the moment I don't recall what that would be.

Q. Well, you made complaints concerning jobbers, and then questions came up concerning housewreckers and things of that sort at these various meetings? A. That is true.

Q. And on occasion those matters appeared later in bulletins, did they not? A. Well, I haven't read these earlier bulletins for a long time, but it seems to me that the question of jobbers was mentioned in the bulletins right from the start.

Q. The first one I think was in 1930. A. That is the year following.

Mr. Bromley: That is not true at all. The very first bulletin had a provision in it about jobbers, and set the discount.

Mr. Steffen: I think that is correct. The one I had reference to is the one that fixed the price at which you were to sell to jobbers as being the same price at which you sold to dealers.

Mr. Bromley: But that wasn't the first mention of jobbers. Jobbers were mentioned in the first bulletin that was issued.

Mr. Steffen: I agree to that, and the one I had reference to was the one issued in August, 1930, at which the

4783 price to dealers and jobbers was made the same.

The Witness: Yes, but I do not recall any discussion between the licensees and the licensor to the effect that that was going to be done.

By Mr. Steffen:

Q. I will show you, Mr. Lenci, in order to refresh your recollection—you say you do not recall—your testimony before the grand jury, beginning at the point marked "X" on page 251, and ending at the point marked "X" on page 251; and also from the point marked "X" on page 268, ending at the point marked "X" on page 269.

Justice Stephens: Show it to counsel first.

(The grand jury minutes referred to were handed to defendants' counsel for examination.)

Justice Stephens: Show it to the Court, now.

(The grand jury minutes referred to were handed to the Court for examination.)

Justice Stephens: What was the first page reference?

Mr. Steffen: Page 251.

Justice Stephens: And the next was what?

Mr. Steffen: Pages 268 to 269.

Justice Stephens: Now you may show it to the witness.

Mr. Bromley: I object to this use of the grand jury minutes again as being entirely improper, and it seems to me that the second reference is a very clear demonstra-
4784 tion of the impropriety. They pick out certain parts of the minutes and mark them with an "X", and will not let us see what comes in between. It is impossible to tell whether the second reference is talking about before this bulletin or after. It is utterly impossible to tell what he is talking about or what time he is talking about.

The first reference is clearly to a period long after the issuance of the first bulletin, just as the witness said. But as to the second reference, there is no way to tell what time it refers to. I suspect it is likewise after the issuance of that bulletin, but it is impossible to tell from those excerpts.

Justice Jackson: Have you had an opportunity to look further into those minutes to see what the second portion has reference to?

Mr. Bromley: I have not.

Justice Jackson: I think you are entitled to know what it means, in order to intelligently examine him.

Mr. Bromley: I feel the same way.

Justice Stephens: The Court would see no objection to your looking at sufficient of the minutes to understand what that means. You don't object to that, do you?

Mr. Steffen: I have to make a formal objection, your Honor, to allowing counsel to look at any grand jury minutes other than those that are presented, but I—

4785 Justice Jackson: (Interposing) Suppose that that portion does not exactly give the picture?

Mr. Steffen: I was going to say that I think it is only reasonable that either the Court—ordinarily it would be the Court that would satisfy itself that those are the proper excerpts from the minutes—

Justice Stephens: (Interposing) We couldn't tell that ourselves without reading the balance.

Mr. Steffen: I have no objection to Mr. Bromley looking at the material between pages 251 and 268.

Justice Stephens: You may resubmit it to counsel.

(The grand jury minutes referred to were again handed to counsel for the defendants for examination.)

Mr. Bromley: May it please the Court, from a reading of the pages between 251 and 268, it is apparent that the testimony which is marked on pages 268 and 269, given by this witness before the grand jury, was all with reference to a meeting of licensees on November 15, 1932, more than two years after the bulletin leveling offff the jobber-dealer price was issued.

Justice Stephens: More than two years afterwards, you say?

Mr. Bromley: Yes, after the bulletin was issued by USG making the price to jobbers the same as to dealers.

So that in no way bears upon his testimony as to whether this matter was discussed prior to 1930 before the bulletin was issued.

4786 Mr. Steffen: Our point on that would be, your Honor, that the discussion in 1932, which is a continuation of discussions that they had had previously, and which referred to a matter that was obviously up as Mr. Bromley pointed out in the very first bulletin and in subsequent meetings, was a matter which would influence—what I mean to say is that the discussion had in 1932 would have a bearing upon what they were doing in 1930, because it was a continuation matter. I am showing this to Mr. Lenci simply to refresh his recollection.

Justice Jackson: Why don't you show it to him and ask him if it does refresh his recollection. Any explanation to clarify it can be brought out on recross.

Mr. Steffen: That is right. The page references are

page 251, and also pages 268 to 269, between the points marked with an "X".

(The grand jury minutes referred to were handed to the witness for examination.)

The Witness: Am I to read what is in between?

Mr. Steffen: No, just the marked portions.

Justice Stephens: Counsel has not asked you to read the intervening material; and Mr. Bromley has stated in your presence what it relates to, without denial. If the witness feels that he needs to read the intervening material, after reading the other material, to be sure what it means, the Court will allow him to do so.

4787 The Witness: (After reading the indicated portions of the grand jury minutes) I would like to briefly skim over what is in between there.

Justice Stephens: You may do so.

Justice Jackson: If it does not refresh your recollection, all you have to do is to say so.

Mr. Steffen: And if it does refresh your recollection, all you have to do is to say that.

The Witness: On page 268, where it starts in, it starts off with a question, "Let us take jobbers", and so forth, and I would like to see the line of questioning up to that point.

Justice Stephens: If the witness feels that in order to make sure whether it refreshes his recollection he should read the intervening material, he may do so.

The Witness: Thank you.

(The witness read the intervening material in the grand jury minutes referred to.)

Justice Stephens: What is the last question, Mr. Reporter? Let's get back to where we started.

(Thereupon, the record was read by the reporter, as requested.)

Justice Stephens: You have now read the intervening material, have you?

The Witness: Yes.

4788 Justice Stephens: Ask your question, Mr. Steffen.

By Mr. Steffen:

Q. My question is, does that refresh your recollection concerning any discussions you may have had with the

licensor, at licensee-licensor meetings, concerning the jobber situation? A. Yes.

Q. And when you said at page 4689 of the transcript that you had no part in making up the bulletin which the United States Gypsum Company issued in August, I believe, of 1930, eliminating jobbers or fixing the same price to jobbers as to dealers, you didn't want to exclude the fact that you had had such meetings and had talked over the elimination of jobbers with the licensor?

Mr. Bromley: I think that that ought to be specific as to whether it was prior to 1930 or subsequent to 1930.

Mr. Steffen: I will make it specific.

By Mr. Steffen:

Q. In August, 1930, there was a bulletin put out by United States Gypsum Company which leveled off the price to dealers and jobbers—do you remember that? A. Yes.

Q. And your answer here said that you had no part in making that up? A. That is right.

Q. And by that you meant that the United States
4789 Gypsum Company, of course, issued their own bulletins? A. Yes.

Q. You do not want to exclude the statement, however, that the licensees had met with the licensor concerning the jobber situation, do you? A. Well, it is my recollection that there was more discussion about the jobbers after 1930—

Q. (Interposing) Than prior to 1930? A. Yes.

Q. My question is—do those excerpts from the grand jury minutes, which have to do with meetings after 1930, refresh your recollection as to anything discussed prior to 1930? A. No, they do not.

Q. I now show you Government's Exhibit 438, which also has to do with jobbers, Mr. Lenci, and concerns your testimony on page 4758 of the transcript. I refer particularly to the first paragraph of that exhibit in which it says that selling through jobbers had been eliminated.

In your testimony, Mr. Lenci, you said:

"A. That is correct. It is merely shortened up there, because that is the way I understood it, and everybody else understood it the same way."

You followed that testimony with a statement to this effect:

"Q. And when you said that you understood it and that that is the way everybody else understood it, you
4790 meant that they all understood that all that had

been eliminated was the right of a manufacturer to sell a jobber at a discount, is that right?"

To which you said:

"A. That is correct, yes."

Now having read your testimony before the grand jury, does that refresh your recollection as to whether or not your statements on page 4758, to the effect that what you should have said was simply that the price had been leveled off, was correct? Do you get all that? A. No, I don't, I am sorry.

Q. Let me get at it in shorter questions, Mr. Lenci.

Have you looked at Exhibit 438? A. Yes.

Q. And the first paragraph speaks of eliminating jobbers? A. Yes.

Q. And you stated first that that was the way that everybody understood it, is that correct? A. Yes.

Q. Do you want to change that testimony?

Mr. Bromley: I object to that question. He didn't testify that that was the way everybody understood it at all—

Mr. Steffen: (Interposing) Just a moment, I will read your testimony, Mr. Lenci.

Mr. Bromley: At what page?

4791 Mr. Steffen: At page 4758.

Mr. Bromley asked you this question:

"Q. What you said was 'Referring to the recent bulletin of the United States Gypsum Company advising the licensees that selling through Jobbers had been eliminated.'

"You knew when you wrote that that all the bulletins had done was level off the price as between jobbers and dealers, didn't you?"

And your answer was:

"A. That is correct. It is merely shortened up there, because that is the way I understood it, and everybody else understood it the same way."

Now do you want to change that testimony, having examined your testimony given before the grand jury? A. I don't see how I can.

Q. That is a correct statement of what you intended to say, is it not?

Justice Jackson: What do you mean by "that"?

Mr. Steffen: By "that" I refer to the first paragraph of Exhibit 438 in which you said that you understood that the jobbers were to be eliminated.

The Witness: Well, to make it clear—

Justice Stephens: (Interposing) The statement there,

for the purpose of exactness of the record, is that selling through jobbers had been eliminated.

4792 Mr. Steffen: That is right.

The Witness: If I may make it clear, my understanding has always been of that particular bulletin that the practice of selling through jobbers at a price less than the dealer price had been eliminated, that the practice of selling them at the special discount had been eliminated, not that the jobbers themselves had been eliminated.

By Mr. Steffen:

Q. That comes down, as you state, however, to a shortened statement that sales, or selling to jobbers, had been eliminated, was the correct way of stating the matter—is that not right?

Justice Jackson: What matter?

The Witness: May I go back to my letter of May 6? The first paragraph of that letter, which is addressed to the Board Survey Company, is merely for the identification of the matter which I wished to discuss, with the various complaints I mentioned in the letter. The first paragraph is not intended as an interpretation, but merely as an identification so that the Board Survey would know what I was talking about.

By Mr. Steffen:

Q. I now want to take up another subject, Mr. Lenci.

At page 4693 of the transcript you state that the matter of taking out a license under the Roos foam patent was a matter of your independent judgment, and that it was

4793 because you desired to get the right to use the patents in your manufacturing process.

I think you testified, Mr. Lenci, that you made no examination of the patents before you reached your decision, did you not? A. That is correct.

Q. Did the United States Gypsum Company disclose to you just how to make board, prior to your taking the license in October, or November, 1929? A. They described it very fully at about that time, whether it was just before or just after, I don't recall.

Q. You are familiar with the license agreement and it provides, I believe, in the license agreement, that they will disclose to you the process as a part of their agreement? A. That is correct.

Q. Now on page 4698 of your testimony, Mr. Lenci, you referred to the matter of classifying housewreckers, as to whether they should be classified as dealers or contractors. Mr. Bromley there asked you the question:

"Now at this meeting of June 6th, was there a discussion about prices?"

And your answer was:

"A. No, I think the thing was an inquiry as to how housewreckers should be classified under the bulletins."

Had you been selling housewreckers as dealers?

4794 A. Yes, sir.

Q. Does your company sell to contractors? A. No.

Q. And do some of the companies sell to contractors? A. It isn't the usual practice.

Q. Do some of them sell to contractors? A. It has happened occasionally in very recent periods, only, during the war, principally on Government contracts, on barracks and buildings of that type.

Q. And the question came down as to whether you would classify housewreckers as dealers or contractors, and if they were to be sold as contractors, whether they would be sold at a different price than you would sell to dealers? A. They would not be entitled to the dealer price.

Q. It would be, ordinarily, a higher price? A. Yes.

Q. And you decided to treat them as dealers? A. They actually were dealers, and had existed that way for years.

Q. Dealers of a particular sort? A. Yes.

Q. At page 4698, Mr. Bromley asked you:

"Q. Was there any 'give and take' in the sense of a discussion, as to what should or should not be the practices or prices, followed by a vote or a decision in any form?"

4795 Your answer was:

"A. Oh, no, no."

That was never the case, was it, that there was a decision or a vote at that time by the licensees? A. That is right.

Q. The licensor heard statements or questions from each of the licensees, if they were so minded? A. Yes.

Q. And was there an expression of opinion? A. No.

Q. Did you say you thought you would like to classify housewreckers as dealers, or not? A. I misunderstood your question, I believe, I thought you asked—

Q. (Interposing) Whether the licensees would express their opinion? A. Yes, it was usually discussed by the

persons who brought it up. If I had a complaint or a question, I would bring it up, and the United States Gypsum would say, "Well, we will think about it and decide what we are going to do."

Q. And if any other licensee had an opinion on the matter, or had a different view on the matter, he expressed it? A. If he was interested, he did.

Q. And the United States Gypsum Company more or less stood as an umpire between the different parties
4796 there, if there was a difference of opinion? A. No, I wouldn't say that they acted as an umpire, because very often we might want something and feel we were entitled to it, and they would make their decision based very largely, we felt, on their own policy.

Q. On what was good business for them? A. Yes.

Q. You also say on page 4699: "You must realize that those bulletins were entirely new to all of us".

By that what did you mean, that they provided many new conditions such as billing weights and basing points and new prices, and size of truck deliveries, and so on? A. What bulletins does that answer refer to?

Q. This apparently had to do with the period between June 6th and following.

Justice Stephens: Of 1929?

Mr. Steffen: Of 1929, up to the first audit, I believe.

The Witness: That is what I thought. Well, the whole idea of the bulletins was new, and a great many of the matters embodied in the bulletins were not clearly expressed, we couldn't understand them, and we naturally had to have the bulletins clarified.

By Mr. Steffen:

Q. Now on page 4700 this question was asked:

"Q. Now the giving away of filler by the manu-
4797 facturers was not a custom in the sense that it was generally accepted or approved practice in the industry, was it?"

And you said:

"A. It was decidedly not approved."

That had been the practice in the industry, though, to give away filler or carpenters' aprons, or things of that sort? A. No, I think I said it was not the usual practice.

Q. But there had been instances where that was done? A. There had been very few, very rare instances.

Q. And that was brought up at a licensee-licensor meeting and there was general disapproval expressed by the in-

dustry present? A. Wasn't that one of the points brought up at that meeting where Mr. MacLeish told us—

Q. (Interposing) I think so. A. I think he was the one that expressed the opinion to us and said that that was one of the attractions that had been offered. It wasn't an opinion on our part.

Q. He stated to you it was an attraction, and you agreed that it was a bad practice, or did you? A. I don't think we agreed, we just accepted it. He said so and that was it.

Q. Now on page 4703, a reference is made to protected job contracts, and on that page Mr. Bromley asked you this question:

4798 "Q. However, there was again another rule, do you recall, among the Fair Trade Practice Rules, Rule 16, which provided that a contract of sale which permits the buyer to cancel, or provide for a reduced price in the event of a market decline, and which does not permit the seller to cancel, or provide for an enhanced price in the event of a market rise, is lacking in mutuality and tends to induce controversy and breach of contract, and is therefore condemned by the industry?"

To which you answered:

"A. Yes."

Is that your testimony? A. Yes, that was referring to the Federal Trade Commission rules, wasn't it?

Q. It says so, yes. A. Yes.

Q. And by "condemned by the industry" you mean condemned by your company and the United States Gypsum Company, and the other licensees? A. Under that Federal Trade Commission Fair Practice Law, yes.

Q. And only as it comes under the Federal Trade Commission Fair Practice Rule No. 16? A. Yes.

Q. As a matter of fact, Mr. Lenci, is there still a practice to protect prices on jobs? A. Yes, you have

4799 to do that.

And is that what was meant by the rule? A. No, it is just the opposite. The rule, if it were followed by the industry, would be of benefit to the industry, but as the business practice has been built up throughout the years we protect against an increase, but if there is a decrease, the contractor pays the lesser price on a protected job.

Q. So that although it is condemned by the industry, the industry still follows that practice? A. Yes, we have no way of enforcing it.

Q. Well, as a matter of fact do not the bulletins provide regulations concerning the extent to which you may protect jobs? A. I don't recall that they do.

Q. Aren't there very explicit provisions as to what will constitute a job and for what length of time you may protect a job? A. I don't recall that.

Justice Stephens: We will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

4800 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Proceed.

Whereupon, GEORGE N. LENCI resumed the stand and testified further as follows:

Redirect Examination (resumed)

By Mr. Steffen:

Q. Before the recess, Mr. Lenci, we were speaking about the protected job contracts, and the length of time that a licensee would be permitted to protect a job, especially on gypsum board and gypsum lath.

I want to show you Government's Exhibit 37, page 530, which appears at the top of page 95 of the complaint.

(Exhibit 37 handed to the witness.)

By Mr. Steffen:

Q. In the second paragraph, it refers to advances in minimum price—

Justice Stephens: (Interposing) Page 95 of the complaint?

Mr. Steffen: That is correct.

Justice Stephens: Paragraph No. (2)?

Mr. Steffen: Especially No. (2), yes, Your Honor.

By Mr. Steffen:

4801 Q. I ask you, Mr. Lenci, if that is a regulation of these protected job contracts, as you understand it? A. Yes.

Q. There have been no price changes in several years, have there? A. This bulletin is dated in 1939. I don't believe there have been.

Q. What I meant to say is that you have had no occasion to refer to this particular bulletin in several years? A. No, that is right.

Q. You would change your testimony, Mr. Lenci, that there is a regulation, then, in the bulletins? A. Yes. I wasn't sure this morning whether it had been published or not.

Q. Now I would like to take you to page 4709 of the transcript. It is a little indefinite, Mr. Lenci, as to when you decided to take out your bubble license. The question is, at the foot of the page:

"And you thereafter did decide to take the bubble license, did you?"

And your answer:

"We did."

The reference is to a statement made by Mr. MacLeish, according to your testimony, to Mr. Rippey, suggesting that you should make up your mind about whether or not
4802 you wanted to take out a license, before you talked about the form of the license.

As a matter of fact, you made up your mind fairly shortly after the May 23 meeting, did you not, to take out a license under the bubble patent? A. Yes.

Q. And by a "very short period of time", what could you say you meant? A. Well, I couldn't place it in days.

Q. That is, you had substantially made up your mind as you went home from the meeting? A. Yes, sir.

Q. Now, I want to refer to your testimony beginning on page 4734. At that point, Mr. Lenci, you were asked this question:

"For instance, if you were told that you could sell gypsum board at $13 per thousand square feet at your mill, would that enable you to operate as a commercial business matter?"

And your answer was:

"No."

Do you remember that testimony? A. Yes.

Q. I want to ask you whether, prior to May, 1929, you were not able to operate as a business matter, even
4803 though you didn't even have a base price given you? A. Well, we weren't working with a base price, we

were working with what price we had to meet at the destination where our competitors were making the prices.

Q. That is, you had to meet competition in 1928 and 1929? A. We had to meet the prices in effect at the destination point, as we found them.

Q. And you could adjust your prices, or your trucking, or the size of your loads, or any other matter that you saw fit, to meet competition, could you not? A. Yes.

Q. Now, what did you mean, then, when you said that you couldn't operate as a commercial business matter if all that was given you was a $13 per thousand square feet at your mill price? A. Well, to give you a very simple illustration of it, we were simply given a mill price of $13, and one of our competitors who had a plant in Philadelphia was making a price on his product, delivered to the dealer's yard, of $14.10, there is only a difference of $1.10 per thousand square feet in there. If we were bound by the $13 at our mill, and had to add to that the freight to destination and the trucking charge from destination to the dealer's yard, we couldn't operate. That is what I meant by that answer.

4804 Q. Well, you go on and state here—and I will refer you to another question that Mr. Bromley asked you, on page 4736:

"In other words, you mean by that, that you would have to know whether that price applied to a large quantity or a small quantity, wouldn't you?"

And you said:

"Yes."

A. Yes, that is another line of thought, too. There were a number of reasons.

Q. Then he asked you:

"And you would have to know whether that price applied to a situation where you were expected to make free delivery, or whether the customer was to pay for the delivery, wouldn't you?"

A. Yes.

Q. And your answer was:

"Yes."

A. That is the one I just illustrated.

Q. This is another question asked you by Mr. Bromley:

"Now a switching charge, to which reference has just recently been made, is a part of the freight charge made by the railroad, isn't it?"

And you said:

"That is correct."

4805 What I am getting at, Mr. Lenci, is this: Mr. Bromley's questions were directed to the point that if there was only a $13 f.o.b. mill price specified, he wanted to know whether you could do business on that basis or not, and what I am trying to make clear is on what basis you were answering.

If you were in a state of competition with your other licensees and licensor as in 1928 and 1929, you could operate without having any price fixed, isn't that correct? A. Yes.

Q. Now, when the licensor fixed a price of $13 f.o.b. mill, did you mean that you couldn't operate at all, as a business matter? A. Yes.

Q. Well, wouldn't it have been possible, Mr. Lenci, for you to have sold in any size carload or truck that you saw fit? This is Mr. Bromley's hypothesis. Suppose that the licensor says that your price at the mill is $13. A. Yes.

Q. And he makes no other regulations. Isn't it then open to you to sell in such size truckloads and in such manner as you see fit? A. No, we couldn't operate.

Q. Well, what you are getting at is that you would be running into competition? A. Yes.

4806 Q. And that you couldn't operate, in the sense that you wouldn't be competitive; is that what you mean? A. Yes, we would be automatically tied to a price which would not be competitive.

Justice Jackson: Do you mean that you would lose money selling at that price?

The Witness: You couldn't even get business to lose the money with.

By Mr. Steffen:

Q. What Mr. Bromley assumed is that the price would be fixed as to your company, and also as to each other company, at $13 f.o.b. mill. A. That still wouldn't permit us to operate.

Q. Why not? A. Well, take the extreme. Suppose I am operating with a $13 mill price—

Q. (Interposing) And suppose here is a National plant— A. (Interposing) And that is operating at $13. Now the customer wants to buy a carload of board at your destination.

Q. Suppose I am in Rochester. A. Take it at New York.

Q. All right. A. You are in New York. The cus-

4807 tomer wants to buy. All right. I am tied down to a

$13 mill price, and so are you. Now your cost to him is a $13 mill price plus merely your delivery charge.

Q. That is right. A. He won't buy from me at $13 at my plant, 400 miles away. So I have got to be permitted to be competitive, which the bulletin permits.

Q. In other words, what you are getting at is that in order to be competitive, it was necessary that all these other matters be regulated? A. The bulletins were the means of making us competitive, not the means of making us non-competitive.

Q. That is right. A. Yes.

Q. And in order to make you competitive at any point, it was necessary, for example, to fix a uniform billing weight, was it not? A. Yes.

Q. That is, so that the delivered price would be uniform? A. Yes.

Q. The freight would be based on a uniform rate? That is, the freight charge to the customer would be based on a uniform billing weight? A. Yes.

4808 Q. And that would apply also as to whether it was large or small quantities? A. Yes.

Q. In order to be competitive, each of the licensees would have to agree to sell, or would be told to sell, only in certain quantities, is that correct? A. Yes.

Q. And you mean the same thing, for example, with regard to switching charges, that you would have to agree that the switching charges in Grand Rapids would be so much; is that right? A. No, we didn't agree—

Q. (Interposing) You were told? A. We were told that if there was a switching charge, that would have to be added to the price, if that was the condition existing at that particular point.

Q. And that that was intended to make you competitive with each of your other licensees selling in that same territory? A. Yes.

Q. Now, let's get at this word "competitive". By "competitive", you mean that selling conditions, price and selling conditions, were uniform; is that correct? A. Yes. You start out with a uniform base, the mill price. Now a great many of these matters that are covered in the

4809 bulletins are exceptions, cutting below that base.

Q. For example? A. The one I gave you a few minutes ago, that our price, after we shipped the material to New York, our price back at the mill is much lower than your mill price if you have your plant at New York, which

is a cut below the base price shown in the bulletins, in order to meet the condition existing at the destination due to a local mill being established in that territory.

Q. Well, let me get— A. (Interposing) I am sorry if I don't make myself clear. I am trying to.

Q. I know that. I want to get very clear in my mind as to the meaning of this word "competitive". As I understand it, what you mean is that you start with a uniform price at the mill. A. Yes.

Q. That makes you competitive in that respect with all other licensees, as you understand the term? A. Yes.

Q. And when it is agreed that you shall ship in certain carload lots at carload lot prices, and not at smaller-than-carload-lots at carload lot prices, that makes you competitive as to the size of your shipments? A. Yes.

4810 And when it is agreed or ordered that your trucking will be in 7500 board feet truckloads, and not smaller, that makes you competitive with your other truckers? A. Yes.

Q. And when it is ordered that you can truck only in certain areas at certain prices, that makes you competitive with each of your other licensees? A. Yes. But those, again, are all variations from the basic price established in the bulletin, which is the mill price plus carload freight to destination.

Q. We understand that. A. Do you see what I mean?

Q. Yes. A. Your bulletin starts out with the idea that the price is so much at the mill, plus the ICC freight to destination.

Q. Based on an arbitrary weight? A. Based on the arbitrary weight, if you want to put it that way.

Q. From a designated shipping point or basing point? A. Yes. Then they start and give us these other conditions that enable us to meet competition as we find it existing in other points.

Justice Stephens: What other conditions?

Justice Jackson: To be able to meet the figure of

4811 the fellow closer to destination?

The Witness: Yes. For instance, where he has no freight to pay and we have to pay $5 in freight, that $5 has to come out of our mill price.

Justice Jackson: That has to come out of your mill price?

The Witness: Yes, or we don't do any business.

Justice Stephens: What do you mean by that—it has to come out of your mill price?

Justice Jackson: You can't take it out of your freight, can you?

The Witness: No.

Justice Jackson: And you can't take it out of your trucking?

The Witness: No.

Justice Jackson: And if you are to meet the price, it has to come only out of the mill price?

The Witness: Yes.

Justice Stephens: I should think that would not make you competitive, but would make you take a loss.

The Witness: It would do so, very often, if you want to meet that condition. We do take a loss in a number of our plants.

Justice Jackson: That is what I asked you a few minutes ago, if it meant a loss to you; and you said no, you
4812 couldn't get the business at all.

The Witness: I thought you meant that if we didn't take the business at all, would it mean a loss.

Justice Jackson: Oh, no.

The Witness: That is right.

By Mr. Steffen:

Q. Do I have it clearly in mind, Mr. Lenci, and correctly in mind, that when you say you want to make yourself competitive, you are in effect eliminating competition with your licensees as respects the particular matter?

For example, when you have a uniform billing weight, each of the licensees is going to sell at the mill base price plus freight based on a uniform billing weight, and that makes you competitive, as you say, with each of your other licensees; is that correct? A. That is correct up to that point.

Q. And when you say "makes you competitive", it in effect means eliminating competition, does it not, on the point in question? Let's take an illustration—

Justice Stephens: (Interposing) Let him answer the question.

The Witness: Well, I can't answer that correctly.

Justice Stephens: Answer it as correctly as you can, if you can.

The Witness: Mr. Steffen started to say, "Let's
4813 take an illustration". Our plant is in Wheatland in Upper New York State. When we ship to Washington, our freight is roughly $5 per thousand. The United

States Gypsum Company has a plant in Philadelphia. Their rate to Washington, we will say, is $3 per thousand. They take their mill price and add $3 per thousand, which would make a price down here of $16. Now, we have got to ship and sell to the customer at that price, we can't get $2 a thousand more because our plant is too far away. So in order to be competitive, we have to cut our price $2 to meet that circumstance, and the only place that can come from is out of what is left at the mill.

By Mr. Steffen:

Q. Isn't that exactly what you did, Mr. Lenci, before you had any price fixing at all? A. Yes.

Q. If you wanted to get into the Washington market, you had to— A. (Interposing) We had to—

Q. (Continuing) —you had to take something from the price at one place or another? A. Yes, certainly.

Q. Let's take this question, Mr. Lenci: Suppose that your competitors were making a 1500 pound board, and you were making a 1600 pound board, would it not be possible for you to price your board at, let us say, $13 mill
4814 base price and charge your freight on exactly the weight of your board? A. No.

Q. You would not be able to sell in competition with the others? A. No, sir, of course not.

Q. You would not be competitive? A. No.

Q. And therefore, to make you competitive, or to eliminate any question of competition in that case, you agree upon a weight for the board? A. That gets back to the standard weight in the bulletin, yes.

Q. And by establishing a weight in the bulletin for board, a uniform weight, it will allow each licensee to eliminate any competition based upon the difference in the weight of the board and the freight that would have to be paid upon it? A. Yes.

Q. And isn't that true with respect to trucking, for example—

Justice Stephens: (Interposing) Before you leave that, let me ask a question, to keep myself clear on this situation.

Is there a parallel between those two cases? You have to pay actual freight to the railroad, do you not?

The Witness: Yes.

4815 Justice Stephens: In the previous illustration you were giving?

The Witness: Yes.

Justice Stephens: Despite the fact that an arbitrary rate is fixed in the bulletin?

The Witness: Yes.

Justice Stephens: Each of the companies you are supposing in your illustration have to pay the actual freight rate?

The Witness: Yes.

Justice Stephens: Do you have to pay on an actual weight in the second illustration, or do you pay on a theoretical weight?

The Witness: To the railroads?

Justice Stephens: Yes.

The Witness: It is a weight which is arrived at by the railroads' making periodical weighings of board at a plant, and reaching what they call an average weight agreement, and that varies from time to time.

Justice Stephens: Is it an approximation of actual weight?

The Witness: Yes.

By Mr. Steffen:

Q. Now, let's take the trucking illustration, Mr. Lenci. If there were no regulations as to the size of the truckload, you might find it profitable to ship, say, 5,000
4816 or 6,000 board feet in a truck, might you not? A. Not actually so.

Q. If you had a very good customer who wanted 6,000 board feet, might it not be profitable to ship 6,000 instead of 7,500? A. I don't think it would.

Q. At least, prior to the bulletins you were permitted to do that if you wanted to? A. Yes.

Q. Now let's suppose this situation. Suppose you have, in a town, say, 50 miles away, two dealers; and each of them wants to get, say, 4,000 board feet. You could pool that truck, could you not? A. That could be done, yes.

Q. Could that be done under the bulletins? A. No. The way the bulletins read, the two customers that were on the load, if that did happen, each would have to be the minimum amount.

Q. Each would have to have 7500 board feet? A. If that was the minimum at that time.

Q. It might be profitable to you to ship at one time to two dealers in the same town, or immediate vicinity, in 4,000 foot lots, might it not, if you were permitted to do that?

A. It might be. I don't recall, even, that we did that
4817 before we had the license.

Q. But if you were to do that, and another licensee were not to be permitted to do that, there would be competition between you on that basis, would there not? A. Yes.

Q. And the effect of the bulletin is to make you and your other licensees competitive as to the size of the truckload, is it not? A. Yes.

Q. And by "competitive", you mean that you eliminate any possibility of competition on the basis of additional accommodations or additional aid given by shipping in smaller or different sized truckloads? A. That is right.

Q. I want to take you to page 4743 of the transcript, where Mr. Bromley's question there referred to competitors. He says:

"Didn't you find out, after you had been in operation under the license for a couple of years, that all kinds of ways were being devised by your competitors"—by the word "competitors", you meant primarily competitors not on a price discrimination level, but on a level of getting business by friendship or otherwise? A. Wasn't that referring back to the analysis made by Mr. MacLeish, of the audit?

4818 Q. I think so, yes. It had to do with the violation of minimum terms set by the licensor. A. Yes.

Q. I wanted simply to get at the word "competitors". The word appears at several places in your testimony. A. That means the other manufacturers of gypsum board.

Q. And you didn't mean by that that there was any competition on a price level? A. Well, all of those things affected the price.

Q. Well, I mean, as between licensor and licensees, the effort was to get rid of any competition on the price level, was it not? A. It was to get rid of those violations that did affect the price, yes.

Q. That is right, and to thereby eliminate any competition between licensor and licensees, or the licensees themselves, as respect those so-called violations? A. Yes.

Q. On pages 4754 and 4755, there are still other references to competitors. I will refer you to Mr. Bromley's question at the top of page 4754:

"In other words, if one of your competitors violated his contractual obligations under the license and made an indirect price cut, that fact alone might mean the difference

between your getting the business and his getting the
4819 business, is that right?"

And you said:

"It very definitely did."

A. Yes.

Q. And by "competitors" there, you meant that the competition was on, or should be on, some level other than price? A. Yes.

Q. Your purpose was to eliminate any competition as to price, or anything having to do with price, as regulated in the bulletins? A. Yes.

Q. There are several references on page 4755 concerning—

Mr. Bromley: (Interposing) I don't know what counsel meant when he said, "Your purpose was to"—did you understand the question?

The Witness: I thought I understood it.

Mr. Steffen: That the purpose of the bulletins was.

Mr. Bromley: You didn't say that.

Mr. Steffen: No, I said "your purpose"—that the purpose of the bulletins was to eliminate any matter of competition based upon price or based upon anything having to do with price, the various things that were taken up in the bulletins concerning truckload sizes, and so forth.

4820 The Witness: I thought you were referring to the bulletins. That is the way I understood it.

By Mr. Steffen:

Q. That is what I wanted to get.

On page 4757, Mr. Lenci, there is a reference to the Board Survey, and Mr. Bromley asked you this question:

"Now, there was nothing secret about these complaints, was there, Mr. Lenci, so far as you were concerned?"

And you answered:

"Not a thing."

Then he said:

"And you meant what you wrote to Board Survey, didn't you, when you complained?"

And you said:

"Yes, we certainly did."

When you state there was nothing secret, is that strictly accurate? Isn't it a fact that your complaints to Board Survey were not communicated to the licensee who may have been complained of, that is, your name was not com-

municated? A. I don't know how they handled it, but I thought our name was communicated.

Q. Did you have any complaints made to you by Board Survey which gave the name of the complainant? A. I don't remember whether we did or not. I can't just place any particular complaint.

4821 Q. You are familiar with the form of complaint that was put out by Board Survey? A. Yes.

Q. And you filled those out yourself? A. Yes.

Q. The ones that you received, do you remember whether they had the name of the complainant, or was it simply the Board Survey saying that there was a complaint made against you? A. I don't remember, I don't remember.

Q. I would like to show you Government's Exhibit No. 500 as simply one example of a complaint; also Government's Exhibit 497.

(Government's Exhibits 500 and 497 handed to the witness.)

By Mr. Steffen:

Q. In either of those two exhibits, is there any reference to the name of the person making the complaint? A. No.

Q. Do you recall ever having received a complaint with the name of the person making it, on it? A. What I was trying to remember was if we had any complaints against us when we were using that blank to be filled in.

Q. You don't recall, then, ever having seen the
4822 name of the complaining licensee? A. I don't remember, no.

Justice Stephens: Where are those exhibits that consisted of the complaint form itself, sent out by a complaining licensee?

Mr. Knuff: Exhibits 513-A, 514, and 515. Exhibit 513-A is a complaint by Ebsary to the Board Survey about the Kelley Plasterboard.

Justice Stephens: Exhibit 513-A is a complaint against Kelley Plasterboard signed by Ebsary?

Mr. Knuff: That is right. Exhibit 514 is the answer of Kelley Plasterboard to the Board Survey on that complaint. You will notice that the Ebsary Gypsum Company's name doesn't appear at all on that form.

Justice Stephens: I see.

By Mr. Steffen:

Q. I would now like to take you to your testimony on page 4765, Mr. Lenci. That had to do with exchanges of board, and I think you testified there that it had been the practice, on the part of some people, to go to the Kelley plant and pick up less than the quantity, or of trading boards with the Kelley Plasterboard Company—do you recall that? A. Yes.

Q. At page 4770, you testified that there was no bulletin regulation as to that, as you recalled; is that correct?

4823 A. Yes.

Q. Do you know whether that practice of allowing a dealer to come to a plant and exchange boards has been discontinued? A. I believe it has.

Q. And it was not discontinued by means of a bulletin? A. I don't recall. I don't think it was in the bulletins, I am not certain.

Q. You don't know whether Mr. Henning, or someone from USG, told Kelley to discontinue the practice? A. It probably came to Kelley in the form of a complaint, that he was doing such a thing.

Q. The complaint was made to Board Survey, and came back to Kelley? A. That would be my—

Mr. Bromley: (Interposing) I move to strike out the prior answer as pure speculation.

Justice Stephens: It seems to the Court that it is just a speculation on the part of the witness.

Mr. Steffen: I think that is right, in so far as he said "probably".

Justice Stephens: It may go out.

Tell what you know about it.

By Mr. Steffen:

Q. You don't know as a fact whether any such

4824 complaint was made to Kelley by Board Survey? A. No, I don't.

Q. My attention has been called to the fact, Mr. Lenci, that we didn't conclude the questioning concerning the secrecy, if any, involved in your complaints to Board Survey. Are you prepared now to say that those investigations were entirely open, or were they secret? A. Well, I think that the question gets itself into two parts. You led it along into these formal complaints. But as I recall it, there was some questioning as to any secrecy when we happened

to make the complaints at one of these board meetings. If we had a complaint to make, we didn't make it in secret.

Q. If you made a complaint at these licensee meetings, there was nothing secret about it? A. If we had a complaint about another company, we didn't go over in the corner about it, but stated our case publicly.

Q. But after the Board Survey Company was instituted, the complaints were in writing to Board Survey, were they not? A. Yes.

Q. And so far as you now recollect, you didn't receive, when a complaint was made against you, the name of
4825 the complaining licensee, did you? A. I don't remember, no.

Q. Now, I would like to take you to page 4772, and also page 4779 of the transcript, where you testified concerning splitting commissions. Do you recall that you testified in connection with Dusol, as being on a commission basis either with his brother or with the Kelley plant, or both? A. Yes.

Q. And that there was a regulation opposed to splitting commissions; do you remember that? A. Yes, there is a regulation in the bulletins.

Q. And on page 4779, this question was asked:

"Wasn't it your understanding that the license bulletins of USG did not outlaw commission men, as such, but merely were aimed at prohibiting the practice of splitting commissions with customers to effect a reduction in the price?"

And you answered "Yes.", to that. A. Yes.

Q. I want to show you Government's Exhibit 37, page 936—or page 555.

Will you please read that, Mr. Lenci? A. Yes, sir.

Mr. Steffen: I understand it will be page 555 in Your Honors' sets of exhibits. There were two numberings, and it is confusing.

By Mr. Steffen:

4826 Q. Have you read Government's Exhibit 37, at page 555, Mr. Lenci? A. Yes.

Q. And that explicitly says, does it not, that the licensor will regard the sale of patented board by commission salesmen, without the written consent of the licensor, as a violation of the terms of the license agreement? A. Yes.

Q. And would you prefer now to change your testimony as it appears here on page 4779? A. Well, to my knowledge, I don't know that any complaint or any action was ever

taken against any company which had legitimate men on a commission basis.

Q. But the regulation was about the time Mr. Dusol was operating, was it not? A. No, this is much later.

Q. And the regulation, in terms at least, would provide that licensees might not engage a commission salesman except under the penalty that the licensor would regard any commission paid to commission salesmen as a reduction in price? A. Yes.

Q. This provision that I have cited you, in Government's Exhibit 37, page 555, appears at other points in the license bulletins, I believe, Mr. Lenci, does it not?
4827 A. I am not sure whether it appears exactly in that same form or not.

Q. You were referred, in your direct testimony, to Government's Exhibit 37, page 530, which has to do with rebates and allowances, and also page 531, which has to do with rebates and allowances, and I imagine that is what you had in mind when you made your answer here on page 4779? A. Yes.

Q. The answer on page 4779 seems to say that the only thing appearing in the license bulletins was a prohibition of the practice of splitting commissions where that would effect a reduction in price by way of rebate. And that would be governed by Exhibit 37, page 531. But this exhibit, Exhibit 37, page 555, is a separate and distinct provision, is that correct? A. Yes, but I would take it that that would be modified by the matter on page 531 of the same exhibit. Those paragraphs, that is, the paragraph on page 555 is headed "Allowances, Etc."; and the one on page 531 is headed, "Rebates, Allowances, Etc." I would take it that that superseded the earlier one.

Q. This is a matter of construction, Mr. Lenci. You would have to examine all the license bulletins. There are several provisions. A. It happens in this folder that
4828 you have the later one bound ahead of the earlier one, which is rather confusing.

Q. That is the way they were furnished us, Mr. Lenci.

I want to take you now to page 4782 of your testimony. Mr. Bromley asked you this question, concerning jobbing, warehousing or trucking arrangements:

"Q. But that the only prohibition was that you should not use a warehouse arrangement as a secret or indirect way to lower the price of the board which you were selling to the dealer from whom you leased warehouse space?"

To that you answered:

"A. That is correct."

Now, that refers to this same matter of leasing a warehouse, for a licensee to lease a warehouse at the dealer's place of business, and thereby to possibly effect a rebate, is that correct? A. Yes.

Q. And the effect of your testimony is that the only prohibition in the bulletins with respect to that matter was this Exhibit 37, page 531, having to do with rebates and allowances.

Now I want to show you Government's Exhibit No. 38, page 112.

(Exhibit No. 38 handed to the witness.)

By Mr. Steffen:

4829 Q. It is dated June 30, 1932. Are you familiar with that provision, Mr. Lenci? A. Which paragraph do you mean, the first paragraph?

Q. The second paragraph. A. Yes.

Q. Stating that: "The establishment or continuance of warehouses, consigning of stocks, or extending other than regular terms, with dealers or other buyers will be construed by Licensor as a rebate and in violation of the minimum price where merchandise is sold at the minimum price."

Are you familiar with that provision? A. Yes.

Q. Isn't it a fact, Mr. Lenci, that the matter of warehousing at a dealer's place was discontinued by the industry? A. Well, to my knowledge, there were only one or two cases of that kind.

Q. And they were discontinued? A. One was a matter of complaint, down in Perth Amboy, New Jersey, that we made against the National; and another one, I believe, against the Certain-teed in Boston. Those are the only two that I remember.

Q. And those were both discontinued? A. Those were discontinued.

Q. Do you recall about the time of those two
4830 instances, Mr. Lenci? A. No, but they must have been early in the 30's.

Q. When you testified on page 4782 that the only prohibition was that you should not use a warehouse arrangement as a secret or indirect way to lower the price of the board which you were selling to the dealer from whom you

lease warehouse space, you had in mind, did you not, the rebate provision which is Government's Exhibit 37, page 555?

Justice Stephens: You mean 531, don't you?

Mr. Steffen: Yes, Your Honor.

The Witness: Yes.

By Mr. Steffen:

Q. Your answer is yes, you say? A. Yes.

Q. On page 4788, Mr. Lenci, this question was asked you: "Q. Well, as of this date, the practice of shipping board on consignment was condemned by the gypsum industry as an unfair trade practice, wasn't it?"

And you gave two reasons, as I recall—one, that a shipment might be made to a dealer, and the dealer might dispute, might make a false claim, concerning the amount of board received or the shrinkage, or something of that sort, and that would constitute a possible price cut, as you understood it. A. Yes.

4831 Q. Now let me ask you as to an ordinary shipment today. Is it not possible for the dealer to enter a complaint that his shipment was short, or that there were boards broken in transit? A. Yes, but there is a difference between the two.

Q. What is the difference? A. If you have a shipment to a customer and he complains that the material was short, you have the immediate opportunity of investigating and checking up with him. But in the case of a consignment, the stuff may be shipped 3 or 4 months before, and he has sold a lot of it out in small quantities, and then when he is all finished he doesn't have as much left as his inventory shows, and he says, "Well, your shipment must have been short", and there is no way of checking it up.

Q. And the industry regarded that as very bad business, to ship on consignment? A. Yes.

Q. And that was the reason, then, for having this provision which I have read you, or which you have before you there, Government's Exhibit 38, page 112, the second paragraph? A. Yes.

Q. Your answer is yes? A. Yes.

4832 Mr. Bromley: If he knows.

Do you know what the reason for it was?

By Mr. Steffen:

Q. Would that be your reason? A. That would be my interpretation of it.

Mr. Bromley: I move to strike out the answer, then. This is a provision in our bulletin.

The Witness: This bulletin wasn't referred to until after I got through answering all the questions.

Mr. Steffen: That is right.

Justice Stephens: Read the last two questions. I couldn't hear one of them.

(The record was read by the reporter as requested.)

Justice Stephens: I think the answer should go out, the witness' interpretation of the bulletin. The Court will have to make that.

Mr. Steffen: What is stricken out?

Justice Stephens: Just his interpretation of the bulletin, the statement that this is his interpretation of the bulletin. You are not foreclosed from asking him how the industry regarded the practice or, if he knows, what the purpose of the bulletin was.

Justice Garrett: That would include the previous answer also, because one was the reason, and he answered that, and then after the objection he said that that was his
4833 interpretation; and I take it that they are so connected that the answers to both would go out.

Justice Stephens: That is correct.

By Mr. Steffen:

Q. That would be your understanding of the purpose of the provision, Mr. Lenci? A. Yes.

Justice Stephens: You gave, as I recollect your testimony, also an additional reason, did you not—

Mr. Steffen: (Interposing) I was just coming to that.

Justice Stephens: Thank you. That had to do with the matter of investment, as I remember it.

4834 By Mr. Steffen:

Q. You had a second reason, which was that if one licensee should ship on consignment to a dealer, and another licensee were to sell only on the usual terms, it would be, in effect, giving an advantage to the first licensee, is that correct? A. Yes.

Q. I want to ask you this question—wouldn't it have been possible for the industry to have allowed all licensees to ship on consignment, if they saw fit? A. How did your question start?

Q. Wouldn't it have been possible, as it was prior to 1929, I take it, for the industry to permit any licensee to ship on consignment if he saw fit, so that, to be perfectly fair to any other licensee who didn't ship on consignment it would be open to him to ship on consignment if he saw fit? A. The USG could have made that arrangement if they had wanted to, but we had no interest in consignments.

Q. You didn't want consignments? A. No, in our total business experience we never had but one, and that was so bad we never wanted to do it again.

Q. I was simply getting at the question of fairness. It would have been fair if all licensees had been privileged to ship on consignment, if they wanted to?

Mr. Bromley: I object to that as incompetent
4835 because calling for a conclusion.

Mr. Steffen: It goes directly to the question, your Honor, in which it is stated that it would be an unfair trade practice, and I think his answer is based upon the assumption that some would and some wouldn't.

Justice Stephens: I think it is argumentative, Mr. Steffen, and I think my colleagues agree with me. Whether or not it would have been fair to allow all licensees to ship on consignment is a matter which you can argue to the Court from the testimony of the witness and from the bulletins and from the general circumstances that he has described. Objection sustained.

By Mr. Steffen:

Q. I want to ask you one more question on that. On your shipments to dealers do you take the risk of loss, Mr. Lenci? Loss in transit, I mean? A. No.

Q. That is borne by the dealer? A. Well, as a matter of fact, as to breakage in transit the dealer either files a claim with the railroad or delivers the proper papers to us and we file the claim.

Q. And the railroad always pays? A. Not always, but in most cases, because we try to put in only claims that are fair and can be substantiated.

Q. If the railroads do not pay, who takes the loss?
4836 A. That is a matter of adjustment in each case, adjustment with the customer, in case the railroad does not accept the loss.

Justice Jackson: Did you ever go into court about it where the railroad refused to accept responsibility?

The Witness: No.

By Mr. Steffen:

Q. Do you assume any responsibility with your customer as to loss in transit? A. I say that that is a matter of adjustment in each case.

Q. I mean on some occasions you do? A. On some occasions we have, yes.

Q. Do you regard yourself as obligated to make good any losses in transit? A. Well, usually the customer has the money.

Q. What is that? A. Usually the customer hasn't paid for the goods, which gives him a little advantage.

Justice Stephens: In other words you give a certain amount of discount time and ordinarily the loss would have occurred within that time so that the customer would still have the money, is that it?

The Witness: Yes; usually if breakage has occurred it can be seen as soon as the car is opened.

4837 By Mr. Steffen:

Q. I now come to certain testimony on pages 4804 to 4819, inclusive, beginning at the bottom of page 4804, all of which has to do with the NRA regulations.

Mr. Steffen: I would like at this time to move to strike all of that testimony beginning at the bottom of page 4808, and carrying over to the end of page 4819, upon the ground that it is incompetent, irrelevant and immaterial, and not proper cross examination.

Justice Stephens: Wasn't there a similar motion made heretofore?

Mr. Steffen: I doubt it.

Mr. Bromley: Yes sir.

Mr. Steffen: I would like to call your Honor's attention in this connection, if I may, briefly to the NRA statute, to Section 5 of the National Industrial Recovery Act, which reads this way:

"While this Title is in effect, or in the case of a license, while Section 4(a) is in effect, and for 60 days thereafter, any Code, agreement or license, approved, prescribed or issued and in effect under this Title, and any action complying with the provisions thereof, taken during such period, shall be exempt from the provisions of the Anti-Trust laws of the United States."

That is the provision in the NRA Code, or in the
4838 NRA statutes, which exempted everything done, or anything done by the Code Authority or by the mem-

bers of an industry; from prosecution under the Anti-Trust laws.

The argument, which I should like to have appear as a matter of record, is briefly that in view of that exemption, nothing having to do with what was done under the NRA could or should have any bearing upon this case.

It would be very similar to appealing to Mr. Lenci to ask him what was done in the Standard Sanitary case, and inasmuch as they may have done certain things there, then what they did here would appear to be right.

We therefore ask that those pages of the testimony be stricken.

Justice Stephens: Do you wish to be heard, Mr. Bromley?

Mr. Bromley: Well, I am not quite sure what his present ground is. If it is that we claim exemption in this lawsuit because of what the NRA provides, that wasn't the purpose at all. What I wanted to show was that under the NRA Code, providing as it did an exception to the application of the Sherman Act, it was, for a time, lawful to fix prices, and the manner in which prices were fixed there, and the extent to which terms and conditions and practices were regulated, were as broad, at least, as our price bulletins are.

As I remember that cross examination it was merely to show that there was nothing strange or unusual in
4839 our bulletin provisions because, under the NRA Code, when prices were regulated, they had the same kind of thing, just as they had later under the Coal Act, and just as they had in the General Electric case.

I was trying only to develop, by that cross examination, that point, that all of these bulletin provisions regulated the price and nothing else.

Justice Stephens: It seems to us that the motion to strike presents just the same question upon which we have previously ruled when objection was made to cross examination—and it is denied.

We may add that we do not make any comment as to what weight the reference to the NRA may have, as that is a different question. We were aware, of course, as you called to our attention at the time, that the NRA was ultimately held unconstitutional; and I have always been aware—and I suppose my brothers were too—that there was a provision in the statute for exemption from the Anti-Trust laws.

But I think the purpose of the testimony was as described by Mr. Bromley, and that that is not or was not improper

cross-examination, and my colleagues agree, and therefore the motion to strike is denied.

By Mr. Steffen:

Q. Were you a member of the body which formulated the rules under the NRA Code, Mr. Lenci?

4840 A. Yes.

Q. What position did you have? A. I was a member of the Code Authority.

Justice Jackson: You were what is called an industry member?

The Witness: Yes.

Justice Jackson: Of the Code Authority?

The Witness: Yes.

By Mr. Steffen:

Q. How many members were there, Mr. Lenci? A. There were thirteen; I remember that because I was the thirteenth appointment.

Q. And who were they, can you tell us? A. I can probably tell you most of them.

Justice Stephens: Speak a little louder, please.

The Witness: There was the United States Gypsum Company; the National Gypsum Company; Certain-teed; ourselves; either Newark Plaster or Kelley, whichever was in effect at that time—

By Mr. Steffen:

Q. (Interposing): That would have been Kelley, probably. A. Yes, Kelley; the American Cyanamid; Texas—

Q. (Interposing): Universal? A. Yes; and I think the Pacific Coast Portland Cement was a member.

Justice Stephens: Portland Cement?

4841 The Witness: Yes, the Pacific Coast Portland Cement; the Oakfield Gypsum Products Corporation; French & Company—

By Mr. Steffen:

Q. (Interposing): Who was French & Company? A. They were small manufacturers in Philadelphia.

Q. They were plaster manufacturers? A. Yes. There must have been a couple of others that I don't remember at the moment.

Q. Was the Cardiff Plaster Company a member? A. I am not sure.

Q. Do you know Mr. Sensibar? A. Yes, but I don't know whether he was active then or not.

Q. Who was the secretary of the committee? A. For the moment I can't remember. He was a Chicago man, not an industry man but he was a man picked for the job outside of the industry.

Q. How long did your group deliberate over the Code provisions? A. Well, as I recall it, probably one or two days.

Justice Jackson: After hearings; did you have hearings on them?

The Witness: I was just trying to remember. The reason I hesitate is that it was quite a long while before we got to where we decided that we wanted a Code or
4842 didn't want a Code. We were about a year later than anyone else in getting started.

Justice Jackson: You needed 90 percent of the industry, didn't you?

The Witness: I believe so, yes.

By Mr. Steffen:

Q. You had 90 per cent represented, I presume? A. Yes.

Q. You had practically all the gypsum board manufacturers, did you not? A. Yes, I believe so. I don't remember now just how long the deliberations took.

Justice Stephens: We will take the afternoon recess now.

(Whereupon, a five minute recess was taken after which the trial was resumed as follows:)

4843 Justice Stephens: Proceed, Mr. Steffen.

By Mr. Steffen:

Q. Did you attend many of the meetings, at which the Code for the Gypsum Industry was drafted? A. No, I don't think so.

Q. I think you told me during the recess that you attended some in the beginning, and some at the last, is that correct? A. Personally, I don't think I attended the first meeting.

Justice Stephens: Mr. Steffen, we think perhaps some time could be saved—we don't restrict you, if you wish to conduct an extended redirect examination on this topic the Court will of course permit you to do so—but we can say that perhaps in the interest of saving time, while we won't pass any final judgment on the weight of this NRA testimony, we do not attach any very great importance to it. We thought it was proper cross-examination and still do,

to indicate, or as tending to indicate, that the development of these bulletin practices was perhaps not a strange and unusual occurrence, happening all at once, but something in the nature of an evolution.

It tends to explain them in a way, and we thought therefore, and still do, that it was proper cross-examination.

But we are not treating the proceedings under the NRA as being any res adjudicata for this case, or any exemption or anything of that sort, and I don't think it is offered for that.

4844 As I say, you can go ahead and examine if you want to, but you needn't do so on the theory that we attach any very great importance to that aspect of the case.

Mr. Steffen: I simply wanted to throw as much mud on it as I could, your Honor. (Laughter.)

By Mr. Steffen:

Q. Let me ask you one or two questions, Mr. Lenci, further.

It is a fact, is it not, that most of the regulations that were promulgated as the Gypsum Code, had already appeared in the license bulletins? A. I haven't read the NRA Code for a long time. It is my recollection that that is substantially correct.

Q. For example, on page 4806, there is a question concerning sales on consignment. Mr. Bromley asked you:

"Q. And isn't it a fact, sir, that under the Code, if a member made a sale on consignment to a customer, it was considered to be a violation of his filed prices?"

Now there was provision, was there not, in the bulletins concerning sales on consignment? A. Yes.

Q. We showed you Government's Exhibit 38, page 112, which was promulgated in 1932, covering that. A. Yes.

Q. And the same would be true with regard to gifts by one gypsum manufacturer to a dealer in conjunction

4845 with a sale to the dealer? A. Yes.

Q. On page 4812 of the transcript there is a reference made to warehousing, and I think we have already called your attention to the fact that there was at that time a provision in the bulletins concerning warehousing—that is this same Government Exhibit 38, page 112—that covers that, is that not correct? A. Yes.

Q. At page 4820 of the transcript there was a question asked you similar to one asked you on page 4687, and I will read it to you:

"Now in connection with those questions, I would like to ask you now—did you understand that there was anything in your license contract, or in the bulletins, which provided that USG should raise or stabilize the prices of gypsum board?"

Your answers today, concerning the provision in the licenses as respects stabilizing, were to the effect that the licenses did provide for stabilizing prices, is that correct?

Mr. Bromley: He didn't say that at all.

Mr. Steffen: I am asking him if that is correct.

The Witness: The license, as I understand it, provided that the USG set the selling price.

By Mr. Steffen:

4846 Q. That is right. A. Yes.

Q. And thereby they would stabilize the price? A. Well, that is a conclusion you draw from that.

Q. Well, it would be a uniform price for the industry, would it not? A. Yes.

Justice Stephens: That is at a given time.

Mr. Steffen: At a given time, yes, your Honor.

By Mr. Steffen:

Q. The reason I asked you that question is that you answered Mr. Bromley's question with a "no". A. I think maybe I misunderstood Mr. Bromley, but I understood the question to be—was there an agreement to stabilize conditions in general by these licensees? How does the question read?

Q. I will read it to you:

"Now in connection with those questions, I would like to ask you now—did you understand that there was anything in your license contract, or in the bulletins, which provided that USG should raise or stabilize the prices of gypsum board?" A. I said "no" to that, didn't I?

Q. Yes, you said "no". A. There was nothing in there that they should raise the prices, they were to fix the price.

Q. It says "raise or stabilize" there. And if they
4847 were to fix the price, would not that have the effect of stabilizing price conditions? A. Naturally.

Q. So that your answer should be "yes" as respects that, shouldn't it? A. It is a double question.

Q. That is right. A. I would say "no" to one part of it and "yes" to the other.

Q. That is what I wanted you to say, if that wasn't the fact.

On page 4838, Mr. Lenci, this question was asked:

"Q. And what was your attitude during these years with respect to the Kelley-Structural relationship generally, if you can tell us?"

And you answered:

"A. We had a feeling right along that Kelley was giving Structural a very much larger distributors' discount than was permitted by the bulletins."

At that time, Mr. Lenci, was it your opinion that a patent holder could require control of the resale price by a distributor— A. (Interposing) At what time was that?

Q. I will have to get you the connection. It is Exhibit No. 440, and I will show you the exhibit.

4848 (The witness was handed a copy of Government's Exhibit No. 440 for examination.)

By Mr. Steffen:

Q. What is your answer now, Mr. Lenci? A. I had that understanding in my own mind until sometime in the early 30's. Whether it was before or after the date of this exhibit, I don't know, unless my memory can be refreshed in some way.

Q. You testified, I might say, at the criminal trial, at page 563 of the transcript, that it was sometime in 1933. Does that refresh your recollection? I will show you the transcript.

(The transcript of the criminal trial referred to was handed to the witness for examination.)

Mr. Bromley: What was that page?

Mr. Steffen: Pages 563 and 564, I think.

The Witness: Well, as I say, I believe it was early in the 1930's, it might, quite possibly, have been at that time.

By Mr. Steffen:

Q. In 1933? A. Yes.

Q. You will note that Government's Exhibit 440 is dated June 9, 1932. A. Yes.

4849 Q. So that you would say, would you, that at that time you expected that the licensor could control the sales and terms and conditions of sale, by Structural to its dealers? A. I believe so.

Q. On page 4846, Mr. Lenci, you testified that for a period your company sold the Structural Gypsum Company, is that correct? A. Yes.

Q. And your attention was called to the various practices which the Structural Gypsum Company had been engaged in, in its sales, and then this question was asked:

"Q. And they continued their sales practices and policies during that time just as they had existed prior thereto?"

And you answered: "A. That is right."

Is that correct?

A. Well, what comes ahead of that? I am not sure just what I am answering, all of it.

Q. I will show you your testimony beginning at page 4845, and carrying over to page 4846.

(The transcript referred to was handed to the witness for examination.)

The Witness: Yes, that was my answer.

By Mr. Steffen:

Q. What I want to get at is just what practices you had in mind. Did you have in mind, for example, that
4850 they continued the practice of having a dealer in their warehouse? A. I am just trying to find out what the practices are that you referred to.

Q. That is what I want to find out. A. It must have been somewhere prior to this.

Q. Can you answer as of the fact, did they continue to have a dealer in their warehouse? You remember that incident, don't you? A. No, they didn't have a dealer in their warehouse while they did business with us.

Q. And did they deliver directly to the job, to the contractors in Philadelphia, for example? A. No, I don't think we ever had any complaint as to that.

Q. And did they sell, to your knowledge, below bulletin prices to dealers? A. I think they did.

Q. In any amount, after you were selling to them? A. Yes.

Q. Did you make a complaint as to that? A. I didn't learn about it until long afterward.

Q. I see. You are not positive that they did undersell or cut the bulletin prices, are you? A. Yes, I think it is a matter of record in the criminal trial.

4851 Q. At the time that you were selling them, that they did so? A. I believe so, I think Mr. McCormick so testified.

Q. And had you known about it you would have made a complaint? A. I believe we would have, because they were in the same markets that we were in.

Q. But you would say that excepting for that one illustration, they have abided by the bulletin prices, while you were selling to them, as far as you know? A. His testimony was a general admission that they had done it in a number of cases.

Q. I don't wish to go into that. We are going to call Mr. McCormick as a witness. I would like to have your knowledge. A. As I say, I got that knowledge later, I didn't know it at the time, but I did find it out two or three years later.

Q. It is strictly hearsay, then. So far as you know—please answer this—they have followed the bulletin prices excepting for those statements that you say Mr. McCormick made at the criminal trial? A. So far as I know.

Q. And on page 4847 there is a question as to whether you ever refused to sell Structural at any time, and you answered "no", is that correct? A. That is correct.

4852 Q. And the next question was:

"Q. Did you ever threaten them that you would refuse to sell them?"

And you answered:

"A. No."

A. That is correct.

Q. If they had been selling board in the same markets that you were, at less than bulletin prices, would you have continued to sell them?

Mr. Bromley: I object to the question "at less than bulletin prices"—these people didn't get the bulletins. I think that assumes a fact not in evidence. They weren't licensees, they weren't entitled to the bulletins, and never got them.

Mr. Steffen: I will strike the word "bulletin".

By Mr. Steffen:

Q. If you had known that Structural was selling at prices lower than yours, would you have continued to sell them? A. I don't know, I couldn't tell you.

Q. You never had that come up? A. The one instance was the case of Stremble that we discussed quite a while ago, where Stremble was rebating.

Q. And Mr. Stremble was fired, was he not? A. Not at our request.

Q. No, but he was fired? A. Yes.

4853 Q. The same question was asked you on pages 4855 and 4856, with regard to the Connecticut Adamant Plaster Company, as follows:

"Q. Did you at that or any other time ever threaten to stop selling gypsum board to the Connecticut Adamant Plaster Company?"

And you answered:

"A. No."

Is that correct? A. That is correct.

Q. Did you have any knowledge that the Connecticut Adamant Plaster Company sold at prices lower than your prices, to dealers in the same territory where you were selling? A. No, I had no knowledge at all, because we were not selling in that territory.

Q. Did you have any arrangement with the Connecticut Adamant Plaster Company as to where they would sell? A. No.

Q. Did they sell in Bridgeport, for example? A. I don't know.

Q. Were you selling in Bridgeport? A. At that time I don't think we were. That is ten or twelve years back, and I don't remember.

Q. Did you discontinue sales to the Connecticut Adamant Plaster Company? A. They discontinued buying
4854 from us, we didn't stop selling them.

Q. And was there any discussion that you recall as to whether they might sell in Fairfield County, or Bridgeport? A. No.

Q. As you recall. A. There was no limitation on our part.

Q. Now on pages 4856, 4857 and 4858, the matter of commission men was brought up, and again you referred to your salesman, Mr. Parker, and also to Mr. Blanchfield.

On page 4858 Mr. Bromley asked you the broad question:

"Q. You now say, do you, that it was your understanding that no licensee had to discharge these commission men, and that their only obligation was to see to it that they did not rebate on the USG fixed prices by the device of splitting a part of their commission with the customer of the licensee?"

To which you answered that that was your understanding. A. Yes.

Q. I call your attention to Government's Exhibit 37, page 555, and I ask you whether that was in your mind at the time that you gave that answer? That is on page 555, Mr. Lenci, in the last sentence; particularly.

(The witness was handed a copy of Government's Exhibit No. 37 for examination.)

The Witness: What I am trying to remember is—
4855 this bulletin was in effect in 1936, and I am not sure whether this man Parker, whether this Parker episode, wasn't a few years later than that.

By Mr. Steffen:

Q. Well, this bulletin, in effect in 1936, continued to be in effect, did it not? A. Only until the next one came out.

Q. Unless the next one changed it? A. No, each bulletin entirely superseded the previous bulletin.

If you will look at page 543 of that exhibit you will see that at the top it reads, "This cancels Bulletin No. 5". Each one, as it came along, canceled in full the previous bulletin.

Q. You don't recall just when Mr. Parker was employed by you? A. No, I do not.

Q. This same bulletin, Government's Exhibit 37, page 555, appears also in Government's Exhibit 37 at page 535, which is dated February 24, 1937. So that during the period from February 22, 1936, until sometime after 1937, this bulletin was in effect? A. Yes, but what was the bulletin in effect prior to 1936?

Q. We can check that also. You don't have any
4856 recollection as to that? A. No, because they changed from time to time, and I am not sure of just the time that Parker was employed.

Q. Had Blanchfield been with you long? A. Blanchfield was with us for probably four years, four or five years.

Q. What years were they? A. Well, I am just making a guess at this, but I would say probably from 1935 to 1940, or somewhere about that time.

Q. I call your attention to the fact that this same bulletin, which I have called your attention to already, appeared in Government's Exhibit 37 at page 559, which was issued on September 16, 1935. So that the bulletin was in effect over a period of at least three or four years.

Justice Jackson: Is there a question?

By Mr. Steffen:

Q. May I ask this question. How was Mr. Blanchfield paid? A. Mr. Blanchfield was paid a substantial salary, and then a bonus for sales above a certain amount.

Q. At the end of the year? A. Yes. He had a fixed salary each month, and then if his commissions were running substantially above that, he could draw part of that as he went along.

Q. How was Mr. Parker paid when he was with you? A. Parker was with us only a couple of months, two or
4857 three months.

Q. How was he paid? A. Just a nominal salary, and commission.

Q. Practically a straight commission basis, then? A. Yes, practically.

Q. Does the industry draw a distinction between a man who is strictly on a commission basis, and one who is on a substantial salary with a bonus at stated intervals? A. I don't know what the practice is with the industry in general, but that was the way we felt about it.

Justice Stephens: What do you mean by that, that there was a difference?

The Witness: We would say that there was a great difference between a man who had a substantial salary and a bonus, and one who was purely a commission man with practically no salary.

By Mr. Steffen:

Q. So as you would construe this provision, it would not apply to a man who was on a straight salary plus bonus? A. No.

Q. At page 4863, Mr. Lenci, this matter of jobbers comes up again. The first question is:

"Q. You said that there came a time when USG, in its price bulletins, eliminated the jobber's discount, and fixed the price to jobbers at the same figure as the dealer's
4858 price, didn't you? A. Yes.

"Q. And you have told us, I believe, that you never knew of any understanding or agreement with USG, or anyone else, at any time, that this would be done? A. They did it on their own initiative, and notified us through the bulletins."

Do you remember that? A. Yes, that is correct.

Q. Now, this morning you read some of your testimony before the grand jury at which the matter of the jobbers being eliminated was taken up and discussed, and would you say, in the light of that testimony which you read this morning, that there was a time at which there was a discussion, and a substantial agreement, that jobbers were to be eliminated from the industry?

Mr. Bromley: I object to that question as assuming facts not in evidence. That is not a correct summary of his grand jury testimony at all.

Mr. Steffen: I didn't intend to summarize it, but I thought it would refresh Mr. Lenci's recollection.

Justice Stephens: Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice Stephens: I don't think the question as-
4859 sumes to state what the grand jury testimony was; it simply refers to it, Mr. Bromley. So that objection is overruled.

By Mr. Steffen:

Q. Can you answer that, Mr. Lenci? A. As I tried to explain, when these matters like the matter of jobbers came up, we would express our views and our understanding, whatever it was at the time, and the USG took those into consideration and drew their own conclusions, and made up their own mind and issued the bulletins.

Q. That is true, but the bulletin had been issued in 1930, and then the jobbers had continued with some licensees, had they not? A. Yes, and after the 1930 bulletin these discussions as to jobbers came up, with the licensees complaining about what the companies were doing with jobbers, that is, continuing to sell them at a discount.

Q. And was there an occasion at which you licensees met, and at which Mr. Henning was present, at which he said, "We can close them out"? A. I don't remember that exact wording.

Q. Was there substantially that statement made by Mr. Henning? A. I don't remember that, I know it is in the grand jury minutes that I read this morning, but I honestly don't remember it at the present time.

4860 Q. That was your testimony before the grand jury. A. I know it was, yes.

Q. Now on page 4873, the question was asked you concerning whether distributors were to be regarded as jobbers, this question being put by Mr. Bromley:

"Q. Well, so far as the bulletins were concerned, Mr. Lenci, the only term ever used in them was 'jobbers', isn't that right?"

And you said: "A. Yes."

And then the next question was:

"Q. Neither the term 'broker', nor the term 'distributor', according to your best recollection, was ever used in a USG price bulletin, was it? A. I am very sure that the term 'broker' was never used, and I don't think the term 'distributor' was used, except in connection with 'manufacturing distributors'."

I want to show you now Government's Exhibit No. 430.

(Government's Exhibit No. 430 was handed to the witness for examination.)

By Mr. Steffen:

Q. You will notice the middle paragraph, Mr. Lenci, please? A. Yes, I see it.

Q. That is a reference to distributors, is it not? A. Yes.

4861 Q. As well as jobbers? A. Yes, jobbers and distributors.

Q. Putting them in substantially the same category? A. Yes.

Q. And Mr. Bromley's assumption in his question to you on page 4873, that the bulletins do not mention "distributors", would be incorrect? A. Yes.

Justice Jackson: Is this a bulletin, this exhibit?

Mr. Steffen: Yes.

By Mr. Steffen:

Q. There was some testimony, Mr. Lenci, on page 4894, which is not quite clear to me, having to do with Maftex. Do you remember having testified concerning that? A. Yes.

Q. Mr. Bromley asked you this question:

"Q. Now so far as you were concerned, it was the fact, wasn't it, that National could sell Maftex at any price it wanted to?"

And you said:

"A. Sure.

"Q. The thing that you objected to was their practice of selling it below their current market price in order, in that fashion, to effect an indirect rebate on the price of the gypsum board? A. That was my complaint."

4862 Now I cannot understand that, Mr. Lenci, because it seems to me to say, on the one hand, that you can sell Maftex at any price you want to, and on the other hand to say that you can't sell it at any price you want to, if you are selling it in conjunction with board because that would effect an indirect cut in price. How do you explain that? A. Well, the National Gypsum Company at that time was selling Maftex through that particular territory at about a certain price, I don't remember what the price was. But they suddenly made a very much lower price to this particular dealer in order to influence the sale of gypsum board.

Q. And you made a complaint about it? A. Yes.

Q. In other words, you were complaining that they should not be privileged to sell Maftex at a lower price if they were

going to thereby effect a reduction in the price of gypsum board, is that correct? A. That was my complaint.

Q. And the two statements simply won't stand up then, I mean they are inconsistent with each other. Your first answer was that they were privileged to sell Maftex at any price they wanted, and your second answer was that they were not privileged to sell it at any price they wanted to if—

A. (Interposing) Wait a minute. There is nothing
4863 that I know of that prevents them from selling Maftex at any price they want to; but, if they take that price and reduce it to a price much lower than they usually sell it at, in order to influence the sale of gypsum board, that is a separate question, and I think I answered it properly.

Q. And you make the complaint that if they do that it will be regarded as a cutting of the price of gypsum board? A. Yes.

Q. Now on page 4894 we come to the Structural sales again, and the fact that in 1932 Structural was reported to have made an arrangement whereby they had a dealer locate himself at Structural's plant. The testimony was as follows:

"Q. Well, let's see, Kelley had the permission of the licensors to sell a distributor at a discount only if the distributor were acting as a wholesaler and not a retailer, isn't that right?"

Q. Your answer was:

"A. That is true, yes."

Now, are you real sure that that is correct, Mr. Lenci? A. Well, they had the permission to sell the Structural Company as a manufacturing distributor, not as a retail dealer.

Q. That is right. A. At a discount.

Q. And you mean by that to say that USG, the licensor, had granted to Kelley authority to sell to Structural only if Structural sold at wholesale? A. As a manufactur-
4864 ing distributor, yes.

Q. That is, sold to dealers? A. Yes.

Q. If Structural sold to retailers, then your understanding is that that was contrary to the arrangement between the licensor and Kelley? A. Yes.

Q. That they were limited to one class of customer? A. Yes.

Q. Is that your understanding also with regard to the Connecticut Adamant Plaster Company, that they should only sell to dealers? A. I would say it would be the same thing.

Q. And the same would be true of Oakfield? A. Yes.

Q. That they might not sell to but one class, that is, to dealers? A. Yes.

Q. Do you know as a fact whether Connecticut Adamant has sold at retail? A. I don't know enough about their business to answer that.

Q. Now on page 4902, Mr. Lenci, another Structural situation was brought up. The question at the bottom of the page is:

"Q. That is something you said you brought up at
4865 the licensee meeting of December 13, 1932? A. That is right.

"Q. Now, when you said 'Kelley to straighten out at once', didn't you mean merely that Kelley was to find out whether, as a matter of fact, Structural had changed the character of its business to the extent indicated? A. Yes.

"Q. You didn't mean, did you, that Kelley was to straighten it out by coercing or compelling Structural to go out of the dealer business? A. We couldn't expect him to do that."

You testified a few moments ago—and this occurred by the way in 1932—that up until sometime in 1933 you had thought it was within the province of the licensor to see that his products were sold not only by licensees, but by distributors, at bulletin prices, and according to bulletin conditions. Would you care to change your testimony upon that point? A. Well, isn't there something in my testimony—something in what you just showed me a few moments ago, in one of those records—that shows I was enlightened sometime in 1932?

Q. 1933 was your testimony in the criminal trial. A. I know I made the statement that it was 1933 at that time, but it seems to me that someone cleared that up—

Justice Jackson: (Interposing) Didn't you say here a few minutes ago that it was in the early 30's, possibly in 1933?

4866 The Witness: Yes, but I think there is something else that is more definite in the record that was shown me a little while ago, but I was not asked about it, and so did not mention it. It showed that it was in 1932 that I found that out. I think it was in response to a question by Mr. Bromley.

Justice Stephens: You mean in the record in this case?

The Witness: Yes.

By Mr. Steffen:

Q. Can you say, Mr. Lenci, that in point of fact you did expect something to be done about the Structural situation? A. We expected that Kelley would check up and not continue what we thought he was doing, and that is, giving a commission to Structural and allowing them to do all these different things they were doing at that particular time.

Q. Your statement in Exhibit 479 was, "Kelley to straighten out at once". Did you not understand by that, that Kelley was to make sure that Structural was selling at proper prices? A. I think this had to do with the establishment of a dealer there.

Q. That is correct. A. Yes. We expected Kelley to see that the Structural Company did not become a dealer, a retail dealer.

Justice Stephens: We will take the afternoon recess at this time.

4867 (Thereupon, at 4:00 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Tuesday, March 21, 1944.)

4868 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Tuesday, March 21, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4871 Justice Stephens: We seem to have had a surplusage of "thats" in this case.

Page 5135, after the word "any" at the end of line 14, add the word "final".

I have one or two questions I would like to ask, that perhaps can be cleared up by further examination. These occurred to me while I was reading the transcript.

On page 5056, the question commencing in line 5:

"Q. I call your attention particularly, Mr. Lenci, to Exhibit 405, and the quotation of $17.50 per thousand, f. o. b. mill. That price, Mr. Lenci, was for the covered-edge board if and when you got into production, was it not? A. Yes.

"Q. I think you testified concerning that on pages 4671 to 4679 of the transcript.

"That price of $17.50, Mr. Lenci, was the same price as the price for No. 2 grade wallboard, was it not?"

Did the witness mean, by "No. 2 grade wallboard", seconds? If not, I would like to have that cleared up when he takes the witness stand. I didn't quite understand what he meant by that.

Then there were a number of questions I had in the afternoon session. Pages 5101 and 5102—not to take too much time or to put too much into the record, I call attention of counsel to the answer commencing at line 3 and ending at line 9, on page 5101; and on page 5102, to the answer commencing at line 8 and ending at line 10; on page 5105, to the answer, or that portion of the answer commencing at line 4 and ending at line 7.

4872

I am still somewhat puzzled as to the testimony on that subject. I wanted to ask the witness whether or not what he meant finally was that the result of the bulletins was to

make the price uniform but not the profit. He talks about a cut below the base price shown in the bulletins, at page 5101. His testimony isn't entirely clear to me yet.

Then in Exhibit 37, page 555, the provision with respect to commissions,—I wanted to ask: How does the mere selling through a commission salesman accomplish a rebate or an allowance? There were two provisions in these bulletins with respect to commissions. One had to do, in terms, with rebates; the one I am now referring to made merely a reference to selling through commission salesmen at all.

I want it explained how the mere selling through a commission salesman would accomplish a rebate or an allowance, unless he made some actual payment out of his commission over to the customer.

Then I would like to have my recollection refreshed in respect of page 5153, as to what Maftex is. I have forgotten.

Perhaps those matters can be brought out by the witness on further examination on redirect, or on cross-examination.

4873 Mr. Knuff: Your Honor, in connection with the correction made at line 21, page 5129, I have checked that with the National Industrial Recovery Act, and it should read "* * * and in effect under this Title," rather than "* * * and effective under this Title,".

Justice Stephens: It may be so corrected.

Mr. Bromley: Could I say at this time, so I am clear as to what is in Your Honor's mind, that there never was a time when both provisions were in a price bulletin. That is to say, in the early days there was this language which said that the licensor will regard the employment of a commission salesman as a violation of the license; and that was changed to make it say specifically that it was a rebate of commissions paid to the salesman.

Justice Jackson: Was it changed back again?

Mr. Bromley: No, the wording was changed.

Justice Jackson: I thought the witness' attention was called to a bulletin of 1937 which still contained that.

Mr. Bromley: That change was not made until 1939, that is right, sir.

Justice Jackson: I thought that condition existed from 1935 to 1937.

Mr. Steffen: That is our understanding.

Justice Jackson: That is what I got from the evidence yesterday, but of course those things should speak

4874 for themselves, you have them here.

Mr. Bromley: I have looked at the bulletins, and I am confident that the provision which had the language about employing commission salesmen continued right up to 1939, and then it was changed to prohibit the splitting of a salesman's commission, it was clarified.

Mr. Steffen: I don't wish to be bound exactly by Mr. Bromley's statement. I think the record will show. But certainly up until 1939, the provision that we speak of obtained.

Justice Jackson: Is that correct, Mr. Bromley?

Mr. Bromley: That is right.

Justice Jackson: And subsequent to 1939, it was just the splitting of commission?

Mr. Bromley: Yes, Your Honor.

Justice Jackson: That is right, is it, Mr. Steffen?

Mr. Steffen: We don't concede that, Your Honor.

Justice Jackson: But you do agree that up until 1939, there was a prohibition against employing salesmen on a commission basis?

Mr. Steffen: Yes, Your Honor, we insist upon that.

Mr. Bromley: Of course, my contention is that the earlier wording, which lasted up until 1939, was merely a prohibition against splitting commissions, whatever it said, and it was so understood in the industry that that was the

4875 intent and purpose of it. But there was a change in the expression of it in 1939.

Mr. Steffen: It might say on that that our contention is the reverse, and the effect was actually to eliminate commission salesmen.

Justice Stephens: I should think that ought to be cleared up, as to what the understanding in the industry was, if it isn't already cleared up in the record.

Take the witness stand, Mr. Lenci.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Redirect Examination (resumed)

Mr. Steffen: I will try, Your Honor, to clear up the matters that you spoke of just now.

By Mr. Steffen:

Q. On page 5153, Mr. Lenci, there was a reference to Maftex. A. Yes.

Q. National, I believe, was selling Maftex in conjunction with board, and there was a complaint made that they were reducing the price on Maftex; do you remember that? A. That is right.

Q. What was Maftex? A. Maftex is a wallboard
4876 made, as I understand, of a shredded wood fiber product, similar to Celotex and boards of that type. It is what is known in the trade as a fiber board or an insulation board.

Justice Stephens: Thank you, that refreshes my recollection. I remember you testified to that before.

The Witness: It is not a gypsum product.

By Mr. Steffen:

Q. Maftex would not be the type of thing that could be shipped in a mixed car, is that correct? A. No, they would not be made at the same plants.

Q. It wouldn't be regarded as a gypsum product? A. Not at all.

Q. Now I would like to show you, Mr. Lenci, Exhibit 405.

(Exhibit No. 405 was handed to the witness.)

By Mr. Steffen:

Q. You testified on page 5056 of the record concerning the No. 2 grade wallboard as being sold at a price of $17.50 per thousand feet. A. Yes.

Q. And I think the Presiding Justice would like to know what the difference is between No. 2 grade wallboard and seconds, or what the difference was at that time? A.

Well, the No. 2 grade was a board which was not
4877 strictly up to the standard of a first-grade board as to exact measurements, exact quality of the paper, and certain details of that kind. It didn't affect the structural qualities of the board at all, but it was not quite first-class, so it was known as a No. 2 board.

Justice Stephens: It differed from seconds, then, as I remember your previous testimony, in that the seconds did come up to all specifications so far as measurements were concerned, but might have some slight imperfections which couldn't pass inspection; is that right?

The Witness: No, that is the No. 2 board. You are describing the No. 2 board. It was deliberately made as a slightly cheaper board.

The seconds were boards which were not up to quality, not through intention but through defects which were not intentional. And they were put out as seconds.

Justice Stephens: That is what I had in mind myself—perhaps I didn't express myself clearly—that the No. 2 grade was intentionally made.

The Witness: That is correct.

Justice Stephens: At a little less than the requirements for No. 1.

The Witness: That is right.

Justice Stephens: But seconds were accidentally imperfect.

4878 The Witness: That is correct.

By Mr. Steffen:

Q. The No. 2 grade sold in competition most clearly with the open-edge board at that time? A. Before the granting of the 1929 license, you mean?

Q. That is right. A. Yes.

Q. Seconds, I think you testified, are no longer on the market? A. That is correct.

Q. They are cut up into plasterboards or into odd sizes? A. If there are any, they are cut up into smaller sizes.

Q. And sold in that fashion? A. Yes.

Justice Stephens: How was it that the open-edge and the No. 2 of the closed-edge sold at approximately the same price or competed with each other, since one was a closed-edge and the other an open-edge board?

The Witness: The No. 2 board was made by the companies who were making closed-edge board, and that was put out to sell at a lower price than their standard board in order to meet the competition of the companies who were deliberately making only open-edge board.

4879 Justice Stephens: I see.

By Mr. Steffen:

Q. Now there were some questions that the Presiding Justice had concerning your testimony on pages 5101, 5102 and 5105. Do you recall, Mr. Lenci, that we were discussing the situation where you were given a $13 base price? A. Yes.

Q. And the testimony had to do with the other matters, such as billing weights and sizes of shipments and trucking areas, and so on, which I think you testified were prescribed in order to make your company and the other licensees competitive with each other; is that right? A. Yes.

Q. And on page 5105, you gave an illustration. I will read it to you to get your memory refreshed. It begins at line 21 on page 5104:

"The Witness: Mr. Steffen started to say, 'Let's take an illustration'."—do you remember that? A. Yes.

Q. (Continuing). "Our plant is in Wheatland in Upper New York State. When we ship to Washington, our freight is roughly $5 per thousand. The United States Gypsum Company has a plant in Philadelphia. Their rate to Washington, we will say, is $3 per thousand. They take their mill price and add $3 per thousand, which
4880 would make a price down here of $16. Now, we have got to ship and sell to the customer at that price, we can't get $2 a thousand more because our plant is too far away. So in order to be competitive, we have to cut our price $2 to meet that circumstance, and the only place that can come from is out of what is left at the mill."

Do you remember that? A. Yes.

Q. Now the Presiding Justice's question is whether the effect of that is to make a uniform price to the dealer, but thereby to cut your profit in selling in Washington. Is that correct? A. That is correct.

Justice Stephens: In other words, what you mean by being made competitive, and what you mean by the necessity of being made competitive, is that you can't sell in the market unless you can sell, at a particular destination, at the same price that other manufacturers sell at?

The Witness: That is correct.

Justice Stephens: And in order that the price may be the same, these various adjustments and bulletin arrangements were made; but the particular manufacturer, if he were located at a disadvantageous distance—now that we are talking in terms of freight rates—has to meet that by taking a cut within his own manufacturing costs?

The Witness: That is correct.

4881 Justice Stephens: I see. I wasn't quite sure about that.

The Witness: What I was trying to explain was that these bulletins permitted us to go below the base price in order to allow us to meet competition at the destination.

Justice Stephens: What puzzled me was the use of the phrase "cut below the base price". I had it in my mind that the base price was a fixed price. What you meant was that although that was the price on which you commenced figuring, in order to get the destination price, nevertheless

you, in order to reach that destination price in competition with other manufacturers, had, in some situations, to take actually less profit than you otherwise would; that is, you had to take it out of your manufacturing costs?

The Witness: That is correct. We called it a freight absorption, and the amount we absorbed out of the freight would come out of your net price at the mill.

Justice Stephens: Thank you.

By Mr. Steffen:

Q. And the freight absorption is going to be different for each manufacturer shipping into a given territory? A. That is correct.

Q. The basing point system, by providing that you will use a fixed mill price at a given mill, plus freight from that mill to the destination, operates to make a uni-
4882 form price at destination, does it not, for all licensees? A. It has that effect, yes.

Q. And that may not have much relation to the profit of a particular mill selling in that territory, is that correct? A. It has a great effect on the profit.

Q. I think you are right on that. What I mean to say is that the profit will vary with different manufacturers shipping into that territory? A. It may vary or it may disappear entirely.

Justice Stephens: That is, the profit may vary, assuming that their manufacturing costs are relatively the same?

The Witness: Yes.

Justice Stephens: I suppose, actually, manufacturing costs do vary to some extent from plant to plant, depending upon efficiency of methods?

The Witness: Naturally.

By Mr. Steffen:

Q. The licensee who happens to be near the market,—as in this case USG, at Philadelphia, being closer to Washington than your company,—would have an advantage, so far as profit is concerned? A. The USG company would have the advantage, that is correct.

Q. And, conversely, if they were selling closer to
4883 your mill, you would have an advantage so far as profit is concerned? A. Yes.

Q. But so far as the customer is concerned, he pays a uniform price? A. Yes. It gives him the option of buying from a number of people instead of just the one that is in the market.

Q. But always at the same price? A. Yes.

Mr. Steffen: Your Honor asked concerning Exhibit 37 at page 555.

I would like to have Mr. Lenci look at that exhibit.

(Exhibit No. 37 handed to the witness.)

By Mr. Steffen:

Q. Will you look, Mr. Lenci, at the last paragraph, the last full paragraph on page 555? A. Yes, sir.

Q. This happens to be the bulletin issued, I think, on February 22, 1936. We have other bulletins which read the same way, Mr. Lenci.

Now I would like to ask you one question, if you have completed reading that, Mr. Lenci. A. Yes.

Q. The question is raised as to selling through
4884 commission men, and I think you testified that there was a danger, in selling through commission men, that a commission man might share or split his commissions with the purchaser? A. That is correct.

Q. If that were done wrongfully, that would constitute a rebate or a cut in price? A. Yes.

Q. Now, the Presiding Justice asked the perfectly obvious and reasonable question: If the commission man is honest, then there would be no rebate to the customer, would there? A. No, that is correct.

Justice Stephens: Perhaps the record ought to show—I am sure you didn't intend to misquote me—that I didn't ask the question whether or not there would be a rebate if the commission man was honest. What I asked was how the mere selling through a commission man, as such, would accomplish a rebate.

Mr. Steffen: Well, I perhaps jumped to a conclusion there, Your Honor.

By Mr. Steffen:

Q. Could you answer the Presiding Justice's question, Mr. Lenci? That is, how does the mere selling through a commission salesman, or how could the mere selling through a commission salesman, accomplish a re-
4885 bate? A. I don't think that it could. I never felt that this paragraph was a correct thing to be in the bulletin.

Q. Well, that is another matter. A. That, we had nothing to do with.

Mr. Steffen: Does the Court have any further questions?

Justice Stephens: No, thank you.

By Mr. Steffen:

Q. Mr. Lenci, at page 4911 of the transcript, this matter of the sale of board in conjunction with plaster was brought up again by Mr. Bromley, and I will read you, in order to refresh your recollection, the two or three questions asked:

"Q. Now, in connection with these Exhibits 489 to 501," —and may he be shown those exhibits, please?

(Exhibits 489 to 501 handed to the witness.)

By Mr. Steffen:

Q. (Continuing) —"Mr. Lenci, you understood that USG was not attempting to fix or control your plaster prices, didn't you? A. Yes, sir.

"Q. And you at all times felt perfectly free to charge for plaster any price that you saw fit, didn't you?"

And your answer was: "A. Yes."

Exhibits 489 to 501 have to do with complaints 4886 against your company? A. Yes.

Q. And the complaint is that you may have been selling plaster below the prevailing prices, to influence the sale of board?

Mr. Bromley: I don't think that that is a correct summary of the complaint at all. It is just the reverse, that you were cutting the board price by cutting the plaster price.

By Mr. Steffen:

Q. Will you state what the complaint was, Mr. Lenci? A. Well, Exhibit 489, the last paragraph of the Board Survey letter reads:

"Please advise in detail as to your sales of patented board to this firm, and specifically advise us of any donations or credits made in conjunction with your sales of said board."

Q. I see.

You construed that as an inquiry as to whether or not you were selling or giving away other articles in conjunction with the sale of board? A. Yes.

Justice Stephens: What are those other exhibit numbers?

Mr. Steffen: They are 489 to 501, I believe, Your Honor.

Justice Stephens: Thank you.

4887 By Mr. Steffen:

Q. In general, Mr. Lenci, these complaints have to do with the prices at which you were selling plaster, although as Mr. Bromley points out they may also have had to do with the prices at which you were selling board?

Mr. Bromley: I object to that as assuming facts not in evidence and calling for a conclusion. The documents are in writing, and I contend they show just the opposite.

Justice Stephens: Let the witness state what the nature of the complaints is, if they need interpretation. They speak for themselves, they are all before us in evidence, but if you want to get the witness' understanding of them for the purpose of redirect examination, you may ask for that.

By Mr. Steffen:

Q. Will you state what your understanding was, Mr. Lenci, of these other exhibits? You have spoken regarding Exhibit 489. A. Well, take Exhibit No. 500, for instance. The first paragraph of that explains itself very clearly. That is a letter from the Board Survey Company.

Q. That would refer to a reduction in the price of board by granting allowances on purchases of other commodities, including plaster? A. That is their inquiry, yes.

4888 Q. What I want to get at, Mr. Lenci, is: What was your practice in selling plaster? Did you have a price list? A. We had no published price list, no.

Q. When you say that, you speak as of what time? A. At any time.

Q. But you had instructions to your salesmen, though? A. We had instructions to our salesmen, and they were told to sell at certain prices, but we were always free, at any time, to meet whatever condition we found existing in whatever territory we were selling.

Q. There was such a thing as a prevailing price or a general price in your territory, during these ten years? A. To a certain extent. It was always flexible.

Q. Who were the principal sellers in your area? A. Well, naturally, the United States Gypsum Company and the National Gypsum Company. Those were the two largest companies operating in that area.

Q. Would you know about what prices they were selling at? A. Naturally. Our salesmen were in contact with our customers at all times, and they kept us very well informed.

Q. Did that influence you in your instructions to your salesmen as to what prices they should get? A. Surely. We wanted to get as much for our product as we could.

4889 Q. And you would be influenced by the USG price in determining what you could get, is that right? A. We would have to be, it would be the condition of the market. We couldn't get more, and we naturally wouldn't want to sell for any less.

Q. Now, I think you testified yesterday concerning sales to contractors. You stated that your company made no sales of board to contractors. Do you sell plaster to contractors? A. No.

Q. You sell strictly through dealers? A. Yes.

Q. And in selling through dealers, does your salesman occasionally help the dealer in talking to a contractor? A. Certainly.

Q. And the dealer's prices are in sharp competition, are they not, in sales to contractors? A. We have always made it a principle not to interfere with the dealer's prices or obtain a price from a dealer and take it to a contractor. We don't feel that that is the business of a manufacturer, it leads to trouble all the time. We like to bring the contractor and the dealer in contact, bring the contractor into contact with a friendly dealer, but as to what the final sales price is, we don't like to get into that at all.

4890 Q. Occasionally, are you approached by a dealer with the proposition that if you will help him out a little on your plaster price, he may be able to sell both board and plaster to contractors? A. No, they don't seem to connect the two.

Q. Well, many contractors buy both board and plaster, do they not? A. It all depends on where you are doing business. In most of the larger cities, they don't; and in the smaller towns, you are not so much interested in the contractor as you are in the regular yard business, as we call it. In other words, in the small town you are selling to the dealer all the time, and he, in turn, retails it to whatever contractor happens to need it. In the larger cities the jobs are more or less outstanding and, as I explained yesterday, they are very apt to be split between a plastering contract and a lathing contract.

Q. That split between your lathing contractor and your plastering contractor is after the main job has been let to the principal contractor? A. Yes, it is let to a general contractor; and then the general contractor lets to a

plastering contractor, and the plastering contractor is very apt to sublet the lathing part to a lathing specialist.

Q. Isn't it the practice for the general contractor, 4891 before putting in his bid, to get figures from his subcontractors? A. It all depends on what sort of a contractor he is. If he is a first-class, established concern, and knows what they are doing, they do their own estimating. If he is more or less of a broker, he will get a collection of sub-bids from everybody he can get hold of.

Q. There are a number of chiselers, aren't there, in the contracting business? A. Yes.

Justice Jackson: That is in every business, I think, too. (Laughter).

By Mr. Steffen:

Q. And they put a considerable amount of pressure upon your dealers, isn't that correct? A. Yes, I suppose they do.

Q. And they would like to get as good a price on their plaster or their board as possible? A. Or anything, yes.

Q. And prior to 1928 or 1929, or during 1928 and 1929, you were perfectly free to make any concession on your plaster price that you saw fit, if it would influence the sale of board, were you not? A. We would have been, yes.

Q. And as you have testified, you have no pub- 4892 lished price list. You would tell your salesmen what to shoot at, is that right? A. Yes.

Q. And in dealing with a dealer, they may get such price for their plaster as they can? A. Yes.

Q. And in quoting their price, they might be influenced somewhat by the fact that they would also sell board to the dealer, might they not? A. They might have been affected that way, yes.

Q. Now in view of those complaints that you have looked at, Exhibits 489 to 501, and the bulletin which is Government's Exhibit 37, at page 531, which you read yesterday, in regard to rebates, isn't it true, Mr. Lenci, that you are no longer as free as you formerly were to change the prices on your plaster or to reduce the price on plaster, or other related commodities, when making sale of board and plaster?

Mr. Bromley: I object to that as incompetent because calling for a conclusion. It seems to me all these questions overlook the fact entirely that before the license agreement, there wouldn't be any necessity to cut the price of plaster in order to influence the sale of board, because the price

of board wasn't fixed before the license agreement; and, therefore, this kind of a question, as to whether he was freer before or after, not only misinterprets the
4893 facts but calls for a conclusion which the Court should make, as to whether, if there was any restraint, it was illegal or not.

Mr. Steffen: I will say to that, that I would like to develop by the witness that in selling prior to 1929, he could modify either his board price or his plaster price as he saw fit. It is true that the board price wasn't fixed. But for business reasons, he might have decided to keep his board price fairly stable and to shade his plaster price, or vice versa.

Justice Stephens: We think the question is not objectionable, and the objection is overruled.

Mr. Steffen: Will you please read the question, Mr. Reporter?

(The pending question was read by the reporter.)

The Witness: Well, I don't know how you can draw the line, just where that line would come, as to how far you can make a cut on your plaster price before it becomes an infringement—not an infringement, but a breach of the price bulletins on board.

Justice Stephens: Read the whole answer. I missed one of his words.

(The answer was read by the reporter.)

By Mr. Steffen:

Q. But you feel that there is a line somewhere, where it would become a rebate, and where, thereafter, you
4894 would not be privileged to make a cut in your plaster price? A. But I don't know where that would be.

Justice Stephens: Wouldn't it be where the reduction in the price of plaster was of an appreciable or substantial character as distinguished from a minor character?

The Witness: Naturally, yes.

Justice Stephens: In other words, you can't fix the line to a cent, but you could approximate it in that manner, I suppose.

The Witness: Yes, but you couldn't say in so many dollars, here in the court room, where that line would be.

Justice Jackson: You couldn't, either, have it as what is sometimes called a "loss leader", could you, where you would actually lose money on your plaster to sell board?

The Witness: No, you couldn't afford to do that, because it would affect too much of your plaster business, because whenever you make a cut on plaster it not only applies to that job but to all other business in that territory.

Justice Stephens: You would not only have to sell at that price to that buyer, but to all other buyers in the territory?

The Witness: Yes.

By Mr. Steffen:

Q. And your other buyers find out very quickly
4895 if there is a cut, do they not? A. They do.

Q. I want to now take you to page 4913, Mr. Lenci, in connection with Exhibit 502.

That refers to your wire in connection with Mr. Lee Story? A. Yes.

Q. Your testimony at lines 8 to 13 of page 4913 indicates that you should have softened that wire somewhat, and made it read that Kelley must cease giving Lee Story a jobber's discount, rather than that he should be eliminated? A. That is correct.

Q. Do you object to the word "eliminated"? A. I do, yes. When you write a telegram like this, you are very apt to be brief and much more to the point than good usage demands.

Q. But the telegram is substantially correct, isn't it? A. The telegram is correct, and would be understood both by us and by the recipient.

Q. I would now like to refer to your testimony, Mr. Lenci, on page 4947, in regard to the sales by Structural. You were there asked this question:

"Q. Now, the nature of that complaint, based on that evidence of what Structural was doing, would be a
4896 charge against your company that your company cut the price to Structural, wouldn't it?"

Do you get the reference? A. Yes.

Q. And your answer was: "A. The inference would be that we were giving Structural a larger manufacturing distributor's discount than we should have.

"Q. And based upon your experience, you knew that Structural's activities might raise that inference as against your company? A. That is right."

That testimony gives me the impression—and I think it might give a reader the impression—that you were disturbed about what some other licensee might think concerning your sales to Structural; is that correct? A. Well,

what led up to that inquiry? There was something ahead of that, wasn't there?

Q. That is right. If you would like to read your testimony beginning on page 4945, you can get the connection.

(Transcript handed to the witness.)

By Mr. Steffen:

Q. That had to do with a telephone conversation with Mr. Bartlett of the USG, did it not? A. That is right.

4897 Q. And following that telephone conversation, you called up Mr. McCormick of the Structural Company? A. Yes.

Q. And you had a conversation with Mr. McCormick? A. Yes.

Q. And thereafter, you talked to Mr. Bartlett concerning that matter? I think you testified as to that. A. I believe so, yes.

Q. Now what I am getting at is this, Mr. Lenci: Your testimony there on page 4947 would carry the impression that you were interested in what other licensees might think concerning your prices to Structural, whether you were cutting the price to Structural or not. Is that not correct? A. What I was interested in was more or less of a complaint made by the licensor that we were cutting the price to Structural.

Q. And that was the reason that you called up McCormick? A. Yes.

Q. It wasn't necessary for you to call up McCormick if you were merely interested in the price at which you were selling McCormick, was it? A. That is probably true, but naturally I was getting more information for myself.

Q. And you reported that back to Mr. Bartlett? A. Yes.

4898 Q. It is true, Mr. Lenci, that all you had to do in order to find out whether there was a price cut was to look at your own ledgers to determine at what price you were selling to Structural; isn't that right? A. That is quite true, but at the same time, we were selling in Philadelphia ourselves, and what I was interested in was to find out whether a company we were selling to was underselling us in one of our territories with our own material.

Q. And that would have a bearing on whether you continued to sell to Structural, would it? A. Yes.

Mr. Steffen: I have lost a reference, Your Honor. If

you would like to take the 11 o'clock recess at this time, it might be convenient.

Justice Stephens: Very well.

(Whereupon, a short recess was taken, after which the trial was resumed as follows:)

4899 Justice Stephens: Proceed, gentlemen.

Mr. Johnston: If the Court please, may I suggest that we are having difficulties down at this end in hearing both counsel and the witness. I appreciate that we are entering the eleventh round of this match, and both counsel and the witness are, no doubt, considerably fatigued, but if they could raise their voices a little louder, so we could hear them, we would appreciate it.

Justice Stephens: I am sure they will be glad to comply with your request.

By Mr. Steffen:

Q. I would now like to take you, Mr. Lenci, to page 4951 of your testimony, having to do with metallized board, and your signing of the metallized board license.

Mr. Bromley asked you this question:

"Q. And did you have any understanding or arrangement or agreement with USG that you would observe those prices prior to the time that you got into production?"

And your answer was:

"A. No."

Do you recall that? A. Yes.

Q. It is true, is it not, that you could not buy board from National until such time as you signed the
4900 license agreement, buy it at a discount, I mean? A. I believe it was.

Justice Stephens: It was what, it was possible or not possible?

The Witness: It was impossible to buy from National until we signed the license, impossible to buy at a discount.

By Mr. Steffen:

Q. I show you Government Exhibit 548 in that connection.

(Government's Exhibit No. 548 was handed to the witness for examination.)

By Mr. Steffen:

Q. I believe it is the last sentence on the second page, to which I wish you to refer. A. Yes.

Q. And when you signed the agreement, the license agreement, for metallized board, did you understand from that, that you were to follow the prices for metallized board established by USG? A. Not until we made board ourselves.

Q. And in that interim did you receive prices, do you remember now, from USG? A. I don't think we did, I am quite sure we didn't.

Q. You testified earlier that you couldn't remember. A. I don't think we did. I have gone over that in my mind, and I don't think we received any bulletins until we signed the license agreement. The reason I say that is
4901 because I remember when we did get them we got quite a group, as I remember it.

Q. During this time when you were buying from National at a discount, you would receive an invoice from National concerning the purchase, would you not? A. Yes.

Q. And that invoice would be at the dealer price, would it not, minus your discount? A. Yes.

Q. And did you also inquire of National, or did you receive from National, information concerning the prices at which they were selling board, metallized board? A. I don't think we got that from National, but from our own men, because it was a matter of common knowledge in the trade what the board was selling for.

Q. It was a stable price? A. Yes.

Q. And you could get that from your salesmen inquiring from dealers, or trade information? A. Yes.

Q. And you sold, during that period, at the same prices as National did? A. I don't recall whether we did or not, but I presume we did.

Q. That would be your best recollection, that you
4902 did? A. Yes.

Q. Now on page 4952, Mr. Lenci, there is a reference to trucking companies, and you were asked this question:

"Q. Now there was nothing in the bulletins, as you understood them, was there, Mr. Lenci, which had any relationship to any requirement that licensees must hire trucks from trucking companies?"

And your answer was:

"A. No."

The next question was:

"Q. And the only provision about hiring trucks, as you understood those bulletins, was the provision contained in the sixth line of the last paragraph on page 531, under the heading 'Rebates and Allowances', which referred to an

indirect price cut or rebate by means of the device of hiring customers' trucks?"

And to that you said:

"A. That is right."

A. Yes.

Q. Your attention was not called at that time to Government's Exhibit 38, page 112, and I would like to show that to you now.

(Government's Exhibit No. 38 was handed to the witness for examination.)

By Mr. Steffen:

4903 Q. This was a bulletin issued in 1932. The portion to which I wish to call your attention is the first paragraph on page 112, Exhibit 38. A. Yes.

Mr. Bromley: What is the date, please?

Mr. Steffen: June 30, 1932.

By Mr. Steffen:

Q. That paragraph would provide, you so understand, I take it, that hiring or using trucking services of a customer would be regarded by the licensor as a rebate? A. My interpretation of that is a different matter.

Q. What is your interpretation? A. Just to clear it up so you will understand what my understanding of it was, I will give this illustration.

Suppose we were selling in a market where there was no provision for trucking, in other words, trucking was only provided for in larger cities. When we sold to the country at large it was not the practice to make truckload deliveries. We sold f.o.b. cars at destination in that event.

This paragraph has to do with a manufacturer going to a dealer and saying, "If you will buy from me in your city, we will give you an allowance so that you can unload your trucks"—which would be a cash rebate. For instance—

Q. (Interposing) If it were a proper allowance, would it be a rebate?

4904 Mr. Bromley: May he finish his answer?

Mr. Steffen: Certainly.

The Witness: For instance, we have been using Washington as an example, a great many times. Washington is not a truckload market. If we sold a carload to a customer in Washington, and to influence him we said, "You pay us our scheduled price in Washington, but we will give you $1.50 a ton so that you can unload the stuff without expense

to you"; that would be a cash rebate. And it was perhaps situations like that which this paragraph, I believe, was intended to cover.

By Mr. Steffen:

Q. As a matter of fact, Mr. Lenci, does the industry, in making deliveries in trucking areas, employ the dealer's truck? A. No.

Q. Do they ever do that? A. I don't know whether they ever did or not, but it is a common practice for each company to have a regular arrangement with some established trucking contractor who has a number of trucks and can always be called upon to give proper service.

Q. Well, as I visualize it there are three ways by which you can deliver by truck: by your own trucks, or you can hire an independent truck, or you can use the
4905 customer's truck? A. Yes.

Q. And the practice is for the licensee to use his own trucks or to engage an independent trucker—but do you ever engage the dealer's trucks to haul to the dealer's place of business in a proper trucking area? A. We never have, and I don't think it has been the general practice on the part of anybody to do that.

Q. Why not? A. Well, the dealer's trucks are usually handling his business, and not our business.

Q. Was there any discussion that you recall concerning the possibility that if you used the dealers' trucks, that the licensees might allow the dealer too large an amount, and that therefore it might constitute an indirect rebate? A. That I believe is covered in one of the bulletins.

Q. And what is your understanding about it? A. That is in one of those paragraphs on Allowances.

Q. That is, you understand that to mean that hiring a customer's truck will constitute an indirect rebate or allowance, is that your understanding? A. I wouldn't want to answer that because we never did it. I don't want to suppose what the other person had in mind.

Q. You have been in the industry for many years, and I simply wanted to get your understanding as to why the industry does not ever hire the dealers' trucks in
4906 making shipments—and you just stated, as I understand it, that you thought it was covered in some bulletin.

Mr. Bromley: I object to that question as assuming facts not in evidence. He hasn't said that the industry never hired a dealer's truck.

By Mr. Steffen:

Q. Let me ask you this. Does the industry to your knowledge hire dealers' trucks in making deliveries to dealers? A. My answer would be not as a general thing or not in, probably, 99 per cent of the cases, but I wouldn't want to say that it was never done.

Q. Has your company ever done that? A. No, we never have.

Q. Do you know of any other company that has ever done that? A. I do not know.

Q. My question is do you know of any licensor or licensee which has delivered to dealers by hiring dealers' trucks?

Mr. Bromley: He has answered that and said he didn't know. I object to that as repetitious.

The Witness: I can't answer that.

By Mr. Steffen:

Q. You don't know of any instance? A. No.

4907. Q. You said a minute ago that you thought it was covered by some provision in the bulletins, and would this Exhibit 38, page 112, apply to that situation and make it constitute a rebate, or what the licensor calls a rebate, if the licensee, under any circumstances, engaged a dealer's truck to haul to the dealer?

Mr. Bromley: I object to that as calling for a conclusion. He said he never heard of the practice, and that he never did it himself. How can he interpret this clause?

Mr. Steffen: I don't want to get his construction of the clause, your Honor, so much as I want to get his understanding, and he said that he did understand, that he thought it was covered by some provision in the bulletins, and I was trying to localize it to this particular one, if possible.

Justice Jackson: I thought the witness had described what he thought this particular thing was, and that it meant trucking from the freight yard to the dealer's yard—isn't that right?

The Witness: Yes.

Justice Jackson: That is your understanding of this particular exhibit?

The Witness: Yes, of this paragraph.

By Mr. Steffen:

Q. Let me show you Government's Exhibit 37, and call your attention to page 531.

4908 (Government's Exhibit No. 37 was handed to the witness for examination.)

By Mr. Steffen:

Q. There is a reference in the middle of that paragraph, Mr. Lenci, to the phrase "by hiring customers' trucks". A. Yes.

Q. Is that the provision that you had in mind? A. Yes.

Q. And your understanding is what concerning that? A. My understanding is that the licensor felt that if the licensees hired a truck from a customer, in a trucking area, that that might be construed as being a cash rebate.

Q. I think that is correct.

You stated just a minute ago, Mr. Lenci, that Washington is not a truckload area, or a truckload market. By that you meant what—just to clear the record? A. By reference to these bulletins you will see that there are certain trucking areas set up, and those are principally around the points where mills are located. Now there is no mill located in Washington. Consequently, Washington is not a trucking area.

Q. And that means that you sell in Washington only in carload lots? A. In carload lots, f.o.b. cars Washington.

Q. It would be possible to sell in less than carload
4909 lots, I suppose, charging the less-than-carload-lot freight rate? A. Theoretically it would be possible, but not from a business point of view.

Q. Because those rates are so high that nobody would buy? A. Nobody would buy at that price, that is right.

Q. Now, Mr. Lenci, we will take you to page 4956 of your testimony, again having to do with sales of plaster and unpatented products. Mr. Bromley asked you concerning that, asking this question:

"Q. And so far as you know were there ever any Board Survey complaints or investigations which had to do with the prices of plaster or other unpatented gypsum products?"

And your answer to that was:

"A. No."

Do you remember that reference, Mr. Lenci? A. Yes.

Q. You have read, this morning, Government's Exhibits 489 to 501? A. Yes.

Q. And would you say that they had to do with sales of plaster, in conjunction with sales of board? A. They had to do with the sale of board, and the inquiry was as to

whether we had influenced those sales by unduly reducing the price of other commodities.

4910 Q. Including plaster? A. Yes.

Q. And therefore your answer was too broad here, is that not true? A. No, I don't think so. Their inquiry was as to whether we had made rebates on board sales.

Q. Well, your testimony just now— A. (Interposing) And they asked us by what method we did it.

Q. That is right. And they pointed to plaster as being one of the methods? A. Yes.

Q. So that really and honestly you would say that your answer here was a little broad, wouldn't you, because the question says:

"Q. And so far as you know were there ever any Board Survey complaints or investigations which had to do with the prices of plaster or other unpatented gypsum products?"

It had to do with the price of board, but did it not also have to do with the price of plaster?

Mr. Bromley: I object to this as argumentative. Haven't we got all the facts?

Justice Stephens: I think it is argumentative. I think the Court will have to determine whether the answer is too broad, unless the witness is willing to admit it,

4911 and he does not admit it.

Mr. Steffen: Not in terms. He has referred to Exhibits 489 to 501, as having to do with the price of board in conjunction with the price of plaster.

By Mr. Steffen:

Q. Do you wish to qualify your answer in any respect? A. No, I don't, I feel it is an inquiry as to the price of board and as to whether or not we made any rebates.

Q. On the price of plaster? A. No, on the price of board.

Q. By selling plaster at a lower price? A. By any means.

Q. Including the sale of plaster? A. Yes.

Mr. Steffen: I think it can be construed rather obviously.

By Mr. Steffen:

Q. Now further on, at page 4956, line 18, you were asked this question:

"Q. Were there ever any conditions, written or oral, attached to the granting of consents issued to your company by USG for permission to sell these manufacturing distributors?"

And your answer was:

"A. No."

In connection with the Structural matter, where Structural was putting a dealer, or was alleged to have
4912 put a dealer, in the Structural warehouse, you made the point I believe in your testimony that the consent given to sell Structural was conditioned upon Structural selling only to the dealer trade—isn't that correct?

Mr. Bromley: I object to that as assuming facts not in evidence.

Mr. Steffen: I am asking him whether or not he did so testify.

Mr. Bromley: He did not so testify.

Mr. Steffen: Let's ask the witness, not Mr. Bromley.

Mr. Bromley: These people were only entitled to the discount if they were wholesalers, not if they were retailers.

Justice Stephens: You may ask the witness what his testimony was, if he remembers. If not, show it to him. That is the short way.

By Mr. Steffen:

Q. I will show it to him. It is on page 4898. Do you remember, Mr. Lenci, in connection with that transaction? A. I don't remember that as any limitation. As I understood the whole matter, all of our sales to manufacturing distributors were for the purpose of permitting those manufacturing distributors to sell to dealers, in other words, they were wholesalers, they were not retailers.

Q. And that was a condition attaching, would you say now, or would you not, that they should sell as wholesalers and not as retailers? A. Well, that is the
4913 interpretation of it, yes. I wouldn't know as you would call that a condition. I think that is not a condition of sale, but it is a business practice.

Q. Would you call it a limitation? A. No, that was the usual way of doing business. Those manufacturing distributors had all been in business for years, and they are manufacturers and not wholesalers. They are not running a little store, and I don't think it would be necessary to make a limitation or a description of what their activities would be.

Q. Well then, would you say that the consent given to Structural was upon the understanding that Structural would continue to do a wholesale and not a retail business? A. I don't think that question ever came up.

Q. I am raising it now. This question was asked you at page 4898:

"Q. Well, let's see, Kelley had the permission of the licensors to sell a distributor at a discount only if the distributor were acting as a wholesaler and not a retailer, isn't that right?"

And you said:

"A. That is true, yes."

Now was that testimony correct? A. Yes. The
4914 licensor and the licensee both knew from long experience the usual methods of the Structural Gypsum Company in doing business.

Q. And therefore the license was given upon the understanding that they would continue the usual method, is that right?

Mr. Bromley: I object to that as deliberately misassuming facts. Isn't it perfectly obvious that the only question is one of discount? There wasn't any attempt to control the kind of business that Structural did, but if they were wholesalers, then they got a discount. I don't see counsel's purpose in trying to twist it around and make it appear that they were controlling the nature of Structural's business. All we said to our licensees was, "You can give Structural a discount if they are wholesalers."

Justice Stephens: Counsel is entitled on redirect examination to confront the witness with his testimony and ask him if, in comparison with other testimony and other items which are called to his attention, from the record, he wishes to change it or modify it, or admit that it is wrong. But when counsel goes beyond that, and argues with the witness as to what the testimony ought to mean, what it does mean with reference to these bulletins and their provisions, it seems to me that it probably goes into what the Court will have to determine as to the meaning of the testimony.

Now of course the line is sometimes hard to draw,
4915 Mr. Steffen, and we don't mean to unlimit you unduly, and severely, but I think in this instance that you are, conducting in effect now a discussion with the witness as to what his testimony really means, and we have got to determine that ourselves.

Mr. Steffen: I think that is right, your Honor. The two items that I wanted to get brought together are now presented, and I think it is quite proper for the Court to decide whether the giving of the consent was upon an understanding or condition or arrangement.

Then at the foot of page 4956 the question is asked:

"Q. And did you ever have any arrangement or understanding or agreement with USG, or with anyone else, that with respect to these consents, the Ebsary Gypsum Company would police or supervise or seek to control manufacturing distributors' resale prices or practices?"

And you said:

"A. No."

The Witness: Yes.

By Mr. Steffen:

Q. And by that you meant that you had no understanding or agreement with USG that you should go out and check prices or terms of sale by your manufacturing distributors? A. That is correct.

Q. But it is true that you, as you have testified a
4916 moment ago, were interested in the prices at which your distributors sold? A. We were interested in the specific case because in the case you mentioned we also were selling in the same market.

Q. And wherever your distributors were selling in the same market, with you, you were interested? A. Yes.

Q. And you, on occasion, did make complaints to Board Survey concerning sales by Structural when they were buying their board from Kelley? A. Yes.

Mr. Bromley: I object to that as assuming facts not in evidence. There isn't any evidence that there was any complaint about Structural. The evidence is in, and shows it was a complaint about the licensee that supplied Structural. It is all in writing.

Mr. Steffen: I will make just this one point. Mr. Bromley insists that these complaints are all against the licensee and not against the manufacturing distributor, and I will rephrase the question without conceding the point.

By Mr. Steffen:

Q. You did, on occasion, make complaints concerning Kelley's sales to Structural? A. That is correct.

Q. Where Structural was reducing prices or other-
4917 wise causing trouble, is that correct? A. Yes.

Justice Stephens: That again is really a question for the Court to determine, against whom the complaint was being made. You contend it was being made against Structural, and your opponents contend it was being made against the licensee.

Mr. Steffen: Therefore I should be privileged to ask the question either way.

Justice Stephens: You are entitled to confront the witness with his testimony and ask his if he wishes to explain or change it in any manner, or what he meant by it.

By Mr. Steffen:

Q. Now on page 4957 you were asked another broad question:

"Q. Was there ever a time when USG or anyone connected with it ever threatened to withdraw a consent issued to you to sell manufacturing distributors?"

And your answer was:

"A. No.

"Q. Was any statement ever made to you by anyone connected with USG that if you did not control or seek to control the resale prices of these manufacturing distributors to whom you sold under the consents, that the consents would be withdrawn?"

And your answer was:

"A. No."

4918 A. That is correct.

Q. And that is your testimony? A. Absolutely.

Q. You did have a conversation with Mr. Bartlett, did you not, and Mr. Gallagher, at different times? A. That was in no way a threat, implied or otherwise, that they would withdraw their consent.

Q. You did not construe it in that way? A. I did not so construe it at any time.

Q. I want to show you Government's Exhibit 445.

(Government's Exhibit No. 445 was handed to the witness for examination.)

By Mr. Steffen:

Q. Does that affect your testimony at all? A. No, your question was as to whether or not the United States Gypsum Company, as licensor, had ever, directly or indirectly, threatened to withdraw a permission given to the Ebsary Gypsum Company to sell manufacturing distributors.

Q. And this has to do with Kelley's sales? A. Yes, this has nothing whatever to do with that at all.

Mr. Steffen: We have no further questions, your Honor.

Justice Stephens: Is there any recross examination?

Mr. Bromley: Yes, your Honor.

Recross examination

By Mr. Bromley:

4919 Q. This last exhibit, No. 445, Mr. Lenci, hasn't even anything to do with the possibility that USG

might withdraw its consent to Kelley to sell Structural, has it? A. This is our complaint against Kelley. This is an inter-communication from myself to Mr. Ebsary, referring to our complaint against the Kelley Plasterboard Company.

Q. But there is no reference in it as to whether or not USG would or had threatened to cancel its consent to Kelley to sell Structural, is there? A. There is not.

Q. Now a few minutes ago, as I understood you, you told Government's counsel that you had complained against Structural because of what it was doing, and then in the next answer you said that you complained against Kelley based on what Structural was doing.

Isn't it the fact that what you did in this situation that involved Structural was to complain merely against Kelley because you thought Kelley might be violating the license? A. That is correct.

Q. But you never complained to Board Survey, or to USG, that Structural was violating any obligation which it had, either under a license or without a license, did you? A. Our complaints were against the other licensee.

Q. You knew that Structural had no license, didn't you? A. Yes.

4920 Q. And you knew that Structural had no obligation with respect to the maintenance of prices, or with respect to the maintenance of any other conditions which were binding on the licensees? A. Yes.

Q. So the fact is that all of your complaints which had anything to do with what you found Structural was doing in the market, were complaints against Kelley because you thought that evidence of what Structural was doing was some indication that Kelley was violating the license and giving Structural an unduly low price? A. Yes.

Mr. Steffen: I would like to ask that that be related as to point of time. I think the witness has testified that up until 1933, possibly, he thought that the licensor could control the price of a distributor.

Mr. Bromley: I am not making any limitation on it, and I am asking the witness without regard to his views of the law, if the fact is not that at all times his complaints were only against the licensees.

The Witness: That is right.

By Mr. Bromley:

Q. And in connection with what counsel has just mentioned about your state of mind, I want you to look at page

4844 and tell me whether that isn't the place in your
4921 testimony to which you referred this morning as being the place at which you gave the date as 1932, and not 1933. A. Yes, although that was yesterday that I made that statement.

Q. Further, in connection with your state of mind back in 1932 and prior thereto, I want to call your attention to your testimony in the criminal case at page 564.

(The testimony referred to was handed to the witness for examination.)

By Mr. Bromley:

Q. Do you recall that in connection with your testimony about your state of mind you testified that you were under that impression, and then that Judge Goldsborough asked you this question:

"I haven't seen anything in the testimony that was given of transactions to any admission on the witness' part that his purpose or the purpose of his company was to control these distributors' prices."

And you said that it was not.

That is in the middle of the page. Do you remember that? A. Yes, I remember that.

Q. And that is correct, isn't it? A. Yes.

Q. So that without regard to your state of mind, it was never your purpose or the purpose of your company
4922 to control the prices or practices of these manufacturing distributors, was it? A. That is right.

Q. It was not? A. It was not.

Q. Now will you look at Exhibit 405, please?

(Government's Exhibit No. 405 was handed to the witness for examination.)

By Mr. Bromley:

Q. You told Government counsel that in this exhibit, which was your letter to your sales manager of May 23, 1929, that you instructed him to charge for the new covered-edge wallboard, after you got into production and made it, a price of $17.50 per thousand square feet, and that this was the price which USG fixed in its bulletin for No. 2 closed-edge board? A. Yes.

Q. The bulletin fixed the price, as of this time, for No. 1 closed-edge board, at $20, didn't it? A. Yes.

Q. How does it come that you instructed your salesmen to charge for your new covered-edge board when you should

make it, not the price that was set for No. 1, but the price that was set for No. 2 board? A. I don't know. I cannot recall the reasons for that except possibly I felt that we were making a new product and we hadn't a great
4923 deal of confidence in its coming out first-class at the very beginning. It was a new product for us, and maybe I felt it would not be up to the first grade.

Q. Isn't that, as a matter of fact, the reason which caused you to set that price? A. I believe it was.

Q. You remember, don't you, that the production problems involved in the manufacture of this closed-edge board were very difficult? A. It meant quite a change for us. Yes, they were.

Q. And you had a lot of trouble making your new machine work, didn't you? A. We had some trouble, yes.

Q. And that resulted in the production of closed-edge board which certainly was not up to the standard of perfection that the USG board was at that time? A. Well, we didn't have as much trouble as we anticipated.

Q. Well, you thought you would have trouble? A. I was afraid that we might.

Q. So you therefore instructed your salesmen to charge for your board the price which USG had set for No. 2 board? A. That I believe was my reason for making that price.

Q. And that is because you felt at that time that probably the board which you would produce would turn out to be of second grade and not first? A. Yes.

4924 Q. For a while, anyway? A. Yes.

Q. You told counsel also that prior to 1929 the Ebsary Gypsum Company had not used an arbitrary billing weight in the pricing of its gypsum board. Do you remember that? A. Yes.

Q. Well, the fact is that at all times prior to 1929 you had used an arbitrary weight in the sense that you had agreed with the railroads upon a weight which should be considered the billing weight for freight shipments, hadn't you? A. That is correct, but we could not use that to make up our prices for this reason, that we were coming in as a new manufacturer of a product which was already on the market, and if we found a certain price existing in some particular destination we didn't say, "We are going to get so much at the mill and so much freight." We would say that the price at destination at which we

can sell is so much, and that would be the way we would make our price.

4925 Q. I understand that, Mr. Lenci. But so far as the freight which was paid by your customers was concerned, they paid freight to the railroad based on the arbitrary weight of the board which had been agreed upon prior to that time between you and the railroad? A. That is correct, and that was deducted from the amount we got at destination.

Q. And that arbitrary weight which was the subject of an agreement between your company and the railroad, back in those days would remain in existence without change for a period of 6 to 12 months or more, wouldn't it? A. Yes, they ran for quite a long period.

Q. And at that time, if you had sold your board on the basis of a mill price plus the freight, and had figured out your price on that basis, you would have used not the actual weight of the board in figuring out the freight part of the price, but this arbitrary weight which you had agreed upon with the railroad, wouldn't you? A. That is correct.

Q. Now, the reason that that arbitrary weight, in those days, didn't change for long periods of time, was that the railroad didn't come around very often to make the test weighings in order to arrive at an arbitrary figure—isn't that right? A. That is right.

4926 Q. Today, they come around more frequently, do they not, or they did prior to the war? A. Yes. I don't know the exact times, but they come around more frequently than they did then.

Q. So that you agree with the railroad now, on the arbitrary freight weight, at intervals of but a few months? A. Yes.

Q. Did the figure of $75,000, which you said your board machine cost you, include the cost of the driers? A. No, it did not.

Q. Have you any idea how much they cost? A. I know exactly what it was.

Q. How much? A. Our contract with the Coe Manufacturing Company was $100,000 for the driers, and that did not include erection.

Q. It did not include erection? A. No. We had to put it up ourselves.

Q. Likewise, the figure of $75,000, which you gave for the board machine, did not include erection or engineering,

did it? A. It included engineering in this way: They furnished a foreman or superintendent, the manufacturer of the machine furnished a superintendent, who was really the engineer, but it did not include the plant engineering necessary to make the entire installation. We had to do that ourselves.

4927 Q. Now, you said that the change-over in 1929, on this machine, so as to result in its being able to produce closed-edge board, from the standpoint of cost, I think you said, was a rather minor matter. Well, the fact is that it resulted in a major change in operation and in result, didn't it? A. Yes.

Q. And when you said "a rather minor matter", did you mean that the cost was minor in relation to the total cost of the machine as it was originally installed? A. Yes.

Q. These changes, however, resulted in a fundamental and important change in the character of the finished product? A. Yes.

Mr. Steffen: We object to that as calling for a conclusion. If he wanted to ask the witness whether they made an open-edge or a closed-edge board, I should think it would be appropriate.

Justice Stephens: I think the objection is not well taken. Objection overruled.

By Mr. Bromley:

Q. With relation to jobbers, Mr. Lenci, you have in mind, haven't you, that the jobber price was made the same as the dealer price in August, 1930? A. Yes.

4928 Q. Now, isn't it a fact that prior to that date, there never any discussion at any meetings, among the licensees or with the licensor, about jobbers at all? A. Well, Mr. Henning had asked us very early in the period to furnish him with the names of our jobbers.

Q. With that exception, Mr. Lenci, isn't it the fact that prior to August, 1930, there was never at any time any discussion with respect to jobbers whatsoever, in any meetings, among the licensees or with the licensor? A. That is during what period?

Q. Prior to August, 1930. A. I don't know whether we had any meetings during that period at all, or not.

Q. That is what I am leading up to. A. We had the first two or three meetings where the licenses were signed, and then it seems to me there was quite a gap in there.

Q. That is right, sir. So, prior to August, 1930, there never was a time that there was a meeting among licensees, attended by the licensor, except these 2 or 3 that you have testified to that had to do with the negotiation of the licenses, isn't that right? A. That is my recollection, yes.

Q. So that, with that in mind, isn't it the fact that there never was any mention made at any of these meetings, prior to August, 1930, even about the subject of
4929 jobbers, except that Mr. Henning once asked you to send in the names of your jobbers? A. I believe that is correct.

Q. And all of your testimony in response to Mr. Steffen's questions about discussions of jobbers, all arose after August, 1930, isn't that right A. Yes, that was the time when we started to complain that the jobbers were still getting their discounts, and there were numerous complaints then, at our meetings.

Q. But all of those complaints were after August, 1930, weren't they? A. I think they were.

Q. Before you took a license from USG, Mr. Lenci, you could charge any price for board you wanted to, couldn't you A. We could charge any price we could get.

Q. Any price you could get? A. Yes.

Q. Now after the license, you could charge for plaster any price you could get, couldn't you? A. Was your first inquiry on plaster or plasterboard?

Q. On board. A. Yes, all right.

Q. I will withdraw the last question.

After the license, the price which you could charge
4930 on board was fixed, wasn't it? A. Yes.

Q. Now, before the license, you could charge for plaster any price you could get, couldn't you? A. Yes.

Q. That was true after the license, wasn't it? A. Yes.

Q. And this situation which you have called a rebate in your testimony, and which was the subject matter of bulletin provisions and complaints having to do with what you did with respect to the price of plaster and other products, when sold with board, didn't that generally take this form: A salesman would say to a dealer, "I will sell you board. My price is fixed, but if you will buy plaster along with it, you can deduct, when the time for payment comes, an amount,—say, for illustration, $1.50,—for every thousand feet of board that you buy."? A. You are speaking of the cash rebates on the sale of board?

Q. Isn't that the form that it generally took? A. It

would take that form or, in some cases, some of our complaints were based on the fact that the salesman actually passed cash to the customer.

Q. Well, now, I am trying to confine my questions to the situation where you did something to the plaster
4931 price when you sold board and plaster to a dealer. Do you understand that? A. Yes; but your question, I understand, applied entirely to board.

Q. No, I didn't mean it to. So I will start over again. You did sell board and plaster, sometimes, to the same dealer-customer, didn't you? A. Yes.

Q. And after you took the license, you knew that you were prohibited from making an indirect price reduction in your board by giving away plaster, didn't you? A. Yes.

Q. And you knew that prohibition extended to making an indirect price cut in the board by giving a customer plaster at a price lower than you would ordinarily charge in that market? A. Yes.

Q. Now wasn't the form which that transaction usually took, where this kind of rebating was indulged in, as follows:

A manufacturer would say to a dealer, "If you buy a thousand feet of board, I must charge you $30 for it. However, if you buy a ton of plaster, although my ordinary price is $10, when you come to pay for it you can deduct $1.50 from that $10 for every thousand feet of board you buy."? A. We didn't do that.

4932 I know you didn't. But isn't that the thing that you complained about? A. We complained about that,—I am just trying to remember a complaint that we did make. I don't recall that we did make any complaints of that type.

Q. Well, you looked over a whole lot of complaints a few minutes ago, didn't you? A. They were complaints made by the licensor against us, that we had done that. But we had not done it. Those Exhibits 489 to 501 were complaints by the licensor against the Ebsary Gypsum Company.

Q. Well, are you familiar with the fact that this kind of indirect rebating was prevalent in the industry after the licenses were taken? A. Yes.

Q. And isn't it a fact that the form that it would take would be something as I have tried to state it? A. Well, I can only answer in this way, Mr. Bromley: That is our supposition as to one of the forms it took.

Q. Well, do you remember your testimony that a 5-cent reduction per ton in the price of plaster wouldn't mean anything to anybody, but a 50-cent or a $1.00 per ton reduction would? A. Yes, that was in answer to a question by Mr. Steffen as to how much it would amount to
4933 before you got over the deadline.

Q. Now, having that testimony in mind, isn't it a fact that what a manufacturer would do, where he wanted to cut the price of board by reducing the price of plaster, would be to make his reduction in the price of plaster so many dollars per ton for each thousand feet of board that the dealer would buy?

Mr. Steffen: I object, Your Honor. This question has been asked once before, and the witness has said it was merely a supposition on his part.

Justice Stephens: Do you know?

The Witness: I don't know, because we did not do it, and it is impossible to pin these things exactly on the other manufacturers.

Justice Jackson: Mr. Bromley's question is: Wouldn't that be the probable course, if such a thing were to be done?

The Witness: That is the way I tried to answer. I said that would be one of the possible ways of doing it.

Justice Stephens: The witness did also say that it was a supposition.

If you know, from your experience in the industry, how that practice took place, or, as a person experienced and expert in the industry, how it probably would be carried out, you may testify as to that. But if you are just guessing, then we would have to sustain the ob-
4934 jection. What is the fact? Are you testifying from your experience as to how these things would probably be carried out, or from your knowledge, or from a mere speculation?

The Witness: I am testifying as to how they would probably be carried out, not from having seen the transaction, because rebating is something you do not see.

Justice Stephens: Well, the answer of the witness may stand as to that.

By Mr. Bromley:

Q. Now, as I understood you, at page 5069 you said that you made no agreement or entered into no understanding to eliminate jobbers, at the meeting which you attended in May, 1929. Now you didn't mean to limit your testimony to that meeting, did you? A. No.

Q. You never had any understanding or agreement with anybody, other than what is expressed in the license and the bulletins, if any, with respect to the elimination of jobbers, did you? A. That is correct.

Q. And likewise, with respect to your testimony on plaster prices, you never had any understanding or agreement with anybody with respect to plaster prices made at any time, other than what may be contained in the
4935 license agreement or the bulletins, did you? A. That is right.

Q. You also said that after August, 1930, selling through jobbers at a discount was eliminated. Now, you meant to restrict that answer only to patented board, didn't you? A. Oh, yes.

Q. In connection with your bubble license, Mr. Lenci, isn't it the fact that before you made up your mind to take the license, the nature of the bubble invention had been disclosed to you? A. Yes, it was described.

Q. That was described to you by Mr. Avery or Mr. Knode, or both, on May 23, 1929, wasn't it? A. That is right.

Q. And not only was the nature of the invention described, but the savings which it was claimed the use of the invention would accomplish were disclosed to you? A. Yes.

Q. And what you meant in your answer to Mr. Steffen was that the "know-how", or the procedure to put the invention into operation, was not disclosed to you until after you had signed the license? A. That is correct.

Q. Have you any idea of the total amount of royalties that your company has paid to USG under the two licenses which you have had with it?

4936 Mr. Steffen: I don't see the connection, Your Honor, between that question and the re-direct examination. I think this is improper re-cross examination.

Justice Stephens: What do you relate it to, in the re-direct examination?

Mr. Bromley: I am trying to find the place.

Justice Stephens: Very well.

Mr. Bromley: At page 4995, at line 14, he was asked: "Q. And what was the royalty that you were charged under the May, 1929, license; do you remember?"

And he said he didn't remember.

Then he was asked questions on that and succeeding pages—if it was 5 percent it would be 65 cents; and he was asked the question on page 4996:

"Q. So that financially, the saving was such that it was very much to your advantage to take out your license and pay a royalty, was it not?"

And he answered:

"A. It was, yes."

So it would seem to me that the door as to what he paid in royalties has been opened.

Mr. Steffen: We have no objection, Your Honor.

Justice Stephens: Very well. Proceed.

The Witness: I haven't the figures before me, but some time ago I made a computation, and as I recall it,
4937 it ran somewhere between $175,000 and $200,000.

Justice Stephens: Is that related to the bubble board royalties or to all royalties?

The Witness: All royalties, both licenses. As I remember it, it was something under $200,000 up to that particular period.

By Mr. Bromley:

Q. Of course, since you took your closed-edge license only in May, 1929, by far the greater part of that would be related to the starch patent and the bubble patent license, that is, the October, 1929, license, wouldn't it? A. Oh, yes.

Q. Although, of course, the May, 1929, license did continue until 1937, so far as royalties were concerned, although that was merged in the October-November, 1929, license, wasn't it? A. Yes.

Q. That is to say, the royalty provision that was contained in the May, 1929, license, which continued until 1937, was the royalty on the patents covering, among other things, the machine for manufacturing the board, the closed-edge board, wasn't it? A. I believe that is correct.

Q. You told Mr. Steffen, I think, that you made no investigation of the patents before you took the
4938 October-November, 1929, license. Perhaps that answer applied to both licenses, did it? A. Yes.

Q. Isn't all you meant by that answer that you did not go to or consult any patent attorney? A. Yes.

Q. You knew the nature of the closed-edge patents, didn't you, before you took the license? A. Yes, not from a technical point of view or from a patent point of view, but from the actual board and what it looked like and how it would be used.

Q. And you also knew the nature, generally, of the

patents which covered the machine for making the board, didn't you? A. Yes.

Q. And wasn't that likewise true with respect to the patents which were contained in the October-November, 1929, license, that you knew generally the nature of those patents and what they covered? A. Yes.

Q. You knew they covered the foam-bubble invention, didn't you? A. Yes.

Q. And you knew they covered things like the
4939 tongue and groove edge, and the recessed edge? A. Yes.

Q. And you knew they covered starch, for instance, for adhesion? A. Yes.

Q. And you knew that there were many other patents in there that covered refinements, both in the product and in the machine for making the product? A. Yes.

Q. So the fact is that you were generally familiar with the nature of many, if not all of the patents, listed in both the licenses? A. Yes. Maybe I misunderstood the previous question. We didn't make a patent research investigation, as to the validity of the patents themselves, and matters of that kind. We knew generally what they covered.

Justice Stephens: We will take our noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

4940 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice Stephens: Proceed, Mr. Bromley.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Recross Examination (resumed)

By Mr. Bromley:

Q. At page 5031, Mr. Lenci, your attention was called to the third "Whereas" clause in your May 22, 1929, license, and you said that you imagined that it was the understanding of everybody who took out a license that they were

going to discontinue the making of open-edge board because, so far as you knew, the licenses were all similar.

Now the clause to which your attention was called appears on page 48 of the complaint as to the third paragraph on that page. You will notice that that paragraph says:

"Whereas, Licensor has been unwilling to grant a license except upon the express condition that Licensee will manufacture plasterboard or gypsum wallboard only with a folded or protected edge similar to that manufactured by Licensor, so that Licensor may be protected in its own business of manufacturing and selling said patented products
4941 and realize to the fullest extent the benefits under said patents from the manufacture by said Licensee;".

Now that was the paragraph which you looked at when you answered Mr. Steffen on page 5031, wasn't it? A. Was I shown this at that time?

Q. Yes, I think you were.

Justice Jackson: He probably wasn't shown it from the complaint.

Mr. Bromley: That is right, if the Court pleases, he was shown that paragraph in a different form.

Justice Jackson: You were shown the May, 1929, license agreement between your company and USG, probably.

Mr. Bromley: I see now, at the top of page 5031, you were shown the complaint, and this very page 48, paragraph 3.

The Witness: All right.

By Mr. Bromley:

Q. Now, do you notice that there is another "Whereas" clause which follows the one you have just read? A. Yes.

Q. And that says, doesn't it:

"Whereas, Licensor has agreed to waive the express condition aforesaid and grant the said License in consideration of the agreement of Licensee to pay to it for the license to use the processes and make and use the
4942 machines and/or inventions set forth and claimed in all of said patents and applications for letters patent the amounts hereinafter stated and upon the terms and conditions hereinafter set forth,"—do you see that paragraph now? A. Yes.

Q. Now, in the light of that paragraph, isn't it clear to you that there was no understanding whatsoever on the part of anybody that the licensees would discontinue the making of open-edge board? A. Yes, that is right.

Q. There was no such understanding, was there? A. No.

Q. And there was no understanding that the licensees could not make open-edge board outside of this agreement, was there? A. No.

Q. So that, your testimony is now, isn't it, that there was no agreement or understanding, either in the license or outside of the license, that the licensees could not make open-edge board if they wanted to? A. That is correct.

Mr. Steffen: Your Honor, it is my understanding that our objection to leading questions by the defendant continues, does it?

Justice Stephens: You have a continuing objection to all leading questions on the part of the defendants to this witness, yes. The same is overruled.

4943

By Mr. Bromley:

Q. At pages 5007 and 5008, you testified that you had three reasons for wanting to take a license from USG, and on page 5008 you were asked this question, at line 13:

"Q. You further testified, on page 4654 of the transcript, that the license covered a large number of patents? A. Yes.

"Q. Was that possibly a third reason why you wanted to take out a license? A. Yes."

Now, didn't you mean by that answer that one of the things you wanted to get, or hoped to get, from taking out a license was the benefit of the research of USG which had resulted in the granting of the many patents granted to it, and the filing of the many applications which it had filed, as set forth in the schedules annexed to the license? A. Yes.

Q. You did not mean to create the impression that you wanted to take a license simply because the license covered a large number of patents, did you? A. No.

Q. What you wanted was, so far as the number of patents was concerned, to get the benefit of USG's research staff in inventions relating to the improvement of the product and the means for producing it, didn't you? A. We felt that at some time we might need to make a board that would come under one of those other classifications.

4944

Q. Now at page 5094, in line 10, you said you had substantially made up your mind to take the bubble license as you went home from the May 23, 1929, meeting; do you remember that? A. Yes.

Q. Now, isn't it a fact that as of that time, neither you nor Mr. Ebsary had made any definite decision as to whether you would or not, although substantially you had agreed at that time that if the bubble invention did have the benefits claimed for it, then you thought you ought to have a license? A. We felt after the description given us by Mr. Avery that it would be a valuable thing for us to have, if we could get it.

Q. And you have said at some other place in your testimony that after you came back you talked to others in the industry. Weren't those talks about whether or not the invention, as they understood it, did have the benefits which Mr. Avery claimed for it? A. Yes.

Q. And you convinced yourself, between that time
4945 and the time you signed the license, that the bubble invention did have real benefits in lightness and strength, didn't you? A. Yes.

Q. As I recall your testimony, you several times told Mr. Steffen that when you said you wanted to be competitive, you meant that you wanted to have competition eliminated. Do you recall that you said that on occasions? A. That we wanted to have competition eliminated?

Q. Yes. A. Well, if I said that, I didn't mean that.

Q. When you used the word "competitive", and in your answers said that you wanted to be made competitive, didn't you mean merely that you wanted to be put in a position where you could go into a market and sell your board on as favorable terms as some other company could? A. Yes. We wanted to have the opportunity of meeting them in any market in our area, on an equal basis.

Q. And your area would be that geographical area the limits of which were set by freight rates, isn't that right? A. That is correct, yes.

Q. In other words, if you were selling lath at $13, and it cost you $7 to make it— A. (Interposing) I wish it did.

Q. (Continuing) —you could not sell a customer where the freight rate was more than $6, and stay in busi-
4946 ness, could you? A. No.

Q. So that, if you took a line around your plant, and drew it through the various points where the freight rate was $6, that would define what you have referred to as your area, wouldn't it? A. Yes. That isn't quite a correct example, Mr. Bromley.

Q. But it is the simplest one I can think of, to start with; isn't that so? A. Yes, but it may lead to some question afterwards which would lead someone astray.

Q. Why? A. Well, for instance, supposing that we were going to quote into such a territory as you illustrate, there would be also some competitor of ours who would have a mill price plus his lower freight to that destination. So that it wouldn't be a $6 difference between the two prices.

Q. You mean by that that it might be less than $6? A. Well, may I make it clear—

Q. (Interposing) Tell me, first, do you mean by that that it might be less than $6 in my illustration? A. It would eventually come to the same thing.

Q. Go ahead and give your illustration. A. Take an arbitrary situation: Supposing that the National
4947 Gypsum Company is quoting in Atlanta, Georgia. They would ship out of Savannah. Now suppose they start with a price of $13 mill at Savannah, and we will say that their freight to Atlanta is $3. They would quote $16.

Justice Stephens: They have a mill at Savannah?

The Witness: Yes. They would quote $16 at Atlanta. Then we would see what our freight rate was to Atlanta.

Justice Jackson: From where?

The Witness: From Wheatland, New York.

Justice Stephens: You mean your actual freight rate?

The Witness: Yes, our actual freight cost. We would have a $16 price to start with. Then if that freight rate was $9, the $9 from the $16 would leave the $7 that you are aiming at, do you see?

Mr. Bromley: Yes, sir.

Justice Stephens: And if it cost you $7 or more to make the board, you couldn't sell it there?

The Witness: We could not sell there, no.

Justice Stephens: Your rate to Atlanta would be $16, because under the bulletins you would take the mill base price at Savannah, which would make the rate you would have to sell at under the bulletins exactly the same as National did?

The Witness: That is right.

By Mr. Bromley:

4948 Q. Now that situation, so far as your competitive position is concerned, would be exactly the same, bulletins or no bulletins, wouldn't it? A. Yes.

Q. In other words, if you didn't have a license and didn't have any price fixed, and didn't have any price bulletins, if you wanted to compete against National with a mill at

Savannah, National selling its board at $13 Savannah mill plus $3 Atlanta freight, or $16, you would have to offer your board down in Atlanta at $16? A. That is correct.

Q. And to do that, you would have to absorb the difference between the $9 freight from Wheatland to Atlanta, and the $3 Savannah-to-Atlanta freight, or $6? A. That is correct.

Q. And that would leave you with a net mill return, on your board sold in Atlanta, of $7? A. That is correct.

Q. And if that $7 was equal to or higher than your cost, then you could do business in Atlanta and break even or make a small profit? A. That is correct.

Q. But if the $7 was less than your cost, then you would be losing money if you did business in Atlanta? A. That is right.

4949 Q. Therefore, you would say that you were not competitive in Atlanta and could not do business? A. That is right.

Q. So that, in your testimony, you merely meant, didn't you, that if the market which you were considering was too far away from your mill, or if the terms of sale were such that the service you had to render was too expensive, you would not be competitive in that particular market? A. That is right.

Q. And it is the fact, isn't it, that the license bulletins gave you prices at which you could do business in the markets which you normally served before the license? A. Yes.

Q. That is, the license provisions made you competitive in your normal markets? A. That is right.

Q. And you did not mean to say, in any of your answers, did you, that under the license bulletins all companies would be able to take business in all markets under the same circumstances? A. No.

Q. And as the Presiding Justice said this morning, while the price to the dealer might be the same, your profit or return would be different as between different companies? A. That is correct.

4950 Q. So that, all the price bulletins did, Mr. Lenci, was to fix a floor or a minimum below which a licensee could not go; isn't that right? A. Yes.

Q. And in any given market, that minimum was the same for every licensee? A. Yes.

Q. But that did not mean that these minimum prices put each licensee on the same plane, so far as his cost of servicing the market was concerned, did it? A. No.

Q. And that was so because each licensee had different costs and expenses to get to the market, depending on the location of his mill? A. Yes.

Q. So that, wouldn't you say, sir, that when you used the word "competitive", or "to make yourself competitive", you did not mean the elimination of competition? A. That is correct.

Q. You were asked some questions with respect to the bulletin provisions regarding commission salesmen, particularly at pages 5118 to 5122, and your attention was called to two different types of provisions in the bulletins—one provision in bulletins prior to 1939, and another provision in bulletins subsequent to February 6, 1939.

4951 Do you remember that? A. Yes.

Q. Those two provisions were never in effect at the same time, were they? A. No.

Q. And in connection with this subject, the Presiding Justice suggested that you be asked this question, which I believe you were asked by Mr. Steffen: How does mere selling through a commission salesman accomplish a rebate or allowance? And I think you said you didn't see how it did.

Well, now, isn't it a fact, Mr. Lenci, that if the commission salesman were a man connected with the buyer, then your answer to that question would have to be different? A. Yes, that is true.

Q. And wasn't it a very common practice in the industry for manufacturers, in order to get business, to sell to a dealer and say, "Now, I will pay your president, or your secretary, or one of your salesmen, a commission on this business"? A. That was the basis of some of our complaints against the Kelley Plasterboard Company.

Q. Then you would say it was a common practice, wouldn't you? A. It was at a time, yes, at that time.

Q. In other words, the manufacturer or licensee

4952 would consider, for the purpose of a particular sale, that somebody connected with the buyer was, for that transaction, a commission salesman of the seller, wouldn't he? A. Yes.

Q. And, of course, if the seller paid a salesman connected with the buyer a commission, and the salesman turned that in to the buyer, that was a rebate, wasn't it? A. Yes.

Q. Now you are familiar, aren't you, with the difference

in wording between this commission salesman clause as it existed prior to 1939, and as it existed afterward? A. Yes.

Q. Quite apart from the wording, Mr. Lenci, wasn't it your understanding at all times that these provisions, that is, the earlier form of commission salesman provision, only applied to the use of commission men for the purpose of cutting the price of patented board? A. I believe that was the intent of that clause.

Q. Well, isn't it a fact that so far as you know, neither Board Survey nor USG ever made any attempt to enforce it in the broader sense, that is, to compel you to get rid of commission salesmen if you had any? A. That is correct, yes.

Q. And you remember that that earlier clause said that the employment of commission salesmen wholly or
4953 partly on commission would be considered a violation of the license, don't you? A. Yes.

Q. Now, during this entire period, this man Blanchfield of whom you spoke was, to say the least, employed partly on a commission basis by your company, wasn't he? A. That is right.

Q. And he went on receiving a commission from 1926 to 1940, didn't he, the whole period involved here? A. Yes.

Q. And you never— A. (Interposing) I don't think it was quite as late as 1940, but that is immaterial.

Q. Well, up to 1939? A. It was up to the latter part of the 30's, yes.

Q. And you were never told by Board Survey or USG, or any of their representatives, either in the nature of a formal complaint or otherwise, that you must discharge your commission salesmen? A. No.

Q. And isn't that likewise true of the provisions with respect to warehouses and customers' trucks, that is to say, that your understanding of the purpose of those provisions —whatever the wording was—was that those arrangements were prohibited only where they were used to effect
4954 a cut in the price of the patented board? A. Yes.

Q. At page 5133, this question of mine was repeated to you:

"Q. Now in connection with those questions, I would like to ask you now—did you understand that there was anything in your license contract, or in the bulletins, which provided that USG should raise or stabilize the prices of gypsum board?"

And you finally said that that was a double question, and you say "No" as to raise, but "Yes" as to stabilize. A. Yes.

Q. Now you know, don't you, that under your form of license agreement, USG had no obligation whatsoever to fix prices? A. They had the right.

Q. They reserved unto themselves the right to fix prices, didn't they? A. That is correct.

Q. But they had no obligation? A. No, that is true.

Q. They made no promise that they would exercise that right at any time, did they? A. No.

Q. Now, likewise you knew, didn't you, that any
4955 price bulletin issued by USG under the license could be withdrawn by USG at any time? A. Yes.

Q. So that, isn't the change in your answer, which you made to Mr. Steffen, incorrect? And weren't you right in the first place when you told us that there was nothing in the license contract or in the bulletins which provided that USG should stabilize the prices of gypsum board? A. Your interpretation of it is correct, Mr. Bromley. They had no obligation to do it, but they had the right to do it.

Q. And, of course, your testimony still stands, doesn't it, that there was no agreement or understanding, outside of the license agreement, that USG either would raise or stabilize prices? A. That is correct.

Q. At page 5142, you were asked this question, with respect to the Structural Gypsum Company, beginning at line 11:

"Q. And did they deliver directly to the job, to the contractors in Philadelphia, for example? A. No, I don't think we ever had any complaint as to that."

Now when you said, "I don't think we ever had any complaint", you meant that you never received any com-
4956 plaint from your dealer-customers about that, didn't you? A. That is, that the Structural had delivered to the contractors—

Q. (Interposing) In Philadelphia. A. Yes.

Q. Is that what you meant? A. Yes.

Q. And didn't you also mean, when you said, "I don't think we ever had any complaint", that you had had no complaint from your own salesmen? A. That is right.

Q. And on the next page, beginning at line 4, you were asked this question with respect to Structural selling at prices lower than your prices:

"Q. And had you known about it you would have made a

complaint? A. I believe we would have, because they were in the same markets that we were in."

Now when you said, "I believe we would have (made a complaint)", you didn't mean that you would have made a complaint to USG, but that you would have complained to Structural? A. Yes.

Q. You knew that neither you nor USG had any
4957 right to control Structural's prices? A. That is right.

Q. But you felt that you had a right to complain to them, since you were selling them the material at a discount, which they were using to undersell you? A. That is right.

Q. Now, beginning at the bottom of page 5155, and going over to page 5156, you were asked this question:

"Q. And you mean by that to say that USG, the licensor, had granted to Kelley authority to sell to Structural only if Structural sold at wholesale?"

And you answered:

"A. As a manufacturing distributor, yes."

You knew, didn't you, that there was no restriction whatsoever, under the bulletins or the license, upon your right to sell to these manufacturing distributors, but that the only restriction was upon your right to give them a discount? A. Yes.

Q. You could sell to these manufacturing distributors at the dealer's price without any limitation whatsoever, couldn't you? A. Of course.

Q. At all times? A. Yes.

Q. And the only restriction you had was that you
4958 couldn't sell them at a discount without permission? A. Yes.

Q. And you knew, didn't you, that the price bulletins made a provision that this consent to give a discount only applied to the extent that the manufacturing distributors did a wholesale business? A. Yes.

Q. Will you look at the July 20, 1933, bulletin, which is Exhibit 38, page 92. Do you see the last paragraph there, Mr. Lenci? A. Yes.

Q. That is the provision to which I have just referred, isn't it? A. Yes.

Q. And that provides that the permission to sell at a discount is restricted to sales of patented board and lath to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail? A. That is correct.

Q. So that, if Structural, during the time that it was being sold by you, for instance, changed the character of its business and became a dealer instead of a wholesaler, then you would have had no permission to give them a discount, would you? A. No, that is right.

4959 Q. And therefore, you felt that it was encumbent upon the supplier, did you not, to keep himself informed and make sure that Structural, while it was getting the discount, did not change the character of its business? A. That is right.

Q. Now the normal character, as you said, of the businesses of all of these manufacturing distributors, was the wholesale business, that is, to sell the dealers, wasn't it? A. Yes.

Q. And this complaint about which you were questioned was a complaint that Structural, contrary to normal procedure, had gone into the retail business by establishing a dealer at its mill, and selling directly to ultimate consumers rather than to dealers; isn't that right? A. Yes.

Q. And you felt that that was a legitimate subject to be inquired about by the supplier, Kelley, who at that time was selling Structural? A. Yes.

Q. So that when you told Mr. Steffen, on page 5156, in answer to the following question:

"Q. If Structural sold to retailers, then your understanding is that that was contrary to the arrangement between the licensor and Kelley?"

And you said:

4960 "A. Yes." You merely meant that Kelley no longer had any right to give Structural the discount? A. That is right.

Q. You did not mean to suggest, did you, that there was any arrangement between the licensor and Kelley by way of attempting to control the kind of business that Structural did? A. I meant the arrangement as to the commission.

Q. As to the discount? A. Yes, as to the discount.

Q. And is that true of your answer to this question, on the same page:

"Q. Is that your understanding also with regard to the Connecticut Adamant Plaster Company, that they should only sell to dealers? A. I would say it would be the same thing.

"Q. And the same would be true of Oakfield? A. Yes.

"Q. That they might not sell to but one class, that is, to dealers? A. Yes."

You didn't mean to create the impression that there was any agreement limiting the business that these manufacturing distributors could do, did you? A. No.

4961 Q. You merely meant to say that they were not entitled to a discount under the license and the consent and the bulletins, unless they confined themselves to a wholesale business? A. That is right.

Q. Or at least, to the extent that they did a retail business, they were not entitled to a discount on such part of their business? A. Yes.

Q. Now at page 5158, still with respect to Structural, you were asked this question:

"Q. Can you say, Mr. Lenci, that in point of fact you did expect something to be done about the Structural situation? A. We expected that Kelley would check up and not continue what we thought he was doing, and that is, giving a commission to Structural and allowing them to do all these different things they were doing at that particular time."

Now when you said "giving a commission to Structural"— A. (Interposing) I should have said an excessive commission, that was what I should have said.

Q. And when you said, "and allowing them to do all these different things they were doing", you meant "and thus allowing them"? A. Yes, that is right.

4962 Justice Stephens: When you use the word "commission", do you mean commission, as such, or discount?

The Witness: Discount, I mean. I should have said discount.

By Mr. Bromley:

Q. And when you say "excessive discount", you mean a discount in excess of the amount provided for in the consent, to-wit, 15 percent on board and 12-1/2 percent on lath; is that right? A. That is right, yes.

Q. Now at page 5031, at the bottom of the page, you were asked this question and gave this answer:

"Then it is a fact, would you not say, Mr. Lenci, that if you had to pay a royalty on open-edge board, and it also cost more to manufacture open-edge board, that it was a business impossibility to continue making open-edge board? A. Well, it would be, on that assumption, yes."

Well, it was the additional cost, rather than the royalty, which would have made it difficult to market the open-edge board, wasn't it? A. Yes, that is true.

Q. The royalty in itself would not have made it a business impossibility to manufacture and sell it, would it? A. No, it was the open-edge board, that was impossible to sell.

4963 Q. Because of its character? A. Because of its character.

Q. And because of its cost? A. Of its cost to manufacture, yes.

Q. Those were the chief factors which led you to conclude that it would be a business impossibility to continue making and selling it? A. Yes.

Q. And when you said "business impossibility", you meant merely that it would make it very difficult for you to do it and make money? A. That is right.

Justice Jackson: Did you mean to say, Mr. Lenci, that it would cost you more to make the open-edge board than the closed-edge board?

The Witness: Oh, yes.

Justice Jackson: On account of the wastage?

The Witness: Yes.

By Mr. Bromley:

Q. Now, at page 5089, you were asked some questions about joint filler, and you said that this was one of the points brought up by Mr. MacLeish at a meeting.

Now, Mr. MacLeish's first appearance at a meeting was in October, 1932, wasn't it? A. That was at the time that he was reporting on the audit?

4964 Q. Yes. A. Yes.

Q. And don't you now remember that this matter of joint filler, and the giving away of carpenters' aprons and joint filler to accomplish a rebate in the price of patented board, was something which was not mentioned by MacLeish at all in 1932, but happened back on June 6, 1929? Let me show you page 4177 of the transcript.

(Transcript handed to the witness.)

By Mr. Bromley:

Q. Does that refresh your recollection, or not? A. Yes, because when I was testifying there, I believe I was referring to my memorandum as to that meeting of June 6.

Q. And your memorandum of June 6 is Exhibit 419 for Identification, isn't it? A. Yes.

Q. And item 10 on that memorandum has to do with joint filler? A. That is right.

Q. The reference is: "No free finisher", on Exhibit 419 for Identification, isn't it? A. Yes.

Q. But "finisher" is joint filler, isn't it? A. Yes.

4965 Justice Stephens: What is the date of that exhibit?

The Witness: June 6, 1929.

By Mr. Bromley:

Q. So that you were mistaken in your testimony that this matter of no gifts of joint filler was brought up by MacLeish in October, 1932, but the fact is, as you know now, that it was brought up by somebody else on June 6, 1929; isn't that correct? A. That is correct.

Mr. Bromley: That is all.

Justice Stephens: Mr. Varian, have you any further questions?

Mr. Varian: No, I have not. I think Mr. Bromley has adequately covered it.

Justice Stephens: Do any counsel for any of the other defendants have any further re-cross examination?

(No response.)

Justice Stephens: Is there anything further, Mr. Steffen?

Mr. Steffen: Nothing further.

Justice Stephens: You are excused, Mr. Lenci, and thank you for attending the court.

(Witness excused.)

Justice Stephens: Call your next witness, gentlemen.

Mr. Steffen: Mr. Hansen, please.

4966 Thereupon, EMIL HANSEN called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Will you state your full name, Mr. Hansen? A. Emil Hansen.

Q. And your address?

Q. And your address? A. 300 West Water Street, Syracuse, New York.

Q. What company are you connected with, Mr. Hansen? A. With the Paragon Plaster Company.

Q. What is your position with that company? A. President and Treasurer.

Q. How long have you been connected with the Paragon Plaster Company? A. Since 1908.

Q. And were you an officer all through that time, Mr. Hansen? A. No, sir.

Q. When did you become an officer? A. To the best of my recollection, in 1914. That is approximate.

Q. And what is the business of the Paragon
4967 Plaster Company? A. The Paragon Plaster Company were manufacturers of brick, concrete products, and sanded wall plaster, and distributors of various building materials, both retailers and wholesalers.

Q. And among those materials, what did you handle?

Justice Stephens: I don't understand yet, Mr. Hansen, whether you were describing yourself as both retailer and wholesaler, or whether your distribution was to both retailers and wholesalers?

The Witness: I am describing our own business here.

Justice Stephens: I see, thank you.

The Witness: May I enlarge on that? We did a retail business in the City of Syracuse, selling to the consumer. Outside the City of Syracuse, we sold to dealers throughout New York State, and at times in New England and other territories.

By Mr. Steffen:

Q. What products did you sell? A. We sold lime, insulation board, gypsum wallboard, and in the very early days we sold Portland cement to dealers. We sold fire-brick. That is generally descriptive. The list would contain about 50 products.

Q. Now what about plaster? A. We manufactured at
Syracuse sanded wall plaster, and retailed that at
4968 Syracuse and sold to dealers throughout the Eastern part of the country, a business that we started in 1888.

Q. When you say you manufactured wall plaster, did you manufacture the stucco? A. We did not, no.

Q. And during this period, where did you get your stucco?

As I understand it, stucco is the base from which you make plaster, isn't it? A. That is right. Now, I can only speak from hearsay for the period of 1888 to 1908.

Q. That will satisfy me, I want to know just in general. A. From 1908, for quite a period, we got our stucco from the

Niagara Gypsum Company, in which we had a substantial stock interest and of which we were partially the organizers. That was located at Oakfield, New York.

That continued until approximately the year 1921 or 1922, at which time we, with two other companies having mixing plants, which we called the sanded plaster plants, organized the Oakfield Gypsum Products Corporation, and built a new mill at Oakfield, New York. From that time on, our gypsum came from that source.

Q. From that time until when? A. From that time until 1938, when we sold the Oakfield Gypsum Products
4969 Corporation to the National Gypsum Company, and from then on, under contract, got our gypsum from the National Gypsum Company.

Q. By "gypsum", you mean what I have called stucco? A. Yes, the stucco.

Justice Stephens: Mr. Steffen, there was a point in this testimony when the word "stucco" was being used as descriptive, as I remember the testimony, of a synthetic gypsum as distinguished from the gypsum rock. Are you using it in that sense now?

Mr. Steffen: No, we might bring that out by the witness.

By Mr. Steffen:

Q. What do you mean by "stucco"? A. Stucco is used as the tradename for calcined gypsum, whether it is synthetic or made from the natural rock.

Q. And you, at the Oakfield Gypsum Products plant, made which kind? A. Made it from the rock. We mined the gypsum rock and calcined it.

Q. And you had a plant to produce stucco from the rock mined there at Oakfield, New York? A. Yes.

Q. Now, let's look at that company. That company was formed when, the Oakfield Gypsum Products Corporation?

A. I think we started our organization in 1920, and
4970 we were building our plant in 1921.

Q. And that was a plant to convert rock into stucco? A. That is right.

Q. Did the Oakfield Gypsum Products Company make any other product? A. We manufactured wall plaster of various types.

Q. At Oakfield? A. At Oakfield. And at one period we made gypsum block.

Q. Now, this Oakfield Gypsum Products Company was formed, you say, in 1920, and was sold in 1938, the property

being sold to the National Gypsum Company? A. That is right.

Q. And you have been procuring your stucco for plaster, since that time, from the National Gypsum Company? A. That is correct.

Q. Are you a stockholder in the National Gypsum Company? A. We are.

Q. By that, do you mean personally, or the corporation? A. Personally and the corporation, also.

Q. Are you an officer or director of the National Gypsum Company? A. No, sir.

Q. Now, who were the other companies that you mentioned, of which there were three, the other compa-
4971 nies that formed the Oakfield Gypsum Products Company? A. The American Hardwall Plaster Company, of Utica, New York, and the Paragon Plaster & Supply Company of Scranton, Pennsylvania.

Q. Were there any other shareholders in Oakfield? A. No.

Q. Just the three companies? A. Just the three.

Q. And was the share ownership equal? A. That is right, it was. Each owned a third.

Q. Now in the organization of Oakfield, did you hold an office in that company? A. Yes, sir. I was not an officer in 1922. I was a Director, but not an officer.

Q. When did you become an officer? I became an officer in 1930.

Q. And what was the office? A. I became the Secretary.

Q. And you continued in that position until 1938? A. Yes, Secretary and Vice President, I think it was, to make the answer complete.

Q. Do you know, or are you familiar with the organization of the American Hardwall Plaster Company? A. Yes, to a reasonable extent.

Q. What is the nature of their business? A. The
4972 same type of business that ours is, generally.

Q. And do you know approximately when they were organized? A. About 1890.

Q. And they are located at Utica? A. At Utica.

Q. Who was the principal officer of the American Hardwall Plaster Company? A. At what time?

Q. Beginning with, say, 1920? A. Mr. J. L. Hughes.

Q. Who else? A. Mr. Hughes was the General Manager. I don't remember who, at that time, was the President of

the organization. I think Mr. Thomas R. Proctor.

4973 Q. Following that time, who became the president, or one of the superior officers of American Hardwall? Did Mr. Merriam or Mr. Eldred become officers? A. Of the American Hardwall?

Q. Yes. A. Mr. Eldred. Mr. Merriam was in Scranton, sir.

Q. And by "Mr. Eldred", you mean who? A. Mr. T. P. Eldred.

Q. What was his position with American Hardwall? A. He was General Manager of it, and, I think, the Secretary.

Q. Was he connected with Oakfield? A. Yes, he was Treasurer of the Oakfield Gypsum Products Corporation from sometime in the 20's.

Q. Do you know where Mr. Eldred is now? A. Mr. Eldred is in Utica. He is at home recovering from a very severe operation. He had a kidney removed.

Q. Do you know about when he had that operation? A. When he had the operation?

Q. Yes. A. Just about Christmas, I think shortly after that.

Q. And he is very seriously incapacitated right now? A. Yes; he had an embolism following the operation.

Q. Now you speak of Mr. Merriman as being connected with the Paragon Plaster & Supply Company of Scranton; is that correct? A. Yes.

4974 Q. What is his full name? A. E. L. Merriman.

Q. What was his office with the Paragon Plaster & Supply Company? A. He was the Treasurer and General Manager.

Q. And I think you told us, when you were here the last time, that he died recently, did you not? A. He died on the date that first appeared here.

Q. That was last month? A. Yes, that is right.

Q. Was Mr. Merriman connected with the Oakfield Gypsum Products Corporation? A. Yes sir, he was a director and the original vice-president, and on the death of the president of the company, who at its organization was W. K. Squier of my company, he became the president of Oakfield Gypsum Products Corporation.

Q. The business of the Paragon Plaster & Supply Company was what kind of business? A. Similar to ours, with a sanded plaster mixing plant, and the distribution of various building products in the mason materials field.

Q. That is, they sold at retail in Scranton and also dis-

4975 tributed— A. (Interposing): It was very much the same character of business as ours.

Q. Now was there an Executive Committee of the Oakfield Gypsum Products Corporation, or how was it managed? A. Yes, it was operated by an Executive Committee.

Q. And who were the members of the Executive Committee? A. The original members were W. K. Squier, E. L. Merriman and J. L. Hughes.

Q. Beginning at about 1929 or 1930— A. (Interposing): In 1930 they were E. L. Merriman, T. P. Eldred, and myself.

Q. And you continued in office until the Company was sold out in 1938? A. That is correct.

Q. Well, now you have stated the Oakfield Gypsum Products Corporation made stucco, and that it was managed by an Executive Committee of you three members, that is Mr. Merriman, Mr. Eldred and yourself? A. That is right.

Q. And the stucco was sold to the three shareholding companies? A. That is correct.

Q. Paragon Plaster Company, American Hardwall Plaster Company, and Paragon Plaster & Supply Company? A. Yes.

4976 Q. Describe your sales between Oakfield and the Paragon Plaster Company and the other two constituent companies? What I want to get at is this. Oakfield was a separate concern, was it, and it kept separate books? A. Yes.

Q. And there were sales made by Oakfield to Paragon Plaster Company, to Paragon Plaster & Supply Company, and to American Hardwall? A. That is right, with some other business.

Q. That is, between the companies? A. No, Oakfield sold to some others.

Q. Well, to begin with, Mr. Hansen, did Oakfield Gypsum Products Corporation sell generally, or did it sell wholly to the three shareholding companies? A. Generally only to the three, with the exception of crushed gypsum rock. We had quite a business with cement companies to which Oakfield sold direct, the Portland Cement companies.

Q. And did that business continue on through— A. (Interposing): Yes, that continued on.

Q. Oakfield handled that as a more or less separate enterprise?

Mr. Bromley: I object to that as incompetent, as calling for a conclusion.

Mr. Steffen: I think it is immaterial, your Honor.

4977 Mr. Bromley: I object on that ground too.

Justice Stephens: If you think it is immaterial, the objection is sustained.

Mr. Steffen: It was more or less a preliminary question.

By Mr. Steffen:

Q. Reference was made to synthetic stucco, Mr. Hansen. Where is synthetic stucco, or where was synthetic stucco, produced, that you know of? A. Well, the only plant that I know of that manufactured it was the one in the vicinity of Kearny, New Jersey, operated by the Structural Gypsum Company.

Q. The Structural Gypsum Company was a subsidiary of — A. (Interposing):—the American Cyanamid Company.

Q. And it was operated during this period of time, or could you tell us what period of time it was operated? A. I couldn't tell you, but it was in operation during this period of time.

Q. And they made stucco by a synthetic process? A. I wouldn't be expert enough to tell you how it was made, sir.

Q. But it was not mined? A. It was not mined, that is right.

Q. And that stucco was made up into plaster, was it, and sold in competition with the plaster that your companies made? A. Yes.

4978 Q. Could you tell us what the relative prices of the two plasters were, that made by your companies and that made by Structural?

Justice Jackson: Do you mean which was the more expensive?

Mr. Steffen: I wanted to know if they were competitors of Mr. Hansen?

The Witness: We were competitors in some fields, not to any great extent. We were competitors when we sold around the metropolitan district; but they didn't sell very much in upper New York State.

By Mr. Steffen:

Q. And did you sell in the metropolitan district to any extent, sell your plaster? A. We did in the early days, yes, in the 20's and into the 30's.

Q. And during that period the Structural people were a competitor of yours? A. That is right.

Q. And were their prices high or low? A. I don't recall; I know that we succeeded in selling to some extent.

Q. Was their product as good as the product that you made, would you say? A. We didn't admit it.

Mr. Bromley: It seems to me that that is immaterial.

4979 Justice Stephens: What is this all about, Mr. Steffen?

Mr. Steffen: I wanted simply to develop some of the background of the business of selling plaster and board.

Justice Stephens: We will take the three o'clock recess at this time.

(Whereupon, a five minute recess was taken, at the conclusion of which the trial was resumed as follows:)

4980 Justice Stephens: Proceed, gentlemen.

By Mr. Steffen:

Q. You were telling us that the Oakfield Gypsum Products Corporation was acting as a producing company for the three shareholding companies? A. That is right.

Mr. Bromley: I object to that as calling for a conclusion. I don't think that is his testimony at all.

Mr. Steffen: Then I will ask it the other way.

By Mr. Steffen:

Q. Is that true, Mr. Hansen? A. Yes, sir.

Q. And they would manufacture stucco, and would they ship that to the three shareholding companies? A. Yes.

Q. That was for what purpose? A. That was for the purpose of making sanded plaster at the three mixing plants.

Q. And what about neat plaster? A. They also made a neat plaster and various other types of plaster.

Q. And did they make that for your three companies? A. For the three companies, yes.

Q. How was it branded? A. It was put up under
4981 three different brands, according to who ordered it.

Q. According to which of the three companies ordered it? A. Yes, the American Hardwall or Paragon Plaster or Paragon of Scranton.

Q. Did the Oakfield Gypsum Products Corporation act as shipping agent in making up cars for the three companies? A. Yes.

Q. Describe that. A. Orders would be sent up from

Utica, Syracuse or Scranton in the name of one of the companies, for making up the mixed cars, and they would be loaded with whatever the order called for. There were stocked at Oakfield such products as were required for mixed-car shipments, such as white plaster and hydrated lime, and gypsum board and gypsum lath.

Q. And these shipments would be made to fill Paragon's orders, for example, in sales to dealers? A. To dealers, yes.

Q. And the same would be true with regard to American Hardwall and the other Paragon company? A. That is correct.

Justice Stephens: Refresh my recollection, what is "neat" plaster, as distinguished from other plaster?

Mr. Steffen: Mr. Hansen, will you refresh all our
4982 recollections on that point?

The Witness: Neat plaster is calcined gypsum, mixed with certain other ingredients for purposes of plastering on walls, with the addition of sand at the job.

By Mr. Steffen:

Q. And "sanded" plaster is what? A. Sanded plaster is plaster in which the sand is added at a mixing plant, whether at the point of manufacture or at some mixing plant located separately; so that when it gets to the job it is used just as it comes from the bags, with the addition of water. No sand is added at the job.

Justice Stephens: Is there a difference in quality between sanded plaster and neat plaster? Is it different looking or does it contain different ingredients?

The Witness: Well, there is sand in the sanded plaster.

Justice Stephens: I understood you to say there was sand in the neat plaster—maybe I misunderstood you.

The Witness: There is no sand in neat plaster. With neat plaster the sand is added at the job. For instance, to plaster this building you would have your bags of neat plaster here and a load of sand.

Justice Jackson: To put on a white hardwall finish, you wouldn't add any sand?

The Witness: The sand would go in the base coats.

Justice Jackson: I am talking about the surface
4983 coat; then you would use it neat, meaning by itself, wouldn't you?

The Witness: Well, the hard white finish is mostly lime with some white calcined gypsum used as a setting agent.

Justice Jackson: One of the witnesses heretofore stated, when I asked him about the old-fashioned hardwall, white hardwall, that he assumed they used gypsum as they used to use lime.

The Witness: Yes.

By Mr. Steffen:

Q. They use a white plaster for the hard finish, do they not? A. Yes.

Q. And there is a mixture of lime with that? A. Right.

Q. Mr. Hansen, during the years 1926, 1927, 1928 and 1929, did the Paragon Plaster Company purchase gypsum board? A. Yes, sir.

Q. And so far as you know did the American Hardwall Plaster Company and the Paragon Plaster and Supply Company also purchase gypsum board? A. Yes.

Q. Where did your company buy board? A. Well, from various sources. The Universal Gypsum and Lime Company was probably our principal source, as I recall it, during that period.

4984 Q. Did you at one time buy from Niagara? A. Yes we bought from the Niagara Gypsum Company also, until they went out of business.

Q. Now, when you were buying gypsum board from Universal, how was that shipped to you? A. That would be shipped directly to us at Syracuse.

Q. Would it also be shipped to you at Oakfield? A. Well now, you said the Paragon Plaster Company. No, anything that was shipped to Oakfield was bought by the Oakfield Gypsum Company.

Q. I understand. And was the Oakfield Gypsum Company buying board, to your recollection, in 1927 and 1928? A. Yes.

Q. And were they supplying that board in mixed cars, which you have described, where they were shipping out neat plaster with your branded name, for example, and also lime, and possibly board—were they doing that at that time? A. They were shipping that out for us, yes.

Q. Do you recall about what time you, the Paragon Plaster Company, commenced buying board in this way from Universal Gypsum and Lime Company?

Mr. Bromley: In what way does "this way" mean? May we have that clear?

Mr. Steffen: In the way he has just described, that is buying it for Paragon, as I understand it, and also

4985 buying some which came to the Oakfield Products Company.

The Witness: That would go back, I should say, to the starting of the Oakfield Gypsum Company, the Oakfield Gypsum Products Corporation.

By Mr. Steffen:

Q. They were dealing in board at the very beginning? A. Yes.

Mr. Bromley: I don't understand this witness to say that Paragon bought board from Universal that went to Oakfield.

The Witness: No, I didn't say that.

Mr. Bromley: That is what the question assumed.

The Witness: I didn't understand it so.

By Mr. Steffen:

Q. Will you clarify that, please? A. Oakfield bought the board that went to Oakfield, and during the period that you have asked me about, the Paragon Plaster Company bought the board that went to Syracuse.

Q. And you kept separate books? A. Yes.

Justice Stephens: What do you mean by saying "went to Syracuse"—do you mean that it went to the Paragon Plaster Company at Syracuse?

The Witness: Yes.

Mr. Bromley: Could we have straightened out what happened to the board that Oakfield bought that you
4986 said was put in mixed cars? That was sold by Oakfield to Paragon, wasn't it?

By Mr. Steffen:

Q. When Paragon sold a mixed car to a dealer, and it included neat plaster with your brand name and was to come from Oakfield and be shipped directly to your dealer-customer, if you also included board, it was the practice for Oakfield to load the board at Oakfield in that mixed car? A. That is right.

Q. How did you handle the sales transactions or the dealings as respects that board? A. That board was invoiced by the Oakfield Gypsum Products Corporation to the Paragon Plaster Company.

Q. And shipped to your dealer? A. Yes.

Mr. Bromley: When you say "invoiced", you mean

that Oakfield sold it to Paragon and that Paragon paid for it?

The Witness: Yes.

Justice Stephens: Is that what you mean?

The Witness: Yes.

Mr. Steffen: That was my understanding, your Honor.

By Mr. Steffen:

Q. That you carried through the form of a sales transaction from Oakfield to the three parent companies?

Mr. Bromley: I object to that, "that you carried through the form"—as calling for a conclusion.

4987 Justice Stephens: The question as phrased is in a conclusional form. Ask the witness whether it was an actual sales transaction.

By Mr. Steffen:

Q. Will you explain the transaction for the benefit of everybody, please? A. Oakfield bought these various products that had to go into the mixed-car shipments. When the mixed cars were shipped, all the material in the cars was billed to the Paragon Plaster Company, or to one of the three companies, whichever did the ordering.

Q. And it was shipped, I think you testified to Paragon's dealer-customer? A. That is right.

Q. And when Oakfield purchased board for this purpose it acted pursuant to the direction of the executive committee of the Oakfield Gypsum Products Corporation, or did it? A. That is correct.

Q. And you were a member of the executive committee? A. That is right.

Q. I want to show you what has been marked as Government's Exhibit No. 559, which is a letter from the Universal Gypsum and Lime Company, signed by Mr. W. G. Stromquist, under date of January 25, 1928, and addressed to the Paragon Plaster Company, Syracuse, New York,

4988 attention of Mr. Emil Hansen, secretary.

(Counsel hands the document to the witness.)

Justice Stephens: This proposed exhibit refers to a letter. Is the letter of July 9th, which is the next succeeding one in this set of exhibits, the letter to which it refers?

Justice Jackson: It can't be; that next letter is dated in July of the same year and this is January.

Mr. Steffen: May I see Exhibit 559, please?

(Document was handed to Mr. Steffen.)

Mr. Bromley: Now, have you changed the form of the papers in which you handed them to the witness?

Mr. Steffen: I have disengaged the original letter, Exhibit 559, from the other one. They were apparently improperly put together because one relates to January 25, 1928, and the other to July 9, 1928.

Justice Stephens: Exhibit 559 is the single sheet alone, now?

Mr. Steffen: The single sheet. There was some error on our part in attaching those together.

By Mr. Steffen:

Q. Have you examined Government Exhibit 559, Mr. Hansen? A. Yes, sir.

Q. And can you say whether or not you received that letter? A. Yes, sir.

4989 Mr. Oliver: If the Court please, may we see that exhibit?

Justice Stephens: Yes, sir. Mr. Marshal, submit it to counsel.

(Government's Exhibit No. 559 was handed to counsel.)

Justice Stephens: Isn't there a set of photostats of these exhibits? They were on the desk of the judges this morning.

Mr. Knuff: They were put on the clerk's desk.

Mr. Johnston: We didn't know anything about them until the recess a few minutes ago.

Justice Stephens: Isn't there some way that we can establish diplomatic relations between counsel for the defendants and the clerk so that each can know what the other needs?

If you have any of those exhibits handed to you, Mr. Clerk, call the attention of defendants' counsel to them so that they can have the benefit of them.

Where are those exhibits now, Mr. Clerk?

The Clerk: Mr. Bromley has one set and the judges have the other three.

Justice Jackson: Have you seen this Exhibit 559, Mr. Finck?

Mr. Finck: Yes, your Honor, I did.

(Government's Exhibit No. 559 was returned to the witness.)

By Mr. Steffen:

4990 Q. Could you tell us now, Mr. Hansen, whether or not that was at about the time you were buying gypsum board from the Universal Gypsum and Lime Company? A. That is correct.

Q. And could you tell us what the phone conversation referred to therein was about? A. No, I couldn't remember that, sir.

Q. Could you tell us whether or not you received prices in connection with this letter?

Mr. Bromley: I object to that as immaterial, on the ground that there is no charge in the complaint or in the bill of particulars that the retail prices of purchasers such as the Paragon Company, were controlled. The ruling which applied to the alleged control of resales of the Witness Perry should be applied in this instance.

Justice Stephens: What is the purpose of this testimony; what are you intending to prove by it as far as the complaint is concerned, or rather as far as the charges in the complaint is concerned?

Mr. Steffen: We don't wish to make an issue on this letter, your Honor. I would like to show him the next exhibit, if you would care to defer your ruling until that time, and I think at that time it will be clearer.

Justice Stephens: Very well.

By Mr. Steffen:

4991 Q. I show you Government's Exhibit No. 560, which purports to be a letter from Mr. Stromquist addressed to the Paragon Plaster and Supply Company, attention of Mr. Merriman, under date of July 9, 1928, and ask you to examine that, please, Mr. Hansen.

(Government's Exhibit No. 560 was handed to the witness.)

By Mr. Steffen:

Q. Can you identify that as Mr. Stromquist's signature, Mr. Hansen? A. You are asking me if I can identify it as Mr. Stromquist's signature?

Q. Yes. A. Yes.

Justice Stephens: Just a moment, Mr. Steffen, let me read it.

All right, you may proceed.

By Mr. Steffen:

Q. I notice in the lower left-hand corner of the second page it shows that a copy may have been sent to the Paragon Plaster Company. Do you recall having received a copy of this letter? A. It would be a little difficult for me to say that. We had frequent correspondence, and I would assume that I received it.

Q. I notice also it has reference to the American
4992 Hardwall Plaster Company, Utica? A. Yes.

Q. Could you tell us whether your company and the American Hardwall, and the Paragon Plaster and Supply Company were all buying from the Universal at this time? A. As far as I know, we were.

Q. Could you be more explicit on that, could you say that you were? A. We were.

Q. By "this time", I mean at about the time of this letter, July 9, 1928? A. That is correct.

Q. Now, I want to call your attention to the fact that in the third paragraph of the letter on the first page, it says, "The very lowest prices"—

Mr. Bromley: (Interposing) I object to reading from a document not in evidence.

By Mr. Steffen:

Q. Let me call your attention to the third paragraph, Mr. Hansen—I will, if I may, withdraw that question, and offer the exhibit, Exhibit 560, in evidence.

I do it with this statement, that the witness has testified, identifying the signature of Mr. Stromquist. It is an obvious quotation of prices for board sold at that time to the two Paragon companies and to the American
4993 Hardwall Plaster Company. In the third paragraph it refers to the—excuse me, I may not read that into the record—but it refers to prices "for your plant at Oakfield."

Now in response to Mr. Bromley's objection, which he made in connection with Exhibit 559, I would make these two points. In the first place, this evidence is offered to show the preliminary arrangements out of which grew the arrangements between Oakfield and the licensees in 1929, 1930, and following, and Mr. Hansen's understanding, and of course the Paragon Plaster Company's understanding, of how those arrangements were carried through, is of course material.

Specifically, however, it provides in the third paragraph there as respects to the sales to "your plant at Oakfield."

We have developed that Oakfield Gypsum Company was the company which was being operated in close conjunction, at least, with the three shareholding companies. The only officers, or the principal officers or managers of the Oakfield Gypsum Products Corporation were the principal officers of the three shareholding companies, and Mr. Hansen was an officer not only of the Paragon Plaster Company, but also was an executive of the Oakfield Gypsum Products Corporation.

A letter coming to Paragon and referring to "your plant at Oakfield" refers to their purchases either as respects Oakfield or Paragon.

So that it seems to me that within the strict definition, Oakfield was their manufacturing distributor, and here are some preliminary papers in connection with the purchases of board by a manufacturing distributor. And, as I say, the basis upon which they made these early purchases—in fact it is only a year before the license agreement went into effect—has a considerable bearing to show the basis upon which they were subsequently handling board for Universal and other licensees.

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Also, as a matter of fact, at this time, July 9, 1928, Universal was a licensee under the closed-edge patent, with the United States Gypsum Company.

Mr. Oliver: If the Court please, before you rule on this exhibit may we have an opportunity to see it?

Justice Stephens: Yes, you may see it.

Mr. Marshal, hand it to Mr. Oliver.

(The document referred to was handed to Mr. Oliver.)

Mr. Bromley: I make the same objection that I made to Exhibit 559, and call the Court's attention to the fact that there is no charge in the complaint that the resale prices of purchasers such as Paragon Plaster and Supply Company of Scranton, were controlled; and that this document is covered precisely by the ruling which this Court made with respect to the alleged control of the resales of the Witness Perry.

Furthermore, I object because there is no identification, no proper foundation laid, because this witness has not testified that this letter was sent to or received by the person to whom it was addressed. All he said was that he assumed that he got a copy of it. Certainly, that does not constitute a sufficient identification.

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Of the two, however, it seems to me the objection to materiality is the more important since we asked the Government to list in their bill of particulars who the manufacturing distributors were whose retail prices they said were controlled, and they listed them but did not put in either the Paragon Plaster, the Paragon Plaster and Supply, or the American Hardwall Company.

Justice Stephens: Are you offering this to prove price fixing in respect of the three companies, Paragon Plaster and Supply and the other two mentioned, other than Oakfield, each of which owned a one-third interest in Oakfield, or are you offering it to prove price fixing with respect to Oakfield—or both?

Mr. Steffen: I think it is with regard to both, although what we are offering it for primarily is with regard to Oakfield.

Justice Stephens: What do you say to that, Mr. Bromley, that in so far as Oakfield was concerned it was a manufacturing distributor? Was it mentioned in the bill of particulars?

Mr. Bromley: Yes. But how can this have any bearing on the Oakfield Gypsum Products Corporation? It isn't addressed to and was not sent to or received by the

4996 Oakfield Gypsum Products Corporation.

Mr. Steffen: I should like to ask the witness what I tried to ask him earlier, as to what he understood by the third paragraph there.

Mr. Bromley: This question was all gone into at the criminal case and these documents were excluded at the criminal case—

Mr. Steffen: (Interposing) I say that is not material.

Mr. Bromley: (Continuing)—because all this one has to do with, for instance, is the Paragon Plaster and Supply Company. It has nothing to do with the Oakfield Gypsum Products Corporation. The same argument was made in the criminal case and these exhibits were all excluded on the theory that there was no charge that the defendants were attempting to control the prices of the Paragon Plaster and Supply Company, the Paragon Plaster or the American Hardwall Company.

Justice Stephens: I have some difficulty in seeing, Mr. Steffen, even if the Court should draw the conclusion from the testimony of this witness that the four companies were one and the same, since you do not charge in the bill of particulars that there was any attempt to control the prices

of the three, other than Oakfield, how these exhibits can be material, or how this exhibit, rather, can be material.

We ruled with respect to Perry, we all agreed
4997 that the objection should be sustained and the motion to strike granted, there being no charge in the complaint of resale price fixing on plaster, board and other gypsum products by wholesalers, as distinguished from manufacturing distributors.

This seems to be a parallel situation.

Mr. Steffen: May I point out the lack of parallel, as I see it?

Justice Stephens: Yes.

Mr. Steffen: The Perry situation was very different, as I see it, in this respect, that Perry was simply doing a sales business. The Paragon Plaster and Supply Company and the Paragon Plaster Company, together with the American Hardwall Plaster Company, as I have developed rather fully, were organized to run the Oakfield Gypsum Products Corporation. The Oakfield Gypsum Products Corporation was a manufacturing distributor, and as I introduce further exhibits it will appear that the Oakfield Gypsum Products Corporation in a year or so became the sole purchaser of board, as a manufacturing distributor. Nothing of that sort occurred in the Perry case. There was no transition period in the sales of Perry, where he, for a period, served part as distributor and part as wholesaler. It was, in that case, just a plain case of a commission man or a salesman who was selling, and your Honors, I think, decided quite rightly that we had made no charge with respect to that.

4998 Now in this case we are not offering this, as I say, for purposes of proving that the defendants attempted to fix the prices at which the Paragon Plaster and Supply Company or the Paragon Plaster Company or the Hardwall Plaster Company sold.

We are offering this to show the basis upon which these sales were being handled in 1928, the year before the license agreements were generally effective in the industry, and it would be, therefore, very persuasive to determine how they handled it one year later.

Justice Stephens: Well, handled it in respect of whom, Paragon, the Paragon Plaster and Supply Company, the American Hardwall Plaster Company or Oakfield?

Mr. Steffen: The Oakfield Gypsum Products Corporation.

Justice Stephens: I don't understand that there is any objection to the exhibit with respect to Oakfield, based upon the contention that there is no charge of resale price fixing with respect to Oakfield. The objection is, as to Oakfield, that it doesn't relate to Oakfield.

Mr. Steffen: I point out the third paragraph, your Honor.

Justice Stephens: In other words, you contend that the phrase, "your plant at Oakfield" refers to the Oakfield Gypsum Products Corporation? I am asking you, Mr. Steffen, is that your contention?

Mr. Steffen: Yes, but I would like to ask this
4999 witness that question at some time, if you have any doubt.

Mr. Bromley: The unfairness of this shift of ground is illustrated by the fact that in every other instance in his bill of particulars, where he had a parent company and a subsidiary, where the charge was that we controlled the prices of both of them, he listed them.

For instance, take the Michigan Gypsum Company, listed in his bill of particulars as a manufacturing distributor. It had a parent, the Alabastine Company, and if you will look in the bill of particulars you will find not only the Michigan Gypsum Company listed, but also the Alabastine Company listed. Likewise, the Structural Gypsum Corporation, of which we have heard so much from Mr. Lenci, had a parent, the American Cyanamid Company. If you will look at the bill of particulars you will find the American Cyanamid Company listed.

Now, when we come to Oakfield there is no suggestion anywhere that they are going to charge us with having fixed the prices of the parents, as they do not list the parents. They list Oakfield but none of the parents. But it seems to me that that is very persuasive that this shift of ground constitutes such a surprise to us that it ought not to be permitted, and it is clearly immaterial to this case.

Justice Stephens: I don't understand this aspect of your objection, Mr. Bromley. You do concede that the bill of particulars did charge the fixing of resale prices
5000 of Oakfield, a manufacturing distributor. Now, if that is true, how can we exclude a letter which refers to the orders for the Oakfield plant, if it does?

Mr. Bromley: There isn't anything in this letter that has anything to do with the resale prices of Oakfield

Gypsum Products Corporation. You don't contend that, do you, Mr. Steffen?

Mr. Steffen: Oh, yes.

Mr. Bromley: Where is there any reference in this letter to the resale prices of Oakfield Gypsum Products Corporation?

Mr. Steffen: Would you like to hear from me on that?

Justice Stephens: Yes.

Mr. Steffen: I will call your attention to the third paragraph. I think I will read this very carefully for you:

"The very lowest prices we can make you on your orders for your plant at Oakfield, N. Y. are as follows:

Gypsolite Wallboard.....$21.00 per M. sq. ft.
Star Gypsum Wallboard.....$15.00 per M. sq. ft.
f.o.b. our plant Akron, New York."

Then the next paragraph, which is related thereto states:

"On orders for your plants at Syracuse, Utica, Bloomsburg and Scranton (three of those are three we have spoken of before, the two Paragon companies and the American Hardwall, and I don't know what Bloomsburg refers to), we will give you the following prices:

5001 Gypsolite Wallboard.....$22.00 per M. sq. ft.
Star Gypsum Wallboard.....$16.00 per M. sq. ft.
f.o.b. our plant Akron, New York."

Now, that is the price to the two Paragon companies and the American Hardwall Plaster at their Syracuse, Utica and Scranton plants, and also the price to them at their Oakfield plant, or rather to the Oakfield plant.

Now, it says, in the next to the last paragraph:

"In quoting carload prices to your dealer trade on Gypsolite Wallboard, you will please maintain our standard price of $25.00 per M. sq. ft."

That is certainly a provision ordering or requiring that resale prices be maintained not only on the sales made directly by Paragon to the dealer trade but also upon the sales made by Oakfield. We have carefully developed in the testimony here that those sales that were made at Oakfield were made by the Oakfield Gypsum Products Corporation, and it would be quite appropriate to write to Mr. Hansen, or to Mr. Merriman, or Mr. Eldred and say, inasmuch as they were also officers at Oakfield, "At

your plant we will sell you at such-and-such a price, and you will resell at such-and-such a price."

Now, it may be a misfortune that this letter was put together that way, that is, that it refers also to Paragon. But it distinctly refers to their sales, to the prices to be sold to them at Oakfield, and to the resale prices
5002 to be paid by them—reading rather loosely—either at Oakfield or at Syracuse, Utica and Scranton.

Justice Stephens: When you talk about "resale prices", do you mean the resale prices of the Paragon Plaster and Supply Company—and what are the other two?

Mr. Bromley: They are at the bottom of that letter, the second page.

Mr. Steffen: They are the three shareholder companies.

Justice Stephens: The Paragon Plaster and Supply Company, the Paragon Plaster Company, and the American Hardwall Plaster Company.

Mr. Steffen: Yes.

Justice Stephens: You contend that this letter tends to prove the fixing of a price at which they could resell their products either to Oakfield or to third parties.

Mr. Steffen: No, I am saying that the letter rather clearly says, as I read it, that these are prices quoted for shipment to "your plant at Oakfield, New York", meaning thereby of course the Oakfield Gypsum Products Corporation plant.

Then, secondly, "for your plants at Syracuse, Utica, * * * and Scranton"—meaning thereby the three parent companies.

Then the next to the last paragraph says, that is the next to the last paragraph on the first page, that
5003 on all business, whether sold by Oakfield Gypsum Products Corporation or by either of the two Paragon companies or the American Hardwall Plaster Company, the price shall be $25 per thousand square feet. That is the price to the dealer trade, either the parent companies' dealer trade or Oakfield's dealer trade.

Mr. Bromley: Well, I never heard a more unsound argument. The letter isn't addressed to the Oakfield Gypsum Products Corporation, either at the top of the page or at the bottom of page 2; and the third paragraph that he talks about beginning, "The very lowest prices we can make you on your orders for your plant at Oakfield, N. Y."—that is on Paragon's orders which Paragon may want to go to Oakfield.

The letter is not addressed to Oakfield, it wasn't received by Oakfield, and it wasn't sent to Oakfield, nor was a copy of it sent to or received by Oakfield.

Justice Stephens: The problem that troubles me about the admissibility of the letter, aside from the question of identification, is that if it purports to be a letter which fixes the resale prices of the Paragon Plaster Company, the Paragon Plaster and Supply Company, and the American Hardwall Plaster Company in their sales either to third parties or to Oakfield, it is not within the charge of the complaint; and if it is not that, what is there in there that indicates that it directed the resale price at which Oakfield should sell these items?

5004 Mr. Bromley: Not a thing.

Mr. Steffen: May I state this, your Honor?

The witness testified that there were purchases by the Oakfield Gypsum Products Corporation from Universal, as well as by Paragon. That was in his preliminary testimony. He stated that if Paragon, for example, had a mixed car order from a dealer in some other city, and they had to ship some neat plaster as well as some board, that they would send that order to Oakfield, their own subsidiary, and say, "Oakfield, ship to our customer one mixed car consisting of so much board and so much plaster."

And Oakfield, which had bought the board—and these were the arrangements we contend—would then invoice the board and make the sale clear through.

The point is that on that sale going to Paragon's dealer this letter says, "You shall charge $25 per thousand square feet."

Justice Stephens: Let me see if I clearly understand that argument. Your argument then is that in that class of sale concerning which Mr. Hansen testified, where Paragon Plaster and Supply, American Hardwall and Paragon Plaster Company would buy from Oakfield, Oakfield would bill those three companies just mentioned but would send the materials direct to the dealer?

Mr. Steffen: That is right.

5005 Justice Stephens: You contend that this letter tends to prove that when Oakfield did that, it had to do it at a price fixed by Universal under the license, or fixed by Universal, rather?

Mr. Steffen: That is right, and fixed under this letter.

Justice Stephens: And that that was a resale price of

Oakfield to Paragon, American Hardwall and Paragon Plaster and Supply, or to third parties—which?

Mr. Steffen: Well, it ran through—you see there is no case just like this when you have three parent companies and one subsidiary company and where they are using the subsidiary company as a producing company. They have that company buy certain board, and they control the Oakfield Gypsum Products Corporation completely, and they have that company, the Oakfield Gypsum Products Corporation buy board, and then, in making sales to dealers, the parent companies would say, "Ship directly to the dealer to whom we have sold; invoice us and we will invoice the customer."

On that type of a transaction which has definitely to do with the manufacturing distributor, it is provided in this letter that those sales must be at $25 per thousand square feet, that is that the dealer would have to pay a $25 price.

That, we contend, is a very definite showing of control of a manufacturing distributor's prices. I would like to make one other point—

5006 Justice Stephens: (Interposing) What puzzles me, Mr. Steffen, is that this paragraph on which you rely says, "The very lowest prices we can make you on your orders for your plant at Oakfield, N. Y. are as follows". That does not sound like resale price fixing to me. It sounds like the price which either the Paragon Plaster and Supply Company or Oakfield would have to pay Universal when it bought goods.

Mr. Steffen: That is right.

Justice Stephens: What has that to do with the resale price?

Mr. Steffen: That is the paragraph that says that when you buy at Oakfield—and what the writer of this letter evidently was doing was saying, "Well, here is a jammed-up situation with three parent companies and one subsidiary, and we know that all four companies are doing business"—and what Stromquist says is, "Now, when you buy from us these are the prices at which you shall buy." That is in the first paragraph, to which I referred. He is saying, "If you are going to buy from us ("you", speaking loosely), you at your plant at Oakfield will pay $21 per thousand square feet; and you, at Utica, Syracuse and Scranton, will pay $22 per thousand square feet."

That is the purchase price from Universal.

Then, the next to the last paragraph on that page
5007 says, in effect, "As to both types of purchases, whether at Oakfield, Syracuse, or elsewhere, you will sell to dealers at a price of $25."

Now, what we have developed here is the way this transaction would go through would be that Universal would sell to Mr. Hansen's plant at Oakfield at $21 per thousand. Then when the sale by Oakfield is made, if made directly it would be made at $25. If it was made through the medium of Paragon, and then to the dealer, again it would be made at $25.

Now, may I make my two points, your Honor?

We offer it first, as I just suggested, as showing a definite control of a resale price by a named manufacturing distributor, the Oakfield Gypsum Products Corporation.

We offer it second for the inferential value that it will have as showing the understanding which Mr. Hansen had, which Mr. Merriman had, and which Mr. Eldred had, concerning these purchases from Universal, and concerning their requirement that it would be resold at a definite price.

Now, it is true that that might be regarded as an attempt to control, and I think it was an actual control of Paragon's resale price. We don't offer it because that is charged in the complaint; we offer it, however, to say that if they were controlling Paragon's resale price, and Paragon was so closely associated with Oakfield that that inferen-
tially shows what the arrangement was in the en-
5008 suing years. The fact of the matter is that in some of the later years they just went along on a general industry understanding that they would have to abide by resale prices, and this is one of the very early letters which indicated the set-up which existed prior to some of the later letters which we will offer.

Justice Stephens: Mr. Bromley, what do you say to Mr. Steffen's contention that the next to the last paragraph on page of proposed Exhibit 560, "In quoting carload prices to your dealer trade on Gypsolite Wallboard, you will please maintain our standard price of $25 per M. square feet"—applies to Oakfield?

Mr. Bromley: I say that it clearly does not apply to Oakfield. It says, "to your dealer trade". That must mean Paragon Plaster and Supply Company's dealer. That is the company to whom the letter is addressed. It is not addressed to Oakfield and no copy of it was ever sent to Oakfield. The letter shows very clearly what "your

dealer trade in Gypsolite Wallboard" means, all the way through. The "your" refers to Paragon Plaster and Supply Company.

Now, you can extend it to at least two other companies by virtue of the fact that the endorsement at the end of the letter shows that a copy of this letter went to two other companies, the American Hardwall Plaster Company, and to the Paragon Plaster Company, but it did not go to Oakfield.

How in the world they can say that this was a
5009 request of Oakfield that Oakfield, in reselling, maintain Universal's prices, I do not see. It may be a request of the Paragon Plaster Company, and it may be a request of the American Hardwall Plaster Company, and of the Paragon Plaster and Supply Company, but you cannot get it beyond that.

As far as it being strange that a person should buy board, a company should buy board, like Paragon, and have the supplier send it to Oakfield, or direct to the customer, we have had a lot of testimony about that. That is what happened between Kelley and Structural. Structural would buy from Kelley, and Kelley would make the delivery to Structural's customer. There is nothing strange about that.

Justice Stephens: Is there anything further on either side?

Mr. Bromley: No, sir.

Mr. Steffen: Before your Honor rules may I develop further from the witness his understanding of this arrangement, what this letter would mean to him and what "your plant at Oakfield" means?

Justice Stephens: Well, the exhibit is not identified yet. It seems to me it ought to be in evidence, at least, and under examination by someone who received it and knows about it, before it is to be given an interpretation contrary to its flat meaning.

We are all agreed, Mr. Steffen, that so far as
5010 the letter purports to be an attempt to fix the resale prices of Paragon Plaster and Supply Company, American Hardwall Plaster Company, and the Paragon Plaster Company, it is not admissible because there is no charge to that effect in the complaint, that there was any resale price fixing so far as those three companies were concerned.

Mr. Steffen: We agree with that.

Justice Stephens: In so far as concerns the attempted use of the exhibit to show a resale price fixing of Oakfield in its sales, it seems to us that the letter perfectly clearly, on its face, does not apply to Oakfield in respect of the dealer trade which is mentioned in the next to the last paragraph on page 1.

It apparently might apply to Oakfield in the third paragraph in respect to orders for Oakfield from Universal. But how it can be said by any strain of the instrument to apply to resales by Oakfield, when in the next to the last paragraph on the first page it says, "To your dealer trade", in a letter addressed to the Paragon Plaster and Supply Company, with copies to the American Hardwall Company and the Paragon Plaster Company, we just aren't able to see, how it has any bearing on Oakfield's resales.

We do not of course deny you the opportunity to prove by proper exhibits that there was resale price fixing in respect of Oakfield, but we don't see how this exhibit proves it.

Mr. Steffen: I don't know that it proves it but—

5011 Justice Stephens: Perhaps I should have said—tends to prove it.

Mr. Steffen: I would like in the morning, if I may, to ask Mr. Hansen concerning his understanding of the arrangement, and what he understood, "The very lowest prices we can make you on your orders for your plant at Oakfield"—might mean.

Mr. Oliver: I would object to that, because this witness stated that he only assumed it was received, and now to ask him to look at it and try to construe language—

Justice Stephens: (Interposing) Well, certainly that question cannot be asked unless the exhibit is identified and the witness is shown to have some familiarity with the transaction. If you can identify it we will consider then whether or not this witness is permitted to show what it is and what the trade understanding of these four companies was with respect to it.

Can you identify it by someone else and can you bring someone else who can show some familiarity with this correspondence?

Mr. Steffen: We have identified it by showing the correctness of the signature; and the second point of identification is that we took it from, or it came from the files, of Universal—no, I am mistaken, we took it from the files of Paragon. In any event, it was supplied by one of those com-

panies, I think it was the Paragon Plaster and Sup-
5012 ply Company. I can verify that in the morning.

Justice Stephens: Are you familiar with Mr. Stromquist's signature?

The Witness: Yes, sir.

Justice Stephens: But you don't have any recollection of having received this letter yourself?

The Witness: Judge—

Justice Stephens: (Interposing) I am not asking you to strain your recollection or suggesting that you ought to remember it. I just want the fact.

The Witness: Well, if you speak of this particular letter, I have got to say no. I have received carbon copies of letters from time to time, but to say, from my memory, that I know I got this carbon copy, I cannot.

By Mr. Steffen:

Q. This was the usual way of receiving information from Universal? A. It was the custom to send a letter to one company, and carbon copies to the other two.

Q. And was there a special letter sent to Oakfield Gypsum Products Corporation? A. No. We maintained no office at Oakfield other than a mill office.

Q. So it would be normal for the letter to reach you at either Scranton, Utica, or Syracuse? A. Letters
5013 addressed to the Oakfield Gypsum Products Corporation would have been sent to one of the three points, that is, correspondence from Universal.

Q. And a letter that referred to matters which had to to do with Oakfield as well as Paragon, might be sent simply to Paragon, is that right? A. Repeat that, will you?

Q. I say that a letter which might have to do with both Oakfield Gypsum Products Corporation matters and Paragon Plaster and Supply Company matters, might be sent simply, as this one appears to have been, to the Paragon Plaster and Supply Company.

Mr. Bromley: I object to that as speculative.

Mr. Steffen: He can tell what the routine of his office was.

Justice Stephens: That wasn't the question. You asked him how it might be sent. If you want to develop what the practices between the three companies were, you can do that, but we will have to do that tomorrow.

Mr. Johnston: If the members of the Court are not going to be using those exhibits tonight, might I borrow a set?

Justice Jackson: You may borrow mine.

Mr. Johnston: There is one other matter. This Exhibit 559 refers to a letter of January 21, and Exhibit 560 refers to a letter of June 13. I would like to see those over the recess tonight, if I may.

5014 Justice Stephens: If they are available, let them be supplied to defendants' counsel so that the correspondence will be understood.

(Whereupon, at 4:10 p. m., a recess was taken until 10:00 o'clock a. m., Wednesday March 22, 1944.)

5015 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Wednesday, March 22, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5016 Justice Stephens: Page 5176, line 14, the word "but" should be stricken out, and the word "that" written in in its place.

There was one point in the morning session that I would like to have an explanation of, if it can be explained without recalling Mr. Lenci, as I suppose it probably can be by agreement. At page 5217, lines 6 and 7, this answer appears:

"A. That is correct, and that was deducted from
5017 the amount we got at destination."

The previous question was:

"Q. • • • But so far as the freight which was paid by your customers was concerned, they paid freight to the railroad based on the arbitrary weight of the board which had been agreed upon prior to that time between you and the railroad? A. That is correct, and that was deducted from the amount we got at destination."

I wasn't quite clear, and I think the past testimony will show it, whether or not the freight was ultimately borne by the customer or by the manufacturer. Apparently the customer paid it, but was it later deducted?

Justice Jackson: The portion absorbed by the manufacturer was given as a credit, as I understand it.

Mr. Bromley: That is right.

Justice Stephens: The portion absorbed by the manufacturer was given as a credit, but not the entire freight?

Justice Jackson: No, not the entire freight.

Mr. Knuff: The way I understand it was handled was that the invoice was sent out by the company, showing the board plus the freight.

Justice Stephens: By "plus the freight", you mean the freight as indicated in the bulletins?

Mr. Knuff: No, the actual freight. Then, if the
5018 buyer paid that, when he would settle with the company he would claim the amount of freight that he paid as a credit against the invoice that the company sent him.

Justice Stephens: The entire amount that he paid?

Mr. Knuff: Yes, that is my understanding.

I don't think the customer ever knew anything about

freight absorption at all. That was a matter that the manufacturer handled himself. A customer never knew whether the freight was absorbed or wasn't absorbed.

Justice Stephens: But the price made to the customer was the mill base price plus the freight to destination from the nearest mill base? That was the price announced to the customer and the price he paid?

Mr. Knuff: Based on the bulletin shipping weight.

Justice Stephens: That is right. And the customer paid the whole amount of that?

Mr. Steffen: That is correct.

Justice Stephens: And then deducted what?

Mr. Knuff: He would deduct the amount of the freight that he had paid to the railroad company, from the invoice.

Justice Stephens: And that would be the freight from mill base to destination?

Mr. Knuff: That is right.

Justice Jackson: That answer is correct at lines 6 and 7, then?

5019 Mr. Knuff: Yes.

Justice Stephens: Is that right, Mr. Collins?

Mr. Collins: As I understand it, the invoice from the manufacturer to the customer will show the mill base plus the freight from the nearest mill to the point of destination. Now if a manufacturer has a mill further away, he will ship the board and the freight on that board will be in excess of the freight specified on the invoice.

Justice Stephens: That is right.

Mr. Collins: The customer pays that freight and deducts that entire amount from the invoice when he remits to the manufacturer.

Justice Stephens: That is what I thought, but I wanted to be certain.

Justice Jackson: Then the answer is correct on lines 6 and 7?

Mr. Collins: Yes.

5022 Justice Stephens: Page 5254, I want to ask a question. In the question commencing at line 6, which reads:

"Q. And when you say 'excessive discount', you mean a discount in excess of the amount provided for in the consent, to-wit, 15 percent on board and 12-1/2 percent on lath; is that right?"

Now there the discussion had to do, as I remember it, Mr. Bromley, with the discount allowed to a manufacturing

distributor, and I am puzzled by the use of the phrase "excessive discount". I thought that under the bulletins, if consent was given to sell to a manufacturing distributor, he got a discount of a fixed nature; but that if he was not a manufacturing distributor, or ceased to be one, he didn't get any discount at all—so that it wasn't a question of excessive discount, but a question of the existence or nonexistence of any discount. Maybe I am misinformed about that.

Mr. Bromley: I think this question has reference to a complaint which was made against Kelley, which was that while Kelley, in his sales to Structural, was entitled to give a discount to Structural because Structural was a manufacturing distributor, instead of making the discount 15 percent, merely, Kelley made it more than that.

5023 Justice Stephens: I see.

Mr. Bromley: That was a price reduction to Structural, then, contrary to the bulletins.

Justice Stephens: That clears that up in my mind.

I have no other questions.

Justice Garrett: I would like to ask Mr. Steffen a question.

On page 5299, Mr. Steffen, in line 21, should the word "not" be inserted before "charged"? Perhaps that is stated like you wish to state it.

Mr. Steffens: I think it is all right, Your Honor. The idea was that we didn't offer it to prove that the defendants were fixing the resale prices of jobbers.

Justice Garrett: All right.

Justice Stephens: Now, in order to clarify the record with respect to this proposed Exhibit 560, I will state what my own views are concerning it—

Mr. Steffen: (Interposing) Your Honor, may I interrupt and ask, before there is a final ruling, that we have some further opportunity to explain the situation—

Justice Stephens: (Interposing) I wasn't about to make a final ruling. I was about to state my own views, and ask my colleagues to express theirs, as I wasn't entirely certain whether we were in full agreement, but not with the idea of making a final ruling. We will hear you fur-

5024 ther upon it before a final ruling is made.

Mr. Steffen: I have some further questions and some further exhibits that may clarify the matter somewhat.

Justice Stephens: My own view is that Exhibit 560 is not admissible to prove resale price fixing by Paragon Plas-

ter and Supply, American Hardwall Plaster Company, or Paragon Plaster Company, because there is no charge in the complaint or bill of particulars that there was resale price fixing so far as those companies were concerned.

So far as Oakfield is concerned, it is my personal view that Exhibit 560 is not yet identified sufficiently to be admitted, for two reasons:

In the first place, there is no showing yet—I suppose this can easily be supplied—that Stromquist was an official or agent of Universal; and, second, there is no showing yet that the letter came out of the possession of the person to whom it was directed, or the firm to which it was directed, to-wit, Paragon Plaster and Supply Company.

I think if the showing is merely that it came out of the files of one of the other two companies, that isn't sufficient to prove that it reached the attention of the company against whom it is now offered, to-wit, Paragon Plaster and Supply, in respect of Oakfield, in connection with whom it is now offered.

I am of the view also that even if Exhibit 560 can
5025 be identified, on its face it doesn't tend to prove—and therefore isn't relevant or material—anything in respect of resale price fixing by Oakfield.

However, I think it might be that the witness, who is familiar with the practice and correspondence between these companies, might be interrogated upon the subject of what the letter does mean, if it is not clear on its face. If it had a trade meaning, it can be explained, just as the bulletins have been explained in respect of their trade meaning.

I don't quite understand, however, I will say frankly to Government counsel, why it is necessary to take so much time on the exhibit, although of course I don't assume to tell you how to try your own case. However, I should think if there was probably a resale price fixing by Universal and Oakfield, on sales by Oakfield, that this witness, or other witnesses in his situation, would have known about it and could be asked about it directly.

Those are merely expressions of my views as presently in my mind. I am open to conviction or further argument upon them. I am not foreclosing you from being heard or from asking the witness further questions.

Perhaps my colleagues would like to express themselves. I am not quite sure what their views are.

Justice Garrett: Well, briefly, by reason of the
5026 relationship shown to exist between this witness, or his company, Paragon, and Oakfield, and in view

of the witness' statement that it was customary for correspondence addressed to Oakfield to be sent to one of these companies and carbon copies of the same sent to the other companies, a relationship is shown which would render admissible, for whatever it would be worth, a letter properly identified in other particulars, as against Oakfield.

I agree that the letter has not yet been sufficiently identified in other particulars to render it admissible at this stage of the proceedings. I, of course, express no opinion whatever as to how much weight it is entitled to, if admitted. That is a question that will have to be determined later.

That is all I have to say about it.

Justice Jackson: You are going to further interrogate this witness, are you not?

Mr. Steffen: That is right.

Justice Jackson: I don't see any sense in expressing an opinion right now, and I haven't any right now.

Mr. Steffen: Mr. Hansen, will you take the stand?

Thereupon, EMIL HANSEN the witness on the stand at the time of adjournment, resumed his testimony as follows:

5027 Direct Examination (resumed)

By Mr. Steffen:

Q. Mr. Hansen, yesterday you were looking at Exhibit 560, which was dated July 9, 1928. I think you might be shown that now, please.

(Exhibit 560 handed to the witness.)

By Mr. Steffen:

Q. Do you recall, Mr. Hansen, that you received other letters from the Universal Gypsum & Lime Company similar to this, concerning prices of board?

Mr. Bromley: I object to that as immaterial and incompetent. In view of the nicety of the distinctions with which we are dealing, I don't think it is proper to ask him if he received other letters similar to this.

Mr. Steffen: I will show you what has been marked as Government's Exhibit 561—

Justice Stephens: (Interposing) The objection is sustained as to that question, so that the record may be clear—but you may present this additional exhibit. Is that the letter of June 3?

Mr. Steffen: No, Your Honor, I didn't anticipate the difficulty that we ran into yesterday, and I am now forced to show Mr. Hansen certain other correspondence, which is relevant and which is very material as respects the relationship between the companies.

5028 Justice Jackson: Does anybody have copies?

Mr. Steffen: No, I am sorry, no one has copies.

Justice Stephens: Then we will have to examine them as they are offered.

(The document referred to was marked Government's Exhibit No. 561 for Identification.)

Justice Stephens: You read it first, Mr. Witness.

(Witness examines Exhibit 561 for Identification.)

Mr. Steffen: Exhibit 561 purports to be a letter dated February 4, 1929, signed by Mr. Stromquist and addressed to Mr. E. L. Merriman, Paragon Plaster and Supply Company, with a reference to Mr. Eldred and Mr. Emil Hansen, and others, at the top of the letter, as receiving copies.

(Exhibit 561 for Identification handed to the Court for examination, and a copy also handed to defendants' counsel for examination.)

By Mr. Steffen:

Q. Have you examined Govenment's Exhibit 561, Mr. Hansen? A. Have I examined it?

Q. Yes. A. Yes.

Q. And is that Mr. Stromquist's signature? A. I would say so.

5029 Q. Do you recall having received this copy? A. No. This was 16 or 17 years ago. I just couldn't recall this specific copy.

Q. Do you have any reason to doubt that it was a copy that your company received?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

Justice Stephens: Sustained.

Mr. Steffen: I will show the witness two other items.

By Mr. Steffen:

Q. I now show you what has been marked Government's Exhibit 562—

Justice Jackson: (Interposing) We do not have that, either?

Mr. Steffen: That is right, Your Honor.

(The document referred to was marked as Government's Exhibit No. 562 for Identification.)

(Exhibit No. 562 for Identification was handed to the witness, and a photostatic copy to the Court, for examination, after which the photostatic copy was handed to defendants' counsel for examination.)

Mr. Steffen: I also hand to the Court a copy of Exhibit 563 for Identification, while the witness is looking at Exhibit 562 for Identification, and call your attention to
5030 the letterhead and the printing in the upper right-hand corner. It will be offered for that only.

(The document referred to was marked as Government's Exhibit No. 563 for Identification.)

(Photostatic copy of Exhibit No. 563 for Identification handed to the Court for examination; then handed to Defendants' counsel for examination.)

Mr. Steffen: I would like to show the witness what has been marked as Government's Exhibit 563, which is a letter dated April 1, 1940, on the letterhead of the Paragon Plaster Company, and which contains a reference to the General Offices at Syracuse and the mine and mill offices at Oakfield, New York, in the upper right-hand corner.

(Exhibit 563 for Identification handed to the witness.)

By Mr. Steffen:

Q. Now, Mr. Hansen, looking at Government's Exhibit 562, which is the Ebsary Gypsum Company letter, can you identify that as a letter signed by Mr. Lenci? A. Yes.

Q. Is that a letter that was received by you? A. I would say so.

Justice Jackson: I don't believe Mr. Johnston hears either counsel or the witness.

5031 Mr. Steffen: I am sorry.

Justice Stephens: Read the last two questions and answers in a loud, clear tone of voice, Mr. Reporter.

(The record was read by the reporter as requested.)

By Mr. Steffen:

Q. Now, looking at Government's Exhibit 563, Mr. Han-

sen, can you tell us whether that is the letterhead that your company used, the Paragon Company used? A. Yes, sir.

Q. And for what period of time did you use that letterhead? A. Oh, I would say that we had used that general letterhead for a period of ten years.

Q. And in the upper right-hand corner it says that you have offices at Syracuse and also a mine and mill at Oakfield? A. That is right.

Q. And what did you mean to imply by that? A. We, as one-third owners of the Oakfield Gypsum Products Corporation, for the purpose of maintaining prestige for the Paragon Plaster Company, claimed to be manufacturers, and therefore said that we had a mill at Oakfield, that being the producing unit for the Paragon Plaster Company at the time.

5032 Q. And it was also the producing unit for the other Paragon company and for Hardwall, is that right? A. That is right.

Q. And that mill was what mill? A. The mill of the Oakfield Gypsum Products Corporation.

Q. Which you were a one-third shareowner in? A. That is right.

Q. Did the Oakfield Gypsum Products Corporaton have a sales office or a general office at Oakfield, in 1928? A. Not a sales office, just a mill office.

Q. And if there were to be purchases, say, from the Universal Gypsum Company, of board, from what office would they be handled?

Justice Stephens: Purchases from whom?

Mr. Steffen: From Universal Gypsum Company, for example, for account of Oakfield.

The Witness: They would probably have been made from the Syracuse office.

By Mr. Steffen:

Q. That is, your office, the Paragon Plaster Company's office, in Syracuse? A. Yes, sir, orders would have been issued from there.

Q. Would you have personally handled that type of order? A. I would have directed it, after consulta-

5033 tion with my two associates as to where business was to be placed.

Q. What do you mean by that? A. Well, I mean as to what company we were placing an order with; and when I say "we", I mean the Oakfield Gypsum Company.

Q. And the Oakfield Gypsum Company, on this type of transaction, would be the buyer from Universal? A. That is right.

Q. And you, or your office, the Paragon office, would place the order with Universal?

Mr. Bromley: I object to that. He has just said that it was Oakfield Gypsum Products that would place the order with Universal, not Paragon.

Justice Stephens: That is correct, Mr. Steffen.

Mr. Steffen: I fell into the same error, I think, that probably the other persons, whose correspondence we have shown here, have—

Mr. Bromley: (Interposing) I don't think that that is a fair inference, and I object to that statement. There is nothing in the record so far to support that.

Justice Stephens: There is nothing in the record to support that. I think it should go out.

Mr. Bromley: While we are on the subject, could we have the witness tell us who he meant when he said, in answer to Mr. Steffen's question, he conferred with
5034 his two associates?

By Mr. Steffen:

Q. Who did you mean by that? A. Mr. Merriman and Mr. Eldred.

Q. Mr. Merriman was with what company? A. With the Paragon Plaster and Supply Company.

Q. And Mr. Eldred was with American Hardwall? A. Yes.

Justice Stephens: When you speak of conferring with your two associates as to Oakfield's purchases, or purchases from Universal for Oakfield, you mean your associates on the Executive Committee of Oakfield?

The Witness: I didn't get that, Judge.

Justice Stephens: When you refer to your two associates, as you have just been referring to them, do you mean your two associates on the Executive Committee of Oakfield?

The Witness: That is right.

Justice Stephens: I see.

By Mr. Steffen:

Q. Well, let's assume, Mr. Hansen, that from time to time the Oakfield Gypsum Products Company would buy

board from Universal, during this period in 1928 and 1929; is that correct? A. Yes, sir.

Q. And where would the order start from?

5035 A. From the Syracuse office.

Q. And you would place the order with Universal, you personally, after consulting, as I understand it, with your two associates? A. I would direct the placing of it.

Q. Thank you. And the order would be placed on forms, would it? A. Yes.

Q. And what name would appear on those forms? A. The Oakfield Gypsum Products Corporation forms.

Q. And the correspondence concerning the Oakfield business would be returned to the Oakfield Gypsum Products Corporation at the Paragon Plaster Company's office at Syracuse, would it? A. Well, it was also the Oakfield office. Our Oakfield stationery would show an office at 300 West Water Street.

Q. 300 West Water Street is the address of the Paragon Plaster Company, also? A. That is right.

Q. Now referring to Government's Exhibit 561, which I think you have before you, Mr. Hansen, can you tell us what you understood by the statement, "On shipments to your plant at Oakfield, N. Y."?

Mr. Bromley: I object to that, first, because it calls for an interpretation of a writing, which doesn't need

5036 any; and, second, because this document is not in evidence.

Justice Stephens: The document not yet having been offered or received in evidence, we haven't reached the point where its meaning is to be considered. You must first offer it in evidence and see if it is qualified to come into evidence. Then if there is any doubt about its meaning, or if it means something different from what it states on its face, in the trade, we will consider whether you can go into that.

The objection is sustained, as presently made, on the present state of the record.

Mr. Steffen: I will now offer Government's Exhibit No. 561.

Justice Stephens: Mr. Marshal, hand the exhibit back to the Court again.

(Exhibit No. 561 for Identification handed to the Court.)

Justice Stephens: Does the record show from whose files this came, Mr. Steffen?

Mr. Steffen: We can state to the Court, and we verified that last night, that these papers that we are now offering, or that we are now presenting before the Court—and I mean by that Exhibits 560, 561 and 562—came from the files of the Paragon Plaster Company. Exhibit 563 was, of course, addressed to us.

5037 Justice Stephens: Do you wish to be heard as to whether that is sufficient identification? It appears now in the record, I think, Mr. Bromley, that this witness identifies the signature of Stromquist,—I don't think he has yet testified who Stromquist was, in connection with Universal,—and it also appears from the statement of counsel, unless that is disputed, that this letter was taken from the files of this witness' company, the Paragon Plaster Company.

Mr. Bromley: I do not dispute that. I think, however, since the witness has testified that he can not say that he received it, it still has failed of identification; and, of course, I object to it on the ground of materiality.

Justice Stephens: Well, we are not reaching that yet.

Mr. Bromley: Yes, sir.

Mr. Steffen: May I be heard, Your Honor?

Justice Stephens: Yes.

Mr. Steffen: Granting that the item has been identified, so far as Mr. Stromquist's signature is concerned—and I doubt if there will be any dispute as to his reputation of the company, that has not been raised seriously yet—

Justice Stephens: (Interposing) Let's clear that up. Do you know who Stromquist was, in connection with Universal?

The Witness: Yes.

Justice Stephens: Who was he?

The Witness: He was the Eastern Sales Manager.

5038 Justice Stephens: Very well, that is out, now. What is the rest of your statement?

Mr. Steffen: Waiving any question of materiality for the moment, we would offer it for the purpose of showing that there were price quotations coming to the Paragon Plaster & Supply Company, and to each of the other companies, and that they were quoted prices not only to the Paragon companies and Hardwall, but to "your plant at Oakfield", and that "your plant at Oakfield" could only mean the Oakfield Gypsum Products Corporation.

Now I think it puts us in an impossible position not to permit us to ask what is meant by that. It is merely a preliminary question—

Justice Stephens: (Interposing) I am sorry, Mr. Steffen, but you said a moment ago you were waiving the question of materiality for the moment. Are you asking this question for the purpose of identifying the document?

Mr. Steffen: These three exhibits are presented for purposes of showing that the term appearing in Exhibit 560, which is the exhibit we had last night, "The very lowest prices we can make you on your orders for your plant at Oakfield, N. Y.", is an ambiguous statement. At least, it seems to have caused doubt in the mind of the Court as to what was meant by "on your orders for your plant at Oakfield", and we have now presented for the Court Ex-
5039 hibits 561, 562 and 563—and 561 and 562, particularly, are letters sent to the parent companies, and relate to "your plant at Oakfield", and have to do with prices and sales conditions.

So it would seem from those two letters, if I may have the witness state what is understood by "your plant at Oakfield"—and I think he has substantially clarified that—that it means the Oakfield Gypsum Products Corporation.

Justice Stephens: I don't understand that we have reached that question yet, Mr. Steffen. Let me state what I think the point of view of the Court is in respect of its duties and rulings on these questions of evidence.

In the first place, you have got to look back and see what the issues are, what issue this is offered under. Well, it is offered to prove, as I understand it, that there was resale price fixing by Oakfield in sales, in connection with Universal, of products purchased from Universal. Now that is what it is offered to prove. Whether it proves that or not, or tends to prove it, depends upon the content of the document, and that has to do with its relevancy and materiality, which are questions of logic and probative force and have nothing to do with identification.

Before we reach those questions, the question is whether or not this document was sent out by Universal and received by Paragon. Now that is the only question we have got before us, before we reach the question of mate-
5040 riality and relevancy. I don't see that the meaning of the phrases in the document has anything to do with determining whether or not it was sent out by Universal and received by Paragon, this man's company.

Mr. Steffen: I am sorry, I thought that Your Honor had gone on to the question of what the letter meant, and this evidence was to show that it was a letter directed to affect or control or specify the prices at which Oakfield would resell.

Justice Stephens: The first thing you have to show is as to whether or not this was sent out by Universal and received by Paragon, the company of which this witness is an officer. Now that is the only objection before us at the present time, that it hasn't been sufficiently identified as a letter sent out by Universal and received by Paragon.

Isn't that the only objection you are raising now, Mr. Bromley?

Mr. Bromley: Yes, sir.

Justice Stephens: As to that, do you wish to be heard?

Mr. Steffen: I certainly do, Your Honor.

I would say that on this matter of materiality, which I think is immediately—

Justice Stephens: (Interposing) We haven't reached the question of materiality. We are talking about identification, first. Its materiality and relevancy will reach
5041 the threshold of the Court's consideration when you first identify the document as a document sent out by Universal and received by this witness' company, Paragon. We don't say you haven't identified it, we are just giving you an opportunity to be heard.

Mr. Steffen: On the matter of identification, we have identified the signature, and we have further stated to the Court—and Mr. Bromley agrees—that it was taken from the files of the Paragon Plaster Company.

Now this is presented as a declaration on the part of the Universal Gypsum & Lime Company by Mr. Stromquist. It is in furtherance of the conspiracy, as we have alleged it in the complaint. Paragraph 45(e) says that the defendants have violated the Sherman Act by "concertedly inducing and coercing manufacturing distributors to resell • • • ". These are letters which are addressed, in the first place, to the three parent companies. Even though they were never received at all by the companies, they would be declarations of an alleged co-conspirator in furtherance of the conspiracy.

We have shown, however, that they were received, and they were taken from the files of the Paragon Plaster Company.

That, I should say, is sufficient, certainly, to show that

the papers are properly identified; and, moreover, that they are material, unless there is some doubt as to
5042 whether it affects the Oakfield Gypsum Products Corporation, and on that I would reserve the right to be heard later.

Justice Stephens: What do you say about identification, Mr. Bromley? I thought we had ruled, on a number of occasions, that where a signature is identified by a person who knows the handwriting of the purported signer and knows his connection with the company for which he purports to sign it, and where it has been taken out of the files of the company of which the witness is an officer, that that is sufficient circumstantial identification that the exhibit was sent and received by the purported sender and receiver.

Mr. Bromley: I don't believe that rule has ever been applied by this Court in a situation where the files talked about were not files of a defendant or an alleged co-conspirator. These files of the Paragon Plaster & Supply Company, or the Paragon Plaster Company—I am not sure which—are files of somebody who is not a defendant, not even an alleged co-conspirator.

Justice Stephens: Does that go to the question of identification? Doesn't that go to the question whether the document is binding upon Oakfield? I think my colleagues agree with me that we are not going to receive this in evidence to prove resale price fixing or as tending to prove resale price fixing by the two Paragon companies or the American Hardwall, because that is not within the
5043 bill of particulars.

But now the Government is trying to prove resale price fixing by Oakfield. The claim is apparently that this letter meant, to the sender, and to the receivers, who were parents of Oakfield, something different from what it says on its face, with respect to resale price fixing by Oakfield. We haven't reached the question of what it means. We have reached the question as to whether or not it has been identified as a letter between the sender and the receiver. What difference does it make, so far as identification is concerned as distinguished from relevancy or its capacity to prove something against Oakfield, as to whether or not Paragon is a defendant?

Mr. Bromley: I think where a defendant produces a document from its files, to the Government, that that is a binding authentication, to some degree, of its genuineness and the fact that it was received, probably. But how can

that rule apply to somebody who is not a party to the suit? How can that apply against us?

Justice Stephens: I may be wrong about it, but my idea was that evidence that a document is produced from a certain person's files to whom, on its face, it is addressed, is merely a matter of circumstantial evidence tending to show that it was received, and that it doesn't have to do with an admission, but maybe I am mistaken about that.

5044 Maybe the reason underlying the Court's rulings ought to be, with respect to the production of a document by a defendant, that it is more than mere circumstantial evidence, that it is in the nature of an admission that he received it.

Mr. Bromley: That is my understanding of the rule. I may be wrong.

Justice Stephens: We will take a recess for a few moments.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5045 Justice Stephens: We are of the view that the document is identified. Our idea, Mr. Bromley, is that the rule with respect to identification, which we have been following, is a rule of circumstantial evidence and not a rule of admissions.

If a document is supposed to be addressed to a particular person, and is found in his possession, even if he doesn't give it up voluntarily—which he did in this case—and it is shown to have proceeded from the source from which it purports to proceed, we think that is some evidence that it has been received by the purported recipient.

We therefore rule that the document is identified.

Since we have separated those questions of materiality and relevancy on the one hand, and identification on the other, and have confined the first ruling to identification, do you wish to be heard further as to whether or not, on its face, this document Mr. Steffen, tends to prove anything in respect of resale price fixing by Oakfield?

Mr. Steffen: Yes, I think perhaps I had better make a statement.

As your Honor has stated, and as we agree, we are not offering this at all for the purposes of showing resale price fixing by the Paragon Plaster Company or the Paragon Plaster and Supply Company, or the American Hardwall Plaster Company. They are jobbers, in this sense;

5046 and we did not charge in the complaint that there

was any attempt by the defendants to fix the resale price by jobbers.

But we did charge in Paragraph 45(e) that the defendants violated the act by, "concertedly inducing and coercing manufacturing distributors to resell", and so forth.

I think that the letter—and I am now speaking with regard to Exhibit 560—on its face indicates—.

Justice Stephens: I thought we were talking about Exhibit 561 at the present time. We haven't ruled on the identification of Exhibit 560. We are ruling on 561. That is the one that all this argument has been about.

Mr. Steffen: Well, I think the argument—

Justice Jackson: (Interposing) Was Exhibit 560 taken from the files of Paragon?

Mr. Steffen: Yes, your Honor.

Justice Stephens: That wasn't made clear to us. We thought we were dealing with 561, and that Exhibit 560 had been passed over for the time being. But if you want a ruling on Exhibit 560, all right—

Mr. Steffen: (Interposing) Exhibits 560, 561 and 562 were all taken from the files of the Paragon Plaster Company, and they have each been identified as far as signature is concerned.

Justice Stephens: It is conceded, is it, Mr. Bromley, that all three documents were taken out of the files of
5047 the Paragon Plaster Company?

Mr. Bromley: We don't know anything about it. I assume, if Mr. Hansen says so, that that is right.

Justice Stephens: It was Mr. Steffen that said so.

Mr. Steffen: I stated so, and I understood from Mr. Bromley a minute ago that he made no point—

Justice Stephens: (Interposing) He made no point with respect to Exhibit 561, and I am simply trying to see to it, as it is my duty as presiding judge to do, that the record is clear on its face with respect to each exhibit offered.

There wasn't any statement concerning Exhibits 560 or 562. But you do state, yourself, that they came into your possession in connection with this covering letter which you displayed, directed to the Attorney General?

Mr. Steffen: No, your Honor. Which one do you speak of?

Justice Stephens: Exhibit 563 for identification.

Mr. Steffen: Exhibit 563 is a letter which we are simply showing to the Court for the purposes of presenting the letterhead of the Paragon Plaster Company.

Justice Stephens: I misunderstood you.

Mr. Steffen: On the matter of receiving these documents from the files of the Paragon Plaster Company, I can state for the Court's information that we have marked on the back of the papers, and I think you will find a mark on all the originals which was made there, placed there, at
5048 the time the papers were taken from the documents which were submitted to us under subpoena. It is a very careful marking, and if I may see the original of Exhibit 560, I can show it to the Court.

Mr. Bromley: I don't make any point of this. If you say you got these three exhibits, 560, 561 and 562 for identification, from the files of the Paragon Plaster Company, I will accept that.

Justice Stephens: Very well. That passes that question.

Now, the next question is what do any one of these exhibits show on their face with reference to resale price fixing by Oakfield under the direction or mandate of the Universal. We will hear you on that.

Mr. Steffen: I should like to refer first, then, to Exhibit 560, and in Exhibit 560, the next to the last paragraph on the first page gives an explicit injunction as follows:

"In quoting carload prices to your dealer trade on Gypsolite Wallboard, you will please maintain our standard price of $25 per M. sq. ft."

It also provides:

"Please use our standard weight of 1850 lbs. per M. sq. ft. in arriving at delivered prices."

We take that to be a straight injunction on the part of Universal to maintain resale prices on the sales of this board.

5049 Now, the question then comes as to what companies this is directed to. In the first place, it is obviously directed to the two Paragon companies and to the American Hardwall Plaster Company. On that I want to say that I think Judge Garrett stated our position very, very clearly, that the three parent companies here have the control of the Oakfield Gypsum Products Company, and what we have to establish is that we have an inducing or a coercion whereby the resale prices of the Oakfield Gypsum Products Corporation are maintained.

Now, coercion may be brought directly against the company which is to sell, that is the Oakfield Gypsum Products Corporation, or it may be brought against the parent companies, and in this case the letter is a flat statement that in selling from "your" Oakfield plant—and the testi-

mony indicates that the Oakfield plant is the Oakfield Gypsum Products Corporation plant—"that you must maintain our resale prices."

Now, that seems to us to be very clear evidence of coercion, addressed to, if you wish, in the first place the shareholders, that is, the Paragon companies and the American Hardwall Plaster Company; and that, certainly, would have an influence on what the related company, the Oakfield Gypsum Products Corporation, would do.

When you follow that with the evidence that we have that Mr. Hansen was also an officer of the Oakfield Gypsum Products Corporation, as well as of the Paragon
5050 Plaster Company, and moreover that he would be familiar with the purchases and transactions of Oakfield; and as a member of the executive committee would have control, together with his two associates, of the policies of the Oakfield Gypsum Products Corporation, it would seem to be very clear that upon sales made by Oakfield to dealers, they should understand that those sales should be made at the resale prices fixed by Universal.

Justice Stephens: Do you wish to be heard, Mr. Bromley?

Mr. Bromley: I have not yet objected, and I therefore desire now to object, to Exhibits 561, 562 and 563 for identification, on the ground that they are immaterial and irrelevant, because, first, as your Honor has indicated and as Mr. Steffen has agreed, there is no charge of resale price fixing—

Mr. Steffen: (Interposing) Pardon me, may I interrupt? Could we have the matter on Exhibit 560 disposed of, and then I would like to be heard on Exhibits 561, 562 and 563 also?

Justice Stephens: You are simply arguing Exhibit 560?

Mr. Steffen: My argument was addressed primarily to 560.

Justice Stephens: Well, we will deal with them one at a time.

You have already objected to Exhibit 560 as not being identified, Mr. Bromley, and we have overruled you on that.

Mr. Bromley: Yes, sir.

Justice Stephens: Now, your next objection is what?

5051 Mr. Bromley: Well, I have already made my objection to Exhibit 560, and we have argued that at length yesterday.

Justice Stephens: It seems to the Court that the objec-

tions to Exhibits 560, 561 and 562 are of the same type as far as materiality and relevancy are concerned, but if you do not want to repeat your objection to Exhibit 560, of course you need not—but you might refresh our recollection on it.

Mr. Bromley: I do want to repeat my objection and my argument as far as Exhibit 560 is concerned.

Justice Jackson: Doesn't that appear at page 5282 of the transcript?

Justice Stephens: Pages 5283 and following, I think.

Mr. Bromley: The page that Justice Jackson referred to contains my objection to Exhibit 559.

Justice Jackson: Your objection to Exhibit 560 appears on page 5286, does it not?

Mr. Bromley: Yes.

Justice Stephens: We have already ruled, Mr. Bromley, that this exhibit is not received in evidence, Exhibit 560, as tending to prove resale price fixing by the two Paragon companies or the American Hardwall Plaster Company, because they are not specified in the complaint or the bill of particulars.

Mr. Bromley: Yes, sir.

Now, in connection with the contention of Mr.
5052 Steffen that it applies to the resale prices of the Oakfield Gypsum Products Corporation, I would like to say that it is not addressed to the Oakfield Gypsum Products Corporation. The use of the word "your" throughout the letter, even in the third paragraph to which Mr. Steffen constantly refers, can only be a reference to the persons or firms to whom the letter is addressed. It states there, "The very lowest prices we can make you on your orders for your plant at Oakfield, N. Y. are as follows:".

I don't believe that that can be read to mean on Oakfield's orders for its plant at Oakfield. If that means anything, it means on the Paragon Plaster and Supply Company's orders for delivery to Oakfield.

But that is not controlling because, as your Honor said on page 5302, beginning at line 13:

"It apparently might apply to Oakfield in the third paragraph in respect to orders for Oakfield from Universal. But how it can be said by any strain of the instrument to apply to resales by Oakfield, when in the next to the last paragraph on the first page it says, 'To your dealer trade', in a letter addressed to the Paragon Plaster and Supply Company, with copies to the American Hardwall Plaster Company and the Paragon Plaster Company, we just aren't

able to see, how it has any bearing on Oakfield's resales."

I think nothing has happened so far to change the
5053 tentative conclusion which the Court reached last night that giving paragraph 3 the broadest interpretation that possibly could be given to it, nevertheless, when you come down to the only material part of the letter for the Government's purpose, all they say is, "In quoting carload prices to your dealer trade on Gypsolite Wallboard, you will please maintain our standard price", and so forth.

Now, certainly, "In quoting carload prices to your dealer trade" must refer to the company to whom the letter is addressed, Paragon Plaster and Supply Company, and probably also to the companies to whom copies of the letter were sent, the American Hardwall Plaster Company and the Paragon Plaster Company.

So I don't see that the situation has changed one iota from what it was last night, and it plainly has no materiality to the charge against the Oakfield Gypsum Products Corporation.

Justice Stephens: If there is nothing further, the Court will rule on the objections to Exhibit 560.

The Court is of the view that there is nothing on the face of Exhibit 560 that proves or tends to prove resale price fixing by Oakfield. Unless there is something further on that subject, that objection as to materiality and relevancy is sustained as to Exhibit 560.

We do not foreclose you from examining the witness further, Mr. Steffen, if the document may be proved to mean something different from what it shows on its
5054 face, subject to hearing argument on that matter from Mr. Bromley.

You have objected, Mr. Bromley, that the document is clear on its face, and that therefore it cannot be construed by the witness.

Now, as to that, it has occurred to the Court that if the Government contends that the letter had a meaning of a different character in the trade between these companies which we have been discussing here, Oakfield, the two Paragon companies, American Hardwall and Universal, if it had a meaning of a cabalistic nature, to them, or was accepted in correspondence between them in its phrasing as having a meaning different from what appears on its face, that could be shown by the witness just as you have, in several instances, Mr. Bromley, shown that although bulletins might, when read, on their face have one meaning

in the trade, they were accepted as having a somewhat different meaning.

Do you see any objection to that, Mr. Bromley? You are entitled to be heard on that before we rule on the exhibit.

I call your attention, for example, to the fact that on page 5244—in thinking over this matter last night and rereading this record—you said to Mr. Lenci, at line 13:

"Q. Quite apart from the wording, Mr. Lenci, wasn't it your understanding at all times that these provisions, that is, the earlier form of commission salesman provision, only applied to the use of commission men for the pur-
5055 pose of cutting the price of patented board?"

Then at page 5245, at line 21, you said:

"Q. And isn't that likewise true of the provisions with respect to warehouses and customers' trucks, that is to say, that your understanding of the purpose of those provisions—whatever the wording was—was that those arrangements were prohibited only where they were used to effect a cut in the price of the patented board?"

There you were dealing with bulletin provisions which, on their face, seemed to prohibit the use of warehouses and customers' trucks at all and prohibit the use of commission men at all, and you were asking Mr. Lenci if it wasn't the fact that notwithstanding that clear wording, they were applied in the trade in a different manner. Now, of course, there is the general rule of construction that a document clear on its face cannot be varied, I mean varied by parol testimony; but I think there is an exception to that rule where the document is used between certain parties and it may be shown, as between the parties to the document, or the parties using the document, that it does have a meaning different from that clearly expressed on its face, as applied between them.

And if the Government contends that this Exhibit 560 does in some manner indicate, as between Universal, the two Paragon companies, American Hardwall, and
5056 Oakfield, a direction to fix the resale price by Oakfield, I suppose the witness could be interrogated on that subject, but I don't rule that without further hearing from you, Mr. Bromley, because it is a new point.

Mr. Bromley: That may possibly be so, but there are two points with respect to that.

This witness says that he doesn't remember having seen this document, and I do not see how he can now interpret it in the light of that.

Secondly, I thought this morning that counsel made that very attempt to develop from this witness that this letter would apply to Oakfield, and the answer was that Oakfield had its own stationery, and its own office, and its own officers, and its separate existence, and I thought it was pretty conclusively established that this letter couldn't refer to Oakfield because of the fact that Mr. Steffen brought out that if it had been intended to go to Oakfield, it would have been addressed to that Company.

Justice Stephens: That is a little bit different from what the Court had in mind. I thought possibly the Government, in view of their suggestion with respect to interrogating the witness, was going to attempt to interpret these two paragraphs of Exhibit 560 which have been under discussion here.

Do you wish to be heard, Mr. Steffen?

5057 Mr. Steffen: Yes, I should like to interrogate the witness further, and I assume proper objection will be made as I ask the questions.

I think I might state, your Honor, that there apparently is ambiguity in Exhibit 560 as to what is meant by "your plant at Oakfield", and if the parties understand what is meant by "your plant at Oakfield", that ought to clarify the whole matter.

Justice Stephens: Well, even if you go that far and the witness testifies that "your plant at Oakfield" meant the Oakfield plant, it still doesn't seem to the Court that it says anything about resale price fixing by Oakfield; it says what Oakfield shall pay for these goods, not what it shall sell them at.

However, you may ask the witness further questions, and Mr. Bromley may object and we will rule on them as objection is raised.

Mr. Bromley: I don't see why counsel doesn't ask him if he had any agreement to fix the resale prices, and get on with the case.

Justice Stephens: I have already suggested that to counsel. I would seem to me that if the Government in good faith contends that there was resale price fixing between Universal and Oakfield, that this witness certainly ought to know about it and should be interrogated directly
5058 about it. However, you are not foreclosed from proving your case in any way you feel you must. That is your responsibility, not ours.

Justice Jackson: That is the way I felt this morning,

and that is the reason I didn't give any statement concerning this exhibit. I thought you were going to question him directly.

Mr. Steffen: We want to proceed in entire good faith, your Honor.

By Mr. Steffen:

Q. Mr. Hansen, you testified that purchases were made through your office at Syracuse on Oakfield Gypsum Products Corporation's forms from Universal, is that correct? A. Yes.

Mr. Bromley: I object to that, that assumes a fact not in evidence.

Mr. Steffen: He has just testified that it was in evidence.

Mr. Bromley: No, he didn't. He said he made purchases through the Oakfield office.

Justice Stephens: Let's hear that question.

(The question was read by the reporter.)

Justice Stephens: What is your objection to that, Mr. Bromley?

Mr. Bromley: I don't know what "your" means. It is indefinite, and for that reason improper, because in the light of the dispute here "your" may mean either
5059 Oakfield or Paragon.

Justice Stephens: I think that objection is well taken.

Ask him how the transactions were handled. Let him tell in his own way. He ought to know.

By Mr. Steffen:

Q. I want to get at the question of purchases made on Oakfield's forms from Universal. There were such purchases, were there not? A. That is right.

Q. My next question is at what prices were those purchases made? A. Will you repeat that?

Q. At what prices did you buy from the Universal Gypsum Company?

Justice Jackson: Did Oakfield buy?

Mr. Steffen: Did Oakfield, yes.

The Witness: At what prices did Oakfield buy from the Universal Gypsum Company?

Mr. Steffen: On these purchases you have just said were made.

The Witness: Well, at the current quoted prices.

By Mr. Steffen:

Q. And were they the same prices at which your company was buying board from Oakfield?

Mr. Bromley: I object,—

5060 Justice Stephens: (Interposing) When you mean Paragon, say Paragon, and when you mean Oakfield, say Oakfield. I think that will clarify the matter.

By Mr. Steffen:

Q. If I understand it, Mr. Hansen, you personally directed purchases to be made in the name of the Oakfield Gypsum Products Corporation from Universal of board? A. That is right.

Q. And your company, the Paragon Company, also bought board from Universal during 1928 and 1929? A. That is right.

Q. Now, my question is—at what prices did, first, the Oakfield Gypsum Products Corporation buy? A. I could hardly be expected to remember the prices in 1928, sir.

Q. That is right.

Were there prices furnished by Universal at which the Oakfield Gypsum Products Corporation purchased? A. Yes, sir.

Q. Can you tell us how they were furnished? A. Well, they were furnished in correspondence to me personally, to Mr. Merriman, and to Mr. Eldred, as indicated in this copy of the letter. That was typical of the quotation sheets that we would get.

Q. Exhibit 560 would be a typical quotation sheet?

5061 A. That is right.

Q. And in making sales by Oakfield, at what prices would the Oakfield Gypsum Products Corporation resell to dealers? A. Would resell to dealers—unless you called the American Hardwall Plaster Company, the Paragon Plaster of Syracuse, and the Paragon Plaster and Supply Company, dealers—they were the only three customers for the gypsum products other than gypsum rock, that Oakfield had.

Q. At this particular time? A. At this particular time.

Mr. Bromley: I didn't get the beginning of that answer.

Justice Stephens: Read it.

(The record was read by the reporter.)

Mr. Bromley: That isn't what he said.

Justice Stephens: No; Mr. Reporter, that was not the answer. It will have to be stricken, and you will have to re-ask the question.

By Mr. Steffen:

Q. I think you testified that the Oakfield Gypsum Products Corporation would sell to Paragon and would make shipments direct to Paragon's customers where Paragon had sold to a customer, is that correct?

Mr. Bromley: I object to that. Can't we have this last question asked, so that we can get the answer in the record?

Mr. Steffen: I was starting back and was coming up to that.

5062 Justice Stephens: I think we ought to have this last question answered so that the record is clear as to what his answer was.

Mr. Bromley: I think I did the reporter an injustice, and that he was right, and that the first part of the answer, which the reporter read, was merely the witness repeating the question.

Justice Stephens: Maybe I also did the reporter an injustice. Read back the original question, Mr. Reporter.

(The question was read by the reporter as follows:)

"And in making th sales by Oakfield, at what prices would the Oakfield Gypsum Products Corporation resell to dealers?"

Mr. Steffen: I would like to withdraw the question.

Justice Stephens: And I would like to know what the answer was.

(The answer referred to was read by the reporter as follows:)

"Would resell to dealers—unless you called the American Hardwall Plaster Company, the Paragon Plaster of Syracuse, and the Paragon Plaster and Supply Company, dealers—they were the only three customers for the gypsum products other than gypsum rock, that Oakfield had."

Justice Jackson: It was merely a matter of inflection in the reporter reading the answer.

5063 Justice Stephens: Now, if you want to withdraw it or ask another question, you may do so.

Mr. Steffen: I think that is a good answer.

By Mr. Steffen:

Q. I think you testified that the Paragon Plaster Company sold both as a dealer and as a jobber, did you not—Paragon sold locally in Syracuse? A. That is correct.

Q. And you also sold as a jobber? A. That is correct.

Q. Now, let me ask you this question. If sales were made by the Oakfield Gypsum Products Corporation of this board which they purchased from Universal, at what price would you understand from this letter, Exhibit 560, the Oakfield Gypsum Products Company should sell?

Justice Stephens: Read that question so that we can get it entirely clear.

(The question referred to was read by the reporter.)

Justice Jackson: Do you get that question?

The Witness: No, unless it is a hypothetical question.

Mr. Bromley: I object to that as incompetent, because it calls for an interpretation of a document, and the document is not in evidence, and the question assumes facts not in evidence.

Mr. Steffen: I will rephrase the question and leave
5064 out the reference to the exhibit.

By Mr. Steffen:

Q. At what prices, Mr. Hansen, would you understand the Oakfield Gypsum Products Company should sell to dealers according to your arrangement with the Universal Gypsum Company, in 1928 and 1929?

Mr. Bromley: I object to that as incompetent because calling for a conclusion and assuming facts not in evidence. There is no proof that there was any arrangement with Universal.

Justice Stephens: Objection sustained. Ask the witness what the arrangements were, if any, and what the prices were, if any.

Mr. Steffen: All right.

By Mr. Steffen:

Q. What were your arrangements, if any, with the Universal Gypsum Company for the resale of board by the Oakfield Gypsum Products Corporation to dealers? A. We had none because the Oakfield Company did not sell to dealers.

Q. You have just testified that you were a dealer? A. Well, I can answer—

Q. (Interposing) And so was American Hardwall a dealer and so was the Paragon Plaster and Supply Company. A. All right. The answer is still that there was no arrangement for resale. You are referring to the
5065 prices at which Oakfield sold to these three companies who were its dealers and jobbers, we will say.

Q. Were there any sales made later than 1928 of Universal's board bought by Oakfield Gypsum Products Company? A. Later than 1928?

Q. Yes, to dealers. A. I think not.

Justice Stephens: When you say "dealers" there, do you mean dealers other than the three corporate owners of Oakfield?

Mr. Steffen: Yes, I mean other than the two Paragon companies and the American Hardwall Plaster Company.

Justice Stephens: I don't think the witness understood that.

The Witness: I answered it meaning dealers other than the three.

Justice Stephens: Your testimony is then, that as far as you recollect there were no sales to dealers other than these three corporate owners of Oakfield, after 1928?

The Witness: Of Universal's board. That is to the best of my recollection. We changed brands in about 1931, I should say.

Mr. Steffen: I would like now to ask some questions, your Honor, directed to show that the Oakfield Gypsum Products Corporation and the three constituent companies were substantially together as one organization.
5066 Justice Stephens: You mean on the theory that the corporate fiction must be disregarded?

Mr. Steffen: That is right, and that therefore resales by the Paragon companies and American Hardwall, of board purchased nominally from the Oakfield Gypsum Products Corporation, was actually a controlling of the resale price of, if you wish, the Oakfield Gypsum Products Corporation, they buying from Universal, and then the transaction between Oakfield and the three parent companies being a strictly friendly transaction, the resale, which constituted a resale, was the sale by the parent companies to the dealers.

We have already developed in evidence that the three companies owned all the stock of Oakfield, that they regarded, in a sense, the Oakfield Gypsum Products Corporation as being a source of supply for the three mixing

companies; that the officers were identical, or at least the managing officers and principal officers of the three constituent companies were the same officers as were managing the Oakfield Gypsum Products Corporation; that the sales officers, or principal offices, of the Oakfield Gypsum Products Corporation, were in the offices of the Paragon Plaster Company and the other parent companies; and that therefore you have the form of a sale to the Oakfield Gypsum Products Corporation, which is designated in here as "your plant"; that the Oakfield Gypsum Products Corporation then, by selling to Paragon, has, in effect, sold through Paragon to the dealers, or at least Paragon and Oakfield for the purposes of that transaction can be regarded as one company.

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But in so far as Universal is concerned, it would constitute a control of the resale price of Oakfield.

I think I can ask one or two further clarifying questions which would bring that out.

Justice Stephens: I don't quite understand your theory. It seems to me—I may be wrong—that your proposal is an invasion of the ruling of the Court that there is no charge in the complaint of any resale price fixing as between Universal and the two Paragons and American Hardwall.

This witness has answered that there were no arrangements between Oakfield and Universal as to its resale prices to these three companies, the two Paragons and the American Hardwall.

Now, as I understand it, you want to disregard the corporate fiction for the purpose of showing that the four companies were all one and that therefore the sales that were made by the two Paragon companies and the American Hardwall, were at resale prices fixed by Universal.

5068

Mr. Steffen: That is right.

Justice Stephens: But the bill of particulars doesn't charge resale price fixing by those three companies, either through a corporate fiction or otherwise.

Mr. Steffen: I agree with that, but that would depend on which price was being controlled, that is, in which capacity are you going to regard this corporate layout after you have identified them? Are you going to treat them as Oakfield, selling through the medium of its parents, or are you going to regard it as the parents which are making the resale? My thought is this, that the relationship between Paragon and Oakfield was very close. When

they bought board, supposedly from Oakfield, Mr. Hansen dealt with Mr. Hansen, or Mr. Hansen and his associates, and the price at which Paragon bought from Oakfield was strictly a friendly price; that while they went through the form of a sale, there wasn't any actual sale there. Therefore, if Universal sold to Oakfield, and they then had a bookkeeping sale between Oakfield and Paragon, all parties knowing that the ultimate transaction was to go to a dealer, you have, in effect, a control of the resale price of Oakfield on board certainly bought from Universal by Oakfield. And this letter would make it very clear that the dealer price, that is, the ultimate dealer price—disregarding for the moment Paragon as being a dealer—that the ultimate dealer price would be regulated, in Exhibit 560.

5069 Justice Stephens: In other words, your theory is that you can prove that there was some secret arrangement or private understanding or tacit understanding, between these three companies and Oakfield, that Oakfield was really the seller to the ultimate dealer, and that the sales which the 2 Paragon companies and American Hardwall purported to make to the ultimate dealer were really Oakfield's sales, and that Oakfield was therefore selling at the price fixed by Universal. Is that it?

Mr. Steffen: That is substantially the argument.

Justice Stephens: Are you prepared to prove that there was some secret and tacit understanding of such character as would permit the Court to disregard the corporate fiction?

Mr. Steffen: I think I can establish, by Mr. Hansen, what the sales arrangements were between Oakfield and Paragon Plaster Company; and that they, as I have said, were a strictly friendly arrangement.

Justice Stephens: Do you wish to be heard, Mr. Bromley, as to this proposed line of examination?

Mr. Bromley: It seems to me that it is entirely immaterial and highly improper. He proved that there was a sale yesterday, there was a sale between Oakfield and Paragon, yesterday.

Now I don't think it is within the issues of this case—certainly we have had no notice of it—that he was

5070 going to embark on the long and difficult undertaking of trying to pierce the corporate veil. Furthermore, he has specifically here, several times, waived any claim that

this evidence was in support of a charge that Paragon's prices were fixed.

Now he wants to go back and establish that charge, and then go a step farther and say, "Well, after all, it is Oakfield." So I think on any principle of issues as framed by the pleadings, it is clearly beyond any issues, and certainly ought not to be permitted now.

Furthermore, I don't think his offer of proof amounts to an offer to pierce the corporate veil. He says he wants to show that the sales were friendly. Well, if that is it, it is immaterial.

Justice Stephens: We are of the view, Mr. Steffen, that the inquiry is not proper, and not within the pleadings, and contrary to the very proof that you have already made in the case. You proved yesterday that there was a bona fide sale between Oakfield and the two Paragons and the American Hardwall. Now, apparently, you are undertaking to prove the contrary of that, that this was a trumped-up arrangement, and that all the companies were really one, and that they all connived at the price fixing arrangement charge. It is not within the pleadings. It involves the charge that the two Paragons and American Hardwall were involved in a price fixing undertaking, and that is not
5071 within the pleadings; and there is no charge of fraud in respect of the corporate fiction.

We are all agreed that it is not a proper inquiry. If you want to protect your record, you can ask the questions and have the objections passed upon individually.

Mr. Steffen: I had possibly better make a straight offer of proof.

We offer to prove, by questions directed to Mr. Hansen, that the Paragon Plaster Company, and the Paragon Plaster & Supply Company, and the American Hardwall Plaster Company, completely controlled the sales policies and the affairs of the Oakfield Gypsum Products Company; and that the purchases from Oakfield Gypsum Products Corporation, by any one of the parent companies, of gypsum board which the Oakfield Gypsum Products Corporation should buy from Universal Gypsum & Lime Company, were in the nature of bookkeeping transactions only; and that they were made with the understanding, and effect, that the board would be resold to dealers; and that in those resales to dealers, the prices which the Universal Gypsum Company specified in its letter of July 9, 1928, Exhibit 560, should be maintained; and that, therefore, the evidence

would show that the Universal Gypsum & Lime Company, one of the alleged conspirators in this case, had used improper means to induce and coerce manufacturing distributors to resell at fixed resale prices.

5072 Justice Stephens: It seems to us, Mr. Steffen, that what that amounts to, if you pierce the corporate veil and show that these four companies were all one, is, in effect, that you are charging or trying to prove that there was price fixing by the two Paragons and American Hardwall, through the device of selling through Oakfield, and that is not covered by the charge in the complaint.

Therefore, the objection is sustained, and the offer is rejected.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

5073 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Proceed, gentlemen.

Thereupon, EMIL HANSEN the witness on the stand at the time of recess, resumed his testimony as follows:

Direct Examination (resumed):

Mr. Steffen: For the purpose of clearing the record, Your Honor, I would like to ask one or two questions concerning Mr. Hansen's answer to my question regarding the sales by Oakfield to Paragon.

By Mr. Steffen:

Q. I believe you testified, Mr. Hansen, that you had no arrangements with Universal concerning Oakfield's sales to Paragon—or was that your testimony? A. The answer is "No" to that.

Q. That is what you testified before? A. I think so.

Q. And did you have anything to do with the original negotiations with Universal? A. Yes.

Q. And who did you see, or who did you talk with?

A. Mr. Stromquist.

5074 Q. When you originally started buying—and by "you" I mean either Paragon or Oakfield started buying from Universal, is that correct? A. That is right.

Q. When you said you had no special arrangement as to prices between Oakfield and Paragon, you mean that that was not discussed with Universal? A. That is correct.

Q. Did you ever buy board from Universal—and by "you" I mean Paragon—and have it shipped to Oakfield?

Mr. Bromley: I object to that as immaterial. Isn't this the same subject matter again?

Mr. Steffen: I want to probe this matter of special arrangements, Your Honor, for about four or five questions.

Mr. Bromley: It seems to me it trespasses upon the ruling, because it has to do with Paragon.

Justice Stephens: We can't tell, Mr. Bromley. It may go to a different matter. We will receive it subject to a motion to strike unless it proves to be material.

By Mr. Steffen:

Q. Was there any practice on that part of Paragon to buy board from Universal and to have it shipped to Oakfield?

Mr. Bromley: The same objection.

Justice Stephens: The same ruling. You may answer, subject to a motion to strike.

5075 The Witness: The answer is no.

Let me get that straight—did Paragon order board and ship it to Oakfield, New York?

By Mr. Steffen:

Q. Order board from Universal and have it shipped to Oakfield, New York. A. The answer is no.

Q. And you would say that all shipments that went to the Oakfield plant were bought in the name of Oakfield? A. That is right.

Q. And that Oakfield, during this period, 1927 and 1928, if I understand your testimony, sold to Paragon, either of the two Paragons, or American Hardwall Plaster Company? A. That is correct.

Q. And your testimony was that you had no special arrangements with Universal as to the price at which Oakfield would sell to Paragon? A. That is correct.

Mr. Bromley: I don't understand what "special" means. He had no arrangement.

Justice Stephens: He testified that he had no arrangement, he didn't say "special" arrangement.

Mr. Steffen: All right, strike the word "special".

By Mr. Steffen:

5076 Q. Could you answer this question, Mr. Hansen: Did the letter of July 9, 1928,—which is Exhibit 560 for Identification, which we showed you this morning,—as you understood it, apply to the Oakfield Gypsum Products Corporation's purchases from Universal?

Mr. Bromley: I object to that as incompetent because calling for the construction of a written document which is not in evidence.

Justice Stephens: Well, there, I think, the objection is not well taken. I think my colleagues agree with me. I was about to announce, before Mr. Steffen proceeded in this examination, that I wanted to make it clear that the Court did not foreclose the Government—I thought I had made it clear, but I want to make it doubly clear—the Court does not assume to foreclose the Government from attempting to prove that this letter, which we rule on its face does not have any application to Oakfield, nevertheless was understood in the trade, between these four companies, as applying to Oakfield in respect of resale prices. I think that is proper examination, if this witness can so testify.

The objection is overruled, to that.

Do you understand that, Mr. Hansen?

The Witness: As to what I may answer?

Justice Stephens: Yes.

The Witness: I think so.

5077 Mr. Steffen: Do you understand the question?

The Witness: May I have it again?

Justice Stephens: Read the question again.

(The pending question was read by the reporter as follows:

"Could you answer this question, Mr. Hansen: Did the letter of July 9, 1928,—which is Exhibit 560 for Identification, which we showed you this morning,—as you understood it, apply to the Oakfield Gypsum Products Corporation's purchases from Universal?")

Justice Stephens: I thought that was not the question. I thought you were trying to find whether it applied to the resale prices by Oakfield.

Mr. Steffen: I wanted it to apply to both.

Justice Jackson: Why not ask him directly what was his understanding?

By Mr. Steffen:

Q. What was your understanding of Exhibit 560, which

I now show you, as it applies to purchases by Oakfield from Universal?

Mr. Bromley: I object to that question. There are two subject matters in the letter, and the ruling is that you may inquire as to resale prices of Oakfield.

Justice Stephens: That is right.

The price at which the sales were made to Oakfield
5078 is not in issue, is it?

Mr. Steffen: No.

Let me ask this question:

By Mr. Steffen:

Q. What was your understanding, Mr. Hansen, with respect to Government's Exhibit 560, as to the letter's application to resales by Oakfield Gypsum Products Corporation?

Mr. Bromley: I object to that as incompetent because the witness has testified he has no recollection of receiving the letter.

Justice Stephens: Well, the witness has said, Mr. Bromley, that the letter was typical of various bulletins or sales announcements received by him from Universal, so I think that is all right. That objection is overruled. The witness may answer what, if any, application this letter had to resale prices by Oakfield.

The Witness: None whatsoever.

By Mr. Steffen:

Q. I think you have answered it completely, Mr. Hansen. A. Pardon me?

Q. I think that is a complete answer.

Mr. Bromley: Well, there is no question.

The Witness: The only reference to Oakfield is in
5079 this paragraph 3, quoting a price for delivery at Oakfield.

By Mr. Steffen:

Q. That is right. And you don't construe the last paragraph as having anything to do with the resale price by Oakfield? A. No, because Oakfield wasn't reselling to dealers, other than the three constituent companies.

Q. And you didn't think there was any regulation— A. (Interposing) And if that were an application to the Oakfield Company as to a pricing policy, then we did not follow it in selling to the three constituent companies.

Q. And you didn't regard the letter as requiring you to follow it, is that it? A. That is right.

Q. And was that, Mr. Hansen, because of the close relationship between Paragon and Oakfield, that you considered this letter didn't apply to sales between Oakfield and Paragon?

Mr. Bromley: I object to that as incompetent because being pure speculation.

Mr. Steffen: I am asking for his reason as to why it shouldn't apply to this type of sale.

Justice Stephens: We think the question is objectionable in asking for the reasons as phrased in the question, because it is an invasion of the ruling this morning
5080 that we are not going to hear testimony, under the pleadings as drawn, concerning alleged resale price fixing by Paragon, by the two Paragons and American Hardwall. If you want to ask this witness, if you think it is necessary to supplement your question, as to why this letter does not apply to the resale prices by Oakfield, if he can tell you anything more on that subject, you may ask that.

By Mr. Steffen:

Q. Will you answer the Court's question, Mr. Hansen? A. I didn't get that?

Q. Could you answer the Presiding Justice's question, which I would be very glad to ask you? A. Why this did not apply to Oakfield's sales to the three constituent companies?

Justice Stephens: Or to anyone.

The Witness: Well, my answer—

Justice Stephens: (Interposing) The Court is not insisting that you argue the matter, of course, Mr. Hansen. You have answered, as I have understood your testimony, that Oakfield didn't sell board to anybody but the three constituent companies.

The Witness: Yes, sir.

Justice Stephens: It sold rock to third parties, but not board?

The Witness: That is right.

5081 Justice Stephens: Now, you have testified that this letter, as you understood it, did not constitute a direction by Universal to Oakfield in respect to resale prices. Counsel apparently wants to inquire how you reached the conclusion that it did not.

If you can add anything to what you said in your previous

statement concerning the paragraphs to which you referred, you may do so, but you are not required to.

The Witness: Well, if this was meant as a direction, we ignored it.

Mr. Steffen: That is satisfactory.

Justice Garrett: And by "we", you mean Paragon?

The Witness: Paragon, the American Hardwall Plaster Company, and Paragon of Scranton.

Mr. Bromley: Well, I thought the question had to do with Oakfield.

Justice Stephens: He meant—well, I don't want to say what he meant.

Mr. Bromley: You ignored it as to Oakfield, too, didn't you? You say it didn't apply to Oakfield, is that what you mean?

Mr. Steffen: The question is: What did you mean when you said "we ignored it"? Did you mean Oakfield and the two Paragons and the American Hardwall, all four companies?

The Witness: I should say that the Executive
5082 Committee of the Oakfield Gypsum Products Corporation ignored it, if they ever took any formal action or gave it any formal consideration.

Justice Stephens: We hope, gentlemen of the Government, that you can move on to some more profitable subject. We spent half of yesterday afternoon and all this morning on matters which really could have been developed, it seems to us, by direct-examination of this witness in about 15 minutes.

Justice Garrett: Was Exhibit 559 introduced?

Mr. Steffen: No, Your Honor.

Justice Stephens: Exhibit 559 was not introduced.

Mr. Steffen: Neither was Exhibit 560.

Justice Stephens: Exhibit 560 we ruled to have been identified; but the questions to and answers of the witness having indicated that it has no relevance as applied to Oakfield, the record will show—so that the Government's record may be protected—that the exhibit is excluded from evidence.

Mr. Steffen: Has Exhibit 561 been acted upon?

Justice Stephens: No, it has not. We haven't that before us. That is in the form of a letter. Will you hand that to the Court, please?

(Exhibit 561 for Identification was handed to the Court.)

Justice Stephens: Government's Exhibit 561 is
5083 excluded from evidence, is not received in evidence, for the same reasons as relate to Exhibit 560.

Q. Now, Mr. Hansen, did you change your source of supply of gypsum board along in 1928, 1929 or 1930,—and by "you" I mean the Paragon Plaster Company or Oakfield? A. Yes, sir.

Q. And can you tell us what other companies you discussed the matter of buying board from, with? A. We discussed the matter with the Kelley Plasterboard Company; with Ebsary Gypsum; and possibly with National Gypsum, I don't recall.

Q. I want to show you again Government's Exhibit 562, which you have identified, I believe.

(Government's Exhibit No. 562 for Identification was handed to the witness.)

By Mr. Steffen:

Q. Was it at about the time of that letter that you took up the matter with, or were approached by, the Ebsary Gypsum Company? A. Yes.

Q. And by "that letter," I refer to Government's Exhibit 562. A. Yes.

Q. Did you, at the time of that letter, effect an
5084 arrangement with the Ebsary Gypsum Company to buy board from them? A. No, sir, but we were free to buy from them.

Q. I understand. And they made you an offer, did they? A. That is right.

Q. And on what basis did they offer to sell you board? A. May I indicate now that you are talking about the Paragon Company?

Q. I wish you would, yes. A. That is correct.

Q. And did they offer to sell you at a discount, and by "you" I mean the Paragon Plaster Company?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: On the ground that there is no charge of conspiracy or resale price fixing by Paragon?

Mr. Bromley: Yes, sir. There is no charge with respect to Paragon at all.

Mr. Steffen: I wish to follow it up, Your Honor, by first showing that if they were buying at a discount, they would be buying on a jobber basis; and I think the evidence will further disclose that they no longer buy on a basis that they were then offered.

Justice Stephens: What is the materiality or relevancy of it, in view of the fact that Paragon is not made a
5085 party to the suit in any particular?

Mr. Steffen: One of the charges in the complaint is that jobbers have been eliminated, and here is a situation where Paragon was being offered on the basis of a discount from the dealer price, as a jobber. I want to show that the offer existed at that time.

Justice Stephens: I didn't realize you were changing to that different issue.

Mr. Steffen: I now offer Government's Exhibit 562 in evidence.

Justice Stephens: Mr. Bromley's objection on the ground of immateriality is overruled, since the evidence is proposed to relate to the charge of elimination of jobbers. Whether the exhibit tends to prove that, we don't yet know. We would have to look at it.

(Exhibit 562 handed to the Court.)

Justice Stephens: Is there any objection to this document as to identification? You testified that this was Mr. Lenci's signature, didn't you, Mr. Hansen?

The Witness: That is right.

Justice Stephens: And that you received it?

The Witness: That is correct.

Justice Stephens: We think that this is admissible in evidence under the elimination-of-jobber issue, because of its reference to a discount of 10 percent on $22.50 and
5086 $15.00, respectively. It may be that it has some relevance to that subject. Received in evidence.

(The document referred to, marked as Government's Exhibit No. 562, was received in evidence.)

Justice Stephens: Mr. Adams, how long will you be with us now?

Mr. Adams: So long as I can be of any help, Your Honor.

Justice Stephens: Well, we want to make a ruling sometime within the next day or so on the matter of Exhibits Nos. 324 and 233, and we want to make it in your presence.

Mr. Adams: I don't want to interrupt you now, but I want to say I am extremely sorry that I couldn't be here earlier in the week. The manpower shortage has caught up with our office.

Justice Stephens: It hasn't inconvenienced us at all. We just missed you, Mr. Adams.

Mr. Adams: Thank you, Your Honor.

Justice Stephens: Mr. Knuff, will you get for us photo-

stats of such exhibits as have been referred to here and of which we do not have copies, as soon as you reasonably can, as we like to read them at night when we read the testimony.

Mr. Knuff: I don't think I can get them today, but I will get them as soon as our photostatic room can
5087 get them out.

Mr. Bromley: Exhibit 562 should be received, should it not, subject to the usual reservation?

Justice Stephens: Yes, it is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Steffen: In order to clear the record, I would also now like to call up Exhibit 563, which was offered simply to show that the Paragon Plaster Company was holding out to the world the fact that they had two offices, that they had an office at Syracuse and a mill at Oakfield.

Justice Stephens: Well, that was shown by the testimony of the witness.

Have you any objection as to that?

Mr. Bromley: Only that it is immaterial, in view of the witness' testimony.

Justice Stephens: Well, it seems to us that it is immaterial; but if you want to make a record you may offer the exhibit, and it is not received,—so that the ruling will be there to protect you. The witness' testimony stands.

By Mr. Steffen:

Q. Did you, subsequently, enter negotiations, Mr. Hansen, with the Kelley Plasterboard Company? A. Yes, sir.

Q. And did you personally handle any of the
5088 negotiations? A. A part of them.

Q. And did you effect an arrangement at any time with the Kelley Plasterboard Company for the purchase of board? A. Well, I had a part in the planning.

Q. But such an arrangement was subsequently effected? A. That is right, yes, sir.

Q. And that applied to what companies?

Mr. Bromley: Was that in writing, may I ask?

Mr. Steffen: I can ask him this question whether it was in writing or not, can I not?

Mr. Bromley: If it was a written contract, which I believe it to be, it seems to me that the contract is the best evidence.

Justice Stephens: Read the question.

(The pending question was read by the reporter.)

Justice Stephens: If it is preliminary, the answer may be given; but if it appears that there was a written arrangement, then the writing should be introduced.

Mr. Steffen: I will withdraw the question, Your Honor.

By Mr. Steffen:

Q. I now show you what has been marked as Government's Exhibit No. 564, which purports to be a letter from the Kelley Plasterboard Company, addressed to the Paragon Plaster Company, under date of December 4, 1930.

5089 (The document referred to was marked as Government's Exhibit No. 564 for Identification.)

(Government's Exhibit No. 564 for Identification was handed to the witness.)

By Mr. Steffen:

Q. Have you examined Government's Exhibit 564 for Identification, Mr. Hansen? A. Yes, sir.

Q. Do you identify that as Mr. Kelley's signature? A. That is right.

Q. That is a letter that you received, is it? A. Yes, sir.

Mr. Steffen: We offer Government's Exhibit 564 in evidence.

Mr. Bromley: Objected to on the same ground as heretofore stated with respect to Exhibit 560.

Justice Stephens: What do you intend to prove by this?

Mr. Steffen: I intend to show, first, Your Honor, the arrangement at this time between the Kelley Plasterboard Company and the Paragon Plaster Company and the Oakfield Gypsum Products Corporation; and I intend to ask the witness just what the transaction is. I don't think the letter is entirely clear, but it indicates in the third paragraph on the first page that, "We are to continue to

5090 bill the Oakfield Gypsum Company on any orders placed by Mr. Miles for your account."

In the second paragraph, it indicates that Mr. Miles will sell at prices supplied by the Kelley Plasterboard Company.

I don't think that the letter, on its face, is ambiguous. I, however, will ask the witness as to the transaction.

Justice Stephens: Let me get the theory of the pleadings under which it is being offered. Is it offered as a part of your case under the charge of resale price fixing in respect of manufacturing distributors? In other words,

you are trying to prove here that Kelley was fixing the resale prices of Oakfield?

Mr. Steffen: That is right, Your Honor, because from this time on, there are no sales to Paragon. The sales are made to Oakfield.

Justice Stephens: Then the objection is overruled. We make no comment upon the weight of the letter. The letter doesn't seem to be entirely clear on that subject, but it does seem to have some relation to that topic. So you may pursue that. The objection is overruled.

(The document referred to, marked as Government's Exhibit 564, was received in evidence.)

By Mr. Steffen:

5091 Q. Mr. Hansen, at this time, was the Oakfield Gypsum Products Corporation buying board from Kelley? A. Yes, sir.

Q. And who is Mr. Miles? A. Mr. Miles was a salesman for the Paragon Plaster Company in the metropolitan district.

Q. And on what basis was he paid? A. On a commission basis.

Q. And—

Mr. Bromley: (Interposing) Then I move to strike out the exhibit, if Mr. Miles was a Paragon salesman. The letter is addressed to Paragon, and the only sales that are talked about are by Mr. Miles.

Mr. Steffen: I want to carry through this transaction, and I think it will be cleared up.

Justice Stephens: We can't rule on it piecemeal, Mr. Bromley. We will have to hear more before we can tell whether this is relevant or irrelevant. It will be received, but you may reserve a right to move to strike it if, on the completion of this aspect of the testimony, it appears to be not material or relevant under the pleadings.

By Mr. Steffen:

Q. Will you tell the Court just how sales were made pursuant to this letter, Government's Exhibit 564? A.

Mr. Miles was selling neat plaster for us in the 5092 metropolitan market—

Justice Stephens: (Interposing) Mr. Hansen, will you let me make a suggestion to you?

The Witness: Yes.

Justice Stephens: Please, whenever you mean Paragon, say Paragon; and whenever you mean Oakfield, say Oakfield. When you say "us", we still have a little ambiguity.

The Witness: Yes, sir.

Mr. Miles was making sales for Paragon, in the metropolitan district, of neat plaster. He saw an opportunity of selling some of the dealers, to whom he was selling plaster, gypsum board and gypsum lath in truckload lots. It was not economical to ship it by car from Oakfield to the metropolitan district in competition with the metropolitan manufacturers. Paragon, therefore, made this arrangement with Kelley,—that Paragon should have permission to sell to certain dealers in the metropolitan district, listing those dealers with Mr. Kelley so that we would not conflict with his major accounts to which he was selling direct. The material, as stated here, was all invoiced to the Oakfield Gypsum Products Corporation—

Mr. Steffen: (Interposing) Now—

Mr. Bromley: (Interposing) Let him finish, please.

Justice Stephens: Go ahead and finish your answer.

The Witness: (Continuing)—to the Oakfield Gypsum Products Corporation, and re-invoiced by Oakfield to Paragon.

5093

By Mr. Steffen:

Q. Mr. Miles, as I understand it, if he made a sale, would notify the Kelley Plasterboard Company of that sale, would he?

Mr. Bromley: I object to this as leading.

Mr. Steffen: Yes, I think it is leading.

Justice Stephens: That objection is sustained. The witness is competent to tell about the transaction in his own words. If it needs any more explanation you may ask him to explain particular details of it, but let him do it in his own way.

By Mr. Steffen:

Q. Explain just how Mr. Miles would handle the transaction with the Kelley Plasterboard Company? A. Well, practically as stated in the letter. To a select list, which we approved—

Justice Stephens: (Interposing) By "we", you mean?

The Witness: Paragon approved.

(Continuing)—and filed with Kelley, Miles was permitted to send the orders directly to Kelley for Paragon, and thereafter, for billing to Oakfield, for deliveries to these dealers in the metropolitan district. And Paragon enjoyed some business on that basis.

Justice Stephens: Let me see if I understand you.
5094 Do you mean by that that Paragon, acting through Miles, ordered board from Kelley for the account of Oakfield; then Paragon, selling it to this select list, would have it invoiced to it from Oakfield in the manner you described yesterday?

The Witness: That is right.

By Mr. Steffen:

Q. Well, as I understood your testimony, it would be invoiced by Kelley to Oakfield, is that right? A. That is right.

Q. And then Oakfield, in turn, would re-invoice it to the Paragon Plaster Company? A. That is right. May I go on to explain?

Q. Yes, I would like to have it fully explained.

Justice Stephens: You may feel entirely free to make as full an answer as you need, in order to make the answer clear.

The Witness: This was done in order to expedite deliveries and to save time, so that instead of having Miles send an order to Syracuse, we had this arrangement to save two days, and therefore get an immediate delivery in the New York district.

Justice Stephens: By "sending to Syracuse", you mean sending to Paragon Plaster Company?

The Witness: That is right.

5095 By Mr. Steffen:

Q. How was the transaction paid for? After Oakfield had invoiced the board to you, that is, to Paragon, what happened next? A. Paragon would pay Oakfield.

Q. That is right. A. And Oakfield would pay Kelley. Now to get this absolutely correct, in this period sometime there was a time when Oakfield's invoices, coming to Syracuse, would be paid by a Paragon check, with the discounts all taken, the Oakfield discounts, taken off, but paid by a Paragon check. Those invoices didn't go through the Oakfield books. There Paragon, again, was simply saving a mail transaction for Oakfield.

Q. Paragon invoiced the shipment to the dealer, is that correct? A. That is right.

Q. And the dealer would then pay Paragon? A. Yes.

Q. Now at this time, was Paragon buying board directly from Kelley? A. I don't believe so. I think this was when Paragon ceased to enjoy a jobber's discount.

Q. Was Paragon a manufacturing distributor? A. It was a distributor, and Paragon tried to claim they
5096 were manufacturers because, as a matter of fact, we were at that time the oldest manufacturers of wall plaster in existence in the country, that being sanded plaster.

Q. But did the Paragon Plaster Company obtain a source of board supply at this time on a discount basis, Paragon directly? A. I think not.

Q. And did you try at this time to buy directly at a discount, and by "directly" I mean from Universal or Kelley or any other company? A. I think from Universal, at least just prior to this.

Q. And what happened there? A. To the best of my recollection, we were notified that all Paragon purchases would have to be made through the Oakfield company if a discount were to be enjoyed, or at least Oakfield was the only company who could enjoy a manufacturer's discount, and Paragon was out.

Q. And has Paragon ever been able to buy, since that time, on a discount basis? A. No, sir.

Mr. Bromley: You mean board, of course?

Mr. Steffen: I mean board, of course—and from the defendants.

Mr. Bromley: I renew my motion to strike out
5097 Exhibit No. 564. It is now completely apparent that the reference in the paragraph referred to by Mr. Steffen, the second paragraph, "It is understood he will sell at the prices which we will supply", is a direction, if it is anything, to the Paragon Company, and not to Oakfield, since, as the Presiding Justice developed, there was a sale by Kelley to Oakfield, and a sale by Oakfield to Paragon, and a sale by Paragon to the dealer. Mr. Miles was the employee of Paragon, and the second paragraph, not only on its face but as now interpreted by the witness, is plainly a direction to Paragon, if it is a direction.

Justice Stephens: I don't see what the exhibit, as explained, has to do with the charge of resale price fixing by Oakfield.

Mr. Bromley: I think it has been plainly demonstrated that it has nothing to do with that.

Justice Stephens: And as to the elimination of jobbers, as to that charge, if you are trying to prove by this exhibit that Paragon was eliminated as a jobber—

Mr. Steffen: (Interposing) We are not, Your Honor.

Justice Stephens: I see.

Mr. Steffen: This exhibit is offered, and this testimony is offered, purely for the purpose of showing that the defendants were endeavoring to influence and coerce the Oakfield Gypsum Products Corporation in its resale
5098 policies, and to require that the Oakfield Gypsum Products Corporation, in making its sales—although in this case it made them through the medium of the Paragon Plaster Company—was required to get a fixed dealer price in making sales to dealers.

Mr. Bromley: That is the same point, all over again, which has been ruled upon.

Mr. Steffen: I think the transaction is considerably clearer in this case, Your Honor.

Justice Stephens: I am sorry, Mr. Steffen, but we don't any of us, here on the bench, see that it tends to prove resale price fixing by Oakfield, and the motion to strike Exhibit 564 is granted.

(Government's Exhibit No. 564, previously received in evidence, was stricken from the record.)

Mr. Steffen: I offer Exhibit 564 upon the second ground which I mentioned just before recess, which I think is much more clearly developed at this point, that Oakfield and Paragon Plaster Company were substantially one concern, so far as these sales were concerned, and that the actual sale, the actual transaction between a licensee and its buyer, was a sale between Kelley and Oakfield. As the witness has testified, that is the only way upon which board could be procured at a discount during this
5099 time. Therefore, if you identify the Paragon Plaster Company and the Oakfield Gypsum Products Corporation as being substantially one concern, and regard it as Oakfield rather than as Paragon, you have a case of a resale by the Oakfield Gypsum Products Corporation at maintained or fixed prices dictated by the Kelley Plasterboard Company, in this case.

It is true that it constitutes a subterfuge, but it is not our fault that that is the case.

Mr. Bromley: That is subject to the same objection as that offer was this morning, it is the same thing over again.

Justice Stephens: It seems to the Court to raise exactly the same question as Exhibits 560 and 561.

The proof yesterday, by this witness, was that the two Paragons and the American Hardwall were the parents of Oakfield. The theory would seem to be there that Oakfield had to act at their instance. This is offered on just the opposite theory. The Government must at least be

consistent in its assertion of fact. If it is offered to prove, contrary-wise, that the two Paragons and American Hardwall were accomplishing resale price fixing through Oakfield, as their creature, then it isn't within the charge, because they are not charged with resale price fixing.

The objection to this exhibit as reoffered, Exhibit 564, is sustained.

By Mr. Steffen:

5100 Q. Did there come a time later, Mr. Hansen, when the Oakfield Gypsum Products Corporation made direct sales to dealers, other than to the two Paragon companies and the American Hardwall Plaster Company? A. Yes, sir.

Q. And about when was that? A. I can only give an approximate time. I think it was in 1931. It might possibly have been in 1932.

Q. How do you fix that in your memory? A. That was at a time when we thought it necessary to expand, when Oakfield felt it necessary to expand its sales, and was able to pick up a salesman who had formerly been with the Niagara Gypsum Company, and then for a short time with the United States Gypsum Company, and who had a knowledge of trade in areas where neither of the three companies, Paragon, Paragon of Scranton, and American Hardwall, were then selling.

Q. And what territory did the Oakfield Gypsum Company sell in? A. Western New York, parts of Pennsylvania, the District of Columbia, Maryland, Virginia—that is the approximate territory.

Q. I now show you Government's Exhibits Nos. 565, 566 and 567, the same being as follows: 565 being a letter purporting to be written by Mr. Kelley to Mr. Emil
5101 Hansen, under date of August 19, 1932; 566 being a letter dated August 22, 1932, entitled, "Supplement to Board License Bulletin No. 3"; and 567 purporting to be a carbon copy of a letter written to S. J. Kelley Company, under date of August 22, 1932, bearing the initials "EH" in the lower left-hand corner.

(The documents referred to were marked as Government's Exhibits Nos. 565, 566, and 567, respectively, for Identification.)

By Mr. Steffen:

Q. Have you examined Government's Exhibits 565, 566, and 567? A. Yes.

Q. Can you identify Government's Exhibit 565? A. Yes, sir.

Q. Is that a letter that you received? A. That is right.

5102 Q. And can you identify Exhibit 566, which is entitled, "Supplement to Board License Bulletin No. 3"? A. By putting it together with the letter, with Exhibit 565—

Q. (Interposing): We want your present recollection, Mr. Hansen? A. My present recollection is that I received this bulletin, or one similar to it.

Q. Enclosed in the letter of August 19th? A. Well, I can only assume that it was enclosed in the letter of August 19th.

Q. You will note that the dates are different? A. Pardon?

Q. I say you will note that the dates are different. A. That is right.

Q. Now is Government's Exhibit 567 a letter which you wrote, or a copy of a letter which you wrote? A. That is correct, it is.

Q. Now, Mr. Hansen, what price bulletin is referred to in the letter of August 19th, Government's Exhibit 565, if you know?

Mr. Bromley: I object to that because it has to do with a written document not yet in evidence. This is, of course, the same problem as before. This again only refers to the Paragon Plaster Company. It is just another at-

5103 tempt to try to prove something against Paragon.

Mr. Steffen: We have been attempting all day to prove something against Oakfield.

Justice Stephens: Well, the first problem is that this bulletin, Exhibit 566, dated August 22nd, is dated at a date which makes it chronologically impossible that it could have been included in the letter of August 19th.

Mr. Steffen: I am asking the witness if he knows what price bulletin was referred to in the letter of August 19th.

Justice Stephens: If you know you may answer that question; the objection is overruled.

The Witness: Ask me that again, please?

By Mr. Steffen:

Q. What price bulletin was referred to, if you know, in the letter of August 19, 1939? A. I think that by that is meant this bulletin which is dated August 22nd.

Mr. Bromley: I move to strike that answer as a pure speculation. It obviously cannot be that, and all the witness is doing is speculating about it.

Justice Stephens: That motion is granted.

By Mr. Steffen:

Q. Let me ask you this question, Mr. Hansen. Did the Kelley Plasterboard Company supply retail price bulletins to you or to the Oakfield Gypsum Company during
5104 this time? A. Yes, we had requested them to send us their prices from time to time, whenever they made changes, both to Oakfield and to Paragon.

Q. And those prices were the same prices at which Kelley sold to dealers in the market?

Mr. Bromley: I object to that on the ground that it is a speculation again.

Justice Stephens: Do you know?

The Witness: I think I could answer that "yes", because they were frequently headed, "Salesmen's Bulletins".

By Mr. Steffen:

Q. And did you have any trade information as to what prices Kelley was selling at? A. No.

Q. Did your salesmen know? A. Except as our salesmen would pick up that information.

Q. And was the Oakfield Gypsum Products Corporation selling at the same prices as Kelley was selling at during this period? A. Of course I couldn't know exactly what Kelley was selling at. We endeavored to sell at the prices that he said were his current prices, for the respective markets.

Q. And you asked him for his prices? A. That is right.

Q. Did he send you his prices? A. Yes.

5105 Q. And by "you" I mean the Oakfield Gypsum Products Corporation? A. Both Oakfield and Paragon.

Q. Mr. Hansen, when you received prices from the Kelley Plasterboard Company was the letter addressed to you, or how was the letter addressed?

Justice Jackson: When who received a letter?

Mr. Steffen: Let me ask it in another way.

By Mr. Steffen:

Q. When prices were received from the Kelley Plasterboard Company how was the letter addressed?

Mr. Bromley: I object to that as a speculation; let's have the letter.

Mr. Steffen: I am asking for the general practice, your Honor.

Mr. Bromley: I don't see how he can testify to that. The only letter that has been produced is addressed to Paragon.

Justice Stephens: I think we ought to have those letters if they are available, or the absence of them accounted for, and the witness then testifying as to what was in them. This is a point which may or may not involve the Court's previous rulings.

If the letters were directed to Oakfield, and stipulated Oakfield's resale prices, then they may be relevant
5106 and material within the charge. But if they relate to Paragon, then they are not. And we ought not to bridge that by ambiguous statements or by mere recollection of the witness, if the documents are available. Aren't they available?

Mr. Steffen: We do not have the price bulletins that go way back to 1932, your Honor. We have the testimony of the witness that he did receive prices, and we have the present letter which indicates that a bulletin was furnished.

What I am now wanting the witness to testify to is as to how they were received, whether they were received by Oakfield, or by Paragon, or how.

Justice Stephens: Well, that in effect is asking how they were addressed. Now if you can demonstrate that the originals are not obtainable, and that the witness has a dependable memory of the contents and the addressees, then you can ask the witness. But the "best evidence rule" has been invoked and we must apply it.

By Mr. Steffen:

Q. Referring to Government's Exhibit 565, Mr. Hansen, did you understand that as conveying price information applicable to your company alone, or to your company and Oakfield?

Mr. Bromley: I object to that because it calls for the construction of an unambiguous written document, which is not in evidence.

Mr. Steffen: The question now is relating to a
5107 particular document.

Justice Stephens: Just a minute, let me read it again.

We think that objection should be overruled. That comes within the rule that I made clear just after we came on the bench this afternoon, that even though a letter may be

clear on its face, if the parties dealing with the letter, sending and receiving it, had a different understanding of it, and the trade arrangement was that it meant to apply to Oakfield rather than to Paragon, or to both, that can be testified to. We are not receiving it as evidence of resale price fixing by Paragon, as that isn't charged.

Read the question to the witness and let him answer it, Mr. Reporter.

(The Reporter read the pending question)

The Witness: My answer to that is that I think this specifically applied to Paragon for this reason, that in about 1931, when Oakfield became interested in direct selling, Mr. Eldred took charge of the sales, he became sales manager, in effect, and our salesman, Mr. Earl North, reported directly to him. So he had to assemble all price information for the various markets because my company was not interested in areas in Western New York, or in Pennsylvania, or in Maryland, and therefore I would not have handled sales correspondence that involved Oakfield's direct sales to dealers.

Mr. Bromley: When you said Western New York
5108 you meant Eastern New York, did you not?

The Witness: I meant Western New York, sir.

Justice Stephens: The witness seems to know his own mind, Mr. Bromley.

Mr. Bromley: I don't know mine. (Laughter)

By Mr. Steffen:

Q. Did you talk with Mr. Kelley at the time that the Oakfield people commenced buying board from the Kelley Plasterboard Company? A. Yes sir.

Q. And do you recall any discussion with him as to the price at which the Oakfield people would resell to dealers? A. I don't remember that we had any such discussion. We had a long-established record of selling; we had sold board for a great many years, competitively, in the market. Our competition was on salesmanship and on quality of material, and not on price.

Mr. Bromley: I move to strike out that answer in so far as the last part of it is concerned; all parts not having to do with his conversation with Kelley.

Mr. Steffen: I don't see any basis for that, your Honor. The only possible basis would be that it was not responsive.

Justice Stephens: Read the question and the answer.

(The reporter read the record as requested)

Justice Stephens: Do you object to it as incompe-
5109 tent or irrelevant or immaterial, that portion of the answer to which you do object?

Mr. Bromley: I object to it as immaterial.

Justice Stephens: I think that objection is well taken.

Mr. Steffen: May I be heard on that, your Honor?

Justice Stephens: Yes.

Mr. Steffen: That answer is, in effect, saying that there wasn't any need to discuss prices for the reason that Mr. Hansen's firm had a long-established record of maintaining prices, and that their competition was not on a basis of price. Therefore, it is extremely material, I should say.

Justice Stephens: I am afraid I am somewhat confused as to what the Government is really trying to prove here, Mr. Steffen.

Mr. Steffen: What we are trying to prove at this point is that the Oakfield Gypsum Products Corporation received prices from Kelley, and that they resold to dealers at Kelley's prices.

Mr. Bromley: Do you contend that that is illegal, Mr. Steffen?

Mr. Steffen: We contend that it is illegal if it is done by an arrangement with Kelley, and if Kelley influenced or induced or directed or controlled the price at which the resales were made. The previous documents that have been excluded, such as Government's Exhibit 560, for example,
would be a direct showing of control of resale prices,
5110 and we do contend that is illegal.

Justice Stephens: Read Mr. Steffen's statement in answer to my question as to what the Government was attempting to prove here.

(The reporter read the record as requested)

Justice Stephens: You intend to follow it up, do you, by proof to the effect that there was something coercive or controlled or induced about this?

Mr. Steffen: Yes, although we consider that the mere fact of selling at exactly the same prices, and on exactly the same terms and conditions, would be circumstantial evidence in and of itself that they were in effect required or persuaded or induced to sell at those same prices.

Justice Stephens: Well, it might have some relevance. Standing alone it would seem to me hardly to be conclusive proof on that subject. It might be an accidental economic consequence; it might be the necessity of meeting

competition; or it might be as the result of control. If the theory here is to prove that there is resale price fixing compelled, or induced, or controlled by Kelley, I suppose the answer may stand as having some relevance to that subject.

The objection is overruled.

The Court would like to make clear that its practice that non-responsive answers shall be stricken out only on the motion of the lawyer asking the question, does not
5111 foreclose the opposite party from objecting to answers which, in addition to being non-responsive, are immaterial, incompetent or irrelevant; and the Court will ask the witness to bear in mind that so far as the witness can clearly give an answer to a question, without explaining the reasons for the answer or going beyond what is a necessary answer, that he should do so.

Then, if counsel on either side need to know the reasons, they will ask for them.

In other words, make your answers as direct as you can and as concise as you can, Mr. Hansen. That doesn't mean that you have to answer everything "yes" or "no", or that you must give an answer which you don't think adequately and truthfully gives your state of mind. You must feel free about that at all times.

Mr. Steffen: Would you care to take the afternoon recess at this time?

Justice Stephens: Yes, we will [redacted] few moments at this time.

(Whereupon, a short recess was taken, after which the trial was resumed, as follows:)

5112 Justice Stephens: Proceed.

By Mr. Steffen:

Q. The Oakfield Gypsum Products Corporation would be selling in competition with what companies, Mr. Hansen, if you know?

Mr. Bromley: At what time?

Mr. Steffen: In about 1932.

The Witness: National; United States Gypsum; Ebsary; Paragon Plaster Company; Paragon Plaster and Supply Company; and American Hardwall Plaster Company in some cases.

By Mr. Steffen:

Q. What could you say as to your familiarity with the prices of those concerns, to dealers?

Mr. Bromley: On what products?

Mr. Steffen: This is on board.

The Witness: This is a question as to my familiarity with those prices?

By Mr. Steffen:

Q. Yes. I was wanting to ask you whether your company kept advised of the prices of those companies. A. I could only testify as to the markets in which Paragon was actively interested after 1931.

Q. What markets were they? A. They were mostly New York State and New England.

Q. And to those states and places, you were
5113 familiar with the sales prices of the companies that you have named in the sale of board? A. Oh, I couldn't say that. I knew generally what they were, or I tried to know.

Q. When you told us a few moments ago that your company had a reputation, or had a policy of competing on a basis of service, not on a basis of prices, what did you mean—did you mean to say that you would maintain substantially the same prices or identically the same prices, as the other companies selling in your territory?

Mr. Bromley: If this refers to Paragon, I object to it as immaterial, and I assume it does refer to Paragon.

Mr. Steffen: I think it refers to Paragon, your Honor, at this point. It may be preliminary, although the witness has testified that he has no familiarity with sales by Oakfield after 1932—Is that correct?

The Witness: As to the details of sales, that is correct.

Justice Stephens: The Court will sustain the objection so far as the questions go to the prices of Paragon. That has been clearly ruled as out of the case. If you know what the prices of Oakfield were generally, or in detail, say so.

The Witness: Not in detail, I do not.

By Mr. Steffen:

Q. Could you state the general policy of whether
5114 they would or would not abide by the same prices that the Kelley Plasterboard Company was making?

Mr. Bromley: I object to that as leading and also as incompetent as far as the use of the word "abide" is concerned.

Mr. Steffen: I will say "follow" then.

Justice Stephens: The objection is sustained. Ask the witness what the policy, if any, of Oakfield, was, if he knows, with respect to its own prices and the prices of its competitors.

By Mr. Steffen:

Q. Can you answer the Court's question? A. The policy of the Oakfield Company was to obtain the top market price that it could find, that its competitors were selling at.

Q. And when you say "obtain", you mean obtain from dealers? A. Pardon me?

Q. Obtain from whom? A. Well, obtain from dealers or obtain from the company from whom Oakfield was purchasing, and distributing.

Q. Making the question apply only to board, you were buying board from Kelley, were you not, the Oakfield people were? A. Oakfield was buying from Kelley principally. I would say that they were buying from Kelley almost exclusively.

5115 Q. And can you say whether or not they got prices from Kelley on the sale of that board to dealers?

Mr. Bromley: I object to that as leading, and also as incompetent because calling for a conclusion.

Justice Stephens: Well, the question as phrased, does imply that the prices were the prices determined by Kelley for Oakfield, and the question is leading. The objection is sustained.

Ask the witness what his prices were and what relationship, if any, they bore to Kelley's prices.

By Mr. Steffen:

Q. What were the Oakfield Gypsum Products Corporation's prices during these years 1932, 1933 and 1934, and what relation did they bear to Kelley's prices? A. To the best of my experience, they were based on Kelley's prices, because that was the way we bought our material.

Q. Will you explain that, please? A. Yes, sir. We would have no way of knowing what margin of profit we were making unless we knew what the delivered price was in any particular market. Therefore, if Oakfield were making a sale in Western New York, they would have to know what Kelley's delivered price to a dealer would be there, because

on that basis Oakfield's discount applied, on the basis
5116 of the net after Kelley's freight was deducted. That is when Oakfield's discount started to apply. That was the margin of profit, of gross profit.

Q. And did you want to know those prices before you actually sold to the dealers? A. We had to know them.

Q. Before you sold? A. That is right.

Q. You learned after the invoice was sent you, when Kelley invoiced it to you he invoiced it at his prices to dealers, did he not? A. That is right.

Q. But at the time you sold to those dealers, you wanted to know what the price was going to be, did you not? A. We had to.

Q. And did you get those prices? A. Yes.

Q. How? A. Well, we got them direct from Kelley.

Q. Did Kelley ever make a complaint against Oakfield that you were not selling at the prices which he furnished you?

Mr. Bromley: Wait a minute. I object to that as incompetent because it assumes facts not in evidence. The prices which he furnished were the prices which he was to charge, according to the testimony of the witness.

Mr. Steffen: That is right.

5117 Mr. Bromley: The prices which were furnished were the prices which Kelley was to charge Oakfield. Therefore the question assumes facts not in evidence.

Mr. Steffen: The witness testified, I believe, that he received prices before he made his contracts. After he made his contracts, of course he would be invoiced.

Justice Stephens: But your question is as to whether or not Kelley made a complaint that Oakfield did not sell at certain prices.

Mr. Steffen: That is right.

Justice Stephens: That isn't what the witness testified about. It assumes that he did. The objection is sustained to the question as phrased. You may ask it in another manner.

By Mr. Steffen:

Q. Did the Oakfield people sell at the prices appearing on the Kelley invoices, or rather on the Kelley price lists? A. I couldn't answer that.

Q. Was that your policy, or was it not? A. That was the policy.

Q. And did Mr. Kelley ever make a complaint that you

did not abide by your policy; did he ever complain that you were cutting prices? A. I think that I had some conversation with Mr. Kelley once as to competing with one
5118 of his customers in New York City under this Miles thing. Now this is Paragon that is talking. I had some complaint that the price was not correct, was not competitive with his to one of his customers. At least, he asked me at what price we were selling.

Justice Jackson: At what price Paragon was selling?

The Witness: Yes.

Mr. Bromley: I move to strike out the answer as immaterial.

Mr. Steffen: I claim the answer, Your Honor, simply for the relevance that it has to show the attitude that Mr. Hansen would have in the Oakfield sales. I don't regard it as very weighty, but if he receives a complaint from Kelley on his resales by Paragon, it indicates that Kelley might make the same complaint if it were a sale by Oakfield.

Justice Stephens: The objection is sustained. The answer may go out so far as it relates to Paragon.

By Mr. Steffen:

Q. Did the Oakfield Gypsum Products Corporation sell through commission men during the years 1932 and 1933? A. I don't believe I can give you a competent answer on that. Mr. Eldred handled all selling arrangements.

Q. Well, I show you what has been marked as Government's Exhibit No. 568, which purports to be a copy of the minutes of an executive committee meeting of the
5119 Oakfield Gypsum Products Corporation under date of November 9, 1932, and purports to be signed with your name.

(The document referred to was marked as Government's Exhibit No. 568, for identification.)

(Government's Exhibit No. 568 was handed to the witness.)

By Mr. Steffen:

Q. I call your attention particularly to the second paragraph of those minutes. A. Yes.

Q. Can you identify Government's Exhibit 568 as a copy of the minutes which you prepared and signed? A. Yes, sir.

Q. Can you tell us what it meant by the second paragraph in regard to the sales by commission men?

Mr. Bromley: I object to that as incompetent, because calling for the construction of a written instrument which is not in evidence, and which is clear on its face.

Justice Stephens: That objection seems to the Court well taken. By the Court's ruling, Mr. Steffen, that in some situations where written instruments have a different meaning to the parties thereto, than appears on their face, the Court does not mean to open the door to having a witness describe, as to every document, what it means, if it is clear. If it is clear, as this seems to be, there is
5120 no point in having it explained. You may refresh the recollection of the witness if you wish to and—

By Mr. Steffen:

Q. (Interposing) Do you recall that matter of the sales of wallboard by salesmen on a commission basis being brought up at some time through the executive committee? A. I recall a letter from one gypsum company to the Paragon Plaster Company, asking what its policy was—

Mr. Bromley: (Interposing) I object to his stating the contents of a letter to Paragon, the letter not being in evidence.

Justice Stephens: That objection is sustained.

By Mr. Steffen:

Q. I will now show you Government Exhibit 569, Mr. Hansen, which purports to be a letter from Mr. Krumholz, addressed to you under date of November 14, 1932.

(The letter referred to was marked as Government's Exhibit No. 569, for identification.)

(Government's Exhibit No. 569 for identification was handed to the witness.)

By Mr. Steffen:

Q. Can you identify Government's Exhibit 569 for identification, Mr. Hansen? A. Yes, sir.

5121 Q. And does that refresh your recollection as to the matter of commission men and as to whether any complaint was ever made against your company concerning sales through commission men?

Justice Jackson: Against which company?

Mr. Steffen: The Oakfield Gypsum Products Corporation now, your Honor.

The Witness: Well, this letter has reference to the Paragon of Syracuse and the Paragon of Scranton.

Mr. Steffen: That is right.

Justice Stephens: I don't understand that. Is this the letter of November 14, 1932, signed by Krumholz, treasurer of the Universal Gypsum and Lime Company?

The Witness: Yes, sir.

Justice Stephens: It is addressed to Emil Hansen, vice president of the Oakfield Gypsum Products Corporation.

Mr. Reporter, will you read the witness' previous answer?

(The record was read by the reporter.)

By Mr. Steffen:

Q. Were you perhaps mistaken on that, Mr. Hansen, because the letter is addressed to you as vice president of the Oakfield Gypsum Products Corporation? A. May I read the letter?

Q. Well, you don't need to read it aloud. You may read it to yourself.

5122 Justice Stephens: We have all read it. We have it before us. I just don't understand your answer. What is there in the letter that indicates that it refers to the two Paragon companies?

The Witness: It states, "I have received advice from Mr. Eldred that his branch of your organization (that is American) has no salesmen operating on a commission basis and he explains that he is not acquainted with the procedure of either your or Mr. Merriman's company"—that is the Paragon of Syracuse and the Paragon of Scranton.

Justice Stephens: In other words, by Eldred's "branch" is meant Paragon?

The Witness: No, that is the American Hardwall Plaster Company.

Justice Jackson: I thought he was the sales manager for Oakfield.

The Witness: He also was, and it may have been that he meant Oakfield when he spoke of Eldred, as well, I don't know.

Justice Stephens: I see.

The Witness: The other is a direct reference to the two Paragon companies.

Justice Stephens: Because of Mr. Merriman's connection?

The Witness: Because of Mr. Merriman's connection with Paragon of Scranton, yes, and because of my connection with Paragon of Syracuse.

5123 By Mr. Steffen:

Q. As I understand it, now, you are regarding the Paragon Plaster Company as a branch of the Oakfield Gypsum Products Corporation? A. Not I—Mr. Krumholz may have been.

Q. But you understood him to mean that? A. I understood what he meant.

Q. At this time, did the Oakfield Gypsum Products Corporation have salesmen paid on a commission basis, do you know? A. I don't know whether Oakfield did or not, on this date.

Q. Do you recall whether this matter was brought up before the Executive Committee of the Oakfield Gypsum Products Corporation? A. Yes, sir.

Q. And was that brought up as a matter having to do with the Oakfield Company or with the three parent companies? A. It was a matter of what the three parent companies were doing.

Q. It had nothing to do with the Oakfield Gypsum Products Corporation? A. I don't recall that it did.

Q. I would like to have you look at the reverse side of Government's Exhibit 568, which purports to be a copy of the minutes of a meeting held December 12th and
5124 13th, 1932, and which is signed by you. Can you identify that as your signature, Mr. Hansen? A. I can, yes.

Justice Stephens: That is, in this file, as a separate instrument. I suppose that is because of photostating?

Mr. Steffen: Yes.

Justice Stephens: But it actually appears on the reverse, does it, of Exhibit 568?

Mr. Steffen: Yes.

Justice Stephens: Thank you.

By Mr. Steffen:

Q. I would like to have you look only at the fourth paragraph, Mr. Hansen.

Will you state, Mr. Hansen, whether you at any time—and when I say "you" I mean the Oakfield Gypsum Products Corporation—felt insecure as respects your source of supply of board?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

Justice Stephens: I don't see the relevancy of it. It may be connected, I suppose. What was the nature of the objection?

Mr. Bromley: That it was incompetent because calling for a conclusion.

Justice Stephens: I don't think that objection is well taken, if that is the only objection. That is the kind
5125 of a conclusion, it seems to me, that a business man could properly draw with respect to his company and its source of supply.

Mr. Bromley: Well, I object to it on the ground that it is leading.

Justice Stephens: Sustained.

By Mr. Steffen:

Q. I refer you to the matter of the several changes that you made in your source of supply, as you have testified, and ask you whether or not you felt secure in the source that you had with the Kelley Plasterboard Company?

Mr. Bromley: Objected to as leading.

Justice Stephens: We will have to sustain that objection. If you want to bring out from this witness whether or not they built a plant of their own, or what actuated them in considering building a plant of their own, you may do so by direct examination, but you have no right to lead.

By Mr. Steffen:

Q. Did you ever consider building a plant of your own? A. A board plant?

Q. Yes. A. Yes.

Justice Jackson: That is Oakfield?

The Witness: Yes.

By Mr. Steffen:

5126 Q. And at about what time, Mr. Hansen? A. Our original plans in 1920 contemplated that, and we had the space arranged for it.

Q. And were you considering it as late as 1932? A. Yes.

Q. And could you tell me why it might have been brought up in 1932? A. Our business was expanding. We were selling in markets that were competitive with other manfacturers. It was a matter of knowing that you were going to be protected in your source of supply, and also of being

able to make a profit on your board instead of taking a loss on it.

Q. What do you mean by that, Mr. Hansen? A. I mean by that, that the discounts that were given to us as manufacturers, to Oakfield as manufacturers, were not sufficient to compensate for the warehousing of the board at Oakfield, and reshipping it, plus the additional expense of overhead and administration.

Q. And what were those discounts? A. 15 percent on wallboard and 12-1/2 percent on gypsum lath.

Q. Did anything come of your plans, or of your thought to build a board plant? A. We had it in mind right up to the time that we sold the plant.

5127 Q. And that was when, Mr. Hansen? A. 1938.

Q. You sold it to the National Gypsum Company? A. That is right.

Q. Since that time have you purchased board at a discount from the National Gypsum Company or any other source? A. This is the Paragon Company. Oakfield ceased to exist in 1938.

Q. Yes. A. The Paragon Company has not been able to buy at a discount.

Q. Do you recall at any time having had any conversation with Mr. MacLeish of the United States Gypsum Company concerning your sales of gypsum board? A. No, sir.

Q. Do you recall at any time that Mr. Eldred or Mr. Merriman may have had such conversations and reported them to your Board? A. I wouldn't know that.

Q. I am asking you if you recall that any report was ever made to your Board? A. Of a talk with Mr. MacLeish?

Q. By Mr. Eldred or Mr. Merriman, yes. A. Not to my knowledge, not to my recollection.

Q. Well, I show you what has been marked as Government's Exhibit 570, which is a copy of the minutes
5128 of the Executive Committee of the Oakfield Gypsum Products Corporation dated May 29, 1933, and ask if that refreshes your recollection?

(The document referred to was marked as Government's Exhibit No. 570, for identification.)

(Government's Exhibit No. 570 for identification was handed to the witness.)

Justice Stephens: There is some doubt about the date of this. In the second line it states it to be the minutes

of the meeting of the Executive Committee held on May 23; and at the bottom the date is given as May 29, 1933. The date of May 29th apparently has to do with a concurrence.

This was marked Government Exhibit 206 in the previous trial, is that correct?

Mr. Steffen: Yes, sir.

Justice Stephens: It is the exhibit of which the first two lines are:

"Minutes of the Meeting of the Executive Committee of the Oakfield Gypsum Products Corp. held at Scranton, Pa., on Tuesday, May 23rd.", is that right?

Mr. Steffen: Yes.

Justice Stephens: What number is this?

Mr. Steffen: 570.

By Mr. Steffen:

Q. I call your attention particularly to the first full
5129 paragraph, Mr. Hansen? A. Yes, sir.

Q. Does that refresh your recollection as to any time at which there was a report by Mr. Eldred concerning a conversation he had had with Mr. MacLeish? A. No.

Q. Do you recall at any time whether you opened your books to Mr. MacLeish to make an audit? A. Not to the best of my knowledge.

Q. Do you know any reason why Mr. MacLeish should be offered an opportunity to look at your books, and by "your books" I mean the books of the Oakfield Gypsum Products Corporation? A. I wouldn't know the reason for that, no.

Q. Do you know of any complaints placed against your company having to do with sales through commission men or in any other way concerning which Mr. MacLeish might object? A. Well, I don't know why Mr. MacLeish would object, sir. I knew Mr. MacLeish in 1931 or 1932 as an attorney for the United States Gypsum Company.

Q. That is right. A. But not well at all. I had met him once or twice.

Q. My question may have been poorly phrased. Do you know of any complaints against your company in which the United States Gypsum Company and Mr. MacLeish might be so interested that you would throw your
5130 books open to allow them to look at them? A. I don't know of any.

Q. Looking at this Exhibit 570, does it refresh your recollection at all as to anything that Mr. Eldred may have reported to your committee? A. He may have, but I don't remember.

Q. Will you turn over to the other side of Government's Exhibit 570 and please read that paragraph and see if that refreshes your recollection?

Justice Stephens: So we are clear what you are looking at, does this also purport to be the minutes of the Executive Committee of the Oakfield Gypsum Products Corporation?

Mr. Steffen: Yes.

Justice Stephens: Of the meeting of June 21st?

Mr. Steffen: Yes, your Honor.

Justice Stephens: Then that is a part of Government's Exhibit 570.

Mr. Steffen: Yes, your Honor.

Mr. Bromley: It is a different meeting, though.

Justice Stephens: Yes.

Mr. Steffen: It is a later meeting, your Honor.

By Mr. Steffen:

Q. Can you tell us now, Mr. Hansen, of any occasion on which complaints were made against the Oakfield Gypsum Products Corporation or on which there was a threat
5131 that your sales agreement would be withdrawn? A. The only one that I am personally familiar with is the one that I told you about that concerned Paragon, myself and Kelley: I know of no other complaint against our company or against Oakfield, to my personal knowledge.

Q. Well, can you testify that that Miles situation was the basis of a threat that was made against you that you either discontinue that type of sales through Paragon and Miles, or that your right to buy board would be withdrawn? A. I wouldn't know that, sir.

Mr. Bromley: Wait a minute—

Justice Jackson: (Interposing) He answered and said he didn't know.

By Mr. Steffen:

Q. You couldn't say? A. I couldn't say.

Q. Do you have any present recollection as to whether there was a time in 1932 when you felt that you might lose your source of supply? A. We felt insecure from 1920 until 1938, as to our source of supply.

Q. And can you say why? A. Sir?

Q. Can you say why, in more detail than you
5132 have so far? A. Because no other manufacturer wanted to develop a live competitor.

Q. And you were a live competitor? A. I hope so.

Q. And your sales took business away from the other companies? A. I think that that is a correct statement, yes.

Q. Did you maintain their prices?

Mr. Bromley: I object to that as calling for a conclusion. I don't think the use of the word "maintain" is proper.

Justice Stephens: That objection is sustained. Ask the witness what his prices were and what he did, and what his reasons were. This is your witness and you ought not to lead him.

By Mr. Steffen:

Q. Can you give any other conclusions having to do with prices or in any other way that would make you feel insecure in 1932? A. It would be conjecture on my part.

Justice Stephens: Don't conjecture.

The Witness: I have no reasons.

Mr. Steffen: Your Honor, I think possibly the conjecture of Mr. Hansen might be quite relevant if it went to show what Mr. Hansen's attitude was as of this time, 1932.

Justice Jackson: Why don't you ask him what his
5133 attitude was? Conjecture can't prove anything or tend to prove anything.

By Mr. Steffen:

Q. What was your attitude? Did you feel insecure, particularly in 1932?

Mr. Bromley: I object to that on the ground that that question has already been ruled upon and excluded. It is repetitious and also incompetent.

Justice Stephens: Well, it is incompetent as leading, and it has been answered once or twice by the witness in his own words, that he did feel insecure. The objection is sustained.

By Mr. Steffen:

Q. You told us just now that you didn't think any company would want to develop a live competitor. Can you tell us whether your sales through commission men extended your business, in your opinion?

Mr. Bromley: What company is this, please?

Mr. Steffen: The Oakfield Gypsum Products Corporation.

Mr. Bromley: He testified that he didn't know whether they had commission men or not. I object to it as assuming facts not in evidence.

By Mr. Steffen:

Q. How was Mr. North paid—

Justice Stephens: (Interposing) The objection is
5134 sustained.

By Mr. Steffen:

Q. How was Mr. North paid, do you know? A. I don't recall whether it was a salary and commission or a straight salary, Mr. Steffen.

Q. Did you sell through jobbers—and I am speaking of the Oakfield Gypsum Products Corporation? A. Did Oakfield sell through jobbers?

Q. Yes.

Mr. Bromley: Do you mean did they sell board, Mr. Steffen?

Mr. Steffen: Yes.

The Witness: Board?

By Mr. Steffen:

Q. Yes. A. May I ask what you define as a jobber, how you define a jobber? (Laughter)

Q. Yes. A jobber is one who buys in wholesale lots from a manufacturer and sells at a discount to dealers at dealer prices. A. One who buys at a discount?

Q. From the manufacturer and sells to dealers.

Justice Stephens: Mr. Hansen, perhaps the Court ought to explain to you that this laughter is not directed at you. The laughter is due to the fact that there has been a great deal of debate and explanation in this case by various
5135 witnesses as to what a jobber is.

The Witness: Well, the answer to that question is no, other than the three companies, Paragon, American Hardwall, and Paragon of Scranton. That is in reference to board, is it not?

By Mr. Steffen:

Q. Yes. A. All right.

Q. Did you ever have a jobber arrangement with reference to plaster? A. Yes, sir.

Q. And with whom?

Mr. Bromley: I object to that as immaterial. What has this got to do with the case?

Justice Stephens: What is the materiality of this under the issues? Is there some charge that Paragon eliminated a jobber of plaster?

Mr. Steffen: No, your Honor.

Justice Stephens: I just don't see it. Perhaps I ought to. State what is the theory of the question.

Mr. Steffen: It was a preliminary question, your Honor, and it would lead to the Fairmont Wall Plaster Company.

By Mr. Steffen:

Q. Did you have any relations with the Fairmont Wall Plaster Company?

5136 Justice Jackson: And by "you" who do you mean?

Mr. Steffen: I am speaking generally as to Oakfield.

The Witness: Yes, sir.

By Mr. Steffen:

Q. And did you sell plaster to them on a jobber basis? A. Yes, sir.

Q. Did you ever sell board to them on a jobber basis? A. No, sir.

Q. Do you know Mr. Spease? A. Yes, sir.

Q. Did you ever have a conversation with Mr. Spease? A. Yes.

Q. Concerning the possibility that he might buy board from you, and by "you", I mean Oakfield Gypsum Products Corporation? A. Concerning the purchase of mixed cars of material shipped from Oakfield, principally plaster in his bags.

Q. Did he also try to buy board from you? A. Yes, sir.

Q. And did you agree to sell him board at a discount in wholesale lots, for resale to dealers? A. No, sir.

Mr. Bromley: I object to that as leading.

Mr. Steffen: I think it is a specific question, merely.

Justice Jackson: He answered no.

5137 Justice Stephens: It is certainly leading. The Court has sustained many objections to leading questions today, and I wish counsel would not ask them. You may ask the witness what, if any, arrangement he made

with Mr. Spease concerning the sales of board, and let him tell you in his own way.

By Mr. Steffen:

Q. You stated that you had a conversation with Mr. Spease? A. Yes.

Q. What arrangements, if any, did you make with him in regard to board? A. My conversation with him was a preliminary discussion in Buffalo, where I met him by appointment, and I told him that we would work out a contract with him to fill his bags with his brand of plaster, to load mixed cars for him containing various products, including board; and made arrangements, as I recall it, wherein we took in a car of his own lime which we stored and reloaded for him so that he would have the advantage of mixed car shipments of his own brand of material. I told him that we could not give him a discount or a commission on board, gypsum board and gypsum lath, that there was not sufficient margin in it to warrant that.

Q. Did you know at that time what Mr. Spease's prior source of board was? A. I did after I had visited
5138 with him, he told me what it was. I don't know that I knew before unless it had developed in a telephone conversation before the actual meeting. I am not clear on that.

Q. Where had he been buying board before? A. From the American Gypsum Company.

Q. Was he then, did you understand, able to buy board further from them?

Mr. Bromley: I object to this as incompetent because hearsay. . .

Mr. Steffen: I am not offering it for the purpose of proving that he did or did not buy board from American, your Honor, but I am offering it simply to show what Mr. Hansen's understanding of the situation was at the time.

The Witness: I wouldn't know that—

Justice Stephens: (Interposing) Just a moment, please, let the Court rule before you answer.

Mr. Steffen: He has already answered that he doesn't know.

Justice Stephens: Very well.

By Mr. Steffen:

Q. Mr. Hansen, did you ever have a complaint made against your company, and by "your" I mean the Oakfeld

Gypsum Products Corporation—concerning bids on Government jobs? A. Not to me.

Q. I am speaking of the Oakfield Gypsum Products
5139 Corporation. Do you know of any such complaint?

A. Not to the best of my knowledge, no. I don't know of any complaint made to Oakfield about Oakfield bidding on Government jobs.

Q. About Oakfield and the three parent companies, all four of you, bidding on Government jobs?

Mr. Bromley: I object to that question in so far as it covers the three companies other than Oakfield, as immaterial.

Justice Stephens: Well, now, didn't we go into that subject, Mr. Steffen, through another witness?

Mr. Steffen: Yes, your Honor.

Justice Stephens: Which witness was that?

Mr. Steffen: Mr. Spease.

Justice Stephens: Under what theory did the proof come in at that time? Can you refresh our recollection?

Mr. Steffen: I think it came in under the theory of control or regulation of the Oakfield Gypsum Products Corporation. The testimony developed that a complaint had been made and that Oakfield wrote to Spease saying that such a complaint had been made, and that they were not permitted to put in a series of bids of that sort.

I am asking Mr. Hansen whether that is true, or whether he remembers that occasion, and I want to ask him some further questions.

As I understand it, the United States Gypsum Com-
5140 pany was reported to have made a complaint against that thing called "multiple bidding", I believe, according to Mr. Bromley.

Justice Stephens: Well, if the question is preliminary to asking the witness about a complaint, the objection is overruled.

Justice Garrett: I understood Mr. Bromley to object to that question in so far as it referred to the companies other than the Oakfield Gypsum Company. Wasn't that your objection?

Mr. Bromley: Yes, your Honor.

Justice Garrett: That of course has been ruled on. I don't wish to criticize Government counsel, but it does seem to me that Government counsel should not keep trying to get in about these two Paragon companies and the American Hardwall Plaster Company questions that have been ruled

on—of course Government counsel has the right to make offers of proof, but is scarcely fair to the Court, having ruled again and again, to keep trying to bring in those Paragon companies and the American Hardwall Plaster Company.

I don't wish to be critical of Government counsel but it is very wearisome to have to pass again and again on those questions.

Justice Stephens: I share Judge Garrett's view. I think the record of the Government has been fully protected so that in the event of an adverse decision it can raise
5141 these matters on appeal with respect to the right to go into the Paragon question.

But I thought—I may say informally to Judge Garrett—that if the complaint had to do with both Oakfield and the other companies, perhaps the question would have to be phrased with respect to all four of them, or otherwise the complaint couldn't be referred to effectually.

What is the last question asked of the witness?

Mr. Steffen: I think the witness has answered that he doesn't remember.

Justice Stephens: Then we can dispense with this discussion.

Mr. Steffen: I would say, in reply to Judge Garrett, that there were two witnesses who might have known about some of these transactions. One was Mr. Merriman, who died about a month ago, and the other is Mr. Eldred who has been in the hospital and is now confined to his home, and he is the man that probably knows most about them.

We are endeavoring to get from Mr. Hansen what we can, and I regret that we were not able to get more evidence than we did. I regret it probably more than defendants' counsel do.

I think I am substantially finished with this witness, but I may have a question or two in the morning.

Justice Stephens: I say this in entire good part
5142 towards Government counsel, as we realize that the case is long and complicated and rests upon circumstances to a large extent, but there have been so many attempts today, when we have had to rule and rule and rerule on the same questions, leading questions and questions about Paragon, that it approaches in fact—although I am sure not in intent—an invasion of our rulings.

The remedy, if the case should ultimately go against the Government, is by appeal and not by invasion.

Mr. Steffen: Your Honor, may I ask one question at this point?

Justice Stephens: Yes.

Mr. Steffen: Perhaps I shouldn't ask the Court this, but we have Mr. Stromquist under subpoena. Mr. Stromquist can identify Government's Exhibit 560, which has been excluded. Now, on the theory of showing that what Mr. Stromquist meant may have been quite different from what Mr. Hansen understood, that exhibit might be admissible as a declaration. That is to say, you have heard the testimony so far, and have heard that there was very close dealing between Oakfield and the Paragon companies and the American Hardwall Company, and if Mr. Stromquist writes a letter and understands by it that Oakfield in its sales shall sell at resale prices, we would consider that material.

I raise that for the reason that I don't want to be
5143 accused of subterfuge here if I should again offer Exhibit 560.

Justice Stephens: We are not assuming at all to foreclose you from making any offers that you feel you must make to prove your case or to make a record in the event of an adverse decision. We will rule on Mr. Stromquist's testimony when you present him.

The court will now take a recess until tomorrow morning.

(Whereupon, at 4:05 p. m., a recess was taken until 10:00 o'clock a.m., Thursday, March 23, 1944.)

5144 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Thursday, March 23, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5153 You may take the witness stand, Mr. Hansen.

Thereupon, EMIL HANSEN the witness on the stand at the time of adjournment, resumed his testimony as follows:

Direct Examination (resumed)

By Mr. Steffen:

Q. You were asked the question, Mr. Hansen, referred to by the Presiding Justice just now, on page 5353 of the transcript:

"Q. And in making sales by Oakfield, at what prices would the Oakfield Gypsum Products Corporation resell to dealers?"

This applies, as you understand, I take it, to the time when Oakfield was buying board and was reselling it; and the question was as to where they were selling to dealers, at what prices were they selling.

And your answer was:

5154 "A. Would resell to dealers—unless you called the American Hardwall Plaster Company, the Paragon Plaster of Syracuse, and the Paragon Plaster and Supply Company, dealers—they were the only three customers for the gypsum products other than gypsum rock, that Oakfield had."

In the first place, that was not a responsive answer, Mr. Hansen. Did you have any other sales besides those three?

Mr. Bromley: Just a moment. I object to the question as incompetent because assuming facts not in evidence.

Justice Stephens: What page is that, now?

Mr. Bromley: Page 5353.

Counsel, instead of merely reading the question beginning at line 2, read it and then tried to interpret it. His interpretation was inaccurate, because the question referred to the time when Oakfield was buying from Universal.

Mr. Steffen: I am very glad to have it more carefully explained. I thought the witness understood the reference.

Justice Stephens: Suppose you just read the answer which he did give there.

Mr. Bromley: I suggest, in the interest of saving time, that we let the witness see a copy of his testimony.

Mr. Steffen: I would be very glad to.

Justice Stephens: Yes, that would help.

(Copy of transcript of testimony handed to the
5155 witness.)

By Mr. Steffen:

Q. Beginning with page 5353, Mr. Hansen, and carrying over to page 5356, will you look at that? A. I want to get the time factor in there.

Q. Then read preceding that, if you wish.

Justice Stephens: Take your time and read it.

I call the attention of counsel to the answer on page 5356 beginning at line 15, and running to the bottom of the page. I think probably that clears the whole thing up, and it may

not be necessary to take any further time, if counsel will agree that that clears it up.

Mr. Steffen: If Your Honor feels that it is clear, we have no desire to ask any further questions.

Justice Stephens: I feel that it is clear if the answers on page 5356, commencing with line 15 and running to the bottom of the page, are agreed upon as correct answers.

Mr. Bromley: I agree they are. I think that clears it all up.

Mr. Steffen: I would like to ask Mr. Hansen:

You have now read your testimony, I take it, so far as page 5356 is concerned?

The Witness: Yes.

By Mr. Steffen:

5156 Q. And the answers appearing on the latter half of that page, are they correct? A. That is right, they are.

Justice Stephens: That takes care of it. Thank you, Mr. Steffen.

By Mr. Steffen:

Q. While you have your testimony before you, look at page 5365, Mr. Hansen, line 15; the question there was put two ways, and you answered "No". A. That is incorrect.

Q. "No" could be an answer to either question. Which did you mean it to be an answer to? A. The answer should be, "No, we had no arrangement with Universal concerning Oakfield's sales to Paragon."

Q. Look at page 5406, now, line 20—you had better read from the middle of the page to get the gist of it.

Justice Stephens: Commence at line 6, Mr. Hansen.

The Witness: Yes, sir.

By Mr. Steffen:

Q. The question, Mr. Hansen, has to do with your answer there on lines 19 and 20. The preceding question had to do with the policy of the Oakfield Company in obtaining top market prices, and the question was:

"Q. Obtain from whom?"

A. Well, now, if you will go back to Judge Stephens'
5157 question as to the prices, my answer to the question, as indicated on line 12, was intended to be that the policy of the Oakfield Company was—

Justice Stephens: (Interposing) That answer is clear.

The answer that puzzled me, Mr. Hansen, is in lines 19 and 20. You see, I had asked you at line 6, and following:

"Ask the witness what the policy, if any, of Oakfield, was, if he knows, with respect to its own prices and the prices of its competitors."

And Mr. Steffen said:

"Can you answer the Court's question?"

You said:

"The policy of the Oakfield Company was to obtain the top market price that it could find, that its competitors were selling at.

"Q. And when you say 'obtain', you mean obtain from dealers? A. Pardon me?

"Q. Obtain from whom? A. Well, obtain from dealers or obtain from the company from whom Oakfield was purchasing, and distributing."

I don't understand what that means, that is all.

The Witness: There apparently was confusion in my mind on that question. If I had said as my intent was, in my answer on line 12, it would be: "The policy of the company was to sell at"—I used the word "obtain" there in the sense of the price that we hoped to receive for our goods.

5158

By Mr. Steffen:

Q. Now, Mr. Hansen, that policy has to do with the Oakfield's sales to dealers? A. That is right.

Q. And did that same policy obtain in your transactions between Oakfield and Paragon?

Mr. Bromley: I object to that as immaterial.

Mr. Steffen: I think that is highly material, as I will develop later, Your Honor.

Mr. Bromley: This is going into Paragon again, isn't it?

Justice Stephens: I don't see the materiality of that. But I still don't understand, Mr. Hansen, what you mean by your answer, even if you used the word "obtain" as meaning to "sell at". I can understand what you sell at, but I still don't understand this answer in lines 19 and 20:

"Well, obtain from dealers or obtain from the company from whom Oakfield was purchasing, and distributing."

I don't see how you can sell to people from whom you are purchasing.

The Witness: That is where my confusion came in. I thought that Mr. Steffen then was asking me where we got the information as to the price that we might secure from

the customer, and I changed the entire sense of it.
5159 In one case I was talking about obtaining value for my merchandise, shall I say; and then we went on to where I thought he was asking, "Well, where did you find out what that competitive price was?"

Justice Stephens: Just give us an answer to that question now, in your own way.

The Witness: The answer to that, of where I found the competitive price, or where Oakfield found the competitive price, was from the company from whom Oakfield was purchasing, and from dealers.

Justice Stephens: I see.

By Mr. Steffen:

Q. That is, you mean you wanted to get the best price possible when you were buying from Universal? A. Pardon me?

Q. Do you mean that you wanted to get the best or lowest price possible when you were buying from Universal, or your supplier? A. That wasn't the intent of the answer.

Q. Your answer had to do strictly with sales by Oakfield? A. That is right.

Q. And you wanted to get the best price possible, is that correct? A. That is right.

5160 Q. Now, I want to ask you whether that applied also in Oakfield's sales to both Paragon companies and the American Hardwall?

Mr. Bromley: I renew my objection. It seems to me that that is immaterial, on the Court's ruling.

Mr. Steffen: Your Honor, this answer will be utterly misleading if it is left this way. Oakfield did sell to the Paragon companies and to American Hardwall, and we have to know on what basis. The answer says that Oakfield sold on the best price obtainable.

Justice Stephens: Do you mean that it goes to the bona fides of the sale as between Oakfield and Paragon?

Mr. Steffen: No. I want to develop the fact that—

Justice Stephens: (Interposing) What the Court has to rule on is whether or not it is material under the issues, and I ask whether or not it goes to the attempt to show that there was not really a bona fide sale between Oakfield and Paragon—

Mr. Steffen: (Interposing) No, I don't want to show that it was not bona fide, but I want to show the extent of it, that is all. He has testified as to the policy in selling to

dealers generally. Now, the status of Paragon is ambiguous, whether as a jobber, a dealer, or what. And I am asking him the question, which I should think would
5161 be extremely material—did Oakfield's general policy apply in sales to Paragon?

Mr. Bromley: If that is offered to sustain the charge that Oakfield's resale prices were controlled, then I do not object to it. But if it is offered to go back to this old theory of trying to pierce the corporate veil—

Mr. Steffen: (Interposing) It is not, Your Honor.

Justice Stephens: I think it may come in, then, with the understanding that it is not on the theory of piercing the corporate veil. The objection is overruled.

The Witness: Oakfield's sales to Paragon were at lesser prices, at a discount from dealer's prices.

By Mr. Steffen:

Q. And did that apply also to the plaster sales?

Mr. Bromley: I object to that is immaterial.

Mr. Steffen: It is simply to round out the testimony, Your Honor.

Mr. Bromley: It is still immaterial.

Justice Stephens: Objection sustained.

By Mr. Steffen:

Q. Please refer now, Mr. Hansen, to pages 5407 and 5409 of the transcript. A. Yes, sir.

Q. On page 5409, beginning with line 16—

Justice Stephens: (Interposing) And, Mr. Han-
5162 sen, at the bottom of page 5407, commencing at line 19.

I didn't know, I may say to counsel, that this is of any materiality, and if you don't think it is, you need not take the time to clear it up. But if it is regarded by the Government as important under the issues, it would be helpful to me if, as was done with Mr. Lenci, it might be spelled out in concrete terms.

By Mr. Steffen:

Q. Could you explain in more detail what you meant by your answer beginning on line 19, page 5407?

Justice Stephens: Mr. Steffen, does this involve basing points and the like?

Mr. Steffen: I think it involves the whole matter of conformance, on the part of Oakfield, with the Kelley prices and terms and conditions of sale.

Mr. Bromley: I don't think it has any relation to basing points.

Mr. Steffen: And in so far as basing points are involved, it does have a relation to basing points.

Justice Stephens: I was confused, I confess, yesterday afternoon, as to what this was offered for. The only charge we were dealing with, I thought, was a charge of resale price fixing by Oakfield as a manufacturing distributor. For some reason or other, I didn't get the relationship of it.

Mr. Steffen: May I state the Government's purpose?

5163 The purpose was to show that the Oakfield people bought from Kelley, bought board, and they resold it to dealers, in general. And they resold it, as I understand this testimony, according to the prices which Kelley furnished them, and according to the trucking conditions and the general sales conditions which obtained in Kelley's sales to dealers; and I understand Mr. Hansen's testimony to be that. But I would be very glad to have him amplify it, if that is not correct.

By Mr. Steffen:

Q. What would you say on that, Mr. Hansen? A. I said, on page 5407, in line 15:

"To the best of my experience, they were based on Kelley's prices, because that was the way we bought our material."

Then I was asked to explain that clause, I assume.

Q. All right. Do you have any further explanation? A. No, I think that answer is complete.

Justice Stephens: Very well, the Court will not labor the matter. Perhaps it is due to the inexperience of the Judge with the details of commercial transactions.

Mr. Steffen: Well, it may very well be the fault of Government counsel in not asking intelligent questions, Your Honor. I wanted simply to develop the conformance.

5164 Justice Stephens: I am sure it will come out eventually before we get through. Perhaps it will be brought out on cross-examination, and perhaps it is not important to take any more time on it.

Thank you for taking up these matters.

By Mr. Steffen:

Q. I have a few questions, Mr. Hansen, regarding the period in 1932 and 1933 when Oakfield was buying board from Kelley. Do you recall the period? A. Yes, sir.

Q. And I think yesterday we showed you Government's Exhibit 568 for Identification, and Government's Exhibit 569 for Identification, and Government's Exhibit 570 for Identification, the first one being minutes of the Executive Committee, and the second being a letter from Mr. Krumholz, and the third also being minutes of the Executive Committee meeting of the Oakfield Gypsum Products Corporation.

Mr. Steffen: I suggest this, Your Honor, at this point: Government's Exhibit 568, which appears as being a copy of the minutes on one side,—inasmuch as there are minutes on the other side of the original, I suggest that we designate the reverse side as Government's Exhibit 568-A.

Justice Stephens: That may be done. In other words, what we have been treating as the rear of Exhibit 568, will now be marked as Exhibit 568-A?

Mr. Steffen: Yes. And the same should be done
5165 with Exhibit 570. On the rear of Exhibit 570 are the minutes of June 21, and they should be designated as Exhibit 570-A.

Justice Stephens: That may be done.

(The documents referred to were marked as Government's Exhibits Nos. 568-A and 570-A, respectively, for Identification.)

By Mr. Steffen:

Q. Let me ask you this question: From your information in the industry, and from your conversation with Mr. Spease, or from any other sources, what would you say as to the attitude of the gypsum industry concerning the use of jobbers?

Mr. Bromley: I object to that as immaterial.

Mr. Steffen: The materiality, I think, will show up, Your Honor. I would like to ask the question.

Mr. Bromley: It is immaterial to any charge in the pleadings.

Mr. Steffen: We have, Your Honor, Government's Exhibit 570-A, which speaks of the fact that at a meeting of the Gypsum Association there was a threat to withdraw—

Mr. Bromley: (Interposing) I don't think counsel ought to read these things into the record before he gets them in evidence.

Mr. Steffen: I have no desire to do that. It is merely for the purpose of saving time.

5166 Justice Stephens: Just let us look at it.

(The Court examined Exhibit 570-A.)

Mr. Steffen: May I make a little more explicit—

Justice Stephens: (Interposing) You are referring to the second paragraph, I suppose, the first sentence in the second paragraph?

Mr. Steffen: That is right.

Justice Stephens: What puzzled the Judges is as to how the attitude of the industry can be material.

Mr. Steffen: Concerning jobbers.

Justice Stephens: Yes. The charge here is the elimination of jobbers. You are entitled to try to prove the elimination of jobbers. But what the general attitude of the industry is, is something that can hardly be material.

Mr. Steffen: May I make that very clear?

Justice Stephens: Yes.

Mr. Steffen: In this case, we have the Oakfield Gypsum Products Corporation, which is a manufacturing distributor; we have testimony already by Mr. Hansen that the Oakfield Gypsum Products Corporation, after it purchased board from Kelley, sold it to the Paragon Company and to the other constituent companies, at a discount, substantially as a jobber.

Now the attitude of the industry, as has been developed here already rather fully, in 1932 and following, was
5167 to get rid of jobbers, or as Mr. Bromley would say, level off the price at which the jobbers bought so that their price would be the same as the dealer's price.

So you have a situation where the Oakfield people are buying at a manufacturer's discount, and are making use, in effect, of jobbers; and I want to develop the question whether that may not have been one reason why the source of board supply which the Oakfield people had, was being threatened.

Justice Stephens: Well, what troubles me, Mr. Steffen, is—suppose the witness answers, first, that he knows what the attitude of the industry toward jobbers was; and, second, that it was unfavorable to the jobbers,—what does that prove? What does it prove with reference to the charge of jobber elimination?

Mr. Steffen: There are two charges here, Your Honor. One is jobber elimination, and the other is Paragraph 45(e). Paragraph 45(e) is to the effect that manufacturing distributors were being coerced and induced to resell at prices, and in effect were being induced not to sell to jobbers

because the jobber price had been put at the same level as the dealer prices. And I think this evidence is very material to show the situation, that the industry wouldn't allow, or was unwilling to allow, the manufacturing distributors to sell to jobbers while they, the licensees, were not permitted to do so.

5168 I am stating that as a circumstance from which I think the Court could find that there was a threat to the continued sale by the Oakfield Gypsum Products Corporation, or the continued purchase of board by the Oakfield Gypsum Products Corporation.

Justice Jackson: I don't see why you can't bring that out by proper questions, though. Why don't you ask him what it was?

Mr. Steffen: I have asked him that.

Justice Jackson: You have asked him what the general attitude of the industry was. Why don't you ask him what they did, why were they complained against? Ask him, "According to the minutes on Exhibit 570-A, was that the reason that you thought you were threatened, because you employed men on commission, or that you wouldn't eliminate jobbers, that you continued to sell to Paragon and the other two companies?"

5169 Mr. Steffen: I was leading up to that, your Honor.

Justice Jackson: I think you can do that by specific questions.

Justice Stephens: We will overrule the objections. You may interrogate the witness concerning the attitude of the industry as a circumstance which may tend to be a part of the picture in which these operations were being carried on.

By Mr. Steffen:

Q. Mr. Hansen, did you understand the attitude of the industry as respects sales by licensees through jobbers?

Justice Stephens: Just answer that yes or no, first, whether you did know what the industry's attitude was.

The Witness: No.

Justice Stephens: The answer is no?

The Witness: That is right.

By Mr. Steffen:

Q. Did you know whether there were jobbers in the industry at that time? A. In 1931, 1932 and 1933?

Q. Yes. A. Yes.

Q. Were there as many jobbers then as there were in 1928, 1929 and 1930?

Mr. Bromley: I object to that as incompetent, because calling for a conclusion.

5170 Justice Stephens: Do you know?

The Witness: No, I do not.

Justice Stephens: The objection is sustained.

By Mr. Steffen:

Q. Was the attitude of the industry concerning jobbers the same as the attitude of the suppliers of other materials which were handled on a distributor basis by Paragon?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

Justice Stephens: The witness has stated that he doesn't know what the attitude of the industry was. That being true, it would seem useless to proceed. Sustained, unless you can develop that he knows about it.

By Mr. Steffen:

Q. You testified that the Paragon people were buying a number of types of masons' supplies and reselling as a distributor, did you not? A. That is right.

Q. And you, for a period, were buying gypsum board as a distributor, were you not? A. A distributor, or a jobber, I don't know which.

Q. And there was a time when that was discontinued, was there not? A. That is right.

Q. When was that? A. I think it was about 1930,

5171 it might have been 1931.

Q. And do you know why it was discontinued? A. No, I do not. That notification to us, as I recall, was first from the Universal Gypsum Company.

Mr. Bromley: You mean the notification that you could no longer get a discount?

Justice Stephens: Is that what you mean?

The Witness: That is correct.

By Mr. Steffen:

Q. That is you had to buy board at dealer prices or not at all? A. That is right.

Q. Now, coming to this matter of Exhibit 570-A, Mr. Hansen—Let me ask you first, did you know the attitude of the industry regarding the hiring of commission men to sell board? A. When you speak of the "industry", you mean all the companies involved in the industry?

Q. What I want to get is the industry policy or the industry practice— A. (Interposing) I know the policy as related to us by any particular company, sir.

Q. Did you have any knowledge as to what Ebsary or National or any of these other companies were doing by way of employing jobbers, or commission men? A.
5172 I don't believe so.

Q. Do you know whether or not National employed jobbers? A. Whether National employed jobbers? Now, you are referring—

Justice Jackson: (Interposing) Employed jobbers?

Mr. Steffen: Employed or sold to jobbers.

Justice Jackson: Oh.

The Witness: You are referring to this particular date?

By Mr. Steffen:

Q. Along in 1932. A. I don't know.

Q. Do you know whether or not they did at a later date? A. Well, I know that from 1938 on I wasn't able to obtain a discount on the purchase of board.

Justice Jackson: And when you say "I", you mean Paragon?

The Witness: Paragon, sir.

Justice Jackson: Paragon of Syracuse?

The Witness: That is right. Oakfield ceased to exist in 1938.

By Mr. Steffen:

Q. Did you try to get a discount? A. Yes, sir.

Q. And who did you talk to when you tried to get a
5173 discount? A. The officers of the National Gypsum Company.

Q. Which ones? Did you see Mr. Baker or Mr. Burley? A. Oh, I think it was Mr. Baker.

Q. What did Mr. Baker tell you?

Mr. Bromley: I object to that as immaterial. Isn't it perfectly plain that National's price to a jobber as of 1938 was fixed by the bulletins at the same figure as the dealer price? That has been established here time after time after time.

Mr. Steffen: I should like to have that developed, your Honor.

Mr. Bromley: What possible good can repetition of a fact that is so plain do in this case? National had no power to give a discount to a jobber because, under our bulletins,

its price to a jobber was fixed at the same figure as the price to the dealer, on board.

Justice Stephens: It has been so clearly demonstrated in the case that the bulletins were drawn in a manner which forbade, after a given time, discounts, that it would seem to us useless to keep proving it.

Mr. Steffen: If I were offering it simply to prove that, I think your Honor would be correct; but I would like to ask this witness the question in order to determine what his information was at that time, and if he received in-
5174 formation from Mr. Baker at that time indicating that their policy had been for some time not to employ jobbers, that would go perhaps back to 1932.

Mr. Bromley: The bulletin was issued in 1930.

Mr. Steffen: But Mr. Hansen doesn't know anything about the bulletins.

Justice Stephens: What does Mr. Hansen's information on the subject, whatever it may be, tend to prove under the issues of this case, which has not already been proved?

Mr. Steffen: It ought to tend to develop the position of the Oakfield Gypsum Products Corporation in the industry, and whether they were being coerced.

Mr. Bromley: Oakfield was out of business then.

Mr. Steffen: I want to find out Mr. Hansen's information concerning the employment of jobbers in the industry, and he went to Mr. Baker and had a conversation. Maybe Mr. Baker didn't tell him anything other than "we can't sell to you." But I think it is perfectly appropriate to ask him one or two questions on that.

Justice Stephens: Well, we will hear the answer and see if there is anything in it that relates to the issues. If there isn't, you may move to strike, Mr. Bromley.

By Mr. Steffen:

Q. What did Mr. Baker say to you in regard to the possibility of selling to jobbers? A. He said that it was
5175 not National's policy to sell gypsum board and gypsum lath to jobbers.

Q. Did he tell you how long that policy had existed? A. I don't recall that.

Q. Following this meeting of your Executive Committee on June 21, 1933, did you negotiate with Mr. Kelley for a contract, and by "you", I mean Oakfield? A. Mr. Eldred negotiated a contract with Kelley.

Q. Did you attend the conference at which that was negotiated? A. Yes, sir.

Q. And why did you seek a contract at that time?

Mr. Bromley: I object to that as immaterial and incompetent.

Justice Stephens: I don't quite see the force of that objection, Mr. Bromley.

What are you attempting to prove by this, Mr. Steffen?

Mr. Steffen: I am attempting to prove that Mr. Hansen's company, the Oakfield Gypsum Products Corporation, was being coerced, and that in order to get around the coercion, they thought they could negotiate a 5-year contract with Mr. Kelley.

Justice Stephens: You mean coerced to sell at the prices fixed by Kelley?

Mr. Steffen: That they felt insecure as to their purchase of board, and that one ground of their insecurity was that there was a jobber situation existing in the Oak-
5176 field organization, and there were complaints against that company; and that following the complaints they proceeded to make a 5-year contract, and I wanted to ask why.

Justice Stephens: The objection is overruled.

By Mr. Steffen:

Q. Why did you negotiate a 5-year contract with Mr. Kelley? A. As I recall, and I think you will find it correct, that contract was a reciprocal contract.

Q. That is right. A. It involved the sale of board and lath to the Oakfield Gypsum Products Corporation, and the sale of stucco, and I think also heat plaster by Oakfield to Kelley—

Q. (Interposing) I show you, Mr. Hansen—

Mr. Bromley: (Interposing) I don't think he had finished.

Mr. Steffen: I thought he had. Finish your answer, Mr. Hansen.

Justice Stephens: If you had not completed your answer, finish it. The question was why you had entered into this contract.

Mr. Steffen: I was going to show him the contract.

Justice Stephens: Let him finish his answer.

The Witness: It was our desire to assure ourselves first of a constant supply of board; second, secure a good customer for our manufactured material; and third, to
5177 get the maximum profit out of it because of the reciprocal arrangement.

By Mr. Steffen:

Q. And you wanted that arrangement for a 5-year period or as long as possible, or what? A. I think that was just good business judgment.

Justice Stephens: We will take the morning recess at this time.

(Whereupon, a 5-minute recess was taken, after which the trial was resumed as follows:)

Justice Stephens: Proceed, gentlemen.

By Mr. Steffen:

Q. I now show you, Mr. Hansen, what has been marked as Government's Exhibit 571, which appears to be a contract in the form of a letter, between the Oakfield Gypsum Products Corporation and the Kelley Plasterboard Company, dated December 1, 1933.

(The letter referred to was marked as Government's Exhibit No. 571, for identification.)

(Government's Exhibit No. 571 for identification was handed to the witness.)

By Mr. Steffen:

Q. Can you identify that, Mr. Hansen, as being Mr. Eldred's signature? A. Yes, sir.

5178 Justice Stephens: Is this the one that bears the exhibit number 208 in the upper right-hand corner, dated December 1, 1933?

Mr. Bromley: Yes, your Honor.

Mr. Steffen: Yes, it is dated December 1, 1933. I don't see the exhibit number 208 on my copy.

Mr. Bromley: It is on my copy.

Justice Stephens: It bears at the top the words: "Letter to—Copy to—E. L. Merriman—T. P. Eldred—Emil Hansen—H. W. Olmsted—728 Broad St., Utica, N. Y."?

Mr. Steffen: That is right.

By Mr. Steffen:

Q. Is Government's Exhibit 571, Mr. Hansen, the contract which you referred to just a moment ago, which was negotiated with the Kelley Plasterboard Company? A. Yes, sir.

Q. And you stated that you attended a preliminary con-

ference with Mr. Kelley concerning that matter, did you not? A. That is right.

Q. Can you tell us anything that took place at that conference with Mr. Kelley, at which there was a discussion of a possible threat to your loss of a source of supply?

Mr. Bromley: I object to that as repetitious and incompetent.

5179 Justice Stephens: Overruled.

The Witness: I don't recall any specific reference to loss of source of supply. It may have been in our minds, but I don't remember a specific mention of it.

By Mr. Steffen:

Q. Could you say that it was in your mind?

Mr. Bromley: I object to that as incompetent.

Mr. Steffen: We feel that it is highly material, your Honor, the attitude of the distributors concerning whether they were being coerced or not.

Justice Stephens: He has already testified that they felt insecure in their source of supply. It is repetitive. The objection is sustained.

By Mr. Steffen:

Q. That is true, is it not?

Justice Jackson: What is true?

Mr. Steffen: That you felt insecure in your source of supply.

Justice Stephens: That has been testified to.

The Witness: Yes.

Mr. Bromley: I move to strike out the answer.

Justice Stephens: It may go out as repetitive. It is quite unnecessary to have the same witness say the same thing twice.

By Mr. Steffen:

5180 Q. Now, Mr. Hansen, did you renew this contract at the end of the 5-year period? A. No.

Q. What change in your circumstances had occurred during that time, if any? A. The Oakfield Gypsum Products Corporation had ceased to exist.

Q. Was Kelley in the business any longer? A. No, he was out of business.

Q. And what became of the Oakfield Gypsum Products Corporation?

Mr. Bromley: I object to that as repetitious. We have had it testified a dozen times that it was sold to National.

By Mr. Steffen:

Q. What became of the plant of the Oakfield Gypsum Products Corporation? Is it still running—that is what I am getting at. A. No, it is not running.

Q. It was dismantled? A. Yes it was dismantled.

Mr. Steffen: We offer in evidence, your Honor, Government's Exhibits 568, 568-A, 569, 570, 570-A and 571, and we offer them with this statement, your Honor.

The witness was unable to remember some of the things appearing in these minutes of the Executive Com-
5181 mittee meetings as, for example, the threat to the board supply, and the reasons for the threat; but they appear in the documents of the Oakfield Gypsum Products Corporation, and they, coupled with the letter of Mr. Krumholz concerning commission men, coupled with the effort for the first time to get a long term 5-year contract with the Kelley Plasterboard Company, are all circumstances, as we see it, which tend to confirm Mr. Hansen's insecurity or feeling of insecurity, and therefore to establish what we charge in Paragraph 45(e) that the defendants concertedly induced and coerced the manufacturing distributors to maintain resale prices and to continue to conform to the practices or the sales terms of the defendant companies.

Justice Stephens: Is there any objection?

Mr. Bromley: I object to Exhibits 568, 568-A, 570 and 570-A, being minutes of the meetings of the Executive Committee of the Oakfield Gypsum Products Corporation, on the ground that they are incompetent because they are not declarations of a co-conspirator under the pleadings. It has already been held by your Honors that Oakfield is not charged as a co-conspirator, and therefore its minutes are not competent under any theory.

I object to Exhibit 569 for identification, being the Krumholz letter to Hansen of November 14, 1932, on the ground that it appears at page 5413 of this record
5182 that that letter had reference to Paragon of Syracuse and Paragon of Scranton, and it therefore is immaterial.

As to Exhibit 571 for identification, the Kelley-Oakfield contract of December 1, 1933, I make only the usual objection.

Justice Stephens: Well, Exhibit 571 is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Government's Exhibit No. 571 was received in evidence.)

Justice Stephens: Do you wish to be heard, Mr. Steffen, on the objections to Exhibits 568, 568-A, 570 and 570-A on the ground that they are mere declarations of the Oakfield Gypsum Products Corporation, and Oakfield, not being charged as a co-conspirator they can't be binding on anyone?

Mr. Steffen: Yes, I do, your Honor.

We are not offering them on the theory that they are declarations of a co-conspirator. We are offering them on the theory that they are documents, made in the usual course, the most formal documents that could be made, to show the state of mind and the attitude of the Oakfield Gypsum Products Corporation on the matters that are very important to determine coercion, or whether they were being induced to conform to a particular action.

These show, I think as clearly as could be, circumstantially, that the Oakfield Gypsum Products Corporation was feeling insecure as respects its source of supply of board; that there were apparently complaints made both as to commission men and as to the possibility of a loss of this source of supply of board—which appears particularly in Exhibit 570-A—

5183

Justice Stephens: (Interposing) First as to Exhibit 568—what, in Exhibit 568 for identification, shows anything concerning commission men, or jobber elimination, or insecurity with respect to source of supply?

Mr. Steffen: May I make the point that this is relevant only if you can show circumstantially that this, taken with other evidence which your Honors have heard in the case, as respects the attitude of the industry concerning commission men—we have discussed that already and introduced bulletins which show what the attitude was—taking that, together with all the other evidence that we have in the case you have a situation where the matter of commission men is being brought up before the Oakfield Gypsum Products Corporation in 1932. That, together with the reverse side, Exhibit 568-A, which has to do with the consideration by the Board of the Oakfield Gypsum Products Corporation at this time, as to whether they should or should not make a board plant, it seems to me is material.

Then following that, in Exhibit 570, with reference to the fact that Mr. MacLeish might be invited to look at their books, which would be an outrageous thing
5184 because Mr. MacLeish is counsel for the United States Gypsum Company; and following that with Exhibit 570-A, in which they say that following the Chicago meeting there was a threat of withdrawal of their source of supply—those things, added together, and viewed in the light of the other evidence in the case, it seems to me rather make out a case, circumstantially, that the attitude or state of mind of the Oakfield Gypsum Products Corporation at this time, was definitely insecure, in other words, that they were feeling the pressure.

I think the issue simply is as to what weight these are to be given. They are, I think, clearly admissible, so far as the rules of evidence are concerned.

Mr. Bromley: Since your Honor has asked a question with respect to the first exhibit offered, Exhibit 568 for identification, I think it should be stated that there obviously is nothing in it about insecurity.

So far as the second paragraph is concerned, the reference to commission salesmen, it was testified to by this witness at page 5415, that that discussion had to do with the Paragon companies and American Hardwall.

So that under no theory is there anything contained in Exhibit 568 for identification that has any materiality on any theory of this case.

Justice Stephens: What about Exhibit 568-A, the paragraph that has reference to data concerning a com-
5185 plete board plant? What do you say as to that, Mr. Bromley?

Mr. Bromley: I say that that is nothing but the declaration of Oakfield which is not competent, because Oakfield is not a co-conspirator, and that at any rate the whole subject matter of the attitude of the Oakfield Gypsum Products Corporation toward building a board plant has been fully testified to by this witness. He has given the reasons, and the period of time during which they felt as they did.

Mr. Steffen: A circumstance that comes up again very definitely in 1932, which as your Honors appreciate was the time when the most pressure was being put on the industry to conform to prices, is, as we see it, very material.

Justice Stephens: The problem is one not merely of materiality, but of competence. These are, on their face, hearsay statements; unless they are made in some manner

which brings them in as an exception to the hearsay rule, they are not competent.

They are not declarations of a co-conspirator, and they cannot come in on that theory as admissions, that is to say, as declarations of a co-conspirator, because Oakfield is not a co-conspirator and is not charged as such.

Now, the only other exception to the hearsay rule, to which you seem to relate them, is utterances offered not for their truth but to show the existence of an attitude of mind or a state of mind in the person who wrote
5186 them, Mr. Hansen, and his company.

I don't see anything on the face of Exhibit 568 which has anything to do with the item of insecurity. The reference there in the second paragraph to commission men, Mr. Hansen said related to Paragon and not to Oakfield.

What is the attitude of my colleagues?

(The Justices conferred.)

Justice Stephens: Exhibit 568 is excluded from evidence. Now, as to Exhibit 568-A.

(The Justices conferred.)

Justice Stephens: We wish to give the Government every opportunity to put in any circumstances which, taken together with other circumstances, may have any relevance to any of the issues, but there is no use of receiving into the record repeated proof of the same item.

Now, you have offered this witness, you have called him as a witness on whose truth and correctness you rely, and he has testified fully that there was insecurity concerning the source of supply, and that the company had considered building a board plant.

Exhibit 568-A is merely a repetition of that testimony, and we are all agreed that it ought to be excluded as purely repetitive. It proves nothing that you have not already proven.

Now, Exhibit 569, it was testified by this witness,
5187 related only to the two Paragon companies. This is your witness, and he described that exhibit as relating only to the Paragon companies.

Mr. Steffen: I think that is right.

Justice Stephens: So that is excluded on the ground that it is an item relating to a matter not within the issues.

Now, as to Exhibits 570 and 570-A—

Mr. Steffen: (Interposing) I might point out, your Honor, that the witness was unable to remember in detail either as to why Mr. MacLeish may have been referred to, or what was the threat at the Chicago meeting of the Gypsum Association because he did not attend. Therefore this offer is not repetitive.

Justice Stephens: Let us look at those exhibits again.

(Government's Exhibits 570 and 570-A were handed up to the Bench for the Court's examination.)

Justice Stephens: What theory of admissibility have you with respect to Exhibit 570? Obviously the only paragraph in that upon which you rely is the first main paragraph referring to the decision that Eldred would write to Mr. MacLeish offering to open the books. Now what does that prove or tend to prove, either alone or in connection with other evidence offered, or that you expect to offer—what does it tend to prove in respect of any issue in the case? That is what we have to keep 5188 in mind at all times in making these rulings.

Mr. Steffen: Well, I would say this, your Honor, that it is impossible, perhaps, to introduce only such paragraphs as say, "We feel insecure." You have to introduce this and read it in the light of the rest of the testimony in the case.

Justice Stephens: We are doing that, it is perfectly clear to us that you have a right to put in various items of evidence, which, though one alone might not constitute proof of anything, yet taken together do. But we have to be given some argument or assurance that each exhibit, when related to others, has some relevance to an issue here.

Now, what does this item, this paragraph concerning Eldred writing to MacLeish offering to open the books at any time—what do you expect to prove by that?

Mr. Steffen: I expect to prove—

Justice Stephens: (Interposing) In connection with other testimony.

Mr. Steffen: In connection with other testimony, yes, that there was a threat against the Oakfield Gypsum Products Corporation, and that they had felt that their position was so insecure that they were prepared to offer their books to MacLeish, who was counsel for the United States Gypsum Company, to let him see whether or not the affairs of the company were being handled satisfac-

torily from the point of view of the United States Gypsum Company.

5189 Justice Stephens: And you are going to call other witnesses to testify that there was a complaint made by the United States Gypsum Company against Oakfield?

Mr. Steffen: We don't know whether Mr. Eldred is going to be well enough to testify, or not. Mr. Eldred is the man who knew about that.

Justice Garrett: Well, it is a very far inference that you ask us to draw, or that you will ask us to draw I suppose, that this paragraph relates at all to any apprehension about supply of board.

Mr. Steffen: Or to terms of and conditions of sales which the Oakfield people were making. The obvious reason why Mr. MacLeish might be interested was that they might be making improper sales, sales at improper prices; and the testimony here has shown that you had a jobber situation in the industry at a time when they were trying to get rid of jobbers, "jobber" in the sense that Oakfield was selling to Paragon at a lower price and Paragon in turn was selling to dealers.

Justice Stephens: We will rule that on the present record, on the present showing, the exhibit is not admissible in evidence, but that ruling is without prejudice to your right to reoffer it if, in connection with other testimony which you produce, it appears then to have some relationship to some issue in the case.

5190 Mr. Steffen: That is Exhibit 570?

Justice Stephens: Yes.

Now, let's look at Exhibit 570-A.

Do you object to 570-A, Mr. Bromley?

Mr. Bromley: Yes, sir, on the same ground.

Justice Stephens: What do you say with respect to the statement there that Mr. Kelley had given assurance of "his cooperation in preventing any change from the present arrangement", and the reference with respect to the withdrawal of the "Board and Gypsum Lath Sales Arrangement"?

Mr. Bromley: I don't understand the legal theory on which the declaration of Oakfield, not a co-conspirator, can be offered in this case anyway. This, if it comes in at all, would come in under utterances forming a verbal part of an act. Now, what is the act that this utterance

forms a part of? How can you get it in under any exception to the hearsay rule?

Mr. Steffen: The Hillmon case—

Justice Stephens: (Interposing) What does it show, Mr. Steffen, with respect to someone's state of mind under the Hillmon case—whose state of mind and the state of mind with respect to what?

Mr. Steffen: The Oakfield Gypsum Products Corporation's state of mind, and I suppose also that of the three members of the Executive Committee.

5191 Justice Stephens: You mean with respect to insecurity?

Mr. Steffen: With respect to insecurity and with respect to what they should do about it, and with respect to the nature of the insecurity, that is, that it grew out of a threat apparently at a meeting of the Gypsum Association in Chicago, which relates it to these defendants.

Justice Stephens: That refers to the position of the Gypsum Association under the National Industrial Recovery Act—you are not relying on the National Industrial Recovery Act, Mr. Steffen, are you?

Mr. Steffen: No, your Honor. It is my understanding that the Gypsum Association was not just a NRA product.

Mr. Bromley: It seems to me to be so far fetched—

Justice Stephens: (Interposing) You need not reply further, Mr. Bromley. We think that if it proves anything at all it proves a state of insecurity on the part of Oakfield, and that has already been fully testified to and the exhibit is excluded as repetitive.

By Mr. Steffen:

Q. I would like to show you what has been marked as Government's Exhibit 403.

(Government's Exhibit No. 403 for identification was handed to the witness.)

By Mr. Steffen:

Q. I want you to look at the first page only, Mr.
5192 Hansen. Do you recognize that as Mr. Stromquist's signature? A. I am not a handwriting expert, but it looks to me like the signature that I was familiar with.

Mr. Steffen: We now offer in evidence, your Honor, Government's Exhibit 403. It has already been stipulated, I think, by Mr. Finck, that this letter was received by them, and the only question is as to who it was signed by.

Justice Stephens: Is there any objection to this, now that Mr. Stromquist's signature has been identified?

Is this being introduced in connection with this witness' testimony?

Mr. Steffen: Oh, no, your Honor. This is simply to cure the thing that I thought was preventing its admission.

Mr. Bromley: I would like to ask some questions of this witness about the signature, if I may, your Honor.

Justice Stephens: You may.

Mr. Bromley: How long has it been since you have seen Stromquist's signature?

The Witness: Three or four months.

Mr. Bromley: I show you Exhibit 559 for identification and ask you whether you can identify that as—

Mr. Steffen: (Interposing) I think, in order to make this fair, your Honor, we would like to have him see several of the signatures of Mr. Stromquist.

Justice Stephens: You may show them to him later. Let Mr. Bromley ask him on voir dire now.

5193

Mr. Steffen: Will you show him also Exhibits 560 and 561?

(Government's Exhibits 559 for identification, 560 for identification and 561 for identification were handed to the witness.)

Mr. Bromley: You will notice a considerable difference between the two signatures on Exhibits 559 and 560?

The Witness: Yes, sir.

Mr. Bromley: You will notice that there is a considerable difference between the signature on Exhibit 559 and the signature on Exhibit 403?

The Witness: There is a difference.

Mr. Bromley: Wouldn't you say that Stromquist's signature was as it appears on Exhibit 559 and not as it appears on Exhibit 403?

The Witness: I could not tell you; I am not a handwriting expert.

Mr. Steffen: Will you also look at Exhibits 560 and 561 to make a fair comparison?

Justice Stephens: We will have to do this alternately. Two lawyers cannot examine the same witness at the same time. Let Mr. Bromley finish, and then you will have your chance, Mr. Steffen.

Justice Garrett: Did I understand Mr. Steffen to

say yesterday that he had Mr. Stromquist under subpoena?

5194 Mr. Steffen: Yes, your Honor.

Justice Stephens: Is he in the room?

Mr. Steffen: Oh, no.

Justice Stephens: Then why take time over this if you can get him here—why can't he identify these signatures?

Justice Jackson: You said you were going to call him anyway.

Mr. Steffen: We were debating that, and I think we probably will.

Justice Stephens: If you are going to call him we might as well save all this time. He will know his own signature.

Mr. Steffen: Very well, your Honor. I would like to make this point, however, your Honor. We don't know whether Mr. Stromquist will be alive ten days from now, and this witness is a man who, I think, can—

Justice Stephens: (Interposing) Well, the probability that both Mr. Stromquist and this witness will not be alive ten days from now is remote. If you can't get Mr. Stromquist, then you can recall this witness if you must have this testimony, but this debate about a signature, which can be definitely established by Mr. Stromquist, takes much time which we really ought to save, Mr. Steffen, if we can.

Mr. Steffen: Very well.

Justice Stephens: So that exhibit is not received at the present time, but it may be reoffered when Mr.

5195 Stromquist is called on to identify his signature.

Mr. Steffen: We have no further questions, your Honor.

Justice Stephens: You may cross examine, Mr. Bromley.

Cross Examination

By Mr. Bromley:

Q. May it please th Court—Mr. Hansen, you have testified that Oakfield had no arrangements with the Universal Gypsum Company as to the prices which Oakfield should charge its dealer-customers on the resale of board purchased from Universal. Is it not likewise the fact that Oakfield had no arrangement, no agreement or understanding with the Kelley Plasterboard Company, or with any other supplier of board as to the prices which

Oakfield should charge its dealer-customers when it resold board purchased from the supplier? A. You ask—is it not likewise so?

Q. Yes. A. The answer is yes.

5196 And isn't it the fact that the Kelley Company continued to supply board to the Oakfield Company at all times subsequent to the date of the contract, December 1, 1933, which is Exhibit 571, right down to the time Oakfield went out of business?

Justice Stephens: Read the question. I am not sure you said what you wanted to, Mr. Bromley.

(The question was read by the reporter.)

Justice Stephens: I misunderstood you.

The Witness: The answer is yes.

By Mr. Bromley:

Q. And isn't it likewise the fact that no one ever complained about Oakfield's resale prices or practices in connection with the sale of board?

Mr. Steffen: That is a very broad question.

Justice Jackson: You mean at any time?

Mr. Bromley: At any time.

Justice Stephens: Well, if the witness knows, the breadth of the question can't be an objection.

The Witness: Not to me.

By Mr. Bromley:

Q. Isn't it the fact, likewise, that so far as you are concerned, you never heard, even, that there was such an organization as the Board Survey Company? A. Never heard? You mean right up to this date?

5197 Q. No, right up to 1938 when the Oakfield Gypsum Products Corporation went out of business. A. I couldn't fix the time when I first heard of the Board Survey organization, but I would say it was along in 1938.

Q. Whenever you heard of it, isn't it the fact that you never had any dealings with it, or any communications from it? A. That is correct.

Q. And isn't it the fact, likewise, that you never saw a license agreement between USG and anybody? A. That is right.

Q. You never attended any meeting of USG and its licensees at any time, did you? A. No, sir.

Q. And you never received any USG licensee bulletins, did you? A. No, sir.

Q. Did you ever have any knowledge that any conditions had been attached by USG, or anyone else, to USG's consent to your suppliers to sell you board at a discount? A. No.

Q. And it is the fact, isn't it, Mr. Hansen, that the Oakfield Company always bought board at a discount
5198 during the entire period of its existence? A. That is correct.

Q. Will you look at your testimony at page 5407, please?

(Copy of testimony handed to the witness.)

By Mr. Bromley:

Q. Do you see in line 9, that the Presiding Justice said: "Ask the witness what his prices were and what relationship, if any, they bore to Kelley's prices."

Do you see that? A. Yes.

Q. Now the fact is, isn't it, that the price which Kelley charged you, Oakfield, was the price which Kelley charged its dealers, less a discount? A. That is correct.

Q. So that, in order for you to know what the board was going to cost the Oakfield Company, which Oakfield bought from Kelley, you had to know what Kelley's dealer price was at all times, didn't you? A. That is correct.

Q. Because the board would cost you, Oakfield I mean, Kelley's dealer price less a 15 or 12-1/2 percent discount; isn't that right? A. That is right.

Q. So you wanted to know what Kelley's dealer
5199 price was, prior to the time that Oakfield sold to its customers, didn't you? A. That is correct.

Q. Because you wanted to know what your cost was before Oakfield sold its board to the customers; is that right? A. That is right.

Q. Now, you said that the cost of the board which Oakfield bought from Kelley, being Kelley's dealer price less a discount, gave the Oakfield Company a very small margin of profit, didn't you? A. Yes, sir.

Q. And when you said "profit", you meant gross profit? A. That is right, and I so testified.

Q. And beginning in line 19 on page 5407, where you said:

"We would have no way of knowing what margin of profit we were making unless we knew what the delivered price was in any particular market."

you meant that you had to know what Kelley's delivered

price was in order to determine what your cost would be, didn't you? A. That is correct.

Q. Now, you wanted to sell the board which you bought from Kelley, at as high a price as you could get, 5200 did you not? A. That is right.

Q. It was the fact, was it not, that Oakfield could not get, for the board, any higher price than Kelley was getting from the same class of customers? A. That is true.

Justice Stephens: We will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

5201 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: You may proceed.

Thereupon, EMIL HANSEN, the witness on the stand at the time of recess, resumed his testimony as follows:

Cross Examination (resumed)

By Mr. Bromley:

Q. You testified, Mr. Hansen, that it was Oakfield's policy to sell board to dealers at the same prices as appeared on Kelley's price lists, didn't you? A. I think so.

Q. Now, the prices which appeared on Kelley's price lists were the prices which Kelley charged for board, to dealers? A. I would assume that that was so.

Q. And if Oakfield sold board at the same price that Kelley sold it to dealers, you would take a loss on that business, wouldn't you? A. The Oakfield Company?

Q. Yes. A. We would in the case of reshipment from Oakfield.

Q. And that was because your margin of profit 5202 was only 15 percent on board, gross profit? A. That is correct.

Q. And that was not enough to enable you to pay the cost of doing business, in the instances to which you have referred? A. That is correct.

Q. And isn't it so that the Oakfield Company could not get more for its board from its dealer-customers, than they could buy that same board for from Kelley? A. That is right.

Q. And it was the fact, wasn't it, that the Oakfield Company did not want to take any less for the board than it could get? A. Yes.

Q. So that resulted, as a matter of fact, generally, in the Oakfield Company being able to get for the board which it bought from Kelley, not any more than the price at which Kelley sold the board to dealers? A. That is right.

Q. And wasn't that all you meant when you said, on page 5409, that it was Oakfield's policy to sell at the same prices that appeared on the Kelley price lists? A. That is right.

Q. That policy was determined by Oakfield not as the result of any agreement, but as a matter of inde-
5203 pendent business judgment, wasn't it? A. That is correct.

Q. Mr. Spease has testified in this case, and he said in his testimony that he had a talk with you about the contract which was subsequently entered into between Oakfield and the Fairmont Wall Plaster Company. In his testimony, Mr. Spease said that you told him you, meaning Oakfield, could not divide the discount which Oakfield got, because if USG found out they would refuse to sell board to Oakfield.

Now, did you say that, or anything like that, to Spease? A. No, sir.

Q. It is the fact that Spease asked you if Oakfield wouldn't sell Fairmont, board at a discount, isn't it? A. I didn't quite get that?

Mr. Bromley: Will you read the question?

(The question was read by the reporter.)

The Witness: He did ask.

By Mr. Bromley:

Q. And you said no, you wouldn't? A. That is right.

Q. And you told him the reason you wouldn't, didn't you? A. Yes, sir.

Q. What was the reason? A. The reason was that
5204 there was no profit to us in the sale of board in that way, and as a matter of fact we would be taking some loss on it.

Q. And that was because the price that you had to pay Kelley for that board was the dealer's price less only 15 percent, wasn't it? A. That is correct.

Q. You told him, however, that you would give him a liberal discount on plaster, did you not? A. That is right.

Q. And in the written contract thereafter entered into, Exhibit 357, it was provided that Oakfield would sell Fairmont plaster at a discount, wasn't it? A. That is correct.

Mr. Bromley: May the witness be shown Exhibit 356?

(Exhibit No. 356 handed to the witness.)

By Mr. Bromley:

Q. Will you look at the first sentence of the last paragraph, please? A. Yes, sir.

Q. What did you mean by that sentence: "Due to the license agreement among the board manufacturers, we have no way of making the sale of this product profitable to you."? A. Well, under that agreement, a price had been fixed to us, or Kelley had been granted permission, as I understand it, to sell us board at a discount
5205 of 15 percent for the board, and 12-1/2 percent for the gypsum lath. Therefore, it was not profitable to us.

Q. But you did not mean to intimate to the Fairmont Wall Plaster Company, in that letter, that this license agreement you referred to was binding on you, or that you were a party to it, or had anything to do with it, other than as you have stated, did you? A. Other than that it was the fact that established the low price for us.

Q. Yes. That is to say, under the license agreement between USG and Kelley— A. (Interposing) I should say the "low discount".

Q. That is to say, under the license agreement between USG and Kelley, Kelley could not give you any more than a 15 percent discount off the dealer's price, could he? A. That is right.

Q. So that, again, all you meant to say was that since your gross profit was 15 percent, you could not resell the board to Fairmont and give him a discount? A. That is correct.

Q. With respect to Exhibit 357, the Oakfield-Fairmont contract, my recollection is that Mr. Spease, in his testimony, inferred, at least, that it was entered into to get around some prohibition by USG—is that the fact, Mr. Hansen?

5206 (Exhibit No. 357 handed to the witness.)

Mr. Steffen: I would object to that, Your Honor, if it is asking for what was in Mr. Spease's mind, or

what his testimony is about. If the question is directed to the contract, that is another matter.

Justice Stephens: The question is directed to the purpose of entering into the contract, and I think it is proper.

The Witness: May I have the question again?

Mr. Bromley: Will you read the question?

(The pending question was read by the reporter.)

The Witness: No.

By Mr. Bromley:

Q. Exhibit 357, the Fairmont contract, was not entered into as any device of any kind, was it?

Mr. Steffen: I think that that is asking for a conclusion and ought not to be permitted, Your Honor. The word "device" is ambiguous.

Justice Stephens: It seems to me, Mr. Steffen, it is the kind of a conclusion that any witness can be asked. After all, psychologically speaking, everything is an inference. Whether a thing is a trick or a device or a subterfuge is something that we all know about. I think that objection is not well taken.

The Witness: No, this was an ordinary contract to protect both the seller and the buyer.

5207 By Mr. Bromley:

Q. There was nothing secret about it? A. No, sir.

Q. And it didn't have any hidden meaning or any hidden purpose behind it, did it? A. No, sir, none whatsoever.

Q. You testified that the Oakfield Gypsum Products Corporation sold out to National in 1938. Wasn't the reason that you sold out because you got what you considered was an advantageous offer for the company from National? A. That was one of the reasons.

Q. Well, you didn't sell out because you had any difficulty, or rather, because Oakfield had any difficulty in buying board from any supplier, did you? A. Not difficulty in buying board, but difficulty in buying it so we could operate profitably.

Q. Because you still were not making money on board, is that right? A. That is correct.

Q. But you didn't sell out because anybody threatened to stop your supply of board, did you? A. No, sir.

Q. Now, you have testified that the Oakfield Company, although considering the matter, never did build a plant to

manufacture board. Oakfield's failure to build a
5208 plant was not because it could not get a license from USG, was it? A. I don't believe so. I think that that was discussed by Mr. Eldred, although I don't know. I have nothing but recollection on that score.

Q. Well, wasn't the reason that you didn't build a plant that the Executive Committee of Oakfield thought that it required too large an investment? A. That is correct.

Q. And wasn't that the only reason? A. Yes, that is right.

Q. And it is the fact, isn't it, that after Oakfield sold out to National, while the Oakfield Gypsum Products Corporation manufacturing plant was dismantled, it was moved by National to another location and has been in operation ever since? A. Well, I was told by Mr. Baker, and by Mr. Tarbell, who was the production man, that it was the intention to move the mechanical equipment to Savannah. I never saw it moved, and I haven't seen it in Savannah, and couldn't identify it there, but that was what they stated their purpose was, or one of their reasons, for buying the plant, to get the machinery immediately available for their Savannah plant. Whether it was moved or not, I do not know.

Q. The Oakfield Gypsum Products Corporation also sold its gypsum mines, didn't it, to National? A.
5209 Yes.

Q. Now, at the time of the sale, there was plenty of raw gypsum up there in the Oakfield Gypsum Products Corporation's mines, wasn't there? A. Yes.

Mr. Bromley: May the witness be shown page 5353 of his testimony?

(Copy of testimony handed to the witness.)

By Mr. Bromley:

Q. You understand, don't you, that the question beginning at line 2 on that page, which reads:

"Q. And in making sales by Oakfield, at what prices would the Oakfield Gypsum Products Corporation resell to dealers?"

was speaking about board purchased by Oakfield from Universal? A. That was my understanding.

Q. Now regardless of your answer as it stands there in the record, from line 4 to line 8, inclusive, isn't it the fact that a correct answer to that question would be:

"Oakfield would not resell Universal board to dealers, unless you called its three parents dealers"?

A. That is what I intended to say.

Q. Was it your understanding at all times, Mr. Hansen, while Oakfield was in existence, that if Oakfield wanted to build a board-manufacturing plant, it could get a
5210 license to manufacture and sell, from USG? A. Well, Mr. Eldred, who made those contacts for us, stated that he understood we could.

Mr. Bromley: That is all.

Justice Stephens: Is there any further cross examination by any other defendant?

(No response.)

Justice Stephens: Any redirect?

Redirect Examination

By Mr. Steffen:

Q. Did you have any understanding, yourself, Mr. Hansen, concerning whether USG would grant a license to the Oakfield people? A. I never had a contact with the USG, asking that question.

Q. And your only information is a statement that at some time Mr. Eldred made that statement? A. That is right.

Q. And did you know what he based that on? Did he say that he was sure, or did he say he thought, or what? A. Well, I would say that he based it on conferences he had with Mr. Henning.

Q. And there was an assumption that he could? A. That is right.

Mr. Steffen: I move to strike that answer, Your
5211 Honor, on the ground that it is based purely upon hearsay statements.

Justice Jackson: You ask to have this answer stricken?

Mr. Steffen: I ask to have the answer to Mr. Bromley's last question stricken, in which the witness stated that he thought Mr. Eldred had said something.

Justice Stephens: Do you resist the motion?

Mr. Bromley: Yes, I do. It seems to me his state of mind, in connection with his testimony about the fact that the company never built a plant, makes—

Justice Jackson: (Interposing) That is not the answer that Mr. Steffen wants stricken.

Justice Stephens: I see your point. In other words, you say that regardless of the truth of Mr. Eldred's statements,

or accuracy of Mr. Eldred's statements, concerning the possibility of ta ing a license from USG, if this witness had information to that effect it was a circumstance which might have a bearing upon his state of mind as to the necessity of building a plant? Is that your point?

Mr. Bromley: As to why he didn't.

Justice Stephens: As to why he did not build a plant?

Mr. Bromley: Yes.

(The Justices conferred.)

Justice Stephens: My two colleagues think it ought to be stricken as pure hearsay. I should be inclined, myself, to think, Mr. Bromley, that it could stay in, provided
5212 it was shown that the same information was brought to the attention of the other members of the Executive Committee so that it would influence them. I should think it might be a material circumstance bearing upon this man's state of mind, but I defer to the views of my colleagues, and it is stricken.

Mr. Bromley: I would merely like to state, for the benefit of the entire Court, that the testimony now is that this information was in the possession of the majority of the Executive Committee of Oakfield Gypsum Products, because there were only three on the Committee, and Mr. Eldred and Mr. Hansen had that understanding.

Justice Stephens: Who was the third member?

Mr. Bromley: Mr. Merriman.

Justice Stephens: Was that statement by Mr. Eldred brought to the attention of the other two of you?

The Witness: It was, sir.

Mr. Steffen: Do you remember about when that was, Mr. Hansen?

The Witness: I would say sometime between 1932 and 1935, when we were giving the most serious consideration to building the plant.

Justice Stephens: In view of that, do you move to strike it?

Mr. Steffen: I think it would be immaterial one way or the other, Your Honor.

5213 Justice Stephens: Then we will let it stand.

By Mr. Steffen:

Q. I want to call your attention again to your testimony on page 5353.

(Copy of testimony handed to the witness.)

By Mr. Steffen:

Q. I think you corrected your testimony again on that, and I should like to have your statement as made to Mr. Bromley, in his last question upon that point.

(The record was read by the reporter as follows:

"Q. Now regardless of your answer as it stands there in the record, from line 4 to line 8, inclusive, isn't it the fact that a correct answer to that question would be:

"'Oakfield would not resell Universal board to dealers, unless you called its three parents dealers'?

"A. That is what I intended to say.")

By Mr. Steffen:

Q. Do you regard that, Mr. Hansen, as a different answer than appears in the record as it stands? A. It was the intent that I had when I said this: "Would resell to dealers"—I meant that as repeating the question, sir, and it does not make sense—

Justice Stephens: (Interposing) Well, it doesn't make sense unless you read it as a question; and unless, also, you add the word "no".

5214

The Witness: That is right.

Justice Stephens: That is to say—

The Witness: (Interposing) "Would resell to dealers?—no, unless you call", and so forth. That is what I meant to answer, and it is the fact.

By Mr. Steffen:

Q. As I understand it, the fact is that Oakfield, at this time, was not selling to dealers except as it might be selling to the three parent companies? A. That is right.

Q. Now, in regard to your property there at Oakfield, when you sold to National the machinery was dismantled, you assume? A. That is right.

Q. And has the mine been operated? A. I believe not.

Q. Now, in regard to your selling to the National Gypsum Company, I think you stated that one of your reasons was that the Oakfield Gypsum Products Corporation business was unprofitable, is that true? A. It was becoming unprofitable.

Q. And will you state why it was becoming unprofitable, in more detail? A. Yes, sir. There were two definite reasons,—a more limited market for neat plaster, which was our principal product of manufacture;

5215

and the inability to secure gypsum board and gypsum lath, which it was necessary to market with gypsum plaster, at a discount sufficient to make that business profitable to us.

Q. Did that apply particularly on mixed cars? A. That is right.

Q. And will you explain why that would be true? A. Because of the necessity of taking the gypsum board and lath into the warehouse at Oakfield, rehandling it, and shipping it out, plus the selling expense.

Q. Was there a change in your business, looking to a larger number of mixed car shipments? A. That would be difficult for me to answer, sir.

Q. Well, your business was more unprofitable in 1938 than it had been back in 1930; is that correct? A. That is right.

Q. And can you attribute that to any change in conditions? A. Because we were selling very much more neat plaster in 1930, 1931 and 1932, than we were in 1936 and 1937.

Q. And you were selling more board in 1936 and 1937? A. We were selling more board in 1936 and 1937.

Q. Proportionately? A. That is correct.

5216 Q. And inasmuch as you were losing more money on your board, and you were selling more board, your business was less profitable; is that right? A. That is right.

Q. Now, in regard to this contract between your company and Fairmont, Exhibit No. 357, it is true that you gave what you said was a liberal discount to Mr. Spease? A. I think so.

Q. By "liberal", do you mean that it was unusually large, or what? A. No, it was a good, fair margin.

Q. And you didn't feel free to make him any concession on your board price?

Mr. Bromley: I object to "didn't feel free". I think that that is incompetent and calls for a conclusion.

Justice Stephens: If that is intended as a characterization of the witness' testimony, I think it is not correct, Mr. Steffen. He didn't say that.

Mr. Steffen: I didn't so intend it.

Justice Stephens: You may bring out what he meant by it, if you wish to, on redirect—if there is any doubt about it.

Mr. Steffen: I think that is all, Your Honor.

Mr. Bromley: I have one matter before this witness is excused. I should like to have an understanding that

5217 the Government will recall him for cross examination

if, after he leaves the jurisdiction, they decide to offer in evidence Exhibits 565, 566 and 567 for Identification.

Justice Stephens: Were those offers excluded with a reserved right to re-offer on some condition?

Mr. Bromley: No, those were never offered at all. Those were Kelley-Hansen letters.

Justice Stephens: That is right.

Mr. Steffen: I would like now to offer those three letters, Your Honor.

Mr. Bromley: And I object to each one of them as immaterial, because this witness has testified, at page 5399, that they all applied to the Paragon Plaster Company.

Justice Stephens: What page?

Mr. Bromley: Page 5399.

Justice Stephens: You mean commencing at line 15?

Mr. Bromley: Yes, sir.

Justice Stephens: That is as to Exhibit 565.

Mr. Steffen: Exhibits 566 and 567 are related.

Justice Stephens: That is right.

Mr. Steffen: Our contention would be that they were addressed to Emil Hansen at 300 West Water Street; that those were also the offices of the Oakfield Gypsum Products Corporation that these were price bulletins furnished by Kelley which may have had to do, as testified on page
5218 5397, with sales by Paragon, but that they were also sales by Oakfield in the sense that Oakfield would sell to Paragon, and Paragon would sell to the dealer.

Justice Stephens: Since the Government's own witness testified that the exhibits related only to Paragon, and testified at the time that he was being examined with the distinction between Paragon and Oakfield in mind, we think the objection is well taken.

Moreover, the exhibits are almost meaningless, on their face, because they are not complete. At least, Exhibit 565 is lacking a bulletin, and 567 refers to 565, apparently, which lacked a bulletin. The two letters are not explanatory on their face. But apart from that, we think the witness himself has testified that they are related only to Paragon, and therefore, under the ruling of the Court with respect to Paragon not being charged with resale price fixing under the pleadings, those exhibits are excluded.

Mr. Bromley: No questions.

Justice Stephens: Mr. Hansen, you are excused, and we thank you for coming here to help the Court.

The Witness: Thank you.

(Witness excused.)

Mr. Knuff: Shall I proceed with the next witness?

Justice Stephens: Yes, do.

Mr. Knuff: Ezra Sensibar, please!

5219 Thereupon, EZRA SENSIBAR, called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Justice Stephens: Have you been a witness before, Mr. Sensibar?

The Witness: Not in this hearing.

Justice Stephens: I don't mean in this case, but in any court.

The Witness: Yes, I have.

Justice Stephens: You are probably familiar with the duties of a witness. Since a case has to be tried according to the issues raised by the complaint and answer, the lawyers are expected to ask questions which are related to those issues, and you should confine your answers, so far as you accurately can, strictly to the questions asked. Don't volunteer any answers, unless it is necessary to make a truthful and accurate answer. If you see adverse counsel rise to make an objection, don't answer until the Court has ruled upon the objection.

The Witness: I will do my best.

Justice Stephens: If you can't answer a question "Yes" or "No", of course, you are not required to. You may feel at ease and free about testifying truthfully and accurately.

5220 The Witness: Thank you.

Direct Examination

By Mr. Knuff:

Q. Your name is Ezra Sensibar, is that correct? A. Yes, sir.

Q. At present you are a resident of Mexico City? A. Yes, sir, I am.

Q. And how long have you been in Mexico City, Mr. Sensibar? A. As a resident, since June, 1942.

Q. Were you formerly connected with the Cardiff Gypsum Company? A. Yes, sir, and I still am.

Q. You still are connected with the Cardiff Gypsum Company? A. Yes, sir.

Q. When did you first become employed by the Cardiff Gypsum Company? A. Along about 1930 or 1931.

Q. In what capacity, at that time? A. As Vice President.

Q. And what is your present capacity with the Cardiff Gypsum Company? A. I am President of the company.

Q. And have been President of the company for
5221 how long? A. Since the summer or fall of 1935.

Q. The Cardiff Gypsum Company's plant is located, if I understand correctly, at Fort Dodge, Iowa, is that correct? A. That is correct, just outside of the city.

Q. Will you explain to the Court the various items that the Cardiff Gypsum Company manufactures? A. The principal product is wall plaster, such as would be used in a room like this. There are a number of other products, in a general way somewhat similar, that are used for special purposes, such as finishing walls; and another product that is called manufacturer's stucco, which is casting material, something used to cast statuary, for example, and other objects.

Q. Do you manufacture any gypsum block? A. No, sir, we do not.

Q. Where are your products sold, Mr. Sensibar—and by "your", I mean the products of the Cardiff Gypsum Company? A. Generally speaking, in the territory bounded on the west by the Rocky Mountains; on the east by Indiana; and on the north by the Canadian line; and toward the south by Texas and the Gulf States.

Q. The products that you manufacture at Fort Dodge are sold throughout that area, is that correct? A. That is right.

5222 Who are the other officers of the Cardiff Gypsum Company, at present? A. Mr. Maurice J. Breen, of Fort Dodge—

Q. (Interposing) Is that "Green" or "Breen"? A. Breen. He is Vice President of the company. Mr. Ira J. MacConnell.

Q. The two men that you have mentioned, in addition to yourself, are the officers of the Cardiff Gypsum Company; is that correct? A. That is right.

Q. Around about 1934 or the beginning of— A. (Interposing) Pardon me. To be perfectly accurate, I should say that Mr. MacConnell resigned some time ago, and has not been replaced.

Q. So that, with that correction, then, Mr. MacConnell was formerly an officer, but recently has resigned? A. That is right.

Q. In 1930, did your company attempt to purchase gypsum board and gypsum lath from any other company?

Mr. Bromley: Just a moment. I object to that as immaterial to any charge in the complaint, the charge, as I understand it, being that the manufacturing distributors named in the bill of particulars were coerced into reselling gypsum board at bulletin prices. There is no charge in the complaint having to do with the inability of
5223 Cardiff Gypsum Company to get gypsum board.

Justice Stephens: Is Cardiff named in the bill of particulars as a manufacturing distributor?

Mr. Bromley: No, sir.

Mr. Knuff: If Your Honor pleases, Cardiff couldn't be named as a manufacturing distributor for the reason that they were never able to purchase board. They couldn't have been named as a manufacturing distributor.

Justice Stephens: Well, I am not saying that you were obliged to. I was just trying to find out what the fact was, and trying to see what the theory of the evidence was, under the pleadings.

What do you intend to prove by this witness, and to what charge in the complaint is it related?

Mr. Knuff: I intend to prove by this witness two principal things: first, that the defendants have conspired to control plaster prices; and, second, that the defendants have conspired to eliminate from the distributive system wholesale distributors who might fail to maintain prices.

Justice Stephens: Read that statement, will you?

(The record was read by the reporter.)

Mr. Knuff: Now, apropos of the first, that is covered by Paragraph 45(c) of the complaint, which appears on page 10; and as to the second, it is covered by Paragraph 121 of the complaint, which appears on page 31 of the complaint.

5224 Justice Stephens: Well, won't you briefly outline, so that the Court can get the theory of relevancy and materiality, how you intend to relate Cardiff to that charge?

Mr. Knuff: Yes, I will outline that briefly.

Justice Stephens: We can't foresee what the proposed testimony is.

Mr. Knuff: Shall I proceed?

Justice Stephens: Yes; just make a very brief statement, you don't need to argue the point.

Mr. Knuff: Beginning early in the 1930's—the exact year the witness will tell us—the Cardiff Gypsum Company endeavored to purchase board from the American Gypsum Company, from United States Gypsum Company, from Certain-teed, from Universal, from National, and from Texas; that endeavor to purchase extended from 1933 down to around 1938 or 1939; that when he went to see the American Gypsum Company to get board from the American, he was told by Mr. Arthur Black of the American Gypsum Company that in view of the fact that the Cardiff Gypsum Company had a reputation on the market as a price-cutter on plaster, he didn't know what could be done for him. However—

Justice Stephens: (Interposing) I think you have stated enough to indicate the general theory of the testimony.

Now, what is your objection to that, Mr. Bromley? If the Government can prove that this company was
5225 eliminated or refused products, isn't that material under the general charges here which have been sustained by the majority of the Court?

Mr. Bromley: I didn't think it was, and there is no charge in the complaint that has to do with this, that I can see anywhere.

The reason it has always seemed so clear to me is that this was one part of the criminal indictment, specifically charged there, which was omitted from the bill in equity, completely omitted. It was very definitely charged in the indictment, but when we come to the bill of complaint that allegation is completely omitted.

Justice Stephens: Paragraph 121 charges complete elimination from the distributive system of wholesale distributors who might fail to maintain prices.

What is the other paragraph that you rely on?

Mr. Knuff: Were you addressing me, Your Honor?

Justice Stephens: Yes.

Mr. Knuff: Paragraph 45(c), Your Honor, at page 10.

Justice Stephens: The objection is overruled.

By Mr. Knuff:

Q. Suppose we start over again with the question. Beginning sometime in 1930, Mr. Sensibar, did the Car-

diff Gypsum Company attempt to purchase board and lath from a board and lath manufacturer?

5226 Mr. Bromley: May I have a general objection to all questions having to do with board?

Justice Stephens: With board?

Mr. Bromley: Yes, with board. As I understand, he has two objectives in view,—one is plaster, and the other is board. May I have a general objection to all questions having to do with board?

Justice Jackson: And "board", of course, includes gypsum lath?

Mr. Bromley: Yes, sir.

Justice Stephens: Paragraph 121 relates to board, plaster, and miscellaneous gypsum products. What is the basis of your differentiation in your objection?

Mr. Bromley: I didn't mean to make any at all, I want to object to both types; but I thought he was only now inquiring about board, and when he came to plaster I thought the ground of my objection would be somewhat different.

Justice Stephens: Are you going to examine first on board, and then on plaster?

Mr. Knuff: No, Your Honor. The reasons that they gave for the refusal to sell them board will, in and of themselves, sustain the position that the Government takes that they were trying to maintain plaster prices.

Mr. Bromley: Then may I have a general objection to all the testimony of this witness, as immaterial?

5227 Justice Stephens: You may. The record will show your general objection that this is immaterial, and that it is overruled.

Justice Garrett: When did the witness state that he became connected with the Cardiff Gypsum Company?

By Mr. Knuff:

Q. Will you answer that, please? A. I became active in the affairs of the company in 1930 or 1931.

Q. Do you remember the question—

Justice Stephens: (Interposing) Let me ask one other question.

This case is so complicated that I don't pretend to remember every detail of it all at once and without notice. Was this subject gone into in the reserved rulings?

Mr. Knuff: Not that I remember, Your Honor.

Mr. Bromley: It was gone into in connection with Mr. Lenci's testimony, as I remember it.

Justice Stephens: Well, we are anxious to have our rulings consistent.

Mr. Bromley: Well, this ruling is consistent with that. I think Mr. Lenci was interrogated, over my objection, as to his dealings with Cardiff, and his attempt to get a consent from USG to sell Cardiff. I think I objected, and I think the Court ruled that that was material,
5228 and it was admitted, Judge Garrett dissenting.

Justice Stephens: Thank you, Mr. Bromley.

By Mr. Knuff:

Q. Do you remember the question? A. No.

Q. Then I will rephrase it. A. All right, sir.

Q. So we understand one another, Mr. Sensibar, when I use the term "board", I want you to understand that I mean by that term wallboard as well as plasterboard and plaster lath. I am going to use "board" as a general term comprehending both board and lath. A. All right, sir.

Mr. Bromley: I am now told that I was mistaken, that there was some limitation in the ruling of the Court.

Justice Stephens: Well, I would like to have the Court's recollection refreshed, if possible. We want to be consistent, not just to be consistent, but because we try to make each ruling correct, and if our ruling on the objections with respect to Lenci's testimony on this subject was carefully made—as we try to make each of our rulings—we ought to have it in mind in making this one, if it presents the same subject.

Can you refresh our recollection as to the part of the record in which that was discussed?

5229 Mr. Bromley: If I may have a moment, Your Honor; I think that I can find it.

Justice Stephens: Yes, take your time.

We will take the afternoon recess at this time, and perhaps counsel, during the recess, can look up that reference. Perhaps Government counsel can assist on that.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5230 Justice Stephens: Proceed.

Mr. Bromley: This question came up, may it please the Court, during the testimony of the witness Lenci, in connection with Exhibits 523 and following. It was there shown that the Cardiff Gypsum Company had

negotiations with the Ebsary Gypsum Company about the purchase of board, and that the Ebsary Gypsum Company applied to USG for USG's consent to Ebsary to sell Cardiff, which consent was refused.

In connection with the proffer of that testimony the Court ruled, in an advisory fashion, on page 4542, saying:

"Justice Stephens: There is nothing before the Court to rule on, but for the guidance of counsel we may say that if these letters, Exhibits 523 to 527, inclusive, are to be offered on the theory that the Government states—which I need not repeat because it is clearly stated on the record—that all of us are agreed, all of the Judges, that they are not admissible under paragraph 45 (e).

"Judge Jackson and I are of the view that they are admissible under paragraph 45 (c), where it is charged that the defendants concertedly raised, maintained and stabilized the general level of prices for plaster and miscellaneous gypsum products.

"We think the proffered evidence may possibly support an inference that the defendants were trying to keep their own prices on plaster up, by keeping the prices of
5231 other people up, although it seems to Judge Jackson and myself that it might support a different inference, that it was a kind of indirect rebating or gift enterprise.

"Judge Garrett is doubtful, I think, whether the evidence is admissible on any theory. In fact, I think it is his view that it is not admissible under any theory of the complaint."

Now, at page 4554—

Justice Stephens: (Interposing) If I may interject, I remember now that was the testimony that had to do, was it not, with Mr. Lenci's letter to USG asking for a consent to sell to Cardiff?

Mr. Bromley: Yes, sir.

Justice Stephens: And his failure to get an affirmative response?

Mr. Bromley: Yes, sir.

At page 4554, the following appears:

"Justice Stephens: Now whether or not you named Cardiff as a manufacturing distributor, how could the evidence which you offered, which is evidence that the defendants refused to sell board to Cardiff, prove that they fixed its price?"

And again at page 4556 the Presiding Justice said:

"I don't yet understand how evidence that the defendants refused to sell board to Cardiff could tend to prove that they were fixing the price of other manufacturing distributors on board, since this company was only a plaster price-cutter."

5232 Finally, at page 4582 there was the general ruling, beginning at line 5:

"Justice Stephens: I am referring to the ruling in which Judge Jackson and myself indicated that this class of evidence was admissible under paragraph 45 (c) of the complaint, but not under 45 (e), to which Judge Garrett dissented, thinking it inadmissible at all. That is clear now, I think."

Justice Jackson: Did we make any reference at all to paragraph 121, Mr. Bromley?

Mr. Bromley: Yes, sir.

At page 4540, beginning in line 21, I said:

"Paragraph 121 is under the effect of the combination. It is not a charge of the combination or its scope. The last sentence to which counsel refers, or the last part of the last sentence, "have completely eliminated from the distributive system wholesale distributors who might fail to maintain said prices", I think plainly refers to jobbers, I think a reading of the whole complaint shows that reference is to the allegations in paragraph 94 that we conspired to sell only to jobbers who sold to dealers, who maintained bulletin prices.

"I did not before understand that the use of the words "wholesale distributors" was ever intended to broaden the scope of the allegations of the conspiracy, and I think all of us have understood that to mean merely jobbers."

5233 Then the record shows the following:

"Justice Stephens: Do you wish to be heard, Mr. Knuff?

"Mr. Knuff: No, your Honor, I think not.

"Justice Stephens: Of course there is no offer before the Court, but the Government states that exhibit numbers—

"Mr. Knuff: (Interposing) Beginning with Exhibit 523 and going to 527, so far.

"Justice Stephens: (Continuing) Exhibits 523, 524, 525, 526, and 527 are to be offered—do you offer them at this time?"

So I thought it was accepted that paragraph 121 did not cover, and the final ruling of the Court was that the Lenci evidence was only admissible under 45 (c), having to do with plaster prices.

Justice Stephens: Judge Jackson and I will rule as we did before, that the evidence is admissible for what it may be worth, subject to the same doubts that we expressed previously as to its value, under paragraph 45 (c).

Judge Garrett will make a separate statement.

Justice Garrett: I suppose that from the standpoint of personal consistency I should again dissent. But the situation is somewhat different from what it was when I dissented before. It has been my uniform practice, after a majority of my associates—when I was sitting with associates—would pass upon a question, to acquiesce in
5234 that holding and treat it as the settled rule or law of the case. Hence, I do not persist in any dissent in this instance.

Justice Stephens: In other words, you feel bound by the ruling when it has once been made?

Justice Garrett: Yes.

Justice Stephens: I think we all take that position.

You may proceed, Mr. Knuff.

Mr. Bromley: May I have the record show that I have a continuing objection to all of this witness' testimony?

Justice Stephens: The record may so show, and it is overruled.

By Mr. Knuff:

Q. In the early part of 1930, did your company make an effort to purchase board from any other manufacturer? A. I don't know of any such attempts.

Q. Maybe I didn't make myself clear—I meant to say in the early 1930's? A. Oh, I beg your pardon. Yes, beginning with the summer of 1933.

Mr. Knuff: Mr. Sensibar, will you kindly speak a little louder so that Mr. Johnston may be able to hear.

Mr. Johnston: If the Court please, I don't want the record to insinuate that I am the only old man here. I think that a good many others are having trouble hearing.

Justice Stephens: Yes, I was having trouble,
5235 Mr. Johnston, I will share the trouble with you. (Laughter)

Mr. Knuff: I was just beginning to wonder if I was getting away with that "shot from ambush", but I see I wasn't successful. (Laughter)

By Mr. Knuff:

Q. From what company did the Cardiff Gypsum Company endeavor to purchase board? A. I believe that the first people with whom we discussed the question was the Universal Gypsum Company.

Q. Who conducted those negotiations? A. I did.

Q. And whom in Universal did you contact? A. Mr. Eugene Holland.

Q. And where did you contact Mr. Holland? A. In Chicago, in the Edgewater Beach Hotel, where we were holding meetings all that summer with respect to establishing a code under the NRA and—

Justice Stephens: (Interposing) Now, Mr. Sensibar, just in the interests of saving time, let this question illustrate the purpose of my little injunction to you at the time we started out.

Read this question to the witness.

(The question was read by the reporter.)

Justice Stephens: The answer to that question should be "the Edgewater Beach Hotel in Chicago." But you proceeded to go on and state how you happened to be there, what the purpose of the meeting was, and that you had been there all summer. You weren't asked that. You were simply asked where you met. Please answer questions directly. If counsel want to bring out those other matters, they will do that.

5236

The Witness: Yes, sir.

By Mr. Knuff:

Q. Can you fix the time a little bit more definitely than the summer of 1933; can you give us the month? A. I would say it began in June.

Q. And did you have one meeting or more than one meeting with Mr. Holland? A. I had a number of them.

Q. And by a "number", what do you mean? A. Perhaps six or eight.

Q. What did you ask Mr. Holland? A. I asked him whether we might not make arrangements so that Cardiff would be sold board on the customary industry basis.

Q. And what was the customary industry basis?

Mr. Bromley: May this testimony having to do with what Mr. Holland said be received subject to the usual reservation?

Justice Stephens: Yes. I think it should be received subject to the usual reservation. It is a declaration of Holland.

5237 Mr. Bromley: May that be understood also as to the future testimony?

Justice Stephens: It may be, and the record may so show.

Mr. Knuff: What was my question?

(The question was read by the reporter as follows:)

"And what was the customary industry basis?"

By Mr. Knuff:

Q. By "customary industry basis" what do you mean? A. I mean a discount of 15 percent on long board and 12-1/2 percent on lath.

Q. What did Mr. Holland say to you, if anything? A. He told me that that would be a matter for the final decision of USG, and that he thought that if they would be willing for us to have the board and lath at all, they would be willing to sell it directly; that since they had a plant at Fort Dodge, that perhaps I might take it up with them directly.

Q. And did Mr. Holland ever state to you that he would endeavor to secure permission from USG to sell your company board? A. Yes. I persisted with him, pointing out that he perhaps was in a better position to get that consent from USG than we were directly.

Q. And did he later tell you whether or not he was
5238 able to get the consent? A. He told me that he had discussed it with them a number of times, and that they had refused it.

Q. Did he tell you why they had refused it? A. He told me that there was a general impression in the industry that Cardiff had been cutting prices on gypsum plaster; that he doubted, under those circumstances, whether we could make a connection to get board.

Q. And were you able to secure board from Universal? A. No, sir.

Q. Now, is that the substance of all the conversation that you had with Mr. Holland? A. Perhaps not. I asked him as a matter of advice what, in his opinion, he thought we

might do. I explained to him the situation of the Cardiff Company, that the control had changed hands, and that I understood the objections of the industry to the policies of the company under the management that had existed up to that time; but I explained that a change had taken place, and in view of that I asked him what he would advise us to do, as newcomers entering into the control of the company.

Mr. Bromley: What was the date of this, please?

Mr. Knuff: What was the date of the conversation that you are now relating, that you had with Mr. Holland?

The Witness: The summer of 1933.

By Mr. Knuff:

5239 Q. Now when you say that you stated to him that the control had changed hands, will you tell us just what you mean by that? I am not sure that I know. A. The Cardiff Gypsum Company had been founded by and the control at that time, the stock control, was in the hands of the Breen family, in Fort Dodge, Iowa, and sometime before that my brother and I had acquired from various interests in Fort Dodge, a controlling percentage of the stock of the company.

Q. And when you say that the control had changed hands, you mean by that that the Breen family was no longer in control of the policies of the Cardiff Gypsum Company, is that correct? A. Well, not quite. Mr. Tom Breen was at that time the president and the manager of the company, but neither he nor his family any longer had a controlling stock interest, and I explained to Mr. Holland at that time that it was our intention to take an active interest in the management of the business, and that he might therefore expect that the policies of the company would change.

Q. What did Mr. Holland say to that? A. He welcomed it and said that he thought that after some short time, after some showing actually of a different policy with respect to sales, that the attitude toward the company might change; and he advised me that in the meantime our
5240 best bet was to take up the matter with the American Gypsum Company.

Q. Now is that the substance of the various conversations that you had with Mr. Holland? Have you given us

the substance of all the conversations? A. Yes, sir, as far as I can remember it.

Q. In 1933 did you contact anyone at USG in an attempt to purchase board from USG? A. Only by way of casual conversation with Mr. Henning.

Q. Was this before your contact with Mr. Holland or after your contact with Mr. Holland, or while you were negotiating with Mr. Holland? A. Yes, it was during that same period.

Q. And while the negotiations were on between you and Mr. Holland? A. That is right.

Q. What did you say to Mr. Henning, if anything? A. I believe I said to him one day, in the company of Mr. Bale—

Q. (Interposing) Mister who? A. James Bale—I believe I explained to him the changed status with respect to the stock ownership of Cardiff, and our plans with respect to entering into the active management of Cardiff, and expressed again the hope that the company would be treated a little differently than they had been in the past.

5241 Q. At that time did you endeavor to buy any board from USG?

Mr. Bromley: I object to that as incompetent, because calling for a conclusion. Let him ask what he said.

Justice Stephens: Sustained. Ask the witness what he said, and what Mr. Henning said.

Mr. Knuff: I don't understand Mr. Bromley's objection. I am asking if he endeavored to buy board from USG.

Justice Stephens: Well, whether he endeavored to buy it or not is a form of conclusion which the Court might draw if we hear what he said to Mr. Henning. Ask for the conversation with Mr. Henning on the subject of the possible purchase of board.

Mr. Knuff: All right, sir.

By Mr. Knuff:

Q. With reference to the purchase of board, did you have any conversation with Mr. Henning? A. I believe I discussed with him the difficulties that Tom Breen had told me of, in that the company had tried for some time to get board and had been persistently refused that privilege, and I went over the same ground with him that I just re-

lated as to the new attitude and policy of the company, and our hope that conditions would change.

Q. What, if anything, did Mr. Henning say to you? A. He gave me encouragement in that respect.

5242 Mr. Bromley: I move to strike the answer out as a conclusion.

Mr. Knuff: I think that the answer probably should go out as a conclusion.

By Mr. Knuff:

Q. Can you tell us what Mr. Henning said to you?

Justice Stephens: Let me explain to you, Mr. Sensibar, so you won't be confused. You are not expected to recollect the exact words, unless you happen to, but you can give the substance and effect of what Mr. Henning said, rather than characterizing it as an "encouragement" or a "discouragement". We can tell whether it was encouraging or discouraging after we hear what he said in substance and effect.

The Witness: All right, sir.

Mr. Henning confirmed the fact that it was the impression around his organization that Cardiff had been a price-cutter in the plaster field, and that this was not a very propitious time to talk about such a matter as I wanted to discuss; but that after a little experience with the new policy of Cardiff, the situation might be better.

By Mr. Knuff:

Q. Now, coming back to the Universal Gypsum Company, did you buy, or were you able to buy board from Universal? A. No, sir.

Q. Were you able to buy board from USG in 1933?

5243 A. No, sir.

Q. Throughout my questions, Mr. Sensibar, I want you to understand that when I say, "Were you able to buy board?", I mean by that were you able to buy board at a discount. You will understand that, will you? A. Yes, sir, I understand that.

Q. And have these questions which you have answered been answered on that basis? A. Yes, they have.

Q. Did you contact any other companies in 1933 with reference to the purchase of board at a discount? A. I think in the fall of that year that I began to talk to the American Gypsum Company of Port Clinton, Ohio.

Q. With whom in the American Gypsum Company did you negotiate? A. With Arthur Black.

Q. I show you what have been marked for identification as Government Exhibits 572, 573, 574, and 575.

(The documents referred to were marked as Government Exhibit Nos. 572, 573, 574 and 575, for identification.)

(Government Exhibits Nos. 572, 573, 574 and 575 were handed to the witness.)

Mr. Knuff: Exhibit 572 is a copy of a telegram, dated 8-25-33, addressed to the American Gypsum Com-
5244 pany and signed—Ezra Sensibar.

Exhibit 573 for identification is a telegram dated August 25, 1933, addressed to Mr. Ezra Sensibar, and signed—American Gypsum Company.

Government's Exhibit 574 for identification is the original of a letter, dated September 21, 1933, addressed to Mr. Ezra Sensibar, and signed American Gypsum Company.

Government's Exhibit No. 575 for identification is a copy of a telegram, dated 10-3-33, addressed to the American Gypsum Company and signed—Ezra Sensibar.

By Mr. Knuff:

Q. Did you send the original of Government's Exhibit 572 for identification to the American Gypsum Company? A. Yes, sir.

Q. Did you receive, in answer to that telegram, Government's Exhibit 573 for identification? A. Yes, I did.

Mr. Knuff: I offer Government's Exhibits 572 and 573 in evidence.

Mr. Bromley: I object on the ground that they are completely immaterial.

Justice Stephens: Overruled; they are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Government's Exhibits Nos. 572 and 573 were received in evidence.)

5245 By Mr. Knuff:

Q. Pursuant to the matter stated in the telegram, that you could come Monday or Tuesday, that is in the telegram—Exhibit 573—did you go to Port Clinton? A. Yes, I did.

Q. And did you go at about the time that was specified in the telegram? A. Yes, sir.

Q. Did you see Mr. Black? A. Yes, I did.

Q. Will you relate to the Court the conversation that you had with Mr. Black? A. I discussed with him the need that Cardiff Gypsum Company had for a wallboard and lath connection, and pointed out to him that it ought to be a very good thing for his company, especially since our sales territory reached out a good deal farther than his sales territory did, and in that way that it might increase his business immeasurably.

Mr. Black told me that from his point of view, as sales manager of the company, it was a desirable proposition, and that he would do all he could to put it through, but that the final decision would not depend on him or on his company, but would depend on what USG would permit them to do.

Q. At that time was any reference made as to your
5246 sales policies with reference to plaster? A. Yes. We discussed that at some length.

Q. Can you tell us what that discussion was? A. My recollection is that at that time there had been some specific complaint made—I can't remember now where the complaint was—as to some sale by Cardiff allegedly below the market price. He wanted some facts regarding that, so that he could use them in any discussion of the subject.

Q. And did you convey to Mr. Black the information that you had concerning the complaint he mentioned to you? A. Yes, I did.

Q. You cannot recall now the name of the specific job about which the complaint was made? A. No, I am afraid not.

Q. How long were you in Port Clinton at that time? A. All day, I think.

Q. When next did you see Mr. Black after your first trip to Port Clinton? A. I saw him at another time on a Sunday, several weeks later.

Q. Where? A. At his home.

Q. In Port Clinton? A. Yes, sir.

Q. And did you have any conversation with him at that time, and if so will you relate the conversation, if
5247 you can, and if you cannot, the substance of the conversation? A. Well, several weeks had elapsed, and I was pressing him for an answer on the matter.

Q. And by "an answer on the matter", what do you mean?

A. As to whether they would sell to Cardiff on the usual industry basis. He told me either that he hadn't been able to take it up with USG or hadn't gotten an answer. In any event, he didn't have an answer at that time, and he said that he would let me know shortly. It seems to me he said he was going to make a special trip to Chicago to talk to them about it.

Q. Did you receive from Mr. Black the letter that is marked for identification as Government's Exhibit 574? A. Yes, sir.

Q. And did you receive this from Mr. Black before your conversation with him on the Sunday that you mentioned, or after you had had that conversation? A. I think it was before.

Q. Before? A. I think so.

Mr. Knuff: We now offer in evidence Government's Exhibit 574.

Mr. Bromley: I object to it as immaterial to any charge in the complaint.

Justice Stephens: That is overruled and the ex-
5248 hibit is received in evidence.

Mr. Bromley: That will be subject to the usual reservation?

Justice Stephens: Yes. All of these are coming in, as far as they are statements by Mr. Black, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Government's Exhibit No. 574 was received in evidence.)

By Mr. Knuff:

Q. Did you see Mr. Black after your visit to him at his home on the Sunday which you have just referred to, and if so where and when? A. Yes, I saw him after that, and I think it was about October or November, subsequent to that, at a Gypsum Association meeting.

Q. Where? A. I couldn't say.

Q. Where were the Gypsum Association meetings held? A. They were held in various cities. About half of them were in Chicago, and the others were held in Buffalo and elsewhere.

Q. And did you have any conversation with him at that time concerning the purchase of board at a discount? A. Yes, I did.

5249 Q. And what was that conversation, please? A. He told me that the USG had finally refused permission

for them to sell us, and that he had no particular hope of getting them to reverse the decision, and he thought for the time being we might as well drop the matter.

Q. Were you able to buy board from the American Gypsum Company? A. No, sir.

Mr. Bromley: At a discount?

Mr. Knuff: At a discount?

The Witness: No, sir.

Mr. Knuff: I now offer in evidence Government's Exhibit 575.

Mr. Bromley: The same objection.

Justice Stephens: Overruled. Received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Government's Exhibit No. 575 was received in evidence.)

Justice Stephens: The record may show that these exhibits are being received by the Court as connected with and showing a foundation for the conversations. They are not, of course, directly probative of the issue involved, but we think they are a proper preliminary foundation for the conversations which have been testified to.

5250 Mr. Knuff: That is all we are offering them for, your Honor.

By Mr. Knuff:

Q. Did you receive the telegram marked Government's Exhibit 575 before the conversation with Mr. Black at the Gypsum Association meeting, or after you had the conversation with him? A. I believe it was before that.

Justice Garrett: You asked him if he had received that—he sent it, didn't he?

Mr. Knuff: I should have said—Did you send this telegram to Mr. Black before the conversation that you had with him at the Gypsum Association meeting, or after the conversation that you had with him at the Gypsum Association meeting?

The Witness: Before, I believe.

Mr. Knuff: Thank you for calling that to my attention, your Honor.

By Mr. Knuff:

Q. Did you endeavor in 1933 to purchase board at a discount from any other gypsum manufacturer, other than the ones that you have mentioned? Now, I am limiting that question to 1933? A. Well, I believe I talked with Warren Henley of Certain-teed regarding that problem.

Q. When you say you believe you talked with
5251 Warren Henley, do you mean by that, that that is your best recollection? A. Yes, sir.

Q. And where did you talk with Mr. Henley? A. At his office.

Q. In Chicago? A. Yes, sir.

Q. And will you tell us the conversation that you had with Mr. Henley? A. It arose out of a general discussion regarding the Code that we were then working on. There were a number of questions involved on which there was a difference of opinion, and one was whether the situation should be created so that jobbers might exist in the industry. That was one of the matters discussed there.

Several of us met one day in his office to talk about that, to see whether we had anything in common on that subject. During that conversation the situation of Cardiff Gypsum came up, as a related question, and I pointed out to him at that time what we believed was the inequity of the existing situation.

Q. What did you point out? A. That Cardiff alone, of all of the independent plaster manufacturers, was not accorded a regular industry status.

Q. And by "regular industry status" what did you mean?

A. I meant the arrangement for the purchase of
5252 board and lath at a 15 percent and 12-1/2 percent discount.

Q. And you say you pointed that out to him? A. Yes, sir, I did.

Q. Go ahead with the rest of the conversation. A. And the question was discussed there as to whether that was a proper matter to treat in the Code, and it was his opinion—

Mr. Bromley: (Interposing) Can't we have more of the conversation and less conclusions about it, if the Court pleases?

Mr. Knuff: What I am interested in, Mr. Sensibar, right now, is the conversation that you had with Mr. Henley relative to buying board from him. Will you try to confine your answers to that particular phase?

Justice Stephens: State what Mr. Henley said, so far as you remember, or in substance and effect, on that subject.

The Witness: He said that he believed that that was a matter that ought to be treated among the companies involved rather than in the Code, and that he would undertake to try to do something about it as far as his company was concerned.

By Mr. Knuff:

Q. Did you ask Mr. Henley to be allowed to purchase board from Certain-teed? A. Yes, that is right.

Q. And what, if anything, did he say he would do?
5253 A. He said that he had been receiving a constant stream of complaints from his sales organization about situations where Cardiff had sold plaster off the market price, and that he would look into those and see whether he could convert some other members of the organization to his belief that they ought to do business with us.

Q. And did he explain what he meant by "some other members of the organization," or did he use those words? A. I don't remember, I am sure, what words he used. The thing that we were thinking about naturally was the salesmen of the company out in the various markets, the sales managers.

Q. Did Mr. Henley tell you that Certain-teed would sell board to Cardiff? A. No, sir.

Q. Did he tell you that they would endeavor to obtain the consent of USG to allow them to sell board at a discount to Cardiff? A. He said that first he would have to convert some other people in his own organization.

Q. That is in Certain-teed's organization? A. Yes, sir—and then it would be naturally a matter for USG to decide.

Q. And did you talk to him later about that? A. I spoke with him again—when you say "later", do you
5254 mean right after this time, right after this period?

Q. Well, at any time. A. Yes, sir. I opened the subject with him after the reorganization of the Cardiff Gypsum Company.

Q. What do you mean by the "reorganization of the Cardiff Gypsum Company"? A. The Cardiff Gypsum went through a 77-B reorganization—

Q. (Interposing) That was in 1935? A. Yes, sir.

Q. I will come to that later. But in 1933 did you talk to Mr. Henley as to whether or not he was able to obtain the consent of USG for Certain-teed to sell you board? A. Yes, the thing was discussed a number of times after that.

Q. And what was the discussion? A. As to whether he had received their consent, and he told me he had not.

Q. And were you able to buy board from Certain-teed? A. No, sir.

Q. And you never did buy any board from Certain-teed, is that correct? A. That is correct.

Q. Now, you spoke of a reorganization of the Cardiff Gypsum Company—just tell us what you meant by
5255 that, please. A. The Cardiff Gypsum Company was reorganized in 1935 under 77-B, and resumed business as a reorganized company in August of that year.

Q. Did the Cardiff Gypsum Company file a voluntary petition in bankruptcy under 77-B, or was there an involuntary petition filed, and later Cardiff filed a petition under 77-B? A. The latter is the case.

Q. That is, an involuntary petition was filed to declare Cardiff a bankrupt? A. Yes, in January of that year.

Q. 1935? A. That is right.

Q. And pursuant to that involuntary petition and acting in the bankruptcy courts, the Cardiff Gypsum Company filed a petition under section 77-B for reorganization? A. That is correct.

Q. And the company was reorganized and resumed business in August of 1935? A. That is right.

Q. Now, in 1935, did you endeavor to purchase board at a discount from USG? A. Yes, sir, we did.

Q. With whom in USG did you talk? A. I think first with Mr. Knode.

Q. I have reference to the year 1935. You talked
5256 with Mr. Oliver Knode during that year? A. Yes.

Q. And what was his position with the company at that time? A. He was either vice president or president.

Q. What conversation did you have with Knode? A. I told him about the reorganization of the company, that we had started in business again, and that Mr. Breen was no longer to have any active connection with the company, that I was taking an active hand in the management of it and in establishing the sales policies of the company; and I asked whether we might not be put on the usual industry basis with respect to the sale of board and lath.

Q. And what, if anything, did Mr. Knode tell you? A. I think he told me to take it up with Mr. Keady.

Q. Did you take it up with Mr. Keady? A. Yes, I did.

Q. And what was Mr. Keady's connection with the company? A. I believe he was vice president in charge of sales, or else sales manager at that time.

Q. You are not sure of his official position, his official title, with the company? A. No, sir.

Q. What, if anything, did you say to Mr. Keady? A. That since he was relatively a newcomer to the
5257 industry, I hoped we could start with a clean slate as far as both of us were concerned.

Q. What did you mean by that, that he was relatively a newcomer to the industry? A. That he had been in that position just a short time.

Q. By a "short time", what do you mean, a matter of years, a matter of months, or a matter of days? A. No, it might have been a year or so.

Q. Proceed. A. And that I felt that with him in an active, responsible position, we might be able to forget; in our discussions, these things that were persistently dragged in about what had happened years and years before, and that we might approach this question of the status of Cardiff purely on a business basis, and without any emotional bias about what had happened; and I asked him whether, from that point of view, he didn't regard it as a good thing for USG to treat Cardiff on the same basis as anybody else would be treated.

5258 Q. And by that what did you mean? A. Given the usual industry recognition with respect to the purchase of board and lath.

Q. What did Mr. Keady say to you, if anything? A. Mr. Keady said that it sounded perfectly reasonable to him but that he would have to take it up with some other members of the organization to see how people around the office felt about it.

Q. And is that all the conversation you had with Mr. Keady at that time? A. I think it is, in substance.

Q. Did you talk with Mr. Henning in 1935? A. Yes, sir.

Q. Before you talked to Mr. Keady or after you talked to Mr. Keady? A. I think before.

Q. Before? A. I think so.

Q. I think I asked you a little while ago with whom you first took up, in USG, in 1935, this matter, and you said that it was Mr. Knode, and that Mr. Knode then sent you to Mr. Keady— A. (Interposing): I believe I made a mistake. I believe that it was Mr. Charles Henning that I saw at that time, and that the discussions with Mr. Keady came later.

Q. Let's see if we can get it straight. With what 5259 official of U. S.G., in 1935, did you first take up the purchase of board, was it Henning or was it Knode? A. No, it was Knode, I am sure of that, and he sent me to Mr. Henning. I was mistaken when I said that Mr. Knode sent me to Mr. Henning.

Q. You say you were mistaken when you said that Mr. Knode sent you to Mr. Henning? A. I am sorry, I meant I was mistaken when I said that I took it up then with Mr.

Keady. Mr. Knode sent me to Mr. Charles Henning. It was a year or so later that I talked with Mr. Keady, not at this time in 1935.

Q. In 1935 you first talked to Knode, and Knode sent you to Henning? A. That is right.

Q. Are you clear on that? A. Yes, I am quite clear on that.

Q. You were mistaken before when you said that Mr. Knode sent you to Mr. Keady, is that correct? A. That is correct.

Q. And you wish to change your testimony? A. I do, yes.

Q. What, if anything, did you say to Mr. Henning, and what did Mr. Henning say to you, about the purchase of board? A. I reviewed with Mr. Henning the conversation
5260 that I had just had with Mr. Knode about the reorganization of the Cardiff Gypsum Company, and about the fact that I was taking or was going to take over the responsible management, and that they would no longer have to deal with Tom Breen, and that they could look forward to a different policy with respect to sales.

Q. Now did you tell him what your policy would be? A. Yes, sir.

Q. And what did you tell him your policy would be in the future? A. That we would expect to have a normal dealer policy, giving up the policy of the old company of selling directly to contractors.

Q. And will you explain just exactly what you mean by "normal dealer policy"?

Mr. Bromley: I object to that unless he told it to Mr. Henning.

By Mr. Knuff:

Q. Did you use the words "normal dealer policy" in your conversation with Mr. Henning? A. I wouldn't be sure of the word "normal"; but I would as to the words "dealer policy".

Q. And did you explain to Mr. Henning what you meant by "dealer policy"? A. I don't think so.

Q. What did you mean by "dealer policy"?

5261 Mr. Bromley: I object to that as incompetent, if he didn't tell Mr. Henning what he meant by it.

Justice Stephens: It may be possible for the witness to explain that it was a phrase which had a common meaning to him and to Mr. Henning. We will have to see. Subject to a motion to strike, you may answer.

By Mr. Knuff:

Q. What did you mean by the use of the expression "dealer policy"? A. It refers to a policy by a manufacturer under which he expects to, and does, make a very high percentage of his sales directly to building material dealers, rather than directly to contractors.

Q. And did you explain to Mr. Henning at this time what your price policy would be? A. Yes, sir.

Q. What did you tell Mr. Henning your price policy would be? A. That we expected to get the full market price.

Q. The full market price? A. Yes, the full price prevailing at any particular time in any particular market.

Q. Just go on and tell us the rest of the conversation that you had with Mr. Henning, please? A. I pointed out
5262 to him that if they expected Cardiff to turn over a new leaf with respect to sales policy, that they also had to give some cooperation; that they couldn't very well expect to set rules under which a company couldn't make a living, and at the same time have them abide by those rules; and that part of the solution to that problem would be to put Cardiff on the same basis as anybody else, and not treat them as an outlaw, but give them the right to sell board and lath on the usual basis.

Q. What, if anything, did Henning say to you? A. His reply to me was that my position was sound, but that he doubted very much whether he could put it over in his organization; that everybody would be afraid that if they gave us board and lath to sell, we would use our plaster in order to sell the board and lath.

Q. And did you give Mr. Henning any assurances as to what your conduct would be, in that event? A. Yes, I did.

Q. Will you tell us what you told Mr. Henning? A. I explained to him that we were in no position, considering our production costs, to sell plaster in any market consistently under the market price; that we had no intention of doing it; and that giving us these other products to sell, which were extremely necessary to the financial health of the company, would probably be the best assurance they could hope to have that that policy would be carried out.

5263 Q. Was there any other conversation at that time with Mr. Henning? A. Only that he would discuss it with his organization and let me know.

Q. Did you see Mr. Henning sometime after that? A. Yes, I did.

Q. About how long after this first visit with Mr. Henning was it until you saw him the second time? A. Oh, a matter of weeks, perhaps four, or five, or six weeks, or something like that.

Q. Where did you see him, at his office? A. At his office in Chicago, yes.

Q. And did you have any conversation the second time about the purchase of board from USG? A. Yes sir.

Q. And will you tell us just what the conversation was, please? A. I pressed him for a favorable decision on it, and he told me that there were people in his organization who were still not willing to believe that we would sell, or continue to sell, plaster at the going prices; that he had had some good reports about what we had done during those few months since the reorganization, but that it would have to be a matter of time to convince the others in the organization.

Q. And were you able, in 1935, to buy board from
5264 USG at a discount? A. No sir.

Q. Did you contact any other companies in 1935 in an endeavor to purchase board at a discount from them? A. National.

Q. In 1935? A. In 1936, probably.

Q. 1936? A. Yes.

Q. Well, now, can you tell us what time in 1936 it was that you contacted National, whether it was in the Spring or Summer, or when? A. I can't place it very accurately.

Q. I would like to show you what has been marked for identification as Government's Exhibit 576, the same being a letter, dated February 1, 1936, addressed to Mr. Arthur Black and signed by Ezra Sensibar.

(The document referred to was marked for identification as Government Exhibit No. 576.)

(The document referred to was handed to the witness for examination)

By Mr. Knuff:

Q. Will you please look at that letter and tell us whether or not that is your signature thereon? A. Yes sir,
5265 it is.

Q. Now in view of the date in that letter, do you care to change your testimony as to which company you first contacted in 1936 with reference to the purchase of

board? A. Yes, it was the American Gypsum Company.

Mr. Knuff: I now offer in evidence Government Exhibit No. 576.

Mr. Bromley: I make the same objection.

Justice Stephens: The objection is overruled, and the document is received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Exhibit No. 576 was received in evidence)

Justice Stephens: We will take the afternoon recess at this time. Before we adjourn I want to state that at the time the opinion of the Court on the motion to strike Paragraph 46(a) was copied into the record, my secretaries did not have time to proof read it. During recent recesses they have very carefully proof read it and have found a number of clerical errors. Also I made in the original opinion, which is filed with the Clerk, one or two minor changes in diction. None of these affect the sense or substance of the opinion.

For the convenience of the court reporter, during the recent recess I asked him informally to make these corrections in the record, but I wish now to cover it by a
5266 formal order and I hand to the Court reporter the list of corrections, to be copied into the record at this point.

(The list of corrections referred to is as follows:)

Memorandum of corrections to be made in the transcript—pages 684-731—Paragraph 46(a)

Opinion

684—Line 7 change "are" to "is"

685—Line 21 Change initial M. in the name Ernest M. Oliver to initial H.

689—Line 20 Correct spelling of word Dodge from Doge to Dodge

690—Line 13 Strike out the letter e in the word Roose

692—Line 14 Change letter d to letter s in the word involved

694—Line 5 After the word decision add a comma and the words and is so that the line will read: is a District Court decision, and is from another jurisdiction, it is

694—Line 12 Strike out the word unreported and in lieu thereof add the following: 51 F. Supp. 972

—Line 13 Strike out Oct. 4,

696—Line 4 After the closing quotation mark add the following: (51 F. Supp. at 973)

5267 697—Line 17 Change the parentheses to brackets around 167 U. S. 264-5 and around Italics supplied

698—Line 8 Correct the word action to acting

702—Line 1 Correct the use of periods and parentheses in this line as follows:

conclusive upon that point . . . . [92 U. S. at 351]

Spacing of periods and use of brackets are correct as above appears.

—Line 15 Change the parentheses to brackets around 94 U. S. at 196

705—Line 11 Change the parentheses to brackets around the letter s following the word patent

709—Line 2 Strike out the word a at the end of the line

710—Line 16 Strike out the word to before the word be

712—Line 5 Add the letter s to the word consideration

—Line 24 Change the parenthesis to a bracket before the word Rev.

—Line 25 Change the second parenthesis to a bracket after the date (1940)

713—Line 13 Change the parentheses to brackets around the words the claimants

715—Line 2 Change the words over reaching to the word overreaching

5268 716—Line 18 Change the parenthesis to a bracket before the word the

—Line 19 Change the parenthesis to a bracket after the word mentioned

717—Line 12 Change the parentheses to brackets around 167 U. S. at 269-270

717—Line 13 Change the parentheses to bracket around the words Italics supplied

—Line 19 Change the parentheses to brackets around 167 U. S. at 268

718—Line 18 Change the word to to the word of

719—Line 18 Correct the use of periods and parentheses in this line as follows:

be collaterally impeached. . . . [255 U. S. at 488]

Spacing of periods and use of brackets are correct as above appears.

720—Line 4 Capitalize the word court

—Line 23 Change the parentheses to brackets around Citing cases and 234 U. S. at 691-2

721—Line 2 Lower case the letter P in the word Paragraph

—Line 14 Indicate a space between the words for incidental

723—Line 3 Change the word manner to the word means.

5269 725—Lines 1 to 12—Strike out all of this heading

726—Line 15 Strike out the quotation mark before the word Suits and indicate a paragraph commencing with the word Suits

—Line 24 Strike out the last two asterisks and the quotation mark

—Line 25 Change the parentheses to brackets around Italics mine

727—Line 19 Change the word which to the word that

728—Line 19 Strike out the fourth asterisk

730—Line 8 Correct the spelling of the word valid from vaild to valid

731—Line 18 Indicate a space between the words present trend

(Thereupon, at 4:05 o'clock p. m., a recess was taken until 10:00 o'clock a. m., Friday, March 24, 1944.)

5271 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Friday, March 24, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5275 Thereupon, EZRA SENSIBAR the witness on the stand at the time of adjournment, resumed his testimony as follows:

Direct Examination (resumed)

Justice Stephens: Are you ready?

Mr. Knuff: Yes, Your Honor.

Justice Stephens: Very well, proceed.

By Mr. Knuff:

Q. Mr. Sensibar, at the conclusion of the proceedings yesterday evening, I believe you had before you the letter of February 1, 1936, Government's Exhibit 576? A. Yes, sir.

Q. Did you, sometime previous to the letter, Government's Exhibit 576, contact Mr. Arthur Black with reference to purchasing board from the American Gypsum Company at a discount? A. Yes, sir, I did.

Q. Will you relate the circumstances of that conference with Mr. Black, please, giving us the date, as near as possible; the place where you saw him; and, as nearly
5276 as you can, the conversation that you had with him?

A. That was some time, some few months, after we resumed business, when the company was reorganized in August, 1935. I dare say it was November or December of that year. I visited him at Port Clinton, in line with a suggestion that he had made several years before, that when conditions changed, and after some experience with our company's policy in the industry, something might be done in the way of a board connection.

We discussed the situation as to what changes had taken place in the attitude of the industry toward Cardiff Gypsum Company, and whether something could be done about a board connection.

He told me that a matter that had been brought to his attention, in the nature of a complaint, concerned our sale of plaster on a Government housing project in Indianapolis, which was called the Community Housing Project, and that there had been some allegation that we had sold plaster below the prevailing market price, and that he thought he ought to have information about that in order to be able to proceed with our request to establish a board connection.

I gave him the data on it at that time.

Q. What did you tell him at that time? A. I told him the dealer to whom the material had been sold, and the price, and the conditions of sale, so that he might
5277 check and see whether they were the reigning conditions at the time or whether they did, in fact, establish a new low market price.

Justice Jackson: Did you mean "reigning" or "prevailing"?

The Witness: "Prevailing".

By Mr. Knuff:

Q. Go ahead, Mr. Sensibar. A. I think that was the substance of the conversation, before this letter.

Justice Jackson: Was that the Severin job that is mentioned in this letter?

The Witness: Yes, sir.

By Mr. Knuff:

Q. Will you look at the second sentence of the second paragraph in Government's Exhibit 576, and tell me what you meant by the expression: "that the transaction was handled in the method customary in the industry and approved by yourself and others"? A. That is, that the sale was made through a recognized local dealer.

Q. And at what price? A. At the prevailing market price.

Q. Now, when you had this conversation with Mr. Black, did Mr. Black tell you that he would contact USG?

5278 A. Yes, he did.

Q. And what did he tell you concerning that? A. He told me that he would first investigate the figures that I had given him. He told me at the time that he had no doubt that I was telling him the truth about the matter, but he wanted to confirm it; and that after confirming it, if he was satisfied, he would then take it up with USG and see whether he could get permission to sell us board.

Q. I show you what has been marked for Identification as Government's Exhibit 577, the same being a letter dated February 10, 1936, addressed to Mr. Ezra Sensibar, and unsigned.

(The document referred to was marked as Government's Exhibit No. 577 for Identification.)

(Government's Exhibit No. 577 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Did you receive the original of that letter, sir? A. Yes, I did.

Q. And whose signature appeared thereon? A. Arthur Black's signature.

Mr. Knuff: We offer in evidence Government's Exhibit No. 577.

5279 Justice Stephens: Let us read it.

(Government's Exhibit No. 577 for Identification examined by the Court.)

Justice Stephens: Is there any objection?

Mr. Bromley: We make the usual objection, and the further objection that it is immaterial.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 577, was received in evidence.)

By Mr. Knuff:

Q. After receiving Government's Exhibit 577, did you have any further conversation with Mr. Black? A. Yes, I did.

Q. Where? A. I believe in Chicago.

Q. When? A. I would say within a month after that time.

Q. What was discussed at that time? A. I pressed him then for an answer on the board question. He was in Chicago, as I recall it, and had discussed it with USG; and he told me that there was simply no chance, that he didn't think that they could get USG to change their earlier

5280 opinion about the matter.

Mr. Bromley: I take it, when the witness said that Black talked to USG, he means that Black told him that he talked to USG—is that right?

Justice Stephens: Is that what you mean?

The Witness: Yes, sir.

By Mr. Knuff:

Q. Did he tell you any conversation or any statements that any representative of USG had made? A. No, I don't think so. At least, I can't remember.

Q. Were you able to purchase board from American Gypsum Company at a discount, in 1936? A. No, sir.

Q. Were you ever able to purchase board from American Gypsum Company at a discount? A. Never.

Q. Did you make any further efforts, after your talk with Mr. Black in early 1936, to purchase board from American Gypsum Company, at any later time? A. Well, in a general way, after they were taken over by Celotex, which was some time later.

Q. But not from American? A. No, sir.

Q. Now, did you talk with any other manufacturer, in 1936, concerning the purchase of board at a dis-
5281 count? A. Yes, sir.

Q. What manufacturer did you talk to? A. National.

Q. With whom in National did you talk? A. At various times, with Mr. Baker and with Mr. Burley; and later, I think, with Mr. Best.

Q. Mr. John Best? A. John C. Best.

Q. Can you tell us when you first contacted Mr. Baker? A. It was shortly after National took over the Universal mill at Fort Dodge.

Q. Can you give us the approximate year when that was? Was it 1936 or 1937? A. I think it was 1936, Mr. Knuff.

Q. You are not sure, but you think it is 1936, however? A. That is right.

Q. Where did you see Mr. Baker? A. Well, these conversations took place over a period of about two years, I would say, and I saw him several times in Buffalo.

Q. Where did you first see him, if you can recall? A. I can't recall.

Q. You can't recall? A. We were seeing each
5282 other every 3 or 4 months, and I can't tell you just where it was we first talked about it.

Q. What did you talk about, with Mr. Baker, concerning the purchase of board, if anything? A. That inasmuch as they now had a mill at Fort Dodge, that he would seem a logical party with whom to make a deal on the purchase of board. And I discussed with him, somewhat as I had with the others, the situation of Cardiff in the industry, our new sales policy; and I asked him to confirm what I told him regarding the new sales methods of the company, which had then been operating about a year or so since its reorganization; and I asked him whether we couldn't make a deal on board and lath.

Q. That is, by "making a deal", did you mean that you wanted to purchase board and lath? A. That is right, on the usual industry basis.

Q. What did Mr. Baker say, if anything? A. My recollection is that at first he said to hold the matter in abeyance a little while, until they got their own sales situation better organized. After time went on, he referred me to Mr. Harrison, who was the Division Sales Manager at Chicago, and told me it would depend a good deal on the recommendation that Mr. Harrison would make.

Q. You say later on—you mean that he told you to
5283 see Mr. Harrison sometime in 1936? A. That might have been 1937, Mr. Knuff.

Q. Did you see Mr. Harrison? A. Yes, sir. I had quite a series of conferences with him. That carried on over the better part of a year, I should say, into 1938.

Q. Can you tell us about the number of conferences that you did have with Mr. Harrison? A. Perhaps half a dozen.

Q. What did you say to Mr. Harrison, if anything, and what did Mr. Harrison say to you? A. I pointed out to him our need for this product to sell in connection with our plaster; furthermore—

Q. (Interposing) What did you point out to him? A. That we had some 10 or 11 salesmen, covering a certain territory, who were selling only plaster, at the time; and that from the sales effort point of view, they could just as well—in fact, much more easily—sell board along with the plaster; that it would result in considerable increase in their own outlet for board, for plasterboard; that, furthermore, the commissions allowed in the industry were such that they would probably make a greater profit on the board that they would sell to us for distribution, than on the board that they would sell themselves, because that 12-1/2 or 15 percent did not cover sales and administrative expense.

5284 He recognized those things, and said that in his opinion it would be a good thing for the company to make the connection, for the National Gypsum Company to make the connection with us, and offered to recommend it and push it as much as he could.

He made some suggestions with respect to a letter that I should write to the company, and some of the things I should say in it.

Q. What representations did he tell you to make to the company? A. He suggested that I should explain this situation, that in almost every city or town there are some dealers to whom, for one reason or another, National was

not able to sell its products; and that by reason of a distribution through us, possibly under our own name, we would be able to reach those dealers, and so increase their sales among dealers who were now not productive of any business.

Q. Did you write that letter? A. Yes, sir.

Q. To whom did you write it? A. I think to Mr. Baker.

Q. Do you have a copy of that letter? A. Yes.

Q. Where is the copy of that letter? A. I don't
5285 know, sir. I haven't been able to locate it for some time.

Q. Well, when you say you have a copy of it— A. (Interposing) I thought you said "had".

Q. No, I said "Do you have a copy of it? A. No, sir.

Q. Have you endeavored to find a copy of that letter? A. Yes, sir, I have.

Q. And you say you have been unable to locate that copy? A. That is right.

Q. Can you tell us the date of that letter, the approximate date of it? A. I think it was in the fall of 1938.

Q. In the fall of 1938? A. Yes, sir.

Q. And what, if anything, did you say in that letter?

Mr. Bromley: I object to that as incompetent.

Justice Stephens: Where is the original?

Mr. Knuff: We have asked the National Gypsum Company to supply us with all letters, and so forth, under the subpoena, and we have never received it from the National Gypsum Company. Mr. Sensibar has said that he hasn't been able to locate his copy of it.

Mr. Finck: If the Court please, I would like to ask if
they requested this specific letter? I have no in-
5286 formation on that.

Mr. Knuff: No, I don't think that we mentioned the letter by date, or anything else. It was covered by the blanket subpoena.

Mr. Finck: We submitted, under the subpoena, a complete file of all the correspondence with Mr. Sensibar. If that letter had been sent, I am sure that you would have it.

Mr. Knuff: We don't have the letter, Your Honor.

Mr. Finck: I object to the testimony of this witness on such a letter.

Mr. Knuff: I won't press it.

Mr. Bromley: I move to strike out the answer that he gave as to what was contained in the letter.

Mr. Knuff: He didn't say what was contained in the

letter, he said that Mr. Harrison suggested certain things to be put in the letter, and I asked him what Mr. Harrison suggested.

Justice Stephens: I thought he said he wrote a letter to such effect.

Mr. Bromley: He did.

Justice Stephens: If there is any dispute about it, we can have it read back, but I think that is what he said.

Mr. Knuff: That may be true, I am not sure.

Justice Stephens: Since you don't press it, let the record show that that is stricken, if it was stated.

Mr. Knuff: I want to be sure that the only thing
5287 that is stricken is that he wrote such a letter. I want to make sure that what he said Mr. Harrison told him does not go out of the record.

Justice Stephens: That is not being stricken.

Will you read that part, Mr. Grover?

(The record was read by the reporter as requested.)

Mr. Finck: If the Court please, I move to strike all of the testimony given regarding the conversation with Mr. Harrison as to what this witness should write to Mr. Baker. We should not be bound by Mr. Harrison's instructions to Mr. Sensibar, whatever they were. He was not an officer of National Gypsum Company.

Justice Stephens: Who was Mr. Harrison?

Mr. Finck: He was the Central District Manager, located in Chicago.

Mr. Knuff: And he is the gentleman that Mr. Baker suggested Mr. Sensibar contact.

Justice Stephens: It seems to the Court that that motion ought to be denied, Mr. Finck. A man doesn't have to be an officer of a corporation to have apparent authority to make statements. But since you don't press for the contents of the letter, Mr. Knuff, the Court is in doubt as to whether or not the words "I wrote that letter" ought to
stay in, because that, to an objective reader of the
5288 record, might indicate that the contents of the letter were what Mr. Harrison had suggested be written.

So the Court will strike out the answer, "I wrote that letter", or the answer to that effect; and you may examine the witness again, Mr. Knuff, to bring out that he wrote a letter, since you do not press for the contents of it.

By Mr. Knuff:

Q. Following that conversation with Mr. Harrison, did you write a letter—

Justice Stephens: (Interposing) Just a moment. Judge Jackson thinks I haven't made clear that I denied Mr. Finck's motion. It is denied.

By Mr. Knuff:

Q. Following your conversation with Mr. Harrison, did you write a letter to Mr. Baker? A. Yes, sir, I did.

Q. Now, you have testified that your first contact with Mr. Baker was in 1936, and you testified as to what was said to Mr. Baker at that time. When next did you see Mr. Baker? A. I am afraid I can't put it any more precisely than that I used to see him generally every 3 or 4 months.

Q. I see. And what other conversations, if any, did you have with Mr. Baker at the other times that you saw him, concerning the purchase of board? A. Well, in the
5289 fall of 1938, this long negotiation over this 2-year period was pretty much coming to a head, and I remember making one or two trips to see Mr. Baker,—one time particularly, to Buffalo,—to press for a favorable decision on this thing.

I pointed out to him then that we had been operating some three years since the company had been reorganized, and that if we were ever going to receive any favorable recognition from the industry, it ought to be about time to do something about it.

I told him that based on our experience, we didn't have any great hope that USG would give him that permission without considerable pressure on his part, and I asked him point-blank whether National Gypsum was prepared to make an issue of the matter, or whether they were going to let it go by the board.

He told me then—and I think this was the last conversation on the subject—that USG had turned it down; that National could probably sell us had they been willing to make an issue of it, but that there were other reasons why they didn't want to make an issue of it.

He told me that he considered it unfair to us; that he thought the doors should have been opened to us on some basis or other; and that we could count on his personal

support as time went on; but that that, for other
5290 reasons, simply wasn't the moment when National could make an issue of it, and that the best thing to do would be to drop it.

Q. At any time, did Mr. Baker suggest that you contact any person in USG in order to expedite any consent that was necessary from USG? A. Yes, sir.

Q. When did he tell you to do that? A. It was toward the end of this period of negotiation. I had 'phoned him several times about bringing the matter to a head; and one day, during a conversation with him, he said that it would be well for me to contact Mr. Keady in Chicago, and press it from that end; and that he would push the matter from Buffalo. He told me that there had been some delay in getting an answer from USG on it, and he thought that might help.

Q. Did you contact Mr. Keady? A. Yes, sir. I saw Mr. Keady about the matter, I would say, twice, at that time.

Q. When did you see him the first time? A. Well, the two times were pretty close together, about 3 or 4 weeks apart, and were in the fall of 1938.

Q. And what conversation did you have with Mr. Keady? A. I explained to him our request to National, and that I understood that National was taking the matter up with them; and that I was there to answer any questions
5291 that he might have as to our sales policies, price policies, or anything else that might be of interest to them in helping them to reach a favorable decision on the matter.

Q. What did Mr. Keady say to you? A. He asked me a number of questions about the status of the company, its ownership; about its markets; its sales organization, and so on—which I explained to him.

I also pointed out to him the benefits that would be derived out of such a deal for USG and the industry as a whole.

Q. What did you point out? A. That it simply wasn't a healthy thing for a large company, dominating that kind of a situation, to keep a small competitor from having the same recognition as other people; that this thing had been going on at that time for 3 years, since the reorganization, and during those three years we had adhered to the sales practices established by USG, with one exception, and that exception consisted of the fact that we did make truck deliveries directly out of Fort Dodge, in a different territory than they did, but that that thing was forced on us by the

very fact we didn't have this board so we couldn't load full cars, and that we would be willing to give up that sales practice as soon as we had the board. And I naturally urged on him to do what he could to grant the consent to National.

5292 Q. What did Mr. Keady say to you? A. He told me that so far as he was concerned, while he had every sympathy with our situation, he considered it a fixed policy of the company that they were not going to allow it. He told me that so far as he was concerned, that matter was final.

Q. Did you ever have any further conferences with Mr. Keady and any other officers of the corporation? A. Yes, sir. During this same period, and I think shortly after these talks with Mr. Keady, I went to see Mr. Knode about it, thinking that it might still be possible to get a reversal of that attitude.

Q. And what was the conversation that you had with Mr. Knode, and who was present at the time? A. I believe there were two meetings with Mr. Knode. One was of a preliminary nature.

Q. Who was present at that time? A. Just he and I.

Q. What was discussed? A. I told him the history of Cardiff's business during the previous 3 years, and pointed out to him that we were again raising this question of being put on a par with other independent members of the industry; and that we really wanted it given serious consideration, because it had become a very serious matter for us.

5293 He suggested that I talk with Mr. Keady, and that resulted, a little later, in a joint conference with Mr. Knode and Mr. Keady and a Mr. English.

Q. Who was Mr. English? A. I understood him to be a Director of the company, from California.

Q. And, before you had this joint conference, have you related all the conversation you had with Mr. Knode? A. Have I related it all?

Q. Yes, before the joint conference. Disregard the joint conference for the moment. Have you told us what you remember as to the conversation that you had with Mr. Knode? A. Yes, sir.

Q. At this conference with Mr. Knode, Mr. Keady, and Mr. English, and yourself, was there any other person present? A. No, sir.

Q. Just the four of you? A. Yes, sir.

Q. Now, what was said at that conference? A. Well, after some introductions—because I hadn't known Mr. English—we got down to the meat of the matter, and I reviewed for them, as fully as I could, the history of our operations during those three years since the reorganization. I pointed out to them that we had started from scratch in August, 1935, with no business, because
5294 we had been completely out of the market for nearly a year; and that it had cost us a great deal to build up a sales organization and to develop a trade again; that we had done that during a period of 3 years at considerable sacrifice, and as consistently as we could along the lines of the policy laid down by USG for their own sales. I pointed out to him that we had—

Q. (Interposing) You say to "him", were you talking to just one person? A. I was seated at Mr. Knode's desk, and the other two gentlemen were seated a little further back, and I was directing my conversation to Mr. Knode.

Q. Go ahead. A. I pointed out to him that there were a number of things that hampered us, and to some extent hampered other independents in the industry. I pointed out that one of those was the freight rate manipulation that had been going on; that another was the peculiar use of basing points; and that so far as we were concerned, perhaps the most serious was this constant inability to make the same kind of a board connection that everybody else had.

I suggested to him that it just wasn't a healthy thing in an industry to let that kind of a thing prevail, and that it seemed strange that a company the size of USG would insist on maintaining that kind of a situation.

I pointed out to him, also, that we had a competitor
5295 right across the tracks from us, who was an independent operator, who had for years enjoyed just the kind of a board connection that we were talking about.

Q. What was that competitor's name? A. Wasem Plaster Company.

Q. Go ahead. A. I told him that it was simply the ordinary business connection prevailing in the industry; I told him that I would substantiate my statements as to sales prices and terms, and that they were welcome to look over our books and see what they showed, to verify my statements.

His response was, in substance, this,—that USG had spent $60,000,000 or $70,000,000 developing the business;

that they had that, at one time or another, invested in their plants; that it would cost at least a half a million dollars to establish a board mill; and that they were not disposed to make available to us facilities of their board plants on any kind of a basis; that if we wanted board, then the thing we ought to do was to decide to build a board mill, and if we could then come in with a showing that we had the money available, that they would then consider granting us a license.

Q. Now, did Mr. Keady or Mr. English say anything at this conference? A. Very little.

5296 Q. Was there anything said after Mr. Knode told you that USG would consider granting Cardiff a license? A. Yes. I told him that that was not the subject of our discussion; and I again pressed him on the matter, pointing out the unfairness of it, pointing out that a number of members of his organization, beginning with Mr. Henning, had recognized the inequity of that situation. I suggested to him that it might be a matter that had some legal aspects to it; and I suggested that without going to any trouble about it, we place the question before some proper agency in Washington, and see whether we could get an advisory opinion on it.

Q. What else was said, if anything? A. He rejected that, and indicated that the decision was final, that they would do nothing about it.

Q. Now, we got into this discussion of the conference with the United States Gypsum Company because of my first question concerning your contacts with Mr. Baker in 1936. Did you talk with anybody else in National in 1936? A. Yes. Beginning in 1936, and through those two years, besides talking with Mr. Baker and Mr. Burley and Mr. Harrison, I also talked with John C. Best from time to time.

Q. You haven't mentioned Mr. Burley before; you have mentioned Mr. Baker and Mr. Harrison. Did you
5297 have any conversation with Mr. Burley? A. I am sorry if I didn't mention Mr. Burley. I think I did.

Q. You may have. My recollection is that you hadn't. A. They were separate conversations. I sometimes talked with Ralph Burley, and sometimes with Mr. Baker.

Q. What was your conversation with Mr. Burley? A. It was generally—

Mr. Bromley: (Interposing) When, please?

The Witness: Beginning in 1936.

(Continuing) —It was generally on the subject of

specific sales, specific orders. During that period I had under discussion with them the question of supplying us with Keene's Cement, and white finishing plaster, which they made out in Kansas, and that was a question apart from the board question.

By Mr. Knuff:

Q. Well, just confine yourself to the board conversations that you had with Mr. Burley. A. They were only general, and would be more or less a repetition of what I had been saying to Mr. Baker, with the idea in mind of getting the organization favorable to this project.

Q. At the risk of being repetitious, what did you say to Mr. Burley, and what did Mr. Burley say to you?

5298 A. I pointed out to Mr. Burley the need that Cardiff had for such a connection, the common one in the industry. I pointed out to him how it would be helpful to his own company, and would very likely diminish some of the resistance that he had, in selling his product, with certain dealers. And I asked him for his backing, with Mr. Baker, in seeing this proposition through.

Q. What did Mr. Burley tell you, if anything? A. Mr. Burley told me that he had been very favorably impressed with the new sales policy of Cardiff; that he was, generally speaking, getting good reports through his salesmen and sales managers; and that he thought the time had come to change the situation, and that he would do what he could with Mr. Baker.

Q. Now, did you have more than one conversation with Mr. Burley? A. Yes, sir.

Q. And have you told us everything that was said to Mr. Burley, and that Mr. Burley said to you, relative to the purchase of board, at this first conversation with him—have you told us everything about that? A. Yes, sir.

Q. When next did you see Mr. Burley, if you did see him again? A. I couldn't—

5299 Mr. Finck: (Interposing) Can you fix the date of the first conversation a little more clearly?

By Mr. Knuff:

Q. Can you fix the date of the first conversation with Mr. Burley? A. Sometime shortly after the taking over of Universal by National.

Q. Was it before your first conversation with Mr. Baker, or after your first conversation with Mr. Baker? A. I

think it was before. I think I first opened it with Mr. Burley.

Q. You first opened the negotiations with Mr. Burley, is that correct? A. Yes, sir.

Q. Now then, when did you talk with Mr. Burley again? A. From time to time throughout this two-year period, Mr. Knuff. I couldn't tell you the dates.

Q. Can you give us the number of conversations, or the approximate number of conversations, that you had with Mr. Burley concerning Cardiff's purchase of board at a discount, from National? A. Three or four, I dare say.

Q. And was the substance of all the conversations that you had with Mr. Burley, similar to the conversation that you have now related that you had with Mr. Burley?

5300 A. Yes, sir.

Q. Did you add anything to later conversations that was not discussed in the first conversation with Mr. Burley? A. Well, I remember once asking him how long this thing was going to go on. I told him there was a limit to most anybody's patience, and that we had been knocking at this door, now, for several years, and always got the same kind of an answer, that "some day in the future it will be opened, but it isn't now".

I asked him how long he thought that ought to continue. His opinion was, he told me, that it was time for the gypsum industry to do something about it; that he thought we had done our share, and that he was satisfied that we would do more if they would do something about it; and he undertook to help all he could.

Q. You have testified that you were in Buffalo in the fall of 1938, is that correct? A. Yes, sir.

Q. I want to show you what has been marked for Identification as Government's Exhibit 578, the same being a letter dated October 24, 1938, addressed to Mr. Ezra Sensibar, and signed M. H. Baker.

(The document referred to was marked as Government's Exhibit No. 578 for Identification.)

5301 (Government's Exhibit No. 578 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you tell us whether you received that letter? A. Yes, sir.

Mr. Knuff: We offer in evidence Government's Exhibit No. 578.

Mr. Bromley: We make the usual objection, and also object on the ground that it is immaterial.

Justice Stephens: The objection is overruled, received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 578, was received in evidence.)

Justice Stephens: Announce the morning recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5302 Justice Stephens: You may proceed.

By Mr. Knuff:

Q. Mr. Sensibar, during the recess have you had an opportunity to think over your testimony as to the conference with the United States Gypsum Company's officials, that is, Mr. Knode, Mr. Keady, and Mr. English? A. Yes sir.

Q. Do you wish to add anything to what you previously told us about what was said at that conference? A. Yes sir, I do.

Q. Would you proceed, please? A. When I made the point with the gentlemen that the arrangement that we were seeking and had been seeking for three years, was simply the usual one in the industry, Mr. Knode said that it was no longer the practice of USG to make those deals; that the one with Wasem was very old at that time, was of long standing; and it was not their policy to make any more arrangements of that kind.

I then suggested to him my understanding that during that very period since we had become interested in Cardiff, they had made other such arrangements—

Q. (Interposing) Did you mention the name of the company that you had in mind at that time? A. I believe I did not.

5303 Q. You believe you didn't? A. That is right. I don't think there was any question about it, we all knew who it was.

Q. What did Mr. Knode—

Mr. Bromley (Interposing): I move to strike that last out as a conclusion, "I don't think there was any question about it, we all knew who it was."

Mr. Knuff: I think it should come out, your Honor.

Justice Stephens: It may be stricken.

By Mr. Knuff:

Q. What, if anything, did Mr. Knode or Mr. English or Mr. Keady say when you called their attention to the fact that similar arrangements had been made with a company other than the Wasem Plaster Company? A. Well, that was covered by Mr. Knode's general statement that they weren't making any deals of that kind during that period, and that the existing ones were old.

Q. Now, Mr. Sensibar, will you please look at Government's Exhibit 578, and particularly at the second paragraph of that exhibit. In any of your conversations that you had with Mr. Baker, did Mr. Baker ever suggest that their plant capacity was limited in any manner? A. No sir, never.

Q. When did you first hear that National's plant wasn't of sufficient capacity to take care of this business that
5304 you were offering— A. (Interposing) When I received this letter—

Mr. Bromley: (Interposing) I object to that on the ground that it assumes facts not in evidence, and I move to strike out the answer. That is not what the letter says. It says, "Any substantial upturn will consume our capacity."

Justice Stephens: That is correct, the answer may be stricken.

By Mr. Knuff:

Q. Mr. Sensibar, at any conversations that you had with Mr. Baker, was the capacity of the National Gypsum Company's plants ever discussed with you? A. No sir.

Mr. Knuff: I believe I have offered Government's Exhibit 578.

Justice Stephens: Yes, that has been received in evidence.

By Mr. Knuff:

Q. Now, at page 5546 of yesterday's transcript, beginning with line 7, the following appears:

"A. The Cardiff Gypsum Company went through a 77-B reorganization—

"Q. (Interposing) That was in 1935? A. Yes, sir.

"Q. I will come to that later. But in 1933 did you talk to Mr. Henley as to whether or not he was able to

obtain the consent of USG for Certain-teed to sell you board?"

5305 Did you mean to infer that in 1935 you talked with Mr. Henley concerning the sale of board? A. No sir.

Q. After 1933, when next did you take up with Certain-teed the question of purchasing board from them at a discount, if you did take it up?

Mr. Bromley: I am sorry, but I have lost track—may we have those last few questions about Certain-teed read?

Justice Stephens: Yes, you might. Read them, Mr. Reporter.

(Thereupon the reporter read the record as requested.)

Justice Stephens: Answer the pending question.

The Witness: It was about 1939, it might have been in 1938. In any event, it was right after the new management came in.

Justice Stephens: The new management of what?

The Witness: The new management of Certain-teed, after Celotex had acquired an interest in the company.

Justice Stephens: I see.

By Mr. Knuff:

Q. And with whom in Certain-teed did you talk at that time? A. First with Mr. Henry J. Hartley, the president.

5306 Q. Where did you talk with Mr. Hartley? A. In their office in New York.

Q. And will you tell us the conversation? A. I told him that I was coming in to get acquainted, at the suggestion of Mr. Dahlberg—

Q. (Interposing) And who is Mr. Dahlberg? A. Mr. Dahlberg was president of the Celotex Corporation at that time.

Q. Proceed. A. And I stated that I wanted to discuss with him some matters with reference to the general situation in the gypsum industry.

He asked me to give him some overall picture of it, because he was new to the business, and would like to get an outsider's viewpoint.

I explained to him, as best I could, the overall situation in the industry with respect to the various companies, their size and influence in the industry, and so forth, and the problems of independents, and Cardiff in particular; and I went on to explain to him the situation with reference

to board and lath, and what it meant to an independent plaster manufacturer.

I then asked him as occasion would arise to inform himself a little better about these things we had been discussing, and asked him whether or not I might come in somewhat later and discuss with him more in detail the question
5307 of some dual arrangement between Certain-teed and Cardiff.

Q. What did you mean by "dual arrangement"? A. I meant an arrangement for them to sell us board and lath on the usual industry basis.

Q. What did Mr. Hartley say to you, if anything? A. Mr. Hartley told me that he was new to the business; that he was just beginning to learn something about it, and that he would welcome my return after a few months, and in the meantime would try to catch up on his information so that he could discuss the matter more intelligently.

Q. Did you subsequently go back and see Mr. Hartley? A. Yes sir, I did.

Q. When? A. I had a number of visits with him over a period of a year or so following the time he took over direction of the company.

Q. And what was the conversation that you had with Mr. Hartley? A. The conversations were that Cardiff Gypsum Company needed a good board and lath connection; that their plant at Fort Dodge would be a logical source of supply; that it would increase the outlets for the production of that plant, and therefore would be a good thing for both companies—and I asked him to enter into such an arrangement with us.

His reply was that they at that time had a number
5308 of matters under discussion with USG; that there were a number of differences about other things; and that as those got to some kind of a solution, he would be glad to take up our matter and try and arrange it for us.

Q. And did that end the second visit with Mr. Hartley? A. The second or third or fourth, or thereabouts.

Q. Did you subsequently see Mr. Hartley after the conversation that you have just related now? A. Yes, I did. It must have been a year or so after our first conversation. During that period, at his request, I had discussed the matter more in detail as to territory and freight rates and so on, with the vice president of the company, Mr. Albert Miller, I think it was, and with their sales manager, I forget his name.

Q. Would it be E. G. Roos? A. No sir.

Q. Would it be Warren Henley? A. He isn't the man that I have in mind at the moment. I did talk with Warren Henley about it during that period, though. It was Cres Stedman.

Q. Did you talk with Mr. Stedman? A. Yes sir, I did.

Q. What was the conversation that you had with Mr. Stedman? A. Mr. Stedman was in charge of the sales of the company—

5309 Mr. Bromley: (Interposing) May we have the time, please?

By Mr. Knuff:

Q. When was the conversation? Mr. Bromley wants to know. A. Well, all of these conversations were within the period of about a year after this new management took over, and my best recollection of that is that it was either late in 1938 or early in 1939, that the new management took over.

Q. Proceed. A. The conversations with Mr. Stedman and with Mr. Miller, who at that time was the vice president, were with regard to the details of the territory that we should serve, or did serve, with our sales organization—

Mr. Adams: (Interposing) Excuse me. Were these conversations with these gentlemen separately, or were they together when you talked with them? Could we have that indicated, please?

Justice Stephens: The Court understood that he was talking to these two men together, is that true?

The Witness: Generally, yes. I generally spoke to Mr. Stedman and Mr. Miller together, but almost always alone with Mr. Hartley, although sometimes with Mr. Miller. I don't remember ever talking with Mr. Hartley and Mr. Stedman together, however.

5310 We discussed the particular sales coverage that we had, that is where our salesmen operated, and what territories they covered; discussed some of the accounts that we handled, with the object in view of giving the facts to Mr. Stedman so that he could make some recommendation as to how much their business would be increased by such an arrangement.

By Mr. Knuff:

Q. What, if anything, did Mr. Stedman tell you, or Mr. Miller? A. They both told me very emphatically that they were in favor of such an arrangement.

Q. How many conversations did you have with Mr. Stedman and Mr. Miller, if you can recall? A. I would say, all in all, a dozen or so.

Q. A dozen or so? A. Yes sir.

Q. And was the substance of all these conversations the same as you have now related? A. That is right. During a part of the time Mr. Hartley felt that he couldn't press the matter because they had other things involved. Towards the end of that time, he assured me that he had pressed the matter with USG, and had discussed it with them, and had been turned down.

Q. How many conversations did you have with Mr. Hartley? A. About eight, I should say.

5311 Is my understanding correct that you had about 12 conversations with Stedman and Miller, and in addition to that, about eight conversations with Mr. Hartley—is that correct? A. That is right.

Justice Stephens: Over how long a period of time?

The Witness: Between a year and a year and a half, I should say.

By Mr. Knuff:

Q. You testified at the criminal trial in the District Court, did you not? A. I did.

Q. It is my recollection that you did not mention the conversations with Mr. Hartley or Mr. Stedman or Mr. Miller at that time. Can you tell us why? A. My recollection is that all the matter with respect to Certain-teed was excluded.

Q. I see. Did you talk with Mr.—

Mr. Bromley: (Interposing) Since he has gone into that, I think I ought to say that it was excluded by Judge Goldsborough because in that case we had a bill of particulars. Since there was a specific allegation in the indictment that one of the parts of the conspiracy was to refuse to sell Cardiff, we asked for a bill of particulars as to the refusals, the dates and the companies, and that bill

5312 of particulars did not include Certain-teed, and did not include others, as I remember.

Mr. Knuff: I just wanted to make it clear why there was none of this testimony given at the criminal trial. I hadn't finished doing that, but I thank Mr. Bromley for doing it. I intended to do it in that manner.

By Mr. Knuff:

Q. Did you have any conversations in 1938 with Mr. Warren Henley? A. Yes, I did.

Q. Where and when? A. Those were held in Chicago shortly after my first approach to the new Certain-teed management. Mr. Henley was one of the old-timers in the business, and knew the background, and Mr. Hartley naturally referred the matter to him for some opinion. Mr. Hartley told me that when I got back to Chicago I should see Warren Henley, and I did that.

Q. And what, if anything, did you say to Mr. Henley, and what, if anything, did Mr. Henley say to you? A. I asked Mr. Henley whether he would be in a position, or of a mind, to make a favorable recommendation on it, since they were looking very largely to his opinion on the matter. He told me that since this matter had been hanging fire, as far as he was concerned, for a period of five years or so then, and seeing the come-back that Cardiff had
5313 made after its reorganization, that he thought, on the whole, that he could recommend it.

Q. How many conversations did you have with Mr. Henley? A. Two or three.

Q. And was the substance of all the conversations similar to the one that you have just now related? A. Yes sir. He asked for some particulars from time to time about certain competitive situations, about certain sales here and there that he had heard about, and I gave him the information.

Q. Were you able to buy board from Certain-teed as a result of the visits that you had with Mr. Hartley, Mr. Stedman, Mr. Miller and Mr. Henley? A. We were not.

Q. Do you know Mr. Wright of the Texas Cement Plaster Company? A. Yes sir.

Q. Did you ever have any conversation with Mr. Wright concerning the purchase of board and lath at a discount, from Texas? A. Yes sir, I did.

Q. Where did you have that conversation? A. At a number of cities at which we used to meet, because we were both members of the Traffic Committee of the Gypsum Association.

5314 Q. When did you first contact Mr. Wright concerning the purchase of board and lath? A. Oh, about 1937 or 1938.

Q. In 1937 or 1938? A. Yes.

Q. Will you tell us the conversation that you had with him? A. It was a general conversation along the lines

that we wanted to have the sales of these products, and that I realized that it was not a very economical proposition, not very sound economically, to think about a connection with his company, because their plant was down in Texas, and the freight absorption to most of our customers would be great; in other words, the freight from his plant to our customers would be larger, on the average, than the freight from our plant to the same customers, who, of course, wouldn't pay any more for the product. So that it would be necessary, either for Texas or for ourselves to absorb the difference in freight, and that that would not make such an arrangement as economically sound as one with a plant in Fort Dodge, which of course was the indicated thing.

Nevertheless, I pointed out to him that it might fill in a gap in their production that was open, and as marginal business might be of some interest to him.

Q. Did you have any conversation with Mr. Wright
5315 as to your previous price policy on plaster? A. Yes.

Q. What was that conversation? A. Texas and ourselves are competitive in a rather narrow area, comprising Missouri, northern Oklahoma, and some of those states about half way between Fort Dodge and their plant in Texas. I discussed with him the competitive situation in a number of those places.

Q. I don't believe you answered the question that I asked you. I asked if you ever had any conversation as to your previous price policy. A. Yes sir, I discussed with him the background of this whole thing, which he said he knew. He had known Tom Breen, and had known the old Cardiff company and its policies, and he also knew about the change in management. I explained to him how we had been operating since 1935.

Q. Again, at the risk of being repetitious, when you say that you discussed the background, will you be a little bit more specific, please? A. That consisted largely in a complaint by USG and Certain-teed and National that in the old days, that is during the period of the Tom Breen management of the company—

Mr. Bromley: (Interposing) Is this what the witness told somebody, or isn't it?

By Mr. Knuff:

5316 Q. I am asking now as to your conversation with Mr. Wright. In the answer that you are making,

Mr. Sensibar, did you tell Mr. Wright what you are now telling us? A. In substance, yes.

Justice Stephens: Very well, proceed.

The Witness: (Continuing)—that the principal members of the industry used to object to our sales policy of selling directly to contractors, and jobbers, and so on, and since we had taken over the management of the company, and since the reorganization in 1935, that we were following the regular or normal, or customary sales practice of the industry in making sales almost exclusively through dealers.

By Mr. Knuff:

Q. This first conversation was had either in 1937 or 1938, is that right? A. That is right.

Q. And at that time did you ask Mr. Wright to have Texas apply to USG for permission to sell your company board and lath at a discount? A. I don't think I put it that way. I think I merely asked him whether we couldn't make an arrangement to buy from them.

Q. What did he say to you? A. He said that that would depend, in the last analysis, on USG; that he would
5317 first have to talk to his people, that is to Mr. Chism and Mr. Gloyd, and then it would depend on whether USG would give him permission.

Q. Did you talk to Mr. Wright after that? A. A number of times, yes.

Q. And with reference to your first conversation, when next did you see Mr. Wright? A. We used to see each other every three or four months at these Traffic Committee meetings.

Q. And how many conversations would you say that you had with Mr. Wright? A. Seven or eight. I kept the thing alive every time we were together, which was over a period of a couple of years.

Q. That is, from 1937 down to 1939 or 1940—was it as late as 1940? A. It may be.

Q. What is your best recollection as to that? A. Either late in 1939 or early in 1940, it was about two years. He finally told me that while they hadn't made any firm application, that they had talked the thing over and that there just wasn't any use.

Q. Did he say who he had talked it over with? A. With USG.

Q. And Mr. Wright told you that? A. Yes sir.

Q. When did he tell you that? A. Well, as I have
5318 said, as nearly as I can tell, either in the fall of 1939 or the spring of 1940.

Q. Did you ever have any conversation with any other person connected with Texas Cement Plaster Company than Mr. Wright? A. Not on that subject, no sir.

Q. I show you what has been marked for identification as Government's Exhibit 579, the same being a letter, dated September 22, 1939, addressed to Mr. Baker of the National Gypsum Company and signed by Ezra Sensibar.

(The document referred to was marked as Government's Exhibit No. 579 for identification.)

(Government's Exhibit No. 579 for identification was handed to the witness.)

By Mr. Knuff:

Q. Is that your signature, Mr. Sensibar? A. Yes, it is.

Justice Stephens: Does that consist of two pages, or one?

Mr. Knuff: It is a one-page letter, your Honor.

Justice Stephens: You are skipping one item, then, in our sets?

Mr. Knuff: Yes, your Honor, I am skipping one item.

By Mr. Knuff:

5319 Q. I also show you what was been marked for identification as Government's Exhibit 580, the same being a copy of a letter from the National Gypsum Company, addressed to Mr. Ezra Sensibar, and signed John C. Best, Vice President.

(The document referred to was marked as Government's Exhibit No. 580 for Identification.)

(Government's Exhibit No. 580 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Did you receive the original of that letter?

Mr. Finck: What is the date of that?

Mr. Knuff: September 27, 1939.

By Mr. Knuff:

Q. Did you receive the original of that letter, Mr. Sensibar? A. Yes, I did.

Justice Stephens: You haven't offered Exhibit No. 579, have you?

Mr. Knuff: No, I have not.

Justice Stephens: Is Exhibit 580 in response to Exhibit 579?

Mr. Knuff: I am going to have three of them marked, and then I will interrogate the witness.

Justice Stephens: I see.

5320 By Mr. Knuff:

Q. I show you what has been marked for identification as Government's Exhibit 581, the same being a copy of a letter dated October 3, 1939, addressed to Mr. John C. Best, and signed, "Cardiff Gypsum Company, by E. S., President."

(The document referred to was marked as Government's Exhibit No. 581 for identification.)

(Government's Exhibit No. 581 for identification was handed to the witness.)

By Mr. Knuff:

Q. Are those your initials on that carbon? A. Yes.

Q. Was the original of that letter sent to Mr. Best? A. It was.

Q. I show you what has been marked for identification Government's Exhibit 582, the same being a copy of a letter dated October 7, 1939, addressed to Mr. Ezra Sensibar, and signed National Gypsum Company, John C. Best, Vice President.

(The document referred to was marked as Government's Exhibit No. 582 for identification.)

(Government's Exhibit No. 582 for identification was handed to the witness.)

By Mr. Knuff:

5321 Q. Did you receive the original of that letter, Mr. Sensibar?

Mr. Finck: What date is that?

Mr. Knuff: October 7, 1939.

By Mr. Knuff:

Q. Did you receive the original of that letter? A. I did.

Q. Would you look at Government's Exhibits Nos. 580 and 582, please?

Justice Stephens: Let the Court take time to read these so that we can tell what this is about.

By Mr. Knuff:

Q. You will notice, Mr. Sensibar, that those are copies of originals. Do you know where the originals are? A. No, I do not.

Q. Have you made an effort to locate them? A. I have, yes sir.

Q. Would you say that the Exhibit marked 580 for identification is a correct copy of the letter that you received? A. Yes, it is.

Q. And would you say that the exhibit marked for identification No. 582 is a true and correct copy of the letter that you received? A. Yes sir.

5322 Q. And you have made an effort to find both of the originals? A. Yes, I have.

Q. And you did that pursuant to a letter that I wrote to you, is that correct? A. That is correct.

Mr. Knuff: We offer in evidence, if your Honor pleases, Government's Exhibits 579, 580, 581 and 582.

Justice Stephens: Let the Court read them.

Now, Mr. Knuff, does one of these letters appear to be an answer to the letter of September 22, Exhibit 579, and if so, which one?

By Mr. Knuff:

Q. Will you tell us, Mr. Sensibar, if any of the letters that you have in front of you is an answer to the letter marked Exhibit 579 for identification, please? A. Yes sir.

Justice Stephens: Which one?

The Witness: The letter of September 27, which is marked Exhibit 580.

Justice Stephens: Is there any objection to these?

Mr. Bromley: May it please the Court, we object to these Exhibits 579 to 582 inclusive, as immaterial to any charge in the complaint. They have to do, if they have to do with anything, with resales by Cardiff of Keene's cement.

5323 Now, there is no claim of any kind in the pleadings about the resale prices of plaster or Keene's cement. Keene's cement is mentioned in the bill of particulars as one of the three miscellaneous gypsum products covered by the suit, but there is no claim of any kind about the resale prices of plaster or any miscellaneous gypsum products.

The rule applied, therefore, last Monday, with respect to the testimony of the witness Perry as to resales by a wholesale distributor, should be applied here.

Justice Stephens: We understood this witness as being called under the charge in Paragraph 45 (c), which concerns concertedly raising, maintaining and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern Area—and that the theory of this testimony was that the United States Gypsum Company and the other defendants wouldn't sell to Cardiff because Cardiff wouldn't keep the price of plaster up, that is, they wouldn't sell board to Cardiff.

Now these letters, it is urged, have to do with the resale price of Keene's cement.

What is your answer to the objection?

Mr. Knuff: My answer to the objection, your Honor, is of course that Keene's cement is a plaster, and that it is mentioned—

Justice Stephens: (Interposing) That is not disputed, the question is concerning resale price.

5324

Mr. Knuff: My offer is not to establish the resale price, but to show that there was a fixing of the plaster prices.

Mr. Bromley: It seems to me that counsel overlooks the fact that up until the subject matter of these letters was approached by him, he had been talking or inquiring about plaster manufactured by the Cardiff Gypsum Company. Now, these letters have something to do, not with anything manufactured by them, but with something which they are trying to buy from the National Gypsum Company, because they don't make it themselves. Therefore his whole approach here has shifted from Paragraph 45 (c) to a charge of resale price fixing of miscellaneous gypsum products, which is not charged in the complaint.

Mr. Knuff: May I refer your Honor to Exhibit No. 581, paragraph 3, which is a letter from Mr. Sensibar to Mr. Best, in which Mr. Sensibar says:

"Your other possible objection might have arisen from a matter which you once asked me to investigate, the alleged sale of some of your Keene's cement at a price below cost. I investigated the quotation and found that through an error it had indeed been made below cost. The Cardiff Gypsum Plaster Company accordingly withdrew it, and the sale was never made."

Now, if your Honor will keep that in mind and then read Government's Exhibit No. 582, in which Mr. Best says:

5325 "I acknowledge letter of the 3rd, and the matters that you mention naturally had a considerable bearing on our decision."

We are not offering these letters to prove the resale price of Keane's cement, but we are offering them as a circumstance from which the Court can infer that National was interested in maintaining plaster prices.

They are not offered for the purpose of proving the truth of the sale below cost of Keane's cement, but purely circumstantially, from which it can be inferred that this evidence, in connection with the other testimony that Mr. Sensibar has given, establishes the fact that the defendants in this case, particularly the defendant National, had in mind a stable price for plaster.

Mr. Brownley: Now, if counsel, in Exhibit No. 581, had read on to the fourth paragraph, he would there have disclosed that the letter characterizes the transaction described in the third paragraph as a "resale price". The last sentence of the fourth paragraph says:

"As to the question of our resale price, we would be entirely willing to verify our present statement by audit."

The instance which is being talked about in the third paragraph is a resale instance. Cardiff bought the Keene's cement from National and resold it.

5326 Justice Stephens: The objection to these exhibits is sustained on the ground that they apparently relate to resale prices of Keene's cement, and that is not covered by any charge in the complaint. They are not received in evidence.

By Mr. Knuff:

Q. I would like to have marked for identification as Government's Exhibit No. 583 a memorandum from Mr. Burley to Mr. Baker, dated September 25, 195[illegible].

(The document referred to was marked as Government's Exhibit No. 583 for identification.)

(Government's Exhibit No. 583 for identification was handed to the witness.)

Justice Stephens: Where is that in this file?

Mr. Knuff: It should follow, your Honor, Exhibit No. 579.

Justice Jackson: It is right ahead of 579.

Mr. Knuff: As I say, in connection with this exhibit, this was furnished to us by the National Gypsum Company under a subpoena served upon them, and apropos of that, I want to call your Honor's attention, on the question of identification, to the position taken by the defendants at page 5334 of the record, beginning with line 12—

Justice Stephens: (Interposing) That was yesterday's record?

Mr. Knuff: Wednesday's, your Honor, just before
5327 the recess on Wednesday.

Justice Stephens: I missed one statement you made. You said that this was supplied from the files of National?

Mr. Knuff: That is right, your Honor.

Justice Stephens: Under subpoena by the Government?

Mr. Knuff: Yes.

Justice Stephens: The Court does not have that record before it. Will you hand it to the Marshal so that the Court may see it?

(A copy of the transcript referred to was handed to the Court.)

Mr. Knuff: I gave your Honor the wrong reference, I am sorry. It should be page 5335, line 14.

Justice Stephens: Very well. Is this exhibit offered?

Mr. Knuff: Yes, your Honor.

Justice Stephens: Let the Court read it.

Is there any objection?

Mr. Bromley: I object to it on the ground that there is no proper foundation, and that it is incompetent. In connection with my statement on page 5335 of the record, not only is it probably inaccurate, but what I had in mind was that this Court had been ruling that where a document had been identified and was produced from the files of a defendant, that that was some authentication for it. This document has not been identified, as I understand it, so
5328 that all we have here, if we have anything, is a document which counsel says was produced by National under subpoena.

So far as its materiality is concerned, I object to it only on the usual ground.

Mr. Knuff: I don't think that Mr. Finck will say that he didn't furnish this exhibit 583 to us. You furnished that to us, did you not?

Mr. Finck: Of course I did.

Mr. Knuff: It was taken from the files of National?

Mr. Finck: It must have been. I submitted it some time ago. I don't recall that one particularly. There is a number on the back of it which is the number that was put on by our office at the time it was submitted.

Mr. Bromley: That is certainly not a sufficient identification.

Justice Stephens: The problem seems to be this, Mr. Knuff. The situations we have had before were situations where a letter, being on its face addressed to a defendant, and then found in its files, and the signature having been identified, the Court ruled that there was, thereby, a circumstantial identification, or rather circumstantial proof of its having been received. But the question apparently raised by Mr. Bromley here is that the mere fact that a memorandum is found in the file of a defendant, or is furnished from the file of a defendant as having been there, without any testimony that it was written by a per-
5329 son connected with the company, doesn't bind the company.

Is that your point, Mr. Bromley?

Mr. Bromley: Yes, your Honor.

Mr. Knuff: I realize what your Honor's previous rulings were, and I felt that Mr. Bromley was shifting, and I just wanted to call your Honor's attention to the matters that appeared there—

Justice Stephens: (Interposing) It is entirely proper for you to call attention to anything that Mr. Bromley has said.

I think, however, that there we were considering a different situation. Now this, I think, is the first time we have had presented to us the question of whether or not the mere existence in the file of a party, of a paper containing apparently relevant—we will assume that for the purpose of argument—material, is sufficient to warrant its coming into evidence without any showing that it was prepared by somebody who had any authority to bind the company.

We will hear you on that if you wish to be heard.

Mr. Knuff: Well, I don't want to labor the argument, but there is no question here that Mr. Burley was the Vice President of the National Gypsum Company; there is likewise no question but what Mr. Baker was the President of National Gypsum Company.

When we send out our subpoenas and ask for cer-
5330 tain correspondence, and that correspondence is furnished to us, in response to that subpoena, it seems

to me that the position that Mr. Bromley took the other day is the correct and sound position, that they are almost estopped, if your Honor pleases, to question the authentication of that, because they have said, "We have before us your subpoena; we are giving you this in answer to it; it is from our files."

Justice Stephens: Well, Mr. Knuff, the problem that troubles me, at least, is this. If you could show to the Court that you had served a subpoena upon the defendants asking them to produce a communication in their files between Burley and Baker, and they then had produced this, I should think that your situation might be a little bit different. But that isn't what the record shows. The record simply shows that you filed a general subpoena for the production of various documents, and I have some doubt as to whether there is a sufficient foundation for this.

Mr. Knuff: Our subpoenas asked for all interoffice communications as a general rule, your Honor. I will be glad, during the lunch hour, to get the subpoena that was served upon them.

Justice Stephens: I think that might be material; perhaps you had better do that.

We will take the luncheon recess at this time.

(Whereupon a recess was taken from 12:10 p.m. until 1:45 p.m.)

5331 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Have you anything further to say with respect to this proposed exhibit?

Mr. Knuff: Yes, Your Honor.

During the lunch hour I sent over to the Department and obtained the original subpoena duces tecum which was served upon the National Gypsum Company on February 17, 1940. The subpoena is in the usual form that has been sustained, time after time, on motions to quash. In paragraph 22 of the subpoena, we asked for the following:

"All original memoranda, reports, and intra-company communications—or copies thereof, where the originals can not be produced—made or written by you, or by any of your subsidiaries, during the period from January 1, 1929, to the date of this subpoena; and all original communications—or copies thereof, where the originals can not be produced—

between you, or between any of your subsidiaries, and any producer or distributor of gypsum products, during the period from January 1, 1929, to the date of this subpoena, referring or relating to the sale of gypsum products, or the refusal to sell gypsum products, by you or by any of your subsidiaries, to Fairmont Wall Plaster Company, Cardiff Gypsum Company, and Gypsum Products Company."

5332 Now we have asked for the inter-office memoranda. National Gypsum Company, pursuant to that subpoena, and pursuant to the various requests contained therein, furnished us Government's Exhibit 583. In effect, the National Gypsum Company said, "We have gone over the matters which you have requested in your subpoena, and here are the documents which we believe relate to what you have asked for."

In addition to that, however, we have the testimony of Mr. Sensibar to the effect that he had contacted Mr. Baker sometime between 1936 and 1938; that Mr. Baker had told him to see Mr. Harrison, the Sales Manager; that he did see Mr. Harrison, had a talk with Mr. Harrison, on one occasion or maybe more, I don't recall how many, now; and the exhibit, Government's Exhibit 583 for Identification, ties the conversation of Mr. Harrison and Mr. Sensibar together.

Now at this time, Government's Exhibit 583 for Identification is meaningless unless it is related to a sale of gypsum products. It wasn't any academic question with National as to the policies of Cardiff. It must have had relation to—and I think we can assume that it did, as reasonable persons—the sale of gypsum products.

We say that in view of what we have asked for in our subpoena, from the National Gypsum Company, the inter-office memoranda, and what they furnished us, taken together with what Mr. Sensibar testified to here this

5333 morning, it is at least prima facie evidence of the genuineness of it. We don't say that it is conclusive, but it relates to the very subject that Mr. Sensibar has testified concerning this morning.

Justice Stephens: Please hand that paragraph of the subpoena to the Marshal so that the Court may see it.

(Subpoena handed to the Court.)

Mr. Knuff: It is paragraph 22, Your Honor.

Justice Stephens: What is the date of the subpoena?

Mr. Knuff: It was served on either the 14th or the 17th of February, 1940.

If your Honor will turn to the Marshal's return, you will get the exact date there. It was either the 14th or the 17th of February, 1940.

Justice Stephens: Do you wish to be heard further, Mr. Finck?

Mr. Finck: Yes, Your Honor.

I haven't looked at the original subpoena for some time, but I doubt very much if this was returned under the paragraph that was just read. There are a great many other provisions in the subpoena; and, of course, the time that we had, to go over 15 years of work and files, was very short, so that we really returned almost everything that had any indication that it was connected with sales of gypsum board and gypsum lath and plaster, and everything else.

Now we did not have time, when we were collecting
5334 this material, to have our officers authenticate these documents and pass upon them.

It seems to me that if a ruling allowing all of this evidence just to be thrown in, were made, it would open the door to allowing the Government to not produce the real facts, but to put in all sorts of evidence here from which the wrong inferences could be taken.

Justice Stephens: How much of this type of evidence do you propose to offer, Mr. Knuff?

Mr. Knuff: Offhand, I can't think of another one except this one.

Justice Stephens: I was about to say that—

Mr. Knuff: (Interposing) I wouldn't want to be bound by that.

Justice Stephens: I was about to say that apparently the only thing in this exhibit that appears, from our present inspection of it, to have any relationship to the issue we are now discussing, is the first sentence of the second paragraph.

Mr. Knuff: That is correct, Your Honor.

Justice Stephens: And that sentence, embodying a claim or purported claim by National as to price cutting by Cardiff, has been proved to be the claim of several of the defendant companies, by this witness, before. It would seem almost repetitive and hardly worth the time we are
5335 spending on it, except for this,—that of course, we don't want to make a ruling which would establish a precedent for introducing a large class of evidence, or for rejecting it, unless we are thoroughly advised as to the propriety of the ruling.

The Marshal will hand this subpoena to Mr. Finck.

(The subpoena was handed to Mr. Finck.)

Mr. Finck: If the Court please, in reading over the exhibit, I hardly see how the contents of the exhibit tie into any of the evidence given by the witness, or to the other exhibits which the Government has tried to introduce here. It is just a very general statement as to certain correspondence, which I do not have, attached to this exhibit.

Justice Stephens: That goes to its relevance, Mr. Finck. Let's get first past the question of its proper identification.

Mr. Bromley: May it please the Court, I am interested not in the exhibit, but in the principle, and I try to test it by our every-day experience in court. If I could serve a subpoena duces tecum on the plaintiff and have a messenger boy bring the documents called for by the subpoena, and then proceed to offer them in evidence, without any witness on the stand, I would be doing something that I never heard of being done in 20 years. Certainly, if I get a subpoena duces tecum returned from the Bethlehem Steel Company, and I get all their files relating to a certain subject,
5336 I wouldn't think I had any right to put them in evidence until I put a witness on the stand and asked him what they were. A return under a subpoena is no verification of anything except they seem on their face to have some relation to what is demanded in the subpoena.

Justice Stephens: Is Mr. Burley or Mr. Baker living?

Mr. Finck: Both of them are living.

Mr. Knuff: I don't know whether this has any bearing or not, but it was offered in the criminal case, and admitted in the criminal case.

Mr. Bromley: With a witness on the stand.

Mr. Knuff: No, Your Honor. Mr. Burley couldn't be called to the stand because Mr. Burley was a defendant in the criminal case.

Mr. Bromley: There were other witnesses from the company on the stand, and there was a long fight about identifying this document, as I remember it, with witnesses on the stand testifying about it.

Justice Jackson: Witnesses from National?

Mr. Bromley: Yes.

Mr. Knuff: That isn't my recollection.

Justice Stephens: Well, it is my personal view that it would not be a sound ruling, to establish that evidence can be introduced in this manner, especially in view of the fact

that the witnesses are available to qualify the docu-
5337 ment, and my own view is that it is not admissible because of lack of identification.

What is your view?

Justice Garrett: I agree with that.

Justice Jackson: So do I.

Justice Stephens: That is the view of all three of us.

The offer of the exhibit is rejected, with leave to re-offer it if you can produce someone to identify it.

Mr. Knuff: Mr. Sensibar, will you resume the stand?

Thereupon, EZRA SENSIBAR, the witness on the stand at the time of recess, resumed his testimony as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. Mr. Sensibar, in 1939, did you endeavor, or did your company endeavor, to purchase gypsum board and lath from the Ebsary Gypsum Company? A. Yes, sir, we did.

Q. Who conducted the negotiations for Cardiff? A. I started them, and had a number of conferences on the subject, and our Sales Manager, Mr. M. S. Gutman, then entered into the situation with respect to a good many of the details of the territories.

Q. What person or persons from Ebsary Gypsum Company did you contact? A. Mr. Fred Ebsary and
5338 Mr. Lenci.

Q. And can you tell us about when you contacted them? A. It was right after we learned that they had been interested in securing a wallboard order in Chicago.

Q. Can you fix the month? A. No, sir, I can't.

Q. I show you what has been marked for Identification as Government's Exhibit 584.

(The document referred to was marked as Government's Exhibit No. 584 for Identification.)

By Mr. Knuff:

Q. Will you look at that exhibit and see if you recognize it, please?

(Government's Exhibit No. 584 for Identification handed to the witness.)

By Mr. Knuff:

Q. That is dated October 4, 1939, addressed to George Lenci, and is signed by the Cardiff Gypsum Company. A. Yes, I remember this letter.

Justice Stephens: Was it marked in the previous trial Exhibit 140?

Mr. Knuff: Yes, Your Honor, that is the one.

Justice Stephens: Thank you. Let us read it, now.

(Government's Exhibit 584 for Identification examined by the Court.)

5339

Justice Stephens: Very well, proceed.

By Mr. Knuff:

Q. Since looking at that exhibit, Mr. Sensibar, does that refresh your recollection as to the date when you had a conference with the Ebsary Gypsum Company? A. Yes, sir.

Q. Would you say it was on or about September or October? A. Yes, I would.

Q. Of 1939? A. Yes. Very likely September, because this was written after my first or second conference with Mr. Ebsary.

Q. Will you just relate the substance of any conferences that you had with Mr. Ebsary, or Mr. Lenci—what you said to them and what they said to you? A. As I said before, this began shortly after—

Mr. Bromley: (Interposing) I object to these preliminaries. Can't we get to the conversation, if the Court please.

Justice Stephens: Just state the conversation, if you can, unless it is necessary to an understanding of the conversation that you state some preliminary matter; if so that can be stated, and we will consider, after hearing it, whether it should stay in.

5340

The Witness: I explained to Mr. Ebsary that the reason for my visit to him was that we had learned of his interest in some wallboard business in Chicago; and that that raised the possibility in our minds that we might be able to make a deal, of mutual benefit, for that whole territory. I then discussed with him the sales territory that we covered, pointing out the extent of the coverage in each part of the territory, and went over with him in a general way what the freight rate situation would be.

He expressed an interest in it, and suggested that on my way back to Fort Dodge, I stop to see their plant near Rochester, and have a talk with some of their people there about the operating situation; and then, that we give him more detailed freight rate information so that we could then follow it up with a more detailed discussion.

By Mr. Knuff:

Q. Now, in your conference with Mr. Ebsary, were the price policies of the Cardiff Gypsum Company, concerning plaster, mentioned? A. I have no recollection that they were.

Q. Now, then, will you continue with what you were going to say when I interrupted you, that on your way back you were to stop at Rochester? A. Yes. I did stop at the plant on my way back, and looked at the plant and talked
5341 with the superintendent there, and was told that—

Q. (Interposing) I am not interested in what the plant superintendent told you. Did you talk with Mr. Lenci? A. Yes, sir.

Q. When? A. I think on my next visit.

Q. And when was that? A. Several weeks after that.

Q. And what conversation did you have with Mr. Lenci? A. I had with me then a list of rates, of freight rates, from their plant near Rochester to principal points in our territory, and also the freight rates from our plant, so that we could see what the amount of absorption would be that would have to be made, either by themselves or by us, in order to take care of the trade in those territories.

We went over those in detail to arrive at what average price or yield the Ebsary Company would have out of sales that they would make to us and ship to our various customers in our territory.

Q. How many conversations did you have with Mr. Lenci? A. Three or four.

Q. And what you are relating now is the subject matter of the first conversation, or have you related all of it? A. Yes, I think of the first conversation, because the matter was covered more in detail afterwards, between
5342 Mr. Lenci and our Sales Manager.

Now, did you secure an order for gypsum board and lath, and forward that order to the Ebsary Gypsum Company? A. Yes, we did.

Q. When? A. Shortly after these September or October conversations.

Q. Was that order ever filled by the Ebsary Gypsum Company? A. No, sir, it was not.

Q. In any of your conversations that you had with either Mr. Lenci or Mr. Ebsary, was the subject of your price policies on plaster ever discussed? A. I think not.

Q. You think not? A. That is right.

Q. I show you what has been marked for Identification as Government's Exhibit 585, the same being a letter dated October 5, 1939, addressed to the Cardiff Gypsum Company and signed Ebsary Gypsum Company—

Mr. Bromley: Before that exhibit is identified, I now move to strike out all the testimony having to do with Ebsary and Cardiff, as well as the testimony of the witness Lenci and the exhibits with respect to it.

Justice Stephens: Will you repeat that, Mr. Reporter?

5343 (The record was read by the reporter.)

Justice Stephens: Do you mean the testimony of the Witness Lenci?

Mr. Bromley: Yes, I was joining up, in that motion, a motion with respect to this witness' testimony and the testimony of Lenci regarding the same subject matter.

Justice Jackson: For the reason that?

Mr. Bromley: For the reason that this witness has testified that there was no mention made of Cardiff's price policies on plaster, which, as I understand it, is the only purpose of the testimony.

Mr. Knuff: Your Honor will recall Mr. Lenci's testimony to the effect that he knew the reputation of the Cardiff Gypsum Company, and when asked what that reputation was, he said they had the reputation of being a price cutter. That is Mr. Lenci's testimony.

Justice Jackson: But this witness states that they didn't discuss anything about price policies on plaster.

Mr. Knuff: That is right.

Justice Jackson: Why shouldn't that be stricken, anyhow, regardless of what Lenci said?

Mr. Knuff: So far as striking that answer, I don't care.

Mr. Bromley: I am not moving that that alone be stricken.

Justice Jackson: I was getting at them one at a time.

Mr. Bromley: My friend makes it too easy, he
5344 wants to just strike out that answer. I moved to strike out Lenci's testimony, also.

Justice Jackson: We can't recall all of Lenci's testimony.

Justice Stephens: Mr. Bromley, it seems to me that the testimony of this witness, and the testimony of Mr. Lenci, ought to stand, notwithstanding the fact that this witness said he didn't talk to Lenci about price cutting, or the alleged price cutting policy of Cardiff, because Lenci did

testify, as I remember it, that he knew something of the reputation of this company for price cutting, that is, Cardiff, and it may be that in connection with other letters and other evidence it can be shown circumstantially that there is some basis for inferring that the refusal of Ebsary to sell board was on that account, or the refusal of USG to permit Ebsary to sell board was on that account.

What do you say to that?

Mr. Bromley: I am frank to say I don't understand the whole theory of the evidence. As I remember Mr. Lenci's testimony, he said he was ready, willing and anxious to sell this company, and he tried his best to get a consent to sell the company, and the letters certainly bear out that testimony.

Justice Stephens: There is no doubt about that.

Mr. Bromley: The testimony is that he wrote a
5345 letter to us, and we, in the exercise of our right under our license, sent him a telegram and said "Permission is refused". Now what in the world that has got to do with the maintenance of plaster prices, I can not for the life of me see.

Justice Stephens: What do you say to that, Mr. Knuff?

Mr. Knuff: I still think that the evidence should not be stricken from the record, because whether the Ebsary Gypsum Company was willing to sell, knowing the reputation, does not seem to answer the question completely at all. The refusal of USG is still a matter for consideration here, and it is a fact that USG likewise knew what the reputation of the Cardiff Gypsum Company was.

Mr. Bromley: Is it the contention of counsel that USG had no right to refuse to give consent, under its license, for any or no reason? Didn't we have an absolute right to refuse, under our license, to give a consent, whether we had any reason or not? If we didn't like the color of the man's hair, we could refuse. We didn't have to give a consent to licensees to sell to this class of trade, because we put a clause in our contract that said, "You licensees can't sell to manufacturing distributors at all without our consent".

Justice Stephens: Well, we have been receiving this testimony only under the theory, in paragraph 45(c) of the complaint, that it might have some tendency to prove that
5346 there was an attempt to keep up the prices on plaster by refusing to sell to those who were supposed to be cutting the price. That is the only theory on which it is being received.

We deny the motion to strike.

By Mr. Knuff:

Q. I show you, Mr. Sensibar, what has been marked for Identification as Government's Exhibit No. 586, the same being a letter dated October 13, 1939, addressed to the Cardiff Gypsum Company, and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 586 for Identification.)

(Government's Exhibit No. 586 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you state whether or not that letter was received at the office of the Cardiff Gypsum Company?

Justice Stephens: What is the date of that letter?

Mr. Knuff: October 13, 1939, Your Honor.

The Witness: It was.

Mr. Bromley: Where is Exhibit 585? I have no record of that.

Justice Jackson: It is the letter of October 5, 1939.

By Mr. Knuff:

Q. I now show you, Mr. Sensibar, what has been marked for Identification as Government's Exhibit 587, the
5347 same being a letter, or rather a carbon copy of a letter, dated October 14, 1939, addressed to Mr. George Lenci, and signed Cardiff Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 587 for Identification.)

(Government's Exhibit No. 587 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Can you state whether the original of that letter was sent? A. It was.

Q. I show you what has been marked for Identification as Government's Exhibit 588—

Justice Stephens: (Interposing) Just a minute, let us read these as we go along.

Mr. Knuff: Pardon me.

(Government's Exhibit No. 587 for Identification was examined by the Court.)

Justice Stephens: Proceed.

By Mr. Knuff:

Q. Government's Exhibit 588 for Identification is a letter dated October 16, 1939, addressed to the Cardiff Gypsum Company and signed George N. Lenci. Will you state whether that letter was received?

5348 (The document referred to was marked as Government's Exhibit No. 588 for Identification.)

(Government's Exhibit No. 588 for Identification was handed to the witness.)

The Witness: Yes, sir, it was.

By Mr. Knuff:

Q. I likewise show you what has been marked for Identification as Government's Exhibit 589, the same being a letter dated October 21, 1939, addressed to the Cardiff Gypsum Company and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 589 for Identification.)

(Government's Exhibit No. 589 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Was that letter received by your company, sir? A. Yes, sir, it was.

Q. I show you what has been marked for Identification as Government's Exhibit 590, the same being a telegram dated October 25, 1939, addressed to the Cardiff Gypsum Company, and signed Ebsary Gypsum Company.

(The document referred to was marked as Govern-
5349 ment's Exhibit No. 590 for Identification.)

(Government's Exhibit No. 590 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Was that telegram received, Mr. Sensibar? A. Yes, sir, it was.

Mr. Knuff: I now offer in evidence Government's Exhibits Nos. 584, 585, 586, 587, 588, 589, and 590.

Justice Stephens: Is there any objection as to identification?

Mr. Bromley: May I have a moment to look at them, please?

Justice Stephens: Yes, you may.

(Exhibits examined by counsel.)

Mr. Bromley: May it please the Court, as to Exhibit 585, we make the usual objection; and also object because it is immaterial to any issue in this case.

Justice Stephens: That objection is overruled, and the exhibit is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Knuff: I don't want to lead the Court into error on Exhibit 585. Mr. Steffen and the Reporter have called my attention to the fact that Mr. Sensibar has not as yet identified Exhibit 585.

Justice Stephens: Suppose you ask him to do that, if he can.

5350 (The document referred to was marked as Government's Exhibit No. 585 for Identification.)

By Mr. Knuff:

Q. Mr. Sensibar, was Exhibit 585 received by your company? A. Yes, sir, it was.

Justice Stephens: Is any question raised as to its having been sent by Mr. Hough or signed by Mr. Hough? Who is representing Ebsary today?

Mr. Finck: Mr. Varian is not here, Your Honor.

Mr. Bromley: I think no question is raised about Mr. Hough's signature.

Justice Stephens: Very well; that exhibit, then, is received, subject to the usual reservation with respect to declarations of alleged co-conspirators; and the objection as to materiality is overruled.

(The document referred to, marked as Government's Exhibit No. 585, was received in evidence.)

Justice Stephens: Are there any other objections?

Mr. Bromley: As to the rest of the exhibits, Nos. 586 to 590, inclusive—

Justice Jackson: (Interposing) How about Exhibit 584?

Mr. Bromley: That wasn't offered.

5351 Mr. Knuff: If I didn't offer it, I meant to offer it. I meant to offer 584 to 590, inclusive.

Justice Stephens: It occurs to the Court that possibly this whole matter could be covered by a stipulation. Apparently all the letters tend to prove, that is, subject to your objection as to the materiality of the evidence, is that the Cardiff Gypsum Company applied to Ebsary for purchases of board to fill its orders, and that Ebsary tried to get the consent of USG, which was refused. That has all been shown before, anyway, by Mr. Lenci.

Mr. Bromley: I offered to stipulate that before, but we couldn't agree on it.

Mr. Knuff: As I say, if the Court cares to not receive these in evidence—

Justice Stephens: (Interposing) We are perfectly willing to receive them if they are properly introducible. I simply made that suggestion in the interest of time. It takes a lot of time to identify the exhibits and to consider the objections on them. If they could be covered by a stipulation, it would be proper; but if there is something in them that you think the Government needs to prove, we don't wish to interfere with your proper efforts to prove it.

Mr. Knuff: I don't think there is anything in these that the Government needs to prove that hasn't already been proved by the exhibits introduced through Mr.
5352 Lenci. They simply round out that picture, supplying the missing letters in the Lenci testimony.

Justice Stephens: How about Exhibit 584?

Mr. Bromley: I make the usual objection, and object on the ground that it is immaterial to any charge in the complaint.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 584, was received in evidence.)

Justice Stephens: How about Exhibit 586?

Mr. Bromley: As to the rest of the exhibits, 586 to 590, inclusive, they not only round out the picture, but they are repetitious, because every one of them has heretofore been introduced and received in evidence.

Justice Jackson: Those very documents?

Mr. Bromley: Every one of them.

Mr. Knuff: If that is the fact, then I don't want them in evidence.

Mr. Bromley: Government's Exhibit for Identification 586 is already in evidence in this case as Government's Exhibit 536.

Justice Stephens: And has 587 been offered again?

5353 Mr. Bromley: I am talking about 586.

Justice Stephens: How about Exhibit 587?

Mr. Bromley: That is already in evidence in this case as Exhibit 537.

Justice Stephens: Exhibit 588?

Mr. Bromley: Already in evidence in this case as Exhibit 539.

Justice Stephens: Exhibit 589?

Mr. Bromley: Already in evidence in this case as Exhibit 541.

Justice Stephens: Exhibit 590?

Mr. Bromley: Already in evidence in this case as Exhibit 543.

Justice Stephens: Is there any dispute about that, Mr. Knuff?

Mr. Knuff: I haven't checked it, and if Mr. Bromley says that that is the fact, I would be inclined to take his word for it.

Justice Stephens: Then we will reject those exhibits last mentioned, commencing with 586 and concluding with 590, on the ground that they are repetitive.

Mr. Knuff: The exhibits themselves I don't believe are in; I don't believe that these identical exhibits are in. But there are carbon copies in, which is practically the same thing, and I am not going to insist at all.

5354 Justice Stephens: Very well.

By Mr. Knuff:

Q. Mr. Sensibar, have you told us about all the conversations that you have had with members of the industry with relation to your attempts to purchase gypsum board and gypsum lath at a discount? Are there any other companies, who are defendants here today, that you talked to, that you haven't already testified concerning? A. To the best of my knowledge, that is all.

Q. I want to call your attention—

Justice Stephens: (Interposing) Just a minute, Mr. Knuff.

(The Justices conferred.)

Justice Stephens: Proceed.

By Mr. Knuff:

Q. I want to call your attention, Mr. Sensibar, to page 5543 of the transcript, beginning at line 7, where I asked you this question:

"Q. And will you tell us the conversation that you had with Mr. Henley?"

And you answered:

"A. It arose out of a general discussion regarding the Code that we were then working on. There were a number of questions involved on which there was a difference of opinion, and one was whether the situation should be 5355 created so that jobbers might exist in the industry. That was one of the matters discussed there.

"Several of us met"—and so forth and so on.

And it was suggested that you proceed to answer the question more directly. Do you recall that in your testimony yesterday? A. Yes, sir.

Q. Now, Mr. Sensibar, in 1931, 1932, 1933, and from then on down, did you know what the policy of the industry was with respect to jobbers?

Mr. Bromley: Objected to as immaterial.

Justice Stephens: Do you wish to be heard, Mr. Knuff? It seems to the Court immaterial what the policy of the industry was. That is so general that it can hardly prove anything in the case.

Mr. Knuff: We have stated in the complaint—

Justice Stephens: (Interposing) If you were talking about the policy of the defendants, that might be different, but your question was as to the policy of the industry. I don't assume to rule that that is admissible, but it would certainly be closer to the edge.

Mr. Knuff: The defendants comprise practically the entire gypsum industry. In so far as board is concerned, they are the industry.

Justice Stephens: That is the charge, but we have 5356 to apply the usual rules of evidence, and I think the question as phrased is not proper. The objection is sustained.

Mr. Knuff: Very well, I will rephrase it.

By Mr. Knuff:

Q. Mr. Sensibar, beginning with 1931, did you know what the policy of the defendants was with regard to jobbers of board in the gypsum industry?

Mr. Bromley: May that be answered "yes" or "no", if Your Honor please?

Justice Stephens: Just state "yes" or "no", whether you knew what the policy of the defendants was.

The Witness: Yes, sir, I did.

By Mr. Knuff:

Q. You say you did know the policy? A. Yes, sir.

Q. Of the defendants? A. Yes, sir.

Q. And will you tell us, in your own words, just what that policy was, please?

Mr. Bromley: Objected to as incompetent.

Justice Stephens: I should think, Mr. Knuff, on further reflection, that what you would have to do would be to show what each defendant did and said, which you have made some showing of, and let the Court determine what the policy was; that that is a conclusion which the Court might have to draw.

5357 What do you say as to that?

Mr. Knuff: Well, I wouldn't be inclined to say that the Court is wrong. I thought maybe I could take just a little shortcut. If you want me to develop it—

Justice Stephens: (Interposing) Thank you for your frankness, Mr. Knuff. I think the objection is well taken.

By Mr. Knuff:

Q. Did you ever talk with anybody in the United States Gypsum Company concerning jobbers of board in the gypsum industry? A. Yes.

Q. With whom did you talk? A. First, probably, with Mr. Henning.

Q. When you say "probably", do you mean you probably talked to Mr. Henning, or do you mean you probably talked to him first—which do you mean? A. First—that I probably talked to him first.

Q. When did you talk to him? A. In the summer of 1933, during those Code meetings.

Q. Will you relate what your conversation was? A. In a general way, I can tell you. During the discussions as to the various points that should have been put into the Code, I pointed out that in the past, the business of Cardiff had depended to a large extent on distribution through jobbers—the further back we go in the history of

5358 Cardiff, the more that is true—and that the sales problem for a company such as Cardiff then was,

was a very difficult one, and that jobbers fitted into that situation very well.

Justice Jackson: Are you talking about jobbers or commission men, which?

The Witness: Jobbers. (Continuing) And that we favored a recognized standing for jobbers in the industry.

By Mr. Knuff:

Q. What did Mr. Henning say? A. He said that a good many of the ills of the industry had, in the past, arisen out of the jobber situation, and that they had decided once and for all to put an end to it.

Q. That they had decided once and for all? A. So far as his company was concerned, yes, sir.

Q. That was in 1933? A. Yes, sir, beginning in June.

Q. And did you have any further conversations with Mr. Henning on that subject? A. Well, from time to time, in a general way, because there were a number of us there who espoused the same ideas, that the jobbers ought to be put back in the picture, and it came up a number of times.

Q. Did you talk with anybody else connected with
5359 USG concerning the jobbers? A. I don't remember that I did.

Q. Mr. Henning, then, is the only person connected with USG that you can remember talking to, is that correct? A. Well, I talked about it to a man who at that time was in charge of Chicago sales for USG, but I can't recall his name.

Q. At or about this time, did you ever talk to anyone connected with National? A. Pardon me, that man's first name was Dick, but I can't remember his second name.

Q. I am afraid "Dick" doesn't help me very much.

Mr. Sensibar, did you ever talk with anybody from National concerning National's attitude about jobbers? A. At the same time, yes, sir, I talked with Mr. Burley, who was attending those conferences.

Q. What was your conversation with Mr. Burley, what did you say to Mr. Burley and what did Mr. Burley say to you? A. It was very much along the same lines as my conversation with Mr. Henning. He said that they had had jobbers at the beginning of their business, and that they no longer favored that kind of a set-up.

Q. Now, when was that conversation with Mr. Burley? A. When?

5360 Q. Yes. A. During the summer, say June or July, and maybe into August, of 1933.

Q. Did you talk to Mr. Burley in company with Mr. Henning, or was your conversation with Mr. Henning separate and apart from your conversation with Mr. Burley? A. I can't remember that. These weren't formal negotiations or discussions. A whole group of us spent a whole summer there, and Lord knows, we talked about pretty nearly everything, from time to time.

Q. Are you sure that you talked to Mr. Burley on this subject? A. Yes, sir, I am.

Q. Did you talk with anybody else from National? A. I don't think so.

Q. Did you talk to anybody connected with Certain-teed, concerning the policy of Certain-teed about jobbers? A. With Mr. Warren Henley, who also attended all those meetings.

Q. When did you talk with Mr. Henley, and what conversation did you have with him? A. During this period of June to August, 1933; and the conversations were for the purpose of pointing out our belief that jobbers were justified and necessary in a sound gypsum industry, and asking his cooperation to put them in by means of the Code that was then being established.

5361 Q. And what was Mr. Henley's answer to you? A. That over a period of time it hadn't worked out, and that they preferred not to re-create that situation.

Q. Did you understand from that, that over a period of time the jobbers hadn't been of any benefit to the industry? A. To his company, so far as they were concerned.

Q. Did you talk with anybody in American concerning jobbers? A. With Arthur Black, yes.

Q. When? A. During this period, June, July and August, 1933.

Q. And what conversation did you have with Black? A. Mr. Black was one of those who wanted jobbers retained or re-created, so far as the gypsum industry was concerned, and we were together on that.

Q. Did you talk with anybody from Texas? A. I believe not.

Q. Did you talk with anybody from Kelley? A. No, sir.

Q. Did you talk with anybody from Ebsary? A. I think not.

Mr. Knuff: I don't know, if there are any other gypsum companies in the industry, I would ask the witness; but I can't remember any others.

You may cross-examine the witness.

5362 Cross Examination

By Mr. Bromley:

Q. Mr. Sensibar, the dealer distribution policy that you talked about is a policy applicable to a manufacturer, isn't it? A. I am afraid I don't quite understand.

Q. Well, when you mentioned the phrase "dealer distribution policy"—whose policy would that be, the policy of the dealer or the policy of the manufacturer? A. Well, did I use that in relation to our sales to dealers—is that how it was used?

Q. Don't you remember? A. No, sir.

Q. Well, isn't it the fact that the dealer distribution policy is the policy of the manufacturer of goods to sell those goods, in the gypsum industry, direct to building material dealers and masons' supply dealers, rather than to contractors? A. I get it now. The words I used were "dealer policy". That is right.

Q. Dealer policy? A. Yes. I didn't identify it, as you said, by "dealer distribution policy".

Q. When you used the phrase "dealer policy", you meant the same thing as the dealer distribution policy,
5363 didn't you? A. Yes.

Q. There is no difference, is there? A. I don't exactly know what you mean.

Q. Isn't the dealer policy a phrase which refers to the method of distribution, that is, through dealers? A. Yes, it does.

Q. And the method of distribution referred to in the phrase "dealer policy" is the distribution method of the manufacturer, isn't it? A. Yes.

Q. A manufacturer of gypsum products could either sell them to dealers, or he could sell them to ultimate consumers, such as housing contractors, couldn't he? A. That is right.

Q. And if it is the policy of any particular manufacturer to sell the gypsum product that he makes, only to dealers, then he is following what you call the dealer policy, isn't he? A. You had the word "only" in there. There might be exceptions and still have a dealer policy.

Q. Well, if most of the time he preferred to sell his product to dealers, then you would say that he was following the dealer policy? A. That is right.

Q. And the policy which is opposed to that, or
5364 different from that, would be a policy, on the part of a manufacturer, to sell directly to the ultimate consumer, such as contractors, wouldn't it? A. That is right.

Q. The manufacturer who sells directly to contractors in the majority of his sales, Mr. Sensibar, would be by-passing the dealer altogether, wouldn't he? A. Yes.

Q. And wouldn't you say that the effect of such a policy, that is, to sell to the contractor instead of to the dealer, if indulged in by a manufacturer to any great extent, would antagonize the lumber dealers and masons' supply dealers and building material dealers of the area in which the manufacturer sold? A. Yes.

Q. And that antagonism would spring from the fact that the manufacturer's policy of selling direct to contractors would cause the dealers to lose that business; isn't that right? A. Yes.

5365 So that if a manufacturer has a policy of selling mainly through dealers, he cannot make it a practice to supply his product directly to contractors, because to do so would destroy the trade of the main class of his customers, that is his dealers, isn't that right? A. Within certain limits.

Q. Well, the policies are inconsistent, aren't they? A. If you are going to pursue either policy—well, let me put it this way, if you are going to pursue one policy in a large majority of your business, obviously you cannot pursue the other one.

Q. Now, the policy of your company under Mr. Breen's control was to sell direct to contractors, wasn't it? A. The generally most truthful answer to that is no, that it was not the policy.

Q. What is the truthful answer? A. What I just gave you.

Q. It is still no? A. Yes.

Q. What did you mean when you testified here yesterday that you told these gentlemen whom you went to see that when you came into the picture you changed the Cardiff policy about distribution? A. I mean this, that under the Breen management the company had no size-
able sales organization. They had Tom Breen and
5366 two or three salesmen. That many salesmen naturally couldn't cover the large territory into which we shipped. The result of that was that the company had

a very limited number of dealer outlets, simply because they didn't have the manpower to cover them, and to fill in between these dealer outlets, where they had territories that were not covered by dealers, they sold directly to the contract trade. That wasn't because they preferred to do it that way. They preferred to sell to the dealers.

What I meant by the change in policy was that we undertook, beginning in 1935, to make the outlay necessary to establish a field organization that would cover the territory and that we were willing to make the sacrifice to a very great extent, of not selling to contractors in the territory in between where we had our direct dealer coverage.

Q. Well, whatever the reason for Mr. Breen's policy, a truthful answer to my question would have been that Breen followed the contractor policy, wouldn't it? A. No sir, I gave you the truthful answer.

Q. Well, didn't you just say that because he didn't have enough salesmen, he sold to contractors? A. That is right.

Q. Now, Breen's policy was also to cut prices in order to get business, even below his cost, wasn't it? A. No sir.

5367 It was not? A. It would be very foolish, wouldn't it?

Q. Well, was it or was it not his policy? A. No, of course not.

Q. You would agree, wouldn't you, that the Cardiff company under Breen's policy, did not follow what you thought were good business policies? A. That is right.

Q. And isn't it the fact, Mr. Sensibar, that a manufacturer which supplied Cardiff with materials under a distributing arrangement, or some similar wholesale arrangement, would antagonize the dealer-customers of the manufacturer? A. It probably depends upon what period you are talking about.

Q. Under the Breen management. A. Until about 1930, I couldn't say. I can tell you about after 1930.

Q. Well, I was asking you as an experienced businessman. Wouldn't it be unwise for a manufacturer who was following the dealer policy, to have a distributor who was following the contractor policy? A. In that situation, if you want my opinion, it is no, that it would have been wise for them to have made that kind of a deal with Tom Breen.

Q. And you don't think that if one of the board
5368 manufacturers had made that arrangement it would have resulted in antagonizing the dealer-customers of that manufacturer in the territory in which Breen operated? A. You are dealing there with a lot of people. Each one has his own ideas, and it is pretty hard to generalize about a whole group. Some would have objected, but I believe that, taking it all-in-all, it would have been wise for them to have gone along with him on that policy.

Q. But you concede, don't you, that a business man might have been reasonable in concluding that he would prefer not to distribute through a distributor who sold to contractors? A. That he would have been what?

Q. Reasonable in his judgment, even though you disagreed with him? A. A lot of people can disagree with me and still be reasonable.

Q. And your answer to my question is yes, then, isn't it? A. No, I don't think I can say that. I don't think it was a reasonable policy by USG.

Q. The Cardiff Company, during all of this time, would, if supplied with board by any one of the manufacturers, have been in competition with the manufacturer
5369 who sold to it, wouldn't it? A. Yes sir.

Q. In other words, for one of these board manufacturers to sell to Cardiff would have just added to the competition that that manufacturer would have had to meet, would it not? A. In an academic way, yes sir. It might also have added to his profits.

Q. Suppose the Cardiff Company had been supplied board out of a manufacturer's mill at Fort Dodge. A. Yes sir.

Q. The Cardiff Company and the supplier with the mill located there, would have been soliciting the same trade, wouldn't they? A. That is right.

Q. Don't you call that competition for business? A. Yes. That was just the situation when I talked with Mr. Harrison, and he thought it would be good for National.

Q. But some other salesman might conclude that it would be bad for a supplier to furnish Cardiff goods to compete with it, isn't that right? A. It was usual practice in the trade.

Q. Now, won't you answer the question? A. Will you repeat it?

(The reporter read the question as above recorded.)

The Witness: Yes.

By Mr. Bromley:

5370 Q. Now, your company, you said, went into bankruptcy in 1935—that is right, isn't it? A. That is right,

Q. That means, doesn't it, that a considerable number of the creditors of your company were left unpaid? A. In cash, yes.

Q. And don't you think that a manufacturer who was approached to sell the Cardiff Company, board, after 1935, would give some consideration to the credit risk? A. Yes, but no one ever questioned that. Nobody ever said to me, "We would sell you, Ezra, but we are afraid you can't pay your bills."

Q. You know, don't you, that your Dun and Bradstreet reports during all the period subsequent to 1935 were, to say the least, very bad? A. No, I don't, I never saw a Dun and Bradstreet report on our company.

Q. Did you ever give a statement to Dun and Bradstreet? A. No sir.

Q. It is a fact, isn't it, Mr. Sensibar, that in 1938 and 1939 there was an upturn in building which left the board manufacturers without the capacity to fill their own customers' needs? A. No, you have that date a little wrong. That upturn was in 1937. 1938 was a worse year than 1937.

5371 Q. 1937 was the year, was it? A. 1937 had a considerable upturn, yes. 1938 had a downturn.

Justice Stephens: We will take the afternoon recess.

(Whereupon a five-minute recess was taken, after which the trial was resumed as follows:)

Justice Stephens: Mr. Steffen, do you wish to get away at quarter of four tonight?

Mr. Steffen: I would like to, your Honor.

Justice Jackson: Can Mr. Knuff carry on until four?

Mr. Steffen: Oh, I think so.

Justice Jackson: Then you can go at any time you want to. (Laughter).

Mr. Steffen: Thank you.

Justice Stephens: Proceed, Mr. Bromley.

By Mr. Bromley:

Q. In your talks with various representatives of the different board manufacturers that you have mentioned, you

realized at all times, didn't you, that you were asking for a supply of patented board? A. Yes, sir.

Q. And your knew, of course, that the patented board which you were seeking was made by these companies, as licensees under licenses with USG, which did not give those licensees the right to sell you that patented product without the consent of the licensor? A. In a gen-

5372 eral way, that was my understanding.

Q. You have testified before about these various talks which you had with the representatives of the manufacturers haven't you? A. I have, yes sir.

Q. And you testified at the criminal trial about them, didn't you? A. That is right.

Q. And this time you have dressed that testimony up a little, haven't you? A. No sir.

Q. You haven't? A. Not a bit.

Q. Haven't you dressed it up a little to emphasize the part that USG played in it, and to exaggerate the discussions about cutting prices on plaster? A. If anything, my friend, there are hundreds of little talks here and there along the line that I have forgotten. This was over a period of 10 or 12 years, and if I could give you the whole story it would be a lot more lengthy and detailed than what I have given you.

Q. Didn't you try to give it in the criminal case? A. I did my best, yes sir.

Q. You want the defendants to lose this suit, don't

5373 you? A. Yes.

Q. And you were disappointed in the result of the criminal case, weren't you? A. Naturally.

Q. And it is your purpose now, and has been for some time, to bring a treble damage suit against the defendants, isn't it? A. No.

Q. You have already consulted counsel about it, haven't you? A. It so happens—

Q. (Interposing) Wait a minute. Can't you tell us that without talking about it? A. Yes, I can say no, I have not consulted counsel about it.

Q. But it so happens that there are two lawyers on your board of directors, doesn't it? A. That is right.

Q. And you have talked to them about it, haven't you? A. Quite naturally. The question of the generally unfavorable losing situation, you may be sure, has been discussed more than once. Those people are stockholders. It is their money as well as mine.

Q. And you are going to sue these defendants for treble damages whenever this case comes to an end, aren't
5374 you? A. I don't know, Mr. Bromley. If we have a means of recovery, and if the company is able to afford the expense of the effort involved to get some recovery, and try to get something back for our stockholders, we certainly are going to try to do everything we can in that connection.

Q. To put it shortly, if the Government wins this suit, then you will sue the defendants for treble damages, won't you? A. No. The answer to that is no. It depends on a whole lot of circumstances, and I cannot give you a categorical answer that you want, that we will sue USG—I don't know.

Q. You mean you have not yet finally decided, is that it? A. I presume in the end it will be a combination of a legal question and a business question, Mr. Bromley.

Q. Then you have not yet finally decided, have you? A. No, naturally.

Q. Well, you threatened to sue USG once before, didn't you? A. No.

Q. Didn't you go to the Department of Justice and complain to it? A. No, I did not.

Q. Didn't you have a conference with a lawyer named Price in Chicago, at which you threatened to sue
5375 USG? A. No sir, that wasn't the way it was at all.

Q. It wasn't? A. I never understood that Mr. Price was a member of the Department of Justice, either.

Q. I don't mean to intimate that he was. Didn't you go to a lawyer named Charles Price, counsel for USG, and threaten to bring a suit against USG? A. No sir.

Q. What was this mention you made this morning about putting the matter up to some Government agency—you meant the Federal Trade Commission, didn't you? A. Frankly, I didn't know who I meant, but I felt at that time, in 1938, that this situation was so outrageous, which we had been trying to get corrected for several years, and that very evidently USG didn't want to correct it, and without knowing what agency, I felt that certainly some agency in Washington would be interested in it, and I suggested that we go and present the matter to them, not by way of a court procedure, but by way of getting an opinion about it, and that was rejected.

Q. Like the Department of Justice? A. I tell you I didn't have in mind what agency it might be, I didn't know.

Q. You did have the Department of Justice in
5376 mind, didn't you? A. No sir, I didn't have any department in mind.

Q. Didn't you have the Federal Trade Commission in mind? A. I didn't have any department in mind. I didn't know, I am not a lawyer, Mr. Bromley.

Q. And you testified before the Grand Jury, didn't you? A. Yes, I was subpoenaed.

Q. And you have tried to get others to testify for the Government in this case, haven't you? A. No sir.

Q. Well, you testified to the conversation which you said you had with Mr. Holland of Universal in 1933, during the criminal trial, did you not? A. Yes, I think I did.

Q. And at that criminal trial you told the Court and jury there as fully and frankly as you could remember, what your conversation with Holland was, didn't you? A. I think I did.

Q. And when you testified about that same conversation here, you added something—do you remember? A. No, I don't.

Q. Don't you remember that when you testified here you added a reference to a mention of Cardiff cutting prices on gypsum plaster? A. Is your question whether I re-
5377 member adding something to it; is that your question?

Q. No. My question was intended to be—when you testified here, didn't you add something that you had not said at the criminal trial at all? A. I don't know. In each case I have tried my very best to remember everything that happened and to relate it, and I am sure I can't tell you whether there is something more in my testimony yesterday or today than there was two years ago.

Q. Can you tell me now whether you said at the criminal trial that in your Holland conversation there was talk about Cardiff cutting prices on plaster? A. I don't know. Is there a record of my testimony of two years ago here?

Q. Yes. Would you like to see it? A. I would be very glad to.

Q. Do you recall that you told us here when you were describing your conversation with Holland, that Holland said something about Cardiff cutting prices on plaster? A. Yes, I think I did. In any event, he said something about it.

Q. Now, you asked if the criminal record was here. Haven't you read your testimony in the criminal trial? A. Yes sir, I have.

Q. That is one of the first things you did when you
5378 came to Washington, wasn't it? A. A month ago, yes sir.

Q. You went to Mr. Knuff's office and read it over carefully, didn't you? A. Yes sir.

Q. And that little black book you have got in front of you contains the notes you made when you read over your criminal testimony, doesn't it? A. You are welcome to it.

Q. Could you answer the question? A. No. What this contains is notations as to the several years when these conversations were held, and the names of the people with whom I held the conversations during particular years, as nearly as I can remember. You are quite welcome to it, there is no secret about it.

Q. You had that little black book at the criminal trial, did you? A. No.

Q. You didn't? A. No.

Q. When did you make it up? A. About ten o'clock last night.

Q. And you have been consulting it right along during your direct examination, haven't you? A. Today, yes sir.

5379 Q. Did you tell any representative of the Department of Justice about these conversations prior to the criminal trial? A. Yes.

Q. And did you aid the Department of Justice in the preparation of the bill of particulars that had to do with the conversations that you had had with these manufacturers? A. No sir, I never knew anything about it.

Q. Well, now, would you look at your criminal testimony?

(Copy of testimony of the witness on the criminal trial was handed to him.)

By Mr. Bromley:

Q. Do you recall that you testified this morning, or rather yesterday afternoon, that in your talk with Holland in 1933, Mr. Holland—

Mr. Steffen: (Interposing) May we have the page, please?

Mr. Bromley: Page 5530.

By Mr. Bromley:

Q. (Continuing)—that Mr. Holland said, "that there was a general impression in the industry that Cardiff had been

cutting prices on gypsum plaster; that he doubted, under those circumstances, whether we could make a connection to get board."

You remember that? A. Yes sir.

5380 Q. Now will you look at your testimony beginning at page 2497 of the criminal case? It isn't there, is it? A. No. I am sorry I forget this point. I should have testified to this here, this morning or yesterday.

Q. Now what are you referring to? A. This, you just asked me to read.

Q. You are sorry you forgot what? A. Shall I read it?

Q. Just give me a reference to it. A. Beginning at line 17 on page 2497 and going over to page 2498, line 14.

Q. So that when you testified here yesterday afternoon you left out altogether what you had said at the bottom of page 2497, didn't you? A. I overlooked it, yes sir.

Q. You didn't say anything about it, did you? A. No sir.

Q. Just read what it was you told us in the criminal case about your Holland conversation, will you? A. Yes.

"I explained to him the desire of our company to have a connection similar to other plaster manufacturers in the industry, such that we could buy board and lath at a dis-

5381 count under the price at which we would sell it to the building material trade. He replied to me that as far as they were concerned there would be some objection to that, that our men would be out visiting the same building material dealers to a very large extent, to whom they were selling lath and board, and that that might be an objection."

Q. You didn't mention that yesterday afternoon at all, did you? A. I overlooked that.

Q. Well, it was a very important overlooking, wasn't it? A. I am sure I don't know. Mr. Bromley—

Q. (Interposing) That happened— A. (Interposing) Now wait a minute.

Q. That happened, didn't it?

Mr. Steffen: Let the witness answer. He was continuing to answer that question.

Justice Stephens: Finish your answer.

The Witness: I was about to say to Mr. Bromley that I am now being asked to recall details of conversations that took place over a period of years. This one took place over eleven years ago. I did my best at the criminal trial to recall those conversations, and I did my best here. Naturally, some things I recall now that I didn't then, and vice versa.

By Mr. Bromley:

5382 Q. So that it would be very easy for you unconsciously and not meaningly, to create an entirely false impression about these conversations, wouldn't it? A. No sir, because I am telling all the truth I can remember in both instances.

Q. Well, let's see if that is so.

You told us here yesterday afternoon that Mr. Holland had told you, in answer to the question,

"Q. Did he tell you why they had refused it?"

that Mr. Holland had said,

"A. He told me that there was a general impression in the industry that Cardiff had been cutting prices on gypsum plaster; that he doubted, under those circumstances, whether we could make a connection to get board."

Now, you didn't mention that in the criminal case at all, did you? A. I don't know, I haven't read through the rest of this testimony.

Q. Well, read it.

Mr. Knuff: If your Honor pleases, I haven't any objection if Mr. Bromley wishes to incorporate in the record the entire testimony of this witness given at the criminal trial.

Justice Stephens: The record may show that you are willing that that be done.

By Mr. Bromley:

5383 Q. It isn't there, is it? A. No sir.

Q. Now yesterday afternoon you also said that you said to Mr. Holland:

"I explained to him the situation of the Cardiff Company, that the control had changed hands, and that I understood the objections of the industry to the policies of the company under the management that had existed up to that time; but I explained that a change had taken place, and in view of that I asked him what he would advise us to do, as newcomers entering into the control of the company."

Now you didn't say anything like that in the criminal case either, did you? A. I think that is correct.

Q. Now is it true— A. (Interposing) Wasn't that a later meeting I was talking about yesterday, than this one?

Q. Well, was it? A. I think so.

Q. You think so? A. Yes. Didn't I tell you yesterday, or tell the Court, that there were several meetings with Mr. Holland, not just one?

Q. Well, what is your recollection, one? A. There were several.

5384 Q. There were several? A. Yes. We had a lot of those general discussions throughout that summer from June to August.

Q. Well, is it your testimony that in the criminal case you were only talking about one conversation, whereas in this case you were talking about several? A. I have done my best to remember the conversations, the several times when they were had, Mr. Bromley.

Q. I want to know what you mean by what you just said. Were you trying to create the impression that in the criminal case you were only talking about one conversation, and that in this case you were talking about several? A. I don't know, I am sure, whether I was talking in the criminal case about one or more.

Q. You don't, in spite of the fact that your eyes are now directed precisely at the question. A. Maybe it says so here.

Q. Well, doesn't it say so? A. I don't know.

Q. Look at line 13: "There were a number of conversations, several of them took place in his office in Chicago.

"Q. Would you relate these conversations for the Court and jury, please?"

Do you see that? A. Yes.

5385 Q. Now it is true, isn't it, as you testified in the criminal case at the bottom of page 2497, that whatever else Holland may have said to you, he told you that since your men would be out soliciting the same material dealers to a very large extent, as his men, that that might constitute an objection to your buying board from Universal? A. Yes sir, and he afterwards withdrew that and was perfectly willing—

Mr. Johnston: (Interposing) We cannot hear him.

The Witness: He afterwards withdrew that as an objection and said that he would be willing to sell us.

By Mr. Bromley:

Q. Well, did you say anything about that in the criminal case? A. I don't remember.

Q. Well, look at it and see. It is all there in the space of two or three pages. A. Yes. I said:

"I pointed out to him then that the discount that we were asking for, and which was customary, was a discount which really is smaller than what it costs to sell the board and

lath. So that even if it were true that we would be selling to his customers, his company would be just as well off to have us to sell it as they would themselves. He recognized that",

and so on.

Q. Now, you wanted the Court to understand from
5386 your testimony here, didn't you, that Holland was telling you that none of the board companies would sell board to you? A. That that was his opinion, yes sir, and that he thought that the best bet would be to take it up with American, that we would have more chance with them.

Q. You didn't say anything about that in the criminal case, didn't you? A. Maybe not.

Q. Well, isn't it the fact, Mr. Sensibar, that it was Mr. Holland who suggested that you go to the American Gypsum Company? A. Yes, I just said so.

Q. Well, you don't mean to say, then, that he told you that none of the companies would sell you board? A. That in his opinion it wasn't likely that they would.

Q. Well, what did he want you to go to American for? A. He thought that was the best possibility.

Q. And thereafter you went to American? A. I did, yes.

Q. Now, in your conversation with Mr. Black—you testified about that conversation at the criminal trial, didn't you? A. Yes.

Q. You told us here that the decision as to whether Black would sell to you would depend upon what
5387 USG would permit American to do—didn't you? A. In the last analysis, yes.

Q. Now, when you gave that testimony here, you meant by that, that Black said it would depend on whether USG would grant American a consent to sell your company patented board, didn't you? A. Yes.

Q. Now in the criminal trial, at page 2500, you testified that Black told you he would have to sell his own people on the idea that this would be a profitable connection. Do you see that? A. I think I testified to that here too.

Q. You do? A. That is my impression, yes sir.

Q. Well, is that the fact, is that what Mr. Black told you? A. That is right.

Q. Now when you told the story here you said, didn't you, that there was a lengthy discussion on Cardiff's sales policies with reference to plaster? A. Well, there was, in any event. I think I said that.

Q. Did you say it in the criminal case? A. I don't remember.

Q. Well, can you look and see? A. Yes.

5388 Q. Look at page 2500. A. No, I don't see that here.

Q. No reference to plaster prices at all appears in the criminal case, does there? A. Oh, yes.

Q. So far as your conversation that we are talking about now? A. It seems to me that I testified about that Community Housing Project in Indianapolis.

Q. You realize that I am asking you about 1933? A. Here?

Q. Yes. A. Yes.

Q. There was no mention in your criminal testimony about any plaster prices in the 1933 meeting with Black, was there? A. No, I don't see it.

Q. Now you went to see Mr. Henley of Certain-teed in 1933, you said. Is that right? A. Yes, I think that is right.

Q. You couldn't remember that without that little book, could you? A. Does it bother you that I use the book?

Q. Could you remember it without your little

5389 book or couldn't you? A. I think so.

Q. Well, what do you look at it each time for? A. If it bothers you, I won't.

Q. What do you look at it for? A. Just to be sure.

Q. What did you use last night when you made that little book up? A. What did I use?

Q. Yes, to refresh your recollection, if anything? A. I looked over something similar to this (indicating copy of minutes of the criminal trial which had previously been handed to the witness) of my testimony at the criminal proceedings.

Q. And you had your criminal testimony last night? A. That is right.

Q. I thought you told me a minute ago that you had read it over a month ago. A. That is right.

Q. But you read it over again last night? A. I scanned through it, picking out the dates.

Q. And you made those notes from your criminal testimony? A. That is right. Well, a lot of them were added because there were a lot of things that weren't in the criminal testimony at all.

Q. There were? A. Yes.

5390 Q. Do you know how that happened? A. I was there when part of it happened, anyway. The Certain-teed testimony was excluded.

Q. Is that the reason for all of your omissions in your criminal testimony? A. I don't think I know what you mean by "omissions" there.

Q. Well, you say you didn't testify to the Certain-teed conversations. A. Yes, it wasn't admitted.

Q. Because they were objected to? A. Yes.

Q. Now there were a great many other conversations that you testified to here that you didn't testify to at the criminal trial at all, weren't there? A. I don't know.

Q. You don't know? A. No sir.

Q. You can't even tell from the little book? A. It seems to me that Texas was not touched on—

Q. (Interposing) Was there an objection to Texas at the criminal trial? A. I don't know, I'm sure.

Q. Don't you know that Texas was listed in the bill
5391 of particulars in the criminal trial? A. I don't know, no sir.

Q. Don't you know that you gave no testimony with respect to any conversation with anybody from Texas at the criminal trial? A. I just said I think there was nothing in the criminal trial about Texas.

Q. From you? A. That is right.

Justice Garrett: I had the impression that Texas was not involved in that indictment. Am I wrong about that? Where did I get that impression?

Mr. Bromley: That is right, your Honor; it was named in the bill of particulars, however, under this charge, and testimony of course was received as to it, because it was alleged to be a co-conspirator, although not a defendant.

By Mr. Bromley:

Q. Now didn't Mr. Henley tell you in 1933 that he would see whether he could convert other members of his organization to his own belief that you ought to be sold? A. Yes, I think he did.

Q. Now, when you said, "other members of the organization", you meant other employees or officers of Certain-teed, didn't you? A. Yes.

Q. You told us yesterday that Mr. Henley had
5392 told you that there was a constant stream of complaints from his sales organization about situations where Cardiff had sold plaster off the market price. Do you remember that? A. I do.

Q. In using the word "complaint", you meant merely, did you not, reports by Certain-teed's salesmen to the head of the Certain-teed sales department? A. Reports in the nature of complaints, yes sir.

Q. But whether they were reports or complaints, they were from Certain-teed's salesmen to Certain-teed's executives? A. That is right.

Q. Now was there any basis in fact whatsoever for Henley's statement that Cardiff was constantly cutting prices on plaster? A. Would you mind repeating that?

(The reporter read the question as above recorded.)

The Witness: I don't think I said that Mr. Henley said that. What he said was that there was a constant stream of complaints coming to his desk regarding—

By Mr. Bromley:

Q. (Interposing) Regarding what? Regarding the cutting of prices on plaster by Cardiff, wasn't it? A. That is right.

Q. Let me ask you, was there any basis in fact
5393 for that statement by Mr. Henley? A. Well, I am not trying to quibble with you. I don't question that he had those reports from his salesmen, if that is what you mean?

Q. Well, the reports were not true, were they? A. In general, no. It is a constant experience of all of us that when a salesman loses an order, he sends a complaint to the home office that somebody else cut the price.

Q. That is commonly used by salesmen as an alibi for failure to get orders, isn't it? A. I'm afraid it is.

Q. Wasn't this statement that Henley made to you a statement with respect to the period of time after you had taken over control of Cardiff? A. No, it was a statement regarding his general experience up to that time in 1933; during the last three years of that period, I did, in fact, have stock control of the company, but I was not directing the sales policies of the company until sometime after 1933.

Q. Well, would a statement like that have been true after you commenced to direct the sales policies of the company? A. No sir.

Q. Were you a price-cutter? A. No sir.

Q. Was the Cardiff Gypsum Company a price-
5394 cutter on plaster? A. No sir.

Q. After you took control of the company, in the sense of directing it, it seldom, if ever, cut a plaster price, did it? A. That is true.

Q. Now is it your testimony that Mr. Henley, after telling you that he had been receiving a constant stream

of complaints about Cardiff's price-cutting, nevertheless voluntarily offered to enter into a business association with you? A. No, that wasn't my testimony.

Q. Well, you testified that he did say that he was in favor of doing business with you? A. That is right, he did.

Q. He did? A. Yes sir.

Q. After mentioning this constant stream of complaints, he nevertheless said that he thought Certain-teed ought to do business with you? A. As a result of considerable discussion and negotiation, he did, and I might say, after some investigation of some of those complaints.

Q. Well, in the criminal case you testified about a conversation that you said you had with Mr. Henning
5395 in 1935—do you remember? A. No, I don't.

Q. Well, do you remember that you testified that you had a conversation with Mr. Henning which was initiated by Mr. Knode? A. Did you just say Mr. Henning or Mr. Henley?

Q. Henning. A. I am sorry, I understood you to say Mr. Henley. Would you ask that again, please.

Q. You testified about a conversation you had with Mr. Henning in 1935, didn't you? A. Yes sir.

Q. And here, after tesifying about it, you said you were sure that that conference was initiated by Mr. Knode, do you remember that? A. Yes sir.

Q. And do you recall the other day when you first testified about this conversation that you said that after you had talked with Mr. Knode, he referred you to Mr. Keady? A. Yes, I became confused about Mr. Keady and Mr. Charles Henning, as to that particular conversation.

5396 Q. Then I take it you will want to withdraw all of your testimony about your alleged conversation with Mr. Keady in 1935? A. I think I corrected that at the time.

Q. I do not think that you did, and that is why I ask it. Whether you did or not, don't you now want to withdraw your testimony about any alleged conversation with Keady in 1935? A. Well, wasn't that corrected at that time to Mr. Charles Henning from Mr. Keady?

Justice Jackson: I thought it was corrected.

Mr. Knuff: I thought it was.

Mr. Bromley: Well, it leaves us in this state: He has testified at length to a conversation with Keady which he had in 1935; and then he says he didn't have a con-

versation with Keady, he had one with Henning, and he proceeded to tell what the Henning conversation was,—which leaves us with his testimony at pages 5548 to 5550, all about what was said between him and Keady, when nothing was said.

Justice Stephens: Well, you can bring out by further cross-examination that nothing was said between him and Keady, I suppose. You may proceed.

By Mr. Bromley:

Q. Nothing was said between you and Keady in
5397 1935, at all? A. That is correct.

Q. And the conversation that you described as having had with Keady could not apply to what you and Henning talked about, because you talked about Keady saying he was a newcomer in the business, and things that Mr Henning never could have said? A. That is right. That conversation with Keady actually took place some time later.

Q. Well, you testified that it took place in 1938, and you later on told us what it was, in detail? A. I think that is right.

Q. So I ask you now, don't you want to withdraw the testimony that you gave with respect to any conversation with Keady in 1935? A. I didn't talk with him at all in 1935.

Q. But you are sure, you say, that your talk with Henning was initiated by a conference with Mr. Knode? A. Yes, sir.

Q. Now, you didn't say anything about that in the criminal case, did you? A. I don't remember.

Q. Would it surprise you to know that you didn't? A. No, it wouldn't surprise me.

Q. Will you look at page 2524 of the transcript
5398 in the criminal case? A. Yes, sir.

Q. There is no question of it there, is there? A. No, sir. This is 1933, isn't it?

Q. 1935, I think. A. If you will look at line 17.

Q. I have seen line 17, and in line 24 the question is:

"Q. Did you ever talk with Mr. Henning in 1935? A. Yes, sir, I did."

And over the page at 2525, you go on to tell all about that, don't you? A. Yes, I go on to tell about it.

Q. And you don't mention a thing about Mr. Knode, do you? A. No, not there; no sir.

Q. Do you know of any other place in the criminal case where you did mention him with respect to your talks with Henning? A. I don't remember.

Q. Now, your discussion with Henning in 1935 was to the effect that you wanted Henning, or USG, to sell you patented gypsum board, wasn't it? A. Yes, sir.

Q. And isn't it the fact that Mr. Henning refused
5399 to make any arrangement with you? A. This is 1935?

Q. Yes, 1935. A. Yes, that was the conclusion of it.

Q. Well, Mr. Henning never made any arrangement with you at any time, did he? A. No.

Q. Now, it was at this meeting in 1935, wasn't it, when your proposition was that if Henning gave you a supply of board, you would resell not only the board but your plaster at market prices? A. You say that was the proposition?

Q. That you made to Henning.

Mr. Knuff: I don't recall the witness testifying that he made any proposition to Henning at all, in the form of a proposition, as such.

Mr. Bromley: Are you objecting to the word "proposition"?

The Witness: No, I was thinking about the whole thing.

Justice Stephens: Counsel for the defendants is entitled to ask the witness what he did propose, if anything, to Henning.

Mr. Bromley: I will withdraw the question.

By Mr. Bromley:

Q. Didn't you say to Henning that if Henning gave you a supply of board, you would resell not only the board but you would sell your plaster at market prices?
5400 A. That was the time, as I recall, that I pointed out to him—

Q. (Interposing) Can't you answer my question? A. I am doing it.

Q. Can't you tell me "yes" or "no"? A. Do you mind letting me go on for a minute?

Q. I mind, yes—

Justice Stephens: (Interposing) You should answer the questions responsively, Mr. Sensibar, if you truthfully and accurately can.

What is the last question?

(The question referred to was read by the reporter.)

The Witness: No.

By Mr. Bromley:

Q. Well, haven't you told us here, with respect to every conversation you had with everybody, that you told them the Cardiff Company's policy had changed, and you were going to sell plaster at market prices? A. Now, if you will let me, I will tell you what I did tell him.

Q. Can't you answer that question "yes" or "no"?

Mr. Knuff: May it please the Court, Mr. Bromley before asked the witness to answer a question "yes" or "no". The witness answered the question, and then
5401 he obviously meant to explain the answer, and before he could even explain the answer another question was fired at him. I think it is unfair to pin a witness down to a "yes" or "no" answer without giving him an opportunity to explain his answer.

Justice Stephens: Well, the Court has admonished the witness at the beginning of his examination, and also, in effect, a moment ago, that he must answer responsively, if he can do so truthfully and accurately, which clearly implied that he need not if he cannot do so truthfully and accurately. But if the question can be answered, truthfully and accurately, "yes" or "no", then the examining lawyer is entitled to have it answered in that manner. Then, if an explanation is thought necessary by adverse counsel, he can bring it out on re-direct.

Mr. Knuff: I think that is all true, and I have no quarrel with Your Honor on that; but the witness clearly indicated that he wanted to explain his answer, and I think in fairness to the witness he ought to be allowed to explain the answer.

Justice Stephens: Read the question.

(The record was read by the reporter as requested.)

Justice Stephens: Can you answer that question "yes" or "no", correctly and truthfully, whether you did or did not tell that to Mr. Henning?

5402 The Witness: I did not.

Justice Jackson: Is it capable of being answered by a "yes" or "no" answer?

The Witness: Not very well. The best answer I can give is "no".

Justice Stephens: You are not required to give a "yes" or "no" answer. But I don't quite see why that question can't be answered, truthfully and accurately, "yes" or "no". Either you told him that or you didn't tell him.

The Witness: I didn't tell him.

Justice Stephens: You see, Mr. Sensibar, you are not supposed to argue this case with opposing counsel. Anything that needs to be explained, Mr. Knuff will have an opportunity to bring out on re-direct-examination. It seems to me that that question can be answered, truthfully and accurately, "yes" or "no". That answer may stand.

You may conduct re-direct-examination on this topic if necessary, Mr. Knuff.

We will take a recess.

(Thereupon, at 4:00 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Monday, March 27, 1944.)

5403 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Monday, March 27, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5406 Justice Stephens: Take the witness stand, Mr. Sensibar.

Thereupon, EZRA SENSIBAR, the witness on the stand at the time of adjournment, resumed his testimony as follows:

Cross Examination (resumed)

By Mr. Bromley:

Q. When did you start directing the sales policies
5407 of the Cardiff Company? A. I had some hand in them from about 1933, Mr. Bromley, and entirely after 1935.

Q. Well, just what hand did you have in them between 1933 and 1935? A. I had conferences from time to time with Tom Breen, who at that time was Manager and Vice President, and was actively in charge of the affairs of the company. I had conferences with him between 1933 and 1935, from time to time. After the reorganization in 1935, I was made President, and took the entire responsibility for the sales policies.

Q. Prior to 1935, your office was in Fort Dodge, was it? A. Yes, sir.

Q. So that you saw Mr. Breen daily, did you? A. No, sir, I never lived in Fort Dodge. I was living in Chicago during that period.

Q. How often were you in Fort Dodge? A. I should say every four or five or six weeks, for a couple of weeks at a time, or something like that.

Q. Then you were in the Chicago office of the Cardiff Company, is that right? A. That is right.

Q. And you spent all your time in the Chicago Cardiff office instead of the Fort Dodge office? A. Well, the time I wasn't in Fort Dodge, yes, sir.

5408 Justice Stephens: How long a period? I didn't quite understand one of your answers. I understood you to say about every six weeks for two weeks. Do you mean you would stay in Fort Dodge for a couple of weeks at a time?

The Witness: That is right, sir.

Justice Stephens: I see. Thank you.

By Mr. Bromley:

Q. You started with the company in 1930, you said? A. As a stockholder, and about that time as Vice President, yes, sir.

Q. And you were a Vice President between 1933 and 1935, weren't you? A. That is right.

Q. So you didn't change the nature of your activities between 1930 and 1935, so far as Cardiff was concerned, did you? A. I became increasingly active in its affairs, Mr. Bromley. I started out as a stockholder in 1930, with

no knowledge whatever of the business; and as time went on, I took a more active hand in it.

Q. Well, you started out as Vice President, too, didn't you? A. Shortly after I acquired a stock interest in the company, I was named Vice President, yes, sir.

5409 Q. Did you ever live in Fort Dodge? A. You mean was it ever my legal residence, did I ever have my family there?

Q. Yes, sir. A. No, sir.

Q. Not even after you became President of the company? A. That is correct.

Q. How often would you go out there after you became President? A. Well, for quite a period during 1935 and 1936 and 1937, I must have spent half my time there; and less after that.

Q. And the rest of your time you spent in the Chicago office, did you? A. Not all of it, no, sir.

Q. Now, wasn't it October, 1934, when the involuntary petition in bankruptcy was filed against Cardiff? A. No, my recollection is definite that it was in January of 1935.

Q. Do you differentiate between the adjudication and the filing of the petition? A. Well, sir, you are in pretty deep for me. I am sure I don't know.

Q. What I mean by that is, don't you remember that the proceedings which resulted in the bankruptcy of your company were started in the fall of 1934?

5410 A. No, sir, my recollection is that the bankruptcy took place in January of 1935.

Q. At several places in the record, you used the word "independent" in connection with the phrase "independent members of the industry". Do you remember that? A. Yes, sir.

Q. By the use of the word "independent", you intended to indicate, did you not, single-plant manufacturers? A. Yes, sir.

Q. At all times when you had meetings or conferences with representatives of the United States Gypsum Company, you knew that it was selling board to a manufacturing distributor named Wasem Plaster Company, didn't you? A. Yes, sir.

Q. You knew the head of that company, Henry Wasem, didn't you? A. Yes, I knew him.

Q. He lived in Fort Dodge, didn't he? A. That is right.

Q. And his plant was located in Fort Dodge? A. That is right.

Q. It is an old, well-established plaster manufacturing company, isn't it? A. Yes.

Q. And their plant and place of business is very
5411 close to the plant and place of business of Cardiff?
A. That is right.

Q. And, of course, Cardiff and Wasem were in competition with one another, weren't they? A. Yes, sir.

Q. Serving almost exactly the same territory? A. That is true.

Q. And you knew that the Wasem Company had had a close business association with the United States Gypsum Company for more than 20 years, at the time you got into the Cardiff business; isn't that right? A. No, I can't say I knew that. I knew it was old; I didn't know how old it was.

Q. Wasem manufactured plaster but did not manufacture board, isn't that right? A. Yes, that is correct.

Q. And Wasem had always purchased its board from the United States Gypsum Company, so far as you knew, hadn't it? A. I could only say about the time after I became interested in Cardiff. So far as I know, they purchased from USG after that, yes, sir.

Q. Now, isn't it a fact that Mr. Henning, when you saw him for the first time back in 1935, told you that, of course, it wouldn't be good business for USG to supply board
to another manufacturing distributor like Cardiff,
5412 which was practically in the backyard of the Wasem
Company? A. Is it a fact that he told me that?

Q. Yes. A. No, sir, it is not a fact. He never told me that.

Q. Do you say that that situation was never discussed between you? A. That is correct, it was never brought up as an objection.

Q. Does that ~~mean that you~~ didn't mention it, either? A. Well, now, I can't say. I might have said to him that we ought to be treated the same as Wasem. But that was never raised as an objection.

Q. Well, did Mr. Henning remain silent when you said you thought Cardiff ought to be treated the same as Wasem? A. I don't recollect definitely that I told him that. I just said to you that I might have said it in that way.

Q. Don't you recollect that he replied very promptly, "Well, I don't see how we can sell you, with Wasem right there in the same territory."? A. No, I just told you that

he never raised any such thought as an objection, Mr. Bromley.

Q. I am asking you whether he didn't raise it in response to your raising the matter? A. Well, first of all, I don't know whether I raised it that way, but he never
5413 raised it as an objection. I am clear on that.

Q. You can't remember whether or not you mentioned it, but you are sure he didn't mention it; is that it? A. That is correct.

Q. You never asked Henning, at any time, if he had refused to grant consents to Universal or American or Certain-teed to sell you, did you? A. I don't believe I did.

Q. Now, what is the date which you fixed as the date of the conference that you had with Messrs. Knode, Keady and English, of the United States Gypsum Company? A. To the best of my recollection, that was in the fall of 1938.

Q. There was only one such conference at which all four of you were present; isn't that right? A. That is true.

Q. Would it surprise you to know that that meeting was held on November 7, 1939? A. No, sir, it wouldn't surprise me.

Q. You might be a year off in the date that you testified to here Friday, might you not? A. Yes, sir, that could be.

Q. Now, if it were in November, 1939, that would be very shortly after the time when you tried to buy
5414 board from Ebsary, wouldn't it? A. Well, it would be right close. I couldn't tell you whether it would be right after or before, Mr. Bromley. If it were in the fall of 1939, that was about the same time that we were negotiating with Ebsary.

Q. Can't you remember now whether the conversation was in the fall of 1939, or the fall of 1938? A. I have been under the impression that it was the fall of 1938, but if you say it was in the fall of 1939, I would be willing to take your word for it.

Q. I do say so. A. All right, sir.

Q. You testified to this meeting in the criminal case, didn't you? A. Yes, sir.

Mr. Bromley: May the witness be shown the testimony at the criminal trial, please?

(Testimony handed to the witness.)

By Mr. Bromley:

Q. Will you turn to page 2531 of your testimony at the criminal trial? A. Yes, sir.

Q. When you testified about that meeting among the four of you, on Friday, you added something which you had not mentioned in the criminal case at all, do you recall that? A. No, sir, I don't.

5415 Q. Do you recall that you told us the other day that you offered to let USG look over the Cardiff books? A. That is right.

Q. Now, you know you didn't say anything of that kind in the criminal case at all, don't you? A. I don't know, sir.

Q. Well, can you find any such reference in your previous testimony in the criminal case? A. Do you want me to read it and see?

Q. I want you to look at it and tell me whether it is there or not. A. I have read up to page 2535, which seems to be the end of it, and it isn't there.

Q. Isn't it a fact that this Mr. English, whom you said was a Director of the company, came in that meeting somewhat accidentally, and was only there for a very few minutes at the last of it? A. I am sure I don't know how he came there. I was introduced to him there. I remember that that was the first time I had ever met him.

Q. Don't you remember that he came in well toward the end of the meeting? A. No, sir, I don't remember that.

Q. Is it your recollection that he was there all
5416 the time? A. My recollection is that he was sitting over on a sofa near a window, just sitting and listening to the conversation, without taking any part in it.

Q. Was he there all the time? A. That is my recollection.

Q. Now, after you got through saying what you said you said to Mr. Knode, didn't Mr. Knode tell you that he knew little, if anything, about your business policies? A. I don't remember him saying that, Mr. Bromley.

Q. Didn't he tell you that he had no interest in your business policies then, or at any other time, and was not interested in telling you how to run your business? A. No, I don't believe he said anything like that. I think I would remember it if he had.

Q. Don't you remember that he told you that as he understood it, neither he nor anyone else from USG had ever suggested what you should do about your business,

or complained to you about Cardiff's activities, and you told him that that was right? A. No, I have no such recollection.

Q. Now, wasn't the subject of the Wasem Plaster Company mentioned at this meeting? A. I believe it was.

Q. And wasn't it mentioned by Mr. Knode, who told you that you must realize that it wouldn't be good
5417 business for USG to sell to another distributor in Fort Dodge, when it was already doing business with the Wasem Company which was located there? A. No, sir, that was not raised as an objection against doing business with us at that meeting, or at any other time that I talked with officials of the USG.

Q. Do you say that you mentioned the Wasem Company? A. Yes, sir, I think I did, in pointing out that it wasn't a fair proposition to be selling board and lath at a discount to a man across the tracks from us, and to refuse to put us on the same basis.

Q. You remember, don't you, in connection with that, that Mr. Knode told you he did not consider either you or the Cardiff Company to be an outlaw in the business? A. That is right.

Q. Wasn't that statement made in connection with your remark to him that you thought USG considered Cardiff to be an outlaw in the industry? A. That is right, that they had been treating us as an outlaw—correct.

Q. And Mr. Knode said that USG did not consider your company to be an outlaw at all, didn't he? A. That is correct, he said that.

Q. And didn't he follow that remark up by saying, "Of course, I don't see how it would be good busi-
5418 ness for us to sell you, with Wasem being located as it is."? A. No, sir, he did not. What he said was that they weren't making any more deals like that.

Q. Didn't he say a little more than that? A. Yes, he said the Wasem deal was an old deal, and that they weren't going to make any more like it.

Q. Didn't he tell you that at that time, there were only a few of these consents to sell manufacturing distributors outstanding, and that it was the policy of USG not to extend these consents to new companies? A. No, he didn't put it that way. He said that the deal with Wasem was an old deal, and that they weren't going to make any more like it.

Q. Well, you testified about this at the criminal trial, didn't you? A. Yes, sir.

Q. Will you turn to page 2559? A. Yes, sir.

Q. Do you see in line 3 that you answered in the affirmative my question:

"Q. Now, didn't Mr. Knode or Mr. Keady or Mr. English, one or all of them, tell you that it was the policy of the company, carefully considered, not to put any more distributors into business?"

That is right, isn't it, that is what he did say?

5419 A. Isn't that the same as I just said, that the deal with Wasem was an old deal, and they weren't going to make any more like it?

Q. Perhaps it is.

You made some statement here the other day to the effect that you said that USG had granted a consent during this period to sell some other plaster manufacturer. Do you remember that? A. I did. I said that I understood that during this same period they were talking about, that I was talking about, that they had granted a consent to somebody else.

Q. And you told us that you brought that to Mr. Knode's attention, but did not mention the name of the company that you had in mind? A. Yes, sir.

Q. Now, the name of the company that you had in mind was the Mathieson Alkali Company, wasn't it? A. Yes, sir.

Q. And you intended by that reference to charge Mr. Knode with an inconsistency, didn't you? A. Yes, I wanted to point out that he wasn't giving us the usual treatment that independents in the industry had been receiving.

Q. And you wanted to suggest to him that when he said it was the company's policy not to grant new con-

5420 sents, that he wasn't telling the truth, because during that very period you say USG had granted a consent to somebody to sell Mathieson. Isn't that the purpose of your testimony that you gave here Friday? A. The purpose of my testimony was to tell what I recollected. The purpose of that question at that time was to point out to him that maybe he wasn't treating us the same as he had treated others.

Q. Did you hear Mr. Dolan testify in the original trial? A. No, sir.

Q. You know who Mr. Dolan is, don't you? A. No, sir.

Q. Don't you know him to be the Sales Manager of the Mathieson Alkali Company during this period? A. No, I don't know Mr. Dolan.

Q. Did you know anything about the Mathieson Alkali Company at all? A. No, sir.

Q. Did you know where their plant was located? A. It was my understanding that they had acquired a plant that was located at Plasterco, Virginia.

Q. That was a plaster plant, wasn't it? A. That was my understanding, yes, sir.

Q. And USG had a board plant right near there,
5421 didn't they? A. That was my understanding.

Q. And you knew from talk in the trade, didn't you, Mr. Sensibar, that USG had been furnishing board to the Mathieson Alkali Company for 6 to 9 years prior to your conversation with Mr. Knode? A. No. My understanding was, at that time, that the Mathieson Alkali Company had just acquired that plant, shortly before this conversation, sometime during the depression.

Q. Mathieson Alkali had been in business for how many years, do you know? A. I don't know, the Alkali Company is old, I guess. But it is my impression that they had acquired that plant, which I understand that Certain-teed had operated before, during the depression.

Q. Wasn't it your information, regardless of where their plant was, that USG had been giving them their board for many, many years prior to that conversation? A. No, sir, it was not.

Q. Didn't Mr. Knode point that out to you, in this conversation, that that was hardly a fair statement to make in view of the fact that Mathieson was an old customer of USG? A. No, because the thing wasn't discussed. He simply refused to enter into any discussion on it.
5422 As I told you; I hadn't mentioned the name Mathieson, and I don't think there was any discussion whatever about it.

Q. You were asked about this very subject matter at the criminal trial, weren't you? A. I was, yes, sir.

Q. Now in this meeting, didn't you tell Mr. Knode and Mr. Keady that what you wanted to do was to submit this matter to the Federal Trade Commission? A. No, sir.

Q. And don't you remember that Mr. Knode told you he didn't believe it was a matter for the Commission, but that, rather, it was a question of USG's legal rights under

its patents, and that he believed the company was within its rights under those patents? A. No, sir, that was not the conversation at all. I suggested to him that since we had been trying to get things changed for years, and had failed, and since it was important to us, and from our point of view a great injustice to us, and since it might have some legal aspects, why didn't we go to Washington and place it before the proper people to get some sort of an opinion on it, without going to any trouble about it—by which I meant legal trouble. He simply brushed that aside, and said there was nothing to that at all.

5423 Q. And that is all he said, is it? A. I am quite sure that that is all he said, yes, sir.

Q. You told us next about the conversations that you had with Baker and Burley of the National company, in 1936, 1937 and 1938; and you testified about these conversations in the criminal case, do you remember? A. Yes, sir, I testified about them.

Q. Will you turn to page 2538 of your testimony in the criminal case? A. Yes, sir, I have it.

Q. Now, you left out of your testimony here, the other day, what you said in the criminal case, didn't you, to-wit, that you told Baker that what you wanted him to do was break his contract with USG and go ahead and sell you? A. What happened was this—

Q. (Interposing) Now wait a minute. That is what you testified to in the criminal case, isn't it? A. I don't think so.

Q. You don't? A. No, sir.

Q. You didn't testify to that here the other day, did you? A. Well, now, I will tell you exactly what happened.

Q. Can't you answer the question? A. Well, I take it what you want is the truth. If you want the whole truth, I will tell you the story.

5424 Q. Can you answer the question? A. Will you repeat it, please?

Mr. Bromley: Will you read it?

(The record was read by the reporter.)

The Witness: I can't tell you now just exactly what I said about that. When Baker told me—

By Mr. Bromley:

Q. (Interposing) You can't tell me now what you said in this case about that, can you? A. I can't tell you word for word.

Q. And you don't remember what you said in the criminal case, do you? A. I remember pretty well what I said both times, but I can't tell you word for word what I said either time.

Q. Now, the fact is that although you didn't say so here the other day, you suggested to Baker that he break his contract with USG and give you board, didn't you? A. No. What happened was that Baker finally told me that USG wouldn't give him permission, or didn't give him permission, and I said to him, "Why don't you go ahead and sell us anyway, and let's cross that bridge about permission when we get to it?"

And he said, "I think I could do that if I would be willing to make an issue of it, but I don't want to make an issue of it."

Q. When you said, "Why don't you go ahead and
5425 sell us anyway", weren't you suggesting that he break his contract wth USG? A. Mr. Bromley, that is entirely a legal matter. I wasn't interested in the contractual relationship between Mr. Baker and USG. I was interested in getting what our company needed. Mr. Baker had said he wanted to sell us, and Harrison had said that also, and I was interested in getting that board. So far as their relationship was concerned, that could take care of itself.

Q. Well, in 1938, you told us on Friday, you had a talk with Mr. Keady of the USG Company about whether or not USG would grant consent to National to sell. Do you remember that? A. Yes, sir.

Q. You testified about that conversation in the criminal case, didn't you? A. I think I did.

Q. Will you turn to page 2546? A. Yes, sir.

Q. Do you see that all you said there was that you talked to Mr. Keady about USG's consent to National to sell Cardiff, and Keady simply said that USG had made up its mind and saw no reason to change it? A. Yes, I see that.

Q. And that is all you said about that conversa-
5426 tion in the criminal case, isn't it? A. That is all that appears here.

Q. Now, here the other day you said that Mr. Keady asked a number of questions about your company and its organization. Do you remember that? A. Yes, sir.

Q. And that you pointed out to him the benefits to be derived for USG and the entire industry if Cardiff was given a supply of gypsum board. Do you remember that? A. Are you repeating my words?

Q. Yes, I am summarizing your words. Do you want to look at it? It is page 5582. A. No, I am perfectly willing to take your word for it.

Q. Did you say that to Mr. Keady? A. Yes, I had such a conversation with him.

Q. And you told us here that you also added that it was not healthy for a large company to hold down a small competitor, do you remember that? A. That is right.

Q. You didn't mention that in the criminal case, did you? A. It doesn't appear here, no, sir.

Q. And you said here the other day that you told Keady that you had adhered to the sales practices estab-
5427 lished by USG for 3 years, with the exception of truck deliveries out of Fort Dodge? A. Yes, I told him that.

Q. You didn't say anything like that in the criminal case, did you? A. I don't recollect that I was asked about the details of that conversation, and this page you directed me to here doesn't show that I was asked about the details of that conversation.

Q. Does it show that you were asked any question at all? A. Yes, the question is: "What did Mr. Keady say?". I told what he had said, that they had made up their minds, and that was that.

Q. You don't think that that was a question that asked you to tell what the conversation was? A. Well, I have just told you.

Q. So in the criminal case, you were just giving what Mr. Keady said, but deliberately leaving out what you said; is that it? A. No, that isn't correct at all.

Q. Well, you said the other day that when you said to Keady that Cardiff had been following the USG sales practices for 3 years, you said, "If we can obtain board, we will be willing to give up that sales practice"—do you
5428 remember testifying to that? A. Yes, sir.

Q. Now, you were proposing to Keady, weren't you, that if he gave you a supply of board, you would agree to restrict the nature of Cardiff's business practices? A. I was talking about that one item of truck deliveries. USG

had a practice at that time, if I recollect rightly, of making deliveries by truck out of their plant at Fort Dodge to just a few surrounding counties; whereas, we made deliveries by truck to a much larger area; and I told him that if that was an objection, if they would be willing to let us have the board we would conform to the same trucking practice that they had.

Q. And don't you remember that Mr. Keady thereupon promptly told you that the mere proposition which you had made to him prevented him from supplying you with board, because any such arrangement as that would be illegal? A. I am positive that he didn't say anything like that.

Q. Didn't you know that any such arrangement as that would have been illegal? A. No, sir.

Q. You didn't know that? A. No, sir.

Q. You said you talked to a Mr. Wright from
5429 the Texas Company? A. Yes, sir.

Q. Who was Mr. Wright? A. Mr. Frank Wright was the Traffic Manager of the company, according to my understanding.

Q. Now when you spoke to him, you knew that it wasn't possible to make any feasible arrangement between two plants, such as Cardiff and Texas, nearly a thousand miles apart, didn't you? A. No, sir—there are two questions in that question.

Q. Answer one and then the other. A. You asked me whether I knew it wasn't feasible. First of all, it may have been feasible. I couldn't very well know it wasn't feasible. A thing like that, Mr. Bromley, requires a pretty careful study of freight rates, and where your customers are. For illustration, freight rates—

Q. (Interposing) I don't care for any illustration, Mr. Sensibar.

Mr. Steffen: May he answer the question fully?

Mr. Bromley: I object to his continuing to answer the question, on the ground that it is not responsive.

Justice Stephens: The objection is sustained. You may bring it out on re-direct-examination, if you think it is material to the Government's case.

By Mr. Bromley:

Q. In each of the instances that you have testified
5430 to with respect to your talks with manufacturers, isn't it true that each one of them stated that it

wanted to sell board to Cardiff if it could?

The Witness: May I have that question repeated, please?

(The question was read by the reporter.)

The Witness: Well, there were certainly officials in each of these companies who told me that they did, yes.

By Mr. Bromley:

Q. And didn't all of them tell you that USG had refused to grant the necessary consent? A. Yes, I think they all finally did.

Q. And you feel, don't you, now, and have felt at all times, that each of the manufacturers that you approached acted in entire good faith in the matter? A. I have never had any occasion to question that.

Q. And you feel that each one of these companies, like National and Ebsary and the others, really tried to see if they couldn't supply you with board, don't you? A. Yes; some tried harder and maybe some not quite as hard, but I think they all did try.

Q. Now, isn't it, however, true that except for Ebsary in 1939, you have no knowledge as to whether any one of the others actually did request USG's permission to sell Cardiff? A. Well, with the possible exception of National, during my talks there with Mr. Keady.

5431 Q. You mean by that that you have no knowledge as to whether any licensee actually applied for permission, except Ebsary and possibly National? A. That is right.

Q. No one of the licensees—not even National—except Ebsary ever told you that they had applied in writing to USG for permission to sell, did they? A. I think that that is correct.

Q. And so far as you now know, each one of these companies which you approached might have had their own reasons for not wishing to sell your company; isn't that right? A. Well, sir, a company is made up of a lot of individuals, Mr. Bromley, and in each of those companies there might have been some people who didn't want to sell us; but when the official representative told me that they had tried, I did believe him.

Q. Now, won't you answer the question as I asked it, please? A. I am afraid I have forgotten the wording.

(The question was read by the reporter.)

The Witness: I think the companies did wish to sell us. As I said before, there might have been individuals in those companies that didn't, but I think that the companies, as a whole, wished to.

Mr. Bromley: That is all.

5432 Justice Stephens: Is there any other cross-examination?

Mr. Johnston: Yes, if the Court please.

Justice Stephens: Very well, Mr. Johnston.

Mr. Johnston: The testimony of this witness to which I am about to refer commences on page 5604 of the record.

Cross Examination

By Mr. Johnston:

Q. I believe you testified that Mr. Wright, of the Texas Company, was the only person connected with that organization with whom you talked about board or lath? A. Yes, sir, I did.

Q. And that you had several conversations with him? A. That is right.

Q. Extending over a period during 1937 and 1938—right? A. That is right, or maybe a little later than that, too.

Q. And that you talked with him as often as every 3 or 4 months? A. That is right.

Q. Now, will you give us the place and the date of any conversation you had with him?

Justice Stephens: Before you answer that, I must have misunderstood you. What page did you give?

Mr. Johnston: Page 5604.

5433 Justice Jackson: That is the testimony you are talking about, that isn't where he started his testimony?

Mr. Johnston: That is the testimony I am talking about, in connection with the Texas Company.

Justice Stephens: Read the last question.

(The pending question was read by the reporter.)

The Witness: Mr. Johnston, the nearest I can come to that is to tell you that it was at the traffic meetings of the Gypsum Association, at whichever ones Mr. Wright attended. I recollect one of those meetings, I believe, was in Cincinnati. They were at different places.

By Mr. Johnston:

Q. When was that meeting? A. I couldn't place the exact date for you.

Q. You don't even know the year? A. I should say 1938 or 1939.

Q. Well, your testimony the other day stated '37 or '38. Are you changing it now to the next year? A. I wouldn't like to be pinned down to the exact year, Mr. Johnston. I simply don't remember.

Q. The fact is you just don't know specifically about any meetings, anywhere, at any time, that you attended and talked to Mr. Wright, do you? A. Yes, sir, I know that we attended a number of those meetings together,
5434 and discussed this board thing at most of those times we were together.

Q. And the Cincinnati meeting is the only meeting that you can specifically fix, and you now think that was in 1939? A. I think I said it was in 1938 or 1939.

Q. 1938 or 1939? A. That is my recollection.

Q. And that is the only meeting? A. I can remember meeting with him other times, but I can not tell you precisely in what city or at what hotel. We had meetings in St. Louis, Cincinnati, Chicago, and Buffalo, over a period of years. There were other meetings when we didn't talk about this. It is pretty hard to pick out of a person's memory the exact place and date that a particular conversation was held.

Q. You can, therefore, remember what you and Mr. Wright talked about, but you can't tell when it was or where it was? A. Well, it is much easier to remember exactly what a person talked about—

Q. (Interposing) Just answer my question. A. (Continuing) —in this case, than it is to tell you exactly where it was—

Q. (Interposing) I don't want any explanation. I want you to answer my questions.

Justice Stephens: Mr. Sensibar, you are falling into the habit of arguing the reasonableness of your answers
5435 with counsel instead of answering questions.

The Witness: I am sorry.

Justice Stephens: You shouldn't do that, because it takes up time. If counsel for the Government feel that your answers need explanation, they have a right to ask you questions on re-direct examination. It is for them, as officers of the Court and counsel for the Government, to decide what

testimony is necessary in their case, not for you. When you proceed to argue or explain these answers, you are assuming their function.

I don't say that as criticizing you, but to explain; and so far as you can accurately do so, you should answer just the questions that are asked you, not argue your reasons.

The Witness: I will try to do so.

Mr. Johnston: Read the question.

(The pending question was read by the reporter.)

By Mr. Johnston:

Q. Is that right? A. I think that that is correct, except for that Cincinnati meeting.

Q. On page 5605 of the transcript, you were asked this question:

"Q. When did you first contact Mr. Wright concerning the purchase of board and lath?"

5436 You were talking about board and lath. Then you were asked the question:

"Q. Will you tell us the conversation that you had with him?"

And I read from your answer, or give the substance of it, and let us see if that is correct. You said that it was "not a very economical proposition, not very sound economically, to think about a connection with his company, because their plant was down in Texas, and the freight absorption to most of our customers would be great; in other words, the freight from his plant to our customers would be larger, on the average, than the freight from our plant to the same customers, who, of course, wouldn't pay any more for the product."

Now that is correct, isn't it? A. Yes, sir.

Q. Did you know who Mr. Wright was at that time? A. I understood him to be the Traffic Manager of the Company.

Q. He merely handled freight matters, didn't he? A. I didn't know exactly what he handled. I knew he did handle freight matters.

Q. You didn't know that he was anything else than a rate clerk, did you? A. Yes, sir, I understood at the

5437 time that he was a man in the confidence of the company.

Q. That he was what? A. A man in the confidence of the company.

Q. In the confidence of the company? A. Yes, sir.

Q. Who told you that? A. I can't remember that. That was my understanding.

Q. Did anybody tell you that he handled anything else than freight matters? A. I can't say, Mr. Johnston.

Q. Then you testified further that in these several conversations, each time you would talk to him he would say that he would take it up, and the next time you would see him he would tell you that he would take it up and let you know? A. Yes.

Q. Now, that is the extent of your negotiations with the Texas Company regarding board and lath, isn't it? A. Substantially, yes.

Justice Stephens: The Court will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice Stephens: Proceed, Mr. Johnston.

By Mr. Johnston:

5438 Q. I believe you testified that this Cardiff Company had some financial difficulties along about 1934; is that correct? A. 1935, yes, sir.

Q. And that it went into bankruptcy in 1935? A. That is right.

Q. And at that time, you were a stockholder? A. That is correct.

Q. How much stock was outstanding in that company at that time? A. You refer now to the company that went into bankruptcy?

Q. The Cardiff Company that went into bankruptcy. A. Yes, sir, that was the Cardiff Gypsum Plaster Company.

It seems to me it had, I believe, 1,000 shares of stock.

Q. Well, it was a $10,000 company, wasn't it? A. Well, sir, I believe that is right. I believe that that is the capital it was organized with in 1896.

Q. February 15, 1896? A. That sounds right.

Q. And when did you first have this financial difficulty in this company that prompted the bankruptcy pro-
5439 ceedings? A. I hardly know what you mean. Are you referring to the three people who petitioned for the bankruptcy?

Q. I am referring to the company. When did the company first have the financial difficulty? A. The company

was hard up for working capital beginning in 1932. 1931 was the last profitable year.

5440 Q. You mentioned, or started to mention, something about three creditors? A. Yes, sir.

Q. What was that? A. I was thinking of the three creditors who signed the petition for bankruptcy.

Q. Then, as I understand it, three creditors of this company filed an involuntary petition in bankruptcy. A. I think that is right.

Q. Against the company? A. Yes.

Q. When did they file that petition? A. Well, my recollection is that it was in January of 1935. Mr. Bromley seems to think it was October of 1934.

Q. And now to refresh your memory, wasn't it in October, 1934, about October 15? A. Well, sir, if that is the record, I will take your word for it, but my recollection is that it was January, 1935, that we went into bankruptcy.

Q. What was your connection with the company at that time? A. I was a stockholder, and I was vice president.

Q. You were the active vice president at that time? A. I wouldn't say that. Mr. Breen was manager of the company.

5441 Q. You were living in Chicago at that time? A. Yes, sir.

Q. And spending some time at Fort Dodge and some time in Chicago? A. That is right.

Q. Then you people came along as directors or officers of the company, after this involuntary petition was filed, and filed a voluntary petition under Section 77-B? A. Yes, sir.

Q. And you think that that was filed along in the latter part of 1934 or the first part of 1935? A. Yes, sir.

Q. And it was under that petition that your reorganization took place? A. That is correct.

Q. Do you know what your debts were, scheduled and filed, in that bankruptcy proceeding, how much they amounted to? A. Yes, sir.

Q. How much? A. About $91,000.

Q. I believe you testified the other day, in response to a question by Mr. Bromley, that you did not pay those debts in cash, is that correct? A. That we didn't pay them all in cash, that is right.

Q. What you did do was to pay the small miscel-

5442 laneous accounts in cash? A. That is correct.

Q. Now the other debts have never been paid to this day, have they? A. I shouldn't say that, sir.

Q. Well, I don't care what you should or shouldn't say—I am asking you to tell me what the fact is. A. The other creditors took stock in the reorganized company. Well, let me give it to you more accurately. My recollection is that all accounts under $300 were paid in full, and that on the larger accounts they got $300 in cash, and the rest in stock of the new company.

Q. How much in stock, altogether, was issued to them? A. I believe they got half of the stock of the reorganized company, and I might say that a large part of that $91,000 owed was owed to Ezra Sensibar.

Q. You were a principal creditor? A. I was, yes.

Q. How much was paid in stock outside of what you got? A. It seems to me that my advances to the company had been—

Q. (Interposing) Wait a minute. Did you understand my question? I am not inquiring about you, I am inquiring about the amount of stock that the creditors other
5443 than yourself got. A. I am trying to think it through —I believe that my advances were $30,000 odd, out of a total of $90,000, or out of the $91,000, so that I got a little better than one-third of the stock that was given to creditors. The remaining $50,000 in creditors got the other two-thirds.

Q. That is, $50,000 in volume of debts got how much stock? A. Got two-thirds of half the stock of the new company.

Q. I know, but how many shares? A. The new company was reorganized with three hundred shares of stock.

Q. What par value? A. No par value.

Q. It was a no-par-value stock? A. I think it was no par value, Mr. Johnston.

Q. All right. A. And half of that went to these $90,000 of creditor claimants.

Q. That would be 150 shares? A. That is right.

Q. Representing how much indebtedness? A. About $91,000.

Q. Then is it fair to say that there was $91,000 of indebtedness of that company that has never been paid? A. Paid in stock—

5444 Q. (Interposing) Other than by this stock? A. That is correct. Well, that is not right, because the small claims were all paid off, and, as I said, $300 was paid on the larger ones. All of that came off the $91,000, if I remember right.

Q. Would you say that it was fairer to say that there

is $50,000 of those debts unpaid? A. That was paid in stock?

Q. Yes. A. Yes, that sounds all right.

Q. Now there was a substantial loan against this company at the time it went into bankruptcy, wasn't there? A. Yes, the advances that I had made to the company.

Q. You had negotiated those loans through your Chicago connections? A. No, sir.

Q. How did you do that? A. I simply advanced the money to the company.

Q. They were your personal advances? A. That is right.

Q. Did you ever hear of a concern by the name of Construction Materials Corporation? A. Yes, sir.

Q. Tell us what that was. A. That was a concern
5445 in Chicago engaged in the production of building materials and the ownership and operation of seagoing hopper dredges.

Q. You were interested in that concern, weren't you? A. I was an employee of it.

Q. Not an executive? A. No, sir.

Q. Who was the financial and executive responsibility of that concern? A. My brother was president of the company, and had built it up.

Q. And you were connected with him? A. With the concern, yes sir, not with him.

Q. Now at about the same time that the Cardiff Company went into bankruptcy, that other concern went into bankruptcy also, didn't it? A. About a year earlier. I can give you that date, it was January 17, 1934.

Mr. Steffen: Your Honor, we have no particular objection to this line of questions, except that it seems to be going rather far afield.

Mr. Johnston: It is not far afield, if the Court please, it is only to bring out the connection that these two concerns had, together, and he is testifying here now about his attempting to go out and establish business relations. I merely want the Court to get the picture—

5446 Justice Stephens: (Interposing) I think we see the purpose of it. I think it is not improper cross-examination. Apparently it goes to the business reasons which the various companies that have been testified about, had in respect to their decision not to sell board to Cardiff. That is what you are developing, Mr. Johnston, is it not?

Mr. Johnston: Exactly.

Justice Stephens: Very well. The objection is overruled.

By Mr. Johnston:

Q. Wasn't that petition filed about the same time the petition with respect to the Cardiff Company was filed? A. No sir, that was filed on January 17, 1934.

Q. That was a reorganization too, wasn't it? A. That company was reorganized, yes sir.

Q. And the debts of that company were not paid? A. Do you want me to go into the details of it?

Q. I just want you to answer my question, yes or no. A. No, they were paid.

Justice Jackson: They were paid, you say?

The Witness: They were paid, some in cash and some in stock, your Honor.

By Mr. Johnston:

Q. How much was paid in cash? A. Well—

Q. (Interposing) Just approximately, if you can
5447 recall. A. Let me think a minute.

Justice Stephens: You can take your time and think about it.

Mr. Johnston: Take all the time you want to. I don't want to destroy any of your processes of thinking at all.

The Witness: I would say that about half a million dollars was paid in cash.

By Mr. Johnston:

Q. And how much in stock? A. To the best of my recollection, about $800,000 or so.

Q. Do the records not show that the liabilities of that company at the time of its bankruptcy were nearly $2,000,000 or more? A. You probably have in mind the claims filed against the company, rather than what the liabilities finally turned out to be. Those claims included one for close to $1,000,000. According to the best of my recollection, it turned out to be a duplicate claim and was thrown out by the court.

Q. Mr. Sensibar, wasn't the stock distribution made on a basis of nearly $2,000,000 in debts? A. No, I don't believe so, I think I have given you the figures.

Q. And you don't know that to be the fact and you were

connected with the company? A. I have given you
5448 the figures to the best of my recollection.

Q. And you were connected with the reorganization, weren't you? A. Yes, I was connected with the reorganization.

Q. And you were connected with it in reference to the reissue of the stock, or rather the issue of stock, for the debts? A. No.

Q. Under the order of the Court under Section 77-B? A. No sir. I had a claim against it, if that is what you mean. I was not the manager of the reorganization.

Q. I believe you testified in response to Mr. Bromley's question that this Cardiff Company never submitted any financial statements to the credit agencies? A. That is correct.

Q. Either before or after the reorganization? A. Yes, that is right.

Q. You were the executive responsible, at least in 1935, from that time on until the present time? A. That is right.

Q. And isn't it a fact that Dun and Bradstreet, at least every year and sometimes oftener, have asked your company to furnish financial statements so that they could put out commercial reports on you? A. Mr. Johnston, from time to time we have been receiving those circular requests of Dun and Bradstreet.

5449 Q. And you have always refused to respond to them? A. To furnish a statement, that is right.

Q. Don't you know, Mr. Sensibar, that any prudent businessman, in considering the establishment of business relations with a concern, would look up its financial credit and standing and rating? A. Yes.

Q. That is common business practice, isn't it? A. Yes, it is.

Q. And isn't Dun and Bradstreet the established credit agency of this country today, to which businessmen go for that information? A. Yes, we have no fault to find with Dun and Bradstreet.

Q. Well, that is a fact, isn't it? A. That is right.

Q. And yet you would refuse, year after year, and still refuse, to furnish any financial information, give any business report or financial statement of your business, to this or any other agency. That is right, isn't it? A. Yes. Is there anything wrong about that, Mr. Johnston?

Q. I am just asking you for the facts. A. That is right.

Q. Now, did you ever have any information, or receive any reports, of how your concern was regarded in
5450 the business world from a financial standpoint, as to its financial responsibility? A. We had a pretty good idea, yes.

Q. It was pretty bad? A. No sir, I am sorry to say that that was not the case. It was pretty good. After 1935 we had no difficulty in buying supplies. We had credits that ran as high as $10,000 or so, established, for purchasing purposes.

Q. Can you name any business concern during 1935, 1936, 1937, 1938, or 1939, with whom you had a credit of $10,000? A. Yes, I can.

Q. Who? A. The St. Regis Paper Bag Company.

Q. Wasn't there a guarantee behind that account? A. No sir. We also had a line of credit at a bank in Fort Dodge that ran over $20,000, and there was no guarantee behind that.

Q. When was that credit established? A. About 1940.

Q. But prior to 1940 you didn't even have a credit rating with the bank there of as much as $2000, did you? A. Yes sir, we did.

Q. Wasn't $1000 your limit? A. We had a good deal more than that. No, $1000 wasn't the limit.

5451 Q. During this period from 1935 on, were you ever sued on any of your accounts? A. I don't believe so. We paid our bills promptly, as far as I can remember.

Q. Did you do any business with the Viking Automatic Sprinkler Company? A. Yes.

Q. What did you do there? A. What was that?

Q. What business did you do with them? A. They installed a sprinkler system throughout the plant.

Q. That was on a contract? A. That is right.

Q. You paid it out in monthly payments? A. That is correct.

Q. Where they retained the title to the system? A. That is correct.

Q. And when you would buy other equipment of any other character, you would have to buy it on time and pay it out in small payments, wouldn't you? A. No, that is not correct.

Q. And either give a chattel mortgage on it or have it put in under a title contract? A. No, that isn't
5452 correct. We made a packer installation that cost

us about $15,000, in order to take care of increased business, and there wasn't anything such as you suggest involved in that. We paid for it all in cash without any extension of time.

Q. Now, you said something about your salesmen, in response to a question by Mr. Knuff, I believe, that you worked salesmen over an area out through the Middle West? A. We did.

Q. How many salesmen did you work after the reorganization? A. I think the most that we had was eleven.

Q. When did you first have eleven? A. I should say in about 1939 or 1940.

Q. Isn't it true that up until 1940, or about that time, you only had two salesmen? A. No sir, that is not true.

Q. And when you started, after your reorganization, you only had one for a time, and then for a long time you only had two salesmen? A. No, that is not the case. When we reorganized, we started right away with three men, and we kept adding to that organization as we could.

Q. Do you know who D. N. Kelliher is? A. Yes sir.

5453 Q. Who is he? A. He is an attorney in Fort Dodge.

Q. Did he ever bring a suit against your company? A. Yes, he did.

Q. On an open account for $480? A. No.

Q. For how much? A. I think you have the amount right, but it wasn't an open account.

Q. What was the nature of the claim? A. It had to do with the claim of a man who had been selling for the compan,, not a customer of the company or anyone we bought from.

Q. Now when was that? A. About August, 1942.

Q. So that as late as 1942, you were still having some difficulties or controversies about your indebtedness? A. No sir.

Q. And isn't it true also that all through that period you were either threatened with suits, or that your accounts were slow, and generally throughout the business world where you were known, you were considered a poor credit risk? A. During the period we paid our bills promptly, our credit was good, and we had no difficulty in buying, Mr. Johnston.

5454 Q. In small quantities? A. Or large quantities, for the size of our company.

Q. Do you think, Mr. Sensibar, as a good businessman, that after this reorganization the financial condition of this Cardiff Company was such that it should merit the favorable consideration of establishing business relations with other business concerns? A. Yes, it not only should have merited it, but it did merit it, and business relations were established with everybody, except in the case of board.

Q. Except with these people that you wanted to do business with? A. That is right.

Mr. Johnston: That is all.

Justice Stephens: Is there any further cross-examination?

Mr. Adams: Yes, your Honor.

Cross-Examination

By Mr. Adams:

Q. Mr. Sensibar, you were interested in doing business with Certain-teed? A. We were, yes sir.

Q. And did you feel that the old management would not do business with you? A. No, we did not.

Q. You never took that matter up with them, did you?

A. Yes sir, I discussed the question first with Mr.
5455 Warren Henley back in 1933.

Q. Then a new management came in after that? A. Yes sir.

Q. Then you took it up with the new management? A. Yes sir, that is correct.

Q. You knew that the old management wouldn't do business with you, is that right? A. No, that isn't right. The old management had told us that they weren't able to.

Q. Then, when the new management came in, you took it up with them, is that right? A. That is right, sir.

Q. You kept yourself pretty well informed about what was going on in the building material business, didn't you? A. I tried to do my best.

Q. And you knew when the new management came in, didn't you? A. Yes.

Q. The new management, as a matter of fact, came in in April, 1936, didn't it? A. I don't know the exact date, I am sure.

Q. Well, you didn't talk to anybody until you talked with Mr. Hartley, did you, in the new management? A. I think that is correct.

Q. And Mr. Hartley didn't come with the com-
5456 pany until 1939, did he? A. Well, now, I don't know the exact date, it was shortly after he came with the company that I made it my business to go and talk with him.

Q. Hadn't you known that there had been a new management in the company since 1936? A. No, I don't believe I have any recollection of that, sir.

Q. But you kept yourself informed about what was going on in the building material business? A. I did the best I could.

Q. And you were anxious to take this matter up with the new Certain-teed management when it came in? A. That is right.

Q. And you have no recollection of the fact that you waited for over three years after the new management came in before you took it up with anybody? A. You are speaking about a management before Mr. Hartley, I take it. I don't remember about that, sir.

Q. Despite your awareness of what was going on in the building business, you have no recollection of that? A. I am perfectly willing to admit having overlooked some good bets, if that is what you mean.

Q. You knew when the Browns were in control of the Certain-teed Company, didn't you? A. I never met
5457 the Browns.

Q. Will you answer the question, please? A. I had heard of them.

Q. You knew when they retired from the business, too, didn't you? A. It seems to me I read about that in the papers.

Q. And that was in 1936, wasn't it? A. I don't remember.

Q. Mr. Sensibar, isn't it a fact that when you got around to asking questions of Certain-teed, the only purpose of asking those questions was so that you could build up a record for bringing a lawsuit? A. No, that is definitely not the fact.

Q. Wasn't it your motive at that time to cover them simply so you could say that you had covered everybody in the building material business? A. That is not the fact, and further—

Q. (Interposing) That is all, you have answered my question. A. Just a minute, if you want the whole truth—

Mr. Steffen: (Interposing) Go ahead and answer it.

Mr. Adams: Please, I asked the question, your Honor, and if they want to ask any further questions—

Justice Stephens: (Interposing) That may be brought out on redirect. The question has been answered.

5458 Is there any further cross-examination?

Mr. Bromley: I did want to ask one question, because I am told I asked the witness a question and didn't get an answer.

Justice Stephens: You may do so.

Cross-Examination (Resumed)

By Mr. Bromley:

Q. Didn't Mr. Knode or Mr. Keady or Mr. English in your conference with them, tell you that it was the policy of the United States Gypsum Company, carefully considered, not to put any more distributors into business? A. The answer they gave me was substantially like that.

Q. And you were asked, and answered in the affirmative, in the criminal case, this question, weren't you?

"Now, didn't Mr. Knode or Mr. Keady or Mr. English, one or all of them, tell you that it was the policy of the company, carefully considered, not to put any more distributors into business?"

A. Isn't that the same as what you just asked?

Q. Well, do you think it is? A. It seems to me it is, yes sir.

Q. Well, at any rate— A. (Interposing) They told me substantially that, that the Wasem deal was old and they weren't making any more like it.

5459 Q. But the question I asked you is—didn't they tell you that it was the policy of the company, carefully considered, not to put any more distributors into business? A. In substance, yes, the same thing.

Q. They did tell you that, is that what you mean? A. In substance, yes. I don't know the exact words.

Mr. Bromley: That is all.

Justice Stephens: Is there any redirect examination?

Mr. Steffen: Yes. Will the reporter please repeat Mr. Adams' last question, which the witness should have been permitted to answer.

Mr. Adams: I object to counsel's remark, and ask that it be stricken, the Court having ruled that the continuation of his answer was not proper.

Justice Stephens: I don't think that that characterization was necessary, Mr. Steffen. The Court had ruled that

he had answered the question and that if you desired to bring out anything further, it might be done on redirect.

Mr. Steffen: I certainly didn't mean to reflect on the Court. I thought it was odd for Mr. Adams to ask a question and then turn around and walk back and not be ready to listen to the answer.

Justice Stephens: The rule is, on cross-examination, that if a question is answerable by a direct answer it must be so answered. Then, if counsel on redirect wish to
5460 bring out more to explain it, they may have that opportunity. Now that question was clearly answerable, as it was answered, without the volunteered explanation.

But you may ask it now, freely.

Read the last question which Mr. Adams asked.

(Whereupon, reporter read the record as requested.)

Justice Stephens: If you wish to make some further explanation of the answer you may do so, if you understand the question. If you want further questions read back, so that you are entirely clear what it was about, you may have that done also, Mr. Sensibar.

The Witness: No, I understand it. I was about to say, your Honor, that I devoted a great deal of time during that period to working out an arrangement with a company known as the Standard Lime and Stone Company, for the supply of lime on a manufacturing distributor basis to a number of gypsum companies, of whom Certain-teed was one. They appreciated very much the work I had done on that matter and were very complimentary and thankful for what I had done, and I am positive that there was no question in their minds about the sincerity of this proposition about our needing board and lath.

Mr. Adams: I respectfully move to strike out that portion of the answer dealing with their being no question in their minds about the sincerity of his motives, as being a pure speculation, and moreover, a matter of conclusion of the witness.

5461 Justice Stephens: Whose mind do you mean, Certain-teed's?

The Witness: The mind of Mr. Hartley and Mr. Miller and Mr. Stedman, from our conversations, from what they told me, and from what I told them.

Justice Stephens: That may go out.

Mr. Steffen: I would like to say a word on that, your Honor.

Justice Stephens: Well, I paused in order to give you an opportunity to say a word, but you didn't take that opportunity, so I thought you were ready for a ruling. You may be heard.

Justice Jackson: Did the witness answer that question? It doesn't seem to me as though he has anwered it. It doesn't seem to me that he explained what his original answer was. There was a direct question there, asking whether or not he was "cooking up" a lawsuit.

Justice Stephens: He said "No" to that.

Justice Jackson: Then I thought he was going to explain it.

Justice Stephens: Let us hear the argument first on the motion to strike that portion of the answer which says that there was no question in the minds of Mr. Hartley and others of Certain-teed with whom he talked, as to the sincerity of his approach, or words to that effect. What is your contention on that, Mr. Steffen?

Mr. Steffen: The argument is that Mr. Adams
5462 was making a charge, in effect, that Mr. Sensibar was "cooking up" a lawsuit, and he replied by explaining the occasion of his visit; that he had these other matters with regard to procuring a lime connection for Certain-teed, and that he, Mr. Sensibar, had no doubt in his mind that Mr. Hartley and the other officers of Certain-teed felt that he was sincere.

Now that goes to the attitude of Mr. Sensibar as to what he understood.

Justice Stephens: Well, I didn't understand him to make that answer. I thought he said that there was no question in their minds.

Go back to the beginning of this, Mr. Reporter, go back to the question preceding the one which Mr. Adams last asked and read through the record.

(Whereupon the reporter read from page 5748, line 9, to and including page 5751, line 21.)

Justice Stephens: My colleagues are of the view that that portion of the answer ought to stand. I think it is a pure conclusion myself, but I defer to their views.

Mr. Adams: May I move to strike out the whole answer as immaterial.

Justice Stephens: Well, I should think it would not be immaterial, Mr. Adams. It is redirect examination as to the reasonableness of the witness's testimony concerning

his reasons for approaching Certain-teed for board.
5463 That motion is denied.

Redirect Examination

By Mr. Steffen:

Q. There is one item, Mr. Sensibar, concerning the Mathieson Alkali Works, which I would like to ask you about.

I believe you testified that you understood their plant was at Plasterco, is that correct? A. That is my understanding.

Mr. Steffen: May it be stipulated here that the plant of the Mathieson Alkali Company was at North Holston?

Mr. Bromley: Yes, it is the same thing. I mean by that that both towns are very close together, in Virginia.

Justice Stephens: Very well, that stipulation may be shown.

Mr. Steffen: We would now like to offer physically the entire testimony of Mr. Sensibar on the criminal trial, beginning at page 2493 to and including page 2503 of Volume 18, and, I think, from page 2514 to page 2596, inclusive, of Volume 19 of the criminal transcript.

We offer that with the idea that the Court has been asked to make various comparisons between the testimony here and the testimony at the criminal trial, and we offer it in order that the Court may have the matter fully before it.

Mr. Bromley: That is objected to as immaterial and incompetent.

Justice Stephens: How many pages does that involve?

5464 Mr. Bromley: About 100.

Mr. Steffen: I would estimate it at 92 or 93, your Honor.

Justice Stephens: Judge Garrett and I are of the view, Mr. Steffen, that that is an irregular offer to put in that entire 100 pages or 93 pages of the examination.

In the first place, much of it not may be relevant or material to explaining the witness' cross-examination, and if it isn't, then we have got into the record, at the expense of both sides, and at the expense of the time of the Court in examining it, a great deal of unnecessary material.

In the second place, it puts the burden upon the Court to sift out, without the aid of counsel on both sides, in the course of an open examination, what is relevant and what isn't, and it leaves the record without any explict indication

of what the Court has treated as relevant and not relevant, or material and not material, to the cross-examination.

We therefore reject that offer of that entire record. We do not, however, forbid you, if you wish to do so, to examine at as much length as you think necessary, into any other phase of the criminal testimony, or rather the testimony given by this witness at the criminal trial, which you think might clear up the answers which he has made on cross-examination.

But it must be done by counsel on redirect, and perhaps also recross, rather than have it put into the record in that wholesale fashion, because that would leave an ap-
5465 pellate court without any understanding as to what we had considered or had not considered as relevant and material and proper re-direct.

Mr. Steffen: Then, your Honor, I would like to have leave to at least select the passages that were brought up in cross-examination and which Mr. Bromley accused Mr. Sensibar of having dressed up in his testimony here or there.

It seems to me that in order for the Court, in looking over the transcript, to determine anything concerning Mr. Sensibar's testimony on that point, they would have to be advised of the exact matters testified to in the criminal case.

Justice Stephens: That is right, and you are entitled to bring those out. So far the proceeding has gone along in an orthodox fashion, and the reason for the rule of having it conducted in this manner, I have just stated. If you want to pick out additional passages and ask the witness if he didn't also testify to those, and argue to the Court the relevance of those, or bring those matters to the attention of the Court as tending to explain his cross-examination, you, of course, are entirely free to do that, and if you need time to do it we will take a little extra time at noon.

But that is the way it must be done because that is the conventional and orthodox practice, and it is based upon the sound reasons which I stated, that we must have an explicit showing, objectively, in the record of what the Court has considered as relevant and material and proper re-direct.

5466 Do you wish to take the recess now so that you will have a little more time to go over that?

Mr. Steffen: I think we might be able to furnish it to the Court at the end of the recess if we could take it now.

Justice Stephens: What I expect you to do is not to furnish it to the Court, but to call to the attention of the

witness various points in the record which you think Mr. Bromley or other examining counsel ought to have called to his attention, and which you think, if called to his attention, would explain his cross-examination. We are not going to receive in evidence ourselves, without having them put to the witness, these statements, because it is the witness' reasonableness and truthfulness that we are interested in.

Mr. Steffen: My thought, your Honor, was that when the witness was cross-examined by Mr. Bromley relative to what he said in the criminal trial, an impression might be given which, it seems to me, would perhaps be erroneous, and the simplest way of getting at the matter would be to put in the transcript the matters which he actually testified to before the criminal court.

If your Honor cares at all, then, to test the accuracy of Mr. Sensibar's statements, it would be a simple reference to what he actually testified to, and that would end the matter.

I agree that your Honors are right that it would be too voluminous to put in all of this testimony, and much
5467 of it would be irrelevant to the cross-examination.

Justice Stephens: I think if you will go through it, you will find that you will be able to select out those portions which you think were overlooked in cross-examination and which, if called to the attention of the witness, and his recollection refreshed may help to modify his answers, and you can ask him if he had those matters in mind when he was giving his answers. That is the usual way to do it.

We will take the noon recess at this time until the usual time.

(Whereupon a recess was taken at 12:07 p.m. until 1:45 p.m.)

5468 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Mr. Grover calls my attention to the fact that at page 5567, line 15, this morning, I asked the Court Reporter to change the word "concerned" to the word "concerning". Mr. Grover calls my attention to the fact that I am in error in respect of that, because of the use of two "that's" in the previous part of the sentence. The participial form is therefore not appropriate, but the past tense of the verb "concern", and that may be left as it was.

I find, also, that I was in error in indicating, in my announcement of the rulings of Judge Garrett and myself with respect to the manner of conducting re-direct-examination, just at the close of the morning session, that Judge Jackson did not agree with us. I find that he does share our views with respect to the manner of conducting re-direct examination.

To repeat the ruling, the view of the Court is that the proper method of conducting the re-direct-examination, in view of the cross-examination concerning the criminal record, is this,—where the Government feels that an answer given on cross-examination might give a misimpression of the facts because of a failure, on the part of cross-
5469 examining counsel, to bring to the attention of the witness additional portions of the record in the criminal case, the proper practice is for the Government, on re-direct-examination, to bring those portions individually to the attention of the witness and ask him if he had them in mind in answering, and whether or not he wishes to change or modify his answer in any manner. Any other form of examination would deny the Government itself the right of presenting to the Court, through the lips of the witness and through his demeanor, an opportunity to determine what was the correct answer on the whole; and it would also deny to the defendants the right of re-cross-examination, because they wouldn't be aware, if we took either the criminal record as a whole or excerpts therefrom, without presentation of the witness, of what was being considered by the Court as relevant and material and proper re-direct, or of its effect upon the witness' previous answers.

So you may proceed in the orthodox way.

Mr. Sensibar, will you take the witness stand?

Thereupon, EZRA SENSIBAR the witness on the stand at the time of recess, resumed his testimony as follows:

Redirect Examination (resumed)

Mr. Steffen: I want to say simply that the Government's offer was to introduce only those portions of the
5470 criminal transcript to which Mr. Bromley referred, and that largely for the Court's assistance and in order to make the record complete.

We have no additional provisions or parts of the transcript which we would like to call to the attention of the witness, because I think that that has been adequately done.

Justice Stephens: If you want to call the attention of the witness again to those same portions, you are entitled to do so. The process is necessarily a laborious one, Mr. Steffen, and if you want to take the time to do it, and think it is of advantage to the Government to do so, we will, of course, give you full opportunity.

Mr. Steffen: We are very well satisfied with the witness' testimony along those points. We have no further redirect.

Justice Stephens: Any re-cross?

Mr. Bromley: No re-cross.

Justice Stephens: Does any other defendant have any re-cross?

(No response.)

Justice Stephens: Mr. Sensibar, was there a change of policy in the Cardiff Company after you came into actual control of its policies?

The Witness: Yes, sir, there was.

Justice Stephens: Now, did that change of policy
5471 have to do with price cutting, or did it not?

The Witness: No, sir, it had to do—

Justice Stephens: (Interposing) Just answer me briefly, first. Did it have to do with price cutting, or did it not?

The Witness: I would say not.

Justice Stephens: You would say not?

The Witness: Yes, sir.

Justice Stephens: Did it have to do with methods of distribution? I refer to the distribution directly to contractors rather than through dealers.

The Witness: That is right.

Justice Stephens: Had the company, prior to your coming into control of its policies, but since your acquaintance with it, been a price cutter on plaster?

The Witness: You refer to the period, say, from 1930 to 1935?

Justice Stephens: I think that would be approximately the period, from the time you came into contact with the company as a stockholder until you came into control of it.

The Witness: I think, Your Honor, that the company was, during that period, often led into an erroneous idea of what the real market situation was, and very likely quoted a number of prices that were below the competitive level during that period. I think we made very few mistakes of that character after 1935, because we had the
5472 manpower to investigate and know just what the market level really was.

Justice Stephens: Then you do think that there were some sales, before 1935, below the current price?

The Witness: That is right.

Justice Stephens: And after 1935, you think there were not?

The Witness: That is correct.

Justice Stephens: Then the reason, I assume, you say there was no change in policy, with respect to price cutting, before and after 1935, was that you mean to indicate that in neither period did you intend to sell below the current price, but did so in the earlier period inadvertently?

The Witness: That is precisely correct.

Justice Stephens: Do you know—just answer this question "yes" or "no"—do you know whether or not the company, before 1935, was reputed to be a price cutter on plaster?

The Witness: It was, yes, sir.

Justice Stephens: And what was its reputation, if you know, after 1935, in that respect?

The Witness: I believe its reputation since 1935 has been very good in that respect. It takes a long time to change the opinions of people about a company's reputation, sir.

Justice Stephens: I suppose, since the Court has
5473 conducted a brief examination, it would be only fair to give counsel on both sides an opportunity to question him further, if they desire to.

Mr. Bromley: No questions.

Mr. Steffen: No questions.

Justice Stephens: Then you are excused, Mr. Sensibar. Thank you for attending the Court.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Steffen: Mr. McCormack.

Thereupon HARRY G. MCCORMACK appearing as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. State your full name, Mr. McCormack, please? A. Harry G. McCormack.

Q. Where are you located? A. In Baltimore.

Q. What company are you with, Mr. McCormack? A. American Cyanamid & Chemical Corporation.

Q. How long have you been with them? A. Since 1928.

5474 Q. 1928? A. Yes, sir.

Q. Were you with the Structural Gypsum Corporation at any time? A. I was with the Structural Gypsum Division, yes, the Structural Gypsum Corporation.

Q. What was the Structural Gypsum Corporation? A. It was a wholly-owned subsidiary of the American Cyanamid Company.

Q. And did they change the status of that company at some point of time? A. Yes, at some time along 1933 or 1934, approximately that time. It then became a division of the American Cyanamid & Chemical Corporation.

Q. It was what was called the Structural Gypsum Division of the American Cyanamid & Chemical Corporation? A. Yes, sir.

Q. What was your office with Structural? A. I was Assistant Sales Manager in charge of Plaster Sales.

Q. That applied to both the Structural Division, and also to the time when the concern was a separate corporation, the Structural Gypsum Corporation? A. That is right.

Q. And you have been in that capacity for how 5475 long, since 1930? A. Since 1928.

Q. Did you have any gypsum experience before you went with the Structural people? A. Oh, yes.

Q. Who were you with? A. I had been with the United States Gypsum Company; the American Cement Plaster Company, which ultimately was absorbed by the Beaver Board Company; and for a short period with the National Gypsum Company.

Q. When you were with the United States Gypsum Company, who was your superior? A. Mr. S. F. Bartlett.

Q. Was there a man named Farley that worked in conjunction with you? A. Yes.

Q. Who was he? A. Jim Farley.

Q. How long ago was that? A. That was back in 1912, just about the time I got out of school. Jim and I were co-partners in crime.

Q. He left the Gypsum Company, did he not, at some

time? A. Jim left it after I did. I preceded him in leaving.

Q. Now, what was the business of the Structural
5476 Gypsum Corporation or the Structural Gypsum Division? A. They manufactured and sold plaster and plaster products, but they did not make board.

Q. What was the source of your supply for plaster? A. We manufactured our plaster from a sludge, a by-product sludge.

Q. That was an American Cyanamid by-product? A. Which came from our parent company's plant.

Q. And in what quantities did that come? A. I can only hazard a guess, but it was sizable quantities, anywhere from 400 up to 700 tons a day.

Q. How was that treated, Mr. McCormack? A. Well, a description of it would be rather technical. I could attempt sketching it.

Q. I want just a general description. A. The sludge came in a slurry form, possibly 35 percent solids and 65 percent water, through a pipeline from our parent company's plant. It emptied into a large decantation reservoir. The solids were drawn from the bottom and put through centrifuges, and the excess water thrown off, and the gypsum sludge was then carried around and finally emptied into kettles and calcined or cooked.

Q. What did you make when you cooked it? A. Calcined gypsum.

5477 Q. And what did you do with that? A. Calcined gypsum is plaster of Paris. That is the base for making wall plaster, gypsum block, or any other gypsum product.

Q. What products did your company make? Did they make board? A. No, sir, they did not.

Q. Did they make tile? A. They made gypsum tile, yes.

Q. And plaster? A. And plaster.

Q. Did you sell any of this calcined gypsum, as such? A. Yes, we did.

Q. Who did you sell it to? A. The Kelley Plasterboard Company.

Q. During what years? A. We sold them on and off over a period of, I would say, beginning along about 1932 or 1933 and continuing possibly up to 1939 or maybe 1940.

Q. Did you buy any board during this period? A. Yes.

Q. And by "board", I mean either gypsum board or gypsum lath. A. Yes, we did.

Q. Which did you buy the most of, board or lath? A. Gypsum lath, mostly.

5478 Q. Why did you buy more lath than board? A. For the reason that our contacts, because of our economic situation in having only plaster to sell, our contacts were mostly with the masons' supply dealers. The masons' supply dealer was usually not considered an outlet for large board, they ordinarily used or sold gypsum lath.

Q. When you say that, you mean you were primarily interested in disposing of your plaster, is that correct? A. That was our principal objective.

Q. Was it important that you also have a source of supply for board, if you were going to sell plaster advantageously? A. It was an advantage to have it.

Q. Why was that so, Mr. McCormack? A. In a good many cases, a dealer would not care to purchase an entire carload of plaster. He might desire to buy it in mixed cars, mixing the plaster with some board. Our competition was in a position to sell in that manner, and we thought it would be an advantage to us to also sell likewise.

Q. That is, I get the impression that your dealer might want to buy both plaster and lath, is that correct? A. Yes.

Q. And he wouldn't want to buy it from two sources? A. That is right.

5479 Q. Now, you stated, I think, that you had been buying board from Kelley during this period, from 1932 until what time? A. Until what time?

Q. Yes. A. We continued to buy it all through the entire period Kelley was in business.

Q. And they went out of business when, do you remember? Was it in about 1938? A. I would judge around that time. Eventually they were bought by the Calvin Tomkins Company.

Q. You mean by the Newark Plaster Company? A. That is right.

Q. And you sold to them for what period of time? A. Newark Plaster Company or Kelley?

Q. You said you sold to Kelley until they went out of business, and did you thereafter sell to the Newark Plaster Company? A. Yes.

Q. And you sold to them until what period of time? A. We are at present selling, to the Newark Plaster Company, some calcined gypsum.

Q. There was a period when their plant burned down, in 1940. You didn't sell at that time, did you? A. Hardly.

5480 Mr. Bromley: What do you mean when you say "you sold"?

Mr. Steffen: Calcined gypsum—is that correct?

The Witness: Yes.

By Mr. Steffen:

Q. And that is sold to the Newark Plaster Company for the purposes of making board? A. I assume that it is.

Q. Is the Structural Division making the same quantity of calcined gypsum now as they were back in 1932 to 1938? A. No, our plant was dismantled possibly 3 to 4 years ago. The quantity of sludge available has been considerably reduced, and almost eliminated, but we did have some gypsum sludge in the impounds back of the plant which we have attempted to salvage, and we retained two kettles in which to cook it. We are selling that as long as it lasts.

Q. Now, when you were buying from the Kelley Plasterboard Company, did you buy at a discount?

Mr. Bromley: What is that?

By Mr. Steffen:

Q. When you were buying board and lath from the Kelley Plasterboard Company, did you buy at a discount? A. They allowed us a discount.

Q. Do you remember what it was, to begin with? A. I think it was 10 percent on the small board, and 12 on the large board, it may have been 12-1/2.

5481 Q. Was that discount later increased? A. Yes, it was.

Q. Do you remember to what amount? A. I think to 12-1/2 and 15 percent, respectively.

Q. And do you remember the year—was that about 1933? A. I could only hazard a guess—possibly at that time.

Q. So far as you recall, it was along about that time, is that right? A. Along about that time, yes.

Q. When you were buying board and lath from Kelley, how was it delivered? A. Kelley delivered some to us at our plant; we picked some up at his plant; or he would ship it on his equipment, or with his equipment, for our account.

Q. And he would ship it directly to the dealers to whom you were selling? A. That is right.

Q. Did you have an arrangement with him whereby you shipped calcined gypsum to him, and took back board or lath in your trucks? A. That is right.

Q. And that board or lath would be delivered where? A. Wherever we could sell it to a dealer.

Q. Would it also, perhaps, be delivered to your
5482 warehouse? A. In some instances, yes.

Q. Where was the Structural Division's plant located? A. At Linden, New Jersey.

Q. Did you have a warehouse there? A. Well, a plant warehouse.

Q. Did you have a warehouse in Philadelphia at any time? A. Yes, sir.

Q. And were shipments made from Kelley directly to that warehouse in Philadelphia, of board and lath? A. That is right.

Q. Now, will you state what areas the Structural Company sold both plaster and lath in—in what areas did they sell? A. Oh, roughly from, I would say, the Connecticut State line, or possibly one or two counties in the extreme western section of Connecticut; through Westchester County, Southern New York State; all of New Jersey; Eastern Pennsylvania; down through this area, into Maryland, the Eastern part of Maryland, coming down into the District of Columbia. That, roughly, was the area. There were some sales made outside of that area, but that, roughly, was where we did business.

Q. Did you receive price lists from Kelley? A. We did.

5483 Q. At which your board was sold?

Mr. Bromley: I object to that as leading, and incompetent because calling for a conclusion.

Justice Stephens: Sustained.

Mr. Steffen: I withdraw that.

By Mr. Steffen:

Q. I now want to show you what has been marked as Government's Exhibit No. 591, which purports to be a price list under date of April 26, 1932, under the heading of Kelley Plasterboard Company—

Justice Jackson: (Interposing) Have we these exhibits?

Mr. Steffen: You should have them. I am sorry I didn't ask you, to begin with, whether you had them.

Justice Stephens: I believe we all have copies now. You may proceed, Mr. Steffen.

How many pages has that exhibit, Mr. Steffen?

Mr. Steffen: It consists of 8 pages, Your Honor.

(The document referred to was marked as Government's Exhibit No. 591 for Identification.)

(Government's Exhibit No. 591 for Identification was handed to the witness.)

Justice Stephens: I count 9 pages.

Mr. Steffen: That probably is correct.

By Mr. Steffen:

5484 Q. I also show you what has been marked for Identification as Government's Exhibit 592, which purports to be a Kelley Plasterboard price list, dated January, 1938.

(The document referred to was marked as Government's Exhibit No. 592 for Identification.)

(Government's Exhibit No. 592 for Identification was handed to the witness.)

Justice Stephens: Is that the one with the picture, Mr. Steffen?

Mr. Steffen: That is right, Your Honor.

I further show—

Justice Stephens: (Interposing) Let's get the record clear as to how many pages that consists of, because it may get torn apart or lost sometime.

It consists of 8 pages.

By Mr. Steffen:

Q. I further show you what has been marked for Identification as Government's Exhibit No. 593, which is dated March 1, 1937, and purports to be a further price list. This exhibit is made up of 3 pages.

(The document referred to was marked as Government's Exhibit No. 593 for Identification.)

(Government's Exhibit No. 593 for Identification
5485 was handed to the witness.)

Justice Stephens: These are all Kelley price lists, are they?

Mr. Steffen: Yes, Your Honor. I was going to ask that question of the witness.

By Mr. Steffen:

Q. Have you had an opportunity, Mr. McCormack, to examine Government's Exhibit 591? A. Yes, I have.

Q. Dated April 26, 1932. A. Yes.

Q. Can you identify that as a price list which you received at Structural? A. They look like Kelley's price lists, all right.

Q. I want you to address your attention first to Government's Exhibit 591, dated April 26, 1932, and I call your attention to the reverse side of the exhibit, upon which there is a stamp. Turn the whole exhibit over. A. Yes.

Q. Can you identify that? A. Yes, it is a mailroom stamp of ours, indicating the receipt of the document.

Q. Now, looking at Government's Exhibit 592, which is the price list of January, 1938, can you identify that as a price list which your company received?

5486 A. I would think it was quite possible that we received it.

Q. And now, in regard to Government's Exhibit 593 for Identification—are you familiar with Exhibit 593? A. I am not familiar with it, but it is possible that we received it.

Q. As I understood your testimony, you did receive price lists from Kelley? A. That is right.

Justice Stephens: Were these taken out of the files of Kelley?

Mr. Steffen: Out of Structural's files.

Justice Stephens: I meant Structural's files.

Mr. Steffen: That is right.

I offer in evidence at this time Government's Exhibits 591, 592 and 593, as price lists of the Kelley Plasterboard Company.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declaration of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 591, 592 and 593, were received in evidence.)

5487 Justice Stephens: Who is representing Newark here today?

Mr. O'Donnell: I do, Your Honor.

Justice Stephens: That is right. Thank you.

By Mr. Steffen:

Q. Could you say, Mr. McCormack, whether you were furnished with price lists by Kelley throughout this period from 1932 to 1940, at which your board was sold?

Mr Bromley: I object to that as leading, and also incompetent because calling for a conclusion.

Justice Stephens: Read the question.

(The question was read by the reporter.)

Mr. Steffen: I would like to withdraw the question, Your Honor, because I didn't intend to ask the latter part of it.

Justice Stephens: Very well.

By Mr. Steffen:

Q. Did you receive price lists from Kelley from time to time all through this period from 1932 to 1940? A. I would say yes. The last couple of years, I am not so sure that Kelley continued to publish a price list, but I would say we received them as long as he published them.

Q. Did you ever buy board from the United States
5488 Gypsum Company? A. Yes, we did.

Q. During what period? A. I would think possibly in 1937 and 1938.

Q. Who did you contact in the United States Gypsum Company when you purchased the board? A. Mr. Gallagher.

Q. Who? A. Mr. Gallagher.

Q. Did you make the arrangements? A. I did.

Q. And how long did you say, for the years 1937 and 1938? A. Roughly, yes, for parts of each of those years.

Q. What transpired at the end of that time, did you discontinue purchasing at that time? A. USG discontinued selling us.

Q. And did you have any conversation with Mr. Gallagher about that? A. Yes. Gallagher told me that their own business had increased to such an extent that their production was not sufficient to fill their own orders and ours too.

Q. Were you able to buy or did you attempt to buy board from them as a dealer at that time? A. As a distributor.

Q. I mean to say, your arrangement with USG was
5489 to buy at a discount? A. Oh, yes, yes.

Q. And your conversation with Mr. Gallagher had altogether to do with buying board from USG at a discount? A. Well, I believe it was generally accepted that we knew what the discounts were.

Q. Surely. But what I am getting at is that you didn't attempt to buy any on a dealer basis from USG, did you? A. Oh, no.

Q. Did you form another connection about this time, that is, take another source of supply for board and lath? A. We already had other connections.

Q. Who else were you buying from? A. We were buying from Kelley, or the old Newark company. After Kelley faded from the picture, we bought from USG, Ebsary—

Q. (Interposing) There was a time when you bought from Ebsary? A. Yes.

Q. Do you remember about when that started? A. Again, I can only hazard a guess. Possibly in 1937.

Q. About the time that you discontinued buying
5490 from USG? A. Possibly so.

Mr. Bromley: Wait a minute, the witness said he bought from USG in 1937 and 1938.

Mr. Steffen: That is correct.

The Witness: We were buying from two or three sources at one time.

By Mr. Steffen:

Q. That is, there was a period, as I get your testimony, in 1937 and 1938, when you were buying from Kelley or Newark, and from USG, and also from Ebsary; is that right? A. That is right.

Q. How long did that continue, that triple buying? A. Well, that continued for quite a lengthy period, I would say possibly a year, until USG advised us they could no longer furnish us board. We then only had Kelley and Ebsary.

Q. Was there a time, Mr. McCormack, when a question came up between Structural and Kelley concerning commission men, do you remember that? A. Yes, I think I do.

Q. And that was about what time, Mr. McCormack? A. Oh, I would place it probably in 1936 or 1937.

Q. Did you have any discussion with Mr. Kelley at about that time? A. I had quite frequent discussions with
5491 Kelley, I mean throughout the years, throughout our business relationship.

Q. Did you discuss, with Mr. Kelley, prices, throughout your relationship, prices at which he would sell you board? A. Yes. That is quite possible.

Q. Do you have any recollection as to the prices at which you should sell board? A. Kelley furnished us his price lists, and—

Q. (Interposing) And you understood— A. (Interposing and continuing) —and we went along with those prices.

Q. I see.

Now, about commission men. Did Mr. Kelley ever say to you anything concerning his right to have commission

men under the license agreement? A. I think Kelley told me at one time that he was not in a position to sell through commission men.

Q. I see. Did he tell you whether that restriction applied to Structural, perhaps? A. No. He may have thought I accepted it by inference, but he never made any actual demands upon me.

Q. Did your company have a man by the name of Stremble in your employ? A. Yes, sir, they did.

5492 Q. Was he working on a commission basis? A. He was a commission salesman.

Q. And did you ever have any conversation with Mr. Kelley about Mr. Stremble? A. Yes, I did.

Q. Can you relate that conversation? A. Kelley phoned me—I can't place the date definitely—that Stremble had been cutting his commissions, and had been rebating part of his commissions to some dealers to whom he was selling board, and he wanted to know what I was going to do about it.

I told Kelley I would investigate the matter, because that was wholly contrary to our policy.

Q. Did you make an investigation? A. I did.

Q. Did you report back to Mr. Kelley, do you remember? A. I can't recall that I did.

Q. What, if anything, did you do in regard to Mr. Stremble? A. I eventually fired him.

Q. You say "virtually fired him"? A. I said "eventually fired him".

Q. At about this time that Mr. Kelley was talking to you about him? A. That would be rather difficult to place

5493 the timing of it. I would say somewhere in there.

Q. Did Mr. Kelley mention the license agreement in his conversation with you, and any restrictions that he might be under as respects commission men? A. He mentioned the restrictions he was under. Whether it was at that particular time, I couldn't say definitely.

Q. Did he say whether or not he had any commission men in his employ? A. He never indicated it to me.

Q. In your testimony at the criminal trial, at page 1970, you testified that he said that commission men were taboo; is that correct? A. Yes.

Mr. Bromley: I object to this as leading, and move to strike the answer.

Justice Stephens: It may go out. You shouldn't lead the witness, Mr. Steffen. The witness is an intelligent witness, and can answer the questions without any leading.

By Mr. Steffen:

Q. Could you give us in any more detail what Mr. Kelley may have told you regarding commission men? A. Somewhere, sometime, in the course of a conversation I had with him, he indicated that under the license agreement he could not sell board through a commission sales-
5494 man.

Q. And did you understand that to place any obligation upon you?

Mr. Bromley: I object to that as leading.

Justice Stephens: The objection is sustained. Ask the witness what effect, if any, it had upon him.

By Mr. Steffen:

Q. What effect, if any, did that have on you? A. We continued to sell through commission salesmen.

Q. How many salesmen did you have? A. Oh, it varied from time to time; probably from 10 to 15 or 16.

Q. And what effect did it have, if any, in connection with Mr. Stremble? I think you testified that he was eventually fired? A. That is right.

Q. And was that partly because—

Mr. Bromley: (Interposing) Just a moment. I move to strike out, "I think you testified that he was eventually fired"—or at least the witness should be given the opportunity to answer the question—"what effect, if any, did it have upon Stremble?"

Justice Stephens: That objection is well taken.

By Mr. Steffen:

Q. What effect, if any, did it have upon Mr.
5495 Stremble, Mr. McCormack? A. Well, frankly, it tended to weaken my confidence in Stremble.

Mr. Bromley: I don't believe that that is a responsive answer, if the Court pleases.

Mr. Steffen: I don't think so, either, Your Honor.

By Mr. Steffen:

Q. The question was: After your conversation with Mr. Kelley, in which he told you that he was under restrictions, under the license agreement, not to have commission men—the question then is: What, if any, effect did your conversation with Mr. Kelley have upon your relations with Mr. Stremble? A. I can't say that it had any effect.

Q. I think you testified you made an investigation, is that right? A. That is right.

Q. And you eventually discharged Mr. Stremble? A. That is right.

Mr. Steffen: I would now like to have marked as Government's Exhibits for Identification the following documents:

A letter of June 5, 1936, signed H. F. Sadler, addressed to the Board Survey Company, to be marked as Exhibit 594; a letter dated June 8, 1936, with the initials
5496 "CBM" in the lower left-hand corner, addressed to Kelley Plasterboard Company, as Government's Exhibit 595; and a letter of July 16, 1936, with the same initials in the lower left-hand corner, addressed to the United States Gypsum Company, as Government's Exhibit 596 for Identification. Attached to Exhibit 596 is a green copy of a letter on the Board Survey Company form, dated June 22, 1936, signed in typewriting by Mr. S. J. Kelley for the Kelley Plasterboard Company.

Justice Stephens: You had better mark that 596-A.

Mr. Steffen: Yes, Your Honor.

(The documents referred to were marked as Government's Exhibits Nos. 594, 595, 596, and 596-A, respectively, for identification.)

(Government's Exhibits Nos. 594, 595, 596 and 596-A for Identification were handed to the witness.)

Mr. Steffen: I might say that at the criminal trial, Your Honor, these exhibits were admitted upon stipulation, as being genuine, and were received in evidence at that time.

I now ask Mr. Bromley whether they may similarly be admitted here?

Mr. Bromley: I would like to look at them.

Justice Stephens: Who does the letter of July 16th purport to be from?

Mr. Steffen: From Mr. Mahan, I believe, who is a
5497 lawyer in Mr. MacLeish's office.

Justice Stephens: It is addressed to the United States Gypsum Company.

Mr. Steffen: And that also applies to the letter of June 8, 1936. He is a lawyer in the MacLeish firm.

Mr. Bromley: I agree that these documents are authentic, and were sent and received.

Justice Stephens: Thank you. That will save a great deal of time.

Mr. Steffen: We offer in evidence Government's Exhibits 594, 595, 596 and 596-A.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 594, 595, 596, and 596-A, respectively, were received in evidence.)

By Mr. Steffen:

Q. I am going to ask you to look, if you will, Mr. McCormack, at Government's Exhibit 596-A, which purports to be a report from the Kelley Plasterboard Company of an investigation of the Stremble situation, and ask if that is accurate, in so far as it concerns you?

5498 A. Not wholly accurate.

Q. What is your understanding of that?

Mr. Bromley: I object to what his understanding is. If he wants to bring out the conversation, I think he should be asked about it.

Justice Stephens: You may tell what explanation you made to Mr. Kelley. The Court will then have to determine whether or not Mr. Kelley's statement was correct. If you have anything to add to what you have already said, Mr. McCormack, you may tell what statement you made to Mr. Kelley on the subjects involved in this purported explanation.

The Witness: I am quite confident that on general principles, I denied to Kelley that Stremble had been cutting his commissions.

By Mr. Steffen:

Q. Do you recall whether you made any assurances to Kelley of the sort mentioned in this report?

Mr. Bromley: I object to that as leading, and incompetent because calling for a conclusion rather than the conversation.

Justice Stephens: That objection is sustained.

By Mr. Steffen:

Q. Do you recall any assurances being given to Kelley concerning the possibility that Mr. Stremble would no longer split commissions?

5499 Mr. Bromley: The same objection.

Justice Stephens: The Court will sustain the

objection. The Court must ask Government counsel not to continue to invade the rulings of the Court with respect to leading questions.

By Mr. Steffen:

Q. I think you testified earlier that you didn't recall for sure whether you had made any report back to Mr. Kelley, is that correct? A. I think that is right.

Q. And does a reading of Government's Exhibit 596-A perhaps refresh your recollection? A. It would not necessarily follow that I had taken it up with Kelley again.

Q. Well, could you say for sure, Mr. McCormack, whether you did or not? A. I don't believe I did.

Q. You don't believe that you did report back? A. I don't believe I did.

Q. Now, I think you testified that beginning in 1937 or thereabouts, you commenced buying board and lath from the Ebsary Gypsum Company; is that right? A. That is right.

Q. And did the matter of Mr. Stremble ever come up in connection with your sale of Ebsary board?
5500 A. Yes, sir, it did.

Q. And do you recall about when? A. It is a little difficult to place, at this time. It was perhaps in 1938.

Q. And did you have a conversation with anyone from Ebsary about Mr. Stremble? A. Mr. Lenci.

Q. What did Mr. Lenci say, or will you relate the whole conversation, if you can? A. Well, he called and said that he had a report that Stremble was cutting commissions. From my conversation with Lenci, I assumed that Stremble had gone in and stepped on the toes of one of his dealers with a cut commission price.

Q. What was Mr. Lenci's attitude in the matter? A. Well, naturally, not a very happy one—

Mr. Bromley: (Interposing) I object to that as immaterial, and incompetent because calling for a conclusion.

Justice Stephens: The objection is sustained.

State what Mr. Lenci said to you, and what you replied. You, of course, understand that the Court doesn't expect you to remember the detailed words that were used, it is so long a time ago, but state the substance and effect of what he said and what you said.

The Witness: Lenci stated that he understood
5501 Stremble was running wild among a group of dealers in either Kings or Queens County, cutting his com-

missions; and again, I told Lenci I doubted it. That was done on general principles, wholly, in defense of one of my salesmen. I promised, however, that I would check into the matter.

By Mr. Steffen:

Q. Did Mr. Lenci indicate at all that he was operating under any restrictions, under the license? A. I think he did. Whether at that time or some other, I couldn't say for sure.

Q. What did he say in that connection, if you can remember? A. That his company was not permitted to sell through commission men.

Q. And what did you understand that meant, as respects your company?

Mr. Bromley: I object to that as incompetent because calling for a conclusion, and as leading.

Mr. Steffen: I think that is a proper question, Your Honor, on the ground that we are wishing to establish that perhaps Mr. Lenci's conversation had some influence on Mr. McCormack's action.

Justice Stephens: Well, the proper way to get that information is to ask this witness what, if any, influence or effect this had upon him. That is the view of the
5502 Court. The objection is sustained.

By Mr. Steffen:

Q. Well, Mr. McCormack, will you answer that question—what, if any, influence did Mr. Lenci's statement have upon your action? A. It certainly influenced me to check into the matter, and make an investigation, because if Stremble had been pursuing such a course, it was wholly contrary to our policy.

Q. Do you recall whether you reported back the results of any investigation you made, to Mr. Lenci? A. I can't recall. I don't know.

Q. I want now to show you what has been marked for Identification as Government's Exhibit 597, which is a letter dated June 20, 1938, purported to be signed by Mr. McCormack, addressed to Mr. Stremble.

(The document referred to was marked as Government's Exhibit No. 597 for Identification.)

(Government's Exhibit No. 597 for Identification was handed to the witness.)

The Witness: That is my letter.

By Mr. Steffen:

Q. You say that that is your letter? A. Yes.

5503 Mr. Steffen: I now offer in evidence Government's Exhibit No. 597.

Mr. Bromley: We object on the ground that it is immaterial and incompetent because not binding on any of the defendants, since it is admittedly not a declaration of a co-conspirator.

Mr. Steffen: We offer it not as a declaration of a co-conspirator, obviously, but simply as having a bearing upon the actual state of mind of Mr. McCormack and the Structural Gypsum Company as of this time, and as giving an indication of the probable basis upon which they acted in dealing with Mr. Stremble following Mr. Lenci's telephone conversation.

Justice Stephens: In other words, you are offering it in the same manner that you offered the statements of Mr. McCormack to Mr. Lenci?

Mr. Steffen: No, your Honor, those would come in as admissions on the part of Mr. Lenci.

Justice Stephens: What has the state of mind of this witness, and his relationship with Stremble, got to do with the issues in this case?

Mr. Steffen: The charge in the case, your Honor, applying here, is that the gypsum manufacturers have influenced, in one way or another, the prices and the terms and conditions upon which manufacturing distributors have resold board, and we have testimony now to the

5504 effect that Mr. Lenci had talked with Mr. McCormack in regard to Stremble, and this letter indicates the understanding which Mr. McCormack apparently had of that matter on June 20, 1938. Now that understanding is important, as the state of mind or understanding of the manufacturing distributor in question on the date or at the time when Mr. Lenci raised this point. It is an indication that one of the reasons why Mr. McCormack acted in firing Mr. Stremble was that he felt that there was some obligation under the license agreement, or under Mr. Lenci's statement concerning the license agreement, that he should not engage commission salesmen, particularly where they split commissions.

Justice Stephens: Is this one of the companies which is described in the bill of particulars as a manufacturing distributor whose resale prices were fixed?

Mr. Steffen: Yes, your Honor.

Justice Stephens: And do you contend that splitting commissions was a method of resale price fixing?

Mr. Steffen: Well, it is Mr. Bromley's argument, certainly, that if commissions are split, it does effect a decrease in the price to the dealer, and that therefore it constitutes, in effect, a rebate, and they would thereby have failed to maintain prices. The connection, I think, is fairly close.

Mr. Johnston: If the Court please, on behalf of Texas, as to this, I just can't see where there is any pos-
5505 sible relevancy or materiality or where we would be bound in any way by a letter between two parties who are entire strangers to this law suit.

Justice Stephens: Well, as I understand it, it is offered as a circumstance showing the state of mind of the Structural Gypsum Division in respect to the resale prices of Structural as a manufacturing distributor, it being asserted that that state of mind is produced by the influence of Ebsary.

Of course if this witness were not here, Mr. Johnston, unless this were admissible merely as a circumstance, regardless of its truth, it would come within the hearsay rule; but the witness is here, subject to cross examination, and under oath, and you are not harmed, therefore, by the absence of cross examination.

The question would seem to be more as to its relevance. Let me hear you, Mr. Bromley, again, as to why you think it is not relevant under the charge of resale price fixing?

Mr. Bromley: First, I take it that Mr. Steffen admits it is not relevant on the ground that it is a declaration of a co-conspirator. That brings us to the theory that it is relevant—as I understand him—on the state of mind of this witness. Now I suppose that is under the verbal act rule of evidence, if it is under anything.

But I am not sure what his state of mind has to do with
it. Again counsel for the Government seeks to come
5506 in the back door. Why doesn't he ask him whether he had an understanding or agreement with Ebsary about resale prices or practices? I don't believe that this sort of charge can be proved in this sort of way by trying to show the state of mind that Mr. McCormack had with one of his salesmen.

Justice Stephens: Why wouldn't state of mind be one of the circumstances tending to show the effectiveness of the asserted agreement, or showing, perhaps, its existence? If he acts verbally in a manner which he would act in if he had an agreement, why isn't that, while perhaps not entitled to great weight, a circumstance tending to prove an agreement with respect to resale price fixing?

Mr. Bromley: I think it probably is, and I think the Court has admitted other evidence of that type on that theory. I can't distinguish it.

Justice Stephens: It may be received in evidence; and the objection is overruled.

(Government's Exhibit No. 597 was received in evidence)

Mr. Bromley: May it be understood that this is received subject to the usual reservation?

Justice Stephens: It is not being received as the declaration of a co-conspirator.

Mr. Bromley: That query of mine raises this question in my mind. I suppose I should have asked the
5507 Court to rule with respect to all the testimony given so far by this witness, with relation to his dealings with Kelley and Ebsary, that it all should be received subject to the usual reservation.

Justice Stephens: So far as this witness has testified concerning conversations with Lenci or Kelley, it should be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Bromley: May that be understood as to future testimony, or rather as to the future so far as other conversations of a like nature are concerned?

Justice Stephens: The record may so show.

We have reached an appropriate point, I think, for the afternoon recess.

Announce the recess.

(Whereupon, a five minute recess was taken, after which the trial was resumed as follows:)

5508 Justice Stephens: Proceed.

By Mr. Steffen:

Q. I now show you what has been marked, Mr. McCormack, as Government's Exhibit 598, which purports to be a price list, dated September 14, 1936.

(The document referred to was marked as Government's Exhibit No. 598 for identification.)

(Government's Exhibit No. 598 for identification was handed to the witness.)

Justice Stephens: That skips the letter of March 7, does it?

Mr. Steffen: Yes, your Honor.

Justice Stephens: That is a two-page letter, the present exhibit?

Mr. Steffen: No, just one page, your Honor, dated September 14, 1936.

Justice Stephens: Oh, yes.

By Mr. Steffen:

Q. Did you make up price lists, Mr. McCormack, for your salesmen? A. At various times, yes.

Q. And from what information did you make up your price lists for board and lath? A. I would be guided
5509 by the price lists furnished to me by my suppliers.

Q. And can you identify Government's Exhibit No. 598? A. It looks like our price list.

Q. Could you say how that was made up? A. I would assume it was made on the basis of prices furnished by one of our suppliers, Kelley, or Ebsary, or whoever we were buying from.

Q. Who was supplying you as of this time, do you remember—1936? A. Kelley, I would think.

Q. Then can you say whether or not it was made up from Kelley's price lists? A. It is quite possible, yes.

Q. Would you say that that is your best recollection? A. That would be my best recollection.

Mr. Steffen: I offer Government's Exhibit 598, your Honor.

Mr. Bromley: We make the usual objection, and also we make the additional objection that it is immaterial and incompetent because not binding on the defendants.

Justice Stephens: I am a little puzzled as to why you make the usual objection. This isn't being offered as a declaration of a co-conspirator, is it?

Mr. Steffen: No, your Honor.

Justice Stephens: It is offered only to show ac-
5510 tion, or alleged action, following upon the asserted direction of Kelley, is it not?

Mr. Steffen: That is right, your Honor, and it should be admissible, I think, upon the same grounds as Exhibit 597 was admissible.

Justice Stephens: Well, of course it may be connected with Kelley. To the extent that if connected by other evidence it may be in the nature of a declaration of Kelley, it is received subject to the usual reservation with respect to declarations of alleged co-conspirators; and the objections as to its materiality and relevancy are overruled.

(The document referred to, marked as Government's Exhibit No. 598, was received in evidence.)

By Mr. Steffen:

Q. And now, Mr. McCormack, I want to direct your attention to the fact that you were buying, according to your testimony, in 1937 and 1938, you were buying board from three companies, Ebsary, USG and Kelley—is that correct? A. That is correct.

Q. And did you sell in the same territories that they did? A. Yes. Our territory embraced areas in which they also sold.

Q. And did you understand that they were all
5511 three, or rather Kelley and Ebsary, under a license agreement?

Mr. Bromley: I object to his understanding as immaterial and incompetent.

Justice Stephens: Sustained.

Mr. Steffen: I will withdraw the question.

By Mr. Steffen:

Q. What, if any, obligation, Mr. McCormack, did you feel that you were under to sell board procured from Kelley at this time, at Kelley's prices? A. I wouldn't say it was an obligation; it was good business sense to go along with those prices.

Q. Why? A. If we undersold our source of supply, and continuously did it, I don't believe we would have a source of supply very long.

Q. And what was your practice, did you undersell your source of supply?

Mr. Bromley: I object to that on the ground that the prices that he charged are the best evidence.

Mr. Steffen: I asked, if I might say, for his practice, not for the actual proof of any particular transaction, and I think he may answer as respects his practice. I have some invoices, which I will also show.

Mr. Bromley: I think he may be permitted to answer with respect to his policy, which he already has answered.

5512 Justice Stephens: I think that is proper, and I thought he had answered that. As to what he did sell at, that must be answered by the actual prices, if they are available, or his memory of them, if they are not, and I assume that you have the price lists available.

If there is any doubt in the record as to what their practice was with respect to underselling, you may repeat that question. I thought the record showed that Mr. McCormack testified in effect that they didn't have the practice of underselling their suppliers. But you may ask that question.

Mr. Bromley: Does your Honor mean "practice", or "policy"?

Justice Stephens: Policy. I was using the words interchangeably.

Mr. Steffen: I think that the policy is sufficiently established, and I have no wish to go into a large volume of invoices to disclose what actual prices were obtained.

Justice Stephens: And we don't wish to have them in the record if it is escapable. At the same time I think that if defendants feel, in order to protect their rights, that they must have an actual evidential showing under the rules as to what the prices were, so that the Court can tell whether there was a following of the Kelley prices or not, that that objection urging the best evidence rule is well taken.

Mr. Bromley: Counsel for the Government well knows that it developed at the criminal trial that these in-
5513 voices will show that the prices were not the same, and that there was a very great dispute about it. It turned out that the prices varied very greatly on account of credit memoranda.

Justice Stephens: Then we will have to go into that.

Mr. Steffen: I don't think I need anything further at this point, your Honor. We have no further questions.

Justice Stephens: You are not offering the April 18th letter?

Mr. Steffen: No, your Honor.

Justice Stephens: You may cross-examine.

Cross-Examination

By Mr. Bromley:

Q. Mr. McCormack, the Structural Company had no license agreement with USG, did it? A. No sir, we did not.

Q. You knew that at all times during the period that you were connected with the company, didn't you? A. I did.

Q. And you knew that your company was not bound by any minimum prices on patented gypsum board, fixed by USG? A. We never accepted that we were.

Q. Well, you knew as a matter of contract that you had no contract with USG whatsoever, isn't that right? A. We had no contractual obligations.

Q. Now isn't it likewise the fact that you had no
5514 understanding or arrangement or agreement with Kelley as to what your resale prices would be? A. I couldn't honestly testify that we had any arrangement with any of our suppliers.

Q. You mean by that that you had no arrangement with Ebsary or with USG or with Kelley with respect to your resale prices, don't you? A. No sir.

Q. You had none, is that right? A. We had none.

Q. You have told the Court that your policy, as I understood you, was to resell the board at as near your suppliers' prices as you were able to, is that right? A. That was our policy.

Q. Now will you tell the Court the reason for that policy? A. I have already explained that it was just business prudence. We couldn't undersell our sources of supply, and expect them to continue furnishing us board with which to undersell them. That is just common horse-sense.

Q. And as you said, your main business was the manufacture and sale of plaster, wasn't it? A. That is right.

Q. And the only reason you sold this board at all was to implement or aid your plaster sales, is that cor-
5515 rect? A. I have already testified to that.

Q. Now did you arrive at that policy, of which you have just spoken, independently of any arrangement with anybody else and because you thought it was the best thing to do for your company? A. It was a company policy, it was evolved within the company, as a company policy.

Q. You realized, did you not, that when Kelley, Ebsary or USG sold you board at a discount, that that was more or less of an accommodation or favor to you? A. I would think it would be a sales incentive.

Q. A sales incentive? A. I would think so.

Q. Well, it was an accommodation to you? A. It was an accommodation, yes. We needed the board to round out our sales to the dealers.

Q. And isn't it the fact that at no time was the discount which you received sufficiently great to enable your company to make any substantial profit out of the board business? A. Well, I don't believe we ever made any great

profit. I don't know that there was ever any cost study made to determine that definitely.

Q. But isn't it the fact that you weren't in the business of buying and reselling board because of the profit
5516 involved in it? A. No, I wouldn't say that.

Q. What do you mean by that, that you did make some money? A. We evidently made a small profit. As I indicated, how much I don't know. It wasn't much. With what the discounts were, it wasn't enough to get rich on.

Q. And as a matter of fact the margin of gross profit which the discount allowed you was pretty generally used up in selling expense and handling and warehousing, wasn't it? A. A good part of it would have to be charged off that way.

Q. Now you were in direct competition at all times, so far as the sale of board was concerned, with each one of the suppliers from whom you bought board, weren't you? A. That is right.

Q. You solicited their trade, their customer trade, and they solicited yours? A. It was open competition, we were all entitled to sell or approach any dealer we had a mind to.

Q. And what would you say about the nature of the competition, was it vigorous, or wasn't it? A. I would say it was most vigorous.

Q. And that goes for the entire period that you were connected with the company, wouldn't you say? A.
5517 Most assuredly.

Q. Now you knew generally, did you not, that all of your suppliers were licensees of USG, so far as patented board was concerned? A. I think that was general information within the industry.

Q. And you knew, of course, that USG was the licensor, didn't you? A. I did.

Q. Wasn't one of the reasons for trying to get as much as you could for your board, the fact that your margin of profit was small? A. That may have been a contributing reason.

Q. Well, you wanted to get as much for your board as you could get, didn't you? A. Yes, naturally.

Q. You couldn't have sold it at any higher price than was being charged by USG or Ebsary or Kelley, could you? A. No, we couldn't get a premium for it, no, certainly not for the same brand of board.

Q. By the way, was this board which you purchased and resold, marked with your trademark or the trademark of

your supplier? A. It was always sold on the supplier's trade mark.

Q. That is true for USG and Ebsary and Kelley—
5518 it was their board? A. That is true.

Q. So that as to board that you sold, which was found in the dealer's hands, anybody who was interested in it wouldn't be able to tell whether that board was sold to the dealer by you or by USG, so far as Sheetrock and Rocklath were concerned, is that right? A. I would say that that is correct.

Q. And that same answer is true so far as the Ebsary board is concerned? A. That is right.

Q. And likewise that would be true of the Kelley board? A. That is right.

Q. In other words, once that board came into the possession of the dealer, nobody else could tell whether the dealer had bought the board from you or from Kelley, for instance? A. That is right.

Q. Wasn't one of the reasons that your policy was to sell as nearly as you could at the same prices as your suppliers charged, because there was so little money in the business anyway that you wanted to get as much as you could? A. Naturally we sought to make a profit.

Q. And was that the reason why, as a matter of policy, you determined to charge the same prices, if you could get them, as your suppliers were charging for this pat-
5519 ented board? A. Naturally.

Q. And is that another reason why you did not, consistently, as a matter of policy, attempt to undersell your supplier? A. I would say that was one of our definite reasons.

Q. And is it true that quite apart from any license agreement, you would at that time have regarded it as bad business for any distributor to cut the prices of that distributor's supplier? A. I would only want to answer for myself. I wouldn't attempt to cover the other fellows.

Q. I didn't mean to ask you about the other fellows. I just was talking about you. Wouldn't you say generally, without regard to any license agreement, that it would have been poor policy for you to cut the prices at which your supplier of any goods was selling those goods on the open market? A. Without question.

Q. Now it is the fact that you knew at all times that you were not bound to charge any particular price for board, or to follow any particular terms of sale on board—

that is the fact, isn't it? A. We never felt that we were under any definite obligation, no.

Q. And what is the fact about jobbers, for instance—didn't Structural at all times sell to jobbers at a dis-
5520 count throughout this period? A. Whether during the entire period or not, it would be difficult to say. For a good part of the period, yes.

Q. And isn't it the fact likewise that throughout this entire period the Structural Company had many salesmen who were compensated on commission? A. Yes, there were.

Q. You never changed that practice or got rid of those salesmen, did you? A. No.

Q. Again, isn't it likewise the fact that throughout this entire period of time, for instance, Structural permitted dealers to pick up small quantities of board at the Structural Company's mill? A. Yes, they did.

Q. And those quantities that you permitted thus to be picked up were smaller quantities than Kelley was permitted to have picked up under the terms of his license, or at least as a matter of his practice, isn't that right? A. That may possibly be so.

Q. Well, you would sell a dealer any quantity, to be picked up at your mill, wouldn't you? A. If he came to our mill to get a truckload of plaster, and wanted a thousand or two thousand or three thousand feet of board, we felt we ought to give it to him, as a matter of ac-
5521 commodation.

Q. And you did give it to him? A. We did, yes.

Q. And that was throughout the period? A. I would think so.

Q. Now, were you ever threatened by anyone at any time that USG's consent to Ebsary or Kelley to sell you would be withdrawn? A. I can't recall any such threat, no.

Q. Were you ever told that any conditions had been attached by USG to any consent which it had granted Ebsary or Kelley to sell you at a discount? A. Frankly, I didn't know until quite late in this picture that we ever were selling under a consent.

Q. Did you ever have anything to do with the Board Survey Company? A. No sir.

Q. Did you ever, before today—or perhaps I should say before the criminal trial—see either Exhibit 594, Exhibit 595, Exhibit 596, or Exhibit 596-A?

Justice Stephens: Let the witness see those exhibits, unless they are before him, so that he will be sure what he is answering.

(Government's Exhibits Nos. 594, 595, 596, and 596-A were handed to the witness.)

5522 The Witness: What were the numbers of those?

Mr. Bromley: 594, 595, 596, and 596-A.

The Witness: I don't know that I ever saw them at the criminal trial.

By Mr. Bromley:

Q. Then is it the fact that today is the first time you have ever seen those documents? A. I would say yes.

Q. Did you ever at any time receive any communication in writing from the Board Survey Company? A. No sir, I did not.

Q. Did you ever at any time receive any communication or complaint about what you were doing in the market, or selling in the market, from anybody representing the Board Survey Company? A. No sir, I did not.

Q. Did any representative of the Board Survey Company or USG ever call upon you and complain about your resale prices or your resale practices? A. No sir.

Q. Now, Stremble was a commission salesman in the employ of Structural, wasn't he? A That is right.

Q. And he was discharged, not once by you, but
5523 twice, wasn't he? A. That is correct, yes.

Q. And isn't it a fact that he was discharged, not because he was a commission salesman, but because you felt that you could not control his practice of rebating a part of his commission to your customers? A. Well, we had satisfied ourselves pretty well on that point. In fact, when we rehired Stremble the second time, he was really on probation, and when we found he was again cutting commissions, we fired him again.

Q. Now, was Stremble fired because of anything that was brought to your attention by any of your other salesmen in your organization? A. Yes, we had—

Q. (Interposing) What was that? A. Stremble was selling in an area where we had a regular, established salesman, a salaried salesman who had been with us for a number of years.

Q. A salaried salesman? A. That is right.

Q. Not on commission at all? A. That is right.

Q. What was his name? A. Horne.

Q. Did he complain to you about Stremble's activities? A. Yes, he complained several times.

5524 Q. What did he say? A. The same thing as Kelley and Lenci had said, that he had been cutting commissions.

Q. What was the reason that he was complaining? A. Stremble was stepping on his toes. He had inadvertently gone into a couple of Horne's dealers and made an offer to them. Horne, naturally, felt that he was being placed at a disadvantage, and he came to me to complain.

Q. Well now, when you say that Stremble went into a couple of Horne's dealers, you mean a couple of dealers that were customers of the Structural Gypsum Company, but who were regularly sold by Structural through its salesman Horne, don't you? A. That is right.

Q. Now it is a fact, isn't it, that Horne was not in a position to split commissions, because he didn't receive commissions? A. He didn't receive commissions.

Q. Therefore, he was not in a position to split commissions, was he? A. He couldn't.

Q. He got the same amount of salary no matter how much business he produced? A. That is right, he was a salaried salesman.

5525 Q. Now Stremble went, on one or more occasions, to one of these customer friends of Horne and got the order from that particular dealer, isn't that right? A. I don't know whether he ever got the order, but Horne claimed he made the offer.

Q. He made the offer? A. Yes.

Q. And if he had gotten the order, that is if Stremble had gotten the order, Stremble would have been paid a commission on that order, wouldn't he? A. Oh yes.

Q. And he would have gotten the credit for getting that business, rather than Horne? A. We couldn't do otherwise.

Q. Isn't that what Horne was complaining about? A. Well, we ourselves wouldn't care to sell through a commission man where we were already getting the business from a salaried salesman. That would be sort of cutting our own throat.

Q. Wasn't that the reason that you first fired Stremble and then put him on probation when you took him back? A. It may have been a contributing factor.

Q. And wasn't that the reason that you finally fired him the second time? A. It was one of the contributing factors, yes.

Q. You testified that prior to the time that
5526 Stremble was fired the first time, you had a talk with Mr. Kelley, didn't you? A. Yes, I did.

Q. Now in that conversation, Kelley didn't make any mention either of USG or Board Survey, did he? A. No, he did not.

Q. Nor did Mr. Kelley mention anything about any license agreement, did he? A. No sir, he did not.

Q. Stremble's activities in splitting commissions and getting business thereby, might have resulted in taking business away from the Kelley Company, might it not? A. It was quite possible, yes.

Q. And isn't it the fact that all Mr. Kelley did was tell you that he had heard that one of your men was splitting commissions, and asked you to investigate the matter? A. Kelley indicated to me that Stremble had gone to a couple of his customers—

Q. (Interposing) A couple of Kelley's customers? A. A couple of Kelley's customers—and it is my recollection that it was on that basis that he telephoned me, that Stremble was hurting Kelley.

Q. And isn't it the fact that all you did was call Stremble in and ask him what he was doing? A. Yes.

5527 Q. Now you did not take Stremble off selling board, did you? A. No, I eventually took him off selling everything.

Q. At that time, I mean, when you called him in after Mr. Kelley had talked to you, you didn't restrict his sales—A. (Interposing) Not immediately, no.

Q. And you made no report back to Mr. Kelley whatsoever, did you? A. Not that I recall.

Q. Isn't it the fact that you let the matter drop after your talk with Kelley because Stremble had told you that he was not rebating? A. There would be no advantage to me in resurrecting it and keeping it hot.

Q. So you let it drop, didn't you? A. I think that that is what developed.

Q. Wasn't it some time later, after your salesman Horne had complained about Stremble splitting commissions, that you called Stremble in again and decided to fire him? A. May I have that question repeated?

Mr. Bromley: Will you read it, Mr. Reporter?

(The reporter read the question as above recorded.)

The Witness: I wouldn't know definitely, I can't answer that question. I don't recall definitely. I wouldn't want to hazard a guess.

5528 Q. Don't you recall that there was quite a period of time between your talk with Kelley and your actual firing of Stremble? A. There may have been, but I can't place definitely what it was.

Q. Well, wasn't the most important reason for your first discharge of Stremble, not what Mr. Kelley had said in his conversation to you, but what your salesman Horne had said by way of complaining against Stremble? A. Well, they both might be contributing factors to the conclusion I reached. Stremble's practices were contrary to our sales policy. We didn't condone that, and we just concluded it would be better to get him out of the picture.

Q. Now you went right on paying commissions to all of your other salesmen who were working on commissions after you fired Mr. Stremble, didn't you? A. That is correct.

Q. You didn't make any change in your commission set-up other than as respects Stremble, did you? A. No sir, that was the only one.

Q. After the lapse of a year or two subsequent to 1936—

Mr. Steffen: (Interposing) Excuse me, Mr. Bromley. Those questions with regard to commissions applied to board or plaster?

By Mr. Bromley:

5529 Q. You understood that my questions were addressed to your salesmen who were selling board on commission? A. I assumed as much.

Q. That is the fact, isn't it? A. They were selling all of our products, all on a commission basis.

Q. Including board? A. Including board.

Q. And that practice you never changed? A. We never changed it.

Q. Now a year or two after 1936, and after you had fired Stremble, you re-hired him, didn't you? A. That is right.

Q. And he went to work for you on a commission basis again? A. That is right.

Q. And then it was that you heard from Mr. Lenci? A. That is right.

Q. Now didn't Mr. Lenci merely tell you that he had heard that Stremble was approaching some Ebsary customers and offering to split his commission with them? A. I can't recall definitely the subject of the conversation. That would be rather difficult to answer.

Q. Well, did he say anything more than that he had

heard that Stremble was soliciting Ebsary's cus-
5530 tomers and offering to split commissions? A. That was substantially what he said.

Q. He didn't mention anything about any license agreement, did he? A. Oh, no, he did not.

Q. Or any complaint from USG or anybody else about it, did he? A. No, he did not.

Q. And he certainly didn't mention Board Survey, did he? A. No, he did not.

Q. And you thereupon decided that Stremble was up to his old practices again, and determined to fire him again, didn't you? A. Well, he had gotten into difficulties with Horne again too.

Q. Oh, he had? You mean by that that you had had another complaint from Horne before you fired him the second time? A. With Horne; it was a continuous thing. He was a thorn in his side continuously.

Q. Stremble was a thorn in Horne's side continuously? A. Yes.

Q. That is what Horne thought Stremble was; is that right? A. That is right.

5531 Q. And that is what Horne told you that he thought Stremble was, isn't it? A. Yes sir.

Q. And wasn't that the principal reason that you fired Stremble the second time? A. Whether it was the principal reason or not, we fired him.

Q. That was a reason? A. It was a reason, yes.

Q. Wasn't it the most important of all the reasons you had? A. Well, it was a pretty good one.

Q. It was a pretty important one, wasn't it? A. I would think so.

Q. Have you got Exhibit No. 597 in front of you? A. Yes, sir, I have.

Q. By the way, you knew, did you not, that in 1938 this practice of Stremble of giving rebates by splitting commissions involved the possibility that your company might be held for a violation of the Robinson-Patman Act? A. Yes, there was always that danger.

Q. You knew about the Robinson-Patman Act, didn't you? A. Oh, yes.

Q. And wasn't that another reason why you de-
5532 termined to fire Stremble? A. As far as split commissions, yes, that would be a very definite reason.

Q. A violation of the Robinson-Patman Act was a crime, wasn't it?

Mr. Steffen: I don't think that you should ask the witness concerning whether a violation of a law constitutes a crime or constitutes a misdemeanor, or what not. It seems to me that calls for a conclusion and is not appropriate.

Justice Stephens: Well, if he knows, or knew at the time, that it was, or thought it was, it would bear upon the action that he took in discharging Stremble. So it is not bad as a conclusion in the usual sense, Mr. Steffen. The Court of course isn't taking the witness' construction of the statute. The Court is permitting cross-examination testing the reasonableness of and reasons for the witness' action. The objection is overruled.

By Mr. Bromley:

Q. Can you answer that, sir? A. Will you repeat the question?

(The reporter read the question as above recorded.)

The Witness: Yes, I would think so.

By Mr. Bromley:

Q. And didn't that influence you in your decision to get rid of Mr. Stremble? A. It is quite possible.

5533 Q. Now looking at the second paragraph of Exhibit 597, do you see that sentence:

"As you know, all gypsum board is manufactured and sold under license agreement, and we have to adhere rigidly to the terms."

A. Yes sir, I see that.

Q. When you wrote that you knew you had no license agreement, didn't you? A. Oh, yes.

Q. What? A. Yes, I did.

Q. And didn't you write that sentence to Stremble as a sort of an excuse for getting rid of him? A. It might have been as good as any.

Q. Well, that is why you wrote it, isn't it? A. As I indicated before, it was probably as good as any excuse to get rid of him.

Q. You never at any time, Mr. McCormack, received a USG licensee bulletin, did you? A. No sir, I did not.

Q. Wasn't it necessary at all times during your relationships with USG, Ebsary and Kelley, that you know in advance the dealer price for patented board, of your suppliers? A. Yes, it was.

Q. And what was the reason for that? A. We
5534 had to know what it was going to cost us, or what commissions would apply in various areas. There were variable prices applying.

Q. And the price which you paid USG or Ebsary or Kelley was the dealer price of those organizations, on which your discount was figured, isn't that right? A. That is right.

Q. So wasn't a reason why you asked for and received price lists, because you wanted to know what the board would cost you before you made contracts for its resale? A. We had to know what the board was going to cost us.

Q. And wasn't that a very important reason why you got the price lists of your suppliers throughout this period. A. It would be one of the reasons.

Q. Did you ever attend a meeting of the licensees, or the licensees with the licensor, in your life? A. No sir.

Q. And did you ever know of anyone investigating your resale prices, or your resale practices? A. Not to my knowledge, no sir.

Q. Did anyone ever police or attempt to police either your resale prices or practices? A. Not to my knowledge.

Q. Did you ever make any attempt to conceal the fact that Structural employed commission salesmen? A.
5535 I don't believe we did, no.

Q. Or that Structural sold to jobbers at a discount? A. I don't recall any effort of concealment.

Q. Or did you ever attempt to conceal the fact that Structural sold in small quantities, whatever the dealers wanted to buy, and permitted them to pick that up at your mill? A. I don't recall any.

Q. Did you ever receive any threats, direct or indirect, that the Structural Gypsum Corporation had to resell its board at the suppliers' prices, or on their terms and conditions? A. I could never honestly testify that any supplier ever made such a demand.

Q. Now will you tell me the difference, briefly, between a masons' supply dealer and a lumber dealer? A. A masons' supply dealer usually is found in the larger cities, selling what they call "hard" materials—cement, plaster, lime, stone aggregate, and sand; as compared with a lumber dealer, who, as the name would imply, sells lumber, window sash, and things that the carpenter uses, as against the masons' supply dealer, who usually sells supplies that the mason uses.

Q. The lumber dealer would handle wallboard, whereas the masons' supply dealer would not, isn't that right? A.
The lumber dealer would handle most of the wall-
5536 board, yes. You might find an isolated instance of a masons' material dealer doing that, but customarily it would be the lumber dealer.

Q. And the masons' supply dealer would handle both lath and plaster? A. That is right.

Justice Stephens: If you have a number of other questions, we will have to take the afternoon recess.

Mr. Bromley: I am through, your Honor.

Justice Stephens: Have you any redirect examination?

Mr. Steffen: Yes, your Honor, we may have as much as ten minutes, unfortunately.

Justice Stephens: Well, that may mean recross-examination. We are sorry to have to ask you to come back tomorrow—I assume you are a very busy businessman—but our work is only about half over. We have to read all this yet tonight, Mr. McCormack, and go over these exhibits, so we will have to ask you to come again tomorrow.

The Witness: All right, sir.

Justice Stephens: Announce the recess.

(Whereupon a recess was taken at 4:00 o'clock p. m. until 10:00 o'clock a.m. of the following day.)

5537 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Tuesday, March 28, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5544 Thereupon, HARRY G. MCCORMACK the witness on the stand at the time of adjournment, resumed his testimony as follows:

Redirect Examination

By Mr. Steffen:

Q. I have only three or four questions, Mr. McCormack. Yesterday, Mr. Bromley, at page 5807 in the record, asked you some questions concerning the competi-
5545 tion with your suppliers, and I think you testified that you solicited the same trade as your suppliers of board did, which would be Ebsary and United States Gypsum Company and the Kelley Plasterboard Company, and that there was open competition between you and your suppliers; also, that the competition was very vigorous. Do you remember that? A. Yes, I do.

Q. Do you differentiate in your answers, Mr. McCormack, between price competition and any other kind of competition? A. Well, that would be sales competition.

Q. And by "competition", what did you mean—that there was price cutting, or was it sales competition? A. Well, I am not aware of any price cutting. It was more the direct sales effort, the number of salesmen who were competing with our salesmen, and just general competition.

Q. But did you mean to say that the prices of board varied? A. I don't believe so.

Q. Would that be true of plaster? A. Yes, it would be.

Q. Plaster prices were stable? A. I think so.

Q. At this time? A. (No response.)

5546 Q. Now at transcript page 5810, Mr. Bromley asked whether or not your company employed jobbers, do you remember that? A. I believe so.

Q. And your testimony was that you had jobbers more or less through all this period? A. We did.

Q. Did those jobbers sell both board and plaster? A. They did.

Q. And there has been testimony here to the effect that the margin of profit was very low, under a 12-1/2 or 15 percent discount, and that it wouldn't admit of having jobbers. What do you say as to that? A. Well, in our jobbing arrangement, we split our commission with the jobber.

Q. And what territories did the jobbers serve, immediately around your plant at Linden—

Justice Stephens: (Interposing) When you use the word "commission" in that instance, you mean discount, do you?

The Witness: Yes.

The one that comes to mind is the Union Materials Company of Baltimore.

By Mr. Steffen:

Q. And did they job both plaster and board for you? A. Yes, they did.

5547 Q. And did you split your commission or discount with them, in jobbing board? A. On board, we did, yes.

Q. Now there was a question concerning bulletins, and you testified that you received price lists from Kelley? A. Yes.

Q. And that in the years 1936, 1937 and 1938, or thereabouts, you bought board from the United States Gypsum Company, do you remember that? A. That is right.

Q. Did the United States Gypsum Company supply you with price bulletins? A. Not that I recall.

Q. And in selling their board, at what prices would you sell?

Mr. Bromley: I object to that. I think the invoices are the best evidence as to what the prices were.

Justice Stephens: Objection sustained.

By Mr. Steffen:

Q. What was your policy in selling their board, as respects prices? A. We knew the prices that applied—in fact, we had Kelley's price lists. We would just use those as a guide.

Q. Now, coming to this Stremble matter, you will remember that in your direct testimony you testified
5548 that on the second occasion when Mr. Stremble was in trouble, you had a conversation with Mr. Lenci.
A. Yes.

Q. And you testified that either at the time of that conversation, or at some other time—and you weren't sure about that—Mr. Lenci had told you he was operating under restrictions under the license agreement. That appears on page 5792 of your testimony. Do you remember that? A. I think—

Mr. Bromley: (Interposing) Just a moment—

Mr. Steffen: (Interposing) May I show the witness his testimony on this point?

Justice Stephens: Yes.

Mr. Steffen: Read from page 5792 over to page 5793.

(Transcript handed to the witness.)

Mr. Bromley: May his attention, if the Court pleases, be called to his cross-examination at page 5820, line 24, to page 5821, line 6?

Mr. Steffen: Your Honor, what I was wanting to do was to do just what Mr. Bromley suggested, to compare those two bits of testimony, because there is an apparent inconsistency.

By Mr. Steffen:

Q. Will you, then, Mr. McCormack, now look at your testimony on page 5820, at which point Mr. Bromley asked you some questions concerning what Mr. Lenci said?
5549 A. Yes, sir.

Q. Have you read your testimony, Mr. McCormack? A. Yes.

Q. You said, on page 5820, in answer to Mr. Bromley's question, that Mr. Lenci made no mention of operating under a license agreement, and in your earlier testimony you stated that he did at some time. Can you clear that up?

Justice Stephens: You had better say, to make the record clear, "at pages 5820 and 5821".

Mr. Steffen: Yes, particularly at page 5821.

By Mr. Steffen:

Q. And in your testimony at page 5792, on your direct testimony, you testified that Mr. Lenci said to you, either at this time or some other time, that he was operating

under restrictions under the license agreement, as respects commission salesmen. A. At some time he did.

Q. Can you testify as to whether it was at this time, or when? A. I wouldn't know.

Q. Can you be sure of your answer, then, to Mr. Bromley on page 5821, in which you said that he made no mention of the license agreement? A. That is most difficult to answer. Frankly, I don't know.

5550 Q. And when you say that, you mean you don't know whether he said it at this time or at some other time? A. Yes; frankly, I don't know.

Q. Then you would like to modify your answer on page 5821 to say that you were not sure whether he did or didn't say anything at that time—is that correct—about the license? A. I think that that would be a fair answer.

Mr. Steffen: That is all, Your Honor.

Justice Stephens: Any re-cross?

Recross Examination

By Mr. Bromley:

Q. In your testimony about plaster prices, Mr. McCormack, you didn't mean to say that plaster prices didn't change from time to time during this period, did you? A. What period do you refer to, Mr. Bromley?

Q. Well, I understood you were referring to the whole period that you were with the Structural Company. A. Oh, plaster prices changed considerably during the entire period. I thought you had reference to some particular period.

Mr. Steffen: I thought the reference was to the years 1936, 1937 and 1938, in my question.

By Mr. Bromley:

Q. How did you understand Mr. Steffen's ques-
5551 tion,—to be limited to 1936, 1937 and 1938, or to apply to the whole period that you were with the Structural Company, so far as plaster prices were concerned? A. I assumed that he was referring to Stremble, and so far as I know, without referring to the record, I imagine our prices were the same. During the entire period that we sold plaster, there were many, many price changes.

By Mr. Bromley:

Q. And there were many price changes in plaster prices during the years 1936, 1937 and 1938, weren't there? A.

Possibly so. Without referring to the record, I can't say definitely. I wouldn't be surprised if there were.

Q. And when you say "possibly so", you mean your best recollection is that the price of plaster did change during the years 1936, 1937 and 1938, don't you? A. I wouldn't know definitely without referring to the record, but if you say they did, I will accept that statement that they did.

Q. Isn't your best recollection, Mr. McCormack, that they did change during the three years mentioned, 1936, 1937 and 1938? A. I wouldn't be surprised if they did.

Q. You mean by that answer that your best memory is that they did change, don't you? A. To be sure, I would have to refer to the records.

5552 Q. So you don't remember as to whether they changed in the years 1936, 1937 and 1938; is that right? A. I honestly don't.

Q. Now, in one of your answers to a question by Mr. Steffen this morning, in connection with whether you received USG price lists, you said that you had Kelley's price lists, and you therefore knew the prices that applied.

Now you didn't mean, in your use of the word "applied", to suggest that the Structural Company had any obligation or arrangement or understanding to follow either the USG or the Kelley or the Ebsary prices in its resales, did you? A. We had no obligation, no.

Q. By the way, on page 5810, in line 18, I asked you this question:

"Q. Now it is the fact that you knew at all times that you were not bound to charge any particular price for board, or to follow any particular terms of sale on board—that is the fact, isn't it?"

And you said:

"A. We never felt that we were under any definite obligation, no."

Now when you used the word "definite", you didn't mean to qualify your answer, did you? A. No, I don't believe so.

5553 You must remember that we were dependent upon others to supply us with board, and just as good business practice we felt it incumbent upon ourselves to get as good a price as they got. As I told Mr. Steffen yesterday, we couldn't undersell our source of supply and expect them to continue furnishing us with board, that was just common business sense.

Q. So that, when you said "We never felt that we were under any definite obligation", all you meant was that you had no obligation of any kind, isn't that right? A. I never felt we had.

Q. Nor did you have any agreement or understanding of any kind, with respect to your resale prices or practices—isn't that right? A. That is correct.

Q. And when you said, Mr. McCormack, yesterday—and I think again today—that you could not honestly testify that you had any obligation to follow your suppliers' prices, you didn't mean to qualify your answer, or your statement, that you had no obligation of any kind, did you? A. No, we had no obligation.

Q. And when you used the word "honestly", that was just your method of saying that you had no obligation or agreement or arrangement or understanding of any kind; isn't that right? A. I would say that that is correct, yes.

Q. And you have no reservation in that answer
5554 whatsoever, have you? A. No, I have not.

Q. Now, at page 5804, in your cross-examination, I asked you this question:

"Q. And you knew that your company was not bound by any minimum prices on patented gypsum board, fixed by USG?"

And you answered:

"A. We never accepted that we were."

Then I said:

"Q. Well, you knew as a matter of contract that you had no contract with USG whatsoever, isn't that right?".

And you said:

"A. We had no contractual obligations."

Now, you meant by those answers that you had no obligations, arrangements or understandings of any kind, with respect to what prices you should charge on your resales of patented board; isn't that so? A. That is correct.

Q. Then at page 5812, at line 10, Mr. McCormack, I asked you a question which I think you did not answer, as follows:

"Q. Were you ever told that any conditions had been attached by USG to any consent which it had granted Ebsary or Kelley to sell you at a discount?"

And you said:

5555 "A. Frankly, I didn't know until quite late in this picture that we ever were selling under a consent."

Mr. Steffen: I think, Your Honor, that this, at least, goes beyond the scope of proper re-cross-examination. I don't recall anything that prompts such a question, at this time. I think several of the questions that have already been asked have gone too far.

Justice Stephens: Well, I think that that is strictly true; but at the same time, I noticed in reading the record that that question was left unanswered. I think the Court would like to have an answer to it.

Mr. Steffen: Is that to be considered as cross-examination and not re-cross?

Justice Stephens: Yes, as cross-examination and not re-cross.

By Mr. Bromley:

Q. Now, will you direct your attention to the question beginning at line 10:

"Q. Were you ever told that any conditions had been attached by USG to any consent which it had granted Ebsary or Kelley to sell you at a discount?"

Will you answer that question, please? A. Well I attempted to answer it, beginning in line 13. I learned of the consent eventually—whether it was at the last trial or just when, I don't know—but frankly, I didn't know that
5556 they were selling us under a consent.

Q. Yes, sir.

Now at any time, even after you learned about the consent, you were never told that there were any conditions attached to that consent by USG, were you?

Mr. Steffen: Your Honor, I think the question has now been answered, and this goes on into a subject which is certainly not proper re-cross, and is wasting time.

Mr. Bromley: Well, it may be, but I still haven't got an answer out of the witness, and I would like to have him answer the question, if I can get him to.

Justice Stephens: It will be treated as cross-examination. I would like to have a direct answer to the question. I think the witness—who I am sure intends to be entirely frank—perhaps doesn't see at first glance that the answer is only an answer upon implication rather than a direct answer to the question, and I think it is important that we should know about it, if he is willing to answer it directly.

The Witness: All I can say is that if I didn't know there was a consent, I wouldn't know what obligations were imposed.

By Mr. Bromley:

Q. Then you never had any information, at any time, Mr. McCormack, that any conditions to the consent had been imposed by USG on anybody; isn't that the fact? A.

5557 I didn't know it until it came up either at the last trial or in the grand jury proceedings.

Q. Well, now, you say you "didn't know it". When you say that, you mean you didn't know that there was such a thing as a consent—isn't that what you mean? A. That is right.

Q. I am asking you to forget all about whether you knew there was a consent or whether you didn't know; and I am merely asking you this simple question; Did anybody, at any time, ever tell you that USG had attached any conditions to any consent which it may have granted any one of its licensees to sell you? A. No, they did not.

Q. Now, sir, will you turn to page 5824, and to the question beginning in line 12. There I asked you:

"Q. And didn't you write that sentence to Stremble as a sort of an excuse for getting rid of him?"

And you said:

"A. It might have been as good as any."

Mr. Steffen: I object, Your Honor, to any questions based upon—

Justice Stephens: (Interposing) He hasn't asked a question yet.

Mr. Steffen: I say I am now objecting to any questions based upon that, as going beyond the scope of proper
5558 re-cross examination.

Mr. Bromley: Well, of course, he isn't even sound about that, because he inquired about the Stremble incident on re-direct.

At any rate, I ask leave now to cross-examine on this subject, because I again believe that the record is not clear, and neither one of the two questions, either the one at line 12 or the one at line 15, was answered.

Justice Stephens: The Court would like to have a direct answer on that, and will, in its discretion, permit further cross-examination on that subject, which means that you can conduct re-direct on it yourself, if you wish to, Mr. Steffen.

By Mr. Bromley:

Q. Have you read those two questions and the answers that you gave there between lines 12 and 17, Mr. McCormack? A. Yes, I have.

Q. And you know what the sentence is that we are talking about, don't you? A. I think so.

Q. That sentence is quoted up at the top of page 5824, beginning at line 3 and ending at line 5, isn't it? A. That is right.

Q. Now, didn't you write that sentence to Stremble merely as an excuse or an alibi, and not because it stated the true facts?

5559 Justice Stephens: You may look at the letter itself, if you wish to.

The Witness: I think I am familiar with it, Your Honor, with this statement.

It is rather difficult to recall the mental processes one would go through to arrive at a decision to fire a man. As I indicated, Stremble was sort of a bad boy, and there undoubtedly were a number of reasons at the time, and an accumulation of things, and possibly this is one of the reasons that helped me reach that conclusion.

By Mr. Bromley:

Q. But, Mr. McCormack, look at the sentence, and that part of it quoted at lines 4 and 5 of this page. You didn't have to adhere rigidly to the terms of any license agreement, did you? A. No, we didn't have any license agreement.

Q. And you knew you didn't have to adhere rigidly, or otherwise, to the terms of anybody else's license agreement, didn't you? A. That is correct, because we didn't have one.

Q. All right, sir, I know you didn't have any, but you knew that Structural didn't have to adhere to the terms of anybody else's license agreement, didn't you? A. That is right.

Q. Well, then, when you wrote that you did have to
5560 adhere rigidly to the terms, you were stating something that you knew wasn't so, but you were just using it as an excuse to get rid of Stremble—now isn't that the plain fact, sir? A. Well, it is quite possible, as I indicated to you yesterday, that I did use it as an excuse, because I was under no obligation with our suppliers.

Q. When you say it is quite possible that you did use it as an excuse, you mean that your best recollection is that that is what you did do, don't you? A. I might say yes.

Q. Now, you have told us that you can not say now when it was that Lenci mentioned his license agreement to you. Regardless of the time that he mentioned it to you, what is your best recollection as to what he said about it? A. About the license agreement?

Q. Yes, sir, in connection with the Stremble incident. I will withdraw that question.

What is your best recollection as to what Lenci said to you about his license agreement? A. He said several things to me. If you have in mind about commission men, he told me that under the license agreement his company could not sell through commission salesmen.

Q. Did he say anything more than that? A. I can't recall that he did.

Q. But you don't know when that was, is that
5561 right? A. I can't place it, no.

Mr. Bromley: That is all.

Justice Stephens: Any re-direct?

Redirect Examination

By Mr. Steffen:

Q. I want to refer, Mr. McCormack, again to your testimony on page 5824 in regard to your letter to Mr. Stremble. You say in the quotation appearing at the top of page 5824 that you had to "adhere rigidly to the terms" of the license agreement. You answered, to Mr. Bromley, that you had no license agreement. Do you recall that? A. That is right.

Q. Is it possible that when you said that you had to adhere rigidly to the terms, that you meant you had to adhere to the prices which Mr. Kelley furnished you? A. We were under no obligation to, Mr. Steffen.

Q. By "obligation", do you mean legal obligation? A. Well, even a moral obligation.

Q. You have testified as to your general policy. A. It was politic for us to observe Kelley's prices simply as a medium for us to continue our source of supply.

Q. And would you say that that policy meant that you had to adhere rather rigidly to Kelley's prices?

Mr. Bromley: I object to that as incompetent because calling for a conclusion as to what it meant. He can
5562 ask him what it was, but not what it meant.

Justice Stephens: The objection is overruled. We think that it is a conclusion in a sense, but it is a kind of a conclusion that this business man would be able to draw, or the kind of a word he would be able to use in describing their price policy.

Mr. Steffen: Will you read the question?

(The question was read by the reporter.)

The Witness: As a general thing, we didn't adhere rigidly.

By Mr. Steffen:

Q. Would that afford any explanation of what you meant in your letter here? A. I don't quite get what you mean.

Q. You have testified, I think, that your policy was to follow Kelley's prices? A. That is right.

Q. And that you felt it was bad business practice to undercut Kelley? A. That is right.

Q. Did you follow that policy rigidly, is what I am suggesting or asking?

Mr. Bromley: I think that calls for a conclusion. I object to it.

Justice Stephens: Read the question. Isn't that
5563 exactly the same question that was asked before?

Mr. Bromley: I think it is, and probably it has been answered. I object to it as repetitious.

Justice Stephens: That objection is sustained.

By Mr. Steffen:

Q. Well, Mr. McCormack, have you any other explanation of the phrase "adhere rigidly to the terms" of the license agreement, than you have already offered? A. We did not have a license agreement, but it was common knowledge in the industry, and in the trade, and every lumber dealer and every mason materials dealer knew of the existence of the license agreement. All I can say is that that term, or that phrase, was at times bandied around rather recklessly.

Justice Jackson: Can't you say whether or not you meant it or didn't? Why don't you come out directly and say, "I didn't mean this" or "I did mean this", one or the other?

The Witness: Well, I didn't mean it, because we did not have an obligation, Your Honor.

Justice Jackson: Then say so, "I didn't mean it"; or, if you did mean it, say, "I did mean it."

The Witness: I didn't mean it, because we had no obligation.

Justice Stephens: It is an important part of this aspect of the case. If you were bound, or felt that you were
5564 bound, or acted as if you were bound, by some agreement with your suppliers or by some agreement that they had, that is a fact that we ought to know. On the other hand, if, humanly, you were just saving your face with this fellow by using that phrase, in order to get rid of him, we would like to know that.

The Witness: Well, as I look back upon it now, we had a salaried salesman in the territory. This man Stremble was just doing a little sort of extracurricular sales work. Stremble was continuing to sell in that territory because he represented manufacturers other than ourselves, he was selling cement, lime, and sewer pipe. And Horne, who was our regular salesman, would still have to come in contact with Stremble. I couldn't use Horne as a medium or excuse—his complaint, I mean—I couldn't use Horne's complaint to tell Stremble that that was the basis of it. He then might have taken it out on Horne.

As I look back upon it now, that is the way I see it.

Justice Stephens: Very well, I think you have made it clear what your state of mind was.

Is there anything further, gentlemen?

Mr. Steffen: No, Your Honor.

Mr. Bromley: That is all.

Justice Stephens: I forgot to ask whether any other defendants intended any re-cross-examination of this
5565 witness. If they wish, they may have that opportunity now.

(No response.)

Justice Stephens: We will take the morning recess at this time.

May this witness be excused?

Mr. Bromley: Yes, Your Honor.

Mr. Steffen: Yes, Your Honor.

Justice Stephens: Thank you, Mr. McCormack, for attending the court.

The Witness: Thank you for your consideration.

(Witness excused.)

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5566 Justice Stephens: The Court will now rule, before taking up the evidence of another witness, upon the motion to strike Government Exhibit No. 324.

Where is Mr. Adams?

Mr. Bromley: Mr. Adams has gone over to the Department of Agriculture. (Laughter).

Justice Stephens: We didn't want to interrupt a witness, but we will have to postpone this now until Mr. Adams returns.

Call the next witness, please.

Mr. Steffen: Mr. Kellogg.

Justice Stephens: How long do you expect this witness' testimony to take?

Mr. Steffen: About ten minutes, or possibly fifteen.

Thereupon, WILLARD H. KELLOGG, JR. appearing as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Would you state your name in full, Mr. Kellogg. A. My name is Willard H. Kellogg, Jr.

Q. Where do you live? A. New Haven, Connecticut.

5567 Q. What company are you connected with? A. The Connecticut Adamant Plaster Company.

Q. How long have you been with them? A. Well, the company was organized the year after I was born, and I have grown up in it.

Q. What is your capacity with the company now, what office do you hold? A. Secretary and Treasurer.

Q. What does the company do, Mr. Kellogg, what does it manufacture? A. It manufactures wall plaster.

Q. What type of wall plaster, neat and sanded? A. Neat and sanded and plaster of Paris.

Q. And where does the company get its gypsum rock? A. From Nova Scotia.

Q. Do you own your source of supply? A. Yes sir.

Q. And what process do you have in New Haven, a calcining process? A. Yes sir.

Q. Do you make your plaster and sell it under your own name? A. Yes sir.

Q. Your own trade name? A. Yes sir.

5568 Q. Do you have a source of supply for board? A. Yes sir.

Q. And do you sell board and lath, plasterboard and lath? A. We do.

Q. What is your source of supply for board? A. At the present time?

Q. Yes. A. The United States Gypsum Company.

Q. And for how long have you been buying board from United States Gypsum Company? A. For about ten years.

Q. For about ten years? A. Yes sir.

Q. And your prior source of supply? A. The Ebsary Gypsum Company and the Kelley Plasterboard Company.

Q. Is it necessary or important in your business to have a source of supply for board and lath? A. We think it is.

Q. And would you tell us why? A. A split sale is difficult to make. If somebody else sells the lath, they are apt to sell the plaster with it. We want to sell the plaster.

Q. You would say it is important, then, as re-
5569 spects your sale of plaster, that you also have the ability to sell lath? A. Yes.

Q. Are you familiar with the fact that the board and lath is a so-called patented article? A. I am now.

Q. How long have you been familiar with that? A. Are you referring to licensing?

Q. Well, that would be my next question. A. I heard of that first in the grand jury investigation.

Q. And you didn't know that prior to that time? A. No sir, I did not.

Q. In buying lath and board from United States Gypsum Company, how do you have it delivered? A. Carloads and truckloads.

Q. And it is delivered to your place, or to your dealers? A. Both ways. We carry a stock, which is delivered to our plant; we also have it delivered direct to our dealer-customers.

Q. And do you receive a discount from United States Gypsum Company? A. Yes sir.

Justice Garrett: Will you speak a little louder, please, Mr. Witness?

The Witness: Yes, your Honor.

5570 By Mr. Steffen:

Q. What is that discount? A. In carload lots, into our warehouse, on the lath it is twelve and a half percent, and on big board, long board, it is 15 percent. On truckload lots direct to our dealer-customers, it is 10 per cent.

Q. What price is that discount figured upon? A. The mill-base price at the mill from which the shipment is made.

Q. In selling to your customers, do you require the prices from the United States Gypsum Company? A. Yes, at times, whenever we need them.

Q. Why do you do that? A. In order to know what price to sell at, what the market price is.

Q. And who do you talk with at the United States Gypsum Company? A. Anybody that answers the phone.

Q. Do you know anyone by name? A. You mean over the last period of ten years that we have been doing business there?

Q. Yes. A. It would be a long directory.

Q. Well, let's have whoever you remember. A. Martin Powers was one of the earliest men I talked
5571 to there. There is a man called Barnett there now that I talk to on the phone.

Q. And what were your conversations with them about? A. Do you mean in any particular instance?

Q. Yes. A. Well, if I had an inquiry from a customer in a town in which I had not previously made a sale, I would ask what the delivered price was to a dealer at that point of delivery.

Q. And why would you want to know that? A. To know what I had to pay for it.

Q. And what would your policy be with respect to selling at the prices you obtained from United States Gypsum Company? A. My policy is to sell at those prices.

Q. Now I think you testified that you had a previous source of supply in the Ebsary Gypsum Company, is that correct? A. Yes sir.

Q. And that was back during what time? A. In the early 30's, 1931 or 1932.

Q. Did you ever have a conversation with Mr. Lenci concerning your relations with the Ebsary Gypsum Company? A. I think the business I did was done with Mr. Lenci.

Q. Was he ever at New Haven? A. Oh, yes.

Q. Do you recall a conversation with Mr. Lenci at any time concerning the territory in which you might sell
5572 board? A. When we first bought of the Ebsary Gypsum Company there was no question of territory, we bought merely for delivery at New Haven. Eventually we wanted deliveries to other points in Connecticut. Mr. Lenci explained to me at that time that he had salesmen traveling in Connecticut, and he wanted to limit my purchases to deliveries to New Haven.

Q. And did he mention Bridgeport in connection with that matter? A. That was the particular incident that brought up the point I have just made.

Q. What did he say about Bridgeport? A. That he had salesmen covering that territory who could handle the business there, and he didn't want to sell me at that point.

Q. And did you subsequently—and I think you have already testified that you did—change to United States Gypsum Company as a source of supply? A. Yes sir.

Q. Was that fact one of the reasons why you made the

change, Mr. Lenci's conversation with regard to Bridgeport? A. Yes, because we were looking for a source of supply that would ship where we wanted them to ship.

Mr. Steffen: We have no more questions, your Honor.

Justice Stephens: Cross-examination?

5573 Cross-Examination

By Mr. Bromley:

Q. You said that your discount was figured on the mill base price, Mr. Kellogg, is that right? A. That is what I understand it to be, sir.

Q. Now the mill base price is the mill base price charged to dealers, isn't it? A. The only price I know is the dealer price, I know of no other type of price.

Q. So when you talk about the mill base price, that is the same thing as saying the dealer price? A. Yes sir.

Q. And you always wanted to know what the dealer price was, because, as you say, that was what the board cost you? A. Yes sir.

Q. And you meant by that, that the board cost you the dealer price less the applicable discount therefrom, did you not? A. Yes sir.

Q. Now you said you also wanted to know your suppliers' prices, in order to know the price to sell at. Do you recall that? A. Yes sir.

Q. Did you at any time have any understanding or agreement or arrangement with anybody as to the resale
5574 prices which you would charge in your resales for board and lath which you bought? A. No sir.

Q. And you determine this policy of which you speak, independently, without relation to any understanding with anybody whatsoever? A. With anybody, yes sir. It was a policy of a long standing in our company.

Q. And it was not the result of any arrangement or agreement or understanding with anybody, was it? A. With anybody in the gypsum business, no sir.

Q. And you have always been free at all times to sell your products at whatever prices you wanted, have you not? A. Yes sir.

Q. So far as you know, or are aware of, has anybody from USG, or Ebsary, or Kelley, or anybody else, ever investigated or checked up on your resale prices on gypsum board? A. The only knowledge that I have of that was brought to my attention in the grand jury proceedings, where the Board Survey Company was named. It was the

first time I had ever heard of it. Nobody from the gypsum companies has ever come to me to investigate any prices.

Q. And nobody from Board Survey ever came to you, as far as you knew, to investigate your prices, did they? A. I never heard of them.

5575 Q. Now, has anybody from the United States Gypsum Company or from any other board manufacturer ever threatened to cease to sell you on account of the prices which you charged or did not charge in your resales of board? A. No sir.

Q. Had you ever heard of the Board Survey Company prior to the grand jury investigation? A. I never had.

Q. And you never received, then, any communications, written or oral, from it, did you? A. No sir.

Q. Did you ever attend a meeting of United States Gypsum Company representatives and representatives of its licensees at any time? A. No sir.

Q. There has been testimony received in this case with relation to the Southbury Lumber Company and the New Haven Reserve Company—do you recall those two companies? A. Yes sir.

Q. Were they customers of yours at some time? A. I think they still are.

Q. And they have been for some time? A. They have been over a good many years.

Q. Now did Mr. Lenci ever come to you and ask you if you had sold to the Southbury Company or the New

5576 Haven Reserve Company at any time? A. No sir.

Q. And did he or anybody else from Ebsary or USG ever ask you or inquire of you as to at what prices you had sold those two customers at any time? A. No sir.

Q. So that I take it your testimony is that nobody at any time from any manufacturing company ever came to you and asked you any questions with respect to your sales, or your sales practices, so far as New Haven Reserve or Southbury Lumber were concerned, is that right? A. That is right.

Q. And now will you give us the reasons why it was the policy of your company to sell, as you have indicated, whenever you were able, at about the prices charged by your supplier of patented board? A. Because we could get as great a price as the supplier, and there was no reason to take less. That was our policy.

Q. Could you get more than the supplier was charging for his board? A. I should doubt it very much.

Q. And is that the reason why your company sold, whenever it was able, at the same prices as were charged
5577 for the board by your suppliers? A. Yes sir.

Q. Was the board which you bought marked with your trademark or the trademark or trade name of the supplier, in each instance? A. With the trade name of the supplier.

Q. You never sold board or lath under your own trade name or trademark, did you? A. No sir.

Q. You always sold it under the trade name or trademark of the supplier from whom you were buying at the time, didn't you? A. That is correct.

Q. Now do you buy products other than gypsum board and lath at a discount from manufacturers? A. Yes sir.

Q. Such as what?

Mr. Steffen: I think that this going beyond the direct examination, your Honor.

Justice Stephens: I am inclined to think it is proper, Mr. Steffen, because you had him generally describe his business. The objection is overruled.

The Witness: Yes sir, we do.

By Mr. Bromley:

Q. And what products do you buy from manufacturers at a discount, other than board and lath?
5578 A. Sewer pipe, flue lining, face brick, lime, insulating wool.

Q. And it is the fact, isn't it, that most of those products you have named are made by companies other than United States Gypsum Company? A. Yes sir.

Q. What is your policy with respect to the prices that you charge in your resales of those materials? A. Just the same as it is with our policy on the sales of board. We follow the market and retain whatever discount we can get as a distributor.

Q. You mean by that answer to say that it is your policy with respect to those materials which you have mentioned, other than board and lath, that you sell them at the same prices which are charged to dealers by your suppliers? A. Yes sir.

Q. That has always been your policy, has it? A. It has.

Q. And there is no difference between that policy and the policy which you follow in your resales of gypsum board and lath, is there? A. No sir.

Mr. Bromley: That is all.

Justice Stephens: Is there any further cross examination by other defendants?

5579 (No response.)

Justice Stephens: Is there any redirect?

Mr. Steffen: We have no redirect, your Honor.

Justice Stephens: You are excused, Mr. Kellogg. Thank you for coming here.

The Witness: Thank you, sir.

(The witness was excused.)

Mr. Knuff: Shall I call the next witness?

Justice Stephens: Yes, certainly.

Mr. Knuff: Mr. H. E. Chism.

Thereupon, H. E. CHISM, appearing as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Knuff:

Q. Your name is H. E. Chism, and you spell your last name C-h-i-s-m, is that correct? A. Yes sir.

Q. You live in Oklahoma City, Oklahoma? A. Yes sir.

Q. And are associated with the Texas Cement Plaster Company, is that correct? A. That is correct.

5580 Q. The Texas Cement Plaster Company is not a corporation, but is an individually owned concern, is that correct? A. That is correct.

Q. The owner of that concern is Mr. Samuel M. Gloyd? A. Yes sir.

Q. What interest does Mr. Gloyd take in the management of that concern? Is he at the office daily? A. No sir.

Q. How frequently does Mr. Gloyd come to the office? A. Well, I should say three or four times a week, and stays at least an hour, possibly two hours.

Q. Does Mr. Gloyd direct the policies and affairs of the Texas Cement Plaster Company? A. Well, not to any considerable extent now.

Q. And who does direct the policies and affairs of the Texas Cement Plaster Company? A. I do.

Q. Mr. Gloyd has delegated to you the authority to direct the affairs of the Texas Cement Plaster Company, is that correct? A. Largely, yes.

Q. Does any other person direct those affairs? A. No, they do not.

Q. Well, why do you use the word, "largely"? A. Well, with the exception of the direction that Mr.
5581 Gloyd gives the business, I take care of the balance of it.

Q. What direction does he give the business? A. As I said, very little at the present time or during the past year or two years, particularly.

Mr. Knuff: May it please the Court, in view of the fact that it is now apparent that this gentleman is, I presume you would call him, the managing agent of the Texas Cement Plaster Company, I believe that under the Rules of Civil Procedure, we are entitled to examine him as if on cross examination.

Justice Stephens: That is Rule 43 (b)?

Mr. Knuff: That is correct.

Justice Stephens: Are you a director of the Company?

The Witness: It is not a corporation.

Mr. Knuff: It is not a corporation, your Honor.

Mr. Johnston: I don't see, if the Court please, how that comes under this rule—

Justice Stephens: (Interposing) Just let me read the rule first.

Is this a partnership?

Mr. Johnston: No, if the Court please, this a wholly-owned business, owned by Mr. Gloyd.

Justice Stephens: It is a corporation?

Mr. Johnston: It is not a corporation, not a partnership, and not an association, just an individual, and he uses this trade name and Mr. Chism works for him
5582 as his manager. I don't see how it would come in under that rule at all.

Justice Stephens: Those facts are without dispute, are they, Mr. Knuff?

Mr. Knuff: That is correct, your Honor.

Justice Stephens: Mr. Gloyd is in business for himself, and he owns the business, and this gentleman, Mr. Chism, is employed by him?

Mr. Johnston: That is right, on a salary, and he has no interest in the business at all.

Under Subsection (b) of Rule 43, it is limited to, "an officer, director, or managing agent of a public or private corporation, or of a partnership or association,"—and it goes no further.

(The Justices conferred.)

Justice Stephens: Have either of you any authorities on this subject at all? We know of none. This rule hasn't been construed, to our knowledge. If you know of no authorities we are ready to rule on the matter.

Mr. Knuff: I haven't any authorities, your Honor, on the subject. I don't believe there are any authorities on it.

I will say frankly to the Court that while I don't believe we come literally within this rule, yet I think it is within the discretion of the Court.

You see we are in a very peculiar position in this case.

5583 We endeavored to get the testimony of Mr. Gloyd, and while the Court has said that we may file interrogatories, in all the 25 years that I have been at the bar, I don't know of any more unsatisfactory way of getting testimony than by interrogatories, written interrogatories. If you are going to prove a signature to a will, yes, written interrogatories are all right there. But here we have the proprietor of this business, a man of about 79 years of age, he comes to the office, according to this witness' testimony, about an hour a day, a couple of times a week, and according to what Mr. Johnston told us—and I haven't any reason to doubt it at this time—Mr. Gloyd is a pretty sick man.

The man that directs the business down there is the gentleman on the witness stand. I think that in view of the fact that we couldn't take Mr. Gloyd's deposition, that it is within the discretion of the Court to grant us this permission. We are in this position here, your Honor, that if we call Mr. Chism as our witness, and it turns out that he testifies differently than what we expect him to testify, we would not otherwise be in a position to impeach or contradict him.

As I say, in view of the ruling of the Court before, I don't think it would be any miscarriage of justice at all to indulge the Government in this request, and we ask that the Court exercise its discretion in the matter and allow us to call this witness as if on cross examination, and interrogate him by leading questions, and if necessary, to impeach him.

5584 Mr. Johnston: Now if the Court please, while I think under the rule my point is well taken—in fact I personally feel pretty sure of it—I am going to indulge the Government, and I am just going to waive the rule, so that there can't be any question about Mr. Chism—

Justice Stephens: (Interposing) Well, I think that that is a very fair thing for you to do. My own view—and I think my colleagues agree with me, Mr. Knuff—is that it is not within our discretion. I think, as you argue, that it is probably within the spirit of the rule to permit the cross examination of this witness, but this is a rule which is in derogation of the common law, which left the matter purely to discretion, and it fixes an absolute presumption of hostility, and it enumerates the persons to whom the rule applies.

Now if the rule were ambiguous, then we could consult the spirit of the rule, but since it isn't ambiguous, and clearly doesn't cover this case, I doubt if we have any discretion in the matter.

But the matter is now academic, in view of Mr. Johnston's very fair waiver.

Mr. Knuff: It is my understanding—and Mr. Johnston may correct me if I am wrong—that we may be allowed to contradict or impeach this witness, is that correct? Does your waiver go to that extent?

Mr. Johnston: I am waiving the rule.

5585 Justice Stephens: He is waiving the rule, yes.

Mr. Knuff: If the waiver goes to that extent, then all right, and we thank Mr. Johnston for his indulgence.

Justice Stephens: He is waiving what he claims to be the inapplicability of this rule to this witness, and is conceding, for the purpose of this examination, that the rule does apply.

Mr. Johnston: I have been trying at all times to help the Government in any way I could in the case, and give them a chance for their money. (Laughter.)

Justice Stephens: Very well, proceed.

By Mr. Knuff:

Q. Mr. Chism, how long have you been with the Texas Cement Plaster Company? A. Since 1922.

Q. And when you came with the Texas Cement Plaster Company, in what capacity were you employed? A. I was doing a little bit of everything, I would call it assistant to the general manager.

Q. And who was the general manager at that time? A. At that time, Mr. G. W. McGahan.

Q. Was Mr. Jacobs with the company at that time? A. No, I don't believe he was just at that time, not until two or three years later.

Q. My understanding is that Mr. Jacobs is dead,
5586 is that correct? A. That is correct.

How long have you been general manager? A. Since 1932, I believe, the early part of 1932.

Q. For the past 12 years, approximately? A. Yes.

Q. What business is the Texas Cement Plaster Company engaged in? A. The manufacture of gypsum wall plaster and gypsum wallboard and lath.

Q. Block? A. Block, yes.

Q. Both neat and sanded plaster? A. Not sanded plaster, no.

Q. Not sanded? A. No.

Q. And where is the mill of the Texas Cement Plaster Company located? A. It is at Plasterco, Texas, near Hamlin.

Q. And where does the Texas Cement Plaster Company sell its products? A. Well, in quite a wide territory in the South and Southwest.

Q. Through what states? A. Eighty percent of it
5587 in Texas, Oklahoma, Kansas, Missouri, and Arkansas. The balance is spread out over possibly 10 other states, surrounding states.

Q. When did you first start to manufacture board, and by "board" I mean board and lath? A. About the middle of 1925.

Q. And at that time I believe you did not manufacture the large board, is that correct? A. We did manufacture the large board beginning at that time.

Q. Did you manufacture lath? A. I think we manufactured some lath.

Q. I was under the impression that at one time you confined your manufacturing activities to either board or lath. I may be wrong on that. A. No, we did not.

Q. At all times you did manufacture both board and lath? A. That is my recollection now, yes.

Q. I would like, Mr. Chism, for you to look at what has been marked Government's Exhibit 599 for identification, the same being an agreement, dated the 11th day of April, 1927, between the United States Gypsum Company and the Texas Cement Plaster Company, and in particular to

have you look at page 12 and tell us whether or not that is Mr. Gloyd's signature?

5588 (The document referred to was marked as Government's Exhibit No. 599 for identification.)

(Government's Exhibit No. 599 for identification was handed to the witness.)

The Witness: Yes sir, it is.

Justice Stephens: Is this the license agreement which was referred to in the complaint?

Mr. Knuff: Yes, your Honor. We would have offered this agreement before, on the first day of the trial, but we didn't have it at the time, and we didn't have a photostat of it.

Mr. Johnston: May I inquire, Mr. Knuff, if that date is the 11th of April or the 18th? I thought it was the 18th of April.

Mr. Knuff: It says here the 11th.

Mr. Johnston: Look at the signature date. There was something about the date of the signing of that contract—

Mr. Knuff: (Interposing) I will show it to you.

Mr. Johnston: No, that is not necessary, but I know that that has been the testimony all the way through here.

Mr. Knuff: I think that has been the testimony, that it was dated the 18th, but it appears from page 1 of Exhibit 599 for identification that it was dated April 11th, and on the signature page, page 12, I don't see anything that would indicate that it was signed on another date than the 11th.

5589 Justice Stephens: No, it says on page 12, "the day and year first above written," and on the first page the date is shown as April 11th.

Justice Jackson: There is only the one agreement, is there?

Mr. Knuff: As far as I know. Is there more than one, Mr. Johnston?

Mr. Johnston: No, but the fact is that it was not finally signed on that date, and the exchange of letters shows it is of the 18th. It is considered to be a contract as of April 18th.

Justice Jackson: What difference does it make?

Mr. Johnston: I don't think it makes any difference, I was just calling it to Mr. Knuff's attention.

Mr. Bromley: My understanding is that it was re-executed on the 18th of April for some reason, perhaps because of a defect in the original agreement. Is that right, Mr. Johnston?

Mr. Johnston: That may be, I have forgotten.

Mr. Knuff: If the Court thinks it is important, I will see if I can clear it up.

Justice Stephens: If there is some defect in the agreement of April 11th, and it was re-executed to clear up the defect, we ought to see the later agreement, if that is the fact.

Mr. Knuff: I would like to see that too.

5590 Justice Stephens: See if you can clear it up by asking the witness.

By Mr. Knuff:

Q. Mr. Chism, do you have before you Government's Exhibit No. 599 for identification? A. Yes, I do.

Q. And was the contract executed on that date, April 11th, if you know? A. It was first executed on this date, April 11, and as I recall it, it was amended or corrected on April 18th.

Q. Corrected in what respect? A. I couldn't tell you.

Q. Well, does the correction that was made on the 18th appear on the agreement that you have before you? A. No, it doesn't.

Q. Well, where does that correction appear? A. My recollection is that it was contained in correspondence, in letters.

Q. Do you have that correspondence with you? A. I believe it has been turned over to you.

Q. Well, I will show you everything that you have turned over to me, and if you will point out to me just what you have in mind, I will be glad to—

Mr. Johnston: (Interposing) If the Court please, the correspondence that he is handing the witness does

5591 not show that, but all of our correspondence was turned over to the Government in response to the subpoena, and the letter in reference to the correction of a name, or the seal, or something like that, is in possession of the Government, although it is not in this last bunch of documents that the Government asked us to furnish them the other day.

I can turn to that in the photostats.

Justice Stephens: Well, we will take the noon recess at this time, and that will give the Government time to look at its files, and perhaps this may then be cleared up.

(Whereupon a recess was taken at 12:10 o'clock p.m. until 1:45 o'clock p.m.)

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: The Court will make rulings on the Exhibits, 233 and 324, which were taken under advisement.

First, the ruling on Certain-teed's motion to strike Exhibit U. S. 324.

5593 Exhibit U.S. 324 is an answer filed by Certain-teed in an action brought against it by USG to restrain Certain-teed from acquiring the assets of Beaver. The exhibit was received in evidence at Tr. 2861-2 as an admission by Certain-teed but not as binding, as a declaration, on other defendants unless connected by other evidence showing the admission to be in furtherance or execution of the alleged conspiracy. At Tr. 3283-5 Mr. Adams for Certain-teed moved to strike Exhibit U.S. 324 upon the ground that it had been ascertained by him upon reading the exhibit that it is not a verified answer and is therefore incompetent. Mr. Adams filed a memorandum in support of his motion wherein he urged this ground (and also that the answer is not signed by Certain-teed (and also that the statements in the answer, Exhibit U.S. 324, are inadmissible because conclusional in nature. The Government filed a memorandum in opposition. Argument was heard and appears in the transcript of February 15, 1944.

The applicable rule of law found in the decisions of Federal courts, including those cited by Mr. Adams in his memorandum, is not a strict rejection of unsigned or unverified pleadings but a rejection of those not connected with the party against which they are offered by oath, signing, adoption, acquiescence, ratification, or circumstances such as allegations of information which could have come only

5594 from the party itself against which the pleading is offered. The use of such pleadings, once they are admitted in evidence, is, as pointed out in 4 Wigmore, Evidence (3d ed. 1940) Par. 1066, limited to the facts they contain; conclusions and other incompetent statements being avoided.

A study of the record leads to the conclusion that there is no direct evidence that Certain-teed furnished the facts alleged in the pleading, Exhibit U.S. 324, to its lawyers or that the lawyers were present at a time when Certain-teed's officers were discussing its dispute with USG. On the other

hand these circumstances do appear: George M. Brown wrote a memorandum while he was president of Certain-teed, which memorandum is in evidence as Exhibit U.S. 212, wherein he stated that Certain-teed must prepare to answer the suit of USG, should appear as a party to it, and should assert that the suit is not filed in the interest of royalties but for the sole purpose of trade domination, monopoly and price control. The allegations of Exhibit U.S. 324 are strikingly similar to this description by Mr. Brown of what should be asserted in the answer to be filed. It appears from Exhibit U.S. 211, a memorandum dated February 7, 1928, which was attributed by the witness C. O. Brown to L. R. Walker, vice president of Certain-teed (Tr. 1930) that the officers of Certain-teed were in communication with Cravath, Henderson and DeGersdorff concerning Certain-teed's acquisition of the Beaver plants, the transaction out of which the dispute with USG arose. The
5595 firm of Cravath, Henderson and DeGersdorff appears on Exhibit U.S. 324 as counsel for Certain-teed. A reading of Exhibit U.S. 324 shows that it contains many allegations of fact relating to the affairs of Certain-teed and the gypsum industry generally. Information about such matters is not usually acquired by counsel in a casual manner but from detailed disclosures made by clients. The fair inference to be drawn from the foregoing circumstances is that the allegations in Exhibit U.S. 324 are attributable to Certain-teed.

The allegations in Exhibit U.S. 324 are not all mere conclusions or statements of law. A reading of paragraphs 27 and 28 of the exhibit, the paragraphs to which the Government mainly refers in its reliance upon the exhibit, reveals that there is a considerable amount of factual material stated. The exhibit can be received for its factual value.

The court reaffirms its prior ruling. The objections of Certain-teed are overruled and its motion to strike is denied. Exhibit U.S. 324 remains in evidence as an admission of Certain-teed, not binding upon the other defendants unless it be shown that the statements in it were made in furtherance or execution of the alleged conspiracy and unless the alleged conspiracy itself be shown aliunde.

Ruling on the Government's reoffer of U.S. 233:
5596 The document marked for identification U.S. 233 is a memorandum dated August 2, 1929, purporting to have been written by A. D. Redfield, patent attorney, to

C. O. Brown of Certain-teed Products Corporation. When it was offered in evidence at tr. 2878, Mr. Adams for Certain-teed objected on the ground that the document came within the attorney-client privilege. Thereupon the Government sought to show by Redfield that the privilege had been waived by Certain-teed through instructions given by a Mr. Dowd when Redfield and an Assistant United States Attorney called Certain-teed's New York office by telephone about June 4, 1940, at the time of the grand jury investigation of the criminal aspects of the alleged violations of the Sherman Antitrust Act. Mr. Adams objected to this use of the telephone conversation because Mr. Dowd was not an officer of Certain-teed at that time, and because the person with whom Redfield said he spoke had not been identified as Mr. Dowd. There was no showing at that time that Mr. Dowd was an officer of Certain-teed or that he otherwise had authority to waive the privilege for Certain-teed. The court ruled at tr. 2890 that the offered exhibit would be refused because privileged, the privilege not having been shown to have been waived by Certain-teed.

At tr. 3529-31 Government counsel requested and obtained leave to reoffer the document on the ground
5597 that it had been ascertained that Dowd had actually been an officer of Certain-teed at the time in question. Mr. Dowd's official position with Certain-teed is now conceded by Mr. Adams.

After careful consideration of the memoranda submitted by both sides and after listening to oral argument, the court has reached these conclusions:

A telephone conversation may be used as the declaration of the purported speaker if that speaker is sufficiently identified. This identification may be made by circumstantial evidence. It is a settled rule in this jurisdiction that it is a prima facie identification of a particular party to a telephone conversation if the call was made to the party's place of business and someone answers and represents himself to be that party. See *Campbell* v. *Willis*, 53 App. D. C. 296, 290 Fed. 271 (1923), and *Takahashi* v. *Hecht Co.*, 62 App. D. C. 72, 64 F. (2d) 710 (1933). Circumstantial identification is even more convincing where the party responding to a telephone call shows knowledge of the subject matter of the call. *Van Riper* v. *United States*, 13 F. (2d) 961 C.C.A. 2, 1926).

The person responding to Redfield in the telephone conversation of June 4, 1940, has been identified circumstan-

tially as Mr. Dowd, in our view. Redfield stated that he and the Assistant United States Attorney had together called Certain-teed's New York office and that he,
5598 Redfield, had spoken with a person representing himself to be Mr. Dowd. As above stated, it is now conceded that Certain-teed had at that time an officer named Dowd. Furthermore, it appears from the statement attributed to this person that he was familiar with the Government investigation and with the past policy of Certain-teed with respect to furnishing documents to the Government. This is a prima facie showing that Dowd was speaking and that, as an officer of Certain-teed, he was speaking for the company.

In response to Redfield's inquiry as to what he should do with respect to claiming or waiving privilege, Mr. Dowd's statement, as reported by Redfield, was: "Well, I don't know, we have nothing to hide, we have thrown our records open to the Department of Justice and so far as I can tell there is no reason that you should not testify." Although mere identification of a document is not a waiver, this authority to testify coupled with the knowledge that the exhibit, if identified, was to be used in evidence before the grand jury would seem to be sufficient to constitute a general waiver. Redfield carried this grant of authority into effect when he went before the grand jury and identified the document so as to lend authority or approval to its use by that body.

Privilege once waived may not be reasserted because the disclosure exhausts the reason for the privilege. Mr. Adams' objection that U. S. 233 is privileged is,
5599 therefore, on the present state of the record, not well taken. Mr. Adams asks leave to call Mr. Dowd to deny the telephone conversation. This leave is granted. That is to say, the testimony for which Mr. Adams proposes to call Mr. Dowd goes to a preliminary question of fact, one not bearing upon the merits of the case as a whole but determining the admissibility of an item of evidence. The defendants are entitled to a ruling before the close of the Government's case as to what evidence is in the record in support of the Government's case. See 9 Wigmore on Evidence (3d ed., 1940) Par. 2550 and cases cited there. The settled practice in this jurisdiction is to determine on voir dire, during the case of the party offering evidence, preliminary questions of fact which themselves determine the admissibility of evidence and to hear, on such voir dire, such evidence as is offered

by either party in respect of the preliminary question of fact. See *McAffee* v. *United States*, 105 Fed. (2d) 21; 70 Appeals, D. C. 142 (1939) in respect of confessions. It will, therefore, be the duty of the court to decide after hearing the witness Dowd whether or not the telephone conversation testified to by Redfield did occur and what its content was in respect of the asserted waiver, and thereupon to determine whether a waiver was authorized.

At tr. 3995-6 Mr. Bromley objected that proposed Exhibit 233 is irrelevant and immaterial because not
5600 shown to be in furtherance or execution of any conspiracy charged in the complaint. The binding effect of the document on Certain-teed is difficult to see since it is not a statement by Certain-teed itself, but by its attorney. There is no present showing that his views were or became the company's views. Even as an admission of Certain-teed the document is not yet shown to be in furtherance or execution of any conspiracy so as to bind the other defendants. These elements may, however, be supplied by later evidence, and the document could be received subject to connection in these two respects.

Mr. Bromley also requested that, if the document is received in evidence, Redfield be recalled for cross examination. Since this document is accredited by Redfield and was written by him, it is but fair and reasonable that the defendants be permitted to cross examine as they have been permitted to cross examine about other exhibits.

In summary, the court rules that a prima facie showing on voir dire has been made of a waiver of privilege in respect of proposed Exhibit 233; so that in the absence of convincing contradictory evidence as to the fact or content of the asserted Redfield-Dowd telephone conversation, the exhibit would be admissible subject to a showing that it is an admission by Certain-teed and subject to the usual reservation. But Certain-teed may call Dowd; and
5601 the court, after hearing his testimony, will rule as to whether the exhibit is admissible. If the exhibit is received, it will be received subject to the recall of Redfield for further cross examination.

Mr. Adams: If the Court please, I was just wondering, with respect to the question of calling Mr. Dowd—since the matter last came before the Court, Mr. Dowd has been again promoted from vice president, and is now president of the company, and it makes it a little more difficult to get hold of him. Do Your Honors have any particular time when you would like to hear that evidence?

Justice Stephens: No, it makes no difference. Any time before the close of the Government's case.

Mr. Adams: Thank you.

Justice Stephens: Mr. Redfield will have to be returned, also.

Justice Jackson suggests that we hear the Dowd testimony first, and if we should then rule that there has been no telephone conversation, or that the contents do not constitute a waiver, then it might not be necessary to recall Redfield.

Where is Redfield?

Mr. Adams: Cincinnati, I believe, Your Honor.

Justice Stephens: We will leave that to the convenience of counsel. This ruling will be copied into the record, and will be clear, I think, from the statement made by
5602 the Court.

Take the witness stand, Mr. Chism.

I may add that we have gone very carefully into these two questions, and extensive memoranda have been prepared and exchanged by the Judges, and the authorities were carefully examined; but it seems not necessary to make a more extensive announcement of the reasons for the rulings than have just been made.

Thereupon, H. E. Chism, the witness on the stand at the time of recess, resumed his testimony as follows:

Mr. Knuff: May it please the Court, apropos of Government's Exhibit 599 for Identification, Mr. Johnston has shown me the correspondence that transpired between the Texas Cement Plaster Company and the United States Gypsum Company, and I believe that the following are the facts:

Originally the contract, Exhibit 599 for Identification, was executed on the 11th day of April, 1927, and it was mailed to the United States Gypsum Company. It so happened, however, that in executing the contract, the Texas Cement Plaster Company—which at that time was a corporation—failed to affix thereto its common and corporate seal, and when the United States Gypsum Company received that contract they called this omission to
5603 the attention of the Texas Cement Plaster Company, sent the contract back to them, and said that while they didn't think it would affect the legality of the contract, nevertheless they felt that the seal probably should be affixed, and they asked the Texas Cement Plaster Company to affix its corporate seal.

The Texas Cement Plaster Company did do this, and they sent the contract back to the United States Gypsum Company, changing the date on it from the 11th to the 18th, but omitting to change the date on their own retained copy, at all.

So that, the United States Gypsum Company's copy was dated the 18th, and the retained copy of the Texas Cement Plaster Company remained as April 11.

Other than the affixing of the corporate seal and the changing of the dates, the contract, Government's Exhibit 599 for Identification, is identical to the contract that was sent to the United States Gypsum Company.

I have, I believe, stated the facts.

Mr. Johnston: And the parties considered the contract as of April 18.

Justice Stephens: Then that may be shown as stipulated between Mr. Johnston and the Government.

Direct Examination (resumed)

By Mr. Knuff:

Q. Do you have before you, Mr. Chism, Govern-
5604 ment's Exhibit 599 for Identification? A. Yes.

Q. I want you to look at that exhibit, following page 12, and you will notice that there is attached immediately following page 12, Exhibit "A"—do you notice that? A. Yes, sir.

Q. Now, in a separate document, consisting of four pages, which I now ask to have marked for Identification as Government's Exhibit 599-A, you will find another exhibit also called Exhibit "A".

(The document referred to was marked as Government's Exhibit No. 599-A for Identification.)

(Government's Exhibit No. 599-A for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you tell us just what your understanding is of the reasons for having two Exhibits "A"? A. My recollection is that this second Exhibit "A" includes all of those patents on the first one, and in addition there are other patents included.

Q. Government's Exhibit 599-A was always considered a part of the April 1927 contract, is that correct? A. Yes, that is my recollection.

Mr. Knuff: We now offer in evidence Govern-
5605 ment's Exhibits 599 and 599-A.

Justice Stephens: Is there any objection?

Mr. Bromley: May I have a minute, Your Honor?

Justice Stephens: Take your time.

Mr. Knuff: I may say that when these documents were given to us by Mr. Johnston they were in the form presented to the Court—that is, Exhibit 599 had an Exhibit "A" attached; and then there was another Exhibit "A", separate and not attached, which we have now identified as Exhibit 599-A.

Mr. Bromley: May it please the Court, we make only the usual objection to Exhibit 599.

Justice Stephens: It is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 599, was received in evidence.)

Mr. Bromley: I should like to examine as to the competency of Exhibit 599-A at this time.

Justice Stephens: You may.

By Mr. Bromley:

Q. Will you turn to the third page of Exhibit 599-A, please? A. Yes, sir.

5606 Q. Do you see that in the margin someone has written the words, in pencil or ink, "New"? A. Yes, sir.

Q. Did you do that? A. No, I did not.

Q. Do you know who did? A. I couldn't tell you.

Q. Do you notice that opposite the word "New" at the top of the page, the reference is to Birdsey patent No. 1,643,801? A. Yes, sir, I do.

Q. And do you notice that in the second line of that paragraph, there is the phrase, "filed January 13, 1921, granted September 27, 1927"? A. Is that the first one mentioned on that page 3?

Q. Yes. A. It doesn't show that here.

Q. Have you got Exhibit 599-A? A. Yes, sir.

Q. After the underlined words "Birdsey patent No. 1,643,801.", doesn't this language appear: "Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944."? A. That is right.

Q. Now, do you see, Mr. Chism, that the note
5607 "granted September 27, 1927" indicates that that patent was granted after you signed your license agreement? A. Yes, that would be true.

Q. Do you notice that that is true as to every paragraph which is marked "New"—that is to say, that the granting date of the patent is a date later than the date of your license? A. I think that is true, yes.

Q. And do you notice on the last page, opposite the third paragraph, as to which there is contained in the margin the note "New", that the granting date of that patent is given as February 26, 1929? A. That is right.

Q. Now, that would indicate that this document, 599-A, was furnished to you some years after you signed the license agreement, wouldn't it? A. Yes, sir, I think it was.

Q. Now, isn't it a fact, then, and don't you now recall, that all this is is a list of the patents or applications which were contained in Exhibit "A" annexed to your contract, brought down to date so as to show which of the applications had ripened into patents, and the dates on which the patents had been granted under the applications? A. That may be true, I never checked it in that way.

Q. You didn't understand that you were being
5608 given any new rights under this Exhibit 599-A, over what were contained in the original Exhibit "A" to Exhibit 599, did you? A. I never had full charge of this matter at that time. I knew something about it, but not a great deal. So I couldn't tell you.

Q. Well, you know now, at least, that 599-A was not a part of the original contract, but was something furnished to you afterward; is that right? A. Yes, that is right.

Q. And was probably merely a revision of the original Exhibit "A" so as to put in the dates on which the applications contained in the original Exhibit "A" had thereafter been issued as patents; isn't that correct? A. I believe that is correct.

Mr. Bromley: With that showing, we make only the usual objection to Exhibit 599-A.

Mr. Knuff: Before the Court rules on it, I can see no reason why I should put it in at all, so I will withdraw it. It appears that Exhibit 599 is the original contract.

Justice Stephens: It may be withdrawn, if you desire to withdraw it.

(The document marked as Government's Exhibit 599-A was withdrawn.)

By Mr. Knuff:

5609 Q. Mr. Chism, if I understand you correctly, you took no part in the negotiations leading up to the execution of Government's Exhibit 599; is that correct? A. No, I did not.

Q. Mr. Gloyd was the gentleman that did negotiate with the United States Gypsum Company concerning that license agreement? A. That is correct.

Q. And you played no part in it at all? A. No, I didn't.

Q. Now, do you know, Mr. Chism, whether or not any patent studies or any patent surveys had been made by Texas Cement Plaster Company before this contract was executed? A. I am quite sure there was not.

Justice Stephens: I don't understand that question, I am sorry. I think I missed one of your words.

Please read it.

(The question was read by the reporter.)

Justice Stephens: Thank you, I understand now. I missed one word.

By Mr. Knuff:

Q. If there had been any patent studies made, do you feel that you would have known about them? A. Yes, I believe I would.

5610 Q. Will you look at page 3 of Government's Exhibit 599, and look at the last paragraph on page 3, beginning with, "It is expressly agreed and understood"—do you notice that? A. Yes, I do.

Q. You understand by that paragraph, do you, that that is the paragraph that reserves to USG the right to fix and determine the minimum price at which Texas could sell the product; is that correct? A. Yes, I believe that is correct.

Q. Now, following the execution of Government's Exhibit 599 in April, 1927, did USG notify you as to the price or prices at which you could sell gypsum board and gypsum lath? A. Yes, they did.

Q. What form did those notices take, sir? A. I couldn't tell you the exact form. I would say it was their regular price bulletins.

Mr. Knuff: Will you show the witness Government's Exhibit 33, please?

(Government's Exhibit No. 33 was handed to the witness.)

By Mr. Knuff:

Q. The book that you have before you, sir, contains price bulletins issued by the United States Gypsum Company, or some of the price bulletins, I should say,
5611 issued by the United States Gypsum Company after March 21, 1931. Now the notices that you got under the 1927 agreement, were they in the form in which the price bulletins appear in Government's Exhibit 33? A. I couldn't remember definitely that they were, but I would presume so.

Q. When you say you "would presume so", do you mean that that is your best recollection? A. That is my best recollection.

Q. You were asked to produce all the price bulletins that USG sent to you, and I don't believe that you produced any prior to May 23, 1929. Do you recall that? A. I recall that we produced all that we had, but I don't remember the dates.

Q. Well, if you will accept my word for it, the record that we have indicates that no bulletins prior to the 23rd day of May, 1929, were furnished us by Texas Cement Plaster Company. A. If you say that is true, I will accept it.

Q. That is what the records in our office indicate. A. All right.

Q. Do you recall whether or not—

Mr. Johnston: (Interposing) If the Court please, I don't believe that that is the fact. The Government has the list of the bulletins that were furnished, and I
5612 wouldn't want to accept that as the fact. I think that record will speak for itself. That was at the time the records were subpoenaed and furnished for the grand jury investigation.

Mr. Knuff: That is correct.

Mr. Johnston: I think the Government should produce that correspondence, that letter, and that will show what was produced.

Justice Stephens: What is the point? Do you want to prove what bulletins were sent by some other evidence?

Mr. Knuff: The point is this, Your Honor, that when Mr. Chism testified before the Grand Jury, his omission to furnish these bulletins was called to his attention, and I think

at that time he excused it on the grounds that, "You have everything that we have; if you don't have them before May 23, 1929, we don't have them; we have given you everything that we have."

I can say that I have never seen, over in our office, any bulletins prior to May 23, 1929.

Justice Stephens: What is the point of it all? If he hasn't got them and you haven't got them, what are you going to do about it?

Mr. Knuff: I am going to try to find out just exactly what was in those prior bulletins, if he knows.

Mr. Johnston: Now, it would seem to me, if the Court please, instead of showing this witness a volume of
5613 bulletins that he doesn't know anything about, and asking him if those aren't the kind of bulletins he received, it would be much better if you would show him the bulletins that he received and ask him if they were the kind of bulletins that he received otherwise.

Justice Stephens: There is no dispute about the fact, is there, that USG sent him these bulletins?

Mr. Johnston: Not at all.

Justice Stephens: Why couldn't the whole thing be stipulated to, as to what bulletins were sent to him and received by him?

Mr. Bromley: I am willing to stipulate that we sent him bulletins from April 18, 1927, to August 6, 1929.

Justice Stephens: And that the terms of the bulletins were the same as those sent to other licensees, which other bulletins are in evidence? Could that be stipulated to, if that is the fact?

Mr. Bromley: Well, let me see. The bulletins were sent in that interval only to such companies as were licensees.

Justice Stephens: That is right.

Mr. Bromley: I think we can stipulate that they were in substantially the general form as are the later ones which are in evidence, that is, they cover prices and terms and conditions of sale. I don't mean by that that they in-
cluded everything that was in the later bulletins, but
5614 in substance they were the same kind of documents.

Justice Stephens: Now, is there any contention in the case, Mr. Knuff, concerning the exact amount of the prices in these earlier bulletins?

Mr. Knuff: I don't know what those earlier bulletins contained, because I never saw one. We asked the United

States Gypsum Company to furnish us with the price bulletins at the criminal trial, and they were furnished; and the bulletins that were furnished us are the bulletins that are now in evidence. I have never seen a bulletin prior to May 23, 1929. I don't know what it looks like. We don't have any over in our files. I am just trying to find out what was in those bulletins. These bulletins, Government's Exhibit 33 and the series of bulletins following that, were furnished us by the United States Gypsum Company; and at the time they were furnished us, we were told that these were all the bulletins that they had at the time.

Justice Jackson: What is the first date?

Mr. Knuff: The first one in here is March 21, 1931. Now there is a period of approximately four years that I know nothing about, I don't know the form that the bulletin took, what was in it, or anything else.

Mr. Johnston: I think counsel is in error there. I think he has one here of August 3, 1929.

Mr. Knuff: I am referring to the bulletins I have
5615 in front of me in Government's Exhibit 33, the first of which is March 23, 1931. I have seen them from May 23, 1929, but I have never seen a bulletin prior to May 23.

Mr. Bromley: Counsel knows now,—I have just stipulated the fact,—back to 1927.

Mr. Knuff: But the stipulation, while I am grateful for the stipulation, it still doesn't help me as to what was in the bulletins.

Justice Stephens: Who can help you, Mr. Knuff?

Mr. Knuff: The witness, maybe.

Justice Stephens: Go ahead and examine him, then.

By Mr. Knuff:

Q. Do you recall what was in the first bulletins that you received, sir? A. No, sir, I couldn't tell you.

Q. Can you tell us whether or not, in addition to specifying the price, there was anything in those bulletins concerning the arbitrary shipping weight that a thousand feet of board should have? A. I couldn't tell you.

Q. Could you tell us whether or not there was a so-called truck delivery area specified in those earlier bulletins? A. I couldn't tell you for certain. I don't think there was.

5616 Q. Could you tell us whether or not there was anything in those earlier bulletins concerning the regulation of stopover charges? A. No, sir.

Q. When you say "No, sir", do you mean that you can't tell, or there wasn't anything in them? A. I mean I don't remember what was in those. If I saw one, I could probably tell you.

Q. I am sorry I can't give you one to look at. I would like to.

Mr. Knuff: I wonder if the United States Gypsum Company could help us out as to those earlier bulletins?

Mr. Bromley: We have furnished everything to the Government that we had at the time we furnished them, and we have nothing else.

Mr. Knuff: While I appreciate Mr. Bromley's offer to stipulate, in view of the fact that I have never seen a bulletin issued prior to the 23rd of May, 1929, I am afraid I can't agree to that stipulation.

Justice Garrett: What are you going to do about it?

Mr. Knuff: I don't know what I am going to do about it. I thought I could get it from this witness, but apparently the witness is just as—and I am not criticizing the witness, I want the Court to understand that—

Justice Stephens: (Interposing) You had better
5617 proceed to another topic, then, and see if you can find these bulletins outside of Court.

By Mr. Knuff:

Q. Well, you do know, Mr. Chism, that you did receive some notification from the United States Gypsum Company concerning the price at which gypsum board and lath was to be sold; is that correct? A. Yes, we received notice.

Q. And the Texas Cement Plaster Company, from 1927, sold at those prices; is that right? A. Yes, we did.

Q. And— A. (Interposing) Up to August 6, 1929.

Q. To August 6, 1929? A. Yes.

Q. Now, after August 6, 1929, did Texas Cement Plaster Company receive a notification from United States Gypsum Company to disregard any previous prices that had bee sent you?

Mr. Bromley: I object to that as immaterial. I think that assumes that such a notice was necessary; whereas, it is apparent, from reading the bulletins that he received, that no such notice was necessary, because the prices were

only fixed under the patent which expired on August 6, 1929.

5618 Justice Stephens: What do you contend as to the materiality of that; since the bulletins fixed the prices only up to a given date, what would it prove for the Government that no notice was given of a discontinuance of prices after that?

Mr. Knuff: I want to know just exactly what USG did. After the so-called Hite and Haggerty patents expired on July 8, 1941, USG sent out a notice under those patents. Now I want to know what they did under the original patents, under the original license agreements.

Mr. Bromley: That argument is neither so nor sound. In 1941, when we sent out a letter, we had patents in force and effect under which we might have fixed prices. We chose no longer to exercise the right, and sent out a letter that we were not going to fix prices any more, at that time. We just chose to discontinue the fixing of prices then.

Back in 1929, the patent under which we had a right to fix prices, expired.

Justice Stephens: We don't see any materiality in it, Mr. Knuff. It is without dispute in the case that the bulletins fixed prices only up to a certain date. If that is the fact, the absence of notice after that wouldn't prove anything one way or the other.

Mr. Knuff: May it be stipulated that no notice was sent out, Mr. Bromley?

5619 Mr. Bromley: I object to that as immaterial.

Justice Stephens: The stipulation would be as immaterial as the proof. The objection is sustained.

By Mr. Knuff:

Q. During the period after April, 1927, and before August 6, 1929, did you purchase board, did Texas purchase board and lath from any other manufacturer? A. I don't remember. I don't believe we did.

Q. In 1927, what companies were selling board and lath in the territory in which the Texas Cement Plaster Company sold board and lath? A. Well, in the principal part of our territory, it would be the United States Gypsum Company, the Certain-teed Products, the Universal Lime & Cement Company, and the Texas Cement Plaster.

Q. Was National down there? A. National was not down there at that time.

Q. Now, after August 6, 1929, at what prices did you sell board and lath in the territory covered by Texas? A. I wouldn't remember. We sold it at the best price we could get for our goods.

Q. Do you mean by that that you sold it at the prevailing price? A. Yes, we did.

Q. You knew that at that time all companies, ex-
5620 cept yourself, had taken out a license with USG, and that under the terms of that license USG fixed the price of the board and lath? A. I probably knew that some of them were operating that way, but not all of them.

Q. Well, it is a fact, and it has been testified in this case —and I believe that you can accept this as correct—that from the middle of 1930, all the companies named as defendants in this case, with the exception of Texas, were licensees of USG—

Mr. Oliver: (Interposing) Of course, that isn't correct.

Mr. Knuff: Just a second, please, Mr. Oliver.

Justice Stephens: Finish your statement; and then don't answer, Mr. Chism, until Mr. Oliver objects.

Mr. Knuff: (Continuing) —with the exception of Texas and Celotex, were licensees of USG, and it is also a fact that under these license agreements USG fixed the price of the licensees.

Now will you tell us whether your sales were at the same prices that the other companies charged, in the territory that you operated in?

Mr. Bromley: I object to that question as assuming facts not in evidence, and also as incompetent because calling for a conclusion, and not the proper way to prove
5621 the prices.

Mr. Knuff: I am not trying to prove a specific price. I am trying to prove a policy.

Justice Stephens: Ask him for the policy, then.

The objection is sustained.

By Mr. Knuff:

Q. Was it the policy of your company to sell at the prices that other companies sold at? A. No, sir.

Q. What was the policy of your company? A. It was to follow the prevailing prices in the field.

Q. And the— A. (Interposing) The prevailing market price.

Q. And the prevailing prices in the field were prices that were fixed by USG?

Mr. Bromley: I object to that—

The Witness: (Interposing) I couldn't say that.

By Mr. Knuff:

Q. From time to time, Mr. Chism, your salesmen would report to you the prevailing prices in the territory that they covered, would they not? A. Yes, they would, quite often.

5622 Q. And from time to time your dealers would report to you the prices at which your dealers were offered gypsum board and lath by other companies, would they not? A. Very often.

Q. And you tried to keep advised as to the prevailing prices, did you not? A. We did try at all times.

Q. And was the policy of your company to sell at the prevailing prices? A. Yes, sir.

Q. In 1928, Mr. Chism, would you say that the price of board had declined from what it was in 1926? A. Well, my recollection is that it had declined, yes.

Q. Would you say that during 1928 there was what is known, or what was known throughout your territory, as a price war? A. Some called it that, yes, sir. There was quite a disturbance.

Q. Pardon me? A. There was quite a disturbance in prices.

Q. What do you mean by "quite a disturbance in prices"? A. Prices were demoralized, and down, and going down.

Q. And how long did they continue to go down? A. Oh, I would say a year, maybe a little longer.

Q. Would you say that the prices became firm
5623 around about June, 1929? A. No sir, I wouldn't say that.

Q. When would you say that they did become firm? A. They didn't become firm until possibly 1932 or 1933—that would be my best judgment.

Q. You are talking about the price of board, are you? I am only confining my questions to the price of board. A. Yes, that would apply to board.

Q. Do you mean that the prices of USG and Certain-teed and National, which were reported to you, showed a variance at any particular time—and I am still referring to board and only board?

Mr. Johnston: If he knows as to their prices?

Mr. Knuff: Yes.

The Witness: I don't think I would know definitely about that. As a matter of fact, the National was not operating in that territory.

By Mr. Knuff:

Q. Well, Certain-teed and Universal and USG? A. I couldn't tell you what their prices were.

Q. Well, without telling me in dollars and cents, were all the prices the same, or was one higher or lower than the others? A. I don't know.

Q. Do you know, Mr. Chism, whether or not the
5624 Texas Cement Plaster Company, after April 11, 1927, and down to August 6, 1929, ever received any notices about meetings of licensees? A. I think we may have received one or two or three letters, or something of that sort.

Q. And is it a fact that someone from Texas attended one or more of those licensee meetings? A. As far as my knowledge goes, nobody ever did.

Q. No person from Texas ever attended any of those licensee meetings? A. No, sir.

Q. Although Texas received notice, no one attended? A. That is right.

Q. Did you have a man working for you down there at that time by the name of Mr. Jacobs? A. Yes, sir.

Q. Did Mr. Jacobs ever attend any of those meetings? A. So far as my knowledge goes, he did not.

Mr. Knuff: I didn't think there would be any question about this, your Honor.

By Mr. Knuff:

Q. I show you, Mr. Chism, what has been marked for identification as Government's Exhibit 600, the same being a letter, dated June 24, 1929, addressed to John E. MacLeish, attorney, and signed S. M. Gloyd; attached to which
5625 letter, and mentioned in Government's Exhibit 600 for identification, is what has been marked Government's Exhibit 600-A for identification, the same being a telegram dated June 24, 1929, addressed to Mr. John E. MacLeish and purporting to be signed by S. M. Gloyd, President, Texas Cement Plaster Company.

(The documents referred to were marked Government's Exhibits Nos. 600 and 600-A for identification.)

(Government's Exhibits Nos. 600 and 600-A for identification were handed to the witness.)

By Mr. Knuff:

Q. Will you look at Government's Exhibit No. 600 for

identification, please, and tell me whether or not that is Mr. Gloyd's signature? A. Yes, that is Mr. Gloyd's signature.

Q. Does that in any way refresh your recollection as to whether or not Mr. Jacobs attended any meeting? A. No sir, it doesn't.

Q. Will you look at Government's Exhibit No. 600-A, and tell us whether or not the telegram form there is the form that was used by the Texas Cement Plaster Company? A. Yes sir.

Mr. Knuff: I offer in evidence, if your Honor pleases, Government's Exhibits Nos. 600 and 600-A.

Justice Jackson: Did you ask him if that refresh-
5626 ed his recollection?

Mr. Knuff: I asked him that and he said it didn't. I am now offering these in evidence, your Honor.

Mr. Bromley: I object to them as immaterial.

Justice Stephens: Do you mean, Mr. Bromley, that you object to these exhibits as immaterial on the ground that it is immaterial whether Mr. Jacobs attended or not, or on the ground that they do not tend to prove that he did attend such a meeting?

Mr. Bromley: On the latter ground, that they do not tend to prove that he attended any meeting.

Justice Stephens: What do you say to that, Mr. Knuff? Here is a telegram stating that Mr. Jacobs would attend. Do you think that that is evidence that he did attend?

Mr. Knuff: I think that that comes very close to the Hillmon case, where the man said he was going up to the mountain.

Justice Stephens: That is exactly what I had in mind. It seems to me that it is doubtful whether it comes within the Hillmon case, but maybe I am wrong. I thought the Hillmon case had to do with a situation where the evidence was of a statement by Hillmon as to where he was going, isn't that true?

Mr. Knuff: Yes, I believe that is true.

Justice Stephens: This is a statement by Gloyd
5627 as to where "Hillmon" was going.

Mr. Knuff: As I say, I am not going to take up the time of the Court, if the Court wants to let it in, all right, or if it wants to exclude it all right. I think it is material or I wouldn't have offered it.

Justice Stephens: The objection is sustained. We think that these documents are not material.

By Mr. Knuff:

Q. I believe, Mr. Chism, that your company never made metallized board, is that correct? A. No, we never did.

Q. And by "metallized board", I mean a board having a foil surface on either one or two sides—you understand that? A. I understand what you mean, I believe.

Q. Your source of supply, if I understand correctly, was the National Gypsum Company, is that correct? A. Principally.

Q. And did you get any from any other place? A. We may have bought some through dealers at Sweetwater, Texas, where the United States Gypsum mill is located.

Q. When you bought the metallized board from National, you either bought National's board that was completely metallized, or you took down to the National's mill your own board and had National put their metal surface
5628 on it, is that correct? A. Yes, we did that.

Q. Your company never signed the metallized license agreement, is that correct? A. No, we never did.

Q. Now, during the time that your company purchased this board, your company received from the USG Company metallized lath or metallized board bulletins, did they not? A. No sir, I don't think so.

Q. You don't think so? A. No sir.

Q. Your company did sign a contract under the Hite and Haggerty Patents on February 10th, 1937, did they not? A. Yes sir, we did.

Q. And after you signed that contract, didn't your company receive from USG the metallized board bulletins? A. No sir, I don't think so.

Q. You don't think so? A. No sir.

Q. And didn't you have correspondence with USG concerning the meaning of the bulletins that were sent you? A. Not the bulletins, I think I had some correspondence relative to one bulletin.

Q. What bulletin was that? A. I couldn't tell you now.

5629 Q. And didn't you have an arrangement with USG that you would sell metallized board in accordance with the terms of USG's bulletins? A. No sir, we had no such arrangement.

Q. You know Mr. Grant Kelleher, don't you? A. I have met the gentleman, yes.

Q. Did you ever tell Mr. Grant Kelleher that you had an arrangement with USG to sell metallized board at bulletin prices? A. I don't think I told him anything like that.

Q. If you had told him about it would you have known it? A. I believe I would.

Q. Would you say now that you did or you didn't? A. That I did not, that is my recollection.

Q. You are positive of that? A. Yes sir.

Q. Did you sell at the same prices that USG specified in their bulletins?

Mr. Bromley: I object to that as incompetent, as calling for a conclusion, and not the proper way to prove prices.

Justice Stephens: Will you read the question again, Mr. Grover?

(The reporter read the question as above recorded.)

Justice Stephens: The objection is sustained. We have sustained many objections to that form of question.
5630 If you want to prove the prices, you will have to prove them in a competent manner. You may ask what the policy was.

Mr. Lapey: May the record show objection on behalf of National as to this testimony of Mr. Chism's, relating to metallized board and lath. I realize that that point has been passed upon, but I think the record should show that objection.

Justice Stephens: You are simply making the objection for the purpose of preserving National's record in respect to this witness?

Mr. Lapey: That is correct, sir.

Justice Stephens: The objection is noted and is overruled.

By Mr. Knuff:

Q. You testified before the grand jury in the District of Columbia on May 3, 1940, did you not? A. On approximately that date, yes sir.

Q. I wish that you would look at your testimony beginning at page 1408, where I have indicated with a pencil mark and continuing down to page 1409, where I have indicated with a pencil mark, please.

Mr. Bromley: May we see it first, if the Court pleases?

Justice Stephens: Yes, you may, and then the Court will look at it.

(The document referred to was handed to defendants' counsel for examination, and following that it was
5631 handed to the Court for examination.)

Justice Stephens: Now show it to the witness, Mr. Marshal.

(The grand jury minutes were handed to the witness, but were not examined by him.)

Mr. Johnston: If the Court please, before the witness looks at those grand jury minutes, or that part of the minutes which has been indicated, I want to make a request that we be permitted to see the grand jury minutes dealing with that entire subject, that is of this witness, so that we may see what his story was before the grand jury. I think it is an improper use of grand jury minutes here, and should not be permitted, in the first place, but if it is, then we should not be limited to three or four questions and answers, which have been singled out by the Government, but we should be permitted to read enough of the minutes so that we may get the context.

Justice Jackson: This is being used to refresh recollection?

Mr. Knuff: In the first instance it is—

Mr. Johnston: But it is not fair to the witness to single out four or five questions, and have him refresh his recollection from that, without seeing the whole story.

Mr. Knuff: I think the whole story on metallized board occupies less than four pages, and if you will hand the minutes back to me, I will mark that portion, as I under-
5632 stand it, and I will hand it up to the Court, and see whether or not that is correct.

Justice Stephens: We think it is fair that the witness should see all of it. Mark it out, and then submit it to defendants' counsel and to the Court again, and then let the witness see it.

I might state, gentlemen, that unless it will inconvenience anyone, there will be no afternoon recess, but the Court will adjourn at 3:30. There is a conference of the judges of the Court of Appeals this afternoon, which I have to attend.

Mr. Knuff: If your Honor please, I want to pass up now for your Honor's inspection, the grand jury minutes beginning at the top of page 1406 and ending where I have drawn a line on page 1408. It is my recollection that that is the entire grand jury testimony of this witness in connection

with metallized board, at this particular time. Whether he testified at any other time or not, I don't know.

Justice Stephens: Hand it to defendants' counsel first.

(The grand jury minutes were handed to defendants' counsel for inspection and were thereafter handed to the Court for inspection.)

Justice Stephens: Show it all to the witness now.

(The grand jury minutes were handed to the witness for examination.)

Mr. Knuff: It starts at the top of page 1406, fol-
5633 lowing: "By Mr. Haddock."

Justice Stephens: And read right down to the point indicated on page 1408—isn't that right, Mr. Knuff?

Mr. Knuff: That is correct, your Honor.

Justice Stephens: And take your time, Mr. Chism.

Mr. Knuff: Now that Mr. Chism has finished, may I have the grand jury minutes, Mr. Marshal?

(The grand jury minutes were handed to Mr. Knuff.)

By Mr. Knuff:

Q. Is it a fact that you did tell Mr. Kelleher that you did have an arrangement with USG concerning the price at which you would sell metallized board?

Mr. Johnston: Just a minute. Now if the Court please, in view of the fact that these other pages that were disclosed to us, put an entirely different light and explanation on the testimony of this witness before the grand jury than those pages that were previously shown, I now object to the use of or reference to these grand jury minutes unless and until I am privileged to see all of the testimony of this witness before the grand jury, for the reason—and I am speaking legally now, I have no personal reference to counsel—I have only counsel's word that these few pages are the pages that have any reference to or any bearing on this subject.

Coming back to my original objection, I think the whole thing is an improper use of grand jury minutes, but
5634 at least I am entitled to look at the minutes and satisfy myself, and not take counsel's word as to whether or not there is any other testimony of this witness in there, and so is the witness entitled to see his testimony.

Now it is just 20 minutes from closing time this evening, and the minutes are not long, and it is not going to hurt anybody and will facilitate the trial and speed up things

here, if that permission is granted, and I make that request and object to the use of or reference to these minutes in any manner until I see them.

Justice Stephens: Is there any objection to that, Mr. Knuff?

Mr. Knuff: Yes, I have an objection to it for this reason, your Honor.

In the first place I think it would create a very bad precedent as far as the Department of Justice is concerned. I don't think that the legal position that Mr. Johnston takes is well taken.

The leading case, or one of the leading cases on this subject, is the Madison Oil Case. In the Madison Oil case—

Justice Stephens: You needn't argue to the Court the propriety of using grand jury minutes for purposes of refreshing recollection. We have already ruled in your favor on that.

Mr. Knuff: I am not going to argue as to the
5635 propriety of their use, but I am going to say that the practice that was adopted in the Madison Oil case, and which the Supreme Court of the United States followed, was for the Court to examine the grand jury minutes to see whether counsel was making an improper use of the grand jury minutes, or not, and that the Court could then say whether or not counsel was making an improper use of them.

The grand jury minutes are, in and of themselves, confidential or secret—

Mr. Johnston: (Interposing) They are not, that is the trouble.

Mr. Knuff: They can be used to refresh the witness' recollection. But Mr. Johnston is not entitled, under any ruling that I know of, ever made by any court of competent jurisdiction, to look at the entire testimony of this witness, the entire grand jury testimony of this witness, to see whether or not the matters that are used here to refresh his recollection are the whole of his testimony.

I think that is the duty of the Court.

Justice Stephens: I thought that the theory of the rule was that once the grand jury's proceeding is terminated by indictment or trial, or what-not, that the rule of secrecy had been dispensed with, so that unless there was something of a defamatory character, or something of that sort in them, which might in the discretion of the Court be kept secret, they could be looked at properly.

5636 I thought we had ruled, Mr. Knuff, that both counsel and the Court must look at the minutes. If the

Court alone looks at the minutes or the record of the grand jury investigation, then counsel for the opposite party must, without opportunity to argue to the Court, or to make objections, accept the Court's ruling, and that is a most unusual procedure. I don't see, myself, offhand, any unfairness at all in letting Mr. Johnston examine the testimony of this witness.

Mr. Knuff: That was the exact question that was raised in the Madison Oil case. They wanted the right to inspect the entire grand jury testimony of the witness who was being interrogated, as to whether or not he said so-and-so, before the grand jury, and the Court in that case ruled that they were not entitled to inspect the entire grand jury testimony of the witness.

Justice Stephens: Is that in the Supreme Court's ruling?

Mr. Knuff: Yes.

The practice in the Madison Oil case was this: The attorney for the Government would say, "Did you testify so-and-so before the grand jury?"

The witness then answered whether he did or whether he didn't.

Counsel wanted the opportunity to examine the entire grand jury minutes. The Government objected to
5637 that procedure on the ground that they were not entitled to do that, and that the most that they could ask would be for the Court to inspect the grand jury minutes to see whether or not counsel for the Government was making an improper use of them.

I haven't any objection to the Court here inspecting the grand jury minutes to see whether I am making any improper use of them. But Mr. Johnston, under the Socony-Vacuum case, is definitely not entitled to look at the entire testimony of this witness before the grand jury.

Justice Jackson: How are you using those minutes now; for what purpose are you having the witness look at them?

Mr. Knuff: To see if they refresh his recollection.

Justice Jackson: Why don't you ask him that? You don't object to such a question as that, do you, Mr. Johnston?

Mr. Johnston: I want him to see all of his testimony, or at least I want to see it first.

I would like to answer that argument of Mr. Knuff. That Madison Oil case was a criminal case—

Justice Stephens: (Interposing) We will hear you, Mr. Johnston, but before you go on, Judge Jackson raises the proposition that perhaps we are wasting a lot of time here, as we have in many other situations in this case, where we have debated on whether or not a witness could answer, and it later turned out that he didn't know anything about the matter. Perhaps this witness' answer, if he were asked if it does refresh his recollection, would be in the
5638 negative. If so, what would be the use in going further with this matter?

Mr. Johnston: Well, I don't know whether what they have shown him does or does not refresh his recollection.

Justice Jackson: Of course you don't, and we don't either, until he answers that question.

Justice Stephens: You have looked over these minutes that have been submitted to you thus far, haven't you?

The Witness: Yes.

Justice Stephens: Do they or do they not—answer this yes or no—refresh your recollection as to what Mr. Knuff—

Mr. Knuff: (Interposing) Pardon me, your Honor, but I just want to say one thing. When Judge Jackson asked me that question I said that that was going to be used first—

Justice Jackson: (Interposing) Let first things come first and second things come second.

Mr. Knuff: I just didn't want to be placed—

Justice Jackson: (Interposing) I understand what you mean.

Justice Stephens: You asked this witness the question as to whether or not it refreshed his recollection—on what? I have forgotten what it was all about.

By Mr. Knuff:

Q. Have you looked at the grand jury minutes that I have shown you? A. Yes.

5639 Q. Do they refresh your recollection as to whether or not you told Mr. Kelleher that you had an arrangement with the USG concerning the price at which you should sell metallized board?

Justice Stephens: Answer that yes or no. Do they or do they not refresh your recollection on that subject?

The Witness: They do not.

Justice Stephens: Now what else do you want to use them for?

Mr. Knuff: The witness has said that he didn't have any understanding with United States Gypsum Company concerning the price at which metallized board was to be sold.

I want to now use the grand jury minutes to impeach that testimony.

Justice Stephens: What is the citation of the Socony-Vacuum case in the Supreme Court?

Mr. Knuff: I am sorry, but I don't have it with me. I can get it for you, shortly.

Mr. Bromley: It is 310 U. S.

Justice Stephens: Mr. Cantor, will you get 310 U. S. for me, so that we may look at it.

How much of the grand jury record is covered by the testimony of this witness? Do you know, Mr. Johnston? probably you don't.

Mr. Johnston: I have never seen that testimony.

5640 I just saw those two or three pages.

Mr. Steffen: It starts, as I have it here, at page 1399, and runs to 1436.

Mr. Johnston: You see the defendants are at a very great disadvantage in a case like this. The criminal case is closed, and the grand jury minutes are supposed to be sealed, if that is their idea, and yet, as to one side of this case they are not sealed. They have every access to them, and we have no access to them, and I just cannot understand that.

Then they come in here with these witnesses, and particularly with this witness, and pick out a page or two, and they have the advantage of knowing the entire testimony, and we are put in the position of only looking at two or three pages.

I think the Court should rule that I have the privilege of looking at those minutes over the recess this evening.

Justice Stephens: It seems, offhand, very unfair to me, but if there is a ruling in the Supreme Court that fixes it, we will have to follow the law. I don't see, myself, offhand, Mr. Knuff, how Mr. Johnston's rights could be protected for his client by merely having the Court examine all of the grand jury minutes showing the testimony of this witness, and then having the Court conclude that the witness ought or ought not to see more than he has been shown, because the Court, conceivably, might conclude otherwise if Mr. Johnston had a right to look at these minutes and make an argument on the subject.

5641 The theory of fair trial is that both sides should be heard, and it does seem unfair to me that the Government is the only one that is allowed to look at these minutes in full; but if there is something in that case, the Socony-Vac-

num case, that compels it, of course we are here to apply the law no matter where the chips may fall.

Mr. Johnston: If the Court please, I want this thing kept in mind in considering that case, and that is, that that Madison Oil case is not an analogous case to our situation here at all.

The Madison Oil case was a criminal case. That was the matter involved; that was the matter before the grand jury then. In this case it is entirely different. We were not a party to the criminal case at all; we were not indicted.

Even if there was some reason in the Socony-Vacuum case why counsel should not be permitted to see the minutes, it would not be any argument that we should be denied that right in this case, it being an entirely different situation.

(The volume requested, 310 U. S., was handed to the Court.)

Mr. Knuff: Page 231, your Honor, I believe is where it starts.

Justice Stephens: The Court has now read that portion of the Socony-Vacuum case, 310 U. S. 150, especially from pages 231 to 234, and it, in the view of the Court, does not bear out your contention, Mr. Knuff.

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Mr. Knuff: Before you make a final ruling, I don't want to interrupt you, but I would like to make a statement.

Justice Stephens: We don't want to be unfair to Mr. Johnston. On the other hand, we don't want to allow any fishing expedition into the grand jury minutes, and it is my recollection now—I may be wrong—but it is my recollection now that pages 1406 to 1408 are the only pages in the grand jury testimony that relate to metallized board, or rather to the testimony by this witness regarding metallized board.

Justice Jackson: What fishing could he do if he just looked at the testimony that was given by this single witness?

Mr. Knuff: We are under a very strict rule, over in the Department, not to allow the entire testimony before the grand jury to be disclosed. I want to comply with your Honor's ruling, and I do not want to be adjudged in contempt of court, but please don't put me in a position where I am disobeying the rule, as I consider it, of the Assistant Attorney General. Before the Court makes this ruling, allow me to take this up with Mr. Berge, as I can't turn these minutes over without getting the permission of Mr. Berge.

I have never known of a case where the grand jury min-

utes have been allowed to be inspected. I have known where they have tried repeatedly to obtain that right, but
5643 I can say, in all sincerity, that I know of no case, not a single one, where the defendants have ever been allowed to inspect the minutes of a grand jury, the entire minutes of a grand jury.

Justice Stephens: Now, Mr. Knuff, that case that you called to our attention holds, first, that the grand jury minutes were used merely for the purpose of refreshing recollection and nothing else. It holds that under those circumstances it was not prejudicial error to refuse to submit the minutes to the inspection of opposing counsel. But it clearly rules that the use of grand jury minutes is within the discretion of the trial judge, and that once the function of the grand jury has been discharged, the grand jury minutes can be used in court within the discretion of the judge.

Now the rule of an Assistant Attorney General with respect to the intra-departmental use of minutes of a grand jury, doesn't supervene the rule of a United States District Court.

Our ruling is that those minutes may be shown, so far as the testimony of this witness is concerned, to Mr. Johnston.

We think the case supports that, rather than holds to the contrary.

Justice Garrett: If you wish to confer—

Justice Stephens: (Interposing) Of course if you want to confer with Mr. Berge and have him appear here, you may do so and have him here tomorrow morning.

5644 Mr. Knuff: We don't want to have Mr. Berge appear here, but I wanted to acquaint Mr. Berge with the facts of the case.

Justice Garrett: I suggest that you might do that by withdrawing the question for the time being.

Mr. Knuff: I will do that, then. I will withdraw the pending question.

Justice Stephens: Very well. Of course that means that we will be delayed again tomorrow, because if you ask this question again, and the minutes have to be read at that time, there are 45 or 50 pages of testimony that will have to be read by the defendants' counsel and by the Court.

There can't be any question but what the District Court has discretion under the case which you cite. The Supreme Court of the United States says that it is within the discretion of the trial court. If that is true, your internal rules in

the Department of Justice cannot supervene the ruling of the Court.

If you want to withdraw the question, all right.

Mr. Knuff: I will withdraw the question, your Honor.

Justice Stephens: Very well.

Announce the recess.

(Whereupon a recess was taken at 3:30 o'clock p. m. until 10:00 o'clock a. m. of the following day.)

5645 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Wednesday, March 29, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5650 You may take the stand, Mr. Spencer.

Thereupon, H. DORSEY SPENCER called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Will you state your full name, Mr. Spencer? A. H. Dorsey Spencer.

5651 Q. And where are you located? A. 420 Lexington Avenue, New York.

Q. Are you a member of the patent bar? A. Yes. I am also a member of the bar of Massachusetts, the bar of the State of New York, the Supreme Court, and various District bars.

Q. For how long have you been practicing? A. In general patent practice for 29 years. Before that I was with the Patent Department of the United Shoe Machinery Company for several years.

Q. Were you at one time a member of the firm of Newell & Spencer & Safford? A. Yes.

Q. I now show you what has been marked as Government's Exhibit 601 for Identification; also, what has been marked as Government's Exhibit 602 for Identification—the first being a letter purporting to have been sent by you, Mr. Spencer, under date of March 4, 1936, and addressed to Certain-teed Products Corp.; and Exhibit 602 being a letter addressed to Mr. S. C. Straub of the Certain-teed Products Corp., under date of December 27, 1933.

(The documents referred to were marked as Government's Exhibits Nos. 601 and 602 for Identification.)

(Government's Exhibits Nos. 601 and 602 for Identification were handed to the witness.)

5652 By Mr. Steffen:

Q. Can you identify Government's Exhibit 601 as being your letter? A. Yes, it is signed by me.

Q. And can you identify Government's Exhibit 602? A. Yes. Both appear to be the original letters as signed by me.

Mr. Steffen: We offer Government's Exhibits Nos. 601 and 602, Your Honor.

Justice Stephens: Have counsel had an opportunity to inspect them?

Mr. Steffen: Yes, they have had photostatic copies.

I might say, by way of identification, that the letters have been identified, and they were received from the Certain-teed Products Corportion's files. They bear the Item Nos. A-e-19 and A-e-61.

Mr. Adams: There is no question about that.

Mr. Steffen: The only question which I think might be raised is as to the attorney-client privilege, and this was passed upon by the Court in connection with Exhibit 269 some time ago, when the same question arose. That exhibit was admitted at page 2309 of the transcript, over Mr. Adams' objection raising the attorney-client privilege claim.

I might say further that the present letters are a little more in point, particularly the letter of 1936,
5653 inasmuch as it states many of the things that appear in the Certain-teed's answer to the Government's complaint, paragraph 119.

Justice Stephens: You say page 2309 of the record?

Mr. Steffen: At page 2309 of the record, it was admitted.

Justice Stephens: Let the Court read them.

(Government's Exhibits Nos. 601 and 602 for Identification examined by the Court.)

Justice Stephens: Is there objection?

Mr. Adams: Yes, if Your Honor please, I think I should ask for permission to ask just one or two questions of Mr. Spencer.

Justice Stephens: You may.

By Mr. Adams:

Q. Mr. Spencer, with respect to these two letters, Exhibits 601 and 602 for Identification, at which you have just looked, at the times that you wrote those letters you were, in your capacity as a lawyer, advising Certain-teed; is that correct? A. Yes.

Mr. Adams: Now, I object to the introduction of these in evidence on the ground that they are within the privilege existing between attorney and client. It has been testified that they were written while Mr. Spencer was act-
5654 ing as counsel; they show on their face that they contain legal advice; and it is our position that

they, therefore, are within the privilege, and we assert that the privilege has not been waived up to this time by any act of the defendant Certain-teed.

Justice Stephens: Do you raise any point different from what you raised in respect of the other similar exhibit, Exhibit No. 269?

Mr. Adams: No, I do not, Your Honor.

We had a point there under the answer to paragraph 119—

Justice Stephens: (Interposing) We have it all in mind. I would be glad to hear you further, but we have it all in mind.

Mr. Adams: All right.

(The Justices conferred.)

Justice Stephens: The exhibits are admitted in evidence, consistently with the previous ruling, and for the reasons stated in respect of the ruling, in respect of Exhibit 269.

Mr. Finck: If the Court please, may the record show an objection on behalf of Baker and National, on the ground that these are incompetent, irrelevant and immaterial, and have no bearing on the issues as regards Baker and National in this case. They only relate to perforated lath, and of course, National, we contend—

5655 Justice Stephens: (Interposing) The majority of the Court, I believe, overruled a similar objection at the time of the reserved ruling.

Mr. Finck: That is true.

Justice Stephens: Your objection may be noted, but it is overruled.

Mr. Bromley: I thought the Court was only passing on the issues of competency, and therefore I did not earlier make my objection, which I do now. I object to both exhibits on the ground that they are immaterial and irrelevant, if they are offered as bearing upon the issues of the invalidity of the patent in question.

Mr. Steffen: While they are not offered for purposes of proving invalidity of the patents, I thought Your Honors' ruling covered that very thoroughly.

Justice Stephens: Yes, they are not being received to prove that the patents were invalid, but under the charge of lack of bona fides in the use of the patents as a basis for license agreements.

Mr. Bromley: I object to them further on the ground that they are immaterial and irrelevant because not in

furtherance of any conspiracy, and not binding on any of the defendants other than Certain-teed.

I do not understand the theory of the Government when they offer this piece of evidence as to Certain-teed,
5656 a fact which, incidentally, is admitted in the answer, and I think they will admit that they have no evidence that USG ever had any advice that the patents were invalid. Its position was that they were valid, and they were going to enforce them. So unless the Government is prepared to state that they have further evidence to show the state of mind of the licensor, it seems to me that this evidence, by itself, has no materiality at all to the charge of subterfuge which, as I understand it, is the only theory on which it is offered.

Mr. Steffen: We say as to that, Your Honor, that proof of state of mind, or of the understanding of any one of the parties who have gotten together on the basis of these license agreements, is certainly admissible for purposes of showing the understanding of such party, and if it is upon an understanding that it might be desirable to use patents for purposes of price fixing, we contend that that shows subterfuge.

Justice Stephens: Well, I think that raises the same question that we passed on with respect to Exhibit 324, which had to do with the admission or asserted admission of Certain-teed in respect of the Beaver Products litigation. We ruled there that the mere admission of one alleged co-conspirator, although valid as against that co-conspirator, was not binding upon other co-conspirators unless it is shown to be in furtherance of or execution of the conspiracy; and we think the same reservation ought
5657 to be made here. The exhibits will be received in evidence, but subject to the usual reservation with respect to declarations of alleged co-conspirators, and not to be held binding upon the other defendants unless shown to be in furtherance of or execution of the conspiracy. We do not make a reservation requiring a showing that these exhibits are Certain-teed's act, because Certain-teed took a license under the Roos patent, on perforated lath, after the receipt of the Spencer letters.

Mr. Bromley: Well, I understand, then, that counsel does not state that he has or expects to produce any other evidence tying this up with any other defendant, and especially with the licensor?

Mr. Steffen: We make no such stipulation, Your Honor.

It is open to us now, I take it, or on rebuttal, to tie up this evidence with other defendants.

Justice Stephens: You have a right to try to do that.

(The documents referred to, marked as Government's Exhibits Nos. 601 and 602, were received in evidence.)

Mr. Steffen: I have one other preliminary matter. I would like to ask Mr. Adams in regard to Mr. Dowd, the reason being that I want to get our witness schedule straightened out.

Mr. Bromley: I wanted to be heard on that entire situation at some convenient time.

Mr. Adams: I, too.

Mr. Steffen: As it was left yesterday, I understood that Mr. Adams was going to contact Mr. Dowd, and
5658 that he would be presented as a witness.

Justice Stephens: What do you want to ask Mr. Adams? Do that first.

Mr. Steffen: I want to make sure that Mr. Dowd will be presented at an early date, so we can get our subpoena out for Mr. Redfield, if the Court rules that way, and get our witnesses scheduled.

Mr. Adams: What I said yesterday, perhaps Mr. Steffen misunderstood. I asked the Court, I think, when the Court would like to have Mr. Dowd presented, because of the fact that it might be difficult for me to get hold of him, and the Court said that he could be presented at the convenience of counsel and the Court. I have not, in the interim, done anything about trying to locate Mr. Dowd, since then. I do not know, as a matter of fact, that Mr. Dowd certainly can not be available in the East earlier than approximately the middle of April. Of course, we adjourn on Friday, anyway, for this period.

Justice Stephens: And take up on the 11th of April.

Mr. Adams: Yes, and I knew that Mr. Dowd could not be here until sometime about the middle of April, so I haven't taken it up with him in the meantime.

Justice Stephens: Will you do so as soon as you reasonably can, and acquaint Mr. Steffen with the probable date when you will bring him here?

5659 Mr. Adams: Yes. I think we can get together on that. As Mr. Bromley said, there is another phase of the matter which he and I would like to discuss with the Court, which we think might possibly be determinative of the whole problem.

Justice Stepehns: We will give you an opportunity to do that, if you wish to, Mr. Bromley, before the close of

the present week's session; but we perhaps ought to get on this morning with the witness on the witness stand, because Mr. Chism, I think, is desirous of getting back to his business. Perhaps at the close of Mr. Chism's testimony you can raise that matter. Can you do that then?

Mr. Bromley: Yes, thank you.

Justice Stephens: Have you any further questions of Mr. Spencer?

Mr. Steffen: No, we have not.

Justice Stephens: Any cross-examination?

Cross Examination

By Mr. Bromley:

Q. Wasn't it your practice, Mr. Spencer, to advise your clients, in situations where you thought a patent was invalid, that while that was your opinion, it was entirely possible that you might be wrong? A. Oh, yes, that is always true, of course.

Q. And did you give that advice to the Certain-teed Company in connection with this Roos patent?

5660 A. I think it appears in the opinions, as I recall it, where I state that—

Justice Stephens: (Interposing) Which exhibit are you referring to?

Mr. Bromley: Do you have in mind, Mr. Spencer, what you said at the bottom of page 2 of Exhibit 602?

The Witness: Yes. I also suggested—

Justice Stephens: (Interposing) That is where you referred to the erudition in patent law of United States District Judges, isn't it?

The Witness: Yes. I also suggested that Certain-teed conduct certain experiments, which I don't think they ever did.

By Mr. Bromley:

Q. Where is that reference, Mr. Spencer? A. That is in the paragraph beginning near the bottom of page 4 of Exhibit 601.

Q. Would you point that out to me, Mr. Spencer, and tell me where the paragraph begins, what the words are?

Justice Stephens: (Leading) "I would suggest that if you wish to avoid the patent", and so forth.

Mr. Bromley: Thank you.

By Mr. Bromley:

Q. Now you say that the tests referred to in that sentence of Exhibit 601 were never made, so far as you know,
5661 is that right? A. I think not. You see, this opinion in 1936 was given shortly before the company changed hands, and as I recall it, they entered into the license agreement shortly after that.

Q. Now, you also pointed out to Certain-teed, did you not, in giving the advice, that a patent issued by the Patent Office is valid on its face? A. That is true, yes.

Q. You pointed out to Certain-teed, didn't you, that patent validity litigation is expensive, and the damages resulting from infringement might be very high? A. I think that is in both opinions.

Q. And you expressed the view to Certain-teed, didn't you, that as a business matter, it might, of course, be advisable for Certain-teed to take a license, even in spite of your opinion? A. I always advise clients to keep out of litigation if they can.

Q. And you, of course, told them, didn't you, Mr. Spencer, that in your judgment it would be unwise for them completely to ignore the Roos patent? A. I think that is in the letters, but I am not sure.

Q. Well, at any rate, in Exhibit 601, you suggest methods of avoiding the patent, do you not? A. Yes.

5662 Q. Particularly on page 3. A. Yes. And, of course, that was the purpose of the paragraph beginning near the bottom of page 4, also.

Q. Beginning with what words? A. "I would suggest".

Q. So that it is true, isn't it, that it was your judgment that Certain-teed would be very unwise completely to ignore the Roos perforated patent? A. That is true.

Q. And you told them that, didn't you? A. Yes.

Q. Now, you do not mean to suggest, in anything that you have said here, that Certain-teed did not act in entire good faith in taking the perforated lath license from USG, do you? A. I think their action was consistent with my opinion.

Mr. Bromley: That is all.

Justice Stephens: Mr. Adams?

Mr. Adams: I have no questions, Your Honor.

Mr. Steffen: We have nothing further, Your Honor.

Justice Stephens: You are excused, Mr. Spencer.

The Witness: Thank you.

(Witness excused.)

Justice Stephens: Do you wish to be heard fur-
5663 ther on the matter that was before the Court last night at the time of adjournment, with respect to the matter of impeachment through the grand jury testimony?

Mr. Steffen: Yes, Your Honor.

Justice Stephens: How long do you wish to be heard?

Mr. Steffen: Only for three or four minutes.

I have a suggestion to make. If Your Honor would care to take the morning recess right now, then we could carry right along following that.

Justice Stephens: Very well. We will take the usual morning recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5664 Mr. Steffen: I have one correction to make. Yesterday, when your Honor asked me how much grand jury testimony there was of this witness, I stated—this was while Mr. Knuff was out of the room—that it started on page 1399 and ended on page 1436. That was a total of 36 pages, approximately. I was looking, at that time, at the volume of grand jury testimony that Mr. Knuff was using.

It appears that in the preceding volume, which contains the testimony for May 2, 1940, Mr. Chism testified on pages 1293 to 1326—a total of 33 pages; on pages 1347 to 1396—a total of 49 pages. That makes a total, all told, of 118 pages of testimony.

We very carefully searched the total testimony again to determine whether the particular pages that we were reading, or having the witness look at yesterday, constituted his whole testimony upon the matter in question, and we are thoroughly satisfied that that is the case.

We recognize that the Court, at the end of the session yesterday, expressed, informally I take it, the opinion that it would be perhaps only fair to allow defense counsel to examine into the grand jury testimony to ascertain whether or not the Government is accurate in saying that the particular pages are the only pages having to do with the metallized board.

I want now to say briefly that from the practice of the Division, and I think that the Court also should con-
5665 sider the position of the Government in this matter, there are 118 pages all told of testimony on various

matters, and that it is a question of being fair to one or fair to the other. The defendants are, of course, entitled to satisfy themselves, or be satisfied, that the testimony in question is the only testimony dealing with metallized board by this witness.

Justice Stephens: Isn't it rather a question of being fair to both, Mr. Steffen?

Mr. Steffen: I should say that would be true, yes.

And to be fair to us, we feel that we would not wish to allow defense counsel to examine at their leisure, or, as Mr. Johnston suggested, that they take the minutes overnight—or at all—the entire amount of testimony.

Justice Stephens: Of this witness?

Mr. Steffen: That is correct.

Now, what we suggest doing as a way out of the predicament is simply to make an offer of proof of the testimony which we are offering to impeach Mr. Chism.

We do that—Mr. Knuff will make that offer—upon our representation, first, that this testimony is the only testimony having to do with the matter in question; and second, with the offer that the Court examine, if it will, the entire testimony to determine whether we have made an accurate and fair selection.

As I understand it, there is no question before the
5666 Court, or was not at the close of the session yesterday?

Justice Stephens: No, because you withdrew the last question.

Mr. Steffen: I don't think there was even a question pending. But we would now like to make an independent offer.

Justice Stephens: You may make an offer if you want to, for the sake of your record, and then we will hear from Mr. Johnston, following which the Court will make a ruling.

Mr. Steffen: Thank you.

Mr. Knuff: May it please the Court, we offer to prove that the witness, H. E. Chism, on May 3rd, 1940, appeared before the Additional Grand Jury of the District of Columbia in the proceedings entitled, "The United States of America v. United States Gypsum Company, et al", and testified as follows—

Mr. Johnston: (Interposing) Now wait a minute—

Mr. Knuff: (Interposing) This is a part of my offer, if your Honor please.

Justice Stephens: That is very true, but we have to hear objections to the offer, if counsel wishes to make them.

Mr. Johnston: I certainly object to his reading that into the record. That is just what we were talking about yesterday, and what we are talking about this morning. I renew my objection of yesterday. If he reads it into the record, then it is there.

5667 Justice Stephens: I thought the Government was making an offer for the purpose of obtaining a ruling to protect its record.

Mr. Knuff: That is right, your Honor.

Mr. Johnston: What are you going to do about keeping it out of the record; will that go out of the record?

Justice Stephens: If the Court rules that the Government is not entitled to make proof of the material contained within the offer, except upon the condition that it submits to you the testimony of this witness for examination, and the Government is not willing to accept this condition, then the Court would reject the offer and would not consider that testimony.

Complete your offer.

Mr. Knuff: I wonder if I hadn't ought to start all over again so that we can get it without any interruptions.

Justice Stephens: You may if you wish; how long is your offer?

Mr. Knuff: It is about a page of typewritten material.

Justice Stephens: Very well.

Mr. Knuff: We offer to prove that the witness H. E. Chism, on May 3, 1940, appeared before the Additional Grand Jury of the District of Columbia in the proceedings entitled "The United States of America v. United States Gypsum Company, et al", and testified as follows:

"Q. Since you became a licensee of United States Gypsum Company on February 10, 1937, have you re-
5668 ceived from United States Gypsum Company any price bulletins covering metallized board? A. I believe the metallized board is included in their regular price bulletins; I am quite sure it is.

"Q. Do you recall having received quotations from United States Gypsum Company covering metallized board? A. Yes, we have.

"By Mr. Kelleher:

"Q. Why were you receiving price lists from USG for metallized board when you were not manufacturing it?

A. We were selling it, distributing it. We paid a royalty on that board.

"Q. Well, now, explain what your understanding of your arrangement with USG was concerning the price at which you would sell board purchased from some other company? A. I don't quite understand that question.

"Q. What arrangement did you have with USG concerning the price at which you would sell metallized board? A. Sell at their regular published price, bulletin price.

"Q. And on the basis of what negotiations did you arrive at such an understanding? A. In accordance with our license agreement.

"Q. Under the terms of your license agreement, are you obliged to sell metallized board purchased from another company at USG prices? A. That would be my interpretation.

"Q. And you did at all times? A. Yes."

That testimony appears on pages 1408 and 1409 of the transcript of the testimony of this witness before the grand jury. This testimony is offered for the purpose of contradicting and impeaching the witness H. E. Chism.

The testimony that is challenged appears on pages 5919 and 5920 of the present transcript.

As a part of this offer, we state that we have exhibited to counsel for the defendants, pages 1406, 1407, 1408, and the first 19 lines of page 1409 of the grand jury testimony.

As a part of this offer, we state to the Court that the testimony appearing on pages 1406, 1407, 1408 and the first 19 lines of page 1409 of the transcript of the testimony of H. E. Chism, constitutes all the testimony given by the witness before the grand jury concerning this subject matter.

As a part of this offer, we further offer to allow the Court to inspect the transcript of all the testimony given before the grand jury by the witness H. E. Chism, in order that the Court may assure itself that no other testimony upon the subject matter was given by the witness.

(The Justices conferred.)

Justice Stephens: Is there anything else from the Government?

Mr. Knuff: I think at this time, on the present state of the record, that our offer is sufficient for any objection, if one is made. I do not know whether an objection will be made or not.

Justice Stephens: The nature of the offer would seem to give the impression that Texas had a metallized board license. You don't contend that, do you?

Mr. Knuff: We do not, your Honor.

Justice Stephens: Is there any objection to this offer?

Mr. Bromley: May it please the Court, I object to the evidence offered, on the ground that it is immaterial, incompetent and irrelevant.

In the first place, the offer is obviously, on its face, incomplete and unfair because all in the courtroom know that there is testimony on pages 1406 and 1407 which bears directly on the testimony which Mr. Knuff has offered to prove. He does not, however, include that in his offer.

Now there may be, in the 118 pages to which reference has been made, evidence which completely explains this. I make that statement because of an experience I had in the criminal case. We went through this very sort of thing in the criminal case, where Mr. Kelleher confronted a witness with a page or two of his grand jury testimony, and after an argument, Judge Goldsborough ordered him to hand the grand jury minutes to me, and I took them
5671 and examined the witness from many other pages than those called to his attention by Mr. Kelleher. The effect of the examination was to show that the witness before the grand jury had changed his testimony and given a corrected answer. That was all demonstrated in the criminal case.

So I say it is not fair, and we should not be asked to rely upon the assurance of Government counsel in the light of that experience.

This situation is a complicated one. The testimony which has been read here, in this offer of proof, is subject to a simple, obvious explanation, if anyone understands the facts of the case.

That explanation is that the metallized board which the Texas Cement Plaster Company sold was board which it manufactured itself in the first instance, under its license, then took it across the street to the National plant and had the foil put on it.

Now as this very offer shows, the Texas Company had to pay a royalty on that board, and did pay a royalty because it manufactured it, and it was patented board manufactured under its general license. The price bulletins fixed the price of that board, as made, before the foil was

put on it, and of course the Texas Company, if it sold that board, had to sell it for at least that price fixed for ordinary board.

Justice Jackson: That is already in the record
5672 through the testimony of Mr. Chism yesterday. He said that they made the board, and brought it to the plant of National, had it metallized, and then brought it back and sold it.

Mr. Bromley: Yes, your Honor, but he didn't take the final step and say why it was that the price of that board was fixed. It was fixed not at the price for metallized board, but at the price for ordinary plain board. Now the explanation is that he went ahead and sold it for a higher price than he could get for ordinary board, because the metallized board was more valuable.

I think this testimony is capable of a simple explanation, and I think we are entitled to show whether that wasn't given before the grand jury; but whether it was or not, counsel should know that that offer is a correct one.

Therefore I think the offer is incompetent and immaterial unless we be given an opportunity to look at it.

Justice Stephens: Do you wish to be heard further, Mr. Johnston?

Mr. Johnston: No, your Honor.

Mr. Knuff: May I be heard further?

Justice Stephens: Yes.

Mr. Knuff: I would like to answer Mr. Bromley in the order in which he took up his presentation to the Court.

Mr. Bromley referred to pages 1406 and 1407 of the grand jury testimony.

5673 There is nothing on pages 1406 and 1407 of the grand jury testimony that in any way contradicts Mr. Chism about what he said on the witness stand yesterday.

Pages 1406 and 1407 of the grand jury testimony relate entirely to the arrangement that Mr. Chism had with the National Gypsum Company as to whether or not he received National Gypsum Company's price lists, and as to how he found out about the National Gypsum Company's prices. He told us on those pages that he would pick up the price lists at somebody else's office. There was some discussion as to why he didn't write to National, and he said it would be rather a delayed manner of getting that information.

So there is nothing on pages 1406 and 1407 that in any way contradicts anything that is said on pages 5919 and

5920 of this record, which is the subject matter that I wish to impeach Mr. Chism on.

On pages 5919 and 5920 of this record, the following appears:

"Q. Your company did sign a contract under the Hite and Hagerty Patents on February 10th, 1937, did they not? A. Yes sir, we did.

"Q. And after you signed that contract, didn't your company receive from USG the metallized board bulletins? A. No sir, I don't think so.

5674 "Q. You don't think so? A. No sir.

"Q. And didn't you have correspondence with USG concerning the meaning of the bulletins that were sent you? A. Not the bulletins, I think I had some correspondence relative to one bulletin.

"Q. What bulletin was that? A. I couldn't tell you now.

"Q. And didn't you have an arrangement with USG that you would sell metallized board in accordance with the terms of USG's bulletins? A. No sir, we had no such arrangement.

"Q. You know Mr. Grant Kelleher, don't you? A. I have met the gentleman, yes.

"Q. Did you ever tell Mr. Grant Kelleher that you had an arrangement with USG to sell metallized board at bulletin prices? A. I don't think I told him anything like that.

"Q. If you had told him about it would you have known it? A. I believe I would.

"Q. Would you say now that you did or you didn't? A. That I did not, that is my recollection.

"Q. You are positive of that? A. Yes sir."

Now I submit that anything that is on pages 1406 and 1407 of the grand jury testimony of course could not

5675 impeach what I have just read from pages 5919 and 5920 of yesterday's transcript, and for that reason I did not offer the testimony appearing at pages 1406 and 1407 of the grand jury testimony. My offer was limited—

Justice Stephens: (Interposing) Mr. Knuff, I don't understand Mr. Bromley to state that you were required to offer that. What he is stating is that the contents of pages 1406 and 1407 indicate that there may be material in the record, like that, which might tend to explain, if counsel were allowed to look at it, the asserted impeachment—isn't that right, Mr. Bromley?

Mr. Bromley: Yes, your Honor, that is right.

Mr. Knuff: I can assure the Court—I read this testimony last night, staying up until two o'clock—that the words "metallized lath", the words "metal lath", or the words, "foil board", do not appear in Mr. Chism's testimony before the grand jury at any other place than 1406, 1407, 1408, and the first 19 lines of page 1409.

I make that representation to the Court as an attorney, that there is no place in that grand jury testimony that even mentions the word "metallized," other than I have indicated, and we offer it to the Court, for the Court's perusal, that is the entire testimony of Mr. Chism, and we feel confident that if the Court will examine that testimony, the Court will sustain the position that I have taken. There can be no question—

5676 Justice Stephens: (Interposing) There is no question about the good faith of counsel's representations, Mr. Knuff, you needn't argue that.

Mr. Knuff: Thank you. There can be no question that the purpose of their request in this case is nothing more nor less than a fishing expedition—

Mr. Johnston: If the Court please, I resent that statement—

Justice Stephens: (Interposing) Express your resentment a little later. Let's hear what Mr. Knuff has to say.

Mr. Knuff: They want to find out, as defendants have from time to time, almost from the beginning of grand jury investigations, what a witness has testified before a grand jury, and I submit that the courts have uniformly held that whether the request is made when the witness is called upon to testify, or whether the request is made concerning a plea in abatement on the basis of a motion to quash an indictment, or whether the question is raised on a motion to inspect grand jury minutes for irregularities that might appear before the grand jury—the courts have been almost uniformly consistent in their rulings that a defendant does not have that right.

Mr. Johnston has said that this is an unfair proceeding that the Government has access to these grand jury minutes.

Of course the Government has access to these grand
5677 jury minutes. It has always been the practice to allow the Government to have access to the grand jury minutes. Government's counsel appears before the grand jury. We are not asking the Court to create for us any new right, we are simply asking the Court to preserve

a right which the Courts have consistently said that we have.

Justice Stephens: Are you through?

Mr. Knuff: Yes, your Honor.

Justice Stephens: Mr. Johnston, do you wish to be heard?

Mr. Johnston: Just to express my resentment of that kind of a statement, I think it is entirely improper and I don't think it is justified at all.

Mr. Bromley has restated my objections of yesterday, and I see no difference between this offer and the question that came up yesterday.

Justice Stephens: We think there is no basis in the record, and no basis in any conduct on the part of counsel for the defendants, which would warrant Government counsel charging them with carrying on a fishing expedition, which is a charge of an improper examination of the grand jury minutes.

The Court will rule on the matter, except that before doing so, the Court will ask Mr. Levi, who has been introduced to the Court this morning as Mr. Berge's first assistant, if he wishes to be heard on this matter.

Mr. Levi: No, I think not, your Honor.

5678 Justice Stephens: The Court has very carefully examined, since last night's recess, the case of U. S. v. Socony-Vacuum Oil Company, 310 U. S., 150, and particularly that portion in Topic VI, beginning at page 231, and running to the top of page 237, which has to do with the use of grand jury testimony in the course of a trial.

The Court thinks that the statement made by the Government yesterday concerning that case was not a correct statement of the case, and the Court wishes to call attention to some one or two items in respect of the case and its meaning, as well as to state the basis of the ruling which it is about to make.

The Court calls particular attention to the fact that in that case the minutes were being used only for the purpose of refreshing the recollection of the witness, and not for the purpose of impeachment, and that the ruling clearly, or by clear implication, differentiates the practice in respect of refreshing recollection and the practice concerning impeachment.

The Court calls attention also to the fact that in that case those portions of the grand jury minutes which were examined upon for the purpose of refreshing recollection

were read to the witness by the Judge in the presence of defendants' counsel, so that they were not withheld from the attention of defendants' counsel, they were read in the courtroom.

The Supreme Court said: "* * * the court adopted
5679 the practice of inspecting the transcript and itself seeking to refresh the witness' recollection by reading from his prior testimony. At no time was the transcript shown to the witness."

Obviously, therefore, the reading must have been out loud in the courtroom; otherwise, the witness wouldn't have known what was in the transcript.

Now the Court has these observations to make upon the position of the Government.

In the first place, the use of minutes to refresh recollection is quite different from their use in respect of impeachment:

First—items which are used merely to refresh recollection are not put in evidence.

Second—if the part that is shown to a witness for the purpose of refreshing his recollection does not refresh his recollection, adverse counsel would not be interested in further portions to seek to refresh recollection—there would be no point in that.

Third—If the part shown to the witness does refresh his recollection, then other portions, if shown to the witness, could hardly, to coin a phrase, "unfreshen it".

Hence, there could be no harm in not showing all of the evidence, all of the witness' testimony, to adverse counsel in respect of refreshing recollection, and all that the Court
5680 in the Socony-Vacuum case held, Mr. Knuff, was that under the practice adopted there it was not prejudicial error to decline, under those circumstances to submit the actual minutes to adverse counsel, since their use was merely to refresh recollection, and since they were read out loud in the presence of adverse counsel.

Now contrast that with their use for impeachment. In the first place, the impeaching portion is put in evidence, that is to say, the orthodox practice in respect of impeachment is to ask the witness on his examination what he said, and then, after he has stated that, ask him if he didn't make a different or contrary statement elsewhere, and if he denies that, show him or prove to him the contradictory statement

and put that in the record, so that the Court can determine what the nature of his credibility is.

The impeaching material is, of course, itself not direct evidence on the merits of the case, but it is in evidence in order that the Court may compare it and test credibility.

Second, other portions of a witness' statement, or other statements that he may have made in the course of the grand jury proceedings, may, if examined, prove to modify the effect of the impeaching material. Therefore, to withhold the witness' testimony from inspection of adverse counsel would be to deprive him and his client of the possible opportunity of qualifying or explaining the asserted impeaching material, and the opportunity, therefore, of attempting to re-accredit the witness in respect of what adverse
5681 counsel regards as favorable or truthful testimony.

No rule of which we are aware, and certainly not the Socony-Vacuum case, compels a party to rely upon the judgment of his adversary or his adversary's counsel as to what is a fair selection of material from previous testimony used for impeaching purposes, or upon the Court's selection of such material, and examination of such material. Such a rule would deny to a party, pro tanto, representation by his own counsel.

Such a rule would be obviously unfair, it would be a revival of Star Chamber proceedings, Star Chamber methods. It would deny to one of the parties to the case the opportunity of seeing material shown only to the Court and to the prosecuting authority.

The fact that this is a Government-called witness cannot affect the foregoing, for the attempted impeachment is upon testimony regarded by the Government as favorable to the defendants. It is for that reason, obviously, that the Government wishes to impeach this witness.

In addition to what I have said concerning the Socony-Vacuum case, and at the possible risk of some repetition, I wish to state further that the Socony-Vacuum case determines flatly and clearly that the use of grand jury minutes for the purpose of refreshing recollection, and, impliedly in respect of impeachment, is within the discretion of the trial judge.

All the Court held in the particular case was that it was not an abuse of discretion, that no prejudicial harm
5682 had been shown, for the Court to use the minutes, or allow the minutes to be used as they were in that case.

Second, the Court held that the reason for secrecy had

passed, the grand jury proceeding having entirely ended.

Third, the Court clearly differentiated between impeachment and refreshment, so far as the need of displaying the witness' testimony to adverse counsel is concerned.

Fourth, the Court held in terms, at page 233, that: "Normally, of course, the material so used must be shown to opposing counsel upon demand, if it is handed to the witness."

The rule of the Department of Justice which has been asserted to exist, not to disclose grand jury minutes indiscriminately, may have some proper foundation, but that is one thing, but one entirely different from the situation which is presented here in the courtroom.

To lift the veil of secrecy in the prosecutor's office, or in respect of the grand jury minutes in the possession of the prosecutor, for his own use and advantage in the courtroom, and then to lower it again as against the adverse party, is an entirely different thing from withholding the grand jury minutes from indiscriminate inspection in the Department of Justice, and in the opinion of the Court it would be a grossly unfair proceeding, which a court of equity ought not permit.

The conclusion of the Court is that if the testimony
5683 of the witness before the grand jury concerning metallized board, the prices charged for it, and the like, is to be used for the purpose of impeachment by the Government, all of the testimony of the witness must be displayed to the Court and to adverse counsel, and also, subject to the Court's ruling after inspection and after hearing the Government and adverse counsel, to the witness. If the Government does not wish to abide this rule, then the use of that portion of the minutes selected by the Government for impeachment, and offered, is denied.

It is for you to choose, gentlemen for the Government; if you wish to conduct this proceeding in the manner which the Court regards as fair to both parties, then this offer of allegedly impeaching material may be received; but if you wish to abide the rule of the Department of Justice, that this material is not to be disclosed to adverse counsel and to the witness, then we reject the offer.

I may say that my colleagues fully concur in all of this ruling and in all that I have said.

Mr. Steffen: I want to say just briefly in regard to your Honor's last statement concerning the rule of the Department of Justice, that we had no purpose at all to set up a rule which, as you have pointed out, is for our

own guidance, in opposition to anything that this Court should rule was what the law is on the subject, and
5684 we of course would be guided by our own conduct of the case, and as I say, we had no intention and no purpose to have that treated as in any way in contradistinction to the Court's ruling upon the law.

Justice Stephens: Very well.

Mr. Steffen: We still feel that it would not be desirable, in the conduct of our case, to take the time or to permit the full examination of Mr. Chism's testimony at this time. We have other questions that will come up, and we would rather not have all of that testimony examined now.

Justice Stephens: I might add this—in fact I intended to add it—that if the minutes of the witness' testimony are to be inspected, that is to say if you choose to make your offer upon the terms which the Court has laid down, if they are to be inspected by adverse counsel, the Court within its discretion would rule that the inspection should take place in the courtroom, not, Mr. Johnston, because of any doubt that it would be used improperly if taken out of the courtroom, but because grand jury minutes are frequently in only one set, and an accident on the street or elsewhere might possibly destroy them in some manner.

Mr. Johnston: That is entirely satisfactory.

Justice Stephens: Then the Court understands that the Government now chooses not to submit the minutes to the inspection of adverse counsel. Therefore, the Court's ruling will be made final that the offer is rejected.

5685 Mr. Knuff: Mr. Chism, take the stand, please.

Thereupon, C. E. Chism resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Knuff:

Q. Am I correct in my understanding, Mr. Chism—

Justice Stephens: (Interposing) I may add one other thing to what I have said, which I think the Government ought to consider before it makes an ultimately final choice in this matter, and that is that the Court in this case is interested in finding the truth, the real facts in respect of this situation, and if this witness has contradicted himself in some manner so that his testimony here is asserted by the Government not to be dependable, the Court would like to know about those facts, because the Court has the duty of determining ultimately the truth and the accuracy

of the facts with respect to this case, and if the Government decides not to use this allegedly impeaching testimony upon the terms fixed by the Court, the Government should have in mind that it is withholding from the attention of the Court what the Government has asserted is material which would affect the credibility of this witness.

You may proceed, Mr. Knuff.

5686 By Mr. Knuff:

Q. Mr. Chism, my understanding is—and you correct me if I am wrong—that sometime in September, 1938, you received a letter from the United States Gypsum Company offering to execute a license to the Texas Cement Plaster Company concerning perforated lath; is that correct? A. I don't recall the exact date. We did receive a letter to that effect in 1938.

Q. I would like to show you a letter from the United States Gypsum Company, and ask you if your recollection as to the date could be refreshed from reading it?

Mr. Knuff: We are not offering this as an exhibit, Your Honor, and don't intend to. We are simply trying to fix the date, that is all.

The Witness: Yes, sir, that is the letter we received.

Justice Stephens: Show it to defendants' counsel, please.

(The document referred to was handed to defendants' counsel for examination.)

By Mr. Knuff:

Q. Has your memory been refreshed as to the date when you received the letter? A. Yes, I noticed the date, September 16, 1938.

Q. Now, previous to receiving this letter, my understanding is that you were manufacturing perforated lath

5687 for a period of 2 or 3 months previous to that time; is that correct? A. Well, I couldn't say about the exact period of time, there. We were manufacturing perforated lath along about that date.

Q. And if I understand your previous testimony, it is that that was just a matter of a few months, whether it would be 2, or 3, or 4, it was a short time before that? A. That is right.

Q. Now, before you started to manufacture perforated lath, I believe that you were buying perforated lath for about a year and a half, from National Gypsum Company;

is that correct? A. Something like that period of time, yes, a considerable period of time.

Q. Your second license with USG was dated February 10, 1937, was it not? A. Yes, sir.

Q. And it was about the time of that second license that you started to purchase perforated lath from National Gypsum Company, or shortly thereafter? A. It might have been shortly after that, or it might have been a little before that, I don't know.

Q. But it was around about that time? A. Around that period, yes.

5688 Q. Now, for some time, perforated lath sold at a differential of 25 cents a thousand square feet above regular lath; is that correct? A. Yes, that is my recollection.

Q. And did your company maintain that differential—

Mr. Bromley: (Interposing) I object to that as calling for a conclusion, and therefore incompetent, so far as the use of the word "maintain" is concerned.

Justice Stephens: Sustained. Ask what the prices were.

Mr. Knuff: If Your Honor please, I am not trying to prove what the price was, I am simply trying to prove the differential; and if, under the ruling that the Court has made before—and I am not questioning it now—we have to go into all these invoices, I am afraid—

Justice Jackson: (Interposing) I think the objection is as to the form of your question.

By Mr. Knuff:

Q. Was there a differential in price on perforated lath over regular lath? A. There was.

Q. And what was that differential? A. Twenty-five cents per thousand square feet.

Q. And did you sell perforated lath that you purchased from National Gypsum Company, at a differential of

5689 25 cents over and above the price of your regular lath? A. Yes, sir.

Q. And you maintained that differential for how long a time?

Mr. Bromley: I object to this as immaterial, and I object to the form of the question in so far as the use of the word "maintain" is concerned. There isn't any charge in the complaint that has to do with Texas and a differential, as I understand it.

Justice Stephens: What is your contention with respect to its materiality, Mr. Knuff?

Mr. Knuff: It is material, Your Honor, because there is a charge in the complaint that the defendants were regulating prices, and we have a situation where the United States Gypsum Company, and all the licensees of United States Gypsum Company, were selling perforated lath at a differential of 25 cents above the regular lath.

Justice Jackson: There is no dispute about that, is there?

Mr. Knuff: This company was not a licensee under the perforated lath agreement, but we contend that from the fact that this company was selling at a differential of 25 cents, the Court can infer that there was an understanding, or an arrangement to fix the prices, between this company and the other defendants.

5690 Justice Jackson: Well, he has already said that he sold it at a differential of 25 cents per thousand square feet. What more do you want? Do you want to ask him whether he always did that? If so, ask him when he quit?

Justice Stephens: The Court will overrule the objection as to materiality, but will sustain the objection as to form.

By Mr. Knuff:

Q. At any time after 1937, did the price of perforated lath and the price of regular lath become the same?

Mr. Bromley: I object to that, unless he indicates whose price he means.

Mr. Knuff: I am talking about your price, and you understood that, didn't you?

The Witness: Yes, I think I understood that.

Justice Stephens: I didn't understand it, myself. I thought you were asking about prices generally, Mr. Knuff. But if you understand that Mr. Chism, you can answer that question.

Justice Jackson: In respect of your company.

The Witness: They did become the same, with respect to our company, at some time after this period when the 25-cent additional price was charged.

By Mr. Knuff:

Q. It was your understanding, was it not, that National Gypsum Company, at the time you purchased perforated lath from them, was not a licensee of

5691 USG? A. I didn't know.

Q. Didn't you write a letter to National in order

to find out whether they were or not? A. I don't recall whether that was before or after we were charging this 25 cents additional.

Q. I am not talking about the 25-cent differential now, I am talking about the time that you purchased lath from National Gypsum Company. At that time, you knew that National Gypsum Company was not a licensee of USG? A. Yes, I believe I knew that.

Q. And your company was never a licensee of USG under the perforated lath agreement, which related to Patent 1,938,354, was it? A. No, we never were.

Q. And your company has manufactured perforated lath since sometime in 1937 down to the present time, is that correct? A. Yes, I believe so, somewhere around in 1937.

Q. Has USG ever instituted any patent infringement suit against Texas Cement Plaster Company?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: What is your contention with respect to that, Mr. Knuff?

Mr. Knuff: Our contention with respect to that, Your Honor, is that we have said that the patent license
5692 agreements were not bona fide license agreements.

The fact that his company is manufacturing a perforated lath, and the fact that USG has never instituted any infringement suit to challenge the right of this company to manufacture perforated lath, would certainly be evidence of whether or not these license agreements were entered into bona fide, whether USG was acting in good faith, or whether they were acting in bad faith.

It seems to me that if USG felt their patent position was sound and strong, that the first thing USG would do would be to institute infringement proceedings.

Now, of course, USG can explain that, but I say from that evidence the Court can infer that the patent license agreements on perforated lath were not bona fide.

(The Justices conferred.)

May it please the Court, we will expedite the ruling and withdraw the question.

Justice Stephens: Very well.

By Mr. Knuff:

Q. I show you, Mr. Chism, what has been marked for identification as Government's Exhibit 603, the same being a letter dated March 16, 1939, addressed to the United

States Gypsum Company, and signed Texas Cement Plaster Company by H. E. Chism.

(The document referred to was marked as Government's Exhibit No. 603 for Identification.)

5693 (Government's Exhibit No. 603 for Identification was handed to the witness.)

By Mr. Knuff:

Q. I first want to ask you whether that is your signature? A. Yes, sir, it is.

Q. Yesterday, at page 5919, I asked you this question:

"Q. And didn't you have correspondence with USG concerning the meaning of the bulletins that were sent you?"

And your answer to that was:

"A. Not the bulletins, I think I had some correspondence relative to one bulletin."

Is this the correspondence that you had in mind? A. This is the letter, yes.

Mr. Knuff: I offer in evidence Government's Exhibit No. 603.

Mr. Bromley: We make the usual objection; and also object to it on the ground that it is immaterial to any charge in the complaint.

Justice Stephens: The objection as to materiality is overruled; it is received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Finck: If Your Honor please, may I also note the objection of National as to immateriality?

5694 Justice Stephens: Yes, that may be noted, and it is overruled.

(The document referred to, marked as Government's Exhibit No. 603, was received in evidence.)

Mr. Knuff: I haven't any further direct.

Justice Garrett: May I ask you, for my information, was there both a metallized board and a metallized lath?

Mr. Knuff: I think there is, but I am not certain. Maybe Mr. Chism can answer Your Honor's question.

The Witness: Yes, there was.

Justice Garrett: I notice in the first paragraph of Exhibit 603 it refers to metallized gypsum board; and in the second paragraph it refers to metallized lath.

Justice Stephens: We will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

5695 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Take the witness stand, Mr. Chism.

Thereupon, H. E. CHISM, the witness on the stand at the time of recess, resumed his testimony as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. Mr. Chism, I show you what has been marked for Identification as Government's Exhibit 51.

(The article referred to was marked as Government's Exhibit No. 51 for Identification.)

(Government's Exhibit No. 51 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you tell us what that exhibit is, please? A. That is the Texas brand of gypsum wallboard.

Q. What thickness? A. Three-eighths.

Q. And for how long have you been manufacturing this type of wallboard, sir? A. Since probably the latter part of February, 1937.

5696 Q. And this is the type of wallboard that is regularly and customarily sold to the wallboard trade, is that correct? A. Yes, sir.

Q. This is the type of board that is sold to your regular dealer trade? A. That is right.

Q. I show you, Mr. Chism, what has been marked for Identification as Government's Exhibit 52.

(The article referred to was marked as Government's Exhibit No. 52 for Identification.)

(Government's Exhibit No. 52 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you tell us what Government's Exhibit No. 52 for Identification is, sir? A. That is the plain gypsum lath.

Q. It is the type of 3/8-inch gypsum lath that is manufactured by the Texas Cement Plaster Company, is that right? A. Yes.

Q. And for how long have you been manufacturing this same type of lath? A. For the same period.

Q. And this is the same type of lath that is regu-
5697 larly and customarily sold to your dealer trade, is that correct? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 53.

(The article referred to was marked as Government's Exhibit No. 53 for Identification.)

(Government's Exhibit No. 53 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you tell us what that is, please? A. That is a sample of the perforated gypsum lath that has been manufactured by the Texas Cement Plaster Company since sometime after February 10, 1937.

Q. It was made during the year 1937—I don't mean this particular board, but this particular type of board—was this particular type of board put into production sometime during the year 1937? A. No, I think it was put into production in 1938.

Q. In 1938? A. Yes.

Q. And what type of board were you producing in 1937, if you were producing any? A. We were producing the plain lath.

Q. You weren't producing any perforated lath in
5698 1937? A. That is my recollection now, that we didn't commence producing that until 1938.

Q. And this is the same type of lath that is sold to your dealer trade regularly and customarily, is that correct? A. Yes, it is.

Q. Mr. Chism, you have also been asked to produce for us certain strips containing patent markings. I don't believe you have those with you today, have you? A. I don't believe I have, no, sir.

Q. You will, at your earliest convenience, procure those and send them to us, will you? A. I will be very glad to.

Mr. Knuff: That is all of the direct-examination, Your Honor.

Justice Stephens: Are you offering these exhibits?

Mr. Knuff: Not at this time.

Justice Stephens: These exhibits are only sections, aren't they?

The Witness: Those have just been cut from the larger pieces.

Justice Stephens: What is the difference between the plain lath and the plain board?

Justice Jackson: The size?

The Witness: The size, for one thing. The lath standard size is 16 x 48, and the larger board is 4 feet wide
5699 and any length from 6 to 12 feet.

Justice Stephens: How about thickness?

The Witness: The thickness varies in the wide board. We only manufacture the 3/8 in the lath.

Justice Stephens: You may cross-examine.

Your last question of this witness, Mr. Knuff, reminds me to ask Mr. Varian, for Ebsary—he is not here, is he?

Mr. Oliver: No, he is not here.

Justice Stephens: Very well. You might tell him, Mr. Oliver, that Mr. Lenci was to furnish the Court some samples for our files. They haven't been received as yet.

Mr. Knuff: I have them over at my office, they sent them to me, Your Honor.

Justice Stephens: I see. All right, you may furnish them at your convenience.

Cross Examination

Mr. Bromley: May I see Exhibits 51 to 53?

(Government's Exhibits Nos. 51 to 53, inclusive, for Identification, were handed to Mr. Bromley.)

By Mr. Bromley:

Q. These exhibits, Mr. Chism, 51 to 53 for Identification, of course are not sold to the trade at all, are they, these little pieces? A. Not the little pieces.

5700 Q. These are just out from— A. (Interposing) They are cut from the larger standard sizes.

Q. Now in addition to the differences which you mentioned to the Court, in answer to the questions of the Presiding

Judge, Exhibit 51, the wallboard sample, shows that its edge is perfectly square, doesn't it? A. Yes, that is right.

Q. Whereas, Exhibit 52, the lath sample, has a rounded edge? A. That is right.

Q. Now is there any reason for that difference in edge, in connection with the use of the respective boards? A. Yes, I think there is.

Q. The wallboard, when erected on the studs, is not plastered over, is it? A. That is correct.

Q. So that it is important, when wallboard is used as an interior finish, to have as close fitting a joint as possible so that the smooth effect of the wall will not be marred by a crack or a joint; isn't that right? A. Yes, sir.

Q. That is not necessary, so far as lath is concerned, because lath is plastered over by coats of plaster; isn't that right? A. No, it is really better to have the
5701 round edge so that it will create a bond for the plaster to stick tighter.

Q. And it is the fact, isn't it, that a square edge is a more difficult edge to make? A. Yes, it is.

Q. Now, there is another difference between the lath and the wallboard, isn't there, in so far as the paper is concerned? A. Yes, there is quite a difference in the paper.

Q. What is that difference? A. Well, the big board has what we call an ivory face, it is cream-colored paper on the face side of it, which is heavier, and it is also a sized paper. The lath does not have that paper on it. It is more porous and it is unsized.

Q. And that is because the wallboard, after erection, not being plastered over, is in a condition to be decorated by paint? A. That is right.

Q. Therefore, you want as smooth and as regular a surface on wallboard, at least on the side exposed to the interior of the room, as possible, don't you? A. Yes, I would think so.

Q. So far as the lath is concerned, the type of paper must be entirely different from the wallboard paper, because the plaster gains its adherence to the wall merely by the crystals of the plaster impinging into the
5702 paper of the lath, isn't that right? A. Yes, it penetrates the paper.

Q. And therefore, you have to use, in lath, an unsized, soft paper, do you not? A. Yes, sir.

Q. So that plaster will adhere to it? A. That is right.

Q. You said in your direct-examination, between lines 1 and 10 of page 5900, that you took no part in the negotiations leading up to the execution of Exhibit 599, which is the Texas license of April 18, 1927—do you recall that? A. Yes, I recall that.

Q. It is a fact, isn't it, that you did participate in discussions with Mr. Gloyd, and others within your company, as to the advisability of taking a license? A. Yes, I did.

Q. And all you meant by your answers on page 5900 was that you, yourself, did not participate in discussions with any representatives of the licensor, United States Gypsum Company? A. That is correct, yes.

Q. You were familiar, weren't you, Mr. Chism, with the discussions had by Mr. Gloyd and others within his organization, and the reasons which motivated Mr. Gloyd to take this license, Exhibit 599? A. Yes, I knew
5703 quite a bit about it.

Q. You also testified on direct-examination, at page 5900, beginning at line 11 and running to the bottom of the page, that there were no patent studies or patent surveys made by Texas Cement Plaster Company before Exhibit 599 was executed. Do you recall that? A. Yes, sir, I remember that.

Q. Now, what were the reasons which caused Mr. Gloyd to take this license of April 18, 1927, Exhibit 599? A. Before that time, we were making an open-edge board, which proved to be very unsatisfactory to our trade and caused us to lose business, and we were constantly losing more; and the cost of manufacture was high, due to loss from bad board, what we called "peelers", and broken edges, and so forth, which made it almost prohibitive. We had to find some way to make a better board.

Q. And what about the attitude of your trade in 1927, as to whether they preferred the closed-edge or the open-edge type of board?

Mr. Knuff: May it please the Court, I didn't object to the last question, although I do think it was going beyond the scope of the examination-in-chief, and also I thought at the time that it was asking the witness to give hearsay testimony. I am not going to move to strike that testimony, but in view of the fact that this is going far beyond
5704 the scope of the examination-in-chief, I think I will and must object to it. He wasn't asked anything on direct-examination concerning the attitude of the trade, or anything else.

Justice Stephens: He was asked about taking out these licenses. Isn't defendants' counsel entitled to go into the reasons for taking them out?

Mr. Knuff: The question that I asked him about the licenses was—did he participate in the discussions with USG, and I think that was the way the witness understood it. I didn't ask anything about any discussions with any other person.

Justice Stephens: But you have offered the license in evidence, and you put him on as your witness to testify about the business of the company.

What do you say, Mr. Bromley?

Mr. Bromley: I say that it certainly is proper cross-examination just resulting from the fact that through this witness the license agreement was offered and received in evidence. But further than that, counsel brought out from this witness that there were no patent studies made, and I am attempting to develop the reason for that, what he knew about the patents, without any studies.

Justice Stephens: The objection is overruled.

By Mr. Bromley:

Q. You knew, didn't you, that this closed-edge
5705 board was a patented product? A. I had understood that it was, yes.

Justice Stephens: The question to which objection was made wasn't answered. If you want an answer to it, you are entitled to it.

Mr. Bromley: Yes.

Will you read it, please?

(The question was read by the reporter as follows:

"Q. And what about the attitude of your trade in 1927, as to whether they preferred the closed-edge or the open-edge type of board?")

The Witness: The attitude of the trade was that they preferred the closed-edge board, and we had to do something pretty quick to protect our business. The open-edge board just wasn't proving satisfactory.

By Mr. Bromley:

Q. And open-edge board was getting increasingly difficult to sell to the trade, wasn't it? A. That is right.

Q. Now, wasn't it your understanding, also, that USG owned patents on the machine necessary to make the

closed-edge board? A. I think I knew that at the time. I am sure that the officers of the company did.

Q. And wasn't it your understanding, also, that
5706 USG had other patents which you concluded would be useful in the manufacture of gypsum board, such as the recessed edge, for instance? A. Yes, sir, I remember that.

Q. And the tongue and groove patent? A. Yes, that is true.

Q. Therefore, wasn't the primary reason of the Texas Cement Plaster Company for taking the license, the reason that it wanted to get the right to manufacture board under patents which you understood the United States Gypsum Company owned? A. Yes, it was.

Q. And as soon as you took out the license, or shortly thereafter, did you commence to make the closed-edge board at your plant? A. Yes, sir, we did.

Q. And have you made the closed-edge board at all times from that time down to the present time? A. Yes, we have.

Q. And after you took your license of February 10, 1937, did you commence to make this so-called light-weight or foam-bubble board? A. Just as soon as we could change our machinery or equipment.

Q. And have you continued the manufacture of
5707 that foam or bubble board down to the present time?

Mr. Steffen: Your Honor, I would like to have that simply as a general understanding of the present witness, if I may. I think that is the purport of the question, and that it does not go to the question of whether they were complying strictly with the patent.

Justice Stephens: I see what you mean.

Read the question.

(The question was read by the reporter.)

Justice Stephens: It doesn't seem to me, Mr. Steffen, that that question, as phrased, asks the witness to testify whether it was made under the patent or not. The objection is overruled.

Mr. Steffen: I simply wanted to be sure as to that.

Mr. Bromley: Will you answer that?

Justice Stephens: Read it again to the witness.

(The question was re-read by the reporter.)

The Witness: Yes, we have.

By Mr. Bromley:

Q. And since February 10, 1937, have you used starch to obtain bond between the paper and the core of your board? A. Yes—

Mr. Steffen: (Interposing) Your Honor, I think that does transgress the direct-examination. There was no question as to the composition of the board, or what
5708 was done by way of manufacturing the board.

Justice Stephens: What do you say to that, Mr. Bromley?

Mr. Bromley: It certainly goes to the charge of subterfuge. He has interrogated this witness about the license, and the charge in the complaint is that it was a subterfuge and not used in good faith, and it seems to me that I am entitled to show, on cross-examination, that the license and the patents were used by this witness in the manufacture of their board. He has said here that he made no patent studies before he took the license. That obviously was offered for the purpose of attempting to convince the Court that the license didn't mean anything to this licensee, that it was a fake or subterfuge. It certainly does not go beyond the limits of proper cross-examination for me to ask this witness if he didn't manufacture the board with the use of starch, because one of these patents covered the use of starch.

Justice Stephens: Objection overruled.

Read the question to the witness.

(The question was read by the reporter.)

The Witness: Yes, we have.

By Mr. Bromley:

Q. And isn't it the fact that after you took your license of February 10, 1937, USG sent engineers down there and instructed you how to manufacture this foam or
5709 lightweight board? A. They did, immediately after signing the agreement.

Q. And they showed you the patents, and they gave you drawings and blue-prints, and supervised the installation of the new machinery and taught you how to use it, didn't they? A. They did.

Q. And they gave you information with respect to the use of such patents as the recessed edge patent, didn't they? A. Yes, they did.

Q. In fact, isn't it true that with respect to every development that you used, in improving the quality of the board,

which you felt came under your license or the USG patents, you went to USG and received instructions from them and the "know-how" as to how to use the patents and the inventions? A. I believe that is correct in every instance.

Q. Now, you have told the Court that the price fixing provision under Exhibit 599, the 1927 license, expired on August 6, 1929. That is right, isn't it? A. Yes, sir.

Q. Now, isn't it true that your prices were not controlled thereafter, by anybody, until you took the license of February 10, 1937? A. That is correct.

Q. And you understood at all times, didn't you, that the price fixing provisions in the two licenses which you
5710 took, only applied to patented board manufactured and sold by you under the license? A. Yes, I did.

Q. And during the interim between August 6, 1929, and February 10, 1937, you never received any price bulletins at all? A. No, sir, we did not.

Q. Did your company, so far as you know, have any agreement or understanding on plaster prices, or the prices of miscellaneous gypsum products? A. No, we didn't.

Q. You never took, you told us, a license to manufacture metallized board, did you? A. We never did, no, sir.

Q. As a matter of fact, Mr. Chism, your company had no interest, or at least very little interest, in marketing metallized board, did you? A. Practically none at all.

Q. There wasn't any demand for it down in your country was there? A. Very little demand.

Q. Have you any idea of the amount of metallized board which you have sold up to the present time, over the entire period that you sold it? A. Approximately two carloads.

5711 Q. And that would be expressed, in thousand square feet, as how many thousand square feet? A. Somewhere between 80,000 and 90,000 feet.

Q. And that is all you have ever sold, at any time? A. Yes, sir.

Q. And this board you manufactured yourself, and took over to the National plant to have metallized, didn't you? A. In most all instances we did that, yes, sir.

Q. The board, then, that you took over to have metallized, was, as you understood it, manufactured under your license agreement and the USG patents? A. It was manufactured under that agreement.

Q. That board which you had National metallize was the same as any other board made under your license, wasn't it? A. That is correct, yes, sir.

Q. Now, am I correct in assuming that we are now talking about a period of time after February, 1937? A. That is my understanding.

Q. And that is your best recollection? A. Yes.

Q. Now, did you or did you not pay a royalty on this board which you had metallized by National, and then sold? A. Yes, we did.

Q. And you paid the royalty because you under-
5712 stood it was manufactured under your general license? A. That is right.

Q. Now, that royalty was the regular, general license royalty, and not any special royalty for metallized lath; isn't that so? A. It was the same royalty we paid for the same kind of board not metallized.

Q. Now, wasn't it your understanding that when you sold this board that you had thus manufactured, whether it was metallized or not, you could not sell it for less than the minimum price established in your general license? A. That is correct, after February 10, 1937.

Q. That is the period of time we are talking about, isn't it? A. Yes.

Q. Now the fact is, isn't it, that when you sold it, you sold it for more than this minimum price? A. Yes, we did.

Q. How were you able to get more for it? A. You mean from the dealer?

Q. Yes, from the dealer. A. You are speaking of the metallized board, now?

Q. Yes. Was it worth more, or how did you happen to be able to sell it for more? A. We had to get more,
5713 because it cost us considerable money to have it metallized.

Q. How much would it cost to have it metallized? A. Well, anywhere from $7 to $9 or $10 per thousand square feet.

Q. Now, that was an additional cost on top of your cost of manufacturing it in the first place? A. That is right.

Q. Therefore, you would expect to get more for it when you sold it, wouldn't you? A. Certainly.

Q. And you did get more for it? A. Yes.

Q. Wasn't it a more valuable product to the dealer than plain lath, and therefore wasn't that the reason that he was willing to pay more for it? A. It was generally assumed that it was a more valuable product.

Q. Isn't it a fact, Mr. Chism, that this higher price which you were able to get, and did get, for the metallized lath, was not controlled by anybody, and you had no arrange-

ment with anyone with respect to it? A. There was no one that controlled our price on metallized board.

Q. You knew that you were free at all times to sell the metallized board at any price, so long as it was higher
5714 than the minimum fixed in your general license, didn't you? A. Correct.

Q. And you had no understanding or arrangement or agreement with anybody as to what price you would charge for this metallized lath when you sold it, did you? A. No, sir.

Q. Now, did you ever receive from USG a metallized board license bulletin? A. No, sir, I never did.

Mr. Bromley: May the witness be shown Exhibit 603, please?

(Government's Exhibit No. 603 was handed to the witness.)

By Mr. Bromley:

Q. Did you ever receive a reply to Exhibit 603? A. No, sir, I didn't.

Q. You will notice in the first sentence you refer to "your price bulletin applying on metallized gypsum board effective March 1, 1937". Do you see that? A. Yes, I see that.

Q. Now, at or before the time that you wrote this letter, had you seen that document that you refer to here in this exhibit? A. I saw it at the time that I wrote the letter.

Q. Will you tell the Court whether that was a
5715 metallized board license bulletin, or merely a price bulletin or price list of USG? A. I wouldn't know. I knew it was a USG price list, at least. I didn't know what they called it.

Q. How did you happen to get it, will you tell us the circumstances and explain the transaction, please? A. Yes. We had a salesman in Missouri who was calling on our dealer at Warrensburg, Missouri, and he was offered an order with the provision that we could furnish a small amount of, I believe it was, metallized lath; and when the salesman started to take the order, the dealer called his attention to the fact that his price was too high.

Q. For metallized lath? A. For metallized lath, yes. So he compared the price that he had quoted with one that was quoted the dealer in this price list, or price bulletin, and found that our price was too high. So he immediately called me by telephone, and I told him that if such a price had been quoted and he could get written authority for it,

to send that authority in to me, along with the order, and we would accept it and fill the order.

Q. Now, when you said "authority" you meant written evidence of the quotation, didn't yo A. That is right, price list.

Q. You wanted to see the written quotation which
5716 the dealer had told your salesman that the dealer had, didn't you? A. Yes, I did.

Q. In order to check up on his truthfulness when he said he had been quoted a lower price than the one which your salesman had quoted him, isn't that right? A. Yes, sir.

Q. Well, what happened thereafter? Did the salesman send the price list in to you which the dealer had given your salesman? A. He sent the price list and the order, and the order was filled.

Q. But he sent the price list? A. Yes, he did.

Q. And when you got it, you saw that USG was quoting, on metallized board, a price lower than you had told your salesman to quote; is that right? A. Yes, I did.

Q. And you thereafter accepted the order at the lower price, did you? A. Yes, we did.

Q. Now, was your purpose in writing Exhibit 603 anything other than merely to find out what the market price in the market was, in this area? A. That is what I was interested in.

5717 Q. And is that all you were interested in? A. Yes, sir.

Q. And you didn't write Exhibit 603 because you had any agreement or understanding with USG at that time, or before or after that time? A. No, sir, I did not.

Q. And you had no agreement with USG as to what prices you were to charge for metallized lath at any time, did you? A. No, sir.

Q. You said, I believe, that in addition to the board you made yourself, and had metallized, there was a small quantity which you bought from somebody, already metallized; is that right? A. Yes, I believe there was.

Q. Can you tell us about how much that was? A. No, I couldn't. It was probably 10 percent of all that we sold.

Q. Did you include that board in your figure of 80,000 to 90,000 feet? A. Yes, I included in that figure all the metallized board that was sold by us at any time.

Q. Now, did you have any agreement or understanding or arrangement with anybody as to the resale price at which you would sell this small quantity of metallized

board which you bought from some other manu-
5718. facturer outright? A. No, sir.

Q. You told Mr. Knuff that for a time you sold perforated lath at 25 cents more per thousand feet than you charged for plain lath, is that right? A. Yes, we did.

Q. Now, will you tell the Court the circumstances surrounding your first information that you could get a 25-cent higher price for perforated lath than you could for plain? A. This information first came to me from our salesman in Dallas, Texas. In accepting an order there, he called me about it, and I think he first wanted to know if we could furnish that, and I told him we could; and then he wanted to know if he should charge the extra 25 cents on the perforated lath. As I recall it, that was new to me, and I asked him if that was the prevailing custom or price in the market there, and he said it was. I said, "If that is true, I want you to accept the order on that basis."

Q. At a 25-cent higher price? A. At a 25-cent higher price on the perforated lath. And he did that, and we furnished the lath on the order.

Q. That is the first time that you had ever heard that any manufacturer was charging more for perforated than for plain lath? A. Yes, sir, that is the way I remember it.

5719 Q. And up to that time, you hadn't been selling the perforated lath which you sold, at the same price as plain lath? A. I wouldn't say definitely that we had. I believe we had.

Q. At least, you weren't aware of the fact that dealers were paying 25 cents more for it from other manufacturers, up to this time, were you? A. That was the first time that I was aware of such a situation.

Q. Isn't it the fact that the sole reason that you thereafter charged 25 cents more for perforated lath was because you found you could get it? A. That is right, we could get it in the market, and we felt like we were entitled to it.

Q. And did you have any arrangement, agreement or understanding with anyone that you would charge a 25-cent higher price for perforated than for plain lath? A. No, sir.

Q. You never took a perforated lath license from USG, did you? A. No, we did not.

Q. Did you ever receive from USG any perforated lath licensee bulletins? A. No, we didn't.

5720 Q. When did you first start to manufacture perforated lath? A. My recollection is that it was about the middle of 1938, or maybe in the fall of 1938.

Q. And since that time, this perforated lath which you have manufactured and sold is the same kind of lath as is manufactured under your general license, isn't it? A. The same kind of lath, perforated.

Q. That is to say, after you make plain lath under your general license, you then perforate it and it becomes what is known as perforated lath, is that right? A. It is plain lath all the way through until it comes to a certain point on our board machine, and there it is made into a perforated lath.

Q. And that is made with a machine which punches the holes through it while it is still in a wet state, isn't it? A. That is right.

Q. Now the fact is, Mr. Chism, that your company, knowing of USG's perforated lath patent, has attempted to develop a type of perforated board which will avoid the claims of the USG patent; isn't that right? A. We didn't do that entirely alone. We assisted some machinery or equipment company in doing that.

Q. Well, you haven't gone out and made the same kind of perforated lath that USG is making, have you?

5721 A. You mean with reference to the size of the holes and the spacing?

Q. Yes. A. No, we don't make the same kind.

Q. You have been very careful to change not only the size of the holes, but the spacing of the holes, in order to avoid the claim of the USG patent, haven't you? A. Yes, we have.

Q. And did you consult with anybody from the National Company in order to see how you could avoid the claims of USG's patent? A. The National Company?

Q. Yes. A. No, sir.

Q. You worked this out by yourself, did you? A. Yes, in conjunction with our machinery company.

Q. And it is a fact, isn't it, Mr. Chism, that the Texas Company has never had a one-hour fire test on its perforated lath? A. No, we never have gotten a fire rating.

Mr. Bromley: That is all.

Justice Stephens: Is there further cross-examination by other defendants?

(No response.)

Justice Stephens: Mr. Johnston?

5722 Mr. Johnston: No, Your Honor.

Justice Stephens: Any re-direct-examination?

Mr. Steffen: May we have just a moment, Your Honor, please?

Justice Stephens: Yes.

Mr. Bromley: May I have the Court's permission to ask the witness about another subject which I inadvertently overlooked?

Justice Stephens: You may.

By Mr. Bromley:

Q. Mr. Chism, isn't it the fact that prior to the time you took your general license in February, 1937, you did not bundle your lath or wallboard in the same fashion that you did afterwards? A. No, we bundled it differently after receiving that license and signing that agreement.

Q. Prior to the time you took the license, how did you bundle your wallboard and lath? A. We didn't bundle the wallboard at all. We bundled the lath with wire ties.

Q. Will you describe briefly what wire ties are? A. Well, it is more like a baling wire, about the size of a baling wire or a little heavier. I don't know what size of wire you would call it. That was just simply wrapped around the bundle at both ends.

5723 Justice Jackson: Like you would bale hay?

The Witness: Just about the same process, yes, sir.

By Mr. Bromley:

Q. What can you say about whether or not that type of bundling was satisfactory or unsatisfactory? A. It was not very satisfactory.

Q. Why not? A. It caused too much breakage.

Q. And would the wire slip and cut the board, or the lath, rather? A. Yes, it would.

Q. After you took the license, you went to the USG system of bundling by the use of paper strips on both the board and the lath, didn't you? A. That is right.

Q. Have you used that invention ever since that time down to the present time? A. Yes, we have, and are still using it.

Mr. Bromley: That is all.

Justice Stephens: Mr. Bromley, you might bring out, if you care to, and if there is no objection, this matter:

In answer to one of your previous questions, the witness testified that they had sold, in all, approximately 80,000 to 90,000 square feet of metallized board and lath, or two carloads. That might perhaps be contrasted with
5724 the amount of ordinary lath and board manufactured and sold by this company during the same period. In other words, the figures standing alone don't mean much to me; 90,000 feet is a lot of feet to the uninstructed person. Perhaps in comparison with the other board, we could get some idea as to what the amount is, relatively speaking.

By Mr. Bromley:

Q. Can you give us your total production in the years 1937, 1938, 1939 and 1940, by years, of board and lath, in square feet?

Justice Stephens: That is, exclusive of metallized.

Mr. Bromley: Yes.

The Witness: It would average better than 20,000,000 square feet per year in those particular years.

Redirect Examination

By Mr. Steffen:

Q. Mr. Chism, you stated that you changed your system of bundling in 1937; is that true? A. Yes, we did.

Q. And you said you formerly bundled with wire? A. Wire ties, yes.

Q. Was that true of your board? A. Not on board, no, sir.

Q. What was true in the case of board? A. We did not bundle board.

5725 Q. Did you use tape across the ends of the board A. No, we did not.

Q. Did you at any time have a process of using tape on your board for bundling purposes? A. Not for bundling purposes, no, sir.

Q. For what purposes? A. For advertising or decorative purposes.

Q. Did you have a process of tying two sheets of board together with a single strip of paper, by hand, as a type of bundling? A. Not prior to the signing of this agreement.

Q. And after the signing of this agreement, did you consider whether or not that was bundling under your license? A. There was some doubt about it in my mind at first.

Q. Is that the way USG bundles? A. That is our understanding.

Q. What was the doubt in your mind? A. It didn't occur to me that by taping the ends of two pieces of board, taping them together—

Q. (Interposing) By hand? A. I didn't think that that made up a bundle.

Q. And they told you that it did? A. They said it did, and others said it did, and we agreed with them.

Q. So you have been paying a royalty on that
5726 type of bundling? A. That is right.

Q. About this perforated lath, where did you buy your perforated lath when you first started getting it? A. I don't know, for certain. We bought the greater portion of it from National Gypsum Company.

Q. And did you negotiate the purchase? A. No, I don't think I did.

Q. Well, who did? A. Our plant foreman.

Q. Did he just step up and buy some board, some perforated lath? A. He probably called up the superintendent of the other plant and told him he wanted a load of perforated lath, or something of that sort.

Q. Did you or Mr. Gloyd know anything about that? A. Oh, yes.

Q. Did you at any time talk with any representative of National about that? A. I don't believe we ever did.

Q. Did your superintendent, to your knowledge, have any conversation as to the price of the board that he was going to buy? A. We had a pretty general knowledge of the price it was going to cost us.

5727 Q. And do you want to tell the Court here that you had no idea that perforated lath was selling at a mark-up of 25 cents, when you bought all that board from National? A. I don't understand your question.

Justice Stephens: I thought you were asking him about metallized board.

Mr. Steffen: No, perforated lath.

By Mr. Steffen:

Q. You bought perforated lath for a considerable period of time from National? A. We bought some perforated lath.

Q. How much would you say you bought? Not just a car or two? A. No, from National we probably bought, altogether, 8 or 10 carloads.

Q. And my question is this: Did you pay more for that when you bought it from National, than you did plain lath? A. I don't remember now, I think we did.

Q. And yet you are telling the Court, as I understand it, that you didn't know that you would have to sell that perforated lath at a 25-cent differential, until some salesman in Dallas, or somewhere, called you up and said, "I have just learned that there is a mark-up of 25 cents on perforated lath"?

Mr. Bromley: I object to that as incompetent be-
5728 cause assuming facts not in evidence. He didn't testify that he would have to sell.

Justice Stephens: That objection is well taken. He didn't say that he had to sell it. Sustained.

By Mr. Steffen:

Q. Do you want to state that the first you ever heard of the difference in price was when this salesman called you up from Dallas; is that right? A. That is right.

Q. Even though you were buying board at an additional price from National? A. I can't even tell you whether I ever saw the price that National put on that lath.

Q. But you saw the invoices when they shipped it to you, didn't you? You knew you were buying it for more than ordinary board? A. It wasn't my business to look over those invoices.

Q. What was your business in that connection? A. I was manager of the business.

Q. And you were buying several carloads of lath— A. (Interposing) We didn't buy several carloads at a time; ordinarily it was in truckload lots.

Q. Well, that is your story, is it? A. Yes, sir.

Q. The first time you found out at all was when
5729 this salesman called you up and told you that he could get 25 cents more? A. My judgment would be that most of this lath that we bought from National occurred after this incident that I speak of. We bought lath from other sources.

Q. What other sources? A. I can't tell you definitely. I would say that we possibly bought some from Sweetwater.

Q. What does "Sweetwater" mean? A. That is the United States Gypsum Company mill—or through some dealer at that point.

Q. And when you bought it from the United States Gypsum Company, did you know that they were charging you

more for that than for unperforated lath? A. I have no recollection of that now.

Q. It is more expensive to make perforated lath than unperforated lath, is it not? A. A trifle.

Justice Garrett: What was that answer?

The Witness: A trifle, a very small amount.

By Mr. Steffen:

Q. Now going to this matter of metallized board, Mr. Chism, you stated that you bought a quantity, possibly 80,000 feet, of metallized board—

Mr. Johnston: (Interposing) He didn't say that.

5730 By Mr. Steffen:

Q. That you marketed a quantity of about 80,000 feet of metallized board, is that correct? A. Altogether, we sold approximately that much.

Q. And you took a certain portion of your own production over to National, and had them metallize it? A. Yes.

Q. And the cost of metallizing it was $7 to $9 per thousand square feet, is that correct? A. Somewhere in that neighborhood.

Q. Give us the difference in cost between metallized and unmetallized board, to the dealer? A. I can't tell you. Somewhere in the neighborhood of $10, roughly.

Q. You don't mean to say that, Mr. Chism? What was the price, if you can remember, around 1937 or 1938, of ordinary board? A. Ordinary 3/8 inch board was about $23.

Q. And what was the dealer price for metallized board, of the same thickness? A. The dealer price would be somewhere around $30 to $33, in that neighborhood.

Q. For what? A. For 3/8 inch board.

Q. Plain board? A. Yes.

5731 Mr. Bromley: You mean metallized, don't you?

The Witness: Yes, that is what I mean.

5732 By Mr. Steffen:

Q. The price of metallized board in 1937 and '38 was only about $32 or $33 per thousand square feet, is that your testimony? A. Yes, that would be my recollection on it.

Q. What has been the price within the last two or three

years of metallized board, three-eighths inch in thickness? A. I don't know, we haven't been able to get any.

Q. What was the price the last time you sold any, do you recall? A. I don't recall, it would be approximately the price I mentioned.

Q. Now this board that you bought already metallized, you testified you did buy some board already metallized, didn't you? A. Yes, I am quite sure that we did.

Q. Was there any difference in the way you sold that board from the way you sold the board which you had metallized by National?

Mr. Bromley: I object to that as calling for a conclusion.

Mr. Steffen: I think he can draw that conclusion, your Honor.

Justice Stephens: Read the question.

(The reporter read the question as above recorded.)

5733 Justice Stephens: The question is very general, Mr. Steffen: Do you mean in price, or as to manner of distribution, or what?

By Mr. Steffen:

Q. I mean as to price, or were there any different instructions to your salesmen as to the board, whether it was manufactured by somebody else already metallized and sold to you, or whether you took your own board and had it metallized? Did you treat those as two separate types of transactions?

Justice Stephens: That question may stand. The objection to the question as asked is sustained on the ground that it was too broad, but the present question may stand.

The Witness: We just sold all of it at the price we were able to get for it in the field.

By Mr. Steffen:

Q. And the price that you were able to get for it in the field was the prevailing price? A. The general market price.

Q. And you got your information as to general market price how, by asking dealers? A. Through our salesmen, and through our dealer friends.

Q. And what prices would they turn in to you, in order that you could ascertain the general market price? A. Various prices.

Q. Well, in the same locality for the same type of board, various prices? A. Well, you are covering a pretty wide field with your question.

5734

Q. Well, I am asking you to limit it, if you must. A. You mean all types of board?

Q. No, I am talking about metallized board, Mr. Chism, and you said that you sold it at the prevailing prices, and I asked you how you got your prices, and you said from the dealers.

Now the next question was—was there any difference in the prices that your salesmen brought in from the dealers? A. Not from the same territory.

Q. They were always the same? A. Yes.

Q. Whether that board had been sold to a dealer by National or by USG or by any others, is that correct? A. I never made any inquiry about who sold the board in the territory.

Q. When you determined the prevailing price, was one price sufficient for your purposes in a particular territory? A. We found out what price we would have to sell that board at to the dealer, and we sold it to him.

Q. I want to know if your salesmen came in and said, "National is selling metallized board at such and such a price, in such and such a town"—if that was sufficient? A. If we found that to be the fact, it was sufficient, yes.

5735

Q. And if USG were selling in a town, that would be sufficient for your purposes, if you had their price? A. Yes, it would.

Q. And was that true with regard to your sales of perforated lath, that you regulated your sales by what your salesmen told you National or USG or Certain-teed were selling to your dealers for, or to dealers in a particular territory?

Mr. Bromley: I object to the use of the word "regulated". I don't know what it means.

Mr. Steffen: I didn't mean to use the word "regulated".

May I have that question repeated?

(The reporter read the question as above recorded.)

Justice Stephens: The word "regulated" is conclusional in character. You may rephrase the question.

By Mr. Steffen:

Q. Was it your policy, Mr. Chism, to sell at the price, for perforated lath, that your salesmen reported to you, if it were the fact, that National or Certain-teed or USG were selling at in a particular territory at a particular time? A. Whatever the general market was there, we sold at that price, yes sir.

Q. And during that period do you recall, when you started selling perforated lath, any differences reported
5736 to you as to the prices at which National or USG or Certain-teed was selling perforated lath in a given territory? A. I expect I had a good many of those told to me.

Q. Do you recall any? A. No, I don't recall any.

Q. Did you find that true as respects plain board? A. Yes, there were always some differences reported to me.

Q. And what were those differences with respect to Mr. Chism? A. With respect to prices or competitive conditions in certain markets. Most of them we found were untrue.

Q. Now back in 1927, you testified on cross-examination, you had difficulty in selling open-edge board, is that correct? A. Yes, it is.

Q. Was Certain-teed selling in the same territory at that time? A. Yes sir.

Q. Were they selling an open-edge board? A. Yes, they were.

Q. And were they good competition?

Mr. Adams: I object to that. I don't know what he means by "good competition."

Justice Stephens: Sustained.

By Mr. Steffen:

5737 Q. Were they vigorous competition? A. It is my recollection that they were all vigorous.

Q. And they were selling an open-edge board? A. Yes, they were.

Mr. Steffen: Will you repeat the question and the answer to the question, just preceding the last question and answer?

(The reporter read the question and answer as above recorded.)

By Mr. Steffen:

Q. My reference had to do with Certain-teed. I asked simply whether Certain-teed was giving you vigorous competition.

Mr. Steffen: I move to strike everything as not responsive, as to the others. Certain-teed was vigorous competition, is that correct?

The Witness: Yes.

Justice Stephens: I don't understand what we are about. What is it you are moving to strike?

Mr. Steffen: I asked him whether Certain-teed constituted vigorous competition, and he answered, saying that they were all vigorous competition, as I understand it, and I have got to go into that.

Justice Stephens: Are you moving to strike that out as non-responsive?

Mr. Steffen: That is right, your Honor.

5738 Justice Stephens: It may go out.

By Mr. Steffen:

Q. Now in 1927, 1928 and 1929, you were operating under a license agreement? A. With the exception of the early part of 1927.

Q. I say with respect to 1927, 1928 and 1929 you were operating under a license agreement at that time? A. From April 18, 1927, we were.

Q. And who else in your territory was operating under a license agreement? A. I don't know.

Q. Was USG selling in your territory? A. Yes.

Q. And was Universal selling in your territory? A. Yes, they were.

Q. And were you in vigorous competition with Universal and with USG? A. Yes, we were.

Q. Now USG and Universal and yourselves were all in a license agreement, did you know that; that is, USG had licensed you and also had licensed Universal—did you know that?

Mr. Bromley: I object to that as assuming facts not in evidence, and as being conclusional. I don't know what the phrase "all in a license agreement" means. Whatever it means, it isn't accurate.

5739 Mr. Johnston: Also, the witness said he didn't know whether the others had a license or not.

Mr. Steffen: It is in evidence, your Honor, that the United States Gypsum Company licensed Texas in 1927, and also Universal.

Justice Stephens: Well, that is true, but the objection is to the use of the phrase in your question, "all in a license agreement."

Mr. Steffen: I will withdraw that.

Justice Stephens: That may be stricken. Rephrase the question.

By Mr. Steffen:

Q. It is true, Mr. Chism, that the United States Gypsum Company had licensed your company and also Universal in the years 1927 and 1928. Was your company in vigorous competition with USG and Universal during the years 1927, 1928, and 1929? A. Yes, we were.

Q. And did you mean, when you said "vigorous competition" that you cut prices on each other? A. Not at all times.

Q. Did you at any time? A. There possibly were times, particularly compared with the signing of this first agreement.

Q. Your first agreement was signed in 1927? A. Yes, but not until April 18th.

5740 Q. I am speaking of the time after April, 1927. Were you cutting prices at that time, after April, 1927, so that you were in vigorous competition with USG and Universal? A. We had been in vigorous competition without cutting prices.

Q. That is what I wanted to know. Then, by "vigorous competition", you mean not necessarily price competition, is that right? A. That is right.

Mr. Bromley: I object to this unless counsel agrees that all his questions refer only to board, and that we are not now getting into the unpatented field of plaster and so forth.

Mr. Steffen: That is right. Your answers have to do with board, do they not?

The Witness: The questions did not so state.

By Mr. Steffen:

Q. Then when you were saying "vigorous competition", you meant that that might have to do with plaster as well? A. It could have.

Q. My questions were intended to relate to board, and during this period after April, 1927, on through 1928 and into 1929, when you testified that you were in "vigorous competition" with USG and Universal, you say that that

did not necessarily mean price competition, is that correct?

A. That is right.

5741 Q. And were you in any price competition with USG and Universal during this period, as to board? A. We were always in price competition with them.

Q. During that period? A. Yes.

Justice Stephens: We will take the afternoon recess.

(Whereupon a short recess was taken, after which the trial was resumed as follows:)

5742 By Mr. Steffen:

Q. Now this Exhibit 603, Mr. Chism, which is your letter to the United States Gypsum Company, asking for price information—do you recall that? A. Yes, I do.

Q. And how did you say that you got that price bulletin? A. Through our salesman in that territory.

Q. Was that a price bulletin that was sent out to dealers? A. I don't remember whether it was or not. It must have been, he got it from a dealer.

Q. And you say you never got a reply to this letter? A. No, I didn't.

Q. And by that, you mean you never got a written reply? A. I don't remember of ever getting any sort of a reply.

Q. Did you ever talk with Mr. Sadler or anybody from USG about this matter? A. I don't think so.

Q. Are you real sure? A. Yes, I am quite positive.

Q. Did Mr. Gloyd? A. Mr. Gloyd didn't have anything to do with those things.

Q. Did anybody from your company ever get a

5743 reply or get any information in response to this letter? A. Not to my knowledge, no.

Q. Isn't that a little odd? A. Not particularly.

Q. Doesn't USG usually answer their letters from you?

Mr. Bromley: I object to that as incompetent. I don't think that that is material or competent.

Justice Stephens: The objection is sustained. That is a speculative matter.

By Mr. Steffen:

Q. Do you ordinarily get replies to your letters to United States Gypsum Company?

Mr. Bromley: The same objection.

Justice Stephens: Well, that is limited to this witness. We will let that in. Objection overruled.

By Mr. Steffen:

Q. Do you ordinarily get replies to your letters to the United States Gypsum Company? A. I think in the majority of instances we do, yes.

Q. Can you explain why a dealer might have a metallized board license, while you might not, when you were buying and selling metallized board?

Mr. Bromley: I object to that as incompetent because assuming facts not in evidence. There hasn't been any evidence at all that a dealer had a metallized board
5744 license, or a metallized board license bulletin.

Justice Stephens: Read the question.

(The question was read by the reporter.)

Justice Stephens: Objection sustained.

Mr. Steffen: I would like to change that to price bulletin.

By Mr. Steffen:

Q. Can you explain, Mr. Chism, how it could come about that a dealer would have a United States Gypsum Company price bulletin applying to metallized gypsum board, while you would not? A. No, I wouldn't know how he had it.

Q. Did you ever ask USG for a price bulletin applying to metallized gypsum board, inasmuch as you were selling the product? A. No.

Q. Why not? A. We were not particularly interested in the metallized board at any time. We didn't want to sell it. We only sold it where it was necessary in order to get other business.

Q. I know it. Did you want to take chances on selling it at a loss? A. No, we took chances on finding the price that applied in each territory.

Q. Why wasn't the honest way to simply write to
5745 USG and simply ask them for their prices?

Mr. Bromley: I object to that as incompetent and improper—

Justice Stephens: (Interposing) The objection is sustained. The implication that it was dishonest to make inquiries in the market has no foundation.

By Mr. Steffen:

Q. Why didn't you write directly to USG and ask for prices? A. Perhaps I never thought about it until this particular case.

Q. Was it, perhaps, a little bit secret? A. I don't know; that was a good way to find out.

Q. And you didn't get any reply? A. No.

Mr. Steffen: That is all.

Justice Stephens: Any re-cross?

Mr. Bromley: No, Your Honor.

Justice Stephens: I would like to ask you one question, Mr. Chism. I understood counsel for the Government to ask you if the dealers, or your salesmen, turned in to you the prices, and I wasn't clear as to your answer. Did you mean that your dealers brought in to you, or that the dealers sent in to you, some actual price list, or that your salesmen reported to you in the usual course of their
5746 relations with you, or your dealers, what prices they were paying?

The Witness: On all types of board?

Justice Stephens: On board.

The Witness: Any kind of board?

Justice Stephens: Any kind of board.

The Witness: Yes, we have had occasions when some of our good dealer friends would send us lists of our competitors.

Justice Stephens: Thank you.

Do you want to make an examination, Mr. Adams?

Mr. Adams: One or two questions, if I may.

Justice Stephens: You may.

Mr. Bromley: I would like to ask the witness something in connection with Your Honor's question.

Justice Stephens: You may.

Recross Examination

By Mr. Bromley:

Q. Isn't it a fact that most of the instances where you got price information would come from your salesmen telling you what dealers were telling them they were currently paying in the market? A. Most of the information came that way.

Q. It would be very rare that your salesmen would bring in or send in a price list of some competitor—that would be rare, wouldn't it? A. Yes.

5747 Q. You kept yourself informed as to general market conditions by asking your salesmen what information they had gotten from dealer-customers in the field as to what the dealer-customers were being quoted by

others, or paying to others—isn't that right? A. That was the source that we depended on entirely.

Justice Stephens: Proceed, Mr. Adams.

Mr. Steffen: May I ask in what capacity Mr. Adams is questioning? I believe he had no cross-examination. Is this re-cross, or what?

Justice Stephens: In what capacity? I suppose he is representing Certain-teed.

Mr. Steffen: My question—is he entitled to examine at this time, inasmuch as he had no cross-examination?

Justice Stephens: Oh, I see what you mean.

What is it you wish to do, Mr. Adams?

Mr. Adams: I want to ask him some questions about a matter which came out during the course of his last examination by Mr. Steffen.

Justice Jackson: This is re-cross on your part?

Mr. Adams: I have not previously examined the witness.

Justice Jackson: But you want cross-examination on evidence brought out on the re-direct?

Mr. Adams: That is right.

Justice Stephens: Do you object to that, Mr. Steffen?

5748 Mr. Steffen: No, Your Honor.

Justice Stephens: You may have that leave.

Recross Examination

By Mr. Adams:

Q. You told Mr. Steffen and the Court that the closed-edge board which you made after April, 1927, was a better product than the open-edge board that you had previously been making?

Mr. Steffen: I don't think he said it was a better product, Your Honor, at all. I object to that.

By Mr. Adams:

Q. Was it a better product? A. Yes, it was.

Mr. Steffen: I object to that on the basis that "better product" calls for a conclusion. It is a different product.

Justice Stephens: That is pretty general. We will sustain the objection. Make your question specific.

By Mr. Adams:

Q. With respect to this closed-edge board, was it better received in the trade than the open-edge board? A. Yes, easier to sell, liked better, more popular.

Q. Was it cheaper to make? A. Yes, it was.

Q. Did it involve less breakage? A. Yes.

5749 Q. And for those reasons, and others, it was better received by the trade; is that right? A. Yes, it was.

Q. Now, you were familiar with the open-edge board that was in competition with you, which was sold by Certain-teed, weren't you? A. Yes, quite familiar.

Q. And can you compare these two boards, with respect to the matters that I have mentioned? This closed-edge board was a better product than the Certain-teed open-edge board, wasn't it? A. Yes.

Q. And didn't the trade, after you began to sell the closed-edge board, prefer the closed-edge board that you sold, to the open-edge board which was being sold in that territory by Certain-teed? A. Yes, they did prefer it.

Q. And you began to take business away from Certain-teed, didn't you? A. We first commenced to regain what we had lost.

Q. You mean what you had lost as a result of making open-edge board yourself in competition with somebody else's closed-edge board? A. That is right.

5750 Q. And you first began to regain that; and then did your business begin to cut in on Certain-teed's business on open-edge? A. I presume that is true. Our volume increased.

Justice Stephens: Any further re-direct?

Mr. Steffen: No, Your Honor.

Justice Stephens: May this witness be excused?

Mr. Bromley: Yes, Your Honor.

Mr. Steffen: Yes, Your Honor.

Justice Stephens: You may be excused, Mr. Chism. Thank you for coming here.

The Witness: Thank you.

(Witness excused.)

Mr. Johnston: I wanted to ask if the Court wanted us to furnish extra samples of the board that were identified? We can do that.

Justice Stephens: I didn't quite understand you, I am sorry.

Mr. Johnston: I wanted to inquire if the Court wanted us to furnish additional samples of those boards that were identified but not introduced?

Justice Stephens: I would like to have them. I would like to have a complete file of each of the exhibits.

Mr. Johnston: Of course, they may not be introduced. I asked Mr. Steffen, and he said he had not introduced them, but he didn't tell me whether he was going to or not.

5751 Justice Stephens: I assume he will eventually introduce them.

5752 Mr. Johnston: One other thing, Mr. Steffen, do you want us to secure and send in samples of that tape?

Mr. Steffen: I think we requested your patented markings over a period of years, yes.

Mr. Johnston: Yes, you did, but we didn't have them here today. We will send them in.

Justice Stephens: Very well, and also send some additional ones for the Court's files.

Mr. Johnston: Yes, your Honor, we will.

Justice Stephens: Mr. Bromley, this might be an appropriate time to raise your question with respect to Mr. Dowd.

Mr. Bromley: May it please the Court, my point is that it seems to me that the Government, in fairness, should tell us now what they propose to show to connect this exhibit with the defendants—

Justice Stephens: (Interposing) So that the record may show it, you are talking about Exhibit 233, I assume?

Mr. Bromley: Yes, that memorandum by Redfield with respect to some other patent.

The opinion of the Court, beginning at the bottom of page 5890—

Justice Stephens: (Interposing) Let me get that now.

Mr. Bromley: It starts at line 24, page 5890.

Justice Stephens: Proceed.

Mr. Bromley: There your Honor reviewed my

5753 objection on the ground of immateriality, and then over the page, beginning at line 2 of page 5891, you said:

"The binding effect of the document on Certain-teed is difficult to see since it is not a statement by Certain-teed itself, but by its attorney. There is no present showing that his views were or became the company's views. Even as an admission of Certain-teed the document is not yet shown to be in furtherance or execution of any conspiracy so as to bind the other defendants. These elements may, however, be supplied by later evidence, and the document could be received subject to connection in these two respects."

I see no use taking up a lot of time and having Mr. Dowd here, and taking his testimony, and arguing the question of competency, when I believe it to be the fact and that the Government will admit it to be the fact, that it has no evidence, and does not intend or hope to present any, that the views of Redfield were or became the company's views, and I think before we embark on a time-consuming effort to establish the competency of the document, we have the rule of evidence applied that this document, and indeed others which are being received subject to connection, should not be received at all unless we have a promise, made on the professional integrity of Government counsel, that it is their present intention to connect it up, connect the document up, by some other evidence, and not leave us hanging in the air with no position taken by
5754 them as to whether that is what they intend to do, or not.

Now I understand the rule to be perfectly plain that if I state to the Court I want to offer evidence subject to connection, it is my duty as a lawyer to assure the Court that I have such connecting evidence, and intend to produce it, and if I don't do that, I don't think that evidence should be received subject to connection.

Justice Stephens: I have taken it for granted that all offers of evidence subject to connection contained an implied promise that it would be connected, an implied representation that the Government did have some means of connecting the proffered evidence.

Mr. Bromley: We, on the defense, know that Redfield's views did not become the company's views, nor were they ever the company's views; that he went off on an expedition of his own and wrote something about a patent which had no significance at that time, and has had none at any time since then.

My point is that before we call Dowd here, and examine and cross-examine him, we should have this assurance from the Government. I don't believe they can make it.

Mr. Adams: I have one further thought that I would like to add, and that is that it is my recollection from this exhibit, as originally produced in the courtroom at the time C. O. Brown was on the stand, that it, on its
5755 face, purports to be addressed to him. He was the officer of the company to whom it was addressed. He, however, was unable to identify the memorandum in any way, and your Honors will recall that we therefore

passed the question of privilege until Redfield was brought here to identify it.

I mention that because it seems to lend support to Mr. Bromley's views, which certainly are mine, that since C. O. Brown, the officer to whom the memorandum was addressed, could not even identify it, that we are now entitled to some definite assurance on the part of the Government that they have evidence somewhere that will connect the exhibit with Certain-teed's knowledge. We say we don't know of any such evidence.

Justice Stephens: Do you wish to be heard, Mr. Steffen, or Mr. Knuff?

Mr. Steffen: Yes, your Honor.

Justice Stephens: Proceed.

Mr. Steffen: I am not prepared to give your Honors full assurance at this time that we have the evidence that Mr. Bromley insists that we should have. I want to say upon that, however, that was offered in perfectly good faith at the time, and of course at the time we expected that Mr. C. O. Brown, at the time the document was presented to him, would know something about it.

I am not at all sure—and I would like to check this
5756 more carefully—that there must be a showing that Mr. Redfield's views, as Mr. Bromley phrased it, became the views of the company.

Mr. Bromley: That was the Court's statement, not mine.

Mr. Steffen: Well, I haven't read the Court's statement in that respect.

Justice Stephens: That was our ruling. We said at the bottom of page 5890, and the top of page 5891:

"Mr. Bromley objected that proposed Exhibit No. 233 is irrelevant and immaterial because not shown to be in furtherance or execution of any conspiracy charged in the complaint. The binding effect of the document on Certain-teed is difficult to see since it is not a statement by Certain-teed itself, but by its attorney. There is no present showing that his views were or became the company's views. Even as an admission of Certain-teed the document is not yet shown to be in furtherance or execution of any conspiracy so as to bind the other defendants. These elements may, however, be supplied by later evidence, and the document could be received subject to connection in these two respects."

We of course have assumed that you expected to connect it. We worked out our views on this subject very carefully, as I said yesterday, and I think they are correct, and it does seem a reasonable request, in view of the expense of bringing Dowd here, and possibly also bringing
5757 Redfield back here, that the Government make some assurance that it does expect to be able to connect, or has some evidence in mind which will connect, the exhibit so as to make it binding, first against Certain-teed, and second against other defendants.

5758 Mr. Steffen: I take it that there are two grounds of admissibility, one as a declaration on the part of an alleged co-conspirator—and in order to do that we would have to show that it was a declaration by an authorized person, I presume. That was the purport of your Honor's ruling, was it not?

Justice Stephens: I don't think I could make the ruling much clearer than I have.

This Exhibit 233 was a letter from Redfield to C. O. Brown, which had to do with some Speer Patent, as I remember.

Mr. Steffen: That is right.

Justice Stephens: And it had some statements in it to the effect that the Speer Patent might possibly be used to bolster up a price-fixing arrangement, or for its nuisance value, or words to that effect.

Now that was the statement of Redfield, and you are offering it as a declaration of Certain-teed. Now it must, in some manner, be made to be the statement of Certain-teed, by some adoption or action which would make it operative, legally, as an admission of Certain-teed. If it became an admission of Certain-teed, then it could come into evidence against Certain-teed. Then after that, it must be shown to be in furtherance or execution of the conspiracy, to be binding upon other defendants.

Perhaps you would like to think this over until
5759 tomorrow morning and see if you can collect your ideas as to this additional evidence that may be necessary.

Mr. Steffen: We will have to check through to see what additional sources we have, and what standard we have to meet. I have not, as I say, read your Honor's opinion in the matter.

Justice Stephens: You may take the time to do that. We think the request is reasonable, however. Neither the

time of the Court nor counsel, either for the Government or the defendants, nor the time of witnesses, nor the expense involved, should be used or incurred unless there is some reasonable likelihood of the exhibits being connected.

Who is the next witness?

Mr. Steffen: Mr. Tice.

Justice Stephens: Come forward, Mr. Tice.

Thereupon, HARRY H. TICE a witness called for and on behalf of the United States, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Will you state your full name, Mr. Tice? A. Harry H. Tice.

Q. Where are you located? A. South Gate, California.

Justice Jackson: How do you spell your name?

The Witness: T-i-c-e.

5760 By Mr. Steffen:

Q. And what company are you associated with? A. Schumacher Wall Board Corporation.

Q. The Schumacher Wall Board Corporation is located at South Gate, California? A. That is correct.

Justice Stephens: That is just outside Los Angeles, is it not?

The Witness: Yes.

By Mr. Steffen:

Q. How long have you been associated with that company, Mr. Tice? A. Since July, 1926.

Q. How long has that company been in existence? A. The present Schumacher Wall Board Corporation has been in existence since July 6, 1926.

Q. And was there a predecessor of this company under the name of Schumacher? A. Yes, the predecessor organizations went back to 1913.

Q. Operating at the same place, South Gate? A. No, they operated in Los Angeles. Our plant was recently moved, in the last three years.

Q. On what date, do you remember? A. May, 1940.

5761 Q. You rebuilt your plant at that time? A. Yes.

Q. What does the Schumacher Wall Board Corporation manufacture, Mr. Tice? A. It manufactures gypsum wallboard, gypsum lath and gypsum roof plank.

Q. Do you manufacture plaster? A. No.

Q. Where does your company get its source of supply of gypsum? A. Near Las Vegas, Nevada.

Q. And what process takes place there? A. We only mine the gypsum and load it on the cars.

Q. And then it is shipped to South Gate? A. That is correct.

Justice Stephens: If you can lift your voice a little, we would appreciate it. We have a little difficulty hearing you.

The Witness: All right.

Mr. Steffen: Mr. Tice has a cold, and it is a little awkward for him to talk in a loud voice.

By Mr. Steffen:

Q. What sales territory does your company cover, Mr. Tice? A. Practically all of the Pacific Coast States,
5762 including California, Arizona, Nevada, Idaho, Utah, Oregon and Washington.

Q. Roughly, how many board feet did you manufacture last year?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: What is the purpose of that?

Mr. Steffen: Simply to develop the scope of the business.

Mr. Bromley: It has no materiality. This man operates west of the Rockies; he is not a defendant or a co-conspirator.

Justice Stephens: Well, if it is preliminary to giving us an understanding of the witness' business, so as to make other testimony understandable, it may come in as preliminary only. We don't see the materiality of it now.

Mr. Steffen: That is the purpose of the question, your Honor.

By Mr. Steffen:

Q. Roughly, how much board and lath does your company manufacture per year? A. Over 100,000,000 square feet.

Q. And does your company make a perforated lath? A. Yes.

Mr. Bromley: I object to that as immaterial and move to strike the answer.

Justice Stephens: Is that on the ground that the conspiracy charged relates to the Eastern Area?

5763 Mr. Bromley: Yes, your Honor.

Justice Stephens: What do you say to that, Mr.

Steffen? What do you intend to prove by this witness?

Mr. Steffen: Well, that raises rather a broad question as to what we intend to prove. As has been developed by the evidence so far, Mr. Tice is outside of the Eastern Area.

We allege in the complaint that the conspiracy which is being established here, or the monopoly, took place within the area East of the Rocky Mountains.

We have had questions raised concerning the manufacture of board and the manufacture of perforated lath in the East.

Mr. Chism testified, for example, concerning the manufacture of board, closed-edge board, in his territory, and of the need to manufacture closed-edge board, using that as one example, in order that his company might survive.

There is also the question of whether the perforated lath of the sort manufactured under the USG Patent, No. 1,938,354, which is the Roos Patent, is a necessary form—let me get at it the other way around.

We consider that in the case there are at least two issues having to do with perforated lath. One will have to do with the general scope of patent No. 1,938,354, and when I bring that out I am bringing out an entirely new subject.

The other will have to do with whether Patent No. 1,938,354, the Roos Patent, completely covers the
5764 product, or the manufacture of perforated lath.

Now I think I should amplify the second, particularly, because it is a very important item of evidence in the Government's case.

Under the General Electric case, which is the decision upon which the defendants rely, it was stated by Chief Justice Taft at that time that the three patents which were in issue there completely covered the manufacture of tungsten filament lamps.

The Court proceeded upon the assumption, in fact it was stipulated by the Government in the case in a stipulation of facts, the case was tried upon a stipulation of facts, it was stipulated by the Government in that case that those patents, if not completely covering, at least were absolutely necessary to the manufacture of tungsten filament lamps in this country, in other words, that the Westinghouse Company would not have been able to manufacture and continue in business in the bulb business, unless they had the General Electric patents, or had the right to manufacture under the General Electric patents.

Now that, as I say, was assumed in that case. There was no evidence presented by the Government or anyone else indicating that there would be another type or a possible other type of tungsten filament bulb, and accordingly the case went off on a ground which we distinctly
5765 do not consider to be conceded in this case—

In other words, in this case we have consistently stated that we raise the question that whether or not the defendants' patents, all of them or any one of them, can be said to completely cover the product which they manufacture, in the fashion which was required in the General Electric case—

Justice Stephens: Will you explain a little more what you mean by "completely cover"?

Mr. Steffen: I don't have with me 272 U. S. 476, which is the General Electric citation, but we have sent for it. When I get it, I can give you the argument, because it is, as I say, a very important argument in our present case.

In that case, as I understand it, the Court and the parties assumed that the patents in question—and there were three of them—one on the filament, one on the means or method of excluding the air, and I have forgotten the third—but the three patents were held to completely cover the making of tungsten filament lamps. No one could make them, there was no possible lamp business left for the Westinghouse Company unless they had the patents which completely covered the making of tungsten filament lamps, or had the right to manufacture under those patents.

Justice Jackson: Well, a company could take a chance and manufacture them, couldn't they?

Mr. Steffen: Then they probably would get slapped down.

5766 Justice Jackson: Suppose they weren't sued by Westinghouse.

The Witness: There was a provision that the General Electric would protect their patents.

So that the case went off on—

Justice Stephens: I don't yet understand the use of your phrase, "completely cover".

Do you mean to indicate that in the General Electric case it was stipulated or assumed that it was impossible to manufacture any tungsten filament bulb except by the use of these patents, unless in an infringing manner?

Mr. Steffen: That is right, that is if anyone were to attempt to make a tungsten filament lamp, which was the type that superseded the old carbon filament lamp, which

had gone by the board, and the tungsten filament lamp, as everyone knows, had become practically the only type of lamp that could be manufactured and sold—on that assumed set of facts, that the tungsten filament lamp patents completely covered—and I will read the language of Chief Justice Taft, at page 481, where the Court said: "These three patents cover completely the making of the modern electric lights, with the tungsten filaments," and so forth.

Then if you will carry over to the second branch of the case, beginning on page 488, where the Court takes up the question of the license agreements to Westinghouse, the first branch had to do with the agency sales arrange-
5767 ments between General Electric and its own agents. The second phase had to do with the licensing agreement between General Electric and the Westinghouse people.

There the Court said:

"Had the Electric Company, as the owner of the patents entirely controlling the manufacture, use and sale of the tungsten incandescent lamps, in its license to the Westinghouse Company, the right to impose the condition that its sales should be at prices fixed by the licensor and subject to change according to its discretion?"

Now those two statements, appearing in the Court's opinion, were greatly amplified if you will read the briefs and the opinion of the lower court, and the stipulation of the parties with respect to the facts of the case, and the argument apparently proceeded very largely on the assumption that the Government had said that the only possibility of the Westinghouse Company continuing business in this case, that is continuing in the lamp or bulb business, was that they have the use of these particular tungsten filament lamp patents, for that period, and that they would have to go out of business completely unless they were to have the use of those particular patents.

Now, I point out that in this case there has certainly been no such concession on the part of the Government, and there is nothing in the pleadings which indicates,
5768 in any way, that these patents are the only and the necessary patents to the manufacture of board, or to the manufacture of lath; that they, on the other hand, are—what I am trying to say is that there is an issue in the case, therefore, which the defendants, as we have asserted in our trial brief, and I think the defendants have

not denied it at any time—have an obligation as an affirmative defense to establish, once we have shown price fixing and a general control of the business, as we have in this case, that they have valid patents—your Honors will permit them the assumption that their patents are valid—that those patents completely cover the manufacture of board and that it would not be possible, in other words, to use the exact comparison, not be possible for other companies to manufacture a gypsum board and continue in business without the use of the USG patents under which they have licensed the licensees in this case.

Now we have made, in our trial brief, at least two point on that, or two arguments on that point.

In one we say that the makeup of the board is a matter of gypsum, paper, and one or two other ingredients that go into the manufacture of the board; that at most, a close analysis of the defendant's patents, as for example the patent on perforated lath, will show it to be a patent not completely covering the sale of the ingredients, the sale of
the paper, but it is a matter of simply some holes
5769 in the board, it at most is an improvement in a
board which had been manufactured for years, and a relatively, as we see it, unimportant improvement.

That follows through with their other patents.

But let's stay for a moment with the perforated lath patent.

If we can show—and this is our thesis here—that Patent No. 1,938,354, which is the perforated lath patent, is just one of a number of other ways of making board, perforated board, which will answer the same requirements as the board manufactured under the Roos Patent No. 1,938,354, we establish, as I see it, that the defendants have no defense, or in other words, that price-fixing based upon a patent which does not completely cover the manufacture of perforated lath, affords them no justification for price-fixing or for all of the other means of control that they have worked out in this case.

Now I want to say this, in order to make my position quite clear on the matter. That evidence, we think, is admissible in one respect as showing subterfuge on the part of the defendants, as respects the perforated lath, those companies which said, "Let's make a perforated lath, and let's figure a price of 25 cents by way of advance."

We say that as respects those companies picking out a patent which was not a necessary patent, and which cer-

tainly today is not a necessary patent, that they
5770 were attempting to fix prices and control the distribution of board upon or under a patent, which, by no stretch of the imagination, can completely cover the manufacture of perforated lath within the description of the General Electric case.

We feel that the defendants must stand upon the description, or rather the ruling of the Court, in the General Electric case, because no court, to our knowledge, has gone farther than that.

Justice Jackson: Does the Roos Patent purport to give the patentee a monopoly on all perforated lath, or just on a certain kind of perforated lath, that kind set out in the specifications and claims of the patent?

Mr. Steffen: It purports, your Honor—and this is a question that we are going to have to take up—simply to cover, as I think we will show when it is construed, a very narrow type of patent. We are not attacking the validity—

Justice Jackson: (Interposing) It is just a kind of perforated lath?

Mr. Steffen: Just a very limited kind of perforated lath.

Our first argument, therefore, and I think the first ground upon which the present evidence will be admissible, is that the fact is that there are other forms of perforated lath. We have already introduced the fact that the National people make a different lath than did the United States Gypsum Company under its patents.

5771 Justice Jackson: Are there any patents for any other perforated lath, besides the Roos Patent?

Mr. Steffen: There are a lot of them, your Honor, and we will introduce in evidence—

Justice Jackson: (Interposing) Each of them is a separate patent for a certain kind of perforated lath, set out in the patent?

Mr. Steffen: That is right. But what it comes down to, your Honor, is that there is no basic patent in the field, in the perforated lath field, today, that in any manner compares with the basic patents in the General Electric case.

Therefore, our first offer of this evidence would be, as I say, to show subterfuge, or to show that the defendants went into a very thin patent situation, and because it was thin, did so probably with the idea of obtaining patent control. That is a matter of argument upon inference.

Now the second point that we make—

Justice Stephens: (Interposing) Before you go to the second point, I am sorry but I still am unable to define in my own mind just what you mean by your "subterfuge" charge. Do you mean now in this aspect of it the charge that the defendants did not think that the Roos Patent was necessary for the manufacture of the board manufactured under the Roos Patent?

Mr. Steffen: My answer, your Honor, is that to
5772 the extent that they thought that the Roos Patent, No. 1,938,354, was very thin, and it was therefore a medium largely to fix prices and gain this 25-cent differential, rather than because they were primarily interested in making this as the only possible perforated lath that they could make, within the terms of the General Electric case, that that would go to the showing that they entered into it for a purpose which the Sherman Act would contend—

Justice Stephens: That seems to be an entirely different question. That is the reason I asked you. I had thought that perhaps your charge of subterfuge was a charge that was intended as a charge that the defendants didn't really have any belief in the validity of their patents, and that therefore they were not acting in good faith. But isn't that a different thing from what you are now talking about as to the coverage of the patents?

Mr. Steffen: Well, I think there are different ideas on that, but if the patent isn't a broad patent, or as your Honor is speaking there, if it isn't a valid patent, either idea reaches the same result—

Justice Stephens: (Interposing) I didn't raise the question as to its validity. I raised the question which I thought you were charging as to the defendants' belief in its validity. You have introduced some letters here which you have indicated will be connected, as tending to in-
5773 dicate that the defendants had advice from their lawyers that they didn't really think that these patents were valid. I thought perhaps that was part of your subterfuge charge. But that seems to be entirely different from what you are now talking about as to the applicability of the General Electric case, where your contention, as I now understand it, is that in order to have a price-fixing system validly based upon the General Electric theory, you must have patents which cover all possible ways of manufacturing the article upon which the price is fixed. That seems to be a different contention. Perhaps I am not yet fully informed about it.

Mr. Steffen: Before this is closed, I would like to explain it very thoroughly.

Justice Stephens: We will hear you further, of course, but for the moment, so that we can get something before our minds to think about during the recess, what do you intend to prove by this witness under your theory about the coverage?

Mr. Steffen: What I intend to establish by this witness' testimony—I don't wish to be bound in detail by this, because I will probably go further—I want to show that his company has manufactured perforated lath out on the Pacific Coast since 1926, and that prior to that time there was perforated lath manufactured out there, and I would like to show at least the Makowski Patent which was issued in 1920, long before Mr. Roos got his patent,
5774 which was issued in 1935 or thereabouts, 1933 or 1935.

I want to show, furthermore, that the perforated board made by the Schumacher Company does sell in competition with the board of the United States Gypsum Company, sold in that same territory, which would indicate that it is perfectly possible to sell that perforated board under competitive conditions with the United States Gypsum Company.

I want to show further that the board which Schumacher people manufacture does pass the one-hour fire test, which is the principal argument which has been advanced for the Roos Patent perforated board.

When I have established that, I think I have shown that the Roos Patent is no basis whatever under the doctrine of the General Electric case, for price-fixing, and price control.

I want to call your Honor's attention in that connection to the fact that the Roos Patent was licensed on a 10-cent royalty basis for a period of about two years, in 1937 and 1938, and that thereafter, the United States Gypsum Company offered gratuitous licenses to the various companies which were its licensees, practically withdrawing it, but in their gratuitous license, they wrote the provision that it would become subject to all the terms and conditions of the general agreements of October or November, 1929.

Now those general agreements of course, are the
5775 ones that we are most interested in here because they provide for price fixing.

In other words, the perforated lath patent is now part of the general back-log of patents upon which the defen-

dants are going to justify their price fixing, and it is our purpose to show that that particular patent at the present doesn't permit such a defense.

Justice Stephens: We will have to suspend at this time—

Mr. Bromley: (Interposing) I would like to say just one word, your Honor.

Justice Stephens: You may do so.

Mr. Bromley: It seems to me that Mr. Steffen's interpretation of the General Electric case is a very novel one, and one never heretofore suggested by anybody.

It results in this: If at the time these General Electric tungsten patents were taken out, somebody else had a way, or a patent to make a light by using aluminum instead of tungsten, then the fellow that had the tungsten patent couldn't fix prices on tungsten because there was another bulb in the field using aluminum instead of tungsten.

Nobody has ever heretofore suggested any such limitation on price fixing as that. That would mean that if I got a patent on a radio today, which is a valuable, novel, fundamental patent, the fact that Mr. Armstrong had a patent on a frequency modulation system would mean that
5776 I couldn't fix the price of my invention.

Nobody has ever said that before, nobody has ever suggested that before; and I don't believe the Supreme Court in its opinion in the General Electric case ever meant to intimate such a thing. All it was saying was that these patents are product patents that cover the light. Of course the patents didn't cover the glass or the screw, or the thread on the base, or the base. They just covered a particular kind of a lamp which had tungsten in it, and from which the air had been pumped out and gas put in.

Now the carbon light was still in existence and still could be used and still was manufactured—not as good, but it could be manufactured.

The very next day I might have discovered a new way, without the use of tungsten, to make an incandescent lamp, and I might have gotten a patent on it. Would that mean that the General Electric system must fall, that their price-fixing system must fall? There is no such intimation in the opinion whatsoever.

Justice Stephens: Well, thank you for your statement of your views, Mr. Bromley. We will consider the matter, and will now adjourn until tomorrow at ten o'clock.

(Whereupon, a recess was taken at 4:04 o'clock p. m. until 10:00 o'clock a. m. of the following day.)

5777 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; EBOR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Thursday, March 30, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5785 Now last night, we were hearing briefly from Mr. Bromley. Do you wish to be heard further, Mr. Bromley, with respect to the admissibility of the offered evidence of the Witness Tice?

Mr. Bromley: No, I think not, Your Honor.

Justice Stephens: What was the last question asked of this witness? Let's see what is before the Court.

Mr. Bromley: On page 6053, line 20, this question was asked:

"Q. And does your company make a perforated lath?" to which the witness answered:

"A. Yes."

That question was then objected to by me, on the ground that it was immaterial, and I moved to strike the answer.

Justice Stephens: Will counsel also refresh the recollection of the Court as to that part of the record in which Mr. Chism was asked the question whether or not USG had ever brought an infringement suit against Texas,
5786 and we, I think, ruled that out. I would like to see that part of the record.

Mr. Bromley: I think that question was withdrawn.

Justice Stephens: I think we expressed ourselves, nevertheless, on the subject, and I would like to see what we stated.

Mr. Bromley: Page 5983, the question was withdrawn just in time.

Mr. Steffen: What do you mean by "just in time", Mr. Bromley? (Laughter).

Justice Stephens: Yes, I remember now. The Court was in the process of considering whether that evidence was admissible or not.

Well, now, Mr. Steffen, I have re-read, myself, since the adjournment last night, the General Electric case, and my colleagues have given consideration to it, also; and I think I reflect their views when I say that we are not able, at the present time, to put the construction upon that case that you do,—that it rules, as I understand your contention, that there can be no valid or proper price fixing under a patent unless it is a basic, all-covering patent. But that aspect of the discourse yesterday seemed to me irrelevant, anyway, to the contention you were making; and I am still in doubt, myself, as to the admissibility of this evidence, offered through Mr. Tice, to prove that he was making and selling some sort of perforated board,
5787 in large quantities, outside of the Eastern area. I am still unable, myself, to see the relevance of it, unless upon some possible theory that if the defendants had faith in their perforated lath patent, under which they were manufacturing, they would have brought infringement suits against similar lath manufactured without benefit of license.

There is a charge in paragraph 46 of the complaint that the licenses were not bona fide, were not entered into bona fide, but merely as a cloak for price fixing. I am still, even on that theory, somewhat in doubt, and I would like to hear you a little further, if you care to be heard—and I think my colleagues would like to hear you a little further—on the materiality and relevancy, under the issues of the case, of the Tice testimony.

Mr. Steffen: I first would like to enter a caveat with respect to the Court's statement concerning the necessity of having a basic patent as a basis for price fixing. That, I take it, we will argue at more length later on, because it is going to be necessary to look at these patents rather carefully to determine whether they are of the significance of the patents which were before the Court in the General Electric case. In other words, as we see the matter, the defendants have pleaded—the United States Gypsum Company has pleaded in its answer, paragraph 35, that everything they have done in this case was done under
5788 the protection of Supreme Court decisions, and thereby they, I think, plead that they are within the terms of the General Electric case, inasmuch as the General Electric case is the leading authority upon price fixing agreements based upon patent licenses—

Justice Stephens: (Interposing) Of course, we will not foreclose you from arguing what you think the General Electric case means, at the close of the Government's case, or at the close of the case as a whole, whatever time is appropriate. At the same time, we are bound to rule upon the admissibility of evidence, so far as we can, as the evidence is offered. Of course, there are sometimes questions as to the admissibility of evidence which are controlled by questions of substantive law, which are the main questions in the case, and under those circumstances the practice of the courts is usually to hear the offered evidence, subject to an ultimate ruling on the question of substantive law, which controls both the merits of the case and the admissibility of evidence. But I am not able to see, Mr. Steffen, yet, the relevance of the Tice evidence to your theory of the meaning of the General Electric case. That is to say, even if we accept, for the time being, your contention that the General Electric case means to forbid all licensing and price fixing under patents unless the patents are what you refer to as covering patents, still I don't see what the Tice testimony tends to prove under that theory of
5789 law.

Can the fact that Mr. Tice manufactured many hundreds of thousands or millions of square feet of perforated board, can that mere fact prove that the patents on perforated lath, which were the subject or the foundation of the license agreements in this case, were not basic or covering patents? I should think that would have to be proved not by the adventitious fact that somebody is manufacturing a lot of board, but by a patent expert.

Mr. Steffen: By the introduction of the patents?

Justice Stephens: Yes, by introduction of the patents, or testimony as to the nature of the patents in connection with the art.

Mr. Steffen: I think Your Honor is correct on that, that complete proof would certainly require the introduction of the patents in question, and in this case the Makowski patent, if a patent is necessary at all.

I will call your attention to the fact that the Schumacher people have held the Makowski patent since they started in business, and that it is probably the patent under which they operate, or were operating in the years from 1920 to 1937, that antedating by many years the Roos patent.

I want to say, next, that National, and some of the other defendants here, have made board, perforated lath, I mean,
without benefit of any patent. So that you have the
5790 situation of three types of perforated lath on the
market, that is, there are three sources of supply or sources of authority for perforated lath. You have the lath made by the Schumacher people, which may or may not be under the Makowski patent, but which I think can be shown to be; you have the National lath, made by the National Gypsum Company; and you have the lath purporting to be made under the Roos patent No. 1,938,354, which USG licensed to certain of the defendant companies.

Now, getting to the relevancy of this question—which, after all, as Your Honor points out, is the issue before us—we consider that in determining the question of good faith and the question of subterfuge of the companies which took out license agreements from USG under the perforated lath patent, it is important to determine what other available sources of perforated lath they could have had; and we wish to show, as we have already shown in the case of National, that they could make it without any patent.

We now want to show that on the Pacific Coast, the Schumacher people were manufacturing and had manufac-

tured a perforated lath for a great many years; and to show, moreover, that that lath passed the one-hour fire test of the Bureau of Standards.

Now with that shown we can build an argument, as we see it, that the defendants, in taking their licenses
5791 under Patent No. 1,938,354, which is the Roos patent, were more, or fully as much interested in getting the price control that went with 1,938,354, as they were in getting the patent which the license covered.

That, in narrow compass, is the basis of our argument.

(The Justices conferred.)

Justice Stephens: Well, the Court will hear the testimony. The objection to the question is overruled; and the motion to strike the answer is denied.

Mr. Steffen: Mr. Tice, will you take the stand, please?

Thereupon, HARRY H. TICE the witness on the stand at the time of adjournment, resumed his testimony as follows:

Direct Examination (resumed)

Justice Stephens: The Court is receiving the evidence, I should add, under the charge of subterfuge. The Court does not see, at the moment, the relevance of the evidence to the question of substantive law, which is raised as to the meaning of the General Electric case.

By Mr. Steffen:

Q. Mr. Tice, I asked you yesterday the question whether your company made a perforated lath, and I believe you answered "Yes".

When did your company start making perforated lath?

5792 Mr. Bromley: May it be understood that I have an objection, on the same grounds as heretofore expressed, to all of this testimony?

Justice Stephens: Yes, that may be shown, and that the Court overrules it, so that your record is protected.

Mr. Bromley: With respect to this specific question, I object to it as incompetent unless counsel indicates what he means by a perforated lath.

Mr. Steffen: I will go into the type of perforated lath.

Mr. Bromley: Well, I object to this question as being too general.

Justice Stephens: That objection is sustained. We ought to have this made pretty definite, if it is going to have

any bearing upon the very issue of subterfuge which you choose to relate it to; so ask him to describe the type of lath which he made, in some detail, if he can.

By Mr. Steffen:

Q. You have answered that you do make a perforated lath? A. Yes.

Q. When you started making perforated lath, what type of lath did you make? A. We made a 3/8 inch, open-edge lath, 24 x 32 inches, with perforations 3/8 of an inch
5793 in diameter, spaced approximately 3-1/2 to 4 inches horizontally on the board, and 2 to 2-1/2 inches perpendicularly on the board.

Q. And what date was this? A. That is when the Shumacher Wall Board Corporation was organized, in 1926.

Q. Now in order to get that clear, do I understand that the size of the perforations in your lath was 3/8 of an inch in diameter? A. That is correct.

Q. And the perforations were in parallel rows to the side of the board, were they—

Mr. Bromley: (Interposing) I object to this as leading and repetitious. He has had the description.

Mr. Steffen: I want to make sure that we understand the description.

Justice Stephens: Well, this witness is testifying under difficulties, due to his cold. However, it is not desirable to repeat the same question in the record twice.

Why don't you have the Court Reporter read his answer.

Mr. Steffen: I got his answer, Your Honor. It is a long, detailed answer, and I thought it might be made clearer if we were to break it down.

Justice Stephens: I am sorry. I thought you said you didn't understand it.

Mr. Steffen: No.

5794 Justice Stephens: Will you read his answer?

(The answer was read by the reporter as follows:

"A. We made a 3/8 inch, open-edge lath, 24 x 32 inches, with perforations 3/8 of an inch in diameter, spaced approximately 3-1/2 to 4 inches horizontally on the board, and 2 to 2-1/2 inches perpendicularly on the board.")

By Mr. Steffen:

Q. Perhaps I had better ask what you mean by the latter part?

Justice Jackson: Why don't you ask him whether or not they were staggered or in a straight line?

Mr. Steffen: That would be a way of getting at it.

By Mr. Steffen:

Q. Were they staggered or in a straight line? A. They were staggered.

Q. What was the distance between your vertical rows?

Mr. Bromley: I object to that as repetitious. He stated that.

Justice Stephens: He may answer.

The Witness: From 2 to 2-1/2 inches.

By Mr. Steffen:

Q. How close were the vertical rows to the outside edge of the board? A. That varied. Sometimes they were
5795 one inch, and sometimes an inch and a half.

Q. Could you state whether they were parallel with the edge of the board, the vertical rows?

Justice Jackson: Do you mean did they comprise a parallel line?

Mr. Steffen: Was the vertical row of perforations parallel with the edge of the board?

The Witness: No, they were staggered.

By Mr. Steffen:

Q. No, I am speaking of the outside line. A. They still were not parallel, because every other row of holes was staggered from the other row, to form an irregular line.

Q. And did you subsequently change the size of the hole, or the perforation? A. Will you repeat that?

Q. Did you at any time change the size of the perforation? A. Yes.

Q. What size did you change it to?

Mr. Bromley: When, please?

Mr. Steffen: I will find that out.

The Witness: What size did we change it to?

By Mr. Steffen:

5796 Q. Yes. A. We changed it to several different sizes. Commencing in 1936, we manufactured lath with 9/16 inch perforations, and 5/8 inch perforations; 11/16 inch perforations; 3/4 inch perforations; and 13/16 inch perforations.

Q. And this was during what period of time? A. From 1936 to 1938.

Q. I show you what has been marked as Government's Exhibit 54 for Identification, and ask if you can identify it?

(The article referred to was marked as Government's Exhibit No. 54 for Identification.)

(Government's Exhibit No. 54 for Identification was handed to the witness.)

By Mr. Steffen:

Q. Is that a piece of your manufacture? A. Yes, sir.

Q. When was that made? A. When was this made?

Q. Yes. A. Probably very recently. I am not sure of the date.

Q. Is that a piece of perforated lath? A. It is.

Q. And what are the spacings of the holes in that
5797 exhibit? A. Well, these are spaced 3-5/8 inches on centers horizontally; and in the perpendicular rows, one spacing is 4-1/4 inches and the next set of spacings is 3-3/4 inches, and it continues that way throughout the length of the board, with alternate spacings of 4-1/4 and 3-3/4 inches.

Q. And how close to the edge of the board does the closest line of holes come? A. One and one-half inches.

Q. Is that true at each end of the board? A. Yes, that is true at the ends.

Q. How long have you been making board according to the type of Exhibit 54? A. Since early in 1938.

Q. Do you know whether your board passes the one-hour fire test?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

By Mr. Steffen:

Q. Did you ever submit samples of your lath to the Bureau of Standards? A. Yes.

Q. And will you state what samples you submitted to them? A. We submitted above five different sets of board for conducting fire tests.

5798 Justice Jackson: Do you mean perforated lath?

The Witness: Yes, five different styles.

By Mr. Steffen:

Q. And what was the first one, do you remember? A. The first one, I believe, was 11/16 inch holes.

Q. And were the holes staggered on the same pattern as appears on Exhibit 54? A. Yes; they were not exactly the same spacing, but with the same pattern.

Q. And then did you make another submission to the Bureau of Standards? A. Yes, we made five.

Q. All told? A. Yes.

Q. What was the second form that you submitted, if you remember? A. I believe the second form was a combination of perforations and indentations.

Q. What was that? A. The perforations on that board were 5/8 inches, and the indentations were approximately 1 inch long by a quarter of an inch wide, and about an eighth of an inch deep.

Q. And then you made, you say, two other submissions to the Bureau of Standards before you finally sub-
5799 mitted the pattern of Exhibit 54? A. Yes, that is true.

Q. And can you state whether you understand that your board has passed the one-hour fire test?

Mr. Bromley: I object to that as immaterial and incompetent. It seems to me that the report of the Bureau of Standards on the test is the best evidence.

Justice Stephens: His understanding whether it passed is not competent. If he has seen the fire test and seen his board stand up against fire for a given length of time, and can personally testify that it did stand up within his own knowledge, he can testify as to that; but as to whether it has passed some test of the Bureau of Standards would have to be shown by the Bureau of Standards report.

By Mr. Steffen:

Q. Did you witness any tests before the Bureau of Standards, Mr. Tice? A. No, I did not.

Q. Did you ever talk with the United States Gypsum Company in regard to perforated lath? A. No.

Q. Did you ever talk with Mr. Knode? A. Oh, yes. Yes, I talked to Mr. Knode.

Q. With regard to what matter, Mr. Tice? A. With regard to a license agreement on perforated lath.

5800 Q. Can you fix the time, approximately? A. It was in the fall of 1937, I believe, about the middle of the month of September.

Q. And how was the meeting arranged, where was it held? A. The meeting was arranged by a telephone ap-

pointment made by Mr. English of the United States Gypsum Company.

Q. Who was Mr. English? A. He is the District Manager for the United States Gypsum Company in California.

Q. And where was the meeting held? A. At the office of Schumacher Wall Board Corporation in Los Angeles.

Q. Were you present? A. Yes.

Q. Who else was present? A. Mr. Knode, Mr. English, Mr. A. R. Moylan, and myself.

Q. I neglected to ask you earlier, what is your office with the company, Mr. Tice? A. My position?

Q. Yes. A. I am Secretary and Assistant Treasurer.

Q. Now, will you tell us what transpired at this
5801 meeting? A. Mr. Knode remarked that he was informed, and was of the opinion, that we were infringing some of United States Gypsum Company's patents.

Q. Did he mention the perforated lath patent? A. Yes, he particularly mentioned the perforated lath patent, and he said that in view of the alleged infringement, he thought we should execute a license agreement.

Justice Jackson: That you should execute it, or that they should execute it?

The Witness: That we should accept one.

By Mr. Steffen:

Q. What was said, if anything, to Mr. Knode? A. We told Mr. Knode that we were of the opinion that we were not infringing any of their patents.

Q. And did you take out a license? A. We did not.

Q. Was there mention made, in the conference, of a foam process? A. Yes.

Q. What was the conversation, if any, concerning that?

Mr. Bromley: I object to that as immaterial, in addition to the general objection which I already have noted in the record.

Justice Stephens: Read the question. I wasn't
5802 quite able to hear it.

(The question was read by the reporter.)

Mr. Bromley: The ground of that additional objection is that the only charge in the complaint, as to which this evidence could be material, that is, evidence from Mr. Tice and what was done on the Pacific Coast, relates to the perforated lath patent, because there the complaint charges that the defendants, or some of them, had advice that it

was invalid. Now there is no such charge in the complaint as to the Roos foam patents, and testimony with respect to those patents, in this connection, is immaterial to any charge in the complaint.

Mr. Steffen: We make the same point, Your Honor, here, also, that under the complaint there is a charge that not only the perforated lath licenses, but also the foam and the starch licenses, were obtained or taken under subterfuge. That is in paragraph 46. It is the contention, as I understand it, of the defendants, that they were strictly bona fide, and they state in their answers that they were taken as bona fide license agreements, and necessary agreements.

It is an issue, as we see it, whether or not it wasn't quite possible for a company to operate successfully not using the foam process. Therefore, it seems to me that on much the same theory, we can offer the evidence of the Schumacher people as to the form of board they made,
5803 and have this witness state whether they did or did not use the foam process.

Justice Stephens: We will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5804 Justice Stephens: With respect to the last objection before the Court, I might say this, Mr. Steffen. Of course we don't expect you to prove your case entirely out of the mouth of one witness, or from one witness by one sentence, but the theory under which we received this evidence I thought we made clear, concerning perforated lath, which was that it might be some evidence—we are not making any comment on weight—under the issue of subterfuge, and lack of bona fides in the license agreement, to show that a large amount of perforated lath was being made and sold without protest by USG.

Now unless you intend to show that this company also made something in the nature of the foam process board, and sold that on a large scale, I should think there might be some doubt about the admissibility of the answer to this particular question.

Mr. Steffen: My thought is to show that they sold the board they made in competition with Certain-teed, National and U. S. Gypsum, in California, and that they have been, throughout this period, making their own board without any licenses from USG.

Justice Stephens: You mean a board which has the qualities of the foam process board?

Mr. Steffen: It has qualities that allow them to compete with the foam process board.

5805 Mr. Bromley: You mean by that, Mr. Steffen, that it does not have the light-weight quality and other advantages of the board manufactured by the foam process?

Mr. Steffen: It isn't as light as the board which USG makes.

Justice Stephens: We will permit the question to be answered, subject to a motion to strike. But it seems to me that as you have now stated it, you are in danger of invading your own theory. Your own theory of the admissibility of this evidence with respect to perforated lath was that the perforated lath was made, in other words, lath which has holes in it and has the claimed qualities of perforated lath, notwithstanding the absence of a license, that it was made and sold in large quantities by this company, and that there was no protest by USG, and no infringement suit; and therefore that is some evidence as tending to show that USG did not have any faith in its own patents. That is the theory that you select to bring this evidence in on. Now it seems to me that consistently you ought to be offering to prove that there was a board something in the nature of the foam process board, made by this company and sold without protest by USG.

But we will hear your evidence, subject to a motion to strike if it appears not to be relevant on your theory.

Justice Jackson: You are not offering this, on 5806 that particular theory, are you?

Mr. Steffen: No, not on that theory at all.

By Mr. Steffen:

Q. Was there any question concerning the foam process during your conference with Mr. Knode? A. Mr. Knode made the statement that he thought it would be to our advantage to take out a license agreement on the foam process.

Q. And what did he say was the advantage? A. That the advantage would be lightening of the board, thereby saving freight charges and saving materials which would go into the manufacture of the board, principally gypsum.

Q. Did you understand also from Mr. Knode's offer, that there would be price-fixing?

Mr. Bromley: I object to his understanding as incompetent.

Justice Stephens: Objection sustained. State what was said. Say what else he said, if you will, please.

The Witness: He offered then to send us a detailed estimate of what these savings would amount to, which he did, by letter.

By Mr. Steffen:

Q. Did he make an offer of a form of contract to you? A. Yes.

Q. How many or what contracts were offered? A. There were two forms of license agreement, one of
5807 them containing a number of patents, including the foam process.

Q. And the other? A. The other one related to the perforated lath.

Q. And did those contracts, as offered to you, provide for price fixing, do you remember? A. They contained a clause retaining the right by the licensor to fix minimum selling prices.

Q. Now I want to show you what has been marked Government's Exhibit No. 604 for identification—

Justice Jackson: (Interposing) We do not have those exhibits, do we, Mr. Steffen?

Mr. Steffen: No, your Honor, you do not have that exhibit. I just barely got the photostating back.

Justice Jackson: Have the defendants seen them?

Mr. Steffen: No, they have not.

(The document referred to was marked Government's Exhibit No. 604 for identification.)

(Photostatic copies of Government's Exhibit No. 604 for identification were handed to the Court and to defendants' counsel. A copy was then handed to the witness.)

By Mr. Steffen:

Q. This purports to be a letter signed by Mr.
5808 Knode, addressed to Mr. Moylan, of the Schumacher Wall Board Corporation, under date of October 1, 1937. Have you examined Government's Exhibit No. 604, Mr. Tice? A. Yes.

Q. Is that a letter which you received? A. Yes, it was received by the Schumacher Wall Board Corporation.

Q. Now did your company subsequently take out a

license under the foam patent or the perforated board patent from USG. A. No sir.

Q. Have you ever taken out a license from USG? A. No sir.

Q. I notice that Government's Exhibit No. 54 has a covered edge. When did you start making a covered-edge board?

Mr. Bromley: I object to that—in addition to my general objection—on the ground that there is no charge in the complaint with respect to any knowledge, or rather any advice to any of the defendants, as to invalidity of the covered-edge patent.

Justice Stephens: Well, in view of the theory under which this evidence is being offered and received, that objection is overruled.

By Mr. Steffen:

5809 Q. You may answer. A. In 1936.

Q. You started to make the covered-edge board in 1936? A. Yes sir.

Q. Will you state, Mr. Tice, how much your board weighs, your 3/8" board, per 1000 square feet? A. The 3/8" wallboard weighs approximately 1800 pounds per thousand square feet.

Q. And what does the 3/8" lath weigh, as you make it? A. 3/8" lath weighs about 1750 pounds per thousand square feet.

Q. And can you state what you use to make the core of your board, now? A. We use gypsum and sawdust.

Q. And about what percentage of sawdust, or how much? A. About 35 pounds per thousand square feet.

Q. 35 pounds of sawdust? A. Yes.

Q. What would that be in terms of cubic feet? A. That is about three cubic feet.

Q. And that would displace how much gypsum, by weight, approximately? A. Probably 75 pounds.

Q. And do you use any other ingredients in your composition of the core? A. Yes, we used processed corn flour.

5810 Q. And how long have you been using that? A. Since the latter part of 1928 or the first of 1929.

Q. And in what proportion? A. In the 3/8" board that runs about 10 pounds per thousand square feet.

Q. And the purpose of using that is what? A. The

purpose is to form a binder and secure adhesion of the paper to the core.

Q. Are you familiar with the USG patents covering the making of wallboard? A. I don't know what patents you refer to.

Q. I think that was a very broad question.

Are you familiar, for example, with a machine patent, the Utzman Patent No. 1,330,413?

Justice Jackson: For a machine?

Mr. Steffen: For a machine for forming a closed-edge board, yes.

The Witness: I have read that patent many years ago.

Justice Stephens: Are you an engineer?

The Witness: No, I am not an engineer.

Justice Jackson: Are you a lawyer or a patent lawyer?

The Witness: No sir.

By Mr. Steffen:

Q. Did you have any advice from counsel concerning the way you manufactured board, as to whether it
5811 might be an infringement of USG Patent No. 1,330,-413?

Mr. Bromley: I object, unless it be shown whether it was in writing or not.

By Mr. Steffen:

Q. Did you have any oral or written advice of counsel concerning Patent No. 1,330,413? A. Yes, we had oral advice.

Q. And what did your counsel say?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: What is the question which was first stated before the objection was made as to whether or not it was oral or written. Read that question.

(The reporter read the question as above recorded.)

Justice Stephens: That relates to the closed-edge board, does it?

Mr. Steffen: That is right.

Justice Stephens: What is the theory of that?

Mr. Steffen: It has to do with machine. I think this is all substantially on the same theory, that is that the defendants in this case are contending that among other things they needed Patent No. 1,330,413, which was the machine patent, and we have on the stand Mr. Tice, whose company has made a closed-edge board since, I think he said, 1936, and we expect to show that that was made properly, not-

withstanding the Utzman Machine Patent.

5812 Justice Jackson: On the same machine?

Mr. Steffen: No.

Justice Jackson: On a different kind of machine?

Mr. Steffen: Yes—indicating that it was not a necessary patent at all.

Justice Stephens: Then your theory here is the same as with respect to the perforated lath?

Mr. Steffen: Substantially the same, yes.

Justice Stephens: The objection is overruled.

Mr. Steffen: You have told us that you did have advice from patent counsel as to whether your machine for making folded-edge board, closed-edge board, constituted an infringement of the USG patent. Can you state what your counsel advised you on that point?

Mr. Bromley: I object to that as immaterial and incompetent. There is no issue here as to what his counsel advised him.

Mr. Steffen: I think that may be properly withdrawn, your Honor.

By Mr. Steffen:

Q. You did, as I understand your testimony, after receiving advice from your counsel, proceed to make a machine for turning or folding the edge, so as to put out a closed-edge board, is that correct?

Mr. Bromley: I object to that as incompetent, because it is a question which creates an inference which is

5813 not warranted, as to what the advice was.

Justice Jackson: Ask him what he did.

Justice Stephens: The objection is sustained. Ask him what he did.

By Mr. Steffen:

Q. What did you do with regard to making a closed-edge board in 1936? A. We built the machinery necessary to make it, and started making it.

Q. Did you ever receive from counsel for USG any notice of an infringement of Roos Patent No. 1,938,354? A. Yes.

Q. Did they ever bring suit against you?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: We will receive it under this general theory of subterfuge. The objection is overruled.

The Witness: No, they never did.

By Mr. Steffen:

Q. Your company is the owner of a Makowski Patent, is it not? A. Yes.

Q. Is that patent No. 1,349,778? A. I don't remember the number..

Q. I show you a soft copy of what purports to be Makowski Patent No. 1,349,778, which I ask to be
5814 marked for identification as Government's Exhibit No. 605.

(The document referred to was marked Government's Exhibit No. 605 for identification.)

(Government's Exhibit No. 605 for identification was handed to the witness.)

By Mr. Steffen:

Q. I will ask you if that is the patent which your company owns?

Mr. Bromley: I object to that as immaterial, in addition to the grounds that I have already stated.

Justice Stephens: What do you intend to prove by the introduction of the Makowski Patent? Is that on perforated lath?

Mr. Steffen: Yes, your Honor, issued in 1920.

Justice Jackson: It is no longer a live patent?

Mr. Steffen: No, it has expired.

Justice Stephens: Well, I am again puzzled, Mr. Steffen. I thought the theory on which you were introducing this evidence with respect to perforated lath was that this company felt entirely free to make it without patents, and therefore that that was some evidence that USG did not have any faith in its own patents.

Now you are going to prove that the Schumacher Wall Board Corporation made board under a patent, apparently.

5815 Mr. Steffen: Your Honor stated that that was our position, that it was a question of whether or not the United States Gypsum people had any faith in their own patents or not. That was not quite the way—

Justice Stephens: (Interposing) Then I think you are under an obligation to tell me so, Mr. Steffen, because I am trying hard to make rulings clearly and consistently, and to give full effect to any proper theory that the Government has, and if I misstate your theory, you ought to tell me.

Mr. Steffen: I am now doing the best I can.

Justice Stephens: Very well.

Mr. Steffen: While it might also show that the United States Gypsum Company didn't have faith in their patent—and I think it does as respects the perforated lath patent of USG—the theory is that the defendants, plus USG, and particularly Certain-teed, didn't care whether it was valid or not valid. They were primarily interested in stabilizing the market, and therefore they said, "Why should we even bother?"

As Mr. Spencer testified yesterday, the Certain-teed people never even made any tests to see if they could avoid—or make board, which didn't come within the terms of the Roos Patent. They said in effect, "We would very much appreciate, for business reasons" (I am speaking generally) "to go under the patent and have the
5816 advantage of price control and a 25-cent advance."

Now that, as we see it, is what the circumstances would indicate.

Now here is a company which has had a patent since 1920 covering a perforated board, which we will be able to establish by calling Mr. Ingberg from the Bureau of Standards, does pass the Bureau of Standards one-hour fire test.

I think that Mr. Tice will tell us that he has never been approached at any time by anybody to take a license under the Makowski patent—indicating, as we see it, that the defendants were not very much concerned, either on the one hand in getting a patent already in existence which would not require price fixing, or making a board which didn't come within any patents. They were primarily concerned, as we see it, with price fixing.

Justice Stephens: Well, I don't think now that I did misstate or misunderstand your theory.

Mr. Steffen: Well, I hope not.

Justice Stephens: As I understand still, the theory of the introduction of this evidence with respect to perforated lath is that since this company made, freely, large quantities of perforated lath of assertedly the same substantial qualities as the perforated lath of these defendants, and that the defendants did not protest, and USG didn't protest, that that was some evidence that the defendants,
5817 and USG, did not believe in their patents.

Now the question we have before us is whether or not this Makowski Patent should be received in evidence, under which patent some form of perforated lath could be manufactured. That is the point that is troubling me now,

because it doesn't seem to me to be consistent with your own theory.

Take an illustration, clearly out of the field of this case, for instance, showing the trouble that I have in my mind, where one person, a manufacturer, has a patent, or a patent license, to manufacture a form of shoe device called buttons, shoe buttons, and he goes ahead and manufactures the shoes which contain those buttons. Is it any evidence that he doesn't believe in that patent, that somebody else has a patent who manufactures shoe laces?

Mr. Steffen: No, your Honor.

Justice Stephens: They both serve the same function, they both close up the fronts of shoes.

What does it prove in the way of bad faith on the part of one man who manufactures under his patent, that somebody else manufactures something else under a different one?

Justice Jackson: With respect to this patent, Mr. Steffen, isn't what you are attempting to show simply that the Schumacher Company made perforated board during the life of the patent, in accordance with the patent, and since then they have still been making it, although the patent has become public property?

5818 Mr. Steffen: Practically.

Justice Jackson: Now what inferences may be drawn from that, or what weight may be attached to it, would come later. That is the way I see it.

Mr. Steffen: Yes sir.

Justice Stephens: Well, my colleagues are of the view that the Makowski patent testimony may come in, subject to a motion to strike if its relevancy and materiality does not eventually appear. I think it would be consistent, myself, to continue to show, as you have already shown under the theory on which we have admitted this evidence, that large quantities of perforated lath were made without reference to patents. But I cannot myself see yet how it proves any bad faith on the part of the defendants to prove that somebody else was manufacturing similar material under a different patent.

But I defer to the views of my colleagues, and you may proceed with the examination.

Justice Garrett: May I make this statement in view of the statement of the presiding Judge?

Justice Stephens: Certainly.

Justice Garrett: I don't mean to indicate, by admitting this evidence, that I think it shows any bad faith. That is a question to be determined later on, and I wouldn't wish it to be thought that in agreeing to its admission, I in any way think it proves anything.

5819 Justice Stephens: I didn't mean to give a mis-impression of my colleagues' views. I simply meant that as I understood my colleagues' views, they thought it might have some tendency or some possible relevancy on that theory, and that I was not able to see it so far as the Makowski Patent is concerned. I have concurred in their rulings so far as your right to prove wholesale manufacture of perforated lath without reference to a patent.

Mr. Steffen: May I say about ten words in regard to your Honor's illustration regarding the shoe buttons and shoe laces?

Justice Stephens: Yes.

Mr. Steffen: Those I would regard as quite different things.

Let's go back to Mr. Bromley's illustration last night of a tungsten filament lamp and an aluminum filament lamp.

Assuming that they are equally good lamps, starting with that assumption, if it can be shown—this is an argument on relevancy—that the industry, all of the people making lamps, decide, "Well, let's take the tungsten filament lamp because we can fix prices on that," and the aluminum filament lamp is held by somebody else, and they say, "We will just squeeze them out,"—I would say that that would be definite evidence to show that they picked the tungsten filament lamp rather than the aluminum filament lamp, for purposes of getting together.

5820 In other words, if a group get together and suppress one and fix prices on another, it seems to me to be very good evidence of subterfuge.

In the present case the Makowski Patent was called to the attention of Certain-teed by Mr. Spencer, and it appears in his letters which were admitted yesterday.

I would like to ask the witness a question now.

By Mr. Steffen:

Q. Mr. Tice, did anyone ever apply to your company for a license under the Makowski Patent? A. No.

Q. Anyone at all? A. No.

Mr. Steffen: I wish to offer now—

Mr. Bromley: (Interposing) Just a moment, before you proceed, Mr. Steffen, did I understand you correctly to say that you represented to the Court that Mr. Ingberg of the Bureau of Standards would testify that lath made under the Makowski Patent passed the one-hour fire test?

Mr. Steffen: I will have Ingberg state that Government's Exhibit No. 54, or lath made according to that description—I don't know whether Mr. Ingberg can testify as to whether it was made under one patent or another, I don't think he is a technical man on that—but he will testify to the thickness of the lath, the spacing of the
5821 holes of the sample which was submitted by the Schumacher Company, and will state that it passed the one-hour fire test. I have here the report of the Bureau of Standards.

Justice Stephens: To pursue your illustration a little further, just for the purpose of testing out your theory and getting it clear in my mind, because I am afraid it isn't yet, and I want you to have every opportunity to convince me—as I understand your last statement, you contend that if there was a patent on an aluminum filament for incandescent lamps, and also a patent on a tungsten filament for incandescent lamps, the fact that a group of persons got together and took licenses under the tungsten filament patent would be evidence that they were taking it for business, rather than patent purposes?

Mr. Steffen: May I make this point—

Justice Stephens: I want to ask a further question. Suppose that one group took licenses under the tungsten patent, and another group took licenses under the aluminum patent—which group would you say then was acting under subterfuge?

Mr. Steffen: I would say this, your Honor, that we are getting out into territory that the Courts have not decided, or not ruled upon.

I start with what I understand is the law as stated by the General Electric case, which had to do, as the Court there said, with patents which completely monopo-
5822 lized the making of a filament lamp of that general type. The difference between the old carbon filament lamp and the tungsten filament lamp was the difference between the horse and buggy and the automobile, practically.

So it was an entirely new basic field. And in that situation the Court said that where you have that type of pat-

ent, and that is the only one that is available, under the facts of the case, price fixing there was held permissible.

Now, we will, at some later time in these proceedings, argue in detail—I think Mr. Bromley will—the variances between the General Electric case, and one very sharp variance in this case, as we see it, is that there are a lot of other patents that were available, and that the patents upon which the defendants were operating were not basic in any sense.

I think that becomes a very important factor, because the moment you get the whole industry together under any patent, the argument can certainly be made from that circumstance, which was not true in the General Electric case, that they chose that with the idea of getting together, while they might have taken one, two or three other patents and stayed in a competitive field.

Justice Stephens: Well, I perhaps am leading the argument too far afield. I thought what the Court held in the General Electric case—I will try and hold my mind open to further persuasion on the final hearing of arguments in this case—but I thought that what the Court held in the General Electric case was that notwithstanding that it was a basic patent and covered the entire manufacture at that time, and notwithstanding that the industry was largely monopolized in the manufacture under the tungsten patent, that still price fixing was valid.

5823

Mr. Steffen: My motion is just the reverse, your Honor, that inasmuch as they did have a good basic patent covering the process, going along to protect it, that they might fix prices.

Justice Stephens: Your contention necessarily leads you, then, does it not, to the proposition that there can't be any valid licensing or price fixing or royalty collecting upon anything except a basic patent; that no improvements can be licensed and price-fixed?

Mr. Steffen: Well—

Justice Jackson: You are going to argue this later on, aren't you?

Mr. Steffen: Yes, your Honor.

Justice Jackson: Then why spend too much time on it now?

Justice Stephens: I apologize to my colleagues. Perhaps I am asking too many questions at the time, but your evidence is being offered, as I understand it, under some theory with respect to the meaning of the General Electric case.

Mr. Stephen: That is right.

5824 Justice Stephens: Since I have to take the major responsibility in announcing the rulings, I would like to know what the theory is, and I still don't get it, and I still don't get how the fact that these people were manufacturing under the Makowski Patent proves anything with respect to the subterfuge of the defendants in connection with the Roos perforated lath patent, but I again defer to the views of my colleagues that it may have some tendency to prove subterfuge, and therefore you may proceed.

I apologize for taking so much time, perhaps unnecessarily.

Justice Jackson: I might put this one line into the record. I think I have made myself perfectly clear, but I wish to again state that the fact that I consider this to be properly admissible does not mean for a second as to what it proves in my mind. I don't know, and won't know until later.

Mr. Steffen: We offer Government's Exhibit No. 54, which is the sample of the perforated lath.

Mr. Bromley: I object to it as immaterial.

Justice Stephens: Objection is overruled. It will be received in evidence.

(The sample referred to was marked Government's Exhibit No. 54 for identification.)

Mr. Steffen: We now offer Government's Exhibit

5825 No. 604, Mr. Knode's letter, and I want to offer it on a somewhat different ground, which ground I will now state.

Mr. Knode's letter is a statement to the effect that under the foam process it is possible to make savings greater than the amount of royalty which he is charging. That same point came up in Mr. Avery's statement to the prospective licensees in May, 1929, and I think it is material to get this as a further admission on the part of United States Gypsum Company that in their view, when they were offering, in May, 1929, the foam patent, that it did not constitute any ultimate loss to the licensee, and that has a very definite bearing, as I see it, upon the nature of their offer, and on the showing or possible showing there of an agreement among the parties that, "Here is a good patent upon which we can fix prices, and which won't cost us anything after we take our savings."

Mr. Johnston: If the Court please, I hardly know what to say. I haven't seen this exhibit. I asked the Clerk yes-

terday if there were any exhibits, and he said there were none.

Mr. Steffen: That is right.

Mr. Johnston: I asked Mr. Steffen if there would be any exhibits, and he said there would be none. And now they are talking about some kind of a letter, or an offer, with the witness on the stand who says that he, like Texas, didn't take out this license. I don't know what position it puts us in.

5826 I don't want to be pestering counsel and the Court here so many times about the privilege of seeing these exhibits, so I think I will just let the record show my objection, a running objection, to the offering of any more exhibits of any kind by the plaintiff until I have had an opportunity to examine them.

Justice Stephens: Well, the Court has made a definite ruling that it will not consider or take into evidence exhibits that defendants' counsel haven't had an opportunity to examine. If you haven't seen this one, you can take your time now and look at it.

Justice Jackson: Have you seen this, Mr. Johnston?

Mr. Johnston: No, I have no idea what it is.

Justice Jackson: Then you may take my copy.

(Justice Jackson's copy of Exhibit No. 604 was handed to Mr. Johnston.)

Mr. Johnston: They take one set and give it to principal counsel, and of course I wouldn't take the responsibility of taking it away from him, and then they offer it in evidence here. That has happened at least twenty times in this trial, and the Court has admonished counsel for the plaintiff about it, but we get no results.

So I am just going to let my running objection stand in the record here, for whatever it may be worth.

Justice Stephens: That objection may be recorded,

5827 and if you will call to the attention of the Court the fact that you have not seen an exhibit, or a photostatic copy of it, the Court will not act on it until you have seen it and have had adequate time to examine it.

Mr. Steffen: I want to say, your Honor, that I think we have done a relatively good job in getting a large number of exhibits photostated. We have no purpose at all in trying to have exhibits admitted which have not been examined by counsel. As I stated to your Honor this morning, this exhibit got tied up in our photostating department. We cannot get these things through just as quickly as we would like to have them.

Justice Stephens: We understand that, Mr. Steffen, there is no culpability involved, I assume, but nevertheless the defendants have a right to look at these exhibits before we take them in evidence.

Mr. Steffen: We certainly agree to that.

Mr. Johnston: (After examining exhibit.) I want to also add, on behalf of Texas, our objection, because this has no relevancy or materiality, and could not in any manner be binding upon Texas.

Justice Stephens: Well, it is received in evidence under the general theory that one conspirator, if charged to be a conspirator, is bound by the acts or declaration of another in furtherance or execution of the conspiracy. It is received in evidence, subject to the usual reserva-
5828 tion with respect to declaration of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 604 for identification, was received in evidence.)

Mr. Bromley: As I understand it, this Exhibit 604 is offered under some special offer which, as I understand it, is that it is because the licensor offered a license to a licensee and told him he could save money if he took the license, even though he paid the royalty—that then the price-fixing clause in the license became unlawful.

Mr. Steffen: I would state that a little differently—

Justice Garrett: (Interposing) But that does state the substance of what you said, doesn't it, the theory upon which you presented it?

Mr. Steffen: If you put it in the context of Mr. Avery's statement in 1929, your Honor, yes.

Justice Garrett: Now I thought so, and I had intended to make this statement, and I wish it to stand, so far as I am concerned, for others. The fact that we may admit some evidence here does not commit the Court, or certainly does not commit me, to the adoption of the theory upon which counsel may state that it is offered, and I want to make that clear. We may have an entirely different theory as to why it may possibly amount to something.

5829 Justice Stephens: Well, that is true. I think we all agree to that.

Of course a trial court is always under this difficulty, gentlemen, as you must well know from your experience as trial lawyers. If the substantive law of a case can be settled on a motion to dismiss the complaint, or on demur-

rer, then, if all of the substantive law can be settled in that manner, you don't get into these difficulties as to whether evidence is admissible or inadmissible, depending upon the substantive law.

But where there is a constant debate between counsel throughout the case as to what the substantive law is controlling the case, it is pretty difficult to make rulings with absolute finality where the admissibility of evidence depends upon substantive law.

We have to give each side a chance to present the case according to their own theories, and then hear the theories argued at the close of the case.

Mr. Steffen: Has Government's Exhibit No. 605 been admitted?

Justice Stephens: It has not been offered, as yet.

Mr. Steffen: Then I will offer it at this time.

Justice Stephens: That is also received, and the objections of counsel are overruled.

5830 (The document referred to, marked as Government's Exhibit No. 605, was received in evidence.)

Justice Stephens: You may cross-examine.

Cross-Examination

By Mr. Bromley:

Q. After you got USG's notice of infringement of the Roos perforated patent, you quit making that kind of lath, didn't you? A. Temporarily.

Q. Well, you didn't resume it again until after USG came out there in the market itself, did you? A. They were in the market before we ever made it, I believe, with that lath.

Q. After you got USG's notice of infringement of the Roos perforated lath patent, you stopped making the kind of lath you were making at that time, didn't you? A. Yes sir.

Q. Now you say that thereafter you resumed making perforated lath of some kind, do you? A. Yes.

Q. But the kind that you resumed with was a different kind, wasn't it? A. Yes.

Q. When you talked to Mr. Knode about his offer
5831 to you of two forms of license, or thereafter, you knew that the price-fixing provisions contained in the forms were limited to the right of USG to fix the prices of such board and lath as you should manufacture under

the patents licensed to you, didn't you? A. Yes, that was my understanding.

Q. Now, did you have any discussion with Mr. Knode at all about this price-fixing clause in the proposed form of license? A. None whatever.

Q. And isn't it the fact, Mr. Tice, that you and your company were willing to take a license under the Roos perforated lath patent, but it was USG's position that you could not have it unless you took a general license too? A. No, that is not correct.

Q. That is not correct? A. No sir, it is not correct.

Q. In other words, you were unwilling to take a license? A. Yes.

Q. Up until 1936, isn't it the fact that the principal product of your company, which you have referred to as perforated lath, was really indented lath? A. Yes, the principal part of our business up until that time was indented lath.

Q. Now indented lath is lath which has no perfora-
5832 tions in it at all, in the sense of a hole going completely through it, isn't that right? A. Yes sir.

Q. And indented lath is a lath product in which, by some machine or other, a little gouge is made on one side of the lath which penetrates the paper and core to a depth of an eighth of an inch, or less, isn't that right? A. That is right.

Q. That is just a little deep scratch or gouge on the surface of the lath, isn't it? A. No, the paper is pushed down into the core.

Q. But it is just a little gouge on one surface? A. That is right.

Q. And your company sold that under what name? A. Grip Lath.

Q. And that is what you have referred to, and what is frequently referred to, as perforated lath, as a general term? A. No, I wasn't referring to the indented lath when I was speaking of perforated lath.

Q. When you answered Mr. Steffen that you made perforated lath for this long time, you weren't referring to indented lath? A. No.

Q. Well, the fact is that this indented lath, up until
1936, was your principal product, isn't that right?
5833 A. Yes, that is right.

Q. You had a patent on that indented lath, didn't you? A. Yes sir.

Q. And you made that lath under the patent, didn't you? A. Yes sir.

5834 Q. Isn't it the fact, Mr. Tice, that the only perforated lath that you made prior to 1936, in the sense of a hole completely through the lath, was a lath which had 3/8 inch holes on 2-inch spacings, and you only made that on one or two occasions for one or two accounts? A. That is not entirely correct.

Q. Will you tell us what the facts are? A. The only perforated lath that we made with holes 3/8 of an inch in diameter would be from 1926 until about 1950. That was the principal product that we made during that time.

At about 1930, the indented lath became the principal product, and the production of the perforated lath dropped off to a very small amount.

Q. The perforated lath which you made during that period had 3/8 inch holes, didn't it? A. That is correct.

Q. And 2-inch spacings? A. No, they were spaced about 3-1/2 inches horizontally and about 2 to 2-1/2 inches vertically.

Q. Now, the purpose of these types of indented or perforated lath, out in your country, was to comply with a law requiring mechanical keys to exist between plaster and lath, in view of the prevalence of earthquakes out

5835 there; isn't that right? A. I believe that that is correct.

Q. And your 3/8 inch lath that you made prior to 1930, as you have described it, had no fire rating at all, did it? A. Not the perforated lath.

Q. That is what I mean. A. That is right.

Q. When you say "not the perforated lath", do you mean that your Grip Lath did have a fire rating? A. Yes, it had a fire rating on a test conducted by Smith, Emery & Company, which was accepted in California cities.

Q. That, of course, was not a Bureau of Standards fire rating? A. No, it was not.

Q. And that fire rating applied only to your Grip or indented lath, and not to this perforated lath with the 3/8 inch holes; isn't that right? A. Yes, that is right.

Q. Now, USG introduced its perforated lath on the Coast sometime around 1932, didn't it? A. No, I don't think so. I think it was 1935.

Q. 1935? A. Yes.

Q. Well, prior to the time that USG introduced its perforated lath, did you ever know of or see a perforat-

5836 ed lath with 3/4 inch perforations entirely through the board, spaced on 4-inch centers in parallel rows,

which had a one-hour fire rating? A. No, I did not.

Q. You never made a closed-edge board until 1936, you say? A. That is right, 1936.

Q. And, of course, that was long after the expiration of the Utzman closed-edge patent, wasn't it? A. It was after the expiration of the original closed-edge patent.

Q. We know that here as the Utzman patent.

Now, is it true that you have never used the USG bubble or foam process? A. No, we have never used it.

Q. And your board is and has been heavy board; isn't that right? A. Heavier than United States Gypsum board.

Q. And isn't your situation with respect to the weight of the board somewhat different, on the Coast, because, generally speaking, your shipping distances are not long? A. Yes, that has a bearing on the matter, because our freight absorption is less because most of our business is concentrated in a small area.

Q. Isn't it your practice to make a thinner board
5837 than is used here in the East? A. Yes, we do make a 1/4 inch wallboard.

Q. Have you found it necessary, in the manufacture of your board, to use a starch derivative in order to secure bond? A. We use a processed corn flour.

Q. Which is a starch product, isn't it? A. Well, it is a converted corn flour which contains dextrin and some starch.

Q. You testified, Mr. Tice, at the beginning of your testimony today, I believe, that between 1936 and 1938, you made perforated lath with holes of various sizes? A. Yes, sir.

Q. And among the sizes which you listed, you said 3/4 of an inch; is that right? A. Yes.

Q. Now, isn't it the fact that during that period, 1936 to 1938, the only 3/4 inch hole perforated lath you ever made was for one special order? A. That is correct.

Q. And you thereupon received a notice of infringement from USG, did you not? A. That was in 1935 when we received the notice of infringement on some board which we had produced in October or November of 1935.

5838 Q. Well, was that board, of which you now speak, board with 3/4 inch holes in it? A. Yes, that was board with 3/4 inch holes.

Q. You made some of that for one order in 1935? A. That is correct.

Q. Then USG sent you a notice of infringement about it? A. Yes, sir.

Q. And you have never made it since? A. Not that same type of lath.

Q. That answer goes right down to the present time, doesn't it? A. Yes, sir.

Mr. Bromley: That is all.

Justice Stephens: Any further cross-examination by other defendant's counsel?

(No response.)

Justice Stephens: Any re-direct-examination?

Redirect Examination

By Mr. Steffen:

Q. You were asked one question, Mr. Tice, in regard to the distances that you had to make shipments, and you said that your area was a smaller area. What were you comparing that with, what were you comparing your area with? A. I didn't exactly say it was a smaller area.

5839 I said that the large percentage of our business was concentrated within a small area, within a 100-mile radius of Los Angeles.

Q. How far do you ship? A. We ship as far as Salt Lake City, that is about the farthest distance.

Mr. Steffen: I have no further questions, Your Honor.

Mr. Bromley: No questions.

Justice Stephens: May this witness be excused?

Mr. Bromley: Yes, Your Honor.

Mr. Steffen: Yes.

Justice Stephens: You may be excused, then, and the Court will take its noon recess.

(Witness excused.)

5840 Mr. Steffen: Before you take the noon recess, I want to make an explanation.

We are approaching the end of the Government's case, as I think we told you a while ago, and we don't have as many witnesses, because there aren't as many witnesses left. We had expected to have Mr. Dahlberg this week, and Mr. Dahlberg had to be excused. We had also expected to work in, if we had any blanks in our schedule, many of the exhibits which we have sent out to have admissions upon. Those reports, or returns, are just coming in, although we granted further extensions of time at the request of each of the defense counsel.

Therefore we are in the predicament of not having anything ready this afternoon. We will be ready tomorrow morning.

Mr. Oliver: If the Court please, Mr. Haydon, whom the Government has called as a witness, has been here since early yesterday morning. He is an employee of the Celotex Corporation. I am most anxious that certainly by tomorrow evening, when we recess until April 11th, Mr. Haydon be on and off the stand, and excused, so that there will be no necessity for him to come back.

I believe it is only fair to ask that Mr. Haydon be put on the stand this afternoon, rather than proceed with the introduction of documents, which can take place at any time, and do not necessitate a man traveling back and forth
5841 from Port Clinton.

Justice Stephens: Can you put Mr. Haydon on today?

Mr. Steffen: I went over part of Mr. Haydon's testimony last night, with Mr. Oliver present. As he knows, we asked to have Mr. Haydon here earlier in the week, so we could get prepared. We did that after we had cancelled Mr. Dahlberg's appearance, at Mr. Oliver's request. That left us in a jam, and we worked last night going over Mr. Haydon's testimony. I wouldn't feel justified in starting his testimony this afternoon. I hope that we may tomorrow morning.

Justice Stephens: How long will his testimony take when he gets on?

Mr. Steffen: It will take probably a day.

Justice Jackson: Can't you put him on this afternoon and examine him as far as you are prepared to go?

Mr. Steffen: I would rather not, your Honor.

Justice Stephens: There isn't any particular point in having a witness, whose proposed testimony hasn't been gone over by counsel, put on, because that doesn't ordinarily save time, either for the Court or counsel. But it seems unfortunate that he has to make two trips here.

Mr. Steffen: We agree with that.

Justice Stephens: If he is going to be on all day tomorrow it means that he will have to come back, does it not? Do you mean that you will take all day tomorrow on direct, Mr. Steffen?

5842 Mr. Steffen: I didn't mean to imply that he would be on all day on direct, but what I meant to imply was that we will be able to finish with him tomorrow, both

direct and cross. Of course that depends on the length of the cross-examination.

Justice Stephens: Well, all counsel can do is do the best they can.

Mr. Oliver: I think that Mr. Steffen could use some time today on the examination of Mr. Haydon, because he talked with Mr. Haydon last evening for about an hour and a half. Mr. Steffen has indicated that he has been delayed in this because Mr. Haydon arrived here only yesterday. I have a written statement here from Mr. Knuff requesting us to have Mr. Haydon here Wednesday morning, March 29th.

Now when we talked about Mr. Dahlberg, I told Mr. Steffen that Mr. Haydon had made his reservation to be here, and that was just about a day prior to the time he would have to take the train to get here, on the reservation I specifically had him arrange for, to be sure to be here on Wednesday, and it was my understanding from that conversation that he would go right ahead and be here Wednesday morning because he had a reservation, and it is hard to get reservations at this time, and from such a long distance, as we all know.

Justice Stephens: Would there be any possibility, Mr. Steffen, if we now adjourn until three o'clock this afternoon, of your putting Mr. Haydon on then? Would
5843 you have sufficient time between now and then to finish your preparation?

Mr. Steffen: It starts a new phase of the case, your Honor, and I would really feel not justified in putting him on. I understand that it is very awkward from Mr. Haydon's standpoint, but we have done our level best to meet everybody's convenience.

Justice Stephens: We think, Mr. Oliver, that we ought not to assume to compel the Government to put a witness on before they have had reasonable time to prepare their examination. It doesn't save time for anyone in the long run, and it appears that the Government is doing the best it can under the difficulties of a complicated case, with many exhibits and witnesses to deal with.

So we will try and finish with Mr. Haydon tomorrow, if we possibly can, but if not, he may have to come back.

We will now recess until tomorrow morning at ten o'clock.

(Whereupon a recess was taken from 12:20 p.m. until 10:00 o'clock a.m. of the following day, March 31st, 1944.)

5844 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Friday, March 31, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5847 I would like to make one brief statement, Mr. Steffen. I would like to ask you one question, just to clear up my own mind.

In reading over this record last night, and in re-reading some of the leading cases recently, I have begun to wonder if perhaps this is the nature of your contention with respect to the evidence we were discussing yesterday, and the covering patent aspect of the General Electric case to which you referred. Is this what you are contending: that in the situation in the General Electric case, the only patent available which would successfully manufacture the tungsten filament, or an incandescent light filament, was the one owned by the General Electric Company, and that therefore the taking of licenses under that patent is not subject to the inference that it was done for any reason except to obtain the benefit of the patent; whereas, as you contend with respect to perforated lath, if there were other patents—like the Makowski patent, and others to which you may have referred—under which perforated lath or board could be made, the fact that the licensee defendants in the instant case took their licenses 5848 from the USG rather than from some of these other patentees is some evidence that they took their licenses from the USG for the purpose of price fixing, because forsooth, they might not have had to pay royalties under the other patents.

Is that the nature of your contention?

Mr. Steffen: I think that well states the nature of our position on the subterfuge argument; and that, of course, was the basis upon which we were offering the testimony.

Justice Stephens: I see.

Well, I didn't clearly understand it yesterday, and I want to be sure I understand, if I can, the contentions of each side.

You might make a brief comment on that, Mr. Bromley—

Mr. Steffen: (Interposing) May I make one more point, in connection with that?

Justice Stephens: Yes.

Mr. Steffen: I want to make a point which I think Your Honors might well consider, too, that there are various types of patents. That is, there are basic patents, and there are slight improvement patents, and there are process or machine patents, so-called, and there are combination patents. The price fixing feature has been allowed most clearly in the case of basic patents. Where a patent holder simply has a machine patent or has a

process patent, we contend—and I think the defen-
5849 dants practically admitted—that you can not fix prices on the article made.

If you have a combination patent, that is, use several elements in one combination, the Mercoid case has now decided very clearly that there may be no control of sales policy, and certainly not of price fixing, of any element going into that combination—

Justice Jackson: (Interposing) Any unpatented element going into the combination?

Mr. Steffen: Yes. And that is material here, because the Roos patent on metallized lath is nothing but a combination patent. The Roos patent is not an article patent, it is just a combination patent.

So that the first point is subterfuge; and the second point is that apparently, as a substantive matter, there has to be a patent of a particular quality before—even though there were no subterfuge—they would be permitted to fix prices, in the face of the Sherman Act.

Justice Stephens: Do you wish to make any comment upon that contention at this time, so that the Court will hear what both sides contend with respect to it, Mr. Bromley?

5850 Mr. Bromley: Yes, may it please the Court.

I think I should advert to the fact that the Roos perforated patent, the Roos perforated board, and the perforated license—that whole subject matter is treated in the complaint under the heading of Subordinate Licenses.

We are not confronted with a situation here where the only patent involved in the suit is the Roos perforated patent, and where everything was done under that. Of course I think it is perfectly apparent that we could have fixed the price of the Roos perforated lath under the general license.

Now since it was, as we maintain, a product patent, not a process patent—it was a different type of lath—we chose to issue a separate license concerning it, and to reserve the price-fixing right in the separate license. But the price could have been fixed under the general license.

Justice Stephens: For the reason that it is, in addition to being perforated, a closed-edge board?

Mr. Bromley: For the reason that in addition to being perforated, the closed-edge patent having expired, it used many other important fundamental patents, such as the Haggerty starch patents and the Roos foam patents.

So that the situation does not justify, even in the light of the allegations of the complaint, the emphasis which the Government is putting, it seems to me, on the Roos patent, and on the Roos lath and on the Roos license,
5851 because in their pleadings they treat it only as a Subordinate License.

Now in what your Honor has said at the outset this morning, I don't see that that changes the problem any from the way you posed it the other day.

Suppose there were other patents under which an electric light bulb could be made—a different bulb, but still it gave light—it hardly seems to me that those facts will raise any inference that either one set of licensees or the other had a purpose to secure price fixing, rather than the patent use.

If you had two sets of patents covering two different bulbs, but the bulbs were substantially the same in so far as they were made of glass and brass and wire, and gave off light, I don't see how anybody can say that because one group of men took licenses under one patent, that it should be inferred that what they were after was price fixing just because there was another patent that covered the same thing.

Justice Jackson: You mean that that would not be a logical inference?

Mr. Bromley: Yes, and it would not raise any inference at all, it seems to me, and I cannot see what difference it makes whether one group of men paid royalties or whether they didn't. Normally, royalties are paid; normally, the licensee gets more, in value, than the royalty he pays—else he wouldn't pay the royalty.
5852 If I pay a royalty of one cent a bulb for every bulb that I manufacture, I must figure that the right which I get is worth more than one cent, or I wouldn't pay the one cent.

So that I don't see what difference it makes, or I don't believe the fact that one set of licensees must pay royalty, and the other set needn't pay any, or that one set must pay a higher royalty than the other, raises any inference one way or the other. That is a matter of bargaining between the parties, just like with the purchase of any commodity. A licensee buys a right, and what he pays for it is arrived at by bargaining.

So that I don't see that the issue is changed at all.

Justice Stephens: Well, thank you, gentlemen, for mak-

ing that statement. We are anxious to know what the contentions are on both sides as to each of these issues.

Call the next witness so that we can finish with him today, if possible.

Mr. Steffen: We would like to make a short statement, your Honor.

We have reached the happy stage where we don't have any more witnesses. We have practically completed the Government's case-in-chief. We had expected, and considered, with Mr. Haydon, the possibility of opening up an entirely different line of testimony. However,
5853 after very careful consideration we have decided that it will save the time of the Court, and make for a more orderly presentation, if we wait until after the defense has put on its case, and then we may or may not need to call Mr. Haydon at all. That is in the event, of course, that the defense puts on any case, in the event, in other words, that the case is continued after the Government rests.

Now having no other witnesses at this time, I want to make a short statement in regard to the week of April 11th. At that time we will have Mr. Dahlberg, who we were forced to continue—he was called for this week, but Mr. Adams and Mr. Oliver both asked to have Mr. Dahlberg put over until the next session.

We have also Mr. Stromquist who couldn't be here until the week of April 11th. We will also call Mr. Ingberg, who will give testimony concerning the fire tests on the National lath, on the Schumacher lath, and also on the USG lath.

Now I don't wish to be bound by just those three witnesses, as there may be one or two others, but I will say to the Court that that should—and as we now see it, will—complete the direct evidence of the Government.

Justice Stephens: You have also, have you not, some exhibits to offer, concerning which you requested stipulations of genuineness?

Mr. Steffen: Yes, your Honor, I want to make
5854 a comment on that.

In order to save time we sent out exhibits to three of the defendant companies. That would save calling, as we figured, several witnesses to identify the exhibits, and therefore save a great deal of time on the part of the Court. We have not yet received from Mr. Adams, of Certain-teed, the answers to our requests. We asked

him, as of March 6th, to give his return, and that has not yet been received. USG and National have both made their replies.

We would like again, as a matter of orderly presentation, to get those things together and organized, and I think we can put them before the Court in a very few minutes at the beginning of the week of April 11th.

Justice Stephens: Even if there are stipulations of genuineness and stipulations as to the facts, of course there ought to be some showing, as each exhibit is introduced, of its relevancy and materiality under the issues, so we will know the purpose that it occupies in the case.

Mr. Steffen: Yes, your Honor, so there may be an opportunity for objection, and a ruling thereon.

We also have another matter concerning our notices or requests to produce. If you will remember, on January 19th, at transcript page 2957, we raised the question of whether the defendants would produce certain matters,

5855 and in particular we asked to have each defendant give us the patent markings that they used, or had used, upon their board from 1929 to date. We have already received Mr. Lenci's patent markings, or rather Ebsary's patent markings, and have assurances from Texas that they will supply their patent markings. We also have assurances from Mr. Oliver that Celotex will furnish their patent markings in the near future. In order to get this matter cleared up we would like to have the defendants produce, as promptly as may be, those matters, so that we can clear that up the week of the 11th of April.

Justice Stephens: Can you do that, gentlemen, within the next week?

Mr. Bromley: Yes, your Honor.

Mr. Steffen: I have one other question. We have searched the record and we do not find a definite commitment on the part of the defendants on this matter. If you will recall, when the North Holston plant matter was before the Court, and the question came up of inter-company purchases, at one stage of the discussion I think Mr. Bromley said that he thought they could furnish us with the amounts of board which USG sold not only to Certain-teed, but to other companies. We would like to have those figures, simply for the purposes of showing the substantial quantity of board which was bought and sold between companies. I don't want it specific as to

amount, or as to year, but I would like to have the general amount, and if that could be produced by the 11th of April, we would like it.

5856 Mr. Bromley: That had to do only with metallized board, didn't it, Mr. Steffen?

Mr. Steffen: I think it had to do with all board, because the North Holston plant, you see, was buying their whole production of board, perforated lath, and so on.

Justice Stephens: That was the issue on which the majority of the Court ruled, in the reserved rulings, that you had a right to go into the alleged selling of purchased board, as distinguished from manufactured board, at bulletin prices?

Mr. Steffen: That is right.

Mr. Bromley: Well, I don't remember that we ever received any requests to furnish anything other than the figures with respect to metallized board, and I said then that I would initiate an investigation and see if I could find out what the figures were.

Mr. Steffen: That is right.

Justice Stephens: Do you want to make a request now for the figures on all purchased board?

Mr. Steffen: I should like to make a request now to be furnished with the figures which USG has concerning the sales of perforated lath, metallized board, and ordinary board, to licensees, by USG.

Mr. Bromley: That can only be done by checking the inventories, if it can be done at all.

Mr. Steffen: I don't want to get a precise in-

5857 voice check, which I think would be impossible, but I am very sure that the USG people have records to indicate the rough amounts that they have sold to licensees.

Mr. Bromley: We have no records of rough amounts; the only records we have are the invoices. However, I will look at it again. Now you want all board, is that right, at North Holston?

Mr. Steffen: Generally.

Mr. Bromley: We can't do that. What do you mean by "generally", everything that USG ever sold to another company?

Mr. Steffen: Yes.

Mr. Bromley: We couldn't possibly do that.

Mr. Steffen: All we want is just the ledger showing, which can be gotten up, I think, in very short order, through

the years, of the board sold to National, the board sold to Universal, and the board sold to each of the other companies.

Justice Stephens: Well, if the defendants can furnish it I am sure they will accommodate you. If they cannot, we can't, of course, compel it. It may not be possible to give it in view of the nature of the records and the extensive amounts involved.

Mr. Steffen: There is one other point that I wish to raise, if I may, and that is with respect to Mr. Dowd.

Justice Stephens: I was about to raise that matter myself. That is with respect to Exhibit 233?

5858 Mr. Steffen: Yes, your Honor.

We would like the record to show that we agree with Mr. Bromley that unless we can connect that matter up, we certainly ought not to call Mr. Dowd. All I can say is that we have not yet been able to get the connecting evidence which would justify us in asking to have Mr. Dowd called. If, in the next few days, we get that evidence, so that we feel justified, we will notify Mr. Adams.

Justice Stephens: Very well. Thank you for your frankness in that matter.

Mr. Johnston, do you have some matter to bring up?

Mr. Johnston: Yes, your Honor. Before we recess I want to make an inquiry. If we resume again on April 11th, when will the Court ordinarily take its next recess, if we go right along?

I make this inquiry because I have some other very pressing matters that I would like to readjust when I go home. I suppose, if the Government gets through at the time at which they indicated this morning that they would, that that would take up the week ending with April 14th. I suppose also that it is reasonably apparent to most all of us that at the conclusion of the Government's case there will be some motions filed for involuntary dismissals.

So I was just wondering what the Court's idea would be in considering those, whether the Court would

5859 want the briefs prepared and submitted prior to the argument, and then, after the argument the matter would be taken under consideration and decided before anything further would be done.

It is merely a matter of suggesting a schedule here now so that we may know what to do, both about this matter, and about other matters that we have. Therefore, I raise the question at this time.

Justice Stephens: Well, I don't quite see how it would be possible to fix a schedule. If the defendants are going to file motions to dismiss, and urge them, and in those motions discuss the record in detail, and discuss these questions of law that have been informally debated throughout the case, we would undoubtedly want the aid of written briefs before we determined them. As to how long it would take to argue the motions, or just when the Government's case will end, or when it would be within the proper power of counsel to submit briefs if we require them, I think it is impossible to say, Mr. Johnston. I don't see how we can make any prophesies.

Mr. Johnston: Well, if the case were to go in the same manner that it has been going on, and we would be putting on evidence yet in April, when would the next recess be? Would it be at the 28th of April, and if so how long would that recess last? I assume that we would recess on the 28th of April. In that event, when would we reconvene?

Justice Stephens: There would have to be a
5860 two weeks' session of the Court of Customs and Patent Appeals after that, so we would return here May 15th.

Mr. Johnston: That was particularly what I wanted to know about.

Justice Jackson: That is definite.

Justice Stephens: That is about all we can do, I suppose, at this time, by way of prophecy.

If there is nothing else, then, there will be an adjournment announced until the 11th day of April, at ten o'clock.

(Whereupon, at 10:40 o'clock, a.m., the trial was adjourned until Tuesday, April 11, 1944, at 10:00 o'clock a.m.)

5862 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

FILED Oct. 22, 1946, CHARLES E. STEWART, CLERK.

Chambers of Judge Harold M. Stephens,
United States Court of Appeals,
Washington, D. C.,
Thursday, April 6, 1944.

The above-entitled cause came on for further hearing at 4:00 o'clock p.m., pursuant to call, before Honorable Harold M. Stephens, sitting as the District Court of the United States for the District of Columbia (pursuant to Section 792, Title 28, U. S. C. A.).

5865 ERRATA SHEET

(Testimony of March 31, 1944.)

Page	Line	Correction
6141	5	Change "License" to "Licenses".
6137	3	Change "expresstion" to "expression".

5866 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Wednesday, April 12, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5867 PROCEEDINGS

Justice Stephens: In the last day's transcript, there was a small change at page 6141, line 5—the word "Li-

cense" at the end of the line should be in the plural, "Licenses".

Have counsel any corrections to suggest?

Mr. Bromley: May it please the Court, at page 6137, in the third line, there is another slight change. The word "expression" is misspelled in Justice Jackson's statement.

Justice Stephens: That change may be made.

Does the Government have any corrections?

Mr. Steffen: No, Your Honor.

Justice Stephens: Call your next witness.

Mr. Steffen: Mr. Ingberg.

Thereupon, S. H. INGBERG, called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Will you state your full name, please, Mr. Ingberg, for the record? A. S. H. Ingberg,—I-n-g-b-e-r-g.

Q. And what is your address, Mr. Ingberg? A. 7018 Hampton Lane, Bethesda, Maryland.

5868 And you are associated with the Bureau of Standards? A. Yes.

Q. How long have you been with the Bureau of Standards? A. Since 1914.

Q. What are your duties out there, Mr. Ingberg? A. I have charge of the fire resistance activities tests.

Q. Would you state briefly what those consist of? A. They consist in tests and standardization of tests relating to the fire resistance and fire hazard of materials, fire prevention, tests and standardization of requirements for equipment for detecting and extinguishing fire.

Q. Along in the period 1930 and 1931 and 1932, did you make any tests concerning gypsum board, fire tests, I mean? A. Yes.

Q. And can you state what tests you made at that time? A. In the period—

Q. (Interposing) Let's say 1930 to 1931? A. I will have to refer to my notes to get the dates right.

In the period 1930-1931, we made four tests with plaster on plain gypsum lath.

Q. By "plain", you mean not perforated? A. Not perforated.

5869 Q. Did you subsequently make some tests on perforated lath? A. Yes.

Q. Did you ever make any tests on perforated lath for the United States Gypsum Company? A. Yes.

Q. And for any other companies? A. Subsequent to the tests for the United States Gypsum Company, we made tests of the products of the National Gypsum Company and the Schumacher Wall Board Corporation.

Q. Going back to these tests in 1930 and 1931 on unperforated lath, did you ever make a report concerning those tests to a committee known as the C-11 Committee? A. Well, it was not a formal report. The results were discussed, I think, at a committee meeting.

Q. At about what time was that? A. I think that was in the fall of 1931.

Q. November 20, 1931? A. I think so.

Q. Did the tests on unperforated lath show that it could pass the one-hour fire test?

Mr. Bromley: I object to that as immaterial, and incompetent if the results of the tests were in writing. But I don't see what the materiality of that is to this case.

5870 Mr. Steffen: I offer it simply preliminarily. I wish to establish simply that the tests upon unperforated lath did not pass the one-hour fire test, and I will go on from there.

Justice Stephens: You mean all unperforated lath?

Mr. Steffen: The tests that Mr. Ingberg made.

(The Justices conferred.)

Justice Stephens: Perhaps I misunderstood you. Does this questioning go to perforated or plain lath?

Mr. Steffen: Plain lath.

Justice Stephens: I misunderstood you. I don't see the materiality of that.

Mr. Steffen: Simply as background to make a comparison between plain and perforated.

Mr. Bromley: If it has any materiality, we concede that plaster on plain lath did not pass the one-hour fire test.

Justice Stephens: If that is conceded, it takes that matter out of issue, and you don't need to make any proof.

Mr. Steffen: I would like to ask one further question.

By Mr. Steffen:

Q. How close did the unperforated lath come to passing the one-hour fire test?

Mr. Bromley: I object to that as immaterial, and also as

incompetent because calling for a conclusion.

5871 (The Justices conferred.)

Justice Stephens: Two of the Judges don't seem to see the materiality of it. If it is conceded that it didn't pass, what difference does it make, Mr. Steffen, whether it failed by a large or small measure, whether it got an A, B or a C?

Mr. Steffen: Well, I will go on from there, if I may.

Justice Stephens: Very well. Objection sustained.

By Mr. Steffen:

Q. You stated, Mr. Ingberg, that you made tests of the Schumacher board. Can you give us the dates? A. The dates?

Q. If you please, yes. A. Well, we made a number for Schumacher, following the other tests. I have the record of the four latest tests here.

Q. All right, can you testify from your own recollection as to when those tests were made? A. The first one I have a record of here—there were two, I think, before that—was May 20, 1936. That was a board that had both indentations and holes.

The next test was on September 9, 1936, also on a board with both indentations and holes.

The next test was on November 24, 1937. That board had holes only.

The final test was made on March 17, 1938, on a

5872 board with holes only.

Q. Now, will you describe the size and arrangement of the holes in the board? A. In the last two tests, or in the last test?

Q. In the fourth test merely. A. In the which?

Q. In the March 17th test.

Mr. Bromley: I object to that as immaterial.

Justice Stephens: Read the question.

(The record was read by the reporter.)

Justice Stephens: What is the point of your objection to that, Mr. Bromley?

Mr. Bromley: I don't understand what materiality it has to any charge in the complaint. Our patent was issued in 1933. Here are tests of another type of board in 1936, 1937 and 1938. I don't see what difference it makes whether they

passed the test or whether they didn't pass the test, whether they were patented or whether they weren't patented.

Justice Stephens: The theory that I thought you were introducing this evidence on, Mr. Steffen, was that if there were types of board, other than that licensed to the defendants in the instant case, which were equally satisfactory so far as the fire test was concerned, that it was some evidence of subterfuge that the defendants took out licenses on the perforated lath from United States Gypsum
5873 Company. Now if that is your theory, what materiality is there in going into these fire tests several years after the licenses were taken out?

Mr. Steffen: The first point is that the licenses were taken out in 1936, at different dates during that year. They were offered in 1936, and they were offered in 1938, a gratuitous license was offered in 1938.

The second point is that whether the Schumacher people finally got around to having their board tested until 1936 or not is more or less beside the point. They were making a board, as Mr. Tice testified last time, as early as 1924, which was perforated. So that there was a perforated lath on the market at the time which, as it is shown, in 1936 passed the one-hour fire test.

Justice Stephens: But if the defendants didn't know at the time they first took out these licenses that there was other board available which it was known would pass the fire test, what is the relevance on the subterfuge charge?

Mr. Steffen: I don't think it had passed the one-hour fire test until March 17, 1936—

Mr. Bromley: (Interposing) Do you mean 1938?

Mr. Steffen: March, 1938, yes.

The point I want to make on relevancy and materiality is that this board was on the market as a perforated lath from 1924 on. It was open to anybody to make a
5874 perforated lath certainly as late as 1938, and in fact earlier than that, because the National, I think we will show this morning, were making a perforated lath which probably did not come within the terms of the Roos Patent, at least it has been sold and has not carried a Roos Patent number.

We contend that the fact that there were at least two other forms of lath available to the industry at all times, which were shown in 1938 to be capable of passing the fire test, although they hadn't been shown to be capable of passing the test in 1936, is evidence from which the Court can

infer that the defendants did not have to take out a license under USG, with price fixing, in order that they could make a perforated lath which would pass the one-hour fire test, or any other test; and that therefore, it is open to the Court to infer that their primary interest was, as I think we have shown some evidence upon, to fix prices and to organize the industry upon the basis called for in the license under USG Patent No. 1,938,354, which is the perforated lath patent.

The criticism, I think, goes to the weight—

Justice Stephens: (Interposing) You have already shown by the testimony of the witness who was here at the last session, from the Schumacher Company in California, that there was another type of perforated lath on the market.

Mr. Steffen: That is right.

5875 Justice Stephens: That has already been shown. This witness isn't called to prove that. This witness is called to prove that there was a fire test on that board in 1938.

Now Mr. Bromley's objection, as I understand it, is that your charge of subterfuge is that at the time these licenses were taken out in 1936, the defendants were aware that other types of board, equally useful so far as fire tests were concerned, were on the market. Now this witness' testimony is after 1936, and I don't see the relevancy or materiality of it on that particular issue of subterfuge.

Have you anything else you want to say, Mr. Bromley?

Mr. Bromley: Except only this, may it please the Court, I don't think Mr. Steffen is correct in his summary of Tice's testimony. All Tice said was that never, prior to the time our lath came out, had they ever made a lath like ours. They had made some with indentations and some with much smaller holes, but they never made anything like ours until after we had gotten the patent, and we notified them of the infringement and they stopped.

Mr. Steffen: I don't think that is correct, strictly. That has only to do with one or two carloads, and had to do with the 3/4 inch hole.

I think the whole question goes back simply to relevancy—I mean to weight.

Justice Stephens: Of course it does—to relevancy.

5876 If you will permit me to say so, it seems to me that you don't really speak to the Court's trouble. The trouble that I have with the evidence that you are now offering is not the general theory of relevancy on

which you are offering it. We have already ruled that you are entitled to show, if you can, that there were other types of perforated lath on the market similar to that being manufactured by the defendants. But this witness is called to prove that in 1938, the lath which he is now testifying about—that of the Schumacher Company—would pass a fire test. Mr. Bromley objects that regardless of this question of subterfuge, that in 1938 its passing a fire test is irrelevant to the state of mind of the defendants in 1936. How could they have known, in 1936, that it would pass a fire test in 1938?

Mr. Steffen: The argument is—and I think the whole trouble is with weight—the argument is that had they made any investigation, had they made any experimentation of their own, they might have ascertained whether or not an unpatented board would have passed the one-hour fire test. Instead of that, they chose to take the course which USG offered to them.

I want to make a second point which I think is more conclusive. Those initial license agreements were signed in 1936. In 1938, USG, in effect, withdrew those licenses, cancelled them, and offered in their place a so-called
5877 gratuitous license. Those licenses were offered in September, 1938, after the time when the Schumacher board had passed the one-hour fire test and after the time when the National board had passed the one-hour fire test. And our assertion as to those agreements which were entered into in September, 1938, is that they were designed primarily and almost exclusively for the purpose of writing back into the basic agreements this perforated lath patent as an additional support for price fixing, and a number of the companies signed those agreements. That is a matter of record. We have introduced them as several of the early exhibits.

Now this testimony would indicate, certainly as respects the gratuitous licenses, that their purpose was not primarily to get the USG patent because they wanted the patent, because they had to have it, but because of the fact that it did give them additional support for their price fixing and tended to promote harmony in the industry.

Justice Stephens: Those are two new points that have been made, Mr. Bromley. Will you reply to those if you care to?

Mr. Bromley: As I understand the first point, he says that a number—I think there were three companies—took

gratuitous licenses subsequent to March, 1938. I think that is right, Newark, Certain-teed and Ebsary took gratuitous licenses subsequent to March, 1938.

5878 Now there isn't any evidence that prices were fixed under those gratuitous licenses. There are no perforated lath price bulletins under those gratuitous licenses, as I understand the state of the record.

Justice Stephens: Mr. Steffen's contention is that that is some evidence that the defendants were using the perforated lath license to give general support to the price fixing on board under other licenses; and he also makes the point that there is some relevancy in the 1938 test, even if the licenses were granted in 1936, in that if the defendants had chosen to investigate in 1936 they could have found out that the Schumacher board would have passed the fire test in 1936 as well as in 1938, and the fact that they didn't investigate is some evidence that they weren't interested in anything except price fixing.

The Court will overrule the objection. It seems very remote, Mr. Steffen, even as to weight, but it may have some slight relevancy, and consequently we will hear it.

By Mr. Steffen:

Q. The question, Mr. Ingberg, was to describe the size of the holes and the arrangement of the holes in the Schumacher board. A. In the last test on March 17, 1938?

Q. That is right. A. There were 48 holes, 13/16

5879 inch in diameter. I have a sketch of it. They sort of staggered—

Justice Stephens: (Interposing) There is one point I ought, in fairness to the defendants' objection, perhaps have gone into. I think you objected also on the ground of competency. Do you wish to raise the question of the propriety of the witness testifying orally rather than offering these records?

Mr. Bromley: Yes, if there is a report that is in writing, I think we ought to have the report.

By Mr. Steffen:

Q. Is there a report in writing on this test of March 17th? A. The report is in writing. I haven't it here.

Mr. Bromley: Then I move to strike out the testimony so far given with respect to the test.

Justice Stephens: I don't see any escape from the propriety of that objection. If this report is in writing and is available to the Government, and could have been brought

here, we ought to have it rather than the witness' recollection.

Justice Jackson: Have you the report there?

Mr. Steffen: I think so.

Justice Stephens: The motion to strike is granted, but you may reexamine the witness on the basis of the actual report, Mr. Steffen.

5880 By Mr. Steffen:

Q. I show you what purports to be a technical report of building materials for use in the design of low-cost housing—

Mr. Johnston: (Interposing) What is the number of it?

Mr. Steffen: It hasn't been numbered yet.

It will be marked Government's Exhibit 606.

(The document referred to was marked as Government's Exhibit No. 606 for Identification.)

By Mr. Steffen:

Q. I ask if that is a report, on pages 20 and 21 thereof, concerning the tests with regard to which you have just testified? A. This report is entitled TRBM No. 8, issued by the National Bureau of Standards. It gives a summary of fire tests of wood and metal frame partitions made up to a certain date.

Q. Now, Mr. Ingberg, referring to this test of March 17, 1938, do you find that in that report? A. From the standpoint of the test of March 17, 1938, I don't think this report has any more status than the notes I have here before me, taken from the original report, for the reason that this report, as mimeographed and approved by the Bureau of Standards, was issued prior to March 17, 1938,

5881 and the tests of the Schumacher lath, Nos. 120 and 123, were made subsequent to that time, and they are written in here, typed in, subsequent to that date. If you want to accept it on that basis—

Justice Stephens: (Interposing) If the witness has material in his own hands, in writing, you may examine him on that, if that has some official basis or if he made it, but it should be disclosed to the defendants.

By Mr. Steffen:

Q. Did you make that notation? A. Yes, the notation in the report here was made by me from the tests.

Justice Stephens: Did you make up the original report?

The Witness: Yes.

Justice Stephens: And you added that insert to it?

The Witness: It was added subsequently.

Mr. Bromley: Might I, with the Court's permission, ask this question?

Justice Stephens: Yes.

Mr. Bromley: There is a written report of the tests of March 17, 1938, prepared by you, isn't there?

The Witness: Yes.

Mr. Bromley: And you haven't that in the court room at all, have you?

The Witness: No, sir.

5882 Justice Stephens: Where is that, Mr. Ingberg?

The Witness: I didn't bring it, we have it in our office. I didn't know it would come up this morning.

Justice Stephens: You couldn't be expected to know that. Counsel should have informed you as to what you were to bring here.

By Mr. Steffen:

Q. I show you what has been marked as Government's Exhibit No. 607, which purports to be a report BMS71, and particularly refer you to pages 20 and 21 thereof, and ask you if that is the report that you have in mind?

(The document referred to was marked as Government's Exhibit No. 607 for Identification.)

A. This is our published report, BMS71—Fire Tests of Wood and Metal Frame Partitions, issued May 12, 1941, as a Bureau of Standards publication. That contains all tests made with perforated gypsum lath, as well as all other plaster bases; and on page 20 thereof, we have the results of the tests in question made on March 17, 1938, of the Schumacher Wall Board Corporation's perforated lath, which were of the lath that I described to you, having—

Mr. Bromley: (Interposing) Just a moment, please. This still isn't the written report about which I asked you, is it?

5883 The Witness: I might say that it is a published report based on the written reports. It has gone through the editorial process at the Bureau of Standards to make certain that it conforms with all the preliminary reports that were issued on these tests.

Mr. Bromley: But isn't there a very full, carefully prepared, written report of the tests of the Schumacher board which were made on March 17, 1938—isn't there such a thing?

The Witness: There is.

Mr. Bromley: And you do not have it in court, do you?

The Witness: No.

Mr. Johnston: I couldn't get his answer.

Justice Stephens: He said no, Mr. Johnston.

Mr. Steffen: Well, if there is objection, it is perfectly possible for us to get the written report, and the notes from which—

Justice Stephens: (Interposing) The Court would appreciate it, Mr. Steffen, if the Government wouldn't waste time the way it has been wasted this morning. It is obvious that this material which has been offered so far, if it is met with an objection as to competency, isn't competent under the best evidence rule. We have been in recess for a week, and I should think the Government could have gotten the originals and have had them here.

5884 Mr. Steffen: Well, I would like to ask to withdraw the witness at this time, and we will call another witness.

Justice Jackson: Can't you telephone for them and have them brought down by messenger while you put on another witness?

Mr. Steffen: We will attempt to do that.

Justice Stephens: Since the Court has ruled in favor of the Government that this material is relevant, wouldn't it be possible for counsel to have an informal conference—and save the time of this witness, from the Bureau of Standards, having to make two or three trips here—as to what material he has, and have him bring in all that either side wants?

Mr. Steffen: I don't think there is any real question on the matter of the tests.

Mr. Bromley: Well, you see, these are confidential, I have never seen them, I don't know what is in them. We have never been permitted to look at them.

Justice Stephens: Then we will have to excuse you, and we will take a few minutes' recess, informally, remaining in the court room, and you may consult with Government counsel as to what you are to bring here; and then either send for it or bring it back. We are sorry to take your time, but we have to have the originals here. We try to be scientific here, as well as in the Bureau of Standards, when it is insisted upon.

5885 The Witness: Judge, what you will get is a copy of the original report. The original report, of course, has gone out.

Justice Stephens: Gone out to whom?

The Witness: To the Schumacher Wall Board Corporation, they get the report because they were sponsoring the tests. What you will get is a carbon copy of the report, that will have the Director's stamp on it; or we can probably have the Director verify the stamp or sign it, if that is what you want.

Mr. Bromley: I make no point of that.

Justice Stephens: We are not interested in formalities. All we want to get is either the original report or a dependable copy of it.

The Witness: Yes, sir.

Mr. Johnston: If the Court please, may I inquire, since counsel for the Government had the Schumacher people here as their witness, maybe counsel has that original report. I would just like to know.

Mr. Steffen: I will say that we do not have that, Your Honor.

Justice Stephens: Very well.

(Witness temporarily excused.)

(Short informal recess.)

Mr. Steffen: Mr. Stromquist.

5886 Thereupon, WALTER G. STROMQUIST called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. State your full name, please, Mr. Stromquist? A. Walter G. Stromquist.

Q. And what is your address? A. 599 Hawthorne Street, Glen Ellyn, Illinois.

Q. And who are you connected with now, Mr. Stromquist? A. The Masonite Corporation, Chicago.

Q. Were you at one time connected with Universal? A. That is correct.

Q. At what time? A. From September, 1925, to February, 1931.

Q. February, 1931? A. That is correct.

Q. And after that, were you connected with the receivership for the Universal Company? A. The receivership was pending while I was with them.

Q. During the period that you were with them, what was your office? A. I spent the first two and a half
5887 years in Chicago, and the balance of the time in New York as Eastern Sales Manager.

Q. So throughout the period, you were Eastern Sales Manager, is that correct? A. Not for the first two and a half years.

Q. Except for the first two and a half years? A. Yes.

Q. And did that comprise some period during which the company was in receivership? A. Yes, sir.

Q. And do you know just what year it was when the receivership occurred? A. I can't recall the date that it started, Mr. Steffen, but it was pending when I left.

Q. Now it is in evidence, Mr. Stromquist, that your company was a licensee under the United States Gypsum Company patents—are you familiar with that? A. In a general way, yes.

Q. Did you attend, at any time, any licensee meetings? A. Oh, I think I attended probably two.

Q. And can you state where they were held and who was present? A. In Chicago.

Q. At about what time? A. I believe in 1927 or 1928, I can't say exactly.

5888 Q. 1927 or 1928? A. Yes.

Q. Now, can you tell us who was present at either one of those meetings? First, who represented USG? A. Mr. Henning was generally there, with counsel.

Q. Who was his counsel? A. Usually John MacLeish.

Mr. Bromley: I move that that answer be stricken out unless he actually recalls that one or both of these gentlemen were present at one or both of the meetings of which he speaks. All he said was that they were usually there.

Justice Stephens: It may go out.

By Mr. Steffen:

Q. Can you recall whether or not Mr. Henning was present? A. Yes.

Q. Can you recall whether or not Mr. MacLeish was present? A. Yes.

Q. What, if any, other companies were represented, and by whom? A. The Atlantic Gypsum Company.

Q. Who represented them? A. Mr. Fuller.

5889 Q. And anybody else? A. That is all I recall.

Q. Was there anybody from Texas? A. Mr. Sam Gloyd.

Q. Do you recall his having been at one of these licensee

meetings? A. I am quite sure that he was present at one meeting.

Q. And was there anyone present from Beaver? A. I don't recall.

Q. Do you know Mr. Blagden? A. Mr. Gus Blagden, yes.

Q. Was he perhaps present? A. Not at the meetings that I attended.

Q. Did you know Warren Henley? A. Yes.

Q. Could you say whether or not he was present? A. I don't recall his presence.

Q. Who represented Universal besides yourself? A. I was there alone at one meeting, and I think Mr. Holland, Eugene Holland, was present with me at the other meeting.

Q. Now during this period of 1927 and 1928, did you receive price bulletins, did Universal receive price bulletins from USG? A. Yes.

5890 Q. Will you state, if you can, what the discussion was at your licensee meetings, at these two meetings that you remember? A. Principally dealing with the development of products, possible improvements in products, particularly with respect to Rocklath, or gypsum lath, commonly known as gypsum lath.

Q. What was the discussion, Mr. Stromquist? A. The general over-all plaster base picture, as it were, quoting the potential figures, quoting figures on wood lath sales, metal lath sales, as gained from Government documents, and citing the volume of plaster base business available to the industry if the product were properly sold and promoted; educational work done with architects, engineers, builders, contractors, dealers, and everyone interested in the field.

Q. What, if any, discussion was there as to the prices of the Rocklath or gypsum lath that would be sold? A. I don't recall any particular discussion of prices except as someone may have asked for an explanation of a bulletin that may have been issued, an interpretation of a bulletin that may have been issued.

Q. What were price conditions at this time, Mr. Stromquist, in the industry? A. Badly demoralized.

5891 Q. And will you describe what you mean by "badly demoralized"? A. If you know what I mean by price cutting and price wars, that is about the broadest way to explain it. You never knew from day to day what you were going to meet with in the way of new and lower prices. You couldn't be sure when you walked into the office of a retail lumber dealer just what price he had been quoted, what price he was paying. The market was extremely competitive.

I know we, at Universal, always tried to get the longest price possible, and we might ask a man $25 and find out that he was buying it for $22 and $23, and then we would have to meet the competition.

Q. Was there any discussion of such market conditions, that you recall, among the licensees? A. In the licensee meetings?

Q. Yes. A. No, sir.

Q. Well, you, as Eastern Sales Manager, had charge of what territory, Mr. Stromquist? A. I would say all the Eastern territory as far West as Cleveland, and down to the Carolina line.

Q. And among your customers, can you name any around Oakfield? A. Around Oakfield?

5892 Q. Yes. A. The Oakfield Gypsum Products Company. We had some lumber dealer customers there, too. I can't remember their names at the moment.

Q. Did you also sell to the Paragon companies? A. The Paragon Company at Syracuse, New York, yes.

Q. And did you know— A. (Interposing) And other companies in Syracuse.

Q. Did you know the American Hardwall Plaster Company? A. Yes; Utica, New York.

Q. Who did you know in the Paragon of Syracuse? A. Emil Hansen.

Q. Did you know him to be connected with Oakfield? A. Yes.

Q. Did you know Mr. Tom Eldred? A. Yes.

Q. And who was he connected with? A. American Hardwall Plaster Company, Utica, New York.

Q. Was he also connected with Oakfield? A. Yes, as a stockholder. I shouldn't say that he personally was a stockholder, I would like to correct that, but it is my understanding that his company owned part of the stock in Oakfield Gypsum Products Company.

Q. And did you know the company of which Mr.
5893 Merriman was a member? A. Mr. E. L. Merriman was with the Paragon Plaster & Supply Company at Scranton, Pennsylvania.

Q. Now I would like to show you Government's Exhibit No. 560, Mr. Stromquist. That is an excluded exhibit.

(Government's Exhibit No. 560 handed to the witness.)

By Mr. Steffen:

Q. Will you examine the signature, Mr. Stromquist? A. Yes, sir, that is my signature.

Q. Will you please read the letter to yourself? A. Yes, sir, I have read it.

Q. Was it your practice, Mr. Stromquist, to send prices to the Paragon people, and also to Oakfield, at which they should resell board?

Mr. Bromley: I object to that as incompetent because calling for a conclusion, in so far as the phrase "at which they should resell board" is concerned; and I object to it as immaterial in so far as the Paragon companies are concerned, there being no charge of the fixing of resale prices by Paragon.

Mr. Steffen: I will leave out the last portion of the question.

Justice Stephens: Rephrase the question so as to leave out the Paragon companies.

Mr. Steffen: I would feel that I would have to
5894 leave in the Paragon companies, Your Honor, because of the fact—which I think the Court is fully familiar with—that this is an involved situation, and we are not offering the answer to prove that they were attempting to fix or control the resale prices of the Paragon companies. We would like simply to bring that in as part of the general picture.

Justice Stephens: I see your point. We will not consider the exhibit, if received, or the testimony, if received, as tending to prove resale price fixing by the two Paragons or American Hardwall, because that is not charged in the complaint. You are entitled to go into the question of whether or not this witness was attempting to fix resale prices of Oakfield, provided you can competently prove that.

What is your objection as to competency, Mr. Bromley?

Mr. Bromley: That was only because of the last part of his question.

Justice Stephens: Very well, proceed.

By Mr. Steffen:

Q. I want to direct your attention, Mr. Stromquist, to the fact that you said that you were selling both Paragon and Oakfield during the period 1927 and 1928, and I ask you if it was your practice to send dealer's prices to them, to both companies? A. Yes, we sent them to Oakfield and to the three other companies, Paragon, American Hard-
5895 wall and Paragon Plaster & Supply Company.

Q. How did you send them, Mr. Stromquist? A. How did we send them?

Q. By mail? A. By mail, yes.

Q. Could you tell us what this letter, Government's Exhibit 560, means in that connection?

Mr. Bromley: I object to that as incompetent because calling for a conclusion. The letter is not in evidence. Counsel is asking for an interpretation of it.

Mr. Steffen: I will offer the letter in evidence, Your Honor, but I think the Court will remember that the letter may be or might have been regarded as ambiguous, and I think Mr. Bromley so regarded it at the last time.

Justice Stephens: The letter was excluded before, as the Court remembers, first because at that time there was no identification of Mr. Stromquist's signature; and, second, because we were of the view that the letter did not, on its face, apply to the resale prices of Oakfield as distinguished from the two Paragons and American Hardwall, and Emil Hansen himself testified that he didn't regard the letter as applicable to Oakfield.

Mr. Steffen: I think that doesn't quite state it, Your Honor.

Justice Stephens: That is what I understood.

5896 Please correct me if I am incorrect.

Mr. Bromley: You are not incorrect, if the Court pleases. The letter was identified at page 5283, and the objection as to competency was overruled. It was excluded at page 5374 on the ground, as Your Honor has said, that the witness testified that it did not apply to Oakfield, but it was understood by him to apply to the Paragon company, and if it did so apply to Oakfield he paid no attention to it.

Mr. Steffen: Let me get that last clear, because Mr. Bromley has made the point that I want to make, that it applied to Paragon because it was addressed to them; and that it also applied to the sales to Oakfield, but that so far as he was concerned, if it meant to control the price at which Oakfield sold to Paragon, then they disregarded it.

Now we are going at this matter from the other end. We are asking Mr. Stromquist what he meant by quoting prices in the way that he did in Exhibit 560, and what Mr. Hansen meant or understood was an entirely different matter. What we are now offering to show is what the writer of the letter understood when he wrote it, and that is all that is material.

Justice Stephens: I am inclined to the view—if my colleagues disagree with me they will please speak for themselves—that the objection to this particular question as

phrased is well taken. You are asking the witness
5897 to do something that the Court has got to do, say what the letter means on its face, so far as this question is concerned. But I think you are entitled to show, if you can, by this witness, what the dealings between the parties were, what the intention of this witness for Universal was, and what form of letters he sent as intended by him to express that intention, so as to convict him, if you can, of an attempt to fix the resale prices of Oakfield, and to bring to the Court's attention the course of dealings between the two companies, the circumstances covering the transaction.

Have you any objection to that, Mr. Bromley?

Mr. Bromley: No, sir; I will go farther, if the Court please. It seems to me that the question he ought to ask him is whether this witness intended this as a direction to Oakfield.

Justice Stephens: That is what I thought you ought to ask, myself, Mr. Steffen.

Objection sustained to the question as asked, but you may ask the question just suggested.

By Mr. Steffen:

Q. You have read Exhibit 560, Mr. Stromquist, and you testified that you were selling board to Oakfield. Now was this letter, Exhibit 560, intended as a direction to Oakfield, and I refer particularly to the next to the last paragraph?

A. This particular letter was intended to cover only
5898 Paragon at Scranton, Pennsylvania, who had the privilege of buying for Oakfield, if they so chose, as as well as buying for their plant at Scranton and as well as buying for resale to their dealers in their trading area. Now somewhere in the files there should be another letter to the Oakfield Gypsum Products Company, if I may make that statement.

Q. Didn't you tell me in the office, Mr. Stromquist, that you, on occasion, wrote to Paragon for purposes of quoting both to Paragon and to Oakfield? A. May I take a moment and explain the relationship between Universal and Oakfield, if it is permissible?

Q. I should like to hear that. A. The Oakfield Gypsum Products Company at Oakfield, New York, was a manufacturer of calcined plaster products, primarily. That company was owned by the Paragon Plaster Company of Syracuse, New York, the American Hardwall Plaster Company at Utica, New York, and Paragon Plaster & Supply Com-

pany of Scranton, Pennsylvania. Just how the stock was split among the three companies, I wouldn't undertake to say, I don't know, but I do know that the entire ownership rested in those three companies.

The Paragon Plaster Company at Syracuse, the American Hardwall Plaster Company at Utica, and the Paragon Plaster & Supply Company at Scranton, were really in three different types of business. By that I mean
5899 classifications of business. At each point they functioned as a wholesaler or jobber of building materials to dealers in their respective trading areas. In their local markets, Syracuse, Utica and Scranton, they conducted a retail business, selling to contractors, builders and consumers, as well as to dealers who would buy from them in their home markets. Then they also acted in the capacity of manufacturers, since at each point they had what is commonly known as a mixing plant, a sanded plaster mixing plant. They were supplied their stucco, or plaster of Paris, from the Oakfield Gypsum Products Company at Oakfield, New York. The stucco was shipped to the three points and there mixed with the sand, retarder, and hair fiber, plus other ingredients, to form a finished product known to the trade as sanded plaster. That was sold by them to dealers and to contractors.

We, in Universal, were very intimately acquainted with the entire relationship, Oakfield and these other companies. It is my own personal opinion—

Mr. Bromley: (Interposing) I object to his opinion if the Court pleases.

Justice Stephens: State the fact and state your dealings, don't state your opinion.

Mr. Bromley: I don't see the relevancy of this answer, anyway, and I move to strike it out.

Justice Stephens: It has all been in the record
5900 before, through other witnesses, hasn't it?

Mr. Bromley: Yes.

Justice Jackson: As I understood it, the witness was going to explain why he made certain answers to you in your office this morning, and this was a voluntary statement to explain why he made them. I think on that theory he ought to be permitted to go on, without expressing an opinion.

The Witness: That is what I was leading up to.

Justice Stephens: Proceed, then. The motion to strike is denied.

The Witness: Our dealings were principally with Mr. Emil Hansen. Now when we dealt with him, we dealt both with respect to Oakfield Gypsum Products matters and Paragon Plaster Company of Syracuse matters. There were times when we would deal with Mr. Tom Eldred, of the American Hardwall Plaster Company, and we would finish any matters we had pending dealing with the American Hardwall Plaster Company business, and at times discuss matters concerning Oakfield. Since he may have been in New York, he would represent Oakfield, too, for Mr. Hansen. Likewise, there were times when we would deal with Mr. E. L. Merriman on matters concerning Paragon, and he would discuss matters affecting Oakfield.

Justice Jackson: That is Paragon of Scranton?

The Witness: That is correct.

Our letters were not always directed to each of the
5901 four companies, if I may put it that way. Most generally they were, but there would be times when we would write a letter to, let us say, Paragon Plaster Company at Syracuse, and we would send copies to Scranton and to Utica for their information, and they would accept those letters as applying to them as well.

It was probably poor business to handle it that way, but we knew all those men so well, and the relationship was so close that there was no question of responsibility, merely the intent of carrying a message to them and getting information to them, and they accepted our handling of the correspondence in that manner.

All of those companies had the right to buy for their respective markets, Syracuse, Utica and Scranton. They also had the right to buy for Oakfield, if they so chose, and we would sell them for delivery at Oakfield.

Justice Stephens: We will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5902 Justice Stephens: Proceed, gentlemen.

By Mr. Steffen:

Q. You were telling us just before the recess, Mr. Stromquist, concerning the three parent companies of Oakfield—the two Paragon companies and the American Hardwall Plaster Company. I want you now to state what your deal-

ings with Oakfield were. I think you testified that you sold to Oakfield. Did you furnish them at any time with dealer prices? A. We wrote some letters to Oakfield, quoting them prices and which applied for their own purchases, and for delivery to Oakfield only.

Q. And did you quote them dealer prices at which you sold such board? A. I beg your pardon?

Q. Did you quote Oakfield dealer prices from time to time at which you sold your dealer trade? A. No, we did not. We generally had a special price to Oakfield for Oakfield delivery.

Q. That is your price to Oakfield. I mean—did you also give them the price at which you were selling to dealers? A. I don't recall any such correspondence. I should say this, in answer, if I may, I am quite sure—

Mr. Bromley: (Interposing) I object to a volunteer statement; he has answered the question.

Justice Stephens: The question has been an-
5903 swered. Suppose you ask him another question.

By Mr. Steffen:

Q. I would like to show you what has been marked as Government's Exhibit No. 608.

(The document referred to was marked as Government's Exhibit No. 608, for identification.)

By Mr. Steffen:

Q. This purports to be a telegram—

Justice Garrett: (Interposing) Mr. Steffen, are you going to introduce that other exhibit?

Mr. Steffen: I am not going to offer it at the moment.

Justice Garrett: Will that be offered under Exhibit No. 560?

Mr. Steffen: If it is offered, yes.

Justice Stephens: Is it offered now?

Mr. Steffen: No, your Honor.

By Mr. Steffen:

Q. I now show you what has been marked for identification as Government's Exhibit No. 608, which purports to be a wire from the Universal Gypsum Company to Emil Hansen, under date of July 10, 1929.

(Document was handed to the witness.)

Justice Stephens: Now hand it to defendants' counsel, unless they have seen it.

5904 Mr. Steffen: I think they have already seen it.

Justice Stephens: Have you seen it, Mr. Bromley?

Mr. Bromley: No, I haven't seen it, I don't believe.

Mr. Steffen: They saw it in the Hansen exhibits.

Justice Stephens: Perhaps they would like to refresh their recollection.

(The document was handed to the defendants' counsel for examination.)

Mr. Bromley: Is there a question pending, may I ask?

Mr. Steffen: No.

Justice Stephens: The witness was just asked to read the wire.

By Mr. Steffen:

Q. Are you familiar with Government's Exhibit No. 608, Mr. Stromquist? A. Is that the telegram you just showed me?

Q. Yes. A. I cannot identify that particular telegram, Mr. Steffen.

Q. Does that refresh your recollection as to how prices were furnished to either Oakfield or Paragon? A. I could say this, that there were times—

Justice Stephens: State whether or not it refreshes your recollection.

The Witness: Yes, it does, your Honor.

5905 Justice Stephens: All right, then state what your recollection is.

The Witness: There were times when we would notify Paragon at Syracuse, and Paragon at Scranton, and American Hardwall at Utica, and also Oakfield, by telegram, of price changes, and prices generally.

By Mr. Steffen:

Q. Now, state to the Court whether that telegram or telegrams of the character you are describing—how they would be addressed?

Mr. Bromley: I object to that as entirely too general.

Mr. Steffen: What I want to get at, Mr. Stromquist is—

Justice Stephens: (Interposing) That objection is sustained, and since the telegram is not in the record, it wouldn't mean anything in the record.

Mr. Steffen: That is right.

By Mr. Steffen:

Q. Did you, on occasion, write or wire to Mr. Emil Hansen, giving him dealer prices?

Mr. Bromley: I object to that unless the writtten communication is produced.

Justice Stephens: That objection is sustained. We have ruled that you can show the course of conduct between these parties with respect to these prices, but this is a very critical matter. You are seeking to establish
5906 resale price fixing by a manufacturing distributor, and if there is written evidence it should be produced.

By Mr. Steffen:

Q. Mr. Stromquist, state whether or not in quoting prices to Paragon you intended, on occasion, that they should also apply to Oakfield? A. Letters written to Paragon Plaster Company at Syracuse, New York, for example, would carry prices applicable to shipments to the Oakfield plant as well as to shipments to Syracuse, or on their orders direct to their dealer trade.

Justice Stephens: What kind of prices do you mean, prices to be paid you, or what prices?

The Witness: Prices to be paid Universal by Paragon at Syracuse. Now, if Paragon elected to purchase for delivery to Oakfield, they could do so on their order form, and the invoice would be rendered to the Paragon Company for such purchase. But that would be on a Paragon order.

By Mr. Steffen:

Q. That is right. Did you have any Oakfield orders? A. Yes, we did.

Q. How did you quote prices to Oakfield? A. At times those prices were addressed to them direct, mailed to their Syracuse office. We did not always do that—it was probably a little bit loose on our part—sometimes we would take whatever prices we named in our letters to
5907 Paragon Plaster Company, for Oakfield delivery, and use those prices in invoicing to Oakfield Gypsum Products.

Q. When Oakfield was buying direct? A. That is correct, on their own order forms.

Q. Now, did you have any arrangement with Oakfield as to whom they might resell their board to? A. No, we did not.

Q. It was open to them to sell to dealers if they saw fit? A. That was their privilege.

Q. And did you ever quote to them the price at which you were selling to dealers? A. I don't recall any such instance for Oakfield. I don't think we ever gave Oakfield any prices that we were selling to dealers at. There would be no object in so doing, Mr. Steffen, for the reason that we never met them in competition, as such.

Q. During what years? A. During all the time I was in New York, for Universal. The competition came from the Paragon companies and the American Hardwall Plaster Company.

Q. Did you know Earl North? A. Yes, I did.

Q. What did you know about him in connection
5908 with Oakfield? A. I know that he was with them for a period, just how long I don't recall. What his duties were, I don't recall.

Q. You wouldn't know, or don't know, whether he sold for Oakfield direct to dealers, or not? A. We never met him in competition, as the Oakfield Gypsum Products Company or as Earl North, as a matter of fact.

Q. I now show you what has been marked as Government's Exhibit No. 609.

(The document referred to was marked as Government's Exhibit No. 609, for identification.)

By Mr. Steffen:

Q. This purports to be a letter of June 3, 1929, signed by Mr. Stromquist, addressed to the Paragon Plaster Company, together with two bulletin enclosures. This was not offered when Mr. Hansen was on the stand, your Honor.

Justice Stephens: Are there photostats of this?

Mr. Knuff: They were furnished to the Court in connection with Mr. Hansen's testimony.

(Copies were handed to the Court.)

Justice Stephens: Mr. Cantor informs me that all of the exhibits of this type were returned to Government counsel.

However, this is the one, is it, dated June 3, 1929, that we are dealing with now?

Mr. Steffen: It is the only one that I think we have,
5909 your Honor.

Mr. Knuff: On the reverse side of the one you have, your Honor, doesn't it say "Judge Stephens' copy"?

Justice Stephens: Yes.

Mr. Knuff: That is the one you handed to me, and I am handing it back to you.

Justice Stephens: Oh, yes.

Mr. Steffen: That is a 2-page letter, and attached to it are Bulletins Nos. 3 and 4, which are referred to in the first paragraph of the letter.

By Mr. Steffen:

Q. Have you examined Government's Exhibit 609, Mr. Stromquist? A. Yes, I have.

Q. And is that your signature? A. That is my signature.

Mr. Steffen: I offer Government's Exhibit No. 609.

Mr. Bromley: I object.

Mr. Steffen: (Interposing) I want to make a statement. Exhibit No. 609 has been identified as a letter written by Mr. Stromquist, and which was also taken from the files of the Paragon Plaster Company, which indicates that it has been received.

We offer it on two grounds.

The first ground is this, that we find here the
5910 Universal Gypsum and Lime Company quoting to Paragon Plaster Company, which we will assume for the moment is simply Paragon Plaster Company and not anything having to do with Oakfield, and telling Paragon Plaster Company what their prices shall be to the dealer trade. Now, there is no question but what the letter, this letter—and in fact, Government's Exhibits 560 and 561—constitute a showing that the Universal Gypsum Company was endeavoring to influence or to control the price at which the Paragon Plaster Company was reselling.

We are not, of course, offering it to show that they were controlling the price of jobbers, for the reason that there is no charge in the complaint to that effect. But we do say that when we have a concern as closely affiliated as was Paragon Plaster Company and the other two parent companies, with Oakfield, and where we find the parties dealing rather informally with one another, and instructing Paragon Plaster Company or the parent companies to

resell at certain prices, which are the dealer prices—in this case, the two bulletins enclosed are taken directly from, or will conform, I call your Honors' attention, to the bulletin, Exhibit 404, which is a United States Gypsum bulletin—now, that, we say, is a showing of facts from which the Court could infer that the Universal Gypsum Company was endeavoring to control not only the price of Paragon, which is admitted practically, but to control the price of the Oakfield Gypsum Products Company
5911 if and when it sold to dealers.

We offer it secondly upon this ground. You will notice in paragraph 2 of the letter that it says, "Please make no price commitments or price guarantees", and language of that sort, in the middle of the paragraph, indicating that this was a rush matter.

Your Honors will note the date, June 3, 1929, which was very shortly after the May 21, 22 and 23 general license agreements had been signed.

We have in evidence already the fact that prices went up during this period. There were a series of bulletins issued. We find here, therefore, the Universal Gypsum Company sending bulletins saying to it, in effect, to beware, that prices are going up. We take that to be an admission on the part of Universal Gypsum Company that they expected prices to advance, and of course their expectations were not disappointed, because prices did advance during this period.

We therefore offer it as an admission on the part of Universal Gypsum Company indicating that prices were likely to, or that they expected prices to, advance during this period in 1929.

That, I think, is very relevant and very material to show that they went into the 1929 meeting with Mr. Avery out in Chicago with the idea of getting higher prices.

Justice Stephens: Do you wish to be heard, Mr. Bromley?

5912 Mr. Bromley: It seems to me, may it please the Court, that the offer of this exhibit comes directly within the ruling of the Court in connection with Exhibits 560 and 561, which ruling was made at page 5374, the exhibits being rejected on the ground that they were immaterial and irrelevant.

I see no difference at all between Exhibit 609 for identification and Exhibits 560 and 561 for identification.

Justice Stephens: We are of the view that the exhibit is

not admissible upon the first theory because it doesn't, on its face, apply at all to Oakfield.

But what do you say with respect to the second theory, that it may be relevant, in the nature of an admission by Universal of an expectation of prices going up at about the time the license agreements were signed?

I think that was not involved in either Exhibit 560 or Exhibit 561, Mr. Bromley.

Mr. Bromley: No, it was not, your Honor.

Justice Stephens: We are inclined to the view that it is admissible on that theory, so far as relevancy and materiality are concerned; in other words, that the objection on the second theory goes to its weight, rather than to its relevancy.

Mr. Bromley: This is offered, then, as an admission by a company not a defendant, on the theory that Universal is a co-conspirator?

Mr. Steffen: That is right.

5913 Mr. Bromley: And an admission that it expected prices to go up after June 3. Well, it seems to me that any such admission is immaterial. Obviously, the sentences to which counsel has called the Court's attention are the usual sentences that any supplier would write to any purchaser who he regarded more or less as an agent, not to make price commitments in the future.

Justice Stephens: Well, I think that that is a matter of interpretation as to its weight, Mr. Bromley.

The Court rules that the exhibit is not admissible on the first theory for which it is offered, to prove resale price fixing by Universal with respect to Oakfield, because it obviously, on its face, does not apply to Oakfield, and the testimony of the witness seems to discountenance its application to Oakfield.

But it is received in evidence on the second theory.

Mr. Bromley: Shouldn't the portion received be limited to the second paragraph of page 1 of exhibit 609 for identification, if that is the theory on which it is received?

Mr. Steffen: I think, in order to comply with the complete evidence rule, as so frequently stated by Mr. Bromley, the entire letter ought to be received.

Justice Stephens: No, the Court will not limit it to that one paragraph, but the letter will be received for that one purpose and on that one theory only, and

5914 is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Exhibit No. 609 received in evidence.)

Mr. Adams: May I be heard a moment on that last ruling, your Honor?

Justice Stephens: With respect to Exhibit 609?

Mr. Adams: Yes, your Honor.

Justice Stephens: Yes.

Mr. Adams: Your Honor stated that it was admitted on the theory that it was an admission, and then stated that it was received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Justice Stephens: That is right.

Mr. Adams: I can't see how it could ever be anything but an admission—how could it be a declaration of a co-conspirator?

Justice Stephens: There is no difference between a declaration and an admission so far as the theory of admissibility is concerned. They are both hearsay, and if they come in, they come in as an admission under the exception to the hearsay rule.

Mr. Adams: It would seem to me that that could never be in furtherance of any conspiracy.

Justice Stephens: That is within the reservation. The usual reservation with respect to declarations of alleged co-conspirators is that there must be evidence,
5915 aliunde, the declaration or admission, to prove the conspiracy, and that the declaration or admission must be shown to be in furtherance or execution of the conspiracy.

Mr. Adams: It was my confusion with respect to the use of the word "admission" as distinguished from the word "declaration". I had in mind that there might be a distinction. Perhaps I am wrong.

Justice Stephens: Neither a declaration nor an admission, whichever name you apply, is admissible except as an admission, because otherwise it would be hearsay, and it isn't binding upon the other co-conspirators unless the conspiracy is first shown aliunde the alleged declaration, and unless it is shown to be in furtherance or execution of the conspiracy. All of this evidence is being received as subject to that same type of proof.

Mr. Steffen: I should like to show the witness Exhibit 402.

(The document was handed to the witness.)

Justice Stephens: Were these the exhibits in which the identification of Mr. Stromquist's signature was lacking before, Mr. Steffen?

Mr. Steffen: No. Mr. Lenci did not identify 402. I think he did identify 401.

Mr. Knuff: They were offered in connection with Mr. Lenci's testimony.

5916 By Mr. Steffen:

Q. Have you examined Exhibits Nos. 401 and 402? A. I have.

Q. Can you identify the signature? A. I can.

Q. Is it your signature? A. Yes.

Q. In both cases, as to Exhibits 401 and 402? A. Yes, sir.

Mr. Steffen: I now offer Exhibits 401 and 402 and I want to make a very brief statement on the matter.

Exhibit 401 I think was offered earlier and rejected. I would ask your indulgence to make a further very brief statement concerning it.

Justice Stephens: Refresh our recollection about it, will you? What was the basis of the previous offer and rejection?

Mr. Steffen: The basis of the offer was—or rather the objection to the offer was made by Mr. Bromley on the ground that this was addressed to the Ebsary Gypsum Company and the Ebsary Gypsum Company didn't appear or wasn't listed as a manufacturing distributor, and of course that is perfectly true, and it is not now offered for the purpose of showing that this was an effort to control a manufacturing distributor's prices di-

5917 rectly; that is, that Ebsary Gypsum Company was, of course, a plaster manufacturer at the time, they hadn't yet started to make board, but they commenced making board and never actually bought board from the Universal Gypsum Company, according to the terms of this letter, as I understand it.

Now, we make this contention, that this letter is written by the Universal Gypsum Company to a company which was in the exact category of a manufacturing distributor, as Mr. Bromley has stated, although they were not named as a manufacturing distributor in the bill of particulars for the reason that they never actually became a distributor.

Our contention, therefore, is that if we can show, as here, that the Universal Gypsum Company was writing to a manufacturing distributor and telling the manufac-

turing distributor not only what their prices were but what their terms and conditions of sales were, concerning basing points and the arbitrary weight of board—1850 pounds—and all matters which come within the selling policies of the licenses under the license agreements, we say that that is a showing of facts upon which the Court can infer that the prices of other actually named manufacturing distributors were also being influenced or controlled, in this case by the Universal Gypsum Company or by the defendants generally.

Our second thought, and ground upon we urge the admissibility of the two letters, is that they constitute admissions at this time on the part of the Universal
5918 Gypsum Company, that they were endeavoring to carry out the terms of the bulletins and endeavoring to get others, in this case the Ebsary Gypsum Company, to carry out the terms of the bulletins as respects basing points, as respects the arbitrary weight of the board, and as respects resale prices. And it seems to me that on both those grounds, the two letters should be admitted.

I wanted, as I endeavored to do, to refresh your Honors because it had been rejected on the first ground, although I doubt that it had been perhaps fully presented at that time.

Justice Stephens: I don't recollect your having presented the exhibit on the first ground that you are now arguing, that it is evidence of a course of conduct on the part of one of the alleged co-conspirators. In other words, it is introduced on the analogy of "other crimes" so to speak.

What do you wish to say, Mr. Bromley, if anything?

Mr. Bromley: Exhibit 401 was rejected at page 4019 of the record, and between pages 4019 and 4029, the basis of the ruling is shown clearly, and it was to the effect that Exhibit 401 for identification was immaterial because there was no charge in the complaint naming Ebsary as a manufacturing distributor.

That objection, of course, would apply to Exhibit 402, although Exhibit 402, while mentioned at page 4043 of the record, was never formally offered. But the two documents are obviously in precisely the same class,
5919 and the ruling made as to 401 would apply as to 402.

Now, the new ground on which both of these exhibits are offered is, I assume, as your Honor has suggested, on some theory of "similar crimes".

Justice Stephens: Similar courses of conduct showing a common purpose or design. There is an exception—referring to the analogy of "other crimes"—I think I explained that in Martin v. United States this court has collated the rulings on that subject, and while the general rule is that other crimes or other wrongs are not admissible, there is a series of exceptions within which is included the one where the otherwise collateral matter tends to prove a common design or intent, or course of conduct.

I think Exhibit 401 was not discussed in that category on the previous ruling, was it, Mr. Bromley?

5920 Mr. Bromley: No, it was not. Neither exhibit was discussed in the light of that theory.

The difficulty that I have with that theory is this: I suppose that all would agree that as the Supreme Court said in the Softlite case just yesterday or the day before, it is perfectly lawful for a manufacturer who sells his goods to a purchaser, to say to the purchaser, "Now, I expect that in your resales you will follow my prices; and I tell you now, if you don't I am not going to sell you any more."

The Supreme Court held that in the Colgate case, as modified by the Beechnut case.

And the Supreme Court, in Justice Reed's opinion, reaffirmed, as I read it, the doctrine that a supplier can go a certain extent in trying to see to it that his customer does not undersell him in the market, and the line is between an agreement and understanding that the purchaser will observe fixed resale prices—that is illegal—on the other hand, it is perfectly lawful for the supplier or seller to say, "Now, I am not going to sell you any more if you undersell me and cut my market, and I will tell you in advance, and I will tell you what I expect you to do; I can't compel you to do it or coerce you to do it or have you agree that you will do it."

So that this letter on its face seems to me to be the mere expression of the exercise of a perfectly lawful
5921 right on the part of the Universal; unless this letter was followed up by some agreement or understanding on the part of Ebsary that they would observe fixed prices, then there is nothing wrong about it.

So it seems to me in this situation, even on the new theory, to be immaterial and irrelevant, because it goes to prove—giving it the worst effect possible—merely a course of lawful conduct, and not unlawful conduct.

Justice Stephens: We will receive these two exhibits in evidence under the theory stated by the Court. We think your objections probably go to the weight or ultimate meaning of the exhibits, Mr. Bromley. We do not receive the exhibts as tending to prove resale price fixing by Ebsary Gypsum Company as a manufacturing distributor, because that was not charged, but under the course of conduct theory we will receive these exhibits in evidence as perhaps having some relevancy and materiality, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 401 and 402, were received in evidence.)

By Mr. Steffen:

Q. I would like to show you what has been marked as Government's Exhibit No. 403, Mr. Stromquist.

5922 Mr. Steffen: This letter, I think, was never identified.

Will you please hand Government's Exhibit No. 403 for Identification to the witness?

(Government's Exhibit No. 403 for Identification was handed to the witness.)

By Mr. Steffen:

Q. Have you examined Government's Exhibit 403 for Identification, Mr. Stromquist? A. Yes, I have.

Q. And is that your signature? A. That is not my signature, but I recognize it as my signature signed by my secretary at that date.

Q. Is that your letter? A. Yes, sir.

Mr. Steffen: We offer now in evidence, Your Honor, Government's Exhibit 403.

Justice Stephens: On the same theory?

Mr. Steffen: This has to do with a different topic. It has to do with the charge that the defendants conspired, among other things, to influence or control the price of miscellaneous products other than gypsum board. This has to do with plaster. The charge in the complaint is very clear, and this is a letter which is exchanging price information between Universal and National con-

5923 cerning plaster in certain territories, and suggesting that Mr. Burley get in touch with Charley.

Who, by the way, is Charley, Mr. Stromquist?

The Witness: Mr. Charley Henning.

Mr. Steffen: Of the United States Gypsum Company?

The Witness: That is correct.

Justice Stephens: Any objection?

5924 Mr. Bromley: I object to it as immaterial and irrelevant.

Justice Stephens: The objection is overruled; the exhibit is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 403, was received in evidence.)

By Mr. Steffen:

Q. Do you recall the occasion when you wrote this letter, Mr. Stromquist? A. Yes, I do.

Q. Had you had any conversation with Mr. Burley concerning this matter? A. Yes, I did.

Q. What was your conversation—

Justice Stephens: (Interposing) Before you answer that question, is the bulletin attached to that, the sheet following it in these photostats that we have?

Mr. Steffen: Yes, your Honor.

Justice Stephens: Perhaps that should be marked Exhibit 403-A, then, because it is not attached to the other.

Mr. Steffen: Yes.

Justice Stephens: Mrs. Gillette, mark the bulletin as Exhibit 403-A; otherwise it may get lost in the record. And it will be admitted under the same theory as Exhibit 403 and subject to the same reservation.

5925 (The document referred to was received in evidence as Government Exhibit No. 403-A.)

Justice Stephens: Mr. Reporter, will you now read the question to the witness?

(The reporter read the pending question.)

The Witness: As I recall it, Mr. Burley phoned me from Buffalo. He was comparatively new in the plaster business at the time, and he had been making a rather careful study of the plaster business, of plaster prices, having had many reports from various sections of the territory, some reports from salesmen and some advices from dealers, as I recall his saying, and there was quite a wide variance in the prices as reported to him and he was a bit concerned as to what really was the going market price, because of

these wide differences. He was merely making a study to determine what he would do.

He asked me if I had any objection to sending him a copy of the prices that Universal Gypsum & Lime Company had published, and which they had been using on sales of sanded plaster in that territory. I told him I would be glad to send him such a bulletin, which I did.

By Mr. Steffen:

Q. What is the reference to "Charlie", "Charlie" Henning? A. Since my activity was primarily in the Eastern market at the time, and not being intimately
5926 acquainted with conditions in Michigan and Wisconsin and parts of Ohio, I wasn't able to tell him much about our findings in those territories, and I merely suggested that if he cared to talk to Mr. Henning about the situation, he might do so.

Mr. Bromley: On the basis of that testimony, may it please the Court I move to strike out Exhibit 403 and 403-A on the basis of the witness' explanation with respect to the letter in which he has stated clearly that it was merely an explanation to Burley who had requested prices from Universal in a territory with which Mr. Burley was not familiar but as to which Mr. Stromquist was familiar, and a suggestion that he see Henning concerning prices in that territory with which Mr. Henning w.s more familiar than Mr. Stromquist—and all of which concerned the price of plaster.

Justice Stephens: We will be glad to hear you, Mr. Steffen. We are inclined to the view that the testimony of your own witness has now shown that this document doesn't prove what you offered it for. That being true, it ought to go out.

Mr. Steffen: I offered it to show an exchange of price information between the licensees. It is true that very rarely are you able to prove an agreement on the part of anybody that they will abide by or follow exactly the prices that each has furnished the other. But the first step in any conspiracy, practically, to make it effective,
is to supply each other with prices, and that is usu-
5927 ally regarded—and I think it will be by the Court here—as very material evidence.

It is true that Mr. Stromquist's statement concerning it as merely an exchange of information, goes to the weight of the matter—we grant that cheerfully.

Justice Stephens: Well, I am inclined to think you are right about that. The objection goes to the weight. The motion to strike is denied and the exhibits may remain.

Mr. Steffen: We are not clear as to whether we still have some exhibit that has not been ruled upon, or not.

Justice Stephens: Well, if you need a little time to consider this, we can take the noon recess at this time. I notice that Mr. Ingberg has returned. How long is he likely to be on the witness stand?

Mr. Steffen: I will have to talk to him for a couple of minutes before he goes on, anyway.

Justice Stephens: Then we will take the noon recess at this time.

(Whereupon, at 12:07 o'clock, p.m., the trial was recessed until 1:45 o'clock, p.m., of the same day.)

5928 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: The hearing will come to order. Take the witness stand, Mr. Stromquist.

Thereupon, WALTER G. STROMQUIST, the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Mr. Steffen: We have no further questions, Your Honor.

Justice Stephens: Cross-examination?

Mr. Bromley: May it please the Court, before I start the cross-examination, I should like to move to strike Exhibits 401 and 402, and I make the motion now because I think I may have misled the Court in what I said this morning.

As I read the argument beginning at the bottom of page 4033, with respect to Exhibit 401, this point, in effect, was argued before, because I called the Court's attention, at the bottom of page 4033, to this situation, saying:

"Suppose, instead of being what it is, this letter was a letter from Universal, a licensee, to a dealer, in which Universal said, 'Now I am going to sell you my material, but, Mr. Dealer, you observe the price I tell you.'

"Would my friend say that that, under any con-
5929 struction of the pleadings, would be material? There isn't any charge here that dealers' resale prices were

fixed, and yet a dealer's price is a resale price, is a resale transaction, in the same sense that this is. We have got to stop somewhere. We couldn't, it seems to me, possibly permit testimony that this conspiracy, as alleged in these pleadings, was broad enough to include the 20,000 dealers."

Now in this situation we have a bill of particulars which names the manufacturing distributors, which does not name Ebsary; and it seems to me that the bill of particulars still should play a function in so far as the scope of the evidence is concerned. In other words, is it not possible that this ruling means, in principle, that they could prove, if they were able to, that these defendants attempted to fix the price of paints, or roofing, or all sorts of materials, or attempted to fix the resale prices of dealers and jobbers and others, all on the theory that they were not limited by the bill of particulars because they got around it, forsooth, on the theory that they were merely proving intent, that is, showing similar crimes.

Now there must be some limitation to that doctrine, even if we accept that doctrine as being applicable here. I have had an opportunity, over the noon recess, to read the Martin case, to which Your Honor referred, and as I understand that case the only possible exception
5930 to the rule that other crimes cannot be proved, which could have any applicability here, is the theory of common scheme or plan, as to which your Honor, the Presiding Justice, in his opinion in the Martin case said:

"Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. This connection must clearly appear upon the evidence. Whether any connection exists is a judicial question. If the court does not fairly perceive it, the accused should be given the benefit of the doubt and the evidence rejected."

Now here we have evidence that the only sales that Universal made to a manufacturing distributor were to the Oakfield company, and we have evidence from this witness that he never sent any price list to the Oakfield company.

So what does proof of a prior crime tend to show in this situation? It certainly cannot be said that there is any connection between what he did with Ebsary and what it now appears he did not do with Oakfield. In other

words, there is no evidence here of any principal crime as to which evidence of prior crimes might color the question of intent.

Furthermore, there is no evidence that what he did with respect to Ebsary was part of any common scheme or design as to what he may have done with the Oakfield company.

5931 So that it seems to me that in effect this argument, although not expressed in words, was considered before by the Court, and that this ruling this morning in effect is reversing the position of the Court; and it seems to me that the theory of "other crimes" just doesn't fit this situation.

Justice Stephens: Well, the Court will not hesitate to reverse itself if convinced that its original ruling was incorrect. It is more important that we be right than that we be consistent, of course, in these rulings. But if we were right in the first instance, then we want to be consistent so as to rule rightly the second time.

It may be that your contentions now made are well taken.

Do you wish to be heard in response, Mr. Steffen?

Mr. Steffen: Just briefly, your Honor.

As I get the argument, when these exhibits, 401 and 402, were before your Honors previously, it seems to me that Mr. Bromley was endeavoring to show that there is no limit to the admission of papers of this sort, and he instanced the fact that we might even have to do with 20,000 dealers. I thought we met that this morning rather clearly by indicating that the Ebsary Gypsum Company was in a class by itself, it was not a dealer and it was not a jobber like Perry, for example.

The Ebsary Gypsum Company was a plaster manufacturer, in this little unique class of people who we have labelled manufacturing distributors, and the only

5932 reason it was not a distributor is because it never distributed. It became a manufacturer before it got into the distributing business.

Now, on the matter of the second point, which is with reference to the Martin case, unfortunately I have not read the Martin case because I was relying on your Honor's ruling.

It seems to me, if I understand the Martin case, that it hasn't anything to do with a conspiracy. We are here

establishing, I think, that not only Universal, but as we have shown also Ebsary and Kelley, and the other companies which have sold to manufacturing distributors, have all, more or less, adopted this same manner of influencing or controlling the resal prices and terms and conditions of resale, by manufacturing distributors. So this is not an isolated instance. This is a matter of one of the alleged co-conspirators, the Universal Gypsum Company, making an effort, as we see it, to control and influence the price of a plaster manufacturer, the resale price, and it seems to me, therefore, that the Martin case, on that reasoning, would not apply at all,—what I mean to say is that Mr. Bromley's statement that it would not apply, would not stand up for the reason that here we have a connection shown in the fact that Universal and Ebsary and the other companies who were selling to manufacturing distributors, were also sending their price information. This happens to be a little more explicit. Universal has told Ebsary
5933 that they shall sell according to such and such conditions, and shall follow such and such prices. That is right in keeping with all the other evidence that we have introduced between the other manufacturers and manufacturing distributors. And while, of course, as we pointed out this morning it is true that the Ebsary Gypsum Company never actually sold or went through with this type of bargain, that is immaterial for our charge is that they endeavored to influence or control, and the fact that they have written letters of this sort for that purpose is certainly evidence on the "other crimes" theory, to indicate that they did, or wanted to, control the price of manufacturing distributors generally.

Mr. Bromley: May it please the Court, there must be some limit to the Government's right to change its position and not be bound by the bill of particulars, and I now desire to call your Honors' attention to the fact that at page 4029 of this record Mr. Knuff has said:

"We don't contend—and this is one of the few times that you will hear me say that we admit something—we don't contend that the Ebsary Gypsum Company was a manufacturing distributor. What we say the Ebsary Gypsum Company was, is that it was a manufacturer."

Now, there must be some limit to the Government's right to change its theory and its position, not only with reference to the bill of particulars, but during the trial of the case.

Of course, it is absurd to say that the Ebsary Gyp-
5934 sum Company was a manufacturing distributor, it just never was; it was a manufacturer which took a license from us to make the board.

Mr. Steffen: We never have changed our position on that. We do not now, and never did, contend that they were a manufacturing distributor. We said that they were a plaster manufacturer in the same category as Connecticut Adamant and Oakfield and Grand Rapids and many other companies, at the time this letter was sent.

Justice Stephens: Will you please hand to the Court, Mr. Marshal, the portions of the transcript where the Court's ruling on these two exhibits appears? I do not have my copy of the record with me.

(The transcript was handed up to the Court.)

Mr. Bromley: At page 4035 I think is the final ruling.

Justice Stephens: Where were they offered?

Mr. Bromley: At page 4009.

Mr. Steffen: I believe Exhibit 402 was never offered. It was never identified until today.

Mr. Bromley: I am talking about 401, but the two things are the same.

Justice Stephens: (After examining transcript) I don't see, Mr. Bromley, where, up to page 4035, we discussed this Martin case theory.

Mr. Bromley: We didn't.

5935 Justice Stephens: Was that after that?

Mr. Bromley: We didn't discuss that in the previous ruling. All I said was that my argument, I think, was applicable to the Martin case theory.

Justice Stephens: I see.

Well, we think, upon still further consideration of the matter, gentlemen, that we ought to abide the previous ruling; even on the Martin case theory, since this Ebsary company was not charged as a manufacturing distributor, you don't get within the theory that you can introduce evidence of another wrong to prove something that is charged, because this isn't proving what is charged.

We call attention to the fact that at page 4035 the Court said that it "does not, by this ruling, restrict the Government from proving the genesis of the consipracy, and the dealings between the licensees, and the litigations and transactions and tradings alleged, but we think the objections to this particular exhibit are well taken."

So we will exclude both Exhibits 401 and 402.

Wasn't your motion directed to both exhibits, 401 and 402, Mr. Bromley?

Mr. Bromley: Yes.

(Government's Exhibits Nos. 401 and 402 were excluded.)

5936 Justice Stephens: You may cross-examine.

Cross Examination

By Mr. Bromley:

Q. Mr. Stromquist, have you Exhibit 403 before you? A. Yes.

Q. At the time you wrote Exhibit 403, that is, in January, 1930, you knew, didn't you, that Mr. Burley of the National Gypsum Company was new, so far as the plaster business in Ohio, Michigan, Wisconsin and Illinois was concerned? A. That is right.

Q. And it was your understanding, wasn't it, that he was not familiar with the going market price of plaster in those States at that time? A. That is correct.

Q. And isn't it a fact that all that he told you in the telephone conversation to which you have testified, was that he had been trying to find out what the going market price of plaster in those territories was? A. That is correct.

Q. And that he had not been able to determine what it was so far as his salesmen's reports to him were concerned? A. That is right.

Q. And he asked you if you would mind telling him what your company charged for plaster in the terri-

5937 tories mentioned, isn't that right? A. That is right.

Q. And as a result of that conversation, you wrote him the letter of January 8, 1930, Exhibit 403, and enclosed your price list to the trade for that territory, didn't you? A. That is right.

Q. Now did you, at that time, or at any time, have any understanding or arrangement or agreement of any kind, with Burley or anyone from the National Gypsum Company, as to what price or prices the National Company would or would not charge for plaster anywhere in the world? A. Positively not.

Q. When you wrote, in Exhibit 403, "However, I suggest you check this with Charley the next time you are in Chicago to make sure", you merely meant, didn't you, to suggest to

Burley that he ask Henning what USG's prices for plaster were in those territories? A. That is correct.

Q. As a matter of fact, the United States Gypsum Company had had a much wider market experience in plaster sales in those territories than you had had for your company, at that time? A. That is correct.

Q. And you thought probably that Henning knew more about the going market price in those territories
5938 than you did, didn't you? A. I knew that he knew more than I did.

Q. Now was it your purpose to suggest to Burley that he approach Henning for the purpose of entering into any arrangement or agreement or understanding with Henning as to what prices should be charged by anybody for plaster in the Middle West territory? A. Will you kindly restate that question again?

Mr. Bromley: Will you read it, please?

(The question was read by the reporter.)

The Witness: No.

By Mr. Bromley:

Q. Did you have any arrangement or understanding or agreement with Henning, or with anybody else in the USG Company, as to what prices should be charged by you or by USG for plaster anywhere? A. Absolutely not.

Q. Now there always has been the strongest and the most vigorous kind of competition in plaster, including price competition, hasn't there, all the time that you were in the gypsum industry? A. That is correct.

Q. By the way, you said at one point in your direct-examination that there was strong competition in board in 1927 and 1928, I believe. Do you remember that? A. Yes, sir.

5939 Q. Well, isn't it the fact that at all times during your connection with the gypsum industry, there was strong competition among the manufacturers in the sale of gypsum board? A. Yes, I think that is a correct statement.

Q. And your experience in the gypsum industry goes down at least into 1931, doesn't it? A. It goes back to 1919.

Q. And ended at least as late as 1931, didn't it? A. That is right.

Q. You knew at the time you wrote Exhibit 403 that you could not lawfully agree with any of your competitors as

to prices they should charge for plaster, didn't you? A. Yes.

Q. And you never had any price agreements as to plaster with anybody at any time, did you? A. Absolutely not.

Mr. Bromley: Will you show the witness Exhibit 609, please?

(Government's Exhibit No. 609 was handed to the witness.)

Justice Stephens: Exhibit 609 is in evidence, is it not?

Mr. Bromley: Yes, Your Honor, for the limited purpose suggested by paragraph 2, of showing that this wit-
5940 ness had an expectation of a price rise in board at the time he wrote this letter.

Justice Stephens: That is right.

By Mr. Bromley:

Q. You had no special reason, did you, Mr. Stromquist, for suggesting to Emil Hansen that he make no future price commitments beyond the period for immediate delivery? A. None other than the fact that the Universal Gypsum & Lime Company, operating under receivership at the time, was very low in funds, working capital, did not want to make many sales of board products at prices prevailing at that time, which showed no profit to them.

Q. And isn't it the fact that when you wrote that second paragraph, you were afraid that if Hansen committed himself at a price for a long period in the future, that you would be forced to sell him at a price then prevailing, in spite of the fact that prices might have risen? A. That is correct.

Q. And you didn't want to get in that situation? A. That is absolutely right.

Q. You did the same thing with all of the people to whom you were selling board at that time, didn't you? A. That is right.

Q. That is, you didn't want to be committed to them simply because they had taken orders for advance
5941 delivery at a time when prices were low, and you hoped they might go up; isn't that right? A. That is correct.

Q. Did you have any knowledge or information of any kind that USG would increase prices to its licensees at or about this time, in June? A. No, sir.

Q. As a matter of fact, you weren't even aware of the fact that four additional companies had signed license agree-

ments in May, 1929, as of the date you wrote this letter, were you? A. No.

Q. And you had no thought, had you, in your mind, of any kind, that USG might do something at about this time to increase the price which you could charge for board? A. No.

Q. You never at any time had any agreement, arrangement or understanding with the Oakfield Company as to what resale prices they would charge, did you? A. No, sir.

Mr. Bromley: That is all.

Justice Stephens: Any further cross-examination by other defendants' counsel?

(No response.)

Justice Stephens: Any re-direct-examination?

5942 Mr. Steffen: I hope Your Honors will hear me for just a moment on Exhibits 401 and 402.

As I got Your Honors' ruling, you were staying with the ruling which had previously been made as respects a declaration or as respects its bearing upon resale price control?

Justice Stephens: That is right.

Mr. Steffen: And I offered them this morning on one other ground, and I want to make sure whether Your Honors considered that in making your recent ruling. The other ground was that we had one of the co-conspirators, the Universal Gypsum Company, writing a letter in which they make what I would contend is an admission, and I would offer it on the basis of an admission, that they were of a mind to control and fix prices and means and methods of sale. Whether that constitutes a declaration, whether it is designed for purposes of influencing the actual resale price of any manufacturing distributor or not, it seems to me proper to say that it constitutes an admission on the part of the Universal Gypsum Company, and as such that it would be admissible, the admission being that they are prepared to control resale prices and prepared, moreover, to set up a system of pricing concerning sales terms and conditions, which would be dictated under the license agreement.

So that I should think they would be admissible
5943 as an admission, whether or not upon the ground that was previously argued.

Justice Stephens: Do you wish to be heard as to that, Mr. Bromley?

Mr. Bromley: It doesn't seem to me that it does any good to argue it on the basis of an admission, unless the admission is as to something that is charged in the complaint. Suppose this witness testified that he was of a mind to control the resale prices of the 20,000 dealers in this country—what probative force has that admission with respect to any issue in the case, since there is no charge that anybody ever tried to control the resale prices of dealers? Suppose he was of a mind to control the prices of roofing that his company manufactured? Since there is no charge that anybody ever attempted to, or ever did any such thing, of what probative value is his state of mind? It seems to me none.

Mr. Steffen: I can point out simply that Mr. Bromley, if he resorts to roofing manufacturers, might as well have resorted to ice cream cones. They are utterly irrelevant. This hasn't anything to do with ice cream cones; it has to do with their state of mind with respect to plaster manufacturers' resale prices, and that is charged in the complaint.

Mr. Bromley: There is no charge as to Ebsary in the complaint, anywhere.

5944 Mr. Steffen: We have gone through that argument. There is a charge in paragraph 45(e), I think, that there is a conspiracy here to influence and control the resale prices of manufacturing distributors. We have indicated in argument that while the Ebsary Gypsum Company was not named a manufacturing distributor, which is perfectly clear, that they were at least the same type of manufacturer that all the other manufacturing distributors were. They are not roofing manufacturers or something else, or 20,000 dealers. They are the same type of people. And this shows, as I see it, a state of mind to control the resale prices by that type of person, that is, a plaster manufacturer. It is right down the line.

Mr. Bromley: That is just suggesting a way, it seems to me—

Justice Stephens: (Interposing) You need not reply, Mr. Bromley.

We are sorry, Mr. Steffen, but we are now convinced that Exhibits 401 and 402 are not admissible in evidence under the charges in the pleadings. We don't think that your last argument raises any new question. If they are not admissible for the reasons we have just stated, they are not admissible as admissions to prove the same thing for which they were offered.

I am sorry, but we can't seem to agree with you about that.

5945 Redirect Examination

By Mr. Steffen:

Q. Mr. Stromquist, you testified concerning the nature of the competition in the industry during the years 1927 and 1928. Do you recall that? A. Yes, sir.

Q. And what was your description of it? A. Strong competition.

Q. And did you say that prices were demoralized? A. Yes.

Q. During that period? A. Yes.

Q. Would you say that the competition that existed after May, 1929, when the various license agreements were signed, was of the same character? A. I would say so, because prices were still not profitable.

Q. What do you mean by that, Mr. Stromquist? A. It was impossible for the Universal Gypsum & Lime Company, speaking as one organization, to make a profit on the prices that prevailed.

Q. You mean that the prices were too low? A. They were too low, that is correct.

Q. And when you said "demoralized", did you mean that they were too low, or that they varied? A. They

5946 were also too low.

Q. Which did you mean, both? A. Well, you had a range of prices, the prices were not identical in all territories, but the entire range had a low level.

Q. And you testified, I think, that you might be offering your board at $23 or $24, and a dealer would tell you that he got it for $22? A. Yes.

Q. And that prices, in that sense, were demoralized; is that what you meant to say? A. Yes.

Q. It has been testified here that after May, 1929, the licensees sold board at uniform prices fixed by USG. Is that your information? A. USG did establish minimum prices.

Q. So that the competition after May, 1929, was not on a price level, is that what you mean to say? A. I beg your pardon?

Q. The competition after May, 1929, was not as respects prices? A. The general situation was not without competition. There were still prices lower than those set by USG in the field, although probably not as bad as prior to

May, 1929, but there were still some low prices being quoted.

5947 Q. You mean they were selling contrary to the USG bulletins? A. That is right.

Q. How long did you stay in the business? A. Until February of 1931.

Mr. Steffen: That is all.

Mr. Bromley: No further questions.

Justice Stephens: You are excused, Mr. Stromquist. Thank you for attending the Court.

(Witness excused.)

Mr. Steffen: Mr. Ingberg, will you resume the stand?

Thereupon, S. H. INGBERG recalled as a witness for and on behalf of the United States, having been previously sworn, resumed the stand and testified further as follows:

Justice Stephens: The Court will say, Mr. Steffen, in respect of the testimony of Mr. Ingberg, that it was not the understanding of the Court, when this witness was being examined this morning, that you were asking him to testify of his own knowledge with respect to these fire tests. He was testifying, obviously, from data that he had on the desk before him as to what was written therein, and we understood you were seeking to prove what was recorded; and therefore, the best evidence rule being invoked,

5948 we were obliged to apply it. We didn't intend the ruling to forbid the Government from asking this witness, if the Government thinks it is relevant and necessary to its case to do so, whether or not he personally conducted these tests, and what he personally learned or saw in them. We didn't understand, however, that you were going into that.

Mr. Steffen: That is exactly what I wanted to go into, Your Honor, and I am sorry if I didn't make myself clear, because Mr. Ingberg—I would like to ask him some questions along that line.

Justice Stephens: We understood you were trying to prove the contents of exhibits.

Mr. Steffen: No.

Justice Stephens: And that being true, the best evidence rule was necessarily invoked and properly ruled upon. But if you want to ask this witness if he conducted these tests personally, and what he saw happen in them, you may do that.

Direct Examination (resumed)

By Mr. Steffen:

Q. Did you conduct this test on March 17, 1938, on Schumacher board? A. Yes.

Q. Did you do that personally? A. I was present at the test.

Q. What is your position out there, are you in
5949 charge of the division? A. I am in charge of the section.

Q. And how many people do you have with you? A. From ten to fifteen.

Q. Who is your assistant? A. N. D. Mitchell.

Q. And did he participate in the tests of the Schumacher board? A. He did.

Justice Jackson: Were the tests made under your supervision?

The Witness: That is right.

By Mr. Steffen:

Q. And you drew up the report, did you? A. I think Mr. Mitchell drew up the report.

Q. Did you examine it? A. Yes.

Q. And did you approve it? A. Yes.

Q. Well, now, I would like to have you describe the board submitted by Schumacher as respects the size of the holes and the arrangement of the holes, if you can do so?

Mr. Bromley: I object to it as immaterial.

Justice Stephens: We have overruled that objection previously, and that will be overruled again.

5950 Let the Court explain to you, Mr. Ingberg—I am not sure whether you are familiar with our practice in the courts or not—if you have an independent recollection of something, which you personally saw or observed or participated in, of course you can tell about that. And if you have any data which refreshes your recollection, you may consult that and then testify as to your own recollection. But if what you are testifying to is merely, without reference to your recollection, what is recorded in exhibits, then we have to have the original exhibits. If you will keep those discriminations in mind, we will appreciate it.

The Witness: Well, Your Honor, we conduct so many hundreds of tests that, of course, the details of each individual test can not remain clear in our minds. We have to refresh our recollection.

Justice Stephens: Well, if these items you have in front of you refresh your recollection so that you can, after looking at them, tell us from your own recollection what happened, then you may freely do that. But if you frankly don't remember anything about it except, in a general way, that a test was held, and are therefore really reading to us the contents of exhibits, then we ought to have those exhibits to read them ourselves, with your help.

The Witness: Well, Your Honor, I might say that the original incident wouldn't be in my recollection ex-
5951 cept as the main results of the test have been refreshed from time to time by reading of various reports, and so on.

By Mr. Steffen:

Q. Tell us, if you can, now, consulting your reports and according to your best recollection, what type of board Schumacher submitted to you for the test on March 17, 1938, as respects size of holes and arrangement? A. I had their records gone over only during the past week or two, and a sketch prepared showing the arrangement of the holes. That is the best I can do—

Mr. Bromley: (Interposing) Who prepared the sketch?

The Witness: The sketch was prepared by my assistant, Mr. Mitchell.

Mr. Bromley: And you don't remember anything about the board that was tested, at all, do you?

The Witness: So far as the details of the holes are concerned, I would have to depend on the records in our record books that he consulted in preparing this sketch, and also we have a photograph showing the board.

By Mr. Steffen:

Q. Can you tell us now, Mr. Ingberg, the size of the holes and the arrangement of the holes in the Schumacher board?

Mr. Bromley: I object to that as incompetent unless the original report in which these details were, I
5952 assume, carefully recorded at the time, is produced.

Justice Stephens: Mr. Steffen, in a desire to be entirely fair in our ruling towards the Government and to give the Government every proper opportunity to prove by this witness what the witness knew, we opened the door to you to call on this witness to testify as to his own knowledge; but it now appears that he doesn't recollect, himself, and couldn't be expected to, because he is the man in charge of

dozens of these tests. So it seems to me we are back where we started, that you really haven't got a witness that can testify from his own recollection but a witness who can identify records. So you had better proceed along that line.

Mr. Steffen: He hasn't said yes or no to my question, Your Honor. I have asked him now several times whether he can tell us, after consulting his records, what the size of the holes was in the board submitted by Schumacher, and their arrangement.

Can you tell us that now, Mr. Ingberg?

Mr. Bromley: I object to that, because it is apparent that he can only do it by reading it off the paper.

Justice Stephens: That is obvious, Mr. Steffen. He is reading it to us. The witness is frank and honest, and states that he can't remember the details at all. That being true, he is just giving us the contents of the
5953 records. Why not put the records in?

Do your records show the size of these holes, Mr. Ingberg?

The Witness: Yes, sir.

Justice Stephens: Why not have the records, Mr. Steffen?

Mr. Steffen: The witness hasn't really answered the question.

Justice Stephens: Very true, but the question is objected to upon the ground that it is obvious he is not answering from his own knowledge, but from the contents of records, and therefore the records ought to go in. We sustain that objection.

By Mr. Steffen:

Q. What records would you refer to, Mr. Ingberg, to ascertain the size of the holes and their arrangement—I mean the original records? A. We have the construction records—I am not sure whether they are here now—and of course, we have the report—

Justice Jackson: (Interposing) A copy of the report that you sent to Schumacher?

The Witness: Yes.

Justice Jackson: Does that give all the details?

The Witness: Yes.

5954 Justice Stephens: Why not have that?

Justice Jackson: That is the report that was made.

Justice Stephens: There is no objection to that being

raised. Mr. Bromley stated before the recess that he would raise no objection as to its being a copy as distinguished from the original.

Mr. Steffen: I will say to Your Honor that we have no objection, so far as the Government is concerned, to introducing these reports. This is a highly competitive industry, not on a price level, but in other regards, and I don't think that the defendants are altogether entitled to look at what is a confidential communication between the Bureau of Standards and the Schumacher people, or the National Gypsum Company, as to the way their boards tested, and so on, and so on, and so on.

Mr. Ingberg conducted the tests. While it is true that he can't remember all the little details, it is very usual for a witness to look at records and from those records to testify. It is past recollection recorded, and on the basis of past recollection recorded he is entitled to testify directly.

Justice Stephens: I am sorry, but we have been through all this. When past recollection recorded is relied upon, then the record comes into evidence. When present recollection refreshed is being used as the expedient to
5955 prepare testimony for admission, then the records may be consulted, but if they refresh recollection the witness testifies.

Obviously this witness doesn't—and he frankly states he can't be expected to—remember all these details himself, and these items don't refresh his recollection.

Mr. Finck: I would like to state that I would be glad to waive any objection that I might have as to the secrecy of any of the tests.

Justice Jackson: Does it make any difference what size the holes are, in your testing, your fire tests?

The Witness: Within certain limits—

Justice Jackson: (Interposing) What do you mean, "within certain limits", within a certain time? For instance, if you were testing board or lath, perforated in any manner, or indented, that would pass an hour's fire test, would it make any difference whether they were big holes or little holes?

The Witness: I think it would.

Justice Jackson: It would?

The Witness: Yes. If they are too small, they don't seem to afford strength to hold the plaster in place.

Justice Jackson: How about a 3/16 inch hole?

The Witness: The plaster wouldn't enter the small holes as readily as the large ones.

Justice Jackson: But if it did enter it, it would
5956 pass the fire test?

The Witness: Under practical conditions of application, it probably wouldn't enter a small hole.

Justice Stephens: I don't see what more we can do, Mr. Steffen. We have tried to be very fair with the Government in respect of this witness. We had thought this noon we had perhaps misunderstood you. But now, if you are relying upon these records, which you obviously are, you can't have your cake and eat it. If you want to rely on them, they will have to come in. I don't see how we can exclude them on the theory that they contain trade secrets, unless somebody raises that objection.

The Witness: On the matter of secrecy of our reports, Your Honor, anyone is entitled to witness any of our tests, and naturally that means that whoever witnesses the tests will know something about the construction. Whereas, we may not send out these reports to anyone that asks for them, we do not put them in anything approaching either a restricted or secret status.

Justice Stephens: You do not do what?

The Witness: We do not put our reports in any restricted or secret status.

Justice Stephens: Although you don't send them out indiscriminately, you do permit people with a proper interest to have access to them?

5957 The Witness: Yes.

Justice Stephens: That would seem to end the trouble. Thank you for your statement.

By Mr. Steffen:

Q. I now show you what has been marked Government's Exhibit 610, which purports to be a report of the National Bureau of Standards under date of March 31, 1938, having to do with the Schumacher Wall Board Corporation board.

(The document referred to was marked as Government's Exhibit No. 610 for identification.)

Mr. Steffen: I regret I don't have any copies, but I think the reason is well understood.

Justice Stephens: Well, we will have to look at it, or those portions of it which are relevant.

(Government's Exhibit No. 610 for Identification handed to the witness.)

By Mr. Steffen:

Q. Will you examine Exhibit 610, Mr. Ingberg, and tell me whether that is a copy of the report, the original of which was sent to the Schumacher Wall Board Corporation? A. It is.

Mr. Steffen: We offer in evidence Government's Exhibit No. 610, which is the report upon the fire test of the Schumacher perforated wallboard.

5958 Justice Stephens: Submit it to counsel, please, after the witness has examined it further, if he wishes.

(Government's Exhibit No. 610 for Identification handed to defendants' counsel for examination.)

Mr. Steffen: I will now ask to have this marked as Government's Exhibit 611 for Identification. My thought in doing that at this time is that it is the same type of report, having to do with National, and I felt that the Court could be looking at this copy while Exhibit 610 is being examined by defendants' counsel. This purports to be a report on the National Gypsum Company lath, under date of December 31, 1936, signed by Mr. Briggs as Director of the Bureau of Standards.

(The document referred to was marked as Government's Exhibit No. 611 for Identification.)

(Government's Exhibit No. 611 for Identification was handed to the witness.)

By Mr. Steffen:

Q. Will you please examine Government's Exhibit No. 611, Mr. Ingberg, and state whether or not that is a copy of the report which was sent to the National Gypsum Company? A. Yes, it is.

Justice Stephens: Hand it to defendants' counsel.

(Government's Exhibit No. 611 for Identification
5959 was handed to defendants' counsel for examination.)

The Witness: Your Honor, would you permit me to explain a little further on the availability of reports of the National Bureau of Standards, in order that the record might be clear?

Justice Stephens: Yes, in just a moment. Let counsel give their attention first to examining these exhibits, because they will want to hear you, also.

(Government's Exhibits Nos. 610 and 611 for Identification were handed to the Court for examination.)

Justice Stephens: Announce the afternoon recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5960 Justice Stephens: Proceed, Mr. Steffen.

Mr. Bromley: We object to both exhibits on the ground that they are immaterial and irrelevant.

Justice Stephens: That objection is overruled, and Exhibits 610 and 611 are admitted in evidence.

(Government's Exhibits Nos. 610 and 611 were received in evidence.)

By Mr. Steffen:

Q. Can you tell us—

Justice Stephens: (Interposing) Pardon me, Mr. Steffen.

You wanted to make some further statement, did you not, Mr. Witness?

The Witness: The remarks I made should apply to the types of tests concerned. We undertook these tests with the understanding that we would be permitted to include the results in publications, that is, it was a part of a general research testing program on the fire resistance of partitions, and on tests of that kind the reports are not privileged, and we intended to include them in the publication which is a part of the exhibit here, and that is available to anyone.

Justice Stephens: Thank you. Proceed, Mr. Steffen.

By Mr. Steffen:

Q. By way of translation, Mr. Ingberg, can you say whether or not the Schumacher lath submitted for test on March 17, 1938, as reported in Exhibit 610, passed

5961 your so-called 1-hour fire test? A. It did.

Q. Can you say the same thing with regard to the lath submitted by National, which is reported in Exhibit 611, under date of December 31, 1936? A. It passed it within the tolerance limits that we apply in tests of that kind.

Justice Stephens: Judge Garrett is moved to inquire whether or not this is the only copy that the Bureau of Standards has, or have you other copies of these exhibits?

The Witness: We can permit these copies to remain in the records of the court.

Justice Stephens: Very well, thank you.

Mr. Steffen: That is all we have.

Justice Stephens: Cross-examination.

Cross-Examination

By Mr. Bromley:

Q. Mr. Ingberg, as I understood you, you just told Mr. Steffen that the lath submitted by the Schumacher Company for test, and reported on in Exhibit 610, passed the 1-hour fire test—is that what you said? A. That is right.

Q. Now, as a matter of fact, Exhibit 610 covers two separate tests of two entirely different laths manu-
5962 factured by Schumacher, doesn't it? A. It does.

Q. And in Exhibit 610 the first board tested bears Test No. 120, does it not? A. That is right.

Q. And the second lath bears Test No. 123, doesn't it? A. That is right.

Q. And the fact is that the Schumacher lath tested under Test No. 120 failed to pass the 1-hour test, isn't that right? A. That is right.

Q. And it was only the lath tested several months later, under Test No. 123, which did pass the test, isn't that right? A. That is right.

Q. The 1-hour fire test. A. That is right. Could I qualify that?

Q. Yes. A. I understood Mr. Steffen to give the date of the test.

Mr. Steffen: Yes, March 17, 1938. That was Test No. 123.

The Witness: Yes.

By Mr. Bromley:

Q. So your answer was meant to only indicate just the particular lath submitted by the Schumacher Com-
5963 pany and tested under Test No. 123, which test occurred on March 17, 1938, that only that lath passed the test? A. That is right.

Q. And the other lath tested under Test No. 120 did not pass the test; did it? A. That is right.

Q. The 1-hour test? A. That is right.

Q. Now, there was a difference between the two pieces of lath, that is, a difference between the Schumacher lath

tested under Test No. 120 and the lath tested under Test No. 123, was there not? A. There was.

Q. What was the diameter of the holes in both the tests? A. 13/16ths inch.

Q. 13/16ths of an inch is 1/16th inch more than 3/4ths of an inch, isn't it? A. Yes.

Q. So that 13/16ths of an inch is pretty close to 3/4ths of an inch in diameter, isn't it? A. It is.

Q. Now, the lath of the Schumacher Company that was tested under Test No. 120 had 42 holes for each
5964 piece of lath, did it not? A. That is right.

Q. And the lath tested under Test No. 123 had 48 holes for each lath, did it not? A. That is right.

Q. And each lath tested under Test No. 120 and Test No. 123 had the dimension of 16" x 48", did it not? A. That is right.

Q. So that while the diameter of the holes was the same in both laths tested under both tests, the spacing of the holes was different, is that right? A. That is right.

Q. Would it be correct, Mr. Ingberg, to say that in Test No. 120 the holes were farther apart than in Test No. 123? A. On the average they would be.

Q. And the fact is that the board with the 42 holes failed to pass the test, while the board with the 48 holes passed the test, isn't that right? A. That is right.

Q. Now, doesn't that mean, Mr. Ingberg, that wherever a municipal building code calls for fire resistant 1-hour fire test board, the only board of Schumacher which could be sold for that use is the 48-hole board?

Mr. Steffen: I wonder if that question isn't going too far in that it seems to ask for the construction
5965 of the building ordinances or building codes.

Mr. Bromley: I will withdraw the question for a moment.

By Mr. Bromley:

Q. You are an expert on building codes and ordinances, aren't you, Mr. Ingberg? A. I have worked with them for some time.

Q. And among the many reports which have come out of the Bureau of Standards under your guidance, is a report issued in 1942 which considered very carefully the provisions of the buildings codes of most of the larger cities of this nation, isn't that right? A. Do you refer to our BMS92?

Q. Yes A. Yes.

Q. That is right, isn't it? A. Yes.

Q. So you would say that you have a pretty comprehensive knowledge of building codes throughout the United States? A. I have had contacts with them from the standpoint of fire resistance requirements.

Q. And isn't it true, generally speaking, that these building codes throughout the United States have very definite requirements with respect to whether materials can be used, based on whether they pass your 1-hour fire
5966 test or whether they don't? A. For use in certain locations in buildings, the building codes will require certain fire resistance.

Q. And isn't it fair to say that this Schumacher board tested under Test No. 120, with the 42 holes in it, could not be used anywhere in the United States in places where board having a 1-hour fire rating was required? A. On the basis of these tests, it would not qualify for the 1-hour rating, that is, the plaster construction and board together.

Q. Now, in the National tests, covered by Exhibit 611, you likewise tested two laths, didn't you? A. Yes.

Q. And there again one lath passed the test and one did not, isn't that right? A. That is right.

Q. In Exhibit 611 what were the test numbers? A. 78 and 89.

Q. 78 and 89? A. Yes.

Q. The lath tested under Test No. 78 did not pass the 1-hour fire test, did it? A. The construction, of which the lath was a part, did not pass.

Q. On the other hand, the lath tested under Test
5967 No. 89 did pass the 1-hour fire test, didn't it? A. The construction of which it was a part did pass the 1-hour fire test.

Q. What were the differenees between those two boards? A. The lath tested under Test No. 78 had 54 holes, 5/8ths inch in diameter; that lath in Test No. 89 had 54 holes, 7/8ths inch in diameter, both with the same arrangement.

Q. What was that arrangement in both cases, staggered? A. It was a staggered arrangement, three in a row in the short direction of the board, staggered.

Q. These two laths were of the same size, that is 16" x 48", as the Schumacher laths, weren't they? A. That is right.

Q. Now, you have tested a great many kinds of gypsum lath, haven't you? A. Well—

Q. (Interposing) Over the years? A. Yes.

Q. And you have found out, haven't you, Mr. Ingberg, that there is a very definite relation between the size of the holes and their spacing, so far as ability to pass a 1-hour fire test is concerned? A. Within certain limits there appears to be such a relation. May I extend my explanation?

Q. Do, yes. A. We, however, call attention in our
5968 publication to the fact that the strength and quality of the plaster is a very important consideration in the fire resistance obtained in this type of construction.

Q. And did you ever find any kind of a perforated lath, which had a hole less than 3/4ths of an inch in diameter, which successfully passed the 1-hour fire test? A. In our tests, we did not.

Q. And isn't it a fact that you never found a perforated lath which would pass the 1-hour fire test which didn't have holes arranged so that there was about one hole to every 16 square inches of surface of lath? A. It would be approximately of that order.

Q. And in this report, BMS92, to which you referred, don't you make this statement—Have you got it there, by the way? A. No.

Q. Have you got it in court with you? A. I don't think so. I might recognize the quotation.

Q. Don't you say on page 34 as follows:—

Mr. Steffen: (Interposing) I wonder if the witness cannot be shown a copy of that, if Mr. Bromley is going to question him about it.

Justice Jackson: He said he thought he would recognize the quotation.

By Mr. Bromley:

5969 Q. Don't you say at page 34 of BMS92:

"gypsum plaster on 3/8-in. perforated gypsum lath, one 3/4-in. diameter hole or larger per not more than 16 in.^{2} of lath surface"—a 1-hour fire rating, according to your test? A. That is not for 1-3/4-inch diameter holes, but for 3/4-inch diameter holes.

Q. I was reading just as it appears in this book.

I will read it again.

"gypsum plaster on 3/8-in. perforated gypsum lath, one 3/4-in. diameter hole or larger per not more than 16 in.^{2} of lath surface"—1-hour fire rating. A. That is correct, according to the result of our test.

Q. And don't you also say:

"gypsum plaster on 3/8 in. gypsum lath, plain, indented, or perforated other than as above"—45 minutes fire rating. A. That is correct according to our test.

Q. Now, those two sentences sum up the results of all of your tests over the years, don't they, on perforated lath? A. They do, except I would have to have incorporated in that the same qualifications I recently gave, that the perforations in the lath are not the only factor in determining the fire resistance of the construction.

Justice Stephens: Didn't you conduct these tests
5970 with plaster of a constant quality, so far as each test was concerned, so you would have a control on that?

The Witness: We did not have consistent quality of plaster; it varied quite widely, and we saw the results in the tests. In fact, we have results where, in construction in which we applied lath conforming with these requirements, it did not pass the 1-hour fire rating, apparently on account of the quality of the plaster.

By Mr. Bromley:

Q. Now, you make no such qualification as you have just given, in BMS92, do you? A. I think we do, sir. If you look on page—Not in BMS92, no, but in BMS91 which is an exhibit here.

Q. I am talking about BMS92. You don't say anything about what you have just told the Court in BMS92? A. I cannot recollect whether something to that effect is in BMS92 or not. We had—

Q. (Interposing) Wait a minute. BMS92 was issued October 7, 1942, wasn't it? A. Yes.

Q. And that is the latest publication of the Bureau of Standards on the subject of fire-resistant perforated lath, isn't it? A. But it is a very brief summary.

Q. Whether it is brief or long, it is your latest
5971 publication, isn't it? A. It is.

Q. Now, whenever you have reported on these tests, such as in Exhibits 610 and 611, you have carefully given all of the characteristics of the plaster, haven't you? A. We have defined the plaster used.

Q. That is to say, you haven't gone in here with a blind test, not knowing whether you had what you call a good

plaster or a bad plaster; have you? A. We made tests on the plaster that would determine, at least in considerable part, the properties of the plaster.

Q. For instance, in Exhibits 610 and 611, you publish, as a part of the report, just what kind of plaster it was and just what characteristics it had as to tensile strength and compressive strength, and how much sand there was in it, and how much water there was in it, and all about it, don't you? A. That is right.

Q. And that has been your practice with each one of the tests you have made? A. That is right.

Q. So that there isn't any mystery, so far as your report is concerned, as to the kind of plaster used, is there? A. No.

Q. Wouldn't you say no to that, Mr. Ingberg?
5972 A. No, there isn't.

Q. Now, quite apart from the grade of plaster which was used, isn't it the fact, sir, that there never has been any perforated lath which passed the 1-hour fire test, which did not have at least a 3/4-inch hole, and one hole to each 16 square inches of surface? A. As far as our tests are concerned, that is correct.

Q. And you found, didn't you, that where you got smaller holes, such as Justice Jackson referred to a few minutes ago, or differently spaced holes, the board just would not pass the 1-hour fire test, isn't that so? A. There was an indication that the conditions for meeting the requirements were better with the larger holes.

Q. Now, you tested, yourself, the perforated lath which USG has sold since 1933 or thereabouts, didn't you? A. Yes.

Q. And you made that test in 1932, didn't you? A. Yes.

Q. You remember that board which you there tested had 3/4-inch holes, one hole to each 16 inches of surface, spaced in parallel columns?

Mr. Steffen: I object to any examination concerning the USG test. I don't think, in any strict or loose sense, that we have opened the subject of the USG test. If the defendants wish at the proper time to put in evidence
5973 concerning whether USG lath passes or does not pass, that will be appropriate.

Justice Stephens: Is there anything in the exhibits which have been offered or introduced which relate to the U. S. Gypsum Company test?

Mr. Steffen: The two exhibits are specific on Schumacher and National.

Mr. Bromley: One of counsel's first questions was whether or not the witness had not made tests of USG, National and Schumacher lath, and the witness said that he had.

Now, my friend puts in tests of the Schumacher and National lath and leaves out the USG test. Certainly the foundation is there for cross-examination as to the USG test. He brought it out.

Mr. Steffen: I asked the question, your Honor, but we did not go into the USG test at all. It was merely a preliminary question.

Justice Stephens: I am afraid you have opened the door, if you asked that question, and you concede that you did. Otherwise the record would have the inference that the USG lath was not good and that this other lath was. Counsel is entitled to explain that, if he can. The objection is overruled.

Mr. Bromley: Will you read the question, please?

(The question was read by the reporter.)

The Witness: Yes.

Mr. Steffen: I object to that. We must have
5974 the best evidence in this case. It seems to me, the witness being unable to answer on direct examination practically the same type of questions with respect to National and Schumacher, and your Honor overruling any effort on our part to get such recollection, that we should insist, when the same matter is coming up with respect to another company, that the best evidence rule should be applied.

Justice Stephens: Well, the Court ruled that if this witness could answer from his own recollection he was permitted to answer. But he stated that he couldn't. Now, we will apply exactly the same rule on both sides of this examination.

Mr. Steffen: Your Honor, may I say that I don't think he stated that he couldn't. There was an objection made every time, for about 15 or 20 times, and he didn't have an opportunity to answer.

Justice Stephens: I am sorry, Mr. Steffen, but I think the witness told the Court clearly, with voluntary statements, on his part, that he conducted a great many of these tests, some of them with the assistance of assistants, and that he did not purport to remember all the details of them or remember them himself, and the Court observed that

he was reading from documents. However, the Court of its own motion opened the door, Mr. Steffen, to you, and asked if you wanted to examine this witness as to his own recollection, and you said yes, that that is what you had called him for.

5975 Then, when you proceeded to do that, it was made clear, I thought, that he didn't have a recollection of his own.

Now, if he still has one, if either side can bring that out we are perfectly willing to listen to this witness as an expert, as to what he knows himself as to these tests.

Mr. Steffen: May I ask that the data which he has before him be removed?

(The papers immediately in front of the witness were removed.)

Justice Stephens: That was on the witness stand when you examined him, Mr. Steffen.

Mr. Steffen: I didn't attempt to examine him on his recollection, because when he looked at it, as he has for Mr. Bromley, we were simply told that he was reading from the document.

Justice Stephens: Mr. Steffen, it seems to the Court that it has been extraordinarily patient and fair and liberal, but if you still think, seriously and sincerely, that this Court has denied you an opportunity to probe this witness' own recollection, we will re-open the direct examination.

Mr. Steffen: I think that would serve no purpose now, your Honor, and I make no point of it.

Justice Stephens: Very well.

Mr. Steffen: We have introduced the two exhibits, and that settles the matter, but I think so far as further

5976 examination is concerned—

Justice Stephens: (Interposing) We will apply exactly the same rule, of course, on both sides.

Mr. Steffen: Thank you.

Justice Stephens: If this witness has an independent recollection, he may give it; if he hasn't, then you will have to examine on the records, Mr. Bromley.

By Mr. Bromley:

Q. Well, you answered my question "Yes", didn't you, Mr. Ingberg? A. That is correct, as to the—

Q. (Interposing) 3/4-inch holes, one for every 16 inches of surface, and in parallel rows. A. Yes.

Q. And that means that there were 48 holes in each lath 16" x 48", doesn't it? A. Yes.

Q. That board which you tested in 1932 passed the 1-hour fire test, and you gave it a 1-hour fire rating, did you not? A. That is right.

I might explain to the Court, if I may, the reason my recollection is better on this, because it is a regular arrangement of holes; it isn't a staggered arrangement such as we were up against on the other lath.

5977 Q. And as a matter of fact the board which you tested for USG was the first perforated lath which you had ever tested, was it not, which passed the test? A. Yes, the first we had subjected to fire tests.

Q. And it was the first one ever to pass the 1-hour fire test, wasn't it? A. That is right.

Mr. Bromley: That is all.

Justice Stephens: Do other defendants wish to cross-examine?

(No response.)

Justice Stephens: Is there any redirect examination?

Mr. Steffen: We have no further questions, your Honor.

Justice Stephens: Mr. Ingberg, please let me be sure that I understood you correctly. Did I or did I not understand you correctly, in answer to my questions and in your voluntary statements, to say that with respect to the National and Schumacher tests, you were under the necessity of referring to the exhibits themselves, rather than testifying from your own recollection?

The Witness: That is right.

Justice Stephens: In other words, they did not refresh your recollection, you had to look at them and see what was in them?

The Witness: I had to, sir, on account of the irregular arrangement and staggered pattern.

5978 Justice Stephens: Very well. Thank you very much.

(The witness was excused.)

Justice Stephens: Have you any other witness today?

Mr. Steffen: No, your Honor, we have no other witness. However, we have some requests for admissions that we could take up at this time.

Justice Stephens: Very well.

Mr. Steffen: I might, however, raise one question.

In connection with Exhibit 233, in the Dowd matter, as you remember, we got in contact with Mr. Alexander S. Speer, and I have asked him, because of the shortness of time, to come. I would like to have authority to subpoena him. He is the man about which the report has to do, and I think he will be able to connect things up.

Justice Stephens: You may have authority to subpoena Mr. Speer.

Mr. Steffen: Thank you. He will appear Friday.

Justice Stephens: Very well.

Mr. Knuff: May it please the Court, in connection with Mr. Emil Hansen's testimony, Exhibits 561, 562 and 563 were offered, I believe, and received, and at that time we did not have photostatic copies of the exhibits for the Court, and the Court asked me to have them prepared. I have those exhibits now and will hand them up to the Court.

Exhibit 561 bears the date of February 4, 1929;
5979 Exhibit 562 bears the date of July 31, 1929, and
Exhibit 562 bears the date of April 1, 1940.

Exhibit 563 was not received, it was excluded, but it was offered in evidence.

Mr. Bromley: Exhibit 561 was not received in evidence, was it, Mr. Knuff?

Mr. Knuff: It may not have been. I was under the impression that it had been. It was offered in evidence, although it may have been excluded. Whatever the record shows will of course govern.

Mr. Bromley: It was excluded; it is only an exhibit for identification.

Mr. Knuff: It is still a part of the Judge's book.

Justice Stephens: Yes, I, at least, have been keeping a set of all these exhibits, so that I can understand the record where reference is made to them, whether they have been admitted in evidence or not.

Mr. Knuff: Now, in connection with Government's Exhibit 605, which was identified and offered in evidence through Mr. Tice, being the soft copies of the Makowski patents, I also have copies for the Court. I do not have copies for the defendants.

(Copies of Government's Exhibits 561, for identification 562, 563 for identification and 605 were handed up to the Court.)

Justice Jackson: They can get all the copies they
5980 want down at Patent Office, can't they?

Mr. Knuff: That is right.

I would now like to have marked as Government's Exhibit 612 for identification certain answers of the United States Gypsum Company to the Government's interrogatories. This exhibit contains certain interrogatories and the answers to them of the United States Gypsum Company. It is prepared in exhibit form. We have, in the past, used some of the interrogatories and answers thereto, although we haven't used all of them, but in order to be sure that we have all the interrogatories and the answers thereto, of USG, which we think are material to the Government's case, we have taken out of the interrogatories of the Government and the answers of the USG, those that we want to introduce in evidence and have, as I say, combined them in exhibit form.

Exhibit 612 will be a Government's exhibit containing certain interrogatories on behalf of the United States of America and answers thereto by the defendant, United States Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 612, for identification.)

Mr. Knuff: Government's Exhibit 613 for identification will be certain Government interrogatories and answers thereto by National.

5981 (The document referred to was marked as Government's Exhibit No. 613, for identification.)

Mr. Knuff: Exhibit No. 614 for identification will be certain interrogatories by the Government and the answers of Certain-teed.

(The document referred to was marked as Government's Exhibit No. 614, for identification.)

Mr. Knuff: Exhibit No. 615 for identification will be certain interrogatories by the Government and the answers thereto of Ebsary.

(The document referred to was marked as Government's Exhibit No. 615, for identification.)

Justice Stephens: Are these offered in evidence?

Mr. Knuff: Yes, I would now like to offer in evidence Government's Exhibits 612, 613, 614 and 615.

Justice Stephens: Is there any objection as to form, on the ground that these are copies, rather than the originals of the interrogatories and answers? If not, if there is any other objection?

Mr. Bromley: There is no objection as to form, subject to our right to compare them.

As to materiality and relevancy, I should like to
5982 have an opportunity to read them and find out just what it is that they are putting in. I would like to reserve that objection until the morning.

Justice Stephens: Very well, we will not rule on them until tomorrow morning, in order to give counsel and the Court both a chance to examine them.

5983 Mr. Knuff: Now I would like to have marked for identification as Government's Exhibit 616, a report of the Sales Department of the United States Gypsum Company, for the year 1926, addressed to Mr. S. L. Avery, and signed C. Henning, Vice President in Charge of Sales. Exhibit 616 for Identification has noted on the original, "Approved by Board of Directors, February (the date is indistinct) 1927", and it is signed by Mr. Bear, Secretary.

(The document referred to was marked for identification as Government Exhibit No. 616.)

Mr. Knuff: I would also like to have marked for Identification as Government's Exhibit 617, a report of the Sales Department of the United States Gypsum Company for the first quarter of 1927. It is addressed to Mr. S. L. Avery and is signed C. Henning, Vice President in Charge of Sales; and Exhibit 617 has noted on the original, "Approved by Board of Directors, May 11, 1927—R. G. Bear, Secretary."

(The document referred to was marked for identification as Government Exhibit No. 617.)

Mr. Knuff: I would like to have marked for identification as Government's Exhibit 618, a report of the Sales Department of the United States Gypsum Company for the first half of 1927, addressed to Mr. S. L. Avery and signed
5984 C. Henning, Vice President in Charge of Sales—and on the first sheet thereof appears the notation, "Approved by Board of Directors, August 11, 1927, R. G. Bear, Secretary".

(The document referred to was marked for identification as Government Exhibit No. 618.)

Mr. Knuff: I would like at this time to also have marked for identification, as Government's Exhibit 619, a six-page report of the Sales Department of the United States Gypsum Company, for 1927, addressed to Mr. S. L. Avery, and signed C. Henning, Vice President in Charge of Sales. Appearing on the first page thereof is the notation, "Approved by Board of Directors, February (I believe it is the 8th) 1928, R. G. Bear, Secretary.

(The document referred to was marked for identification as Government Exhibit No. 619.)

Mr. Knuff: I would also like to have marked for identification as Government's Exhibit No. 620, a five page exhibit headed, "Report of Sales Department—First Half 1928", addressed to Mr. S. L. Avery and signed C. Henning, and having a notation on the first page, "Approved by Board of Directors, August (I believe it is the 18th) 1928, R. G. Bear, Secretary."

(The document referred to was marked for identification as Government Exhibit No. 620.)

5985 Mr. Knuff: I would also like to have marked for identification as Government's Exhibit 621, a three-page exhibit headed, "Report of Sales Department—First Quarter 1929", addressed to Mr. S. L. Avery, and signed "C. Henning, V.P.S.", and having noted on the first page, "Approved by Board of Directors, May 8, 1929, R. G. Bear, Secretary."

(The document referred to was marked for identification as Government Exhibit No. 621.)

Mr. Knuff: At this time I would like to offer in evidence Government's Exhibits 616, 617, 618, 619, 620, and 621.

Justice Stephens: Is there any objection.

Mr. Bromley: I object to them as immaterial and irrelevant.

Justice Stephens: We haven't had an opportunity to examine them, and if there is serious contention on that we will have to ask counsel for the Government to demonstrate their relevancy and then we will have to read them and hear your objections to them, Mr. Bromley. What is the contention as to their relevancy, Mr. Knuff?

Mr. Knuff: Their relevancy, your Honor, is to show the competitive conditions in the gypsum industry for the years and for the periods specified by the various exhibits. They show just what the conditions in the industry were during

those years. They are reports of Mr. Henning to the Board of Directors. Take the first report, Exhibit 616 for
5986 identification. On page 3, under the heading "Sheetrock", in the second paragraph, it is stated:

"The Certain-teed competition is severe, due to the fact that they have made a price decline of ten per cent in all markets on both plaster wallboard and plasterboard. We have not as yet met this price decline. The larger markets in the East are being flooded by 'seconds' which are presumably 'firsts', and are changing $30 markets to $20 markets. We are meeting this competition where necessary to hold our—

Justice Stephens: (Interposing) In order not to get all this in the record, unless it is going to come into the record, just point out to us the parts which you think are relevant, the paragraphs which you think are relevant—or if that is sufficient you can make your argument based upon that.

Mr. Knuff: I think that, in general, will indicate the general scope of the offer. I can point it out paragraph by paragraph in each one, if desired.

Justice Stephens: You don't need to do that; we can read them.

Mr. Adams: If the Court please, may I add to Mr. Bromley's objection, one as to competency. If the purpose here is to prove what the conditions were in the industry, by a report of this kind, it seems to me that that is going beyond the proper rules. I might call the Court's attention to the fact that Mr. Henning is dead. I notice that
5987 Mr. Knuff read something there about what Certain-teed was doing. I don't admit that that is what Certain-teed was doing, and I don't concede that it can be proved in this way.

Justice Stephens: Well, they might be admissible as declarations of USG. They are hardly binding upon other companies as to the statements made by USG concerning those other companies.

Mr. Finck: Before ruling on these exhibits, if the Court please, may we have an opportunity of seeing them? We will try to do that tonight.

Justice Stephens: Yes, I think it would be better if we did not make a ruling on them until tomorrow, so that we may have a chance to look through them ourselves, and so that counsel may also have a chance to examine them.

(Judge Jackson's and Judge Garrett's copies of Exhibits 616 to 621, inclusive, for identification, were handed to Mr. Finck and Mr. Johnston, respectively, for use over the recess.)

Justice Stephens: Have defendants' counsel copies of these interrogatories and answers?

Mr. Finck: We do not have copies.

Mr. Knuff: I handed them over just a minute ago.

Mr. Adams: One set was handed to Mr. Bromley.

(Judge Jackson's and Judge Garrett's copies of these exhibits were loaned to defendants' counsel for use over recess.)

5988 Justice Stephens: Announce the recess until tomorrow morning at ten o'clock.

(Whereupon, at 4 o'clock p.m., the trial was recessed until Thursday morning, April 13, 1944, at 10:00 o'clock.)

5989 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Thursday, April 13, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted, with the following additional appearances:

WALTER G. MOYLE, ESQ., Washington, D. C., NORMAN WAITE, ESQ., Chicago, Ill., and ANDREW J. DALLSTREAM, ESQ., Chicago, Ill., for defendants Celotex and Dahlberg.

5994 Page 6233, from line 18 to line 23, inclusive, the Presiding Judge expressed himself so clumsily, using the plural in some instances and the singular in others, in referring to two exhibits, that the statement will have to be rewritten, I think, to read as follows—it will be easier to redictate it than to make the corrections:

"We are sorry, Mr. Steffen, but we are now convinced that Exhibits 401 and 402 are not admissible in evidence under the charges in the pleadings. We don't think that your last argument raises any new question. If they are not admissible for the reasons we have just stated, they are not admissible as admissions to prove the same thing for which they were offered."

Apparently the Court Reporter has a correction. Page 6258, line 6, the word "diamater" should have an "e" instead of an "a"—"diameter".

Thank you, Mr. Grover.

Does the Government have any corrections in the afternoon session?

Mr. Steffen: We have none, Your Honor.

Mr. Moyle: If Your Honor please, I would like to move the admission of two of my associate counsel, or rather, the main counsel representing The Celotex Corporation, from the Illinois Bar.

5995 This is Mr. Andrew J. Dallstream; and this is Mr. Norman Waite—both of the Illinois Bar, representing The Celotex Corporation, and one or both may desire to participate in the cross-examination.

Justice Stephens: You are admitted for the purpose of this trial, gentlemen; you are welcome here.

Mr. Steffen: We will proceed either with a ruling on the exhibits that were offered last night, or will call Mr. Dahlberg immediately.

Justice Stephens: I should think that perhaps we had better proceed with the witness so as not to take his time here while we are discussing the exhibits, unless the exhibits are to be entered without objection. Will there be contest on the exhibits, ruling on which was reserved?

Mr. Bromley: Yes, Your Honor.

6064 Mr. Adams: If the Court please, I should like to return to Exhibit 233, the so-called Redfield memorandum.

At the last session we suggested that the Government be called upon to give us some assurance that that memoran-

dum would be connected. The Government stated yesterday that they had a witness named Speer. They didn't say that he would connect it, but they said they thought he would. I suppose we can take it that they thus intended by that statement to give us the assurance which I understand we are entitled to under the cases.

Now earlier, when Your Honors' ruled upon this question, you said that it might be desirable, in the interest of saving the bringing of other witnesses, to call Mr. Dowd, because, if the Court found that Mr. Dowd had no such conversation, then the privilege was not waived, and
6065 that it would not be necessary to call any other witnesses with respect to it.

By good fortune, and by accident, Mr. Dowd is available, and it would seem to me that I might be able to be of some assistance to the Government and the Court in that respect, particularly as the Government has said that it intends to call Mr. Speer from, I take it, outside the city. I think he lives in Buffalo, or some place like that.

If I could call Mr. Dowd this afternoon, as I think the Court indicated I could in its earlier ruling, and if the Court could then make a determination on that phase of it, we might save the trouble of examining another witness with respect to that exhibit.

I therefore have Mr. Dowd here, and would like to have an opportunity to call him now.

Mr. Steffen: I would say this, Your Honor, as I told the Court last night, that we had gotten in touch with Mr. Speer, and that Mr. Speer was the man who made the invention which was in question, and he is referred to in Mr. Redfield's memorandum; and that I had requested him to come here and that I asked authority to subpoena him. Mr. Speer, I think, is now in the city, and therefore there is no possibility of saving any money on this matter.

When I said that I thought we could connect up the matter of Certain-teed and this memorandum, I said what
6066 any careful lawyer would say, that I expected by this witness to be able to establish that connection.

I have had a long distance telephone talk with him, just as I did with Mr. Stromquist, and if he will stand up under careful discussion with him as to what took place, and so on, as he did over the telephone, I am very sure that he will be able to connect the Certain-teed Company with the Redfield memorandum, and show that it was an authorized memorandum, and not something that blew in the window.

And I did that because Mr. Bromley and Mr. Adams both said that they didn't want to call Mr. Dowd unless they were sure that we were going to be able to connect this, and I told Your Honors that I felt that was a justified proposition, and that I would see whether I could connect it. I have made such efforts as I can, and I think that we have now in the city Mr. Speer, prepared to testify, that is, as soon as I can get over and talk with him; and our plan, as I told you last night, was to have him here tomorrow morning.

I should like to have the privilege of then putting on Mr. Speer. That seems a little odd, I might say, that they could get Mr. Dowd by this fortunate accident at this late date.

Mr. Adams: That is one of the characteristic insinuations of Government counsel, and if the Court wants me to state the reason that Mr. Dowd happens to be in
6067 the vicinity of Washington, I will.

Justice Stephens: No, the Court will not draw any inference that there is any impropriety on either side. We think the Government fairly did give the defendants an assurance that they would not expect them to produce Mr. Dowd unless the Government gave its professional assurance or made some showing of connection, and apparently the Government is attempting to do that through Mr. Speer.

Now we ruled, in summary, on this exhibit, that a prima facie showing on voir dire had been made of the waiver of privilege, so that in the absence of convincing contradictory evidence as to the fact or content of the asserted Redfield-Dowd telephone conversation, the exhibit would be admissible, subject to a showing that it is an admission by Certain-teed, and subject to the usual reservation—and that means subject to a showing of the conspiracy, aliunde, and a showing that the admission was in furtherance or execution of the conspiracy; but that Certain-teed might call Dowd; then the Court, after hearing his testimony, would rule as to whether the exhibit was admissible; and if it is received, it will be received subject to recall of Redfield for further cross-examination.

Now do you object, Mr. Steffen, to having Dowd on now while he is here? This controversy between you gentlemen now is largely a matter of order of testimony. Of
6068 course, normally the Government would make its case with respect to this exhibit first. In the ordi-

nary course we would hear the Government's testimony to qualify the exhibit first, and then hear Dowd afterwards.

Mr. Adams: May I say this, Your Honor, that at page 5892 of the record, Your Honor said, after we had discussed the return of Mr. Redfield for further cross-examination, that:

"Justice Jackson suggests that we hear the Dowd testimony first, and if we should then rule that there has been no telephone conversation, or that the contents do not constitute a waiver, then it might not be necessary to recall Redfield."

That is why we have Mr. Dowd here. He is here in town, and I might say that it would be extremely inconvenient to hold him over until tomorrow.

Justice Stephens: We are inclined to the view, Mr. Adams, that the Government ought to be allowed, in the absence of a showing of extreme inconvenience, to put on its case with respect to this exhibit first. It may not be ready to cross-examine Mr. Dowd until it first has a talk with Mr. Speer, or has some other preparation; and unless the inconvenience is very great, it would seem to us that we ought not to vary the usual order of the testimony.

Couldn't Mr. Dowd stay here until tomorrow?

Mr. Adams: I would like to say on that, that it
6069 would be a matter of grave inconvenience to Mr. Dowd, who actually should not be here. The Government said a week ago, or more than a week ago, that they would let me know about Mr. Dowd's testimony, and they never said a word about it until yesterday.

Now Mr. Dowd made all his other plans, involving a scheduled stop today in Philadelphia, and departing immediately from there to New York, and from there immediately to Chicago. All his transportation has been arranged, and it would be extremely inconvenient to him, and also would result in a serious business disadvantage to the company.

Justice Jackson: He didn't anticipate testifying when he came down here, did he? He just came here accidentally. What difference does it make? Call him some other time.

Mr. Adams: If he is here, why can't we use him?

Justice Jackson: Because we think it would be unjust to the Government to do it right now.

Justice Stephens: The Government might want to cross-examine Mr. Dowd, and if Mr. Dowd is going to leave tonight it might not have the opportunity to do so, it might not have the opportunity to prepare for cross-examination. If the exhibit is critical, the Government ought to have a fair chance to prepare its attack on Mr. Dowd's testimony, if any.

Mr. Adams: Mr. Steffen, do you object to calling
6070 Dowd today?

Mr. Steffen: Yes.

Mr. Adams: That is merely a matter of the Government's statement on that point. I certainly can do no more than to say that in all sincerity I was endeavoring here to comply with what I understood to be the Court's intention, that we should call Dowd first and then, if Your Honors were able to make a ruling prior to recalling Redfield—

Justice Stephens: (Interposing) I don't think that is quite correct, Mr. Adams. During the discussion of the admissibility of this exhibit, it is true that the suggestion was made by Justice Jackson that Mr. Dowd might be called first, and that might end the matter. But when the question of the admissibility of this exhibit was ruled on, and after the colloquy which succeeded that, it was made clear, for the convenience of defendants' counsel, that Mr. Dowd needn't come until the Government had either given assurance or made a showing of connection. So I don't think that any harm has been done.

Do you think it would be a serious disadvantage to you gentlemen to proceed to examine Dowd now?

Mr. Steffen: We are not prepared; I would much prefer to put it over until tomorrow morning, and the reason that I didn't tell Mr. Adams was because I wanted to make my own assurances as to whether I wanted to put on
6071 a witness to connect it, and I told him that I would do that. So I don't feel that we have been in any way misleading, Mr. Adams.

Mr. Adams: Maybe not intentionally, but I certainly have been definitely misled, and I have brought Mr. Dowd here with the hope that we could dispose of this today.

Justice Stephens: I am sorry, Mr. Adams, but I think that wouldn't be fair, under all the circumstances. If you want to hold him here until tomorrow morning, the Government will apparently put Mr. Speer on then; and then we could get Mr. Dowd disposed of and perhaps he wouldn't have to make another trip back here. Of course, he may

not have to anyway, we don't know what the Government is going to be able to show.

Mr. Adams: May I say this, Your Honor, that as I understood, Mr. Dowd's testimony is only testimony on the voir dire.

Justice Stephens: That is right.

Mr. Adams: And is not any part of the defendants' case.

Justice Stephens: It only goes to the preliminary question of fact bearing upon the admissibility of the exhibit. It doesn't go to the merits of the case.

Mr. Adams: As I understand it, the Government is drawing to the end of its case, and it is almost physically impossible for me, under the circumstances, to put in the proof which I regard as essential.

Justice Stephens: We will give you an opportunity, if the case reaches the point on the voir dire, 6072 that is if the Government makes such a showing, in view of the Court's ruling, as to connect the exhibit in the manner in which we have indicated it must be connected to make a prima facie showing, then you will be given an opportunity to call Dowd on voir dire, because we have ruled that that preliminary question of fact must be disposed of within the Government's case.

Mr. Adams: Well, I should like to point out only one thing further, Your Honors, and I am sorry if I appear to over-stress this point, but it is because I know of the inconvenience that will result from this order of proof,—that is that Mr. Steffen apparently wants to consult Mr. Speer. Mr. Speer could not under any conceivable state of facts have any knowledge about an alleged telephone conversation between Mr. Dowd and Mr. Redfield in June of 1940. It just couldn't be possible that Speer could have anything to do with it—

Justice Stephens: (Interposing) That isn't the subject on which it would be expected Speer would testify, Mr. Adams. He would testify, or any other witness they call would testify, we assume, under the Government's assurances, as to some fact on the basis of which the Court might connect this exhibit with Certain-teed as an admission.

Mr. Adams: Thank you, Your Honor.

Would Your Honors indulge me one moment?

6073 Justice Stephens: Yes, surely.

Mr. Adams: I have this one further suggestion, Your Honors. I have only, I think, four or five questions

to ask Mr. Dowd. It would seem reasonable that I might put him on, ask him those questions, and let the Government cross-examine him; and if they think, then, that they have to hold him over another day to examine him about four or five questions, they could do so.

Justice Stephens: I am sorry, Mr. Adams, we are all of the view that the normal course of presentation of the foundation for this exhibit ought to be followed. Mr. Dowd ought to remain here if he can, and if not he can come back later if needed.

Mr. Adams: Thank you, sir.

Justice Stephens: Now we have some rulings on exhibits to consider.

Mr. Knuff: 612 to 615, inclusive, were the interrogatories and the answers, respectively, of the United States Gypsum Company, National, Certain-teed, and Ebsary; and I believe the matter was left last night with the thought in mind that the defendants would like to compare what we had inserted in the exhibits with what they had included in their answers. I think that would be the first group that the Court should pass upon at this time.

Mr. Bromley: May it please the Court speaking
6074 now only for the defendants United States Gypsum Company, Avery and Knode, we have no objection to Exhibit 612 for Identification, being the answers of United States Gypsum Company to certain of the Government's interrogatories.

Justice Stephens: What have the other defendants to say with respect to that exhibit?

6075 Mr. Johnston: On behalf of Texas we object to Exhibit 612 as having no competency or relevancy or materiality, and as in no manner binding upon Texas.

Justice Stephens: Are there any objections from other defendants?

Mr. Oliver: We object on behalf of Celotex and Dahlberg.

Mr. Adams: I take it that all these objections will inure to the benefit of all the defendants without making it necessary for us all to state them?

Justice Stephens: That is correct.

Of course the statements of USG in response to interrogatories asked it, wouldn't be, without more, binding upon anyone else. But these may be offered in the nature of declarations of alleged co-conspirators, and I assume they are?

Mr. Knuff: No, they are not, your Honor. Exhibit 612 is simply offered as an admission of USG, not binding on

anybody else. Exhibit 613 is offered as an admission of National, not binding—

Justice Stephens: (Interposing) You don't offer them as binding upon anybody except the particular defendant?

Mr. Knuff: Not at all.

Justice Stephens: I was about to say that we would receive them, if you were, subject to the usual reservation, but if you are not offering them except to bind the particular parties which have answered them, then they are re-
6076 ceived for that purpose only. So Exhibit 612 is received as binding upon USG only.

(The document heretofore marked as Government Exhibit 612, was received in evidence.)

Mr. Finck: We have no objection to 613.

Justice Stephens: Exhibit 613 is therefore received as being offered for and as binding only upon National.

(The document heretofore marked as Government Exhibit 613, was received in evidence.)

Justice Stephens: How about Exhibit 614, Certain-teed?

Mr. Adams: Well, Certain-teed takes the same position except that as to Interrogatory No. 24, and the answer thereto, we object on the ground that it doesn't tend to prove anything in this case, and therefore is immaterial.

Justice Stephens: That answer is: "We are unable to supply the answer to this interrogatory from any company record or the memory of any present employee competent to speak."

Do you offer the interrogatory, Mr. Knuff, in view of that answer, to prove anything?

Mr. Knuff: No, your Honor, No. 24 can be stricken.

Justice Stephens: Very well; then we will receive Exhibit 614, except for Interrogatory No. 24, and the answer thereto, which are not offered, as to Certain-teed only.

Each of these exhibits is being offered and received
6077 as binding only upon the particular company that answered the interrogatories.

(The document heretofore marked as Government Exhibit 614 was received in evidence.)

Justice Stephens: Exhibit 615—Ebsary. Who is here representing Ebsary today?

Mr. Finck: I wouldn't undertake to admit anything for Ebsary, but I can find out by tomorrow morning from Mr. Varian, if you would like. I will call him tonight.

Justice Stephens: I should think there could hardly be any proper objection to it. At the same time, he has a right to be here and therefore we will reserve ruling on that until tomorrow morning, and you will get in touch with him, Mr. Finck. We will not rule on Exhibit 615 until tomorrow.

Mr. Knuff: Now if your Honor pleases—

Justice Stephens (Interposing): Who is local counsel for Ebsary?

Mr. Knuff: Tumulty and Tumulty.

Justice Stephens: That is right. Mr. Tumulty is not here, is he? Judge Garrett suggests, and I think properly, that if foreign counsel cannot be present, local counsel ought to be, so that we don't have to hold up our rulings. But in this instance we will suspend action on Exhibit 615 until tomorrow morning.

6078 Mr. Knuff: Now in connection with Government's Exhibits 616 to 621 for identification, inclusive, we offer these exhibits as declarations of a co-conspirator. They are not simply admissions of USG, they are offered as a declaration of a co-conspirator in furtherance of the conspiracy.

Mr. Bromley: We object to these exhibits, 616 to 621, inclusive, for identification, on the ground that they are incompetent, immaterial and irrelevant, and specifically, that they are incompetent and immaterial because they are not in furtherance of any conspiracy and could not possibly be so construed. Therefore, under the theory on which they are offered, they are neither material nor competent.

They are further incompetent because they are conclusions, and, at most, represent a lot of hearsay statements as to assumed conditions in the market.

Justice Stephens: Do any of the other defendants wish to be heard?

Mr. Adams: I stated yesterday, your Honor, that we wished to object so far as any statements concerning Certain-teed were concerned, as contained in these reports, on the ground that they could not possibly be binding on Certain-teed.

Justice Stephens: What do you offer to show by them—pardon me, Mr. Johnston, do you wish to be heard?

Mr. Johnston: In addition to what Mr. Bromley has said, I want to emphasize that they are merely inter-
6079 company communications of the United States Gypsum Company and have no bearing at all on anything that can bind Texas.

Mr. Finck: I would just like to record the objection of

National and Baker to these exhibits, as not binding upon them.

Justice Stephens: They are very voluminous documents, and must have a great deal of material in them that isn't of any importance. What paragraphs are you especially relying upon, and what do you want to prove by them?

Mr. Knuff: Does your Honor care which question I answer first? You asked two questions.

Justice Stephens: No, you can answer them in any order you please.

Mr. Knuff: We think they are in furtherance of the conspiracy and are descriptive of conditions that existed at the time of the conspiracy. We further think that they are admissions by USG of conditions that existed at the time of the formation of, and during the continuance of the conspiracy. There are statements in here that show the state of mind of USG.

Whether or not these statements are true, or whether or not they are not true, is immaterial. The statements are nevertheless declarations and admissions of USG.

They are offered on the same theory that the Court has passed on similar exhibits, that is Exhibits 328 to 332 inclusive, which appears at page 2864 of the record.

6080 Those exhibits were the exhibits relating to Mr. Avery's reports to the stockholders.

Justice Stephens: Yes, I remember those.

Mr. Knuff: The particular things that we rely upon here are contained in Exhibit 616, on page 3—

Justice Stephens: (Interposing) Will you carefully point out each paragraph in each exhibit that you rely on, because otherwise we are ruling in the dark. I went through these last night as well as I could, but they are very voluminous and I would like to have you be specific.

Mr. Knuff: The entire page 3 of Exhibit 616.

Justice Stephens: Let us look at that.

(The Court examines the portion of the exhibit indicated.)

Justice Stephens: Now what is the next?

Mr. Knuff: Exhibit 617, on page 2, beginning under the general subject "Sheetrock and Sterling", and continuing over to page 3, down to the general heading, "Partition Tile".

Justice Stephens: Let us read that.

(The Court examines the portion of the exhibit indicated.)

Justice Stephens: All right, the next.

Mr. Knuff: Now on the same exhibit, Exhibit 617, on page 4, under the general head, "General Competitive Conditions", and continuing through page 5, through
6081 page 6, through page 7, through page 8, and down to the heading, "California District".

Justice Stephens: Let us read that.

(The Court examines the portion of the exhibit indicated.)

Justice Garrett: Mr. Knuff, where these paragraphs refer to "wall board" as being sold by this company and that company, does that mean patented wall board, or not?

Justice Stephens: These antedated the patents, didn't they?

Mr. Knuff: No—which exhibit are you referring to?

Justice Stephens: I didn't mean that they antedated the patents, but the licenses.

Justice Garrett: I am reading from page 5 of Exhibit 617, where it says, "The Certain-teed Company are shipping into the Sea Board markets from their Texas mill, offering wallboard regularly," and so forth. I don't care to read it all into the record. Does that mean patented wallboard, or not?

Mr. Knuff: I don't believe that that paragraph on page 5 of Exhibit 617 has reference to patented wallboard, because at that time I do not believe Certain-teed was a licensee. Certain-teed did not become a licensee until May of 1929, and this report is for the first quarter of 1927.

Justice Stephens: Now as to Exhibit 618, what portions do you rely on?

6082 Mr. Knuff: Particularly page 3 of that exhibit, beginning under the main topic, "Plasterboard", and continuing over on page 4 down to the main topic, "Partition Tile." Also the last page of that exhibit, the 5th paragraph.

Justice Jackson: You mean starting with the words, "In general we are going through a keen competitive price,"?

Mr. Knuff: That is right. Also the last paragraph, the 5th and last paragraphs.

(The Court reads the portion of the exhibit indicated.)

Justice Stephens: Now as to Exhibit 619.

Mr. Knuff: Page 2, the first paragraph; then on page 4, beginning under the heading, "Plasterboard", and con-

tinuing down to the topic, "Partition Tile." On page 6, beginning with the topic, "General", and from there to the end.

(The Court examines the portion of the exhibit indicated.)

Justice Garrett: Would you refresh my memory about the meaning of "Sheetrock"?

Mr. Knuff: "Sheetrock" is a trade name that the United States Gypsum Company uses for their wallboard. Is that correct?

Mr. Bromley: Yes, for their patented wallboard.

Justice Stephens: Now, as to Exhibit 620.

Mr. Knuff: On page 2, the first paragraph; then on page
3, the paragraph under the heading, "Plasterboard",
6083 and continuing down to the paragraph marked,
"Partition Tile"; then on the last page of that exhibit, the paragraphs following the heading, "General."

(The Court examines the portion of the exhibit indicated.)

Justice Stephens: Now as to Exhibit 621.

Mr. Knuff: Particularly page 2, under the subheading, "Plasterboard", and extending down to the general heading, "Partition Title."

(The Court examines the portion of the exhibit indicated.)

Justice Stephens: We will take the afternoon recess at this time.

(Whereupon a short recess was taken, after which the trial was resumed as follows:)

Justice Stephens: Mr. Oliver, do you have a statement to make?

Mr. Oliver: If your Honor pleases, may I record my objection to Exhibits 616 to 621, inclusive, as not binding upon Celotex and Dahlberg.

Justice Stephens: Are there any other comments on any of these exhibits?

(No response.)

If not, the Court will rule.

The Court sees no distinction between these Ex-
6084 hibits 616 to 621, inclusive, and Exhibits 328 to 332
inclusive. Those least mentioned exhibits were ad-

mitted because they contained statements in the nature of admissions descriptive of the industry situation prior to the time of the 1929 license agreements. We were of the view that they were admissible as the admissions of a party, to-wit the admissions of USG, which might possibly be taken in connection with other testimony as a foundation for the Government's contentions with respect to the alleged reasons for entering into the license agreements.

We did not receive them as binding upon other parties unless shown to be in furtherance of the conspiracy, and unless the conspiracy itself was shown by evidence aliunde.

We see no distinction between the proferred exhibits, 616 to 621 inclusive, and 328 to 332 inclusive, in these respects.

We are not able to see, on the face of them, Mr. Knuff, how they may be said, at the present time, to be in furtherance or execution of the conspiracy. But we will receive them in evidence, particularly the portions referred to by counsel, as admissions of a party, to-wit USG, and not binding upon the other parties unless a conspiracy is shown aliunde, and unless the admissions are shown to be in furtherance or execution of the conspiracy.

Mr. Knuff: I think that ruling is consistent with the previous ruling, your Honor.

6085 (The documents referred to, marked as Government's Exhibits Nos. 616 to 621, inclusive, were received in evidence.)

Justice Stephens: We note, Mr. Knuff, that in part the exhibits just received cover the same years as those previously received, but they are more detailed than the former exhibits.

Mr. Knuff: That is correct.

Justice Stephens: The former being more generalized.

Mr. Knuff: Yes, your Honor.

Mr. Bromley: May it please the Court, the Court's ruling on Exhibits 328 to 332 inclusive, appears at page 2873 of the record, and as I understood that ruling it was that those exhibits would be received as binding only on USG.

I do not understand that in that ruling the Court indicated that the production of any other proof of any kind could transform that evidence into the declarations of a co-conspirator; that no matter what evidence was received, that those documents remained merely as admissions binding only on USG, because that ruling said specifically that

they were not in furtherance or execution of any conspiracy.

Justice Stephens: Well, that is true, Mr. Bromley. We have been receiving dozens of declarations or admissions of various parties here in the case which didn't, on their face, seem to be in furtherance or execution of the
6086 conspiracy, however, subject to the usual reservation, which reservation has always embraced two items, first, that the conspiracy must be shown, aliunde the declarations or admissions; and second, that the declaration or admission must be shown to be in furtherance or execution of the conspiracy.

Suppose, with respect to Exhibits 328 to 332, some evidence should come into the record later, which showed that those admissions were in furtherance or execution of the conspiracy. It is difficult to see how such evidence could show that, but if it could show that, wouldn't they then become admissible, provided also a conspiracy had been shown aliunde, that is, admissible against all defendants?

Perhaps it is a highly technical conception, but isn't it theoretically correct, to make the reservation with respect to any type of an admission?

Mr. Bromley: I think that probably is theoretically sound, but I don't understand that there is any offer here to connect these any further.

Justice Stephens: Is there? Do you expect to connect these any further?

Mr. Knuff: We think they have already been connected, and we will point out at the proper time the connection.

Justice Stephens: We disagree with you there. We don't see, at present, anything in the record which indicates that these exhibits which are now being considered, any
6087 more than Exhibits 328 to 332, are themselves in furtherance or execution of the alleged conspiracy, and if you think there is something to that effect, you ought to point it out to us now.

Mr. Knuff: Well, I am not prepared to do so now. We thought that that would arise on the question of a motion to dismiss, whether or not the conspiracy had been shown, and at that time we will be prepared to point out the matters that we think show clearly the existence of a conspiracy.

Justice Stephens: I am not asking you about the existence of the conspiracy, I am asking you about evidence

showing that these admissions were in furtherance or execution of the conspiracy.

Mr. Knuff: Maybe I didn't state myself clearly, your Honor.

We will, at that time, endeavor to point out how they furthered the conspiracy.

Justice Garrett: That will be a matter of argument.

Mr. Knuff: Yes, that is a matter of argument.

Justice Stephens: Well, that is true, but of course in a case as complicated as this, it has been necessary to take a lot of items of evidence into the record subject to connection, subject to motions to strike.

We are trying to avoid all reserved rulings, so far as possible, and we thought if you could show us now how these are in furtherance or execution of a conspiracy,
6088 we might be able to rule more explicitly.

Justice Jackson: Well, your stand is that you have already proven a conspiracy.

Mr. Knuff: We think so, your Honor.

Justice Jackson: And of course the defendants will argue that you haven't.

Mr. Knuff: Yes, your Honor.

Justice Jackson: And later on we will determine who is right.

Mr. Knuff: Yes.

Justice Stephens: That isn't exactly the thing that is concerning me at the moment. That is a matter of course, which we will have to hear argument on later. Mr. Bromley's argument is that these admissions, on their face, cannot be in furtherance of the conspiracy, and therefore they ought to be received at the present time only as binding upon USG. I am inclined to the view that that is correct, and that is the reason that I made these reservations, that these exhibits are admitted only as admissions of USG, and at the present time are only binding upon USG and are not binding upon anyone else, unless there is some further showing made, first as to a conspiracy, and second as to the admissions being in furtherance or execution of the conspiracy.

That seems to me to protect the other defendants, Mr. Bromley, because if we are not shown anything, or
6089 convinced by any other argument, that there is anything presently in the record which makes these admissions in furtherance or execution of the conspiracy, then they stand right where they are now, binding only upon USG.

Mr. Knuff: I want to take up next, if your Honor please, the requests for admissions that we have served on certain of the other defendants, and I had thought at this time to call up the requests on Certain-teed. However, I don't see Mr. Adams here.

Justice Stephens: Mr. Marshal, ask Mr. Adams to return, will you?

(Mr. Adams returned to the courtroom.)

Justice Garrett: The Clerk has handed me a batch of papers. Aren't these all in these several—

Mr. Knuff: (Interposing) Requests for admissions?

Justice Garrett: Yes.

Mr. Knuff: They are, your Honor, but we thought, since you would want a copy of each pleading, that you wouldn't want to tear one pleading apart and put it in the exhibits, and that is the reason we gave you an additional set of them.

Justice Garrett: All right, thank you.

Incidentally, I notice that Certain-teed and National have answered, and that USG has not.

Mr. Knuff: USG has answered.

Justice Garrett: Well, I have no copy of its answer.

6090 Mr. Knuff: I can't speak for them. They served a copy of their answer on me.

(There was a discussion off the record.)

Mr. Bromley: While we verified and served a response to the requests for admissions, we did not file it, understanding the law to be that this is an extra-judicial proceeding, with which the Court has nothing to do, and that it is not proper for Government counsel to call it to the attention of the Court or to ask the Court to pass on it, or make any ruling with respect to it.

If a party upon whom a request for admissions as to genuineness is served, files an answer and does not admit any of the requests, there is nothing that the Court has any power to do about it,

The rule says that the Government should then proceed to prove the documents in the regular way, and assess the expense against the party who has failed to admit genuineness.

So we conceived of this as an extra-judicial proceeding which it was not proper to bother or burden the Court with.

As far as our admissions are concerned, and of course in our case we admitted most of the documents, all the Government has to do is offer them in evidence and our admission stands as a bar to any objection on the ground of incompetency because of lack of identification.

Justice Garrett: Thank you for that explanation.

6091 Justice Stephens: What is that Rule?

Mr. Knuff: It is Rule 36, your Honor.

Justice Stephens: That has been my view. I suppose that is without contest, isn't it, Mr. Knuff, that the Court has nothing to do with this matter unless you need to call the attention of the Court to the fact, if it be a fact, that—well, let me put it this way:

The rule provides:

"Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters."

Unless that aspect of the rule has to be called to the attention of the Court, so as to lay a foundation for an implied admission, through failure of the opposite party to serve, as provided in the rule, there is nothing for the Court to do, is there; if these documents have been admitted as to genuineness, then you simply offer them, don't you, and call our attention to that, and if the defendants, on the other side, don't deny it, then we discuss the

6092 question of relevancy and materiality?

Mr. Knuff: I think that is correct. The reason the Court was given copies of the requests is because I construe the rule—I can't seem to locate it right now—that every notice served upon the other side shall be filed, within a reasonable time, and since we served this on the other side, I construed this rule to mean that I would have to file the notice in court.

Justice Stephens: Well, there is no harm in doing that, of course.

Mr. Knuff: Will the Court pardon us just a moment, please?

Justice Stephens: Yes, indeed.

(Government counsel conferred together.)

Justice Stephens: Before we proceed further, the Court would like to reiterate and expand a little its statement informally made before the recess that each of the defendants ought to have some representation in this courtroom at all times. We realize that lawyers who have a small office staff, are under difficulty in attending a long trial like this at all times, but we think that either local counsel should be here, or if not, that some arrangement should be made with the lawyers who are here regularly, to speak for such defendants as are not represented, and each of them, because we ought not have to postpone rulings, or rule in the absence of representation.

6093 Perhaps I am whipping, in these statements, the absent counsel who are not here to receive the whip, and perhaps we will have to communicate with them through the Clerk; but possibly you can informally indicate to them, if you have contact with them, that they ought to have representation here at all times.

Mr. Bromley: We will assume the burden of communicating that information to those who are not here.

Justice Stephens: Thank you very much, Mr. Bromley.

Justice Garrett: Mr. Knuff, I would like to ask you, before you begin having these exhibits marked for identification, do you propose to have all of them marked, or just those that have been admitted here?

Mr. Knuff: Just those that have been admitted.

Justice Garrett: I don't think that Certain-teed has admitted to any exhibits.

Mr. Knuff: Yes, your Honor, they have.

Justice Garrett: Well, then, I misread their statement. National has, I know.

Mr. Knuff: When I said I was only going to offer those that had been admitted, I misspoke myself. We think that there are some, particularly of the United States Gypsum Company, where they have not admitted them, that we are going to offer anyway on the ground that they are circumstantially admitted by another admission that they have made in here.

6094 Justice Garrett: Thank you.

Mr. Johnston: I would like to have the record show that we, who did not receive these requests for admissions, of course don't know anything about what they

are. In this bunch of exhibits there are probably two or three hundred pages, none of which I have ever seen.

Justice Stephens: Well, even if the defendants to whom these exhibits immediately relate, have admitted their genuineness, we still have the question before us, Mr. Johnston, of materiality and relevancy, on the pleadings, of each one of them, and we will have to examine each one of them as it is offered in evidence, and you will have an opportunity at that time, at least, to see it and you can borrow one of these sets also during the evening's recess.

Mr. Johnston: That is what I wanted to be understood.

Mr. Knuff: I think Mr. Johnston possibly has misspoke himself because on Tuesday evening, in my office, in the prerence of Mr. Steffen, I handed over to Mr. Johnston the very documents that I am now going to offer, gave him copies of them, on Tuesday afternoon.

Mr. Johnston: When I was in counsel's office, he returned to me the documents of Texas that we had delivered to him; and then he handed me a package, which I did not open, but delivered to Mr. Bromley, as chief counsel, and I don't know what was in the package.

6095 Justice Stephens: Very well, we will see that you have time to examine each one of these exhibits.

Mr. Knuff: I would like to have marked for identification Government's Exhibit 624 through 640.

Exhibit 624 is a statement, signed by George P. Krug, sworn to on the 20th day of August, '29; Exhibit 625 is a statement signed by George P. Krug and sworn to on the 17th day of September, 1929; Exhibit 626 is a statement, signed by George P. Krug, sworn to the 21st day of October, 1929; Exhibit No. 627 is a statement, signed by George P. Krug, sworn to on the 20th day of November, 1929; Exhibit 628 is a statement, signed by George P. Krug, and sworn to the 20th day of December, 1929; Exhibit 629 is a statement, signed by George P. Krug, and sworn to on the 20th day of January, 1930; Exhibit No. 630 is a statement, signed by George P. Krug, sworn to the 3rd day of March, 1930; Exhibit 631 is a statement, signed by George P. Krug, sworn to on the 15th day of March, 1930; Exhibit 632 is a statement, signed by George P. Krug, sworn to the 16th day of April, 1930; Exhibit 633 is a statement, signed by George P. Krug, sworn to the 14th day of May, 1930; Exhibit No. 634 is a statement signed by George P. Krug, and sworn to the 17th day of June, 1930; Exhibit 635 is a statement, signed by George P. Krug, and

sworn to the 15th day of July, 1930; Exhibit 636 is a statement, signed by George P. Krug, sworn to the 14th
6096 day of August, 1930; Exhibit 637 is a statement, signed by George P. Krug, sworn to on the 15th day of September, 1930; Exhibit 638 is a statement, signed by George P. Krug, sworn to the 18th day of October, 1930; Exhibit 639 is a statement, signed by George P. Krug, and sworn to the 14th day of November, 1930; and Exhibit No. 640 is a statement, signed by George P. Krug, sworn to the 17th day of February, 1931.

(The documents referred to were marked for identification as Government's Exhibits Nos. 624 to 640, inclusive.)

Mr. Knuff: The genuineness of these exhibits, so marked for identification, is not denied by Certain-teed.

Mr. Adams: Your Honor, I have to differ with the statement.

The first of the requests for admissions was that these statements were signed by George P. Krug on behalf of Certain-teed Products Corporation. That we admit.

Justice Stephens: I can't hear you, Mr. Adams.

Mr. Adams: That fact we admit; we admit that they were signed by Mr. Krug.

Justice Stephens: You admit that Exhibits 624 to 640, inclusive, were signed by George P. Krug?

Mr. Adams: That is correct. But I do not admit—which counsel stated that I did—the genuineness of these documents.

6097 Justice Stephens: I don't quite see the distinction. If he signed them in his capacity as auditor, you don't contend that he signed them improperly, do you, or without authority?

Mr. Adams: No, your Honor, but there are handwritten portions of these documents which we do not admit. I just wanted to make that clear. There is no question but what Mr. Krug signed the documents, and also that they are Certain-teed's documents, but later on somebody else wrote certain things on them.

Justice Jackson: Are they admitted, then, except for the handwriting that appears on them?

Mr. Adams: Yes, although there is one further limitation that I should state, and that is that we do not admit that Exhibits 628 to 640, both inclusive, are statements of plaster wallboard and gypsum wallboard manufactured and sold by Certain-teed Products Corporation, license un-

der agreement dated May 22, 1929, between United States Gypsum Company and Certain-teed Products Corporation, during the various periods referred to in those exhibits, since the plaster wallboard and gypsum wallboard manufactured and sold by Certain-teed subsequent to November 5, 1929, was manufactured under a license agreement with the United States Gypsum Company, dated October 15, 1929, and not dated May 22, 1929.

Each of these exhibits, your Honor, subseqeunt to Exhibit 627, to and including 640, and I believe some after that—

6098 Justice Stephens: (Interposing) And including Exhibit 628?

Mr. Adams: Including Exhibit 628—state at the top, as your Honors will see, that it is a statement of plaster wallboard and gypsum wallboard manufactured and sold during the period named on each exhibit, by Certain-teed Products Corporation, licensed under agreement dated May 22, 1929, between United States Gypsum Company and Certain-teed Products Corporation.

Justice Stephens: Well, Mr. Knuff?

Mr. Knuff: The way these exhibits are here is the way we received them from USG. They were reports, I presume, that Certain-teed filed with USG. USG handed these reports over to us, and we photostated them, just as we received them from USG.

Mr. Adams: I am not raising any suggestion that there has been any change made by the Government in these exhibits. I am merely stating that we cannot admit what is obviously not a statement of truth.

Justice Stephens: In other words, you reserve the right to contend—and you do not admit—that Mr. Krug's statement as appears at the top, or as the title, is correct, for the reasons you have just stated.

Mr. Adams: That is right, your Honor.

Justice Stephens: Well, it seems to me, Mr. Knuff, that with respect to those exhibits, the correctness of which is in dispute, you will have to call a witness, won't you?

6099 Mr. Knuff: After they have admitted the genuineness of the signature, your Honor? If there is a mistake here, it is a mistake that can be explained at the proper time by Certain-teed. They have admitted that this signature is genuine. I think that there is a mistake, personally. I think that it was a mistake on the part of Certain-teed; I think Certain-teed should have said that it was

under an agreement dated such-and-such a date in November. But it was Certain-teed's mistake, not ours.

Mr. Adams: I don't know whose mistake it is—

Justice Stephens: (Interposing) The Court isn't interested in that, either. The Court is interested in getting things in that are true and correct.

Mr. Adams: As I take it, your Honor, under the Rule, I can be required to admit the genuineness of documents. I think I have admitted that. The precise language of this request for admission is somewhat important here.

They ask first whether: "The following statements, photostatic copies of which are attached hereto, made a part hereof, and marked Exhibits 1 through 34 (which include the exhibits now under consideration) were signed on behalf of Certain-teed Products Corporation by Geo. P. Krug."

The answer is yes.

But I do not say that the alleged statements of fact appearing on the papers signed by Mr. Krug are true,
6100 and I cannot be required so to admit.

Justice Stephens: This is a novel situation, and we will have to discuss it with counsel.

How are you in any different situation, Mr. Adams, than you would be if Mr. Krug were called to the witness stand? Suppose he was called to the witness stand and handed this document, and asked if he signed it, and he said yes, and stated that he signed it as the general auditor of Certain-teed. That would identify it, wouldn't it?

Mr. Adams: There is no question about that, we admit that he signed these, and moreover that he signed them on behalf of Certain-teed.

Justice Stephens: Of course, these are being offered as Government exhibits. Is it your contention that you are entitled to have Mr. Krug here to cross-examine him as to the correctness of the statements contained in these exhibits?

Mr. Adams: Yes, your Honor.

Justice Jackson: What statement is it that you say is incorrect, merely the date of the license?

Mr. Adams: Yes.

Justice Jackson: And that is the only point, is it?

Mr. Adams: I think I should go further, if I may be permitted to do so, your Honor, since we are discussing this whole matter.

I don't know whether your Honors have before
6101 you the requests for admission, but No. 4 of the requests is—

Mr. Knuff: I haven't taken that up as yet.

Mr. Adams: I know that, and I don't know whether I am premature on this or not, but I think I should say that No. 4 of the requests for admissions, asks us to admit that:

"The statements of fact contained in Exhibits 1 through 64 are true."

Exhibits 1 through 64 include the exhibits now under discussion.

Well, now, in my reply, I have refused to admit that the statements of fact contained in these exhibits are true, and I take the position that if the Government desires to prove these facts, they are required and compelled to produce the witness here so that we can cross-examine him; and as a matter of fact, the notice is improper in form, under the cases, in any event, since the cases hold that you cannot hand your adversary a document and ask him to admit that the statements of fact contained therein are true, because that places upon him the burden of deciding what is a statement of fact and what isn't, at his peril. You must, rather, ask him to admit what facts are true and are not true. That has not been done by the Government in this case.

Justice Stephens: What is that rule again, Rule 36?

Mr. Knuff: Rule 36, your Honor.

Justice Stephens: (Reading) "At any time after
6102 the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein."

The party who receives such a request is, of course, not obliged to grant it. It would seem to me, Mr. Knuff,—I will be glad to hear you and my colleagues will also of course—that all you have shown so far by the admission of Certain-teed is the genuineness of the documents, in the sense that they have been identified as documents signed by an auditor of the company, Mr. Krug.

But if there is a dispute, or the absence of an admission as to the correctness of what is in these documents, since the Government is relying upon them, and offering them, I have some difficulty in seeing how you can avoid calling a witness for cross-examination.

Mr. Knuff: Well, here is the position I take. Suppose we forget for one moment that there has been a request for the admission of the genuineness of these documents, and suppose we have George P. Krug on the witness stand. Then I would ask Mr. Krug, "Is this your signature?" And he would say, "It is."

Passing for one moment the relevancy and materiality, or anything like that, I would then offer these documents in evidence, and they would be, prima facie, admitted.

6103

Mr. Adams: Then we could cross-examine Mr. Krug.

Justice Stephens: Yes, because we have ruled a dozen times here that where you call a witness to the witness stand and have him identify a document, and thereby accredit it, you have opened the door to cross-examination as to the correctness of the document, because you are offering it to the Court as correct.

Justice Jackson: Are you questioning the mathematics and figures on these, Mr. Adams? Do you want to cross-examine your own auditor as to that?

Mr. Adams: He is not our own auditor.

Justice Jackson: He was then, though?

Mr. Adams: Yes.

Justice Jackson: You want to question him on that, do you?

Mr. Adams: I have, myself—

Justice Jackson: (Interposing) If you do, you haven't any other recourse except to call him.

Mr. Adams: May I go further, your Honor, in answer to Judge Jackson's inquiry? This includes this whole group of exhibits. We have been requested to admit a lot of other facts which we think we ought to have an opportunity to examine witnesses about.

As far as I am concerned, I have gone just as far as I can by admitting that these are—there is no question about it—authentic documents on our part.

6104

Justice Stephens: This rule, Mr. Knuff, is a Rule of convenience to try to save the necessity of proving facts which can be admitted, and of proving signatures, which can be admitted. But I am fearful that your position that when you have once had a witness testify to a document, in the sense of identifying the signature upon it, and stating that it is a document that he signed, that that puts the document in for all purposes, without cross-examination, cannot be sustained.

The Court ought to know, before the close of the Government's case, what every exhibit means, and we can't tell what it means unless the opposite party has had an opportunity to cross-examine on it, if you rely upon it for the statements therein, as you undoubtedly do.

Mr. Knuff: We are not asking Mr. Adams at this time to make a binding admission, we haven't come to that, and I am not going to ask Mr. Adams to make a binding admission that the facts stated therein are true. I don't care whether they are or not for the purposes of the Government's case.

We say that we have made up a prima facie admission on the part of Certain-teed, and that is what we are offering these for, as prima facie admissions. If they want to deny them at the proper time, that is all right, we don't care. We are not asking them to make an admission
6105 now that will forever bind them from questioning the authenticity or the genuineness or the correctness of these documents.

Justice Stephens: But you do not meet the point that troubles me, and I think troubles my colleagues. You say you are offering it only as a prima facie admission. Well, what you apparently mean by that is that once you get these documents in as prima facie admissions, the defendants are not permitted to attack them until they get to their part of the case. Well, now, I don't think that is the law on the procedure with respect to trials.

This Rule 36, which has to do with admissions, is a rule of convenience, with the idea of saving time for the Court and counsel, but it doesn't abolish the rules of evidence or the right of cross-examination.

If you put a document in, in your direct case, as the Government's document, and the defendants haven't admitted the correctness of the statements of fact therein, the Court has a duty to find out, and defendants' counsel have a right to attempt to show the Court, that it is not correct, if it is not correct, before it is considered as a part of the Government's case, because the Court must know, before the close of the Government's case, what it can rely on and what it can't rely on, with respect to every item of evidence, and what that means; if it has a
6106 meaning different from what it says on its face, and that can be brought out on cross-examination, the Court ought to know it, as a matter of duty, and defendants' counsel have a right to bring that out.

I don't see how you can escape, if there is a dispute as to the contents of these documents, in any particular, how you can escape the necessity of subjecting the witness who prepared them, to cross-examination.

I will say this, however, to Mr. Adams, that we think he ought to go to such limits as he possibly can to make admissions in these matters, because the time of the Court can be very greatly saved if that great mass of material can be put in through Rule 36, rather than through the lips of witnesses under cross-examination.

Mr. Adams: I quite agree, your Honor, with that. But you see one difficulty that I have here is that we are being asked to admit wholesale statements of fact contained in these exhibits. I simply cannot do it. These documents did not come out of our files.

Justice Jackson: They came out of the files of the United States Gypsum Company, did they not?

Mr. Adams: That is right.

Justice Jackson: And they were reports from your company to United States Gypsum Company, weren't they?

Mr. Adams: That is correct.

Justice Jackson: Didn't you have copies of them?

6107 Mr. Adams: No.

Justice Jackson: Is Mr. Krug available?

Mr. Adams: I have no idea where Mr. Krug is. He is not in our employ. But I wanted to call your Honor's attention to one case, which is the only case I could find on the subject, which I think, had the Government followed, might have facilitated this matter.

In that case the court held that the proper practice is for the party seeking the admission to ask the other party to admit facts. Now we haven't been asked to admit facts. Every place I have been asked to admit a fact, I have done so, where I could. But they go ahead and say that they want admissions that the statements of fact contained in these exhibits are true. I don't know what facts they are talking about.

Mr. Knuff: As I said, I haven't come to that portion of my request at all. What I have now offered goes simply to Paragraph 1 of my request, that is, a request for an admission that:

"The following statements, photostatic copies of which are attached hereto, made a part hereof, and marked Exhibits 1 through 34, were signed on behalf of Certain-teed Products Corporation by Geo. P. Krug."

Justice Stephens: That has been admitted by Mr. Adams.

Mr. Knuff: And that is all I am asking at this time for Certain-teed to admit.

6108 Justice Stephens: Very well, perhaps this is all unnecessary. Perhaps there is nothing before the Court. Mr. Adams, I thought, however, was objecting to the admission of these documents on the ground that they were not correct, and he ought to have a chance to cross-examine on that.

Mr. Adams: I think I precipitated that in trying to answer a question by Judge Jackson. I wanted to make it perfectly clear that while we admit the genuineness of these documents, we cannot admit what is in them.

Justice Stephens: Then, at the present time, there is nothing before the Court.

Mr. Johnston: Let me call the Court's attention to this fact, that if this class of exhibit is to be admitted under these circumstances, then we, who represent other defendants, are foreclosed from any right or opportunity to cross-examine any witness about them, and I don't know what is in them. I imagine that there are some, at least, about which we would like to make inquiry, and if this procedure is followed, then we have no opportunity at all to make any inquiry about any of these exhibits.

Justice Stephens: Well, your rights might be protected, so far as that is concerned, by a ruling that they will bind only the persons who make the admissions. I don't think this Rule is limited to a case with only one defendant.

However, there is nothing before the Court at the present.

6109 The Court has this suggestion to make to you, Mr. Adams and Mr. Knuff. Why can't you, informally, since there appears to be no dispute between you, stipulate that that date is in error up in the title of this exhibit, or these exhibits, concerning which you were speaking?

Mr. Knuff: I will stipulate right now that it is probably a mistake. I think it is; I think I told the Court that it was. I make no point of anything that is included in the capital letters at the top of these statements at all. It is only a matter of identification, that is all.

Justice Stephens: We will now adjourn until tomorrow morning at ten o'clock.

(Whereupon a recess was taken at 4:10 o'clock p. m. until 10:00 o'clock a. m. of the following day, April 14, 1944.)

6110 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Friday, April 14, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

6116 Mr. Tumulty: May it please the Court, my attention was called, following the afternoon session yesterday, to the desire expressed by the Court that all defendants be represented at all times, either by foreign or

local counsel, or by some arrangement with some of the counsel who are here.

I have conferred with Mr. Varian regarding that, and he asked me to express his regret that he had found it impractical to be here all the time, and to say that after considering the matter we feel the best solution of it is to authorize Mr. Finck, one of the counsel who expects to be here, to act for Ebsary, with full authority to make any admissions or objections as matters are raised in the course of the trial. As a matter of fact, Mr. Varian had requested that Mr. Finck enter objections for him, but apparently that authority wasn't broad enough to cover the mat-
6117 ter that came up yesterday.

I also want to express our regret that that omission has possibly caused some inconvenience to the Court.

Justice Stephens: No serious inconvenience. We simply wish to avoid inconvenience in the future, Mr. Tumulty. There apparently will be a great many offers of documents from now on, and there may be a good deal of colloquy and objection, and someone ought to be here to represent each defendant. Thank you for appearing, and for your explanation.

Are there any other defendants who are not represented? I suppose not, now. Mr. Adams is here for Certain-teed; Mr. Finck for National; and I guess everyone else is represented.

That makes it possible to make a ruling and clear the record, Mr. Knuff, on Exhibit 615. That was one of the interrogatory exhibits, the one for Ebsary.

Is there any objection to that, Mr. Finck, on the part of Ebsary?

Mr. Finck: No, Your Honor.

Justice Stephens: Then Exhibit 615 is received in evidence as binding only upon the particular company, to-wit, Ebsary, which answered the interrogatory.

(The document referred to, marked as Government's Exhibit No. 615, was received in evidence.)

6118 Justice Stephens: Are there witnesses present this morning that we can call to the witness stand, before proceeding to other colloquies which might take more time?

Mr. Steffen: Mr. Speer is here, Your Honor.

Justice Stephens: You may call him, then, and we will proceed to these other matters afterward.

Thereupon, ALEXANDER S. SPEER called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Will you state your full name, Mr. Speer? A. Alexander S. Speer.

Q. And where do you live, Mr. Speer? A. 108 Depew Avenue, Buffalo.

Q. Buffalo, New York? A. Yes.

Q. How long have you lived there, Mr. Speer? A. Twenty-four years.

Q. Were you at any time connected with one of the gypsum companies? A. First with Beaver Products, and then with Certain-teed.

6119 Q. And about what years were you connected with the Beaver Products Company? A. In 1919.

Q. And in what capacity, Mr. Speer? A. I was a consulting engineer.

Q. And do you recall that at some time the Certain-teed Products Company took over the Beaver Products? A. Yes, sir.

Q. Do you remember about when that was? A. 1928. I don't know the exact date.

Q. I think it has been testified to as being April, 1928. A. All right.

Q. Did you continue with the Certain-teed Products Company in the same capacity? A. Yes, sir.

Q. And that was what, Mr. Speer? A. As a consulting engineer.

Q. Consulting engineer? A. Yes.

Q. And how long did you continue with Certain-teed Products as a consulting engineer? A. Well, I am still under contract.

Q. I want to know—

Justice Jackson: (Interposing) Are you still
6120 with them as a consulting engineer?

The Witness: I still have a contract on account of certain patents.

By Mr. Steffen:

Q. What did you do as a consulting engineer for Certain-teed? A. Well, my duty was to produce improved articles.

Q. Of what sort, Mr. Speer? A. Well, in the roofing

line, and also plasterboard and beaverboard, and wallboard in general.

Q. And did you ever take out any patents on your work? A. Yes, sir.

Q. Could you tell us roughly how many—or what you did? A. Well, I think it is a little over 80 or a hundred.

Q. Patents? A. Yes, sir. Altogether, since I started, not since I was with the Beaverboard.

Q. You mean that is since you started with Certain-teed, or all-told, both with Beaver and Certain-teed? A. It would be about 40.

Q. For Certain-teed? A. For Beaverboard and Certain-teed.

Q. Did you at any time work on an invention or a
6121 device for making a closed-edge board? A. Yes, sir.

Q. Can you tell us about when that was? A. About 1924 or 1925, or it may be earlier.

Q. And did you ever file an application for a patent on that? A. Yes, sir.

Q. On a closed-edge board? A. Yes, sir.

Q. Did you ever make any samples of the board that you were working on? A. Yes, sir.

Q. And did you do that before you made application for a patent? A. Yes. My policy always has been to make the articles first and then apply for the patent afterward.

Justice Garrett: Will the witness kindly raise his voice a little? I am having some difficulty in hearing him.

By Mr. Steffen:

Q. Will you please talk louder, Mr. Speer, for the Court? A. Yes, sir.

Justice Stephens: When did you say you first commenced to work for Beaver?

6122 The Witness: In 1919.

Justice Stephens: And when for Certain-teed?

The Witness: In 1928.

Justice Stephens: Thank you.

By Mr. Steffen:

Q. I now want to show you Mr. Speer, what has been marked as Government's Exhibit 641 for Identification.

(The article referred to was marked as Government's Exhibit No. 641 for Identification.)

By Mr. Steffen:

Q. I will ask if you can tell us what that is?

(Government's Exhibit No. 641 for Identification was handed to the witness.)

A. This is a closed-edge board.

Q. And do you know how it was made, or who made it? A. I know how it is made.

Q. Who made it? A. I had a man assisting me to make it.

Q. It was made by you or under your supervision? A. Yes.

Q. At about what time?

Mr. Johnston: We can't hear the witness at all, down here.

Justice Stephens: Raise your voice, if you can,
6123 Mr. Speer.

By Mr. Steffen:

Q. Do you remember about what time that was made, Mr. Speer?

Justice Jackson: You mean this particular exhibit?

Mr. Steffen: Yes.

By Mr. Steffen:

Q. This exhibit before you. A. About 1926 or 1927. Of course, I couldn't remember exactly.

Q. Did you file an application for a patent based on the product which is Government's Exhibit 641 for Identification? A. Yes, sir.

Q. Do you remember what the date of that application was? A. I don't recollect now.

Q. Could your recollection be refreshed on that? A. Around 1927.

Q. I show you what has been marked as Government's Exhibit No. 642 for Identification.

(The document referred to was marked as Government's Exhibit No. 642 for Identification.)

By Mr. Steffen:

6124 Q. This purports to be a patent issued to you under date of January 27, 1931, No. 1,790,252, and ask you to look at that and see if that refreshes your recollection, Mr. Speer, as to when you filed your application? Look at that first page.

(Government's Exhibit No. 642 for Identification was handed to the witness.)

A. According to this paper—

Justice Stephens: (Interposing) Just answer whether or not that refreshes your recollection. Don't read from the paper. Does it refresh your recollection?

The Witness: Yes, Your Honor.

By Mr. Steffen:

Q. About when would you say you filed your application? What is your best recollection as to when you filed your application for the patent? A. January 12, 1927.

Q. Who was the attorney, if you remember, who represented you in filing the application? A. Mr. Robinson.

Q. And with what firm was he associated, if any? A. He was working for the Beaver Products Corporation.

Q. At that time? A. At that time.

6125 Q. Now, Mr. Speer, after you became a consulting engineer for Certain-teed, did you have any conversations at any time with the officers of Certain-teed? A. Well, I did, yes.

Q. Who did you know among the officers? What officers did you know, if any? A. Mr. George M. Brown; Mr. Whittemore; and Claude Brown.

Q. Did you know Mr. Van Hagan? A. Yes, sir.

Q. Did you know Mr. Straub? A. Yes, sir.

Q. Mr. L. R. Walker? A. Yes, I did.

Q. Now, did you ever have occasion to talk to patent counsel for Certain-teed during this period from April, 1928, when Certain-teed took over the Beaver Products, upthrough the year 1928 and the year 1929? A. Mr. Redfield was the patent counsel, and I did talk to him.

Q. Did you talk to anyone else, any other patent counsel? A. There was no other patent counsel.

Q. Who was Mr. Chaffee? A. He was General Counsel of Certain-teed.

6126 Q. And when you say that Mr. Redfield was patent counsel, what do you mean? A. Well, he was a patent attorney. He had the right to apply for patents in the Patent Office.

Q. And where were his offices, do you remember? A. partly in Mr. Chaffee's office and partly in Certain-teed's office.

Q. And what was the address? A. 100 East 42nd Street.

Q. New York City? A. Yes.

Q. Where was your business address? A. It was in Buffalo, at Certain-teed's office.

Q. And did you see any of the officers of Certain-teed in Buffalo? A. Frequently.

Q. Where was Mr. Van Hagan's office? A. Van Hagan was in the same office building.

Q. And what was his capacity, Mr. Van Hagan's capacity? A. He was Manager of the Plaster Division.

Q. Do you remember when the claims of your application were first allowed? A. About 1928.

Q. What month? A. I wouldn't remember.

6127 Q. Was it in the latter part or the early part—December, or June, or some other month? A. As I recall it, it was early in 1928.

Q. Could your recollection be refreshed on that, Mr. Speer?

Your answer is that it might be? (Laughter).

Justice Stephens: I think that is a highly speculative question which the witness can hardly answer until he sees the alleged refreshing document.

By Mr. Steffen:

Q. I want to show you what has been marked Government's Exhibit 643, which is the file wrapper covering the patent which is Exhibit No. 642, and ask you to look at the page that has been marked, the top of the page and the last line.

(The document referred to was marked as Government's Exhibit No. 643 for Identification.)

(Government's Exhibit No. 643 for Identification was handed to the witness.)

By Mr. Steffen:

Q. I will ask if that refreshes your recollection as to the date when your claims were allowed? A. December 7, 1928.

Q. Now can you remember that? A. Now I re-

6128 member it.

Q. It was in December, 1928? A. Yes.

Q. Well, Mr. Speer, perhaps it will help you if you consider whether you had any meetings at any time—

Justice Stephens: (Interposing) He said, "*Now* I remember it."

Mr. Steffen: Yes.

By Mr. Steffen:

Q. I want to see if it will help you further to consider whether you had any meetings at or about the time that the various claims of your patent were allowed, with Mr. Chaffee or Mr. Whittemore or anyone? A. I did, yes.

Q. Can you tell us the occasion and where you had such a meeting? A. About this patent?

Q. Yes. A. Of course, I had meetings about various patents.

Q. What I want to know is—can you recall any occasion when you had a discussion with officers of Certain-teed, on or about the time that these claims of your patent had been allowed, in New York or elsewhere? A. In both places, New York and Buffalo.

Q. And will you tell us, if you can, what conference, if any, you had in New York? A. I couldn't remember.

6129

Q. Well, what was your practice—were you ever in New York? A. Yes, sir.

Q. And when you went to New York, who would you see, if anyone?

Mr. Bromley: I object to that as speculative and too general.

Mr. Steffen: It is preliminary, Your Honor, to see if I can locate a date—

Justice Jackson: Well, it might run from the date of the man's birth until now.

Justice Stephens: It is too general. Objection sustained.

By Mr. Steffen:

Q. I want to ask you with regard to the year 1928, after the Certain-teed people had taken over the Beaver plants and you were engaged, as you say, as a consulting engineer for Certain-teed—during that period from April, 1928, and on through that year, did you have occasion to go to New York? A. Yes, sir.

Q. And when you went to New York, who did you see in connection with the matter of your duties as a consulting engineer for Certain-teed?

6130

Mr. Bromley: I object to that as too general, and as immaterial. If he has got some conference in mind, why doesn't he ask him about it?

Justice Stephens: Well, that is purely a preliminary question to bring out who he saw. I think that objection should be overruled.

The Witness: Mr. Chaffee and Mr. Whittemore, and Mr. Redfield.

By Mr. Steffen:

Q. Can you say how frequently you went to New York?

Justice Stephens: Now you should fix the time and place, since your preliminary question is over with, so far as you reasonably can.

By Mr. Steffen:

Q. Can you say how frequently you were in New York and saw Mr. Chaffee or Mr. Whittemore or both of them? A. At least once a month, on the average.

Q. And those conferences were with regard to your duties as a consulting engineer? A. Yes.

Mr. Bromley: I object to that as leading.

Justice Stephens: The witness should not be led.

Mr. Steffen: Yes, Your Honor.

By Mr. Steffen:

6131 Q. Then when you saw Mr. Chaffee, can you tell us what you talked with him about?

Mr. Adams: I respectfully object to that question on the ground that that involves a communication between attorney and client, and is consequently privileged.

Mr. Steffen: I would make the point, Your Honor, that this is preliminary, and that it would usually result also in a conference with Mr. Whittemore, and that the matter of privilege, I should think, would stand on the same ground that this whole question of privilege stands upon, —that is, we are leading to the Redfield memorandum, which is Exhibit 233, and these are the preliminary conferences. If the Redfield memorandum is not within the attorney-client privilege, the conversations preliminary to and giving effect to, and out of which the Redfield memorandum grew, it seems to me, would be equally outside of the attorney-client privilege. That is the basis of that line of questioning.

Justice Stephens: You are attempting to establish here, I assume, that the Redfield document was the act, by adoption or acquiescence or action of some sort, of Certain-teed?

Mr. Steffen: Yes, Your Honor, and make the connection which Your Honor has pointed out needed to be made in order to show that this was in some sense a declaration of

a member of Certain-teed, either that they acted
6132 upon the declaration or that it is declarative of the purpose and intent and understanding of the members of Certain-teed.

Mr. Adams: It is perfectly clear, Your Honor—

Justice Stephens: (Interposing) Well, it seems to me, Mr. Adams, that your objection is a little premature. We don't know yet what the nature of the conversation was. Not every conversation between a lawyer and his client is privileged. It depends upon the content of the conversation.

On the other hand, Mr. Steffen, I should think you can't lift yourself by your bootstraps. The mere fact that there is a question as to whether or not Exhibit 233 escapes the privilege, and that you have to build a foundation to get it out of the privilege, doesn't, I think, lower the bars of the rules of evidence with respect to conversations which you may wish to go into on that topic. If they are privileged, they are privileged.

We will have to hear the answer to that question before we can know whether these particular conversations you are going into now are privileged.

Mr. Steffen: All right.

Justice Stephens: You may reserve a right to move to strike, Mr. Adams, if it turns out that the conversations which are now being related were privileged.

Mr. Steffen: Perhaps I had better restate the matter, Your Honor.

6133 By Mr. Steffen:

Q. I want to refer now, Mr. Speer, to any meetings which you may have had with Mr. Chaffee or Mr. Whittemore, or both, after the time when your claims were allowed, in December, 1928, and can you recall any occasion when you were in New York and had such a conference concerning your closed-edge board patent? A. Yes, I spoke to Mr. Chaffee and also to Mr. Whittemore.

Q. And did you ever have a conference where both of them were present? A. My recollection is that I did have.

Q. And was there anyone else present at that conference? A. Well, occasionally some of the other officers, officials, came in, probably for a few minutes.

Q. And who would you mention? A. Walker—

Q. (Interposing) Mr. L. R. Walker? A. Yes, he was the General Sales Manager.

Q. And can you say what was said at this conference by yourself?

Mr. Adams: I object, Your Honor, on the ground that this witness has not testified yet about any conference, and particularly has not identified the persons who were present. He says occasionally other people came in
6134 to these conferences.

Justice Stephens: Let me ask the witness a question.

Are you talking now about some particular conference that you had in mind, at which Mr. Chaffee and Mr. Whittemore were present; or are you simply stating that there were, from time to time, conferences at which those two men were present and that on those occasions sometimes others dropped in?

The Witness: Yes, Your Honor.

Justice Stephens: The latter?

The Witness: Yes, Your Honor.

Justice Stephens: I had some doubt, myself, as to whether the witness was talking about any particular conference.

Objection sustained, but you may proceed further, Mr. Steffen.

By Mr. Steffen:

Q. What we want to know, Mr. Speer, is whether you can remember a particular conference at which both Mr. Whittemore and Mr. Chaffee were present, at which you discussed the matter of your patent, the claims of which had been allowed in December, 1928. Now do you have a recollection of a meeting? That is what I am asking you. A. I don't have a definite recollection, because it wasn't the only subject we discussed.

6135 Q. But do you have a recollection of a meeting at which this subject was discussed? A. I don't think so.

Q. Did you ever, at any time, discuss with Mr. Whittemore the possibility that the company should make a board according to your patent? A. Yes—

Mr. Bromley: (Interposing) Just a moment. I object to that as leading and suggestive, and also on the ground it has already been answered; and move to strike the answer.

Justice Stephens: Read it, please.

(The question was read by the reporter.)

Justice Stephens: It is leading, and therefore the objection is sustained; and it has been answered in the negative.

Mr. Steffen: The negative answers heretofore were that

he could not remember particular conferences. I asked him whether he had a conference at any time at which it was suggested that the matter of making the board under his patent had been considered.

Justice Stephens: Perhaps I misunderstood your objection. I thought it had been answered in the negative.

Mr. Bromley: I thought it had. I thought he had theretofore said he couldn't remember any conferences.

I move to strike this answer "Yes" on the ground
6136 that the question was a leading question, and therefore improper.

Justice Stephens: I think it is not proper to lead here, Mr. Steffen. We want to be reasonably lenient, within our discretion, on preliminary questions, but whether a conference was had on this particular topic is apparently critical. You ought to ask the witness what conversations he had, and when, and what was discussed in them, and not suggest what was discussed in them.

Objection sustained and the motion to strike is granted.

By Mr. Steffen:

Q. Now, Mr. Speer, we want to know any conversation that you had with Mr. Whittemore or Mr. Chaffee concerning the matter of making a board—

Mr. Bromley: (Interposing) I object to that as repetitious on the ground that it has already been answered.

Mr. Steffen: He said he did have a conversation. I don't know how I can direct him to the subject matter better than by asking him whether he ever had a conversation regarding the making of the board according to his patent.

Mr. Bromley: The witness has told counsel that he had no recollection of what transpired at any conversation that he may have had.

Justice Stephens: No, I think he didn't state that, Mr. Bromley. What he stated was that he didn't have a
6137 recollection of a particular conference. The witness does testify that he had conferences from time to time with Whittemore and Chaffee, ar[illegible] that from time to time other persons would drop in. He apparently couldn't recollect any particular conference.

The objection is overruled to that last question.

Mr. Steffen: Let's have an answer to the previous question. Will you read it, Mr. Reporter?

(The question was read by the reporter.)

Justice Jackson: That is no question, is it? You are not asking him anything.

By Mr. Steffen:

Q. My question is: Will you tell the Court what was said if anything, at any conference that you had with Mr. Whittemore or Mr. Chaffee, concerning the possibility that the company might make a board according to your patent?

Mr. Adams: I object to that on the ground that it is suggestive, in the first place, and leading; and in the second place, that the time and place of the conference should be fixed, and I think it is particularly important here, because the witness has already said that he couldn't remember any particular conference, or what transpired at any particular conference.

Justice Stephens: Is that true, Mr. Speer? Do you or do you not remember any particular conference that you
6138 had with these gentlemen that you have mentioned?

The Witness: I don't, I don't remember. It is not clear to me.

Justice Jackson: But you do remember that you did have conferences with them about this subject matter?

The Witness: Yes.

Justice Jackson: But you can't fix any specific rate or any specific conference?

The Witness: Yes.

Justice Jackson: But you had conferences with them concerning it?

The Witness: Yes.

Justice Stephens: Can you tell where those conferences took place?

The Witness: Mostly in New York.

Justice Stephens: In whose offices?

The Witness: In Mr. Whittemore's office or Mr. Chaffee's office.

Justice Stephens: Can you say within what period they took place? If you can't remember a particular date, can you say approximately within what period they took place?

The Witness: Within a year.

Justice Stephens: What year?

The Witness: 1928.

Justice Stephens: Well, we haven't ruled hereto-
6139 fore in this case that conferences should be limited to a particular day. If they can be fixed with reasonable certainty so that the defendants can have a chance to prepare themselves to cross-examine them, that is sufficient.

I should think those last answers are sufficient, if he now remembers what was said. If there are objections to that, they may be shown in the record on behalf of the defendants, and overruled.

By Mr. Steffen:

Q. Will you tell us what was said at these conferences between you and Mr. Chaffee and Mr. Whittemore, about the matter of making a board? If you can't remember the exact words, can you give us the substance?

Mr. Adams: Was this in the year 1928?

By Mr. Steffen:

Q. This was in 1928, and did you have conferences in the early part of 1929? A. Yes, sir.

Q. During the latter part of 1928 and the early part of 1929, then, tell us what was said, if you can, or the substance of what was said, concerning the matter of making a closed-edge board? A. Well, I just simply wanted Certain-teed to start manufacturing this particular board.

Q. You did? A. Yes.

6140 Q. And what did you say along that line? A. That is about all I said. I tried to get them to use it.

Q. You tried to get them to use it? A. Yes.

Q. Why did you think they should use it?

Mr. Adams: I object to that, if you please.

Jutice Stephens: Yes, why he thought they should use it is immaterial, I should think. Objection sustained.

By Mr. Steffen:

Q. State, if you can, what reasons you may have advanced for them using your board?

Mr. Adams: I object—

Justice Stephens: (Interposing) It is exactly the same question you asked before, except a little more explicitly stated. You asked him what his reasons were—just a minute, there is a division on the bench. Judge Jackson disagrees with me. If my colleagues differ with me, I am very happy to consult them.

What do you say about it, Judge Garrett?

(The Justices conferred.)

Justice Stephens: How do you claim his reasons as to why they should make the board are material?

Mr. Steffen: I want to get the conversation to

6141 show the discussion that took place, if it did—

Justice Stephens: (Interposing) You didn't ask for that, you asked him what his reasons in his own mind were, as I understood, as to why they should use the board.

Mr. Steffen: What reasons did he urge upon the company, if any.

Justice Stephens: He may state the conversation, and if the conversation included reasons, he may state those. I thought you were inquiring as to what his inner reasons were as to why they should use it.

Mr. Steffen: No.

By Mr. Steffen:

Q. Did you advance any reasons to Mr. Whittemore and Mr. Chaffee why it might be desirable for the company to make a board according to your invention? A. Yes, sir.

Q. And what were they? A. In the first place, I consider the board superior—

Mr. Bromley: (Interposing) I move to strike that out.

By Mr. Steffen:

Q. What did you say to them?

Mr. Bromley: May that answer be stricken?

Justice Stephens: It may go out, although I think plainly the witness means that that is what he told them.

Mr. Speer, don't give us your own thoughts, either
6142 then or now, as to why the board should be used.

Tell us what you said to them. You don't have to tell the exact words. Of course, we don't expect you to be superhuman in your memory. But if you can remember the substance of what you said to them, tell us that.

The Witness: Well, my main reason was—

Justice Jackson: (Interposing) Is this what you told them?

The Witness: Yes, that is what I told them, that my reason was that the board was superior to anything they had at that time.

By Mr. Steffen:

Q. Why was it superior, did you say, if you did?

Mr. Adams: I object again to this. It seems to me that this is much too suggestive and leading. The witness obviously has a very vague recollection on this.

Justice Stephens: I don't think that last question is improper. If the witness told them why it was superior, that is a part of the conversation. The objection is overruled.

You may proceed on that question, Mr. Steffen.

By Mr. Steffen:

Q. If you told them that it was superior, in what particu-

lars did you say that it was superior? A. The edge was reinforced, that is what I told them.

Q. Can you show, by your sample there, what you
6143 mean by the edge being reinforced? A. Yes, sir.

Q. Will you do that for the Court, please?

Justice Stephens: That exhibit is not in the record yet, Mr. Steffen.

Mr. Steffen: All right.

By Mr. Steffen:

Q. Simply describe, Mr. Speer, what you told them? A. Well, this board—

Justice Stephens: (Interposing) Don't describe it from that exhibit, because, unhappily, it isn't in the record, and therefore the description, if you refer to the board, won't be in the record, won't be proper. Just lay it aside and tell us what you told them as to its superior qualities.

The Witness: I told them it had a double reinforced edge; and that it would withstand nailing better than anything they had at that time. That is what I told them.

By Mr. Steffen:

Q. And did Mr. Chaffee—

Justice Stephens: (Interposing) If you feel it is necessary to your presentation of this witness, you may offer this exhibit as illustrative of his testimony.

Mr. Steffen: I should like to do that, Your Honor.

Justice Stephens: Any objection?

6144 Mr. Bromley: I object to it as immaterial, only.

Justice Stephens: It will be received as illustrative of his testimony.

(The article marked as Government's Exhibit No. 641, was received in evidence for the limited purpose stated.)

Justice Stephens: Now you may describe, if you wish, what you told them in terms of that exhibit. Did you have it there with you?

The Witness: Yes, sir.

Justice Stephens: Very well.

By Mr. Steffen:

Q. And what did you tell them about it, Mr. Speer, if you can tell us any more, using the board that you have before you?

Mr. Bromley: Could we see the board, the exhibit, please?

Mr. Steffen: Surely.

(Government's Exhibit No. 641 handed to defendants' counsel.)

Justice Stephens: We will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

6145 Justice Stephens: Proceed.

Mr. Steffen: Will you return Exhibit 641 to the witness, Mr. Marshal?

(Exhibit 641 was again handed to the witness.)

By Mr. Steffen:

Q. Just before the recess we were talking about this meeting at which you were advancing reasons to Mr. Whittemore why they should produce your board. Can you state any additional reasons that you may have mentioned to Mr. Whittemore? A. Yes, I can.

Q. Would you state them, please? A. Well, they had trouble about the open-edge, and wanted to get away from it, and I told Mr. Whittemore that this would be a good board to take the place of the open-edge board.

Q. Do you know whether Certain-teed was making an open-edge board at this time? A. I couldn't remember distinctly. I know they were making open-edge board, but I don't know whether it was at the same time.

Q. I notice that the exhibit, Government's Exhibit No. 641, has a colored insert in there—could you tell us what that is?

Did you mention that to Mr. Whittemore? A. I

6146 did, it had an advertising value, a sales value.

Q. What would be the advertising value if they used that? A. It was something entirely different from any board on the market.

Q. Now, I notice that the edge is rounded on Exhibit 641. Can you explain that, or did you mention that to Mr. Whittemore or to Mr. Chaffee? A. No, I wouldn't say anything about the shape of the edge, because I told Mr. Whittemore that they could make any shape. In fact, I did have samples when I spoke to them.

Q. What did Mr. Whittemore say?

Mr. Adams: This is also subject to my objection as to privilege, I suppose. I take it that Mr. Chaffee was present.

Justice Stephens: Yes. The Judges can't tell whether a document or a conversation is privileged without looking at it or hearing it. We will have to hear the testimony first, but you may move to strike it if it turns out to be privileged.

By Mr. Steffen:

Q. What, if anything, did Mr. Whittemore say in response to your statements? A. Well, he didn't say very much.

Q. Well, how would you describe what he said? What did he say? A. He didn't say very much, I repeat it again.

6147 Justice Jackson: Did he say anything?

The Witness: Well, he said that he had to look into it.

Mr. Steffen: Now this may be privileged, your Honor, and within Mr. Adams' objection.

By Mr. Steffen:

Q. What, if anything, did Mr. Chaffee say to Mr. Whittemore while you were there, concerning whether the company should make or should not make closed-edge board of the sort you had? A. Mr. Chaffee favored it. He told Mr. Whittemore and myself—I was present when he told Mr. Whittemore—that he would like to see this board go over.

Q. And did he give any reasons? A. He did give reasons.

Q. And what reasons did he give? A. One of the reasons was that Certain-teed could license this particular board and collect royalties on it.

Q. Now do you recall any other conversation at this time concerning the board? Did Mr. Walker or anybody else who may have been present—

Mr. Adams: (Interposing) May I interrupt here? Mr. Steffen is proceeding into a new series of conversations, your Honor, I believe.

Mr. Steffen: I intended to stay with this one conversation.

6148 Justice Stephens: He hasn't yet identified one conversation. The witness has been frankly describing the contents of conversations or conferences that were held in 1928 and early 1929, without fixing a particular date. He says that at those conferences, other persons dropped in from time to time.

What is your objection, Mr. Adams?

Mr. Adams: I think I am premature, then.

By Mr. Steffen:

Q. Do you recall any conference during this period, the latter part of 1928 and the first half of 1929, when Mr. Walker was present, and can you tell us anything that he may have said, if he was present? A. Well, I couldn't remember.

Q. I see. Well, now, you have told us that you made the test, and made the sample which is before you, which is Government's Exhibit 641 in evidence, while you were still a consulting engineer for Beaver Products. Do you recall at any time having made a sample board while you were connected with Certain-teed? A. Yes sir.

Q. And can you give us approximately when that test was made? A. I should say around 1929.

Q. And did you sail for Europe during the summer
6149 of 1929? A. Yes sir.

Q. And does that help you place in any way the time when you made a test for Certain-teed? A. I don't know, I don't think I would remember distinctly, so many things happened then.

Q. What I wanted to get at simply was--was your test or your sample board made for Certain-teed before you sailed for Europe or after, can you tell? A. Before and after.

Q. I see. When did you sail for Europe? A. It was, as I recall it, in July, and I stayed there until September 15, about.

Q. Will you describe to us what sort of a pilot test you made for Certain-teed at this time?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: What do you claim for this by way of laying a foundation for Exhibit 233? It may be preliminary, I don't know.

Mr. Steffen: It is partly preliminary, and partly, I think I should tell your Honors, for a second purpose which I have in connection with Mr. Speer's testimony.

I wish to introduce this evidence to indicate that the Certain-teed people were actually making tests on a closed-edge board at the time, that is in 1929, and I do that for the reason that I think one of the important issues in
6150 this case, as certainly Mr. Bromley will claim, is that there is a question as to whether the Utzman closed-edge board was the only closed-edge board that could be made. Here we have, I think, the Certain-teed people ex-

perimenting with a board in the period around May, 1929, and it is very relevant, it seems to me, to show what that test was and whether that test was successful, for the purpose of showing that it was not essential for Certain-teed to take out a license under the closed-edge board patent in order to get a closed edge, they had one right in their own works; they held the patent and the claims had already been allowed, as the file wrapper will show, in December, 1928. And I want to introduce that.

But it is also preliminary to the Redfield matter, for the reason that there were conferences with Mr. Redfield at this same time, out of which grew the discussion which resulted in Exhibit No. 233.

Justice Stephens: Do you wish to be heard further, Mr. Bromley?

Mr. Bromley: I don't understand the materiality of it. This patent was not issued until 1931.

Mr. Steffen: As respects that, the claims were allowed in December, 1928, and as Mr. Redfield states in his memorandum, and as your Honors will understand, when they were allowed the patent could issue in a very short time thereafter.

Mr. Adams: I object to the statement concerning
6151 what appears in the Redfield memorandum.

Mr. Steffen: I make it on the broad proposition that when the claims are allowed, as does appear in the file wrapper which I will offer in evidence, you have, then, positive evidence that they did have nine claims covering a closed-edge board, the very closed-edge board which is Government's Exhibit No. 641; and that those claims could have been issued, as your Honors know, in a patent, very shortly after, in a matter of a few weeks.

I want to show also that they were making experiments on that board, making tests of it, in their plant at Buffalo, and that Mr. Speer conducted them, and that they were successful.

Justice Garrett: The matter didn't get in interference, I suppose, after the claims had been passed?

Mr. Steffen: No, your Honor, because the file wrapper shows that the patent was issued in 1931.

Justice Garrett: There was a period of more than a year after the claims had been marked "Allowed," before they actually took out the patent?

Mr. Steffen: That is right.

Mr. Bromley: Approximately three years.

Mr. Steffen: December, 1928, to January, 1931, when the patent was issued.

(Discussion off the record.)

Mr. Steffen: We will introduce the patents, and
6152 your Honors can tell from that just how broad or how narrow the claims were. Our contention is that the claims were sufficiently broad to allow them to manufacture this board, regardless of the Utzman Patent.

Justice Jackson: They could manufacture this board, but not the Utzman board?

Mr. Steffen: That is right.

Justice Stephens: So far as Mr. Adams' objection to the reference to the contents of Exhibit 233 is concerned, that objection is well taken, and we will not consider the comment of counsel for the Government, made in respect of that, as part of the record.

But as far as this question of materiality is concerned, we suppose you are offering this under the theory of subterfuge, are you not?

Mr. Steffen: That is right, your Honor.

Justice Stephens: You are attempting to show that the defendants knew, or might reasonably have known, that they could have manufactured a closed-edge board without paying royalties and having licenses, is that right?

Mr. Steffen: That is right, your Honor.

Justice Stephens: Well, we think it is material on that issue, and the objection is overruled. The objection apparently goes to its weight rather than to its materiality or relevancy.

Mr. Stephen: May we have the last question,
6153 please, Mr. Grover?

Justice Stephens: Before you read that, Mr. Grover, I would like to make this suggestion to you, Mr. Steffen.

Insofar as you can—it may be, to use a mixed figure of speech, that you can't unscramble the testimony—but insofar as you can, if you could separate the testimony which has to do with the asserted foundation for Exhibit 233, from the testimony that goes to the subterfuge theory, it will make the record clearer, because we ought to have all the testimony together on the subject of Exhibit 233. But if you can't accomplish that, if they are all related and interrelated, we can't expect you to do the impossible.

Justice Jackson: You are really on the subterfuge issue now, are you not?

Mr. Steffen: This immediate testimony will have to do with that, and then it leads into the conversation, which I think we can show, with Mr. Redfield.

Will you read the pending question, Mr. Reporter?

(The reporter read the question as follows:

"Q. Will you describe to us what sort of a pilot test you made for Certain-teed at this time?")

By Mr. Steffen:

Q. Will you please do that, Mr. Speer, describe the test you made? A. We built a miniature machine, a pilot machine.

6154 Q. Where did you build that? A. In Buffalo, at the Certain-teed plant.

Q. And will you describe the machine more fully? A. Well, it was practically the same as a large machine, except on a smaller scale.

Q. And did you run off some samples of board on that machine? A. I did.

Q. Do you recall ever having taken those samples anywhere? A. Yes.

Q. To whom did you show them? A. I showed them to Mr. Chaffee, to Mr. Whittemore, and to Mr. Van Hagan.

Q. And can you tell us what any one of them told you about the samples? A. Well, the only one who liked them was Mr. Chaffee.

Q. Can you say anything that Mr. Whittemore told you about them? A. Well, he liked the samples, but he didn't commit himself whether we should go ahead or not.

Q. Did you have any talk with Mr. Van Hagan, who you say was in the same building with you? A. Well, he saw the machine and he saw the process.

Q. And did he express an opinion concerning whether it was a good or a bad product? A. He didn't,

6155 as I recall it.

Q. He did or did not? A. He did not.

Q. Now, that machine that you built,—could you give us an estimate of how much it cost? A. There was quite considerable labor involved.

Q. How long did it take to make it? A. I couldn't answer that.

Q. Could you say roughly how long, one month or ten months? A. No, I don't think ten months, less than that.

Q. And what authority did you have to get, if any, to

make it? A. Well, they had to approve the appropriation for it.

Q. And when you say "they", who do you mean? A. Well, I really don't know who approved that, but Mr. Whittemore was supposed to approve any appropriations. He was the final authority in approving them.

Q. When did you first meet Mr. Redfield, or do you remember having met Mr. Redfield? A. I remember meeting him, but I don't remember the time.

Q. It appears that you had nine claims in your patent allowed in December, 1928. Was there ever, at any time, an amendment to your claims, were there ever any
6156 further claims? A. Yes.

Q. And do you recall about when that was? A. I am not positive about the time.

Q. Will you refer to Government's Exhibit No. 643 for identification, and see if that will refresh your recollection? A. I can read it so I remember it.

Q. Well, can you tell us now about what it was?

Justice Stephens: Is there any dispute about it? Couldn't we stipulate on that and save this time?

Mr. Steffen: It was June 5, 1929.

Justice Stephens: Show the file wrapper to counsel for the defendants.

The Witness: June 12, 1929.

(Exhibit 643 for identification was handed to defendants' counsel.)

Mr. Bromley: I will stipulate that the applicant Speer made an amendment to his claims on June 5, 1929.

Justice Stephens: Thank you. That will save proving this.

Mr. Bromley: His answer, June 12, was incorrect.

Justice Jackson: What is that?

Mr. Bromley: The witness answered, June 12, 1929. That is the date on which he revoked a power of attorney.

The Witness: That is the date I read, the date of the power of attorney.

6157 Mr. Bromley: We weren't interested in that; we wanted to get the date when you filed your amendment.

The Witness: I will have to look at that.

Mr. Bromley: That was June 5, 1929.

By Mr. Steffen:

Q. Mr. Robinson had formerly been your counsel, had he not, Mr. Speer? A. Yes sir.

Q. And do you remember when Mr. Redfield became counsel? A. Yes sir.

Q. About when was that, at about this same time? A. Well, he became attorney for the Certain-teed when Certain-teed took over the Beaver Products Corporation. He was already employed by them at the time they purchased the Beaver Products Corporation.

Q. Now you say he was employed by Certain-teed—what do you base that upon?

Justice Jackson: Who is this, Mr. Redfield?

Mr. Steffen: Yes.

Mr. Bromley: I object to that as calling for a conclusion.

Mr. Steffen: I know it, and that is why I want to correct it, if it is not based on actual information. I think his answer is a conclusion.

Mr. Bromley: Then I move to strike his answer.

Justice Stephens: It may go out.

6158 By Mr. Steffen:

Q. Do you know whether Mr. Redfield was hired by Certain-teed? A. I do not.

Q. Do you know where his offices were? A. Yes sir.

Q. And where were they—

Justice Stephens: (Interposing) Is it necessary to take time on this? Isn't it already on the record that he was a member of the Chaffee organization, which was counsel for Certain-teed?

Mr. Steffen: I believe that is correct, your Honor.

By Mr. Steffen:

Q. Now, do you recall having a conversation with Mr. Redfield on or about this time in June, 1929, concerning the matter of your patent and the possibility of making a product under your patent? A. Yes sir.

Q. Can you tell us about where that conversation was held? A. I can't remember the exact time.

Justice Jackson: He asked you where, the place.

The Witness: It was either in Buffalo or New York, or Chicago. We had correspondence just then, various correspondence, and I met him in Chicago, and also I

6159 met him in New York and Buffalo.

By Mr. Steffen:

Q. Did you have more than one conference with Mr. Redfield at about this time in June, 1929? A. Yes sir.

Q. Did you also have a conference, or any conferences, with Mr. Chaffee, during this time? A. I did.

Q. And do you recall ever having discussed, either with Mr. Redfield or Mr. Chaffee, the USG or Avery license agreement?

Mr. Adams: At this point I object with regard to these conversations, on the ground that they are privileged. These, I believe, are new and different conversations than the previous ones referred to.

Justice Stephens: You want to make your record. Yes, your objection may be recorded and is overruled, subject to a motion to strike, if the conversations turn out to be privileged.

By Mr. Steffen:

Q. Do you recall ever having conversations, either with Mr. Redfield or with Mr. Chaffee, at about this time, concerning the USG license agreement? A. I had conversations with Mr. Chaffee, but not with Mr. Redfield.

6160 Q. At that time? A. Yes.

Q. And did you ever see the license agreement? A. I did.

Q. And did you ever have a copy of it? A. I did.

Q. I now would like to have you tell me what your conversation with Mr. Redfield was concerning the matter of making a closed-edge board according to your patent? A. Well, I don't remember it exactly.

Q. We want simply the substance of your conversation. A. Well, I told Mr. Redfield about this particular edge, how they could utilize it for Certain-teed, meaning how they could use it, and how they could collect royalties.

Q. And what did he say to you, or what discussion did he have with you? A. That is about all I remember.

Q. Did you discuss the general situation in the industry with Mr. Redfield?

Mr. Bromley: I object to that as leading and suggestive.

Justice Stephens: Yes, this is supposed to be a critical matter with respect to the admissibility of Exhibit 233. You shouldn't lead. Objection sustained.

By Mr. Steffen:

Q. State what you did discuss, if anything, in addition to the matter you have just mentioned?

6161 Mr. Bromley: He has already said he didn't remember anything more.

Mr. Steffen: This goes to Mr. Speer's conversation with Mr. Redfield.

Justice Stephens: Have you stated everything that you talked to Mr. Redfield about, so far as you remember, in substance and effect?

The Witness: Well, I don't think I remember anything more just at this minute.

By Mr. Steffen:

Q. Did you have any further discussion with Mr. Chaffee about the matter of the license agreements? A. I did.

Q. What did he say? A. Well, he was very downhearted about it.

Mr. Adams: I move to strike that, your Honor, that Mr. Chaffee was "downhearted", although I think probably he should have been. (Laughter)

Justice Stephens: Well, technically it is a conclusion. It may go out. Tell us what Mr. Chaffee said, in substance and effect.

The Witness: Well M.. Chaffee said that Certain-teed signed that agreement against his advice. I remember that distinctly.

By Mr Steffen:

6162 Q. And did you talk with Mr. Redfield concerning that? A. I don't think I did, I don't remember ever discussing it with him. He was a patent lawyer, and that is all. (Laughter)

Justice Stephens: Mr. Olson,, that is pretty hard on you. (Laughter)

By Mr. Steffen:

Q. I want to show you Government's Exhibit 233, Mr. Speer, and ask if that refreshes your recollection on any conversation you may have had with Mr. Redfield?

(The document referred to was handed to the witness.)

A. I would like to take my time just to read it over, because it happened many years ago.

Justice Stephens: Take your time and read it.

By Mr. Steffen:

Q. Have you examined Exhibit No. 233, Mr. Redfield's memorandum, Mr. Speer? A. Yes sir.

Q. And does that recall to your mind anything that you discussed with Mr. Redfield? A. Well, I would say that substantially—

Mr. Adams: (Interposing) Just a minute, please. May the witness be instructed here—

Justice Stephens: (Interposing) That may go
6163 out. Just lay aside that document for a moment.

All you are being asked now is whether or not the reading of that document refreshes your present recollection as to anything you told Mr. Redfield, or that he discussed with you. Just answer that yes or not. Does it or does it not?

The Witness: Yes, your Honor, it does.

Justice Stephens: It does?

The Witness: Yes.

By Mr. Steffen:

Q. Tell us what it brings back to your mind.

Mr. Adams: I suggest that the witness be given a full opportunity, of course, to read the document, but I don't think that he should now be permitted in effect to read from it.

Justice Stephens: All you are being asked now, Mr. Speer, since you say your present recollection has been refreshed as to what you told Mr. Redfield, is to tell us what you did tell him in addition to what you have already told us.

(At this point the witness laid Exhibit 233 face down.)

The Witness: I told Mr. Redfield that this plasterboard, this patent itself, would be a very good trade with United States Gypsum Company in their new agreement. That is one thing. The other was that it had a distinctive fea-
ture. Also, we looked up the patents, and we saw
6164 that the Utzman Patent was about to expire, the next year, and they should have something, some patent, which would be still in force. That is about all.

By Mr. Steffen:

Q. Do you recall any further discussion with Mr. Redfield about this matter? A. No sir.

Q. Or any other discussions with Mr. Chaffee, about the same matter? A. I think I discussed it exactly the way I just stated. Whether Mr. Chaffee was present or not, I discussed the same thing.

Justice Stephens: I don't quite understand you. Do you mean that you don't know whether Mr. Chaffee was present or not?

The Witness: I don't think, as far as I remember, that Mr. Chaffee was present.

Justice Stephens: Very well.

By Mr. Steffen:

Q. Now, you have told us that you went to Europe in the summer of 1929, and got back in September? A. Yes sir.

Q. Do you remember any conversations thereafter with Mr. Redfield or with officers of the corporation, concerning the desirability of using your patent?

6165 Mr. Adams: Since this appears to be concerning a new group of conversations, I would like to interpose my usual objection.

Justice Stephens: Your objection may be recorded, and it is overruled. You may reserve the right to move to strike in the event it appears to be privileged.

By Mr. Steffen:

Q. Do you remember any conversations with officers of the company after September, 1929, when you returned from Europe, concerning the desirability of using your patent in making board? A. I do.

Q. About when? A. I can't fix the time just now.

Q. Will you tell us as nearly as you can? A. I would be guessing, and I don't want to guess.

Q. That is all right. Was it within the next year? A. I should say within a year or a year and a half.

Q. Can you tell us whether the company ever has made a product according to your patent? A. No sir.

Q. You mean that they haven't made it, is that it? A. They haven't made it.

Mr. Steffen: I now offer in evidence, your Honor, Government's Exhibits 642 and 643. Exhibit 642

6166 is the Speer Patent, which was issued on January 27, 1931, and concerning which Mr. Speer has testified—

Justice Stephens: (Interposing) You are offering that on the subterfuge theory, I assume?

Mr. Steffen: We are offering that, and Exhibit 643, which is the file wrapper, on the subterfuge theory.

Mr. Bromley: I object to them as immaterial.

Justice Stephens: The objection is overruled; they are received in evidence.

(Government's Exhibits Nos. 642 and 643 for identification were received in evidence.)

Mr. Steffen: I believe that Exhibit 641 was introduced in evidence—

Justice Stephens: Merely as illustrative of the witness's testimony, and it was received for that purpose.

Mr. Steffen: I would like now to offer it broadly as a sample of the board which could be made in accordance with the Speer Patent.

Justice Stephens: Is there any objection?

Mr. Bromley: Not other than that it is immaterial.

Justice Stephens: The objection is overruled; it is received in evidence.

(Government's Exhibit No. 641 for identification was received in evidence.)

6167 Mr. Steffen: We now reoffer Government's Exhibit No. 233, your Honor, and I want to make a short statement on that.

Justice Jackson: Just one minute. Have you assigned your patent to Certain-teed, Mr. Speer, the one you have been testifying about?

The Witness: Yes, your Honor.

Justice Jackson: When was the assignment made, do you know?

The Witness: Before the patent application.

Justice Jackson: I see.

Mr. Adams: I don't want to interrupt Mr. Steffen's statement, but I have some motions to strike, which I would like to make, and it would seem to me that it would be appropriate to make them now.

Justice Stephens: That is right. We ought to know what is before us before we hear the argument on whether or not Exhibit 233 has been qualified.

Are you moving to strike out Mr. Speer's testimony of his conversations with Chaffee and Redfield, as privileged?

Mr. Adams: That is right, your Honor.

I call particular attention to the fact that the first group of conversations included testimony with respect to Chaffee's views as to licensing under this patent—clearly a legal matter.

Secondly, this witness testified that with respect
6168 to the later conversations, Chaffee told him that when Certain-teed entered into this license agreement, that it was contrary to Chaffee's advice—again purely a legal matter, and he was obviously expressing a legal opinion on a legal subject, one in which Chaffee apparently was interested, and upon which he must have been consulted in his professional capacity.

The later discussions were with Mr. Redfield, and had

to do with the use of the patent, and the matter of collecting royalties under it. They had looked up the patents and discussed the various matters with relation to the patents, and their legal status. It seems to me to be clear that all of those matters would fall within the attorney-client privilege, and therefore should not be allowed in evidence.

Justice Stephens: Do you think the conversations appear to have been for the purpose of eliciting legal advice, and that they were conversations between a client and his lawyer?

Mr. Adams: Clearly. You see Mr. Speer was acting here as a consulting engineer for the company. He was called into conference with counsel for the company, and executives, for the purpose of discussing the use by the company of a product. Obviously, Mr. Chaffee wasn't there as a businessman. Obviously, he was concerned, as the witness has testified, about the license agreements, and the position of Certain-teed with respect to the license agreements.

I do not think, however, your Honor, that I am
6169 compelled to take the position that he must have been present for the purpose of eliciting legal advice. I think that is what you said. I think it is sufficient that the purpose of the conference or the meeting or the communication, rather, was to—

Justice Stephens: (Interposing) Mr. Wigmore states that the privilege covers all matters discussed by the client with a view to advice—and no others. Mr. Hughes, in his work on evidence, says in effect, the same thing, that the purpose of the communication must be to elicit legal advice—otherwise there is no privilege.

It seems to me that in part these conversations were merely an attempt on the part of Mr. Speer, naturally enough, an inventor of this Speer edge, to demonstrate to his employer its advantages. Is there anything privileged about that?

Mr. Adams: I think that, standing alone and not taken in relation to the whole of the circumstances in this case, it would probably not be privileged. I think that we can ask the Court reasonably to look at all the circumstances which would attend upon this situation.

It seems to me that in the light of all those circumstances, where you have the company having had an experience with this open-edge board, we know from the

record that they had been and were considering the question of securing the Utzman board, which they deemed to be better; we know that they consulted their
counsel about it; we know that their counsel was
6170 concerned about the question of the license agreements; and now we have this witness who comes along and discusses, as a consulting engineer, another product which would obviously relate to a very vital legal matter.

I therefore say, it seems to me at least, that we could reasonably regard this as part of the whole situation as it existed at that time, and that we cannot therefore fairly separate it from the context of all that had gone before, and what went after.

Justice Stephens: Mr. Steffen, do you wish to be heard on this aspect of whether or not these conversations were privileged?

Mr. Steffen: I might say just a word or two.

It seems to me that in regard to the first conversation, at which Mr. Chaffee was present, and talked, concerning whether they should or should not manufacture board according to the Speer Patent, and he urged in effect that they should, I don't see any legal advice or professional capacity there at all. That was straight business. Therefore I would think that under no rule whatever would they come within the attorney-client privilege.

Then in the May conversations, Chaffee makes the statement, according to this witness, that he was opposed to the company's having gone into the May, 1929, agreement. That, again, I don't think is anything more
6171 than a statement of his general position on the matter. Certainly, it was a past event at that time, the contract had been signed in May, and he had opposed it, or he was now saying that he had opposed it.

Then coming down to the discussions last testified to by Mr. Speer, at which Mr. Redfield or Mr. Chaffee, or both, discussed the desirability of finding some patent upon which they could operate, as related in Government's Exhibit No. 233 for identification, we say again that that, to the Government's mind, doesn't constitute a case coming within the attorney-client privilege.

It seems that it gets closer to the line—we are frank to grant that.

It seems to us that this is matter largely, again, of finding a business device, or bartering device, that they could use in their dealings with USG. It doesn't involve any

great amount, so far as the conversation was related to the Court, of professional advice, as I see it. It seems to me more a business device of getting something to barter or trade with, and that clearly would not be a matter within the attorney-client privilege.

There was nothing confined by the client to the attorneys concerning that. They were actually functioning as, in effect, officers of the company, and of course as your Honors know, in most industries, it is true that
6172 your patent men are probably better advised, and they work in close conjunction with the company concerning patent matters, and they really are the company on the business aspects of the matters that they handle.

So it seems to me that is not within the attorney-client privilege either.

But we make the second point on that, which we think should be controlling, and that is that if we can have Exhibit No. 233 introduced as being an exhibit which has been taken out from under the attorney-client privilege, in other words, if we have made a prima facie showing, as your Honors have held, that the privilege was waived as respects Government's Exhibit No. 233, it seems to me necessarily that the conversations leading to the writing of Exhibit 233 would be waived likewise.

You cannot simply waive a document and then say that the conversations or matters having to do with the writing of the document are not likewise waived.

That is not a case of lifting ourselves by our bootstraps in any sense, it seems to me. It is simply a case of carrying a waiver to the logical extent to which I think it goes.

So that on either ground—I think the first two conversations are clearly not within the attorney-client privilege, and I think the third conversation, much of it, and we contend none of it, is within the attorney-client
6173 privilege—but moreover, even though your Honors were to hold that it was, we would say that that likewise had been waived by the prima facie waiver which we have established in connection with Exhibit 233.

This is, as I understand it, merely a matter of connecting it with Certain-teed and the acts and purposes of Certain-teed.

Justice Stephens: Do you wish to reply, Mr. Adams?

Mr. Adams: I don't think there is any substance or anything in this record at all that indicates or justifies

Mr. Steffen's suggestion that the patent counsel here, or the other counsel, were acting in a business capacity. They were not; it is clear that they couldn't be. They were acting here, even on his theory that they wanted to get a device to avoid the other patents in the field, they must have been acting for the purpose of examining the legality of the position of their client, and they would have to give advice on that subject, because that would be the keynote of avoiding any such situation, of avoiding the other patents, I meant to say.

So that you can't say that that is a business matter, because it is precisely the contrary, and it has to be precisely the contrary.

Secondly, of course I don't think there is any substance to the suggestion of counsel that where a man waives a privilege on a document to be presented to a grand jury, that he has waived all the conversations with respect
6174 to the whole matter, and other matters between him and his client. It seems to me that that is, as your Honor suggested, clearly pulling yourself up by your bootstraps.

(The Judges conferred among themselves.)

Justice Stephens: We would like to know more about why these conversations were held. If this witness was there as an engineer of the company, or for the purpose, as an engineer of the company, of getting legal advice, if that was in substance and effect the reason he talked to these lawyers, we would like to know it. If, on the contrary, he was simply pushing his product, so to speak, we would like to know that. We are now engaged in a form of voir dire. The Government is trying to prove the connection of Exhibit 233 by certain conversations. Now an objection has been raised as to whether or not we can consider those conversations. Those are on voir dire. I should think that you might cross-examine Mr. Adams, or you might pursue the matter further, if you wish, Mr. Steffen, at this stage, to bring out a little more clearly what the conversations were for, what these conferences between Mr. Speer and these various persons were for. I don't require you to do that, but we feel considerably in the dark yet because I don't think the examination has yet clearly brought out why this gentleman was consulting these lawyers.

It seems to me, speaking for myself alone, that
6175 he was simply trying to get the company, and any officers that he could find to talk about it, to adopt this product.

Mr. Adams: Might we have an opportunity to consider that, your Honor?

Justice Stephens: Yes, we will take the noon recess at this time.

(Whereupon a recess was taken at 12:15 o'clock p.m. until 1:45 o'clock p.m.)

6176 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice Stephens: Have you something more to say, Mr. Adams?

The Court had better make a brief statement before either counsel says anything. We have reached, I think, some conclusions on the pathway toward a decision on this waiver question which, if we state them, will help counsel, perhaps.

It should be borne in mind that our previous ruling as to Exhibit 233 was that a "prima facie showing on voir dire has been made of a waiver of privilege in respect of the proposed Exhibit 233." I emphasize the words "voir dire" to call the attention of counsel to the fact that we are simply engaged thus far in a preliminary inquiry as to a preliminary question of fact, bearing upon the admissibility of Exhibit 233, to-wit, concretely, whether or not the alleged Redfield-Dowd conversation did take place and contained the words which Redfield testified it contained. That is the primary undertaking which we are now carrying on.

Now we continued with our ruling to say—or to repeat it in summary, "the Court rules that a prima facie showing on voir dire has been made of a waiver of privilege in respect of proposed Exhibit U. S. 233, so that in the absence of convincing contradictory evidence as to the
6177 fact or content of the asserted Redfield-Dowd telephone conversation, the exhibit would be admissible subject to a showing, first, that it is an admission by Certain-teed; and, second, subject to the usual reservation, that is, a showing that it was in furtherance or execution of the conspiracy."

Now at the moment—I mean today—we are going into that topic just mentioned, that is, the question whether or not this Redfield document, which on its face is merely a

letter written by Redfield to Certain-teed, can be taken to be the act of Certain-teed as an admission, and that is all we are going into at the present time. We haven't yet ruled on the question whether this exhibit is admissible, even if it was the act of Certain-teed, because we haven't yet heard Dowd, since the Government objected to hearing Dowd yesterday. We are only engaged now in the question whether or not, by Mr. Speer's testimony, it can be shown that the Redfield exhibit, if it should later be held to have been waived so far as privilege is concerned, is Certain-teed's act or admission.

Now that being true, Mr. Steffen, it seems to us there isn't anything to your contention that what you refer to as a prima facie showing of waiver would include a waiver of these conversations we are talking about this morning, because you would only be in a position to make that contention if we had already heard Dowd and had de-
6178 cided that the Dowd-Redfield conversation was what Redfield testified to, and had then ruled that the exhibit was admissible in evidence, the preliminary question of fact having been determined in the Government's favor. Then you might be in a position to make the contention that the exhibit having been ruled as admissible, subject to connection with Certain-teed,—that is, admissible so far as the waiver question is concerned,—carried with it a waiver of the preliminary conversations which we are now dealing with. But even if that were true, we don't think there is anything to the contention that, if there is an established waiver so far as Exhibit 233 is concerned, that would carry with it a waiver of all conversations preceding the execution of Exhibit 233, which in any way related to it. It might carry with it a waiver of the very conversation in which Exhibit 233 was asked for or prepared or discussed. That might be said to be merged in the instrument. But we don't think it would carry with it a waiver of preliminary conversations.

Therefore, we are of the view that we have got to determine independently whether these conversations that have been testified to this morning are privileged or not privileged. But we feel—and we say this to both the Government and the defendants—that we haven't yet been shown the real nature of these conferences. If Mr. Speer,
6179 as an engineer of the company, of Certain-teed, was authorized to consult these lawyers concerning legal matters relating to the Speer device, or the Speer prod-

uct, and was acting, therefore, for Certain-teed in getting legal advice, the conversations may well be privileged. If, on the other hand, he had some personal interest in pushing his own product, and was simply trying to get the company to adopt it, and was therefore calling it to the attention of these lawyers and officers, if he had some special interest by way of bonus or commission, or something of that sort, which made it a personal matter, or even if, just as an engineer, he was merely personally interested in the success of his work as an engineer for the company, and tried therefore to call the product to the attention of the lawyers and other officers, but was not acting for Certain-teed in consulting them and getting legal advice, it would seem to us that these conversations might well not be privileged.

It seems to us that neither the Government nor the defendants have really yet gone beyond the fringe of these conversations, and that we ought to have some questions asked here as to why he was consulting these people, and who authorized him to consult them, if anyone, and what he was consulting them for, and in what capacity he was consulting them.

We want to know the real facts as to the nature
6180 of these conferences and the reasons for them.

Mr. Steffen: There is a motion to strike certain of the testimony before the Court, I believe. I would like—

Justice Stephens: (Interposing) We haven't passed on that yet, and we are not going to pass on it until we get further light on the nature of these conferences between Speer and these lawyers, if counsel are willing to go into that subject.

Mr. Steffen: I will ask Mr. Speer to take the stand.

Mr. Adams: How will this examination be conducted, Your Honor? I think that the Government having made its showing, perhaps I should apply for permission to examine him on voir dire.

Justice Stephens: Well, if Mr. Steffen has anything more, let him finish it, and then you can cross-examine.

Take the witness stand, Mr. Speer.

Thereupon, ALEXANDER S. SPEER the witness on the stand at the time of recess, resumed his testimony as follows:

Justice Stephens: We may also have to take a few moments to have Mr. Grover read us some of these conversations. We tried to do that during the noon hour, but were not able to get in touch with him.

Direct Examination (resumed)

6181 By Mr. Steffen:

Q. When you first came with Certain-teed, Mr. Speer, who did you talk with, with whom did you make your arrangements when you first came with Certain-teed? A. With Mr. Whittemore and Mr. Chaffee.

Q. Did you ever talk with Mr. George M. Brown? A. I don't think I had any talk with him about the contract.

Q. Can you tell us what the discussion was with regard to what your duties were to be? A. Well, I don't think there was any discussion at all, because I had a previous contract.

Q. Well, let's go into that in more detail. What did you do when you were working for Certain-teed? A. Well, I was getting up new processes and new articles.

Q. And how many, or what number did you get up, can you tell us that? A. Previous to Certain-teed coming in?

Q. No, I want to start with Certain-teed. A. Start with Certain-teed?

Q. That is right. A. Probably 15.

Q. And did those result, or some of those result,

6182 in patents? A. Yes.

Q. And did you ever make any reports to Mr. Whittemore or to anyone else concerning your work, from time to time? A. I did.

Q. And how were they made? A. I didn't understand your question.

Q. How were your reports made, and how often were they made? A. They were made verbally, as well as in writing.

Q. And when they were made verbally, where were they made? A. In New York.

Q. And to whom? A. And also in Buffalo.

Q. And to whom did you talk in New York? A. I talked to Mr. Whittemore and Mr. Chaffee.

Q. And what was the nature of your reports?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

Mr. Steffen: The question is broad. I would like to ask him broadly as to what he told Mr. Whittemore concerning the work he had under way.

By Mr. Steffen:

Q. Can you give us any detail as to that?

6183 Justice Stephens: Just a minute, there is an objection here. We will have to rule on it. If you are dealing with written reports—

Mr. Steffen: (Interposing) We are talking about verbal reports, Your Honor.

Justice Stephens: He has already told us about them, hasn't he?

Mr. Steffen: I don't think he has in detail. I want to know the nature of the reports that he made to Mr. Whittemore in order to lead into whether they were strictly technical or whether they had to do with the business aspects.

Justice Stephens: He may answer. The objection is overruled.

By Mr. Steffen:

Q. Tell me the scope of the reports that you made verbally to Mr. Whittemore, and to Mr. Chaffee, on these occasions when you were in New York? A. They were purely technical.

Q. And had to do with the products that you were making? A. Yes, sir—not only the products I was making, but the products that somebody else was making. I was acting as an expert.

Q. And by "somebody else", who do you mean?

6184 A. Somebody else in the company. And also, I had several outside inventions submitted to me, and I passed them on.

Q. And they had to do also with some of your own inventions? A. Yes, they did.

Q. Now these inventions that you made, were they your property or did you transfer them to Certain-teed? A. I transferred them to Certain-teed.

Q. And can you tell us whether you had to advise with Mr. Chaffee or anyone concerning the patents or those inventions? A. I had to go either to Mr. Whittemore or Mr. Chaffee, or to both.

Q. With regard to your— A. (Interposing) Inventions.

Q. (Continuing)—to your inventions? A. Yes, sir.

Q. And you have told us of your conversations with Mr. Chaffee, in part. Can you give us any more detail as to your conversations with Mr. Chaffee concerning these inventions which you were getting patents upon?

Mr. Bromley: I object to that as repetitious. He has given us the conversations. Shouldn't the man be asked whether he went to see Chaffee as an employee of the
6185 company consulting legal counsel for legal advice?

Justice Stephens: That is what we are interested in, Mr. Steffen:

Mr. Steffen: I think that would be objectionable if I asked it in that way. It calls for a conclusion.

Mr. Bromley: I won't object.

Mr. Adams: I won't object.

Mr. Steffen: What I want to do is to find out what he did, from which you can conclude whether what he did was for the purposes of getting legal advice.

Justice Stephens: The Court gets the impression that neither Mr. Adams nor Mr. Steffen is quite willing to go into the essence of this question.

Mr. Adams: If I could ask that question that Mr. Bromley asked just now, I would ask it.

Justice Stephens: Perhaps I prejudged you, because you haven't had a chance.

The objection to the last question is sustained, because we have heard this witness testify as to all he can remember about these conversations. What we want to know is whether or not he was consulting these people for the purpose of getting legal advice from them. I don't think you will find any objection to those questions if you are willing to ask them, Mr. Steffen. Of course, we don't compel you to ask them. You must try your own case.

6186 Mr. Steffen: I would like to ask him in a little more detail.

By Mr. Steffen:

Q. Did you consult with Mr. Chaffee concerning the form of the patents that you were taking out on your own inventions? A. I didn't quite get you.

Q. Did you consult with Mr. Chaffee concerning the form of the patents that were being taken out?

Mr. Adams: I think that ought to be clarified as to what he means by the "form of the patents". If he means was he asking him, as a lawyer, about how to get a patent, that is one thing; but the form of a patent is an established thing.

Justice Stephens: I don't know quite what the question means. Why don't you ask him the direct question—of course, Mr. Steffen, I don't want to put you in the difficult position of bringing out matters that you fear may be

inimical to the interests of the Government. If you want to drop the examination, you are entitled to do so. But I would like to ask the witness a question, and perhaps this will save time.

Mr. Steffen: I would be willing to have Your Honor ask just what is in your mind.

Justice Stephens: Very well.

6187 Mr. Speer, when you went to consult Mr. Chaffee, or talk to Mr. Chaffee and Mr. Redfield, as you testified this morning, for what purpose did you go to see them?

The Witness: Well, I wanted to get their advice about the whole thing.

Justice Stephens: What kind of advice?

The Witness: I would say legal advice.

Justice Stephens: Did you ask them, in those conversations you have testified to this morning, for legal advice?

The Witness: Well, I don't know how to answer that question.

Justice Stephens: Well, did you ask them for their counsel or judgment on legal questions relating to your proposed patents?

The Witness: I did, I asked Mr. Redfield and also Mr. Chaffee about these patents.

Justice Jackson: What did you ask them?

The Witness: I asked Mr. Redfield what he could do about getting up these different claims for the patents.

Justice Jackson: About getting up the claims for the patents?

The Witness: Yes. He acted as patent attorney.

Justice Jackson: Naturally you would ask him that. What did you ask Chaffee?

The Witness: I asked Chaffee also—

6188 Justice Jackson: (Interposing) The same thing?

The Witness: Not exactly, because he wasn't a patent attorney.

Justice Stephens: Now what was your interest in asking him those questions? Were you proceeding in behalf of yourself, or of the company, in asking those questions?

The Witness: Both.

Justice Stephens: State what authority had been given you by anyone, in the way of words or writing, to consult these gentlemen about these patent questions?

The Witness: I had a contract with the company, and the contract provided that I was to submit these patents to the company, to the Beaver Products, and also to Cer-

tain-teed, who purchased the Beaver Products, and that was my authority.

Justice Jackson: Under your contract, Mr. Speer, were you additionally compensated for your patents that were adopted by your employers?

The Witness: No, I was benefited by the royalty that they would collect, if they collected.

Justice Jackson: And when they collected royalty, you would participate in that royalty?

The Witness: One-fourth of the royalty, to be exact.

Justice Jackson: Then you had a personal interest in having your own patents adopted?

6189 The Witness: Yes, Your Honor.

Justice Stephens: Do you want to ask any questions, Judge Garrett?

Justice Garrett: You say any royalties that they might collect, you would have a participation in. I suppose that meant, did it, that if they licensed anyone under the patent and obtained royalties, then you would get a fourth of the royalties?

The Witness: One-fourth of it over and above a guarantee that I had. There was a certain guarantee attached to it.

Justice Garrett: In the event they used the patent alone, and did not license anyone under it, were you to receive anything for its use by them?

The Witness: No, I was not. They had to license outsiders.

Justice Garrett: And when you referred this morning to the matter of consulting with reference to how royalties could be collected, you had reference to those royalties that might result from any licensing of the patents?

The Witness: That is correct, Your Honor.

Justice Garrett: That is all.

Mr. Bromley: I would like to ask this: When you said you had a guarantee under your contract, you meant that you had a salary of some $15,000 or $20,000 a year under the contract, didn't you?

6190 The Witness: I had a part salary and part royalty guarantee. I didn't have to put all my time into my work, I could do something else on the outside.

Mr. Bromley: But you had a salary?

The Witness: It was a guaranteed royalty.

Mr. Bromley: That was a flat sum per year, wasn't it?

The Witness: Yes, it was a flat sum.

Mr. Bromley: And then if the company licensed somebody else under patents which belonged to the company but which covered your inventions, you got over and above that a share in whatever royalties the company collected?

The Witness: I would like to just elaborate so as to make it clear. I was to receive a certain amount of guarantee—it happened to be $15,000. Now all the royalties they collected from the outsiders, outside firms, they figured out the total amount, and they deducted the guarantee. It actually worked, in many cases.

Justice Stephens: Have you got a copy of this contract under which you were working for the company, with you?

The Witness: Yes, Your Honor.

Justice Stephens: Have you it here?

The Witness: Yes, I have it here.

Justice Stephens: I still think that we perhaps haven't yet quite got down to the question whether or not, when this witness was talking with these two lawyers,
6191 Chaffee and Redfield, he was, within the scope and course of his duties, consulting them for the company.

Mr. Steffen perhaps might, on the part of the Government, object to the Presiding Judge's questions on that topic as to their conclusional character.

I would like to see this contract. If he had some instructions from the company to consult lawyers, that is one thing. If he was going there to consult these lawyers because of his own interest in royalties, that is another thing.

By Mr. Steffen:

Q. Did Mr. Redfield or Mr. Chaffee consult with you on occasion? A. They did.

Q. And did they on many occasions? A. I would say yes.

Mr. Steffen: I have here, Your Honor, a contract, which is dated, however, in 1930—and the only reason I haven't introduced it is that it is dated in 1930. It purports to cover and be similar to all prior contracts. There have been a number of contracts between the company and Mr. Speer.

Justice Stephens: It is subsequent to these conversations, isn't it?

Mr. Steffen: This is subsequent, and that is the
6192 reason I haven't used it. I don't have any of the original, earlier contracts.

Justice Stephens: Perhaps if we let Mr. Adams conduct some examination—

Mr. Steffen: (Interposing) Maybe Mr. Adams has some earlier contracts.

Mr. Adams: I don't have these earlier contracts—

Justice Stephens: (Interposing) I want to be sure Mr. Steffen is through.

Mr. Steffen: I think I am, for the moment.

Mr. Adams: I do not have these earlier contracts, but if I might look at this one, I might be able to—

Justice Stephens: (Interposing) You may, there will be no objection to that.

(The contract referred to was handed to Mr. Adams.)

Justice Stephens: If you can bring out from the witness that this is in substance the same as the previous contracts and nobody objects to the use of secondary material, you can find out from that, maybe, what this man had authority to do. It seems to us that if this man was consulting these lawyers in his own private capacity that is one thing; but if he was going there to consult them as an engineer for the company, about patent law, that is another thing.

Mr. Steffen: He has told us that he has a one-
6193 quarter interest and the company has a three-quarters interest in every invention that he made while he was employed by the company; they were all assigned over to the company; they might be used one way or the other; and he was consulted by Redfield and Chaffee just as much as he consulted them. He was also consulted by Whittemore, and he consulted Whittemore; and he was also consulted by Van Hagan and he consulted Van Hagan.

Mr. Bromley: Would it help to find out whether this man paid the lawyers?

What is the fact, Mr. Speer?

The Witness: The fact is that the company paid the lawyers. According to my contract, I wasn't to pay any legal fees.

By Mr. Adams:

Q. Mr. Speer, I have here a document which purports to be an agreement, dated June 4, 1930, between you and Certain-teed. That is the one that you produced and gave to Mr. Steffen, isn't it, that we are talking about? A. Yes.

Q. And this agreement is really substantially a continuation of your earlier agreement with Beaver, isn't it? A. That is correct.

Q. And does it contain substantially all of the provi-

sions that the contract you had with Beaver con-
6194 tained? A. Yes, sir.

Q. So that what you did, when you came with the Certain-teed Company, was to cancel your Beaver contract and take a new contract? A. Yes.

Q. Which, so far as you were concerned, put you in the same place with Certain-teed that you had been with Beaver? A. No, it didn't, I received less money. (Laughter).

Q. But so far as what you had to do, it was the same thing, is that right? A. Exactly the same.

Q. Your obligations under the contract were the same? A. Yes, sir.

Q. And so far as you recall, the provisions in the Certain-teed contract were substantially the same as the ones in the Beaver contract? A. Yes, sir.

Mr. Adams: Under those circumstances, Your Honor, I offer this document in evidence, however with the condition attached to my offer that I should not like to have it deemed to be a defendants' exhibit, but merely offered on the voir dire.

Justice Stephens: This is only on voir dire. We are
6195 now on a subordinate voir dire, so to speak. We are now on a voir dire as to the admissibility of these conversations between this witness and Redfield and Chaffee, and are pursuing the question of the admissibility of those conversations in order to determine whether or not this Exhibit 233, if privilege has been waived in respect of it, can be connected with Certain-teed. We are merely on voir dire now, on the right to have these conversations come in evidence.

Mr. Adams: I have no doubt. I am merely being overcautious, but I simply wanted to make that offer.

Mr. Steffen: I will be glad to introduce this contract.

Justice Jackson: Is that the original?

Mr. Steffen: Yes.

Justice Jackson: Probably Mr. Speer would want to go home with that in his pocket, so why not have copies made of it?

Justice Stephens: We can have copies made, and then the original withdrawn. Let it be marked and introduced as an exhibit, with the understanding that the original may be withdrawn and a copy substituted.

Mr. Steffen: There is no question, I take it—it is signed by Mr. Speer and Mr. Whittemore.

Mr. Adams: There is no question about it.

By Mr. Steffen:

Q. I show you what has been marked Govern-
6196 ment's Exhibit 644 for Identification, and ask you if that is your contract?

(The document referred to was marked as Government's Exhibit No. 644 for Identification.)

A. Yes.

Q. Is that your signature at the foot of it? A. Yes, it is.

Q. And the other signature is whose? A. Mr. Whittemore's.

Mr. Steffen: We offer Government's Exhibit No. 644 in evidence.

Justice Stephens: It will be received.

(The document referred to, marked as Government's Exhibit No. 644, was received in evidence.)

Mr. Adams: Would Your Honors care to examine it?

Justice Stephens: You may examine upon it or examine it yourself.

Mr. Adams: Would you like to look at it, that was my question?

Justice Stephens: We would like to have those portions pointed out which have any bearing upon this man's duty to consult lawyers for the company, or not.

Mr. Bromley: I think paragraph 5 is the important one.

6197 Mr. Adams: I simply call attention to Paragraph 5, and thought perhaps the Court would like to look at it.

(Government's Exhibit No. 644 handed to the Court for examination.)

Justice Stephens: Proceed, Mr. Adams, if you wish to ask this witness some questions.

(Government's Exhibit No. 644 handed to the witness.)

By Mr. Adams:

Q. Mr. Speer, will you look at the fifth paragraph of Government's Exhibit 644? A. Yes, sir.

Q. Now it is the fact, isn't it, Mr. Speer, that when you had anything relating to an invention, under that agreement— A. (Interposing) Applying to building, I

would like to qualify that, because I had other things.

Q. All right. (Continuing)—that that became the property of Certain-teed; isn't that right? A. Yes.

Q. And you had to disclose to them anything that you had in that line? A. Yes.

Q. And you were working for the company under
6198 that contract? A. Just a certain portion of my time, and it specified the major portion.

Q. The major portion of your time in relation to these products? A. Yes.

Q. And from time to time, you took up these matters with Certain-teed's counsel, with respect to those inventions, didn't you? A. Yes, sir.

Q. And your conversations and dealings with them were in the interest of Certain-teed, weren't they? A. Yes, sir.

Q. And Certain-teed's counsel were considering these various inventions from any number of various point of view, weren't they? A. Yes, sir.

Q. In respect of Certain-teed's legal position, isn't that right? A. Yes, sir.

Q. So that you would take the matters up with them so that they could act upon them in their capacity as lawyers for Certain-teed; isn't that right? A. Yes, sir.

Q. And if Certain-teed happened to use one of these inventions, you might later benefit, is that correct?
6199 A. That is correct.

Q. But the purpose of your consultation with Certain-teed's counsel was so that Certain-teed's counsel could act with reference to these matters in a legal way; isn't that right? A. Yes.

Q. And when you were taking these matters up with Certain-teed's lawyers, you were going to see them as an employee of Certain-teed under that contract, weren't you? A. Yes, sir.

Q. And in accordance with your duties, as you understood them? A. Yes, sir.

Q. And they were paying their lawyers, weren't they? A. Yes, so far as I know. (Laughter).

Justice Stephens: That is a very conservative answer, Mr. Speer.

By Mr. Adams:

Q. Mr. Speer, you embarrass me. A. Well, they wouldn't work for the company unless they got paid.

Mr. Adams: That is all.

Justice Stephens: Mr. Bromley, you objected to this exhibit on the ground that it hadn't been connected. I think it was you who raised the question of the
6200 connection of this exhibit with Certain-teed, even if it was said not to be privileged or if the privilege was said to be waived. Do you wish to examine this witness, or contribute any illumination to this subject?

Mr. Bromley: You mean do I wish to examine him as to Exhibit 644, the contract?

Justice Stephens: No, when I mentioned an exhibit, I meant Exhibit 233—I meant on the subject of his testimony this morning with respect to these alleged privileged conversations, which are relied upon by the Government to connect 233 with Certain-teed.

Mr. Bromley: I have nothing further on this preliminary question. If all this stays in, then I do have some cross. (Laughter).

Justice Jackson: Are you through?

Mr. Steffen: I think Mr. Adams has done a very good job of showing that Mr. Speer was consulting these lawyers in his capacity as an agent or employee of Certain-teed, and that therefore he was very definitely authorized to act for Certain-teed, not limited, necessarily, as his testimony shows, to technical questions, but very broadly, as the contract shows, to promote products.

And, Mr. Speer, in promoting new products, was it limited to technical questions of patent law?

Mr. Adams: I submit that that would be im-
6201 material, Your Honor. Patent law is just as valid as any other part of the law.

Justice Stephens: Objection overruled.

By Mr. Steffen:

Q. Were you limited, in your duties, to discussing questions of patent law? A. No.

Q. Will you tell us what the scope of the duties of a promoter of a new product may be?

Mr. Bromley: I object to that as speculative.

By Mr. Steffen:

Q. What were your duties, as a promoter of new products?

Mr. Bromley: We have the contract in evidence, and I object on the ground that the contract is the best evidence.

Mr. Steffen: I will ask him what he did. An agency

contract is simply general authority. It is not a limitation on what he may or does do.

Justice Stephens: I think he may go into it. It has been gone into pretty fully already, but if you think it is necessary to go further into what he actually did, Mr. Steffen, you may do so. We went into the contract for the purpose of determining his authority to consult lawyers, as far as we could.

Mr. Steffen: I will defer the matter.

Justice Stephens: I told you you might ask the question.

6202 By Mr. Steffen:

Q. Could you tell us the scope of the duties and the things that you did as a promoter of new products for Certain-teed? A. I did experimental work, either myself or delegated it to somebody else, and saw that the work was perfected, and also saw to it that the process of manufacturing was the correct one.

Q. Did you consult as respects sales? A. Yes, sales—naturally, you have to be Jack-of-all-trades when you promote a new article.

Q. And with the company, who did you consult concerning the sales qualities of a new article? A. I talked to Mr. Whittemore and Roos—

Q. (Interposing) Who was Roos? A. He was an assistant general sales manager.

Q. And did you consider the advertising possibilities of a new product? A. Yes, sir; some times I got up the advertising myself.

Q. Now I want to ask you a question in regard to Mr. Chaffee. Did you have any talks with him on matters beyond law? Was he an inventor? A. He was.

Q. And did he ever discuss with you, ideas con-
6203 cerning products? A. He did.

Q. Now in regard to Mr. Redfield, I think you have testified that his offices were with the Certain-teed company, is that not correct? A. So far as I know, because I always saw him at Certain-teed.

Q. And how did he communicate with you, on what forms?

Mr. Bromley: Didn't this witness testify this morning that Redfield had an office with Chaffee?

Mr. Steffen: Let's get that clear. I don't think he did.

By Mr. Steffen:

Q. Where was Mr. Redfield's office? A. I always saw him, as I recall it, at Certain-teed.

Q. And that was at 100 East 42nd Street? A. Yes, sir, the same place as Mr. Chaffee's office.

Q. The same building, you mean? A. Yes, sir, the same building.

Q. And on what forms did Mr. Redfield communicate with you, if you know? A. On Certain-teed's stationery.

6204 Q. He used Certain-teed's stationery? A. Yes.

Q. I show you Government's Exhibit 233, and ask if that is what you mean by "Certain-teed's stationery", or "Certain-teed's form"?

(Government's Exhibit 233 was handed to the witness.)

A. Of course, this is a copy, it is not the original.

Q. Merely as to the form?

Mr. Adams: I don't see the materiality of this, Your Honor. It wouldn't make any difference how counsel communicated with anyone else. He was still associated with Mr. Chaffee, and that is Mr. Redfield's own testimony in this case.

Mr. Steffen: I want to bring out, Your Honor, what I stated orally, and that is that patent counsel may be members of the bar, but they also have a business quality; and in this case Mr. Redfield, as Mr. Speer testifies, had his offices with Certain-teed rather than with Chaffee, who had his general offices in the same building. He communicated with Mr. Speer using the ordinary forms—

Justice Stephens: (Interposing) You may ask the question.

By Mr. Steffen:

Q. Exhibit No. 233 is such a form?

Justice Jackson: You have asked him if that is

6205 such a form?

Mr. Steffen: Yes.

By Mr. Steffen:

Q. I want to show you, to refresh your recollection, what purports to be a memorandum from Mr. Redfield to you under date of January 10, 1929, which I ask be marked Government's Exhibit 645 for Identification.

(The document referred to was marked as Government's Exhibit No. 645 for Identification.)

By Mr. Steffen:

Q. Do you recognize that as the type and form upon which you received communications from Mr. Redfield? A. Yes, I do. This is it.

Q. That is the type of form? A. Yes.

Q. And is that the same type of form as appears on Government's Exhibit 233? A. Well, this is just a copy, they wouldn't send it like this, but they would also send it on this stationery.

Mr. Steffen: I think I have no further questions, Your Honor, on this level.

Justice Stephens: Mr. Adams, do you have something further?

Mr. Adams: Yes.

6206 By Mr. Adams:

Q. Mr. Speer, when you did these various things on the matters that you were working on, that Mr. Steffen asked you about, you also took up the legal phases with the counsel for the company, didn't you? A. To what extent?

Q. You talked with Mr. Roos or somebody else, perhaps, about the sales possibilities, or something like that, but when you came to the legal phases of it, you took those matters up with Mr. Chaffee and Mr. Redfield, didn't you? A. That is correct.

Q. And you took those matters up with them in their capacity as the counsel for the company, isn't that right? A. Well, I don't know whether I should define it the same way—

Q. (Interposing) It was dealing with legal matters, wasn't it? A. Yes, sir.

Justice Jackson: I am a little bit uncertain yet. All of Mr. Adams questions have been general as to what you generally did. Now with respect to the conversations that you related this morning to Mr. Steffen, wherein you said you spoke to Mr. Whittemore and Mr. Chaffee and others, did you go into those conferences for the purpose of securing legal advice on behalf of Certain-teed, from

6207 Chaffee or Mr. Redfield?

The Witness: I did.

Justice Jackson: You did?

The Witness: I did, yes.

Mr. Adams: I have nothing further.

Justice Stephens: Well, if there is nothing further, we are ready to rule.

It seems to us clear that these conversations with Redfield and Chaffee were privileged, and the motions to strike must be granted, and they are granted.

Mr. Steffen: May I ask, Your Honor, does that apply to all of the conversations? I will take the very first one, if I may be heard for a moment, the one concerning the conversation at which Mr. Chaffee and Mr. Whittemore were present; and the only conversation that was had, irrespective of what the purposes might have been, the only conversation that we offered there at all was that Mr. Speer recommended to Mr. Whittemore that they bring out a closed-edge board of the type that he was manufacturing. Now that certainly is not privileged at that point, that is a conversation between Mr. Speer and Mr. Whittemore.

Justice Stephens: There isn't any motion to strike out the Whittemore conversation, as I understand it. As I understand it, there is a motion to strike out the conversations at which Chaffee and Redfield were present.

6208 Mr. Steffen: Only these latter conversations in May or June, then?

Justice Stephens: We are striking out all of the testimony of this witness directed to his conversations with either Chaffee or Redfield. He has testified that Whittemore and others dropped in, from time to time, but nevertheless he has clearly answered both Judge Jackson and myself, on specific questions, and the more general questions of Mr. Adams, that when he talked with Chaffee and Redfield he was there to get legal advice for Certain-teed.

Now if there is a conversation in the record, a separate conversation with Whittemore, about his desiring to have a product promoted, of course Whittemore isn't a lawyer and that conversation can stay in.

Mr. Adams: I did not understand that there was any such conversation. There I am only relying on my recollection of the record. My notes indicate that he talked with them, Mr. Chaffee and Mr. Whittemore,—that Mr. Chaffee was present.

Justice Stephens: Well, the record is there; and the Court will make the ruling, reiterate it, that all testimony of this witness as to conversations between himself and Mr. Chaffee, and himself and Mr. Redfield, are privileged and are therefore stricken out. If there is any evidence in

the record of a separate conversation with Mr. Whit-
6209 temore, on the subject just described by Government counsel, that is not stricken out.

Mr. Steffen: May I make a point concerning that?

Justice Stephens: Yes.

6210 Mr. Steffen: As I understand it, if Mr. Redfield were here, and we had him identify his memorandum, Exhibit No. 233, and he then testified that he had a conversation with Mr. Dowd, and your Honors would rule that prima facie that constituted a waiver of any attorney-client privilege, it would then be open to us, as I understand it, to ask Mr. Redfield anything at all about the way he put that memorandum together.

I don't see how it can be avoided, because if you were going to say that the memorandum was waived by the waiver that he testified to, you have to allow the writer to talk about it, and Mr. Redfield, therefore, would be able to talk and state just what information he had, and what he acted upon when he wrote that memorandum.

Therefore, his conversations would certainly not be privileged.

Now, I have asked for the other end of the conversations. I have now got Mr. Speer saying that he talked with Mr. Redfield. Now I don't care in what capacity he talked with Mr. Redfield. I think it is all the better that he talked with him as an employee of Certain-teed, rather than as just some independent promoter.

He was an interested party in the sense that he got some percentage himself. But three-quarters of his interest was as a representative of Certain-teed.

6211 Now it seems to me that if we are to be permitted at all to connect Exhibit No. 233, and to show that it is something more than just a piece of paper that Mr. Redfield wrote, and Mr. Redfield could talk and tell us, and tell the Court that he wrote that, not because he was simply a patent counsel, but because he, as most of these people, had additional duties, and additional understandings as to what he was to do. He was employed in a sense as a patent counsel, but he was also employed or had offices in Certain-teed's plant. He handled a large number of things concerning promotions, he wrote a memorandum in which he said the various things set out in Exhibit 233.

Now it seems to me that Exhibit 233, if there is no attorney-client privilege with respect to it, then the writer could testify, and the person could testify as to conversa-

tions he had with people in the company. You have to tie it in with Certain-teed, and Mr. Adams has shown that Mr. Speer was in the company, and that he saw Mr. Redfield as a member of Certain-teed—tying it right up with Certain-teed.

Now we say simply that the conversations upon which Mr. Redfield acted, when he wrote the memorandum, are not privileged, because of the fact that Mr. Dowd, according to Mr. Redfield's testimony, has waived the privilege.

Accordingly, it seems to me that Mr. Adams has
6212 beautifully connected up the fact of the writing of Exhibit 233 and the fact that it emanated from people connected with Certain-teed, Mr. Speer and the other people that talked with Mr. Redfield when he wrote the memorandum.

And if, as I say, Mr. Redfield is to be allowed to talk concerning how and why and when he wrote that memorandum, the people that talked to him are equally allowed to talk.

Justice Stephens: I wish, Mr. Steffen, that you would make these arguments before the Court rules, instead of afterwards.

Mr. Steffen: I am awfully sorry, your Honor.

Justice Stephens: I am not scolding you, but we need the benefit of all that counsel has in his mind before we rule, and we need to have the opportunity of hearing everything applying to a question before we rule.

I thought I gave you a full opportunity to say everything you wanted to, but you wait until we have ruled adversely, and then make a new speech, and then we have to reopen the thing for the lawyers on the other side.

Mr. Steffen: I am following Mr. Adams' technique.

Justice Stephens: I don't approve of it, no matter whose technique it is.

Please get these matters over with once and for all, if possible.

Mr. Adams, do you want to reply?

6213 Mr. Adams: It seems to me that that argument is founded on any number of false assumptions. The simple question here is whether this witness went to counsel to get legal advice. That was the question which Judge Jackson asked him, and which I asked him. Everything that he talked to them about concerned matters of legal advice.

Mr. Steffen pulls right out of the air something and says that that connects him or Redfield with this memo-

randum. It doesn't do anything of the kind, it doesn't even come close to it.

Justice Jackson: I think possibly that this is a trifle untimely, because the situation couldn't arise, Mr. Steffen, until after we had decided whether or not the privilege was waived with respect to Exhibit 233. Then, in that event, you can make this argument, can't you?

Justice Stephens: I explained that, Mr. Steffen, when I came along on the bench this afternoon. It seems to me the answer to your present contention is that we haven't yet ruled that this exhibit is admissible. We have ruled that, on its face, it is a privileged communication. We have ruled that a voir dire prima facie showing has been made by the Government under the Redfield testimony that the privilege was waived, but we have said that we cannot decide that voir dire question bearing upon the admissibility of the document as a privileged, but privilege-waived document, until we have heard Mr. Dowd.

6214 Now, you had an opportunity to hear Dowd yesterday, but decided that you didn't wish to do so. You are now engaged in an undertaking to connect the Redfield document with Certain-teed before we have ruled whether or not it is admissible.

That being true, I don't think you have reached the question you have argued yet.

I still think you have to meet the question, which I also commented upon when I came on the bench this afternoon of waiver of privilege with respect to a particular document, perhaps including a waiver of the very conversations out of which that document grew, I don't think it includes the waiver of every other conversation had with the witness on the general subject involved.

It seems to me your argument is premature. We haven't yet ruled that the privilege on this document has been waived, because we haven't yet heard Dowd. We are simply giving you an opportunity now, out of order, to try and connect the Redfield document with Certain-teed.

Mr. Steffen: May I say just a word?

Justice Stephens: Yes.

Mr. Steffen: My understanding is, so far as Mr. Dowd is concerned, that that goes to the question of whether or not there was a waiver of the privilege.

Justice Stephens: That is right.

6215 Mr. Steffen: I understand that, prima facie at least, Mr. Redfield's testimony that he did have

such a conversation would constitute a waiver. I had understood your Honor's ruling, but I will simply state that I had laid that to one side, and had started with the assumption that inasmuch as we had Mr. Redfield's testimony concerning the waiver, and that, on its face, constituted a waiver, as your Honors I think stated, subject, of course—

Justice Stephens: (Interposing) All I ruled was—and I took careful pains to write out the ruling, and I re-read it today, and I put emphasis on it—that it only constituted a prima facie voir dire showing, not a final showing on voir dire.

6216 Mr. Steffen: Well, my thought was, as I say—laying that question of the waiver of privilege to one side—that what we were doing with Mr. Speer was to connect the writing which Mr. Redfield made, Exhibit 233, with the Certain-teed Company, to show that it was an authorized transaction.

I thought I could do that entirely apart from this question of what Mr. Dowd might say, one way or the other, and I thought that that was probably a preliminary matter in order to determine whether it was important to go on with Mr. Dowd. We got into that discussion yesterday, and it has been pro and con. In any event, I asked—and the Court agreed with me yesterday—that we go into this matter before we took up Mr. Dowd, and this matter is a matter of connection.

Now it seems to me that if we can assume for a moment that Mr. Dowd's testimony would not be sufficient, so that the waiver would be effective as to Exhibit 233—let's assume that for the moment—then this connection must be brought in as though there had been a waiver of the attorney-client privilege; and in such event, as your Honors state, the conversations leading directly to the writing of that agreement and connecting it directly with Certain-teed, would be equally within the waiver of privilege.

Now if we allow Mr. Adams at this moment to strike those conversations from the record permanently, then we haven't anything to go forward at all with, when Mr. Dowd comes on.

6217 Justice Jackson: You have Redfield, haven't you?

Mr. Steffen: Why could we not take this position? Why not suspend ruling on this motion to strike until we do hear from Mr. Dowd, if necessary?

Mr. Bromley: There is no connection between the two things that I can see.

Mr. Steffen: That goes to the issue I thought we were arguing.

Justice Jackson: All Dowd is going to testify to is as to whether or not such a telephone conversation took place?

Mr. Steffen: Yes.

Mr. Adams: As I advised the Government yesterday, and the Government had an opportunity yesterday to interview Mr. Dowd, he told them that he would testify that he never had any such conversation with Redfield, or with any representative of the Government. That is why I wanted to put him on yesterday because it would only have taken five minutes to do the whole job. Mr. Dowd told the Government that he knows absolutely nothing else about this whole matter.

Justice Stephens: Of course these rulings on motions to strike do not tear anything physically out of the record; it is still there and if the disposition of this matter turns differently, after we hear Dowd, and you still want to contend that this matter is properly before the Court, you may move to reinstate it. We are not going to
6218 prejudice you that way by any technical ruling.

I am afraid I still haven't been able to make clear to you—perhaps I am clumsy in my way of expressing rulings—that we haven't yet made any ruling that Exhibit 233 is a privileged document as to which the privilege has been waived.

I will go back to the simple illustration of a dying declaration. If the Government, in a criminal case, where the identity of the assailant was the only issue, in a murder case, put on a dying declaration, it must prove two things to get it into evidence: First, that it was uttered by a person in extremis; and second, that that person was consciously in fear of death.

If the Government puts that on, that doesn't let the exhibit in evidence; we still have to hear the evidence of the defendant to the contrary of that if he wants to offer any. We have to hear that before the court rules as to the admissibility of the declaration.

The same thing is true here. You put on Mr. Redfield to establish a waiver with respect to Exhibit 233, and Redfield testified to facts which, we think, if true, would constitute a waiver. But we haven't ruled that the privilege has been waived. All we have ruled is that the Government has

made, on its side of that voir dire hearing, a showing prima facie that it was waived. But we have still got to hear Dowd so that we can have all the evidence, on that preliminary question of fact bearing upon the admissibility of this exhibit, before us, before we decide whether or not it is admissible in the sense of being a privileged document in respect of which the privilege has been waived.

We still, then, have a second question as to whether it was the act of Certain-teed, rather than the mere act of Redfield. That is the inquiry into which we have been going now.

Now to prove that it was the act of Certain-teed you have to prove it by competent evidence, not by evidence which is privileged and therefore excludable. If you wanted to examine Dowd first, if you had wanted to examine Dowd first, you might, perhaps, have gotten to the position where you could argue what you are now arguing, and we will give you an opportunity still to argue it if you want to get Dowd back here and go into this matter.

It does seem to all of us that an extraordinary amount of time is being taken over this one little exhibit which, after all, when you read it, is merely the expression of a view on the part of one man as to how the Speer patent might have been used, either for trading purposes or to bolster up an alleged price-fixing system. We have spent—I spent during one recess two or three days, and my clerk a good deal more, in looking up the law on this subject and writing a memorandum, and we have had a week's time in Court about it. Is it really that important?

Mr. Steffen: It has become a sort of issue, your Honor, and it is very difficult to drop it on either side. I think it is important. It is one item in favor of the Government.

Justice Stephens: We don't want to foreclose you from exercising all necessary zeal in the promotion of your case.

Mr. Steffen: I will agree that it has taken a lot of time.

Mr. Adams: I will be glad to agree, if the Government wants to withdraw it.

Justice Stephens: We will let the rulings thus far made, stand, with the understanding that if we go any further with this inquiry, if Dowd is to be produced, and you wish to make a further contention that these conversations with Redfield and Chaffee are to be or ought to be considered by the Court on the connection question, we will hear you. We want to be fair and open on the matter.

Do you need this witness any further?

Mr. Steffen: He hasn't been examined by Mr. Bromley.

Justice Stephens: Do you wish to examine him further?

Mr. Bromley: Yes, your Honor.

Cross Examination

By Mr. Bromley:

Q. May Exhibit 641 be handed to the witness?

(Government Exhibit 641 was handed to the witness.)

Justice Stephens: The Court ought to have made
6221 clear, of course, that it is not striking out of the record the testimony of this witness as to the nature and asserted usefulness of this Speer patented board, on the issue of subterfuge. That is in the record and I assume that is what you are cross-examining about now, isn't it, Mr. Bromley?

Mr. Bromley: Yes, your Honor.

Mr. Steffen: May I make just one point, and that is that I would like to have an opportunity to be heard on the McAfee case at some time, which I think goes to the basis of your Honor's ruling in the first instance on the matter of privilege, on the examination on voir dire.

Justice Stephens: I will be glad to hear you. I wrote it and I ought to know something about it, but if you feel you can tell me something more, I will be glad to hear it. The McAfee case I don't think supports your contention.

That case, of course, involved a peculiar local offshoot of the preliminary question of fact rule. There is a rule with respect to confessions in this jurisdiction, and in some other jurisdictions, that despite the fact that the judge in a criminal trial, with a jury, must pass upon the preliminary question of the voluntariness of the confession, and if he rules adversely, that is the end of it, nevertheless, if he does not rule adversely but rules that there is some evidence which indicates that the confession is voluntary, he must re-submit that to the jury.

6222 But that is a very peculiar rule in relation to confessions, and my original memorandum—which I should be glad to submit to counsel if they wish to see it—which I submitted to my fellow judges on the question of Exhibit 233, goes very thoroughly into the question of this preliminary determination by judges of questions of fact which are incidental or prerequisite to the admissibility of evidence.

I don't think there is any substantial authority to the effect that that preliminary question must not be determined in non-jury cases finally and absolutely by the judges, before the evidence is admitted.

I even went so far, because I am an Appellate Court judge rather than a Trial Court judge, usually, to consult one of the experienced judges in this jurisdiction as to the practice here, and the practice I am following in this situation is exactly the practice which is followed in this jurisdiction in trials, both civil and criminal, with respect to preliminary questions of fact. I don't think the McAfee case varies that at all.

Mr. Steffen: May I refer to your Honor's language at page 24 of the McAfee case?

Justice Stephens: Yes.

Mr. Steffen: It says: "It is asserted by the defendants under the evidence that the written confession was so clearly not voluntary that it was the duty of the Trial
6223 Judge to exclude it. Under the law and practice in this jurisdiction the duty of a trial judge in respect of an offered confession is, first, on voir dire to determine whether or not there is evidence upon which the confession might be held to be voluntary. If he concludes there is no such evidence, then he must exclude the confession from the case. But if, in his view, there is evidence from which it might be held to be voluntary, he must admit it in evidence and submit it to the jury under proper instructions."

Now our contention, as applied to this case, is that that is strong authority. We have put on evidence, we have put on Mr. Redfield's testimony that there was a waiver, and using your Honor's language, if there is evidence from which it might be found that there was a waiver, then the court is dutybound to submit the question to the jury, or in this case to the Court, upon a final hearing, after the defendants, of course, have had their opportunity.

It seems to me, therefore, that even though Mr. Dowd is called, that the real question is—was there any evidence, as you state there, from which a court might find that there was a waiver? And if there was evidence, then that is the end of it so far as the matter of getting the item in evidence is concerned; and it is then for the defendant at the proper time to put in countervailing evidence, if he has it.

Justice Stephens: You are now rearguing a mat-
6224 ter on which we spent several days and ruled finally. That case does not mean that, Mr. Steffen.

The practice in this jurisdiction, both before and since the McAfee case, is clearly this: When a confession is offered in evidence the Government puts on witnesses to try to prove that it was voluntary, that it was not made under threats or promises or duress or force of any sort. But before the court rules on the question of whether or not that can go to the jury, it also hears from the defendant on voir dire on that subject, in the absence of the jury. And having heard both sides, it then rules whether or not there is evidence which ought to be submitted to the jury on the subject.

If it finds that it is not voluntary, in the view of the court, it doesn't submit it to the jury at all. If it finds that there is some evidence that the jury ought to consider, that it is voluntary, it submits both sides of that again to the jury, it is repeated in the presence of the jury.

I don't see how I can make it any clearer than I have.

Justice Jackson: I might tell you, Mr. Steffen, that the only reason that I agree with such a ruling is that I understand that it is the practice in this jurisdiction; it is contrary to any practice I have ever had in other jurisdictions.

Justice Stephens: I can show you authority in Wigmore, Mr. Steffen, and authority in the Federal cases.

We will take the afternoon recess.

6225 (Whereupon a five minute recess was taken, after which the trial was resumed as follows:)

6226 Justice Stephens: Proceed, Mr. Bromley.

By Mr. Bromley:

Q. Annexed to the sample, which is Government's Exhibit No. 641, is some advertising material, isn't there, Mr. Speer? A. Yes sir.

Q. Did you put that on there? A. I did, yes, just for a wrapper. It was a wrapper and also signified that this was the Bestwall Edge.

Q. That descriptive matter describes the edge of which Exhibit No. 641 is a sample, does it? A. It doesn't describe it, because this advertisement wasn't made for this particular edge. This is just a wrapper to show the sample.

Mr. Bromley: May I see the exhibit, please?

(Government's Exhibit No. 641 was handed to Mr. Bromley by the Marshal.)

By Mr. Bromley:

Q. Then do you say that all these pictures and all this printing that forms a part of this exhibit has no relationship to the sample at all? A. I would say that it has not.

Q. That it has not? A. It has not.

Q. In other words, you just picked it up as a scrap of paper to wrap this little thing up in, did you?

6227 A. Well, it is simply to show it. That is the way we were showing samples, and it is a similar product, except that it is an improved product, and we just used the wrapper. It was there and we used it for convenience.

Q. When did you put it on, for the purpose of this case, or for the purpose of something else? A. A long time ago, I imagine it was about ten or twelve years ago, maybe more.

Q. I notice that this paper bears a date. Did you know that? A. Well, it must have been around 1930 or 1931, I should say.

Q. Would it surprise you to know that the paper is dated in 1923? A. Well, I don't think it would make any difference.

Q. No. A. No.

Q. Well, then, this descriptive matter of the Bestwall Edge is descriptive matter which described the type of edge the Beaver Company was making at some time prior to 1923, isn't that right? A. That is correct.

Q. And that edge, described in this piece of paper, is similar to the edge in the little sample, isn't it? A. I would say so, except it has some new features.

6228 Q. But so far as the folding of the paper is concerned, the Bestwall Edge described in the paper wrapper is substantially similar to the way you folded the paper in the little sample, isn't it? A. Yes, it is similar, but not the same.

Q. I say, it is similar. A. Yes.

Q. And it is quite similar, isn't it? A. I don't know.

Q. Well, there is a picture of the way the paper is folded in the Bestwall Edge described in this advertising, or descriptive material attached to Exhibit 641, is there not? A. Yes.

Q. And that picture is the one in a circle which appears at the top of the inside of the advertising matter? A. That is correct.

Q. And if one looks at that picture, that will show the way the paper was folded in the Bestwall board, won't it? A. Exactly.

Q. And then, by looking at the sample, one can judge whether the Bestwall type of folded edge was or was not similar or identical to this little sample, isn't that right? A. Yes, that is right.

Q. Now you knew, didn't you, that this type of edge described in this piece of paper, which you called the
6229 Bestwall Edge, was adjudicated by a Federal Court to be an infringement of USG's Utzman Patent? A. Yes, I did know about it.

Q. And the Court handed down that decision in 1925—do you remember that? A. Well, I don't know about the date.

Q. Don't you remember that the Beaver Company was enjoined by USG from making this type of edge? A Yes, I do.

Q. And don't you remember that the Beaver Company then took a license and agreed to pay a large sum of money to USG as damages for its infringement? A. I know all about it.

Q. And then, when you went with the Certain-teed Company, Certain-teed was making open-edge board, wasn't it? A. Well, no, not at that time, a little later, I think, after United States Gypsum won, I think in the first court—I don't know what date it was. But I came there in December, 1919, with Beaver Board, and then they were still making the Bestwall Edge. I don't think you had any decision yet.

Q. No, that is right, we didn't get our decision, as I thought you told me a minute ago, 1925. That is right, isn't it? A. Well, I couldn't remember the date, but I think you are correct about that.

6230 Q. Well, don't you remember, as a matter of fact, that the lower court's decision enjoining this Bestwall Edge, was back in 1921 or 1922? A. I know that Bestwall lost the case. I wasn't in the plasterboard department, but I happened to know it.

Q. You knew that Bestwall lost the case sometime in the 1920's, didn't you? A. Yes, sir.

Q. Now, after you went into the employment of the Certain-teed Company, didn't you find out that Certain-teed was making an open-edge board? A. Well, I really don't remember whether it was just at that time, or a little previous.

Q. I am talking now about 1928, Mr. Speer. Do you un-

derstand that? A. I think you are correct about it, as I think about it.

Q. Well, at the time you first started to work for Certain-teed, it was making an open-edge board, was it not? A. I don't know what Certain-teed was making then. I was interested in the Beaver Products then. That was a new company, Beaver Products.

Q. Weren't you working for the Certain-teed Company? A. No, I was working for the Beaver Products, not for Certain-teed.

6231 Q. When did you start to work for Certain-teed? A. When they took over the old Beaver Products Company.

Q. That was in 1928, wasn't it? A. That is correct.

Q. Now, I say, as of that time, don't you know that Certain-teed was making an open-edge board? A. Well, I think they were, that is all I can say, that I think they were, just now. I can't remember exactly at what time, but my impression is that they did make an open-edge board, and also I know for sure that they did make an open-edge board at some time, but I couldn't tell you the exact year.

Q. When you told us that you said to Mr. Whittemore, or to some other official or officials of Certain-teed, that this closed-edge board of yours was better than anything that Certain-teed had, you meant, didn't you, that it was better because Certain-teed was making an open-edge board, and that this was a better product? A. No, I meant that I considered—it was my personal opinion—that this new edge was superior even to the Utzman edge. I am not talking about open-edge. Anybody could see that any of the closed edges were superior to the open-edge.

Q. By the way, you knew that at this very time, when you first started to work for Certain-teed, that Certain-teed had a lawsuit against it, brought by USG?

6232 A. Yes sir.

Q. Is this Exhibit 641 representative of a closed-edge type of board? A. Yes sir.

Q. Well, now, it is partially open, isn't it? A. Well, I don't know. This is just one of the samples. There are all varieties, probably 10 different varieties, that you can make with those edges. I just happened to find that one a short time ago.

Q. Just direct your attention to Exhibit 641. That is clearly a semi-open-edge board, isn't it? A. Well, I don't know.

(Government's Exhibit 641 was handed to the witness.)

The Witness: In this sample it is a semi-open-edge board, the way it is made.

By Mr. Bromley:

Q. In other words, in this sample, the plaster core is exposed for a distance near the edge of perhaps a quarter of an inch, wouldn't you say? A. Yes.

Q. And where I have put those two little pencil marks, the material on the face of the board, near the edge, is plaster, and not paper, isn't it? A. Yes sir.

6233 Mr. Bromley: I would like to show that to the Court, if I may. It can be seen this way (indicating). The paper stops there and goes down, and this paper comes up here and stops here, and this is exposed plaster, and all across here is exposed plaster (indicating).

(Exhibit No. 641 was handed up for the examination of the Court and then returned to Mr. Bromley.)

By Mr. Bromley:

Q. When the Bestwall Company was enjoined, it went to the manufacture of an open-edge board, didn't it? A. Well, I couldn't say positively whether the Bestwall Company went to open-edge. Yes, thinking it over, it did go to open-edge, and I recall the shape of it, too.

Mr. Bromley: That is all.

Justice Stephens: Is there any further cross-examination by other defendants' counsel?

(No response.)

Justice Stephens: Is there any redirect examination?

Mr. Steffen: I have one or two questions.

Redirect Examination

By Mr. Steffen:

Q. I want to ask one or two questions, Mr. Speer, in regard to Government's Exhibit No. 641. Could you tell us whether the shape of the edge which you make according to your patent, could vary from the one shown here as

6234 Government's Exhibit 641? A. Yes, it does, because it is an absolutely closed edge.

Q. What other shapes were possible? A. Well, beveled-edge, and a square-edge, and various way of inserting this reinforced edge.

Mr. Steffen: I think that is all, your Honor.

Justice Stephens: May this witness be excused?

Mr. Bromley: I would like to have the record show that I reserve the right, if I may, to have this witness recalled in the event his testimony is reinstated, for further cross-examination with respect to it.

Justice Stephens: The record may show that. You may have that right reserved.

Justice Jackson: Are you through with this witness?

Mr. Steffen: I am through, your Honor.

Mr. Bromley: I am through with him, yes sir.

Justice Stephens: You may be excused now, Mr. Speer. Thank you for coming here and helping us.

(The witness was excused.)

Justice Stephens: Do you have any other witnesses today?

Mr. Steffen: We have none, your Honor.

Justice Stephens: Shall we return to the exhibits that we were discussing last night?

Mr. Knuff: Yes, that is as good a matter as any 6235 to take up.

Justice Stephens: Judge Garrett called my attention to the fact, for your information, gentlemen, that on Tuesday, the 25th of April, it will be necessary to recess this Court on account of the fact that a conference is to be had in the Court of Customs and Tax Appeals, which Judge Jackson and Judge Garrett will have to attend.

Will your case, do you think, be likely to be closed by that time?

Mr. Knuff: I would say yes, your Honor.

Justice Stephens: Do you have any other witnesses?

Mr. Knuff: Mr. Adams, I presume, will want to call Mr. Dowd; and Mr. Bromley, I presume, will want to recall Mr. Speer. For the present I can't think of any other witnesses that we intend to call.

Justice Jackson: There are no more new witnesses, outside of Dowd?

Mr. Knuff: Mr. Redfield, of course—

Justice Stephens: (Interposing) Judge Jackson said, "new witnesses".

Mr. Knuff: No new witnesses, that is correct.

Justice Stephens: It may be that it would be desirable for the convenience of some out-of-town counsel, if your case isn't closed at that time, that they not come back until

Wednesday of that week, so that you gentlemen who come from out of town and go home for the weekend, won't
6236 have to come back for just a day. However, we can leave that until later.

Mr. Knuff: That will give us all of next week, anyway.

Justice Stephens: Yes, we will be here all next week, without interruption.

Mr. Knuff: I would say that we ought to be able to finish up in good shape by then.

Justice Stephens: How many of these exhibits have you?

Mr. Knuff: Somewhere in the neighborhood of 150. I am not saying that facetiously.

Justice Stephens: If we have to go into the relevancy and materiality of each one of them, I don't know whether we can do that in a week, or not.

Mr. Adams: Might I make a statement?

Justice Stephens: Yes.

Mr. Adams: There is a point in the record here which I would like to clear up, where I inadvertently made a statement which I, in checking it over last night, found I was wrong about.

Justice Stephens: In yesterday's record?

Mr. Adams: Yes, your Honor, and it appears on page 6395, at the bottom of the page. Judge Jackson asked me about these exhibits, and asked if I had copies of them, and I said "No."

Justice Stephens: That is at line 25 of page 6395, and the first line on page 6396.

Mr. Adams: That is right.

6237 I was confused about that. I don't have copies of the subsequent exhibits, the statements which were said to be attached to subsequent exhibits in the request to produce, but I find that, so far as I can ascertain, we do have copies of some of these documents, and I didn't want to mislead the Court in that respect. I was confused as to the two.

Justice Stephens: Very well, thank you for making that statement.

Mr. Adams: Secondly, I would like to say that the Presiding Judge made the suggestion, to which I agreed, that I ought to go to such limits as I could to avoid the necessity of putting in these exhibits through witnesses. I wanted to tell your Honors that so far as I can see, these are royalty reports—I am referring to Exhibits 624 to 640,

inclusive—and as I say, we have admitted that Mr. Krug signed them.

We do not have the data or the records upon which we can verify these reports, and we have no way of knowing whether the reports state the facts, or whether they don't state the facts. That is one reason that I couldn't make any admission about them.

However, since they appear to be royalty reports, although I can't say that they report correctly the figures, I am willing to stipulate with the Government that during the months mentioned in the reports, we did make reports, and that we reported and paid all the royalties due for
6238 the patented board manufactured by us under the licenses.

That would seem to me, perhaps, to avoid the necessity of putting in these documents. I am certainly glad to stipulate that we did pay all the royalties that were due. I am, unfortunately, unable to tell the Court whether these statements are accurate or not.

Justice Stephens: Thank you, Mr. Adams.

Now, perhaps I ought to make an announcement. The discussion last night was, in a sense, academic. I was looking for light and counsel were attempting to shed it. I have given some thought to the matter, and I am not yet going to make a ruling because there is nothing before the Court to clear up the discussion which we were indulging in last night.

I would like to tell you what my tentative views are, gentlemen, with respect to the use of Rule 36 in respect to the problem before us last night.

In the first place, I think Rule 36 does contemplate an extra-judicial proceeding, except where it is sought to compel the assessment of costs, and attorneys' fees because of a failure to make an admission which ought to have been made.

I think that part of the Rule which permits counsel for the plaintiff—to use plaintiff as an example—to ask for an admission of fact, is an attempt to save time in this sense, that if the opposite party, the defendant, can
6239 admit a fact, then that fact is taken out of issue, it needn't be proved or disproved on either side.

It seems to me that where counsel for the defendant, as in this instance, have admitted the correctness of a signature, like Mr. Krug's signature, and have also admitted, as you did, Mr. Adams, with respect to this series of exhibits,

that they were the authentic reports of the company—you said that at one place in the record—so that they would be binding upon the company, then we would be past the question of identification and past the question of connection.

It seems to me that if an admission merely admitted the signature on the document as being the signature of the person purporting to sign it, that the Government would still have to show that he had authority to sign the statement.

But where you admit that it is the authentic act of the company, then the Government is saved that difficulty.

Now, with respect to this matter of cross-examination, which is more critical, I was, I think, under a misapprehension last night as to how the Government intends to use these documents, and I may still not be fully informed. But after thinking the matter over and reading the colloquy, last night, it seems to me that the Government must be intending to use these documents as admissions. Is that right?

Mr. Knuff: We are using these documents as evidence from which the Court can infer an admission. We
6240 have asked the defendants to admit that the facts contained therein are true.

Justice Stephens: But suppose the defendant doesn't make the admission?

Mr. Knuff: Then we are going to offer these as evidence —or rather, we are going to offer an accredited document in evidence, so that the Court can infer from that accredited document that the facts therein stated are true.

Justice Stephens: You are getting around the hearsay rule, aren't you, on the theory that the documents constitute an admission of a party?

Mr. Knuff: Evidence of an admission of a party.

Justice Stephens: They are admissions of the party.

Mr. Knuff: That is right.

Justice Stephens: That, I think, raises a point that I ought to have commented upon last night, in which I perhaps may have misled counsel as to the attitude of the Presiding Judge, although I think it is clear on the whole of my statement that I was speaking tentatively only.

We have had dozens of documents in evidence here, gentlemen for the defendants, which have come in without cross-examination. If they come in as an admission, that is to say, if John Doe is called to the witness stand to identify the signature of Richard Roe, on a document, and if it is

shown that that signature is the signature of an of-
6241 ficer of a party, then the statement in the document thus identified can come in, notwithstanding the hearsay rule, because it is an admission, provided it contains relevant and material matter.

Of course all matter not under oath and subject to cross-examination in the courtroom, is hearsay, and is excluded unless it comes within an exception. But a properly identified admission is an exception, and therefore an admission can come in without cross-examination.

So I don't think the Government is bound to call the witnesses under those circumstances.

That is just by way of preliminary statement of my own views. We will reach these points for actual ruling when you get into offering documents.

Mr. Adams: I think, your Honor, that I should perhaps in justice to my own position, say that I did not intend anything that I ever said to be taken as an admission that, as your Honor indicated—

Justice Stephens: (Interposing) I didn't say you said that, Mr. Adams. I said you said that these documents signed by Mr. Krug were authentic, and I will show you where you said it.

Mr. Adams: I am looking at this page 6386. I made a statement about them there, beginning on line 4. May that perhaps be what your Honor is thinking about?

6242 Justice Stephens: No, it occurred at some other place.

Justice Garrett: Did you say page 6386?

Mr. Adams: Yes, line 4, and from there on, Judge Garrett, I talked about it.

Justice Stephens: At the bottom of page 6392 you say:

"As far as I am concerned, I have gone just as far as I can by admitting that these are—there is no question about it—authentic documents on our part."

Mr. Adams: Well, I certainly would like the opportunity to state to the Court that I did not intend that statement to go beyond the admissions which I have made on the record, and filed with this Court, and if I did say that, I did not intend to say so, I did not intend to say that I admitted that these were authentic documents of Certain-teed, because I do not so admit, as I have tried to make clear earlier this afternoon.

In that connection, I draw your Honor's attention to the fact that I was requested to admit, in the requests for admissions:

"1. The following statements, photostatic copies of which are attached hereto, made a part hereof, and marked Exhibits 1 through 34, were signed on behalf of Certain-teed Products Corporation by Geo. P. Krug."

I admit that, and that is all I admit.

The same is true with respect to 2 and 3, and
6243 those are the later documents in this group.

But that position that I take would be subject to any ruling that your Honors might want to make, upon the legal effect of that admission, of course.

But I certainly do not want to be taken as having said, and would like to withdraw any intimation, that I did admit that these were authentic documents.

Justice Stephens: Well, I don't know whether there is much difference between the use of the word "authentic" and the use of the words "signed on behalf of the company", although perhaps you might still wish to get in between those two phrases for the purpose of showing, or contending, that Krug was not the kind of an auditor who had it within the scope of his authority to make this statement, or rather to sign this statement.

For the Government to use these documents as admissions, of course, they must be signed by someone who had authority to speak for the company. But if you say that he signed them on behalf of the company, I should think that you had gone quite a ways in that direction.

Mr. Adams: I certainly have, your Honor. That was why I said yesterday that I had gone just as far as I could. Later on in their requests, however, they want to know whether the statements contained therein are true.

Mr. Bromley: On the subject of your Honor's
6244 remarks, with respect to admissions, I take it that these documents which are being received as admissions, are binding only on the parties who made them, and in that connection their status will not hereafter be changed, even if it be determined that prima facie proof of conspiracy, outside of declarations of co-conspirators, has been adduced by the Government.

I want to advert to that now, because as I understand the law, if the Government offered here in evidence now a signed confession of violation of the Sherman Act by the president of the Certain-teed Company, that document would be admissible as an admission against Certain-teed, and as against Certain-teed only. It would never become transformed into any kind of a declaration which would be

binding on anybody else, because it was not made in furtherance of any conspiracy. Therefore, under the procedure which the Government is now adopting, these things are coming in, not as declarations of co-conspirafors, subject to connection later, and subject to being held to be binding on everybody if proof of a conspiracy appears in the record, but they are being offered merely as admissions, and they are binding only against the party who made them, and that status will never be changed by anything that could happen in this case.

Mr. Knuff: I don't want to be bound by what Mr. Bromley says is his understanding. I think that some of
6245 the documents that are going to be introduced will be introduced purely and solely for the purpose of admission. On the other hand, I feel quite sure—I can't place the one, two, three or half dozen out of the hundred and fifty that we are going to use as declarations,—but I feel quite sure that in this list of exhibits there are some that will be used as declarations of a co-conspirator.

In fact, I would think that even those exhibits that are used as an admission, if they are in furtherance of a conspiracy, or descriptive of it, or show the operator of the conspiracy, then, after the conspiracy has been shown aliunde, then those admissions would likewise be considered declarations.

For the most part I think Mr. Bromley is correct, but I just want to enter a caveat—

Justice Stephens: (Interposing) I have never been able to see any difference, myself, gentlemen, so far as the hearsay rule is concerned, between what you call an admission and what you call a declaration.

The only reason either such thing can come in against the hearsay rule is that it is a statement by a party, or by someone authorized to speak for a party, on a relevant and material subject. That gets it around the hearsay rule.

If it is a pure admission, like a confession—to use Mr. Bromley's example, which has been discussed here and
which we discussed earlier in the case, it doesn't, as
6246 such, bind anybody but the person who makes the admission, even if a conspiracy is proved aliunde.

As I stated the other day, it is hard for me to imagine how it could occur, but I suppose, theoretically, if a confession could be shown to have furthered the conspiracy, that it might be binding upon others under the general doctrine of substantive law.

When we pass the hearsay rule, we get into questions of substantive law. The only reasons that declarations of co-conspirators can be binding upon other co-conspirators, is because under the substantive law once a conspiracy is shown, the acts and words of all the conspirators, of each of the conspirators, are binding upon all the others, if in execution and furtherance of the conspiracy, but not otherwise.

Now, Mr. Bromley, do you contend that a confession, if a conspiracy were shown aliunde the confession, and if it were also shown that the confession furthered or executed or tended to execute the conspiracy, wouldn't be binding just because it is called a confession, upon others? I don't see how that could happen, but if it did happen, I should think it would be binding, Mr. Bromley.

Mr. Bromley: I agree with your Honor, but the point I am trying to make, I think, is somewhat different. Mr. Adams comes in here and makes an admission, let us assume, as to the authenticity of a document, which, if
6247 received on the basis of that admission, is binding on him. But it certainly is not binding on me. I have made no concession about authenticity. There has been no witness on the stand to establish its authenticity.

Justice Stephens: I think you are perfectly right about that.

Mr. Bromley: Therefore, I say that the document can never change its status as to me. It is an admission by Certain-teed, but it can never become an act of mine or an act of any other defendant, whether there be proof of conspiracy or not.

Justice Stephens: I agree with you that far, fully. I don't think that there can be any dispute about it, and I think Mr. Knuff has just stated that he agreed with you that far. All I have added is that—

Mr. Knuff: (Interposing) I don't believe I quite agree with that. I don't believe I want to be bound by that statement, your Honor. I don't believe that I would agree with Mr. Bromley that far.

Justice Stephens: How can the admission of one party be binding upon another party unless it is in furtherance or execution of the conspiracy? The only time the admission of one man can ever bind another man is when they are acting in concert and the admission is shown to further or execute the conspiracy.

6248 Mr. Knuff: That is right. Now if the attorney for one of these parties comes in and says, "My

client did what appears on this paper," and if what appears on this paper is in furtherance or descriptive of the conspiracy, then, when the conspiracy is shown, the act of that one defendant, on the basis of partnership, makes his act the act of all partners.

Justice Stephens: No, I can't go that far with you, because you used the word "descriptive".

Mr. Knuff: I think I can show you some authority on that. I would be glad to be prepared as to that on Monday.

Justice Stephens: Well, I think we have established the law by thorough argument, although I will be glad to hear from you and see any authorities that you may want to present. But I think the law is absolutely elementary, is it not, that the declarations of an alleged co-conspirator cannot be binding upon any other co-conspirator unless you have two things: First, that a conspiracy is shown aliunde the declaration; and second, that the declaration is shown to be in furtherance of or execution of the conspiracy.

Now that we have ruled a dozen times in this case, and it has been the guiding principle of substantive law throughout the case.

Now an admission is a form of declaration. How you could make an admission of one co-conspirator binding upon others, and get it in—it can get in past the hearsay rule because it is an admission, and therefore you don't have to have cross-examination—but when it gets in, it gets in only as the act of the particular person making the admission, the statement of that particular person making the admission. Whether you call it an admission or a declaration, I don't see how, as a matter of substantive law, it can bind anybody but the person making it, unless it is shown to be in furtherance of or in execution of a conspiracy.

6249

Mr. Knuff: Maybe we are not far apart at all; maybe it is just our understanding of what is meant by "in furtherance of the conspiracy".

Justice Stephens: I think that is the difficulty, and the thing I am fearful you are going to have trouble with, with respect to these exhibits, is that they simply seem to be descriptions of royalty payments and things of that sort. Maybe they further a conspiracy and maybe not, I don't know. I suppose that is your point, isn't it, Mr. Bromley?

Mr. Bromley: Well, that is a point, but I want to make it plain that, following what your Honor has just said

about the binding effect of an admission, the admission which can never bind me is Adams' admission here in the courtroom that this document is an authentic document. Now, that admission cannot be said to be in furtherance of any conspiracy. Nothing that Adams admits in this courtroom can, by any possibility, be said ever to
6250 be in furtherance of any conspiracy, and therefore Mr. Adams is not my agent, and his admissions as to authenticity do not bind me and do not make these documents or their contents binding upon me in any sense whatsoever at any time, no matter what other evidence is or is not in the record.

I think that is the fundamental misconception which Mr. Knuff has in his mind. I think he thinks he can put these things in on Mr. Adams' admission of authenticity, and then somehow they will get to be binding on me. That is not so. They are not binding on me unless there is a witness on the stand whom I have an opportunity to cross-examine, and there is established here some evidence of their authenticity as against me. Mr. Adams' admission in this courtroom is not binding upon me and never can be, because it is not in furtherance of a conspiracy and cannot become a declaration of a co-conspirator of mine.

Justice Stephens: I don't see any escape from that.

Mr. Knuff: I think I understand Mr. Bromley's position. However, I don't agree with it.

Justice Stephens: Very well, we have to meet that when you get a question to be ruled on.

Announce the recess.

(Whereupon a recess was taken at 4:05 o'clock p. m. until 10:00 o'clock a. m., April 17, 1944.)

6251 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Monday, April 17, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

6257 You may proceed.

Mr. Knuff: May it please the Court, at this time I would like to offer in evidence Government's Exhibits 624 to 640, inclusive.

Justice Stephens: That is that first series of purported royalty reports, isn't it?

Mr. Knuff: That is right, Your Honor.

Justice Stephens: As to which Mr. Adams has admitted that Mr. Krug signed the documents on behalf of Certain-teed?

Mr. Knuff: That is correct.

Justice Stephens: Is there any objection to those?

Mr. Keber: Yes, Your Honor.

Justice Stephens: Are you here representing Mr. Adams?

Mr. Keber: Yes. Mr. Adams was unavoidably required to go to Chicago on very important business, and I am here to attempt to take up the slack to some extent.

Justice Stephens: What is your name?

Mr. Keber: Peter Keber. My presence was announced in the early part of the case, but I haven't been here much since.

Justice Stephens: You are a member of Mr.
6258 Adams' office, are you?

Mr. Keber: Yes, I am a member of Mr. Adams' office.

Justice Stephens: Very well. I am sorry we haven't become better acquainted with you.

Mr. Keber: I object to so much of these exhibits as have been offered, on the ground that the exhibits, on the face of them, contain pencilled notations. The time and the place and the person who put these pencilled notations upon the exhibits has not been shown and has not been admitted, and therefore the exhibits, it seems to me, on their face are not in the form in which they were signed by Mr. Krug.

As I understand it, the only admission before the Court is Mr. Krug's signature on behalf of Certain-teed.

I also call the Court's attention to the fact that Exhibits 628 through 640 refer to the license agreement dated May 22, 1929. Now I believe that Mr. Knuff, from reading some of the back testimony, has stipulated that he is not relying upon any of the matters contained in the capital letters at the top of these exhibits. If that stipulation is agreed to, then that part of my objection is withdrawn. Otherwise, we take the position that the agreement is misstated, that is, as being as of May 22, 1929, in Exhibits 628 to 640, inclusive.

Mr. Knuff: I don't think Mr. Keber quite has the Government's position there. We are relying on the
6259 matters that are contained at the top of the page in capital letters. I feel that from Exhibit 628

through 640, there has possibly been a mistake in so far as Certain-teed is concerned, because at that time Certain-teed may take the position that they were operating under the license of October, 1929. But we definitely are relying upon the matters that are contained at the top of the page.

Justice Jackson: Did that supersede the May license?

Mr. Knuff: Yes, Your Honor.

Justice Jackson: You are relying upon what is on the top of those pages to show that it is a statement of Certain-teed concerning the royalties paid under their license?

Mr. Knuff: That is right.

Justice Jackson: But so far as the date is concerned, you concede that it was not under the May license, but under the October license which superseded that agreement?

Mr. Knuff: That is right.

Justice Jackson: That is what I understood your position to be.

Justice Stephens: We should think, in any event, that since Mr. Krug signed these on behalf of the company, the objection would probably go to the weight of these exhibits. In other words, isn't there a prima facie identification and correctness established by the admission? If you wanted to dispute the date, wouldn't you be obliged
6260 to do that yourself by evidence?

Mr. Keber: Well, I had assumed, if the Court pleases, from the statement Mr. Knuff made, as I interpreted it in reading the testimony, that he would have no objection at least to that amendment, that is, that this was an obvious mistake, it seemed to be an obvious mistake.

Justice Jackson: Just with respect to the date?

Mr. Keber: Yes.

Justice Stephens: So far as that is concerned, you do concede that, do you not, Mr. Knuff?

Mr. Knuff: I think it was an obvious mistake.

Justice Stephens: That may be shown in the record. I should think that would protect you, Mr. Keber.

Mr. Knuff: Now in so far as the pencilled notations that are on the exhibit, we, of course, are not offering the pencilled notations as a part of the exhibits, because I believe they were put on by USG.

Justice Stephens: And if the exhibits are received, they will be received without reference to the pencilled notations.

Mr. Knuff: Yes.

Justice Stephens: Is there any objection as to relevancy or materiality?

Mr. Bromley: The other defendants, may it please the Court, object to them as incompetent and as not
6261 binding on them; and also as immaterial and irrelevant. I do not understand the purpose for which all of these exhibits are offered in such detail. If it be to prove merely that the licensees paid royalties under the license agreements, I will stipulate that all the licensees paid all the royalties that were due to USG called for by all the agreements. I will even stipulate that up to the time this suit was started, we received about $4,000,000 in royalties from them; and after the suit was started we have received several hundred thousand dollars a year from them in royalties, up to the present time.

I don't see the purpose of burdening the record with all of this detail. I thought that was admitted by the pleadings, anyway, and was not an issue in the case.

Justice Stephens: The Court was going to inquire, Mr. Knuff, in considering these over the weekend, whether that all couldn't be stipulated to. There seems to be no dispute in the case that royalties in large sums were paid.

Mr. Knuff: Well, again, Mr. Bromley assumes to be able to read what is in our mind. That isn't the purpose of the offer at all.

Justice Jackson: Why don't you tell us what it is?

Mr. Knuff: The purpose of the offer, if Your Honor please, appears on the second line, "Gypsum Wall Board—Seconds—62,284 Square Ft." That is offered for the pur-
pose of showing that at the time of this report, Gyp-
6262 sum Wall Board—Seconds were sold; that subsequently, seconds were taken off the market. That is under paragraph 45(b) of the complaint.

Justice Stephens: You mean that you wish to indicate by other exhibits that seconds later came off the market?

Mr. Knuff: The exhibits themselves will indicate that, Your Honor.

Justice Stephens: I mean by "other exhibits", exhibits other than 624. You are talking about 624 now?

Mr. Knuff: That is right, from 624 down to 637, inclusive, they show that Certain-teed was selling seconds. Then beginning with 638, the place in there "Gypsum Wallboard Seconds", there are dashes to indicate blanks.

Now that won't appear in exactly that form in the rest of them, but it will appear that later on they didn't even bother reporting seconds.

Now in Government's Exhibit 404, which is the price bulletin issued by USG on the 23rd day of May, 1929, USG fixed the price for seconds. Whether or not seconds were sold, of course, wouldn't be evidenced by the fact that they fixed the price for them. These exhibits show that seconds were sold at that time.

Justice Stephens: Well, the Court was under the impression, from the colloquy between counsel at the last session, that you were offering these to prove payment of royalties. If you have some different purpose, we
6263 will, of course, consider that.

It would seem to me that perhaps even the point you now refer to, to-wit the report on the selling of seconds up to a certain date, and the non-selling or non-reporting of selling of seconds after that date, might also be made the subject of stipulation. There are apparently about 150 of these exhibits, and it would take a very great deal of time to get them all in evidence, if we have to inspect each one of them. Also, if the case ever reaches the state of appeal, the expense of dealing with them, of course, is to be considered, on both sides. However, we don't wish to handicap your case. If you feel you must have them in, we will be glad to hear you about it.

Could the sale of these seconds, and non-sale of seconds, be stipulated to by Certain-teed?

Mr. Keber: Will you pardon me a moment?

Justice Stephens: Yes, certainly.

Mr. Keber: I am afraid, if the Court please, that my knowledge of that situation doesn't encompass that.

Justice Jackson: Couldn't you very well agree that so far as Exhibits 624 to 637, inclusive, are concerned, they show on their faces that gypsum wallboard seconds were sold in certain quantities, at an average price, and the amount; and that from Exhibit 638 to 640, there has been no manufacture or sale of gypsum board seconds?
6264 That is what the thing really says, on its face. I wonder if that couldn't be done?

Justice Stephens: Well, if I may interpolate and add to my colleague's statement, I don't think that would be sufficient as a stipulation, or perhaps I should say that would be over-sufficient. If the stipulation is as to what the exhibits show, we might as well have the exhibits in. We have got to have some stipulation as to what the volumes and dates of seconds sales were, irrespective of the exhibits, if you are going to get along without the exhibits.

Mr. Keber: Does the Court have in mind a stipulation with respect specifically to gypsum wallboard seconds?

Justice Stephens: Yes, that is right.

Mr. Keber: And the volume that was reported as sold, of those seconds?

Justice Jackson: Appearing on these exhibits.

Justice Stephens: We don't wish to over-urge you, Mr. Keber, to make a stipulation. What we are suggesting is that since you have already admitted Mr. Krug signed these documents in behalf of Certain-teed, it would appear that they are presumptively correct. That being true, the Court and counsel on both sides of the case could be saved the difficulty of dealing with such a volume of material if, instead of having the exhibits introduced in evidence, you would look at each one of them and then stipulate as to the amounts of wallboard seconds on which royal-
6265 ties were paid up to a given date; and then stipulate that after that date there were no royalties paid on gypsum wallboard seconds.

But you might want to take some time to do that, and we don't want to over-urge you. You must stand on such rights as you feel you must, in your clients' protection.

Mr. Keber: If the Court please, I would like to take advantage of your suggestion that I have an opportunity to consider that more fully, particularly in view of the fact that I think we have taken the position, and are going to take the position, that we will not stipulate; that is, we have taken the position in our response to the request for admissions that we would not admit the facts stated in these exhibits, and that our admission merely went to the fact that Mr. Krug signed them on behalf of Certain-teed.

Justice Stephens: Let me look at your admission just a moment—

Mr. Knuff: (Interposing) In so far as Nos. 1, 2 and 3 of our requests for admissions are concerned, there are no answers by Certain-teed. Therefore, what is contained in requests 1, 2 and 3 are admitted under Rule 36.

Justice Stephens: We don't seem to have in our files the answers of Certain-teed.

Mr. Knuff: I will let Your Honor have my copy.

(Copy of Certain-teed's answers handed to the Court.)

6266 Justice Stephens: Where is the request for admissions against Certain-teed? Have you got that here, Mr. Cantor?

(Request for admissions against Certain-teed handed to the Court.)

Justice Stephens: That raises another issue, Mr. Knuff. We have now read the answer of Certain-teed. It appears that Certain-teed has not ignored your request for admissions of fact, but has taken the position that—for example on page 2, paragraph (e), of its answer—"that said Request for Admissions is improper and not authorized by the Rules of Civil Procedure in that it does not specifically set forth the relevant matters of fact on which admissions of truth are sought, and the Defendant is therefore unable to make any admissions or denials with respect thereto."

Mr. Adams submitted, you will remember, and I called to your attention the Kraus case—I haven't the full citation in mind—which seemed to hold under the new Rules, Rule 36, that a plaintiff or party asking its opponent for admissions can not submit a blanket exhibit with the request that all matters stated therein be admitted, but must itself pick out, rather than burden the opponent with selecting, the items of fact which it is requested be admitted.

What do you say about that?

Mr. Knuff: We are not down to that yet, Your Honor, because it is not before the Court.

6267 Justice Stephens: I thought you just presented it to me, and that is why I was going over all this material, because you said they had not answered concerning admissions of fact.

Mr. Knuff: The only thing that is before the Court, Your Honor, is the matter contained in paragraph 1 of our request, and that is that:

"The following statements, photostatic copies of which are attached hereto, made a part hereof, and marked Exhibits 1 through 34, were signed on behalf of Certain-teed Products Corporation by Geo. P. Krug."

And that is all I am offering these exhibits for at this time.

Justice Stephens: That is very true, Mr. Knuff, but the Court also has some responsibility in the situation, and the Court was trying to arrange to save your time and the Court's time and the defendants' time by getting a stipulation on the items of fact, and Mr. Keber has just answered that he couldn't stipulate because they were unwilling to admit the facts in view of the form of your request for

admissions, and you replied to that that they hadn't made any answer at all concerning the matters of fact. Therefore, I thought I was put to the duty of examining into those matters.

But if we can't stipulate, I suppose we can't. So let's go ahead. You may offer these under your Paragraph 1.

6268 Is there any objection as to relevancy or competency, other than what has already been uttered by Mr. Bromley? Do any of the other defendants make any objection?

Mr. Johnston: I assume those inure to the benefit of all defendants other than Certain-teed?

Justice Stephens: Yes.

Mr. Keber: May I ask the Court a question? I assume, from Mr. Johnston's remark, that the objection as to relevancy inures to my benefit as counsel for Certain-teed, Certain-teed's benefit, as well, in spite of the fact that I didn't specifically make that objection?

Justice Stephens: You may make an objection yourself as to relevancy and materiality, if you wish to.

Mr. Keber: I object to the documents on the ground that they are not relevant or material for the reasons stated by Mr. Bromley in that connection.

Justice Stephens: We think if the documents are offered for the purpose stated by Mr. Knuff, to prove payment of royalties on certain amounts of seconds up to a given date, and thereafter the non-payment of royalties on seconds, that since they have been admitted to have been signed by George P. Krug in behalf of Certain-teed, they would be admissible as admissions of Certain-teed on that subject, and that they are relevant and material under the pleadings.

So those objections are overruled, and the exhibits
6269 are received for the limited purpose stated.

(The documents referred to, marked as Government's Exhibits Nos. 624 to 640, inclusive, were received in evidence for the limited purpose stated.)

Mr. Knuff: If Your Honor will indulge me now, I will mark these. I couldn't mark them before I came into Court because I didn't know what other exhibits, if any, were going to be used.

Justice Stephens: Certainly.

Mr. Bromley: That means that these exhibits are re-

ceived as binding only against Certain-teed, then, if Your Honor please?

Justice Stephens: Are you offering them as against other defendants?

Mr. Knuff: No, these are just an admission as to Certain-teed, Your Honor.

Justice Stephens: That may be understood.

We will take a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

6270 Mr. Knuff: May it please the Court, I would like at this time to have marked for identification Government's Exhibits 646 to 692, inclusive.

(The documents referred to were marked Government's Exhibits Nos. 646 to 692, inclusive, for identification.)

Mr. Knuff: Exhibit No. 646 is a two-page statement, signed by George Krug, George P. Krug, and sworn to on the 16th day of March, 1931.

Exhibit No. 647 for identification, comprising two pages, is a statement signed by George P. Krug and sworn to on the 15th of April, 1931.

Exhibit No. 648 comprises two pages, and is a statement signed by George P. Krug on behalf of Certain-teed, and sworn to on the 13th day of May, 1931.

Exhibit No. 649 comprises two pages, and is a statement signed on behalf of Certain-teed by George P. Krug, and was sworn to on the 2nd day of July, 1931.

Government's Exhibit 650 for identification comprises three pages, and was signed on behalf of Certain-teed by George P. Krug, and was sworn to on the 19th day of August, 1931.

Exhibit 651 comprises two pages, was signed by George P. Krug on behalf of Certain-teed, and was sworn to
6271 the 21st day of September, 1931.

Exhibit 652 for identification comprises two pages, and was signed on behalf of Certain-teed by George P. Krug, and was sworn to on the 19th day of October, 1931.

Exhibit 653 comprises two pages, was signed by George P. Krug on behalf of Certain-teed, and was sworn to on the 19th day of November, 1931.

Exhibit 654 comprises two pages, was signed by George P. Krug on behalf of Certain-teed, and was sworn to on the 17th of February, 1932.

Exhibit 655 comprises two pages, was signed on behalf of Certain-teed by George P. Krug, and was sworn to on the 20th day of April, 1932.

Exhibit 656 comprises two pages, was signed on behalf of Certain-teed by George P. Krug, and was sworn to on the 20th day of May, 1932.

Exhibit 657 comprises two pages, was signed on behalf of Certain-teed by George P. Krug, and was sworn to on the 17th day of June, 1932.

Exhibit 658 comprises two pages, was signed by George P. Krug on behalf of Certain-teed, and was sworn to on the 25th day of July, 1932.

Exhibit 659 comprises two pages, was signed on behalf of Certain-teed by George P. Krug, and was sworn to on the 15th day of August, 1932.

6272 Exhibit 660 comprises two pages, was signed by George P. Krug on behalf of Certain-teed, and was sworn to on the 20th of September, 1932.

Exhibit 661 comprises two pages, was signed by George P. Krug on behalf of Certain-teed, and was sworn to on the 20th of October, 1932.

Exhibit 662 comprises two pages, was signed by George P. Krug on behalf of Certain-teed, and was sworn to on the 17th day of November, 1932.

Exhibit 663 consists of one page, which was signed on behalf of Certain-teed by E. H. Laney, and was sworn to on the 15th day of December, 1930.

Exhibit 664 comprises two pages, and was signed on behalf of Certain-teed by E. H. Laney, being sworn to on the 21st day of January, 1931.

Exhibit 665 comprises two pages, was signed on behalf of Certain-teed by E. H. Laney, and was sworn to on the 20th day of July, 1931.

Exhibit 666 comprises two pages, was signed by E. H. Laney on behalf of Certain-teed, and was sworn to on the 15th day of December, 1931.

Exhibit 667 comprises two pages, was signed by E. H. Laney on behalf of Certain-teed, and was sworn to on the 20th of January, 1932.

Exhibit 668 comprises two pages, was signed by
6273 E. H. Laney on behalf of Certain-teed, and was sworn to on the 20th day of December, 1932.

Exhibit 669 comprises three pages, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to on the 19th of January, 1933.

Justice Stephens: Do those two pages follow Watson's affidavit?

Mr. Knuff: Yes, your Honor.

Justice Stephens: What is the number of his affidavit?

Mr. Knuff: 669. That is a three-page exhibit.

Exhibit 670 for identification is the four-page exhibit, and was signed by Benjamin B. Watson on behalf of Certain-teed, and was sworn to on the 20th of February, 1933.

Exhibit 671 is a four-page exhibit, was signed by Benjamin B. Watson on behalf of Certain-teed Products Corporation, and was sworn to on the 20th day of March, 1933.

Exhibit 672 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to on the 21st of April, 1933.

Exhibit 673 is a three-page exhibit, signed by Benjamin B. Watson on behalf of Certain-teed, and was sworn to on the 22nd day of May, 1933.

Exhibit 674 is a four-page exhibit, was signed by Benjamin B. Watson on behalf of Certain-teed, and was sworn to on the 20th day of June, 1933.

6274 Exhibit 675 is a four-page exhibit, was signed by Benjamin B. Watson on behalf of Certain-teed, and was sworn to on the 20th day of July, 1933.

Exhibit 676 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to on the 17th day of August, 1933.

Justice Jackson: There is no signature there under that jurat.

Mr. Knuff: I beg your pardon, it was intended to be sworn to.

Justice Stephens: It is signed, at any rate.

Mr. Knuff: It was intended to be sworn to on the 17th of August, 1933, but the signature to the jurat is missing. I think that will identify the document, however.

Justice Stephens: How many pages are there in that exhibit?

Mr. Knuff: Four pages, your Honor.

Exhibit 676 is a four-page exhibit, signed on behalf of Certain-teed by Benjamin B. Watson, and sworn to the 19th day of September, 1933.

Exhibit 678 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to on the 19th day of October, 1933.

Exhibit 679 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was
6275 sworn to on the 20th day of November, 1933.

Exhibit 680 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to on the 18th day of December, 1933.

Exhibit 681 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to the 17th day of January, 1934.

Exhibit No. 682 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to on the 19th day of February, 1934.

Exhibit No. 683 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to on the 19th day of March, 1934.

Exhibit No. 684 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to the 19th day of April, 1934.

Exhibit No. 685 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to the 18th day of May, 1934.

Exhibit No. 686 is a four-page exhibit, was signed on

behalf of Certain-teed by Benjamin B. Watson, and was sworn to the 19th day of June, 1934.

Exhibit No. 687 is a four-page exhibit, was signed by Benjamin B. Watson on behalf of Certain-teed Products Corporation, and was sworn to the 26th day of July, 1934.

6276 Exhibit No. 688 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to the 20th day of August, 1934.

Exhibit 689 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to the 20th day of September, 1934.

Exhibit No. 690 is a four-page exhibit, signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to the 19th day of October, 1934.

Exhibit No. 691 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to the 19th day of November, 1934.

Exhibit No. 692 is a four-page exhibit, was signed on behalf of Certain-teed by Benjamin B. Watson, and was sworn to the 19th day of December, 1934.

Exhibits 646 to 692, inclusive, are offered in evidence as statements signed on behalf of Certain-teed by the respective parties named.

Certain-teed was requested to admit that the statements were signed by the parties mentioned therein, and Certain-teed, in their answer, has failed to deny that they were signed by the respective persons whose signatures appear thereon.

We now offer in evidence Government's Exhibits Nos. 646 to 692, inclusive.

Justice Stephens: What is the state of the record,
6277 or the state of the admissions, Mr. Keber? Do you admit or do you not, that these last-named exhibits were signed by the persons who purported to sign them?

Mr. Keber: If the Court pleases, we admit that Exhibits 646 through 662, inclusive, were signed by Krug on behalf of Certain-teed, as requested.

Now so much for that feature of it, we admitted that—

Justice Stephens: (Interposing) Well, let's dispose of those first, or do you want to make a further statement before disposing of those?

Mr. Keber: Yes, I do, your Honor.

With respect to those exhibits, counsel for the Government was describing them, and I understood him to say that they consisted of various numbers of pages, most of them two pages, and as I noted from his remarks, that down to Exhibit 662 they were all exhibits of more than one page.

Now, in the requests for admissions, we received but one page of each exhibit. Attached to the request was but one page of each exhibit. The pages that were attached to the request contained a statement thereon, of which this is typical, "Less Sales Purchased per attached."

The statement presumably that is referred to on that page, and by that sentence, is not and was not incorporated in the request for admissions, and therefore whatever response we made to that request obviously did not
6278 cover any such attached paper.

Justice Stephens: That covers all the exhibits, 646 to 662, inclusive?

Mr. Keber: Yes, your Honor.

Justice Stephens: As I understand it, you admitted that Krug signed on behalf of Certain-teed, so far as the page actually submitted to you was concerned, which was the first page of each exhibit, but nothing else?

Mr. Keber: Exactly, sir.

Mr. Knuff: There are no signatures on the other pages.

Mr. Keber: Well, I don't know what the other pages are, I haven't seen them.

Justice Stephens: But the admission would seem not to include, Mr. Knuff, anything except what was actually submitted to the defendants, unless you can take time to look them over and agree that they are the proper attachments, Mr. Keber.

Mr. Knuff: You see, if your Honor pleases, let's take Exhibit No. 646 that you have in front of you there, and look at the heading, "Less Purchased per Statement attached—5,774" square feet.

Now, turn to the second page of the exhibit and you will see, "December Shipments From Gypsum, Ohio", and under "Square Feet", the third figure is 5,774, which is exactly what was on the first sheet, and which is a breakdown
6279 of what was on the first sheet.

Justice Stephens: That is what it purports to be. Why didn't you serve all those papers upon the defendants at once, so that we wouldn't have to go through and identify each one of them?

Mr. Knuff: The reason we didn't serve these other papers on the defendants is because if we had had Mr. Krug on the witness stand, we would have shown Mr. Krug this document, and asked him if that was his signature, and he would have said "Yes", and that would have authenticated the document.

Justice Stephens: It would have, if Mr. Krug had been handed all the pages of it.

Mr. Knuff: We would have asked him if that was his signature, and that would have authenticated the document.

Justice Stephens: It would have authenticated the document as submitted to Mr. Krug, but if all you submitted to Mr. Krug was just the first page, it wouldn't have carried with it an admission of the correctness of the second page or any pages following the first.

Mr. Knuff: We are not asking the defendant to admit the correctness of it at all. They say that they won't. They say that they have no knowledge of whether it is correct or not. Now the correctness of these exhibits is not in issue at this time.

Justice Stephens: But the identification of them
6280 is in issue, Mr. Knuff, and you have got an admission which identifies the first pages, but not the others, unless they are circumstantially connected in some manner.

Mr. Knuff: I think they are circumstantially connected, when you take a look at this, "Less Purchased per Statement attached—5,774," and then take a look at the second page, and you will see the same thing, "5,774".

Justice Stephens: Why aren't you offering them for their correctness? Aren't you relying on them as showing the amount of "seconds" sold up to one period, and not sold thereafter?

Mr. Knuff: We have asked Mr. Adams to admit the correctness of them. Mr. Adams, in his answer, says that he can neither admit nor deny the correctness of them. So therefore, we can't say that this is a binding admission upon Certain-teed.

Justice Stephens: That isn't my question, I am sorry. When we had this last series of exhibits offered, just preceding Exhibit 646, you offered them in evidence not merely as identified, but also as binding for their contents, upon Certain-teed, to the extent that they showed the amount of "seconds" up to a particular date, and no sales of "seconds" thereafter. Aren't you offering these also for a similar purpose?

Mr. Knuff: That is correct, your Honor, we are.

Justice Stephens: But you haven't yet identified,
6281 except as you assert circumstantially, anything but the first pages of these exhibits. I don't see why you didn't submit the other pages to the defendants, and they would undoubtedly have made an admission on them also, if they could have seen them, as to identification.

However, it hasn't been done, and now we have got to meet the situation as it is. Perhaps, Mr. Keber, you can take these, take an hour's time, and go through them and see if they are sufficiently connected, as far as second, third and fourth pages are concerned, where the exhibit has more than one page, so that you can admit that Mr. Krug's signature covered execution of those pages as well as the first page, on behalf of Certain-teed.

Do you think you could do that? Otherwise, the Court has got to go through every one of those second, third and fourth pages, have it demonstrated that they are sufficiently circumstantially connected with the first page so that it may be said that Mr. Krug's signature and the admission of his signature, identifies the second, third or fourth pages, as the case may be.

Mr. Keber: I don't mean to be captious—

Justice Stephens: (Interposing) I don't suggest that you are.

Mr. Keber: My difficulty is that apparently these papers have been separated. Now the suggestion with
6282 respect to circumstantial connection is based upon the fact that certain figures happen to coincide. Where the papers came from which are now sought to be connected with each exhibit that was included in the request for admissions, it does not appear. Once they were separated, I have no way of ascertaining whether those papers that may be submitted to me at this time were the papers originally connected with these or not. They may have been connected in such a way at one time that the figures did coincide—or they might not have coincided at the time they were attached.

I have no way of ascertaining those facts, and the mere fact, therefore, that they now coincide, or may coincide, as presented to me, does not indicate that they did or did not at the time they were originally connected together, if they were.

Mr. Knuff: Answering Mr. Keber's statement as to where we obtained these exhibits, we obtained them from

the United States Gypsum Company. They are the royalty reports that were furnished United States Gypsum Company by Certain-teed. The papers, as we received them from the United States Gypsum Company, were connected. For the purpose of eliminating the photostating bill, and for getting out rather hurriedly the requests for admissions, the second, and possibly third and fourth pages, were not included.

They came from the United States Gypsum Com-
6283 pany's files, and were separated by us over in our office. They were in the form when we received them that they now appear, with possibly letters attached to them, letters of transmittal, that USG presumably had attached to them.

Justice Stephens: With respect to that type of exhibit—we are talking about Exhibits 646 to 662 now—

Justice Jackson: (Interposing) We are talking about Exhibit No. 646 at the present time, I thought.

Justice Stephens: Yes, but the objections are to Exhibits 646 to 662, inclusive, which appear over the signature of Krug, and they are all exhibits where Krug's signature and the jurat appear on the first page, are they not, unlike the Watson exhibits, where the affidavit precedes the succeeding pages?

Mr. Knuff: That is right.

Justice Stephens: So we haven't reached the Watson exhibits yet?

Mr. Knuff: That is right.

Justice Stephens: Well, it is my view, and I think the view of my colleagues, that you haven't identified yet, through the admissions or otherwise, anything except the first page which Mr. Krug signed and swore to.

Justice Jackson: What difference does it make to you, anyway? That second page is merely a breakdown, if it is, of the 5,774 square feet in the case of Exhibit No.
6284 646, is it not?

Mr. Knuff: That is right, it is a breakdown of it.

Justice Stephens: Well, are there any other objections? I suppose you make the objection also to the handwritten material on these exhibits?

Mr. Keber: Exactly, if the Court please.

Justice Stephens: They are not offered by the Government, as I understand it?

Mr. Knuff: That is right.

Mr. Keber: The objection also carries through, on

these exhibits, with respect to the date of the license agreement.

Justice Stephens: Well, the Government will probably concede that it does not rely on that particular date as stated in the title.

Mr. Knuff: That is correct.

Mr. Bromley: The other defendants object to them as incompetent because not binding on any of them, and also as immaterial and irrelevant. I do not understand again the purpose of the offer of this mass of exhibits. What does it show? I again offer to stipulate that royalties were paid by licensees.

Justice Stephens: What is the purpose of this series of exhibits? I am now talking about Exhibits 646 to 692 inclusive.

Mr. Knuff: In addition to showing that there were
6285 no sales of "seconds", this series of exhibits also shows that Certain-teed was purchasing board from outside sources. Now we tried to get Mr. Adams to stipulate that there were considerable quantities of board that were purchased, and he would not so stipulate. Then we made an effort to find out how much board they did purchase, and found these royalty statements, and if your Honors will notice, you can start in with Exhibit 647, and in that month they purchased 5,880 square feet of board; Exhibit 648 indicates that they purchased during that month, 157,625 square feet of board; Exhibit 649 indicates that during that month they purchased 162,656 square feet of board; Exhibit 650 indicates that during that month they purchased 316,573 square feet of board; Exhibit 651 indicates that they purchased 167,520 square feet of board—and so on down through, from 651 to 692 they show, by months, sizeable purchases of board from sources other than Certain-teed.

Mr. Keber: May I be heard on that?

Justice Stephens: Yes.

Mr. Keber: I had understood that Mr. Knuff's offer had to do principally with the fact that it would show, that these reports would show no "seconds" reported as having been sold.

Justice Stephens: That was what he said with respect to the series of exhibits just introduced before this
6286 group. This series which we are now discussing is introduced, as I understand it, to prove by way of

admission on the part of Certain-teed, two things: First, that "seconds" were sold up to some date and not sold thereafter; and second, to prove that board was purchased by Certain-teed from outside sources.

Mr. Keber: Well, with respect to the latter offer, it seems to me that since the exhibits are being offered specifically for the purpose of showing that Certain-teed purchased board from the outside, that that, on the face of it, shows that the exhibits that are being offered are incomplete, because on the face of these exhibits it says, for instance, "Less Purchased per Statement attached"—and since the emphasis is now being laid on the figure that is there shown, it seems to me that the reception of the exhibits without the attached statement makes it an incomplete exhibit, and therefore subject to exclusion under the rule of incompleteness.

Mr. Knuff: The statement that is attached makes it complete.

Justice Stephens: Yes, but the statement that is attached isn't identified.

Mr. Knuff: It is circumstantially identified, your Honor.

Justice Stephens: We have ruled that it is not identified.

Mr. Knuff: Well, even on the first page where it
6287 says, "Less Purchased per Statement attached", and when the second or third sheets go in, or what not, the exhibits show on their face that Certain-teed was buying board.

Justice Stephens: Is there any dispute about the fact that Certain-teed was buying board, as distinguished from the amounts which it bought? How about that, Mr. Keber?

Mr. Keber: I take it that Certain-teed was buying board.

Mr. Bromley: That has already been admitted in the record, that Certain-teed bought board.

Justice Stephens: Well, unless you are relying upon them to prove how much board was bought, I should think then, Mr. Knuff, that you wouldn't need these additional sheets to the exhibits, on that aspect. You could offer them to prove when "seconds" were sold and not sold, but so far as the purchased board was concerned, if it can be conceded by counsel for Certain-teed that board was purchased by Certain-teed between certain dates, is the amount material?

Mr. Knuff: Well, this is the first time it was conceded. We asked them to stipulate, and they wouldn't stipulate

before, we asked them to stipulate that there were substantial amounts purchased, and they wouldn't so stipulate.

We asked Mr. Whittemore on the witness stand, and he said that they purchased somewhere between a couple of dollars' worth and $500, or something like that. Mr. Adams said that he did not have the invoices, and could not
6288 find out how much board they were buying.

Justice Stephens: Well, we realize that there hasn't been a stipulation on the subject before, and therefore it was proper and necessary, indeed, for the Government to go forward with this proof; but unhappily, we all three feel that the attached statements cannot be said to be circumstantially identified because they have obviously been separated and there are so many opportunities for error, so that if you are relying upon them for exact figures, you would be obliged to identify them more satisfactorily.

But if you can now stipulate, if you think you can fairly do that, Mr. Keber, that board in substantial quantities was purchased between given dates, I should think that would take that problem of identifying those attachments out of the case, so that the exhibits could come in, so far as the first pages are concerned, on the other item of "seconds."

The Government wouldn't need to offer the attached pages because they would relate only to the amounts of purchased board, and you wouldn't be prejudiced by their not being attached, because the first pages do show that board was purchased, in something that appears to be in the nature of grand totals. I suppose the attached statements are a breakdown of types of sizes of board?

Mr. Knuff: Between board and lath.

For instance, on Exhibit 646, the second page
6289 shows that there was 3,640 square feet of 3/8-inch board, purchased, and 2,134 square feet of lath, purchased, making a total of 5,574 square feet, which is the figure appearing on the first page, 5,574 square feet of purchased board.

Justice Jackson: Well, you have it on the first page anyway?

Mr. Knuff: Yes.

Justice Stephens: Well, Mr. Keber's objection was that it is incomplete if the Government relies upon exact figures.

It begins to look, however, Mr. Keber, as if it was a little something of a tempest in a teapot. The first page, which Mr. Krug swore to on behalf of the company, does

show the purchase of board, in round numbers, and apparently what the breakdown does is to split it up as between board and lath, and sizes.

However, Mr. Adams is not here, and we don't want to press you to make any stipulation that you feel you ought not make. Will Mr. Adams be back tomorrow?

Mr. Keber: I am afraid not, sir. I expect he will be in Chicago for the balance of the week.

Justice Stephens: Maybe we will have to send out a United States Marshal and get him back here. We have got to try this case, and we have got to have someone here who can act for the defendants.

6290 Mr. Keber: I submit, if the Court pleases, that I will be glad to act for the defendants in this connection.

Justice Stephens: I realize that, and I made that comment only to indicate that if you don't feel authorized to make a stipulation, we don't want to press you to make one. That wouldn't be fair to you or to your client. But if you are not in a position either to speak or not speak for the company, then we must have someone here who can.

Justice Jackson: You are assuming that responsibility, aren't you?

Mr. Keber: So far as I am able to, I am assuming that, yes.

But the Court asked me to stipulate that Certain-teed bought "substantial amounts"—I think that was the expression the Court used.

Justice Stephens: That is right.

Mr. Keber: Now on Exhibit No. 646, taking the amount that appears there, 5,774 square feet, I shouldn't suppose that that would be "substantial".

Justice Jackson: As compared to what?

Mr. Keber: 4,579,000 square feet.

Justice Stephens: Of what?

Mr. Keber: Of board manufactured during that month.

Justice Stephens: When I used the words, "substantial amount", I was thinking in terms of what all the

6291 exhibits showed, and not suggesting that you use the term "substantial" in contradistinction to manufactured board. However, you are not bound to accept the Court's terms. That was just a suggestion in the hope of getting a stipulation.

Mr. Keber: I will be willing to stipulate that Certain-

teed bought board; I think that that is as far as I can go.

Justice Stephens: Very well.

Mr. Knuff: You see, your Honor, these are not approximate figures, they are not round figures, they are actual figures, and the second page is a breakdown of what appears on the first page.

Take, for instance, Exhibit—

Justice Jackson: (Interposing) It seems to me that since the first page is admittedly signed by Krug, and the first page, referring to Exhibit No. 646, contains the figure of 5,774 square feet of board that was purchased—that figure is on there, and Krug signed it, and I should think that it ought to come in for what it is worth; whether it is broken down or not, it is purchased board of some kind.

Mr. Knuff: That is the way I feel, and the only reason we put the second and third pages in here was to meet Mr. Bromley's "complete evidence" rule. We felt that the first page carried with it everything that we wanted in there.

6292 Justice Stephens: Well, that is very true, but unhappily you didn't serve the second, third and fourth pages, respectively, for purposes of identification.

Can you admit this? Apparently the Government does not rely upon the second, third and fourth pages of these exhibits, Mr. Keber, for anything except to satisfy the "complete evidence" rule, and it isn't relying upon them as far as the breakdown aspect is concerned. Would it be safe for you to stipulate that the amounts shown on the first pages of these exhibits represent amounts purchased by Certain-teed, amounts of board purchased?

In other words, can you satisfy yourself by examining these second, third and fourth pages, that they do represent, after all, only a breakdown which does not affect the validity of the gross figures stated on the first page?

Justice Jackson: You don't admit the correctness of those figures at all, do you, in your admissions?

Mr. Keber: I don't deny it either, I don't know. The extent of our admission, sir, was that Mr. Krug signed these on behalf of Certain-teed. Now with respect to the facts, we took a definite position. We discussed that here this morning in connection with the other exhibits. We could not admit the facts.

Now it seems to me that what I am being requested to do by Government counsel is to stipulate facts that we
6293 have already indicated we are unable to admit.

Justice Stephens: Of course, while it is true that

you don't admit these facts stated on the first page, or any other pages of these exhibits, the Government can, if it identifies the first page, and if the first page may come in evidence within the "complete evidence" rule, offer these as an admission on your part. Then, if you doubt the correctness of it, you have to offer evidence to the contrary at the proper time.

But the problem we are up against here is that unless you are willing to stipulate as to the correctness of the figures, which you apparently cannot do, and unless you are willing to admit that Krug's signature identifies the second, third and fourth pages of the exhibits as well as the first, there just isn't any proper legal identification of the second, third and fourth pages; and if you continue to insist that the first page ought not to come in unless explained by the second, third and fourth pages, then, there being no identification of the second, third and fourth pages, we are presented with a problem of admissibility that I don't see any way around.

The Government, however, Mr. Keber, is not relying upon the second, third and fourth pages. Do you really think that you need to insist upon the second, third and fourth pages being put in evidence as explanatory of the first page?

6294 If you do not, and if we could agree that the second, third and fourth pages need not be admitted, and that the first page can come in merely under your admission that the secretary, Krug, signed on behalf of the company, then we are over our problem.

Mr. Keber: Perhaps I can illustrate my difficulty, sir, by saying that as far as I know, from what we have been served with, and from what we have seen, the statements that are attached to these first pages may or may not coincide; they may or may not have coincided originally. I am faced with the possibility that a figure, shown on the first page, may not coincide with the figure shown on the second page. I just don't know.

Under those circumstances, I am reluctant to undertake the responsibility of conceding something that I don't know about. In other words, if the second page was different from the first page at the time it was submitted, then some question might exist as to the propriety of the figure on the first page, or its correctness.

Justice Jackson: As a matter of fact, Mr. Knuff, is there any such discrepancy as has been suggested?

Mr. Knuff: None.

Justice Jackson: And defendants could take advantage of it if there were such a discrepancy?

Mr. Knuff: Certainly.

6295 Justice Stephens: Could you take time, if we were to take a little extra recess this noon, to go through these second, third and fourth pages, and see if they are sufficiently related to the first page so that you wouldn't need to insist upon your objection?

I, myself, am convinced, and I think Judge Garrett agrees with me--I am not sure whether Judge Jackson does or not—that there isn't any legal identification of the second, third and fourth pages of Exhibits 646 to 662, which we are now talking about, with respect to this particular objection. Therefore, they cannot come in. And since the first page refers to them, and is incomplete without the following pages, I don't see how the first page can come in.

Justice Jackson: Well, my stand is this. If those pages, other than the first page, are identified by figures, common sense would seem to indicate that they ought to go right with the first page. If there is a discrepancy, however, or if they are not intelligible by comparison with the first page, of course they are not admissible. But otherwise I would think they are.

Justice Stephens: Well, the problem of determining whether or not they are apparently related by identification is a problem of going through every one of these exhibits very carefully, and it is something that we can hardly

6296 undertake to do on the bench. It would take hours.

Mr. Keber: I would be glad to undertake that during the lunch hour, without committing myself as to what position I will take after having examined them.

Justice Jackson: I understood from Mr. Knuff's statement that that had been done and that there are no discrepancies. Have you examined all of them, Mr. Knuff?

Mr. Knuff: Every one of them, yes sir.

Justice Stephens: That may be true, but we cannot compel the defendant to accept Mr. Knuff's statement, because no matter how much he might rely on his good faith and good judgment, there might be mistakes.

Suppose we take the noon recess now, and take it until two o'clock.

It seems to us that there isn't much likelihood of harm

being done here, Mr. Keber, if the second, third and fourth pages come in. Nevertheless, you are entitled to rely upon the rules, and I think your contentions are correct with respect to them.

So we will take a recess now until two o'clock.

(Whereupon a recess was taken at 12:00 o'clock until 2:00 o'clock p.m.)

6297 AFTERNOON SESSION

(The trial was resumed at 2:00 o'clock p. m., pursuant to recess.)

Justice Stephens: Gentlemen, have we arrived at any possible stipulation?

Mr. Keber: If the Court pleases, I have spent the noon recess, as suggested by the Court, in working on this matter.

With reference to a remark that was made this morning, I might clarify our situation somewhat by saying that with respect to these second sheets, I am advised that the company, Certain-teed Products Corporation, did not have any copies in its possession of the second sheets; and therefore, even had they been sent to us along with a request for admissions, we would probably not have been in a position to ascertain their genuineness and have thus been able to agree to that fact.

Before I turn to the next subject, I also want to make one further remark with respect to a statement made by Mr. Knuff this morning. He said, as I recollect it, that Mr. Adams had been requested, on several occasions, to stipulate with respect to the amount of board that was purchased, and that he had taken the position that it was an insignificant amount—I am just trying substantially to repeat Mr. Knuff's statement—and that Mr. Whittemore had testified that it was a very slight amount, an in-
6298 finitesimal amount. I wasn't sure, although I believed at the time—I wanted to check it up—I was quite certain that Mr. Adams had referred, when he said it was an infinitesimal amount, to metallized board; and that Mr. Whittemore's testimony in that connection, which I have looked at through the noon recess, was specific with respect to metallized lath.

Therefore, I wouldn't like to acquiesce in the statement made by Mr. Knuff with respect to what Mr. Adams was or was not prepared to stipulate.

Now with that preamble, I think we are now in a position to make the following stipulation. The stipulation is this:

On condition that Exhibits 646 through 668—that, I think, encompasses all the Krug and Laney first pages—I will begin again: On condition that Exhibits 646 through 668 be withdrawn, Certain-teed is prepared to stipulate that the first page of the monthly reports, bearing the signature of Krug and/or Laney, covering the months of February through May, 1931, inclusive; July through October, 1931, inclusive; January, 1932; March through October, 1932, inclusive; November through December, 1930, inclusive; June, 1931; November through December, 1931, inclusive; and November, 1932, contain figures indicating that the amounts of gypsum board (wallboard and lath) manufactured and sold by Certain-teed, and the amounts purchased and sold by Certain-teed, were as follows:

6299 February, 1931: Amount manufactured and sold—4,573,776 square feet; amount purchased and sold—5,774 square feet—

Justice Jackson: (Interposing) That is for the month of February?

Mr. Keber: Yes, sir, 1931.

Justice Jackson: That is as it appears on Exhibit 646, isn't it?

Mr. Keber: That is correct.

March, 1931: amount manufactured and sold—5,707,167 square feet; amount purchased and sold—5,880 square feet.

Justice Jackson: The total as I read it here is 5,713,047. Of course, it isn't very material. I was just wondering if I had the right sheet.

Mr. Keber: Do you want to pursue it?

Justice Jackson: That is on Exhibit 647?

Mr. Keber: Yes, sir.

Justice Garrett: I understand that the stipulation you are proposing to enter into is based upon the withdrawal of these exhibits?

Mr. Keber: Exactly.

Justice Garrett: So that it is not necessary for us to fool with these figures that are here and compare them, is it?

Mr. Keber: No, except to check the accuracy of
6300 my stipulation with the statements made on these exhibits.

Justice Stephens: You can check that for yourself. You go ahead and read your stipulation into the record.

Mr. Keber: Answering Judge Jackson, the figure we took was the last balance figure.

Justice Jackson: I see. I didn't see that before.

Justice Stephens: Go ahead with your stipulation.

Mr. Keber: April, 1931: amount manufactured and sold—6,156,704 square feet; amount purchased and sold—157,625 square feet.

May, 1931: amount manufactured and sold—5,788,816 square feet; amount purchased and sold—162,656 square feet.

July, 1931: amount manufactured and sold—3,926,140 square feet; amount purchased and sold—316,573 square feet.

August, 1931: amount manufactured and sold—3,315,176 square feet; amount purchased and sold—167,520 square feet.

September, 1931: amount manufactured and sold—3,716,888 square feet; amount purchased and sold—125,956 square feet.

October, 1931: amount manufactured and sold—3,954,984 square feet; amount purchased and sold—247,445 square feet.

January, 1932: amount manufactured and sold—3,424,854 square feet; amount purchased and sold—194,549 square feet.

March, 1932: amount manufactured and sold—3,126,535 square feet; amount purchased and sold—170,627 square feet.

April, 1932: amount manufactured and sold—4,
6301 067,089 square feet; amount purchased and sold—
52,612 square feet.

May, 1932: amount manufactured and sold—3,514,286 square feet; amount purchased and sold—202,539 square feet.

June, 1932: amount manufactured and sold—3,314,493 square feet; amount purchased and sold—189,885 square feet.

July, 1932: amount manufactured and sold—2,635,089 square feet; amount purchased and sold—115,285 square feet.

August, 1932: amount manufactured and sold—2,779,040 sqaure feet; amount purchased and sold—147,918 square feet.

September, 1932: amount manufactured and sold—2,839,108 square feet; amount purchased and sold—162,816 square feet.

October, 1932: amount manufactured and sold—3,663,558 square feet; amount purchased and sold—229,096 square feet.

November, 1930: amount manufactured and sold—4,662,729 square feet; amount purchased and sold—zero.

December, 1930: amount manufactured and sold—3,260,297 square feet; amount purchased and sold—17,724 square feet.

June, 1931: amount manufactured and sold—4,509,827 square feet; amount purchased and sold—403,859 square feet.

November, 1931: amount manufactured and sold—2,863,663 square feet; amount purchased and sold—214,789 square feet.

December, 1931: amount manufactured and sold—
6302 2,433,991 square feet; amount purchased and sold—84,891 square feet.

November, 1932: amount manufactured and sold—2,351,605 square feet; amount purchased and sold—195,259 square feet.

Justice Stephens: Do you, then, accept that stipulation and withdraw those exhibits, Mr. Knuff?

Mr. Knuff: May I just have a moment?

Justice Stephens: Yes.

Mr. Knuff: You see, the original offer contemplated two aspects, (1) to show that seconds were not being sold; (2) to show the amount of board that was purchased from USG and sold.

Now in so far as the stipulation goes as to the amount of board purchased and sold, although it hasn't been stipulated that it was purchased from USG, I presume that

Mr. Keber would have no objection to adding that to the stipulation, because it all came from USG. That is covered by stipulation, but it doesn't go to the first aspect. I have asked Mr. Keber if he will stipulate that during these months, no seconds were reported as being sold by Certain-teed.

Mr. Keber: Well, I think I can stipulate the following in that connection—

Justice Stephens: (Interposing) I should think you could do that, because the face of these papers, if
6303 they don't report the sales of seconds, don't report them.

What were you about to say?

Mr. Keber: It is a negative matter.

We will stipulate that these reports, those referred to in the previous stipulation, do not contain any separate reference to royalties on seconds calculated on the basis of a selling price for seconds different from the selling price of regular board.

Justice Stephens: Is that satisfactory, Mr. Knuff?

Mr. Knuff: That second stipulation covers the matter that I had in mind.

Justice Stephens: The matter of seconds?

Mr. Knuff: That is right.

Now then, I just want to be sure that the stipulation refers to purchases from USG.

Mr. Keber: Well, I don't think that I could stipulate that. I do not know that. I take it that it doesn't limit itself to the purchase of board from USG, and I have no way of ascertaining how the board was purchased.

Justice Stephens: What difference does it make to your case, Mr. Knuff, whether it was purchased from the USG or from anybody else?

Mr. Knuff: We wanted to tie this to the North Holston contract, the North Holston, the Laramie, and the other
6304 contracts that were the subject of deferred rulings and have subsequently come in.

Justice Stephens: I see.

Mr. Keber: May I just make this additional statement there? There is nothing that I see on the first pages of these documents that refers to where the material was purchased.

Justice Stephens: If that is true, Mr. Knuff, you wouldn't be any worse off with this omission to stipulate concerning USG than you would with the documents in evidence.

Mr. Knuff: Well, if the documents were in evidence in the way in which I have offered them, of course they would show where the board came from. If just the first page is in evidence, I am in no better position.

Justice Stephens: Well, we are agreed that there has been no identification of the second, third and fourth pages, so you are in that position anyway.

Mr. Knuff: Well, I take it, from what Mr. Keber has said, that there is going to be an objection concerning the exhibits beginning with 669, and Exhibit 669 is simply the affidavit itself—

Justice Jackson: (Interposing) Have we finished everything up to that?

Mr. Knuff: No, but I want to make this point: If there is going to be an objection from Exhibit 669 on, and they are just going to say that the affidavits can come in,
6305 the only thing we can do is to re-serve these papers on Mr. Adams. Now it seems to me that that is a useless waste of effort, because when we re-serve them on Mr. Adams he will come in and admit just as he did in this case—he can't do anything else—that is, that the signature appearing on the first page is the signature of Mr. Watson or Mr. Krug or Mr. Laney, whatever the signature is. He will take the same position then as he has taken now.

But if the Court thinks that he ought to see the second and third and fourth pages, we are going to let him see them. We will get the second, third and fourth pages in that way. If we have got to go ahead and serve these over again, we may as well serve the whole thing over again.

Justice Stephens: The problem is this, Mr. Knuff: We are bound to apply the rules, and we can't speculate as to what Mr. Adams will do. He may, if you serve the second, third and fourth pages on them, be willing to admit that Mr. Krug's signature on page 1 was signed in behalf of the company, and that pages 2, 3 and 4 may be treated as accompanying page 1, and therefore validated by Mr. Krug's signature. But if he doesn't do that, you will be right back where you are now.

Mr. Knuff: Well, what we can do then is to say that we got them from USG, and they are submitted here
6306 for the Court's consideration in the same condition that we got them from USG, and that is with the affidavit and then, following, the other pages. It is a highly technical position. No matter if there are 15 pages on these exhibits, they are still Mr. Watson's signature.

Justice Stephens: Provided they are the exhibits which were attached when he signed his signature. That is the problem.

Mr. Knuff: USG knows whether they are or not, because we understood they took photostats of everything they turned over to us. USG knows whether we are trying to slip something over or not. We are not trying to slip anything over.

Justice Stephens: No one suspects the Government of that, Mr. Knuff. The Court is simply in the position of having to apply the rules of evidence when they are invoked. Even though, as you assert, it seems technical to you, the defendants may feel that they have a right to require proof as to the correctness of these items, since you are going to rely upon them.

Is there anything USG can do to forward this situation, that you know of, Mr. Bromley?

Mr. Bromley: Nothing that I know of, if Your Honor pleases.

Mr. Johnston: If the Court please, may I be heard a minute?

6307 Justice Stephens: Yes.

Mr. Johnston: This class of exhibits was divided into three groups this morning. There is involved between 200 and 300 sheets. Now I presume there are a lot more of the same kind of offers. I just wonder if counsel for the Government realize the terrific additional expense they are putting us to in offering all of these, especially in view of the offer of counsel for Certain-teed to stipulate and save all of this expense in the record.

Indeed, I go further and say that it would seem to me that as to these exhibits starting with 624 up to where this stipulation starts, they should also be subject to consideration and a stipulation, and that they might be withdrawn.

Now do you realize that just this morning, one-third as many exhibits, in pages, are being offered, about, as have been offered in this entire case up to date, and I don't know where it is going to stop. The expense of this case is just mounting so terribly here, and I have a small client, and other clients are involved in this thing, and if there were some way of shortening this record and stopping this outlandish expense, I would like to see it done.

Now the Government has not helped us any at all. The Court tried to help us all that it could, but the Government

has consistently refused, all through this case, to furnish us copies of these exhibits, and refuses now, and
6308 they come in with several hundred exhibits to dump into the hopper at the last minute of the trial of this case, and I don't think that is fair, I don't think it is right to expect us to go to this enormous expense, especially as to my client, when I can't see where it means anything at all in this case, or proves anything as against the Texas Company.

I just call that to the attention of the Court in a spirit of fairness, in a matter of dividing the expense of this trial. If there is some way of shortening it, I would like to see it done.

Justice Stephens: How many more exhibits of this type have you in mind offering?

Mr. Knuff: In so far as this particular objection is concerned, it will only be from 669 to 692.

Justice Jackson: You have three more groups, haven't you?

Mr. Knuff: The same objection that has been raised will not occur in the other groups at all.

Mr. Johnston: Why not?

Justice Jackson: It seems to me that we are getting a tremendous record here, and that is what I had in my mind this morning. It seems to be not a matter at issue at all but what this defendant, and probably other defendants, have bought board and sold it, they admit it. And I think Mr. Bromley said royalties had been paid, likewise;
6309 didn't you, Mr. Bromley?

Mr. Bromley: No, sir.

Justice Jackson: Well, they admit purchasing board. Does the quantity that they purchased and sold mean anything?

Mr. Knuff: If they admit that—

Justice Jackson: (Interposing) I understood Mr. Bromley to say that this morning.

Mr. Bromley: I didn't fully apprehend your question. I have admitted that board was purchased and sold; and I have further admitted that on all board manufactured and sold, the licensees paid all the royalties due. So both facts are here without issue in the case.

Justice Jackson: That is my question, as to the necessity of putting all this in. It is going to make it a poisonously big record, I think.

Mr. Knuff: If all the defendants will admit that board has been purchased, and that there have been inter-com-

pany purchases, and that that board has been sold, we haven't any reason to—

(Mr. Knuff and Mr. Steffen confer.)

Mr. Knuff: Mr. Steffen suggested to me that the stipulation as Mr. Keber had read it here this afternoon would be satisfactory to the Government, with the further understanding that the defendants in this case have purchased board from one another.

6310 Justice Jackson: Is that a fact that they all have, that each one of them has? You said "all". Does that mean Texas?

Mr. Knuff: Texas did purchase metallized board.

Justice Jackson: Metallized board?

Mr. Knuff: Yes.

Justice Jackson: Do these exhibits include metallized board?

Mr. Knuff: They do not.

Justice Jackson: That is a horse of another color, then.

Mr. Johnston: The Court, I am sure, remembers the testimony about Texas. They made their board, took it over to another plant, and had it metallized.

Mr. Knuff: Some of it was done that way.

Mr. Johnston: Perhaps two or three small pieces, little orders, insignificant, not a thousandth of one percent of their product.

You remember that question came up on the witness stand, when they were attacking Mr. Chism's testimony before the Grand Jury, and on cross-examination that was explained very clearly, I think, on Your Honor's question, that it was board they made and took over to the plant and had metallized.

Justice Stephens: Mr. Bromley has made a stipulation for USG, and all you are dealing with now, as I

6311 understand it, under these Exhibits 646 to 668, is what you regard as purchases from USG by Certain-teed.

Mr. Knuff: That is right.

Justice Stephens: Can't you accept Mr. Keber's stipulation that far, so that we can get rid of putting into the record Exhibits 646 to 668, inclusive, and substitute for them the stipulation which he has read into the record, plus Mr. Bromley's statement concerning board purchased from USG? Then we will approach these other exhibits when we get to them. We can at least save this much.

Mr. Knuff: Yes, we can accept that.

Mr. Bromley: Of course, my stipulation did not mean that USG had sold all the licensees. I do not believe that is the fact. All I mean is that some board has been purchased and sold, by some of these defendants from some other defendants—I don't know how much or whom.

Mr. Steffen: I might make a statement in that connection, if I may.

Justice Stephens: Surely.

Mr. Steffen: We asked Mr. Bromley about two or three weeks ago—I am not sure of the date—to supply us with the figures indicating how much board, how much lath, and how much metallized board, USG had sold to any of the licensees. And I think it was left to Mr. Collins to see what could be done about that. We at that time
6312 stated that we didn't want the matter necessarily precisely down to the cent, but that we did want to know substantially how much board USG had sold to each of the different companies.

Justice Jackson: That is all board, when you say "board", including metallized board?

Mr. Steffen: Yes, and perforated lath. And I think we are entitled to ask for that generally, and I would much prefer that than just a general statement that board has been sold.

On the other hand, we do not insist on a precise showing of the exact number of board feet and the exact number of dollars and cents.

Mr. Bromley: You told us that we could find that on our ledgers, and we went to our ledgers and of course we can not find it. There is no way we can get it without going all over the millions of invoices. That we have told you, and that is the fact.

I am willing to make any reasonable guess at it, but it can only be a guess.

Mr. Steffen: That is the first time you have told us that. Will you make a reasonable guess as to the amount of board, ordinary wallboard, perforated lath, and metallized board, that has been sold by USG to its licensees? I think we are entitled to that as a matter of establishing the size of the inter-company purchases that have been made.

6313 Justice Jackson: If they can give it to you.

Mr. Steffen: If it can be obtained. If they want to offer a stipulation as to amounts, we would be very glad to consider it.

Justice Garrett: You are carrying us away from the immediate thing that is before us, Mr. Steffen.

Mr. Steffen: That is correct, Your Honor.

Justice Garrett: The immediate thing that is before us is a proposal to stipulate certain matters by Mr. Keber. Mr. Knuff has indicated his unwillingness to accept that except upon certain conditions. One of the conditions Mr. Keber states he can't agree to, because he doesn't know.

Now it just seems to me—and of course I speak only for myself, and without conference with my colleagues—that that matter ought to be disposed of, that Mr. Knuff should say yes or no.

If he says no, then clearly, as has been indicated, we will rule out every one of these exhibits. If he does accept it, we will have that much disposed of.

Mr. Steffen: I think, Your Honor, that he said yes and did accept it, and I was going on to another matter which I thought had been raised by Mr. Bromley's general statement. I wanted to make sure that it was not to be in substitution—

Justice Garrett: (Interposing) He put a condi-
6314 tion in there that Mr. Bromley should agree to something, which Mr. Bromley did agree to.

May I understand, Mr. Bromley—you agreed that royalties had been paid to the USG by Certain-teed on all board manufactured by Certain-teed under the licenses granted by USG?

Mr. Bromley: Yes, Your Honor.

Justice Garrett: Did you agree that it had been paid on all board purchased by Certain-teed and resold?

Mr. Bromley: No.

Justice Garrett: I didn't think you did, but I wanted to clearly understand that.

Justice Jackson: There is no contention that it was.

Justice Stephens: The reason I wasn't pressing counsel further, Judge Garrett, was because my understanding was that Mr. Knuff had not reached the position where he could quite accept Mr. Keber's offered stipulation, because it did not include the agreement which he wanted made that this board had been purchased from USG. Mr. Keber said he didn't know where it had been purchased, and therefore couldn't make any statement concerning that. So I thought the stipulation was not accepted. But if the stipulation as read into the record by Mr. Keber is now accepted by the Government, then we can get rid of 646 to 668. The only alternative, as we see it—as my colleague, Judge Garrett,

has stated—is that we think, under the rules of evi-
6315 dence, the second, third and fourth pages of Exhibits 646 to 662, which were the ones we were considering this morning in that aspect, have not been identified; and that since page 1 of each exhibit referred to attachments that were not identified, page 1 couldn't come in. Therefore, there would seem to be no alternative to the Government except to accept this stipulation for what value it is to the Government, or else re-serve these exhibits in complete, attached form, and attempt to get an admission, or call Mr. Krug and have the witness identify all of these, if they really amount to anything.

What we are all trying to do, I am sure, is cooperate in the interest of saving time and expense of all persons concerned. I am a little confused at this moment as to just what state the asserted stipulation is in, because I am not quite sure, in view of Mr. Steffen's statement and Mr. Knuff's statement, whether the stipulation is accepted or not.

Mr. Knuff: It is accepted.

Mr. Keber: As it was read into the record?

Mr. Knuff: As it was read into the record.

Justice Stephens: Very well.

Mr. Keber: Now I had assumed that the stipulation that had been prepared met, on all fours, the thing that Mr. Knuff was most interested in, and when I offered to so stipulate I should like to have it understood that I
6316 was taking a chance as to the accuracy of the facts, but with a sincere desire to reduce the size of the record and to meet the suggestion that the Court made this morning; and that is why I have some little difficulty, although I am somewhat new to this atmosphere here, in understanding Mr. Knuff's statement about what Mr. Adams may or may not do with respect to other exhibits. It seems to me that if I had insisted upon the objection that I made this morning,—and as Judge Garrett indicates, and as I believe the Presiding Judge did indicate—I could have kept this whole matter out of evidence. I have some difficulty, therefore, in understanding Mr. Knuff's attitude.

Justice Stephens: Now, Mr. Knuff, we want the Government to be satisfied, as well as the defendants, that its rights are being properly protected. Are you satisfied with the stipulation so far as the "seconds" item is concerned, as well as with respect to the other?

Mr. Knuff: Yes.

Justice Stephens: Very well. Then we thank you both, gentlemen, for your efforts to save time and expense.

Exhibits 646 through 668, inclusive, may be withdrawn.

(Government's Exhibits Nos. 646 through 668, inclusive, were withdrawn.)

Mr. Knuff: That leaves us with 669 to 692 to be
6317 disposed of.

Justice Stephens: That is right. Those are the Watson papers, aren't they?

Mr. Knuff: That is right, Your Honor.

Justice Stephens: They seem to be in a somewhat different category. They consist of an affidavit at the front and other papers following, which purport to have been attached. What do the admissions show with respect to that series of papers?

Mr. Knuff: What we asked Mr. Adams to admit there was that "The following statements, photostatic copies of which are attached hereto, made a part hereof, and marked Exhibits 41 through 64, were signed on behalf of Certain-teed Products Corporation by Benj. B. Watson."

Mr. Adams failed to answer that request.

I might say in connection with this that the only thing we served on Mr. Adams was page 1, that is, the affidavit itself, of each of the exhibits. We didn't serve the statements attached thereto.

If you have your Request for Admissions before you, it will begin at Exhibit 41.

Justice Jackson: That would be No. 3 in the Request?

Mr. Knuff: Yes, Your Honor.

Justice Stephens: Now what is your contention, and what is there before the Court?

Mr. Knuff: The offer of Exhibits 669 to 692, the
6318 offer in evidence.

Justice Stephens: That, in terms of the Admissions, is Exhibits—

Mr. Knuff: (Interposing) It is Item No. 3 on the Request for Admissions, and under No. 3 it includes Exhibits 41 to 64 of that item.

Justice Stephens: What do you have to say, Mr. Keber?

Mr. Keber: I object to the admission of these exhibits in evidence on the ground that no proper foundation has been laid for their receipt.

Reference has been made by Government counsel to the Request for Admissions. I presume he referred to para-

graph 3, and he said we did not respond thereto. That is correct, and the effect of that response, I take it, is that we have admitted that Benjamin B. Watson signed Exhibits 41 to 64—those are the exhibit numbers as contained in the Request for Admissions—on behalf of Certain-teed Products Corporation. That is the extent of our admission. And of course, that only goes to the papers that were attached to the notice to admit.

Justice Stephens: And those were the purported affidavits of Watson?

Mr. Keber: That is correct.

Now so far as those affidavits are concerned, they are obviously a certification, I suppose, of some other papers.

6319 Justice Stephens: Now read your answer. If we are going to have to rule on whether or not, under Rule 36, you have or have not made an admission, we will have to have it in the record. You were requested, under Request No. 3—

Mr. Keber: We just didn't do anything about No. 3, so we deemed that admitted.

Justice Stephens: I thought I read an answer here in which you stated you couldn't answer.

Mr. Keber: No, that was directed, if the Court pleases, to another item, to Item 4. Item 4 says "The statements of fact contained in Exhibits 1 through 64 are true."

Justice Stephens: I am sorry, I misunderstood this.

Mr. Keber: And our statements under sub-paragraph (c), refer to Item 4, and if you will look at the first page you will see: "1. As to Item 4, states"—and then we have various sub-paragraphs, and sub-paragraph (c), which deals with these particular exhibits, 41 through 60 it says, and it should be 41 through 64—

Justice Stephens: (Interposing) Where is your answer to Item 3?

Mr. Keber: We did not put in an answer to Item 3, intending thereby to concede Item 3.

Justice Stephens: I am sorry, I am badly confused.

Mr. Keber: Perhaps I can make that clear. As we understand the rules—

6320 Justice Stephens: (Interposing) Let's go back to the beginning, because I think the record is now in an unhappily confused condition. Let's start over again and clear both the record and the mind of the Presiding Judge.

You are offering now, as I understand it, Mr. Knuff, the exhibits which have been marked for Identification 669 through 692, inclusive?

Mr. Knuff: That is correct.

Justice Stephens: Which are the same as have been referred to in your Request for Admissions as Exhibits 41 to 64?

Mr. Knuff: Yes.

Justice Stephens: Now your Request for Admissions was as follows:

"Plaintiff, United States of America, requests the defendant, Certain-teed Products Corporation, within ten days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

• • •

"3. The following statements, photostatic copies of which are attached hereto, made a part hereof, and marked Exhibits 41 through 64, were signed on behalf of Certain-teed Products Corporation by Benj. B. Watson,"

6321 Now you say that 41 through 64, which is 24 exhibits, is the same as 669 to 692, inclusive; is that right?

Mr. Knuff: It is the same as the first pages of 669 to 692, inclusive.

Justice Stephens: That is what I mean, the first pages of 669 to 692.

Mr. Knuff: Yes.

Justice Stephens: Now your answer, Mr. Keber—you made no answer at all, you simply stood silent, did you, as to Item No. 3?

Mr. Keber: Exactly.

Justice Stephens: Intending thereby to do what?

Mr. Keber: Intending thereby to concede that Exhibits 41 through 64, or Exhibits 669 through 692—that is, the first pages thereof—were signed on behalf of Certain-teed Products Corporation by Benjamin B. Watson—and that is all.

Justice Stephens: There is no dispute, is there, between you that it was simply the first page, as these exhibits are now presented to us, to-wit, the affidavit of Watson, which was served upon you, and nothing else?

Mr. Keber: That is all that was presented to us.

Justice Stephens: Now you are objecting to the introduction of that page, as well as to the introduction of the attachments which are now presented to the Court—or what?

Mr. Keber: Yes, sir, I am objecting to both. I am
6322 objecting to it as an entire exhibit; and I am objecting to the first page—the first page specifically—on the basis that it violates the complete evidence rule. It purports to be a certification of something for which there has been no foundation laid whatever.

Justice Stephens: And the other pages, you are objecting to on the ground that they have not been identified?

Mr. Keber: That is right.

Justice Stephens: What is the position of the Government?

Mr. Knuff: The position of the Government, of course, is that we feel if we had called Mr. Watson to the witness stand and asked Mr. Watson if this was his signature, and he said that it was his signature, that that would have carried with it all the attachments that were connected to it at that time.

Justice Jackson: He would have to testify that those were the attachments, wouldn't he?

Mr. Knuff: I will say to the Court that we got them from USG, and I don't think that USG is going to say that they weren't attached at the time.

Justice Jackson: I know, but Certain-teed is the objector right now.

Mr. Knuff: They were obtained from USG, gotten from
6323 their files, and we took them apart for the purpose of photostating them; and we only served the first page on the defendant Certain-teed simply because we felt, and still feel, that that was sufficient to carry with it the attachment of it as a whole.

Mr. Keber: I don't understand that last part of it. If it was on the basis of economy—and I advert to that because I understood that to be one of Mr. Knuff's reasons—copies have now been made, and why wouldn't it have been just as easy to have made an additional copy to serve with the Request for Admissions?

Justice Stephens: Apart from that, if you had Watson on the witness stand and asked him to identify the first page of these exhibits and identify his signature thereon, and he did, but the other pages were not then attached, we couldn't rule, even if he was here in the court room, that that identified the pages later attached, and you are in no

better position in respect of your service under Rule 36—

Mr. Knuff: (Interposing) These pages were attached, Your Honor.

Justice Stephens: Not when they were submitted to Certain-teed.

Mr. Knuff: No.

Justice Stephens: We understand that nothing was served upon the defendant Certain-teed, in this group of exhibits, except the purported affidavit of Watson,
6324 with nothing attached to it.

Mr. Knuff: That is right.

Justice Stephens: We think the standing silent of Certain-teed under Rule 36 does not carry with it a sufficient identification of the attachments which are now attached to these affidavits, to bring them into evidence.

All you admitted, Mr. Keber, was that Watson had signed those affidavits which were served upon you, in behalf of Certain-teed. That is right, isn't it?

Mr. Keber: That is right.

Justice Stephens: That is your contention?

Mr. Keber: Yes.

Justice Stephens: And you contend that, now that you are confronted in the court room with certain attachments, you have a right to object to the competency of both the affidavit as identified by your silence, and to the attachments, because the affidavit itself is incomplete, on its face, since it refers to attachments which you hadn't seen at the time these first pages were served upon you, and the attachments can't come into evidence now because they are not identified?

Mr. Keber: Exactly.

Justice Stephens: We don't see any escape from that, Mr. Knuff.

Where is Mr. Watson?

6325 Mr. Knuff: I don't know where he is.

What we will do is just serve these over, that is all.

(Discussion off the record.)

Justice Stephens: For the time being, we reject the offer of Exhibits 669 to 692, inclusive, with leave to the Government to re-offer them if it can furnish better identification or foundation for them.

Mr. Johnston: If the Court please, before we get too far away from it, I would like the record to show that that stipulation is not binding in any way upon Texas or Gloyd.

Justice Stephens: The Court doesn't construe it as binding upon anyone but the persons who made it.

We will take a recess of five minutes at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Mr. Knuff: We would like at this time to have marked for Identification Government's Exhibit 693, the same being a letter dated September 11, 1931, addressed to Mr. C. Henning, and signed M. H. Baker, President.

(The document referred to was marked as Government's Exhibit No. 693 for Identification.)

Mr. Finck: Will you please give me the number of the exhibit that you had marked on the one you sent?

Mr. Knuff: Exhibit No. 5, Mr. Finck.

6326 Mr. Finck: Thank you.

(Discussion off the record.)

Justice Garrett: Now National admitted to a lot of these exhibits. I don't remember now which ones. They are all set out in the answer. Is it necessary to go through all of those that they admitted? Couldn't you give them to us in a bunch? Or is there some question, was there a string tied to their admission in any way, Mr. Finck?

Mr. Finck: Only as to what was marked originally No. 5. There we do not admit the writing on the margin.

Justice Stephens: This is what is described, in terms of the Request for Admissions, as Exhibit 5, isn't it?

Mr. Knuff: That is right.

Justice Stephens: And it is covered by paragraph 4 of the answer, is it?

Mr. Knuff: Yes, Your Honor.

Justice Stephens: Let me see what the request was.

Mr. Knuff: The request was:

"M. H. Baker, president of National Gypsum Company, on or about September 11, 1931, sent a letter to C. Henning, United States Gypsum Company, Chicago, Illinois. A photostatic copy of said letter is attached hereto, made a part hereof, and marked Exhibit 5."

Justice Stephens: That is Item 5 that you are reading from?

6327 Mr. Knuff: That is right, item 5 of our request.

The answer is contained in Paragraph 4 of National's answer, and it reads as follows:

"4. Admit Item 5, except that the notations in writing on the letter did not appear on the original document which was sent."

In other words, the pencil notations did not appear on the original document, and we don't contend that they were on the original document, and we are not offering the writing that is on Exhibit 693.

However, in conjunction with Exhibit 693, I want to call your Honor's attention to Government's Exhibit No. 35, page 502 under the heading of "Buffalo", which appears about an inch and a half from the bottom of the page. There you will notice the words, "Erie, Niagara, Orleans, Genessee, Monroe Counties, New York".

Now the bulletin immediately preceding the bulletin of September 18, 1931, which is page 502 of Government's Exhibit 35, is the bulletin of June 27, 1931, which is Government's Exhibit 35 at page 504, and under the subject or heading "Buffalo", at the bottom of the page, you will find that the counties of Niagara and Erie are mentioned.

I call your Honor's attention to that in view of the writing that is on the bottom of the page.

Justice Stephens: Are you offering Exhibit 693?

6328 Mr. Knuff: Yes.

Justice Stephens: Is there any objection?

Mr. Finck: Yes, your Honor. I object to the exhibit as showing—that is, if anything is to be admitted in evidence, it should be admitted without the writing appearing in the margin. The Government has not asked us anything about the writing in the margin. If they had, we would have answered the question.

The only fact that they have sought admission of was the one as to whether or not this letter, dated so and so, was sent by Baker to Henning, and we have admitted that.

Now, as I understand it, that is received in evidence for that purpose only, as to that fact, not as to anything else that is on the letter.

Mr. Knuff: I am simply calling your Honor's attention to something that is already in evidence—

Justice Jackson: (Interposing) That might properly be done in a brief at the proper time, might it not?

Mr. Knuff: I think you ought to catch it at this time, so as to have the continuity.

Justice Stephens: If you are asking us, in admitting this exhibit, to give consideration to the long-hand nota-

tions, one of them at the left, opposite the first paragraph of the letter of September 11th, and one at the bottom, written crosswise, if you are trying to get those in
6329 evidence because of their circumstantial relation to something already in evidence, we will have to pass on that now.

Mr. Knuff: I am not offering that. I am calling your Honors' attention to Government Exhibit 35, first to page 504, where, under "Buffalo", you will find the counties of Niagara and Erie named; then to the next bulletin, the bulletin of September 18, 1931, which is Government's Exhibit 35 at page 502, under the heading, "Buffalo", where you will find the counties of Erie, Niagara, Orleans, Genessee and Monroe, named. And I call your Honors' attention to the fact that Rochester is in Monroe County, New York.

Mr. Finck: If the Court please, I object to the remarks of Government counsel and move that they be stricken from the record, because I am certainly not bound by any statements put on this letter, which letter I have admitted, where these statements were put on by other persons.

Justice Stephens: We don't think we have any right to consider, gentlemen of the Government, anything written on these letters in long-hand, in view of Mr. Finck's limited admission for National, unless you call someone to demonstrate who wrote it, and identify it.

In other words, what you are doing is offering this exhibit only for the typewritten portion, but you are, in addition to that, assuming to call our attention to something in handwriting on it because of its alleged
6330 relationship to previous exhibits, and yet we have no right to consider it because it isn't in evidence.

Mr. Knuff: I would be willing to have something placed over this handwriting, I am not offering this handwriting. I am offering it in connection with Government Exhibit No. 35, at page—

Justice Stephens: (Interposing) I think we all misunderstood you, Mr. Knuff. We thought you were trying to connect up the longhand-written material on Exhibit No. 693 with Exhibit 35, and that did not seem to us anything that we could properly consider. But if you are not doing that, that is over with.

Now, is there any other objection—if Exhibit No. 693 is offered, Mr. Finck, only for the typewritten portion to

which your admission relates, have you any other objection to its being admitted in evidence?

Mr. Finck: I have none.

Mr. Bromley: And the defendants, other than National, object to it as incompetent because not binding upon them, and also as immaterial and irrelevant to any issue in the case.

Justice Stephens: What is its relevance and materiality, Mr. Knuff?

Mr. Knuff: It is relevant and material because it shows on its face that what National was doing here was
6331 asking the United States Gypsum Company to have certain territory included in the bulletins. Now we say that that shows, on its face, that the bulletins were not just the bulletins of USG alone, but were the bulletins of USG, plus the suggestions from the rest of the industry.

Mr. Finck: If the Court please, just to amend my previous answer to your question, I would also like to note, for National and Baker, that we do object to this letter as irrelevant and immaterial, in addition to the objection I previously raised.

Mr. Bromley: In response to the proffer of Government counsel, I thought it was understood by everyone that under the license agreement between the licensor and the licensee, the licensor could not sell on any terms more favorable than he permitted his licensees to. If we were making a price for truckload deliveries someplace, and were not according that privilege to the licensees, the licensor had the obligation of according that same privilege. Here it was called to our attention under the terms of the license, as the licensee had the perfect right to do, and it was our obligation not to ourselves sell at any other or different or more favorable terms than those at which we permitted our licensees to sell.

The charge with respect to it is just the performance of our obligation under the license, as I see it.

6332 Justice Stephens: Now, as to relevance and materiality, we overrule the objection. We think the objection as just stated requires us at the present time to determine the exhibit's weight, or meaning, whereas we will have to determine that in the light of all the evidence; so that objection is overruled.

Now, the objection by Mr. Bromley, for USG and the other defendants, that it is not binding upon anyone other than National, has not yet been ruled upon.

I suppose that raises the usual point that the declaration of an alleged co-conspirator is not to be binding upon others until a conspiracy is shown aliunde, and it is shown to be in furtherance or execution of that conspiracy.

Mr. Bromley: I meant it to cover the point that we raised on Friday, that National's admission as to the authenticity of this document does not bind any of the defendants, other than National.

Justice Stephens: We ruled that that was correct, and this is not received as binding upon anyone but National, unless it should be, in some manner, shown to be in furtherance or execution of the conspiracy, and the conspiracy is shown aliunde the declaration.

Mr. Bromley: Of course, our position is that this type of admission, made in a courtroom, can never be connected up with the other defendants, even though there be
6333 prima facie evidence of a conspiracy adduced at some time in the future, because this is only National's admission here in the courtroom, that this is an authentic document, and not ours.

Mr. Johnston: If the Court please—

Justice Stephens: (Interposing) Just a minute, one at a time, Mr. Johnston. You are drawing a distinction, between the admission of authenticity, and the admission—

Mr. Bromley: (Interposing) —if any, in the document.

Justice Stephens: (Continuing) —if any, in the document.

Mr. Bromley: Yes.

Justice Stephens: Well, so far as the admission of authenticity is concerned, I should think that couldn't bind anyone except National.

Mr. Bromley: That is right, your Honor.

Justice Stephens: Unless my colleagues disagree with me, I would so rule, and do so rule.

As to the asserted admissions of the document, they are received subject to the usual reservation with respect to declarations of co-conspirators.

(Government's Exhibit No. 693 for identification was admitted in evidence for a limited purpose.)

Mr. Johnston: I just wanted to call the Court's
6334 attention to the fact that this group of exhibits, signed by Mr. Baker, in some instances, and by Mr. Burley in others, which latter ones we are coming to, so

I will direct my remarks to both of them that permitting these to go in under these circumstances denies us the right to examine these witnesses, and I understand the gentlemen are both alive, and one or both of them under subpoena, and why weren't they brought here so that they could be examined about these, and so we could cross-examine them?

I just don't understand the technique of the thing. I think it is manifestly unfair to offer to put these in and deny us the right to cross-examine.

Justice Stephens: Well, we are ruling that as far as their authenticity is concerned, the admission of authenticity does not bind you. Therefore the document isn't good as against you. That is the reason that ruling is made, that you have been denied the right of cross-examination by not producing these witnesses, and therefore the admission can only bind the person making it, to-wit, the admission of authenticity. How are you harmed, then?

Mr. Johnston: Not unless they attempt later to use these against us. If the record may show that under no circumstances could any of these exhibits, this one, for instance, and others similar, in any manner, bind Texas, then I am satisfied—whatever the other evidence may be.

6335 Justice Stephens: We have ruled clearly, we have just finished ruling, at Mr. Bromley's insistence, that so far as the admission of authenticity is concerned, this document does not bind anybody but National. So it isn't proved, it isn't identified, as against anybody but National.

Mr. Bromley: I think Mr. Johnston's difficulty may arise from the fact that I perhaps led your Honor to say that insofar as the admissions in this document, if any, are concerned, they might be considered as a declaration of a co-conspirator. I think Mr. Johnston feels, and I know I do, that if the Government adopts this technique of trying to put these papers in, based on the admission of the party who wrote them as to authenticity, that that means that they never thereafter can use the admission, if any in the document, as against anybody except, in this case, National.

That is the penalty that they incur for this type of procedure, and I think your Honor, in drawing the distinction that I attempted to make, between the admission of authenticity and the admission, if any, of fact in the document, did not mean to say that the admission, if any, in the

document, could ever become binding upon anybody, any more than the admission of authenticity could.

Justice Stephens: Not unless the authenticity is in some other manner established, so that there would be the
6336 right of cross-examination in respect of it.

Mr. Bromley: That is what I assumed you had in mind.

Justice Stephens: Perhaps the Court has been unduly cautious in continuing to reiterate this usual reservation, but it is my understanding that an admission is binding upon no one but the person admitting it, whether made in the courtroom or out of the courtroom, or where. The only admission we have here is an admission of authenticity of this document. Now that is binding upon National, and it therefore binds National so far as the contents of the document are concerned. It doesn't bind anyone else because it hasn't been admitted to be authentic in any manner which could bind anyone but National.

The hearsay rule is still operating, and an admission is an exception to the hearsay rule, but it is an exception only as against the person who makes the admission.

If the Government wishes to have the advantage of using these documents against defendants other than National, it ought to call Baker, Burley, and such other persons as wrote them, and put them on the witness stand.

Mr. Knuff: I would like at this time to offer in evidence Government's Exhibit No. 344, the same being a memorandum dated December 16, 1932, purporting to be signed by M. H. Baker, and addressed to R. F. Burley.

Justice Jackson: That has been offered before,
6337 hasn't it?

Mr. Knuff: It was offered in conjunction with Mr. Higgins' testimony when he was on the witness stand. We asked Mr. Higgins if he could identify the initials, E.B.B. at the top of the exhibit, and Mr. Higgins said he knew who those initials belonged to, but he couldn't tell whether they were in Mr. Biesinger's handwriting or not.

Justice Stephens: Is this covered by some admission, Mr. Knuff?

Mr. Knuff: Yes, it is Item No. 6 of our requests for admissions. That item reads as follows:

"6. M. H. Baker, president of National Gypsum Company, on or about December 16, 1932, sent an inter-office memorandum to R. F. Burley. A photostatic copy of said memo-

randum is attached hereto, made a part hereof, and marked Exhibit 6."

The answer of Mr. Finck concerning this, is contained in Paragraph 5, and reads as follows:

"5. Cannot truthfully either admit or deny that M. H. Baker, on or about December 16, 1932, sent an inter-office memorandum to R. F. Burley, referred to as Exhibit 6 in Government's Request for Admissions, for the reason that M. H. Baker does not recall writing the memorandum, nor does R. F. Burley recall receiving the same, and that a reading of the memorandum does not refresh the recollection of M. H. Baker and R. F. Burley that they have
6338 seen such exhibit, nor have either of them any knowledge of the meaning of the contents thereof. Defendant admits that said Exhibit was taken from the files of the National Gypsum Company, and that R. F. Burley, who was in charge of sales of the National Gypsum Company on December 16, 1932, can identify the initials in the upper right-hand corner, 'E.B.B.—Your file', as his writing."

Where you say the "upper right-hand corner" there, you mean the upper left-hand corner, do you not, Mr. Finck?

Mr. Finck: I will speak for myself.

If the Court please, we object to the admission of this, and we have so stated in our answer, that we cannot truthfully either admit or deny that this exhibit was communicated by Baker to Burley. That, in my opinion, is a denial. The rest of the answer is simply a statement of the reasons why we did not admit it. The admissions therein stated, I presume, are not admissible here.

If they want to call Baker or Mr. Burley to tell the story, then that will be evidence.

Justice Stephens: Are you offering Exhibit No. 344?

Mr. Knuff: Yes, your Honor.

Justice Stephens: Do you wish to be heard as to whether or not it is admissible in view of Rule 36, Mr. Knuff?

Mr. Knuff: Yes, I would like to be heard, your Honor, in this connection.

6339 We say now at this time that this exhibit is circumstantially identified by the matters that are contained in the answer to our request for admissions. That is, that this was taken from the file of National Gypsum Company; that the initials in the upper left-hand corner, "E.B.B.—your file" are in the handwriting of Mr. Burley.

Now, the Court has repeatedly said that that circumstantially identifies the document. They have said that in connection with some of the exhibits that Mr. C. O. Brown identified. He had his initials up there.

When you consider that this is on the letterhead of the National Gypsum Company, and when it was taken from their files, when it is admitted that the initials "E.B.B." are in Mr. Burley's handwriting, I think that that is circumstantially sufficient at this time to admit it in evidence. It is not denied at all that it was taken from their files, in fact it is admitted that it was taken from their files. It is not denied that Mr. Baker sent it, it is neither admitted nor denied.

Mr. Finck: If the Court please, this seems to be a roundabout way of getting the circumstantial evidence upon which this document may be admitted. The only admission that I make as, for instance, to the initials in the upper left-hand corner, is in the reason that I give for not being able to admit the authenticity of the document. I do not
6340 admit, under any circumstances, that Baker sent this memorandum to Burley, but I give as my reasons the various facts that I set forth in my answer.

Now, the facts that I set forth for my reasons certainly should not be taken now to circumstantially identify the document. If they want to identify the document any further, it seems to me they should call a witness.

Now these men, both Baker and Burley, have been shown this document; they know nothing about it; they say that the facts therein contained are not true; that these facts certainly did not happen; and they can't remember anything about it; they can't remember writing it; and they can't remember seeing it.

Justice Jackson: But Burley evidently received it.

Mr. Finck: Burley evidently marked it for filing.

Justice Jackson: Well, he received it or he couldn't have marked it.

Mr. Finck: Well, he doesn't remember it anyway, and I have gone just as far as I can in my reasons, and I am perfectly willing that this be admitted, subject to the conditions that I have set forth in my answer. That is all they could say.

Justice Stephens: You say you are willing it should be admitted, subject to the conditions set forth in Paragraph 5 of your answer?

6341 Mr. Finck: I would rather have Baker come here and testify and tell about it.

Mr. Knuff: Mr. Baker couldn't add anything to it, if what is said in the answer is correct, according to Mr. Finck. He says Baker or Burley do not remember anything about it—

Mr. Finck: (Interposing) They remember this about it, they remember that the statements of fact in this document, in the second paragraph particularly, are not so.

Mr. Knuff: That goes to the weight of the document, not to its admissibility.

Mr. Finck: That goes to the document itself.

(The Justices conferred.)

Justice Stephens: I think we have a disagreement here, although I am not sure what Judge Jackson's views are—

Justice Jackson: (Interposing) I will state my own views.

Justice Stephens: Judge Garrett and I are of the view that you haven't laid any foundation for admitting this proposed Exhibit 344.

Rule 36 says that the person upon whom the request for admissions is served must reply within a given time by, "a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot either truthfully admit or
6342 deny those matters."

By reading the whole of Paragraph 5 of National's answer, it seems to us that it is, in effect, a statement of why National cannot either truthfully admit or deny that M. H. Baker, on or about December 16, 1932, sent an inter-office memorandum to Burley, referred to as Exhibit 6 in the Government's request for admissions—and that is all that you asked to be admitted. You didn't ask for any admission concerning the handwriting which appears in the upper left-hand corner, and even the admission made is simply an admission as to what Mr. Burley can do by way of identifying these.

It isn't an admission that he does identify them.

So I am of the view, and I think Judge Garrett agrees with me, that there isn't any foundation laid under this Rule. Judge Jackson may have a different view.

Justice Jackson: I have, decidedly.

This is an inter-office memorandum between two officers of National, on their regular form. It is directed to R. F. Burley, and purports to have been sent by M. H. Baker.

I think that the ruling of the majority is just shaving the rules of evidence too fine. There is no question in my mind that the admission in its last line here, that Mr. Burley can identify, "E.B.B.—your file", as his handwriting, means that he wrote it. I can't put any other
6343 construction on it. He evidently routed it to Mr. E.B.B., whoever that was. He couldn't have done that without receiving it. Strangers aren't sending in these inter-office memoranda to Mr. Burley.

For the reasons I have just stated I think it should be admitted. As to its weight, I don't know.

I think my view is reasonable.

Mr. Finck: I want to be reasonable in this too. All I was asked to admit was whether Baker sent this inter-office memorandum to Burley. I couldn't do that. So therefore I had to give a reason for it. So really all I am doing here under the Rule is denying the request for the admission.

Justice Jackson: But you have gratuitously admitted, in effect, that Mr. Burley wrote, "E.B.B.—your file".

Mr. Finck: As one of my reasons for not being able to admit or deny it. I stated the full facts. It seems to me that I have gone as far as I can, although I do not admit the request which was made of me by the Government.

Justice Jackson: Well, the ruling is in, anyway.

Justice Garrett: Baker is a defendant in this case. He was not called upon for any admission here, was he, just Certain-teed?

Mr. Knuff: We call upon Mr. Baker's company, and Mr. Baker's company made the admission that Mr. Finck has just stated here. We didn't ask Certain-teed to admit
6344 something National did. Even if we had called Baker, according to the answer here, we wouldn't have gotten any more than we have already gotten. He says he doesn't remember the document. All I can say is that there have been quite a number of documents that have come in simply on that basis.

Take for instance a document with the initials, "A.W.", meaning Audenreid Whittemore, on them. Mr. Whittemore testified that he didn't remember the subject matter of the document, but that those were his initials.

Justice Stephens: Mr. Knuff, with respect to my col-

league's statement that the majority is cutting the rules of evidence too fine—

Justice Jackson: (Interposing) In this case.

Justice Stephens: (Continuing) I understand that that is exactly what you meant, and I take it entirely in good part—but in view of the fact that you have made that statement, I should like to state a little more just why this thing strikes me as it does.

You, Mr. Knuff, have either got to call Baker to identify this document, or else you have got to get an admission from the other side as to what it is. Now all you asked the other side to admit was that M. H. Baker, president of National Gypsum Company, on or about December 16, 1932, sent an inter-office memorandum to R. F. Burley, and you referred to a photostatic copy.

6345 Now your opponent did not admit that, and he gave reasons why he couldn't admit it. It seems to me that that is the end of it.

Justice Jackson: But he did make an admission that those initials were written by Burley, and that that is his handwriting. He didn't have to do that, but he did it.

Justice Stephens: I don't agree with my colleague. What the admission says is, that he can identify his initials, implying that if he were called to the witness stand he could identify them. I don't understand it to be an admission that he has identified them for the purpose of this case.

I think the purport of the majority ruling is that Rule 36 provides for an extra-judicial proceeding. We have nothing to do with it, on the Court, except to find out, after the requests for admissions have been made, and the replies brought in, after they are brought to our attention, whether or not such replies constitute admissions of what was sought to be admitted. And I think it clearly does not, in this instance.

Exhibit 344 is not received in evidence.

Mr. Knuff: I would like at this time to have marked for identification, Government's Exhibit 694.

6346 (The document referred to was marked Government's Exhibit No. 694 for identification.)

Mr. Knuff: This is a copy of a letter, dated March 22, 1935, addressed to Mr. Ed. H. Diegel, General Sales Manager, Ebsary Gypsum Company, and signed, "Vice President."

I would like at this time to offer Exhibit No. 694 in evidence.

In connection with this exhibit, we asked National, under Paragraph 8, to admit that:

"8. R. F. Burley, vice-president of National Gypsum Company, on or about March 22, 1935, sent a letter to Ed. H. Diegel, general sales manager, Ebsary Gypsum Company, New York City. A photostatic copy of said letter is attached hereto, made a part hereof, and marked Exhibit 8."

The answer of National is contained in Paragraph 6, which states,

"Admits 7, 8, 9", and so forth.

Justice Stephens: Is there any objection, Mr. Finck?

Mr. Finck: Only that it is irrelevant and immaterial, and not binding in any respect on the defendant Baker, because this request for admissions is not addressed to Baker.

Mr. Bromley: The defendants, other than National, object to it as incompetent because not binding upon them.

6347 Justice Stephens: What is the materiality and relevance of this to the issues in the case?

Mr. Knuff: On page 29 of the Complaint, in Paragraph 114, the last sentence states:

"Notwithstanding said facts, USG required its licensees to execute said agreements in order to be enabled to purchase metallized board for resale to dealers and consumers."

Now, if you will read the third paragraph of the letter, you will see that it says,

"Can't you get ahold of Mr. Ebsary—"

Justice Stephens: Just call our attention to it, because it is not in the record yet. What sentence is it?

Mr. Knuff: The second sentence in the third paragraph, beginning with the word, "Can't".

Justice Stephens: This purports to be signed by Burley of National, doesn't it? I mean it purports to have been sent by Burley of National.

Mr. Knuff: Yes, your Honor, to Mr. Diegel of the Ebsary Gypsum Company.

Justice Stephens: State what it is you intend to prove by the letter? We are in doubt about it. We don't quite

see--at least I don't, and I don't think my colleagues do—just what you intend to prove by it.

Mr. Knuff: Well, beginning with paragraph 133—

Justice Stephens: (Interposing) We have read
6348 paragraph 114 carefully, and we have read the letter carefully. Tell us what it is you intend to prove by the letter.

Mr. Knuff: What we said in Paragraph 114.

Justice Stephens: How does it tend to prove that? We are having trouble seeing the logical relation of that to the pleading.

Mr. Knuff: "Can't you get ahold of Mr. Ebsary and have him sign this license right away? Mr. Baker wants to work cooperatively with Mr. Ebsary on this so you will not be penalized when one of your customers want foil included in the car, but, as explained to you, we can't extend the 12½% discount until Mr. Ebsary signs the foil license."

Mr. Johnston: If the Court pleases, I think that ought to go out of the record. It is not in evidence and they should not be permitted to read it in, particularly after the Court has stated that it should not be read into the record.

Justice Stephens: It may go out if we do not admit the exhibit in evidence.

What I am trying to get you to do is not to read either the complaint or the exhibit to us, we have read both of those carefully two or three times. Just assume we know the contents of the complaint and the letter, and make an argument, if you care to, as to how the contents of the letter tend to prove the allegations of Paragraph 114. I
6349 don't see it yet. Maybe one of our difficulties is that at this state of the Government's case, perhaps inevitably, it is shifting from one issue to another, and we don't have in mind the background of the particular issue that you are now dealing with.

Mr. Knuff: In Paragraph 114 we said that at the time the foil license agreement was executed, none of the licensees, except National, intended to manufacture foil board, but that all of the licensees intended to purchase metallized board from USG or National, but notwithstanding the fact that none of the licensees intended to manufacture this board, USG nevertheless required the licensees to sign the foil license agreement, in spite of the fact that they did not intend to manufacture the foil board.

Now the letter of Mr. Burley says exactly that, that

we can't sell this to you at a discount until you sign the foil board license.

Justice Stephens: But what does that prove; how does that tend to prove that USG was trying to compel Ebsary to take a license? That is what puzzles me: It may show that Baker of National was trying to get Ebsary to take a license, but how does it show that USG was trying to get them to take a license?

Mr. Knuff: Economic pressure—they couldn't get the discount until they signed the license.

Justice Stephens: But the charge in Paragraph
6350 114 is that USG required its licensees to execute these agreements. How do Baker's overtures to Diegel, of Ebsary, prove anything against USG? I just don't understand it, that is all. Maybe I am slow about the point.

Justice Jackson: USG, of course, was the only licensor of this board, that these people were concerned in?

Mr. Knuff: That is right.

Justice Jackson: Of the foil license?

Mr. Knuff: Yes.

Justice Jackson: So if Ebsary was to sign the foil license, it would have to be the foil license of USG?

Mr. Knuff: That is right.

Justice Stephens: Yes, that is right, but the charge in the complaint is that it was under USG's compulsion that these licenses were being taken out.

Mr. Knuff: I think the connection will appear when we come to the letter of October 24, 1935.

Justice Stephens: That is farther down in the list of exhibits?

Mr. Knuff: Yes.

Justice Stephens: Well, we will have to suspend at this time until tomorrow morning.

(Whereupon, a recess was taken at 4:00 o'clock p.m. until 10:00 o'clock a.m., April 18, 1944.)

6351 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Tuesday, April 18, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

6356 Justice Stephens: That is right.

At the adjournment, we were discussing the admissibility of proposed Exhibit—

Mr. Knuff: (Interposing) Before we come to that, I have something else I would like to speak about.

Mr. Keber: May I be heard for just a moment? I

don't know whether this is too late to do this, but yesterday in connection with the receipt of Exhibits 624 to 640, other defendants noted an objection as to their incompetency, as not binding upon them, not having been properly identified.

Now we represent, in addition to Certain-teed, Henry J. Hartley. The admission with respect to the Krug signature, and that it was signed on behalf of Certain-teed, was made only by Certain-teed in response to a request for admissions addressed only to Certain-teed, and therefore I presume that I should have moved at that time, or objected at that time to its competency against Henry J. Hartley, whom we also represent. If it is not too late, I should like to note that objection for the protection of Mr. Hartley.

Justice Stephens: That is, you are taking the same position that the defendants have taken with respect to these other exhibits, that the admission of the Krug signature is binding only upon the person who made the admission, to-wit, Certain-teed itself, as a company?

6357 Mr. Keber: Precisely.

Justice Stephens: Is there any objection to having that objection made now, Mr. Knuff?

Mr. Knuff: No.

Justice Stephens: That objection may be recorded, and it is sustained. The exhibit is received, as has already been stated, only as binding upon Certain-teed.

Mr. Keber: Thank you, sir.

I think the record reflects the fact that my stipulation yesterday was only on behalf of Certain-teed and not on behalf of Mr. Hartley. I should like to have that understood.

Justice Stephens: That may be understood.

Mr. Finck: If the Court please, the same condition exists with respect to Baker, in connection with the admissions that we are now making for National. If it is agreeable to the Court, I would like to have a continuing objection on behalf of Baker as to the competency of all these admissions.

Justice Stephens: I think you really are protected already, gentlemen, because the Court has ruled that an exhibit served and introduced under Rule 36 is binding, so far as the authenticity of the signature admitted is concerned, only upon the legal person making the admis-

sion. But you may record your objection on behalf
6358 of Baker, and it is ruled that the exhibits to which you have reference, Mr. Finck, are binding only upon the company.

Mr. Finck: Thank you.

Mr. Knuff: Yesterday afternoon, I thought that I understood the ruling of the Court on Exhibit 693. However, upon reading the transcript of the testimony last night, I find that I am not sure whether I do understand what Your Honors ruled yesterday.

Justice Stephens: Where is the ruling?

Mr. Knuff: The ruling starts on page 6621 of the transcript, and continues over to 6625.

I would like to say a few words, make a very brief statement, as to the Government's position with respect to—

Justice Stephens: (Interposing) Before you do that, let me refresh my recollection on the matter.

Mr. Knuff: It starts at line 14, page 6621. I believe that would be the logical place to start in order to get the background of the objection.

Justice Stephens: Yes, but to get my recollection refreshed, I will have to go back and see where the exhibit was first referred to.

If it wasn't made clear, the Court's correction on page 6621, in line 3, Mr. Grover, changing the word "its" to "the exhibit's", was the singular possessive of "ex-
6359 hibit", not the plural possessive. Judge Jackson misunderstood me on that, or else I didn't express myself clearly.

Now where do we start talking about Exhibit 693?

Mr. Oliver: It was marked at page 6614.

Justice Stephens: Very well, Mr. Knuff, proceed.

Mr. Knuff: In the Government's request for admissions directed to National, asking National to admit the authenticity of certain documents, in paragraph 5 of that request we asked National to admit that:

"M. H. Baker, president of National Gypsum Company, on or about September 11, 1931, sent a letter to C. Henning, United States Gypsum Company, Chicago, Illinois. A photostatic copy of said letter is attached hereto, made a part hereof, and marked Exhibit 5."

And we attached to that a copy of the letter, and we marked that as Exhibit No. 5.

In the answer of National to that request, National, in paragraph 4, states:

"Admits Item 5, except that the notations in writing on the letter did not appear on the original document which was sent."

The Government takes the position that there is no favored way of proving the authenticity of any document. We can prove the genuineness of a document in many ways.

First, we can call the writer of the document to
6360 the witness stand to admit that he wrote the document—

Justice Stephens: (Interposing) Are you talking about the longhand note on the letter?

Mr. Knuff: No, I am not. I am talking about the proving of the document.

Justice Jackson: All right, go ahead.

Mr. Knuff: We can prove by someone who knew Mr. Baker's handwriting that that is Mr. Baker's signature.

Or, we could call a handwriting expert and have the handwriting expert testify, from an examination of admitted original documents, that the signature appearing on Government's Exhibit 693 is the signature of Mr. Baker.

Or, we could prove it by calling someone to the witness stand who saw Mr. Baker sign this particular document. Perhaps in this case it would be Mildred Parker, who was Mr. Baker's secretary at that time.

Or, we can prove the genuineness of the document by an admission. That admission can take many forms. If the document was included in the pleadings, and the answer of the defendant admitted the genuineness of the document, that would prove the document.

On the other hand, if this document came up in another proceeding, and Mr. Baker had said in those other proceedings that "This is my signature", we could prove it in that way.

6361 Or, we can do what we did here and utilize Rule 36, which says that the opposing party can call upon the other party to admit the genuineness of the signature.

In other words, there isn't any standard way of proving the genuineness of a document. What we are interested in is the genuineness of the document, its authenticity. We are not interested in, I take it, the manner in which we prove it. If we prove that this is a genuine document, irrespective of how we prove it, then that is an accredited

document and that document should be considered as a proven document, just like any other document.

In other words, there are no degrees of credibility to a document. If we prove a document one way, by calling the writer of the document, the document could be certainly admitted. If we prove the document in another way, not by calling the writer, not by calling any witness, it is still an accredited document. If it is an accredited document, it is entitled to all the attributes of a genuine document.

Now when we prove, as we have here, by the admission of the defendant National, that this is a genuine document, the document proves either an admission or a declaration, whatever is contained in the document. In this case we say that there is contained in this document an admission of a co-conspirator, and that admission, then, can be
6362 used against all the other co-conspirators. By adopting this rule, and by utilizing Rule 36, we do not—Mr. Bromley to the contrary notwithstanding—incur any penalty.

Mr. Bromley says, on page 6624, that we incur a penalty, that the contents of the document can not be considered as an admission of a co-conspirator. I say there is nothing in the rules that penalizes us because we use the rules. There is nothing in any of the cases that I have examined—and I think I have examined all the annotations that cover Rule 36—there is not anything in the annotated cases which says that because we have seen fit to prove the document in the way that we have done, we incur a penalty and thereafter we can not use what is in the letter as an admission or a declaration of a co-conspirator.

In other words, there are not degrees of utilization for this letter. This letter doesn't take a 1-A classification simply because we put a witness on the witness stand to prove it. It doesn't take a 4-F classification, and can't be used, simply because we prove it by an admission.

We think that we are entitled to have this letter, the contents of this letter, considered by the Court as an admission or a declaration of a co-conspirator. Now I think the ruling of the Court doesn't quite go that far. I think on page 6621, the ruling of the—

Justice Stephens: (Interposing) The Court will
6363 aid you by saying that it was the intention of the Presiding Judge to rule just to the contrary of what you assert.

Mr. Knuff: On page 6621, Judge Stephens says:

"We ruled that that was correct, and this is not received as binding upon anyone but National, unless it should be, in some manner, shown to be in furtherance or execution of the conspiracy, and the conspiracy is shown aliunde the declaration."

We think that that is a correct statement of the law. But when we come over to 6625, we find there that it can't be used as an admission against anyone except National.

Now we take the position that the admission by National authenticates the document. The document being authenticated, what is in the document then can be used as an admission or a declaration, whichever the document contains. If it is simply an admission like that they weren't selling seconds, then of course it is only an admission. If, on the other hand, it contains a declaration in futherance of the conspiracy—and we say that Exhibit 693 does contain that—then we contend that the admission contained in the exhibit becomes the declaration.

We would like, if Your Honor pleases, to have that ruling clarified.

Justice Stephens: Well, the ruling doesn't need clarifying, Mr. Knuff. Subject to the separately ex-
6364 pressed views of my colleagues, if they are moved by your argument, I will say this, for myself, and to protect your record, that the correction of the ruling made on page 6625, or the narrowing of the ruling, or the making more clear of the ruling on page 6625 as compared with page 6621, was because I thought that I ought, for myself and my colleagues, to express definitely a view which is just the contrary of the view that you are taking, and to rule that where you ask for the identification of a signature under Rule 36 and simply get an admission,—that is in this instance Baker signed the document in behalf of the company concerned, National—that admission of authenticity of the signature could bind no one but National.

Now I think, in the interest of time, I do not need to hear a reply. If my colleagues wish to hear a reply from the defendants on this, I, of course, want them to do so. But I think the difficulty with your position, Mr. Knuff, lies not in what the cases hold, but in the statute, the Act of June 19, 1934, Chapter 651, which passed the act enabling the Supreme Court to enunciate these rules. That says, in the first paragraph: "Said rules shall neither

abridge, enlarge nor modify the substantive rights of any litigant."

Now Rule 36 makes binding upon a party who makes an admission, that admission; but if the admission
6365 of a party is to be binding upon anyone other than the party, it is binding not because of rules of evidence, but because of rules of substantive law which make one man's act or admission or declaration, under some circumstances, binding upon another.

The admission made under Rule 36, so far as the party making it is concerned, gets away from the hearsay rule, but it doesn't get away from the hearsay rule so far as the right of cross-examination by other parties is concerned, as to the authenticity of that document; and it can't be made binding upon them as an admission because they didn't admit it. It can't be made binding upon them as direct proof, without cross-examination.

So I think the ruling was correct. But you are entitled to urge your views upon my colleagues. If they wish to hear from Mr. Bromley or the other defendants, I would be glad to have them do so.

Justice Jackson: I had thought that National admitted the authenticity of that document.

Mr. Knuff: It does.

Justice Jackson: I take that from what Mr. Bromley said on page 6621.

Now I was under a misapprehension, because my thought was that the ruling as announced by Justice Stephens, on page 6621, was in effect the final ruling of the
6366 Court on this exhibit. The ruling on page 6621 corresponds with my idea as to what the rule of evidence should be in this case.

If, for instance, anyone who is alleged to be a conspirator makes an admission, why, of course, that doesn't of itself bind any other co-conspirator unless there is some evidence to show that it is in furtherance of the conspiracy, and the conspiracy is proved by evidence aliunde.

Now I can't see any difference between that and the present situation, and therefore I must disagree with the ruling of my colleagues. I think it should be admitted for what it is worth.

Justice Stephens: I think, in fairness to my colleague, I ought to say—and it goes without saying that this is entirely in good part—that I think he loses sight of the fact, in this ruling, as he expresses himself, that we are

dealing here not with the usual situation of an admission or declaration of a co-conspirator, but we are dealing here with an admission of authenticity of a document; and there has been no proof, according to the rules of evidence or substantive law, either one, against any defendant except National, as to the authenticity of that document, because the admission of authenticity is an admission and under Rule 36 it binds only the party making it. The terms of the rule itself say that. It says "a party".

Do you wish to be heard, Mr. Bromley?

6367 Mr. Bromley: No, Your Honor.

Mr. Knuff: Answering Judge Stephens as to the binding effect on the parties, I think that there are degrees of conclusiveness of the binding effect of that admission. In so far as National is concerned, that almost amounts to an estoppel. They could not now come into Court and say that the document is not a genuine document. In so far as the other defendants are concerned, it is open to them to challenge the genuineness of that document. If they choose not to undertake to challenge the correctness of that document, then I think they are bound by it. It is not contended in this case, I do not believe—if so, I haven't so understood it—that Exhibit 693 is not a genuine document. The document was taken from the files of USG. Not a single defendant here questions the genuineness or the authenticity of this document.

Now if they want to question it, it is still open for every person, except National. As to National, we now contend that they are estopped. But the matter of binding the defendants is one of degree, not of kind. It is still open to the other defendants to challenge the authenticity of this document. We have shown prima facie that it is a genuine document.

Justice Stephens: Read me again, will you, the admission which you made, Mr. Finck, and the question

6368 which was put to you.

Mr. Finck: The question was—

Justice Stephens: (Interposing) I have the answer before me. Just read the question.

Mr. Finck: The request is No. 5:

"M. H. Baker, president of National Gypsum Company, on or about September 11, 1931, sent a letter to C. Hen-

ning, United States Gypsum Company, Chicago, Illinois. A photostatic copy of said letter is attached hereto, made a part hereof, and marked Exhibit 5."

Justice Stephens: Then the answer was:

"Admits Item 5, except that the notations in writing on the letter did not appear on the original document which was sent."

I think I have never been more clear, Mr. Knuff, about the correctness of a ruling, in the course of this case, than I am about this one. It is a fine point, but to me it is a perfectly clear point.

To illustrate my position—not to prolong the discussion further, because I think it is useless to do so—if Baker were called to the witness stand, and you asked him to identify this document and admit his signature and admit that he wrote it, and the other defendants therefore had an opportunity to cross-examine him and test his veracity and his accuracy under oath, on cross-examination, then
6369 the exhibit could be admitted in evidence for all that was in it. Both its authenticity and its contents would be binding on all proper persons, provided it was shown to be a declaration of a co-conspirator and the conspiracy was shown aliunde the declaration, and it was shown to be in furtherance or execution of the conspiracy.

But you are proceeding under Rule 36, and what you are really asking the Court to do is to permit you to get an admission from A, who is not on the witness stand, and therefore not subject to cross-examination, and make it binding upon B. I don't think the rules of substantive law or evidence, either one, permit that.

But the record may show your position on it, as it does. I know of nothing, I may add, in the law which recognizes categories of bindingness of admissions.

Mr. Knuff: I don't want to seem captious, but I am still at a loss to know what the ruling of the Court is. I understand what Judge Stephens' ruling is, and I understand what Judge Jackson's position is, but I don't understand yet what Judge Garrett's position is.

Justice Garrett: I concur with Justice Stephens.

Mr. Knuff: Now in connection with Exhibit 344, I want to call Your Honors' attention to a previous ruling, to which the ruling yesterday seems to be contrary.

I want to call Your Honors' attention to Govern-
6370 ment's Exhibit 226. The ruling on Government's Exhibit 226 appears at page 2016.

Justice Stephens: Where is the ruling on Exhibit 344, first? Let's get that in mind.

Mr. Knuff: The ruling on Exhibit 344 was in yesterday's transcript, and it was rejected. The ruling is on page 6630, beginning at line 18, I believe:

"Justice Stephens: Judge Garrett and I are of the view that you haven't laid any foundation for admitting this proposed Exhibit 344."

Justice Stephens: I will have to go back, to refresh my recollection on that.

You gentlemen will have to bear with me if I seem a little slow on the uptake this morning. When I got home last night, prepared to read the record in this case, I found an emergency matter from the Court of Appeals which occupied me, together with these other items, until a quarter of two this morning.

Where do we start ruling on Exhibit 344, Mr. Knuff? Apparently it is at page 6625. Now let me refresh my recollection.

Mr. Knuff: Line 21, on page 6625.

Justice Stephens: Yes. Just let me read it, now.

(Transcript examined by the Court.)

Justice Stephens: I think we have this in mind now.

6371 Mr. Knuff: Now I direct your Honors' attention to Government's Exhibit 226. It is a memorandum, dated June 4, 1929; it was written by George M. Brown, and it has to do with matters that are connected with this case.

That memorandum was identified by Claude O. Brown, not by George M. Brown. Claude Brown was placed on the witness stand, and, on page 2016, the following appears:

"By Mr. Steffen:

"Q. I would ask you, Mr. Brown, whether you are familiar with the writing at the top of the memorandum, the word 'Whittemore'? A. I would say that was his writing.

"Q. Is that Mr. Whittemore's writing, 'Looks OK to me'? A. 'Looks OK to me' is Whittemore's writing.

"Q. And the initials 'AW' are also his? A. Yes.

"Q. Do you know who wrote 'Whittemore', which is scratched out, at the top? A. I think Mr. Brown wrote it.

"Q. That would be Mr. George M. Brown? A. Yes, sir.

"Q. Do you recall having seen the memorandum? A. No, sir.

"Mr. Steffen: We offer Government's Exhibit 226 in evidence.

6372 "I will point out to your Honors that the Item No. X279 indicates that it was taken from the files of the Certain-teed Company. The initials 'AW' are the initials of a Vice President of the company, who says that it looks OK to him. The writing 'Whittemore' is identified as being George M. Brown's writing. That is, he addressed it, apparently, to Mr. Whittemore, and Mr. Whittemore acknowledged it.

"Mr. Adams: May I ask a question?

"Justice Stephens: Yes.

"Mr. Adams: Do you know who prepared this memorandum?

"The Witness: No, sir.

"Mr. Adams: I object on the ground that there is no proper foundation.

"Justice Stephens: The objection is overruled"—

Justice Stephens: (Interposing) How many pages of this do you propose to read, Mr. Knuff?

Mr. Knuff: I am practically through.

Justice Stephens: I was going to say that we could read it and save time.

Mr. Knuff: I will be through when I read your Honor's ruling.

"Justice Stephens: The objection is overruled. We think it has been sufficiently identified. It may be admitted in evidence, subject to the usual reservation as to declarations of alleged co-conspirators."

6373 Now, in that case, we had Mr. Claude Brown identify, not his own handwriting, but the handwriting of someone else. He had never seen the document as far as the record goes, at least he did not recall seeing it. Now in connection with Government's Exhibit 344, we have a much stronger case. We have here a document that admittedly has, in the upper left-hand corner of that document, the initials, "E.B.B." in the handwriting of Mr. Burley, the

person to whom the document was sent. That is admitted. It is admitted that those initials, "E.B.B.", are in Burley's handwriting.

Now the defendant National has said that they cannot say that this was sent by Mr. Baker. They also say that this is Mr. Burley's handwriting at the top. It seems to me that they have taken an inconsistent position. If the document was received by the person to whom it was addressed, it must, of necessity, have been sent, and it was received by the person to whom it was sent, because the person to whom it was sent says, "Those initials, E.B.B., are in my handwriting."

Now we say that this document is identified and is entitled to come in as an exhibit in this case the same as Government's Exhibit 226, and we ask your Honors to reconsider, in the light of your ruling on 226, your action of yesterday afternoon on Exhibit 344.

Mr. Finck: If the Court please, I can only restate
6374 what I said yesterday, that we were asked by the Government to admit that M. H. Baker, on or about December 16, 1932, sent an inter-office communication or memorandum to R. F. Burley.

Now I cannot admit that, and under the Rule I have a right to either admit it or deny it, or state that I cannot truthfully either admit or deny it. That is what I have done. If I say that I cannot either truthfully admit or deny, then I must give a reason, and I follow with these reasons in which I state certain facts.

I did not want to make any admissions. If necessary, even now I think I could withdraw my answer and deny it, not admit it at all. I have done that, practically, in the way I have answered the request. Now I think, under the Rule, we have not made the admission sought, and therefore that this document should not be admitted in evidence.

Justice Stephens: Well, it is my view, Mr. Knuff, that nothing new has been presented. I had in mind, at the time I made my ruling yesterday, in which Judge Garrett concurred, some previous rulings. In fact, I think you referred to some of them, at least impliedly. I don't think the two rulings are inconsistent in view of the nature of Mr. Finck's answer to your request for admissions.

So far as I am concerned, the ruling will stand with respect to Exhibit 344.

Justice Garrett: I concur.

6375 Justice Stephens: Judge Jackson may wish to express himself differently.

Justice Jackson: I have already done that.

Justice Stephens: He disagreed with us yesterday, and I assume his position is the same.

Justice Jackson: Yes, I am disagreeing with you now also but I expressed myself as to that yesterday.

Justice Stephens: I feel constrained to say—and I think I speak for my colleagues, although I will be glad to have them express themselves separately if they disagree with me—that I really think the Government ought not to expect to reargue rulings when they have been carefully made.

So far as I can see the argument made this morning, made with respect to Exhibit 693, presented absolutely nothing new over what was heard yesterday, and it seems to me that the argument as to 344, did not.

I fear, perhaps, that the Presiding Judge has been at fault in this case and has left the Government—because of the anxiety of the Presiding Judge to be very careful and consistent in his rulings, and give counsel for the Government full opportunity to present a case which the Court recognizes is difficult to prove because of the circumstantial character of it, every opportunity that it properly should have to present its case—gain the impression
6376 that the Court is willing to permit invasion and invasion and invasion of its rulings, and reargument and reargument and reargument of matters which it has very carefully and thoughtfully and conscientiously considered.

The theory of a trial is that both sides shall be given full opportunity to express themselves and say everything they need to say, to convince the Court that a ruling ought to be one way or the other—but that that should be the end of it.

It does seem to me, gentlemen for the Government, that you go beyond what ought to be the proper limit of the Court's patience and the Court's discretion. You argue these matters very carefully, to the best of your ability; we hear argument on both sides; the Judges confer and then make a considered and careful ruling—and if it is adverse to the Government, the Government seems to feel that it has a right to reargue the whole thing all over again.

I confess that I am getting to the end of my patience, and I think close to the end of a proper exercise of discretion in permitting the Government to take so much time in these matters.

We were going to take, as I understood from the Government's promise, another few days to finish the Govern-

ment's case. But it looks to me, if we have got to go through this sort of thing every day, that we will be
6377 here another month or six weeks, and I really think it ought to be stopped.

Mr. Steffen: May I say just a word, your Honor?

Justice Stephens: Yes.

Mr. Steffen: I want to say, for the Government, that we are very appreciative of the patience with which the Court has listened to the arguments of the Government, and we felt that we were not pressing an argument unless we were presenting something that had some substance to it.

I think your Honor's remarks could be equally directed to the defendants, as I feel you have been equally patient with them.

This matter of Exhibit 693 was first argued on Friday afternoon when I was not here. It was then argued again yesterday, and the decision on Exhibit 693 was not, to my mind, entirely clear.

Moreover, it covered a matter that will run through all of these exhibits, and as respects that argument, I felt that we should have a fairly clear hearing, and while it did take the better part of a half an hour, I think that it was important, from the Government's viewpoint, to get that carefully presented.

As to Exhibit 344, I think that we don't have as strong a case at all on that; but on Exhibit 693 I thought we did have a very important addition to present; and I say that so far as finishing the Government's case is concern-
6378 ed, we hope, as soon as we can get these requests for admissions presented, to be then perfectly free to close the case, and I don't see any reason why that shouldn't be done in the next day or so.

Justice Stephens: Well, the Court is not speaking in censure, gentlemen. The Court realizes that you are properly zealous in the presentation of your case, and the Court realizes that there have been some rearguments by some of the defendants' counsel, one of whom is absent today, so I will not comment on him in his absence. He has also been very insistent upon rearguments and reargu-ments.

What I say is in good nature and in good part, and in the interest of saving time.

When we get a decision made, let's abide it, and if we don't like it, the proper recourse of the party against whom the decision is made is to appeal.

We will take our morning recess.

(Whereupon a five-minute recess was taken, after which the trial was resumed as follows:)

Mr. Knuff: May it please the Court, when the Court adjourned yesterday afternoon, I believe I had offered in evidence Government's Exhibit No. 694, which would be Exhibit No. 8 in your group of exhibits. It had been marked for identification as Exhibit No. 694.

It is a copy of a letter, dated March 22, 1935, ad-
6379 dressed to Mr. Ed. H. Diegel, and was signed "Vice President".

This is a carbon copy of the original, and under the admissions of National, in Paragraph 6, it is admitted to be a photostat of an unsigned carbon copy of the document which was sent or received as stated therein.

Apropos of Exhibit 694, I want to call your Honor's attention to Government Exhibit 548, which was offered and received in evidence—

Justice Stephens: (Interposing) Are you citing Stephens against Stephens again? (Laughter)

Mr. Knuff: No, your Honor.

The attachment to Exhibit 548 was dated March 18th. This exhibit is dated March 22, 1935. Exhibits 548 and 694 deal with the same subject matter. We are not arguing relevancy at all.

Justice Stephens: I think you are entitled to argue relevancy.

Mr. Knuff: I mean at this particular time we are not.

Justice Stephens: We hadn't finished the argument on relevancy last night, as I recall.

Justice Jackson: What is the extent of the admission here, that this is a photostat of an unsigned carbon copy which was sent or received as stated in your request?

Mr. Knuff: That is right. The original, of course, I take it from this admission, was sent to Mr. Diegel of the
6380 Ebsary Gypsum Company. We don't have the original, but we do have the carbon.

But as I say, I understand from the admission here that there is no question raised by National that the original was sent to Ebsary.

Justice Stephens: The only question I had, Mr. Knuff, about the admissibility of Exhibit 694, was whether it tended to prove Paragraph 114 of the complaint, and I

wasn't clear on that when we were finishing the argument last night.

Mr. Knuff: This is just one step in proving the allegations of Paragraph 114 of the complaint, and should be considered along with all the other evidence in the case.

Justice Stephens: Do the defendants wish to be heard with respect to it, any further?

Mr. Bromley: I don't believe there is anything to be added to the obvious comment to be made on the document which the Presiding Justice made at page 6638, yesterday: ". . . how does that tend to prove that USG was trying to compel Ebsary to take a license?"

Now, it seems to me that it doesn't tend to prove that at all, and therefore it can have no relevancy or materiality.

Justice Stephens: The only theory that occurred to me, Mr. Bromley, that it might come in on is this. I still am of the view that I expressed yesterday, that when you look at this exhibit alone it is difficult to see how it tends
6381 to prove what you offer it for, Mr. Knuff. But it may be that, connected with other evidence that you have as to the asserted action of USG in connection with National and other licensees, it may have some tendency to prove your theory.

On that theory that it may, in connection with other evidence, have some tendency to prove the allegations of Paragraph 114 of the complaint, we will admit it in evidence, subject to the right to move to strike it if there is no connecting evidence, and subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Bromley: Well, I think it should be admitted subject to a motion to strike, on the same terms as Exhibit 693 was admitted, and subject to the same limitations as applied to Exhibit 693, because again—

Justice Stephens: (Interposing) With respect to authenticity as well as the usual reservation?

Mr. Bromley: Yes, your Honor.

Justice Stephens: Both of those reservations or limitations upon the ruling are made, that it is admitted as binding, even if connected, only upon National.

Justice Jackson: Of course my opinion with respect to this is the same as it was with respect to Exhibit 693.

Justice Stephens: For the protection of the Government, and for the protection of the views of my col-
6382 league, Judge Jackson, there may be a showing in the record that there is a continuing ruling on the

part of the majority of the Court that exhibits which are identified under Rule 36, only bind the person who identifies them. That will give the Government a record on any other exhibits of that class.

(The document referred to, marked as Government's Exhibit No. 694, was received in evidence.)

Mr. Knuff: We would like to have marked at this time, if the Court pleases, Government's Exhibit No. 695 for identification, the same being a letter, or rather a carbon copy of a letter, dated August 27, 1935, addressed to Mr. George N. Lenci, and signed by the National Gypsum Company, "Vice President."

(The document referred to was marked as Government's Exhibit No. 695 for identification.)

Mr. Knuff: We would also like to have marked for identification as Government's Exhibit No. 696, an inter-office memorandum, dated October 7, 1935, directed to E. B. Biesinger, and having typed thereon the name "R. F. Burley".

(The document referred to was marked as Government's Exhibit No. 696 for identification.)

6383 Justice Jackson: How about the pencilled memorandum at the top of that exhibit, are you offering that too?

Mr. Knuff: No, your Honor, we are not.

Justice Jackson: That will save Mr. Finck an objection there.

Mr. Knuff: Yes.

I would also like to have marked as Government's Exhibit No. 697 for identification, a carbon copy of what is apparently an inter-office communication, or memorandum, dated October 24, 1935, addressed to F. G. Krumholz, and signed in typewriting R. F. Burley.

(The document referred to was marked as Government's Exhibit No. 697 for identification.),

Mr. Knuff: At this time we offer in evidence Government's Exhibits No. 695, 696 and 697.

In connection with that offer, we direct your Honors' attention to the requests for admissions, first to Request No. 10, that:

"National Gypsum Company, on or about August 27, 1935, sent a letter to George N. Lenci, Ebsary Gypsum Company, New York City. A photostatic copy of this letter is attached hereto, made a part hereof, and marked Exhibit 10."

We also call attention to Request No. 11, reading:

"R. F. Burley, Vice-President of National Gypsum
6384 Company, on or about October 7, 1935, sent an inter-office memorandum to E. B. Biesinger. A photostatic copy of said memorandum is attached hereto, made a part hereof, and marked Exhibit 11."

Also, we call attention to Request No. 12, reading as follows:

"R. F. Burley, Vice-President of National Gypsum Company, on or about October 24, 1935, sent an inter-office memorandum to F. G. Krumholz, National Gypsum Company, Chicago, Illinois. A photostatic copy of said memorandum is attached hereto, made a part hereof, and marked Exhibit 12."

The answer, submitted on behalf of National, in Paragraph 6, admits 10, 11 and 12, which are the three requests that I have just read, and I understand from this answer that although Exhibits 695 and 697 are photostats of carbons, the answer admits that the originals of 695 and 697—

Justice Jackson: How about 696?

Mr. Knuff: That apparently is an original.

(Continuing):—that the originals of 695 and 697 were sent to the persons to whom they were addressed.

Exhibit No. 696 apparently is an original document.

They are offered on the same theory that we offered Exhibit 694, and for the same purpose.

Mr. Finck: You are not offering the writing on Exhibit 696, are you?

6385 Mr. Knuff: No, we are not, Mr. Finck.

I might say that Mr. Finck in his answer—

Justice Jackson: (Interposing) Did you say that Exhibit No. 696 was an original?

Mr. Knuff: That is my understanding—Exhibit 696 apparently is an original.

Justice Jackson: That is what I understood you to say, and the copy of course that we have is a photostat of the original?

Mr. Knuff: Yes, you have the photostat of the original.
Justice Stephens: Let us read these now.

(After reading Exhibits 695, 696, and 697.)

Do the defendants wish to be heard?

Mr. Finck: If the Court please, as to Exhibit 695 and 697, I object to those as incompetent, irrelevant and immaterial as to Baker, that is, the request not having been made of Baker. I would just like to have the record show that objection for him.

As to National, the exhibits are objected to as irrelevant and immaterial.

I don't know what the purpose of the Government is in trying to have these exhibits admitted. They refer only to foil board and lath. Now there is no charge in the complaint that National ever tried to induce anyone to sign the metallized license agreement, and on the charges in
6386 the complaint, of course we take the same position as we have all through the trial, that National is expected from any charges in the complaint with respect to metallized board or lath.

Therefore, I cannot see how these letters can be material to the issues in the complaint as against National, and if they are only to be received as against National, I see no relevancy to them whatsoever.

Justice Stephens: As I remember it, the majority of the Court ruled, at the time of the reserved rulings, despite the phrasing of Paragraph 114 of the complaint with respect to National, that evidence concerning foil and National was admissible, did it not?

Mr. Finck: That is true, yes sir.

Justice Stephens: Well, consistently with that ruling of the majority of the Court, and with our previous rulings, these three exhibits will be received in evidence subject to the following limitation: That they are not binding except upon the persons actually making the admissions, under Rule 36.

Mr. Finck: As to Exhibit 696—

Justice Jackson: (Interposing) Of course, in all of these rulings, my stand will appear as dissenting from the ruling of the majority. My feeling is that they should be admitted for all purposes, for all defendants, if there is evidence, aliunde, to show that a conspiracy exists
6387 and that these documents were made in furtherance or execution of the conspiracy. I don't think that

I have to say that every time such a ruling is made by the majority of the Court.

Justice Stephens: Certainly not. The Presiding Judge does not continue to reiterate his dissents from the majority rulings on some of the reserved rulings. After a ruling has been made definitely, and established, by a majority of the Court, I assume that it becomes the law of the case, which we all follow, even though one of us might disagree with it, individually.

Now what do you say as to Exhibit 696, Mr. Finck?

Mr. Finck: I object to that as incompetent, irrelevant and immaterial, as to both National and Baker.

(The Judges conferred.)

Justice Stephens: Pardon me, what do you say as to Exhibit No. 696, Mr. Finck?

Mr. Finck: I presume all these are offered without the pencilled notations.

Justice Stephens: But do you make a different objection with respect to Exhibit 696 than you do with respect to Exhibits 695 and 697?

Mr. Finck: Yes, your Honor.

Justice Stephens: In other words, you raise no question as to their binding effect upon Baker?

6388 Mr. Finck: Oh, yes, I raise the same objection with respect to Baker.

Justice Jackson: I thought you said you objected as to Hartley, didn't you, because he hadn't been served?

Mr. Finck: No, your Honor, you must have misunderstood me.

Mr. Keber: We represent Hartley, Judge Jackson, and I mentioned him this morning in connection with another exhibit. We represent him as an officer of Certain-teed Products.

Mr. Finck: Of course no requests for admissions were made of Baker.

Justice Jackson: Well, the ruling seems to be sufficiently clear so that he is not bound. I agree with that.

Mr. Finck: I think so.

Justice Stephens: I don't see how Judge Jackson can agree with it, in fairness to him.

Justice Jackson: He wasn't served, and this can't bind him at the present time. It doesn't bind anybody but National. But if, on the whole record, a conspiracy is shown, and these documents here have been written, in the

opinion of the Court, in furtherance of the conspiracy, then of course they will bind everybody. That is what I meant.

Justice Stephens: Very well, I was just trying to save you from an inconsistency with yourself.

6389 Justice Jackson: Thank you, sir.

Justice Stephens: Exhibits 695, 696 and 697 are received in evidence. The objections as to relevancy and materiality are overruled. So far as the ruling of the majority of the Court is concerned, Judge Garrett and myself rule that they can bind only those persons—and I use the word "persons" in the legal sense—who were served under Rule 36, and made an actual admission with respect to the documents. That would exclude them as binding upon Baker or upon any other defendant.

(The documents referred to, marked Government's Exhibits Nos. 695, 696 and 697, respectively, were received in evidence.)

Mr. Knuff: I would like at this time to have marked for identification Government's Exhibit No. 698, the same being a carbon copy of a letter, dated October 24, 1935, addressed to Mr. H. E. Chism, and signed National Gypsum Company, "Vice President".

(The document referred to, was marked as Government's Exhibit No. 698 for Identification.)

Mr. Knuff: In connection with this exhibit, I direct your Honors' attention to Paragraph 13 of the Request for Admissions.

6390 Justice Stephens: This is a request directed to whom, to Texas?

Mr. Knuff: No, your Honor, to National.

Under Paragraph 13 of the request, National was requested to admit that:

"National Gypsum Company, on or about October 24, 1935, sent a letter to H. E. Chism, Texas Cement Plaster Company, Oklahoma City, Oklahoma. A photostatic copy of said letter is attached hereto, made a part hereof, and marked Exhibit 13."

The answer of National appears in Paragraph 7, and that answer is:

"Cannot truthfully either admit or deny that the defendant, on or about October 24, 1935, sent a letter to H. E.

Chism, referred to as Exhibit 13 in Government's request for admissions, although the copy of which said Exhibit 13 is a photostat, came from the files of the defendant and was returned to the Government under subpoena. No persons now associated with the defendant, National Gypsum Company, can identify the document."

I do not place any force on my request for admissions, nor the answer of the defendant under Paragraph 7.

I offer this now as being circumstantially identified because of what appears on Government's Exhibit 697. Government's Exhibit No. 697 is dated October 24, 1935.

6391 Government's Exhibit 698 is dated October 24, 1935.

Government's Exhibit No. 697 has to do with the sale of foil board to the Texas Cement Plaster Company. Government's Exhibit 698, in the first sentence, says:

"Note attached correspondence with Texas Cement Plaster Company."

On Government's Exhibit 697 there appears the notation thereon, at the top, "3091", which was placed on the carbon copy of that letter by National at the time they turned Exhibit No. 697 over to the Government.

At the top of Exhibit 698 the Court will notice that there appears the number, "3092", which indicates that 3092 follows 3091.

So I say that in view of the circumstances connected with other previously admitted documents, this document is circumstantially identified as being a document that was sent to the Texas Cement Plaster Company by National, and on that basis we offer the document as being circumstantially identified.

Justice Stephens: Let us read it, please.

(After reading Exhibit No. 698): I misunderstood you, I guess, at one point. I thought you were offering Exhibit 698 as something received from Texas, rather than as something sent to Texas.

Mr. Knuff: What we have here was received from

6392 the National Gypsum Company. The original of that letter apparently was sent to Texas. We received Exhibit No. 698 from the files of the National Gypsum Company.

Justice Stephens: I understood that, but I thought that you said that it was something that had been received by National from Texas; but on its face, it appears to have been something sent by National to Texas.

Is there any objection to this, Mr. Finck, with respect to its circumstantial identification? What the Government is asserting here, as I understand it, is that Exhibit No. 698 ought to come in as a part of Exhibit No. 697.

Mr. Finck: With respect to the attachment, your Honor, of course we couldn't tell anything about that, and the circumstance of the number "3091" and the number "3092", would not necessarily mean that this correspondence was attached together.

Nobody in the office knew anything about it, so I did not admit such a fact.

Justice Stephens: Mr. Knuff is not relying upon the answer to the request for admissions served upon you under Rule 36. He is relying simply upon circumstantial identification.

Mr. Finck: I object to it on the ground that no proper foundation has been laid for its admission, of course, and in addition to that, I also object to it on all the
6393 grounds stated with respect to Exhibit 695.

Justice Garrett: The only question immediately before the Court is the question of the identification of Exhibit 698, is it not? I mean, that is the thing we are asked to rule on now? We have to determine whether or not this is circumstantially identified.

Mr. Knuff: That is right.

Justice Stephens: Well, we will have to take that under advisement.

I am sorry, but we have to adjourn at this time. I have an emergency matter in the Court of Appeals. Unhappily, there are only two judges sitting on the Court of Appeals other than myself, and this is an emergency matter presented there which has to do with a trial in the District Court.

Therefore, we will have to adjourn until 2:30.

(Thereupon, at 11:55 o'clock a.m., a recess was taken until 2:30 o'clock p.m., of the same day.)

6394 AFTERNOON SESSION

(The trial was resumed at 2:30 o'clock p.m., pursuant to recess.)

Justice Stephens: Mr. Finck, I think we were hearing from you about the admissibility of proposed Exhibit 698, as allegedly circumstantially connected with Exhibit 697.

Mr. Finck: If the Court please, I desire to say no more, except this, that I see nothing in Exhibit 697 which in and

of itself would circumstantially identify 698, which is now before us.

Justice Stephens: Has 697 been admitted?

Mr. Finck: Yes, it has.

Justice Stephens: Read your answer to the request for the admission, Mr. Finck. Read both the request for admission and the answer, if you will.

Mr. Finck: National is requested to admit that: "National Gypsum Company, on or about October 24, 1935, sent a letter to H. E. Chism, Texas Cement Plaster Company, Oklahoma City, Oklahoma."

Justice Stephens: That is directed to Exhibit 698, is it?

Mr. Finck: Yes.

Justice Stephens: Now what do you say?

Mr. Finck: We say we: "Cannot truthfully either admit or deny that the defendant on or about October 24,
6395 1935, sent a letter to H. E. Chism, referred to as Exhibit 13 in Government's Request for Admissions, although the copy of which said Exhibit 13 is a photostat, came from the files of the defendant and was returned to the Government under subpoena. No persons now associated with the defendant, National Gypsum Company, can identify the documents."

Justice Garrett: I suppose that should be "document".

Mr. Finck: It should be.

Justice Stephens: Do you deny that it is circumstantially connected? I call your attention to the fact that, laying aside the question of your admission now, and giving your attention, Mr. Finck, purely to the matter of circumstantial connection, 697 says, in the first paragraph:

"Note attached correspondence with Texas Cement Plaster Company. They want to buy Foil Lath and Foil Wallboard from us and possibly Tile Board and Grain Board."

Then at the bottom:

"In the attached letter, you will note I have added the freight from Sweetwater to Texas Cement Plaster Company's mill."

And in Exhibit 698, it says, about two-thirds of the way down:

"Freight from Sweetwater to your mill".

Mr. Finck: That is the only connection that I can see in the two documents. Exhibit 697 refers to:

6396 "Note attached correspondence wtih Texas Cement Plaster Company. They want to buy Foil Lath and

Foil Wallboard from us and possibly Tile Board and Grain Board."

Then in the letter written to Mr. Chism, it refers to "your recent note to our Dallas Office".

You will note that Exhibit 697 was addressed to Krumholz at the Chicago Office. I see no connection there.

Justice Stephens: I don't quite see your point there. Exhibit 697 is directed to Krumholz at the Chicago Office, but that is an inter-office communication, isn't it?

Mr. Finck: Yes, that is an inter-office communication attaching certain correspondence with the Texas Cement Plaster Company. And, of course, 698 is a letter addressed to the Texas Cement Plaster Company. But I can't connect them both at this time by reading them. It is very true that the "Freight from Sweetwater to your mill" is indicated in the letter to Chism. But otherwise, I see no connection.

Justice Stephens: Well, it is a very close point. Judge Garrett and I are inclined to think it ought not to come in. In a way, Mr. Knuff, it is an evasion—I am sure it is not an international evasion, I don't use the term in that sense at all—of the ruling we made yesterday. If you want to serve exhibits that have attachments, and get them in within Rule 36, you should serve them together and get an admission which concerns all of them. True, 698 was
6397 served as well as 697, but the defendants say they know nothing about 698. It is a sort of a situation where the evidence is equivocal as to whether it is circumstantially connected or not, and where it is equivocal it isn't preponderating; and since the burden is upon the person offering it to show that it is admissible, Judge Garrett and I are inclined to think that it ought not to come in. Judge Jackson has a different view. It is a close question, but I think we had better rule that it is not admissible. You may have leave to try and prove it some other way, if you can.

Justice Jackson: In my opinion it is admissible,—without taking up too much wording in the record,—for the reasons that were advanced by Mr. Knuff in his tender.

Mr. Knuff: May it please the Court, I would like to have marked for Identification Government's Exhibit 699, the same being a letter dated June 25, 1932, addressed to the Board Survey Company, and signed National Gypsum Company, R. F. Burley.

(The document referred to was marked as Government's Exhibit No. 699 for Identification.)

Mr. Knuff: I would also like to have marked for Identification as Government's Exhibit 700, a carbon copy of a letter addressed to Mr. R. F. Burley, and signed Board Survey Company, dated July 2, 1932.

6398 (The document referred to was marked as Government's Exhibit No. 700 for Identification.)

Mr. Knuff: I would also like to have marked for Identification as Government's Exhibit 701, a letter dated July 12, 1932, addressed to the Board Survey Company, and signed National Gypsum Company, R. F. Burley, Vice President.

(The document referred to was marked as Government's Exhibit No. 701 for Identification.)

Mr. Knuff: I would also like to have marked for Identification as Government's Exhibit 702, a carbon copy of a letter dated August 9, 1932, addressed to R. F. Burley, and signed Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 702 for Identification.)

Mr. Knuff: In connection with Government's Exhibits 699, 700, 701 and 702, I call Your Honors' attention to Paragraph 14 of the Government's Request for Admissions. Paragraph 14, in connection with Exhibit 699, reads as follows:

"National Gypsum Company, on or about June 25, 1932, sent a letter to Board Survey Company, Chicago, Illinois.

A photostatic copy of said letter is attached hereto, 6399 made a part hereof, and marked Exhibit 14."

The answer of National Gypsum Company to that request is contained in Paragraph 6, in which National states that it admits 14.

In connection with Government's Exhibit 700, I call Your Honors' attention to Paragraph 15 of the Government's Request directed to National, in which appears the following:

"National Gypsum Company, on or about July 5, 1932, received a letter from Board Survey Company, dated July

2, 1932. A photostatic copy of said letter is attached hereto, made a part hereof, and marked Exhibit 15."

The answer of National Gypsum Company to that Request likewise appears in Paragraph 6, wherein National admits Paragraph 15, but with respect to Request No. 15 says that No. 15 is a photostat of an unsigned carbon copy of the document, the original of which was sent or received—in this case it would be received—by Mr. Burley.

With respect to Exhibit 701, I call Your Honors' attention to Paragraph 16 of the Request, which reads as follows:

"National Gypsum Company, on or about July 12, 1932, sent a letter to Board Survey Company, Chicago, Illinois. A photostatic copy of said letter is attached hereto, made a part hereof, and marked Exhibit 16."

The answer of National is contained in Paragraph 6, in which National admits Item No. 16 of the Govern-
6400 ment's Request.

In connection with Exhibit 702, I direct Your Honors' attention to Paragraph 17 of the Government's Request, which paragraph reads as follows:

"National Gypsum Company, on or about August 11, 1932, received a letter from Board Survey Company, dated August 9, 1932. A photostatic copy of said letter is attached hereto, made a part hereof, and marked Exhibit 17."

The answer of National is contained in Paragraph 6, and in Paragraph 6 National admits the letter marked for Identification as Government's Exhibit 702, although they say here that this is a photostat of a carbon copy of the letter, the original of which, in this case, was received by National.

We now offer in evidence Government's Exhibits 699, 700, 701 and 702.

Mr. Bromley: If the Court pleases, it does seem to me that counsel could have saved us much time and many dollars of expense if he had stated merely that National admitted the authenticity of these four documents, without reading into the record, and making us pay for it, all of these requests and answers, when the net effect of them is an admission by National. I do wish and I make the request that counsel summarize these things and not read them into the record, because we have got to pay for

6401 them, unfortunately, and it is getting to be a tremendous burden.

Justice Stephens: I was about to make that same suggestion, with a little modification,—that if there is any qualification upon the admission, Mr. Finck could stand up and state what he had admitted, in very brief terms. We have had here two or three pages of transcript, at a dollar a page—(Laughter).

Mr. Knuff: (Interposing) In view of the fact that this is an extra-judicial proceeding, I thought you would want the record to show exactly what it was.

Justice Stephens: If there was any dispute as to its meaning, all right. Then I think both the Government and the other side have a right to have indicated in the record the data which is the foundation of the Court's ruling. But where it is all admitted, as this seems to be, there is hardly any reason for taking any such space.

Which are the two as to which there is a qualification on the admission?

Mr. Knuff: As to 700 and 702, these happen to be carbons, although there is no qualification on their admission. They admit that they did receive the originals.

We are not offering the writing on either Exhibit 699 or 702.

Justice Stephens: Is there any objection to these? There is no objection, I take it, on the ground of com-

6402 petency, Mr. Finck, since you have made these admissions?

Mr. Finck: Only as to Baker.

Justice Stephens: I understand that, but as to National?

Mr. Finck: That is right.

Justice Stephens: Is there any objection as to relevancy or materiality on the part of any defendants?

Mr. Finck: I would like to make an objection on such grounds, relevancy and materiality.

Mr. Johnston: I assume that the running objection and ruling will stand as to these. Certainly as to Texas, I want to object to these as incompetent, irrelevant and immaterial, and call the Court's attention to the fact that as to all of these, they just cover the same class of offer that these former letters did, and I assumed the ruling of the Court in the former would also apply to these.

Justice Stephens: We are talking about relevancy and materiality now, not about who they bind. It seems to me they probably are relevant and material, consistently with

previous rulings, because they go to this question of alleged illegal use of the Board Survey Company. So objections as to relevancy and materiality are overruled. The exhibits are received in evidence, under the ruling of the majority of this Court, only as binding upon the actual legal person who made the admission, to-wit, National.

6403 (The document referred to, marked as Government's Exhibits 699, 700, 701 and 702, were received in evidence.)

Mr. Knuff: I would like to have marked for Identification as Government's Exhibit 703, a letter dated September 17, 1932, addressed to Frank M. Miller, of the Board Survey Company, and signed National Gypsum Company, R. F. Burley, Vice President.

(The document referred to was marked as Government's Exhibit No. 703 for Identification.)

Mr. Knuff: In Paragraph 18 of Government's Request for Admissions, we asked National to admit that this letter was sent to Mr. Miller; and in Paragraph 6 of National's answer, National admits that the letter was sent.

We now offer in evidence Government's Exhibit 703.

Mr. Finck: The same objections.

Justice Stephens: The same ruling with respect to Exhibit 703. Objections as to relevancy and materiality are overruled; and the exhibit is received in evidence, under the ruling of the majority of the Court, as binding only upon National, the person who made the admission.

(The document referred to, marked as Govern-
6404 ment's Exhibit No. 703, was received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibits 704 and 705. Exhibit 704 is a letter dated September 26, 1932, addressed, to Board Survey Company, signed National Gypsum Company, "R. F. Burley—B", Vice President.

Exhibit 705 is a carbon copy of a letter dated September 27, 1932, addressed to Mr. R. F. Burley, National Gypsum Company, Buffalo, New York, and signed Board Survey Company.

(The documents referred to were marked as Government's Nos. 704 and 705, respectively, for Identification.)

Mr. Knuff: In Paragraph No. 19 of the Government's

Request for Admissions, we ask National to admit that Government's Exhibit 704 was sent to Board Survey Company; and in Paragraph 20 of the Request for Admissions, we ask National to admit that they received Government's Exhibit 705.

Paragraph 6 of National's answer admits that they sent Exhibit 704; and that they received the original of 705.

Justice Stephens: Those two exhibits are received under the same terms as the previous rulings. Any objections as to materiality and relevancy are overruled; and the exhibits are received as binding only upon National, the person making the admission.

6405 (The documents referred to, marked as Government's Exhibits Nos. 704 and 705, respectively, were received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibits 706 and 707.

(The documents referred to were marked as Government's Exhibits Nos. 706 and 707, respectively, for Identification.).

Mr. Knuff: Government's Exhibit 706 is a letter dated October 4, 1932, addressed to the Board Survey Company and signed National Gypsum Company, R. F. Burley, Vice President.

Exhibit 707 for Identification is a carbon copy of a letter dated October 8, 1932, addressed to Mr. R. F. Burley, and signed Board Survey Company.

In Paragraph No. 21 of the Government's Request for Admissions, we requested National to admit that they sent the letter which is marked for Identification as Government's Exhibit 706; and in Paragraph 22, we asked National to admit that they received the original of the letter which is marked Government's Exhibit 707.

Paragraph 6 of the defendant National's answer admits the sending and/or receiving of these two exhibits.

We offer in evidence Government's Exhibits 706 and 707.

6406 Justice Stephens: The same ruling as with respect to the two previous exhibits. The objections as to relevancy and materiality, if any, are overruled; and the exhibits are received in evidence as binding only upon the person making the admission, to-wit, National.

(The documents referred to, marked as Government's Exhibits Nos. 706 and 707, respectively, were received in evidence.)

Mr. Bromley: Wouldn't it do just as well if counsel said, in these instances, "counsel admits authenticity"?

Justice Stephens: I was going to suggest, myself, that possibly we could still further shorten this if Mr. Finck and Mr. Knuff could stand together, so there is no question. Or if Mr. Finck is sufficiently familiar with what is going on, I should think all you need to say, Mr. Knuff, is that "We have asked for an admission as to authenticity, of National, as to both of these exhibits, and the admission has been made."

Then we would save a great deal more time and space of the Court Reporter's record.

Where there is a debate or dispute whether or not the answer of a party, under Rule 36, constitutes an admission, then, of course, the record should show the data which the Court is ruling on; but otherwise, if it is without dis-
6407 pute, let's put it in in about five words, if we can.

Now what is the next?

Mr. Knuff: I would like to have marked for Identification Government's Exhibits 708 and 709.

(The documents referred to were marked as Government's Exhibits Nos. 708 and 709, respectively, for Identification.)

Mr. Knuff: Exhibit 708 is a letter dated June 2, 1933, addressed to the Board Survey Company and signed National Gypsum Company, R. F. Burley, Vice President.

Government's Exhibit 709 for Identification is a copy of a letter dated June 3, 1933, addressed to National Gypsum Company and signed Board Survey Company.

We offer in evidence 708 and 709.

Mr. Finck: They are both admitted.

Justice Stephens: There is no dispute as to authenticity, Mr. Finck, is that right?

Mr. Finck: They are admitted by National.

Justice Stephens: They may be received in evidence. Objections as to relevancy and materiality, if any, are overruled; they are received as binding only upon National, the person making the admission.

(The documents referred to, marked as Govern-
6408 ment's Exhibits Nos. 708 and 709, respectively, were received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibits 710 and 711.

(The documents referred to were marked as Government's Exhibits Nos. 710 and 711, respectively, for Identification.)

Mr. Knuff: Government's Exhibit 710 is a letter dated July 11, 1933, addressed to the Board Survey Company and signed R. F. Burley, Vice President. Exhibit 710 for Identification is a two-page exhibit.

Government's Exhibit 711 for Identification is a copy of a letter dated July 29, 1933, addressed to National Gypsum Company and signed Board Survey Company.

I offer in evidence Government's Exhibits 710 and 711.

Mr. Finck: The authenticity of both exhibits is admitted by National.

Justice Stephens: These are received in evidence. Any objections as to relevancy and materiality are overruled; they are received in evidence as binding only upon the person making the admission, to-wit, National.

(The documents referred to, marked as Government's Exhibits Nos. 710 and 711 for Identification, were
6409 received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 712, the same being a photostatic copy of a letter dated January 5, 1935, addressed to the Board Survey Company and signed National Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 712 for Identification.)

Mr. Knuff: We now offer in evidence Government's Exhibit 712.

Mr. Finck: The authenticity of Exhibit 712 is admitted by National.

Justice Stephens: The authenticity being admitted by National, the exhibit is received as binding upon National only. Objections as to relevancy and materiality, if any, are overruled.

(The document referred to, marked as Government's Exhibit No. 712, was received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 713, the same being a letter dated February 19, 1936, addressed to the Board Survey

Company and signed National Gypsum Company, E. B. Biesinger.

(The document referred to was marked as Government's Exhibit No. 713 for Identification.)

6410 Mr. Knuff: I now offer in evidence Government's Exhibit 713.

Justice Stephens: Does National admit the authenticity of this exhibit?

Mr. Finck: We do.

Justice Stephens: It may be received in evidence as binding upon National only. Any objections as to relevancy and materiality are overruled.

(The document referred to, marked as Government's Exhibit No. 713, was received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 714.

(The document referred to was marked as Government's Exhibit No. 714 for Identification.)

Mr. Knuff: This is a two-page letter, dated December 17, 1930, addressed to the National Gypsum Company and signed Audenreid Whittemore, Vice President.

I would also like to have marked for Identification as Government's Exhibit 714-A, a one-page letter attached to Exhibit 714, and being dated December 17, 1930, addressed to National Gypsum Company and signed Audenreid Whittemore, Vice President.

(The document referred to was marked as Gov-
6411 ernment's Exhibit No. 714-A for Identification.)

Mr. Knuff: I would also like to have marked for Identification as Government's Exhibit 714 B, a four-page agreement dated the 17th of December, 1930, between Certain-teed Products Corporation and National Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 714-B for Identification.)

Mr. Knuff: We now offer in evidence Government's Exhibits 714, 714-A and 714-B.

Justice Stephens: Is the authenticity of these items admitted by National?

Mr. Finck: It is, Your Honor.

Justice Stephens: Let us read them.

(Exhibits examined by the Court.)

Justice Stephens: Is there any objection as to relevancy or materiality?

Mr. Finck: The same objection, Your Honor.

Justice Stephens: What is the purpose of these exhibits?

Mr. Knuff: There are several purposes, Your Honor.

On the first page of Exhibit 714, you will notice that the Certain-teed Products Corporation is conveying to National Gypsum Company, Certain-teed Products Corporation's price on plaster and miscellaneous gypsum products. That appears under the designation "C. P. C.
6412 Established Sell. Price, f.o.b. Ft. Dodge". C. P. C., I take it, stands for Certain-teed Products Corporation.

Justice Stephens: What else are you offering them for?

Mr. Knuff: In the next place, it is somewhat on the same basis as the North Holston exhibits.

Under Exhibit 714-B, the contract provides for the purchase by National, of board, from Certain-teed.

Justice Stephens: The exhibits are received in evidence. Objections as to relevancy and materiality are overruled. They are received as binding upon the person only who admits them, to-wit, National.

(The documents referred to, marked as Government's Exhibits Nos. 714, 714-A and 714-B, respectively, were received in evidence.)

Mr. Knuff: Now apart from any request for admissions, I would like at this time to substitute the original document for the carbon copy, of Government's Exhibit 343. Exhibit 343 was introduced in this case in connection with Mr. Higgins' testimony. At that time Mr. Bromley furnished us with a carbon copy of 343. Since then we have found the original letter, and we would like permission to substitute the original of that letter for the carbon that has been received in evidence. The original of the letter has
6413 attached thereto the attachments that are mentioned in the carbon copy, which were not a part of the original exhibit. We are making the attachments a part of Exhibit 343 now.

6414 Justice Stephens: Is there any objection to this substitution by anyone?

Mr. Bromley: I don't understand the purpose of it.

Justice Stephens: The purpose of it, apparently, is to get in evidence certain attachments which are referred to in the carbon copy of Exhibit 343, and which are apparently attached to the original which is now being offered.

Mr. Bromley: Defendants object to the substitution, which obviously enlarges the scope and character of the original exhibit. I don't know anything about these things that he now annexes to Exhibit 343.

Mr. Knuff: Exhibit 343 came from the files of United States Gypsum Company—

Justice Jackson: (Interposing) Through what witness was that introduced?

Mr. Knuff: Mr. Higgins, when he was on the witness stand.

Justice Jackson: Was it objected to as not being complete?

Mr. Knuff: We didn't have Exhibit No. 343 at all, and Mr. Bromley handed it over to us, handed the carbon over to us, and said in effect—I am not quoting him directly—"Why don't you use this?"

We looked at it and had it marked, and offered it in evidence. We now find the original of it, which was
6415 taken from United States Gypsum Company's files, and we are substituting this for the carbon copy that Mr. Bromley furnished us.

Mr. Bromley: And adding five or six additional pages.

Mr. Johnston: I certainly object to substitution by adding these additional pages here, which seem to be five or six invoices, and putting them in now when we have no opportunity to cross-examine anybody about them. They couldn't be relevant, material or competent as to Texas.

Justice Stephens: Do you wish to be heard, Mr. Knuff?

Mr. Knuff: Well, as I said a moment ago, they came from the files of United States Gypsum Company. Mr. Bromley undoubtedly has photostats of them. I understand that before USG turned over anything to us, under subpoena, that they made photostats. They unquestionably have a photostat of this exhibit with these attachments.

Justice Stephens: Well, that doesn't go to the problem raised by the objections. The problem is that this Exhibit 343 came in through the testimony of Higgins, and the defendants had a chance at that time to cross-examine him as to its meaning; and if the attachments had been attached to the exhibit at that time, defendants would have had an opportunity to cross-examine Higgins on the attachments; but they weren't attached, and thus they didn't have that opportunity. I should think, unless you want to recall Higgins, that the objections are well taken to the sub-
6416 stitution of this exhibit.

The objections are sustained and the substitution is denied, with leave to the Government to recall Higgins if it wishes to accredit the attachments.

Mr. Bromley: May it please the Court, I find I totally misapprehended the statement of counsel with respect to Exhibit No. 714. Isn't it perfectly plain that there isn't any mention of patented board or lath or any other kind of board or lath in Exhibit No. 714, and if that be so, what possible materiality or relevancy can that have to any charge in this case?

Justice Stephens: Well, there is a reference to Keene's Cement.

Mr. Knuff: The second item is, "Concrete Bond Plaster", and the next one, "Sand Float Finish"—both of which are plaster.

Mr. Bromley: But there is no charge in the complaint that anybody agreed or conspired to fix the resale prices of plaster or Keene's Cement.

Mr. Knuff: This isn't a case of fixing the resale price, it is a case of the Certain-teed Products Corporation sending to National Gypsum Company, Certain-teed's prices.

Justice Stephens: Well, what do you want to prove by it, under the issue? What wrong does it aid you to prove; what charged wrong does it aid in the proof of?

6417 I ask that question, not to express doubt, but to get information. I don't understand it myself.

Mr. Knuff: Paragraph 45(c) of the complaint states:

"(c) concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern area."

Justice Stephens: That term "miscellaneous gypsum products" was defined how in the bill of particulars?

Mr. Bromley: As Keene's Cement, block and tile.

Under this contract, National is buying these products listed on the first page of Exhibit 714 from Certain-teed, and Certain-teed, in the second paragraph, states, among other things, in effect, "We will sell you Land Plaster at $3.75. Our price at which we sell generally is $6.00."

That is to show them what a good deal they are getting.

Then the contract provides that if the C. P. C. established selling price changes, then the price to National changes.

So of course Certain-teed has got to inform National

of what the established selling price charged by C. P. C. is, because if that changes, then the cost to National changes.

At any rate, it is a purchase by National, and if counsel contends that giving National this information is in support of any charge in the complaint, it must be a charge that National, in its resale of such plaster or
6418 Keene's Cement, as it bought from Certain-teed, would observe the established selling price of C. P. C.

But there is no charge in the complaint about resale price-fixing of plaster or Keene's Cement.

Justice Stephens: Mr. Knuff disclaims that it is introduced under the resale price-fixing charge. He asserts that it is introduced under Paragraph 45(c) of the complaint, which states, "(c) concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products", and so forth.

How does it tend to prove that, Mr. Knuff?

Mr. Knuff: An interchange of price information—that is one of the commonest ways of getting into an agreement to stabilize prices, the interchange of price information.

Justice Stephens: This doesn't purport to be an interchange of price information; it purports to be prices at which Certain-teed will sell to National.

Mr. Knuff: That is in the first column, where it says $3.75. Then in the second column, under "C. P. C. Established Sell. Price, f.o.b. Ft. Dodge", it states the price as $6.00. That is the price that Certain-teed is selling at. Certain-teed is giving its price to National.

Mr. Bromley: Look at the next paragraph, Mr. Knuff, where it states:

"All prices quoted in this letter are subject to
6419 change if the general market price in the territory supplied by the Fort Dodge Plant changes", and so forth.

Mr. Knuff: I have read it—so what?

Mr. Bromley: That would explain to me why C. P. C. gave the established market price.

Justice Stephens: Well, we think the objections probably go to weight, Mr. Bromley, and we will receive Exhibit 714 in evidence, as previously stated. That is to say, the ruling may stand.

Mr. Knuff: I would like at this time to have marked for identification Government's Exhibit 715, the same

being an inter-office memorandum, dated October 19, 1928, addressed to J. F. Haggerty, and signed in typewriting, M. H. Baker, and superimposed on the typing appear the initials "M.H.B."

In Paragraph 1 of our request we asked the National Gypsum Company to admit that this memorandum was sent by Baker to Mr. Haggerty. In Paragraph 1 of their answer they say that they cannot either admit or deny that Baker sent this memorandum. Now I suppose here we have a situation where the matter will have to be spread on the record.

Justice Stephens: Yes, I suppose so, if you want to make a record on the matter.

Mr. Knuff: In connection with Government's Exhibit No. 715 for identification, under its request for admissions, the Government requested the National Gypsum Company to admit that:

6420 "M. H. Baker, on or about October 19, 1928, sent an inter-office memorandum to F. J. Haggerty, president of National Gypsum Company. A photostat of said inter-office memorandum is attached hereto, made a part hereof, and marked Exhibit 1."

The answer of National Gypsum Company appears in Paragraph 1 of National's answer to the Government's request for admissions. It reads as follows:

"1. Cannot truthfully either admit or deny that M. H. Baker on or about October 19, 1928, sent an inter-office memorandum to J. F. Haggerty, President of National Gypsum Company, as set forth in the Government's Exhibit 1, for the following reasons: J. F. Haggerty died on or about April 29, 1929. M. H. Baker does not have any present recollection of writing the memorandum. Defendant admits that said Exhibit was taken from the files of National Gypsum Company and that the initials 'M.H.B.' written at the end of the memorandum, are in the handwriting of M. H. Baker, President of National Gypsum Company."

Justice Stephens: Now what is your contention, Mr. Knuff?

Mr. Knuff: We would like at this time to offer in evidence Government's Exhibit No. 715, and in connection with that offer, and apart from the request for admissions, we say that the document is entitled to be admitted

6421 in evidence because it is admitted by National that the initials, "M.H.B." are in the handwriting of

M. H. Baker, President of the National Gypsum Company. Whether or not it was received by Mr. Haggerty, the fact remains that it is still an admission of M.H.B.—Mr. Baker.

Justice Stephens: Mr. Finck, what do you say?

Mr. Finck: May it please the Court, the document was submitted to the officers of National, and we cannot admit the request of the Government, that this memorandum was communicated to Mr. Haggerty. Furthermore, the document is entirely irrelevant, as I see it. There is no charge in the complaint that we exploited the Gypsum Institute. The memorandum on the face of it seems to have been filed in the Gypsum Institute files. The document did come from the files of the National Gypsum Company, but not from the files of J. F. Haggerty. There is no one in the company, no officer or employee or anyone else, to whom this has been presented, who knows anything about it, and we cannot make the admission which the Government requests.

Justice Stephens: You admit, however, that it was taken from the files of National?

Mr. Finck: That is right, and we admit that the initials, "M.H.B." are Mr. Baker's initials.

Justice Jackson: Made by him?

Mr. Finck: Presumably so. We admit that they
6422 are in his handwriting.

Justice Jackson: Then they would have to have been made by him.

Mr. Finck: Yes.

Justice Stephens: The question is one of relevancy.

Mr. Finck: The question is whether it was sent to Mr. Haggerty.

Justice Stephens: What difference does that make, if it is a statement by Mr. Baker as an officer of National, providing it is relevant and material—what difference does it make whether it reached Haggerty or not, if it is offered as an admission?

Mr. Finck: I suppose it doesn't, but my main contention is that it is irrelevant, that it only deals with the subject of the Gypsum Institute.

Justice Stephens: We will hear you, Mr. Knuff, before we rule on the question of its materiality and relevancy. There isn't any charge here, is there, that the defendants were exploiting the Gypsum Institute in 1928?

Mr. Finck: The memorandum itself is directed only to Baker's ideas as to how the Institute should be operated,

as far as I can see. He talks about the Institute being exploited with the trade—

Justice Stephens: (Interposing) We understand your position—

6423 Mr. Finck: (Continuing)—and setting up a code of trade ethics. What that has to do with any charge in the complaint I cannot see. I am just bewildered on that point.

Justice Stephens: What do you say, Mr. Knuff, briefly?

Mr. Knuff: If your Honor pleases, it shows a conspiratorial state of mind.

Under Paragraph 1 it says; "One and the same price to all dealers in each market."

Then under Paragraph 2 it says, "100% distribution through dealers."

Now insofar as Paragraph No. 2 is concerned, we allege that there was a conspiracy here to eliminate jobbers, and whether or not this conclusively shows that, or whether or not this exhibit, taken in and of itself conclusively shows a conspiratorial state of mind, we say that it has some weight, that it is relevant; and that this exhibit, in connection with all other evidence in the case, should be considered by the Court.

The Court will notice that this exhibit is dated October 19, 1928, during the period in which we say that the conspiracy was in operation. For that reason, we think that it is both relevant and material, as showing the state of mind of National at that time, as to Paragraph 1, and certainly as showing the state of mind of National insofar as jobbers were concerned.

Mr. Finck: If the Court please—

6424 Justice Stephens: (Interposing) Is there anything in the record about a Gypsum Institute?

Mr. Finck: Nothing.

Mr. Bramley: Nothing.

Justice Stephens: Yes, Mr. Finck?

Mr. Finck: It seems to me that the Government is going 'way beyond the purpose of the rules, when they are asking us to admit and asking the Court to admit in evidence documents which seem to contain real issues. Now if Mr. Knuff desires to have Mr. Baker explain what is meant by this memorandum, to the Court, he can get him very easily. I can explain everything in the memorandum, but I don't suppose that is my office at the moment.

But I hardly think that the Court should take a docu-

ment of this kind, which relates to an entirely foreign matter, something foreign to the issues, and draw inferences from it, when there is a real issue involved. This letter most certainly is not relevant to the issues in this case.

Justice Stephens: I am inclined to think that your objection to the use of the Rule to get the document in evidence, is not well taken, Mr. Finck. Of course, under the ruling of Judge Garrett and myself, it would be binding only upon National as respects the admission that these
initials were Baker's initials, and in his hand-
6425 writing, and that it was found in National's files;
but I suppose the purpose of Rule 36 is to get admissions in evidence of a binding character, for what they are worth.

It does seem to go far, in view of the controversial nature, of the claimed controversial nature of the alleged admission. However, I don't think we need to rule on it on the basis of Rule 36, and we will not make a ruling on that basis.

It is my view, and I think Judge Garrett agrees with me, that the offered document is entirely irrelevant and immaterial under the issues. It doesn't seem to me that the fact the defendants may be shown, or one of the defendants may be shown by the exhibit, to have an alleged conspiratorial feeling with respect to the Gypsum Institute, is sufficiently connected here. It is too remote. Do you agree with me?

Justice Garrett: Yes.

Justice Stephens: What is your view, Judge Jackson?

Justice Jackson: I dissent from that ruling. I think it is relevant and material and should be admitted.

Justice Stephens: The majority ruling is that it is irrelevant and immaterial, and the exhibit is excluded.

Mr. Knuff: I would like to have marked at this time, as Government's Exhibit No. 716 for identification, a telegram, dated May 17, 1929, addressed to S. L. Avery,
6426 and signed M. H. Baker.

(The document referred to was marked as Government's Exhibit No. 716 for identification.)

Mr. Knuff: We asked, in our request for admissions, for National to admit that Mr. Baker sent this telegram. National's answer to that was that they could not truthfully admit or deny that the telegram was sent by Mr.

Baker to Mr. Avery, because there was nothing in the contents of the telegram to refresh the recollection of any officer, employee or agent of the defendant that such a telegram was sent.

Apart from the request and the answer of National, we offer Government's Exhibit No. 716, and we contend that this exhibit is circumstantially identified, and for the following reasons:

First, the telegram is dated May 17, 1929, which was just four days prior to the May 21st agreement that has been testified to in this case, before.

Second, it is addressed to Mr. S. L. Avery, a person who was intimately associated with the May 21st agreement.

Third, in the first line of the telegram it states, "Our contract signed and in mail". In connection with that, Government's Exhibit No. 3 shows that the National Gypsum Company's contract was signed on the
6427 16th day of May, just one day previous to the 17th, the date of this telegram. So that the person who was sending the telegram certainly must have known something about when Government's Exhibit No. 3 was signed.

Fourth, the telegram says, "We are working with Ebsary with hope of everybody being set by Saturday to justify your calling meeting all board makers Monday." Since the telegram was dated May 17, 1929, I have consulted the World Almanac, and I find that Monday would be May the 20th, which was one day previous to the meeting of Tuesday, May 21st.

Fifth, the telegram was signed by a Mr. Baker—at that time there was a Mr. Baker connected with the National Gypsum Company at Buffalo, the very place where this telegram originated.

Sixth, this telegram was taken from the files of the addressee, S. L. Avery, or from the files of the United States Gypsum Company, and bears on its face the receipt stamp of the United States Gypsum Company, showing it to have been received in Chicago on May 17, 1929. I don't know that the hour hand indicates the exact hour that it was received, but there is a receiving stamp of the United States Gypsum Company affixed right to the tele-

gram. We received this from United Sates Gypsum Company under subpoena.

We say that in view of all these circumstances,
6428 although Mr. Baker hasn't any recollection of this telegram, that the telegram is circumstantially identified and is entitled to be admitted as an exhibit in this case.

Justice Stephens: Is there any objection?

Mr. Finck: If the Court please, we of course have told all we know about this telegram, but even though all the circumstances suggested by Mr. Knuff are true, after having submitted this to Mr. Baker I hesitate very much to admit it myself. He remembers nothing about it. It seems to me that—

Justice Stephens: (Interposing) We are not asking you to admit it. We are just asking what you state in reply, if anything, to Mr. Knuff's argument as to its alleged circumstantial identification, outside of your failure to admit.

Mr. Finck: I have nothing more to say on that.

Mr. Bromley: I don't understand that what counsel has said has anything to do with circumstantial identification. He hasn't said anything about the telegram. There is nothing on the telegram that identifies it at all. I don't believe what he has been arguing about is properly addressed to circumstantial identification at all. There is nothing on the document that identifies it.

Justice Stephens: Is it denied that it came out of your files?

6429 Mr. Bromley: It is not.

Justice Garrett: There is testimony as to that meeting on the 20th in the record, is there not?

Mr. Knuff: On the 21st.

Justice Garrett: Yes—that was my recollection.

Mr. Knuff: Mr. Lenci testified concerning that, and I am not sure whether Mr. Whittemore did or not. There is also in evidence, as Government's Exhibit 3, National's contract which shows that it was signed on the 16th of May.

Justice Stephens: Yes, I understand that.

(The Justices conferred.)

Justice Stephens: We are of the view that it is circumstantially identified, and it is received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 716, was received in evidence.)

Justice Stephens: We will take the afternoon recess at this time.

(Thereupon, at 4:07 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Wednesday, April 19, 1944.)

6430 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Wednesday, April 19, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

6435 Mr. Knuff: May it please the Court, at this time we would like to have marked for identification Government's Exhibit 343-A, the same being a letter dated May 24, 1932, addressed to Mr. F. M. Miller, and having attached thereto National Gypsum Company's Invoices numbered 58,467, 57,851, 56,568, 56,499, 56,376, and 55,253. Those were handed up to Your Honors yesterday morning as a separate exhibit marked 343.

Justice Jackson: That is the one you wanted to substitute?

Mr. Knuff: Yes.

Justice Jackson: I don't believe I ever saw that.

Mr. Knuff: I gave them to the Clerk yesterday morning to place on the bench.

Justice Stephens: I have them, but Judge Garrett and Judge Jackson don't appear to have them.

Justice Jackson: What is the date of that, Mr. Knuff?

Mr. Knuff: May 24, 1932.

Justice Jackson: From Baker to Miller?

6436 Mr. Knuff: Yes.

Justice Jackson: I have it.

(The document referred to was marked as Government's Exhibit No. 343-A for identification.)

Justice Stephens: That is the original of the exhibit which, as Exhibit 343, has been put in in copy form, is it?

Mr. Knuff: Yes.

Justice Stephens: That is the one you attempted to substitute yesterday in order to get the attachments in, and we ruled adversely against you?

Mr. Knuff: That is right.

We asked Mr. Finck to admit the genuineness of the document, and in Paragraph 6 of Mr. Finck's answer the genuineness was admitted.

We now offer in evidence Government's Exhibit 343-A.

Justice Jackson: How many pages are there in that?

Mr. Knuff: There are two pages to the letter, and 6 pages of invoices, making a total of 8 pages.

Justice Stephens: And they are all marked Exhibit 343-A?

Mr. Knuff: Yes.

Justice Stephens: What paragraph of your request was that contained in?

Mr. Knuff: No. 30.

6437 Justice Jackson: That was the substituted sheet?

Mr. Knuff: Yes.

Justice Stephens: What paragraph of Mr. Finck's answer covers that?

Mr. Knuff: Paragraph 6.

Justice Stephens: Is there any objection?

Mr. Bromley: We object on the ground that it is incompetent because not binding on any defendant other than National.

Justice Stephens: Exhibit 343-A is received in evidence as binding upon National only, to-wit, the person who made the admission.

(The document referred to, marked as Government's Exhibit No. 343-A, was received in evidence.)

Mr. Knuff: I would like to have marked for identification at this time, Government's Exhibit 717, the same being a letter dated June 20, 1939, addressed to Mr. S. L. Avery and signed M. H. Baker, with the initials "MP" following Mr. Baker's name.

(The document referred to was marked as Government's Exhibit No. 717 for Identification.)

Mr. Knuff: In connection with this exhibit, we asked Mr. Finck to admit the genuineness of the document
6438 in Paragraph 3 of our request, or rather, we asked Mr. Finck to admit that the letter was sent to Mr. Avery. In answer to that, Mr. Finck—

Mr. Finck: (Interposing) If the Court please, I think I can save time. We will admit the authenticity of these next two exhibits.

Mr. Knuff: We offer Exhibit No. 717 in evidence.

Justice Stephens: That is received in evidence as binding only upon National, the person who made the admission.

(The document referred to, marked as Goverment's Exhibit No. 717, was received in evidence.)

Mr. Knuff: We would like to have marked at this time for Identification, Government's Exhibit 718, the same being a letter dated November 2, 1931, addressed to Mr. S. L. Avery, and signed M. H. Baker, President.

(The document referred to was marked as Government's Exhibit No. 718 for Identification.)

Mr. Knuff: I understand from Mr. Finck that the genuineness of that document is also admitted.

Mr. Finck: That is right.

Mr. Knuff: We offer in evidence Government's Exhibit 718.

Justice Stephens: It is received in evidence as
6439 binding on National only, the person who made the admission.

(The document referred to, marked as Government's Exhibit No. 718, was received in evidence.)

Justice Stephens: Does that finish those concerning National?

Mr. Knuff: That finishes the National exhibits, Your Honor.

Justice Stephens: What is the next set?

Mr. Knuff: The USG exhibits.

Justice Stephens: Are there available, by any chance, copies of USG's answers?

Mr. Bromley: Yes, Your Honor.

Justice Stephens: They weren't presented to the Judges heretofore, and it might be convenient if we had them now.

Mr. Bromley: We have one copy.

(Copy of USG answers handed to Justice Stephens.)

Justice Stephens: I will look at that, and then I will show it to my colleagues as necessary. It is quite brief. Proceed.

Mr. Knuff: I offer in evidence Government's Exhibit 550, the same having been previously marked for Identification. In the Government's Request for Admissions, we asked USG to admit that the letter was sent to Mr. Black. That is contained in Paragraph 1 of our Request.

6440 In Paragraph 1 of USG's answer, USG admitted that.

Justice Jackson: That is Exhibit 550?

Mr. Knuff: Yes.

Justice Jackson: How do we jump back like that?

Mr. Knuff: When Mr. Lenci was on the witness stand, I thought he could identify Mr. Carey's signature.

Justice Jackson: I see.

Mr. Keber: Judge Jackson, I thought I heard you make an observation that you had an extra copy of that series of exhibits, and if you do have, I wonder if we might use it back here?

Justice Jackson: Yes, I will write my name on here so it might be routed back to us.

Mr. Keber: Thank you.

(Set of USG exhibits handed to Mr. Keber.)

Justice Stephens: The admission seems not to comprehend the handwritten additions to the letter.

Mr. Knuff: Those are not offered.

Justice Stephens: Is there any objection to this document?

Does this contain more than one page, Mr. Knuff?

Mr. Knuff: This contains three pages, Your Honor.

Justice Stephens: Unless there is other objection, it will be received in evidence as binding only on USG, the person making the admission.

6441 (The document referred to, marked as Government's Exhibit No. 550, was received in evidence.)

Justice Stephens: Proceed.

Mr. Knuff: In connection with Government's Exhibit 550, in paragraph 2 of the Government's request, we asked USG to admit that on or about December 28, 1934, they sent a similar letter, and enclosed therewith similar enclosures, to each of the following companies: Atlantic Gypsum Products Corporation, Certain-teed Products Corporation, Kelley Plasterboard Company, Inc., National Gypsum Company, and Universal Gypsum & Lime Company. The USG has made that admission.

Justice Stephens: In Paragraph 1 of USG's answer?

Mr. Knuff: Yes.

We offer in evidence at this time Government's Exhibit 554, the same having been previously marked for Identification.

Justice Jackson: Identify that by date, please.

Mr. Knuff: December 31, 1934.

Mr. Johnston: If the Court please, before we go to that next exhibit, hadn't the record better show as to this admission on 550?

Justice Stephens: I don't think there is anything for the Court to do under those circumstances.

Mr. Johnston: He is offering it.

6442 Justice Stephens: Exhibit 550 is in evidence.

Mr. Johnston: I am talking about this other statement, this other admission. The fact that USG admits that a similar letter was sent to these other companies wouldn't in any manner bind Texas.

Mr. Knuff: Texas wasn't mentioned.

Mr. Johnston: That is what I wanted the record to show. It is incompetent, irrelevant and immaterial as to Texas.

Mr. Oliver: And also as to Celotex and Dahlberg.

Mr. Keber: I take the same position with respect to Certain-teed and Hartley.

Mr. Knuff: Certain-teed was mentioned.

Mr. Keber: But the admission wasn't made by Certain-teed.

Justice Stephens: Well, the admission which has just been referred to by Government counsel, based upon the Request for Admissions in Request No. 2, as to USG, and answered in Paragraph 1 of USG's answer to the Request for Admissions, is treated by the Court as binding only upon USG.

Now what is this next one?

Mr. Knuff: I offered in evidence, if Your Honor pleases, Government's Exhibit 554. That was previously marked for Identification while Mr. Lenci was on the witness stand. We asked USG, in Request No. 3, to admit that the letter was sent to Arthur Black; and in Paragraph 1 of USG's
6443 answer, they so admit.

Mr. Bromley: Except the handwritten notations.

Mr. Knuff: Except the handwritten notations, yes.

Justice Stephens: This is received in evidence as binding only on USG.

(The document referred to, marked as Government's Exhibit No. 554, was received in evidence.)

Mr. Knuff: With reference to Government's Exhibit 554, in paragraph 4 of the Government's Request for Admissions, we asked USG to admit that a similar letter was sent by the Board Survey Company, on December 31, 1934, to each of the following companies: Atlantic Gypsum Products Corporation, Certain-teed Products Corporation, Kelley Plasterboard Company, Inc., National Gypsum Company, and Universal Gypsum & Lime Company.

In Paragraph 1 of USG's answer, they so admit.

Justice Stephens: Except for the handwritten notations which may appear on the letter.

Mr. Knuff: That is right. Of course, there couldn't be any handwritten notations on the letters—

Justice Stephens: (Interposing) I see that USG's response has to do with handwritten notations which appear on Exhibits 1, 2 and 3—that is, Exhibits 1, 2 and 3 referred to in the Request for Admissions. What do they cor-
6444 respond to in the exhibits as listed in the Court numbers?

Mr. Knuff: No. 2 corresponds to Exhibit 554.

Justice Garrett: Well, it is marked "3" on mine. Is that December 31, 1934?

Mr. Knuff: No. 3 is also dated December 31, 1934. Exhibit 554, which is Exhibit No. 2 of the Government's Request for Admissions, is a one-page exhibit.

Justice Garrett: I see.

Justice Stephens: I am sorry, but I am a little confused. This Exhibit 554 that I have before me doesn't bear any exhibit number as it does in this other file.

Mr. Johnston: If the Court please, Exhibit 554 was a letter from Board Survey to Black, dated December 31, 1934, and was admitted on February 22.

Justice Stephens: It was identified, but it wasn't admitted, according to my records.

Mr. Johnston: Yes, identified.

Justice Stephens: I should think, as a matter of proper precaution, the record ought to show that the admission is recorded in the terms made by USG, which does not include an admission of any handwritten notations, and that the admission is treated by the Court as binding only on USG.

Mr. Knuff: I don't think any handwriting is involved in this one at all.

Justice Jackson: It doesn't make any difference 6445 whether there is or is not, does it, Mr. Knuff?

Mr. Knuff: No, your Honor.

Justice Stephens: If there isn't, you are not harmed; and if there is, USG is protected within the terms of its own admission.

Mr. Knuff: We offer in evidence Government's Exhibit 556, the same having been marked for Identification when the Witness George N. Lenci was on the stand.

We asked USG in Request No. 5 to admit that the letter was sent to Arthur Black; and in Paragraph 1 of USG's answer, they so admit, except that they don't admit the handwriting that is contained on this exhibit.

Justice Jackson: That is the letter starting "Re: Dunnage"?

Mr. Knuff: That is correct, your Honor.

Justice Stephens: The exhibit is admitted as binding only upon USG.

(The document referred to, marked as Government's Exhibit No. 556, was received in evidence.)

Mr. Knuff: With reference to Exhibit 556, we asked USG to admit that on or about December 31, 1934, they sent a similar letter to each of the following companies: Atlantic Gypsum Products Corporation, Certain-teed Products Corporation, Kelley Plasterboard Company,
6446 Inc., National Gypsum Company, and Universal Gypsum & Lime Company.

In Paragraph 1 of USG's answer, they so admit.

Justice Stephens: That admission may be recorded as binding upon USG only, and as not containing an admission of any handwritten notations which may possibly appear upon the letters referred to.

Mr. Knuff: I would like at this time to have marked for Identification Government's Exhibit 719, the same being a letter dated May 10, 1935, addressed to Mr. Arthur R. Black, and signed Board Survey Company, E. W. Casey, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 719 for Identification.)

Mr. Knuff: In Government's Request No. 7, we asked USG to admit that this letter was sent to Mr. Black; and in Paragraph 2 of USG's answer, they so admit, except for the handwriting notation in the upper left-hand corner of the exhibit.

Justice Stephens: There is no notation as to admission of the handwriting, but you don't mean to offer the handwriting, of course.

Mr. Knuff: We don't offer that anyway.

We now offer Government's Exhibit 719 in evidence.

Justice Stephens: That is in your Request No. 7?
6447 Mr. Knuff: That is right.

Justice Stephens: Exhibit 719 is received in evidence as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 719, was received in evidence.)

Mr. Knuff: With reference to Government's Exhibit 719, we asked USG to admit that a similar letter was sent on May 10, 1935, to each of the following companies: Atlantic Gypsum Products Corporation, Certain-teed Products Corporation, Kelley Plasterboard Company, Inc., National Gypsum Company, and Universal Gypsum & Lime Company. In Paragraph 2 of USG's answer, they so admit.

Justice Stephens: That is covered by the Government's Request No. 81

Mr. Knuff: That is right, Your Honor.

Justice Stephens: Well, that admission may be shown, but is it treated by the Court as binding upon USG only.

Mr. Knuff: I would like at this time to have marked for Identification Government's Exhibit 720, the same being a telegram dated May 17, 1929, addressed to S. M. Gloyd, Texas Cement Plaster Company, and signed S. L. Avery.

(The document referred to was marked as Government's Exhibit No. 720 for Identification.)

6448 Mr. Knuff: We would also like to have marked for Identification Government's Exhibit 721, the same being a telegram dated 5-18-29, addressed to S. M. Gloyd and signed S. L. Avery.

(The document referred to was marked as Government's Exhibit No. 721 for Identification.)

Mr. Knuff: We would also like to have marked for Identification Government's Exhibit 722, the same being a telegram dated May 20, 1929, addressed to S. L. Avery, and signed S. M. Gloyd.

(The document referred to was marked as Government's Exhibit No. 722 for Identification.)

Mr. Knuff: With reference to Exhibit 720, in Paragraph 9 of the Government's Request, we requested USG to admit that such a telegram was sent; and in Paragraph 2 of USG's answer, it is so admitted.

With reference to Government's Exhibit 721, in Paragraph 10 of the Government's Request, we asked USG to admit that such a telegram was sent; and in Paragraph 2 of USG's answer, they so admit.

With reference to Government's Exhibit 722, in Paragraph 11 of the Government's Request, we asked USG to admit that such a telegram was received; and in Paragraph 2 of USG's answer, USG so admits.

6449 We offer in evidence Government's Exhibits 720, 721 and 722.

Justice Stephens: They are received as binding upon USG only, the person making the admission.

(The documents referred to, marked as Government's Exhibits Nos. 720, 721, and 722, respectively, were received in evidence.)

Mr. Bromley: May it please the Court, I don't believe it is necessary for Mr. Knuff to burden us with a recital of the number of his request and the number of our admission. Most of these exhibits we admit. Why can't he say, "Authenticity admitted", and stop, instead of taking a half a page of the record as to each one of these?

Justice Stephens: I should think that could be done.

Mr. Knuff: I will do so.

Justice Stephens: The only place where it is necessary to put in either the substance or the form or the detail of an admission and request, is where there is something for the Court to act on, some dispute between counsel as to what the admission means; but if you have received an admission of authenticity of a document, all you need to do is refer to the document and say that an admission of authenticity has been made; and if counsel for the opposite party
6450 doesn't object to that, that is the end of it.

Mr. Knuff: I should have had marked for Identification at the same time, Government's Exhibit 723, the same being a carbon copy of a letter dated May 20, 1929, addressed to Mr. S. M. Gloyd, and signed "President".

(The document referred to was marked as Government's Exhibit No. 723 for Identification.)

Mr. Knuff: Authenticity admitted.

Justice Stephens: By USG?

Mr. Knuff: By USG.

We offer Government's Exhibit 723 in evidence.

Justice Stephens: Received in evidence as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 723, was received in evidence.)

Mr. Johnston: If the Court please, I just want to make an observation or inquiry. I suppose the purpose of the Government in offering that exhibit is to clear up any question as to whether or not Mr. Gloyd was at that meeting on May 21, 1929, in Chicago. I think that letter clarifies the situation. I suppose that is why it was offered.

Mr. Knuff: We are not bound by any of Mr. Johnston's suppositions.

6451 Justice Stephens: Is there a dispute between the parties as to whether Mr. Gloyd was or was not present at that meeting?

Mr. Knuff: I don't know whether he was or not.

Mr. Johnston: There is no evidence that he was there, and they have been talking all the time about his attending that meeting in Chicago, and this ought to satisfy them.

Justice Stephens: You may proceed, gentlemen.

Mr. Knuff: I wonder if we can take the morning recess at this time?

Justice Stephens: Yes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

6452 Justice Stephens: Proceed.

Mr. Knuff: With regard to Exhibits 720, 721, and 723, authenticity wasn't the only thing involved in the Government's request. Admission was also requested that these telegrams, Exhibits 720 and 721, were sent. So I want the record to show that they are authentic telegrams, and that the telegrams, Exhibits 720 and 721, and the letter, Exhibit 723, were sent.

I would like at this time to have marked for identification Government's Exhibit No. 724, the same being a telegram, or rather a copy of a telegram, dated May 18, 1929, addressed to F. Fred G. Ebsary, and signed S. L. Avery.

(The document referred to was marked as Government's Exhibit No. 724 for identification.)

Mr. Knuff: We offer in evidence Government's Exhibit No. 724. It is admitted that the telegram is authentic, and that it was sent.

Justice Stephens: The admission may be shown, and the exhibits will be received as binding only upon USG.

(The document referred to, marked as Government's Exhibit No. 724, was received in evidence.)

Mr. Knuff: We would like at this time to have marked for identification Government's Exhibit 725, the same
6453 being a copy of a telegram, dated May 18, 1929, addressed to M. H. Baker, of the National Gypsum Company, and signed S. L. Avery.

(The document referred to was marked as Government's Exhibit No. 725 for identification.)

Mr. Knuff: We would also like to have marked for identification at this time Government's Exhibit No. 726, the same being a copy of a telegram dated June 24, 1929, addressed to M. H. Baker, and signed John E. MacLeish.

(The document referred to was marked as Government's Exhibit No. 726 for identification.)

Mr. Knuff: We offer in evidence Government's Exhibits 725 and 726.

It is admitted by USG that the telegrams are authentic, and that they were sent.

Mr. Bromley: The admission referred to by counsel was qualified to the extent that the typed notations to the left of the signature on Exhibit 726, were not on the telegram as sent.

Mr. Knuff: That is correct.

Justice Stephens: That limitation may be shown upon the admission.

The exhibits are received in evidence as binding
6454 upon USG only.

(The documents referred to, marked as Government's Exhibits Nos. 725 and 726, were received in evidence.)

Mr. Knuff: We would like to have marked for identification at this time Government's Exhibit No. 727, the same being a letter, dated June 13, 1933—

Justice Stephens: (Interposing) That is not the next one in the file which we have, is it?

Mr. Knuff: No, your Honor, skip one.

It is dated June 13, 1933, and is addressed to Mr. F. M. Miller, and signed in typewriting, H. F. Sadler.

(The document referred to was marked as Government's Exhibit No. 727 for identification.)

Mr. Knuff: The authenticity of this memorandum, and the fact that it was sent, is admitted by USG.

Justice Stephens: Exhibit No. 727 is received in evidence as binding upon USG only.

(The document referred to, marked as Government's Exhibit No. 727, was received in evidence.)

Mr. Knuff: We would like to have marked for identification at this time Government's Exhibit No. 728, the same being a memorandum, dated April 21, 1933, address-
6455 ed to Mr. F. M. Miller—

Justice Stephens: (Interposing) You are going back now, in our sets of exhibits?

Mr. Knuff: Yes, I am going back one letter.

Justice Stephens: Oh, yes.

(The document referred to was marked as Government's Exhibit No. 728 for identification.)

Mr. Knuff: At this time we offer Government's Exhibit No. 728 as being circumstantially identified.

Justice Stephens: Is there any objection to the circumstantial identification of Exhibit No. 728?

Mr. Bromley: I don't see that there is any circumstantial identification of any kind.

Mr. Knuff: The circumstances on which the Government relies are: First, that it was admitted that Exhibit 728 was taken from the files of USG; second, you will notice on Exhibit 728 that the subject matter is Watertown Builders Supply Company, Cambridge, Massachusetts. You will notice also that the report is a report from Mr. Gallagher. You will also notice that it has to do with a cut in the plaster prices by Certain-teed.

Exhibit 727 likewise is a report from Mr. Gallagher and also has to do with the cutting of plaster prices. I think,
in view of the fact that Exhibit 728 at the top of it
6456 deals with the Watertown Builders Supply Company,
and the fact that it is within two months' time of Exhibit 727, and the fact that both reports were made by Mr. Gallagher, that they are circumstances from which the identification can be determined.

Justice Stephens: If we admit Exhibit 728 as circumstantially identified, we are in effect, ruling that it is the report or the basis of the report referred to in 727, and the dates are very different. What does it add, anyway, Mr. Knuff? Does it prove anything more than 727 proves?

Mr. Knuff: Well, it gives the specific plaster prices.

Justice Garrett: Was there any admission by USG as to Exhibit 728?

Mr. Knuff: USG refused to admit or deny that the letter was sent to Mr. F. M. Miller, but they do admit that it was taken from their files.

Justice Stephens: We are agreed here that it is not circumstantially identified, and Exhibit No. 728 is rejected.

Mr. Bromley: I should like to say at this time, may it please the Court, that in order to save the size of the record, and obviate what I feel to be useless repetition, that I am prepared to stipulate now, on condition that what I believe to be the next 20 or so exhibits contemplated to be offered by the Government are not offered, that a total of 20 complaints was handled by the Board Survey Company on the
basis of rebates on the price of patented board, ef-
6457 fected through rebates on prices of plaster, roofing,
insulation board, and the like.

Justice Stephens: Would that be sufficient to satisfy the Government and avoid the necessity of putting in these documents?

Mr. Knuff: It will not satisfy the Government, your Honor. We do not feel that we should take Mr. Bromley's conclusion as to what these exhibits show.

Mr. Bromley: You don't contend that they show anything different from what I just said, do you?

Mr. Knuff: We do contend that they show something entirely different than that it is a rebate.

Mr. Bromley: Would you mind telling me what you do contend?

Mr. Knuff: We contend that they show that there is a fixing of plaster prices, by some of these exhibits. They can call them rebates, or they can call them anything they want to, but we contend that it is a fixing of plaster prices.

(Discussion off the record.)

Justice Stephens: Proceed, Mr. Knuff.

Mr. Knuff: I would like to have marked for identification Government's Exhibits 729 and 730.

6458 (The documents referred to were marked as Government's Exhibits Nos. 729 and 730 for identification.)

Mr. Knuff: Government's Exhibit 729 is a carbon copy of a letter, dated November 14, 1932, to C. O. Brown, and signed by the Board Survey Company.

Government's Exhibit No. 730 for identification is a letter, dated November 28, 1932, to Frank M. Miller, and signed Warren Henley.

The authenticity of both of these letters was admitted by USG, and they also admit that Exhibit 729, or the original thereof, was sent, and that Exhibit 730 was received.

We offer in evidence Government's Exhibits Nos. 729 and 730.

Justice Stephens: Received, as binding on USG only.

(The documents referred to, marked as Government's Exhibits Nos. 729 and 730, were received in evidence.)

Mr. Knuff: I would like to have marked for identification Government's Exhibits 731 and 732.

(The documents referred to were marked as Government's Exhibits Nos. 731 and 732 for identification.)

Mr. Knuff: Government's Exhibit 731 is a carbon
6459 copy of a letter, dated May 13, 1933, to C. O. Brown, and signed by the Board Survey Company.

Government's Exhibit 732 for identification is a letter, dated May 25, 1933, to Miller, and signed by Warren Henley.

Exhibit 731 is a carbon copy of a letter, the genuineness of which is admitted, and it is further admitted that the original thereof was sent.

As to Exhibit 732, the genuineness of that letter is admitted, and it is further admitted that it was received by the United States Gypsum Company.

We offer in evidence Government's Exhibits 731 and 732.

Justice Stephens: These are received as binding on USG only.

(The documents referred to, marked as Government's Exhibits Nos. 731 and 732 for identification, were received in evidence.)

Mr. Knuff: I would like to have marked for identification Government's Exhibits 733 and 734.

(The documents referred to were marked as Government's Exhibits Nos. 733 and 734 for identification.)

Mr. Knuff: Government's Exhibits No. 733 is a carbon copy of a letter, dated August 2, 1933, addressed to C. O. Brown, and signed by the Board Survey Company.
6460 Exhibit No. 734 is a letter, dated August 18, 1933, addressed to Frank Miller of the Board Survey Company, and signed by Warren Henley.

The genuineness of Exhibit 733 is admitted, and also the fact that this exhibit was sent, or rather the original thereof; the genuineness of Exhibit 734 is likewise admitted, and also that it was received.

We offer in evidence Government's Exhibits 733 and 734.

Justice Stephens: These two exhibits are received as binding upon USG only.

(The documents referred to, marked as Government's Exhibits Nos. 733 and 734, were received in evidence.)

Mr. Knuff: I would like to have marked for identification Government's Exhibits 735 and 736.

(The documents referred to were marked as Government's Exhibits Nos. 735 and 736 for identification.)

Mr. Knuff: Government's Exhibit No. 735 is a carbon copy of a letter, dated August 3, 1933, addressed to C. O. Brown, and signed by the Board Survey Company.

Government's Exhibit 736 is a letter, dated August 18, 1933, addressed to Mr. Miller, and signed Warren Henley.

The genuineness, and the fact that the original of
6461 735 was sent, are admitted; and the genuineness and the fact that Exhibit 736 was received are admitted.

We offer in evidence Government's Exhibits 735 and 736.

Justice Stephens: These are received as binding on USG only.

(The documents referred to, marked as Government's Exhibits Nos. 735 and 736, were received in evidence.)

Mr. Knuff: I would like to have marked for identification Government's Exhibits 737 and 738.

(The documents referred to were marked as Government's Exhibits Nos. 737 and 738 for identification.)

Mr. Knuff: Government's Exhibit No. 737 is a carbon copy of a letter, dated August 3, 1933, addressed to C. O. Brown, and signed Board Survey Company.

Government's Exhibit 738 is a letter, dated August 18, 1933, addressed to Frank Miller, and signed by Warren Henley.

The genuineness of Exhibit 737, and the fact that the original of that exhibit was sent, are admitted; the genuineness of Exhibit 738 and the fact that it was received, are admitted.

We offer in evidence Government's Exhibits 737 and 738.

Justice Stephens: These exhibits are received as binding on USG only.

6462 (The documents referred to, marked as Government's Exhibits Nos. 737 and 738, were received in evidence.)

Mr. Knuff: Now, your Honors, skip one letter, that is the letter of August 15, 1932, in the sets of exhibits which you have.

I would like to have marked for identification Government's Exhibit 739, the same being a carbon copy of a letter, dated August 19, 1932, addressed to Warren Henley and signed by the Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 739 for identification.)

Mr. Knuff: We offer in evidence Government's Exhibit 739.

Justice Stephens: Received as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 739, was received in evidence.)

Mr. Knuff: We would like to have marked for identification Government's Exhibit 740, the same being a copy of a letter, dated August 15, 1933, addressed to F. M. Miller, and signed, in typewriting, H. F. Sadler.

6463 (The document referred to was marked as Government's Exhibit No. 740 for identification.)

Mr. Knuff: We would also like to have marked for identification Government's Exhibit 741, the same being a letter, dated August 29, 1932, addressed to Frank M. Miller, and signed Warren Henley.

(The document referred to was marked as Government's Exhibit No. 741 for identification.)

Mr. Knuff: We offer Government's Exhibits 740 and 741 in evidence, as circumstantially identified.

Justice Stephens: By what?

Mr. Knuff: By Exhibit 739. Exhibit No. 739 is a letter, addressed to Mr. Henley, and concerns W. Skobliski. Exhibit 740 gives the address of Mr. Skobliski as Long Island, and Exhibit 739 also gives his address as Long Island.

Justice Stephens: Well, we understand now that you claim that Exhibits 740 and 741 are circumstantially identified by 739, or in relation thereto?

Mr. Knuff: Yes, your Honor.

Justice Stephens: Let us read the three of them and perhaps we can see and ask questions, and thereby save time.

(The Justices read the exhibits referred to.)

6464 Justice Stephens: Let's talk about these one at a time. Is there any objection to the introduction of Exhibit 741 as being circumstantially identified with Exhibit 739, in view of the admission which I take it, USG has made, that Exhibit 741 came out of the files of USG—is that admitted?

Mr. Knuff: That is admitted, your Honor. It is admitted that 741 came from the files of USG.

Justice Stephens: What about that, Mr. Bromley, do

your contest that Exhibit 741 is identified circumstantially with Exhibit 739, which is already in evidence?

Mr. Bromley: Our position is that no one in our organization could identify Exhibit 741. It is not Henley's signature, and we know nothing about it except the fact that it came from our files.

Justice Stephens: Is the signature of Warren Henley admitted as correct?

Mr. Bromley: No, it is not.

Mr. Knuff: It is not denied, either.

Mr. Bromley: We weren't asked about it. We now deny it.

Mr. Knuff: The circumstance that identifies the letter apparent from the first paragraph of Exhibit 741, "Acknowledging your inquiry of August 19th", and so forth. Now Exhibit 739, which admittedly was sent by USG, is a letter dated August 19, 1932. So it seems the two are intimately connected.

6465 Justice Stephens: We think that Exhibit No. 741 is circumstantially identified, and it is received in evidence as binding only on USG.

(The document referred to, marked as Government's Exhibit No. 741, was received in evidence.)

Justice Stephens: We don't think that Exhibit 740 is circumstantially identified, at least we don't see that it is presently, Mr. Knuff. We haven't heard you on that, but so far, we don't see any relationship, on the face of it, between Exhibits 740 and 739.

Mr. Knuff: If Exhibit 740 is admitted in evidence as circumstantially identified, it is—

Justice Stephens: (Interposing) We haven't admitted Exhibit No. 740 yet.

Mr. Knuff: I beg your pardon. If Exhibit 741 is admitted in evidence as circumstantially identified, I don't believe that it is subject to the limitation that it is only binding on USG.

Mr. Bromley: That is a novel theory. The only way that it comes in is because of its connection with a document, the only status of which is that we are the only defendants who admit its authenticity.

Justice Stephens: That is the same matter that

6466 we had yesterday under consideration, and we ruled against you on that, Mr. Knuff, at least Judge Garrett and I did.

Mr. Knuff: With reference to Exhibit 740, the circumstances that identify Exhibit 740 are these.

First, it is on the stationery of United States Gypsum Company. Right at the top it says, "United States Gypsum Co." It was taken from the United States Gypsum Company's files. The subject matter with which it deals is a dealer by the name of W. Skobliski, West Hempstead, Long Island. It has to do with a complaint concerning Certain-teed. Exhibit 739 deals with the same subject matter, W. Skobliski—

Justice Stephens: (Interposing) Let us read it again with that in mind. We didn't see, at the top of Exhibit 740, the reference to Skobliski when we first read it. It was obscured by the binding. Let us read it again.

(The Justices reread Exhibit No. 740.)

Justice Stephens: Who was Sadler?

Mr. Knuff: Mr. Sadler was at that time, I believe, assistant to the vice president.

Justice Stephens: Of what?

Mr. Knuff: Of USG. I take it that is what, "A. V. P." stands for.

Justice Stephens: The only thing we can see that would seem to identify it is the fact that Skobliski is referred to in each one of the exhibits, 739 and 740. So far as
6467 the subject matter of Exhibit 740 is concerned, it doesn't seem to us to mean anything in relation to Exhibit 739. We are of the view that it is not circumstantially identified.

Mr. Knuff: I didn't have an opportunity to finish pointing out my reasons for feeling that it is circumstantially identified.

Justice Stephens: I am sorry. Proceed.

Mr. Knuff: The subject matter of the complaint was Certain-teed in Exhibit 740. Exhibit 739 was a letter addressed to Certain-teed—

Justice Stephens: (Interposing) How do you get, out of Exhibit 740, that it relates to Certain-teed?

Mr. Knuff: It states:

"'Says he is wholesale and retail and that he sells more material to dea' rs than to jobs. Claims he handled 30 cars of Gypsum-Board last year and seven cars so far this year. Claims to be handling Certain-teed.'"

Exhibit 740 relates to Certain-teed. Exhibit 739, which is a letter just four days later than Exhibit 740, and which would ordinarily come out some time later than Exhibit 740, was addressed to Mr. Warren Henley of the Certain-teed Products Corporation.

As I previously said, Exhibit 740 is on the stationery of the United States Gypsum Company, on their printed letterhead. Mr. Sadler, at that time, was assistant to
6468 the vice president of USG; and it came from the files of United States Gypsum Company.

Justice Stephens: Exhibit No. 739 is a letter which Board Survey sent to Certain-teed.

Mr. Knuff: That is right.

Justice Stephens: How can that be said to refer to previous correspondence between USG and Board Survey?

Mr. Knuff: Exhibit 740 is a letter to Board Survey.

Justice Stephens: That is right.

Mr. Knuff: And the Board Survey then follows that up on the 19th of August, by writing a letter to the concern which was mentioned in Exhibit 740, which is Certain-teed. It seems to me to be a perfect chain.

Mr. Sadler made the complaint to Board Survey on the 15th of August. The Board Survey, on the 19th of August, writes to Certain-teed and Certain-teed was the subject matter of the complaint in the letter of August 15, 1932, Exhibit 740.

Justice Stephens: When you get Exhibit 740 in, if it should come in, what do you prove by it? What does it mean?

Mr. Knuff: Well, it means just this, your Honor, that in Paragraph 92 of the complaint we set forth that USG is policing the industry, and—

Justice Stephens: (Interposing) We understand all that, that that is your charge, but what I am trying to see is the relevancy of Exhibit 740 to that charge.

6469 Mr. Knuff: The extent of policing activities under the licensing agreement is relevant and material under the allegation of subterfuge in Paragraph 46. We don't want to argue that at this time, but that is our theory.

Justice Stephens: You don't understand me, that isn't what I am asking you about. I know what you contend your complaint charges. Now I am trying to find out what the relevancy of Exhibit 740 is to that complaint. Let me read it again. I may be dense about it, but I just don't see it.

Is it the second paragraph of Exhibit 739 which you think is a reference to Exhibit 740?

Mr. Knuff: Well, I think all of Exhibit 739 is with reference to 740, your Honor.

Justice Stephens: The first paragraph of Exhibit 739 says, "Please refer to our previous correspondence and your June 21 letter", and so forth. Now Exhibit 740 is not a letter of June 21, and it isn't previous correspondence between Certain-teed and Board Survey, but is previous correspondence, if any, between USG and Board Survey. It seems to me that unless you get it in under some other paragraph of Exhibit 739, that it obviously is circumstantially disconnected, rather than connected.

Mr. Knuff: "Please refer to our previous correspondence" would mean correspondence between Board
6470 Survey and Warren Henley—

Justice Stephens: (Interposing) Warren Henley was from Certain-teed Company, wasn't he?

Mr. Knuff: Yes, your Honor.

Justice Stephens: That is what I said. I said that the reference was to previous correspondence between Board Survey and Certain-teed, and Exhibit 740 is not such correspondence.

Mr. Knuff: That is right, and we don't contend that it is.

Justice Stephens: Then what circumstance does connect it with Exhibit 739?

Is it the mere fact that in the second paragraph of Exhibit 739 it is asserted that special allowances have been made by Certain-teed to Skobliski, and that Exhibit 740 relates to Skobliski?

Mr. Knuff: That is one of the items that connect it. The fact that the subject matter at the top of Exhibit 739 is "Re: W. Skobliski, Long Island, N. Y.", which is also the subject matter of 740, is another circumstance.

The fact that Exhibit 739 is dated August 19, 1932, and Exhibit 740 is dated August 15, 1932, is another circumstance.

A further circumstance is that the letter, Exhibit 739, was addressed to Warren Henley, and the complaint con-
6471 tained in Exhibit 740 had to do with Certain-teed. Warren Henley is with Certain-teed. Furthermore, the fact that both 739 and 740 were taken from the files of USG, and that Exhibit 740 is on the letterhead of USG, are all circumstances identifying the correspondence.

Justice Garrett: I take it that the last paragraph of Ex-

hibit 740 is an excerpt from some report that was sent to Gallagher by a salesman who made some investigation into Skobliski's business?

Mr. Knuff: That would be my understanding.

Justice Garrett: It is in quotation marks, and it says that it is a report submitted to Sales Manager Gallagher, by salesman Roche. Now Gallagher was the Sales Manager of USG, was he?

Mr. Knuff: Yes.

Justice Garrett: And salesman Roche was a salesman for whom?

Mr. Knuff: I would assume that Roche was a salesman for USG.

Justice Garrett: His name has been in the testimony before, I believe, but I have forgotten which company he was a salesman for.

Mr. Knuff: If the name Roche has ever been mentioned in the testimony, your Honor, I don't recall it.

Mr. Bromley: Maybe your Honor is thinking of Roos.

6472 Justice Garrett: No, I am thinking of a salesman. I thought that someone testified about a saleman by the name of Roche.

Justice Jackson: There were two men by the name of Roos, weren't there, one an inventor, and the other a salesman?

Mr. Knuff: Yes, Carlisle K. Roos was the inventor, and E. G. Roos was the sales manager, at one time, for Certain-teed.

Justice Stephens: Judge Garrett and I are, for some reason or other, unable to see the circumstantial identification of Exhibit 740. Judge Jackson has a different view. In addition to that, I will say that I can't see that Exhibit 740, on its face, means anything at all in respect of alleged undercutting of prices, or price-fixing on plaster. If it said in the last sentence that these figures, $29 to $31, were less than bulletin prices, that might mean something, but it doesn't say that.

Mr. Knuff: Here is what Exhibit No. 740 means to me. Throughout the case Mr. Bromley, at one time or another, has said that Board Survey never did anything concerning dealers. Well, maybe Board Survey didn't do anything, but here you have a situation where you have a salesman of

USG going into warehouses and snooping around and finding out things.

Justice Jackson: That is all based on a complaint
6473 against Certain-teed?

Mr. Knuff: That is right.

Justice Jackson: Well, what is wrong with what Mr. Bromley said or what you say he said?

Mr. Knuff: I think that maybe, in so far as the corporate idea is concerned, Board Survey did it, but you have Board Survey being a wholly-owned subsidiary of USG, and you have USG's men doing the same thing.

Justice Jackson: To get something on Certain-teed?

Mr. Knuff: Yes.

Justice Jackson: Surely, if Certain-teed violated the license agreement, why not?

Mr. Knuff: That is right.

Justice Jackson: I don't know what this document means. I do think, however, that it has been sufficiently circumstantially identified. As far as its weight is concerned, to my mind it is a blank, it is a nothing. That is the way I feel about it, but it has been sufficiently identified, I think, in that all three of these exhibits, 739, 740 and 741, evidently deal with a complaint against Certain-teed as to sales made in alleged violation of their license agreement, through the sales being made to Skobliski. That is the only reason I feel that it is circumstantially identified. As to what it means, I don't know, so it won't mean anything to my mind, even if it were to be considered.

6474 Mr. Knuff: I suppose the Court is going to take the noon recess at this time.

Justice Stephens: Yes.

Mr. Knuff: Before announcing the recess, your Honor, Mr. Steffen and I have just been advised of something that has come up in our office that will undoubtedly keep us beyond the usual time for reconvening, 1:45, so I wonder if we can have an adjournment today until two o'clock?

Justice Stephens: Yes, surely.

(Thereupon, at 12:20 o'clock p. m., a recess was taken until 2:00 o'clock p. m., of the same day.)

6475 AFTERNOON SESSION

(The trial was resumed at 2:00 o'clock p. m., pursuant to recess.)

Justice Stephens: With respect to Exhibit 740, is it admitted that 740 came out of the files of USG?

Mr. Knuff: Yes, Your Honor.

Justice Stephens: It seems too bad to take any more time on Exhibit 740, because I can't think that it adds to or subtracts very much from the case. But it has been suggested to me, during the course of the noon hour, in considering this and conferring among the Judges about it, that possibly, Mr. Bromley, that may be circumstantially connected to Exhibit 739 in this way, that 740 appears to be a report by Sadler of USG to Board Survey concerning Skobliski, and a complaint by Salesman Roche concerning him, and it may, therefore, have been the foundation for writing the letter of August 19, Exhibit 739, from Board Survey to Henley of Certain-teed, to which Henley responded in Exhibit 741. That may possibly connect 740 with 739.

Mr. Bromley: May it please the Court, when we received these requests for admissions, we proceeded on the basis of trying to determine whether we could honestly and fairly admit or whether we couldn't, and of course we made no investigation on any theory of circumstantial identification.

Now in order to save time, and because the docu-
6476 ment seems to me to be entirely meaningless, and because the Government insists on it so strenuously, I am prepared now to make no objection to the circumstantial identification of Exhibit 740 for Identification, and to withdraw that objection if the record shows it already to have been made.

Justice Stephens: Very well; thank you, Mr. Bromley. Exhibit 740 may then come in evidence as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 740, was received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 742, the same being a carbon copy of a letter of August 23, 1932, addressed to C. O. Brown, and signed by Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 742 for Identification.)

Mr. Knuff: The fact of sending the letter and the fact that it is an authentic letter is admitted by USG.

We now offer Exhibit 742 in evidence.

Justice Stephens: That may be received as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 742, was received in evidence.)

6477 Justice Stephens: I am beginning to wonder a little, Mr. Knuff—that is the reason I pause—there have been now a half a dozen exhibits, I imagine, in the nature of complaints by Board Survey to Certain-teed, that Certain-teed is not abiding the license agreements, that is, that it is indulging in rebating or is cutting below the minimum price in some way or other. Isn't it beginning to be cumulative so that it is no longer necessary to prove those complaints?

Mr. Knuff: I suppose it might be said to be cumulative, but we wanted to give the Court just a very small picture of the number of these complaints. I dare say that we have, over in our office, and we could offer in evidence, a matter of 2,000 of these complaints. That is just a rough guess, I may be wrong one way or the other on that, but I believe that my guess is substantially correct.

Justice Stephens: The thought I had is that I assume there isn't any dispute in the case but that there were a very large number of the complaints by each of the licensees against the others, which were called to the attention of the Board Survey Company. Perhaps we could save some time and space that way, but possibly we will save more if we just go ahead.

Mr. Bromley: May it please the Court, so far as counsel's statement is concerned, my information is that the exhibits which he has offered or intends to offer, or
6478 which they submitted to us, are all the complaints of this nature made at any time by anybody; and so far as his statement of 2,000 complaints is concerned, I don't believe, if you took all the complaints made on any subject by any licensee over the entire period, it would approach that figure. Our information is that the total would not exceed more than between 300 and 400, of every nature, and that these rebating complaints which he has submitted to us with his Request for Admissions, are all of that nature ever made at any time.

Justice Stephens: For how long a period of time, Mr. Bromley?

Mr. Bromley: From 1932 to 1937, which was the period during which Board Survey was in existence. It was not in existence before that or after that.

Justice Stephens: Well, you may proceed, Mr. Knuff.

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 743, the same being a letter dated September 8, 1932, addressed to Mr. Frank M. Miller, and signed Warren Henley.

(The document referred to was marked as Government's Exhibit No. 743 for Identification.)

Mr. Knuff: We offer this letter in evidence as being circumstantially identified by 742. USG, in their answer, refused to admit or deny the authenticity of this
6479 letter, although they do admit that the letter came from their files. The circumstantial identification is contained in the first paragraph of 743—

Mr. Bromley: (Interposing) Just a moment. I make no objection on the ground that it is not circumstantially identified.

Justice Stephens: Very well. Then it is received in evidence as binding upon USG only.

(The document referred to, marked as Government's Exhibit No. 743, was received in evidence.)

Justice Stephens: Let me read this.

(Government's Exhibit No. 743 examined by the Court.)

Justice Stephens: Very well.

Mr. Knuff: Skip one letter now, Your Honors, please. I would now like to have marked for Identification Government's Exhibit 744, the same being a letter dated March 24, 1934, addressed to Mr. Sadler and signed by Warren Henley. It is admitted by USG that this letter was received by them.

(The document referred to was marked as Government's Exhibit No. 744 for Identification.)

Mr. Knuff: We offer in evidence Government's Ex-
6480 hibit No. 744.

Justice Stephens: Received as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 744, was received in evidence.)

Mr. Knuff: We would like to have marked at this time for Identification, Government's Exhibit 745, the same being a carbon copy of a letter dated March 16, 1934, addressed to Mr. C. O. Brown and signed by the Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 745 for Identification.)

Mr. Knuff: This letter, Government's Exhibit 745, is circumstantially identified by Government's Exhibit 744. Mr. Bromley has refused to admit or deny that 745 was sent, or its authenticity.

Justice Stephens: Does he admit that it came from the files of USG?

Mr. Knuff: Yes.

Justice Stephens: Is there any objection now as to circumstantial identification?

Mr. Bromley: No, Your Honor.

Justice Stephens: It is received in evidence as binding on USG only.

6481 (The document referred to, marked as Government's Exhibit No. 745, was received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibits 746 and 747.

(The documents referred to were marked as Government's Exhibits Nos. 746 and 747, respectively, for Identification.)

Mr. Knuff: Exhibit 746 is a letter, or carbon copy of a letter, dated April 24, 1934, addressed to Warren Henley and signed Board Survey Company.

Government's Exhibit 747 is a letter addressed to H. F. Sadler, signed Warren Henley, and dated May 11, 19?

Government's Exhibit 746 is admitted to be an authentic copy of a letter that was sent by USG, and 747 is admitted to have been received by USG.

Justice Stephens: You don't quite mean that, do you? You mean that USG admits 746 is an authentic copy of a letter sent by Board Survey to Certain-teed?

Mr. Knuff: That is right.

Justice Stephens: And it also admitted that 747 is the reply?

Mr. Knuff: The word "reply" hasn't been used, but it obviously is the reply, and what they have admitted

6482 is that they received it.

Justice Stephens: If there is no objection on the ground of identification, they will be received in evidence, Exhibits 746 and 747, as binding on USG only.

(The documents referred to, marked as Government's Exhibits Nos. 746 and 747, respectively, were received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 748, the same being a carbon

copy of a letter dated July 19, 1934, addressed to Mr. C. O. Brown, and signed Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 748 for Identification.)

Mr. Knuff: It is admitted by USG that this letter is an authentic letter, and the original of it was sent.

We offer Exhibit 748 in evidence.

Justice Stephens: Received in evidence as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 748, was received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 749, the same being a letter dated July 31, 1934, addressed to Mr. H. F. Sadler, and signed Warren Henley.

6483

(The document referred to was marked as Government's Exhibit No. 749 for Identification.)

Mr. Knuff: USG refuses to admit or deny the authenticity of this document, but they do admit that it came from their files.

We offer it as being circumstantially identified.

Justice Stephens: If there is no objection as to circumstantial identification, it is received as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 749, was received in evidence.)

Mr. Knuff: Omit the next two exhibits, please, and come to the one dated 9/13/35.

We would like to have marked for Identification Government's Exhibit 750, the same being a complaint addressed to the Board Survey Company, signed by Certain-teed Products Corporation, dated September 13, 1935.

(The document referred to was marked as Government's Exhibit No. 750 for Identification.)

Mr. Knuff: In connection with this exhibit, USG admits that this is a reply received from the Certain-teed Products Corporation by Board Survey Company.

6484

Justice Stephens: This is received as binding on USG only.

Mr. Bromley: It is not a complaint, it is the explanation.

Justice Stephens: We noticed that.

(The document referred to, marked as Government's Exhibit No. 750, was received in evidence.)

Mr. Knuff: I would like to now have marked for Identification the two exhibits that I skipped, as Exhibits 751 and 752. Exhibit 751 is a document dated September 3, 1935, addressed to the Board Survey Company and signed USG. Exhibit 752 is a document addressed to Certain-teed Products Corporation, and has typed thereon "Board Survey Company—Executive Secretary.", dated September 3, 1935.

(The documents referred to were marked as Government's Exhibits Nos. 751 and 752, respectively, for Identification.)

Mr. Knuff: We offer Government's Exhibits 751 and 752 as being circumstantially identified by Exhibit 750.

Justice Stephens: Unless there is objection to the circumstantial identification claimed, the two exhibits
6485 are received as binding on USG only.

(The documents referred to, marked as Government's Exhibits Nos. 751 and 752, respectively, were received in evidence.)

Mr. Knuff: Omit the next one and come to the letter of April 13, 1932.

I would like to have that letter marked for Identification as Government's Exhibit No. 753.

(The document referred to was marked as Government's Exhibit No. 753 for Identification.)

Mr. Knuff: That is a carbon copy of a letter dated April 13, 1932, addressed to M. H. Baker, and signed Board Survey Company.

USG admits the genuineness of this letter and the sending of the original thereof.

We offer it in evidence.

Justice Stephens: This is received as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 753, was received in evidence.)

Mr. Knuff: We would like to have marked for Identification Government's Exhibit 754, the same being a
6486 letter dated April 5, 1932, addressed to Frank M. Miller, and signed Warren Henley.

(The document referred to was marked as Government's Exhibit No. 754 for Identification.)

Mr. Knuff: USG neither admits nor denies the genuineness of this document, but they do admit that it came from their files. It is offered as being circumstantially identified by Government's Exhibit 753.

Justice Stephens: If there is no objection to the circumstantial identification alleged, it is received in evidence as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 754, was received in evidence.)

Mr. Knuff: Omit the next letter, and come to the letter dated August 10, 1932. That letter of August 10 has on the top of it a rather large "F 8/30".

Justice Stephens: It is marked Exhibit No. 43, isn't it, in your Request for Admissions?

Mr. Knuff: That is right, Your Honor. I would like to have that letter marked Government's Exhibit 755 for Identification, the same being a carbon copy of a letter dated August 10, 1932, addressed to M. H. Baker, and signed Board Survey Company.

6487 (The document referred to was marked as Government's Exhibit No. 755 for Identification.)

Mr. Knuff: USG admits the genuineness of this document, and admits that the original thereof was sent.

We offer it in evidence.

Justice Stephens: Received as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 755, was received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 756, the same being a letter dated August 10, 1932, addressed to F. M. Miller, and signed H. F. Sadler.

(The document referred to was marked as Government's Exhibit No. 756 for Identification.)

Mr. Knuff: I would also like to have marked for Identification Government's Exhibit 757, the same being a letter dated August 23, 1932, addressed to Mr. F. M. Miller and signed M. H. Baker—MP.

(The document referred to was marked as Government's Exhibit No. 757 for Identification.)

Mr. Knuff: USG refuses to admit or deny the
6488 genuineness of 756 and 757, although they do admit that both 756 and 757 came from their files.

We offer 756 and 757 as being circumstantially identified by 755.

Justice Stephens: If there is no objection to their circumstantial identification, Exhibits 756 and 757 are received as binding on USG only.

(The documents referred to, marked as Government's Exhibits Nos. 756 and 757, respectively, were received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibits 758 and 759.

(The documents referred to were marked as Government's Exhibits Nos. 758 and 759, respectively, for Identification.)

Mr. Knuff: Government's Exhibit 758 is a letter dated October 13, 1932, addressed to Frank M. Miller and signed Warren Henley.

Government's Exhibit 759 is a copy of a letter dated October 31, 1932, addressed to R. F. Burley and signed Board Survey Company.

USG admits receiving 758, and admits sending the original of 759. We offer in evidence Government's
6489 Exhibits 758 and 759.

Justice Stephens: These are received as binding on USG only.

(The documents referred to, marked as Government's Exhibits Nos. 758 and 759, respectively, were received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 760, the same being a carbon copy of a letter dated December 20, 1932, addressed to Mr. M. H. Baker, President, and signed Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 760 for Identification.)

Mr. Knuff: I would also like to have marked Government's Exhibit 761, the same being a letter dated January

9, 1933, addressed to Board Survey Company and signed by National Gypsum Company—Vice President.

(The document referred to was marked as Government's Exhibit No. 761 for Identification.)

Mr. Knuff: We offer in evidence Government's Exhibits 760 and 761. USG admits the authenticity of 760, and admits sending the original of 760. As to 761, they neither admit nor deny the authenticity or the receipt of
6490 this letter. They do admit that it came from their files.

We offer Government's Exhibit 761 as being circumstantially identified by Exhibit 760.

Justice Stephens: Let the Court read them.

(Government's Exhibits 760 and 761 for Identification examined by the Court.)

Justice Stephens: Unless there is some objection to the circumstantial identification of Exhibit 761, both exhibits 760 and 761 are received in evidence as binding on USG only.

(The documents referred to, marked as Government's Exhibits Nos. 760 and 761, respectively, were received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 762, the same being a letter dated April 15, 1933, addressed to Mr. F. M. Miller and signed in typewriting H. F. Sadler.

(The document referred to was marked as Government's Exhibit No. 762 for Identification.)

Mr. Knuff: I would also like to have marked for Identification Government's Exhibit 763, the same being a copy of a letter dated April 17, 1933, addressed to National Gypsum Company and signed Board Survey Company.

6491 (The document referred to was marked as Government's Exhibit No. 763 for Identification.)

Mr. Knuff: I would also like to have marked for Identification Government's Exhibit No. 764, the same being a letter dated May 1, 1933, addressed to Frank M. Miller, and signed National Gypsum Company, R. F. Burley, Vice President.

(The document referred to was marked as Government's Exhibit No. 764 for Identification.)

Mr. Knuff: We offer in evidence Government's Exhibits 762, 763 and 764.

With reference to Exhibits 763 and 764, USG admits the genuineness of the letters; and in regard to 763, the fact that it was sent; and as to 764, they admit that that letter was received.

In so far as 762 is concerned, USG neither admits nor denies as to it. They do admit that it came from their files. We offer 762 as being circumstantially identified by 763 and 764.

Justice Stephens: Unless there is some objection to the circumstantial identification of Exhibit 762, Exhibits 762, 763 and 764 are received in evidence as binding on USG only.

(The documents referred to, marked as Government's Exhibits Nos. 762, 763 and 764, respectively, were received in evidence.)

6492

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 765, the same being a letter dated April 21, 1933, addressed to Mr. F. M. Miller and signed H. F. Sadler.

(The document referred to was marked as Government's Exhibit No. 765 for Identification.)

Mr. Knuff: I would also like to have marked for Identification Government's Exhibit 766, the same being a carbon copy of a letter dated July 31, 1933, addressed to National Gypsum Company and signed Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 766 for Identification.)

Mr. Knuff: I would also like to have marked for Identification Government's Exhibit 767, the same being a letter dated August 9, 1933, addressed to Board Survey Company and signed National Gypsum Company, R. F. Burley—B.

(The document referred to was marked as Government's Exhibit No. 767 for Identification.)

Mr. Knuff: We offer Government's Exhibits 765, 766 and 767 in evidence.

6493

In so far as Exhibit 766 is concerned, USG admits the genuineness of the letter and the fact that the

original of it was sent. In so far as 765 and 767 are concerned, USG neither admits nor denies the genuineness of the documents. They do admit that they came from the files of USG. Exhibits 765 and 767, we say, are circumstantially identified by 766.

Justice Stephens: Unless there is some objection to the circumstantial identification of Exhibits 765 and 767, all three exhibits are received in evidence as binding upon USG only.

(The documents referred to, marked as Government's Exhibits 765, 766 and 767, were received in evidence.)

Mr. Knuff: We would like to have marked for Identification Government's Exhibit 768, the same being a complaint dated June 23, 1936, addressed to Board Survey Company, and signed United States Gypsum Company, H. F. Sadler.

(The document referred to was marked as Government's Exhibit No. 768 for Identification.)

Mr. Knuff: I would also like to have marked for Identification Government's Exhibit 769, the same being a letter dated November 11, 1936, addressed to Scott, MacLeish & Falk, and signed National Gypsum Company, R. F. Burley—B.

6494 (The document referred to was marked as Government's Exhibit No. 769 for Identification.)

Mr. Knuff: USG admits the genuineness of and the fact that Exhibit 768 was sent; and they admit that 769 was received by them.

We offer 768 and 769 in evidence.

Justice Garrett: Exhibit 769 seems to be addressed to Scott, MacLeish & Falk. Where do they come into this case?

Mr. Knuff: I presume they were Board Survey Company's attorneys at this time, I don't know.

Mr. Bromley: That is right.

Justice Stephens: Both exhibits are admitted in evidence as binding on USG only.

(The documents referred to, marked Government's Exhibits 768 and 769, were received in evidence.)

Mr. Knuff: We would like to have marked for Identification Government's Exhibit 770, the same being a carbon

copy of a letter dated May 21, 1935, addressed to Warren Henley, and signed Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 770 for Identification.)

Mr. Knuff: We would also like to have marked for Identification Government's Exhibit 771, the same
6495 being a letter dated June 11, 1935, addressed to Mr. E. W. Carey and signed Warren Henley.

(The document referred to was marked as Government's Exhibit No. 771 for Identification.)

Mr. Knuff: We offer in evidence Government's Exhibits 770 and 771. USG admits the fact that the original of 770 was sent, and the genuineness thereof; and they admit receiving 771.

Justice Stephens: Received in evidence as binding against USG only.

(The documents referred to, marked as Government's Exhibits 770 and 771, were received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 772, the same being a carbon copy of a letter dated June 14, 1935, addressed to Mr. Warren Henley, and signed Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 772 for Identification.)

Mr. Knuff: I would also like to have marked for Identification Government's Exhibit 773, the same being a letter dated June 19, 1935, addressed to E. W. Carey and signed Warren Henley.

6496 (The document referred to was marked as Government's Exhibit No. 773 for Identification.)

Mr. Knuff: We offer in evidence Government's Exhibits 772 and 773. USG admits that they received Governments' Exhibit 773. USG neither admits nor denies that Government's Exhibit 772 was written by them, but they do admit that it was taken from their files.

We contend that Government's Exhibit 772 is circumstantially identified by Government's Exhibit 773 for Identification.

Justice Stephens: Unless there is objection to the circumstantial identification of 772, both exhibits are received in evidence as binding against USG only.

(The documents referred to, marked Government's Exhibits Nos. 772 and 773, were received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 774, the same being a complaint dated June 22, 1936, addressed to the Board Survey Company and signed United States Gypsum Company, H. F. Sadler.

(The document referred to was marked as Government's Exhibit No. 774 for Identification.)

Mr. Knuff: I would also like to have marked for
6497 Identification Government's Exhibit 775, the same being a carbon copy of a letter dated July 16, 1936, addressed to Certain-teed Products Corporation, and unsigned.

(The document referred to was marked as Government's Exhibit No. 776 for Identification.)

Mr. Knuff: I would also like to have marked for Identification Government's Exhibit 776, the same being a copy of a reply addressed to the Board Survey Company, dated July 29, 1936, and signed by Certain-teed Products Corporation.

(The document referred to was marked as Government's Exhibit No. 776 for Identification.)

Mr. Knuff: We now offer in evidence Government's Exhibits 774, 775 and 776. USG admits that Government's Exhibit 774 for Identification is a genuine document, and that it was sent by USG. They admit that Exhibit 776 was received by the Board Survey Company. In so far as Exhibit 775 is concerned, they neither admit nor deny the genuineness of the document, but they do admit that it was taken from their files.

We say that Government's Exhibit 775 is circumstantially identified by Government's Exhibits 774 and 776.

Justice Stephens: The first of these, in date, is 775, isn't it?

6498 Mr. Knuff: The first in date is 774, June 22, 1936.

Justice Stephens: That is right.

Let us read these.

(Government's Exhibits 774, 775 and 776 for Identification examined by the Court.)

Justice Stephens: Who does 775 purport to be from?

Mr. Knuff: I think that is from an attorney by the name of Mahan. I am not quite sure of the name.

Mr. Bromley: C. B. Mahin, connected with the firm of Scott, MacLeish & Falk; and Scott, MacLeish & Falk were then acting as attorneys for Board Survey.

Justice Stephens: Unless there is some objection to the circumstantial identification referred to, the three exhibits are received in evidence as binding against USG only.

(The documents referred to, marked Government's Exhibits Nos. 774, 775 and 776, respectively, were received in evidence.)

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 777, the same being a carbon copy of a letter dated May 17, 1933, addressed to M. H. Baker, and signed Board Survey Company.

(The document referred to was marked as Govern-
6499 ment's Exhibit No. 777 for Identification.)

Mr. Knuff: We would also like to have marked for Identification Government's Exhibit 778, the same being a letter dated May 22, 1933, addressed to Board Survey Company and signed National Gypsum Company, R. F. Burley, Vice President.

(The document referred to was marked as Government's Exhibit No. 778 for Identification.)

Mr. Knuff: USG admits the genuineness and the sending of the original of Government's Exhibit 777; and admits receiving Government's Exhibit 778.

We offer Government's Exhibits 777 and 778 in evidence.

Justice Stephens: Received in evidence as binding against USG only.

(The documents referred to, marked Government's Exhibits 777 and 778, were received in evidence.)

Mr. Knuff: We would like to have marked for Identification Government's Exhibit 779, the same being a letter dated October 31, 1932, addressed to Board Survey Company and signed National Gypsum Company, R. F. Burley, Vice President.

(The document referred to was marked as Government's Exhibit No. 779 for Identification.)

Mr. Knuff: We would also like to have marked
6500 for Identification Government's Exhibit 780, the same being a carbon copy of a letter dated November 21, 1932, addressed to F. G. Krumholz, and signed Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 780 for Identification.)

Mr. Knuff: USG admits receiving 779, and admits the genuineness and the sending of the original of Government's Exhibit 780.

We offer Exhibits 779 and 780 in evidence.

Justice Stephens: Received in evidence as binding on USG only.

(The documents referred to, marked as Government's Exhibits 779 and 780, were received in evidence.)

Justice Garrett: Let me inquire. In 779, reference is made to the Universal Gypsum Company.

Mr. Knuff: The Universal Gypsum Company, at that time, was a licensee of USG. Universal afterwards was taken over by National.

Justice Garrett: Oh, yes. I had forgotten just what that connection was. Thank you.

Mr. Knuff: I would like to have marked for Identification Government's Exhibit 781, the same being a memo-
6501 randum dated July 20, 1933, addressed to Mr. F. M. Miller and signed in typewriting H. F. Sadler.

(The document referred to was marked as Government's Exhibit No. 781 for Identification.)

Mr. Knuff: I would also like to have marked for Identification Government's Exhibit 782, the same being a carbon copy of a letter dated July 29, 1933, addressed to National Gypsum Company, and signed Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 782 for Identification.)

Mr. Knuff: I would also like to have marked for Identification Government's Exhibit 783, the same being a letter dated August 9, 1933, addressed to the Board Survey Company, and signed National Gypsum Company, R. F. Burley—B.

(The document referred to was marked as Government's Exhibit No. 783 for Identification.)

Mr. Knuff: I would also like to have marked for Identification Government's Exhibit No. 784, the same being a

carbon copy of a letter dated September 12, 1933, addressed to R. F. Burley and signed Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 784 for Identification.)

6502 Mr. Knuff: We offer in evidence Government's Exhibits 781, 782, 783 and 784.

In so far as Government's Exhibit 782 is concerned, USG admits the genuineness of the document and the fact that the original of it was sent.

USG likewise admits the genuineness of 784, and the fact that the original of that document was sent.

In so far as Exhibits 781 and 783 are concerned, USG neither admits nor denies the genuineness of the document, but they do admit that 781 and 783 were taken from their files.

We contend that 781 and 783 are circumstantially identified by 782 and 784.

Justice Stephens: Unless there is some objection to the circumstantial identification relied upon, all of the exhibits just mentioned are received in evidence as binding against USG only.

(The documents referred to, marked as Government's Exhibits Nos. 781, 782, 783 and 784, respectively, were received in evidence.)

Mr. Bromley: May it please the Court, I should like to ask counsel for the Government—and I think defendants are entitled to know—whether or not, with respect to Exhibits 727 to 784, inclusive, all of which I believe are of the
6503 type of Exhibit 784 and the preceding ones, he is offering these exhibits to prove that the defendants fixed prices on paints, or roofing products, or insulating board, or Maftex board, or building paper, or insulating board seconds, or Color Texture, or fiber board? I have looked over these exhibits and find that most of them have to do with the products which I have mentioned.

For instance, Exhibit 742 and Exhibit 743 have to do with a reduction below the going market price of roofing products. Exhibits 750, 751 and 752 have to do with a rebate on patented board effected through a reduction in the market price of building paper. Exhibits 755, 756, 757 and 767 have to do with an alleged rebate on patented board effected through a reduction of the price charged for paints.

Exhibits 753, 754, 760, 761, 762, 763, 764, 765, 766, 767, 768 and 769 have to do with rebates effected through price

reductions on insulation board, which is a wood product, the record shows, having nothing to do with gypsum whatsoever.

It seems to me that we are entitled to know whether the Government is now trying to prove price fixing beyond what is alleged in the complaint, which, on its broadest interpretation, I think, is limited to plaster and Keene's Cement and block and tile.

Mr. Knuff: Since we have not alleged in the complaint that they did fix the price of roofing materials or
6504 paint, or Maftex, or what-not, of course we are not offering these exhibits to prove that. We are offering these exhibits for the purpose of showing subterfuge under Paragraph 46 of the complaint.

Justice Garrett: Let me ask you, then, why did you introduce the answers? As I read the answers that you have introduced in here, to these various complaints, they are practically all of them denials.

Mr. Bromley: That is right.

Justice Garrett: You have your own reasons for it, I suppose.

Mr. Knuff: I wanted to bring to the attention of the Court the fact that USG was sending it out, and also to bring to the attention of the Court the fact that the person to whom they were sending it got it.

Justice Jackson: It just seems that you did, you didn't—you did, you didn't.

Mr. Knuff: That is right, but I think it does show subterfuge, and we will be prepared to argue that when the time comes.

Justice Stephens: What is the theory of the Government, briefly, that it proves subterfuge?

Mr. Knuff: That what the defendants actually did, by policing the alleged sale of patented board, indicates quite clearly what the defendants had in mind, what they
6505 intended to accomplish by the policing of the licensing agreements. We contend that the agreements were simply a cloak or a smoke screen or a subterfuge to cover up and conceal the real purpose of the defendants. The real purpose is set forth in Paragraphs 44 and 45 of the complaint, that is, to regiment the gypsum industry and thereby to restrain, dominate and control the manufacture and distribution of gypsum products.

Justice Stephens: I think I see your purpose.

The exhibits are not received as evidence of price fixing on the items just referred to by Mr. Bromley, the Govern-

ment conceding that they are not offered for that purpose.

Mr. Knuff: Shall we take the afternoon recess at this time?

Justice Stephens: Yes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

6506 Mr. Knuff: Your Honors, omit the next two items in your list, the letter of July 14, 1933, and the letter of July 25, 1933, and that brings us down to what I would like to have marked as Government's Exhibit 785 for identification, the same being a carbon copy of an inter-office memorandum, dated July 24, 1933, addressed to Mr. E. A. Gallagher, and signed H. F. Sadler.

(The document referred to was marked as Government's Exhibit No. 785 for identification.)

Mr. Knuff: USG admits the authenticity of this exhibit, and the sending of the original thereof.

We offer in evidence Government's Exhibit 785.

Justice Stephens: Unless there is objection, it is received in evidence as binding on USG only.

(The document referred to, marked as Government's Exhibit No. 785, was received in evidence.)

Mr. Knuff: At this time we would like to reoffer, if your Honors please, Government's Exhibit 271, and in connection with this matter, I just want to make a very short statement.

Justice Stephens: Let us get the exhibit before us, first, so we can have it in mind.

All right, proceed, Mr. Knuff.

6507 Mr. Knuff: Government's Exhibit 271 for identification was offered at about the time the North Holston and Laramie and the other contracts were offered, and there were reserved rulings on all of those.

We subsequently made an offer on those, and I think that in general our offer was sustained. At the time we made the offer, we did not include in that offer Exhibit 271, thinking that the offer was to be more or less of a—for want of a better word, sort of a "guinea pig" offer—and that everything else that related to it would come in after the offer was made. We thought that the ruling of the Court on the offer would cover the exhibits on which the ruling was deferred.

This was reoffered again at page 3272 of the record, and

was withdrawn. We would now like to reoffer Exhibit 271 for the purpose of showing intercompany sales.

Justice Jackson: It wasn't rejected by the Court, was it?

Mr. Knuff: No sir, it was not.

Justice Jackson: Did it comprise any part of the reserve rulings?

Mr. Knuff: It was a part of the reserve rulings at that time.

Justice Stephens: We ruled, in the reserve rulings, in favor of your contentions with respect to certain
6508 contracts involving the North Holston and Laramie plants, but I don't think we have any rulings suspended now except the ruling on Exhibit 233.

Mr. Knuff: When your Honors made the ruling, your Honors called our attention to the fact that Government's Exhibits 239, 240, 271, 272, and 273 were considered as not offered, and the Court called our attention to that fact.

Now in so far as Exhibits 239, 240, 272 and 273 are concerned, while we think they are material, we are not going to press the offer of them. But we do feel that Exhibit 271 should now be reoffered.

Justice Stephens: Is there any objection to Exhibit 271, in view of the reserved rulings on the North Holston and Laramie matters? I assume you have the same objections, Mr. Bromley, but is there anything new in the way of an objection?

Mr. Bromley: No—we object to it as immaterial and irrelevant. This hasn't anything to do, of course, with North Holston or Laramie.

Justice Stephens: Let me see those reserve rulings and reference to these exhibits, Mr. Cantor.

(The matters requested were handed to Justice Stephens by Mr. Cantor.)

(The Justices conferred.)

Justice Stephens: It would seem to me, Mr. Brom-
6509 ley, that 271 should be admitted if there is no dispute as to its authenticity, in view of the ruling of the majority of the Court that these intercompany purchases of board were admissible under the charges in the complaint.

Mr. Bromley: Yes, I think that is right.

Justice Stephens: So, unless there is some objection as to authenticity of the letter, Exhibit 271 is received in evidence according to the ruling of the majority on the subject of gypsum products asserted to have been purchased by

one defendant from another, and thereafter sold at bulletin prices, as alleged.

(The document referred to, marked as Government's Exhibit No. 271, was received in evidence.)

Mr. Bromley: That would be subject to the usual reservation, I take it?

Justice Stephens: Yes, received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Steffen: We have reached practically the end of the Government's case, your Honor. I want to make reference to one or two matters, however.

We have taken up Exhibit No. 693 to determine whether the signature of M. H. Baker is a genuine signature or not, and we are prepared to prove, by putting on a wit-
6510 ness, a handwriting expert, from the FBI, that the signature of M. H. Baker on Exhibit 693 is genuine. I want to make only a brief statement in that connection. I don't think anybody in the room doubts that it is genuine. It has been admitted by National, and the item comes from the files of USG. Moreover, National, in their answer to our requests to admit, stated that Mr. Baker couldn't add anything if he were on the stand. So we think it is perfectly fair, if the defendants want to put us to that bother, to—

Justice Stephens: (Interposing) My records indicate that Exhibit No. 693 has been received for a limited purpose.

Mr. Steffen: That is right, your Honor. The only thing that prevented it from being received generally was that the signature of Mr. Baker was not deemed proven as respects others than National.

Justice Stephens: In other words, this is one of the exhibits that we took in because the admission of authenticity was limited to the person making the admission?

Mr. Steffen: That is right.

Justice Stephens: Now you want to put a witness on to prove the signature of Baker?

Mr. Steffen: Yes, although I don't have the witness here at the moment. However, I can have him here in the morning. We have taken it up with the FBI, and they have given us a memorandum indicating that they have
6511 examined that signature in the light of five or six other signatures that have already been admitted, signatures of Baker, two of them being on license agreements, and the others on letters that have been admitted and

identified; and they will establish without question that this is Mr. Baker's signature.

With that point established, then the item is admissible in all respects.

As I said, I think it is perfectly fair to the defendants, because there isn't any real issue on Mr. Baker's signature, and there isn't any question, according to National's answer, that Mr. Baker would not be prepared to say anything about the letter, anyhow, if he were on the stand.

Mr. Johnston: As I understand it, all this expert witness would do would be to identify the signature of Baker, and it has already been admitted, so far as National is concerned?

Mr. Steffen: Yes, but we want it now identified so that Mr. Johnston, for example, can cross-examine the person identifying it.

Mr. Johnston: I don't want to cross-examine him, I want to cross-examine Baker.

Justice Stephens: I think Mr. Steffen's contention is this. The Court ruled that when you identify a signature by an admission of a defendant, that identification can only bind persons making the admission, and no one else;
6512 but if the signature is identified in the courtroom in some other manner, there might be a different result.

Mr. Keber: If the Court pleases—

Justice Stephens: (Interposing) We have had a great many signatures identified on the witness stand by "A", who identifies "B's" signature, and there has been no objection to the introduction of those under those circumstances.

Now, Mr. Keber.

Mr. Keber: I was about to say that I thought that the scope of the request for the admission was not only as to the identification of the signature, but also the fact that the letter was sent. Now I don't know whether that is being unreasonably narrow, perhaps it is, but I don't think that the handwriting expert can prove that fact.

Mr. Steffen: It is immaterial, your Honor, whether that is proven or not, because this would be admitted as a declaration of Mr. Baker, and as I understand it, moreover, it was taken from the files of USG. Therefore, the matter of whether it was sent or not is pretty well established by other evidence than the admission of National.

Mr. Bromley: So far as the defendants represented by me are concerned, I am willing to stipulate that if the Government called a handwriting expert he would identify the signature as Baker's.

Justice Jackson: How many defendants does that
6513 not include?

Mr. Keber: I will make the same stipulation.

Justice Stephens: Will the other defendants stipulate as to that?

Mr. Johnston: I don't want to be unreasonable with the Government. They are getting pretty low now, and I will just withdraw my objection and let Mr. Bromley's stipulation cover me also. (Laughter.)

Justice Stephens: The Court will take it then, unless some defendant's counsel rises and objects, that each defendant has stipulated that if a handwriting expert were called by the Government, he would testify that the signature on Exhibit 693 is that of Baker.

Mr. Steffen: We now offer Government's Exhibit 693 generally as a declaration of an alleged co-conspirator.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declaration of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 693, was received in evidence.)

Mr. Steffen: The next matter that is at loose ends is the Dowd matter. I don't know what attitude the defendants wish to take about that. I may say that from
6514 the standpoint of the Government I think we would be willing to rest without introducing Exhibit 233, providing we have the privilege at a later date, if and when Mr. Dowd is called, to offer Exhibit 233, to reopen our proof and introduce that one exhibit.

Justice Jackson: And you would withdraw it now with that understanding, would you, or would you just let the record stand the way it is?

Mr. Steffen: Let it stand as it is now.

But what I am saying is that we could rest our case without having it really admitted as part of our case for purposes of a motion to dismiss, if there is to be such a motion, with the understanding that we can reopen our case and introduce that one exhibit if and when Mr. Dowd is called, and if and when the Court decides that there was a waiver of the attorney-client privilege.

Mr. Johnston: I don't understand all the strings to that. You are just not going to go any further about Mr. Dowd?

Mr. Steffen: I am being very generous at the moment, I am saying that we are prepared to rest so far as Exhibit 233 is concerned, but I would like to have the privilege

of introducing it later if and when Mr. Dowd could be brought here, and when the Court decides—

Mr. Johnston: (Interposing) That is the point I am interested in—there might not be any "later".

6515 Justice Stephens: The Court must know whether Mr. Dowd's testimony is going to be introduced before the close of the Government's case or not. We have ruled that if the defendants want to call him before the close of the Government's case, they may do so. They may also urge, if they wish to do so, that the Government has not connected that matter, hasn't connected Exhibit 233 with Certain-teed. That matter, I don't think, has been put before the Court for formal ruling.

The testimony of Mr. Speer was introduced for the purpose of connecting Exhibit 233 with Certain-teed, showing that Redfield's act in writing it was the act of Certain-teed; so if there were an adverse decision on that, it wouldn't be necessary to call Dowd; whereas, if there were an affirmative decision on that, the defendants would still have a right to call Dowd, and complete the voir dire hearing on the preliminary question of fact bearing upon the admissibility of the evidence.

We ought to finish the Government's case before the Government rests, I should think.

Mr. Steffen: I think, your Honor, as I visualize it, it is up to the defendants to complete the examination on voir dire. We introduced Mr. Redfield, and he made his statement to the effect that he had a telephone conversation.

That telephone conversation, left by itself, would 6516 indicate that there was a waiver of the attorney-client privilege. That, however, as your Honor pointed out, was on voir dire, and it is therefore up to the defendants, on their part of the voir dire, to bring on Mr. Dowd and have him state whether or not he had the conversation.

Justice Stephens: That is right.

Mr. Steffen: There is nothing we can do about it.

Justice Stephens: That is right, Mr. Steffen, and that was the Court's ruling, but the Court ruled also, under an objection made by Mr. Bromley, that there wasn't in the record, at the time of the announcement of our ruling on Exhibit 233, any evidence that Certain-teed adopted or acted upon Redfield's letter, Exhibit 233, in any such manner as would make Redfield's act its act, and I thought that what you were going forward with under the Speer testimony, was to try to prove that.

I thought we had excluded, under the ruling of Judge Jackson and Judge Garrett and myself—all three of us, as I remember—all of the testimony of Speer except the items of testimony which went to subterfuge, which was another topic. If that is true, and if the Court should rule that the Government has not yet connected Exhibit 233 with Certain-teed, then the defendants might not have to call Dowd unless the Government wants to make some other effort to connect it, or unless the Government can be
6517 successful in its contention that it has connected it.

Mr. Steffen: May I make a statement upon that?

Justice Stephens: Yes, surely.

Mr. Steffen: The connection that we felt we had made was the various conversations between Mr. Speer on the one hand and Mr. Redfield and Mr. Chaffee on the other. Now it is true that those were the conversations that your Honors struck out as being privileged, the reason being that there had not been shown to be a waiver.

Of course we are in a position where we can't show a waiver until your Honors will act upon or decide that Mr. Redfield's telephone conversation with Mr. Dowd constituted a waiver. In other words, that matter is doubly-loaded, as it stands right now. Our connection is also dependent now upon what Mr. Dowd will say. If Mr. Dowd says, "I don't remember that conversation," and nothing more, and your Honor says, "Well, in that position of the evidence we have one man saying positively that he did have the conversation and another man saying that he didn't, and that that constitutes a waiver"—then it constitutes a waiver also of the conversation which was had with Mr. Redfield and which constituted the connection.

The two things are now both, as I see it, dependent on what is to be decided by Mr. Dowd on the stand, or rather what is to be testified to by Mr. Dowd on the stand.

6518 Justice Stephens: I thought we ruled adversely to you on that. I thought the Court, through the Presiding Judge—and I thought my colleagues agreed with me—held quite clearly the other day that although the waiver of privilege with respect to a document, like Exhibit 233, might include a waiver of the conversation out of which that particular document grew, so that that conversation might be said to be merged in that document, that it didn't, however, include a waiver of other or different conversations not so closely connected with the document as to be said to be merged in it, in the event of a waiver.

I have had perfectly clearly in my mind that even if the Court should decide, after hearing Mr. Dowd, that the Redfield-Dowd conversation did take place, and did contain the words which Redfield testified it contained, that still the Government would have to prove that Exhibit 233 was more than the act of Redfield, and that it would have to do it by evidence. I thought that that was what the Government was trying to do through Speer, and that it had failed to do so because the conversations on which it relied to prove that, were stricken out.

Mr. Steffen: Of course you have us in that situation—I don't mean to say that the Court has us in that situation, but we are in that situation, and what I want to say is that it looks very unfair from my standpoint, for the
6519 reason that if we start with the proposition that the Court will hold that there was a waiver of the attorney-client privilege, if Mr. Dowd is put on the stand and testifies as I hope he will, then the connection that we would have would be Mr. Speer's conversations with Mr. Redfield. Now they have been ruled out at the moment as being privileged, as I understand it.

But your Honor's statement just now, to the effect that if the document was not privileged, and Mr. Redfield could testify, then the testimony of Mr. Speer of his conversations with Mr. Redfield, which closely connected Certain-teed and Redfield, would be admissible as conversations, although ordinarily privileged, not privileged in this case because Mr. Redfield had generally been relieved of the privilege by the Dowd-Redfield conversation.

Justice Jackson: You mean then that that conversation would be actually merged in the writing, Exhibit 233?

Mr. Steffen: That is right, and we argued, as I remember, when the thing came up, that we would like to have had your Honors withhold ruling on that piece of evidence, that is the conversation between Mr. Speer and Mr Redfield which tied the transaction up with Certain-teed, and if we could have had that withheld, until we got a ruling on the voir dire, then it could have fallen either way, depending on which way you decided, whether or not this
6520 was a waiver of the conversation.

Justice Stephens: I am afraid there is a very deep misunderstanding between Government counsel and the Presiding Judge as to what we did the other day and why we did it.

I didn't have in mind at all, Mr. Steffen, that there was any conversation testified to by Mr. Speer which was so closely connected with the execution of Exhibit 233 that it could be said to be merged in it if Exhibit 233 was waived, so far as privilege was concerned. I thought all the conversations that Speer testified to before the Court were general conversations with counsel with respect to the advisability of using the Speer contrivance, or the Speer product, and it wasn't my understanding that those conversations approached anything that could be merged in Exhibit 233.

Do the defendants wish to be heard on this matter?

Mr. Bromley: Simply to point out that Speer testified that he had been in Europe two months prior to the time of Exhibit 233, and as your Honor has suggested, he didn't suggest, even by indirection, that he ever had any talks about Exhibit 233; he never heard of it or saw it; he knew nothing about it at all; and there is nothing in what he said as to his conversations with Redfield which could have any possible bearing on something that didn't come into existence for several months afterward.

So that it was my impression too that there was an
6521 utter and complete lack of connection in the Speer testimony, and that is the only asserted ground of connection in the record, there isn't any other.

Justice Jackson: I am sure that I would have to refresh my recollection with respect to Speer's testimony with regard to his conversations with Redfield, but I did think he said—I may be wrong—that he told Redfield that his closed-edge board could be used as a bargaining point with USG, the very thing that is in Exhibit 233. That is in my mind, I don't know whether that is correct or not.

Mr. Steffen: It is also in the transcript, your Honor.

Mr. Bromley: Didn't we set out here to have established that this company adopted or acted on this memorandum?

Justice Stephens: That is right.

Mr. Bromley: Now, assuming the accuracy of what Justice Jackson says, how does that conversation, occurring at least two months before the memorandum, show that the company adopted or acted on any suggestion contained in the memorandum? There is no evidence that they ever did use it.

Justice Jackson: I thought he said, I thought Redfield said that he represented the company when he went there.

Mr. Bromley: Yes, he did, but how does that show that

the company ever used that as a bargaining weapon with USG?

Justice Jackson: I don't think there is any evidence at all showing that it was acted upon.

6522 Mr. Bromley: Oh, no, there is not. That is where the lack of connection comes, it seems to me. If there is no evidence that the company adopted Redfield's suggestion, or acted upon it, then the memorandum has no significance whatsoever.

Mr. Steffen: The cases, as I read them, on what constitutes a declaration or an act in furtherance of a conspiracy, and therefore a declaration which is binding upon alleged co-conspirators, are not limited to a very close construction of what is in furtherance of a conspiracy, and there are a number of decisions which are simply declarative of the purposes and ideals that the parties have in mind, whether they actually carry out those identical purposes in the way suggested, or others that are similar.

The declaration here is in effect, "We should find a patent upon which we can fix prices." This was in the summer of 1929, and it was not two or more months after the Speer conversation, as Mr. Bromley said, but fairly closely after the Speer conversation.

Justice Stephens: Let me interject, if I may, in the possible hope of saving time, although I will let you finish if you wish to, after you have heard what I have said.

It seems to me now that you are going off on an entirely new subject as to whether or not if Exhibit 233 is shown to have been adopted by Certain-teed, it is a declara-

6523 tion in furtherance of a conspiracy.

I thought what we were talking about now is whether or not Exhibit 233 was adopted, whether there is evidence showing that Exhibit 233 was adopted by Certain-teed.

Exhibit 233, looked at alone, is merely the statement of Mr. Redfield. Now it can't bind Certain-teed unless Certain-teed has adopted or acted upon it, or made it its own in some manner. I thought that that was what we were dealing with, and not the effect of it after it came into evidence, as the declaration of a co-conspirator.

Mr. Steffen: I intended to address myself to that very point, your Honor.

Justice Stephens: Very well.

Mr. Steffen: The decisions on when a declaration is in furtherance of a conspiracy are not limited solely to cases

where the company acted upon the particular declaration. They may be descriptive of the broad purposes that the company has, and I can cite you 28 Fed. (2nd) 1 (1928), a decision by Judge Evans, where he is very explicit on the thing, and he reviews a number of cases, such as the Hillmon case, and others, and also cites from Jones on Evidence, and states that a declaration, whether acted upon or not, if it is descriptive of the purposes which the parties had at that time, may constitute a declaration which is deemed to be in furtherance of the conspiracy, within the Rule.

6524 Now, Mr. Redfield's memorandum, in which he said, "Let's get a patent (in effect) upon which we can fix prices, because the Utzman Patent expires on August 6"—this memorandum being written on August the second—is clearly descriptive, in my view, of the purposes which the Certain-teed people actually did have in mind, and we established that by Mr. Speer's statement.

Mr. Speer, under Mr. Adams' cross-examination, was shown to have been a promoter, a responsible man in the company; that when he went to see Redfield he acted on behalf of the company; and he testified cold, as Judge Jackson said, that he had recommended to Mr. Redfield the possibility of using his, Speer's, patents as a means for fixing prices—

Mr. Bromley: (Interposing) No, he testified to nothing of the kind.

Mr. Steffen: Excuse me—as a means of obtaining licenses from other members of the industry, and obtaining royalties for the company under them—and that, in effect, therefore, he did talk over the subject matter of Exhibit 233.

6525 Then Mr. Redfield, after Mr. Speer had left for Europe, true, Mr. Redfield on August 2nd wrote his memorandum.

Now Mr. Speer also testified that Mr. Redfield was patent counsel or patent attorney for Certain-teed, that he was in Certain-teed's office and used the Certain-teed memorandum forms for his reports.

We have other evidence in the record indicating that—in one of the George M. Brown exhibits—Mr. Redfield gave George M. Brown a memorandum in June on the whole question of the foam license agreements.

So that it was very definitely in Mr. Redfield's mind; he was more than just an outside attorney who was being

called in to give an opinion; and it was more than just an exhibit that blew in to Certain-teed—but it is descriptive of what Certain-teed really did during the summer of 1929.

Certain-teed, looking at the George M. Brown memorandum, was persuaded to take out a license under the foam, and later under the starch patents. They at that time got price-fixing based on those two patents. So that the idea of having some patent under which they could operate and under which they subsequently did operate, was definitely in their minds, although they didn't operate under this particular patent, that is perfectly true.

But the basic idea which Mr. Redfield announces, was acted upon, if you wish to take it in the very narrow
6526 sense of what constitutes a declaration in furtherance of a conspiracy.

Now if that constitutes connection, assuming that it is admissible, it of course has been stricken out by the Court's ruling for the reason that the Court held—and I think that that, as I understood it, is exactly what the ruling was—that the conversation between Mr. Speer and Mr. Redfield, whether it constituted a connection or didn't constitute a connection, would have to be stricken out for the reason that it was privileged, even though, had we a waiver established, it would be the type of conversation which gave rise to or gave meaning to Exhibit 233—and would ordinarily not, therefore, be a privileged communication.

Justice Stephens: Well, it is exactly at that point that I was unable to follow you the other day when we had a very extensive argument on exactly this same subject.

As I said then, and as I have reiterated this afternoon, it seemed to me that while the waiver of privilege with respect to a memorandum or document might waive the privilege as to the conversation out of which it arose, or as a result of which it was executed, it wouldn't waive all privilege with respect to all conversations between attorney and client on the general subject of the memorandum.

Mr. Steffen: I think the transcript will show, your Honor, that the Court's ruling struck out that conversation not for the reason that it didn't constitute a connec-
6527 tion, but for the reason that it was privileged.

Justice Stephens: That is right.

Mr. Steffen: Therefore I had felt that the matter of whether it constituted a connection or not, was still an open question.

Justice Stephens: Well, I am sorry—I have tried to be open-minded—I am sorry that you regard the Court's ruling on the subject as unfair—

Mr. Steffen: (Interposing) Your Honor—

Justice Stephens: (continuing) —I realize you don't intend to criticize, but you do obviously feel that it is unfair. I have tried hard to understand your point of view and I don't think it is a question of what I think is fair or what you think is fair. It is a question of what the Court ultimately, which must have the final authority and responsibility, thinks the law is.

I thought we had made it thoroughly clear, but perhaps we haven't. Judge Jackson may have a doubt on the matter, I don't know. Do you wish to be heard, Mr. Bromley?

Mr. Bromley: No sir, I think not.

Justice Stephens: Do you wish to call Mr. Dowd, gentlemen of the defendants?

Mr. Bromley: I don't see any necessity for it. I was about to raise that point myself. I don't see why we should waste the time involved in calling Dowd when
6528 it is perfectly plain to me that no connection has been established. I think I ought to say that I don't know of any other Redfield memorandum that is in the record, to which Mr. Steffen has referred. There isn't any.

Mr. Steffen: I refer you to Government's Exhibit 226—there is, in other words.

Justice Stephens: Is that on this same subject?

Mr. Steffen: No, your Honor. Mr. Bromley was just saying that he knew of no other memorandum mentioning Mr. Redfield, in the record.

Mr. Bromley: No, I didn't say "mentioning Mr. Redfield", I said "by Mr. Redfield". Is that an exhibit by Mr. Redfield?

Mr. Steffen: I said it was an exhibit mentioning Redfield, and that is all I said.

Mr. Bromley: You didn't put it that way, you said it was a Redfield memorandum.

Mr. Steffen: I don't believe that I stated that.

Justice Stephens: I think my colleagues agree with me that the Court would prefer that the Government not rest if this matter is left in any doubt and there might be possibly the necessity of reopening the Government's case. If Dowd is to be called he ought to be called within the Government's case.

If there is anything doubtful about the Court's ruling on the item of connection, then that ought to be clarified by some motion, possibly the defendants could move—
6529 well, 233 isn't in evidence yet, is it?

Mr. Bromley: No, your Honor.

Justice Stephens: There is nothing to move about, I guess.

As far as I am concerned, I thought the matter was closed by the thorough manner we went into it the other day; but I will be glad to consult with my colleagues during the recess.

Mr. Steffen: I will refer your Honor to page 6509 of the record, at which your Honor's ruling was made, and that, I think, simply strikes out the conversation between Mr. Speer and Mr. Chaffee on the one hand, and Mr. Redfield, which we were relying upon as connecting evidence; and I didn't think that it constituted a holding at all that that, if admitted, would constitute connection. That is, I thought the connection matter was to one side.

Justice Stephens: We ruled, when we made our original ruling on Exhibit 233, from which I read into the record, we ruled that Exhibit 233, even if the Dowd-Redfield conversation took place and contained the words that Redfield said it contained, still hadn't been connected, and that the Government would have to connect it with Redfield. In other words, we ruled that the act or utterance of "A" wouldn't be binding upon "B" unless "B" was shown to have solicited or in some manner acted upon it and made it its own.

Now you were in the process, I thought, of attempting to establish a connection through Speer, and I thought
6530 we had ruled that the Speer conversations, except those having to do with the alleged subterfuge issue, were out of the record, on motions to strike. That being true, under the present state of the record as I understand it, Exhibit 233 is not shown to have been connected, and therefore isn't in evidence.

Mr. Steffen: I think that is perfectly true, so far, and my only question is that if we could establish a waiver, then the conversations between Mr. Speer and Mr. Redfield, I had thought, would constitute the necessary connection and would not be excluded, as your Honor did on page 6509.

Justice Stephens: Well, the division between our points of view with respect to that is, to state it for, I think, the third time, that it has been my view that the immediate

conversation out of which an exhibit or document was prepared might be within the waiver of the document, but that preliminary and other conversations would not be. I thought that there was nothing in the Speer conversations, as testified to, which indicated that they were so closely connected with the execution of the document that they would be within a waiver.

We will consider the matter during the recess.

Do you have anything in addition to the Dowd difficulty?

Mr. Steffen: I have only a short statement that I would like to make and I presume I can make that in the morning?

Justice Stephens: Yes. You might furnish my
6531 law clerk, if you will, a reference to the transcript pages of Mr. Speer's testimony.

Mr. Steffen: I will do that.

Justice Stephens: Will you also take the reference, Mr. Cantor, to that case which Mr. Steffen just cited?

Mr. Cantor: Yes sir.

Justice Stephens: Announce the recess.

(Whereupon, at 4:05 o'clock, p.m., the trial was recessed until Thursday morning, April 20, 1944, at 10 o'clock a.m.)

6532 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Thursday, April 20, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

6534 The Court read last night the case which counsel cited,—or read it this morning—28 Fed. (2d) 1,
6535 International Indemnity v. Lehman. It seems only to announce the orthodox proposition that declara-

tions which are explanatory of an act which is in furtherance of a conspiracy are admissible in evidence.

The Court has carefully read—that is, the Presiding Judge has carefully read the colloquy which took place last night between counsel and the Court with respect to Exhibit 233, and is moved to make the following very brief additional comment:

The Court doesn't want Government counsel to have been misled in any manner by the Court's ruling, and it may be that Government counsel gained the impression, in some manner, that the Court hadn't ruled on the question whether there was connection or no connection with respect to Exhibit 233. I had thought, and it seems to me now, that there can't be any real basis for misunderstanding on that subject, because at the time we announced our written ruling on 233, we held that even if the Redfield-Dowd conversation took place and contained the words of waiver which Mr. Redfield testified to, still it was necessary to show two things to make the exhibit admissible: (1) that it was an act or declaration in furtherance of the conspiracy, and (2) that it was connected in some manner so that Redfield's act in writing 233 was shown to be the act of Certain-teed. In other words, we ruled that those
6536 two elements had not yet been shown.

Now nothing has happened since then except the Speer testimony, which was relied upon to connect, and the Speer testimony was in large part stricken out. So it seems to me the Government must fairly have been advised that the Court had not ruled that there was any connection. On the contrary, it ruled that there yet was no connection.

It seems to me also that it should be very clearly borne in mind, in thinking about 233, that what the Government is claiming waiver of is waiver of privilege with respect to an exhibit, a document, and that all you attempted to show in the Redfield-Dowd conversation was that there had been a waiver of the privilege with respect to that document.

I said, in the course of our colloquy, that possibly that would include waiver of the conversation in which the document was itself prepared or as a result of which it was prepared, if you were claiming waiver of more than the mere exhibit; but that it did not seem to me that even if that were true it would involve waiver of separate conversations—that they would have to stand on their own bottom so far as the rules of evidence were concerned.

I had thought, Mr. Steffen, that when Speer was offered, he was offered not on the subject of waiver, but on the subject of connection, that you were trying to prove by Speer that Exhibit 233 was in some manner the act
6537 of Certain-teed; and that when you were trying to prove that, which is an item of connection, not an item of waiver, you were bound by the rules of evidence, and if conversations which you relied upon to prove connection were themselves privileged conversations, and not such conversations as would be within the waiver of Exhibit 233 itself—assuming that waiver to exist—that you were faced with the rules of evidence with respect to privilege.

However, I may say, on the other side, it has occurred to me, in thinking this matter over during the evening, that this might be true, Mr. Bromley—while this seems like, perhaps, again taking more time than is advisable concerning this exhibit, because it doesn't seem very important, still I am anxious to be fair and right in my rulings—I suppose the normal or ordinary way to prove that a memorandum like 233 was the act of a company would be to call someone connected with the company, an officer of the company, to testify that he solicited it, such as in this case Mr. Whittemore or Mr. Brown, or to call somebody from the company or the Board of Directors to show that after it was received it was acted upon in some manner which touched this alleged conspiracy.

But I suppose it might possibly be shown in another way, that this memorandum was the act of Certain-teed in the sense that it was solicited by Certain-teed. It would
6538 seem to me that the mere fact that a client solicits advice from a lawyer, his mere going to the lawyer and asking him to give advice or to write a memorandum, that the mere fact or such solicitation of advice wouldn't, itself, be privileged—the mere fact that a client asks a lawyer to advise him, as distinguished from the statements he makes to the lawyer in order to get the advice.

If the Speer testimony should show, by reasonable inference or directly, that he, as company engineer, was authorized by Certain-teed to present devices and products which he had devised, to their lawyers, and to obtain memoranda for the company with respect to them, then it might be urged that Certain-teed was, through Speer, soliciting the memorandum which resulted.

Now I was unable to do more, last night, than to read all these 100 or 150 exhibits that came in yesterday and the record, I haven't reread the Speer testimony. But there may be something in that point, if that is what Mr. Steffen has been urging. I hadn't understood that was what he was urging, but it occurred to me last night, after thinking over the colloquy, in a desire to be conscientiously attentive to it, that maybe that was what he was contending.

Is that what you are contending, Mr. Steffen?

Mr. Steffen: I was prepared this morning to
6539 close out the Speer matter as rapidly as possible.

I would call your attention simply to the fact that we reoffered Exhibit 233 when Mr. Speer was on the stand, and we checked last night and I don't believe there was any ruling on it.

Therefore, I will ask simply for a ruling on the reoffer of Exhibit 233, and of course that will raise the question of whether there has been sufficient connection shown. I do that simply to make our record clear.

I want to make a statement in that connection. We think Mr. Speer's testimony shows that Redfield was employed as a patent man for Certain-teed, although he may have been on the payroll of the Chaffee firm. Redfield himself stated that he was on the payroll of the Chaffee firm, and acting for Certain-teed in patent matters.

We also called Your Honors' attention, last night, to Government's Exhibit 226, which is George M. Brown's memorandum, in which he said, "I have given such consideration to Mr. Redfield's report as I have time for." His report was a report on the bubble or foam license agreement. This was in June.

Then a third item of connection, of course, would be Mr. Speer's testimony on transcript page 6452, in which he said—if you will recall, we showed him Exhibit 233, and he read it, and we asked him if he had any conversation
6540 concerning Exhibit 233, and he turned it upside down, as you will remember, and said, in effect, "Well, I remember I told Mr. Redfield that I thought my patent would make a good trading position in our dealings with USG, and that I thought the device or the edge that we made was better than the Utzman because of the distinctive feature that it has reinforced edge."

We don't think that is a privileged communication because he may or may not have been there for legal advice. That looks like straight business. But I am simply offering

this, and would like a ruling and would like to have it finished.

Justice Stephens: I may add this to what I said, with particular reference to Mr. Keber, acting for Mr. Adams. It occurred to me last night in thinking of this thing, and this morning in discussing the Speer testimony with my assistant, Mr. Cantor, that possibly Mr. Adams builded better than he knew, or worse than he knew, when he so carefully brought out the fact that Mr. Speer was company engineer and was going to Redfield to present matters, as engineer, to the company lawyer. Maybe it is a fair inference from that that 233 was requested by Speer as company engineer, and if so, that that would connect it and make it a company document.

Mr. Steffen: Our re-offer of 233 was on page 6456.

Justice Jackson: Was that subsequent to the
6541 Speer testimony, that the offer was made?

Mr. Steffen: Yes, that re-offer was made on the theory that we had connected the matter up by Mr. Speer's testimony and these other matters that I now mention.

Mr. Keber: May I just make a remark? My knowledge of this matter doesn't encompass the situation too definitely, but it seems to me that the point in showing that Mr. Speer was a company representative, of course, was in connection with the question of showing that the conversation was privileged, and that Certain-teed could raise the privilege because it was a conversation between Certain-teed, by its representative, and its counsel. As I had understood it, even assuming that there had been some reference—and I don't take it there was—in the testimony of Mr. Speer to Exhibit 233, and a request made by Mr. Speer for such a memorandum, the objection went precisely to that conversation, because the request was for legal advice.

Justice Stephens: Do you contend, Mr. Keber, that the fact that a client goes to his lawyer and tells him he would like to have some advice on a particular subject, that that much is privileged?

Mr. Keber: I take it that it is, because if the client couldn't go to his lawyer without having that fact disclosed, that he had sought legal advice and was asking for legal
advice about a specific matter, that might deprive the
6542 privilege of one of its best characteristics.

Justice Stephens: In other words, the privilege goes so far as to make secret the fact that a client consults his lawyer?

Mr. Keber: With respect to a particular matter. I take it it wouldn't be secret that he went into the lawyer's office, perhaps, but thereafter, when the question directs itself as to whether he consulted his lawyer about this or that matter, then you are getting into the question of what the legal advice concerned, and I take it from that point on the privilege starts to operate.

Justice Jackson: This is all explanatory of Mr. Adams' actions with respect to his cross-examination?

Mr. Keber: Possibly not as clearly as he would have put it, but as well as I could do.

Justice Stephens: You don't need to apologize for the way you present matters, Mr. Keber.

Well, so far as I personally am concerned, I don't want to belabor a small point or waste the time of the Court by being superconscientious, but I don't feel now, after having thought the matter over last night, that I ought to rule on the question of connection until I read the Speer testimony, and that will take me an hour, at any rate, to do it. I don't know how my colleagues feel about it.

What else did you have in mind this morning, Mr. Steffen?

6543 Mr. Steffen: I am ready to rest, practically.

Justice Stephens: You have no other statement to make?

Mr. Steffen: A very short statement.

Justice Stephens: Are the defendants ready to make a motion at this time, or do they wish to take a recess?

Mr. Steffen: I would like to make my statement before they make their motions.

Justice Stephens: You want to make your statement before a ruling on Exhibit 233?

Mr. Steffen: I would be very glad to.

May it please the Court, I wish to make a short statement in regard to the patent phases of the case. First, we are not going to make an offer concerning patent invalidity at this time. We have no reason to suppose that the Court has changed its views since the ruling upon that question last fall in connection with Paragraph 46(a). We, of course, do not concede, on the record, that any of the defendants' patents are valid.

Second, we do not consider that it is for the Government at this time to introduce any of the patents upon which the defendants may rely to justify their actions, if they can be justified; and of course until some showing of the patents

upon which the defendants rely is made, it would be premature on our part, as we see it, to offer any prior art to define the true scope of their patents. Our position
6544 in this respect has been stated over the past year, and appears particularly in our trial brief on pages 21 and 22.

Third, we, of course, do not concede that the patents, or any of them, which are mentioned in the complaint or referred to in the various license agreements, are of the type described in the General Electric case as "completely covering" the products made by the defendants.

Fourth, we do not concede that any gypsum board or lath manufactured by the defendants during the period of the alleged conspiracy embodies or comes within the claims of any patents the defendants may have.

Finally, I want to say that I make this with entire respect. I wish simply to make the record very clear that we make no concessions on those points, so that the defendants may not be misled in any way, and the failure on my part to mention something is not to be deemed a concession.

Subject to the ruling on Exhibit 233, we are prepared to rest.

Mr. Bromley: May it please the Court, I don't understand how counsel thinks he can comment on the scope of the patents if he hasn't introduced them in evidence, or how he can say that he has proved that they don't completely cover our product. If he hasn't put them in evidence, I should think the presumption that arises from the license agreements, which he did put in evidence, would be
6545 that the patents completely covered the product, and that they were used.

Of course, I think the Utzman patent and the Roos foam patents are in evidence, because they are exhibits to the complaint, and they are admitted—and the Haggerty starch patents, too—the five most important, fundamental product patents are in evidence, as I read the pleadings. Out of the 50 or 60 patents concerned, those annexed to the complaint are the fundamental product patents. They are admitted by the answers, as I understanding the pleadings. So they are before the Court. But I don't understand the position of Government counsel that he can argue about the scope of the patents if he doesn't think they are in the record.

Now assuming that the Government has rested, I should like to say this: As I recall the outset of this trial, the

Government gave us an assurance that they were going to produce evidence which would establish a conspiracy, prima facie, outside of the declarations of the co-conspirators. I think the Court felt—I know I did—that the mere fact that they put in license agreements did not establish any combination or conspiracy of any sort. That question was raised early in the trial, and after those license agreements were received in evidence, this assurance was given us that the Government would produce other evidence of understanding, arrangement or conspiracy among the defendants.

6546 I don't believe that promise has been performed. I haven't seen or heard any such evidence. Almost every document that has been offered has been received subject to the reservation that at some time it must be connected with some conspiracy by some proof outside of it.

So, therefore, I desire at this time, on behalf of the defendants United States Gypsum Company, Sewell L. Avery, and Oliver M. Knode, to move, and I do move, that all of the exhibits and testimony which have been received as to said defendants subject to the usual reservation be stricken from the record upon the grounds that no prima facie showing of any alleged conspiracy has been made, and that such exhibits and testimony have not been shown to have been in furtherance or in execution of any alleged conspiracy.

Said defendants further move to strike all of the exhibits and testimony which have been received as to said defendants subject to connection other than the usual reservation.

Justice Stephens: Are you making this motion to strike separate from your motion to dismiss?

Mr. Bromley: Yes, sir. It was my purpose to make two motions,—first, the motion to strike, and then the motion to dismiss.

Justice Stephens: Do you have something to say, Mr. Finck?

Mr. Finck: If the Court please, I would like to
6547 make a motion to strike on behalf of National Gypsum Company and Melvin H. Baker.

Justice Stephens: You may.

Mr. Finck: On the assumption that Mr. Bromley's motion only runs to his clients, I would like to make a similar motion.

The defendants National Gypsum Company and Melvin H. Baker move to strike from the record all of the exhibits and testimony which, in the course of the trial, were received as to such defendants subject to the usual reservation with respect to the declarations or admissions of alleged co-conspirators, on the ground that no prima facie showing that such defendants were parties to any alleged conspiracy has been made, and that such evidence has not been shown to have been in furtherance or in execution of any alleged conspiracy.

In addition to the foregoing, the said defendants further move to strike from the record all of the exhibits and testimony which have been received as to said defendants subject to connection, on the ground that no prima facie showing of the required connection has been made.

Now on behalf of the Ebsary Gypsum Company, Inc., and Frederick G. Ebsary, I would like to have the record show that a similar motion to strike all of the exhibits and testimony received as to such defendants subject to the usual reservation, has been made on the same
6548 grounds as stated in the motion made on behalf of National Gypsum Company and Melvin H. Baker; and in addition, said defendants further move to strike from the record all of the exhibits and testimony which have been received as to said defendants subject to connection, on the same ground as stated in the motion made on behalf of National Gypsum Company and Melvin H. Baker.

Mr. Keber: I have a similar motion to make on behalf of Certain-teed and Hartley.

The defendants Certain-teed Products Corporation and Henry J. Hartley move to strike from the record all exhibits and testimony which, in the course of the trial, were received as to such defendants subject to the usual reservation with respect to the declarations or admissions of alleged co-conspirators, on the ground that no prima facie showing that such defendants were parties to any such alleged conspiracy has been made, and that such evidence has not been shown to have been in furtherance of or in execution of any alleged conspiracy.

In addition to the foregoing, said defendants further move to strike from the record all of the exhibits and testimony which have been received as to said defendants subject to connection, on the ground that no prima facie showing of the required connection has been made.

6549 Mr. Johnston: If the Court please, on behalf of Samuel M. Gloyd, one of the defendants, I make a motion to strike, similar to the motion of National, as dictated into the record by Mr. Finck. I do this for the sake of brevity because I see no reason for repeating it all; and if the local rules require it, I will file a formal motion with the Clerk. I am not sure as to what the Rules require in that respect.

Justice Jackson: That motion is made with respect to Texas too?

Mr. Johnston: Texas is Gloyd. We have used the word "Texas" all the way through here for convenience.

Justice Jackson: I see.

Mr. Johnston: The record is clear that Mr. Gloyd was doing business under that trade name.

Mr. Oliver: May it please the Court, on behalf of The Celotex Corporation and Bror G. Dahlberg, I now move to strike the following exhibits and testimony upon the ground that no connection has been established whereby said exhibits, or said testimony, became or are binding upon these defendants or either of them:

1. All exhibits except Government Exhibits 13, 14, 22 and 23.

2. All testimony of all witnesses, other than Arthur R. Black (in so far as he testified regarding his present employment with The Celotex Corporation, transcript
6550 pages 2523 to 2525, inclusive), and C. F. Miller (in so far as his testimony relates to The Celotex Corporation, transcript pages 2614, 2615, and 2633 to 2638, inclusive).

In addition to the foregoing, said defendants further move to strike all evidence, verbal or written, which, in the course of the trial was received as to such defendants subject to the usual reservation with respect to the declarations or admissions of alleged co-conspirators, on the ground that no prima facie showing of any alleged conspiracy has been established, and that such evidence has not been shown to have been in furtherance or in execution of any alleged conspiracy.

Mr. O'Donnell: May the Court please, on behalf of the Defendant Newark Plaster Company and the individual Defendant Frederick Tomkins, we respectfully move this Court to strike all exhibits and testimony which, in the

course of the trial, were received as to such defendants subject to the usual reservation with respect to the declarations or admissions of alleged co-conspirators, on the ground that there has been no prima facie showing that such defendants were parties to any alleged conspiracy, or that any alleged conspiracy existed, and that such evidence has not been shown to have been in furtherance or in execution of any alleged conspiracy.

In addition to the foregoing, said defendants further move to strike from the record all of the evidence
6551 which has been received as to said defendants subject to connection, on the ground that there has been no prima facie showing of the required connection.

Justice Garrett: Of course I have only gotten these motions as they were stated, but your motion, Mr. Bromley, didn't go beyond striking the exhibits, did it?

Mr. Bromley: Yes sir, it did; it included the testimony.

Justice Garrett: It included a motion to strike the oral testimony as well?

Mr. Bromley: Yes, your Honor.

Justice Garrett: I didn't understand that at the time. Then, in substance, all motions are directed both to the exhibits and to the oral testimony?

Mr. Bromley: Yes, your Honor.

Justice Stephens: Do you wish to make an argument on your motion?

Mr. Bromley: No, your Honor. It was my plan, rather, to ask the Court, after I had made a motion to dismiss, what its pleasure was with respect to the program following these motions. It was my thought that if we could go away and prepare briefs on both sides, and come back here on or about the 15th of May, and argue these motions, having submitted briefs in advance and given them to the Court in advance, that probably that would be the plan that would enable us to make the best progress.

6552 Justice Jackson: Or both motions on one?

Mr. Bromley: On both motions.

Justice Jackson: But you haven't made your second motion yet.

Mr. Bromley: Not yet, your Honor.

Justice Garrett: Well, if your first motion is sustained—

Mr. Bromley (interposing): I don't need the second one. (Laughter)

Mr. Steffen: We won't hold Mr. Bromley to making any concession if he makes a second motion in conjunction with the first. (Laughter)

Mr. Bromley: I had thought that what counsel should do, if they could, would be to exchange briefs on Monday, say, the 8th of May, a week before the 15th, and then if they wanted to put in reply briefs, let them do that by the 15th or before the 15th of May, and then come in here on the 15th and proceed to argue both motions, because I take it that fundamentally the question is the same as to both motions.

Justice Jackson: That is the very thing I had in mind, and there is no necessity of briefing twice, as I see it.

Mr. Steffen: I think the fairest way of exchanging briefs is the way Mr. Bromley suggested, that they give us theirs and we give them ours on May 8th, and that will give us each an opportunity to see what the other's case is before we come to the argument on May 15th.

6553 Justice Stephens: It is very important to the Court, if you are going to exchange initial briefs, that there be reply briefs also, because sometimes, when briefs are presented at the same time by way of exchange, you don't get a real "crossing of swords" by counsel, so that the Court finds some assertions made by one side that aren't touched upon by the other. So I think it is quite important that if the briefs are to be exchanged in advance of the argument, there should also be reply briefs submitted so that the Court can be sure that it has the views of each of the parties on all of the contentions of the opposite party.

Mr. Bromley: Of course the fair thing to do in this situation would be for the Government first to state just what it is it thinks it has shown by way of a prima facie case.

I say that because I am frank to admit that I just don't see what they have done in that respect, and when I write my brief I have got to set up all possible straw men and knock them down.

Now there ought not to be any secret about it. If they think they have introduced any evidence of any combination, outside of the declarations, it seems to me that they ought to say so.

Mr. Steffen: We do.

Mr. Bromley: And tell us what it is, and not keep it a secret, because there is no reason why it should be

6554 a secret from us. I should find great difficulty in setting up a hypothesis as to what they might contend, and I would like to know—speaking about fairness—

in advance just what it is they think they have proved by way of combination.

I can understand the Hitchman case, where you have a union in meeting assembled, and they pass resolutions and reach agreements that they will go out and unionize the men. There there was proof of a definite understanding or agreement, and after it was made in the convention, and their agents and organizers went out into the field, the declarations which they made, which are relevant to that understanding which has been proved, are binding on everybody.

Now in that case the Government took a perfectly open position as to what understanding they had proved, before they attempted to bind the defendants with the declarations.

I would like to have the Government tell me just what it is that these defendants agreed among themselves to do, because I don't believe that there is any proof that they ever agreed among themselves to do anything, and I don't believe they ever had any common purpose, except, maybe, after they got to be licensees I guess they had the common but not joint purpose of observing their contracts. And I think that is the only common purpose that there is any proof about at all, and I don't think that common purpose constitutes an arrangement or agreement or understanding or conspiracy—and I am mindful of the
6555 fact that the Government need only prove a lawful arrangement, I know that, sure.

Justice Stephens: Prove what?

Mr. Bromley: That they need only establish, for their prima facie case, a lawful arrangement. Then they can come along with declarations and give the illegal color or character if they want to.

What I would like to know is, sometime before I write my brief, if I can, just what lawful arrangements the Government thinks it has proved, and what that evidence is. So I would like to have their brief first on the motion to strike.

Justice Stephens: It would be very helpful to the Court if it knew just what the Government's contentions were, in respect of that.

Mr. Steffen: Your Honor, I would—

Justice Jackson (interposing): I suppose the Government feels that it has proved the allegations of its complaint?

Mr. Steffen: That is what we thought, your Honor. We also supplied you with a very thoroughgoing trial brief, we thought.

Justice Stephens: Yes, which I have read very carefully, and also all the cases cited therein.

Mr. Steffen: That laid out, I think, the general thesis of our case. Of course it is preposterous, shall I say, for a person making a motion to strike, to ask the other
6556 party to give him his evidence or his arguments in advance. The usual way is for the moving party to give the other party a brief; and then he may reply. In this case I went along, very generously I thought, with Mr. Bromley and said that we would exchange briefs on May 8th—which is a less fair way from the Government's standpoint.

I want to leave one thought with you, if I may, on this matter, in answer to Mr. Bromley's point. I think if he will read the Masonite case very carefully again he will get a pretty good idea of what has been established in the present case.

I also want to refer now to what Mr. Dallstream said, at the time Mr. Dahlberg was on the stand. You will remember that he made a statement in connection with the Masonite case. In the Masonite case you had a series of agreements and they were all, on their face, legal, as he said—they were agency agreements. The question then was, where was the conspiracy. And Mr. Dallstream, in very few words, told us where the conspiracy was. He said, on page 6350 of the transcript: ". . . and the case in the Supreme Court proceeded on the ground that it was a true agency, and that the violation occurred only because it blanketed and enveloped the whole industry with the contract".

That is what we have here.

Justice Stephens: Do you rely upon the Inter-
6557 state Circuit case also?

Mr. Steffen: Oh yes, I don't want to be limited as to what we rely upon—

Justice Stephens (interposing): I am not attempting to limit you. I only want to find out, as far as you are willing to state, what cases you rely on. I had assumed that you would be contending under the Interstate Circuit case as well as the Masonite case.

Mr. Steffen: I think Mr. Dallstream's statement shows the relationship between the conspiracy and these agreements. The agreements, like the agency agreements, may,

when looked at singly, be innocent. The vice lay when the industry got together to blanket the industry under those agreements. Mr. Dallstream put it in very few, very terse and very nice words.

Mr. Bromley: I don't see why there should be any confusion about either one of those cases. I have got the Masonite case before me and I think the second headnote states the heart of the decision and explains why it is not applicable to our case. It says:

"Acceptance by competitors without previous agreement of an invitation to participate in a plan, the necessary consequence of which, if carried out, will be restraint of interstate commerce, renders them liable as conspirators under the Sherman Act."

6558 Now here the defendants accepted an invitation to a plan, the necessary consequence of which was a lawful consequence. We had a patent and we had the right to grant licenses.

In the Masonite case "the necessary consequence of which" was an illegal restraint of trade because it was not protected by any patent.

In the Interstate Circuit case all you had was a group of distributors of motion pictures, whom it was proved circumstantially agreed with one another that they would only license their motion pictures to exhibitors under one form of contract which contained provisions about the admission price and so forth. The defendants restrained themselves unlawfully because they limited their freedom of action, and each agreed with the other that they would only use this one form of contract, that they would only do business on these terms. That was not protected by any patent, it was a restraint of each of them, and an unlawful restraint.

How you can draw any analogy between those two cases and this situation, where we have a presumptively valid patent and we extend an invitation to all those who want to operate under our patent to sign a license, and the licenses are lawful, and they are carried out lawfully, how you can draw any analogy between that and these other two cases, I fail to see.

The Government recognizes that because for
6559 months they have been talking about subterfuge.

They try to get away from the conclusion that I make, that this plan is not like the plan in the Masonite case because this plan is lawful. They try to make it unlawful by

saying, "Oh, well, but it isn't what it appears to be, it is a fake, it is a fraud, and it was not entered into for the purpose of using the patents or lawfully fixing the prices."

Well, that is an admission that they haven't proved anything by just proving the patent agreements. They have got to go farther and show that it was a smoke-screen, and that is what they have talked for weeks and weeks and weeks, and all they have succeeded in proving is that it was a bona fide plan, carried out to the last detail, royalties were actually paid, the patents were used, and the thing was observed meticulously, as a lawful contract scheme, under legal guidance, and there wasn't any fake or fraud about it in the slightest.

Justice Stephens: I would like, just by way of preliminary discussion, to hear you a little further as to this, Mr. Bromley, and then I will make a comment as to what I think the order of business ought to be, subject to the views of my colleagues, of course.

I read the trial briefs, of course, of both the defendants and the Government, as well as the cases cited in them. In fact, I spent all the last recess doing that, with more thoroughness than I had had the opportunity to do before.

6560 I had supposed that the Government might contend that under the Interstate Circuit case—since there were copyrights there can be price-fixing under copyrights—that there was some sort of an analogy between that case and this case.

As I remember the facts in the Interstate Circuit case, the exhibitors entered into an arrangement with each other and with the distributors, whereby the distributors, under a rigid contract, were forbidden to sell to exhibitors unless the "second-string" theaters would show their pictures at a minimum price, and would eliminate double features.

Apparently the Court held that that was illegal despite the fact that there was a copyright which entitled the owner to fix prices and terms and conditions of use of the films, because there was concert of action among the exhibitors in bringing about these rigid contracts.

I had supposed that the Government would be contending that there was some evidence that the communications between the various licensees and Mr. Avery, antecedent to the meetings on or about the 22nd or the 23rd of May, 1929, were to be considered as analogical to these arrangements between the exhibitors in arranging the contract with the distributors. What do you think about that?

Mr. Bromley: Well, I think this about that. If you had a situation where there was one distributor who owned
6561 copyrighted pictures, I take it all would agree that he could say to all exhibitors, "Now you can have my copyrighted pictures and show them, but you must do it on condition that you will get the following amount of protection, and the 'subsequent-run' fellows can't have them for six months, and then can only have them if they charge fifty cents."

That is perfectly lawful if there is one distributor who owns his copyrighted product and he enters into those arrangements with all distributors.

The vice of the Interstate Circuit case was that you had not only one licensor, but you had all licensors, all distributors, agreeing with one another that they would each do business with their customers on precisely the same terms.

All we have in this case is USG, one licensor, who makes substantially similar arrangements with its licensees. If you had USG, the owner of some patents, and somebody else, the owner of some patents, and they both said, "Now we will license the industry on the same terms", then you would have the Interstate Circuit case. But you haven't got that.

Therefore, I see no analogy between the two cases and I think the copyright in the Interstate Circuit case would protect the individual distributor in his license arrangements with all of his exhibitor customers. But of course you can't get the owners of a lot of copyrights on different products together and say, "We will all follow the
6562 scheme in our dealings with our customers."

That is the distinction which, to my mind, takes the Interstate Circuit case right out of any analogy to this situation because here we have only one licensor who tells his customers, and nobody else, his licensees, that is, the basis on which he will do business.

Justice Stephens: Well, of course the object of these arguments is to help the Court get to a considered and sound conclusion on the facts and the law of the case.

It would be helpful to the Court, I think, if the Government's contentions were a little more concretely in the mind of the Court and of adverse counsel, than they are at the present time and than they are as presented by the Government's trial brief. At the same time Mr. Steffen is tech-

nically within his rights in insisting that you present your brief first, and we can't require the Government, I suppose, to present anything in advance if it doesn't wish to aid the situation by doing it, or thinks that it wouldn't aid the situation any by doing it.

I think we had better take a recess until two o'clock and let the Judges consider what their views are with respect to the time when we should hear argument on this, and the time when briefs should be presented, and to rule on Exhibit 233 so that we will get the record absolutely clear.

Mr. Bromley: Shouldn't I make my motion to dis-
6563 miss before you do that?

Justice Stephens: Yes, you may do that.

Mr. Steffen: I would simply like to state that we regard it as very odd that we should have to go forward at all at this time, and I will say, from the standpoint of the Government that we are just as much at sea as to what the defendants contend is their defense—

Justice Jackson (interposing): Well, you will all be enlightened, I suppose, when you get each other's briefs.

Mr. Steffen: That is right, your Honor, this is all premature. However, I am glad to give the Court any assistance that it wishes.

Justice Stephens: I am sure you are, Mr. Steffen.

All right, Mr. Bromley.

Mr. Bromley: May it please the Court, the defendants United States Gypsum Company, Sewall L. Avery and Oliver M. Knode, move, under Rule 41(b) to dismiss the complaint herein with prejudice on the ground that upon the facts and the law the plaintiff has shown no right to relief. Specifically the grounds of the motions are:

1. That the Government has failed to introduce evidence sufficient to establish that said defendants ever became parties to contracts in restraint of trade and commerce in gypsum board, plaster and miscellaneous gypsum products among the several States in violation of Section
6564 1 of the Sherman Act, as charged in and by the complaint, as amended.

2. That the Government has failed to introduce evidence sufficient to establish that said defendants ever became parties to or engaged in a combination and conspiracy in restraint of trade and commerce in said gypsum products among the several States in violation of Section 1 of the Sherman Act, as charged in and by the complaint, as amended.

3. That the Government has failed to introduce evidence sufficient to establish that said defendants ever monopolized trade and commerce in said gypsum products among the several States in violation of Section 2 of the Sherman Act, as charged in and by the complaint, as amended.

4. That the Government has failed to introduce evidence sufficient to establish that said defendants ever have attempted to monopolize trade and commerce in said gypsum products among the several States in violation of Section 2 of the Sherman Act, as charged in and by the complaint, as amended.

5. That the Government has failed to introduce evidence sufficient to establish that said defendants ever became parties to or engaged in a combination and conspiracy to monopolize trade and commerce in said gypsum products among the several States in violation of Section 2 of the Sherman Act, as charged in and by the complaint, as amended.

6. That the Government has failed to introduce evidence sufficient to establish that said defendants ever became parties to contracts in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Act, as charged in and by the complaint, as amended.

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7. That the Government has failed to introduce evidence sufficient to establish that said defendants ever became parties to or engaged in a combination and conspiracy in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Act, as charged in and by the complaint, as amended.

Justice Stephens: Are there motions by other defendants?

Mr. Finck: If the Court please—

Justice Stephens (interposing): I might state—I am not sure that the Rules require it but I think it would be helpful if, after these motions have been written up in the transcript, defendants' counsel could take time to have them written up formally and filed in the case with the Clerk.

I say that out of my experience in respect of the motions for summary judgment which I had considerable difficulty with, you will remember, in getting at the real terms of the

motions for a directed verdict. It is a great convenience to the Court if, in addition to what is dictated into the transcript, motions both to strike and to dismiss can be formally filed with the Clerk.

6566 Proceed, Mr. Finck.

Mr. Finck: The Defendants National Gypsum Company and M. H. Baker; and Ebsary Gypsum Company, Inc. and Frederick G. Ebsary, move under Rule 41(b) to dismiss the complaint upon the merits on the ground that upon the facts and the law the Plaintiff has shown no right to relief; and further move to dismiss the complanit on the specific grounds as stated in the motion to dismiss the complaint herein, made by the United States Gypsum Company.

Mr. Steffen: I understand, when you suggest that written copies of these motions be filed with the Clerk, that Government counsel will also get the usual number?

Justice Stephens: That would be conventional, of course.

Mr. Steffen: We would like to have three copies of each motion, if possible.

Justice Stephens: I am sure defendants' counsel will accommodate you.

Mr. Johnston: If the Court please, on behalf of Samuel M. Gloyd, that defendant will adopt the motion of the United States Gypsum Company—and we will file a formal motion. I thought that should be done, and that is the reason I raised the question.

Mr. Keber: The Defendants Certain-teed Products Corporation and Henry J. Hartley move, under Rule 41(b)

6567 to dismiss the complaint herein upon the merits, on the ground that upon the facts and the law, Plaintiff has shown no right to relief.

Specifically, the grounds of the motion are those stated by Mr. Bromley on behalf of the United States Gypsum Company and the other individual defendants whom he represents, which grounds we adopt in toto.

I don't know whether I am out of step in saying this, but I don't know whether it is perfectly clear, as to the defendants other than USG, concerning the procedure to be adopted with respect to the exchange of briefs here. For instance, our position may be somewhat different from that of USG. I don't know whether the Government anticipates writing one brief which will discuss not only USG's problems, but ours as well.

Justice Stephens: I should think that when defendants present their briefs, each defendant would have a right to present a separate brief if it wishes to do so. Then the Government would have to reply to each of the contentions made in the brief of each defendant. If the defendants wish, of course, to combine with Mr. Bromley in the submission of a brief, or to do both, to adopt in the large the brief submitted by Mr. Bromley and file supplemental briefs on each item that each defendant separately thinks it ought to urge, that can be done. But they ought all to be presented at the same time to the Government so the Government can have the benefit of knowing what the contentions of all
6568 defendants are, and so that the Court can see the exchange of views.

However, we can settle all that before we adjourn finally today.

Another desirable thing that I might mention, just while we are speaking about it informally, is that I think it is very desirable that the reply briefs should be presented in time for the judges to be able to read them before the argument. Perhaps it would be better to postpone the argument a little bit longer, if necessary, in order to give the Court the advantage of doing that. I find it, myself, very helpful in understanding a lawyer's argument if I have his brief and have read it in advance of the argument.

Mr. Johnston: If the Court please, in that connection May 15th will come around very soon, and if these briefs are exchanged by May 8th that wouldn't give much time for preparation of reply briefs if the argument is to be on the 15th of May.

Now I have a selfish motive in making this suggestion also, that a little longer time would suit my purpose very well, because I have another case starting on the 1st of May and I might be able to dispose of one phase of it if I had a few more days' time. I wonder if it would make any difference to the parties or to the Court if the date of argument on these motions might be set off a little farther than May 15th.

Justice Stephens: We will consider that before
6569 we adjourn today, and have a definite understanding. Are there other motions by other defendants?

Mr. Bromley: What is Mr. Johnston's suggestion, May 16th?

Mr. Johnston: No, I thought around the first of June, possibly. A week or two additional time would mean a lot

to me, if the Court please. Of course I am in this case and I will adjust my other appointments to this, but I just have one of those emergency matters that come up now and then that I must get into on the first of May.

Mr. Oliver: May it please the Court, the Defend... The Celotex Corporation and Bror G. Dahlberg now move, under Rule 41(b) for a dismissal of the complaint as to these defendants on the ground that upon the facts and the law the Plaintiff has shown no right to relief; and on the further specific grounds stated by Mr. Bromley in his motion, which grounds are adopted by these defendants.

Mr. O'Donnell: May the Court please, on behalf of the Defendant Newark Plaster Company, and the individual Defendant Frederick Tomkins, I now move, under Rule 41(b), for a dismissal of the complaint as to these defendants on the ground that upon the law and the facts, the Plaintiff has shown no right to relief; and I further move for judgment for these defendants. For the purposes of specification, I adopt the grounds stated by Mr. Bromley on behalf of the United States Gypsum Company.

6570 Justice Stephens: Are there any other motions by any defendants?

Justice Garrett: I suppose, of course, that whatever action the Court may finally take on Exhibit 233 would not affect any of the motions that have been made.

Mr. Bromley: No sir.

Justice Stephens: It may be shown, when we make a ruling on Exhibit 233 one way or the other, that that ruling may be considered as antecedent to these motions. Nobody would object to that, I assume.

We will take a recess at this time, gentlemen, until 2:30 this afternoon.

(Whereupon, at 11:15 o'clock, a. m., a recess was taken until 2:30 o'clock, p. m., of the same day.)

6571 AFTERNOON SESSION

(The trial was resumed at 2:30 o'clock, p. m., pursuant to recess.)

Justice Stephens: We have considered during the recess this Exhibit 233, and all of us have reconsidered and reread, since last night and during the recess, Mr. Speer's testimony, and we have reached the conclusion that, even

treating Mr. Speer's testimony as none of it privileged, and considering all of his testimony, it does not constitute a connection as far as Exhibit 233 is concerned, and make Exhibit 233 the act of Certain-teed.

Therefore, to protect your record, Mr. Steffen, we reject Exhibit 233.

Now with respect to the time for the filing of briefs and argument. So far as the convenience of the Judges is concerned it is of little importance whether the argument be held on the 15th of May, which is a Monday, or the following Monday, May 22nd, or as Mr. Johnston suggests, along about the first of June.

Of course we think the main consideration should be—when can the briefs be presented and the argument held in such manner and form as will be most helpful to the Court. We don't want you pressed to the point, on either side, where you can't get out adequate briefs and adequate replies and make adequate oral arguments, because we
6572 want the briefs carefully annotated to the record, so far as the facts are concerned, and we want counsel on each side to cross swords with each other on the meaning of the evidence and the meaning of the authorities, and we would like to have counsel go into the authorities, wherever it seems necessary to do so, to fully understand what the rulings—of the Supreme Court particularly—mean beyond the face of the opinions.

That is to say, we would like to know what the record is in some of these cases. I should think it would be very valuable to know what the facts in the record are in the General Electric case, for example, to compare the licensing system there with the system here. It might be desirable to know what the record facts are in the Interstate Circuit case, beyond what appears on the face of the opinion.

Now we would like to hear from counsel on both sides as to when they think it would be best to have the briefs presented, and best to have the argument. We should think that the main briefs should be exchanged so that each side will know what the other is arguing, and then file reply briefs. It might be that it would be sufficient to have the reply briefs presented before the argument, then have the oral argument, and then have additional, or reply briefs, presented, if necessary, to be sure that there is a complete meeting of issues on both sides. Possibly it would be sufficient to have the main briefs presented before the
6573 argument and then one set of reply briefs presented

after the oral argument and after consideration of the main briefs.

We will be glad to have suggestions and we will accommodate ourselves largely to the needs of counsel so far as time to do the job adequately is concerned.

Mr. Steffen: May it please the Court, on behalf of the Government we might say that the arrangement suggested by Mr. Bromley, of the exchanging of main briefs on May 8th and final briefs and argument delivered on May 15th, is satisfactory. I think we can get together an adequate argument by that time.

However, we would be willing to concede a few days, particularly after the 15th, because there wouldn't be very much time between May 8th and May 15th to get any typing done.

Justice Stephens: To get in a reply brief?

Mr. Steffen: That is right, and get the document over to the Court.

I want to say on the other side what I have said for a year or more, that we are anxious to get this case concluded, but of course we don't wish to have it poorly considered. If possible, I would rather not have it postponed any longer than May 22nd.

Justice Stephens: We don't want to postpone it, either. At the same time, the case is so important, and has taken so much time already, that we ought not to hasten it
6574 in this most critical aspect of the case, and if an opinion has to be prepared, the problem of preparing an opinion on such a complicated matter is a very serious problem.

It would seem to us, if the motions should be denied, that it would be pretty difficult to get the case finished this term because there must be some surcease for all of us during the summer months.

If the motions are granted, how long it would take to prepare an opinion I wouldn't undertake to say. What have you to suggest, Mr. Bromley?

Mr. Bromley: May it please the Court, no one on my side agrees with my tentative schedule as I suggested this morning, and they all make the point that I didn't allow sufficient time between the receipt of the main briefs and the filing of replies. I think they are right.

Therefore, I suggest this alternative arrangement: To exchange main briefs on Monday, May 8th; to exchange

reply briefs on Thursday, May 18th; and to argue the motions on Monday, May 22nd.

Justice Stephens: That is agreeable to the Court, and if, after the oral argument, we feel or you feel that we need any supplemental replies, they may be filed then.

Mr. Bromley: Yes sir. Under this arrangement it would give the Court two weeks to read the main briefs and a week to read the reply briefs.

6575 Justice Stephens: That is fine. Do you have in mind having these briefs printed or typewritten? The problem of printing is a problem of time, of course.

Mr. Steffen: We nearly always have ours typed, your Honor, for lack of money?

Justice Stephens: Is the Government poor, Mr. Steffen?

Mr. Steffen: So we are told. (Laughter.)

Justice Stephens: Well, I realize, sometimes, that appropriations are limited.

Mr. Bromley: We expect to print ours, if there is enough money left.

Justice Stephens: Of course if it is possible to have them printed, from the standpoint of the Court they are much easier to deal with, but we don't want to make any flat requirement on that. I don't think the rules require it.

Mr. Johnston: If the Government is poor, we might print their briefs for them. (Laughter.)

Justice Jackson: Mark well the word "might". (Laughter.)

Mr. Johnston: I will do that if they will let me write it. (Laughter.)

Justice Stephens: Well, the last suggestion made by Mr. Bromley as to time is approved by the Judges, and that will be the order. Is there anything else to come up at this time?

Mr. Bromley: Nothing, I think.

6576 Justice Stephens: We thank you on both sides, gentlemen, Government counsel and defendants' counsel, for your pains and help to the Court thus far in the case, and we shall welcome you back here again on the 22nd of May.

Announce the recess.

(Whereupon, at 2:45 o'clock, p. m., the trial was recessed until Monday, May 22, 1944, at 10:00 o'clock, a. m.)

6577 Justice Stephens: I might say I have written down two questions to ask you at the close of the agreement. I do not want to interrupt you during the argument unless necessary.

I want to ask you what you mean by the word "stabilization". It has been used a great deal and it seemed to me to be used not merely in terms of prices but of something beyond prices; and I wonder what you mean by the
6578 term "blanketing"; when those two terms are used in the contex of the Sherman Act?

Passing back to the question we have just been discussing, I fully understand that there is an issue between the parties under the General Electric case which I am hoping you will discuss—as to whether or not, under the General Electric case, a group of licensees can be lawfully formed, as distinguished from one licensee as in that case. Does that help clarify the question that I asked you?

Mr. Steffen: I think that clearly presents the question and if I can rephrase the question, it is, in Mr. Bromley's words, whether it is perfectly lawful, as he would say, for competitors to sit down together to take out a license from one of their number holding a patent, that the licenses should be common in form, that there should be price fixing and that they should even discuss the matter of price fixing, although he does not go so far as to say there should be any discussion as to what the prices should be but they should know at the time they enter into it that there would be a common agreement, that there would be price fixing and that presumably they would operate under it, but no agreement as to what the prices should be.

As I understand it, Mr. Bromley—and I want to be perfectly fair in it—as I understand it Mr. Bromley takes that position, that it is lawful and I think most of his arguments are predicated on the assumption that it
6579 is perfectly lawful under the General Electric case for a group of erstwhile competitors to get together under a common license and to fix their prices. That is a clear-cut issue and it raises two general questions. One is as to the charge in the complaint, whether we charge that that is illegal, and I think perhaps I had better refer to that somewhat in view of your Honor's question concerning "blanketing."

Our notion of "blanketing" is that it is a loose word to describe the bringing together of the whole industry under

a common license agreement or, in other words, it is very similar to conspiracy. It is an association, concert of people under common agreements. That is, blanketing them together. As applied to the Masonite case, there was a series of competing companies who were making one type or another of hard board. They had competing patents, just as in this case the Beaver Company had some thirty-odd patents to begin with and they were in competition and those patents were turned over to USG, became part of the first Beaver agreement. Then, when they decided among them, Masonite, Celotex and Certain-teed and the other parties to the Masonite case, that they would take out common del credere agency agreements which provided for price fixing, I think it can be shown in the opinion that the court thought that was a very dangerous device, that it would have the effect of knitting together an entire industry, thereby eliminating competition, and that
6580 was the vice, as I see it, that the court struck down in the Masonite case.

We contend that the exact vice exists in this case although the device which they used in this case to put it over is different. That is, in the Masonite case, they used the del credere agency agreement and accomplished elimination of competition. Here they took out patent license agreements and accomplished, by virtue of the price fixing clause, exactly the same result and the Sherman Act is directed at eliminating that result. The fact that it was handled by one device or another seems to be a matter of no importance. That is, if you look through the many cases from the time the Sherman Act was passed up to the present time, you will find that the parties have been extremely ingenious in finding devices whereby they could accomplish an elimination of competition and a fixing of prices or stabilizing of conditions.

We contend and our position here is that that is exactly what the defendants here have done, using a patent license agreement with price fixing they have been able to completely eliminate price competition throughout the gypsum industry, particularly with regard to board.

Of course we contend also that it has operated to stabilize or, in other words, to influence the price of plaster and that they did that as part of the intention of the combination.

6581 Justice Garrett: Pardon me just a moment, Mr. Steffen. I want to understand you clearly. Did I

understand you to say that the Beaver Company owned a lot of patents which were transferred to USG?

Mr. Steffen: That is right.

Justice Garrett: Transferred in connection with the settlement of the litigation?

Mr. Steffen: That is right. The Beaver Company was the largest company other than USG at the time. They were the biggest companies in the field and when Mr. Blagden and Mr. Avery made their arrangement in 1926, one of the provisions of the arrangement was that Beaver would turn over around thirty or thirty-two patents to the United States Gypsum Company and then they were incorporated in the appendix to the agreement and they became the patents which were in the appendix to the May agreements and likewise the November agreements which were executed throughout the industry.

I will have some further comment on that but your Honor will appreciate that what was accomplished there was, in a measure, a pooling of patents and a licensing back to Beaver with price fixing of the very patents which they had originally owned. We will go into that when I take up the Blagden testimony.

Justice Jackson: Was not the Beaver Company over a barrel there in an infringement suit?

6582 Mr. Steffen: Well, I do not think I have to answer that, your Honor, whether it was or not. That is the contention.

Justice Jackson: They paid a lot of money.

Mr. Steffen: They paid a lot of money and it makes it look as though they were over a barrel. Let's make one other point. They can be over a barrel and they may have all sorts of business reasons and Mr. Avery may be just as adamant as he wants to be saying, "You have got to take price fixing", but when the result is over, they have agreed to a contract whereby they pool their patents and there is price fixing thereafter between them. That is concert of action to accomplish an illegal purpose. That, as we say, is a violation of the Sherman Act.

I am going to notice very carefully Mr. Bromley's defense, which is two-fold; one, that the General Electric case is a protection and, two, I take it, that the Rubber Tire Wheel Company case is a protection to what they have done.

Mr. Bromley: Wouldn't it be fair to point out that there is a statement in the record about this matter that completely contradicts his present argument?

On page 1572, your Honor specifically asked Mr. Knuff this question:

"The Court understood Mr. Bromley to object to your inquiry into the ownership of these patents upon the ground that there is no charge in the complaint that the
6583 transfer of them by Beaver to USG was illegal.

"Mr. Knuff: We do not so contend."

I thought that took that out of the case a long time ago.

Mr. Steffen: What was the transcript page?

Mr. Bromley: 1572, beginning in line 2 and ending in line 7.

Mr. Steffen: The answer to that is complete, your Honor. When Mr. Knuff said that he said that quite properly.

What I am saying to you now is that the fact that Beaver did transfer patents to USG is one of the facts of this case. We do not charge that as being illegal, just as Mr. Knuff said, but in determining whether there is illegality in the price fixing matter you are to consider all the facts and that is definitely one set of facts which is to be considered and which is very operative in determining the type of combination and conspiracy that we have here. I, therefore, was quite well aware of the statement, transcript 1572, and quite willing to say we do not charge that as one ground of illegality in and of itself. It is simply one of the facts in the case and is to be weighed in determining whether the charges we do make, that is, of price fixing, are charges which can be sustained as illegal price fixing.

6584 Justice Stephens: Are you passing on to a new subject beyond the General Electric case now?

Mr. Steffen: I am going to spend quite a little time on that General Electric case, your Honor.

Justice Stephens: I had some questions to ask you about the General Electric case but I do not want to interrupt the course of your argument. I thought you were passing from it.

Mr. Steffen: I would rather that you would defer those questions but I would be delighted to have the Court ask me any questions they want at any time.

I want to clear the record, if there is any doubt in anybody's mind, as to whether we, under the complaint, charged that a combination to blanket the industry under common price fixing agreements in the form of license agreements

is illegal. If there is any doubt, I say I think there is doubt because Mr. Bromley has once said, I believe, that the only possible illegality in such a combination would be if they extended the monopoly to control the sales or if they extended the monopoly to cover or control plaster sales. What he suggests thereby is that there is nothing illegal in the heart of the thing, which is a combination to fix prices on the patented goods. That is the matter which we charge in the complaint is illegal and which I expect to establish on the law is illegal and which I will then show is established in the evidence.

6585 Justice Stephens: Before you leave this particular point, I would like to ask you a little further about your position with respect to these Beaver license transfers. Those transfers of patents from Beaver to USG took place at the time of the settlement, did they not?

Mr. Steffen: That is right.

Justice Stephens: And at the same time that Beaver took a license back from USG?

Mr. Steffen: That is right.

Justice Stephens: I say this, in entire good part, but it seems to me duplicitous to argue that you can, on the one hand, say, as Mr. Knuff said, you charge nothing illegal about those transfers of patents to Beaver when they were a part of the very kind of a transaction which you say is now illegal, to-wit, transferring patents to USG and taking licenses back constituting, in its nature, a blanket or pool. How can you divide the mind of the Court or divide the facts in that way?

Mr. Steffen: I do not govern the Court's mind, your Honor. We could not have presented the facts in this case without presenting those facts. We do not charge that as being illegal, as a charge. I pointed out the charges are price fixing and eliminating jobbers. Those are the things we have been discussing.

6586 Justice Stephens: But if it is illegal for one company, like Beaver, to transfer its own patents to USG and take a license back, then it was illegal, wasn't it, to transfer those patents from Beaver to USG?

Mr. Steffen: Whether illegal or not, it is not charged as illegality. It is simply one of the facts to be weighed with all the other facts in determining whether this was an illegal conspiracy to fix prices, which we do charge. The same thing happened in connection with the Haggerty patent, your Honor, and that is all in evidence. The Haggerty patent was kicking around the industry, so to

speak, from 1924 to 1929. The only people using it were Universal and National. National used it for a period and was sued for infringement. National and Universal struck a bargain after a bit whereby National was permitted to continue to use the patent. This was following the action in Buffalo at which the court issued a restraining order, as we think, not because the patent was infringed necessarily but because Haggerty and the National people, being assignors to Universal of the patent, were estopped from setting up any question of validity and the court said on that showing that Haggerty and Universal would be enjoined or a preliminary restraining order would issue.

Following that, according to Mr. Finck in his opening statement, National made an arrangement to use that patent under an indemnity arrangement. In the summer of 1929, that had ripened, according to Mr. Finck, I believe,
6587 substantially into a prospective license from Universal. Then it was decided, and the evidence is clear on this, that Universal should sell the patent to USG. Mr. Bromley told you in his argument that that was something arranged entirely independently by USG; that USG and Universal arranged the transfer as a separate and independent transaction. Of course, it is obvious that it was not arranged as an independent transaction. It was arranged as part of this whole scheme. The C. O. Brown memorandum, which is in evidence, discloses that the matter was talked over by the different members of the industry and it was decided or it was discussed whether they should take licenses from Universal or whether USG should buy the patent. It may be when they came to take a license under the patent they sat down independently and did it but it cannot be treated as an isolated, unrelated transaction.

What I am getting at is this: That thereafter, Universal sold the patent to USG and took a license back, in effect, from USG so that again you have a situation of patents which are being transferred within the industry and which, in that case, were transferred to the dominant power in the industry and made the basis for their price fixing. I mean, we do not charge that the transfer was illegal but we do charge that the price fixing based on that transfer was illegal and I do not think there is any element of duplicity in our position.

6588 Justice Stephens: I repeat I used the word "duplicity" in good part. I have difficulty in seeing

the same fact in two different lights at the same time—in view of Mr. Knuff's statement. To put it in broader terms and in what are perhaps more important terms, I had got the impression, as a result of Mr. Knuff's statement concerning Beaver and as a result of the presentation of the case as a whole, this was not charged as a patent pooling case—

Mr. Steffen: That is right.

Justice Stephens: (Continuing) —or as a cross-licensing case but only as a case which was illegal because, regardless of where USG got the patents or from whom it got them, it could not use them in the way that it has, and I thought, therefore, that when Mr. Knuff stated you did not charge illegality in the transfer of Beaver's patents to USG at the same time Beaver got a license back from USG he was, in effect, conceding this was not a cross-licensing or pooling of patents case.

Mr. Steffen: We will say that the charge here is the charge of price fixing but, in order to determine it, you have to look at all the facts and one of the facts was that these patents were transferred back and forth.

I want to spell out very clearly our charges in order that it can be seen just where we charge that a conspiracy to blanket the industry under common license agree-
6589 ments in order to organize the industry and stabilize prices is illegal. I will secondly then want to take up the question of whether or not it is illegal.

In paragraph 44, as I have said to the Court many times, we charge a conspiracy to restrain trade and that is the charge under which we are proceeding here in this argument. In paragraph 45, we make the further statement that:

"Said companies have entered into, have carried out and are carrying out said combination for the purpose and with the effect of restraining, dominating and controlling the manufacture and distribution of said gypsum products in the Eastern area by concertedly raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by said companies in the Eastern area."

I will stop there. That, therefore, constitutes the charge that the defendants have conspired to restrain trade; that they have done so with the purpose and effect of estab-

lishing arbitrary and non-competitive levels for so-called patented gypsum board.

In paragraph 46, we say:

"Said combination was entered into and has been and is being carried out by the defendant companies, in part, under the guise of numerous license agreements purporting to relate to the use of certain patents owned by the defendant, USG, in the manufacture of gypsum board."

6590 In other words, as I understand that and the rest of the paragraph bears it out, we charge that they have conspired to restrain trade. We charge that it is a price fixing type of restraint rather than, as your Honor has pointed out, a patent-pooling type.

It is a price-fixing type of restraint which is the principal charge here and we charge it has been done under the guise of using patent license agreements.

Those patent license agreements are the ones we introduced on the first day. They are patent license agreements which contain a price fixing clause and that, therefore, we, I think, charge clearly and the heart of this case has to do with the price fixing on so-called patented board pursuant to USG bulletins. That is right at the heart of the case.

If your Honor has any question on that I would be glad to talk about it further but it seems to me so clear that that is one of the charges in this case that it can hardly be argued further.

Of course, in addition, we say and they are stated there in paragraph 45, b, c, d and e, that they did a lot of other things besides fixing prices on their so-called patented board. They, as we contend, in their conspiracy sought to control plaster prices. We contend further that the conspiracy resulted in a combined elimination of jobbers.

We contend further that they have controlled or
6591 influenced or coerced the resale prices by manufacturing distributors and that those things are all over and above the basic charge of a conspiracy to fix, at arbitrary and on non-competitive levels, the price of patented board regulated by USG bulletins. That is the basic charge.

6592 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Holding a Three Judge Court

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Court Room,
U. S. Court of Appeals Building,
Washington, D. C.,
June 15, 1946.

The above-entitled cause came on for decision at 10:00 o'clock, a.m., pursuant to notice, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

6593 On behalf of the Plaintiff:

ROSCOE T. STEFFEN, ESQ., and EDWARD KNUFF, ESQ., Special Assistants to the Attorney General of the United States; and KENNETH R. L. LINDSAY, Special Attorney.

On behalf of the Defendants:

BRUCE BROMLEY, ESQ. and GEORGE S. COLLINS, ESQ., New York, N. Y.; CRANSTON SPRAY, ESQ., Chicago, Illinois; and HUGH LYNCH, JR., ESQ., Washington, D. C., for defendants United States Gypsum Company, Avery and Knode.

ELMER E. FINCK, ESQ., Buffalo, New York, for defendants National Gypsum Company and Baker.

CHARLTON OGBURN, ESQ., ROBERT W. BURTON, ESQ., and and ENOCH D. CHASE, ESQ., Washington, D. C., for defendant Certain-teed Products Corporation.

PETER KEBER, ESQ., New York, N. Y., for defendant Hartley.

ERNEST H. OLIVER, ESQ., and RALPH P. WANLASS, ESQ., Washington, D. C., for defendants The Celotex Corporation and Dahlberg.

JOSEPH P. TUMULTY, JR., ESQ., Washington, D. C., and ELMER E. FINCK, ESQ., Buffalo New York, for defendants Ebsary Gypsum Company, Inc., and Ebsary.

JAMES O'DONNELL, JR., ESQ., Washington, D. C., for defendants Newark Plaster Company, and Tomkins.

DAVID I. JOHNSTON, ESQ., Oklahoma City, Oklahoma, and SCOTT P. CRAMPTON, ESQ., Washington, D. C., for defendant Gloyd.

6594 PROCEEDINGS

Justice Stephens: The court reporter asks me to request all counsel who are present this morning to register their names with him before they leave the room, so that their appearance at this hearing may be shown.

The Court has reached a decision on the pending motions and has prepared an opinion expressing its reasons for the decision. The opinion will be filed with the clerk and copies will be furnished counsel. This morning there are a limited number of copies available, but there are sufficient for all counsel on the Government's and defendants' side, both; and afterwards, if you will make application for such additional copies of the opinion as you want, we will be able to furnish them early next week. The opinion includes: a statement of the facts, charges and answers, a history of the case, and a description of the motions. Then, in Topic

I, a discussion of the duty of the Court under Rule 41 (b). In Topic II, a consideration of the *General Electric* and *Bement* cases relied upon by the defendants, and of the question whether there is a parallel between the instant case and those cases. Topic III, a discussion of the burden of proof, the principles of proof and the limitations on the declarations rule. Topic IV, a discussion of the question whether there is evidence, outside the declarations received subject to connection, of the conspiracy charged. Topics V, VI and VII, a discussion of the issues of
6595 fact, and of a special contention made by the Government. Topic VIII, a consideration of the authorities principally relied upon by the Government. In the enumerated topics we have discussed with particularity the evidence and the contentions of the parties in respect of the issues of fact and law, and have set forth in some detail the reasons for the decision we reach. This has required an extended opinion. In Topic IX the case is summarized as follows:

The complaint of the Government charges violations of Sections 1, 2 and 3 of the Sherman Act and seeks, under Section 4, an injunction. It alleges that the defendants are parties to contracts in restraint of trade and commerce, and that they have combined and conspired to restrain, and have attempted to monopolize and have monopolized, trade and commerce in gypsum products, by means of the execution of sham patent licenses granted by the defendant United States Gypsum Company and accepted by the other defendants and designed only to give color of legality to the combination and conspiracy charged. It alleges that the defendants have combined and conspired to fix prices upon gypsum board and upon miscellaneous gypsum products made and sold by them, to standardize such board and its method of production, to eliminate jobbers from the distribution of gypsum products, and to induce manufacturing distributors to resell at prices fixed by the defendants gypsum board purchased from them; and it is alleged that these unlawful purposes were effectuated.
6596 Judge Garrett, Jackson and myself all concur in this opinion.

The Clerk will be handed an official signed copy of the opinion and the Clerk will now kindly hand to each of the counsel in the case a copy of the opinion. As I said, other copies will be available the first of the week.

How much time do you wish to prepare proposed findings of fact, conclusions of law, and judgment, to be served upon the Government and then presented to the Court, Mr. Bromley? Do you wish to consult with other counsel on that?

Mr. Bromley: May I, if Your Honor pleases? (Off the record consultation between Mr. Bromley and associate counsel.)

We would like thirty days, may it please the Court.

Justice Stephens: How much time would the Government like to consider the proposed findings of fact and conclusions of law, and to take into consideration whether it has any objections as to form?

Mr. Steffen: I might say, Your Honor, that I think thirty days is quite a long time. We had only fifteen days in January to prepare an itemization; but if the defense counsel think they have to have thirty days, that will
6597 be all right. We will take about five days additional to look over that.

Justice Stephens: I think your suggestion that the difference is discriminatory is not well taken. All I asked you to present in January was a brief statement of those items of evidence which you contended connected the declarations. This order on the part of the Court is the preparing of findings of fact, conclusions of law and decree.

I will say this, Mr. Bromley, that I think you gentlemen on the defendants' side will find that this opinion so very thoroughly discusses every item of fact and law, both the principal issues and the subordinate issues, that you will not find great difficulty in preparing the findings. I assume there will be an appeal in this case and we want to expedite the appellate proceedings as much as we can, so if you can serve them earlier than thirty days, please do so.

Mr. Bromley: We will, sir.

Mr. Steffen: I would like to make one point at this time on the record, and that is that we, of course, on the Government's side, do not recognize that findings are in order at this time under the rules, the new rules, and therefore we do not feel that it is necessary to have findings at all.

Justice Stephens: Do you not wish them served upon you for that reason?

Mr. Steffen: Oh yes, we ask to have them served in the usual way, but we do not think that the time taken
6598 is proper under the circumstances.

We have one or two other matters we would like to call to the Court's attention.

Justice Stephens: You will find the question of the duty of the Court to make findings discussed quite thoroughly in the topic which discusses that; I think you will find that the majority of the authorities sustain that position, and in those cases they have made findings. You will also find that the new rules proposed to the Supreme Court require them.

One other point, Mr. Steffen. The exhibits which have been in the possession of the court reporter for the convenience, during the trial, of counsel and the Court, will be transferred to the possession of the Clerk of the United States District Court and kept in his vaults with due access to counsel on both sides, in the event of an appeal.

Mr. Steffen: I may say that there will be an appeal, from the standpoint of the Government.

Justice Stephens: I assumed so, yes.

Mr. Steffen: Mr. Knuff has a point he would like to make.

Justice Stephens: Yes, Mr. Knuff.

Mr. Knuff: Shall I come to the lecturn or make it from here?

Justice Stephens: Suit your own convenience. We could probably hear you better if you came to the lecturn.

Mr. Knuff: May it please the Court, I have here
6599 an order to be signed nunc pro tunc as of November 23, 1943. You will recall that on the 15th day of November the Court sustained certain motions with reference to Paragraph 46 (a) of the complaint. Paragraph 46 (a) of the complaint was that paragraph that set up the invalidity of certain patents owned by the defendants. And I believe the Court will also recall that on the 23rd day of November of that year we filed a motion asking the Court to do two things, first, to make the opinion of the Court a part of the record; and second, to correct the opinion in accordance with the motion. The Court at that time—

Justice Stephens: (Interposing) Are you referring to the motion which was supported by Mr. Steffen's affidavit?

Mr. Knuff: That is right, Your Honor.

Justice Stephens: In which he charged the Court with having misstated the opinion?

Mr. Knuff: With misconstruing it.

Justice Stephens: Misstated was the word, Mr. Knuff.

Mr. Knuff: I haven't looked at the record recently; my

impression was that it was "misconstruing". It is my firm belief that the Court intended to grant one portion of that motion, that is, that it intended to grant that portion of the motion to make the opinion a part of the record, but at page 1430 it says this, and I am quoting from line 2: "The motion therefore to correct the record is denied." And it left up in the air, as I see it, the portion of the motion
6600 asking to make the opinion a part of the record. You denied the motion to correct, but there was left up in the air that other portion. Now I think the Court intended to make the opinion a part of the record, and I have here, and I will ask Mr. Watts to distribute it to the Court, the order that I would like to have signed carrying into effect that portion of what I conceive to be the Court's intention. This order states in part:

"It is ordered that so much of the motion which is directed to the question that the Court modify its opinion or to take such other appropriate action as the Court may deem proper to conform its opinion to the fact that the Government did not concede" and so forth "is hereby denied."

"It is further ordered that in all other respects the said motion be and the same is hereby granted."

It is simply a formal motion to get the record into what I think the Court intended.

Justice Stephens: We have never been able to understand at all why all this proceeding with respect to that opinion was necessary. Of course if you want that opinion a part of the record it will be made a part of the record, and it is so ordered now. You don't need any signed order on it, but if you want one we will give it to you. But the necessity of attempting to convict the Court of a misstatement of your argument is utterly unnecessary, Mr. Knuff. Of course the Court didn't intentionally misstate anything. If the Court misunderstood, all you would
6601 have to do would be to show that to an appellate court on the appeal. You don't need any record to do that except the record of what the Court said in its opinion as compared with your brief. However, if you want this opinion made a part of the record, it is so ordered now.

6602 Justice Stephens: Now Mr. Knuff, this order that you have handed up here for signature doesn't seem to me, nor to Judges Jackson or Garrett, to be what you

claimed it was. I thought you wanted an order
6603 making the opinion on the motion to strike Paragraph 46 (a), a part of the record, and that that was all you wanted; but you have in here a previous paragraph and an order which has to do with the refusal of the Court to correct the opinion. You got up, as I understood you, and stated that the Court had made the order declining to correct the opinion or correct the record, but had not made it clear that its opinion was a part of the record.

Mr. Knuff: That is right.

Justice Stephens: But you are asking us here to reiterate our refusal to correct the opinion. You don't need any signed order in this anyway.

Mr. Knuff: I have followed rather closely the motion that was made—

Justice Jackson: (Interposing) Why do you want this signed if all you want is that opinion in the record?

Mr. Knuff: I felt that it was the better practice to have it. Since the motion was made in writing I felt it was the better practice to have the order likewise.

Justice Jackson: What difference does that make if it is made here in open court, and it has been made?

Mr. Knuff: Well, I just don't want to have it argued at an appellate court at any other time that our record isn't in the proper shape. Now if the Court doesn't care to sign this order, that is perfectly all right; my record is then protected.

Justice Stephens: Well, the Court—

6604 Mr. Bromley: (Interposing) May it please the Court—

Justice Stephens: Just a minute, Mr. Bromley, let me read this.

Mr. Bromley: Excuse me.

Justice Stephens: This order which you have asked us to sign not only asks us to direct that the opinion be made a part of the record, as I understand it, but also asks us to reiterate our declining to amend or correct the record or the opinion. It is not necessary to sign it. The record was made, Mr. Knuff, at the time; the record that we had on that subject was made then, and for what it is worth to you on appeal, or the defendants, it is in the record. The Court is anxious to preserve a correct record, anxious to give counsel who have not prevailed in the case the fullest opportunity to urge to the Supreme Court any error that you think we have committed, and to make everything clear,

but there is no need of reiterating our refusal, as you now describe it, to correct the record or correct the opinion. That is done. In so far as making this opinion a part of the record is concerned, the opinion on the motion to strike Paragraph 46 (a), that you are entitled to and it is so ordered now, and it is now a part of the record. We don't need to sign anything.

Mr. Bromley, did you have some statement to make?

Mr. Bromley: I merely wanted to call Your Honor's attention to something I assume you know, and that
6605 is that it is in the record now as a part of the record, having been copied into the record at that time.

Justice Stephens: That is true. The Court is mystified by this whole matter. It is difficult to construe it as this, and I don't construe it as this, because I can't believe that counsel for the Government would attempt to affront the Court, but it is difficult to put any other construction upon it because if the Court erred in its construction of your argument you can prove that to the Supreme Court by what the Court said, comparing it with your argument. There is no need of filing any affidavits and putting the Court in the position of having done something wrong.

Mr. Knuff: There was no effort made on our part at all to in any way entrap the Court. We simply felt that as representatives of the Government we had a right to determine for our own selves, either rightly or wrongly, what we conceive to be the correct procedure. If the Court doesn't agree with us, that is perfectly all right. We are not going to enter into any discussions with the Court.

Justice Stephens: You may announce an adjournment, Mr. Marshal.

6606 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Holding a Three Judge Court

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Court Room, U. S. Court of Appeals Building,
Washington, D. C., Friday, August 2, 1946.

The above-entitled cause came on for discussion of the Proposed Findings of Fact, Conclusions of Law, and Decree, at 10:00 o'clock a.m., pursuant to notice, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

6607 Appearances: On behalf of the Plaintiff: George B. Haddock, Esq., Special Assistant to the Attorney General of the United States, and Kenneth R. Lindsay, Special Attorney. On behalf of the Defendants: Bruce Bromley, Esq. and George S. Collins, Esq., New York, N. Y.; Cranston Spray, Esq., Chicago, Illinois; and Hugh Lynch, Jr., Esq., Washington, D. C., for defendants

United States Gypsum Company, Avery and Knode. Charlton Ogburn, Esq., Washington, D. C., for defendant Certain-teed Products Corporation. Ernest H. Oliver, Esq., and Ralph P. Wanlass, Esq., Washington, D. C., for defendants The Celotex Corporation and Dahlberg. Joseph P. Tumulty, Jr., Esq., Washington, D. C., for defendants Ebsary Gypsum Company, Inc., and Ebsary. Scott P. Crampton, Esq., Washington, D. C., for defendant Gloyd.

6608 Justice Stephens: That is true. I think that suggested change is not necessary.

Now we have one or two other matters which won't take very long. There are some erroneous statements at one or two places in the record which we want to make comment upon and correct. At tr. 7624, on June 15, 1946, Mr. Steffen said in respect of the time requested by the defendants' counsel in which to prepare proposed findings, conclusions and decree, "I think thirty days is quite a long time. We had only fifteen days in January to prepare an itemization * * *". This statement is in error. On January 17, 1945, at the conference in Judge Stephens' chambers the following occurred (tr. 7606):

"The Judges would like to have the Government, within fifteen days—or, if you wish more time you may ask for it—file a brief statement of the items of evidence which the Government contends establish, apart from the declarations, the existence of an illegal conspiracy, and serve this, in the usual course, upon the defendants. The defendants are allowed fifteen days—or such further time if they need it, upon application—in which to comment in answer upon such items, with the usual service, of course, upon the Government."

Actually the Government took from January 17 to March 12, 1945, to wit, 54 days, to prepare and present the
6609 requested itemization. The Government's first response to the request was presented on February 6, to wit, in 20 days, but did not contain the requested itemization.

At page 2, lines 6-9 of the Government's memorandum in opposition to the motion to strike paragraph 46 (a) of the complaint (see Tr. 1437, lines 15-19) it is said:

"On August 10, 1943, *at the suggestion of the Court,* counsel for the defendants undertook to file a motion to

strike paragraph 46 (a) of the complaint upon the ground that the Government is estopped to offer any evidence at the trial showing the invalidity of the defendants' patents." (Italics supplied)

This statement, apparently intended to indicate that the court invited an attack upon paragraph 46 (a), is not correct. The facts are that when the Government filed its motion to amend the complaint by adding paragraph 46 (a), on February 24, 1943, the motion was resisted by the defendants as untimely, and it was urged that if the amendment was to be permitted it should be allowed only on condition that full particulars of the amendment should be required, time should be granted the defendants to answer or otherwise plead following the filing of the particulars, and the commencement of trial should be postponed until the defendants had had adequate opportunity to prepare and defend the new allegations; and the defendants also reserved the right to deny that the Government might legally attack the validity of a patent in the manner
6610 proposed and to argue that point at an appropriate time. The order of the court allowing the amendment reserved a right to the defendants to attack the legal sufficiency of the amendment. Thereafter, on several occasions, counsel for both the Government and the defendants raised the point, and the court recognized, that it would be desirable to have a test of the legal sufficiency of paragraph 46 (a) at some time prior to the commencement of the actual trial of the case—this in order that counsel for both sides might be advised as to whether they would or would not need to make preparation, the Government to prove, and the defendants to defend against, the allegations of paragraph 46 (a). On August 10, 1943, informal colloquy between counsel and the court was held on this subject, and it was agreed that there should be an argument on October 12 under a motion to strike. This ultimately became, at the choice of defendants' counsel, a motion in the alternative, that is, to strike or for partial judgment. The court did not invite an attack on paragraph 46 (a).

The foregoing is confirmed by the transcript at pages 357-371, under the date of March 12, 1943; at page 453, beginning with line 15, through page 468, line 21, under date of August 10, 1943; page 471, lines 17-22, under date of August 10, 1943; and pages 748-9 of the transcript, under date of November 16, 1943.

On June 15, 1946, the Government request-
6611 ed the court to sign an order granting *nunc pro tunc* the Government's motion of November 23, 1943, to make the opinion of the court on the defendant's motion to strike paragraph 46 (a) of the complaint a part of the record, and denying *nunc pro tunc* the Government's motion of November 23, 1943, to correct the record by modifying the opinion referred to, in such manner as not to indicate that the Government had conceded in its argument in opposition to the defendants' motions to strike paragraph 46 (a) that under that paragraph it sought a judicial determination that the Patent Commissioner had erred in granting the patents mentioned in that paragraph, to wit, the Roos patents. The court declined to sign the order. Thereafter Government counsel requested the clerk to file the unsigned order. The somewhat extraordinary character of these requests by Government counsel has caused the court to give further consideration to the same and to review the oral argument and memorandum of the Government in opposition to the motions to strike paragraph 46 (a) and the court's opinion on the motions to strike, and the Government's request for modification of the same. Upon such further consideration the court again declines to sign the proposed order for the reason that that which it would acomplish if signed has already been done. The opinion was copied into the transcript of record at pages 685-724; the dissenting opinion by Judge Bland, at pages
725-731. On November 29, 1943 (tr. 1434) the
6612 court ordered the opinion made a part of the record.

The motion to correct the record by modifying the opinion was denied at tr. 1430 on November 23, 1943. There is no warrant for the court's duplicating these actions. If the Government desires to make the court's denial of the motion to correct the record by modifying the opinion, a part of the record on appeal, it can do so by means of a bill of exceptions. The proposed order which Government counsel requested the court to sign on June 15, 1946, may be copied into the transcript of record. Counsel for the Government may also offer it to the clerk for filing, and if it is the practice of the clerk in this jurisdiction to accept and file unsigned orders, that practice may be carried out—if not, the clerk need not file it.

(The proposed order is as follows:)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff

v.

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants.

ORDER DENYING MOTION FOR CORRECTION OF RECORD

On consideration of the motion of Roscoe T. Steffen, 6613 Special Assistant to the Attorney General, filed herein on November 23, 1943, to make its opinion upon the defendants' motion to strike, etc., paragraph 46a of the complaint, a part of the record in this proceeding, and, further, to modify its said opinion, or to take such other appropriate action as the Court may deem proper, to conform its opinion to the fact that the Government did not concede either in its brief or upon oral argument as recited in the opinion that the question before the Court was whether the Commissioner of Patents had erred in issuing the five Roos patents mentioned in paragraph 46a of the complaint, accompanied by the affidavit of the said Roscoe T. Steffen, it is by the Court this day of , 1946, nunc pro tunc as of November 23, 1943,

ORDERED that so much of the motion which is directed to the same question that the court modify its opinion, or to take such other appropriate action as the Court may deem proper, to conform its opinion to the fact that the Government did not concede either in its brief or oral argument that the Commissioner of Patents had erred in issuing the five Roos patents, be and the same is hereby denied; and it is

FURTHER ORDERED, that in all other respects the said motion be and the same is hereby granted.

By the Court

HAROLD M. STEPHENS
Justice Presiding

6614 It is appropriate, in view of the Government's renewed reference to this matter, to make the following comment:

What the Government conceded or asserted in its argument in opposition to the motions to strike paragraph 46a must be determined from the argument itself, as made orally and in the memorandum of the Government. The Government's and the defendants' oral argument, including the defendant's rebuttal argument, are in the transcript of the record at pages 541 to 648, of October 18, 1943, and the Government's memorandum in opposition to the motions to strike paragraph 46 (a) is in the transcript of record at pages 1436-1496. Whether the court, as contended by the Government, misstated the Government's position, must be determined by examination of the Government's oral argument and memorandum, and examination of the court's characterization of the same in its opinion. But upon a review of the matter the court thinks there was no misstatement in its opinion. Counsel for the Government stated in the course of his oral argument (tr. 607), in answer to questions by Judges Garrett and Stephens as to whether the Government under paragraph 46 (a) was not asking of the court a judicial determination that the patents are invalid:

"I would say that you are quite right, that you would have to make a judicial determination. The difference is one in remedy. We don't ask to have it cancelled. Our only authority, as I see it here, is to enforce the
6615 Sherman Act, and that is all that we ask, that such remedies be granted as are necessary to make sure that the central policy of the Sherman Act is fully carried out. And if, in the course of that, it is necessary to say that patent number so and so is invalid, and therefore their price-fixing scheme is invalid based on that, that would be a judicial determination, but we do not ask to have the patent cancelled."

This statement was more than a concession that the question under paragraph 46 (a) of the complaint was whether the Commissioner of Patents had erred in granting the patents. It was, in necessary legal meaning, an

assertion to that effect. Paragraph 46 (a) of the complaint charged no fraud in the obtaining of the patents, or arbitrary action in granting them, and no action beyond jurisdiction of the Patent Commissioner in granting the patents. It charged that there is no real invention or novelty in the claims of the patents, that the claims disclose no patentable invention in view of the prior art, that the alleged inventions were described in printed publications in the United States more than two years prior to filing of the applications, that the alleged inventions are inoperative, that they were abandoned by the inventor and that he was guilty of laches before the applications were filed, that the alleged inventions described in the claims were not reduced to practice until after other inventors had invented and reduced the same to prac-
6616 tice and applied for patents thereon, and that the alleged inventions are described in ambiguous terms. (It was also charged in paragraph 46 (a) that the defendants had been informed of the invalidity of the claims of the patents and had unreasonably failed to file with the Commissioner any disclaimer of the claims; but this was abandoned by the Government. (See Tr. 657).) The questions raised by such allegations are precisely the questions which are committed by the statutes to the quasi-judicial determination of the Commissioner as an expert official or tribunal. See Revised Statutes Sections 4886, 4888, 4893 (1875); 35 U.S.C., Sections 31, 33, 36 (1940). Attention is particularly called to the wording of Revised Statute Section 4893, reading:

"On the filing of any such application and the payment of the fees required by law, the Commissioner of Patents shall cause *an examination to be made of the alleged new invention or discovery; and, if on such examination it shall appear* that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the Commissioner shall issue a patent therefor." (Italics supplied). Rules of Practice in the United States Patent Office (1945), 37 Code Fed. Reg. §1.133 (1939); *Abbott* v. *Coe*, 71 App. D. C. 195, 109 F. (2d) 449 (1940); and *Sloane* v. *Coe*, 74 App. D. C. 200, 122 F. (2d) 37 (1941). Both cases recognize the expert quasi-judicial functions of the Commissioner.

Therefore if the court determined that the patents
6617 referred to in paragraph 46 (a) were invalid for the reasons charged in paragraph 46 (a), it would

of necessity have determined that the Commisioner erred in issuing them—that he issued them in violation of the conditions laid down in Rev. Stat. Sec. 4886 for the granting of patents. The court did not fail to note the contention of the Governemnt that the Commissioner is overburdened and not in a position to make a searching examination and final determination of all considerations bearing upon the right of an applicant to obtain a patent, *i.e.*, the considerations of invention, utility, commercial success, novelty, anticipation, and the like, and that the Commissioner accordingly relies heavily upon the oath and affidavits of the applicant in issuing a patent. The failure of the Patent Commissioner because of overburden of work or lack of facilities or opportunity to make a searching examination of such considerations might explain an error in the issuance of patents where the conditions laid down in Rev. Stat. Sec. 4886 were not fulfilled, but it would not free his action from error. The court did not fail to notice the contention of the Government that patents granted by the Commissioner are but prima facie valid, since they may be held invalid in infringement proceedings. But assuming this, it is of no moment in the present context. The Commissioner may err in a prima facie determination as well as in a final determination.

6618 The Government cannot by any contention or form of words or affidavit avoid the plain fact that in asking for a judicial determination of invalidity of the patents for the reasons charged in paragraph 46 (a), it was in legal effect asking for a determination that the Commissioner erred in issuing them, because if the court determined that they were invalid it would of necessity have determined that the Commisioner erred in issuing them.

8717 DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, *plaintiff*

v.

UNITED STATES GYPSUM COMPANY, *et al., defendants*

Opinion on motions to strike certain exhibits and testimony received subject to connection and to dismiss the Government's complaint with prejudice under Rule 41 (b) of the Federal Rules of Civil Procedure

Filed June 15, 1946

[File endorsement omitted.]

Messrs. *Wendell Berge,* Assistant Attorney General; *Roscoe T. Steffen* and *Edward Knuff,* Special Assistants to the Attorney General; and *Francis R. Shields* and *Kenneth R. Lindsay,* Special Attorneys, for plaintiff.

Messrs. *Bruce Bromley, Hugh Lynch, Jr.,* and *George S. Collins,* for the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode; Messrs. *Nicholas J. Chase, Elmer E. Finck* and *Paul W. Lapey,* for the defendant National Gypsum Company; Messrs. *Nicholas J. Chase* and *Elmer E. Finck,* for the defendant Melvin H. Baker; *Clausen, Hirsh and Miller* and Mr. *Charlton Ogburn,* for the defendant Certain-teed Products Corporation;* Messrs. *Harold F. McGuire, F. W. H. Adams, Leonard B. Ettelson, Stephen Allie* and *Peter Keber,* for the defendant Henry J. Hartley; Messrs. *Walter G. Moyle, Ernest H. Oliver, Andrew J. Dallstream* and *Norman Waite,* for the defendants The Celotex Corporation and Bror G. Dahlberg; Messrs. *Joseph P. Tumulty, Joseph P. Tumulty, Jr., Alfred W. Varian, Herbert M. Simon* and *Elmer E. Finck,* for the defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary; Messrs. *James O'Donnell, Jr.,* and *Benjamin P. DeWitt,* for the defendants Newark Plaster

* By *nunc pro tunc* order of the court dated April 21, 1945, effective March 17, 1945, Clausen, Hirsh and Miller and Mr. Charlton Ogburn were instituted in the place of Messrs. Harold F. McGuire, F. W. H. Adams, Leonard B. Ettelson, Stephen Allie and Peter Keber, as attorneys for the defendant Certain-teed Products Corporation.

Company and Frederick Tomkins; and Messrs. *George E. H. Goodner, Scott P. Crampton, David I. Johnston, Roy C. Lytle, James R. Keaton* and *Frank Wells*, for the defendant Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

Before STEPHENS, Associate Justice, United States Court of Appeals for the District of Columbia (Presiding), and GARRETT, Presiding Judge, JACKSON, Judge, United States Court of Customs and Patent Appeals, designated as Justices of the District Court of the United States for the District of Columbia.*

8718 STEPHENS, J.: This is an action in equity instituted by the United States, hereinafter referred to as the Government, to restrain the defendants from alleged violations of Sections 1, 2 and 3 of the Sherman Act. Injunctive relief is sought under Section 4.[1] The corporate defendants are: United States Gypsum Company (hereinafter referred to as USG), National Gypsum Company (National), Certain-teed Products Corporation (Certain-teed), The Celotex Corporation (Celotex), Ebsary Gypsum Company, Inc. (Ebsary), and Newark Plaster Company (Newark). The individual defendants are Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company (Texas), Sewell L. Avery, Oliver M. Knode, Melvin H. Baker, Bror G. Dahlberg, Henry J. Hartley, Frederick G. Ebsary, and Frederick Tomkins. Avery was president of USG from 1905 to 1936, and since then has been chairman of the Board of Directors. Knode is president of USG. Baker is president of National. Dahlberg is president of Celotex and chairman of the Board of Directors of Certain-teed. Hartley is president of Certain-teed. Ebsary is president of Ebsary. Tomkins is president of Newark.

The defendants are engaged in the mining of gypsum rock and in the manufacture and in the sale in interstate commerce, in the "Eastern area" of the United States, of gypsum board, gypsum plaster, and miscellaneous gypsum products defined in a bill of particulars as gypsum block, gypsum tile, and Keene's cement. The "Eastern area" in-

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* Holding a three-judge statutory court pursuant to the provisions of the Act of February 11, 1903, 32 Stat. 823, as amended by the Act of June 25, 1910, 36 Stat. 854, the Act of March 3, 1911, 36 Stat. 1167, and the Act of April 6, 1942, 56 Stat. 198; 15 U. S. C. §28 (1940).

1 Act of July 2, 1890, 26 Stat. 209, as amended by the Act of March 3, 1911, 36 Stat. 1167, and by the Act of August 17, 1937, 50 Stat. 693; 15 U. S. C. §§1, 2, 3 and 4 (1940).

cludes all of the states of the United States from the East Coast westward to and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.[2]

Gypsum board consists of two outer sheets of heavy tough paper, front and back, called "liners," between which there is a lightened gypsum core which is firmly bonded to the paper. Gypsum wallboard is a product used as a finished interior wall. Gypsum lath or plasterboard is a product used as a base to which a coat of plaster may be applied. In the manufacture of gypsum products the raw gypsum rock is first subjected to calcination—the process of driving off the water of crystallization by heating. Calcined gypsum, or stucco, when mixed with water, resumes the original content thereof so that the manufactured product is chemically substantially the same as the raw rock and has the same properties. In the reforming process the manufacture of the products above described is made possible. The products are extensively used in the building industry.

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In the early periods of its manufacture gypsum board was crudely made by pouring buckets of calcined gypsum mixed with water in thin layers between multiple pieces of rough felt paper, smoothing the product with rollers, hardening it on racks and trimming the pieces to size. This was a hand operation. In 1912 the defendant USG commenced the development of more efficient methods of manufacture of gypsum products. An important advance was in the making, by virtue of patent No. 1,034,746, issued in 1912 to USG on application of an inventor-employee named Clarence W. Utzman, of "closed-edge board."[3] Prior to 1912 gypsum board had been made with exposed edges. This required trimming, and there was also breakage in shipping and use,

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2 As more particularly described in the complaint, the "Eastern area" includes the District of Columbia and the States of Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, and that portion of the State of Montana east of the counties of Phillips, Petroleum, Musselshell, Yellowstone, and Carbon.

3 Claim 1 of the patent reads as follows: "A plasterboard comprising a body, a covering of fibrous material adhering to one face of the body folded to inclose an edge of the body and overlie a portion of the opposite face thereof, and a covering of fibrous material for said opposite face of the body overlying said folded-over portion of the first mentioned covering but having its edge spaced from the edge of the board."

with consequent wastage. The making of closed-edge board solved this problem. Various other improvements were developed, including a board making machine, the use of foam as a substitute for sawdust as an "aggregate" in the gypsum core to lighten the board, and the use of starch to improve the bond between paper and core. Metallized board, gypsum board covered with metallic foil, was devised for purposes of insulation; and a gypsum lath perforated in such manner as to increase the fire resisting qualities of wall structure was devised. These improvements were covered by patents—product, process, and machine—many of which were issued to USG; others were acquired by that company. A demand arose in the trade for these improved products, and companies other than USG commenced to copy them. There ensued many years of litigation in which USG strove to enforce, and eventually succeeded in enforcing, its patent rights.

Prior to 1917 the Bestwall Manufacturing Company (Bestwall) commenced the manufacture of closed-edge board. USG sued for infringement and won. *Bestwall Mfg. Co.* v. *United States Gypsum Co.*, 270 Fed. 542 (C. C. A. 7th, 1921). Bestwall had, however, in the course of the litigation, been acquired by The Beaver Products Company, Inc. (Beaver), and USG by a supplemental bill sued both of these companies for infringement and again prevailed. *United States Gypsum Co.* v. *Bestwall Mfg. Co.*, 15 F. (2d) 704 (N. D. Ill. 1925). These decisions made the manufacture of closed-edge board by a competitor of USG impossible without infringement of USG's patent rights.
8720 This is admitted by the Government. Prior to the last mentioned decision, Augustus S. Blagden, president of Beaver, made overtures of settlement to Sewell L. Avery, president of USG; he continued these efforts after the decree under the supplemental bill. Avery, at a meeting in December, 1925, specified as terms of settlement the payment of damages by Beaver for infringement of USG's patents, acknowledgment by Beaver of the validity of USG's patents, payment of royalties, and the right in USG to fix prices of gypsum board made and sold by Beaver under the Utzman closed-edge patent. A settlement agreement was executed on July 29, 1926, Beaver paying $250,000 cash damages and USG granting Beaver a license to make, use and sell the patented products, to use the patented processes and to make and use the patented machines. The terms of the license contract are stated in greater detail below.

In September, 1925, after the decision against Beaver, USG sued The American Gypsum Company (American) and the Universal Gypsum and Lime Company (Universal) for infringement, and served a notice of infringement upon the Niagara Gypsum Company (Niagara). On September 17, 1926, a settlement and license agreement was entered into with Universal similar to that with Beaver, except that the lump sum payment was approximately $35,000. A license agreement was entered into between USG and the Atlantic Gypsum Products Company (Atlantic) on March 5, 1927. In this instance no damages were paid. Texas signed a license agreement on April 11, 1927. This contract was not by way of settlement of an existing claim of infringement, although it recited that Texas had equipped its plant to make closed-edge board and that USG was threatening to sue if such board were produced.

These four license contracts are for convenience referred to in the record as the "1926-1927 contracts." The licenses granted were under two Utzman patents No. 1,034,746 (the product patent) and No. 1,029,328 (a process patent), and under a third Utzman patent No. 1,330,413 (a machine patent), expiring February 10, 1937, under a Birdsey patent No. 1,358,508 (a product patent for partially closed-edge board), and under some sixty or more other patents and applications for patents. The material provisions of the contracts were these: USG granted an indivisible and non-exclusive license until the expiration of the Utzman machine patent on February 10, 1937. It reserved the right to fix during the life of the Utzman product patent, expiring August 6, 1929, the minimum prices at which the licensees might sell board embodying the disclosure of that patent, but at not more than the prevailing market price. The licensees agreed to pay specified royalties on all gypsum board manufactured by them, whether patented or unpatented, until February 10, 1937, the date of the expira-
8721 tion of the machine patent; they acknowledged and agreed not to contest the validity of the patents under which the licenses were granted; they agreed that all of the patented products sold by them and known in the trade as "seconds" should be invoiced and marked as "seconds." USG agreed that the licensees might sell patented gypsum board to manufacturers of plaster and gypsum products who did not themselves make board (referred to in the record as "manufacturing distributors"), the royalties payable to remain based upon the regular selling price of the licensees to the regular dealer trade. The licensees

agreed to keep separate records showing the quantity of all board sold by them, and periodically to render reports to USG showing the quantities and prices of their sales. USG reserved the right to inspect and to make copies of the licensees' memoranda from such records.

In May, 1929, following further litigation, four more license contracts were entered into between USG on the one part and Certain-teed, National, Ebsary, and Niagara, on the other part. In 1923 Certain-teed, originally a manufacturer of roofing products, entered the gypsum industry with the acquisition of the Acme Cement Plaster Company (Acme). In 1926 it commenced the manufacture of open-edge gypsum board at the former Acme plant in Texas. On January 20, 1928, it purchased the assets of Beaver. Beaver was then making a closed-edge board. Certain-teed refused to assume the Beaver-USG settlement agreement and license. USG thereupon, on or about February 21, 1928, instituted suit in the District Court of the United States in Illinois against Certain-teed and Beaver, seeking an injunction against the distribution of the proceeds of sale to the Beaver stockholders and asserting that Certain-teed should be required to assume all liabilities of Beaver under its settlement agreement and license. Certain-teed was required to put up a million dollar bond, or otherwise to suffer a temporary injunction, as security for damages which might be found due to USG. On May 22, 1929, Certain-teed settled this suit with USG, agreeing to pay damages of approximately $64,000 and to fulfill the obligations of Beaver under its original settlement agreement and license; USG executed in Certain-teed's favor a patent license agreement and the suit was dismissed and the bond released. A supplemental license agreement between USG and Certain-teed covering a bundling process patent, more particularly referred to below, was executed on July 3, 1929. On May 16, 1929, National settled two patent infringement suits which USG had brought against it, one on November 5, 1926, the other on May 7, 1928, paying on account of damages approximately $178,000 and entering into a patent license agreement with USG. National had commenced the manufacture of a modified closed-edged gypsum board in 1926.

Ebsary, which had commenced making open-edge
8722 gypsum board in 1928, was granted a patent license by USG on May 22, 1929. This license was not a part of settlement of an infringement claim, since Ebsary had not manufactured closed-edge board and there was no infringement suit or basis therefor against it.

Niagara commenced making an open-edge gypsum board, but later made board with a semi-protected edge covered by a Clark application for a patent owned by American. This board had been developed by American in an attempt to compete with USG's closed-edge board. USG claimed that this board infringed its Birdsey patent No. 1,358,508 covering the manufacture of board with a partially closed edge. Priority over the Clark application had been awarded Birdsey by the Commissioner of Patents; this was affirmed by the Court of Appeals of the District of Columbia in 1926. *Clark* v. *Birdsey*, 56 App. D. C. 136, 10 F. (2d) 1001. A contract of settlement was entered into between Niagara and USG. This contract is not in evidence but is referred to in a later license agreement between Niagara and USG dated October 8, 1929, in which it appears that the earlier contract provided for money damages to USG in the sum of approximately $28,000 and a patent license to Niagara. These four license contracts between USG on the one part and Certain-teed, National, Ebsary and Niagara on the other part, are called the "May 1929 contracts" in the record. The provisions of these four contracts were in substance the same as those of the 1926-1927 license agreements except that in the May 1929 contracts USG's right to fix minimum prices was not limited as in the previous agreements, and sales to manufacturing distributors and jobbers were permitted only on USG's written consent. These contracts involved the same patents as the 1926-1927 agreements, with a Birdsey "bundle" patent No. 1,696,877 added covering a method of bundling gypsum board for shipment by binding several boards together into a stack through the application of a gummed tape lengthwise along the edges of the boards. Use of this bundling process was required by the contracts.

There remain to be described the litigation and negotiations leading up to the execution of certain "November 1929 contracts" and the terms thereof.[4] In 1929 USG owned three applications for patents of Carlisle K. Roos covering cellular core gypsum board produced by the employment of foam or a foaming agent in the core of the board to produce a multitude of cells or voids thereby lightening the board,

4 As will be noted, most of these license agreements were executed on various dates during October, 1929, but they became effective on November 5, 1929, and have been referred to throughout the record as the "November 1929 contracts."

eliminating the use of sawdust, which had been an
8723 unsatisfactory material, as an "aggregate," and resulting in quicker drying. These applications were in interference with an application for a patent by Erick Christian Bayer, a foreign patentee, the American rights to whose patent had been acquired by USG. The Roos applications prevailed in the interference proceeding and Roos patents Nos. 2,017,022,[5] 2,079,338, and 2,080,009[6] were ultimately issued to USG (October 8, 1935, May 4, 1937, and May 11, 1937, respectively). On May 23, 1929, after the last of the May 1929 license agreements had been executed, Avery of USG described the scope and nature of the Roos bubble board invention and outlined its advantages, including weight reduction, lower freight cost, elimination of the sawdust problem, easier handling and quicker drying, and offered the various licensees above referred to a license on this invention.

Shortly after this, Universal through its president and co-receiver, Eugene Holland, claimed that USG, by using starch in its board to obtain adhesion between the core and paper liners, was infringing two patents owned by Universal known as the Hite and Haggerty patents Nos. 1,230,297 and 1,500,452, respectively. The Hite patent covered a heat insulating material and method of making the same. The Haggerty patent covered a gypsum plaster wallboard employing starch or a cooked carbohydrate in the core of the board to insure a good bond between the core and the paper covering sheets.[7] This had solved the "peeler" trouble in the gypsum board industry and made possible modern high speed production of gypsum board. Without it, high temperatures used to expedite drying of the board would result in defective board in the form of "peelers." In 1927

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5 Claim 9 of the patent reads as follows: "A light weight building material composed of a hard mass of cellular structure which comprises set cementitious material having permanently fixed therein foam cells that possess their original form and which are arranged throughout the structure in foam-like formation."

6 Claim 17 of the patent reads as follows: "A wallboard comprising a porous body of hardened cellular cementitious material enclosing a plurality of voids encased in tough pliable films, and cover sheets therefor which are applied by means of pressure when said cementitious material is in a plastic state whereupon said cover sheets remain bonded to said cementitious material after the same has set and hardened."

7 Claim 2 of the patent reads as follows: "A wallboard consisting mainly of gypsum and having a paper liner, cooked starch being incorporated with the gypsum in about the proportion of 2 lbs. of starch to 40 lbs. of gypsum, to insure adhesion of said paper liner."

Universal had brought suit in the United States District Court in Buffalo, New York, against National for infringing of the Haggerty patent, demanding an injunction and an accounting, and the court had ruled that the Haggerty patent was valid and infringed (*Universal Gypsum & Lime Co.*, v. *Haggerty*, 21 F. (2d) 544 (W. D. N. Y. 1927)), and National had posted a substantial bond rather than suffer enforcement of a temporary injunction. Avery told Holland that it was not USG's policy to infringe patent rights
8724 and that he would investigate the claim. In June and July of 1929 negotiations were going on between USG and its various licensees in respect of a possible license covering the bubble board invention, and the various companies were investigating to ascertain whether the invention had merit. During this same period Holland continued to discuss with Avery separately the matter of the alleged infringement of the Haggerty and Hite starch patents. As a result of these discussions USG agreed to purchase and did purchase these patents. Universal was in receivership and the sale was a favorable one from its standpoint because it provided Universal with substantial funds permitting it to reorganize and emerge from receivership with its accounts paid. The original and ancillary proceedings were in seven different Federal district courts and the sale was approved by all of these courts on or about November 5, 1929. The sale was consummated in a license contract of November 5, 1929, which settled a claim of USG against Universal for infringement of USG's partially closed-edge patent and the claim of Universal against USG for infringement of the Hite and Haggerty patents.[8] The Hite and Haggerty patents were assigned to USG with reservation of royalty to Universal. Universal was itself granted a license under these patents and under the Birdsey patent No. 1,358,508 and under patents which might be issued under the Roos and Bayer applications and under numerous other patents. This license contract superseded the 1926 license agreement between USG and Universal. In August, 1929, USG had announced its arrangement to purchase the Haggerty and Hite patents and offered its licensees new licenses which would replace the prior license contracts and

8 Although Birdsey patent No. 1,358,508 for partially closed edge gypsum board was included within the patents which were the basis of the USG Universal license contract of September 17, 1926, there was apparently still outstanding at the time of the execution of the license contract of November 5, 1929, an infringement claim by USG against Universal under this Birdsey patent. See page 2 of the license contract of November 5, 1929, Government Exhibit 6.

include in one document the outstanding patents of the earlier licenses, the Haggerty and Hite patents, and the applications for patents on the Roos bubble board invention. This offer was made subject to the approval of the district courts above referred to.

Niagara on October 8, 1929, Certain-teed on the 15th, National on the 17th, Ebsary on the 18th, and Atlantic on the 21st, entered into new patent license contracts with USG which superseded the previous agreements between these companies and USG, and these new contracts covered the Hite and Haggerty patents and also the anticipated patents under the Roos and Bayer applications.

As stated above, USG had in September, 1925, instituted a suit against American for infringement of USG's closed-edge patent. It had also in the same month commenced a suit against American for infringement of the Birdsey patent on partially closed-edge board. American attempted to obtain a more favorable settlement than had been granted to other infringers. USG's infringement suit with respect to the Birdsey patent had been postponed pending settlement negotiations, reinstated, and ultimately tried and decided in favor of USG. Settlement discussions by
8725 American were resumed, with renewed efforts to obtain concessions, with USG. On November 25, 1929, American finally settled its outstanding litigation with USG on the terms originally offered, *i.e.*, on terms similar to those of the earlier settlements with other companies, and accepted a license from USG similar to the license contracts of the other licensees. American paid in settlement of past infringement approximately $152,000. On April 23, 1930, Kelley Plasterboard Company, Inc. (Kelley) took a similar license.[9] Texas did not enter into a license contract in 1929, but continued as a licensee under its license of April 11, 1927, although it was not subject to price control after August 6, 1929, the date of the expiration of the Utzman closed-edge patent. Upon the expiration on February 10, 1937, of its license of April 11, 1927, Texas accepted a further license contract similar in form to the November 1929 contract with the other licensees. This completed the execution of the nine contracts generally referred to in the record as the "November 1929 contracts" (although the Texas contract was not executed until 1937 and the Kelley contract

9 On January 3, 1939, USG consented to the assignment of this license to Newark.

not until April 23, 1930) with Niagara, Certain-teed, National, Ebsary, Atlantic, Universal, American, Kelley, and Texas. Each of these contracts extended licenses under the Haggerty and Hite patents, under patents which might be issued under the Roos and Bayer applications, and under a large number of patents still vital which had been the subject of the previous contracts, including the Utzman machine patent No. 1,330,413, Birdsey patent No. 1,358,508 on the partially closed-edge board, the bundle patent No. 1,696,877, and under patents which might be issued under several additional applications for patents. These November 1929 contracts were in general in the same terms as the earlier contracts. Each contained a "most favored nation" clause providing that if subsequent to the effective date of a particular agreement USG should grant to any other person, except to Universal, a license more favorable in terms, then USG would grant to the particular licensee a license on the same terms. The Texas contract alone in its "most favored nation" clause did not contain the exception to Universal. The price fixing clause contained a provision that the minimum prices fixed by USG should not be more than those at which USG determined to sell gypsum board or other products embodying the inventions claimed in the patents to its own like trade in the same market. Use of the Birdsey bundling process by the licensees was made optional.

It will be noted that the nine license contracts last above described involve only five of the named defendants—USG, Certain-teed, National, Ebsary, and Texas, leaving Celotex and Newark unmentioned. It will be noted also that the five companies—Niagara, Atlantic, Universal, American, and Kelley—parties to the November 1929 license contracts are not defendants. This is to be explained as fol-
8726 lows: Niagara was acquired by USG in 1929. National acquired Universal in 1935 and Atlantic in 1936. Newark acquired the stock of Kelley in 1937 and merged with Kelley in 1939. Celotex acquired American in 1939. Upon acquiring these companies respectively National, Newark and Celotex took over the licenses which had been entered into by Universal, Atlantic, Kelley and American with USG.

In addition to the 1926-1927, May 1929, and November 1929, contracts which related to gypsum board as such, certain additional contracts, sometimes referred to in the record as "subordinate contracts," relating to metallized board

and perforated lath, were executed as follows: At various times in 1934-1935 USG as owner of Roos patent No. 1,914,345 covering the use of metallic foil as a thermal insulating element in wallboard granted licenses to various other companies. The license contracts in evidence are those of National of October 5, 1934, Kelley of October 12, 1934,[10] Certain-teed of November 2, 1934, Atlantic of November 30, 1934, American of December 4, 1934,[11] Universal of April 4, 1935, and Ebsary of August 14, 1935. In these contracts USG granted licenses to make, use and sell plasterboard having a metallized surface embodying the inventions disclosed and claimed in the patents or patent applications covered by the contracts, and reserved the right to fix the minimum prices on board embodying the inventions in question, but at not more than USG's own price in the same market. The licensees agreed to pay a royalty for all plasterboard having a metallized surface manufactured and sold by them and covered by the claims of the patents issued or to be issued under applications for patents. The licensees agreed not to sell metallized board to other board manufacturers except upon USG's written consent, and not to sell to anyone on consignment. They agreed to acknowledge and not to contest the vadidity of the patents issued or to be issued and to record the quantities of metallized board manufactured "and/or sold," USG reserving the right to inspect and copy such records. Each licensee was accorded the position of a "most favored nation" with respect to licenses under these patents.

Similarly USG was the owner of Roos patent No. 1,938,354 covering a fire resistant plasterboard. This board had holes of given size punched through it at designated intervals. Upon application of a coat of plaster the same pushed its way through the holes and hardened into a mechanical key with consequent improvement of the fire resistant qualities of the wall in which such plasterboard was used. USG granted patent licenses to Certain-teed on June 8, 1936, American on July 10, 1936, Ebsary on February 2, 1937, and Kelley on June 23, 1937, for the manufacture, use and sale of this board. In substance the terms of these
8727 licenses were the same as those of the metallized board license contracts. Later USG offered a re-

10 On January 3, 1939, USG consented to the assignment of this contract to Newark.

11 This contract was assigned to Celotex on April 12, 1939.

vised perforated lath license to its licensees royalty free, *i.e.*, extended an offer to include the perforated board patent in the basic board license agreement at no additional royalty. Such revised licenses were accepted by Certain-teed, Ebsary and Kelly.[12]

Minimum price bulletins were sent out by USG to its licensees under the various license contracts, except during the period from August 6, 1929 (the date of expiration of the Utzman product patent No. 1,034,746), until the date of the execution of the November 1929 contracts. The price bulletins are limited in their application to patented board manufactured and sold by the licensees under their respective licenses. The price on board was calculated on the basis of a mill price plus freight from the nearest mill (freight-wise) to the point of destination. The bulletins provided for prices on various quantities of board such as carloads, less-than-carloads, and truckloads. In particular markets, such as metropolitan areas, where it was economic to deliver gypsum board in truckload quantities, prices were established for such quantities and the areas in which such prices were to apply were defined. Outside of such areas a higher price was fixed. Provision was made in various instances for a variation in price to cover pool car shipments, railroad switching charges, and "pick-ups" at a mill. The bulletins contained provisions purposed to prevent the violation of the minimum price requirements through such devices, in connection with a sale of board, as the giving away of board as "dunnage," making advertising allowances to the customer, granting of fictitious damage claims, splitting of commissions with the customer by commission salesmen, paying of unearned warehousing charges, fictitious hiring of customers' trucks, giving away of plaster or other products, or the sale of such products at a price unusually below the licensee's prevailing market price. There is set out in the margin a more detailed description of the price bulletins.[13]

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12 On January 3, 1939, USG granted Newark, which had merged with Kelley, a royalty free perforated lath license, at the same time canceling the Kelley revised license.

13 There were two general classes of provisions. The first related to prices as such and the second related to protecting the prices set. The first class of provisions made an affirmative statement of the minimum price which might be charged by a licensee for board embodying the licensed inventions. For this purpose the overall market was variously divided. The basic list of prices was for carload shipment to dealers so set up as to divide the market territorially

(*Continued*)

8728 During the periods when price bulletins were sent out by USG to its licensees each licensee, in the main, sold gypsum board manufactured by it at the prices and upon the terms and conditions stipulated in the bulletins. No bulletins have been sent out since July 8, 1941.

8729 In 1932 USG set up as a department a wholly owned corporation called the Board Survey Company. Its function was to receive complaints of license violations, to investigate the facts, call them to the attention of the licensee involved, and upon occasion to the attention of the licensor USG. Board Survey Company was organized by USG for the purpose of bringing about compliance with the licenses. The licensees had no part in its formation, management or operation. From time to time a representative of USG, as licensor, met

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by the use of mill basing points, the delivered price to dealers being determined by taking the lowest combination of mill base price plus freight from that point to destination. A standard billing weight was given per thousand square feet of different thicknesses of board. These were for standard dimensions, a differential being added to the base price for odd sized products. Special prices were stated for cut stock of stated thicknesses f.o.b. certain mills in named markets. Superimposed on this basic price system were variations stating flat delivered prices for delimited areas, defining as single delivery points described metropolitan areas, stating special base prices for some thicknesses of board shipped from named base points for delivery in limited territories, providing for variations in price and/or allocation of charges (*i.e.*, to dealer or shipper) for special shipments such as mixed cars, pool cars, and stopover cars, with territorial variations; and there were provisions for special prices for particular jobs, types of jobs, or types of purchasers other than dealers, *e.g.*, contractors, prefabricated house makers, Century of Progress, and the like. Special discounts were provided for sales "to other manufacturers" where permitted. In fine, prices were varied according to the following factors in various combinations: style of product, amount of product, territory, form of shipment, nature of use, and type of purchaser.

The bulletins covering perforated lath were less detailed and less numerous (apparently because of the subsequent inclusion of the perforated board patent in the basic board license agreement), but they involved the same factors as above named.

The provisions described above were substantially duplicated with respect to a separate set of prices applicable to delivery f. o. b. dealers' trucks at given mills or warehouses. This type of transaction was called a "pick-up," and it appears that the bulletins did not contemplate such deliveries at any other places than at those listed or delivery of less than a stated minimum number of square feet. There was no provision in the bulletins for sales to purchasers other than dealers, except for the provisions above referred to in respect of contractors and prefabricated house manufacturers and the like, and "other manufacturers."

The second class of provisions, referred to above as related to price protection, were first in the following form:

"Allowances, Etc.: The minimum price fixed by licensor for patented board and/or lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding, for switching performed after car has been originally set for un-

(*Continued*)

with representatives of the licensee companies for the purpose of explaining to them the provisions of the minimum price bulletins and for the purpose of securing adherence to such minimum prices by the licensees.

The defendants and their predecessors in interest were, at the time the license agreements were entered into, competitors in the manufacture and sale of substantially all of the gypsum board and a substantial part of the gypsum plaster made and sold in the "Eastern area," and the defendants now make and sell substantially all of the gypsum board and a substantial portion of the plaster in the "Eastern area." Sales of gypsum products are largely to retail dealers in building materials and mason supplies, rather than to building contractors and ultimate consumers.

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loading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented board and/or lath. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers; or through allowance or adjustment on board which customer claims is of poor grade and not up to standard, except when such an allowance or adjustment on substandard board is first authorized by the licensor; or by allowance for any other reason whatsoever by a license direct or by a salesman of patented board out of his own compensatio ; or through the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regulation minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

"Also, where a salesman selling patented board to a customer is authorized by licensee or its agent to sell the same wholly or partly on a commission basis, or where a salesman not employed by licensee makes a sale of patented board to a customer on a commission basis and licensee or his agent accepts such sale, in either of such events the commission paid by the licensee is a deduction from the price at which the board is sold by licensee, and where, after deducting such commission, the amount is less than the minimum price, licensor shall regard the sale as made at a price less than the minimum price fixed by licensor and a violation of the terms of the license agreement. Licensor also regards sales of patented board by commission salesmen, without the written consent of licensor, as a violation of the terms of the license agreement." See pages 3-4 of Government Exhibit 37, a bulletin of February 24, 1937.

Later another form was used, to wit:

"*Rebates, Allowances, Etc.*

"Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price by granting the customer rebates, unearned or unwarranted refunds, credits or discounts, by reducing the price of other products, by hiring customers' trucks, by granting allowances for advertising or other purposes, by splitting of salesmen's compensation or commissions with customers, by overshipment of patented products, by including board under the guise of dunnage, or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by licensee below such minimum price." See page 2 of Government Exhibit 37, a bulletin of February 6, 1939.

The Government's complaint covers 33 closely printed pages, including 123 numbered paragraphs, and there is an appendix of an additional 94 pages. The charges are generalized in paragraphs 44 to 46 (a), inclusive, of the complaint as follows:

44. Defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in gypsum board, plaster, and miscellaneous gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act. Defendants are, and have been for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act. Defendants are monopolizing, and have monopolized for many years last past, trade and commerce in said gypsum products among the several States, in violation of Section 2 of the Sherman Antitrust Act. Defendants are, and have been for many years last past, attempting to monopolize trade and commerce in said gypsum products among the several States and are, and have been for many years last past, actively engaged in a continuing combination and conspiracy to monopolize trade and commerce in said gypsum products among the several States, in violation of Section 2 of the Sherman Antitrust Act. Defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act. Defendants are, and have been for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act. Said unlawful contracts, combination, conspiracy, monopoly, and attempt to monopolize will be referred to hereinafter as the combination.[14]

45. Said combination has been formed, has been carried out, and is being carried out by each of the defendant companies (acting, in part, through those of their officers

14 For convenience the term "combination" will sometimes be used in this opinion, as it is in the complaint, to refer to the alleged unlawful contracts, combination, conspiracy, monopoly and attempt to monopolize.

and directors made defendants herein) and by other companies hereinafter referred to engaged in the manu-
8730 facture of said gypsum products. Said companies have entered into, have carried out, and are carrying out said combination for the purpose, and with the effect, of restraining, dominating, and controlling the manufacture and distribution of said gypsum products in the Eastern area by:

(a) Concertedly raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by said companies in the Eastern area;

(b) concertedly standardizing gypsum board and its method of production by limiting the manufacture of board to uniform methods, and by producing only uniform kinds of board, for the purpose, and with the effect, of eliminating competition arising from variations in methods of production and in kinds of board manufactured and distributed in the Eastern area;

(c) concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern area;

(d) concertedly refraining from distributing gypsum board, plaster, and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern area, and concertedly refusing to sell said products to jobbers at prices below said companies' prices to dealers, for the purpose, and with the effect, of eliminating substantially all jobbers from the distribution of said gypsum products in the Eastern area;

(e) concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies.

46. Said combination was entered into and has been, and is being, carried out by the defendant companies in part under the guise of numerous license agreements purporting to relate to the use of certain patents owned by the defendant U.S.G. in the manufacture of gypsum board. To give color of legality to said combination, the defendant companies, and other companies hereinafter named, concertedly agreed among themselves to enter into, and did enter into, said license agreements. Said license agree-

ments are not bona fide patent license agreements reasonably designed to secure to U.S.G. the pecuniary reward for valid patent monopolies, but were entered into and executed for the illegal purposes described in paragraphs 44 and 45 hereof. The formation and operation of said combination is more fully set forth in paragraphs 47 to 120 hereof.

(a) Many of the patents mentioned and described in said license agreements by which the said combination has been, and is being carried out in part, are process or machine patents. The said patents mentioned and described in the said license agreements, even assuming they are valid, are not basic article or product patents and do not singly or all together cover completely the business of mining and selling gypsum, or cover completely gypsum board, which is one of the forms in which unpatented gypsum is sold by the defendants, but at most constitute minor additions to the established and unpatented art of making gypsum board and afford no legal justification for the said combination.

Paragraphs 47 to 120 of the complaint detail the generalized charges above set forth. It is not possible to state this detail within a reasonably limited space, but it will be of some aid to an understanding of the questions presented by the motions now before the court if these paragraphs are summarized. They allege that:

The combination was formed during the period between September, 1925, and early in the year 1930. The plan for stabilization of prices grew out of the efforts of the parties to the early patent infringement disputes to settle their differences. Avery as president of USG, Blagden as president of Beaver, and Griswold as vice-president of American decided to induce the industry to enter into license agreements containing price fixing provisions under USG's dominant Utzman closed-edge board patents, Blagden and Griswold agreeing to act as contact men with the industry. In negotiations in 1926 the industry responded favorably, but there was disagreement over the terms of the proposed licenses and only Beaver and Universal signed agreements in that year; but further efforts of the proponents of the plan resulted in the signing of the contracts in 1927 by Atlantic and Texas. Increasing competition in the industry, and declining prices for all gypsum products during 1927 and 1928, revived interest in price

stabilization, and Holland as president of Universal agreed with Avery to promote the stabilization plan. From time to time in the latter part of 1928 and the early part of 1929 conferences and meetings were held by companies not yet licensed. The Utzman patent on closed-edge board was to expire, however, in August, 1929, and in view of that fact Avery for USG assured prospective licensees that, if the agreements proposed were signed, USG would look for an additional patent under the color of
8731 which prices could be controlled. In reliance upon this assurance Certain-teed, National, Ebsary, and Niagara signed the May 1929 contracts. But not all of the agreement between USG and these companies was put into formal writing. On the contrary, in addition to the signed license agreements, informal side agreements were made between USG and its licensees that they would discontinue making unpatented open-edge board and second-class closed-edge board; that they would dispose of inventories of such board at prices fixed by USG; that thereafter they would manufacture and sell a closed-edge board manufactured and bundled by the processes and methods used by USG; that USG would advance and stabilize the prices for board; that all companies would increase their prices for other gypsum products; and that USG would continue to control prices through the use of other patents after expiration of the Utzman product patent in August, 1929.

Immediately after the May 1929 license contracts were executed USG, pursuant to its argreement to find a patent under which to continue price control, offered additional licenses under the foam process. Universal then sought to induce USG to purchase the Hite and Haggerty starch patents by a claim that the use of farinaceous paste in the foam process infringed them. USG knew that this claim had no basis in fact, and knew also that there were other and non-infringing methods of reinforcing the bubbles in the foam, and had advised its licensees to that effect. Nevertheless, the sale by Universal to USG was agreed to and consummated and the November 1929 contracts were signed—all for the purpose of giving color of legality to price control by USG pending issuance of patents under the foam process. Again, in addition to the formal writings, there were side agreements to the effect that the use of adhesives in the manufacture of board to increase the bond between core and liners—there had been such use

for many years prior to 1929 by the licensees other than Ebsary and Kelley—would be considered to fall within the scope of the Hite and Haggerty patents for the purpose of permitting price control by USG during the life of these patents; that Ebsary and Kelley would commence to use adhesives for the same purpose; and that the licensees, as soon as they could equip their plants, would manufacture and bundle by substantially the same processes as those employed by USG.

USG and certain of its licensees entered into separate patent license agreements relating to metallized board and perforated lath, for the purpose of extending and strengthening the operation of the basic license agreements.[15] At the time of the execution of the metallized board agreements, during 1934-1935, none of the licensees, except National, intended to manufacture such board, but, as USG well knew, to purchase it from USG or National for resale to dealers and consumer; USG, notwithstanding this, required the licensees to execute these agreements in order to be enabled to purchase metallized board for resale; USG fixed the minimum prices and terms and conditions of sale of metallized board with the knowledge and notwithstanding the fact that a substantial part thereof sold by the licensees, except National, was purchased from National and USG. USG, as an inducement to the licensees to sign the perforated lath contracts in 1936-1937, agreed to fix prices on such lath at a differential above plain lath; the agreements were signed in reliance upon this inducement and USG fixed the prices at a differential above the price of plain lath, and the licensees sold perforated lath at such prices. At the time of the execution and throughout the period of operation under the perforated lath contracts, USG, Certain-teed, and American were informed, sometimes by patent counsel, and believed, that the perforated lath patent was void; and the companies entered into these license agreements principally for the purpose of enabling USG to fix the prices of perforated lath sold by it and its licensees. These agreements were not bona fide license agreements, and the exercise of price control by USG under them was not reasonably adapted to protect the pecuniary rewards of a patentee under a lawful patent monopoly.

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15 The licensees who executed contracts relating to metallized board and perforated lath have been named in the statement of facts above.

In paragraphs 121 to 123 of the complaint the alleged effect of the combination is stated. It is, in substance, charged that:

By means of the combination the defendants have controlled and dominated for more than ten years the manufacture and distribution of 100 percent of the gypsum board and 80 percent of the plaster and miscellaneous gypsum products manufactured and sold in the "Eastern area," and they will continue to do so, unless restrained, until 1954 when the last of the USG patents on the foam process expires. Since 1929 all gypsum board sold by all manufacturers and manufacturing distributors in the "Eastern area" has been sold at uniform and non-competitive prices dictated by USG, with resultant elimination of price competition in the distribution of gypsum board from manufacturers to dealers. For the purpose of maintaining these uniform and non-competitive prices, the defendants have standardized the manufacture of board, have limited its distribution to themselves and certain manufacturing distributors, and have eliminated wholesale dis-
8732 tributors who might fail to maintain such prices.

The uniform and non-competitive prices have been, throughout the period of the operation of the combination, substantially higher than those prevailing at the time of its formation in 1929, and have failed to reflect substantial reductions in manufacturing costs. Each of the defendants has thereby realized substantial profits. The uniformity among the defendants in the distribution of gypsum board has reflected itself in uniformity in the distribution of plaster and miscellaneous gypsum products by the defendants. They now distribute certain products on the basis of many of the terms and conditions of sale prescribed by USG for gypsum board.

It will be seen that the charges above summarized reduce themselves in essence to the following: (1) That the license contracts entered into between the defendant USG, as licensor, and the other defendants, as licensees, are themselves illegal as in restraint of trade in view of the nature of the patents upon which the contracts are based, in view of the fact that USG and the plurality of defendant licensees manufacture all of the gypsum board in the "Eastern area," and in view of the terms and conditions of the contracts, including those providing for the establishment of minimum prices on patented gypsum board to be made and sold by the defendants. (2) That the

license contracts, even if valid on their face, were not entered into as bona fide license agreements, reasonably designed to secure to USG the pecuniary reward for valid patent monopolies, but were executed by the defendants merely to give color of legality to a combination to restrain trade, by control of the prices and terms and conditions of the sale of gypsum board, plaster, and miscellaneous gypsum products throughout the gypsum industry. (3) That the defendants' operations were carried beyond the proper limits of a patent monopoly and licensing thereunder by raising and fixing at arbitrary and non-competitive levels the price of gypsum board made and sold by the defendants, by improper standardization of gypsum board and its method of production, by raising, maintaining and stabilizing the level of prices of unpatented materials—plaster and miscellaneous gypsum products—by effectuating improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products, and by fixing the prices at which manufacturing distributors resold gypsum board.

The theory of the Government's charge, with respect to connecting the various defendants with the violations of law alleged, is that as each defendant became a party to a license agreement, either immediately or through acquisition of a company already licensed, it did so with knowledge of the existence and operation of the combination and thereby became a party thereto.

The defendants' answers to the charges made in the complaint cover 165 pages including 638 paragraphs. It is not possible in reasonable space to state the answers in detail. They may be generalized as follows:

The defendants admit the execution of the 1926-1927, May 1929, and November 1929, patent license agreements, and admit the fixing of prices thereunder by USG upon gypsum board and lath manufactured and sold under such contracts, by virtue of price bulletins sent out by
8733 USG from the date of execution of the several license agreements until July 8, 1941, except for the period from August 6, 1929, the date of expiration of the Utzman closed-edge board patent, No. 1,034,746, to the date of the execution of the November 1929 contracts, and except that Texas was sent no bulletins from August 6, 1929, to February 10, 1937, the date of execution of its second license contract. The defendants admit that they sold such gypsum board at the prices stated in the bulletins.

The defendants USG, National, Certain-teed, Ebsary, and Newark admit the execution of the metallized board contracts and admit that USG determined minimum prices for board manufactured and sold under such contracts from the date of their execution until the date of the filing of the complaint. The defendants USG, Certain-teed, Ebsary, and Newark admit the execution of the perforated lath contracts and admit that USG determined minimum prices for board manufactured and sold under those contracts from the date of their execution until May, 1938. But the defendants deny that they have violated Sections 1, 2, and 3 of the Sherman Act, or any of such sections, by being parties to contracts in restraint of trade and commerce, or by combining and conspiring to restrain trade and commerce, or by attempting to monopolize and monopolizing trade and commerce in gypsum board, plaster, and miscellaneous gypsum products, or in any manner charged in the complaint, or at all. They deny the allegations of paragraph 46 of the complaint to the effect that the license agreements were entered into by concerted action to give color of legality to the combination and that they were not bona fide license agreements, reasonably designed to give to USG the pecuniary reward for valid patent monopolies; they assert that on the contrary the license agreements were bona fide in both law and fact and were reasonably designed to secure to USG the pecuniary reward to which it was entitled for its valid patent monopolies. The defendants admit the setting up by USG in 1932 of the Board Survey Company as a wholly owned corporation whose function was to bring about compliance with the licenses, but they assert that the licensees had no part in the formation, management, or operation of this company. The defendants admit that from time to time the licensor met with the licensees for the purpose of explaining the provisions of the minimum price bulletins with respect to patented gypsum board and securing adherence to the minimum prices by the licensees; but they assert that all discussion at these meetings was limited to patented gypsum board, that the prices of plaster or unpatented products were never discussed, and that there was never any agreement reached among those in attendance as to what should or should not be done as to a particular matter. The defendants deny that any side agreements were entered into. The denials of the defendants with respect to monopoly do not include a denial that within the group of defendants there

is manufactured and sold substantially all of the gypsum board produced and sold in the "Eastern area." The contention of the defendants in this respect is that to the extent that they have a "monopoly" upon the production and sale of gypsum board, the same is legitimatized by the patent license agreements. The defendants deny that the license agreements and the operations thereunder were applied to unpatented plaster and miscellaneous gypsum products, to purchased board, to standardization of products to the elimination of jobbers and non-conforming wholesalers, or to the fixing of resale prices of manufacturing distributors.

The answers will be further detailed as is necessary in the discussion to follow.

The instant proceeding was filed on August 15, 1940.[16] A three-judge court was constituted on September 15, 1942. Preliminary to trial the Government propounded to the defendants 361 interrogatories,[17] to many of which 8734 objections were filed. Hearings were had and rulings made on these objections. Thereafter the defendants, by virtue of amended answers containing pleas of *res judicata* based upon a disposition favorable to the defendants therein of the criminal case first described in the margin, filed motions for summary judgment. These motions were argued orally and briefs were submitted, and the motions were denied on August 10, 1943 (51 F. Supp. 613). Thereafter, the defendants moved to strike, or alternatively for partial judgment dismissing, paragraph 46 (*a*) of the Government's complaint as amended, which paragraph presented an issue as to the validity of certain

16 There have been two previous related proceedings. These were criminal indictments, both returned on June 28, 1940. One, *United States* v. *United States Gypsum Co., et al.*, No. 66008, in the District Court of the United States for the District of Columbia, charged USG, National, Certain-teed, Ebsary, Newark, and numerous officers and employees of these companies and of The American Gypsum Company (acquired by Celotex), with conspiring illegally to fix prices on gypsum board and to eliminate jobbers from the gypsum board industry; the other indictment, *United States* v. *Certain-teed Products Corp., et al.*, No. 66007, in the District Court of the United States for the District of Columbia, charged USG and Certain-teed with a conspiracy illegally to fix prices on perforated gypsum lath. The criminal case first described came on for trial in the fall of 1941, and on November 19, 1941, at the conclusion of the Government's case, a verdict was directed in favor of the defendants. A nolle prosequi was filed in the second case on September 17, 1942.

17 Fifty-one interrogatories were served upon USG, Avery, and Knode; 53 upon National and Baker; 56 upon Certain-teed and Hartley; 42 upon Celotex and Dahlberg; 53 upon Ebsary and Frederick G. Ebsary; 59 upon Newark and Tomkins; 47 upon Texas.

of the patents upon which the November 1929 license agreements were based. These motions were orally argued and briefs were submitted upon them, and an order was entered on November 15, 1943 (53 F. Supp. 889), dismissing all of the Government's claim contained in paragraph 46 (a) except the first and last sentences thereof.

The instant case came on for trial on November 15, 1943, and continued, with some intermissions, until the close of presentation of evidence by the Government on April 20, 1944. The testimony of 28 witnesses was heard and 641 exhibits, mostly of a documentary character, were received in evidence. Much of the testimony and most of the exhibits (448) were received in evidence subject to connection; 86 exhibits were offered but rejected. The record comprises since the commencement of the actual trial 7585 pages, exclusive of the exhibits. The latter comprise several thousand additional pages. At the close of the Government's case the defendants moved to strike from the record all of the exhibits and testimony received subject to connection, on the ground that no *prima facie* showing of any conspiracy had been made, that such exhibits and testimony had not been shown to be in furtherance or in execution of any conspiracy, and that such exhibits had not otherwise been connected. The defendants moved also to dismiss the complaint with prejudice under Rule 41 (b) of the Federal Rules of Civil Procedure on the ground that upon the facts and the law the plaintiff had shown no right to relief. Briefs were submitted in advance of oral argument in support of and in opposition to the motions. After oral argument the motions were submitted and taken under advisement on May 29, 1944. On June 6, 1944, additional briefs were filed, and on January 17, 1945, the court requested further briefs. The last of these was filed on March 14, 1945.

We proceed to discussion of the several questions of law and fact raised by the motions.

I

The Duty of the Court on Motions to Dismiss Under Rule 41 (b) of the Federal Rules of Civil Procedure

At the threshold there must be discussed the question of the duty of the court on motions to dismiss under Rule 41 (b). The rule provides, so far as here pertinent:

> * * * After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that *upon the facts and the law* the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits. [Italics supplied]

The defendants assert that under this rule it is the duty of the court to weigh the evidence, to draw inferences therefrom, and, if it finds the evidence insufficient to make out a case for the plaintiff, to render a decision for the defendant on the merits and make findings of fact and conclusions of law. To the contrary, the Government contends that "The sole question presented to the trial judge by such a motion is one of law, namely, whether the plaintiff's evidence and all the inferences fairly to be drawn from it, considered in the most favorable light, make out a prima facie case for relief. * * *"[18] This contention is, in effect, that the court should conduct itself under a motion to dismiss under Rule 41 (b) as would a court in a jury trial on a defendant's motion for a directed verdict at the close of the plaintiff's case. We think that this is not correct, but that the duty of the court is that asserted by the defendant as above stated.

The so-called *prima facie* case rule governing the action of judges in jury trials rests upon the established division of functions, in such proceedings, between jury and judge, whereby the jury tries the facts and the judge determines the law. The judge, before verdict, has no function as to the facts except in the limited sense of determining whether there is "a case for the jury." If there is substantial proof

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18 The Government's contention is phrased in the language of *Schad* v. *Twentieth Century-Fox Film Corp.*, 136 F. (2d) 991, 993 (C. C. A. 3d, 1943). This case is discussed below.

of the elements of the plaintiff's charge, the case must go to the jury, even if the judge, if he were the trier of the facts, would himself decide the case against the plaintiff. Putting it otherwise, a judge in a jury trial does not withdraw a case from the jury on a defendant's motion at the end of the plaintiff's case unless the judge can fairly say that no reasonable juryman could find for the plaintiff. *Pennsylvania R. Co.* v. *Chamberlain,* 288 U.S. 333 (1933); *Gunning* v. *Cooley,* 281 U.S. 90 (1930); *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521 (1925); *Slocum* v. *New York Life Ins. Co.,* 228 U.S. 364 (1913);
8736 *Jackson* v. *Capital Transit Co.,* 69 App. D.C. 147, 99 F. (2d) 380 (1938), *cert. denied,* 306 U.S. 630 (1939); *Hopkins* v. *Baltimore & Ohio R. Co.,* 65 App. D.C. 167, 81 F. (2d) 894 (1936).

But in an action tried without a jury the judge is the trier of both the facts and the law. This fundamental distinction between jury and non-jury trials should not be ignored; and if the reason for the jury trial practice does not exist in non-jury trials, where the judge is the trier of the facts, the jury trial practice ought not to be applied but should give way in favor of a practice consistent with the actual function of the judge in non-jury cases and consistent with the spirit of the Federal Rules of Civil Procedure. Rule 1 expressly provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Therefore, a court should dispose of a case at the first opportunity which is appropriate under the rules and in accord with the rights of the parties. When a court sitting without a jury has heard all of the plaintiff's evidence, it is appropriate that the court shall then determine whether or not the plaintiff has convincingly shown a right to relief. It is not reasonable to require a judge, on motion to dismiss under Rule 41 (b), to determine merely whether there is a *prima facie* case, such as in a jury trial should go to the jury, when there is no jury—to determine merely whether there is a *prima facie* case sufficient for the consideration of a trier of the facts *when he is himself the trier of the facts.* To apply the jury trial practice in non-jury proceedings would be to erect a requirement compelling a defendant to put on his case and the court to spend the time and incur the public expense of hearing it if the plaintiff had, ac-

cording to jury trial concepts, made "a case for the jury," even though the judge had concluded that on the whole of the plaintiff's evidence the plaintiff ought not to prevail. A plaintiff who has had full opportunity to put on his own case and has failed to convince the judge, as trier of the facts, of a right to relief, has no legal right under the due process clause of the Constitution to hear the defendant's case, or to compel the court to hear it, merely because the plaintiff's case is a *prima facie* one in the jury trial sense of the term. *Porter* v. *Wilson,* 239 U.S. 170 (1915). In *Lambuth* v. *Stetson & Post Mill Co.,* 14 Wash. 187, 44 Pac. 148 (1896), a lawsuit in which a jury had been waived, the defendant moved for a nonsuit and dismissal after the plaintiff had put in his evidence and rested. The motion was granted because in the view of the trial judge a fair preponderance of the proof established facts which prevented recovery by the plaintiff. On appeal the plaintiff claimed that the trial judge had no right to weigh the evidence. The Supreme Court of Washington rejected this contention and, in doing so, stated:

8737 But, where the entire trial is before the court which must finally pass upon the law and facts of the case, there is no good reason why it should not be allowed to determine the facts necessary to a proper application of the law at any time during the trial. It would be worse than useless for the court, after its attention had been called to the insufficiency of the evidence offered by the plaintiff to establish the facts necessary to enable him to recover, and after being satisfied that such was the nature of the evidence introduced by the plaintiff, to require the defendant to put in evidence to disprove that which had been already sufficiently disproved.

When the trial is before a jury, the court cannot weigh the testimony upon a motion for a non-suit, for the reason that it cannot weigh it at any time; but when the trial is without a jury, the court must eventually weigh the testimony for the purpose of determining where the preponderance is, and there is no reason why it should not so weigh it at the earliest possible time when the rights of the plaintiff will not be cut off by its so doing; and when the plaintiff has introduced all of his proof and rested, no right of his will be cut off if the court then determines what has been proven. It cannot be presumed that plaintiff's case will be strengthened by the evidence put in by

the defendant. If, when plaintiff had submitted his evidence, the defendant had rested without putting in any proof, it is clear that the court would have had to determine the question of fact made by the pleadings upon a preponderance of the testimony. Hence, under the rule contended for by the appellant, the court might be put in the anomalous position of denying the motion for a non-suit, and immediately thereafter, upon the refusal of the defendant to put in any proof, deciding the case in his favor.

No good purpose could be subserved by refusing to a trial court the right to determine the law in the light of the evidence upon a motion for a non-suit, the same as upon final submission.

It was the right of the court, upon the motion for non-suit, to decide as to the preponderance of the evidence, and it having decided that such preponderance was with the defendant, and there having been testimony to support such findings, the judgment rendered thereon must be affirmed. [14 Wash. at 190-1, 44 Pac. at 149]

The Government attacks this reasoning upon the ground that it has no application to a conspiracy case such as the instant case where, according to the Government:

> * * * most of the plaintiff's evidence * * * has to come from hostile or *quasi* hostile witnesses. In such cases the plaintiff makes no effort to put in more than a prima facie case in the first instance, recognizing that when the defendants put on their witnesses many additional facts may be brought out * * *

No proper distinction can be drawn under the Federal Rules of Civil Procedure between a plaintiff's burden in a conspiracy case and in other cases. The argument of the Government assumes that a plaintiff has some vested or due process interest in hearing the defendant's witnesses and seeing the defendant's documentary evidence, even though the plaintiff has not been able to establish his own case. This assumption has been rejected, as above pointed out, by the Supreme Court in *Porter* v. *Wilson, supra.* The argument is especially lacking in cogency in view of Rules 43 (b) and 26 to 37, inclusive, of the Federal Rules of Civil Procedure. These permit a party to call an adverse party and interrogate him by leading questions and contradict and impeach him, and also permit a party to call an officer, director, or managing agent of a public or private corporation, or of a partnership or association which is an adverse party, and cross examine and contradict and impeach him in all respects

as if he had been called by the adverse party. These rules also permit depositions pending action, interrogatories to parties, discovery and production of documents and things for inspection, copying, or photographing, and requests for admission of facts and of genuineness of documents.

These rules were availed of in the instant case. 8738 Most of the Government's evidence came either from the lips of officers or employees of the defendants, or from documents obtained from the files of the defendants.

The Notes to the Federal Rules of Civil Procedure state, concerning Rule 41 (b):

> • • • This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.

The Government, in arguing for the "*prima facie* case" construction of the rule, emphasizes the statement that a motion to dismiss under Rule 41 (b) is "the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50." But this statement carries the "equivalence" of motions under the two rules unduly far, indeed begs the question which is under discussion. Rule 50 (a) provides:

> • • • A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made • • •

Motions under Rule 41 (b) and (50) (a) are similar in that a motion under either rule leaves the defendant with a right to present his own case if the decision on his motion goes against him; and the motions under the two rules are similar in that both provide a defendant with a method of mid-trial attack upon the plaintiff's case, and a means of determining whether or not the defendant must present his evidence. But beyond these likenesses, motions under Rule 41 (b) and Rule 50 (a) should be assimilated only so far as is consonant with reason and with the spirit of the Federal Rules of Civil Procedure. To say that Rule 41 (b), applying to non-jury cases, provides the equivalent in all respects of motions for a directed verdict in jury trials under Rule 50 (a) is to ignore the difference

between the functions of the judge in jury cases where the judge is not the trier of the facts and in non-jury cases where he is the trier of the facts.

The Government argues further that Rule 41 (b) should be interpreted to require only a jury trial method of viewing the evidence at the end of the plaintiff's case for the reason that as a matter of trial convenience this will save time; otherwise, urges the Government, a judge must "*twice weigh* the evidence," if (it is assumed the Government means) the defendants' motion to dismiss is denied. But this is an unavoidable incident of permitting a mid-trial motion. It is true that under the construction here put upon Rule 41 (b) the judge will have to evaluate the plaintiff's evidence, and if he concludes that it substantially supports the plaintiff's cause of action and therefore denies the motion and hears the defendant's case, the judge will then be required again to consider the plaintiff's evidence, in comparison with that of the
8739 defendant. But some such burden as this is unavoidable, even under the construction of Rule 41 (b) urged by the Government. For if at the close of the plaintiff's evidence the court on a defendant's motion to dismiss, determining merely whether there is such evidence as would warrant sending the case to a jury and finding that there is, denies the motion and puts the defendant to his proof, then at the close of the defendant's case the judge will have to weigh the plaintiff's evidence against that of the defendant; while the judge's first consideration of the plaintiff's evidence will not be technically a weighing of it, but more accurately speaking a survey, nevertheless the judge will have given consideration to the plaintiff's evidence twice.

There is no authority in this jurisdiction on the question under discussion. Elsewhere there is a division. Supporting the position taken here are the following: *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. (2d) 891 (C. C. A. 7th, 1941); *Bach* v. *Friden Calculating Machine Co.*, 148 F. (2d) 407 (C. C. A. 6th, 1945); *Young* v. *United States*, 111 F. (2d) 823 (C. C. A. 9th, 1940); *cf. United States* v. *Blauner Construction Co.*, 37 F. Supp. 968 (D. Mass. 1941).

The cases relied upon by the Government to support its contention concerning Rule 41 (b) are: *Federal Deposit Ins. Corp.* v. *Mason*, 115 F. (2d) 548 (C. C. A. 3d, 1940); *Schad* v. *Twentieth Century-Fox Film Corp.*, 136 F. (2d) 991 (C. C. A. 3d, 1943); *Shaw* v. *Missouri Pac. R. Co.*, 36 F. Supp. 651 (W. D. La. 1941), 39 F. Supp. 652 (W. D. La.

1941). See also *Reich* v. *Vegex*, 137 F. (2d) 647 (C. C. A. 3d, 1943). Of these cases it is necessary to discuss only *Federal Deposit Ins. Corp.* v. *Mason and Schad* v. *Twentieth Century-Fox Film Corp.* The second of these is based in part upon the first, and the others mentioned proceed upon the same theory as do these two cases. The decision in *Federal Deposit Ins. Corp.* v. *Mason* was based solely upon the statement in the Notes to the Federal Rules of Civil Procedure that for actions tried without a jury Rule 41 (b) provides "the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50." *Schad* v. *Twentieth Century-Fox Film Corp.* was based in part upon the position just expressed, but in addition upon the view that if Rule 52 (a) concerning findings of fact applies to rulings on motions to dismiss under Rule 41 (b), it does not contemplate not making findings of fact in the event that a motion is *denied*. The court concluded from this that if a judge in a non-jury proceeding is to weigh the evidence on a motion to dismiss at the close of the plaintiff's case, he must, under Rule 52 (a), in the event of the *denial* of the motion, make findings of fact in the plaintiff's favor, and this before hearing the defendant's evidence, with the consequence, the court thought, of possible denial of due process to the defendant. In both of these cases the court fails to take account of the difference between a court's function in jury proceedings and in non-jury proceed-
8740 ings. *Schad* v. *Twentieth Century-Fox Film Corp.* is, moreover, wrong in its view of the requirement of Rule 52 (a) concerning findings of fact. That rule provides, so far as here pertinent:

> • • • In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment • • •

When this is read in connection with Rule 41 (b), it is clear that findings of fact are not to be made upon *denial* of a motion to dismiss. Under Rule 41 (b) it is *dismissal*, not refusal to dismiss, that operates "as an adjudication upon the merits" and entitles a party to "entry of the appropriate judgment." If a motion to dismiss is denied, the mid-trial attack allowed the defendant has failed and the case is not complete. No final adjudication on the merits can be made, therefore, until the defendant's case has been heard and evaluated by the judge in comparison with the case of the

plaintiff. It would, therefore, be useless to make findings of fact upon *denial* of a motion to dismiss. It may be noted, however, that even if Rule 52 (a), read in connection with Rule 41 (b), be construed as requiring findings of fact upon the denial of a motion to dismiss, there could hardly be denial of due process to the defendant in the making of such findings. Findings of fact under such circumstances would be merely interlocutory. It is not to be assumed that a trial judge is incapable, after hearing a plaintiff's case and determining from it alone that the plaintiff would be entitled to prevail, of holding his mind open to hear the defendant's evidence before reaching a final determination as to the rights of the two parties. We conclude that under Rule 41 (b) it is the duty of the court to weigh the evidence, to draw inferences therefrom and, if it finds the evidence insufficient to make out a case for the plaintiff, to render a decision for the defendant on the merits.

Once this view is taken it is clear that it becomes the duty of the court, on *granting* a motion to dismiss under Rule 41 (b), to make findings of fact. Rule 52 (a) requires findings of fact and conclusions of law "In all actions tried upon the facts without a jury." Obviously, if the defendant were to rest his case at the time he made his motion to dismiss, the court on granting the motion would be under a duty to make findings. Under Rule 50 (a) the defendant is not required to rest; he has a right to offer evidence in the event his motion to dismiss is denied. But the existence of this right is not persuasive that the court is not to make findings of fact if, under the view here taken of Rule 41 (b), the defendant, without resting, moves to dismiss and the court *grants* the motion. A case has been "tried upon the facts" when the plaintiff's evidence, weighed by the judge, has been found insufficient. A dismissal under Rule 41 (b) operates "as an adjudication upon the merits." Attention is called to the fact that in three of the cases (to wit,
8741 *Gary Theatre Co.* v. *Columbia Pictures Corp.*, *United States* v. *Blauner Construction Co.*, and *Young* v. *United States*) cited above as supporting the position here taken on the duty of the court on a motion to dismiss under Rule 41 (b), findings of fact were made under Rule 52 (a) on the granting of a motion to dismiss; and in the fourth case cited (*Bach* v. *Friden Calculating Machine Co.*), where the trial court failed to make findings of fact, the Circuit Court of Appeals required them to be made. The argument of the Government against making findings of fact hangs from its view, which we here reject, that on a motion

to dismiss under Rule 41 (b) the court does not weigh the evidence but merely follows the jury trial practice of determining whether or not a *prima facie* case has been established. There would, of course, be little point in making findings of fact on the decision of the mere "question of law" whether a plaintiff, if his evidence and legitimate inferences to be drawn therefrom are looked at in the most favorable light, has made a case sufficient to present to a jury if the proceeding were a jury proceeding.

If the court decides on a motion to dismiss under Rule 41 (b) that upon the facts and the law the plaintiff has shown no right to relief, conclusions of law, as well as findings of fact, must be made under Rule 52 (a), and the court must direct the entry of the appropriate judgment, *i.e.*, a judgment of dismissal on the merits.

We proceed to consider and weigh the evidence, pausing first, however, to determine a paramount question of law.

II

The Legality of the License Agreements

Are the patent license contracts described in the statement of facts at the outset of this opinion lawful: This question is to be answered in the light of the nature of the principal patents upon which the agreements were founded (the Utzman, Roos and Haggerty patents), in the light of the fact that the defendants make and sell substantially all of the gypsum board in the "Eastern area," and in the light of the terms and conditions of the license agreements, including especially the provisions for establishment and protection by USG of minimum prices on patented gypsum board manufactured and sold by the licensees. This question must be answered in the affirmative if no material distinction exists between the instant case and *United States* v. *General Electric Company*, 272 U. S. 476 (1926).

For purposes of comparison reference to the *General Electric* case must be made at some length. The case presented two questions. The first involved the legality under the Sherman Act of a system of distribution adopted by the General Electric Company (hereinafter referred to as General Electric) and used by the Westinghouse Electric and Manufacturing Company and the Westinghouse Lamp Company (both hereinafter referred to as Westinghouse, the Lamp Company being a wholly owned subsidiary and selling agent of the Electric and Manufacturing Com-

8742 pany), whereby electric lamps were distributed direct to the consumer through a complex del credere agency arrangement. It was charged that this system of distribution was merely a device to enable General Electric to fix the resale price of lamps in the hands of purchasers—which it was asserted the "agents" were in fact. This first question did not turn on the rights of a patent owner, but some consideration of it is necessary to an understanding of the second question. The latter involved the validity under the Sherman Act of a license granted March 1, 1912, by General Electric to Westinghouse to make, use and sell lamps under patents owned by General Electric. It was charged that the license provided that Westinghouse would, with regard to lamps manufactured by it under the license, follow the prices and maintain the terms and conditions of sale observed by General Electric in the distribution of lamps which it made.

Prior to 1912 in a suit between the United States and the three defendants in the *General Electric* case and thirty-two other corporations, a consent decree was entered dissolving, as illegal, a combination charged with restraint of interstate commerce in electric lamps, and enjoining fixing of resale prices for purchasers, but permitting the owner of patents to fix the prices as which a licensee should sell lamps. In 1912, after the consent decree, a new plan was evolved by General Electric whereby through a comprehensive system lamps were distributed directly to the consumer. Recognizing that the plan was devised to enable General Electric "to deal directly with consumers and purchasers, and * * * to avoid selling the lamps owned by the [General Electric] company to jobbers or dealers, and prevent sale by these middle men to consumers at different and competing prices," the Court said that the question (in this first aspect of the case) is "whether, in view of the arrangements made by the company with those who ordinarily and usually would be merchants buying from the manufacturer and selling to the public,—such persons are to be treated as agents, or as owners of the lamps consigned to them under such contracts." (272 U. S. at 483-4) The Court reviewed the provisions of the contracts for distribution and held they were bona fide agency agreements and that they involved no sale to the agents and hence no resale price fixing. That the decision in this aspect of the case did not turn upon the fact that a patented article was involved was made clear by the statement of the Court that

"there is nothing as a matter of principle, or in the authorities, which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act. The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer." (272 U. S. at 488)

8743 The second question in the case arose out of the following facts. General Electric was the owner of three patents, the Just & Hanaman "basic" patent of 1912 for the use of tungsten filaments in the manufacture of electric lamps, the Coolidge patent of 1913 covering a process of manufacturing tungsten filaments by which their tensile strength and endurance were increased, and the Langmuir patent of 1916 for the use of gas in electric lamp bulbs to increase the intensity of the light. These three patents, so the Court stated, "cover completely the making of the modern electric lights with the tungsten filaments, and secure to the [General] Electric Company the monopoly of their making, using and vending." (272 U. S. at 481) The nature of these patents and their relation to the art are detailed later in this topic. The license, founded upon the foregoing patents (and others), granted by General Electric to Westinghouse on March 1, 1912, gave Westinghouse, in consideration of royalties to be paid, the right to manufacture, use and sell electric lamps having tungsten filaments, and contained certain restrictive provisions as to the prices, terms and conditions under which Westinghouse might sell the product made under the license. The detailed provisions of the license will also be discussed below. Additional licenses of non price fixing character but containing quantity restrictions were granted to persons other than Westinghouse; these licenses will be adverted to below. The Government contended that the license to Westinghouse not only obligated that company to follow the prices, terms and conditions of sale to be fixed from time to time by General Electric and observed by it, but also required Westinghouse to adopt the General Electric agency distribution plan. Westinghouse had, as a matter of fact, adopted the agency plan of distribution and had followed the same restrictions in the case of its own agents as those prescribed by General Electric, but it contended that it was not required to do so. The Court considered this point of

dispute immaterial, saying: "It does not appear that this provision was express in the license, because no such plan was set out therein; but even if the construction urged by the Government is correct, we think the result must be the same." (272 U. S. at 489)

By unanimous decision the Court sustained the validity of the General Electric-Westinghouse license. It held that the restrictive provisions were not violative of the Sherman Act. In reaching this conclusion, the Court analyzed the rights of the owner of a patent, recognized that a patentee's right to acquire a profit by the price at which the product is sold is a substantive right, and held that the terms and conditions contained in the license were such as were reasonably adapted to secure to the owner of the patent the pecuniary reward to which he is entitled. The Court necessarily passed upon the validity of the restrictions in
8744 the license because they were a part of the license contract which was before the Court.[19] Further reference to the license agreement is made later. In discussing the rights of a patent owner, the Court said:

> The owner of a patent may assign it to another and convey, (1) the exclusive right to make, use and vend the invention throughout the United States, or, (2) an undivided part or share of that exclusive right, or (3) the exclusive right under the patent within and through a specific part of the United States. But any assignment or transfer short of one of these is a license, giving the licensee no title in the patent and no right to sue at law in his own name for an infringement. *Waterman* v. *Mackenzie,* 138 U. S. 252, 255; *Gayler* v. *Wilder,* 10 How. 477, 494, 495; *Moore* v. *Marsh,* 7 Wall. 515, and *Crown Company* v. *Nye Tool Works,* 261 U. S. 24, 30. *Conveying less than title to the patent, or part of it, the patentee may grant a license to make, use and vend articles under the specifications of his patent for any royalty or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.* It is well settled, as already said, that where a patentee makes the patented article and sells it, he can exercise no future control over what the purchaser may wish to do with the article after his purchase. It has passed beyond the scope of the patentee's rights. *Adams* v. *Burke,* 17 Wall. 453; *Bloomer* v. *McQuewan,* 14

19 The license agreement was Exhibit A to a stipulation of facts upon which the case was submitted.

How. 539; *Mitchell* v. *Hawley*, 16 Wall. 544; *Hobbie* v. *Jennison*, 149 U. S. 355; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659. But the question is a different one which arises when we consider what a patentee who grants a license to one to make and vend the patented article may do in limiting the licensee in the exercise of the right to sell. The patentee may make and grant a license to another to make and use the patented articles, but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. He owns the material of them and may use them. But if he sells them, he infringes the right of the patentee, and may be held for damages and enjoined. *If the patentee goes further, and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, "Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself."* He does not thereby sell outright to the licensee the articles the latter may make and sell, or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell.

This question was considered by this Court in the case of *Bement* v. *National Harrow Company*, 186 U. S. 70. A combination of manufacturers owning a patent to make float spring tool harrows, licensed others to make and sell the products under the patent, on condition that they would not during the continuance of the license sell the products *at a less price, or on more favorable terms of payment and delivery to purchasers*, than were set forth in a schedule made part of the license. That was held to be a valid use of the patent rights of the owners of the patent. It was objected that this made for a monopoly. The Court, speaking by Mr. Justice Peckham, said (p. 91):

"The very object of these laws is monopoly, and the rule is, with few exceptions, that *any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.*"

Speaking of the contract, he said (p. 93);

"*The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.*"

8745 The question which the Court had before it in that case came to it on a writ of error to the Court of Appeals of New York, and raised the federal issue whether a contract of license of this kind, having a wide operation in the sales of the harrows, was invalid because a violation of the Anti-Trust law. This Court held that it was not. [Italics supplied] [272 U. S. at 489-491]

The Court in the *General Electric* case held that *Bement* v. *National Harrow Company*, 186 U. S. 70 (1902), had not been overruled by *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502 (1917), in which it had held that the owner of a patented machine could not grant a license for its use conditioned upon the use in it of certain unpatented products.

The Court distinguished certain cases in which it had ruled that restrictions as to price of patented articles were invalid (*Boston Store* v. *American Graphophone Co.*, 246 U. S. 8 (1918); *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490 (1917); *Bauer* v. *O'Donnell*, 229 U. S. 1 (1913); *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20 (1912); *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339 (1908)), holding that those cases were but "instances of the application of the principle of *Adams* v. *Burke*, 17 Wall. 453, 456 . . . that a patentee may not attach to the article made by

him, or with his consent, a condition running with the article in the hands of purchasers, limiting the price at which one who becomes its owner for full consideration shall part with it." (272 U. S. at 493-4) The Court said that these cases "do not consider or condemn a restriction put by a patentee upon his licensee as to the prices at which the latter shall sell articles which he makes and only can make legally under the license." (272 U. S. at 494)

The right of a patent owner to control the terms and conditions including the minimum price under which a licensee may make and sell the patented product as established in the *Bement* and *General Electric* cases has not been denied or qualified in later cases. On the contrary, the later cases reaffirm that right. In *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27 (1931), holding that a patent licensor cannot exact as a condition of a license that unpatented materials used in connection with the invention (a manufacture) shall be purchased from the licensor, the Supreme Court nevertheless recognized that a patent owner "can grant licenses upon terms consistent with the limited scope of the patent monopoly, *United States* v. *General Electric Co.*, 272 U. S. 476, 489." (283 U. S. at 31) In *General Talking Pictures Co.* v. *Western Electric Co.*, 304 U. S. 175 (1938), *on rehearing*, 305 U. S. 124 (1938), *further rehearing denied*, 305 U. S. 675 (1939), the Court upheld a license to manufacture amplifiers under the licensee's patent where the license was "to manufacture • • •, and to sell only for radio amateur reception, radio experimental reception and radio broadcast reception" (305 U. S. at 126), and held that sales by such a licensee for 8746 use in the commercial field constituted an infringement, i.e., a violation of the license. In holding that this restriction was valid, the Court said: "That a restrictive license is legal seems clear. *Mitchell* v. *Hawley*, 16 Wall. 544. As was said in *United States* v. *General Electric Co.*, 272 U. S. 476, 489, the patentee may grant a license 'upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.' The restriction here imposed is of that character." (305 U. S. at 127) This was upon rehearing. In the opinion written when the case was first heard, the Court said: "Unquestionably, the owner of a patent may grant licenses to manufacture, use or sell upon conditions not inconsistent with the scope of the monopoly." (304 U. S. at 181) In *Interstate Circuit* v. *United States*, 306

U. S. 208 (1939), the Court held that certain restrictions in motion picture distributors' licenses to exhibitors exceeded the scope of a copyright monopoly, but, expressly referring to the *Bement* and *General Electric* cases, recognized that "a patentee has power to control the price at which his licensee may sell the patented article * * * ." (306 U. S. at 228) In *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436 (1940), wherein control of jobbers' resale prices was held illegal, a provision in patent licenses whereby licensee refining companies were required to sell the patented product—Ethyl gasoline—"at a certain fixed price differential above the average net sales price of the licensees' best non-premium grade of commercial gasoline" (309 U. S. at 448), was not questioned; and the *General Electric* case was referred to and its principle recognized. In *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942), *rehearing denied*, 316 U. S. 713 (1942), the Court disapproved an "agency" arrangement set up in the "hardboard" industry, but said that the case did not present "any question as to the validity of a license to manufacture and sell, since none of the 'agents' exercised its option to acquire such a license from Masonite. Hence we need not reach the problems presented by *Bement* v. *National Harrow Co.*, 186 U. S. 70, and that part of the *General Electric* case which dealt with the license to Westinghouse Company." (316 U. S. at 277) In *United States* v. *Univis Lens Co.*, 316 U. S. 241 (1942), the Court held that fixing the price of a patented article beyond the first sale constituted an improper extension of the scope of the patent monopoly, but said that in this view of the case there was no occasion for reconsideration of the *General Electric* case, and the Court in no way rejected the proposition announced by the lower court in *United States* v. *Univis Lens Co.*, 41 F. Supp. 258 (S. D. N. Y. 1941): "Nor does the owner of a patent violate the Sherman Anti-Trust Law by fixing prices in license agreements under which articles may be manufactured and sold by the licensees. United States v. General Electric Co., 272 U. S. 476 * * * ; E. Bement & Sons v. National Harrow Co., 8747 supra * * * ." (41 F. Supp. at 264) In *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944), *rehearing denied*, 321 U. S. 802 (1944), and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944), *rehearing denied*, 321 U. S. 802 (1944), cases dealing with combination patents covering installed heating systems, which neither the patent owner nor the licensees manufactured or installed, the Court held that the patent

monopoly could not be extended to include the imposition of otherwise illegal restrictions on the sale of unpatented stoker switches used in the heating system, but the Court in no way discountenanced the *Bement* and *General Electric* cases. The *Mercoid* cases are referred to again below.

The *General Electric* case has been stated above in broad outline, and from the facts and questions presented in the case and the decision thereon and the language quoted from the opinion, it is seen that the primary propositions for which the case stands are that a patentee may divide his monopoly by licensing the right to make, use and vend the patented product, and that he may fix the terms and conditions, including the price, under which the patented product shall be sold, subject only to the limitation that such terms and conditions do not yield to the patentee more than the normal and reasonable reward of a patent monopoly. Additional propositions for which the case stands, corollary to these primary propositions, will be stated later.

The problem presented in such cases as the *General Electric* case and the instant case is that of determining whether or not the monopoly accorded to an inventor under the patent laws has been extended beyond its proper operation under those laws and into the field denounced by the Sherman Act. The patent laws and the Sherman Act exist side by side, each being entitled to full recognition and application by the courts.[20] The nature of a patent monopoly
8748 and of the rights thereunder and the relationship of a patent monopoly to the Sherman Act were discussed

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20 In a Senate debate preceding the enactment of the Sherman Act, Senator Sherman, its proponent, stated:

"* * * It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination. Unlawful combinations made by individuals are declared by the several states to be against public policy and void, and in proper cases they may be punished as criminals. If their business is lawful they can combine in any way and enjoy the advantage of their united skill and capital, provided they do not combine to prevent competition. A limited monopoly secured by a patent right is an admitted exception, for this is the only way by which an inventor can be paid for his invention." (21 Cong. Rec. 2457 (1890))

The use of the term "limited monopoly" by Senator Sherman makes it pertinent to comment that there is a distinction between a patent monopoly and other monopolies granted by the Government. A patent to land, either upon purchase from the Government or by virtue of satisfaction of the homestead or mining laws, grants to the patentee a right to land upon which, prior to the issuance of the patent, the applicant had no claim; on the contrary, it was wholly owned by the Government in trust for the people; such a patent moreover grants the land in perpetuity. A patent monopoly is not only limited in time to seventeen years but also it grants nothing that either the Government or anyone else has theretofore owned or possessed. It is the applicant's invention or discovery—as a result of his own energy and of his ingenuity beyond

in an illuminating manner in *United States* v. *Motion Picture Patents Co.*, 225 Fed. 800 (E. D. Pa. 1915), *appeal dismissed* per stipulation of counsel, 247 U. S. 524 (1918), hereinafter referred to as the *Motion Picture Patents* case. That case was not cited in the *General Electric* case, but it has been cited, and with approval, more recently by the Supreme Court. *Standard Oil Co.* v. *United States*, 283 U. S. 163, 174 (1931); *cf. Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 415 (1945), *rehearing denied*, 324 U. S. 888 (1945). In the *Motion Picture Patents* case motion picture producers and importers, some of whom had patents upon articles such as positive films, cameras and projecting machines, formed a combination. They created a board to censor films, established exchanges and refused to sell films to operators of theaters who did not belong to the exchanges and who did not pay royalties on their machines to the combination, regardless of when or from whom the machines were purchased. It was attempted to justify the restrictions as a protection of the patent rights of the parties to the combination. The court held that the combination was invalid as a violation of the Sherman Act for the reason that the regulations imposed did not bear a normal relation to the protection of patent rights, but were on the contrary intended to accomplish the imposition upon the trade of undue and unreasonable restraints with the direct result of monopolizing trade in all the accessories of the motion picture art, and the further end, largely achieved, of dom-

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the ordinary skill of the art—of "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof" (Rev. Stat. §4886 (1875), as amended, 35 U. S. C. §31 (1940)) which is the basis for the issuance of a patent. An inventor is under no legal obligation to disclose or to use the fruit of his thought and labor. The patent laws, upon the theory that the public will benefit by disclosure and use of inventions, offer him, in consideration of disclosure, an exclusive right to make, use and vend for a period of seventeen years. It is true, as stated by Mr. Justice Story in *Pennock & Sellers* v. *Dialogue*, 2 Pet. 1 (U. S. 1829), that the promotion of the progress of science and the useful arts is the main objective of the patent laws and that the reward of inventors is secondary and merely a means to that end. It is true, also, as said by Mr. Justice Daniel in *Kendall* v. *Winsor*, 21 How. 322, 329 (U. S. 1858), that "Whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these." And it is true, as said in *United States* v. *Masonite Corp.*, *supra*, that this must be the point of departure for decision on the facts of antitrust cases involving patents "lest the limited patent privilege be enlarged by private agreements so as to by-pass the Sherman Act." (316 U. S. at 278.) But these statements do not narrow the ruling in the *General Electric* case. They but put in other words the limitation expressed in that case—that the terms and conditions of a patent license are not to yield to the patentee more than the normal and reasonable reward of a patent monopoly.

inating the motion picture business itself. District Judge Dickinson, who wrote the opinion, pointed out that the right to make, use and vend the subject matter of a patent is the natural right of an inventor and that what the patent law does is to withhold for a limited period of time
8749 from all others than the patentee or his assigns, the right to make, use or vend the patented article; he pointed out also that *the monopoly recognized by the patent law is not the monopoly condemned by the Sherman Act.* He said: "To hold otherwise would clearly be * * * a logical absurdity, because *there can be no such thing as restraint in a trade which has no existence, and a monopoly created by law, in pursuance of a policy of the law, cannot be said to result from such restraint.* To transfer a phrase from the opinion of Judge Cochran, in Patterson v. United States [222 Fed. 599, 620 (C. C. A. 6th, 1915), *cert. denied,* 238 U. S. 635 (1915)], which was directed to something else, but which is applicable here: 'There can be no monopolizing in the legal and accurate sense of the word where there can be no common occupation.'" (Italics supplied) (225 Fed. at 804-5) Judge Dickinson said also:

> We have, therefore, to determine the limits of a right and a wrong which seem to overlap each other. It is the right of a patentee, through having the exclusive sale of the patented article, to control, and in that sense, to monopolize, the trade in it. It is wrong by any illegal restraint of trade to monopolize it, or any part of it. On the one hand, it cannot have been intended to make it unlawful to acquire that the right to which the law has conferred. On the other hand (as already observed), it cannot be that the grant of a patent right confers a license to do that which the law condemns.
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> *The solution of the problem is to be sought by finding the special field of operation of each of these laws.* There is a field of trade, the sole occupancy of which may be in a patentee. Here he is supreme, and the keeper of the gate of entrance. There is another field which is in the common occupancy of all. Where the law has given the whole field to a patentee, with the express right of exclusion of others, and the use of the power of the law to enforce the exclusion, it is unthinkable that such exclusion is an illegal restraint of trade. Where the field, however, is open to all, competition for trade is likened to a race in which all may enter, but in which there must be no unfair jostling or hampering of others. Each one is free to exert all his powers, and

distance, if he can, all competitors, and win all the prizes; but he must run fairly and accord to others a like freedom. If he possesses a patented device which will aid him in the race, he may use it, as he may use any other form of property; but he must put it only to its proper use, and if he uses it as a weapon to disable a rival contestant, or to drive him from the field, he cannot justify such use, because of his patent right, except to the extent of protecting his exclusive right. *We have, therefore, the principle, which is recognized in all the cases, that if the subject-matter of a contract, which otherwise would be illegal because of restraint of trade, is a patented article, this takes away the illegality only to the extent to which the field of the trade, controlled through the combination, is coextensive with the field within which exclusive control has been granted by the law.* This is the doctrine of Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, Bement v. Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, the Bath Tub case, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, and all the other kindred cases to which we have been referred.[21]

The difference between this private field and the common field of trade is, as a distinction, sufficiently clear; but there may be again an overlapping. The owner of a patented article has the right to enter upon this common field of trade. *His patented article may be so superior, or of such less cost than anything else upon the market, as to supplant all others and give to him the whole trade as effectually as if his patented article has originally had the field to itself. Indeed, its ownership may be sought, for the reason that it has this possibility of power.* Again, the patent may apply to only certain features of the article of trade, and yet enable the owner to reap the same advantage, and control a trade in what is beyond the exclusive rights given by the patent. The special circumstances affecting a particular contract or combination may make the principle difficult of application, and the line of legality

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21 *Henry* v. *Dick* was overruled in *Motion Picture Patents Co.* v. *Universal Co.*, *supra*, upon the ground that the grant of a patent to a machine is of the exclusive right to use the mechanism and produce the result with any appropriate material, but that such material is no part of the patented machine or of the combination which produces the patented result, and that therefore the owner of the patent cannot restrict use of the machine to material supplied by him. In the *General Electric* case the Court stated that "The overruling of the *Dick* case and the disapproval of the *Button-Fastener* case by the *Motion Picture Film* case did not carry with it the overruling of *Bement* v. *Harrow Company*." (272 U. S. at 493.)

or illegality hard to draw; but the principle remains the same. *The legality of such a contract is determined by the judgment of whether, in its whole scope and legal intendment, it is fairly limited in its operation to the proper field of trade belonging to the patentee, and whether any further advantages which flow to him are fairly incidental, and are not the evil fruit of unfair practices employed to restrain the right of others to a share of the common trade. It is the legal intendment of the contract or combination which is to be found.* The motives of the contracting parties, whether innocent or otherwise, do not determine the real character of their act; but it is determined through the judgment of the law. Motives and intentions, except as declared, or appearing from the character of the act, are too vague and difficult of ascertainment to be made the basis of the legal judgment called for in such cases. A conspiracy under this statute, as at common law, may have, as an element, the seeking of an unlawful end, or the employment of unlawful means.

We learn from the opinion of the Keystone Watch Case Co. Case that *the prohibited restraint of trade, beside being undue and unreasonable, must be the direct, and not a merely incidental, result of the contract or combination, before the latter will be condemned as illegal. If it is asked to be condemned, not because of the illegality of the means employed to accomplish its end, but because monopoly results as a consequence, the monopoly must be shown to be an unlawful monopoly, not the monopoly granted by the patent laws. A contract or agreement among business men, which had as its end to preserve to the owners of a patent the exclusive sale of the patented article, and as its means the exercise of due, reasonable, and fairly proper control over sales to be made, would not be condemned as void in itself, or justify any inference of guilt under the act of 1890.* Where, however, by what was agreed to be done, the end indicated, in the sense of the result to be expected, was a monopolistic control of what was not the exclusive property of any one, or such a monopoly was the direct result of undue and unreasonable restraints of trade, to be employed as the means of carrying out what was to be done, the fact that anyone or more of the persons concerned owned patents would not prevent a finding of conspiracy. [Italics supplied.] [225 Fed. at 805-7].

In the *Bement, General Electric* and *Motion Picture Patents* cases are found the principles and propositions which must be applied in cases such as the instant case,

i.e., in cases where it is charged that patent license agreements and operations thereunder violate the Sherman Act.

The Government, however, urges that the *General Electric* case and the instant case are distinguishable. It is said first that in the *General Electric* case the patents completely covered the incandescent lamp, whereas in the instant case they do not completely cover the patented product. Second, it is asserted that in the *General Electric* case the licensing, so far as price fixing restrictions are concerned, extended only to Westinghouse, a single competitor of General Electric, and that the percentage of manufacturing and sale of patented electric lamps controlled by General Electric and Westinghouse was but 85% of the total business of this type; whereas, in the instant case, the licensing, all of which involved price fixing, extends to six competitors, and the licensor and licensees manufacture and sell 100% of the patented product in the "Eastern area." Third, it is contended that in the *General Electric* case the terms and conditions of the patent license related only to price fixing and were not unduly restrictive, whereas in the instant case the terms and conditions of the licenses go beyond mere
8751 price fixing and are unduly restrictive. In order to discuss these contentions, it is necessary somewhat further to detail the facts as shown by the opinion and by the record in the *General Electric* case. This will serve the purpose also of disclosing the corollary propositions, alluded to above, for which the *General Electric* case stands. The case was heard in the Supreme Court upon a record (of some 875 printed pages) which included a "stipulation by counsel for all parties which, together with the exhibits attached thereto and filed therewith, contains all the evidence upon which the case was tried in the District Court, and the said exhibits attached to said stipulation." (Record, *United States* v. *General Electric Company, et al.*, No. 113, Supreme Court, October Term 1926, at 875. This record is hereinafter for convenience referred to as the G. E. Record.)

In respect of the nature of the patents in the General Electric case and in the instant case: The first incandescent electric lamp was invented in 1880 by Thomas Edison. The original patents for such lamps had expired long before the General Electric-Westinghouse license agreement was executed in 1912. The light giving element in the lamp of 1880 was a carbon filament. In 1904 an improved carbon filament known as "metallized carbon filament" was invented. Next a tantalum filament lamp was introduced. This reduced the consumption of current substantially as

compared with the standard carbon filament lamp, but it was not a satisfactory lamp for use on alternating current. Thereafter a tungsten filament incandescent electric lamp was introduced and was developed to such an extent that it consumed only about one-third of the current consumed by the carbon filament lamp in its best form, and less than one-half of that consumed by the metallized carbon filament lamp was therefore superior to those containing carbon filaments or metallized carbon or tantalum filaments. But the patents covering the tungsten filament lamp was not "basic" in the sense that they covered a fundamentally new and basic invention covering completely an incandescent electric lamp. They were merely for improvements upon the original invention of Edison of 1880. The tungsten filament manufactured under the Just & Hanaman patent of 1912 was brittle and in consequence expensive to manufacture and easily broken in shipment and use. The Coolidge patent of 1913 covered improvements which merely increased the tensile strength and endurance of the tungsten filament. The Langmuir patent of 1916 further improved the incandescent electric lamp for the introduction of gas into the bulb, and this improvement came to be used in many but not all of the tungsten filament lamps made. It thus appears that the Just & Hanaman, Coolidge and Langmuir patents (the three patents specifically mentioned in the opinion of the Court in the *General Electric* case) covered various features of the incandescent lamp having a tungsten filament, which represented a further development in the incandescent lamp field over the lamps with carbon, metallized, or tantalum filaments. At the time the General Electric-Westinghouse license was executed in 1912 about 50% of the total number of lamps sold were of the ordinary carbon filament type. After nine years of operation under the license, the percentage of tungsten filament lamps increased, because of their superior quality, to some 97% of total production. The General Electric Company occupied a dominant position in the incandescent lamp industry by reason of its patent ownership. It had patents not only on the tungsten filament lamps but also on the carbon and tantalum filament lamps, and the latter were included in the General Electric-Westinghouse license and the licensor reserved the right to fix the price of lamps having metallized carbon or tantalum filaments the same as it did in respect of tungsten filament lamps. The Court in the *General Electric* case drew no distinction as to General Electric's rights as the owner of patents covering different

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types of lamps. The step by step progress in electric lamp production was founded upon the original basic work of Edison.[22]

The principal patents upon which the license agreements in the instant case were founded, to wit, the Utzman, Haggerty and Roos patents, typical claims of which have been set out in the statement of facts at the outset of this opinion, were product patents upon a building material called plasterboard or wallboard. The patents, as will be noted from the claims, were upon the entire product, not merely upon the edge of the board in the Utzman patent, or upon the starch in the Haggerty patent, or upon the bubbles or air cells in the Roos patents. As appears in the statement of facts, these patents covered important developments in the gypsum board manufacturing industry. The open-edge board which preceded the closed-edge board of the Utzman patent had defects in that there was in its manufacture wastage due to the necessary trimming of the board edge, the edge was weaker, and the core would sift out in handling and nailing. When the closed-edge board of the Utzman patent came into the market the open-edge board was
8753 largely displaced under the demand of the trade for the better product. The Haggerty patent, directed to the employment of starch or a cooked carbohydrate in the core of the board to insure a good bond between the core and the paper covering sheets, solved the "peeler" trouble in the gypsum board industry, and made possible the modern high speed production of gypsum board. The Roos patents, covering cellular core gypsum board produced by the employment of foam or a foaming agent in the core to produce innumerable cells or voids, thereby lightening the board and lending desirable nailing and other qualities thereto, supplanted the sawdust theretofore a necessary "aggregate" used in the core. Sawdust had be-

22 This was recognized in *General Electric Co.* v. *Laco-Philips Co.*, 233 Fed. 96 (C. C. A. 2d, 1916), where the court, speaking of the Just & Hanaman patent, said: "I think the invention here in suit is of great merit, entitled to firm support, and second only to Edison's. Edison found a dim pathway and transformed it into an illuminated road. Just & Hanaman have broadened that road into a boulevard, alive with blazing lights." (233 Fed. at 105.)

In *General Electric Co.* v. *Independent Lamp & Wire Co.*, 267 Fed. 824 (D. N. J. 1920), the court, speaking of the Coolidge patent, said: "The ductile tungsten filament has gone into general use, and has in large measure, if not entirely, supplanted all other filaments, including that of Just & Hanaman, for incandescent electric lamps. It is less expensive to produce, yet it has far greater durability and utility than the squirted filament. It is a commercially new product of great utility, having properties and characteristics unknown to the natural and normal tungsten, or, in fact, to any other material." (267 Fed. at 828-9.)

come difficult to obtain and was moreover unsatisfactory as an "aggregate" because of variation in quality and character, which produced manufacturing difficulties. The use of the foam of the Roos patents solved these difficulties and produced a superior product with reduced manufacturing costs. Thus while the gypsum board manufacturing industry and the electric lamp industry deal with different materials, both nevertheless important to the occupants of modern houses and buildings, there is a parallel between the development of the two industries in the step by step improvements in an important product—gypsum board as a building material and the incandescent electric lamp as a lighting medium.

We think no substantial distinction can properly be drawn between the instant case and the *General Electric* case in respect of the importance of the patented improvements within the respective industries, or in respect of the nature of the patents which underlie the license agreements in the two cases. The basic patents on gypsum board had expired, we assume (it is so asserted by the Government and not denied by the defendants), before the execution of the license agreements in the instant case. The Utzman patent itself was for an improvement and it expired August 6, 1929. Likewise in the *General Electric* case the basic Edison patents of 1880 had expired at the time of the General Electric-Westinghouse license of 1912, and the patents upon which that license was based were improvement patents. It is true that the gypsum and the paper in gypsum board are as such not patented; but that is equally true of the metal base and the glass of the General Electric tungsten filament lamps. The patents, although on different materials, are of similar character and bear a similar relationship to the respective industries and the development thereof. The patents principally involved in the instant case no less, and no more, cover completely the patented product than do those principally involved in the *General Electric* case.

The patents in the instant case and those in the *General Electric* case are distinguishable from those involved in *Mercoid Corp.* v. *Mid-Continent Investment Co., supra,* and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator*
8754 *Co., supra.* Those cases dealt with combination or "system" patents covering a domestic heating system comprising three main elements—a motor driven stoker for feeding fuel to the combustion chamber of a furnace, a room thermostat for controlling the feeding of fuel, and a com-

bustion stoker switch to prevent extinguishment of the fire. The patents were upon the combination, not upon these constituent devices. Such patents are not comparable to a product patent, which covers the whole product, although no patent has been granted upon the constituent materials. The unpatented glass and metal base in an electric lamp and the unpatented calcined gypsum rock and paper in plasterboard are not to be compared with an unpatented constituent device in a combination patent.

In respect of the comparative number of (price fixing) licenses and the extent of manufacture and sale of the patented product in the General Electric case and the instant case: No material distinction can be drawn between the two cases because in the former there was but one (price fixing) competitor licensee whereas in the latter there are six. As appears from the opinions in the *General Electric* and *Bement* cases, the owner of a product patent may manufacture and sell the article himself alone if he sees fit and at such price as he may choose. Or he may "sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article." (272 U. S. at 491, quoting from 186 U. S. at 93) In short the owner of a product patent may either exercise the monopoly thereof exclusively himself or he may divide its exercise. In the *General Electric* and *Bement* cases nothing indicates that the division of a patent monopoly is limited to the patentee and a single licensee. It can make no difference so far as the Sherman Act is concerned whether the patentee licenses no one, or licenses one, two, three, four, five or six or a dozen, others. Putting this otherwise, if the patent laws, despite the Sherman Act, do not legitimatize a monopoly in the manufacture and sale of a patented product by a patentee-licensor and several licensees, they cannot legitimatize a monopoly by the patentee-licensor and one licensee or by the patentee alone, *because in each instance the exclusion of the public from manufacture, use or sale within the field marked out by the patent is exactly the same, i.e., complete.* Once it is recognized that a patentee may divide his monopoly, no limit can reasonably be put upon the number of persons he may see fit to license, provided always the terms and conditions of the licenses do not go beyond those which normally and reasonably secure the rewards of a patent monopoly. If in the *General Electric* case the Court had held that the patent laws do not permit any

division of his monopoly by a patentee and had therefore stricken down the Westinghouse license (and the additional non price fixing licenses), General Electric itself
8755 would then have been in control of all of the manufacturing, using and selling of the electric lamps covered by the patents. Although but one price fixing license happened to be involved in the *General Electric* case, it would be an irrational fixation to construe the decision of the Court as limiting licensing under price fixing restrictions to one competitor, since the public is equally excluded *and equally subjected to the patentee's price* whether there is no licensee, one licensee or many. *Cf. United States* v. *Line Material Company*, 64 F. Supp. 970 (E. D. Wis. 1946); Laurence I. Wood, *Patents and Antitrust Law* (C. C. H. 1942) 182-3.

No distinction, moreover, can be drawn between the *General Electric* case and the instant case because the percentage of manufacturing and sale of patented electric lamps controlled by General Electric and Westinghouse, the single price fixing licensee, was but 85% of the total lamp business, whereas in the instant case USG and its six competitor licensees manufacture and sell substantially all of the gypsum board in the "Eastern area." It is not possible to conclude that the *General Electric* case would have been differently decided if 100% of the trade in electric lamps had been within the control of the General Electric and Westinghouse companies. It is not necessary for violation of the Sherman Act that a restraint of trade shall be complete; it is sufficient if it is substantial. *Paramount Famous Corp.* v. *United States*, 282 U. S. 30 (1930); *Fashion Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941). The control of the electric lamp industry under the General Electric-Westinghouse license was substantial. The control was recognized as legitimate not because it was limited to 85%, so far as price fixing restrictions were concerned, but because it was by virtue of a patent, and under license terms and conditions which the Supreme Court thought were normally and reasonably adapted to securing the reward which the General Electric Company as patentee was by the grant of the patent entitled to secure. Indeed, the Court expressly recognized in the *General Electric* case that a patentee is entitled to a complete monopoly. It said:

But it is said that the system of distribution is so complicated and involves such a very large number of agents, distributed throughout the entire country, that the very size

and comprehensiveness of the scheme brings it within the Anti-Trust law. We do not question that in a suit under the Anti-Trust Act the circumstance that the combination effected secures domination of so large a part of the business affected as to control prices is usually most important in proof of a monopoly violating the Act. But under the patent law the patentee is given by statute a monopoly of making, using and selling the patented article. *The extent of his monopoly in the articles sold and in the territory of the United States where sold is not limited in the grant of his patent,* and the comprehensiveness of his control of the business in the sale of the patented article is not necessarily an indication of illegality of his method. * * * [Italics supplied.] [272 U. S. at 485].

While it is not necessary to rest the conclusions above reached upon the following, it is of interest to note that it appears from the opinion of the Court in the *General* 8756 *Electric* case that in the year 1921 the relative percentages of business done by the companies in the electric lamp industry were: General Electric 69%, Westinghouse 16%, other licensees 8%, manufacturers not licensed 7%. While there were no price restrictions in the licenses of the other licensees, comprising 8%, the licenses granted by General Electric to Westinghouse and the other licensees contemplated a prorating of business between the licensor and all of its licensees, and also included type restrictions. The stipulation of facts discloses that "the amount of lamps licensed to be sold * * * is limited by the terms of each of such licenses." (G. E. Record, *supra,* at 92) Westinghouse was given a larger percentage (15% at first, later increased to 17.25%).[23] As to the restriction in respect of types of lamps, at the time the General Electric-Westinghouse license was executed General Electric wrote

23 The Westinghouse percentage was accomplished by a license provision that the royalty should be 2% of the sales price on that part of the Westinghouse production which amounted to no more than 15% (later 17.25%) of the combined General Electric and Westinghouse sales of the patented lamps, but that the royalty should be increased to 10% on any sales of Westinghouse in excess of that percentage. The license provided for a reduction of the 2% royalty to 1% after the total royalties paid by Westinghouse amounted to $800,000 (later increased to $945,000) or in any event at the end of 10 years; but it was specifically provided that under no circumstances should the 10% royalty on the excess sales of Westinghouse be decreased. It is to be inferred that General Electric did not regard it necessary to reserve the right to fix the price for the manufacturers given a small percentage to sell in a limited field, but that it thought that in the case of Westinghouse the percentage was sufficiently large to necessitate the reservation of the right to fix the Westinghouse price minimum in order to protect General Electric as licensor in its own market.

Westinghouse concerning the other licensees, or some of them:

> • • • it is understood that the arrangement with the Western Electric Company referred to will relate solely to lamps sold under the "Sunbeam" trademark.
>
> Also that the arrangement with the American Ever Ready Company referred to will relate solely to lamps of the miniature and decorative types.
>
> It is also understood that the General Electric Company will not sell lamps of its manufacture to either the Aetna, Capital, Liberty or Gilmore Company in excess of quantities which, added to the quantities manufactured by such Licensees, respectively, will equal the aggregate quantities which such Licensees are respectively licensed to manufacture under such licenses as may be granted to them respectively superseding the license dated April 1st, 1909.
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Our understanding is that the acceptance of the Westinghouse Company of the License of March 1st, 1912, is conditional upon the foregoing. [G. E. Record, *supra,* at 113.] Absent the legitimization of a patent, a restriction upon the quantity of a product sold in interstate commerce is a violation of the Sherman Act. *American Equipment Co.* v. *Tuthill,* 69 F. (2d) 406 (C. C. A. 7th, 1934.)[24] A restriction upon type of product would seem equally to be a violation, in the absence of a legitimatizing patent.

8757 From the foregoing it appears that the restrictive provisions in the General Electric licenses involved 93% of the industry, with actual price fixing provisions applicable to 85%. It is true that the opinion, so far as the second question therein involved is concerned, discusses only the legality of the Westinghouse license from General Electric in which the latter company imposed the condition that Westinghouse sales should be at prices fixed by General Electric and subject to change according to its discretion. But it is not to be assumed that the decision of the Court was not reached in the light of the facts shown by the record with reference to the terms of all of the licenses.

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24 A patent was involved in that case, but it was not upon the product (brick) on the output of which by licensees there was a quantity restriction. The patent was for a brick loading machine, and use of the patent as a foundation for the license agreements involved was, in a broad sense, subterfuge. This case is discussed in greater detail in topic VIII.

In respect of the terms and conditions of the license agreements and price bulletins in the instant case, as compared with the terms and conditions, including price provisions, of the General Electric-Westinghouse license: The terms and conditions of the license agreements and price bulletins in the instant case have been stated at the outset of this opinion; it is not necessary to restate them here. The provisions of the General Electric-Westinghouse license are summarized in the margin.[25] Comparison of the provisions in the two cases discloses no material distinction.
8758 In both cases the licenses were non-exclusive; there was to be no contest of the validity of the licensors'

25 Annexed to the stipulation of facts in the *General Electric* case and made a part of such stipulation were Exhibit A, the license agreement of March 1, 1912, and Exhibit B, the General Electric Company's del credere agency contracts, instructions and schedules, and purchase contracts. Annexed to the license agreement were a Schedule A, listing the patents on which the license agreement was founded, and a Schedule B, the contents of which will be referred to below. Comprised within Exhibit A, the license agreement, and Schedules A and B thereto, were the following provisions (which cover pages 111 to 180 of the Record of 875 printed pages in the *General Electric* case). It will be noted that, while not so segregated, they divide themselves into three general classes of provisions: general and miscellaneous provisions, including the provisions of the license agreement itself (Exhibit A) of some twenty numbered paragraphs; provisions for arriving at price; and provisions for protecting price.

The license agreement granted to the licensee a non-exclusive license under the patents listed in Schedule A, and under patents which the licensor might own or control, and under patents to be issued under patent applications owned by the licensor, for improvements on carbon filament, metallized filament, tungsten and tantalum filament lamps, and for improvements in machines, appliances or processes for the manufacture of such lamps. The license agreement impliedly forbade the licensee to contest, during the existence of the agreement, validity of the licensor's patents. The licensee agreed to pay royalties, and the licensor and licensee each agreed to keep books with reference to its manufacture, sales and shipments of all electric lamps, and to keep its books open to the inspection of the other. The license provided that it was granted on the express condition that the licenser should have the right to fix the licensee's prices, terms and conditions of sale of any tantalum, metallized carbon, or tungsten filament lamp which embodied any of the inventions of the patents included in the license. These terms and conditions were set forth in Schedule B. The licensee agreed that it would sell lamps only in accordance with Schedule B and under the licensor's form of contract and in compliance with general sales rules set out in Schedule B and at prices not lower and on terms and conditions no more favorable to the purchaser than those set out in the Schedule. The licensee agreed to make reports called for in the Schedule. The reports included: a report within ten days on all appointments of agents showing date of appointment and compensation allowed; an immediate report of each purchaser's contract entered into, with the amount on which discounts were based; an immediate report of all sales to purchasers for immediate delivery without contract; a report giving the net value of all lamps sold by each agent; a report giving the net value of all lamps delivered under purchasers' contracts; a monthly report of all allowances, replacements and other adjustments made on account of claims for defective lamps, or otherwise giving the amounts of such allowances; a report of the net value of incandescent lamps of each class sold and invoiced.

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patents; there were provisions for royalties, records
8759 and reports. In both cases the licenses were granted upon the condition that the licensor should have the right to fix the minimum prices at which the licensee
8760 should sell the patented product, the prices to be charged by the licensor and licensee to be the same.

Schedule B included, in addition to the general sales rules referred to above, forms for the appointment of B agents and A agents, for the purchase of incandescent lamps, instructions to manufacturers' agents, sales instructions for A agents and for B agents, price schedules of extra charges for tipless lamps, colored lamps, changes in standard base of lamp, etching letters and special lamps. Schedule B also contained a list of prices of the different types of metallized carbon, tantalum and tungsten filament (Mazda) lamps, a discount table and instructions with respect to deliveries, freight charges and the like. The licensee expressly agreed to sell lamps under the licensor's (manufacturer's) form of contract for purchase of lamps. This contract form covered a purchaser's estimated requirements for a year and contemplated that purchases should in no event exceed the purchaser's requirement of lamps for its own use during the period of the contract; required the purchaser to agree to pay for lamps in accordance with the rate of discount specified, and to pay transportation charges in accordance with an attached delivery schedule; provided for terms of 30 days with 2% discount for payment within 10 days; reserved to the manufacturer the right to cancel if lamps sold thereunder were used on lighting circuits other than those supplied with current by the purchaser exclusively, or other than those located in the building or on the property occupied, owned or leased by the purchaser. (The licensee was thus restricted entirely to making sales to consumers.)

The license agreement prohibited the licensee from selling in the territory of the Chicago Edison Company or the Boston Edison Company except to those companies.

The general sales rules in Schedule B provided that lamps might be sold at contract prices only to purchasers who had executed the standard form of purchase contract, and to purchasers for immediate delivery without contract where the seller had definite knowledge that the lamps so sold were for the purchaser's own immediate use; required that all purchase contracts must be made on standard forms furnished or approved by the licensor; required each contract to be limited to one brand of lamp. The sales rules provided that prior to the acceptance of any contract information regarding the amount of purchases for which the contract might be made must be obtained from the licensor; provided that on lamps purchased, billed and delivered at standard package or higher prices within 30 days prior to the signing of a contract, contract prices might be allowed, but that lamps ordered before the expiration of a contract and not delivered and invoiced within 30 days after the expiration thereof, should not be included in the contract. The sales rules provided that the requirements of more than one customer could not be combined and covered by one contract except where the lamps were ordered for use in installations owned or controlled by one corporation, co-partnership or individual. The sales rules, as well as the contract form above, required that the terms of sale should be 2% 10 days, 30 days net; they provided that no bid for use both in foreign and domestic territory should offer any lower price on the lamps for foreign consumption than on those for domestic use (although the right to fix the price on lamps applied only to those sold for use in domestic territory). Under the sales rules no sales or quotations were to be submitted on lamps covered by attached schedules in connection with any other material or lamps not covered by such schedules where the award of such business was based upon the combined value of the scheduled lamps and other lamps and materials; no sample was to be supplied free of charge; no guarantee could be made on lamps except in accordance with the "standard specifications"; allow-

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In both cases, in respect of prices, there were two classes of provisions, one class providing how price should be arrived at, the other intended to protect the price fixed, *i.e.*, to prevent indirect price cutting. In both cases the provisions for arriving at price were drafted in view of the fact that the ultimate price at which a product is to be sold cannot be

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ances for burned out lamps or bases were forbidden and also allowances or payments made to cover the cost of inspecting or testing lamps, except that factory facilities might be given without charge for the purpose of initial inspection or test, but not for life test. (These provisions were obviously intended to prevent indirect price cutting by the furnishing of services or other things of value to the purchaser.)

Under the price lists and discount schedules included in Schedule B there was a variation in prices and discounts depending upon the quantities purchased during a period of a year, and according to whether or not the purchase was in standard package quantities or in broken package quantities. The applicable discount varied from 10% to 37% in standard package quantities and 0% to 27% on broken package quantities depending upon whether the purchaser was in a bracket for $150, $300, $600, $1200, $2500, $5000, $10,000, $20,000, $40,000, $80,000, or $150,000 in total purchases during the period of a year. The license agreement placed certain restrictions upon the time within which changes might be made in the discount schedules.

The delivery and freight schedule set out in Schedule B provided that all lamps might be sold or billed to purchasers f.o.b. point of shipment, with freight allowed on shipments consisting of not less than one standard package to all points on or east of the Mississippi River, to all points in the states of Minnesota, Iowa and Missouri, and to all points on the Missouri River south of Sioux City, Iowa; on deliveries of less than standard package quantities, it was required that the goods should be sold only f.o.b. the manufacturer's place of business or that of his agent, and no allowance was to be made for either freight or express; as to all points outside the areas above described freight was to be added to the billing price of lamps in accordance with additional charges shown on the schedule, which were apparently calculated by the licensor on an average freight cost basis.

The license agreement obligated the licensee not to allow its agents any greater compensation than that allowed by the licensor to its agents; and the licensor expressly reserved the right to approve or disapprove any agent which the licensee might seek to appoint. The provision in terms was this: "It is understood that the Licensor proposes to appoint as agents, for the sale of a portion of its metallized filament, tungsten filament and tantalum filament lamps, persons and companies who will sell the Licensor's said lamps to consumers through their own salesmen. And this license is granted only upon and is subject to the condition that the Licensee shall not interfere with such portion of the Licensor's business in such lamps carried on in this manner, by offering to allow or allowing the Licensee's agents greater compensation than that allowed by the Licensor to its agents, as specified in said Schedule B, or by appointing as agents persons or companies of whom the Licensor affirmatively disapproves as being irresponsible representatives for handling metallized filament, tungsten filament and tantalum filament incandescent lamps covered by this license." (G. E. Record, *supra*, at 122-3) (This is to be compared with the provisions in the USG license bulletins purposed to prevent rebating on the price of patented board by the splitting of salesmen's commissions with customers.)

The license agreement forbade the licensee's selling any parts of an incandescent lamp made under the license, as distinguished from a complete lamp, without the written consent of the licensor; the licensee was permitted to refill burned out lamps and to sell the same, but was required to guarantee that any such lamps sold by it would not be refilled.

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arrived at merely by naming an amount, but that other factors which have economic relationship to price—such as terms of payment, cost of delivery to various areas, including freight charges, quantity sold, type of product sold, and the like, must also be stipulated. It was recognized by the Court in the *General Electric* case that terms of payment

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It was provided in the license agreement that if arbitrators should find that the licensee had sold at lower prices or on terms and conditions more favorable to the purchaser than those prescribed by the licensor, the damages for such violation of the license, in the absence of evidence to the contrary, should be an amount equal to the total value at the prices established under the agreement of the lamps involved in each transaction. A similar provision existed in respect of damages assessed against the licensor for any sales made by it at prices lower or on terms and conditions more favorable to the purchaser than those prescribed for the licensee.

The foregoing summary of the provisions of the General Electric-Westinghouse license agreement shows the restrictions placed upon the licensee by the license itself. As has been pointed out above in the text, the Government contended in the *General Electric* case that the license agreement itself required Westinghouse to adopt General Electric's del credere agency method of distribution and therefore to be bound also by the same restrictions therein which General Electric placed upon its own agents, and the Court held that, assuming this to be correct, "the result must be the same." (272 U. S. at 489.) Therefore the restrictions of the del credere agency contracts, instructions to agents and agents' compensation schedules, may be considered as having been held to be proper restrictions upon a licensee, although not contained in the provisions of the license agreement itself in the *General Electric* case. The restrictions are contained in Exhibit B, above referred to, and may be summarized as follows:

The General Electric del credere agency system divided the trade into three classes: (1) Large consumers readily reached by General Electric and sold directly by its own salaried employees with deliveries being made from its own factories and warehouses; (2) large consumers under contracts with General Electric, negotiated by agents, the deliveries being made from stock in the custody of the agents; (3) general consumers who were sold by agents under similar contracts. The agents under the second class were called B agents and those under the third class A agents. There were some 400 B agents of General Electric operating under two contracts, which specified in detail the manner in which they were to handle and distribute the lamps consigned to them. These agents performed the functions formerly performed by jobbers in the industry. The B agents were to recommend to General Electric efficient and reliable distributors to act as A agents. There were some 21,000 A agents—usually retail electrical supply dealers in small places. (At the time the stipulation of facts in the General Electric case was entered into Westinghouse Lamp Company employed approximately 140 B agents and approximately 6100 A agents throughout the United States.) The A agents were authorized to make sales only to consumers for immediate delivery and to purchasers under written contract with the manufacturer. Lamps were consigned to the A and B agents and were sold through them in accordance with minute instructions and detailed requirements. Rules for eligibility for appointment as B and A agents were established and standard forms of contracts to be entered into with different classes of agents were specified. The restrictions and requirements with respect to agents and purchasers were complex. The price schedules, discount schedules, agents' compensation schedules, forms of contracts for various types of purchasers and agents, and accompanying instructions in effect by January, 1925, cover 614 pages (pp. 180-794) of the printed record in the *General Electric* case.

and delivery affect price.[26] The provisions in the General Electric-Westinghouse license and in the licenses in the instant case in respect of indirect price cutting, *i.e.*, the price protective provisions, including those which relate to commission salesmen, are of similar character. This is commented upon further in footnote 25. If there is any difference between the provisions of the licenses in the *General Electric* case and in the instant case, it is in the greater stringency and complexity of those in the former.

The foregoing comparison of the patents involved in the *General Electric* case and in the instant case and of their relation to the respective industries, and the comparison of the amount of trade controlled by the parties to the license agreements in each of the two cases, and of the terms and conditions of the license agreements, and the conclusion reached above that no material distinction exists between the two cases, require that the question stated at the outset of this topic II be answered in the affirmative. That is to say, the license agreements described in the statement of facts at the outset of this opinion, examined in the light of the nature of the principal patents upon which they were founded, in the light of the fact that the defendants make and sell substantially all of the gypsum board in the "Eastern area," and in the light of the terms and conditions
8761 of the agreements, including those relating to price, are lawful. The decision in the *General Electric* case must be taken as sanctioning division of a patent monopoly by the granting of one or more licenses based on improvement patents, of control by a patentee through licenses of the price of either a major portion or all of a product made and sold in an industry, and of such stringent terms and conditions of patent licenses, including both price fixing and price protective provisions, as are shown by the record in that case. Since the facts in the instant case are substantially parallel to those in the *General Electric* case in the respects mentioned, the license agreements in the instant case must be considered valid.

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26 As pointed out earlier in this topic II, the Court in the *General Electric* case said, in respect of the *Bement* case: "A combination of manufacturers owning a patent to make float spring tool harrows, licensed others to make and sell the products under the patent, on condition that they would not during the continuance of the license sell the products at a less price, *or on more favorable terms of payment and delivery to purchasers*, than were set forth in a schedule made part of the license. That was held to be a valid use of the patent rights of the owners of the patent. * * *" (Italics supplied.) (272 U. S. at 490-1)

It is stated in the stipulation of facts in the record in the *General Electric* case that Westinghouse in negotiating its license dealt with General Electric "at arm's length," and it is suggested by the Government that on that account the two cases are distinguishable.[27] If by the suggested distinction the Government means to imply that there was coercion by USG in obtaining execution of the license agreements in the instant case, it is to be answered that there is no charge of coercion in the complaint and that the suggestion is therefore irrelevant to any issue defined by the pleadings. If by the suggestion is meant that the license agreements in the instant case were not executed in good faith, that is an issue which is discussed below.

It was said above that in addition to the primary propositions for which the *General Electric* case stands (that a patentee may divide his monopoly by licensing the right to make, use and vend the patented product, and that he may fix the terms and conditions, including the price, under which the patented product may be sold by the licensee, subject only to the limitation that such terms and conditions do not yield to the patentee more than the normal reward of a patent monopoly), the decision stands for certain further propositions, corollary to its primary holdings. These corollary propositions appear as follows:

The *General Electric* case demonstrably involves on its facts negotiation and discussion resulting in a "contract in restraint of trade," a "combination and conspiracy in restraint of trade," a "monopoly," "price stabilization," substantial elimination of manufacture and sale of inferior materials, *i.e.*, "standardization," and elimination of
8762 an element (jobbers) in the distributive system, *i.e.*, "control of distribution." All of this, except for the legitimatizing patents upon which the General Electric-Westinghouse license agreement was founded, except for the fact that the terms and conditions of the license did not, in the view of the Supreme Court, yield to General Electric more than the normal reward of its patent monopoly, and except for the fact that the price stabilization, standardiza-

27 "* * * The Westinghouse Electric & Manufacturing Company in negotiating and executing said license acted in entire good faith, and witnesses called on its behalf would testify (and this shall be regarded as testimony given in this case) that in the negotiation of said contract it dealt with the General Electric Company at arm's length and secured the most favorable terms that it was able to negotiate after protracted discussions covering a period of many months, and believed and still believes that the license finally obtained was reasonable and fair and entirely lawful in every respect." (G. E. Record, *supra*, at 105)

tion of materials, and control of distribution were but the normal and incidental fruits of a patent monopoly and licensing thereunder, would have been a violation of the Sherman Act. As a matter of course the complicated General Electric-Westinghouse license was not entered into without preliminary negotiation and discussion. This is shown in footnote 27, and further in the following from the stipulation of facts:

At the time of the aforesaid decree the General Electric Company was the owner of the patent rights relating to the tungsten filament lamp, upon which applications had then been filed and under which the above mentioned Just & Hanaman patent No. 1018502 and Coolidge patent No. 1082933 were subsequently issued. Because of the superiority of the tungsten filament over the carbon filament, the exclusive right to make, use and vend lamps manufactured with tungsten filaments under the aforesaid patents, if valid and lawfully acquired by the General Electric Company, and of the scope indicated by their claims, vested in their owner, the General Electric Company, what has since become a practical monopoly of the manufacture and sale of incandescent electric lamps. *The Westinghouse Electric & Manufacturing Company because of this situation entered into negotiations with the General Electric Company,* for a license to manufacture under said patents, which negotiations resulted in the arrangement now in existence, as set forth in the above mentioned agreement, dated March 1, 1912, between the Westinghouse Electric & Manufacturing Company and the General Electric Company. * * * [Italics supplied.] [G. E. Record, *supra,* at 104.]

The record in the *General Electric* case also shows that General Electric, in entering into the license agreement with Westinghouse, discussed with Westinghouse the terms of the licenses with the other licensees. This appears from that portion of the record above quoted as demonstrating quantity and type limitations upon the other licensees. The license agreement between Westinghouse and General Electric was, of course, a "contract." In performing the obligations of the license agreement, Westinghouse and General Electric constituted a "combination and conspiracy" as did General Electric and each of the other licensees in performing the obligations of the several other licenses which, although they did not subject the other licensees to price control, did impose quantity and type limitations upon them. The General Electric-Westinghouse license controlled

a sufficient amount of trade in electric lamps, 85%, to constitute a "monopoly" which, in the absence of a patent, would have been a violation of the Sherman Act. Since General Electric and Westinghouse were both to sell the patented product at the same price, there was "price stabilization" as between them, and hence in the electric lamp industry, since they controlled 85% of it; and the price was set, presumably, at a profitable level. The increase in tungsten filament lamps to 97% of total production, be-
8763 cause of their superior quality, with the consequent substantial elimination of sale of lamps of the ordinary carbon filament type, accomplished "standardization" of the patented product. The arrangements for selling direct to consumers with consequent elimination of jobbers under the General Electric agency distribution plan adopted by Westinghouse constituted "control of distribution."[28] Finally, it is obvious in the *General Electric* case that the very purpose of the negotiation, discussion, execution of the license, and conducting of operations thereunder, was, on the part of the General Electric Company, that of exploiting its patent monopoly through collection of royalties, and at the same time, by means of price control, protecting its own profit in the making and selling of the tungsten filament lamps; and, on the part of Westinghouse, that of acquiring the right to make, use and sell the superior patented article and thereby making profit. And both must have expected, since both were to sell at the same price, that this "price stabilization" between them would cause stabilization in the industry; and both must have hoped and expected that their making and sale of the superior lamps would lessen the making and selling of inferior products by them and by others; and both clearly purposed the "control of distribution" through the elimination of jobbers. Yet the Supreme Court regarded none of this, in either purpose or accomplishment, as illegal. It looked upon the negotiation, discussion, license agreement and operations thereunder as the accomplishment of a lawful end by lawful means.

It follows from the foregoing that the terms "contract in restraint of trade," "combination and conspiracy," "monop-

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28 It has been pointed out earlier in this topic that the General Electric plan of distribution which, had it been a requirement of the General Electric-Westinghouse license, would not, the Court said, have changed the result in the case, "was of course devised for the purpose of enabling the company to deal directly with consumers and purchasers, and doubtless was intended to avoid selling the lamps owned by the company to jobbers or dealers, and prevent sale by these middle men to consumers at different and competing prices. * * * " (272 U. S. at 483)

oly," "price fixing," "price stabilization," "standardization," and "control of distribution" do not necessarily carry an illegal connotation. Confusion is avoided if this is borne in mind. Showing, without more, in a case brought under the Sherman Act, but involving a patent license, that there have been relationships, operations and accomplishments, which, grossly, are within the terms quoted, is not enough. The question in such a case is not merely whether there has been a "contract," a "combination," a "monopoly," "price fixing," "price stabilization," "standardization," "control of distribution," and a purpose to accomplish and a partnership in accomplishing such *actual* restraints of trade—for the patent laws, within their limits, permit all of the foregoing; the question in such a case is whether the purposes and accomplishments of the parties to the license contract went beyond the lawful limits of a patent monopoly and into
8764 the field of purposes and acts denounced by the Sherman Act. Were the "restraints of trade" *illegal, i.e.,* of Sherman Act quality and extent, or were they such as the patent laws permit—is the question.

The *General Electric* case illustrates that the law, whether in the form of a statute, or of principles arising out of judicial application of a statute (in this instance the statute authorizing the granting of patents and the principles arising out of judicial application thereof to patent licensing arrangements and operations) cannot legitimatize such arrangements and operations and at the same time stigmatize as unlawful the purpose to bring them about, the necessary means of bringing them about and carrying them on, or the consequences that normally flow from them. The *General Electric* case establishes that a patent license agreement granting the right to make, use and vend a patented product, under terms and conditions, including prices, fixed by the licensor, is lawful. Such a license agreement ordinarily, and, when the prices are (as in the *General Electric* case) a part of the license contract, necessarily, involves negotiation and discussion between the licensor and the licensee and agreement upon the terms and conditions, a purpose to execute and carry out the agreement, combined action in signing the agreement and in performing the obligations thereof, with knowledge that it will result in a stabilized and presumably profitable price for the patented product as between the parties and in the industry (since the parties are, by virtue of the patent, the only ones having a right to make, use and sell the superior patented product) and with knowledge that it will result in a monopoly (*i.e.,* a

divided patent monopoly), in probable discontinuance of manufacture and sale by the licensee of inferior materials (the licensee's incentive to take a license is the right to make the superior product), and in control of distribution. What a lawful patent license agreement normally involves cannot be unlawful. Additionally, since a patent owner may lawfully divide his patent monopoly with a plurality of licensees, there will in the usual course be with each of such licensees the same negotiation and discussion, agreement upon terms, purpose to execute and carry out a license contract and to accomplish its normal results, and combined action in so doing, as in the case of a single licensee. And each licensee will be informed of and discuss with the licensor the terms and conditions of the proposed licenses; otherwise no more than a single license could be executed. A patent owner would not be able to license competing manufacturers upon different price terms; no one such would be willing to suffer competitive disadvantages; no one such would be willing to sign in the dark as to the terms to be extended to the others; ordinarily, moreover, there will be discussion at large, *i.e.*, with the trade, of the advantages
8765 and disadvantages of the licenses proposed by the patent owner. Each of a plurality of licensees will, moreover, have the same purpose to take a license and to secure its resulting advantages. The licensor and each licensee of such a plurality constitute a "combination" to effectuate the purposes of their license. Since a plurality of licenses is lawful, all of this must be lawful. Further, if in practical effect the licensor and the plurality of licensees are a "combination" to the same end, such a "combination" is not stigmatized by the law—provided in purpose and effect it does not secure to the patent owner more than the normal reward of a patent monopoly, nor to any of the licensees with whom that monopoly is divided more than the advantages which naturally result to a licensee, as well as to a licensor, from patent licensing. All of this necessarily follows from the *General Electric* case. Compare the words of the court quoted from the *Motion Picture Patents* case, *supra*.

In the course of the oral arguments upon the motions now under consideration in the instant case, the presiding judge put to the Government the following questions:

Justice Stephens: Since your argument is being interrupted by these questions and since you are going to discuss the General Electric case in greater detail, I should like to put to you * * * some problems which arise in my mind on what seems to be your opinion, from the briefs and your statement this morning, with respect to the General Elec-

tric case, not with the expectation you will answer them now but so that you can think them over and answer them later.

I have read the General Electric case very carefully and given considerable thought to your position as announced in your briefs that it really is not a case which controls the instant case. My thinking takes me back first, on the subject of the General Electric case, to what is the nature of a patent or of a so-called patent monopoly. It is not, as I understand it, quite like a monopoly such as the Government gives to one to whom it grants Blackacre—which the Government, as the representative of the people, originally owned entire and now passes over upon some consideration to a grantee in perpetuity or in fee simple. It is not that kind of monopoly because the Government never did have the process or product or design or machine which becomes the subject of a patent. The invention was originally in the mind of the inventor. What the Government gives him, what we call a patent monopoly, is an exclusive right to make, use and vend over a period of years and theory of that is, as I have always understood it, that that will be an inducement to him to disclose the results of his inventive activity to the public for the benefit of the public and to the development of industry.

As I understand the theory of the General Electric case, since a patentee does have an exclusive right to make, use and vend over a period of time, he may make a choice between keeping that himself, keeping his patent monopoly exclusively in him over the period of the patent and licensing the right to make, use and vend to someone else and he may, under the theory of the General Electric case, fix reasonable terms and conditions, including prices, on the first sale by his licensee, in protection of his patent monopoly.

Let's assume for the moment that the General Electric case means that he can only have one licensee. He cannot enter into an agreement with that licensee without discussion of terms and conditions and prices; so that far, at least, the discussion cannot be illegal. The getting together of the parties cannot be said to be the kind of a conspiracy which is illegal under the Sherman Act because the Sherman Act and the patent laws stand together.

I have difficulty in seeing, taking the next step, how it can be said that the General Electric case confines a patentee to licensing one licensee—because what difference can it make, if he has a right to retain the whole patent monopoly in

himself if he wishes to, whether he divides it with one or divides it with ten or with a hundred? It is still a patent monopoly. The public is excluded except to the extent that he gives it the benefit of the invention by using it himself or by dividing it with licensees. If it then follows from the General Electric case that a patentee can have more than one licensee, again how can it be illegal for the group
8766 of licensees or the several licensees to discuss either with him or with each other the terms of the license arrangements? In short, how can the law both give and take away with the same hand? It gives the right to enter into either one or a group of patent-license agreements. Does it not necessarily also give the right to do the things that are normally necessary to constitute such agreements—talk about them and discuss the terms? Must a patentee go by stealth and by night to each licensee separately to make out the license agreement and avoid any discussion with the group?

Moreover, if the suggestions I have made concerning the General Electric case are sound, if it is lawful to enter into a license agreement containing price-fixing terms and conditions in reasonable protection of the patent monopoly with either one or a series or a group of licensees, how can it be illegal to accomplish the inevitable economic consequences of that, which you phrase as blanketing an industry or stabilizing prices, or even producing uniformity in products because the patented product is more likely to sell because of its merit; and if it is not illegal to accomplish the normal economic consequences of licensing, how can it be illegal to talk about them and arrange for them in entering into license agreements? [Tr. 7259-7262.]

These questions were not satisfactorily answered by the Government either in the course of the further oral argument or in the written briefs submitted on the motions.

The principles and propositions stated and the conclusions reached in this topic H leave for determination two issues of fact. There is no dispute about the nature of the principal patents upon which the license agreements were founded, or about the extent of manufacture and sale by the defendants of gypsum board in the "Eastern area," or about the signing of the agreements, or about the terms and conditions thereof, including those for the establishment and protection of minimum prices on patented board made and sold by the defendants. It has been determined that the license agreements, looked at in the light of the nature of

the patents, of the fact that the defendants make and sell substantially all of the gypsum board in the "Eastern area," and in the light of the terms and conditions of the agreements, are lawful. But it has been assumed in this topic that the license agreements are bona fide agreements; whereas it is charged by the Government that they are not such but are sham and were entered into for illegal purposes. It has also been assumed in this topic that the agreements were carried out according to their terms, which have been held valid; whereas it is charged that the operations of the defendants actually went beyond the proper limits of a patent monopoly and licensing thereunder.

These two questions of fact are therefore left for decision: One, were the license agreements not entered into as bona fide agreements, but merely to give color of legality to a combination to restrain trade in violation of the Sherman Act; the other, were the actual operations of the defendants carried beyond the proper limits of a patent monopoly and licensing thereunder, *i.e.*, beyond the activities contemplated by the agreements as written and into the field denounced by the Sherman Act. But before determination of these two issues of fact can be made, a question relating
8767 to the burden of proof must be answered, comment must be made upon certain pertinent principles of proof, and the rule concerning the admissibility of declarations of alleged co-conspirators must be stated. And, preliminary to consideration of the two issues of fact, there must be determined, under the motions to strike declarations admitted in evidence subject to connection, whether there is evidence outside the declarations of the existence of the conspiracy charged and of the defendants' participation therein.

III

The Burden of Proof; Principles of Proof; the Rule Concerning Admissibility of Declarations of Alleged Co-Conspirators

The burden of proof: As has been stated at the outset of this opinion, the Government's complaint in paragraph 44 charges, in the language of the statute, violations of Sections 1, 2 and 3 of the Sherman Act; and in paragraph 45 these charges are amplified by allegations that the defendants have combined to fix arbitrary and non-competitive prices for the sale of gypsum products both patented and unpatented, to standardize the products which they manu-

factured, to control distribution of such products, and to require manufacturing distributors, upon resale of products purchased from the defendants, to conform to arbitrary and non-competitive prices. The complaint then alleges in paragraph 46 that the combination was entered into and carried out by the defendants in part under the guise of license agreements purporting to relate to the use of patents owned by the defendant USG in the manufacture of gypsum board; that to give color of legality to the combination, the defendant companies and other companies agreed among themselves to enter into, and did enter into, these license agreements; that such agreements are not bona fide patent license agreements reasonably designed to secure to USG the pecuniary reward for valid patent monopolies, but were entered into and executed for the illegal purposes described in paragraphs 44 and 45 of the complaint. Paragraphs 44, 45 and 46 of the complaint are set out verbatim in the description of the charges at the outset of this opinion.

The defendants USG, Avery and Knode, in paragraph 35 of their answer, respond to paragraph 46 of the complaint by denying each and all of the averments thereof. Then, "further answering," they aver that USG developed improvements in the manufacture of gypsum products and that it owns numerous patents covering its inventions; that it acquired a legal monopoly in the manufacture, use and sale of products embodying the inventions of its patents, and that it determined to share that monopoly and to grant licenses to the end that the gypsum industry and the public might benefit; and that as a condition in said licenses, USG reserved the right to establish minimum prices. The
8768 right so reserved to USG was, so it is further averred, designed to and did protect its patent rights and was a lawful restriction under the patent laws and the decisions of the Supreme Court; the license agreements, it is alleged, involved basic patents and were in law and in fact bona fide agreements reasonably designed to secure to USG the pecuniary reward for its valid patent monopolies to which it was entitled. The full text of this paragraph 35 of the answer of USG, Avery and Knode is set forth in the margin.[29] The answers of National and Baker, of Ebsary

29 "35. Deny each and all of the averments contained in Paragraph 46 of the Complaint and, further answering, these defendants aver that through extensive research work carried on by the expenditure each year of substantial sums of money, the defendant, United States Gypsum Company, developed extensive improvements in the art of manufacturing gypsum products and in the character and quality of such products and acquired and now owns numer-

(*Continued*)

and Fred Ebsary, and of Newark and Tomkins deny the allegations of paragraph 46 of the complaint. The defendants Certain-teed and Hartley deny the allegations of paragraph 46, except that these defendants admit that the licenses referred to in paragraphs 76, 85, 113 and 117 of the complaint were executed between USG and Certain-teed;[30] they deny that the license agreements were made for any purpose described in paragraphs 44, 45 and 46 of the complaint, and aver that each agreement was voluntarily made for the lawful purpose of enabling Certain-teed to make, sell and distribute gypsum products covered by USG patents. The defendants Celotex and Dahlberg deny the allegations of paragraph 46 of the complaint; further answering, these defendants aver that Celotex was organized in 1935 and did not until 1937 engage in the gypsum business directly or indirectly, that in 1937 and 1938 it acquired a minority stock interest in Certain-teed and thereafter began selling gypsum products manufactured in plants of Certain-
8769 teed, that in 1939 Celotex acquired the assets of American, including the license agreement between USG and American, and that upon advice of counsel Celotex assumed the obligations of that license agreement and has ever since observed its terms. Texas denies the allega-

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ous United States Letters Patent covering its inventions and improvements embodied in said gypsum products and in their manufacture, particularly with regard to gypsum board. Further answering, these defendants aver that, in accordance with the patent laws of the United States, the defendant, United States Gypsum Company, acquired a legal monopoly in the manufacture, sale and use of such gypsum products embodying the inventions and improvements set forth and claimed in its said patents and that, after due deliberation, said defendant determined to share its said monopoly with other manufacturers of gypsum board through the granting of licenses to manufacture and sell gypsum board embodying the inventions and improvements set forth and claimed in said defendant's patents, to the end that the gypsum industry and the public generally might benefit through the production and enjoyment of a superior product they could not otherwise have produced or had, and, as a condition in said licenses and for the reasonable and appropriate protection of the patent rights which it had acquired, the defendant, United States Gypsum Company, reserved the right to establish the minimum prices at which its licensees might sell the patented products so manufactured by them, pursuant to the terms of the license agreement. These defendants further aver that the right so reserved to defendant, United States Gypsum Company, was designed to and did protect said defendant's patent rights and was an entirely proper and legal restriction within the purview of the patent laws and the decisions of the Supreme Court of the United States; that the said license agreements involved basic patents in the manufacture of gypsum board and were, in law and in fact, bona fide license agreements, reasonably designed to secure to the defendant, United States Gypsum Company, the pecuniary reward for its valid patent monopolies to which it was entitled."

30 These are the paragraphs of the complaint which allege the execution by USG and Certain-teed of the May 1929, November 1929, metallized board, and perforated lath license agreements.

tions of paragraph 46 of the complaint; further answering, Texas alleges that it made license agreements with USG in good faith and in the belief that USG had basic patents, that all of the agreements were made in due course of business and for legal purposes, and in order to permit Texas to make gypsum products, and that, relying upon the validity of the patents and the legality of the agreements, Texas expended large sums in plant equipment.

It is the contention of the Government that in this state of the pleadings the burden is upon the defendants, by way of confession and avoidance, to justify under the patent licenses the restraints of trade described in the complaint. The Government relies, in this contention, so far as the effect of the pleadings is concerned, upon the *Motion Picture Patents* case, stated in another connection in topic II of this opinion; and, so far as the bearing of the substantive law is concerned, upon the *Masonite* case, also referred to in topic II, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), *rehearing denied*, 310 U. S. 658 (1940), and *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944). The defendants assert that the burden of proving lack of bona fides in the license agreements is upon the Government.

The foregoing is, however, for the purpose of consideration of the contentions concerning burden of proof, an insufficient description of the pleadings of the Government in respect of the patent license agreements. Not only has the Government in paragraph 46 of the complaint set up the execution of such agreements and charged them not to be bona fide, but also in subsequent paragraphs of the complaint it has in detail alleged the circumstances leading up to the execution of the license agreements, and has set forth in detail the manner in which it claims that they were carried beyond the normal limits of a patent monopoly. These allegations have been outlined at the outset of this opinion. Particular reference may here be made, however, to the following paragraphs of the complaint: Paragraph 77 charges that at the time of the execution of the May 1929 licenses USG and its licensees, among other things, mutually agreed that they would immediately discontinue the manufacture of unpatented open-edge board and dispose of inventories of the same at prices to be fixed by USG, agreed that USG would immediately furnish and stabilize prices for board, agreed that as prices for board were raised all companies would increase their prices for plaster and miscellaneous gypsum products, and agreed that the prices

for board manufactured by the licensees would be
8770 controlled, through the use of other patents, by USG after the expiration of the Utzman patent in August 1929. Paragraph 86 alleges that for many years prior to 1929 the licensees, except Ebsary and Kelley, had been using adhesives in the manufacture of board to increase adhesion between the core and liners, and that the licensees, in addition to the agreements contained in the licenses of November 1929, mutually agreed among themselves and with USG to consider such use of adhesives as falling within the scope of the Hite and Haggerty patents for the purpose of permitting price control by USG during the life of said patents; and that Ebsary and Kelley agreed to commence using adhesives for the same purpose. Paragraph 93 alleges that USG and its licensees have by concerted action sought to standardize the manufacture of gypsum board and have refrained from manufacturing and marketing open-edge board and other board not within the agreed upon scope of the patents involved in the license agreements, and that National was induced, by USG and the other licensees, in 1934 and 1935, to refrain from marketing a new light weight board until the other licensees were equipped to make and market a similar board. Paragraph 95 alleges that USG and its licensees, for the purpose of eliminating distribution of gypsum products through jobbers, agreed among themselves to sell gypsum board to jobbers at no less than the minimum prices set by USG for sale of board to dealers and to sell plaster and miscellaneous gypsum products to jobbers at no less than the prevailing minimum prices to dealers for such products, and that this agreement was carried into effect. Paragraphs 96-102 charge that the licenses were used to fix the price of unpatented board in that prices were fixed on unpatented open-edge board, on closed-edge board manufactured and sold during the period from August 6 to November 5, 1929, when USG owned no patents covering such board, that prices were fixed under the Haggerty and Hite starch patents from November 1929 to October 1935, although none of the licensees, except Universal, was manufacturing board under those patents, and that prices were fixed after October 1935 under the Roos foam patents notwithstanding that a substantial part of the board produced by various of the licensees was not covered by the patents issued upon the foam process. Paragraph 103 asserts that beginning in May 1929 USG and its licensees concertedly raised and stabilized the prices of plaster and miscellaneous gypsum products and agreed to sell, and have sold, such

products on the basis of various of the terms and conditions prescribed by USG for the sale of gypsum board. Paragraph 108 alleges that since 1929 USG and its licensees have by concerted action induced and coerced manufacturing distributors purchasing gypsum board from them to resell such board to dealers and consumers at bulletin prices determined and fixed by USG for sales of board by its licensees to such trade. All of these paragraphs of the
8771 complaint are in aid of the allegations of paragraph 46 as well as of paragraphs 44 and 45.

In this condition of the pleadings, it would be extraordinary to place the burden of proof in respect of the bona fides of, and the propriety of operations under, the patent license agreements upon the defendants, in the absence of some clear requirement of adjective or substantive law. To place the burden as urged by the Government would be, in effect, to strip the Government's complaint of all of its allegations in respect of the patent license agreements, to eliminate from the complaint paragraph 46, and the other paragraphs which supplement the same, alleging the execution and the manner of applying the license agreements. All of these allegations would thus be treated as surplusage and the Government's case would be left resting in the large upon the contents of paragraphs 44 and 45. Where the Government has pitched its case as carefully and elaborately as it has upon violation of the Sherman Act through the execution of patent license agreements not bona fide, and not designed to secure to USG the pecuniary reward for valid patent monopolies, but executed only for illegal purposes, and where the Government has set forth in such detail as it has the manner of accomplishment, through misuse of patent license agreements, of these illegal purposes, it ought to be required to prove the case it has thus alleged unless, as said, there is some clear rule of adjective or substantive law which relieves it of this burden.

None of the cases relied upon by the Government, *Motion Picture Patents, Masonite, Socony-Vacuum* and *Bausch & Lomb,* supports its contention concerning the burden of proof on the issue in question. In the *Motion Picture Patents* case the court introduced its discussion of the effect of the patents there involved by saying: "The next branch of the defense which presents itself for analysis and discussion is that based upon the patent rights of the Motion Picture Patents Company. The plea is, in legal effect and in practical acknowledgment, one in confession and avoidance, for

there is, as already stated, a substantial (although not formal) admission that, with this patent right ownership out of the case, plaintiff should have the relief prayed." (225 Fed. at 803.) But the pleadings are not set out in the opinion of the court; therefore, it cannot be determined whether or not the complaint, as in the instant case, charged that the restraints of trade alleged were accomplished through the misuse of patent license agreements. For all that appears on the face of the opinion, there may have been no mention of patents in the complaint; the defendants may without contest have assumed the burden of justifying their acts under patents. It does not appear that any question was raised as to the burden of proof in respect of patent rights. The case is, therefore, inconclusive. There is, moreover,

conclusive authority to the contrary: Where an in-
8772 dictment under the Sherman Act charges a conspiracy in restraint of trade, and monopolization, by a company, its officers and agents, and alleges patents covering products manufactured and sold, the indictment must also negative that the trade and commerce was covered by the patents. *Patterson* v. *United States,* 222 Fed. 599 (C. C. A. 6th, 1915), *cert. denied,* 238 U. S. 635 (1915). Demurrers to three counts of the indictment in that case were overruled by the trial judge. On appeal after trial and conviction the Circuit Court of Appeals found certain errors in exclusion of evidence and in instructions to the jury in respect of the first count, and held that demurrers should have been sustained as to the second and third counts. With respect to the third count, the court said:

"* * * The indictment, having thus charged that the National [Cash Register] Company had patents covering the cash registers made and sold by it, should have negatived that the trade and commerce which it so secured and held onto was covered by those patents. In the first count it is alleged that defendants' conduct therein complained of was not "justified or warranted by any letters patent"; but it was not meant thereby to charge that the trade and commerce affected by the conspiracy complained of therein was not covered by the National Company's patents, for it is the position of the government that the defendants were not justified or warranted by those patents in protecting the rights so secured in that way. It is charged in the first count that at the beginning of the 20 years the National Company did 80 per cent. of the manufacturing of cash registers. This of itself was a practical monopoly. It is not

alleged that it had been secured by wrongful acts. Presumably it was entitled to it under its patents. It is true that it is alleged that long before the 3 years preceding the finding of the indictment most of the basic patents and many of the improvements had expired. But this concedes that some of the basic patents were then still unexpired at the beginning of the 3 years, and it is consistent with the fact that such was the case as to a great number of improvement patents. Everything, therefore, which the count alleges, may be true, and yet the National Company have been entitled to hold onto the business which it had so secured, in which case its conduct in so doing could not have been monopolizing. [222 Fed. at 625.]

It would follow from this ruling that the burden of proof, upon an allegation negativing that the trade and commerce charged to have been restrained was covered by the patents, must have been upon the Government, since it is elementary that a pleader must prove those allegations which are essential to his complaint. In *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188 (1933), the Grain Company, a broker, sued Dickson, a customer, for commissions and advances on contracts for purchases and sales of grain. Dickson answered that the contracts did not contemplate that any grain should actually be bought and sold or delivered in his behalf and were in consequence in violation of the Missouri Bucket Shop Law, having been executed in that state. This defense, like the assertion of the Government concerning the license agreements in the instant case, was, in effect, an allegation that the contracts were fictitious, *i.e.*, not bona fide contracts for purchases and sales. It was contended by the Grain Company that the burden was upon Dickson, who made this allegation, to prove it. The Court so held.

So far as the substantive law is concerned, the contention of the Government is that an agreement to fix prices on products in interstate commerce is *per se* a violation of the Sherman Act; and the Government appears to urge
8773 therefore that a complaint charging price fixing, as in paragraph 45 of the complaint in the instant case, states a cause of action; hence it is sufficient for the Government to prove the allegations of that cause, leaving the burden of justification under patents to the defendants. It is true that it is held in *United States* v. *Masonite Corp.*, *United States* v. *Socony-Vacuum Oil Co.*, and *United States* v. *Bausch & Lomb Co.*, cited by the Government, that price fixing, reasonable or unreasonable, is unlawful *per se*. But in the *Masonite* case, although the "hardwood" involved

was covered by patents owned by Masonite, the options of the other defendants to take patent licenses from Masonite were not exercised; the case therefore does not involve price fixing alleged to have resulted from the misuse of patent license agreements. Neither *United States* v. *Socony-Vacuum Oil Co.* nor *United States* v. *Bausch & Lomb Co.* involved patents at all. The *Bement* and *General Electric* cases, as has been demonstrated in topic II, hold that price fixing under patent license agreements is not an illegal restraint of trade, but a valid exercise of a patent monopoly so long as the terms and conditions of the agreements and the practice thereunder are limited to reasonably securing to the patentee the reward to which by virtue of the grant of the patent he is entitled. From these cases it is to be inferred that a complaint under the Sherman Act, alleging price fixing under patent license agreements, without more, would not state a cause of action. It would follow that proof of such allegations alone would not carry a plaintiff's case beyond a motion to dismiss. In view of the holding in the *Bement* and *General Electric* cases, it must be alleged, and therefore shown, in order to make out a case of violation of the Sherman Act, either that the patent license agreements were not bona fide, or that even if not sham agreements as executed, the operations under them were carried beyond the proper limits of a patent monopoly. The *Bement* and *General Electric* cases were decided upon the assumption that the license agreements were bona fide. The contention in those cases was that even under bona fide patent license contracts price fixing is not lawful, and the Court rejected that view. But obviously a case of unlawful price fixing would be made out under the Sherman Act if it were alleged and shown that the patent license agreements providing for price fixing were not bona fide, but were entered into only to give color of legality to the conduct of the parties. Patents would not sustain price fixing if not honestly used. Equity would regard the substance, not the form. It is clear that it is upon this theory that the Government's complaint was drawn. Having pitched its battle upon this ground, the Government ought to be required to fight it there. There is no clear requirement of law, in any of the cases cited by the Government, placing upon the defendants the burden of proving bona fides in execution and practice under the patent license agreements. The cases which
8774 directly pass upon such or similar questions are, as above demonstrated, to the contrary.

Authoritative texts lend no support to the contentions of the Government concerning burden of proof on the issue of bona fides in the license agreements. Stephen, *Digest of the Law of Evidence* (12th ed. 1936) Art. 100, under the sub-topic "He who asserts must prove," states that "Whoever in the course of a judicial proceeding first asserts that a fact exists or *does not exist*, must prove the existence or *non-existence* of such fact." (Italics supplied.) In Article 104, under the sub-topic "Burden of proof as to particular fact," it is said: "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proving the fact shall lie on any particular person; but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively." In 9 Wigmore, *Evidence* (3d ed. 1940) §§2485-6, the author points out that the determination of the propositions of persuasion which are assigned to a particular party in litigation as a prerequisite to the action of a court is made "first and broadly, by the *substantive law*, which fixes the groups of data that enter into legal relations and constitute rights and duties, and, secondly and more in detail, by the *laws of pleading and procedure*, which further group and subdivide these larger groups of data, and assign one or another sub-group to this or that party as prerequisites of the tribunal's action in his favor." Of course, as further pointed out by the author, "the groupings defined by the substantive law and the further subdivision by the law of pleading do not necessarily end the process of apportionment by law. It arises again *after trial begun* and during the stage of adducing evidence. Even within a single pleading there are instances in which the burden of proof (in the sense of a risk of non-persuasion) may be taken from the pleader desiring action and placed upon the opponent." Wigmore further points out that "The characteristic * * * of this burden of proof (in the sense of a risk of non-persuasion) in legal controversies is that the law divides the process into stages, and apportions definitely to each party the specific facts which will in turn fall to him as the prerequisites of obtaining action in his favor by the tribunal." There is no single principle or rule, according to Wigmore,

which will solve all cases and afford a general test for ascertaining the incidence of the risk of non-persuasion:

8775 It is often said that the burden is upon the *party having in form the affirmative allegation. But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove;* a common instance is that of a promisee alleging non-performance of a contract. [Italics supplied.]

It is sometimes said that it is upon the party *to whose case the fact is essential.* This is correct enough, but it merely advances the inquiry one step; we must then ask whether there is any general principle which determines to what party's case a fact is essential.

Still another consideration has often been advanced as a special test for solving a limited class of cases, *i.e.* the burden of proving a fact is said to be put on the *party who presumably has peculiar means of knowledge* enabling him to prove its falsity if it is false. This principle has received frequent application in modern statutes making it an offense to pursue a certain occupation without a State *license* or forbidding a certain act unless in personal circumstances justifying an *exception.*

But this consideration furnishes no universal working rule; if it did, then the plaintiff in an action for defamation charging him to be living in adultery should be required to prove that he is lawfully married. This consideration, after all, merely takes its place among other considerations of fairness and experience as a most important one to be kept in mind in apportioning the burden of proof in a specific case.

The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations. Thus, in most actions of *tort* there are many possible justifying circumstances—self-defence, leave and license, 'volenti non fit injuria,' and the like; but it would be both unfair and contrary to experience to assume that one of them was probably present, and to require the plaintiff to disprove the existence of each one of them; so that the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances, which would if they existed leave him without a claim, are put upon the defendant to prove. Nevertheless, in malicious prosecution, on the one hand, the facts as to the defendant's good faith and probable cause, which might otherwise

have been set down for the defendant to show in excuse (as the analogous facts in an action for defamation are reserved for a plea of privilege), are here put upon the plaintiff, who is required to prove their non-existence; because as a matter of experience and fairness this seems to be the wiser apportionment. So, on the other hand, in an action for defamation ("false words," in the old nomenclature), it might have been supposed on other analogies that to the plaintiff it would fall to prove the falsity of the defendant's utterance; yet as a matter of fairness, it has in fact been put upon the defendant to prove the truth of his utterance. • • •

There is, then, no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness. [9 Wigmore, *Evidence*, §2486.]

In 1 Jones, *Evidence in Civil Cases* (4th ed. 1938) § 180, it is stated:

• • • Some early text writers declared the burden of proof to be on the party who asserts the affirmative of the issue or question in dispute. "*Ei incumbit probatio qui dicit, non qui negat.*" (The burden of proof lies upon him who affirms, not him who denies.) However, later writers have questioned the accuracy of the rule, urging that the burden of proof does not depend upon the form of the proposition, but that the burden of proving any given claim or defense rests upon him who asserts it. To some extent, recognition is seemingly given to the former test in a few of the recent cases.

The authorities hold that whoever asserts a claim or defense which is negative in form or depends upon a negative has the burden of establishing the truth of the allegation. But this seems to be only another way of saying that he who affirms must prove; and in cases involving negative propositions the courts seem not to have regarded the form of the issue as material.[31]

31 *Dickson* v. *Uhlmann Grain Co.*, discussed above, is here cited.

The allegations of paragraph 46 of the Government's complaint concerning bona fides in the execution and use of the license agreements are in the form of a negative. This, as noted, will not necessarily relieve the pleader from the burden of proof. The Government does not specifically urge that the facts relating to the issue of bona fides are so
8776 peculiarly within the knowledge of the defendants as to require, as a matter of convenience and fairness, that they be produced by them. The Government could hardly urge this in the instant case, in view of the fact that it, as pointed out in topic I of this opinion, fully availed itself of Rules 43 (b) and 26 to 37 of the Federal Rules of Civil Procedure. As said, most of the Government's evidence came either from the lips of officers or employees of the defendants, or from documents obtained from their files. The officers and employees who testified gave no indication of reluctance to disclose any matters relevant under the issues.

In the course of its contentions with respect to burden of proof, the Government does assert that the burden is upon the defendants to show that in fact the board made by them and controlled by the license agreements was covered by the patents. This, however, is but a subsidiary aspect of the issue of bona fides advanced in paragraph 46, and the Government is not confronted with any undue obstacle, and has not claimed to be, in obtaining evidence on this subject from the defendants' files or officers or employees.

So far as the affirmative allegations of the answers of the defendants USG, Avery and Knode, Certain-teed and Hartley, Celotex and Dahlberg, and Texas are concerned, if the burden of proof on the issue of the bona fides of the patents is properly on the Government, as is herein held, these allegations may be treated as surplusage, or as denials in affirmative form, or as assertions in aid of the denials, which were expressed in the answers of each of these defendants, of the allegations of paragraph 46. "An allegation of fact that is material only as an indirect negative of something to be proved by the other party does not shift the burden of proof. *Starratt* v. *Mullen*, 148 Massachusetts, 570." Per Mr. Justice Holmes in *Javierre* v. *Central Altagracia*, 217 U. S. 502, 508 (1910).[32]

32 In aid of a more generalized argument on burden of proof the Government cites *United States* v. *Eastman Kodak Co.*, 226 Fed. 62 (W. D. N. Y. 1915), *appeal dismissed*, 255 U. S. 578 (1921), and *United States* v. *United States Steel Corp.*, 223 Fed. 55 (D. N. J. 1915), *affirmed*, 251 U. S. 417 (1920). In the first of those cases it was undisputed that the Eastman Kodak Company controlled from 75 to 80% of the entire interstate trade in cameras, film,

(*Continued*)

8777 The basis for injunctive relief under Section 4 of the Sherman Act must be definitely and satisfactorily proved by the Government. *United States* v. *Aluminum Co. of America*, 44 F. Supp. 97, 215 (S. D. N. Y. 1941), *reversed on other grounds*, 148 F. (2d) 416 (C. C. A. 2d, 1945). It has been repeatedly held in suits brought under this statute that there must be a definite factual showing of illegality in the conspiracy, combination, or monopoly charged. *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933); *Standard Oil Co.* v. *United States*, 283 U. S. 163, 179 (1931); *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918). We hold that this properly includes, in the instant case, the duty of proof, by the Government, of the allegations of paragraph 46 of the complaint as well as of all other allegations of the complaint which are in aid of said paragraph.

Principles of proof: In determining questions of fact a trier of facts (whether jury, court or commission) properly takes two steps: One, determination, from consideration of the evidence, of the underlying or subsidiary (sometimes referred to as the basic) facts; the other, determination from

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plates and photographic paper, and had accordingly secured a monopoly. District Judge Hazel held that under these circumstances the burden rested upon the defendants to prove that this was accomplished by lawful methods—normal processes of growth, mere acquisition of property, or superior merit of products. In *United States* v. *United States Steel Corp.*, Circuit Judge Buffington, speaking for the District Court, ruled that the vast size of the Steel Corporation, the influence and control incident to such size, and the seeming power of the Corporation to crush and its ability to absorb business through its systemized organization, were all factors so associated with monopoly to restrain trade and crush out competition "that we may say that, standing alone as a mere isolated fact, this great company gives one such an impression of monopoly that we feel we may in this inquiry place the burden upon it and its formers to satisfy us by affirmative proof that monopoly was not the purpose for which it was formed, but that it was the normal, regular, and natural outcome of the improvement in steel making, and its concentrated powers were only such as were deemed to be necessary to successful producing and marketing its product." (223 Fed. at 121.) But when the *Steel Corporation* case reached the United States Supreme Court, that tribunal ruled that "we must adhere to the law and the law does not make mere size an offense or the existence of unexerted power an offense." (251 U. S. at 451) In *United States* v. *International Harvester Co.*, 274 U. S. 693, 708 (1927), the Supreme Court ruled that "The law, however, does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its powers. *United States* v. *Steel Corporation*, 251 U. S. 417, 451." Again in *United States* v. *Swift & Co.*, 286 U. S. 106, 116 (1932), the Court said "Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly (*United States* v. *United States Steel Corp.*, 251 U. S. 417; *United States* v. *International Harvester Co.*, 274 U. S. 693, 708), but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

such facts of the question whether the ultimate facts alleged have been established. And, under the system of law guaranteed by the Constitution, the subsidiary facts must be reached from the evidence and the ultimate facts from the subsidiary facts, not arbitrarily or by assumption or conjecture, or by a process contrary to reason, but according to reason. Inferences must be reasoned inferences, otherwise a case is not decided according to law. Certain principles have been recognized by the courts with reference to the dependability of inferences. They safeguard the integrity of ultimate facts arrived at by inference. These principles, authoritative guides to every trier of fact, whether jury, court or commission, are the following:

(1) An inference to be reasonable must be warranted from all the evidence, otherwise a fact reasonably inferable from a single fact or group of facts might be inconsistent with the totality of proven or conceded subsidiary facts. As said in *National Labor Relations Board* v. *Union Pacific Stages*, 99 F. (2d) 153, 177 (C. C. A. 9th, 1938), where the court interpreted the meaning of Section 10 (e) of
8778 the National Labor Relations Act, providing that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive": "But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence." In short, a trier of fact may not ignore a part of the evidence. *National Labor Relations Board* v. *Thompson Products*, 97 F. (2d) 13, 15 (C. C. A. 6th, 1938), the court said in respect of Section 10 (e) of the Act: "It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction. • • • Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought."

(2) If two equally probable but inconsistent inferences may be drawn from the same facts, a finding of fact cannot reasonably be based upon either of them; in such a situation the evidence is equivocal. *Pennsylvania R. Co.* v. *Chamberlain*, cited in topic I of this opinion. In that case the Court said: "We, therefore, have a case be-

longing to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. [Citing authorities.]" (288 U. S. at 339) *Cf. Cupples Co. Manufacturers* v. *National Labor Relations Board,* 106 F. (2d) 100 (C. C. A. 8th, 1939).

(3) Where two different inferences may be drawn from undisputed facts, that which is the more probable is the one which must be drawn. *National Labor Relations Board* v. *Sands Mfg. Co.,* 306 U. S. 332 (1939); *Appalachian Electric Power Co.* v. *National Labor Relations Board,* 93 F. (2d) 985 (C. C. A. 4th, 1938).

(4) A fact may not be inferred from a proven fact or facts where unimpeached and uncontradicted testimony consistent with such proven fact or facts but inconsistent with the fact sought to be inferred, is in the record. *Pennsylvania R. Co.* v. *Chamberlain; Cupples Co. Manufacturers* v. *National Labor Relations Board; Foote Bros. Gear & Mach. Corp.* v. *National Labor Relations Board,* 114 F. (2d) 611 (C. C. A. 7th, 1940), *reversed per curiam on other grounds,* 311 U. S. 620 (1940). This proposition was phrased as follows in the *Pennsylvania Railroad* case: "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not per-
8779 missible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. * * * A rebuttable inference of fact, as said by the court in the *Wabash Railroad* case [141 Fed. 932, 935 (C. C. A. 8th, 1905)], 'must necessarily yield to credible evidence of the actual occurrence.' And, as stated by the court in *George* v. *Missouri Pac. R. Co.* * * * [213 Mo. App. 668, 674, 251 S. W. 729, 732 (1923)], 'It is well settled that where plaintiff's case is based upon an inference or inferences, * * * the case must fail upon proof of undisputed facts inconsistent with such inferences.'" (288 U. S. at 340-1.) In the *Cupples Co. Manufacturers* case the court stated: "evidence which merely furnishes grounds for suspicion and conjecture proves nothing, and * * * the

Board, like a jury, may not disregard the uncontradicted testimony of unimpeached and credible witnesses." (106 F. (2d) 105.) In the *Foote Bros. Gear & Mach. Corp.* case the court said: "In reaching our conclusion we wish to make it clear that * * * (c) A statement which alone may afford substantial support for a fact finding may lose its weight entirely in the face of uncontradicted facts inconsistent with it." (114 F. (2d) at 622.)

In short the rules of logic and reasoning which are necessary to the accomplishment of the type of adjudication guaranteed under our system of law must be applied by every trier of fact in reaching findings. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (1938); *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4th, 1938); *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 98 F. (2d) 406 (C. C. A. 5th, 1938), *rehearing denied*, 98 F. (2d) 870 (1938); *Cupples Co. Manufacturers* v. *National Labor Relations Board*; *Magnolia Petroleum Co.* v. *National Labor Relations Board*, 112 F. (2d) 545 (C. C. A. 5th, 1940).

By substantial evidence is meant more than a mere scintilla; it must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *National Labor Relations Board* v. *Columbian Co.*, 306 U. S. 292, 300 (1939); *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229 (1938); *Gunning* v. *Cooley*, 281 U. S. 90, 94 (1930); *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. (2d) 985, 989 (C. C. A. 4th, 1938). In the Federal courts substantial evidence rather than a mere scintilla is necessary to support a judgment. *Pennsylvania R. Co.* v. *Chamberlain*, *supra*; *Jackson* v. *Capital Transit Co.* and *Hopkins* v. *Baltimore & Ohio R. Co.*, both cited in topic I of this opinion.

The evidence offered by the Government in the instant case is mostly circumstantial and the subsidiary facts in the case are largely not in dispute; it is in respect of
8780 the meaning of these facts, of the inferences to be drawn from them, that the parties are in contest. Hence the principles above stated are to be borne in mind in considering and determining the issues of fact in the case.

Certain other principles relating to proof of such charges as are involved in the instant case should be stated: A conspiracy is a partnership in the accomplishment of an un-

lawful thing, or of a lawful thing by unlawful means. *Duplex Co.* v. *Deering*, 254 U. S. 443, 465 (1921); *United States* v. *Kissel*, 218 U. S. 601, 608 (1910); *Patterson* v. *United States*, 222 Fed. 599, 630-1 (C. C. A. 6th, 1915), *cert. denied*, 283 U. S. 635 (1915). Under the Sherman Act a conspiracy need not involve an overt act, although the commission of such an act or acts may tend to characterize a conspiracy in respect of time and place. The "Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability." *Nash* v. *United States*, 229 U. S. 373, 378 (1913). *Cf. United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224-6 (1940), *rehearing denied*, 310 U. S. 658 (1940). A conspiracy may be proved by circumstantial evidence. *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600, 612 (1914); *Baush Machine Tool Co.* v. *Aluminum Co. of America*, 72 F. (2d) 236, 241 (C. C. A. 2d, 1934), *cert. denied*, 293 U. S. 589 (1934). As stated in the latter case "Conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done and from the circumstances." Evidence as to conspiracy is, of course, to be considered as a whole—not piecemeal. Although separate acts of alleged conspirators may, when viewed alone, seem innocent, they may, when looked at as parts of a general scheme, take on an illegal aspect. *United States* v. *Reading Co.*, 226 U. S. 324, 357 (1912), *modification*, not affecting this holding, 228 U. S. 158 (1913); *United States* v. *Patten*, 226 U. S. 525, 544 (1913).

The rule concerning admissibility of declarations of alleged co-conspirators: Much of the testimony introduced by the Government in this case, and most of the exhibits, consist of declarations of alleged co-conspirators. It is necessary therefore to bear in mind the rules concerning admissibility of such declarations. Ordinarily the law holds a person liable only by reason of his own acts or utterances. But where two or more persons act in concert, with a common purpose, the acts and declarations of one during the existence, and in pursuance, of the conspiracy, are held in law to be the acts and utterances of the others. As said in *Connecticut Mutual Life Ins. Co.* v. *Hillmon*, 188 U. S. 208, 218 (1903), "'every act and declaration of each member of the conspiracy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is
8781 therefore original evidence against each of them."

But upon the application of this rule there are definite limitations which flow from its foundation, to wit, one person may be held liable for the acts and utterances of another *if the two are acting in concert and to a common purpose.* In order to render admissible as against one member of an alleged conspiracy the acts or declarations of another, the *existence of the conspiracy charged and the connection of the conspirators with it must be shown independently.* It is also necessary that the acts and declarations shall have some relation to the execution of the common purpose; declarations must be more than mere narratives. In *Winchester & Partridge Mfg. Co.* v. *Creary,* 116 U. S. 161, 166 (1885), a common purpose to defraud other creditors of a vendor by a sale of property was charged against the vendor and a vendee-creditor. The jury was permitted to consider, as against the vendee, declarations of the vendor, made after the sale, as to its true character. The Supreme Court held this error, saying: "it is sufficient to say that such declarations are not admissible against the vendee, unless the alleged common purpose to defraud is first established by independent evidence, and unless they have such relation to the execution of that purpose that they fairly constitute a part of the *res gestae.*" In *Thomas* v. *United States,* 57 F. (2d) 1039, 1041-2 (C. C. A. 10th, 1932), the limitations were described thus:

To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established. Pope v. United States (C. C. A. 3) 289 F. 312, 315; Kelton v. United States (C. C. A. 3) 294 F. 491, 495; Isenhouer v. United States (C. C. A. 8) 256 F. 842; United States v. Goldberg, 7 Biss. 175, Fed. Cas. No. 15,223; United States v. McKee, 3 Dill. 551, Fed. Cas. No. 15,686; Burns v. United States (C. C. A. 8) 279 F. 982, 986; Dolan v. United States (C. C. A. 9) 123 F. 52; Stager v. United States (C. C. A.) 233 F. 510.

Declarations made by one conspirator to another are not competent evidence to establish the connection of a third person with the conspiracy. Kuhn v. United States (C. C. A. 9) 26 F. (2d) 463; United States v. McKee, supra.

The existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirator done or made in his absence. Hauger v. United States (C. C. A. 4) 173 F. 54, 57; United States v. Richards (D. C. Neb.) 149

F. 443; United States v. Goldberg, supra; United States v. McKee, supra.

In *Stager* v. *United States*, 233 Fed. 510, 513 (C. C. A. 2d, 1916), the court said:

"* * * When a conspiracy is once established acts and admissions of any one of the conspirators in pursuance of the conspiracy, and while it continues, are admissible against the others, upon the theory that the conspirators are agents for one another in the common enterprise. Connecticut Mutual Life Insurance Co. v. Hillmon, 188 U. S. at page 218, 23 Sup. Ct. 294, 47 L. Ed. 446. But the preliminary question whether sufficient evidence of a conspiracy has been adduced must always be answered by the court in the affirmative or the general rule of evidence excluding hearsay will render an admission of one of the conspirators inadmissible against the others. * * *

In *Mayola* v. *United States*, 71 F. (2d) 65, 67 (C. C. A. 9th, 1934), the court ruled that the declarations of one coconspirator to another are not competent to establish the connection of a third person with the conspiracy. It quoted from *Nibbelink* v. *United States*, 66 F. (2d) 178, 179
8782 (C. C. A. 6th, 1933), as follows: "'* * * Before the declarations of coconspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made.'" To the same effect see *United States* v. *Renda*, 56 F. (2d) 601 (C. C. A. 2d, 1932). In *Logan* v. *United States*, 144 U. S. 263, 309 (1892), the Supreme Court expressly ruled against the use of declarations concerning past events, saying that "the defendants on trial could not be affected by the admissions made by others of the alleged conspirators after the conspiracy had ended" since such declarations "were not in execution or furtherance of the conspiracy, but were mere narratives of a past fact." See also *Harrington* v. *United States*, 267 Fed. 97 (C. C. A. 8th, 1920); *Oras* v. *United States*, 67 F. (2d) 463 (C. C. A. 9th, 1933).

Declarations are, strictly, hearsay, being made out of court and without the sanction of an oath, but are received in evidence as in the nature of admissions of a party. They may, of course, in some instances be verbal parts of an act which is itself material and relevant in a case, and in such event admissible as original evidence. Hughes, *Evidence* (1907) Ch. XVII, §6. "If a declaration has its force by it-

self, as an abstract statement, detached from any particular fact in question, depending for its effect on the credit of the person making it, it is not admissible in evidence. * * * But when the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. * * * Such a declaration derives credit and importance as forming a part of the transaction itself." The quotation is from Justice Fletcher, in *Lund* v. *Tyngsborough*, 9 Cush. 36, 42 (Mass. 1851). But the acts and explanatory declarations of one alleged co-conspirator would be admissible as against others only subject to the limitations above expressed.

State v. *Trocchio*, 121 Me. 368, 117 Atl. 460 (1922), is urged by the Government as rejecting the limitation that declarations of one alleged co-conspirator are not admissible against others until there has been independently proved the existence of the conspiracy and the participation of the others therein. In that case, involving a conspiracy to kill, exceptions were taken to the admission as against one defendant (Philomena Trocchio) of letters and confessions of others. The court said:

* * "The defendant, Philomena, however, strongly protests that the letters and confessions were not admissible as tending to prove participation in the conspiracy on her part, inasmuch as a conspiracy must first be established before the acts or words of alleged co-conspirators can become admissible.

8783 We do not understand the rule of the admission of testimony, in proof of a conspiracy, to be as limited as above stated and claimed. We think the true rule, as shown by ample authority is, that the acts and words of all parties alleged to be participants in the conspiracy, as well as all other testimony, are admissible in the discretion of the court, for the purpose of proving the fact of a conspiracy, but are not to be taken into consideration against any one of the parties concerned, until, from the evidence thus admitted, the fact of a conspiracy is proved; after which the acts and words of each co-conspirator, whenever done or whenever said, in furtherance of the common purpose are admissible against all the alleged conspirators, upon the ground that the act of one is the act of all. [121 Me. at 375, 117 Atl. at 462.]

Reading of the entire opinion in that case, however, indicates that what was really in the mind of the court in its ruling was the order of evidence. The court states, for example, that it is claimed by the defendant Philomena Trocchio that none of the evidence disclosed by the letters between her daughter Elizabeth and Nick Vetrano (the other defendant), or their confessions, were admissible against her until a conspiracy in which she was a participant was proved. In respect of this the court said: "Such is the general rule, but the exceptions are so numerous that in nearly all the jurisdictions of this country *the order of introducing all testimony* upon conspiracy charges, is left to the discretion of the presiding Justice." (Italics supplied.) (121 Me. at 378, 117 Atl. at 463-4) *Spies* v. *The People*, 122 Ill. 1, 238-9, 12 N. E. 865, 980, 17 N. E. 898 (1887), *petition for writ of error dismissed*, 123 U. S. 131 (1887), cited by the Government also relates to the order in which evidence is received, within the discretion of a trial court, in a conspiracy case. It is, of course, true that a trial judge may in his discretion receive evidence concerning declarations of alleged co-conspirators prior to proof of the existence of the conspiracy and of the participation of the other defendants therein, subject to a promise, by the party offering the declarations, of ultimate independent proof of the conspiracy and the connection of the defendants therewith. Such order of proof was permitted in the instant case.

The Government asserts that the law requires slight evidence only of connection of an alleged conspirator with the conspiracy, citing *Galatas* v. *United States*, 80 F. (2d) 15 (C. C. A. 8th, 1935), *cert. denied*, 297 U. S. 711 (1936); *Van Riper* v. *United States*, 13 F. (2d) 961, 967 (C. C. A. 2d, 1926), *cert. denied sub nom. Ackerson* v. *United States*, 273 U. S. 702 (1926); *Roberts* v. *United States*, 248 Fed. 873, 880 (C. C. A. 9th, 1918), *cert. denied*, 247 U. S. 522 (1918); and *Gernert* v. *United States*, 240 Fed. 403 (C. C. A. 9th, 1917). In the *Gernert* case the evidence was not slight. In the *Van Riper* case it is held that there is no requirement that each of several co-conspirators be shown to have had an *equal* part in forming and carrying out the conspiracy. It is added that if it be shown that he subsequently adopted the conspiracy with knowledge of its design and purpose, declarations may be admissible against a conspirator, even though he had nothing to do with the conspiracy at its inception. This is the ruling in the *Roberts* case, the

8784 court there making the qualification, however, that the adoption of the conspiracy must be in its original design and purpose. In *Galatas* v. *United States*, it is said that where a conspiracy is established "but slight evidence connecting a defendant therewith may still be substantial, and if so, sufficient." (80 F. (2d) at 224.) But none of these cases indicates that the "slight evidence" which may be sufficient to connect a defendant with a conspiracy, or to show that he adopted it, can be insubstantial. *Wilson* v. *United States*, 190 Fed. 427, 438 (C. C. A. 2d, 1911), *affirmed*, 221 U. S. 361 (1911), is cited as holding that a party may be connected with a conspiracy by evidence which if standing alone would be insufficient to establish the existence of the conspiracy. But the case does not hold that the connecting evidence may itself be insubstantial.[33]

The Government also relies upon *Cummings* v. *United States*, 15 F. (2d) 168 (C. C. A. 9th, 1926). That case involved a conspiracy to violate the National Prohibition Act. The defendants relied upon the proposition that the formation of a conspiracy could not be established "by declarations of the defendants." The court said that it was true that a declaration by a single defendant would not be competent as against the others or sufficient in itself to prove the conspiracy, but that if the defendants "each and all, though separately, admitted or declared the existence of the alleged conspiracy, such declarations would be competent, and, taken together with the conduct of the parties and other circumstances, might very well constitute the most convincing evidence." (15 F. (2d) at 169.) This case is cited in *Hoeppel* v. *United States*, 66 App. D. C. 71, 76, 85

33 The *Van Riper* case, above cited, contains a good statement of the rule concerning the admissibility of declarations in conspiracy cases: "Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime.' What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all. Hitchman C. & C. Co. v. Mitchell, 245 U. S. 229, 249, 38 S. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; Conn. Mut. L. Ins. Co. v. Hillmon, 188 U. S. 208, 23 S. Ct. 294, 47 L. Ed. 446. For this reason, merely narrative declarations are not competent. But it is also a part of the law of joint crimes that, when a party joins an existing group already so engaged, he assumes responsibility for all that has been done theretofore. Anonymous, 6 Mod. 43; People v. Mather, 4 Wend. (N. Y.) 229, 258, 259, 260, 21 Am. Dec. 122; Comm. v. Rogers, 181 Mass. 184, 194, 63 N. E. 421; 1 Russell on Crimes (8th Ed.) 190; 1 Bishop, New Criminal Law, §642. For this reason all that was done before he entered may be used against him, but obviously not what was done after he left, Logan v. U. S., 144 U. S. 263, 309, 12 S. Ct. 617, 36 L. Ed. 429; Brown v. U. S., 150 U. S. 93, 14 S. Ct. 37, 37 L. Ed. 1010." (13 F. (2d) at 967.)

F. (2d) 237, 242 (1936), *cert. denied,* 299 U. S. 557 (1936), *rehearing denied,* 299 U. S. 622 (1936). But neither the latter case nor *Cummings* v. *United States* alters the general rule with respect to the admissibility of declarations. In the *Cummings* case, a criminal case, the declarations were apparently separate *confessions,* not merely admissions of a party in the usual sense of those words in civil cases.

The Government cites *Hitchman Coal & Coke Co.*
8785 v. *Mitchell,* 245 U. S. 229, 249 (1917), wherein the Court says: "In order that the declarations and conduct of third parties may be admissible in such a [conspiracy] case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves." Cited also are *Van Riper* v. *United States, supra; Boyle* v. *United States,* 259 Fed. 803, 808 (C. C. A. 7th, 1919); *United States* v. *American Column & Lumber Co.,* 263 Fed. 147, 152 (W. D. Tenn. 1920), *affirmed,* 257 U. S. 377 (1921); but none of these cases discusses this aspect of the declarations rule. There is, moreover, a limitation upon the independent evidence requirement which the statement in the *Hitchman* case is not to be read as negating. The independent evidence which must be introduced by the Government before declarations of one co-conspirator can be used to bind another must prove *the very combination charged.* Declarations cannot be used to prove the common purpose, or to enlarge the scope of any common purpose which has been proved. Without this limitation, one person might be bound by the declarations of another disclosing an illegal undertaking quite different from an innocent transaction in which the two had been jointly engaged. This limitation is recognized in *United States* v. *Food and Grocery Bureau,* 43 F. Supp. 966 (S. D. Cal. 1942). That was a criminal prosecution for violation of Section 1 of the Sherman Act against the Food and Grocery Bureau and others, charging a conspiracy to stabilize retail prices of food and grocery products. The testimony for the Government showed that what started as an effort on the part of persons engaged in the food and grocery business to secure the enforcement of the Unfair Trade Practices Act of California gradually developed into a price fixing and stabilization scheme. Thus, the starting

point of the conspiracy dealt with a legal venture, *i.e.*, the association of various persons to assist in the enforcement of a law. Evidence consisting of declarations showed that the association departed from the original object and started illegally to fix prices. At the conclusion of the Government's case it moved to apply to all of the defendants evidence which had been received subject to later connection as to certain defendants. In denying this motion in respect of several defendants who were not shown, by independent proof, to have been parties to the unlawful part of the plan, the court said:

But unless the passage from the legal to this illegal object is brought home individually to the various defendants, mere membership in the Bureau, mere contributions toward its support, or the collection of the tax on milk by wholesalers from retailers for the use of the Bureau, are not sufficient to charge the individual members—be they persons or groups—with these acts.

Nor, assuming that the Secretary of the Bureau, the Bureau as a corporate entity, and the directors, who participated in its deliberations, knew of the activities, can this illegal object be charged to the organizations of which some of the directors were also members, unless it appear that the organization, *as such,* knew and sanc-
8786 tioned the acts of their representatives. Any other attitude would result in grave injustice. *Some of the defendant organizations are co-operatives—groups consisting of hundreds of petty tradesmen. It would be wholly unfair to charge this group with the actions of some of their officers in attempting to bind them to an illegal act, unless it be shown that the matter was brought up and explained at some meeting and that the nature of the activity was clearly understood by the membership. Our law abhors crime by association. To say that a hundred grocers, bound together in a cooperative, should be found guilty of the violation of a statute of the United States because one or two of their officers or directors were also on the Board of the Bureau, would be applying to criminal law the civil law of agency. This cannot and should not be done.*

* * * * *

I am of the view that the evidence does not show that any of these individual or group defendants, as to whom the motion is denied, *engaged in any scheme of price-fixing or joined others in carrying out an intention to fix retail prices in obstruction of interstate commerce.*

To amplify this further would require a repetition or application to each of these defendants of the legal norms discussed. This is unnecessary. I believe that the application of the principles to each of them is obvious. Either their part was insignificant, or there is no evidence of any knowledge on their part that anyone was doing aught but engage in a legal activity. There is no evidence that they participated in any act of an illegal nature, such as coercion, threats, intimidation, and the like, in carrying out the objects for which they may have associated themselves with the Food and Grocery Bureau, at its inception. *You cannot ground a conspiracy upon the doing of a lawful act, unless the means are unlawful.* The effort to support the Unfair Practices Act was not accomplished by any unlawful means, so far as these particular defendants are concerned. [Italics supplied.] [43 F. Supp. at 973.]

An effort to bind one party by the declarations of another merely because they had a contract which itself did not involve any common or joint undertaking was rejected in *Winchester & Partridge Mfg. Co.* v. *Creary, supra.*

IV

Evidence of Conspiracy Outside the Declarations

Under the limitation stated in topic III, unless there is evidence, outside the declarations, of the conspiracy charged, the declarations are binding only upon the declarant, not upon other members of the alleged conspiracy. The conspiracy charged in the complaint is a conspiracy to accomplish the restraints of trade alleged in paragraph 45 (*viz.*, the fixing of prices on gypsum board made and sold by the defendants, improper standardization of board, fixing of prices on unpatented materials, improper control of distribution of gypsum products, and fixing of the prices at which manufacturing distributors would resell gypsum board) by the execution, as alleged in paragraph 46, of patent license agreements which are not bona fide agreements intended to secure to USG the pecuniary reward of its patent monopoly, but which were entered into only to give color of legality to a combination to restrain trade as alleged.

The Government asserts that the conspiracy is proved by evidence, outside the declarations, to the effect that: (1) In 1927-1929 there was a price war in the gypsum industry; due to litigation and competition from open-edge board prices in some localities were as low as cost, and

for some manufacturers business was no longer profitable. (2) On May 21, 22 and 23, 1929, Avery, Henning and MacLeish (counsel), of USG; Reeb, of Niagara; Baker, of National; Kelley, of Kelley; Neale and Channing, of Atlantic; C. O. Brown and Whittemore, of Certain-teed; Holland, of Universal; and Ebsary, Lenci and Rippey (counsel), of Ebsary, met by previous arrangement in Chicago in relation to the possible settlement of the USG
8787 patent litigation and the issuance of licenses by USG.[34] Avery and MacLeish stated to the others

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34 Following is a list of the full names and the business or professional identity of all of the persons referred to in this opinion. Hereafter in the text for convenience surnames only will be used except where two persons have the same surnames, in which event given names or initials will be used for differentiation. In the following list the letter (W) after a name indicates that such person was a witness.

Avery, Sewell L., USG, Chairman of Board since 1936; President 1905-1936.

Baker, Melvin H., National, President.

Bayer, Erick Christian, Foreign Patentee.

Black, Arthur R. (W), Celotex, Supervisor of Sales since 1939; Sales Manager of American 1907-1939.

Blagden, Augustus G. (W), Beaver, President 1923-1928.

Brown, Claude Oliver (W), Certain-teed, Vice-president 1929-1937; General Sales Manager 1925-1929.

Brown, George M. (W), Certain-teed, Chairman of Board of 1936-1937; President 1904-1935.

Channing, M. M., Atlantic, Counsel.

Chism, H. E. (W), Texas, General Manager since 1937. Assistant to the General Manager 1922-1932.

Coffin, W. E., Certain-teed.

Dahlberg, Bror G. (W), Certain-teed, Chairman of Board since 1938. Celotex, President since 1921.

Diegel, Ed. H., Ebsary, General Sales Manager.

Ebsary, Frederick G., Ebsary, President.

Fuller, Willard P., Atlantic, President.

Gloyd, Samuel M., Texas.

Griswold, Frank J. (W), American, Vice-president and General Manager.

Haggerty, J. F., National, President.

Hansen, Emil (W), Paragon Plaster Co., President and Treasurer.

Hartley, Henry J., Certain-teed, President.

Henley, Warren, Certain-teed, Merchandise Manager.

Henning, C. F., USG, Vice-president in charge of sales.

Higgins, Charles A. (W), Quality Materials Co. since 1937; Central Sales Manager of National 1929-1937.

Hite, C., Universal, Research.

Holland, Eugene (W), Universal, President and General Manager and Co-Receiver.

Ingberg, S. H. (W), Bureau of Standards.

Kelley, Stephen J., Kelley, President.

Kellogg, Willard H., Jr. (W), Connecticut Adament Plaster Co., Secretary and Treasurer.

Kling, John A., American, Chairman of Board.

(*Continued*)

present that the *General Electric* decision sanctioned
8788 the granting of patent licenses containing provision for sale of the patented product at minimum prices to be fixed by the licensor, and explained the terms of the proposed licenses. Certain-teed, Ebsary and Niagara at this time signed their May 1929 licenses under the Utzman and other patents. National had signed its license on May 16. The first price bulletin under these licenses was then issued. Thereafter Avery explained the advantages of the Roos foam invention and suggested the taking of additional licenses under the patent for this. There were further representations during the summer of 1929 as to the advantages of the Roos foam invention, and of the Haggerty and Hite starch patents which were owned by Universal but were to be sold to USG. As evidence, outside the declarations, of the conspiracy charged, the Government relies also upon (3) the fact of execution of the 1926-1927, May 1929, November 1929, metallized board and perforated lath license agreements; and upon (4) the terms and provisions of these licenses. These terms are outlined in the statement of facts at the outset of this opinion and need not be repeated here.

These items do not prove the conspiracy charged because they do not show that the licenses were not bona fide or that they were executed to accomplish restraints outside

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Knode, Oliver M., USG, President.

Lenci, George N. (W), Ebsary, Vice-president.

MacLeish, John E., USG, Counsel.

McCormack, Harry G. (W), American Cyanamid Corp. since 1928; prior thereto, Assistant Sales Manager of Structural Gypsum Corp., and prior thereto with USG, National and American.

McCrady, J. H., American, President.

Miller, Frank M., Board Survey, Executive Secretary.

Neale, Laurence I. (W), Atlantic, Vice-president.

Nelson, Robert M. (W), Certain-teed, Vice-president and Treasurer.

Reeb, M. A., Niagara, President.

Rippey, Harlan W., Ebsary, Counsel.

Roos, Carlisle K., USG, Director of Research.

Spease, J. R. (W), Fairmont Wall Plaster Co.

Spencer, H. Dorsey (W), Certain-teed, Counsel.

Stromquist, Walter G. (W), Universal, Eastern Sales Manager.

Tomkins, Frederick (W), Newark, President. Calvin Tomkins Co., Vice-president. President of Kelley 1937-1939.

Utzman, Clarence W., USG, Inventor-Employee, Research.

Van Hagan, H. H., Certain-teed, Production Department.

Whittemore, Audenreid (W), Certain-teed, Executive Vice-president.

Williams, C. E., National.

the proper limits of a patent monopoly. The low prices in 1927-1929 may have been an inducement to the execution of licenses under which prices on patented board would be fixed by the licensor at presumably profitable levels, since the licensor was also a manufacturer; *non constat* that it was an inducement to execute non-bona fide licenses with intent to accomplish unlawful restraints of trade. The meeting, representations and negotiations mentioned prove nothing as to the alleged non-bona fide character of the licenses or as to the alleged illegal objectives thereof; nor does the fact of execution of the licenses, unless it be assumed, contrary to the holding in topic II, that a plurality of patent licenses is unlawful. The provisions of the licenses evidence nothing as to alleged non-bona fides of the licenses or as to their asserted illegality of purpose. As is shown in topic II similar provisions were approved in the *General Electric* case. That the fixing by USG of the minimum prices to be charged in sales of patented board by the licensees was provided for in the licenses is no evidence of wrongful purpose unless it is otherwise shown that the licenses were sham. The Government emphasizes the provisions for recognition of the validity of USG's patents, for the marking of seconds, for the payment of royalty on all board sold whether patented or not, and the "most favored nation" clause. Recognition of the validity of the patents is no evidence that the licenses were not executed bona fide; indeed, without more, it is evidence that they were. The provisions for marking seconds and for royalty are no
8789 evidence that the licenses were sham or that they were executed for the accomplishment of illegal objectives; the one was to avoid confusion between first grade and defective board; the other was a means of measuring the amount to be paid for the right of the licensees to use the patents. The "most favored nation" clause is no evidence that the licenses were not executed in good faith. Given a right to execute a plurality of licenses, a patentee may properly draft them with uniform terms and with such a provision against future discrimination by the licensor between the licensees.

The Government contends further that the actual operations of the defendants after the licenses were signed were carried beyond the proper limits of the patent monopoly, and that this shows that the licenses were executed with a wrongful intent—since it may be taken for granted that the manufacturing and sales activities were designed. But

there is no evidence to support this contention. It is demonstrated in topic VI of this opinion that the evidence fails to establish that there was resale price fixing, improper control of distribution, fixing of prices on unpatented products, or improper standardization of gypsum board. The discussion of those topics will not be duplicated here. That USG did fix, by the issuance from time to time of bulletins, the minimum prices at which patented board should be sold, and that in the large the licensees conformed to these prices, is not in dispute. But to infer from this that the licenses were executed with a wrongful purpose is either to assume, rather than to prove, that they were sham, or to reason from a false premise, that is to say, from a premise that the fixing by a licensor under bona fide licenses of the minimum price on sales of the patented product is illegal. The *General Electric* decision holds that this is not illegal.

In considering the question whether there is evidence, outside the declarations, of the conspiracy charged, the court has taken into account the contention of the Government that the declarations may themselves be considered, as admissions, under the theory of *Cummings* v. *United States*, referred to in topic III. But, as pointed out there, the so-called separate "admissions" in that case were really confessions which admitted and declared the existence of the conspiracy. None of the declarations in the instant case constitutes a confession of the conspiracy charged.

It is concluded that there is no evidence, outside the declarations, of the conspiracy charged. The court now proceeds to consider, on the merits, the two principal questions of fact in the case, and in examining the evidence will regard the declarations as binding only upon the declarant.

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V

The Bona Fides of the Patent License Agreements

The first of the two questions of fact in the case is, as stated at the close of topic II: Were the license agreements entered into by the defendants not as bona fide patent license agreements but to give color of legality to a combination to restrain trade in violation of the Sherman Act? The execution of the license agreements, their terms, and the litigation out of which, in the large, they grew, have been described at the outset of this opinion. But further facts

connected with the execution and operation of the contracts must be alluded to in order that the conflicting contentions of the parties in respect of the questions of fact may be understood and resolved. It is to be borne in mind that although there are conflicting contentions, this is not a case of conflicting evidence in the usual sense of those words. All of the evidence before the court was introduced by the Government, none by the defendants. There was, of course, cross-examination by the defendants, and items of evidence thus elicited are in some part relied upon by the defendants; but those items are out of the mouths of the Government's witnesses, and their credibility is not assailed by either the Government or the defendants, except in the instance of one witness the dependability of whose testimony, in connection with the second issue of fact, is questioned by the defendants. Since many of the witnesses were officers of the defendant companies, the Government was free, under Rule 43 (b) of the Federal Rules of Civil Procedure, to interrogate them by leading questions, and it did so. Under the same rule the Government was free to contradict or impeach such witnesses. This it did not do. The conflicting contentions of the parties on the issues of fact in the case are not as to what the evidence is, or as to what are the basic facts shown by the evidence; the dispute is as to the inferences to be drawn from the basic facts and, therefore, as to what the ultimate facts are. *Cf. Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 68 App. D. C. 282, 287, 96 F. (2d) 554, 559 (1938); *cert. denied; sub. nom. Grass* v. *Saginaw Broadcasting Co.,* 305 U. S. 613 (1938).[35] Accordingly the principles set forth in topic III in respect of the drawing of inferences are to be regarded.

8791 It is to be noted that the first question of fact—were the license agreements entered into by the defendants not as bona fide license agreements but to give color of legality to a combination to restrain trade in violation of the Sherman Act—has two aspects: One, were the agreements executed as bona fide agreements, intended to

35 In that case it is pointed out that the process which a court or a commission properly follows in reaching a decision on the facts includes four parts: (1) Evidence must be taken and weighed both as to its accuracy and as to its credibility; (2) from consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of an applicable statute or principle of law, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow on the application of the statutory or judicially enunciated criterion.

bind each party to the premises made therein, or were they intended by the parties only as sham agreements to disguise illegal purposes; the other, were the agreements executed with intent to gain more than appears on their face—to gain objectives beyond the proper limits of a patent monopoly? Each of these two aspects of the question merges into the other. If the license agreements were intended not as binding, but only as sham, agreements, then in equity they would be contracts in form only, not in substance, and the parties to them would be without patent protection so far as price fixing is concerned, *i.e.*, USG would have no warrant to fix prices on sales of board by the licensees, or they to abide by prices so fixed; and if the agreements, even though executed as binding instruments and in that sense bona fide, were intended to gain more than appears on their face, to gain objectives beyond the proper limits of a patent monopoly, then they would, in a broad sense, not be bona fide; and if so intended, even if not so applied, the agreements would be illegal—because a Sherman Act conspiracy need not involve an overt act. Although the two aspects of the first question of fact do, as said, merge into each other, they will, for convenience, be discussed separately.

Were the license agreements executed as bona fide agreements intended to bind each party, or were they intended only as sham agreements to disguise illegal purposes? The evidence introduced by the Government fails to prove that the agreements were intended only as sham agreements to disguise illegal purposes; on the contrary it shows that they were executed bona fide.

All of the license agreements, except that of July 29, 1926, between USG and Beaver, and that of September 17, 1926, between USG and Universal, were executed after the decision in the *General Electric* case on November 23, 1926; and *Bement* v. *National Harrow Company* had long been decided (May 19, 1902) before the Beaver and Univeral agreements were signed. The terms and conditions of the licenses in the instant case are similar to those in the General Electric-Westinghouse license. This has been shown in topic II of this opinion. It thus appears that the license agreements in the instant case, except those executed in 1926 by Universal and Beaver, were patterned upon the *General Electric* decision and the license agreements which in that case were sanctioned by the Supreme Court; and the Universal and Beaver licenses were ap-

parently executed upon the faith of the *Bement* decision. Both that case and the *General Electric* decision, as pointed out in topic II, sanction price fixing by a patentee
8792 on a product manufactured and sold under patent licenses granted by him. The licensees in the instant case had been advised that license agreements giving price control to the licensor were proper and that they had a right to enter into them under the patent laws. Griswold of American testified in this respect that in 1926 he understood that the law granted to USG the right to fix prices under its (Utzman) patent. Specifically, he said that his attorneys had advised him that he had a right to enter into a license agreement under the patent laws, and that if Avery saw his way clear to grant a license, he had a right to do so and to tell his licensees the price at which they should sell the patented product. Griswold said that there was no secret about that—that everybody seemed to know it at that time. He testified similarly in reference to the Birdsey partially closed-edge patent. Lenci of Ebsary testified that at the Palmer House in Chicago in May, 1929, when representatives of his company, National, Certain-teed and Niagara signed the May 1929 agreements, Avery stated that under the *General Electric* decision USG had a right to offer the licenses; and Lenci said further that Rippey, counsel for Ebsary, advised that it was lawful under the *General Electric* decision to take out a license under which USG would fix the prices of the patented product. It is implied in the testimony of George M. Brown of Certain-teed that he understood that price fixing by a patent licensor was lawful. It may properly be inferred that Holland was of the view that the USG license to Universal was lawful, since the sale transaction of the Haggerty and Hite patents by Universal to USG, of which the license was a part, was approved by the seven United States District Courts in which the Universal receiverships were pending. All of this evidences good faith in the execution of the licenses.

All of the license agreements subjected the licensees to the payment of substantial royalties; and many of them were entered into, as appears from the statement of facts at the outset of this opinion, in settlement of infringement litigation and in consideration of the payment of substantial damages. This affirmatively evidences good faith and negatives sham and subterfuge. It is not reasonably to be thought that licensees would agree to pay, and actually

pay, substantial sums of money in royalties and damages if the agreements were entered into only as a cloak to disguise illegal conduct. If the agreements had been sham, the royalties would have been sham. Some such device as royalty rebates would have been provided for, as in the *Standard Sanitary* case, referred to in topic II, where the royalties were based not upon selling price but upon a flat figure per unit, 80% of which was returnable to the licensee if he abided by all of the provisions of his license. This case is discussed in greater detail in topic VIII.

8793 Commencing as early as 1926, when the Beaver license was negotiated, USG offered terms of settlement of infringement claims and a license to the various board manufacturers, and throughout all of its negotiations with the various companies USG insisted upon these same terms which were: payment of damages for infringement, acknowledgment of the validity of USG's patents, payment of royalties, and the right in USG to fix prices upon board made and sold under its patents. American attempted to get better terms but Avery remained firm that American should either pay in full for past infringement and for future use of the patents, or go without the benefit of using them. On May 18, 1929, shortly prior to the execution in Chicago, on or about May 22, of the license agreements with Ebsary, Certain-teed and Niagara (National had signed its agreement on May 16), Avery wired to Ebsary of Ebsary, George M. Brown of Certain-teed, Baker of National, Holland of Universal, and Gloyd of Texas, that Kling of American had sent in a contract with material changes unacceptable to USG, and that unless each of the other companies was willing to sign its proposed license without American the meeting with Avery in Chicago was futile. If Avery, as arch conspirator in an arrangement to use patent licenses as a "coverup" for illegal purposes and acts, was interested only in such purposes and acts, including price fixing, his insistence upon the execution of licenses, each of which called for payment of damages and royalties and recognition of patent validity, as well as the right in USG to fix prices of sale by the licensees of the patented product, is not understandable. In a sham transaction there would hardly be bargaining over terms, or rigid insistence by the licensor upon the same terms for all settlements and licenses. Avery's conduct in insisting upon the same terms to all licensees might be consistent with misinformation as to his right to license USG's com-

petitors and fix the price of board made and sold by them and as to the right of the competitors to take licenses and to submit to price control, but it is inconsistent with an intention by Avery and USG and the manufacturers who took licenses to execute them as a blind or "coverup" for illegal purposes and conduct.

There was nothing furtive in the action of the parties. There was open negotiation and discussion between USG and the other companies in the industry of the proposed licenses, and there was open discussion among the companies other than USG of their mutual problems arising out of USG's ownership and insistence upon enforcement of dominant patent rights in the gypsum board field. This is consistent only with good faith in the execution of the licenses.

The conduct of USG and the licensees in respect of the enforcement of the license provisions, especially the price protective provisions, after the licenses were signed, affirmatively evidences good faith. As pointed out in
8794 the statement of facts at the outset of this opinion, USG, in 1932, set up a wholly owned corporation called the Board Survey Company to receive complaints of license violations, investigate the facts, and call them to the attention of the licensee involved, and upon occasion to the attention of the licensor—this for the purpose of bringing about compliance by all of the licensees with the minimum price provisions relating to board made and sold under the licenses. The Government urges this as improper "policing" of the industry, but it appears more reasonable to characterize it as insistence by the licensor and the licensees who lodged complaints upon obedience to the terms of the licenses. From time to time, as also pointed out in the statement of facts, a representative of USG as licensor met with representatives of the licensees to explain to them the provisions of the minimum price bulletins, and for the purpose of securing adherence to these bulletins by the licensees. These meetings were held from as early as June 6, 1929, to March, 1937. Lenci of Ebsary described such meetings held on October 17, November 15, and December 13, 1932, and April 27, 1933. Apparently the only licensee which never attended such a meeting was Texas. The formation by USG of Board Survey, its activity, the lodging by the several licensees with Board Survey of complaints concerning license violations, and the holding of the licensee meetings—all for the purpose of enforcing

the licenses, evidence that the licensor and licensees regarded the license agreements as valid and binding. Their conduct in these respects is inconsistent with sham or subterfuge in the execution of the agreements.

The evidence introduced by the Government shows that the companies which became licensees did so because they desired to settle, or avoid, litigation, and to obtain the right to make the closed-edge board, considering it a business necessity to be able to do so; several of the licensees had made the closed-edge board before they acquired the right to do so from USG, for which infringement of the Utzman patents they paid substantial damages, as described in the statement of facts at the outset of this opinion. Also some of the licensees had manufactured board containing starch which was covered by the Haggerty patent. Numerous other patents included in the licenses were essential to the manufacturing of modern gypsum board. Blagden of Beaver, in describing that company's reasons for taking a license, testified:

Q. And what were your reasons for urging your company to take and finally taking a license as it did in 1926?

A. Well, we had lost the patent suit on two occasions, that is, we had lost our case with the United States Gypsum Company on two occasions, and after studying the situation deeply I felt that we would lose in a higher court, and if we could possibly get together and settle the matter it would be best to do so.

Q. Did you also consider, Mr. Blagden, that it was very important to your company to get the right to make this closed-edge product in order to satisfy the demands of your customers?

A. We had definitely proven that the closed-edge board was the cheapest board to manufacture, and we had tried every other way, and even though we had to pay a royalty we thought it would save us money in the long run.

8795 Q. And what about the demand of your customers for this type of closed-edge board as opposed to open-edge?

A. They were emphatic about that.

Q. They wanted it, that is?

A. They wanted the closed-edge.

Q. And the fact is, of course, that ever since you came with the company, and indeed ever since the Beaver Company had been in existence, the only type of board it had made was a closed-edge?

A. We made for a while a semi-closed edge.

Q. Yes, but some type of closed edge?

A. That is right.

Q. And were you concerned, and was it a reason for your decision to take a license, about the contingent liability which was constantly hanging over the company's head by way of liability for damages?

A. Yes, sir.

Q. Was that a reason why you wanted to take a license?

A. That was a great big reason.

Q. And is it true to say, Mr. Blagden, that you were one of those business men who had a natural dislike for litigation?

A. Yes, sir. I tried to see if we couldn't settle it out of court as soon as I found out the true situation, after becoming president of the company. [Tr. 1673-5.]

Whittemore of Certain-teed testified:

Q. What was the attitude of your company and yourself toward whether or not you desired to manufacture the Utzman closed-edge board?

A. We wanted to make it.

Q. Will you tell the Court the reasons why you wanted to make it?

A. Well, there were a number of reasons. The board was a better board than the open-edge board; it was less subject to damage in transit because of the edge coverage by paper; it was easier to manufacture; and it was decidedly more salable.

Q. Now when you say that it was "decidedly more salable", do you include in that answer the fact that as of this time, at least, there was a strong customer demand in the trade for closed-edge board?

A. Yes. If you will let me answer that question in my own way, I think I can get at what you want to develop.

Q. I wish you would.

A. The Certain-teed Products Corporation made an open-edge board. At the same time, the Beaver Products were making a closed-edge board; when we took over the Beaver Products we immediately discontinued the manufacture of closed-edge board in the Beaver plant, and went to an open-edge board. We found that the customer demand precluded our selling an open-edge board at the same price as the closed-edge board, and prices declined, declined and declined.

Q. Then would you say that the primary reason for your taking this license from USG was to get the right to manufacture the product covered by the closed-edge patent?

A. That was one reason, and also to get rid of the possibility of future litigation. You referred to the Utzman patent. The Utzman patent was only one of some fifty to one hundred patents that we were licensed to use. Some of those patents were vital in the production of closed-edge board, and had we not had a blanket license to use all of the patents of USG, we would have been subject to possible litigation, and we wanted to avoid that—we had had plenty. [Tr. 2663-4.]

Chism of Texas said that the reasons which caused Gloyd to take the license of April 1927 were that before that time the company had been making an open-edge board which proved very unsatisfactory to the trade and caused the company to lose business, that the cost of manufacture was high due to loss from bad board, *i.e.*, "peelers" and broken edges, which made it almost prohibitive. The company had decided in some way to make a better board. The trade preferred the closed-edge board and the company had to do something "pretty quick" to protect its business. Chism knew that the closed-edge board was a patented product and he and the officers of Texas knew that USG owned patents on the machine necessary to make the closed-edge board, and he understood also that USG had other patents, such
8796 as those for the recessed edge and the tongue and groove, which he concluded would be useful in the manufacture of gypsum board. The primary reason for the Texas company's taking the license was that it wanted to get the right to manufacture board under patents which USG owned. Chism indicated also that the license of February 10, 1937, was taken by Texas in order to obtain the advantages of making the light weight bubble board. He testified as follows:

Q. And what about the attitude of your trade in 1927, as to whether they preferred the closed-edge or the open-edge type of board?

* * * * * *

The Witness: The attitude of the trade was that they preferred the closed-edge board, and we had to do something pretty quick to protect our business. The open-edge board just wasn't proving satisfactory.

* * * * * *

Q. And open-edge board was getting increasingly difficult to sell to the trade, wasn't it?

A. That is right.

Q. Now, wasn't it your understanding, also, that USG owned patents on the machine necessary to make the closed-edge board?

A. I think I knew that at the time. I am sure that the officers of the company did.

Q. And wasn't it your understanding, also, that USG had other patents which you concluded would be useful in the manufacture of gypsum board, such as the recessed edge, for instance?

A. Yes, sir, I remember that.

Q. And the tongue and groove patent?

A. Yes, that is true.

Q. Therefore, wasn't the primary reason of the Texas Cement Plaster Company for taking the license, the reason that it wanted to get the right to manufacture board under patents which you understood the United States Gypsum Company owned?

A. Yes, it was.

Q. And as soon as you took out the license, or shortly thereafter, did you commence to make the closed-edge board at your plant?

A. Yes, sir, we did.

Q. And have you made the closed-edge board at all times from that time down to the present time?

A. Yes, we have.

Q. And after you took your license of February 10, 1937, did you commence to make this so-called light-weight or foam-bubble board?

A. Just as soon as we could change our machinery or equipment.

Q. And have you continued the manufacture of that foam or bubble board down to the present time?

* * * * * *

The Witness: Yes, we have.

* * * * * *

Q. And since February 10, 1937, have you used starch to obtain bond between the paper and the core of your board?

* * * * * *

The Witness: Yes, we have.

Q. And isn't it the fact that after you took your license of February 10, 1937, USG sent engineers down there and

instructed you how to manufacture this foam or lightweight board?

A. They did, immediately after signing the agreement.

Q. And they showed you the patents, and they gave you drawings and blueprints, and supervised the installation of the new machinery and taught you how to use it, didn't they?

A. They did.

Q. And they gave you information with respect to the use of such patents as the recessed edge patent, didn't they?

A. Yes, they did. [Tr. 5994-6000]

It appears also that, although there was discussion among the prospective licensees and with USG of the terms of the proposed licenses and of the advantages of signing them, nevertheless the decision to take a license was reached by each of the companies independently. Whittemore testified
8797 that the decision which Certain-teed made before going out to the Chicago meeting in May, 1929, to settle with USG and take a license had nothing to do with any other company in the business, that his company would have taken the license if it could have gotten it without regard to what any other company did or did not do. This was confirmed by George M. Brown, who said that Certain-teed had determined to go ahead with the license without regard to what other companies did about it. Nelson of Certain-teed said that he had reached the conclusion that the best thing for his company was to take out a license, and that it made no difference to Certain-teed whether other companies did or not. Lenci likewise testified that before he left to go to the Chicago meeting in May, 1929, Ebsary and the rest of the responsible officers and directors of the Ebsary company had determined to take a license from USG, Ebsary's reason for taking the license being its desire and need to manufacture a closed-edge type of board. Griswold testified, in respect of American, National, Ebsary and Niagara, that there was no agreement among these companies to get together and take out a license. He said also that he had nothing to do with Atlantic's taking out a license (the reference is to Atlantic's first license, *i.e.*, the 1927 license) except to answer Atlantic's questions with respect to the process of manufacture of wallboard, advising that if Atlantic was going into the board business it was best to make the closed-edge board if Atlantic could reach an agreement with Avery, and sending Atlantic a copy of the USG license; that further than recommending it, he was not responsible for the taking out of a license by Texas, which

company went ahead on its own accord. Griswold also testified categorically that he did not act as agent or emissary of Avery in obtaining the license agreements, and that Avery did not tell him to go out and act for him in inducing other companies to take out a license. As pointed out in the statement of facts at the outset of this opinion, Blagden for Beaver and Avery for USG negotiated the Beaver 1926 license. But Blagden stated definitely that he had nothing to do with the taking by Universal, Atlantic and Texas of their 1926-1927 licenses except to answer questions that individuals may have asked him from time to time. Black of American testified that American signed its license without regard to what other board manufacturers "did or would not do"; that at a meeting in Ebsary's room in New York in October, 1928, there was no understanding or agreement reached that no one would sign unless all signed, and no such understanding or agreement at a subsequent meeting in the Certain-teed office.

The foregoing circumstances—execution of the licenses on the faith of the *Bement* and *General Electric* cases, payment of royalties and damages by the licensees, insistence by USG upon the same terms for all, open negotiation and enforcement, signing by the licensees to avoid litigation and to make the better, closed-edge board, and upon independent decisions by the several licensees—all established by the Government's own witnesses, whose testimony
8798 was frank and convincing—strongly evidenced good faith in the execution of the license agreements.

In the face of the foregoing the Government must rely, in the large, upon the following: In a memorandum of June 6, 1929, by C. O. Brown, sales manager of Certain-teed, which was attached to an intra-company memorandum of June 11 from Whittemore, vice-president, to Van Hagan of the production department (the two memoranda, declarations binding only upon Certain-teed, constitute Government Exhibit 227[36]), reference is made to the interference situation in which the patent applications covering the bubble board invention are involved. Brown mentions that price control on plasterboard under Certain-teed's May 1929 license expires in August, but suggests that this control may be extended if a satisfactory arrangement can be made with the bubble board patent. He states that for

36 Since the only exhibits in evidence are Government exhibits they will for convenience be referred to hereafter merely as Exhibit —, rather than as Government Exhibit —.

legal reasons the bubble patent "should not be considered from the standpoint of price control but should be gone into by each manufacturer from the standpoint of economy and benefit. Price control would naturally follow such a move." Brown then suggests that Van Hagan see Knode of USG in respect of estimated savings in manufacturing costs under the bubble patent, refers to receipt of a proposed form of license agreement, states that USG is making the bubble board and therefore knows from experience that it is practical, and then concludes that "The lawyers are very emphatic that there is a much less chance of being accused of using the patent as a subterfuge to control price —first being, it is gone into before expiration of the Basic patent on plaster board and second, it is gone into from the standpoint of economy in cost." Brown states also that the lawyers pronounce the patent a very strong one if and when issued. Whittemore, in his memorandum, refers to Brown's attached memorandum as indicating possible advantages in the bubble board, and requests Van Hagan to investigate with Knode the possible savings in the use of the invention. Certain-teed did in fact, according to the evidence, investigate the bubble board invention and concluded, about July 3, 1929, that it had merit and that a license should be taken. This is evidenced by Exhibit 228 (a declaration binding only upon Certain-teed), an intra-company memorandum of July 3, 1929, written by C. O. Brown, and by his testimony. Certain-teed was apparently not motivated by a desire for price-fixing when it determined to take this license, for George M. Brown testified that the company would always have opposed price fixing if it could have done so; that he finally agreed to submit to a price fixing provision because it was the only basis on which Certain-teed could get a license from USG; that the company had concluded that it was desirable and beneficial to have the right to use the Haggerty starch and the Roos bubble board
8799 patents, as well as others. In respect of his memorandum to Van Hagan, Whittemore testified that when he said therein "you can easily see the possibilities in this bubble patent," he was referring to the possibility of making under that patent "as cheap a product and just as good a one." He testified further that he had the final decision in respect of Certain-teed's taking out the bubble board and starch patent licenses. He said that the primary reason motivating Certain-teed was that the method of manufacturing covered by these patents was decidedly cheaper, and that the product could be made much lighter with resultant sav-

ings in transportation costs not only to Certain-teed but also to board users, *i.e.*, that this made the freight charge paid by the purchaser less. Whittemore testified also that Certain-teed made a careful investigation of the merits of the foam invention before signing the license. It had experimented with thermocrete, an effervescent material which created bubbles in the core of board, in an effort to find something to replace sawdust as an aggregate, but thermocrete proved not adaptable in the manufacture of light weight board. Whittemore recollected that Van Hagan saw the bubble board process in operation at one of USG's plants before the license was signed. The reliance of the Government is upon the statements of C. O. Brown above quoted. They are asserted to evidence consciousness of guilt on the part of the officials of Certain-teed. With equal reason there might be inferred a purpose not to take the bubble board license unless there were economic reasons for doing so, and no illegality either in fact or appearance. When Exhibit 227 is viewed in the light of all of the evidence above set forth in respect of it, it cannot reasonably be inferred that Certain-teed was not acting in good faith. The mention by C. O. Brown that price control on board may be extended after August if a satisfactory arrangement can be made with the bubble board patent is not evidence of bad faith in taking out the November license. It could be no less lawful to take out a license extending or renewing price control than to take out the original license providing for price control. Both were legitimatized by the *General Electric* decision.

In an intra-company memorandum of August 9, 1929, from C. O. Brown of Certain-teed to George M. Brown reference is made to a recent meeting of gypsum board manufacturers in Chicago in respect of licenses and royalties on gypsum board patents, to the proposed purchase by USG from Universal of the starch patents and the proposal of USG to grant licenses to its own licensees to use both the starch and foam inventions in board manufacture. The memorandum states that it would be the plan to write one contract covering all patents involved, the machine patent on closed-edge board, the bubble patent, the starch patent and the bundling patent, and that the attorneys feel that

such a contract would be exceptionally strong and
8800 that price control could be maintained during its life
without difficulty. There is an attached memorandum of July 30, 1929, also by C. O. Brown (the two memoranda, declarations binding only upon Certain-teed, constitute Ex-

hibit 231), in reference to a meeting in Chicago a fortnight earlier, attended by National, Atlantic and Ebsary, with their lawyers, and by C. O. Brown for Certain-teed. This memorandum refers to proposed bubble and starch patent license arrangements and to the reluctance of National to sign a license until the starch patent litigation is settled; it suggests that Universal's not signing—put by Universal upon the grounds that it has not assured itself that the bubble process is more economical than the starch process, and that Universal is in the hands of receivers and therefore could not bind itself for a period beyond the receivership—is in the nature of a "holdup" to force a sale of the starch patent. The memorandum states that USG advises that it has nothing to fear from the starch patent, refers to the anxiety of Universal, being in receivership, to capitalize on the starch patent for its maximum value, and asserts that in the view of Atlantic and National the starch patent could have been bought until recently for $200,000 or less, whereas if the entire industry paid a royalty under licenses, at present price levels, until 1938, the total might be several million dollars. This memorandum of July 30 refers also to Avery's refusal to discuss what the arrangements between USG and Universal would be. It goes on to say that there is some doubt as to the strength of the starch patent and that all of the companies with the exception of National would be free to contest its validity if they did use it (that is, in the absence of a license); but that in the interest of harmony USG has been making tests to see if there was value in combining the starch and bubble processes and advises that experiments indicate that there would be benefit in using starch in a limited degree with the bubble process. The memorandum also states that it would be advantageous to combine the two patents since the starch patent has issued, whereas the bubble patent is in an application status, so that a combination of the two would give a patent to work under at once in the manufacture and sale of gypsum board, whereas under the bubble process alone there would be an interim between August 6 and the date of issuance of the bubble patent when there would be no patent control—that there is considerable benefit in having patent control continue without a break. Whittemore testified that during the negotiations for the bubble license Certain-teed had learned that USG had purchased the Haggerty and Hite starch patents, that Certain-teed had already investigated the starch situation and thought that it might be subject, on account of its own use of starch,

to a claim of infringement of the Haggerty patent. He said that as a result, when the opportunity to relieve itself
8801 of such a claim was presented, Certain-teed was glad to take advantage of it. Starch was important in the manufacture of marketable gypsum board; it secured firm adhesion between the paper and the core and prevented "peelers." Whittemore denied that there was any understanding that the starch and bubble patents would be used merely as a vehicle to obtain price control. It is not apparent how the foregoing intra-company discussion evidences bad faith in taking the November license by Certain-teed, even though price control by USG was one of the objectives. It was not unlawful for USG to grant the license subject to a right to fix prices; it could not therefore be unlawful for Certain-teed to accept such a license with all of its advantages, including price control by USG, in mind. In view of the possibility of an infringement claim, and in view of the importance of starch in the manufacture of marketable gypsum board and the study made by Certain-teed of the advantages of the starch and bubble patents, it cannot fairly be concluded that the license was taken by this company only as a sham. C. O. Brown's statement that the attorneys feel that a license contract covering the machine patent on closed-edge board, and the bubble, starch and bundling patents, would be exceptionally strong, and that price control could be maintained during its life without difficulty, evidences that the attorneys were of the view that price control by USG under its patents, acquired or to be acquired, would be lawful.

As recited in the statement of facts at the outset of this opinion, Certain-teed acquired the assets of Beaver on January 20, 1928, but refused to assume the obligations of the USG-Beaver settlement agreement and license, whereupon on or about February 21, 1928, USG brought suit in the District Court of the United States in Illinois against Certain-teed and Beaver seeking an injunction against the distribution to the Beaver stockholders of the proceeds of the sale, and asserting that Certain-teed should be required to assume the liabilities of Beaver to USG. In a Certain-teed intra-company memorandum dated March 1, 1928 (Exhibit 212, a declaration binding only upon Certain-teed), apparently written by George M. Brown, this suit is referred to and the statement made that the action should be defended and an answer filed alleging that the suit was commenced "not in the interests of royalties but for the sole purpose of

trade domination and monopoly and price control." On March 14, 1928, Certain-teed, by its counsel, filed in this suit an unverified answer (Exhibit 324, received in evidence only as a possible admission on the part of Certain-teed and not as binding upon any other defendant), containing allegations again to the effect that the purpose of the suit was not to collect the royalties to which USG claimed it was entitled, but to enable USG "to continue to dominate and monopolize the industry and to restrain competition
8802 by this defendant." As has also been stated in the statement of facts at the outset of this opinion, Certain-teed on May 22, 1929, settled this suit with USG and signed a patent license agreement. It is contended by the Government that Certain-teed's taking this license agreement in the face of the statements in Exhibits 212 and 324 evidences bad faith; that is to say, that if Certain-teed knew or believed that USG was attempting to dominate and monopolize the gypsum board industry and to restrain competition by Certain-teed, that company must have intended to join in such an illegal purpose when it took the license. But it can with at least equal, if indeed not greater, reasonableness be inferred that Certain-teed had before signing the license reached the conclusion that its statement concerning USG's purpose in bringing the suit was erroneous, and that Certain-teed therefore felt free to accept the license agreement. The exhibits are therefore equivocal in meaning and constitute no substantial evidence of bad faith.

As appears from the statement of facts, the perforated lath license contracts were signed by Certain-teed, American, Ebsary and Kelley on June 8, 1936, July 10, 1936, February 2, 1937, and June 23, 1937, respectively. These contracts were based upon the Roos perforated lath patent No. 1,938,354. It is asserted by the Government that these licenses were not taken in good faith. The principal reliance of the Government in respect of this charge is upon two letters, one of December 27, 1933, and one of March 4, 1936 (Exhibits 602 and 601 respectively, declarations binding only upon Certain-teed). Both were written to Certain-teed by Spencer, a patent lawyer. In each Spencer states that in his view the perforated lath patent is not valid. The Government contends that since Certain-teed took the perforated lath license in the face of this statement it must be said to have acted in bad faith, to have taken the license only as a subterfuge and cover for illegal purposes.

The evidence shows that building codes contain varying requirements in respect of the fire resistant qualities of building materials. In many localities there is a requirement in the case of plaster bases that a wall structure (the base, plus the applied coat of plaster) must stand a one hour fire test. Ordinary gypsum lath does not pass this test because upon the application of great heat the applied coat of plaster calcines and drops off the lath and the structure collapses. USG, to meet this difficulty, developed the perforated gypsum lath covered by the Roos patent. This lath contained perforations of such size and spacing as to permit a wall structure composed of it to withstand the one hour test. It appears that when plaster is applied to this type of lath some of it passes through the perforations and forms
a mechanical key which, because of the size and spac-
8803 ing of the holes, supports the coat of plaster with the
result that it will resist fire for an hour. Ingberg, an expert from the Bureau of Standards, testified that the only perforated lath which ever passed the one hour test was of the type covered by the Roos perforated lath patent, having at least ¾ inch holes, one to each sixteen square inches of surface; that in many tests performed at the Bureau no perforated lath with a hole less than ¾ inch in size successfully passed the test, and that no perforated lath passed it that did not have the holes arranged at least one to every sixteen square inches. Ingberg further testified that USG's perforated lath was submitted to the Bureau and that it passed the one hour fire test and received the Bureau's one hour fire rating; that this was the first lath ever to pass this test. Whittemore of Certain-teed testified that since USG was proposing to bring out perforated lath, it was necessary for Certain-teed to obtain a supply of the product in order to be competitive, or as he put it "to protect our mixed car business." He said that if his company had tried itself to make the lath, it would have been obliged to have it tested by the Bureau of Standards to see whether or not it would stand the one hour fire test under which the Roos patent had qualified. Certain-teed thought that the volume of business in perforated lath would be small—although in this respect the company turned out to be mistaken, as the demand in the trade became considerable. Nevertheless, not wanting itself to spend money attempting to make a fire resistant board, Certain-teed thought that the simple and easy thing to do was to take a license. Whittemore said, "We also realized that the statement that no

patent is so strong that it can't be broken, and so weak that it can't be sustained, was pretty nearly true," and that "We * * * realized that in litigated matters the attorneys are always 50 percent wrong." He reiterated that Certain-teed, not desiring itself to build up an expense account in respect of development of the lath and not wishing to risk possible liability in future litigation, decided that the best thing to do was to take a license. In explaining this he referred to an episode in Certain-teed's past manufacturing experience wherein a competitor, after contesting certain patents for several years, had been subjected to three-quarters of a million dollars infringement damages and half a million in expense for attorneys' fees and costs, when his own company escaped by paying $25,000 for a license under the same patents. This, he testified, had been a lesson to Certain-teed to be careful in respect of building up possible patent infringement litigation.

Spencer, the writer of Exhibits 601 and 602, was called to the witness stand. He testified that, in advising Certain-teed that in his opinion the Roos perforated lath patent was not valid, he nevertheless also pointed out in the
8804 same letters that his opinion might be wrong, that the patent, having been issued by the Patent Office, was valid on its face, and that validity litigation which might ensue upon ignoring it might be expensive and the damages high. In Exhibit 602, the letter of December 27, 1933, he recognized the possibility that a district court might hold the patent valid and that such a decision might be affirmed by the circuit court of appeals. He admitted that in Exhibit 601, the letter of March 4, 1936, he suggested methods of avoiding the Roos patent, and told Certain-teed that it was his judgment that it would be unwise completely to ignore it. In answer to the question whether or not he meant to suggest that Certain-teed did not act in good faith in taking the perforated lath license, he replied that he thought Certain-teed's action was consistent with his opinion.

It would not be reasonable to conclude, in view of the foregoing, that Certain-teed was not acting in good faith in taking the perforated lath license. In view of the qualifications put by Spencer upon his opinions, of the experience of Certain-teed in respect of contests of the validity of patents, and in view of the need of Certain-teed for the perforated lath and the demonstrated competency of the USG product to meet building code fire tests, it appears that the company

was acting providently and honestly, rather than in bad faith, in taking the perforated lath license.

In respect of Newark, Tomkins testified that his company took the perforated lath license because it desired to be competitive with the other licensees who had signed a similar agreement; that Newark found it necessary to sell perforated lath; that he felt that the company had to be in a position to produce it and that he wished to be able to do so lawfully.[37] There appears to be nothing in the record directly relating to the question of the good faith of American or Ebsary in respect of their taking perforated lath licenses.

It cannot be concluded from the evidence that the perforated lath licenses were not executed in good faith.

Substantiation of the Government's charge, set forth in the statement of facts at the outset of this opinion, that the metallized board licenses were signed by the various licensees, except National, without any expectation that they would manufacture such board, but with the intention that they would purchase it from USG or National and then resell it at prices and under conditions fixed by USG, would evidence lack of good faith in the execution of these licenses. But this charge is not proved; on the contrary there is substantial evidence refuting it. The metallized
8805 board licenses were, as appears from the statement of facts, signed by National, Kelley, Certain-teed, Atlantic, American, Universal and Ebsary on October 5, 1934, October 12, 1934, November 2, 1934, November 30, 1934, December 4, 1934, April 4, 1935, and August 14, 1935, respectively. C. O. Brown testified that when Certain-teed executed the metallized board license it intended to manufacture such board; that Certain-teed had no agreement or understanding as to the price at which it would resell metallized board purchased from other companies; that he knew that the price bulletins sent out by USG did not apply to metallized board purchased from others, but only to such board manufactured by Certain-teed. Whittemore, of the same company, stated that price control applied only to patented products manufactured by Certain-teed, and that he understood that USG had no right to control any price except that of the manufactured product at its first sale by Certain-teed to a third party; that the amount of metal-

37 On May 1, 1937, Newark purchased the stock of Kelley. On June 23, 1937, Kelley executed its perforated lath license agreement with USG. On January 3, 1939, Newark merged with Kelley. On the same date USG granted Newark a perforated lath license, at the same time canceling the previous perforated lath license granted Kelley.

lized board which Certain-teed purchased from other manufacturers was so small that "you could wheel it out in a wheelbarrow." Neale of Atlantic testified that he talked with Fuller of that company about the desirability of executing a metallized board license and that he (Neale) favored such a license, since there was an increasing demand for that type of board. A memorandum of September 6, 1934, from Fuller to Neale (Exhibit 289, a declaration binding only upon Atlantic) states that Atlantic, realizing that much work would have to be done and much money spent to get the new type of product accepted in volume, "would rather see U. S. G. and National bear the brunt of this work, and hop on when the bus is running." Neale testified further that when Atlantic took the license it intended to manufacture metallized board, and that early in 1935 the company was taking steps to get into manufacturing immediately in the metallized board field. Neale said also that he knew that under this license the only price that could be fixed by USG was that upon such board as was manufactured by Atlantic under the patent. Black of American testified that Henning of USG thought that the board manufacturers should get behind this new insulating product, and that he (Black) agreed with this, that insulation board had developed into a strong competitor of gypsum boaid and that he felt that it would be a good thing for the manufacturers to enter the metallized board field. He testified further that American took the metallized board license with the expectation of manufacturing the product, and that it did manufacture the same after taking the license. Black testified also that it was his understanding at all times that the only price fixed by USG was that of board manufactured by American under the patents licensed by USG. In respect of Kelley and Newark, Tomkins stated that both of those companies manufactured metallized board.

Lenci of Ebsary said that that company took the
8806 metallized board license because it desired to manufacture the product; that he felt it was a matter of some importance to board manufacturers to be able to make a board and a lath with insulating qualities; that Ebsary started to make this product early in 1936. He testified further that Ebsary did not receive price bulletins on metallized board until the license had been signed, and may not have received them until it commenced manufacturing; that whatever the fact was as to this, he understood that the bulletin provisions applied only to such board as Ebsary

itself made and sold. Lenci said also that there was no understanding or arrangement or agreement with USG that metallized board bulletin prices should be observed prior to the time Ebsary got into production. The testimony of these witnesses establishes the contrary of the Government's charge so far as the companies they represent is concerned. There appears to be no testimony on this subject directly relating to National and Universal.

It has been pointed out in the statement of facts at the outset of this opinion that the royalty payable for the privilege of manufacturing, using and selling gypsum board under the patents was an amount equivalent to a designated percentage of the selling price of the licensees on all gypsum board manufactured by them, whether patented or not. It is apparently urged by the Government that this evidences that the license agreements were not executed in good faith. This royalty provision is in effect a provision for a percentage of gross sales, and as such is but a convenient means of measuring the amount to be paid for the privilege of using the patents. It might with equal propriety have been a lump sum. Especially in view of the fact that it was unlikely for economic reasons that open-edge board would be manufactured after the licensees were authorized to make the superior product—a subject discussed in sub-topic (2) of this topic V—this provision in the license agreements can hardly be looked upon as an attempt to impose a royalty upon an unpatented product. For the same reason it cannot be said to have been intended to drive open-edge board off the market. In the absence of some such purpose in the royalty provision it is not seen how it can evidence bad faith in the execution of the licenses.

It is contended by the Government that the board manufactured and sold by the defendants was not covered by the patents on which the license agreements were based. If this charge were substantiated it would tend to prove bad faith in the execution of the agreements. But as pointed out in topic III the burden of proof on this aspect of the issue of bona fides, as well as upon the whole of that issue, is upon the Government. No evidence has been introduced by the Government proving or tending to prove that the board made and sold by the defendants was not made under the patents.

8807 It is charged by the Government that not all of the agreement between USG and the licensee companies was put into formal writing; that on the contrary, in

addition to the signed license agreements, informal side agreements were made between USG and its licensees that they would discontinue making open-edge board and seconds of closed-edge board, that USG would advance and stabilize the prices for board, that all companies would increase their prices for other gypsum products, and that USG would continue to control prices through the use of other patents after expiration of the Utzman product patent in August, 1929. If there were evidence that such side agreements were entered into, that would tend to prove that the license agreements themselves were not executed in good faith. But there is no evidence that such side agreements were executed, and there is affirmative evidence to the effect that they were not. Griswold of American testified that he had no understanding with Avery or anyone else that price control would be extended under some other patent after expiration of the Utzman patent. C. O. Brown of Certain-teed recalled no understanding that USG would find some other patent to continue price control beyond August 6, 1929, the date of expiration of the Utzman patent. Whittemore had no recollection of any agreement or understanding between Certain-teed and USG or anyone else that USG would find a patent to continue price control upon expiration of the Utzman patent. George M. Brown testified that he never had any agreement or understanding with Avery or anyone in USG outside of those understandings which were contained in the written license agreements between Certain-teed and USG. Holland of Universal testified similarly that he never had any understanding with USG in addition to the provisions contained in Universal's license. Lenci of Ebsary testified that at the time the first price bulletins were supplied under the May 1929 licenses, he knew that the price control could only last until August 6, and had no reason to believe that it would continue beyond that date, that he was not sufficiently familiar with USG's patents to know whether or not USG had others which would take the place of the Utzman patent. The testimony establishing the absence of side agreements on the other subjects concerning which, as above set forth, such agreements were alleged to have been made, is discussed later in this topic V.

We conclude in respect of the first aspect of the charge of lack of bona fides that the evidence introduced by the Government shows that the license agreements were executed as bona fide agreements intended to bind each party

to the promises made therein, not as sham agreements to disguise illegal purposes.

8808 *Were the license agreements non-bona fide because executed with intent to accomplish restraints of trade beyond the proper limits of the patent monopoly,* specifically (1) to raise and fix at arbitrary and non-competitive levels the price of gypsum board; (2) to accomplish improper standardization of gypsum board and its method of production; (3) to raise, maintain and stabilize the level of prices of unpatented materials—plaster and miscellaneous gypsum products; (4) to effectuate improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products; or (5) to fix the prices at which manufacturing distributors resell gypsum board?

(1) *Intent to raise the price of gypsum board*: The charge in the complaint is that the defendants raised and fixed at arbitrary and non-competitive levels the price of gypsum board made and sold by them. It is to be borne in mind that within the ruling of the Supreme Court in the *General Electric* and *Bement* cases it is the right of a patentee to fix the price of his product at such level as he chooses and to require his licensees to sell at the price thus fixed. The patent law does not assume to regulate the reasonableness of the price of a patented product. Therefore, the price may lawfully be "arbitrary" in the sense that it is whatever the patentee within his discretion decides to fix, rather than a price determined by economic law. And since the licensor and licensee both lawfully sell at the price fixed by the former, that price is "non-competitive" as between them; and where there is a plurality of licensees the price will be "arbitrary" and "non-competitive" as between all of them and the licensor. All of this has been demonstrated in the discussion of the *General Electric* and *Bement* cases in topic II of this opinion. The charge of the Government, therefore, in the exact terms in which it is put, charges nothing illegal where bona fide patent licensing is involved. Nevertheless, if patent license agreements were executed with an intent by the parties that prices should be fixed at high levels, that might tend to prove that the agreements were not bona fide but were rather a disguise.

But the evidence fails to prove that the licenses were executed with an intent to fix prices at high levels, or at any given levels. The Government's witnesses testified that there was at no time any understanding or agreement, or

even discussion, as to what the prices of gypsum board would be upon the execution of the licenses. Griswold of American testified that Avery did not discuss what prices the licensor might establish for gypsum board, that Avery told him on several occasions that the right to fix prices must be exercised by USG alone; and Griswold said that he did not have any discussion with anyone else as to what board prices would be. Blagden testified that Beaver had no understanding or even discussion with Avery as
8809 to what prices USG would fix under the Beaver license. Holland stated that there was no agreement between Universal and USG in respect of what prices would be on board. C. O. Brown of Certain-teed testified that he did not at any time have any knowledge or receive any information from USG as to what it would do in the future with regard to establishing minimum prices under the licenses; that he had never heard Avery or anyone else state what prices would or would not be fixed; that he was given to understand by USG at all times that the fixing of prices was entirely in its discretion. George M. Brown testified similarly that there was not at any time, either prior or subsequent to taking the licenses, any understanding with Avery or with anyone else that gypsum board prices would be raised; that he never had any discussion with Avery as to what Avery would or would not do with regard to prices on gypsum board; and that Certain-teed had nothing to do with fixing prices. Nelson said that at no time in his conversation with officers and representatives of Certain-teed did he ever hear of any agreement or understanding as to what USG would do about board prices if Certain-teed took a license, and that he never heard of any commitment on the part of USG that it would raise prices. Whittemore also testified on this subject. He stated that USG never made any commitment of any kind as to any figure at which it might fix the price of board after Certain-teed took the license, and that USG never made any statement with respect to what it intended to do concerning fixing prices. He said further that Certain-teed did not enter into its license agreement with USG "for the purpose of rigging up a price-fixing scheme." With respect to Ebsary, Lenci testified that he had no knowledge at any time during the conferences at Chicago on May 21 and 22, 1929, as to what board prices would be until after the licenses were signed and the first of the price bulletins handed to the licensees. He said, further, that Ebsary had no understanding or

agreement that if it took a license USG would raise or stabilize prices on patented board, that he never had any discussion at any time with Avery, or with anyone else, as to what prices Avery would establish after execution of the licenses. Lenci recognized that if USG were to fix the price of board that would naturally have the effect of establishing a uniform price for the industry at a given time, but he stated that he did not understand that there was anything in the license contract which provided that USG should raise or stabilize the price of board. In a telegram to Gloyd of Texas of May 17, 1929 (Exhibit 720, received as binding upon USG only), Avery said: "There has been much discussion of infringement settlement and license on board. Nothing has yet developed although I think it safe to say the outlook is favorable. If license were generally closed it would be desirable to discuss a reasonable market price for the licensed product. Will keep you informed in hope
8810 that you may participate if outcome favorable." But there is no evidence that the suggested discussion of a reasonable market price ever took place.

It is to be noted that discussion of prices between the patentee and the prospective licensees would not have been illegal. In the *General Electric* case the prices established on the patented product were a part of the license agreement itself, and must therefore have been discussed by the parties in determining their contractual obligations. Since a patentee has a right to grant a license and to fix thereunder the price of the patented product and the licensee a duty to abide by such price, the patentee is not bound to refrain from discussing with a prospective licensee what the price is to be. Nevertheless, in the instant case the evidence affirmatively shows that neither before nor after the execution of the licenses were there any discussions between the licensor and the licensees on the subject of the minimum prices at which the patented products were to be sold. Apparently the various companies taking licenses were content to abide whatever action the licensor took with respect to prices, anticipating that the same would be reasonably profitable.

It is true that the evidence shows that the gypsum industry in the "Eastern area" was in a demoralized condition in the years 1927-1929. There was litigation, bad feeling, price cutting. The prices of board had fallen so low that for some manufacturers business was no longer profitable. In this situation it was important to the companies making

board that prices reach a profitable level—and in signing the agreements with USG the several licensees were no doubt in part motivated not only by the desire to make closed-edge board and to settle or avoid litigation, but also by the expectation that the exercise of its price fixing right by USG as licensor would result in a price advance. Prices could not go down and business continue; any change would, as a matter of economic necessity, be upward. Indeed, it is not in dispute that it was the hope and expectation of the several prospective licensees that board prices would advance, and that they would be stabilized—in the sense that each licensee together with the licensor would be selling, at a given time, at the minimum prices fixed by the licensor. Lenci of Ebsary and Whittemore of Certain-teed both testified to the demoralized condition of the industry. Whittemore said, in reference to what he expected would happen to board prices when the May 1929 agreements were signed, that prices "couldn't decline any more. If they went any way they would have to advance." Lenci testified that at the time USG's first price bulletin was supplied to the licensees after the May 1929 licenses were executed in Chicago, someone remarked that he hoped they would get $30 wallboard. Lenci said that the price of board could not go lower than it was and his company stay in business,
8811 that all of the licensees were human enough to hope that prices were going to be stabilized and raised and that they were not disappointed. In the memorandum of July 3, 1929 (Exhibit 228), referred to above in the discussion of the first aspect of the bona fides question, C. O. Brown said: "Taking these things [outlined advantages of signing the bundling and bubble board licenses] into consideration, plus other advantages in working under the patent, we feel justified in taking a license and paying the royalty set by the Licensor"; and he explained that the "other advantages" he had in mind were "a stabilized market on gypsum lath," that is to say "price control." Exhibit 200 (a declaration binding only upon National), the minutes of a directors' meeting of National on July 23, 1929, recites that under the license agreements (the starch and bubble board agreements of November 1929) submitted to each of the wallboard manufacturers "the prices of wall board would be fixed for the whole industry for the term of approximately seventeen years"; and a concluding resolution authorizes the entering of a license agreement "provided that the United States Gypsum Company, by virtue of the

agreement with this Corporation and with other manufacturers of gypsum wall board, shall control the price of wall board sold in the United States and its possessions." The minutes of August 27, 1929 (Exhibit 201), a declaration binding only upon National), authorized the signing of a license by the president if in his judgment such action "will result in *legal* stabilization of the markets." (Italics supplied.)

But evidence that it was expected by the licensees that the price fixing right in USG when exercised would result in the same minimum price of board at a given time for the licensor and for all the licensees who took licenses, and evidence that it was believed that as a matter of economic necessity any prices fixed by USG would be better than the demoralized prices of 1927-1929 and would be profitable prices, falls short of establishing an infent to fix prices at high levels and therefore short of showing lack of bona fides in the execution of the licenses.

Indeed, such evidence fails to prove any illegal intent in respect of price fixing. It is not illegal for parties negotiating a patent license agreement to hope, expect, or intend that the normal economic consequences of patent licensing will follow execution of the license. As said in topic II, a patent license agreement granting the right to make, use and vend the patented product under terms and conditions, including prices, fixed by the licensor, necessarily involves knowledge that a stabilized and presumably profitable price for the patented product will result as between the parties and therefore in the industry. The law cannot legitimatize patent licensing arrangements and at the same time
8812 stigmatize the normal consequences thereof. To conclude that the parties to a patent license agreement, providing for sale of the patented product at a price to be fixed by the licensor, may not lawfully at the time of executing the same anticipate that such prices as are from time to time thus fixed will be profitable and the same for both licensor and licensee, *i.e.,* stabilized as between the parties, would be to conclude that the law forbids the execution of patent licenses with a price fixing provision. The *General Electric* case demonstrates that that is not the law. The foregoing applies as well to a plurality of patent licenses as to a single license.

(2) *Intent to accomplish such standardization of gypsum board and its method of production (specifically, by elimination of the manufacture and sale of open-edge board, sec-*

onds and No. 2 board, and by the restrictive provision of the May 1929 licenses concerning the use of the bundling process) as is beyond the proper limits of the patent monopoly:

Open-edge board: Only Texas, Certain-teed and Ebsary are concerned in respect of the open-edge board issue unless a conspiracy is shown and the other defendant-licensees proved parties thereto, since only those companies had made open-edge board before signing their licenses. Beaver, Universal, National, Niagara and American had made only closed-edge or partially closed-edge board. Atlantic's commencement of manufacturing any board was coincidental with its taking a license.

The evidence establishes that there was no agreement to discontinue the manufacture and sale of open-edge board so far as Certain-teed and Ebsary are concerned. Nothing in the license agreements forbids making and selling it. Whittemore testified that Certain-teed had no agreement with USG not to make open-edge board, that according to his understanding Certain-teed was free to make any board, patented or unpatented, although it did not desire to make the open-edge variety because it could not sell it. C. O. Brown also said that Cerain-teed never had any understanding or agreement that the manufacture of open-edge board would be discontinued after the license was signed, and that there was no discussion of such a thing at the licensee meetings. Nelson testified to similar effect. Lenei of Ebsary stated that there was no understanding or agreement reached in the meetings at Chicago not expressed in the license contracts themselves, one of which he signed for Ebsary, and no agreement that the licensees would no longer make the open-edge board—that there was no agreement inside or outside the licenses that the licensees could not make such board if they desired. There is no evidence that Texas agreed not to make the open-edge board.

It may be taken for granted that those companies which had not manufactured open-edge board had no expectation of commencing its manufacture when they took the
8813 licenses granting them the right to make the closed-edge product. Likewise it is not disputed that each of the companies—Texas, Certain-teed and Ebsary—which had made the open-edge board took its license primarily to obtain the right to make the closed-edge type because this was demanded by the trade and the open-edge was not wanted. Therefore it may be inferred that such licensees

did not expect, once they had secured the right to make the closed-edge board, to go forward further with the manufacture and sale of the inferior article. Lenci of Ebsary testified in this connection that when his company commenced to make board in 1928 it made the open-edge variety, "raw all the way around," and found it unsatisfactory because expensive and wasteful. After fabrication, a portion of such board had to be trimmed off by revolving saws, with resulting piles of raw edges and waste. It was extremely hard to sell the open-edge board—the dealer trade demanded the closed-edge variety at that time (1928-1929) being made by certain of Ebsary's competitors. Ebsary's primary reason for taking a license was its desire and need to make the closed-edge board, and once it got the license for this, the company was anxious to go over to closed-edge production, and independently, through Lenci and the other company officers, determined to do so. C. O. Brown testified similarly that Certain-teed took its license in order to make the less expensive and better board and could see no reason for making the inferior type—that the trade did not want it. Chism of Texas likewise said that prior to taking its April 1927 license Texas was making an open-edge board, which proved unsatisfactory to the trade and caused loss of business; that the cost of manufacture was high due to "peelers" and broken edges, and that the open-edge product was getting increasingly difficult to sell. Texas took the license because it wanted to get the right to make board under USG's patents, and immediately after taking the license commenced the manufacture of the closed-edge board and has made that type of product ever since. In short, the primary intention of these three companies in taking the licenses was to obtain the right to make closed-edge board, and this is what they did make thereafter. But they had no agreement either with USG or with one another not to make the open-edge variety, and were legally free to make and sell it. Their expectation, incidental to the taking of the licenses for the primary purpose of making the superior board, not thereafter to manufacture and sell the open-edge variety, was not illegal. The primary purpose being lawful, the incidental expectation cannot be unlawful. Those who have been making, outside of a license, an inferior product, are not bound by the Sherman Act to intend to continue its manufacture and sale in the event they take a license to make a superior product. The discontinuance of making and selling the inferior article will be the

normal economic consequence, or accompaniment, of the manufacture and sale of the superior one. As stated
8814 in topic II, the law cannot legitimatize patent licensing arrangements and operations and at the same time stigmatize as unlawful the purpose to bring them about, the necessary means of bringing them about and carrying them on, or the consequences which normally flow from them. It was there pointed out also that a license to make, use and vend a superior patented product involves probable discontinuance of manufacture and sale of inferior products.

The Government appears to rely upon Exhibits 226 and 332 as evidence of an improper intent not to make and sell open-edge board. The first of these is a memorandum of June 4, 1929, by George M. Brown (a declaration binding only upon Certain-teed), referring to the benefits anticipated in stabilizing the industry by the making of a uniform product. But if it was not illegal to take a license and to make and sell thereunder the closed-edge board, it was not illegal to anticipate the benefits normally flowing from such a course. Exhibit 332 is USG's Report to Stockholders for the fiscal year ending December 31, 1929 (a declaration admitted as binding only upon USG). This report refers to the correction of infringement conditions by damage payments and licenses under royalty, and then states that the returns, while substantial, are relatively of a minor amount —that the major benefits are relief from legal contention and "increased consumption of wallboard products which should follow the quality improvements that a full and uniform use of the patented methods and products should assure." It was lawful for USG to offer to the several board manufacturers, and for them to accept, the closed-edge board license. Since all of the manufacturers took such licenses and made and sold such board there was bound to be full and uniform use thereof. That was a benefit which the patentee had a legal right to anticipate.

The Government appears to construe the provision of the licenses providing for payment as royalty of "an amount • • • equivalent to [a stated percentage] of the selling price of the Licensee of all plasterboard or gypsum wallboard of every kind, whether patented or unpatented, manufactured and sold by Licensee," as an agreement to make the patented product and no other—notwithstanding that this provision on its face impliedly recognizes the right of the licensees to

make open-edge board.[38] It may be assumed, and there is support for the assumption in the testimony of
8815 Lenci, that with royalty thus measurable by all board produced, whether patented or not, and with open-edge board more expensive to make than the closed-edge type, it would have been a business impossibility to continue making the open-edge board as well as the closed-edge variety. Theoretically, it may be said that such a provision in the licenses must either be intended as an indirect application of the royalty to unpatented board or an attempt to eliminate the manufacture of the latter. But under the circumstances of this case as shown by the evidence it can hardly be said to be either, since it was unlikely economically that the open-edge board would be manufactured once the right to make the closed-edge board was acquired. In view of the attitude of the trade the open-edge board would not have been marketed even if the royalty had not been measurable in part by its sale, since it was inferior board and not desired in comparison with the closed-edge type.

The fifth and sixth "whereas clauses" in the Ebsary agreement of May 22, 1929, Exhibit 5, read as follows:

Whereas, Licensor has been unwilling to grant a license except upon the express condition that Licensee will manufacture plasterboard or gypsum wallboard only with a folded or protected edge similar to that manufactured by Licensor, so that Licensor may be protected in its own business of manufacturing and selling said patented products and realize to the fullest extent the benefits under said patents from the manufacture by said Licensee; and

Whereas, Licensor has agreed to waive the express condition aforesaid and grant the said License in considera-

38 The provision in full is: "2. The Licensee further agrees to pay to the Licensor for the right, license and privilege of manufacturing, using and/or selling plasterboard or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions embodying the inventions set forth and claimed in said Utzman Patents and in any and all of said patents and applications for letters patent described in Exhibit A, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to five per cent (5%) of the selling price of the Licensee of all plasterboard or gypsum wallboard of every kind, whether patented or unpatented, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman Patent Number 1,034,746, and thereafter an amount equivalent to one and one half per cent (1 1/2%) of the selling price of the Licensee of all such plasterboard or gypsum wallboard from August 6, 1929, until February 10, 1937, the date of the expiration of said Patent Number 1,330,413."

This is the language of the Ebsary license of May 22, 1929, Exhibit 5. The provisions of the Texas license of April 11, 1927, Exhibit 599, and of the Certain-teed license of May 22, 1929, Exhibit 4, are similar.

tion of the agreement of Licensee to pay to it for the license to use the processes and make and use the machines and/or inventions set forth and claimed in all of said patents and applications for letters patent the amounts hereinafter stated and upon the terms and conditions hereinafter set forth * * *

The Government contends that the language of the sixth "whereas clause" is only a "purported waiver of such condition" referred to in the fifth, and asserts that the fact is that by tacit agreement all of the companies understood in May, 1929, that the open-edge board was to be discontinued. The Government refers to the testimony of Lenci who, on being shown on direct examination only the fifth "whereas clause," said that it was the understanding of everybody who took out a license that the making of open-edge board was to be discontinued. But on cross-examination, when his attention was called to the sixth "whereas clause," Lenci corrected this statement as follows:

Q. Now, in the light of that paragraph, isn't it clear to you that there was no understanding whatsoever on the part of anybody that the licensees would discontinue the making of open-edge board?

A. Yes, that is right.

Q. There was no such understanding, was there?

8816 A. No.

Q. And there was no understanding that the licensees could not make open-edge board outside of this agreement, was there?

A. No.

Q. So that, your testimony is now, isn't it, that there was no agreement or understanding, either in the license or outside of the license, that the licensees could not make open-edge board if they wanted to?

A. That is correct. [Tr. 5234.]

The testimony thus given after both "whereas clauses" had been shown to the witness is accepted as correctly reflecting the facts.[39]

We conclude that there is no substantial evidence that the license agreements were executed with an unlawful intent to eliminate open-edge board, and therefore no sub-

39 In the record the "whereas clauses" above mentioned were incorrectly referred to as the third and fourth rather than the fifth and sixth. This was because what was shown the witness during the examination was page 48 of the complaint on which four "whereas clauses" appeared. But there were two previous "whereas clauses" on page 47. The Ebsary agreement of May 22, 1929, is printed in the complaint at pages 47-57 inclusive.

stantial evidence that the agreements were in such respect not bona fide. Each of the parties to the license agreements was, as said above, free to make and sell open-edge board. Any expectation not to do so was the normal consequence, or accompaniment, of the purpose to make and sell the superior closed-edge product. To hold that the licensees were required to continue to make and sell the inferior article, or that they could not lawfully have an expectation, or even a definite intent, not to do so would be in effect to rule that they could not take the licenses to make the superior board. The law does not at one and the same time sanction an act and penalize the normal economic consequences thereof.

Seconds and No. 2 board: A "second," in the parlance of the trade, is a defective board produced unintentionally in the process of manufacturing standard board. A "No. 2 board" is a board made of lower grade material than that used in the manufacturing of the standard board. Unlike open-edge board, both seconds and No. 2 board are, by definition, board made under the patents. The uncontradicted evidence is that there was no agreement or understanding that seconds and No. 2 board would not be manufactured, but on the contrary that the licensees were free at all times to make and sell such board. C. O. Brown of Certain-teed, Neale of Atlantic, and Black of Celotex were the witnesses examined on this subject. Brown testified that Certain-teed never had any agreement or understanding that the manufacture of second grade board would be discontinued after it received its license. Neale testified, referring to a letter of May 24, 1927 (Exhibit 279),[40] written by Fuller to Avery of USG, that at all times from that date forward
8817 Atlantic sold, without restriction, such seconds as resulted from its production and that he did not recall any agreement or understanding with Avery, USG, or anyone else with respect to whether Atlantic should sell seconds. Black testified that it was his understanding that there was no provision in the licenses which prohibited Celotex from selling seconds if it wanted to, and no agreement

40 This letter (a declaration binding only upon Atlantic) refers to the undesirability of selling seconds in certain markets, to the restriction of sales of seconds to such territory as might absorb them with the least disturbance to the trade in general, and to the policy of Atlantic to sell as few seconds anywhere as possible. The letter refers also to the need of each wallboard manufacturer for some outlet for No. 2 board, stating that this is logical in territory fairly near the plant since this reduced price commodity cannot bear much freight.

between Celotex and USG by which Celotex agreed not to market seconds.

It is contended by the Government that the provision of the license agreements requiring seconds to be marked as such evidences an intention to accomplish their elimination.[41] On the contrary it indicates that it was expected that seconds would be made—as they inevitably are, according to the testimony—otherwise why require them to be marked. If there were to be no seconds, the marking provision would be superfluous. It is reasonably inferable that the real purpose of this provision was to prevent harming the reputation of the standard board by the confusion of seconds with it. Such a precaution was not improper.

We think there is no warrant in the evidence for a conclusion that the license agreements were executed with an intent to eliminate seconds and No. 2 board, and no warrant, therefore, for a conclusion that they were in this respect not bona fide.

The bundling process: USG's Birdsey patent No. 1,696,877, of December 25, 1928, covered a method of binding seven or eight pieces of gypsum board or lath together with a gummed tape which ran lengthwise along the edges of the board or lath. The May 1929 license agreements, except that with Certain-teed, granted rights under this patent and required that the licensees use this bundling process and no other.[42] As is explained in the statement of facts at the outset of this opinion, Certain-teed was first granted license rights under the bundling patent by a supplemental license agreement executed July 3, 1929. This contained the restrictive provision. The November 1929 agreements did not contain the restrictive provision.

It appears from the evidence that there is no satisfactory way of bundling gypsum board or lath except by means of the Birdsey process. C. O. Brown testified that Cer-
8818 tain-teed wanted to bundle its lath and knew of no better or more economical way than the process cov-

41 The license provision was as follows: "9. The Licensee and the Licensor each expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as 'seconds' shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said board showing the word 'seconds' in letters at least three inches in height." (Exhibit 3, paragraph 9.)

42 The restrictive provision was: "It is expressly understood that licensee in its business of manufacturing and selling plasterboard and/or gypsum wallboard will use only said bundle set forth and claimed in said Patent Number 1,696,877 and will not use any other bundle or method of bundling plasterboard during the term of said license." This is the language of the Ebsary agreement of May 22, 1929 (Exhibit 5).

ered by the bundle patent. Chism said that prior to its license of February 10, 1937, Texas did not bundle wallboard at all, and that lath was tied with wire, baling wire or a little heavier, wrapped around the bundle at both ends—about the same method as that used in baling hay; that this was not satisfactory because it caused too much breakage, and because the wire would slip and cut the lath; that after Texas took the license it used the Birdsey patent system of bundling by the use of paper strips on both board and lath—that it has used that invention ever since and is still using it.

It is inferable that the restrictive provision of the May 1929 licenses (and of Certain-teed's July 3, 1929, supplemental license) was put into the contracts for two purposes: to exploit the bundling patent and to accomplish packaging and delivery of board and lath by the licensees in a manner which would preserve quality, *i.e.*, without breakage. Delivery of board by the licensees in broken condition would tend to devalue the product and thus lessen the pecuniary reward of the patentee's monopoly. Within the principle of the *General Electric* decision, it would be a not improper license term to require packaging of a patent product in such manner as would sustain its quality and therefore the price. *Quaere*: Can the owner of a product patent who is also owner of a process patent covering packaging of the product insure proper packaging by requiring use of the patented process only? Is such a restriction illegal as involving a purpose beyond the proper scope of either or both such patent monopolies?

It is urged that if the effect of such a restrictive provision is to drive off the market a competing process, whether patented or not, the provision would be illegal under the principle of the *Motion Picture Patents* case, discussed in topics II and III, because not the incidental consequence of the proper use in its own field of the patent monopoly, but its use in restraint of trade in a field where the rights to compete are common. The ruling in *National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. (2d) 255 (C. C. A. 3d, 1943), *rehearing denied, id.*, is also urged as rendering such a provision illegal. In that case the plaintiff sought damages for infringement of a patent for a compression spring washer. The defendant opposed recovery upon the ground that the plaintiff had issued licenses to various manufacturers of metal washers under a form of agreement by which as licensees they undertook that they would not make or sell any form of "non-tangling" spring washers not covered by the plaintiff's patent. The court held, in view of this restriction,

that the plaintiff was using its patent to suppress competition by unpatented articles, and it accordingly denied recovery. It is to be noted that this case did not involve the use of a process patent in aid of a product patent. It
8819 is contended, moreover, that even in the absence of a competing process or product such a restrictive provision would be illegal, since it would tend to stifle the use of another process or product, if such should be devised, and to discourage invention.

It is pointed out in topic VI.(2) of this opinion that it is neither necessary nor proper to rule upon the question of the legality of the restrictive bundling provision in the May 1929 licenses and the Certain-teed supplemental license of July 3, 1929, for the reason that the question is moot, the provision having been eliminated in the November 1929 licenses. Assuming for the purpose of the present discussion, however, that the restriction in the May licenses and the Certain-teed July license was illegal, it would follow technically that there was in this respect an improper purpose involved in their execution and that they were in this respect, therefore, not bona fide. But since this purpose was abandoned when the November licenses were executed with the restrictive provision omitted, the provision and its purpose cannot be held to support the charge of an intent to accomplish improper industry standardization. While the earlier licenses and the negotiations concerning them and the operations under them are relevant to the purposes of the November licenses, it is the latter which are now outstanding, and under attack in this suit. An abandoned purpose, even if it was illegal while it existed, in the previous licenses, cannot be held to vitiate the present licenses.

In the May 1929 licenses and the Certain-teed July license each licensee agreed to pay the licensor for the right to use the bundling process "a license fee or royalty of ten cents (10¢) per thousand square feet of plasterboard and/or gypsum wallboard which is sold by it in bundles of any kind." [43] In the November 1929 contracts the provision was for "an amount (hereinafter referred to as a license fee or royalty) equivalent to ten cents (10¢) per one thousand (1,000) square feet of plasterboard and/or gypsum wallboard which is sold by Licensee in bundles of any kind,

43 This is the language of the Ebsary agreement of May 22, 1929 (Exhibit 5).

whether or not the bundles shall be made according to the claims set forth and claimed in said patents * * *. The term 'bundle' shall not include unbundled material wired or strapped for purpose of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates." [44] It is urged by the Government that these provisions evidence an attempt to standardize by eliminating other methods of packaging. But in view of the fact, shown by the evidence, that no other process was available (except, for lath, the common and uneconomic method of tying with wire), this cannot be concluded.

8820 (3) *Intent to raise, maintain and stabilize the level of prices of unpatented materials—plaster and miscellaneous gypsum products*:[45] All of the witnesses examined upon this subject testified convincingly that there was at no time any understanding or agreement that prices would be raised or fixed upon plaster or any unpatented gypsum product. Griswold of American testified that there was no discussion between him and Avery of the price of gypsum block and plaster, and no agreement with USG or with any of the other licensees about plaster, block, or tile prices; that it was understood that such an agreement would be illegal. Blagden said that the Beaver license had nothing to do with the price of plaster or miscellaneous gypsum products, and that he had no understanding with Avery, or with anyone else, as to the price of plaster or any other unpatented material. Holland testified that when he became president of Universal, he had no understanding with USG, or anyone else, with respect to the prices of plaster or other unpatented products. With respect to Certain-teed, C. O. Brown stated that he had no understanding that the license agreements of either May or November 1929 would be used to raise or fix the prices of plaster or other unpatented gypsum products; that so far as he knew there was never at any time any agreement or understanding reached regarding the fixing of prices of such materials; that he knew that price fixing under the licenses was applicable only to the patented articles made by Certain-teed, and that Certain-teed was free to sell unpatented products at such prices and on such terms as it chose. George M. Brown testified similarly that Certain-

44 This is the language of the Ebsary agreement of October 18, 1929 (Exhibit 11).

45 The miscellaneous gypsum products referred to in the complaint, as specified by the bill of particulars, are gypsum block, gypsum tile, and Keene's cement.

teed never had any understanding with anyone about the prices it should charge for plaster, gypsum block, gypsum tile, or Keene's cement. Nelson of the same company, testifying concerning the May 1929 license, said that he had never heard of any agreement or understanding that the price control provided for therein should extend to unpatented articles such as plaster, Keene's cement, tile, or block. Whittemore also, referring to the May 1929 license, said that there was never any understanding or agreement with anyone that the prices of plaster or unpatented gypsum products would be raised or fixed; that the only prices which USG could fix under the license agreement were those of patented articles made by Certain-teed.

Lenci of Ebsary testified that he never had any understanding or agreement with anyone with respect to plaster prices other than what was contained in the license agreement or bulletins; that there was nothing in the license agreement concerning plaster; and that the only thing in the bulletins was the protective provision against violation of the minimum price requirements through the
8821 device, among others, of giving away plaster or other products in connection with the sale of board, or the sale of plaster or other products, in connection with the sale of board, at a price unduly below the prevailing market price of such products. Lenci testified further that there was nothing that kept Ebsary from free competition in plaster, and that in his experience such competition was extremely free during the last ten or fifteen years. Black said that Celotex never had any agreement or understanding with USG, or with any other licensee, to raise or fix the prices of plaster or other unpatented gypsum products; that he knew that the license agreements which his company had related only to patented board so far as the price fixing provisions were concerned. Tomkins of Newark stated that he at all times felt perfectly free to charge any price for plaster that he wanted to; that the only effect that the bulletins had was to prevent his making a fake or false price for plaster in order to give a rebate to a board purchaser; that Newark never had any agreement or understanding of any kind with respect to white plaster or any other gypsum product than board. Chism of Texas testified that he understood at all times that the price fixing provisions in the two licenses which Texas signed applied only to patented board manufactured and sold by Texas under the licenses, and that Texas had no agreement or understanding in respect of plaster prices or the prices of

miscellaneous gypsum products. In this state of the evidence, a finding that the licenses were executed with the intention of raising and stabilizing the prices of unpatented materials, and that they were therefore not bona fide, would not be warranted.

It may be assumed, indeed the evidence shows, that the parties to the license agreements were aware that settlement of the litigation, by the signing of the licenses, and the ending of the price war which had demoralized the industry, and the fixing of prices by USG at levels which would presumably be profitable, would as a matter of normal economic consequence improve general conditions in the industry and therefore result in better prices for all products. In a letter written to McCrady of American on April 12, 1928, by Griswold of the same company (Exhibit 141, a declaration binding only upon American), Griswold says: "There is no question but that if the Wall Board market were fixed up the Wall Plaster market would automatically be affected at the same time." Griswold testified, when asked whether he had discussed with Avery whether a stable price for board would have an effect upon plaster or tile prices, that "we probably exchanged views on the possibility of that being the case, because that naturally would follow, that if prices on one of the principal products of a company were at a fairly remunerative basis, and had been changed to that basis, and another article they sold was sold below the cost of manufacture, it was natural to figure that it would influence to a certain extent
8822 the lower prices, that a man wouldn't be trying to make all of his money on one product he was selling, and giving the other one away." Lenci stated frankly that, since under the price protective provisions a licensee would not be free to give away plaster or to sell it at an extraordinarily low price in order to influence the sale of board, that might have the effect of stabilizing plaster prices as compared with their condition prior to the execution of the licenses. It is, indeed, conceded by the defendants that although after the signing of the May 1929 licenses the bulletins established board prices at the levels which USG had been following just prior to the licenses, subsequently, until August 6, 1929, and (except for Texas) after the execution of the November 1929 agreements, the prices on patented gypsum board were advanced over what they had been during the price war, and that the prices of other gypsum products improved during the same period over their condition during the price war. This is discussed

more particularly in topic VI (1) and (3) of this opinion. But these considerations evidence no improper intent disclosing bad faith in the execution of the license agreements. The primary purpose of USG in granting the licenses was the settlement of litigation, the collection of damages for infringement, the obtaining of royalties, the fixing of a profitable price on patented board, and the securing of the various advantages which would normally flow from the general manufacture and sale of the superior product. The primary purpose of the licensees in signing the licenses was the obtaining of the right to make the superior product and the settlement or avoidance of litigation. The granting and accepting of the licenses with these primary purposes and with the normal expectation also, by the licensees, or some of them, that USG would fix a reasonably profitable price on board was, as has been demonstrated, lawful. That being true, the fact that the parties knew that as a matter of economic consequence the price of plaster and miscellaneous gypsum products would also improve cannot taint with bad faith the execution of the license agreements. A contrary view would make unlawful the incidental consequences of lawful patent licensing.

4. *Intent to effectuate improper restriction upon the distribution of gypsum board, plaster and miscellaneous gypsum products; specifically, to "eliminate" jobbers through the discontinuance of a sales discount:*

In the theoretical economic sense a jobber is a functionary in the wholesaling process. He buys from the manufacturer, or from another wholesaler who has bought from the manufacturer, and sells to the dealer. The jobber's service is that of relieving the manufacturer, or in some instances the wholesaler, from the necessity of direct contact with the dealer—this being accomplished by the jobber's sales force.

As explained in the statement of facts at the outset
8823 of this opinion, in the gypsum industry USG and the several licensees are the manufacturers of gypsum products, and the dealers in such products are largely retailers of building materials and mason supplies.

The price bulletin issued by USG on May 23, 1929 (Exhibit 404, a declaration binding only upon USG), immediately after the execution of the May 1929 licenses, had fixed the minimum list price at which the licensees might sell patented board made by them to dealers. On May 24, by a further bulletin (Exhibit 408, a declaration binding only upon USG), USG authorized the sale of such board to

jobbers at a 10% discount from the dealer price. On August 8, 1930, USG by a bulletin (Exhibit 430, a declaration binding only upon USG) withdrew this discount. This bulletin stated: "Effective this date the price to jobbers and distributors is the same as the price to the regular dealer trade, as per our letters * * * [of various dates]" establishing prices to dealers. The reason for the withdrawal of the discount will be discussed in topic VI (4) of this opinion.

The evidence introduced by the Government fails to establish that the license agreements were executed with an intent to eliminate jobbers through this withdrawal of discount and that they were on that account not bona fide. The witnesses examined on this subject all testified that there was no agreement or understanding whereby jobbers would be eliminated from the gypsum board distributive system, and no understanding or agreement that a jobber discount would be discontinued and the price to jobbers made the same as the dealer price. Thus Lenci of Ebsary testified that he did not enter into or know of any agreement or understanding that jobbers would be eliminated from the distributive system. He stated further that it was not his understanding that there was anything in the license agreement executed by Ebsary, or in the bulletins, which prohibited the selling of Ebsary's goods to jobbers. He testified also that at the May meetings in Chicago, when the Certain-teed, Niagara and Ebsary licenses were signed, there was no agreement to eliminate jobbers. George M. Brown of Certain-teed stated that the only agreements he had with Avery or anyone in USG were those contained in the written licenses. Black testified that it was his understanding that there was no prohibition in the USG-American license (of November 25, 1929) against American's selling to jobbers. The issuance, immediately upon execution of the May 1929 licenses, of the bulletin of May 24 (Exhibit 408) providing for a discount to jobbers evidences that at that time it was intended that sales to jobbers should be made.

The Government refers to a letter of November 12, 1929 (Exhibit 181, a declaration binding only upon American), written by Kling to Avery before the signing of the November 24, 1929, agreement between American and
8824 USG. Kling asks Avery, among other things, for "Your approval of our (4) Jobbers—the Fairmount [*sic*] W. P. Co., the Toledo P. P. Co., the Cleveland Gypsum Co., and Abbey Co." To this Avery responded under

date of November 16, 1929 (Exhibit 182, a declaration binding only upon USG):

> • • • You ask for our approval of your jobbers. Under paragraph 9 of the contract you have the right to sell jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail) without any approval from us. If the jobbers you name are regular jobbers as above stated, then you would have the right to sell the patented product to them. • • •

The letter from Kling evidences that American was selling to jobbers and desired to continue doing so. Neither that letter nor the one from Avery is any evidence of an intent to "eliminate" them or withdraw the discount. On the contrary these letters indicate an intent to continue to deal with jobbers.

In the bulletin of May 24, 1929 (Exhibit 408), whereby the discount to jobbers was established, Henning of USG said: "You will please send us a list of the jobbers to whom you are selling patented board." Lenci of Ebsary testified that at a licensee meeting on June 6, 1929, Henning discussed the question of jobbers in the industry and asked the licensees to send him the names of those to whom they were selling as jobbers. The Government refers to this as a move to eliminate jobbers gotten under way as soon as the industry was once organized under the license agreements. But this request for the names of jobbers and the (undefined) discussion of the question of jobbers in the industry are equivocal in respect of any intent to eliminate them or withdraw the discount. What Henning's purpose was in obtaining the names is speculative. He may have desired them in order to satisfy himself by investigation that the persons named as jobbers were really jobbers, rather than dealers.

Although the charge in the complaint of improper restriction upon distribution includes plaster and miscellaneous gypsum products, *i.e.*, unpatented materials, as well as gypsum board, there is no evidence concerning any dealings by USG or the licensees with jobbers in respect of plaster and miscellaneous gypsum products.

It cannot be concluded that the license agreements were executed with intent to "eliminate" jobbers, and that they were for that reason not bona fide.

(5) *Intent to fix the prices at which manufacturing distributors resell gypsum board*: The term manufacturing distributors is applicable to companies which manufacture and sell gypsum plaster but which do not, for lack of investment in the large amount of plant equipment necessary in the making of gypsum board, manufacture board. In order to be able to market a full line of products, the manufacturing distributors purchase gypsum board from USG or one or more of its licensees. The purchases are made at a discount, and the sales of the board are
8825 made to the same dealer trade as that to which USG and its licensees sell their board, and therefore are made in competition with USG and its licensees. As pointed out in the statement of facts at the outset of this opinion, both the May and the November 1929 license agreements provided that a licensee might not sell patented gypsum board to manufacturing distributors without the written consent of USG. The manufacturing distributors referred to in the evidence are the Structural Gypsum Corporation, of Linden, New Jersey; the Connecticut Adamant Plaster Company, of New Haven, Connecticut; and the Oakfield Gypsum Products Corporation, of Oakfield, New York, hereinafter referred to as Structural, Connecticut Adamant, and Oakfield, respectively.[46]

There is no substantial evidence that the license agreements were executed with intent to fix the prices at which manufacturing distributors resell gypsum board. All the witnesses examined on the subject testified that there was no understanding or agreement of any kind that the resale prices of such distributors should be regulated or controlled. Neale of Atlantic stated that neither he nor his company was ever a party to any understanding or agreement to control resale prices of manufacturing distributors. Whittemore of Certain-teed stated that he fully understood that the only prices which USG could fix under the license agreement (his reference was to the May 1929 agreement) were the prices of patented articles made by his company, that USG had no right to control any price on board except the price at the first sale made by Certain-teed, and that he

46 The bill of particulars lists as manufacturing distributors, in addition to those named in the text, the American Cyanamid & Chemical Corporation, of New York, N. Y.; The Calvin Tomkins Company, of New York, N. Y.; the Grand Rapids Plaster Company, of Grand Rapids, Michigan; the Michigan Gypsum Company, of Grand Rapids, Michigan; The Alabastine Company, of Grand Rapids, Michigan; and the Wasem Plaster Company, of Fort Dodge, Iowa. No evidence was introduced concerning those companies.

understood that USG's right to fix prices did not extend to resales by either dealers or manufacturing distributors. Lenci of Ebsary said that while he at one time thought that the ownership of a patent carried with it the right to control resale prices, this misapprehension had been acquired from something he had read and was not the result of anything that had been said or done at any licensee meeting or of any understanding or agreement with USG or anyone else, and that his erroneous impression was corrected by MacLeish, USG's attorney, at one of the licensee meetings in 1932. He testified, further, that notwithstanding his impression up to that time, at no time had it been his purpose or that of Ebsary to control the prices or practices of manufacturing distributors, and that they at no time had any understanding or arrangement or agreement with anyone to the effect that Ebsary would control or attempt to control the resale prices at which manufacturing dis-
8826 tributors or any of them sold board purchased from Ebsary. Stromquist testified that Universal never at any time had any agreement or understanding as to what resale prices should be charged by the manufacturing distributor to which it sold, to wit, Oakfield.

The clause of the licenses forbidding sales to manufacturing distributors without the written consent of USG does not, looked at by itself, constitute evidence of an intention to control the prices of such distributors. It is equivocal on that issue. How this clause was applied in practice will be commented upon in topic VI (5) of this opinion.

Nothing in the record warrants the conclusion that the license agreements were executed with intent to fix the prices at which manufacturing distributors resell gypsum board, and that they were on that account not bona fide.

We conclude in respect of the second aspect of the first question of fact in the case that the evidence fails to show that the license agreements were executed with intent to gain objectives beyond the proper limits of a patent monopoly in any of the respects charged.

It is, therefore, concluded, in respect of the whole of the first issue of fact, that the evidence fails to establish that the license agreements were entered into by the defendants not as bona fide license agreements but to give color of legality to a combination to restrain trade in violation of the Sherman Act.

VI

The Operations of the Defendants and the Limits of the Patent Monopoly

Notwithstanding the conclusions reached in respect of the first issue of fact, it still remains to determine whether or not the actual operations of the defendants were carried beyond the proper limits of the patent monopoly and licensing thereunder, *i.e.*, beyond the activities contemplated by the agreements as written and into the field denounced by the Sherman Act. This is the second issue of fact in the case. It is charged (1) that the price of gypsum board was raised and fixed at arbitrary and non-competitive levels; (2) that improper standardization of gypsum board and its method of production was accomplished; (3) that the level of prices of unpatented materials—plaster and miscellaneous gypsum products—was raised, maintained and stabilized; (4) that improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products was effectuated; and (5) that the prices at which manufacturing distributors resold gypsum board were fixed.

8827 (1) *Raising the price of gypsum board*: It is pointed out in topic V (1) of this opinion that the charge in the complaint that the defendants raised and fixed the prices of gypsum board at arbitrary and non-competitive levels, alleges nothing illegal where bona fide patent licensing is involved, for the reason that under the patent law it is the right of a patentee to fix the price of the patented product at such levels as he chooses and to require his licensees to sell at the price thus fixed. The question whether or not at the time of the execution of the license agreements there was an intent by the parties that the price of gypsum board should be raised to high levels has been discussed only because of its possible bearing upon the question of the bona fides of the agreements. It has been concluded that no such intent is shown. It is therefore not necessary to determine whether or not the price of gypsum board was actually raised to high levels. But it may be noted that the evidence is as follows: After the signing of the May 1929 licenses by National, Certain-teed, Ebsary and Niagara, the USG bulletins established board prices at the levels at which USG had been selling board just prior to the execution of these licenses. For example, the price bul-

letin of May 23, 1929 (Exhibit 404, a declaration binding only upon USG), set 3/8" standard board at $20 per M square feet on the Oakfield, New York-Grand Rapids, Michigan, etc. mill base. On the New Brighton, New York, mill base the figure was $22.60; on the Charlestown, Massachusetts, mill base, $23.65; on the Buffalo, New York, Loveland, Colorado (mixed car shipments), and Philadelphia mill bases, $22.73, $30 and $22.60; respectively. These were the first prices announced after the signing of the May licenses. Lenci of Ebsary testified that these prices were about what USG was getting for its board at the time, and higher than Ebsary had been getting. Subsequently, until August 6, 1929, and (except for Texas) after the execution of the November licenses, the prices were advanced over what they had been during the price war. This is admitted by the defendants—reference being made to Exhibits 410, 413, 414, 416 and 33 (declarations binding only upon USG), the last bringing the prices down to February 12, 1940. But it is not in dispute that these prices did not exceed those which prevailed prior to the first license (the Beaver license) and the price war. Since 1935 the prices have been lowered so that for the past several years wallboard has sold for $23 per M square feet and lath for $13, as compared with $30 and $15-$16, respectively, before the first license. This is attested by Exhibit 33 and Exhibit 34 (a declaration binding only upon USG) and by the testimony of Griswold of American.

While the charge of the Government, as stated in the complaint, is that the price of gypsum board was raised and fixed at arbitrary and non-competitive levels, the essence of the Government's contention on this subject, as made
8828 in the Government's briefs, is that it was illegal for USG to fix, and for the licensees to abide by, the board prices at all. Its reliance is upon the ruling in *United States* v. *Socony-Vacuum Oil Co.* and *United States* v. *Bausch & Lomb Co.*, referred to in topic III of this opinion, to the effect that price fixing, reasonable or unreasonable, is unlawful *per se*. But, as pointed out in topic III, neither of these cases involved patents. And neither of them purports to overrule the *General Electric* case which, as demonstrated in topic II, legitimatizes price fixing under patent license agreements and therefore permits the establishment of prices at "arbitrary" and "non-competitive" levels.

(2) *Was there such standardization of gypsum board and its method of production (specifically, by the elimination of*

the manufacture and sale of open-edge board, seconds and No. 2 board, and by the restrictive provision of the May 1929 licenses concerning the use of the bundling process) as is beyond the proper limits of the patent monopoly?

Open-edge board: It is not in dispute that Texas, Certain-teed and Ebsary, the only companies which prior to their licenses had made open-edge board, discontinued its manufacture and sale once they had acquired the right to make closed-edge board. It may be assumed that the other licensees, who had not manufactured the open-edge board, did not commence its manufacture. But it was pointed out in topic V (2) that according to the evidence the open-edge board was wasteful and not desired by the trade, that the primary purpose of Texas, Certain-teed and Ebsary in taking their licenses was to acquire the right to make and sell the superior closed-edge board, and that a concomitant expectation that the open-edge board would be discontinued was not beyond the proper limits of the patent monopoly and licensing thereunder. It follows that the actual discontinuance of manufacture and sale of open-edge board by Texas, Certain-teed and Ebsary, and the non-manufacture and sale of such board by the other licensees, was not illegal. Since it was lawful to take the licenses to make the superior board, it was not unlawful not to make and sell the uneconomic open-edge variety. The normal economic consequence of what is lawful cannot be unlawful. As pointed out in topic II, at the time the General Electric-Westinghouse license was executed in 1912, about 50% of the total number of lamps sold were of the ordinary carbon filament type, but after nine years of operation under the license the percentage of tungsten filament lamps increased, because of their superior quality, to some 97% of total production, that is to say, the carbon filament lamps substantially disappeared from the market. It was not concluded in the *General Electric* case that on this account the operations of the parties under the General Electric-Westinghouse license had been carried beyond the proper limits of the patent monopoly.

8829 *Seconds and No. 2 board*: The Government asserts that in 1929 USG issued bulletins under which the minimum prices at which seconds and No. 2 board could be sold were raised until they were the same as that for standard board, and that since this occurred there has been no sale of seconds and No. 2 board. The prices fixed by

the bulletins are set forth in the margin.[47] It appears not to be disputed by the defendants that the effect of the bulletins was to set the minimum price of seconds and No. 2 board at the same figure as that for standard board, and in the comments to follow this will be assumed, although, as will be noted from the bulletin prices set forth in the margin, No. 2 board stood on the Oakfield, New York, basing point at the same price as No. 1 only from June 26 to July 9, 1929, and seconds at no time reached the same figure as the standard board; also on the New Brighton, New York, basing point No. 2 board stood at the same price as No. 1 only from June 26 to July 9, 1929, and the seconds at no time reached the same price as the standard board.

The evidence fails to show that there was a complete elimination of either seconds or No. 2 board. C. O. Brown of Certain-teed testified that on December 3, 1929 (he was referring to Exhibit 236, a memorandum from Henley of Certain-teed to Coffin of the same company[48]), Certain-teed was making seconds and that every company unavoidably

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47 The bulletins referred to are Exhibits 404 of May 23, 1929; 410 of June 7, 1929; 411 of June 19, 1929; 413 of June 26, 1929; and 414 of July 9, 1929. (The exhibits are declarations binding only upon USG.) These bulletins show that: On May 23, 1929 (Exhibit 404), the price of 3/8" #1 Grade (standard) wallboard f.o.b. Oakfield, New York; Gypsum, Ohio; Plasterco, Virginia; Grand Rapids, Michigan; Ft. Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas; and Acme, Texas, was $20 per M sq. ft.; of #2 Grade wallboard of the same dimension, $17.50 per M sq. ft.; and of seconds of the same dimension $15 per M sq. ft. On June 7, 1929 (Exhibit 410), the price of #2 board for the same dimension and basing points was raised to $18.75, and the price of seconds to $16.25, per M sq. ft., no change being made in the price of standard board. These same prices were continued by the bulletin of June 19, 1929 (Exhibit 411). On June 26, 1929 (Exhibit 413), #2 board was priced at $20, the same as the standard board; and seconds were priced at $17.50. On July 9, 1929 (Exhibit 414), standard board went to $22.50, seconds remained at $20, and no mention was made of #2 board, the same remaining therefore at the previous figure of $20 per M sq. ft.

On May 23, 1929 (Exhibit 404), the price of 3/8" #1 Grade (standard) wallboard, based on New Brighton, New York, was $22.60 per M sq. ft.; of #2 Grade of the same dimension, $20.10 per M sq. ft.; and of seconds of the same dimension, $17.60 per M sq. ft. On June 7, 1929 (Exhibit 410), the #2 board was raised to $21.35 per M sq. ft.; the seconds to $18.85; and, no change being made in the standard board price, it thus remained at $22.60. On June 19, 1929 (Exhibit 411), no price change was made for the New Brighton, New York, basing point, and prices therefore remained the same on standard, #2 board, and seconds. On June 26, 1929 (Exhibit 413), the New Brighton price for 3/8" #2 board was changed from $21.35 per M sq. ft. to $22.60; and the seconds from $18.85 to $20.10; no change was indicated in the standard board. On July 9, 1929 (Exhibit 414), the 3/8" standard board based on New Brighton was priced at $25.10 per M sq. ft., the seconds at $22.60; no change in price of #2 board being indicated, that remained at $22.60.

The foregoing figures are given as illustrative. The bulletins refer also to prices f.o.b. other basing points.

48 This memorandum (a declaration binding only upon Certain-teed) states that the writer is endeavoring to work out a seconds policy with USG.

does. Neale of Atlantic testified that as his company
8830 improved in the art of board manufacturing naturally fewer and fewer seconds were made. Fuller, in a letter of May 24, 1927 (Exhibit 279, a declaration binding only upon Atlantic), referred to in topic V (2), mentioned the policy of Atlantic to sell as few seconds anywhere as possible, and pointed out that seconds will run into a much higher percentage during the period of getting a new wallboard plant running smoothly than they should later on. In the same letter he referred to Atlantic's hope of disposing of the necessary output of seconds with as little damage to established markets as possible. This is the only evidence on the subject and it shows a diminution rather than an elimination of seconds. It shows nothing concerning No. 2 board. Assuming, however, that seconds and No. 2 board went wholly off the market as a result of the bulletins, there would be no illegality.

As explained in topic V (2), a second was a defective board, and No. 2 board was made of inferior material and accordingly its sale would be harmful to the reputation of the first quality product. C. O. Brown testified that the selling of seconds is harmful to the reputation of the perfect grade of any manufactured product. Protection by a patentee manufacturer of the quality of his product is important commercially, for if quality and reputation for quality descend so will demand and price. It would have been lawful for USG as patentee, if it so desired, to refrain from making and selling No. 2 board and, to the extent that they were made in the normal process of manufacturing standard board, to refrain from selling seconds. Similarly, it would have been lawful for USG directly to require this of its licensees in order that their sale of inferior products would not damage the reputation of the board produced by USG. Since the No. 2 board and seconds were, as stated in topic V (2), by definition board made under the patents, it was lawful for USG to fix the minimum price at which they were sold. Accordingly, it could fix the price of all patented board products at the same figure. And if the purpose of this was indirectly to accomplish a diminution or elimination of the sale by the licensees of the inferior products, this was lawful. In the General Electric-Westinghouse license there was a restriction against selling second grade material in the form of refilled burned out lamps. If such a direct prohibition is lawful, the same end may be reached indirectly by pricing all patented products, whether inferior, defective, or standard, at the same figure.

In the instant case, if the licensees desired to try to sell defective or inferior patented products at the price established for the standard board, they were free to do so, although this would have been difficult economically.

The Government refers to *Standard Sanitary Mfg. Co.* v. *United States,* referred to in topic II, as supporting its contentions concerning the elimination of seconds. That case is reviewed below in topic VIII in the course of discussion of authorities especially relied upon by the Government. It is sufficient to point out here that the "seconds" which
8831 it was purposed to eliminate from the market in that case were not patented products.

The bundling process: It has been pointed out in topic V (2) that the May 1929 license agreements and the Certain-teed supplemental license of July 3, 1929, granted rights under the Birdsey patent No. 1,696,877 and required that the licensees use this bundling process and no other, but that the November 1929 licenses did not contain this restrictive provision. Since the bundling patent covered merely a process of packaging, it obviously could accomplish no standardization of board as such. There is no evidence that during the period from May to November, when the restrictive provision was in the licenses, it drove off the market any other process of packaging, or that there was any other process (except for lath, the common and uneconomic method of tying with wire); and the evidence shows that use of the bundling process, since execution of the November 1929 licenses, has been on its merit, for lack of a better one. There is no evidence that the restrictive provision will be reintroduced into the presently outstanding licenses; its absence from November, 1929, until August 15, 1940, the date this action was filed, indicates that its reintroduction is unlikely. There is no evidence that the elimination of this provision in November, 1929, was in anticipation of the instant action, or of any other antitrust proceeding. Under these circumstances, the question of the legality of the restrictive provision has become moot, and its presence in the May licenses is not a foundation for equitable restraint. In *Standard Oil Co.* v. *United States,* cited in topics II and III, it appeared that certain patent license provisions the legality of which was questioned were voluntarily cancelled prior to the entry of a decree below in respect of other issues. The Supreme Court held that since the relief sought was an injunction and hence related only to the future, the question of the validity of such pro-

visions had become moot. In *Industrial Ass'n* v. *United States*, 268 U. S. 64, 84 (1925), the Court said concerning injunctive relief sought in respect of allegedly unlawful interference with freedom of sale and purchase of building supplies:

> • • • whatever may have been the original situation, the practice was abandoned long before the present suit was instituted, and nothing appears by way of threat or otherwise to indicate the probability of its ever being resumed. Under these circumstances, there is no basis for present relief by injunction. *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 444-445.

Cf. United States v. *Hamburg-American Co.*, 239 U. S. 466, 475-8 (1916).

(3) *Was the level of prices of unpatented materials—plaster and miscellaneous gypsum products—raised, maintained and stabilized*: As pointed out in topic V. (3), it is admitted by the defendants that during the period of price improvement upon patented gypsum board after the signing of the licenses, the prices of other gypsum prod-
8832 ucts increased over their condition in the 1927-1929 price war. If this increase was but the incidental economic result of the general industry betterment and the improvement in the prices of patented board, themselves consequent upon the settlement of the litigation and the execution of the licenses, it was not beyond the proper limits of the patent monopoly because the settlement of the litigation and the execution of the licenses were lawful. If, however, the increased price of unpatented materials was the result of some device adopted or action taken to bring about such an increase, rather than of the operation of economic law, then it was unlawful as beyond the proper limits of the patent monopoly.

The Government relies upon the bulletin provision set forth in the statement of facts at the outset of this opinion that "Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price • • • by reducing the price of other products" • • •" (Exhibit 37, a declaration binding only upon USG, a bulletin of February 6, 1939, page 2) This, it will have been noted, is but part of a larger provision concerning rebates and allow-

ances—a price protective provision. The Government contends that the portion quoted was but a device to raise, maintain and stabilize the price of plaster and miscellaneous gypsum products, and that it was effectively applied by the defendants to that end. To the contrary the defendants assert that the provision in question is a proper price protective measure and that it was not abused. That such a price protective provision is proper in a patent license has already been concluded in topic II of this opinion, where the terms and conditions of the licenses in the instant case were compared with those in the *General Electric* case. And the evidence in the instant case fails to establish that in operation this provision was used illegitimately, *i.e.*, to raise, maintain and stabilize the price of unpatented materials.

The Government introduced numerous exhibits in support of its contention that the bulletin provision was improperly applied. Those discussed below are typical. Exhibit 489 (a declaration binding only upon USG) is a letter of March 31, 1933, from Board Survey to Ebsary which advised of a complaint that Ebsary had violated the minimum price on patented gypsum board through the device of rebating by giving away plaster to a dealer, Wallace & Herring, of Alexandria, Virginia, in connection with a sale of patented board. The letter sought advice in detail as to

> the sales of board to Wallace & Herring and specific
> 8833 advice also as to any donations or credits made in
> conjunction with such sales.[49]

Exhibit 490 (a declaration binding only upon Ebsary) is an intra-company letter of April 10, 1933, from Diegel, general sales manager of Ebsary, to Lenci, its secretary, stating that in the sales to Wallace & Herring inquired about by Board Survey, Ebsary secured "regular prices on the board and regular prices on the plaster." Exhibit 491 (a declaration binding only upon Ebsary) is Ebsary's reply of April 12, 1933,

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49. The body of this letter reads as follows:

"We are advised that your company has recently sold wallboard and/or plasterboard embodying the claims and inventions of the patents under which you are licensed to Wallace & Herring, Alexandria, Virginia at prices below the licensor's minimum price to you for such board in such market.

"Specifically, that you did sell this firm a mixed carload of plaster and patented board and did not invoice or charge to this firm a certain amount of plaster, and this was also handled so as to reflect to the said Wallace & Herring, Alexandria, Virginia a rebate on the patented board they purchased from you.

"Please advise in detail as to your sales of patented board to this firm, and specifically advise us of any donations or credits made in conjunction with your sales of said board."

written by Lenci in answer to the Board Survey charge of March 31, 1933. In this letter Lenci advised that Ebsary has secured from Wallace & Herring in every case the full bulletin prices for wallboard or plasterboard under the license agreement, and that no special price was made to induce board business.[50] Following this, on April 14, 1933, by Exhibit 492 (a declaration binding only upon USG), Board Survey wrote Ebsary, complained that the letter of April 12, 1933, was not a full answer to the March 31 charge, and sought advice as to whether or not Ebsary had donated plaster to Wallace & Herring so as to reflect to it a rebate on purchases of the patented board. To this Ebsary replied on April 20, 1933, by Exhibit 493 (a declaration binding only upon Ebsary), "we wish to state definitely that we have made no donation of plaster to these people. Furthermore, that we did not make them any special price on plasterboard in order to induce an order for board." Exhibi. 494, a letter of June 15, 1933 (a declaration binding only upon USG), involves a similar complaint against Ebsary in respect of sales of board to the Waltham Lime Company, of Waltham, Massachusetts. This letter stated that the Waltham Company had recently sold plasterboard manufactured by Ebsary at a price which would seem not possible if Ebsary's sales of board to this dealer had been made at the minimum fixed by the licensor, and that it is alleged that Ebsary's sales of plaster had been at less than the market price in order to reflect a lower price than the licensor's minimum.

In reply to this Ebsary, under date of June 20, 1933 8834 (Exhibit 495, a declaration binding only upon Ebsary), asserted that its sales of board to the Waltham Company were strictly in accordance with the bulletins issued under the license agreement, and that sales of plaster to this dealer were made on the same basis as the prevailing prices made by Ebsary's competitors for similar business, and not with the intent to influence board sales. A letter of June 15, 1933, to Ebsary by Board Survey, Exhibit 497 (a declaration binding only upon USG), advised of an alleged sale of plaster by Ebsary to the "Liberty Coal

50 The body of this letter reads thus:

"Referring to your letter of March 31st with reference to Wallace & Herring, Alexandria, Virginia, we wish to advise that we have secured from them in every case the full Bulletin price for wallboard or plasterboard under the License Agreement.

"Whatever sales of plasterboard have been made to this firm have been made at the prevailing price and no special price made to induce board business."

Company, Chelsea, Massachusetts," at less than the market price in order to reflect to this customer on its purchases of patented board a price lower than the licensor's minimum. By a letter of June 20, 1933, to Board Survey, Exhibit 498 (a declaration binding only upon Ebsary), Ebsary repudiated this charge, stating that sales of board to the "Liberty Coal & Cement Company" had been strictly in accordance with the bulletins issued under the license agreement, and that the sales of plaster had been made on the same basis as the prevailing prices charged by competitors, and not with the intent to influence board sales. Again, a letter of April 24, 1934, from Board Survey to Ebsary, Exhibit 500 (a declaration binding only upon USG), advised of an alleged violation of minimum prices on sales of plasterboard to Service Masons Supply Company, of New York, by allowances on other commodities. In Exhibit 501 (a declaration binding only upon Ebsary), under date of May 3, 1934, Ebsary denied this and specified only one carload shipment of board to Service Masons Supply Company during the preceding six months, quoted the prices, and stated that this carload was charged and paid for at the proper bulletin price and that sales of other materials were paid for at the prices prevailing in the New York market, and that no special prices or concessions of any kind were made to influence the sale of this car of board.

Lenci testified that all of these letters had to do with charges that Ebsary was rebating on its board prices through the device of cutting plaster prices in combination sales. He stated that he fully understood that USG was not attempting to fix or control Ebsary's plaster prices, and that Ebsary felt free to sell plaster at any price it saw fit provided it did not attempt to cut the price of board through the means of giving away plaster, or through charging an abnormally low price for it in a combination sale. Concerning Exhibit 500, Lenci said that it was a letter from Board Survey referring to an asserted reduction in the price of board by granting allowances in purchases of other commodities, including plaster; that Ebsary had no published price list at any time in selling plaster; that its instructions to salesmen were to sell at certain prices, but that it always felt free at any time to meet a quotation which it found existing in any territory in which it was selling. He said that
to a certain extent there was such a thing as a pre-
8835 vailing price or general price in Ebsary's territory, but that this was always flexible; that the two largest

companies operating in Ebsary's area were USG and National, and that Ebsary would naturally know about the prices those companies were selling at since its salesmen were in contact with customers at all times and kept the company well informed. Lenci stated that that influenced Ebsary in its instructions to its salesmen as to what prices they should get, since it wanted to get as much for its product as it could—that the company would have to be influenced by the USG price on plaster in determining what it (Ebsary) could get—"it would be the condition of the market. We couldn't get more, and we naturally wouldn't want to sell for any less."

Other exhibits introduced by the Government relate to asserted violations by other companies, specifically Certain-teed and National, of the minimum price on patented gypsum board by means of gifts of, or rebates upon, plaster. The exhibits relating to Certain-teed are Nos. 727, 729-738, and 746-749. Those relating to National are Nos. 758 and 759. (Each of these exhibits was received in evidence as binding only upon USG.) None of the asserted violations referred to in these exhibits relates to gypsum block, gypsum tile or Keene's cement. The Government introduced additional exhibits which concern alleged violations of the minimum price on patented gypsum board by means of gifts of, or rebates upon, roofing products, paints, insulation board, building paper and fibre board, and by means of such devices as free painting of signs, sales of company stock below the market price, donations to a ball club and receiving payments for board in certificates of deposit, rather than in legal tender. But these are not embraced within the charge of the complaint for this confines itself to plaster and miscellaneous gypsum products, which, as specified in the bill of particulars, include only gypsum block, gypsum tile and Keene's cement. It is therefore unnecessary to discuss these additional exhibits.

There is no substantial evidence in any of the foregoing exhibits that the price protective provision quoted at the outset of this sub-topic was used by the defendants as a device to raise, maintain and stabilize the price of plaster. What the evidence relied upon by the Government does show is merely this: One of the licensees would hear that patented board purchased by a dealer from another licensee was being resold at such a price as would indicate that the vendor-licensee had granted the dealer a concession below the minimum price on board: A report of this would be made to Board Survey as a probable violation of the bulletins. Board Survey would make inquiry of the vendor-li-

censee and receive an explanation. Putting this otherwise, various licensees were insisting that USG through Board Survey require obedience to the bulletin provisions
8836 in respect of prices on patented board. But they were not seeking to sustain the price of plaster, except in the sense that they were complaining against what were believed to be fake or false sales of plaster or sales at such gross diminution below the prevailing plaster price as constituted a means of rebating from the bulletin price on board. USG, on being informed of alleged rebating, was requiring the accused licensees to explain or desist. If the effect of this was to keep the price of plaster at or about the prevailing rate in the industry, this was only the incidental result of the exercise of the right of the licensor to insist upon obedience to the bulletins so far as patented board was concerned and was therefore not illegal.

We conclude that there is no substantial evidence that the conceded advance in the price of plaster after the signing of the licenses was the result of a device adopted, or action taken, by the defendants, or the result of anything other than the rise in board prices and the general industry betterment occasioned by the settlement of the litigation and the signing of the licenses.

(4) *Was improper restriction effectuated upon the distribution of gypsum board, plaster and miscellaneous gypsum products, by "elimination" of jobbers through the discontinuance of a sales discount*: As explained in topic V (4), jobbers in their proper function serve a useful purpose in the wholesaling process, buying from the manufacturer and selling to the dealer. Upon the execution of the May 1929 licenses, USG, by a bulletin of May 24, 1929 (Exhibit 408, a declaration binding only upon USG), applicable by its terms to patented board made by the licensees, authorized the sale of such board to jobbers at a discount of 10% below the minimum list price fixed for licensees' sales to dealers.

It appears, however, that jobbers in the gypsum industry occupy a somewhat ambiguous position. Higgins, at one time a division sales manager of National, testified that the terms "wholesaler," "jobber" and "distributor" have been "footballed and kicked around" and vary with different industries, and that there are no jobbers in the gypsum industry in the sense of persons who buy from manufacturers, sell to dealers, bill the dealers, carry the accounts and pay the manufacturers. Lenci of Ebsary said that in the gypsum board business it was difficult to know whether or

not a given person was a jobber. During his direct examination Spease, of the Fairmont Wall Plaster Company, named a number of persons or firms as jobbers; but on cross-examination it appeared that his statements were somewhat reckless, that he knew little of the activities of such persons or firms in recent years. Lenci testified that Ebsary largely sold direct to dealers; that it was not particularly interested in selling to jobbers, partly because it had its own sales force and therefore jobbers had little to offer in the
8837 way of service, but also because jobbers, buying at a jobber discount, would set up an unfair artificial competition. He explained that some of them who purchased board on the representation that they were acting in their proper function as jobbers, *i.e.*, as intermediaries between the manufacturer and dealers, were in fact themselves acting as dealers, reselling to contractors and ultimate consumers, and that in so doing they could undersell the regular dealer, who received no discount, with resultant bad feeling on his part toward Ebsary. Lenci explained also that some jobbers in selling to dealers would divide the discount with them, and to that extent undersell Ebsary with its own dealer-customers.

In this situation USG, on August 8, 1930, by a further bulletin (Exhibit 430, a declaration binding only upon USG), withdrew the jobber discount—that is, made the minimum price at which licensees could sell to jobbers the same as the minimum price to the regular dealer trade. As this was put by Lenci, there came a time in 1930 when Ebsary received a bulletin which "leveled off the price to dealers and jobbers." While thereafter a jobber who purchased board from either USG or one of the licensees was obliged to pay the same price as a dealer, the discontinuance of the discount did not have the effect of forbidding sales of board to jobbers if they were willing to buy at the dealer price. The evidence shows that many jobbers continued to buy board and were nevertheless able to perform a proper jobber's function. There were small dealers who, for financial reasons or lack of warehouse space, were not able to buy or store board in the minimum quantities in which the licensees were required by the bulletins to sell it. A jobber financially able to purchase a substantial amount of board and having adequate warehouse space could, though he purchased at the dealer price, resell in small lots to such dealers at an advance, because of the service he thus rendered them. The Government asserts that the withdrawal of the discount had the effect of completely eliminating job-

bers from the gypsum industry. But the record does not support this statement; there is no evidence that any jobber was put out of business altogether. On the contrary, according to Lenci's testimony, jobbers are still in business and doing a good business.

The question for determination is whether or not USG's withdrawal of the discount was lawful. Under the ruling in the *General Electric* case the answer is in the affirmative. The Court there said that it was reasonable that a patentee who manufactures and vends the patented goods on his own account should say to his licensee, "you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself." (272 U. S. at 490.) There was adequate reason for the establishment of one minimum price on patented board to all classes of trade—except manufacturing distributors, whose discount, allowed for a different reason, is discussed in sub-topic (5) (a) of this topic VI. 8838

USG as patentee had a legitimate interest in maintaining the price of the patented product by refusing to permit it to be sold to so-called jobbers at a discount with consequent disturbance of the minimum price structure by the artificial competition set up as above described. It is noteworthy, also, that, as pointed out in topic II, the General Electric plan of distribution, which was adopted by Westinghouse, was devised to enable General Electric "to deal directly with consumers and purchasers, and * * * to avoid selling the lamps owned by the [General Electric] company to jobbers or dealers, and prevent sale by these middle men to consumers at different and competing prices." (272 U. S. at 483.) Both jobbers and retailers were thus "eliminated." The Supreme Court found nothing illegal in this.

The Government asserts that the discontinuance of the jobber discount was by agreement between USG and its licensees and that this made it unlawful. Such an agreement would not be unlawful. As is pointed out in topic V (1), in the *General Electric* case the prices established on the patented product were a part of the license agreement itself. The authorization of the jobber discount was but a fixing of the licensee price on board to a certain class of trade; and the discontinuance of the discount was but a refixing of the price. But there is no substantial evidence in the instant case that USG and the licensees did agree upon discontinuance of the discount. Lenci of Ebsary testified that he did not enter into or know of any agreement or understanding that jobbers would be eliminated from the distributive sys-

tem of gypsum board; that Ebsary had no understanding or agreement with anyone that at some time after 1929 the jobber price would be raised to the amount of the dealer price. He said that it was not his understanding that there was anything in Ebsary's license agreement or in the bulletins which prohibited Ebsary's selling its goods to jobbers. He stated that Ebsary had no part in making up the bulletin of August 8, 1930; that "It came as an order, as a direction in the form of a bulletin."

The Government urges that Exhibits 438, 471 and 502 evidence concerted action. Exhibit 438 (a declaration binding only upon Ebsary), a letter of May 6, 1932, from Ebsary to the Board Survey Company, refers "to the recent bulletin of the United States Gypsum Company advising the licensees that selling through jobbers had been eliminated. We would advise that Daniel Duskis, Inc., Glendale, L. I. is still buying Certain-teed board through Orin F. Perry, New York." Exhibit 471 (a declaration binding only upon Ebsary) is a letter written by Ebsary on November 28, 1932, to Board Survey, again concerning a purchase by Duskis from Perry; this is referred to as in violation of the bulletin "eliminating sales of licensed board
8839 through jobbers and commission men." In his testimony concerning Exhibit 438, Lenci explained the phrasing of these letters, saying that he knew when he wrote the first quoted sentence of Exhibit 438 that all that the bulletin had done was to level off the price as between jobbers and dealers, and that the letter should have read "Referring to the recent bulletin * * * advising the licensees that selling through jobbers at a discount had been eliminated." He said that he and everyone else understood that all that had been eliminated was the right of a manufacturer to sell a jobber at a discount. Lenci explained the second sentence of the exhibit as meaning that Duskis, a Long Island dealer, was buying Certain-teed board through Perry, and that he would not do so if Perry were paying Certain-teed the dealers' prices, "which would indicate to me that Perry was still getting a jobber's discount from Certain-teed." Lenci stated that he was complaining to Board Survey about a price cut by Certain-teed, specifically, that in view of the evidence of what Duskis was doing, Ebsary felt that Certain-teed was giving Perry a discount prohibited by the USG bulletin then in effect. Lenci testified similarly concerning Exhibit 502 (a declaration binding only upon Ebsary), a telegram from Ebsary to Henning of USG, dated November 8, 1934, in which it was said "Lee Story

must be eliminated immediately as a jobber."[51] Lenci explained that this was intended only as a complaint against Kelley; that he (in sending this telegram) meant that Kelley must cease giving Lee Story a jobber's discount, and that the wire should have read "Kelley must cease giving Lee Story a jobber's discount," rather than that Lee Story should "be eliminated." Lenci testified that the telegram would be thus understood by both Ebsary and the recipient. His testimony was frank and convincing, and makes clear that the correspondence above described was in the nature of complaints that particular licensees had made arrangements with jobbers or dealers to give discounts or lower prices on patented board in violation of the minimum price bulletins. His explanation is consistent with his testimony that there was no elimination of jobbers but merely an elimination of their discount, and, in view of his explanation, the correspondence is not in conflict with his testimony that there was no agreement to eliminate the discount.

The Government relies upon *Eastern States Lumber Ass'n* v. *United States*, cited in topic III, and *Binderup* v. *Pathe Exchange*, 263 U. S. 291 (1923), both decided under the Sherman Act. The first of these cases involved a 8840 combination of associations of retailers of lumber whose members agreed not to buy from wholesalers who themselves, in competition with the retailers, sold directly to the consumer, thus undermining the retailer's trade. The Supreme Court held that a retailer had the right, individually, to stop dealing with a wholesaler, but could not lawfully do so in combination and agreement with others. In *Binderup* v. *Pathe Exchange* the defendants, who controlled the distribution of motion picture films, acted in concert in canceling exhibition contracts, and in refusing to deal in the future, with the plaintiff. The Court ruled that, acting separately, each of the distributors could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the statute, but that conspiracy and combination of all to prevent any from dealing with the exhibitor was illegal. These cases are not in point. They involve an agreement forbidden by the Sherman Act and not legitimatized by any other law. In the instant case,

51 The full text of the telegram is: "Lee Story and Companys man in Brooklyn is quoting on Kelly [*sic*] board up to two dollars per thousand below license bulletin prices to lumber dealers in New York City You must investigate and correct this immediately as we look to you for protection under our contract Lee Story must be eliminated immediately as a jobber. Wire us full information at once tonight."

as above demonstrated, in view of the patent law and the *General Electric* decision not only was withdrawal of the discount legitimate but also its withdrawal by agreement, had there been such an agreement, would not have been unlawful.

No evidence was introduced in support of the charge that the defendants effectuated improper restriction upon distribution of plaster and miscellaneous gypsum products through jobbers. Both the bulletin establishing the jobber discount and the bulletin withdrawing it applied in terms only to patented board.

It is concluded that there is no evidence that the operations of the defendants went beyond the proper limits of the patent monopoly by improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products, and this whether the charge of the complaint means elimination of the jobber discount or of jobbers or of jobbing.

(5) *Were the prices at which manufacturing distributors resold gypsum board fixed by the defendants*: As stated in topic V (5), the manufacturing distributors referred to in the evidence, Connecticut Adamant, Oakfield and Structural, are engaged in making and selling gypsum plaster, but purchase the gypsum board which they sell from other manufacturers, *i.e.*, from USG or one or more of the licensees. A discount off the bulletin price to dealers was allowed them. The Government urges that control of resale prices is evidenced by (a) the use of USG of the provision in the May and November 1929 licenses requiring USG's written consent to the sale by licensees of patented board to manufacturing distributors; (b) the supplying to manufacturing distributors by their licensee-sellers of the bulletin dealer prices on board; (c) the policing of manufacturing distributors' sales of board; and (d) the limiting of the manufacturing distributors' discount to approximately the cost of handling the board.

8841 (a) *Use of the consent to sell clause*: The testimony is uniformly to the effect that USG freely, and without conditions attached, granted consents to the licensees to sell board to manufacturing distributors. Tomkins of Newark, Kelley and The Calvin Tomkins Company (a wholly owned subsidiary of Newark which conducted Newark's sales business), testified that USG never refused a request by any of his companies for permission to sell a

manufacturing distributor, that no consent once granted was ever withdrawn, that no conditions, oral or written, were ever attached to the consents except that they were revocable, and that USG never threatened to withdraw a consent once granted. Lenci testified that the only occasion when USG ever refused a request by Ebsary to sell a manufacturing distributor was in the case of the Cardiff Gypsum Company; that all other requests had been granted by USG, and that there were never any conditions, written or oral, attached to the granting of such consents.[52] Lenci testified, further, that there was never with respect to these consents any arrangement, understanding, or agreement with USG or anyone else that Ebsary would police, supervise, or seek to control manufacturing distributors' resale prices or practices. He said that there never was an instance in which a consent issued by USG to Ebsary was withdrawn, or where USG or anyone connected with it threatened to withdraw a consent once issued; that no statement was ever made to him by anyone connected with USG that if Ebsary did not control or seek to control the resale prices of manufacturing distributors to whom Ebsary sold under the consents, they would be withdrawn.

Similarly, the manufacturing distributors themselves testified that they never understood that the consents to sell which had been issued by USG to their respective suppliers would be withdrawn in the event that the distributors did not resell gypsum board at given prices. Thus Hansen stated that he never had any knowledge that any conditions had been attached by USG, or anyone else, to the consents given by USG to Oakfield's suppliers. McCormack could recall no threat by anyone at any time that USG's consent to Ebsary or Kelley to sell Structural would be withdrawn. Asked whether he was ever told that any conditions had been attached by USG to any consent which it had granted Ebsary or Kelley to sell Structural at a discount, McCormack replied that he did not know "until quite late in this picture that we ever were selling under a consent." Kellogg of Connecticut Adamant testified that no one from USG or any other board manufacturer ever threatened to cease to

52 The Government asserts that the evidence shows that the reason for USG's refusal to give its consent to Ebsary to sell the Cardiff Gypsum Company was that Cardiff was known as a price-cutter on plaster. But the evidence concerning refusal to grant the Ebsary request was received solely on the issue of whether the defendants were attempting to control the prices of plaster.

sell his company on account of prices it charged on resales of board.

8842 (b) *Supplying to manufacturing distributors USG's minimum dealer prices on board*: It is not denied by the defendants that when the licensee-manufacturers sold gypsum board and lath to manufacturing distributors they from time to time furnished the latter with information concerning the prices fixed by the bulletins for sale of these products by the licensees to dealers. The Government urges this circumstance as evidencing either a contractual or a coercive arrangement whereby the manufacturing distributors were themselves obliged to sell to dealers at the bulletin prices. The witnesses, however, gave a different explanation. The discount allowed to manufacturing distributors was 12½% on lath and 15% on board off the bulletin price to dealers. Tomkins, testifying in respect of the sending by Kelley and The Calvin Tomkins Company of price lists to Oakfield, Structural and Connecticut Adamant, explained that in quoting a manufacturing distributor on gypsum board a licensee did not, as a matter of practice, deduct the allowed discount from the bulletin price to dealers and then quote the resultant net price. The licensee advised the manufacturing distributor of the price it was to pay by sending it the bulletin price to dealers; this enabled the distributor to arrive at the price it must pay by deducting the discount from the bulletin dealer price for any particular sales destination. Therefore, the manufacturing distributor was informed promptly by the licensee-supplier of any change in the bulletin price to dealers on board because this would affect the manufacturing distributor's cost. Kellogg of Connecticut Adamant, which as a manufacturing distributor had purchased board from USG for about ten years and prior to that had bought from Ebsary and Kelley, testified in respect of purchases from USG that his policy was to sell to Connecticut Adamant's customers at the prices he obtained from USG—the market price—and that for that reason, as well as in order to know what Connecticut Adamant had to pay for the board, he would ask USG what the delivered price to a dealer at a particular point of delivery was. He said that he always wanted to know the dealer price, because that was what the board cost Connecticut Adamant—the dealer price less the applicable discount. McCormack said that he had never at any time received a

USG licensee bulletin, but that it was necessary at all times during the relationship of Structural with USG, Ebsary and Kelley, from whom it purchased, to know in advance through price lists the supplier's dealer price for patented board, because that was the price on which Structural's discount was figured. Structural had to know what the board was going to cost before it made contracts for its resale. Hansen testified that Oakfield always bought board at a discount. Asked what its prices were and what relationship, if any, they bore to the prices of Kelley, its supplier, he responded that the price which Kelley charged Oakfield
was the price Kelley charged its dealers less dis-
8843 count. Therefore, in order to know prior to selling to its own customers what the board was to cost it, Oakfield had to know Kelley's dealer price.

The manufacturing distributors themselves testified that they had no agreement with their suppliers to resell board at any particular prices. Thus Hansen stated that Oakfield had no arrangement, agreement, or understanding with Universal, Kelley, or any other supplier of board, as to the prices Oakfield should charge its dealer-customers when it resold the board. McCormack said that he could not honestly testify that Structural had any arrangement with any of its suppliers, Ebsary, USG, or Kelley, with respect to its resale price, that it was Structural's policy to resell the board at as near the supplier's price as was possible, that that was just a matter of business prudence; that Structural could not undersell its sources of supply and expect them to continue furnishing it board with which to undersell them. Kellogg testified that while he wanted to know the supplier's prices, not only to determine what the board cost Connecticut Adamant but also in order to know at what price to sell it, he nevertheless at no time had any arrangement, understanding, or agreement with anybody as to the prices Connecticut Adamant would charge for board and lath in resales; that this policy (of selling at the market price, *i.e.*, the licensee price to dealers) was determined without relation to any understanding with anybody, and was not the result of any arrangement with anyone in the gypsum business; that Connecticut Adamant had always been free to sell its products at whatever price it desired. He said, further, that no one from the gypsum manufacturing companies had ever come to him to investigate any price, and no one from Board Survey; and that no one from USG or any other board manufacturer had ever threatened

to stop selling board to Connecticut Adamant on account of prices it charged on resales.

That there were no contractual or coercive arrangements by which manufacturing distributors were compelled to resell board at prices fixed by USG is confirmed by the licensees. Lenci testified that Ebsary at no time had any understanding or arrangement with anyone to the effect that it would control or attempt to control the resale prices at which the manufacturing distributors, or any of them, sold board purchased from Ebsary. Tomkins said that his companies, Kelley and Newark, never had any agreement with any of the manufacturing distributors to whom price lists were sent that such distributors would resell board at the prices in such lists or at any other prices. Stromquist stated that he at no time had any agreement, understanding, or arrangement of any kind with Oakfield as to what resale prices that company would charge on board purchased from Universal. Griswold of American testified that Avery of USG did not at any time say anything to him to the effect that control of prices by USG through the license
8844 agreement with American would extend to anything but the first sale of the patented article. Neale of Atlantic said that he recalled no effort by himself or by his company to become a party to any understanding or agreement, at licensee meetings or otherwise, to control the resale prices of distributors.

It is apparent from the foregoing that the manufacturing distributors were kept informed by their suppliers of the minimum prices fixed by the USG bulletins for sales of board by licensees to dealers in order that the distributors might figure their own cost, since that was determined by a discount off the dealer price. It is apparent also that the distributors desired to know the dealer prices in order that they might be in a position to compete. They would not be able to sell above, and on the small margin allowed by the discount (a subject discussed in sub-topic (5) (d) of this topic VI), would not be able to sell much below, the prevailing market price. But there is no evidence that they were either contractually bound or in any way coerced to resell board purchased from the licensees at either the dealer price fixed in the bulletins or any other given price. It is obvious that the prevailing market price, at which the manufacturing distributors would for business reasons desire to sell, would normally be the USG bulletin price to dealers. This was the price at which USG and each of the li-

censees would, under the license contracts, be obliged to sell; and since they manufactured substantially all of the gypsum board in the "Eastern area," their sale price would be the prevailing market price.

(c) *Policing of manufacturing distributors' sales of board*: The Government has introduced evidence which it asserts proves such investigation and regulation of the resale prices of manufacturing distributors on gypsum board as was tantamount to control.

In respect of Connecticut Adamant: In Exhibit 463 (a declaration binding only upon USG), a letter of May 8, 1933, from Board Survey by Miller, to Ebsary, Board Survey states that it is advised that Connecticut Adamant is offering patented board, manufactured and sold by Ebsary, to the New Haven Reserve Supply Company, of New Haven, Connecticut, and other New Haven dealers, f.o.b. their warehouse in any quantity, at the licensor's minimum price to Ebsary for minimum carload lots of board, delivered at New Haven. Board Survey asks Ebsary to "Please advise." This the Government apparently relies upon as evidencing policing by Board Survey for USG of Connecticut Adamant's resale price on board. But by Exhibit 467 (a declaration binding only upon Ebsary), a letter of June 13, 1933, Ebsary replied that its customer, Connecticut Adamant, had made no sales of board to New Haven Reserve Supply Company. Lenci testified that this was a complaint by Board Survey against Ebsary; that although it
8845 involved Connecticut Adamant also and though the allegation was not spelled out in the letter, Ebsary nevertheless understood that it was a complaint not against what Connecticut Adamant was said to be doing, but against what Ebsary was alleged to be doing in respect of its price to Connecticut Adamant. He said that anyone in the industry would so construe the letter, including Miller, its writer. In Exhibit 464, a letter of May 11, 1933, from Board Survey to Ebsary (a declaration binding only upon USG), Board Survey informs Ebsary that it is advised that Connecticut Adamant sold gypsum board to the Southbury Lumber Company, of Southbury, Connecticut, at the licensor's minimum price to Ebsary and that "This would hardly seem possible if your sales * * * to * * * Connecticut Adamant * * * had been made at the licensor's minimum * * *" This the Government apparently also relies upon as evidencing policing by Board Survey for USG of the resale

price of Connecticut Adamant. But by Exhibit 468 (a declaration binding only upon Ebsary), a letter of June 13, 1933, Ebsary replied that Connecticut Adamant is rated as a manufacturer, and that the discount which Ebsary is accordingly permitted as a licensee to allow it on sales of board enables Connecticut Adamant itself to resell at the bulletin price. Lenci explained that the Board Survey complaint was not against Connecticut Adamant but against Ebsary upon the theory that, in view of Connecticut Adamant's resale price, Ebsary must have been violating the bulletin minimum for licensee sales to dealers; Board Survey had apparently forgotten the manufacturing distributor status of Connecticut Adamant.

It is clear from the foregoing that the "policing" was not of Connecticut Adamant's resale price but of Ebsary's price to Connecticut Adamant.

In respect of Oakfield: In a letter from Lenci of Ebsary to Henning of USG written March 28, 1936, Exhibit 512 (a declaration binding only upon Ebsary), and in Exhibit 513A, a complaint against Kelley addressed to Board Survey by Ebsary (a declaration binding only upon Ebsary) naming Oakfield as Kelley's customer, Ebsary alleged that the Delaware Clay Products Company, of Pittsburgh, Pennsylvania, was selling "Oakleaf Gypsum Board" to dealers at the "regular" price, and suggested that Kelley must have arrangements with Oakfield making this possible. Board Survey investigated the complaint. Kelley, on May 1, 1936, in Exhibit 514 (a declaration binding only on Kelley), stated that its sales to Oakfield were made at the scheduled (bulletin) price and that Delaware Clay Products, to whom Oakfield sold, sells board without compensation.[53] Lenci explained this situation and demon-
8846 strated that the complaint was against the licensee Kelley rather than against the manufacturing distributor Oakfield, as follows: Oakfield bought the board from Kelley at a discount and then sold it to Delaware Clay Products, which in turn offered the same board for sale at the dealer price. The margin out of which the two companies, Oakfield and Delaware Clay Products, had to make

53 Kelley's explanation, although it names Oakfield as the customer involved, is made in terms of Paragon Plaster & Supply Co. The evidence shows that that company, the Paragon Plaster Company, and the American Hardwall Plaster Company were the sole owners of Oakfield, that Oakfield was the plaster producing company for them, and that it stocked plasterboard and lath for mixed car shipments for those companies.

their selling expenses was small—15% on board, 12½% on lath, *i.e.*, this was the discount to manufacturing distributors allowed by the USG price bulletins. Presuming both Oakfield and Delaware Clay Products to pay expenses and make some profit, it appeared that if Delaware Clay Products was selling at the dealer price, Kelley must have been allowing Oakfield more than the discount permitted by the bulletins, thereby violating the license agreement. Thus it appears that the situation was again one in which a complaining licensee, in this instance Ebsary itself, inferred from the activities of the accused licensee's customer, the manufacturing distributor, that the accused licensee was violating the license bulletins. Again the investigation was not of the resale price of the manufacturing distributor, but of the discount allowed by the seller-licensee.

In respect of Structural: In a letter of May 6, 1932, Exhibit 438 (a declaration binding only upon Ebsary), Ebsary, first referring to a USG bulletin establishing a two dollar differential between board shipped in mixed carloads and board shipped in full carloads from metropolitan New York, complained to Board Survey that the Tisdale Lumber Company, of Flushing, New York, had purchased from Structural a mixed carload of miscellaneous plaster and board at carload prices. On its face this appears to be a complaint in respect of Structural's resale price. But Lenci explained that the licensees were required by the bulletin provision to charge $2 more per thousand feet on board shipped in mixed carloads than upon board shipped in full carloads (in a mixed carload there are other products and therefore less board than in a full carload) and that since the Tisdale Company had bought less than a full carload quantity of board at the full carload price, *i.e.*, the lesser price, it would appear that Kelley had not charged Structural the $2 differential. The Tisdale Company was a prospective customer of Ebsary, and Kelley's apparently cut price to Structural resulted in the latter's being able to prevent Ebsary from getting the Tisdale business. Thus Ebsary was complaining of an apparent license violation by Kelley, and not of the resale price by Structural.

The Government relies also upon Exhibits 443 and 444 (declarations binding only upon Ebsary and USG, respectively) as evidencing policing of the resale prices of Structural. These exhibits appear to be part of a series of complaints by Ebsary and replies by USG or Board Survey.

Neither of these two exhibits mentions Structural or
8847 the subject of resale prices. The other exhibits in this series comprise Exhibits 436, 437, 438, 447, 439, 440, 449, 441, 442, 445 and 446 (each of which is a declaration binding only upon Ebsary) and Exhibit 450 (a declaration binding only upon USG).[54] These exhibits, except for the replies by USG or Board Survey, appear on their face to be complaints by Ebsary concerning sales of gypsum board by Structural in small quantities. Lenci testified concerning this that by selling in small quantities Structural was giving a service to its dealer-customers which Ebsary as a licensee could not supply, because the USG bulletins required Ebsary to charge for similar deliveries a higher price than Structural was getting. Lenci had concluded from what Structural was doing that Kelley, Structural's licensee-supplier, had made a special arrangement to give Structural an excessive discount which enabled it to cut prices and indulge in the practices which rendered Ebsary non-competitive. His complaints, so Lenci testified, were based upon lack of confidence in the good faith of Kelley in selling to Structural. Lenci said that Ebsary knew that Structural had no license and no obligation with respect to maintenance of prices or other conditions binding upon the licensees. He made clear that in these complaints he was not protesting against Structural or its prices or practices but against Kelley.

It is apparent from the foregoing that when the evidence concerning the alleged control by the defendants of the resale prices on board of manufacturing distributors by "policing" such resale prices is considered as a whole, it fails to establish such control or any attempt thereat. What it does establish is that one licensee was insisting to USG that a competitor-licensee was apparently violating, and should be required to abide by, the minimum price provisions of the bulletins. As pointed out in the statement of facts at the outset of this opinion, there was a "most favored nation" clause in each of the licenses. If one licensee was permitted by USG to sell board on more favorable terms than another the license of the former was in effect being rewritten. The protest of the complaining licensee was therefore natural and one stemming from the provisions of its license agreement.

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54 The exhibits are listed in chronological, rather than numerical, order.

(d) *Limitation of the manufacturing distributors' discount*: USG fixed the price at which the licensees might sell board and lath (sometimes in this sub-topic referred to as board) to manufacturing distributors at, as above stated, 15% and 12½%, respectively, off the minimum price to dealers. The Government asserts that this was with the purpose of preventing the manufacturing distributors from doing more than barely staying in the board business or that, as the Government otherwise phrased it, the discount was set at a figure which would not permit the manufacturing distributors as a business matter to cut prices
8848 on their resales of board. The Government says that as a result they resold to their dealer customers at approximately the bulletin price at which USG and the licensees sold to dealers. This, as pointed out earlier in this topic, would normally be the prevailing market price, since USG and the licensees manufactured substantially all of the board and lath in the "Eastern area" and were the principal sellers. The Government contends that in effect, therefore, USG was controlling the resale price and that this was illegal.

Hansen of Oakfield testified that the discount at which the board manufacturers sold to manufacturing distributors gave Oakfield a very small margin of gross profit in reselling; further, that Oakfield could not get more for its board from its dealer-customers than the amount at which the latter could buy the same board from Oakfield's supplier, Kelley, and that Oakfield did not want to take any less than it could obtain. McCormack said that the only reason Structural sold board was to aid its plaster sales; that it was an accommodation to Structural to get the board from the suppliers because Structural needed it to round out its sales to dealers; that Structural, he thought, did not ever make any great profit out of the board business, although no cost study was ever made to determine that definitely. He would not say that Structural was not in the business of buying and reselling board because of the profit involved, as the company evidently made a small profit, but it was not much since a good part of the discount would have to be charged off to selling expense, handling and warehousing. He admitted, however, that, although the margin of profit was very low, Structural sometimes split its discount on board with jobbers. Lenci of Ebsary testified that generally speaking the 15% margin on board would be used up by a manufacturing distributor in over-

head and handling charges; that the basic reason for the discount was to enable the manufacturing distributors to avail themselves of the accommodation of being able to offer board in mixed carloads to their dealer-customers; that it was never designed to permit the distributors to make a profit, but to give them board which they could ship to their customers along with their other products.

Since Hansen said nothing as to net profit and McCormack said that there was a profit, though small, and Lenci's testimony, although to the effect that the discount was designed not for profit but for accommodation, indicates nothing as to the actuality of profit or loss in manufacturing distributors' resales, it cannot be concluded that there was no profit whatever. And while the testimony shows that it was an advantage to the distributors to stock the board for resale along with their plaster products, there is no evidence that it was necessary for them to have board to remain in business, none that they were threatened that board would be withheld unless they resold at the dealer price, and none that they were parties to any contract to resell at the dealer price. They were legally free to resell at
8849 any price they chose, although economically it would have been difficult for them to resell at more than the market price, other conditions being equal, and they would probably not wish to sell at less if that would entail a loss. It may be assumed that as a normal economic consequence of the setting of the discount at a figure approximating the cost of handling the board, the manufacturing distributors ordinarily resold at approximately the price, if not, indeed, at the exact price, at which USG and the licensees sold direct to dealers, *i.e.*, the prevailing market price; and it may be assumed that USG contemplated that this would occur and had in mind the protection of its minimum price structure.

But the Sherman Act does not condemn the normal economic consequences of acts which are themselves legitimate under the patent laws. Therefore the contention of the Government that USG is guilty of illegal control of the resale prices of manufacturing distributors necessarily rests upon the premise that it was unlawful for USG to fix the discount on an approximate cost of handling basis, rather than on one which would allow the distributors a substantial profit and thereby enable them to resell at less than the market price. This premise cannot be sustained. As a patent owner USG, under the doctrine of the *General Electric* case, had

a right to license the making, using and vending of the patented product upon any condition the performance of which was reasonably within the reward which the patent owner by the grant of the patent is entitled to secure. One of such rewards is extended marketing of the product. This will be promoted by additional outlets. USG might therefore properly give a discount incentive to manufacturing distributors to buy board from USG or the licensees and thereby the advantage of handling it in connection with their plaster products. But a patent franchise does not constitute the patentee a public utility whose product must be sold at the same, regulated, price to all who offer to buy. USG was not obligated under either the patent laws or the Sherman Act to sell board or to permit its licensees to sell board to manufacturing distributors. As has been noted in sub-topic (4) of this topic VI, the decision in the *General Electric* case sanctioned patent licensing arrangements whereunder all sales of the patented product were to be made to consumers only and not to jobbers or dealers. And USG was under no duty, if it did make or permit sales to manufacturing distributors, to set a licensee price which would assure the distributors a profitable margin for resales; it could set such price as it chose.

The Government's contention that USG exercised illegal control over the resale prices of manufacturing distributors on board and lath cannot be sustained. There is no evidence of contractual or coercive control. Reselling by the
8850 manufacturing distributors at or about the dealer price was but the normal economic consequence of limitation of the discount to an approximate cost of handling margin. This limitation was lawful; the normal economic result cannot be unlawful.

It is concluded that there is no substantial evidence that the defendants either by use of the consent clause, by supplying the manufacturing distributors with information as to dealer prices on board, by policing manufacturing distributors' sales, by limiting the discount to approximately the cost of handling, or in any manner, fixed the prices at which manufacturing distributors resold gypsum board.

It is therefore concluded, in respect of the whole of the second issue of fact, that the evidence fails to establish that the operations of the defendants were carried beyond the proper limits of the patent monopoly and licensing thereunder, *i.e.*, beyond the activities contemplated by the agreements as written and into the field denounced by the Sherman Act.

VII

Significance of the Evidence, Assuming the Declarations Connected; the Asserted Plan to Blanket the Industry Under Patent Licenses

Significance of the evidence, assuming the declarations connected: In topics V and VI of this opinion we have been at pains, in examining the evidence which the Government appears to reply upon as proving the combination and conspiracy charged in the complaint, to consider as binding only upon the declarant the declarations which were received in evidence subject to connection. This was our duty, the limitations upon the declarations rule having been invoked by the defendants and the Government having failed, as shown in topic IV, to prove by evidence outside the declarations the existence of the conspiracy charged. But in view of the importance of this case and the consequent probability that it will reach a higher tribunal, we think it desirable also to state our views as to the meaning of the evidence when the declarations are considered as binding not merely upon the declarant but also upon all of the alleged co-conspirators. We have considered the evidence in this light, and we think the Government still has not proved that the license agreements were executed not as bona fide license agreements reasonably designed to secure to USG the pecuniary rewards of its patent monopoly but only as sham agreements to give color of legality to the illegal purposes alleged in the complaint, and has not proved that the operations of the defendants were carried beyond the proper limits of the USG patent monopoly, and therefore has not proved the combination and conspiracy charged. The evidence discussed in topics V and VI
8851 no more proves lack of bona fides in the execution
½ of the license agreements, or operations beyond the limits of the patent monopoly, when the declarations are regarded as binding upon all of the alleged co-conspirators, than it does when such declarations are considered as binding only upon the declarant. This is necessarily so—in the view we take of the significance of the declarations. Since, as demonstrated in topics V and VI, they fail to convict the declarants themselves of lack of bona fides in the execution of the licenses, or of operations beyond the proper limits of the USG patent monopoly, they cannot convict others thereof.

There is, however, in the record additional evidence, including declarations, not heretofore alluded to because ag-

gregated and relied upon by the Government as relevant to a special contention to be discussed below. This evidence consists in the large of intra and inter-company correspondence relating to the terms upon which USG was offering to settle litigation and extend licenses, and the advantages and disadvantages of taking licenses; included is testimony explanatory of this correspondence. The following items sufficiently illustrate the character of this evidence:[55]

(a) Exhibit 185, a memorandum sent by Blagden of Beaver to Avery of USG in December, 1925. This suggests, as an alternative to possible reversal of the USG-Bestwall-Beaver decision of July 21, 1925, a settlement and license enabling USG to maintain "a lawful price control" through the "legitimate means of patent licenses," Blagden to endeavor to induce other manufacturers to accept licenses and permit USG to take a "dominating position."

(b) Testimony by Blagden that, after the Beaver-USG license was signed in July, 1926, in conversations from time to time with some of the other members of the industry, upon their inquiring about the Beaver license, he advised them to "join up."

(c) Exhibit 189, a letter of October 1, 1926, from Blagden to Avery in which Blagden said that "the 'entente cordial' that has started between our companies is only a beginner and * * * if we play the game right, it should bring about big things."

(d) Testimony of Blagden that he advised George M. Brown of Certain-teed that he could not afford to make board without the superior folded edge and advised him to take a license for his own best interests and get "with the others" the benefit of price stabilization, *i.e.*, "the benefit of the license price, which would be the same price" to all.

(e) Exhibit 123, a letter of October 15, 1926, in which Griswold of American wrote Avery that a committee from American expected "to meet with all other Manufacturers of board who have not yet signed the License Agreement. * * * with the object in view of getting united action * * *."

(f) Exhibit 124, a letter of October 19, 1926, in which Avery replied expressing appreciation for Griswold's in-

55 This evidence is discussed on pages 9 to 46 in the Government's Memorandum filed May 5, 1944, in opposition to the motions now under consideration.

terest and for the "broad-visioned manner with which you [Griswold] have proceeded with this important subject" and said that he would be interested in hearing from Griswold after the meeting.

(g) Exhibit 132, a letter of January 3, 1927, in which Griswold wrote Avery that he had started out "to deliver 100 per cent of the manufacturers of board that would be willing to sign up on a license agreement with your company * * *."

8852 (h) Exhibit 136b, a letter of March 24, 1927, from Griswold to Williams of National in which Griswold reported that Texas had recently decided to take a USG license and since that decision had "reached the decision to join in our proposition so they will become one of the group which we are merging," and that Atlantic signed and that if Certain-teed which was considering it "comes in" and National, that "will make it 100% with all manufacturers who will be operating under the license agreement and will do away with the legal complications which have existed in the past and which are so unpleasant as well as expensive."

(i) Exhibit 104, a letter of May 12, 1926, by Griswold to McCrady of American stating that Blagden had had interviews with Avery in respect of settlement of disputes and litigation between the wallboard manufacturers by a licensing arrangement and that (according to Griswold) the outlook is favorable and "According to the plans we have we figure that there is a possibility of us holding the price steady on wall board for the next fourteen or fifteen years which means much to the industry."

(j) Testimony of Holland of Universal that he suggested to Griswold in September, 1928, that American ought to take a USG license like Universal's—so that the industry might make the better board since the open-edge board was giving wallboard generally "a black eye."

(k) Exhibit 204, a letter of January 7, 1929, in which Holland wrote Haggerty of National that an effort should be made to hold another meeting of those interested in the board situation; that American cannot hope to gain by delaying the settlement because this will demoralize prices throughout 1929.

(l) Exhibit 206, a letter of January 12, 1929, wherein Holland tells Haggerty that he thinks that the matter of future prices after the Utzman patent ran out was not keeping American out because Avery had other patents, and that "it is my opinion that if you and the others interested in the settlement of the wallboard controversy bring enough pressure to bear on the American crowd * * * something can be done."

(m) Testimony of Holland that he "kept trying to talk these people [other manufacturers] into taking out a [closed-edge] license."

(n) Testimony of Griswold that in a conversation in April, 1928, with George M. Brown, Griswold discussed with him the advisability of Certain-teed's taking a license and making closed-edge instead of open-edge board which was then selling at a rather low price, and that Brown said that if all the other manufacturers took out a license, or certain of them, he might consider it, but that he felt that Certain-teed's competitors, especially Ebsary, since it was a "pretty hot" competitor of Certain-teed's "in that territory," should also be licensed.

(o) The fact that Texas signed its 1927 license after Griswold in Exhibit 157, a letter of April 9, 1927, receipt of which Gloyd of Texas acknowledged in Exhibit 158 (dated April 11), advised that Certain-teed was willing to take a license and that Avery, who had been opposed, had yielded to the persuasion of Blagden and himself and would consider Certain-teed's application, and that National would file application and that with American that "will make the matter one hundred percent."

(p) Exhibit 198, minutes of a May 14, 1929, directors' meeting of National reciting a statement by the chairman that he had been "informed that all other manufacturers of gypsum products * * * except * * * American * * * had agreed to sign the license contract in substantially the form as submitted to this Board," and setting forth a resolution authorizing the proper officers to execute a license agreement with USG in the form submitted.

(q) Exhibit 716, a telegram of May 17, 1929, from Baker of National to Avery in which Baker advised that National was "working with Ebsary with hope of everybody being set by Saturday to justify your calling meeting all board

makers Monday if you like," and that Reeb of Niagara was ready.

(r) Exhibit 205, a letter of January 9, 1929, in which Haggerty wrote Holland that it was a question in his mind "whether or not the other four board makers, who are outside the license agreement, feel that it would be advantageous to go in without the American Gypsum Company," and that "the chief value in a meeting would be to discuss that point," and that "If this price control feature was discontinued in August, as is the case in the present form of the agreement, how could we expect the cooperation of the United States Gypsum Company in anything bearing upon a discussion of price"; that USG's position would then "be exactly what it is now, and rightly so," *i.e.*, unwillingness to discuss price before a license agreement with the price control feature is signed.

8853 (s) The admission in Ebsary's answer that "prior to May, 1929 Ebsary had conferred with others concerning the contemplated license" and that in May, 1929, prior to the meeting of the 22nd, "there was a meeting or conference between these defendants and U. S. G. and others, at which there was discussed the granting by U. S. G. to the defendant Ebsary and others of a license * * *."

(t) Testimony of Lenci that he went to Chicago for the May, 1929, meeting pursuant to a previous arrangement.

(u) The fact that Channing attended the May, 1929, meeting in Chicago, notwithstanding that Atlantic was already a licensee, having executed its license in March, 1927.

This evidence, even when silhouetted, *i.e.*, looked at out of context with the other evidence in the record which has been reviewed in topics IV, V and VI, and considering the declarations as binding upon all, does not prove the conspiracy charged for there is nothing in it, as inspection of the foregoing illustrative items will show, indicating that the licenses which USG was willing to grant were to be, or that when executed they were, sham licenses signed to give color of legality to illegal purposes, or that the operations of the defendants were carried beyond the proper limits of the USG patent monopoly. Indeed, Exhibit 185 (item (a)), especially emphasized by the Government, refers to "a lawful price control" but USG through the "legitimate means of patent licenses"; and the very openness of the intra and

inter-company discussions and suggestions with respect to the advantages and disadvantages of taking USG licenses bespeaks good faith in the execution of the licenses. There is nothing at all in this evidence to indicate that there was to be improper standardization, price fixing upon unpatented materials, improper restriction upon distribution of gypsum products through jobbers, or control of resale prices of manufacturing distributors. The references to price stabilization are no evidence of illegal purpose in the absence of a showing of lack of good faith in the execution of the license agreements, for under the *Bement* and *General Electric* cases price control by a patent owner is lawful; hence it could not be unlawful for USG as patent owner or the (prospective) licensees to desire and anticipate its results.

If the evidence above referred to does not, when looked at by itself, prove the elements of lack of bona fides in the license agreements and intent to accomplish objectives beyond the proper limits of the USG patent monopoly necessary to establish the conspiracy charged, *a fortiori* it does not do so when looked at in context with the other evidence in the case, even though the declarations in this and the other evidence are considered, in disregard of the limitations upon the declarations rule, as binding upon all of the alleged co-conspirators.[56]

8854 *The asserted plan to blanket the industry under patent licenses*: What the Government especially contends that this additional evidence proves is that the defendants "have * * * associated themselves together in a common plan or enterprise to blanket the gypsum industry under * * * license agreements" and "stabilize prices." But assuming, *arguendo*, that this evidence does show a common plan under which the defendants and their predecessors in the "Eastern area" were to take patent licenses from USG with price restrictions and consequent price stabilization,

56 It is, indeed, doubtful that the Government even contends that this additional evidence proves lack of bona fides in the licenses or operations beyond the proper limits of the patent monopoly. Throughout the introduction of evidence and the oral argument, in which emphasis was placed by the Government on the charge of lack of bona fides in the licenses, they were variously referred to as "sham," "subterfuge," "coverup," "not bona fide." In the Government's briefs filed in opposition to the present motions there is little on this subject or in these terms, and in that part of the memorandum which aggregates the additional evidence now under discussion (pages 9 to 46 of the Government's Memorandum of May 5, 1944) there is nothing; and nothing concerning operations beyond the proper limits of the patent monopoly.

this, in the absence of sham licenses and an intent to accomplish objectives beyond the proper limits of the patent monopoly, would not be illegal. It is not unlawful to agree to do what is not unlawful when done. It has been demonstrated in topic II that the parties to a patent license agreement containing a price control provision have in the negotiation and execution of the same "conspired" and "combined" to restrain trade actually, but not unlawfully because the patent laws permit this so long as the license is bona fide and not intended to accomplish objectives beyond the proper limits of the patent monopoly. Under such a license there is actual restraint of trade, but no illegal restraint. If two such licenses (a plurality of licenses) were severally executed, each bona fide and without objectives beyond the proper limits of the patent monopoly, the totality thereunder of actual restraint of trade in the patented product would be the sum of the actual restraints under each, and the totality of illegal restraint none. And if in the case of two such licenses (a plurality), the two (prospective) licensees and the patent owner were in advance to agree with each other (associate themselves together in a common plan that the two licenses should be executed, and if they were executed, still the totality of actual restraint under such licenses would be no more than if they had been executed without prearrangement; and the totality of illegal restraint would, again, be none—for each license when executed would in itself be lawful. Into howsoever large a plurality this be carried, the result is the same, *i.e.*, the totality of actual restraint of trade in the patent product is the sum of the actual restraints under each of the license agreements, and no more; and the totality of illegal restraint is none. If A, B, C, D, E and F agree in advance with each other and with P, a patent owner, that each shall sign a bona fide patent license to be granted by P, with control of the price of the patented product in P, the only additional restraint, as compared with the totality of restraint
8855 if the same licenses were executed severally, *i.e.*, without prior agreement, would be the disablement of A, B, C, D, E and F, in view of their contract to take licenses from P, to take them from X, *i.e.*, some other patent owner. But the instant case does not, under the complaint, concern itself with interstate trade in patent licenses; it has to do only with interstate trade in gypsum products.

In short, the contention of the Government that the additional evidence referred to in this topic VII proves that

the defendants associated themselves together in a common plan "to blanket" the gypsum industry under patent licenses and stabilize prices, and that this is unlawful, fails for want of support in law in view of the *Bement* and *General Electric* cases, even if proved in fact—unless the licenses were to be sham and the objectives under them beyond the proper limits of the USG patent monopoly. Given a right under the patent law to grant a plurality of bona fide licenses with price control provisions but no objectives beyond the proper limits of a patent monopoly, it can make no difference in either totality of actual restraint, or in law, whether the several licenses are executed with, or without, prearrangement between the patentee and the prospective licensees as a group. The vice in the Government's contention in this respect is that it assumes that agreement or action in concert by competitors in industry is under all circumstances inherently and necessarily unlawful, when the fact is that it is not unlawful unless it has an unlawful end or contemplates unlawful means.[57]

We have assumed above, *arguendo*, that there is proof of the contention that the defendants associated in a common plan "to blanket" the gypsum industry under patent licenses and stabilize prices. But though it may be said that the evidence especially aggregated by the Government in proof of this contention tends to support it if looked at alone, it cannot be looked at alone. As said in topic III under the sub-topic "Principles of Proof," an inference to be reasonable must be warranted from all the evidence, otherwise a fact reasonably inferable from a single fact, or group of facts, might be inconsistent with the totality of proven or conceded subsidiary facts. *National Labor Relations Board* v. *Union Pacific Stages*, 99 F. (2d) 153, 177 (C. C. A. 9th, 1938). "Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought." *National Labor Relations Board* v. *Thompson Products*, 97 F. (2d) 13, 15 (C. C. A. 6th, 1938).

When the evidence referred to above in this topic VII is considered in connection with other related items, it fails to prove that the defendants associated in a plan to blanket the industry under the patent licenses and stabilize prices:

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57 It is common knowledge that there are numerous national trade associations which agree upon and carry out plans for industry betterment without coming within the condemnation of the Sherman Act.

8856 The Government especially emphasizes Exhibit 185, the memorandum sent by Blagden of Beaver to Avery of USG in December, 1925, suggesting a settlement and license enabling USG to maintain a lawful price control and to take a dominating position in the industry (item (a) set forth above in this topic). Segregating this memorandum from other evidence to which reference is made below, the Government couples it with the facts that after several meetings between Avery and Blagden in June and July, 1926, the Beaver-USG license agreement was signed (on July 29); that Blagden testified that he talked with other members of the industry on the subject of a license and advised them to "join up" (item (b)), and specifically with George M. Brown whom he advised to take a license and get the benefit with the others of price stabilization, *i.e.*, of the license price which would be the same price to all (item (d)); that Blagden referred in correspondence with Avery to the " 'entente cordial' that has started between our companies," Exhibit 189 (item (c)); that Avery, according to a statement by Griswold, had yielded to the persuasion of Blagden and himself and would consider Certain-teed's application for a license (item (o)); and that ultimately the various other companies took licenses. And the Government urges that from this an inference should be drawn that there was an agreement between Beaver and USG that an industry wide license system would be promoted. But when such evidence is looked at in context with other related evidence, including uncontradicted and unimpeached testimony, the inference which the Government draws is seen not to be justified. In the first place the evidence shows that the right to the use of USG's patents covering the closed-edge gypsum board, a superior product cheaper to make and demanded by the trade, was needed by the other manufacturers. This is made to appear in greater detail in topic V of this opinion. The decision in the USG infringement suits against Bestwall and Beaver had, however, made it impossible for competitors of USG to manufacture the closed-edge board without infringing USG's patent rights. The trial court decision in USG's favor in the second suit was rendered on July 21, 1925. Recognizing the difficulty of Beaver's position and the approach of the time when a final judgment for large damages might be entered (the ultimate settlement with Beaver involved a $250,000 damage payment), Blagden made overtures to Avery to settle the litigation and at a meeting between them in December,

1925, Avery specified the terms upon which USG would settle as described in the statement of facts at the outset of this opinion. At the time of this discussion and offer of settlement on the basis later adopted for the USG-Beaver settlement Blagden did not have with him the memorandum, Exhibit 185—it had been in course of preparation by Blagden's lawyer; and there is no evidence that the subject matter in it was ever discussed by Blagden or Avery
8857 or that the memorandum was ever seen or its contents discussed by any other persons in the industry. Blagden testified that he did not discuss with Avery the matter of all companies' settling disputes and taking licenses. The evidence shows that Beaver settled its lawsuit and took a license without regard to the other companies. Blagden so testified, and he testified also that he had nothing to do with the taking of licenses by Universal in September, 1926, Atlantic in March, 1927, and Texas in April, 1927—and these were the only licenses which were executed while Blagden remained in the gypsum business; indeed, until after Certain-teed had taken over the Beaver company on January 20, 1928, and repudiated the USG-Beaver settlement and license. He testified that he left this business in 1928. In this early period USG had patent infringement suits against other gypsum board manufacturers—as appears in the statement of facts at the outside of this opinion—suits similar to that which had been prosecuted against Bestwall and Beaver. Except for USG, Beaver was the largest gypsum board manufacturer in the industry at the time and therefore the other companies were naturally interested in what Beaver was going to do about a settlement and license and what terms it would be able to get from USG. As Blagden put it, his company was regarded as the "guinea pig" of the industry. When other companies inquired about the USG-Beaver settlement and license, Blagden as a matter of course answered the inquiries and, since he disliked litigation and regarded the Beaver license as an advantageous contract because it permitted the manufacturer to supply the demand of the trade with a superior product at less cost, he usually recommended that the other companies settle and take a license. All this appears from his testimony. And it is in this context that he said that he suggested that the other companies "join up," and in the same context that he advised George M. Brown to take a license and get with the others the benefit of price stabilization.

In respect of Exhibit 189 (item (c)) and the "entente cordial," Blagden testified that he meant that the "bickering and squabbling and fighting" which had been going on between Beaver and USG was over upon the signing of the license agreement, and that the two companies were again friendly; that the phrase "entente cordial" was merely his expression in respect of the better feeling that probably would result from the settlement and license; and that by "if we play the game right" he meant only living up to the license agreement and obeying the published prices of USG and that in this respect he was referring only to Beaver's agreement with USG.

The Government stresses Griswold's letter to Avery of October 15, 1926, Exhibit 123 (item (e)), referring to a committee from American which expected "to meet with all other Manufacturers of board who have not yet signed
8858 the License Agreement: * * * with the object in view of getting united action," and Avery's reply stating that he would be interested in hearing from Griswold after the meeting, Exhibit 124 (item (f)), and the letter of January 3, 1927, in which Griswold wrote Avery that he had started out "to deliver 100 per cent of the manufacturers of board that would be willing to sign up on a license agreement with your company," Exhibit 132 (item (g)), and the letter of March 24, 1927, from Griswold to Williams of National referring to Texas' "decision to join in our proposition so they will become one of the group which we are merging" and that with Atlantic which had signed and Certain-teed which was considering coming in and National that "will make it 100% with all manufacturers who will be operating under the license agreement," Exhibit 136b (item (h)), and Griswold's statement in a letter of April 9, 1927, to Gloyd advising that National would file application and that with American and Certain-teed whose application would be considered by Avery, that "will make the matter one hundred percent," Exhibit 157 (item (o)). But again when these items of evidence are looked at in the context of other related items it is seen that they do not prove that the defendants associated themselves together in a plan to blanket the industry under licenses. In the first place the correspondence between Griswold and Avery in the fall of 1926 and the early part of 1927 indicates that, while Griswold discussed the matter of a license agreement with various gypsum board manufacturers, some of the companies, including Griswold's own company, American, told him

that they were not satisfied with the license offered and that USG refused to make any concessions from the terms of the settlement and license which had been given to Beaver and Universal. This especially appears from Exhibits 123 through 135 and Exhibit 191. Avery made clear that he would not change the terms which he had announced at the time of the Beaver settlement and license. As he said in Exhibit 134, a letter of February 2, 1927, to Griswold, "I can hold out no encouragement to you for any change in our position." Thus there was no unanimity. Next it is made clear by Griswold's testimony that he was not an agent of emissary of Avery's. His statements to this effect were categorical and convincing. They have been referred to in topic V of this opinion. Griswold testified that he had nothing to do with the taking of the Universal and Texas licenses and nothing to do with the taking of Atlantic's license except to answer Atlantic's questions with respect to the process of manufacture of wallboard, advising that if Atlantic was going into the board business it was best to make the closed-edge board, if Atlantic could reach an agreement with Avery, and sending Atlantic a copy of the USG license. Still further, it is to be noted that the Government's emphasis of the items just mentioned leaves out of account Griswold's interest in a merger. Throughout the period of time covered by these items Griswold was working on a merger of American and most if not all of
8859 the other manufacturers except USG, the merged company to take a license, and the evidence convincingly indicates that at all times the thing which was uppermost in Griswold's mind was the success of this merger. He makes continual reference to the subject throughout his correspondence, including Exhibit 157 and Exhibit 136b above referred to. The evidence fails to show that either Avery or USG had anything to do with the origination of this venture. It was Griswold's enterprise. But Griswold knew that his plan for a merger could not be consummated with outstanding infringement suits and the existence of a very real possibility of judgments for infringement damages against some or all of the proposed constituent companies. Griswold's testimony shows that he had a firm conviction that a gypsum board manufacturer must make a closed-edge board in order satisfactorily to continue in business. This made it imperative that he remain in a position to obtain a license for his merged company. His testimony also indicates that he believed that the litigation

and bad feeling throughout the industry would bring about increasing bitterness and turmoil and eventually result in price wars and chaotic conditions generally. It is fairly inferable also from his testimony and the circumstances that he was not without hope that he might get special concessions in connection with USG's damage claims against his own company by giving Avery the impression that he was promoting USG's interests. The amount Avery first had in mind, according to the evidence, for infringement damages to be paid by Beaver, was a million dollars. Especially in respect of Exhibit 136b, Griswold testified that when he wrote it he had talked to Williams as to the possibility of National's becoming part of his contemplated merger. Therefore what he meant by "our position" and "make it 100%" in this letter, and by the phrase "deliver 100 per cent" in Exhibit 132, and by "united action" in Exhibit 123, was the getting of all of the companies other than USG into his proposed merger. Obviously Griswold recognized that this would settle the unpleasant and expensive litigation, or, as he put it in Exhibit 136b, do away "with the legal complications which have existed in the past and which are so unpleasant as well as expensive."

As evidencing a plan to blanket the industry under licenses the Government refers to the testimony of Holland that he suggested to Griswold in 1928 that American ought to take a USG license like Universal's (item (j)), to the letter of January 7, 1929, in which Holland suggested to Haggerty of National that an effort should be made to hold another meeting of those interested in the board situation and that American could not hope to gain by delaying the settlement, Exhibit 204 (item (k)), to Haggerty's reply indicating that in his view the chief value in a meeting would be to discuss whether or not the other four board
makers who were outside the license agreement would
8860 think it advantageous to go in without American, Exhibit 205 (item (r)), to Holland's letter of January 12, 1929, telling Haggerty if he and the others interested in the settlement of the wallboard controversy "bring enough pressure to bear on the American crowd" something can be done, Exhibit 206 (item (l)), and to Holland's testimony that he "kept trying to talk these people [other manufacturers] into taking a license" (item (m)). But these items of evidence when looked at in connection with other related evidence in the case are seen not to indicate such a plan, but to involve Holland's interest in accomplishing a merger

of his own. Holland became president of Universal early in 1928. The evidence shows that he regarded closed-edge board as a product much superior to the open-edge variety. He was struggling to keep Universal out of receivership and he recognized that the future of the company was endangered by the chaotic conditions in the industry, which he attributed primarily to the litigation and dissension. His testimony shows that he sought to save Universal from bankruptcy through an attempted merger of various of the smaller manufacturers, and that the merger proposal had been promoted by New York underwriters. Holland's testimony shows that his interest in this merger was solely on account of his own company. It appears also that he sought to clear up the litigation in the industry, and that, thinking that the closed-edge board was a better product, he would have liked to have all the companies making that variety of board rather than the open-edge which was giving wallboard generally "a black eye"—in Holland's language; that is to say, he was interested in promoting better conditions so far as marketability of gypsum board was concerned in order to help his company as well as the other manufacturers out of their unfortunate financial situation due to the litigation and the price war. In view of Holland's interest in a merger and in improvement of the condition of his own company, his comments in Exhibit 204 in respect of the desirability of holding another meeting and American's delaying the settlement, and in Exhibit 206 concerning bringing pressure to bear upon American, are understandable and it is clear that they have no reference to an alleged USG plan to blanket the industry under patent licenses. Holland testified that he was at no time a representative of USG and that he never had an understanding or agreement with USG or with anyone in that company that he would promote any plan looking toward the licensing of all of the industry under price fixing agreements. Indeed, it appears that he found Avery on several occasions when he talked with him in 1928 and 1929 somewhat disinclined to discuss the matter of settlement and license—"a very hard man to reach, he rather ignored me most of the time in my efforts to bring about a discussion." Holland stated further, categorically, that whatever he did during this period 1928-1929 in connection with license agreements he did on behalf of the Universal company or himself and no one else, except possibly in respect of his proposed merger in which of course other companies would be involved.

8861 As evidencing a common plan or enterprise to blanket the industry under licenses and stabilize prices, the Government refers to the letter of May 12, 1926, written by Griswold of American to McCrady of the same company stating that Blagden had had interviews with Avery in respect of settlement of disputes and litigation between the wallboard manufacturers by a licensing arrangement and that "According to the plans we have we figure that there is a possibility of us holding the price steady on wall board for the next fourteen or fifteen years," Exhibit 104 (item (i)). But Griswold testified that when he wrote that letter he assumed that USG would fix prices under the Birdsey patent which had issued in 1920 and had therefore, out of twenty years to run (Griswold's understanding of the life of a patent), fourteen years remaining, and Griswold said that he figured that if "the different parties" took out a license agreement with USG and the law gave USG the right to establish the price at which a licensee could sell the product, the price of wallboard would remain fairly stationary unless disturbed by competition of other products. But he testified further that he did not mean by the statement in the letter to McCrady that he had any understanding with Avery or anyone else that price control would be extended under some patent after the expiration of the Utzman patent; that he never had any discussion with Avery or anyone else about Avery's finding some patent other than the Utzman patent to give a longer price control, his understanding being that the price control would end at the expiration of the patent. Griswold testified also that the reference in this letter to holding the price steady was his own statement, not Blagden's. Blagden testified that he did not discuss with Avery the matter of all companies' settling disputes by taking licenses, and that he did not have a plan for holding the price steady for fourteen or fifteen years.

The testimony of Griswold to the effect that George M. Brown of Certain-teed had said that if all the other manufacturers, or certain of them, took out a license he might consider it but that he felt that Certain-teed's competitors, especially Ebsary, should also be licensed (item (n)), is apparently relied upon by the Government as evidencing an insistence on the part of Certain-teed that all in the industry must be licensed. But Certain-teed's license when executed was not conditioned, under the evidence, upon any other manufacturer's taking a license. Moreover, Gris-

wold testified that at no time did National, Certain-teed, Ebsary and Niagara agree with one another that they would take out a license. Whittemore of Certain-teed testified, as has been pointed out in topic V of this opinion, that the decision which he and George M. Brown and the management of Certain-teed made to settle with USG and take a license had nothing to do with any other company in the business, and that Certain-teed took the license
8862 because it desired to manufacture the Utzman closed-edge board and also to get rid of the possibility of future litigation. George M. Brown testified in respect of taking the May 1929 license that Certain-teed "had determined * * * to go ahead with it without regard to what other companies did about it." Indeed, Brown testified that "we didn't care what others did, and we would have preferred, if we could have had the say about it, that some of them shouldn't have the right to make it, because we didn't think they would respect the obligations that we had to respect." Brown thought that some of Certain-teed's competitors "if they took licenses, would not respect the price which United States Gypsum fixed" and that that "would be annoying."

The recital in the minutes of the May 14, 1929, directors' meeting of National of the chairman's statement that he had been "informed that all other manufacturers of gypsum products * * * except * * * American had agreed to sign the license contract in substantially the form submitted to this Board," and the resolution authorizing execution of a license agreement with USG in the form submitted, Exhibit 198 (item (p)), are equivocal. It is without dispute that the various companies were at about this time considering the May 1929 licenses. It is no more inferable from these minutes that the various (prospective) licensees had agreed with each other to sign the license contract with USG than it is that they had agreed severally with USG to do so. Moreover the chairman's statement recited in the minutes is mere narrative.

The Government urges that the telegram of May 17, 1929, in which Baker of National advised Avery that National was "working with Ebsary with hope of everybody being set by Saturday to justify your calling meeting all board makers Monday if you like," and that Reeb of Niagara was ready, Exhibit 716 (item (q)), and the admission in Ebsary's answer that prior to the Chicago meeting of May 22, 1929, Ebsary had conferred with others concerning the

contemplated license and that Ebsary and USG and others had met and discussed the granting by USG of a license (item (s)), and the testimony of Lenci that he went to the May, 1929, meeting in Chicago pursuant to a previous arrangement (item (t)); and the fact that Channing attended the Chicago meeting notwithstanding the fact that Atlantic was already a licensee (item (u))—all tend to evidence that the Chicago meeting was prearranged. It seems not to be disputed by the defendants that this meeting was prearranged. But this is not necessarily evidence of an association of National, Certain-teed, Ebsary and Niagara in a common plan or enterprise to blanket the entire gypsum industry with licenses and stabilize prices. Under the evidence every company in the industry was interested in settlement or avoidance of litigation and in securing a right to make the closed-edge board, and each company
8863 which contemplated taking a license was interested, in view of the "most favored nation" clause in the contracts already executed, *i.e.*, the 1926-1927 contracts, to see that the others got no better terms. This may well account for the attendance of Channing at the May, 1929, meeting. Moreover, each of the companies contemplating taking licenses would naturally be interested in attending the meeting in order to know whether the others were going to settle with USG. But Lenci testified that there was no general understanding at the Chicago meeting, and that so far as he knew the other (prospective) licensees each determined to take a license before going to Chicago. He testified also that Ebsary's conclusion to take a license was reached independently, without regard to what other companies would or would not do. Whittemore testified that notwithstanding the fact that representatives of other companies were in attendance at the May, 1929, meeting, Certain-teed made its agreement with USG independently, that the Certain-teed negotiations were conducted with USG individually, and that there was no agreement or understanding or concerted action of any kind among the manufacturers.

VIII

Authorities Relied upon by the Government

The Government especially relies in the substantive aspects of the case upon *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942), *rehearing denied*, 316 U. S. 713 (1942);

Interstate Circuit v. *United States*, 306 U. S. 208 (1939); *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20 (1912); and *American Equipment Co.* v. *Tuthill*, 69 F. (2d) 406 (C. C. A. 7th, 1934). These cases have been briefly mentioned in various contexts in previous topics of this opinion, but will now be discussed at greater length.

In the *American Equipment* case the American Equipment Company, owner of a patent upon a mechanical brick handler used to move small quantities of brick from car to kiln and kiln to car but which did not affect the shape, size, quality or color of the brick, an unpatented product, granted a license for its use to brick manufacturers who made 90% of the brick used in the Chicago area. The patent owner assigned each licensee a production quota and instituted a royalty of a given price per thousand of brick made and delivered from the licensee's yard; but if the quota was either exceeded or not reached a substantial penalty royalty upon the amount of the deviation was added. Prior to the establishment of this license and quota system the price of brick in the Chicago area had varied from $3.75 to $10 per thousand; thereafter it was stabilized, remaining for one ten year period at $12, notwithstanding wide and continual fluctuation in the price of brick materials. During a period of twenty-one years the various licensees complied
8864 with the quota or paid the penalty for deviation. But during the succeeding two year period one licensee (Tuthill Building Material Company), although it sold brick much in excess of its quota, paid only the quota royalty, and the patent owner brought an accounting suit for the penalty royalty due upon the brick which exceeded the quota. Recovery was denied upon the ground that the parties to the licenses had, by means of the rigid limitation upon output, fixed prices upon an unpatented product and that such price fixing, not the use of the brick handling machine, was the dominant purpose of the license agreements. The Circuit Court of Appeals approved the doctrine of the *General Electric* case but held it not applicable.

The distinction between the *American Equipment* case on the one hand and the *General Electric* case and the instant case on the other is obvious. The *General Electric* case warrants price control by the owner of a product patent in order that he may secure the pecuniary reward of his patent monopoly. There is a normal relation between that reward and restriction upon the licensee's selling price, for unless that price can be controlled by the patent owner the latter's

profit in making and selling the patented product may be destroyed. In the *American Equipment* case the patent was upon a machine, not a product, and the price was fixed, through the limitation of output, upon the brick, an unpatented product; and this was the dominant purpose of the licensing arrangements. In view of the limitation upon output there was no normal relation between the control of the price of brick and the securing of the reward of the machine patent monopoly; the patent licenses were, therefore, in a broad sense, subterfuge. In the instant case the patents upon which the licenses were principally founded are product patents; USG, the patent owner, was itself a manufacturer and seller of the patented product, and the price control was upon the sale price of that product when also made and sold by the licensees. The purpose of USG in granting the licenses was to settle infringement litigation, collect infringement damages, secure royalties, and protect its own profit in the manufacture and sale of the patented product; the purpose of the licensees in accepting licenses was to settle or avoid litigation and obtain the right to make the superior product demanded by the trade. These purposes were legitimate. If the licensees, or some of them, also anticipated and desired the benefit of a stabilized price, that was not wrongful because a stabilized price would be the normal economic consequence of the exercise of USG's right as patent owner to protect its own profit by price control.

In respect of the *Masonite, Interstate Circuit* and *Standard Sanitary* cases: None of these cases purports to overrule the *Bement* or *General Electric* cases (the *Standard Sanitary* case was decided after the *Bement* case but before the *General Electric* decision). Hence, unless the instant case on the one hand and the *Bement* and *General Electric* cases on the other are distinguishable—and it is
8865 demonstrated in topic II of this opinion that they are not—these three cases, *Masonite, Interstate Circuit* and *Standard Sanitary*, cannot require a result in the instant case different from that which we reach. And each of the three cases is distinguishable on its facts from the instant case and the *Bement* and *General Electric* cases.

The *Standard Sanitary* case: in that case one Wayman, a defendant, but not himself a manufacturer, on condition of the elimination of unpatented hard enameled "seconds," secured from Standard Sanitary and other manufacturers options upon process patents for enameling iron sanitary

utensils. A committee of six, including Wayman and five manufacturers' representatives, worked out, to be incorporated in license contracts, a plan for manufacturers' prices and jobbers' and dealers' resale prices. Under the plan the manufacturers were not to sell jobbers who did not also take a license and submit to a price schedule. Royalties were a given sum per day for furnace use, but 80% was returnable as "cash bail" if a licensee abided by all of the provisions of its license. Having obtained approval of this plan by a sufficient number in the industry, Wayman exercised his options, became the owner of the patents, and issued the licenses as planned. Eighty-five percent of the manufacturers and ninety percent of the jobbers were parties to the arrangements. In answer to a charge that these arrangements were in violation of the Sherman Act, it was sought to justify them under the *Bement* case and upon the ground that an undue number of the (unpatented) seconds were being produced, with consequent harm to the reputation of the superior patented product and to the consumer—since the seconds were "palmed off" as not defective. The seconds were said to be "discrediting the ware and demoralizing the market and business." The Court held that the licensing arrangements were illegal. Quoting from the *Bement* case, it recognized that the Sherman Act "'clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers.'" (226 U. S. at 40) But the Court held that the Wayman license agreements "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. * * *" (226 U. S. at 48)

The case is distinguishable from the *Bement*, *General Electric* and instant cases. The price control in the *Standard Sanitary* case did not bear a normal relation to protection, or even to exploitation, of the patent monopoly
8866 in Wayman, for the prices were not fixed by him but by a committee of manufacturers' representatives of which he (not a manufacturer) was but one of six, and the royalties were to be 80% rebated if the license terms were complied with. Therefore, as in the *American Equipment* case, the licenses were, broadly, subterfuge. In the *Bement*,

General Electric and instant cases the price control was normally adapted to the protection of the patent rights of the several licensors since they were themselves manufacturers and sellers of the patented product. Moreover, in the *Standard Sanitary* case the license arrangements extended to the unpatented seconds and to the resale prices of jobbers and dealers on the patented product. As we have demonstrated in topic VI, there was no control of unpatented materials or of resale prices in the instant case; and there was none in the *Bement* or *General Electric* cases.

The *Interstate Circuit* case: The trial court in that case found that distributors of copyrighted moving picture films had entered into a contract with each other and with, and at the instance of, exhibitors who operated first run theatres —and who dominated the motion picture business in the territory where their theatres were located—providing that the distributors' licenses granted second run theatres in the same territory should restrict the licensees from exhibiting at a lower admission price than 25¢ and from running double features. The Supreme Court held this finding supported by evidence and the contract a violation of the Sherman Act. The decision was reached in part upon the holding in *Straus* v. *American Publishers' Ass'n*, 231 U. S. 222 (1913), and *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930), that competing distributors may not lawfully agree to limit their individual freedom of action by a contract binding them, in the marketing of their superior copyrighted product, to do business with their customers in uniform manner—in the *Straus* case by selling books only to those who would maintain resale prices, in the *Paramount* case by using a standard form of film license contract with exhibitors providing for compulsory arbitration of disputes. The Court distinguished the *Bement* and *General Electric* cases, saying: "Appellants argue that the distributors were free to license the films for exhibition subject to the restrictions, just as a patentee in a license to manufacture and sell the patented article may fix the price at which the licensee may sell it. *Bement* v. *National Harrow Co.*, 186 U. S. 70; *United States* v. *General Electric Co.*, 272 U. S. 476. That the parallel is not complete is obvious. Because a patentee has power to control the price at which his licensee may sell the patented article, it does not follow that the owner of a copyright can dictate that other pictures may not be shown with the licensed film or the admission price which shall be paid for an entertainment

which includes features other than the particular
8867 picture licensed. Cf. *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corporation* v. *American Patents Development Corp.*, 283 U. S. 27; *Leitch Manufacturing Co.* v. *Barber Co.*, 302 U. S. 458." (306 U. S. at 228) But the Court held it was not necessary "to pass upon these or related questions" because granting that "each distributor, in the protection of his own copyright monopoly, was free to impose the present restrictions upon his licensees * * * they were not free to use their copyrights as implements from restraining commerce in order to protect" a first run exhibitor's picture theatre monopoly "by suppressing competition with it" by the second run theatres. (306 U. S. at 228.)

The case is distinguishable from the *Bement, General Electric* and instant cases: In the *Interstate Circuit* case the price and double feature restrictions of the license contracts with the second run exhibitors were not purposed to secure to the distributor-copyright-owners the pecuniary reward of their copyright monopolies, because they were not themselves exhibitors of pictures; the restrictions were intended, as said by the Court, to suppress the competition of the second run theatres against the first run exhibitors. Whereas in the *Bement, General Electric* and instant cases the price restrictions in the several license agreements were for the protection of the patent monopoly of the respective licensors, and were not purposed to suppress competition between the licensees and third parties. Even assuming a general agreement between USG and its (prospective) licensees that the several license contracts should be executed, the net result of all of the individual license agreements when executed would not exceed the right of USG to fix the prices at which the patented product should be sold by any or all in the industry who made it under USG patents; as said in topic VI of this opinion, the totality of illegal restraint would be none. Moreover, as also stated in topic VII, we find in the instant case no general agreement.

The *Masonite* case: The Masonite Corporation owned patents on a product known as "hardboard" and itself manufactured and sold the same. It constituted competing manufacturers of building materials its del credere "agents" for the vending of hardboard, through their respective sales organizations, at prices and under terms and conditions fixed by Masonite and to be followed by it. Masonite also agreed to issue to the "agents" at their request "a license

to manufacture and sell hard boards" under its patents upon specified terms and conditions and for a cash consideration, but this option was not exercised by the "agents." The Court, treating the "agencies" for the purpose of the decision as bona fide del credere agencies, nevertheless held that the form in which the parties chose to cast the transaction was not to govern and that the "agency" ar-
8868 rangements in reality presented a *Bloomer* v. *McQuewan*,[58] *Addms* v. *Burke*,[59] *Hobbie* v. *Jennison*[60] pattern wherein when a patented product "'passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress.'" (316 U. S. at 278, quoting from 14 How. at 549) The Court said:

> * * * Doubtless there is a proper area for utilization by a patentee of a *del credere* agent in the sale or disposition of the patented article. A patentee who employs such an agent to distribute his product certainly is not enlarging the scope of his patent privilege if it may fairly be said that that distribution is part of the patentee's own business and operates only to secure to him the reward for his invention which Congress has provided. But where he utilizes the sales organization of another business—a business with which he has no intimate relationship—quite different problems are posed since such a regimentation of a marketing system is peculiarly susceptible to the restraints of trade which the Sherman Act condemns. And when it is clear, as it is in this case, that the marketing systems utilized by means of the *del credere* agency agreements are those of competitors of the patentee, and that the purpose is to fix prices at which the competitors may market the product, the device is, without more, an enlargement of the limited patent privilege and a violation of the Sherman Act. In such a case the patentee exhausts his limited privilege when he disposes of the product to the *del credere* agent. He then has, so far as the Sherman Act is concerned, no greater rights to price maintenance than the owner of an unpatented commodity would have. *Dr. Miles Medical Co.* v. *John D. Parks & Sons Co.*, 220 U. S. 373. * * * [316 U. S. at 279-80.]

The Court distinguished the decision in the first part of the *General Electric* case by saying that the Court thought in

58 14 How. 539 (U. S. 1852).

59 17 Wall. 453 (U. S. 1873).

60 149 U. S. 355 (1893).

that case that the purpose and effect of the marketing plan were to secure to the patentee only a reward for his invention, but that that was not true in the *Masonite* case. In respect of the decision in the second part of the *General Electric* case, the Court said: "We do not have here any question as to the validity of a license to manufacture and sell, since none of the 'agents' exercised its option to acquire such a license from Masonite. Hence we need not reach the problems presented by *Bement* v. *National Harrow Co.*, 186 U. S. 70, and that part of the *General Electric* case which dealt with the license to Westinghouse Company. Rather, we are concerned here only with a license to vend. * * *" (316 U. S. at 277.)

The distinctions thus taken by the Court as to the *Bement* and *General Electric* cases are valid in respect of the instant case (as they must be if, as we hold, the instant case parallels those two cases). In the instant case, as in the *Bement* and *General Electric* cases, the patent owner USG, although a manufacturer and seller of gypsum board, is not one that sells through the sales organizations of its competitors; although it manufactures board, it does its own selling. It is to be noted further that horizontal operation of price control is necessarily implied in the ruling in the *General Electric* case that the owner of a product patent may grant a license to manufacture and sell with restrictions upon the licensee's price, for one who takes and operates under such a license will *ipso facto* be a competitor.

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IX

Conclusion

In the previous topics we have discussed with particularity the evidence and the contentions of the parties in respect of the issues of fact and law in the instant case, and have set forth in some detail the reasons for the decision which we reach. This has required an extended opinion. The case may now be summarized.

The complaint of the Government charges violations of Sections 1, 2 and 3 of the Sherman Act and seeks, under Section 4, an injunction. It alleges that the defendants are parties to contracts in restraint of trade and commerce, and that they have combined and conspired to restrain, and have attempted to monopolize and have monopolized, trade and commerce in gypsum products, by means of the

execution of sham patent licenses granted by the defendant USG and accepted by the other defendants and designed only to give color of legality to the combination and conspiracy charged. It alleges that the defendants have combined and conspired to fix prices upon gypsum board and upon miscellaneous gypsum products made and sold by them, to standardize such board and its method of production, to eliminate jobbers from the distribution of gypsum products, and to induce manufacturing distributors to resell at prices fixed by the defendants gypsum board purchased from them, and it is alleged that these unlawful purposes were effectuated. All of this is asserted to have taken place in interstate commerce in the "Eastern area" of the United States, comprising, roughly, all of the states east of the Rocky Mountains, and the state of Wyoming and a part of the state of Montana. The defendants admit the execution of patent licenses to make, use and sell gypsum board under terms and conditions, including minimum prices, to be established by USG, and admit that they sold such board under such terms and conditions; but they assert that this is legitimate under the patent laws. In respect of the charge of monopoly the defendants do not deny that they make and sell substantially all of the gypsum board in the "Eastern area," but they assert that to the extent that they have a "monopoly" upon the production and sale of such board it is legitimatized by the patent laws and the license agreements. They deny that the licenses were sham or that they were entered into to disguise an illegal combination. They deny all of the other charges. The defendants rely upon the *Bement* and *General Electric* cases. The Government relies principally upon the *Standard Sanitary, Masonite, Interstate Circuit* and *American Equipment* cases. At the close of presentation of evidence by the Government the defendants moved to dismiss under Rule 41 (b) of the Federal Rules of Civil Procedure. This is the frame of the case in its substantive aspects.

In the adjective aspects of the case: The Government urges that on motions to dismiss under Rule 41 (b)
8870 and despite the absence of a jury the court must determine only whether the case presented is sufficient to submit to a jury, and if so put the defendants to their proof. The defendants contend that the court is to weigh the evidence and if it finds it insufficient render judgment of dismissal on the merits. The Government contends that the burden is upon the defendants by way of confession

and avoidance to justify under the patent licenses the restraints of trade charged. The defendants urge that the burden of proving lack of bona fides in the license agreements is upon the Government. On these two issues we sustain the contentions of the defendants. (Topics I and III.) The defendants have moved to strike certain declarations of alleged co-conspirators received in evidence subject to connection by proof, independent of the declarations, of the existence of the conspiracy charged. The Government contends that such proof has been made, the defendants that it has not. We hold that there is no evidence independent of the declarations of the conspiracy charged and that the motions to strike are therefore well taken. (Topic IV.)

On the substantive side of the case and in respect of the law: The *Bement* and *General Electric* cases sanction price fixing by a patent owner on sales of a patented product by one or more licensees if—as in those cases—the terms and conditions of the licenses are reasonably adapted to securing the rewards of the patent monopoly, and if—as in those cases—the licenses are bona fide. We think that the *Bement* and *General Electric* cases and the instant case are substantially parallel on their facts so far as the nature of the patents upon which the licenses were founded, the terms and conditions of the license agreements, and the extent of control of manufacture and sale of the respective products are concerned; and we hold therefore that the licensing arrangements, including price fixing, in the instant case are lawful unless the licenses were sham. (Topic II.) This leaves for determination two principal questions of fact, one, were the licenses sham or were they bona fide; the others, were the operations of the defendants carried beyond the license terms, *i.e.*, beyond the proper limits of the USG patent monopoly, or were they not. We hold, weighing the evidence, and whether the declarations of the alleged co-conspirators be considered, because not connected, as binding only upon the declarants, or whether they be considered as binding upon all, that the evidence fails to show the licenses sham—on the contrary shows that they are bona fide—and fails to show that the operations of the defendants went beyond the proper limits of the USG patent monopoly. We hold that the evidence shows no improper standardization of gypsum board, no price fixing on plaster and miscellaneous gypsum products, no elimination of jobbers, no fixing of the prices at which manufacturing distributors sold gypsum board purchased from the defendants.

The evidence shows price fixing by USG on board
8871 manufactured and sold by the defendants, but we hold that since the licenses are bona fide this is sanctioned by the *Bement* and *General Electric* decisions. (Topics V, VI and VII.) We think the *Standard Sanitary, Masonite, Interstate Circuit* and *American Equipment* cases distinguishable from the instant case and the *Bement* and *General Electric* cases. (Topic VIII.)

In respect of a special contention of the Government that the evidence shows a plan participated in by the defendants "to blanket" the industry under patent licenses and stabilize prices and that this is illegal: We hold that even if proof of such a plan be assumed, *arguendo*, the contention as to its illegality cannot be sustained in the absence of sham licenses and an intent to accomplish objectives beyond the proper limits of the patent monopoly. But we hold also that the evidence fails to prove that the defendants associated themselves in a common plan to execute patent licenses and stabilize prices. (Topic VII.)

It is apparent upon a review of the record in this case that the licensing arrangements which are the subject of the action, rather than being part of a scheme to circumvent the Sherman Act, were entered into as the result of a confluence of certain legal and economic factors. During the period from 1912 to 1937, that is, from the development and patenting of the Utzman closed-edge board to the execution of the Kelley perforated lath license, the last of the so-called subordinate contracts, USG was, or became, the owner of patents or patent applications covering gypsum products whose superior qualities gave that company a substantial competitive advantage over other manufacturers. These patents were, notably, including those for the Utzman closed-edge board and for the process and the machine for making it, the Birdsey partially closed-edge board patent, the Roos foam or bubble board patents, the starch board patents of Hite and Haggerty, and the Roos metallized board and perforated lath patents. The products covered by these patents eliminated trimming and wastage, lightened the board for handling and freight, made unnecessary the use of the unsatisfactory sawdust aggregate in board, solved the "peeler" problem, provided a thermal insulating element, and satisfied fire regulations. In short they accomplished modern mechanized high speed gypsum board production. The trade demanded these superior products. Without the right to make, use and sell them the

manufacturers other than USG would be distinctly disadvantaged. In this situation copying commenced. USG showed a determination to protect its patents in the courts, and in the litigation against Bestwall and Beaver in the early nineteen twenties in respect of the Utzman product and process patents it succeeded in doing so. After the decisions favorable to USG in that litigation closed-edge board could not be manufactured and sold by others
8872 without infringement of USG's rights. Also, in 1926, USG secured judicial affirmance of an award of priority for its Birdsey patent, over Clark. USG sued American for infringement of both the Utzman closed-edge and the Birdsey partially closed-edge patents; sued Universal for infringement of the Utzman patents and made a claim against it for infringement of the Birdsey patent; filed two suits against National; and served upon Niagara a notice of infringement. This litigation extended to 1928, when the second suit against National was filed. The manufacturers other than USG must, it was now obvious, in view of the trade demand, either copy and litigate, themselves devise successfully competitive products, cut prices on inferior products, such as open-edge board, at business loss, or pay damages (those that had infringed) and take licenses. USG was willing, upon terms of payment of damages (where infringement had occurred), acknowledgment of the validity of its patents, payment of royalties and the right in USG to fix the prices on gypsum board made and sold under the licenses, to grant licenses. The Supreme Court had in the *General Electric* case in 1926, confirming the ruling of the *Bement* case in 1902, recognized licensing and price control under the patent laws, notwithstanding the Sherman Act. In the foregoing situation, various of the expedients or alternatives open to the manufacturers other than USG were availed of. Beaver, Universal, Atlantic and Texas in the early period 1926-1927 took licenses and made the closed-edge board, Beaver and Universal paying damages. National and American both suffered the litigation. Some of the companies, eventually all, cut prices—in the price war of 1927-1929—with distressing results. Universal fell into receivership. American attempted to develop a competitive product in the semi-protected edge board of Clark, but this failed in the interference proceeding in which priority was awarded to Birdsey. After the two years of price war, Certain-teed, National, Ebsary and Niagara were ready for licenses. They needed the closed-edge board;

they desired to settle or avoid litigation; they anticipated a price advance under USG bulletins. Certain-teed, believing that it could continue to press the open-edge board upon the trade, had long been unwilling to take a license with price control. But the trade demanded the closed-edge board. Certain-teed, moreover, had a million dollar overhanging bond in a suit brought by USG to compel Certain-teed to assume the liabilities of Beaver under its settlement and license, Certain-teed having purchased the assets of Beaver. National settled the two infringement suits pending against it, paying damages. Ebsary found it extremely hard to sell the open-edge board and therefore took a license. Niagara disposed of USG's claim against it by taking a license and paying damages. These were the so-called May 1929 licenses.

USG then offered licenses under the Roos foam board patent applications to its outstanding licensees. Discussions concerning the advantages and disadvantages
8873 of this board and negotiations in respect of the offered licenses followed. Universal, though it took a license under the Utzman patents in 1926, had acquired the Hite and Haggerty starch patents, and there had been copying. It secured a judgment against National in 1927 establishing the validity of the Haggerty patent. In the summer of 1929 Universal claimed that USG, in the use of starch in its board to obtain adhesion between core and liners, was infringing. Universal now, in order to obtain funds with which to get out of receivership, sold the Hite and Haggerty patents to USG. After USG thus became the owner of these starch patents, one of which had been validated, and included them in its offer, licenses were, between October, 1929, and February, 1937, accepted by Niagara, Certain-teed, National, Ebsary, Atlantic, Universal, American, Kelley and Texas. American had attempted to get more favorable license terms than the other companies and had, as said above, attempted to develop, for competition with the closed-edge board, the semi-protected edge board of Clark. But USG's pending suit against American for infringement of the Birdsey partially closed-edge patent, once postponed, but reinstated, had by now, the summer of 1929, been decided in favor of USG; and the USG Utzman patent infringement suit against American was still pending. American renewed its efforts at concessions, but finally in November, 1929, and on the terms originally offered by USG at the time of the Beaver license, settled the outstanding suits and took a license from

USG, paying damages. The Texas license was the last of what have been called the November 1929 contracts, under the Roos foam patent applications, the Hite and Haggerty starch patents, and others.

Finally the perforated lath and metallized board licenses were offered by USG. The licensees needed these products to be competitive and in 1934-1935 National, Kelley, Certain-teed, Atlantic, American, Universal and Ebsary took the metallized board licenses; and in 1936-1937 Certain-teed, American, Ebsary and Kelley signed the perforated lath contracts. Thus over a period of eleven years, 1926-1937, the licensing arrangements in the instant case were completed.

In this running account of the development of the licensing arrangements is seen the operation of legal and economic factors which naturally, if not, indeed, inevitably, brought the arrangements about—the superiority of the products to which USG had patents, the validation of patents in the courts in favor of USG and Universal, the difficulties of litigation actual and threatened, the demand of the trade for the superior products, price cutting, the failure, except in the case of Universal, which sold its patents to USG, to develop competing products, the force of the *Bement* and *General Electric* rulings, and finally the decision of USG, under those cases, to share its patent monopoly. We think it clear, in the light of these factors
8874 which were operating upon the industry over the years in question, that the licenses were not a part of a scheme to restrain trade in violation of law by subterfuge as charged, but the result of a choice by the manufacturers other than USG to follow under bona fide licenses the pathway recognized by the Supreme Court, *i.e.*, to accept licenses subject to price control. All that was done, including the intra- and inter-company discussions of the advantages and disadvantages of licensing, and including the negotiations for licenses, was necessarily incident to the granting and acceptance of a plurality of patent licenses.

In view of the parallel between the *General Electric* and *Bement* cases and the instant case, and in view of the failure of proof that the licenses were sham or that the operations of the defendants went beyond the proper limits of the USG patent monopoly, the case of the Government is reduced to the contention that a plurality of licenses is wrongful—that under the *Bement* and *General Electric* cases but a single license may be granted with price fixing provisions. In re-

spect of this we reiterate that it would be an irrational fixation to construe the *Bement* and *General Electric* decisions as limiting licensing with price fixing restrictions to a single licensee, since the public is equally excluded and equally subjected to the patent owner's price whether there is no licensee, one licensee, or more. If USG had granted no licenses, all of the patented board would then have been made and sold by USG at its own price, and without competition in sales service. In the instant case if all but one license were stricken down, upon the theory that a plurality is wrongful, USG and the single licensee would then make and sell all of the patented product at the prices determined by USG. The extent of the monopoly is not altered by its division. In the *General Electric* case there was a plurality of licenses. While only the Westinghouse license contained a price restriction, the group of licenses granted by General Electric to Westinghouse and its other licensees contemplated a prorating of business between the licensor and all of the licensees, and included also type restrictions. Prorating and type restrictions are, as fully as price fixing, violations of the Sherman Act in the absence of legitimatizing patents. There was a plurality of licenses in the *Standard Sanitary* case and also in the *Interstate Circuit* case, but the holding in those cases that the licensing arrangements violated the Sherman Act was not upon that ground. The same is true of the *American Equipment* case.

Although, for the reasons set out in topic IV, we consider as well taken the defendants' motions to strike the declarations which were received in evidence subject to connection, it is not necessary formally to rule upon those motions. Since we have considered the declarations both as binding upon the declarants alone and as binding upon all
8875 of the alleged co-conspirators, the exhibits and testimony received subject to connection may remain in the record.

The motions to dismiss the Government's complaint will be granted. Counsel for the defendants will prepare, serve upon the Government and present to the court proposed findings of fact, conclusions of law and judgment of dismissal upon the merits.

I am authorized to state that Judges Garrett and Jackson concur in this opinion.

HAROLD M. STEPHENS.
FINIS J. GARRETT.
JOSEPH R. JACKSON.

8876 IN DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 8017

UNITED STATES OF AMERICA, *plaintiff*

v.

UNITED STATES GYPSUM COMPANY, *et al., defendants*

[File endorsement omitted.]

Findings of fact and conclusions of law

Filed Aug. 5, 1946

This cause having come on for trial, and the Court having heard and considered the testimony and exhibits introduced, and having read and considered the briefs filed by the respective parties, and having heard and considered oral argument of counsel for the respective parties, and after due deliberation, and having filed its written Opinion on June 15, 1946, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of fact

1. This is an action in equity instituted by the United States, hereinafter referred to as the Government, to restrain the defendants from alleged violations of Sections 1, 2 and 3 of the Sherman Act. Injunctive relief is sought under Section 4.

2. The corporate defendants are: United States Gypsum Company (hereinafter referred to as USG), National Gypsnm Company (National), Certain-teed Products Corporation (Certain-teed), The Celotex Corporation (Celotex), Ebsary Gypsum Company, Inc. (Ebsary), and Newark Plaster Company (Newark). The individual defendants are Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company (Texas), Sewell L. Avery, Oliver M. Knode, Melvin H. Baker, Bror G.
8877 Dahlberg, Henry J. Hartley, Frederick G. Ebsary, and Frederick Tomkins. Avery was president of

USG from 1905 to 1936, and since then has been chairman of the Board of Directors. Knode is president* of USG. Baker is president of National. Dahlberg is president of Celotex and chairman* of the Board of Directors of Certain-teed. Hartley is president* of Certain-teed. Ebsary is president of Ebsary.. Tomkins is president of Newark.

3. The defendants are engaged in the mining of gypsum rock and in the manufacture and in the sale in interstate commerce, in the "Eastern area" of the United States, of gypsum board, gypsum plaster, and miscellaneous gypsum products defined in a bill of particulars as gypsum block, gypsum tile, and Keene's cement. The "Eastern area" includes all of the states of the United States from the East Coast westward to and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.

4. Gypsum board consists of two outer sheets of heavy tough paper, front and back, called "liners," between which there is a lightened gypsum core which is firmly bonded to the paper. Gypsum wallboard is a product used as a finished interior wall. Gypsum lath or plasterboard is a product used as a base to which a coat of plaster may be applied. The term board as hereinafter used includes wallboard and lath or plasterboard. In the manufacture of gypsum products the raw gypsum rock is first subjected to calcination—the process of driving off the water of crystallization by heating. Calcined gypsum, or stucco, when mixed with water, resumes the original content thereof so that the manufactured product is chemically substantially the same as the raw rock and has the
8878 same properties. In the reforming process the manufacture of the products above described is made possible. The products are extensively used in the building industry.

5. In the early periods of its manufacture gypsum board was crudely made by pouring buckets of calcined gypsum mixed with water in thin layers between multiple pieces of rough felt paper, smoothing the product with rollers, hardening it on racks and trimming the pieces to size. This was a hand operation. In 1912 the defendant USG commenced the development of more efficient methods of manufacture of gypsum products. An important ad-

* As of the time when the suit was filed.

vance was in the making, by virtue of patent No. 1,034,746, issued in 1912 to USG on application of an inventor-employee named Clarence W. Utzman, of "closed-edge board." Prior to 1912 gypsum board had been made with exposed edges. This required trimming, and there was also breakage in shipping and use, with consequent wastage. The making of closed-edge board solved this problem. Various other improvements were developed, including a board making machine, the use of foam as a substitute for sawdust as an "aggregate" in the gypsum core to lighten the board, and the use of starch to improve the bond between paper and core. Metallized board, gypsum board covered with metallic foil, was devised for purposes of insulation; and a gypsum lath perforated in such manner as to increase the fire resisting qualities of wall structure was devised. These improvements were covered by patents—product, process, and machine—many of which were issued to USG; others were acquired by that company. A demand arose in the trade for these improved products, and companies other than USG commenced to copy them. There ensued many years of litigation in which USG strove to enforce, and eventually succeeded in enforcing, its patent rights.

8879 6. Prior to 1917 the Bestwall Manufacturing Company (Bestwall) commenced the manufacture of closed-edge board, USG sued for infringement and won. *Bestwall Mfg. Co.* v. *United States Gypsum Co.*, 270 Fed. 542 (C. C. A. 7th, 1921), *cert. denied*, 263 U. S. 713 (1923). Bestwall had, however, in the course of the litigation, been acquired by The Beaver Products Company, Inc. (Beaver), and USG by a supplemental bill sued both of these companies for infringement and again prevailed. *United States Gypsum Co.* v. *Bestwall Mfg. Co.*, 15 F. (2d) 704 (N. D. Ill. 1925). These decisions made the manufacture of closed-edge board by a competitor of USG impossible without infringement of USG's patent rights. Prior to the last mentioned decision, Augustus S. Blagden, president of Beaver, made overtures of settlement to Sewell L. Avery, president of USG; he continued these efforts after the decree under the supplemental bill. Avery, at a meeting with Blagden in December, 1925, specified as terms of settlement the payment of damages by Beaver for infringement of USG's patents, acknowledgment by Beaver of the validity of USG's patents, payment of royalties,

and the right in USG to fix prices of gypsum board made and sold by Beaver under the Utzman closed-edge patent. A settlement agreement was executed on July 29, 1926, Beaver paying $250,000 cash damages and USG granting Beaver a license to make, use and sell the patented products, to use the patented processes and to make and use the patented machines.

7. In September, 1925, after the decision against Beaver, USG sued The American Gypsum Company (American) and the Universal Gypsum and Lime Company (Universal) for infringement, and served a
8880 notice of infringement upon the Niagara Gypsum Company (Niagara). On September 17, 1926, a settlement and license agreement was entered into with Universal similar to that with Beaver, except that the lump sum payment was approximately $35,000. A license agreement was entered into between USG and the Atlantic Gypsum Products Company (Atlantic) on March 5, 1927. In this instance no damages were paid, Atlantic not having previously made gypsum board. Texas signed a license agreement on April 11, 1927. This contract was not by way of settlement of an existing claim of infringement, although it stated that Texas had equipped its plant to make closed-edge board and that USG was threatening to sue if such board were produced.

8. These four license contracts are for convenience referred to in the record as the "1926-1927 contracts." The licenses granted were under two Utzman patents No. 1,034,746 (the product patent) and No. 1,029,328 (a process patent), and under a third Utzman patent No. 1,330,413 (a machine patent) expiring February 10, 1937, under a Birdsey patent No. 1,358,508 (a product patent for partially closed-edge board), and under some sixty or more other patents and applications for patents. The material provisions of the contracts were these: USG granted an indivisible and non-exclusive license until the expiration of the Utzman machine patent on February 10, 1937. It reserved the right to fix during the life of the Utzman product patent, expiring August 6, 1929, the minimum prices at which the licensees might sell board embodying the disclosure of that patent, but at not more than the prevailing market price. For the privilege of manufacturing, using and selling gypsum board under the patents, the licensees agreed to pay an amount equivalent to a desig-

nated percentage of the selling price of the licensees
8881 on all gypsum board manufactured by them, whether patented or not, until February 10, 1937, the date of the expiration of the machine patent; they acknowledged and agreed not to contest the validity of the patents under which the licenses were granted; they agreed that all of the patented products sold by them and known in the trade as "seconds" should be invoiced and marked as "seconds." USG agreed that the licensees might sell patented gypsum board to manufacturers of plaster and gypsum products who did not themselves make board (referred to in the record as "manufacturing distributors"), the royalties payable to remain based upon the regular selling price of the licensees to the regular dealer trade. The licensees agreed to keep separate records showing the quantity of all board sold by them, and periodically to render reports to USG showing the quantities and prices of their sales. USG reserved the right to inspect and to make copies of the licensees' memoranda from such records.

9. In May, 1929, following further litigation, four more license contracts were entered into between USG on the one part and Certain-teed, National, Ebsary, and Niagara, on the other part. In 1923 Certain-teed, originally a manufacturer of roofing products, entered the gypsum industry with the acquisition of the Acme Cement Plaster Company (Acme). In 1926 it commenced the manufacture of open-edge gypsum board at the former Acme plant in Texas. On January 20, 1928, it purchased the assets of Beaver. Beaver was then making a closed-edge board. Certain-teed refused to assume the Beaver-USG settlement agreement and license. USG thereupon, on or about February 21, 1928, instituted suit in the District Court of the United States in Illinois against Certain-teed and Beaver, seeking
an injunction against the distribution of the pro-
8882 ceeds of sale to the Beaver stockholders and asserting that Certain-teed should be required to assume all liabilities of Beaver under its settlement agreement and license. Certain-teed was required to put up a million dollar bond, or otherwise to suffer a temporary injunction, as security for damages which might be found due to USG. On May 22, 1929, Certain-teed settled this suit with USG, agreeing to pay damages of approximately $64,000 and to fulfill the obligations of Beaver under its original settlement agreement and license; USG executed in Certain-teed's favor a patent license agreement and the suit was

dismissed and the bond released. A supplemental license agreement between USG and Certain-teed covering a bundling process patent was executed on July 3, 1929. On May 16, 1929, National settled two patent infringement suits which USG had brought against it, one on November 5, 1926, the other on May 7, 1928, paying on account of damages approximately $178,000 and entering into a patent license agreement with USG. National had commenced the manufacture of a modified closed-edge gypsum board in 1926. Ebsary, which had commenced making open-edge gypsum board in 1928, was granted a patent license by USG on May 22, 1929. This license was not a part of settlement of an infringement claim, since Ebsary had not manufactured closed-edge board and there was no infringement suit or basis therefor against it. Niagara commenced making an open-edge gypsum board, but later made board with a semi-protected edge covered by a Clark application for a patent owned by American. This board had been developed by American in an attempt to compete with USG's closed-edge board. USG claimed that this board infringed its Birdsey patent No. 1,358,508 covering the manufacture of board with a partially closed edge. Pri-
8883 ority over the Clark application had been awarded Birdsey by the Commissioner of Patents; this was affirmed by the Court of Appeals of the District of Columbia in 1926. *Clark* v. *Birdsey*, 56 App. D. C. 136, 10 F. (2d) 1001. A contract of settlement was entered into between Niagara and USG in May, 1929. This contract is not in evidence but is referred to in a later license agreement between Niagara and USG dated October 8, 1929, in which it appears that the earlier contract provided for money damages to USG in the sum of approximately $28,000 and a patent license to Niagara.

10. The four license contracts between USG on the one part and Certain-teed, National, Ebsary and Niagara on the other part, are called the "May 1929 contracts" in the record. The provisions of these four contracts were in substance the same as those of the 1926-1927 license agreements except that in the May 1929 contracts the only restriction on USG's right to fix minimum prices for patented board was that the right expired on August 6, 1929, the date of expiration of the Utzman product patent, and sales of the patented product to manufacturing distributors and jobbers were permitted only on USG's writ-

ten consent. These contracts involved the same patents as the 1926-1927 agreements, with a Birdsey "bundle" patent No. 1,696,877 added covering a method of bundling gypsum board for shipment by binding several boards together into a stack through the application of a gummed tape lengthwise along the edges of the boards. Use of this bundling method was required by the contracts.

11. In 1929 USG owned three applications for patents of Carlisle K. Roos covering cellular core gypsum board produced by the employment of foam or a foaming agent in the core of the board to produce a multitude of
8884 cells or voids thereby lightening the board, eliminating the use of sawdust, which had been an unsatisfactory material, as an "aggregate," and resulting in quicker drying. These applications were in interference with an application for a patent by Erick Christian Bayer, a foreign patentee, the American rights to whose patent had been acquired by USG. The Roos applications prevailed in the interference proceeding and Roos patents Nos. 2,017,022, 2,079,338, and 2,080,009 were ultimately issued to USG (October 8, 1935, May 4, 1937, and May 11, 1937, respectively). On May 23, 1929, after the last of the May 1929 license agreements had been executed, Avery of USG described the scope and nature of the Roos bubble board invention and outlined its advantages, including weight reduction, lower freight cost, elimination of the sawdust problem, easier handling and quicker drying, and offered the various licensees above referred to a license on this invention.

12. Shortly after this, Universal through its president and co-receiver, Eugene Holland, claimed that USG, by using starch in its board to obtain adhesion between the core and paper liners, was infringing two patents owned by Universal known as the Hite and Haggerty patents Nos. 1,230,297 and 1,500,452, respectively. The Hite patent covered a heat insulating material and method of making the same. The Haggerty patent covered a gypsum plaster wallboard employing starch or a cooked carbohydrate in the core of the board to insure a good bond between the core and the paper covering sheets. This had solved the "peeler" trouble in the gypsum board industry and made possible modern high speed production of gypsum board. Without it, high temperatures used to expedite drying of the board would result in defective board in the form of

"peelers," i.e., board having insufficient bond between
8885 the liners and the core. In 1927 Universal had brought suit in the United States District Court in Buffalo, New York, against National for infringing of the Haggerty patent, demanding an injunction and an accounting, and the court had ruled that the Haggerty patent was valid and infringed (*Universal Gypsum & Lime Co.* v. *Haggerty*, 21 F. (2d) 544 (W. D. N. Y. 1927)), and National had posted a substantial bond rather than suffer enforcement of a temporary injunction. Avery told Holland that it was not USG's policy to infringe patent rights and that he would investigate the claim. In June and July of 1929 negotiations were going on between USG and its various licensees in respect of a possible license covering the bubble board invention, and the various companies were investigating to ascertain whether the invention had merit. During this same period Holland continued to discuss with Avery separately the matter of the alleged infringement of the Haggerty and Hite starch patents. As a result of these discussions USG agreed to purchase and did purchase these patents. Universal was in receivership and the sale was a favorable one from its standpoint because it provided Universal with substantial funds permitting it to reorganize and emerge from receivership with its accounts paid. The original and ancillary receivership proceedings were in seven different Federal district courts and the sale was approved by all of these courts on or about November 5, 1929. The sale was consummated in a license contract of November 5, 1929, which settled a claim of USG against Universal for infringement of USG's partially closed-edge patent and the claim of Universal against USG for infringement of the Hite and Haggerty patents. The Hite and Haggerty patents were assigned to USG with reservation of royalty to Universal. Universal was itself granted a license under these patents and
8886 under the Birdsey patent No. 1,358,508 and under patents which might be issued under the Roos and Bayer applications and under numerous other patents. This license contract superseded the 1926 license agreement between USG and Universal. In August, 1929, USG had announced its arrangement to purchase the Haggerty and Hite patents and offered its licensees new licenses which would replace the prior license contracts and include in one document the outstanding patents of the earlier licenses, the Haggerty and Hite patents, and the applica-

tions for patents on the Roos bubble board invention. This offer was made subject to the approval of the district courts above referred to.

13. Niagara on October 8, 1929, Certain-teed on the 15th, National on the 17th, Ebsary on the 18th, and Atlantic on the 21st, entered into new patent license contracts with USG which superseded the previous agreements between these companies and USG, and these new contracts covered the Hite and Haggerty patents and also the anticipated patents under the Roos and Bayer applications as well as the unexpired patents of the earlier contracts.

14. As found above, USG had in September, 1925, instituted a suit against American for infringement of USG's closed-edge patent. It had also in the same month commenced a suit against American for infringement of the Birdsey patent on partially closed-edge board. American attempted to obtain a more favorable settlement than had been granted to other infringers. USG's infringement suit with respect to the Birdsey patent had been postponed pending settlement negotiations, reinstated, and ultimately tried and decided in favor of USG. Settlement discussions by American were resumed, with renewed efforts to obtain concessions with USG. On November 25, 1929,
8887 American finally settled its outstanding litigation with USG on the terms originally offered, *i.e.*, on terms similar to those of the earlier settlements with other companies, and accepted a license from USG similar to the license contracts of the other licensees. American paid in settlement of past infringement approximately $152,000. On April 23, 1930, Kelley Plasterboard Company, Inc. (Kelley) took a similar license. On January 3, 1939, USG consented to the assignment of this license to Newark. Texas did not enter into a license contract in 1929, but continued as a licensee under its license of April 11, 1927, although it was not subject to price control after August 6, 1929, the date of the expiration of the Utzman closed-edge patent, and no effort was made by any defendant or any agent of any defendant to establish or control the price at which Texas sold gypsum board during the period from August 6, 1929, until February 10, 1937, at which time its license of April 11, 1927, expired and Texas accepted a further license contract similar in form to the November 1929 contract with the other licensees. This completed the execution of the nine contracts generally

referred to in the record as the "November 1929 contracts" (although the Texas contract was not executed until 1937 and the Kelley contract not until April 23, 1930) with Niagara, Certain-teed, National, Ebsary, Atlantic, Universal, American, Kelley, and Texas. Each of these contracts extended licenses under the Haggerty and Hite patents, under patents which might be issued under the Roos and Bayer applications, and under a large number of patents still vital which had been the subject of the previous contracts, including the Utzman machine patent No. 1,330,413, Birdsey patent No. 1,358,508 on the partially closed-edge board, the bundle patent No. 1,696,877, and under patents which might be issued under several
8888 additional applications for patents. These November 1929 contracts were in general in the same terms as the earlier contracts. Each contained a "most favored nation" clause providing that if subsequent to the effective date of a particular agreement USG should grant to any other person, except to Universal, a license more favorable in terms, then USG would grant to the particular licensee a license on the same terms. The Texas contract alone in its "most favored nation" clause did not contain the exception to Universal. The price fixing clause contained a provision that the minimum prices fixed by USG should not be more than those at which USG determined to sell gypsum board or other products embodying the inventions claimed in the patents to its own like trade in the same market. Use of the Birdsey bundling process by the licensees was made optional.

15. Niagara was acquired by USG in 1929. National acquired Universal in 1935 and Atlantic in 1936. Newark acquired the stock of Kelley in 1937 and merged with Kelley in 1939. Celotex entered the gypsum industry for the first time when it acquired the assets of American in 1939. Upon acquiring these companies respectively National, Newark and Celotex took over the above-mentioned licenses which had been entered into by Universal, Atlantic, Kelley and American with USG.

16. In addition to the 1926-1927, May 1929, and November 1929, contracts which related to gypsum board as such (sometimes hereinafter referred to as the main board license agreements), certain additional contracts, sometimes referred to in the record as "subordinate contracts," relating to metallized board and perforated lath, were

executed as follows: At various times in 1934-1935 USG as owner of Roos patent No. 1,914,345 covering the
8889 use of metallic foil as a thermal insulating element in board granted licenses to various other companies. The license contracts in evidence are those of National of October 5, 1934, Kelley of October 12, 1934 (USG on January 3, 1939, consented to the assignment of this contract to Newark), Certain-teed of November 2, 1934, Atlantic of November 30, 1934, American of December 4, 1934 (assigned to Celotex on April 12, 1939), Universal of April 4, 1935, and Ebsary of August 14, 1935. In these contracts USG granted licenses to make, use and sell board having a metallized surface embodying the inventions disclosed and claimed in the patents or patent applications covered by the contracts, and reserved the right to fix the minimum prices on board embodying the inventions in question, but at not more than USG's own price in the same market. The licensees agreed to pay a royalty for all board having a metallized surface manufactured and sold by the licensees and covered by the claims of the patents issued or to be issued under applications for patents. The licensees agreed not to sell metallized board to other board manufacturers except upon USG's written consent, and not to sell to anyone on consignment. They agreed to acknowledge and not to contest the validity of the patents issued or to be issued and to record the quantities of metallized board manufactured "and/or sold," USG reserving the right to inspect and copy such records. Each licensee was accorded the position of a "most favored nation" with respect to licenses under these patents.

17. Similarly, USG was the owner of Roos patent No. 1,938,354 covering a fire resistant plasterboard. This board had holes of given size punched through it at designated intervals. Upon application of a coat of plaster the same pushed its way through the holes and hardened into a
mechanical key with consequent improvement of the
8890 fire resistant qualities of the wall in which such plasterboard was used. USG granted patent licenses to Certain-teed on June 8, 1936, American on July 10, 1936, Ebsary on February 2, 1937, and Kelley on June 23, 1937, for the manufacture, use and sale of this board. In substance the terms of these licenses were the same as those of the metallized board license contracts. Later USG offered a revised perforated lath license to its licensees royalty free, *i.e.*, extended an offer to include the perforated

board patent in the main board license agreement at no additional royalty. Such revised licenses were accepted by Certain-teed, Ebsary and Kelley. On January 3, 1939, USG granted Newark, which had merged with Kelley, a royalty free perforated lath license, at the same time canceling the Kelley revised license.

18. Minimum price bulletins were sent out by USG to its licensees under the various license contracts, except during the period from August 6, 1929 (the date of expiration of the Utzman product patent No. 1,034,746), until the date of the execution of the November 1929 contracts. The price bulletins are limited in their application to patented board manufactured and sold by each licensee under its license. The price on board was calculated on the basis of a mill price plus freight from the nearest mill (freightwise) to the point of destination. The bulletins provided for prices on various quantities of board such as carloads, less-than-carloads, and truckloads. In particular markets, such as metropolitan areas, where it was economic to deliver gypsum board in truckload quantities, prices were established for such quantities and the areas in which such prices were to apply were defined. Outside of such areas a higher price was fixed. Provision was made in various instances for a variation in price to cover pool car
8891 shipments, railroad switching charges, and "pick-ups" at a mill. The bulletins contained provisions purposed to prevent the violation of the minimum price requirements through such devices, in connection with a sale of board, as the giving away of board as "dunnage," making advertising allowances to the customer, granting of fictitious damage claims, splitting of commissions with the customer by commission salesmen, paying of unearned warehousing charges, fictitious hiring of customers' trucks, giving away of plaster or other products, or the sale of such products at a price unusually below the licensee's prevailing market price.

19. During the periods when price bulletins were sent out by USG to its licensees, each licensee, in the main, sold gypsum board manufactured by it at the prices and upon the terms and conditions stipulated in the bulletins. No bulletins have been sent out since July 8, 1941.

20. In 1932 USG set up as a department a wholly owned corporation called the Board Survey Company. Its func-

tion was to receive complaints of license violations, to investigate the facts, call them to the attention of the licensee involved, and upon occasion to the attention of the licensor USG. Board Survey Company was organized by USG for the purpose of bringing about compliance with the licensee. The licensees had no part in its formation, management or operation. From time to time a representative of USG, as licensor, met with representatives of the licensee companies for the purpose of explaining to them the provisions of the minimum price bulletins and for the purpose of securing adherence to such minimum prices by the licensees.

21. The defendants or their predecessors in interest were, at the time the license agreements were entered
8892 into, competitors in the manufacture and sale of substantially all of the gypsum board and a substantial part of the gypsum plaster made and sold in the "Eastern area," and the defendants now make and sell substantially all of the gypsum board and a substantial portion of the plaster in the "Eastern area." Sales of gypsum products are largely to retail dealers in building materials and mason supplies, rather than to building contractors and ultimate consumers.

22. The instant proceeding was filed on August 15, 1940.* A three-judge court was constituted on September 15, 1942. Preliminary to trial the Government propounded to the defendants an aggregate of 361 interrogatories, to many of which objections were filed. Hearings were had and rulings made on these objections. Thereafter the defendants, by virtue of amended answers containing pleas of *res judicata* based upon a disposition favorable to the defendants therein of the criminal case first described in the footnote, filed motions for summary judgment. These

* There have been two previous related proceedings. These were criminal indictments, both returned on June 28, 1940. One, *United States* v. *United States Gypsum Co. et al.*, No. 66008, in the District Court of the United States for the District of Columbia, charged USG, National, Certain-teed, Ebsary, Newark, and numerous officers and employees of these companies and of The American Gypsum Company (acquired by Celotex), with conspiring illegally to fix prices on gypsum board and to eliminate jobbers from the gypsum board industry; the other indictment, *United States* v. *Certain-teed Products Corp. et al.*, No. 66007, in the District Court of the United States for the District of Columbia, charged USG and Certain-teed with a conspiracy illegally to fix prices on perforated gypsum lath. The criminal case first described came on for trial in the fall of 1941, and on November 19, 1941, at the conclusion of the Government's case, a verdict was directed in favor of the defendants. A nolle prosequi was filed in the second case on September 17, 1942.

motions were argued orally and briefs were submitted, and the motions were denied on August 10, 1943
8893 (51 F. Supp. 613). Thereafter the defendants moved to strike, or alternatively for partial judgment dismissing, paragraph 46(a) of the Government's complaint as amended, which paragraph presented an issue as to the validity of certain of the patents upon which the November 1929 license agreements were based. These motions were orally argued and briefs were submitted upon them, and an order was entered on November 15, 1943 (53 F. Supp. 889), dismissing all of the Government's claim contained in paragraph 46(a) except the first and last sentences thereof.

23. The instant case came on for trial on November 15, 1943, and continued, with some intermissions, until the close of presentation of evidence by the Government on April 20, 1944. The testimony of 28 witnesses was heard and 641 exhibits, mostly of a documentary character, were received in evidence. Much of the testimony and most of the exhibits (448) were received in evidence subject to connection; 86 exhibits were offered but rejected. The record comprises since the commencement of the actual trial 7585 pages, exclusive of the exhibits. The later comprise several thousand additional pages. At the close of the Government's case the defendants moved to strike from the record all of the exhibits and testimony received subject to connection, on the ground that no *prima facie* showing of any conspiracy had been made, that such exhibits and testimony had not been shown to be in furtherance or in execution of any conspiracy, and that such exhibits had not otherwise been connected. The defendants moved also to dismiss the complaint with prejudice under Rule 41 (b) of the Federal Rules of Civil Procedure on the ground that upon the facts and the law the plaintiff had shown no right to relief. Briefs were submitted in advance of
8894 oral argument in support of and in opposition to the motions. After oral argument the motions were submitted and taken under advisement on May 29, 1944. The Government admitted that the motions should be granted as to Dahlberg. On June 6, 1944, additional briefs were filed, and on January 17, 1945, the court requested further briefs. The last of these was filed on March 14, 1945.

24. The principal patents upon which the main board license agreements in the instant case were founded, to wit,

the Utzman (No. 1,034,746), Haggerty (No. 1,500,452) and Roos (Nos. 2,017,022, 2,079,338 and 2,080,009) patents, were product patents upon a building material called plasterboard or wallboard. The patents were upon the entire product, not merely upon the edge of the board in the Utzman patent, or upon the starch in the Haggerty patent, or upon the bubbles or air cells in the Roos patents. These patents covered fundamental developments in the gypsum board manufacturing industry. The open-edge board which preceded the closed-edge board of the Utzman patent had defects in that there was in its manufacture wastage due to the necessary trimming of the board edge, the edge was weaker, and the core would sift out in handling and nailing. When the closed-edge board of the Utzman patent came into the market the open-edge board was largely displaced under the demand of the trade for the better product. The Haggerty patent, directed to the employment of starch or a cooked carbohydrate in the core of the board to insure a good bond between the core and the paper covering sheets, solved the "peeler" trouble in the gypsum board industry, and made possible the modern high speed production of gypsum board. The Roos patents, covering cellular core gypsum board produced by the employment of foam or a foaming agent in the core to produce
8895 innumerable cells or voids, thereby lightening the board and lending desirable nailing and other qualities thereto, supplanted the sawdust theretofore a necessary "aggregate" used in the core. Sawdust had become difficult to obtain and was moreover unsatisfactory as an "aggregate" because of variation in quality and character, which produced manufacturing difficulties. The use of the foam of the Roos patents solved these difficulties and produced a superior product with reduced manufacturing costs.

25. No substantial distinction can properly be drawn between the instant case and the *General Electric* case (272 U. S. 476) in respect of the importance of the patented improvements within the respective industries, or in respect of the nature of the patents which underlie the license agreements in the two cases. The patents, although on different materials, are of similar character and bear a similar relationship to the respective industries and the development thereof. The patents principally involved in the instant case no less, and no more, cover completely the patented product than do those principally involved in the *General Electric* case.

26. The price bulletins in the instant case contained two classes of provisions, one class providing how price should be arrived at, the other intended to protect the price fixed, *i.e.*, to prevent indirect price cutting in the sale of the patented product. The price provisions were drafted in view of the fact that the ultimate price at which the patented product is to be sold cannot be arrived at merely by naming an amount, but other factors which have economic relationship to price—such as terms of payment, cost of delivery to various areas, including freight
8896 charges, quantity sold, type of product sold, and the like must also be stipulated. The price protective provisions related only to the minimum prices established on the patented product and were designed solely to protect such prices.

27. The terms and conditions of the license agreements and price bulletins in the instant case, as compared with the terms and conditions, including price provisions, in the *General Electric* case, disclose no material distinction. In both cases the licenses were non-exclusive; there was to be no contest of the validity of the licensors' patents; there were provisions for royalties, records and reports. In both cases the licenses were granted upon the condition that the licensor should have the right to fix the minimum prices at which the licensee should sell the patented product, the prices to be charged by the licensor and licensee to be the same. In both cases, in respect of prices, there were two classes of provisions, one class providing how price should be arrived at, the other intended to protect the price fixed, *i.e.*, to prevent indirect price cutting. In both cases the provisions for arriving at price were drafted in view of the fact that the ultimate price at which a product is to be sold cannot be arrived at merely by naming an amount, but that other factors which have economic relationship to price—such as terms of payment, cost of delivery to various areas, including freight charges, quantity sold, type of product sold, and the like, must also be stipulated. The provisions of the licenses in the *General Electric* case and in the licenses in the instant case in respect of indirect price cutting, *i.e.*, the price protective provisions, are of similar character. If there is any difference between
8897 the provisions of the licenses in the *General Electric* case and in the instant case, it is in the greater stringency and complexity of those in the former.

28. The provisions of all of the license agreements in the instant case and the operations thereunder, including the bulletins issued by the licensor containing the price and price protective provisions, are reasonably and normally adapted to secure to USG the pecuniary reward for its patents and do not go beyond the limits of the monopoly granted by the patent laws.

29. The license agreements were executed at arm's length. There is no issue herein that their execution was obtained by coercion. Rather, the Government contends that the agreements were not bona fide but were sham agreements executed to disguise illegal purposes.

30. The evidence fails to establish that the agreements were not made in good faith or were intended only as sham agreements to disguise illegal purposes. On the contrary, the license agreements were executed as bona fide agreements and were intended to bind each party to the promises made therein. They were not sham agreements executed to disguise illegal purposes.

31. All of the license agreements except that of July 29, 1926 between USG and Beaver and that of September 17, 1926, between USG and Universal were executed after the decision in the *General Electric* case on November 23, 1926; and *Bement* v. *National Harrow Company* had long been decided (May 19, 1902) before the Beaver and Universal agreements were signed. The license agreements were executed upon the faith of these decisions. Prior to the making of the licenses in the instant case, the parties thereto had been advised that such licenses giving price control to the licensor were proper and that they had a right to enter into them under the patent laws.

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32. All of the license agreements (except only the revised perforated lath licenses accepted by three of the licensees when USG extended an offer to include the perforated board patent in the main board license agreement without additional royalty) required the licensees to pay, and they did pay, substantial royalties; and many of them were entered into, as hereinbefore found, in settlement of infringement litigation and in consideration of the payment of substantial damages, which damages were paid.

33. Commencing as early as 1926 when the Beaver license was negotiated, USG offered terms of settlement of infringement claims and a license to any or all of the

various board manufacturers. Throughout all of its negotiations with the various companies USG insisted upon these same terms which were: payment of damages for infringement, acknowledgment of the validity of USG's patents, payment of royalties, and the right in USG to fix prices upon board made and sold under its patents. At all times USG remained firm on these terms and rigidly insisted upon such terms for all settlements and licenses. American attempted to get better terms but USG remained firm that American should either pay in full for past infringement and for future use of the patents or go without the benefit of using them.

34. In the making of the licenses there was nothing furtive in the action of the parties. There was open negotiation and discussion between USG and the other companies in the industry of the proposed licenses and there was open discussion among the companies other than USG of their mutual problems arising out of USG's ownership and insistence upon enforcement of dominant patent rights in the gypsum board field.

8899 35. After the licenses were signed, they were enforced by USG and its agency, Board Survey, as valid and binding contracts and were so regarded by all the parties thereto. The enforcement of the license provisions after the licenses were signed, the formation by USG of Board Survey, and its activities to bring about compliance by all of the licensees with the terms of the licenses, and the meetings of USG with its licensees to explain to them the provisions of the minimum price bulletins and for the purpose of securing adherence to these bulletins by the licensees, affirmatively evidence good faith and that the licensor and licensees regarded the license agreements as valid and binding.

36. The companies which became licensees did so because they desired to settle or avoid litigation and to obtain the right to use USG's patents, considering it a business necessity to be able to do so. Several of the licensees had made the closed-edge board before they acquired the right to do so from USG, for which infringement of the Utzman patents they paid substantial damages. Also some of the licensees had manufactured board containing starch which was covered by the Haggerty patent. Numerous other patents included in the licenses were essential to the manufacturing of modern gypsum board.

37. Although there was discussion among the prospective licensees and with USG of the terms of the proposed licenses and of the advantages of signing them, nevertheless the decision to take a license was reached by each of the companies independently. The licensees took their respective licenses, without regard to what other companies did. Neither Griswold of American, Blagden of Beaver nor Holland of Universal acted, nor was told to act, as agent or emissary of USG or Avery in obtaining license agreements. The Avery-Blagden discussions involved the settlement of the USG-Beaver infringement litigation. Any interest by Griswold and Holland in the settlement of litigation in the industry was motivated by con-
8900 cern for their respective companies and the proposed mergers each of them was promoting.

38. The execution of the licenses on the faith of the *Bement* and *General Electric* cases, payment of royalties and damages by the licensees, insistence by USG upon the same terms for all, open negotiation and enforcement, signing by the licensees to avoid litigation and to make the better closed-edge board and upon independent decisions by the several licensees—all evidence good faith in the execution of the license agreements.

39. Exhibits 227 and 231 are Certain-teed intra-company memoranda wherein C. O. Brown, Sales Manager, made reference to negotiations for the bubble board and starch licenses, and to the patents and patent applications involved. Those exhibits do not establish bad faith in the execution of the license agreements either on the part of Certain-teed or any other person or company. The primary reason of Certain-teed in taking a license under the Haggerty starch and the Roos bubble board patents was that the method of manufacture was cheaper, the products could be made much lighter with resultant savings in transportation costs, and a better product resulted, Certain-teed carefully investigated the bubble board invention and concluded, about July 3, 1929, that it had merit and that a license should be taken. It had already investigated the starch situation and thought that it might be subject, on account of its own use of starch, to a claim of infringement of the Haggerty patent. When the opportunity to obtain a license under the starch patents as well as the bubble board invention was presented, Certain-teed was glad to take advantage of it. Certain-teed was not moti-

vated by a desire for price fixing when it determined to take the license. There was no understanding or agreement that the starch and bubble patents or the proposed licenses would be used as a vehicle to obtain price control. Whittemore, Vice-President of Certain-teed, had the final decision in respect of Certain-teed's taking the bubble board and starch patent license. The statement in his memorandum (part of Exhibit 227) to Van Hagan of the production department, "you can easily see the possibilities in this bubble patent", referred to the possibilities of production and quality advantages under that patent.

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40. The Government contended that, if Certain-teed believed that USG was attempting to dominate and monopolize the gypsum board industry and to restrain competition as averred in the unverified answer of Certain-teed filed in USG's injunction suit against it and the memorandum with respect thereto (Exhibits 324 and 212, respectively), that company must have intended to join in such an illegal purpose when it subsequently took the license. It can with at least equal, if not greater, reasonableness be inferred that Certain-teed had before signing the license reached the conclusion that its statement concerning USG's purpose in bringing the suit was erroneous and that Certain-teed therefore felt free to accept the license agreement. The exhibits are at most equivocal in meaning and do not establish bad faith in the execution of the license agreement.

41. The Government has failed to establish that the perforated lath license contracts, signed by Certain-teed, American, Ebsary and Kelley on June 8, 1936, July 10, 1936, February 2, 1937, and June 23, 1937, respectively, were made in bad faith. On the contrary, said licenses were made in good faith and were intended to bind each party to the promises made therein. They were not sham agreements executed to disguise illegal purposes.

8902

42. In many localities there is a building code requirement in the case of plaster bases that a wall structure (the base plus the applied coat of plaster) must stand a one hour fire test. USG, to meet this requirement, developed the perforated gypsum lath covered by the Roos patent, which contained perforations of such size and spacing as to permit a wall structure composed of it to

withstand the one hour test. When plaster is applied to this type of lath some of it passes through the perforations and forms a mechanical key which, because of the size and spacing of the holes, supports the coat of plaster with the result that it will resist fire for an hour. USG's perforated lath passed the one hour fire test of the United States Bureau of Standards and received the Bureau's one hour fire rating. This was the first gypsum lath ever to pass this test. The only perforated lath which ever passed the Bureau's one hour test was of the type covered by the Roos perforated lath patent.

43. Certain-teed, in taking the perforated lath license, believed it was necessary to obtain a supply of the perforated lath product in order to be competitive. It thought that the volume of business in perforated lath would be small—although in this respect the company turned out to be mistaken, as the demand in the trade became considerable. Another reason motivating the company in taking the license was a desire to avoid possible patent infringement liability. Certain-teed was acting in good faith in taking this license.

44. Newark took the perforated lath license because it desired to be competitive with the other licensees who had signed a similar agreement. Newark found it necessary to sell perforated lath, felt that it had to be in a position to produce it, and wanted to be able to do so lawfully. In taking this license Newark acted in good faith.

8903 45. There is no evidence questioning the good faith of American or Ebsary in respect of their taking perforated lath licenses.

46. The Government has failed to establish that the metallized board licenses, signed by National, Kelley, Certain-teed, Atlantic, American, Universal and Ebsary on October 5, 1934, October 12, 1934, November 2, 1934, November 30, 1934, December 4, 1934, April 4, 1935, and August 14, 1935, respectively, were signed by the various licensees without any expectation that they would manufacture such board, but with the intention that they would purchase it from USG or National and then resell it at prices and under conditions fixed by USG. On the contrary, said licenses were made in good faith by each of said licensees with the intention to manufacture such board and were intended to bind each party to the promises made

therein: They were not sham agreements executed to disguise illegal purposes.

47. When Certain-teed executed the metallized board license it intended to manufacture such board and soon thereafter did manufacture it. It had no agreement or understanding as to the price at which it would resell metallized board purchased from other companies. The amount of metallized board which Certain-teed purchased from other manufacturers was very small.

48. Atlantic considered the desirability of executing a metallized board license and favored such a license since there was an increasing demand for that type of board. When Atlantic took the license it intended to manufacture metallized board and before its business was sold to National it had started the manufacture of metallized board. Atlantic had no understanding or agreement with USG or anyone else as to the price at which it would sell metallized board purchased by it from other companies.

49. American concurred in USG's view that the
8904 board manufacturers should get behind this new insulating product, and, since insulating board had developed into a strong competitor of gypsum board, felt that it would be a good thing for the manufacturers to enter the metallized board field. American took the metallized board license with the expectation of manufacturing the product and did manufacture it after taking the license. American understood at all times that the only price fixed by USG was that of board manufactured by American under the patents licensed by USG.

50. There is no evidence questioning the good faith of Kelley and Newark in taking the metallized board license. Both companies manufactured metallized board under the license.

51. Ebsary took the metallized board license because it desired to manufacture the product under it, feeling that it was a matter of some importance to board manufacturers to be able to make a board and a lath with insulating qualities. Ebsary started to make this product early in 1936. Ebsary understood that the bulletin provisions applied only to such board as Ebsary itself made and sold. There was no understanding or agreement between USG and Ebsary that metallized board bulletin prices should be obser-

ved prior to the time Ebsary got into production of metallized board.

52. There is no evidence questioning the good faith of National or Universal on the subject of the metallized board license.

53. The prices which USG fixed under the metallized board licenses applied only to the patented metallized board manufactured and sold by the respective licensees. While some of the licensees purchased patented metallized board from other manufacturers and resold it, the resale prices of such board were not fixed by USG, nor was
8905 there any understanding or agreement that they would be.

54. The fact that for the privilege of using the patents, royalties are fixed in the license agreements at an amount equivalent to a designated percentage of the selling price of the licensees of all gypsum board manufactured by them, whether or not patented, does not establish an agreement to make only the patented product and does not establish that the license agreements were executed in bad faith. The patents were numerous and covered not only the patented board but machines and processes in the manufacture of board, and the rights and privileges granted were of great value to the manufacturers of gypsum board. This royalty provision is in effect a provision for a percentage of gross sales, and as such is but a convenient means of measuring the amount to be paid for the privilege of using the patents. It might with equal propriety have been a lump sum. This provision in the license agreements was not an attempt to impose a royalty upon an unpatented product, nor was it intended to drive open-edge board off the market, nor did it have that effect.

55. No evidence has been introduced proving or tending to prove that the board made and sold by the defendants was not made under the patents on which the license agreements were based.

56. There were no agreements between USG and the licensee companies other than those which were put into formal writing. There were no informal side agreements between USG and any of its licensees or between any of the defendants herein that they would discontinue making

open-edge board or seconds of closed-edge board, or that USG would advance and stabilize the prices for board, or that all or any of the companies would increase their prices for other gypsum products, or that USG would con-
8906 tinue to control prices through the use of other patents after expiration of the Utzman product patent in August 1929.

57. The evidence does not establish any of the Government's charges that the license agreements were non-bona fide because executed with intent to accomplish restraints of trade beyond the proper limits of the patent monopoly, specifically (1) illegally to raise and fix at arbitrary and non-competitive levels the price of gypsum board; (2) to accomplish improper standardization of gypsum board and its method of production; (3) to raise, maintain and stabilize the level of prices of unpatented materials—plaster and miscellaneous gypsum products; (4) to effectuate improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products; or (5) to fix the prices at which manufacturing distributors resell gypsum board.

58. The licenses were not executed with an intent to fix prices of gypsum board at high levels or any given levels. There was at no time any understanding or agreement or even discussion as to what the prices of gypsum board would be upon the execution of the licenses.

59. After the execution of the licenses, the licensees had nothing whatever to do with fixing the minimum prices at which the patented products were to be sold.

60. The gypsum industry in the "Eastern area" was in a demoralized condition in the years 1927-1929. There was litigation, bad feeling, price cutting. The prices of board had fallen so low that for some manufacturers business was no longer profitable. Prices could not go down
8907 and business continue; any change would, as a matter of economic necessity, be upward.

61. The license agreements were not executed with intent to accomplish improper standardization of board and its method of production.

62. Only Texas, Certain-teed and Ebsary had made open-edge board before signing their licenses. Beaver, Universal, National, Niagara and American had made only

closed-edge or partially closed-edge board. Atlantic's commencement of manufacturing any board was coincidental with its taking a license. There was no understanding or agreement to refrain from or discontinue the manufacture and sale of open-edge board. Nothing in the license agreements forbids making and selling it.

63. Each of the companies—Texas, Certain-teed and Ebsary—which had made the open-edge board had found it unsatisfactory because it was expensive and wasteful in production and distribution and because it was not desired by their customers who were demanding the closed-edge board, with resultant loss of business to each of the manufacturers. The primary reason that each of these companies took a license was to obtain the right to make the closed-edge board and this is what they did after acquiring a license. It may be inferred that each of such licensees did not expect, once it had secured the right to make the closed-edge board, to go forward further with the manufacture and sale of the inferior article.

64. Exhibit 226, which is a Certain-teed intra-company memorandum of June 4, 1929, by George M. Brown, and Exhibit 332, which is USG's Report to Stockholders for the fiscal year ending December 31, 1929, do not establish an improper intent not to make and sell open-edge board.

8908 65. The sixth "whereas clause" in Exhibit 5 (the Ebsary agreement of May 22, 1929), is not merely a purported waiver of the condition referred to in the fifth "whereas clause". Nor is it the fact that by tacit agreement the companies understood in May 1929 that the open-edge board was to be discontinued. The testimony of Lenci, who on being shown on direct examination only the fifth "whereas clause" said that it was the understanding of everybody who took out a license that the making of the open-edge board was to be discontinued, was corrected on cross-examination when his attention was called to the sixth "whereas clause", and it is clear from his entire testimony and from other evidence in the case that there was in fact no such understanding or agreement.

66. The license agreements were not executed with an intent to eliminate open-edge board.

67. A "second" is a defective board produced unintentionally in the process of manufacturing standard board.

A No. 2 board is a board made of lower grade material than that used in the manufacturing of the standard board. Both seconds and No. 2 board are by definition board made under the patents. There was no agreement or understanding that seconds or No. 2 board would not be manufactured. On the contrary the parties to the license agreements were free at all times to make and sell such board.

68. The provision of the license agreements requiring seconds to be marked as such was not intended to eliminate seconds. It is inferred that the real purpose of this provision was to prevent harming the reputation of the standard board by the confusion of seconds with it.

69. The license agreements were not executed with an intent to eliminate either seconds or No. 2 board.

8909 70. USG's Birdsey patent No. 1,696,877 of December 25, 1928, covered a method of binding gypsum boards together with a gummed tape which ran lengthwise along the edges of the board. The May 1929 license agreements, except that with Certain-teed, granted rights under this patent and required that the licensees use this bundling method and no other. Certain-teed was first granted license agreement executed July 3, 1929. This contained the restrictive provision. The November 1929 agreements did not contain the restrictive provisions. There was no satisfactory way of bundling gypsum board or lath except by means of the Birdsey bundle. Attempts to tie the board with wire resulted in the wire slipping and cutting the board thereby causing much breakage. Delivery of board by the licensees in broken condition would tend to devalue the product and thus lessen the pecuniary reward of the patentee's monopoly and it is inferable that the restrictive provision regarding use of the bundling patent was to exploit the patent and to accomplish packaging and delivery of board by the licensees in a manner which would preserve quality, i.e., without breakage. In any event, the restrictive provision was abandoned when the November 1929 licenses were executed.

71. The provisions for royalties for the use of the USG bundling patents contained in the May 1929 licenses, the Certain-teed July 3, 1929 license, and the November 1929 licenses, do not establish an attempt to standardize by eliminating other methods of packaging. The provisions were not so intended, nor did they have such effect. No

other method was available (except, for lath, the
8910 uneconomic method of tying with wire).

72. The license agreements were not executed with an intent to standardize in respect of the bundling patents.

73. There was at no time any understanding or agreement among any of the parties to the respective license agreements that the prices would be raised or fixed upon plaster or any unpatented gypsum product. Nor were the license agreements in the instant case executed with an intent to raise, maintain and stabilize the prices of unpatented materials such as plaster and miscellaneous gypsum products. The parties to the respective license agreements knew that the licensor's right to fix minimum prices was limited to the prices on patented board manufactured and sold by the respective licensees.

74. After the signing of the May 1929 licenses, bulletins established patented board prices at the levels which USG had been following just prior to the licenses. Subsequently until August 6, 1929, and (except for Texas) after the execution of the November 1929 agreements, the prices on patented gypsum board were advanced over what they had been during the price war, and the prices of other gypsum products improved during the same period over their condition during the price war. The primary purpose of USG in granting the licenses was the settlement of litigation, the collection of damages for infringement, the obtaining of royalties, the fixing of a profitable price on patented board, and the securing of the various advantages which would normally flow from the general manufacture and sale of the superior product. The primary purpose of the licensees in the signing of the licenses was the obtaining of the right to make the superior product and the settlement or avoidance of litigation.

8911 75. The license agreements were not executed with an intent to effectuate improper restriction upon the distribution of gypsum board, plaster or miscellaneous gypsum products, specifically, to "eliminate" jobbers through the discontinuance of a sales discount.

76. A jobber is a functionary in the wholesaling process who buys from the manufacturer, or from another wholesaler who has bought from the manufacturer, and sells to the dealer. The jobber's service is that of relieving the

manufacturer, or in some instances the wholesaler, from the necessity of direct contact with the dealer—this being accomplished by the jobber's sales force. In the gypsum industry, jobbers occupy a somewhat ambiguous position, since it is difficult to know whether or not a given person is a jobber.

77. There was no agreement or understanding between any of the parties to the license agreements in the instant case whereby jobbers would be eliminated from the gypsum board distributive system. Nor was there any understanding or agreement that jobbers' discounts would be discontinued. The issuance of the bulletin of August 8, 1930 (Exhibit 430) making the price to jobbers the same as to dealers was the exercise of the right of USG to establish a price for the patented product.

78. The Kling letter of November 12, 1929 to Avery (Exhibit 181), wherein Kling asks, among other things, for Avery's approval of four named jobbers and Avery's reply of November 16, 1929 (Exhibit 182) referring him to a provision in the proposed license with American and pointing out that American would have the right to sell the patented board to jobbers, do not establish an intent to "eliminate" jobbers, but on the contrary establish an
8912 intent to continue to deal with them.

79. The bulletin of May 24, 1929 (Exhibit 408) requesting each licensee to send USG a list of the jobbers to whom it was selling patented board and the discussion concerning jobbers at the licensee meeting of June 6, 1929 do not establish an intent to eliminate jobbers or withdraw the discount. They are at best equivocal in respect of any such intent.

80. The charge in the complaint of improper restrictions upon distribution of plaster and miscellaneous gypsum products, is not established. There is no evidence concerning any dealings by USG or the licensees with jobbers in respect of plaster and miscellaneous gypsum products.

81. The license agreements in the instant case were not executed with an intent to fix the prices at which manufacturing distributors would resell gypsum board.

82. The term "manufacturing distributors" is applicable to companies which manufacture and sell gypsum plaster but which do not, for lack of investment in the large amount

of plant equipment necessary in the making of gypsum board, manufacture board. In order to be able to market a full line of products, the manufacturing distributors purchase gypsum board from USG or one or more of its licensees. The purchases are made at a discount, and the sales of the board are made to the same dealer trade as that to which USG and its licensees sell their board, and therefore are made in competition with USG and its licensees. Both the May and the November 1929 license agreements provided that a licensee might not sell patented gypsum board to manufacturing distributors
8913 without the written consent of USG. The manufacturing distributors referred to in the evidence are the Structural Gypsum Corporation, of Linden, New Jersey; the Connecticut Adamant Plaster Company, of New Haven, Connecticut; and the Oakfield Gypsum Products Corporation, of Oakfield, New York, hereinafter referred to as Structural, Connecticut Adamant, and Oakfield, respectively. No evidence was introduced concerning the other companies listed in the bill of particulars as manufacturing distributors.

83. There was no understanding or agreement of any kind that the resale prices of manufacturing distributors should be regulated or controlled. At no time was it Lenci's purpose, or that of Ebsary, as contended by the Government, to control the prices or practices of manufacturing distributors, and they at no time had any understanding or agreement with anyone to the effect that Ebsary would control or attempt to control the resale prices at which manufacturing distributors or any of them sold board purchased from Ebsary.

84. The clause of the licenses forbidding sales to manufacturing distributors without the written consent of USG was not intended to control the prices of such distributors, nor was it so used.

85. The license agreements in the instant case were not executed with intent to gain objectives beyond the proper limits of a patent monopoly.

86. The actual operations of the defendants under the license agreements were not carried beyond the proper limits of the patent monopoly and licensing thereunder, i.e., beyond the activities contemplated by the agreements as written and into the field denounced by the Sherman Act.

8914 The evidence does not establish any of the Government's charges, (1) that the price of gypsum board was illegally raised and fixed at arbitrary and non-competitive levels; (2) that improper standardization of gypsum board and its method of production was accomplished; (3) that the level of prices of unpatented materials—plaster and miscellaneous gypsum products—was raised, maintained and stabilized; (4) that improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products was effectuated; or (5) that the prices at which manufacturing distributors resold gypsum board were fixed.

87. The defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, illegally raise or fix at arbitrary or non-competitive levels the price of gypsum board, as charged by the Government.

88. As above found, after the signing of the May 1929 licenses, the USG bulletins established patented board prices at the levels at which USG had been selling board just prior to the execution of these licenses and subsequently these bulletin prices were advanced over what they had been during the price war. But the prices so established did not exceed those which prevailed prior to the first license (the Beaver license) and the price war. Since 1935 the prices have been lowered so that for the past several years wallboard has sold for $23 per M square feet and lath for $13, as compared with $30 and $15-$16, respectively, before the first license.

89. The defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, accomplish any improper standardization of gypsum board or its method of production, as charged by the Government.

8915 90. Texas, Certain-teed and Ebsary, the only companies which prior to their licenses had made open-edge board, discontinued its manufacture and sale once they had acquired the right to make closed-edge board. The other licensees who had not manufactured the open-edge board did not commence its manufacture. But this was not the result of any understanding or agreement between any of the parties for the elimination of open-edge board.

91. The evidence fails to establish that there was an elimination of either seconds or No. 2 board. Every company unavoidably produces some seconds. As a company improves in the art of board manufacturing fewer and fewer seconds are produced. There is no evidence concerning elimination of No. 2 board.

92. The selling of seconds is harmful to the reputation of the perfect grade of the manufactured product. Protection by a patentee manufacturer of the quality of his product is important commercially, for if quality and reputation for quality descend, so will demand and price.

93. There is no evidence that during the period from May to November, 1929, when the restrictive provision regarding the bundling patents was in the licenses, it drove off the market any other method of packaging or that there was any other method (except, for lath, the uneconomic method of tying with wire). The use of the bundling invention, since the execution of the November 1929 licenses, has been on its merit for lack of a better one. There is no evidence that the restrictive provision will be reintroduced into the presently outstanding licenses; and it is found that its reintroduction is unlikely. There is no evidence that the elimination of this provision in November 1929 was in anticipation of the instant action, or of
8916 any other anti-trust proceeding. The question of the legality of the restrictive provision has become moot, and its presence in the May licenses is not a foundation for equitable restraint.

94. The defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, raise, maintain or stabilize the level of prices of plaster or miscellaneous gypsum products or any other unpatented product, as charged by the Government. The increase in price of plaster and miscellaneous gypsum products over the price during the 1927-1929 price war was not the result of any device adopted or action taken by the defendants to bring about such increase.

95. The Bulletin provision that "Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price * * * by reducing the

price of other products * * *" is but part of a larger provision concerning rebates and allowances made for the purpose and with the effect of reducing the licensee's price on patented board below the minimum price therefor—a price protective provision. It was not a device to raise, maintain or stabilize the price of plaster or miscellaneous gypsum products, and it was not applied by the defendants to that end. Nor did it have that effect. On the contrary the provision in question was a proper price protective measure reasonably designed to secure to USG the pecuniary reward of its patent monopoly. In operation, it was not used to raise, maintain or stabilize the price of unpatented materials.

8917 96. Exhibits 489 through 495, 497, 498, 500 and 501, are Ebsary and Board Survey letters involving complaints that Ebsary had violated the minimuin price on patented gypsum board through the device of rebating by giving away plaster or other products to a dealer in connection with a sale of patented board for the purpose of reducing the minimum price on the board, and do not establish that defendants or any of them raised, maintained or stabilized the prices of unpatented materials. Ebsary fully understood that USG was not attempting to fix or control Ebsary's plaster prices.

97. Exhibits 727, 729 through 738, 746 through 749, 758 and 759 are letters involving complaints that the minimum price on patented gypsum board had been violated by certain other licensees through the device of rebating by giving away plaster to a dealer in connection with a sale of the patented board, and do not establish that defendants or any of them raised, maintained or stabilized the prices of unpatented materials.

98. The Government introduced additional exhibits relating to asserted violations of the ininimum price on the patented board by means of gifts of, or rebates upon, roofing products, paints, insulation board, building paper and fibre board, or by means of such devices as free painting of signs, sales of company stock below the market price, donations to a ball club or receiving payment for board in certificates of deposit, rather than in legal tender. The purpose of these investigations disclosed by these exhibits was the same as in the case of the investigations relating to asserted gifts of, or rebates upon, plaster—namely, to

prevent the licensee involved from violating its license contract by selling the patented board manufactured by it at a price below the minimum price therefor established by the licensor. The items referred to in these ex-
8918 hibits are not embraced within the charge of the complaint.

99. The defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, effectuate any improper restriction upon distribution of gypsum board, plaster or miscellaneous gypsum products, as charged by the Government.

100. As found above, USG, on August 8, 1930, by a bulletin (Exhibit 430) made the minimum price at which a licensee could sell its patented board to jobbers the same as the minimum price to the regular dealer trade. While thereafter a jobber who purchased patented board from either USG or one of its licensees was obliged to pay the same price as a dealer, the discontinuance of the discount did not have the effect of forbidding sales of board to jobbers if they were willing to buy at the dealer price. Many jobbers continued to buy board and were able to perform a proper jobber's function. There were small dealers who, for financial reasons or lack of warehouse space, were not able to buy or store board in the minimum quantities in which the licensees were required by the bulletins to sell it. A jobber financially able to purchase a substantial amount of board and having adequate warehouse space could, though he purchased at the dealer price, resell in small lots to such dealers at an advance, because of the service he thus rendered them.

101. The discontinuance of the jobber discount was not accomplished pursuant to any understanding or agreement among defendants or any of them.

102. Exhibits 438, 471 and 502, which are communications of Ebsary to Board Survey and USG, do not establish concerted action to "eliminate" jobbers. Such ex-
8919 hibits were complaints that particular licensees had made arrangements with jobbers or dealers to give discounts or lower prices on patented board in violation of the minimum price bulletins.

103. No evidence was introduced in support of the charge that the defendants effectuated any restriction upon

distribution of plaster and miscellaneous gypsum products through jobbers. Both the bulletin establishing the jobber discount and the bulletin making the price to jobbers and dealers the same applied only to patented board.

104. The defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, fix the prices at which manufacturing distributors resold gypsum board, as charged by the Government.

105. The evidence does not establish any of the Government's charges that the resale prices of manufacturing distributors were controlled by (a) the use by USG of the provision in the May and November 1929 licenses requiring USG's written consent to the sale by licensees of patented board to manufacturing distributors, (b) the supplying to manufacturing distributors by their licensee sellers of the bulletin dealer prices on board, (c) the policing of manufacturing distributors sales of board, and (d) the limiting of the manufacturing distributor discount to approximately the cost of handling the board.

106. USG freely, and without conditions attached, granted consents to the licensees to sell board to manufacturing distributors. No consent once granted was ever withdrawn. The consents were never used by USG to control or attempt to control in any way the resale price of any of the manufacturing distributors.

8920 107. So far as the manufacturing distributors themselves were concerned, the consents to sell, which had been given by USG to their respective suppliers, were not subject to be withdrawn in the event that the distributors did not resell gypsum board at given prices and no threats of withdrawal of consents to their suppliers were ever made to any of them.

108. None of the manufacturing distributors had any agreement with its supplier to resell board at any particular price or prices. The furnishing by the licensees of information with respect to their dealer prices to the manufacturing distributors was to enable the distributors to determine their own net cost of the board, and not for the purpose of controlling the manufacturing distributors' resale prices. The discount allowed to the manufacturing distributors was 12-1/2% (on lath) and 15% (on wallboard) off the dealer price, and this was the basis on

which the manufacturing distributors were normally quoted.

109. No one from the board manufacturing companies or Board Survey ever investigated any manufacturing distributor with respect to its resale prices; and no one from USG or any other board manufacturer ever threatened to stop selling board to a manufacturing distributor on account of prices it charged on resales.

110. There were no contractual or coercive arrangements by which manufacturing distributors were compelled to resell board either at prices fixed by USG or at any other price.

111. There was no investigation and regulation of the resale prices of manufacturing distributors on gypsum board.

8921 112. Exhibits 463 and 464 do not establish policing by Board Survey of Connecticut Adamant's resale price on board. The "policing" was not of Connecticut Adamant's resale price but of Ebsary's price to Connecticut Adamant.

113. Exhibits 512, 513 A and 514 and related evidence involve a complaint against the licensee Kelley rather than against the manufacturing distributor Oakfield. The situation was one in which a complaining licensee inferred from the activities of the accused licensee's customer, the manufacturing distributor, that the accused licensee was violating the license bulletins. Again the investigation was not of the resale price of the manufacturing distributor but of the discount allowed by the seller licensee.

114. Exhibit 438 and related evidence present a situation wherein a complaint was made of an apparent license violation by Kelley and not of the resale price by Structural.

115. Exhibits 436 through 447, 449 and 450 and related evidence involve complaints against apparent license violations by Kelley rather than a protest against Structural or its prices or practices.

116. The evidence fails to establish any control of or attempt to control the manufacturing distributors' resale prices on board by "policing" such resale prices. All that the evidence establishes is that one licensee was insisting

to USG that a competitor-licensee was apparently violating, and should be required to abide by, the minimum price provisions of the bulletins. The protest of the complaining licensee was natural and stemmed from the "most favored nation" clause in each of the licenses for, if one li-
8922 censee was permitted by USG to sell board on more favorable terms than another, the license of the former was in effect being rewritten.

117. As above found, USG fixed the price at which the licensees might sell patented wallboard and lath to manufacturing distributors at 15% and 12-1/2%, respectively, off the minimum price to dealers. The fixing of this discount did not result in any unlawful control of the resale prices of manufacturing distributors.

118. The evidence (including certain evidence specially relied on by the Government consisting in the large of intra and inter-company correspondence and memoranda relating to the terms upon which USG was offering to settle litigation and extend licenses and the advantages and disadvantages of taking licenses—Exhibits 104, 123, 124, 132, 136b, 157, 158, 185, 189, 198, 204, 205, 206 and 716—the admission in paragraph 7 of the answer of Ebsary and the testimony of Griswold, Blagden, Holland and Lenci) fails to establish that defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices, as charged by the Government. On the contrary, there was no such plan or enterprise to blanket the gypsum industry with patent licenses and stabilize prices.

Conclusions of Law

1. This Court has jurisdiction of this cause.

2. A patentee may divide his patent monopoly by licensing the right to make, use and sell the patented
8923 product and may fix the terms and conditions, including the price, under which the patented product shall be sold, provided the terms and conditions of sale are normally and reasonably adapted to secure the pecuniary reward of the patentee's monopoly.

3. No legal distinction can properly be drawn between the instant case and the *General Electric* case (272 U.S. 476).

4. None of the defendants was a party to any contract, combination in the form of trust or otherwise, or conspir-

acy, in restraint of trade or commerce among the several states in gypsum products in violation of Section 1 of the Sherman Anti-Trust Act.

5. None of the defendants monopolized or attempted to monopolize, or combined or conspired with any other person or persons, to monopolize any part of the trade or commerce among the several states in gypsum products in violation of Section 2 of the Sherman Anti-Trust Act.

6. None of the defendants was a party to any contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in gypsum products in the District of Columbia, or in restraint of trade or commerce in gypsum products between any state or states or the District of Columbia, or between the District of Columbia and any state or states, in violation of Section 3 of the Sherman Anti-Trust Act.

7. The license agreements were executed in good faith and said agreements, and the activities of defendants and their agents thereunder, were lawful and proper and within the limits of the licensor's patent monopoly.

8924 8. Upon the facts and the law, the plaintiff has shown no right to relief.

9. Defendants and each of them are entitled to judgment dismissing the complaint upon the merits.

Dated August 5, 1946.

HAROLD M. STEPHENS.
FINIS J. GARRETT.
JOSEPH R. JACKSON.

8925 IN

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, *plaintiff*

v.

UNITED STATES GYPSUM COMPANY, *et al., defendants*

[File endorsement omitted.]

Final judgment

Filed Aug. 5, 1946

This cause having come on for trial, and the plaintiff having completed its presentation of evidence, and the Court having made and filed its Findings of Fact and Conclusions of Law,

IT IS HEREBY ADJUDGED AND DECREED that the complaint as amended herein be, and the same hereby is, dismissed on the merits.

Dated August 5, 1946.

HAROLD M. STEPHENS.
FINIS J. GARRETT.
JOSEPH R. JACKSON.

Now July 15 1946 Service of the within is acknowledged.

EDWARD KNUFF,
Sp. Asst. to Atty. Gen.

8926 In District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Order correcting opinion of June 15, 1946, on motions to strike certain exhibits and testimony received subject to connection and to dismiss the Government's complaint with prejudice under Rule 41 (b) of the Federal Rules of Civil Procedure

Filed Sept. 4, 1946

It is hereby ordered that the following corrections be made in the opinion of the court of June 15, 1946:

Cover page. 3rd paragraph, 2nd line. After the word "Garrett" insert the following, "Presiding Judge," and delete the letter "s" from the word "Judges" which follows the word "Jackson,". As corrected the second line of this paragraph will read: "for the District of Columbia (Presiding), and Garrett, Presiding Judge, and Jackson, Judge, United".

Page 3. 22nd line. Change the word "stated" to the word "recited".

Page 4. 27th line. Insert a comma after the word "injunction".

Page 7. 16th line. Change the footnote number "7a" to "8" and in the footnote change "7a" to "8".

Page 8. 7th line. Change the footnote number "7b" to "9" and in the footnote change "7b" to "9".

Page 9. 14th line. Change the footnote number "8" to "10" and in the footnote change "8" to "10". 15th line. Change the footnote number "9" to "11" and in the footnote change "9" to "11". 22nd line. Change the words "the licensees" to the word "them".

Page 10. 5th line. Change the footnote number "9a" to "12" and in the footnote change "9a" to "12". 11th line. Change the word "regulated" to the word "calculated". 12th line. Delete the words "of any patent":

13th line. Delete the word "licensee". 27th line. After the words "below the" insert the word "licensee's". 28th line. Change the footnote number "10" to "13" and in the footnote change "10" to "13".

Page 11. 2nd line. Change the word "they" to the words "each licensee". Change the word "them" to the word "it". In the footnote. Change the number "10" to "13".

8927 Page 12. 13th line. Change the word "most" to the words "a substantial part". 43rd line. Change the footnote number "11" to "14" and in the footnote change "11" to "14".

Page 13. 53rd line. Lower case the letter "P" in the words "President" in this line. 54th line. Lower case the letters "V" and "P" in the words "Vice-President". 63rd line. Lower case the letter "P" in the word "President".

Page 14. 34th line. Change the footnote number "11a" to "15" and in the footnote change "11a" to "15".

Page 16. 48th line. Change the footnote number "12" to "16" and in the footnote change "12" to "16". 50th line. Change the footnote number "13" to "17" and in the footnote change "13" to "17".

Page 18. 19th line (following the heading). Change the footnote number "14" to "18" and in the footnote change "14" to "18".

Page 20. 33rd line. Insert a paragraph sign before the words "The Government attacks". 45th line. Change the period following the word "Wilson" to a comma and insert the word "supra".

Page 22. 1st line. Change the word "inescapable" to the word "unavoidable".

Page 26. 17th line. Delete the hyphen following the word "non".

Page 27. 2nd line. Change the footnote number "15" to "19" and in the footnote change "15" to "19".

Page 30. 25th line. Change the footnote number "16" to "20" and in the footnote change "16" to "20".

Page 31. 14th line. Change the words "The restrictions were" to the words "It was". Change the words "be

justified" to the words "justify the restrictions". 15th line. Change the words "It was" to the words "The court". In the footnote. Change the number "16" to "20".

Page 32. 45th line. Change the footnote number "17" to "21" and in the footnote change "17" to "21".

Page 34. 29th line. After the word "merely" insert the word "for". 32nd line. Change the word "by" to the word "covered". After the word "improvements" insert the word "which".

Page 35. 16th line. Change the footnote number "18" to "22" and in the footnote change "18" to "22". 24th line. Change the word "fundamental" to the word "important".

Page 36. 17th line. Change the word "upon" to the word "in".

Page 37. 34th line. After the word "which" insert the words "normally and". 35th line. Delete the words "to the patentee". Delete the word "normal".

8928 Page 38. 25th line. After the word "were" insert the words "normally and". 26th line. Delete the word "normal".

Page 39. 10th line. Change the footnote number "19" to "23" and in the footnote change "19" to "23". 30th line. Change the footnote number "20" to "24" and in the footnote change "20" to "24".

Page 40. 16th line. Change the footnote number "21" to "25" and in the footnote change "21" to "25".

Page 41. In the footnote. Change the number "21" to "25".

Page 42. In the footnote. Change the number "21" to "25".

Page 43. 11th line. Change the footnote number "22" to "26" and in the footnote change "22" to "26". In the footnote "21—continued". Change the number "21" to "25".

Page 44. 13th line. Change the footnote number "23" to "27" and in the footnote change "23" to "27".

Page 45. 11th line. Change the figure "23" to "27".

Page 46. 6th line. Change the footnote number "24" to "28" and in the footnote change "24" to "28".

Page 47. 11th line. Change the word "and" following the word "on," to the word "or".

Page 48. 2nd line from bottom of page. Delete the comma following the words "if it then".

Page 49. 12th line (following break in text). Change the word "were" to the word "are". 13th line (following break in text). Change the word "were" to the word "are". After the word "and" insert the word "were".

Page 51. 8th line. Change the footnote number "25" to "29" and in the footnote change "25" to "29". 12th line. Change the footnote number "26" to "30" and in the footnote change "26" to "30".

Page 52. 31st line. Delete the word "again".

Page 53. 5th line. Delete the words "each of".

Page 58. 63rd line. Change the footnote number "27" to "31" and in the footnote change "27" to "31".

Page 59. 14th line. Change the word "under" to the words "confronted with". 26th line. Change the footnote number "28" to "32" and in the footnote change "28" to "32". 7th line of footnote. Change the word "attained" to the word "secured".

Page 60. In the footnote. Change the number "28" to "32".

Page 67. 11th line. Change the footnote number "29" to "33" and in the footnote change "29" to "33".

Page 69. 1st line of double spaced material. Change the word "with" to the word "by".

8929 Page 70. 1st line. Change the footnote number "30" to "34" and in the footnote change "30" to "34".

Page 73. 27th line (following heading). Change the footnote number "31" to "35" and in the footnote change "31" to "35".

Page 81. 7th line. Change the footnote number "32" to "36" and in the footnote change "32" to "36".

Page 87. 24th line. Change the footnote number "33" to "37" and in the footnote change "33" to "37".

Page 91. 8th line. Change the word "and" to the word "or".

Page 94. 11th line. Change the word "states" to the word "recites".

Page 96. 29th line. Change the words "each other" to the words "one another".

Page 97. Last line of text. Change the footnote number "34" to "38" and in the footnote change "34" to "38".

Page 98. In the footnote. Change the number "34" to "38".

Page 99. 10th line. Change the footnote number "35" to "39" and in the footnote change "35" to "39". Last line of text. Change the footnote number "36" to "40" and in the footnote change "36" to "40".

Page 100. 9th line. Change the footnote number "37" to "41" and in the footnote change "37" to "41". 24th line. Change the footnote number "38" to "42" and in the footnote change "38" to "42".

Page 102. 25th line. Change the footnote number "39" to "43" and in the footnote change "39" to "43". 33rd line. Change the footnote number "40" to "44" and in the footnote change "40" to "44".

Page 103. 2nd line. Change the footnote number "41" to "45" and in the footnote change "41" to "45".

Page 107. 1st line. After the word "Fairmount" insert the following "[sic]". 33rd line. Delete the words "not bona fide". 34th line. Delete the word "because". Change the period following the word "jobbers" to a comma and insert the words "and that they were for that reason not bona fide".

Page 108. 10th line. Change the footnote number "42" to "46" and in the footnote change "42" to "46".

Page 110. 9th line. Change the word "was" to the words "has been". 11th line. Change the first "was" to the words "has been". Change the second "was" to the word "is". 31st line. After the word "license" insert the following "(the Beaver license)".

Page 112. 5th line. Change the footnote number "43" to "47" and in the footnote change "43" to "47". 18th line.

Change the footnote number "44" to "48" and in the footnote change "44" to "48".

8930 Page 116. 1st line. Change the footnote number "45" to "49" and in the footnote change "45" to "49". 11th line. Change the footnote number "46" to "50" and in the footnote change "46" to "50".

Page 120. 8th line. Delete the comma after the word "jobbers". Delete the comma after the word "dealers".

Page 122. 18th line. Change the footnote number "47" to "51" and in the footnote change "47" to "51". 27th line. Add the letter "s" to the word "bulletin".

Page 123. 14th line. Delete the words "the withdrawal of the discount, even if there had been an agreement". 15th line. Change the words "between USG and the licensees to do so, is legitimatized by" to the words "in view of". 16th line. Delete the period following the word "decision" and insert the words "not only was withdrawal of the discount legitimate but also its withdrawal by agreement, had there been such an agreement, would not have been unlawful." As corrected the sentence commencing in line 13 will read "In the instant case, as above demonstrated, in view of the patent law and the General Electric decision not only was withdrawal of the discount legitimate but also its withdrawal by agreement, had there been such an agreement, would not have been unlawful."

Page 124. 13th line. Change the footnote number "48" to "52", and in the footnote change "48" to "52".

Page 127. 20th line. Add the letter "d" to the word "manufacture".

Page 128. Last line of text. Change the footnote number "49" to "53" and in the footnote change "49" to "53".

Page 130. 4th line. Change the footnote number "50" to "54" and in the footnote change "50" to "54".

Page 134. 17th line. Change the footnote number "51" to "55" and in the footnote change "51" to "55".

Page 135. 10th line. After the word "had" insert the word "had".

Page 136. Last line of text. Change the footnote number "52" to "56" and in the footnote change "52" to "56".

Page 137. In the footnote. Change the number "52" to "56".

Page 138. 20th line. Change the footnote number "53" to "57" and in the footnote change "53" to "57".

Page 145. 11th line. Change the word "recitation" to the word "recital".

Page 150. 10th line. Change the word "This" to the word "The".

Page 151. 1st line. Change the footnote number "54" to "58" and in the footnote change "54" to "58". Change the footnote number "55" to "59" and in the footnote change "55" to "59". Change the footnote number "56" to "60" and in the footnote change "56" to "60". 40th line. Change the word "which" to the word "that".

8931 Page 155. 8th line. Before the word "copy" insert the word "either".

By the court this 21st day of August, 1946.

Harold M. Stephens.
HAROLD M. STEPHENS.

Finis J. Garrett.
FINIS J. GARRETT.

Joseph R. Jackson.
JOSEPH R. JACKSON.

8932 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Order correcting opinion of June 15, 1946, on motions to strike certain exhibits and testimony received subject to connection and to dismiss the Government's complaint with prejudice under Rule 41 (b) of the Federal Rules of Civil Procedure

Filed Sept. 24, 1946

It is hereby ordered that the following corrections be made in the opinion of the court of June 15, 1946:

Page 2. 29th line. Change the comma after the date "1921)" to a period and delete the reference "cert. denied, 263 U. S. 713 (1923)".

Page 38. 8th line. Change the letter "w" to the letter "u" in the name "Lawrence".

By the court this 24th day of September, 1946.

Harold M. Stephens.
HAROLD M. STEPHENS.

Finis J. Garrett.
FINIS J. GARRETT.

Joseph R. Jackson,
JOSEPH R. JACKSON.

8933 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Assignment of errors and prayer for reversal

Filed Sept. 30, 1946

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final decree in the district court on August 5, 1946, in the above-entitled cause, and says that in the entry of the final decree the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in its ruling, made in advance of trial, that the plaintiff was not entitled to show the invalidity of any of defendants' patents and that the court had no authority in the present proceeding to pass on the validity of defendants' patents.

2. The court erred in entering its order of November 15, 1943, granting defendants' motion for partial judgment and dismissing paragraph 46(a) of the complaint as amended, except the first and last sentences of said paragraph.

3. The court erred (1) in holding that the plaintiff conceded at the oral argument that the Government is seeking a judicial determination that the Patent Office erred in issuing the patents mentioned in paragraph 46(a) of the complaint and (2) in denying plaintiff's motion that the court modify its opinion in this respect.

8934 4. The court erred in holding that, in so far as the present suit attacks the validity of any of defendants' patents, the distinction between this suit and an independent proceeding by the Government for cancellation of such patents is not substantial.

5. The court erred in holding that where the Government brings a proceeding under the Sherman Act charging an illegal price-fixing conspiracy, it may not show the fact of patent invalidity in order to show the illegality of the defendants' conspiracy.

6. The court erred in holding that in a proceeding brought by the Government under the Sherman Act in

which the validity of certain of defendants' patents is pertinent to the issues in such proceeding, the Government is estopped to show the invalidity of these patents.

7. The court erred in ruling at the trial that where one of the defendants had admitted, under Rule 36 of the Rules of Civil Procedure, the genuineness of a document written by him, the admission of genuineness bound only such defendant, and a declaration in furtherance of the conspiracy contained in the document bound only such defendant even though the conspiracy has been established aliunde.

8. The court erred in holding that on a motion to dismiss at the close of plaintiff's case in a nonjury action under Rule 41(b) of the Federal Rules of Civil Procedure, it is the duty of the court to weigh the evidence, draw inferences therefrom, and, if it finds the evidence insufficient to make out a case for the plaintiff, to render a decision for the defendant on the merits.

9. The court erred in holding that on the defendants' motion to dismiss pursuant to Rule 41(b), every factual issue as to which the evidence before the court did not preponderate in favor of the plaintiff must be resolved against the plaintiff.

10. The court erred in holding that Rule 52(a) of the Rules of Civil Procedure required the court to make findings of fact upon the granting of defendants' motion to dismiss.

8935 11. The court erred in making any findings of fact in the present case.

12. The court erred in holding that defendants' patent license contracts are indistinguishable from the patent licensing agreement ruled upon in *United States* v. *General Electric Co.*, 272 U. S. 476, and that said contracts, including their price provisions, are lawful.

13. The court erred in holding that there is no dispute about the nature of the principal patents upon which the license agreements were founded.

14. The court erred in holding that the defendants did not have the burden of establishing that their price fixing was justified by their patent rights and that the plaintiff had the burden of establishing the contrary.

15. The court erred in holding that the affirmative allegations made in defendants' answers concerning their pat-

ent rights do not constitute pleas in confession and avoidance as matters of defense, but may be treated as surplusage, or as denials in affirmative form, or as assertions in aid of denials.

16. The court erred in holding that there was no evidence, outside the declarations of alleged conspirators, to establish any of the charges of illegal conduct made in the complaint.

17. The court erred in making its examination of the evidence upon the basis that each declaration of a defendant was binding only upon the declarant.

18. The court erred in holding that the defendants, in their actual operations under the license agreements, did not exceed the proper limits of rights given by patent law.

19. The court erred in holding that even if the declarations of alleged coconspirators are considered as binding on all the defendants, the evidence fails to establish that the defendants illegally conspired to restrain, or that they illegally conspired to monopolize, interstate commerce in gypsum board and gypsum products.

8936 20. The court erred in finding that Roos patent applications, ultimately issued as patents Nos. 2,017,022, 2,079,338, and 2,080,009, covered cellular core gypsum board produced by the employment of foam or a foaming agent in the core of the board to produce a multitude of cells or voids (Finding 11).

21. The court erred in finding that the court ruled in *Universal Gypsum & Lime Co.* v. *Haggerty,* 21 F. 2d 544, that the Haggerty patent (No. 1,500,452) was valid (Finding 12).

22. The court erred in finding that the Haggerty patent solved the "peeler" trouble in the gypsum board industry and made possible modern high-speed production of gypsum board (Findings 12 and 24).

23. The court erred in finding that Roos patent No. 1,914,345 covered the use of metallic foil as a thermal insulating element in board and that this patent covered a board having a metallized surface (Finding 16).

24. The court erred in finding that Roos patent No. 1,938,354 covered a fire-resistant plasterboard having holes punched through it at designated intervals (Finding 17).

25. The court erred in finding that U. S. G. offered a revised perforated lath license to its licensees at no additional royalty (Finding 17).

26. The court erred in finding that the price on board in U.S.G.'s price bulletins was calculated on the basis of a mill price plus freight from the nearest mill (freight-wise) to the point of destination (Finding 18).

27. The court erred in finding that the Utzman (No. 1,034,746), Haggerty (No. 1,500,452) and Roos (Nos. 2,017,-022; 2,079,338 and 2,080,009) patents were product patents upon the entire product and that they covered fundamental developments in the gypsum board industry (Finding 24.)

8937 28. The court erred in finding that when the closed-edge board of the Utzman patent came into the market the open-edge board was largely displaced under the demand of the trade for the better product (Finding 24).

29. The court erred in finding that there is no substantial distinction between the present case and the *General Electric* case (272 U. S. 476) in respect of either the importance of the patented improvements within the respective license agreements; that the patents are of similar character and bear a similar relationship to the respective industries; and that the patents principally involved in the present case cover the patented product just as completely as did the principal patents in the *General Electric* case (Finding 25).

30. The court erred in finding that the so-called price protective provisions of U.S.G.'s price bulletins related only to the minimum prices established on the patented product and were designed solely to protect such prices (Finding 26).

31. The court erred in finding that the terms and conditions of the license agreements and price bulletins in the instant case as compared with the terms and conditions, including price provisions, in the *General Electric* case (272 U. S. 476), disclose no material distinction, and that the provisions of the licenses (*sic*) in the *General Electric* case and the licenses in this case in respect to indirect price cutting are of similar character (Finding 27).

32. The court erred in finding that the provisions of all the license agreements and the operations thereunder,

including U.S.G.'s price bulletins, are reasonably and normally adapted to secure to U.S.G. the pecuniary reward for its patents and do not go beyond the limits of the monopoly granted by the patent laws (Finding 28).

8938 33. The court erred in finding that the license agreements were not executed to disguise illegal purposes (Finding 29 and 30).

34. The court erred in finding that the enforcement of the license agreements by U.S.G., the formation by U.S.G. of Board Survey, and its activities to bring about compliance by all the licensees, and the meetings between U.S.G. and its licensees, affirmatively evidence good faith (Finding 35).

35. The court erred in finding that the companies which became licensees did so because they desired to settle or avoid litigation and to obtain the right to use U.S.G.'s patents, considering it a business necessity to be able to do so; that some of the licensees had manufactured board containing starch which was covered by the Haggerty patent; and that numerous other patents included in the licenses were essential to the manufacturing of modern gypsum board (Finding 36).

36. The court erred in finding that the decision to take a license was reached by each company independently and that the licensees took their respective licenses without regard to what other companies did (Finding 37).

37. The court erred in finding that Exhibits 227 and 231 do not establish bad faith on the part of Certain-teed in the execution of the license agreements, that Certain-teed was not motivated by a desire for price fixing when it determined to take the license, and that there was no understanding or agreement that the starch and bubble patents or the proposed licenses would be used as a vehicle to obtain price control (Finding 39).

38. The court erred in finding that Exhibit 324 and 212 are equivocal in meaning and do not establish bad faith in the execution of the license agreement (Finding 40).

39. The court erred in finding that Certain-teed acted in good faith in taking the perforated lath license agreement (Finding 43).

8939 40. The court erred in finding that while some of the licensees purchased patented metallized board

from other manufacturers and resold it, the resale prices of such board were not fixed by U.S.G., nor was there any understanding or agreement that they would be (Finding 53).

41. The court erred in finding that the fixing of royalties in the license agreements at an amount equivalent to a designated percentage of the licensees' selling price of all gypsum board manufactured by them, whether patented or not, was not intended to drive open-edge board off the market and did not have that effect (Finding 54).

42. The court erred in finding that there were no agreements between U.S.G. and the licensee companies other than those which were put into formal writing and that there were no informal side agreements between U.S.G. and any of the defendants that they would discontinue making open-edge board or seconds of closed-edge board, or that U.S.G. would advance and stabilize the prices for board, or that all or any of the companies would increase their prices for other gypsum products, or that U.S.G. would continue to control prices through the use of other patents after the expiration of the Utzman product patent in August 1929 (Finding 56).

43. The court erred in finding that the evidence does not establish that the license agreements were executed with intent to accomplish restraints beyond the limits of the patent monopoly (Finding 57).

44. The court erred in finding that the license agreements were not executed with an intent to fix prices of board at high levels or any given level and that there was at no time any understanding or agreement or even discussion as to what the prices of gypsum board would be upon the execution of the licenses (Finding 58).

45. The court erred in finding that after the execution of the licenses, the licensees had nothing whatever to do with fixing the minimum prices at which the patented products were to be sold (Finding 59).

8940 46. The court erred in finding that the license agreements were not executed with intent to accomplish improper standardization of board and its method of

production or with intent not to make and sell open-edge board or to eliminate it from the market (Findings 61, 64, and 66).

47. The court erred in finding that there was no agreement or understanding that seconds or No. 2 board would not be manufactured, and that the license agreements were not executed with intent to eliminate either seconds or No. 2 board (Findings 67 and 69).

48. The court erred in finding that the provisions for royalty for use of the U.S.G. bundling patents contained in the May 1929 licenses, the Certain-teed July 3, 1929 license, and the November 1929 licenses, do not establish an attempt to standardize by eliminating other methods of packaging, and that the provisions were not so intended and did not have such effect, and that no other method (except an uneconomic one) was available (Findings 71, 72 and 93).

49. The Court erred in finding that there was at no time an understanding or agreement among any of the parties to the respective license agreements that the prices would be raised or fixed upon plaster or any unpatented gypsum product and that the license agreements were not executed with an intent to raise, maintain and stabilize the prices of unpatented materials (Finding 73).

50. The court erred in finding that the primary purpose of the licensees was the obtaining of the right to make a superior product and the settlement or avoidance of litigation, and that the primary purpose of U.S.G. was settlement of litigation, collection of damages for infringement, obtaining royalties, and securing the various advantages which would normally flow from the general manufacture and sale of a superior product (Finding 74).

8941 51. The court erred in finding that the license agreements were not executed with intent to effectuate improper restriction upon the distribution of gypsum board or gypsum products by eliminating jobbers through discontinuance of a sales discount (Finding 75).

52. The court erred in finding that there was no agreement or understanding between any of the parties to eliminate jobbers from the distributive system; that there was no understanding or agreement that jobbers' discounts

would be discontinued; that the issuance of the bulletin of August 8, 1930, was the exercise of the right of U.S.G. to establish a price for the patented product; and that after the issuance of this bulletin many jobbers continued to buy board and were able to perform a proper jobber's function (Findings 77, 100, 101 and 102).

53. The court erred in finding that the charge in the complaint of improper restrictions upon distribution of plaster and miscellaneous gypsum products is not established, and that there is no evidence concerning any dealings by U.S.G. or the licensees with jobbers in respect of plaster and miscellaneous gypsum products (Finding 80).

54. The court erred in finding that the license agreements were not executed with an intent to fix or control the prices at which manufacturing distributors would resell gypsum board, and that the defendants did not by any of their operations under the license agreements, or by any agreement or understanding, fix or control the resale prices of gypsum board or attempt so to do (Finding 81, 83, 84, 104, 105, 106, 107, 109, 110, 116 and 117).

55. The court erred in finding that the license agreements were bona fide and were not executed with intent to gain objectives beyond the proper limits of the patent monopoly, and that the operations under the license agreements were not carried beyond the proper limits of the patent monopoly (Findings 85 and 86).

8942 56. The court erred in finding that the defendants did not, by their operations under the license agreements or by any agreement or understanding, illegally raise, maintain, or fix at noncompetitive levels, the price of gypsum board, gypsum products, or other unpatented materials, or accomplish any improper standardization of gypsum board or its method of production (Finding 87, 89, 94, 95, 96, 97 and 99).

57. The court erred in finding that elimination of open-edge board was not the result of any understanding or agreement between the parties and that the evidence fails to establish that there was an elimination of seconds (Findings 90 and 91).

58. The court erred in finding that the defendants did not associate themselves in a plan to blanket the industry under patent licenses and stabilize prices (Finding 118).

59. The court erred in concluding that a patentee may divide his patent monopoly by licensing the right to make, use and sell the patented product and may fix the terms and conditions, including the price, under which the patented product shall be sold, providing the terms and conditions of sale are normally and reasonably adapted to secure the pecuniary reward of the patentee's monopoly (Conc. 2).

60. The court erred in concluding that no legal distinction can properly be drawn between the present case and the *General Electric* case (Conc. 3).

61. The court erred in concluding that none of the defendants was a party to any contract, combination or conspiracy in illegal restraint of interstate commerce in gypsum products (Conc. 4).

62. The court erred in concluding that none of the defendants monopolized, or attempted to monopolize, or combined or conspired to monopolize, any part of interstate commerce in gypsum products (Conc. 5).

63. The court erred in concluding that the license agreements were executed in good faith and that the activities thereunder of defendants and their agents were lawful and proper and within the limits of the licensor's patent monopoly (Conc. 7).

8943

64. The court erred in concluding that upon the facts and the law, the plaintiff had shown no right to relief (Conc. 8).

65. The court erred in not denying the defendants' motion to dismiss the complaint.

66. The court erred in entering judgment dismissing the complaint.

Wherefore, plaintiff prays that the final decree of the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as the court may deem just and proper.

Roscoe T. Steffen
ROSCOE T. STEFFEN,

Edward Knuff
EDWARD KNUFF,
Special Assistants to the Attorney General.

This 30th day of September 1946.

8944 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Petition for appeal

Filed Sept. 30, 1946

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final judgment and decree of this Court entered on the 5th day of August 1946, does hereby pray an appeal from said final judgment and decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the judgment erroneous are set forth in the Assignment of Errors and Prayer for Reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that its appeal may be allowed and that a citation be issued as provided by law, that a transcript of the record, proceedings, and documents upon which said final judgment and decree was based, duly authenticated,

8945 be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Wendell Berge
WENDELL BERGE,
Assistant Attorney General.

Roscoe T. Steffen
ROSCOE T. STEFFEN,
Special Assistant to the Attorney General.

Edward Knuff
EDWARD KNUFF,
Special Assistant to the Attorney General.

This 30th day of September 1946

9144 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Order allowing appeal

Filed Sept. 30, 1946

In the above-entitled cause the United States of America plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause entered on the 5th day of August, 1946, and having also made and filed its Assignment of Errors and Prayer for Reversal, and Statement of Jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided.

It is therefore ordered and adjudged

That the appeal be and the same is hereby allowed as prayed for.

Harold M. Stephens,
HAROLD M. STEPHENS,

Finis J. Garrett,
FINIS J. GARRETT,

Joseph R. Jackson,
JOSEPH R. JACKSON,

Designated as Justices of the District Court of the United States for the District of Columbia.

This 30th day of September 1946.

9145 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Citation

Filed Sept. 30, 1946

To United States Gypsum Company; National Gypsum Company; Certain-teed Products Corporation; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, Doing Business Under the Name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Henry J. Hartley; Frederick G. Ebsary; and Frederick Tomkins.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in Washington within forty (40) days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the District of Columbia, wherein the United States of America is appellant and you are appellees, to show cause why the judgment rendered against the said appellant as mentioned in said appeal should not be corrected.

Harold M. Stephens,
HAROLD M. STEPHENS,

Finis J. Garrett,
FINIS J. GARRETT,

Joseph R. Jackson,
JOSEPH R. JACKSON,

Designated as Justices of the District Court of the United States for the District of Columbia.

This 30th day of September 1946.

9169 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Request to certify and transmit original documents

Filed Oct. 18, 1946.

Comes now the United States of America, plaintiff-appellant herein, and requests the Court to enter an order directing the clerk of this court to enter an order to certify and transmit to the Clerk of the Supreme Court of the United States the original papers and documents specified in the praecipe to the clerk of this court as the transcript of the record on appeal.

Edward Knuff,
EDWARD KNUFF,
Special Assistant to the Attorney General.

This 14th day of October 1946.

9170 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Order to certify and transmit original documents

Filed Oct. 18, 1946

In the above-entitled cause the United States of America, plaintiff-appellant herein, has applied for an order directing the clerk of this court to certify and transmit to the Clerk of the Supreme Court of the United States the original papers and documents specified in the praecipe to the clerk of this court as the transcript of the record on appeal.

It is therefore ordered

That the request be and the same is hereby granted, and the clerk of this court is directed to certify and transmit to the Supreme Court of the United States the original papers and documents specified in the praecipe.

HAROLD M. STEPHENS

This 14th day of October 1946

9171 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Praecipe for transcript of record

Filed Oct. 18, 1946

To the Clerk of the District Court of the United States:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript in the order given below the following papers, viz.:

1. The complaint; filed August 15, 1940.

2. Defendants' joint motion for bill of particulars; filed November 18, 1940.

3. Order on motion for bill of particulars; filed May 12, 1941.

4. Government's bill of particulars; filed May 15, 1941.

5. Amendment to complaint; filed June 5, 1941.

6. Answer of each defendant.

7. Expediting certificate; filed December 16, 1941.

8. Designation of judges appointed to the three-judge district court; filed September 17, 1942.

9172 9. Motion of each defendant for leave to file supplemental answer together with each proposed supplemental answer.

10. Government's motion for leave to amend prayer of complaint together with the proposed amendment; filed October 31, 1942.

11. Order granting the defendants leave to file supplemental answers; filed November 6, 1942.

12. Government's motion for leave to amend complaint by adding thereto a new paragraph numbered 46(a), together with the proposed amendment; filed February 22, 1943.

13. Order granting Government's motion to amend prayer of complaint; filed March 12, 1942.

14. Order granting Government's motion to amend complaint by adding a new paragraph numbered 46(a); filed March 12, 1943.

15. Defendants' joint motion to strike or, in the alternative, for partial judgment; filed September 28, 1943.

16. Revocation of designation of Judge Oscar E. Bland to perform duties of a District Judge; filed November 13, 1943.

17. Designation of Judge Joseph R. Jackson to perform duties of a District Judge; filed November 13, 1943.

18. Appointment of Judge Joseph R. Jackson as a member of the three-judge district court; filed November 13, 1943.

19. Opinion of the court (majority and dissenting) on defendants' joint motion for partial judgment; filed November 15, 1943.

9173 20. Order granting defendants' joint motion for partial judgment; filed November 15, 1943.

21. Supplemental answer of each defendant to paragraph 46(a) of the complaint; filed during the period November 15 to 29, 1943.

22. The following portions of the stenographic transcript of the testimony and trial proceedings: pages 539 to 541, line 23, inclusive; pages 583 to 636, line 9, inclusive; pages 915, line 14, to 6865, inclusive.

23. All Government exhibits.

24. Government's requests for admissions directed to Certain-teed, National, and USG; filed March 8th and 9th, 1944.

25. Answers of Certain-teed, and National to Government's requests for admissions; filed March 28th and April 3rd, 1944.

26. Opinion; filed June 15, 1946.

27. Findings of fact and conclusions of law; filed August 5, 1946.

28. Final order and decree of the district court; filed August 5, 1946.

29. Orders correcting the opinion of June 15, 1946; filed September 4th and 25th, 1946.

30. Assignment of errors and prayer for reversal; filed September 30, 1946.

31. The petition for appeal.

32. Statement of Jurisdiction.

33. Order allowing appeal.

34. Citation.

9174 35. Statement required by paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States.

36. Proof of service of appeal papers.

37. Opposing Statement as to Jurisdiction.

38. Request to transmit original documents.

39. Order to transmit original documents.

40. This praecipe.

41. Proof of service of this praecipe.

42. Clerk's certificate.

Roscoe T. Steffen
ROSCOE T. STEFFEN
Special Assistant to the Attorney General

Edward Knuff
EDWARD KNUFF
Special Assistant to the Attorney General

This 17th day of October 1946.

9175 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Proof of service

Filed Oct. 25, 1946

Service of the Praecipe for Transcript of Record, Request to Certify and Transmit Original Documents and Order to Certify and Transmit Original Documents, is accepted and copies received this 18th day of October 1946.

Hugh Lynch, Jr., Attorney for the defendants, United States Gypsum Company, Sewell L. Avery, and Oliver M. Knode; Ernest H. Oliver, Attorney for the Defendant, The Celotex Corporation; Nicholas J. Chase, per Shapiro, Attorney for the Defendants, National Gypsum Company and Melvin H. Baker; Joseph P. Tumulty, Jr., Attorney for the Defendants, Ebsary Gypsum Company, Inc. and Frederick G. Ebsary; Carlton Ogburn, by Wiley Narron, Attorney for the Defendant, Certain-teed Products Corporation; James O'Donnell, Jr., Attorney for the defendants, Newark Plaster Company and Frederick Tomkins; Harold F. McGuire, per R. Spierson, Attorney for the Defendant, Henry J. Hartley; Scott P. Crampton, Attorney for the Defendant, Samuel M. Gloyd, Doing Business Under the Name of Texas Cement Plaster Company.

9176 In District Court of the United States

[File endorsement omitted.]

[Title omitted.]

Order granting extension of time within which to file counter-praecipe

Filed Oct. 25, 1946

It is by the Court this 25 day of October, 1946

Ordered that the time within which defendants may file their counter-praecipe setting forth their designation of record on appeal be and it is hereby extended from October 28, 1946 to November 15, 1946.

HAROLD M. STEPHENS

Copy of this proposed Order served upon Edward Knuff, Attorney for Plaintiff, Department of Justice, Washington, D. C. the 25th day of October, 1946.

HUGH LYNCH, JR.
Hugh Lynch, Jr.

9177 In District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Filed Nov. 15, 1946

Defendants' counter-praecipe

To the Clerk of the District Court of the United States for the District of Columbia:

In preparing the transcript of the record in the above-entitled cause, please include in said transcript the following:

1. Interrogatories addressed by plaintiff to defendants U. S. G., National, Certainteed, Celotex, Ebsary, Newark and Texas on or about January 23, 1942, and order, dated April 5, 1943, requiring answers to certain of said interrogatories.

2. Affidavit of Edward Knuff, sworn to October 4, 1943, submitted in opposition to motion to strike or, in the alternative, for judgment in respect to par. 46(a) of Complaint.

3. Reply affidavit of George S. Collins, sworn to October 15, 1943, submitted on motion to strike or, in the alternative, for judgment in respect to par. 46(a) of the Complaint.

9178 4. Stipulation and attached exhibit submitted to Court on November 15, 1943, in connection with motions to strike or, in the alternative, for judgment in respect of par. 46(a) of the Complaint.

5. Certified copies of the following patents: No's. 1,914,345; 1,938,354; 2,017,022; 2,079,338; and 2,080,009 submitted on motion to strike or, in the alternative, for judgment in respect of par. 46(a) of the Complaint.

6. All pages of the stenographic transcript of proceedings from page 1 to page 7750, inclusive, not designated in paragraph 22 of plaintiff's praecipe, dated October 17, 1946.

7. All errata sheets showing corrections to all pages of stenographic transcript of proceedings from page 1 to page 7750, inclusive and all pages of stenographic transcript containing tables of contents and tables of exhibits.

8. Stipulations correcting opinion of June 15, 1946, dated October 18, 1946 and October 29, 1946.

9. Order dated October 28, 1946, extending defendants' time to file counter-praecipe.

10. This counter-praecipe, together with proof of service thereof.

9179 OBJECTION TO PLAINTIFF'S PRAECIPE

1. Defendants object to Items 24 and 25 of plaintiff's praecipe upon the ground that the requests for admissions and answers thereto were not offered or received in evidence and are not properly part of the record in the case. (See Transcript pp. 6378-6381.)

November 15, 1946

Respectfully submitted,

Bruce Bromley, George S. Collins, Hugh Lynch, Jr., Attorneys for defendants, United States Gypsum Company, Sewell L. Avery and Oliver M. Knode; Elmer E. Finck, Nicholas J. Chase, Attorneys for defendants, National Gypsum Company and Melvin H. Baker; Donald N. Clausen, Herbert W. Hirsh, Charlton Ogburn, Attorneys for defendant, Certain-teed Products Corporation; F. W. H. Adams, Peter Keber, Attorneys for defendant, Henry J. Hartley; Andrew J. Dallstream, Ernes H. Oliver, Attorneys for defendant, The Celotex Corporation; Benjamin P. DeWitt, James O'Donnell, Jr., Attorneys for defendants, Newark Plaster Company and Frederick Tomkins; D. I. Johnston, George E. H. Goodner, Attorneys for defendant, Samuel M. Gloyd, etc.

Nov. 15, 1946. Service accepted and one copy received.

EDWARD KNUFF,
Sp. Asst. to Atty. General.

9180 District Court of the United States
for the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered 1 to 9263, both inclusive, to be the original papers filed in the foregoing action, said

papers having been ordered transmitted to the Supreme Court of the United States by order of this Court filed October 18, 1946, and according to praecipes for transcript of record by counsel filed and made a part hereof, in action entitled United States of America, Plaintiff, vs. United States Gypsum Company, et al., Defendants, Civil Action No. 8017, as the same remains of record in said Court, except the following:

Items 4 and 8 of defendants' counter-praecipe, do not appear of record.

The Government's exhibits filed by counsel, are transmitted herewith under separate certificates.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of November 1946.

CHARLES E. STEWART, *Clerk*,

[SEAL] By HARRY M. HULL,
Deputy Clerk.

9182 In the Supreme Court of the United States

Statement of points to be relied upon and designation of parts of the record necessary for consideration thereof

Filed Dec. 2, 1946.

1. Now comes the appellant in the above-entitled cause and for its statement of points upon which it intends to rely in its appeal to this Court adopts the points contained in its assignment of errors heretofore filed herein.

2. The entire record in this cause as filed in this Court pursuant to appellant's praecipe to the Clerk of the District Court of the United States for the District of Columbia is necessary for the consideration of the foregoing points and appellant designates said entire record for printing by the Clerk of this Court except as follows:

(1). Of the answers of the defendants, omit the answer of Bror G. Dahlberg. (Answer of Dahlberg is Part II of the answer of Celotex and appears on pages 36 to 39 of said answer.)

(2) Of the Transcript of Proceedings on Trial, omit those parts of the transcript designated in Schedule A attached hereto.

(3) Of the Government's exhibits, omit those listed in Schedule B attached hereto.

(4) Of the appellant's praecipe, omit items 24 and 25.

GEORGE T. WASHINGTON
Acting Solicitor General

This 22nd day of November 1946

9182-A SCHEDULE A—PARTS OF THE TRANSCRIPT OF PROCEEDINGS ON TRIAL TO BE OMITTED

Pages 1015 to 1017, line 18 inclusive.

Pages 1144, line 18 to 1153, line 20 inclusive.

Pages 1259 to 1260, line 14 inclusive.

Pages 1379 to 1381, line 3 inclusive.

Pages 1433 to 1434, line 3 inclusive.

Pages 1622 to 1623, line 5 inclusive.

Pages 1728 to 1731, line 23 inclusive.

Pages 1809 to 1813, line 8 inclusive.

Pages 1866 to 1878, inclusive.

Pages 1880 to 1882, line 2 inclusive.

Pages 2006 to 2010, inclusive.

Pages 2113 to 2116, inclusive.

Pages 2230 to 2233, line 6 inclusive.

Pages 2367 to 2376, line 7 inclusive.

Pages 2502 to 2506, line 4 inclusive.

Pages 2617 to 2622, line 18 inclusive.

Pages 2728 to 2732, line 17 inclusive.

Pages 2843 to 2846, inclusive.

Pages 2952 to 2968, line 20 inclusive.

Pages 3075 to 3082, line 1 inclusive.

Pages 3222 to 3229, inclusive.
Pages 3231 to 3236, inclusive.
Pages 3349 to 3352, line 8 inclusive.
Pages 3480 to 3486, inclusive.
Pages 3534 to 3537, line 2 inclusive.
Pages 3660 to 3665, inclusive.
Pages 3783 to 3787, line 8 inclusive.
Pages 3927 to 3934, line 22 inclusive.
9183 Pages 4068 to 4071, inclusive.
Pages 4213 to 4215, inclusive.
Pages 4333 to 4334, line 14 inclusive.
Pages 4431 to 4438, line 14 inclusive.
Pages 4547 to 4552, line 3 inclusive.
Pages 4663 to 4664, line 14 inclusive.
Pages 4792 to 4795, line 15 inclusive.
Pages 4923 to 4926, inclusive.
Pages 5040 to 5055, line 11 inclusive.
Pages 5161 to 5162, inclusive.
Pages 5308 to 5315, line 14 inclusive.
Pages 5437 to 5445, line 8 inclusive.
Pages 5563 to 5566, line 4 inclusive.
Pages 5695 to 5697, line 16 inclusive.
Pages 5829 to 5835, line 16 inclusive.
Pages 5937 to 5941, line 14 inclusive.
Pages 6069 to 6076, line 8 inclusive.
Pages 6136 to 6138, line 5 inclusive.
Pages 6153 to 6154, inclusive.
Pages 6279 to 6283, line 1 inclusive.
Pages 6284 line 16 to 6353, line 10 inclusive.

Pages 6400 to 6405, line 10 inclusive.

Pages 6541 to 6546, line 3 inclusive.

Pages 6641 to 6645, line 1 inclusive.

Pages 6720 to 6724, line 6 inclusive.

Pages 6822 to 6823, line 23 inclusive.

9184 SCHEDULE B—LIST OF GOVERNMENT'S EXHIBITS TO BE OMITTED

40 to 42 inclusive, 54, 103, 116, 137, 139, 140, 143, 148, 210, 219 to 223 inclusive, 228 A, 229, 233, 239, 240, 242, 243, 257, 267, 270, 272, 273, 296, 297, 303, 304, 309, 319, 320, 342, 344, 358, 401, 402, 419, 477 to 479 inclusive, 488, 507, 551, 552, 557, 559 to 561 inclusive, 563 to 568 inclusive, 568 A, 569 570, 570 A, 579 to 583 inclusive, 586 to 590 inclusive, 599 A, 600, 600 A, 606 to 608 inclusive, 622, 622 A, 623, 645 to 692 inclusive, 698, 715, 728.

9185 Service of the attached Statement of Points to be Relied Upon and Designation of Parts of the Record Necessary for Consideration thereof, together with Schedules A and B attached thereto, is accepted and copies received this 25th day of November, 1946.

Hugh Lynch, Jr., Attorney for the Defendants, United States Gypsum Company, Sewell L. Avery, and Oliver M. Knode; Ernest H. Oliver, Attorney for the Defendant, The Celotex Corporation; Nicholas J. Chase, Attorney for the Defendants, National Gypsum Company and Melvin H. Baker; Joseph P. Tumulty, Jr., Attorney for the Defendants, Ebsary Gypsum Company, Inc. and Frederick G. Ebsary; Charlton Ogburn, Attorney for the Defendant, Certain-teed Products Corporation; James O'Donnell, Jr., F. S., Attorney for the Defendants, Newark Plaster Company and Frederick Tomkins; Harold F. McGuire for Henry J. Hartley, Attorney for the Defendant, Henry J. Hartley, per M. J. Hoffman; Geo. E. H. Goodner, Attorney for the Defendant, Samuel M. Gloyd, Doing Business Under the Name of Texas Cement Plaster Company.

[File endorsement omitted.]

9186 In the Supreme Court of the United States

Appellees' designation of additional parts of the record to be printed

Filed Dec. 17, 1946

Appellees hereby designate the following for printing by the Clerk of this Court, in addition to those parts designated for printing by appellant:

(1) p. 365,* line 4 through line 15.

(2) p. 657, line 6 through line 25.

(3) p. 673 through p. 681, line 22.

(4) p. 734, line 6 through p. 735, line 5.

(5) p. 744 through p. 757, line 5.

(6) p. 2843 through p. 2844, line 3.

(7) p. 4436, line 22 through p. 4438, line 14.

(8) p. 5308, line 18 through p. 5311, line 17.

(9) p. 5313, first two words of line 18, p. 5314, line 4 through p. 5315, line 14.

(10) p. 7240, line 19 through p. 7254, line 5.

(11) p. 7609 through p. 7612.

(12) p. 7624, line 5 through p. 7629, line 5.

(13) p. 7632, line 22 through p. 7635, line 21.

9187 (14) p. 7636 through p. 7637.

(15) p. 7722, line 3 through p. 7732, line 8.

(16) The following parts of interrogatories addressed by plaintiff to defendant United States Gypsum Company on or about January 23, 1942:

(a) From page 1, caption and 5 lines immediately under caption;

(b) From page 5, paragraphs 40, 41 and 42; and

* Except where otherwise indicated, page references are to Stenographic Transcript of Proceedings.

(c) From page 6, the material following paragraph 51.

(17) The following parts of interrogatories addressed by plaintiff to defendant National Gypsum Company on or about January 23, 1942:

(a) From page 1, caption and 5 lines immediately under caption;

(b) From page 5, paragraphs 40, 42 and 43; and

(c) From page 6, the material following paragraph 53.

(18) The following parts of interrogatories addressed by plaintiff to defendant Certain-teed Products Corporation on or about January 23, 1942:

(a) From page 1, caption and 5 lines immediately under the caption;

(b) From page 5, paragraphs 43, 45 and 46; and

(c) From page 6, the material following paragraph 56.

(19) The following parts of interrogatories ad-
9188 dressed by plaintiff to defendant, The Celotex Corporation on or about January 23, 1942:

(a) From page 1, caption and 5 lines immediately under the caption;

(b) From pages 3 and 4, paragraphs 31 and 32; and

(c) From page 5, the material following paragraph 42.

(20) The following parts of interrogatories addressed by plaintiff to defendant, Ebsary Gypsum Company, Inc., on or about January 23, 1942:

(a) From page 1, caption and 5 lines immediately under the caption;

(b) From page 5, paragraphs 40, 42 and 43; and

(c) From page 6, the material following paragraph 53.

(21) The following parts of interrogatories addressed by plaintiff to defendant Newark Plaster Company on or about January 23, 1942:

(a) From page 1, caption and 5 lines immediately under the caption;

(b) From page 5, paragraphs 42 and 43; and

(c) From page 6, the material following paragraph 59.

(22) The following parts of interrogatories addressed by plaintiff to defendant Texas Cement Plaster Company on or about January 23, 1942:

(a) From page 1, caption and 5 lines immediately under caption;

9189 (b) From pages 4 and 5, paragraphs 36, 38 and 39; and

(c) From page 5, the material following paragraph 47.

(23) The following parts of the Trial Court's order, dated April 5, 1943, requiring answers to certain interrogatories:

(a) Pages 1 and 2;

(b) From the 10th line from the bottom of page 4 through line 3 of page 6; and

(c) From page 8, last paragraph and signature.

(24) Affidavit of Edward Knuff, sworn to October 4, 1943, submitted in opposition to motion to strike or, in the alternative, for judgment in respect of paragraph 46(a) of complaint.

(25) Reply affidavit of George S. Collins, sworn to October 15, 1943, submitted on motion to strike or, in the alternative, for judgment in respect of paragraph 46(a) of the complaint.

(26) The granting provisions of the certified copy of Patent No. 2,017,022.

(27) Stipulations correcting opinion of June 15, 1946, dated October 18, 1946 and October 29, 1946.

(28) Order dated October 28, 1946, extending time to file counter-praecipe.

(29) Counter-praecipe dated November 15, 1946.

(30) Order dated December 3, 1946, extending time of appellees to designate additional parts of record for printing.

In printing the foregoing, please insert items (1) 9190 through (15) in proper sequence in connection with the pages of Transcript of Proceedings designated by appellant; insert items (16) through (23) after item (14) of appellant's praecipe dated October 17, 1946; insert items (24) through (26) after item (15) of appellant's praecipe dated October 17, 1946; insert item (27) after item (29) of appellant's praecipe dated October 17, 1946, and insert items (28) through (30) after item (41) of appellant's praecipe dated October 17, 1946.

December 17, 1946.

Respectfully submitted,

Bruce Bromley, Attorney for appellees, United States Gypsum Company, Sewell L. Avery and Oliver M. Knode; Elmer E. Finck, Nicholas J. Chase, Attorneys for appellees, National Gypsum Company and Melvin H. Baker; Donald N. Clausen, Herbert W. Hirsh, Charlton Ogburn, Attorneys for appellee, Certain-teed Products Corporation; F. W. H. Adams, Peter Keber, Attorneys for appellee, Henry J. Hartley; Andrew J. Dallstream, Ernest H. Oliver, Attorneys for appellee, The Celotex Corporation; Benjamin P. DeWitt, James O'Donnell, Jr., Attorneys for appellees, Newark Plaster Company and Frederick Tomkins; D. I. Johnston, George E. H. Goodner, Attorneys for appellee, Samuel M. Gloyd, etc.

9191 Service of three copies of Appellees' designation of additional parts of the record to be printed, is acknowledged this 17 day of December 1946.

George T. Washington,
GEORGE T. WASHINGTON,
M. B.
Acting Solicitor General.

[File endorsement omitted.]

9192 Supreme Court of the United States

Order noting probable jurisdiction

December 16, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

9193 *Government's Exhibit No. 1*

This agreement, executed in duplicate this 29th day of July, 1926, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as "Gypsum Company", party of the first part, and The Beaver Products Company, Inc., a New York corporation, of the town of Tonawanda, State of New York, hereinafter referred to as "Beaver Company", party of the second part; witnesseth:

Whereas, the Gypsum Company is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, No. 1,029,328, dated June 11th, 1912, for Method of Manufacturing Plaster Board, and No. 1,034,746, dated August 6th, 1912, for Plaster Board, (hereinafter called the "Utzman patents"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and Applications for Letters Patent of the United States set forth in Exhibit "A" attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, the Gypsum Company is about to acquire in part settlement of its claims against said Beaver Company the entire right, title and interest in, to and under the Letters Patent and Applications for Letters Patent of the United States, set forth in Exhibit "B" attached hereto and made a part hereof; and

Whereas, heretofore, on or about November 20th, 1916, the Gypsum Company filed its Bill of Complaint in the United States District Court for the Northern Dis-
9194 trict of Illinois, Eastern Division, against the Bestwall Manufacturing Company, (a predecessor in title of the Beaver Company) charging infringement by it of the aforesaid Letters Patent, Numbers 1,029,328 and 1,034,746, and thereafter the said Court, upon a trial of the issues in said cause, by its decision rendered July 21, 1919 (258 Fed. 647) found both of the said Letters Patent valid and infringed by the defendant in said cause, and subsequently on or about January 4th, 1921, the decree of the District Court, entered pursuant to the aforesaid decision and awarding an accounting for profits and damages and ordering the issuance of a permanent injunction, was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit (270 Fed. 542), and subsequently the Gypsum Company on

June 13th, 1921, filed its Supplemental Bill in said cause charging infringement of the said last mentioned Letters Patent by the method employed in the manufacture of and by the modified form of plaster board then being manufactured and sold by the defendant in said cause, and thereupon further proceedings were had and taken in said cause (decisions with respect to which are reported in 290 Fed. (C. C. A.) 798, 290 Fed. (C. C. A.) 800, and 263 U. S. 713), and thereafter upon trial in open court the said District Court on or about July 21, 1925, found the issues under said supplemental bill in favor of the Gypsum Company and that the said Letters Patent were infringed by the method of manufacture and by the modified form of plaster board then being manufactured and sold by the defendant therein and ordered an accounting of profits and damages and the issuance of a permanent injunction (decision not yet reported) and more recently, on or about No-
9195 vember 4, 1925, the United States Circuit Court of Appeals for the Seventh Circuit granted a stay of the accounting proceedings and of the issuance of the injunction so ordered by the District Court upon the filing by the defendant (appellant) of a bond in the penal sum of One Million Dollars ($1,000,000.), which said bond was duly filed and said cause is now pending on appeal in the said United States Circuit Court of Appeals for the Seventh Circuit; and

Whereas, the Gypsum Company has a substantial claim against the Beaver Company because and on account of said infringement, and the parties hereto have expended large sums of money in said patent litigation and the same has been otherwise costly and expensive to them and they are desirous of making a full and complete settlement of said controversy and of avoiding further litigation; and

Whereas, the parties hereto have agreed to settle said claim by the payment to the Gypsum Company by the Beaver Company of the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) in cash, and an amount equivalent to five per cent. (5%) of Beaver Company's selling price of all plaster board or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent. (1½%) of such selling price from August 6, 1929 to February 10, 1937, and the assignment to the Gypsum Company of the said Letters Patent and applications for Letters Patent set forth in said Exhibit "B", and in the

granting to Beaver Company of the license as in this agreement contained.

Now, therefore, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to-wit:

9196 1. The Beaver Company hereby agrees to pay to the Gypsum Company upon the execution of this agreement the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) and to assign, transfer, convey and set over, or cause to be assigned, transferred, conveyed and set over, unto the Gypsum Company the said Letters Patent and Applications for Letters Patent described in said Exhibit "B" and any and all Letters Patent which may be issued therefor or thereupon, in consideration of which, and of the payment by the Beaver Company to the Gypsum Company of the amounts hereinafter mentioned, the Gypsum Company does hereby release and discharge the Beaver Company, the Beaver Board Companies, Bestwall Manufacturing Company, the American Cement Plaster Company, and every subsidiary, associated or affiliated company, and all persons privy to or claiming under any of them, from all claims and demands, whether for damages or profits or for both damages and profits, which the Gypsum Company now has against them or any of them, for or on account of any infringement of any of its said Utzman patents and said patents described in Exhibit "A", by the Beaver Company or any predecessor in interest or title, prior to the date hereof.

2. The parties hereto do hereby agree to dismiss, without further cost to either party, all actions both at law and in equity, wheresoever pending, arising out of or in any way connected with the infringement of said Utzman patents, against The Beaver Products Company, Inc., the Beaver Board Companies, Bestwall Manufacturing Company, the American Cement Plaster Company, or any subsidiary, associated or affiliated company of any of them, it being understood, however, that the Appeal in Cause No. 3693, October Term, 1925, now pending in the Cir-
9197 cuit Court of Appeals for the Seventh Circuit, shall be dismissed so that the decree below shall stand as a final adjudication in said cause. It is further understood that the judgment therein for an accounting shall be satis-

fied of record and that the Gypsum Company waives all right to the issuance of a writ of injunction pursuant to the terms of said decree.

3. The Gypsum Company agrees to give and grant unto Beaver Company an indivisible and non-exclusive right, license and privilege of using the processes and making and using the machines and/or inventions set forth and claimed in said Utzman Patents and in any and all of said patents or applications for letters patent described in said Exhibits "A" and "B", at any and all factories now or hereafter owned and/or operated or controlled by the Beaver Company or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using plaster board or gypsum wallboard embodying the inventions and improvements set forth and claimed in said Utzman patents and said patents and applications for letters patent described in Exhibits "A" and "B", until the 10th day of February, 1937, the date of expiration of Patent No. 1,330,413, mentioned in said Exhibit "A", which said license shall be evidenced by a separate instrument this day executed and delivered to the Beaver Company, a true copy of which is hereto attached marked Exhibit "C", and made a part hereof.

4. The Beaver Company further agrees to pay to the Gypsum Company in settlement and discharge of the said claim, and for the right, license and privilege of
9198 manufacturing, using and/or selling plaster board or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions embodying the inventions and improvements set forth and claimed in said Utzman Patents and in any and all of said patents and applications for letters patent described in Exhibits "A" and "B", an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to five per cent. (5%) of the selling price of the Beaver Company, of all plaster board or gypsum wallboard of every kind, manufactured and sold by the Beaver Company between the date hereof and August 6, 1929 the date of the expiration of said Utzman Patent No. 1,034,746, and thereafter an amount equivalent to one and one-half per cent. (1½%) of the selling price of the Beaver Company, of all such plaster board or gypsum wallboard, from August 6, 1929 until February 10, 1937, the date of the expiration of said patent No. 1,330,413.

5. It is expressly understood and agreed that the said license shall be personal to the Beaver Company and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent of the Gypsum Company or transferred by operation of law, except that the same may be assigned to any successor or subsidiary corporation of the Beaver Company, and except that in the event of the appointment of a receiver or receivers for the purpose of conserving the business and assets of the Beaver Company, such receiver or receivers shall succeed to all the Beaver Company's rights under said license and under this agreement.

9199 6. The said License shall contain a provision that the said license is granted upon the condition that the Gypsum Company shall have, and that it does thereby reserve, the right to determine and fix at any time, and to change from time to time during the term of said Utzman Patent Number 1,034,746, the minimum price or prices (not more, however, than the then prevailing market price or prices) at which the Beaver Company shall sell any plaster board or gypsum wallboard manufactured by the Beaver Company embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon the Beaver Company, accompanied with a statement of the price or prices at which the Beaver Company shall sell said patented product, and thereafter shall give to the Beaver Company written or telegraphic notice of any change in such price or prices, and the Beaver Company expressly covenants and agrees that it will not at any time during the term of said Utzman Patent Number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale any plaster board or gypsum wallboard, embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746, at a price or prices less than that stated by the Gypsum Company in said notice, or in any such written or telegraphic notice of a change in such price or prices. It is expressly understood and agreed that this provision of the said License shall apply only to the said Utzman Patent Number 1,034,746, and shall not apply to any of said other Letters Patent.

9200 7. The Beaver Company agrees, during the term of said license, to keep separate, full and accurate

books of account and records showing the exact quantity of all plaster board and gypsum wallboard manufactured and sold by it, and agrees that on or before the 20th day of each and every calendar month during said term it will render unto the Gypsum Company true written returns, verified under oath by an officer or other agent of the Beaver Company, setting forth the quantity of all said plaster board and gypsum wallboard manufactured and sold by it during the preceding calendar month, together with the price or prices at which the same was sold, such written returns to be delivered to the Gypsum Company at its office in Chicago, Illinois, and the Beaver Company agrees to pay to the Gypsum Company, on or before the 20th day of each calendar month, at the office of the Gypsum Company at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under the said license on account of all of said plaster board and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

8. The Gypsum Company, or its duly authorized representative, shall during the term of said license have the right at all reasonable times during business hours to inspect the books of account and records of the Beaver Company referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plaster board and gypsum wallboard manufactured and sold by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom.

9201 9. The Beaver Company agrees that all plaster board or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents, shall be distinctly marked with the word "patented" together with the dates of the Utzman patents and the dates of any other patents which the Gypsum Company may properly specify, and in connection with the said markings it will further mark said patented product with the words "Licensed under the above Letters Patent", which markings shall be plainly visible.

10. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products who do not or may not manufacture gypsum wallboard or plaster board but who desire or may desire to have gypsum wall-

board or plaster board manufactured for them, it is understood and agreed that the Beaver Company may manufacture gypsum wallboard or plaster board embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer; provided, however, that the said license fee or royalty to be paid to the Gypsum Company as hereinbefore provided, shall be based upon all gypsum wallboard or plaster board manufactured for such other manufacturer, and upon the regular selling price of the Beaver Company of such plaster board or gypsum wallboard to its regular dealer trade at the time of such sale, and shall not be based upon the price at which said plaster board or gypsum wallboard is sold by the Beaver Company to such other manufacturer.

11. The Beaver Company expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as "seconds" shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards
9202 showing the word "seconds" in letters at least three inches in height.

12. It is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by the Beaver Company having a protected edge is within the scope of said Utzman patents Nos. 1,029,328 and 1,034,746.

After the expiration of said Letters Patent No. 1,034,746, and until the expiration of Letters Patent No. 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a protected edge is within the claims or is manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent No. 1,330,413, or of one or more of the other of said letters patent listed in Exhibits "A" and "B" hereto, under which the aforesaid indivisible and non-exclusive right, license and privilege is granted.

13. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Beaver Company hereby acknowledges the validity of the letters patent, granted and to be granted, forming the subject matter of said license, throughout the respective lives of

the said letters patent and each of them, and agrees that it will not at any time before or after the expiration or termination of said license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said letters patent or the title thereto of the Gypsum Company, or question in any way the prima facie scope of either or any of said letters
9203 patent, or the priority, novelty or patentability of the subject matter of any of the said applications for letters patent.

14. In the event that the Beaver Company shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements herein to be by the Beaver Company kept and performed, then Gypsum Company, at its election, may serve upon Beaver Company notice of intention to terminate the license herein granted, which notice shall specify the alleged neglect, failure or refusal; and if, within thirty (30) days from the date of delivery of said notice, the Beaver Company shall not keep or perform the conditions and agreements specified in said notice, then said license and all rights acquired by the Beaver Company thereunder shall be and become cancelled and terminated, without the necessity of any court action; provided, however, that the Beaver Company shall not be relieved thereby from paying to the Gypsum Company any licensee fees or royalties or any other obligations accrued hereunder at the time of such termination. In case at any time the Beaver Company shall commit any act of bankruptcy, then the license hereunder shall immediately be and become cancelled and terminated, but the Gypsum Company shall not thereby be prevented from collecting all license fees or royalties and other obligations accrued hereunder at the time of such termination. Failure on the part of the Gypsum Company to notify the Beaver Company of a breach of the license or to terminate said license because of such breach shall not constitute a waiver of the Gypsum Company's right to terminate said license in accordance with the provisions of this paragraph. The Gypsum Company may specif-
9204 ically enforce this contract or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be provided by law.

15. It is understood and agreed that if at any time during the continuance of the license the Beaver Company shall, in the judgment of the Gypsum Company, suffer substan-

tial detriment by reason of any infringement upon the part of any person or persons of the said patents whether now or hereafter issued under which the license is granted, the Gypsum Company will afford the Beaver Company such reasonable protection as in the judgment of the Gypsum Company shall be necessary or proper, and in case the Gypsum Company shall grant to any such infringer, or to any other person, any license under said patents upon terms more favorable than those contained in the said license, then it will grant to Beaver Company a license on the same terms.

16. The Gypsum Company agrees, upon the expiration of the said license, to grant to the Beaver Company a license to manufacture, use and/or sell under said patents and applications for letters patent described in said Exhibits "A" and "B", upon such terms and conditions as may then be agreed upon between the parties hereto, and failing to arrive at any such agreement the Gypsum Company will grant to the Beaver Company from and after such expiration date, a license to make, and use the machines and use the processes and to manufacture, use and sell the articles disclosed in said patents and applications for letters patent described in said Exhibit "B", whether or not disclosed or claimed in any patent or application for letters patent, described in Exhibit "A", in consideration of the sum
9205 of One Dollar ($1.00), the receipt whereof is hereby acknowledged by the Gypsum Company.

17. The terms "plasterboard" and "gypsum wall board" shall be understood to mean all board by whatever name called having the structural characteristics of plasterboard or gypsum wall board, irrespective of the purpose for which the same may be sold or used.

18. This agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph contained shall be construed to permit an assignment by the Beaver Company of any right hereunder, or under said license, except as hereinabove specifically authorized.

19. It is understood and agreed that the patents and applications for Letters Patent set forth in Exhibit "B" are pledged with Central Trust Company of Illinois and Aksel K. Bodholdt, Trustees under a certain First and Refunding mortgage, executed by Beaver Products Company, Inc.,

to said Central Trust Company and Aksel K. Bodholdt, Trustee, dated July 1, 1922, and the same are to be released and assigned to the Gypsum Company by said trustees, or one of said trustees. It is further understood and agreed that the Beaver Company shall be authorized and empowered to pledge the license herein provided for with said trustees under said mortgage, with the express understanding, however, that the same shall not be transferred or assigned by said trustees, on a foreclosure of said mortgage, to any person or persons, without the consent of the Gypsum Company.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents,
9206 attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY,

By S. L. AVERY,
Its President.

ATTEST:

GEO. G. GLYNN,
Asst. Secretary.

THE BEAVER PRODUCTS COMPANY, INC.,

By A. S. BLAGDEN,
Its President.

ATTEST:

E. H. LEECHWORTH,
Secretary.

9207 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

9208 Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, Expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Birdsey application Serial No. 437,062. Filed January 13, 1921.

Birdsey application Serial No. 506,676, filed October 10, 1921.

Birdsey application Serial No. 545,231 filed March 20, 1922.

Birdsey application Serial No. 555,627, filed April 19, 1922.

Birdsey application Serial No. 583,795, filed August 23, 1922.

Moore application Serial No. 590,356, filed September 25, 1922.

Knode application Serial No. 590,358, filed September 25, 1922.

Birdsey application Serial No. 605,896 filed December 9, 1922.

Smith application Serial No. 662,359 filed September 12, 1923.

9209 Birdsey application Serial No. 737,237, filed September 12, 1924.

Utzman application Serial No. 750,224, filed November 17, 1924.

Birdsey application Serial No. 754,927, filed December 10, 1924.

Brookby application Serial No. 50,538, filed August 17, 1925.

Birdsey application Serial No. 57,507, filed September 21, 1925.

Brookby & Absmeier application Serial No. 91,297, filed March 1, 1926.

9210 EXHIBIT "B"

Patent See Note (3)	Armstrong patent No. 1,278,821, app'n. filed Jan. 4, 1918, granted September 17, 1918, expires September 17, 1935.	
Re 16860	Armstrong patent No. 1,348,387, app'n. filed Mar. 15, 1919, granted August 3, 1920, expires August 3, 1937, app'n. for reissue filed June 3, 1922, Ser. 565,737.....	2475
Re 16969	Armstrong patent No. 1,367,292, app'n. filed July 12, 1919, granted February 1, 1921, expires February 1, 1938, app'n. for reissue filed June 9, 1922, Ser. 567,205.....	2502
See Note (3)	Utzman patent No. 1,455,127, app'n. filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.	
See Note (3)	Utzman patent No. 1,492,588, app'n. filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.	
See Note (3)	Williams patent No. 1,519,180, app'n. filed Aug. 18, 1922, granted December 16, 1924, expires December 16, 1941.	
See Note (3)	Armstrong patent No. 1,556,575, app'n. filed Oct. 1, 1921, granted October 13, 1925, expires October 13, 1942.	
See Note (3)	Armstrong patent No. 1,399,455, app'n. filed Feb. 24, 1920, granted December 6, 1921, expires December 6, 1938.	
See Note (3)	Tyler patent No. 1,417,117, app'n. filed Nov. 15, 1919, granted May 23, 1922, expires May 23, 1939.	
#1701291	Armstrong app'n. Ser. No. 310,470, filed July 12, 1919*.....	2620
#1638280	Utzman app'n. Ser. No. 374,833, filed April 19, 1920.....	2397
#1641611 Re #18363	Armstrong app'n. Ser. No. 377,421, filed April 29, 1920.....	2331
#1686671	Speer app'n. Ser. No. 427,044, filed November 29, 1920.....	2541
#1641648	Speer app'n. Ser. No. 427,045, filed November 29, 1920.....	2330
#1604707	Mehlhope app'n Ser. No. 473,288, filed May 28, 1921.....	2215
#1731116	Utzman app'n. Ser. No. 477,371, filed June 14, 1921.....	2711
Abandoned 1927	Kohler app'n. Ser. No. 482,073, filed July 2, 1921.	
1665168	Gustafson app'n. Ser. No. 509,366 filed December 2, 1919. Renewed October 21, 1921.....	3547

* Assignment not recorded, Patent issued to U. S. G. Co.

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9211.

See Note (3) 1673944	Kohler, et al. app'n. Ser. No. 540,412, filed March 2, 1922.	
Re 16860	Armstrong app'n. Ser. No. 565,737, filed June 3, 1922.....	2475
Re 16969	Armstrong app'n. Ser. No. 567,205, filed June 9, 1922.....	2502
#1824245	Utzman app'n. Ser. No. 581,361, filed August 12, 1922.....	3138
#1703183	Utzman, app'n. Ser. No. 581,362, filed August 12, 1922.....	2631
Abandoned 1931	Williams app'n. Ser. No.[1] 582,606, filed August 18, 1922.	
Abandoned 1926	Tonning app'n. Ser. No. 590,221, filed September 25, 1922.	
Abandoned 1928	Armstrong app'n. Ser. No.[2] 596,983, filed October 26, 1922.	
Abandoned 1927	Speer app'n. Ser. No.[2] 610,739, filed January 5, 1923.	
Abandoned 1927	Rehm app'n. Ser. No. 8,654, filed February 12, 1925.	
Abandoned 1927	Rehm app'n. Ser. No. 8,655, filed February 12, 1925.	
Abandoned 1927	Rehm app'n. Ser. No. 8,656, filed February 12, 1925.	
Abandoned 1927	Rehm app'n. Ser. No. 8,657, filed February 12, 1925.	
Abandoned 1927	Rehm app'n. Ser. No. 23,775, filed April 17, 1925.	

1 Assignment to Patent Dept. 2-9-1934.

2 Assignment to Patent Dept. 2-6-1934.

3 Original letters patent not located. See attorneys' letter in Patent File #2215. 2-19-1934.

9212 EXHIBIT "C"

LICENSE AGREEMENT

This agreement executed in duplicate this ——— day of July, 1926, by and between the United States Gypsum Company, an Illinois corporation of Chicago, Illinois, hereinafter referred to as "Licensor" and The Beaver Products Company, Inc., a New York Corporation of the Town of Tonawanda, State of New York, hereinafter referred to as "Licensee", witnesseth:

Whereas, Licensor is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, No. 1,029,328, dated June 11th, 1912, and No. 1,034,746, dated August 6th, 1912, (hereinafter called the "Utzman Patents"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and applications for Letters Patent of the United States set forth in Exhibit "A" attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, heretofore said Utzman patents have been adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; see also 263 U. S. 713), and said courts have decreed that said Utzman patents are valid and were infringed by the defendants in the cases so reported, and in the decision of the said District Court rendered on or about July 21, 1925, and not yet reported, by reason of the making, using and selling of plaster board or gypsum wallboard
9213 having protected edges, and said District Court has ordered perpetual injunctions and accountings against said defendants; and

Whereas, Licensee recognizes and admits the validity and scope of said Utzman patents and admits that Licensee has heretofore infringed upon the same, and that Licensor has a substantial claim against Licensee for damages and profits because and on account of said infringement, and both Licensor and Licensee have expended or will be compelled to expend large sums of money in patent litigation in respect of said infringement, and such litigation has been, or will be otherwise costly and expensive to both of said parties who are therefore desirous of making

a full and complete settlement of their controversies and of avoiding further litigation; and

Whereas, the parties hereto have agreed to settle said claim by the payment to the Licensor by the Licensee, of a sum of money in cash and an amount equivalent to five per cent. (5%) of Beaver Company's selling price of all plaster board or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent. (1½%) of such selling price from August 6, 1929 to February 10, 1937, and the assignment to Licensor of certain Letters Patent and applications for Letters Patent, and the granting of this License to the Licensee.

Now, therefore, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to wit:

9214 1. Licensor has agreed to and does hereby give and grant unto Licensee, an indivisible and non-exclusive right, license and privilege of using the processes, and making and using the machines and/or inventions set forth and claimed in said Utzman Patents, and in any and all of said patents or applications for letters patent described in said Exhibit "A", at any and all factories now or hereafter owned and/or operated or controlled by Licensee or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and/or using plaster board or gypsum wallboard embodying the inventions and improvements set forth and claimed in said Utzman patents and said patents and applications for letters patent described in Exhibit "A", until the 10th day of February, 1937, the date of expiration of Patent No. 1,330,413, mentioned in said Exhibit "A".

It is expressly agreed and understood that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves the right to determine and fix at any time, and to change from time to time during the term of said Utzman Patent number 1,034,746 the minimum price or prices (not more, however, than the then prevailing market price or prices) at which the Licensee shall sell any plaster board or gypsum wallboard manufactured by Licensee embodying the improvements set forth and claimed in said Utzman Patent number 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice

of its intention so to do upon Licensee, accompanied with a statement of the price or prices at which the Licensee shall sell said patented product, and thereafter shall give to the Licensee written or telegraphic notice of any
9215 change in such price or prices, and the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman Patent number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale, any plaster board or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent number 1,034,746 at a price or prices less than that stated by the Licensor in said notice, or in any such written or telegraphic notice of a change in such price or prices. It is expressly understood and agreed that this provision of the said License shall apply only to the said Utzman Patent number 1,034,746, and shall not apply to any of said other Letters Patent.

2. The Licensee further agrees to pay to the Licensor, in settlement and discharge of the said claim, and for the right, license and privilege of manufacturing, using and/or selling plaster board or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions, embodying the inventions and improvements set forth and claimed in said Utzman Patents and in any and all of said patents and applications for letters patent described in Exhibit "A", an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to five per cent. (5%) of the selling price of the Licensee, of all plaster board or gypsum wallboard of every kind, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman Patent No. 1,034,746, and thereafter an amount equivalent to one and one-half per cent. (1½%) of the selling price of the Licensee, of all such plaster board or gypsum wallboard, from August 6, 1929 until February 10, 1937, the date of the expiration of said patent No. 1,330,413.

9216 3. It is expressly understood and agreed that the said License shall be personal to the Licensee and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent of the Licensor or transferred by operation of law, except that the same may be assigned to any successor or subsidiary corporation of Licensee, and except that in the event of

the appointment of a receiver or receivers for the purpose of conserving the business and assets of Licensee, such receiver or receivers shall succeed to all of Licensee's rights under said License and under this agreement.

4. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plaster board and gypsum wallboard manufactured and sold by it, and agrees that on or before the 20th day of each and every calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plaster board and gypsum wallboard manufactured and sold by it during the preceding calendar month, together with the price or prices at which the same was sold, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor, on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said plaster board and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

5. Licensor, or its duly authorized representative shall have the right at all reasonable times during busi-
9217 ness hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plaster board and gypsum wallboard manufactured and sold by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom.

6. Licensee agrees that all plaster board or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents shall be distinctly marked with the word "Patented", together with the dates of the Utzman patents, and the dates of any other patents which Licensor may properly specify, and in connection with the said markings it will further mark said patented product with the words "Licensed under the above Letters Patent", which markings shall be plainly visible.

7. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products who do not or may not manufacture gypsum wallboard or plas-

ter board but who desire or may desire to have gypsum wallboard or plaster board manufactured for them, it is understood and agreed that Licensee may manufacture gypsum wallboard or plaster board embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer; provided, however, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard or plaster board manufactured for such other manufacturer and upon the regular selling price of
Licensee of such plaster board or gypsum wallboard
9218 to its regular dealer trade at the time of such sale,
and shall not be based upon the price at which plaster board or gypsum wallboard is sold by Licensee to such other manufacturer.

8. Licensee expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as "seconds" shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

9. It is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by Licensee having a protected edge is within the scope of said Utzman patents Nos. 1,029,328 and 1,034,746.

After the expiration of said Letters Patent No. 1,034,746 and until the expiration of Letters Patent No. 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a protected edge is within the claims or is manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent No. 1,330,413, or of one or more of the other of said letters patent listed in Exhibit "A" hereto, under which the aforesaid indivisible and non-exclusive right, license and privilege is granted.

10. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Li-
9219 censee hereby acknowledges the validity of the Letters Patent, granted and to be granted, forming the subject-matter of this license, throughout the respective

lives of the said Letters Patent and each of them, and agrees that it will not at any time before or after the expiration or termination of this license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said Letters Patent or the title thereto of Licensor, or question in any way the prima facie scope of either or any of said Letters Patent, or the priority, novelty or patentability of the subject-matter of any of the said applications for letters patent.

11. In the event that Licensee shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements herein to be by Licensee kept and performed, then Licensor, at its election, may serve upon Licensee notice of intention to terminate the license herein granted, which notice shall specify the alleged neglect, failure or refusal; and if, within thirty (30) days from the date of delivery of said notice, Licensee shall not keep or perform the conditions and agreements specified in said notice, then said license and all rights acquired by Licensee hereunder shall be and become cancelled and terminated without the necessity of any court action; provided, however, that Licensee shall not be relieved thereby from paying to Licensor any license fees or royalties or any other obligations accrued hereunder at the time of such termination. In case at any time Licensee shall commit any act of bankruptcy, then the license hereunder shall immediately be and become cancelled and terminated, but Licensor
9220 shall not thereby be prevented from collecting all license fees or royalties and other obligations accrued hereunder at the time of such termination. Failure on the part of Licensor to notify Licensee of a breach of this license contract or to terminate said license because of such breach shall not constitute a waiver of Licensor's right to terminate said license in accordance with the provisions of this paragraph. Licensor may specifically enforce this contract or any of the terms, conditions and covenants hereof, by injunction or in such other manner as may be provided by law.

12. Any notice to be given under the terms hereof may be served upon the Licensee by mailing the same to the Licensee, postage prepaid, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of said notice upon the Licensee.

13. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, whether now or hereafter issued, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper; and in case the Licensor shall grant to any such infringer, or to any other person, any license under said patents upon terms more favorable than these granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms.

14. The terms "plasterboard" and "gypsum wall board" shall be understood to mean all board by whatever
9221 name called having the structural characteristics of plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used.

15. This license and all of the coverants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by the Licensee except as hereinabove specifically provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY,

By ——— ———, *Its President.*

Attest:

———— ———, *Secretary.*

THE BEAVER PRODUCTS COMPANY, INC.,

By ——— ———, *Its President.*

Attest:

———— ———, *Secretary.*

9222 *Government's Exhibit No. 2*

LICENSE AGREEMENT

This agreement executed in duplicate this 17th day of September 1926, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as "Licensor" and the Universal Gypsum & Lime Co., a Delaware corporation, with its principal business office in the City of Chicago, State of Illinois, hereinafter referred to as "Licensee," witnesseth,

Whereas, Licensor is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, Number 1,029,328, dated June 11th, 1912 and Number 1,034,746, dated August 6th, 1912, (hereinafter called the "Utzman Patents"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and applications for Letters Patent of the United States set forth in Exhibit "A" attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, heretofore said Utzman patents have been adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; see also 263 U. S. 713), and said courts have decreed that said Utzman patents are valid and were infringed by the defendants in the cases so reported, and in the decision of the said District Court rendered on or about July 21, 1925, and not yet reported, by reason of the making, using and selling of plaster board or gypsum wallboard having protected edges, and said District
9223 Court has ordered perpetual injunctions and accountings against said defendants; and

Whereas, Licensee recognizes and admits the validity and scope of said Utzman patents insofar only as they cover plaster board and/or gypsum wallboard, and admits that Licensee has heretofore infringed upon the same, and that Licensor has a substantial claim against Licensee for damages and profits because and on account of said infringement, and both Licensor and Licensee have expended or will be compelled to expend large sums of money in patent litigation in respect of said infringement, and such

litigation has been, or will be otherwise costly and expensive to both of said parties who are therefore desirous of making a full and complete settlement of their controversies and of avoiding further litigation; and

Whereas, the parties hereto have agreed to settle said claim by the payment to the Licensor by the Licensee, of a sum of money and an amount equivalent to five per cent. (5%) of Licensee's selling price of all plaster board or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent (1½%) of such selling price from August 6, 1929 to February 10, 1937 as hereinafter provided in paragraph numbered 2 of this agreement, and the granting of this license to the Licensee for the consideration expressed in said paragraph numbered 2;

Now, therefore, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to-wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee, an indivisible and non-exclusive
9224 right, license and privilege of using the processes, and making and using the machines and/or inventions set forth and claimed in said Utzman patents, and in any and all of said patents or applications for letters patent described in said Exhibit "A", at any and all factories now or hereafter owned and/or operated or controlled by Licensee or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places plaster board and/or gypsum wallboard embodying the inventions and improvements set forth and claimed in said Utzman patents and said patents and applications for letters patent described in Exhibit "A", and of selling and/or using such plaster board and/or gypsum wallboard so manufactured, until the 10th day of February, 1937, the date of expiration of Patent Number 1,330,413, mentioned in said Exhibit "A".

It is expressly agreed and understood that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves the right to determine and fix at any time, and to change from time to time during the term of said Utzman Patent Number 1,034,746 the minimum price or prices (not more, however, than the then prevailing market price or prices) at which the Licensee shall sell any

plaster board or gypsum wallboard manufactured by Licensee embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the price or prices at which the Licensee shall sell said patented product, and thereafter shall give to the Licensee written or telegraphic notice of any change in such price or prices, and the Licensee expressly covenants and agrees that it will not be at
9225 any time during the terms of said Utzman Patent Number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale, any plaster board or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746, at a price or prices less than that stated by the Licensor in said notice, or in any such written or telegraphic notice of a change in such price or prices. It is expressly understood and agreed that this provision of the said license shall apply only to the said Utzman Patent Number 1,034,746, and shall not apply to any of said other Letters Patent.

2. The Licensee has agreed, and does hereby agree, to pay to the Licensor, in settlement and discharge of the said claim, and for the right, license and privilege of manufacturing, using and/or selling plaster board or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions embodying the inventions and improvements set forth and claimed in said Utzman patents and in any and all of said patents and applications for letters patent described in Exhibit "A", an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to five per cent. (5%) of the selling price of the Licensee, of all plaster board or gypsum wallboard of every kind, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman Patent Number 1,034,746, and thereafter an amount equivalent to one and one-half per cent. (1½%) of the selling price of the Licensee, of all such plaster board or gypsum wallboard, from August 6, 1929, until February 10, 1937, the date of the expiration of said Patent Number 1,330,413.

3. It is expressly understood and agreed that the said license shall be personal to the Licensee and that the same

or any right therein or thereunder shall not be sold,
9226 assigned or transferred without the written consent of the Licensor or transferred by operation of law, except that the same may be assigned to any successor or subsidiary corporation of Licensee, and except that in the event of the appointment of a receiver or receivers for the purpose of conserving the business and assets of Licensee, such receiver or receivers shall succeed to all of Licensee's rights under said license and under this agreement.

4. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plaster board and gypsum wallboard manufactured and sold by it, and agrees that on or before the 20th day of each and every calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plaster board and gypsum wallboard manufactured and sold by it during the preceding calendar month, together with the price or prices at which the same was sold and invoiced, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor, on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said plaster board and gypsum wallboard sold and invoiced by it during the next preceding calendar month.

5. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity
9227 of said plaster board and gypsum wallboard manufactured and sold by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom.

6. Licensee agrees that all plaster board or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents shall be distinctly marked with the word "Patented", together with the dates of the Utzman patents, and the date of any other patents which Licensor may properly specify, and in connection with the said markings it will further mark said patented product with the words "Licensed under the above Letters Patent", which markings shall be plainly visible.

7. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, or jobbers of such products, who do not or may not manufacture gypsum wallboard or plaster board but who desire or may desire to have gypsum wallboard or plaster board manufactured for them, it is understood and agreed that Licensee may manufacture gypsum wallboard or plaster board embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer and/or jobber; provided, however, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard or plaster board manufactured for, and sold and invoiced to, such other manufacturer and/or jobber and upon the regular selling price of Licensee of such plaster board or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plaster board or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer or jobber.

8. Licensee expressly covenants and agrees that all of said patented product sold by it and commonly
9228 known in the trade as "seconds" shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

9. It is expressly understood and agreed that the patented plaster board and/or gypsum wallboard manufactured and sold hereunder shall include all such board having a protected edge, it being recognized by the parties hereto that any such board manufactured by Licensee having a protected edge is within the scope of said Utzman Patents Numbers 1,029,328 and 1,034,746.

After the expiration of said Letters Patent Number 1,034,746 and until February 10, 1937, the date of the expiration of Letters Patent Number 1,330,413, it is expressly understood and agreed that the patented plaster board and/or gypsum wallboard manufactured and sold hereunder shall include all such board having a protected edge, and that any and all such board having a protected edge is within the claims or is manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent Number 1,330,413, or of one

or more of the other of said letters patent listed in Exhibit "A" hereto, under which the aforesaid indivisible and non-exclusive right, license and privilege is granted.

10. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges only until February 10, 1937, the date of the expiration of the said Letters Patent Number 1,330,413, the validity of the aforesaid Utzman patents and all of the said Letters patent, granted and to be granted on applications for patents specified in Exhibit "A", and only insofar as each and every of said Letters Patent relate to plaster board and/or gypsum wallboard, and agrees that it will not at any time prior to February 10, 1937,
9229 the date of the expiration of said Letters Patent Number 1,330,413, whether before or after the termination of this license, insofar only as they relate to plaster board and/or gypsum wallboard, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said Letters Patent or the title thereto of Licensor, or question in any way the prima facie scope of either or any of said Letters Patent; but it is expressly understood that the Licensee shall have full right to contest the priority, novelty or patentability of the subject matter of any and all of the claims of the applications for letters patent specified in Exhibit "A" in accordance with customary patent office procedure to the same extent as though this agreement had never been entered into.

11. In the event that Licensee shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements hereinafter in this paragraph specified to be by Licensee kept and performed, then Licensor, at its election, may serve upon Licensee notice of intention to terminate the license herein granted, which notice shall specify the alleged neglect, failure or refusal; and if Licensee, within thirty (30) days from the date of the delivery of said notice, shall not have paid to Licensor the license fees or royalties then due and payable in accordance with the terms hereof if specified in said notice; or within such thirty (30) day period shall not have made and kept the books of account and records hereinbefore mentioned if specified in said notice; or within such thirty (30) day period shall not have permitted Licensor to examine said books of account and records as hereinbefore pro-

vided if specified in said notice; or within thirty (30)
9230 days after receipt of such notice shall not have
marked said plaster board or gypsum wallboard manufactured by it subsequent to the receipt of such notice "Patented", with the dates of the patents, or marked or invoiced the same as "seconds", as hereinbefore provided if specified in said notice; or shall, after the receipt of such notice, fail in good faith to comply with the conditions contained in paragraph 1 hereof, in the sale of plaster board and/or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746, in case Licensor shall exercise the right therein reserved by it, if specified in said notice, then in either of such events the said license and all rights acquired by Licensee hereunder shall be and become cancelled and terminated without the necessity of any court action; provided, however that Licensee shall not be relieved thereby from paying to Licensor any license fees or royalties accrued hereunder at the time of such termination; and provided further that should a difference of opinion arise at any time under this agreement between the parties hereto as to the validity of the grounds for any default that may be specified in said notice, the Licensor shall in such case not be privileged to declare a default hereunder on account of any such alleged default specified in said notice with respect to which a difference of opinion has arisen as aforesaid, until and unless the same has first been settled by arbitration as hereinafter provided. In such case of a difference of opinion, Licensee shall, within said thirty (30) day period, first state in writing to Licensor wherein and in what respect such difference of opinion shall consist and shall at the same time appoint in writing one person as an arbitrator and the Licensor shall thereupon appoint another person as an arbitrator and in case the two persons so appointed shall not agree, within thirty (30) days after such appointment, upon the difference of
opinion which shall have arisen, then the two per-
9231 sons so appointed shall appoint a third person, and the decision of a majority of the three arbitrators so appointed shall constitute a final settlement of the said difference of opinion and be binding upon both the Licensor and the Licensee; provided, further, that in case the difference of opinion above mentioned shall constitute a difference of opinion as to the amount of the royalties or license fees to be paid hereunder then the Licensee shall first pay or offer to pay the amount of such license fees or

royalties which it then admits is due and payable in accordance with the terms hereof and the acceptance thereof by the Licensor shall not waive its rights in the controversy with respect thereto. Upon the determination of the said dispute by the said arbitrators as aforesaid, then if the Licensee shall fail or refuse to comply with the terms of the award or finding made by the said arbitrators within thirty (30) days from the date of such award or finding, in the event such award or finding is against the Licensee, then the Licensor may at its election terminate and cancel this license. In the event of default hereunder by the Licensee and notice of such default is served on Licensee by Licensor as herein provided, and after service of such notice Licensee shall cure such default as herein provided, the same shall constitute a nullification of the said notice by the Licensor as though the same had not been served. In case at any time Licensee shall commit any act of bankruptcy then the license hereunder shall immediately be and become cancelled and terminated, but Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. Failure on the part of Licensor to notify Licensee of a breach of this license contract as aforesaid or to terminate said license because of such breach shall not constitute a waiver of Licensor's right to terminate said
9232 license at a later time in accordance with the provisions of this paragraph. Licensor may specifically enforce this contract or any of the terms, conditions and covenants hereof, by injunction or in such other manner as may be provided by law.

12. Any notice to be given under the terms hereof may be served upon the Licensee by mailing the same to the Licensee postage prepaid and duly registered, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, registered and postage prepaid and so addressed, shall constitute service of said notice upon the Licensee.

13. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, whether now or hereafter issued, under which this license is granted, by the manufacture, use and/or sale of plaster board and/or gypsum wallboard, the Licensor will afford the Licensee such reasonable protection as in

the judgment of the Licensor shall be necessary or proper; and in case the Licensor shall grant to any such infringer, or to any other person, any license or licenses under said patents for the manufacture, use and/or sale of plaster board and/or gypsum wallboard wherein the royalties or license fees are more favorable than those granted hereunder to this Licensee, then the royalties or license fees hereunder shall be automatically reduced for all plaster board and/or gypsum wallboard thereafter sold, to the basis fixed in such other license or licenses for the term or terms of any such other license or licenses, but not to exceed the term of this license.

9233 14. The terms "plaster board" and "gypsum wallboard" wherever used in this agreement, shall be understood to mean plaster board and gypsum wallboard of every kind having the structural characteristics of plaster board or gypsum wallboard, as now commercially recognized, and with fibrous or paper covering on or adjacent to both sides, but the terms shall not be construed to mean precast slabs manufactured from Insulex or other gypsum mixtures that are more than one and one-half (1½) inches in thickness and which do not have a protected edge either in whole or in part.

15. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by the Licensee except as hereinabove specifically provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY

By C. F. HENNING, *Its Vice-President.*

Attest:

P. G. BEAR, *Secretary.*

UNIVERSAL GYPSUM & LIME CO.

By W. E. SHEARER, *Its President.*

Attest:

C. F. KALER, *Secretary.*

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires June 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birsdey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

9235 Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Birdsey application Serial No. 437,062 filed January 13, 1921.

Birdsey application Serial No. 506,676, filed October 10, 1921.

Birdsey application Serial No. 545,231, filed March 20, 1922.

Birdsey application Serial No. 555,627, filed April 19, 1922.

Birdsey application Serial No. 583,795, filed August 23, 1922.

Moore application Serial No. 590,356, filed September 25, 1922.

Knode application Serial No. 590,358, filed September 25, 1922.

Birdsey application Serial No. 605,896, filed December 9, 1922.

Smith application Serial No. 662,359, filed September 12, 1923.

Birdsey application Serial No. 737,237, filed September 12, 1924.

Utzman application Serial No. 750,224, filed November 17, 1924.

Birdsey application Serial No. 754,927, filed December 10, 1924.

Brookby application Serial No. 50,538, filed August 17, 1925.

9236 Birdsey application Serial No. 57,507, filed September 21, 1925.

Brookby & Absmeier application Serial No. 91,297 filed March 1, 1926.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial 565,737.

Armstrong patent No. 1,367,282. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial 567,205.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Armstrong application Serial No. 310,470 filed July 12, 1919.

Utzman application Serial No. 374,833 filed April 19, 1920.

Armstrong application Serial No. 377,421, filed April 29, 1920.

Speer application Serial No. 427,044, filed November 29, 1920.

Speer application Serial No. 427,045, filed November 29, 1920.

Mehlhope application Serial No. 473,288, filed May 28, 1921.

9237 Utzman application Serial No. 477,371, filed June 14, 1921.

Kohler application Serial No. 482,073, filed July 2, 1921.

Gustafson application Serial No. 509,366, filed December 2, 1919; renewed October 21, 1921.

Kohler, et al., application Serial No. 540,412, filed March 2, 1922.

Armstrong application Serial No. 565,737, filed June 3, 1922.

Armstrong application Serial No. 567,205, filed June 9, 1922.

Utzman application Serial No. 581,361, filed August 12, 1922.

Utzman application Serial No. 581,362, filed August 12, 1922.

Williams application Serial No. 582,606, filed August 18, 1922.

Tonning application Serial No. 590,221, filed September 25, 1922.

Armstrong application Serial No. 596,983, filed October 26, 1922.

Speer application Serial No. 610,739, filed January 5, 1923.

Rehm application Serial No. 8,654, filed February 12, 1925.

Rehm application Serial No. 8,655, filed February 12, 1925.

Rehm application Serial No. 8,656, filed February 12, 1925.

Rehm application Serial No. 8,657, filed February 12, 1925.

Rehm application Serial No. 23,775, filed April 17, 1925.

9238 *Government's Exhibit No. 3*

UNITED STATES GYPSUM COMPANY

300 West Adams Street

CHICAGO

JUNE 13, 1929.

MR. M. H. BAKER

National Gypsum Company,

Buffalo, N. Y.

DEAR SIR: To the license agreement between you and the United States Gypsum Company, executed May 16, 1929, is affixed an "Exhibit A" which is a list of United States patents and patent applications. This list was prepared in 1926, a duplicate thereof being attached to a similar agreement executed at that time. Since 1926, however, the status of a number of the patents and applications listed has changed in that two of the patents enumerated have been reissued, a number of the applications listed have since matured into issued patents; certain of the applications are still pending and the remainder have lapsed and hence are not in the list.

In order to bring the list up to date by giving effect to these changes, we have rewritten "Exhibit A" and enclose copy of the same herewith. Will you please substitute the enclosed for "Exhibit A" which is at present affixed to the aforesaid license agreement and advise us that you have done so, returning the old exhibit to us for cancellation.

The Federal Statutes relating to patents have recently been amended to require that in marking an article manufactured under a patent the number of the patent should be given. Will you please, therefore, in marking your product covered by the license, include also the number of each patent with the date thereof, as is now provided for in the license agreement, or if you prefer use only the patent number?

Very truly yours,

S. L. AVERY, *President.*

Certified a true copy of the original

T. E. DAVIS,
Sec'y, National Gypsum Co.

9239 LICENSE AGREEMENT

This agreement executed in duplicate this 16th day of May, 1929, by and between the United States Gypsum Company, an Illinois corporation of Chicago, Illinois, hereinafter referred to as "Licensor" and National Gypsum Company, a Delaware corporation, having its principal office at Buffalo, New York, hereinafter referred to as "Licensee," witnesseth:

Whereas, Licensor is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, No. 1,029,398, dated June 11th, 1912, and No. 1,034,746, dated August 6th, 1912 (hereinafter called the "Utzman Patents"), and Letters Patent of the United States, No. 1,358,508, dated November 9, 1920 (hereinafter called the "Birdsey Patent"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and applications for Letters Patent of the United States set forth in Exhibit "A" attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, heretofore said Utzman Patents have been adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; 15 Fed. (2d) 704; see also 263 U.S. 713), and said courts have decreed that said Utzman Patents are valid and were infringed by the defendants named in said suits, by reason of their making, using and selling plasterboard or gypsum wallboard having protected edges, and said District Court ordered perpetual injunctions and accountings against said defendants; and

9240 Whereas, said Birdsey Patent number 1,358,508 has been adjudicated by the United States District Court for the Northern District of Ohio (in Equity number 1621), and said court has decreed that said Birdsey patent is valid and was infringed by Defendant in said cause by reason of its making, using and selling plasterboard and/or gypsum wallboard having edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against Defendant which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit (Appeal number 5392); and

Whereas, Licensor has a substantial claim against Licensee for damages and profits because and on account of alleged infringements of patents; and

Whereas, Licensor has agreed to grant a license to Licensee under said patents and to settle the said claim in consideration of the payment by the Licensee to Licensor of five per cent (5%) of Licensee's selling price of all plasterboard or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent (1½%) of such selling price from August 6th, 1929, to February 10, 1937, plus three and one-half per cent (3½%) of such selling price from August 6, 1929 until said three and one-half per cent (3½%) of such selling price shall aggregate the sum of approximately one hundred Eighty Thousand Dollars ($180,000.00).

Now, therefore, in consideration of the sum of one dollar and other good and valuable considerations, receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to wit:

1. Licensor has agreed to and does hereby give and grant unto licensee, an indivisible and non-exclusive right, license and privilege of using the processes, and making and using the machine and/or inventions set forth
9241 and claimed in said Utzman Patents, and in any and all of said patents or applications for letters patent described in said Exhibit A, at the plant or factory now owned and/or operated by Licensee at Clarence, N. Y. and National City, Michigan, or at any other plant or factory hereafter owned or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at said plant or factory and selling and/or using plasterboard or gypsum wallboard manufactured at said plant or factory and embodying the invention and improvements set forth and claimed in said Utzman Patents and said patents and applications for letters patent described in Exhibit A, until the 10th day of February, 1937, the date of expiration of patent number 1,330,413 mentioned in said Exhibit A, all subject to the terms and conditions hereinafter stated.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves the right to determine and fix at any time and to change from time to time during the term of said Utzman Patent number 1,034,746 the minimum price or

prices at which the Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee embodying the improvement set forth and claimed in the said Utzman Patent 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon Licensee accompanied with a statement of the price or prices at which the Licensee shall sell said patented product, and thereafter shall give to the Licensee written or telegraphic notice of any change in such price or prices, and the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman Patent number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale any plasterboard or gypsum wallboard embodying the improvements set
9242 forth and claimed in said Utzman Patent number 1,034,746 prior to the expiration thereof at a price or prices less than that stated by the Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

2. The Licensee further agrees to pay to the Licensor in settlement and discharge of said claim and for the right, license and privilege of manufacturing, using and/or selling plasterboard or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions embodying the inventions and improvements set forth and claimed in said Utzman Patents and in any and all of said patents and applications for letters patent described in Exhibit A, an amount (hereafter for convenience referred to as a license fee or royalty) equivalent to five per cent (5%) of the selling price of the Licensee of all plasterboard or gypsum wallboard of every kind, whether patented or unpatented, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman Patent number 1,034,746 and thereafter an amount equivalent to one and one-half per cent (1½%) of the selling price of the Licensee of all such plasterboard or gypsum wallboard from August 6, 1929, until February 10, 1937, the date of the expiration of said patent number 1,330,413, and in addition thereto an amount equivalent to three and one-half per cent (3½%) of the selling price of the Licensee of such plasterboard or gypsum wallboard from August 6, 1929, until said three and one-half per cent (3½%) of said selling price shall have aggregated the sum of approximately One Hundred Eighty Thousand Dollars ($180,000).

It is understood and agreed that if prior to the expiration of said license the Licensee shall not have paid
9243 to the Licensor said additional sum of approximately One Hundred Eighty Thousand Dollars ($180,000) over and above the said five per cent (5%) royalties between the date hereof and August 6, 1929, and the said one and one-half per cent (1½%) royalties from August 6, 1929, until February 10, 1937, the Licensee shall from the date of the expiration of said license pay to the Licensor five per cent (5%) of the selling price of the Licensee of all plasterboard or gypsum wallboard manufactured and sold by it until said sum of approximately One Hundred Eighty Thousand Dollars ($180,000) shall have been fully paid and satisfied.

It is expressly understood and agreed that this contract is executed without prejudice to Licensor to assert its said claim against Licensee for infringement of its said patents in case for any reason this contract shall not remain in force throughout the full term thereof and the Licensee shall not pay to the Licensor all of the sums of money herein agreed to be paid to it in accordance with the terms hereof, and it is further agreed that the claim of Licensor against Licensee for said infringement is not settled or discharged by the execution of this instrument, but shall only be settled and discharged by the full performance of this contract and the payment to Licensor of said sums of money. In case of the termination of this contract at any time prior to the expiration thereof or in the event of the failure of Licensee to make full payment to Licensor of all of said royalties or license fees, including said additional sum of approximately One Hundred Eighty Thousand Dollars ($180,000), in the manner herein specified, Licensor, shall have the same right which it now has or had prior to the execution of this instrument to recover of and from Licensee the full amount of its said claim for damage for infringement of its said patents, and nothing herein
9244 contained shall prevent the recovery by Licensor of all of its damages for such infringement against Licensee according to the full measure of damages allowed in such cases, the same as if this contract had never been made, less only such sums as shall have been paid by Licensee to Licensor since August 6, 1929, on account of said additional sum or amount of approximately One Hundred Eighty Thousand Dollars ($180,000.00). Upon the payment to Licensor of all of said royalties or license fees throughout the full term of said license plus said additional

sum of approximately One Hundred Eighty Thousand Dollars ($180,000.00) at the time and in the manner herein specified, then the said claim of Licensor against Licensee for infringement of its said patents shall thereupon be and become fully settled, discharged and satisfied.

3. It is further agreed that so long as this agreement shall remain in force between the parties hereto, or in case the license granted under paragraph 1 hereof shall continue until February 10, 1937, then until the expiration of the patent specifically described in this paragraph, the Licensor does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in that certain patent known as the Birdsey Plasterboard Bundle Patent number 1,696,877, dated December 25, 1928, at the plant or factory now owned and/or operated by Licensee at Clarence, N. Y., and National City, Michigan or at any other plant or factory hereafter owned or operated by it and of selling bundles of plasterboard and/or gypsum wallboard set forth and claimed in said patent number 1,696,877, upon the terms and conditions hereinafter stated.

The Licensee agrees to pay to the Licensor for the right, license and privilege of making, using, or selling the inventions set forth and claimed in said Patent number 1,696,877 in addition to the sums hereinabove set forth, a li-
9245 cense fee or royalty of ten cents (10¢) per thousand square feet of plasterboard and/or gypsum wallboard which is sold by it in bundles of any kind, payable at the times and in accordance with the terms of paragraph 5 hereof. It is expressly understood that licensee in its business of manufacturing and selling plasterboard and/or gypsum wallboard will use only said bundle set forth and claimed in said patent number 1,696,877 and will not use any other bundle or method of bundling plasterboard during the term of said license.

4. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent of the Licensor or transferred by operation of law.

It is expressly understood that the Licensee shall not discontinue its business of manufacturing and selling plasterboard and/or gypsum wallboard until the Licensor shall have received the full payment of all of the amounts agreed to be paid to it hereunder by the Licensee, nor shall this

license be assigned to any company or companies acquiring the capital stock or assets of Licensee, or to any company resulting from any merger or consolidation between Licensee and any other company, nor shall any such merger, consolidation or acquisition affect any claim which Licensor has against Licensee or against any such other company for infringement of its said patents; provided, however, that this license may, with the written consent of the Licensor, be assigned to any company holding a similar license from Licensor upon the express assumption by such company of all claims of Licensor against Licensee and of the agreements and obligations of the Licensee herein contained.

9246 5. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the 20th day of each and every calender month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and gypsum wallboard manufactured and sold by it during the preceding calendar month, and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor, on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said plasterboard and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

6. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it, and the quantity thereof put up and sold by it in bundles, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom.

7. Licensee agrees that all plasterboard or gypsum wall-

board manufactured and sold by it embodying the
9247 claims of any of said patents shall be distinctly
marked with the word "Patented", together with the dates of the Utzman Patents, and the dates of any other patents which Licensor may properly specify, and in connection with the said markings it will further mark said patented product with the words, "Licensed under the above Letters Patent," which markings shall be plainly visible.

8. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, or jobbers of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may with the written consent of Licensor manufacture gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer and/or jobber; provided, however, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard or plasterboard manufactured for, and sold and invoiced to, such other manufacturer and/or jobber and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer or jobber. The Licensee shall have no right to manufacture and sell any plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent to other manufacturers or jobbers or other wholesale distributors of such products, without the written consent of Licensor.

It is understood that the selling price of the Licensee
wherever mentioned in this instrument means the
9248 selling price to its regular dealer trade, and in case
of the sale of any of said plasterboard or gypsum wallboard, whether patented or unpatented, for a price less than said price to Licensee's regular dealer trade, Licensee shall account to the Licensor in the payment of royalties hereunder at its regular dealer price; provided, however, that nothing herein continued shall give the Licensee the right to sell any of said patented products upon which the Licensor shall have fixed and determined the

price thereof in accordance with the terms hereof at less than such price.

9. The Licensee and the Licensor each expressly covenants and agrees that all of said patented products sold by it and commonly known in the trade as "seconds" shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

10. It is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by Licensee having a protected edge is within the scope of said Utzman Patents numbers 1,029,326 and 1,034,746.

After the expiration of said Letters Patent number 1,034,746 and until the expiration of Letters Patent number 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a
9249 protected edge is within the claims or is manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent number 1,330,413, or of one or more of the other of said Letters Patent listed in Exhibit "A" hereto, under which the aforesaid indivisible and non-exclusive right, license and privilege is granted.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of the Letters Patent, granted and to be granted, forming the subject-matter of this license, throughout the full term of this contract, unless the same shall be cancelled or terminated prior thereto by reason of the default of the Licensor hereunder, and agrees that it will not at any time before February 10th, 1937 or the earlier termination of the license by reason of the default of the Licensor hereunder, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said Letters Patent or the title thereto of Licensor, or question in any way the prima facie scope of either or any of said Letters Patent, or the priority, novelty or patentability of the subject-matter of any of the said applications for letters patent.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements herein to be by it kept and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this Agreement, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice, the party in default shall not cure the default specified in said notice, then the
9250 other party may cancel and terminate this Agreement, by notifying the party in default, in writing, of its election so to do, without the necessity of any court action; provided, however, that neither party shall be relieved thereby from any liability accrued at the time of such termination. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may specifically enforce this contract or any of the terms, conditions and covenants hereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served upon the Licensor or the Licensee by mailing the same to the Licensor or Licensee, postage prepaid, addressed to it as its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, whether now or hereafter issued, under which this license is granted, the Licensor will afford the Licensee such responsible protection as in the judgment of the Licensor shall be necessary or proper; and in case the Licensor shall grant to any such infringer, or to any other person, any license under said patents upon terms more favorable than those granted hereunder to this
9251 Licensee, then it will grant to this Licensee a license on the same terms.

15. The terms "plasterboard" and "gypsum wallboard" shall be understood to mean all board by whatever name

called having the structural characteristics of plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used.

16. The term "sum of approximately One Hundred Eighty Thousand Dollars ($180,000)" whenever used herein shall mean an amount of money to be determined as follows:

Within thirty days, an Accountant, satisfactory to both parties, shall make an audit of licensee's books as to quantities and prices of plasterboard and gypsum wallboard of all kinds sold by the licensee prior to the date hereof and shall make a certified report thereon. A sum equivalent to 5% of the licensee's selling price of all plasterboard and gypsum wallboard of all kinds sold by the licensee between the 29th of July, 1926, and the date hereof, as shown by said report of audit, shall be the principal sum; to this sum shall be added another sum as compensation for infringement of patents prior to 29th of July 1926, which shall be determined by the licensor on substantially the same basis as the settlements made by licensor with other infringers of the aforesaid patents, for infringements prior to said date. The two sums thus added together shall be the amount which the term "sum of approximately One Hundred Eighty Thousand Dollars ($180,000)" shall represent and mean.

17. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by the Licensee except as hereinabove specifically provided.

9252 In witness whereof the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY,
By S. L. AVERY, *Its President.*

Attest:
P. G. BEAR, *Secretary.*

NATIONAL GYPSUM COMPANY,
By M. H. BAKER, *Its President.*

Attest:
T. E. DAVIS, *Secretary.*

9253 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

9254 Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925; expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial No. 565,737, reissued January 24, 1928, as Reissue patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial No. 567,205, reissued May 22, 1928 as Reissue Patent No. 16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

9255 Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,676, filed October 10, 1921, granted November 29, 1927, expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,627, filed April 19, 1922, granted April 30, 1929, expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662,359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1,631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927, expires May 31, 1944.

Brookby & Absmeier patent No. 1,689,322. Application Serial No. 91,297, filed March 1, 1926, granted October 30, 1928, expires April 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.

Utzman patent No. 1,638,280. Application Serial No. 374,833, filed April 19, 1920, granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927, expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No. 427,044, filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,045, filed November 29, 1920, granted September 6, 1944.

Mehlhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926, expires October 26, 1943.

9256 Gustafson patent No. 1,665,168. Application Serial No. 509,366, filed December 2, 1919; renewed October 21, 1921, granted April 3, 1928, expires April 3, 1945.

Kohler, et al. patent No. 1,673,944. Application Serial No. 540,412, filed March 2, 1922, granted June 19, 1928, expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey application Serial No. 583,795, filed August 23, 1922. Finally allowed January 18, 1929. Patent No. 1,717,890 will issue June 25, 1929.

Utzman application Serial No. 477,371, filed June 14, 1921. Finally allowed April 26, 1929.

Knode application Serial No. 590,358, filed September 25, 1922.

Utzman application Serial No. 581,361, filed August 12, 1922.

Williams application Serial No. 582,606, filed August 18, 1922.

9257 *Government's Exhibit No. 4*

LICENSE AGREEMENT

This agreement executed in duplicate this 22 day of May, 1929, by and between the United States Gypsum Company, an Illinois corporation of Chicago, Illinois, hereinafter referred to as "Licensor" and Certain-teed Products Corporation, a Maryland corporation having its principal office at Baltimore, Maryland, hereinafter referred to as "Licensee", witnesseth:

Whereas, Licensor is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, No. 1,029,328, dated June 11th, 1912, and No. 1,034,746, dated August 6th, 1912 (hereinafter called the "Utzman Patents"), and Letters Patent of the United States, No. 1,358,508, dated November 9, 1920 (hereinafter called the "Birdsey Patent"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and applications for Letters Patent of the United States set forth in Exhibit "A" attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, heretofore said Utzman Patents have been adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; 15 Fed. (2d) 704; see also 263 U. S. 713), and said courts have decreed that said Utzman Patents are valid and were infringed by the defendants named in said suits, by reason of their making, using and selling plasterboard or gypsum wallboard having protected
9258 edges and said District Court ordered perpetual injunctions and accountings against said defendants; and

Whereas, Licensee recognizes and admits the validity and scope of said Utzman patents; and

Whereas, said Birdsey Patent number 1,358,508 has been adjudicated by the United States District Court for the Northern District of Ohio (in Equity Number 1621), and said Court has decreed that said Birdsey Patent is valid and was infringed by defendant in said cause by reason of its making, using and selling plasterboard and/or gypsum wallboard having edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit (Appeal number 5392); and

Whereas, on or about April 1, 1928, Licensee acquired substantially all the plants, properties and assets of The Beaver Products Company, Inc., and the Licensor now asserts a claim against the Licensee for a sum equivalent to five per cent (5%) of the Licensee's selling price of

all plasterboard and gypsum wallboard of every kind manufactured at plants formerly owned by The Beaver Products Company, Inc., and sold by the Licensee between April 1, 1928, and the date hereof, and the Licensee recognizes such claim and has agreed to pay the same in the manner hereinafter provided; and

Whereas, Licensor, at the request of Licensee, has agreed to grant a license to Licensee under the aforesaid patents, and to settle the said claim, in consideration of the payment by the Licensee to Licensor of five per cent (5%) of Licensee's selling price of all plasterboard or gypsum wallboard manufactured and sold by it until August 6th, 1929, and one and one-half per cent (1½%) of such selling price from August 6th, 1929, to February 10th, 1937, plus three and one-half per cent (3½%) of such selling price from August 6th, 1929, until said three and one-half per cent (3½%) of such selling price shall aggregate
9259 the fixed sum mentioned in paragraph 16 hereof.

Now, therefore, in consideration of the sum of one dollar and other good and valuable considerations, receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to-wit.

1. Licensor has agreed to and does hereby give and grant unto Licensee, an indivisible and non-exclusive right, license and privilege of using the processes, and making and using the machines and/or inventions set forth and claimed in said Utzman Patents, and in any and all of said patents or applications for letters patent described in said Exhibit A, at the plant or factory now owned and/or operated by Licensee at Fort Dodge, Iowa; Grand Rapids, Michigan; Acme, Texas; Akron, New York, or at any other plant or factory hereafter owned or operated by it, and of manufacturing at said plant or factory and selling and/or using plasterboard or gypsum wallboard manufactured at said plant or factory and embodying the inventions and improvements set forth and claimed in said Utzman Patents and said patents and applications for letters patent described in Exhibit A, until the 10th day of February, 1937, the date of expiration of patent number 1,330,413 mentioned in said Exhibit A, all subject to the terms and conditions hereinafter stated.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and

it hereby reserves the right to determine and fix at any time and to change from time to time during the term of said Utzman Patent number 1,034,746 the minimum price or prices at which the Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee embodying the improvements set forth and claimed in the said Utzman Patent 1,034,746, and in case it shall exercise the
9260 right so reserved it shall first serve written notice of its intention so to do upon Licensee accompanied with a statement of the price or prices at which the Licensee shall sell said patented product, and thereafter shall give to the Licensee written or telegraphic notice of any change in such price or prices, and the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman Patent number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale any plasterboard or gypsum or wallboard embodying the improvements set forth and claimed in said Utzman Patent number 1,034,746 prior to the expiration thereof at a price or prices less than that stated by the Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

2. The Licensee further agrees to pay to the Licensor in settlement and discharge of said claim and for the right, license and privilege of manufacturing, using and/or selling plasterboard or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions embodying the inventions set forth and claimed in said Utzman Patents and in any and all of said patents and applications for letters patent described in Exhibit A, an amount (hereafter for convenience referred to as a license fee or royalty) equivalent to five per cent (5%) of the selling price of the Licensee of all plasterboard or gypsum wallboard of every kind, whether patented or unpatented, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman Patent number 1,034,746 and thereafter an amount equivalent to one and one-half per cent (1½%) of the selling price of the Licensee of all such plasterboard or gypsum wallboard from August 6, 1929, until February 10, 1937, the date
9261 of the expiration of said patent number 1,330,413, and in addition thereto an amount equivalent to three and one-half per cent (3½%) of the selling price of the Licensee of such plasterboard or gypsum wallboard

from August 6, 1929, until said three and one-half per cent (3½%) of said selling price shall have aggregated the fixed sum mentioned in Paragraph 16 hereof.

It is understood and agreed that if prior to the expiration of said license the Licensee shall not have paid to the Licensor said additional fixed sum mentioned in Paragraph 16 hereof, over and above the said five per cent (5%) royalties between the date hereof and August 6, 1929, and the said one and one-half per cent (1½%) royalties from August 6, 1929, until February 10, 1937, the Licensee shall from the date of the expiration of said license pay to the Licensor five per cent (5%) of the selling price of the Licensee of all plasterboard or gypsum wallboard manufactured and sold by it until said fixed sum mentioned in Paragraph 16 hereof shall have been fully paid and satisfied.

It is expressly understood and agreed that this contract is executed without prejudice to Licensor to assert its said claim against Licensee in case for any reason this contract shall not remain in force throughout the full term thereof and the Licensee shall not pay to the Licensor all of the sums of money herein agreed to be paid to it in accordance with the terms hereof, and it is further agreed that the said claim of the Licensor against Licensee is not settled or discharged by the execution of this instrument, but shall only be settled and discharged by the full performance of this contract and the payment to Licensor of said sums of money. In case of the termination of this contract at any time prior to the expiration thereof or in the event of the failure of Licensee to make full payment to Licensor of all of said royalties or License fees, including said additional fixed sum mentioned in
9262 Paragraph 16 hereof, in the manner herein specified, Licensor shall have, in addition to all its other rights under this agreement, the right to recover of and from Licensee the full amount of its said claim, and nothing herein contained shall prevent the recovery by Licensor of the full amount of its said claim from Licensee, less only such sums as shall have been paid by Licensee to Licensor since August 6, 1929, on account of said additional fixed sum mentioned in Paragraph 16 hereof. Upon the payment to Licensor of all of said royalties or license fees throughout the full term of said license, plus said additional fixed sum mentioned in Paragraph 16 hereof, at the time and in the manner herein specified, then the said claim

of Licensor against Licensee shall thereupon be and become fully settled, discharged and satisfied.

3. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee and that the same or any right therein or thereunder shall not be sold, assigned or transferred without written consent of the Licensor or transferred by operation of law.

4. It is expressly understood that the Licensee shall not discontinue its business of manufacturing and selling plasterboard and/or gypsum wallboard until the Licensor shall have received the full payment of all of the amounts agreed to be paid to it hereunder by the Licensee, nor shall this license be assigned to any company or companies acquiring the capital stock or assets of Licensee, or to any company resulting from any merger or consolidation between Licensee and any other company, nor shall any such merger, consolidation or acquisition affect any claims which Licensor has against Licensee or against any such other company for infringement of its said patents or
9263 otherwise; Provided, However, that this license may, with the written consent of the Licensor, be assigned to any company holding a similar license from Licensor upon the express assumption by such company of all claims of Licensor against Licensee and of the agreements and obligations of the Licensee herein contained.

5. Licensee agrees to keep separate full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, and agrees that on or before the 20th day of each and every calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and gypsum wallboard manufactured and sold by it during the preceding calendar month, together with the price or prices at which the same was sold, such written returns to be delivered to Licensor at its offices in Chicago, Illinois, and Licensee agrees to pay to Licensor, on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said plasterboard and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

6. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the
9264 quantity of said plasterboard and gypsum wallboard manufactured and sold by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom.

7. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents shall be distinctly marked with the word "Patented," together with the dates of the Utzman Patents, and the dates of any other patents which Licensor may properly specify, and in connection with the said markings it will further mark said patented product with the words, "Licensed under the above Letters Patent," which markings shall be plainly visible.

8. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, or jobbers of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may with the written consent of Licensor manufacture gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer and/or jobber; provided, however, that the said license fee or royalty to be paid to Licensor as hereinbefore provided, shall be based upon all gypsum wallboard or plasterboard manufactured for, and sold and invoiced to, such other manufacturer and/or jobber and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer or
9265 jobber. The Licensee shall have no right to manufacture and sell any plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent to other manufacturers or jobbers or other wholesale distributors of such products, without the written consent of Licensor.

It is understood that the selling price of the Licensee wherever mentioned in this instrument means the selling price to its regular dealer trade, and in case of the sale of any of said plasterboard or gypsum wallboard, whether patented or unpatented, for a price less than said price to Licensee's regular dealer trade, Licensee shall account to the Licensor in the payment of royalties hereunder at its regular dealer price; provided, however, that nothing herein contained shall give the Licensee the right to sell any of said patented products upon which the Licensor shall have fixed and determined the price thereof in accordance with the terms hereof at less than such price.

9. The Licensee and the Licensor each expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as "seconds" shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

10. It is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by Licensee having a protected edge is within the scope of said Utzman Patents numbers 1,029,326 and 1,034,746.

9266 After the expiration of said letters patent number 1,034,746 and until the expiration of Letters Patent number 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a protected edge is within the claims or is manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent Number 1,330,413, or of one or more of the other of said Letters Patent listed in Exhibit A hereto, under which the aforesaid indivisible and non-exclusive right, license and privilege is granted.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of the Letters Patent, granted and to be granted, forming the subject-matter of this license, throughout the full term of this contract,

unless the same shall be cancelled or terminated prior thereto by reason of the default of the Licensor hereunder, and agrees that it will not at any time before February 10th, 1937, or the earlier termination of the license by reason of the default of the Licensor hereunder, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said Letters Patent or the title thereto of Licensor, or question in any way the prima facie scope of either or any of said Letters Patent, or the priority, novelty or patentability of the subject-matter of any of the said applications for letters patent.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements herein to be by it kept and
9267 performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this Agreement, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice, the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this Agreement, by notifying the party in default, in writing, of its election so to do, without the necessity of any court action; provided, however, that neither party shall be relieved thereby from any liability accrued at the time of such termination. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may specifically enforce this contract or any of its terms, conditions and covenants hereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served upon the Licensor or the Licensee by mailing the same to the Licensor or Licensee, postage prepaid, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, whether now or hereafter issued,
9268 under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper; and in case the Licensor shall grant to any such infringer, or to any other person, any license under said patents upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms.

15. The terms "plasterboard" and "gypsum wallboard" shall be understood to mean all board by whatever name called having the structural characteristics of plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used.

16. The term "fixed sum mentioned in Paragraph 16 hereof," whenever used herein, shall mean an amount of money to be determined as follows: Within thirty (30) days from the date hereof, an accountant satisfactory to both parties shall make an audit of Licensee's books as to quantity and prices of plasterboard and gypsum wallboard of all kinds manufactured at the plants and/or mills formerly owned or operated by The Beaver Products Company, Inc., and sold by the Licensee between April 1, 1928, and the date hereof, and shall make a certified report thereon. A sum equivalent to five per cent (5%) of the Licensee's selling price of all such plasterboard and gypsum wallboard of all kinds sold between the dates aforesaid by the Licensee, as shown by said report of audit, shall be the amount which the term "fixed sum mentioned in Paragraph 16 hereof" shall represent and mean.

17. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by the Licensee except as hereinabove specifically provided.

9269 In witness whereof, the parties hereto have caused these presents to be signed by their respective Presi-

dents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

[SEAL] UNITED STATES GYPSUM COMPANY,

By S. L. AVERY, *Its President.*

JOHN E. MACLEISH,
Witness.

[SEAL] CERTAIN-TEED PRODUCTS CORPORATION,

By GEO. M. BROWN, *Its President.*

EDWARD WHITTEMORE,
Witness.

9270 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,388,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

9271 Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Birdsey application Serial No. 437,062, filed January 13, 1921.

Birdsey application Serial No. 506,676, filed October 10, 1921.

Birdsey application Serial No. 545,231, filed March 20, 1922.

Birdsey application Serial No. 555,627, filed April 19, 1922.

Birdsey application Serial No. 583,795, filed August 23, 1922.

Moore application Serial No. 590,356, filed September 25, 1922.

Knode application Serial No. 590,358, filed September 25, 1922.

Birdsey application Serial No. 605,896, filed December 9, 1922.

Smith application Serial No. 662,359, filed September 12, 1923.

Birdsey application Serial No. 737,237, filed September 12, 1924.

Utzman application Serial No. 750,224, filed November 17, 1924.

Birdsey application Serial No. 754,927, filed December 10, 1924.

Brookby application Serial No. 50,538, filed August 17, 1925.

9272 Birdsey application Serial No. 57,507, filed September 21, 1925.

Brookby & Absmeier application Serial No. 91,297, filed March 1, 1926.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial 565,737.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial 567,205.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted Decembe. 6, 1921, expires December 6, 1938.

Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Armstrong application Serial No. 310,470, filed July 12, 1919.

Utzman application Serial No. 374,833, filed April 19, 1920.

Armstrong application Serial No. 377,421, filed April 29, 1920.

Speer application Serial No. 427,044, filed November 29, 1920.

Speer application Serial No. 427,045, filed November 29, 1920.

Mehlhope application Serial No. 473,288, filed May 28, 1921.

9273 Utzman application Serial No. 477,371, filed June 14, 1921.

Kohler application Serial No. 482,073, filed July 2, 1921.

Gustafson application Serial No. 509,366, filed December 2, 1919; renewed October 21, 1921.

Kohler, et al., application Serial No. 540,412, filed March 2, 1922.

Armstrong application Serial No. 565,737, filed June 3, 1922.

Armstrong application Serial No. 567,205, filed June 9, 1922.

Utzman application Serial No. 581,361, filed August 12, 1922.

Utzman application Serial No. 581,362, filed August 12, 1922.

Williams application Serial No. 582,606, filed August 18, 1922.

Tonning application Serial No. 590,221, filed September 25, 1922.

Armstrong application Serial No. 596,983 filed October 26, 1922.

Speer application Serial No. 610,739, filed January 5, 1923.

Rehm application Serial No. 8,654, filed February 12, 1925.

Rehm application Serial No. 8,655, filed February 12, 1925.

Rehm application Serial No. 8,656, filed February 12, 1925.

Rehm application Serial No. 8,657, filed February 12, 1925.

Rehm application Serial No. 23,775, filed April 17, 1925.

9274 *Government's Exhibit No. 5*

LICENSE AGREEMENT

This agreement, executed in duplicate this 22nd day of May, 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as "Licensor," and Ebsary Gypsum Co. Inc., a New York corporation, of Newark, N. J., hereinafter referred to as "Licensee," witnesseth:

Whereas, Licensor is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, No. 1,029,328, dated June 11th, 1912, and No. 1,034,746, dated August 6th, 1912 (hereinafter called the "Utzman Patents"), and Letters Patent of the United States, No. 1,358,508, dated November 9, 1920 (hereinafter called the "Birdsey Patent"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and applications for Letters Patent of the United States set forth in Exhibit "A" attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, heretofore said Utzman Patents have been adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh

Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; 15 Fed. (2d) 704; see also 263 U. S. 713), and said Courts have decreed that said Utzman Patents are valid and were infringed by the defendants named in said suits, by reason of their making, using and selling plasterboard or gypsum wallboard having protected edges, and said District Court ordered perpetual injunctions and accountings against said defendants; and

Whereas, said Birdsey Patent Number 1,358,508 has been adjudicated by the United States District Court
9275 for the Northern District of Ohio (In Equity Number 1621), and said Court has decreed that said Birdsey Patent is valid and was infringed by defendant in said cause by reason of its making, using and selling plasterboard and/or gypsum wallboard having edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit (Appeal Number 5392); and

Whereas, Licensee recognizes and admits the validity and scope of said patents and is desirous of obtaining a license to use the processes and make and use the machines and/or inventions set forth and claimed in said patents and in said patents or applications for letters patent described in Exhibit "A"; and

Whereas, Licensor has been unwilling to grant a license except upon the express condition that Licensee will manufacture plasterboard or gypsum wallboard only with a folded or protected edge similar to that manufactured by Licensor, so that Licensor may be protected in its own business of manufacturing and selling said patented products and realize to the fullest extent the benefits under said patents from the manufacture by said Licensee; and

Whereas, Licensor has agreed to waive the express condition aforesaid and grant the said License in consideration of the agreement of Licensee to pay to it for the license to use the processes and make and use the machines and/or inventions set forth and claimed in all of said patents and applications for letters patent the amounts hereinafter stated and upon the terms and conditions hereinafter set forth,

Now, therefore, in consideration of the sum of One Dollar ($1.00), and other good and valuable consideration, the

receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to-wit:

9276 1. Licensor has agreed to and does hereby give and grant unto Licensee, an indivisible and non-exclusive right, license and privilege of using the processes, and making and using the machines and/or inventions set forth and claimed in said Utzman Patents, and in any and all of said patents or applications for letters patent described in said Exhibit A, at the plant or factory now owned and/or operated by Licensee at Wheatland, New York, or at any other plant or factory hereafter owned or operated by it, and of manufacturing at said plant or factory and selling and/or using plasterboard or gypsum wallboard manufactured at said plant or factory and embodying the inventions and improvements set forth and claimed in said Utzman Patents and said patents and applications for letters patent described in Exhibit A, until the 10th day of February, 1937, the date of expiration of patent number 1,330,413 mentioned in said Exhibit A, all subject to the terms and conditions hereinafter stated.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves the right to determine and fix at any time and to change from time to time during the term of said Utzman Patent Number 1,034,746 the minimum price or prices at which the Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee embodying the improvements set forth and claimed in the said Utzman Patent 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the price or prices at which the Licensee shall sell said patented product, and thereafter shall give to the Licensee written or telegraphic notice of any change in such price or prices, and the Licensee expressly

9277 covenants and agrees that it will not at any time during the term of said Utzman Patent Number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale any plasterboard or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746 prior to the expiration thereof at a price or prices less than

that stated by the Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

2. The Licensee further agrees to pay to the Licensor for the right, license and privilege of manufacturing, using and/or selling plasterboard or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions embodying the inventions set forth and claimed in said Utzman Patents and in any and all of said patents and applications for letters patent described in Exhibit A, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to five per cent (5%) of the selling price of the Licensee of all plasterboard or gypsum wallboard of every kind, whether patented or unpatented, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman Patent Number 1,034,746, and thereafter an amount equivalent to one and one half per cent (1½%) of the selling price of the Licensee of all such plasterboard or gypsum wallboard from August 6, 1929, until February 10, 1937, the date of expiration of said Patent Number 1,330,413.

3. It is further agreed that so long as this agreement shall remain in force between the parties hereto, or in case the License granted under Paragraph 1 hereof shall continue until February 10, 1937, then until the expiration of the patent specifically described in this para-
9278 graph, the Licensor does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in that certain patent known as the Birdsey Plasterboard Bundle Patent Number 1,696,877, dated December 25, 1928, at the plant or factory now owned and/or operated by Licensee at Wheatland, New York, or at any other plant or factory hereafter owned or operated by it, and of selling bundles of plasterboard and/or gypsum wallboard set forth and claimed in said patent number 1,696,877, upon the terms and conditions hereinafter stated.

The Licensee agrees to pay to the Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said Patent Number 1,696,877, in addition to the sums hereinabove set forth, a license fee or royalty of ten cents (10¢) per thousand square feet of plasterboard and/or gypsum wallboard which is sold by

it in bundles of any kind, payable at the times and in accordance with the terms of Paragraph 4 hereof. It is expressly understood that licensee in its business of manufacturing and selling plasterboard and/or gypsum wallboard will use only said bundle set forth and claimed in said Patent Number 1,696,877 and will not use any other bundle or method of bundling plasterboard during the term of said license.

4. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent of the Licensor or transferred by operation of law.

It is expressly understood that the Licensee shall not discontinue its business of manufacturing and selling plasterboard and/or gypsum wallboard until the Licensor shall have received the full payment of all of the amounts
9279 agreed to be paid to it hereunder by the Licensee, nor shall this license be assigned to any company or companies acquiring the capital stock or assets of Licensee, or to any company resulting from any merger or consolidation between Licensee and any other company, nor shall any such merger, consolidation or acquisition affect any claim which Licensor has against Licensee or against any such other company for infringement of its said patents; provided, however, that this license may, with the written consent of the Licensor, be assigned to any company holding a similar license from Licensor upon the express assumption by such company of all claims of Licensor against Licensee and of the agreements and obligations of the Licensee herein contained.

5. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the 20th day of each and every calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and gypsum wallboard manufactured and sold by it during the preceding calendar month, and the quantity thereof put up and sold by it in bundles, together with the price or prices at which

the same was sold, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor, on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said plasterboard and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

6. Licensor, or its duly authorized representative, 9280 shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it, and the quantity thereof put up and sold by it in bundles, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom.

7. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents shall be distinctly marked with the word "Patented", together with the dates of the Utzman Patents, and the dates of any other patents which Licensor may properly specify, and in connection with the said markings it will further mark said patented product with the words, "Licensed under the above Letters Patent," which markings shall be plainly visible.

8. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, or jobbers of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may with the written consent of Licensor manufacture gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer and/or jobber; provided, however, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard or plasterboard manufactured for, and sold and invoiced to, such other manufacturer and/or jobber and upon the regular selling price of Licensee

of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and
9281 shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer or jobber. The Licensee shall have no right to manufacture and sell any plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent to other manufacturers or jobbers or other wholesale distributors of such products, without the written consent of Licensor.

It is understood that the selling price of the Licensee wherever mentioned in this instrument means the selling price to its regular dealer trade, and in case of the sale of any of said plasterboard or gypsum wallboard, whether patented or unpatented, for a price less than said price to Licensee's regular dealer trade, Licensee shall account to the Licensor in the payment of royalties hereunder at its regular dealer price; provided, however, that nothing herein contained shall give the Licensee the right to sell any of said patented products upon which the Licensor shall have fixed and determined the price thereof in accordance with the terms hereof at less than such price.

9. The Licensee and the Licensor each expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as "seconds" shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

10. It is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by Licensee having a protected edge is within the scope of said Utzman Patents Numbers 1,029,326 and 1,034,746.

9282 After the expiration of said Letters Patent number 1,034,746 and until the expiration of Letters Patent Number 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a protected edge is within the claim or is manu-

factured according to the processes or by the use of machines embodying the claims either of said Letters Patent Number 1,330,413, or of one or more of the other of said Letters Patent listed in Exhibit "A" hereto, under which the aforesaid indivisible and non-exclusive right, license and privilege is granted.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of the Letters Patent, granted and to be granted, forming the subject-matter of this license, throughout the full term of this contract, unless the same shall be cancelled or terminated prior thereto by reason of the default of the Licensor hereunder, and agrees that it will not at any time before February 10th, 1937, or the earlier termination of the license by reason of the default of the Licensor hereunder, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said Letters Patent or the title thereto of Licensor, or question in any way the prima facie scope of either or any of said Letters Patent, or the priority, novelty or patentability of the subject-matter of any of the said applications for letters patent.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements herein to be by it kept and performed, then the other party, at its election, may serve upon the
9283 party in default written notice of intention to terminate this Agreement, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice, the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this Agreement, by notifying the party in default, in writing, of its election so to do, without the necessity of any court action; provided, however, that neither party shall be relieved thereby from any liability accrued at the time of such termination. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may specifically enforce

this contract or any of the terms, conditions and covenants hereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served upon the Licensor or the Licensee by mailing the same to the Licensor or Licensee, postage prepaid, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, whether now or hereafter issued, under
9284 which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor, shall be necessary or proper; and in case the Licensor shall grant to any such infringer, or to any other person, any license under said patents upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this License a license of the same terms.

15. The terms "plasterboard" and "gypsum wallboard" shall be understood to mean all board by whatever name called having the structural characteristics of plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used.

16. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by the Licensee except as hereinabove specifically provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

[SEAL] UNITED STATES GYPSUM COMPANY,
By S. L. AVERY, *Its President.*

JOHN E. MACLEISH,
Witness.

[SEAL] EBSARY GYPSUM CO. INC.,
By F. G. EBSARY, *Its President.*

GEORGE N. LENCI, V. P.
Witness.

9285 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921; expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

9286 Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Birdsey application Serial No. 437,062, filed January 13, 1921.

Birdsey application Serial No. 506,676, filed October 10, 1921.

Birdsey application Serial No. 545,231, filed March 20, 1922.

Birdsey application Serial No. 555,627, filed April 19, 1922.

Birdsey application Serial No. 583,795, filed August 23, 1922.

Moore application Serial No. 590,356, filed September 25, 1922.

Knode application Serial No. 590,358, filed September 25, 1922.

Birdsey application Serial No. 605,896, filed December 9, 1922.

Smith application Serial No. 662,359, filed September 12, 1923.

Birdsey application Serial No. 737,237, filed September 12, 1924.

Utzman application Serial No. 750,224, filed November 17, 1924.

Birdsey application Serial No. 754,927, filed December 10, 1924.

Brookby application Serial No. 50,538, filed August 17, 1925.

9287 Birdsey application Serial No. 57,507, filed September 21, 1925.

Brookby & Absmeier application Serial No. 91,297, filed March 1, 1926.

Armstrong patent No. 1,278,821. Applications filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial 565,737.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial 567,205.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Armstrong application Serial No. 310,470, filed July 12, 1919.

Utzman application Serial No. 374,833, filed April 19, 1920.

Armstrong application Serial No. 377,421, filed April 29, 1920.

Speer application Serial No. 427,044, filed November 29, 1920.

Speer application Serial No. 427,045, filed November 29, 1920.

Mehlhope application Serial No. 473,288, filed May 28, 1921.

9288 Utzman application Serial No. 477,371, filed June 14, 1921.

Kohler application Serial No. 482,073, filed July 2, 1921.

Gustafson application Serial No. 509,366, filed December 2, 1919; renewed October 21, 1921.

Kohler, et al., application Serial No. 540,412, filed March 2, 1922.

Armstrong application Serial No. 565,737, filed June 3, 1922.

Armstrong application Serial No. 567,205, filed June 9, 1922.

Utzman application Serial No. 581,361, filed August 12, 1922.

Utzman application Serial No. 581,362, filed August 12, 1922.

Williams application Serial No. 582,606, filed August 18, 1922.

Tonning Application Serial No. 590,221, filed September 25, 1922.

Armstrong application Serial No. 596,983, filed October 26, 1922.

Speer Application Serial No. 610,739, filed January 5, 1923.

Rehm application Serial No. 8,654, filed February 12, 1925.

Rehm application Serial No. 8,655, filed February 12, 1925.

Rehm application Serial No. 8,656, filed February 12, 1925.

Rehm application Serial No. 8,657, filed February 12, 1925.

Rehm application Serial No. 23,775, filed April 17, 1925.

9289 *Government's Exhibit No. 6*

November 5th, 1929.

ABEL DAVIS AND EUGENE HOLLAND,
Receivers, and Universal Gypsum & Lime Co.,
Chicago, Illinois.

DEAR SIRS: Referring to contract with you of even date herewith, in order to clear up some questions of construction of the instrument as drawn, it is understood that:

The words "less five cents (5¢) per one thousand (1,000) square feet if in board form or the equivalent thereto in weight if in other form" appearing on page 6 of said contract shall be construed to mean 5¢ for each 1,000 square feet of plasterboard or gypsum wallboard and on all other gypsum products 5¢ for each such number of pounds as is the equivalent of the number of pounds in 1,000 square feet of plasterboard or gypsum wallboard of 3/8" thickness, and for this purpose the weight of 1,000 square feet of any such board is to be taken as 1850 pounds.

The paragraph commencing on page 6 of said contract with the words "First party does hereby agree also to pay to second and third parties" and ending on page 7 with the words "and such licensee shall have paid its license fees or royalties therefor to first party" means that first party

is to pay the said 1% less said 5¢ of the licensee's price upon the same number of feet of each kind of plasterboard or gypsum wallboard or the same quantity of other gypsum products, upon which the licensee is required to pay royalties or license fees to first party for the use of the Haggerty and/or Hite patents and only during the time the license with such licensee remains in force and such licensee pays its license fees or royalties to first party.

The provision commencing on page 8 with the words "If first party voluntarily cancels or changes any such license" and ending on page 9 with the words "first party may have under said license" is to be construed as follows:

(1) The words "If first party voluntarily cancels or changes any such license" appearing in said provision mean a cancellation or change voluntarily and deliberately made by agreement between first party and the licensee without the consent of second or third parties and do not include the cancellation, termination or change of the license agreement for any other reason whatsoever. Without intending to limit the phrase "for any other reason whatsoever" in the next preceding sentence, it is understood that the words "If first party voluntarily cancels or changes any such license" do not mean or include termination, cancellation or change made or done pursuant to the terms of the license agreement or in the exercise of any right or privilege thereunder; or due to any construction which may be put upon the license agreement by any court different from that claimed or understood by second or third parties or by first party or the licensee; or because of the holding of any court that the license agreement or any part thereof is invalid or unenforcible; or by the action, order or decree of any court for any reason whatsoever; or because of any default by the licensee thereunder; or because of any claim made by the licensee with respect to any inducement in the making of the license agreement or that first party has defaulted in any of the terms or conditions thereof; or resulting from an award or finding of arbiters ap-
9290 pointed under the terms of the license agreement; or arising on account of errors, mistakes or omissions made by the agents or employes of first party or the licensee in or about the performance of the license agreement.

(2) The words contained in said provision commencing with the words "then first party will make said payment" and ending with the words "until the expiration of

said Haggerty patent or such earlier date that first party would have been relieved from paying upon the licensee's production and sales if no such voluntary cancellation or change had occurred" are to be construed according to the following illustrations:

(a) Suppose a license agreement has been made with X which during the first 6 months thereof manufactured and sold 600,000 square feet of plasterboard and gypsum wallboard, consisting of 300,000 square feet of gypsum lath, 200,000 square feet of gypsum wallboard and 100,000 square feet of plasterboard, and upon which first party made monthly payments to second and third parties in accordance with the terms of said contract. Assume that a year after the license agreement is made with X first party, by voluntary agreement with X, changes the license agreement so that X is required to pay royalties or license fees to first party upon only half of its production and sales, thereby reducing the number of feet of such board upon which first party is required to pay second and third parties. If such change were then applied to the first six months of the license agreement with X it would appear that first party would have paid upon only 300,000 square feet, consisting of 150,000 square feet of lath, 100,000 square feet of wallboard and 50,000 square feet of plasterboard. The extent of the reduction during such six months' period would have been the difference between the original 600,000 square feet and the said 300,000 square feet, or 150,000 square feet of lath, 100,000 square feet of wallboard and 50,000 square feet of plasterboard, one-sixth of each of which, or 25,000 square feet of lath, 16,666 square feet of wallboard and 8,333 square feet of plasterboard, is the number of square feet making up such reduction and upon which first party would be required to pay second and third parties monthly until the expiration of the Haggerty patent or such earlier date that first party would have been relieved from paying upon X's production and sales if no such voluntary cancellation or change had occurred; and first party in such case would also continue to pay monthly on the 50,000 square feet upon which X continued to pay license fees or royalties to first party. Suppose during any month following the change X should increase its production and sales to 200,000 square feet, then during any such month first party would pay to second and third parties upon 100,000 square feet, being the number of feet upon which first party receives royalties or license fees

from X, plus 50,000 square feet, the amount of said reduction. If, on the other hand, during any month following such a change X's production and sales decreased to 50,000 square feet, then first party would pay upon 25,000 square feet, being the number of feet upon which first party receives royalties or license fees from X, plus the said reduction of 50,000 square feet;

(b) If in such case the license with X was voluntarily cancelled, then, by applying the changed situation to the first six months' period of the contract, it would appear that the reduction by reason of the change would have been the total production and sales of X, or 600,000 square feet for the period, making 100,000 square feet monthly. First party would then pay monthly upon 100,000 square feet, consisting of 50,000 square feet of lath, 33,333 square feet of wallboard and 16,666 square feet of plaster-
9291 board, until the expiration of the Haggerty patent or such earlier date that first party would have been relieved from paying upon X's production and sales if no such voluntary cancellation had occurred.

(3) The word "price" contained in the phrase "then first party will make said payment to second and third parties upon its own sales and price" contained in said provision, means the price of first party defined the same as the price of the licensee as defined at the bottom of page 6 and the top of page 7 of said contract.

(4) The price as defined on pages 6 and 7 of said contract shall be the licensee's delivered selling price less the deductions in said definition contained and less such other deductions as may be allowed the licensee in writing at the time the license agreement originally takes effect.

(5) The words contained in said provision "or such earlier date that first party would have been relieved from paying upon the licensee's production and sales if no such voluntary cancellation or change had occurred" mean if the license agreement had continued in its original form and would have terminated or licensee would have ceased to pay royalties thereunder, for any reason except first party's voluntary cancellation as above stated, then the date when that would have happened shall fix the date when first party shall not be required to pay anything further on account of said reduction and/or upon the production and sales of any licensee whose license agreement may have been so voluntarily cancelled or changed. To illustrate:

If the license agreement has been so voluntarily cancelled, then first party's obligation to pay anything on account of said reduction and/or on account of the production of any such licensee shall cease and determine in case of a holding that all of the claims of the Haggerty and Hite patents are invalid or in case the licensee shall cease to do business or cease to manufacture and sell plasterboard and gypsum wallboard or in any other case where the license would have terminated or the licensee would have ceased to pay any royalties or license fees to first party if the license had not been so voluntarily cancelled. If the license agreement has been so voluntarily changed but not cancelled, then the obligation of first party to pay anything on account of any such reduction and/or on account of any production and sales of the licensee shall cease and determine if the license agreement is terminated or the licensee ceases to pay any royalties or license fees to first party, for any reason whatsoever, except such a voluntary cancellation by first party.

This letter shall become a part of said contract with the same effect as if the same had been written therein.

Very truly yours,

UNITED STATES GYPSUM COMPANY

By S. L. AVERY, *Its President.*

ACCEPTED:

EUGENE HOLLAND,
ABEL DAVIS,
Receivers.

UNIVERSAL GYPSUM & LIME CO.

By OLIVER MITCHELL, *Vice-President.*

9292 This agreement, made and executed in triplicate at Chicago, Illinois, this 5th day of November, A. D. 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, party of the first part, and Abel Davis and Eugene Holland, as Receivers in Equity for Universal Gypsum & Lime Co., a Delaware corporation having an office in Chicago, Illinois, pursuant to appointment by the United States District Court for the Northern District of Illinois, Eastern Division, on April 22, 1929, in a certain cause there pending, entitled International Cooperage Company, Inc., complainant, vs. Universal Gypsum & Lime Co., defendant, State Bank of Chicago

and William C. Miller, as trustees, intervenors, vs. Universal Gypsum & Lime Co., defendant, Equity number 9090, and and not individually, and Eugene Holland as receiver for the said Universal Gypsum & Lime Co. by appointment in any other United States District Court in proceedings now pending similar to the proceedings above described, and not individually, parties of the second part, and Universal Gypsum & Lime Co., a Delaware corporation of Chicago, Illinois, party of the third part, witnesseth, that:

Whereas, the first party is the owner of certain letters patent and applications for letters patent of the United States covering an improved gypsum wallboard and method or process of making the same, together with machines and appliances for the manufacture of such inventions, all as more specifically set forth in Exhibit A attached hereto and made a part hereof; and

Whereas, first party was the owner of all of the right, title and interest in and under letters patent of the
9293 United States number 1,029,328 and number 1,034,-746, known as the Utzman patents, the last of which expired August 6, 1929, which said Utzman patents were adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; 15 Fed. (2d) 704; see also 263 U. S. 713) and said courts decreed that said Utzman patents were valid and were infringed by the defendants named in said suits by reason of their making, using and selling plasterboard or gypsum wallboard having protected edges, and said District Court ordered perpetual injunctions and accountings against said defendants; and

Whereas, said Birdsey patent number 1,358,508 mentioned in said Exhibit A has been adjudicated by the United States District Court for the Northern District of Ohio, in Equity Case number 1621, and said court has decreed that said Birdsey patent is valid and was infringed by the defendant in said cause by reason of its making, using and selling plasterboard and/or gypsum wallboard having edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against the said defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit; and

Whereas, first party asserted a substantial claim against third party for damages and profits because and on account of an alleged infringement of said patents; and first party agreed to grant a license to third party under said Utzman patents and said patents described in said Exhibit A to February 10, 1937, and to settle the said claim in consideration of the payment by third party to first party of
9294 a certain payment plus five per cent (5%) of third party's selling price and all plasterboard and/or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent (1½%) of such selling price from August 6, 1929, to February 10, 1937; and

Whereas, the first party is the owner of all rights in and to an application for United States letters patent filed by Carlisle K. Roos, entitled "Cementitious Material," now pending in the United States Patent Office and covering the process of making a cellular product by forming a tenacious foam and mixing the foam with a cementitious material, and has heretofore acquired the sole and exclusive right in the United States of America (when gypsum is used as the main binding material) in that certain application for United States letters patent filed by Erik Christian Bayer, entitled "Methods of Manufacturing Porous Building Materials" and relating to a process broadly similar to that of said Roos application, which said applications with certain other Roos applications are set forth in Exhibit B hereto attached and made a part hereof, and which are all hereinafter referred to as said Roos and/or Bayer applications; and

Whereas, the second and third parties desire to acquire a license under said Roos and Bayer applications, and to obtain a license from first party to make, use and sell the inventions and improvements set forth and claimed in all of said patents and applications for letters patent described in said Exhibit A throughout the full term thereof; and

Whereas, the second and third parties are the owners of the entire right, title and interest in and to letters patent of the United States and the inventions and improvements described therein, as follows: Joseph F. Haggerty
9295 number 1,500,452, dated July 8, 1924, for plasterwall board, and Charles E. Hite number 1,230,297, dated June 19, 1917 for heat-insulating material and method of making the same, subject to an outstanding license to the

California Cedar Products Company under said Haggerty patent; and

Whereas, second and third parties claim that in the process of manufacturing plasterboard and gypsum wallboard; as heretofore practiced by it, first party, by the use of a carbohydrate or starchy substance, has infringed the claims of the said Haggerty and Hite patents, especially by the use of carbohydrates in the manufacture of plasterboard and gypsum wallboard, the core of which is made according to the claims and improvements set forth and claimed in said Roos and Bayer applications; and

Whereas, the parties hereto have agreed to settle and adjust all of said claims, including any claim which second parties or said third party may have against first party for infringment of said Haggerty and Hite patents, and as a part of said settlement said second parties have agreed to sell, assign, transfer and convey to first party the entire right, title and interest in and to said inventions, improvements and said letters patent known as the Haggerty and Hite patents as aforesaid, and first party has agreed to give to second and third parties a license to manufacture, use and sell the inventions and improvements set forth and claimed in said Roos and Bayer applications in the manufacture of gypsum plasterboard and/or gypsum wallboard, upon the terms and conditions hereinafter stated; and

Whereas, the United States District Court for the Northern District of Illinois, Eastern Division, by an order entered in said cause, Equity number 9090, and said
9296 other United States District Courts by orders entered therein in said receivership proceedings, have authorized the execution of this contract by said second and third parties.

Now, therefore, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, receipt whereof is hereby acknowledged by each party from the other party, and of the mutual covenants and agreements hereinafter contained, the parties hereto do hereby agree as follows, to-wit:

1. Second and third parties have agreed to and do hereby sell, assign and set over unto first party, its successors and assigns, the entire right, title and interest for the United States of America, its territories and possessions, in and to the inventions and improvements set forth and claimed in

said Haggerty patent number 1,500,452 and said Hite patent number 1,230,297 and in and to said letters patent together with any and all reissues and extensions of said letters patent, subject only to an outstanding license dated May 28, 1926, to California Cedar Products Company under said Haggerty patent upon the terms and conditions as in said license contained. The execution and delivery of this agreement shall in itself constitute the consideration for the sale and assignment of said patents to first party and nothing done or omitted to be done hereunder or in connection with any of the agreements herein contained shall affect the title of first party in or to said patents, but the same shall forever remain the absolute property of first party.

First party, in consideration of the sale and assignment of said Haggerty and Hite patents to it does hereby agree to grant unto second and third parties a license as 9297 hereinafter set forth under said Roos and Bayer applications described in said Exhibit B and any patent which may be issued for or upon said inventions or applications, and to pay to second and third parties upon the execution hereof the sum of Thirty Thousand Dollars ($30,000.00).

First party does hereby agree also to pay to second and third parties an amount equal to one per cent (1%) of the selling price, less five cents (5¢) per one thousand (1,000) square feet if in board form or the equivalent thereto in weight if in other form, of such plasterboard, gypsum wallboard and/or other gypsum products as may be manufactured and sold by those licensees which may at any time hold a license from first party, its successors or assigns, to use the inventions and improvements set forth and claimed in said Haggerty and/or Hite patents and in any reissues or extensions thereof and upon which board or other products the said licensees are obliged to pay royalties or license fees for the use of said patents to first party, except second and third parties or their assigns. First party shall, on or before the last day of each calendar month, pay to second and third parties the amount then due under this agreement for all such plasterboard, gypsum wallboard and/or such other gypsum products, manufactured and sold by said licensees during the next preceding calendar month. The said amount shall be computed and paid only upon those products of any such licensee upon which it is obligated under the terms of its license to pay to first party.

license fees or royalties for the use of said Haggerty and/or Hite patents and during the time such license fees or royalties are paid to first party. The price upon which said amount shall be computed shall be such licensee's delivered selling price less freight, trucking, or other
9298 transportation charges paid by the customer and regular cash discounts allowed by such licensee, but where sales are made to jobbers or manufacturers or other wholesale distributors then the price for this purpose shall be such licensee's regular dealer price on the date of sale less freight, trucking or other transportation charges, and discount as aforesaid. Adjustments made by first party for claims made by the customer shall be deducted from the aggregate amount of such selling price in making said computation. The delay of any licensee to report its production of such products with the prices at which they were sold or to pay its license fees or royalties to first party shall extend the time of payment by first party to the extent of the amount to be determined from such report until licensee shall have made its report or first party shall otherwise have obtained the information necessary to make such payment and such licensee shall have paid its license fees or royalties therefor to first party.

If for any reason any such licensee shall cease to be a licensee of first party under said Haggerty and Hite patents or shall cease to be liable to pay the stipulated royalties or license fees agreed to be paid by it for the use of said Haggerty and Hite patents, then in either of such events the output of such licensee shall not thereafter be included in computing the amount to be paid by first party as aforesaid. If all of the claims of said Haggerty and Hite patents shall be held by a court of last resort upon final appeal or review to be invalid, or if for any reason said licensees shall cease to be licensees of first party under said Haggerty and Hite patents or cease to be liable to pay the stipulated royalties or license fees agreed to be paid by them for the use of said Haggerty and Hite patents
9299 and no other licensee shall at any time thereafter be licensed by first party, its successors or assigns, under said Haggerty and/or Hite patents in the manufacture of plasterboard and gypsum wallboard or other gypsum products, then in any such event the obligation of first party to make said payments as aforesaid shall thereupon cease and determine.

Nothing herein contained shall be construed to affect the right of first party to cancel, terminate, change or alter any license agreement with any licensee for the use of said Haggerty or Hite patents or to exercise any right or privilege it may have under any such license agreement or to waive any of the provisions thereof. If first party voluntarily cancels or changes any such license so that the number of feet of plasterboard or gypsum wallboard (except that sold for export) upon which first party is obligated to pay second and third parties under this agreement is thereby reduced, then first party will make said payment to second and third parties upon its own sales and price of plasterboard or gypsum wallboard to the extent of any such reduction, the extent of such reduction to be determined by taking licensee's production and sales during the first six (6) months' period of such license agreement and applying the effect which such cancellation or change would have had upon the number of feet of board upon which first party was required to make said payments to second and third parties if such cancellation or change had existed during said six (6) months' period, and one-sixth of the number of feet of each kind of board making up said reduction shall constitute the number of feet of each kind of board upon which first party is to pay each month until the expiration of said Haggerty patent or such earlier date that first party would have been relieved from paying upon the licensee's production and sales if no such voluntary cancellation or change had occurred. This provision shall not apply to cancellation of any such license agreement because of default of such licensee or in the exercise of
9300 any right or privilege first party may have under said license.

Second and third parties shall have the right to examine any reports made by any licensee of first party under said Haggerty and/or Hite patents, as well as any audits of the books and records of such licensee made or caused to be made by first party.

Second and third parties by separate instrument of even date herewith have executed and delivered to first party an assignment selling, assigning and setting over unto first party, its successors and assigns, their entire right, title and interest for the United States of America, its territories and possessions, in and to said inventions and improvements set forth and claimed in said Haggerty and

Hite patents, and said letters patent, together with any and all reissues and extensions thereof.

First party does hereby agree to assume and pay the obligations of third party to pay to Charles E. Hite of Philadelphia, installments maturing after the date hereof, of One Hundred Dollars ($100) per week during the remainder of the first period of six (6) years, commencing October 27, 1923, and One Hundred Dollars ($100) per week for a further period of five (5) years commencing at the expiration of said first period, as provided in that certain contract dated October 27, 1923, and made between the said Hite and The Gypsolite Company for the sale of said Hite patent to the latter, and on the same date guaranteed by third party, which contract shall be assigned to first party as of the date hereof, together with all advantages and benefits arising thereunder subsequent to the date hereof, but such assignment shall not affect the rights of second and/or third parties in any patent issued on any invention of said Charles E. Hite, other than said patent num-
9301 ber 1,230,297, acquired by them prior hereto.

The second and third parties do hereby release and discharge the first party and its subsidiaries from all claims or demands, whether for damages or profits or for both damages and profits, which the second and/or third parties now have or claim to have against them or any of them for or on account of any infringement of the said Haggerty and/or Hite patents by the first party or any of its said subsidiaries prior to the date hereof. The second and third parties do hereby further release and discharge any person or company receiving a license from first party under said Haggerty and/or Hite patents, from all claims and demands, whether for damages or profits or for both damages and profits, which the second and/or third parties now have against them or any of them for or on account of any infringement of the said Haggerty and/or Hite patents prior to the date hereof. It is understood that this agreement is made for the personal benefit of any such other person or company receiving such a license and shall not apply to any assignee of such licensee.

2. First party agrees promptly to disclose to second and third parties all information and formulae which it now has or may obtain relating to the process of making a cellular product through the formation of a tenacious foam and mixing the foam with a cementitious material as set

forth and claimed in said applications for letters patent filed by Carlisle K. Roos and Erik Christian Bayer, in so far as the same is or may be applied to gypsum, and including all information and formulae for the manufacture of gypsum plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Roos and Bayer applications, together with a description of the machines or appliances which it now
9302 has for making the same. It will assist second and third parties to make their plants ready for making plasterboard and gypsum wallboard embodying said claims and for practicing said process in the manufacture of said board by furnishing without cost to second parties the advice and instruction of first party's experts and information with respect to the purchase and cost of said machines and appliances.

3. First party has agreed and does hereby give and grant unto second and third parties an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the inventions and improvements set forth and claimed in said Roos and Bayer applications for letters patent of the United States described in said Exhibit B and in any patent or patents granted for or upon any of said inventions or applications in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants now owned and operated by second or third parties in the United States of America and/or at the plants now owned and operated by any of the present subsidiaries of third party in the United States of America and/or at any plants which may be built by second or third parties in the United States of America on any land now owned, leased or controlled by second or third parties and/or any of said present subsidiaries and/or on any land hereafter acquired, owned, leased or controlled by second or third parties or said present subsidiaries in the vicinity of land now owned, leased or controlled by them and not acquired from one engaged in the business of manufacturing and selling gypsum products, and of manufacturing at said plants, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard and/or gypsum wallboard manufactured at said plants, the body or core of which
9303 is made in accordance with the process or processes set forth and claimed in said Roos and Bayer applications for letters patent, or in any patent or patents

granted for or upon any of said inventions or applications, until the last to expire of any patent which may be granted for or upon any of said Roos or Bayer applications, including any extension and/or reissue thereof. This license shall not include the right to manufacture gypsum plasterboard or gypsum wallboard embodying said Roos and/or Bayer process at any plant or factory purchased or acquired by second or third parties or by any such subsidiary from any other person or company subsequent to the date hereof, without the express written consent of first party.

4. The first party has agreed to and does hereby grant and give unto second and third parties an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the inventions and improvements set forth and claimed in said Haggerty patent number 1,500,452, and said Hite patent number 1,230,297, in the manufacture of gypsum plasterboard and/or gypsum wallboard, blocks, pipe covering and other products which may come within the scope of said patents at the plants now owned and operated by second or third parties in the United States of America and/or at the plants now owned and operated by any of the present subsidiaries of third party in the United States of America and/or at any plants which may be built by second or third parties in the United States of America on any land now owned, leased or controlled by second or third parties and/or any of said present subsidiaries, and/or on any land hereafter acquired, owned, leased or controlled by second or third parties or said present subsidiaries
9304 in the vicinity of land now owned, leased or controlled by them and not acquired from one engaged in the business of manufacturing and selling gypsum products, and of manufacturing at said plants, selling and using in the United States of America and the territories and possessions thereof, gypsum plasterboard and/or gypsum wallboard and said other products, embodying the inventions and improvements set forth and claimed in said Haggerty and/or Hite patents for the full term of the last to expire of said letters patent, including any extensions and/or reissues thereof. This license shall not include the right to manufacture gypsum plasterboard or gypsum wallboard or any of said other products embodying the said Haggerty and/or Hite inventions, at any plant or factory purchased or acquired by second or third parties or by any such subsidiary from any other person

or company subsequent to the date hereof, without the express written consent of first party.

5. First party has agreed to and does hereby give and grant unto second and third parties an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent described in said Exhibit A in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants or factories now owned and/or operated by second and third parties, or at any other plant or factory hereafter owned and/or operated or controlled by them or any subsidiary, associated or affiliated company of third party, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and possessions thereof, gypsum plasterboard and/or gypsum wallboard manufactured at any such place
9305 or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters patent described in said Exhibit A for the full term of said letters patent, or of any letters patent which may be granted for or upon any of said applications described in said Exhibit A, including any extensions and/or reissues thereof.

6. It is expressly understood and agreed that each and all of the indivisible and non-exclusive rights, licenses and privileges aforesaid are granted upon condition that the first party shall have, and it hereby reserves, the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said licenses shall continue, th minimum price or prices at which second and third parties shall sell any plasterboard or gypsum wallboard manufactured by second and third parties by the use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard, gypsum wallboard, blocks, pipe covering and/or other products manufactured by second and third parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos

or Bayer inventions and/or applications described in said Exhibit B, any of said plasterboard or gypsum wallboard manufactured by second and third parties, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said Roos or Bayer inventions and/or applications described in said Exhibit B; and in case first party shall exer-
9306 cise the rights so reserved, it shall first serve written notice of its intention so to do upon second and third parties, accompanied with a statement of the minimum price or prices at which second and third parties shall sell said gypsum plasterboard and/or gypsum wallboard or said other products, and thereafter shall give to second and third parties written or telegraphic notice of any change in such price or prices, and second and third parties expressly covenant and agree that they will, not, so long as this agreement shall continue in force and effect and after receipt of such notice, given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by them by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard, gypsum wallboard, blocks, pipe-covering and/or other products manufactured by second and third parties and which during the existence thereof shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297 or any gypsum plasterboard or gypsum wallboard manufactured by second and third parties after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications described in said Exhibit B and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said Roos or Bayer inventions and/or applications described in said Exhibit B, at a price or prices less than that stated by first party in said notice or in any such written or telegraphic notice of a change in such price or prices.

9307 Such minimum price shall not be more than that price at which first party determines to sell plasterboard or gypsum wallboard or said other products embody-

ing the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

7. Second and third parties agree to pay to first party in fulfillment of the obligation of third party to pay one and one-half per cent (1½%) of its said selling price from August 6, 1929, to February 10, 1937, as aforesaid, in settlement and discharge of the said claim of first party against said third party and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of gypsum plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and/or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent described in said Exhibit A, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to one and one-half per cent (1½%) of the selling price of second and third parties of all plaster board and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by second and third parties between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A.

It is understood that upon the issuance or granting of a patent for or upon any of the said Roos or
9308 Bayer applications described in said Exhibit B, then after the expiration from the date of the issuance of any such patent of a term equivalent to the present unexpired term of the last to expire of the said Haggerty and Hite patents, second and third parties, in addition to the foregoing royalties or license fees, will pay to first party for the right, license and privilege of thereafter using the process set forth and claimed in said Roos and Bayer applications and of any patent granted or issued for or upon said applications, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to one per cent (1%) of the selling price of second and third parties of all plasterboard and gypsum wallboard of every kind, whether or not embodying the inventions and improvements set forth and claimed in said Roos and Bayer applications, or any such patent issued for or upon the

same, manufactured and sold by second and third parties until the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications.

Second and third parties' "selling price" shall mean the delivered selling price of second and third parties, less freight paid by the customer and less regular cash discounts allowed by them to the customer.

8. It is further agreed that so long as the licenses provided for in paragraphs 3, 4 and 5 hereof shall remain in force between the parties hereto, or in case said licenses shall expire before the expiration of the patents specifically described in this paragraph and the said licenses shall have continued in force between the parties hereto for the full term hereof, then until the expiration of the patents specifically described in this paragraph, first party does hereby give and grant unto the second and third parties an in-
9309 divisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in those certain patents known as the Birdsey Plasterboard Bundle Patent number 1,696,877, dated December 25, 1928, Utzman patent number 1,724,740, dated August 13, 1929, Birdsey patent number 1,730,113 dated October 1, 1929, and applications for letters patent serial numbers 329,581 filed December 31, 1928, and 296,354 filed July 30, 1928, and any patent which may be granted for or upon said applications, including any extensions and/or reissues thereof, at the plants or factories now owned and/or operated by second and third parties or at any other plants or factories hereafter owned and/or operated or controlled by second and third parties, or any subsidiary, associated or affiliated company of said third party, and of selling or using bundles of plasterboard and/or gypsum wallboard put up or bundled by second and third parties at any such place or places, according to the claims set forth and claimed in said patents and applications for letters patent in this paragraph described, upon the terms and conditions hereinafter stated.

Second and third parties agree to pay to first party for the right, license and privilege of making, using or selling the inventions set forth and claimed in said patents and applications in the next preceding paragraph described, in addition to the sums hereinabove set forth, an amount (here-

inafter referred to as a license fee or royalty) equivalent to ten cents (10¢) per one thousand (1,000) square feet of plasterboard and/or gypsum wallboard which is sold by second and third parties in bundles of any kind, whether or not the bundles shall be made according to the claims set forth and claimed in said patents, which said license fee or royalty shall be payable at the times and in accordance with
9310 the terms of paragraph 10 hereof. The term "bundle" shall not include unbundled material wired or strapped for purposes of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates.

9. It is expressly understood and agreed that this contract and the licenses herein granted shall be personal to the second and third parties, and that the same or any right therein or hereunder shall not be sold, assigned or transferred without the written consent of first party or transferred by operation of law; Provided, However, that the same may be assigned by second and third parties to any company acquiring all of the assets and business or capital stock of third party or its plasterboard and wallboard business or its assets used in connection therewith, on condition that second and third parties shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of second and third parties under this agreement and to be bound by all of the terms and conditions thereof and shall deliver such agreement to first party. Second and third parties agree that in case of the sale of all of the assets and business or capital stock of third party or its plasterboard and wallboard business or its assets used in connection therewith, they will require the purchaser or purchasers thereof to assume in writing all the obligations of second and third parties hereunder and to agree to be bound by the terms and conditions hereof and deliver such agreement to first party. It is expressly understood, however, that if this agreement is assigned, as in this paragraph provided, the licenses granted in paragraphs 3 and 4 hereof and the rights extended under paragraph 22 hereof shall apply only to plants conveyed
9311 by second and third parties to such assignee and such plants as may be thereafter built by such assignee on land now owned, leased or controlled by second and/or third parties and not to any other plant or plants which such assignee may then have or build or acquire thereafter on

ground other than that now owned, leased or controlled by second and/or third parties. Second and third parties may, however, assign the right to receive the said sums agreed to be paid to them by first party hereunder separately, if desired, from the licenses herein granted, without the consent of first party.

10. Second and third parties agree to keep separate, full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by them, as well as a separate record of all plasterboard and/or gypsum wallboard sold by them in bundles, and agree that at any time when they are required to pay any of said royalties or license fees under any of the licenses granted hereunder, in accordance with the terms hereof, they will, on or before the 20th day of each calendar month, render unto first party true written returns, verified under oath by second and third parties or their duly authorized agent, setting forth the quantity of all plasterboard and/or gypsum wallboard manufactured and sold by them during the preceding calendar month, and/or the quantity thereof put up and sold by them in bundles, together with the price or prices at which the same was sold and is to be accounted for hereunder, such written returns to be delivered to first party at its office in Chicago, Illinois, and second and third parties agree to pay to first party, on or before the 20th day of each calendar month, at the office of first party at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may
9312 then be due under this agreement on account of all of said plasterboard and/or gypsum wallboard manufactured and sold by them and/or put up and sold by them in bundles during the next preceding calendar month.

11. First party, or its duly authorized representative, shall at any time during the term hereof when second and third parties are required to pay any of said royalties in accordance with the terms hereof, have the right at all reasonable times during business hours to inspect the books of account and records of second and third parties, referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by second and third parties and the quantity thereof put up and sold by them in bundles, and the price or prices at which the same was sold, and to make copies thereof and memo-

randa therefrom; Provided, However, that if at the time of any such examination second and third parties shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne one-half thereof by first party and one-half thereof by second and third parties. If the parties at any such time shall not agree upon the certified public accountant to make such examination, then first party shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other way connected with it. If second and third parties shall not accept any one of them, then first party shall have the right to make such examination itself.

12. Second and third parties agree that all plasterboard or gypsum wallboard manufactured and sold by them
9313 embodying the claims of any of said patents and/or applications for letters patent shall be distinctly marked with the word "patented" and/or "patent applied for," as the case may be, together with the numbers of any of said patents or applications specified by first party, the claims of which may be embodied in said plasterboard or gypsum wallboard, and in connection with said marking, second and third parties will further mark said board with the words "licensed under the above letters patent" and/or "licensed under pending applications for letters patent," as the case may be, which marking shall be plainly visible. Other products manufactured and sold by second or third parties protected under said Haggerty or Hite patents shall be similarly marked. Second and third parties further agree that all bundles put up and sold by them embodying the claims of said patents numbers 1,696,877, 1,724,740 and 1,730,113 and/or any of said applications serial numbers 329,581 and 296,354 shall be similarly marked, together with the numbers of said bundle patents and/or applications.

13. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that second and third parties may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in

straight cars or in mixed cars with other building material and who do not sell at retail) gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in any letters patent after the same shall have been issued or granted for or upon any of the said applications, and may, 9314 with the written consent of first party, manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to first party, as hereinbefore provided, shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor, and upon the regular selling price of second and third parties of such plasterboard or gypsum wallboard to their regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by second and third parties to such other manufacturer, jobber or wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give second and third parties the right to manufacture gypsum plasterboard or gypsum wallboard, embodying the inventions and improvements set forth and claimed in any of said letters patent or in any letters patent after the same shall have been granted for or upon any of said applications, for said other manufacturers or wholesale distributors and to sell the same, without the written consent of first party.

14. Second and third parties covenant and agree that all of said gypsum plasterboard and gypsum wallboard manufactured and sold by them embodying the inventions and improvements set forth and claimed in any of said letters patent or patents issued upon any of said applications and commonly known in the trade as "seconds" shall be plainly invoiced as "seconds" and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least 9315 three (3) inches in height.

15. As one of the considerations for the indivisible and non-exclusive licenses herein and hereby granted, second and third parties hereby acknowledge the validity of said letters patent or of any letters patent which may be granted or issued for or upon said applications, forming

the subject-matter of said licenses, so long as said licenses shall remain in full force and effect, and agree that they will not at any time during the existence of said licenses, directly or indirectly, by themselves, through or together with another or others, contest the validity of any of said letters patent or the title thereto of first party. This paragraph shall apply only to plasterboard and/or gypsum wallboard in so far as all of said patents or patents issued upon any of said applications are concerned, except said Haggerty and Hite patents.

16. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate the licenses herein granted, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of service of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate the licenses herein granted by notifying the party in default in writing of its election so to do, without the necessity of any court action; Provided, However, that neither party shall be relieved thereby from any liability accrued at the time of such termination, and Provided Further that if the party upon whom said notice is served shall deny that it is in default, in whole or in part, as specified therein, then the party serving such notice shall not be privileged to cancel said licenses on account of the alleged default specified therein, provided the party upon whom said notice shall have been served shall within said thirty (30) day period perform the agreements and submit the question to arbitration, as in this paragraph hereinafter set forth. In case of any such denial, the party upon whom the notice shall have been served shall within said thirty (30) day period state in writing to the other party wherein and in what respect it denies the default specified in said notice, and shall at the same time make good any default specified therein which it does not deny, and appoint in writing one person as arbiter to arbitrate the question of whether or not it is in default in respect to that which it shall have denied as aforesaid, it being understood, however, that if the question shall be with respect to the amount of royalties or license fees to be paid hereunder, then the

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second and third parties shall first pay or offer to pay the amount of such license fees or royalties which they then admit is due and payable in accordance with the terms hereof, and the acceptance thereof by the first party shall not operate as a waiver of any of its rights hereunder or any claim it may have made in any notice served by it upon second parties. The party so serving said notice shall, after the other party shall have made good any default specified in said notice which it did not deny in writing as aforesaid, including the payment of royalties or license fees, if any, admitted to be due and payable hereunder, and within ten (10) days from the date of the appointment of said first arbiter in accordance with the terms hereof, appoint in writing another person as arbiter, and the two persons so appointed shall within ten (10) days or as soon as possible thereafter appoint in writing a third person as ar-
9317 biter. The three persons so appointed shall, within thirty (30) days from the date of the appointment of said last mentioned arbiter, or as soon as possible thereafter, decide whether or not the party upon whom said notice has been served is in default hereunder with respect to anything contained in said notice. The decision of a majority of the three arbiters so appointed shall constitute a final settlement of the said question and be binding and conclusive upon the parties hereto, and if it shall have been determined by a majority of the said arbiters that the party upon whom said notice was served is in default with respect to anything contained in said notice, and the party so found to have been in default shall fail or refuse to comply with the terms of the award or finding made by said arbiters within thirty (30) days from the date such award or finding shall have been made, the party serving said notice may, at its election, terminate and cancel the said licenses in writing. In the event of default hereunder by either party, and notice of such default is served by the other party as herein provided, and after service of such notice the party in default shall cure the same as hereinbefore provided, the same shall constitute a nullification of said notice to the same effect as if said notice had not been served. In case this contract shall be assigned in accordance with the terms hereof or third party shall become substituted for second parties as hereinafter stated, then if any such assignee or said third party shall at any time be adjudged a bankrupt while holding said license, then all of said licenses shall immediately be and become cancelled and

terminated, but first party shall not thereby be prevented from collecting any license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as
9318 constituting a waiver of any further breach or breaches. Either party may proceed by action to specifically enforce this contract or any of the terms, conditions and covenants thereof by injunction or in such other manner as may be provided by law. The cancellation of said licenses for any reason whatsoever, shall not affect the title of first party in and to said Haggerty or Hite patents, and shall not affect the right of second and third parties to collect any sums due to them under the terms hereof.

17. Any notice to be given under the terms hereof may be served by either party hereto by mailing the same to the other party hereto, postage prepaid and registered, addressed to such party at its or their last known principal office. In case such notice is served upon first party or upon any corporation a party to this contract, then the same shall be addressed to an officer of first party or such other corporate party, as the case may be, directed to its last known principal office. The deposit of any such notice in the United States mails, postage prepaid, registered and so addressed, shall constitute service of notice hereunder.

18. It is understood and agreed that if at any time during the term hereof second and third parties shall, in the judgment of first party, suffer substantial detriment by reason of any infringement on the part of any person or persons of any of said letters patent or of any patent that may be granted upon said applications under which this license is granted, first party will afford second and third parties such reasonable protection as in the judgment of first party shall be necessary or proper.

The agreement to pay said royalties for said pat-
9319 ents described in Exhibit A is made in consideration of the settlement of said claim of first party against third party and the right and privilege which second and third parties have already exercised of using the said Utzman patents first above mentioned and for the right and privilege of using any and/or all of said patents described in said Exhibit A throughout the full term thereof. If a court of last resort upon final appeal or review, shall hold all claims of the patents granted for or upon said Roos and Bayer applications described in said Exhibit B invalid, or

second and/or third parties shall be permanently enjoined from manufacturing plasterboard and/or gypsum wallboard, the body or core of which is made according to the processes set forth and claimed in said Roos and Bayer applications, in such manner that they cannot practice in any way any of the inventions set forth in the said applications or patents issued thereupon, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review, shall decree all claims of said Roos and Bayer patents invalid or make said injunction permanent and final, second and third parties shall be relieved from the payment of said license fees or royalties amounting to one per cent (1%) of their said selling price agreed to be paid by them for the use of the process set forth and claimed in said Roos and Bayer applications described in said Exhibit B or any patent which may be issued therefor or thereupon commencing after the expiration of the said Haggerty and Hite patents as hereinbefore provided. If a court of last resort upon final appeal or review, shall decree all the claims of said patents mentioned in paragraph 8 hereof invalid or second and/or third parties shall be permanently enjoined from using the
9320 inventions of all of the claims of said patents described in said paragraph 8 so that they cannot practice in any way any of the inventions set forth therein, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree all said claims invalid or make said injunction permanent and final, second and third parties shall be relieved from the payment of the royalties or license fees agreed to be paid therefor as set forth in said paragraph 8 hereof.

19. In case first party shall at any time subsequent to the date hereof grant to any other person any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 8 hereof for the manufacture, sale or use of gypsum wallboard embodying the claims or inventions set forth or claimed in said patents or said applications set forth in said Exhibit A and paragraph 8 hereof, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to second and third parties, then it will grant to second and third parties a license on the same terms, or extend to them

the same right granted to any such other person. This paragraph shall also apply to any license for the manufacture of plasterboard or gypsum wallboard under any patent issued for or upon said Roos and Bayer applications described in Exhibit B during the period second and third parties are required to pay license fees or royalties therefor to first party.

20. The terms "gypsum plasterboard," "gypsum wallboard" and "plasterboard" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same
9321 may be sold or used, and shall include gypsum laths and all other gypsum boards.

21. If there shall have been invented or come into use any process which shall make the said process of forming a cellular product as set forth and claimed in said Roos and Bayer applications described in said Exhibit B obsolete or shall displace the same, and first party shall in its own manufacture permanently and wholly abandon the use of the subject-matter of the claims of said Roos and Bayer applications, it shall notify second and third parties in writing thereof and second and third parties may, upon thirty (30) days' written notice to first party after they shall have become required to pay to first party license fees or royalties in accordance with the terms hereof for the use of said Roos and Bayer applications or patents, cancel and terminate this license in so far as the same applies to said Roos and Bayer applications or to any patent or patents granted or issued therefor or thereupon, and from the date of such cancellation the royalties or license fees to be paid by second and third parties hereunder for the use of said Roos and Bayer applications or patents shall cease and determine; Provided, However, that if first party shall not in such event permanently and wholly abandon the use of said process, but shall only partially abandon the same, then to the extent or degree and for the term that first party shall abandon the same in its own manufacture second and third parties shall be relieved from the payment of license fees or royalties during the time they are required to pay the same in accordance with the terms hereof to the same extent, that is to say, if the first party shall in such
9322 event manufacture and sell any board, the core of which is made of gypsum of a particular size, kind

or make or for a particular purpose or use, without the use of said process embodied therein, then if second and third parties shall manufacture and sell the same board of the same particular size, kind or make and for the same purpose or use without the use of said process embodied therein, then second and third parties shall not be required to pay royalties or license fees upon such particular board for the term that first party shall manufacture and sell the same. The use by first party of any improvement which second and third parties have the right to use, as set forth in paragraph 22 hereof, or the manufacture of plasterboard or gypsum wallboard without the use of said process for sale only in foreign countries where first party has no patented rights in said process shall not constitute an abandonment of said process or a partial abandonment thereof within the meaning of this paragraph.

22. If first parties shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubble described in the process set forth in said Roos and Bayer applications and/or method of its introduction in the core of plasterboard or gypsum wallboard, and which improvement is covered by the claims of said Roos and/or Bayer applications, and shall itself use the same in its own manufacture, then if second and third parties shall pay the license fees or royalties hereinbefore stipulated during the time they are required to pay the same, the right, license or privilege contained in paragraph 3 hereof shall be extended to and include the use of said improvement in the manufacture by second and third
9323 parties of gypsum plasterboard or gypsum wallboard at the plants described in said paragraph 3, subject to all of the terms and conditions herein contained, except only that second and third parties shall not be required to pay any additional sum, royalty or license fee therefor. It is further understood that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement, as well as the provisions hereof reserving the right in first party to determine and fix at any time and to change from time to time the minimum price or prices at which second and third parties shall sell any gypsum plasterboard or gypsum wallboard manufactured by second and third parties and embodying the claims

of said patents, shall apply to the improvement set forth and claimed in any patent or patents granted or issued for or upon said improvement. First party will promptly notify second and third parties of the general adoption by it of any such improvement in its own manufacuture, together with such information as it may possess as to the use thereof in the manufacture of plasterboard and gypsum wallboard.

23. Second and third parties have investigated and fully satisfied themselves with respect to the inventions and improvements set forth in said patents and applications for letters patent, and the use thereof in their own manufacture, and have executed this agreement without relying upon any representations which may have been made by first party with respect thereto. No representations have been made by first party not expressly stated in this contract which second or third parties shall at any time have any right to rely upon as an inducement for making this contract or for any result or results to be obtained by
9324 second and third parties in their own plants by their use of the inventions and improvements set forth and claimed in any of said patents or applications for letters patent.

24. First party agrees at any time during the term hereof to extend to second and third parties upon their written request an indivisible and non-exclusive license or privilege to use said process or processes set forth and claimed in said Roos or Bayer applications described in said Exhibit B, in the manufacture in their said plants of any other gypsum product not specifically covered by this agreement and in which first party shall use the same in its own manufacture and to sell the same upon the payment to first party of one per cent (1%) of the selling price of second and third parties of all of said other gypsum product, whether or not embodying the said process in making the same, manufactured and sold by second and third parties, and upon the same terms as set forth herein and upon all of the conditions hereof, subject, however, to the requirement to pay said one per cent (1%) of said selling price, as in this paragraph mentioned, in which event in the agreement for the same there shall be substituted for said plasterboard and/or gypsum wallboard the name of such other product or products. An agreement containing all of said terms

and conditions shall be reduced to writing and signed by the parties hereto before the same shall become effective.

25. This contract shall from the date hereof supersede all prior license agreements at any time made between any of the parties hereto relating to the subject-matter hereof or any of the patents or applications for letters patent referred to in this agreement; Provided, However, that neither party shall be barred or prevented from recover-
9325 ing any claims which may have accrued under said prior license agreements prior to the date hereof, including all payments, royalties or license fees agreed to be paid thereunder up to the date of this agreement.

26. This agreement and all of the covenants and agreements herein contained shall be binding upon and inure to the benefit of the successors and assigns of the parties hereof, and second parties in their respective capacities as receivers or co-receivers in equity of third party by appointment of any United States District Court in proceedings now pending similar to proceedings just above described, but nothing in this paragraph contained shall be construed to permit an assignment hereof or any right hereunder by second and third parties except as hereinabove specifically provided. It is further understood that second and third parties shall be treated as one party and notice and payment to or by or other action taken by second parties during said receivership shall be regarded as notice and payment to or by or action taken by the second and third parties, and if the said receivers shall be discharged and the business and properties of third party delivered back to said third party, then this agreement together with all the terms and conditions hereof shall be binding upon and inure to the benefit of third party to the same effect as if second parties were not named as a party herein.

In witness whereof first party has hereunto caused these presents to be signed by its president, attested by its secretary and its corporate seal to be hereunto affixed, and second parties have signed, sealed and delivered
9326 these presents pursuant to said order of the United States District Court for the Northern District of Illinois, Eastern Division, in said cause and said orders in said other causes, and third party has caused these presents to be signed by its vice-president, attested by its secretary and its corporate seal to be hereunto affixed, pursuant to

said order of the United States District Court for the Northern District of Illinois, Eastern Division, in said cause and said orders in said other causes; all done in triplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY,

By S. L. AVERY,
Its President.

ATTEST:

R. G. BEAR
Secretary.

[*SEAL*]

EUGENE HOLLAND,
ABEL DAVIS,
As Receivers in Equity for Universal Gypsum & Lime Co., and not individually.

UNIVERSAL GYPSUM & LIME CO.

By OLIVER MITCHELL,
Its Vice-President.

ATTEST:

FRANK G. KRUMHOLZ
Secretary.

[*SEAL*]

9327 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

9328 Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial No. 565,737, reissued January 24, 1928 as Reissue patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial No. 567,205, reissued May 22, 1928 as Reissue Patent No. 16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

9329 Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,676, filed October 10, 1921, granted November 29, 1927, expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,672, filed April 19, 1922, granted April 30, 1929, expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662,359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1,631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927, expires May 31, 1944.

Brookby & Absmeier patent No. 1,689,322. Application Serial No. 91,297, filed March 1, 1926, granted October 30, 1928, expires Oct. 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.

Utzman patent No. 1,638,280. Application Serial No. 374,833, filed April 19, 1920, granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927, expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No. 427,044, filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,045, filed November 29, 1920, granted September 6, 1927, expires September 6, 1944.

Mehlhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926, expires October 26, 1943.

9330 Gustafson patent No. 1,665,168. Application Serial No. 509,366, filed December 2, 1919, renewed October 21, 1921 granted April 3, 1928, expires April 3, 1945.

Kohler, et al patent No. 1,673,944. Application Serial No. 540,412, filed March 2, 1922, granted June 19, 1928, expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey Patent No. 1,718,890. Application Serial No. 583,795, filed August 23, 1922, granted June 25, 1929, expires June 25, 1946.

Utzman application Serial No. 477,371, filed June 14, 1921, finally allowed April 26, 1929. Patent No. 1,731,116 will issue October 8, 1929.

Knode application Serial No. 590,358. Filed September 25, 1922.

Utzman application Serial No. 581,361. Filed August 12, 1922.

Williams application Serial No. 582,606. Filed August 18, 1922.

9331 EXHIBIT "B"

**Roos application Serial No. 733,197, filed August 20, 1924.

Bayer application Serial No. 661,723, filed September 8, 1923.

**Roos application Serial No. 3477, filed January 19, 1925.

Roos application Serial No. 142,155, filed October 16, 1926.

** Both are prior applications to Roos patent #2079565 issued May 4, 1937 on application #35527 filed 6-8-1925 and renewed 2-18-1931.

9332 *Government's Exhibit No. 7*

LICENSE AGREEMENT

This Agreement made this 21st day of October, A.D. 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and Atlantic Gypsum Products Company a New Hampshire corporation, of Portsmouth, New Hampshire, hereinafter referred to as Licensee, Witnesseth, That

Whereas, Licensor is the owner of certain letters patent and applications for letters patent of the United States covering an improved gypsum wallboard and method or process of making the same, together with machines and appliances for the manufacture of such inventions which, with certain other patents, are more specifically set forth in Exhibit A attached hereto and made a part hereof; and

Whereas, Licensor was the owner of all of the right, title and interest in and under letters patent of the United States number 1,029,338 and number 1,034,746 known as the Utzman Patents, the last of which expired August 6, 1929, which said Utzman Patents were adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit, and were decreed by said courts as valid and having been infringed by the defendants named in said suits; and

Whereas, Birdsey Patent number 1,358,508, mentioned in said Exhibit A, was decreed by the United States District Court for the Northern District of Ohio as valid and infringed by the defendant in said cause by reason
9333 of its having made, used and sold plasterboard and/or gypsum wallboard with edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit; and

Whereas, Licensor is the owner of a new process disclosed in that certain application for United States letters patent filed by Carlisle K. Roos, entitled "Cementitious Material," now pending in the United States Patent Office

and covering the process of making a cellular product, which comprises forming a tenacious foam and mixing the foam with cementitious material, and of certain other applications filed by said Roos covering specific employment of said invention, and Licensor has heretofore acquired the sole and exclusive rights in the United States of America (when gypsum is used as the main binding material) in that certain application for United States letters patent described in Exhibit A filed by Erik Christian Bayer, entitled "Methods of Manufacturing Porous Building Materials," and relating to a process broadly similar to that of said first mentioned Roos application, which said Roos and Bayer applications are described and set forth in said Exhibit A; and

Whereas, Licensor has agreed to purchase that certain Haggerty Patent number 1,500,452, dated July 8, 1924, and that certain Hite Patent number 1,230,297, dated June 19, 1917, both mentioned in said Exhibit A, subject to approval of the United States District Court for the Northern District of Illinois, Eastern Division thereof, and other
9334 United States district courts in receivership proceedings therein pending against the present owner of said patents; and

Whereas, gypsum wallboard or plasterboard manufactured by Licensee is made by the use of the machines or according to the processes or embodying the claims of some or all of said patents and applications for letters patent set forth in said Exhibit A, and Licensee desires to include in its manufacture the inventions and improvements set forth and claimed in said Roos and Bayer applications and said Haggerty and Hite patents, and to obtain a license from Licensor to make, use and sell the inventions and improvements set forth and claimed in all of said patents and applications for letters patent set forth in said Exhibit A throughout the full term thereof; and

Whereas, Licensor has agreed to grant said License and to make certain disclosures as to the said Roos and Bayer applications referred to in said Exhibit A, upon the terms and conditions hereinafter stated;

Now, Therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged from each party

to the other party, and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto do hereby agree as follows, to-wit:

1. Licensor agrees promptly to disclose to Licensee all information and formulae which it now has or may obtain relating to the process of making a cellular product through the formation of a tenacious foam and mixing the foam with a cementitious material, as set forth and claimed in said applications for letters patent filed by Carlisle K. Roos and Erik Christian Bayer, in so far as the same
9335 is or may be applied to gypsum, and including all information and formulae for the manufacture of gypsum plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Roos and Bayer applications, together with a description of the machines or appliances which it now has for making the same. It will assist Licencee to make its plant ready for practicing said process in the manufacture of plasterboard and gypsum wallboard by furnishing without cost to Licensee the advice and instruction of Licensor's experts and information with respect to the purchase and cost of said machines and appliances.

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters patent described in said Exhibit A, for
9336 the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum wallboard, and
9337 thereafter shall give Licensee written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by second parties and which during the existence thereof shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297,

or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

9338 3. Licensee agrees to pay to Licensor for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,452, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licenses of all such plasterboard and gypsum wallboard manufactured and sold by it between

July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; Provided, How-
9339 ever, that if no patent shall have been granted or issued for or upon any of said Roos or Bayer applications covering said process referred to in paragraph 1 hereof, within two (2) years from the date hereof, then commencing with the end of said two (2) year period the said license fees or royalties agreed to be paid by Licensee shall be reduced by one per cent (1%) of Licensee's said selling price until such patents shall have been granted or issued for or upon any of said Roos and Bayer applications, at which time Licensee shall again commence to pay the full amount of said license fees or royalties until the date of the expiration of the last to expire of any such patent or patents. If at the time of the execution of this contract Licensee's plant shall not be equipped to practice the process set forth and claimed in said Roos or Bayer applications in the manufacture of plasterboard or gypsum wallboard, then Licensee shall pay as such license fees or royalties two and one-half per cent (2½%) of said selling price between the date hereof and January 1, 1930, or such earlier date as Licensee shall make its plant ready to practice said process in the manufacture of said board, and the payment of three and one-half per cent (3½%) of said selling price and said period of two (2) years in this paragraph mentioned shall commence on January 1, 1930, or such earlier date as Licensee shall have made its plant ready as aforesaid. The amount of one per cent (1%) of said selling price included in said royalties or license fees is the amount agreed to be paid by Licensee for the use of said Haggerty and Hite patents.

Licensee's selling price shall mean the delivered selling price of Licensee, less freight paid by the customer and less regular cash discounts allowed by Licensee.

4. It is further agreed that so long as the license provided for in paragraph 2 hereof shall remain in force
9340 between the parties hereto, or in case the license granted under paragaph 2 hereof shall expire before the expiration of the patents specifically described in this paragraph, and the said license granted under paragraph 2 shall continue in force between the parties hereto for the full term of the last to expire of any of said patents described in said Exhibit A, or of any patent or patents granted for or upon any application described in said

Exhibit A, then until the expiration of the patents specifically described in this paragraph, Licensor does hereby give and grant unto the Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in those certain patents known as the Birdsey Plasterboard Bundle Patent number 1,696,877, dated December 25, 1928, Utzman Patent number 1,724,740 dated August 13, 1929, Birdsey Patent number 1,730,113 dated October 1, 1929, and applications for letters patent serial numbers 329,581 filed December 31, 1928, and 296,354 filed July 30, 1928, and any patent which may be granted for or upon said applications, including any extensions and/or reissues thereof, at the plants or factories now owned or operated by Licensee or at any other plant or factory hereafter owned and/or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, and of selling or using bundles of plasterboard and/or gypsum wallboard put up or bundled by Licensee at any such place or places according to the claims set forth and claimed in the said patents and applications for letters patent in this paragraph described, upon the terms and conditions hereinafter stated.

Licensee agrees to pay to Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said patents and applications in the next preceding paragraph described, in addition to the sums hereinabove set forth, an amount (hereinafter referred to as a license fee or royalty) equivalent to ten cents (10¢) per one thousand (1,000) square feet of plasterboard and/or gypsum wallboard which is
9341 sold by Licensee in bundles of any kind, whether or not the bundles shall be made according to the claims set forth and claimed in said patents, which said license fee or royalty shall be payable at the times and in accordance with the terms of paragraph 6 hereof. The term "bundle" shall not include unbundled material wired or strapped for purpose of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates.

5. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; Provided,

However, that the same may be assigned by Licensee to any company acquiring all the assets and business or all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, and to agree to be bound by all of the terms and conditions of this contract, and deliver such agreement to Licensor.

6. Licensee agrees to keep separate full and accurate books of account and records showing the exact 9342 quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the twentieth day of each calendar month it will render unto Licensor true written returns verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and/or gypsum wallboard manufactured and sold by it during the preceding calendar month and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold and is to be accounted for hereunder, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all said plasterboard and/or gypsum wallboard manufactured and sold by it and put up and sold by it in bundles during the next preceding calendar month.

7. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it and the quantity thereof put up and sold by it

in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; Provided, However, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equal-
9343 ly by both parties. If the parties at any such time shall not agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing not directly or indirectly employed by it or in any other way connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

8. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents and/or applications for letters patent shall be distinctly marked with the word "Patented" and/or "Patent Applied For," as the case may be, together with the numbers of any of said patents or applications specified by Licensor, the claims of which may be embodied in said plasterboard or gypsum wallboard, and in connection with said marking Licensee will further mark said board with the words "Licensed Under The Above Letters Patent" and/or "Licensed Under Pending Applications for Letters Patent," as the case may be, which marking shall be plainly visible. Licensee further agrees that all bundles put up and sold by it embodying the claims of any of said patents numbers 1,696,877, 1,724,740 and 1,730,113 and/or any of said applications serial numbers 329,581 and 296,354 shall be similarly marked together with the numbers of said bundle patents and/or applications.

9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, It Is Understood And Agreed that Licensee may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight

cars or in mixed cars with other building material
9344 and who do not sell at retail) gypsum wallboard
or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in any letters patent after the same shall have been issued, granted for or upon any of the said applications and may with the written consent of first party manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent or in any letters patent after the same shall have been granted for or upon any of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

10. Licensee covenants and agrees that all of said gypsum plasterboard and gypsum wallboard manufactured and sold by it embodying the inventions and improvements set forth and claimed in any of said Letters patent or patents issued upon any of said applications and commonly
known in the trade as "Seconds" shall be plainly
9345 invoiced as "Seconds" and shall be plainly marked
with a visible red stamp or label firmly fixed on each of said boards showing the word "Seconds" in letters at least three inches in height.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of said letters patent or of any letters patent which may be granted or issued for or upon said applications, forming the subject-matter of said license so long as said license shall remain

in full force and effect, and agrees that it will not at any time during the existence of said license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said letters patent or the title thereto of Licensor.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action: Provided, However, that neither party shall be relieved thereby from any liability accrued at the time of such termination; and Provided Further, that if the party upon whom said notice is served shall deny that it is in default in whole or in part, as specified therein, then the party serving such notice shall not be privileged to cancel this contract on account of the alleged default specified
9346 therein, provided the party upon whom said notice shall have been served shall within said thirty (30) day period perform the agreements and submit the question to arbitration, as in this paragraph hereinafter set forth. In case of any such denial the party upon whom the notice shall have been served shall within said thirty (30) day period state in writing to the other party wherein and in what respect it denies the default specified in said notice and shall at the same time make good any default specified therein which it does not deny and appoint in writing one person as arbiter to arbitrate the question of whether or not it is in default in respect to that which it shall have denied as aforesaid, it being understood, however, that if the question shall be with respect to the amount of royalties or license fees to be paid hereunder, then the Licensee shall first pay or offer to pay the amount of such license fees or royalties which it then admits is due and payable in accordance with the terms hereof, and the acceptance thereof by the Licensor shall not operate as a waiver of any of its rights hereunder or of any claim it may have made in any notice served by it upon Licensee.

The party so serving said notice shall, after the other party shall have made good any default specified in said notice which it did not deny in writing as aforesaid, including the payment of royalties or license fees, if any, admitted by it to be due and payable hereunder, and within ten (10) days from the date of the appointment of said first arbiter in accordance with the terms hereof, appoint in writing another person as arbiter, and the two persons so appointed shall within ten (10) days or as soon as possible thereafter appoint in writing a third person as arbiter. The three persons so appointed shall, within thirty (30) days from the date of the appointment of said last mentioned arbiter, or as soon as possible thereafter, decide whether or not the party upon whom said notice
9347 has been served is in default hereunder with respect to anything contained in said notice. The decision of a majority of the three arbiters so appointed shall constitute a final settlement of the said question and be binding and conclusive upon both the Licensor and the Licensee, and if it shall have been determined by a majority of the said arbiters that the party upon whom said notice was served is in default with respect to anything contained in said notice and the party so found to have been in default shall fail or refuse to comply with the terms of the award or finding made by said arbiters within thirty (30) days from the date such award or finding shall have been made, the party serving said notice may at its election terminate and cancel this agreement in writing. In the event of default hereunder by either party and notice of such default is served by the other party as herein provided, and after service of such notice the party in default shall cure the same as hereinbefore provided the same shall constitute a nullification of said notice to the same effect as if said notice had not been served. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become canceled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may proceed by action to specifically enforce this contract or any of the terms, conditions and covenants thereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served by the Licensor or the Licensee by mailing the same to the other party hereto, postage prepaid and registered, addressed to any of its officers at its
9348 last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under paragraph 2 hereof shall be confirmed in writing in the ordinary course of business.

14. It Is Understood And Agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement on the part of any person or persons of any of said letters patent or of any patent that may be granted upon said applications, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper.

If a court of last resort upon final appeal or review shall decree all the claims of the patents granted for or upon said Roos and Bayer applications invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard, the body or core of which is made according to the process set forth and claimed in said Roos and Bayer applications in such manner that they cannot practice in any way any of the inventions set forth in the said applications, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree that all the claims of the patents granted or issued for or upon said Roos and Bayer applications are invalid, or make such injunction permanent and final, the license fees or royalties to be paid by Licensee hereunder shall be reduced by one per cent (1%) of said selling price, or if a court of last resort upon final appeal or review shall decree that all the claims of said Haggerty and
9349 Hite patents are invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Haggerty and Hite patents in such manner that they cannot practice in any way any of the inventions set forth in said patents, and such injunction shall be made final by a court of last

resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree all claims of said Haggerty and Hite patents invalid or make said injunction permanent and final, the said license fees or royalties agreed to be paid by Licensee for said Haggerty and Hite patents shall cease and determine.

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

16. The terms "gypsum plasterboard," "gypsum
9350 wallboard" and "plasterboard" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

17. If at any time after the expiration of two (2) years from January 1, 1930, or such earlier date that Licensee shall make its plant ready to practice the process set forth and claimed in said Roos and Bayer applications in the manufacture of gypsum wallboard or plasterboard, there shall have been invented or come into use any process which shall make the said process of forming a cellular product as set forth and claimed in said Roos and Baver applications obsolete or shall displace the same, and the Licensor shall in its own manufacture permanently and wholly abandon the use of the subject-matter of the claims of said Roos

and Bayer applications, it shall notify Licensee in writing thereof, and Licensee may then, upon thirty (30) days' written notice to Licensor, cancel and terminate this license in so far as the same applies to said Roos and Bayer applications or to the patent or patents granted or issued therefor or thereupon, and from the date of such cancellation the royalties or license fees to be paid by Licensee hereunder shall be reduced by one per cent (1%) of its said selling price; Provided, However, that if Licensor shall not in such event permanently and wholly abandon the use of said process but shall only partially abandon the same, then to the extent or degree and for the term that Licensor shall abandon the same in its own manufacture Licensee shall be relieved from the payment of license fees or royalties to the same extent, that is to say, if Licensor shall in such event manufacture and sell any board the core of which is made of gypsum of
9351 a particular size, kind or make, or for a particular purpose or use, without the use of said process embodied therein, then if Licensee shall manufacture and sell the same board of the same particular size, kind or make and for the same purpose or use, without the use of said process embodied therein, then Licensee shall not be required to pay royalties or license fees upon such particular board for the term that Licensor shall manufacture and sell the same. "License fees" and "royalties" for the purpose of this paragraph shall mean one per cent (1%) of said selling price. The use by Licensor of any improvement which Licensee has the right to use as set forth in paragraph 18 hereof, or the manufacture of plasterboard or gypsum wallboard without the use of said process for sale only in foreign countries where Licensor has no patented rights in said process, shall not constitute an abandonment of said process or a partial abandonment thereof within the meaning of this paragraph.

18. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubble described in the process set forth in said Roos and Bayer applications and/or method of its introduction in the core of plasterboard or gypsum wallboard, and which improvement is covered by the claims of said Roos and Bayer applications, and shall itself use the same in its own manufacture, then so long as Licensee shall continue to pay the license fees or royalties herein-

before stipulated the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum plasterboard or gypsum wallboard, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional sum, royalty or license fee therefor. It is further under-
9352 stood that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement, as well as the provision of paragraph 2 hereof reserving the right in Licensor to determine and fix at any time and to change from time to time the minimum price or prices at which Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the claims of said patents, shall apply to the improvement set forth and claimed in any patent or patents granted or issued for or upon said improvement. Licensor will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of plasterboard and gypsum wallboard.

19. Licensee has investigated and fully satisfied itself with respect to the inventions and improvements set forth in said patents and applications for letters patent and the use thereof in its own manufacture, and has executed this agreement without relying upon any representations which may have been made by Licensor with respect thereto. No representations have been made by Licensor not expressly stated in this contract which Licensee shall at any time have any right to rely upon as an inducement for its making this contract or for any result or results to be obtained by Licensee in its own plant by its use of the inventions and improvements set forth and claimed in any of said patents or applications for letters patent.

20. The Licensor agrees at any time during the term hereof to extend to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the said process or processes set forth and claimed in said Roos or Bayer applications in the manufacture in its said plants of any other gypsum product not specifically covered by this agreement and in which Li-
9353 censor shall use the same in its own manufacture and to sell the same, upon the payment to Licensor of

one per cent (1%) of the selling price of Licensee of all of said other gypsum product, whether or not embodying the said process in making the same, manufactured and sold by Licensee and upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the words "plasterboard and/or gypsum wallboard" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

21. From the date this contract shall become effective the same shall supersede all prior license agreements at any time made between the parties hereto relating to the subject-matter hereof or relating to any of the patents or applications for letters patent referred to in this agreement; Provided, However, that Licensor shall not be barred or prevented from recovering any claim which may have accrued under any such prior license agreements prior to the time this contract shall become effective, including all payments, royalties or license fees agreed to be paid thereunder by Licensee up to the date this agreement shall go into effect.

22. This license and all of the covenants and agreements hereof shall become effective upon the date Licensor shall receive a conveyance and assignment of said Haggerty and Hite patents to it, pursuant to authority granted by the United States District Court to the receivers of the Universal Gypsum & Lime Co., a Delaware corporation, and to said company, to sell and assign said Haggerty and Hite patents to Licensor, and from the effective date thereof this license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit
9354 of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by Licensee, except as hereinabove specifically provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY,

By S. L. AVERY,

Its President.

ATTEST:

R. G. BEAR,

Secretary.

ATLANTIC GYPSUM PRODUCTS COMPANY,

By WILLARD P. FULLER,

Its Treasurer.

ATTEST:

HUGH CHANNING,

Secretary.

9355 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

9356 Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial No. 565,737, reissued January 24, 1928 as Reissue patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1,

1938; application for reissue filed June 9, 1922, Serial No. 567,205, reissued May 22, 1928 as Reissue Patent No. 16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

9357 Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,676, filed October 10, 1921, granted November 29, 1927, expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,627, filed April 19, 1922, granted April 30, 1929, expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662,359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1,631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927, expires May 31, 1944.

Brookby & Absmeier patent No. 1,689,322. Application Serial No. 91,297, filed March 1, 1926, granted October 30, 1928, expires Oct. 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.

Utzman patent No. 1,638,280. Application Serial No. 374,833, filed April 19, 1920, granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927, expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No. 427,044, filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,045, filed November 29, 1920, granted September 6, 1927, expires September 6, 1944.

Mehlhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926, expires October 26, 1943.

9358 Gustafson patent No. 1,665,168. Application Serial No. 509,366, filed December 2, 1919, renewed October 21, 1921, granted April 3, 1928, expires April 3, 1945.

Kohler, et al. patent No. 1,673,944. Application Serial No. 640,412, filed March 2, 1922, granted June 19, 1928, expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey Patent No. 1,718,890. Application Serial No. 583,795, filed August 23, 1922, granted June 25, 1929, expires June 25, 1946.

Utzman application Serial No. 477,371, filed June 14, 1921, finally allowed April 26, 1929. Patent No. 1,731,116 will issue October 8, 1929.

Knode application Serial No. 590,358. Filed September 25, 1922.

Utzman application Serial No. 581,361. Filed August 12, 1922.

Williams application Serial No. 582,606. Filed August 18, 1922.

*Roos application Serial No. 733,197, filed August 20, 1924.

Bayer application Serial No. 661,723, filed September 8, 1923.

*Roos application Serial No. 3477, filed January 19, 1925.

Roos application Serial No. 142,155, filed October 16, 1926.

Haggerty patent No. 1,500,452. Application Serial No. 565,433, filed June 2, 1922, granted July 8, 1924.

Hite patent No. 1,230,397. Application Serial No. 115,649, filed August 18, 1916, granted June 19, 1917.

9359 November 5, 1929.

ATLANTIC GYPSUM PRODUCTS COMPANY,
40 Central Street,
Boston, Massachusetts.

Attention: Mr. Willard P. Fuller

DEAR SIRS: This is to advise you that the Federal Courts in the Universal Gypsum & Lime Co. receiverships entered orders approving the contract with United States Gypsum Company. We have this day received the conveyance and assignment of the Haggerty and Hite patents to us pursuant to authority granted by the United States District Court for the Northern District of Illinois, Eastern Division, and the other Federal District Courts in which receivership proceedings are pending, to the receivers of the Universal Gypsum & Lime Co. and said Company to sell and assign said Haggerty and Hite patents to us. Your license agreement dated October 21, 1929, therefore becomes effective on this date. In the future all royalties for our patents will be collected in accordance with the terms of the license agreement of October 21, 1929.

Yours very truly,

UNITED STATES GYPSUM COMPANY,

——— ———, *Secretary.*

*. Both are prior applications to Roos patent #2,079,565 issued May 4, 1937 on application #35527 filed 6-8-1925 and renewed 2-18-1931.

9360 ATLANTIC GYPSUM PRODUCTS COMPANY
40 Central Street
BOSTON, U. S. A.

NOVEMBER 9, 1929.

UNITED STATES GYPSUM COMPANY,
300 West Adams Street,
Chicago, Illinois.

Attention: Mr. R. G. Bear, Secretary.

GENTLEMEN: We wish to acknowledge receipt of your letter of November 5, advising us that the Federal Courts in the Universal Gypsum & Lime Cco. receiverships entered orders approving the contract with United States Gypsum Company and that having received the conveyance and assignment of the Haggerty and Hite patents, you have notified us that our license agreement, dated October 21, 1929, therefore becomes effective as of November 5, 1929.

We will compute all royalties under our license agreement in accordance with the terms of this agreement.

Very truly yours,

ATLANTIC GYPSUM PRODUCTS COMPANY,

By WILLARD P. FULLER,

Treasurer.

WPF:A

9361 *Government's Exhibit No. 8*

LICENSE AGREEMENT

This agreement made this 10th day of February, at 12:00 P. N. A. D. 1937, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as "Licensor", and S. M. Gloyd of Oklahoma City, Oklahoma, doing business as and in the name of Texas Cement Plaster Co., hereinafter referred to as "Licensee"; witnesseth, that

Whereas, Licensor is the owner of certain letters patent and applications for letters patent of the United States covering an improved gypsum wallboard and method or process of making the same, together with machines and appliances for the manufacture of such inventions which,

with certain other patents, are more specifically set forth in Exhibit A attached hereto and made a part hereof; and

Whereas, gypsum wallboard or plasterboard manufactured by Licensee is made by the use of the machines or according to the processes or embodying the claims of some or all of said patents and applications for letters patent set forth in said Exhibit A, and Licensee desires to obtain a license from Licensor to make, use and sell the inventions and improvements set forth and claimed in all of said patents and applications for letters patent set forth in said Exhibit A throughout the full term thereof; and

Whereas, Licensor has agreed to grant said license upon the terms and conditions hereinafter stated;

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged from each party to the other party, and in consideration of the mutual covenants and agreements hereinafter contained, the parties
9362 hereto do hereby agree as follows, to-wit:

1. Licensor agrees promptly to disclose to Licensee all information and formulae which it now has or may obtain relating to the process of making a cellular product through the formation of a tenacious foam and mixing the foam with a cementitious material, as set forth and claimed in Roos Letters Patent No. 2,017,022, in so far as the same is or may be applied to gypsum, and including all information and formulae for the manufacture of gypsum plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Roos patent together with a description of the machines or appliances which it now has for making the same. It will assist Licensee to make its plant ready for practicing said process in the manufacture of plasterboard and gypsum wallboard by furnishing without cost to Licensee the advice and instruction of Licensor's experts and information with respect to the purchase and cost of said machines and appliances.

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached

hereto in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by Licensee, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such
9363 place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters patent described in said Exhibit A, for the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents or patents which may be issued upon any of said applications and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent or letters patent which may be issued upon any of said applications and which shall embody the inventions and improvements set forth and claimed in any of said patents or letters patent which may be issued upon any of said applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied by a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum wallboard, and thereafter shall give to Licensee written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that Licensee will not, so long as this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said patents or patents which may
9364 be issued upon any of said applications and which shall embody the inventions and improvements set

forth and claimed in any of said patents or patents which may be issued upon any of said applications, at a price or prices less than that stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

3. Licensee agrees to pay to Licensor for said disclosures, information and assistance, the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to two per cent (2%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and July 8, 1941, the date of the expiration of patent number 1,500,452 mentioned in said Exhibit A, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by Licensee between July 8, 1941,
9365. and the date of the last to expire of said Roos patent number 2,017,022 and any patent or patents which may be issued upon said Roos applications mentioned in said Exhibit A. The amount of one per cent (1%) of said selling price included in said royalties or license fees is the amount agreed to be paid by Licensee for the use of said Haggerty patent.

Licensee's selling price shall mean the delivered selling price of Licensee, less freight paid by the customer and less regular cash discounts allowed by Licensee.

4. It is further agreed that so long as the license provided for in paragraph 2 hereof shall remain in force between the parties hereto, or in case the license granted under paragraph 2 hereof shall expire before the expiration of the patents specifically described in this paragraph, and the said license granted under paragraph 2 shall continue in force between the parties hereto for the full term of the last to expire of any of said patents described in said Exhibit A, or of any patent or patents granted for or upon any application described in said Exhibit A, then until the expiration of the patents specifically described in this paragraph, Licensor does hereby give and grant unto the Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in those certain patents known as the Birdsey Plasterboard Bundle Patent number 1,696,877, dated December 25, 1928, Utzman Patent number 1,724,740, dated August 13, 1929, Birdsey Patent number 1,730,113, dated October 1, 1929, and Birdsey Patent number 1,946,056, dated February 6, 1934, including any extensions and/or reissues thereof, at the plants or factories now owned or operated by Licensee or at any other plant or factory hereafter owned and/or operated and controlled by Licensee, and of selling or using
9366 bundles of plasterboard and/or gypsum wallboard put up or bundled by Licensee at any such place or places according to the claims set forth and claimed in the said patents and applications for letters patent in this paragraph described, upon the terms and conditions hereinafter stated.

Licensee agrees to pay to Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said patents and applications in the next preceding paragraph described, in addition to the sums hereinabove set forth an amount (hereinafter referred to as a license fee or royalty) equivalent to ten cents (10¢) per one thousand (1,000) square feet of plasterboard and/or gypsum wallboard which is sold by Licensee in bundles of any kind, whether or not the bundles shall be made according to the claims set forth and claimed in said patents, which said license fee or royalty shall be payable at the times and in accordance with the terms of paragraph 6 hereof. The term "bundle" shall not include unbundled material wired or strapped for purpose of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates.

5. It is express understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right therein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; provided, however, that the same may be assigned by Licensee to any company acquiring all of Licensee's plasterboard and wallboard assets and business, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell, 9367 transfer or convey all of Licensee's plasterboard and/or wallboard business, or the assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, and to agree to be bound by all of the terms and conditions of this contract, and deliver such agreement to Licensor.

6. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by Licensee, as well as a separate record of all plasterboard and/or gypsum wallboard sold by Licensee in bundles, and agrees that on or before the twentieth day of each calendar month Licensee will render unto Licensor true written returns verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and/or gypsum wallboard manufactured and sold by Licensee during the preceding calendar month and the quantity thereof put up and sold by Licensee in bundles, together with the price or prices at which the same was sold and is to be accounted for hereunder, such written returns to be delivered to Licensor at its office in Chicago, Illinois; and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all said plasterboard and/or gypsum wallboard manufactured and sold by Licensee and put up and sold by Licensee in bundles during the next preceding calendar month.

7. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business

hours, to inspect the books of account and records
9368 of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by Licensee and the quantity thereof put up and sold by Licensee in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; provided, however, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public account agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by both parties. If the parties at any such time shall not agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accounts of good standing not directly or indirectly employed by it or in any other way connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

8. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by Licensee embodying the claims of any of said patents and/or applications for letters patent or patents which may be issued thereupon, shall be distinctly marked with the word "Patented" and/or "Patent applied for," as the case may be, together with the numbers of any of said patents or applications specified by Licensor, the claims of which may be embodied in said plasterboard or gypsum wallboard, and in connection with said marking Licensee will further mark said board with the words "Licensed under the above letters patent" and/or "Licensed under pending applications for letters patent" as the case may be, which marking shall be plainly visible. Licensee further agrees that all bundles put
up and sold by Licensee embodying the claims of any
9369 of said patents numbers 1,696,877, 1,724,740, 1,730,113 and 1,946,056 shall be similarly marked together with the numbers of said bundle patents.

9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is

understood and agreed that Licensee may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail), at the prices so fixed by Licensor as aforesaid, gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent, and may, with the written consent of Licensor, manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; provided, however, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said
9370 letters patent or in any letters patent after the same shall have been granted for or upon any of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

10. Licensee covenants and agrees that all of said gypsum plasterboard and gypsum wallboard manufactured and sold by Licensee embodying the inventions and improvements set forth and claimed in any of said letters patent or patents issued upon any of said applications and commonly known in the trade as "seconds" shall be plainly invoiced as "seconds" and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of said letters patent or of any letters patent which may be granted or issued for

or upon said applications, forming the subject-matter of said license so long as said license shall remain in full force and effect, and agrees that Licensee will not at any time during the existence of said license, directly or indirectly, by himself, through or together with another or others, contest the validity of either or any of said letters patent or the title thereto of Licensor.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty
9371 (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; provided, however, that neither party shall be relieved thereby from any liability accrued at the time of such termination; and provided further, that if the party upon whom said notice is served shall deny that it is in default in whole or in part, as specified therein, then the party serving such notice shall not be privileged to cancel this contract on account of the alleged default specified therein, provided the party upon whom said notice shall have been served shall within said thirty (30) day period perform the agreements and submit the question to arbitration, as in this paragraph hereinafter set forth. In case of any such denial the party upon whom the notice shall have been served shall within said thirty (30) day period state in writing to the other party wherein and in what respect it denies the default specified in said notice and shall at the same time make good any default specified therein which it does not deny and appoint in writing one person as arbiter to arbitrate the question of whether or not it is in default in respect to that which it shall have denied as aforesaid, it being understood, however, that if the question shall be with respect to the amount of royalties or license fees to be paid hereunder, then the Licensee shall first pay or offer to pay the amount of such license fees or royalties which it then admits is due and payable in accordance with the terms hereof, and the acceptance thereof by the Licensor shall not operate

as a waiver of any of its rights hereunder or of any claim it may have made in any notice served by it upon Licensee. The party so serving said notice shall, after the other party shall have made good any default specified
9372 in said notice which it did not deny in writing as aforesaid, including the payment of royalties or license fees, if any, admitted by it to be due and payable hereunder, and within ten (10) days from the date of the appointment of said first arbiter in accordance with the terms hereof, appoint in writing another person as arbiter, and the two persons so appointed shall within ten (10) days or as soon as possible thereafter, appoint in writing a third person as arbiter. The three persons so appointed shall, within thirty (30) days from the date of the appointment of said last mentioned arbiter, or as soon as possible thereafter, decide whether or not the party upon whom said notice has been served is in default hereunder with respect to anything contained in said notice. The decision of a majority of the three arbiters so appointed shall constitute a final settlement of the said question and be binding and conclusive upon both the Licensor and the Licensee, and if it shall have been determined by a majority of the said arbiters that the party upon whom said notice was served is in default with respect to anything contained in said notice and the party so found to have been in default shall fail or refuse to comply with the terms of the award or finding made by said arbiters within thirty (30) days from the date such award or finding shall have been made, the party serving said notice may at its election terminate and cancel this agreement in writing. In the event of default hereunder by either party and notice of such default is served by the other party as herein provided, and after service of such notice the party in default shall cure the same as hereinbefore provided the same shall constitute a nullification of said notice to the same effect as if said notice had not been served.

In case at any time the Licensee shall be adjudged
9373 a bankrupt, then the license hereunder shall immediately be and become canceled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may proceed by action to specifically enforce this contract or

any of the terms, conditions and covenants thereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served by the Licensor or the Licensee by mailing the same to the other party hereto, postage prepaid and registered, addressed to any of its officers at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under paragraph 2 hereof shall be confirmed in writing in the ordinary course of business.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement on the part of any person or persons of any of said letters patent or of any patent that may be granted upon said applications, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper.

If a court of last resort upon final appeal or review shall decree invalid all the claims of said Roos patent No. 2,017,022 and patents issued upon said Roos applications, or Licensee shall be permanently enjoined from 9374 manufacturing plasterboard and gypsum wallboard, the body or core of which is made according to the process set forth and claimed in said Roos patents in such manner that they cannot practice in any way any of the inventions set forth in the said Roos patents, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree that all the claims of said Roos patents are invalid, or make such injunction permanent and final, the license fees or royalties to be paid by Licensee hereunder shall be reduced by one per cent (1%) of said selling price, or if a court of last resort upon final appeal or review shall decree that all the claims of said Haggerty patent are invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Haggerty patent in such manner that they cannot practice in any way any of the inventions set forth

in said patents, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree all claims of said Haggerty patent invalid or make said injunction permanent and final, the said license fees or royalties agreed to be paid by Licensee for said Haggerty patent shall cease and determine. If, in accordance with the provisions of this paragraph, the royalties for said Roos patents and said Haggerty patent shall be reduced so that no further license fees or royalties are payable under paragraph 3 hereof, then this license agreement shall thereupon become canceled and terminated.

15. In case Licensor shall, subsequent to the date hereof, grant to any other person any license under said patents or applications for letters patent set forth in
9375 said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

16. The terms "gypsum plasterboard," "gypsum wallboard" and "plasterboard" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

17. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubble described in the process set forth in said Roos Patent No. 2,017,022 or method of its introduction in the core of plasterboard or gypsum wallboard, and which improvement is covered by the claims of said Roos patent, and shall itself use the same in its own manufac-

ture, then so long as Licensee shall continue to pay the license fees or royalties hereinbefore stipulated the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum plasterboard or gypsum wallboard, subject to all of the terms and conditions
9376 herein contained, except only that Licensee shall not be required to pay any additional sum, royalty or license fee therefor. It is further understood that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement, as well as the provision of paragraph 2 hereof reserving the right in Licensor to determine and fix at any time and to change from time to time the minimum price or prices at which Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the claims of said patents, shall apply to the improvement set forth and claimed in any patent or patents granted or issued for or upon said improvement. Licensor will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of plasterboard and gypsum wallboard.

18. Licensee has investigated and fully satisfied himself with respect to the inventions and improvements set forth in said patents and applications for letters patent and the use thereof in his own manufacture, and has executed this agreement without relying upon any representations which may have been made by Licensor with respect thereto. No representations have been made by Licensor not expressly stated in this contract which Licensee shall at any time have any right to rely upon as an inducement for his making this contract or for any result or results to be obtained by Licensee in his own plant by his use of the inventions and improvements set forth and claimed in any of said patents or applications for letters patent.

9377 19. The Licensor agrees at any time during the term hereof to extend to Licensee, upon his written request, an indivisible and non-exclusive license or privilege to use the said process or processes set forth and claimed in said Roos Patent No. 2,017,022 in the manufacture in his said plants of any other gypsum product not specifical-

ly covered by this agreement and in which Licensor shall use the same in its own manufacture and to sell the same, upon the payment to Licensor of one per cent (1%) of the selling price of Licensee of all of said other gypsum product, whether or not embodying the said process in making the same, manufactured and sold by Licensee and upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the words "plasterboard and/or gypsum wallboard" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

20. From the date this contract shall become effective the same shall supersede all prior license agreements at any time made between the parties hereto relating to the subject matter hereof or relating to any of the patents or applications for letters patent referred to in this agreement.

21. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the Licensor, and the heirs, administrators, executors and assigns of the Licensee, but nothing in this paragraph shall be con-
9378 strued to permit an assignment hereof by Licensee, except as hereinabove specifically provided.

In witness whereof the Licensor has caused these presents to be signed by its president, attested by its secretary, and its corporate seal hereunto affixed, and the Licensee has signed and sealed these presents, all the day and year first above written.

UNITED STATES GYPSUM COMPANY,

[SEAL] By O. M. KNODE, *President.*

ATTEST

C. H. HAVER, *Secretary.*

[SEAL]

S. M. GLOYD,
doing business as and in the name of
TEXAS CEMENT PLASTER CO.

WITNESS:

9379 EXHIBIT A.

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

9381 Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937, application for reissue filed June 3, 1922, Serial No. 565,737, reissued January 24, 1928, as Reissue patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial No. 567,205, reissued May 22, 1928, as Reissue Patent No. 16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed Feb-

ruary 24, 1920, granted December 6, 1921, expires December 6, 1938.

9382 · Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,676, filed October 10, 1921, granted November 29, 1927, expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,627, filed April 19, 1922, granted April 30, 1929, expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662,359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1,631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927, expires May 31, 1944.

Brookby & Absmeier patent No. 1,689,322. Application Serial No. 91,297, filed March 1, 1926, granted October 30, 1928, expires October 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.

Utzman patent No. 1,638,280. Application Serial No. 374,833, filed April 19, 1920 granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927, expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No.

427,044, filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,045, filed November 29, 1920, granted September 6, 1927, expires September 6, 1944.

Mehlhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926, expires October 26, 1943.

9383 Gustafson patent No. 1,665,168. Application Serial No. 509,366, filed December 2, 1919, renewed October 21, 1921, granted April 3, 1928, expires April 3, 1945.

Kohler et al patent No. 1,673,944. Application Serial No. 540,412, filed March 2, 1922, granted June 19, 1928, expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey patent No. 1,718,890. Application Serial No. 583,795, filed August 23, 1922, granted June 25, 1929, expires June 25, 1946.

Utzman application Serial No. 477,371, filed June 14, 1921, finally allowed April 26, 1929. Patent No. 1,731,116, will issue October 8, 1929.

Knode patent No. 1,754,429. Application Serial No. 590,358, filed September 25, 1922, granted April 15, 1930, expires April 15, 1947.

Utzman patent No. 1,824,245. Application Serial No. 581,361, filed August 12, 1922, granted September 22, 1931, expires September 22, 1948.

*Roos patent No. 2,017,022. Application Serial No. 733,197, filed August 20, 1924, granted October 8, 1935, expires October 8, 1952.

*Roos application Serial No. 3477, filed January 19, 1925.

Roos application Serial No. 142,155, filed October 16, 1926.

Haggerty patent No. 1,500,452. Application Serial No. 565,433, filed June 2, 1922, granted July 8, 1924, expires July 8, 1941.

9384 *Government's Exhibit No. 9*

LICENSE AGREEMENT

This agreement, executed in duplicate this 17th day of October, 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and National Gypsum Company, a Delaware corporation having its principal office at Buffalo, New York, hereinafter referred to as Licensee, witnesseth:

Whereas, Licensor is the owner of certain letters patent and applications for letters patent of the United States covering an improved gypsum wallboard and method or process of making the same, together with machines and appliances for the manufacture of such inventions, which with certain other patents are more specifically set forth in Exhibit A attached hereto and made a part hereof; and

Whereas, Licensor was the owner of all of the right, title and interest in and under Letters Patent of the United States, number 1,029,328 and number 1,034,746, known as the Utzman patents, the last of which expired August 6, 1929, which said Utzman Patents were adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit, and were decreed by said courts as valid and having been infringed by the defendants named in said suits; and

Whereas, the Birdsey Patent number 1,358,508, mentioned in said Exhibit A, was adjudicated by the United States District Court for the Northern District of Ohio, and said court decreed that said Birdsey Patent was
9385 valid and infringed by the defendant in said cause by reason of its having made, used and sold plasterboard and/or gypsum wallboard with edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit; and

Whereas, Licensor has a substantial claim against Licensee for damages and profits because and on account of an alleged infringement of said patents, and Licensor agreed to grant a license to Licensee under said patents

(not including the Roos or Bayer applications and the Haggerty or Hite patents referred to in said Exhibit A) to February 10, 1937, and to settle the said claim in consideration of the payment by the Licensee to Licensor of five per cent (5%) of Licensee's selling price of all plasterboard and/or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent (1½%) of such selling price from August 6, 1929, to February 10, 1937, plus three and one-half per cent (3½%) of such selling price from August 6, 1929, until said three and one-half per cent (3½%) of such selling price aggregated the fixed sum of One Hundred Seventy Eight Thousand Two Hundred Thirteen Dollars and Six Cents ($178,213.06); and

Whereas, Licensor is the owner of that certain application for United States letters patent filed by Carlisle K. Roos, entitled "Cementitious Material," now pending in the United States Patent Office and covering the process of making a cellular product, which comprises forming a tenacious foam and mixing the foam with a cementitious material, and of certain other applications filed by said Roos covering specific employment of said invention,
9386 and Licensor has heretofore acquired the able and exclusive rights in the United States of America (when gypsum is used as the main binding material) in that certain application for United States letters patent described in said Exhibit A filed by Erik Christian Bayer, entitled "Methods of Manufacturing Porous Builing Materials," and relating to a process broadly similar to that of said first mentioned Roos application, which said Roos and Bayer applications are described and set forth in said Exhibit A; and

Whereas, Licensor has agreed to purchase that certain Haggerty patent number 1,500,452 dated July 8, 1924, and that certain Hite Patent number 1,230,297 dated June 19, 1917, subject to approval of the United States District Court for the Northern District of Illinois, Eastern Division thereof, and other United States District Courts in receivership proceedings therein pending against the present owner of said patents, both of which said patents are set forth in said Exhibit A; and

Whereas, Licensee desires to include in its manufacture the inventions and improvements set forth and claimed in the said Roos and Bayer applications and said Haggerty and Hite patents referred to in said Exhibit A, and to ob-

tain a license from Licensor to make, use and sell the inventions and improvements set forth and claimed in all of said patents and applications for letters patent described in said Exhibit A throughout the full term thereof, and Licensor has agreed to grant such a license to Licensee upon the terms and conditions hereinafter stated;

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged from each party to the other party, and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto do hereby agree as follows, to-wit:

1. Licensor agrees promptly to disclose to Licensee all information and formulae which it now has or may obtain relating to the process of making a cellular product through the formation of a tenacious foam and mixing the 9387 foam with a cementitious material, as set forth and claimed in said applications for letters patent filed by Carlisle K. Roos and Erik Christian Bayer, in so far as the same is or may be applied to gypsum, and including all information and formulae for the manufacture of gypsum plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Roos and Bayer applications, together with a description of the machines or appliances which it now has for making the same. It will assist Licensee to make its plant ready for practicing said process in the manufacture of plasterboard and gypsum wallboard by furnishing without cost to Licensee the advice and instruction of Licensor's experts and information with respect to the purchase and cost of said machines and appliances.

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America and the territories

and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for let-
9388. ters patent described in said Exhibit A, for the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230-297, or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or
9389 gypsum wallboard, and thereafter shall give to Licensee written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall

embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by second parties and which during the existence thereof shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

9390 3. Licensee agrees to pay to Licensor in settlement and discharge of said claim and for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Li-

censee of all such plasterboard and gypsum wallboard manufactured and sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,452, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; Provided, However, that if no patent shall
9391 have been granted or issued for or upon any of said Roos or Bayer applications covering said process referred to in paragraph 1 hereof, within two (2) years from the date hereof, then commencing with the end of said two (2) year period the said license fees or royalties agreed to be paid by Licensee shall be reduced by one per cent (1%) of Licensee's said selling price until such patent shall have been granted or issued for or upon any of said Roos and Bayer applications, at which time Licensee shall again commence to pay the full amount of said license fees or royalties until the date of the expiration of the last to expire of any such patent or patents. If at the time of the execution of this contract Licensee's plant shall not be equipped to practice the process set forth and claimed in said Roos or Bayer applications in the manufacture of plasterboard or gypsum wallboard, then Licensee shall pay as such license fees or royalties two and one-half per cent (2½%) of said selling price between the date hereof and January 1, 1930, or such earlier date as Licensee shall make its plant ready to practice said process in the manufacture of said board, and the payment of three and one-half per cent (3½%) of said selling price and said period of two (2) years in this paragraph mentioned shall commence on January 1, 1930, or such earlier date as Licensee shall have made its plant ready as aforesaid. The amount of one per cent (1%) of said selling price included in said royalties or license fees in the amount agreed to be paid by Licensee for the use of said Haggerty and Hite patents..

Licensee's selling price shall mean the delivered selling price of Licensee, less freight paid by the customer and less regular cash discounts allowed by Licensee.

In addition to the amounts hereinabove agreed to be

paid by Licensee, Licensee, in further consideration
9392 of said license and in settlement of said claim, shall pay to Licensor an amount hereinafter referred to as a license fee or royalty equivalent to one and one-half per cent (1½%) of the selling price of Licensee of all such plasterboard and/or gypsum wallboard manufactured and sold by it after the date hereof, and until said one and one-half per cent (1½%) of said selling price shall have aggregated the sum of $173,644.95, being the full amount of said fixed sum which is unpaid up to date hereof. It is understood and agreed that if prior to the expiration of said license granted in paragraph 2 hereof Licensee shall not have paid to Licensor said additional sum of $173,644.95, over and above said other license fees or royalties, then Licensee shall from the date of the expiration of said license pay to Licensor five per cent (5%) of the selling price of Licensee of all plasterboard and/or gypsum wallboard manufactured and sold by it until said sum of $173,644.95 shall have been fully paid and satisfied.

It is expressly understood and agreed that this contract is executed without prejudice to Licensor to assert its said claim against Licensee for infringement of its said patents in case for any reason this contract shall not remain in force until February 10, 1937, and Licensee shall not pay to Licensor all of said royalties or license fees agreed to be paid by it up to said last mentioned date, and in addition thereto said one and one-half per cent (1½%) of said selling price until said fixed sum shall have been fully paid in accordance with the terms hereof, and it is further agreed that the claim of Licensor against Licensee for said infringement is not settled or discharged by the execution of this instrument but shall only be settled and discharged by the full performance of this contract by Licensee up to February 10, 1937, and the payment to Licensor of all of said royalties or license fees up
9393 to said last mentioned date, including said one and one-half per cent (1½%) of said selling price until said fixed sum shall have been fully paid. In case of the termination of this contract at any time prior to February 10, 1937, for any reason, or in the event of the failure of Licensee to make full payment to Licensor of all of said royalties or license fees up to said last mentioned date, including said one and one-half per cent (1½%) of said selling price until said fixed sum is fully paid in the manner herein specified, Licensor shall have the same right which

it originally had against Licensee before the execution of this agreement or the execution of any license agreement between Licensee and Licensor with respect to any of said patents, to recover of and from Licensee the full amount of its said claim for damages for infringement of its said patents, and nothing herein contained shall prevent the recovery by Licensor of all of its damages for such infringement against Licensee according to the full measure of damages allowed in such cases the same as if this contract or any other license contract made between Licensor and Licensee had never been made, less only such sums as shall have been paid by Licensee to Licensor since the date, hereof, on account of said additional one and one-half per cent (1½%) of said selling price in reduction of said fixed sum of $173,644.95, in either of which events Licensee shall pay to Licensor the balance of said fixed sum then remaining unpaid in part payment of its said claim for damages, it being understood that in no event shall the recovery from Licensee in such case be less than the amount of said fixed sum then remaining unpaid. Upon the payment to Licensor of all of said royalties or license fees up to February 10, 19^7, plus said additional sum of $173,644.95 at the time
9394 and in the manner herein specified, then the said claim of Licensor against Licensee for infringement of its said patents shall thereupon be and become fully settled, discharged and satisfied.

4. It is further agreed that so long as the license provided for in paragraph 2 hereof shall remain in force between the parties hereto, or in case the license granted under paragraph 2 hereof shall expire before the expiration of the patents specifically described in this paragraph, and the said license granted under paragraph 2 shall continue in force between the parties hereto for the full term of the last to expire of any of said patents described in said Exhibit A, or of any patent or patents granted for or upon any applications described in said Exhibit A, then until the expiration of the patents specifically described in this paragraph, Licensor does hereby give and grant unto the Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in those certain patents known as the Birdsey Plasterboard Bundle Patent number 1,696,877, dated December 25, 1928, Utzman Patent

number 1,724,740 dated August 13, 1929, Birdsey Patent number 1,730,113 dated October 1, 1929, and applications for letters patent serial numbers 329,581 filed December 31, 1928, and 296,354 filed July 30, 1928, and any patent which may be granted for or upon said applications, including any extensions and/or reissues thereof, at the plants or factories now owned or operated by Licensee or at any other plant or factory hereafter owned and/or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, and of selling or using bundles of plasterboard and/or gypsum wallboard put up or bundled by Licensee at any such place or places according to the claims set forth and claimed in the said patents and applications for letters patent in this paragraph described, upon the terms and conditions hereinafter stated.

Licensee agrees to pay to Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said patents and applications 9395 in the next preceding paragraph described, in addition to the sums hereinabove set forth, an amount (hereinafter referred to as a license fee or royalty) equivalent to ten cents (10¢) per one thousand (1,000) square feet of plasterboard and/or gypsum wallboard which is sold by Licensee in bundles of any kind, whether or not the bundles shall be made according to the claims set forth and claimed in said patents, which said license fee or royalty shall be payable at the times and in accordance with the terms of paragraph 6 hereof. The term "bundle" shall not include unbundled material wired or strapped for purpose of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates.

5. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law: Provided, However, that the same may be assigned by Licensee to any company acquiring all the assets and business or all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound

by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, including the asumption of the claim which Licensor has against Licensee for damages for infringement of its said patents and the agreements in settlement and discharge thereof, as in this contract contained, and to agree to be bound by all of the terms and conditions of this
9396 contract, and deliver such agreement to Licensor.

It is expressly understood that Licensee shall not discontinue its business of manufacturing and selling plasterboard and/or gypsum wallboard until Licensor shall have received the full amount of said license fees or royalties agreed to be paid by Licensee hereunder for the use of all of said patents until February 10, 1937, plus the full payment of said fixed sum of $173,644.95 in the manner and upon the payments as hereinabove set forth.

6. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the twentieth day of each calendar month it will render unto Licensor true written returns verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and/or gypsum wallboard manufactured and sold by it during the preceding calendar month and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold and is to be accounted for hereunder, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all said plasterboard and/or gypsum wallboard manufactured and sold by it and put up and sold by it in bundles during the next preceding calendar month.

7. Licensor, or its duly authorized representative,
9397 shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it and the quantity thereof put up and sold by it in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; Provided, However, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by both parties. If the parties at any such time shall not agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing not directly or indirectly employed by it or in any other way connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

8. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents and/or applications for letters patent shall be distinctly marked with the words "Patented" and/or "Patent applied for," as the case may be, together with the numbers of any of said patents or applications specified by Licensor, the claims of which may be embodied in said plasterboard or gypsum wallboard, and in connection with said marking Licensee will further mark said board with the words "Licensed under the above letters patent" and/or "Licensed under pending applications for letters patent," as the case may be, which marking shall be plainly visible. Licensee further agrees that all bundles put up and sold by it embodying the
9398 claims of any of said patents numbers 1,696,877, 1,724,740 and 1,730,113 and/or any of said applications serial numbers 329,581 and 296,354 shall be similarly marked together with the numbers of said bundle patents and/or applications.

9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, jobbers or other wholesale distributors of such products,

who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail) gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in any letters patent after the same shall have been issued, granted for or upon any of the said applications and may with the written consent of first party manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or wholesale distributor Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and
9399 claimed in any of said letters patent or in any letters patent after the same shall have been granted for or upon any of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

10. Licensee covenants and agrees that all of said gypsum plasterboard and gypsum wallboard manufactured and sold by it embodying the inventions and improvements set forth and claimed in any of said letters patent or patents issued upon any of said applications and commonly known in the trade as "seconds" shall be plainly invoiced as "Seconds" and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "Seconds" in letters at least three inches in height.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of said letters patent or of any letters patent which may be granted or issued for or upon said applications, forming the subject-matter of said license so long as said license shall remain in full force and effect, and agrees that it will not at any time during the existence of said license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said letters patent or the title thereto of Licensor. Licensee heretofore having posted a bond to stay an injunction from violating the said Haggerty patent and having recognized in open court the scope and validity of said patent, does hereby acknowledge the validity of the said Haggerty patent forming the subject-matter of this license throughout the full terms of this contract, unless the same shall be canceled or terminated prior thereto by reason of the default of the Licensor hereunder, and agrees that it will not at any time before the expiration date of said Hag-
9400 gerty patent, or the earlier termination of the license by reason of the default of the Licensor hereunder, directly or indirectly, by itself, through or together with another or others, contest the validity of said Haggerty patent or the title thereto of Licensor, or question in any way the prima facie scope of any of the claims of said Haggerty patent.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; Provided, However, that neither party shall be relieved thereby from any liability accrued at the time of such termination; and Provided Further, that if the party upon whom said notice is served shall deny that it is in default in whole or in part, as specified therein, then the party serving such notice shall not be privileged to cancel this contract on account of the alleged default

specified therein, provided the party upon whom said notice shall have been served shall within said thirty (30) day period perform the agreements and submit the question to arbitration, as in this paragraph hereinafter set forth. In case of any such denial the party upon whom the notice shall have been served shall within said thirty (30) day period state in writing to the other party wherein and in what respect it denies the default specified in said notice and shall at the same time make
9401 good any default specified therein which it does not deny and appoint in writing one person as arbiter to arbitrate the question of whether or not it is in default in respect to that which it shall have denied as aforesaid, it being understood, however, that if the question shall be with respect to the amount of royalties or license fees to be paid hereunder, then the Licensee shall first pay or offer to pay the amount of such license fees or royalties which it then admits is due and payable in accordance with the terms hereof, and the acceptance thereof by the Licensor shall not operate as a waiver of any of its rights hereunder or of any claim it may have made in any notice served by it upon Licensee. The party so serving said notice shall, after the other party shall have made good any default specified in said notice which it did not deny in writing as aforesaid, including the payment of royalties or license fees, if any, admitted by it to be due and payable hereunder, and within ten (10) days from the date of the appointment of said first arbiter in accordance with the terms hereof, appoint in writing another person as arbiter, and the two persons so appointed shall within ten (10) days or as soon as possible thereafter appoint in writing a third person as arbiter. The three persons so appointed shall, within thirty (30) days from the date of the appointment of said last mentioned arbiter, or as soon as possible thereafter, decide whether or not the party upon whom said notice has been served is in default hereunder with respect to anything contained in said notice. The decision of a majority of the three arbiters so appointed shall constitute a final settlement of the said question and be binding and conclusive upon both the Licensor and the Licensee, and if it shall have been determined by a majority of the said arbiters that the party upon whom said notice was served is in default with respect to anything contained in said notice and the party so found to have been in de-

9402 fault shall fail or refuse to comply with the terms of the award or finding made by said arbiters within thirty (30) days from the date such award or finding shall have been made, the party serving said notice may at its election terminate and cancel this agreement in writing. In the event of default hereunder by either party and notice of such default is served by the other party as herein provided, and after service of such notice the party in default shall cure the same as hereinbefore provided the same shall constitute a nullification of said notice to the same effect as if said notice had not been served. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become canceled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may proceed by action to specifically enforce this contract or any of the terms, conditions and covenants thereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served by the Licensor or the Licensee by mailing the same to the other party hereto, postage prepaid and registered, addressed to any of its officers at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under paragraph 2 hereof shall be confirmed in writing in the ordinary course of business.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by 9403 reason of any infringement on the part of any person or persons of any of said letters patent or of any patent that may be granted upon said applications, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper. If a court of last resort upon final appeal or review shall decree all the claims of the patents granted for or upon said Roos and Bayer applications invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard, the body or core of which

is made according to the process set forth and claimed in said Roos and Bayer applications in such manner that they cannot practice in any way any of the inventions set forth in the said applications, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree that all the claims of the patents granted or issued for or upon said Roos and Bayer applications are invalid or make such injunction permanent and final, the license fees or royalties to be paid by Licensee hereunder shall be reduced by one per cent (1%) of said selling price, or if a court of last resort upon final appeal or review shall decree that all the claims of said Haggerty and Hite patents are invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Haggerty and Hite patents in such manner that they cannot practice in any way any of the inventions set forth in said patents, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree all claims of said Haggerty and Hite patents invalid or make said injunction permanent and final, the said license fees or royalties agreed to be paid by Licensee for said
9404 Haggerty and Hite patents shall cease and determine.

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement

of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

16. The terms "gypsum plasterboard," "gypsum wallboard" and "plasterboard" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

17. If at any time after the expiration of two (2) years from January 1, 1930, or such earlier date that Licensee shall make its plant ready to practice the process set forth and claimed in said Roos and Bayer applications in the manufacture of gypsum wallboard or plasterboard, there shall have been invented or come into use any process which shall make the said process of forming a 9405 cellular product as set forth and claimed in said Roos and Bayer applications obsolete or shall displace the same, and the Licensor shall in its own manufacture permanently and wholly abandon the use of the subject-matter of the claims of said Roos and Bayer applications, it shall notify Licensee in writing thereof, and Licensee may then, upon thirty (30) days' written notice to Licensor, cancel and terminate this license in so far as the same applies to said Roos and Bayer applications or to the patent or patents granted or issued therefor or thereupon, and from the date of such cancellation the royalties or license fees to be paid by Licensee hereunder shall be reduced by one per cent (1%) of its said selling price; Provided, However, that if Licensor shall not in such event permanently and wholly abandon the use of said process but shall only partially abandon the same, then to the extent or degree and for the term that Licensor shall abandon the same in its own manufacture Licensee shall be relieved from the payment of license fees or royalties to the same extent, that is to say, if Licensor shall in such event manufacture and sell any board the core of which is made of gypsum of a particular size, kind or make, or for a particular purpose or use, without the use of said process embodied therein, then if Licensee shall manufacture and sell the same board of the same particular size, kind or make and

for the same purpose or use, without the use of said process embodied therein, then Licensee shall not be required to pay royalties or license fees upon such particular board for the term that Licensor shall manufacture and sell the same. "License fees" and "royalties" for the purpose of this paragraph shall mean one per cent (1%) of said selling price. The use by Licensor of any improvement which Licensee has the right to use as set forth in paragraph 18 hereof, or the manufacture of plasterboard or gypsum wallboard without the use of said process for sale only in foreign countries
9406 where Licensor has no patented rights in said process, shall not constitute an abandonment of said process or a partial abandonment thereof within the meaning of this paragraph.

18. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubble described in the process set forth in said Roos and Bayer applications and/or method of its introduction in the core of plasterboard or gypsum wallboard, and which improvement is covered by the claims of said Roos and Bayer applications, and shall itself use the same in its own manufacture, then so long as Licensee shall continue to pay the license fees or royalties hereinbefore stipulated the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum plasterboard or gypsum wallboard, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional sum, royalty or license fee therefor. It is further understood that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement, as well as the provision of paragraph 2 hereof reserving the right in Licensor to determine and fix at any time and to change from time to time the minimum price or prices at which Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the claims of said patents, shall apply to the improvement set forth and claimed in any patent or patents granted or issued for or upon said improvement. Licensor will promptly notify Licensee of the general adoption by it

of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of plasterboard and gypsum wallboard.

9407 19. Licensee has investigated and fully satisfied itself with respect to the inventions and improvements set forth in said patents and applications for letters patent and the use thereof in its own manufacture, and has executed this agreement without relying upon any representations which may have been made by Licensor with respect thereto. No representations have been made by Licensor not expressly stated in this contract which Licensee shall at any time have any right to rely upon as an inducement for its making this contract or for any result or results to be obtained by Licensee in its own plant by its use of the inventions and improvements set forth and claimed in any of said patents or applications for letters patent.

20. The Licensor agrees at any time during the term hereof to extend to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the said process or processes set forth and claimed in said Roos or Bayer applications in the manufacture in its said plants of any other gypsum product not specifically covered by this agreement and in which Licensor shall use the same in its own manufacture and to sell the same, upon the payment to Licensor of one per cent (1%) of the selling price of Licensee of all of said other gypsum product, whether or not embodying the said process in making the same, manufactured and sold by Licensee and upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the words "plasterboard and/or gypsum wallboard" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

21. From the date this contract shall become effective the same shall supersede all prior license agree-
9408 ments at any time made between the parties hereto relating to the subject-matter hereof or relating to any of the patents or applications for letters patent referred to in this agreement; Provided, However, that Licensor shall not be barred or prevented from recovering

any claim which may have accrued under any such prior license agreements prior to the time this contract shall become effective, including all payments, royalties or license fees agreed to be paid thereunder by Licensee up to the date this agreement shall go into effect.

22. This license and all of the covenants and agreements hereof shall become effective upon the date Licensor shall receive a conveyance and assignment of said Haggerty and Hite patents to it, pursuant to authority granted by the United States District Court to the receivers of the Universal Gypsum & Lime Co., a Delaware corporation, and to said company, to sell and assign said Haggerty and Hite patents to Licensor, and from the effective date therof this license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be contsrued to permit an assignment hereof by Licensee, except as hereinabove specifically provided.

In witness whereof the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY,

By S. L. AVERY,

Its President.

ATTEST:

R. G. BEAR,

Secretary.

NATIONAL GYPSUM COMPANY,

By M. H. BAKER,

Its President.

ATTEST:

F. E. DAVIS,

Secretary.

9409 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted Octtober 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

9410 Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial No. 565,737, reissued January 24, 1928 as Reissue Patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial No. 567,205, reissued May 22, 1928 as Reissue Patent No. 16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

9411 Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,676, filed October 10, 1921, granted November 29, 1927, expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,627, filed April 19, 1922, granted April 30, 1929, expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662,359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1,631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927, expires May 31, 1944.

Brookby & Absmeier patent No. 1,689,322. Application Serial No. 91,297, filed March 1, 1926, granted October 30, 1928, expires Oct. 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.

Utzman patent No. 1,638,280. Application Serial No. 374,833, filed April 19, 1920, granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927, expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No. 427,044, filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,045, filed November 29, 1920, granted September 6, 1927, expires September 6, 1944.

Mehlhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926, expires October 26, 1943.

9412 Gustafson patent No. 1,665,168. Application Serial No. 509,366, filed December 2, 1919, renewed October 21, 1921, granted April 3, 1928, expires April 3, 1945.

Kohler, et al patent No. 1,673,944. Application Serial No. 540,412, filed March 2, 1922, granted June 19, 1928, expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey Patent No. 1,718,890. Application Serial No. 583,795, filed August 23, 1922, granted June 25, 1929, expires June 25, 1946.

Utzman application Serial No. 477,371, filed June 14, 1921, finally allowed April 26, 1929. Patent No. 1,731,116 will issue October 8, 1929.

Knode application Serial No. 590,358. Filed September 25, 1922.

Utzman application Serial No. 581,361. Filed August 12, 1922.

Williams application Serial No. 582,606. Filed August 18, 1922.

Roos application Serial No. 733,197, filed August 20, 1924.

Bayer application Serial No. 661,723, filed September 8, 1923.

Roos application Serial No. 3,477, filed January 19, 1925.

Roos application Serial No. 142,155, filed October 16, 1926.

Haggerty patent No. 1,500,452. Application Serial No. 565,433, filed June 2, 1922, granted July 8, 1924.

Hite patent No. 1,230,297. Application Serial No. 115,649, filed August 16, 1916, granted June 19, 1917.

9413 *Government's Exhibit No. 10*

LICENSE AGREEMENT

This Agreement, executed in duplicate this 15th day of October, 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and Certain-Teed Products Corporation, a Maryland corporation, having its principal office at New York, New York, hereinafter referred to as Licensee, witnesseth:

Whereas, Licensor is the owner of certain letters patent and applications for letters patent of the United States covering an improved gypsum wallboard and method or process of making the same, together with machines and appliances for the manufacture of such inventions, which with certain other patents are more specifically set forth in Exhibit A attached hereto and made a part hereof; and

Whereas, Licensor was the owner of all of the right, title and interest in and under letters patent of the United States, number 1,029,328 and number 1,034,746, known as the Utzman patents, the last of which expired August 6, 1929, which said Utzman Patents were adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit, and were decreed by said courts as valid and having been infringed by the defendants named in said suits; and

Whereas, Birdsey Patent number 1,358,508, mentioned in said Exhibit A, was adjudicated by the United States District Court for the Northern District of Ohio, and said court decreed that said Birdsey Patent was valid and infringed by the defendant in said cause by reason of its having made, used and sold plasterboard and/or
9414 gypsum wall board with edges of the character disclosed in said patent and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit; and

Whereas, the Beaver Products Company, Inc., formerly infringed said Utzman Patents and subsequent thereto agreed to settle the claim which Licensor had against it for damages by taking a license from Licensor under said patents, and agreeing to pay in settlement of said claim and for said license a sum equivalent to five (5) per cent of said Licensee's selling price of all plasterboard or gypsum wallboard manufactured and sold by it from the date of said license until August 6, 1929, and one and one-half (1½%) per cent of such selling price from August 6, 1929, to February 10, 1937; and

Whereas, on April 1, 1928, Licensee acquired substantially all of the plants, property and assets of the Beaver Products Company, Inc., and assumed all of its general obligations, and thereafter the said Beaver Products Company, Inc., ceased to do any business and failed to make any further payments under said license, and Licensor asserted a claim against Licensee for a sum equivalent to five per cent (5%) of Licensee's selling price of all plasterboard and gypsum wallboard of every kind manufactured at plants formerly owned by the Beaver Products Company, Inc. and sold by Licensee subsequent to April 1, 1928, and Licensee recognized such claim and agreed to pay the same, and it was agreed between Licensor and Licensee that the former would grant a license to the latter under said patents and settle said claim in consideration of the payment to Licensor of five per cent (5%) of Licensee's selling price of all plasterboard and gypsum wallboard manufactured and sold by it between May 22, 1929, the date of said agreement, and August 6, 1929, and one and one-half per cent (1½%) of such selling price from August 6, 1929, to February 10, 1937, plus three and
9415 one-half per cent (3½%) of such selling price from August 6, 1929, until said three and one-half per cent (3½%) of such selling price aggregated the fixed sum of Sixty Four Thousand Four Hundred Sixty Seven Dollars and Twelve Cents ($64,467.12); and

Whereas, Licensor is the owner of that certain application for United States letters patent filed by Carlisle K. Roos, entitled "Cementitious Material," now pending in the United States Patent Office and covering the process of making a cellular product, which comprises forming a tenacious foam and mixing the foam with a cementitious material, and of certain other applications filed by said

Roos covering specific employment of said invention, and Licensor has heretofore acquired the sole and exclusive rights in the United States of America (when gypsum is used as the main binding material) in that certain application for United States letters patent described in said Exhibit A filed by Erik Christian Bayer, entitled "Methods of Manufacturing Porous Building Materials," and relating to a process broadly similar to that of said first mentioned Roos application, which said Roos and Bayer applications are described and set forth in said Exhibit A; and

Whereas, Licensor has agreed to purchase that certain Haggerty patent number 1,500,452 dated July 8, 1924, and that certain Hite patent number 1,230,297 dated June 19, 1917, subject to approval of the United States District Court for the Northern District of Illinois, Eastern Division thereof, and other United States District Courts in receivership proceedings therein pending against the present owner of said patents, both of which said patents are set forth in said Exhibit A; and

Whereas, Licensee desires to include in its manufacture the inventions and improvements set forth and claimed in the Haggerty and Hite patents and the Roos and Bayer applications referred to in said Exhibit A, and to
9416 obtain a license from Licensor to make, use and sell the inventions and improvements set forth and claimed in all of said patents and applications for letters patent throughout the full term thereof, and Licensor has agreed to grant such a license to Licensee upon the terms and conditions hereinafter stated;

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged from each party to the other party, and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto do hereby agree as follows, to-wit:

1. Licensor agrees promptly to disclose to Licensee all information and formulae which it now has or may obtain relating to the process of making a cellular product through the formation of a tenacious foam and mixing the foam with a cementitous material, as set forth and claimed in said applications for letters patent filed by Carlisle K. Roos and Erik Christian Bayer, in so far as the same is or

may be applied to gypsum, and including all information and formulae for the manufacture of gypsum plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Roos and Bayer applications, together with a description of the machines or appliances which it now has for making the same. It will assist Licensee to make its plant ready for practicing said process in the manufacture of plasterboard and gypsum wallboard by furnishing without cost to Licensee the advice and instruction of Licensor's experts and information with respect to the purchase and cost of said machines and appliances.

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto in the manufacture of gypsum plas-
9417 terboard and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters patent described in said Exhibit A, for the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth

and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum wallboard, and thereafter shall give to Licensee written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by second parties and which during the existence thereof shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have been issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

9418

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum

wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

9419 3. Licensee agrees to pay to Licensor in settlement and discharge of said claim and for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,452, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; Provided, However, that if no patent shall have been granted or issued for or upon any
9420 of said Roos or Bayer applications covering said process referred to in paragraph 1 hereof, within two (2) years from the date hereof, then commencing with the end of said two (2) year period the said license fees or royalties agreed to be paid by Licensee shall be reduced by one per cent (1%) of Licensee's said selling price until such patent shall have been granted or issued for or upon any of said Roos and Bayer applications, at which time

Licensee shall again commence to pay the full amount of said license fees or royalties until the date of the expiration of the last to expire of any such patent or patents. If at the time of the execution of this contract Licensee's plant shall not be equipped to practice the process set forth and claimed in said Roos or Bayer applications in the manufacture of plasterboard or gypsum wallboard, then Licensee shall pay as such license fees or royalties two and one-half per cent (2½%) of said selling price between the date hereof and January 1, 1930, or such earlier date as Licensee shall make its plant ready to practice said process in the manufacture of said board, and the payment of three and one-half per cent (3½%) of said selling price and said period of two (2) years in this paragraph mentioned shall commence on January 1, 1930, or such earlier date as Licensee shall have made its plant ready as aforesaid. The amount of one per cent (1%) of said selling price included in said royalties or license fees is the amount agreed to be paid by Licensee for the use of said Haggerty and Hite patents.

Licensee's selling price shall mean the delivered selling price of Licensee, less freight paid by the customer and less regular cash discounts allowed by Licensee.

In addition to the amounts hereinabove agreed to be paid by Licensee, Licensee, in further consideration of said license and in settlement of said claim, shall
9421 pay to Licensor an amount equivalent to one and one-half per cent (1½%) of the selling price of Licensee of all such plasterboard and/or gypsum wallboard manufactured and sold by it after the date hereof and until said one and one-half per cent (1½%) of said selling price shall have aggregated $60,200.29, being the full amount of said fixed sum which is unpaid up to the date hereof. It is understood and agreed that if prior to the expiration of the license granted in paragraph 2 hereof Licensee shall not have paid to Licensor said additional sum of $60,200.29 over and above said other license fees or royalties, then from the date of the expiration of said license, Licensee shall pay to Licensor five per cent (5%) of the selling price of Licensee of all plasterboard and/or gypsum wallboard manufactured and sold by it until said sum of $60,200.29 shall have been fully paid.

It is expressly understood and agreed that this contract is executed without prejudice to Licensor to assert its said claim against Licensee in case for any reason this agreement shall not remain in force until February 10, 1937, and

Licensee shall not pay to Licensor up to said date one and one-half per cent (1½%) of its said selling price over and above said two per cent (2%) of its said selling price paid for the right to use the said Haggerty and Hite inventions and the process set forth and claimed in said Roos and Bayer applications, plus said additional one and one-half per cent (1½%) of said selling price until the full amount of said fixed sum shall have been paid, and it is further agreed that the said claim of Licensor against Licensee is not settled or discharged by the execution of this instrument but shall only be settled and discharged by the payment by Licensee to Licensor of said one and
9422 one-half per cent (1½%) of its said selling price up to February 10, 1937, over and above said two per cent (2%) of its said selling price, plus the full amount of said sum of $60,200.29, in the manner and upon the payments as hereinabove set forth. In case of the termination of this contract at any time prior to the expiration thereof, or in the event of the failure of Licensee to make full payment to Licensor of all of said amounts in this paragraph mentioned, Licensor shall have, in addition to all its other rights under this agreement, the right to recover of and from Licensee the full amount of said sum of $60,200.29, which said sum Licensee forever recognizes and admits and agrees to pay, less only such sums as shall have been paid by Licensee to Licensor since the date hereof on account of said additional one and one-half per cent (1½%) of said selling price as hereinabove provided. Upon the payment to Licensor of said one and one-half per cent (1½%) of said selling price up to February 10, 1937, over and above said two per cent (2%) of said selling price, plus the full payment of said sum of $60,200.29, in the manner and upon the payments as hereinabove set forth, then the said claim of Licensor against Licensee shall thereupon be and become fully settled, discharged and satisfied.

4. It is further agreed that so long as the license provided for in paragraph 2 hereof shall remain in force between the parties hereto, or in case the license granted under paragraph 2 hereof shall expire before the expiration of the patents specifically described in this paragraph, and the said license granted under paragraph 2 shall continue in force between the parties hereto for the full term of the last to expire of any of said patents described in said Exhibit A, or of any patent or patents granted
9423 for or upon any application described in said Exhibit A, then until the expiration of the patents spe-

cifically described in this paragraph, Licensor does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in those certain patents known as the Birdsey Plasterboard Bundle Patent number 1,696,877, dated December 25, 1928, Utzman Patent number 1,724,740, dated August 13, 1929, Birdsey Patent number 1,730,113 dated October 1, 1929, and applications for letters patent serial numbers 329,581 filed December 31, 1928, and 296,354 filed July 30, 1928, and any patents which may be granted for or upon said applications, including any extensions and/or reissues thereof, at the plants or factories now owned or operated by Licensee or at any other plant or factory hereafter owned and/or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, and of selling or using bundles of plasterboard and/or gypsum wallboard put up or bundled by Licensee at any such place or places according to the claims set forth and claimed in the said patents and applications for letters patent in this paragraph described, upon the terms and conditions hereinafter stated.

Licensee agrees to pay to Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said patents and applications in the next preceding paragraph described, in addition to the sums hereinabove set forth, an amount (hereinafter referred to as a license fee or royalty) equivalent to ten cents (10¢) per one thousand (1,000) square feet of plasterboard and/or gypsum wallboard which is sold by Licensee in bundles of any kind, whether or not the bundles shall be made according to the claims set forth and claimed in said patents, which said license fee or royalty shall be payable at the times and in accordance with the terms of paragraph 6 hereof. The term "bundle" shall not include unbundled material wired or strapped for purpose of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates.

5. It is expressly understood and agreed that the
9424 license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; Provided, However, that the same may be assigned by Licensee to any company acquiring all the

assets and business or capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell all of its assets and business or capital stock, or to transfer and convey its plasterboard and/or wallboard business or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, and to agree to be bound by the terms and conditions hereof, and deliver such agreement to Licensor.

It is expressly understood that the Licensee shall not discontinue its business of manufacturing and selling plasterboard and/or gypsum wallboard until the Licensor shall have received the full payment of said one and one-half per cent (1½%) of said selling price up to February 10, 1937, over and above said two per cent (2%) of said selling price, plus the full payment of said sum of $60,200.29, in the manner and upon the payments as hereinabove set forth.

6. Licensee agrees to keep separate full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the twentieth day of each calendar month it will render unto Licensor true written
9425 returns verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and/or gypsum wallboard manufactured and sold by it during the preceding calendar month and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold and is to be accounted for hereunder, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all said plasterboard and/or gypsum wallboard manufactured and sold by it and put up and sold by it in bundles during the next preceding calendar month.

7. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it and the quantity thereof put up and sold by it in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; Provided, However, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by both parties. If the parties at any such time shall not agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing not directly or indirectly employed by it or in any other way connected with it, and if Licensee
9426 shall not accept any one of them, then Licensor shall have the right to make such examination itself.

8. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents and/or applications for letters patent shall be distinctly marked with the word "Patented" and/or "Patent Applied For," as the case may be, together with the numbers of any of said patents or applications specified by Licensor, the claims of which may be embodied in said plasterboard or gypsum wallboard, and in connection with said marking Licensee will further mark said board with the words "Licensed Under the Above Letters Patent" and/or "Licensed Under Pending Applications for Letters Patent," as the case may be, which marking shall be plainly visible. Licensee further agrees that all bundles put up and sold by it embodying the claims of any of said patents numbers 1,696,877, 1,724,740 and 1,730,113 and/or any of said applications serial numbers 329,581 and 296,354 shall be similarly marked together with the numbers of said bundle patents and/or applications.

9. Having regard for the fact that there are or may be certain manufacturers of plasters or gypsum products, jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum

wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail) gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in any letters patent
9427 after the same shall have been issued, granted for or upon any of the said applications and may with the written consent of first party manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent or in any letters patent after the same shall have been granted for or upon any of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

10. Licensee covenants and agrees that all of said gypsum plasterboard and gypsum wallboard manufactured and sold by it embodying the inventions and improvements set forth and claimed in any of said letters patent or patents issued upon any of said applications and commonly known in the trade as "Seconds" shall be plainly invoiced as "Seconds" and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "Seconds" in letters at least three inches
9428 in height.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby grant-

ed, Licensee hereby acknowledges the validity of said letters patent or of any letters patent which may be granted or issued for or upon said applications, forming the subject-matter of said license so long as said license shall remain in full force and effect, and agrees that it will not at any time during the existence of said license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said letters patent or the title thereto of Licensor.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; Provided, However, that neither party shall be relieved thereby from any liability accrued at the time of such termination; and Provided Further, that if the party upon whom said notice is served shall deny that it is in default in whole or in part, as specified therein, then the party serving such notice shall not be privileged to cancel this contract an account of the alleged default specified therein, provided the party upon whom said notice shall have been served shall
9429 within said thirty (30) day period perform the agreements and submit the question to arbitration, as in this paragraph hereinafter set forth. In case of any such denial the party upon whom the notice shall have been served shall within said thirty (30) day period state in writing to the other party wherein and in what respect it denies the default specified in said notice and shall at the same time make good any default specified therein which it does not deny and appoint in writing one person as arbifer to arbitrate the question of whether or not it is in default in respect to that which it shall have denied as aforesaid, it being understood, however, that if the question shall be with respect to the amount of royalties or license fees to be paid hereunder, then the Licensee shall first pay or offer to pay the amount of such license fees or royalties which it then admits is due and payable in accordance with the terms hereof, and the acceptance thereof by the

Licensor shall not operate as a waiver of any of its rights hereunder or of any claim it may have made in any notice served by it upon Licensee. The party so serving said notice shall, after the other party shall have made good any default specified in said notice which it did not deny in writing as aforesaid, including the payment of royalties or license fees, if any, admitted by it to be due and payable hereunder, and within ten (10) days from the date of the appointment of said first arbiter in accordance with the terms hereof, appoint in writing another person as arbiter, and the two persons so appointed shall within ten (10) days or as soon as possible thereafter appoint in writing a third person as arbiter. The three persons so appointed shall, within thirty (30) days from the date of the appointment of said last mentioned arbiter, or as soon as possible thereafter, decide whether or not the party upon
9430 whom said notice has been served is in default hereunder with respect to anything contained in said notice. The decision of a majority of the three arbiters so appointed shall constitute a final settlement of the said question and be binding and conclusive upon both the Licensor and the Licensee, and if it shall have been determined by a majority of the said arbiters that the party upon whom said notice was served is in default with respect to anything contained in said notice and the party so found to have been in default shall fail or refuse to comply with the terms of the award or finding made by said arbiters within thirty (30) days from the date such award or finding shall have been made, the party serving said notice may at its election terminate and cancel this agreement in writing. In the event of default hereunder by either party and notice of such default is served by the other party as herein provided, and after service of such notice the party in default shall cure the same as hereinbefore provided the same shall constitute a nullification of said notice to the same effect as if said notice had not been served. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become canceled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may proceed by action to specifically enforce this contract or any of the terms, conditions and covenants thereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served by the Licensor or the Licensee by mailing the same to the other party hereto, postage prepaid and registered, addressed to any of its officers at its last
9431 known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under paragraph 2 hereof shall be confirmed in writing in the ordinary course of business.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement on the part of any person or persons of any of said letters patent or of any patent that may be granted upon said applications, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper.

If a court of last resort upon final appeal or review shall decree all the claims of the patents granted for or upon said Roos and Bayer applications invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard, the body or core of which is made according to the process set forth and claimed in said Roos and Bayer applications in such manner that they cannot practice in any way any of the inventions set forth in the said applications, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree that all the claims of the patents granted or issued for or upon said Roos and Bayer applications are invalid, or make such injunction permanent and final, the license fees or royalties to be paid by Licensee hereunder shall be reduced by one per cent (1%) of said selling price, or if a court of last resort upon final appeal or review shall decree that all the claims of said Hag-
9432 gerty and Hite patents are invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Haggerty and Hite patents in such manner that they cannot practice in any way any of the inventions set forth in said patents, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the

court of last resort upon final appeal or review shall decree all claims of said Haggerty and Hite patents invalid or make said injunction permanent and final, the said license fees or royalties agreed to be paid by Licensee for said Haggerty and Hite patents shall cease and determine.

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or applications, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

16. The terms "gypsum plasterboard," "gypsum
9433 wallboard" and "plasterboard" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

17. If at any time after the expiration of two (2) years from January 1, 1930, or such earlier date that Licensee shall make its plant ready to practice the process set forth and claimed in said Roos and Bayer applications in the manufacture of gypsum wallboard or plasterboard, there shall have been invented or come into use any process which shall make the said process of forming a cellular product as set forth and claimed in said Roos and Bayer applications obsolete or shall displace the same, and the Licensor shall in its own manufacture permanently and wholly abandon the use of the subject-matter of the claims of said Roos and Bayer applications, it shall notify Licensee in writing thereof, and Licensee may then, upon thirty (30) days' written notice to Licensor, cancel and terminate this license in so far as the same applies to said

Roos and Bayer applications or to the patent or patents granted or issued therefor or thereupon, and from the date of such cancellation the royalties or license fees to be paid by Licensee hereunder shall be reduced by one per cent (1%) of its said selling price; Provided, However, that if Licensor shall not in such event permanently and wholly abandon the use of said process but shall only partially abandon the same, then to the extent or degree and for the term that Licensor shall abandon the same in its own manufacture Licensee shall be relieved from the payment of license fees or royalties to the same extent, that is to say, if Licensor shall in such event manufacture and sell any board the core of which is made of gypsum of
9434 a particular size, kind or make, or for a particular purpose or use, without the use of said process embodied therein, then if Licensee shall manufacture and sell the same board of the same particular size, kind or make and for the same purpose or use, without the use of said process embodied therein, then Licensee shall not be required to pay royalties or license fees upon such particular board for the term that Licensor shall manufacture and sell the same. "License fees" and "royalties" for the purpose of this paragraph shall mean one per cent (1%) of said selling price. The use by Licensor of any improvement which Licensee has the right to use as set forth in paragraph 18 hereof, or the manufacture of plasterboard or gypsum wallboard without the use of said process for sale only in foreign countries where Licensor has no patented rights in said process, shall not constitute an abandonment of said process or a partial abandonment thereof within the meaning of this paragraph.

18. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubble described in the process set forth in said Roos and Bayer applications and/or method of its introduction in the core of plasterboard or gypsum wallboard, and which improvement is covered by the claims of said Roos and Bayer applications, and shall itself use the same in its own manufacture, then so long as Licensee shall continue to pay the license fees or royalties hereinbefore stipulated the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum plasterboard or gypsum wallboard, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional sum, royalty or

license fee therefor. It is further understood that if a patent or patents shall be granted or issued for or
9435 upon said improvement, then all of the provisions of this agreement, as well as the provision of paragraph 2 hereof reserving the right in Licensor to determine and fix at any time and to change from time to time the minimum price or prices at which Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the claims of said patents, shall apply to the improvement set forth and claimed in any patent or patents granted or issued for or upon said improvement. Licensor will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of plasterboard and gypsum wallboard.

19. Licensee has investigated and fully satisfied itself with respect to the inventions and improvements set forth in said patents and applications for letters patent and the use thereof in its own manufacture, and has executed this agreement without relying upon any representations which may have been made by Licensor with respect thereto. No representations have been made by Licensor not expressly stated in this contract which Licensee shall at any time have any right to rely upon as an inducement for its making this contract or for any result or results to be obtained by Licensee in its own plant by its use of the inventions and improvements set forth and claimed in any of said patents or applications for letters patent.

20. The Licensor agrees at any time during the term hereof to extend to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the said process or processes set forth and claimed in said Roos or Bayer applications in the manufacture in its said plants of any other gypsum product not specifically
9436 covered by this agreement and in which Licensor shall use the same in its own manufacture and to sell the same, upon the payment to Licensor of one per cent (1%) of the selling price of Licensee of all of said other gypsum product, whether or not embodying the said process in making the same, manufactured and sold by Licensee and upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the

words "plasterboard and/or gypsum wallboard" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

21. From the date this contract shall become effective the same shall supersede all prior license agreements at any time made between the parties hereto relating to the subject-matter hereof or relating to any of the patents or applications for letters patent referred to in this agreement; Provided, However, that Licensor shall not be barred or prevented from recovering any claim which may have accrued under any such prior license agreements prior to the time this contract shall become effective, including all payments, royalties or license fees agreed to be paid thereunder by Licensee up to the date this agreement shall go into effect.

22. This license and all of the covenants and agreements hereof shall become effective upon the date Licensor shall receive a conveyance and assignment of said Haggerty and Hite patents to it, pursuant to authority granted by the United States District Court to the receivers of the Universal Gypsum & Lime Co., a Delaware corporation, and to said company, to sell and assign said Haggerty and Hite patents to Licensor, and from the effective date thereof this license and all of the covenants and
9437 agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by Licensee, except as hereinabove specifically provided.

In witness whereof the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY,
By S. H. AVERY, *Its President.*

ATTEST:
R. G. BEAR,
Secretary.

CERTAIN-TEED PRODUCTS CORPORATION,
By GEO. M. BROWN, *Its President.*

ATTEST:
ROBT. M. NELSON
Secretary.

[SEAL]

9438 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

9439 Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922. Serial No. 565,737, reissued January 24, 1928 as Reissue patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial No. 567,205, reissued May 22, 1928 as Reissue Patent No. 16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

9440 Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,676, filed October 10, 1921, granted November 29, 1927, expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,627, filed April 19, 1922, granted April 30, 1929, expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662,359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1,631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927, expires May 31, 1944.

Brookby & Absmeier patent No. 1,689,322. Application Serial No. 91,297, filed March 1, 1926, granted October 30, 1928, expires October 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.

Utzman patent No. 1,638,280. Application Serial No. 374,833, filed April 19, 1920, granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927, expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No. 427,044; filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,045, filed November 29, 1920, granted September 6, 1927, expires September 6, 1944.

Mehlhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926, expires October 26, 1943.

9441 Gustafson patent No. 1,665,168. Application Serial No. 509,366, filed December 2, 1919, renewed October 21, 1931, granted April 3, 1928, expires April 3, 1945.

Kohler, et al patent No. 1,673,944. Application Serial No. 540,412, filed March 2, 1922, granted June 19, 1928, expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey patent No. 1,718,890. Application Serial No. 583,795, filed August 23, 1922, granted June 25, 1929, expires June 25, 1946.

Utzman application Serial No. 477,371, filed June 14, 1921, finally allowed April 26, 1929. Patent No. 1,731,116 will issue October 8, 1929.

Knode application Serial No. 590,358. Filed September 25, 1922.

Utzman application Serial No. 581,361. Filed August 12, 1922.

Williams application Serial No. 582,606. Filed August 18, 1922.

Roos application Serial No. 733,197, filed August 20, 1924.

Bayer application Serial No. 661,723, filed September 8, 1923.

Roos application Serial No. 3477, filed January 19, 1925.

Roos application Serial No. 142,155, filed October 16, 1926.

Haggerty patent No. 1,500,452. Application Serial No. 565,433, filed June 2, 1922, granted July 8, 1924.

Hite patent No. 1,230,297. Application Serial No. 115,649, filed August 18, 1916, granted June 19, 1917.

9442 *Government Exhibit No. 11*

LICENSE AGREEMENT

This agreement made this 18th day of October, A. D. 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and Ebsary Gypsum Co., Inc. a New York corporation, of Newark, New Jersey, hereinafter referred to as Licensee, Witnesseth, that

Whereas, Licensor is the owner of certain letters patent and applications for letters patent of the United States covering an improved gypsum wallboard and method or process of making the same, together with machines and appliances for the manufacture of such inventions which, with certain other patents, are more specifically set forth in Exhibit A attached hereto and made a part hereof; and

Whereas, Licensor was the owner of all of the right, title and interest in and under letters patent of the United States number 1,029,328 and number 1,034,746 known as the Utzman Patents, the last of which expired August 6, 1929, which said Utzman Patents were adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit, and were decreed by said courts as valid and having been infringed by the defendants named in said suits; and

Whereas, Birdsey Patent number 1,358,508, mentioned in said Exhibit A, was decreed by the United States District Court for the Northern District of Ohio as valid and infringed by the defendant in said cause by reason of
9443 its having made, used and sold plasterboard and/or gypsum wallboard with edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit; and

Whereas, Licensor is the owner of a new process disclosed in that certain application for United States letters patent filed by Carlisle K. Roos, entitled "Cementitious Material," now pending in the United States Patent Office and covering the process of making a cellular product, which comprises forming a tenacious foam and mixing the foam with a cementitious material, and of certain other applications filed by said Roos covering specific employment of said invention, and Licensor has heretofore acquired the sole and exclusive rights in the United States of America (when gypsum is used as the main binding material) in that certain application for United States letters patent described in Exhibit A filed by Erik Christian Bayer, entitled "Methods of Manufacturing Porous Building Materials," and relating to a process broadly similar to that of said first mentioned Roos application, which said Roos and Bayer applications are described and set forth in said Exhibit A; and

Whereas, Licensor has agreed to purchase that certain Haggerty Patent number 1,500,452, dated July 8, 1924, and that certain Hite Patent number 1,230,297, dated June 19, 1917, both mentioned in said Exhibit A, subject to approval of the United States District Court for the Northern District of Illinois, Eastern Division thereof, and other United States district courts in receivership proceedings
9444 therein pending against the present owner of said patents; and

Whereas, gypsum wallboard or plasterboard manufactured by Licensee is made by the use of the machines or according to the processes or embodying the claims of some or all of said patents and applications for letters patent set forth in said Exhibit A, and Licensee desires to include in its manufacture the inventions and improvements set forth and claimed in said Roos and Bayer applications and said Haggerty and Hite patents, and to obtain a license from Licensor to make, use and sell the inventions and improvements set forth and claimed in all of said patents and applications for letters patent set forth in said Exhibit A throughout the full term thereof; and

Whereas, Licensor has agreed to grant said license and to make certain disclosures as to the said Roos and Bayer applications referred to in said Exhibit A, upon the terms and conditions hereinafter stated;

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged from each party to the other party, and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto do hereby agree as follows, to-wit:

1. Licensor agrees promptly to disclose to Licensee all information and formulae which it now has or may obtain relating to the process of making a cellular product through the formation of a tenacious foam and mixing the foam with a cementitious material, as set forth and claimed in said applications for letters patent filed by Carlisle K. Roos and Erik Christian Bayer, in so far as the same is or may be applied to gypsum, and including all information and formulae for the manufacture of gypsum
9445 plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Roos and Bayer applications, together with a description of the machines or appliances which it now has for making the same. It will assist Licensee to make its plant ready for practicing said process in the manufacture of plasterboard and gypsum wallboard by furnishing without cost to Licensee the advice and instruction of Licensor's experts and information with respect to the purchase and cost of said machines and appliances.

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters patent de-

scribed in said Exhibit A, for the full term of said
9446 letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum wallboard, and thereafter shall give to Licensee writ-
9447 ten or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by second parties and which during the existence thereof shall embody the inventions and improvements set

forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

9448 3. Licensee agrees to pay to Licensor for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,452, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured

and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; Provided, However, that if no patent shall
9449 have been granted or issued for or upon any of said Roos or Bayer applications covering said process referred to in paragraph 1 hereof, within two (2) years from the date hereof, then commencing with the end of said two (2) year period the said license fees or royalties agreed to be paid by Licensee shall be reduced by one per cent (1%) of Licensee's said selling price until such patent shall have been granted or issued for or upon any of said Roos and Bayer applications, at which time Licensee shall again commence to pay the full amount of said license fees or royalties until the date of the expiration of the last to expire of any such patent or patents. If at the time of the execution of this contract Licensee's plant shall not be equipped to practice the process set forth and claimed in said Roos or Bayer applications in the manufacture of plasterboard or gypsum wallboard, then Licensee shall pay as such license fees or royalties two and one-half per cent (2½%) of said selling price between the date hereof and January 1, 1930, or such earlier date as Licensee shall make its plant ready to practice said process in the manufacture of said board, and the payment of three and one-half per cent (3½%) of said selling price and said period of two (2) years in this paragraph mentioned shall commence on January 1, 1930, or such earlier date as Licensee shall have made its plant ready as aforesaid. The amount of one per cent (1%) of said selling price included in said royalties or license fees is the amount agreed to be paid by Licensee for the use of said Haggerty and Hite patents.

Licensee's selling price shall mean the delivered selling price of Licensee, less freight paid by the customer and less regular cash discounts allowed by Licensee.

4. It is further agreed that so long as the license provided for in paragraph 2 hereof shall remain in force
9450 between the parties hereto, or in case the license granted under paragraph 2 hereof shall expire before the expiration of the patents specifically described in this paragraph, and the said license granted under paragraph 2 shall continue in force between the parties hereto for the full term of the last to expire of any of said patents described in said Exhibit A, or of any patent or patents

granted for or upon any application described in said Exhibit A, then until the expiration of the patents specifically described in this paragraph, Licensor does hereby give and grant unto the Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in those certain patents known as the Birdsey Plaster-Board Bundle Patent number 1,696,877, dated December 25, 1928, Utzman Patent number 1,724,740 dated August 13, 1929, Birdsey Patent number 1,730,113 dated October 1, 1929, and applications for letters patent serial numbers 329,581 filed December 31, 1928, and 296,354 filed July 30, 1928, and any patent which may be granted for or upon said applications, including any extensions and/or reissues thereof, at the plants or factories now owned or operated by Licensee or at any other plant or factory hereafter owned and/or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, and of selling or using bundles of plasterboard and/or gypsum wallboard put up or bundled by Licensee at any such place or places according to the claims set forth and claimed in the said patents and applications for letters patent in this paragraph described, upon the terms and conditions hereinafter stated.

Licensee agrees to pay to Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said patents and applications in the next preceding paragraph described, in addition to the sums hereinabove set forth, an amount (hereinafter referred to as a license fee or royalty) equivalent to ten cents (10¢) per one thousand (1,000) square feet of plasterboard and/or gypsum wallboard which is sold by Licensee
9451 in bundles of any kind, whether or not the bundles shall be made according to the claims set forth and claimed in said patents, which said license fee or royalty shall be payable at the times and in accordance with the terms of paragraph 6 hereof. The term "bundle" shall not include unbundled material wired or strapped for purpose of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates.

5. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; Provided,

However, that the same may be assigned by Licensee to any company acquiring all the assets and business or all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, and to agree to be bound by all of the terms and conditions of this contract, and deliver such agreement to Licensor.

6. Licensee agrees to keep separate full and accurate books of accounts and records showing the exact
9452 quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the twentieth day of each calendar month it will render unto Licensor true written returns verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and/or gypsum wallboard manufactured and sold by it during the preceding calendar month and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold and is to be accounted for hereunder, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all said plasterboard and/or gypsum wallboard manufactured and sold by it and put up and sold by it in bundles during the next preceding calendar month.

7. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it and the quantity thereof put up and sold by it in bun-

dles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; Provided, However, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by both parties. If
9453 the parties at any such time shall not agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing not directly or indirectly employed by it or in any other way connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

8. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents and/or applications for letters patent shall be distinctly marked with the word "Patented" and/or "Patent Applied for," as the case may be, together with the numbers of any of said patents or applications specified by Licensor, the claims of which may be embodied in said plasterboard or gypsum wallboard, and in connection with said marking Licensee will further mark said board with the words "Licensed Under the Above Letters Patent" and/or "Licensed Under Pending Applications for Letters Patent," as the case may be, which marking shall be plainly visible. Licensee further agrees that all bundles put up and sold by it embodying the claims of any of said patents numbers 1,696,877, 1,724,740 and 1,730,113 and/or any of said applications serial numbers 329,581 and 296,354 shall be similarly marked together with the numbers of said bundle patents and/or applications.

9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and
9454 who do not sell at retail), gypsum wallboard or plasterboard embodying the inventions and improvements

set forth and claimed in said letters patent or in any letters patent after the same shall have been issued, granted for or upon any of the said applications and may with the written consent of first party manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent or in any letters patent after the same shall have been granted for or upon any of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

10. Licensee covenants and agrees that all of said gypsum plasterboard and gypsum wallboard manufactured and sold by it embodying the inventions and improvements set forth and claimed in any of said Letters patent or patents issued upon any of said applications and commonly known in the trade as "seconds" shall be plainly invoiced as
9455 "seconds" and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of said letters patent or of any letters patent which may be granted or issued for or upon said applications, forming the subject-matter of said license so long as said license shall remain in full force and effect, and agrees that it will not at any time during the existence of said license, directly or indirectly, by itself, through or together with another or others, contest the va-

lidity of either or any of said letters patent or the title thereto of Licensor.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; Provided, However, that neither party shall be relieved thereby from any liability accrued at the time of such termination; and Provided Further, that if the party upon whom said notice is served shall deny that it is in default in whole or in part, as
9456 specified therein, then the party serving such notice shall not be privileged to cancel this contract on account of the alleged default specified therein, provided the party upon whom said notice shall have been served shall within said thirty (30) day period perform the agreements and submit the question to arbitration, as in this paragraph hereinafter set forth. In case of any such denial the party upon whom the notice shall have been served shall within said thirty (30) day period state in writing to the other party wherein and in what respect it denies the default specified in said notice and shall at the same time make good any default specified therein which it does not deny and appoint in writing one person as arbiter to arbitrate the question of whether or not it is in default in respect to that which it shall have denied as aforesaid, it being understood, however, that if the question shall be with respect to the amount of royalties or license fees to be paid hereunder, then the Licensee shall first pay or offer to pay the amount of such license fees or royalties which it then admits is due and payable in accordance with the terms hereof, and the acceptance thereof by the Licensor shall not operate as a waiver of any of its rights hereunder or of any claim it may have made in any notice served by it upon Licensee. The party so serving said notice shall, after the other party shall have made good any default specified in said notice which it did not deny in writing as aforesaid, including the payment of royalties or license fees, if any, ad-

mitted by it to be due and payable hereunder, and within ten (10) days from the date of the appointment of said first arbiter in accordance with the terms hereof, appoint in writing another person as arbiter, and the two persons so appointed shall within ten (10) days or as soon as possible thereafter appoint in writing a third person as arbiter. The three persons so appointed shall, within thirty (30) days from the date of the appointment of said last mentioned arbiter, or as soon as possible thereafter, decide whether or not the party upon whom said notice has been
9457 served is in default hereunder with respect to anything contained in said notice. The decision of a majority of the three arbiters so appointed shall constitute a final settlement of the said question and be binding and conclusive upon both the Licensor and the Licensee, and if it shall have been determined by a majority of the said arbiters that the party upon whom said notice was served is in default with respect to anything contained in said notice and the party so found to have been in default shall fail or refuse to comply with the terms of the award or finding made by said arbiters within thirty (30) days from the date such award or finding shall have been made, the party serving said notice may at its election terminate and cancel this agreement in writing. In the event of default hereunder by either party and notice of such default is served by the other party as herein provided, and after service of such notice the party in default shall cure the same as hereinbefore provided the same shall constitute a nullification of said notice to the same effect as if said notice had not been served. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become canceled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may proceed by action to specifically enforce this contract or any of the terms, conditions and covenants thereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served by the Licensor or the Licensee by mailing the same to the other party hereto, postage prepaid and

registered, addressed to any of its officers at its last
9458 known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under paragraph 2 hereof shall be confirmed in writing in the ordinary course of business.

14. It Is Understood and Agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement on the part of any person or persons of any of said letters patent or of any patent that may be granted upon said applications, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper.

If a court of last resort upon final appeal or review shall decree all the claims of the patents granted for or upon said Roos and Bayer applications invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard, the body or core of which is made according to the process set forth and claimed in said Roos and Bayer applications in such manner that they cannot practice in any way any of the inventions set forth in the said applications, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree that all the claims of the patents granted or issued for or upon said Roos and Bayer applications are invalid, or make such injunction permanent and final, the license fees or royalties to be paid by Licensee hereunder shall be reduced by one per cent (1%) of said selling price, or if a court of last resort upon final appeal or review shall decree that
all the claims of said Haggerty and Hite patents
9459 are invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Haggerty and Hite patents in such manner that they cannot practice in any way any of the inventions set forth in said patents, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree all claims of said

Haggerty and Hite patents invalid or make said injunction permanent and final, the said license fees or royalties agreed to be paid by Licensee for said Haggerty and Hite patents shall cease and determine.

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

9460. 16. The terms "gypsum plasterboard," "gypsum wallboard" and "plasterboard" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

17. If at any time after the expiration of two (2) years from January 1, 1930, or such earlier date that Licensee shall make its plant ready to practice the process set forth and claimed in said Roos and Bayer applications in the manufacture of gypsum wallboard or plasterboard, there shall have been invented or come into use any process which shall make the said process of forming a cellular product as set forth and claimed in said Roos and Bayer applications obsolete or shall displace the same, and the Licensor shall in its own manufacture permanently and wholly abandon the use of the subject-matter of the claims of said Roos and Bayer applications, it shall notify Licensee in writing thereof, and Licensee may then, upon thirty (30) days' written notice to Licensor, cancel and terminate this

license in so far as the same applies to said Roos and Bayer applications or to the patent or patents granted or issued therefor or thereupon, and from the date of such cancellation the royalties or license fees to be paid by Licensee hereunder shall be reduced by one per cent (1%) of its said selling price; Provided, However, that if Licensor shall not in such event permanently and wholly abandon the use of said process but shall only partially abandon the same, then to the extent or degree and for the term that Licensor shall abandon the same in its own manufacture Licensee shall be relieved from the payment of license fees or royalties to the same extent, that is to say, if Licensor shall in such event manufacture and sell any board the core of which is made of gypsum of a
9461 particular size, kind or make, or for a particular purpose or use, without the use of said process embodied therein, then if Licensee shall manufacture and sell the same board of the same particular size, kind or make for the same purpose or use, without the use of said process embodied therein, then Licensee shall not be required to pay royalties or license fees upon such particular board for the term that Licensor shall manufacture and sell the same. "License fees" and "royalties" for the purpose of this paragraph shall mean one per cent (1%) of said selling price. The use by Licensor of any improvement which Licensee has the right to use as set forth in paragraph 18 hereof, or the manufacture of plasterboard or gypsum wallboard without the use of said process for sale only in foreign countries where Licensor has no patented rights in said process, shall not constitute an abandonment of said process or a partial abandonment thereof within the meaning of this paragraph.

18. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubble described in process set forth in said Roos and Bayer applications and/or method of its introduction in the core of plasterboard or gypsum wallboard, and which improvement is covered by the claims of said Roos and Bayer applications, and shall itself use the same in its own manufacture, then so long as Licensee shall continue to pay the license fees or royalties hereinbefore stipulated the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum

plasterboard or gypsum wallboard, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional sum, royalty or license fee therefor. It is further understood that if a. patent or patents shall be
9462 granted or issued for or upon said improvement, then all of the provisions of this agreement, as well as the provision of paragraph 2 hereof reserving the right in Licensor to determine and fix at any time and to change from time to time the minimum price or prices at which Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the claims of said patents, shall apply to improvement set forth and claimed in any patent or patents granted or issued for or upon said improvement. Licensor will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of plasterboard and gypsum wallboard.

19. Licensee has investigated and fully satisfied itself with respect to the inventions and improvements set forth in said patents and applications for letters patent and the use thereof in its own manufacture, and has executed this agreement without relying upon any representations which may have been made by Licensor with respect thereto. No representations have been made by Licensor not expressly stated in this contract which Licensee shall at any time have any right to rely upon as an inducement for its making this contract or for any result or results to be obtained by Licensee in its own plant by its use of the inventions and improvements set forth and claimed in any of said patents or applications for letters patent.

20. The Licensor agrees at any time during the term hereof to extend to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the said process or processes set forth and claimed in said Roos or Bayer applications in the manufacture in its said plants of any other gypsum product not specifically covered by this agreement and in which Licen-
9463 sor shall use the same in its own manufacture and to sell the same, upon the payment to Licensor of one per cent (1%) of the selling price of Licensee of all said other gypsum product, whether or not embodying the said

process in making the same, manufactured and sold by Licensee and upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the words "plasterboard and/or gypsum wallboard" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

21. From the date this contract shall become effective the same shall supersede all prior license agreements at any time made between the parties hereto relating to the subject-matter hereof or relating to any of the patents or applications for letters patents referred to in this agreement; Provided, However, that Licensor shall not be barred or prevented from recovering any claim which may have accrued under any such prior license agreements prior to the time this contract shall become effective, including all payments, royalties or license fees agreed to be paid thereunder by Licensee up to the date this agreement shall go into effect.

22. This license and all of the covenants and agreements hereof shall become effective upon the date Licensor shall receive a conveyance and assignment of said Haggerty and Hite patents to it, pursuant to authority granted by the United States District Court to the receivers of the Universal Gypsum & Lime Co., a Delaware corporation, and to said company, to sell and assign said Haggerty and Hite patents to Licensor, and from the effective date thereof this license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the
9464 successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by Licensee, except as hereinabove specifically provided.

In Witness Whereof the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY

By S. L. AVERY

Its President.

ATTEST:

R. G. BEAR

Secretary.

EBSARY GYPSUM CO., INC.,

By F. G. EBSARY

Its President.

[Corporate Seal.]

ATTEST:

O. E. HOUGH

Secretary.

9465 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

9466 Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial No. 565,737, reissued January 24, 1928 as Reissue patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1,

1938; application for reissue filed June 9, 1922, Serial No. 567,205, reissued May 22, 1928 as Reissue Patent No. 16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1942, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

9467 Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,676, filed October 10, 1921, granted November 29, 1927, expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,672, filed April 19, 1922, granted April 30, 1929, expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662,359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1,631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927, expires May 31, 1944.

Brookby & Absmeier patent No. 1,689,322. Application Serial No. 91,297, filed March 1, 1926, granted October 30, 1928, expires Oct. 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.

Utzman patent No. 1,638,280. Application Serial No. 374,833, filed April 17, 1920, granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927, expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No. 427,044, filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,045, filed November 29, 1920, granted September 6, 1927, expires September 6, 1944.

Mehlhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926, expires October 26, 1943.

9468 Gustafson patent No. 1,665,168. Application Serial No. 509,366, filed December 2, 1919, renewed October 21, 1921, granted April 3, 1928, expires April 3, 1945.

Kohler, et al. patent No. 1,673,944. Application Serial No. 540,412, filed March 2, 1922, granted June 19, 1928, expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey Patent No. 1,718,890. Application Serial No. 583,795, filed August 23, 1922, granted June 25, 1929, expires June 25, 1946.

Utzman application Serial No. 477,371, filed June 14, 1921, finally allowed April 26, 1929. Patent No. 1,731,116 will issue October 8, 1929.

Knode application Serial No. 590,358. Filed September 25, 1922.

Utzman application Serial No. 581,361. Filed August 12, 1922.

Williams application Serial No. 582,606. Filed August 18, 1922.

Roos application Serial No. 733,197, filed August 20, 1924.

Bayer application Serial No. 661,723, filed September 8, 1923.

Roos application Serial No. 3477, filed January 19, 1925.

Roos application Serial No. 142,155, filed October 16, 1926.

Haggerty patent No. 1,500,452. Application Serial No. 565,433, filed June 2, 1922, granted July 8, 1924.

Hite patent No. 1,230,297. Application Serial No. 115,649, filed August 18, 1916, granted June 19, 1917.

9469 *Government's Exhibit No. 12*

LICENSE AGREEMENT

This agreement, executed in duplicate this 8th day of October, 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as a Licensor, and Niagara Gypsum Company, a New York corporation of Oakfield, New York, hereinafter referred to as Licensee, Witnesseth:

Whereas, Licensor is the owner of certain letters patent and applications for letters patent of the United States covering an improved gypsum wallboard and method or process of making the same, together with machines and appliances for the manufacture of such inventions, which with certain other patents are more specifically set forth in Exhibit A attached hereto and made a part hereof; and

Whereas, Licensor was the owner of all of the right, title and interest in and under Letters Patent of the United States, number 1,029,328 and number 1,034,746, known as the Utzman patents, the last of which expired August 6, 1929, which said Utzman Patents were adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit, and were decreed by said courts as valid and having been infringed by the defendants named in said suits; and

Whereas, the Birdsey Patent number 1,358,508, mentioned in said Exhibit A, was adjudicated by the United States District Court for the Northern District of Ohio, and said court decreed that said Birdsey Patent was valid
9470 and infringed by the defendant in said cause by reason of its having made, used and sold plasterboard and/or gypsum wallboard with edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit; and

Whereas, Licensor has a substantial claim against Licensee for damages and profits because and on account of an alleged infringement of said patents, and Licensor agreed to grant a license to Licensee under said patents (not including the Roos or Bayer applications and the Haggerty or Hite patents referred to in said Exhibit A) to February 10, 1937, and to settle the same claim in consideration of the payment by the Licensee to Licensor of five per cent (5%) of Licensee's selling price of all plasterboard and/or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent (1½%) of such selling price from August 6, 1929, to February 10, 1937, plus three and one-half per cent (3½%) of such selling price from August 6, 1929, until said three and one-half per cent (3½%) of such selling price aggregated the fixed sum of Twenty-seven Thousand Nine Hundred Nineteen Dollars ($27,919.00); and

Whereas, Licensor is the owner of that certain application for United States letters patent filed by Carlisle K. Roos, entitled "Cementitious Material," now pending in the United States Patent Office and covering the process of making a cellular product, which comprises forming a tenacious foam and mixing the foam with a cementitious material, and of certain other applications filed by said
9471 Roos covering specific employment of said invention, and Licensor has heretofore acquired the sole and exclusive rights in the United States of America (when gypsum is used as the main binding material) in that certain application for United States letters patent described in said Exhibit A filed by Erik Christian Bayer, entitled "Methods of Manufacturing Porous Building Materials," and relating to a process broadly similar to that of said first mentioned Roos application, which said Roos and Bayer applications are described and set forth in said Exhibit A; and

Whereas, Licensor has agreed to purchase that certain Haggerty patent number 1,500,452 dated July 8, 1924, and that certain Hite Patent number 1,230,297 dated June 19, 1917, subject to approval of the United States District Court for the Northern District of Illinois, Eastern Division thereof, and other United States District Courts in receivership proceedings therein pending against the present owner of said patents, both of which said patents are set forth in said Exhibit A; and

Whereas, Licensee desires to include in its manufacture the inventions and improvements set forth and claimed in the said Roos and Bayer applications and said Haggerty and Hite patents referred to in said Exhibit A, and to obtain a license from Licensor to make, use and sell the inventions and improvements set forth and claimed in all of said patents and applications for letters patent described in said Exhibit A throughout the full term thereof, and Licensor has agreed to grant such a license to Licensee upon the terms and conditions hereinafter stated;

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged from each party to the other party, and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto do hereby agree as follows, to-wit:

9472 1. Licensor agrees promptly to disclose to Licensee all information and formulae which it now has or may obtain relating to the process of making a cellular product through the formation of a tenacious foam and mixing the foam with a cementitious material, as set forth and claimed in said applications for letters patent filed by Carlisle K. Roos and Erik Christian Bayer, in so far as the same is or may be applied to gypsum, and including all information and formulae for the manufacture of gypsum plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Roos and Bayer applications, together with a description of the machines or appliances which it now has for making the same. It will assist Licensee to make its plant ready for practicing said process in the manufacture of plasterboard and gypsum wallboard by furnishing without cost to Licensee the advice and instruction of Licensor's experts and information with respect to the purchase and cost of said machines and appliances.

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and
9473 possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters patent described in said Exhibit A, for the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions, and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written

notice of its intention so to do upon Licensee, ac-
9474 companied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum wallboard, and thereafter shall give to Licensee written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by second parties and which during the existence thereof shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

9475 3. Licensee agrees to pay to Licensor in settlement and discharge of said claim and for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or roy-

alty) equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,452, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; Provided,

However, that if no patent shall have been granted or
9476 issued for or upon any of said Roos or Bayer applications covering said process referred to in paragraph 1 hereof, within two (2) years from the date hereof, then commencing with the end of said two (2) year period the said license fees or royalties agreed to be paid by Licensee shall be reduced by one per cent (1%) of Licensee's said selling price until such patent shall have been granted or issued for or upon any of said Roos and Bayer applications, at which time Licensee shall again commence to pay the full amount of said license fees or royalties until the date of the expiration of the last to expire of any such patent or patents. If at the time of the execution of this contract Licensee's plant shall not be equipped to practice the process set forth and claimed in said Roos or Bayer applications in the manufacture of plasterboard or gypsum wallboard, then Licensee shall pay as such license fees or royalties two and one-half per cent (2½%) of said selling price between the date hereof and January 1, 1930, or such earlier date as Licensee shall make its plant ready to practice said process in the manufacture of said board, and the payment of three and one-half per cent (3½%) of said selling price and said period of two (2) years in this paragraph mentioned shall commence on January 1, 1930, or such earlier date as Licensee shall have made its plant ready as aforesaid. The amount of one per cent (1%) of said selling price included in said royalties or license fees is the amount

agreed to be paid by Licensee for the use of said Haggerty and Hite patents.

Licensee's selling price shall mean the delivered selling price of Licensee, less freight paid by the customer and less regular cash discounts allowed by Licensee.

In addition to the amounts hereinabove agreed to be paid by Licensee, Licensee, in further consideration of
9477 said license and in settlement of said claim, shall pay to Licensor an amount hereinafter referred to as a license fee or royalty equivalent to one and one-half per cent (1½%) of the selling price of Licensee of all such plasterboard and/or gypsum wallboard manufactured and sold by it after the date hereof, and until said one and one-half per cent (1½%) of said selling price shall have aggregated the sum of $27,650.85, being the full amount of said fixed sum which is unpaid up to date hereof. It is understood and agreed that if prior to the expiration of said license granted in paragraph 2 hereof Licensee shall not have paid to Licensor said additional sum of $27,650.85, over and above said other license fees or royalties, then Licensee shall from the date of the expiration of said license pay to Licensor five per cent (5%) of the selling price of Licensee of all plasterboard and/or gypsum wallboard manufactured and sold by it until said sum of $27,650.85 shall have been fully paid and satisfied.

It is expressly understood and agreed that this contract is executed without prejudice to Licensor to assert its said claim against Licensee for infringement of its said patents in case for any reason this contract shall not remain in force until February 10, 1937, and Licensee shall not pay to Licensor all of said royalties or license fees agreed to be paid by it up to said last mentioned date, and in addition thereto said one an one-half per cent (1½%) of said selling price until said fixed sum shall have been fully paid in accordance with the terms hereof, and it is further agreed that the claim of Licensor against Licensee for said infringement is not settled or discharged by the execution of this instrument but shall only be settled and discharged by the full performance of this contract by Licensee up to February 10, 1937, and the payment to Licensor of all of said royalties or license fees up to said last mentioned
9478 date, including said one and one-half per cent (1½%) of said selling price until said fixed sum shall have been fully paid. In case of the termination of this contract at any time prior to February 10, 1937, for any reason, or in the event of the failure of Licensee to make full payment

to Licensor of all of said royalties or license fees up to said last mentioned date, including said one and one-half per cent (1½%) of said selling price until said fixed sum is fully paid in the manner herein specified, Licensor shall have the same right which it originally had against Licensee before the execution of this agreement or the execution of any license agreement between Licensee and Licensor with respect to any of said patents, to recover of and from Licensee the full amount of its said claim for damages for infringement of its said patents, and nothing herein contained shall prevent the recovery by Licensor of all of its damages for such infringement against Licensee according to the full measure of damages allowed in such cases the same as if this contract or any other license contract made between Licensor and Licensee had never been made, less only such sums as shall have been paid by Licensee to Licensor since the date hereof on account of said additional one and one-half per cent (1½%) of said selling price in reduction of said sum of $27,650.85, in either of which events Licensee shall pay to Licensor the balance of said fixed sum then remaining unpaid in part payment of its said claim for damages, it being understood that in no event shall the recovery from Licensee in such case be less than the amount of said fixed sum then remaining unpaid. Upon the payment to Licensor of all of said royalties or license fees up to February 10, 1937, plus said additional sum of $27,650.85, at the time and in the manner herein specified, then the said claim of Licensor against
9479 Licensee for infringement of its said patents shall thereupon be and become fully settled, discharged and satisfied.

4. It is further agreed that so long as the license provided for in paragraph 2 hereof shall remain in force between the parties hereto, or in case the license granted under paragraph 2 hereof shall expire before the expiration of the patents specifically described in this paragraph, and the said license granted under paragraph 2 shall continue in force between the parties hereto for the full term of the last to expire of any of said patents described in said Exhibit A, or of any patent or patents granted for or upon any application described in said Exhibit A, then until the expiration of the patents specifically described in this paragraph, Licensor does hereby give and grant unto the Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in those

certain patents known as the Birdsey Plasterboard Bundle Patent number 1,696,877, dated December 25, 1928, Utzman Patent number 1,724,740, dated August 13, 1929, Birdsey patent number 1,730,113, dated October 1, 1929, and applications for letters patent serial numbers 329,581, filed December 31, 1928, and 296,354, filed July 30, 1928, and any patent which may be granted for or upon said applications, including any extensions and/or reissues thereof, at the plants or factories now owned or operated by Licensee or at any other plant or factory hereafter owned and/or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, and of selling or using bundles of plasterboard and/or gypsum wallboard put up or bundled by Licensee at any such place or places according to the claims set forth and claimed in the said patents and applications for letters patent in this paragraph described, upon the terms and conditions hereinafter stated.

Licensee agrees to pay to Licensor for the right,
9480 license and privilege of making, using or selling the inventions set forth and claimed in said patents and applications in the next preceding paragraph described, in addition to the sums hereinabove set forth, an amount (hereinafter referred to as a license fee or royalty) equivalent to ten cents (10¢) per one thousand (1,000) square feet of plasterboard and/or gypsum wallboard which is sold by Licensee in bundles of any kind, whether or not the bundles shall be made according to the claims set forth and claimed in said patents, which said license fee or royalty shall be payable at the times and in accordance with the terms of paragraph 6 hereof. The term "bundle" shall not include unbundled material wired or strapped for purpose of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates.

5. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; Provided, However, that the same may be assigned by Licensee to any company acquiring all the assets and business or all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor.

Licensee agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, including the assumption of the claim which Licensor has against Licensee for damages for infringement of its said patents and the agree-
9481 ments in settlement and discharge thereof, as in this contract contained, and to agree to be bound by all of the terms and conditions of this contract and deliver such agreement to Licensor.

It is expressly understood that Licensee shall not discontinue its business of manufacturing and selling plasterboard and/or gypsum wallboard until Licensor shall have received the full amount of said license fees or royalties agreed to be paid by Licensee hereunder for the use of all of said patents until February 10, 1937, plus the full amount of said sum of $27,650.85 in the manner and upon the payments as hereinabove set forth.

6. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the twentieth day of each calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and/or gypsum wallboard manufactured and sold by it during the preceding calendar month and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold and is to be accounted for hereunder, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all said plasterboard and/or gypsum wallboard manufactured and sold by it and put up and sold by it in bundles during the next preceding calendar month.

9482 7. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding

paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it and the quantity therof put up and sold by it in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; Provided, However, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by both parties. If the parties at any time shall not agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing not directly or indirectly employed by it or in any other way connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

8. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents and/or applications for letters patent shall be distinctly marked with the words "Patented" and/or "Patent applied for," as the case may be, together with the numbers of any of said patents or applications specified by Licensor, the claims of which may be embodied in said plasterboard or gypsum wallboard, and in connection with said marking Licensee will further mark said board with the words "Licensed under the above letters patent" and/or "Licensed under pending applications for letters patent," as the case may be, which
9483 marking shall be plainly visible. Licensee further agrees that all bundles put up and sold by it embodying the claims of any of said patents numbers 1,696,877, 1,724,740 and 1,730,113 and/or any of said applications serial numbers 329,581 and 296,354 shall be similarly marked together with the numbers of said bundle patents and/or applications.

9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may manufacture for

jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail) gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in any letters patent after the same shall have been issued, granted for or upon any of the said applications and may with the written consent of first party manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or wholesale distributor. Nothing hereinbefore
9484 contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent or in any letters patent after the same shall have been granted for or upon any of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

10. Licensee covenants and agrees that all of said gypsum plasterboard and gypsum wallboard manufactured and sold by it embodying the inventions and improvements set forth and claimed in any of said Letters Patent or Patents issued upon any of said applications and commonly known in the trade as "seconds" shall be plainly invoiced as "seconds" and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of said letters patent or of any letters patent which may be granted or issued for or upon said applications, forming the subject-matter of

said license so long as said license shall remain in full force and effect, and agrees that it will not at any time during the existence of said license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said letters patent or the title thereto of Licensor.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and
9485 performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; Provided, However, that neither party shall be relieved thereby from any liability accrued at the time of such termination; and Provided Further, that if the party upon whom said notice is served shall deny that it is in default in whole or in part, as specified therein, then the party serving such notice shall not be privileged to cancel this contract on account of the alleged default specified therein, provided the party upon whom said notice shall have been served shall within said thirty (30) day period perform the agreements and submit the question to arbitration, as in this paragraph hereinafter set forth. In case of any such denial the party upon whom the notice shall have been served shall within said thirty (30) day period state in writing to the other party wherein and in what respect it denies the default specified in said notice and shall at the same time make good any default specified therein which it does not deny and appoint in writing one person as arbiter to arbitrate the question of whether or not it is in default in respect to that which it shall have denied as aforesaid, it being understood, however, that if the question shall be with respect to the amount of royalties or license fees to be paid hereunder, then the Licensee shall first pay or offer to pay the amount of such license fees or royalties which it then admits is due and payable in
9486 accordance with the terms hereof, and the acceptance thereof by the Licensor shall not operate as a

waiver of any of its rights hereunder or of any claim it may have made in any notice served by it upon Licensee. The party so serving said notice shall, after the other party shall have made good any default specified in said notice which it did not deny in writing as aforesaid, including the payment of royalties or license fees, if any, admitted by it to be due and payable hereunder, and within ten (10) days from the date of the appointment of said first arbiter in accordance with the terms hereof, appoint in writing another person as arbiter, and the two persons so appointed shall within ten (10) days or as soon as possible thereafter appoint in writing a third person as arbiter. The three persons so appointed shall, within thirty (30) days from the date of the appointment of said last mentioned arbiter, or as soon as possible thereafter, decide whether or not the party upon whom said notice has been served is in default hereunder with respect to anything contained in said notice. The decision of a majority of the three arbiters so appointed shall constitute a final settlement of the said question and be binding and conclusive upon both the Licensor and the Licensee, and if it shall have been determined by a majority of the said arbiters that the party upon whom said notice was served is in default with respect to anything contained in said notice and the party so found to have been in default shall fail or refuse to comply with the terms of the award or finding made by said arbiters within thirty (30) days from the date such award or finding shall have been made, the party serving said notice may at its election terminate and cancel this agreement in writing. In the event of default hereunder by either party and notice of such default is served by the other party as herein provided; and after service of such notice the party
9487 in default shall cure the same as hereinbefore provided, the same shall constitute a nullification of said notice to the same effect as if said notice had not been served. In case at any time the Licensee shall be adjudged a bankrupt; then the License hereunder shall immediately be and become canceled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may proceed by action to specifically enforce this contract or any of the terms, conditions and covenants thereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served by the Licensor or the Licensee by mailing the same to the other party hereto, postage prepaid and registered, addressed to any of its officers at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under paragraph 2 hereof shall be confirmed in writing in the ordinary course of business.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement on the part of any person or persons of any of said letters patent or of any patent that may be granted upon said applications, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper.

If a court of last resort upon final appeal or review
9488 shall decree all the claims of the patents granted for or upon said Roos and Bayer applications invalid or Licensee ~~shall~~ be permanently enjoined from manufacturing plasterboard and gypsum wallboard, the body or core of which is made according to the process set forth and claimed in said Roos and Bayer applications in such manner that they cannot practice in any way any of the inventions set forth in the said applications, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree that all the claims of the patents granted or issued for or upon said Roos and Bayer applications are invalid, or make such injunction permanent and final, the license fees or royalties to be paid by Licensee hereunder shall be reduced by one per cent (1%) of said selling price, or if a court of last resort upon final appeal or review shall decree that all the claims of said Haggerty and Hite patents are invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Haggerty and Hite patents in such manner that they cannot practice in any way any of the inventions set forth in said patents, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the

time the court of last resort upon final appeal or review shall decree all claims of said Haggerty and Hite patents invalid or make said injunction permanent and final, the said license fees or royalties agreed to be paid by Licensee for said Haggerty and Hite patents shall cease and determine.

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel
9489 Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

16. The terms "gypsum plasterboard," "gypsum wallboard" and "plasterboard" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

17. If at any time after the expiration of two (2) years from January 1, 1930, or such earlier date that Licensee shall make its plant ready to practice the process set forth and claimed in said Roos and Bayer applications in the manufacture of gypsum wallboard or plasterboard, there shall have been invented or come into use any process which shall make the said process of forming a cellular product as set forth and claimed in said Roos and Bayer ap-
9490 plications obsolete or shall displace the same, and the Licensor shall in its own manufacture permanently and wholly abandon the use of the subject-matter of

the claims of said Roos and Bayer applications, it shall notify Licensee in writing thereof, and Licensee may then, upon thirty (30) days' written notice to Licensor, cancel and terminate this License in so far as the same applies to said Roos and Bayer applications or to the patent or patents granted or issued therefor or thereupon, and from the date of such cancellation the royalties or license fees to be paid by Licensee hereunder shall be reduced by one per cent (1%) of its said selling price; Provided, However, that if Licensor shall not in such event permanently and wholly abandon the use of said process but shall only partially abandon the same, then to the extent or degree and for the term that Licensor shall abandon the same in its own manufacture Licensee shall be relieved from the payment of license fees or royalties to the same extent, that is to say, if Licensor shall in such event manufacture and sell any board the core of which is made of gypsum of a particular size, kind or make, or for a particular purpose or use, without the use of said process embodied therein, then if Licensee shall manufacture and sell the same board of the same particular size, kind or make and for the same purpose or use, within the use of said process embodied therein, then Licensee shall not be required to pay royalties or license fees upon such particular board for the term that Licensor shall manufacture and sell the same. "License fees" and "royalties" for the purpose of this paragraph shall mean one per cent (1%) of said selling price. The use by Licensor of any improvement which Licensee has the right to use as set forth in paragraph 18 hereof, or the manufacture of plasterboard or gypsum wallboard without the use of said process for sale only in foreign countries where Licensor has no patented rights in said process, shall not constitute an abandonment of said process or a partial abandonment thereof within the meaning of this paragraph.

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18. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubble described in the process set forth in said Roos and Bayer applications and/or method of its introduction in the core of plasterboard or gypsum wallboard, and which improvement is covered by the claims of said Roos and Bayer applications, and shall itself use the same in its own manufacture, then so long as Licensee shall continue to pay the license fees or royalties hereinbefore

stipulated, the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum plasterboard or gypsum wallboard, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional sum, royalty or license fee therefor. It is further understood that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement, as well as the provision of paragraph 2 hereof reserving the right in Licensor to determine and fix at any time and to change from time to time the minimum price or prices at which Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the claims of said patents, shall apply to the improvement set forth and claimed in any patent or patents granted or issued for or upon said improvement. Licensor
9492 will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture together with such information as it may possess as to the use thereof in the manufacture of plasterboard and gypsum wallboard.

19. Licensee has investigated and fully satisfied itself with respect to the inventions and improvements set forth in said patents and applications for letters patent and the use thereof in its own manufacture, and has executed this agreement without relying upon any representations which may have been made by Licensor with respect thereto. No representations have been made by Licensor not expressly stated in this contract which Licensee shall at any time have any right to rely upon as an inducement for its making this contract or for any result or results to be obtained by Licensee in its own plant by its use of the inventions and improvements set forth and claimed in any of said patents or applications for letters patent.

20. The Licensor agrees at any time during the term hereof to extend to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the said process or processes set forth and claimed in said Roos or Bayer applications in the manufacture in its said plants of any other gypsum product not specifically covered by this agreement and in which Licensor shall use the same in its own manufacture and to sell the same. upon the payment to Licensor of one per cent (1%) of the selling price

of Licensee of all of said other gypsum product, whether or not embodying the said process in making the same, manufactured and sold by Licensee and upon the
9493 same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the words "plasterboard and/or gypsum wallboard" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

21. From the date this contract shall become effective the same shall supersede all prior license agreements at any time made between the parties hereto relating to the subject-matter hereof or relating to any of the patents or applications for letters patent referred to in this agreement; Provided, However, that Licensor shall not be barred or prevented from recovering any claim which may have accrued under any such prior license agreements prior to the time this contract shall become effective, including all payments, royalties or license fees agreed to be paid thereunder by Licensee up to the date this agreement shall go into effect.

22. This license and all of the covenants and agreements hereof shall become effective upon the date Licensor shall receive a conveyance and assignment of said Haggerty and Hite patents to it, pursuant to authority granted by the United States District Court to the receivers of the Universal Gypsum & Lime Co., a Delaware corporation, and to said company, to sell and assign said Haggerty and Hite patents to Licensor, and from the effective date thereof this license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing
9494 in this paragraph shall be construed to permit an assignment hereof by Licensee, except as hereinabove specifically provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

[SEAL] UNITED STATES GYPSUM COMPANY

By S. L. AVERY

Its President.

C. F. HENNING,
Witness.

[SEAL] NIAGARA GYPSUM COMPANY

By M. A. REIB

Its President.

E. R. NORTH
Witness.

9495 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921 expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

9496 Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2. 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey Patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial No. 565,737, reissued January 24, 1928 as Reissue patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919 granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial No. 567,205, reissued May 22, 1928 as Reissue Patent No. 16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

9497 Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,676, filed October 10, 1921, granted November 29, 1927, expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,627, filed April 19, 1922, granted April 30, 1929, expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662,359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1,631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927, expires May 31, 1944.

Brookby & Absmeier patent No. 1,689,322. Application Serial No. 91, 297, filed March 1, 1926, granted October 30, 1928, expires Oct. 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.

Utzman patent No. 1,638,280. Application Serial No. 374,833, filed April 19, 1920, granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927, expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No. 427,044, filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,045, filed November 29, 1920, granted September 6, 1927, expires September 6, 1944.

Mehlhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926, expires October 26, 1943.

9498 Gustafson patent No. 1,665,168. Application Serial No. 509,366, filed December 2, 1919, renewed October 21, 1921, granted April 3, 1928, expires April 3, 1945.

Kohler, et al patent No. 1,673,944. Application Serial No. 540,412, filed March 2, 1922, granted June 19, 1928, expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey patent No. 1,718,890. Application Serial No. 583,795, filed August 23, 1922, granted June 25, 1929, expires June 25, 1946.

Utzman application Serial No. 477,371, filed June 14, 1921, finally allowed April 26, 1929. Patent No. 1,731,116 will issue October 8, 1929.

Knode application Serial No. 590,358. Filed September 25, 1922.

Utzman application Serial No. 581,361. Filed August 12, 1922.

Williams application Serial No. 582,606. Filed August 18, 1922.

Roos application Serial No. 733,197, filed August 20, 1924.

Bayer application Serial No. 661,723, filed September 8, 1923.

Roos application Serial No. 3477, filed January 19, 1925.

Roos application Serial No. 142,155, filed October 16, 1926.

Haggerty patent No. 1,500,452. Application Serial No. 565,433, filed June 2, 1922, granted July 8, 1924.

Hite patent No. 1,230,297. Application Serial No. 115,649, filed August 18,1916, granted June 19, 1917.

9499 *Government's Exhibit No. 13*

LICENSE AGREEMENT

This agreement, executed in duplicate this 25th day of November, 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and The American Gypsum Company, an Ohio corporation of Port Clinton, Ohio, hereinafter referred to as Licensee, witnesseth:

Whereas, Licensor is the owner of certain letters patent and applications for letters patent of the United States covering an improved gypsum wallboard and method or process of making the same, together with machines and appliances for the manufacture of said inventions, including among them the Haggerty and Hite patents and the Roos and Bayer applications hereinafter referred to, all of which said patents and applications for letters patent are more specifically set forth in Exhibit A attached hereto and made a part hereof; and

Whereas, Licensor was the owner of all of the right, title and interest in and under Letters Patent of the United States, number 1,029,328 and number 1,034,746, known as the Utzman patents, the last of which expired August 6, 1929, which said Utzman Patents were adjudicated by the United States District Court for the Northern District of

Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit, and were decreed by said courts as valid and having been infringed by the defendants named in said suits; and

Whereas, the Birdsey Patent number 1,358,508, mentioned in said Exhibit A, was adjudicated by the United States District Court for the Northern District of Ohio,
9500 and said court decreed that said Birdsey Patent was valid and infringed by the Licensee in said cause by reason of its having made, used and sold plasterboard and/or gypsum wallboard with edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit; and

Whereas, Licensor has a substantial claim against Licensee for damages and profits because and on account of said alleged infringement; and

Whereas, Licensor is the owner of that certain application for United States letters patent filed by Carlisle K. Roos, entitled "Cementitious Material," now pending in the United States Patent Office and covering the process of making a cellular product, which comprises forming a tenacious foam and mixing the foam with a cementitious material, and of certain other applications filed by said Roos covering specific employment of said inventions, and Licensor has heretofore acquired the sole and exclusive rights in the United States of America (when gypsum is used as the main binding material) in that certain application for United States letters patent described in said Exhibit A filed by Erik Christian Bayer, entitled "Methods of Manufacturing Porous Building Materials," and relating to a process broadly similar to that of said first mentioned Roos application, which said Roos and Bayer applications are described and set forth in said Exhibit A; and

Whereas, Licensee desires to include in its manufacture the inventions and improvements set forth and claimed in said Roos and Bayer applications and in those two certain patents known as the Haggerty and Hite patents referred to in said Exhibit A and to obtain a license from Licensor
to make, use and sell the inventions and improve-
9501 ments set forth and claimed in all of said patents and applications for letters patent described in said Exhibit A throughout the full term thereof and Licensor

has agreed to grant such a license to Licensee upon the terms and conditions hereinafter stated;

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged from each party to the other party, and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto do hereby agree as follows, to-wit:

1. Licensor agrees promptly to disclose to Licensee all information and formulae which it now has or may obtain relating to the process of making a cellular product through the formation of a tenacious foam and mixing the foam with a cementitious material, as set forth and claimed in said applications for letters patent filed by Carlisle K. Roos and Erik Christian Bayer, in so far as the same is or may be applied to gypsum, and including all information and formulae for the manufacture of gypsum plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Roos and Bayer applications, together with a description of the machines or appliances which it now has for making the same. It will assist Licensee to make its plant ready for practicing said process in the manufacture of plasterboard and gypsum wallboard by furnishing without cost to Licensee the advice and instruction of Licensor's experts and information with respect to the purchase and cost of said machines and appliances.

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto
in the manufacture of gypsum plasterboard and/or
9502 gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters

patent described in said Exhibit A, for the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or
9503 core of which is made according to the process set forth and claimed in any patent granted for or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum wallboard, and thereafter shall give to Licensee written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by second parties and which during the existence

thereof shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that stated by Licensor in said
9504 notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

3. Licensee agrees to pay to Licensor in settlement and discharge of said claim and for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and
9505 sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,452, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such

plasterboard and gypsum wallboard manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; Provided, However, that if no patent shall have been granted or issued for or upon any of said Roos or Bayer applications covering said process referred to in paragraph 1 hereof, within two (2) years from the date hereof, then commencing with the end of said two (2) year period the said license fees or royalties agreed to be paid by Licensee shall be reduced by one per cent (1%) of Licensee's said selling price until such patent shall have been granted or issued for or upon any of said Roos and Bayer applications, at which time Licensee shall again commence to pay the full amount of said license fees or royalties until the date of the expiration of the last to expire of any such patent or patents. If at the time of the execution of this contract Licensee's plant shall not be equipped to practice the process set forth and claimed in said Roos or Bayer applications in the manufacture of plasterboard or gypsum wallboard, then Licensee shall pay as such license fees or royalties two and one-half per cent (2½%) of said selling price between the date hereof and January 1, 1930, or such earlier date as Licensee shall make its plant ready to practice said process in the manufacture of said board, and the payment of three and one-half per cent (3½%) of said selling price and said period of two (2) years in this paragraph mentioned shall commence on January 1, 1930, or such
9506 earlier date as Licensee shall have made its plant ready as aforesaid. The amount of one per cent (1%) of said selling price included in said royalties or license fees in the amount agreed to be paid by Licensee for the use of said Haggerty and Hite patents.

Licensee's selling price shall mean the delivered selling price of Licensee, less freight paid by the customer and less regular cash discounts allowed by Licensee.

In addition to the amounts hereinbefore agreed to be paid by Licensee, Licensee, in further consideration of said license, and in settlement of said claim, shall pay to Licensor an amount hereinafter referred to as a license fee or royalty equivalent to one and one-half per cent (1½%) of the selling price of Licensee of all such plasterboard and/or gypsum wallboard manufactured and sold by it after the date hereof and until said one and one-half per cent (1½%) of said selling price shall have aggregated the fixed sum

hereinafter in this paragraph set forth. It is understood and agreed that if prior to the expiration of said license granted in paragraph 2 hereof Licensee shall not have paid to Licensor the said fixed sum over and above said other license fees or royalties, then Licensee shall from the date of the expiration of said license pay to Licensor five per cent (5%) of the selling price of Licensee of all plasterboard and/or gypsum wallboard manufactured and sold by it until said fixed sum shall have been fully paid and satisfied. The fixed sum mentioned in this paragraph shall mean an amount of money to be determined as follows: Within thirty (30) days from the date hereof Licensor's auditor, or, if Licensee requests it, then a certified public accountant not otherwise employed by Licensor, shall make an audit of Licensee's books as to the quantity and
9507 prices of plasterboard and gypsum wallboard of all kinds sold by Licensee between the 29th day of July, 1926, and the date hereof, and shall make a certified report thereof. A sum equivalent to five per cent (5%) of Licensee's selling price of all plasterboard and gypsum wallboard of all kinds sold by Licensee between the 29th day of July, 1926, and the date hereof, as shown by said report of audit, shall be the principal sum, to which principal sum there shall be added the sum of Fifty Thousand Dollars ($50,000.00) as compensation for infringement of patents prior to July 29, 1926. The said principal sum plus said sum of Fifty Thousand Dollars ($50,000.00) shall be the amount herein referred to as said fixed sum and the term "fixed sum" wherever used herein shall mean the said principal sum plus said sum of Fifty Thousand Dollars ($50,000.00). If a certified public accountant is employed to make said audit, then the expense thereof shall be borne by Licensee.

It is expressly understood and agreed that this contract is executed without prejudice to Licensor to assert its said claim against Licensee for infringement of its said patents in case for any reason this contract shall not remain in force until February 10, 1937, and Licensee shall not pay to Licensor all of said royalties or license fees agreed to be paid by it up to said last mentioned date, and in addition thereto said one and one-half per cent (1½%) of said selling price until said fixed sum shall have been fully paid in accordance with the terms hereof, and it is further agreed that the claim of Licensor against Licensee for said infringement is not settled or discharged by the execution of this instrument but shall only be settled and discharged

by the full performance of this contract by Licensee up to February 10, 1937, and the payment to Licensor of all of said royalties or license fees up to said last mentioned date, including said additional one and one-half per cent
9508 (1½%) of said selling price until said fixed sum shall have been fully paid. In case of the termination of this contract at any time prior to February 10, 1937, for any reason, or in the event of the failure of Licensee to make full payment to Licensor of all of said royalties or license fees up to said last mentioned date, including said one and one-half per cent (1½%) of said selling price until said fixed sum is fully paid in the manner herein specified, Licensor shall have the same right which it originally had against Licensee before the execution of this agreement or the execution of any license agreement between Licensee and Licensor with respect to any of said patents, to recover of and from Licensee the full amount of its said claim for damages for infringement of its said patents, and nothing herein contained shall prevent the recovery by Licensor of all of its damages for such infringement against Licensee according to the full measure of damages allowed in such cases the same as if this contract had never been made, less only such sums as shall have been paid by Licensee to Licensor since the date hereof on account of said additional one and one-half per cent (1½%) of said selling price in reduction of said fixed sum, in either of which events Licensee shall pay to Licensor the balance of said fixed sum then remaining unpaid in part payment of its said claim for damages, it being understood that in no event shall the recovery from Licensee in such case be less than the amount of said fixed sum then remaining unpaid. Upon the payment to Licensor of all of said royalties or license fees up to February 10, 1937, plus said fixed sum at the time and in the manner herein specified, then the said claim of Licensor against Licensee for infringement of its said patents shall thereupon be and become fully settled, discharged and satisfied.

4. It is further agreed that so long as the license
9509 provided for in paragraph 2 hereof shall remain in force between the parties hereto, or in case the license granted under paragraph 2 hereof shall expire before the expiration of the patents specifically described in this paragraph, and the said license granted under paragraph 2 shall continue in force between the parties hereto for the full term of the last to expire of any of said patents de-

scribed in said Exhibit A, or of any patent or patents granted for or upon any applications described in said Exhibit A, then until the expiration of the patents specifically described in this paragraph, Licensor does hereby give and grant unto the Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in those certain patents known as the Birdsey Plasterboard Bundle Patent number 1,696,877, dated December 25, 1928, Utzman Patent number 1,724,740 dated August 13, 1929, Birdsey Patent number 1,730,113 dated October 1, 1929, and applications for letters patent serial numbers 329,581 filed December 31, 1928, and 296,354 filed July 30, 1928, and any patent which may be granted for or upon said applications, including any extensions and/or reissues thereof, at the plants or factories now owned or operated by Licensee or at any other plant or factory hereafter owned and/or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, and of selling or using bundles of plasterboard and/or gypsum wallboard put up or bundled by Licensee at any such place or places according to the claims set forth and claimed in the said patents and applications for letters patent in this paragraph described, upon the terms and conditions hereinafter stated.

Licensee agrees to pay to Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said patents and applications in the next preceding paragraph described, in addition to the sums hereinabove set forth, an amount (hereinafter referred to as a license fee or royalty) equivalent to ten cents (10¢) per one thousand (1,000) square feet of plasterboard and/or gypsum wallboard which is sold by Licensee in bundles of any kind, whether or not the bundles shall be made according to the claims set forth and claimed in said patents, which said license fee or royalty shall be payable at the times and in accordance with the terms of paragraph 6 hereof. The term "bundle" shall not include unbundled material wired or strapped for purpose of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates.

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5. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; Pro-

vided, However, that the same may be assigned by Licensee to any company acquiring all the assets and business or all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, including the assumption of the claim which Licensor has against Licensee for damages for infringement of its said patents and the agreements in settlement and discharge thereof, as in this contract contained, and to agree to be bound
9511 . by all of the terms and conditions of this contract, and deliver such agreement to Licensor.

It is expressly understood that Licensee shall not discontinue its business of manufacturing and selling plasterboard and/or gypsum wallboard until Licensor shall have received the full amount of said license fees or royalties agreed to be paid by Licensee hereunder for the use of all of said patents until February 10, 1937, plus the full payment of said fixed sum in the manner and upon the payments as hereinabove set forth.

6. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the twentieth day of each calendar month, it will render unto Licensor true written returns verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and/or gypsum wallboard manufactured and sold by it during the preceding calendar month and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold and is to be accounted for hereunder, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be

due under this agreement on account of all said plasterboard and/or gypsum wallboard manufactured and sold by it and put up and sold by it in bundles during the next preceding calendar month.

7. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it and the quantity thereof put up and sold by it in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; Provided, However, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by both parties. If the parties at any such time shall not agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing not directly or indirectly employed by it or in any other way connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

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8. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents and/or applications for letters patent shall be distinctly marked with the words "Patented" and/or "Patent Applied for," as the case may be, together with the numbers of any of said patents or applications specified by Licensor, the claims of which may be embodied in said plasterboard or gypsum wallboard, and in connection with said marking Licensee will further mark said board with the words "Licensed Under the Above Letters Patent" and/or "Licensed Under Pending Applications for Letters Patent," as the case may be, which marking shall be plainly visible. Licensee further agrees that all bundles put up and sold by it embodying the claims of any of said patents numbers 1,696,877, 1,724,740 and 1,730,113 and/or any of said applications serial numbers 329,581 and 296,354 shall be similarly marked together with the numbers of said bundle patents and/or applications.

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9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail) gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in any letters patent after the same shall have been issued, granted for or upon any of the said applications and may with the written consent of first party manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth
9514 and claimed in any of said letters patent or in any letters patent after the same shall have been granted for or upon of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

10. Licensee covenants and agrees that all of said gypsum plasterboard and gypsum wallboard manufactured and sold by it embodying the inventions and improvements set forth and claimed in any of said letters patent or patents issued upon any of said applications and commonly known in the trade as "Seconds" shall be plainly invoiced as "Seconds" and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "Seconds" in letters at least three inches in height.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of said letters patent or of any letters patent which may be granted or issued for or upon said applications, forming the subject-matter of said license so long as said license shall remain in full force and effect, and agrees that it will not at any time during the existence of said license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said letters patent or the title thereto of Licensor.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the
9515 party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; Provided, however, that neither party shall be relieved thereby from any liability accrued at the time of such termination; and Provided Further, that if the party upon whom said notice is served shall deny that it is in default in whole or in part, as specified therein, then the party serving such notice shall not be privileged to cancel this contract on account of the alleged default specified therein, provided the party upon whom said notice shall have been served shall within said thirty (30) day period perform the agreements and submit the question to arbitration, as in this paragraph hereinafter set forth. In case of any such denial the party upon whom the notice shall have been served shall within said thirty (30) day period state in writing to the other party wherein and in what respect it denies the default specified in said notice and shall at the same time make good any default specified therein which it does not deny, and appoint in writing one person as arbiter to arbitrate the question of whether or not it is in default in respect to that which it shall have denied as aforesaid, it being understood, however, that if the question shall be with respect to the amount of royalties or license fees to be paid hereunder, then the Licensee shall

first pay or offer to pay the amount of such license
9516 fees or royalties which it then admits is due and payable in accordance with the terms hereof, and the acceptance thereof by the Licensor shall not operate as a waiver of any of its rights hereunder or of any claim it may have made in any notice served by it upon Licensee. The party so serving said notice shall, after the other party shall have made good any default specified in such notice which it did not deny in writing as aforesaid, including the payment of royalties or license fees, if any, admitted by it to be due and payable hereunder, and within ten (10) days from the date of the appointment of said first arbiter in accordance with the terms hereof, appoint in writing another person as arbiter, and the two persons so appointed shall within ten (10) days or as soon as possible thereafter appoint in writing a third person as arbiter. The three persons so appointed shall, within thirty (30) days from the date of the appointment of said last mentioned arbiter, or as soon as possible thereafter, decided whether or not the party upon whom said notice has been served is in default hereunder with respect to anything contained in said notice. The decision of a majority of the three arbiters so appointed shall constitute a final settlement of the said question and be binding and conclusive upon both the Licensor and the Licensee, and if it shall have been determined by a majority of the said arbiters that the party upon whom said notice was served is in default with respect to anything contained in said notice and the party
so found to have been in default shall fail or refuse
9517 to comply with the terms of the award or finding made by said arbiters within thirty (30) days from the date such award or finding shall have been made, the party serving said notice may at its election terminate and cancel this agreement in writing. In the event of default hereunder by either party and notice of such default is served by the other party as herein provided, and after service of such notice the party in default shall cure the same as hereinbefore provided the same shall constitute a nullification of said notice to the same effect as if said notice had not been served. In case at any time the Licensee shall be adjudged a bankrupt, the license hereunder shall immediately be and become canceled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a

waiver of any further breach or breaches. Either party may proceed by action to specifically enforce this contract or any of the terms, conditions and covenants thereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served by the Licensor or the Licensee by mailing the same to the other party hereto, postage prepaid and registered, addressed to any of its officers at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under paragraph 2 hereof shall be confirmed in writing in the ordinary course of business.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason 9518 of any infringement on the part of any person or persons of any of said letters patent or of any patent that may be granted upon said applications, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper.

If a court of last resort upon final appeal or review shall decree all the claims of the patents granted for or upon said Roos and Bayer applications invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard, the body or core of which is made according to the process set forth and claimed in said Roos and Bayer applications in such manner that they cannot practice in any way any of the inventions set forth in the said applications, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal on review shall decree that all the claims of the patents granted or issued for or upon said Roos and Bayer applications are invalid or make such injunction permanent and final, the license fees or royalties to be paid by Licensee hereunder shall be reduced by one per cent (1%) of said selling price, or if a court of last resort upon final appeal or review shall decree that all the claims of said Haggerty and Hite patents are invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard embodying the inventions and improvements

set forth and claimed in said Haggerty and Hite patents in such manner that they cannot practice in any way any of the inventions set forth in said patents, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree all claims of said Haggerty and Hite patents invalid or make said injunction permanent and final, the said license fees or royalties agreed to be paid by Licensee for said Haggerty
9519 and Hite patents shall cease and determine.

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

16. The terms "gypsum plasterboard," "gypsum wallboard" and "plasterboard" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

17. If at any time after the expiration of two (2) years from January 1, 1930, or such earlier date that Licensee shall make its plant ready to practice the process set forth and claimed in said Roos and Bayer applications in the manufacture of gypsum wallboard or plasterboard, there shall have been invented or come into use any process which shall make the said process of forming a cellular

product as set forth and claimed in said Roos and
9520 Bayer applications obsolete or shall displace the same, and the Licensor shall in its own manufacture permanently and wholly abandon the use of the subject-matter of the claims of said Roos and Bayer applications, it shall notify Licensee in writing thereof, and Licensee may then, upon thirty (30) days' written notice to Licensor, cancel and terminate this license in so far as the same applies to said Roos and Bayer applications or to the patent or patents granted or issued therefor or thereupon, and from the date of such cancellation the royalties or license fees to be paid by Licensee hereunder shall be reduced by one per cent (1%) of its said selling price; Provided, however, that if Licensor shall not in such event permanently and wholly abandon the use of said process but shall only partially abandon the same, then to the extent or degree and for the term that Licensor shall abandon the same in its own manufacture Licensee shall be relieved from the payment of license fees or royalties to the same exfent, that is to say, if Licensor shall in such event manufacture and sell any board the core of which is made of gypsum of a particular size, kind or make, or for a particular purpose or use, without the use of said process embodied therein, then if Licensee shall manufacture and sell the same board of the same particular size, kind or make and for the same purpose or use, without the use of said process embodied therein, then Licensee shall not be required to pay royalties or license fees upon such particular board for the term that Licensor shall manufacture and sell the same. "License fees" and "royalties" for the purpose of this paragraph shall mean one per cent (1%) of said selling price. The use by Licensor of any improvement which Licensee has the right to use as set forth in paragraph 18 hereof, or the manufacture of plasterboard or gypsum wallboard without the use of said process for
sale only in foreign countries where Licensor has no
9521 patented rights in said process, shall not constitute an abandonment of said process or a partial abandonment thereof within the meaning of this paragraph.

18. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubble described in the process set forth in said Roos and Bayer applications and/or method of its introduction in the core of plasterboard or gypsum wallboard, and which improvement is covered by the claims of

said Roos and Bayer applications, and shall itself use the same in its own manufacture, then so long as Licensee shall continue to pay the license fees or royalties hereinbefore stipulated the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum plasterboard or gypsum wallboard, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional sum, royalty or license fee therefor. It is further understood that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement, as well as the provision of paragraph 2 hereof reserving the right in Licensor to determine and fix at any time and to change from time to time the minimum price or prices at which Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the claims of said patents, shall apply to the improvement set forth and claimed in any patent or patents granted or issued for or upon said improvement. Licensor will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of plasterboard and gypsum wallboard.

9522 19. Licensee has investigated and fully satisfied itself with respect to the inventions and improvements set forth in said patents and applications for letters patent and the use thereof in its own manufacture, and has executed this agreement without relying upon any representations which may have been made by Licensor with respect thereto. No representations have been made by Licensor not expressly stated in this contract which Licensee shall at any time have any right to rely upon as an inducement for its making this contract or for any result or results to be obtained by Licensee in its own plant by its use of the inventions and improvements set forth and claimed in any of said patents or applications for letters patent.

20. The Licensor agrees at any time during the term hereof to extend to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the said process or processes set forth and claimed in said Roos or Bayer applications in the manufacture in its said plants of any other gypsum product not specifically covered by this agreement and in which Licensor shall use the same in its own manufacture and to sell the same, upon the pay-

ment to Licensor of one per cent (1%) of the selling price of Licensee of all of said other gypsum product, whether or not embodying the said process in making the same, manufactured and sold by Licensee and upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the words "plasterboard and/or gypsum wallboard" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

21. This license and all of the covenants and agree-
9523 ments hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by Licensee, except as hereinabove specifically provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY
By S. L. AVERY
Its President.

ATTEST:
R. G. BEAR
Secretary.

THE AMERICAN GYPSUM COMPANY
By JNO. A. KLING
Chairman.

ATTEST:
J. B. DAVIS
Secretary.

Accepted Jobbers: Toledo Plaster & Supply Co, The Cleveland Gypsum Co, Fairmount Wall Plaster Co, Abbey Co, Wyman Allen, 10% discount of minimum.
S. L. A.

9524 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

9525 Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1943.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial No. 565,737, reissued January 24, 1928 as Reissue patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial No. 567,205, Reissued May 22, 1928 as Reissue Patent No. 16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

9526 Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,676, filed October 10, 1921, granted November 29, 1927, expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,627, filed April 19, 1922, granted April 30, 1929, expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662,359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1,631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927, expires May 31, 1944.

Brookby & Absmeier patent No. 1,689,322. Application Serial No. 91,297, filed March 1, 1926, granted October 30, 1928, expires October 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.

Utzman patent No. 1,638,280. Application Serial No. 374,833, filed April 19, 1920, granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927, expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No. 427,044, filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,045, filed November 29, 1920, granted September 6, 1927, expires September 6, 1944.

Mehlhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926, expires October 26, 1943.

9527 Gustafson patent No. 1,665,168. Application Serial No. 509,366, filed December 2, 1919, renewed October 21, 1921, granted April 3, 1928, expires April 3, 1945.

Kohler, et al patent No. 1,673,944. Application Serial No. 540,412, filed March 2, 1922, granted June 19, 1928, expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey patent No. 1,718,890. Application Serial No. 583,795, filed August 23, 1922, granted June 25, 1929, expires June 25, 1946.

Utzman application Serial No. 477,371, filed June 14, 1921, finally allowed April 26, 1929. Patent No. 1,731,116, will issue October 8, 1929.

Knode application Serial No. 590,358. Filed September 25, 1922.

Utzman application Serial No. 581,361. Filed August 12, 1922.

Williams application Serial No. 582,606. Filed August 18, 1922.

Roos application Serial No. 733,197, filed August 20, 1924.

Bayer application Serial No. 661,723, filed September 8, 1923.

Roos application Serial No. 3,477, filed January 19, 1925.

Roos application Serial No. 142,155, filed October 16, 1926.

Haggerty patent No. 1,500,452. Application Serial No. 565,433, filed June 2, 1922, granted July 8, 1924.

Hite patent No. 1,230,297. Application Serial No. 115,649, filed August 18, 1916, granted June 19, 1917.

9528 *Government's Exhibit No. 14*

ASSIGNMENT AND BILL OF SALE

This Agreement made at Port Clinton, Ohio, this 12th day of April, 1939, by and between The American Gypsum Company, an Ohio corporation (hereinafter called the "Grantor"), and The Celotex Corporation, a Delaware corporation, (hereinafter called the "Grantee"), witnesseth:

Whereas, in pursuance of a plan of complete liquidation of the Grantor it is the desire of the Grantor to distribute all the property of the Grantor to its sole stockholder (the Grantee herein) in complete cancellation of all the capital stock of the Grantor;

Now, therefore, in consideration of the premises and the complete cancellation of all the capital stock of the Grantor (consisting of 4,000 shares of preferred stock of the par value of $100 each and 4,697 shares of common stock of the par value of $100 each) IT IS COVENANTED AND AGREED by and between the parties hereto as follows:

1. For value received the Grantor has sold, conveyed, assigned, transferred, set over and delivered, and by these presents does sell, convey, assign, transfer, set over and deliver, to the Grantee, all the assets, business, good will, effects and property of the Grantor, real, personal and mixed, tangible and intangible, of every kind, nature and description and wheresoever situate, including particularly but not exclusively any and all property of every kind, nature and description held in trust by or in the possession of any other person, persons or corporation whatsoever, for the benefit of the Grantor or in which the Grantor has any right, claim or interest of any kind, directly or indirectly, to be the absolute property forever of the Grantee, and including particularly but not exclusively all the right, title and interest of the Grantor in and to the license granted to the Grantor in and by the license agreement between United States Gypsum Company, an Illinois corporation, and the Grantor, dated November 25, 1929.

9529 2. The Grantor at any time and from time to time upon the request of the Grantee shall forthwith execute and deliver such instruments of assignment, transfer, conveyance, endorsement, direction or authorization, as will be sufficient, requisite or advisable to vest in the

Grantee the full and complete absolute legal and equitable title in and to all assets, business, good will, effects and property sold and transferred or intended to be sold and transferred hereunder, it being understood, however, that this agreement shall be, and the same is hereby declared to be, in all respects sufficient to, and the same does hereby, sell, convey, transfer, assign and set over unto the Grantee, full, absolute and complete title in and to all assets, business, good will, effects and property of the Grantor; provided that nothing in this paragraph contained shall be deemed to prevent the dissolution of the Grantor at any time in accordance with the laws of the State of Ohio.

3. The Grantee hereby agrees to assume all the liabilities of the Grantor as shown on its balance sheet of even date herewith and hereby agrees to assume all of the obligations of the Grantor as Licensee under its above mentioned agreement with United States Gypsum Company, and hereby assumes the claim which said United States Gypsum Company has against the Grantor for damages for infringement of said United States Gypsum Company's patents and the agreements in settlement and discharge thereof as in said agreement contained, and agrees to be bound by all of the terms and conditions of said agreement between said United States Gypsum Company and the Grantor.

4. The Grantee concurrently with the execution hereof surrenders all the issued and outstanding capital stock of the Grantor for complete cancellation.

In witness whereof the parties hereto have caused this instrument to be executed in duplicate in their respective names by their duly authorized officers and stock-
9530 holders of said corporation, signed, sealed with the corporate seal and delivered said instrument as the free and voluntary act of said corporation and as their own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 12th day of April 1939.

EMIL E. LANG,
Notary Public.

My commission expires 1/18/41.

STATE OF OHIO,
County of Ottawa, ss:

I, Emil E. Lang, a notary public in and for said county in the state aforesaid, do hereby certify that O. S. Mansell and M. D. Musgrove personally known to me, and known to me to be the same persons whose names are subscribed to the foregoing instrument as vice-president and assistant secretary, respectively, of THE CELOTEX CORPORATION, a Delaware corporation, appeared before me this day in person and severally acknowledged that they, being thereunto duly authorized by the board of directors of said corporation, signed, sealed with the corporate seal and delivered said instrument as the free and voluntary act of said corporation and as their own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 12th day of April 1939.

EMIL E. LANG,
Notary Public.

My Commission expires 1/18/41.

9531 Given under my hand and notarial seal this 12th day of April, 1939.

EMIL E. LANG,
Notary Public.

My commission expires 1/18/41.

STATE OF OHIO
County of Ottawa, ss:

I, Emil E. Lang, a notary public in and for said county in the state aforesaid, do hereby certify that O. S. Mansell and M. D. Musgrove personally known to me, and known to me to be the same persons whose names are subscribed to the foregoing instrument as vice-president and assistant secretary, respectively, of THE CELOTEX CORPORATION, a Delaware corporation, appeared before me this

day in person and severally acknowledged that they, being thereunto duly authorized by the board of directors of said corporation, signed, sealed with the corporate seal and delivered said instrument as the free and voluntary act of said corporation and as their own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 12th day of April, 1939.

EMIL E. LANG,
Notary Public.

My Commission expires 1/18/41.

9532 Memorandum of Agreement by and between The Celotex Corporation, a Delaware corporation (hereinafter called "Celotex"), and The American Gypsum Company, an Ohio corporation (hereinafter called "American"), witnesseth:

Whereas Celotex has acquired and now owns all of the capital stock of American and proposes to acquire all of the assets and business of American; and

Whereas among the assets of American is the license granted to it by United States Gypsum Company, an Illinois corporation, under a license agreement between said United States Gypsum Company and American, dated November 25, 1929; and

Whereas said license agreement provides that the license therein granted may be assigned by American to any company acquiring all the assets and business or all the capital stock of American, on condition that American shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of American under said license agreement and to be bound by all of the terms and conditions thereof and shall deliver such agreement to the United States Gypsum Company, Licensor;

Now, therefore, IT IS MUTUALLY AGREED that in connection with the acquisition by Celotex of all the assets and business of American, American will assign to Celotex all American's right, title and interest in and to the license granted to American in and by the license agreement between United States Gypsum Company, an Illinois corporation, and American, dated November 25, 1929, and Celotex agrees to assume and does hereby as-

sume all of the obligations of American as Licensee under said license agreement and hereby assumes the claim which said United States Gypsum Company has against American for damages for infringement of said United States Gypsum Company's patents and the agreements in settlement and discharge thereof as in said license agreement contained, and agrees to be bound by all of the terms and conditions of said license agreement.

9533 In witness whereof the parties hereto have caused this instrument to be executed in duplicate in their respective names and by their duly authorized officers and their corporate seals to be hereunto affixed this 12th day of April, 1939.

THE CELOTEX CORPORATION,
by ——— ———,
Vice President.

ATTEST:

M. D. MUSGROVE,
Assistant Secretary.

THE AMERICAN GYPSUM COMPANY,
by C. F. MILLER,
President.

ATTEST:

O. S. MANSELL,
Secretary.

STATE OF OHIO,
County of Ottawa, ss:

I, E. E. Lang, a notary public in and for said county in the state aforesaid, do hereby certify that C. F. Miller and O. S. Mansell, personally known to me, and known to me to be the same persons whose names are subscribed to the foregoing instrument as vice president and secretary, respectively, of The American Gypsum Company, an Ohio corporation, appeared before me this day in person and severally acknowledged that they, being thereunto duly authorized by the board of directors and their cor-
9534 porate seals to be hereunto affixed, all on the day and year first above written.

THE AMERICAN GYPSUM COMPANY
by C. F. MILLER,
President.

Attest: _____,

Secretary.

THE CELOTEX CORPORATION,
by O. S. MANSELL,
Vice President.

Attest:

M. D. MUSGROVE,
Assistant Secretary.

STATE OF OHIO,
County of Ottawa, ss:

I, E. E. Lang, a notary public in and for said county in the state aforesaid, do hereby certify that C. F. Miller and O. S. Mansell, personally known to me, and known to me to be the same persons whose names are subscribed to the foregoing instrument as vice president and secretary, respectively, of The American Gypsum Company, an Ohio corporation, appeared before me this day in person and severally acknowledged that they, being thereunto duly authorized by the board of directors and stockholders of said corporation, signed, sealed with the corporate seal and delivered said instrument as the free and voluntary act of said corporation and as their own free and voluntary act, for the uses and purposes therein set forth.

9535 *Government's Exhibit No. 15*

LICENSE AGREEMENT

This Agreement made this 23rd day of April, A. D. 1930, by and between the United States Gypsum Company, an Illinois corporation of Chicago, Illinois, hereinafter referred to as Licensor, and the Kelley Plasterboard Company, Inc., a New Jersey corporation of Delawanna, New Jersey, hereinafter referred to as Licensee, Witnesseth, That

Whereas, Licensor is the owner of certain letters patent and applications for letters patent of the United States covering an improved gypsum wallboard and method or process of making the same, together with machines and appliances for the manufacture of such inventions which, with certain other patents, are more specifically set forth in Exhibit A attached hereto and made a part hereof; and

Whereas, Licensor was the owner of all of the right, title and interest in and under letters patent of the United States number 1,029,328 and number 1,034,746 known as the Utzman Patents, the last of which expired August 6, 1929, which said Utzman Patents were adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit, and were decreed by said courts as valid and having been infringed by the defendants named in said suits; and

Whereas, Birdsey Patent number 1,358,508, mentioned in said Exhibit A, was decreed by the United States District Court for the Northern District of Ohio as valid and
9536 infringed by the defendant in said cause by reason of its having made, used and sold plasterboard and/or gypsum wallboard with edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit; and

Whereas, Licensor is the owner of a new process disclosed in that certain application for United States letters patent filed by Carlisle K. Roos, entitled "Cementitious Material," now pending in the United States Patent Office and covering the process of making a cellular product, which comprises forming a tenacious foam and mixing the foam with a cementitious material, and of certain other applications filed by said Roos covering specific employment of said invention, and Licensor has heretofore aquired the sole and exclusive rights in the United States of America (when gypsum is used as the main binding material) in that certain application for United States letters patent described in Exhibit A filed by Erik Christian Bayer, entitled "Methods of Manufacturing Porous Building Materials," and relating to a process broadly similar to that of said first mentioned Roos application, which said Roos and Bayer applications are described and set forth in said Exhibit A; and

Whereas, Licensee desires to manufacture gypsum wallboard or gypsum plasterboard by the use of the machines or according to the processes or embodying the claims of said patents and applications for letters patent set forth in said Exhibit A, including the inventions and improve-

ments set forth and claimed in said Roos and Bayer applications and said Haggerty and Hite patents men-
9537 tioned therein, and to obtain a license from Licensor to make, use and sell the inventions and improvements set forth and claimed in all of said patents and applications for letters patent set forth in said Exhibit A throughout the full term thereof; and

Whereas, Licensor has agreed to grant a license to said Licensee and to make certain disclosures as to the said Roos and Bayer applications referred to in said Exhibit A upon the terms and conditions hereinafter stated;

Now, Therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged from each party to the other party, and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto do hereby agree as follows, to-wit:

1. Licensor agrees promptly to disclose to Licensee all information and formulae which it now has or may obtain relating to the process of making a cellular product through the formation of a tenacious foam and mixing the foam with a cementitious material, as set forth and claimed in said applications for letters patent filed by Carlisle K. Roos and Erik Christian Bayer, in so far as the same is or may be applied to gypsum, and including all information and formulae for the manufacture of gypsum plasterboard and gypusm wallboard embodying the inventions and improvements set forth and claimed in said Roos and Bayer applications, together with a description of the machines or appliances which it now has for making the same. It will assist Licensee to make its plant ready for practicing said process in the manufacture of plasterboard and gypsum wallboard by furnishing without cost to
9538 Licensee the advice and instruction of Licensor's experts and information with respect to the purchase and cost of said machines and appliances.

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto in the manufacture of gypsum plasterboard

and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated, or affiliated company, and of manufacturing at any such place or places, selling and using the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters patent described in said Exhibit A, for the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It Is Expressly Understood and Agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines
9539 or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297; or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or core of which is made according to the process set forth and claimed in any patent granted r or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum wallboard, and thereafter shall give to Licensee written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as

this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by said Licensee and which during the existence thereof shall embody the inventions and improvements set forth and claimed in
9540 either patent number 1,500,452 or patent number 1,230,297, or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

3. Licensee agrees to pay to Licensor for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or

embodying the inventions and improvements set
9541 forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,453, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; Provided, However, that if no patent shall have been granted or issued for or upon any of said Roos or Bayer applications covering said process referred to in paragraph 1 hereof, within two (2) years from the date hereof, then commencing with the end of said two (2) year period the said license fees or royalties agreed to be paid by Licensee shall be reduced by one per cent (1%) of Licensee's said selling price until such patent shall have been granted or issued for or upon any of said Roos and Bayer applications, at which time Licensee shall again commence to pay the full amount of said license fees or royalties until the date of the expiration of the last to expire of any such patent or patents. The amount of one per cent (1%) of said selling price included in said royalties or license fees is the amount agreed to be paid by Licensee for the use of said Haggerty and Hite patents.

Licensee's selling price shall mean the delivered selling price of Licensee, less freight paid by the customer and less regular cash discounts allowed by Licensee.

9542 4. It is further agreed that so long as the license provided for in paragraph 2 hereof shall remain in force between the parties hereto, or in case the license granted under paragraph 2 hereof shall expire before the expiration of the patents specifically described in this paragraph, and the said license granted under paragraph 2 shall continue in force between the parties hereto for the full term of the last to expire of any of said patents described in said Exhibit A, or of any patent or patents granted for or upon any application described in said

Exhibit A, then until the expiration of the patents specifically described in this paragraph, Licensor does hereby give and grant unto the Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in those certain patents known as the Birdsey Plasterboard Bundle Patent number 1,696,877, dated December 25, 1928, Utzman Patent number 1,724,740 dated August 13, 1929, Birdsey Patent number 1,730,113 dated October 1, 1929, and applications for letters patent serial numbers 329,581 filed December 31, 1928, and 296,354 filed July 30, 1928, and any patent which may be granted for or upon said applications, including any extensions and/or reissues thereof, at the plants or factories now owned or operated by Licensee or at any other plant or factory hereafter owned and/or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, and of selling or using bundles of plasterboard and/or gypsum wallboard put up or bundled by Licensee at any such place or places according to the claims set forth and claimed in the said patents and applications for letters patent in this paragraph described, upon the terms and conditions hereinafter stated.

Licensee agrees to pay to Licensor for the right, 9543 license and privilege of making, using or selling the inventions set forth and claimed in said patents and applications in the next preceding paragraph described, in addition to the sums hereinabove set forth an amount (hereinafter referred to as a license fee or royalty) equivalent to ten cents (10¢) per one thousand (1,000) square feet of plasterboard and/or gypsum wallboard which is sold by Licensee in bundles of any kind, whether or not the bundles shall be made according to the claims set forth and claimed in said patents, which said license fee or royalty shall be payable at the times and in accordance with the terms of paragraph 6 hereof. The term "bundle" shall not include unbundled material wired or strapped for purpose of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates.

5. It Is Expressly Understood and Agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law:

Provided, However, that the same may be assigned by Licensee to any company acquiring all the assets and business or all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of
9544 Licensee hereunder, and to agree to be bound by all of the terms and conditions of this contract, and deliver such agreement to Licensor.

6. Licensee agrees to keep separate full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the twentieth day of each calendar month it will render unto Licensor true written returns verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and/or gypsum wallboard manufactured and sold by it during the preceding calendar month and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold and is to be accounted for hereunder, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all said plasterboard and/or gypsum wallboard manufactured and sold by it and put up and sold by it in bundles during the next preceding calendar month.

7. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard

manufactured and sold by it and the quantity thereof put up and sold by it in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; Provided, However, that
9545 if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by both parties. If the parties at any such time shall not agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing not directly or indirectly employed by it or in any other way connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

8. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents and/or applications for letters patent shall be distinctly marked with the word "Patented" and/or "Patent Applied for," as the case may be, together with the numbers of any of said patents or applications specified by Licensor, the claims of which may be embodied in said plasterboard or gypsum wallboard, and in connection with said marking Licensee will further mark said board with the words "Licensed Under the Above Letters Patent" and/or "Licensed Under Pending Applications for Letters Patent," as the case may be, which marking shall be plainly visible. Licensee further agrees that all bundles put up and sold by it embodying the claims of any of said patents numbers 1,696,877; 1,724,470 and 1,730,113 and/or any of said applications serial numbers 329,581 and 296,354 shall be similarly marked together with the numbers of said bundle patents and/or applications.

9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wall-
9546 board or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them; It Is Understood and Agreed that Licensee may, with the written consent of Licensor, manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in

straight cars or in mixed cars with other building material and who do not sell at retail) gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in any letters patent after the same shall have been issued, granted for or upon any of the said applications and may, with the written consent of Licensor, manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice; and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent or in any letters patent after the same shall have been granted for or upon any of said applications for any such jobber, manufacturer or wholesale distributor, or to sell the same, without the written consent of Licensor.

10. Licensee covenants and agrees that all of said gypsum plasterboard and gypsum wallboard manu-
9547 factured and sold by it embodying the inventions and improvements set forth and claimed in any of said letters patent or patents issued upon any of said applications and commonly known in the trade as "Seconds" shall be plainly invoiced as "Seconds" and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "Seconds" in letters at least three inches in height.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of said letters patent or of any letters patent which may be granted or issued for or upon said applications, forming the subject-

matter of said license so long as said license shall remain in full force and effect, and agrees that it will not at any time during the existence of said license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said letters patent or the title thereto of Licensor.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; Provided, However, that neither party shall be relieved thereby from any liability accrued at the time of such termination; and Provided, Further, that
9548 if the party upon whom said notice is served shall deny that it is in default in whole or in part, as specified therein, then the party serving such notice shall not be privileged to cancel this contract on account of the alleged default specified therein, provided the party upon whom said notice shall have been served shall within said thirty (30) day period perform the agreements and submit the question to arbitration, as in this paragraph hereinafter set forth. In case of any such denial the party upon whom the notice shall have been served shall within said thirty (30) day period state in writing to the other party wherein and in what respect it denies the default specified in said notice and shall at the same time make good any default specified therein which it does not deny and appoint in writing one person as arbiter to arbitrate the question of whether or not it is in default in respect to that which it shall have denied as aforesaid, it being understood, however, that if the question shall be with respect to the amount of royalties or license fees to be paid hereunder, then the Licensee shall first pay or offer to pay the amount of such license fees or royalties which it then admits is due and payable in accordance with the terms hereof, and the acceptance thereof by the Li-

censor shall not operate as a waiver of any of its rights hereunder or of any claim it may have made in any notice served by it upon Licensee. The party so serving said notice shall, after the other party shall have made good any default specified in said notice which it did not deny in writing as aforesaid, including the payment of royalties or license fees, if any, admitted by it to be due and payable hereunder, and within ten (10) days from the date of the appointment of said first arbiter in accordance with the terms hereof, appoint in writing another person as arbiter, and the two persons so
9549 appointed shall within ten (10) days or as soon as possible thereafter appoint in writing a third person as arbiter. The three persons so appointed shall, within thirty (30) days from the date of the appointment of said last mentioned arbiter, or as soon as possible thereafter, decide whether or not the party upon whom said notice has been served is in default hereunder with respect to anything contained in said notice. The decision of a majority of the three arbiters so appointed shall constitute a final settlement of the said question and be binding and conclusive upon both the Licensor and the Licensee, and if it shall have been determined by a majority of the said arbiters that the party upon whom said notice was served is in default with respect to anything contained in said notice and the party so found to have been in default shall fail or refuse to comply with the terms of the award or finding made by said arbiters within thirty (30) days from the date such award or finding shall have been made, the party serving said notice may at its election terminate and cancel this agreement in writing. In the event of default hereunder by either party and notice of such default is served by the other party as herein provided, and after service of such notice the party in default shall cure the same as hereinbefore provided the same shall constitute a nullification of said notice to the same effect as if said notice had not been served. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or
9550 breaches. Either party may proceed by action to specifically enforce this contract or any of the terms,

conditions and covenants thereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served by the Licensor or the Licensee by mailing the same to the other party hereto, postage prepaid and registered, addressed to any of its officers at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under paragraph 2 hereof shall be confirmed in writing in the ordinary course of business.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement on the part of any person or persons of any of said letters patent or of any patent that may be granted upon said applications, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper.

If a court of last resort upon final appeal or review shall decree all the claims of the patents granted for or upon said Roos and Bayer applications invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard, the body or core of which is made according to the process set forth and claimed in said Roos and Bayer applications in such manner that they cannot practice in any way any of the inventions set forth in the said applications, and such injunction shall be made final by a court of last re-
9551 sort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree that all the claims of the patents granted or issued for or upon said Roos and Bayer applications are invalid, or make such injunction permanent and final, the license fees or royalties to be paid by Licensee hereunder shall be reduced by one per cent (1%) of said selling price, or if a court of last resort upon final appeal or review shall decree that all the claims of said Haggerty and Hite patents are invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Haggerty and Hite patents in such manner that they cannot prac-

tice in any way any of the inventions set forth in said patents, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree all claims of said Haggerty and Hite patents invalid or make said injunction permanent and final, the said license fees or royalties agreed to be paid by Licensee for said Haggerty and Hite patents shall cease and determine.

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license,
9552 upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

16. The terms "gypsum plasterboard," "gypsum wallboard" and "plasterboard" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

17. If at any time after the expiration of two (2) years from the date hereof, there shall have been invented or come into use any process which shall make the said process of forming a cellular product as set forth and claimed in said Roos and Bayer applications obsolete or shall displace the same, and the Licensor shall in its own manufacture permanently and wholly abandon the use of the subject-matter of the claims of said Roos and

Bayer applications, it shall notify Licensee in writing thereof, and Licensee may then, upon thirty (30) days' written notice to Licensor, cancel and terminate this license in so far as the same applies to said Roos and Bayer applications or to the patent or patents granted or issued therefor or thereupon, and from the date of such cancellation the royalties or license fees to be paid by Licensee hereunder shall be reduced by one per cent (1%) of its said selling price; Provided, However, that if Licensor shall not in such event permanently and wholly abandon the use of said process but shall only partially abandon the same, then to the extent or degree and for the term that Licensor shall abandon the same in its own manufacture Licensee shall be relieved from the payment of license fees or royalties to the same extent, that is to say, if Licensor shall in such event manufacture and sell any board the core of which is made of gypsum of a particular size, kind or make, or for a particular purpose or use, without the use of said process embodied therein, then if Licensee shall manufacture and sell the same board of the same particular size, kind or make and for the same purpose or use, without the use of said process embodied therein, then Licensee shall not be required to pay royalties or license fees upon such particular board for the term that Licensor shall manufacture and sell the same. "License fees" and "royalties" for the purpose of this paragraph shall mean one per cent (1%) of said selling price. The use by Licensor of any improvement which Licensee has the right to use as set forth in paragraph 18 hereof, or the manufacture of plasterboard or gypsum wallboard without the use of said process for sale only in foreign countries where Licensor has no patented rights in said process, shall not constitute an abandonment of said process or a partial abandonment thereof within the meaning of this paragraph.

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18. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubble described in the process set forth in said Roos and Bayer applications and/or method of its introduction in the core of plasterboard or gypsum wallboard, and which improvement is covered by the claims of said Roos and Bayer applications and shall itself use the same in its own manufacture, then so long as Licensee shall continue to pay the license fees or royalties hereinbefore stipulated the right, license or privilege herein contained

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shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum plasterboard or gypsum wallboard, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional sum, royalty or license fee therefor. It is further understood that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement, as well as the provision of paragraph 2 hereof reserving the right in Licensor to determine and fix at any time and to change from time to time the minimum price or prices at which Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the claims of said patents, shall apply to the improvement set forth and claimed in any patent or patents granted or issued for or upon said improvement. Licensor will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of plasterboard and gypsum wallboard.

19. Licensee has investigated and fully satisfied itself with respect to the inventions and improvements set forth in said patents and applications for letters patent and the use thereof in its own manufacture, and has executed this agreement without relying upon any representations which may have been made by Licensor with respect thereto. No representations have been made by Licensor not expressly stated in this contract which Licensee 9555 shall at any time have any right to rely upon as an inducement for its making this contract or for any result or results to be obtained by Licensee in its own plant by its use of the inventions and improvements set forth and claimed in any of said patents or applications for letters patent.

20. The Licensor agrees at any time during the term hereof to extend to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the said process or processes set forth and claimed in said Roos or Bayer applications in the manufacture in its said plants of any other gypsum product not specifically covered by this agreement and in which Licensor shall use the same in its own manufacture and to sell the same, upon the payment to Licensor of one per cent (1%) of the selling price of Licensee of all of said other gypsum

product, whether or not embodying the said process in making the same, manufactured and sold by Licensee and upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the words "plasterboard and/or gypsum wallboard" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

21. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by Licensee except as hereinabove specifically provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective
9556 presidents, attested by their respective secretaries and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY,
By S. L. AVERY,
Its President.

ATTEST:
R. G. BEAR,
Secretary.

[SEAL.]

KELLEY PLASTERBOARD COMPANY, INC.,
By S. J. KELLEY,
Its President.

ATTEST:
G. A. WILEMAN,
Secretary.

[SEAL.]

9557 EXHIBIT A.

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 13, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1931, expires October 25, 1938.

Birdsey patent No. 1,395,033. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

9558 Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial No. 565,737, reissued January 24, 1928, as Reissue patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial No. 567,205, reissued May 22, 1928 as Reissue Patent No. 16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

9559 Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,376, filed October 10, 1921, granted November 29, 1927, expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,627, filed April 19, 1922, granted April 30, 1929, expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662,359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1,631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927, expires May 31, 1944.

Brookby & Absmeier patent No. 1,689,322. Application Serial No. 91,297, filed March 1, 1926, granted October 30, 1928, expires October 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.

Utzman patent No. 1,638,280. Application Serial No. 374,833, filed April 19, 1920, granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927, expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No. 427,044, filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,045, filed November 29, 1920, granted September 6, 1927, expires September 6, 1944.

Melilhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926, expires October 26, 1943.

9560 Gustafson patent No. 1,665,168. Application Serial No. 509,366, filed December 2, 1919, renewed October 21, 1921, granted April 3, 1928, expires April 3, 1945.

Kohler et al patent No. 1,673,944. Application Serial No. 540,412, filed March 2, 1922, granted June 19, 1928, expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey patent No. 1,718,890. Application Serial No. 583,795, filed August 23, 1922, granted June 25, 1929, expires June 25, 1946.

Utzman application Serial No. 477,371, filed June 14, 1921, finally allowed April 26, 1929. Patent No. 1,731,116, will issue October 8, 1929.

Knode application Serial No. 590,358. Filed September 25, 1922.

Utzman application Serial No. 581,361. Filed August 12, 1922.

Williams application Serial No. 582,606. Filed August 18, 1922.

Roos application Serial No. 733,197, filed August 20, 1924.

Bayer application Serial No. 661,723, filed September 8, 1923.

Roos application Serial No. 3477, filed January 19, 1925.

Roos application Serial No. 142,155, filed October 16, 1926.

Haggerty patent No. 1,500,452. Application Serial No. 565,433, filed June 2, 1922, granted July 8, 1924.

Hite patent No. 1,230,297. Application Serial No. 115,649, filed August 18, 1916, granted June 19, 1917.

9561 *Government's Exhibit No. 16*

This Agreement, made and entered into this 3rd day of January A.D. 1939, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois (hereinafter sometimes referred to as "Gypsum"), and Newark Plaster Company, a New Jersey corporation, of Newark, New Jersey, resulting from the merger of Newark Plaster Company, a New Jersey corporation, of Newark, New Jersey, and Kelley Plasterboard Company, Inc., a New Jersey corporation (hereinafter sometimes referred to as "Newark"), witnesseth, that

Whereas, Gypsum and said Kelley Plasterboard Company, Inc., entered into a certain license agreement dated April 23, 1930 (as supplemented by letters from Gypsum to Kelley dated June 18, 1930, and August 31, 1938), under the terms of which Gypsum, as licensor therein named, granted to said Kelley Plasterboard Company, Inc., as licensee therein named, certain indivisible and non-exclusive rights, licenses and privileges under certain letters patent and applications for letters patent relating to the manufacture and sale of gypsum plasterboard and gypsum wallboard, as therein more specifically described and set forth; and

Whereas, said Newark Plaster Company existing before said merger and said Kelley Plasterboard Company, Inc., have effected a merger in accordance with the provisions of the New Jersey General Corporation law, under
9562 the corporate name of Newark Plaster Company, and said Kelley Plasterboard Company, Inc., has assigned, transferred and set over unto Newark, all of its right, title and interest in and to said license agreement and the rights, licenses and privileges therein contained, upon and subject to all of the conditions, terms and agreements as in said license agreement set forth; and

Whereas, it is provided in said license agreement that the licenses therein granted shall be personal to licensee and that the same, or any right therein or thereunder, shall not be sold or assigned or transferred without the written consent of licensor, or transferred by operation of law, provided that the same may be assigned by licensee to any company acquiring all of the assets and business or all of the capital stock of licensee, on condition that licensee shall first obtain an agreement in writing from any such assignee, agreeing to assume all of the obligations of

licensee under said agreement and to be bound by all of the terms and conditions thereof, and shall deliver such agreement to licensor;

Now, therefore, in consideration of the sum of One Dollar ($1.00), and other good and valuable considerations, each to the other in hand paid, receipt whereof is hereby acknowledged by each of the parties hereto, and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto have agreed as follows:

9563 1. Gypsum consents to the assignment to Newark of the said license agreement, together with all of the rights, licenses and privileges therein contained, subject to all of the conditions, terms and agreements as in said license agreement set forth.

2. Newark agrees to, and does hereby, assume all of the obligations of licensee under said license agreement, and agrees to be bound by all of the terms and conditions thereof to the same effect as if Newark originally had been named in said license agreement as licensee therein.

3. In case Newark shall at any time sell any gypsum plasterboard or gypsum wallboard, or cause the same to be sold, through or by any of its wholly owned subsidiaries, then Sections 6 and 7 of said license agreement shall be read as if the words "or sold by its wholly owned subsidiary" were inserted after the words "sold by it", wherever such last mentioned words appear in said Sections 6 and 7 of said license agreement, and as if the words "or its wholly owned subsidiary" were inserted after the words "of licensee" in the third line of said Section 7 of said license agreement. The sales or acts of any such subsidiary shall for all purposes of said license agreement be construed as the sales or acts of Newark as such licensee, and Newark shall be fully responsible therefor. Nothing herein contained shall be construed to grant any license under said patents to any wholly owned subsidiary of
9564 Newark, or to authorize the sale of gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said patents to or by any such subsidiary, without the written consent of Gypsum thereto first had and obtained.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, at-

tested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY,
By W. L. KEADY,
Vice-President.

Attest:

C. H. SHAVER,
Secretary.

NEWARK PLASTER COMPANY,
By FREDERICK TOMKINS,
Its President.

Attest:

F. H. MILES,
Asst. Secretary.

9565 This Indenture, made this 16th day of December A. D. 1938, between the Kelley Plasterboard Company, Inc., a New Jersey corporation, of Delawanna, New Jersey, Party of the First Part, and Newark Plaster Company, a New Jersey corporation, of Newark, New Jersey, Party of the Second Part, witnesseth, that

Whereas, by license agreement dated April 23, 1930 (as supplemented by letters from the United States Gypsum Company to First Party, dated June 18, 1930, and August 31, 1938), and made between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, the licensor, of the one part, and Kelley Plasterboard Company, Inc., the licensee, of the other part, said licensor granted unto said licensee certain indivisible and non-exclusive rights, licenses and privileges under certain letters patent and applications for letters patent relating to the manufacture and sale of gypsum plasterboard and gypsum wallboard, as more specifically described and set forth in said license agreement; and

Whereas, Newark Plaster Company, a New Jersey corporation, of Newark, New Jersey, and said Kelley Plasterboard Company, Inc., are about to effect a merger under and pursuant to the provisions of the New Jersey General Corporation Law, under the corporate name of Newark Plaster Company; and

Whereas, it is provided in said license agreement
9566 that the license therein granted shall be personal to licensee and that the same, or any right therein or

thereunder, shall not be sold or assigned or transferred without the written consent of licensor, or transferred by operation of law, provided that the same may be assigned by licensee to any company acquiring all the assets and business or all the capital stock of licensee, on condition that licensee shall first obtain an agreement in writing from any such assignee, agreeing to assume all of the obligations of licensee thereunder and to be bound by all of the terms and conditions thereof, and shall deliver such agreement to licensor,

Now, this indenture witnesseth, that in consideration of the sum of One Dollar ($1.00), and other good and valuable considerations, receipt whereof is hereby acknowledged, First Party does hereby assign, transfer and set over unto the said Newark Plaster Company resulting from the merger of Newark Plaster Company, a New Jersey corporation, of Newark, New Jersey, and Kelley Plasterboard Company, Inc., a New Jersey corporation, of Delawanna, New Jersey, effective however as of the date on which said merger shall become effective, all of the right, title and interest of First Party in and to said license agreement and the rights, licenses and privileges therein contained, upon and subject to all of the conditions, terms, and agreements as in said license agreement set forth.

9567 The parties agree that the Newark Plaster Company resulting from said merger shall assume all of the obligations of licensee under said license agreement, and shall be bound by all of the terms and conditions thereof to the same effect as if it originally had been named in said license agreement as licensee therein.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

KELLEY PLASTERBOARD COMPANY, INC.
By VINCENT S. VILLARD,
Vice-President.

Attest:

F. H. MILES,
Assist Secretary.

NEWARK PLASTER COMPANY,
By FREDERICK TOMKINS,
Its President.

Attest:

CALVIN TOMKINS JR.
Secretary.

9567-A *Government's Exhibit No. 17*

FOIL BOARD LICENSE BETWEEN UNITED STATES GYPSUM COMPANY AND UNIVERSAL GYPSUM & LIME CO. DATED APRIL 4, 1935

9568 PLASTER BOARD AGREEMENT

This Agreement, made and entered into this 4th day of April A.D. 1935, by and between United States Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and having its principal place of business at 300 West Adams Street, Chicago, Illinois, hereinafter referred to as the "Gypsum Company," and Universal Gypsum & Lime Co., a corporation organized and existing under and by virtue of the laws of the State of Delaware and having its principal place of business at 105 W. Madison St., Chicago, Illinois, hereinafter referred to as "Licensee," witnesseth:

Whereas, Gypsum Company is the owner of United States Letters Patent to Roos No. 1,914,345, relating to wall construction, and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas, Licensee desires an indivisible and non-exclusive license from Gypsum Company, under the terms and conditions hereinafter set forth and as hereinafter specified, to manufacture, use and sell plasterboard under Said Roos Patent No. 1,914,345 and under said patent rights set forth in said Schedule A; and

Whereas, Gypsum Company is willing to grant such license, under the terms and conditions hereinafter set forth and as hereinafter specified,

Now, therefore, in consideration of the premises, the sum of One Dollar ($1.00) in hand paid, receipt of which is hereby acknowledged by Gypsum Company, and the mutual covenants herein contained, it is hereby agreed as follows:

9569 I

Gypsum Company hereby represents and warrants that it has the right to grant the license hereby granted.

II

The term "plaster board," as herein used, is intended to include material commonly known as plasterboard and also materials known as plaster wall board, plaster lath, and plaster sheathing boards.

III

Gypsum Company has agreed to and does hereby give and grant unto Licensee the indivisible, non-exclusive right, license and privilege to make, use and sell plaster board having a metallized surface embodying the inventions disclosed and claimed in said Roos Patent and in the patents or patent applications set forth in Schedule A, or in any of them; Provided, However, that the right, license and privilege herein and hereby granted is specifically limited to the plaster board and building structures incorporating the same as set forth in said Schedule A, and does not extend to any other product or structure.

IV

(a) It is expressly understood and agreed that the indivisible and non-exclusive rights, licenses and privileges aforesaid are granted, and they are hereby accepted, upon the express condition that Gypsum Company shall have, and it hereby reserves the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights, licenses and privileges granted hereunder shall continue, the minimum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said Roos Patent or any of the said patents set forth in Schedule A, or which shall embody the inventions or improvements set forth and claimed in any patents issued upon any of the applications for patent set forth in said Schedule A, provided that the right hereinabove reserved to determine and fix the minimum price or prices of any such plas-
9570 ter board shall not be exercised with respect to any such plaster board embodying only the inventions or improvements, or one or more of them, set forth and claimed in any of the applications for patent set forth in

said Schedule A, prior to the date when the patent or patents shall have been granted or issued upon such application or applications, respectively.

(b) In the event Gypsum Company shall exercise the right thus reserved, namely, to determine and fix at any time, and to change from time to time, such minimum price or prices, it shall notify Licensee of its election to exercise such right, and shall include in such notice, or accompany such notice by, a statement of such minimum price or prices at which Licensee shall or may sell said plaster board having a metallized surface, manufactured by Licensee, and thereafter shall give License written or telegraphic notice of any change in such price or prices; and Licensee expressly covenants and agrees that it will not, so long at this agreement shall continue in force and effect, after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any plaster board having a metallized surface manufactured by said Licensee embodying the inventions and improvements set forth in said Roos Patent or in any of said patents set forth in said Schedule A, or embodying the inventions or improvements set forth and claimed in any patents issued upon any applications for patent set forth in said Schedule A, at a price or prices less than that stated by Gypsum Company in said notice or in any such written or telegraphic notice of change in said price or prices. The said minimum price or prices at which Licensee shall or may sell said p' 'ented products as determined and fixed by Gypsum Company may be the same for all classes of trade, provided that Gypsum Company may, at any time and from time to time, determine and fix different prices for different classes of trade. It is further understood and agreed that any such minimum price or prices so determined and fixed by Gypsum Company may be
9571 made with respect to each trade market or place where said plaster board having a metallized surface may be sold, and may also be made with respect to different quantities purchased, such as carloads, less than carloads and truck loads, and that such minimum price or prices may differ in amount in each different market or place according to market conditions or quantities, all as may be determined by Gypsum Company.

(c) The said minimum price or prices so determined and fixed from time to time by Gypsum Company shall not

be more than the respective price or prices at which Gypsum Company itself determines to sell such products embodying the said inventions and improvements hereinbefore mentioned, to its own like trade in the same market.

(d) It is understood and agreed that all orders, contracts, or commitments for the future sale of said plaster board having a metallized surface and embodying the inventions and improvements hereinbefore mentioned shall be made subject to establishment of, and/or change in, such minimum price at which said materials or products may be sold, and that all shipments thereof shall be made at no less than the minimum price or prices contained in any notice of establishment of, and/or change in, price or prices received before shipment; provided, however, that on all orders taken for immediate shipment at not less than the minimum price, if any, then in effect, shipment thereof may be made at the price at which taken within five days of the date of such order; provided, further, that written contracts may be made at not less than the minimum price, if any, then in effect, to furnish such patented material for any specific work or job then contemplated or under construction; Provided, Further, that where contracts for specific work or jobs have been let to general contractors before notice of establishment of, and/or change in, price, then Licensee, if it has made a commitment for any such specific work or job prior to such notice, may at any time within thirty (30) days after such notice make a written contract to furnish the material for such specific work or job, at the price at which it was committed, 9572 but not less than the minimum price, if any, in effect at the time of such commitment. Within ten (10) days after each notice of minimum price or change thereof, Licensee will furnish to Gypsum Company a written statement of all specific work or jobs, contracts and commitments which Licensee had at the time such notice was given, showing the date of the contract or commitment, name of purchaser, location and description of specific work or job, quantity of material, and price at which the same was sold or commitment made, and shall immediately notify Gypsum Company of the making of any such contract for such specific work or job within the thirty-day term hereinbefore mentioned, and of the completion or abandonment of all specific work, jobs, contracts and commitments theretofore had by Licensee. It is understood and agreed that no such

contract or commitment shall be recognized as valid hereunder, unless the contract or commitment shall have been made in good faith before notice of making a price or change thereof, and unless such contract or commitment shall have been for some specific work or job then contemplated or under construction in which such patented material specified in the said contract or commitment is to be furnished or installed.

V

As consideration for the rights, licenses, and privileges herein granted to Licensee, Licensee agrees to pay royalty to Gypsum Company for all plaster board having a metallized surface manufactured and sold by Licensee and which are covered by claims of said Roos patent or patents set forth in the said Schedule A, or patents which may be issued under any of the applications set forth under said Schedule A, or which are to be used in making structures covered by said patent rights, at the rate of forty cents (40¢) per thousand square feet surface area where only one face is metallized, and at the rate of fifty cents (50¢) per thousand square feet where both faces are metallized, on any product covered by any of the patent rights aforesaid.

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VI

It is expressly understood that Licensee shall have no right, without the written consent of Gypsum Company first obtained, to manufacture any of said patented material for any other manufacturer of plaster board, whether or not licensed under said patents, or to sell such patented material to any other such manufacturer, or to deliver any of the same to any person, firm or corporation whatsoever on consignment.

VII

It is expressly understood and agreed that the rights, licenses and privileges herein granted are and shall be personal to Licensee, and none of said rights, licenses and privileges, nor any right herein or thereunder, shall be sold, assigned, or transferred without the written consent of Gypsum Company first obtained, nor shall Licensee permit the same, or any of them, to be transferred by operation of law: Provided, however, that such rights, licenses and privileges may be assigned by Licensee to any company acquiring all of the business and assets of said Licen-

see, on condition that Licensee shall first obtain an agreement in writing from any such assignee, in which such agreement such assignee agrees to assume all of the obligations of Licensee under this agreement and agrees to be bound by all of the terms and conditions hereof, and shall deliver such agreement to Gypsum Company.

VIII

In the event Gypsum Company shall, subsequent to the effective date hereof, grant to any other person, firm or corporation, any license under said Roos Patent or under said patents or applications for patent set forth in said Schedule A, for the manufacture, use, or sale of plaster board having a metallized surface, and embodying the claims or inventions set forth and claimed in said patents or said applications for patent, upon terms more favorable than those granted hereunder to Licensee, then Gypsum Company will grant to Licensee a license upon the same terms, or will extend to licensee the same right
9574 granted to such other licensee.

IX

Licensee agrees to keep true and accurate books of account showing the total amount of plaster board having a metallized surface manufactured and/or sold by Licensee under the rights, licenses and privileges herein granted, and the prices at which the same have been sold. Such books and records shall at all times during business hours be open to the inspection of Gypsum Company or its duly authorized representatives. Gypsum Company shall have the right to make copies of any such records and make memoranda therefrom, provided that if at the time of such examination Licensee shall so request, such examination shall be made by a certified public accountant satisfactory to Gypsum Company, in which event the expense of such examination by the said certified public accountant shall be borne by Licensee.

X

Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report, under the hand and verification of some officer or other duly authorized agent of Licensee, showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar

month and which was manufactured by Licensee under the rights, licenses and privileges herein granted, and also showing whether such plaster board had one or two metallized surfaces, together with the prices at which the same shall have been sold, and at the time of furnishing such report, Licensee will pay to Gypsum Company the full royalty as herein provided for, such plaster board having a metallized surface so sold by Licensee during such preceding calendar month. Such reports shall be furnished to Gypsum Company at its principal office, at Chicago, Illinois.

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XI

Licensee expressly covenants and agrees that all sales by Licensee hereunder of plaster board having a metallized surface shall be bona fide sales thereof, and Licensee further expressly covenants and agrees that no such products shall be placed on consignment. For the purposes of this agreement, a sale shall be considered to have been made not later than the date on which the goods are shipped.

XII

Licensee agrees that all plaster board having a metallized surface sold by it hereunder shall be numbered with the respective numbers of any appropriate patents under which the rights, licenses and privileges herein granted are granted, and covering the manufacture, sale, or use thereof. Gypsum Company shall have the right from time to time to specify the substance of the notice with which said products shall be so marked.

XIII

As one of the considerations for the indivisible and non-exclusive rights, licenses and privileges herein and hereby granted to Licensee, Licensee agrees that it will not at any time during the life of this agreement, or during the existence of said rights, licenses and privileges, directly or indirectly, by itself or through or together with another or others, contest the validity of said letters patent, or of said patent rights, or of any letters patent hereafter issued upon said applications so set forth in said Schedule A, or the right or title of Gypsum Company therein or thereto as herein or as in said Schedule A set forth, but in the event that any of said patents under which Licensee is licensed hereunder is held invalid or of limited construction by a

court of competent jurisdiction from whose decision no appeal is or can be taken, then the Licensee shall have the right to make, use or vend the structure so held to be outside of the scope of said patent rights, free and clear
9576 of the terms of this agreement.

Licensee agrees to give prompt notice of any suit or action which shall be brought against it in consequence of practicing the inventions set forth in said patents and said patent rights, and thereupon, if Gypsum Company shall desire to conduct the defense of such suit or action, it shall have the right to do so, but Licensee shall have the right, in such event, to be represented in such suit or action, at its own expense, by counsel of its own selection. Gypsum Company shall not, by undertaking to conduct the defense of any such suit or action, be under any obligation to indemnify the Licensee against any judgment, order or decree or other result therein.

XIV

(a) In the event Licensee shall fail to make any report or shall fail to pay the royalty herein provided to be paid, or in the event that Licensee shall sell any of the materials covered by the price restriction provisions of Paragraph IV hereof, at a price or prices lower than the specified price or prices established and fixed by Gypsum Company as herein provided, Gypsum Company shall have the right to cancel all of the rights, licenses and privileges herein granted to Licensee; provided, however, that Licensee shall not be relieved thereby from any liability accrued at the time of such cancellation. In the event of any such breach, Gypsum Company shall give written notice to Licensee of the default or defaults claimed by Gypsum Company to have occurred, and of the desire of Gypsum Company to cancel the rights, licenses and privileges of Licensee hereunder; and if Licensee shall not make good the default or defaults complained of within a period of thirty (30) days from the giving of such notice, then all of the rights, licenses and privileges of Licensee hereunder shall forthwith cease and terminate without further action on the part of Gypsum Company; provided, however, that if, upon the giving of any such notice, Licensee shall deny that the
9577 defaults, or any of them, complained of have occurred, then the question as to whether the default or defaults, the occurrence of which is so denied by Licensee, have in fact occurred, shall be referred to arbitration under Paragraph XV hereof.

(b) In the event that such arbiters find that such default or defaults have occurred, then Licensee shall promptly cure the same, and in any event shall cure the same within thirty (30) days from the date of the finding of such arbiters; and in the event such default or defaults shall not be so cured within the time limited, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine without further action on the part of Gypsum Company; the termination of said rights, licenses and privileges following the finding of the arbiters as aforesaid shall not release Licensee from any liability then existing.

(c) In the event (1) that Licensee shall be adjudicated a bankrupt, or (2) a receiver shall be appointed for licensee, whose appointment shall not be vacated within sixty (60) days thereafter, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of Gypsum Company, provided that such termination shall not relieve Licensee of any and all liability then existing.

(d) The waiver by Gypsum Company of any breach on the part of Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

(e) In the event any default shall have occurred as specified in sub-paragraph (a) of this Paragraph XIV, Gypsum Company may give notice of such default without stating its desire to terminate the rights, licenses and privileges herein granted to Licensee, and in the event such defaults shall not be cured by Licensee within the times mentioned in said sub-paragraph (a), Gypsum Com-
9578 pany shall have the right, without terminating the said rights, licenses and privileges herein granted to Licensee, to maintain any appropriate action hereunder, at law or in equity, for the collection of license fees or royalties, or for damages, or for any other remedy as may be appropriate. The provisions mentioned in said sub-paragraph (a) with respect to arbitrating the fact as to whether any default or defaults complained of has or have in fact occurred, shall be applicable in all respects in the event notice of default is given without any statement by Gypsum Company of its desire to terminate the rights, licenses and privileges herein granted to Licensee, excepting that if the arbiters shall find that any of said defaults complained of shall have occurred, then Gypsum Company shall

have the same right, without a termination of said rights, licenses and privileges so granted to Licensee, to maintain its appropriate action hereunder.

XV

Any question subject to arbitration under any provision of this contract shall be arbitrated in accordance with the rules then obtaining of the American Arbitration Association. The finding or findings of the arbiters with respect to the occurrence or non-occurrence of any claimed default, shall be final and conclusive. In the event the finding or findings of the arbiters shall be with respect to any default or defaults, or claimed default or defaults, in the payment of royalties or other sums of money herein required to be paid by the Licensee to Gypsum Company and the arbiters shall find that such default or defaults shall have occurred, the arbiters shall in their finding fix and determine the amount of royalties or other sums of money due from License to Gypsum Company, whereupon Licensee will promptly pay the same to Gypsum Company, and in any event will pay the same within the times hereinbefore mentioned in Paragraph XIV hereof for the curing of defaults, provided that Gypsum Company shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for
9579 the amount so found to be due by the arbiters in any court of competent jurisdiction.

XVI

Any notice to be given under the terms hereof may be served by either party by mailing such notice to the other party hereto, by registered mail, postage prepaid, addressed to such party at its last known principal office, and the deposit of any such notice in the United States mails, registered, postage prepaid, and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under Paragraph IV hereof shall be confirmed in writing. Either party may change, from time to time, the address to which all notices shall be mailed, provided that in the absence of any different address, the respective addresses herein first above stated shall be the adresses to which such notices shall be mailed.

XVII

Except as herein otherwise expressly provided, this agreement shall remain in force for the full term of

each patent under which the respectitve rights, licenses and privileges are hereby granted, and shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns, provided, however, that nothing in this Paragraph XVII contained shall be construed to permit any assignment hereof or of any of the rights, licenses, and privileges herein granted, except as herein otherwise specifically provided. Nothing herein contained shall be construed as extending any license for the manufacture and/or use and/or sale of plaster board not having a metallized surface heretofore or hereafter granted under any other agreement between the parties hereto.

In the event that the exclusive right and license of the Gypsum Company, as set forth in said Schedule A hereto, shall for any reason whatsoever (whether on account of the default of the Gypsum Company or otherwise) 9580 terminate, and such termination shall have the effect of terminating or shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate, without further act on the part of either of the parties hereto, provided that Licensee shall not be relieved thereby from any liability then existing, and provided further that Gypsum Company shall not be liable in any way to Licensee on account of such termination. Gypsum Company agrees that if its said exclusive right and license shall so be terminated, it will promptly notify Licensee of such termination.

XVIII

Anything hereinabove contained to the contrary notwithstanding, this agreement and the rights, licenses and privileges herein granted to the Licensee may be cancelled and terminated, at any time, by either party hereto, by at least ninety (90) days' prior written notice to the other party of the election of the party serving the notice to exercise such right of cancellation and of the date on which such cancellation shall be effective, but such cancellation shall not relieve either party from any liability accrued or due at the date of such cancellation; Provided, However, that if Gypsum Company shall exercise the right to cancel this agreement as in this paragraph provided, then within ninety (90) days of its said notice it will submit to Licensee a new contract embodying a proposal for a non-exclusive license under said patents

for the life of said patents, for acceptance by Licensee within ten (10) days from the date of such submittal.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

9581 UNITED STATES GYPSUM COMPANY,
By C. F. HENNING,
Its Vice President.

ATTEST:
C. H. SHAVER,
Secretary.

[SEAL]

UNIVERSAL GYPSUM & LIME CO.
By EUGENE HOLLAND,
Its President.

ATTEST:
C. J. SIMMONS,
Secretary.

[SEAL]

9582 SCHEDULE A

The Gypsum Company has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of plaster board having a metallized surface under the following patents and applications for patents known as the Alfol patents.

PATENTS

Inventor	*Patent No.*	*Issue Date*
E. Schmidt, et al	1,757,479	May 5, 1930
E. Schmidt	1,890,418	Dec. 6, 1932
Eduard Dyckerhoff	1,934,174	Nov. 7, 1933

APPLICATIONS

Inventor	*Serial No.*	*Filing Date*
Schmidt, et al	105,753	April 30, 1926
Eduard Dyckerhoff	442,219	April 7, 1930
Ernst Schmidt	663,572	March 30, 1933

together with any divisions, continuations, renewals or reissues thereof, but it is understood that the term "building structures" is limited to the walls, floors, roofs and ceilings of buildings and does not include pipes or ducts or other heating apparatus installed in the building or refrigerating or cooling apparatus or structures whether built into the building or not, and it is further understood that Gypsum Company has no right or license under said patents or applications to use metal foil for insulators except where such foil is applied to a non-metallic member as a facing therefor.

9583 *Government's Exhibit No. 18*

PLASTER BOARD AGREEMENT

This agreement, made and entered into this 30th day of November A. D. 1934, by and between United States Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and having its principal place of business at 300 West Adams Street, Chicago, Illinois, hereinafter referred to as the "Gypsum Company," and Atlantic Gypsum Products Company, a corporation organized and existing under and by virtue of the laws of the State of New Hampshire and having its principal place of business at Boston, Massachusetts, hereinafter referred to as "Licensee," witnesseth:

Whereas, Gypsum Company is the owner of United States Letters Patent to Roos No. 1,914,345, relating to wall construction, and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas, Licensee desires an indivisible and non-exclusive license from Gypsum Company, under the terms and conditions hereinafter set forth and as hereinafter specified, to manufacture, use and sell plaster board under said Roos Patent No. 1,914,345 and under said patent rights set forth in said Schedule A; and

Whereas, Gypsum Company is willing to grant such license, under the terms and conditions hereinafter set forth and as hereinafter specified,

Now, therefore, in consideration of the premises, the sum of One Dollar ($1.00) in hand paid, receipt of

9584 which is hereby acknowledged by Gypsum Company, and the mutual covenants herein contained, it is hereby agreed as follows:

I

Gypsum Company hereby represents and warrants that it has the right to grant the license hereby granted.

II

The term "plaster board," as herein used, is intended to include material commonly known as plasterboard and also materials known as plaster wall board, plaster lath, and plaster sheathing boards.

III

Gypsum Company has agreed to and does hereby give and grant unto Licensee the indivisible, non-exclusive right, license and privilege to make, use and sell plaster board having a metallized surface embodying the inventions disclosed and claimed in said Roos Patent and in the patents or patent applications set forth in Schedule A, or in any of them; Provided, However, that the right, license and privilege herein and hereby granted is specifically limited to the plaster board and building structures incorporating the same as set forth in said Schedule A, and does not extend to any other product or structure.

IV

(a) It is expressly understood and agreed that the indivisible and non-exclusive rights, licenses and privileges aforesaid are granted, and they are hereby accepted, upon the express condition that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights, licenses and privileges granted hereunder shall
9585 continue, the minimum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said Roos Patent or any of the said patents set forth in Schedule A, or which shall embody the inventions or improvements set forth and claimed in any patents issued upon any of the applications for patent set forth in said Schedule A, provided that the right hereinabove reserved to determine and fix the minimum price or prices of any such plaster

board shall not be exercised with respect to any such plaster board embodying only the inventions or improvements, or one or more of them, set forth and claimed in any of the applications for patent set forth in said Schedule A, prior to the date when the patent or patents shall have been granted or issued upon such application or applications, respectively.

(b) In the event Gypsum Company shall exercise the right thus reserved, namely, to determine and fix at any time, and to change from time to time, such minimum price or prices, it shall notify Licensee of its election to exercise such right, and shall include in such notice, or accompany such notice by, a statement of such minimum price or prices at which Licensee shall or may sell said plaster board having a metallized surface, manufactured by Licensee, and thereafter shall give Licensee written or telegraphic notice of any change in such price or prices; and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any plaster board having a metallized surface manufactured by said Licensee embodying the inventions and improvements set forth in said Roos Patent or in any of said
9586 patents set forth in said Schedule A, or embodying the inventions or improvements set forth and claimed in any patents issued upon any applications for patent set forth in said Schedule A, at a price or prices less than that stated by Gypsum Company in said notice or in any such written or telegraphic notice of change in said price or prices. The said minimum price or prices at which Licensee shall or may sell said patented products as determined and fixed by Gypsum Company may be the same for all classes of trade, provided that Gypsum Company may, at any time and from time to time, determine and fix different prices for different classes of trade. It is further understood and agreed that any such minimum price or prices so determined and fixed by Gypsum Company may be made with respect to each trade market or place where said plaster board having a metallized surface may be sold, and may also be made with respect to different quantities purchased, such as carloads, less than carloads and truck loads, and that such minimum price or prices may differ

in amount in each different market or place according to market conditions or quantities, all as may be determined by Gypsum Company.

(c) The said minimum price or prices so determined and fixed from time to time by Gypsum Company shall not be more than the respective price or prices at which Gypsum Company itself determines to sell such products embodying the said inventions and improvements hereinbefore mentioned, to its own like trade in the same market.

(d) It is understood and agreed that all orders, contracts, or commitments for the future sale of said plaster board having a metallized surface and embodying the inventions and improvements hereinbefore mentioned shall be made subject to establishment of, and/or change in, such minimum price at which said materials or products may be sold, and that all shipments thereof shall
9587 be made at no less than the minimum price or prices contained in any notice of establishment of, and/or change in, price or prices received before shipment; provided, however, that on all orders taken for immediate shipment at not less than the minimum price, if any, then in effect, shipment thereof may be made at the price at which taken within five days of the date of such order; provided, further, that written contracts may be made at not less than the minimum price, if any, then in effect, to furnish such patented material for any specific work or job then contemplated or under construction; Provided, Further, that where contracts for specific work or jobs have been let to general contractors before notice of establishment of, and/or change in, price, then Licensee, if it has made a commitment for any such specific work or job prior to such notice, may at any time within thirty (30) days after such notice make a written contract to furnish the material for such specific work or job, at the price at which it was committed, but not less than the minimum price, if any, in effect at the time of such commitment. Within ten (10) days after each notice of minimum price or change thereof, Licensee will furnish to Gypsum Company a written statement of all specific work or jobs, contracts and commitments which Licensee had at the time such notice was given, showing the date of the contract or commitment, name of purchaser, location and description of specific work or job, quantity of material, and price at which the same was sold or

commitment made, and shall immediately notify Gypsum Company of the making of any such contract for such specific work or job within the thirty-day term hereinbefore mentioned, and of the completion or abandonment of all specific work, jobs, contracts and commitments theretofore had by Licensee. It is understood and agreed
that no such contract or commitment shall be rec-
9588 ognized as valid hereunder, unless the contract
or commitment shall have been made in good faith before notice of making a price or change thereof, and unless such contract or commitment shall have been for some specific work or job then contemplated or under construction in which such patented material specified in the said contract or commitment is to be furnished or installed.

V

As consideration for the rights, licenses, and privileges herein granted to Licensee, Licensee agrees to pay royalty to Gypsum Company for all plaster board having a metallized surface manufactured and sold by Licensee and which are covered by claims of said Roos patent or patents set forth in the said Schedule A, or patents which may be issued under any of the applications set forth under said Schedule A, or which are to be used in making structures covered by said patent rights, at the rate of forty cents (40¢) per thousand square feet surface area where only one face is metallized, and at the rate of fifty cents (50¢) per thousand square feet where both faces are metallized, on any product covered by any of the patent rights aforesaid.

VI

It is expressly understood that Licensee shall have no right, without the written consent of Gypsum Company first obtained, to manufacture any of said patented material for any other manufacturer of plaster board, whether or not licensed under said patents, or to sell such patented material to any other such manufacturer, or to deliver any of the same to any person, firm or corporation whatsoever on consignment.

VII

It is expressly understood and agreed that the
9589 rights, licenses and privileges herein granted are and shall be personal to Licensee, and none of said

rights, licenses and privileges, nor a · right herein or thereunder, shall be sold, assigned, or transferred without the written consent of Gypsum Company first obtained, nor shall Licensee permit the same, or any of them, to be transferred by operation of law; Provided, however, that such rights, licenses, and privileges may be assigned by Licensee to any company acquiring all of the business and assets of said Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee, in which such agreement such assignee agrees to assume all of the obligations of Licensee under this agreement and agrees to be bound by all of the terms and conditions hereof, and shall deliver such agreement to Gypsum Company.

VIII

In the event Gypsum Company shall, subsequent to the effective date hereof, grant to any other person, firm or corporation, any license under said Roos Patent or under said patents or applications for patent set forth in said Schedule A, for the manufacture, use, or sale of plaster board having a metallized surface, and embodying the claims or inventions set forth and claimed in said patents or said applications for patent, upon terms more favorable than those granted hereunder to Licensee, then Gypsum Company will grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted to such other licensee.

IX

Licensee agrees to keep true and accurate books of account, showing the total amount of plaster board having a metallized surface manufactured and/or sold by
9590 Licensee under the rights, licenses and privileges herein granted, and the prices at which the same have been sold. Such books and records shall at all times during business hours be open to the inspection of Gypsum Company or its duly authorized representatives. Gypsum Company shall have the right to make copies of any of such records and make memoranda therefrom, provided that if at the time of such examination Licensee shall so request, such examination shall be made by a certified public accountant satisfactory to Gypsum Company, in which event the expense of such examination by the said certified public accountant shall be borne by Licensee.

X

Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report, under the hand and verification of some officer or other duly authorized agent of Licensee, showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month and which was manufactured by Licensee under the rights, licenses and privileges herein granted, and also showing whether such plaster board had one or two metallized surfaces, together with the prices at which the same shall have been sold, and at the time of furnishing such report, Licensee will pay to Gypsum Company the full royalty as herein provided for such plaster board having a metallized surface so sold by Licensee during such preceding calendar month. Such reports shall be furnished to Gypsum Company at its principal office, at Chicago, Illinois.

XI

Licensee expressly covenants and agrees that all sales by Licensee hereunder of plaster board having a metallized surface shall be bona fide sales thereof, and
9591 Licensee further expressly covenants and agrees that no such products shall be placed on consignment. For the purposes of this agreement, a sale shall be considered to have been made not later than the date on which the goods are shipped.

XII

Licensee agrees that all plaster board having a metallized surface sold by it hereunder shall be numbered with the respective numbers of any appropriate patents under which the rights, licenses and privileges herein granted are granted, and covering the manufacture, sale, or use thereof. Gypsum Company shall have the right from time to time to specify the substance of the notice with which said products shall be so marked.

XIII

As one of the considerations for the indivisible and non-exclusive rights, licenses and privileges herein and hereby granted to Licensee, Licensee agrees that it will not at any time during the life of this agreement, or during the existence of said rights, licenses and privi-

leges, directly or indirectly, by itself or through or together with another or others, contest the validity of said letters patent, or of said patent rights, or of any letters patent hereafter issued upon said applications so set forth in said Schedule A, or the right or title of Gypsum Company therein or thereto as herein or as in said Schedule A set forth, but in the event that any of said patents under which Licensee is licensed hereunder is held invalid or of limited construction by a court of competent jurisdiction from whose decision no appeal is or can be taken, then the Licensee shall have the right to make, use or vend the structure so held to be outside of the scope of said patent rights, free and clear of the terms of this agreement.

9592 Licensee agrees to give prompt notice of any suit or action which shall be brought against it in consequence of practicing the inventions set forth in said patents and said patent rights, and thereupon, if Gypsum Company shall desire to conduct the defense of such suit or action, it shall have the right to do so, but Licensee shall have the right, in such event, to be represented in such suit or action, at its own expense, by counsel of its own selection. Gypsum Company shall not, by undertaking to conduct the defense of any such suit or action, be under any obligation to indemnify the Licensee against any judgment, order or decree or other result therein.

XIV

(a) In the event Licensee shall fail to make any report or shall fail to pay the royalty herein provided to be paid, or in the event that Licensee shall sell any of the materials covered by the price restriction provisions of Paragraph IV hereof, at a price or prices lower than the specified price or prices established and fixed by Gypsum Company as herein provided, Gypsum Company shall have the right to cancel all of the rights, licenses and privileges herein granted to Licensee; provided, however, that Licensee shall not be relieved thereby from any liability accrued at the time of such cancellation. In the event of any such breach, Gypsum Company shall give written notice to Licensee of the default or defaults claimed by Gypsum Company to have occurred, and of the desire of Gypsum Company to cancel the rights, licenses and privileges of Licensee hereunder; and if Licensee shall not make good the default or defaults com-

plained of within a period of thirty (30) days from the giving of such notice, then all of the rights, licenses and privileges of Licensee hereunder shall forthwith cease and terminated without further action on the part
9593 of Gypsum Company; provided, however, that if, upon giving of any such notice, Licensee shall deny that the defaults, or any of them, complained of have occurred, then the question as to whether the default or defaults, the occurrence of which is so denied by Licensee, have in fact occurred, shall be referred to arbitration under Paragraph XV hereof.

(b) In the event that such arbiters find that such default or defaults have occurred, then Licensee shall promptly cure the same, and in any event shall cure the same within thirty (30) days from the date of the finding of such arbiters; and in the event such default or defaults shall not be so cured within the time limited, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine without further action on the part of Gypsum Company; the termination of said rights, licenses and privileges following the finding of the arbiters as aforesaid shall not release Licensee from any liability then existing.

(c) In the event (1) that Licensee shall be adjudicated a bankrupt, or (2) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty (60) days thereafter, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of Gypsum Company, provided that such termination shall not relieve Licensee of any and all liability then existing.

(d) The waiver by Gypsum Company of any breach on the part of Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

(e) In the event any default shall have occurred as specified in sub-paragraph (a) of this Paragraph XIV, Gypsum Company may give notice of such default without stating its desire to terminate the rights, li-
9594 censes and privileges herein granted to Licensee, and in the event such defaults shall not be cured by Licensee within the times mentioned in said sub-paragraph (a), Gypsum Company shall have the right, without

terminating the said rights, licenses and privileges herein granted to Licensee, to maintain any appropriate action hereunder, at law or in equity, for the collection of license fees or royalties, or for damages, or for any other remedy as may be appropriate. The provisions mentioned in said sub-paragraph (a) with respect to arbitrating the fact as to whether any default or defaults complained of has or have in fact occurred, shall be applicable in all respects in the event notice of default is given without any statement by Gypsum Company of its desire to terminate the rights, licenses and privileges herein granted to Licensee, excepting that if the arbiters shall find that any of said defaults complained of shall have occurred, then Gypsum Company shall have the same right, without a termination of said rights, licenses and privileges so granted to Licensee, to maintain its appropriate action hereunder.

XV

Any question subject to arbitration under any provision of this contract shall be arbitrated in accordance with the rules then obtaining of the American Arbitration Association. The finding or findings of the arbiters with respect to the occurrence or non-occurrence of any claimed default, shall be final and conclusive. In the event the finding or findings of the arbiters shall be with respect to any default or defaults, or claimed default or defaults, in the payment of royalties or other sums of money herein required to be paid by the Licensee to Gypsum Company and the arbiters shall find that such default or defaults shall have occurred, the arbiters shall in their finding fix and determine the amount of royalties or other sums of money due from License to Gypsum Company, whereupon Licensee will promptly pay the same to Gypsum Company, and in any event will pay the same within the times hereinbefore mentioned in Paragraph XIV hereof for the curing of defaults, provided that Gypsum Company shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbiters in any court of competent jurisdiction.

9595

XVI

Any notice to be given under the terms hereof may be served by either party by mailing such notice to the other

party hereto, by registered mail, postage prepaid, addressed to such party at its last known principal office, and the deposit of any such notice in the United States mails, registered, postage prepaid, and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under Paragraph IV hereof shall be confirmed in writing. Either party may change, from time to time, the address to which all notices shall be mailed, provided that in the absence of any different address, the respective addresses herein first above stated shall be the addresses to which such notices shall be mailed.

XVII

Except as herein otherwise expressly provided, this agreement shall remain in force for the full term of each patent under which the respective rights, licenses and privileges are hereby granted, and shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns, provided, however, that nothing in this Paragraph XVII contained shall be construed to permit any assignment hereof or of any of the rights, licenses, and privileges herein granted, except as herein otherwise specifically provided. Nothing herein contained shall be construed as extending any license for the
9596 manufacture and/or use and/or sale of plaster board not having a metallized surface heretofore or hereafter granted under any other agreement between the parties hereto.

In the event that the exclusive right and license of the Gypsum Company, as set forth in said Schedule A hereto, shall for any reason whatsoever (whether on account of the default of the Gypsum Company or otherwise) terminate, and such termination shall have the effect of terminating or shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate, without further act on the part of either of the parties hereto, provided that Licensee shall not be relieved thereby from any liability then existing, and provided further that Gypsum Company shall not be liable in any way to Licensee on account of such termination. Gypsum Company agrees that if its said exclusive right and license shall so be terminated, it will promptly notify Licensee of such termination.

XVIII

Anything hereinabove contained to the contrary notwithstanding, this agreement and the rights, licenses and privileges herein granted to the Licensee may be cancelled and terminated, at any time, by either party hereto, by at least ninety (90) days' prior written notice to the other party of the election of the party serving the notice to exercise such right of cancellation and of the date on which such cancellation shall be effective, but such cancellation shall not relieve either party from any liability accrued or due at the date of such cancellation; Provided, However, that if Gypsum Company shall exercise the right to cancel this agreement as in this paragraph provided, then within ninety (90) days of its said notice it will
9597 submit to Licensee a new contract embodying a proposal for a non-exclusive license under said patents for the life of said patents, for acceptance by Licensee within ten (10) days from the date of such submittal.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY
By C. F. HENNING,
Its President.

ATTEST:
C. H. SHAVER,
Secretary.

ATLANTIC GYPSUM PRODUCTS CO.
By WILLARD P. FULLER,
Its President.

ATTEST:
CLAIR A. HANEN,
Secretary.

9598 SCHEDULE A

The Gypsum Company has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of plaster board having a metallized surface uder the following patents and applications for patents known as the Alfol patents.

PATENTS

Inventor	*Patent No.*	*Issue Date*
E. Schmidt, et al	1,757,479	May 5, 1930
E. Schmidt	1,890,418	Dec. 6, 1932
Eduard Dyckerhoff	1,934,174	Nov. 7, 1933

APPLICATIONS

Inventor	*Ser. No.*	*Filing Date*
Schmidt, et al	105,753	April 30, 1926
Eduard Dyckerhoff	442,219	April 7, 1930
Ernst Schmidt	663,572	March 30, 1933

together with any divisions, continuations, renewals or reissues thereof, but is is understood that the term "building structures" is limited to the walls, floors, roofs and ceilings of buildings and does not include pipes or ducts or other heating apparatus installed in the building or refrigerating or cooling apparatus or structures whether built into the building or not, and it is further understood that Gypsum Company has no right or license under said patents or applications to use metal foil for insulators except where such foil is applied to a non-metallic member as a facing therefor.

9599 *Government's Exhibit No. 19*

AGREEMENT

This Agreement, made and entered into this 5th day of October, A. D. 1934, by and between United States Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and having its principal place of business at 300 West Adams Street, Chicago, Illinois, hereinafter referred to as the "Gypsum Company," and National Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware and having its principal place of business at 188 Delaware Avenue, Buffalo, New York, hereinafter referred to as "Licensee," Witnesseth:

Whereas, Gypsum Company is the owner of United States Letters Patent to Roos No. 1,914,345, relating to wall construction, and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas, Licensee desires an indivisible and non-exclusive license from Gypsum Company, under the terms and conditions hereinafter set forth and as hereinafter

specified, to manufacture, use and sell plaster board under said Roos Patent No. 1,914,345 and under said patent rights set forth in said Schedule A; and

Whereas, Gypsum Company is willing to grant such license, under the terms and conditions hereinafter set forth and as hereinafter specified,

Now, Therefore, in consideration of the premises, the sum of One Dollar ($1.00) in hand paid, receipt of
9600 which is hereby acknowledged by Gypsum Company, and the mutual covenants herein contained, it is hereby agreed as follows:

I

Gypsum Company hereby represents and warrants that it has the right to grant the license hereby granted.

II

The term "plaster board," as herein used, is intended to include material commonly known as plaster board and also materials known as plaster wall board, plaster lath, and plaster sheathing boards.

III

Gypsum Company has agreed to and does hereby give and grant unto Licensee the indivisible, non-exclusive right and privilege to make, use and sell plaster board having a metallized surface embodying the inventions disclosed and claimed in said Roos Patent and in the patents or patent applications set forth in Schedule A, or in any of them; provided, however, that the right, license and privilege herein and hereby granted is specifically limited to the plaster board and building structures incorporating the same as covered by the patents or patent rights set forth in Schedule A, and does not extend to any other product or structure.

IV

(a) It is expressly understood and agreed that the indivisible and non-exclusive rights, licenses and privileges aforesaid are granted, and they are hereby accepted, upon the express condition that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights,

licenses and privileges granted hereunder shall
9601 continue, the minimum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said Roos Patent or any of the said patents set forth in Schedule A, or which shall embody the inventions or improvements set forth and claimed in any patents issued upon any of the applications for patent set forth in said Schedule A, provided that the right hereinabove reserved to determine and fix the minimum price or prices of any such plaster board shall not be exercised with respect to any such plaster board embodying only the inventions or improvements, or one or more of them, set forth and claimed in any of the applications for patent set forth in said Schedule A, prior to the date when the patent or patents shall have been granted or issued upon such application or applications, respectively.

(b) In the event Gypsum Company shall exercise the right thus reserved, namely, to determine and fix at any time, and to change from time to time, such minimum price or prices, it shall notify Licensee of its election to exercise such right, and shall include in such notice, or accompany such notice by, a statement of such minimum price or prices at which Licensee shall or may sell said plaster board having a metallized surface, manufactured by Licensee, and thereafter shall give Licensee written or telegraphic notice of any change in such price or prices; and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell of offer for sale any plaster board having a metallized surface manufactured by said Licensee embodying the inventions and improvements set forth in said Roos Patent or in any of said patents set forth in said Schedule
9602 A, or embodying the inventions or improvements set forth and claimed in any patents issued upon any applications for patent set forth in said Schedule A, at a price or prices less than that stated by Gypsum Company in said notice or in any such written or telegraphic notice of change in said price or prices. The said minimum price or prices at which Licensee shall or may sell said patented products as determined and fixed by Gypsum Company may be the same for all classes of trade, provided that Gypsum Company may, at any time and from time to

time, determine and fix different prices for different classes of trade. It is further understood and agreed that any such minimum price or prices so determined and fixed by Gypsum Company may be made with respect to each trade market or place where said plaster board having a metallized surface may be sold, and may also be made with respect to different quantities purchased, such as carloads, less than carloads and truck loads, and that such minimum price or prices may differ in amount in each different market or place according to market conditions or quantities, all as may be determined by Gypsum Company.

(c) The said minimum price or prices so determined and fixed from time to time by Gypsum Company shall not be more than the respective price or prices at which Gypsum Company itself determines to sell such products embodying the said inventions and improvements hereinbefore mentioned, to its own like trade in the same market.

(d) It is understood and agreed that all orders, contracts, or commitments for the future sale of said plaster board having a metallized surface and embodying the inventions and improvements hereinbefore mentioned shall be made subject to establishment of, and/or change in, such minimum price at which said materials or products may be sold, and that all shipments thereof shall be
9603 made at no less than the minimum price or prices contained in any notice of establishment of, and/or change in, price or prices received before shipment; provided, however, that on all orders taken for immediate shipment at not less than the minimum price, if any, then in effect, shipment thereof may be made at the price at which taken within five days of the date of such order; provided, further, that written contracts may be made at not less than the minimum price, if any, then in effect, to furnish such patented material for any specific work or job then contemplated or under construction; provided, further, that where contracts for specific work or jobs have been let to general contractors before notice of establishment of, and/or change in, price, then Licensee, if it has made a commitment for any such specific work or job prior to such notice, may at any time within thirty (30) days after such notice make a written contract to furnish the material for such specific work or job, at the price at which it was committed, but not less than the

minimum price, if any, in effect at the time of such commitment. Within ten (10) days after each notice of minimum price or change thereof, Licensee will furnish to Gypsum Company a written statement of all specific work or jobs, contracts and commitments which Licensee had at the time such notice was given, showing the date of the contract or commitment, name of purchaser, location and description of specific work or job, quantity of material, and price at which the same was sold or commitment made, and shall immediately notify Gypsum Company of the making of any such contract for such specific work or job within the thirty-day term hereinbefore mentioned, and of the completion or abandonment of all specific work, jobs, contracts and commitments theretofore had by Licensee. It is understood and agreed that no such contract or commitment shall be recognized as
9604 valid hereunder, unless the contract or commitment shall have been made in good faith before notice of making a price or change thereof, and unless such contract or commitment shall have been for some specific work or job then contemplated or under construction in which such patented material specified in the said contract or commitment is to be furnished or installed.

V

As consideration for the rights, licenses, and privileges herein granted to Licensee, Licensee agrees to pay royalty to Gypsum Company for all plaster board having a metallized surface manufactured and sold by Licensee and which are covered by claims of said Roos patent or patents set forth in the said Schedule A, or patents which may be issued under any of the applications set forth under said Schedule A, or which are to be used in making structures covered by said patent rights, at the rate of forty cents (40¢) per thousand square feet surface area where only one face is metallized, and at the rate of fifty cents (50¢) per thousand square feet where both faces are metallized, on any product covered by any of the patent rights aforesaid.

VI

It is expressly understood that Licensee shall have no right, without the written consent of Gypsum Company first obtained, to manufacture any of said patented material for any other manufacturer of plasterboard, whether or

not licensed under said patents, or to sell such patented material to any other such manufacturer, or to deliver any of the same to any person, firm or corporation whatsoever on consignment.

VII

It is expressly understood and agreed that the
9605 rights, licenses and privileges herein granted are and shall be personal to Licensee, and none of said rights, licenses and privileges, nor any right herein or thereunder, shall be sold, assigned, or transferred without the written consent of Gypsum Company first obtained, nor shall Licensee permit the same, or any of them, to be transferred by operation of law; provided, however, that such rights, licenses, and privileges may be assigned by Licensee to any company acquiring all of the business and assets of said Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee, in which such agreement such assignee agrees to assume all of the obligations of Licensee under this agreement and agrees to be bound by all of the terms and conditions hereof, and shall deliver such agreement to Gypsum Company.

VIII

In the event Gypsum Company shall, subsequent to the effective date hereof, grant to any other person, firm or corporation, any license under said Roos Patent or under said patents or applications for patent set forth in said Schedule A, for the manufacture, use, or sale of plaster board having a metallized surface, and embodying the claims or inventions set forth and claimed in said patents or said applications for patent, upon terms more favorable than those granted hereunder to Licensee, then Gypsum Company will grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted to such other licensee.

IX

Licensee agrees to keep true and accurate books of account, showing the total amount of plaster board having
a metallized surface manufactured and/or sold by
9606 Licensee under the rights, licenses, and privileges herein granted, and the prices at which the same have been sold. Such books and records shall at all times during business hours be open to the inspection of Gypsum Com-

pany shall have the right to make copies of any of such records and make memoranda therefrom, provided that if at the time of such examination Licensee shall so request, such examination shall be made by a certified public accountant satisfactory to Gypsum Company, in which event the expense of such examination by the said certified public accountant shall be borne by Licensee.

X

Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report, under the hand and verification of some officer or other duly authorized agent of Licensee, showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month and which was manufactured by Licensee under the rights, licenses and privileges herein granted, and also showing whether such plaster board had one or two metallized surfaces, together with the prices at which the same shall have been sold, and at the time of furnishing such report, Licensee will pay to Gypsum Company the full royalty as herein provided for such plaster board having a metallized surface so sold by Licensee during such preceding calendar month. Such reports shall be furnished to Gypsum Company at its principal office, at Chicago, Illinois.

XI

Licensee expressly covenants and agrees that all sales by Licensee hereunder of plaster board having a metallized surface shall be bona fide sales thereof, and Licensee
9607 further covenants and agrees that no such products shall be placed on consignment. For the purposes of this agreement, a sale shall be considered to have been made not later than the date on which the goods are shipped.

XII

Licensee agrees that all plaster board having a metallized surface sold by it hereunder shall be numbered with the respective numbers of any appropriate patents under which the rights, licenses and privileges herein granted are granted, and covering the manufacture, sale, or use thereof. Gypsum Company shall have the right from time to time to specify the substance of the notice with which said products shall be so marked.

XIII

As one of the considerations for the indivisible and non-exclusive rights, licenses and privileges herein and hereby granted to Licensee, Licensee agrees that it will not at any time during the life of this agreement, or during the existence of said rights, licenses and privileges, directly or indirectly, by itself or through or together with another or others, contest the validity of said letters patent, or of said patent rights, or of any letters patent hereafter issued upon said applications so set forth in said Schedule A, or the right or title of Gypsum Company therein or thereto as herein or as in said Schedule A set forth, but in the event that any of said patents under which Licensee is licensed hereunder is held invalid or of limited construction by a court of competent jurisdiction from whose decision no appeal is or can be taken, then the Licensee shall have the right to make, use or vend the structure so held to be outside of the scope of said patent rights, free and clear of the terms of this agreement.

9608 Licensee agrees to give prompt notice of any suit or action which shall be brought against it in consequence of practicing the inventions set forth in said patents and said patent rights, and thereupon, if Gypsum Company shall desire to conduct the defense of such suit or action, it shall have the right to do so, but Licensee shall have the right, in such event, to be represented in such suit or action, at its own expense, by counsel of its own selection. Gypsum Company shall not, by undertaking to conduct the defense of any such suit or action, be under any obligation to indemnify the Licensee against any judgment, order or decrees or other result therein.

XIV

(a) In the event Licensee shall fail to make any report or shall fail to pay the royalty herein provided to be paid, or in the event that Licensee shall sell any of the materials covered by the price restriction provisions of Paragraph IV hereof, at a price or prices lower than the specified price or prices established and fixed by Gypsum Company as herein provided, Gypsum Company shall have the right to cancel all of the rights, licenses and privileges herein granted to Licensee, provided, however, that Licensee shall not be relieved thereby from any liability accrued at the time of such cancellation. In the event of any such breach,

Gypsum Company shall give written notice to Licensee of the default or defaults claimed by Gypsum Company to have occurred, and of the desire of Gypsum Company to cancel the rights, licenses and privileges of Licensee hereunder; and if Licensee shall not make good the default or defaults complained of within a period of thirty (30) days from the giving of such notice, then all of the rights, licenses and privileges of Licensee hereunder shall forthwith cease and terminate without further action on the part
9609 of Gypsum Company, provided, however, that if, upon the giving of any such notice, Licensee shall deny that the defaults, or any of them, complained of have occurred, then the question as to whether the default or defaults, the occurrence of which is so denied by Licensee, have in fact occurred, shall be referred to arbitration under Paragraph XV hereof.

(b) In the event that such arbiters find that such default or defaults have occurred, then Licensee shall promptly cure the same, and in any event shall cure the same within thirty (30) days from the date of the finding of such arbiters; and in the event such default or defaults shall not be so cured within the time limited, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine without further action on the part of Gypsum Company; the termination of said rights, licenses and privileges following the finding of the arbiters as aforesaid shall not release Licensee from any liability then existing.

(c) In the event (1) that Licensee shall be adjudicated a bankrupt, or (2) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty (60) days thereafter, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of Gypsum Company, provided that such termination shall not relieve Licensee of any and all liability then existing.

(d) The waiver by Gypsum Company of any breach on the part of Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

(e) In the event any default shall have occurred as specified in sub-paragraph (a) of this Paragraph XIV, Gypsum Company may give notice of such default without stating

its desire to terminate the rights, licenses and privi-
9610 leges herein granted to Licensee, and in the event such defaults shall not be cured by Licensee within the times mentioned in said sub-paragraph (a), Gypsum Company shall have the right, without terminating the said rights, licenses and privileges herein granted to Licensee, to maintain any appropriate action hereunder, at law or in equity, for the collection of license fees or royalties, or for damages, or for any other remedy as may be appropriate. The provisions mentioned in said sub-paragraph (a) with respect to arbitrating the fact as to whether any default or defaults complained of has or have in fact occurred, shall be applicable in all respect in the event notice of default is given without any statement by Gypsum of its desire to terminate the rights, licenses and privileges herein granted to Licensee, excepting that if the arbiters shall find that any of said defaults complained of shall have occurred, then Gypsum Company shall have the same right, without a termination of said rights, licenses and privileges so granted to Licensee, to maintain its appropriate action hereunder.

XV

Any question subject to arbitration under any provision of this contract shall be arbitrated in accordance with the rules then obtaining of the American Arbitration Association. The finding or findings of the arbiters with respect to the occurrence or non-occurrence of any claimed default, shall be final and conclusive. In the event the finding or findings of the arbiters shall be with respect to any default or defaults, or claimed default or defaults, in the payment of royalties or other sums of money herein required to be paid by the Licensee to Gypsum Company, and the arbiters shall find that such default or defaults shall have occurred, the arbiters shall in their finding fix and determine the amount of royalties or other sums of money due from Licensee to Gypsum Company, whereupon Licensee will promptly pay the
9611 same to Gypsum Company, and in any event will pay the same within the times hereinbefore mentioned in Paragraph XIV hereof, for the curing of defaults, provided that Gypsum Company shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbiters in any court of competent jurisdiction.

XVI

Any notice to be given under the terms hereof may be served by either party by mailing such notice to the other party hereto, by registered mail, postage prepaid, addressed to such party at its last known principal office, and the deposit of any such notice in the United States mails, registered, postage prepaid, and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under Paragraph IV hereof shall be confirmed in writing. Either party may change, from time to time, the address to which all notices shall be mailed, provided that in the absence of any different address, the respective addresses herein first above stated shall be the addresses to which such notices shall be mailed.

XVII

Except as herein otherwise expressly provided, this agreement shall remain in force for the full term of each patent under which the respective rights, licenses and privileges are hereby granted, and shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns, provided, however, that nothing in this Paragraph XVII contained shall be construed to permit any assignment hereof or of any of the rights, licenses, and privileges herein granted, except as herein otherwise specifically provided. Nothing herein contained shall
9612 be construed as extending any license for the manufacture and/or use and/or sale of plaster board not having a metallized surface heretofore or hereafter granted under any other agreement between the parties hereto.

In the event that the exclusive right and license of the Gypsum Company, as set forth in said Schedule A hereto, shall for any reason whatsoever (whether on account of the default of the Gypsum Company or otherwise) terminate, and such termination shall have the effect of terminating or shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate, without further act on the part of either of the parties hereto, provided that Licensee shall not be relieved thereby from any liability then existing, and provided further that Gypsum Company shall not be liable in any way to Licensee on account of such termination. Gypsum Com-

pany agrees that if its said exclusive right and license shall so be terminated, it will promptly notify Licensee of such termination.

XVIII

Anything hereinabove contained to the contrary notwithstanding, this agreement and the rights, licenses and privileges herein granted to the Licensee may be cancelled and terminated, at any time, by either party hereto, by at least ninety (90) days' prior notice to the other party of the election of the party serving the notice to exercise such right of cancellation and of the date on which such cancellation shall be effective, but such cancellation shall not relieve either party from any liability accrued or due at the date of such cancellation; Provided, However, that if Gypsum Company shall exercise the right to cancel this agreement as in this paragraph provided, then within ninety (90) days of its said notice it will submit
9613 to Licensee a new contract embodying a proposal for a non-exclusive license under said patents for the life of said patents, for acceptance by Licensee within ten (10) days from the date of such submittal.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY,
By C. F. HENNING,
Its Vice President.

ATTEST:
T. R. PARRISH,
Asst. Secretary.

NATIONAL GYPSUM COMPANY.
By M. H. LAKE,
Its President.

ATTEST:
F. E. DAVIS,
Secretary.

9614 SCHEDULE A

The Gypsum Company has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of plaster board having a metallized surface under the following patents and applications for patents known as the Alfol patents.

PATENTS

Inventor	*Patent No.*	*Issue Date*
E. Schmidt, et al	1,757,479	May 6, 1930
E. Schmidt	1,890,418	Dec. 6, 1932
Eduard Dyckerhoff	1,934,174	Nov. 7, 1933

APPLICATIONS

Inventor	*Ser. No.*	*Patent*	*Filing Date*
Schmidt, et al	105,753		April 30, 1926
Eduard Dyckerhoff	442,219		April 7, 1930
Ernst Schmidt	663,572	2,015,817	March 30, 1933

together with any divisions, continuations, renewals or reissues thereof, but it is understood that the term "building structures" is limited to the walls, floors, roofs and ceilings of buildings and does not include pipes or ducts or other heating apparatus installed in the building or refrigerating or cooling apparatus or structures whether built into the building or not, and it is further understood that Gypsum Company has no right or license under said patents or applications to use metal foil for insulators except where such foil is applied to a non-metallic member as a facing therefor.

9615 *Government's Exhibit No. 20*

PLASTER BOARD AGREEMENT

This Agreement, made and entered into this 2nd day of November A. D. 1934, by and between United States Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and having its principal place of business at 300 West Adams Street, Chicago, Illinois, hereinafter referred to as the "Gypsum Company," and Certain-teed Products Corporation, a corporation organized and existing under and by virtue of the laws of the State of Maryland and having its principal place of business at 100 East 42d St., New York, N. Y., hereinafter referred to as "Licensee," witnesseth:

Whereas, Gypsum Company is the owner of United States Letters Patent to Roos No. 1,914,345, relating to wall construction, and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas, Licensee desires an indivisible and non-exclusive license from Gypsum Company, under the terms and conditions hereinafter set forth and as hereinafter specified, to manufacture, use and sell plaster board under said Roos Patent No. 1,914,345 and under said patent rights set forth in said Schedule A; and

Whereas, Gypsum Company is willing to grant such license, under the terms and conditions hereinafter set forth and as hereinafter specified,

Now, therefore, in consideration of the premises, the sum of One Dollar ($1.00) in hand paid, receipt of
9616 which is hereby acknowledged by Gypsum Company, and the mutual covenants herein contained, it is hereby agreed as follows:

I

Gypsum Company hereby represents and warrants that it has the right to grant the license hereby granted.

II

The term "plaster board," as herein used, is intended to included material commonly known as plasterboard and also materials known as plaster wall board, plaster lath, and plaster sheathing boards.

III

Gypsum Company has agreed to and does hereby give and grant unto Licensee the indivisible, non-exclusive right, license and privilege to make, use and sell plaster board having a metallized surface embodying the inventions disclosed and claimed in said Roos Patent and in the patents or patent applications set forth in Schedule A, or in any of them; Provided, However, that the right, license and privilege herein and hereby granted is specifically limited to the plaster board and building structures incorporating the same, as set forth in said Schedule A, and does not extend to any other product or structure.

IV

(a) It is expressly understood and agreed that the indivisible and non-exclusive rights, licenses and privileges aforesaid are granted, and they are hereby accepted, upon the express condition that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights, licenses and privileges granted hereunder shall con-
9617 tinue, the minimum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said Roos Patent or any of the said patents set forth in Schedule A, or which shall embody the inventions or improvements set forth and claimed in any patents issued upon any of the applications for patent set forth in said Schedule A, provided that the right hereinabove reserved to determine and fix the minimum price or prices of any such plaster board shall not be exercised with respect to any such plaster board embodying only the inventions or improvements, or one or more of them, set forth and claimed in any of the applications for patent set forth in said Schedule A, prior to the date when the patent or patents shall have been granted or issued upon such application or applications, respectively.

(b) In the event Gypsum Company shall exercise the right thus reserved, namely, to determine and fix at any time, and to change from time to time, such minimum price or prices, it shall notify Licensee of its election to exercise such right, and shall include in such notice, or accompany such notice by, a statement of such minimum price or prices at which Licensee shall or may sell said plaster board having a metallized surface, manufactured by Licensee, and thereafter shall give Licensee written or telegraphic notice of any change in such price or prices; and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any plaster board having a metallized surface manufactured by said Licensee embodying the inventions and improvements set forth in said Roos Patent or in any of said patents set forth in said Schedule A, or

9618 embodying the inventions or improvements set forth and claimed in any patents issued upon any applications for patent set forth in said Schedule A, at a price or prices less than that stated by Gypsum Company in said notice or in any such written or telegraphic notice of change in said price or prices. The said minimum price or prices at which Licensee shall or may sell said patented products as determined and fixed by Gypsum Company may be the same for all classes of trade, provided that Gypsum Company may, at any time and from time to time, determine and fix different prices for different classes of trade. It is further understood and agreed that any such minimum price or prices so determined and fixed by Gypsum Company may be made with respect to each trade market or place where said plaster board having a metallized surface may be sold, and may also be made with respect to different quantities purchased, such as carloads, less than carloads and truck loads, and that such minimum price or prices may differ in amount in each different market or place according to market conditions or quantities, all as may be determined by Gypsum Company.

(c) The said minimum price or prices so determined and fixed from time to time by Gypsum Company shall not be more than the respective price or prices at which Gypsum Company itself determines to sell such products embodying the said inventions and improvements hereinbefore mentioned, to its own like trade in the same market.

(d) It is understood and agreed that all orders, contracts, or commitments for the future sale of said plaster board having a metallized surface and embodying the inventions and improvements hereinbefore mentioned shall be made subject to establishment of, and/or change in, such minimum price at which said materials or products may be sold, and that all shipments thereof shall be made
9619 at no less than the minimum price or prices contained in any notice of establishment of, and/or change in, price or prices received before shipment; provided, however, that on all orders taken for immediate shipment at not less than the minimum price, if any, then in effect, shipment thereof may be made at the price at which taken within five days of the date of such order; provided, further, that written contracts may be made at not less than the minimum price, if any, then in effect, to furnish such patented material for any specific work or job

then contemplated or under construction; Provided, Further, that where contracts for specific work or jobs have been let to general contractors before notice of establishment of, and/or change in, price, then Licensee, if it has made a commitment for any such specific work or job prior to such notice, may at any time within thirty (30) days after such notice make a written contract to furnish the material for such specific work or job, at the price at which it was committed, but not less than the minimum price if any, in effect at the time of such commitment. Within ten (10) days after each notice of minimum price or change thereof, Licensee will furnish to Gypsum Company a written statement of all specific work or jobs, contracts and commitments which Licensee had at the time such notice was given, showing the date of the contract or commitment, name of purchaser, location and description of specific work or job, quantity of material, and price at which the same was sold or commitment made, and shall immediately notify Gypsum Company of the making of any such contract for such specific work or job within the thirty-day term hereinbefore mentioned, and of the completion or abandonment of all specific work, jobs, contracts and commitments theretofore had by Licensee. It is understood and agreed that no such contract or commitment shall be recognized as valid hereunder, unless the
9620 contract or commitment shall have been made in good faith before notice of making a price or change thereof, and unless such contract or commitment shall have been for some specific work or job then contemplated or under construction in which such patented material specified in the said contract or commitment is to be furnished or installed.

V.

As consideration for the rights, licenses, and privileges herein granted to Licensee, Licensee agrees to pay royalty to Gypsum Company for all plaster board having a metallized surface manufactured and sold by Licensee and which are covered by claims of said Roos patent or patents set forth in the said Schedule A, or patents which may be issued under any of the applications set forth under said Schedule A, or which are to be used in making structures covered by said patent rights, at the rate of forty cents (40¢) per thousand square feet surface area where only one face is metallized, and at the rate of fifty cents (50¢) per thousand square feet where both faces are metallized,

on any product covered by any of the patent rights aforesaid.

VI.

It is expressly understood that Licensee shall have no right, without the written consent of Gypsum Company first obtained, to manufacture any of said patented material for any other manufacturer of plaster board, whether or not licensed under said patents, or to sell such patented material to any other such manufacturer, or to deliver any of the same to any person, firm or corporation whatsoever on consignment.

VII.

It is expressly understood and agreed that the
9621 rights, licenses and privileges herein granted are and shall be personal to Licensee, and none of said rights, licenses and privileges, nor any right herein or thereunder, shall be sold, assigned, or transferred without the written consent of Gypsum Company first obtained, nor shall Licensee permit the same, or any of them, to be transferred by operation of law; and Provided, however, that such rights, licenses, and privileges may be assigned by Licensee to any company acquiring all of the business and assets of said Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee, in which such agreement such assignee agrees to assume all of the obligations of Licensee under this agreement and agrees to be bound by all of the terms and conditions hereof, and shall deliver such agreement to Gypsum Company.

VIII.

In the event Gypsum Company shall, subsequent to the effective date hereof, grant to any other person, firm or corporation, any license under said Roos Patent or under said patents or applications for patent set forth in said Schedule A, for the manufacture, use, or sale of plaster board having a metallized surface, and embodying the claims or inventions set forth and claimed in said patents or said applications for patent, upon terms more favorable than those granted hereunder to Licensee, then Gypsum Company will grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted to such other licensee.

IX.

Licensee agrees to keep true and accurate books of accounts, showing the total amount of plaster board having a metallized surface manufactured and/or sold by Licensee under the rights, licenses and privileges herein granted, and the prices at which the same have been sold. Such books and records shall at all times during business hours be open to the inspection of Gypsum Company or its duly authorized representatives. Gypsum Company shall have the right to make copies of any of such records and make memoranda therefrom, provided that if at the time of such examination Licensee shall so request, such examination shall be made by a certified public accountant satisfactory to Gypsum Company, in which event the expense of such examination by the said certified public accountant shall be borne by Licensee.

9622

X.

Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report, under the hand and verification of some officer or other duly authorized agent of Licensee, showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month and which was manufactured by Licensee under the rights, licenses and privileges herein granted, and also showing whether such plaster board had one or two metallized surfaces, together with the prices at which the same shall have been sold, and at the time of furnishing such report, Licensee will pay to Gypsum Company the full royalty as herein provided for such plaster board having a metallized surface so sold by Licensee during such preceding calendar month. Such reports shall be furnished to Gypsum Company at its principal office, at Chicago, Illinois.

XI.

Licensee expressly covenants and agrees that all sales by Licensee hereunder of plaster board having a metallized surface shall be bona fide sales thereof, and Licensee further expressly covenants and agrees that no such products shall be placed on consignment. For the purposes of this agreement, a sale shall be considered to have been made not later than the date on which the goods are shipped.

9623

XII.

Licensee agrees that all plaster board having a metallized surface sold by it hereunder shall be numbered with the respective numbers of any appropriate patents under which the rights, licenses and privileges herein granted are granted, and covering the manufacture, sale, or use thereof. Gypsum Company shall have the right from time to time to specify the substance of the notice with which said products shall be so marked.

XIII.

As one of the considerations for the indivisible and non-exclusive rights, licenses and privileges herein and hereby granted to Licensee, Licensee agrees that it will not at any time during the life of this agreement, or during the existence of said rights, licenses and privileges, directly or indirectly, by itself or through or together with another or others, contest the validity of said letters patent, or of said patent rights, or of any letters patent hereafter issued upon said applications so set forth in said Schedule A, or the right or title of Gypsum Company therein or thereto as herein or as in said Schedule A set forth; but in the event that any of said patents under which Licensee is licensed hereunder is held invalid or of limited construction by a court of competent jurisdiction from whose decision no appeal is or can be taken, then the Licensee shall have the right to make, use or vend the structure so held to be outside of the scope of said patent rights, free and clear of the terms of this agreement.

9624 Licensee agrees to give prompt notice of any suit or action which shall be brought against it in consequence of practicing the inventions set forth in said patents and said patent rights, and thereupon, if Gypsum Company shall desire to conduct the defense of such suit or action, it shall have the right to do so, but Licensee shall have the right, in such event, to be represented in such suit or action, at its own expense, by counsel of its own selection. Gypsum Company shall not, by undertaking to conduct the defense of any such suit or action, be under any obligation to indemnify the Licensee against any judgment, order or decreee or other result therein.

XIV.

(a) In the event Licensee shall fail to make any report or shall fail to pay the royalty herein provided to be paid,

or in the event that Licensee shall sell any of the materials covered by the price restriction provisions of Paragraph IV hereof, at a price or prices lower than the specified price or prices established and fixed by Gypsum Company as herein provided, Gypsum Company shall have the right to cancel all of the rights, licenses and privileges herein granted to Licensee; provided, however, that Licensee shall not be relieved thereby from any liability accrued at the time of such cancellation. In the event of any such breach, Gypsum Company shall give written notice to Licensee of the default or defaults claimed by Gypsum Company to have occurred, and of the desire of Gypsum Company to cancel the rights, licenses and privileges of Licensee hereunder; and if Licensee shall not make good the default or defaults complained of within a period of thirty (30) days from the giving of such notice, then all of the rights, licenses and privileges of Licensee hereunder shall forthwith cease and terminate without further action on the part of Gypsum Company; provided, however, that
9625 if, upon the giving of any such notice, Licensee shall deny that the defaults, or any of them, complained of have occurred, then the question as to whether the default or defaults, the occurrence of which is so denied by Licensee, have in fact occurred, shall be referred to arbitration under Paragraph XV hereof.

(b) In the event that such arbiters find that such default or defaults have occurred, then Licensee shall promptly cure the same, and in any event shall cure the same within thirty (30) days from the date of the finding of such arbiters; and in the event such default or defaults shall not be so cured within the time limited, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine without further action on the part of Gypsum Company; the termination of said rights, licenses and privileges following the finding of the arbiters as aforesaid shall not release Licensee from any liability then existing.

(c) In the event (1) that Licensee shall be adjudicated a bankrupt, or (2) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty (60) days thereafter, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of Gypsum Company, provided that such termination shall not relieve Licensee of any and all liability then existing.

(d) The waiver by Gypsum Company of any breach on the part of Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

(e) In the event any default shall have occurred as specified in sub-paragraph (a) of this Paragraph XIV, Gypsum Company may give notice of such default without stating its desire to terminate the rights, licenses and privi-
leges herein granted to Licensee, and in the event
9626 such defaults shall not be cured by Licensee within the times mentioned in said sub-paragraph (a), Gypsum Company shall have the right, without terminating the said rights, licenses and privileges herein granted to Licensee, to maintain any appropriate action hereunder, at law or in equity, for the collection of license fees or royalties, or for damages, or for any other remedy as may be appropriate. The provisions mentioned in said sub-paragraph (a) with respect to arbitrating the fact as to whether any default or defaults complained of has or have in fact occurred, shall be applicable in all respects in the event notice of default is given without any statement by Gypsum Company of its desire to terminate the rights, licenses and privileges herein granted to Licensee, excepting that if the arbiters shall find that any of said defaults complained of shall have occurred, then Gypsum Company shall have the same right, without a termination of said rights, licenses and privileges so granted to Licensee, to maintain its appropriate action hereunder.

XV.

Any question subject to arbitration under any provision of this contract shall be arbitrated in accordance with the rules then obtaining of the American Arbitration Association. The finding or findings of the arbiters with respect to the occurrence or non-occurrence of any claimed default, shall be final and conclusive. In the event the finding or findings of the arbiters shall be with respect to any default or defaults, or claimed default or defaults, in the payment of royalties or other sums of money herein required to be by the Licensee to Gypsum Company and the arbiters shall find that such default or defaults shall have occurred, the arbiters shall in their finding fix and determine the amount of royalties or other sums of money due from Li-
cense to Gypsum Company, whereupon Licensee will
9627 promptly pay the same to Gypsum Company, and in any event will pay the same within the times hereinbefore mentioned in Paragraph XIV hereof for the curing of defaults, provided that Gypsum Company shall have

the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbiters in any court of competent jurisdiction.

XVI.

Any notice to be given under the terms hereof may be served by either party by mailing such notice to the other party hereto, by registered mail, postage prepaid, addressed to such party at its last known principal office, and the deposit of any such notice in the United States mails, registered, postage prepaid, and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under Paragraph IV hereof shall be confirmed in writing. Either party may change, from time to time, the address to which all notices shall be mailed, provided that in the absence of any different address, the respective addresses herein first above stated shall be the addresses to which such notices shall be mailed.

XVII.

Except as herein otherwise expressly provided, this agreement shall remain in force for the full term of each patent under which the respective rights, licenses and privileges are hereby granted, and shall be binding upon, and inure to the benefit of the parties hereto, their successors and assigns, provided, however, that nothing in this Paragraph XVII contained shall be construed to permit any assignment hereof or of any of the rights, licenses, and privileges herein granted, except as herein otherwise specifically provided. Nothing herein contained shall be
9628 construed as extending any license for the manufacture and/or use and/or sale of plaster board not having a metallized surface heretofore or hereafter granted under any other agreement between the parties hereto.

In the event that the exclusive right and license of the Gypsum Company, as set forth in said Schedule A hereto, shall for any reason whatsoever (whether on account of the default of the Gypsum Company or otherwise) terminate, and such termination shall have the effect of terminating or shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate, without further act on the part of either of the parties hereto, provided that Licensee shall not be relieved thereby from any liability then existing, and provided further that Gypsum

Company shall not be liable in any way to Licensee on account of such termination. Gypsum Company agrees that if its said exclusive right and license shall so be terminated, it will promptly notify Licensee of such termination.

XVIII.

Anything hereinabove contained to the contrary notwithstanding, this agreement and the rights, licenses and privileges herein granted to the Licensee may be cancelled and terminated, at any time, by either party hereto, by at least ninety (90) days' prior written notice to the other party of the election of the party serving the notice to exercise such right of cancellation and of the date on which such cancellation shall be effective, but such cancellation shall not relieve either party from any liability accrued or due at the date of such cancellation; Provided, However, that if Gypsum Company shall exercise the right to cancel this agreement as in this paragraph provided, then within ninety (90) days of its said notice it will submit to Licensee
9629 a new contract embodying a proposal for a non-exclusive license under said patents for the life of said patents, for acceptance by Licensee within ten (10) days from the date of such submittal.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY.

By C. F. HENNING,
Its Vice President.

ATTEST:
C. H. SHAVER,
Secretary.

CERTAIN-TEED PRODUCTS CORPORATION,

By ANDENREID WHITTEMORE,
Vice President.

ATTEST:
ROBERT M. NELSON,
Secretary.

9630 SCHEDULE A

The Gypsum Company has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained

by the use of plaster board having a metallized surface uder the following patents and applications for patents known as the Alfol patents.

PATENTS

Inventor	*Patent No.*	*Issue Date*
E. Schmidt, et al	1,757,479	May 5, 1930
E. Schmidt	1,890,418	Dec. 6, 1932
Eduard Dyckerhoff	1,934,174	Nov. 7, 1933
Schmidt	2,015,817	Oct. 1, 1935

APPLICATIONS

Inventor	*Ser. No.*	*Filing Date*
Schmidt, et al	105,753	April 30, 1926
Eduard Dyckerhoff	442,219	April 7, 1930
Ernst Schmidt	663,572	March 30, 1933

together with any divisions, continuations, renewals or reissues thereof, but it is understood that the term "building structures" is limited to the walls, floors, roofs and ceilings of buildings and does not include pipes or ducts or other heating apparatus installed in the building or refrigerating or cooling apparatus or structures whether built into the building or not, and it is further understood that Gypsum Company has no right or license under said patents or applications to use metal foil for insulators except where such foil is applied to a non-metallic member as a facing therefor.

9631 *Government's Exhibit No. 21*

PLASTER BOARD AGREEMENT

This agreement, made and entered into this 14th day of August A. D. 1935, by and between United States Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and having its principal place of business at 300 West Adams Street, Chicago, Illinois, hereinafter referred to as the "Gypsum Company," and Ebsary Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 52 Vanderbilt Avenue, New York, New York, hereinafter referred to as "Licensee," witnesseth:

Whereas, Gypsum Company is the owner of United States Letters Patent to Roos No. 1,914,345, relating to wall construction, and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas Licensee desires an indivisible and non-exclusive license from Gypsum Company, under the terms and conditions hereinafter set forth and as hereinafter specified, to manufacture, use and sell plaster board under said Roos Patent No. 1,914,345 and under said patent rights set forth in said Schedule A; and

Whereas, Gypsum Company is willing to grant such license, under the terms and conditions hereinafter set forth and as hereinafter specified,

Now, therefore, in consideration of the premises, the sum of One Dollar ($1.00) in hand paid, receipt of
9632 which is hereby acknowledged by Gypsum Company, and the mutual covenants herein contained, it is hereby agreed as follows:

I

Gypsum Company hereby represents and warrants that it has the right to grant the license hereby granted.

II

The term "plaster board," as herein used, is intended to include material commonly known as plasterboard and also materials known as plaster wall board, plaster lath, and plaster sheathing boards.

III

Gypsum Company has agreed to and does hereby give and grant unto Licensee the indivisible, non-exclusive right, license and privilege to make, use and sell plaster board having a metallized surface embodying the inventions disclosed and claimed in said Roos Patent and in the patents or patent applications set forth in Schedule A, or in any of them; Provided, However, that the right, license and privilege herein and hereby granted is specifically limited to the plaster board and building structures incorporating the same as set forth in said Schedule A, and does not extend to any other product or structure.

IV

(a) It is expressly understood and agreed that the indivisible and non-exclusive rights, licenses and privileges aforesaid are granted, and they are hereby accepted, upon the express condition that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the

existence of said patents and so long as said rights, licenses and privileges granted hereunder shall
9633 continue, the minimum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said Roos Patent or any of the said patents set forth in Schedule A, or which shall embody the inventions or improvements set forth and claimed in any patents issued upon any of the applications for patent set forth in said Schedule A, provided that the right hereinabove reserved to determine and fix the minimum price or prices of any such plaster board shall not be exercised with respect to any such plaster board embodying only the inventions or improvements, or one or more of them, set forth and claimed in any of the applications for patent set forth in said Schedule A, prior to the date when the patent or patents shall have been granted or issued upon such application or applications, respectively.

(b) In the event Gypsum Company shall exercise the right thus reserved, namely, to determine and fix at any time, and to change from time to time, such minimum price or prices, it shall notify Licensee of its election to exercise such right, and shall include in such notice, or accompany such notice by, a statement of such minimum price or prices at which Licensee shall or may sell said plaster board having a metallized surface, manufactured by Licensee, and thereafter shall give Licensee written or telegraphic notice of any change in such price or prices; and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any plaster board having a metallized surface manufactured by said Licensee embodying the inventions and improvements set forth in said Roos Patent or in any of said patents set forth in said Schedule
9634 A, or embodying the inventions or improvements set forth and claimed in any patents issued upon any applications for patent set forth in said Schedule A, at a price or prices less than that stated by Gypsum Company in said notice or in any such written or telegraphic notice of change in said price or prices. The said minimum price or prices at which Licensee shall or may sell said patented products as determined and fixed by Gypsum Company may be the same for all classes of trade,

provided that Gypsum Company may, at any time and from time to time, determine and fix different prices for different classes of trade. It is further understood and agreed that any such minimum price or prices so determined and fixed by Gypsum Company may be made with respect to each trade market or place where said plaster board having a metallized surfaced may be sold, and may also be made with respect to different quantities purchased, such as carloads, less than carloads and truck loads, and that such minimum price or prices may differ in amount in each different market or place according to market conditions or quantities, all as may be determined by Gypsum Company.

(c) The said minimum price or prices so determined and fixed from time to time by Gypsum Company shall not be more than the respective price or prices at which Gypsum Company itself determines to sell such products embodying the said inventions and improvements hereinbefore mentioned, to its own like trade in the same market.

(d) It is understood and agreed that all orders, contracts, or commitments for the future sale of said plaster board having a metallized surface and embodying the inventions and improvements hereinbefore mentioned shall be made subject to establishment of, and/or change in, such minimum price at which said materials or products may be sold, and that all shipments thereof shall
9635 be made at no less than the minimum price or prices contained in any notice of establishment of, and/or change in, price or prices received before shipment; provided, however, that on all orders taken for immediate shipment at not less than the minimum price, if any, then in effect, shipment thereof may be made at the price at which taken within five days of the date of such order; provided, further, that written contracts may be made at not less than the minimum price, if any, then in effect, to furnish such patented material for any specific work or job then contemplated or under construction; Provided, Further, that where contracts for specific work or jobs have been let to general contractors before notice of establishment of, and/or change in, price, then Licensee, if it has made a commitment for any such specific work or job prior to such notice, may at any time within thirty (30) days after such notice make a written contract to furnish the material for such specific work or job, at the

price at which it was committed, but not less than the minimum price, if any, in effect at the time of such commitment. Within ten (10) days after each notice of minimum price or change thereof, Licensee will furnish to Gypsum Company a written statement of all specific work or jobs, contracts and commitments which Licensee had at the time such notice was given, showing the date of the contract or commitment, name of purchaser, location and description of specific work or job, quantity of material, and price at which the same was sold or commitment made, and shall immediately notify Gypsum Company of the making of any such contract for such specific work or job within the thirty-day term hereinbefore mentioned, and of the completion or abandonment of all specific work, jobs, contracts and commitments theretofore had by Licensee. It is understood and agreed that no such
9636 contract or commitment shall be recognized as valid hereunder, unless the contract or commitment shall have been made in good faith before notice of making a price or change thereof, and unless such contract or commitment shall have been for some specific work or job then contemplated or under construction in which such patented material specified in the said contract or commitment is to be furnished or installed.

V

As consideration for the rights, licenses, and privileges herein granted to Licensee, Licensee agrees to pay royalty to Gypsum Company for all plaster board having a metallized surface manufactured and sold by Licensee and which are covered by claims of said Roos patent or patents set forth in the said Schedule A, or patents which may be issued under any of the applications set forth under said Schedule A, or which are to be used in making structures covered by said patent rights, at the rate of forty cents (40¢) per thousand square feet surface area where only one face is metallized, and at the rate of fifty cents (50¢) per thousand square feet where both faces are metallized, on any product covered by any of the patent rights aforesaid.

VI

It is expressly understood that Licensee shall have no right, without the written consent of Gypsum Company

first obtained, to manufacture any of said patented material for any other manufacturer of plaster board, whether or not licensed under said patents, or to sell such patented material to any other such manufacturer, or to deliver any of the same to any person, firm or corporation whatsoever on consignment.

VII

It is expressly understood and agreed that the
9637 rights, licenses and privileges herein granted are and shall be personal to Licensee, and none of said rights, licenses and privileges, nor any right herein or thereunder, shall be sold, assigned, or transferred without the written consent of Gypsum Company first obtained, nor shall Licensee permit the same, or any of them, to be transferred by operation of law; Provided, however, that such rights, licenses, and privileges may be assigned by Licensee to any company acquiring all of the business and assets of said Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee, in which such agreement such assignee agrees to assume all of the obligations of Licensee under this agreement and agrees to be bound by all of the terms and conditions hereof, and shall deliver such agreement to Gypsum Company.

VIII

In the event Gypsum Company shall, subsequent to the effective date hereof, grant to any other person, firm or corporation, any license under said Roos Patent or under said patents or applications for patent set forth in said Schedule A, for the manufacture, use, or sale of plaster board having a metallized surface, and embodying the claims or inventions set forth and claimed in said patents or said applications for patent, upon terms more favorable than those granted hereunder to Licensee, then Gypsum Company will grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted to such other licensee.

IX

Licensee agrees to keep true and accurate books of account, showing the total amount of plaster board having
a metallized surface manufactured and/or sold by
9638 Licensee under the rights, licenses and privileges herein granted, and the prices at which the same

have been sold. Such books and records shall at all times during business hours be open to the inspection of Gypsum Company or its duly authorized representatives. Gypsum Company shall have the right to make copies of any of such records and make memoranda therefrom, provided that if at the time of such examination Licensee shall so request, such examination shall be made by a certified public accountant satisfactory to Gypsum Company, in which event the expense of such examination by the said certified public accountant shall be borne by Licensee.

X

Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report, under the hand and verification of some officer or other duly authorized agent of Licensee, showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month and which was manufactured by Licensee under the rights, licenses and privileges herein granted, and also showing whether such plaster board had one or two metallized surfaces, together with the prices at which the same shall have been sold, and at the time of furnishing such report, Licensee will pay to Gypsum Company the full royalty as herein provided for such plaster board having a metallized surface so sold by Licensee during such preceding calendar month. Such reports shall be furnished to Gypsum Company at its principal office, at Chicago, Illinois.

XI

Licensee expressly covenants and agrees that all sales by Licensee hereunder of plaster board having a metallized surface shall be bona fide sales thereof, and
9639 Licensee further expressly covenants and agrees that no such products shall be placed on consignment. For the purposes of this agreement, a sale shall be considered to have been made not later than the date on which the goods are shipped.

XII

Licensee agrees that all plaster board having a metallized surface sold by it hereunder shall be numbered with the respective numbers of any appropriate patents under which the rights, licenses and privileges herein granted

are granted, and covering the manufacture, sale, or use thereof. Gypsum Company shall have the right from time to time to specify the substance of the notice with which said products shall be so marked.

XIII

As one of the considerations for the indivisible and non-exclusive rights, licenses and privileges herein and hereby granted to Licensee, Licensee agrees that it will not at any time during the life of this agreement, or during the existence of said rights, licenses and privileges, directly or indirectly, by itself or through or together with another or others, contest the validity of said letters patent, or of said patent rights, or of any letters patent hereafter issued upon said applications so set forth in said Schedule A, or the right or title of Gypsum Company therein or thereto as herein or as in said Schedule A set forth, but in the event that any of said patents under which Licensee is licensed hereunder is held invalid or of limited construction by a court of competent jurisdiction from whose decision no appeal is or can be taken, then the Licensee shall have the right to make, use or vend the structure so held to be outside of the scope of said patent rights, free and clear of the terms of this agreement.

9640 Licensee agrees to give prompt notice of any suit or action which shall be brought against it in consequence of practicing the inventions set forth in said patents and said patent rights, and thereupon, if Gypsum Company shall desire to conduct the defense of such suit or action, it shall have the right to do so, but Licensee shall have the right, in such event, to be represented in such suit or action, at its own expense, by counsel of its own election. Gypsum Company shall not, by undertaking to conduct the defense of any such suit or action, be under any obligation to indemnify the Licensee against any judgment, order or decree or other result therein.

XIV

(a) In the event Licensee shall fail to make any report or shall fail to pay the royalty herein provided to be paid, or in the event that Licensee shall sell any of the materials covered by the price restriction provisions of Paragraph IV hereof, at a price or prices lower than the specified price or prices established and fixed by Gypsum Company as herein provided, Gypsum Company shall

have the right to cancel all of the rights, licenses and privileges herein granted to Licensee; provided, however, that Licensee shall not be relieved thereby from any liability accrued at the time of such cancellation. In the event of any such breach, Gypsum Company shall give written notice to Licensee of the default or defaults claimed by Gypsum Company to have occurred, and of the desire of Gypsum Company to cancel the rights, licenses and privileges of Licensee hereunder; and if Licensee shall not make good the default or defaults complained of within a period of thirty (30) days from the giving of such notice, then all of the rights, licenses and privileges of Licensee hereunder shall forthwith cease and terminate without further action on the part of Gypsum Com-
9641 pany; provided, however, that if, upon the giving of any such notice, Licensee shall deny that the defaults, or any of them, complained of have occurred, then the question as to whether the default or defaults, the occurrence of which is so denied by Licensee, have in fact occurred, shall be referred to arbitration under Paragraph XV hereof.

(b) In the event that such arbiters find that such default or defaults have occurred, then Licensee shall promptly cure the same, and in any event shall cure the same within thirty (30) days from the date of the finding of such arbiters; and in the event such default or defaults shall not be so cured within the time limited, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine without further action on the part of Gypsum Company; the termination of said rights, licenses and privileges following the finding of the arbiters as aforesaid shall not release Licensee from any liability then existing.

(c) In the event (1) that Licensee shall be adjudicated a bankrupt, or (2) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty (60) days thereafter, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of Gypsum Company, provided that such termination shall not relieve Licensee of any and all liability then existing.

(d) The waiver by Gypsum Company of any breach on the part of Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

(e) In the event any default shall have occurred as specified in sub-paragraph (a) of this Paragraph XIV, Gypsum Company may give notice of such default without stating its desire to terminate the rights, licenses
9642 and privileges herein granted to Licensee, and in the event such defaults shall not be cured by Licensee within the times mentioned in said sub-paragraph (a), Gypsum Company shall have the right, without terminating the said rights, licenses and privileges herein granted to Licensee, to maintain any appropriate action hereunder, at law or in equity, for the collection of license fees or royalties, or for damages or for any other remedy as may be appropriate. The provisions mentioned in said sub-paragraph (a) with respect to arbitrating the fact as to whether any default or defaults complained of has or have in fact occurred, shall be applicable in all respects in the event notice of default is given without any statement by Gypsum Company of its desire to terminate the rights, licenses and privileges herein granted to Licensee, excepting that if the arbiters shall find that any of said defaults complained of shall have occurred, then Gypsum Company shall have the same right, without a termination of said rights, licenses and privileges so granted to Licensee; to maintain its appropriate action hereunder.

XV

Any question subject to arbitration under any provision of this contract shall be arbitrated in accordance with the rules then obtaining of the American Arbitration Association. The finding or findings of the arbiters with respect to the occurrence or non-occurrence of any claimed default, shall be final and conclusive. In the event the finding or findings of the arbiters shall be with respect to any default or defaults, or claimed default or defaults, in the payment of royalties or other sums of money herein required to be paid by the Licensee to Gypsum Company and the arbiters shall find that such default or defaults shall have occurred, the arbiters shall in their finding fix and determine the amount of royalties or other sums of money due from License to Gypsum Company, whereupon
9643 Licensee will promptly pay the same to Gypsum Company, and in any event will pay the same within the times hereinbefore mentioned in Paragraph XIV hereof for the curing of defaults, provided that Gypsum Company

shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbiters in any court of competent jurisdiction.

XVI

Any notice to be given under the terms hereof may be served by either party by mailing such notice to the other party hereto, by registered mail, postage prepaid, addressed to such party at its last known principal office, and the deposit of any such notice in the United States mails, registered, postage prepaid, and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under Paragraph IV hereof shall be confirmed in writing. Either party may change, from time to time, the address to which all notices shall be mailed, provided that in the absence of any different address, the respective addresses herein first above stated shall be the addresses to which such notices shall be mailed.

XVII

Except as herein otherwise expressly provided, this agreement shall remain in force for the full term of each patent under which the respective rights, licenses and privileges are hereby granted, and shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns, provided, however, that nothing in this Paragraph XVII contained shall be construed to permit any assignment hereof or of any of the rights, licenses, and privileges herein granted, except as herein otherwise specifically provided. Nothing herein contained
9644 shall be construed as extending any license for the manufacture and/or use and/or sale of plaster board not having a metallized surface heretofore or hereafter granted under any other agreement between the parties hereto.

In the event that the exclusive right and license of the Gypsum Company, as set forth in said Schedule A hereto, shall for any reason whatsoever (whether on account of the default of the Gypsum Company or otherwise) terminate, and such termination shall have the effect of terminating or shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate, without further act on the part of either of the parties

hereto, provided that Licensee shall not be relieved thereby from any liability than existing, and provided further that Gypsum Company shall not be liable in any way to Licensee on account of such termination. Gypsum Company agrees that if its said exclusive right and license shall so be terminated, it will promptly notify Licensee of such termination.

XVIII

Anything hereinabove contained to the contrary notwithstanding, this agreement and the rights, licenses and privileges herein granted to the Licensee may be cancelled and terminated, at any time, by either party hereto, by at least ninety (90) days' prior written notice to the other party of the election of the party serving the notice to exercise such right of cancellation and of the date on which such cancellation shall be effective, but such cancellation shall not relieve either party from any liability accrued or due at the date of such cancellation; Provided, However, that if Gypsum Company shall exercise the right to cancel this agreement as in this paragraph provided, then within ninety (90) days of its said notice it will submit
9645 to Licensee a new contract embodying a proposal for a non-exclusive license under said patents for the life of said patents, for acceptance by Licensee within ten (10) days from the date of such submittal.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY.

By C. F. HENNING, *Its Vice President.*

ATTEST:

C. H. SHAVER, *Secretary.*

EBSARY GYPSUM COMPANY, INC.

By F. G. EBSARY, *Its President.*

ATTEST:

GEORGE N. LENCI, *Secretary.*

9646 SCHEDULE A

The Gypsum Company has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of plaster board having a metallized surface under the following patents and applications for patents known as the Alfol patents.

PATENTS

Inventor	*Patent No.*	*Issue Date*
E. Schmidt, et al	1,757,479	May 5, 1930
E. Schmidt	1,890,418	Dec. 6, 1932
Eduard Dyckerhoff	1,934,174	Nov. 7, 1933

APPLICATIONS

Inventor	*Ser. No.*	*Filing Date*
Schmidt, et al	105,753	April 30, 1926
Eduard Dyckerhoff	442,219	April 7, 1930
Ernst Schmidt	663,572	March 30, 1933

together with any divisions, continuations, renewals or reissues thereof, but it is understood that the term "building structures" is limited to the walls, floors, roofs and ceilings of buildings and does not include pipes or ducts or other heating apparatus installed in the building or refrigerating or cooling apparatus or structures whether built into the building or not, and it is further understood that Gypsum Company has no right or license under said patents or applications to use metal foil for insulators except where such foil is applied to a non-metallic member as a facing therefor.

9647 *Government's Exhibit No. 22*

PLASTER BOARD AGREEMENT—METALLIZED

This agreement, Made and entered into this 4th day of December A. D., 1934, by and between United States Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and having its principal place of business at 300 West Adams Street, Chicago, Illinois, hereinafter referred to as the "Gypsum Company," and The American Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio and having its principal place of business at Port Clinton, Ohio, hereinafter referred to as "Licensee," witnesseth:

Whereas, Gypsum Company is the owner of United States Letters Patent to Roos No. 1,914,345, relating to wall construction, and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas, Licensee desires an indivisible and non-exclusive license from Gypsum Company, under the terms and conditions hereinafter set forth and as hereinafter specified, to manufacture, use and sell plaster board under said Roos patent No. 1,914,345 and under said patent rights set forth in said Schedule A: and

Whereas, Gypsum Company is willing to grant such license, under the terms and conditions hereinafter set forth and as hereinafter specified,

Now, therefore, in consideration of the premises, the sum of One Dollar ($1.00) in hand paid, receipt of which is hereby acknowledged by Gypsum Company, and the mutual covenants herein contained, it is hereby agreed as follows:

I

Gypsum Company hereby represents and warrants that it has the right to grant the License hereby granted.

II

The term "plaster board," as herein used, is intended to include material commonly known as plasterboard and also materials known as plaster wall board, plaster lath, and plaster sheathing boards.

9648

III

Gypsum Company has agreed to and does hereby give and grant unto Licensee the indivisible, non-exclusive right, license and privilege to make, use and sell plaster board having ametallized surface embodying the inventions disclosed and claimed in said Roos Patent and in the patents or patent applications set forth in Schedule A, or in any of them; Provided, However, that the right, license and privilege herein and hereby granted is specifically limited to the plaster board and building structures incorporating the same as set forth in said Schedule A, and does not extend to any other product or structure.

IV

(a) It is expressly understood and agreed that the indivisible and non-exclusive rights, licenses and privileges

aforesaid are granted, and they are hereby accepted, upon the express condition that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights, licenses and privileges granted hereunder shall continue, the minimum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said Roos Patent or any of the said patents set forth in Schedule A, or which shall embody the inventions or improvements set forth and claimed in any patents issued upon any of the applications for patent set forth in said Schedule A, provided that the right hereinabove reserved to determine and fix the minimum price or prices of any such plaster board shall not be exercised with respect to any such plaster board embodying only the inventions or improvements, or one or more of them, set forth and claimed in any of the applications for patent set forth in said Schedule A, prior to the date when the patent or patents shall have been granted or issued upon such application or application respectively.

(b) In the event Gypsum Company shall exercise the right thus reserved, namely, to determine and fix at any time, and to change from time to time, such minimum price or prices, it shall notify Licensee of its election to exercise such right, and shall include in such notice, or accompany such notice by, a statement of such minimum price or prices at which Licensee shall or may sell said plaster board having a metallized surface, manufactured by
9649 Licensee; and thereafter shall give Licensee written or telegraphic notice of any change in such price or prices; and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any plaster board having a metallized surface manufactured by said Licensee embodying the inventions and improvements set forth in said Roos Patent or in any of said patents set forth in said Schedule A, or embodying the inventions or improvements set forth and claimed in any patents issued upon any application for patent set forth in said Schedule A, at a price or prices less than that stated by Gypsum Company in said notice or in any such written or telegraphic notice of change in said price or prices. The said minimum price or prices at

which Licensee shall or may sell said patented products as determined and fixed by Gypsum Company may be the same for all classes of trade, provided that Gypsum Company may, at any time and from time to time, determine and fix different prices for different classes of trade. It is further understood and agreed that any such minimum price or prices so determined and fixed by Gypsum Company may be made with respect to each trade market or place where said plaster board having a metallized surface may be sold, and may also be made with respect to different quantities purchased, such as carloads, less than carloads and truck loads, and that such minimum price or prices may differ in amount in each different market or place according to market conditions or quantities, all as may be determined by Gypsum Company.

(c) The said minimum price or prices so determined and fixed from time to time by Gypsum Company shall not be more than the respective price or prices at which Gypsum Company itself determines to sell such products embodying the said inventions and improvements hereinbefore mentioned, to its own like trade in the same market.

(d) It is understood and agreed that all orders, contracts, or commitments for the future sale of said plaster board having a metallized surface and embodying the inventions and improvements hereinbefore mentioned shall be made subject to establishment of, and/or change in, such minimum price at which said materials or products may be sold, and that all shipments thereof shall be made at no less than the minimum price or prices contained in any notice of establishment of, and/or change in, price or prices received before shipment; provided, however, that on all orders taken for immediate shipment at not less
9650 than the minimum price, if any, then in effect, shipments thereof may be made at the price at which taken within five days of the date of such order; provided, further, that written contracts may be made at not less than the minimum price, if any, then in effect, to furnish such patented material for any specific work or job then contemplated or under construction; Provided, Further, that where contracts for specific work or jobs have been let to general contractors before notice of establishment of, and/or change in, price, then Licensee, if it has made a commitment for any such specific work or job prior to such notice, may at any time within thirty (30) days after such notice make a written contract to furnish the material for

such specific work or job, at the price at which it was committed, but not less than the minimum price, if any, in effect at the time of such commitment. Within ten (10) days after each notice of minimum price or change thereof, Licensee will furnish to Gypsum Company a written statement of all specific work or jobs, contracts and commitments which Licensee had at the time such notice was given, showing the date of the contract or commitment, name of purchaser, location and description of specific work or job, quantity of material, and price at which the same was sold or commitment made, and shall immediately notify Gypsum Company of the making of any such contract for such specific work or job within the thirty-day term hereinbefore mentioned, and of the completion or abandonment of all specific work, jobs, contracts and commitments theretofore had by Licensee. It is understood and agreed that no such contractor commitment shall be recognized as valid hereunder, unless the contract or commitment shall have been made in good faith before notice of making a price or change thereof, and unless such contract or commitment shall have been for some specific work or job then contemplated or under construction in which such patented material specified in the said contract or commitment is to be furnished or installed.

V

As consideration for the rights, licenses, and privileges herein granted to Licensee, Licensee agrees to pay royalty to Gypsum Company for all plaster board having a metallized surface manufactured and sold by Licensee and which are covered by claims of said Roos patent or patents set forth in the said Schedule A, or patents which may be issued under any of the applications set forth under said Schedule A, or which are to be used in making structures covered by said patent rights, at the rate of forty cents (40¢) per thousand square feet surface area where
9651 only one face is metallized, and at the rate of fifty cents (50¢) per thousand square feet where both faces are metallized, on any product covered by any of the patent rights aforesaid.

VI

It is expressly understood that Licensee shall have no right, without the written consent of Gypsum Company first obtained, to manufacture any of said patented ma-

terial for any other manufacturer of plaster board, whether or not licensed under said patents, or to sell such patented material to any other such manufacturer or to deliver any of the same to any person, firm or corporation whatsoever on consignment.

VII

It is expressly and agreed that the rights, licenses and privileges herein granted are and shall be personal to Licensee, and none of said rights, licenses and privileges, nor any right herein or thereunder, shall be sold, assigned, or transferred without the written consent of Gypsum Company first obtained, nor shall Licensee permit the same, or any of them, to be transferred by operation of law; Provided, however, that such rights, licenses, and privileges may be assigned by Licensee to any company acquiring all of the business and assets of said Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee, in which such agreement such assignee agrees to assume all of the obligations of Licensee under this agreement and agrees to be bound by all of the terms and conditions hereof, and shall deliver such agreement to Gypsum Company.

VIII

In the event Gypsum Company shall, subsequent to the effective date hereof, grant to any other person, firm or corporation, any license under said Roos Patent or under said patents or application for patent set forth in said Schedule A, for the manufacture, use, or sale of plaster board having a metallized surface, and embodying the claims or inventions set forth and claimed in said patents or said applications for patent, upon terms more favorable than those granted hereunder to Licensee, then Gypsum Company will grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted to such other licensee.

9652 IX

Licensee agrees to keep true and accurate books of account, showing the total amount of plaster board having a metallized surface manufactured and/or sold by Licensee under the rights, licenses and privileges herein granted, and the prices at which the same have been sold. Such books and records shall at all times during business-

hours be open to the inspection of Gypsum Company or its duly authorized representatives. Gypsum Company shall have the right to make copies of any of such records and make memoranda therefrom, provided that if at the time of such examination Licensee shall so request, such examination shall be made by a certified public accountant satisfactory to Gypsum Company, in which event the expense of such examination by the said certified public accountant shall be borne by Licensee.

X

Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report, under the hand and verification of some officer or other duly authorized agent of Licensee, showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month and which was manufactured by Licensee under the rights, licenses and privileges herein granted, and also showing whether such plaster board had one or two metallized surfaces, together with the prices at which the same shall have been sold, and at the time of furnishing such report, Licensee will pay to Gypsum Company the full royalty as herein provided for such plaster board having a metallized surface so sold by Licensee during such preceding calendar month. Such reports shall be furnished to Gypsum Company at its principal office, at Chicago, Illinois.

XI

Licensee expressly covenants and agrees that all sales by Licensee hereunder of plaster board having a metallized surface shall be bona fide sales thereof, and Licensee further expressly covenants and agrees that no such products shall be placed on consignment. For the purposes of this agreement, a sale shall be considered to have been made not later than the date on which the goods are shipped.

XII

Licensee agrees that all plaster board having a metallized surface sold by it hereunder shall be numbered
9653 with the respective numbers of any appropriate patents under which the rights, licenses and privileges herein granted are granted, and covering the manufacture, sale, or use thereof. Gypsum Company shall have the right from time to time to specify the substance of the notice with which said products shall be so marked.

XIII

As one of the considerations for the indivisible and non-exclusive rights, licenses and privileges herein and hereby granted to Licensee, Licensee agrees that it will not at any time during the life of this agreement, or during the existence of said rights, licenses and privileges, directly or indirectly, by itself or through or together with another or others, contest the validity of said letters patent, or of said patent rights, or of any letters patent hereafter issued upon said applications so set forth in said Schedule A, or the right or title of Gypsum Company therein or thereto as herein or as in said Schedule A set forth, but in the event that any of said patents under which Licensee is licensed hereunder is held invalid or of limited construction by a court of competent jurisdiction from whose decision no appeal is or can be taken, then the Licensee shall have the right to make, use or vend the structure so held to be outside of the scope of said patent rights, free and clear of the terms of this agreement.

Licensee agrees to give prompt notice of any suit or action which shall be brought against it in consequence of practicing the inventions set forth in said patents and said patent rights, and thereupon, if Gypsum Company shall desire to conduct the defense of such suit or action, it shall have the right to do so but Licensee shall have the right, in such event, to be represented in such suit or action, at its own expense, by counsel of its own selection. Gypsum Company shall not, by undertaking to conduct the defense of any such suit or action, be under any obligation to indemnify the Licensee against any judgment, order or decree or other result therein.

XIV

(a) In the event Licensee shall fail to make any report or shall fail to pay the royalty herein provided to be paid, or in the event that Licensee shall sell any of the materials covered by the price restriction provisions of Paragraph IV hereof, at a price or prices lower than the specified price or prices established and fixed by Gypsum Company as herein provided, Gypsum Company shall have the right to cancel all of the rights, licenses and privileges herein granted to Licensee; provided, however, that Licensee shall not be relieved thereby from any liability accrued at the time of such cancellation. In the event of any such breach, Gypsum Company shall give

9654

written notice to Licensee of the default or defaults claimed by Gypsum Company to have occurred, and of the desire of Gypsum Company to cancel the rights, licenses and privileges of Licensee hereunder; and if Licensee shall not make good the default or defaults complained of within a period of thirty (30) days from the giving of such notice then all of the rights, licenses and privileges of Licensee hereunder shall forthwith cease and terminate without further action on the part of Gypsum Company; provided, however, that if, upon the giving of any such notice, Licensee shall deny that the defaults, or any of them, complained of have occurred, then the question as to whether the default or defaults, the occurrence of which is so denied by Licensee, have in fact occurred, shall be referred to arbitration under Paragraph XV hereof.

(b) In the event that such arbiters find that such default or defaults have occurred, then Licensee shall promptly cure the same, and in any event shall cure the same within thirty (30) days from the date of the finding of such arbiters; and in the event such default or defaults shall not be so cured within the time limited, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine without further action on the part of Gypsum Company; the terminationof said rights; licenses and privileges following the finding of the arbiters as aforesaid shall not release Licensee from any liability then existing.

(c) In the event (1) that Licensee shall be adjudicated a bankrupt, or (2) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty (60) days thereafter, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of Gypsum Company, provided that such termination shall not relieve Licensee of any and all liability then existing.

(d) The waiver by Gypsum Company of any breach on the part of Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

(e) In the event any default shall have occurred as specified in sub-paragraph (a) of this paragraph XIV, Gypsum Company may give notice of such default without stating its desire to terminate the rights, Licenses and privileges

herein granted to Licensee, and in the event such
9655 default shall not be cured by Licensee within the times mentioned in said sub-paragraph (a), Gypsum Company shall have the right, without terminating the said rights, Licenses and privileges herein granted to Licensee, to maintain any appropriate action hereunder, at law or in equity, for the collection of license fees or royalties, or for damages, or for any other remedy as may be appropriate. The provisions mentioned in said sub-paragraph (a) with respect to arbitrating the fact as to whether any default or defaults complained of has or have in fact occurred, shall be applicable in all respects in the event notice of default is given without any statement by Gypsum Company of its desire to terminate the rights, licenses and privileges herein granted to Licensee, excepting that if the arbiters shall find that any of said defaults complained of shall have occurred, then Gypsum Company shall have the same right, without a termination of said rights, licenses and privileges so granted to Licensee, to maintain its appropriate action hereunder.

XV

Any question subject to arbitration under any provision of this contract shall be arbitrated in accordance with the rules then obtaining of the American Arbitration Association. The finding or findings of the arbiters with respect to the occurrence or non-occurrence of any claim default, shall be final and conclusive. In the event the finding or findings of the arbiters shall be with respect to any default or defaults, or claimed default or defaults, in the payment of royalties or other sums of money herein required to be paid by the Licensee to Gypsum Company and the arbiters shall find that such default or defaults shall have occurred, the arbiters shall in their finding fix and determine the amount of royalties or other sums of money due from Licensee to Gypsum Company, whereupon Licensee will promptly pay the same to Gypsum Company, and in any event will pay the same within the times hereinbefore mentioned in Paragraph XIV hereof for the curing of defaults, provided that Gypsum Company shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbiters in any court of competent jurisdiction.

XVI

Any notice to be given under the terms hereof may be served by either party by mailing such notice to the other party hereto, by registered mail, postage prepaid, addressed to such party at its last known principal office, and the deposit of any such notice in the United States mails, registered, postage prepaid, and so addressed, shall constitute service of notice hereunder. Any telegraphic
9656 notice given under Paragraph IV hereof shall be confirmed in writing. Either party may change, from time to time, the address to which all notices shall be mailed, provided that in the absence of any different address, the respective addresses herein first above stated shall be the addresses to which such notices shall be mailed.

XVII

Except as herein otherwise expressly provided, the agreement shall remain in force for the full term of each patent under which the respective rights, licenses and privileges are hereby granted, and shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns, provided, however, that nothing in this paragraph XVII contained shall be construed to permit any assignment hereof or of any of the rights, licenses, and privileges herein granted, except as herein otherwise specifically provided. Nothing herein contained shall be construed as extending any license for the manufacture and/or use and/or sale of plaster board not having a metallized surface heretofore or hereafter granted under any other agreement between the parties hereto.

In the event that the exclusive right and license of the Gypsum Company, as set forth in said Schedule A hereto, shall for any reason whatsoever (whether on account of the default of the Gypsum Company or otherwise) terminated, and such termination shall have the effect of terminating or shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate, without further act on the part of either of the parties hereto, provided that Licensee shall not be relieved thereby from any liability then existing, and provided further that Gypsum Company shall not be liable in any way to Licensee on account of such termination. Gypsum Company agrees that if its said exclusive right and license shall so be terminated, it will promptly notify Licensee of such termination.

XVIII

Anything hereinabove contained to the contrary notwithstanding, this agreement and the rights, licenses and privileges herein granted to the Licensee may be cancelled and terminated, at any time, by either party hereto, by at least ninety (90) days' prior written notice to the other party of the election of the party serving the notice to exercise such right of cancellation and of the date on which such cancellation shall be effective, but such cancellation shall not relieve either party from any liability accrued or due at the date of such cancellation; Provided, However, that if Gypsum Company shall exercise
9657 the right to cancel this agreement as in this paragraph provided, then within ninety (90) days of its said notice it will submit to Licensee a new contract embodying a proposal for a non-exclusive license under said patents for the life of said patents, for acceptance by Licensee within ten (10) days from the date of such submittal.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the date and year first above written.

UNITED STATES GYPSUM COMPANY,

By (Signed) C. F. HENNING,
Its Vice President.

ATTEST:

(Signed) C. H. THAVER,
Secretary.

THE AMERICAN GYPSUM COMPANY,

By (Signed) C. F. MILLER,
Its President.

ATTEST:

(Signed) J. D. KLING,
Secretary.

9658 SCHEDULE A

The Gypsum Company has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of plaster board having a metallized surface

uder the following patents and applications for patents known as the Alfol Patents.

PATENTS

Inventor	*Patent No.*	*Issue Date*
E. Schmidt, et al	1,757,479	May 5, 1930
E. Schmidt	1,890,418	Dec. 6, 1932
Eduard Dyckerhoff	1,934,174	Nov. 7, 1933

APPLICATIONS

Inventor	*Ser. No.*	*Filing Date*
Schmidt, et al	105,753	April 30, 1926
Eduard Dyckerhoff	442,219	April 7, 1930
Ernst Schmidt	663,572	March 30, 1933

together with any divisions, continuations, renewals or reissues thereof, but it is understood that the term "building structures" is limited to the walls, floors, roofs and ceilings of buildings and does not include pipes or ducts or other heating apparatus installed in the building or refrigerating or cooling apparatus or structures whether built into the building or not, and it is further understood that Gypsum Company has no right or license under said patents or applications to use metal foil for insulators except where such foil is applied to a non-metallic member as a facing therefor.

9659 *Government's Exhibit No. 23*

Memorandum of agreement by and between The Celotex Corporation, a Delaware corporation (hereinafter called "Celotex"), and The American Gypsum Company, an Ohio corporation (hereinafter called "American"), witnesseth:

Whereas, Celotex has acquired and now owns all of the capital stock of American and proposes to acquire all of the assets and business of American; and

Whereas, among the assets of American is the license granted to it by United States Gypsum Company, an Illinois corporation, under a license agreement between said United States Gypsum Company and American, dated December 4, 1934; and

Whereas, said license agreement provides that the license therein granted may be assigned by American to any company acquiring all the assets and business or all the capital stock of American, on condition that American

shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of American under said license agreement and to be bound by all of the terms and conditions thereof and shall deliver such agreement to the United States Gypsum Company, Licensor;

Now, therefore, it is mutually agreed that in connection with the acquisition by Celotex of all the assets and business of American, American will assign to Celotex all American's right, title and interest in and to the license granted to American in and by the license agreement between United States Gypsum Company, an Illinois corporation, and American, dated December 4, 1934, and Celotex agrees to assume and does hereby assume all of the obligations of American as Licensee under said license agreement, and agrees to be bound by all of the terms and conditions of said license agreement.

9660 In witness whereof the parties hereto have caused this instrument to be executed in duplicate in their respective names and by their duly authorized officers and their corporate seals to be hereunto affixed, this 12th day of April, 1939.

THE CELOTEX CORPORATION,

By ——— ——— *Vice President*

ATTEST:

M. D. MUSGROVE, *Assistant Secretary*

THE AMERICAN GYPSUM COMPANY,

By C. F. MILLER, *President*

ATTEST:

O. S. MANSELL *Secretary.*

STATE OF OHIO,
County of Ottawa, } ss:

I, Emil E Lang, a notary public in and for said county in the state aforesaid, do hereby certify that C. F. Miller and O. S. Mansell, personally known to me, and known to me to be the same persons whose names are subscribed to the foregoing instrument as vice president and secretary, respectively, of The American Gypsum Company, an Ohio corporation, appeared before me this day in person and severally acknowledged that they, being thereunto duly authorized by the board of directors and stockholders of said corporation, signed, sealed with the corporate

9661 seal and delivered said instrument as the free and voluntary act of said corporation and as their own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 12th day of April, 1939.

EMIL E LANG,
Notary Public.

My commission expires 1/18/41.

STATE OF OHIO,
County of Ottawa, } ss:

I, Emil E. Lang, a notary public in and for said county in the state aforesaid, do hereby certify that O. S. Mansell and M. D. Musgrove personally known to me, and known to me to be the same persons whose names are subscribed to the foregoing instrument as vice president and assistant secretary, respectively, of The Celotex Corporation, a Delaware corporation, appeared before me this day in person and severally acknowledged that they, being thereunto duly authorized by the board of directors of said corporation, signed, sealed with the corporate seal, and delivered said instrument as the free and voluntary act of said corporation and as their own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 12th day of April 1939.

EMIL E LANG,
Notary Public

My commission expires 1/18/41.

9662 *Government's Exhibit No. 24*

PLASTER BOARD AGREEMENT

This agreement, made and entered into this 12th day of October A. D. 1934, by and between United States Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and having its principal place of business at 300 West Adams Street, Chicago, Illinois, hereinafter referred to as the "Gypsum Company," and Kelley Plasterboard Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and having its principal

place of business at Delawanna, (Clifton) New Jersey, hereinafter referred to as "Licensee," witnesseth:

Whereas, Gypsum Company is the owner of United States Letters Patent to Roos No. 1,914,345, relating to wall construction, and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas, Licensee desires an indivisible and non-exclusive license from Gypsum Company, under the terms and conditions hereinafter set forth and as hereinafter specified, to manufacture, use and sell plaster board under said Roos Patent No. 1,914,345 and under said patent rights set forth in said Schedule A; and

Whereas, Gypsum Company is willing to grant such license, under the terms and conditions hereinafter set forth and as hereinafter specified,

Now, therefore, in consideration of the premises, the sum of One Dollar ($1.00) in hand paid, receipt of which
9663 is hereby acknowledged by Gypsum Company, and the mutual covenants herein contained, it is hereby agreed as follows:

I

Gypsum Company hereby represents and warrants that it has the right to grant the license hereby granted.

II

The term "plaster board," as herein used, is intended to include material commonly known as plasterboard and also materials known as plaster wall board, plaster lath, and plaster sheathing boards.

III

Gypsum Company has agreed to and does hereby give and grant unto Licensee the indivisible, non-exclusive right, license and privilege to make, use and sell plaster board having a metallized surface embodying the inventions disclosed and claimed in said Roos Patent and in the patents or patent applications set forth in Schedule A, or in any of them; Provided, However, that the right, license and privilege herein and hereby granted is specifically limited to the plaster board and building structures incorporating the

same as set forth in said Schedule A, and does not extend to any other product or structure.

IV

(a) It is expressly understood and agreed that the indivisible and non-exclusive rights, licenses and privileges aforesaid are granted, and they are hereby accepted, upon the express condition that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights, licenses and privileges granted hereunder shall con-
9664 tinue, the minimum price or prices at whch Licensee shall or may sell plaster board having a metallized surface which is covered by said Roos Patent or any of the said patents set forth in Schedule A, or which shall embody the inventions or improvements set forth and claimed in any patents issued upon any of the applications for patent set forth in said Schedule A, provided that the right hereinabove reserved to determine and fix the minimum price or prices of any such plaster board shall not be exercised with respect to any such plaster board embodying only the inventions or improvements, or one or more of them, set forth and claimed in any of the applications for patent set forth in said Schedule A, prior to the date when the patent or patents shall have been granted or issued upon such application or applications, respectively.

(b) In the event Gypsum Company shall exercise the right thus reserved, namely, to determine and fix at any time, and to change from time to time, such minimum price or prices, it shall notify Licensee of its election to exercise such right, and shall include in such notice, or accompany such notice by, a statement of such minimum price or prices at which Licensee shall or may sell said plaster board having a metallized surface, manufactured by Licensee, and thereafter shall give Licensee written or telegraphic notice of any change in such price or prices; and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any plaster board having a metallized surface manufactured by said Licensee embodying the inventions and improvements set forth in said Roos Patent

or in any of said patents set forth in said Schedule A,
9665 or embodying the inventions or improvements set forth and claimed in any patents issued upon any applications for patent set forth in said Schedule A, at a price or prices less than that stated by Gypsum Company in said notice or in any such written or telegraphic notice of change in said price or prices. The said minimum price or prices at which Licensee shall or may sell said patented products as determined and fixed by Gypsum Company may be the same for all classes of trade, provided that Gypsum Company may, at any time and from time to time, determine and fix different prices for different classes of trade. It is further understood and agreed that any such minimum price or prices so determined and fixed by Gypsum Company may be made with respect to each trade market or place where said plaster board having a metallized surface may be sold, and may also be made with respect to different quantities purchased, such as carloads, less than carloads and truck loads, and that such minimum price or prices may differ in amount in each different market or place according to market conditions or quantities, all as may be determined by Gypsum Company.

(c) The said minimum price or prices so determined and fixed from time to time by Gypsum Company shall not be more than the respective price or prices at which Gypsum Company itself determines to sell such products embodying the said inventions and improvements hereinbefore mentioned, to its own like trade in the same market.

(d) It is understood and agreed that all orders, contracts, or commitments for the future sale of said plaster board having a metallized surface and embodying the inventions and improvements hereinbefore mentioned shall be made subject to establishment of, and/or change in, such minimum price at which said materials or products may be sold, and that all shipments thereof shall be
9666 made at no less than the minimum price or prices contained in any notice of establishment of, and/or change in, price or prices received before shipment; provided, however, that on all orders taken for immediate shipment at not less than the minimum price, if any, then in effect, shipment thereof may be made at the price at which taken within five days of the date of such order; provided, further, that written contracts may be made at not less than the minimum price, if any, then in effect, to furnish

such patented material for any specific work or job then contemplated or under construction; Provided, Further, that where contracts for specific work or jobs have been let to general contractors before notice of establishment of, and/or change in, price, then Licensee, if it has made a commitment for any such specific work or job prior to such notice, may at any time within thirty (30) days after such notice make a written contract to furnish the material for such specific work or job, at the price at which it was committed, but not less than the minimum price, if any, in effect at the time of such commitment. Within ten (10) days after each notice of minimum price or change thereof, Licensee will furnish to Gypsum Company a written statement of all specific work or jobs, contracts and commitments which Licensee had at the time such notice was given, showing the date of the contract or commitment, name of purchaser, location and description of specific work or job, quantity of material, and price at which the same was sold or commitment made, and shall immediately notify Gypsum Company of the making of any such contract for such specific work or job within the thirty-day term hereinbefore mentioned, and of the completion or abandonment of all specific work, jobs, contracts and commitments theretofore had by Licensee. It is understood and agreed that no such contract or commitment shall
9667 be recognized as valid hereunder, unless the contract or commitment shall have been made in good faith before notice of making a price or change thereof, and unless such contract or commitment shall have been for some specific work or job then contemplated or under construction in which such patented material specified in the said contract or commitment is to be furnished or installed.

V

As consideration for the rights, licenses, and privileges herein granted to Licensee, Licensee agrees to pay royalty to Gypsum Company for all plaster board having a metallized surface manufactured and sold by Licensee and which are covered by claims of said Roos patent or patents set forth in the said Schedule A, or patents which may be issued under any of the applications set forth under said Schedule A, or which are to be used in making structures covered by said patent rights, at the rate of forty cents (40¢) per thousand square feet surface area where only one face

is metallized, and at the rate of fifty cents (50¢) per thousand square feet where both faces are metallized, on any product covered by any of the patent rights aforesaid.

VI

It is expressly understood that Licensee shall have no right, without the written consent of Gypsum Company first obtained, to manufacture any of said patented material for any other manufacturer of plaster board, whether or not licensed under said patents, or to sell such patented material to any other such manufacturer, or to deliver any of the same to any person, firm or corporation whatsoever on consignment.

VII

It is expressly understood and agreed that the
9668 rights, licenses and privileges herein granted are and shall be personal to Licensee, and none of said rights, licenses and privileges, nor any right herein or thereunder, shall be sold, assigned, or transferred without the written consent of Gypsum Company first obtained, nor shall Licensee permit the same, or any of them, to be transferred by operation of law; Provided, however, that such rights, licenses, and privileges may be assigned by Licensee to any company acquiring all of the business and assets of said Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee, in which such agreement such assignee agrees to assume all of the obligations of Licensee under this agreement and agrees to be bound by all of the terms and conditions hereof, and shall deliver such agreement to Gypsum Company.

VIII

In the event Gypsum Company shall, subsequent to the effective date hereof, grant to any other person, firm or corporation, any license under said Roos Patent or under said patents or applications for patent set forth in said Schedule A, for the manufacture, use, or sale of plaster board having a metallized surface, and embodying the claims or inventions set forth and claimed in said patents or said applications for patent, upon terms more favorable than those granted hereunder to Licensee, then Gypsum Company will grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted to such other licensee.

IX

Licensee agrees to keep true and accurate books of account, showing the total amount of plaster board having a metallized surface manufactured and/or sold by Li-
9669 censee under the rights, licenses and privileges herein granted, and the prices at which the same have been sold. Such books and records shall at all times during business hours be open to the inspection of Gypsum Company or its duly authorized representatives. Gypsum Company shall have the right to make copies of any of such records and make memoranda therefrom, provided that if at the time of such examination Licensee shall so request, such examination shall be made by a certified public accountant satisfactory to Gypsum Company, in which event the expense of such examination by the said certified public accountant shall be borne by Licensee.

X

Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report, under the hand and verification of some officer or other duly authorized agent of Licensee, showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month and which was manufactured by Licensee under the rights, licenses and privileges herein granted, and also showing whether such plaster board had one or two metallized surfaces, together with the prices at which the same shall have been sold, and at the time of furnishing such report, Licensee will pay to Gypsum Company the full royalty as herein provided for such plaster board having a metallized surface so sold by Licensee during such preceding calendar month. Such reports shall be furnished to Gypsum Company at its principal office, at Chicago, Illinois.

XI

Licensee expressly covenants and agrees that all sales by Licensee hereunder of plaster board having a metallized surface shall be bona fide sales thereof, and Licensee
9670 further expressly covenants and agrees that no such products shall be placed on consignment. For the purposes of this agreement, a sale shall be considered to have been made not later than the date on which the goods are shipped.

XII

Licensee agrees that all plaster board having a metallized surface sold by it hereunder shall be numbered with the respective numbers of any appropriate patents under which the rights, licenses and privileges herein granted are granted, and covering the manufacture, sale, or use thereof. Gypsum Company shall have the right from time to time to specify the substance of the notice with which said products shall be so marked.

XIII

As one of the considerations for the indivisible and non-exclusive rights, licenses and privileges herein and hereby granted to Licensee, Licensee agrees that it will not at any time during the life of this agreement, or during the existence of said rights, licenses and privileges, directly or indirectly, by itself or through or together with another or others, contest the validity of said letters patent, or of said patent rights, or of any letters patent hereafter issued upon said applications so set forth in said Schedule A, or the right or title of Gypsum Company therein or thereto as herein or as in said Schedule A set forth, but in the event that any of said patents under which Licensee is licensed hereunder is held invalid or of limited construction by a court of competent jurisdiction from whose decision no appeal is or can be taken, then the Licensee shall have the right to make, use or vend the structure so held to be outside of the scope of said patent rights, free and clear of the terms of this agreement.

9671 Licensee agrees to give prompt notice of any suit or action which shall be brought against it in consequence of practicing the inventions set forth in said patents and said patent rights, and thereupon, if Gypsum Company shall desire to conduct the defense of such suit or action, it shall have the right to do so, but Licensee shall have the right, in such event, to be represented in such suit or action, at its own expense, by counsel of its own selection. Gypsum Company shall not, by undertaking to conduct the defense of any such suit or action, be under any obligation to indemnify the Licensee against any judgment, order or decree or other result therein.

XIV

(a) In the event Licensee shall fail to make any report or shall fail to pay the royalty herein provided to be paid, or in the event that Licensee shall sell any of the materials covered by the price restriction provisions of Paragraph IV hereof, at a price or prices lower than the specified price or prices established and fixed by Gypsum Company as herein provided, Gypsum Company shall have the right to cancel all of the rights, licenses and privileges herein granted to Licensee; provided, however, that Licensee shall not be relieved thereby from any liability accrued at the time of such cancellation. In the event of any such breach, Gypsum Company shall give written notice to Licensee of the default or defaults claimed by Gypsum Company to have occurred, and of the desire of Gypsum Company to cancel the rights, licenses and privileges of Licensee hereunder; and if Licensee shall not make good the default or defaults complained of within a period of thirty (30) days from the giving of such notice, then all of the rights, licenses and privileges of Licensee hereunder shall forthwith cease and terminate without further action on the
9672 part of Gypsum Company; provided, however, that if, upon the giving of any such notice, Licensee shall deny that the defaults, or any of them, complained of have occurred, then the question as to whether the default or defaults, the occurrence of which is so denied by Licensee, have in fact occurred, shall be referred to arbitration under Paragraph XV hereof.

(b) In the event that such arbiters find that such default or defaults have occurred, then Licensee shall promptly cure the same, and in any event shall cure the same within thirty (30) days from the date of the finding of such arbiters; and in the event such default or defaults shall not be so cured within the time limited, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine without further action on the part of Gypsum Company; the termination of said rights, licenses and privileges following the finding of the arbiters as aforesaid shall not release Licensee from any liability then existing.

(c) In the event (1) that Licensee shall be adjudicated a bankrupt, or (2) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty

(60) days thereafter, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of Gypsum Company, provided that such termination shall not relieve Licensee of any and all liability then existing.

(d) The waiver by Gypsum Company of any breach on the part of Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

(e) In the event any default shall have occurred as specified in sub-paragraph (a) of this Paragraph XIV, Gypsum Company may give natice of such default without stating its desire to terminate the rights, licenses and privileges herein granted to Licensee, and in the event
9673 such defaults shall not be cured by Licensee within the times mentioned in said sub-paragraph (a), Gypsum Company shall have the right, without terminating the said rights, licenses and privileges herein granted to Licensee, to maintain any appropriate action hereunder, at law or in equity, for the collection of license fees or royalties, or for damages, or for any other remedy as may be appropriate. The provisions mentioned in said sub-paragraph (a) with respect to arbitrating the fact as to whether any default or defaults complained of has or have in fact occurred, shall be applicable in all respects in the event notice of default is given without any statement by Gypsum Company of its desire to terminate the rights, licenses and privileges herein granted to Licensee, excepting that if the arbiters shall find that any of said defaults complained of shal have occurred, then Gypsum Company shall have the same right, without a termination of said rights, licenses and privileges so granted to Licensee, to maintain its appropriate action hereunder.

XV

Any question subject to arbitration under any provision of this contract shall be arbitrated in accordance with the rules then obtaining of the American Arbitration Association. The finding or findings of the arbiters with respect to the occurrence or non-occurrence of any claimed default, shall be final and conclusive. In the event the finding or findings of the arbiters shall be with respect to any default or defaults, or claimed default or defaults, in the payment of royalties or other sums of money herein required to be paid by the Licensee to Gypsum Company and the arbiters

shall find that such default or defaults shall have occurred, the arbiters shall in their finding fix and determine the amount of royalties or other sums of money due from Licensee to Gypsum Company, whereupon Licensee will
9674 promptly pay the same to Gypsum Company, and in any event will pay the same within the times hereinbefore mentioned in Paragraph XIV hereof for the curing of defaults, provided that Gypsum Company shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbiters in any court of competent jurisdiction.

XVI

Any notice to be given under the terms hereof may be served by either party by mailing such notice to the other party hereto, by registered mail, postage prepaid, addressed to such party at its last known principal office, and the deposit of any such notice in the United States mails, registered, postage prepaid, and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under Paragraph IV hereof shall be confirmed in writing. Either party may change, from time to time, the address to which all notices shall be mailed, provided that in the absence of any different address, the respective addresses herein first above stated shall be the addresses to which such notices shall be mailed.

XVII

Except as herein otherwise expressly provided, this agreement shall remain in force for the full term of each patent under which the respective rights, licenses and privileges are hereby granted, and shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns, provided, however, that nothing in this Paragraph XVII contained shall be construed to permit any assignment hereof or of any of the rights, licenses, and privileges herein granted, except as herein otherwise specifically provided. Nothing herein contained shall
9675 be construed as extending any license for the manufacture and/or use and/or sale of plaster board not having a metallized surface heretofore or hereafter granted under any other agreement between the parties hereto.

In the event that the exclusive right and license of the Gypsum Company, as set forth in said Schedule A hereto, shall for any reason whatsoever (whether on account of

the default of the Gypsum Company or otherwise) terminate, and such termination shall have the effect of terminating or shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate, without further act on the part of either of the parties hereto, provided that Licensee shall not be relieved thereby from any liability then existing, and provided further that Gypsum Company shall not be liable in any way to Licensee on account of such termination. Gypsum Company agrees that if its said exclusive right and license shall so be terminated, it will promptly notify Licensee of such termination.

XVIII

Anything hereinabove contained to the contrary notwithstanding, this agreement and the rights, licenses and privileges herein granted to the Licensee may be cancelled and terminated, at any time, by either party hereto, by at least ninety (90) days' prior written notice to the other party of the election of the party serving the notice to exercise such right of cancellation and of the date on which such cancellation shall be effective, but such cancellation shall not relieve either party from any liability accrued or due at the date of such cancellation; Provided, However, that if Gypsum Company shall exercise the right to cancel this agreement as in this paragraph provided, then within ninety (90) days of its said notice it will submit to Li-
9676 censee a new contract embodying a proposal for a non-exclusive license under said patents for the life of said patents, for acceptance by Licensee within ten (10) days from the date of such submittal.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY,

By C. F. HENNING, *Its Vice President.*

ATTEST:

T. R. PARRISH, *Asst. Secretary*

KELLEY PLASTERBOARD COMPANY, INC.

By S. J. KELLEY, *Its President.*

ATTEST:

G. A. WILEMAN, *Secretary.*

9677 SCHEDULE A

The Gypsum Company has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of plaster board having a metallized surface uder the following patents and applications for patents known as the Alfol patents.

PATENTS

Inventor	*Patent No.*	*Issue Date*
E. Schmidt, et al	1,757,479	May 6, 1930
E. Schmidt	1,890,418	Dec. 6, 1932
Eduard Dyckerhoff	1,934,174	Nov. 7, 1933

APPLICATIONS

Inventor	*Ser. No.*	*Filing Date*
Schmidt, et al	105,753	April 30, 1926
Eduard Dyckerhoff	442,219	April 7, 1930
Ernst Schmidt	663,572	March 30, 1933

together with any divisions, continuations, renewals or reissues thereof, but it is understood that the term "building structures" is limited to the walls, floors, roofs and ceilings of buildings and does not include pipes or ducts or other heating apparatus installed in the building or refrigerating or cooling apparatus whether built into the building or not, or cooling apparatus or structures whether built into the building or not, and it is further understood that Gypsum Company has no right or license under said patents or applications to use metal foil for insulators except where such foil is applied to a non-metallic member as a facing therefor.

9678 *Government's Exhibit No. 25*

This agreement, made and entered into this 3rd day of January, A.D. 1939, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois (hereinafter sometimes referred to as "Gypsum"), and Newark Plaster Company, a New Jersey corporation, of Newark, New Jersey, resulting from the merger of Newark Plaster Company, a New Jersey corporation, of Newark, New Jersey, and Kelley Plasterboard Company, Inc., a New Jersey corporation (hereinafter sometimes referred to as "Newark"), witnesseth, that:

Whereas, Gypsum and said Kelley Plasterboard Company, Inc., entered into a certain license agreement dated October 12, 1934, under the terms of which Gypsum, as licensor therein named, granted to said Kelley Plasterboard

Company, Inc., as licensee therein named, certain rights, licenses and privileges under certain patents relating to the manufacture and sale of plasterboard having a metallized surface, as therein more particularly described and set forth; and

Whereas, said Newark Plaster Company existing before said merger and said Kelley Plasterboard Company, Inc., have effected a merger in accordance with the provisions of the New Jersey General Corporation Law, under the corporate name of Newark Plaster Company, and said Kelley
Plasterboard Company, Inc., has assigned, trans-
9679 ferred and set over unto Newark, all of its right,
title and interest in and to said license agreement and the rights, licenses and privileges therein contained, upon and subject to all of the conditions, terms and agreements as in said license agreement set forth; and

Whereas, it is provided in said license agreement that the rights, licenses and privileges therein granted are and shall be personal to licensee, and none of said rights, licenses and privileges, nor any right therein or thereunder, shall be sold, assigned or transferred without the written consent of Gypsum first obtained, nor shall licensee permit the same, or any of them, to be transferred by operation of law; provided, however, that such rights, licenses and privileges may be assigned by licensee to any company acquiring all of the business and assets of said licensee, on condition that licensee shall first obtain an agreement in writing from any such assignee, in which such agreement such assignee agrees to assume all of the obligations of the licensee under said agreement, and agrees to be bound by all of the terms and conditions thereof, and shall deliver such agreement to licensor,

Now, therefore, in consideration of the sum of One Dollar ($1.00), and other good and valuable considerations, each to the other in hand paid, receipt whereof is hereby acknowledged by each of the parties hereto, and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto have agreed as follows:

1. Gypsum consents to the assignment to Newark
9680 of the said license agreement, together with all of
the rights, licenses and privileges therein contained, subject to all of the conditions, terms and agreements as in said license agreement set forth.

2. Newark agrees to, and does hereby, assume all of the obligations of licensee under said license agreement,

and agrees to be bound by all of the terms and conditions thereof to the same effect as if Newark originally had been named in said license agreement as licensee therein.

3. In case Newark shall at any time sell any plasterboard having a metallized surface covered by the claims of said patents, or cause the same to be sold, through or by any of its wholly owned subsidiaries, then Sections IX and X of said license agreement shall be read as if the words "or sold by its wholly owned subsidiary" were inserted after the words "sold by licensee", wherever such last mentioned words appear in said Sections IX and X of said license agreement. The sales or acts of any such subsidiary shall, for all purposes of said license agreement, be construed as the sales or acts of Newark, as such licensee, and Newark shall be fully responsible therefor. Nothing herein contained shall be construed to grant any license under said patents to any wholly owned subsidiary of Newark, or to authorize the sale of plasterboard having a metallized surface embodying the inventions disclosed and claimed in any of said patents to or by any such subsidiary, without the written consent of Gypsum thereto first had and obtained.

9681 In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY

By W. T. KEADY

Vice President.

ATTEST:

C. H. THAVER, *Secretary.*

NEWARK PLASTER COMPANY

By FREDERICK TOMKINS

Its President.

ATTEST:

O. N. MILES, *Secretary.*

9682 *Government's Exhibit No. 26*

Agreement made this 8th day of June, 1936, by and between United States Gypsum Company, an Illinois corporation, having its principal office and place of business at Chicago, Illinois, hereinafter referred to as "Licensor", and Certain-Teed Products Corp., a Maryland corporation, having its principal office and place of business

at New York, N. Y., hereinafter referred to as "Licensee"; witnesseth:

Whereas, Licensor is the owner of Letters Patent of the United States No. 1,938,354, relating to a plasterboard lath particularly adapted for the fire-resistant wall and ceiling constructions and structures, covered by the claims of said patent, and Licensee desires to be licensed to manufacture, use and sell such patented plasterboard lath;

Now, therefore, in consideration of the sum of One Dollar ($1.00) in hand paid, each to the other, the receipt whereof is hereby acknowledged, and of the mutual covenants herein contained, the parties hereto agree as follows:

1. Licensor hereby grants to Licensee, subject to the terms and conditions hereinafter set forth, an indivisible and non-exclusive right, license and privilege of manufacturing at the plants and factories now or hereafter owned by Licensee or any of its wholly owned subsidiaries, perforated plasterboard lath having a gypsum core and paper covering adhering thereto embodying the inventions and improvements set forth and claimed in said Letters Patent of the United States No. 1,938,354, and of selling and using, in the United States of America and the territories and possessions thereof, said perforated plasterboard lath manufactured by Licensee at its said plants and factories, or the said plants or factories of its subsidiaries, for the full term of said Letters Patent and any extensions
9683 or reissues thereof, subject, however, to cancelation or termination as hereinafter provided.

2. The license above granted, to manufacture, use and sell perforated plasterboard lath embodying the inventions and improvements of said Letters Patent, is granted on condition that Licensor reserves the right to determine, change and/or withdraw at any time and from time to time, during the term of this agreement, the minimum price or prices and/or terms and conditions of sale at which Licensee shall sell or offer for sale any such perforated plasterboard lath, and in case Licensor shall exercise the right so reserved, it shall first serve upon Licensee written notice of such minimum price or prices and/or terms and conditions of sale, and shall thereafter give to Licensee written or telegraphic notice of any change or changes in or withdrawal of such price or prices and/or terms and conditions of sale; and Licensee expressly covenants and agrees that after notice of any such price or prices and/or terms and conditions of sale or any change therein, it will not, directly or indirectly, sell or offer for

sale any such perforated plasterboard lath at a price or prices less than those, or upon terms and conditions of sale other than as, stated by Licensor in such written notice or any such written or telegraphic notice of a change in such price or prices and/or terms and conditions of sale. Such minimum price or prices and/or terms and conditions of sale so determined by Licensor and any change or changes therein may be with respect to any one or more, or all, classes of trade, markets, or methods of shipment or delivery, and may be the same or different with respect to different classes of trade, markets, or methods of shipment or delivery, all as may be determined from time to time by Licensor. All orders, contracts or commitments for future sale or delivery of any such perforated plasterboard lath shall be made subject to change in such minimum price or prices and/or terms and conditions of sale as above provided, and no shipments thereof may be made at less
9684 than the minimum price or prices or upon terms and conditions of sale other than as, contained in the last such notice of minimum price or prices and/or terms and conditions of sale, and the last notice of change or changes therein, received before shipment.

Said minimum price or prices shall not be more than that price, nor shall such terms and conditions of sale be other than those, at which Licensor determines to sell such perforated plasterboard lath embodying the inventions and improvements set forth and claimed in said Letters Patent, to its own like trade in the same market.

3. Notwithstanding any other provisions of this agreement, it is a condition and limitation of the licenses above granted that Licensee may not sell any of said perforated plasterboard lath to other manufacturers, jobbers or wholesalers without the written consent of Licensor, and then only at the minimum price or prices fixed and determined by Licensor therefor, as provided in Section 2 hereof; that Licensee shall not deliver any of said perforated plasterboard lath to any person or company on consignment; and that Licensee may not use or sell any of said perforated plasterboard lath of inferior manufacture and commonly known as "seconds".

4. All such perforated plasterboard lath shall be plainly marked by Licensee, "Licensed under United States Letters Patent No. 1,938,354."

5. As consideration for the grant of the aforesaid rights, licenses and privileges, Licensee agrees to pay to Licensor a royalty or license fee at the rate of ten cents (10¢) per thousand square feet of all of said perforated plasterboard lath sold or used by Licensee during the term of this agreement, which shall be paid monthly to Licensor on or before the 20th day of each calendar month for all of said perforated plasterboard lath sold or used by Licensee during the next preceding calendar month, as hereinafter more specifically set forth.

9685 For the purpose of this section of this agreement, all perforated plasterboard lath manufactured by Licensee and sold for erection in said patented wall and ceiling constructions and structures shall be conclusively treated as perforated plasterboard lath manufactured in accordance with the claims of said patent; and all perforated plasterboard lath shall be considered sold on the date shipped or delivered to purchaser, whether or not title passes at the time of shipment or delivery.

The royalties or license fees payable by Licensee under this license shall be in addition to any royalties or license fees payable by Licensee for any license under any other patents which may have been granted heretofore by Licensor to Licensee.

6. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all of said perforated plasterboard lath manufactured, sold or used by it, and agrees that on or before the 20th day of each calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all of said perforated plasterboard lath manufactured, sold or used by it during the preceding calendar month, together with the price or prices at which the same was sold, such returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said perforated plasterboard lath sold or used by it during the next preceding calendar month.

7. Licensor or its duly authorized representative shall have the right at all reasonable times during business hours to inspect such books of account and records of Licensee

as are necessary to determine the quantity of such perforated plasterboard lath manufactured, sold or used
9686 by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; provided, however, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne by Licensee. If the parties at any such time shall not agree upon a certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other way connected with it, and Licensee shall have the right to select which of them shall make such examination, and if Licensee shall not accept any of them within ten (10) days after receiving the names thereof from Licensor, then Licensor shall have the right to make such examination itself.

8. As one of the considerations of this agreement, Licensee hereby acknowledges the validity of Letters Patent of the United States No. 1,938,354, and agrees that it will not, during the existence of this agreement, directly or indirectly, either alone or through or together with another or others, contest the validity of such Letters Patent or any of the claims thereof, or the title thereto of Licensor. The granting of the license herein contained shall not be construed or deemed to grant to Licensee any license under any other letters patent owned by Licensor or under which it is licensed with a right to license others. Nothing herein contained shall be construed to permit Licensee to use, at any time, any of Licensor's trade marks or names.

9. In the event either party hereto shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept or performed by it, then the other party may at its election serve upon the party claimed to be in default shall not have cured all this agreement, which notice shall specify the ne-
9687 glect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party claimed to be in default, notice of termination of the defaults specified in said notice, then this agreement shall terminate without the necessity of any other or further notice and without the necessity of any court action; provided, however, that neither party shall be relieved

thereby of any liability accrued at the time of such termination. A waiver by either party hereto of any breach by the other party shall not be deemed or construed to be a waiver of any other or subsequent breach or breaches hereof.

10. In case at any time Licensee shall be adjudged bankrupt or insolvent, or a receiver appointed for its assets and business, or its assets assigned for the benefit of creditors, then Licensor may at its option cancel this agreement with or without notice, but in any such event Licensor shall not thereby be prevented from collecting any and all license fees or royalties accrued hereunder at the time of such termination.

11. In the event Licensor grants to any other person, firm or corporation, a license similar to this license under said letters patent to manufacture, use and sell said perforated plasterboard lath under more favorable terms or conditions than stated herein, Licensor shall immediately give notice thereof to Licensee, and grant to Licensee a license on such terms and conditions, or amend this agreement so as to extend such more favorable terms and conditions to Licensee during the time they are enjoyed by such other person, firm or corporation.

12. The licenses herein granted are personal to Licensee, and the same or any right therein or thereunder shall not be sold, assigned, or transferred without the written consent of Licensor first had and obtained; and if this agreement or any of Licensee's rights hereunder are transferred by operation of law, then Licensor may cancel this agreement at any time thereafter, with or without notice.

9688 13. This agreement shall continue in force and effect for the full term of said letters patent and any extensions or reissues thereof; provided, however, that the same may be canceled or terminated by either party hereto upon giving to the other of said parties one year's written notice of its intention to cancel or terminate the same. Upon the giving of such notice this contract and all of the provisions hereof, together with said license, shall, at the end of six (6) months from the end of the period stated in such notice, be and become canceled and terminated without the necessity of any further notice by either party hereto. Licensee, by reason of any such cancelation or termination, shall not be relieved from the payment of any royalties or license fees payable hereunder for all of said

patented perforated plasterboard lath sold or used by it up to the date of final cancelation or termination hereof.

14. Any and all notices required to be served hereunder upon Licensor may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Licensor at 300 West Adams Street, Chicago, Illinois; and any and all notices required to be served hereunder upon Licensee may be served by mailing a copy thereof, postage prepaid registered mail, addressed to Licensee at 100 E. 42nd St., New York, N. Y.; and such mailing of notice shall constitute proper service of notice hereunder.

15. This agreement shall be binding upon and enure to the benefit of the successors and assigns of the parties hereto; provided, however, that nothing herein contained shall be construed to permit any assignment of this agreement or of any rights hereunder except as hereinabove specifically provided.

In witness whereof, the parties hereto have hereunto caused these presents to be signed on their behalf by their respective presidents, attested by their respective
9689 secretaries, and their corporate seals hereunto affixed, all done the day and year first above written.

UNITED STATES GYPSUM COMPANY.

By C. F. HENNING, *Vice-President.*

ATTEST:

C. H. THAVER, *Secretary.*

CERTAIN-TEED PRODUCTS CORP.

By CHESTER E. RAHR, *President.*

ATTEST:

Secretary

9690 *Government's Exhibit No. 27*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 16, 1938.

CERTAIN-TEED PRODUCTS CORPORATION
100 East Forty-second Street,
New York, N. Y.

GENTLEMEN: In view of the fact that perforated plasterboard lath, which also embodies the claims of the patents contained in our original board license, has attained such

importance and constitutes a large volume of the board manufactured and sold thereunder, we have decided to grant to you as one of our board licensees the right to use our U. S. Letters Patent No. 1,938,354 in the manufacture and sale of plasterboard without the payment of additional royalties or license fees, the same as if such patent were listed in Exhibit A of our original board license, upon the terms and conditions hereinafter set forth.

You are herefore granted an indivisible and nonexclusive license to manufacture at your plants perforated plasterboard lath having a gypsum core and paper covering adhering thereto, embodying the claims of Letters Patent of the United States No. 1,938,354 and of selling and using the same in the United States of America and the territories and possessions thereof, subject to the terms and conditions hereinafter set forth.

It is understood that nothing herein contained shall give you the right to use any of our other patents, or change or alter in any way the terms of your original board license agreement of October 15, 1929, it being understood that your only right to manufacture and sell gypsum plasterboard and/or gypsum wallboard, including perforated plasterboard lath, embodying the claims of any of the patents set forth and described in Exhibit A of your said original board license agreement is under and in accordance with the terms and conditions of said last mentioned agreement.

It is of course understood that all perforated plasterboard lath manufactured and sold by you shall be included in computing your royalties or license fees under your said original board license agreement and you will make reports of your manufacture and sale thereof and we shall have the right to inspect books of account and records, in the same manner and to the same extent as set forth in said original board license agreement.

9691 You are not to manufacture any of said lath for or to sell the same to another manufacturer or to any manufacturer or distributor selling plaster or gypsum products as a manufacturer, or to deliver any of said lath to any person or company on consignment, or to sell any of the same of inferior manufacture, commonly known as "seconds".

You will mark all such patented lath "Licensed under United States Letters Patent No. 1,938,354".

You will not assign this license without our written consent, nor shall the same or any right hereunder be transferred by operation of law or otherwise.

This license may be cancelled or terminated by either party hereto upon giving to the other party hereto one (1) year's written notice of cancellation or termination thereof. Any such notice shall become effective upon depositing the same in the United States mails, postage prepaid and registered, addressed to you at your principal office in New York, New York, or to us at our principal office, 300 West Adams Street, Chicago, Illinois.

Your perforated plasterboard lath license agreement dated June 8, 1936, shall become cancelled and terminated upon the acceptance of this letter by you, provided, however, that neither party shall thereby be relieved of any liability thereunder accrued prior to September 1, 1938.

This license shall become effective as of September 1, 1938, when accepted by you in writing.

If satisfactory, please sign the duplicate copy of this letter indicating your acceptance thereof and return the same to us.

Yours very truly,

UNITED STATES GYPSUM COMPANY,

O. M. KNODE, *President.*

Accepted, this 4th day of October, 1938.

CERTAIN-TEED PRODUCTS CORPORATION.

By AUDENREID WHITTEMORE
Executive Vice President.

9692 *Government's Exhibit No. 28*

Agreement made this 2nd day of February, 1937, by and between United States Gypsum Company, an Illinois corporation, having its principal office and place of business at Chicago, Illinois, hereinafter referred to as "Licensor", and Ebsary Gypsum Company, Inc., a New York corporation, having its principal office and place of business at 52 Vanderbilt Ave., New York, N. Y., hereinafter referred to as "Licensee";

Witnesseth:

Whereas, Licensor is the owner of Letters Patent of the United States No. 1,938,354, relating to a plasterboard lath particularly adapted for the fire-resistant wall and ceiling constructions and structures, covered by the claims of said patent, and Licensee desires to be licensed to manufacture, use and sell such patented plasterboard lath;

Now, therefore, in consideration of the sum of one Dollar ($1.00) in hand paid, each to the other, the receipt whereof is hereby acknowledged, and of the mutual covenants herein contained, the parties hereto agree as follows:

1. Licensor hereby grants to Licensee, subject to the terms and conditions hereinafter set forth, an indivisible and non-exclusive right, license and privilege of manufacturing at the plants and factories now or hereafter owned by Licensee or any of its wholly owned subsidiaries, perforated plasterboard lath having a gypsum core and paper covering adhering thereto embodying the inventions and improvements set forth and claimed in said Letters Patent of the United States No. 1,938,354, and of selling and using, in the United States of America and the territories and possessions thereof, said perforated plasterboard lath manufactured by Licensee at its said plants and factories, or the said plants or factories of its subsidiaries, for the full term of said Letters Patent and any extensions or
9693 reissues thereof, subject, however, to cancelation or termination as hereinafter provided.

2. The license above granted, to manufacture, use and sell perforated plasterboard lath embodying the inventions and improvements of said Letters Patent, is granted on condition that Licensor reserves the right to determine, change and/or withdraw at any time and from time to time, during the term of this agreement, the minimum price or prices and/or terms and conditions of sale at which Licensee shall sell or offer for sale any such perforated plasterboard lath, and in case Licensor shall exercise the right so reserved, it shall first serve upon Licensee written notice of such minimum price or prices and/or terms and conditions of sale, and shall thereafter give to Licensee written or telegraphic notice of any change or changes in or withdrawal of such price or prices and/or terms and conditions of sale; and Licensee expressly covenants and agrees that after notice of any such price or prices and/or terms and

conditions of sale or any change therein, it will not, directly or indirectly, sell or offer for sale any such perforated plasterboard lath at a price or prices less than those, or upon terms and conditions of sale other than as, stated by Licensor in such written notice or any such written or telegraphic notice of a change in such price or prices and/or terms and conditions of sale. Such minimum price or prices and/or terms and conditions of sale so determined by Licensor and any change or changes therein may be with respect to any one or more, or all, classes of trade, markets, or methods of shipment or delivery, and may be the same or different with respect to different classes of trade, markets, or methods of shipment or delivery, all as may be determined from time to time by Licensor. All orders, contracts or commitments for future sale or delivery of any such perforated plasterboard lath shall be made subject to change in such minimum price or prices
9694 and/or terms and conditions of sale as above provided, and no shipments thereof may be made at less than the minimum price or prices or upon terms and conditions of sale other than as, contained in the last such notice of minimum price or prices and/or terms and conditions of sale, and the last notice of change or changes therein, received before shipment.

Said minimum price or prices shall not be more than that price, nor shall such terms and conditions of sale be other than those, at which Licensor determines to sell such perforated plasterboard lath embodying the inventions and improvements set forth and claimed in said Letters Patent, to its own like trade in the same market.

3. Notwithstanding any other provisions of this agreement, it is a condition and limitation of the licenses above granted that Licensee may not sell any of said perforated plasterboard lath to other manufacturers, jobbers or wholesalers without the written consent of Licensor, and then only at the minimum price or prices fixed and determined by Licensor therefor, as provided in Section 2 hereof; that Licensee shall not deliver any of said perforated plasterboard lath to any person or company on consignment; and that Licensee may not use or sell any of said perforated plasterboard lath of inferior manufacture and commonly known as "seconds".

4. All such perforated plasterboard lath shall be plainly marked by Licensee, "Licensed under United States Letters Patent No. 1,938,354."

5. As consideration for the grant of the aforesaid rights, licenses and privileges, Licensee agrees to pay to Licensor a royalty or license fee at the rate of ten cents (10¢) per thousand square feet of all of said perforated plasterboard lath sold or used by Licensee during the term of this agreement, which shall be paid monthly to Licensor on or
9695 before the 20th day of each calendar month for all of said perforated plasterboard lath sold or used by Licensee during the next preceding calendar month, as hereinafter more specifically set forth.

For the purpose of this section of this agreement, all perforated plasterboard lath manufactured by Licensee and sold for erection in said patented wall and ceiling constructions and structures shall be conclusively treated as perforated plasterboard lath manufactured in accordance with the claims of said patent; and all perforated plasterboard lath shall be considered sold on the date shipped or delivered to purchaser, whether or not title passes at the time of shipment or delivery.

The royalties or license fees payable by Licensee under this license shall be in addition to any royalties or license fees payable by Licensee for any license under any other patents which may have been granted heretofore by Licensor to Licensee.

6. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all of said perforated plasterboard lath manufactured, sold or used by it, and agrees that on or before the 20th day of each calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all of said perforated plasterboard lath manufactured, sold or used by it during the preceding calendar month, together with the price or prices at which the same was sold, such returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said perforated plas-
9696 terboard lath sold or used by it during the next preceding calendar month.

7. Licensor or its duly authorized representative shall have the right at all reasonable times during business hours

to inspect such books of account and records of Licensee as are necessary to determine the quantity of such perforated plasterboard lath manufactured, sold or used by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; provided, however, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne by Licensee. If the parties at any such time shall not agree upon a certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other way connected with it, and Licensee shall have the right to select which of them shall make such examination, and if Licensee shall not accept any of them within ten (10) days after receiving the names thereof from Licensor, then Licensor shall have the right to make such examination itself.

8. As one of the considerations of this agreement, Licensee hereby acknowledges the validity of Letters Patent of the United States No. 1,938,354, and agrees that it will not, during the existence of this agreement, directly or indirectly, either alone or through or together with another or others, contest the validity of such Letters Patent or any of the claims thereof, or the title thereto of Licensor. The granting of the license herein contained shall not be construed or deemed to grant to Licensee any license under any other letters patent owned by Licensor or under which it is licensed with a right to license others. Nothing herein contained shall be construed to permit Licensee to
9697 use, at any time, any of Licensor's trade marks or names.

9. In the event either party hereto shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept or performed by it, then the other party may at its election serve upon the party claimed to be in default, notice of termination of this agreement, which notice shall specify the neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party claimed to be in default shall not have cured all the defaults specified in said notice, then this agreement shall terminate without the necessity of any other or further notice and without the necessity of

any court action; provided, however, that neither party shall be relieved thereby of any liability accrued at the time of such termination. A waiver by either party hereto of any breach by the other party shall not be deemed or construed to be a waiver of any other or subsequent breach or breaches hereof.

10. In case at any time Licensee shall be adjudged bankrupt or insolvent, or a receiver appointed for its assets and business, or its assets assigned for the benefit of creditors, then Licensor may at its option cancel this agreement with or without notice, but in any such event Licensor shall not thereby be prevented from collecting any and all license fees or royalties accrued hereunder at the time of such termination.

11. In the event Licensor grants to any other person, firm or corporation, a license similar to this license under said letters patent to manufacture, use and sell said perforated plasterboard lath under more favorable terms or conditions than stated herein, Licensor shall immediately give notice thereof to Licensee, and grant to Licensee a license on such terms and conditions, or amend this agreement so as to extend such more favorable terms and
9698 conditions to Licensee during the time they are enjoyed by such other person, firm or corporation.

12. The licenses herein granted are personal to Licensee, and the same or any right therein or thereunder shall not be sold, assigned, or transferred without the written consent of Licensor first had and obtained; and if this agreement or any of Licensee's rights hereunder are transferred by operation of law, then Licensor may cancel this agreement at any time thereafter, with or without notice.

13. This agreement shall continue in force and effect for the full term of said letters patent and any extensions or reissues thereof; provided, however, that the same may be canceled or terminated by either party hereto upon giving to the other of said parties one year's written notice of its intention to cancel or terminate the same. Upon the giving of such notice this contract and all of the provisions hereof, together with said license, shall, at the end of six (6) months from the end of the period stated in such notice, be and become canceled and terminated without the necessity of any further notice by either party hereto. Licensee, by reason of any such cancelation or termination, shall not

be relieved from the payment of any royalties or license fees payable hereunder for all of said patented perforated plasterboard lath sold or used by it up to the date of final cancelation or termination hereof.

14. Any and all notices required to be served hereunder upon Licensor may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Licensor at 300 West Adams Street, Chicago, Illinois; and any and all notices required to be served hereunder upon Licensee may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Licensee at 52 Vanderbilt Ave., New York, N. Y.; and such mailing of notice shall constitute proper service of notice hereunder.

9699 15. This agreement shall be binding upon and enure to the benefit of the successors and assigns of the parties hereto; provided, however, that nothing herein contained shall be construed to permit any assignment of this agreement or of any rights hereunder except as hereinabove specifically provided.

In witness whereof, the parties hereto have hereunto caused these presents to be signed on their behalf by their respective presidents, attested by their respective secretaries, and their corporate seals hereunto affixed, all done the day and year first above written.

UNITED STATES GYPSUM COMPANY,

By W. L. KEADY, *Vice-President.*

By O. M. KNODE, *President.*

ATTEST:

N. O. LANG, *Ass't Secretary.*

EBSARY GYPSUM COMPANY, INC.

By F. G. EBSARY, *President.*

ATTEST:

FRANK W. ALLEN, *Secretary.*

9700 *Government's Exhibit No. 29*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 16, 1938.

EBSARY GYPSUM COMPANY, INC.
52 Vanderbilt Avenue,
New York, New York

GENTLEMEN: In view of the fact that perforated plasterboard lath, which also embodies the claims of the patents contained in our original board license, has attained such importance and constitutes a large volume of the board manufactured and sold thereunder, we have decided to grant to you as one of our board licensees the right to use our U. S. Letters Patent No. 1,938,354 in the manufacture and sale of plasterboard without the payment of additional royalties or license fees, the same as if such patent were listed in Exhibit A of our original board license, upon the terms and conditions hereinafter set forth.

You are therefore granted an indivisible and nonexclusive license to manufacture at your plants perforated plasterboard lath having a gypsum core and paper covering adhering thereto, embodying the claims of Letters Patent of the United States No. 1,938,354 and of selling and using the same in the United States of America and the territories and possessions thereof, subject to the terms and conditions hereinafter set forth.

It is understood that nothing herein contained shall give you the right to use any of our other patents, or change or alter in any way the terms of your original board license agreement of October 18, 1929, it being understood that your only right to manufacture and sell gypsum plasterboard and/or gypsum wallboard, including preforated plasterboard lath, embodying the claims of any of the patents set forth and described in Exhibit A of your said original board license agreement is under and in accordance with the terms and conditions of said last mentioned agreement.

It is of course understood that all perforated plasterboard lath manufactured and sold by you shall be included in computing your royalties or license fees under your said original board license agreement and you will make reports of your manufacture and sale thereof and we shall have

the right to inspect books of account and records, in the same manner and to the same extent as set forth in said original board license agreement.

9701 You are not to manufacture any of said lath for or to sell the same to another manufacturer or to any manufacturer or distributor selling plaster or gypsum products as a manufacturer, or to deliver any of said lath to any person or company on consignment, or to sell any of the same of inferior manufacture, commonly known as "seconds".

You will mark all such patented lath "Licensed under United States Letters Patent No. 1,938,354".

You will not assign this license without our written consent, nor shall the same or any right hereunder be transferred by operation of law or otherwise.

This license may be cancelled or terminated by either party hereto upon giving to the other party hereto one (1) year's written notice of cancellation or termination thereof. Any such notice shall become effective upon depositing the same in the United States mails, postage prepaid and registered, addressed to you at your principal office in New York, New York, or to us at our principal office, 300 West Adams Street, Chicago, Illinois.

Your perforated plasterboard lath license agreement dated February 2, 1937, shall become cancelled and terminated upon the acceptance of this letter by you, provided, however, that neither party shall thereby be relieved of any liability thereunder accrued prior to September 1, 1938.

This license shall become effective as of September 1, 1938, when accepted by you in writing.

If satisfactory, please sign the duplicate copy of this letter indicating your acceptance thereof and return the same to us.

Yours very truly,

UNITED STATES GYPSUM COMPANY,

O. M. KNODE, *President.*

Accepted, this 10th day of
January, 1939.

ERSARY GYPSUM COMPANY; INC.,

By GEORGE N. LENCI

V. P.

9702 *Government's Exhibit No. 30*

Agreement made this 10th day of July 1936, by and between United States Gypsum Company, an Illinois corporation, having its principal office and place of business at Chicago, Illinois, hereinafter referred to as "Licensor", and The American Gypsum Co., an Ohio corporation having its principal office and place of business at Port Clinton, Ohio hereinafter referred to as "Licensee"; witnesseth:

Whereas, Licensor is the owner of Letters Patent of the United States No. 1,938,354, relating to a plasterboard lath particularly adapted for the fire-resistant wall and ceiling constructions and structures, covered by the claims of said patent, and Licensee desires to be licensed to manufacture, use and sell such patented plasterboard lath;

Now, therefore, in consideration of the sum of One Dollar ($1.00) in hand paid, each to the other, the receipt whereof is hereby acknowledged, and of the mutual covenants herein contained, the parties hereto agree as follows:

1. Licensor hereby grants to Licensee, subject to the terms and conditions hereinafter set forth, an indivisible and non-exclusive right, license and privilege of manufacturing at the plants and factories now or hereafter owned by Licensee or any of its wholly owned subsidiaries, perforated plasterboard lath having a gypsum core and paper covering adhering thereto embodying the inventions and improvements set forth and claimed in said Letters Patent of the United States No. 1,938,354, and of selling and using, in the United States of America and the territories and possessions thereof, said perforated plasterboard lath manufactured by Licensee at its said plants and factories, or the said plants or factories of its subsidiaries, for the full term of said Letters Patent and any extensions or
9703 reissues thereof, subject, however, to cancelation or termination as hereinafter provided.

2. The license above granted, to manufacture, use and sell perforated plasterboard lath embodying the inventions and improvements of said Letters Patent, is granted on condition that Licensor reserves the right to determine, change and/or withdraw at any time and from time to time, during the term of this agreement, the minimum price or prices and/or terms and conditions of sale at which Licensee shall

sell or offer for sale any such perforated plasterboard lath, and in case Licensor shall exercise the right so reserved, it shall first serve upon Licensee written notice of such minimum price or prices and/or terms and conditions of sale, and shall thereafter give to Licensee written or telegraphic notice of any change or changes in or withdrawal of such price or prices and/or terms and conditions of sale; and Licensee expressly covenants and agrees that after notice of any such price or prices and/or terms and conditions of sale or any change therein, it will not, directly or indirectly, sell or offer for sale any such perforated plasterboard lath at a price or prices less than those, or upon terms and conditions of sale other than as, stated by Licensor in such written notice or any such written or telegraphic notice of a change in such price or prices and/or terms and conditions of sale. Such minimum price or prices and/or terms and conditions of sale so determined by Licensor and any change or changes therein may be with respect to any one or more, or all, classes of trade, markets, or methods of shipment or delivery, and may be the same or different with respect to different classes of trade, markets, or methods of shipment or delivery, all as may be determined from time to time by Licensor. All orders, contracts or commitments for future sale or delivery of any such perforated plasterboard lath shall be made subject to change in such minimum price or prices and/or terms and conditions of sale as above provided, and no shipments thereof may be made at less than the minimum price or prices or upon terms and conditions of sale other than as, contained in the last such notice of minimum price or prices and/or terms and conditions of sale, and the last notice of change or changes therein, received before shipment.

9704

Said minimum price or prices shall not be more than that price, nor shall such terms and conditions of sale be other than those, at which Licensor determines to sell such perforated plasterboard lath embodying the inventions and improvements set forth and claimed in said Letters Patent, to its own like trade in the same market.

3. Notwithstanding any other provisions of this agreement, it is a condition and limitation of the licenses above granted that Licensee may not sell any of said perforated plasterboard lath to other manufacturers, jobbers or wholesalers without the written consent of Licensor, and then

only at the minimum price or prices fixed and determined by Licensor therefor, as provided in Section 2 hereof; that Licensee shall not deliver any of said perforated plasterboard lath to any person or company on consignment; and that Licensee may not use or sell any of said perperforated plasterboard lath of inferior manufacture and commonly known as "seconds".

4. All such perforated plasterboard lath shall be plainly marked by Licensee, "Licensed under United States Letters Patent No. 1,938,354."

5. As consideration for the grant of the aforesaid rights, licenses and privileges, Licensee agrees to pay to Licensor a royalty or license fee at the rate of ten cents (10¢) per thousand square feet of all of said perforated plasterboard lath sold or used by Licensee during the term of this agreement, which shall be paid monthly to Licensor on
9705 or before the 20th day of each calendar month for all of said perforated plasterboard lath sold or used by Licensee during the next-preceding calendar month, as hereinafter more specifically set forth.

For the purpose of this section of this agreement, all perforated plasterboard lath manufactured by Licensee and sold for erection in said patented wall and ceiling constructions and structures shall be conclusively treated as perforated plasterboard lath manufactured in accordance with the claims of said patent; and all perforated plasterboard lath shall be considered sold on the date shipped or delivered to purchaser, whether or not title passes at the time of shipment or delivery.

The royalties or license fees payable by Licensee under this license shall be in addition to any royalties or license fees payable by Licensee for any license under any other patents which may have been granted heretofore by Licensor to Licensee.

6. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all of said perforated plasterboard lath manufactured, sold or used by it, and agrees that on or before the 20th day of each calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all of said perforated plasterboard lath manufactured, sold or used by it during the preceding calendar month, together with the price or prices at which the same was sold, such re-

turns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said perforated plasterboard lath sold or used by it during the next preceding calendar
9706 month.

7. Licensor or its duly authorized representative shall have the right at all reasonable times during business hours to inspect such books of account and records of Licensee as are necessary to determine the quantity of such perforated plasterboard lath manufactured, sold or used by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; provided, however, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne by Licensee. If the parties at any such time shall not agree upon a certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other way connected with it, and Licensee shall have the right to select which of them shall make such examination, and if Licensee shall not accept any of them within ten (10) days after receiving the names thereof from Licensor, then Licensor shall have the right to make such examination itself.

8. As one of the considerations of this agreement, Licensee hereby acknowledges the validity of Letters Patent of the United States No. 1,938,354, and agrees that it will not, during the existence of this agreement, directly or indirectly, either alone or through or together with another or others, contest the validity of such Letters Patent or any of the claims thereof, or the title thereto of Licensor. The granting of the license herein contained shall not be construed or deemed to grant to Licensee any license under any other letters patent owned by Licensor or under which it is licensed with a right to license others. Nothing herein contained shall be construed to permit Licensee
9707 to use, at any time, any of Licensor's trade marks or names.

9. In the event either party hereto shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept or performed by it, then the other party may at its election serve upon the party claimed to be in default, notice of termination of this agreement, which notice shall specify the neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party claimed to be in default shall not have cured all the defaults specified in said notice, then this agreement shall terminate without the necessity of any other or further notice and without the necessity of any court action; provided, however, that neither party shall be relieved thereby of any liability accrued at the time of such termination. A waiver by either party hereto of any breach by the other party shall not be deemed or construed to be a waiver of any other or subsequer breach or breaches hereof.

10. In case at any time Licensee shall be adjudged bankrupt or insolvent, or a receiver appointed for its assets and business, or its asetss assigned for the benefit of creditors, then Licensor may at its option cancel this agreement with or without notice, but in any such event Licensor shall not thereby be prevented from collecting any and all license fees or royalties accrued hereunder at the time of such termination.

11. In the event Licensor grants to any other person, firm or corporation, a license similar to this license under said letters patent to manufacture, use and sell said perforated plasterboard lath under more favorable terms or conditions than stated herein, Licensor shall immediately give notice thereof to Licensee, and grant to Licensee a license on such terms and conditions, or amend this agreement so as to extend such more favorable terms and
9708 conditions to Licensee during the time they are enjoyed by such other person, firm or corporation.

12. The licenses herein granted are personal to Licensee, and the same or any right therein or thereunder shall not be sold, assigned, or transferred without the written consent of Licensor first had and obtained; and if this agreement or any of Licensee's rights hereunder are transferred by operation of law, then Licensor may cancel this agreement at any time thereafter, with or without notice.

13. This agreement shall continue in force and effect for the full term of said letters patent and any extensions

or reissues thereof; provided, however, that the same may be canceled or terminated by either party hereto upon giving to the other of said parties one year's written notice of its intention to cancel or terminate the same. Upon the giving of such notice this contract and all of the provisions hereof, together with said license, shall, at the end of six (6) months from the end of the period stated in such notice, be and become canceled and terminated without the necessity of any further notice by either party hereto. Licensee, by reason of any such cancelation or termination, shall not be relieved from the payment of any royalties or license fees payable hereunder for all of said patented perforated plasterboard lath sold or used by it up to the date of final cancelation or termination hereof.

14. Any and all notices required to be served hereunder upon Licensor may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Licensor at 300 West Adams Street, Chicago, Illinois; and any and all notices required to be served hereunder upon Licensee may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Licensee at Port Clinton, Ohio; and such mailing of notice shall constitute proper service of notice hereunder.

9709 15. This agreement shall be binding upon and enure to the benefit of the successors and assigns of the parties hereto; provided, however, that nothing herein contained shall be construed to permit any assignment of this agreement or of any rights hereunder except as hereinabove specifically provided.

In witness whereof, the parties hereto have hereunto caused these presents to be signed on their behalf by their respective presidents, attested by their respective secretaries, and their corporate seals hereunto affixed, all done the day and year first above written.

UNITED STATES GYPSUM COMPANY,
By C. F. HENNING, *Vice President.*

ATTEST:

C. H. SHAVER, *Secretary.*

THE AMERICAN GYPSUM CO.
By C. J. MILLER, *President*

ATTEST:

JOHN D. VEINIG, *Secretary.*

9710 *Government's Exhibit No. 31*

Agreement made this 23d day of June 1937, by and between United States Gypsum Company, an Illinois corporation, having its principal office and place of business at Chicago, Illinois, hereinafter referred to as "Licensor", and Kelley Plasterboard Company, Inc., a New Jersey corporation, having its principal office and place of business at Delawanna, Clifton, New Jersey, hereinafter referred to as "Licensee"; witnesseth:

Whereas, Licensor is the owner of Letters Patent of the United States No. 1,938,354, relating to a plasterboard lath particularly adapted for the fire-resistant wall and ceiling constructions and structures, covered by the claims of said patent, and Licensee desires to be licensed to manufacture, use and sell such patented plasterboard lath;

Now, therefore, in consideration of the sum of One Dollar ($1.00) in hand paid, each to the other, the receipt whereof is hereby acknowledged, and of the mutual covenants herein contained, the parties hereto agree as follows:

1. Licensor hereby grants to Licensee, subject to the terms and conditions hereinafter set forth, an indivisible and non-exclusive right, license and privilege of manufacturing at the plants and factories now or hereafter owned by Licensee or any of its wholly owned subsidiaries, perforated plasterboard lath having a gypsum core and paper covering adhering thereto embodying the inventions and improvements set forth and claimed in said Letters Patent of the United States No. 1,938,354, and of selling and using, in the United States of America and the territories and possessions thereof, said perforated plasterboard lath manufactured by Licensee at its said plants and factories, or the said plants or factories of its subsidiaries, for the full term of said Letters Patent and any extensions or reissues
9711 thereof, subject, however, to cancelation or termination as hereinafter provided.

2. The license above granted, to manufacture, use and sell perforated plasterboard lath embodying the inventions and improvements of said Letters Patent, is granted on condition that Licensor reserves the right to determine, change and/or withdraw at any time and from time to time, during the term of this agreement, the minimum price or

prices and/or terms and conditions of sale at which Licensee shall sell or offer for sale any such perforated plasterboard lath, and in case Licensor shall exercise the right so reserved, it shall first serve upon Licensee written notice of such minimum price or prices and/or terms and conditions of sale, and shall thereafter give to Licensee written or telegraphic notice of any change or changes in or withdrawal of such price or prices and/or terms and conditions of sale; and Licensee expressly covenants and agrees that after notice of any such price or prices and/or terms and conditions of sale or any change therein, it will not, directly or indirectly, sell or offer for sale any such perforated plasterboard lath at a price or prices less than those, or upon terms and conditions of sale other than as, stated by Licensor in such written notice or any such written or telegraphic notice of a change in such price or prices and/or terms and conditions of sale. Such minimum price or prices and/or terms and conditions of sale so determined by Licensor and any change or changes therein may be with respect to any one or more, or all, classes of trade, markets, or methods of shipment or delivery, and may be the same or different with respect to different classes of trade, markets, or methods of shipment or delivery, all as may be determined from time to time by Licensor. All orders, contracts or commitments for future sale or delivery of any such perforated plasterboard lath shall be made subject to change in such minimum price or prices and/or terms
9712 and conditions of sale as above provided, and no shipments thereof may be made at less than the minimum price or prices or upon terms and conditions of sale other than as, contained in the last such notice of minimum price or prices and/or terms and conditions of sale, and the last notice of change or changes therein, received before shipment.

Said minimum price or prices shall not be more than that price, nor shall such terms and conditions of sale be other than those, at which Licensor determines to sell such perforated plasterboard lath embodying the inventions and improvements set forth and claimed in said Letters Patent, to its own like trade in the same market.

3. Notwithstanding any other provisions of this agreement, it is a condition and limitation of the licenses above

granted that Licensee may not sell any of said perforated plasterboard lath to other manufacturers, jobbers or wholesalers without the written consent of Licensor, and then only at the minimum price or prices fixed and determined by Licensor therefor, as provided in Section 2 hereof; that Licensee shall not deliver any of said perforated plasterboard lath to any person or company on consignment; and that Licensee may not use or sell any of said perforated plasterboard lath of inferior manufacture and commonly known as "seconds".

4. All such perforated plasterboard lath shall be plainly marked by Licensee, "Licensed under United States Letters Patent No. 1,938,354."

5. As consideration for the grant of the aforesaid rights, licenses and privileges, Licensee agrees to pay to Licensor a royalty or license fee at the rate of ten cents (10¢) per thousand square feet of all of said perforated plasterboard lath sold or used by Licensee during the term of this agreement, which shall be paid monthly to Licensor on or
9713 before the 20th day of each calendar month for all of said perforated plasterboard lath sold or used by Licensee during the next preceding calendar month, as hereinafter more specifically set forth.

For the purpose of this section of this agreement, all perforated plasterboard lath manufactured by Licensee and sold for erection in said patented wall and ceiling constructions and structures shall be conclusively treated as perforated plasterboard lath manufactured in accordance with the claims of said patent; and all perforated plasterboard lath shall be considered sold on the date shipped or delivered to purchaser, whether or not title passes at the time of shipment or delivery.

The royalties or license fees payable by Licensee under this license shall be in addition to any royalties or license fees payable by Licensee for any license under any other patents which may have been granted heretofore by Licensor to Licensee.

6. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all of said perforated plasterboard lath manufactured, sold or used by it, and agrees that on or before the 20th day of each calendar mnoth it will render unto Licensor true written returns, verified under oath by an officer or other agent

of Licensee, setting forth the quantity of all of said perforated plasterboard lath manufactured, sold or used by it during the preceding calendar month, together with the price or prices at which the same was sold, such returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month, at the office of Licensor at Chicago Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said perforated plasterboard lath sold or
9714 used by it during the next preceding calendar month.

7. Licensor or its duly authorized representative shall have the right at all reasonable times during business hours to inspect such books of account and records of Licensee as are necessary to determine the quantity of such perforated plasterboard lath manufactured, sold or used by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; provided, however, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne by Licensee. If the parties at any such time shall not agree upon a certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other way connected with it, and Licensee shall have the right to select which of them shall make such examination, and if Licensee shall not accept any of them within ten (10) days after receiving the names thereof from Licensor, then Licensor shall have the right to make such examination itself.

8. As one of the considerations of this agreement, Licensee hereby acknowledges the validity of Letters Patent of the United States No. 1,938,354, and agrees that it will not, during the existence of this agreement, directly or indirectly, either alone or through or together with another or others, contest the validity of such Letters Patent or any of the claims thereof, or the title thereto of Licensor. The granting of the license herein contained shall not be construed or deemed to grant to Licensee any license under any other letters patent owned by Licensor or under which it is licensed with a right to license others. Nothing herein con-

tained shall be construed to permit Licensee to use,
9715 at any time, any of Licensor's trade marks or names.

9. In the event either party hereto shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept or performed by it, then the other party may at its election serve upon the party—imed to be in default, notice or termination of this agreement, which notice shall specify the neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party claimed to be in default shall not have cured all the defaults specified in said notice, then this agreement shall terminate without the necessity of any other or further notice and without the necessity of any court action; provided, however, that neither party shall be relieved thereby of any liability accrued at the time of such termination. A waiver by either party hereto of any breach by the other party shall not be deemed or construed to be a waiver of any other or subsequent breach or breaches hereof.

10. In case at any time Licensee shall be adjudged bankrupt or insolvent, or a receiver appointed for its assets and business, or its assets assigned for the benefit of creditors, then Licensor may at its option cancel this agreement with or without notice, but in any such event Licensor shall not thereby be prevented from collecting any and all license fees or royalties accrued hereunder at the time of such termination.

11. In the event Licensor grants to any other person, firm or corporation, a license similar to this license under said letters patent to manufacture, use and sell said perforated plasterboard lath under more favorable terms or conditions than stated herein, Licensor shall immediately give notice thereof to Licensee, and grant to Licensee a license on such terms and conditions, or amend this agreement so as to extend such more favorable terms and
9716 conditions to Licensee during the time they are enjoyed by such other person, firm or corporation.

12. The licenses herein granted are personal to Licensee, and the same or any right therein or thereunder shall not be sold, assigned, or transferred without the written consent of Licensor first had and obtained; and if this

agreement or any of Licensee's rights hereunder are transferred by operation of law, then Licensor may cancel this agreement at any time thereafter, with or without notice.

13. This agreement shall continue in force and effect for the full term of said letters patent and any extensions or reissues thereof; provided, however, that the same may be canceled or terminated by either party hereto upon giving to the other of said parties one year's written notice of its intention to cancel or terminate the same. Upon the giving of such notice this contract and all of the provisions hereof, together with said license, shall, at the end of six (6) months from the end of the period stated in such notice, be and become canceled and terminated without the necessity of any further notice by either party hereto. Licensee, by reason of any such cancelation or termination, shall not be relieved from the payment of any royalties or license fees payable hereunder for all of said patented perforated plasterboard lath sold or used by it up to the date of final cancelation or termination hereof.

14. Any and all notices required to be served hereunder upon Licensor may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Licensor at 300 West Adams Street, Chicago, Illinois; and any and all notices required to be served hereunder upon Licensee may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Licensee at Delawanna, Clifton, New Jersey; and such mailing of notice shall constitute proper service of notice hereunder.

9717 15. This agreement shall be binding upon and enure to the benefit of the successors and assigns of the parties hereto; provided, however, that nothing herein contained shall be construed to permit any assignment of this agreement or of any rights hereunder except as hereinabove specifically provided.

In witness whereof, the parties hereto have hereunto caused these presents to be signed on their behalf by their respective presidents, attested by their respective secretaries, and their corporate seals hereunto affixed, all done the day and year first above written.

UNITED STATES GYPSUM COMPANY
By W. L. KEADY
Vice-President

ATTEST:
N. O. LANG, *Ass't Secretary.*

KELLEY PLASTERBOARD COMPANY, INC.
By FREDERICK TOMKINS
President.

ATTEST:
——— ——— *Secretary.*

9718 *Government's Exhibit No. 32*

JANUARY 3, 1939.

NEWARK PLASTER COMPANY (A Merged Corporation),
Newark, New Jersey:

GENTLEMEN:- In view of the fact that perforated plasterboard lath, which also embodies the claims of the patents contained in our original board license, has attained such importance and constitutes a large volume of the board manufactured and sold thereunder, we have decided to grant to you, as one of our board licensees, the right to use our U. S. Letters Patent No. 1,938,354 in the manufacture and sale of plasterboard without the payment of additional royalties or license fees, the same as if such patent were listed in Exhibit A of our original board license, upon the terms and conditions hereinafter set forth.

You are therefore granted an indivisible and non-exclusive license to manufacture at your plants perforated plasterboard lath having a gypsum core and paper covering adhering thereto, embodying the claims of Letters Patent of the United States No. 1,938,354, and of selling and using the same in the United States of America and the territories and possessions thereof, subject to the terms and conditions hereinafter set forth.

It is understood that nothing herein contained shall give you the right to use any of our other patents, or change or alter in any way the terms of your original board license agreement of April 23, 1930, granted Kelley Plasterboard Company, Inc. and heretofore assigned to you, it being understood that your only right to manufacture and sell

gypsum plasterboard and/or gypsum wallboard, including perforated plasterboard lath, embodying the claims of any of the patents set forth and described in Exhibit A of your said original board license agreement, is under and in accordance with the terms and conditions of said last mentioned agreement.

It is of course understood that all perforated plasterboard lath manufactured and sold by you shall be included in computing your royalties or license fees under your said original board license agreement, and you will make reports of your manufacture and sale thereof, and we shall have the right to inspect books of account and records, in the same manner and to the same extent as set forth in said original board license agreement.

You are not to manufacture any of said lath for or to sell the same to another manufacturer or to any manufacturer or distributor selling plaster or gypsum products as a manufacturer, or to deliver any of said lath to any person or company on consignment, or to sell any of the same of inferior manufacture, commonly known as "seconds".

9719 You will mark all such patented lath "licensed under United States Letters Patent No. 1,938,354".

You will not assign this license without our written consent, nor shall the same or any right hereunder be transferred by operation of law or otherwise.

This license may be cancelled or terminated by either party hereto upon giving to the other party hereto one (1) year's written notice of cancellation or termination thereof. Any such notice shall become effective upon depositing the same in the United States mails, postage prepaid and registered, addressed to you at your principal office in Newark, New Jersey, or to us at our principal office, 300 West Adams Street, Chicago, Illinois.

This license is granted in place of similar license accepted by Kelley Plasterboard Company, Inc., on September 23, 1938, which, with perforated plasterboard lath license agreement dated June 23, 1937, granted said Kelley Plasterboard Company, Inc., is now cancelled and terminated; provided, however, that you assume all liability of said Kelley Plasterboard Company, Inc., under said cancelled licenses which accrued prior to the date hereof:

This license, when accepted by you, shall become effective as of the date hereof and continue until cancelled or terminated by either party as aforesaid.

If satisfactory, please sign the duplicate copy of this letter, indicating your acceptance thereof, and return the same to us.

Very truly yours

UNITED STATES GYPSUM COMPANY,

By W. L. KEADY *Vice-President*

Accepted, this 3rd
day of January 1939.

NEWARK PLASTER COMPANY (A Merged Corporation)

By FREDERICK TOMKINS *Pres.*

9720 *Government's Exhibit No. 33*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 21, 1931.

Board License Bulletin No. 1—Carload Shipments

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices now in effect at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1850 # per M)	1/4" Gypsum Wallboard (Wt. 1250 # per M)	1/2" Gypsum Wallboard (Wt. 2250 # per M)	3/4" Gypsum Wallboard (Wt. 3600 # per M)	3/8" Tiled Gypsum Wallboard (Wt. 1850 # per M)	3/8" Gypsum Plasterboard (Wt. 1850 # per M)	1/4" Gypsum Plasterboard (Wt. 1250 # per M)	1/2" Gypsum Plasterboard (Wt. 2250 # per M)
Oakfield, N. Y.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Plastereo, Va.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, O.	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
#Grand Rapids, Mich.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
*Ft. Dodge, Ia.	27.00	24.50	29.50	35.00	50.00	15.50	15.50	16.25
*Southard, Okla.	27.00	24.50	29.50x	35.00	50.00	15.50	15.50	16.25
*Sweetwater, Tex.	27.00	24.50	29.50x	— —	50.00	15.50	15.50	16.25
*Acme, Texas	27.00	24.50	29.50x	— —	50.00	15.50	15.50	16.25
Laramie, Wyo.	33.00	29.00	— —	— —	55.00	21.50	— —	— —
Loveland, Colo.	34.50	29.50	39.50	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Ia., Southard, Okla., Acme or Sweetwater, Texas, into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, and Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price.

x 1/2" Wallboard $28.00 per M. sq. ft. f.o.b. Sweetwater, Texas, Acme, Texas, or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Mich., add $1.00 per M to prices applying f.o.b. cars, Grand Rapids mill.

9721 Delivered Carload Prices, Chicago, Illinois, and Suburbs: Board in straight or mixed cars delivered to following suburbs, price is same as f.o.b. cars delivered in Chicago proper:

South Side: Argo, Blue Island, Chicago Heights, Clearing, Harvey, Homewood, Lansing, Midlothian, Oak Lawn, Oak Glen, Summitt, Dolton, Hegewisch, South Holland.

Minimum Price Cutstock Plasterboard to following markets as follows: 1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars, Oakfield, N. Y.; Gypsum, Ohio; Grand Rapids, Michigan.

Markets: Buffalo, N. Y.; Niagara and Erie Counties.

Rochester, N. Y.; City of Rochester, and Monroe and Wayne Counties, N. Y.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

This bulletin cancels all previous bulletins.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice-President in Charge Sales.

CFH'

9722 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 14, 1931.

Board License Bulletin No. 1-A—Cancels Bulletin No. 1 of March 21, 1931—Carload Shipments

Licensees:

1. American A R Black (John A. Kling, Pres.)
2. Universal Eugene Holland
3. Certainteed C. O. Brown (cc—Warren Henley)
4. Atlantic W. P. Fuller (cc—L. I. Neale)
5. Ebsary Stromquist (cc—Fred Ebsary)
6. National M. N. Baker
7. Kelley Plas. Bd. Co. S. J. Kelley

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices now in effect at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. (s) Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1850 # per M)	1/4" Gypsum Wallboard (Wt. 1250 # per M)	1/2" Gypsum Wallboard (Wt. 2250 # per M)	3/4" Gypsum Wallboard (Wt. 3600 # per M)	3/8" Tiled Gypsum Wallboard (Wt. 1850 # per M)	3/8" Gypsum Plasterboard (Wt. 1850 # per M)	1/4" Gypsum Plasterboard (Wt. 1250 # per M)	1/2" Gypsum Plasterboard (Wt. 2250 # per M)
Oakfield, N. Y.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Plasterco, Va.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, Ohio	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
#Grand Rapids, Mich.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
*Fort Dodge, Ia.	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25†
*Southard, Okla.	27.00	24.50	29.50x	35.00	50.00	15.00	15.00	16.25†
*Sweetwater, Texas	27.00	24.50	29.50x	— —	50.00	15.00	15.00	16.25†
*Acme, Texas	27.00	24.50	29.50x	— —	50.00	15.00	15.00	16.25†
Laramie, Wyo.	33.00	29.00	— —	— —	55.00	21.50	— —	— —
Loveland, Colo.	34.50	29.50	39.50	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme or Sweetwater, Texas, into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma,

(*Reference notes continued on following page*)

9723 Delivered Carload Prices, Chicago, Illinois, and Suburbs: Board in straight or mixed cars delivered to following area, price is same as f.o.b. cars delivered in Chicago: Cook county, Du Page county, and the following towns in Lake county, Illinois; Deerfield, Highland Park, and Lake Forest.†

Minimum Price Cutstock Plasterboard to following markets, as follows: 1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars, Oakfield, N. Y.; and Gypsum, Ohio.†

Markets: Buffalo, N. Y.; Niagara and Erie Counties. Rochester, N. Y.; City of Rochester, and Monroe and Wayne Counties, N. Y.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____,

Vice President in Charge of Sales.

† Indicates change in this revision.

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(Reference notes continued from preceding page)

Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, and Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

x 1/2" Wallboard $28.00 per M sq. ft. f.o.b. Sweetwater, Texas, Acme, Texas; or Southard, Oklahome, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Mich., add $1.00 per M to prices applying f.o.b. cars, Grand Rapids mill.

(s) On all stop-over cars add to mill price freight rate to final destination regardless of lower rate which might apply to any intermediate point at which stop is made (except where rate to intermediate point is higher, in which event delivered price is mill price plus highest rate to any intermediate point at which stop is made). On stop-over cars add stop-over charge.†

9724

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 25, 1931.

Board License Bulletin No. 1—Cancels Bulletin No. 1-A—Carload Shipments

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective June 1st, 1931 at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. (s) Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1600# per M) †	1/4" Gypsum Wallboard (Wt. 1050# per M) †	1/2" Gypsum Wallboard (Wt. 2150# per M) †	3/4" Gypsum Wallboard (Wt. 3300# per M) †	3/8" Tiled Gypsum Wallboard (Wt. 1600# per M) †	3/8" Gypsum Plasterboard (Wt. 1600# per M) †	1/4" Gypsum Plasterboard (Wt. 1050# per M) †	1/2" Gypsum Plasterboard (Wt. 2150# per M) †
Oakfield, N. Y.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Plastereo, Va.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, Ohio	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
#Grand Rapids, Mich.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
*Fort Dodge, Ia.	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
*Southard, Okla.	27.00	24.50	29.50x	35.00	50.00	15.00	15.00	16.25
*Sweetwater, Texas	27.00	24.50	29.50x	— —	50.00	15.00	15.00	16.25
*Acme, Texas	27.00	24.50	29.50x	— —	50.00	15.00	15.00	16.25
Laramie, Wyo.	33.00	29.00	— —	— —	55.00	21.50	— —	— —
Loveland, Colo.	34.50	29.50	39.50	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme or Sweetwater, Texas, into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, and Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

x 1/2" Wallboard $28.00 per M sq. ft. f.o.b. Sweetwater, Texas, Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

(*Reference notes continued on following page*)

9725 † The above prices shall apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

Delivered Carload Prices, Chicago, Illinois, and Suburbs: Board in straight or mixed cars delivered to following area, price is same as f.o.b. cars delivered in Chicago: Cook County, Du Page county, and the following towns in Lake county, Illinois; Deerfield, Highland Park, and Lake Forest.

Delivered Carload Prices, Detroit, Michigan, and Suburbs: Board in straight or mixed cars delivered to following area, price is same as f.o.b. cars delivered in Detroit: Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Minimum Price Cutstock Plasterboard to following markets, as follows: 1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars, Oakfield, N. Y.; and Gypsum, Ohio.

Markets: Buffalo, N. Y.; Niagara and Erie Counties. Rochester, N. Y.; City of Rochester, and Monroe and Wayne Counties, N. Y.

Prices shall apply to all shipments made after June 1st except only upon bona fide orders actually received and accepted by you at your home office in writing prior to June 1st and shipped by you within ten days after June 1st.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____,

Vice President in Charge of Sales.

† Indicates change in this revision.

CFH'

(*Reference notes continued from preceding page*)

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Mich., add $1.00 per M to prices applying f.o.b. cars, Grand Rapids mill.

(s) On all stop-over cars add to mill price freight rate to final destination regardless of lower rate which might apply to any intermediate point at which stop is made (except where rate to intermediate point is higher, in which event delivered price is mill price plus highest rate to any intermediate point at which stop is made). On stop-over cars add stop-over charge.

9726 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 16, 1931.

Board License Bulletin No. 1—Cancels Previous Bulletin No. 1—Carload Shipments

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. (s) Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1600# per M)	1/4" Gypsum Wallboard (Wt. 1050# per M)	1/2" Gypsum Wallboard (Wt. 2150# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallboard (Wt. 1600# per M)	3/8" Gypsum Plasterboard (Wt. 1600# per M)	1/4" Gypsum Plasterboard (Wt. 1050# per M)	1/2" Gypsum Plasterboard (Wt. 2150# per M)
Oakfield, N. Y.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Plasterco, Va.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, Ohio	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
#Grand Rapids, Mich.	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
*Fort Dodge, Ia.	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25†
*Southard, Okla.	27.00	24.50z	29.50x	35.00	50.00	15.00	15.00	16.25†
*Sweetwater, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25†
*Acme, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25†
Laramie, Wyo.	33.00	29.00z	— —	— —	55.00	21.50	— —	— —†
Loveland, Colo.	34.50	29.50z	39.50	— —	57.50	22.00	— —	— —†

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme or Sweetwater, Texas, into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, and Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

x 1/2" Wallboard $28.00 per M sq. ft. f.o.b. Sweetwater, Texas, Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

(*Reference notes continued on following page*)

9727 The above prices shall apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated.†

Delivered Carload Prices, St. Louis, Mo. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in St. Louis: Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction.†

Delivered Carload Prices, Kansas City, Mo. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered to Kansas City, Mo.; Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, and Kansas City, Kansas.†

Delivered Carload Prices, Cleveland, O. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in Cleveland, O.; Euclid, O.; North Randall, O.†

Delivered Carload Prices, Chicago, Illinois, and Suburbs; Board in straight or mixed cars delivered to following area, price is same as f.o.b. cars delivered in Chicago: Cook County, Du Page County, and the following towns in Lake County, Illinois; Deerfield, Highland Park, and Lake Forest.

9728 Delivered Carload Prices, Detroit, Michigan, and Suburbs: Board in straight or mixed cars delivered to following area, price is same as f.o.b. cars delivered in Detroit: Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland

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(Reference notes continued from preceding page)

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Mich., add $1.00 per M to prices applying f.o.b. cars, Grand Rapids mill.

(s) On all stop-over cars add to mill price freight rate to final destination regardless of lower rate which might apply to any intermediate point at which stop is made (except where rate to intermediate point is higher, in which event delivered price is mill price plus highest rate to any intermediate point at which stop is made). On stop-over cars add stop-over charge.

z Minimum price 1/4" Wallboard for shipment into following states, deduct $2.00 per M. sq. ft. from mill prices shown on page 1: Montana, Wyoming, Colorado, Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Missouri, and Arkansas.†

county; and Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Minimum Price Cutstock Plasterboard to following markets, as follows: 1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars, Oakfield, N. Y.; and Gypsum, Ohio.

Markets: Buffalo, N. Y.; Niagara and Erie Counties. Rochester, N. Y.; City of Rochester, and Monroe and Wayne Counties, N. Y.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____ _____,

Vice President in Charge of Sales.

† Indicates changes in this reissue.

CFH'

9729

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 28, 1931.

Board License Bulletin No. 1—Cancels Previous Bulletin No. 1—Carload Shipments

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. (s) Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1600 # per M)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	1/2" Gypsum Wallboard (Wt. 2150 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallboard (Wt. 1600 # per M)	3/8" Gypsum Plasterboard (Wt. 1600 # per M)	1/4" Gypsum Plasterboard (Wt. 1050 # per M)	1/2" Gypsum Plasterboard (Wt. 2150 # per M)
Oakfield, N. Y.	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
Plasterco, Va.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, Ohio	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
#Grand Rapids, Mich.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
*Fort Dodge, Ia.	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
*Southard, Okla.	27.00	24.50z	29.50x	35.00	50.00	15.00	15.00	16.25
*Sweetwater, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
*Acme, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
Laramie, Wyo.	33.00	29.00z	— —	— —	55.00	21.50	— —	— —
Loveland, Colo.	34.50	29.50z	39.50	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme or Sweetwater, Texas, into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, and Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930, are lower, use these rates.

x 1/2" Wallboard $28.00 per M sq. ft. f.o.b. Sweetwater, Texas, Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

(Reference notes continued on following page)

9730 The above prices shall apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

Delivered Carload Prices, St. Louis, Mo. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in St. Louis: Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction.

Delivered Carload Prices, Kansas City, Mo. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered to Kansas City, Mo.; Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, and Kansas City, Kansas.

Delivered Carload Prices, Cleveland, O. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in Cleveland, O.; Euclid, O.; North Randall, O.

Delivered Carload Prices, Chicago, Illinois and Suburbs: Board in straight or mixed cars delivered to following area, price is same as f.o.b. cars delivered in Chicago: Cook County, Du Page County, and the following towns in Lake County, Illinois; Deerfield, Highland Park, and Lake Forest.

9731 Delivered Carload Prices, Detroit, Michigan, and Suburbs: Board in straight or mixed cars delivered to following area, price is same as f.o.b. cars delivered in Detroit: Wayne county; and towns of Birmingham, Claw-

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(Reference notes continued from preceding page)

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Mich., add $1.00 per M to prices applying f.o.b. cars, Grand Rapids mill.

(s) On all stop-over cars add to mill price freight rate to final destination regardless of lower rate which might apply to any intermediate point at which stop is made (except where rate to intermediate point is higher, in which event delivered price is mill price plus highest rate to any intermediate point at which stop is made). On stop-over cars add stop-over charge.

z Minimum price 1/4" Wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices shown on page 1: Montana, Wyoming, Colorado, Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Missouri, Arkansas, Kentucky, Tennessee, Mississippi, Alabama, and La.

son, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Minimum Price Cutstock Plasterboard to following markets, as follows: 1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars, Oakfield, N. Y.; and Gypsum, Ohio.

Markets: Buffalo, N. Y.; Niagara and Erie Counties. Rochester, N. Y.; City of Rochester, and Monroe and Wayne Counties, N. Y.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____,

Vice President in Charge of Sales.

† Indicates changes in this reissue.

CFH'

9732 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 8, 1932.

Board License Bulletin No. 1—Cancels Previous Bulletin No. 1—Carload Shipments

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. (s) Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1600# per M	1/4" Gypsum Wallboard (Wt. 1050# per M)	1/2" Gypsum Wallboard (Wt. 2150# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallboard (Wt. 1600# per M)	3/8" Gypsum Plasterboard (Wt. 1600# per M)	1/4" Gypsum Plasterboard (Wt. 1050# per M)	1/2" Gypsum Plasterboard (Wt. 2150# per M)
Oakfield, N. Y.	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
Plasterco, Va.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, Ohio	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
#Grand Rapids, Mich.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
*Fort Dodge, Ia.	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
*Southard, Okla.	27.00	24.50z	29.50x	35.00	50.00	15.00	15.00	16.25
*Sweetwater, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
*Acme, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
Laramie, Wyo.	33.00	29.00z	— —	— —	55.00	21.50	— —	— —
Loveland, Colo.	34.50	29.50z	39.50	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme or Sweetwater, Texas, into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, and Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

Minimum prices for wallboard apply to 32" x 48" board shipped into this area.†

x 1/2" Wallboard $28.00 per M sq. ft. f.o.b. Sweetwater, Texas, Acme, Texas; or Southard, Oklahoma; for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

(Reference notes continued on following page)

9733 The above prices shall apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

Delivered Carload Prices, St. Louis, Mo. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in St. Louis: Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction.

Delivered Carload Prices, Kansas City, Mo. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered to Kansas City, Mo.; Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, and Kansas City, Kansas.

Delivered Carload Prices, Cleveland, O. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in Cleveland, O.; Euclid, O.; North Randall, O.

Delivered Carload Prices, Chicago, Illinois and Suburbs: Board in straight or mixed cars delivered to following area, price is same as f.o.b. cars delivered in Chicago: Cook County, Du Page county, and the following towns in Lake County, Illinois; Deerfield, Highland Park, and Lake Forest.

9734 Delivered Carload Prices, Detroit, Michigan, and Suburbs: Board in straight or mixed cars delivered to following area, price is same as f.o.b. cars delivered in Detroit: Wayne county; and towns of Birmingham, Claw-

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(Reference notes continued from preceding page)

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Mich., add $1.00 per M to prices applying f.o.b. cars, Grand Rapids mill.

(s) On all stop-over cars add to mill price freight rate to final destination regardless of lower rate which might apply to any intermediate point at which stop is made (except where rate to intermediate point is higher, in which event delivered price is mill price plus highest rate to any intermediate point at which stop is made). On stop-over cars add stop-over charge.

z Minimum price 1/4" Wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices shown on page 1: Montana, Wyoming, Colorado, Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Missouri, Arkansas, Kentucky, Tennessee, Mississippi, Alabama, and Louisiana; also city of Superior, Wisconsin.†

son, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Minimum Price Cutstock Plasterboard to following markets, as follows: 1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars, Oakfield, N. Y.; and Gypsum, Ohio.

Markets: Buffalo, N. Y.; Niagara and Erie Counties. Rochester, N. Y.; City of Rochester, and Monroe and Wayne Counties, N. Y.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____,

Vice President in Charge of Sales.

† Indicates changes in this reissue.

CFH'

9735 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 5, 1932.

Board License Bulletin No. 1—Cancels Previous Bulletin No. 1 and Supplements—Carload Shipments

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. (s) Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1600# per M)	1/4" Gypsum Wallboard (Wt. 1050# per M)	1/2" Gypsum Wallboard (Wt. 2150# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallboard (Wt. 1600# per M)	3/8" Gypsum Plasterboard (Wt. 1600# per M)	1/4" Gypsum Plasterboard (Wt. 1050# per M)	1/2" Gypsum Plasterboard (Wt. 2150# per M)
Oakfield, N. Y.	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
Plasterco, Va.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, Ohio	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
#Grand Rapids, Mich.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
*Fort Dodge, Ia.	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
*Southard, Okla.	27.00	24.50z	29.50x	35.00	50.00	15.00	15.00	16.25
*Sweetwater, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
*Acme, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
Laramie, Wyo.	33.00	29.00z	— —	— —	55.00	21.50	— —	— —
Loveland, Colo.	34.50	29.50z	39.50	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme or Sweetwater, Texas, into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, and Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

Minimum prices for wallboard apply to 32" x 48" and 36" x 48" sizes shipped into this area, except where used for specific roof jobs, in which event plasterboard prices shall apply.

(*Reference notes continued on following page*)

9736 The above prices shall apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

Delivered Carload Prices, St. Louis, Mo. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in St. Louis: Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction.

Delivered Carload Prices, Kansas City, Mo. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered to Kansas City, Mo.; Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, and Kansas City, Kansas.

Delivered Carload Prices, Cleveland, O. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in Cleveland, O.; Euclid, O.; North Randall, O.

Delivered Carload Prices, Chicago, Illinois and Suburbs: Board in straight or mixed cars delivered to following area, price is same as f.o.b. cars delivered in Chicago: Cook County, Du Page county, and the following towns in Lake County, Illinois; Deerfield, Highland Park, and Lake Forest.

9737 Delivered Carload Prices, Detroit, Michigan, and Suburbs: Board in straight or mixed cars delivered

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(Reference notes continued from preceding page)

x 1/2" Wallboard $28.00 per M sq. ft. f.o.b. Sweetwater, Texas, Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Mich., add $1.00 per M to prices applying f.o.b. cars, Grand Rapids mill.

(s) On all stop-over cars add to mill price freight rate to final destination regardless of lower rate which might apply to any intermediate point at which stop is made (except where rate to intermediate point is higher, in which event delivered price is mill price plus highest rate to any intermediate point at which stop is made). On stop-over cars add stop-over charge.

z Minimum price 1/4" Wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices shown on page 1: Montana, Wyoming, Colorado, Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Missouri, Arkansas, Kentucky, Tennessee, Mississippi, Alabama, Louisiana; Wisconsin, Upper Michigan, Virginia, W. Va., Okla. & Texas.

to following area, price is same as f.o.b. cars delivered in Detroit: Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Minimum Price Cutstock Plasterboard to following markets, as follows: 1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars, Oakfield, N. Y.; and Gypsum, Ohio.

Markets: Buffalo, N. Y.; Niagara and Erie Counties. Rochester, N. Y.; City of Rochester, and Monroe and Wayne Counties, N. Y.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____ _____,

Vice President in Charge of Sales.

† Indicates changes in this reissue.

CFH'

9738 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 12, 1932.

Board License Bulletin No. 1—Cancels Previous Bulletin No. 1 and Supplements Thereto—Carload Shipments

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight (including surcharge) from that mill to destination. In stop-over cars delivered price for any part of car is C. L. delivered price as above defined to point of delivery of that part of car. In every case rates, surcharges and minimum weights as shown in published freight tariffs apply.

Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1600 # per M)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	1/2" Gypsum Wallboard (Wt. 2150 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallboard (Wt. 1600 # per M)	3/8" Gypsum Plasterboard (Wt. 1600 # per M)	1/4" Gypsum Plasterboard (Wt. 1050 # per M)	1/2" Gypsum Plasterboard (Wt. 2150 # per M)
(y) Oakfield, N. Y.	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
Plasterco, Va.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, Ohio	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
#Grand Rapids, Mich.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
*Fort Dodge, Ia.	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
*Southard, Okla.	27.00	24.50z	29.50x	35.00	50.00	15.00	15.00	16.25
*Sweetwater, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
*Acme, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
Laramie, Wyoming	33.00	29.00z	— —	— —	55.00	21.50	— —	— —
Loveland, Colo.	34.50	29.50z	39.50	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme, or Sweetwater, Texas, into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

(*Reference notes continued on following page*)

9739 The above prices shall apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Minimum Price Cutstock Plasterboard to following counties: 1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars, Oakfield, N. Y. for shipment to Niagara, Erie, Monroe, and Wayne counties, N. Y.

Pickup price at Oakfield or delivered by truck to dealer's warehouse located in counties listed next above, $14.50 per M sq. ft. for 1/4" or 3/8" cutstock.

Pickup price at Buffalo warehouses, for destinations in counties listed in this paragraph, 1/4", $15.45 per M sq. ft.; 3/8", $15.94 per M sq. ft.

(2) Delivered Carload Prices, St. Louis, Mo. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in
9740 St. Louis: Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction.

(Reference notes continued from preceding page)

Minimum prices for wallboard apply to 32" x 48" and 36" x 48" sizes shipped into this area, except where used for specific roof jobs, in which event plasterboard prices shall apply.

(x) 1/2" Wallboard $28.00 per M sq. ft. f.o.b. Sweetwater, Texas, Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

(z) Minimum prices 1/4" wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices shown on page 1: Montana, Wyoming, Colorado, Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Missouri, Arkansas, Kentucky, Tennessee, Mississippi, Alabama, Florida, Georgia, Louisiana; Wisconsin, Upper Michigan, Virginia, W. Virginia, Oklahoma and Texas.

(y) Minimum price wallboard and Plasterboard in straight cars shipped by rail to dealer's warehouse or nearest siding in Metropolitan New York—New Jersey Area (counties as listed), $2.00 per M less than prices applying to mixed and pool cars f.o.b. Oakfield, N. Y. This applies to New York City, also Westchester, Rockland, Nassau, and Suffolk counties, New York; also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties, New Jersey.

On pool cars or mixed cars in this area, minimum quantity is 5000 sq. ft. of patented board shipped to one destination.

For delivered price to Kings county, New York, use lowest board rate from Oakfield, N. Y., to Brooklyn.

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids mill.

(3) Delivered Carload Prices, Kansas City, Mo. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered to Kansas City, Mo.; Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, and Kansas City, Kansas.

(4) Delivered Carload Prices, Cleveland, O. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in Cleveland, O.; Euclid, O.; North Randall, O.

(5) Century of Progress: Minimum prices to contractors, for gypsum wallboard, f.o.b. cars, Chicago, Illinois, Century of Progress siding, as follows:

3/8" Gypsum Wallboard ..... $31.82 per M sq. ft.

Tongue & Grooved, primed one coat in accordance with specifications as furnished for Electrical Building for Century of Progress Exhibition.

1/2" Gypsum Wallboard ..... $44.12 per M sq. ft.
1/2" Gypsum Wallboard, bent and formed at Mill, primed as above ..... 94.12 per M sq. ft.

(6) Metropolitan Detroit Area: Minimum price Wallboard and/or Plasterboard delivered by rail to dealer's warehouse or nearest railroad siding in straight, mixed, or pool cars; (also applies to carload deliveries by truck to one dealer's warehouse):

	Price
3/8" Gypsum Wallboard	$29.24
1/4" Gypsum Wallboard	25.97
1/2" Gypsum Wallboard	32.51
3/8" Tiled Gypsum Wallboard	52.24
3/8" Gypsum Plasterboard	17.24
1/4" Gypsum Plasterboard	16.47
1/2" Gypsum Plasterboard	19.26

Applies to Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(7) Metropolitan Chicago Area: Minimum price, deliveries by rail to dealer's warehouse or nearest railroad siding in straight, mixed or pool cars:

	In 30-Ton Minimum cars	In 20-Ton Minimum Cars
3/8" Gypsum Wallboard	$29.32	$29.80
1/4" Gypsum Wallboard	26.02	26.34
1/2" Gypsum Wallboard	32.62	33.26
3/8" Tiled Gypsum Wallboard	52.32	52.80
3/8" Gypsum Plasterboard	17.32	17.80
1/4" Gypsum Plasterboard	16.52	16.84
1/2" Gypsum Plasterboard	19.37	20.01

Applies to Cook and DuPage counties, Ill., Lake County, Indiana; also the following towns in Lake county, Illinois: Deerfield, Highland Park, and Lake Forest.

9741 (8) Allowances, etc.: The minimum price fixed by licensor for patented board and/or lath shall be the minimum net cost to licensee's customers and such net cost shall not be reduced below such minimum price or prices by or through allowance, payment or rebate to customers for use of railroad siding, for switching performed after car has been originally set for unloading, for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented board and/or lath, or for stopover charges except that stopover charges need not be included in the minimum price in shipments to Michigan, Wisconsin, Illinois, Indiana, and Ohio. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers, or the extension of other than regular terms to any such dealer or buyer.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

——— ———, *Vice-President.*

9742 UNITED STATES GYPSUM COMPANY.
300 West Adams Street
CHICAGO

FEBRUARY 4, 1933.

Board License Bulletin No. 1—Cancels Previous Bulletin No. 1—Carload Shipments

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight (including surcharge) from that mill to destination. In stop-over cars delivered price for any part of car is C. L. delivered price as above defined to point of delivery of that part of car. In every case rates, surcharges and minimum weights as shown in published freight tariffs apply.

Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1600 # per M)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	1/2" Gypsum Wallboard (Wt. 2150 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallboard (Wt. 1600 # per M)	3/8" Gypsum Plasterboard (Wt. 1600 # per M)	1/4" Gypsum Plasterboard (Wt. 1050 # per M)	1/2" Gypsum Plasterboard (Wt. 2150 # per M)
(y) Oakfield, N. Y.	27.00	24.50	29.50	35.00.	50.00	15.00	15.00	16.25
Plasterco, Va.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, Ohio	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
#Grand Rapids, Mich.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
*Fort Dodge, Ia.	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
*Southard, Okla.	27.00	24.50z	29.50x	35.00	50.00	15.00	15.00	16.25
*Sweetwater, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
*Acme, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
Laramie, Wyoming	33.00	29.00z	— —	— —	55.00	21.50	— —	— —
Loveland, Colo.	34.50	29.50z	39.50	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme, or Sweetwater, Texas, into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

Minimum prices for wallboard apply to 32" x 48" and 36" x 48" sizes shipped into this area, except where used for specific roof jobs, in which event plasterboard prices shall apply.

(Reference notes continued on following page)

9743 The above prices shall apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Minimum Price Cutstock Plasterboard to following counties: 1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars, Oakfield, N. Y. for shipment to Niagara, Erie (including the portion of Gowanda, New York, in Cattaraugua County), Monroe, and Wayne counties, N. Y.†

Pickup price at Oakfield or delivered by truck to dealer's warehouse located in counties listed next above, $14.50 per M sq. ft. for 1/4" or 3/8" cutstock.

Pickup price at Buffalo warehouses, for destinations in counties listed in this paragraph, 1/4", $15.45 per M sq. ft.; 3/8", $15.94 per M sq. ft.

(2) Delivered Carload Prices, St. Louis, Mo. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in
9744 St. Louis: Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction.

(3) Delivered Carload Prices, Kansas City, Mo. and Suburbs: Board in straight or mixed cars delivered to fol-

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(Reference notes continued from preceding page)

(x) 1/2" Wallboard $28.00 per M sq. ft. f.o.b. Sweetwater, Texas, Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

(z) Minimum prices 1/4" wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices shown on page 1: Montana, Wyoming, Colorado, Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Missouri, Arkansas, Kentucky, Tennessee, Mississippi, Alabama, Florida; Georgia, Louisiana; Wisconsin, Upper Michigan, Virginia, W. Virginia, Oklahoma, and Texas.

(y) Minimum price wallboard and Plasterboard in straight cars shipped by rail to dealer's warehouse or nearest siding in Metropolitan New York—New Jersey Area (counties as listed), $2.00 per M less than prices applying to mixed and pool cars f.o.b. Oakfield, N. Y. This applies to New York City, also Westchester, Rockland, Nassau, and Suffolk counties, New York; also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties, New Jersey.

On pool cars or mixed cars in this area, minimum quantity is 5000 sq. ft. of patented board shipped to one destination.

For delivered price to Kings county, New York, use lowest board rate from Oakfield, N. Y., to Brooklyn.

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids mill.

lowing stations, price is same as f.o.b. cars delivered to Kansas City, Mo.; Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, and Kansas City, Kansas.

(4) Delivered Carload Prices, Cleveland, O. and Suburbs: Board in straight or mixed cars delivered to following stations, price is same as f.o.b. cars delivered in Cleveland, O.; Euclid, O.; North Randall, O.

(5) Century of Progress: Minimum prices to contractors, for gypsum wallboard, f.o.b. cars, Chicago, Illinois, Century of Progress siding, as follows:

3/8" Gypsum Wallboard ..... $31.82 per M sq. ft.

Tongue & Grooved, primed one coat in accordance with specifications as furnished for Electrical Building for Century of Progress Exhibition.

1/2" Gypsum Wallboard ..... $44.12 per M sq. ft.
1/2" Gypsum Wallboard, bent and formed at Mill, primed as above ..... 94.12 per M sq. ft.

(6) Metropolitan Detroit Area: Minimum price Wallboard and/or Plasterboard delivered by rail to dealer's warehouse or nearest railroad siding in straight, mixed, or pool cars; (also applies to carload deliveries by truck to one dealer's warehouse):

	Price
3/8" Gypsum Wallboard	$29.24
1/4" Gypsum Wallboard	25.97
1/2" Gypsum Wallboard	32.51
3/8" Tiled Gypsum Wallboard	52.24
3/8" Gypsum Plasterboard	17.24
1/4" Gypsum Plasterboard	16.47
1/2" Gypsum Plasterboard	19.26

Applies to Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb County, Michigan.

(7) Pittsburgh, Pennsylvania and Suburbs: Minimum price delivered by rail to dealer's warehouse or nearest railroad siding in straight, mixed, or pool cars, Pittsburgh, Pennsylvania, and following suburbs: Aspinwall, Bellvue, Ben Avon, Braddock, Castle Shannon, East Liberty, Emsworth, Etna, Fairhaven, Hays, Homestead, McKees Rocks, Millvale, Munhall, Option, Rankin, Sharpsburg, West Homestead, West Liberty, Wilkinsburg.

3/8" Gypsum Wallboard	$29.80
1/4" Gypsum Wallboard	26.34
1/2" Gypsum Wallboard	33.26
3/8" Tiled Gypsum Wallboard	52.80
3/8" Gypsum Plasterboard	17.80
1/4" Gypsum Plasterboard	16.84
1/2" Gypsum Plasterboard	20.01

(8) Metropolitan Chicago Area: Minimum price, deliveries by rail to dealer's warehouse or nearest railroad siding in straight, mixed, or pool cars:

9745

	In 30-Ton Minimum cars	In 20-Ton Minimum Cars
3/8" Gypsum Wallboard	$29.32	$29.80
1/4" Gypsum Wallboard	26.02	26.34
1/2" Gypsum Wallboard	32.62	33.26
3/8" Tiled Gypsum Wallboard	52.32	52.80
3/8" Gypsum Plasterboard	17.32	17.80
1/4" Gypsum Plasterboard	16.52	16.84
1/2" Gypsum Plasterboard	19.37	20.01

Applies to Cook and DuPage counties, Ill., Lake County, Indiana; also the following towns in Lake county, Illinois; Deerfield, Highland Park, and Lake Forest.

(9) Baltimore, Maryland Suburbs: Delivered by rail to following stations minimum price is same as f.o.b. cars delivered in Baltimore, Maryland: Elkridge, Maryland, and Glen Burnie, Maryland.†

(10) Allowances, etc.: The minimum price fixed by licensor for patented board and/or lath shall be the minimum net cost to licensee's customers and such net cost shall not be reduced below such minimum price or prices by or through allowance, payment or rebate to customers for use of railroad siding, for switching performed after car has been originally set for unloading, for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented board and/or lath, or for stopover charges except that stopover charges need not be included in the minimum price in shipments to Michigan, Wisconsin, Illinois, Indiana, and Ohio; also Davenport and Dubuque, Iowa. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers, or the extension of other than regular terms to any such dealer or buyer.†

(11) Dunnage: Gypsum boards used for dunnage, not invoiced to the customer, shall be plainly marked on the face side with visible red stamp or label firmly fixed on each of said boards showing the word "Dunnage" in letters at least three (3) inches high.†

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____ _____,

Vice-President.

9746 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 31, 1933.

Board License Bulletin No. 1—Cancels Previous Bulletin No. 1—Carload Shipments

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight (including surcharge) from that mill to destination. In stop-over cars delivered price for any part of car is C. L. delivered price as above defined to point of delivery of that part of car. In every case rates, surcharges and minimum weights as shown in published freight tariffs apply.

Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1600# per M)	1/4" Gypsum Wallboard (Wt. 1050# per M)	1/2" Gypsum Wallboard (Wt. 2150# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallboard (Wt. 1600# per M)	3/8" Gypsum Plasterboard (Wt. 1600# per M)	1/4" Gypsum Plasterboard (Wt. 1050# per M)	1/2" Gypsum Plasterboard (Wt. 2150# per M)
(y) Oakfield, N. Y.	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
Plastereo, Va.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, Ohio	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
# Grand Rapids, Mich.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
* Fort Dodge, Ia.	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
* Southard, Okla.	27.00	24.50z	29.50x	35.00	50.00	15.00	15.00	16.25
* Sweetwater, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
* Acme, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
Laramie, Wyo.	33.00	29.00z	— —	— —	55.00	21.50	— —	— —
Loveland, Colo.	34.50	29.50z	39.50	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme, or Sweetwater, Texas into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

(*Reference notes continued on following page*)

9747 The above prices shall apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

†(1) 32″x48″ Gypsum Board: In all areas 32″x48″ gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to minimum plasterboard price for such specific jobs.

(b) In states of Illinois, Indiana, Ohio, Pennsylvania, New York, New Jersey, Kentucky, West Virginia, and lower Michigan, 32″x48″ board, if grey surfaced and round edged, is subject to minimum plasterboard price.

†(2) 36″x48″ Gypsum Board: 36″x48″ is standard plasterboard size in all states for use on specific roof jobs only and is subject to plasterboard minimum price for such specific roof jobs.

†(3) Minimum Price Cutstock Plasterboard to following counties: 1/4″ and 3/8″—$12.50 per M sq. ft. f.o.b. cars, Oakfield, N. Y. for shipment to Niagara, Erie (including the portion of Gowanda, New York, in Cattaraugus county), Monroe, and Wayne counties, N. Y.

(*Reference notes continued from preceding page*)

(x) 1/2″ Wallboard $28.00 per M sq. ft. f.o.b. Sweetwater, Texas; Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

(z) Minimum prices 1/4″ wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices shown on page 1; Montana, Wyoming, Colorado, Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Missouri, Arkansas, Kentucky, Tennessee, Mississippi, Alabama, Florida, Georgia, Louisiana, Wisconsin, Upper Michigan, Virginia, W. Virginia, Oklahoma and Texas.

(y) Minimum price wallboard and Plasterboard in straight cars shipped by rail to dealer's warehouse or nearest siding in Metropolitan New York—New Jersey Area (Counties as listed), $2.00 per M less than prices applying to mixed and pool cars f.o.b. Oakfield, N. Y. This applies to New York City, also Westchester, Rockland, Nassau, and Suffolk Counties, New York; also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties, New Jersey.

On pool cars or mixed cars in this area, minimum quantity is 5000 sq. ft. of patented board shipped to one destination.

For delivered price to Kings county, New York, use lowest board rate from Oakfield, N. Y., to Brooklyn.

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

Pickup price at Oakfield or delivered by truck to dealer's warehouse located in counties listed next above, $14.50† per M sq. ft. for 1/4" or 3/8" cutstock.

9748 Pickup price at Buffalo warehouses, for destinations in counties listed in this paragraph, 1/4" $15.45† per M sq. ft.; 3/8", $15.95† per M sq. ft.

† Note †: These prices do not apply to 32"x48" board. See Paragraph (1).

(4) Century of Progress: Minimum prices to contractors, for gypsum wallboard, f.o.b. cars, Chicago, Illinois, Century of Progress siding, as follows:

3/8" Gypsum Wallboard	$31.82 per M sq. ft.
†3/8" Gypsum Wallboard, bent and formed at mill (not primed)	81.82 per M sq. ft.

Tongue and Grooved, primed one coat in accordance with specifications as furnished for Electrical Building for Century of Progress Exhibition.

1/2" Gypsum Wallboard	44.12 per M sq. ft.
1/2" Gypsum Wallboard, bent and formed at mill, primed as above	94.12 per M sq. ft.

†Primed One Side: The above price for primed board covers priming one coat both sides and four edges. Price of same boards primed one side only, and four edges, is $2.75 per M sq. ft. less than minimum prices shown above.

(6) Dunnage: Gypsum boards used for dunnage, not invoiced to the customer, shall be plainly marked on the face side with visible red stamp or label firmly fixed on each of said boards showing the word "Dunnage" in letters at least three (3) inches high.

†(7) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

9749 *Delivered Carload Minimum Prices in—*	*Same as—*
†College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
†Bristol, Tenn.	Bristol, Va.
†Cook and DuPage counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois; Deerfield, Highland Park, and Lake Forest.	Chicago, Ill. Use 14½¢ rate (this includes emergency charge) to figure minimum price in straight or mixed cars. This applies to 20-Ton cars or more.
†Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, O.; North Randall, O.	Cleveland, O.
Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Michigan
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, and Kansas City, Kansas.	Kansas City, Mo.
Aspinwall, Bellvue, Ben Avon, Braddock, Castle Shannon, East Liberty, Emsworth, Etna, Fairhaven, Hays, Homestead, McKees Rocks, Millvale, Munhall, Option, Rankin, Sharpsburg, West Homestead, West Liberty, Wilkinsburg, Pa.	Pittsburgh, Pa. Use 17½¢ freight rate (this includes emergency charge) to figure minimum price in straight or mixed cars.
†South Windham, Maine	Portland, Maine
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction, Mo.	St. Louis, Mo.
†Armory & Indian Orchard, Mass.	Springfield, Mass.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____,

Vice President.

† Indicates changes in this reissue.

9750

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 3, 1933.

Board License Bulletin No. 1—Cancels Previous Bulletin No. 1—Carload Shipments

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight (including surcharge) from that mill to destination. In stop-over cars delivered price for any part of car is C. L. delivered price as above defined to point of delivery of that part of car. In every case rates, surcharges and minimum weights as shown in published freight tariffs apply.

Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1600# per M)	1/4" Gypsum Wallboard (Wt. 1050# per M)	1/2" Gypsum Wallboard (Wt. 2150# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallboard (Wt. 1600# per M)	3/8" Gypsum Plasterboard (Wt. 1600# per M)	1/4" Gypsum Plasterboard (Wt. 1050# per M)	1/2" Gypsum Plasterboard (Wt. 2150# per M)
(y) Oakfield, N. Y.	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
Plasterco, Va.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, Ohio	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
# Grand Rapids, Mich.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
* Fort Dodge, Ia.	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
* Southard, Okla.	27.00	24.50z	29.50x	35.00	50.00	15.00	15.00	16.25
* Sweetwater, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
* Acme, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
Laramie, Wyo.	33.00	29.00z	— —	— —	55.00	21.50	— —	— —
Loveland, Colo.	34.50	29.50z	39.50	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme, or Sweetwater, Texas into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

(z) 1/2" Wallboard $28.00 per M sq. ft. f.o.b. Sweetwater, Texas; Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

(*Reference notes continued on following page*)

9751 The above prices shall apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) 32"x48" Gypsum Board. In all areas 32"x48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to minimum plasterboard price for such specific jobs.

(b) In states of Illinois, Indiana, Ohio, Pennsylvania, New York, New Jersey, Kentucky, West Virginia, and lower Michigan, 32"x48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(2) 36"x48" Gypsum Board. 36"x48" is standard plasterboard size in all states for use on specific roof jobs only and is subject to plasterboard minimum price for such specific roof jobs.

(3) Minimum Price Cutstock Plasterboard‡ to following counties: 1/4" and 3/8"—$12.50‡ per M sq. ft. f.o.b. cars, Oakfield, N. Y. for shipment to Niagara, Erie (including the portion of Gowanda, New York, in Cattaraugus
9752 county), Monroe, and Wayne counties, N. Y.

Pickup price at Oakfield or delivered by truck to dealer's warehouse located in counties listed next above, $14.50‡ per M sq. ft. for 1/4" or 3/8" cutstock.

(Reference notes continued from preceding page)

(x) Minimum prices 1/4" wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices shown on page 1; Kansas, Nebraska, S. Dakota, No. Dakota, Minnesota, Iowa, Missouri, Arkansas, Kentucky, Tennessee, Mississippi, Alabama, Florida, Georgia, N. Carolina, S. Carolina, Louisiana, Wisconsin, Upper Michigan, Virginia, W. Virginia, Oklahoma and Texas.†
Deduct $4.50 per M sq. ft. from mill prices shown on page 1; Montana, Wyoming, Colorado, New Mexico, Idaho, Utah and Arizona.†

(y) Minimum price wallboard and Plasterboard in straight cars shipped by rail to dealer's warehouse or nearest siding in Metropolitan New York—New Jersey Area (Counties as listed), $2.00 per M less than prices applying to mixed and pool cars f.o.b. Oakfield, N. Y. This applies to New York City, also Westchester, Rockland, Nassau, and Suffolk Counties, New York; also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties, New Jersey.
On pool cars or mixed cars in this area, minimum quantity is 5000 sq. ft. of patented board shipped to one destination.
For delivered price to Kings county, New York, use lowest board rate from Oakfield, N. Y., to Brooklyn.

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

Pickup price at Buffalo warehouses, for destinations in counties listed in this paragraph, 1/4", $15.45‡ per M sq. ft.; 3/8", $15.94‡ per M sq. ft.

Note ‡ : These prices do not apply to 32"x48" board. See Paragraph (1).

(4) Century of Progress: Minimum prices to contractors, for gypsum wallboard, f.o.b. cars, Chicago, Illinois, Century of Progress siding, as follows:

3/8" Gypsum Wallboard	$31.82 per M sq. ft.
3/8" Gypsum Wallboard, bent and formed at mill (not primed)	81.82 per M sq. ft.

Tongue and Grooved, primed one coat in accordance with specification as furnished for Electrical Building for Century of Progress Exhibition.

1/2" Gypsum Wallboard	44.12 per M sq. ft.
1/2" Gypsum Wallboard, bent and formed at mill, primed as above	94.12 per M sq. ft.

Primed One Side: The above price for primed board covers priming one coat both sides and four edges. Price of same boards primed one side only, and four edges, is $2.75 per M sq. ft. less than minimum prices shown above.

(5) Allowances, etc.: The minimum price fixed by licensor for patented board and/or lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding, for switching performed after car has been originally set for unloading, (except in switching limits of Minneapolis and St. Paul, Minnesota, pool cars are permitted one switch at manufacturer's expense), for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented board and/or lath, or for stop-over charges except that stopover charges need not be included in the minimum price in shipments to Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, and South Dakota. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers, or the extension of other than regular terms to any such dealer or buyer.

(6) Dunnage: Gypsum boards used for dunnage, not invoiced to the customer, shall be plainly marked on t...

face side with visible red stamp or label firmly fixed on each of said boards showing the word "Dunnage" in letters at least three (3) inches high.

(7) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois: Deerfield, Highland Park, and Lake Forest.	Chicago, Ill. Use 14½¢ rate (this includes emergency charge) to figure minimum price in straight or mixed cars. This applies to 20-Ton cars or more.
9753 Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, O.; North Randall, O.	Cleveland, O.
Wayne county; and towns of Birmingham, Dawson, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Michigan
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, and Kansas City, Kansas.	Kansas City, Mo.
Aspinwall, Bellvue, Ben Avon, Braddock, Castle Shannon, East Liberty, Emsworth, Etna, Fairhaven, Hays, Homestead, McKees Rocks, Millvale, Munhall, Option, Rankin, Sharpsburg, West Homestead, West Liberty, Wilkinsburg, Pa.	Pittsburgh, Pa. Use 17½¢ freight rate (this includes emergency charge) to figure minimum price in straight or mixed cars.
South Windham, Maine	Portland, Maine
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction, Mo.	St. Louis, Mo.
†Armory, Indian Orchard, and Oak Street, Mass.	Springfield, Mass.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____,

Vice President.

† Indicates changes in this reissue.

9754 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 28, 1933.

Carload Shipments
Board License Bulletin No. 1—Cancels Previous Bulletin No. 1—Cancels All Previous Supplements—Except: Supplement Dated Sept. 5, 1933—Supplement Dated Oct. 24, 1932

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective midnight September 30, 1933, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight (including surcharge) from that mill to destination. In stop over cars delivered price for any part of car is C. L. delivered price as above defined to point of delivery of that part of car. In every case rates and minimum weights as shown in published railroad freight tariffs apply.

Prices f.o.b. cars:	3/8" Gypsum Wallboard (Wt. 1600 # per M)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	1/2" Gypsum Wallboard (Wt. 2150 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M). See Note **	3/8" Tiled Gypsum Wallboard (Wt. 1600 # per M)	3/8" Gypsum Plasterboard (Wt. 1600 # per M)	1/4" Gypsum Plasterboard (Wt. 1050 # per M)	1/2" Gypsum Plasterboard (Wt. 2150 # per M)
(y) Oakfield, N. Y.	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
Plasterco, Va.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
Gypsum, Ohio	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
# Grand Rapids, Mich.	27.00	24.50z	29.50	— —	50.00	15.00	15.00	16.25
* Fort Dodge, Ia.	27.00	24.50z	29.50	35.00	50.00	15.00	15.00	16.25
* Southard, Okla.	27.00	24.50z	29.50x	35.00	50.00	15.00	15.00	16.25
* Sweetwater, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
* Acme, Texas	27.00	24.50z	29.50x	— —	50.00	15.00	15.00	16.25
Laramie, Wyo.	33.00	29.00z	— —	— —	55.00	21.50	— —	— —
Loveland, Colo.	34.50	29.50z	39.50	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme, or Sweetwater, Texas into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

9755 The above prices shall apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) 32″x48″ Gypsum Board. In all areas 32″x48″ gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to minimum plasterboard price for such specific jobs.

(b) In states of Illinois, Indiana, Ohio, Pennsylvania, New York, New Jersey, Kentucky, West Virginia, and lower Michigan, 32″x48″ board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(2) 36″x48″ Gypsum Board. 36″x48″ is standard plasterboard size in all states to gypsum roof contractors for use on specific gypsum roof jobs only and is subject to plasterboard minimum price for such specific gypsum roof jobs.†

(3) Minimum Price Cutstock Plasterboard‡ to following counties: 1/4″ and 3/8″—$12.50‡ per M sq. ft. f.o.b. cars, Oakfield, N. Y. for shipment to Niagara, Erie (in-

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** 3/4″ Gypsum Plasterboard $20.00 per M sq. ft. f.o.b. same mills as shown for 3/4″ Gypsum Wallboard. Weight 3300# per M sq. ft.†

(x) 1/2″ Wallboard $28.00 per M sq. ft. f.o.b. Sweetwater, Texas; Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

(z) Minimum prices 1/4″ wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices shown on page 1; Kansas, Nebraska, S. Dakota, No. Dakota, Minnesota, Iowa, Missouri, Arkansas, Kentucky, Tennessee, Mississippi, Alabama, Florida, Georgia, N. Carolina, S. Carolina, Louisiana, Wisconsin, Upper Michigan, Virginia, W. Virginia, Oklahoma and Texas.

Deduct $4.50 per M sq. ft. from mill prices shown on page 1 for shipments into following states; Montana, Wyoming, Colorado, New Mexico, Idaho, Utah and Arizona.

(y) Minimum price wallboard and Plasterboard in straight cars shipped by rail to dealer's warehouse or nearest siding in Metropolitan New York—New Jersey Area (Counties as listed), $2.00 per M less than prices applying to mixed and pool cars f.o.b. Oakfield, N. Y. This applies to New York City, also Westchester, Rockland, Nassau, and Suffolk Counties, New York; also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties, New Jersey.

On pool cars or mixed cars in this area, minimum quantity is 5000 sq. ft. of patented board shipped to one destination.

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

cluding the portion of Gowanda, New York, in Cat-
9756 taraugus county), Monroe, and Wayne counties, N. Y.

Pickup price at Oakfield or delivered by truck to dealer's warehouse located in counties listed next above, $14.50‡ per M sq. ft. for 1/4" or 3/8" cutstock.

Pickup price at Buffalo warehouses, for destinations in counties listed in this paragraph, 1/4", $15.34‡ per M sq. ft.; 3/8", $15.78‡ per M sq. ft.†

Note ‡ : These prices do not apply to 32"x48" board. See Paragraph (1).

(4) Century of Progress: Minimum prices to contractors, for gypsum wallboard, f.o.b. cars, Chicago, Illinois, Century of Progress siding, as follows:

3/8" Gypsum Wallboard	$31.58 per M sq. ft.†
3/8" Gypsum Wallboard, bent and formed at mill (not primed)	81.58 per M sq. ft.†

Tongue and Grooved, primed one coat in accordance with specification as furnished for Electrical Building for Century of Progress Exhibition.

1/2" Gypsum Wallboard	$43.80 per M sq. ft.†
1/2" Gypsum Wallboard, bent and formed at mill, primed as above	93.80 per M sq. ft.†

Primed One Side: The above price for primed board covers priming one coat both sides and four edges. Price of same boards primed one side only, and four edges, is $2.75 per M sq. ft. less than minimum prices shown above.

(5) Allowances, etc.: The minimum price fixed by licensor for patented board and/or lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding, for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented board and/or lath, or for stop-over charges except that stop-over charges need not be included in the minimum price in shipments to Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, and Nebraska. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers, or the extension of other than reg-

ular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

(6) Dunnage: Gypsum boards used for dunnage, not invoiced to the customer, shall be plainly marked on the face side with visible red stamp or label firmly fixed on each of said boards showing the word "Dunnage" in letters at least three (3) inches high.

(7) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
9757 Cook and DuPage counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois: Deerfield, Highland Park, and Lake Forest.	†Chicago, Ill. Use 13¢ rate to figure minimum price in straight or mixed cars. This applies to 20-Ton cars or more.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, O.; North Randall, O.	Cleveland, O.
Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Michigan
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	†Brooklyn, N. Y.
South Windham, Maine	Portland, Maine
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, and Oak Street, Mass.	Springfield, Mass.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____,

Vice President.

† Indicates changes in this reissue.

9758 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 10, 1934.

Carload Shipments
Board License Bulletin No. 1—Cancels Bulletin No. 1, Dated Sept. 28, 1933—Cancels All Previous Supplements Except Supplement Dated Oct. 24, 1932 and Supplement Dated March 14, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective April 25, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. In stop-over cars delivered price for any part of car is C. L. delivered price as above defined to point of delivery of that part of car. In every case rates and minimum weights as shown in published railroad freight tariffs apply.

Prices f.o.b. cars:	⅜" Gypsum Wallboard (Wt. 1600# per M)	¼" Gypsum Wallboard (Wt. 1050# per M)	½" Gypsum Wallboard (Wt. 2150# per M)	¾" Gypsum Wallboard (Wt. 3300# per M) See Note **	⅜" Tiled Gypsum Wallboard (Wt. 1600# per M)	⅜" Gypsum Plasterboard (Wt. 1600# per M)	¼" Gypsum Plasterboard (Wt. 1050# per M)	½" Gypsum Plasterboard (Wt. 2150# per M)
†(y) Oakfield, N. Y.	28.50	24.50	31.00	36.50	50.00	15.00	15.00	16.25
† Plasterco, Va.	28.50	24.50	31.00	— —	50.00	15.00	15.00	16.25
† Gypsum, Ohio	28.50	24.50	31.00	36.50	50.00	15.00	15.00	16.25
† #Grand Rapids, Mich.	28.50	24.50	31.00	— —	50.00	15.00	15.00	16.25
† * Fort Dodge, Ia.	28.50	24.50z	31.00	36.50	50.00	15.00	15.00	16.25
† * Southard, Okla.	28.50	24.50z	31.00x	36.50	50.00	15.00	15.00	16.25
† * Sweetwater, Tex.	28.50	24.50z	31.00x	— —	50.00	15.00	15.00	16.25
† * Acme, Texas	28.50	24.50z	31.00x	— —	50.00	15.00	15.00	16.25
† Laramie, Wyo.	34.50	31.00z	— —	— —	55.00	21.50	— —	— —
† Loveland, Colo.	36.00	31.50z	41.00	— —	57.50	22.00	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme, or Sweetwater, Texas into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

(Reference notes continued on following page)

9759 The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) 32"x48" Gypsum Board. In all areas 32"x48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to minimum plasterboard price for such specific jobs.

(b) In states of Illinois, Indiana, Ohio, Pennsylvania, New York, New Jersey, Kentucky, West Virginia, and Lower Michigan, 32"x48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(2) 36"x48" Gypsum Board. 36"x48" is standard plasterboard size in all states to gypsum roof contractors for use on specific gypsum roof jobs only and is subject to plasterboard minimum price for such specific gypsum roof jobs.

(3) Minimum Price Cutstock Plasterboard for shipment to Niagara, Erie (including the portion of Gowanda, New York, in Cattaraugus county), Monroe, and Wayne counties, N. Y.:

1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.

1/4" and 3/8"—$14.50 per M sq. ft. delivered by truck or picked up at Oakfield, N. Y.

(*Reference notes continued from preceding page*)

** 3/4" Gypsum Plasterboard $20.00 per M sq. ft. f.o.b. same mills as shown for 3/4" Gypsum Wallboard. Weight 3300# per M sq. ft.

†(x) 1/2" Wallboard, $29.50 per M sq. ft. f.o.b. Sweetwater, Texas; Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

†(z) Minimum prices 1/4" wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices shown on page 1: Montana, Wyoming, Colorado, New Mexico, Idaho, Utah and Arizona.

(y) Minimum price wallboard and Plasterboard in straight cars shipped by rail to dealer's warehouse or nearest siding into following counties in Metropolitan New York—New Jersey area $2.00 per M less than prices applying to mixed and pool cars f.o.b. Oakfield, N. Y.; Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau, and Suffolk counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties, New Jersey.

On pool cars or mixed cars in this area, minimum quantity is 5000 sq. ft. of patented board shipped to one destination.

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

9760 Pickup price on regular plasterboard at Buffalo warehouses, for destinations in counties listed in this paragraph: 1/4"—$15.34 per M sq. ft.; 3/8"—$15.78 per M sq. ft.

Note: These prices do not apply to 32"x48" board. See Paragraph (1).

(4) Century of Progress: Minimum prices to contractors, for gypsum wallboard, f.o.b. cars, Chicago, Illinois, Century of Progress siding, as follows:

†3/8" Gypsum wallboard	$33.08 per M sq. ft.
†3/8" Gypsum wallboard, bent and formed at mill (not primed)	83.08 per M sq. ft.

Tongue and Grooved, primed one coat in accordance with specification as furnished for Electrical Building for Century of Progress Exhibition.

†1/2" Gypsum wallboard	$45.30 per M sq. ft.
†1/2" Gypsum wallboard, bent and formed at mill, primed as above	95.30 per M sq. ft.

Primed One Side; The above price for primed board covers priming one coat both sides and four edges. Price of same boards primed one side only, and four edges, is $2.75 per M sq. ft. less than minimum prices shown above.

(5) Allowances, Etc.: The minimum price fixed by licensor for patented board and/or lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding, for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented board and/or lath, or for stop-over charges except that stop-over charges need not be included in the minimum price in shipments to Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, and Nebraska. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers, or the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement.

On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

(6) Dunnage: Gypsum boards used for dunnage, not invoiced to the customer, shall be plainly marked on the face side with visible red stamp or label firmly fixed on each of said boards showing the word "Dunnage" in letters at least three (3) inches high.

(7) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
9761 Cook and DuPage counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois: Deerfield, Highland Park, and Lake Forest.	Chicago, Ill. Use 13¢ rate to figure minimum price on straight or mixed cars. This applies to 20-Ton cars or more.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, O.; North Randall, O.	Cleveland, O.
Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Michigan.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, and Kansas City, Kansas	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.
South Windham, Maine	Portland, Maine
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, and Oak Street, Mass.	Springfield, Mass.
†Arlington Siding, N. Y.	Poughkeepsie, N. Y.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____,

Vice President.

† Indicates changes in this reissue.

9762 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 25, 1934.

Carload Shipments
Board License Bulletin No. 1—Cancels Bulletin No. 1, Dated April 10, 1934

†DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective May 31, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. On stop-over cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates and minimum weights as shown in published railroad freight tariffs apply.

Prices f.o.b. cars;	⅜" Gypsum Wallboard (Wt. 1600 # per M)	½" Gypsum Wallboard (Wt. 1050 # per M)	½" Gypsum Wallboard (Wt. 2150 # per M)	⅝" Gypsum Wallboard (Wt. 3300 # per M) See Note **	3/8" Tiled Gypsum Wallboard (Wt. 1600 # per M)	⅜" Gypsum Plasterboard (Wt. 1600 # per M)	½" Gypsum Plasterboard (Wt. 1050 # per M)	½" Gypsum Plasterboard (Wt. 2150 # per M)	3/8" Perforated Gypsum Plasterboard (Wt. 1600 # per M)
(y). Oakfield, N. Y.	28.50	24.50	31.00	36.50	50.00	15.00	15.00	16.25	17.50
Plasterco, Va.	28.50	24.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Gypsum, Ohio	28.50	24.50	31.00	36.50	50.00	15.00	15.00	16.25	— —
‡ Grand Rapids, Mich.	28.50	24.50	31.00	— —	50.00	15.00	15.00	16.25	— —
* Fort Dodge, Iowa	28.50	24.50z	31.00	36.50	50.00	15.00	15.00	16.25	— —
* Southard, Okla.	28.50	24.50z	31.00x	36.50	50.00	15.00	15.00	16.25	— —
* Sweetwater, Tex.	28.50	24.50z	31.00x	— —	50.00	15.00	15.00	16.25	— —
* Acme, Texas	28.50	24.50z	31.00x	— —	50.00	15.00	15.00	16.25	— —
† Laramie, Wyo.	34.50	29.00z	— —	— —	55.00	21.50	— —	— —	— —
† Loveland, Colo.	36.00	29.50z	41.00	— —	57.50	22.00	— —	— —	— —

* In shipments from Fort Dodge, Iowa, Southard, Okla., Acme, or Sweetwater, Texas into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, S. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, Wisconsin, use rates in effect prior to May 25, 1930, to arrive at delivered price; except where rates effective after May 25, 1930 are lower, use these rates.

(*Reference notes continued on following page*)

9763 The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) 32"x48" Gypsum Board. In all areas 32"x48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to minimum plasterboard price for such specific jobs.

(b) In States of Illinois, Indiana, Ohio, Pennsylvania, New York, New Jersey, Kentucky, West Virginia, and Lower Michigan, 32"x48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(2) 36"x48" Gypsum Board. 36"x48" is standard plasterboard size in all States to gypsum roof contractors for use on specific gypsum roof jobs only and is subject to plasterboard minimum price for such specific gypsum roof jobs.

†(3) Minimum Price Cutstock Plasterboard for shipment to Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.:

1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.

1/4" and 3/8"—$14.50 per M sq. ft. delivered by truck or picked up at Oakfield, N. Y.

(*Reference notes continued from preceding page*)

** 3/4" Gypsum Plasterboard $20.00 per M sq. ft. f.o.b. same mills as shown for 3/4" Gypsum Wallboard. Weight 3300# per M sq. ft.

(x) 1/2" Wallboard, $29.50 per M sq. ft. f.o.b. Sweetwater, Texas; Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico, and Arizona.

(z) Minimum prices 1/4" wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices shown on page 1: Montana, Wyoming, Colorado, New Mexico, Idaho, Utah and Arizona.

(y) Minimum price wallboard and Plasterboard in straight cars shipped by rail to dealer's warehouse or nearest siding into following counties in Metropolitan New York—New Jersey area $2.00 per M less than prices applying to mixed and pool cars f.o.b. Oakfield, N. Y.: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau, and Suffolk counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties, New Jersey.

On pool cars or mixed cars in this area, minimum quantity is 5000 sq. ft. of patented board shipped to one destination.

Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

NOTE:—These prices do not apply to 32"x48" board. See Paragraph (1).

9764 (4) Century of Progress: Minimum prices to contractors, for gypsum wallboard, f.o.b. cars, Chicago, Illinois, Century of Progress siding, as follows:

3/8" Gypsum Wallboard	$33.08 per M sq. ft.
3/8" Gypsum Wallboard, bent and formed at mill (not primed)	83.08 per M sq. ft.

Tongue and Grooved, primed one coat in accordance with specification as furnished for Electrical Building for Century of Progress Exhibition.

1/2" Gypsum Wallboard	$45.30 per M sq. ft.
1/2" Gypsum Wallboard, bent and formed at mill, primed as above	95.30 per M sq. ft.

Primed One Side: The above price for primed board covers priming one coat both sides and four edges. Price of same boards primed one side only, and four edges, is $2.75 per M sq. ft. less than minimum prices shown above.

(5) Allowances, Etc.: The minimum price fixed by licensor for patented board and/or lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding, for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented board and/or lath, or for stop-over charges. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers, or the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

(6) Dunnage: Gypsum boards used for dunnage and not invoiced to the customer shall be not larger than 4'x4' and any gypsum boards so used with any dimen-

sion greater than 12" shall be plainly stamped in red on the face side of each board, showing the words "Dunnage—Not to Be Sold" in letters at least 3" high. Excessive tonnage is a violation of the license agreement.

(7) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland.	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
9765 †Cook and DuPage counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois: Deerfield, Highland Park, and Lake Forest.	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
†Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Michigan
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y..	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction, Mo.	St. Louis, Mo.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____ _____,

Vice President.

† Indicates change in this reissue.

9766 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 16, 1935.

Carload Shipments
Board License Bulletin No. 1—Cancels Bulletin No. 1, Dated May 25, 1934—and all Supplements Thereto

E. S. PITTS

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

†Patented products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination. In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below.

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4),	¼" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) See Note *	⅜" Gypsum Wallboard (Wt. 1400M per M)	½" Gypsum Wallboard (Wt. 1900# per M)	¾" Gypsum Wallboard (Wt. 3300# per M)	⅜" Tiled Gypsum Wallboard (Wt. 1400# per M)	¼" Gypsum Plasterboard (Wt. 950# per M)	⅜" Gypsum Plasterboard (Wt. 1400# per M)	½" Gypsum Plasterboard (Wt. 1900# per M)	¾" Gypsum Plasterboard (Wt. 3300# per M)
Acme, Tex.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Grand Rapids, Mich.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Gypsum, Ohio	22.50	26.50	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	21.25	— —	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	21.00	— —	— —
Oakfield, N. Y.	22.50	26.50	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Plasterco, Va.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Southard, Okla.	22.50	— —	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Sweetwater, Tex.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —

* 5/16" Gypsum Wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

9767 Emergency Freight Charges: The minimum delivered prices of patented gypsum wallboard and gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented gypsum wallboard and gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented gypsum wallboard and gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds:

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

9768 Stopover, Switching and Other Extra Delivery Charges: All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the States of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) In the States of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge or Grand Rapids) is in effect, delivered prices of patented board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lb. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

(2) 1/2" Wallboard, $29.50 per M sq. ft. f.o.b. Fort Dodge, Iowa; Sweetwater, Texas; Acme, Texas; or Southard, Oklahoma, for shipment into Oklahoma, Texas, Arkansas, Louisiana, New Mexico and Arizona.

(3) In straight carloads of patented gypsum board and/or lath products, consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York—New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

On pool cars or mixed cars into the Metropolitan New York—New Jersey area as described above, minimum

quantity is 5000 sq. ft. of patented gypsum board and/or lath products to one destination. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined area have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(4) Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

9769 †(5) 24″x48″ Cutstock Plasterboard. In States of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama the minimum price is $17.50 per M sq. ft. for 1/4″ and 3/8″ thickness and $18.75 per M sq. ft. for 1/2″ thickness, f.o.b. Plasterco, Va., Grand Rapids, Mich., Fort Dodge, Ia., Southard, Okla., Sweetwater, Texas and Acme, Texas.

†(6) 32″x48″ Gypsum Board. In all areas 32″x48″ gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

†(b) In all states east of the Mississippi River (except Wisconsin and Upper Michigan), and in the states of Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32″x48″ board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(7) 36″x48″ Gypsum Board. 36″x48″ is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(8) Minimum Price Cutstock Plasterboard for shipment to Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.:

1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.
1/4" and 3/8"—$14.50 per M sq. ft. delivered by truck or picked up at Oakfield, N. Y.

NOTE: These prices do not apply 32"x48" board. See Paragraph (6).

(9) For Texas Centennial (Dallas, Texas)

The minimum prices of patented gypsum wallboard, aluminum paint primed, one coat, both sides and four edges, for the Texas Centennial, Dallas, Texas, are as follows:

3/8" Gypsum Wallboard—$43.50 per M sq. ft. f.o.b. Sweetwater, Texas
1/2" Gypsum Wallboard— 44.50 per M sq. ft. f.o.b. Sweetwater, Texas

Prices of same boards primed one side only, and four edges, are $4.50 per M sq. ft. less than minimum prices shown above.

9770 (10) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois: Deerfield, Highland Park, and Lake Forest.	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.

†(11) Sales to Contractors and Odd Sizes:

On odd sizes and on sales to contractors, roofing contractors, and metal ceiling contractors, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers				To Contractors (Incl. Metal Ceil. Contractors)				To Roofing Contractors			
Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
—	—	2.50	1.25	2.50	1.25	5.00	2.50	1.25	1.25	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

———, *Vice President.*

† Indicates change in this reissue.

9771 (10) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and Du Page counties, Ill., Lake County, Indiana; also following towns in Lake Count Illinois; Deerfield, Highland Park and Lake Forest (all to be priced on rate of 13¢ per cwt. plus Emergency Charge regardless of minimum shipped)	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y

†(11) Sales to contractors and prefabricated house manufacturers; also extras on odd sizes: On odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers				To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.				To Roofing Contractors			
Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes	
Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. B
—		2.50	1.25	2.50	1.25	5.00	2.50	1.25	1.25	1.25	1.2

Very truly yours,

UNITED STATES GYPSUM COMPANY,

_____,

Vice President.

† Indicates change in this reissue.

9772 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 22, 1936.

Carload Shipments—Board License Bulletin No. 1—Cancels Bulletin No. 1, Dated September 16, 1935—and All Supplements Thereto.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective February 24, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Patented gypsum wallboard and plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination. In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallboard (Wt. 1175 # per M) See Note *	⅜" Gypsum Wallboard (Wt. 1400 # per M)	½" Gypsum Wallboard (Wt. 1900 # per M)	¾" Gypsum Wallboard (Wt. 3300 # per M)	⅜" Tiled Gypsum Wallboard (Wt. 1400 # per M)	¼" Gypsum Plasterboard (Wt. 950 # per M)	⅜" Gypsum Plasterboard (Wt. 1400 # per M)	½" Gypsum Plasterboard (Wt. 1900 # per M)	¾" Gypsum Plasterboard (Wt. 3300 # per M)
Acme, Tex.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Detroit, Mich.	— —	— —	— —	— —	— —	— —	— —	15.00	— —	— —
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Grand Rapids, Mich.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Gypsum, Ohio	22.50	26.50	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	21.25	— —	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	21.00	— —	— —
Oakfield, N. Y.	22.50	26.50	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Plastereo, Va.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Southard, Okla.	22.50	— —	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Sweetwater, Tex.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —

* 5/16" Gypsum Wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

9773 Emergency Freight Charges: The minimum delivered prices of patented gypsum wallboard and gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented gypsum wallboard and gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f. o. b. mill prices of patented gypsum wallboard and gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds:

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

9774 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge or Grand Rapids) is in effect, delivered prices of patented board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

†(2) 1/4" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Montana, Utah and that portion of Idaho south and east of but not including the counties of Valley, Boise, Elmore, Idaho and Owyhee, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Ft. Dodge, Iowa; or $24.25 per M sq. ft. f.o.b. Laramie, Wyoming; or $24.00 per M sq. ft. f.o.b. Loveland, Colorado.

†(b) For shipment into states of Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina and Florida, minimum price of 1/4" patented gypsum wallboard is $21.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; and Plasterco, Virginia.

†(3) 3/8" Wallboard Exceptions:

†(a) For shipment into states of New Mexico, Texas, Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina, and Florida, minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; and Plasterco, Virginia.

†(b) For shipment into state of Oklahoma, minimum price of 3/8" patented gypsum wallboard is $27.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

9775 †(4) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico and Texas, also into City of Texarkana, Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma. See paragraph (d) below.

†(b) For shipment into state of Oklahoma, minimum price of 1/2" patented gypsum wallboard is $28.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma. See paragraph (d) below.

†(c) For shipment into states of Arkansas (except city of Texarkana—see (a) above), Louisiana (except counties as listed in (a) above), Arizona, Kansas and Nebraska, minimum price of 1/2" patented gypsum wallboard is $29.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa. See paragraph (d) below.

(d) Minimum prices for 1/2" patented gypsum wallboard, surfaced with a weather resisting paper, are not effective when sold for use as an exterior [illegible] thing material on specific jobs, as such sales will be considered an experimental development of gypsum board in a new field.

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†(5) 5/16' Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other

gypsum products, for shipment into following markets only, is as follows:

—$15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Marion County, Indiana (Indianapolis); Sangamon County, Illinois (Springfield); Woodbury County, Iowa (Sioux City); Henrico County, Virginia (Richmond); Hartford County, Connecticut (Hartford); Hampden County, Massachusetts (Springfield); Providence County, Rhode Island (Providence); Mercer County County, New Jersey (Trenton); Lancaster County, Pennsylvania (Lancaster); Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio; also following towns in Missouri; St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction. See paragraph (8) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

—$16.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in towns of Kansas City, Dodson and Edgecomb, Missouri; also into towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; also in Hennepin County, Minnesota (Minneapolis) and Ramsey County, Minnesota (St. Paul).

(6) 3/8" Plasterboard. The minimum price of 3/8" patented gypsum plasterboard in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also
9776 towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(7) In straight carloads of patented gypsum board and/or lath products, (except 5/16" thickness plasterboard—see par. 5) consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York—New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Mon-

mouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey; also in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(8) On pool cars or mixed cars into the Metropolitan New York—New Jersey Area and the Philadelphia Area as described in paragraph (7) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products to one destination. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

(9) Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

(10) 24" x 48" Cutstock Plasterboard. In states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama the minimum price is $17.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $18.75 per M sq. ft. for 1/2" thickness, f.o.b. Plasterco, Va., Grand Rapids, Mich., Fort Dodge, Ia., Southard, Okla., Sweetwater, Texas and Acme, Texas.

(11) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

9777 (12) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(13) Minimum Price Cutstock Plasterboard for shipment to Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne counties, N. Y.:

1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.

1/4" and 3/8"—$14.50 per M sq. ft. delivered by truck or picked up at Oakfield, N. Y.

Note: These prices do not apply 32" x 48" board. See paragraph (6).

(14). For Texas Centennial (Dallas, Texas):

The minimum prices of patented gypsum wallboard, aluminum paint primed, one coat, both sides and four edges, for the Texas Centennial, Dallas, Texas, are as follows:

3/8" Gypsum Wallboard—$43.50 per M sq. ft. f.o.b. Sweetwater, Texas

1/2" Gypsum Wallboard—44.50 per M sq. ft. f.o.b. Sweetwater, Texas.

Prices of same boards primed one side only, and four edges, are $4.50 per M sq. ft. less than minimum prices shown above.

(15) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest (all to be priced on rate of 13¢ per cwt. plus Emergency Charge regardless of minimum shipped)	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction, Mo.	St. Louis, Mo.
9778 Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.

(16) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

On odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows.

(Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers				To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.				To Roofing Contractors			
Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
—	—	2.50	1.25	2.50	1.25	5.00	2.50	1.25	1.25	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

———— ————, *Vice President.*

† Indicates change in this reissue.

9779 (4) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico and Texas, also into city of Texarkana, Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma. See paragraph (d) below.

(b) For shipment into state of Oklahoma, minimum price of 1/2" patented gypsum wallboard is $28.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma. See paragraph (d) below.

(c) For shipment into states of Arkansas (except city of Texarkana—see (a) above), Louisiana (except counties as listed in (a) above), Arizona, Kansas and Nebraska, minimum price of 1/2" patented gypsum wallboard is $29.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa. See paragraph (d) below.

(d) Minimum prices for 1/2" patented gypsum sheathing, surfaced with a weather resisting paper, are not effective when sold for use as an exterior sheathing material on specific jobs, as such sales will be considered an experimental development of gypsum board in a new field. Exception: (Effective March 6, 1936) The minimum price of 1/2" patented gypsum sheathing, Tongue and Groove Edge, width 24", lengths 6'8" and 8', for shipment into Cook, Lake, DuPage and McHenry Counties, Illinois and Lake County, Indiana, also for shipment into Erie and Niagara Counties, New York, is $15.00 per M sq. ft. f.o.b. Grand Rapids, Michigan and Oakfield, New York.

(5) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

—$15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Marion County, Indiana (Indianapolis); Sangamon County, Illinois (Springfield); Woodbury County, Iowa (Sioux City); Henrico County, Virginia (Richmond); Hartford County, Connecticut (Hartford); Hampden County, Massachusetts (Springfield); Providence County, Rhode Island (Providence); Mercer County, New Jersey (Trenton); Lancaster County, Penn-

sylvania (Lancaster); Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio; also following towns in Missouri; St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction. See paragraph (8) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

—$16.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in towns of Kansas City, Dodson and Edgecomb, Missouri; also into towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; also in Hennepin County, Minnesota (Minneapolis) and Ramsey County, Minnesota (St. Paul).

(6) 3/8" Plasterboard. The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of

9780 †(4) 1/2" Wallboard Exceptions:

†(a) For shipment into states of New Mexico, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Ft. Dodge, Iowa. See paragraph (d) below.

(b) For shipment into state of Oklahoma, minimum price of 1/2" patented gypsum wallboard is $28.00 per M sq.ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma. See paragraph (d) below.

†(c) For shipment into States of Louisiana (except counties as listed in (a) above), Arizona, Kansas and Nebraska, minimum price of 1/2" patented gypsum wallboard is $29.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa. See paragraph (d) below.

(d) Minimum price for 1/2" patent gypsum sheathing, surfaced with a weather resisting paper, are not effective

† Indicates change in this reissue.

when sold for use as an exterior sheathing material on specific jobs, as such sales will be considered an experimental development of gypsum board in a new field. Exception: (Effective March 6, 1936) The minimum price of 1/2" patented gypsum sheathing, Tongue and Groove Edge, width 24", lengths 6'8" and 8', for shipment into Cook, Lake, DuPage and McHenry Counties, Illinois and Lake County, Indiana, also for shipment into Erie and Niagara Counties, New York, is $15.00 per M sq.ft. f.o.b. Grand Rapids, Michigan and Oakfield, New York.

~~(5)~~ 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

—$15.00 per M sq.ft. f.o.b. cars delivered to dealers warehouse or siding in Marion County, Indiana (Indianapolis); Sangamon County, Illinois (Springfield); Woodbury County, Iowa (Sioux City); Henrico County, Virginia (Richmond); Hartford County, Connecticut (Hartford); Hampden County, Massachusetts (Springfield); Providence County, Rhode Island (Providence); Mercer County, New Jersey (Trenton); Lancaster County, Pennsylvania (Lancaster); Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio; also following towns in Missouri; St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction. See paragraph (8) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

—$16.00 per M sq.ft. f.o.b. cars delivered to dealers warehouse or siding in towns of Kansas City, Dodson and Edgecomb, Missouri; also into towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; also in Hennepin County, Minnesota (Minneapolis) and Ramsay County, Minnesota (St. Paul).

(6) 3/8" Plasterboard. The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq.ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of

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9781 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 14, 1936.

Carload Shipments—Board License Bulletin No. 1 (Page 1)—Cancels Page 1 Dated February 22, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 16, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Patented gypsum wallboard and plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination. In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallboard (Wt. 1175 # per M) See Note *	⅜" Gypsum Wallboard (Wt. 1400 # per M)	½" Gypsum Wallboard & ½" Gypsum Sheathing (Wt. 1900 # per M)	½" Gypsum Wallboard (Wt. 3300 # per M)	⅜" Tiled Gypsum Wallboard (Wt. 1400 # per M)	¼" Gypsum Plasterboard (Wt. 950 # per M)	⅜" Gypsum Plasterboard (Wt. 1400 # per M)	½" Gypsum Plasterboard (Wt. 1900 # per M)	⅝" Gypsum Plasterboard (Wt. 3300 # per M)
Acme, Tex.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	
Detroit, Mich.	— —	— —	— —	— —	— —	— —	— —	15.00	— —	— —
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Grand Rapids, Mich.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Gypsum, Ohio	22.50	26.50	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	21.25	— —	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	21.00	— —	— —
Oakfield, N. Y.	22.50	26.50	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Plastereo, Va.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Southard, Okla.	22.50	— —	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Sweetwater, Tex.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —

* 5/16" Gypsum Wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

9782 Emergency Freight Charges: The minimum delivered prices of patented gypsum wallboard and gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented gypsum wallboard and gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f. o. b. mill prices of patented gypsum wallboard and gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds:

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

9783 Stopover, Switching and Other Extra Delivery Charges: All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

†(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gypsum plasterboard products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Oregon and Washington, also that portion of state of Idaho west and north of and including Owyhee, Gooding, Elmore, Boise, Valley and Idaho Counties.

(2) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge or Grand Rapids) is in effect, delivered prices of patented board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

†(3) 1/4" Wallboard Exceptions:

(a). For shipment into state of New Mexico and that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma and Fort Dodge, Iowa; or $24.25 per M sq. ft. f.o.b. Laramie, Wyoming.

†(b) For shipment into that portion of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, also that portion of Idaho south and east of but not including Owyhee, Gooding, Elmore, Boise, Valley and Idaho Counties, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq. ft. f.o.b. Fort Dodge, Iowa; or $22.50 per M sq. ft. f.o.b. Seattle, Wash.; or $24.25 per M sq. ft. f.o.b. Laramie, Wyoming.

†(c) For shipment into states of Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina and
9784 Florida, also into Hamilton County only in state of Tennessee minimum price of 1/4" patented gypsum wallboard is $21.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; and Plasterco, Virginia.

(4) 3/8" Wallboard Exceptions:

†(a) For shipment into states of New Mexico, Texas, Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina, and Florida also into Hamilton County only in state of Tennessee minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; and Plasterco, Virginia.

†(b) For shipment into that portion of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, also that portion of Idaho south and east of but not including Owyhee, Gooding, Elmore, Boise, Valley and Idaho Counties, minimum price of 3/8" patented gypsum wallboard is $28.50 per M sq.ft. f.o.b. Fort Dodge, Iowa; or $25.00 per M sq.ft. f.o.b. Seattle, Washington; or $34.75 per M sq.ft. f.o.b. Laramie, Wyoming.

(c) For shipment into state of Oklahoma, minimum price of 3/8" patented gypsum wallboard is $27.00 per M sq.ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(5) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is

$26.00 per M sq.ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Ft. Dodge, Iowa. See paragraph (d) below.

(b) For shipment into state of Oklahoma, minimum price of 1/2" patented gypsum wallboard is $28.00 per M sq.ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma. See paragraph (d) below.

(c) For shipment into states of Louisiana (except counties as listed in (a) above), and into Kansas and Nebraska, minimum price of 1/2" patented gypsum wallboard is $29.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa. See paragraph (d) below.

(d) Minimum prices for 1/2" patented gypsum sheathing, surfaced with a weather resisting paper, are not effective when sold for use as an exterior sheathing material on specific jobs, as such sales will be considered an experimental development of gypsum board in a new field, except:

9785 †For shipment into Cook, Lake, Du Page and McHenry counties, Illinois, also Lake and Porter counties, Indiana, the minimum price of 1/2" patented gypsum sheathing, Tongue and Groove edge, width 24", lengths 6'8" and 8', is $15.00 per M sq.ft. f.o.b. Grand Rapids, Michigan (Price for Porter County, Indiana effective March 16, 1936).

For shipment into Erie and Niagara counties, New York, the minimum price of 1/2" patented gypsum sheathing, Tongue and Groove edge, width 24", lengths 6'8" and 8', is $15.00 per M sq.ft. f.o.b. Oakfield, New York.

†For shipment into states of Oklahoma and Texas, the minimum price of 1/2" patented gypsum sheathing, Tongue and Groove edge, width 24", lengths 6'8" and 8', is $31.00 per M sq.ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

†For shipment into Cuyahoga County, Ohio, the minimum price of 1/2" patented gypsum sheathing is as stated in Supplement to Board License Bulletin No. 1, dated March 6, 1936.

†(6) 1/4" Plasterboard. The minimum price of 1/4" patented gypsum plasterboard is $15.00 per M sq. ft. f.o.b. Fort Dodge, Iowa or f.o.b. Seattle, Washington for shipment into that portion of Montana west of and includ-

ing Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, also that portion of Idaho south and east of but not including Owyhee, Gooding, Elmore, Boise, Valley and Idaho Counties.

(7) 5/16" Plasterboard: The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

†$15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Marion County, Indiana (Indianapolis); Sangman County, Illinios (Springfield); Woodbury County, Iowa (Sioux City); Henrico County Virginia (Richmond); Norfolk County, Virginia (Norfolk); Roanoke County, Virginia (Roanoke); Hartford County, Connecticut (Hartford); Hampden County, Massachusetts (Springfield); Providence County, Rhode Island (Providence); Mercer County, New Jersey (Trenton); Lancaster County, Pennsylvania (Lancaster); Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio; Oklahoma County, Oklahoma (Oklahoma City); Tulsa County, Oklahoma (Tulsa); also following towns in Missouri; St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction. See paragraph (8) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

†$16.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in towns of Kansas City, Dodson and Edgecomb, Missouri; also into towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; also in Hennepin County, Minnesota (Minneapolis); Ramsay County, Minnesota (St. Paul); Lan-
9786 caster County, Nebraska (Lincoln); Buchanan County, Missouri (St. Joseph); Sedgwick County, Kansas (Wichita).

(8) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in

(Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(b) The minimum price of 3/8" patented gypsum plasterboard is $15.00 per M sq. ft. f.o.b. Fort Dodge, Iowa or $17.50 per M sq. ft. f.o.b. Seattle, Washington for shipment into that portion of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, also that portion of Idaho south and east of but not including Owyhee, Gooding, Elmore, Boise, Valley and Idaho Counties.

(9) In straight carloads of patented gypsum board and/or lath products, (except 5/16" thickness plasterboard—see par. 7) consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York—New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey; also in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(10) On pool cars or mixed cars into the Metropolitan New York—New Jersey Area and the Philadelphia Area as described in paragraph (9) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products to one destination. Note: Any mixture of metallized and regular patented board products (in-

cluding special surfaced gypsum board products) may be combined to make up the required minimums.

9787 (11) Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

(12) 24"x48" Cutstock Plasterboard: In states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama the minimum price is $17.50 per M. sq. ft. for 1/4" and 3/8" thicknesses and $18.75 per M sq. ft. for 1/2" thickness, f.o.b. Plasterco, Va., Grand Rapids, Mich., Fort Dodge, Ia., Southard, Okla., Sweetwater, Texas and Acme, Texas.

(13) 32"x48" Gypsum Board: In all areas 32"x48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32"x48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(14) 36"x48" Gypsum Board: 36"x48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(15) Minimum Price Cutstock Plasterboard for shipment to Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.:

1/4" and 3/8"—$12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.

1/4" and 3/8"—$14.50 per M sq. ft. delivered by truck or picked up at Oakfield, N. Y.

NOTE: These prices do not apply 32"x48" board. See paragraph (13).

(16) For Texas Centennial (Dallas, Texas).

The minimum prices of patented gypsum wallboard, aluminum paint primed, one coat, both sides and four edges, for the Texas Centennial, Dallas, Texas, are as follows:

3/8" Gypsum Wallboard—$43.50 per M sq. ft. f.o.b. Sweetwater, Texas.

1/2" Gypsum Wallboard—44.50 per M sq. ft. f.o.b. Sweetwater, Texas.

Prices of same boards primed one side only, and four edges, are $4.50 per M sq. ft. less than minimum prices shown above.

9788 (17) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage counties, Ill.; Lake County, Indiana; also following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest (all to be priced on rate of 13¢ per cwt. plus Emergency Charge regardless of minimum shipped)	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.

(18) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

On odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers				To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.				To Roofing Contractors			
Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
—	—	2.50	1.25	2.50	1.25	5.00	2.50	1.25	1.25	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

——— ———, *Vice President.*

† Indicates change in this reissue.

9789 Illinois, also Lake and Porter counties, Indiana, the minimum price of 1/2" patented gypsum sheathing, Tongue and Groove edge, width 24", lengths 6'8" and 8', is $15.00 per M sq. ft. f.o.b. Grand Rapids, Michigan.

For shipment into Erie and Niagara counties, New York, the minimum price of 1/2" patented gypsum sheathing, Tongue and Groove edge, width 24", lengths 6'8" and 8', is $15.00 per M sq. ft. f.o.b. Oakfield, New York.

†For shipment into Queens and Nassau Counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented gypsum sheathing, Tongue and Groove edge, width 24", lengths 6'8" and 8' is $15.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products, or $17.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. Oakfield, New York (this change effective April 1, 1936).

For shipment into states of Oklahoma and Texas, the minimum price of 1/2" patented gypsum sheathing, Tongue and Groove edge, width 24", lengths 6'8" and 8', is $31.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

For shipment into Cuyahoga county, Ohio, the minimum price of 1/2" patented gypsum sheathing is as stated in Supplement to Board License Bulletin No. 1, dated March 6, 1936.

(6) 1/4" Plasterboard: The minimum price of 1/4" patented gypsum plasterboard is $15.00 per M sq. ft. f.o.b. Fort Dodge, Iowa or f.o.b. Seattle, Washington for shipment into that portion of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, also that portion of Idaho south and east of but not including Owyhee, Gooding, Elmore, Boise, Valley and Idaho counties.

(7) 5/16" Plasterboard: The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

†$15.00 per M sq. ft.: f.o.b. cars delivered to dealers warehouse or siding in Marion County, Indiana (Indianapolis); Sangamon County, Illinois (Springfield); Wood-

bury County, Iowa (Sioux City); Princess Anne County, Virginia; Hanover County, Virginia; Henrico County, Virginia (Richmond); Norfolk County, Virginia (Norfolk); Roanoke County, Virginia (Roanoke); Hartford County, Connecticut (Hartford); Hampden County, Massachusetts (Springfield); Providence County, Rhode Island (Providence); Mercer County, New Jersey (Trenton); Lancaster County, Pennsylvania (Lancaster); Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio; Oklahoma County, Oklahoma (Oklahoma City); Tulsa County, Oklahoma (Tulsa); also following towns in Missouri; St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction. See paragraph (10) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey. (Price for Princess Anne and Hanover Counties, Virginia effective April 1, 1936).

$16.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in towns of Kansas City, Dodson and Edgecomb, Missouri; also into towns of

9790 Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; also in Hennepin County, Minnesota (Minneapolis); Ramsay County, Minnesota (St. Paul); Lancaster County, Nebraska (Lincoln); Buchanan County, Missouri (St. Joseph); Sedgewick County, Kansas (Wichita).

(8) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(b) The minimum price of 3/8" patented gypsum plasterboard is $15.00 per M sq. ft. f.o.b. Fort Dodge, Iowa or $17.50 per M sq. ft. f.o.b. Seattle, Washington for shipment into that portion of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, also that portion of Idaho south and east of but

† Indicates change in this reissue.

not including Owyhee, Gooding, Elmore, Boise, Valley and Idaho Counties.

(9) In straight carloads of patented gypsum board and/or lath products, (except 5/16" thickness plasterboard —see par. 7) consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York—New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey; also in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(10) On pool cars or mixed cars into the Metropolitan New York—New Jersey Area and the Philadelphia Area as described in paragraph (9) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

9791 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 7, 1936.

Carload Shipments—Board License Bulletin No. 1 (Page 1)--Cancels Page 1 Dated March 14, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective April 9, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Patented gypsum wallboard and plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination. In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) See Note *	⅜" Gypsum Wallboard (Wt. 1400# per M)	½" Gypsum Wallboard & ½" Gypsum Sheathing (Wt. 1900# per M)	½" Gypsum Wallboard (Wt. 3300# per M)	⅜" Tiled Gypsum Wallboard (Wt. 1400# per M)	¼" Gypsum Plasterboard (Wt. 950# per M)	⅜" Gypsum Plasterboard (Wt. 1400# per M)	½" Gypsum Plasterboard (Wt. 1900# per M)	⅝" Gypsum Plasterboard (Wt. 3300# per M)
Acme, Tex.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Detroit, Mich.	— —	— —	— —	— —	— —	— —	— —	15.00	— —	— —
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Grand Rapids, Mich.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Gypsum, Ohio	22.50	26.50	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	21.25	— —	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	21.00	— —	— —
Oakfield, N. Y.	22.50	26.50	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Plasterco, Va.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —
Southard, Okla.	22.50	— —	28.50	31.00	36.50	50.00	15.00	15.00	16.25	20.00
Sweetwater, Tex.	22.50	— —	28.50	31.00	— —	50.00	15.00	15.00	16.25	— —

* 5/16" Gypsum Wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

9792. Emergency Freight Charges: The minimum delivered prices of patented gypsum wallboard and gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented gypsum wallboard and gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f. o. b. mill prices of patented gypsum wallboard and gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds:

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

9793 Stopover, switching and other extra delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gypsum plasterboard products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of state of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lbs. minimum (from Fort Dodge or Grand Rapids) is in effect, delivered prices of patented board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

(3) 1/4" Wallboard Exceptions:

(a) For shipment into state of New Mexico and that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma and Fort Dodge, Iowa; or $24.25 per M sq. ft. f.o.b. Laramie, Wyoming.

(b) For shipment into states of Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina and Florida, also into Hamilton County only in state of Tennessee minimum price of 1/4" patented gypsum wallboard is $21.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; and Plasterco, Virginia.

(4) 3/8" Wallboard Exceptions:

(a) For shipment into states of New Mexico, 9794 Texas, Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina, and Florida also into Hamilton County only in state of Tennessee minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; and Plasterco, Virginia.

(b) For shipment into state of Oklahoma, minimum price of 3/8" patented gypsum wallboard is $27.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(5) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Ft. Dodge, Iowa. See paragraph (d) below.

(b) For shipment into state of Oklahoma, minimum price of 1/2" patented gypsum wallboard is $28.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma. See paragraph (d) below.

(c) For shipment into states of Louisiana (except counties as listed in (a) above), and into Kansas and Nebraska, minimum price of 1/2" patented gypsum wallboard is $29.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa. See paragraph (d) below.

(d) Minimum prices for 1/2" patented gypsum sheathing, surfaced with a weather resisting paper, are not effective when sold for use as an exterior sheathing material on specific jobs, as such sales will be considered an experi-

mental development of gypsum board in a new field, except:

—For shipment into Cook, Lake, Du Page and McHenry Counties, Illinois, also Lake and Porter Counties, Indiana, the minimum price of 1/2" patented gypsum sheathing, Tongue and Groove edge, width 24", lengths 6'8" and 8', is $15.00 per M sq. ft. f.o.b. Grand Rapids, Michigan.

—For shipment into Erie and Niagara counties, New York, the minimum price of 1/2" patented gypsum sheathing, Tongue and Groove edge, width 24", lengths 6'8" and 8', is $15.00 per M sq. ft. f.o.b. Oakfield, New York.

—For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented gypsum sheathing, Tongue and Groove edge, width 24", lengths 6'8" and 8' is $15.00 per M sq. ft. for shipment in straight carloads of patented gypsum board produets, or $17.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. Oakfield, New York.

9795 —For shipment into states of Oklahoma and Texas, the minimum price of 1/2" patented gypsum sheathing, Tongue and Groove edge, width 24", lengths 6'8" and 8', is $31.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

—For shipment into Cuyahoga county, Ohio, the minimum price of 1/2" patented gypsum sheathing is as stated in Supplement to Board License Bulletin No. 1, dated March 6, 1936.

(6) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

†(a) $15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.

†—Douglas County, Nebraska (Omaha).

—Hampden County, Massachusetts (Springfield).

—Hanover County, Virginia.

—Hartford County, Connecticut (Hartford).

†—Hennepin County, Minnesota (Minneapolis).

—Henrico County, Virginia (Richmond).
—Lancaster County, Pennsylvania (Lancaster).
—Marion County, Indiana (Indianapolis).
—Mercer County, New Jersey (Trenton).
—Norfolk County, Virginia (Norfolk).
—Oklahoma County, Oklahoma (Oklahoma City).
†—Peoria County, Illinois (Peoria).
†—Pottawatomie County, Iowa (Council Bluffs).
—Princess Anne County, Virginia.
—Providence County, Rhode Island, (Providence).
†—Ramsey County, Minnesota (St. Paul).
—Roanoke County, Virginia (Roanoke).
—Sangamon County, Illinois (Springfield).
—Tulsa County, Oklahoma (Tulsa).
—Woodbury County, Iowa (Sioux City).

also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction.

See paragraph (9) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

†(b) $16.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph).
†—Cass County, North Dakota (Fargo).
9796 †—Greene County, Missouri (Springfield).
†—Jasper County, Missouri (Joplin).
—Lancaster County, Nebraska (Lincoln).
†—Minnehaha County, South Dakota (Sioux Falls).
†—Newton County, Missouri (Joplin).
—Sedgewick County, Kansas (Wichita)

also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(7) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in

Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(8) In straight carloads of patented gypsum board and/or lath products, (except 5/16" thickness plasterboard —see par. 6) consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York—New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex, and Ocean counties, New Jersey; also in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia counties, Pennsylvania and Camden county, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(9) On pool cars or mixed cars into the Metropolitan New York—New Jersey Area and the Philadelphia Area as described in paragraph (8) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

9797 (10) Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

(11) 24"x48" Cutstock Plasterboard. In states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama the minimum price is $17.50 per M sq. ft. for 1/4" and

3/8" thicknesses and $18.75 per M sq. ft. for 1/2" thickness, f.o.b. Plasterco, Va., Grand Rapids, Mich., Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

(12) 32"x48" Gypsum Board. In all areas 32"x48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32"x48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(13) 36"x48" Gypsum Board. 36"x48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(14) Minimum price 1/4" and 3/8" Cutstock Plasterboard for shipment to Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y. is $12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.

This price does not apply to 32"x48" board. See paragraph (12).

(15) For Texas Centennial (Dallas, Texas).

The minimum prices of patented gypsum wallboard, aluminum paint primed, one coat, both sides and four edges, for the Texas Centennial, Dallas, Texas, are as follows:

3/8" Gypsum Wallboard—$43.50 per M sq. ft. f.o.b. Sweetwater, Texas.
1/2" Gypsum Wallboard—44.50 per M sq. ft. f.o.b. Sweetwater, Texas.

Prices of same boards primed one side only, and four edges, are $4.50 per M sq. ft. less than minimum prices shown above.

9798 (16) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage counties, Ill.; Lake County, Indiana; also following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest (all to be priced on rate of 13¢ per cwt. plus Emergency Charge regardless of minimum shipped)	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.

(17) Sales of contractors and prefabricated house manufacturers, also extras on odd sizes:

On odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers				To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.				To Roofing Contractors			
Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
—	—	2.50	1.25	2.50	1.25	5.00	2.50	1.25	1.25	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

———— ————, *Vice President.*

† Indicates change in this reissue.

9799 —Greene County, Missouri (Springfield).
—Jasper County, Missouri (Joplin).
—Lancaster County, Nebraska (Lincoln).
—Minnehaha County, South Dakota (Sioux Falls).
—Newton County, Missouri (Joplin).
—Sedgewick County, Kansas (Wichita).

also towns of Kansas City; Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(7) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(b) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida. (This change effective April 13, 1936)

(8) In straight carloads of patented gypsum board and/or lath products, (except 5/16" thickness plasterboard —see par. 6) consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York—New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex, and Ocean counties, New Jersey; also in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia counties, Pennsylvania and Camden county, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or

for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(9) On pool cars or mixed cars into the Metropolitan New York—New Jersey Area and the Philadelphia Area as described in paragraph (8) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

9800 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 4, 1936.

Carload Shipments
Board License Bulletin No. 1 (Page 1)—Cancels Page 1
Dated April 7, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective May 7, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Patented gypsum wallboard and plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination. In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallboard (Wt. 1175 per M) See Note *	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	1/2" Gypsum Sheathing (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallboard (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M)	3/4" Gypsum Plasterboard (Wt. 3300 # per M)
†Acme, Tex.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Boston (Charlestown) Mass.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Detroit, Mich.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†East Chicago, Ind.	22.50	— —	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Fort Dodge, Iowa	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Grand Rapids, Mich.	22.50	26.50	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Gypsum, Ohio	26.75	— —	34.75	— —	— —	— —	56.25	— —	21.25	— —	— —
Laramie, Wyo.	26.50	— —	34.50	39.00	— —	— —	56.00	— —	21.00	— —	— —
Loveland, Colo.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†New Brighton, L. I., N. Y.	22.50	26.50	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Oakfield, N. Y.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Philadelphia, Pa.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Plasterco, Va.	22.50	— —	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Southard, Okla.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Sweetwater, Tex.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —

* 5/16" Gypsum Wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

9801 Emergency Freight Charges: The minimum delivered prices of patented gypsum wallboard and gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented gypsum wallboard and gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f. o. b. mill prices of patented gypsum wallboard and gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds:

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

9802 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gypsum plasterboard products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Ft. Dodge, East Chicago or Grand Rapids) is in effect, delivered prices of patented board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

(3) 1/4" Wallboard Exceptions:

(a) For shipment into state of New Mexico and that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma and Fort Dodge, Iowa; or $24.25 per M sq. ft. f.o.b. Laramie, Wyoming.

†(b) For shipment into states of Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina and Florida, also into Hamilton County only in state of Tennessee minimum price of 1/4" patented gypsum wallboard is $21.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; and Plasterco, Virginia.

(4) 3/8" Wallboard Exceptions:

†(a) For shipment into states of New Mexico, 9803 Texas, Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina and Florida also into Hamilton County only in state of Tennessee minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; and Plasterco, Virginia.

(b) For shipment into state of Oklahoma, minimum price of 3/8" patented gypsum wallboard is $27.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(5) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(b) For shipment into state of Oklahoma, minimum price of 1/2" patented gypsum wallboard is $28.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(c) For shipment into states of Louisiana (except counties as listed in (a) above), and into Kansas and Nebraska, minimum price of 1/2" patented gypsum wallboard is $29.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(d) For shipment into Cuyahoga County, Ohio, the minimum price of 1/2" patented gypsum wallboard is as stated in supplement to Board License Bulletin No. 1, dated March 6, 1936.

†(6) 1/2" T&G Sheating Exceptions:

†(a) For shipment into Cook, Du Page and McHenry Counties, Illinois, also Lake and Porter Counties, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $17.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

†(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $21.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

†(c) For shipment into Wayne County, Michigan, towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan, in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $20.47 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

†(d) For shipment into Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York, in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $24.80 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

9804 †(e) For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented gypsum sheathing is $19.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $21.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(f) For shipment into Erie and Niagara counties, New York, the minimum price of 1/2" patented gypsum sheathing is $15.00 per M sq. ft. f.o.b. Oakfield, New York.

†(g) For shipment into state of Texas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, the minimum price of 1/2"

patented gypsum sheathing is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

†(h) For shipment into State of Oklahoma, the minimum price of 1/2" patented gypsum sheathing is $28.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(i) For shipment into Cuyahoga County, Ohio, the minimum price of 1/2" patented gypsum sheathing is as stated in Supplement to Board License Bulletin No. 1, dated March 6, 1936.

(7) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

†(a) $14.68 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Mercer County, New Jersey (Trenton).

(b) $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
—Douglas County, Nebraska, (Omaha).
—Hampden County, Massachusetts (Springfield).
—Hanover County, Virginia.
—Hartford County, Connecticut (Hartford).
—Hennepin County, Minnesota (Minneapolis).
—Henrico County, Virginia (Richmond).
—Lancaster County, Pennsylvania (Lancaster).
—Marion County, Indiana (Indianapolis).
—Norfolk County, Virginia (Norfolk).
—Oklahoma County, Oklahoma (Oklahoma City).
—Peoria County, Illinois (Peoria).
—Pottawatomie County, Iowa (Council Bluffs).
—Princess Anne County, Virginia.
—Providence County, Rhode Island, (Providence).
—Ramsey County, Minnesota (St. Paul).
—Roanoke County, Virginia (Roanoke).
—Sangamon County, Illinois (Springfield).
—Tulsa County, Oklahoma (Tulsa).
—Woodbury County, Iowa (Sioux City).

9805 also following towns in Missouri; St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood,

Jennings, Wellston, Clayton, Webster Groves, Maplewood, Grayois Station, Old Orchard, and Lake Junction.

See paragraph (10) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

(c) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph).
—Cass County, North Dakota (Fargo).
—Greene County, Missouri (Springfield).
—Jasper County, Missouri (Joplin).
—Lancaster County, Nebraska (Lincoln).
—Minnehaha County, South Dakota (Sioux Falls).
—Newton County, Missouri (Joplin).
—Sedgewick County, Kansas (Wichita).

also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

†(d)—For shipment to Meadville, Pennsylvania for the Meadville Housing Operation, the minimum price of 5/16" patented gypsum plasterboard is as stated in telegram dated April 15, 1936.

(8) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(b) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

†(9) In straight carloads of patented gypsum board and/or lath products, (see exceptions below) consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. New Brighton or f.o.b. Philadelphia prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York—New Jersey

Areas as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester Rockland Nassau and Suffolk Counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex, and Ocean Counties, New Jersey; also in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

9806 Exceptions:

5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M) in straight and pool carloads or in mixed carloads with other gypsum products, for shipment into Mercer County, New Jersey (not to be sold in balance of Metro New York—New Jersey Area) is $14.68 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding.

1/2" T&G Sheathing. The minimum price of 1/2" patented gypsum sheathing for shipment into Queens and Nassau Counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, is $19.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $21.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers warehouse or siding.

Where any licensee or any of its employees, salesmen or executive has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(10) On pool cars or mixed cars into the Metropolitan New York—New Jersey Area and the Philadelphia Area as described in paragraph (9) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Note: Any mixture of metallized and regular pat-

ented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(11) Grand Rapids Switching District. For minimum prices of patented gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Grand Rapids, Michigan Switching District, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

†(12) Chicago Area. For minimum prices of patented gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products (either 40,000# or 60,000# cars) f.o.b. cars delivered to dealers warehouse or siding within the Chicago Area, add 50¢ per M sq. ft. to prices applying f.o.b. cars, East Chicago mill. This applies into Cook and DuPage Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest. Exception: Minimum price of 1/2" gypsum sheathing, surfaced with a weather resisting paper, for shipment into the Chicago Area as described above is $17.66 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding.

9807 †(13) Detroit Area. For minimum prices of patented gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area, add 60¢ per M sq. ft. to prices applying f.o.b. cars, Detroit Mill. This applies into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan. Exception: Minimum price of 3/8" gypsum plasterboard is $15.00 per M sq. ft. and minimum price of 1/2" gypsum sheathing (surfaced with a weather resisting paper) is $20.47 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area as described above.

†(14) 24"x48" Cutstock Plasterboard. In States of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama the minimum price is $17.50 per M sq. ft. for 1/4" and 3/8" thickness and $18.75 per M sq. ft. for 1/2" thickness, f.o.b. Plasterco, Va., Grand Rapids, Mich.,

Fort Dodge, Iowa; East Chicago, Indiana; Gypsum, Ohio; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

(15) 1/4" and 3/8" Cutstock Plasterboard. Minimum price for shipment to Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y. is $12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.

This price does not apply to 32"x48" board.

(16) 32"x48" Gypsum Board. In all areas 32"x48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the States of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32"x48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(17) 36"x48" Gypsum Board. 36"x48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(18) For Texas Centennial (Dallas, Texas)

The minimum prices of patented gypsum wallboard, aluminum paint primed, one coat, both sides and four edges, for the Texas Centennial, Dallas, Texas, are as follows:

9808 For Texas Centennial (Dallas, Texas) (Cont'd.).

3/8" Gypsum Wallboard—$43.50 per M sq. ft. f.o.b. Sweetwater, Texas

1/2" Gypsum Wallboard—44.50 per M sq. ft. f.o.b. Sweetwater, Texas

Prices of same boards primed one side only, and four edges, are $4.50 per M sq. ft. less than minimum prices shown above.

(19) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage counties, Ill.; Lake County, Indiana; also following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Michigan
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Okla. City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.

(20) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

9809

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.		To Roofing Contractors	
Std. Sizes		Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY,

_____, *Vice President.*

† Indicates change in this reissue.

9810 Stopover, Switching and Other Extra Delivery Charges:

†All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered price when delivered by truck.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gypsum plasterboard products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Ft. Dodge, East Chicago or Grand Rapids) is in effect, delivered prices of patented board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wis-

consin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

(3) 1/4" Wallboard Exceptions:

(a) For shipments into states of New Mexico, Colorado and Wyoming, also that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma and Fort Dodge, Iowa; or $24.25 per M sq. ft. f.o.b. Laramie, Wyoming and $24.00 per M sq. ft. f.o.b. Loveland, Colorado.

(b) For shipment into states of Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina and Florida, minimum price of 1/4" patented gypsum wallboard is $21.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

(4) 3/8" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Colorado, Wyoming, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina and Florida also into that portion of
9811 Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania; or $31.25 per M sq. ft. f.o.b. Laramie, Wyoming and $31.00 per M sq. ft. f.o.b. Loveland, Colorado.

(5) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Oklahoma, Texas, and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(b) For shipment into states of Louisiana (except Counties as listed in (a) above), and into Kansas and Nebraska, minimum price of 1/2" patented gypsum wallboard is $29.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(c) For shipment into Cuyahoga County, Ohio, the minimum price of 1/2" patented gypsum wallboard is as stated in supplement to Board License Bulletin No. 1, dated March 6, 1936.

(6) 1/2" T&G Sheathing Exceptions:

(a) For shipment into Cook, Lake, Du Page and McHenry Counties, Illinois, also Lake and Porter Counties, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $17.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $21.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(c) For shipment into Wayne County, Michigan, towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan, in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $20.47 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York, in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $24.80 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(e) For shipment into Queens and Nassau Counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold
9812 Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented gypsum sheathing is $19.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one

destination and invoiced to one account, or $21.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(f) For shipment into Erie and Niagara Counties, New York, the minimum price of 1/2" patented gypsum sheathing is $15.00 per M sq. ft. f.o.b. Oakfield, New York.

†(g) For shipment into states of Oklahoma and Texas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, the minimum price of 1/2" patented gypsum sheathing is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(h) For shipment into Cuyahoga County, Ohio, the minimum price of 1/2" patented gypsum sheathing is as stated in Supplement to Board License Bulletin No. 1, dated March 6, 1936.

(7) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

(a) $14.68 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Mercer County, New Jersey (Trenton).

(b) $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
—Douglas County, Nebraska, (Omaha).
—Hampden County, Massachusetts (Springfield).
—Hanover County, Virginia.
—Hartford County, Connecticut (Hartford).
—Hennepin County, Minnesota (Minneapolis).
—Henrico County, Virginia (Richmond).
—Lancaster County, Pennsylvania (Lancaster).
—Marion County, Indiana (Indianapolis).
—Norfolk County, Virginia (Norfolk).
—Oklahoma County, Oklahoma (Oklahoma City).
—Peoria County, Illinois (Peoria).
—Pottawatomie County, Iowa (Council Bluffs).
—Princess Ann County, Virginia.

—Providence County, Rhode Island (Providence).
—Ramsey County, Minnesota (St. Paul).
—Roanoke County, Virginia (Roanoke).
—Sangamon County, Illinois (Springfield).
—Tulsa County, Oklahoma (Tulsa).
—Woodbury County, Iowa (Sioux City).

9813 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 2, 1936.

Carload Shipments
Board License Bulletin No. 1 (Page 1)—Cancels Page 1
Dated May 4, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective June 4, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Patented gypsum wallboard and plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175 per M). See Note *	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	1/2" Gypsum Sheathing (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallboard (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)	3/4" Gypsum Plasterboard (Wt. 3300# per M)
Acme, Texas	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Boston (Charlestown) Mass.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Detroit, Mich.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
East Chicago, Ind.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Fort Dodge, Iowa	22.50	— —	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
Grand Rapids, Mich.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Gypsum, Ohio	22.50	26.50	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
Laramie, Wyo.	26.75	— —	34.75	— —	— —	— —	56.25	— —	21.25	— —	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	— —	56.00	— —	21.00	— —	— —
New Brighton, S. I., N. Y.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Oakfield, N. Y.	22.50	26.50	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
Philadelphia, Pa.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Plastereo, Va.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Southard, Okla.	22.50	— —	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
Sweetwater, Texas	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —

* 5/16" Gypsum Wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

9814 #Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than ¼¢ per cwt. to be dropped, fractions of ¼¢ per cwt. to ½¢ per cwt. to be considered as ½¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

Emergency Freight Charges:

The minimum delivered prices of patented gypsum wallboard and gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented gypsum wallboard and gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented gypsum wallboard and gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds:

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

9815 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full emergency Increase applicable to such charges, will be paid by customers.

Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered priee when delivered by truck.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gypsum plasterboard products for shipment to or delivery in the following area: States of California, Ari-

zona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Ft. Dodge, East Chicago or Grand Rapids) is in effect, delivered prices of patented board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

(3) 1/4" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Colorado and Wyoming, also that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma and Fort Dodge, Iowa; or $24.25 per M sq. ft. f.o.b. Laramie, Wyoming and $24.00 per M sq. ft. f.o.b. Loveland, Colorado.

(b) For shipment into states of Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina and Florida, minimum price of 1/4" patented gypsum wallboard is $21.00 per M sq. ft. f.o.b. Acme, Texas: Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

†(c) For shipment into states of North Dakota, South Dakota, Nebraska and Kansas, minimum price of 1/4" patented gypsum wallboard is $22.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma.

†(d) For shipment into state of Minnesota, minimum price of 1/4" patented gypsum wallboard is $22.00 per

M sq. ft. f.o.b. Fort Dodge, Iowa or $22.50 per M sq. ft. f.o.b. Grand Rapids, Michigan and East Chicago, Indiana.

9816 (4) 3/8" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Colorado, Wyoming, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina and Florida also into that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania; or $31.25 per M sq. ft. f.o.b. Laramie, Wyoming and $31.00 per M sq. ft. f.o.b. Loveland, Colorado.

(b) For shipment into states of North Dakota, South Dakota, Nebraska and Kansas, minimum price of 3/8" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma.

(c) For shipment into states of Minnesota and Missouri, minimum price of 3/8" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $28.50 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(5) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Oklahoma, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(b) For shipment into states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mjssissippi, Louisiana (except counties listed in (a) above), Kansas, Nebraska, South Dakota, North Dakota and that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/2" patented gypsum wallboard is $29.00 per M sq. ft. f.o.b. Plasterco, Virginia; Philadelphia, Pennsylvania; Gypsum, Ohio; East Chicago, Indiana;

Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas, and Acme, Texas.

(c) For shipment into states of Minnesota and Missouri, minimum price of 1/2" patented gypsum wallboard is $29.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $31.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(d) For shipment into Cuyahoga County, Ohio, the minimum price of 1/2" patented gypsum wallboard is as stated in supplement to Board License Bulletin No. 1, dated March 6, 1936.

(6) 1/2" T&G Sheathing Exceptions:

(a) For shipment into Cook, Lake, Du Page and McHenry Counties, Illinois, also Lake and Porter Counties, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $17.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

9817 (b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $21.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(c) For shipment into Wayne County, Michigan, towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan, in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $20.47 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York, in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $24.80 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(e) For shipment into Queens and Nassau Counties, New York also towns of Amityville, Huntington, North-

port, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented gypsum sheathing is $19.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $21.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(f) For shipment into Erie and Niagara counties, New York, the minimum price of 1/2" patented gypsum sheathing is $15.00 per M sq. ft. f.o.b. Oakfield, New York.

(g) For shipment into states of Oklahoma and Texas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, the minimum price of 1/2" patented gypsum sheathing is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(h) For shipment into Cuyahoga County, Ohio, the minimum price of 1/2" patented gypsum sheathing is as stated in Supplement to Board License Bulletin No. 1, dated March 6, 1936.

(7) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

(a) $14.68 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Mercer County, New Jersey (Trenton). See paragraph (10) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

9818 (7) 5/16" Plasterboard (Cont'd.)

(b) $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
—Douglas County, Nebraska, (Omaha).
—Franklin County, Ohio (Columbus).
—Hampden County, Massachusetts (Springfield).
—Hanover County, Virginia.
—Hartford County, Connecticut (Hartford).

—Hennepin County, Minnesota (Minneapolis).
—Henrico County, Virginia (Richmond).
—Kent County, Rhode Island.
—Lancaster County, Pennsylvania (Lancaster).
—Marion County, Indiana (Indianapolis).
—Norfolk County, Virginia (Norfolk).
—Oklahoma County, Oklahoma (Oklahoma City).
—Peoria County, Illinois (Peoria).
—Pottawatomie County, Iowa (Council Bluffs).
—Princess Anne County, Virginia.
—Providence County, Rhode Island (Providence).
—Ramsey County, Minnesota (St. Paul).
—Roanoke County, Virginia (Roanoke).
—Sangamon County, Illinois (Springfield).
—Tulsa County, Oklahoma (Tulsa).
—Woodbury County, Iowa (Sioux City).

also following towns in Missouri; St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction.

(c) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph).
—Cass County, North Dakota (Fargo).
—DeKalb County, Georgia.
—Fulton County, Georgia (Atlanta).
—Greene County, Missouri (Springfield).
—Jasper County, Missouri (Joplin).
—Lancaster County, Nebraska (Lincoln).
—Minnehaha County, South Dakota (Sioux Falls).
—Newton County, Missouri (Joplin).
—Sedgewick County, Kansas (Wichita).

also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo Argentine, Westport, Overland Park and Kansas City, Kansas.

(d) For shipment to Meadville, Pennsylvania for the Meadville Housing Operation, the minimum price of 5/16" patented gypsum plasterboard is as stated in telegram dated April 15, 1936.

9819 (8) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq.

ft. f. o. b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(b) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.87 per M sq. ft. f. o. b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(9) In straight carloads of patented gypsum board and/or lath products consigned to one destination and invoiced to one account, minimum prices of patented gypsum board products f. o. b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston areas (as described below) shall be same as f. o. b. New Brighton, Philadelphia or Boston mill prices as listed on page one of this bulletin. This applies into areas as follows:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. Exception: Refer to section (e) of paragraph (6) and section (a) of paragraph (7) for minimum prices of 1/2" T&G sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Boston Area: Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or

for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

9820 (10) For minimum prices of patented gypsum board products, in pool cars or in mixed cars with other gypsum products, f. o. b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston Areas as described in paragraph (9) above, add $2.00 per M sq. ft. to prices applying f. o. b. cars New Brighton, Philadelphia to Boston Mills. Exceptions: Refer to section (e) of paragraph (6) and section (a) of paragraph (7) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

On pool cars or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described in paragraph (9) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(11) Grand Rapids Switching District. For minimum prices of patented gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products, f. o. b. cars delivered to dealers warehouse or siding within the Grand Rapids, Michigan Switching District, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

(12) Chicago Area. For minimum prices of patented gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products (either 40,000# or 60,000# cars) f.o.b. cars delivered to dealers warehouse or siding within the Chicago Area, add 50¢ per M sq. ft. to prices applying f.o.b. cars, East Chicago mill. This applies into Cook and DuPage Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest. Exception: Minimum price of 1/2" gypsum sheathing for shipment into the Chicago Area as described above is $17.66 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding.

(13) Detroit Area. For minimum prices of patented gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area, add 60¢ per M sq. ft. to prices applying f.o.b. cars, Detroit Mill. This applies into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan. Exception: Minimum price of 3/8" gypsum plasterboard is $15.00 per M sq. ft. and minimum price of 1/2" gypsum sheathing is $20.47 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area as described above.

(14) 24" x 48" Cutstock Plasterboard. In states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama the minimum price is $17.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $18.75 per M sq. ft. for 1/2" thickness, f.o.b. Plasterco, Va., Grand Rapids, Mich., Fort Dodge, Iowa; East Chicago, Indiana; Gypsum, Ohio; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

(15) 1/4" and 3/8" Cutstock Plasterboard. Minimum price for shipment to Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y. is $12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.

This price does not apply to 32" x 48" board.

9821 (16) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(c) In Henrico County, Virginia only, 32" x 48" cutstock plasterboard is subject to minimum plasterboard price.

(17) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum

roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(18) For Texas Centennial (Dallas, Texas).

The minimum prices of patented gypsum wallboard, aluminum paint primed, one coat, both sides and four edges, for the Texas Centennial, Dallas, Texas, are as follows:

3/8" Gypsum Wallboard—$43.50 per M sq. ft. f.o.b. Sweetwater, Texas.

1/2" Gypsum Wallboard—44.50 per M sq. ft. f.o.b. Sweetwater, Texas.

Prices of same boards primed one side only, and four edges, are $4.50 per M sq. ft. less than minimum prices shown above.

(19) Delivered Carload Minimum Prices in Certain Suburbs Same as in City Proper, as Indicated Below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois; Deerfield, Highland Park and Lake Forest.	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland County; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Michigan
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.
9822 Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Okla. City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.

(20) Sales to Contractors and Prefabricated House Manufacturers, Also Extras on Odd Sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

———— ————, *Vice President.*

† Indicates change in this reissue.

9823 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered price when delivered by truck.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gypsum plasterboard products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Ft. Dodge, East Chicago or Grand Rapids) is in effect, delivered prices of patented board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

(3) 1/4" Wallboard Exceptions:

†(a) For shipment into states of Florida, New Mexico, Colorado and Wyoming, also that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Plasterco, Virginia; and Fort Dodge, Iowa; or $24.25 per M sq. ft. f.o.b. Laramie, Wyoming and $24.00 per M sq. ft. f.o.b. Loveland, Colorado.

†(b) For shipment into states of Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina and North Carolina, minimum price of 1/4" patented gypsum wallboard is $21.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan;

† Indicates changes in this reissue (changes become effective June 23, 1936).

East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia and Philadelphia, Pennsylvania.

(c) For shipment into states of North Dakota, South Dakota, Nebraska and Kansas, minimum price of 1/4" patented gypsum wallboard is $22.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma.

(d) For shipment into state of Minnesota, minimum price of 1/4" patented gypsum wallboard is $22.00 per M sq. ft. f.o.b. Fort Dodge, Iowa or $22.50 per M sq. ft. f.o.b. Grand Rapids, Michigan and East Chicago, Indiana.

(4) 3/8" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Colorado, Wyoming, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina and Florida, also into that portion of Mon-
9824 tana east of but not including, Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania; or $31.25 per M sq. ft. f.o.b. Laramie, Wyoming and $31.00 per M sq. ft. f.o.b. Loveland, Colorado.

(b) For shipment into states of North Dakota, South Dakota, Nebraska and Kansas, minimum price of 3/8" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma.

(c) For shipment into states of Minnesota and Missouri, minimum price of 3/8" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $28.50 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(d) For shipment into states of Maine, New Hampshire, Vermont, Wisconsin and Upper Michigan, also into Kentucky (not including Boone, Kenton and Campbell counties), also into West Virginia (not including Hancock, Brooke, Ohio and Marshall Counties), also for shipment into town of Bluefield only in state of Virginia, minimum price of 3/8" patented gypsum wallboard is $27.00 per M sq. ft. f.o.b. Oakfield, New York; Boston, Massachusetts;

Plasterco, Virginia; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan; and Fort Dodge, Iowa.

(5) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Oklahoma, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(b) For shipment into states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisiana (except counties listed in (a) above), Kansas, Nebraska, South Dakota, North Dakota and that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/2" patented gypsum wallboard is $29.00 per M sq. ft. f.o.b. Plasterco, Virginia; Philadelphia, Pennsylvania; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

(c) For shipment into states of Minnesota and Missouri, minimum price of 1/2" patented gypsum wallboard is $29.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $31.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(d) For shipment into Cuyahoga County, Ohio, the minimum price of 1/2" patented gypsum wallboard is as stated in supplement to Board License Bulletin No. 1, dated March 6, 1936.

(6) 1/2" T&G Sheathing Exceptions:

(a) For shipment into Cook, Lake, Du Page and McHenry Counties, Illinois, also Lake and Porter Counties, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $17.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

9825 (7) 5/16" Plasterboard (Cont'd.).

(b) $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio
†—Dauphin County, Pennsylvania (Harrisburg)
—Douglas County, Nebraska, (Omaha)
†—Franklin County, Massachusetts, (Greenfield)
—Franklin County, Ohio, (Columbus)
—Hampden County, Massachusetts (Springfield)
†—Hampshire County, Massachusetts, (Northampton)
—Hanover County, Virginia
—Hartford County, Connecticut (Hartford)
—Hennepin County, Minnesota (Minneapolis)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island
—Lancaster County, Pennsylvania (Lancaster)
—Marion County, Indiana (Indianapolis)
—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Pottawatomie County, Iowa (Council Bluffs)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Ramsey County, Minnesota (St. Paul)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)
—Woodbury County, Iowa (Sioux City)

also following towns in Missouri; St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

(c) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—DeKalb County, Georgia
—Fulton County, Georgia (Atlanta)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Newton County, Missouri (Joplin)
—Sedgewick County, Kansas (Wichita)

† Indicates changes in this reissue (changes become effective June 23, 1936).

also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(d) For shipment to Meadville, Pennsylvania for the Meadville Housing Operation, the minimum price of 5/16" patented gypsum plasterboard is as stated in telegram dated April 15, 1936.

9826 (8) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(b) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida .

†(9) In straight carloads of patented gypsum board and/or lath products consigned to one destination and invoiced to one account, minimum prices of patented gypsum board products f.o.b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston areas (as described below) shall be same as prices applying f.o.b. cars New Brighton, Philadelphia or Boston mills. This applies into areas as follows:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. Exception: Refer to section (e) of paragraph (6) and section (a) of paragraph (7) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New

† Indicates change in this reissue.

York, also of 5/16" plasterboard into Mercer County, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Boston Area: Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

9827 including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania; or $31.25 per M sq. ft. f.o.b. Laramie, Wyoming and $31.00 per M sq. ft. f.o.b. Loveland, Colorado.

(b) For shipment into states of North Dakota, South Dakota, Nebraska and Kansas, minimum price of 3/8" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma.

(c) For shipment into states of Minnesota and Missouri, minimum price of 3/8" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $28.50 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

†(d) For shipment into states of Maine, New Hampshire, Vermont, Wisconsin and Upper Michigan, also into Kentucky (not including Boone, Kenton and Campbell counties), also into West Virginia (not including Hancock,

† Indicates changes in this reissue.

Brooke, Ohio and Marshall Counties), also for shipment into Tazewell and Buchanan counties only in state of Virginia, also for shipment into Essex, Middlesex, Suffolk and Norfolk Counties, Mass., the town of Mansfield, Mass. and that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass., minimum price of 3/8" patented gypsum wallboard is $27.00 per M sq. ft. f.o.b. Oakfield, New York; Boston, Massachusetts; Plasterco, Virginia; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan; and Fort Dodge, Iowa.

(5) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Oklahoma, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(b) For shipment into states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisiana (except counties listed in (a) above), Kansas, Nebraska, South Dakota, North Dakota and that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/2" patented gypsum wallboard is $29.00 per M sq. ft. f.o.b. Plasterco, Virginia; Philadelphia, Pennsylvania; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

(c) For shipment into states of Minnesota and Missouri, minimum price of 1/2" patented gypsum wallboard is $29.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $31.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(d) For shipment into Cuyahoga County, Ohio, the minimum price of 1/2" patented gypsum wallboard is as stated in supplement to Board License Bulletin No. 1, dated March 6, 1936.

(6) 1/2" T&G Sheathing Exceptions:

(a) For shipment into Cooke, Lake, DuPage and McHenry Counties, Illinois, also Lake and Porter Counties,

Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $17.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

9828 including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania; or $31.25 per M sq. ft. f.o.b. Laramie, Wyoming and $31.00 per M sq. ft. f.o.b. Loveland, Colorado.

(b) For shipment into states of North Dakota, South Dakota, Nebraska and Kansas, minimum price of 3/8" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma.

(c) For shipment into states of Minnesota and Missouri, minimum price of 3/8" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $28.50 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

†(d) For shipment into states of Maine, New Hampshire, Vermont, Rhode Island, Wisconsin and Upper Michigan, also into Kentucky (not including Boone, Kenton and Campbell counties), also into West Virginia (not including Hancock, Brooke, Ohio and Marshall Counties), also for shipment into Tazewell and Buchanan counties only in state of Virginia, also for shipment into Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable, Dukes and Nantucket Counties, Massachusetts, minimum price of 3/8" patented gypsum wallboard is $27.00 per M sq. ft. f.o.b. Oakfield, New York; Boston, Massachusetts; Plasterco, Virginia; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan and Fort Dodge, Iowa.

(5) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Oklahoma, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

† Indicates changes in this reissue.

(b) For shipment into states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisiana (except counties listed in (a) above), Kansas, Nebraska, South Dakota, North Dakota and that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/2" patented gypsum wallboard is $29.00 per M sq. ft. f.o.b. Plasterco, Virginia; Philadelphia, Pennsylvania; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

(c) For shipment into states of Minnesota and Missouri, minimum price of 1/2" patented gypsum wallboard is $29.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $31.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(d) For shipment into Cuyahoga County, Ohio, the minimum price of 1/2" patented gypsum wallboard is as stated in supplement to Board License Bulletin No. 1, dated March 6, 1936.

(6) 1/2" T&G Sheathing Exceptions:

(a) For shipment into Cooke, Lake, DuPage and McHenry Counties, Illinois, also Lake and Porter Counties, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $17.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

9829 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 10, 1936

Carload Shipments
Board License Bulletin No. 1 (Page 1) Cancels Page 1
Dated June 2, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notifield that effective July 13, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Patented gypsum wallboard and plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175 per M) See Note.*	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	1/2" Gypsum Sheathing (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallboard (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)	3/4" Gypsum Plasterboard (Wt. 3300# per M)
Acme, Texas	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Boston (Charlestown) Mass.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Detroit, Mich.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
East Chicago, Ind.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Fort Dodge, Iowa.	22.50	— —	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
Grand Rapids, Mich.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Gypsum, Ohio	22.50	26.50	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
Laramie, Wyo.	26.75	— —	34.75	— —	— —	— —	56.25	— —	21.25	— —	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	— —	56.00	— —	21.00	— —	— —
New Brighton, S. I., N. Y.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Oakfield, N. Y.	22.50	26.50	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
Philadelphia, Pa.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Plasterco, Va.	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Southard, Okla.	22.50	— —	28.50	31.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
Sweetwater, Texas	22.50	— —	28.50	31.00	22.00	— —	50.00	15.00	15.00	16.25	— —

* 5/16" Gypsum Wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

9830 #Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than ¼¢ per cwt to be dropped, fractions of ¼¢ per cwt. to ½¢ per cwt. to be considered as ½¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

Emergency Freight Charges: The minimum delivered prices of patented gypsum wallboard and gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented gypsum wallboard and gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f. o. b. mill prices of patented gypsum wallboard and gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds:

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

9831 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered price when delivered by truck.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gypsum plasterboard products for shipment to or delivery

in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 1/4" Wallboard Exceptions:

(a) For shipment into states of Florida, New Mexico, Colorado and Wyoming, also that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq.ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Plasterco, Virginia; and Fort Dodge, Iowa; or $24.25 per M sq.ft. f.o.b. Laramie, Wyoming and $24.00 per M sq.ft. f.o.b. Loveland, Colorado.

(b) For shipment into states of Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina and North Carolina, minimum price of 1/4" patented gypsum wallboard is $21.00 per M sq.ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia and Philadelphia, Pennsylvania.

†(c) For shipment into states of North Dakota, South Dakota, Nebraska and Kansas, minimum price of 1/4" patented gypsum wallboard is $21.00 per M sq.ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma.

†(d) For shipment into states of Minnesota, Iowa and Missouri minimum price of 1/4" patented gypsum wallboard is $21.00 per M sq.ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma, or $22.50 per M sq.ft. f.o.b. Grand Rapids, Michigan and East Chicago, Indiana.

†(e) For shipment into states of Virginia, Kentucky (not including Boone, Kenton and Campbell Counties) and West Virginia (not including Hancock, Brooke, Ohio and Marshall counties), minimum price of 1/4" patented gypsum wallboard is $21.00 per M sq.ft. f.o.b. Plasterco, Virginia or $22.50 per M sq.ft. f.o.b. Philadelphia, Pennsylvania; Oakfield, New York; Gypsum, Ohio; Grand Rapids, Michigan; and East Chicago, Indiana.

(3) 3/8" Wallboard Exceptions:

†(a) For shipment into states of New Mexico, Colorado, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina and Florida, also into that portion of Montana east of

but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties minimum price of 3/8"
9832 patented gypsum wallboard is $25.00 per M sq.ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania; or $31.25 per M sq.ft. f.o.b. Laramie, Wyoming and $31.00 per M sq.ft. f.o.b. Loveland, Colorado.

†(b) For shipment into states of Minnesota, Iowa and Missouri, minimum price of 3/8" patented gypsum wallboard is $26.00 per M sq.ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $27.00 per M sq.ft. f.o.b. East Chicago, Indiana; or $28.50 per M sq.ft. f.o.b. Grand Rapids, Michigan.

†(c) For shipment into the District of Columbia and states of Maine, New Hampshire, Vermont, Rhode Island, Massachusetts, Maryland, Virginia, Wisconsin and Upper Michigan, also into Kentucky (not including Boone, Kenton and Campbell counties), also into West Virginia (not including Hancock, Brooke, Ohio and Marshall counties), minimum price of 3/8" patented gypsum wallboard is $27.00 per M sq.ft. f.o.b. Oakfield, New York; Boston, Massachusetts; Philadelphia, Pennsylvania; Plasterco, Virginia; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan and Fort Dodge, Iowa.

†(d) For shipment into states of Illinois and Indiana, minimum price of 3/8" patented gypsum wallboard is $27.00 per M sq.ft. f.o.b. East Chicago, Indiana or $28.50 per M sq.ft. f.o.b. Fort Dodge, Iowa; Grand Rapids, Michigan; and Gypsum, Ohio.

(4) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Oklahoma, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq.ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

†(b) For shipment into states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisiana (except counties listed in (a) above), Kansas, Nebraska, South Dakota, North Dakota, Colorado, Wyoming, and that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon counties, minimum price of 1/2" patented gypsum wallboard is $27.00 per M sq.ft. f.o.b. Plasterco, Virginia;

Philadelphia, Pennsylvania; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

(c) For shipment into states of Minnesota, Iowa and Missouri, minimum price of 1/2" patented gypsum wallboard is $28.00 per M sq.ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $31.00 per M sq.ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(5) 1/2" T&G Sheathing Exceptions:

(a) For shipment into Cooke, Lake, DuPage and McHenry counties, Illinois, also Lake and Porter counties, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $17.66 per M sq.ft. f.o.b. cars delivered to dealers' warehouse or siding.

9833 (b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $21.42 per M sq.ft. f.o.b. cars delivered to dealers' warehouse or siding.

(c) For shipment into Wayne County, Michigan, towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan, in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $20.47 per M sq.ft. f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York, in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $24.80 per M sq.ft. f.o.b. cars delivered to dealers' warehouse or siding.

(e) For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented gypsum sheathing is $19.00 per M sq.ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $20.00 per M sq.ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(f) For shipment into Erie and Niagara counties, New York, the minimum price of ½" patented gypsum sheathing is $15.00 per M sq.ft. f.o.b. Oakfield, New York.

(g) For shipment into states of Oklahoma and Texas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, the minimum price of 1/2" patented gypsum sheathing is $26.00 per sq.ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(6) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

(a) $15.00 per M sq.ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
—Dauphin County, Pennsylvania (Harrisburg)
—Douglas County, Nebraska, (Omaha)
—Franklin County, Massachusetts, (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts, (Northampton)
—Hanover County, Virginia
—Hartford County, Connecticut (Hartford)
—Hennepin County, Minnesota (Minneapolis)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island
9834 —Lancaster County, Pennsylvania (Lancaster)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton) See paragraph (9) for minimum quantity required for shipment in pool cars or mixed cars.
—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Pottawatomie County, Iowa (Council Bluffs)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Ramsey County, Minnesota (St. Paul)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)
—Woodbury County, Iowa (Sioux City)

also following towns in Missouri; St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

(b) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—DeKalb County, Georgia
—Fulton County, Georgia (Atlanta)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Newton County, Missouri (Joplin)
—Sedgewick County, Kansas (Wichita)

also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(7) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(b) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.87 per sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

9835 (8) In straight carloads of patented gypsum board and/or lath products consigned to one destination and invoiced to one account, minimum prices of patented gypsum board products f.o.b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston areas (as described below) shall be same as prices applying f.o.b. cars New Brighton, Philadelphia or Boston mills. This applies into areas as follows:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union,

Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. Exception: Refer to section (e) of paragraph (5) and section (a) of paragraph (6) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Boston Area: Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

†(9) For minimum prices of patented gypsum board products, in pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston Areas as described in paragraph (8) above, add $1.00 per M sq. ft. to prices applying f.o.b. cars New Brighton, Philadelphia or Boston mills. Exceptions: Refer to section (e) of paragraph (5) and section (a) of paragraph (6) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

On pool cars or mixed cars into the Metro New York—New Jersey Area, the Philadelphia Area and the Boston Area as described in paragraph (8) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

9836 (10) Grand Rapids Switching District. For minimum prices of patented gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Grand Rapids, Michigan Switching District, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids mill.

(11) Chicago Area. For minimum prices of patented gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products (either 40,000# or 60,000# cars) f.o.b. cars delivered to dealers warehouse or siding within the Chicago Area, add 50¢ per M sq. ft. to prices applying f.o.b. cars, East Chicago mill. This applies into Cook and DuPage Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest. Exception: Minimum price of 1/2" gypsum sheathing for shipment into the Chicago Area as described above is $17.66 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding.

(12) Detroit Area. For minimum prices of patented gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area, add 60¢ per M sq. ft. to prices applying f.o.b. cars, Detroit mill. This applies into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville and Centerline, in Macomb County, Michigan. Exception: Minimum price of 3/8" gypsum plasterboard is $15.00 per M sq. ft. and minimum price of 1/2" gypsum sheathing is $20.47 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area as described above.

(13) 24" x 48" Cutstock Plasterboard. In states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama the minimum price is $17.50 per M sq. ft. for 1/4" and 3/8" thickness and $18.75 per M sq. ft. for 1/2" thickness, f.o.b. Plasterco, Va., Grand Rapids, Mich., Fort Dodge, Iowa; East Chicago, Indiana; Gypsum, Ohio; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

(14) 1/4" and 3/8" Cutstock Plasterboard. Minimum price for shipment to Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y. is $12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.

This price does not apply to 32" x 48" board.

(15) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

9837 (b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(c) In Henrico County, Virginia only, 32" x 48" cutstock plasterboard is subject to minimum plasterboard price.

(16) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(17) Delivered Carload Minimum Prices in Certain Suburbs Same as in City Proper, as Indicated Below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage counties, Ill.; Lake County, Indiana; also following towns in Lake County, Illinois; Deerfield, Highland Park and Lake Forest.	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland County; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb County, Michigan.	Detroit, Michigan
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Okla. City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.
Roselyn, Virginia	Washington, D. C.

9838 (18) Sales to Contractors and Prefabricated House Manufacturers, Also Extras on Odd Sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, and differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

———— ————, *Vice President.*

† Indicates change in this reissue.

9839 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 23, 1936.

Carload Shipments
Board License Bulletin No. 1—Cancels Board License Bulletin No. 1 Dated July 10, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 28, 1936 the minimum price at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Patented gypsum wallboard and plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallboard (Wt. 1175 per M) See Note *	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	1/2" Gypsum Sheathing (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallboard (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M)	3/4" Gypsum Plasterboard (Wt. 3300 # per M)
†Acme, Texas	21.00	— —	27.00	29.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Boston (Charlestown) Mass.	21.00	— —	27.00	29.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Detroit, Mich.	21.00	— —	27.00	29.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†East Chicago, Ind.	21.00	— —	27.00	29.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Fort Dodge, Iowa	21.00	— —	27.00	29.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Grand Rapids, Mich.	21.00	24.00	27.00	29.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Gypsum, Ohio	24.25	— —	31.25	— —	— —	— —	56.25	— —	21.25	— —	— —
†Laramie, Wyo.	24.00	— —	31.00	— —	— —	— —	56.00	— —	21.00	— —	— —
†Loveland, Colo.	21.00	— —	27.00	29.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†New Brighton, S. I., N. Y.	21.00	24.00	27.00	29.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Oakfield, N. Y.	21.00	— —	27.00	29.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Philadelphia, Pa.	21.00	— —	27.00	29.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Plasterco, Va.	21.00	— —	27.00	29.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Southard, Okla.	21.00	— —	27.00	29.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Sweetwater, Texas											

* 5/16" Gypsum Wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

9840 #Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than ¼¢ per cwt. to be dropped, fractions of ¼¢ per cwt. to ½¢ per cwt. to be considered as ½¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

Emergency Freight Charges: The minimum delivered prices of patented gypsum wallboard and gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented gypsum wallboard and gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f. o. b. mill prices of patented gypsum wallboard and gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds:

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.20	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

9841 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered price when delivered by truck.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gypsum plasterboard products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of

State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 1/4" Wallboard Exceptions:

(a) For shipment into states of Florida, New Mexico, Colorado and Wyoming, also that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Plasterco, Virginia; and Fort Dodge, Iowa.

(3) 3/8" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Colorado, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina and Florida, also into that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

(b) For shipment into states of Minnesota, Iowa and Missouri, minimum price of 3/8" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $27.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(4) 1/2" Wallboard Exceptions:

(a) For shipment into states of New Mexico, Oklahoma, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(b) For shipment into states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisiana (except counties listed in (a) above), Kansas, Nebraska, South Dakota, North Dakota, Colorado, Wyoming, and that portion of Montana east of but
9842 not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon counties, minimum price

of 1/2" patented gypsum wallboard is $27.00 per M sq. ft. f.o.b. Plasterco, Virginia; Philadelphia, Pennsylvania; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

†(c) For shipment into states of Minnesota, Iowa and Missouri, minimum price of 1/2" patented gypsum wallboard is $28.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $29.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(5) 1/2" T&G Sheathing Exceptions:

†(a) For shipment into Lake and McHenry counties, Illinois, also Porter county, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $17.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $21.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(c) For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented gypsum sheathing is $19.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $20.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Erie and Niagara counties, New York, the minimum price of 1/2" patented gypsum sheathing is $15.00 per M sq. ft. f.o.b. Oakfield, New York.

(6) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

(a) $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
—Dauphin County, Pennsylvania (Harrisburg)
—Douglas County, Nebraska (Omaha)
—Franklin County, Massachusetts (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts (Northampton)
9843 —Hanover County, Virginia
—Hartford County, Connecticut (Hartford)
—Hennepin County, Minnesota (Minneapolis)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island
—Lancaster County, Pennsylvania (Lancaster)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton) See paragraph (8) for minimum quantity required for shipment in pool cars or mixed cars.
—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Pottawatomie County, Iowa (Council Bluffs)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Ramsey County, Minnesota (St. Paul)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)
—Woodbury County, Iowa (Sioux City)

also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

(b) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Broward County, Florida
—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Dade County, Florida (Miami)
—DeKalb County, Georgia

—Fulton County, Georgia (Atlanta)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
†—Monroe County, Florida
—Newton County, Missouri (Joplin)
†—Palm Beach County, Florida
—Sedgewick County, Kansas (Wichita)

also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(7) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida

9844 †(8) Delivery Price Areas

Prices of patented board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

Del'd Prices into: (See Descriptions of Areas Below)		1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	1/4" Gypsum Lath	3/8" Gypsum Lath	1/2" Gypsum Lath
†Metro N. Y.—N. J., Boston and Philadelphia Areas (See Notes b & c)	Straight Cars	21.00	27.00	29.00	22.00	50.00	15.00	15.00	16.25
	Pool or Mxd. Cars	22.00	28.00	30.00	23.00	51.00	16.00	16.00	17.25
†Southeast New York & Southern New Jersey Areas, Also Lehigh and Northampton Counties, Penna. and New Castle County, Del.	Straight, Pool or Mxd. Cars	22.00	28.00	30.00	23.00	51.00	16.00	16.00	17.25
†Chicago Area	Straight, Pool or Mxd. Cars	21.50	27.50	29.50	17.66	50.50	15.50	15.50	16.75
†Detroit Area	Straight, Pool or Mxd. Cars	21.60	27.60	29.60	20.47	50.60	15.60	15.00	16.85
†Grand Rapids Switching Area	Straight, Pool or Mxd. Cars	22.00	28.00	30.00	23.00	51.00	16.00	16.00	17.25

Notes and Exceptions Applying to Delivered Price Areas Listed Above:

(a) Descriptions of Areas:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

†Boston Area: Essex, Middlesex, Suffolk, Norfolk and Worcester counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine.

†Southeast New York Area: Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York.

9845 †Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey.

Chicago Area: Cook and Du Page Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

†Detroit Area: Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores and Centerline in Macomb County, Michigan.

Grand Rapids, Mich. Switching Area: As described in published railroad freight tariffs.

†(b) Delivered prices for shipment in straight cars into Metro New York-New Jersey, Philadelphia and Boston Areas apply on straight carloads of patented gypsum board products consigned to one destination and invoiced to one account. Any mixture of regular patented board products (including special surfaced gypsum board products) and metallized patented board products may be combined to make up the required minimum. Exceptions: Refer to

section (c) of paragraph (5) and section (a) of paragraph (6) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(c) In pool cars or mixed cars into the Metro New York-New Jersey area, Philadelphia area and the Boston area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum. Exceptions: Refer to section (c) of paragraph (5) and section (a) of paragraph (6) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

(9) 24" x 48" Cutstock Plasterboard. In states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama the minimum price is $17.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $18.75 per M sq. ft. for 1/2" thickness, f.o.b. Plasterco, Va., Grand Rapids, Mich., Fort Dodge, Iowa, East Chicago, Indiana, Gypsum, Ohio, Southard, Oklahoma, Sweetwater, Texas and Acme, Texas.

9846 (10) 1/4" and 3/8" Cutstock Plasterboard. Minimum price for shipment to Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y. is $12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.

This price does not apply to 32" x 48" board.

(11) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(c) In Henrico County, Virginia only, 32" x 48" cut-stock plasterboard is subject to minimum plasterboard price.

(12) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(13) Delivered Carload Minimum Prices in Certain Suburbs Same as in City Proper, as Indicated Below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall & Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Okla. City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.

9847 (14) Sales to Contractors and Prefabricated House Manufacturers, also Extras on Odd Sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

———— ————, *Vice President.*

† Indicates change in this reissue.

9848 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered price when delivered by truck.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gypsum plasterboard products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 1/4" Wallboard Exceptions:

(a) For shipment into states of Florida, New Mexico, Colorado and Wyoming, also that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Plasterco, Virginia; and Fort Dodge, Iowa.

(3) 3/8" Wallboard Exceptions:

†(a) For shipment into states of New Mexico, Colorado, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina and Florida, also into that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties also into Kansas City, Missouri, minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

†(b) For shipment into states of Minnesota, Iowa and Missouri (except Kansas City—see paragraph (a) above) minimum price of 3/8" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $27.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids Michigan

(4) 1/2" Wallboard Exceptions:

† Indicates changes (to become effective August 8, 1936).

(a) For shipment into states of New Mexico, Oklahoma; Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne counties, Louisiana, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(b) For shipment into states of North Carolina, South Carolina, Georgia; Florida; Tennessee, Alabama, Mississippi, Louisiana (except counties listed in (a) above), Kansas, Nebraska, South Dakota, North Dakota, Colorado, Wyoming, and that portion of Montana east of but not including Phillips, Petroleum,

9849 (10) 1/4" and 3/8" Cutstock Plasterboard. Minimum price for shipment to Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y. is $12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.

This price does not apply to 32" x 48" board.

(11) 32" x 48" Gypsum Board. In all areas 32"x48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(c) In Henrico County, Virginia only, 32" x 48" cutstock plasterboard is subject to minimum plasterboard price.

(12) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(13) Delivered Carload Minimum Prices in Markets as Listed Are Same as in Adjacent Cities, as Indicated Below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall & Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street, and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard, and Wilmont, Okla.	Okla. City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
†Omaha, Nebraska	Council Bluffs, Ia.
†Moline and Rock Island, Illinois	Davenport, Iowa

9850 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered price when delivered by truck.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gypsum plasterboard products for shipment to or delivery in the following area: States of California, Arizona, Nevada,

† Indicates changes (to become effective August 8, 1936).

Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 1/4" Wallboard Exceptions:

(a) For shipment into states of Florida, New Mexico, Colorado and Wyoming; also that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 1/4" patented gypsum wallboard is $20.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Plasterco, Virginia; and Fort Dodge, Iowa.

(3) 3/8" Wallboard Exceptions:

†(a) For shipment into states of New Mexico, Colorado, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina and Florida, also into that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties, minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma, Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia and Philadelphia Pennsylvania.

†(b) For shipment into states of Minnesota, Iowa and Missouri minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $27.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

†(c) For shipment into Logan, Mingo, Wyoming, McDowell, Raleigh, Mercer, Summers and Fayette Counties, West Virginia, also into that portion of Virginia west of and including Highland, Augusta, Nelson, Amherst, Campbell and Halifax Counties, minimum price of 3/8" patented gypsum wallboard is $25.00 per M sq. ft. f.o.b. Plasterco, Virginia; or $27.00 per M sq. ft. f.o.b. Gypsum, Ohio.

†(4) 1/2" Wallboard Exceptions:

(a) For shipment into states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisiana, Texas, New Mexico, Oklahoma, Arkansas,

† Indicates changes (to become effective August 17, 1936).

Kansas, Nebraska, South Dakota, North Dakota, Colorado, Wyoming, and that portion of Montana east of but not including Phillips, Petroleum, Musselshell, Yellowstone and Carbon counties, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Plaste co, Virginia; Philadelphia, Pennsylvania; Gypsum, Ohio; East 9851 Chicago, Indiana; Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

†(b) For shipment into states of Minnesota, Iowa and Missouri, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $29.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

†(c) For shipment into Logan, Mingo, Wyoming, McDowell, Raleigh, Mercer, Summers and Fayette Counties, West Virginia, also into that portion of Virginia west of and including Highland, Augusta, Nelson, Amherst, Campbell and Halifax Counties, minimum price of 1/2" patented gypsum wallboard is $26.00 per M sq. ft. f.o.b. Plasterco, Virginia; or $29.00 per M sq. ft. f.o.b. Gypsum, Ohio.

(5) 1/2" T&G Sheathing Exceptions:

(a) For shipment into Lake and McHenry counties, Illinois, also Porter county, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $17.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $21.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(c) For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented gypsum sheathing is $19.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account or $20.00 per M sq. ft. for shipment in pool cars or

† Indicates changes (to become effective August 17, 1936).

mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Erie and Niagara counties, New York, the minimum price of 1/2" patented gypsum sheathing is $15.00 per M sq. ft. f.o.b. Oakfield, New York.

(6) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

†(a) $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio
—Dauphin County, Pennsylvania (Harrisburg)
—Douglas County, Nebraska (Omaha)
—Franklin County, Massachusetts (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts (Northampton)
—Hanover County, Virginia
—Hartford County, Connecticut (Hartford)
—Hennepin County, Minnesota (Minneapolis)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island
9852 —Lancaster County, Pennsylvania (Lancaster)
†—Lackawanna County, Pennsylvania (Scranton)
†—Luzerne County, Pennsylvania (Wilkes-Barre)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton) See paragraph (8) for minimum quantity required for shipment in pool cars or mixed cars.
—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Pottawatomie County, Iowa (Council Bluffs)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Ramsey County, Minnesota (St. Paul)
—Roanoke County, Virginia (Roanoke)

† Indicates changes (to become effective August 17, 1936).

—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)
—Woodbury County, Iowa (Sioux City)

also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

†(b) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Broward County, Florida
—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Dade County, Florida (Miami)
—DeKalb County, Georgia
—Fulton County, Georgia (Atlanta)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Monroe County, Florida
—Newton County, Missouri (Joplin)
—Palm Beach County, Florida
—Sedgewick County, Kansas (Wichita)
†—Shawnee County, Kansas (Topeka)
†—Shelby County, Tennessee (Memphis)

also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

†(c) $16.25 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Jefferson County, Alabama (Birmingham).

†(d) $17.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Duval County, Florida (Jacksonville).

†(e) $17.50 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Orleans County, Louisiana (New Orleans).

(7) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.87 per M sq. ft. f.o.b.

† Indicates changes (to become effective August 17, 1936).

cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida

9853 —Lancaster County, Pennsylvania (Lancaster)
—Lackawanna County, Pennsylvania (Scranton)
—Luzerne County, Pennsylvania (Wilkes-Barre)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton) See paragraph (8) for minimum quantity required for shipment in pool cars or mixed cars.
—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Pottawatomie County, Iowa (Council Bluffs)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Ramsey County, Minnesota (St. Paul)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)
—Woodbury County, Iowa (Sioux City)

also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

(b) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:
—Broward County, Florida
—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Dade County, Florida (Miami).
—DeKalb County, Georgia
—Fulton County, Georgia (Atlanta)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Monroe County, Florida
—Newton County, Missouri (Joplin)
—Palm Beach County, Florida
—Sedgewick County, Kansas (Wichita)
—Shawnee County, Kansas (Topeka)

also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland

Park and Kansas City, Kansas; also that portion of Kentucky west of and including Marshall and Calloway Counties and that portion of Tennessee west of and including Henry, Benton, Decatur and Hardin Counties.

(c) $16.25 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Jefferson County, Alabama (Birmingham).

(d) $17.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Duval County, Florida (Jacksonville).

(e) $17.50 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Orleans County, Louisiana (New Orleans).

(7) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Flor-
9854 ida.

—Lancaster County, Pennsylvania (Lancaster)
—Lackawanna County, Pennsylvania (Scranton)
—Luzerne County, Pennsylvania (Wilkes-Barre)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton) see paragraph (8) for minimum quantity required for shipment in pool cars or mixed cars.

—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Pottawatomie County, Iowa (Council Bluffs)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Ramsey County, Minnesota (St. Paul)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)
—Woodbury County, Iowa (Sioux City)

†also the St. Louis Area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.

† Indicates change (to become effective August 24, 1936).

(b) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Broward County, Florida
—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Dade County, Florida (Miami)
—DeKalb County, Georgia
—Fulton County, Georgia (Atlanta)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Monroe County, Florida
—Newton County, Missouri (Joplin)
—Palm Beach County, Florida
—Sedgewick County, Kansas (Wichita)
—Shawnee County, Kansas (Topeka)

also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; also that portion of Kentucky west of and including Marshall and Calloway Counties and that portion of Tennessee west of and including Henry, Benton, Decatur and Hardin Counties.

(c) $16.25 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Jefferson County, Alabama (Birmingham).

(d) $17.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Duval County, Florida (Jacksonville).

(e) $17.50 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Orleans County, Louisiana (New Orleans).

(7) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Flor-
9855 ida.

(10) 1/4" and 3/8" Cutstock Plasterboard. Minimum price for shipment to Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne

† Indicates change (to become effective August 25, 1936).

Counties, N. Y. is $12.50 per M sq. ft. f.o.b. cars Oakfield, N. Y.

This price does not apply to 32" x 48" board.

(11) 32" x 49" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(c) In Henrico County, Virginia only, 32" x 48" cutstock plasterboard is subject to minimum plasterboard price.

(12) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(13) Delivered Carload Minimum Prices in Markets as Listed Are Same as in Adjacent Cities, as Indicated Below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall & Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
†Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street, and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard, and Wilmont, Okla.	Okla. City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline and Rock Island, Illinois	Davenport, Iowa

† Indicates changes (to become effective August 25, 1936).

9856 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 11, 1936

Carload Shipments

Board License Bulletin No. 1 (Page 1)—Cancels Page 1
Dated July 23, 1936

This Reissue Cancels All Supplements to Board License Bulletin No. 1 Dated July 23, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective September 15, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Patented gypsum wallboard and plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)†	5/16" Gypsum Wallboard (Wt. 1175 # per M) See Note *	3/8" Gypsum Wallboard (Wt. 1400 # per M)†	1/2" Gypsum Wallboard (Wt. 1900 # per M)†	1/2" Gypsum Sheathing (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallboard (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M)	3/4" Gypsum Plasterboard (Wt. 3300 # per M)
†Acme, Texas	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Boston (Charlestown) Mass.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Detroit, Mich.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†East Chicago, Ind.	20.00	— —	25.00	26.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Fort Dodge, Iowa	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Grand Rapids, Mich.	20.00	24.00	25.00	26.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Gypsum, Ohio	24.25	— —	31.25	— —	— —	— —	56.25	— —	21.25	— —	— —
Laramie, Wyo.	24.00	— —	31.00	— —	— —	— —	56.00	— —	21.00	— —	— —
Loveland, Colo.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†N. Brighton, S. I., N. Y.	20.00	24.00	25.00	26.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Oakfield, N. Y.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Philadelphia, Pa.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Plasterco, Va.	20.00	— —	25.00	26.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Southard, Okla.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
†Sweetwater, Texas											

* 5/16" Gypsum Wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

9857 #Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than ¼¢ per cwt. to be dropped, fractions of ¼¢ per cwt. to ½¢ per cwt. to be considered as ½¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

Emergency Freight Charges: The minimum delivered prices of patented gypsum wallboard and gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented gypsum wallboard and gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f. o. b. mill prices of patented gypsum wallboard and gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds:

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

9858 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within the following Gypsum Board Del'd Price Areas: Metro New York-New Jersey, Philadelphia, Boston, Southeast New York, Southern New Jersey Areas; Lehigh and Northampton Counties, Pennsylvania and New Castle County, Delaware, also Detroit, Michigan Area. (Refer to pages 5 and 6 for descriptions of areas).

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gyp-

sum plasterboard products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 1/2" T&G Sheathing Exceptions:

(a) For shipment into Lake and McHenry counties, Illinois, also Porter County, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $17.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented gypsum sheathing is $21.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(c) For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented gypsum sheathing is $19.00 per M sq. ft. for shipment in straight carloads of patented gypsum products consigned to one destination and invoiced to one account, or $20.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Erie and Niagara counties, New York, the minimum price of 1/2" patented gypsum sheathing is $15.00 per M sq. ft. f.o.b. Oakfield, New York.

9859 (3) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following areas only, is as follows:

(a) $12.75 per M sq. ft. F.O.B. Fort Dodge, Iowa, East Chicago, Indiana, and Grand Rapids, Michigan for shipment into State of Minnesota.

(b) $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
—Dauphin County, Pennsylvania (Harrisburg)
—Douglas County, Nebraska (Omaha)
—Franklin County, Massachusetts (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts (Northampton)
—Hanover County, Virginia
—Hartford County, Connecticut (Hartford)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island
—Lancaster County, Pennsylvania (Lancaster)
—Lackawanna County, Pennsylvania (Scranton)
—Luzerne County, Pennsylvania (Wilkes-Barre)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton—see paragraph (5) for minimum quantity required for shipment in pool cars or mixed cars.)
—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Pottawatomie County, Iowa (Council Bluffs)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)
—Woodbury County, Iowa (Sioux City)

also the St. Louis Area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.

(c) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

—Broward County, Florida
—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Dade County, Florida (Miami)
—DeKalb County, Georgia
—Fulton County, Georgia (Atlanta)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
9860 —Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Monroe County, Florida

—Newton County, Missouri (Joplin)
—Palm Beach County, Florida
—Sedgewick County, Kansas (Wichita)
—Shawnee County, Kansas (Topeka)

also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; also that portion of Kentucky west of and including Marshall and Calloway Counties and that portion of Tennessee west of and including Henry, Benton, Decatur and Hardin Counties.

(d) $16.25 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Jefferson County, Alabama (Birmingham).

(e) $17.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Duval County, Florida (Jacksonville).

(f) $17.50 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Orleans County, Louisiana (New Orleans).

(4) 3/8" Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(b) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Niagara, Erie (including town of Gowanda, N. Y.) Monroe and Wayne Counties, New York.

(5) Delivered Price Areas

Prices of patented gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

9861 Del'd. Prices Into: (See Descriptions of Areas Below)		1/4" Gypsum Wallboard†	3/8" Gypsum Wallboard†	1/2" Gypsum Wallboard†	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	1/4" Gypsum Lath	3/8" Gypsum Lath	1/2" Gypsum Lath
†Metro N. Y.—N. J., Boston and Philadelphia Areas	Straight Cars	20.00	25.00	26.00	22.00	50.00	15.00	15.00	16.25
†(See Notes b & c) Southeast New York & Southern New Jersey	Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25
†Areas, Also Lehigh and Northampton Counties, Penna. and New Castle County, Del.	Straight, Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25
†Chicago Area	Straight, Pool or Mxd. Cars	20.50	25.50	26.50	17.66	50.50	15.50	15.50	16.75
†Detroit Area Grand Rapids	Straight, Pool or Mxd. Cars	20.60	25.60	26.60	20.47	50.60	15.60	15.00	16.85
†Switching Area	Straight, Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25

Notes and Exceptions Applying to Delivered Price Areas Listed Above:

(a) Descriptions of Areas:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Boston Area: Essex, Middlesex, Suffolk, Norfolk and Worcester counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine.

Southeast New York Area: Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York.

Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey.

Chicago Area: Cook and DuPage Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

Detroit Area: Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren,
9862 Halfway, Fraser, Roseville, Saint Clair Shores and Centerline in Macomb County, Michigan.

Grand Rapids, Mich. Switching Area: As described in published railroad freight tariffs.

(b) Delivered prices for shipment in straight cars into Metro New York-New Jersey, Philadelphia and Boston Areas apply on straight carloads of patented gypsum board products consigned to one destination and invoiced to one account. Any mixture of regular patented board products (including special surfaced gypsum board products) and metallized patented board products may be combined to make up the required minimum. Exceptions: Refer to section (c) of paragraph (2) and section (b) of paragraph (3) for minimum prices of 1/2". T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(c) In pool cars or mixed cars into the Metro New York-New Jersey area, Philadelphia area and the Boston area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Any mixture of metallized and regular patented products (including special surfaced gypsum board products) may be combined to make up the required minimum. Exceptions: Re-

fer to section (c) of paragraph (2) and section (b) of paragraph (3) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

(6) 24" x 48" Cutstock Plasterboard. In states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama the minimum price is $17.50 per M sq. ft. for 1/4" and 3/8" thickness and $18.75 per M sq. ft. for 1/2" thickness, f.o.b. Plasterco, Va., Grand Rapids, Mich., Fort Dodge, Iowa, East Chicago, Indiana, Gypsum, Ohio, Southard, Oklahoma, Sweetwater, Texas and Acme, Texas.

(7) 1/4" and 3/8" Cutstock Plasterboard—The minimum price of 1/4" and 3/8" patented open edge (cutstock) gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Niagara, Erie (including town of Gowanda, N. Y.) Monroe and Wayne Counties, N. Y.

This price does not apply to 32" x 48" board.

(8) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

9863 (a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(c) In Henrico County, Virginia only, 32" x 48" cutstock plasterboard is subject to minimum plasterboard price.

(9) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(10) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall & Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street, and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard, and Wilmont, Okla.	Okla. City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline and Rock Island, Illinois	Davenport, Iowa

(11) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

9864 (b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

9865 Del'd. Prices Into: (See Descriptions of Areas Below)		1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallbd.	1/4" Gypsum Lath	3/8" Gypsum Lath	1/2" Gypsum Lath
Metro N. Y.—N. J., Boston and Philadelphia Areas	Straight Cars	20.00	25.00	26.00	22.00	50.60	15.00	15.00	16.25
(See Notes b & c) Southeast New York & Southern New Jersey Areas, Also Lehigh and Northampton Counties, Penna. and New Castle County, Del.	Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25
	Straight, Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25
Chicago Area	Straight, Pool or Mxd. Cars	20.50	25.50	26.50	17.66	50.50	15.50	15.50	16.75
Detroit Area	Straight, Pool or Mxd. Cars	20.60	25.60	26.60	20.47	50.60	15.60	15.00	16.85
Grand Rapids Switching Area	Straight, Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25

Notes and exceptions apply to delivered price areas listed above:

(a) Description of Areas:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

†Boston Area: Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable, and Worcester Counties, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine; and state of Rhode Island.

Southeast New York Area: Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York.

† Indicates change (to become effective September 19, 1936)

Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey.

Chicago Area: Cook and DuPage Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

Detroit Area: Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, 9866 Halfway, Fraser, Roseville, Saint Clair Shores and Centerline in Macomb County, Michigan.

Grand Rapids, Mich. Switching Area: As described in published railroad freight tariffs.

†(b) Delivered prices for shipment in straight cars into Metro New York-New Jersey, Philadelphia and Boston Areas apply on straight carloads of patented gypsum board products consigned to one destination and invoiced to one account. Any mixture of regular patented board products (including special surfaced gypsum board products) and metallized patented board products may be combined to make up the required minimum.

Exceptions: Refer to section (c) of paragraph (2) and section (b) of paragraph (3) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey, Kent and Providence Counties, Rhode Island.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

†(c) In pool cars or mixed cars into the Metro New York-New Jersey area, Philadelphia area and the Boston area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned

† Indicates change.

to one destination and invoiced to one account. Any mixture of metallized and regular patented products (including special surfaced gypsum board products) may be combined to make up the required minimum.

Exceptions: Refer to section (c) of paragraph (2) and section (b) of paragraph (3) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey, Kent and Providence Counties, Rhode Island.

(6) 24"x48" Cutstock Plasterboard. In states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama the minimum price is $17.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $18.75 per M sq. ft. for 1/2" thickness, f.o.b. Plasterco, Va., Grand Rapids, Mich., Fort Dodge, Iowa, East Chicago, Indiana, Gypsum, Ohio, Southard, Oklahoma, Sweetwater, Texas and Acme, Texas.

(7) 1/4" and 3/8" Cutstock Plasterboard: The minimum price of 1/4" and 3/8" patented open edge (cutstock) gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Niagara, Erie (including town of Gowanda, N. Y. Monroe and Wayne Counties, N. Y.

This price does not apply to 32"x48" board.

(8) 32"x48" Gypsum Board. In all areas 32"x48" gypsum board is subject to the minimum wallboard price except:

9867 (3) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following areas only, is as follows:

†(a) $12.00 per M sq. ft. F.O.B. Fort Dodge, Iowa, East Chicago, Indiana, and Grand Rapids, Michigan for shipment into State of Minnesota. (Confirms telegram dated 9-28-36).

(b) $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

† Indicates changes.

† — Cumberland County, Pennsylvania (Effective October 6, 1936).
— Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
† — Dallas County, Texas (Dallas) (Confirms telegram dated 9-28-36).
— Dauphin County, Pennsylvania (Harrisburg).
— Douglas County, Nebraska (Omaha).
— Franklin County, Massachusetts (Greenfield).
— Franklin County, Ohio (Columbus).
— Hampden County, Massachusetts (Springfield).
— Hampshire County, Massachusetts (Northampton).
— Hanover County, Virginia.
— Hartford County, Connecticut (Hartford).
— Henrico County, Virginia (Richmond).
— Kent County, Rhode Island.
† — Knox County, Tennessee (Knoxville) (Confirms telegram 9-28-36).
— Lancaster County, Pennsylvania (Lancaster).
— Lackawanna County, Pennsylvania (Scranton).
— Luzerne County, Pennsylvania (Wilkes-Barre).
— Marion County, Indiana (Indianapolis).
— Mercer County, New Jersey (Trenton—see paragraph (5) for minimum quantity required for shipment in pool cars or mixed cars).
— Norfolk County, Virginia (Norfolk).
— Oklahoma County, Oklahoma (Oklahoma City).
— Peoria County, Illinois (Peoria).
— Pottawatomie County, Iowa (Council Bluffs).
— Princess Anne County, Virginia.
— Providence County, Rhode Island (Providence).
— Roanoke County, Virginia (Roanoke).
— Sangamon County, Illinois (Springfield).
— Tulsa County, Oklahoma (Tulsa).
— Woodbury County, Iowa (Sioux City).

also the St. Louis area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.

(c) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

— Broward County, Florida.
— Buchanan County, Missouri (St. Joseph).
— Cass County, North Dakota (Fargo).
— Dade County, Florida (Miami).
† — Davidson County, Tennessee (Nashville) (Confirms telegram dated 9-28-36).

† Indicates changes.

— DeKalb County, Georgia.
— Fulton County, Georgia (Atlanta).
— Greene County, Missouri (Springfield).
— Jasper County, Missouri (Joplin).

9868 (a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32″x48″ board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(c) In Henrico County, Virginia only, 32″x48″ cutstock plasterboard is subject to minimum plasterboard price.

(9) 36″x48″ Gypsum Board. 36″x48″ is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(10) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered-Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall & Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street, and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
†Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
†Virginia Beach, Virginia	Norfolk, Va.

† Indicates changes (to become effective October 6, 1936)

(11) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.- Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

9869 (3) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following areas only, is as follows:

†(a) $12.00 per M sq. ft. F.O.B. Fort Dodge, Iowa, East Chicago, Indiana, and Grand Rapids, Michigan for shipment into State of Minnesota, also into the City of Superior, Wisconsin.

(b) $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

— Cumberland County, Pennsylvania.
— Cuyahoga County, (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
— Dallas County, Texas (Dallas).
— Dauphin County, Pennsylvania (Harrisburg).
— Douglas County, Nebraska (Omaha).
— Franklin County, Massachusetts (Greenfield).
— Franklin County, Ohio (Columbus).
— Hampden County, Massachusetts (Springfield).
— Hampshire County, Massachusetts (Northampton).
— Hanover County, Virginia.
— Hartford County, Connecticut (Hartford).
— Henrico County, Virginia (Richmond).
— Kent County, Rhode Island.
— Knox County, Tennessee (Knoxville).
— Lancaster County, Pennsylvania (Lancaster).
— Lackawanna County, Pennsylvania (Scranton).
— Luzerne County, Pennsylvania (Wilkes-Barre).

† Indicates changes (to become effective October 14, 1936)

— Marion County, Indiana (Indianapolis).
— Mercer County, New Jersey (Trenton—see paragraph (5) for minimum quantity required for shipment in pool cars or mixed cars).
— Norfolk County, Virginia (Norfolk).
— Oklahoma County, Oklahoma (Oklahoma City).
— Peoria County, Illinois (Peoria).
— Pottawatomie County, Iowa (Council Bluffs).
— Princess Anne County, Virginia.
— Providence County, Rhode Island (Providence).
— Roanoke County, Virginia (Roanoke).
— Sangamon County, Illinois (Springfield).
— Tulsa County, Oklahoma (Tulsa).
— Woodbury County, Iowa (Sioux City).

Also the St. Louis area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.

(c) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

— Broward County, Florida.
— Buchanan County, Missouri (St. Joseph).
— Cass County, North Dakota (Fargo).
— Dade County, Florida (Miami).
— Davidson County, Tennessee (Nashville).
— De Kalb County, Georgia.
— Fulton County, Georgia (Atlanta).
— Greene County, Missouri (Springfield).
— Jasper County, Missouri (Joplin).
9870 — Lancaster County, Nebraska (Lincoln).
— Minnehaha County, South Dakota (Sioux Falls).
— Monroe County, Florida.
— Newton County, Missouri (Joplin).
— Palm Beach County, Florida.
— Sedgewick County, Kansas (Wichita).
— Shawnee County, Kansas (Topeka).

Also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; also that portion of Kentucky west of and including Marshall and Calloway Counties and that portion of Tennessee west of and including Henry, Benton, Decatur and Hardin Counties.

(d) $16.25 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Jefferson County, Alabama, (Birmingham).

(e) $17.50 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Duval County, Florida (Jacksonville).

(f) $17.50 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Orleans County, Louisiana (New Orleans).

(4) Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.87 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

†(b) The minimum price of 1/4" or 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne Counties, New York.

(5) Delivered Price Areas:

Prices of patented gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

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† Indicates change (to become effective October 14, 1936)

9871 Del'd. Prices Into: (See Descriptions of Areas Below)		1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallbd.	1/4" Gypsum Lath	3/8" Gypsum Lath	1/2" Gypsum Lath
Metro N. Y.—N. J., Boston and Philadelphia Areas (See Notes b & c)	Straight Cars	20.00	25.00	26.00	22.00	50.00	15.00	15.00	16.25
	Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25
Southeast New York & Southern New Jersey Areas, Also Lehigh and Northampton Counties, Penna. and New Castle County, Del.	Straight, Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25
Chicago Area	Straight, Pool or Mxd. Cars	20.50	25.50	26.50	17.66	50.50	15.50	15.50	16.75
†Detroit Area	Straight, Pool or Mxd. Cars	20.60	25.60	26.60	20.47	50.60	15.00	15.00	16.85
Grand Rapids Switching Area	Straight, Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25

Notes and exceptions applying to delivered price areas listed above:

(a) Descriptions of Areas:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Boston Area: Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable, and Worcester Counties, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine; and state of Rhode Island.

Southeast New York Area: Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York.

Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey.

† Indicates change (to become effective October 14, 1936)

Chicago Area: Cook and DuPage Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

Detroit Area: Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren,

9872 (3) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following areas only, is as follows:

(a) $12.00 per M sq. ft. f.o.b. Fort Dodge, Iowa, East Chicago, Indiana, and Grand Rapids, Michigan for shipment into State of Minnesota, also into the City of Superior, Wisconsin.

(b) $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

— Cumberland County, Pennsylvania.
— Cuyahoga County, (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
— Dallas County, Texas (Dallas).
— Dauphin County, Pennsylvania (Harrisburg).
— Douglas County, Nebraska (Omaha).
— Franklin County, Massachusetts (Greenfield).
— Franklin County, Ohio (Columbus).
— Hampden County, Massachusetts (Springfield).
— Hampshire County, Massachusetts (Northampton).
— Hanover County, Virginia.
— Hartford County, Connecticut (Hartford).
— Henrico County, Virginia (Richmond).
— Kent County, Rhode Island.
— Knox County, Tennessee (Knoxville).
— Lancaster County, Pennsylvania (Lancaster).
— Lackawanna County, Pennsylvania (Scranton).
— Luzerne County, Pennsylvania (Wilkes-Barre).
— Marion County, Indiana (Indianapolis).
— Mercer County, New Jersey (Trenton—see paragraph (5) for minimum quantity required for shipment in pool cars or mixed cars).
— Norfolk County, Virginia (Norfolk).
— Oklahoma County, Oklahoma (Oklahoma City).
— Peoria County, Illinois (Peoria).
— Pottawatomie County, Iowa (Council Bluffs).

— Princess Anne County, Virginia.
— Providence County, Rhode Island (Providence).
— Roanoke County, Virginia (Roanoke).
— Sangamon County, Illinois (Springfield).
† — Tazewell County, Illinois.
— Tulsa County, Oklahoma (Tulsa).
— Woodbury County, Iowa (Sioux City).

Also the St. Louis area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.

(c) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

— Broward County, Florida.
— Buchanan County, Missouri (St. Joseph).
— Cass County, North Dakota (Fargo).
— Dade County, Florida (Miami).
— Davidson County, Tennessee (Nashville).
— DeKalb County, Georgia.
— Fulton County, Georgia (Atlanta).
— Greene County, Missouri (Springfield).
— Jasper County, Missouri (Joplin).

873 Del'd. Prices Into: (See Descriptions of Areas Below)		1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallbd.	1/4" Gypsum Lath	3/8" Gypsum Lath	1/2" Gypsum Lath
Metro N. Y.—N. J., Boston and Philadelphia Areas (See Notes b & c)	Straight Cars	20.00	25.00	26.00	22.00	50.00	15.00	15.00	16.25
	Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25
Southeast New York & Southern New Jersey Areas, Also Lehigh and Northampton Counties, Penna. and New Castle County, Del.	Straight, Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25
Chicago Area	Straight, Pool or Mxd. Cars	20.50	25.50	26.50	17.66	50.50	15.50	15.50	16.75
Detroit Area	Straight, Pool or Mxd. Cars	20.60	25.60	26.60	20.47	50.60	15.00	15.00	16.85
Grand Rapids Switching Area	Straight, Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25

† Indicates changes (to become effective October 24, 1936).

Notes and exceptions applying to delivered price areas listed above:

(a) Descriptions of Areas:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

†Boston Area: Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable, and Worcester Counties, Mass.; Rockingham, Hillsborough and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine; and state of Rhode Island.

Southeast New York Area: Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York.

Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland, and Burlington Counties, New Jersey.

Chicago Area: Cook and DuPage Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

Detroit Area: Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren.

† Indicates change (to become effective October 28, 1936).

9874 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 29, 1936.

Carload Shipments
Board License Bulletin No. 1 (Page 1)—Cancels Page 1
Dated September 11, 1936

This Reissue Cancels All Supplements to Board License Bulletin No. 1 Dated September 11, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective January 1, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,5 ,452 and Hite patent number 1,230,297, are as follows:

†Patented gypsum wallboard and plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallboard (Wt. 1175 # per M) See Note *	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	1/2" Gypsum Sheathing (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallboard (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M)	3/4" Gypsum Plasterboard (Wt. 3300 # per M)
Acme, Texas	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Boston (Charlestown) Mass.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Detroit, Mich.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
East Chicago, Ind.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Fort Dodge, Iowa	20.00	— —	25.00	26.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
Grand Rapids, Mich.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Gypsum, Ohio	20.00	24.00	25.00	26.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
†Heath, Montana	22.50	— —	25.00	26.00	32.00	— —	50.00	15.00	15.00	16.25	— —
†Laramie, Wyo.	24.00	— —	30.75	— —	— —	— —	55.75	— —	20.75	— —	— —
†Loveland, Colo.	23.75	— —	30.50	— —	— —	— —	55.50	— —	20.50	— —	— —
N. Brighton, S. I., N. Y.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Oakfield, N. Y.	20.00	24.00	25.00	26.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
Philadelphia, Pa.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Plastereo, Va.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —
Southard, Okla.	20.00	— —	25.00	26.00	22.00	36.50	50.00	15.00	15.00	16.25	20.00
Sweetwater, Texas	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	15.00	16.25	— —

* 5/16" Gypsum wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

9875 #Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢.

Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

†Stopover, switching and other extra delivery charges:

All stopover charges, switching charges and other extra delivery charges will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within the following Gypsum Board Del'd Price Areas: Metro New York-New Jersey, Philadelphia, Boston, Southeast New York, Southern New Jersey Areas: Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware; State of Connecticut; Cheshire, Sullivan, Merrimac and Belknap Counties, New Hampshire. (Refer to page 5 for descriptions of areas).

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum wallboard and gypsum plasterboard products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 5/16" Plasterboard. The minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following areas only, is as follows:

(a) $12.00 per M sq. ft. f.o.b. Fort Dodge, Iowa, East Chicago, Indiana, and Grand Rapids, Michigan for shipment into State of Minnesota, also into the City of Superior, Wisconsin.

(b) $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

— Cumberland County, Pennsylvania.
— Dallas County, Texas (Dallas).
— Dauphin County, Pennsylvania (Harrisburg).
— Douglas County, Nebraska (Omaha).
— Franklin County, Massachusetts (Greenfield).
— Franklin County, Ohio (Columbus).
9876 — Hampden County, Massachusetts (Springfield).
— Hampshire County, Massachusetts (Northampton).
— Hanover County, Virginia.
— Hartford County, Connecticut (Hartford).
— Henrico County, Virginia (Richmond).
— Kent County, Rhode Island.
— Knox County, Tennessee (Knoxville).
— Lancaster County, Pennsylvania (Lancaster).
— Lackawanna County, Pennsylvania (Scranton).
— Luzerne County, Pennsylvania (Wilkes-Barre).
— Marion County, Indiana (Indianapolis).
— Mercer County, New Jersey (Trenton—see paragraph (4) for minimum quantity required for shipment in pool cars or mixed cars).
— Norfolk County, Virginia (Norfolk).
— Oklahoma County, Oklahoma (Oklahoma City).
— Peoria County, Illinois (Peoria).
— Pottawatomie County, Iowa (Council Bluffs).
— Princess Anne County, Virginia.
— Providence County, Rhode Island (Providence).
— Roanoke County, Virginia (Roanoke).
— Sangamon County, Illinois (Springfield).
— Tazewell County, Illinois.
— Tulsa County, Oklahoma (Tulsa).
— Woodbury County, Iowa (Sioux City).

Also the St. Louis area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.

(c) $16.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in the following markets:

— Broward County, Florida.
— Buchanan County, Missouri (St. Joseph).
— Cass County, North Dakota (Fargo).
— Dade County, Florida (Miami).
— Davidson County, Tennessee (Nashville).
— DeKalb County, Georgia.
— Fulton County, Georgia (Atlanta).
— Greene County, Missouri (Springfield).
— Jasper County, Missouri (Joplin).
— Lancaster County, Nebraska (Lincoln).
— Minnehaha County, South Dakota (Sioux Falls).
— Monroe County, Florida.
— Newton County, Missouri (Joplin).
— Palm Beach County, Florida.
— Sedgewick County, Kansas (Wichita).
— Shawnee County, Kansas (Topeka).

Also towns of Kansas City, Dodson and Edgecomb, Missouri, and Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; also that portion of Kentucky west of and including Marshall and Calloway Counties and that portion of Tennessee west of and including Henry, Benton, Decatur and Hardin Counties.

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(d) $16.25 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Jefferson County, Alabama (Birmingham).

(e) $17.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Duval County, Florida (Jacksonville).

(f) $17.50 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Orleans County, Louisiana (New Orleans).

(g) Minimum price of 5/16" patented gypsum plasterboard is same as minimum price of 3/8" patented gypsum plasterboard f.o.b. cars delivered to dealers warehouse or siding in Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.

(3) Plasterboard Exceptions:

(a) The minimum price of 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $21.45 per M sq. ft.

f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(b) The minimum price of 1/4" or 3/8" patented gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Niagara, Erie (including town of Gowanda, N. Y.) Monroe and Wayne Counties, New York.

†(c) The minimum price of 1/4" or 3/8" patented gypsum plasterboard for shipment into Lower Michigan (except Monroe County and except the Detroit Area) is $14.00 per M sq. ft. in cars f.o.b. mill, Detroit Michigan or $15.00 per M sq. ft. f.o.b. Grand Rapids, Michigan. Refer to next paragraph for minimum price into Monroe County, Michigan. Refer to paragraph (4) for minimum price into the Detroit Area.

†(d) The minimum price of 1/4" or 3/8" patented gypsum plasterboard for shipment into Monroe County, Michigan, in straight, pool or mixed cars, is $15.50 per M sq. ft. f.o.b. cars, delivered to dealers warehouse or siding.

†(e) The minimum price of 1/4" or 3/8" patented gypsum plasterboard for shipment into Lucas County, Ohio, and town of Perrysburg, Ohio, in straight, pool or mixed cars, is $16.00 per M sq. ft. f.o.b. cars, delivered to dealers warehouse or siding.

†(f) The minimum price of 1/4" or 3/8" patented gypsum plasterboard, in sizes 16"x32" and 16"x48" only, in straight, pool, or mixed cars, is $14.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Kings, Queens, Nassau, and Suffolk Counties, New York. Refer to next paragraph for minimum prices of sizes other than 16"x32" and 16"x48".

9878 (4) Delivered Price Areas:

Prices of patented gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding with areas listed below are as follows:

Delivered Prices Into: (See Descriptions of Areas Below)		1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tile'd Gypsum Wallboard	1/4" Gypsum Lath	3/8" Gypsum Lath	1/2" Gypsum Lath
Metro N. Y.—N. J., Boston and Philadelphia Areas (See Notes b & c)	Straight Cars	20.00	25.00	26.00	22.00	50.00	15.00	15.00	16.25
	Pool or Mxd. Cars .	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25
†Sullivan, Merrimac & Belknap Counties, New Hampshire, Lehigh and Northampton Counties, Penna. and New Castle County, Del.	Straight, Pool or Mxd. Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25
†Chicago Area .	Straight, Pool or Mixed Cars,	20.50	25.50	26.50	22.50	50.50	15.50	15.50	16.75
†Detroit Area	Straight, Pool or Mixed Cars	20.60	25.60	26.60	22.60	50.60	15.00	15.00	16.85
Grand Rapids Switching Area	Straight, Pool or Mixed Cars	21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25

Notes and exceptions applying to delivered price areas listed above:

(a) Descriptions of Areas:

Metro New York—New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

9879 Boston Area: Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester Counties, Mass.; Rockingham, Hillsborough and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine; and state of Rhode Island.

Southeast New York Area: Orange, Ulster, Sullivan Putnam and Dutchess Counties, New York.

Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland, and Burlington Counties, New Jersey.

Chicago Area: Cook and DuPage Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

Detroit Area: Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb County, Michigan.

Grand Rapids, Mich. Switching Area: As described in published railroad freight tariffs.

'(b) Delivered prices for shipment in straight cars into Metro New York-New Jersey, Philadelphia and Boston Areas apply on straight carloads of patented gypsum board products consigned to one destination and invoiced to one account. Any mixture of regular patented board products (including special surfaced gypsum board products) and metallized patented board products may be combined to make up the required minimum. Exceptions: Refer to section (b) of paragraph (2) for minimum price of 5/16" plasterboard into Mercer County, New Jersey, Kent and Providence Counties, Rhode Island; also refer to section (f) of paragraph (3) for minimum price of 1/4" and 3/8" plasterboard, in sizes 16"x32" and 16"x48" only, into Kings, Queens, Nassau and Suffolk Counties, New York.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

'(c) In pool cars or mixed cars into the Metro New York-New Jersey area, Philadelphia area and the Boston

area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Any mixture of metallized and regular patented products (including special surfaced gypsum board products) may be combined to make up the required minimum. Exceptions: Refer to section (b) of paragraph (2) for minimum price of 5/16" plasterboard into Mercer County, New Jersey, Kent and Providence Counties, Rhode Island; also refer to section (f) of paragraph (3) for minimum price of 1/4" and 3/8" plasterboard, in sizes 16"x32" and 16"x48" only, into Kings, Queens, Nassau and Suffolk Counties, New York.

9880 (5) 24"x48" Cutstock Plasterboard. In states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama the minimum price is $17.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $18.75 per M sq. ft. for 1/2" thickness, f.o.b. Plasterco, Va., Grand Rapids, Mich., Fort Dodge, Iowa, East Chicago, Indiana, Gypsum, Ohio, Southard, Oklahoma, Sweetwater, Texas and Acme, Texas.

(6) 1/4" and 3/8" Cutstock Plasterboard—The minimum price of 1/4" and 3/8" patented open edge (cutstock) gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $15.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Niagara, Erie (including town of Gowanda, N. Y.) Monroe and Wayne Counties, N. Y.

This price does not apply to 32"x48" board.

(7) 32"x48" Gypsum Board. In all areas 32"x48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Missouri, Nebraska, Colorado, Kansas, Oklahoma, Arkansas and Louisiana, 32"x48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(c) In Henrico County, Virginia only, 32"x48" cutstock plasterboard is subject to minimum plasterboard price.

(8) 36″x48″ Gypsum Board. 36″x48″ is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(9) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall & Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park & Kansas City, Kansas	Kansas City, Mo.
South Windham, Maine	St. Louis, Mo.
Gabe, Shepard and Wilmont, Okla.	
Armory, Indian Orchard, Oak Street, & Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davehport, Iowa
Virginia Beach, Virginia	Norfolk, Va.

9881 (10) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

9882 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1937

Carload Shipments
Board License Bulletin No. 1 (Page 1)—Cancels
Bulletin No. 1 Dated December 29, 1936

C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 1, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

†Patented gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs, with exceptions as provided for in this Bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallboard (Wt. 1175 # per M) See Note	3/8" Gypsum Wallboard (Wt. 1400 # per M)†	1/2" Gypsum Wallboard (Wt. 1900 # per M)†	1/2" Gypsum Sheathing (Wt. 1900 # per M).	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallboard (Wt. 1400 # per M)	3/8" Gypsum Plaster Lath (Wt. 1400 # per M)†	1/4" Gypsum Liner Board (Wt. 950 # per M)†	3/8" Gypsum Liner Board (Wt. 1400 # per M)†	1/2" Gypsum Liner Board (Wt. 1900 # per M)†
†Acme, Texas	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	16.25
†*Boston, Mass.	*20.00	— —	*24.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*16.25
†Detroit, Mich.	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	16.25
†East Chicago, Ind.	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	16.25
†Fort Dodge, Iowa	20.00	— —	25.00	26.00	22.00	36.50	50.00	13.00	15.00	15.00	16.25
†Grand Rapids, Mich.	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	16.25
†Gypsum, Ohio	20.00	24.00	25.00	26.00	22.00	36.50	50.00	13.00	15.00	15.00	16.25
†Heath, Montana	22.50	— —	25.00	26.00	32.00	— —	50.00	13.00	15.00	15.00	16.25
†Laramie, Wyo.	24.00	— —	30.75	— —	— —	— —	55.75	18.75	— —	20.75	— —
†Loveland, Colo.	23.75	— —	30.50	— —	— —	— —	55.50	18.50	— —	20.50	— —
†*N. Brighton, S. I., N. Y.	*20.00	— —	*24.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*16.25
†Oakfield, N. Y.	20.00	24.00	25.00	26.00	22.00	36.50	50.00	13.00	15.00	15.00	16.25
†*Philadelphia, Pa.	*20.00	— —	*24.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*16.25
†Plastèrco, Va.	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	16.25
†Southard, Okla.	20.00	— —	25.00	26.00	22.00	36.50	50.00	13.00	15.00	15.00	16.25
†Sweetwater, Texas	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	16.25

Note: 5/16" Gypsum Wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

9883 #Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

†(*) Prices f.o.b. cars Boston, Mass., New Brighton, N. Y. and Philadelphia, Pa. apply for shipments into the following area only: States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Maryland, Delaware and Virginia; the District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

†Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Del'd Price Area wherein minimum prices of patented gypsum board products delivered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

†(2) Plaster Lath Exceptions:

†(a) The minimum price of 3/8" patented gypsum plaster lath, in straight and pool carloads, or in mixed carloads with other gypsum products is $16.00 per M sq. ft.

f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

†(3) Delivered Price Areas:

Prices of patented gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

9884 Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath†	1/4" Gypsum Liner Board†	3/8" Gypsum Liner Board†	1/2" Gypsum Liner Board†
†(a) Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:	20.70	25.00	26.45	23.45	51.00	14.00	15.70	16.00	17.70
†(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also State of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:	20.95	25.40	26.90	23.90	51.40	14.40	15.95	16.40	18.15
†(c) Westchester, Rockland and Suffolk Counties, New York:	20.85	25.25	26.65	23.65	51.25	14.25	15.85	16.25	17.90
†(d) State of Connecticut (except Fairfield and Litchfield Counties):	21.05	25.60	27.15	24.15	51.60	14.60	16.05	16.60	16.40
†(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:	21.20	25.75	27.40	24.40	51.75	14.75	16.20	16.75	18.65
†(f) Delaware, Greene and Columbia Counties, New York:	21.45	26.10	27.85	24.85	52.10	15.10	16.45	17.10	19.10
†(g) Niagara and Erie Counties, New York (including town of Gowanda):	20.70	26.00	27.35	23.35	51.00	14.00	15.70	16.00	17.60

9885 Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath†	1/4" Gypsum Liner Board†	3/8" Gypsum Liner Board†	1/2" Gypsum Liner Board†
†(h) Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park and Lake Forest, Illinois:	20.35	25.50	26.70	22.70	50.50	13.50	15.35	15.50	16.95
†(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park and Lake Forest):	20.50	25.70	26.95	22.95	50.70	13.70	15.50	15.70	17.20
†(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb County, Michigan:	20.70	26.00	27.45	23.45	51.00	14.00	15.70	16.00	17.70
†(k) Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	21.00	26.00	27.00	23.00	51.00	14.00	16.00	16.00	17.25

†(4) 32"x48" Gypsum Board, if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock board in size 32"x48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32"x48" cutstock board is subject to the minimum liner board price for such specific jobs.

†(5) 36"x48" Gypsum Board. 36"x48" is standard liner board size in all states for use on specific gypsum roof jobs only and is subject to minimum liner board price for such specific gypsum roof jobs.

(6) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall & Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park & Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street & Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.

9886 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY,

———— ————, *Vice President.*

† Indicates change in this reissue.

9887 (3) Delivered Price Areas: (Cont'd)

Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
†(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest, in Lake County, Illinois:	20.35	25.50	26.70	*22.70	50.50	13.50	15.35	15.50	16.95
†(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	20.50	25.70	26.95	22.95	50.70	13.70	15.50	15.70	17.20
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb County, Michigan:	20.70	26.00	27.45	23.45	51.00	14.00	15.70	16.00	17.70
(k) Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	21.00	26.00	27.00	23.00	51.00	14.00	16.00	16.00	17.25

(4) 32"x48" Gypsum Board. If grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock board in size 32"x48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32"x48" cutstock board is subject to the minimum liner board price for such specific jobs.

(5) 36"x48" Gypsum Board. 36"x48" is standard liner board size in all states for use on specific gypsum roof jobs only and is subject to minimum liner board price for such specific gypsum roof jobs.

(6) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices In—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall & Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street & Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
Rosalyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.

9888 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 7, 1937.

Carload Shipments
Board License Bulletin No. 1 (Page 1)—Cancels Page 1
Dated February 24, 1937

C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective May 11, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Patented gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs, with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for Standard Sizes as Listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) See Note	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	1/2" Gypsum Sheathing (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd (Wt. 1400# per M)	3/8" Gypsum Plaster Lath (Wt. 1400# per M)	1/2" Gypsum Plaster Lath (Wt. 1900# per M) †	1/4" Gypsum Liner Board (Wt. 950# per M)	3/8" Gypsum Liner Board (Wt. 1400# per M)	1/2" Gypsum Liner Board (Wt. 1900# per M)
Acme, Texas	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
*Boston, Mass.	*20.00	— —	*24.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*15.00	*16.25
Detroit, Mich.	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
East Chicago, Ind.	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Fort Dodge, Iowa	20.00	— —	25.00	26.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Grand Rapids, Mich.	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Gypsum, Ohio	20.00	24.00	25.00	26.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Heath, Montana	22.50	— —	25.00	26.00	32.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Laramie, Wyo.	24.00	— —	30.75	— —	— —	— —	55.75	18.75	— —	— —	20.75	— —
Loveland, Colo.	23.75	— —	30.50	— —	— —	— —	55.50	18.50	— —	— —	20.50	— —
*N. Brighton, S. I., N. Y.	*20.00	— —	*24.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*15.00	*16.25
Oakfield, N. Y.	20.00	24.00	25.00	26.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
*Philadelphia, Pa.	*20.00	— —	*24.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*15.00	*16.25
Plasterco, Va.	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	20.00	— —	25.00	26.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Sweetwater, Texas	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25

Note: 5/16" Gypsum wallboard is for sale to manufacturers only, for fabrication at their factories—not a dealer item.

† Indicates changes.

9889 (3) Delivered Price Areas: (Cont'd)

Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath†	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(a) Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:	20.70	25.00	26.45	23.45	51.00	14.00	16.45	15.70	16.00	17.70
(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also State of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:	20.95	25.40	26.90	23.90	51.40	14.40	16.90	15.95	16.40	18.15
(c) Westchester, Rockland and Suffolk Counties, New York:	20.85	25.25	26.65	23.65	51.25	14.25	16.65	15.85	16.25	17.90
(d) State of Connecticut (except Fairfield and Litchfield Counties):	21.05	25.60	27.15	24.15	51.60	14.60	17.15	16.05	16.60	18.40
(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:	21.20	25.75	27.40	24.40	51.75	14.75	17.40	16.20	16.75	18.65
(f) Delaware, Greene and Columbia Counties, New York:	21.45	26.10	27.85	24.85	52.10	15.10	17.85	16.45	17.10	19.10
(g) Niagara and Erie Counties, New York (including town of Gowanda):	20.70	26.00	27.35	23.35	51.00	14.00	16.35	15.70	16.00	17.60

† Indicates changes (to become effective May 11, 1937).

9890 Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath†	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest, in Lake County, Illinois:	20.35	25.50	26.70	22.70	50.50	13.50	15.70	15.35	15.50	16.95
(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	20.50	25.70	26.95	22.95	50.70	13.70	15.95	15.50	15.70	17.20
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb County, Michigan.	20.70	26.00	27.45	23.45	51.00	14.00	16.45	15.70	16.00	17.70
(k) Grand Rapids, Mich., Switching Area (as described in published railroad tariffs):	21.00	26.00	27.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25

(4) 32" x 48" Gypsum Board. If grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock board in size 32" x 48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32" x 48" cutstock board is subject to the minimum liner board price for such specific jobs.

(5) 36" x 48" Gypsum Board. 36" x 48" is standard liner board size in all states for use on specific gypsum roof jobs only and is subject to minimum liner board price for such specific gypsum roof jobs.

(6) Delivered Carload Minimum Prices in Markets as Listed Are Same as in Adjacent Cities, as Indicated Below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall & Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street & Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Iowa
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.

† Indicates changes (to become effective May 11, 1937)

9891 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 12, 1937

Carload Shipments
Board License Bulletin No. 1 (Page 1)—Cancels Page 1
Dated May 7, 1937.

MR. C. NEWMAN,
Clerk,
General Sales.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective June 17, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452, are as follows:

Patented gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs, with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallbd. (Wt. 950# per M)	3/8" Gypsum Wallbd. (Wt. 1400# per M) †	1/2" Gypsum Wallbd. (Wt. 1900# per M) †	1/2" Gypsum Sheathing (Wt. 1900# per M)	3/4" Gypsum Wallbd. (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	3/8" Gypsum Plaster Lath (Wt. 1400# per M)	1/2" Gypsum Plaster Lath (Wt. 1900# per M)	1/4" Gypsum Liner Board (Wt. 950# per M)	3/8" Gypsum Liner Board (Wt. 1400# per M)	1/2" Gypsum Liner Board (Wt. 1900# per M)
†Acme, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Boston, Mass.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Detroit, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†East Chicago, Ind.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Fort Dodge, Iowa	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
†Grand Rapids, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Gypsum, Ohio	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
†Heath, Montana	22.50	23.00	25.00	32.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Laramie, Wyo.	24.00	28.75	— —	— —	— —	55.75	18.75	— —	— —	20.75	— —
†Loveland, Colo.	23.75	28.50	— —	— —	— —	55.50	18.50	— —	— —	20.50	— —
†National City, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†New Brighton, S. I., N. Y.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Oakfield, N. Y.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
†*Philadelphia, Pa.	*20.00	*23.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*15.00	*16.25
†Plasterco, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Southard, Okla.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
†Sweetwater, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25

9892 #Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

†(*) Prices f.o.b. cars Philadelphia, Pa: apply for shipments into the following area only: States of New York, New Jersey, Maryland, Delaware and Virginia; The District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Del'd Price Area wherein minimum prices of patented gypsum board products delivered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) Plaster Lath Exceptions:

(a) The minimum price of 3/8" patented gypsum plaster lath, in straight and pool carloads, or in mixed carloads with other gypsum products is $16.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(3) Delivered Price Areas:

Prices of patented gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

9893 Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(a) Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:										
†	20.70	24.00†	26.45	23.45	51.00	14.00	16.45	15.70	16.00	17.70
(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also State of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:										
†	20.95	24.40†	26.90	23.90	51.40	14.40	16.90	15.95	16.40	18.15
(c) Westchester, Rockland and Suffolk Counties, New York:										
†	20.85	24.25†	26.65	23.65	51.25	14.25	16.65	15.85	16.25	17.90
(d) State of Connecticut (except Fairfield and Litchfield Counties):										
†	21.05	24.60†	27.15	24.15	51.60	14.60	17.15	16.05	16.60	18.40
(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:										
†	21.20	24.75†	27.40	24.40	51.75	14.75	17.40	16.20	16.75	18.65
(f) Delaware, Greene and Columbia Counties, New York:										
†	21.45	25.10†	27.85	24.85	52.10	15.10	17.85	16.45	17.10	19.10
(g) Niagara and Erie Counties, New York (including town of Gowanda):										
†	20.70	24.00†	26.35†	23.35	51.00	14.00	16.35	15.70	16.00	17.60
(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest, in Lake County, Illinois:										
†	20.35	23.50†	25.70†	22.70	50.50	13.50	15.70	15.35	15.50	16.95

9894 Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8 Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	20.50	†23.70	†25.95	22.95	50.70	13.70	15.95	15.50	15.70	17.20
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb County, Michigan. †	20.70	24.00†	26.45†	23.45	51.00	14.00	16.45	15.70	16.00	17.70
(k) Grand Rapids, Mich., Switching Area (as described in published railroad tariffs): †	21.00	24.00†	26.00†	23.00	51.00	14.00	16.00	16.00	16.00	17.25

(4) 32" x 48" Gypsum Board. If grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock board in size 32" x 48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32" x 48" cutstock board is subject to the minimum liner board price for such specific jobs.

(5) 36"x 48" Gypsum Board. 36" x 48" is standard liner board sizes in all states for use on specific gypsum roof jobs only and is subject to minimum liner board price for such specific gypsum roof jobs.

†(6) Delivered Carload Minimum Prices in Markets as Listed Are Same as in Adjacent Cities, as Indicated Below:

Delivered Carload Minimum Prices In—	*Same as—*
College Park, Ga.	Atlanta, Ga.
†Elkridge, Glen Burnie, Catsonville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
†Cheviot, Bridgetown and North College Hill, Ohio	Cincinnati, O.
Euclid, North Randall & Bedford, Ohio	Cleveland O.
Dodson & Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street & Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
†Rosslyn, and Lacey, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Iowa
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.

9895 Sales to Contractors and Prefabricated House Manufacturers, also Extras on Odd Sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,
UNITED STATES GYPSUM COMPANY,
Vice President.

† Indicates changes in this reissue.

9896 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 13, 1937.

Carload Shipments
Board License Bulletin No. 1 (Page 1)—Cancels Page 1
Dated June 12, 1937.

MR. C. NEWMAN,
General Sales,
Office.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 16, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452, are as follows:

Patented gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs, with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	1/2" Gypsum Sheathing (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	3/8" Gypsum Plaster Lath (Wt. 1400 # per M)	1/2" Gypsum Plaster Lath (Wt. 1900 # per M)	1/4" Gypsum Liner Board (Wt. 950 # per M)	3/8" Gypsum Liner Board (Wt. 1400 # per M)	1/2" Gypsum Liner Board (Wt. 1900 # per M)
Acme, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Boston, Mass.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Detroit, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
East Chicago, Ind.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Fort Dodge, Iowa	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Grand Rapids, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Gypsum, Ohio	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
†Heath, Montana	22.50	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Laramie, Wyo.	24.00	28.75	— —	— —	— —	55.75	18.75	— —	— —	20.75	— —
Loveland, Colo.	23.75	28.50	— —	— —	— —	55.50	18.50	— —	— —	20.50	— —
National City, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
New Brighton, S. I., N. Y.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Oakfield, N. Y.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
*Philadelphia, Pa.	*20.00	*23.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*15.00	*16.25
Plasterco, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Sweetwater, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25

4830

9897 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 21, 1937

Carload Shipments
Board License Bulletin No. 1 (Page 1)—Cancels Page 1
Dated July 13, 1937.

MR. C. NEWMAN
Chicago Office

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective November 1, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452, are as follows:

Patented gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs, with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050 # per M) †	3/8" Gypsum Wallboard (Wt. 1475 # per M) †	1/2" Gypsum Wallboard (Wt. 2000 # per M) †	1/2" Gypsum Sheathing (Wt. 2000 # per M) †	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475 # per M) †	3/8" Gypsum Plaster Lath (Wt. 1475 # per M) †	1/2" Gypsum Plaster Lath (Wt. 2000 # per M) †	1/4" Gypsum Liner Board (Wt. 1050 # per M) †	3/8" Gypsum Liner Board (Wt. 1475 # per M) †	1/2" Gypsum Liner Board (Wt. 2000 # per M) †
Acme, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Boston, Mass.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Detroit, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
East Chicago, Ind.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Fort Dodge, Iowa	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Grand Rapids, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Gypsum, Ohio	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Heath, Montana	22.50	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Laramie, Wyo.	24.10	28.75	— —	— —	— —	55.75	18.75	— —	— —	20.75	— —
†Loveland, Colo.	24.10	28.75	— —	— —	— —	55.75	18.75	— —	— —	20.75	— —
National City, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.
New Brighton, S. I., N. Y.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Oakfield, N. Y.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
*Philadelphia, Pa.	*20.00	*23.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*15.00	*16.25
Plasterco, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Sweetwater, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25

† Note changes in weights.

9898 #Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

*Prices f.o.b. cars Philadelphia, Pa. apply for shipments into the following area only: States of New York, New Jersey, Maryland, Delaware and Virginia; The District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

†Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges will be paid by customers; that is to say, in arriving at the minimum price all such charges must be added. Exception: Stopover charges need not be included on shipments to destinations within any Gypsum Board Del'd Price Area wherein minimum prices of patented gypsum board products delivered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) Plaster Lath Exceptions:

(a) The minimum price of 3/8" patented gypsum plaster lath, in straight and pool carloads, or in mixed carloads with other gypsum products is $16.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(3) Delivered Price Areas:

Prices of patented gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

9899 Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(a) Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of Southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:										
†	20.80†	24.10†	26.50†	23.50†	51.10†	14.10†	16.50†	15.80†	16.10†	17.75†
(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also State of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:										
†	21.05†	24.50†	27.00†	24.00†	51.50†	14.50†	17.00†	16.05†	16.50†	18.25†
(c) Westchester, Rockland and Suffolk Counties, New York:										
†	20.90†	24.30†	26.75†	23.75†	51.30†	14.30†	16.75†	15.90†	16.30†	18.00†
(d) State of Connecticut (except Fairfield and Litchfield Counties):										
†	21.20†	24.65†	27.25†	24.25†	51.65†	14.65†	17.25†	16.20†	16.65†	18.50†
(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:										
†	21.30†	24.85†	27.50†	24.50†	51.85†	14.85†	17.50†	16.30†	16.85†	18.75†
(f) Delaware, Greene and Columbia Counties, New York:										
†	21.60†	25.20†	28.00†	25.00†	52.20†	15.20†	18.00†	16.60†	17.20†	19.25†
(g) Niagara and Erie Counties, New York (including town of Gowanda):										
†	20.75†	24.05†	26.40†	22.40†	51.05†	14.05†	16.40†	15.75†	16.05†	17.65†
(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest, in Lake County, Illinois:										
†	20.40†	23.55†	25.75†	22.75†	50.55†	13.55†	15.75†	15.40†	15.55†	17.00†

9900	Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(i)	McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):										
†		20.55†	23.75†	26.00†	23.00†	50.75†	13.75†	16.00†	15.55†	15.75†	17.25†
(j)	Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.										
†		20.80†	24.10†	26.50†	23.50†	51.10†	14.10†	16.50†	15.80†	16.10†	17.75†
(k)	Grand Rapids, Mich., Switching Area (as described in published railroad tariffs):										
		21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25

(4) 32"x48" Gypsum Board. If grey, surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock board in size 32"x48" is subject to the minimum wallboard price; except where used for specific roof jobs only, size 32"x48" cutstock board is subject to the minimum liner board price for such specific jobs.

(5) 36"x48" Gypsum Board. 36"x48" is standard liner board size in all states for use on specific gypsum roof jobs only and is subject to minimum liner board price for such specific gypsum roof jobs.

(6) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices In—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown and North College Hill, Ohio	Cincinnati, O.
Euclid, North Randall & Bedford, Ohio	Cleveland, O.
Dodson & Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street & Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
Rosslyn, and Lacey, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.

9901 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Inc. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

9902 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 17, 1937.

Carload Shipments
Board License Bulletin No. 1 (Page 1)---Cancels Page 1
Dated October 21, 1937.

MR. C. NEWMAN
Chicago.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective December 20, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452, are as follows:

Patented gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs, with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	3/8" Gypsum Wallboard (Wt. 1475 # per M)	1/2" Gypsum Wallboard (Wt. 2000 # Per M)	1/2" Gypsum Sheathing (Wt. 2000 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tile Gypsum Wallbd. (Wt. 1475 # per M)	3/8" Gypsum Plaster Lath (Wt. 1475 # per M)	1/2" Gypsum Plaster Lath (Wt. 2000 # per M)	1/4" Gypsum Liner Board (Wt. 1050 # per M)	3/8" Gypsum Liner Board (Wt. 1475 # per M)	1/2" Gypsum Liner Board (Wt. 2000 # per M)
Acme, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Boston, Mass.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Detroit, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
East Chicago, Ind.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Fort Dodge, Iowa	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Grand Rapids, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Gypsum, Ohio	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Heath, Montana	22.50	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Laramie, Wyo.	24.35†	29.05†	— —	— —	— —	56.05†	19.05†	— —	— —	21.05†	— —
†Loveland, Colo.	24.35†	29.05†	— —	— —	— —	56.05†	19.05†	— —	— —	21.05†	— —
National City, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
New Brighton, S. I., N. Y.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Oakfield, N. Y.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
*Philadelphia, Pa.	*20.00	*23.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*15.00	*16.25
Plasterco, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Sweetwater, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25

† Denotes changes.

9903 (3) Delivered Price Areas: (Cont'd)

Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	20.55	23.75	26.00	23.00	50.75	13.75	16.00	15.55	15.75	17.25
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75
(k) Grand Rapids, Mich., Switching Area (as described in published railroad tariffs):	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25

(4) 32"x48" Gypsum Board. If grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock board in size 32"x48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32"x48" cutstock board is subject to the minimum liner board price for such specific jobs.

(5) 36"x48" Gypsum Board. 36"x48" is standard liner board size in all states for use on specific gypsum roof jobs only and is subject to minimum liner board price for such specific gypsum roof jobs.

†(6) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices In—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown and North College Hill, Ohio	Cincinnati, O.
Euclid, North Randall & Bedford, Ohio	Cleveland, O.
Dodson & Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County, Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street & Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
Rosslyn, and Lacey, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
†Boardman, Ohio	Youngstown, Ohio

9904 #Where an old 'rate per ton' is effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

*Prices f.o.b. cars Philadelphia, Pa. apply for shipments into the following area only: States of New York, New Jersey, Maryland, Delaware and Virginia; the District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges will be paid by customers; that is to say, in arriving at the minimum price all such charges must be added. Exception: Stopover charges need not be included on shipments to destinations within any Gypsum Board Del'd Price Area wherein minimum prices of patented gypsum board products delivered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) Plaster Lath Exceptions:

(a) The minimum price of 3/8" patented gypsum plaster lath, in straight and pool carloads, or in mixed carloads with other gypsum products is $16.50 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida. This change becomes effective January 10, 1938.

(3) Delivered Price Areas:

Prices of patented gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

9905 Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):										
	20.55	23.75	26.00	23.00	50.75	13.75	16.00	15.55	15.75	17.25
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.										
	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75
(k) Grand Rapids, Mich., Switching Area (as described in published railroad tariffs):										
	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25

(4) 32″ x 48″ Gypsum Board. If grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock board in size 32″x48″ is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32″x48″ cutstock board is subject to the minimum liner board price for such specific jobs.

(5) 36″x48″ Gypsum Board. 36″x48″ is standard liner board size in all states for use on specific gypsum roof jobs only and is subject to minimum liner board price for such specific gypsum roof jobs.

(6) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices In—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown and North College Hill, Ohio	Cincinnati, O.
Euclid, North Randall & Bedford, Ohio	Cleveland, O.
Dodson & Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street & Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
†Rosslyn, and Lacey, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

† Indicates change in this reissue, to become effective January 15, 1938.

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9906 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 11, 1938

Carload Shipments
Board License Bulletin No. 1 (Page 1)—Cancels Page 1
Dated December 17, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective February 15, 1938 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452, are as follows:

Patented gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs, with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	3/8" Gypsum Wallboard (Wt. 1475 # per M)	1/2" Gypsum Wallboard (Wt. 2000 # per M)	1/2" Gypsum Sheathing (Wt. 2000 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475 # per M)	3/8" Gypsum Plaster Lath (Wt. 1475 # per M)	1/2" Gypsum Plaster Lath (Wt. 2000 # per M)	1/4" Gypsum Liner Board (Wt. 1050 # per M)	3/8" Gypsum Liner Board (Wt. 1475 # per M)	1/2" Gypsum Liner Board (Wt. 2000 # per M)
Acme, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Boston, Mass.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Detroit, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
East Chicago, Ind.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Fort Dodge, Iowa	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Grand Rapids, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Gypsum, Ohio	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
†Heath, Montana	20.00†	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Laramie, Wyo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
Loveland, Colo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
National City, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
New Brighton, S. I., N. Y.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Oakfield, N. Y.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
*Philadelphia, Pa.	*20.00	*23.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*15.00	*16.25
Plastereo, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Sweetwater, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25

† Indicates change in this reissue (effective February 15, 1938).

9907 #Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

*Prices f.o.b. cars Philadelphia, Pa. apply for shipments into the following area only: States of New York, New Jersey, Maryland, Delaware and Virginia; The District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges will be paid by customers; that is to say, in arriving at the minimum price all such charges must be added. Exception: Stopover charges need not be included on shipments to destinations within any Gypsum Board Del'd Price Area wherein minimum prices of patented gypsum board products delivered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

†(1A) Wallboard Exceptions.

The minimum price of 1/4" patented gypsum wallboard delivered to Key West, Florida is $24.00 per M sq. ft.

The minimum price of 3/8" patented gypsum wallboard delivered to Key West, Florida is $29.00 per M sq. ft.

Minimum prices as above stated for delivery to Key West, Florida apply on a minimum quantity of 40000# of 1/4" and/or 3/8" patented gypsum wallboard only.

(2) Plaster Lath Exceptions:

The minimum price of 3/8" patented gypsum plaster lath, in straight and pool carloads, or in mixed carloads with other gypsum products is $16.50 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(3) Delivered Price Areas:

Prices of patented gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

† Indicates changes, effective immediately.

9908 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 1, 1938

Carload Shipments
Board License Bulletin No. 1 (Page 1)—Cancels Page 1
Dated February 11, 1938

MR. C. NEWMAN
Chicago Office

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective April 5, 1938 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452, are as follows:

Patented gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (See Note # page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs, with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices f.o.b. cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	3/8" Gypsum Wallboard (Wt. 1475 # per M)	1/2" Gypsum Wallboard (Wt. 2000 # per M)	1/2" Gypsum Sheathing (Wt. 2000 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475 # per M)	3/8" Gypsum Plaster Lath (Wt. 1475 # per M)	1/2" Gypsum Plaster Lath (Wt. 2000 # per M)	1/4" Gypsum Liner Board (Wt. 1050 # per M)	3/8" Gypsum Liner Board (Wt. 1475 # per M)	1/2" Gypsum Liner Board (Wt. 2000 # per M)
Acme, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Boston, Mass.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Detroit, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
East Chicago, Ind.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Fort Dodge, Iowa	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Grand Rapids, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Gypsum, Ohio	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Heath, Montana	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Laramie, Wyo.	24.55†	29.35†	— —	— —	— —	56.35†	19.35†	— —	— —	21.35†	— —
†Loveland, Colo.	24.55†	29.35†	— —	30.60†	— —	56.35†	19.35†	— —	— —	21.35†	— —
National City, Mich.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
New Brighton, S. I., N. Y.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Oakfield, N. Y.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
*Philadelphia, Pa.	*20.00	*23.00	*25.00	*22.00	— —	*50.00	*13.00	*15.00	*15.00	*15.00	*16.25
Plasterco, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Sweetwater, Texas	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25

† Indicates change in this reissue.

9909 (3) Delivered Price Areas: (Cont'd)

Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(a) Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of Southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75
†(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also Rockingham and Strafford Counties, New Hampshire; also State of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:	21.05	24.50	27.00	24.00	51.50	14.50	17.00	16.05	16.50	18.25
(c) Westchester, Rockland and Suffolk Counties, New York:	20.90	24.30	26.75	23.75	51.30	14.30	16.75	15.90	16.30	18.00
(d) State of Connecticut (except Fairfield and Litchfield Counties):	21.20	24.65	27.25	24.25	51.65	14.65	17.25	16.20	16.65	18.50
(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:	21.30	24.85	27.50	24.50	51.85	14.85	17.50	16.30	16.85	18.75

† Indicates change, to become effective June 1, 1938

9910 Delivered Prices. Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(f) Delaware, Greene and Columbia Counties, New York:	21.60	25.20	28.00	25.00	52.20	15.20	18.00	16.60	17.20	19.25
(g) Niagara and Erie Counties, New York (including town of Gowanda):	20.75	24.05	26.40	23.40	51.05	14.05	16.40	15.75	16.05	17.65
(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest, in Lake County, Illinois:	20.40	23.55	25.75	22.75	50.55	13.55	15.75	15.40	15.55	17.00
(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	20.55	23.75	26.00	23.00	50.75	13.75	16.00	15.55	15.75	17.25
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75
(k) Grand Rapids, Mich., Switching Area (as described in published railroad tariffs):	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25

(4) 32″x48″ Gypsum Board. If grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock board in size 32″x48″ is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32″x48″ cutstock board is subject to the minimum liner board price for such specific jobs.

(5) 36″x48″ Gypsum Board. 36″x48″ is standard liner board size in all states for use on specific gypsum roof jobs only and is subject to minimum liner board price for such specific gypsum roof jobs.

†(6) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
†Cheviot, Bridgetown, Mount Healthy, and North College Hill, Ohio	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Dodson & Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street & Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
Rosslyn, and Lacey, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

† Indicates change in this reissue to become effective June 1, 1938.

9911 (3) Delivered Price Areas: (Cont'd)

Delivered Prices Into:	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	20.55	23.75	26.00	23.00	50.75	13.75	16.00	15.55	15.75	17.25
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75
(k) Grand Rapids, Mich., Switching Area (as described in published railroad tariffs):	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25

(4) 32"x48". Gypsum Board. If grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock board in size 32"x48" is subject to the minimum wall board price, except where used for specific roof jobs only, size 32"x48" cutstock board is subject to the minimum liner board price for such specific jobs.

(5) 36"x48" Gypsum Board. 36"x48" is standard liner board size in all states for use on specific gypsum roof jobs only and is subject to minimum liner board price for such specific gypsum roof jobs.

†(6) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

† Indicates change in this reissue.

Delivered Carload Minimum Prices In—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown, Mount Healthy and North College Hill, Ohio	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Dodson, Edgecomb, Waldo, & Westport, Mo.; Argentine, Rosedale, Overland Park, Merriam & Kansas City, Kans.	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street & Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
Rosslyn, and Lacey, Virginia & Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline, and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

† Indicates change in this reissue.

9912 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1939

Carload Shipments
Board License Bulletin No. 1 (Page 1)—Cancels Page 1
Dated April 1, 1938

C. NEWMAN

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective February 7, 1939, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent) are as follows:

Minimum prices per thousand square feet of patented gypsum board products for delivery by rail, in straight cars or cars mixed with other gypsum products, including pool cars and stop over cars, shall be the lowest combination of mill price listed below and all rail freight from such mill to destination. Rail freight shall be determined in accordance with rail rates as published in regular freight tariffs, using weights shown below, plus all stopover, switching, cartage and other extra delivery charges in connection with the shipment. In stopover cars, minimum prices of the patented gypsum board products in any portion of the car shall be the minimum prices as herein defined to the point of delivery of that portion of the car.

MILLS	1/4" Gypsum Wallboard (Wt. 1050 # per M)	3/8" Gypsum Wallboard (Wt. 1475 # per M)	1/2" Gypsum Wallboard (Wt. 2000 # per M)	1/2" Gypsum Sheathing (Wt. 2000 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475 # per M)	3/8" Gypsum Plaster Lath (Wt. 1475 # per M)	1/2" Gypsum Plaster Lath (Wt. 2000 # per M)	1/4" Gypsum Liner Bd. (Wt. 1050 # per M)	3/8" Gypsum Liner Bd. (Wt. 1475 # per M)	1/2" Gypsum Liner Bd. (Wt. 2000 # per M)
Acme, Texas Boston, Mass. Detroit, Mich. E. Chicago, Ind. Ft. Dodge, Iowa Grand Rapids, Mich. Gypsum, Ohio Heath, Montana Jacksonville, Fla. National City, Mich. New Brighton, S. I., N. Y. Oakfield, N. Y Philadelphia, Pa. Plastereo, Va. Southard, Okla. Sweetwater, Tex.	20.00	23.00	25.00	22.00	50.00	13.00	15.00	15.00	15.00	16.25

9913 Where an old 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on the basis of rate per cwt., fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

The above prices apply to the sale of all patented gypsum board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Pacific Coast—Until further notice, minimum prices as above defined shall not apply to sales of the patented gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington; also that portion of the State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 32"x48" Gypsum Board—Specific Roof Jobs—The minimum price of cutstock board in size 32"x48", when sold for use on specific roof jobs, is the same as the minimum liner board price.

(3) Key West, Florida—The minimum price of 1/4" patented gypsum wallboard delivered to Key West, Florida is $24.00 per M sq. ft.

The minimum price of 3/8" patented gypsum wallboard delivered to Key West, Florida is $29.00 per M sq. ft.

The minimum price of 3/8" patented gypsum plaster lath delivered to Key West, Florida is $17.20 per M sq. ft.

(4) Minimum Prices Into Delivered Price Areas.

Minimum prices of the patented gypsum board products in straight cars or cars mixed with other gypsum products, including pool cars and stopover cars, for delivery by rail within areas listed below, are the prices set forth below plus any stopover charges (except that stopover charges need not be added to determine the minimum price on shipments to destinations in delivered price areas wherein the minimum price delivered by truck is the same as the minimum price for delivery by rail):

	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(a) Into Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass., north of continuation of Southern boundary of Norfolk County, and town of Mansfield, Mass., also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J., west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75

9914	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(b) Into balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also Rockingham and Strafford Counties, New Hampshire; also State of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J., east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:	21.05	24.50	27.00	24.00	51.50	14.50	17.00	16.05	16.50	18.25
(c) Into Westchester, Rockland and Suffolk Counties, New York:	20.90	24.30	26.75	23.75	51.30	14.30	16.75	15.90	16.30	18.00
(d) Into State of Connecticut (except Fairfield and Litchfield Counties):	21.20	24.65	27.25	24.25	51.65	14.65	17.25	16.20	16.65	18.50
(e) Into Sullivan, Ulster and Dutchess Counties, New York, and Litchfield County, Connecticut:	21.30	24.85	27.50	24.50	51.85	14.85	17.50	16.30	16.85	18.75
(f) Into Delaware, Greene and Columbia Counties, New York:	21.60	25.20	28.00	25.00	52.20	15.20	18.00	16.60	17.20	19.25
(g) Into Niagara and Erie Counties, New York (including town of Gowanda):	20.75	24.05	26.40	23.40	51.05	14.05	16.40	15.75	16.05	17.65
(h) Into Cook and DuPage Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest, in Lake County, Illinois:	20.40	23.55	25.75	22.75	50.55	13.55	15.75	15.40	15.55	17.00
(i) Into McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest):	20.55	23.75	26.00	23.00	50.75	13.75	16.00	15.55	15.75	17.25
(j) Into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75

9915	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(k) Into Grand Rapids, Mich., Switching Area (as described in published railroad tariffs):	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25
(i) Into Jacksonville and So. Jacksonville, Fla. Switching Area, where per car switching rates apply (as described in published railroad tariffs):	21.25	24.25	26.25	23.25	51.25	14.25	16.25	16.25	16.25	17.50

(5) Minimum prices delivered in markets as listed are same as in adjacent cities, as indicated below:

Delivered minimum Prices In—	*Same As—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown, Mount Healthy and North College Hill, Ohio	Cincinnati, O.
Euclid, North Randall and Bedford, Ohio	Cleveland, O.
Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

(6) Minimum Prices to Contractors—Consumers.

On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors, prefabricated house manufacturers and consumers generally, the minimum price shall be the minimum price as above estab-
9916 lished plus the following amounts per M sq. ft.:

To Contractors (Inc. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. and Consumers Generally Std. Sizes		To Contractors for Use on Roof Decks Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(7) Minimum Prices for Non-Standard or Odd Sizes.

On sales of non-standard or odd sizes, the minimum price shall be the minimum price as above established plus the following amounts per M sq. ft.:

To Dealers Odd Sizes		To Contractors (Inc. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. and Consumers Generally Odd Sizes		To Contractors for Use on Roof Decks Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

9917 UNITED STATES GYPSUM COMPANY

MARCH 29, 1939

DEAR SIR:

We understand that you are manufacturing or are about to manufacture at your Texas mill a 1/2" gypsum liner board weighing approximately 2000 lbs. per M sq. ft., 24"x80" square edge, using gray surfaced paper.

Referring to our license agreement with you, you are hereby notified that effective March 30, 1939, the minimum price at which you may sell such product embodying the inventions and improvements set forth and claimed in our letters patent under which you are licensed (not including applications for letters patent) shall be the lowest combination of the following mill prices and all rail freight to Acme, Texas

Acme, Texas Sweetwater, Texas Southard, Oklahoma	$16.25 per M Sq. Ft.

Rail freight shall be determined in accordance with rail rates as published in regular freight tariffs, using the weight shown above, plus all stopover, switching, cartage and other extra delivery charges in connection with the shipment. In stopover cars, the minimum price of such patented gypsum board product in any portion of the car shall be the minimum price as herein defined to the point of delivery of that portion of the car.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice-President.

WLK:EAS

9918 Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on the basis of rate per cwt., fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

The above prices apply to the sale of all patented gypsum board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Pacific Coast—Until further notice, minimum prices as above defined shall not apply to sales of the patented gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington; also that portion of the State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 32"x48" Gypsum Board—Specific Roof Jobs—The minimum price of cutstock board in size 32"x48", when sold for use on specific roof jobs, is the same as the minimum liner board price.

(3) Key West, Florida—The minimum price of 1/4" patented gypsum wallboard delivered to Key West, Florida is $24.00 per M sq. ft.

The minimum price of 3/8" patented gypsum wallboard delivered to Key West, Florida is $29.00 per M sq. ft.

The minimum price of 3/8" patented gypsum plaster lath delivered to Key West, Florida is $17.20 per M sq. ft.

(4) Minimum Prices into Delivered Prices Areas.

Minimum prices of the patented gypsum board products in straight cars or cars mixed with other gypsum products, including pool cars and stopover cars, for delivery by rail within areas listed below, are the prices set forth below plus any stopover charges (except that stopover charges need not be added to determine the minimum price on shipments to destinations in delivered price areas wherein the minimum price delivered by truck is the same as the minimum price for delivery by rail):

	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
†(a) Into Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass., north of continuation of Southern boundary of Norfolk County, and town of Mansfield, Mass., also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J., west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also that portion of Bucks County, Penna. south and east of line drawn between and including towns of Lexington and Lumberville; also that portion of Montgomery County, Penna. south and east of line drawn between and including towns of Mont Clare and So. Hatfield; also Delaware and Philadelphia Counties, Penna.:	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75
2919 †(b) Into Chester County, Penna.; also that portion of Bucks County, Penna. north and west of line drawn between but not including towns of Lexington and Lumberville; also that portion of Montgomery County, Penna. north and west of line drawn between but not including towns of Mont Clare and So. Hatfield:	20.85	24.20	26.65	23.65	51.20	14.20	16.65	15.85	16.20	17.90
†(c) Into balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also Rockingham and Strafford Counties, New Hampshire; also State of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May and Cumberland Counties, New Jersey; also that portion of Burlington County, N. J., east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also that portion of New Castle County, Delaware, south of line extending through, but not including towns of New Castle, Tasker, State Road and Audenried; also Cecil County, Maryland; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.; also town of Milford (in Pike County), Penna.:	21.05	24.50	27.00	24.00	51.50	14.50	17.00	16.05	16.50	18.25
†(d) Into Westchester, Rockland and Suffolk Counties, New York; Gloucester and Salem Counties, New Jersey; also that portion of New Castle County, Delaware, north of line extending through and including towns of New Castle, Tasker, State Road and Audenried:	20.90	24.30	26.75	23.75	51.30	14.30	16.75	15.90	16.30	18.00
(e) Into state of Connecticut (except Fairfield and Litchfield Counties):	21.20	24.65	27.25	24.25	51.65	14.65	17.25	16.20	16.65	18.50
†(f) Into Sullivan, Ulster and Dutchess Counties, New York, and Litchfield County, Connecticut; also towns of Stroudsburg and East Stroudsburg (in Monroe County), Penna.:	21.30	24.85	27.50	24.50	51.85	14.85	17.50	16.30	16.85	18.75

	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(g) Into Delaware, Green and Columbia Counties, New York:	21.60	25.20	28.00	25.00	52.20	15.20	18.00	16.60	17.20	19.25
(h) Into Niagara and Erie Counties, New York (including town of Gowanda):	20.75	24.05	26.40	23.40	51.05	14.05	16.40	15.75	16.05	17.65
(i) Into Cook and DuPage Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest, in Lake County, Ill.:	20.40	23.55	25.75	22.75	50.55	13.55	15.75	15.40	15.55	17.00
(j) Into McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest):	20.55	23.75	26.00	23.00	50.75	13.75	16.00	15.55	15.75	17.25
(k) Into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75
9920 (l) Into Grand Rapids, Mich., Switching Area (as described in published railroad tariffs):	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25
(m) Into Jacksonville and So. Jacksonville, Fla. Switching Area, where per car switching rates apply (as described in published railroad tariffs):	21.25	24.25	26.25	23.25	51.25	14.25	16.25	16.25	16.25	17.50

(5) Minimum prices delivered in markets as listed are same as in adjacent cities, as indicated below:

Delivered Minimum Prices In—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown, Mount Healthy and North College Hill, Ohio	Cincinnati, O.
Euclid, North Randall and Bedford, Ohio	Cleveland, O.
Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Okla. City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

(6) Minimum Prices to Contractors—Consumers.

On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors, prefabricated house manufacturers and consumers generally, the minimum price shall be the minimum price as above established plus the following amounts:

9921 CONFIRMATION OF TELEGRAM

UNITED STATES GYPSUM COMPANY

CHICAGO, MAY 11, 1939.

M. H. Baker, President, National Gypsum Company, 188 Delaware Ave., Buffalo, N. Y.

R. F. Burley, Vice President, Universal Gypsum & Lime Company, 188 Delaware Ave., Buffalo, N. Y.

Grant A. Wileman, Newark Plaster Company, Delawanna, New Jersey.

Frederick Tomkins, President, Newark Plaster Company, c/o The Calvin Tomkins Co., 50 Church St., New York, N. Y.

F. G. Ebsary, President, Ebsary Gypsum Company, Inc., Scottville, New York.

George N. Lenci, Vice President, Ebsary Gypsum Company, Inc., 52 Vanderbilt Ave., New York, N. Y.

C. L. Von Egloffstein, President, Certain-teed Products Corp., 100 East 42nd St., New York, N. Y.

Warren Henley, Merch. Mgr., Certain-teed Products Corp., 1830 Bankers Bldg., 105 W. Adams St., Chicago, Ill.

C. F. Miller, President, American Gypsum Company, Port Clinton, Ohio.

A. R. Black, Gen'l Sales Mgr., American Gypsum Company, Port Clinton, Ohio.

S. M. Gloyd, President, Texas Cement Plaster Co., First National Bldg., Oklahoma City, Okla.

H. E. Chism, Texas Cement Plaster Co., First National Bldg., Oklahoma City, Okla.

Referring to our license contract with you this is to notify you effective May 15, 1939 the minimum prices of patented gypsum board products for shipment into the Savannah Georgia freight area shall be determined in the same manner as provided in the current license bulletin number one using Savannah freight except carload deliveries within switching limits of Savannah and Port Wentworth Georgia where minimum delivered prices shall be your minimum mill price plus $1.25 per M. square feet on patented gypsum wallboard sheathing and linerboard and plus $1.00 per M. sq. ft. on patented gypsum plaster lath.

UNITED STATES GYPSUM COMPANY

9922 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 10, 1939.

MR. C. NEWMAN
Chicago Office

Board License Bulletin (Page 1)—Cancels All Previous Bulletins

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective June 14, 1939, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent) are as follows:

Minimum prices per M sq. ft. of patented gypsum board products shall be the mill price listed below plus carload rail freight from producing mill to destination of the shipment. Carload rail freight may be equalized with the carload rail freight from any of the producing mills listed below having a lower carload rail freight to such destination.

PRODUCING MILLS	MILL PRICE PER M-SQ. FT.								
	1/4" Gypsum Wallboard (Wt. 1075 # per M)	3/8" Gypsum Wallboard (Wt. 1525 # per M)	1/2" Gypsum Wallboard (Wt. 2050 # per M)	1/2" Gypsum Sheathing (Wt. 2050 # per M)	3/8" Gypsum Plaster Lath (Wt. 1525 # per M)	1/2" Gypsum Plaster Lath (Wt. 2050 # per M)	1/4" Gypsum Liner Bd. (Wt. 1075 # per M)	3/8" Gypsum Liner Bd. (Wt. 1525 # per M)	1/2" Gypsum Liner Bd. (Wt. 2050 # per M)
Acme, Texas Akron, N. Y. Boston, Mass. Clarence Center, New York Delawanna, N. J. Detroit, Mich. East Chicago, Ind. Fort Dodge, Iowa Grand Rapids, Michigan Gypsum, Ohio Hamlin, Texas (Plasterco or Plastereo Jct.) Heath, Montana Jacksonville, Florida National City, Michigan New Brighton, S. I., N. Y. Oakfield, New York Philadelphia, Pa. Plasterco, Va. Portsmouth, N. H. Rotan, Texas Savannah, Ga. Southard, Okla. Sweetwater, Texas Wheatland, N. Y.	20.00	23.00	25.00	22.00	13.00	15.00	15.00	15.00	16.25

9923 In computing the delivered minimum price hereunder, rail freight, wherever mentioned in this bulletin, shall mean rail freight in accordance with rail rates published in regular freight tariffs, using the weights shown above, and shall include all stopover, switching, cartage and other extra delivery charges applicable to the shipment.

If the applicable rail rate, to be used in computing the delivered minimum price, is on a per ton basis, then the rate per CWT. shall first be determined, and fractions of less than 1/4¢ per CWT over or under an even 1¢ or 1/2¢ shall be dropped and the even 1¢ or 1/2¢ shall be used, and fractions of 1/4¢ or more over an even 1¢ or 1/2¢ shall be considered as the next even 1/2¢ or 1¢. Example: The rate of $3.55 per ton equaling 17-3/4¢ per CWT shall be consid-

ered 18¢ per CWT. In converting the applicable per CWT rate into freight per M sq. ft. to determine the minimum price hereunder, fractions of less than 1/2¢ per M sq. ft. shall be dropped and the nearest even 1¢ shall be used, and fractions of 1/2¢ or more per M sq. ft. shall be considered the next even 1¢.

The above prices apply to all sales of patented gypsum board except as follows:

1. Pacific Coast. Until further notice the above minimum prices shall not apply to sales of patented gypsum board for shipment to or delivery in the following area: states of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington; also that portion of the state of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

2. Stopover Cars. The minimum price for each portion of a stopover car consigned to a different destination shall be the mill price plus the carload rail freight from the producing mill, provided that carload freight may be equalized with the carload freight from any of the producing mills listed above having a lower carload rail freight to the destination of that portion of the car, except that stopover charges need not be added to determine minimum price on shipments to destinations in which deliveries are made by truck.

3. Delivered Price Areas. Minimum prices of patented gypsum board products per M sq. ft. for delivery within the areas listed below are the prices set forth below plus any stopover charges (except that stopover charges need not be added to determine the minimum price on shipments to destinations in which deliveries are made by truck).

9924

	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(a) Into Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass., north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass., also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York, also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J., west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also that portion of Bucks County, Penna., south and east of line drawn between and including towns of Lexington and Lumberville; also that portion of Montgomery County, Penna., south and east of line drawn between and including towns of Mont Clare and So. Hatfield; also Delaware and Philadelphia Counties, Penna.:	20.80	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75
(b) Into Chester County, Penna.; also that portion of Bucks County, Penna., north and west of line drawn between but not including towns of Lexington and Lumberville; also that portion of Montgomery County, Penna., north and west of line drawn between but not including towns of Mont Clare and So. Hatfield:	20.85	24.20	26.65	23.65	14.20	16.65	15.85	16.20	17.90
(c) Into balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also Rockinghanf and Strafford Counties, New Hampshire; also state of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May and Cumberland Counties, New Jersey; also that portion of Burlington County, N. J., east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also that portion of New Castle County, Delaware, south of line extending through, but not including, towns of New Castle, Tasker, State Road and Audenried; also Cecil County, Maryland; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.; also town of Milford (in Pike County), Penna.:	21.05	24.50	27.00	24.00	14.50	17.00	16.05	16.50	18.25
(d) Into Westchester, Rockland and Suffolk Counties, New York; Gloucester and Salem Counties, New Jersey; also that portion of New Castle County, Delaware, north of line extending through and including towns of New Castle, Tasker, State Road and Audenried:	20.90	24.30	26.75	23.75	14.30	16.75	15.90	16.30	18.00
(e) Into State of Connecticut (except Fairfield and Litchfield Counties):	21.20	24.65	27.25	24.25	14.65	17.25	16.20	16.65	18.50
9925 (f) Into Sullivan, Ulster and Dutchess Counties, New York, and Litchfield County, Connecticut; also towns of Stroudsburg and East Stroudsburg (in Monroe County), Penna.:	21.30	24.85	27.50	24.50	14.85	17.50	16.30	16.85	18.75

	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(g) Into Delaware, Greene and Columbia Counties, New York:	21.60	25.20	28.00	25.00	15.20	18.00	16.60	17.20	19.25
(h) Into Niagara and Erie Counties, New York (including town of Gowanda):	20.75	24.05	26.40	23.40	14.05	16.40	15.75	16.05	17.65
(i) Into Cook and DuPage Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest, in Lake County, Illinois:	20.40	23.55	25.75	22.75	13.55	15.75	15.40	15.55	17.00
(j) Into McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest):	20.55	23.75	26.00	23.00	13.75	16.00	15.55	15.75	17.25
(k) Into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	20.80	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75
(l) Into Grand Rapids, Mich., Switching Area (as described in published railroad tariffs):	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
(m) Into Jacksonville and So. Jacksonville, Fla., Switching Area, where per car switching rates apply (as described in published railroad tariffs):	21.25	24.25	26.25	23.25	14.25	16.25	16.25	16.25	17.50
(n) Into Savannah and Port Wentworth, Georgia, Switching Limits where per car switching rates apply (as described in published railroad tariffs):	21.25	24.25	26.25	23.25	14.00	16.00	16.25	16.25	17.50
(o) Into Key West, Florida:	24.00	29.00			17.20				

9926 4. Minimum Prices in Markets Adjacent to Cities.

Minimum prices of patented gypsum board for delivery in the following markets adjacent to the following cities shall be:

Delivered Minimum Prices In—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown, Mount Healthy and North College Hill, Ohio	Cincinnati, O.
Euclid, North Randall and Bedford, Ohio	Cleveland, O.
Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

5. Pick-up Prices at Mills or Warehouses.

Minimum prices of patented gypsum board per M sq. ft. f.o.b. trucks at mills and warehouses are as follows:

MILLS AND WAREHOUSES	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
Texas	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Boston, Mass.	20.80	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Port Clinton, Ohio	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Portsmouth, N. H.	21.05	24.50	27.00	24.00	14.50	17.00	16.05	16.50	18.25
Laramie, Wyoming	24.62	29.56			19.56			21.56	
Metro. N. Y.–N. J.	20.80	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75

9927 6. Minimum Prices for Delivery by Truck:

Minimum prices for patented gypsum board per M sq. ft. when delivered by truck (truckloads containing 7500 sq. ft. or more) in the areas named below shall be the same as the prices heretofore named for delivery into such areas:

Eastern Area—which includes the States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware; towns of Stroudsburg and East Stroudsburg in Monroe County, and Town of Milford in Pike County, Pennsylvania.

Western New York Area—which includes Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates, Chemung, Schuyler and Livingston Counties, New York; also Crawford, Erie, McKean and Warren Counties, Pennsylvania.

Detroit Area—which includes Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

7. Minimum Prices to Contractors—Consumers:

On sales to contractors, roofing contractors, metal ceiling contractors, prefabricated house manufacturers and other consumers, the minimum price shall be the minimum price as above established plus the following amounts per M sq. ft.:

To Contractors (Inc. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. and Consumers Generally Std. Sizes		To Contractors for Use on Roof Decks Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

9928 8. Standard Size Products:

The minimum prices hereinabove established apply to sales of patented gypsum board in sizes suitable for use in construction and regularly manufactured and offered for sale for use in construction, which products are commonly known in the trade as standard size products and are as follows:

Thickness & Width	Lengths
(1) Square Edge Wallboard	
1/4" x 32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8" x 32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2" x 32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2" x 36"	8'-9' and 10'
(2) T&G Edge Wallboard	
1/2" x 36" or 48"	8'-9' and 10'
(3) T&G Edge Sheathing	
1/2" x 24"	6'-8" and 8'
(4) Plaster Lath	
3/8" x 16"	32"-36" and 48"
1/2" x 16"	32"-36" and 48"
(5) Liner Board	
1/4" x 24"	32" and 48"
1/4" x 32"	36"
1/4" x 32"	48" (grey surfaced and round edged)
3/8" x 24"	32" and 48"
3/8" x 32"	36"
3/8" x 32"	48" (grey surfaced and round edged)
1/2" x 24"	32" and 48"
1/2" x 32"	36"
1/2" x 32"	48" (grey surfaced and round edged)
(6) Special Liner Board for Use on Specific Roof Jobs	
3/8" x 32" or 36"	48"
1/2" x 32" or 36"	48"

9. Non-Standard Size Products.

For sales of non-standard size products, minimum prices per M sq. ft. shall be the minimum price above established plus the following amounts per M sq. ft. (except that such amounts need not be added on sales of non-standard sizes to contractors for use on roof decks):

Wall Bd. & Sheathing	Lath & Liner
2.50	1.25

9929 Effective Date of Minimum Prices:

Advances in Minimum Prices:

In the event of an increase in the minimum prices of patented gypsum board products, the advanced minimum price

shall apply to all shipments made after the effective date of the price increase, except that the price in effect just prior to the advance in minimum price shall apply in the following instances:

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

(2) On sales of gypsum plaster lath to dealers for any specific job requiring not less than the minimum carload quantity of plaster lath (each building of a project to be considered as a separate specific job hereunder); and

On sales of gypsum wallboard or gypsum liner to gypsum roofing contractors for specific gypsum roof jobs; and

On sales of gypsum wallboard, gypsum sheathing or gypsum liner board to dealers for specific industrial housing projects; and

On sales of gypsum wallboard, gypsum sheathing or gypsum liner on direct bids to the federal government for specific federal government jobs;* but only where the general contract for such specific job is awarded prior to the effective date of the price increase, or where the dealer (or contractor on specific roof jobs) has made a written quotation on such job prior to the effective date of the price increase, and providing the order is placed by such dealer or contractor and accepted by the licensee within 30 days on private jobs, and 60 days on federal government jobs, after the effective date of the price increase.

(3) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee, prior to the effective date of price increase.

Decreases in Minimum Price.

In the event of a decrease in the minimum prices of the patented gypsum board products, the new and lower minimum prices are applicable to all sales and shipments made after the effective date of the decrease in minimum price,

* NOTE: A Federal Government job is one where the Federal Government lets the contract to a general contractor or places an order directly with licensee.

including all orders for the patented gypsum board products on file at the time of decrease in minimum prices, and also shipments in transit; but licensee must be prepared to furnish licensor with satisfactory evidence of the fact that the shipment was actually in transit and not delivered when the price decrease became effective. Carrier's
9930 freight bill will be accepted as evidence of that fact.

Rebates, Allowances, Etc.:

Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price by granting the customer rebates, unearned or unwarranted refunds, credits or discounts, by reducing the price of other products, by hiring customers' trucks, by granting allowances for advertising or other purposes, by splitting of salesmen's compensation or commissions with customers, by overshipment of patented products, by including board under the guise of dunnage, or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by licensee below such minimum price.

The minimum prices set forth herein pertain to existing conditions, and, as provided in the license agreement, Licensor has and reserves the right to change and alter such minimum prices from time to time.

UNITED STATES GYPSUM COMPANY,

Vice President.

9931

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 14, 1939.

MR. C. NEWMAN
Chicago

DEAR SIR: We understand that you are manufacturing or are about to manufacture at your Texas mill a 1/2" gypsum liner board weighing approximately 2050 lbs. per M sq. ft., 24"x80" square edge, using gray surfaced paper.

Referring to our license agreement with you, you are hereby notified that the minimum price at which you may sell such product embodying the inventions and improvements set forth and claimed in our letters patent under which you are licensed (not including applications for letters patent) shall be the following mill price plus carload rail freight from producing mill to destination of shipment. Carload rail freight may be equalized with carload rail freight from any of the Texas and Oklahoma producing mills listed below having a lower carload rail freight to such destination.

Producing Mills	Mill Price
Acme, Texas Hamlin (Plasterco or Plasterco Jot.) Texas Rotan, Texas Sweetwater, Texas Southard, Oklahoma	$16.25 per M sq. ft.

In computing the delivered minimum price hereunder, rail freight shall be determined in accordance with rail rates as published in regular freight tariffs, using the weight shown above, plus all stopover, switching, cartage and other extra delivery charges in connection with the shipment. In stopover cars, the minimum price of such patented gypsum board product in any portion of the car shall be the minimum price as herein defined to the point of delivery of that portion of the car.

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

9932 . 4. Minimum Prices in Markets Adjacent to Cities.

Minimum prices of patented gypsum board for delivery in the following markets adjacent to the following cities shall be:

Delivered Minimum Prices In—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
†Cheviot and Bridgetown, Ohio	Cincinnati, O.
Euclid, North Randall and Bedford, Ohio	Cleveland, O.
Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

5. Pick-up Prices at Mills or Warehouses.

Minimum prices of patented gypsum board per M sq. ft. f.o.b. trucks at mills and warehouses are as follows:

Mills and Warehouses	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
Texas	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Boston, Mass.	20.80	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75
Fort Dodge, Iowa...	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Port Clinton, Ohio..	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Portsmouth, N. H. ..	21.05	24.50	27.00	24.00	14.50	17.00	16.05	16.50	18.25
Laramie, Wyoming ..	24.62	29.56			19.56			21.35	
Metro. N. Y.–N. J..	20.80	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75

9983 †3. Minimum Prices in Delivered Price Areas (Cont'd)

	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
†(a) Into Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass., north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass., also Rockingham and Strafford Counties, New Hampshire; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York, also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J., west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also that portion of Bucks County, Penna., south and east of line drawn between and including towns of Lexington and Lumberville; also that portion of Montgomery County, Penna., south and east of line drawn between and including towns of Mont Clare and So. Hatfield; also Delaware and Philadelphia Counties, Penna.:	20.80	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75
(b) Into Chester County, Penna.; also that portion of Bucks County, Penna., north and west of line drawn between but not including towns of Lexington and Lumberville; also that portion of Montgomery County, Penna., north and west of line drawn between but not including towns of Mont Clare and So. Hatfield:	20.85	24.20	26.65	23.65	14.20	16.65	15.85	16.20	17.90
†(c) Into balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also state of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May and Cumberland Counties, New Jersey; also that portion of Burlington County, N. J., east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also that portion of New Castle County, Delaware, south of line extending through, but not including, towns of New Castle, Tasker, State Road and Audenried; also Cecil County, Maryland; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.; also town of Milford (in Pike County), Penna.:	21.05	24.50	27.00	24.00	14.50	17.00	16.05	16.50	18.25
(d) Into Westchester, Rockland and Suffolk Counties, New York; Gloucester and Salem Counties, New Jersey; also that portion of New Castle County, Delaware, north of line extending through and including towns of New Castle, Tasker, State Road and Audenried:	20.90	24.30	26.75	23.75	14.30	16.75	15.90	16.30	18.00
(e) Into State of Connecticut (except Fairfield and Litchfield Counties):	21.20	24.65	27.25	24.25	14.65	17.25	16.20	16.65	18.50

† Indicates change effective September 1, 1939.

9934	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(f) Into Sullivan, Ulster and Dutchess Counties, New York, and Litchfield County, Connecticut; also towns of Stroudsburg and East Stroudsburg (in Monroe County), Penna.:	21.30	24.85	27.50	24.50	14.85	17.50	16.30	16.85	18.75
(g) Into Delaware, Greene and Columbia Counties, New York:	21.60	25.20	28.00	25.00	15.20	18.00	16.60	17.20	19.25
(h) Into Niagara and Erie Counties, New York (including town of Gowanda):	20.75	24.05	26.40	23.40	14.05	16.40	15.75	16.05	17.65
(i) Into Cook and DuPage Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest, in Lake County, Illinois:	20.40	23.55	25.75	22.75	13.55	15.75	15.40	15.55	17.00
(j) Into McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest):	20.55	23.75	26.00	23.00	13.75	16.00	15.55	15.75	17.25
(k) Into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	20.80	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75
(l) Into Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
(m) Into Jacksonville and So. Jacksonville, Fla. Switching Area, where per car switching rates apply (as described in published railroad tariffs):	21.25	24.25	26.25	23.25	14.25	16.25	16.25	16.25	17.50
(n) Into Savannah and Port Wentworth, Georgia, Switching Limits where per car switching rates apply (as described in published railroad tariffs):	21.25	24.25	26.25	23.25	14.00	16.00	16.25	16.25	17.50
(o) Into Key West, Florida:	23.89†	28.52†			17.76†				

† Indicates change effective September 1, 1939.

9935 4. Minimum Prices in Markets Adjacent to Cities.

Minimum prices of patented gypsum board for delivery in the following markets adjacent to the following cities shall be:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot and Bridgetown, Ohio	Cincinnati, O.
Euclid, North Randall and Bedford, Ohio	Cleveland, O.
Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa.
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

†5. Pick-up Prices at Mills or Warehouses.

Minimum prices of patented gypsum board per M sq. ft. f.o.b. trucks at mills and warehouses are as follows:

Mills and Warehouses	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
Texas	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Fort Dodge, Iowa...	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Port Clinton, Ohio.	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Laramie, Wyoming .	24.62	29.56			19.56			21.35	
Metro. N. Y.–N. J.	20.80	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75

† Indicates change.

9936 3. Minimum Prices in Delivered Price Areas (Cont'd)

	1/4"e Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
(f) Into Sullivan, Ulster and Dutchess Counties, New York, and Litchfield County, Connecticut; also towns of Stroudsburg and East Stroudsburg (in Monroe County), Penna.:	21.30	24.85	27.50	24.50	14.85	17.50	16.30	16.85	18.75
(g) Into Delaware, Greene and Columbia Counties, New York:	21.60	25.20	28.00	25.00	15.20	18.00	16.60	17.20	19.25
(h) Into Niagara and Erie Counties, New York (including town of Gowanda):	20.75	24.05	26.40	23.40	14.05	16.40	15.75	16.05	17.65
(i) Into Cook and DuPage Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest, in Lake County, Illinois:	20.40	23.55	25.75	22.75	13.55	15.75	15.40	15.55	17.00
(j) Into McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briargate and Lake Forest):	20.55	23.75	26.00	23.00	13.75	16.00	15.55	15.75	17.25
(k) Into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	20.80	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75
(l) Into Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
(m) Into Jacksonville and So. Jacksonville, Fla. Switching Area, where per car switching rates apply (as described in published railroad tariffs):	21.25	24.25	26.25	23.25	14.25	16.25	16.25	16.25	17.50
(n) Into Savannah and Port Wentworth, Georgia, Switching Limits where per car switching rates apply (as described in published railroad tariffs):	21.25	24.25	26.25	23.25	14.00	16.00	16.25	16.25	17.50
(o) Into Key West, Florida:	23.89	28.52	——	——	17.76	——	——	——	——
(p) Into Milwaukee, Wisc. Switching Area (as described in published railroad tariffs), also towns of Butler and West Allis, Wisc.:	——	——	——	——	14.98	——	——	——	——

† Indicates change effective October 2, 1939.

9937 4. Minimum Prices in Markets Adjacent to Cities.

Minimum prices of patented gypsum board for delivery in the following markets adjacent to the following cities shall be:

Delivered Minimum Prices In—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot and Bridgetown, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, Ohio	Cleveland, Ohio
Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Maryland	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

5. Pick-up Prices at Mills or Warehouses.

Minimum prices of patented gypsum board per M sq. ft. f.o.b. trucks at mills and warehouses are as follows:

Mills and Warehouses	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
Texas	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Laramie, Wyoming	24.62	29.56			19.56			21.56	
Metro. N. Y.–N. J.	20.80	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75

† Indicates change.

9938 †4. Minimum Prices in Markets Adjacent to Cities.

Minimum prices of patented gypsum board for delivery in the following markets adjacent to the following cities shall be:

Delivered Minimum Prices In—	*Same as—*
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot and Bridgetown, Ohio	Cincinnati, Ohio
North Randall, Ohio	Cleveland, Ohio
Dodson, Edgecomb, Waldo and Westport, Mo.; Overland Park and Merriam, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory and Indian Orchard, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Maryland	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio
Algiers, Gretna and Marrero, La.	New Orleans, La.

†5. Pick-up Prices at Mills or Warehouses.

Minimum prices of patented gypsum board per M sq. ft. f.o.b. trucks at mills and warehouses are as follows:

Mills and Warehouses	1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Gypsum Plaster Lath	1/2" Gypsum Plaster Lath	1/4" Gypsum Liner Board	3/8" Gypsum Liner Board	1/2" Gypsum Liner Board
Fort Dodge, Iowa...	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	14.00	16.00	16.00	16.00	17.25
Laramie, Wyoming	24.62	29.56			19.56			21.56	
Metro. N. Y.–N. J..	20.60	24.10	26.50	23.50	14.10	16.50	15.80	16.10	17.75

† Indicates change.

9939 †6. Minimum Prices for Delivery by Truck:

Minimum prices for patented gypsum board per M sq. ft. when delivered by truck (truckloads containing 7500 sq. ft. or more) in the areas named below shall be the same as the prices heretofore named for delivery into such areas:

†Eastern Area—which includes the States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Ulster, Sullivan and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware; towns of Stroudsburg and East Stroudsburg in Monroe County, and town of Milford in Pike County, Pennsylvania.

Western New York Area—which includes Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates, Chemung, Schuyler and Livingston Counties, New York; also Crawford, Erie, McKean and Warren Counties, Pennsylvania.

Detroit Area—which includes Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit: Van Dyke and Centerline in Macomb County, Michigan.

7. Minimum Prices to Contractors—Consumers:

On sales to contractors, roofing contractors, metal ceiling contractors, prefabricated house manufacturers and other consumers, the minimum price shall be the minimum price as above established plus the following amounts per M sq. ft.:

† Indicates change.

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. and Consumers Generally		To Contractors for Use on Roof Decks	
Std. Sizes		Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

9940 *Government's Exhibit No. 34*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1939.

C. NEWMAN

Prices F.O.B. Trucks at Mills & Warehouses
Board License Bulletin No. 2 (Page 1)—Cancels Page 1
Dated August 16, 1938

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective February 7, 1939, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our prices under which you are licensed (not including applications for letters patent), are as follows:

Minimum prices per M sq. ft. at which you may sell patented gypsum board products f.o.b. trucks at mills and warehouses (Truckloads containing 7500 sq. ft. or more) are as follows:

	1/4" Gypsum Wallboard (Wt. 1050# per M)	3/8" Gypsum Wallboard (Wt. 1475# per M)	1/2" Gypsum Wallboard (Wt. 2000# per M)	1/2" Gypsum Sheathing (Wt. 2000# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475# per M)	3/8" Gypsum Plaster Lath (Wt. 1475# per M)	1/2" Gypsum Plaster Lath (Wt. 2000# per M)	1/4" Gypsum Liner Bd. (Wt. 1050# per M)	3/8" Gypsum Liner Bd. (Wt. 1475# per M)	1/2" Gypsum Liner Bd. (Wt. 2000# per M)
Texas Mills	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25
Boston, Mass.	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland, Ohio	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Ft. Dodge, Iowa Mills	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich. Mills	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25
Port Clinton—Gypsum; Ohio Mills	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	20.00	23.00	25.00	22.00	50.00	13.00	15.00	15.00	15.00	16.25
Laramie, Wyo.	24.55	29.35	— —	— —	56.35	19.35	— —	— —	21.35	— —
Loveland, Colo.	24.55	29.35	— —	30.60	56.35	19.35	— —	— —	21.35	— —
Metro. NY–NJ Whses.	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75
Milwaukee, Wisc.	— —	— —	— —	— —	— —	15.67	— —	— —	— —	— —
Nat'l. City, Mich.	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25
Western N.Y Mills & Whses.	20.75	24.05	26.40	23.40	51.05	14.05	16.40	15.75	16.05	17.65
Philadelphia, Pa. Area	20.80	24.10	26.50	23.50	51.10	14.10	16.50	15.80	16.10	17.75
Piedmont, S. D.	24.10	28.75	32.80	— —	— —	18.75	— —	— —	— —	— —
Plasterco, Va.	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25
Portsmouth, N. H.	21.05	24.50	27.00	24.00	51.50	14.50	17.00	16.05	16.50	18.25
Southard, Okla.	21.00	24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25

On sales to contractors, roofing contractors, metal
9941 ceiling contractors, prefabricated house manufacturers and consumers, and sales of odd or non-standard sizes, the minimum price at which you may sell for delivery f.o.b. trucks at mills and warehouses shall be the minimum prices established above plus the same amounts shown in Bulletin #2 for such sales for delivery by rail.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

9942 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 16, 1938.

Prices F.O.B. Trucks at Mills & Warehouses—
Board License Bulletin No. 2 (Page 1)—Cancels Page 1
Dated May 27, 1938.

MR. C. NEWMAN
Chicago Office

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective August 18, 1938, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for Standard Sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	3/8" Gypsum Wallboard (Wt. 1475 # per M)	1/2" Gypsum Wallboard (Wt. 2000 # per M)	1/2" Gypsum Sheathing (Wt. 2000 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475 # per M)	3/8" Gypsum Plaster Lath (Wt. 1475 # per M)	1/2" Gypsum Plaster Lath (Wt. 2000 # per M)	1/4" Gypsum Liner Board (Wt. 1050 # per M)	3/8" Gypsum Liner Board (Wt. 1475 # per M)	1/2" Gypsum Liner Board (Wt. 2000 # per M)
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston, Mass.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland, Ohio	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
†Eldorado, Okla.	(Discontinued)										
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Kansas City, Mo.	— —	— —	— —	— —	— —	56.78	— —	— —	— —	— —	— —
Laramie, Wyo.	24.55	29.35	— —	— —	— —	56.35	19.35	— —	— —	21.35	— —
Loveland, Colo.	24.55	29.35	— —	30.60	— —	56.35	19.35	— —	— —	21.35	— —
*Metro N. Y.—N. J. Whses.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Miami, Fla.	— —	— —	— —	— —	— —	— —	17.50	— —	— —	— —	— —
Milwaukee, Wisc.	— —	— —	— —	— —	— —	— —	15.67	— —	— —	— —	— —
National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Oakfield, N. Y.	20.75	24.05	26.40	23.40	38.80	51.05	14.05	16.40	15.75	16.05	17.65
*Philadelphia, Pa.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Piedmont, S. D.	24.10	28.75	32.80	— —	— —	— —	18.75	— —	— —	— —	— —
Plasterco, Va.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Portsmouth, N. H.	21.05	24.50	27.00	24.00	— —	51.50	14.50	17.00	16.05	16.50	18.25
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Tex.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

9943 The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 32"x48" Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32"x48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32"x48" cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36"x48" Gypsum Board—36"x48" is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Inc. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50.	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates changes in this reissue.

9944 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 27, 1938.

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated April 1, 1938.

MR. C. NEWMAN
Chicago.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective June 1, 1938, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for Standard Sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	3/8" Gypsum Wallboard (Wt. 1475 # per M)	1/2" Gypsum Wallboard (Wt. 2000 # per M)	1/2" Gypsum Sheathing (Wt. 2000 #- per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475 # per M)	3/8" Gypsum Plaster Lath (Wt. 1475 # per M)	1/2" Gypsum Plaster Lath (Wt. 2000 # per M),	1/4" Gypsum Liner Board (Wt. 1050 # per M)	3/8" Gypsum Liner Board (Wt. 1425 # per M)	1/2" Gypsum Liner Board (Wt 2000 # per M)
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston, Mass.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland, Ohio	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Kansas City, Mo.	— —	— —	— —	— —	— —	56.78	— —	— —	— —	— —	— —
Laramie, Wyo.	24.55	29.35	— —	— —	— —	56.35	19.35	— —	— —	21.35	— —
Loveland, Colo.	24.55	29.35	— —	30.60	— —	56.35	19.35	— —	— —	21.35	— —
*Metro, N. Y.-N. J. Whses.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Miami, Fla.	— —	— —	— —	— —	— —	— —	17.50	— —	— —	— —	— —
Milwaukee, Wisc.	— —	— —	— —	— —	— —	— —	15.67	— —	— —	— —	— —
National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Oakfield, N. Y.	20.75	24.05	26.40	23.40	38.80	51.05	14.05	16.40	15.75	16.05	17.65
*Philadelphia, Pa.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Piedmont, S. D.	24.10	28.75	32.80	— —	— —	— —	18.75	— —	— —	— —	— —
Plasterco, Va.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
†*Portsmouth, N. H.	21.05†	24.50†	27.00†	24.00†	— —	51.50†	14.50†	17.00†	16.05†	16.50†	18.25†
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Texas	†21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

† Indicates change to become effective June 1, 1938.

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9945

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 1, 1938.

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated March 15, 1938.

MR. C. NEWMAN
Chicago Office

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective April 5, 1938, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for Standard Sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	3/8" Gypsum Wallboard (Wt. 1475 # per M)	1/2" Gypsum Wallboard (Wt. 2000 # per M)	1/2" Gypsum Sheathing (Wt. 2000 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Filed Gypsum Wallbd. (Wt. 1475 #. per M)	3/8" Gypsum Plaster Lath (Wt. 1475 # per M)	1/2" Gypsum Plaster Lath (Wt. 2000 # per M)	1/4" Gypsum Liner Board (Wt. 1050 # per M)	3/8" Gypsum Liner Board (Wt. 1475 # per M)	1/2" Gypsum Liner Board (Wt. 2000 # per M)
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston, Mass.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Kansas City, Mo.	— —	— —	— —	— —	— —	56.78†	— —	— —	— —	— —	— —
†Laramie, Wyo.	24.55†	29.35†	— —	— —	— —	56.35†	19.35†	— —	— —	21.35†	— —
†Loveland, Colo.	24.55†	29.35†	— —	30.60†	— —	56.35†	19.35†	— —	— —	21.35†	— —
*Metro N. Y.—N. J. Whses.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Miami, Fla.	— —	— —	— —	— —	— —	— —	17.50	— —	— —	— —	— —
Milwaukee, Wisc.	— —	— —	— —	— —	— —	— —	15.67	— —	— —	— —	— —
National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Oakfield, N. Y.	20.75	24.05	26.40	23.40	38.80	51.05	14.05	16.40	15.75	16.05	17.65
*Philadelphia, Pa.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
†Piedmont, S. D.	24.10†	28.75†	32.80†	— —	— —	— —	18.75†	— —	— —	— —	— —
Plastereo, Va.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Portsmouth, N. H.	21.47	25.97	27.80	24.80	— —	52.07	15.07	17.80	16.47	17.07	19.05
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: any mixture of regular patented board products (including special surfaced gypsum board products).

9946 The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 32"x48" Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32"x48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32"x48" cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36"x48" Gypsum Board—36"x48" is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
3.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates changes in this reissue.

9947

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 15, 1938

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated March 10, 1938.

MR. C. NEWMAN,
Chicago Office.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective March 21, 1938, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for Standard Sizes as listed in Bulletin No. 4)	1/4 Gypsum Wallboard (Wt. 1050# per M)	3/8" Gypsum Wallboard (Wt. 1475# per M)	1/2" Gypsum Wallboard (Wt. 2000# per M)	1/2" Gypsum Sheathing (Wt. 2000# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475# per M)	3/8" Gypsum Plaster Lath (Wt. 1475# per M)	1/2" Gypsum Plaster Lath (Wt. 2000# per M)	1/4" Gypsum Liner Board (Wt. 1050# per M)	3/8" Gypsum Liner Board (Wt. 1475# per M)	1/2" Gypsum Liner Board (Wt. 2000# per M)
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston, Mass.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Kansas City, Mo.	— —	— —	— —	— —	— —	56.63	— —	— —	— —	— —	— —
Laramie, Wyo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
Loveland, Colo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
*Metro N. Y.-N. J. Whses.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Miami, Fla.	— —	— —	— —	— —	— —	— —	17.50	— —	— —	— —	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	15.67	— —	— —	— —	— —
National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Oakfield, N. Y.	20.75	24.05	26.40	23.40	38.80	51.05	14.05	16.40	15.75	16.05	17.65
*Philadelphia, Pa.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Piedmont, S. D.	23.89	28.46	32.40	— —	— —	— —	18.46	— —	— —	— —	— —
Plasterco, Va.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
†*Portsmouth, N. H.	21.47†	25.07†	27.80†	24.80†	— —	52.07†	15.07†	17.80†	16.47†	17.07†	19.05†
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.

†* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

9948 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 32" x 48" Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32" x 48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32" x 48" cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36" x 48" Gypsum Board—36" x 48" is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) And to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wallbd. & Sheathing	Lath & Liner	Wallbd. & Sheathing	Lath & Liner	Wallbd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reisaue.

9949 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 10, 1938

Prices F.O.B. Trucks at Mills & Warehouses — Board Licçense Bulletin No. 2 (Page 1)—Cancels Page 1 Dated February 11, 1938.

MR. C. NEWMAN
Chicago Office

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective March 21, 1938, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for Standard Sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	3/8" Gypsum Wallboard (Wt. 1475 # per M)	1/2" Gypsum Wallboard (Wt. 2000 # per M)	1/2" Gypsum Sheathing (Wt. 2000 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475 # per M)	3/8" Gypsum Plaster Lath (Wt. 1475 # per M)	1/2" Gypsum Plaster Lath (Wt. 2000 # per M)	1/4" Gypsum Liner Board (Wt. 1050 # per M)	3/8" Gypsum Liner Board (Wt. 1475 # per M)	1/2" Gypsum Liner Board (Wt. 2000 # per M)
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston & Portsmouth	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Kansas City, Mo.	— —	— —	— —	— —	— —	56.63	— —	— —	— —	— —	— —
Laramie, Wyo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
Loveland, Colo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
*Metro N. Y.-N. J. Whses.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
†Miami, Fla.	— —	— —	— —	— —	— —	— —	17.50†	— —	— —	— —	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	15.67	— —	— —	— —	— —
National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Oakfield, N. Y.	20.75	24.05	26.40	23.40	38.80	51.05	14.05	16.40	15.75	16.05	17.65
*Philadelphia, Pa.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Piedmont, S. D.	23.89	28.46	32.40	— —	— —	— —	18.46	— —	— —	— —	— —
Plastereo, Va.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

9950 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 32" x 48" Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32" x 48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32" x 48" cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36" x 48" Gypsum Board—36" x 48" is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) And to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wallbd & Sheathing	Lath & Liner	Wallbd. & Sheathing	Lath & Liner	Wallbd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

9951 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 11, 1938

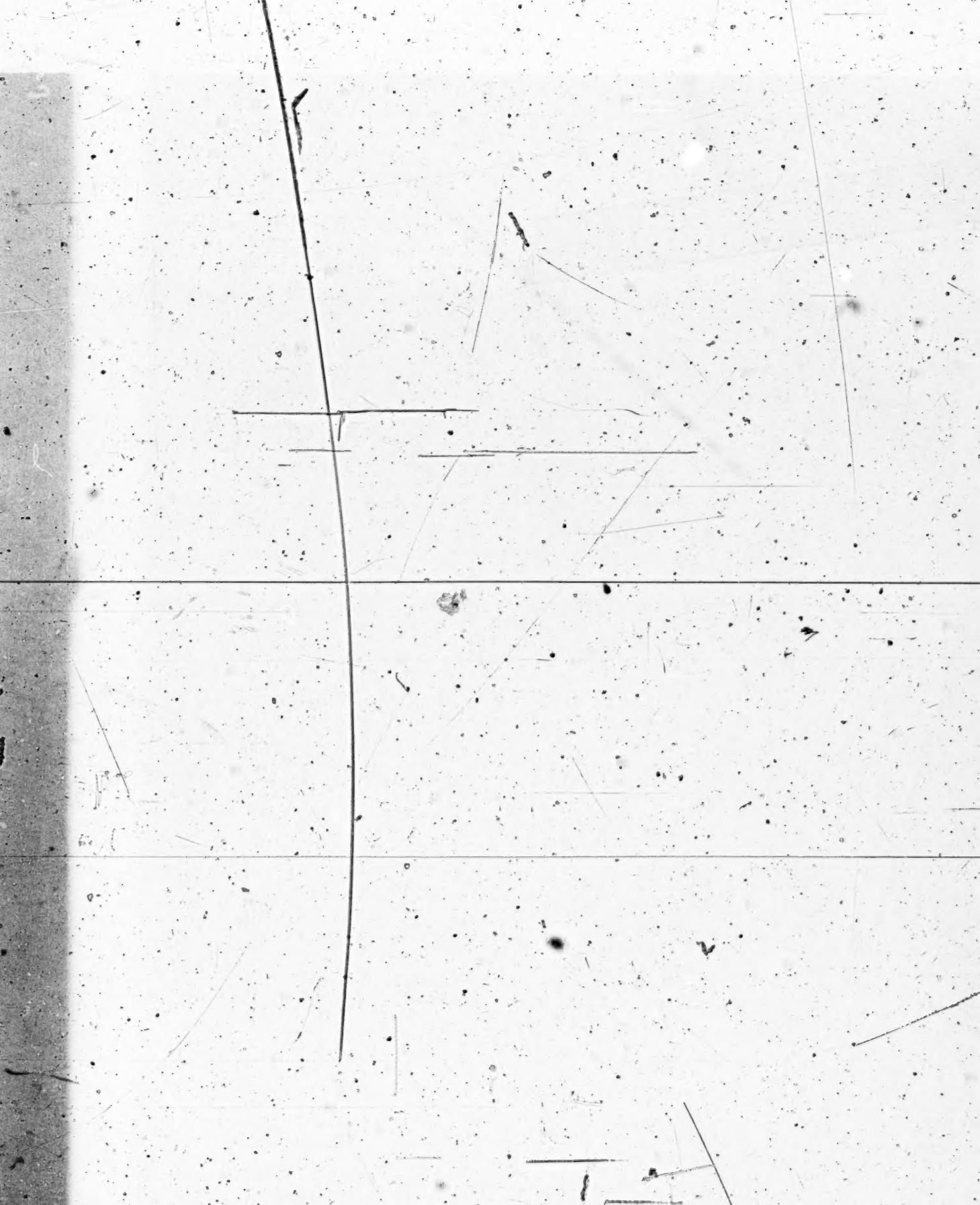
Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated January 4, 1938

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective February 15, 1938, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for Standard Sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	3/8" Gypsum Wallboard (Wt. 1475# per M)	1/2" Gypsum Wallboard (Wt. 2000 # per M)	1/2" Gypsum Sheathing (Wt. 2000 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475# per M)	3/8" Gypsum Plaster Lath (Wt. 1475# per M)	1/2" Gypsum Plaster Lath (Wt. 2000 # per M)	1/4" Gypsum Liner Board (Wt. 1050 # per M)	3/8" Gypsum Liner Board (Wt. 1475 # per M)	1/2" Gypsum Liner Board (Wt. 2000 # per M)
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston & Portsmouth	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
†Heath, Montana	20.00†	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Kansas City, Mo.	— —	— —	— —	— —	— —	56.63†	— —	— —	— —	— —	— —
Laramie, Wyo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
Loveland, Colo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
*Metro N. Y.—N. J. Whses.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Miami, Fla.	— —	— —	— —	— —	— —	— —	17.00	— —	— —	— —	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	15.67	— —	— —	— —	— —
National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Oakfield, N. Y.	20.75	24.05	26.40	23.40	38.80	51.05	14.05	16.40	15.75	16.05	17.65
*Philadelphia, Pa.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
†Piedmont, S. D.	23.89†	28.46†	32.40†	— —	— —	— —	18.46†	— —	— —	— —	— —
Plastereo, Va.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

† Indicates change in this reissue (effective February 15, 1938).



9952 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 4, 1938.

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated December 31, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective January 15, 1938, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for Standard Sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	3/8" Gypsum Wallboard (Wt. 1475 # per M)	1/2" Gypsum Wallboard (Wt. 2000 # per M)	1/2" Gypsum Sheething (Wt. 2000 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475 # per M)	3/8" Gypsum Plaster Lath (Wt. 1475 # per M)	1/2" Gypsum Plaster Lath (Wt. 2000 # per M)	1/4" Gypsum Liner Board (Wt. 1050 # per M)*	3/8" Gypsum Liner Board (Wt. 1475 # per M)	1/2" Gypsum Liner Board (Wt. 2000 # per M)
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston & Portsmouth	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	22.50	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Laramie, Wyo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
Loveland, Colo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
*Metro N. Y.—N. J. Whses.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Miami, Fla.	— —	— —	— —	— —	— —	— —	17.00	— —	— —	— —	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	15.67	— —	— —	— —	— —
National City	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Oakfield, N. Y.	20.75	24.05	26.40	23.40	38.80	51.05	14.05	16.40	15.75	16.05	17.65
*Philadelphia, Pa.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.7
†Plasterco, Va.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

† Indicates change in this reissue, to become effective January 15, 1938.

9953 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 31, 1937.

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated December 17, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective January 10, 1938, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for Standard Sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050# per M)	3/8" Gypsum Wallboard (Wt. 1475# per M)	1/2" Gypsum Wallboard (Wt. 2000# per M)	1/2" Gypsum Sheathing (Wt. 2000# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475# per M)	3/8" Gypsum Plaster Lath (Wt. 1475# per M)	1/2" Gypsum Plaster Lath (Wt. 2000# per M)	1/4" Gypsum Liner Board (Wt. 1050# per M)	3/8" Gypsum Liner Board (Wt. 1475# per M)	1/2" Gypsum Liner Board (Wt. 2000# per M)
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston & Portsmouth	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	22.50	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Laramie, Wyo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
Loveland, Colo.	24.35	29.05	— —	— —	— —	56.05	19.05	— —	— —	21.05	— —
*Metro. N. Y.—N. J. Whses.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
†Miami, Fla.	— —	— —	— —	— —	— —	— —	17.00†	— —	— —	— —	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	15.67	— —	— —	— —	— —
National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Oakfield, N. Y.	20.75	24.05	26.40	23.40	38.80	51.05	14.05	16.40	15.75	16.05	17.65
*Philadelphia, Pa.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
*Plasterco, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

9954 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 17, 1937

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated October 21, 1937.

MR. C. NEWMAN,
Chicago.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective December 20, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for Standard Sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050# per M)	3/8" Gypsum Wallboard (Wt. 1475# per M)	1/2" Gypsum Wallboard (Wt. 2000# per M)	1/2" Gypsum Sheathing (Wt. 2000# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475# per M)	3/8" Gypsum Plaster Lath (Wt. 1475# per M)	1/2" Gypsum Plaster Lath (Wt. 2000# per M)	1/4" Gypsum Liner Board (Wt. 1050# per M)	3/8" Gypsum Liner Board (Wt. 1475# per M)	1/2" Gypsum Liner Board (Wt. 2000# per M)
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston & Portsmouth	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	22.50	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Laramie, Wyo.	24.35†	29.05†	— —	— —	— —	56.05†	19.05†	— —	— —	21.05†	— —
†Loveland, Colo.	24.35†	29.05†	— —	— —	— —	56.05†	19.05†	— —	— —	21.05†	— —
*Metro N. Y.—N. J. Whses.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Miami, Fla.	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
†Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	15.67†	— —	— —	— —	— —
National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Oakfield, N. Y.	20.75	24.05	26.40	23.40	38.80	51.05	14.05	16.40	15.75	16.05	17.65
*Philadelphia, Pa.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Plasterco, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products)

9955 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 32" x 48" Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32" x 48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32" x 48" cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36" x 48" Gypsum Board—36" x 48" is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

4906

9956 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 21, 1937

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated October 5, 1937.

MR. C. NEWMAN
Chicago Office

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective November 1, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 1050 # per M) †	3/8" Gypsum Wallboard (Wt. 1475 # per M) †	1/2" Gypsum Wallboard (Wt. 2000 # per M) †	1/2" Gypsum Sheathing (Wt. 2000 # per M) †	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1475 # Per M) †	3/8" Gypsum Plaster Lath (Wt. 1475 # Per M) †	1/2" Gypsum Plaster Lath (Wt. 2000 # per M) †	1/4" Gypsum Liner Board (Wt. 1050 # per M) †	3/8" Gypsum Liner Board (Wt. 1475 # Per M) †	1/2" Gypsum Liner Board (Wt. 2000 # per M) †
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
†*Boston & Portsmouth	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Cleveland	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00*	— —	16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	22.50	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Laramie, Wyo.	24.10	28.75	— —	— —	— —	55.75	18.75	— —	— —	20.75	— —
†Loveland, Colo.	24.10	28.75	— —	— —	— —	55.75	18.75	— —	— —	20.75	— —
†*Metro N. Y.-N. J. Whses.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Miami, Fla.	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
†Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	15.52	— —	— —	— —	— —
National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
†*Oakfield, N. Y.	20.75	24.05	26.40	23.40	38.80	51.05	14.05	16.40	15.75	16.05	17.65
†*Philadelphia, Pa.	20.80	24.10	26.50	23.50	— —	51.10	14.10	16.50	15.80	16.10	17.75
Plasterco, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Tex.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

9957 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 32" x 48" Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32" x 48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32" x 48" cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36" x 48" Gypsum Board—36" x 48" is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

† Indicates change in this reissue.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

9958 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 5, 1937.

MR. C. NEWMAN

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated July 13, 1937.

DEAR SIRS: Referring to or license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M) †	3/8" Gypsum Wallboard (Wt. 1400 # per M) †	1/2" Gypsum Wallboard (Wt. 1900 # per M) †	1/2" Gypsum Wallboard (Wt. 1900 # per M) †	3/4" Gypsum Wallboard (Wt. 3300 # per M) †	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M) †	3/8" Gypsum Plaster Lath (Wt. 1400 # per M †	1/2" Gypsum Plaster Lath (Wt. 1900 # per M) †	1/4" Gypsum Liner Board Wt. 950 # per M) †	3/8" Gypsum Liner Board (Wt. 1400 # per M) †	1/2" Gypsum Liner Board (Wt. 1900 # per M) †
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston & Portsmouth	20.70	24.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
Cleveland	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
†Fort Dodge, Iowa	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16:00	16.00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath; Montana	22.50	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Laramie, Wyo.	24.00	28.75	— —	— —	— —	55.75	18.75	— —	— —	20.75	— —
Loveland, Colo.	23.75	28.50	— —	— —	— —	55.50	18.50	— —	— —	20.50	— —
*Metro N. Y.—N. J. Whses.	20.70	24.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
Miami, Fla.	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	15.43	— —	— —	— —	— —
National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Oakfield, N. Y.	20.70	24.00	26.35	23.35	38.80	51.00	14.00	16.35	15.70	16.00	17.[illegible]
*Philadelphia, Pa.	20.70	24.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
Plastereo, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Tex.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

9959 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 32" x 48" Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32" x 48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32" x 48" cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36" x 48" Gypsum Board—36" x 48" is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

4912

9960 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 13, 1937.

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated June 12, 1937.

MR. C. NEWMAN,
General Sales,
Office.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 16, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	1/2" Gypsum Sheathing (Wt. 1900 # per M) †	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	3/8" Gypsum Plaster Lath (Wt. 1400 # per M)	1/2" Gypsum Plaster Lath (Wt. 1900 # per M)	1/4" Gypsum Liner Board (Wt. 950 # per M)	3/8" Gypsum Liner Board (Wt. 1400 # per M)	1/2" Gypsum Liner Board (Wt. 1900 # per M)
Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston & Portsmouth	20.70	24.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
Cleveland	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
Fort Dodge, Iowa	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
†Heath, Montana	22.50	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Laramie, Wyo.	24.00	28.75	— —	— —	— —	55.75	18.75	— —	— —	20.75	— —
Loveland, Colo.	23.75	28.50	— —	— —	— —	55.50	18.50	— —	— —	20.50	— —
*Metro N. Y.—N. J. Whses.	20.70	24.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
Miami, Fla.	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	15.43	— —	— —	— —	— —
National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Oakfield, N. Y.	20.70	24.00	26.35	23.35	38.80	51.00	14.00	16.35	15.70	16.00	17.60
*Philadelphia, Pa.	20.70	24.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
Plastereo, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Tex.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

9961 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 32" x 48" Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32" x 48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32" x 48" cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36" x 48" Gypsum Board—36" x 48" is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

9962

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 12, 1937

Prices F. O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated May 7, 1937.

MR. C. NEWMAN,
Clerk,
General Sales.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective June 17, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	3/8" Gypsum Wallboard (Wt. 1400 # per M) †	1/2" Gypsum Wallboard (Wt. 1900 # per M) †	1/2" Gypsum Sheathing (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	3/8" Gypsum Plaster Lath (Wt. 1400 # per M)	1/2" Gypsum Plaster Lath (Wt. 1900 # per M)	1/4" Gypsum Liner Board (Wt. 950 # per M)	3/8" Gypsum Liner Board (Wt. 1400 # per M)	1/2" Gypsum Liner Board (Wt. 1900 # per M)
†Acme, Texas	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
†*Boston & Portsmouth	20.70	24.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
Cleveland	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
†Eldorado, Okla.	21.00	24.00	26.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
†Fort Dodge, Iowa	20.00	23.00	25.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
†Grand Rapids, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
†Gypsum, Ohio	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
†Heath, Montana	22.50	23.00	25.00	32.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Laramie, Wyo.	24.00	28.75	— —	— —	— —	55.75	18.75	— —	— —	20.75	— —
†Loveland, Colo.	23.75	28.50	— —	— —	— —	55.50	18.50	— —	— —	20.50	— —
†*Metro N. Y.-N. J. Whses.	20.70	24.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
Miami, Fla.	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	15.43	— —	— —	— —	— —
†National City, Mich.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
†*Oakfield, N. Y.	20.70	24.00	26.35	23.35	38.80	51.00	14.00	16.35	15.70	16.00	17.60
†*Philadelphia, Pa.	20.70	24.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
†Plasterco, Va.	20.00	23.00	25.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
†Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
†Sweetwater, Tex.	21.00	24.00	26.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

9963 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 32″ x 48″ Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32″ x 48″ is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32″ x 48″ cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36″ x 48″ Gypsum Board—36″ x 48″ is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

9964 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 7, 1937.

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated February 24, 1937.

C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective May 11, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallbd. (Wt. 1175 # per M) (See Note in Bul. No. 1)	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	1/2" Gypsum Sheathing (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	3/8" Gypsum Plaster Lath (Wt. 1400 # per M)	1/2" Gypsum Plaster Lath (Wt. 1900 # per M) †	1/4" Gypsum Liner Board (Wt. 950 # per M)	3/8" Gypsum Liner Board (Wt. 1400 # per M)	1/2" Gypsum Liner Board (Wt. 1900 # per M)
Acme, Texas	21.00	— —	26.00	27.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
*Boston & Portsmouth	20.70	— —	25.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
Cleveland	— —	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Eldorado, Okla.	21.00	— —	26.00	27.00	23.00	— —	51.00	14.00	— —	16.00	16.00	17.25
Fort Dodge, Iowa	20.00	— —	25.00	26.00	22.00	36.50	50.00	13.00	15.00	15.00	15.00	16.25
Grand Rapids, Mich.	21.00	— —	26.00	27.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25
Gypsum, Ohio	21.00	25.00	26.00	27.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Heath, Montana	22.50	— —	25.00	26.00	32.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Laramie, Wyo.	24.00	— —	30.75	— —	— —	— —	55.75	18.75	— —	— —	20.75	— —
Loveland, Colo.	23.75	— —	30.50	— —	— —	— —	55.50	18.50	— —	— —	20.50	— —
*Metro N. Y.—N. J. Whses.	20.70	— —	25.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	— —	15.43	— —	— —	— —	— —
*Oakfield, N. Y.	20.70	24.80	26.00	27.35	23.35	38.80	51.00	14.00	16.35	15.70	16.00	17.60
*Philadelphia, Pa.	20.70	— —	25.00	26.45	23.45	— —	51.00	14.00	16.45	15.70	16.00	17.70
Plasterco, Va.	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	15.00	16.25
Southard, Okla.	21.00	— —	26.00	27.00	23.00	37.50	51.00	14.00	16.00	16.00	16.00	17.25
Sweetwater, Tex.	21.00	— —	26.00	27.00	23.00	— —	51.00	14.00	16.00	16.00	16.00	17.25

* Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

† Indicates changes (To become effective May 11, 1937).

9965 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 32" x 48" Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32" x 48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32" x 48" cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36" x 48" Gypsum Board—36" x 48" is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change.

9966 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1937

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 (Page 1) Dated December 29, 1936.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective March 1, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M) †	5/16" Gypsum Wallboard (Wt. 1175# per M) †	3/8" Gypsum Wallboard (Wt. 1400# per M) † (See Note in Bul. No. 1)	1/2" Gypsum Wallboard (Wt. 1900# per M) †	1/2" Gypsum Sheathing (Wt. 1900# per M) †	3/4" Gypsum Wallboard (Wt. 3300# per M) †	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	3/8" Gypsum Plaster Lath (Wt. 1400# per M) †	1/4" Gypsum Liner Board (Wt. 950# per M) †	3/8" Gypsum Liner Board (Wt. 1400# per M) †	1/2" Gypsum Liner Board (Wt. 1900# per M) †
†Acme, Texas	21.00	— —	26.00	27.00	23.00	— —	51.00	14.00	16.00	16.00	17.25
†*Boston & Portsmouth	20.70	— —	25.00	26.45	23.45	— —	51.00	14.00	15.70	16.00	17.70
†Cleveland	— —	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —
†Eldorado, Okla.	21.00	— —	26.00	27.00	23.00	— —	51.00	14.00	16.00	16.00	17.25
†Fort Dodge, Iowa	20.00	— —	25.00	26.00	22.00	36.50	50.00	13.00	15.00	15.00	16.25
†Grand Rapids, Mich.	21.00	— —	26.00	27.00	23.00	— —	51.00	14.00	16.00	16.00	17.25
†Gypsum, Ohio	21.00	25.00	26.00	27.00	23.00	37.50	51.00	14.00	16.00	16.00	17.25
†Heath, Montana	22.50	— —	25.00	26.00	32.00	— —	50.00	13.00	15.00	15.00	16.25
†Laramie, Wyo.	24.00	— —	30.75	— —	— —	— —	55.75	18.75	— —	20.75	— —
†Loveland, Colo.	23.75	— —	30.50	— —	— —	— —	55.50	18.50	— —	20.50	— —
†*Metro N. Y.—N. J. Whses.	20.70	— —	25.00	26.45	23.45	— —	51.00	14.00	15.70	16.00	17.70
†Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	16.00	— —	— —	— —
†Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	— —	15.43	— —	— —	— —
†*Oakfield, N. Y.	20.70	24.80	26.00	27.35	23.35	38.80	51.00	14.09	15.70	16.00	17.60
†*Philadelphia, Pa.	20.70	— —	25.00	26.45	23.45	— —	51.00	14.00	15.70	16.00	17.70
†Plasterco, Va.	20.00	— —	25.00	26.00	22.00	— —	50.00	13.00	15.00	15.00	16.25
†Southard, Okla.	21.00	— —	26.00	27.00	23.00	37.50	51.00	14.00	16.00	16.00	17.25
†Sweetwater, Tex.	21.00	— —	26.00	27.00	23.00	— —	51.00	14.00	16.00	16.00	17.25

†*: Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products).

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†(1) 32″ x 48″ Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32″ x 48″ is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32″ x 48″ cutstock board is subject to the minimum liner board price for such specific jobs.

†(2) 36″ x 48″ Gypsum Board—36″ x 48″ is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such specific gypsum roof jobs.

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(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

9968 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 29, 1936

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 (Page 1) Dated September 11, 1936 and All Supplements Thereto.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective January 1, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	1/2" Gypsum Sheathing (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	5/16" Gypsum Plasterboard (Wt. 1175# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
Acme, Texas	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
*Boston & Portsmouth	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†Cleveland	— —	— —	— —	— —	— —	— —	— —	— —	18.00	18.00	— —
Eldorado, Okla.	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Fort Dodge, Iowa	20.00	— —	25.00	26.00	22.00	36.50	50.00	15.00	— —	15.00	16.25
Grand Rapids, Mich.	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Gypsum, Ohio	21.00	25.00	26.00	27.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
†Heath, Montana	22.50	— —	25.00	26.00	32.00	— —	50.00	15.00	— —	15.00	16.25
†Laramie, Wyo.	24.00	— —	30.75	— —	— —	— —	55.75	— —	— —	20.75	— —
†Loveland, Colo.	23.75	— —	30.50	— —	— —	— —	55.50	— —	— —	20.50	— —
*Metro N. Y.—N. J. Whses.	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	16.00	23.70	— —
†Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	— —	— —	— —	17.43	— —
*Oakfield, N. Y.	21.00	25.00	26.00	27.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
*Philadelphia, Pa.	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Plasterco, Va.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	— —	15.00	16.25
Southard, Okla.	21.00	— —	26.00	27.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
Sweetwater, Tex.	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular patented board (including special surfaced gypsum board products) and metallized patented board products may be combined to make up the 5000 feet minimum. Exception: 3/8" Tiled Gypsum Wallboard or special surfaced gypsum board products may be picked up in any quantity at Metro N. Y.—N. J. Warehouses.

9969 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 24" x 48" Cutstock Plasterboard: $18.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $19.75 per M sq. ft. for 1/2" thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the States of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(3) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(4) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

To Dealers		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs.		To Roofing Contractors	
Odd Sizes		Odd Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

9970 In all markets except where an exception is made as follows:

(1) 24″ x 48″ Cutstock Plasterboard: $18.50 per M sq. ft. for 1/4″ and 3/8″ thicknesses and $19.75 per M sq. ft. for 1/2″ thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 32″ x 48″ Gypsum Board. In all areas 32″ x 48″ gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the States of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32″ x 48″ board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(3) 36″ x 48″ Gypsum Board. 36″ x 48″ is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(4) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs.		To Roofing Contractors	
Std. Sizes		Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof job only):

To Dealers		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.		To Roofing Contractors	
Odd Sizes		Odd Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

9971

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 11, 1936

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated August 13, 1936.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective September 15, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 #. per M) †	5/16" Gypsum Wallboard (Wt. 1175 # per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400 # per M) †	1/2" Gypsum Wallboard (Wt. 1900 # per M) †	1/2" Gypsum Sheathing (Wt. 1900 # per M) †	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	5/16" Gypsum Plasterboard (Wt. 1175 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M).
†Acme, Texas	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†*Boston & Portsmouth	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Cleveland	— —	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
†Eldorado, Okla.	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†Fort Dodge, Iowa	20.00	— —	25.00	26.00	22.00	36.50	50.00	15.00	— —	15.00	16.25
†Grand Rapids, Mich.	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.2
†Gypsum, Ohio	21.00	25.00	26.00	27.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
Laramie, Wyo.	24.25	— —	31.25	— —	— —	— —	56.25	— —	— —	21.25	— —
Loveland, Colo.	24.00	— —	31.00	— —	— —	— —	56.00	— —	— —	21.00	— —
†*Metro N. Y.—N. J. Whses.	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	16.00	23.12	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	— —	— —	— —	17.57	— —
†*Oakfield, N. Y.	21.00	25.00	26.00	27.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
†*Philadelphia, Pa.	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†Plastereo, Va.	20.00	— —	25.00	26.00	22.00	— —	50.00	15.00	— —	15.00	16.25
†Southard, Okla.	21.00	— —	26.00	27.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
†Sweetwater, Tex.	21.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular patented board (including special surfaced gypsum board products) and metallized patented board products may be combined to make up the 5000 feet minimum. Exception: 3/8" Tiled Gypsum Wallboard or special surfaced gypsum board products may be picked up in any quantity at Metro N. Y.—N. J. Warehouses.

9972 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:.

(1) 24" x 48" Cutstock Plasterboard: $18.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $19.75 per M sq. ft. for 1/2" thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 1/4" and 3/8" Regular or Cutstock Plasterboard. Minimum price when picked up for destinations in Niagara, Erie, (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4" and 3/8" thicknesses $15.00 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32" x 48" board.

(3) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(4) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(5) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof job only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

9973

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 13, 1936

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated July 23, 1936.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective August 17, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks, Mills or Whses. (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M) *	1/2" Gypsum Sheathing (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	5/16" Gypsum Plasterboard (Wt. 1175# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
Acme, Texas	22.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
*Boston & Portsmouth	22.00	— —	28.00	30.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Cleveland	— —	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
Eldorado, Okla.	22.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†Fort Dodge, Iowa	21.00	— —	25.00	26.00	22.00	36.50	50.00	15.00	— —	15.00	16.25
Grand Rapids, Mich.	22.00	— —	28.00	30.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Gypsum, Ohio	22.00	25.00	28.00	30.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
Laramie, Wyo.	24.25	— —	31.25	— —	— —	— —	56.25	— —	— —	21.25	— —
Loveland, Colo.	24.00	— —	31.00	— —	— —	— —	56.00	— —	— —	21.00	— —
*Metro N. Y.—N. J. Whses.	22.00	— —	28.00	30.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	16.00	23.12	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	— —	— —	— —	17.57	— —
*Oakfield, N. Y.	22.00	25.00	28.00	30.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
*Philadelphia, Pa.	22.00	— —	28.00	30.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†Plastereo, Va.	21.00	— —	25.00	26.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Southard, Okla.	22.00	— —	26.00	27.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
Sweetwater, Tex.	22.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular patented board (including special surfaced gypsum board products), and metallized patented board products may be combined to make up the 5000 feet minimum. Exception: 3/8" Tiled Gypsum Wallboard or special surfaced gypsum board products may be picked up in any quantity at Metro N. Y.—N. J. Warehouses.

9974 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 24″ x 48″ Cutstock Plasterboard: $18.50 per M sq. ft. for 1/4″ and 3/8″ thicknesses and $19.75 per M sq. ft. for 1/2″ thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 1/4″ and 3/8″ Cutstock Plasterboard. Minimum price when picked up for destinations in Niagara, Erie, (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4″ and 3/8″ thicknesses $13.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32″ x 48″ board.

(3) 32″ x 48″ Gypsum Board. In all areas 32″ x 48″ gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisana, 32″ x 48″ board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(4) 36″ x 48″ Gypsum Board. 36″ x 48″ is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(5) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs.		To Roofing Contractors	
Odd Sizes		Odd Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

9975 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 23, 1936.

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated July 13, 1936.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective July 28, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks, Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	1/2" Gypsum Sheathing (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	5/16" Gypsum Plasterboard (Wt. 1175# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
†Acme, Texas	22.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†*Boston & Portsmouth	22.00	— —	28.00	30.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Cleveland	— —	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
†Eldorado, Okla.	22.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Fort Dodge, Iowa	21.00	— —	26.00	28.00	22.00	36.50	50.00	15.00	— —	15.00	16.25
†Grand Rapids, Mich.	22.00	— —	28.00	30.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†Gypsum, Ohio	22.00	25.00	28.00	30.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
Laramie, Wyo.	24.25	— —	31.25	— —	— —	— —	56.25	— —	— —	21.25	— —
†Loveland, Colo.	24.00	— —	31.00	— —	— —	— —	56.00	— —	— —	21.00	— —
†*Metro N. Y.—N. J. Whses.	22.00	— —	28.00	30.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	16.00	23.12	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	— —	— —	— —	17.57	— —
†*Oakfield, N. Y.	22.00	25.00	28.00	30.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
†*Philadelphia, Pa.	22.00	— —	28.00	30.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†Plasterco, Va.	21.00	— —	27.00	29.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†Southard, Okla.	22.00	— —	26.00	27.00	23.00	37.50	51.00	16.00	— —	16.00	17.25
†Sweetwater, Tex.	22.00	— —	26.00	27.00	23.00	— —	51.00	16.00	— —	16.00	17.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular patented board (including special surfaced gypsum board products), and metallized patented board products may be combined to make up the 5000 feet minimum. Exception: 3/8" Tiled Gypsum Wallboard or special surfaced gypsum board products may be picked up in any quantity at Metro N. Y.—N. J. Warehouses.

9976 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 24"x48" Cutstock Plasterboard: $18.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $19.75 per M sq. ft. for 1/2" thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 1/4" and 3/8" Cutstock Plasterboard. Minimum price when picked up for destinations in Niagara, Erie, (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4" and 3/8" thicknesses $13.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32"x48" board.

(3) 32"x48" Gypsum Board. In all areas 32"x48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32"x48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(4) 36"x48" Gypsum Board. 36"x48" is standard plasterboard size in all States for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(5) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs.		To Roofing Contractors	
Odd Sizes		Odd Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

9977

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 13, 1936.

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated July 10, 1936.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks, Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) (See Bul. No. 1 Note *)	3/3" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	1/2" Gypsum Sheathing (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	5/16" Gypsuth Plasterboard (Wt. 1175# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
Acme, Texas	23.00	— —	27.00	28.00	28.00	— —	52.00	17.00	— —	17.00	18.25
*Boston & Portsmouth	23.50	— —	28.00	32.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Cleveland	— —	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
Eldorado, Okla.	23.00	— —	27.00	28.00	28.00	— —	52.00	17.00	— —	17.00	18.25
†Fort Dodge, Iowa	21.00	— —	26.00	28.00	22.00	36.50	50.00	15.00	— —	15.00	16.25
Grand Rapids, Mich.	24.50	— —	30.50	33.00	24.00	— —	52.00	17.00	— —	17.00	18.25
Gypsum, Ohio	24.50	28.50	30.50	33.00	24.00	38.50	52.00	17.00	— —	17.00	18.25
Laramie, Wyo.	24.25	— —	31.25	— —	— —	— —	56.25	— —	— —	21.25	— —
Loveland, Colo.	24.00	— —	31.00	39.00	— —	— —	56.00	— —	— —	21.00	— —
*Metro N. Y.—N. J. Whses.	23.50	— —	29.50	32.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	— —	23.12	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	— —	— —	— —	17.57	— —
*Oakfield, N. Y.	24.50	28.50	30.50	33.00	24.00	38.50	52.00	17.00	— —	17.00	18.25
*Philadelphia, Pa.	23.50	— —	29.50	32.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Plasterco, Va.	21.00	— —	27.00	32.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Southard, Okla.	23.00	— —	27.00	28.00	28.00	38.50	52.00	17.00	— —	17.00	18.25
Sweetwater, Tex.	23.00	— —	27.00	28.00	28.00	— —	52.00	17.00	— —	17.00	18.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular patented board (including special surfaced gypsum board products), and metallized patented board products may be combined to make up the 5000 feet minimum. Exception: 3/8" Tiled Gypsum Wallboard or special surfaced gypsum board products may be picked up in any quantity at Metro N. Y.—N. J. Warehouses.

9978 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 24"x48" Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $20.75 per M sq. ft. for 1/2" thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 1/4" and 3/8" Cutstock Plasterboard. Minimum price when picked up for destinations in Niagara, Erie, (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32"x48" board.

(3) 32"x48" Gypsum Board. In all areas 32"x48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all States east of the Mississippi River and in the states of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32"x48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(4) 36"x48" Gypsum Board. 36"x48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(5) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contfactors are for specific roof jobs only):

To Dealers		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs.		To Roofing Contractors	
Odd Sizes		Odd Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

9979 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 10, 1936.

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated June 24, 1936.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective July 13, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks, Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallboard (Wt. 1175 # per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	1/2" Gypsum Sheathing (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	5/16" Gypsum Plasterboard (Wt. 1175 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M)
Acme, Texas	23.00	— —	27.00	28.00	28.00	— —	52.00	17.00	— —	17.00	18.25
†*Boston & Portsmouth	23.50	— —	28.00	32.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Cleveland	— —	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
Eldorado, Okla.	23.00	— —	27.00	28.00	28.00	— —	52.00	17.00	— —	17.00	18.25
Fort Dodge, Iowa	22.50	— —	28.50	31.00	22.00	36.50	50.00	15.00	— —	15.00	16.25
Grand Rapids, Mich.	24.50	— —	30.50	33.00	24.00	— —	52.00	17.00	— —	17.00	18.25
Gypsum, Ohio	24.50	28.50	30.50	33.00	24.00	38.50	52.00	17.00	— —	17.00	18.25
Laramie, Wyo.	24.25	— —	31.25	— —	— —	— —	56.25	— —	— —	21.25	— —
Loveland, Colo.	24.00	— —	31.00	39.00	— —	— —	56.00	— —	— —	21.00	— —
†*Metro N. Y.—N. J. Whses.	23.50	— —	29.50	32.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	— —	23.12	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	— —	— —	— —	17.57	— —
*Oakfield, N. Y.	24.50	28.50	30.50	33.00	24.00	38.50	52.00	17.00	— —	17.00	18.25
†*Philadelphia, Pa.	23.50	— —	29.50	32.00	23.00	— —	51.00	16.00	— —	16.00	17.25
†Plasterco, Va.	21.00	— —	27.00	32.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Southard, Okla.	23.00	— —	27.00	28.00	28.00	38.50	52.00	17.00	— —	17.00	18.25
Sweetwater, Tex.	23.00	— —	27.00	28.00	28.00	— —	52.00	17.00	— —	17.00	18.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular patented board (including special surfaced gypsum board products), and metallized patented board products may be combined to make up the 5000 feet minimum. Exception: 3/8" Tiled Gypsum Wallboard or special surfaced gypsum board products may be picked up in any quantity at Metro N. Y.—N. J. Warehouses.

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(1) 24″x48″ Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4″ and 3/8″ thicknesses and $20.75 per M sq. ft. for 1/2″ thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 1/4″ and 3/8″ Cutstock Plasterboard. Minimum price when picked up for destinations in Niagara, Erie, (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4″ and 3/8″ thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32″x48″ board.

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(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contra.) and to Prefabricated House Mfrs.		To Roofing Contractors	
Std. Sizes		Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs.		To Roofing Contractors	
Odd Sizes		Odd Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

9981 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 24, 1936.

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—(Confirms telegram dated June 23, 1936)—Cancels Bulletin No. 2 Dated May 19, 1936.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective June 24, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks, Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	1/2" Gypsum Sheathing (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	5/16" Gypsum Plasterboard (Wt. 1175# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
Acme, Texas	23.00	— —	27.00	28.00	28.00	— —	52.00	17.00	— —	17.00	18.25
†*Boston & Portsmouth	24.50	— —	29.00	33.00	24.00	— —	52.00	17.00	— —	17.00	18.25
Cleveland	— —	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
Eldorado, Okla.	23.00	— —	27.00	28.00	28.00	— —	52.00	17.00	— —	17.00	18.25
Fort Dodge, Iowa	22.50	— —	28.50	31.00	22.00	36.50	50.00	15.00	— —	15.00	16.25
Grand Rapids, Mich.	24.50	— —	30.50	33.00	24.00	— —	52.00	17.00	— —	17.00	18.25
Gypsum, Ohio	24.50	28.50	30.50	33.00	24.00	38.50	52.00	17.00	— —	17.00	18.25
Laramie, Wyo.	24.25	— —	31.25	— —	— —	— —	56.25	— —	— —	21.25	— —
Loveland, Colo.	24.00	— —	31.00	39.00	— —	— —	56.00	— —	— —	21.00	— —
*Metro N. Y.—N. J. Whses.	24.50	— —	30.50	33.00	24.00	— —	52.00	17.00	— —	17.00	18.25
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	— —	23.12	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	— —	— —	— —	17.57	— —
*Oakfield, N. Y.	24.50	28.50	30.50	33.00	24.00	38.50	52.00	17.00	— —	17.00	18.25
*Philadelphia, Pa.	24.50	— —	30.50	33.00	24.00	— —	52.00	17.00	— —	17.00	18.25
Plasterco, Va.	23.50	— —	29.50	32.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Southard, Okla.	23.00	— —	27.00	28.00	28.00	38.50	52.00	17.00	— —	17.00	18.25
Sweetwater, Tex.	23.00	— —	27.00	28.00	28.00	— —	52.00	17.00	— —	17.00	18.25

*. Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular patented board (including special surfaced gypsum board products), and metallized patented board products may be combined to make up the 5000 ft. minimum. Exception: 3/8" Tiled Gypsum Wallboard or special surfaced gypsum board products may be picked up in any quantity at Metro N. Y.—N. J. Warehouses.

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(1) 24"x48" Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $20.75 per M sq. ft. for 1/2". thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 1/4" and 3/8" Cutstock Plasterboard. Minimum price when picked up for destinations in Niagara, Erie, (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32"x48" board.

(3) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

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To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs.		To Roofing Contractors	
Odd Sizes		Odd Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

9983 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 19, 1936

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated May 4, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective May 21, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

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Cleveland	— —	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
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Gypsum, Ohio	24.50	28.50	30.50	33.00	24.00	38.50	52.00	17.00	— —	17.00	18.25
†Laramie, Wyo.	24.25	— —	31.25	— —	— —	— —	56.25	— —	— —	21.25	— —
†Loveland, Colo.	24.00	— —	31.00	39.00	— —	— —	56.00	— —	— —	21.00	— —
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Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	— —	23.12	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	— —	— —	— —	17.57	— —
*Oakfield, N. Y.	24.50	28.50	30.50	33.00	24.00	38.50	52.00	17.00	— —	17.00	18.25
†*Philadelphia, Pa.	24.50	— —	30.50	33.00	24.00	— —	52.00	17.00	— —	17.00	18.25
Plasterco, Va.	23.50	— —	29.50	32.00	23.00	— —	51.00	16.00	— —	16.00	17.25
Southard, Okla.	23.00	— —	27.00	28.00	28.00	38.50	52.00	17.00	— —	17.00	18.25
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W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and perfabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs.		To Roofing Contractors	
Odd Sizes		Odd Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

9985 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 4, 1936

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated March 14, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective May 7, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks, Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	1/2" Gypsum Sheathing (Wt. 1900# per M)†	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	5/16" Gypsum Plasterboard (Wt. 1175# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
†Acme, Texas	24.50	—	27.00	28.00	28.00	—	52.00	17.00	—	17.00	18.25
†*Boston & Portsmouth	24.00	—	30.00	32.50	23.50	—	51.50	16.50	—	16.50	17.75
Cleveland	—	—	—	—	—	—	—	—	16.25	18.00	—
†Eldorado, Okla.	24.50	—	29.00	30.00	30.00	—	52.00	17.00	—	17.00	18.25
†Fort Dodge, Iowa	22.50	—	28.50	31.00	22.00	36.50	50.00	15.00	—	15.00	16.25
†Grand Rapids, Mich.	24.50	—	30.50	33.00	24.00	—	52.00	17.00	—	17.00	18.25
†Gypsum, Ohio	24.50	28.50	30.50	33.00	24.00	38.50	52.00	17.00	—	17.00	18.25
Laramie, Wyo.	26.75	—	34.75	—	—	—	56.25	—	—	21.25	—
Loveland, Colo.	26.50	—	34.50	39.00	—	—	56.00	—	—	21.00	—
†*Metro N. Y.—N. J. Whses.	24.00	—	30.00	32.50	23.50	—	51.50	16.50	—	16.50	17.75
Miami, Fla.	—	—	—	—	—	—	—	—	—	23.12	—
†Milwaukee, Wis.	—	—	—	—	—	—	—	—	—	17.57	—
†*Oakfield, N. Y.	24.50	28.50	30.50	33.00	24.00	38.50	52.00	17.00	—	17.00	18.25
†*Philadelphia, Pa.	24.00	—	30.00	32.50	23.50	—	51.50	16.50	—	16.50	17.75
†Plasterco, Va.	23.50	—	29.50	32.00	23.00	—	51.00	16.00	—	16.00	17.25
†Southard, Okla.	24.50	—	29.00	30.00	30.00	38.50	52.00	17.00	—	17.00	18.25
†Sweetwater, Tex.	24.50	—	27.00	28.00	28.00	—	52.00	17.00	—	17.00	18.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular patented board (including special surfaced gypsum board products), and metallized patented board products may be combined to make up the 5000 ft. minimum. Exception: 3/8" Tiled Gypsum Wallboard or special surfaced gypsum board products may be picked up in any quantity at Metro N. Y.—N. J. Warehouses.

9986 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exceptions is made as follows:

(1) 24" x 48" Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $20.75 per M sq. ft. for 1/2" thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 1/4" and 3/8" Cutstock Plasterboard. Minimum price when picked up for destinations in Niagara, Erie, (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32" x 48" board.

(3) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(4) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(5) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs.		To Roofing Contractors	
Std. Sizes		Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs.		To Roofing Contractors	
Odd Sizes		Odd Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

9987

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 14, 1936.

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated February 22, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 16, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	5/16" Gypsum Plasterboard (Wt. 1175# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
Acme, Texas	24.50	— —	27.00	28.00	— —	52.00	17.00	— —	17.00	18.25
*Boston & Portsmouth.	27.07	— —	34.28	38.13	— —	55.78	19.57	— —	20.78	23.38
Cleveland	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
Eldorado, Okla.	24.50	— —	29.00	30.00	— —	52.00	17.00	— —	17.00	18.25
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	— —	15.00	16.25
Grand Rapids, Mich.	24.50	— —	30.50	33.00	— —	52.00	17.00	— —	17.00	18.25
Gypsum, Ohio	24.50	28.50	30.50	33.00	38.50	52.00	17.00	— —	17.00	18.25
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	— —	21.25	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	— —	21.00	— —
*Metro. N. Y.–N. J. Whses.	24.50	— —	31.44	34.99	— —	52.94	17.00	— —	17.94	20.24
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	23.12	— —
Milwaukee, Wis.	— —	— —	— —	— —	— —	— —	— —	— —	17.71	— —
*Oakfield, N. Y.	24.50	28.50	30.50	33.00	38.50	52.00	17.00	— —	17.00	18.25
*Philadelphia, Pa.	24.50	— —	31.44	34.99	— —	52.94	17.00	— —	17.94	20.24
Plasterco, Va.	23.50	— —	29.50	32.00	— —	51.00	16.00	— —	16.00	17.25
Southard, Okla.	24.50	— —	29.00	30.00	38.50	52.00	17.00	— —	17.00	18.25
Sweetwater, Tex.	24.50	— —	27.00	28.00	— —	52.00	17.00	— —	17.00	18.25

*†Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular patented board (including special surfaced gypsum board products), and metallized patented board products may be combined to make up the 5000 ft. minimum. Exception 3/8" Tiled Gypsum Wallboard or special surfaced gypsum board products may be picked up in any quantity at Metro N. Y.—N. J. Warehouses.

9988 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 24″ x 48″ Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4″ and 3/8″ thicknesses and $20.75 per M sq. ft. for 1/2″ thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 32″ x 48″ Gypsum Board. In all areas 32″ x 48″ gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32″ x 48″ board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(3) 36″ x 48″ Gypsum Board. 36″ x 48″ is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(4) Minimum Price Cutstock Plasterboard picked up for destinations Niagara, Erie, (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4″ and 3/8″ thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32″ x 48″ board. See paragraph (2).

(5) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

On odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers				To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.				To Roofing Contractors			
Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
—	—	2.50	1.25	2.50	1.25	5.00	2.50	1.25	1.25	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

4954

9989

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 22, 1936

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated February 12, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective February 24, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	5/16" Gypsum Plasterboard (Wt. 1175# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
Acme, Texas	24.50	— —	27.00	28.00	— —	52.00	17.00	— —	17.00	18.25
*Boston & Portsmouth.	27.07	— —	34.28	38.13	— —	55.78	19.57	— —	20.78	23.38
Cleveland, Ohio	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
†Eldorado, Okla.	24.50	— —	29.00	30.00	— —	52.00	17.00	— —	17.00	18.25
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	— —	15.00	16.25
Grand Rapids, Mich.	24.50	— —	30.50	33.00	— —	52.00	17.00	— —	17.00	18.25
Gypsum, Ohio	24.50	28.50	30.50	33.00	38.50	52.00	17.00	— —	17.00	18.25
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	— —	21.25	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	— —	21.00	— —
*Metro. N. Y.–N. J. Whses.	24.50	— —	31.44	34.99	— —	52.94	17.00	— —	17.94	20.24
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	23.12	— —
Milwaukee, Wisc.	— —	— —	— —	— —	— —	— —	— —	— —	17.71	— —
*Oakfield, N. Y.	24.50	28.50	30.50	33.00	38.50	52.00	17.00	— —	17.00	18.25
*Philadelphia, Pa.	24.50	— —	31.44	34.99	— —	52.94	17.00	— —	17.94	20.24
Plasterco, Va.	23.50	— —	29.50	32.00	— —	51.00	16.00	— —	16.00	17.25
†Southard, Okla.	24.50	— —	29.00	30.00	38.50	52.00	17.00	— —	17.00	18.25
Sweetwater, Tex.	24.50	— —	27.00	28.00	— —	52.00	17.00	— —	17.00	18.25

*† Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular and metallized patented board products may be combined to make up the 5000 ft. minimum. Exception: 3/8" Tiled Gypsum Wallboard may be picked up in any quantity at Metro N. Y.—N. J. Warehouses.

9990 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 24" x 48" Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $20.75 per M sq. ft. for 1/2" thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(3) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(4) Minimum Price Cutstock Plasterboard picked up for destinations in Niagara, Erie, (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32" x 48" board. See paragraph (2).

(5) Refer to Board License Bulletin No. 1 for differentials applicable on odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and Prefabricated House Manufacturers. (Note: Sales to roofing contractors are for specific roof jobs only.)

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

4956

9991

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 12, 1936

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated February 6, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective February 15, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	5/16" Gypsum Plasterboard (Wt. 1175# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
Acme, Texas	24.50x	— —	27.00x	28.00	— —	52.00	17.00	— —	17.00x	18.25
*Boston & Portsmouth.	27.07	— —	34.28	38.13	— —	55.78	19.57	— —	20.78	23.38
Cleveland, Ohio	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	— —	15.00	16.25
Grand Rapids, Mich.	24.50	— —	30.50	33.00	— —	52.00	17.00	— —	17.00	18.25
Gypsum, Ohio	24.50	28.50	30.50	33.00	38.50	52.00	17.00	— —	17.00	18.25
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	— —	21.25	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	— —	21.00	— —
*Metro. N. Y.–N. J. Whses.	24.50	— —	31.44	34.99	— —	52.94	17.00	— —	17.94	20.24
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	23.12	— —
†Milwaukee, Wisc.	— —	— —	— —	— —	— —	— —	— —	— —	17.71	— —
*Oakfield, N. Y.	24.50	28.50	30.50	33.00	38.50	52.00	17.00	— —	17.00	18.25
*Philadelphia, Pa.	24.50	— —	31.44	34.99	— —	52.94	17.00	— —	17.94	20.24
Plasterco, Va.	23.50	— —	29.50	32.00	— —	51.00	16.00	— —	16.00	17.25
Southard, Okla.	24.50	— —	30.50	31.50	38.50	52.00	17.00	— —	17.00	18.25
Sweetwater, Tex.	24.50	— —	27.00	28.00	— —	52.00	17.00	— —	17.00	18.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular and metallized patented board products may be combined to make up the 5000 ft. minimum.

x Price also applies pickups only at Eldorado, Okla.

9992 The above price apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 24" x 48" Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $20.75 per M sq. ft. for 1/2" thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(3) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(4) Minimum Price Cutstock Plasterboard picked up for destinations in Niagara, Erie, (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32" x 48" board. See paragraph (2).

(5) Refer to Board License Bulletin No. 1 for differentials applicable on odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and Prefabricated House Manufacturers. (Note: Sales to roofing contractors are for specific roof jobs only.)

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

9993 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1936

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated December 2, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective February 7, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallboard (Wt. 1175 # per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	5/16" Gypsum Plasterboard (Wt. 1175 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M)
Acme, Texas	24.50x	— —	27.00x	28.00	— —	52.00	17.00	— —	17.00x	18.25
*Boston & Portsmouth	27.07	— —	34.28	38.13	— —	55.78	19.57	— —	20.78	23.38
Cleveland, Ohio	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	— —	15.00	16.25
Grand Rapids, Mich.	24.50	— —	30.50	33.00	— —	52.00	17.00	— —	17.00	18.25
Gypsum, Ohio	24.50	28.50	30.50	33.00	38.50	52.00	17.00	— —	17.00	18.25
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	— —	21.25	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	— —	21.00	— —
*Metro. N. Y.-N. J. Whses.	24.50	— —	31.44	34.99	— —	52.94	17.00	— —	17.94	20.24
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	23.12	— —
*Oakfield, N. Y.	24.50	28.50	30.50	33.00	38.50	52.00	17.00	— —	17.00	18.25
*Philadelphia, Pa.	24.50	— —	31.44	34.99	— —	52.94	17.00	— —	17.94	20.24
Plasteteo, Va.	23.50	— —	29.50	32.00	— —	51.00	16.00	— —	16.00	17.25
Southard, Okla.	24.50	— —	30.50	31.50	38.50	52.00	17.00	— —	17.00	18.25
Sweetwater, Tex.	24.50	— —	27.00	28.00	— —	52.00	17.00	— —	17.00	18.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular and metallized patented board products may be combined to make up the 5000 ft. minimum.

x. Price also applies pickups only at Eldorado, Okla.

9994 The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 24″ x 48″ Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4″ and 3/8″ thicknesses and $20.75 per M sq. ft. for 1/2″ thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 32″ x 48″ Gypsum Board. In all areas 32″ x 48″ gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32″ x 48″ board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(3) 36″ x 48″ Gypsum Board. 36″ x 48″ is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(4) Minimum Price Cutstock Plasterboard picked up for destinations in Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4″ and 3/8″ thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32″ x 48″ board. See paragraph (2).

(5) Refer to Board License Bulletin No. 1 for differentials applicable on odd sizes and on sales to contractors, roofing contractors and metal ceiling contractors. (Note: Sales to roofing contractors are for specific roof jobs only.)

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

9995 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 2, 1935

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated November 13, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950# per M)	5/16" Gypsum Wallboard (Wt. 1175# per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	5/16" Gypsum Plasterboard (Wt. 1175# per M) †	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
Acme, Texas	24.50x	— —	27.00x	28.00	— —	52.00	17.00	— —	17.00x	18.25
*Boston & Portsmouth	27.07	— —	34.28	38.13	— —	55.78	19.57	— —	20.78	23.38
†Cleveland, Ohio	— —	— —	— —	— —	— —	— —	— —	16.25	18.00	— —
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	— —	15.00	16.25
Grand Rapids, Mich.	24.50	— —	30.50	33.00	— —	52.00	17.00	— —	17.00	18.25
Gypsum, Ohio	24.50	28.50	30.50	33.00	38.50	52.00	17.00	— —	17.00	18.25
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	— —	21.25	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	— —	21.00	— —
*Metro. N. Y.–N. J. Whses.	24.50	— —	31.44	34.99	— —	52.94	17.00	— —	17.94	20.24
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	— —	23.12	— —
*Oakfield, N. Y.	24.50	28.50	30.50	33.00	38.50	52.00	17.00	— —	17.00	18.25
*Philadelphia, Pa.	26.50	— —	33.44	36.99	— —	54.94	19.00	— —	19.94	22.24
Plasterco, Va.	23.50	— —	29.50	32.00	— —	51.00	16.00	— —	16.00	17.25
Southard, Okla.	24.50	— —	30.50	33.50	38.50	52.00	17.00	— —	17.00	18.25
Sweetwater, Tex.	24.50	— —	27.00	28.00	— —	52.00	17.00	— —	17.00	18.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular and metallized patented board products may be combined to make up the 5000 ft. minimum.

x Price also applies pickups only at Eldorado, Okla.

9996 The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 24" x 48" Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $20.75 per M sq. ft. for 1/2" thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

†(b) In all states east of the Mississippi River and in the states of Iowa, Minnesota, Nebraska, Colorado, Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(3) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(4) Minimum Price Cutstock Plasterboard picked up for destinations in Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32" x 48" board. See paragraph (2).

(5) Refer to Board License Bulletin No. 1 for differentials applicable on odd sizes and on sales to contractors, roofing contractors and metal ceiling contractors. (Note: Sales to roofing contractors are for specific roof jobs only.)

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

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9997

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 13, 1935

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated October 23, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective November 15, 1935 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallboard (Wt. 1175 # per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M)
Acme, Texas	24.50x	— —	27.00x	28.00	— —	52.00	17.00	17.00x	18.25
*Boston & Portsmouth	27.07	— —	34.28	38.13	— —	55.78	19.57	20.78	23.38
Cleveland, Ohio	— —	— —	— —	— —	— —	— —	— —	18.00	— —
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	15.00	16.25
Grand Rapids, Mich.	24.50	— —	30.50	33.00	— —	52.00	17.00	17.00	18.25
Gypsum, Ohio	24.50	28.50	30.50	33.00	38.50	52.00	17.00	17.00	18.25
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	21.25	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	21.00	— —
*Metro N. Y.—N. J. Whses.	24.50	— —	31.44	34.99	— —	52.94	17.00	17.94	20.24
†Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	23.12	— —
*Oakfield, N. Y.	24.50	28.50	30.50	33.00	38.50	52.00	17.00	17.00	18.25
*Philadelphia, Pa.	26.50	— —	33.44	36.99	— —	54.94	19.00	19.94	22.24
Plastereo, Va.	23.50	— —	29.50	32.00	— —	51.00	16.00	16.00	17.25
Southard, Okla.	24.50	— —	30.50	31.50	38.50	52.00	17.00	17.00	18.25
Sweetwater, Tex.	24.50	— —	27.00	28.00	— —	52.00	17.00	17.00	18.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular and metallized patented board products may be combined to make up the 5000 ft. minimum.

x Price also applies pickups only at Eldorado, Okla.

9998 The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 24″ x 48″ Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4″ and 3/8″ thicknesses and $20.75 per M sq. ft. for 1/2″ thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 32″ x 48″ Gypsum Board. In all areas 32″ x 48″ gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River and in the states of Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32″ x 48″ board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(3) 36″ x 48″ Gypsum Board. 36″ x 48″ is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(4) Minimum Price Cutstock Plasterboard picked up for destinations in Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4″ and 3/8″ thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32″ x 48″ board. See paragraph (2).

(5) Refer to Board License Bulletin No. 1 for differentials applicable on odd sizes and on sales to contractors, roofing contractors and metal ceiling contractors. (Note: Sales to roofing contractors are for specific roof jobs only.)

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

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9999 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 23, 1935

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated September 17, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective October 24, 1935 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallboard (Wt. 1175 # per M) (See Bul. No. 1 Note *)	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	3/4" Gypsum Wallboard, (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M)
†Acme, Texas	24.50x	— —	27.00x	28.00	— —	52.00	17.00	17.00x	18.25
*Boston & Portsmouth	27.07	— —	34.28	38.13	— —	55.78	19.57	20.78	23.38
Cleveland, Ohio	— —	— —	— —	— —	— —	— —	— —	18.00	— —
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	15.00	16.25
Grand Rapids, Mich.	24.50	— —	30.50	33.00	— —	52.00	17.00	17.00	18.25
Gypsum, Ohio	24.50	28.50	30.50	33.00	38.50	52.00	17.00	17.00	18.25
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	21.25	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	21.00	— —
*Metro N. Y.—N. J. Whses.	24.50	— —	31.44	34.99	— —	52.94	17.00	17.94	20.24
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	24.37	— —
*Oakfield, N. Y.	24.50	28.50	30.50	33.00	38.50	52.00	17.00	17.00	18.25
*Philadelphia, Pa.	26.50	— —	33.44	36.99	— —	54.94	19.00	19.94	22.24
Plasterco, Va.	23.50	— —	29.50	32.00	— —	51.00	16.00	16.00	17.25
Southard, Okla.	24.50	— —	30.50	31.50	38.50	52.00	17.00	17.00	18.25
†Sweetwater Tex.	24.50	— —	27.00	28.00	— —	52.00	17.00	17.00	18.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular and metallized patented board products may be combined to make up the 5000 ft. minimum.

x Price also applies pickups only at Eldorado, Okla.

10000 The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as follows:

(1) 24" x 48" Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4" and 3/8" thicknesses and $20.75 per M sq. ft. for 1/2" thickness, f.o.b. trucks at Southard, Oklahoma.

(2) 32" x 48" Gypsum Board. In all areas 32" x 48" gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

†(b) In all states east of the Mississippi River and in the states of Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32" x 48" board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(3) 36" x 48" Gypsum Board. 36" x 48" is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(4) Minimum Price Cutstock Plasterboard picked up for destinations in Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32" x 48" board. See paragraph (2).

(5) Refer to Board License Bulletin No. 1 for differentials applicable on odd sizes and on sales to contractors, roofing contractors and metal ceiling contractors. (Note: Sales to roofing contractors are for specific roof jobs only.)

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10001 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 17, 1935

Prices F.O.B. Trucks at Mills & Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated August 27, 1935

E. S. PITTS,
Office

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Dealer Prices f.o.b. Trucks Mills or Warehouses (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Gypsum Wallboard (Wt. 950 # per M)	5/16" Gypsum Wallboard (Wt. 1175 # per M) (See Bul. No. 1 Note *) †	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M)
Acme, Texas	24.50x	— —	30.50x	31.50	— —	52.00	17.00	17.00x	18.25
*Boston & Portsmouth, Mass.	27.07	— —	34.28	38.13	— —	55.78	19.57	20.78	23.38
Cleveland, Ohio	— —	— —	— —	— —	— —	— —	— —	18.00	— —
Fort Dodge, Iowa	22.50	— —	28.50	31.00	36.50	50.00	15.00	15.00	16.25
Grand Rapids, Mich.	24.50	— —	30.50	33.00	— —	52.00	17.00	17.00	18.25
Gypsum, Ohio	24.50	28.50	30.50	33.00	38.50	52.00	17.00	17.00	18.25
Laramie, Wyo.	26.75	— —	34.75	— —	— —	56.25	— —	21.25	— —
Loveland, Colo.	26.50	— —	34.50	39.00	— —	56.00	— —	21.00	— —
*Metro N. Y.—N. J. Whses.	24.50	— —	27.44	34.99	— —	52.94	17.00	17.94	20.24
Miami, Fla.	— —	— —	— —	— —	— —	— —	— —	24.37	— —
*Oakfield, N. Y.	24.30	28.50	30.50	33.00	38.50	52.00	17.00	17.00	18.25
*Philadelphia, Pa.	26.50	— —	35.44	36.99	— —	54.94	19.00	19.94	22.24
Plasterco, Va.	23.50	— —	29.50	32.00	— —	51.00	16.00	16.00	17.25
Southard, Okla.	24.50	— —	30.50	31.50	38.50	52.00	17.00	17.00	18.25
Sweetwater, Tex.	24.50	— —	30.50	31.50	— —	52.00	17.00	17.00	18.25

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular and metallized patented board products may be combined to make up the 5000 ft. minimum.

x Price also applies pickups only at Eldorado, Okla.

10002 The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as follows:

†(1) 24″ x 48″ Cutstock Plasterboard: $19.50 per M sq. ft. for 1/4″ and 3/8″ thicknesses and $20.75 per M sq. ft. for 1/2″ thickness, f.o.b. trucks at Southard, Oklahoma.

†(2) 32″ x 48″ Gypsum Board. In all areas 32″ x 48″ gypsum board is subject to the minimum wallboard price except:

(a) Where used for specific roof jobs it is subject to the minimum plasterboard price for such specific jobs.

(b) In all states east of the Mississippi River (except Wisconsin and Upper Michigan), and in the states of Missouri, Kansas, Oklahoma, Arkansas and Louisiana, 32″ x 48″ board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(3) 36″ x 48″ Gypsum Board. 36″ x 48″ is standard plasterboard size in all states for use on specific gypsum roof jobs only and is subject to minimum plasterboard price for such specific gypsum roof jobs.

(4) Minimum Price Cutstock Plasterboard picked up for destinations in Niagara, Erie (including the town of Gowanda, New York) Monroe and Wayne Counties, N. Y.: 1/4″ and 3/8″ thicknesses $14.50 per M sq. ft. f.o.b. trucks at Oakfield, N. Y. This price does not apply to 32″ x 48″ board. See paragraph (2).

†(5) Refer to Board License Bulletin No. 1 for differentials applicable on odd sizes and on sales to contractors, roofing contractors and metal ceiling contractors. (Note: Sales to roofing contractors are for specific roof jobs only.)

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10003 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 27, 1935

Prices F.O.B. Trucks at Mills and Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2
Dated August 21, 1935

E. S. PITTS.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective September 1, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/4" Gypsum Wallboard (Wt. 950# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	7/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
Plastereo, Va.	29.50	23.50	32.00	— —	51.00	16.00	16.00	17.25
Fort Dodge, Ia.	28.50	22.50	31.00	36.50	50.00	15.00	15.00	16.25
Southard, Okla.	30.50	24.50	31.50	38.50	52.00	17.00	17.00	18.25
Sweetwater, Texas	30.50	24.50	31.50	— —	52.00	17.00	17.00	18.25
Acme, Texas	30.50x	24.50x	31.50	— —	52.00	17.00x	17.00	18.25
Gypsum, Ohio	30.50	24.50	33.00	38.50	52.00	17.00	17.00	18.25
Grand Rapids, Mich.	30.50	24.50	33.00	— —	52.00	17.00	17.00	18.25
†*Oakfield, N. Y.	30.50	24.50	33.00	38.50	52.00	17.00	17.00	18.25
Laramie, Wyo.	34.75	26.75	— —	— —	56.25	21.25	— —	— —
Loveland, Colo.	34.50	26.50	39.00	— —	56.00	21.00	— —	— —
†*Metro N. Y.—N. J. Whses.	31.44	24.50	34.99	— —	52.94	17.94	17.00	20.24
†*Philadelphia, Pa.	33.44	26.50	36.99	— —	54.94	19.94	19.00	22.24
†*Boston & Portsmouth, Mass.	34.28	27.07	38.13	— —	55.78	20.78	19.57	23.38
†Cleveland, Ohio	— —	— —	— —	— —	— —	18.00	— —	— —
†Miami, Fla.	— —	— —	— —	— —	— —	24.37	— —	— —

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular and metallized patented board products may be combined to make up the 5000 ft. minimum.

x Price also applies pickups only at Eldorado, Okla.

Very truly yours,
UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10004 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 21, 1935

Prices F.O.B. Trucks at Mills and Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated July 5, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective August 26, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/4" Gypsum Wallboard (Wt. 950# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
Plasterco	29.50	23.50	32.00	— —	51.00	16.00	16.00	17.25
Fort Dodge	28.50	22.50	31.00	36.50	50.00	15.00	15.00	16.25
Southard	30.50	24.50	31.50	38.50	52.00	17.00	17.00	18.25
Sweetwater	30.50	24.50	31.50	— —	52.00	17.00	17.00	18.25
Acme	30.50x	24.50x	31.50	— —	52.00	17.00x	17.00	18.25
†Gypsum	30.50	24.50	33.00	38.50	52.00	17.00	17.00	18.25
†Grand Rapids	30.50	24.50	33.00	— —	52.00	17.00	17.00	18.25
*Oakfield	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
Laramie	34.75	26.75	— —	— —	56.25	21.25	— —	— —
Loveland	34.50	26.50	39.00	— —	56.00	21.00	— —	— —
*Metro. N. Y.-N. J. Whses.	31.44	26.50	34.90	— —	52.94	17.94	17.00	20.24
*Philadelphia	33.44	28.50	36.99	— —	54.94	19.94	19.00	22.24
*Boston & Portsmouth	34.28	29.07	38.13	— —	55.78	20.78	19.57	23.38

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of regular and metallized patented board products may be combined to make up the 5000 ft. minimum.

x Price also applies pickups only at Eldorado, Okla.

Very truly yours,
UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10005 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 5, 1935

Prices F.O.B. Trucks at Mills and Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated April 16, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective July 10, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/4" Gypsum Wallboard (Wt. 950# per M)	1/2". Gypsum Wallboard (Wt. 1900# per M)	3/4". Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
†Plastereo	29.50	23.50	32.00	— —	51.00	16.00	16.00	17.25
†Fort Dodge	28.50	22.50	31.00	36.50	50.00	15.00	15.00	16.25
Southard	30.50	24.50	31.50	38.50	52.00	17.00	17.00	18.25
Sweetwater	30.50	24.50	31.50	— —	52.00	17.00	17.00	18.25
Acme	30.50x	24.50x	31.50	— —	52.00	17.00x	17.00	18.25
Gypsum	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
Grand Rapids	30.50	26.50	33.00	— —	52.00	17.00	17.00	18.25
*Oakfield	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
Laramie	34.75*	26.75	— —	— —	56.25	21.25	— —	— —
Loveland	34.50	26.50	39.00	— —	56.00	21.00	— —	— —
*Metro N. Y.-N. J. Whses.	31.44	26.50	34.99	— —	52.94	17.94	17.00	20.24
*Philadelphia	33.44	28.50	36.99	— —	54.94	19.94	19.00	22.24
*Boston & Portsmouth	34.28	29.07	38.13	— —	55.78	20.78	19.57	23.38

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products.

x Price also applies pickups only at Eldorado, Okla.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10006 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 16, 1935

Prices F.O.B. Trucks at Mills and Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated March 15, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective April 18, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/4" Gypsum Wallboard (Wt. 950# per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M)
Plasterco	29.50	25.50	32.00	— —	51.00	16.00	16.00	17.25
Fort Dodge	28.50	24.50	31.00	36.50	50.00	15.00	15.00	16.25
Southard	30.50	24.50	31.50	38.50	52.00	17.00	17.00	18.25
Sweetwater	30.50	24.50	31.50	— —	52.00	17.00	17.00	18.25
Acme	30.50x	24.50x	31.50	— —	52.00	17.00x	17.00	18.25
Gypsum	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
Grand Rapids	30.50	26.50	33.00	— —	52.00	17.00	17.00	18.25
*Oakfield	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
†Laramie	34.75	26.75	— —	— —	56.25	21.25	— —	— —
†Loveland	34.50	26.50	39.00	— —	56.00	21.00	— —	— —
†*Metro N. Y.-N. J. Whses.	31.44	26.50	34 .9	— —	52.94	17.94	17.00	20.24
†*Philadelphia	33.44	28.50	3 .99	— —	54.94	19.94	19.00	22.24
†*Boston & Portsmouth	34.28	29.07	38.13	— —	55.78	20.78	19.57	23.38

* Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products.

x Price also applies pickups only at Eldorado, Okla.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

4972

10007

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 15, 1935

Prices F.O.B. Trucks at Mills and Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2 Dated February 25, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective March 20, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1400# per M)	1/4" Gypsum Wallboard (Wt. 950# per M)	1/2" Gypsum Wallboard (Wt. 1900# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400# per M)	3/8" Gypsum Plasterboard (Wt. 1400# per M)	1/4" Gypsum Plasterboard (Wt. 950# per M)	1/2" Gypsum Plasterboard (Wt. 1900# per M)
Plasterco	29.50	25.50	32.00	— —	51.00	16.00	16.00	17.25
Fort Dodge	28.50	24.50	31.00	36.50	50.00	15.00	15.00	16.25
†Southard	30.50	24.50	31.50	38.50	52.00	17.00	17.00	18.25
†Sweetwater	30.50	24.50	31.50	— —	52.00	17.00	17.00	18.25
†Acme	30.50x	24.50x	31.50	— —	52.00	17.00x	17.00	18.25
Gypsum	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
Grand Rapids	30.50	26.50	33.00	— —	52.00	17.00	17.00	18.25
*Oakfield	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
Laramie	34.25	26.50	— —	— —	55.75	20.75	— —	— —
Loveland	34.00	26.25	38.50	— —	55.50	20.50	— —	— —
*Metro N. Y.-N. J. Whses.	31.23	26.35	34.71	— —	52.73	17.73	16.85	19.96
*Philadelphia	33.23	28.35	36.71	— —	54.73	19.73	18.85	21.96
*Boston & Portsmouth	34.00	28.88	37.75	— —	55.50	20.50	19.38	23.00

* Minimum pickup 5,000 sq. ft. board and/or lath.

x Price also applies pickups only at Eldorado, Okla.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10008 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 25, 1935

Prices F.O.B. Trucks at Mills and Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2, Dated October 16, 1934—and Supplement Dated November 22, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective March 1, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses (Note changes in Weights)	3/8" Gypsum Wallboard (Wt. 1400 # per M)	1/4" Gypsum Wallboard (Wt. 950 # per M)	1/2" Gypsum Wallboard (Wt. 1900 # per M)	3/4" Gypsum Wallboard (Wt. 3500 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1400 # per M)	3/8" Gypsum Plasterboard (Wt. 1400 # per M)	1/4" Gypsum Plasterboard (Wt. 950 # per M)	1/2" Gypsum Plasterboard (Wt. 1900 # per M)
Plasterco	29.50	25.50	32.00	— —	51.00	16.00	16.00	17.25
Fort Dodge	28.50	24.50	31.00	36.50	50.00	15.00	15.00	16.25
Southard	30.50	26.50	31.50	38.50	52.00	17.00	17.00	18.25
Sweetwater	30.50	26.50	31.50	— —	52.00	17.00	17.00	18.25
Acme	30.50x	26.50x	31.50	— —	52.00	17.00x	17.00	18.25
Gypsum	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
Grand Rapids	30.50	26.50	33.00	— —	52.00	17.00	17.00	18.25
*Oakfield	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
†Laramie	34.25	26.50	— —	— —	55.75	20.75	— —	— —
†Loveland	34.00	26.25	38.50	— —	55.50	20.50	— —	— —
†*Metro N. Y.-N. J. Whses.	31.23	26.35	34.71	— —	52.73	17.73	16.85	19.96
†*Philadelphia	33.23	28.35	36.71	— —	54.73	19.73	18.85	21.96
†*Boston & Portsmouth	34.00	28.88	37.75	— —	55.50	20.50	19.38	23.00

* Minimum pickup 5,000 sq. ft. board and/or lath.
x Price also applies pickups only at Eldorado, Okla.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10009 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 16, 1934

Prices F.O.B. Trucks at Mills and Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2, Dated May 25, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that †the minimum prices effective November 1, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1600 # per M)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	1/2" Gypsum Wallboard (Wt. 2150 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1600 # per M)	3/8" Gypsum Plasterboard (Wt. 1600 # per M)	1/4" Gypsum Plasterboard (Wt. 1050 # per M)	1/2" Gypsum Plasterboard (Wt. 2150 # per M)
Plastereo	29.50	25.50	32.00	— —	51.00	16.00	16.00	17.25
Fort Dodge	28.50	24.50	31.00	36.50	50.00	15.00	15.00	16.25
†Southard	30.50	26.50	31.50	38.50	52.00	17.00	17.00	18.25
†Sweetwater	30.50	26.50	31.50	— —	52.00	17.00	17.00	18.25
†Acme	30.50x	26.50x	31.50	— —	52.00	17.00x	17.00	18.25
Gypsum	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
Grand Rapids	30.50	26.50	33.00	— —	52.00	17.00	17.00	18.25
*Oakfield	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
†Laramie	34.50	27.00	— —	— —	55.00	21.50	— —	— —
†Loveland	36.00	27.50	41.00	— —	57.50	22.00	— —	— —
*Metro N. Y.-N. J. Whses.	31.62	26.55	35.19	— —	53.12	18.12	17.05	20.44
*Philadelphia	33.62	28.55	37.19	— —	55.12	20.12	19.05	22.44
*Boston & Portsmouth	34.50	29.13	38.38	— —	56.00	21.00	19.63	23.63
*Buffalo	31.78	27.34	34.72	— —	53.28	18.28	17.84	19.97

* Minimum pickup 5,000 sq. ft. board and/or lath.
x Price also applies pickups only at Eldorado, Okla.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10010 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 25, 1934

Prices F.O.B. Trucks at Mills and Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2, Dated April 23, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective May 31, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1600 # per M)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	1/2" Gypsum Wallboard (Wt. 2150 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1600 # per M)	3/8" Gypsum Plasterboard (Wt. 1600 # per M)	1/4" Gypsum Plasterboard (Wt. 1050 # per M)	1/2" Gypsum Plasterboard (Wt. 2150 # per M)
Plasterco	29.50	25.50	32.00	— —	51.00	16.00	16.00	17.25
Fort Dodge	28.50	24.50	31.00	36.50	50.00	15.00	15.00	16.25
Southard	28.50	24.50	29.50	36.50	50.00	15.00	15.00	16.25
Sweetwater	28.50	24.50	29.50	— —	50.00	15.00	15.00	16.25
†Acme	28.50x	24.50x	29.50	— —	50.00	15.00x	15.00	16.25
Gypsum	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
Grand Rapids	30.50	26.50	33.00	— —	52.00	17.00	17.00	18.25
*Oakfield	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
†Laramie	34.50	27.00	— —	— —	55.00	21.50	— —	— —
†Loveland	36.00	27.50	41.00	— —	57.50	22.00	— —	— —
*Metro N. Y.-N. J. Whses.	31.62	26.55	35.19	— —	53.12	18.12	17.05	20.44
*Philadelphia	33.62	28.55	37.19	— —	55.12	20.12	19.05	22.44
*Boston & Portsmouth	34.50	29.13	38.38	— —	56.00	21.00	19.63	23.63
*Buffalo	31.78	27.34	34.72	— —	53.28	18.28	17.84	19.97

* Minimum pickup 5,000 sq. ft. board and/or lath.
x. Price also applies pickups only at Eldorado, Okla.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10011 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 23, 1934.

Prices F.O.B. Trucks at Mills and Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2, Dated April 10, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective April 25, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297 are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1600 # per M)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	1/2" Gypsum Wallboard (Wt. 2150 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1600 # per M)	3/8" Gypsum Plasterboard (Wt. 1600 # per M)	1/4" Gypsum Plasterboard (Wt. 1050 # per M)	1/2" Gypsum Plasterboard (Wt. 2150 # per M)
Plasterco	29.50	25.50	32.00	— —	51.00	16.00	16.00	17.25
Fort Dodge	28.50	24.50	31.00	36.50	50.00	15.00	15.00	16.25
Southard	28.50	24.50	29.50	36.50	50.00	15.00	15.00	16.25
Sweetwater	28.50	24.50	29.50	— —	50.00	15.00	15.00	16.25
Acme	28.50	24.50	29.50	— —	50.00	15.00	15.00	16.25
Gypsum	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
Grand Rapids	30.50	26.50	33.00	— —	52.00	17.00	17.00	18.25
*Oakfield	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
Laramie	34.50	29.00	— —	— —	55.00	21.50	— —	— —
†Loveland	36.00	29.50	41.00	— —	57.50	22.00	— —	— —
*Metro. N. Y.-N. J. Whses.	31.62	26.55	35.19	— —	53.12	18.12	17.05	20.44
*Philadelphia	33.62	28.55	37.19	— —	55.12	20.12	19.05	22.44
*Boston & Portsmouth	34.50	29.13	38.38	— —	56.00	21.00	19.63	23.63
*Buffalo	31.78	27.34	34.72	— —	53.28	18.28	17.84	19.97

* Minimum pickup 5,000 sq. ft. board and/or lath.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10012 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 10, 1934

Prices F.O.B. Trucks at Mills and Warehouses—Board License Bulletin No. 2—Cancels Bulletin No. 2, Dated October 16, 1933

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective April 25, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1600# per M)	1/4" Gypsum Wallboard (Wt. 1050# per M)	1/2" Gypsum Wallboard (Wt. 2150# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1600# per M)	3/8" Gypsum Plasterboard (Wt. 1600# per M)	1/4" Gypsum Plasterboard (Wt. 1050# per M)	1/2" Gypsum Plasterboard (Wt. 2150# per M)
†Plasterco	29.50	25.50	32.00	— —	51.00	16.00	16.00	17.25
†Fort Dodge	28.50	24.50	31.00	36.50	50.00	15.00	15.00	16.25
†Southard	28.50	24.50	29.50	36.50	50.00	15.00	15.00	16.25
†Sweetwater	28.50	24.50	29.50	— —	50.00	15.00	15.00	16.25
†Acme	28.50	24.50	29.50	— —	50.00	15.00	15.00	16.25
†Gypsum	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
†Grand Rapids	30.50	26.50	33.00	— —	52.00	17.00	17.00	18.25
†*Oakfield	30.50	26.50	33.00	38.50	52.00	17.00	17.00	18.25
†Laramie	34.50	29.00	— —	— —	55.00	21.50	— —	— —
†Loveland	36.00	29.50	39.50	— —	57.50	22.00	— —	— —
†*Metro N. Y.-N. J. Whses.	31.62	26.55	35.19	— —	53.12	18.12	17.05	20.44
†*Philadelphia	33.62	28.55	37.19	— —	55.12	20.12	19.05	22.44
†*Boston & Portsmouth	34.50	29.13	38.38	— —	56.00	21.00	19.63	23.63
†*Buffalo	31.78	27.34	34.72	— —	53.28	18.28	17.84	17.97

* Minimum pickup 5,000 sq. ft. board and/or lath.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10013 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 16, 1933

Board License Bulletin No. 2—(Cancels Previous Bulletin No. 2)—Prices F.O.B. Trucks at Mills and Warehouses

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1600 # per M)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	1/2" Gypsum Wallboard (Wt. 2150 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1600 # per M)	3/8" Gypsum Plasterboard (Wt. 1600 # per M)	1/4" Gypsum Plasterboard (Wt. 1050 # per M)	1/2" Gypsum Plasterboard (Wt. 2150 # per M)
Plasterco	28.00	23.50	30.50	— —	51.00	16.00	16.00	17.25†
Fort Dodge	27.00	22.50	29.50	35.00	50.00	15.00	15.00	16.25
Southard	27.00	22.50	28.00	35.00	50.00	15.00	15.00	16.25
Sweetwater	27.00	22.50	28.00	— —	50.00	15.00	15.00	16.25
Acme	27.00	22.50	28.00	— —	50.00	15.00	15.00	16.25
Gypsum	29.00	26.50	31.50	37.00	52.00	17.00	17.00	18.25
Grand Rapids	29.00	26.50	31.50	— —	52.00	17.00	17.00	18.25
*Oakfield	29.00	26.50	31.50	37.00	52.00	17.00	17.00	18.25
Laramie	33.00	27.00	— —	— —	55.00	21.50	— —	— —
Loveland	34.50	27.50	39.50	— —	57.50	22.00	— —	— —
*Metro N. Y.-N. J. Whses.	30.12	26.55	33.69	— —	53.12	18.12	17.05	20.44†
*Philadelphia	32.12	28.55	35.69	— —	55.12	20.12	19.05	22.44†
*Boston & Portsmouth	33.00	29.13	36.88	— —	56.00	21.00	19.63	23.63†
*Buffalo	30.28	27.34	33.22	— —	53.28	18.28	17.84	19.97†

* Minimum pickup 5,000 sq. ft. board and/or lath.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

This letter sent to the following:

A. Harner
R. Cooke
C. J. Lane
E. S. Pitts
F. M. Miller
R. J. Sterling
C. C. Spray
E. A. Gallagher
S. S. Jenkins
W. T. Coe

Mr. M. H. Baker, President
National Gypsum Company
409 Jackson Boulevard
Buffalo, New York

Messrs. Abel Davis and
Eugene Holland, Receivers
in Equity
Universal Gypsum Company
105 W. Madison Street
Chicago, Illinois

Mr. S. J. Kelley, President
Kelley Plasterboard Co.,
Delawanna
New Jersey

Mr. F. G. Ebsary, President
Ebsary Gypsum Company, Inc.
Scottsville
New York

cc to:
Mr. George N. Lenci,
Ebsary Gypsum Company, Inc.
414 Ogden Street
Newark, New Jersey

Mr. W. P. Fuller, President
Atlantic Gypsum Products Company
40 Central Street
Boston, Massachusetts

Mr. L. I. Neale, Vice President
Atlantic Gypsum Products Company
60 East 42d Street
New York, New York

Mr. C. O. Brown, Vice President
Certain-teed Products Corporation
100 East 42d Street
New York, New York

Mr. Warren Henley, Merch. Mgr.
Certain-teed Products Corporation
2246 West 49th Street
Chicago, Illinois

Mr. C. F. Miller, President
American Gypsum Company
Port Clinton
Ohio

Mr. A. R. Black, Sales Manager
American Gypsum Company
Port Clinton
Ohio

10014 UNITED STATES GYSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 10, 1933

Board License Bulletin No. 2—(Cancels Previous Bulletin No. 2 & Supplements)—Prices F.O.B. Trucks at Mills and Warehouses

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite Patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1600# per M)	1/4" Gypsum Wallboard (Wt. 1050# per M)	1/2" Gypsum Wallboard (Wt. 2150# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1600# per M)	3/8" Gypsum Plasterboard (Wt. 1600# per M)	1/4" Gypsum Plasterboard (Wt. 1050# per M)	1/2" Gypsum Plasterboard (Wt. 2150# per M)
Plasterco	27.00	22.50	29.50	— —	50.00	15.00	15.00	16.25†
Fort Dodge	27.00	22.50	29.50	35.00	50.00	15.00	15.00	16.25†
Southard	27.00	22.50	28.00	35.00	50.00	15.00	15.00	16.25†
Sweetwater	27.00	22.50	28.00	— —	50.00	15.00	15.00	16.25†
Acme	27.00	22.50	28.00	— —	50.00	15.00	15.00	16.25†
Gypsum	29.00	26.50	31.50	37.00	52.00	17.00	17.00	18.25
Grand Rapids	29.00	26.50	31.50	— —	52.00	17.00	17.00	18.25
*Oakfield	29.00	26.50	31.50	37.00	52.00	17.00	17.00	18.25
Laramie	33.00	27.00	— —	— —	55.00	21.50	— —	— —
Loveland	34.50	27.50	39.50	— —	57.50	22.00	— —	— —
*Metro N. Y.—N. J. Whses.	30.44	26.76	34.12	— —	53.44	18.44	17.26	20.87
*Philadelphia	32.44	28.76	36.12	— —	55.44	20.44	19.26	22.87
*Boston & Portsmouth	33.32	29.34	37.31	— —	56.32	21.32	19.84	24.06†
*Buffalo	30.44	27.45	33.44	— —	53.44	18.44	17.95	20.19

* Minimum pickup 5,000 sq. ft. board and/or lath.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10015 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 12, 1932

Board License Bulletin No. 2—(Cancels Previous Bulletin No. 2 & Supplements)—Prices F.O.B. Trucks at Mills and Warehouses

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1600# per M)	1/4" Gypsum Wallboard (Wt. 1050# per M)	1/2" Gypsum Wallboard (Wt. 2150# per M)	3/4" Gypsum Wallboard (Wt. 3300# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1600# per M)	3/8" Gypsum Plasterboard (Wt. 1600# per M)	1/4" Gypsum Plasterboard (Wt. 1050# per M)	1/2" Gypsum Plasterboard (Wt. 2150# per M)
Plasterco	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Fort Dodge	27.00	22.50	29.50	35.00	50.00	15.00	15.00	16.25
Southard	27.00	24.50	28.00	35.00	50.00	15.00	15.00	16.25
Sweetwater	27.00	24.50	28.00	— —	50.00	15.00	15.00	16.25
Acme	27.00	24.50	28.00	— —	50.00	15.00	15.00	16.25
Gypsum	29.00	26.50	31.50	37.00	52.00	17.00	17.00	18.25
Grand Rapids	29.00	26.50	31.50	— —	52.00	17.00	17.00	18.25
*Oakfield	29.00	26.50	31.50	37.00	52.00	17.00	17.00	18.25
Laramie	33.00	27.00	— —	— —	55.00	21.50	— —	— —
Loveland	34.50	27.50	39.50	— —	57.50	22.00	— —	— —
*Metro N. Y.—N. J. Whses.	30.44	26.76	34.12	— —	53.44	18.44	17.26	20.87
*Philadelphia	32.44	28.76	36.12	— —	55.44	20.44	19.26	22.87
*Boston	33.32	29.34	37.31	— —	56.32	21.32	19.84	24.06
*Buffalo	30.44	27.45	33.44	— —	53.44	18.44	17.95	20.19

* Minimum pickup 5,000 sq. ft. board and/or lath.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

4982

10016

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 27, 1932

Board License Bulletin No. 2—(Cancels Previous Bulletin No. 2)—Prices F.O.B. Trucks at Mills and Warehouses

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1600 # per M)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	1/2" Gypsum Wallboard (Wt. 2150 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd (Wt. 1600 # per M)	3/8" Gypsum Plasterboard (Wt. 1600 # per M)	1/4" Gypsum Plasterboard (Wt. 1050 # per M)	1/2" Gypsum Plasterboard (Wt. 2150 # per M)
field	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
sterco	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
sum	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
nd Rapids	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
t Dodge	27.00	22.50	29.50	35.00	50.00	15.00	15.00	16.25
thard	27.00	24.50	28.00	35.00	50.00	15.00	15.00	16.25
etwater	27.00	24.50	28.00	— —	50.00	15.00	15.00	16.25
ne	27.00	24.50	28.00	— —	50.00	15.00	15.00	16.25
ro N. Y.—N. J. Whses.	30.44	26.76	34.12	— —	53.44	18.44	17.26	20.87
adelphia	30.44	26.76	34.12	— —	53.44	18.44	17.26	20.87
ton	31.32	27.34	35.31	— —	54.32	19.32	17.84	22.06
falo	28.44	25.45	31.44	— —	51.44	16.44	15.95	18.19
roit	29.24	25.97	32.51	— —	52.24	17.24	16.47	19.26†
t Chicago	29.32	26.02	32.62	— —	52.32	17.32	16.52	19.37
amie	33.32	29.21	— —	— —	55.32	21.82	— —	— —
eland	34.82	29.71	39.93	— —	57.82	22.32	— —	— —

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at you home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,
UNITED STATES GYPSUM COMPANY
Vice President in Charge of Sales.

† Indicates changes in this reissue.

CFH'

10017 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 28, 1931.

Board License Bulletin No. 2—(Cancels Previous Bulletin No. 2)—Prices F.O.B. Trucks at Mills and Warehouses

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective January 4, 1932, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1600 # per M)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	1/2" Gypsum Wallboard (Wt. 2150 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1600 # per M)	3/8" Gypsum Plasterboard (Wt. 1600 # per M)	1/4" Gypsum Plasterboard (Wt. 1050 # per M)	1/2" Gypsum Plasterboard (Wt. 2150 # per M)
Oakfield	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25†
Plasterco	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Gypsum	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
Grand Rapids	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Fort Dodge	27.00	22.50	29.50	35.00	50.00	15.00	15.00	16.25
Southard	27.00	24.50	28.00	35.00	50.00	15.00	15.00	16.25
Sweetwater	27.00	24.50	28.00	— —	50.00	15.00	15.00	16.25
Acme	27.00	24.50	28.00	— —	50.00	15.00	15.00	16.25
Metro N. Y.—N. J. Whses.	30.44	26.76	34.12	— —	53.44	18.44	17.26	20.87†
Philadelphia	30.44	26.76	34.12	— —	53.44	18.44	17.26	20.87†
Boston	31.32	27.34	35.31	— —	54.32	19.32	17.84	22.06†
Buffalo	28.44	25.45	31.44	— —	51.44	16.44	15.95	18.19†
Detroit	29.00	25.81	32.19	— —	52.00	17.00	16.31	18.94†
East Chicago	29.32	26.02	32.62	— —	52.32	17.32	16.52	19.37†
Laramie	33.32	29.21	— —	— —	55.32	21.82	— —	— —†
Loveland	34.82	29.71	39.93	— —	57.82	22.32	— —	— —†

Prices shall apply to all shipments made on or after January 4, except only upon bona fide orders actually received and accepted by you at your home office in writing before January 4 and shipped by you within ten days after January 4, 1932.

Very truly yours,
UNITED STATES GYPSUM COMPANY
Vice President in Charge of Sales.

CFH'

10018 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 16, 1931.

Board License Bulletin No. 2—(Cancels Previous Bulletin No. 2)—Prices F.O.B. Trucks at Mills and Warehouses

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks: Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1600 # per M)	1/4" Gypsum Wallboard (Wt. 1050 # per M)	1/2" Gypsum Wallboard (Wt. 2150 # per M)	3/4" Gypsum Wallboard (Wt. 3300 # per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1600 # per M)	3/8" Gypsum Plasterboard (Wt. 1600 # per M)	1/4" Gypsum Plasterboard (Wt. 1050 # per M)	1/2" Gypsum Plasterboard (Wt. 2150 # per M)
Oakfield	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Plasterco	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Gypsum	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25
Grand Rapids	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Fort Dodge	27.00	22.50	29.50	35.00	50.00	15.00	15.00	16.25†
Southard	27.00	24.50	28.00	35.00	50.00	15.00	15.00	16.25
Sweetwater	27.00	24.50	28.00	— —	50.00	15.00	15.00	16.25
Acme	27.00	24.50	28.00	— —	50.00	15.00	15.00	16.25
Metro N. Y.-N. J. Whses.	30.12	26.55	33.69	— —	53.12	18.12	17.05	20.44†
Philadelphia	30.12	26.55	33.69	— —	53.12	18.12	17.05	20.44†
Boston	31.00	27.13	34.88	— —	54.00	19.00	17.63	21.63†
Buffalo	28.28	25.34	31.22	— —	51.28	16.28	15.84	17.97†
Detroit	28.84	25.71	31.97	— —	51.84	16.84	16.21	18.72†
East Chicago	29.08	25.87	32.30	— —	52.08	17.08	16.37	19.05†
Laramie	33.00	27.00	— —	— —	55.00	21.50	— —	— —†
Loveland	34.50	27.50	39.50	— —	57.50	22.00	— —	— —†

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,
UNITED STATES GYPSUM COMPANY
Vice President in Charge of Sales.

† Indicates changes in this reissue.

10019 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 25, 1931.

Board License Bulletin No. 2—(Cancels Previous Bulletin No. 2)—Prices F.O.B. Trucks at Mills and Warehouses

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective June 1st, 1931, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks: Mills or Warehouses	3/8" Gypsum Wallboard (Wt. 1600# per M) †	1/4" Gypsum Wallboard (Wt. 1050# per M) †	1/2" Gypsum Wallboard (Wt. 2150# per M) †	3/4" Gypsum Wallboard (Wt. 3300# per M) †	3/8" Tiled Gypsum Wallbd. (Wt. 1600# per M) †	3/8" Gypsum Plasterboard (Wt. 1600# per M) †	1/4" Gypsum Plasterboard (Wt. 1050# per M) †	1/2" Gypsum Plasterboard (Wt. 2150# per M) †
Oakfield	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Plasterco	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Gypsum	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25†
Grand Rapids	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25†
Fort Dodge	27.00	24.50	29.50	35.00	50.00	15.00	15.00	16.25†
Southard	27.00	24.50	28.00	35.00	50.00	15.00	15.00	16.25†
Sweetwater	27.00	24.50	28.00	— —	50.00	15.00	15.00	16.25†
Acme	27.00	24.50	28.00	— —	50.00	15.00	15.00	16.25†
Metro N. Y.-N.J. Whses.	30.12	26.55	33.69	— —	53.12	18.12	18.12	20.44†
Philadelphia	30.12	26.55	33.69	— —	53.12	18.12	18.12	20.44†
Boston	31.00	27.13	34.88	— —	54.00	19.00	19.00	21.63†
Buffalo	28.28	25.34	31.22	— —	51.28	16.28	16.28	17.97†
Detroit	28.84	25.71	31.97	— —	51.84	16.84	16.84	18.72†
East Chicago	29.08	25.87	32.30	— —	52.08	17.08	17.08	19.05†
Laramie	33.00	29.00	— —	— —	55.00	21.50	— —	— —
Loveland	34.50	29.50	39.50	— —	57.50	22.00	— —	— —

Prices shall apply to all loadings made after June 1st except only upon bona fide orders actually received and accepted by you at your home office in writing before June 1st and loaded by you within ten days after June 1st.

Very truly yours,

UNITED STATES GYPSUM COMPANY
Vice President in Charge of Sales.

CFH'

10020 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 21, 1931

Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills or Warehouses

American A R Black (John A. Kling, Pres.)

Universal Eugene Holland

Certainteed C.O. Brown (cc—Warren Henley)

Atlantic W. P. Fuller (cc—L.I. Neale)

Ebsary Geo. N. Lenci (cc—Fred Ebsary)

National M. N. Baker

Kelley Plas. Bd. Co. S.J. Kelley

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices now in effect at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Prices f.o.b. Trucks:	3/8" Gypsum Wallboard (Wt. 1850# per M)	1/4" Gypsum Wallboard (Wt. 1250# per M)	1/2" Gypsum Wallboard (Wt. 2250# per M)	3/4" Gypsum Wallboard (Wt. 3600# per M)	3/8" Tiled Gypsum Wallbd. (Wt. 1850# per M)	3/8" Gypsum Plasterboard (Wt. 1850# per M)	1/4" Gypsum Plasterboard (Wt. 1250# per M)	1/3" Gypsum Plasterboard (Wt. 2250# per M)
Oakfield	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Plâstereo	27.00	24.50	29.50	— —	50.00	15.00	15.00	16.25
Gypsum	28.00	25.50	30.50	36.00	51.00	16.00	16.00	17.25
Grand Rapids	28.00	25.50	30.50	— —	51.00	16.00	16.00	17.25
Ft. Dodge	27.00	24.50	29.50	35.00	50.00	15.50	15.50	16.25
Southard	27.00	24.50	28.00	35.00	50.00	15.50	15.50	16.25
Sweetwater	28.00	25.50	29.00	— —	51.00	16.50	16.50	17.25
Acme	27.00	24.50	28.00	— —	50.00	15.50	15.50	16.25
Harrison, N. J.	32.61	28.94	35.89	— —	55.61	19.61	19.61	21.64
New Brighton, N. Y.	32.61	28.94	35.89	— —	55.61	19.61	19.61	21.64
Bronx (Port Morris)	32.61	28.94	35.89	— —	55.61	19.61	19.61	21.64
Philadelphia	32.61	28.94	35.89	— —	55.61	19.61	19.61	21.64
Boston	33.63	29.63	37.13	— —	56.63	20.63	20.63	22.88
Buffalo	28.48	25.50	31.30	— —	51.48	16.48	16.48	— —
Detroit	30.13	26.94	33.09	— —	53.13	18.13	18.13	19.84
E. Chicago	30.41	27.13	33.43	— —	53.41	18.41	18.41	20.18
Laramie	33.00	29.00	— —	— —	55.00	21.50	— —	— —
Loveland	34.50	29.50	39.50	— —	57.50	22.00	— —	— —

10021 Board /License Bulletin Number 2

Prices shall apply to all loadings made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

This bulletin cancels all previous bulletins.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President in Charge Sales

CFH'

CLERK'S COPY

10022 *Government's Exhibit No. 35*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 13, 1939.

Board Prices, Delivered by Truck

Board License Bulletin No. 3 (Page 1)—Cancels Bulletin No. 3 Dated March 3, 1939.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), are as follows:

Minimum prices per M sq. ft. at which you may sell the patented gypsum board products when delivered by truck in the areas named below, (TRUCKLOADS containing 7500 sq. ft. or more) shall be the same for deliveries in carloads by rail as heretofore provided:

Eastern Area—which includes the States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Dutchess and Putnam, Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware; towns of Stroudsburg and East Stroudsburg (in Monroe County) and town of Milford (in Pike County) Pennsylvania.

Western New York Area—which includes Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates, Chemung, Schuyler and Livingston Counties, New York, also Crawford, Erie, McKean and Warren Counties, Pennsylvania.

Detroit Area—which includes Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change.

10023 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 3, 1939

Board Prices, Delivered by Truck

Board License Bulletin No. 3 (Page 1)—Cancels Bulletin No. 3 Dated February 6, 1939.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), are as follows:

Minimum prices per M sq. ft. at which you may sell the patented gypsum board products when delivered by truck in the areas named below, (TRUCKLOADS containing 7500 sq. feet or more) shall be the same for deliveries in carloads by rail as heretofore provided:

†Eastern Area—which includes the States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange and Putnam,

Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware.

Western New York Area—which includes Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates, Chemung, Schuyler and Livingston Counties, New York; also Crawford, Erie McKean and Warren Counties, Pennsylvania.

Detroit Area—which includes Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change.

10024 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1939

C. NEWMAN

Board Prices, Delivered by Truck

Board License Bulletin No. 3 (Page 1)—Cancels Pages 1 and 2 Dated July 16, 1938

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), are as follows:

Minimum prices per M sq. ft. at which you may sell the patented gypsum board products when delivered by truck in the areas named below, (TRUCKLOADS containing 7500 sq. feet or more) shall be the same for deliveries in carloads by rail as heretofore provided:

Eastern Area—which includes the States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Sullivan, Ulster and Dutchess Counties, New York; Bucks; Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware.

Western New York Area—which includes Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates, Chemung, Schuyler and Livingston Counties, New York; also Crawford, Erie, McKean and Warren Counties, Pennsylvania.

Detroit Area—which includes Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10025 (4) Detroit Area: Minimum prices for patented gypsum board products delivered by truck to dealer's warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board products, or in mixed loads minimum weight 7½ tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren,

Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

(5) Miami Area: Minimum prices for patented gypsum plaster lath as provided in Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with other gypsum products to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue, to become effective January 15, 1938.

10026 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 16, 1938

Board Prices, Delivered by Truck to Dealers' Warehouses

Board License Bulletin No. 3 (Page 1)—Cancels Pages 1 Dated October 21, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letter patent), including Haggerty patent number 1,500,452, are as follows:

(1) Eastern Area: Minimum prices for patented gypsum board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. This applies into States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and

Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Sullivan Ulster and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware. See paragraph 3 for minimum loads.

(2) Western New York Area: Minimum prices for patented gypsum board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Board License, Bulletin No. 1. This applies into Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York; also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 3 for minimum loads.

(3) Minimum Quantities: (Applying to paragraphs 1 and 2 above). Each truck delivery of patented gypsum board products at carload prices shall contain a minimum of 7500 sq. ft. gypsum board products consigned to one destination and invoiced to one account. Truck deliveries shall be made by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum load.

10027 †(4) Detroit Area: Minimum prices for patented gypsum board products delivered by truck to dealer's warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board products, or in mixed loads minimum weight 10 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Half-

way, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

(5) Miami Area: Minimum prices for patented gypsum plaster lath as provided in Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with other gypsum products to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10028 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 21, 1937.

Board Prices, Delivered by Truck to Dealers' Warehouses

Board License Bulletin No. 3 (Page 1)—Cancels Board License Bulletin No. 3 Dated February 24, 1937.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective November 1, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452, are as follows:

(1) Eastern Area: Minimum prices for patented gypsum board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. This applies into States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford,

Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Sullivan, Ulster and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware. See paragraph 3 for minimum loads.

(2) Western New York Area: Minimum prices for patented gypsum board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. This applies into Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York; also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 3 for minimum loads.

(3) Minimum Quantities: (Applying to paragraphs 1 and 2 above). Each truck delivery patented gypsum board products at carload prices shall contain a minimum of 7500 sq. ft. gypsum board products consigned to one destination and invoiced to one account. Truck deliveries shall be made by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum load.

10029 (4) Detroit Area: Minimum prices for patented gypsum board products delivered by truck to dealer's warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser,

Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

(5) Miami Area: Minimum prices for patented gypsum plaster lath as provided in Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with other gypsum products to make minimum weight.†

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10030 (4) Detroit Area: Minimum prices for patented gypsum board products delivered by truck to dealer's warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.†

(5) Miami Area: Minimum prices for patented gypsum plaster lath as provided in Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and pro-

viding delivery of entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with gypsum bag goods to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10031 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1937.

Board Prices, Delivered by Truck to Dealers' Warehouses

Board License Bulletin No. 3 (Page 1)—Cancels Board License Bulletin No. 3 Dated February 11, 1937.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 1, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

†(1) Eastern Area: Minimum prices for patented gypsum board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. This applies into States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Sullivan, Ulster and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware. See paragraph 3 for minimum loads.

†(2) Western New York Area: Minimum prices for patented gypsum board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. This applies into Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York; also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 3 for minimum loads.

†(3) Minimum Quantities: (Applying to paragraphs 1 and 2 above. Each truck delivery of patented gypsum board products at carload prices shall contain a minimum of 7500 sq. ft. gypsum board products consigned to one destination and invoiced to one account. Truck deliveries shall be made by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum load.

10032 †(4) Detroit Area. Minimum prices for patented gypsum board products delivered by truck to dealer's warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb County, Michigan.

(5) Miami Area. Minimum prices for patented gypsum plaster lath as provided in Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of

entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with gypsum bag goods to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10033 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 11, 1937.

Board Prices, Delivered by Truck to Dealers' Warehouses

Board License Bulletin No. 3 (Page 1.)—Cancels Board License Bulletin No. 3—Dated December 29, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard products (except 1/4" and 3/8" thickness regular or open edge cutstock plasterboard—see exception below) delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight exceeds $2.00 per M sq.ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Catteraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren Counties, Pennsylvania. See paragraph 7 for minimum loads.

1/4" and 3/8" Regular or Open Edge (Cutstock) Plasterboard. Minimum price 1/4" and 3/8" patented regular or open edge gypsum plasterboard delivered by truck to

dealers warehouse in Niagara, Erie, (including town of Gowanda, N.Y.), Monroe and Wayne Counties, New York is $15.00 per M sq.ft. This price does not apply to 32"x48" cutstock board. See paragraph 7 for minimum loads.

(2) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard (see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau, and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 7 for minimum loads.

5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq.ft.
10034 See paragraph 7 for minimum loads.

1/4" & 3/8" Plasterboard. Minimum price of 1/4" and 3/8" plasterboard (in sizes 16"x32" and 16"x48" only) delivered by truck to dealers warehouse in Kings, Queens, Nassau and Suffolk Counties, New York is $14.00 per M sq.ft. See paragraph 7 for minimum loads.

(3) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

(4) Boston Area. Minimum price wallboard and/or plasterboard (except 5/16" plasterboard—see exception below) delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars Boston Mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester Counties, Mass.; Rockingham, Hillsborough and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine; and State of Rhode Island. See paragraph 7 for minimum loads.

5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealers warehouse in Kent and Provi-

dence Counties, Rhode Island (this product not to be sold in balance of Boston Area) is $15.00 per M sq.ft. See paragraph 7 for minimum loads.

(5) Southeast New York Area. Minimum price wallboard and/or plasterboard delivered by truck to dealers warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton Mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa., New Castle County, Delaware, the State of Connecticut and Cheshire, Sullivan, Merrimac, Belknap Counties, New Hampshire. Minimum price wallboard and/or plasterboard (except 5/16" plasterboard—see exception below) delivered by truck to dealer's warehouse, add $2.00 per M sq.ft. to prices applying f.o.b. cars Philadelphia, New Brighton or Boston mills as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware; State of Cennecticut; and Cheshire, Sullivan, Merrimac, Belknap Counties, New Hampshire. See paragraph 7 for minimum loads.

5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealers warehouse in Hartford County, Connecticut is $16.00 per M sq.ft. See paragraph 7 for minimum loads.

(7) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5000 sq.ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

10035 (8) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq.ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented

gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(9) Detroit Area. Minimum price patented gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq.ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb county, Michigan.

†(10) Cancelled, effective February 13, 1937.

(11) Miami Area. Minimum prices for patented gypsum lath as provided in Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum lath may be combined with gypsum bag goods to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10036 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 29, 1936.

Board Prices, Delivered by Truck to Dealers' Warehouses

Board License Bulletin No. 3 (Page 1)—Cancels Board License Bulletin No. 3 Dated October 27, 1936 and All Supplements Thereto.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective January 1, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard products (except 1/4" and 3/8" thickness regular or open edge cutstock plasterboard—see exception below) delivered by truck to dealer's warehouse, add $2.00 per M sq.ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight exceeds $2.00 per M sq.ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren Counties, Pennsylvania. See paragraph 7 for minimum loads.

1/4" and 3/8" Regular or Open Edge (Cutstock) Plasterboard. Minimum price 1/4" and 3/8" patented regular or open edge gypsum plasterboard delivered by truck to dealers warehouse in Niagara, Erie, (including town of Gowanda, N.Y.), Monroe and Wayne Counties, New York is $15.00 per M sq.ft. This price does not apply to 32"x48" cutstock board. See paragraph 7 for minimum loads.

(2) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard (see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan,

Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau, and Suffolk Counties, N.Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 7 for minimum loads.

5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq.ft.
10037 See paragraph 7 for minimum loads.

1/4" & 3/8" Plasterboard. Minimum price of 1/4" and 3/8" plasterboard (in sizes 16"x32" and 16" by 48" only) delivered by truck to dealers warehouse in Kings, Queens, Nassau and Suffolk Counties, New York is $14.00 per M sq.ft. See paragraph 7 of minimum loads.

(3) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

(4) Boston Area. Minimum price wallboard and/or plasterboard (except 5/16" plasterboard—see exception below) delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars Boston Mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester Counties, Mass.; Rockingham, Hillsborough and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine; and State of Rhode Island. See paragraph 7 for minimum loads.

5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealers warehouse in Kent and Providence Counties, Rhode Island (this product not to be sold in balance of Boston Area) is $15.00 per M sq.ft. See paragraph 7 for minimum loads.

(5) Southeast New York Area. Minimum price wallboard and/or plasterboard delivered by truck to dealers warehouse, add $2.00 per M sq.ft. to prices applying f.o.b. cars New Brighton Mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa., New Castle County, Delaware, the State of Connecticut and Cheshire, Sullivan, Merrimac, Belknap Counties, New Hampshire. Minimum price wallboard and/or plasterboard (except 5/16" plasterboard—see exception below) delivered by truck to dealer's warehouse, add $2.00 per M sq.ft. to prices applying f.o.b. cars Philadelphia, New Brighton or Boston mills as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware; State of Connecticut; and Cheshire, Sullivan, Merrimac, Belknap Counties, New Hampshire. See paragraph 7 for minimum loads.

5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealers warehouse in Hartford County, Connecticut is $16.00 per M sq.ft. See paragraph 7 for minimum loads.

(7) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5000 sq.ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

10038 (8) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq.ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(9) Detroit Area. Minimum price patented gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq.ft. gypsum board and/or lath products, or in mixed loads

minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb county, Michigan.

(10) Franklin County (Columbus) Ohio. Minimum price of patented gypsum lath delivered by truck to dealer's warehouse or direct to job within Franklin County, Ohio is same as price for deliveries in carloads by rail. Truck delivery shall be in straight or mixed loads, minimum weight 5 tons, consigned to one destination and invoiced to one account. Gypsum bag goods only may be included with patented gypsum lath to make minimum weight.

†(11) Miami Area. Minimum prices for patented gypsum lath as provided in Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum lath may be combined with gypsum bag goods to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10039 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 27, 1936.

Board Prices, Delivered by Truck to Dealers' Warehouses.

Board License Bulletin No. 3 (Page 1)—Cancels Page 1 Dated October 12, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective October 29, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard products (except 1/4" and 3/8" thickness regular or open edge (cutstock plasterboard, see exception below) delivered by truck to dealer's warehouse, add $2.00 per M sq.ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq.ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren Counties, Pennsylvania. See paragraph 7 for minimum loads.

1/4" and 3/8" Regular or Open Edge (Cutstock) Plasterboard. Minimum price 1/4" and 3/8" patented regular or open edge gypsum plasterboard delivered by truck to dealers warehouse in Niagara, Erie, (including town of Gowanda, N.Y.), Monroe and Wayne counties, New York is $15.00 per M sq.ft. This price does not apply to 32" x 48" cutstock board. See paragraph 7 for minimum loads.

(2) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard (except 5/16" thickness plasterboard and 1/2" T&G Sheathing—see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau, and Suffolk counties, N.Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 7 for minimum loads.

10040 5/6" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealer's warehouse in

Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq.ft. See paragraph 7 for minimum loads.

Minimum Price 1/2" Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York, is $20.00 per M sq.ft. See paragraph 7 for minimum loads.

(3) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

(4) Boston Area. Minimum price wallboard and/or plasterboard (except 5/16". plasterboard—see exception below) delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars Boston mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester Counties, Mass.; Rockingham, Hillsborough and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine; and state of Rhode Island. See paragraph 7 for minimum loads.

5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealers warehouse in Kent and Providence Counties, Rhode Island (this product not to be sold in balance of Boston Area) is $15.00 per M sq.ft. See paragraph 7 for minimum loads.

(5) Southeast New York Area. Minimum price wallboard and/or plasterboard delivered by truck to dealers warehouse, add $2.00 per M sq.ft. to prices applying f.o.b. cars New Brighton Mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa., and New Castle County, Delaware. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq.ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin

#1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton Counties, Pennsylvania; and New Castle County, Delaware. See paragraph 7 for minimum loads.

(7) Minimum Quantities: (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5000 sq.ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(8) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq.ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

10041

†(9) Detroit Area. Minimum price patented gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq.ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb county, Michigan.

†(10) Franklin County (Columbus) Ohio. Minimum price patented gypsum lath delivered by truck to dealer's warehouse or direct to job within Franklin County, Ohio is same as price for deliveries in carloads by rail. Truck

delivery shall be in straight or mixed loads, minimum weight 5 tons, consigned to one destination and invoiced to one account. Gypsum bag goods only may be included with patented gypsum lath to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10042 5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq.ft. See paragraph 7 for minimum loads.

Minimum Price 1/2" Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York, is $20.00 per sq.ft. See paragraph 7 for minimum loads.

(3) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

†(4) Boston Area. Minimum price wallboard and/or plasterboard (except 5/16" plasterboard—see exception below) delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars Boston mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester Counties, Mass.; Rockingham, Hillsborough and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine; and state of Rhode Island. See paragraph 7 for minimum loads.

5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealers warehouse in Kent and Providence Counties, Rhode Island (this product not to be sold in balance of Boston Area)† is $15.00 per M sq.ft. See paragraph 7 for minimum loads.

† Indicates change (to become effective October 28, 1936).

(5) Southeast New York Area. Minimum price wallboard and/or plasterboard delivered by truck to dealers warehouse, add $2.00 per M sq.ft. to prices applying f.o.b. cars New Brighton Mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa., and New Castle County, Delaware. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq.ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton Counties, Pennsylvania; and New Castle County, Delaware. See paragraph 7 for minimum loads.

(7) Minimum Quantities: (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5000 sq.ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(8) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq.ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applied to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto,

10043 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 12, 1936.

Board Prices, Delivered by Truck to Dealers' Warehouses

Board License Bulletin No. 3 (Page 1)—Cancels Page 1
Dated September 11, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard products (except 1/4" and 3/8" thickness regular or open edge (cutstock) plasterboard, see exceptions below) delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 7 for minimum loads.

†1/4" and 3/8" Regular or Open Edge (Cutstock) Plasterboard. Minimum price 1/4" and 3/8" patented regular or open gypsum plasterboard delivered by truck to dealers warehouse in Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne counties, New York is $15.00 per M sq. ft. This price does not apply to 32" x 48" cutstock board. See paragraph 7 for minimum loads.

(2) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard (except 5/16" thickness plasterboard and 1/2" T&G sheathing—see exceptions below) delivered by truck to dealer's warehouse, and $1.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 7 for minimum loads.

† Indicates change.

10044 5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq. ft. See paragraph 7 for minimum loads.

Minimum Price 1/2" Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York, is $20.00 per M sq. ft. See paragraph 7 for minimum loads.

(3) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

†(4) Boston Area. Minimum price wallboard and/or plasterboard (except 5/16" plasterboard—see exception below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester Counties, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine; and state of Rhode Island. See paragraph 7 for minimum loads.

†5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealers warehouse in Kent and Providence Counties, Rhode Island (this product not to be sold in balance of Boston Area) is $15.00 per M sq. ft. See paragraph 7 for minimum loads.

(5) Southeast New York Area. Minimum price wallboard and/or plasterboard delivered by truck to dealers warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton Mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa., and New Castle County, Delaware.

† Indicates change (to become effective September 19, 1936).

Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton Counties, Pennsylvania; and New Castle County, Delaware. See paragraph 7 for minimum loads.

(7) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(8) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto,

10045 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 11, 1936

Board Prices, Delivered by Truck to Dealers' Warehouses.

—Board License Bulletin No. 3—Cancels Bulletin No. 3 Dated July 23, 1936 and All Supplements Thereto.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective September 15, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboad and/or plasterboard products (except 1/4" and 3/8" thickness regular or open edge (cutstock) plasterboard, see exception below) delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 7 for minimum loads.

1/4" and 3/8" Regular or Open Edge (Cutstock) Plasterboard. Minimum price 1/4" and 3/8" patented regular or open edge gypsum plasterboard delivered by truck to dealers warehouse in Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne counties, New York is $15.00 per M sq. ft. See paragraph 7 for minimum loads.

(2) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard (except 5/16" thickness plasterboard and 1/2" T&G sheathing—see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 7 for minimum loads.

10046 5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq. ft. See paragraph 7 for minimum loads.

Minimum Price 1/2" Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York, is $20.00 per M sq. ft. See paragraph 7 for minimum loads.

(3) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add

$1.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

(4) Boston Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk and Worcester counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine. See paragraph 7 for minimum loads.

(5) Southeast New York Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton Mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa., and New Castle County, Delaware. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton Counties, Pennsylvania; and New Castle County, Delaware. See paragraph 7 for minimum loads.

(7) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(8) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those

materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies
to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo
10047 Alto, Kossuth, Winnebago, Hancock, Cherokee,
Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(9) Detroit Area. Minimum price patented gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

† Indicates change in this reissue.

10048 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 23, 1936

Board Prices, Delivered by Truck to Dealers' Warehouses.

Board License Bulletin No. 3—Cancels Bulletin No. 3—Dated July 10, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 28, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and

claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard products delivered by truck to dealer's warehouse, and $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 7 for minimum loads.

(2) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard (except 5/16" thickness plasterboard and 1/2" T&G sheathing—see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 7 for minimum loads.

5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq. ft. See paragraph 7 for minimum loads.

Minimum Price 1/2" Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York, is $20.00 per M sq. ft. See paragraph 7 for minimum loads.

(3) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to
10049 Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

†(4) Boston Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk and Worcester counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Mass. See paragraph 7 for minimum loads.

†(5) Southeast New York Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton Mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York. See paragraph 7 for minimum loads.

†(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa., and New Castle County, Delaware. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton Counties, Pennsylvania; and New Castle County, Delaware. See paragraph 7 for minimum loads.

†(7) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum.

(8) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto,

Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

†(9) Detroit Area. Minimum price patented gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

† Indicates change in this reissue.

10050

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 10, 1936.

Board Prices, Delivered by Truck to Dealers' Warehouses.

Board License Bulletin No. 3 (Page 1)—Cancels Page 1
Dated June 2, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 13, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard products delivered by truck to dealer's warehouse, and $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

(2) Orange County, New York. Minimum price wallboard and/or Plasterboard products delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

†(3) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard (except 5/16" thickness plasterboard and 1/2" T&G sheathing—see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq.ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean counties, New Jersey. See paragraph 6 for minimum loads.

†5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq. ft. See paragraph 6 for minimum loads.

†Minimum Price 1/2" Gypsum Sheathing, deliver-
10051 ed by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York, is $20.00 per M sq. ft. See paragraph 6 for minimum loads.

†(4) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars

Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 6 for minimum loads.

(5) Boston Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine. See paragraph 6 for minimum loads.

(6) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area. Minimum price 3/8" plasterboard is $15.00 per M sq. ft. and minimum price of 1/2" sheathing is $20.47 per M sq. ft., delivered by truck to dealer's warehouse. Minimum price patented gypsum board and/or lath products other than 3/8" plasterboard and 1/2" sheathing delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum

straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10052 in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York, is $21.00 per M sq. ft. See paragraph 6 for minimum loads.

(4) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Philadelphia prices as listed on page one of bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 6 for minimum loads.

†(5) Boston Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Boston mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine. See paragraph 6 for minimum loads.

(6) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account,

delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area. Minimum price 3/8" plasterboard is $15.00 per M sq. ft. and minimum price of 1/2" sheathing is $20.47 per M sq. ft., delivered by truck to dealer's warehouse. Minimum price patented gypsum board and/or lath products other than 3/8" plasterboard and 1/2" sheathing delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10053 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 2, 1936.

Board Prices, Delivered by Truck to Dealers' Warehouses.

Board License Bulletin No. 3 Cancels Bulletin No. 3 Dated May 4, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective June 4, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard products delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight, including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

(2) Orange County, New York. Minimum price wallboard and/or plasterboard products delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard (except 5/16" thickness plasterboard and 1/2" T&G sheathing—see exceptions below) delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. New Brighton prices as listed on page one of bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $14.68 per M sq. ft. See paragraph 6 for minimum loads.

10054 Minimum Price 1/2" Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York, is $21.00 per M sq. ft. See paragraph 6 for minimum loads.

†(4) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Philadelphia prices as listed on page one of bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 6 for minimum loads.

†(5) Boston Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Boston prices as listed on page one of bulletin #1. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine. See paragraph 6 for minimum loads.

(6) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or

lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area. Minimum price 3/8" plasterboard is $15.00 per M sq. ft. and minimum price of 1/2" sheathing is $20.47 per M sq. ft., delivered by truck to dealer's warehouse. Minimum price patented gypsum board and/or lath products other than 3/8" plasterboard and 1/2" sheathing delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10055 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 4, 1936

Board Prices, Delivered by Truck to Dealers' Warehouses.

Board License Bulletin No. 3—Cancels Bulletin No. 3—Dated March 30, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective May 7, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying

the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard products delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

(2) Orange County, New York. Minimum price wallboard and/or plasterboard products delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard products (except 5/16" thickness plasterboard) delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

†5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $14.68 per M sq. ft. See paragraph 6 for minimum loads.

†Minimum price 1/2" Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New

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York, is $21.00 per M sq. ft. See paragraph 6 for minimum loads.

(4) Philadelphia Area: Minimum price wallboard and/or plasterboard products delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 6 for minimum loads.

(5) Boston Area. Minimum price wallboard and/or plasterboard products delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York County, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to the York County line. See paragraph 6 for minimum loads.

(6) Minimum Quantities: (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath products consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area: Minimum price wallboard and/or plasterboard products delivered by truck to dealer's warehouse add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area: Minimum price 3/8" plasterboard is $15.00 per M sq. ft. and minimum price of 1/2" sheathing

is $20.47 per M sq. ft., delivered by truck to dealer's warehouse. Minimum price patented gypsum board and/or lath products other than 3/8" plasterboard and 1/2" sheathing delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10057 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 30, 1936

Board Prices, Delivered by Truck to Dealers' Warehouses.

Board License Bulletin No. 3—Cancels Bulletin No. 3 Dated March 2, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective April 1, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to

which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

Minimum Price Cutstock Plasterboard delivered by truck to Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. This price does not apply to 32" x 48" board. See paragraph 6 for minimum loads.

Minimum Price 1/2" Gypsum Sheathing, surfaced with a weather resisting paper, Tongue and Groove edge, width 24", lengths 6'8" and 8', delivered by truck to dealers warehouse in Erie and Niagara Counties, New York is $17.00 per M sq. ft. See paragraph 6 for minimum loads.

(2) Orange County, New York. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard (except 5/16" thickness plasterboard) delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

5/16" Plasterboard. Minimum price 5/16"
10058 plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq. ft. See paragraph 6 for minimum loads.

Minimum Price 1/2" Gypsum Sheathing, surfaced with a weather resisting paper, Tongue and Groove edge, width

24", lengths 6'8" and 8', delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York, is $17.00 per M sq. ft. See paragraph 6 for minimum loads.

(4) Philadelphia Area: Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. (Note: Camden County was omitted in error in issue dated February 22, 1936). See paragraph 6 for minimum loads.

(5) Boston Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York County, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to the York County line. See paragraph 6 for minimum loads.

(6) Minimum Quantities: (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area: Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas,

Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area: Minimum price 3/8" plasterboard delivered by truck to dealer's warehouse $15.00 per M sq. ft. Minimum price patented gypsum board and/or lath products other than 3/8" plasterboard delivered by truck to dealer s warehouse is same as price delivered by rail. Truck delivery shal ' in minimum straight loads of 5,000 sq. ft. gypsum boa' . nd/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser Roseville and Centerline in Macomb County, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10059 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 2, 1936

Board Prices, Delivered by Truck to Dealers' Warehouses.

Board License Bulletin No. 3—Cancels Bulletin No. 3—Dated February 22, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 4, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

†(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

Minimum Price Cutstock Plasterboard delivered by truck to Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. This price does not apply to 32" x 48" board. See paragraph 6 for minimum loads.

(2) Orange County, New York. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard except 5/16" thickness plasterboard (see next par.) delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

5/16" Plasterboard. Minimum price 5/16" plas-
10060 terboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq. ft. See paragraph 6 for minimum loads.

†(4) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars.

This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties Pennsylvania and Camden County, New Jersey. (Note: Camden County was omitted in error in issue dated February 22, 1936). See paragraph 6 for minimum loads.

(5) Boston Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York County, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to the York County line. See paragraph 6 for minimum loads.

(6) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area. Minimum price 3/8" plasterboard delivered by truck to dealer's warehouse $15.00 per M sq. ft. Minimum price patented gypsum board and/or lath products other than 3/8" plasterboard delivered by truck to

dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10061 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 22, 1936.

Board Prices, Delivered by Truck to Dealers' Warehouses.

Board License Bulletin No. 3—Cancels Bulletin No. 3—Dated January 10, 1936 and All Supplements Thereto.

C. NEWMANN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective February 24, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca,

Wyoming, Cattaraugus, Chautauqua, Steuben, and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

Minimum Price Cutstock Plasterboard delivered by truck to Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. This price does not apply to 32" x 48" board. See paragraph 6 for minimum loads.

(2) Orange County, New York. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard except 5/16" thickness plasterboard (see next par.) delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

5/16" Plasterboard. Minimum price 5/16"
10062 plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq. ft. See paragraph 6 for minimum loads.

(4) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania. See paragraph 6 for minimum loads.

(5) Boston Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of

Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York County, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to the York County line. See paragraph 6 for minimum loads.

(6) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area. Minimum price 3/8" plasterboard delivered by truck to dealer's warehouse $15.00 per M sq. ft. Minimum price patented gypsum board and/or lath products other than 3/8" plasterboard delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10063 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 10, 1936

Board Prices, Delivered by Truck to Dealer's Warehouses.

Board License Bulletin No. 3—Cancels Bulletin No. 3—Dated September 17, 1935 and All Supplements Thereto.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Steuben, and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

Minimum Price Cutstock Plasterboard delivered by truck to Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne Counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. This price does not apply to 32" x 48" board. See paragraph 6 for minimum loads.

(2) Orange County, New York. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard except 5/16" thickness plasterboard (see next par.) delivered by truck to dealer's warehouse is same as delivered price by rail in

mixed cars. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

10064 *†5/16" Plasterboard. Minimum price 5/16" plasterboard delivered by truck to dealer's warehouse in Kings and Queens Counties, New York and Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $15.00 per M sq. ft. See paragraph 6 for minimum loads.

(4) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Bucks, Montgomery, Chester, Delaware, and Philadelphia counties, Pa. and Camden County, N. J. See paragraph 6 for minimum loads.

(5) Boston Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York county, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to the York County line. See paragraph 6 for minimum loads.

†(6) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board

rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area. Minimum price 3/8" plasterboard delivered by truck to dealer's warehouse $15.00 per M sq. ft. Minimum price patented gypsum board and/or lath products other than 3/8" plasterboard delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10065

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 17, 1935

Board Prices, Delivered by Truck to Dealers' Warehouses.

Board License Bulletin No. 3—Cancels Bulletin No. 3—Dated November 30, 1934 and All Supplements Thereto.

E. S. PITTS,
Office

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which

you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Buffalo-Oakfield Area, as follows: Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua and Livingston counties, New York, and Crawford, Erie, McKean and Warren Counties, Pennsylvania. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, and $2.00 per M to f.o.b. Oakfield prices shown in bulletin #1. See paragraph 5 for Minimum loads.

Minimum Price Cutstock Plasterboard delivered by truck to Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne Counties, N. Y.: 1/4" and 3/8" thicknesses $14.50 per M sq. ft. This price does not apply to 32" x 48" board. See paragraph 5 for minimum loads.

(2) Metropolitan New York-New Jersey Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to New York City, also Westchester, Rockland and Nassau and Suffolk Counties, N. Y., also following counties in New Jersey; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean counties. See paragraph 5 for minimum loads.

(3) Philadelphia Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Bucks, Montgomery, Chester, Delaware, and Philadelphia counties, Pa. and Camden County, N. J. See paragraph 5 for minimum loads.

(4) Boston Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's
10066 warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk county, Mass., Rockingham and

Strafford Counties, New Hampshire; York county, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to York County line. See paragraph 5 for minimum loads.

†(5) Minimum Quantities. (Applying to paragraphs 1, 2, 3 and 4 above) 5000 sq. ft. gypsum board and/or lath to one destination only, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

(6) Fort Dodge (Iowa) Trucking Area. Minimum price wallboard and/or plasterboard delivered by truck dealer's warehouse add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story Counties, Iowa.

†(7) Refer to Board License Bulletin No. 1 for differentials applicable on odd sizes and on sales to contractors, roofing contractors and metal ceiling contractors. (Note: Sales to roofing contractors are for specific roof jobs only.)

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10067 Norfolk county, Mass., Rockingham and Strafford Counties, New Hampshire; York County, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to the York County line. See paragraph 5 for Minimum loads.

†(5) Minimum Quantities. (Applying to paragraphs 1, 2, 3 and 4 above) 5,000 sq. ft. gypsum board and/or lath to one destination only. Minimum mixed load 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included. Only those materials taking regular straight or

mixed carload plaster and board rates may be included with gypsum board and/or lath to make 7½ ton minimum. Delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Exception (Applying to Metropolitan New York-New Jersey Area only): In mixed truckloads containing minimum 5,000 sq. ft. gypsum board and/or lath products, the 7½ ton minimum need not apply.

(6) Fort Dodge (Iowa) Trucking Area. Minimum price wallboard and/or plasterboard delivered by truck to dealers' warehouse add $3.00 per M ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.: only those materials taking regular straight or mixed carload plaster and board rates may be included with gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pochahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story Counties, Iowa.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10068 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 25, 1934

Board Prices, Delivered by Truck to Dealers' Warehouses.

Board License Bulletin No. 3—Cancels Bulletin No. 3 dated February 4, 1933, and Supplement to Board License Bulletin, dated April 1, 1933.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective May 31, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent

number 1,500,452 and Hite patent number 1,230,297, are as follows:

†(1) Northwestern New York State, as follows: Erie (including the town of Gowanda, New York), Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, and Livingston counties, New York. Minimum price wallboard and/or plasterboard delivered by truck to dealers' warehouse, add $2.00 per M to f.o.b. Oakfield prices shown in bulletin #1. See Paragraph 5 for Minimum loads.

†(2) Metropolitan New York-New Jersey. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to New York City, also Westchester, Rockland and Nassau and Suffolk counties, N. Y., also following counties in New Jersey; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties. See Paragraph 5 for Minimum loads.

†(3) Philadelphia. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Bucks, Montgomery, Chester, Delaware, and Philadelphia counties, Pa. and Camden County, N. J. See Paragraph 5 for Minimum loads.

†(4) Boston. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk, and Norfolk counties, Mass., Rockingham and Strafford Counties, New Hampshire; York County, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to the York County line. See Paragraph 5 for Minimum loads.

†(5) Minimum Quantities. (Applying to paragraph 1, 2, 3, and 4 above) 5,000 sq. ft. gypsum board and/or lath to one destination only. Minimum mixed load 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included. Only those materials taking regular straight or
10070 mixed carload plaster and board rates may be included with gypsum board and/or lath to make 7½ ton minimum. Delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies.

(6) Fort Dodge (Iowa) Trucking Area. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse and $3.00 per M ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story Counties, Iowa.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10069 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 4, 1933

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3

Board Prices, Delivered by Truck to Dealers' Warehouses.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Northwestern New York State, as follows: Erie, (including the part of Gowanda, New York, in Cattaraugus County), Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, and Livingston counties, New York. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to f.o.b. Oakfield prices shown in bulletin #1. See paragraph 5 for Minimum loads.

No carload quantities delivered by truck except at the single truckload price.

(2) Metropolitan New York-New Jersey. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to New York City, also Westchester, Rockland and Nassau counties, N. Y.; also Amityville, Huntington, and Cold Springs Harbor in Suffolk county; also following counties in New Jersey: Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties. See Paragraph 5 for Minimum loads.

(3) Philadelphia. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Bucks, Montgomery, Chester, Delaware, and Philadelphia countries, Pa. See Paragraph 5 for Minimum loads.

(4) Boston. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk, and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county lying north of the continuation of the southern boundary of Norfolk county, Mass., Rockingham and Strafford Counties, New
10071 Hampshire; York County, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to the York County line.

(5) Minimum Quantities. 5,000 sq. ft. gypsum board and/or lath to one destination only. Minimum mixed load (gypsum board and/or lath and other gypsum materials). 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included. Delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies.

These minimums apply to paragraphs 1, 2, 3, and 4 above.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10072 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 10, 1933.

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3—Board Prices, Delivered by Truck to Dealers' Warehouses.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Northwestern New York State, as follows: Erie, (including part of Gowanda, N. Y., in Cattaraugus County) Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, and Livingston counties, New York, Minimumprice wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to f.o.b. Oakfield prices shown in bulletin #1. See Paragraph 5 for Minimum loads.

No carload quantities delivered by truck except at the single truckload price.

Minimum price for truck deliveries is carload delivered price plus $2.00 per M sq. ft. for following counties: Chautauqua, Cattaraugus, Alleghany, Steuben, Schuyler, Yates, Chemung, Tompkins, and Cayuga. See paragraph 5 for Minimum loads.

(2) Metropolitan New York-New Jersey. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to New York City, also Westchester, Rockland and Nassau counties, N. Y.; also Amityville, Huntington, and Cold Springs Harbor in Suffolk county; also following counties in New Jersey: Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties. See Paragraph 5 for Minimum loads.

(3) Philadelphia. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Bucks, Montgomery, Chester, Delaware, and Philadelphia counties, Pa. See Paragraph 5 for Minimum loads.

10073 (4) Boston. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk, and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county lying north of the continuation of the southern coundary of Norfolk county, Mass., and Rockingham.†

(5) Minimum Quantities. 5,000 sq. ft. gypsum board and/or lath to one destination only. Minimum mixed load (gypsum board and/or lath and other gypsum materials), 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included. Delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies.

These minimums apply to paragraphs 1, 2, 3, and 4 above.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10074 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 21, 1932.

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3—Board Prices, Delivered by Truck to Dealers' Warehouses.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you

and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Northwestern New York State, as follows: Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, and Livingston counties, New York, Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to f.o.b. Oakfield prices shown in bulletin #1. See Paragraph 5 for Minimum loads.

No carload quantities delivered by truck except at the single truckload price. Minimum price for truck deliveries is carload delivered price plus $2.00 per M sq. ft. for following counties: Chautauqua, Cattaraugus, Alleghany, Steuben, Schuyler, Yates, Chemung, Tompkins, and Cayuga. See paragraph 5 for Minimum loads.†

(2) Metropolitan New York-New Jersey. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to New York City, also Westchester, Rockland and Nassau counties, N. Y.; also Amityville and Cold Springs Harbor in Suffolk county; also following counties in New Jersey: Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth and Ocean counties. See Paragraph 5 for Minimum loads.

(3) Philadelphia. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Bucks, Montgomery, Chester, Delaware, and Philadelphia counties, Pa. See paragraph 5 for Minimum loads.

10075 (4) Boston. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk, and Norfolk counties, Mass., the town of Mansfield, Mass., and that portion of Plymouth county lying north of the continuation of the southern boundary of Norfolk county.

(5) Minimum Quantities. 5,000 sq. ft. gypsum board and/or lath to one destination only. Minimum mixed load

(gypsum board and/or lath and other gypsum materials), 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included. Delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies.

These minimums apply to paragraphs 1, 2, 3, and 4 above.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† -Indicates change in this reissue.

10076 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 22, 1932.

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3—Board Prices, Delivered by Truck to Dealers' Warehouses.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Northwestern New York State, as follows: Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, and Livingston counties, New York. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to f.o.b. Oakfield prices shown in bulletin #1. See Paragraph 5 for Minimum loads.

No carload quantities delivered by truck except at the single truckload price.

†Minimum price for truck deliveries is carload delivered price, for following counties: Chautauqua, Cattaraugus, Allegany, Steuben, Schuyler, Yates, Chemung, Tompkins, and Cayuga. See Paragraph 5 for Minimum loads.

(2) Metropolitan New York-New Jersey. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applied to New York City, also Westchester, Rockland and Nassau counties, N. Y.; also Amityville and Cold Springs Harbor in Suffolk county; also following counties in New Jersey: Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties. See Paragraph 5 for Minimum loads.

(3) Philadelphia. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Bucks, Montgomery, Chester, Delaware, and Philadelphia counties, Pa. See Paragraph 5 for Minimum loads.

(4) Boston. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's ware-
10077 house or nearest siding. This applies to Essex, Middlesex, Suffolk, and Norfolk counties, Mass., the town of Mansfield, Mass.; and that portion of Plymouth county lying north of the continuation of the southern boundary of Norfolk county.

(5) Minimum Quantities. 5,000 sq. ft. gypsum board and/or lath to one destination only. Minimum mixed load (gypsum board and/or lath and other gypsum materials), 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included. Delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies.

These minimums apply to paragraphs, 1, 2, 3, and 4 above.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates changes in this reissue.

10078 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 12, 1932.

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3 and Supplements—Board Prices, Delivered by Truck to Dealers' Warehouses.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

(1) Northwestern New York State, as follows: Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, and Livingston counties, New York. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to f.o.b. Oakfield prices shown in bulletin #1. See Paragraph 5 for Minimum loads.

Minimum price for truck deliveries is carload delivered price, for following counties: Chautauqua, Cattaraugus, Allegany, Steuben, Schuyler, Yates, and Cayuga. See Paragraph 5 for minimum loads.

No carload quantities delivered by truck except at the single truckload price.

(2) Metropolitan New York-New Jersey. Minimum price wallboard and/or plasterboard delivered by truck to dealear's warehouse is same as delivered price by rail in mixed cars. This applied to New York City, also Westchester, Rockland and Nassau counties, N. Y.; also Amityville and Cold Springs Harbor in Suffolk county; also following counties in New Jersey: Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, and Ocean counties. See Paragraph 5 for minimum loads.

(3) Philadelphia. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Bucks, Montgomery, Chester, Delaware, and Philadelphia counties, Pa. See Paragraph 5 for Minimum loads.

(4) Boston. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex,
10079 Suffolk, and Norfolk counties, Mass., the town of Mansfield, Mass., and that portion of Plymouth county lying north of the continuation of the southern boundary of Norfolk county.

(5) Minimum Quantities. 5,000 sq. ft. gypsum board and/or lath to one destination only. Minimum mixed load (gypsum board and/or lath and other gypsum materials), 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included. Delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies.

These minimums apply to paragraphs 1, 2, 3, and 4 above.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10080 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 27, 1932.

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3—Board Prices, Delivered by Truck to Dealers' Warehouses.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum price board delivered in straight or mixed truckloads to dealer's warehouse (Minimum straight load board 5000 sq. ft.; minimum mixed load 7½ tons) into areas described below is regular carload delivered price plus

$2.00 per M sq. ft. for wallboard and plus $1.00 per M sq. ft. for plasterboard. This applies only to those materials taking regular straight or mixed-car plaster and board rates; and to truckloads delivered to one destination.

Boston: Essex, Middlesex, Suffolk, and Norfolk Counties, Massachusetts.

Minimum price board delivered in straight truckloads of not less than 5000 sq. ft. to dealer's warehouse into areas described below is regular carload delivered price.

Minimum price of board delivered to dealer's warehouse in mixed truckloads of not less than 7½ tons into area described below is regular carload delivered price. This applies only to those materials taking regular straight or mixed carload plaster and board rates; and to truckloads delivered to one destination.

Buffalo: Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Livingston, Chautaugua, Cattaraugus, Allegany, Steuben, Schuyler, Yates, and Cayuga counties, New York.[1]

Metro. N. Y. Area (Consisting of the Bronx, Manhattan, Queens, Brooklyn, Richmond) also Westchester, Rockland and Nassau Counties, N. Y.; also Amityville and Cold Springs Harbor in Suffolk County.

New Jersey—Following Counties; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset and Monmouth.

10081 Philadelphia: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pa.

Board delivered by truck, carload quantities (Straight or Mixed Cars) into area described below:

The minimum price of gypsum board included in carload quantities (minimum 40,000 lbs. in truckloads to single destination within 48 hours) delivered by truck into area described below shall be the regular carload delivered price. This applies only to those materials taking regular straight or mixed car plaster and board rates from Oakfield:

Following Counties in New Jersey: Sussex, Warren, Hunterdon and Camden.

Following County in New York: Suffolk.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing

before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice-President in Charge of Sales.

† Indicates changes in this reissue.

CFH'

10082 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 24, 1931.

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3—Board Prices, Delivered by Truck to Dealers' Warehouses.

American A R Black (John A. Kling, Pres.)
Universal Eugene Holland
Certainteed C. O. Brown (cc—Warren Henley)
Atlantic W. P. Fuller (cc—L. I. Neale)
Ebsary Geo. N. Lenci (cc—Fred Ebsary)
National M. N. Baker
Kelley Plas. Bd. Co. S. J. Kelley

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum price board delivered in straight or mixed truckloads to dealer's warehouse (minimum straight load board 5000 sq. ft.; minimum mixed load 7½ tons) into areas described below is regular carload delivered price plus $2.00 per M sq. ft. for wallboard and plus $1.00 per M sq. ft. for plasterboard. This applies only to those materials taking regular straight or mixed-car plaster and board rates; and to truckloads delivered to one destination.

Boston: Essex, Middlesex, Suffolk, and Norfolk Counties, Massachusetts.

Detroit: Wayne, Oakland, and Macomb Counties, Michigan.

Minimum price board delivered in straight truckloads of not less than 5000 sq. ft. to dealer's warehouse into areas described below is regular carload delivered price.

Minimum price of board delivered to dealer's warehouse in mixed truckloads of not less than 7½ tons into area described below is regular carload delivered price. This applies only to those materials taking regular straight or mixed carload plaster and board rates; and to truckloads delivered to one destination.

Buffalo: Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming and Livingston counties, N. Y.†

Metro. N. Y. Area (Consisting of the Bronx, Manhattan, Queens, Brooklyn, Richmond) also Westchester, Rockland and Nassau Counties, N. Y.; also Amityville and Cold Springs Harbor in Suffolk County.

New Jersey—Following Counties; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset and Monmouth.

10083 Philadelphia: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pa.

Board delivered by truck, carload quantities (Straight or Mixed Cars) into area described below:

The minimum price of gypsum board included in carload quantities (minimum 40,000 lbs. in truckloads to single destination within 48 hours) delivered by truck into area described below shall be the regular carload delivered price. This applies only to those materials taking regular straight or mixed car plaster and board rates from Oakfield.

Following Counties in New Jersey: Sussex, Warren, Hunterdon and Camden.

Following County in New York: Suffolk.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually re-

ceived and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice-President in Charge of Sales.

† Indicates changes in this reissue.

CFH'

10084 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 2, 1931.

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3—Board Prices, Delivered by Truck to Dealers' Warehouses.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum price board delivered in straight or mixed truckloads to dealer's warehouse (Minimum straight load board 5000 sq. ft.; minimum mixed load 7½ Tons) into areas described below is regular carload delivered price plus $2.00 per M sq. ft. for wallboard and plus $1.00 per M sq. ft. for plasterboard. This applies only to those materials taking regular straight or mixed-car plaster and board rates; and to truckloads delivered to one destination.

Boston: Essex, Middlesex, Suffolk, and Norfolk Counties, Massachusetts.

Detroit: Wayne, Oakland, and Macomb Counties, Michigan.

Minimum price board delivered in straight truckloads of not less than 5000 sq. ft. to dealer's warehouse into areas described below is regular carload delivered price.

Minimum price of board delivered to dealer's warehouse in mixed truckloads of not less than 7½ tons into area described below is regular carload delivered price. This applies only to those materials taking regular straight or mixed carload plaster and board rates; and to truckloads delivered to one destination.

Buffalo: Erie, Niagara, Orleans, Genesee, and Monroe counties, N. Y.

Metro. N. Y. Area. (Consisting of the Bronx, Manhattan, Queens, Brooklyn, Richmond) also Westchester, Rockland and Nassau Counties, N. Y.; also Amityville and Cold Springs Harbor in Suffolk County.

New Jersey—Following Counties; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset and Monmouth.†

Philadelphia: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pa.

10085 Board delivered by truck, carload quantities (Straight or Mixed Cars) into area described below:

The minimum price of gypsum board included in carload quantities (minimum 40,000 lbs. in truckloads to single destination within 48 hours) delivered by truck into area described below shall be the regular carload delivered price. This applies only to those materials taking regular straight or mixed car plaster and board rates from Oakfield.

Following Counties in New Jersey: Sussex, Warren, Hunterdon and Camden.†

Following County in New York: Suffolk.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing

before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice-President in Charge of Sales.

† Indicates changes in this reissue.

CFH'

10086

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 18, 1931.

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3—Board Prices, Delivered by Truck to Dealers' Warehouses.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvement set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum price board delivered in straight or mixed truckloads to dealer's warehouse (Minimum straight load board 5000 sq. ft.; minimum mixed load 7½ Tons) into areas described below is regular carload delivered price plus $2.00 per M sq. ft. for wallboard and plus $1.00 per M sq. ft. for plasterboard. This applies only to those materials taking regular straight or mixed-car plaster and board rates; and to truckloads delivered to one destination.†

Boston: Essex, Middlesex, Suffolk, and Norfolk Counties, Massachusetts.

Detroit: Wayne, Oakland, and Macomb Counties, Michigan.

Minimum price board delivered in straight truckloads of not less than 5000 sq. ft. to dealer's warehouse into areas described below is regular carload delivered price.

Minimum price of board delivered to dealer's warehouse in mixed truckloads of not less than 7½ tons into area described below is regular carload delivered price. This applies only to those materials taking regular straight or mixed carload plaster and board rates; and to truckloads delivered to one destination.

Buffalo: Erie, Niagara, Orleans, Genesee, and Monroe counties, N. Y.†

Metro. N. Y. Area. (Consisting of the Bronx, Manhattan, Queens, Brooklyn, Richmond) also Westchester, Rockland and Nassau Counties, N. Y.; also Amityville and Cold Springs Harbor in Suffolk County.†

New Jersey—Following Counties: Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex.†

Philadelphia: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pa.†

10087 Board delivered by truck, carload quantities (Straight or Mixed Cars) into area described below:

The minimum price of gypsum board included in carload quantities (minimum 40,000 lbs. in truckloads to single destination within 48 hours) delivered by truck into area described below shall be the regular carload delivered price. This applies only to those materials taking regular straight or mixed car plaster and board rates from Oakfield.

Following Counties in New Jersey: Sussex, Warren, Hunterdon, Mercer, Somerset and Camden.†

Following County in New York: Suffolk.†

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually

received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice-President in Charge of Sales.

† Indicates changes in this reissue.

CFH'

10088 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 27, 1931

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3—Board Prices, Delivered by Truck to Dealers' Warehouses

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum price board delivered in straight or mixed truckloads to dealer's warehouse (Minimum load 7½ tons) into areas described below is regular carload delivered price plus $2.00 per M sq. ft. for wallboard and plus $1.00 per M sq. ft. for plasterboard. This applies only to those materials taking regular straight or mixed-car plaster and board rates: and to truckloads delivered to one destination. (1/4" Plasterboard same price as 3/8" Plasterboard delivered truckloads).

Boston: Essex, Middlesex, Suffolk, and Norfolk Counties, Massachusetts.

Philadelphia: Bucks, Montgomery, Chester, Delaware, and Philadelphia Counties, Pa.

Detroit: Wayne, Oakland, and Macomb, Counties, Michigan.

Buffalo: Niagara and Erie Counties, New York.

Minimum price board delivered in straight or mixed truckloads to dealer's warehouse.(Minimum load 7½ tons) into areas described below is regular carload delivered price this applies only to those materials taking regular straight or mixed-car plaster and board rates; and to truckloads delivered to one destination. (1/4" Plasterboard same prices as 3/8" Plasterboard delivered truckloads).†

Metro. N. Y. Area (Consisting of the Bronx, Manhattan, Queens, Brooklyn, Richmond); also Nassau, Westchester and Rockland Counties, N. Y.†

New Jersey—Following Counties: Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Monmouth, and Somerset.

10090 Board delivered by truck, carload quantities (Straight or Mixed Cars) into area described below:†

The minimum price of gypsum board included in carload quantities (minimum 40,000 lbs. in truckloads to single destination within 48 hours) delivered by truck into area described below shall be the regular carload delivered price. This applies only to those materials taking regular straight or mixed car plaster and board rates from Oakfield.

Following Counties in New Jersey: Sussex, Warren, Hunterdon, Mercer, Ocean, Burlington, Camden, Atlantic, Gloucester, Salem, Cumberland, and Cape May.†

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually

received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice-President in Charge of Sales.

† Indicates changes in this reissue.
CFH'

SEPTEMBER 4, 1931.

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3—Board Prices, Delivered by Truck to Dealers' Warehouses.

MR. S. J. KELLEY, Pres.,
Kelley Plasterboard Co.,
Delawanna, New Jersey.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum price board delivered in straight or mixed truckloads to dealer's warehouse (Minimum load 7½ tons) into areas described below is regular carload delivered price plus $2.00 per M sq. ft. for wallboard and plus $1.00 per M sq. ft. for plasterboard. This applies only to those materials taking regular straight or mixed-car plaster and board rates: and to truckloads delivered to one destination. (1/4" Plasterboard same price as 3/8" Plasterboard delivered truckloads).

Boston: Essex, Middlesex, Suffolk, and Norfolk Counties, Massachusetts.

Detroit: Wayne, Oakland, and Macomb Counties, Michigan.

Buffalo: Niagara and Erie Counties, New York;

Minimum price board delivered in straight truckloads of not less than 5000 sq. ft. to dealer's warehouse into areas described below is regular carload delivered price.

Minimum price of board delivered to dealer's warehouse in mixed truckloads of not less than 7½ tons into area described below is regular carload delivered price. This applies only to those materials taking regular straight or mixed carload plaster and board rates; and to truckloads delivered to one destination. (See Exception* Phila.)

1/4" Plasterboard same price as 3/8" Plasterboard delivered truckloads.

Metro. N. Y. Area (Consisting of the Bronx, Manhattan, Queens, Brooklyn, Richmond) also Nassau, Westchester and Rockland Counties, N. Y.

10089 New Jersey—Following Counties: Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Monmouth, and Somerset.

*Philadelphia—Bucks, Montgomery, Chester, Delaware, and Philadelphia Counties, Pa.

*Exception—Minimum mixed load 5 tons.

Board delivered by truck, carload quantities (Straight or Mixed Cars) into area described below:

The minimum price of gypsum board included in carload quantities (minimum 40,000 lbs. in truckloads to single destination within 48 hours) delivered by truck into area described below shall be the regular carload delivered prices. This applies only to those materials taking regular straight or mixed car plaster and board rates from Oakfield.

Following Counties in New Jersey: Sussex, Warren, Hunterdon, Mercer, Ocean, Burlington, Camden, Atlantic, Gloucester, Salem, Cumberland, and Cape May.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice-President in Charge of Sales.....

† Indicates change in this reissue.

CFH:CH

10091 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 25, 1931.

Board License Bulletin No. 3—Cancels Previous Bulletin No. 3—Board Prices, Delivered by Truck to Dealers' Warehouses

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective June 1st, 1931, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum price board delivered in mixed truckloads to dealer's warehouse (Minimum load 7½ Tons) into areas described below is regular carload delivered price plus $2.00 per M sq. ft. for wallboard and plus $1.00 per M sq. ft. for plasterboard. This applies only to those materials taking regular straight or mixed-car plaster and board rates; and to truckloads delivered to one destination. (1/4" Plasterboard same price as 3/8" Plasterboard delivered truckloads).

Metro. N. Y. Area (consisting of the Bronx, Manhattan, Queens, Brooklyn, Richmond); Nassau and Westchester counties, N. Y.

New Jersey—Following counties; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Monmouth, and Somerset.†

Boston: Essex, Middlesex, Suffolk, and Norfolk counties, Massachusetts.†

Philadelphia: Bucks, Montgomery, Chester, Delaware, and Philadelphia counties, Pa.†

Detroit: Wayne, Oakland, and Macomb, counties, Michigan.†

Buffalo: Niagara and Erie counties, N. Y.

Board delivered by truck, carload quantities (Straight or Mixed Car), Metro. N. Y. and area described below:

The minimum price of gypsum board included in carload quantities (minimum 40,000 lbs. in truckloads to single destination within 48 hours) delivered by truck into area described below shall be the regular carload delivered price. This applies only to those materials taking regular straight or mixed car plaster and board rates from Oakfield.

10092 Area: Metro. New York (Consisting of Bronx, Manhattan, Queens, Brooklyn, and Richmond); New York Counties: Nassau, Westchester, and Rockland.

New Jersey: Entire State.

Prices shall apply to all shipments made after June 1st except only upon bona fide orders actually received and accepted by you at your home office in writing before June 1st and shipped by you within ten days after June 1st.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice-President in Charge of Sales.

CFH'

10093 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 21, 1931.

Board License Bulletin No. 3—Board Prices, Delivered by Truck to Dealers' Warehouses

American A. R. Black (John A. Kling, Pres.)
Universal Eugene Holland
Certainteed C. O. Brown (cc—Warren Henley)
Atlantic W. P. Fuller (cc—L. I. Neale)
Ebsary Geo. N. Lenci (cc—Fred Ebsary)
National M. N. Baker
Kelley Plas. Bd. Co. S. J. Kelley

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices now in effect at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum price board delivered to dealer's warehouse (Minimum load 7½ Tons) into specific areas described below is regular carload delivered price plus $2.00 per M sq. ft. for wallboard and plus $1.00 per M sq. ft. for plasterboard: (1/4" Plasterboard same price as 3/8" Plasterboard delivered truckloads)

Boston: Essex, Middlesex, Suffolk, and Norfolk counties, Massachusetts.

Philadelphia: Bucks, Montgomery, Chester, Delaware, and Philadelphia counties, Pa.

Detroit: Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Buffalo: Niagara and Erie counties, N. Y.

Minimum price board delivered in mixed truckloads to dealer's warehouse (Minimum load 7½ Tons) into areas

described below is regular carload delivered price plus $2.00 per M sq. ft. for wallboard and plus $1.00 per M sq. ft. for plasterboard. This applies only to those materials taking regular straight or mixed-car plaster and board rates from Oakfield; and to truckloads delivered to one destination. (1/4" Plasterboard same price as 3/8" Plasterboard delivered truckloads)

Metro. N. Y. Area (consisting of the Bronx, Manhattan, Queens, Brooklyn, Richmond); Nassau and Westchester Counties, N. Y.

10094 New Jersey—Following counties and towns: Counties; Hudson, Essex, Union, Bergen, Passaic, and Morris.

Following towns in Middlesex county; N. J.:

Avenel	Sewaren	Perth Amboy	New Market
Cartaret	South River	Roosevelt	Nixon
Cheesequake	Highland Park	South Amboy	Oak Tree
Chrome	Iselin	Stelton	Oldbridge
Dunellin	Keasbey	Metucheon	Saysville
Fords	Lincoln	Middlesex	So. Plainfield
Parlin	Maurer	Milltown	Woodbridge
Port Reading	Menlo Park	New Brunswick	

Following towns in Monmouth County, N. J.: Matawan and Keyport.

Board delivered by truck, carload quantities (Straight or Mixed Car). Metro. N. Y. and area described below:

The minimum price of gypsum board included in carload quantities (minimum 40,000 lbs. in three truckloads to single destination within 48 hours) delivered by truck into area described below shall be the regular carload delivered price. This applies only to those materials taking regular straight or mixed car plaster and board rates from Oakfield.

Area: Metro. New York (consisting of Bronx, Manhattan, Queens, Brooklyn, and Richmond):

New York Counties: Nassau, Westchester, and Rockland.

New Jersey—Entire State.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually

received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

This bulletin cancels all previous bulletins.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice-President in Charge of Sales.

CFH'

10095 *Government's Exhibit No. 36*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1939.

Application of Prices—Board License Bulletin No. 4 (Page 1)—Cancels Bulletin No. 4 Dated June 12, 1937

C. N. NEWMAN

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patente under which you are licensed (not including applications for letters patent), are as follows:

The minimum prices named in Bulletins 1, 2 and 3 apply (except where otherwise specified) to sales of patented gypsum board products in sizes suitable for use in construction and regularly manufactured and offered for sale for use in construction, which products are sometimes referred to herein as standard size products. Such sizes are now as follows:

Thickness & Width	Lengths
(1) Square Edge Wallboard	
1/4" x 32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8" x 32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2" x 32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2" x 36"	8'-9' and 10'

(2) T&G Edge Wallboard

1/2" x 36" or 48"..... 8'-9' and 10'

(3) T&G Edge Sheathing

1/2" x 24".....6' 8" and 8'

(4) Plaster Lath

3/8" x 16".....32"-36" and 48"
1/2" x 16".....32"-36" and 48"

(5) Liner Board

1/4" x 24".....32" and48"
1/4" x 32".....36"
1/4" x 32".....48" (Grey surfaced and round edged)
3/8" x 24".....32" and48"
3/8" x 32".....36"
3/8" x 32".....48" (Grey surfaced and round edged)
1/2" x 24".....32" and 48"
1/2" x 32".....36"
1/2" x 32".....48" (Grey surfaced and round edged)

(6) Special Liner Board for Use on Specific Roof Jobs

3/8" x 32" or 36".....48"
1/2" x 32" or 36".....48"

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10096 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 12, 1937.

Board License Bulletin No. 4—(Page 1)—Cancels Page 1
Dated May 7, 1937.

MR. C. NEWMAN
Clerk,
General Sales.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective June 17, 1937 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452, are as follows:

Standard sizes are as follows:

Thickness & Width	Lengths
(1) Square Edge Wallboard:	
1/4" x 32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/4" x 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8" x 32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8" x 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2" x 32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2" x 36"	8'-9' and 10'
1/2" x 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/4" x 48"	4' and 8'.
(2) T&G Edge Wallboard:	
1/2" x 36"	8'-9' and 10'
1/2" x 48"	8'-9' and 10'
(3) T&G Edge Sheathing:	
1/2" x 24"	6' 8" and 8'

(4) Plaster Lath (may be either cutstock or grey surfaced and round edged):

3/8" x 16"..... 32"-36" and 48"
1/2" x 16"..... 32"-36" and 48"

(5) Liner Board (may be either cutstock or grey surfaced and round edge unless otherwise indicated).

1/4" x 24"..... 32" and 48"
1/4" x 32"..... 36"
1/4" x 32"..... 48" (grey surfaced and round edged only)
3/8" x 24"..... 32" and 48"
3/8" x 32"..... 36"
3/8" x 32"..... 48" (grey surfaced and round edged only)
1/2" x 24"..... 32" and 48"
1/2" x 32"..... 36"
1/2" x 32"..... 48" (grey surfaced and round edged only)

(6) Special Liner Board for use on specific roof jobs only (may be either cutstock or grey surfaced and round edged):

3/8" x 32"..... 48"
3/8" x 36"..... 48"
1/2" x 32"..... 48"
1/2" x 36"..... 48"

10097 Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates changes in this reissue.

10098 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 7, 1937.

Board License Bulletin No. 4—(Page 1)—Cancels Page 1 Dated February 24, 1937.

C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective May 11, 1937 the

minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes are as follows:

Thickness & Width	Lengths
(1) Square Edge Wallboard:	
1/4" x 32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/4" x 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
5/16" x 32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
5/16" x 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8" x 32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8" x 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2" x 32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2" x 36"	8'-9' and 10'
1/2" x 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/4" x 48"	4' and 8'
(2) T&G Edge Wallboard:	
1/2" x 36"	8'-9' and 10'
1/2" x 48"	8'-9' and 10'
(3) T&G Edge Sheathing:	
1/2" x 24"	6' 8" an 8'
(4) Plaster Lath (may be either cutstock or grey surfaced and round edged):	
3/8" x 16"	32"-36" and 48"
†1/2" x 16"	32"-36" and 48"
(5) Liner Board (may be either cutstock or grey surfaced and round edge unless otherwise indicated).	
1/4" x 24"	32" and 48"
1/4" x 32"	36"

† Indicates change.

10099 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1937.

Board License Bulletin No. 4—Cancels Bulletin No. 4 Dated March 3, 1936.

C. N. NEWMAN
Ofc

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 1, 1937 the minimum prices at which you may sell gypsum wall board and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite number 1,230,297, are as follows:

Standard sizes are as follows:

Thickness & Width	Lengths
(1) Square Edge Wallboard:	
1/4" x 32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/4" x 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
5/16" x 32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
5/16" x 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8" x 32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8" x 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2" x 32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2" x 36"	8'-9' and 10'
1/2" x 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/4" x 48"	4' and 8'.
(2) T&G Edge Wallboard:	
1/2" x 36"	8'-9' and 10'
1/2" x 48"	8'-9' and 10'
(3) T&G Edge Sheathing:	
1/2" x 24"	6' 8" and 8'
(4) Plaster Lath (may be either cutstock or grey surfaced and round edged):	
3/8" x 16"	32" 36" and 48"

†(5) Liner Board (may be either cutstock or grey surfaced and round edge unless otherwise indicated).

	1/4" x 24"	32" and 48"	
	1/4" x 32"	36"	
10100	1/4" x 32"	48"	(grey surfaced and round edged only)
	3/8" x 24"	32" and 48"	
	3/8" x 32"	36"	
	3/8" x 32"	48"	(grey surfaced and round edged only)
	1/2" x 24"	32" and 48"	
	1/2" x 32"	36"	
	1/2" x 32"	48"	(grey surfaced and round edged only)

†(6) Special Liner Board for use on specific roof jobs only (may be either cutstock or grey surfaced and round edged):

3/8" x 32"	48"
3/8" x 36"	48"
1/2" x 32"	48"
1/2" x 36"	48"

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates changes in this reissue.

10101 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 3, 1936

Board License Bulletin No. 4—Cancels Bulletin No. 4—Dated February 22, 1936.

DEAR SIRS; Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes of patented gypsum wallboard and plasterboard are as follows: (Minimum prices on patented board and lath apply on standard sizes only).

(1) for 1/4"—3/8"—1/2" Thicknesses Lath (or Cutstock) and Square Edge Wallboard:

Lengths:	32"	36"	48"	5'	6'	7'	8'	9'	10'	11'	12'
Widths:											
16"	L	L	L	—	—	—	—	—	—	—	—
24"	L	—	L**	—	—	—	—	—	—	—	—
32"	—	L	W#	W	W	W	W	W	W	W	W
†36"	—	—	W#	—	—	—	W*	W*	W*	—	—
48"	—	—	W	W	W	W	W	W	W	W	W

(2) for 5/16" Thickness Square Edge Wallboard: same as for 1/4"—3/8"—1/2" Square Edge Wallboard.

(3) for 5/16" Thickness Lath: 16" x 32" and 16" x 48" only. This item for shipment into markets as described in Bulletin No. 1 only.

(4) for 1/2" Thickness T&G Edge Sheathing: 24" wide x 6'8" and 8' only.

(5) for 1/2" Thickness T&G Edge Wallboard: 36" or 48" wide x 8', 9', & 10' only.

(6) for 3/4" Thickness Lath: 16" x 48" only.

(7) for 3/4" Thickness Square Edge Wallboard: 48" wide x 8', 9' and 10' only.

L Lath.

W Wallboard.

*† 36" Width Square Edge Wallboard in 8', 9' & 10' lengths is standard width for 1/2" thickness only.

** 24" x 48" Open Edge (Cutstock) Gypsum Board: Plasterboard price applies, except: (See Bulletins No. 1 & No. 2 for exceptions).

32" x 48" Gypsum Board: Wallboard price applies in all areas, except: (See Bulletins No. 1 & No. 2 for exceptions).

36" x 48" Gypsum Board: Wallboard price applies, except: (See Bulletins No. 1 and No. 2 for exceptions).

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10102 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 22, 1936

Board License Bulletin No. 4—Cancels Bulletin No. 4—Dated September 17, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes of patented gypsum wallboard and plasterboard are as follows: (Minimum prices on patented board and lath apply on standard sizes only).

(1) for 1/4"—3/8"—1/2" Thicknesses Lath (or Cutstock) and Square Edge Wallboard:

Lengths:	32"	36"	48"	5'	6'	7'	8'	9'	10'	11'	12'
Widths:											
16"	L	L	L	—	—	—	—	—	—	—	—
24"	L	—	L*	—	—	—	—	—	—	—	—
32"	—	L	W#	W	W	W	W	W	W	W	W
36"	—	—	W#	—	—	—	W	W	W	—	—
48"	—	—	W	W	W	W	W	W	W	W	W

(2) for 5/16" Thickness Square Edge Wallboard: same as for 1/4"—3/8"—1/2" Square Edge Wallboard.

(3) for 5/16" Thickness Lath: 16" x 32" and 16" x 48" only. This item for shipment into markets as described in Bulletin No. 1 only.

(4) for 1/2" Thickness T&G Edge Sheathing: 24" wide x 6'8" and 8' only.

(5) for 1/2" Thickness T&G Edge Wallboard: 36" or 48" wide x 8', 9', & 10' only.

(6) for 3/4" Thickness Lath: 16" x 48" only.

(7) for 3/4" Thickness Square Edge Wallboard: 48" wide x 8', 9' and 10' only.

L Lath.

W Wallboard.

* 24" x 48" Open Edge (Cutstock) Gypsum Board: Plasterboard price applies, except: (See Bulletins No. 1 and No. 2 for exceptions).

32" x 48" Gypsum Board: Wallboard price applies in all areas, except: (See Bulletins No. 1 and No. 2 for exceptions).

36" x 48" Gypsum Board: Wallboard price applies, except: (See Bulletins No. 1 and No. 2 for exceptions).

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10103 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 17, 1935.

Board License Bulletin No. 4—Cancels Bulletin No. 4—Dated May 17, 1935.

E. S. PITTS,
Office

DEAR SIR: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes of patented gypsum wallboard and plasterboard are as follows: (Minimum prices on patented board and lath apply on standard sizes only).

(1) for ¼"—3/8"—½" Thicknesses Lath (or Cutstock) and Square Edge Wallboard:

Lengths:	32"	36"	48"	5'	6'	7'	8'	9'	10'	11'	12'
Widths:											
16"	L	L	L	—	—	—	—	—	—	—	—
24"	L	—	L*	—	—	—	—	—	—	—	—
32"	—	L	W#	W	W	W	W	W	W	W	W
36"	—	—	W#	—	—	—	W	W	W	—	—
48"	—	—	W	W	W	W	W	W	W	W	W

(2) for 5/16" Thickness Square Edge Wallboard: same as for 1/4"—3/8"—1/2" Square Edge Wallboard.

(3) for 1/2" Thickness T&G Edge Sheathing: 24" wide x 6'8" and 8' only.

(4) for 1/2" Thickness T&G Edge Wallboard: 36" or 48" wide x 8', 9', and 10' only.

(5) for 3/4" Thickness Lath: 16" x 48" only.

(6) for 3/4" Thickness Square Edge Wallboard: 48" wide x 8', 9', and 10' only.

L Lath.

W Wallboard.

†* 24" x 48" Open Edge (Cutstock) Gypsum Board: Plasterboard price applies, except: (see Bulletins No. 1 and No. 2 for exceptions).

†# 32" x 48" Gypsum Board: Wallboard price applies in all areas, except: (See Bulletins No. 1 and No. 2 for exceptions).

†# 36" x 48" Gypsum Board: Wallboard price applies, except: (See Bulletins No. 1 and No. 2 for exceptions).

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this issue.

10104 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 17, 1935

Board License Bulletin No. 4—Cancels Bulletin No. 4—Dated April 26, 1935.

DEAR SIR: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard

and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes of patented gypsum wallboard and plasterboard are as follows: (Minimum prices on patented board and lath apply on standard sizes only).

(1) for 1/4"—3/8"—1/2" Thicknesses Lath (or Cutstock) and Square Edge Wallboard:

Lengths:	32"	36"	48"	5'	6'	7'	8'	9'	10'	11'	12'
Widths:											
16"	L	L	L	—	—	—	—	—	—	—	—
†24"	L	—	L*	—	—	—	—	—	—	—	—
32"	—	L	W#	W	W	W	W	W	W	W	W
36"	—	—	W#	—	—	—	W	W	W	—	—
48"	—	—	W	W	W	W	W	W	W	W	W

(2) for 5/16" Thickness Square Edge Wallboard: same as for 1/4"—3/8"—1/2" Square Edge Wallboard.

(3) for 1/2" Thickness T&G Edge Sheathing: 24" wide x 6'8" and 8' only.

(4) for 1/2" Thickness T&G Edge Wallboard: 36" or 48" wide x 8', 9' and 10' only.

(5) for 3/4" Thickness Lath: 16" x 48" only.

(6) for 3/4" Thickness Square Edge Wallboard: 48" wide x 8', 9', and 10' only.

L Lath.

W Wallboard.

†* 24" x 48" Open Edge (Cutstock) Gypsum Board: Plasterboard price applies, except (see Bulletin No. 1) for shipment of 1/4" and 3/8" thicknesses into states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama.

32" x 48" Gypsum Board: Wallboard price applies in all areas, except: (See Bulletin No. 1 for exceptions).

36" x 48" Gypsum Board: Wallboard price applies in all states, except to gypsum roofing contractors for use on specific gypsum roof jobs where plasterboard price applies.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this issue.

5082

10105 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 26, 1935

Board License Bulletin No. 4—Cancels Bulletin No. 4—Dated April 24, 1935.

DEAR SIR: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes of patented gypsum wallboard and plasterboard are as follows: (Minimum prices on patented board and lath apply on standard sizes only).

(1) for 1/4"—3/8"—1/2" Thicknesses Lath (or Cutstock) and Square Edge Wallboard:

Lengths:	32"	36"	48"	5'	6'	7'	8'	9'	10'	11'	12'
Widths:											
16"	L	L	L	—	—	—	—	—	—	—	—
24"	L	—	L	—	—	—	—	—	—	—	—
32"	—	L	W#	W	W	W	W	W	W	W	W
†36"	—	—	W#	—	—	—	W	W	W	—	—
48"	—	—	W	W	W	W	W	W	W	W	W

(2) for 5/16" Thickness Square Edge Wallboard: same as for 1/4"—3/8"—1/2" Square Edge Wallboard.

(3) for 1/2" Thickness T&G Edge Sheathing: 24" wide x 6'8" and 8' only.

(4) for 1/2" Thickness T&G Edge Wallboard: 36" or 48" wide x 8', 9' and 10' only.

(5) for 3/4" Thickness Lath: 16" x 48" only.

(6) for 3/4" Thickness Square Edge Wallboard: 48" wide x 8', 9' and 10' only.

L Lath.

W Wallboard

32" x 48" Gypsum Board: Wallboard price applies in all areas, except: (See Bulletin No. 1 for exceptions).

36" x 48" Gypsum Board: Wallboard price applies in all states, except to gypsum roofing contractors for use on specific gypsum roof jobs where plasterboard price applies.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10106 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 24, 1935.

Board License Bulletin No. 4—Cancels Bulletin No. 4—Dated September 5, 1933.

E. S. PITTS,
Office

DEAR SIR: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes of patented gypsum wallboard and plasterboard are as follows: (Minimum prices on patented board and lath apply on standard sizes only).

(1) for 1/4"—3/8"—1/2" Thicknesses Lath (or Cutstock) and Square Edge Wallboard:

Lengths:	32"	36"	48"	5'	6'	7'	8'	9'	10'	11'	12'
Widths:											
16"	L	L	L	—	—	—	—	—	—	—	—
24"	L	—	L	—	—	—	—	—	—	—	—
32"	—	L	W#	W	W	W	W	W	W	W	W
36"	—	—	W#	—	—	—	—	—	—	—	—
48"	—	—	W	W	W	W	W	W	W	W	W

(2) for 5/16" Thickness Square Edge Wallboard: same as for 1/4"—3/8"—1/2" Square Edge Wallboard.

(3) for 1/2" Thickness T&G Edge Sheathing: 24" wide x 6'8" and 8' only.

(4) for 1/2" Thickness T&G Edge Wallboard: 36" or 48" wide x 8', 9' and 10' only.

(5) for 3/4" Thickness Lath: 16" x 48" only.

(6) for 3/4" Thickness Square Edge Wallboard: 48" wide x 8', 9' and 10' only.

L Lath.

W Wallboard

32" x 48" Gypsum Board: Wallboard price applies in all areas, except: (See Bulletin No. 1 for exceptions).

36" x 48" Gypsum Board: Wallboard price applies in all states, except to gypsum roofing contractors for use on specific gypsum roof jobs where plasterboard price applies.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10107 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 5, 1933

Board License Bulletin No. 4—Cancels Previous Bulletin No. 4 of March 31, 1933

DEAR SIR; Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes (Minimum prices on patented board apply on standard sizes only)

Lengths:	32"	36"	48"	5'	6'	7'	8'	9'	10'	11'	12'
Widths:											
16"	L	L	L	—	—	—	—	—	—	—	—
24"	L	—	L	—	—	—	—	—	—	—	—
32"	—	L	W#	W	W	W	W	W	W	W	W
36"	—	—	W#	—	—	—	W*	W*	W*	—	—
48"	—	—	W	W	W	W	W	W	W	W	W

L Lath.

W Wallboard (Wallboard sizes other than these are special).

* Standard Size in 1/2" Tongue & Groove Only.

32" x 48" Gypsum Board: Wallboard price applies in all areas, except to gypsum roofing contractors for use on specific gypsum roof jobs where plasterboard price applies; and in the states of Illinois, Indiana, Ohio, Pennsylvania, New York, New Jersey, Kentucky, West Virginia and Lower Michigan, grey surfaced and round edged 32" x 48" board is subject to plasterboard price.

36" x 48" Gypsum Board: Wallboard price applies in all states, except to gypsum roofing contractors for use on specific gypsum roof jobs where plasterboard price applies.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10108 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 31, 1933.

Board License Bulletin No. 4—Cancels Previous Bulletin No. 4

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effectively immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes (Minimum prices on patented board apply on standard sizes only)

Wallboard: Thickness: 1/4", 3/8" and 3/4"
Width: 32" or 48"
Length: 4', 5', 6', 7', 8', 9', 10', 11', and 12'.

Thickness: 1/2"
Width: 24", 32", 36", and 48"
Length: 4', 5', 6', 7', 8', 9', 10', 11', and 12'.
Exception: 24" x 4' is a Plasterboard size.

Plasterboard: Dimensions: Thickness, 1/4", 3/8" and 1/2";

16" x 32"	16" x 36"
16" x 48"	24" x 48"
32" x 36"	# 36" x 48"
24" x 32"	# 48" x 32"

See bulletin 1, page 2, paragraphs 1 and 2.†

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10109 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 12, 1932

Board License Bulletin No. 4—Cancels Previous Bulletin No. 4

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices now in effect at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed

(not including applications for letters patent), including Haggerty patent number 1,500.452 and Hite patent number 1,230,297, are as follows:

Standard sizes (Minimum prices on patented board apply on standard sizes only)

Wallboard: Thickness: 1/4", 3/8" and 3/4"
Width: 32" or 48"
Length: 4', 5', 6', 7', 8', 9', 10', 11', and 12'.

Thickness: 1/2"
Width: 24", 32", 36", and 48"
Length: 4', 5', 6', 7', 8', 9', 10', 11', and 12'.

Plasterboard: Dimensions: Thickness, 1/4", 3/8" and 1/2";

16" x 32"	16" x 36"
16" x 48"	24" x 48"
32" x 36"	# 36" x 48"
24" x 32"	# 48" x 32"

Standard sizes for plasterboard in certain territories only.

Exception: (See bulletin 1 page 2 note *). 36" x 48" in any case is standard size for use on specific roof jobs only.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10110 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 28, 1931.

Board License Bulletin No. 4—Cancels Previous Bulletin No. 4

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices now in effect at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes (Minimum prices on patented board apply on standard sizes only)

Wallboard: Thickness: 1/4", 3/8" and 3/4"
Width, 32" or 48"
Length, 4', 5', 6', 7', 8', 9', 10', 11', and 12'.

Thickness: 1/2"
Width, 24", 32", 36", and 48".
Length, 4', 5', 6', 7', 8', 9', 10', 11' and 12'.

Plasterboard: Dimensions.

16" x 32"	48" x 32" Roof
16" x 48"	16" x 36"
32" x 36"	24" x 48"
24" x 32"	†

36" x 48" Plasterboard size for use on specific roof jobs only.
Thickness: 1/4", 3/8", and 1/2".

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President in Charge Sales.

† Indicates change in this revision.

C F H'

10111 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 21, 1931.

Board License Bulletin No. 4—Cancels Previous Bulletin No. 4.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices now in effect at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes (Minimum prices on patented board apply on standard sizes only)

Wallboard: Thickness: 1/4", 3/8" and 3/4"
Width, 32" or 48"
Length, 4', 5', 6', 7', 8', 9', 10', 11', and 12'.

Thickness: 1/2".†
Width, 24", 32", 36" and 48".†
Length, 4', 5', 6', 7', 8', 9', 10', 11' and 12'.

Plasterboard: Dimensions

16" x 32"	48" x 32"
16" x 48"	16" x 36"†
32" x 36"	24" x 48"†
24" x 32"	

Thickness: 1/4", 3/8", and 1/2".

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President in Charge Sales

† Indicates change in this reissue.

10112 UNITED STATES GYPSUM COMPANY

JULY 21, 1931,

Board License Bulletin No. 4—Cancels Previous Bulletin No. 4.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices now in effect at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Standard sizes (Minimum prices on patented board apply on standard sizes only)

Wallboard: Width, 32" or 48"
Length, 4', 5', 6', 7', 8', 9', 10', 11', and 12'.
Thickness: 1/4", 3/8" 1/2", and 3/4".

Plasterboard: Dimensions
16" x 32"
16" x 48"
32" x 36"
24" x 32"
48" x 32"
Thickness: 1/4", 3/8", and 1/2".

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice-President in Charge Sales.

CH

10113 *Government's Exhibit No. 37*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1939

Effective Date of Minimum Prices—Rebates—Board License Bulletin No. 5 (Page 1)—Cancels Bulletin No. 5—Dated February 24, 1937

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), are as follows:

Advances in Minimum Price.

In the event of an increase in the minimum prices of patented gypsum board products, the advanced minimum prices shall apply to all shipments made after the effective date of the price increase, except that in the following cases the minimum price shall be the minimum price in effect immediately prior to such increase:

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

(2) On sales of gypsum plaster lath to dealers for any specific job requiring not less than the minimum carload quantity of plaster lath (each building of a project to be considered as a separate specific job hereunder); and

On sales of gypsum wallboard or gypsum liner to gypsum roofing contractors for specific gypsum roof jobs; and

On sales of gypsum wallboard, gypsum sheathing or gypsum liner board to dealers for specific industrial housing projects; and

On sales of gypsum wallboard, gypsum sheathing or gypsum liner on direct bids to the federal government for specific federal government jobs;*

But only where the general contract for such specific job is awarded prior to the effective date of the price increase, or where the dealer (or contractor on specific roof jobs) has made a written quotation on such job prior to the effective date of the price increase, and providing the
10114 order is placed by such dealer or contractor and accepted by the licensee within 30 days, on private jobs, and 60 days on federal government jobs, after the effective date of the price increase.

(3) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee, prior to the effective date of price increase.

Decreases in Minimum Price

In the event of a decrease in the minimum prices of the patented gypsum board products, the new and lower minimum prices shall apply to all sales and shipments made after the effective date of the decrease in minimum price, including all orders for the patented gypsum board products on file at the time of decrease in minimum prices, and also shipments in transit; but licensee must be prepared to furnish licensor with satisfactory evidence of the fact that the shipment was actually in transit and not delivered when the price decrease became effective. Carrier's freight bill will be accepted as evidence of that fact.

Rebates, Allowances, Etc.

Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price by granting the customer rebates, unearned or unwar-

* Note: A Federal Government job is one where the Federal Government lets the contract to a general contractor or places an order directly with licensee.

ranted refunds, credits or discounts, by reducing the price of other products, by hiring customers' trucks, by granting allowances for advertising or other purposes, by splitting of salesmen's compensation or commissions with customers, by overshipment of patented products, by including board under the guise of dunnage, or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by licensee below such minimum price.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10115 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1937.

Conditions of Sale—Board License Bulletin No. 5
Cancels Bulletin No. 5 (Page 1)
Dated March 14, 1936

C. N. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective March 1, 1937 at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Duration of Quotations and Specific Job Protection Price Advances:

In the event of an increase in the minimum prices of patented gypsum board products, the advanced minimum price shall apply to all shipments made after the effective date of the price increase, except:

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase. Exception: Bona fide orders for discontinued types of patented gypsum board for dealers' stocks, received and accepted by you at your home office in writing with one week from date of discontinuance, for shipment within two weeks from the date of discontinuance, may be invoiced at minimum prices in effect at time of discontinuance.

(2) For gypsum plaster lath on any specific job requiring not less than a minimum carload quantity of plaster lath (28,600 sq. ft.), where the general contract for such specific job is awarded prior to the effective date of the price increase, or where the dealer has made a written quotation on such job prior to the effective date of the price increase, and providing order for gypsum plaster lath is immediately placed by dealer and accepted by licensee within 30 days on private jobs, 60 days on Federal Government jobs after the effective date of price increase. Each building of a project shall be considered as a separate specific job hereunder, subject to minimum requirement of carload quantity (28,600 sq. ft.) for each such building. Exception: Minimum quantity for each specific job on 5/16" plaster lath shall be 34,000 sq. ft.

(3) For gypsum wallboard or gypsum liner on specific gypsum roof jobs to gypsum roofing contractors on which the general contract is awarded prior to the effective date of the price increase, or on which contractor has made written quotation prior to the effective date of the price increase, and providing order for gypsum wallboard or gypsum liner is immediately placed by contractor
10116 and accepted by licensee within 30 days on private jobs, 60 days on Federal Government jobs after the effective date of price increase.

(4) (a) For gypsum wallboard and gypsum sheathing on direct bids to the federal government for specific federal government jobs on which the general contract is awarded prior to the effective date of price increase, or on which written bid is made by licensee prior to the effective date of price increase, provided order for gypsum wallboard or gypsum sheathing is immediately placed by the federal government and accepted by licensee within sixty days after the effective date of price increase.

(b) For gypsum wallboard, gypsum sheathing or gypsum liner board on specific industrial housing projects on which the general contract is awarded prior to the effective date of price increase, or on which the dealer has made a written quotation prior to the effective date of the price increase, and provided order for gypsum wallboard, gypsum sheathing or gypsum liner board is immediately placed by the dealer and accepted by licensee within thirty days from effective date of the price increase.

(5) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee, prior to the effective date of price increase.

Price Decreases:

In the event of a decrease in the minimum prices of patented gypsum board products, all orders on file shall be invoiced at the new and lower prices. Shipments in transit shall be invoiced at the reduced prices, provided carrier's expense bill is presented by customer, as evidence that shipment actually was in transit and not delivered when the price decrease became effective.

Federal Government Jobs

A Federal government job or contract is one where a department of the Federal government, as defined below, lets a contract direct to a general contractor, or where such a department of the Federal Government places an order directly with a licensee, such order being invoiced directly to such department for use solely and directly by such department.

The "Federal Government" as used herein shall mean the following departments of the Federal government.

1. Agricultural
2. Bureau of Indian Affairs
3. Coast Guard
4. Commerce
5. Interior
6. Justice
7. Labor
8. Marine Corps
9. Navy
10. Post Office

11. State (*) 14. War (Including CCC Camps)

(**)12. Treasury

13. Veterans' Bureau 15. District of Columbia

(*) CCC Camps:

(Gypsum Wallboard)

In areas where the Federal government carries out CCC Camp construction directly or by letting contract to a contractor to furnish both material and labor (such
10117 contractor is considered as the direct representative of the Federal government on the specific project being figured) the minimum price of gypsum wallboard direct to the Federal government or to such contractor under such conditions only for CCC Projects, in minimum carload quantities, is the dealer delivered price f.o.b. cars railhead delivery only.

Where less carload quantities of gypsum wallboard are required, or CCC Camp site delivery, any quantity, is requested, quotation will be made only through dealers.

(**) WPA Projects.

(a) State Projects. On purchases by or thru the State Procurement Division of the Treasury Department (to be invoiced direct to the Federal Government) for use on State WPA projects, the minimum quoted price of patented gypsum wallboard and/or lath, for shipment in carloads, shall be the dealer delivered price f.o.b. cars railhead delivery only, plus $2.50 per M sq. ft. on wallboard or $1.25 per M sq. ft. on lath, less 2% cash discount on gross amount.

Shipment in carloads may include shipment in mixed cars with other gypsum products, providing all materials contained in such car are for use on a WPA project and providing entire carload is invoiced direct to the Federal government.

Patented gypsum board products for State WPA projects when specified in quantities not for shipment in carloads as above outlined, or when State WPA job site delivery, any quantity, is requested, shall be quoted through dealers only.

(b) Federal Projects. On purchases by the Procurement Division or Resettlement Purchase Section of the

Treasury Department (to be invoiced direct to the Federal Government) for use on Federal WPA projects, the minimum quoted price of patented gypsum wallboard and/or lath, for shipment in carloads for delivery at railhead shall be the regular dealer carload delivered price less 2% cash discount on gross amount. For delivery to project site, the minimum quoted price of patented gypsum wallboard and/or lath shall be the regular dealer carload delivered price f.o.b. cars at railhead specified in bid form, plus $1.00 per M sq. ft., less 2% cash discount on gross amount.

The classification "Federal Government" does not include the following: TVA, PWA, CWA, HOLC, FERA, SHD, or any corporation formed by the Federal government for carrying out any works or projects, all such purchasers to be classified as consumers, and sold at the dealers delivered price plus contractor differentials as specified in Board License Bulletin No. 1 whether such sale is made to the corporation or directly to the department under which the corporation is formed.

Allowances, Etc.: The minimum price fixed by licensor for patented board and/or lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding; for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented board and/or lath. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers; or through allowance or adjustment on board which customer claims is of poor grade and not up to standard, except when such an allowance or adjustment on substandard board is first authorized by the licensor; or by allowance for any other reason
10118 whatsoever by a licensee direct or by a salesman of patented board out of his own compensation; or through the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

Also, where a salesman selling patented board to a customer is authorized by licensee or its agent to sell the same wholly or partly on a commission basis, or where a salesman not employed by licensee makes a sale of patented board to a customer on a commission basis and licensee or his agent accepts such sale, in either of such events the commission paid by the licensee is a deduction from the price at which the board is sold by licensee, and where after deducting such commission, the amount is less than the minimum price, licensor shall regard the sale as made at a price less than the minimum price fixed by licensor and a violation of the terms of the license agreement. Licensor also regards sales of patented board by commission salesmen, without the written consent of licensor, as a violation of the terms of the license agreement.

Sales to Other Gypsum Manufacturers:

There shall be no sale of patented gypsum board products to manufacturers of gypsum products without the written consent of the licensor. When such written approval has been granted maximum discounts from the minimum dealer prices established by the licensor, as listed in Board License Bulletin No. 1, shall be 15% on wallboard and 12½% on plasterboard. Such permission is restricted to sales of patented products to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

The minimum of 7500 sq. ft. of patented gypsum board and/or lath products as required for pickups and shipments out of Eastern mills and warehouses does not apply for pickups by or deliveries to other gypsum manufacturers, providing such pickups or deliveries are destined for manufacturer's own warehouse or plant. If picked up or shipped for delivery direct to a dealer's warehouse, then the 7500 sq. ft. minimum shall apply.

10119 Dunnage:

Gypsum boards used for dunnage and not invoiced to the customer shall be not larger than 4′ x 4′ and any gypsum boards so used with any dimension greater than 12″ shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3″ high. Excessive dunnage is a violation of the license agreement. Exception: Greater New York (Manhattan, Bronx, Kings, Queens and Richmond counties, New York)

a. Shipments in cars.

Gypsum boards used for dunnage in shipments by car and not invoiced to customer shall be not larger than 12″ x 48″, shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3″ high, and shall be board with no value and unfit for use or resale. Excessive dunnage is a violation of the license agreement.

†b. Shipments in trucks.

Gypsum boards used for dunnage in shipments by truck and not invoiced to the customer shall be not larger than 12″ x 48″ except when larger sheets might be necessary to protect the bottom of a truck. All gypsum boards used for dunnage shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3″ high, and be defaced, marred, diagonally scored or mutilated and otherwise so marked that they will have no value and will be unfit for use or resale. Excessive dunnage is a violation of the license agreement.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10120 Also where a salesman selling patented board to a customer is authorized by licensee or its agent to sell the same wholly or partly on a commission basis, or where a salesman not employed by licensee makes a sale of patented board to a customer on a commission basis and licensee or his agent accepts such sale, in either of such events the commission paid by the licensee is a deduction from the price at which the board is sold by licensee, and where after deducting such commission, the amount is less than the minimum price, licensor shall regard the sale as made at a price less than the minimum price fixed by licensor and a violation of the terms of the license agreement. Licensor also regards sales of patented board by commission salesmen, without the written consent of licensor, as a violation of the terms of the license agreement.

Sales to Other Gypsum Manufacturers:

There shall be no sale of patented gypsum board products to manufacturers of gypsum products without the written consent of the licensor. When such written approval has been granted maximum discounts from the minimum dealer prices established by the licensor, as listed in Board License Bulletin No. 1, shall be 15% on wallboard and 12½% on plasterboard. Such permission is restricted to sales of patented products to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

The minimum of 5000 sq. ft. of patented gypsum board and/or lath products as required for pickups and shipments out of Eastern mills and warehouses does not apply for pickups by or deliveries to other gypsum manufacturers, providing such pickups or deliveries are destined for manufacturer's own warehouse or plant. If picked up or shipped for delivery direct to a dealer's warehouse, then the 5000 sq. ft. minimum shall apply.

Dunnage:

Gypsum boards used for dunnage and not invoiced to the customer shall be not larger than 4′ x 4′ and any gypsum boards so used with any dimension greater than 12″ shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3″ high. Excessive dunnage is a violation of the license agreement. Exception: Greater New York Market (Manhattan, Bronx, Kings, Queens and Richmond counties, New York)

a. Shipments in cars.

Gypsum boards used for dunnage in shipments by car and not invoiced to customer shall be not larger than 12″ x 48″, shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3″ high, and shall be board with no value and unfit for use or resale. Excessive dunnage is a violation of the license agreement.

b. Shipments in trucks.

Gypsum boards used for dunnage in shipments by truck and not invoiced to the customer shall be not larger than 12″ x 48″ except when larger sheets might be necessary to protect the bottom of a truck in which instances such sheets shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO

BE SOLD" in letters at least 3" high, and be defaced, marred, diagonally scored or mutilated and otherwise so marked that they will have no value and will be unfit for use or resale. Excessive dunnage is a violation of the license agreement.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10121 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 14, 1936.

Conditions of Sale—Board License Bulletin No. 5
Cancels Bulletin No. 5—Dated February 22, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective March 16, 1936 at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Duration of Quotations and Specific Job Protection Price Advances:

In the event of an increase in the minimum prices of patented gypsum wallboard or plasterboard, the advanced minimum price shall apply to all shipments made after the effective date of the price increase, except:

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

(2) For gypsum lath on specific jobs on which the general contract is awarded prior to date of any price change and order for gypsum lath is placed with the li-

censee within 30 days on private jobs, 60 days on Federal government jobs after the effective date of the price increase.

(3) For gypsum wallboard and/or gypsum lath on specific gypsum roof jobs to gypsum roofing contractors on which the general contract is awarded prior to date of any price change and order for gypsum wallboard and/or gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on Federal government jobs after the effective date of the price increase.

(4) (a) For gypsum wallboard on specific Federal government jobs on which the general contract is awarded prior to date of any price change and order for gypsum wallboard is placed with the licensee within 60 days from effective date of price increase.

(b) For gypsum wallboard on specific industrial housing projects on which the general contract is awarded prior to date of any price change and order for gypsum wallboard is placed with the licensee within 30 days from effective date of price increase.

(5) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee prior to the effective date of price increase.

10122

Federal Government Jobs

A Federal government job or contract is one where a department of the Federal government, as defined below, lets a contract direct to a general contractor, or where such a department of the Federal Government places an order directly with a licensee, such order being invoiced directly to such department for use solely and directly by such department.

The "Federal Government" as used herein shall mean the following departments of the Federal government.

1. Agricultural
2. Bureau of Indian Affairs
3. Coast Guard
4. Commerce
5. Interior
6. Justice
7. Labor
8. Marine Corps
9. Navy
10. Post Office
11. State
(**)12. Treasury
13. Veterans' Bureau
(*) 14. War (Including CCC Camps)
15. District of Columbia

(*) CCC Camps:
(Gypsum Wallboard)

In areas where the Federal government carries out CCC Camp construction directly or by letting contract to a contractor to furnish both material and labor (such contractor is considered as the direct representative of the Federal government on the specific project being figured) the minimum price of gypsum wallboard direct to the Federal government or to such contractor under such conditions only for CCC Projects, in minimum carload quantities, is the dealer delivered price f.o.b. cars railhead delivery only.

Where gypsum wallboard is sold and invoiced directly to the Federal government or to such contractor under such conditions, for CCC Projects only, in minimum carload quantities, a maximum allowance of $1.50 per M sq. ft. may be made to a dealer as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M sq. ft., total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Where less carload quantities of gypsum wallboard are required, or CCC Camp site delivery, any quantity, is requested, quotation will be made only through dealers.

(**) WPA Projects.

(a) State Projects. On purchases by or thru the State Procurement Division of the Treasury Department (to be invoiced direct to the Federal Government) for use on State WPA projects, the minimum quoted price of patented gypsum wallboard and/or lath, for shipment in carloads, shall be the dealer delivered price f.o.b. cars railhead delivery only, plus $2.50 per M sq. ft. on wallboard or $1.25 per M sq. ft. on lath, less 2% cash discount on gross amount.

Shipment in carloads may include shipment in mixed cars with other gypsum products, providing all ma-
10123 terials contained in such car are for use on a WPA project and providing entire carload is invoiced direct to the Federal government.

Where patented gypsum wallboard and/or lath is sold and invoiced directly to the Federal Government for State WPA projects, a maximum allowance of $2.50 per M sq. ft. on wallboard and $1.25 per M sq. ft. on lath may be made to a dealer as a dealer commission.

Patented gypsum board products for State WPA projects when specified in quantities not for shipment in carloads as above outlined, or when State WPA job site delivery, any quantity, is requested, shall be quoted through dealers only.

(b) Federal Projects. On purchases by the Procurement Division or Resettlement Purchase Section of the Treasury Department (to be invoiced direct to the Federal Government) for use on Federal WPA projects, the minimum quoted price of patented gypsum wallboard and/or lath, for shipment in carloads for delivery at railhead shall be the regular dealer carload delivered price less 2% cash discount on gross amount. For delivery to project site, the minimum quoted price of patented gypsum wallboard and/or lath shall be the regular dealer carload delivered price f.o.b. cars at railhead specified in bid form, plus $1.00 per M sq. ft., less 2% cash discount on gross amount. On patented gypsum wallboard and/or lath sold and invoiced direct to the Federal Government for Federal WPA Projects, either railhead or project site delivery, a maximum allowance of $1.00 per M sq. ft. may be made to a dealer as a dealer commission.

The classification "Federal Government" does not include the following: TVA, PWA, CWA, HOLC, FERA, SHD, or any corporation formed by the Federal government for carrying out any works or projects, all such purchasers to be classified as consumers, and sold at the dealers delivered price plus contractor differentials as specified in Board License Bulletin No. 1 whether such sale is made to the corporation or directly to the department under which the corporation is formed.

Allowances, Etc.: The minimum price fixed by licensor for patented board and/or lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding; for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or

other service by them in connection with shipments or deliveries of patented board and/or lath. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers; or through allowance or adjustment on board which customer claims is of poor grade and not up to standard, except when such an allowance or adjustment on substandard board is first authorized by the licensor; or by allowance for any other reason whatsoever by a licensee direct or by a salesman of patented board out of his own compensation; or through the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement, On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

10124 Also, where a salesman selling patented board to a customer is authorized by licensee or its agent to sell the same wholly or partly on a commission basis, or where a salesman not employed by licensee makes a sale of patented board to a customer on a commission basis and licensee or his agent accepts such sale, in either of such events the commission paid by the licensee is a deduction from the price at which the board is sold by licensee, and where after deducting such commission, the amount is less than the minimum price, licensor shall regard the sale as made at a price less than the minimum price fixed by licensor and a violation of the terms of the license agreement. Licensor also regards sales of patented board by commission salesmen, without the written consent of licensor, as a violation of the terms of the license agreement.

Sales to Other Gypsum Manfacturers:

There shall be no sale of patented gypsum board products to manufacturers of gypsum products without the written consent of the licensor. When such written approval has been granted maximum discounts from the minimum dealer prices established by the licensor, as listed in Board License Bulletin No. 1, shall be 15% on wallboard and 12½% on plasterboard. Such permission is restricted to sales of patented products to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

The minimum of 5000 sq. ft. of patented gypsum board and/or lath products as required for pickups and shipments out of Eastern mills and warehouses does not apply for pickups by or deliveries to other gypsum manufacturers, providing such pickups or deliveries are destined for manufacturer's own warehouse or plant. If picked up or shipped for delivery direct to a dealer's warehouse, then the 5000 sq. ft. minimum shall apply.

Dunnage:

Gypsum boards used for dunnage and not invoiced to the customer shall be not larger than 4′ x 4′ and any gypsum boards so used with any dimension greater than 12″ shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3″ high. Excessive dunnage is a violation of the license agreement.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10125 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 22, 1936.

Conditions of Sale—Board License Bulletin No. 5
Cancels Bulletin No. 5—Dated September 16, 1935

C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Duration of Quotations and Specific Job Protection Price Advances:

In the event of an increase in the minimum prices of patented gypsum wallboard or plasterboard, the advanced minimum price shall apply to all shipments made after the effective date of the price increase, except:

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

(2) For gypsum lath on specific jobs on which the general contract is awarded prior to date of any price change and order for gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on Federal government jobs after the effective date of the price increase.

(3) For gypsum wallboard and/or gypsum lath on specific gypsum roof jobs to gypsum roofing contractors on which the general contract is awarded prior to date of any price change and order for gypsum wallboard and/or gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on Federal government jobs after the effective date of the price increase.

(4) (a) For gypsum wallboard on specific Federal government jobs on which the general contract is awarded prior to date of any price change and order for gypsum wallboard is placed with the licensee within 60 days from effective date of price increase.

(b) For gypsum wallboard on specific industrial housing projects on which the general contract is awarded prior to date of any price change and order for gypsum wallboard is placed with the licensee within 30 days from effective date of price increase.

(5) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee prior to the effective date of price increase.

10126

Federal Government Jobs

A Federal government job or contract is one where a department of the Federal government, as defined below, lets a contract direct to a general contractor, or where

such a department of the Federal Government places an order directly with a licensee, such order being invoiced directly to such department for use solely and directly by such department.

The "Federal Government" as used herein shall mean the following departments of the Federal government.

1. Agricultural
2. Bureau of Indian Affairs
3. Coast Guard
4. Commerce
5. Interior
6. Justice
7. Labor
8. Marine Corps
9. Navy
10. Post Office
11. State
(**)12. Treasury
13. Veterans' Bureau
(*) 14. War (Including CCC Camps)
15. District of Columbia

(*) CCC Camps:
(Gypsum Wallboard)

In areas where the Federal government carries out CCC Camp construction directly or by letting contract to a contractor to furnish both material and labor (such contractor is considered as the direct representative of the Federal government on the specific project being figured) the minimum price of gypsum wallboard direct to the Federal government or to such contractor under such conditions only for CCC Projects, in minimum carload quantities, is the dealer delivered price f.o.b. cars railhead delivery only.

Where gypsum wallboard is sold and invoiced directly to the Federal government or to such contractor under such conditions, for CCC Projects only, in minimum carload quantities, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Where less carload quantities of gypsum wallboard are required, or CCC Camp site delivery, any quantity, is requested, quotation will be made only through dealers.

(**) WPA Projects:

On purchases by or thru the State Procurement Division of the Treasury Department (to be invoiced direct to the Federal Government) for use on WPA projects, the minimum quoted price of patented gypsum wallboard and/or lath, for shipment in carloads, shall be the dealer delivered price f.o.b. cars railhead delivery only, plus $2.50 per M sq. ft. on wallboard or $1.25 per M sq. ft. on lath, less 2% cash discount on gross amount.

10127 Shipment in carloads may include shipment in mixed cars with other gypsum products, providing all materials contained in such car are for use on a WPA project and providing entire carload is invoiced direct to the Federal government.

Where patented gypsum wallboard and/or lath is sold and invoiced directly to the Federal Government for WPA projects, a maximum allowance of $2.50 per M sq. ft. on wallboard and $1.25 per M sq. ft. on lath may be made as a dealer commission.

Patented gypsum board products for WPA projects when specified in quantities not for shipment in carloads as above outlined, or when WPA job site delivery, any quantity, is requested, shall be quoted through dealers only.

This classification does not include the following: TVA, PWA, CWA, HOLC, FERA, SHD, or any corporation formed by the Federal government for carrying out any works or projects, all such purchasers to be classified as consumers, and sold at the dealers delivered price plus contractor differentials as specified in Board License Bulletin No. 1 whether such sale is made to the corporation or directly to the department under which the corporation is formed.

Allowances, Etc.: The minimum price fixed by licensor for patented board and/or lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding; for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or

other service by them in connection with shipments or deliveries of patented board and/or lath. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers; or through allowance or adjustment on board which customer claims is of poor grade and not up to standard, except when such an allowance or adjustment on substandard board is first authorized by the licensor; or by allowance for any other reason whatsoever by a licensee direct or by a salesman of patented board out of his own compensation; or through the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

Also, where a salesman selling patented board to a customer is authorized by licensee or its agent to sell the same wholly or partly on a commission basis, or where a salesman not employed by licensee makes a sale of patented board to a customer on a commission basis and licensee or his agent accepts such sale, in either of such events the commission paid by the licensee is a deduction from the price at which the board is sold by licensee, and where after deducting such commission, the amount is less than the minimum price, licensor shall regard the sale as made at a price less than the minimum price fixed by licensor and a violation of the terms of the license agreement. Licensor also regards sales of patented board by commission salesmen, without the written consent of licensor, as a violation of the terms of the license agreement.

Sales to Other Gypsum Manufacturers:

There shall be no sale of patented products to manufacturers of gypsum products without the written consent of the licensor. When such written approval has been granted maximum discounts from the minimum dealer prices established by the licensor, as listed in Board License Bulletin No. 1, shall be 15% on wallboard and 12½% on plasterboard. Such permission is restricted to sales of patented products to said manufac-

10128

turers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

The minimum of 5000 sq. ft. of patented gypsum board and/or lath products as required for pickups and shipments out of Eastern mills and warehouses does not apply for pickups by or deliveries to other gypsum manufacturers, providing such pickups or deliveries are destined for manufacturer's own warehouse or plant. If picked up or shipped for delivery direct to a dealer's warehouse, then the 5000 sq. ft. minimum shall apply.

Dunnage:

Gypsum boards used for dunnage and not invoiced to the customer shall be not larger than 4′ x 4′ and any gypsum boards so used with any dimension greater than 12″ shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3″ high. Excessive dunnage is a violation of the license agreement.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10129 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 16, 1935.

Terms and Conditions of Sale—Board License
Bulletin No. 5

E S PITTS

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Duration of Quotations and Specific Job Protection Price Advances:

In the event of an increase in the minimum prices of patented gypsum wallboard or plasterboard, the advanced minimum price shall apply to all shipments made after the effective date of the price increase, except:

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

†(2) For gypsum lath on specific jobs on which the general contract is awarded prior to date of any price change and order for gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on Federal government jobs after the effective date of the price increase.

†(3) For gypsum wallboard and/or gypsum lath on specific gypsum roof jobs to gypsum roofing contractors on which the general contract is awarded prior to date of any price change and order for gypsum wallboard and/or gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on Federal government jobs after the effective date of the price increase.

†(4) (a) For gypsum wallboard on specific Federal government jobs on which the general contract is awarded prior to date of any price change and order for gypsum wallboard is placed with the licensee within 60 days from effective date of price increase.

†(b) For gypsum wallboard on specific industrial housing projects on which the general contract is awarded prior to date of any price change and order for gypsum wallboard is placed with the licensee within 30 days from effective date of price increase.

10130 (5) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee prior to the effective date of price increase.

†Federal Government Jobs.

A Federal government job or contract is one where a department of the Federal government, as defined below,

lets a contract direct to a general contractor, or where such a department of the Federal Government places an order directly with a licensee, such order being invoiced directly to such department for use solely and directly by such department.

The "Federal Government" as used herein shall mean the following departments of the Federal government:

1. Agricultural
2. Bureau of Indian Affairs
3. Coast Guard
4. Commerce
5. Interior
6. Justice
7. Labor
8. Marine Corps
9. Navy
10. Post Office
11. State
12. Treasury
13. Veterans' Bureau
14. (*) War (Including CCC Camps)
15. District of Columbia

(*) CCC Camps:
(Gypsum Wallboard).

In areas where the Federal government carries out CCC Camp construction directly or by letting contract to a contractor to furnish both material and labor (such contractor is considered as the direct representative of the Federal government on the specific project being figured) the minimum price of gypsum wallboard direct to the Federal government or to such contractor under such conditions only for CCC Projects, in minimum carload quantities, is the dealer delivered price f.o.b. cars railhead delivery only.

Where gypsum wallboard is sold and invoiced directly to the Federal government or to such contractor under such conditions, for CCC Projects only, in minimum carload quantities, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Where less carload quantities of gypsum wallboard are required, or CCC Camp site delivery, any quantity, is requested, quotation will be made only through dealers.

'This classification does not include the following: TVA, PWA, CWA, HOLC, FERA, SHD, or any corporation formed by the Federal government for carrying out any works or projects, all such purchasers to be classified as consumers, and sold at the dealers delivered price plus contractor differentials as specified under "Odd Sizes and Sales to Contractors", (See Bulletin No. 1) whether such sale is made to the corporation or directly to the
10131 department under which the corporation is formed.

Allowances, Etc.: The minimum price fixed by licensor for patented board and/or lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding; for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented board and/or lath. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers; or through allowance or adjustment on board which customer claims is of poor grade and not up to standard, except when such an allowance or adjustment on substandard board is first authorized by the licensor; or by allowance for any other reason whatsoever by a licensee direct or by a salesman of patented board out of his own compensation; or through the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

Also, where a salesman selling patented board to a customer is authorized by licensee or its agent to sell the same wholly or partly on a commission basis, or where a salesman not employed by licensee makes a sale of patented board to a customer on a commission basis and licensee or his agent accepts such sale, in either of such events the

commission paid by the licensee is a deduction from the price at which the board is sold by licensee, and where after deducting such commission, the amount is less than the minimum price, licensor shall regard the sale as made at a price less than the minimum price fixed by licensor and a violation of the terms of the license agreement. Licensor also regards sales of patented board by commission salesmen, without the written consent of licensor, as a violation of the terms of the license agreement.

Sales to Other Gypsum Manufacturers: There shall be no sale of patented products to manufacturers of gypsum products without the written consent of the licensor. When such written approval has been granted maximum discounts from the minimum dealer prices established by the licensor, as listed in Board License Bulletin No. 1, shall be 15% on wallboard and 12½% on plasterboard. Such permission is restricted to sales of patented products to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

The minimum of 5000 sq. ft. of patented gypsum board and/or lath products as required for pickups and shipments out of Eastern mills and warehouses does not apply for pickups by or deliveries to other gypsum manufacturers, providing such pickups or deliveries are destined for manufacturer's own warehouse or plant. If picked up or shipped for delivery direct to a dealer's warehouse, then the 5000 sq. ft. minimum shall apply.

10132 Dunnage: Gypsum boards used for dunnage and not invoiced to the customer shall be not larger than 4′ x 4′ and any gypsum boards so used with any dimension greater than 12″ shall be plainly stamped in red on the face side of each board, showing the words "Dunnage —Not To Be Sold" in letters at least 3″ high. Excessive dunnage is a violation of the license agreement.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

! Indicates change in this reissue.

10133 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 10, 1939

Export Board License Bulletin—Cancels All Previous Export Bulletins

MR. C. NEWMAN
Chicago

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent) are as follows:

* Prices f.a.s. Atlantic Seaports (Portland, Me., Boston, Mass., New York, N. Y., Philadelphia, Pa., Baltimore, Md. and Norfolk, Va.), for shipment to Porto Rico, Virgin Islands, Guam, Panama Canal Zone, Alaska, Hawaii and Philippines:

3/8" Gypsum Wallboard $21.50 per M sq.ft. including crating.

1/4" Gypsum Wallboard $20.00 per M sq.ft. including crating.

3/8" Gypsum Plasterboard $20.00 per M sq.ft. including crating.

Exception: The minimum price of 1/4" patented gypsum wallboard for shipment to the Philippine Islands is $18.00 per M sq.ft. including crating f.a.s. New York, N. Y.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

* Prices apply for standard sizes.

10134 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 5, 1936.

Export Board License Bulletin—Cancels Export Board License Bulletin Dated April 10, 1934 and Supplements Thereto.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297 are as follows:

[1]Prices f.a.s. Atlantic Seaports (Portland, Me., Boston, Mass., New York, N. Y., Philadelphia, Pa., Baltimore, Md. and Norfolk, Va.), for shipment to Porto Rico, Virgin Islands, Guam, Panama Canal Zone, Alaska, Hawaii and Phillipines:

3/8" Gypsum Wallboard $21.50 per M sq.ft. including crating.
1/4" Gypsum Wallboard 20.50 per M sq. ft. including crating.

3/8" Gypsum Plasterboard $20.00 per M sq.ft. including crating.
1/4" Gypsum Plasterboard 20.00 per M sq. ft. including crating.

Exception: The minimum price of 1/4" patented gypsum wallboard and 1/4" patented gypsum plasterboard for shipment to the Phillipine Islands is $18.00 per M sq. ft. including crating f.a.s. New York, N. Y.

[1]Prices apply for standard sizes as listed in Board License Bulletin No. 4.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President.

10135 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 10, 1934.

Export Board License Bulletin—Cancels Export Board License Bulletin, Dated December 13, 1932.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective April 25, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows, crated, f.a.s. New York, N. Y., for shipment to Porto Rico, Virgin Islands, Guam, Panama Canal Zone, Alaska, Hawaii, and Philippines:

†	3/8" Gypsum Wallboard	$21.50	per M sq.ft.
†	1/4" Gypsum Wallboard	20.50	" " "
	3/8" Gypsum Plasterboard	20.00	" " "
	1/4" Gypsum Plasterboard	20.00	" " "

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10136 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 13, 1932

Export Board License Bulletin

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as

follows, crated, f.a.s. New York, N. Y., for shipment to Porto Rico, Virgin Islands, Guam, Panama Canal Zone, Alaska, Hawaii, and Phillipines:

3/8" Gypsum Wallboard	$20.00	per M sq.ft.
1/4" Gypsum Wallboard	19.00	" "
3/8" Gypsum Plasterboard	20.00	" " "
1/4" Gypsum Plasterboard	20.00	" " "

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10137 *Government's Exhibit No. 38*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 28, 1938

Board License Bulletins Nos. 1 & 2

MR. C. NEWMAN
Chicago Office

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452, are changed as follows:

Effective immediately, Supplement dated March 25, 1937 to Board License Bulletins Nos. 1 & 2 dated February 24, 1937, is cancelled, and the minimum price of the patented 24" x 48" Cutstock Liner Board for shipment and delivery in state of Oklahoma will be the minimum price for Liner Board in standard sizes, as listed in current Board License Bulletins Nos. 1, 2 & 4.

Yours very truly

UNITED STATES GYPSUM COMPANY

Vice-President.

10138 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 25, 1937.

Supplement to Board License Bulletins Nos. 1 & 2
Dated February 24, 1937.

C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective immediately, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

24" x 48" Cutstock Liner Board—in order to afford opportunity to move excessive stocks accumulated in southwest which are subject to imminent deterioration, the price of this product for shipment and delivery in state of Oklahoma only, until further announcement, shall be same as minimum gypsum plaster lath price.

Yours very truly

UNITED STATES GYPSUM COMPANY

Vice President.

10139 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 10, 1936.

Supplement to Board License—Bulletin No. 1

C. Newman

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and

improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

Effective December 12, 1936, the minimum dealer price of 1/4" or 3/8" patented gypsum plasterboard for shipment into Lower Michigan (except Monroe County and except the Detroit Area as described in Board License Bulletin No. 1) is $14.00 per M sq.ft. in cars f.o.b. mill, Detroit, Michigan.

Effective December 12, 1936, the minimum dealer price of 1/4" or 3/8" patented gypsum plasterboard for shipment into Monroe County Michigan, in straight, pool or mixed cars, is $15.50 per M sq.ft., f.o.b. cars, delivered to dealers warehouse or siding.

Effective December 12, 1936, the minimu mdealer price of 1/4" or 3/8" patented gypsum plasterboard for shipment into Lucas County, Ohio, and town of Perrysburg, Ohio, in straight, pool or mixed cars is $16.00 per M sq.ft. f.o.b. cars, delivered to dealers warehouse or siding.

Minimum dealer prices of 1/4" or 3/8" patented gypsum plasterboard for shipment into the Detroit Area remain as stated in Board License Bulletins Nos. 1 and 3.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President.

10140 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 9, 1936.

Supplement to Board License—Bulletins No. 1 and No. 2.

C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective December 11, 1936, the minimum prices at which you may sell gypsum wall-

board and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Effective December 11, 1936, minimum dealer prices for patented gypsum board products f.o.b. cars, Heath, Montana, are as follows:

	Weight Per M Sq.Ft.	Price Per M Sq.Ft.
1/4" Gypsum Wallboard	950#	$22.50
3/8" Gypsum Wallboard	1400#	25.00
1/2" Gypsum Wallboard	1900#	26.00
1/2" Gypsum Sheathing	1900#	22.00
3/8" Tiled Gypsum Wallboard	1400#	50.00
1/4" Gypsum Lath	950#	15.00
3/8" Gypsum Lath	1400#	15.00
1/2" Gypsum Lath	1900#	16.25

Prices also apply for pickups.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10141 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 4, 1936

Supplement to Board License Bulletins No. 1 and No. 3

C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective December 7, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

(1) Effective December 7, 1936, the minimum prices of patented gypsum board products, in straight and pool cars, or mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding in State of Connecticut and in Cheshire, Sullivan, Merrimac and Belknap Counties, New Hampshire, are as follows:

1/4" Gypsum Wallboard	3/8" Gypsum Wallboard	1/2" Gypsum Wallboard	1/2" Gypsum Sheathing	3/8" Tiled Gypsum Wallboard	1/4" Gypsum Lath	3/8" Gypsum Lath	1/2" Gypsum Lath
21.00	26.00	27.00	23.00	51.00	16.00	16.00	17.25

For minimum prices of patented gypsum board products delivered to dealers warehouse by truck within the above outlined area, add $1.00 per M sq. ft. to prices for deliveries by rail. Minimum truckloads shall be as defined in paragraph (7) of Board License Bulletin No. 3.

(2) Effective December 7, 1936, the minimum prices for patented gypsum lath as provided in Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum lath may be combined with gypsum bag goods to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10142 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 24, 1936.

Supplement to Board License—Bulletins No. 1 and No. 3

C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective November 27, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

Effective November 27, 1936, the minimum price of 1/4" or 3/8" patented gypsum plasterboard, in sizes 16" x 32" and 16" x 48" only, for shipment into Kings, Queens, Nassau and Suffolk Counties, New York is $14.00 per M sq. ft. f.o.b. cars or trucks delivered to dealers warehouse or siding. Price applies for shipment in straight, pool or mixed cars, also for shipment in minimum truckloads (any mixture) as defined in paragraph (7) of Board License Bulletin No. 3.

Cancel all 1/2" T&G Sheathing exceptions as listed in Board License Bulletins #1 and #3. Effective November 27, 1936, the minimum price of 1/2" patented gypsum sheathing is $22.00 per M sq. ft. f.o.b. mills as listed in Board License Bulletin No. 1, without exception. For truck deliveries add amounts as specified in Board License Bulletin #3. For deliveries in cars into Chicago and Detroit Areas, minimum prices become $22.50 and $22.60 per M sq. ft. respectively, f.o.b. cars delivered to dealers warehouse or siding.

Very truly yours,

UNITED STATES GYPSUM COMPANY

President.

10143 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 3, 1936

Supplement to Board License Bulletins No. 1 and No. 3—
Dated July 23, 1936

C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective September 5, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

1/4" or 3/8" Regular or Open Edge (Cutstock) Plasterboard

Effective September 5, 1936 the minimum price of 1/4" or 3/8" patented gypsum plasterboard, regular or open edge (cutstock), in straight, pool or mixed carloads or in trucks with other gypsum products is $15.00 per M sq. ft. FOB cars or trucks delivered to dealers warehouse or siding in Niagara, Erie (including town of Gowanda, N. Y.) Monroe and Wayne Counties, New York.

This price does not apply to 32" x 48" board.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President.

10144 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 3, 1936

Supplement to Board License Bulletin No. 1—
Dated July 23, 1936

C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective September 5, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

5/16" Plasterboard: Effective September 5, 1936 the minimum price of 5/16" Plasterboard (weight 1175# per M) for shipment into state of Minnesota, is $12.75 per M sq. ft. FOB Fort Dodge, Iowa; East Chicago, Indiana and Grand Rapids, Michigan.

This cancels price of $15.00 per M sq. ft. FOB cars delivered into Hennepin County, Minnesota, as shown on page four of Board License Bulletin No. 1 dated August 13, 1936, and into Ramsey County, Minnesota, as shown on page 5 of Board License Bulletin No. 1 dated August 22, 1936.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10145 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 17, 1936

Board License Bulletins

DEAR SIR: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Cancel the following supplements to Board License Bulletins:

—Supplement dated March 6, 1936, in reference to sale of plain and aluminum paint primed 1/2" T&G Gypsum Wallboard and 1/2" T&G Gypsum Sheathing for shipment into Cuyahoga County, Ohio.

—Supplement dated March 24, 1936, in reference to contributions made directly to The Great Lakes Exposition, in connection with sale of patented gypsum board products for use on structures erected by The Great Lakes Exposition.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President.

10146 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 24, 1936

Supplement to Board License Bulletins.

C. NEWMAN
Office

DEAR SIRS: Referring to our license contract with you, your are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Referring specifically to the supplement (dated March 6, 1936) to Bulletin No. 1, and to paragraph regarding allowances on page 3 of Bulletin No. 5 (dated March 14, 1936), contributions by any licensee made directly to The Great Lakes Exposition, Cleveland, Ohio, which do not exceed $2.00 per M sq. ft. of patented board or lath sold by such licensee for use on and actually used on structures erected by The Great Lakes Exposition, Cleveland, Ohio (excluding any structures erected by exhibitors,) will not be considered as allowances or rebates effecting a violation of the license; provided, that the licensee making such contributions shall report to the licensor the amount of any such contributions, the amount of patented board and lath so sold, and the dates of such contributions and sales, as and when the same are made.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10147 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 6, 1936.

Supplement to Board License Bulletin No. 1—Dated February 22, 1936 and Board License Bulletin No. 2—Dated February 22, 1936.

MR. C. NEWMAN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 7, 1936 the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Minimum dealer prices for shipment into Cuyahoga County, Ohio:

(1) (a) For 1/2" T&G Edge Gypsum Wallboard, Plain Not Primed in sizes 36" or 48" wide by 8', 9', or 10' long, minimum price is $31.00 per M sq. ft., f.o.b. Gypsum, Ohio. For other sizes minimum price is $33.50 per M sq. ft. f.o.b. Gypsum, Ohio.

(b) For 1/2" T&G Edge Gypsum Wallboard Aluminum Paint Primed One Side and Four Edges in sizes 36" or 48" wide by 8', 9', or 10' long, minimum price is $37.25 per M sq. ft. f.o.b. Gypsum, Ohio. For other sizes minimum price is $39.75 per M sq. ft., f.o.b. Gypsum, Ohio.

(c) For 1/2" T&G Edge Gypsum Wallboard Aluminum Paint Primed Both Sides and Four Edges in sizes 36" or 48" wide by 8', 9', or 10' long, minimum price is $40.00 per M sq. ft., f.o.b. Gypsum, Ohio. For other sizes minimum price is $42.50 per M sq. ft., f.o.b. Gypsum, Ohio.

(2) (a) For 1/2" T&G Edge Gypsum Sheathing, Surfaced With a Weather Resisting Paper, Plain Not Primed in size 24" wide by 6'8" or 8' long minimum price is $22.50 per M sq. ft., f.o.b. Gypsum, Ohio. For other sizes minimum price is $28.50 per M sq. ft., f.o.b. Gypsum, Ohio,

(b) For 1/2" T&G Edge Gypsum Sheathing, Surfaced With a Weather Resisting Paper, Aluminum Paint Primed One Side and Four Edges in size 24" wide by 6'8" or 8' long minimum price is $28.75 per M sq. ft., f.o.b. Gypsum, Ohio. For other sizes minimum price is $34.75 per M sq. ft., f.o.b. Gypsum, Ohio.

10148 (c) For 1/2" T&G Edge Gypsum Sheathing, Surfaced With a Weather Resisting Paper, Aluminum Paint Primed Both Sides and Four Edges in size 24" wide by 6'8" or 8' long, minimum price is $31.50 per M sq. ft., f.o.b. Gypsum, Ohio. For other sizes minimum price is $37.50 per M sq. ft., f.o.b. Gypsum, Ohio.

The above prices apply for shipments in carloads, straight or mixed. Add $2.00 per M sq. ft. for pickups f.o.b. Gypsum, Ohio.

This supplement cancels and supersedes telegram dated February 26, 1936, in reference to prices for the Great Lakes Exposition, Cleveland, Ohio.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President.

10149 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 13, 1936.

Supplement to Board License Bulletin No. I—
Dated September 16, 1935.

C. NEWMAN
Office

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective February 15, 1936 at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Hag-

gerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

(1) 3/8" Wallboard. The minimum price of 3/8" patented gypsum wallboard for shipment into city of Texarkana, Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; or Southard, Oklahoma.

(2) 1/2" Wallboard. The minimum price of 1/2" patented gypsum wallboard for shipment into city of Texarkana, Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; or Southard, Oklahoma.

The minimum price of 1/2" patented gypsum wallboard for shipment into states of Kansas and Nebraska is $29.50 per M sq. ft. f.o.b. Fort Dodge, Iowa or Southard, Oklahoma.

Prices apply for standard sizes as listed in Bulletin No. 4.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10150 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1936.

Supplement to Board License Bulletin No. 1—Dated September 16, 1935 and Board License Bulletin No. 3—Dated January 10, 1936.

C. NEWMAN.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective February 7, 1936 at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not

including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

(1) In straight carloads of patented gypsum board and/or lath products, consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from F.O.B. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pa. and Camden County, N. J.

On pool cars or mixed cars into the Philadelphia Area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products to one destination. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined area have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(2) Del'd By Truck Prices Into Philadelphia Area. Minimum price of patented gypsum board and/or lath delivered by truck to dealers warehouse is same as delivered price by rail in mixed cars. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pa. and Camden County, N. J. Minimum quantity 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimum.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10151 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 9, 1935

Supplement to Board License Bulletin No. 1—
Dated September 16, 1935.
(Confirms Telegram Dated December 6, 1935)

A. W. IRWIN,
Office

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Effective December 9, 1935 the minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads or in mixed carloads with other gypsum products, is as follows:

$16.00 per M sq. ft. f.o.b. cars delivered into Hennepin County, Minnesota (Minneapolis), and Ramsey County, Minnesota (St. Paul).

The above price applies for sizes 16" x 32" and 16" x 48" only, bundled.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10152 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 2, 1935

Supplement to Board License Bulletin No. 3
Dated September 17, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which

you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Effective immediately add Steuben County, New York to the Buffalo-Oakfield Trucking Area as described in par. 1 of Bulletin No. 3 dated September 17, 1935.

Yours very truly

UNITED STATES GYPSUM COMPANY

Vice President.

10153 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 22, 1935

Supplement to Board License Bulletin No. 3
Dated September 17, 1935.

H. L. MILLER:

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective November 25, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by ~~you and~~ embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Orange County, New York. For minimum price patented gypsum wallboard and/or plasterboard delivered by truck to dealers' warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. Minimum quantity 5000 sq. ft. patented gypsum board and/or lath products to one destination only and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies.

Note: Any mixture of regular and metallized patented board products may be combined to make up the required minimum.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10154 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 19, 1935.

Supplement to Board License Bulletin No. 1 Dated September 16, 1935 and Board License Bulletin No. 2—Dated November 13, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective November 21, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Effective November 21, 1935, add states of Iowa, Minnesota, Nebraska, and Colorado to the area wherein size 32" x 48" patented gypsum board, if grey surfaced and round edged, is subject to the minimum plasterboard price.

Yours very truly

UNITED STATES GYPSUM COMPANY

Vice President.

10155 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 5, 1935

Supplement to Board License Bulletin No. 1 Dated September 16, 1935 and Board License Bulletin No. 3 Dated September 17, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective November 7, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

(1) Effective November 7, 1935 the minimum price of 3/8" patented gypsum plasterboard for delivery into Detroit Area of Wayne County, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan is as follows:

$15.00 per M sq. ft. delivered to dealers warehouse or siding, in cars or trucks. Truck delivery shall be in minimum straight loads of 5000 sq. ft. (any mixture) patented gypsum board and/or lath products, or in mixed loads, minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included to make minimum weight. Patented gypsum board products other than 3/8" plasterboard included in such truckloads shall take the regular carload delivered price.

(2) Effective November 7, 1935 the minimum price of 3/8" patented gypsum plasterboard for shipment in straight and pool carloads or in mixed carloads with other gypsum products, to destinations outside the Detroit Area as described above is $15.00 per M sq. ft. f.o.b. cars Detroit, Michigan; Grand Rapids, Michigan; or Gypsum, Ohio.

The above prices apply for standard sizes as listed in Board License Bulletin No. 4.

Yours very truly

UNITED STATES GYPSUM COMPANY

Vice President.

10156 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 5, 1935

Supplement to Board License Bulletin No. 1 Dated September 16, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective November 7, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Effective November 7, 1935 the minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in minimum quantities of 5000 sq. ft. consigned to one destination and invoiced to one account, for delivery into Kings and Queens Counties, N. Y., is $15.00 per M sq. ft. delivered by truck to dealers warehouse, or f.o.b. cars delivered in straight and pool carloads or in mixed carloads with other gypsum products.

Effective November 7, 1935 the minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), for delivery into Cuyahoga County, Ohio (Cleveland) and towns of Willoughby and Wickliffe, Ohio, is $15.00 per M sq. ft. f.o.b. cars delivered in straight and pool carloads or in mixed carloads with other gypsum products.

The above prices apply for sizes 16" x 32" and 16" x 48" only, bundled.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10157 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 31, 1935.

Supplement to Board License Bulletin No. 1—
Dated September 16, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

WPA Projects

On purchases by or thru the State Procurement Division of the Treasury Department (to be invoiced direct to the Federal Government) for use on WPA projects, the minimum quoted price of patented gypsum wallboard and/or lath, for shipment in carloads, shall be the dealer delivered price f.o.b. cars railhead delivery only, plus $2.50 per M sq. ft. on wallboard or $1.25 per M sq. ft. on lath, less 2% cash discount on gross amount.

Shipment in carloads may include shipment in mixed cars with other gypsum products, providing all materials contained in such car are for use on a WPA project and providing entire carload is invoiced direct to the Federal Government.

Where patented gypsum wallboard and/or lath is sold and invoiced directly to the Federal Government for WPA projects, a maximum allowance of $2.50 per M sq. ft. on wallboard and $1.25 per M sq. ft. on lath may be made as a dealer commission.

Patented gypsum board products for WPA projects when specified in quantities not for shipment in carloads as above outlined, or when WPA job site delivery, any quantity, is requested, shall be quoted through dealers only.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10158 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 31, 1935.

Supplement to Export Board License Bulletin
Dated April 10, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum price effective immediately at which you may sell ¼" gypsum wallboard and ¼" gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claime din our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, is changed as follows:

The minimum price of 1/4" patented gypsum wallboard and 1/4" patented gypsum plasterboard for shipment to the Phillipine Islands is $18.00 per M sq. ft. f.a.s. New York, New York.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10159 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 22, 1935.

Supplement to Board License Bulletin No. 1
Dated September 16, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard

manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

(1) Effective October 24, 1935, add states of Wisconsin and Upper Michigan to the area wherein size 32″x48′ patented gypsum board, if grey surfaced and round edged, is subject to minimum plasterboard price.

(2) Effective October 24, 1935 the minimum prices of patented gypsum wallboard for shipment into state of New Mexico are changed as follows: For 1/4″—$20.00 per M sq. ft., for 3/8″—$25.00 per M sq. ft. and for 1/2″—$26.00 per M sq. ft., f.o.b. Acme, Texas, Sweetwater, Texas and Southard, Oklahoma. (Applying for standard sizes as listed in Bulletin No. 4).

(3) Effective October 24, 1935 the minimum prices of 3/8″ and 1/2″ patented gypsum wallboard for shipment into state of Texas are changed as follows: For 3/8″—$25.00 per M sq. ft., and for 1/2″ $26.00 per M sq. ft., f.o.b. Acme, Texas, Sweetwater, Texas and Southard, Oklahoma. (Applying for standard sizes as listed in Bulletin No. 4).

(4) Effective October 24, 1935 the minimum price of 1/4″ patented gypsum wallboard for shipment into states of Montana, Utah and that portion of Idaho south and east of but not including the Counties of Valley, Boise, Elmore, Idaho and Owyhee is $20.00 per M sq. ft. f.o.b. Fort Dodge, Iowa, $24.25 per M sq. ft. f.o.b. Laramie, Wyo. or $24.00 per M sq. ft. f.o.b. Loveland, Colorado. (Applying for Standard sizes as listed in Bulletin No. 4).

Yours very truly

UNITED STATES GYPSUM COMPANY

Vice President.

10160 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 14, 1935.

Supplement to Board License Bulletin No. 1
Dated September 16, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective October 17, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Effective October 17, 1935 the minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads or in mixed carloads with other gypsum products, is as follows:

$15.00 per M sq. ft. f.o.b. cars delivered into Henrico County, Virginia (Richmond); Hartford County, Connecticut (Hartford); Hampden County, Massachusetts (Springfield); Providence County, Rhode Island (Providence); Mercer County, New Jersey (Trenton); Lancaster County, Pennsylvania (Lancaster).

The above price applies for sizes 16"x32" and 16"x48" only, bundled.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10161 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 11, 1935.

Supplement to Board License Bulletin No. 1
Dated September 16, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective October 14, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Effective October 14, 1935 the minimum price of 5/16" patented gypsum plasterboard (weight 1175# per M), in straight and pool carloads or in mixed carloads with other gypsum products, is as follows:

(1) $15.00 per M sq. ft. f.o.b. cars delivered into Marion County, Indiana (Indianapolis); Sangamon County, Illinois (Springfield); Woodbury County, Iowa (Sioux City); also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

(2) $16.00 per M sq. ft. f.o.b. cars delivered into towns of Kansas City, Dodson and Edgecomb, Missouri; also into towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

The above prices apply for sizes 16"x32" and 16"x48" only, bundled.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10162 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 25, 1935.

Supplement to Board License Bulletin No. 1
Dated September 16, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

CCC Camps—(As listed below)
(Gypsum Wallboard)

The minimum prices of 1/4" and 3/8" patented gypsum wallboard in minimum carload quantities f.o.b. cars delivered, railhead delivery only, sold direct to the Federal Government for CCC Camps at destinations listed below, are as follows:

Item No. 10163	Camp	Railhead	Net Prices F.O.B. Railhead Per Sq. Ft.	Per Sq. Ft.	Total For 47000 Sq. Ft.
1	A-3	Beltsville, Md.	3/8"—31.08	.03108	1460.76
	A-3	Beltsville, Md.	1/4"—24.19	.02419	1136.93
2	A-4	Beltsville, Md.	3/8"—31.08	.03108	1460.76
	A-4	Beltsville, Md.	1/4"—24.19	.02419	1136.93
3	S-64	Parkton, Md.	3/8"—30.81	.03081	1448.07
	S-64	Parkton, Md.	1/4"—24.01	.02401	1128.47
4	S-65	Piedmont, W. Va.	3/8"—30.81	.03081	1448.07
	S-65	Piedmont, W. Va.	1/4"—24.01	.02401	1128.47
5	S-66	Frostburg, Md.	3/8"—30.81	.03081	1448.07
	S-66	Frostburg, Md.	1/4"—24.01	.02401	1128.47
6	S-67	Oakland, Md.	3/8"—30.81	.03081	1448.07
	S-67	Oakland, Md.	1/4"—24.01	.02401	1128.47
7	S-68	Piedmont, W. Va.	3/8"—30.81	.03081	1448.07
	S-68	Piedmont, W. Va.	1/4"—24.01	.02401	1128.47
8	SCS-5	White Hall, Md.	3/8"—30.81	.03081	1448.07
	SCS-5	White Hall, Md.	1/4"—24.01	.02401	1128.47
9	NP-12	Luray, Va.	3/8"—30.67	.03067	1441.49
	NP-12	Luray, Va.	1/4"—23.91	.02391	1123.77
10	P-77	Lawrenceville, Va.	3/8"—31.08	.03108	1460.76
	P-77	Lawrenceville, Va.	1/4"—24.19	.02419	1136.93
11	P-78	Hanover, Va.	3/8"—30.81	.03081	1448.07
	P-78	Hanover, Va.	1/4"—24.01	.02401	1128.47

Item No.	Camp	Railhead	Net Prices F.O.B. Railhead Per Sq. Ft.	Per Sq. Ft.	Total For 47000 Sq. Ft.
10163					
12	P-79	Fremont, Va.	3/8"—30.94	.03094	1454.18
	P-79	Fremont, Va.	1/4"—24.09	.02409	1132.23
13	P-80	Moseley, Va.	3/8"—30.67	.03067	1441.49
	P-80	Moseley, Va.	1/4"—23.91	.02391	1123.77
14	P-88	Amelia, Va.	3/8"—30.67	.03067	1441.49
	P-88	Amelia, Va.	1/4"—23.91	.02391	1123.77
15	P-89	Farmville, Va.	3/8"—30.26	.03026	1422.22
	P-89	Farmville, Va.	1/4"—23.63	.02363	1110.61
16	SCS-2	Danville, Va.	3/8"—30.26	.03026	1422.22
	SCS-2	Danville, Va.	1/4"—23.63	.02363	1110.61
17	SCS-3	Rocky Mount, Va.	3/8"—29.85	.02985	1402.95
	SCS-3	Rocky Mount, Va.	1/4"—23.35	.02335	1097.45
18	SCS-4	Ridgeway, Va.	3/8"—30.26	.03026	1422.22
	SCS-4	Ridgeway, Va.	1/4"—23.63	.02363	1110.61
19	SCS-9	Lynchburg, Va.	3/8"—30.26	.03026	1422.22
	SCS-9	Lynchburg, Va.	1/4"—23.63	.02363	1110.61
20	SP-22	Quantico, Va.	3/8"—30.94	.03094	1454.18
	SP-22	Quantico, Va.	1/4"—24.09	.02409	1132.23
21	SP-23	Alexandria, Va.	3/8"—30.81	.03081	1448.07
	SP-23	Alexandria, Va.	1/4"—24.01	.02401	1128.47
22	F-16	Massie's Mill, Va.	3/8"—31.49	.03149	1480.03
	F-16	Massie's Mill, Va.	1/4"—24.47	.02447	1150.09
23	F-17	Big Island, Va.	3/8"—30.67	.03067	1441.49
	F-17	Big Island, Va.	1/4"—23.91	.02391	1123.77
24	F-8	Endeavor, Pa.	3/8"—31.77	.03177	1493.19
	F-8	Endeavor, Pa.	1/4"—24.65	.02465	1158.55
25	F-9	Marienville, Pa.	3/8"—30.53	.03053	1434.91
	F-9	Marienville, Pa.	1/4"—23.82	.02382	1119.54
26	F-10	Ridgway, Pa.	3/8"—30.26	.03026	14222.2
	F-10	Ridgway, Pa.	1/4"—23.63	.02363	1110.61
27	F-11	Kane, Pa.	3/8"—30.26	.03026	1422.22
	F-11	Kane, Pa.	1/4"—23.63	.02363	1110.61
28	F-12	Kane, Pa.	3/8"—30.26	.03026	1422.22
	F-12	Kane, Pa.	1/4"—23.63	.02363	1110.61
29	F-13	Sheffield, Pa.	3/8"—30.26	.03026	1422.22
	F-13	Sheffield, Pa.	1/4"—23.63	.02363	1110.61
30	F-14	Bradford, Pa.	3/8"—30.26	.03026	1422.22
	F-14	Bradford, Pa.	1/4"—23.63	.02363	1110.61
31	SCS-1	Home, Pa.	3/8"—30.39	.03039	1428.33
	SCS-1	Home, Pa.	1/4"—23.72	.02372	1114.84
32	SCS-2	Punxsutawney, Pa.	3/8"—30.26	.03026	1422.22
	SCS-2	Punxsutawney, Pa.	1/4"—23.63	.02363	1110.61
33	S-143	Karthaus, Pa.	3/8"—30.81	.03081	1448.07
	S-143	Karthaus, Pa.	1/4"—24.01	.02401	1128.47
34	S-144	Emporium, Pa.	3/8"—30.26	.03026	1422.22
	S-144	Emporium, Pa.	1/4"—23.63	.02363	1110.61
35	S-145	Montoursville, Pa.	3/8"—30.53	.03053	1434.91
	S-145	Montoursville, Pa.	1/4"—23.82	.02382	1119.54
36	P-146	Austin, Pa.	3/8"—31.08	.03108	1460.76
	P-146	Austin, Pa.	1/4"—24.19	.02419	1136.93
37	S-147	Emporium, Pa.	3/8"—30.26	.03026	1422.22
	S-147	Emporium, Pa.	1/4"—23.63	.02363	1110.61
10164					
38	S-148	Mifflinburg, Pa.	3/8"—30.81	.03081	1448.07
	S-148	Mifflinburg, Pa.	1/4"—24.01	.02401	1128.47
39	S-149	Gouldsboro, Pa.	3/8"—30.81	.03081	1448.07
	S-149	Gouldsboro, Pa.	1/4"—24.01	.02401	1128.47

Item No. 10163	Camp	Railhead	Net Prices F.O.B. Railhead Per Sq. Ft.	Per Sq. Ft.	Total For 47000 Sq. Ft.
40	P-150	Moosic, Pa.	3/8"—30.53	.03053	1434.91
	P-150	Moosic, Pa.	1/4"—23.82	.02382	1119.54
41	P-153	Nesquehoning, Pa.	3/8"—30.81	.03081	1448.07
	P-153	Nesquehonin,g Pa.	1/4"—24.01	.02401	1128.47
42	S-154	Bedford, Pa.	3/8"—30.81	.03081	1448.07
	S-154	Bedford, Pa.	1/4"—24.01	.02401	1128.47
43	S-155	Galeton, Pa.	3/8"—31.08	.03108	1460.76
	S-155	Galeton, Pa.	1/4"—24.19	.02419	1136.93
44	SP-6	Burgettstown, Pa.	3/8"—30.26	.03026	1422.22
	SP-6	Burgettstown, Pa.	1/4"—23.63	0.2363	1110.61
45	SP-8	Rockwood, Pa.	3/8"—30.81	.03081	1448.07
	SP-8	Rockwood, Pa.	1/4"—24.01	.02401	1128.47
46	SP-11	Jamestown, Pa.	3/8"—30.26	.03026	1422.22
	SP-11	Jamestown, Pa.	1/4"—23.63	.02363	1110.61
47	SP-12	Ohiopyle, Pa.	3/8"—30.81	.03081	1448.07
	SP-12	Ohiopyle, Pa.	1/4"—24.01	.02401	1128.47
48	SP-13	Allentown, Pa.	3/8"—30.81	.03081	1448.07
	SP-13	Allentown, Pa.	1/4"—24.01	.02401	1128.47
49	SP-15	Rockwood, Pa.	3/8"—30.81	.03081	1448.07
	SP-15	Rockwood, Pa.	1/4"—24.01	.02401	1128.47
50	SP-16	Burgettstown, Pa.	3/8"—30.26	.03026	1422.22
	SP-16	Burgettstown, Pa.	1/4"—23.63	.02363	1110.61
51	SP-17	Birdsboro, Pa.	3/8"—30.81	.03081	1448.07
	SP-17	Birdsboro, Pa.	1/4"—24.01	.02401	1128.47

Where patented gypsum wallboard is sold and invoiced directly to the Federal Government for the above CCC Projects, in minimum carload quantities, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

P.S. The above prices are net—no further discount to be allowed.

10165 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 18, 1935.

Supplement to Board License Bulletin No. 1
Dated September 16, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

Effective immediately, the minimum price shown in Board License Bulletin No. 1 dated September 16, 1935, for patented 1/2" gypsum wallboard, surfaced with a weather resisting paper, is not effective when sold for use as an exterior sheathing material on specific jobs, as such sales will be considered an experimental development of gypsum board in a new field.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10166 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 27, 1935.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934, and Board License Bulletin No. 3—
Dated November 30, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective September 1, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

—Effective September 1, 1935 the minimum price of 1/4" patented Gypsum Wallboard for shipment into states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland and District of Columbia is $22.50 per M sq. ft. f.o.b. Oakfield, New York, Gypsum, Ohio, and Plasterco, Virginia.

—Effective September 1, 1935 add Cattaraugus and Chautauqua Counties, New York, and Crawford, Erie, McKean and Warren Counties, Pennsylvania to the Trucking Area as described in par. 1 of Bulletin No. 3 dated November 30, 1934.

Yours very truly

UNITED STATES GYPSUM COMPANY

Vice President.

10167 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 23, 1935.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934. (Confirms Telegram)

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

CCC Camp—South Fork, Colorado
(Gypsum Wallboard)

The minimum prices of 1/4" patented gypsum wallboard f.o.b. cars delivered, railhead delivery only, sold direct to and invoiced direct to the Federal Government for CCC Camp at South Fork, Colorado, are as follows:

Net Prices Item No. 1 (1/4"x48"x')			Net Prices Item No. 2 (1/4"x48"x10')		
Per M Sq. Ft.	Per Piece	Total For 849 Pcs.	Per M Sq. Ft.	Per Piece	Total For 457 Pcs.
$28.47	$ .9094	$590.20	$28.47	$1.1368	$519.51

The 39048 sq. ft. required for this camp may be considered as a minimum carload.

Where patented gypsum wallboard is sold and invoiced directly to the Federal Government for the South Fork, Colorado CCC Project, in carload quantity, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date

of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10168 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 21, 1935.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934

DEAR SIRS: Referring to our license contract with you, your are hereby notified that the minimum prices effective August 26, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

Effective August 26, 1935 the minimum price of 1/4" patented gypsum wallboard for shipment into states of Illinois, Indiana, Ohio and Michigan is $22.50 per M sq. ft. f.o.b. Grand Rapids, Mich., Fort Dodge, Ia. and Gypsum, Ohio.

Effective August 26, 1935 the minimum price of 1/4" and 3/8"x32"x48" patented gypsum board, if grey surfaced and round edged, for shipment into states of North Carolina, South Carolina, Florida and Georgia, is $15.00 per M sq. ft. f.o.b. Plasterco, Virginia.

Effective August 26, 1935 add the states of Montana, Colorado and Wyoming to area wherein stopover charges need not be included in the minimum price of patented gypsum board.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10169 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

Supplement to Board License Bulletin No. 1
Dated May 25, 1934. (Confirms Telegram)

AUGUST 5, 1935

MR. E. S. PITTS,
Office

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

CCC Camp—Buckeye, Colorado
(Gypsum Wallboard)

The minimum prices of 1/4" patented gypsum wallboard in minimum carload quantities f.o.b. cars delivered, railhead delivery only, sold direct to and invoiced direct to the Federal Government for CCC Camp at Buckeye, Colorado, are as follows:

Net Prices Item No. 1 (1/4"x48"x')			Net Prices Item No. 2 (1/4"x48"x10')		
Per M Sq. Ft.	Per Piece	Total For 664 Pcs.	Per M Sq. Ft.	Per Yiece	Total For 542 Pcs.
$25.96	$ .8306	$551.52	$25.96	$1.0384	$562.81

Where patented gypsum wallboard is sold and invoiced directly to the Federal Government for the Buckeye, Colorado CCC Project, in minimum carload quantities, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission,

name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10170

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 19, 1935

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS:- Referring to our license contract with you, you are hereby notified that the minimum prices effective July 22d, 1935 at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Effective July 22d, 1935 add the state of Kentucky to area wherein stopover charges need not be included in the minimum price of patented gypsum board.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10171 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 18, 1935

Supplement to Board License Bulletin No. 1—Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

In connection with inquiries for 3/4" patented gypsum board for the Cedar Central Housing Project, Cleveland, Ohio, this is to notify you that the minimum price for 3/4" patented gypsum lath in sizes other than standard is $21.25 per M sq. ft. to dealers, or $22.50 per M sq. ft. to contractors, f.o.b. Gypsum, Ohio.

Standard sizes for 3/4" patented gypsum lath are outlined in Bulletin No. 4 dated May 17, 1935.

Very truly yours,
UNITED STATES GYPSUM COMPANY

Vice President.

10172 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 12, 1935

Supplement to Board License Bulletin No. 1—Dated May 25, 1934 (Confirms Telegram)

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and

improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

CCC Camp—Elizabeth, Colorado
(Gypsum Wallboard)

The minimum prices of 1/4" patented gypsum wallboard in minimum carload quantities f.o.b. cars delivered, railhead delivery only, sold direct to and invoiced direct to the Federal Government for CCC Camp at Elizabeth, Colorado, are as follows:

Net Prices Item No. 1 (1/4"x48"x')			Net Prices Item No. 2 (1/4"x48"x10')		
Per M Sq. Ft.	Per Piece	Total For 764 Pcs.	Per M Sq. Ft.	Per Piece	Total For 542 Pc.
$25.87	$ .8278	$632.44	$25.87	$1.0348	$560.86

Where patented gypsum wallboard is sold and invoiced directly to the Federal Government for the Elizabeth, Colorado CCC Project, in minimum carload quantities, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10173 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 12, 1935

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Cancel the following supplements to Board License Bulletin No. 1:

—Supplement dated April 19, 1935 in reference to sale of patented gypsum plasterboard for Subsistence Homestead Project No. 6, Shoup Station, Westmoreland County, Penna.

—Supplement dated April 25, 1935 in reference to sale of patented gypsum plasterboard for Subsistence Homestead Project No. 7, Dailey, Randolph County, W. Va.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10174 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 5, 1935

Supplement to Board License Bulletin No. 1, Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective July 10th, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

Effective July 10, 1935 the minimum price of 1/4" patented gypsum wallboard for shipment into states of Minnesota, Iowa, Wisconsin, Upper Michigan, Kentucky, West Virginia and Virginia is $22.50 per M sq. ft. f.o.b. Fort Dodge, Iowa, Gypsum, Ohio, Grand Rapids, Michigan, Oakfield, New York and Plasterco, Virginia.

Yours very truly

UNITED STATES GYPSUM COMPANY

Vice President.

10175 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 3, 1935.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Add to paragraph (7), page 3, Bulletin No. 1.

Delivered Carload Minimum Prices to—	Same as—
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10176 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 2, 1935

Supplement to Board License Bulletin No. 1, Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum priees effective July 8th, 1935, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

(1) Cancel paragraph (1) of supplement dated April 12, 1935, (to Board License Bulletin No. 1, dated May 25, 1934), in reference to minimum price of $17.50 per M sq. ft. on size 32" x 48" patented gypsum board, grey surfaced and round edged.

(2) Effective July 8, 1935, the minimum price of 1/4" and 3/8" x 32" x 48" patented gypsum board, if grey surfaced and round edged, for shipment into states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama, is $15.00 per M sq. ft., f.o.b. Plasterco, Virginia, Grand Rapids, Michigan, Fort Dodge, Iowa, Southard, Oklahoma, Sweetwater, Texas and Acme, Texas.

This paragraph supplements Bulletin No. 1, Page 2, dated May 25, 1934, referring to 32" x 48" gypsum board.

Yours very truly

UNITED STATES GYPSUM COMPANY

Vice-President.

10177 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 12, 1935.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Texas Centennial (Dallas, Texas).
The minimum prices of patented gypsum wallboard, aluminum paint primed, one coat, both sides and four edges, for the Texas Centennial, Dallas, Texas, are as follows:

3/8" Gypsum Wallboard—$43.50 per M sq. ft. f.o.b. mill.
1/2" " " — 44.50 " " " " " "

Prices of same boards primed one side only, and four edges, are $4.50 per M sq. ft. less than minimum prices shown above.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President.

5165

10178 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 10, 1935

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

CCC Camps—Colorado
(Gypsum Wallboard)

The minimum prices of 1/4" patented gypsum wallboard in minimum carload quantities f.o.b. cars delivered, railhead delivery only, sold direct to the Federal Government for Colorado CCC Camps at destinations listed below, are as follows:

	Net Prices Item No. 1 (1/4"x48"x8')		Net Prices Item No. 2 (1/4"x48"x10')	
Destination	Per Piece	Total For 764 Pieces	Per Piece	Total For 542 Pieces
Grand Junction	$ .8404	$642.07	$ 1.0506	$569.43
Springfield	.8059	615.71	1.0074	546.01
Trinidad	.8028	613.34	1.0035	543.90
Pueblo	.8122	620.52	1.0152	550.24
Cheyenne Wells	.8122	620.52	1.0152	550.24
Montrose	.9188	701.96	1.1486	622.54
Hugo	.8216	627.70	1.0270	556.63
Placerville	.9408	718.77	1.1760	637.39
Durango	.9408	718.77	1.1760	637.39
Roberts Spur	.8279	632.52	1.0348	560.86
Rifle	.8404	642.07	1.0506	5694.3

Where patented gypsum wallboard is sold and invoiced directly to the Federal Government for the above CCC Projects, in minimum carload quantities, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date

shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the com-
10179 mission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President.

10180 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 17, 1935

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

The minimum price of 1/4" or 3/8" x 24" x 48" open edge (cutstock) patented gypsum board is $17.50 per M sq. ft. f.o.b. Plasterco, Virginia, Grand Rapids, Michigan, Fort Dodge, Iowa, Southard, Oklahoma, Sweetwater, Texas and Acme, Texas for shipment into states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10181 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 19, 1935

Supplement to Board License Bulletin No. 1, Dated May 25, 1934—Cancels letter Supplement of February 26, 1935
CCC Camps

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

CCC Camps:
(Gypsum Wallboard)

In areas where the Federal Government carries out CCC Camp construction directly or by letting contract to a contractor to furnish both material and labor (such contractor is considered as the direct representative of the Federal Government on the specific project being figured) the minimum price of patented gypsum wallboard direct to the Federal Government or to such contractor under such conditions only for CCC Projects, in minimum carload quantities, is the respective dealer delivered price f.o.b. cars railhead delivery only.

Where patented gypsum wallboard is sold and invoiced directly to the Federal Government or to such contractor under such conditions, for CCC Projects only, in minimum carload quantities, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Where less carload quantities of patented gypsum wallboard are required, or CCC Camp site delivery, any quantity, is requested, quotation will be made only through dealers.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President.

10182 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 25, 1935

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Subsistence Homesteads Projects (SHD)
Gypsum Plasterboard (Lath—Plain)
thickness 1/4" and 3/8"; size 16" x 48" bundled;
one surface of each bundle to be stamped "SHD" in letters 2" high

The minimum price on patented gypsum plasterboard direct to the Federal Government, Department of the Interior, Division of Subsistence Homesteads for shipment to Project No. 7, Dailey, Randolph County, W. Va., in minimum carload quantities is $ .01584 per sq. ft. for 3/8" thickness, and $ .01485 per sq. ft. for 1/4" thickness, less 2% discount, f.o.b. cars Dailey, Randolph County, West Virginia.

Where patented gypsum plasterboard is sold to the Federal Government as above for Dailey, W. Va., Subsistence Homestead Project in minimum carload quantities, a maximum allowance of $ .55 per thousand sq. ft. may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the Project, date shipped, yardage sold, the unit price per square yard, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer must be filed with the licensor with the regular monthly reports.

Where less carload quantities of patented gypsum plasterboard are required, or Subsistence Homesteads site delivery, any quantity, is requested, quotation will be made only through dealers.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President.

10183 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 19, 1935

Supplement to Board License—Bulletin No. 1—
Dated May 25, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under

which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Subsistence Homesteads Projects (SHD)
Gypsum Plasterboard (Lath—Plain)
thickness 3/8″; size 16″ x 48″; bundled;
one surface of each bundle to be stamped "SHD" in letters 2″ high

The minimum price on patented gypsum plasterboard direct to the Federal Government, Department of the Interior, Division of Subsistence Homesteads for shipment to Project No. 6, Shoup Station, Westmoreland County, Penna., in minimum carload quantities is 15¢ per square yard (or .01666 per sq. ft.) f.o.b. cars Shoup Station, Westmoreland County, Pennsylvania.

Where patented gypsum plasterboard is sold to the Federal Government as above for Westmoreland Subsistence Homestead Project in minimum carload quantities, a maximum allowance of 1/2¢ per square yard may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the Project, date shipped, yardage sold, the unit price per square yard, total amount of the billing total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer must be filed with the licensor with the regular monthly reports.

Where less carload quantities of patented gypsum plasterboard are required, or Subsistence Homesteads site delivery, any quantity, is requested, quotation will be made only through dealers.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President.

10184 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 12, 1935

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

MR. E. S. PITTS
Office.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent 1,230,297, are supplemented as follows:

(1) The minimum price of 1/4" or 3/8" x 32" x 48" patented gypsum board, if grey surfaced and round edged, is $17.50 per M sq. ft. f.o.b. Plasterco, Va., Grand Rapids, Mich., Fort Dodge, Iowa, Southard, Okla., Sweetwater, Texas and Acme, Texas for shipment into states of Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Alabama.

(2) The minimum price of 1/4" patented gypsum wallboard for shipment into the state of Missouri is $22.50 per M sq. ft. f.o.b. Fort Dodge, Iowa, Grand Rapids, Mich. and Southard, Okla.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10185 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 9, 1935

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297 are supplemented as follows:

The minimum delivered prices of patented gypsum wallboard and gypsum plasterboard will be directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and on Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented gypsum wallboard and gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented gypsum wallboard and gypsum plasterboard shall be as detailed in schedule attached.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10186 Patented Gypsum Wallboard and Lath

Opposite old rate, using the table below, is the proper new pricing rate, in cents per 100 pounds:

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.256	.28	.395	.42
.09	.10	.22	.24	.35	.37
.14	.15	.27	.29	.40	.42
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

Stopover Charges: In that area where stopover charges are now absorbed the Emergency increase applicable to stopover charge shall also be absorbed. In those states where stopover charges are not absorbed, the Emergency increase (10%) which is applicable to stopover charges shall be added. ($6.30 charge becomes $6.93, etc.).

10187 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 6, 1935

Supplement to Board License—Bulletin No. 1—
Dated May 25, 1934.

E. S. PITTS.
Office

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

Effective immediately, the minimum price of 1/4" patented gypsum wallboard for shipment to towns of Kansas City, Dodson and Edgecomb, Mo., is $22.50 per M sq. ft. f.o.b. Fort Dodge, Iowa.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vic. President.

10188 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 4, 1935

Supplement to Board License—Bulletin No. 1—Dated May 25, 1934.—And Board License Bulletin No. 3—
Dated November 30, 1934.

MR. E. S. PITTS.
Office

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and

improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,-452 and Hite patent number 1,230,297, are supplemented as follows:

—Add Warren and Sussex Counties, New Jersey to Metro N. Y.—N. J. Area as described in paragraph (y) on page 2 of Bulletin No. 1 dated May 25, 1934.

—Add Warren and Sussex Counties, New Jersey to Metro N. Y.—N. J. Area as described in paragraph (2) on page 1 of Bulletin No. 3 dated November 30, 1934.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10189 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

Supplement to Board License Bulletins.

MARCH 29, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,-452 and Hite patent number 1,230,297, are supplemented as follows:

Patented gypsum wallboard and/or lath to Metal Ceiling Contractors shall be sold on a contractor basis.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10190 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 20, 1935.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Refer to paragraph 1-b on page 2 of Board License Bulletin No. 1 dated May 25, 1934:

Add Garrett and Allegany Counties, Maryland, to area wherein 32" x 48" patented gypsum board, if grey surfaced and round-edged, is subject to minimum plasterboard price.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10191 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 18, 1935.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

Refer to page 1 of Board License Bulletin No. 1 dated May 25, 1934. Change second paragraph to read as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as given in supplement dated February 25, 1935.

The weights referred to above, given you in supplement dated February 25, 1935, are as follows:

1/4"	thickness	—950#	per	M	sq.	ft.
5/16"	"	—1175#	"	"	"	"
3/8"	"	—1400#	"	"	"	"
1/2"	"	—1900#	"	"	"	"
3/4"	"	—3300#	"	"	"	"

We desire to emphasize that all shipments of patented gypsum board products, in straight carloads or in mixed carloads with other gypsum products, are to be figured, for purposes of meeting required minimum weights, at weights per M sq. ft. as shown above.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10192 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 15, 1935

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective March 20, 1935 at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

Effective March 20, 1935 the minimum price of 1/4" patented gypsum wallboard for shipment into the following states:

Alabama	Louisiana	So. Carolina
Arizona	Mississippi	So. Dakota
Arkansas	Montana	Tennessee
Colorado	Nebraska	Texas
Florida	New Mexico	Utah
Georgia	No. Carolina	Wyoming
Idaho	No. Dakota	
Kansas	Oklahoma	

is $22.50 per M sq. ft. f.o.b. Plasterco, Va., Grand Rapids, Mich., Ft. Dodge, Ia., Southard, Okla., Sweetwater, Texas and Acme, Texas.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10193 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 25, 1935.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective March 1, 1935 at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

(1) Change in Weights—Change Weights of patented Wallboard and Plasterboard as follows:

1/4"	thickness	—950#	per	M	sq.	ft.	
5/16"	"	—1175#	"	"	"	"	
3/8"	"	—1400#	"	"	"	"	
1/2"	"	—1900#	"	"	"	"	
3/4"	"	—3300#	"	"	"	"	(no change)

(2) Carload Shipments

Prices f.o.b. Cars:	3/8" Gypsum Wallboard	1/4" Gypsum Wallboard	1/2" Gypsum Wallboard	3/8" Gypsum Tileboard	3/8" Gypsum Plasterboard
Laramie, Wyo.	34.25	28.50(z)	—	55.75	30.75
Loveland, Colo.	34.00	28.25(z)	38.50	55.50	20.50

(z) Minimum prices 1/4" Wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices as above shown: Montana, Wyoming, Colorado, New Mexico, Idaho, Utah and Arizona.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10194 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 25, 1935.

Supplement to Board License Bulletin No. 2—
Dated October 16, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,-452 and Hite patent number 1,230,297, are supplemented as follows:

Pickups Price f.o.b. Trucks	3/8" Gypsum Plasterboard
Cleveland, Ohio	$18.00 per M sq. ft.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10195 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 12, 1935.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and

improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

We desire to emphasize the meaning of Paragraph "y" on page 2 of Board License Bulletin No. 1, dated May 25, 1934, by changing the wording to read as follows:

(y) In straight carloads of patented gypsum board and/or lath products, consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York—New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon and Ocean Counties, New Jersey.

On pool cars or mixed cars into this area, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products to one destination. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined area have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice-President.

10196 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 26, 1935

Supplement to Board License Bulletin No. 1--
Dated May 25, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,-452 and Hite patent number 1,230,297, are as follows:

CCC Camps:

The minimum price of wallboard and/or plasterboard direct to the Federal Government for CCC Projects in minimum carload quantities is the dealer delivered price f.o.b. cars, railhead delivery only.

Where patented wallboard or plasterboard is sold and invoiced direct to the Federal Government for CCC Projects, a maximum allowance of $1.50 per M sq. ft. may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M sq. ft., total amound of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, and amount and date of payment to each dealer must be filed with the licensor with the regular monthly reports.

Where less carload quantities of patented wallboard and/or plasterboard are required, or Campsite delivery any quantity is requested, quotation will be made only through dealers.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10197 — UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 21, 1935.

Supplement to Board License Bulletins

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent #1,500,452 and Hite patent #1,230,297, are as follows:

Referring to the permission which we have given you to sell patented gypsum wallboard and patented gypsum plasterboard to manufacturers of gypsum products (subject to our approval of each manufacturer at a discount of 15% on wallboard and 12½% on plasterboard, for resale to the dealer trade, this is to advise you that:

the minimum of 5000 sq. ft. of patented gypsum board and/or lath products as required for pickups and shipments out of Eastern mills and warehouses does not apply for pickups by or deliveries to other gypsum manufacturers, providing such pickups or deliveries are destined for manufacturer's own warehouse or plant. If picked up or shipped for delivery direct to a dealer's warehouse, then the 5000 sq. ft. minimum shall apply.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10198 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 11, 1935

Supplement to Board License Bulletin No. 1—Dated May 25, 1934, and Board License Bulletin No. 3—Dated November 30, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

—Add Hunterdon County, New Jersey to Metro N. Y.—N. J. area as described in paragraph (y) on page 2 of Bulletin No. 1 dated May 25, 1934.

—Add Hunterdon County, New Jersey to Metro N. Y.—N. J. Area as described in paragraph (2) on page 1 of Bulletin No. 3 dated November 30, 1934.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10199 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 9, 1935

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Change second sentence of reference (*) as issued January 4, 1935 to read:

"Rate applying to 80,000 lb. minimum out of Fort Dodge or Grand Rapids into these states etc."

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10200 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 4, 1935.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Add reference (*) to minimum prices for Patented Board and Lath f.o.b. Fort Dodge, Iowa and Grand Rapids, Michigan as follows:

(*) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge or Grand Rapids) is in effect, delivered prices of patented Board and/or Lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lb. minimum out of Fort Dodge into these states will be used in pricing patented Board and/or Lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10201 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 4, 1935.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Add reference (*) to minimum prices for Patented Board and Lath f.o.b. Fort Dodge, Iowa and Grand Rapids, Michigan as follows:

(*) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge or Grand Rapids) is in effect, delivered prices of patented Board and/or Lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lb. minimum out of Fort Dodge into these states will be used in pricing patented Board and/or Lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

5182

10202 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 31, 1934.

Board Prices, Delivered by Truck to Dealers' Warehouses.

Supplement to Board License Bulletin No. 3—Dated November 30, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Change paragraph (5) on page 2 of Board License Bulletin No. 3 to read as follows:

(5) Minimum Quantities. (Applying to paragraphs 1, 2, 3 and 4 above) 5000 sq. ft. gypsum board and/or lath to one destination only. Delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10203 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 30, 1934

Supplement to Board License Bulletins

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent #1,500,452 and Hite patent #1,230,297, are as follows:

Referring to the permission which we have given you to sell patented gypsum wallboard and patented gypsum plasterboard to manufacturers of gypsum products (subject to our approval of each manufacturer) at a discount of 15% on wallboard and 12½% on plasterboard, for resale to the dealer trade, this is to advise you that the following named gypsum manufacturers may be sold on this basis:

—Oakfield Gypsum Products Corporation
—Connecticut Adamant Plaster Company

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10204 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 28, 1934

Board Prices, Delivered by Truck to Dealers' Warehouses. Supplement to Board License Bulletin No. 3—Dated May 25, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Substitute the following paragraph for paragraph 5, page 1, Bulletin No. 3 dated May 25, 1934:

(5) Minimum Quantities. Applying to paragraphs 1, 2, 3 and 4 above) 5,000 sq. ft. gypsum board and/or lath to one destination only. In mixed loads with other gypsum products, a minimum of 5,000 sq. ft. gypsum board and/or lath to be included. Delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10205 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 22, 1934

Supplement to Board License Bulletin No. 1—Dated May 25, 1934—and to Board License Bulletin No. 2—Dated October 16, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective November 24, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

Supplement to Board License Bulletin No. 1 Dated May 25, 1934:

Carload Shipments

Prices f.o.b. Cars:	3/8" Gypsum Wallboard	1/4" Gypsum Wallboard	1/2" Gypsum Wallboard	3/8" Gypsum Tileboard	3/8" Gypsum Plasterboard
Laramie, Wyo.	35.00	29.00(z)	—	56.50	21.50
Loveland, Colo.	34.75	28.50(z)	39.50	56.25	21.25

(z) Minimum prices 1/4" Wallboard for shipment into following states, deduct $2.00 per M sq. ft. from mill prices as above shown: Montana, Wyoming, Colorado, New Mexico, Idaho, Utah and Arizona.

Supplement to Board License Bulletin No. 2 Dated October 16, 1934:

Pickups

Prices f.o.b. Trucks:					
Laramie, Wyo.	35.00	27.00	—	56.50	21.50
Loveland, Colo.	34.75	26.50	39.50	56.25	21.50

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10206 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 1, 1934

Supplement to Board License Bulletins—Cancels Supplement of April 11, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent #1,500,452 and Hite patent #1,230,297, are as follows:

In the event of an increase in the minimum prices of patented gypsum wallboard or plasterboard, the advanced minimum price shall apply to all shipments made after the effective date of the price increase, except:

†(1) On bona fide orders actually received and accepted by you at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

(2) For gypsum lath on specific jobs on which the contract is awarded and order for gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on federal government jobs after the effective date of the price increase.

(3) For gypsum wallboard and/or gypsum lath on specific gypsum roof jobs to gypsum roofing contractors on which the contract is awarded and order for gypsum wallboard and/or gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on federal government jobs after the effective date of the price increase.

†(4) (a) For gypsum wallboard on specific federal government jobs on which the contract is awarded and order for gypsum wallboard is placed with the licensee within 60 days from date of price increase.

(b) For gypsum wallboard on specific industrial housing projects on which the contract is awarded and order for gypsum wallboard is placed with the licensee within 30 days from date of price increase.

(5) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee prior to the effective date of price increase.

10207 Federal Government jobs are those where the order for gypsum board is placed by and invoiced to an official administrative department of the Federal Government to be used solely and directly by the Federal Government, or where the contract is awarded to a contractor by an official administrative department of the Federal Government.

The following are considered official administrative departments of the Federal Government:

Treasury	Interior	Justice
War	Veterans Bureau	Post Office
Navy	Federal Dept of State	Agriculture
Commerce	Labor	

including recognized branches of these departments.

Where obligations are incurred in accordance with Sections 2, 3 or 4 of the preceding paragraph, the licensee must file with the licensor a record of such obligations within ten days after the expiration of the period during which the incurring of such obligations is permitted.

The selling of patented gypsum wallboard and/or lath below the minimum price, except as provided above, is in violation of the license.

Referring to the permission which we have given you to sell to manufacturers of gypsum products, (subject to our approval of each manufacturer), at a discount of 15% on wallboard and 12½% on plasterboard; this is to advise you that effective immediately said permission is restricted to sales of patented board and lath to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10208

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO, ILLINOIS

NOVEMBER 1, 1934.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective November 17, 1934 at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are changed as follows:

Effective November 17, 1934, cancel paragraph (*) on page 2 of Board License Bulletin No. 1 dated May 25, 1934, which refers to pricing of Patented Board shipments from Ft. Dodge. Iowa, Southard, Oklahoma, Acme or Sweetwater, Texas, into Arizona, New Mexico, Colorado, Wyoming, Utah, Oklahoma, Texas, Kansas, Missouri, Nebraska, So. Dakota, N. Dakota, Minnesota, Arkansas, Louisiana, Iowa, Upper Michigan, and Wisconsin.

Effective November 17, 1934, use actual Gypsum Board rates as published in tariffs which become effective on that date.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10209 OCTOBER 30, 1934.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective at once, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Add to paragraph (7), page 3, Bulletin No. 1:

Delivered Carload Minimum Prices In—	Same as:
Gabe and Sheppard, Okla.	Oklahoma City, Okla.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10210 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 23, 1934

Supplement to Board License Bulletin No. 2—
Dated October 16, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective November 1, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

The minimum prices for pickups of patented board and/or lath as established in our Board License Bulletin No. 2 dated October 16, 1934 are effective November 1, 1934 with no protection permitted for dealer warehouse stocks, or for protected jobs or for operations as provided for generally in supplement dated April 11, 1934. All orders accepted at current minimum prices must be picked up not later than October 31, 1934.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10211 UNITED STATES GYPSUM COMPANY.
300 West Adams Street
CHICAGO

OCTOBER 16, 1934

Supplement to Board License Bulletin No. 3—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices, effective November 1, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent 1,500,452 and Hite patent 1,230,297 are supplemented as follows:

Effective November 1, 1934, the supplement dated July 26, 1934, adding par. 7 (Texas Trucking Area) to Board License Bulletin No. 3, is cancelled.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10212 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 19, 1934.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

MR. E. S. PITTS,
Office.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective immediately, stopover charges need not be included in the minimum price of gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent No. 1,500,452 and Hite patent No. 1,230,297, for shipments to Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska and following towns in Kentucky: Newport, Latonia, Ludlow, Erlanger, Covington, Bellevue, Brent and Dayton.

Also: Add to paragraph 7, Bulletin No. 1, dated May 25, 1934:

Delivered Carload Minimum Prices In—	Same as—
Wilmont, Okla.	Oklahoma City, Oklahoma.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10213 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 26, 1934

Supplement to Board License Bulletin No. 3—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices, effective July 27, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent 1,500,452 and Hite patent 1,230,297 are supplemented as follows:

Add the following paragraph to page 2, Bulletin No. 3 dated May 25, 1934:

(7) Texas. Minimum price wallboard and/or plasterboard delivered by truck to dealers' warehouse, add $1.00 per M to price delivered by rail to dealers' warehouse or nearest siding. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with gypsum wallboard and/or plasterboard to make minimum weight. This applies to following counties in Texas; Amb, Hale, Floyd, Motley, Cottle, Foard, Wilbarger, Witchita, Hockley, Lubbock, Crosby, Dickens, King, Knox, Baylor, Archer, Yoakum, Terry, Lynn, Garza, Kent, Stonewall, Haskell, Throckmorton, Young, Gaines, Dawson, Borden, Scurry, Fisher, Jones, Shackelford, Breckenridge, Andrews, Martin, Howard, Mitchell, Nolan, Taylor, Callahan, Eastland, Loving, Winkler, Ector, Midland, Glasscock, Sterling, Coke, Runnels, Coleman, Brownwood, Comanche, Ward, Crane, Upton, Reagan, Irion, Green, Concho, McCulloch, SanSaba, Mills, Reeves, Pecos, Crockett, Schleicher, Menard, Mason, Sutton, Kimble; also Lee County, New Mexico.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10214 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 24, 1934.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective July 27, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Add to paragraph (7), page 3, Bulletin No. 1:

Delivered Carload Minimum Prices In—	Same as—
Chicopee, Mass.	Springfield, Mass.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10215 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 10, 1934

Supplement to Board License Bulletins Nos. 1 and 3

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective June 28, 1934, at which you may sell gypsum wallboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Substitute the following paragraph for paragraph 4, page 1, Bulletin No. 3 dated May 25, 1934:

(4) Boston. Minimum price wallboard and/or plasterboard delivered by truck to dealer's warehouse, add $2.00 per M to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk, and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk county, Mass., Rockingham and Strafford Counties, New Hampshire; York County, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to the York County line.

Add to paragraph 7, page 3, Bulletin No. 1, dated May 25, 1934:

Delivered Carload Minimum Prices In—	Same as—
Overland Park, Kansas	Kansas City, Mo.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice-President.

10216 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 5, 1934

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 6, 1934, stopover charges need not be included in the minimum price of gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent No. 1,500,452 and Hite patent No. 1,230,297, for shipments to Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas and Nebraska.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10217 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 5, 1934.

Supplement to Board License Bulletin No. 1—
Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective July 6, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in

our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

Add to paragraph (7), page 3, Bulletin No. 1:

Delivered Carload Minimum Prices In—	Same as—
Armory, Indian Orchard and Oak Street, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10218 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 4, 1934.

Supplement to Board License Bulletin No. 1 Dated May 25, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective June 4, 1934, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

5/16" Gypsum Wallboard (wt. 1325# per M) f.o.b. cars Oakfield, New York and Gypsum, Ohio . . . . . $26.50 per M

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

10219 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 11, 1934.

Supplement to Board License Bulletins—Cancels Supplement of March 14, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective April 25, 1934 at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent #1,500,452 and Hite patent #1,230,297, are as follows:

In the event of an increase in the minimum price of patented gypsum wallboard or plasterboard, the advanced minimum price shall apply to all shipments made after the effective date of the price increase, except:

(1) On bona fide orders actually received and accepted by you at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase, which means on or before May 5, 1934;

(2) For gypsum lath on specific jobs on which the contract is awarded and order for gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on federal government jobs after the effective date of the price increase;

(3) For gypsum wallboard and/or gypsum lath on specific gypsum roof jobs to gypsum roofing contractors on which the contract is awarded and order for gypsum wallboard and/or gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on federal government jobs after the effective date of the price increase:

†(4) (a) For gypsum wallboard on specific federal government jobs on which the contract is awarded and order for gypsum wallboard is placed with the licensee within 60 days from April 25, 1934;

(b) For gypsum wallboard on specific industrial housing projects on which the contract is awarded and order for gypsum wallboard is placed with the licensee within 30 days from April 25, 1934;

(c) For gypsum wallboard sold to the Century of Progress or for buildings to be erected in connection with the Century of Progress provided shipment is made on or before May 31, 1934.

10220 †(5) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee prior to the effective date of the price increase.

†Federal Government jobs are those where the order for gypsum board is placed by and invoiced to an official administrative department of the Federal Government to be used solely and directly by the Federal Government, or where the contract is awarded to a contractor by an official administrative department of the Federal Government.

†The following are considered official administrative departments of the Federal Government:

Treasury	Interior	Justice
War	Veterans Bureau	Post Office
Navy	Federal Dept of State	Agriculture
Commerce	Labor	

including recognized branches of these departments.

†Where obligations are incurred in accordance with Sections 2, 3 or 4 of the preceding paragraph, the licensee must file with the licensor a record of such obligations within ten days after the expiration of the period during which the incurring of such obligations is permitted.

The selling of patented gypsum wallboard and/or lath below the minimum price, except as provided above, is in violation of the license.

Referring to the permission which we have given you to sell to manufacturers of gypsum products, (subject to our

approval of each manufacturer), at a discount of 15% on wallboard and 12½% on plasterboard; this is to advise you that effective immediately said permission is restricted to sales of patented board and lath to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

10221

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 14, 1934.

Supplement to Board License Bulletins—Cancels Letter of March 6, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

In the event of an increase in the minimum price of patented gypsum wallboard or plasterboard, the advanced minimum price shall apply to all shipments made after the date of the price increase, except:

(1) On bona fide orders actually received and accepted by you at your home office in writing before date of the price increase and shipped by you within ten days after date of price increase;

(2) For gypsum lath on protected specific jobs;

(3) For gypsum wallboard and/or gypsum lath on protected specific gypsum roof jobs to gypsum roofing contractors.

(4) For gypsum wallboard on specific Federal Government jobs on which contract is awarded and order for gypsum wallboard is placed with licensee within 60 days after date of price increase.

†(5) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee prior to the effective date of the price increase.

The selling of patented gypsum wallboard and/or lath below the minimum price except as provided above, is in violation of the license.

Referring to the permission which we have given you to sell to manufacturers of gypsum products, (subject to our approval of each manufacturer), at a discount of 15% on wallboard and 12½% on plasterboard; this is to advise you that effective immediately said permission is restricted to sales of patented board and lath to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

A Harner
R Cooke
C J Lane
E S Pitts
R J Sterling
C C Spray
E A Gallagher
S S Jenkins
S. F. Bartlett
R. M. Beckler

M. H. Baker, President
National Gypsum Company
409 Jackson Boulevard
Buffalo, N. Y.

Messrs. Abel Davis & Eugene Holland
Receivers in Equity
Universal Gypsum Company
105 W. Madison Street
Chicago, Illinois.

Mr. S. J. Kelley, President
Kelley Plasterboard Company
Delawanna, N. J.

cc to

Mr. F. G. Ebsary, President
Ebsary Gypsum Company, Inc.
Scottsville
New York.

Mr. George N. Lenci
Ebsary Gypsum Company, Inc.
414 Ogden Street
Newark, N. J.

Mr. W. P. Fuller, President
Atlantic Gypsum Products Co
40 Central Street
Boston, Mass.

Mr. L. I. Neale, V. P.
Atlantic Gypsum Products Co
60 E. 42d St
N. Y. C.

Mr. C. O. Brown, V. P.
100 E. 42d Street
Certain-teed Products Corp
New York.

Mr. Warren, Henry, Merch. Mgr.
Certain-teed Products Corp.
2246 W. 49th St
Chicago, Illinois.

Mr. C. F. Miller, President
American Gypsum Company
Port Clinton, Ohio.

Mr. A. R. Black, Sales Manager
American Gypsum Company
Port Clinton, Ohio.

10222 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 6, 1934.

Supplement to Board License Bulletins—Cancels Letter of January 2, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

In the event of an increase in the minimum price of patented gypsum wallboard or plasterboard, the advanced minimum price shall apply to all shipments made after the date of the price increase, except:

(1) On bona fide orders actually received and accepted by you at your home office in writing before date of the price increase and shipped by you within ten days after date of price increase;

(2) For gypsum lath on protected specific jobs;

(3) For gypsum wallboard and/or gypsum lath on protected specific gypsum roof jobs to gypsum roofing contractors.

(4) For gypsum wallboard on specific Federal Government jobs on which contract is awarded and order for gypsum wallboard is placed with licensee within 60 days after date of price increase.

(5) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under yearly contract awarded by that committee prior to the effective date of the price increase.

The selling of patented gypsum wallboard and/or lath below the minimum price except as provided above, is in violation of the license.

Referring to the permission which we have given you to sell to manufacturers of gypsum products, (subject to our approval of each manufacturer), at a discount of 15% on wallboard and 12½% on plasterboard; this is to advise you that effective immediately said permission is restricted to sales of patented board and lath to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10223 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JAN 2 1934

Supplement to Board License Bulletins—Cancels Letter of September 5, 1933.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

In the event of an increase in the minimum price of patented gypsum wallboard or plasterboard, the advanced minimum price shall apply to all shipments made after the date of the price increase, except:

(1) On bona fide orders actually received and accepted by you at your home office in writing before date of the price increase and shipped by you within ten days after date of price increase;

(2) For gypsum lath on protected specific jobs;

(3) For gypsum wallboard and/or gypsum lath on protected specific gypsum roof jobs to gypsum roofing contractors.

†(4) For gypsum wallboard on specific Federal Government jobs on which contract is awarded and order for gypsum wallboard is placed with licensee within 60 days after date of price increase.

The selling of patented gypsum wallboard and/or lath below the minimum price except as provided above, is in violation of the license.

Referring to the permission which we have given you to sell to manufacturers of gypsum products, (subject to our approval of each manufacturer), at a discount of 15% on wallboard and 12½% on plasterboard; this is to advise you that effective immediately said permission is restricted to sales of patented board and lath to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10224 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 16, 1933.

Supplement to Board License Bulletin No. 1

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Refer to Board License Bulletin #1 dated September 28, 1933, page three and substituted following for second paragraph:

Pickup price at Buffalo warehouses, for destinations in counties listed in this paragraph, 1/4", $15.34† per M sq. ft.; 3/8".$15.78† per M sq. ft.

Note†: These prices do not apply to 32"x48" board. See Paragraph (1).

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

This letter sent to the following:.

A. Harner
R. Cooke
C. J. Lane
E. S. Pitts
F. M. Miller
R. J. Sterling
C. C. Spray
E. A. Gallagher
S. S. Jenkins
W. T. Coe

Mr. M. H. Baker, President
National Gypsum Company
409 Jackson Boulevard
Buffalo, New York

Messrs. Abel Davis and
Eugene Holland, Receivers in Equity
Universal Gypsum Company
105 W. Madison Street
Chicago, Illinois

Mr. S. J. Kelley, President
Kelley Plasterboard Co.,
Delawanna
New Jersey

cc to:

Mr. E. G. Ebsary, President
Ebsary Gypsum Company, Inc.
Scottsville
New York

Mr. W. P. Fuller, President
Atlantic Gypsum Products Company
40 Central Street
Boston, Massachusetts

Mr. C. O. Brown, Vice President
Certain-teed Products Corporation
100 East 42d Street
New York, New York

Mr. C. F. Miller, President
American Gypsum Company
Port Clinton
Ohio

Mr. George N. Lenci,
Ebsary Gypsum Company, Inc.
414 Ogden Street
Newark, New Jersey

Mr. L. I. Neale, Vice President
Atlantic Gypsum Products Company
60 East 42d Street
New York, New York

Mr. Warren Henley, Merch. Mgr.
Certain-teed Products Corporation
2246 West 49th Street
Chicago, Illinois

Mr. A. R. Black, Sales Manager
American Gypsum Company
Port Clinton
Ohio

10225 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPT. 5, 1933.

Supplement to Board License Bulletins—Cancels Letter of July 20, 1933.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

In the event of an increase in the minimum price of patented gypsum wallboard or plasterboard, the advanced minimum price shall apply to all shipments made after the date of the price increase, except:

(1) On bona fide orders actually received and accepted by you at your home office in writing before date of the price increase and shipped by you within ten days after date of price increase;

(2) For gypsum lath on protected specific jobs;

(3) For gypsum wallboard and/or gypsum lath on protected specific gypsum roof jobs to gypsum roofing contractors.

The selling of patented gypsum wallboard and/or lath below the minimum price except as provided above, is in violation of the license.

Referring to the permission which we have given you to sell to manufacturers of gypsum products, (subject to our approval of each manufacturer), at a discount of 15% on wallboard and 12½% on plasterboard; this is to advise

you that effective immediately said permission is restricted to sales of patented board and lath to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

Allowances, Etc:

Eliminate from Board License Bulletin Number One of May 3, 1933, page three paragraph five, the following: "(Except in Switching limits of Minneapolis and Saint Paul, Minnesota, pool cars are permitted one switch at manufacturer's expense)".

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10226 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 20, 1933

Supplement to Board License Bulletins

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

In the event of an increase in the minimum price of patented gypsum wallboard or plasterboard, the advanced minimum price shall apply to all shipments made after the date of the price increase, except only upon bona fide orders actually received and accepted by you at your home office in writing before date of the price increase and shipped by you within ten days after date of price increase. The selling of patented gypsum wallboard and lath for specific jobs, below the minimum price except as provided above, is in violation of the license.

Referring to the permission which we have given you to sell to manufacturers of gypsum products, (subject to our approval of each manufacturer), at a discount of 15% on wallboard and 12½% on plasterboard; this is to advise you that effective immediately said permission is restricted to sales of patented board and lath to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10227 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 1, 1933.

Supplement to Board License Bulletin No. 1

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Refer to supplement dated May 11 and change addition to paragraph 5, Bulletin No. 1, to read as follows "Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

Refer to Board License Bulletin No. 1, May 3, 1933, page 2, paragraph (2) and change to read as follows:

"(2) 36"x48" is standard plasterboard size in all states to gypsum roof contractors for use on specific gypsum roof jobs only and is subject to plasterboard minimum price for such specific gypsum roof jobs.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10228 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 11, 1933.

Supplement to Board License Bulletin No. 1.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Refer to paragraph (5), page 3, of Board License Bulletin No. 1, dated May 3, 1933, and add Texas and Nebraska to the list of states in which stopover charges need not be included in the minimum price.

Also add the following to same paragraph (No. 5): "Any quotation deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, is considered a quotation to sell at less than the minimum price and is therefore a violation of the license agreement".

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10229 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 19, 1933

Supplement to Board License Bulletin No. 1

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Substitute following paragraph for paragraph (5), page 3, Board License Bulletin No. 1, March 31, 1933:

(5) Allowances, Etc.: The minimum price fixed by licensor for patented board and/or lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding, for switching performed after car has been originally set for unloading, (except in switching limits of Minneapolis and St. Paul, Minnesota, pool cars are permitted one switch at manufacturer's expense), for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented board and/or lath, or for stop-over charges except that stopover charges need not be included in the minimum price in shipments to Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, and South Dakota. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers, or the extension of other than regular terms to any such dealer or buyer.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10230 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 10, 1933

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

3/4" gypsum plasterboard in the standard lath widths and lengths, $20.00 per thousand sq. ft. f.o.b. Oakfield, N. Y., Gypsum, Ohio, Ft. Dodge, Ia., and Southard, Oklahoma. Standard weight of 3/4" gypsum plasterboard is 3300 lbs. per M sq. ft.

Referring to Bulletin No. 1, paragraph 7, Oak Street, Mass. takes same minimum delivered price as Springfield, Mass.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10231 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 1, 1933

Supplement to Board License Bulletin No. 3.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Fort Dodge Trucking Area as follows: Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone, and Story counties, Iowa. Minimum prices and minimum truckloads delivered to dealer's warehouse as follows:

Wallboard and Plasterboard, add $3.00 per M sq. ft. to Minimum f.o.b. Ft. Dodge, prices.

Minimum truckload 4,000 lbs., either straight board or mixed with other gypsum products. Use standard weights in computing board minimums.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10232 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 6, 1933

Supplement to Board License Bulletin No. 1

Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum prices to dealers for gypsum wallboard f.o.b. cars, Chicago, Illinois, Century of Progress siding, as follows:

3/8" Gypsum Wallboard, bent and formed at mill (not primed):

30 Ton Car	20-Ton Car
$79.32 Per M	$79.80 per M

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10233 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

22d DECEMBER 1932

Dunnage

As per your request, I am attaching hereto our standard instructions on loading and bracing wallboard and plasterboard.

It is our policy that a large board only be used on the bottom, and we use no large board dunnage on top, using paper where necessary; strips to be used on sides.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10234 Amount used in straight Cars of Board

	Minimum Used	Average	Maximum Used	
American		156		
Atlantic			1100	
Certain-teed			533	
Ebsary		600	(600)	
Kelley			500	
National	864	1112	1360	
Universal	233	378	524	
U. S. G.			500	(Including strips)

10235 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 1, 1932.

Supplement to Board License Bulletin No. 1

Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Delivered Prices in Straight or Mixed Cars, Pittsburgh, Pa. and Following Suburbs: Aspinwall, Bellvue, Ben Avon, Braddock, Castle Shannon, East Liberty, Emsworth, Etna, Fairhaven, Hays, Homestead, McKees Rocks, Millvale, Munhall, Option, Rankin, Sharpsburg, West Homestead, West Liberty, Wilkinsburg,

3/8" Gypsum Wallboard	$29.80
1/4" Gypsum Wallboard	26.34
1/2" Gypsum Wallboard	33.26
3/8" Tiled Gypsum Wallboard	52.80
3/8" Gypsum Plasterboard	17.80
1/4" Gypsum Plasterboard	16.84
1/2" Gypsum Plasterboard	20.01

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10236 Copy sent to

M. H. Baker
S. J. Kelley
F. G. Ebsary—Geo N. Lenci
W. P. Fuller—L. I. Neale
C. O. Brown—Warren Henley
John A Kling—A. R. Black

OCTOBER 28, 1932.

MR. WILLARD P. FULLER, PRES.,
Atantic Gypsum Company,
40 Central Street,
Boston Mass.

DEAR MR. FULLER: An inquiry has just been received from one of our licensees requesting information as to how the situation is to be handled where, on sales of gypsum wallboard and plasterboard embodying the claims and inventions of our patents, the purchaser makes a claim that the patented product does not come up to standard but is a poor grade of material.

We had thought that this was fully understood by all our licensees, but in the light of the inquiry we are writing to advise that no licensee is permitted under the license to make an allowance or adjustment of any nature whatsoever which brings the price of the patented product sold below the minimum price to such licensee therefor, and any such allowance or adjustment would be in violation of the license agreement.

In case any situation such as that above referred to should arise in any sale of the patented product under your license, we should be notified immediately in order that we may make an investigation of the facts as soon as possible after the purchaser's claim is first presented to you.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10237 OCTOBER 28, 1932

UNIVERSAL GYPSUM & LIME COMPANY
105 West Washington Street
Chicago, Illinois

DEAR SIRS: Referring to your inquiry under date of October 25 regarding the handling of situations arising in the sale of gypsum wallboard and plasterboard embodying the claims and inventions of our patents where the purchaser claims the board is a poor grade of material, you are not authorized or permitted under the license agreement to make an allowance or adjustment of any nature whatsoever which brings the price actually received for the patented board below the minimum price to you therefor, and any such allowance or adjustment would be in violation of the license agreement.

In case any situation such as you refer to should arise we should be notified immediately in order that we may make an investigation of the facts as soon as possible after the purchaser's claim is first presented to you.

It was our belief that this was clearly understood by all the licensees but in the light of your inquiry we are this day sending a similar letter to each of the other licensees.

Yours very truly,

10238 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 24, 1932

Supplement to Board License Bulletin Numbers 1, 2 & 3.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that sales of gypsum wallboard and gypsum plasterboard embodying the inventions and improvements set forth and claimed in our said patents, directly or indirectly, at a price less than the minimum price fixed by us is a violation of the terms of your license agreement.

Where a salesman of patented board makes an allowance to the customer out of his own compensation, the same constitutes a deduction from the price at which the board is sold, and if, after making such deduction, the sale is made at a price less than the minimum price fixed by Licensor, it constitutes a direct violation of the terms of the license agreement, whether or not Licensee had knowledge of the allowance so made by the salesman.

Where a salesman selling patented board to a customer is authorized by Licensee or its agent to sell the same wholly or partly on a commission basis, or where a salesman not employed by Licensee makes a sale of patented board to a customer on a commission basis and Licensee or his agent accepts such sale, in either of such events the commission paid by the Licensee is a deduction from the price at which the board is sold by Licensee, and where, after deducting such commission, the amount is less than the minimum price, Licensor shall regard the sale as made at a price less than the minimum price fixed by Licensor and a violation of the terms of the license agreement. Licensor also regards sales of patented board by commission salesmen, without the written consent of Licensor, as a violation of the terms of the license agreement.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

5222

10239. UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 13, 1932

Supplement to Board License Bulletin Number 1.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Davenport and Dubuque, Iowa, are included in the area where stopover charges need not be included in the minimum price, in addition to the five states listed in paragraph 8, bulletin No. 1, dated August 12, 1932.

Gypsum boards used for dunnage, not invoiced to the customer, shall be plainly marked on the face side with visible red stamp or label firmly fixed on each of said boards shown the word "Dunnage" in letters at least three (3) inches high.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10240 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 12, 1932

DEAR SIRS: Referring to paragraph two of our license contract with you, we are mailing you herewith Board License Bulletins Nos. 1, 2, 3, and 4 which cancel and supersede all previous price bulletins on gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed.

The changes in minimum price in the attached bulletins as compared to those being cancelled are as follows:

Bulletin 3, paragraph 4. The delivered-by-truck price is extended to include Mansfield, Massachusetts and that portion of Plymouth county lying north of the continuation of the southern boundary of Norfolk county.

Also note that the minimum price applicable to patented board and/or lath shipped into the Metropolitan Boston area now applies to any quantity in straight, pool, or mixed cars. Formerly a minimum of 5,000 sq. ft. applied to pool cars and mixed cars.

Bulletin 1, page 4, paragraph 8 provides that the stopover charge need not be included in the minimum price in shipments to Michigan, Wisconsin, Illinois, Indiana, and Ohio.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10241 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 30, 1932

Supplement to Board License Bulletin No. 1.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

1/4" Gypsum Wallboard $22.50 per M sq. ft., Billing Weight 1050# per M f.o.b.

Ft. Dodge, Iowa
Southard, Okla.
Sweetwater, Texas
Acme, Texas
Grand Rapids, Mich.
Plasterco, Virginia
Gypsum, Ohio

for shipments to following states (in addition to states already taking the $22.50 price, as listed in Board License Bulletin No. 1 and Supplements): Oklahoma, Texas, Wisconsin, Upper Michigan, Virginia, and West Virginia.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

CFH'AN

10242 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 16, 1932

Supplement to Board License Bulletin

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum Quantities, Mixed Cars & Pool Cars, Philadelphia Area.

Referring to our letter to you dated April 12, 1932, "Supplement to Board License Bulletin Nos. 1, 2, & 3", page 2. Effective immediately, any quantity of gypsum board and/or lath may be shipped in Pool Cars or Mixed Cars to the following counties in the Philadelphia, Pa., area: Bucks, Montgomery, Chester, Delaware, and Philadelphia.

There is no change in the minimums applying to pickups or truck deliveries.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10243 Truck Deliveries into following counties: Chautauqua, Cattaraugus, Allegany, Steuben, Schuyler, Yates, and Cayuga. Minimum price, carload delivered price.

Minimum Price Cutstock Plasterboard to following markets, as follows:

1/4" and 3/8"—$12.50 per M per sq. ft. f.o.b. cars, Oakfield, N. Y.

Markets: Buffalo, N. Y.; Niagara and Erie Counties.

Rochester, N. Y.; City of Rochester, and Monroe and Wayne counties, N. Y. Pickup price at Oakfield or delivered by truck to dealer's warehouse located in markets listed next above, $14.50 per M sq. ft. for 1/4" or 3/8" cutstock. Pickup price at Buffalo warehouses, for destinations in area described in this paragraph, 1/4". $15.45 per M sq. ft.; 3/8", $15.94 per M sq. ft.

Minimum Quantities: (This applies to all pickups and truck deliveries mentioned in this letter.)

Pickups: 5,000 sq. ft. gypsum board and/or lath.

Truck deliveries: To one destination only (by manufacturer's own trucks or trucks hired by manufacturer from regular trucking companies) 5,000 sq. ft. gypsum board and/or lath. Minimum mixed load (gypsum board and/or lath and other gypsum materials), 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included.

No Carload Quantities delivered by truck except at the single truckload price.

Allowances to customers for trucking or unloading or other service by them in connection with shipments or deliveries of patented board or lath will be construed by Licensor as a rebate and in violation of the minimum price where merchandise is sold at the minimum price.

The establishment or continuance of warehouses, consigning of stocks, or extending other than regular terms, with dealers or other buyers will be construed by Licensor

as a rebate and in violation of the minimum price where merchandise is sold at the minimum price.

This letter supersedes other board license bulletins as pertaining to the area in Northwestern New York described herein.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10244 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 5, 1932

Supplement to Board License Bulletins Nos. 1, 2, & 3.
(Supersedes similar letter dated June 30, 1932.)

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Straight Cars, Mixed Cars, Pool Cars: Prices per M sq. ft. f.o.b. Oakfield, N. Y.

		Wt. per M Sq. Ft.
3/8" Gypsum Wallboard	$27.00	1600 lbs.
1/4" Gypsum Wallboard	24.50	1050 "
1/2" Gypsum Wallboard	29.50	2150 "
3/8" Tiled Gypsum Wallboard	50.00	1600 "
3/8" Gypsum Plasterboard	15.00	1600 "
1/4" Gypsum Plasterboard	15.00	1050 "
1/2" Gypsum Plasterboard	16.25	2150 "

To arrive at carload delivered price, add freight from Oakfield, New York.

Pickups at producting mills; Truck deliveries:

Northwestern New York State, as follows: Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, and Livingston counties, New York.

Minimum price wallboard and/or plasterboard picked up at your mill or delivered by truck to dealer's warehouse, add $2.00 per M to above f.o.b. mill prices.

These pickup prices apply without regard to destination.

Pickups at Buffalo Warehouses:

3/8" Gypsum Wallboard	$30.44 per M sq. ft.
1/4" Gypsum Wallboard	27.45 per M sq. ft.
1/2" Gypsum Wallboard	33.44 per M sq. ft.
3/8" Tiled Gypsum Wallboard	53.44 per M sq. ft.
3/8" Gypsum Plasterboard	18.44 per M sq. ft.
1/4" Gypsum Plasterboard	17.95 per M sq. ft.
1/2" Gypsum Plasterboard	20.19 per M sq. ft.

10245 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 5, 1932.

Supplement to Board License Bulletin No. 1.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Referring to page 2, paragraph (s), "Board License Bulletin No. 1" dated April 5, 1932, which is now changed to read: "Delivered price of patented board in stopover cars is lowest combination of mill price plus freight from that mill to any stopover point or final destination. This means that patented board shipped in stopover cars is to be priced at the carload price applicable to respective stopover or destination point. Stopover charges are not to be absorbed by the licensee."

Referring to page 2, paragraph 1, "Supplement to Board License Bulletin Nos. 1, 2 & 3" dated April 12, 1932. Where reference is made to "straight cars," you are to be governed by the minimum carload quantities as provided in published tariffs for shipments from Oakfield, New York.
New York)

Brooklyn, N. Y. occupies the entire Kings county, New York. The lowest carload board rate from Oakfield, N. Y., to Brooklyn is used in computing the minimum delivered price of patented gypsum board and lath for any carload delivery in Kings county, New York.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

5230

10246 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 30, 1932.

Supplement to Board License Bulletins Nos. 1, 2, & 3.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Northwestern New York State; as follows: Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Livingston counties, New York.

Straight Cars, Mixed Cars, Pool Cars: Prices per M sq. ft. f.o.b. Oakfield, New York.

	Minimum Cars	Wt. per M Sq. Ft.
3/8" Gypsum Wallboard	$27.00	1600 lbs.
1/4" Gypsum Wallboard	24.50	1050 "
1/2" Gypsum Wallboard	29.50	2150 "
3/8" Tiled Gypsum Wallboard	50.00	1600 "
3/8" Gypsum Plasterboard	15.00	1600 "
1/4" Gypsum Plasterboard	15.00	1050 "
1/2" Gypsum Plasterboard	16.25	2150 "

(To arrive at delivered price, add freight from Oakfield, New York)

Pickups, Truck Deliveries

Minimum price wallboard and/or plasterboard picked up at your mill or delivered by truck to dealer's warehouse, add $2.00 per M to above f.o.b. mill prices.

Minimum Quantities:

Pickups: 5,000 sq. ft. gypsum board and/or lath.

Truck Deliveries: To one destination only (by manufacturer's own trucks or those hired by manufacturer from regular trucking companies) 5,000 sq. ft. gypsum board and/or lath. Minimum mixed load (gypsum board and/or lath and other gypsum materials), 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included.

10247 Allowances to customers for trucking or unloading or other service by them in connection with shipments or deliveries of patented board or lath will be construed by Licensor as a rebate and in violation of the minimum price where merchandise is sold at the minimum price.

The establishment or continuance of warehouses, consigning of stocks, or extending other than regular terms, with dealers or other buyers will be construed by Licensor as a rebate and in violation of the minimum price where merchandise is sold at the minimum price.

This letter supersedes other board license bulletins as pertaining to the area in Northwestern New York described herein.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10248 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 14, 1932.

Supplement to Board License Bulletins Nos. 1, 2, & 3.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective July 1, 1932, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Gypsum, Ohio:

Pickups:

Minimum dealer prices wallboard and/or plasterboard picked up at Gypsum, Ohio, are as follows:

		Wt. per M Sq. Ft.
3/8" Gypsum Wallboard	$29.00	1600 lbs.
1/4" Gypsum Wallboard	26.50	1050 "
1/2" Gypsum Wallboard	31.50	2150 "
3/8" Tiled Gypsum Wallboard	52.00	1600 "
3/8" Gypsum Plasterboard	17.00	1600 "
1/4" Gypsum Plasterboard	17.00	1050 "
1/2" Gypsum Plasterboard	18.25	2150 "

Grand Rapids, Michigan:

Pickups:

Minimum dealer prices wallboard and/or plasterboard up at Grand Rapids, Michigan, are as follows:

		Wt. per M Sq. Ft.
3/8" Gypsum Wallboard	$29.00	1600 lbs.
1/4" Gypsum Wallboard	26.50	1050 "
1/2" Gypsum Wallboard	31.50	2150 "
3/8" Tiled Gypsum Wallboard	52.00	1600 "
3/8" Gypsum Plasterboard	17.00	1600 "
1/4" Gypsum Plasterboard	17.00	1050 "
1/2" Gypsum Plasterboard	18.25	2150 "

Allowances to customers for trucking or unloading or other service by them in connection with shipments or

deliveries of patented board or lath will be construed by Licensor as a rebate and in violation of the minimum
10249 price where merchandise is sold at the minimum price.

Prices shall apply to all pickups after June 30, 1932,

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10250 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 31, 1932.

Supplement to Board License Bulletins Nos. 1, 2, & 3.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Ocean County, New Jersey

Mixed Cars, Pool Cars, Pickups, Truck Deliveries.

Minimum price wallboard and/or plasterboard picked up at mill or manufacturer's warehouse or delivered by truck to dealer's warehouse, or delivered by rail in mixed cars or pool cars to dealer's warehouse or nearest siding, is

		Weights per M Sq. Ft.
1/4" Gypsum Wallboard	$24.50 per M Sq. Ft.	1050# per M
3/8" Gypsum Wallboard	27.00 per M Sq. Ft.	1600# per M
1/2" Gypsum Wallboard	29.50 per M Sq. Ft.	2150# per M
1/4" Gypsum Plasterboard	15.00 per M Sq. Ft.	1050# per M
3/8" Gypsum Plasterboard	15.00 per M Sq. Ft.	1600# per M
1/2" Gypsum Plasterboard	16.25 per M Sq. Ft.	2150# per M
3/8" Tiled Gypsum Wallboard	50.00 per M Sq. Ft.	1600# per M

Plus freight from Oakfield, New York.

Minimum Quantities.

Pickups: 5,000 sq. ft. gypsum board and/or lath.

Truck Deliveries: To one destination only, (by manufacturer's own trucks or those hired by manufacturer from regular trucking companies) 5,000 sq. ft. gypsum board and/or lath. Minimum mixed load (gypsum board and/or lath and other materials), 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included.

Pool Cars or Mixed Cars: 5,000 sq. ft. of gypsum board and/or lath to one destination.

Straight Cars: Minimum prices on straight cars gypsum board and/or lath shipped by rail to dealer's warehouse or nearest siding, $2.00 per M on board and lath less than above prices. This applies to above area.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10251 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 19, 1932

Special Board License Bulletin

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Minimum prices to contractors, for gypsum wallboard, f.o.b. cars Chicago, Illinois, Century of Progress siding, as follows:

3/8" Gypsum Wallboard..... $51.82 per M sq. ft.

Tongue & Grooved, primed one coat in accordance with specifications as furnished for Electrical Building for Century of Progress Exhibition.

1/2" Gypsum Wallboard..... $44.12 per M sq. ft.

1/2" Gypsum Wallboard, bent and formed at Mill, primed as above, $94.12 per M sq. ft.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10252 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 16, 1932.

Supplement to Board License Bulletins.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Metropolitan Detroit Area

Minimum Price Wallboard and/or Plasterboard delivered by rail to dealer's warehouse or nearest railroad siding in straight, mixed, or pool cars; (Also applies to carloads delivered by truck to one dealer's warehouse);

	Minimum Cars	Per M Sq. ft.
3/8" Gypsum Wallboard	$29.24	1600 lbs.
1/4" Gypsum Wallboard	25.97	1050 lbs.
1/2" Gypsum Wallboard	32.51	2150 lbs.
3/8" Tiled Gypsum Wallboard	52.24	1600 lbs.
3/8" Gypsum Plasterboard	17.24	1600 lbs.
1/4" Gypsum Plasterboard	16.47	1050 lbs.
1/2" Gypsum Plasterboard	19.26	2150 lbs.

The establishment or continuance of warehouses, consigning of stocks or extending other than regular terms, with dealers or other buyers will be construed by Licensor as a rebate and in violation of the minimum price where merchandise is sold at the minimum price.

Allowances to customers for use of railroad siding, for switching performed after car has been originally set for unloading, for trucking or unloading, or other service by them in connection with shipments or deliveries of patented board or lath will be construed by Licensor as a rebate and in violation of the minimum price where merchandise is sold at the minimum price.

The above applies to shipments into Metropolitan Detroit Area, including Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

This letter supersedes all previous bulletins pertaining to the area described herein.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President in Charge of Sales.

10253 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 15, 1932.

Supplement

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Refer to "Supplement to Board License Bulletin Nos. 1, 2, and 3" dated April 12, 1932. Minimum prices shown for delivery in mixed cars and pool cars into Metropolitan New York—New Jersey area also apply to all of Suffolk county, New York. However, minimum prices shown for truck deliveries only apply to Amityville and Cold Springs Harbor in Suffolk county.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10254 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 14, 1932.

Supplement to Board License Bulletin Number 1.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Metropolitan Chicago Area

Deliveries by rail to dealer's warehouse or nearest railroad siding in straight, mixed or pool cars:

	In 30-ton Minimum Cars	In 20-ton Minimum Cars	Billing Wt. Per M sq. ft.
3/8" Gypsum Wallboard	$29.32	$29.80	1600 lbs.
1/4" Gypsum Wallboard	26.02	26.34	1050 lbs.
1/2" Gypsum Wallboard	32.62	33.26	2150 lbs.
3/8" Tiled Gypsum Wallboard	52.32	52.80	1600 lbs.
3/8" Gypsum Plasterboard	17.32	17.80	1600 lbs.
1/4" Gypsum Plasterboard	16.52	16.84	1050 lbs.
1/2" Gypsum Plasterboard	19.37	20.01	2150 lbs.

The establishment or continuance of warehouses, consigning of stocks or extending other than regular terms, with dealers or other buyers will be construed by Licensor as a rebate and in violation of the minimum price where merchandise is sold at the minimum price.

Allowances to customers for use of railroad siding, for switching performed after car has been originally set for unloading, for trucking or unloading, or other service by them in connection with shipments or deliveries of patented board or lath will be construed by Licensor as a rebate and in violation of the minimum price where merchandise is sold at the minimum price.

The above applies to shipments into Metropolitan Chicago Area, including Cook and DuPage counties, Illinois; Lake County, Indiana; also the following towns.

in Lake County, Illinois: Deerfield, Highland Park, and Lake Forest.

This letter supersedes Board License Bulletin No. 1 as pertaining to the area described herein.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President in Charge of Sales.

10255 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 13, 1932

Supplement to Board License Bulletin No. 1

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

1/4" Gypsum Wallboard $22.50 per M sq. ft. f.o.b. Plasterco, Virginia for shipments into Florida and Georgia. Minimum delivered price is $22.50 per M plus freight from Plasterco, Va. to destination. Billing weight 1050 lbs. per M sq. ft.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President

CFH

10256 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 12, 1932

Supplement to Board License Bulletin Nos. 1, 2, & 3.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

Metropolitan New York-New Jersey

Mixed Cars, Pool Cars, Pickups, Truck Deliveries.

Minimum price wallboard and/or plasterboard picked up at mill or manufacturer's warehouse or delivered by truck to dealer's warehouse, or delivered by rail in mixed cars or pool cars to dealer's warehouse or nearest siding, is

		Billing Weights
1/4" Gypsum Wallboard	$24.50 per M sq. ft.	1050# per M
3/8" Gypsum Wallboard	27.00 per M sq. ft.	1600# per M
1/2" Gypsum Wallboard	29.50 per M sq. ft.	2150# per M
1/4" Gypsum Plasterboard	15.00 per M sq. ft.	1050# per M
3/8" Gypsum Plasterboard	15.00 per M sq. ft.	1600# per M
1/2" Gypsum Plasterboard	16.25 per M sq. ft.	2150# per M

Plus freight from Oakfield, N. Y. to destination.

Minimum Quantities:

Pickups: 5,000 sq. ft. gypsum board and/or lath.

Truck Deliveries: To one destination only, (by manufacturer's own trucks or those hired by manufacturer from regular trucking companies) 5,000 sq. ft. gypsum board and/or lath. Minimum mixed load (gypsum board and/or lath and other materials), 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included.

Pool Cars or Mixed Cars: 5,000 sq. ft. of gypsum board and/or lath to one destination.

Applies to Following Area:

Metropolitan New York Area: New York City (consisting of the Bronx, Manhattan, Queens, Brooklyn, Richmond) also Westchester, Rockland and Nassau Counties, N. Y.; also Amityville and Cold Springs Harbor in Suffolk county.

Metropolitan New Jersey Area: Following counties: Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset and Monmouth.

10257 Straight Cars: Minimum prices on straight cars gypsum board and/or lath shipped by rail to dealer's warehouse or nearest siding, $2.00 per M on board and lath less than above prices. This applies to above area and all of Suffolk county, N. Y.

Philadelphia—Boston

Straight Cars, Mixed Cars, Pool Cars

Minimum prices on straight, mixed, or pool cars gypsum board and/or lath shipped by rail to dealer's warehouse or nearest siding, to one destination is

		Billing Weights
1/4" Gypsum Wallboard	$24.50 per M sq.ft.	1050# per M
3/8" Gypsum Wallboard	27.00 per M sq. ft.	1600# per M
1/2" Gypsum Wallboard	29.50 per M sq. ft.	2150# per M
1/4" Gypsum Plasterboard	15.00 per M sq. ft.	1050# per M
3/8" Gypsum Plasterboard	15.00 per M sq. ft.	1600# per M
1/2" Gypsum Plasterboard	16.25 per M sq. ft.	2150# per M

Plus freight from Oakfield, N. Y. to destination.

Pickups, Truck-Deliveries

Minimum price wallboard and/or plasterboard picked up at mill or manufacturer's warehouse or delivered by truck to dealer's warehouse, add $2.00 per M to price given above for straight cars.

Minimum Quantities:

Pickups: 5,000 sq. ft. gypsum board and/or lath.

Truck Deliveries: To one destination only (by manufacturer's own trucks or those hired by manufacturer from

regular trucking companies) 5,000 sq. ft. gypsum board and/or lath. Minimum mixed load (gypsum board and/or lath and other materials), 7½ tons; 5,000 or more sq. ft. gypsum board and/or lath to be included.

Pool Cars or Mixed Cars: 5,000 sq. ft. of gypsum board and/or lath to one destination.

Applies to Following Area:

Philadelphia—Bucks, Montgomery, Chester, Delaware and Philadelphia counties, Pa.

Boston—Essex, Middlesex, Suffolk, and Norfolk counties, Mass.

Allowances to customers for trucking or unloading or other service by them in connection with shipments or deliveries of patented board or lath will be construed by Licensor as a rebate and in violation of the minimum price where merchandise is sold at the minimum price.

The establishment or continuance of warehouses, consigning of stocks, or extending other than regular terms, with dealers or other buyers will be construed by Licensor as a rebate and in violation of the minimum price where merchandise is sold at the minimum price.

This letter supersedes other board license bulletins numbers 1, 2 and 3, as pertaining to the area described herein.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY
Vice President

CFH'

10258 18th FEBRUARY, 1932

Mr. C. O. Brown, Vice President
Certain-teed Products Corporation
100 East 42nd Street,
New York,
New York.

DEAR SIR: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297 are as follows:

Minimum price of board and lath f.o.b. trucks, Laramie, Wyoming, and Loveland, Colorado, is same as f.o.b. cars.

This supplements Board License Bulletin No. 2, January 27, 1932.

Very truly yours,

Vice President

10259 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 29, 1932

Supplement to Board License Bulletin No. 1

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

With reference to page 3, paragraph 1, Board License Bulletin No. 1, December 28, 1931, board in straight or mixed cars delivered in Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan:

3/8" Gypsum Wallboard	$29.24 per M sq. ft.
1/4" Gypsum Wallboard	25.97 per M sq. ft.
1/2" Gypsum Wallboard	32.51 per M sq. ft.
3/8" Tiled Gypsum Wallboard	52.24 per M sq. ft.
3/8" Gypsum Plasterboard	17.24 per M sq. ft.
1/4" Gypsum Plasterboard	16.47 per M sq. ft.
1/2" Gypsum Plasterboard	19.26 per M sq. ft.

(The above prices also apply to board f.o.b. truck, Detroit warehouse in accordance with Board License Bulletin No. 2, January 27, 1932.)

Minimum price board delivered in straight or mixed truckloads to area mentioned above, to dealer's warehouse (Minimum straight load board 5000 sq. ft.; minimum mixed load 7½ tons), as follows: (This applies only to those materials taking regular straight or mixed-car plaster and board rates; and to truckloads delivered to one destination):

3/8" Gypsum Wallboard	$31.24 per M sq. ft.
1/4" Gypsum Wallboard	27.97 per M sq. ft.
1/2" Gypsum Wallboard	34.51 per M sq. ft.
3/8" Tiled Gypsum Wallboard	54.24 per M sq. ft.
3/8" Gypsum Plasterboard	18.24 per M sq. ft.
1/4" Gypsum Plasterboard	17.47 per M sq. ft.
1/2" Gypsum Plasterboard	20.26 per M sq. ft.

Prices shall apply to all shipments made after receipt of this notice except only upon bona fide orders actually received and accepted by you at your home office in writing before receipt hereof and shipped by you within ten days after receipt of this notice.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President in Charge of Sales.

CFH'

10260 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 28, 1931.

DEAR SIRS: Referring to paragraph two of our license contract with you, you are hereby notified that the minimum prices effective January 4, 1932, at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are as follows:

In accordance with I. C. C. Ruling of December 7, 1931, the increase in freight rates is effective January 4, 1932 applying on gypsum wallboard and gypsum plasterboard. Board License Bulletin No. 1, provides; "Delivered price is lowest combination of mill price plus freight from that mill to destination," therefore, to the present delivered prices of gypsum wallboard and gypsum plasterboard shall be added the increase in freight on which the delivered price is determined. A schedule for determining this new freight per M square feet is attached. This schedule is based on the rate now used and the increase is reflected in the freight to be added to the mill price.

For shipments into area outlined in last paragraph page one, Bulletin No. 1, dated December 28, 1931, use rates as outlined with proper increase.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President in Charge of Sales.

CFH'

10261 **NEW FREIGHT RATE SCHEDULE**

Schedule for Determining Freight per M sq. ft. on Gypsum Wallbd. & Plasterbd. in Carloads (New Rates per 1000 sq. ft. indicated on same line as old rate per 100 lbs.)

Old Rate per 100 Pounds	THICKNESS & Billing Wt. per M sq. ft. New rates per 1000 sq. ft.			Old Rate Per 100 Pounds	THICKNESS & Billing Wt. per M sq. ft. New rates per 1000 sq. ft.		
	¼" 1050#	⅜" 1600#	½" 2150#		¼" 1050#	⅜" 1600#	½" 2150#
.05	.58	.88	1.18	.32	3.57	5.44	7.31
.055	.63	.96	1.29	.325	3.62	5.52	7.42
.06	.68	1.04	1.40	.33	3.68	5.60	7.53
.065	.74	1.12	1.51	.335	3.73	5.68	7.63
.07	.79	1.20	1.61	.34	3.78	5.76	7.74
.075	.89	1.36	1.83	34.5	3.83	5.84	7.85
.08	.95	1.44	1.94	.35	3.89	5.92	7.96
.085	1.00	1.52	2.04	.355	3.94	6.00	8.06
.09	1.05	1.60	2.15	.36	3.99	6.08	8.17
.095	1.10	1.68	2.26	.365	4.04	6.16	8.28
.10	1.16	1.76	2.37	.37	4.10	6.24	8.39
.105	1.21	1.84	2.47	.375	4.15	6.32	8.49
.11	1.26	1.92	2.58	.38	4.20	6.40	8.60
.115	1.31	2.00	2.69	.385	4.25	6.48	8.71
.12	1.37	2.08	2.80	.39	4.51	6.56	8.82
.125	1.47	2.24	3.01	.395	4.36	6.64	8.92
.13	1.52	2.32	3.12	.40	4.41	6.72	9.03
.135	1.58	2.40	3.23	.405	4.46	6.80	9.14
.14	1.63	2.48	3.33	.41	4.52	6.88	9.25
.145	1.68	2.56	3.44	.415	4.57	6.96	9.35
.15	1.73	2.64	3.55	.42	4.62	7.04	9.46
.155	1.79	2.72	3.66	.425	4.67	7.12	9.57
.16	1.84	2.80	3.76	.43	4.73	7.20	9.68
.165	1.89	2.88	3.87	.435	4.78	7.28	9.78
.17	1.94	2.96	3.98	.44	4.83	7.36	9.89
.175	2.05	3.12	4.19	.445	4.88	7.44	10.00
.18	2.10	3.20	4.30	.45	4.94	7.52	10.11
.185	2.15	3.28	4.41	.455	4.99	7.60	10.21
.19	2.21	3.36	4.52	.46	5.04	7.68	10.32
.195	2.26	3.44	4.62	.465	5.09	7.76	10.43
.20	2.31	3.52	4.73	.47	5.15	7.84	10.54
.205	2.36	3.60	4.84	.475	5.20	7.92	10.64
.21	2.42	3.68	4.95	.48	5.25	8.00	10.75
.215	2.47	3.76	5.05	.485	5.30	8.08	10.86
.22	2.52	3.84	5.16	.49	5.36	8.16	10.97
.225	2.57	3.92	5.27	.495	5.41	8.24	11.07
.23	2.63	4.00	5.38	.50	5.46	8.32	11.18
.235	2.68	4.08	5.48	.505	5.51	8.40	11.29
.24	2.73	4.16	5.59	.51	5.57	8.48	11.40
.245	2.78	4.24	5.70	.515	5.62	8.56	11.50
.25	2.84	4.32	5.81	.52	5.67	8.64	11.61
.255	2.89	4.40	5.91	.525	5.72	8.72	11.72
.26	2.94	4.48	6.02	.53	5.78	8.80	11.83
.265	2.99	4.56	6.13	.535	5.83	8.88	11.93
.27	3.05	4.64	6.24	.54	5.88	8.96	12.04
.275	3.10	4.72	6.34	.545	5.93	9.04	12.15
.28	3.15	4.80	6.45	.55	5.99	9.12	12.26
.285	3.20	4.88	6.56	.555	6.04	9.20	12.36
.29	3.26	4.96	6.67	.56	6.09	9.28	12.47
.295	3.31	5.04	6.77	.565	6.14	9.36	12.58
.30	3.36	5.12	6.88	.57	6.20	9.44	12.69
.305	3.41	5.20	6.99	.575	6.25	9.52	12.79
.31	3.47	5.28	7.10	.58	6.30	9.60	12.90
.315	3.52	5.36	7.20	.585	6.35	9.68	13.01

For old rates over .585 add 2¢ per cwt., to calculate new rate per M sq. ft.

10262 *Government's Exhibit No. 39*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 29, 1938

Perforated Lath License Bulletin No. 1—Cancels Perforated Lath License Bulletin No. 1—Dated October 21, 1937.

(Confirms Telegram Dated April 29, 1938)

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective May 2, 1938 minimum prices at which you may sell perforated gypsum plaster lath manufactured by you and embodying the invention set forth and claimed in our patent number 1,938,354, are as follows:

The minimum price of 3/8" patented perforated gypsum plaster lath (weight 1475# per M) for shipment in cars is $13.00 per M sq. ft. f.o.b. Boston, Mass.; New Brighton, S. I., New York; Philadelphia, Penna.; Plasterco, Va.; Oakfield, New York; Gypsum, Ohio; Detroit, Mich.; Grand Rapids, Mich.; East Chicago, Ind.; Fort Dodge, Iowa; Heath, Montana; Southard, Oklahoma; Sweetwater, Texas; Acme, Texas; and National City, Mich.

Minimum prices for pickups, for truck deliveries into trucking areas or in carloads into established flat delivered price areas are same as corresponding minimum prices established by us for regular 3/8" patented gypsum plaster lath, as listed in regular Board License Bulletins Nos. 1, 2 and 3.

Until further notice the above minimum prices shall not apply to sales of patented perforated gypsum lath for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

Other matters affecting price shall be the same as for regular 3/8" patented gypsum plaster lath, as detailed in regular Board License Bulletins.

These prices apply for 3/8" thickness only, in sizes 16" x 32", 16" x 36" and 16" x 48" only.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change.

10263 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 21, 1937

Perforated Lath License Bulletin No. 1—Cancels Perforated Lath License Bulletin No. 1— Dated September 28, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective November 1, 1937 minimum prices at which you may sell perforated gypsum plaster lath manufactured by you and embodying the invention set forth and claimed in our patent number 1,938,354, are as follows:

†The minimum price of 3/8" patented perforated gypsum plaster lath (weight 1475# per M) for shipment in cars is $13.25 per M sq. ft. f.o.b. Boston, Mass.; New Brighton, S. I., New York; Philadelphia, Penna.; Plasterco, Va.; Oakfield, New York; Gypsum, Ohio; Detroit, Mich.; Grand Rapids, Mich.; East Chicago, Ind.; Fort Dodge, Iowa; Heath, Montana; Southard, Oklahoma; Sweetwater, Texas; and Acme, Texas.

Minimum prices for pickups, for truck deliveries into trucking areas or in carloads into established flat delivered price areas are 25¢ per M sq. ft. higher than corresponding minimum prices established by us for regular 3/8" patented gypsum plaster lath, as listed in regular Board License Bulletins Nos. 1, 2 and 3.

Until further notice the above minimum prices shall not apply to sales of patented perforated gypsum lath for

shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

Other matters affecting price shall be the same as for regular 3/8" patented gypsum plaster lath, as detailed in regular Board License Bulletins.

These prices apply for 3/8" thickness only, in sizes 16" x 32", 16" x 36" and 16" x 48" only.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change.

10264 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 28, 1937

Perforated Lath License Bulletin No. 1
Cancels Perforated Lath License Bulletin No. 1
Dated April 2, 1937

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately minimum prices at which you may sell perforated gypsum plaster lath manufactured by you and embodying the invention set forth and claimed in our patent number 1,938,354, are as follows:

The minimum price of 3/8" patented perforated gypsum plaster lath (weight 1400# per M) for shipment in cars is $13.25 per M sq. ft. f.o.b. Boston, Mass.; New Brighton, S. I., New York; Philadelphia, Penna.; Plasterco, Va.; Oakfield, New York; Gypsum, Ohio; Detroit, Mich.; Grand Rapids, Mich.; East Chicago, Ind.; Fort Dodge, Iowa; Heath, Montana; Southard, Oklahoma; Sweetwater, Texas; and Acme, Texas.

Minimum prices for pickups, for truck deliveries into trucking areas or in carloads into established flat delivered price areas are 25¢ per M sq. ft. higher than corresponding minimum prices established by us for regular 3/8" patented gypsum plaster lath, as listed in regular Board License Bulletins Nos. 1, 2 and 3.

Until further notice the above minimum prices shall not apply to sales of patented perforated gypsum lath for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

Other matters affecting price shall be the same as for regular 3/8" patented gypsum plaster lath, as detailed in regular Board License Bulletins.

These prices apply for 3/8" thickness only, in sizes 16"x32", 16"x36" and 16"x48" only.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change.

10265 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 2, 1937

Perforated Lath License Bulletin No. 1—Cancels Perforated Lath License Bulletin No. 1—Dated March 24, 1937

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective April 4, 1937 minimum prices at which you may sell perforated gypsum plaster lath manufactured by you and embodying the invention set forth and claimed in our patent number 1,938,354, are as follows:

†The minimum price of 3/8" patented perforated gypsum plaster lath (weight 1400# per M) for shipment in cars is $13.25 per M sq. ft. f.o.b. Boston, Mass.; New Brighton, S. I., New York; Philadelphia, Penna.; Plasterco, Va.; Oakfield, New York; Gypsum Ohio; Detroit, Mich.; Grand Rapids, Mich.; East Chicago, Ind.; Fort Dodge, Iowa; Heath, Montana; Southard, Oklahoma; and Sweetwater, Texas.

Minimum prices for pickups, for truck deliveries into trucking areas or in carloads into established flat delivered price areas are 25¢ per M sq. ft. higher than corresponding minimum prices established by us for regular 3/8" patented gypsum plaster lath, as listed in regular Board License Bulletins Nos. 1, 2 and 3.

Until further notice the above minimum prices shall not apply to sales of patented perforated gypsum lath for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

Other matters affecting price shall be the same as for regular 3/8" patented gypsum plaster lath, as detailed in regular Board License Bulletins.

These prices apply for 3/8" thickness only, in sizes 16"x32", 16"x36" and 16"x48" only.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change.

10266 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 24, 1937

Perforated Lath License Bulletin No. 1—Cancels Perforated Lath License Bulletin No. 1—Dated February 24, 1937

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective immediately minimum prices at which you may sell perforated gypsum plaster lath manufactured by you and embodying the invention set forth and claimed in our patent number 1,938,354, are as follows:

The minimum price of 3/8" patented perforated gypsum plaster lath (weight 1400# per M) for shipment in cars is $13.25 per M sq. ft. f.o.b. Boston, Mass.; New Brighton, S. I., New York; Philadelphia, Penna.; Plasterco, Va.; Oakfield, New York; Gypsum, Ohio; Detroit, Mich.; Grand Rapids, Mich.; East Chicago, Ind.; Fort Dodge, Iowa; and Heath, Montana.

Minimum prices for pickups, for truck deliveries into trucking areas or in carloads into established flat delivered price areas are 25¢ per M sq. ft. higher than corresponding minimum prices established by us for regular 3/8" patented gypsum plaster lath, as listed in regular Board License Bulletins Nos. 1, 2 and 3.

Until further notice the above minimum prices shall not apply to sales of patented perforated gypsum lath for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

Other matters affecting price shall be the same as for regular 3/8" patented gypsum plaster lath, as detailed in regular Board License Bulletins.

†These prices apply for 3/8" thickness only, in sizes 16"x32", 16"x36" and 16"x48" only.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change.

10267 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1937

Perforated Lath License Bulletin No. 1—Cancels Perforated Lath License Bulletin No. 1—Dated December 29, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that minimum prices at which you may sell perforated gypsum plaster lath manufactured by you and embodying the invention set forth and claimed in our patent number 1,938,354, are as follows:

†The minimum price of 3/8" patented perforated gypsum plaster lath (weight 1400# per M) for shipment in cars is $13.25 per M sq. ft. f.o.b. Boston, Mass.; New Brighton, S. I., New York; Philadelphia, Penna.; Plasterco, Va.; Oakfield, New York; Gypsum, Ohio; Detroit, Mich.; Grand Rapids, Mich.; East Chicago, Ind.; Fort Dodge, Iowa; and Heath, Montana.

Minimum prices for pickups, for truck deliveries into trucking areas or in carloads into established flat delivered price areas are 25¢ per M sq. ft. higher than corresponding minimum prices established by us for regular 3/8" patented gypsum plaster lath, as listed in regular Board License Bulletins Nos. 1, 2 and 3.

Until further notice the above minimum prices shall not apply to sales of patented perforated gypsum lath for

shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

Other matters affecting price shall be the same as for regular 3/8" patented gypsum plaster lath, as detailed in regular Board License Bulletins.

These prices apply for 3/8" thickness only, in sizes 16"x32" and 16"x48" only.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10268

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 29, 1936

Perforated Lath License Bulletin No. 1—Cancels Perforated Lath License Bulletin No. 1—Dated July 22, 1936

A. J. LEY
Atlanta.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that minimum prices at which you may sell perforated gypsum lath manufactured by you and embodying the invention set forth and claimed in our patent number 1,938,354, are as follows:

The minimum price of 3/8" patented perforated gypsum lath (weight 1400# per M) for shipment in cars is $15.25 per M sq. ft. f.o.b. Boston, Mass.; New Brighton, S. I., New York; Philadelphia, Penna.; Plasterco, Va.; Oakfield, New York; Gypsum, Ohio; Detroit, Mich.; Grand Rapids, Mich.; East Chicago, Ind.; Fort Dodge, Iowa; and Heath, Montana.

Minimum prices for pickups, for truck deliveries into trucking areas or in carloads into established flat delivered price areas are 25¢ per M sq. ft. higher than corresponding minimum prices established by us for regular 3/8" patented gypsum lath, as listed in regular Board License Bulletins Nos. 1, 2 and 3.

Until further notice the above minimum prices shall not apply to sales of patented perforated gypsum lath for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

Other matters affecting price shall be the same as for regular 3/8" patented gypsum lath, as detailed in regular Board License Bulletins.

These prices apply for 3/8" thickness only, in sizes 16"x32" and 16"x48" only.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

5256

10269 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 22, 1936.

A. J. Ley,
Atlanta Office

Perforated Lath License Bulletin

DEAR SIRS: Referring to our license contract with you, you are hereby notified that minimum prices at which you may sell perforated gypsum lath manufactured by you and embodying the invention set forth and claimed in our patent number 1,938,354, are as follows:

The minimum price of 3/8" patented perforated gypsum lath (weight 1400# per M) for shipment in cars is $15.25 per M sq. ft. f.o.b. Boston, Mass.; New Brighton, S. I., New York; Philadelphia, Penna.; Plasterco, Va.; Oakfield, New York; Gypsum, Ohio; Detroit, Mich.; Grand Rapids, Mich.; East Chicago, Ind.; and Fort Dodge, Iowa.

Minimum prices for pickups, for truck deliveries into trucking areas or in carloads into established flat delivered price areas are 25¢ per M sq. ft. higher than corresponding minimum prices established by us for regular 3/8" patented gypsum lath, as listed in regular Board License Bulletins Nos. 1, 2 and 3.

Other matters affecting price shall be the same as for regular 3/8" patented gypsum lath, as detailed in regular Board License Bulletins.

These prices apply for 3/8" thickness only, in sizes 16"x32" and 16"x48" only.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10270 *Government's Exhibit No. 101*

JONES, ADDINGTON, AMES & SEIBOLD
Attorneys and Counselors
77 West Washington Street
CHICAGO

AUGUST 18, 1925

American Gypsum Company,
Port Clinton, Ohio.

GENTLEMEN:

Acting under instructions of our client, United States Gypsum Company, we hereby notify you that the plaster board which you are manufacturing and selling, and the process used by you in manufacturing said board, infringe the following United States letters patent owned by the United States Gypsum Company:

No. 1,029,328, granted June 11, 1912, to C. W. Utzman;
No. 1,034,746, granted August 6, 1912, to C. W. Utzman;
No. 1,358,508, granted November 9, 1920, to C. R. Birdsey.

We further wish to advise you that unless you desist forthwith from such infringement and make prompt settlement for your past infringement we shall, acting under instructions from our client, be obliged to institute suit under said patents for an injunction and an accounting.

Trusting that you will let us hear from you promptly in regard to the foregoing, we are,

Very truly yours,

JONES, ADDINGTON, AMES & SEIBOLD,

By ARTHUR A. OLSON.

ABS:ERK

Registered mail.

10271 *Government's Exhibit No. 102*

THE AMERICAN GYPSUM COMPANY

Record of Called meeting of the Board of Directors of The American Gypsum Company held at the office of the Company in Portage Township, Ottawa County, Ohio, on Wednesday, August 19, 1925, at 10:30 A.M.

Meeting called to order by President J. H. McCrady. A roll call indicated all Directors present, namely

J. H. McCrady	Harry W. Benn
Edward McCrady	P. K. Tadsen
F. J. Griswold	C. F. Miller

J. B. Davis

The minutes of Regular meeting of July 20, 1925 were read by the Secretary, and the same, on motion by Harry W. Benn, seconded by Edward McCrady and carried, were approved.

Auditor Wilber T. Richardson's Financial Report covering period from January 1st to July 31st, 1925 was read, and upon motion by P. K. Tadsen, seconded by Harry W. Benn and carried, was received and ordered filed.

The Sand Handling Committee which was appointed at the last meeting of the Board to investigate and report as to machinery best suited for requirements at Cleveland Mixing Plant reported that a used, ¾ yard bucket, Electric Crawler, made by The Thew Shovel Company of Lorain, Ohio, had been purchased in Detroit for the sum of $5500.00, payable as follows; $1000.00 cash, $1900.00 when shipped and balance of $2600.00 to be paid in our Gypsum products; thereupon Edward McCrady moved and P. K. Tadsen seconded, that as the work of this Committee had been concluded, it be discharged, Motion carried.

Moved by Edward McCrady that the Manager investigate as to the best type of Sand Screens for use at our Cleveland Mixing Plant; and further, that he is by this motion authorized to purchase, that which in his opinion is most desirable; motion seconded by P. K. Tadsen and carried.

Whereas The American Gypsum Company has received a letter dated August 18, 1925 from Attorneys Jones, Addington, Ames & Seibold of Chicago, representing The United States Gypsum Company, notifying us that the Plaster Board which we are manufacturing and selling, and the process used by us in manufacturing it, infringe three United States letters patent owned by The United States Gypsum Company; they further advise us that unless we desist forthwith from such infringement and make prompt settlement for past infringement they shall, acting under the instructions of their client, be obliged to institute suit under said patents for an injunction
10272 and accounting; therefore C. F. Miller moved and P. K. Tadsen seconded, that a Committee consisting of J. H. McCrady, J. B. Davis, and F. J. Griswold be appointed with full power to take such action as may be necessary to protect the interest of The American Gypsum Company, Motion carried.

On motion seconded and carried, this meeting closed.

J. H. McCrady,
President.

J. B. Davis,
Secretary.

10273 — *Government's Exhibit No. 104*

MAY 12, 1926

MR. J. H. MCCRADY,
c/o McCrady Brothers Co.,
Braddock, Pa.

DEAR SIR:

I just returned from a meeting at Buffalo yesterday with Mr. Blagden, President of the Beaver Products Company. He has had one or two interviews with Avery on the matter of settling all disputes and litigations between the wall board manufacturers by entering into a licensing arrangement and the thing looks very favorable. We are standing on 50¢ per M royalty. Avery is talking about $1.00 per M and I am inclined to think he will probably stand pretty firm on this price. However, on his own admission he has so much at stake on the proposition that he may change his views.

This matter will be discussed by all the independent wall board manufacturers at a meeting in Chicago next Wednesday afternoon and probably some definite action taken on it as the probabilities are that Avery may meet with us at that meeting. If you feel able to attend the meeting I will be very glad indeed to have you be there. According to the plans we have we figure that there is a possibility of us holding the price steady on wall board for the next fourteen or fifteen years which means much to the industry.

Yours truly,

THE AMERICAN GYPSUM CO.

F. J. GRISWOLD

FJG RJB

10274 *Government's Exhibit No. 105*

THE AMERICAN GYPSUM COMPANY

Record of Special Meeting of the Board of Directors of The American Gypsum Company, held at the office of the Treasurer in Cleveland, Ohio, on Thursday June 3rd, 1926 at 10:00 AM.

President J. H. McCrady called meeting to order at appointed time.

A roll call indicated the following:

Present

J. H. McCrady	P. K. Tadsen
Edward McCrady	J. B. Davis
Harry W. Benn	F. J. Griswold

C. F. Miller

The reading of minutes of Board meeting held May 17th, 1926 was deferred until next Board meeting.

This meeting called by the President for the purpose of considering matters relating to Wall Board edge litigation, and a proposed licensing agreement (arising therefrom) with The United States Gypsum Company of Chicago, Illinois, for the manufacture of Wall Board under patents claimed to be owned or controlled, by The U. S. Gypsum Company.

After the Board of Directors had fully considered this entire matter, insofar as presented to it, C. F. Miller moved and Harry W. Benn seconded, that President J. H. McCrady and General Manager F. J. Griswold, be appointed a Committee to continue negotiations, and to attend a meeting of those interested, which will be held in the Palmer House, Chicago, Ill., June 8th, 1926, Motion carried.

On motion duly seconded and carried, this meeting closed.

J H. MCCRADY,
President.

J. B. DAVIS,
Secretary.

10275 *Government's Exhibit No. 106*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

JUNE 2, 1926.

MR. S. L. AVERY, *President,*
United States Gypsum Company,
205 West Monroe Street,
Chicago, Illinois.

DEAR SIR:

I have just returned from Buffalo and while there I had the pleasure of meeting Mr. Haggerty of the National Gypsum Company.

Mr. Haggerty apparently had not a very complete report on just what happened and was very much interested in hearing the details. When I left him, he admitted being personally sold on the proposition, but, of course, like the rest of us, stated he would have to take up the matter with his Board of Directors for further confirmation.

There is no question in my mind about his attitude, and as he and Mr. Williams control the National Gypsum Company, I feel very sure there will be no opposition from his directors.

While there I had the pleasure of an interview with Mr. Blagden, who reported that the contracts have been written up, but are being rewritten and it is expected they will be ready to submit in a very short time.

I shall be very glad to receive two copies of this contract, because I want to forward one to the Texas Cement Plaster Company with any comments I desire to make on it.

It would be very nice if this matter could come up at the time of the next meeting of the Industries, which is on July 13th and 14th.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.

10276 *Government's Exhibit No. 107*

JULY 6 1926

F. J. GRISWOLD, *President*
American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

Thanks for your letter of the second, regarding Mr. Haggerty and Mr. Williams. It is the only information I have had on the subject since you were here. We have made some little progress on the license contract. My impression is that many of the difficulties I anticipated are going to disappear, and that the paper will resolve itself into a fairly simple thing. Mr. Blagden and his attorney Mr. Mitchell expect to arrive Thursday, and I shall be pleased to send you the two copies of the contract you suggest as soon as it is drawn.

It seems reasonable to me that the contract should take form in plenty of time for the consideration of those interested when they are here at the Industries meeting on the thirteenth and fourteenth.

With kind regards, I am
Yours truly,

10277 *Government's Exhibit No. 108*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

JUNE 16, 1926.

MR. S. L. AVERY, *President,*
United States Gypsum Company,
205 West Monroe Street,
Chicago, Illinois:

DEAR SIR:

In talking with Mr. Blagden over the telephone yesterday I told him to advise you that Mr. M. A. Reeb and myself will be in Chicago Friday of this week and will be ready to see you at 11:00 o'clock Chicago time.

Should you be unable to see us Friday, request that you kindly wire me at Hotel Sinton, Cincinnati, Thursday, June 17th, and should I get such information from you I will advise Mr. Reeb so he will not plan on being there Friday but will arrange some future date that will be agreeable to you.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.

10278 *Government's Exhibit No. 109*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

AUGUST 13, 1926.

MR. S. L. AVERY, *President,*
United States Gypsum Company,
Chicago, Illinois.

DEAR SIR:

Replying to your letter of June 6th, we received the package containing patents listed under exhibit A on pages one and two, but we did not receive any of the patents listed on pages 3, 4, 5 and 6, which were originally owned by the Beaver Products Company.

We have asked the Beaver Products Company to rush these patents to us as the wording of the license agreement makes it quite necessary that we look over these patents, very few of which we have had any knowledge in the past.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.

10279 *Government's Exhibit No. 110*

Augst 16 1926

F. J. GRISWOLD, *President*
American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

In answer to yours of the thirteenth I will say that Mr. Blagden, under date of August ninth, advises me that the Beaver company was mailing you at that time a memorandum containing the numbers of all patents and patent applications referred to in the license agreement. From this I assume that they have no copies of these patents themselves, and expect you to obtain them from Washington.

It is my belief that you will find a satisfactory justification without going through this laborious list or securing the sometimes technical explanation of the direct and indirect uses of these patents in the present production of almost all board. The Utzman machine patent itself is, I believe, one of the most important, and perhaps you may find it possible, after going over this and one or two others, to satisfy yourself sufficiently to escape the need of a careful investigation of so many patents and applications.

Very truly yours,

President.

10280 *Government's Exhibit No. 111*

THE AMERICAN GYPSUM COMPANY

Record of regular meeting of the Board of Directors of The American Gypsum Company held at the office of the Treasurer, 876 The Arcade, Cleveland, Ohio, on Monday August 16, 1926, at 10:00 AM.

President McCrady called this meeting to order.

A roll call indicated the following:

Present

J. H. McCrady	P. K. Tadsen
Edward McCrady	C. F. Miller
Harry W. Benn	F. J. Griswold

J. B. Davis

Minutes of regular meeting held July 19, 1926 were read by the Secretary and the same, upon motion by Harry W. Benn, seconded by Edward McCrady and carried, were approved.

The Financial report of Auditor Wilber T. Richardson covering period from January 1st to July 31st, 1926 was read by the Secretary, the same on motion by P. K. Tadsen, seconded by C. F. Miller, and carried, were ordered placed in the files of the Company.

Mr. A. T. Button of the Engineering Department of The N.Y.C. Railroad Company was advised that could furnish the railroad Company its requirements (about 350,000 cubic yards) for making the grade elimination embankment through Port Clinton, Ohio, from our run-of-mine limestone rock, in sizes containing approximately 1½ cubic feet, down to ½ inch and screenings, for the sum of $.80 per ton of 2000 pounds, f o b cars Port Clinton Mill.

A copy of the proposed Licensing Agreement, as suggested by The United States Gypsum Company was read in detail and after a full discussion by the Board, Harry W. Benn moved that this entire matter be again referred to the Committee, consisting of J. H. McCrady, F. J. Griswold and J. B. Davis, for a general revision as to details, and that the Committee endeavor if passible to limit any licensing agreement to a three year period; and further, that

C. F. Miller is by this motion appointed an alternate to serve upon the above Committee in case any one of those noted are unable to attend its sessions, motion seconded by Edward McCrady and unanimously carried.

The above Committee was requested to try and report at or before the next regular meeting of the Board.

Moved by C. F. Miller and seconded by Harry W. Benn that the Manager obtain from The American Appraisal Company, and from two other companies of like standing, a proposal to fully complete the appraisal of all land and property of The American Gypsum Company,
10281 wherever located (A part of this work has already been done), Motion carried.

On motion, duly made, seconded and carried, this meeting closed.

J. H. McCrady,
President.

J. B. Davis,
Secretary.

10282 *Government's Exhibit No. 112*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

AUGUST 17, 1926.

MR. S. L. AVERY, *President,*
United States Gypsum Company,
205 Monroe Street,
Chicago, Illinois.

DEAR MR. AVERY:

Do not think I am not working on the matter about which we have had some correspondence.

I am leaving for Buffalo this afternoon to see Mr. Haggerty and may also see Mr. Brown of the Certain-teed Products Company. Will be back the first of the coming week and you will hear from me soon after that time.

Yours respectfully,

THE AMERICAN GYPSUM COMPANY

F. J. GRISWOLD

FJG/AS.

10283 *Government's Exhibit No. 113*

PORT CLINTON, OHIO

AUGUST 31, 1926.

MR. S. L. AVERY,
c/o U. S. Gypsum Co.,
205 West Monroe St.,
Chicago, Ill..

DEAR SIR:

Pardon the delay in replying to your letter of August 16 but the writer has been absent since that date and just returned Sunday morning.

Was at Buffalo Saturday but Mr. Blagdon had not returned from his vacation. They expected him back on the job September 1. His Company sent me a list of Exhibit "A" and I find also a considerable number of patents which I have not had a chance to check at this writing and in order to save time on the matter, before leaving, I instructed our patent attorneys to secure the copies and check them over. If Mr. Blagdon returns we will try and arrange for a meeting the first of the coming week at Chicago and get some definite action on this matter.

While at Buffalo I had an interview with Mr, Haggerty. At New York I also met Mr. Fuller of the Atlantic Gypsum Company. Had a very pleasant talk with him along the lines we are working on and expect another interview with him in the very near future.

While in New York I met Martin Johnson and will be very glad to advise you the coming week of some of the things the writer has in mind.

Yours respectfully,

F. J. GRISWOLD

10284 *Government's Exhibit No. 114*

PORT CLINTON, OHIO

SEPTEMBER 8, 1926.

MR. S. L. AVERY, *President,*
United States Gypsum Company,
205 South Monroe Street,
Chicago, Illinois.

DEAR MR. AVERY:

I expected to be in Chicago Tuesday of this week, but circumstances prevent Mr. J. H. McCrady from being there at that time, so have had to postpone the matter until Monday, September 13th, at which date we will both be in Chicago ready to take up the matter of the licensing agreement.

Yours respectfully,

F. J. GRISWOLD

FJG/AS.

10285 *Government's Exhibit No. 115*

SEPTEMBER 10 1926

F. J. GRISWOLD
American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

Your letter of the eighth is at hand, and I shall be pleased to see you and Mr. McCrady on Monday the thirteenth. I trust nothing will prevent your keeping this engagement, for I myself leave Wednesday morning for the East.

Yours truly,

10286 *Government's Exhibit No. 117*

McCrady Brothers Company
Building Supplies, Lumber
Coal — Coke and Millwork
BRADDOCK, PA.

Sept. 20, 1926.

Mr. J. B. Davis,
Detour, Chippewa County,
Michigan.

My dear friend John:

I received your postal stating you and Mrs. Davis landed in your little cottage by the sea and that your hay fever has entirely disappeared. Now in regard to my trip to Chicago, would say I left here Sunday morning; had an hour lay-over in Cleveland. Clint met me at the depot and we talked over matters pertaining to the American Gypsum Company. He said while he had not been up at the plant that everything seemed to be moving along nicely and he thought he would go to the plant sometime soon.

Now in regard to our conference in Chicago with Mr. Avery, I am not going to enter into details or even hit the high spots as I had C.F. Miller on the 'phone about an hour ago and he advised me that he had written you as to what transpired in our conference with Mr. Avery. He gave us to understand that for the next ten years, we, the American Gypsum Company, would have to eat out of his hand and that is just what we would have to do if we sign this contract. Now in regard to the Board meeting, we decided to postpone it until your return home from your vacation. I am enclosing, herewith, a copy of the contract which you can look over at your leisure. You do not need to return this copy as I have another here.

Mrs. McCrady and the writer both extend our best wishes to you and Mrs. Davis and also to your son, Warren, and his family.

Yours very truly,

J. H. McCrady

10287 *Government's Exhibit No. 118*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

SEPTEMBER 20, 1926.

MR. J. B. DAVIS,
Detour, Chippewa Co.,
Michigan.

DEAR MR. DAVIS:

Glad to know that everything is okeh with you on the island. Things are going along very well here and business seems to be holding up just about the same as it did for the same period in 1925.

We hear quite a little talk over the country about business not being as good as people would like to have it, but it doesn't seem to have much effect on the volume of business yet.

We feel very confident that the remaining months of this year will give us as good tonnage as 1925, and if they do, we should be satisfied.

I am enclosing copy of letter that I just wrote our Mr. McCrady.

The trip to Chicago was made by Mr. McCrady, Mr. Miller and myself. There was nothing definite done, of course, as we were a committee and have to report to the Board of Directors. Mr. McCrady said this meeting will not be called until you return.

There were some changes made in the contract and I am enclosing you a copy of it.

We went over the matter fully with Mr. Avery and Mr. John McLease, their general counsel. They explained very fully why they could not incorporate in the contract things which they admitted they would have liked to put in but which they could not put in.

The Beaver Board Company signed the original contract and the Universal Gypsum Company were to have signed last Wednesday afternoon, according to Mr. Shearer. It seems like this is a question of more faith in the other fellow and is something that we are asked to do for the good of the industry. From a legal stand point it is a bad contract, but it is a good deal like the one that Frank Carpenter passed on, and the one we had with the Cleveland Builders. If he were on the Board of Directors, and the officers did not sign it, he would be in favor of discharging them for the simple reason that it looks like it would be a good thing from an operating stand point. It is the
10288 same in this case, Mr. Avery gave us positive assurance as to what they would not do towards forcing any provisions that would work a hardship on any licensee providing certain conditions developed.

I understand from McCrady that Harry and Ed did not take very kindly to it, but I am sure I do not know anything further than the brief statement which he made over the telephone.

I am leaving fro Chicago at noon today to attend a regular meeting of the Gypsum Industries.

It certainly is a delightful feeling that we are experiencing now with our bills paid up and money in the bank. Collections so far amount to $148,000.00 out of our estimate of $250,000.00 for the month, consequently we still have about $100,000.00, which we expect to collect. If we collect this amount of money we will be in very good condition the first of October.

Hoping that both you and Mrs. Davis are enjoying your stay there to the fullest extent, I remain,

Yours respectfully,

THE AMERICAN GYPSUM COMPANY

F. J. GRISWOLD

Dictated but not read
FJG/AS.

10289 *Government's Exhibit No. 119*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

OCTOBER 7, 1926.

MR. S. L. AVERY, *President,*
United States Gypsum Company,
205 West Monroe Street,
Chicago, Illinois.

DEAR MR. AVERY:

Simply because you do not hear from me, do not think there is not being some work done on the matter of the licensing agreement.

Two of our directors have been away and have just returned and we have a meeting scheduled for Monday of the coming week, at which time some definite action will be taken on the matter.

On the matter about which you are familiar I simply report progress with the expectation that it will go thru as planned.

Yours respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.
Dictated but not read

10290 *Government's Exhibit No. 120*

OCTOBER 9 1926

F. J. GRISWOLD
The American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

Thanks for yours of the seventh. To be frank with you, I have been a little disturbed about the slowness of our progress, although I have appreciated the burden of your efforts in other fields and assumed that this was the cause of the delay. I have been postponing a rather extensive trip in the expectation of a conclusion on the matter, and am pleased to know that the meeting scheduled for Monday may bring some development that will decide it.

I am very glad to know of the progress you report in your last paragraph, and I very much hope you accomplish this for the satisfaction it will be to yourself and for the good I believe it will bring to the industry in general.

Very truly yours,

10291 *Government's Exhibit No. 121*

PORT CLINTON, OHIO

OCTOBER 9, 1926.

MR. S. L. AVERY, *President,*
United States Gypsum Company,
205 West Monroe Street,
Chicago, Illinois.

DEAR MR. AVERY:

It may interest you to know that Mr. Fuller and Mr. Channing of the Atlantic Gypsum Company, have been with me here for the last two days, and have just left for home.

I have considered it a very wise move to get pretty well acquainted with these gentlemen. They claim they are going into the manufacture of Gypsum Wall Board as well as the manufacture of a pulp board, which, from the information I have been able to get from them, is something entirely different from any pulp board on the market.

I have talked very earnestly to them on the matter of the licensing agreement and believe they will consider it favorably. They, of course, wanted to know its contents and asked me for a copy of the proposed contract, which of course I have not given them. I promised to see what can be done.

Do you see any objections to giving them a copy of the contract, omitting from it any names, either of the licensor or the proposed licensees?

Both of these gentlemen seem to be very earnest in assuring me that they are in the business to make money, and if competition would allow them to do so, they certainly expect to make it out of the gypsum business. They assured me that their experience in the business is such that they feel absolutely confident of their ability to get the same prices for their products as other companies get for their's, and intimated that they do not expect to follow any other policy than that of selling their materials at the market prices established by other concerns in the same line.

I might add further that both of these gentlemen impressed me as being very level headed business men and ones whom I would expect to do exactly as they stated they would.

Would be pleased to hear from you at your convenience.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY.
F. J. GRISWOLD

FJG/AS.

10292 *Government's Exhibit No. 122*

OCTOBER 11 1926

F. J. GRISWOLD
American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

Thanks for yours of the ninth regarding Mr. Fuller and Mr. Channing. I am having made up an extra copy of the license which I am forwarding to you, and if you believe it advisable to forward it on to them I would be pleased to have you do it. It does not seem proper for me to send it on directly as we have so far not had the pleasure of meeting, and the subject of the license has not, of course, been mentioned. It is a pleasure to have your favorable judgment of the qualities and points of view of these men, and it is a satisfaction to know that men coming into the industry are of this character.

Very truly yours,

10293 *Government's Exhibit No. 123*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

OCT. 15, 1926.

MR. S. L. AVERY, *President,*
United States Gypsum Co.
205 West Monroe St.,
Chicago, Ills.

DEAR MR. AVERY:

Acknowledging your letter of the 11th enclosing copy of License Agreement.

I am confident the way to deal with the gentleman referred to is by dealing with him in a frank open manner, which I have attempted to do up to the present time.

It is my opinion that it will be a wise move to forward the contract to Mr. Fuller with a request that the matter be kept strictly confidential, and a further request that he is to return the contract to me as soon as some decision has been reached in the matter.

In this connection I might advise you that the Directors of this Company had a meeting Monday of this week, and the License Agreement matter was referred back to a Committee.

This Committee expects to meet with all other Manufacturers of board who have not yet signed the License Agreement. The meeting will probably be Thursday of this coming week with the object in view of getting united action on this matter.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/LM.

10294 *Government's Exhibit No. 124*

OCTOBER 19 1926

F. J. GRISWOLD
American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

Thanks for yours of the fifteenth. I am glad to have the information this contains, and will be interested in hearing from you after the meeting that you expect to have with all other manufacturers of the board who have not so far signed the license agreement. Regardless of the outcome of your efforts in this particular, I want to assure you of my appreciation not only of your interest but of the broad-visioned manner with which you have proceeded with this important subject.

I learn nothing much about your other efforts, but the grape-vine circuit continues to bring in evidences of your progress and expressions of confidence in your ultimate success

Very truly yours,

10295 *Government's Exhibit No. 125*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

OCTOBER 20, 1926.

MR. S. L. AVERY,
c/o United States Gypsum Co.,
Chicago, Illinois.

DEAR MR. AVERY:

Replying to your letter of the 19th, I regret to report that I was unsuccessful in getting all of the people interested to attend the meeting on the 21st, as planned, but some of them were unable to come on account of previous engagements. I do not believe I will be able to get them together until after the first of the month, but all of them have expressed the desire to come as soon as they can arrange their affairs to do so.

I might add that the Atlantic Gypsum Company is very much interested, judging from a recent telegram I received from them.

I am quite sure you appreciate what I have to contend with and also appreciate the fact that if the original plan should fail of unanimous consent of all of the manufacturers, and if the other deal about which you are familiar should materialize, it would still leave the way open to bring the matter to a head in a much easier way. I am quite sure that one or the other will succeed by patient and persistent work.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.

10296 *Government's Exhibit No. 126*

OCTOBER 22 1926

F. J. GRISWOLD
American Gypsum Company
Port Clinton, Ohio

MY DEAR MR. GRISWOLD:

Your letter is received, and I am interested in all you say. The time that has passed since we first took up this license matter is long, and I am eager to have a talk with you soon. Charlie tells me that he phoned you this morning and that you planned to be in Chicago the first day or two of November. I am glad of this, because I will admit to being a little disturbed at our lack of progress.

Yours very truly,

10297 *Government's Exhibit No. 127*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

NOVEMBER 1, 1926.

MR. S. L. AVERY, *President,*
United States Gypsum Company,
205 West Monroe Street,
Chicago, Illinois.

DEAR MR. AVERY:

Pardon delay in replying to your letter of October 22nd, but I have been absent from the office and just returned.

It will be impossible for me to be in Chicago this week but will call and see you when I am there.

I am trying to arrange for a meeting either Saturday of this week or Monday of the coming week. I have heard from most of the parties.

After this meeting I expect to have definite views of some of the manufacturers of Wall Board which I have not had an opportunity of getting up to the present time.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.

10298 *Government's Exhibit No. 128*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

NOVEMBER 16, 1926.

MR. S. L. AVERY,
c/o United States Gypsum Co.,
205 West Monroe Street,
Chicago, Illinois.

DEAR MR. AVERY:

After spending considerable time with the manufacturers of Wall and Plaster Board, discussing the proposed license agreement submitted by your company, I am now compelled to admit that further efforts would simply be a waste of time and that it would be impossible to get them to sign this agreement as written. The principle objection is the length of time which the agreement runs and the list of patents described as exhibit A, acknowledgment of the validity of which is required according to the present agreement. You will remember that when the matter was first up for discussion it was figured that the length of time which the agreement was to run was to be much shorter as the Utzman Patent expired in about three years.

I have discussed this matter pretty thoroughly with all of the companies with the exception of the Certainteed Products Company. I am not in a position to know where they would stand on a contract that only covered the Utzman Patent and run during the life of the Utzman Patent which is about three years. I expect to see them in a short time but I feel confident that all of the rest of the manufacturers will sign such an agreement along the same general lines of your present agreement. I also believe that the Atlantic Gypsum Company who are figuring on going into the Wall Board business will sign such an agreement, but know they will object to an agreement running practically ten years. I expect to be able to report to you in a short time exactly what they are willing to do.

I am pleased to report that matters are progressing very favorably along the line about which you are familiar and believe it will not be long before some definite action is taken.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.
Dictated but not read

10299 *Government's Exhibit No. 129*

NOVEMBER 22 1926

MR. F. J. GRISWOLD, *President*
American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

Your letter of the sixteenth I find on my return to the office. I appreciate your efforts with the other board manufacturers. I understand your statement of their position, and regret that we have no alternative to offer. I have been disappointed that you have not found it possible to earlier express your own position in this matter. I do not find anything in yours of the sixteenth that relates to the position of the American Gypsum Company, but assume that you will advise us of this at an early date.

Yours truly,

President.

10300 *Government's Exhibit No. 130*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

NOVEMBER 29, 1926.

MR. S. L. AVERY, *Pres.*,
United States Gypsum Co.,
205 West Monroe St.,
Chicago, Illinois.

DEAR MR. AVERY:

Replying to your letter of the 22nd, in view of the fact that all of the independent manufacturers with the exception of the Beaver Products Company and the Universal Gypsum Company, were opposed to the length of time which the proposed license agreement was to run, and to the acknowledgment of the validity of so many patents, the Directors of The American Gypsum Company were opposed to signing the agreement which so many other manufacturers refused to sign. The writer hopes to submit something for your consideration in the very near future. Might add further that proposition number two, with which you are quite familiar, seems to be progressing very nicely, and if it goes thru to a successful conclusion, may somewhat change the situation all around.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.

10301 *Government's Exhibit No. 131*

DECEMBER 30 1926

F. J. GRISWOLD, General Manager
American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

As the attempts made to adjust the differences between us relating to the plaster-board edge seem to have exhausted themselves without result, I am writing to advise you that we hereby withdraw the proposal made to you in this connection.

Yours truly,

President.

10302 *Government's Exhibit No. 132*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

JANUARY 3, 1927.

MR. S. L. AVERY, *President*
United States Gypsum Company
Chicago, Ill.

DEAR MR. AVERY:

I acknowledge receipt of your letter of the 30th. Am very sorry indeed that we have not been able to reach an adjustment in the matter referred to not only with this Company but all the other people interested and regret to note that you feel as you do about the matter but am frank to say to you that I have not given it up.

You will remember that I started out to deliver 100 per cent of the manufacturers of board that would be willing to sign up on a license arrangement with your company which at that time only extended during the life of the Utzman patents and at a meeting that was held all of the manufacturers seemed to feel favorable to the matter but the later contracts which were submitted extended the time over about an eleven year period and brought in to this new contract a number of other patents which had not been considered in the original proposition, which explains the stumbling block for me all the way along.

Since the meeting referred to the Certainteed Products Company began the manufacture of board and are making an open edge type of board rather than make any protected edge type which might get them into litigation. I regret to say that some of the reports I hear from the Southwest territory indicate that they are doing just what I anticipated would be done in case this license agreement was not entered into. Another manufacturer, the Atlantic Gypsum Company, are just about ready to start the manufacture of wall board and they too will manufacture an open type edge unless some agreement can be reached with you on a shorter time contract.

With the exception of the Certainteed Products Company and the possible change of mind of the National Gypsum Company every other manufacturer now is ready to enter into a shorter term contract. The Certainteed Com-

pany are considering the matter but have not given me a definite answer. If their actions are favorable every manufacturer will then be ready to enter into a shorter time contract which will be along the same general lines of your present contract and if I am successful in getting 100 per cent the proposition will be submitted to you for consideration. As indicated above, at the present time, every concern including the Atlantic Gypsum Company is willing to enter into this contract with the exception of the Certainteed Products Company. The National Gypsum
10303 Company has so indicated but suggested one or two alternate propositions which I think they would waive providing all the rest of the manufacturers agreed on the proposed contract.

Yours respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD.

FJG R

10304 *Government's Exhibit No. 133*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

JANUARY 31, 1927.

MR. S. L. AVERY, *Pres.*
United States Gypsum Co.,
205 West Monroe Street,
Chicago, Illinois.

DEAR MR. AVERY:

Thru Mr. Henning, I am advised that you will return to Chicago on February 2nd.
I wish to advise that all of the manufacturers of Wall Board have now given me a final answer as to their attitude covering the license agreement with you, and I stand ready to meet you at the earliest possible date.
I expect to attend the meeting of the Industries at Chicago Tuesday and Wednesday, February 8th and 9th.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.

10305 *Government's Exhibit No. 134*

FEBRUARY 2 1927

F. J. GRISWOLD
American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

Yours of the thirty-first is at hand. I think our conversations and the correspondence we have had on the patent matter have made clear the company's position on this subject. I gather from your communication that the position of the wall board interests with whom you have conferred is of the nature indicated in your former letters. While I should be very pleased to see you and to discuss this matter, I can hold out no encouragement to you for any change in our position.

Yours very truly,

President.

10306 *Government's Exhibit No. 135*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

FEBRUARY 5, 1927.

MR. S. L. AVERY, *President,*
United States Gypsum Co.,
205 West Monroe Street,
Chicago, Illinois.

DEAR MR. AVERY:

I acknowledge receipt of your letter of February 2nd, and assure you that your former communications have made clear to me your position, but I feel it my duty to give you the information that I have, which, of course, you will act upon as you decide for your best interest.
I will be in Chicago on the 7th, 8th and 9th and would like to see you on the 7th, if possible, but will call you by 'phone and arrange for a meeting.

Yours respectfully,

THE AMERICAN GYPSUM CO.
F. J. GRISWOLD

FJG/AS.

10307 *Government's Exhibit No. 136A*

MARCH 24, 1927.

MR. C. E. WILLIAMS,
c/o National Gypsum Co.,
Buffalo, New York.

DEAR MR. WILLIAMS:

Replying to your letter of March 21st, Mr. Frank Cox, who was formerly with us in Detroit, Michigan, has made a change as indicated in your telegram, but he is now with us here at Port Clinton, and so far as we know he is not contemplating any further change.
A letter addressed to him in care of The American Gypsum Company will reach him.
I have not had the pleasure of hearing from you since discussing the board proposition with you in Buffalo and I suppose Mr. Haggerty is home, as he expected to be in a few days.

I am very glad to inform you that the Texas Cement Plaster Company decided recently to enter into the license agreement with the United States Gypsum Company, but I am still further pleased to advise you that since they reached that decision, they have reached the decision to join in our proposition so they will become one of the group which we are merging. The Atlantic Gypsum Company signed up their agreement and the Certainteed Products Company are considering it with much greater favor. I would like to urge upon you to discuss the matter with Mr. Haggerty, because our organization, when we get lined up will soon reach an agreement, which, if the Certainteed come in, and I am sure they will, will make it 100% with all manufacturers who will be operating under the license agreement, doing away with all legal complications which have existed in the past and which are so unpleasant as well as expensive.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY

FJG/AS.

10308 *Government's Exhibit No. 136-B*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

MARCH 24, 1927.

MR. C. E. WILLIAMS,
c/o National Gypsum Co.,
Buffalo, New York.

DEAR MR. WILLIAMS:

Replying to your letter of March 21st, Mr. Frank Cox, who was formerly with us in Detroit, Michigan, has made a change as indicated in your telegram, but he is now with us here at Port Clinton, and so far as we know he is not contemplating any further change.
A letter addressed to him in care of The American Gypsum Company will reach him.

I have not had the pleasure of hearing from you since discussing the board proposition with you in Buffalo and I suppose Mr. Haggerty is home, as he expected to be in a few days.

I am very glad to inform you that the Texas Cement Plaster Company decided recently to enter into the license agreement with the United States Gypsum Company, but I am still further pleased to advise you that since they reached that decision, they have reached the decision to join in our proposition so they will become one of the group which we are merging. The Atlantic Gypsum Company signed up their agreement and the Certainteed Products Company are considering it with much greater favor. I would like to urge upon you to discuss the matter with Mr. Haggerty, because our organization, when we get lined up, will soon reach an agreement, which, if the Certainteed comes in, and I am sure they will, will make it 100% with all manufacturers who will be operating under the license agreement and will do away with the legal complications which have existed in the past and which are so unpleasant as well as expensive.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.

10309 *Government's Exhibit No. 138*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

DECEMBER 27, 1927.

MR. J. H. MCCRADY,
c/o McCrady Brothers Co.,
Braddock, Pa.

DEAR MR. MCCRADY:

I was up to Chicago last week and got to talking with Mr. Avery on the matter of the suit that is pending over the question of validity of their so called Birdsey Patent. He doesn't want to postpone the case but wants it to come to trial and it is assigned for January 27th at Cleveland. He said enough to show me that he would very much rather have us take out a license agreement than to proceed with the suit, but of course I just listened to that.
They have given up the idea of applying for a temporary injunction. The case that comes up will be to test the validity of the patent with the idea of getting a permanent injunction, and this is a case where we will be allowed to put our witnesses on the stand. Up to the present time it has all been the submission of depositions, but in this case no depositions will be used unless the witness has disappeared or we are unable to get him to put him on the stand. This trial will have to do only with the so-called Birdsey Patent edge which is an edge tucked in similar to the one which we are making. The Utzman type edge will not come into this case. By this I mean the type edge that the U.S.G. Company use on their Board.

After seeing Avery I had a long talk with our attorneys. You will remember at the last meeting it was suggested that Davis look up somebody in Cleveland and I was to get in touch with Charles Brown, Patent Attorney, who was connected with the Universal Gypsum Company, but after talking with them some time I made up my mind that Charles Brown would not work very harmoniously. Both Mr. Mehlhope and Mr. Poole thot that if we wanted to get additional counsel we should by all means get somebody that is looked up to as one of the best patent attorneys in

the country and they suggested a Mr. Charles Neave of New York, whom they claim is one of the most prominent patent attorneys in the country, their argument being that this case involves considerable money and if we are going to employ additional counsel at all, we should get the best available. I think this is pretty good advice.

For your information will say that Birdsey was granted a patent prior to the patent granted to Sidney C. Clark, our superintendent of the Wall Board Plant who assigned his patent, of course, to the American Gypsum Company. There has also been granted an additional patent to Birdsey 10310 and a patent to Schumacher, all on a type edge that is along the same general lines. By this I mean the two edges of the paper were tucked in. The first patent granted to Birdsey, however, is different than any of the rest. In the sketches and description which Birdsey gives of his patent he evidently had in mind a completely covered edge. That is, the edge of the Board was covered with paper and no stucco was showing. On all of the rest of the patents, including our's, there is no attempt made to completely cover the edge of the paper. On the other hand we are trying to keep from doing that very thing. We simply tuck the edges of the Board in and let the stucco come clear up to the face of the edge so our Board is practically the same as a raw edge Board, whereas, Birdsey's shows no stucco at all, but shows paper on the edge. As stated above, there are two other patents besides our's that are very similar to our own, all of which shows that the patent office realizes that there is a decided difference in the two different type edges.

If our attorneys can get the judge to realize the difference there is between the two type edges, there should be no trouble in our defending this case successfully. On the other hand if the attorneys cannot get the judge to study the question to such an extent that he can see the difference and simply looks at it in a general way, the decision is apt to go against us. It is for this reason that I personally favor that we get the best talent we possibly can to get the facts of the case across to the judge so forcibly that he will go into the matter thoroughly.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.

10311 *Government's Exhibit No. 141*

PORT CLINTON, OHIO

APRIL 12, 1928.

MR. J. H. MCCRADY,
c/o McCrady Brothers Co.,
Braddock, Pa.

DEAR MR. MCCRADY:

Since dictating other letters today, Mr. Blagden who is with the Certainteed Products Company called me up and said that inasmuch as he and I had done as much or more work than anybody else on the license agreement between the Wall Board manufacturers and the U.S.G. Company sometime ago, the result of which the Beaver Products Company, the Universal Gypsum Company, the Texas Cement Plaster Company and the Atlantic Gypsum Company had entered into a license agreement with the U.S.G. Company, that he in the last two or three weeks had had one or more conferences with Avery of the U.S.G. Company and he had also talked to his own people, the principal of which is George W. Brown, President of the Certainteed Products Company, and it was his own personal opinion that if The American Gypsum Company, the National Gypsum Company, the Ebsary Gypsum Company and the Niagara Gypsum Company would all get together and agree and then some of us talk to George W. Brown, President of the Certainteed Products, it was his opinion that Mr. Brown would agree to join us, and he felt pretty sure that Brown would join.

You remember I reported when I was in New York I had a two and one-half hour conference with Brown, at which time he stated very plainly to me that they were willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred percent.

When I was in Chicago about ten days ago I saw Avery for a few minutes and I was given to understand by him that notwithstanding the fact they had an injunction suit against the Certainteed Products Company to try to make them carry out the Beaver Products Company's license

agreement, the U.S.G. was willing to drop the suit against the Certainteed providing the Certainteed would carry out the Beaver Products Company's contract. Of course, we have got to make allowance to the fact that Blagden is now connected with the Certainteed Products Company and he may be acting as Brown's spokesman in this case, it really being the object of the Certainteed Products Company to get matters fixed up again and the markets stabilized.

For your information will say that the Wall Plaster market will never be straightened up or stabilized providing the Wall Board and Gypsum Lath market remains in the condition it is. There is no question but that if the Wall Board market were fixed up the Wall Plaster market would automatically be affected at the same time. Blagden
10312 was very anxious to know what our position in the matter would be and I told him that I could not tell him until sometime about the middle of the coming week. He seems very anxious to get at the matter at once, because he thot if it could be done now, before the market gets to the extreme bottom like it is in the south-west territory where plaster is selling for $2.50 a ton, it would probably be much easier to get it fixed up than it would be when matters get worse.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY

FJG/AS.

10313 *Government's Exhibit No. 142*

JUNE 18, 1928

MR. J. H. MCCRADY,
c/o McCrady Brothers Co.,
Braddock, Pa.

DEAR MR. MCCRADY:

Richardson has sent us his report, and I am pleased to advise that the result shown for the month of May was a gain of . We had about $1,700 expenses to pay out during the month of May that in reality should have been distributed over several months, but under our system the amounts are charged as expense items, which accrue during the month which they are paid.

Our tonnage shipt was not up to 1927. At the same time it was very good and has shown some signs of increasing for the month of June. The same trouble still prevails, that dealers will not order any material for stock and only order when they are compelled to do so for work that cannot be delayed any longer. The price situation has not changed materially and, of course, the low prices have spread to other towns but it has not spread very rapidly. $6.00 seems to be about the prevailing price excepting on specific jobs here and there where lower prices are made. We seldom find where a lower quotation than $6.00 is made to a dealer on material for warehouse stock. There has not been to our knowledge any direct movement made in the way of raising prices; but there are rumors all over the country that salesmen of both the Certain-teed and the U.S.G. Companies within the last ten days or two weeks have been advising contractors on specific jobs to get their orders in as prices are going to be advanced. These rumors come from all parts of the country and it is safe to assume that some word has been passed down the line from headquarters that the dove of peace would be soon looking for a place to light. As advised you at the last meeting, the Certainteed Products Company frankly admit that they have got enough and they would like to see the prices stabilized. The U.S.G. Company have quit their war talk and are advising contractors to get under cover on both plaster and wall board and also blocks, so lets hope that the two combatants have about gotten enough of the present conditions and will have sense enough to create better ones within the near future. The outlook for business is fair and we believe we will enjoy a very fair tonnage in the next four months, at least, and hope it will continue up to December 31st.

Yours respectfully,

THE AMERICAN GYPSUM COMPANY

FJG/AS.

10314 *Government's Exhibit No. 144*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

SEPTEMBER 10, 1928.

MR. EUGENE HOLLAND,
c/o Universal Gypsum & Lime Co.,
Chicago, Illinois.

DEAR MR. HOLLAND:

I acknowledge receipt of your letter of the 7th, and note your statement that nothing new has developed in regard to the price situation.

The attitude of this Company has not changed, and we do not think there is a ghost of a show of our Board ever considering the present license agreement of the Gypsum Company. If they will amend the agreement to give their licensees some protection and consideration for the money they get paid, I am inclined to think our people would consider the proposition, but so far Mr. Avery has gone on record that he will not make any change and there is not much chance of this Company being interested in his agreement.

I think you will agree that under the conditions as they are now, you, as licensees, should be entitled to some protection, which you are not getting, and we, of course, feel the same way, and I think the rest of the concerns do also. I believe the National would consider the agreement providing they would have some guarantee as to what action the Gypsum Company is going to take.

We have been compelled to make an open edge Board until we can get squared around here, but we are just coming on the market with a new closed edge Board, which we think will prove very satisfactory to the trade.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.

10315 *Government's Exhibit No. 143*

SEPT. 13, 1928

MR. F. J. GRISWOLD
American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

In the second paragraph of your letter of September 10 you state you believe that possibly your company could be interested in a modified license agreement on closed edge wallboard. I wish you would give me definite information, if you care to, as to just what your idea of this license agreement should be, stating clearly all of the points you think should be covered. I would not expect to use this information received from you other than as a background in approaching this whole situation when the proper time comes.

I think Mr. Haggerty and others interested are still of the opinion that some time in the near future I should attempt to arrange a meeting; in order to be in a position to intelligently handle the situation I should have a very definite idea from everyone involved as to just what they hope to accomplish in such a meeting.

I understand the plaster committee of the National Building Supply Dealers Association is meeting today and I have just been called to sit in with them informally for a few minutes. I am hoping that some good will come out of the effort of the dealers to bring about a more orderly distribution of our products.

With best personal regards, I am

Very truly yours,

President.

EH W

10316 *Government's Exhibit No. 146*

THE AMERICAN GYPSUM COMPANY
General Offices and Mills
PORT CLINTON, OHIO

SEPTEMBER 19, 1928.

MR: EUGENE HOLLAND,
c/o Universal Gypsum & Lime Co.,
Conway Building,
Chicago, Illinois.

DEAR MR. HOLLAND:

Replying to your letter of the 13th, I have my own ideas of what would be acceptable in the way of a license agreement, but with conditions as they are at the present time, I would not want to make a statement of the ideas of our Board until I consulted them about it. I will take up the matter with them at the first opportunity, but I am of the opinion that there is not much use of your spending much time on the proposition, at least, until the U. S. Gypsum Company indicates in some way that they are in a receptive mood, because as near as I can see, the entire proposition hinges on their attitude. There apparently is no question but that the other manufacturers would all welcome better market conditions, but such conditions cannot be brought about without the U. S. Gypsum Company wanting better market conditions and being willing to make an attempt to improve conditions themselves. So far as I know they have not shown any indications up to the present time that they cared for better market conditions. Conditions are settling down to what might be quite a siege in warfare. Everybody is getting ready to hang out as long as they can, and hoping, of course, that it will not be long before an armistice of some kind is agreed upon and the warfare ended.

While we may not be in line with the license agreement, we are perfectly willing to get all of the money we can for our products, and inasmuch as it has been the policy of this company in the past to always get the best market prices for our products, if the license agreement would be entered into by the other manufacturers, the effect of

which would be to sell a licensed product at a certain price, we are confident that with the goods we will put on the market, we will have no trouble in getting as high a price as the licensor.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.
Dictated but not read

10317 *Government's Exhibit No. 147*

SEPT. 20, 1928

MR. F. J. GRISWOLD
American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

I am afraid that nothing can be done towards stabilization until the board matter is entirely out of the way. I believe that Mr. Avery has been very definite in a statement to that effect. Inasmuch as Certain-teed, National, and others are unwilling to negotiate any on the board proposition until your decision is clearly defined, it would seem that the entire matter rests with your decision.

Possibly you are better able to negotiate this yourself, but several of us have thought that maybe we could get farther by having a meeting of several representatives of firms who are involved in the board situation. It might at least be worth while trying, and such a meeting would at least result in finding out just exactly wherein the difference of opinion exists. I was in hopes that you would be in a position to attend such a meeting in case the others were so disposed. If any change takes place in your position, I would be very glad to be informed if you so desire.

With best personal regards, I am

Very truly yours,

President.

EH W

10318 *Government's Exhibit No. 149*

TEXAS CEMENT PLASTER CO.
OKLAHOMA CITY, OKLA.

FEBRUARY 17, 1927

MR. F. J. GRISWOLD,
c/o American Gypsum Company,
Port Clinton, Ohio.

DEAR MR. GRISWOLD:

Your letter of Fenruary 10th received advising me of your conference with Mr. Avery in reference to the patent for the folded edge.

You probably have heard before now about my conference with Mr. Johnson.

If Avery changes his mind and wishes to give us a contract for the folded edge let me hear from you.

We have been having wonderfully nice weather down here.

Yours very truly,

TEXAS CEMENT PLASTER CO.,
S. M. GLOYD
President.

SMG:ON

10319 *Government's Exhibit No. 150*

FEBRUARY 21, 1927.

TEXAS CEMENT PLASTER CO.,
Oklahoma City, Oklahoma.

GENTLEMEN: *Attention Mr. S. M. Gloyd.*

Replying to your letter of February 17th, I have heard nothing further from Mr. Avery up to the present time as to the contract covering the license agreement. My guess is that everything is going to come out all right on this deal, because it looks now like the proposition Johnson has been working on is almost sure to go thru, and it will be decided the coming week. I expect all contracts to be signed up by that time ready to proceed with the business. If this occurs, I feel sure we will be able to get along with Mr. Avery and I hope to be able to arrange with him for a license agreement with your company, covering the three year period. For your information, however, will say that the Atlantic Gypsum Company of Boston is considering signing up with him on a long time contract and Williams of the National Gypsum Company seems to be inclined to sign up on a long time contract. Reeb is also considering it favorable. Of course, if the deal referred to above goes thru, Reeb will be in on that so that in all probability we will be able to get together with Avery in some way. All of us I think will be willing to go in on the long time contract if he will give us some assurance that what he has told us verbally will be carried out by someone else in case he should not be on the job.

Very glad, indeed, to hear you have been having nice weather. The weather we have been having the last week has not been so very bad, but has been what we would call typical winter weather for this time of the year. There is quite a snow storm raging today, however, and it looks like we are going to have some rough weather the next few days.

You will hear from me again within the next week as to how the matter referred to above is progressing.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY

FJG/AS.

10320 *Government's Exhibit No. 151*

TEXAS CEMENT PLASTER CO.,
OKLAHOMA CITY, OKLA.

MARCH 10, 1927

MR. F. J. GRISWOLD,
c/o American Gypsum Co.,
Port Clinton, Ohio.

DEAR MR. GRISWOLD:

Have just returned from Florida and find yours of the 21st and 28th both on my desk.

Also have a letter from Mr. Johnson which advised me that the merge you and he were working on had been completed. I am certainly glad you have been successful in this; thought most likely it would be done some way because you were giving it such careful consideration and this usually brings results.

I want to thank you for all the trouble you have given it in our behalf and if the folded edge business comes up again with Mr. Avery you can count us in line.

Just returned from Havana and Florida. Had a very nice trip, yet there is a lot of work about this running around that I don't care for.

Very truly yours,

TEXAS CEMENT PLASTER CO.,

S. M. GLOYD,
President.

SMG:ON

10321 *Government's Exhibit No. 152*

MARCH 14, 1927.

MR. S. M. GLOYD,
c/o Texas Cement Plaster Co.,
Oklahoma City, Oklahoma.

DEAR MR. GLOYD:

Replying to your letter of March 10th, note that you have just returned from Havana and Florida, and that you had a nice trip. Also note your comments that there is a lot of work about running around that you don't care for. I have noticed myself that even when I go on a pleasure trip, there is more or less work about it that sometimes tires a person, but when one takes trips for the interest of the business, he gets very much more tired.

This is all the more reason, Mr. Gloyd, why you should get rid of your plaster mill down there so you will not have anything connected with that to give you anything to worry about.

The mills that we have signed up, of course, is simply the beginning of the proposition we have in mind. We want to take in a number more of them before we get thru, and I hope we can make the matter look attractive enough to you so you will join us.

I believe the Gypsum Industries will have a meeting in Chicago the early part of April. Are you planning to be up there at that time?

For your information, we understand that the Atlantic Gypsum Company have signed up their contract with the United States Gypsum Company on the covered edge. As soon as we get our matters in shape I am going to take up the license agreement with Avery, and feel we will reach an agreement where all of our plants will be in on the license agreement, and hope to get things in shape so you can go in also. I have you in mind at all times when I am talking with Avery on the proposition and as soon as we get matters in shape so they will look attractive to you, I will take up the matter with you.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY

FJG/AS.

10322 *Government's Exhibit No. 153*

TEXAS CEMENT PLASTER CO.
OKLAHOMA CITY, OKLA.

MARCH 25, 1927

MR. F. J. GRISWOLD,
American Gypsum Co.,
Port Clinton, Ohio.

DEAR MR. GRISWOLD:

Just returned home and I have decided to apply to Mr. Avery right away for license to make the folded edge on our Board.

Have also decided that I would like to have you reply, setting forth what you had in mind to have Avery and his board of directors place on their minuite book in reference to Avery's version of how he would treat you and I, and also other firms that he had given license for the folded edge. I refer to the kind of treatment and the way that he would treat the license arrengement after the expiration of two and one-half years or during the remainder of the eight years.

Would like to have a free expression from you of your ideas of what resolutions Avery should place on the minuites and have confirmed by the board of directors, if we could get it.

I am firmly of the opinion that if you will make application for your company right away that they would both be accepted and contract sent us right away.

He already has the Universal Gypsum Company and the Beaver Products Corporation signed up on it and believe he would have to waive it to them if he gave us a better contract.

Please let me have a very prompt reply as I have definitely decided to write Avery very soon, but will await your reply.

Yours very truly,

TEXAS CEMENT PLASTER CO.
S. M. GLOYD,
President

SMG:ON

10323 *Government's Exhibit No. 154*

TEXAS CEMENT PLASTER CO.
OKLAHOMA CITY, OKLA.

MARCH 28, 1927

MR. F. J. GRISWOLD,
Port Clinton, Ohio

DEAR MR. GRISWOLD:

Enclosed find copy of my message of even date. Presume you have the letter I wrote to you Saturday.

Have definitely decided to take out license as was indicated by Mr. Avery's discussion with me last week. Thought probably you would be ready to make application as I do.

I will likely have a letter from you before this reaches you.

Yours very truly,

TEXAS CEMENT PLASTER CO.

S. M. GLOYD
President

SMG:ON
Encl.

10324 *Government's Exhibit No. 155*

MARCH 31, 1927.

TEXAS CEMENT PLASTER CO.
Oklahoma City, Oklahoma.

GENTLEMEN: *Attention Mr. S. M. Gloyd.*

Upon the writer's return to the office he found your letters of the 25th, and 28th.

You will have no trouble with Mr. Avery of the United States Gypsum Company if you make your application for a license agreement on that score. I am positive he will grant same.

I do not think Mr. Avery is worrying about our actions, because when our deal is completed, he understands that we will make an arrangement with him and take out a license agreement. Of course, if you do not take out a license agreement at this time, he is figuring if you join our merger proposition that would clear up the situation, because of the fact that we would take out a license for all of the plants manufacturing Board.

It may interest you to know that I had an interview with the National people while in Chicago the other day, and when discussing the subject, they seemed to be thinking more favorably than they ever did, at I am expecting them to arrive at a conclusion when they discuss the matter further with Mr. Avery.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY

FJG/AS.

10325 *Government's Exhibit No. 156*

S. M. GLOYD
Lumber Dealer
OKLAHOMA CITY, OKLA.

APRIL 5, 1927.

MR. F. J. GRISWOLD,
c/o American Gypsum Co.,
Port Clinton, Ohio.

DEAR MR. GRISWOLD:

Yours of the 31st received, and will say that I made application to the U. S. G. Company for license to manufacture their folded edge plaster board, and presume I will hear something from them before the end of this week.

In my last letter from Johnson he indicated that you and the other three mills are all signed up and ready to go, and presume that you are as busy as a bird dog.

Yours very truly,

S. M. GLOYD.

SMG:PF

10326 *Government's Exhibit No. 157*

APRIL 9, 1927.

MR. S. M. GLOYD,
c/o Texas Cement Plaster Co.,
Oklahoma City, Oklahoma.

DEAR MR. GLOYD:

Pardon delay in replying to your letter of the 5th, which was on my desk upon my return.

Note you have made application to the U.S.G. Company for license to manufacture the Utzman type folded edge Wall Board. I was in Chicago Tuesday and Wednesday of this week and had a long talk with Mr. Avery. He advised me that he received your application.

It may be very interesting information to you to know that the Certainteed Products Company has expressed indirectly a willingness to enter into a license agreement, and Mr. Avery, who has been opposed to granting them a license, has finally yielded to the persuasion of Mr. Blagden, Mr. Palmer and myself and has consented to consider their application. We expect to have another meeting with the Certainteed Products Company in New York on Thursday of the coming week, which we believe will end the matter, and they will file their application which will be granted.

When they make application, I feel absolutely sure then that the National Gypsum Company will also file their application, and inasmuch as we expect to go in, this will make the matter one hundred percent—in fact better than one hundred percent, because I was able to induce the Atlantic Gypsum Products Company to take out a license and this company was not considered at the time the matter was first thot of.

Mr. Avery seems to be very appreciative of the work his friends have done, which will do away with all the troublesome and distasteful litigation.
It might interest you also to know that the bankers have notified my company here as well as the Niagara and the Empire that the audits of their books have been completed and the results found satisfactory and they would proceed to take over the properties according to contracts.

Now, Mr. Gloyd, I will never feel just right on this matter until we have your plant, and I sincerely hope that the negotiations that are being conducted will result in your plant being one of those in the merger, That is what I had in mind when I started and I would like very much to have my ambitions in this direction fulfilled.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY

FJG/AS.

10327 *Government's Exhibit No. 158*

TEXAS CEMENT PLASTER CO.
OKLAHOMA CITY, OKLA.

APRIL 11, 1927

MR. F. J. GRISWOLD,
American Gypsum Co.,
Port Clinton, Ohio.

DEAR MR. GRISWOLD:

Your letter of the 9th received and I have the license contract before me. I am signing and returning them to Mr. Avery today.

I really hope that the Certain-teed Products Corporation will apply for the folded edge Board and that Mr. Avery will grant them license.

I am glad that your undertakings in the merging of those companies are going forward satisfactory to you. Presume I will hear a little further from Mr. Johnson in a few days. He, like yourself, has been very anxious to get our company and he may have worked out something by this time.

We have a new dragline in operation which enables us to uncover all of the Gypsum Rock that we will have need for for the next generation as our overburden runs from five to fifteen feet.

Yours very truly,

TEXAS CEMENT PLASTER CO.,

S. M. GLOYD,
President

SMG:ON

10328 *Government's Exhibit No. 159*

APRIL 13, 1927.

MR. S. M. GLOYD,
c/o Texas Cement Plaster Co.,
Oklahoma City, Oklahoma.

DEAR MR. GLOYD:

I acknowledge receipt of your letter of the 11th, advising that you are signing the license agreement and returning it to Mr. Avery of the U.S.G. Company.

I am leaving on this afternoon train for New York City where a number of us will meet in conference, and we hope to straighten out Mr. Brown of the Certainteed Products Company. There is little question in my mind but what we will be able to induce Mr. Avery to enter into the license agreement with them, if they are willing, and if they sign the agreement, the National Gypsum Company will also sign, and Johnson and I will then sign up the other companies, which will make it 100%. We hope this will, for many years, do away with the expensive litigation which has been the means of creating considerable feeling between the different manufacturers.

I note that you have a new dragline in operation and am very anxious to get down and look over your plant, but have been so busy here that I have been unable to do so. If matters work out like I hope, I will want to take a run down and look it over.

I feel pretty sure that Johnson will work out the proposition to your satisfaction.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY

FJG/AS.

10329 *Government's Exhibit No. 160*

THE AMERICAN GYPSUM CO.
PORT CLINTON, OHIO

MAY 31, 1927.

MR. S. L. AVERY, *President,*
United States Gypsum Company,
300 West Adams Street,
Chicago, Illinois.

DEAR MR. AVERY:

Our attorneys in Chicago, Offield, Mehlhope, Scott & Poole have written our Cleveland attorneys, Messrs. Hull, Brock & West, advising them the result of our conference in Chicago last week; further, that the writer will be in Cleveland this week and will see Judge Westerhaven and explain the situation to him as agreed. They suggested that they notify the local attorneys of your company in Cleveland.
I am writing Messrs. Hull, Brock & West today, advising that I will be in Cleveland Saturday morning, June 4th.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY

F. J. GRISWOLD

FJG/AS

10330 *Government's Exhibit No. 160A*

THE AMERICAN GYPSUM COMPANY

Record of special meeting of the Board of Directors of The American Gypsum Company, held at the office of the Secretary and Treasurer, 876 The Arcade, Cleveland, Ohio, at 10:30 A.M. on Wednesday, June 22, 1927.

Meeting called to order by President J. H. McCrady at the time set as above.

A roll call indicated the following:

Present

J. H. McCrady
Edward McCrady
Harry W. Benn
P. K. Tadsen
F. J. Griswold
C. F. Miller
J. B. Davis

There were also present, R. A. McCrady, Attorney, and Stockholder John M. McCrady.

The minutes of special meeting of June 10th, 1927 were read by the Secretary and on motion by Harry W. Benn, seconded by Edward McCrady, the same were approved as read; motion carried.

Wilber T. Richardson's financial statement as of May 31st, 1927, was read by the Secretary and passed to the Directors for personal examination, thereupon Harry W. Benn moved and Edward McCrady seconded, that it be accepted and filed; motion carried.

C. F. Miller moved and Harry W. Benn seconded that a 25% cash dividend be paid forthwith, upon the common stock of The American Gypsum Company, to all stockholders of record at close of business June 22, 1927; motion carried.

The following, relating to the Wall Board Edge royalty claim and suit of the United States Gypsum Company, in United States District Court, Northern District of Ohio, Eastern Division, was read by the Secretary, and the Board ordered that it be filed, and also made a part of the records of this meeting:

10331

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

In Equity No. 1621

United States Gypsum Company,
Plaintiff,

vs.

The American Gypsum Company,
½ Defendent.

It is hereby stipulated by and between the parties in the above entitled cause with the consent of this Honorable Court that this cause be dropped from the Trial Calendar under Equity Rule 57 subject to reinstatement by either party within one year from the date hereof.

HULL, BROCK & WEST

BATES, MACKLIN, GOLRICK & TEARE

Approved.

D. C. WESTENHAVER,
Judge.

May 31, 1927.

On motion duly seconded and carried, this meeting closed.

J. H. McCRADY,
President.

J. H. DAVIS,
Secretary.

10332 *Government's Exhibit No. 161*

JUNE 2, 1927.

MR. F. J. GRISWOLD,
The American Gypsum Company
Port Clinton, Ohio

DEAR MR. GRISWOLD:

Thanks for your letter of the 31st. Through our attorneys here I learned that the patent case has been postponed in Cleveland, without the prejudice our local attorneys feared, in the opinion of our representative. I have made a note of our conversation covering your personal assurances regarding the carrying out of our outlined understanding immediately subsequent to the taking over of the American and the Niagara by the new corporation, this to be on the basis of $50,000 for the American and $6000 for the Niagara, the 5% commission to apply to the shipment of board of both companies from the date of the license issued to the Universal Company. I hope that nothing interferes with the success of your plans and that you will be comfortably launched on the date anticipated, and have a long and happy voyage as master of a ship that appears to me to be on good lines and of sea worthy construction.

With kind regards, I am

Yours truly,

President.

10333 *Government's Exhibit No. 162*

THE AMERICAN GYPSUM CO.
CLEVELAND, O.

Cleveland, Ohio.
AUGUST 8, 1927.

MR. JNO A. KLING,

DEAR SIR:

Since you are going to Chicago, will suggest your calling upon Mr. S. L. Avery of the United States Gypsum Company, in connection with the wall-board edge law suit now pending between the United States Gypsum Company and The American Gypsum Company, with the idea of settlement.

Yours truly,

J. H. MCCRADY,
President.

10334 *Government's Exhibit No. 163*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 20, 1927.

MR. JOHN A. KLING
Cleveland Builders Supply Company
Leader News Building
Cleveland, Ohio.

MY DEAR MR. KLING:

Since your last visit, I have heard nothing from you on the patent matter we discussed. As the conditions which at the time seemed to warrant our postponement have expired, our attorneys are making application for the reinstatement of the suit. This, as you know, is a preliminary, and would not interfere with any step toward the adjustment of this matter in line with our recent conversation if the American Gypsum Company cares to take it up.

I understand you had a trip abroad. I hope you have had a good rest and added a polish to your always impressive vigor.

Sincerely,

S. L. AVERY

10335 *Government's Exhibit No. 164*

JNO. A. KLING
CLEVELAND

OCTOBER 15th, 1927

MR. S. L. AVERY,
United States Gypsum Company,
300 West Adams Street,
Chicago, Ill.

MY DEAR MR. AVERY:

Find yours of the 20th on my return to the office this morning and will immediately inquire into the American and U.S.G. controversy over patents.

Am in hopes that the matter can be adjusted without a lawsuit and by giving me a few days to inquire I will consider it a favor.

Sending regards and best wishes, I am

Respectfully yours,

JNO. A. KLING

10336 *Government's Exhibit No. 165*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 27, 1927.

MR. JOHN KLING
Cleveland Builders Supply Company
Leader News Building
Cleveland, Ohio.

DEAR MR. KLING:

Absence has prevented an earlier reply to yours of the 15th. The only step taken so far, I believe, is the reinstatement of the case. My understanding is that while the matter will move toward a place in the calendar, there is ample time for you to give the subject the consideration you suggest.

With kind regards, I am

Yours truly,

S. L. AVERY

10337 *Government's Exhibit No. 166*

JNO. A. KLING
CLEVELAND

OCTOBER 28th, 1927

MR. S. L. AVERY,
United States Gypsum Company,
Chicago, Ill.

DEAR MR. AVERY:

Complying with mine of the 15th, and again replying to yours of September 20th, I had occasion to meet Mr. J. H. McCrady, President of the American Gypsum Company, on other matters, at which time I explained our visit and my asking about the lawsuit, and recommended that the differences between the two companies be reconciled if possible.

Will suggest that you make no reference to my injecting myself into the matter, but write Mr. McCrady, (who knows of my writing you) saying that the suit has been held up long enough and that you would like to have the matter settled, otherwise, the suit will be started.

Sending regards and trusting you are enjoying the best of health, I am

Respectfully yours,

JNO. A. KLING

MR. BROOKBY: Mr. Avery would like to know the present status of this case. Are you in contact with it?

G. K.

10338 *Government's Exhibit No. 167*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 16, 1927.

MR. JOHN A. KLING
Leader News Building
Cleveland, Ohio.

DEAR MR. KLING:

Absence has prevented an earlier response to yours of October 28. I think I have advised you that the case between our company and yours has been restored to the docket. It seems probable that there will be a call of the calendar about the first of December. There has been no occasion for me to address Mr. McCrady on this matter, and I am a little reluctant to take the subject up with him in view of the fact that he has always had Mr. Griswold handle it. This patent subject has not been mentioned by Mr. Griswold or any other representative of your company since the conclusion of negotiations incident to the proposed combination.

With kind regards, I am

Yours truly,

S. L. AVERY,
President.

10339 *Government's Exhibit No. 168*

JNO. A. KLING
CLEVELAND

NOVEMBER 18TH, 1927

MR. S. L. AVERY
United States Gypsum Company
300 West Adams Street,
Chicago, Ill.

MY DEAR MR. AVERY:

Appreciate yours of the 16th, and since the case has been placed on the calendar, I will assume Mr. Griswold, or the Secretary, has been notified.

There being such a difference between what I understood was Mr. Griswold's idea of your willingness to settle and your explanation to me at our meeting, did not go into details with Mr. McCrady but suggested getting the matter adjusted, explaining I meet you and incidentally talked about the lawsuit and hoped the differences could be adjusted out of court.

Dislike to inject myself into the controversy, but am anxious to have the matter settled, and believe communication from either you or your attorney would result in the American Gypsum Directors urging something be done.

Respectfully yours,

JNO. A. KLING

10340 *Government's Exhibit No. 169*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

JULY 7, 1928.

MR. S. L. AVERY, *President,*
United States Gypsum Co.,
300 West Adams St.
Chicago, Illinois.

DEAR MR. AVERY:

It was on the Fourth day of July, 1928, about 10:30 A.M., and I had just finished playing the seventh hole in a foursome play in an eighteen hole flag tournament, being the third low handicapped man when some man handed me a clipping from a Chicago paper, telling of the decision of Judge Jones in our Wall Board edge controversy. Being a golf player yourself you will have to agree that a fellow that would do a trick like that in a golf tournament must have done so with the deliberate intention of ruining my score, or else he knew d— little about golf playing. I am not saying that it was not harder to play after that, but I will say I finished the eighteen holes with my usual score, and then played twenty-two more holes with the lowest score I ever have made, so I am now firmly convinced that golf is an excellent game to play to keep your mind off your business worries.

I was, of course, surprised at this decision and will admit that I was disappointed, but realize that both could not win, and congratulate you on doing so.

You stated, furing our conversation last week, that no matter who won the decision in this Court, it didn't mean much and that the case would likely go to the higher court in order to settle the question beyond dispute. The Board of Directors of our Company meet on July 11th, at which time, I think, this matter will be discussed, and no doubt a plan of handling it decided on, of which you will in due course of time be advised.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY

FJG/AS. F. J. Griswold

10341 *Government's Exhibit No. 170*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

SEPTEMBER 22, 1928.

MR. J. B. DAVIS,
Detrour, Chippewa County,
Michigan.

FRIEND DAVIS:

This is Saturday afternoon, and I thot I would drop you a line before the office closed to let you know that we have made remarkable progress with our new Wall Board edge, and we are now in production, making it about as fast as we made the old White Rock Board, and are really making a better edge than the old one. This seems to be the opinion of every one that has seen it. We are getting in a number of orders and have already made shipments which have proven satisfactorily. In fact we have had nothing but praise for this type edge. I am not the least bit worried about being able to hold all of our old customers with this edge, neither do I think there is any danger of the U.S.G. Company being able to cause us any particular trouble other than possibly an attempt to scare us off. Mr. Kling nor any one else who has gone into the matter with other attorneys see where they have much chance, because the edge we are now making, is nothing more than an open edge Board, which is moulded and forced in by a troweling process with reinforcing cloth. The Board is not a covered edge, neither can it be claimed that it is a fully protected edge. We claim it is simply a moulded edge which is reinforced, and this is correct.

There is no particular change in the price of Wall Board. In fact it is getting worse. It is down as low as $12.00 at the Mill. There are some indications, however, that there is a possibility of something being done to get prices in better shape before the first of the year. There are reports coming in in a round about way indicating that the U.S.G. Company are far from satisfied with the situation.
There is no particular change in the Plaster situation also. The price is $4.00 in quite a few places but in some places we, of course, are getting as high as $6.00. Our average

price is $5.00. We are meeting competition where we think advisable and are trying to increase our tonnage, but we are not making much progress so far as Plaster goes, but the new Wall Board will, bring us in some additional tonnage.

We have had wonderful weather here, very little rain. It is ideal weather for ripening of corn, which is practically all out of the way of frost. So far as I know we 10342 have not had any frost here yet although it has been pretty chilly.

I went duck hunting a little while last evening for the first time, but didn't have very good luck. The ducks are up to their old habits and do not come in until after sundown, and they haven't been shot at either to make them scary. It seems that the instinct of some good preservation teaches this. There are lots of duck after sundown and I could have killed the limit.

Hope you are enjoying your stay there and also hope you will get some good duck shooting before you return. Mr. Kling is in California, having left Cleveland Sunday, September 16, going to Los Angeles, due to the fact that his mother had an operation and he made the trip on that account. I haven't heard when he will be back.

We have a cash balance in the bank of $74,283.68, with all August bills paid, and we estimate we will collect $52,000.00 yet this month. We are losing money, of course. We cannot do anything else under present conditions, but we are watching the corners closely to keep our finances in as good shape as possible.

We had a directors' meeting the 17th.

Yours very respectfully,

THE AMERICAN GYPSUM COMPANY
F. J. GRISWOLD

FJG/AS.

Dictated but not read.

10343 *Government's Exhibit No. 171*

THE AMERICAN GYPSUM CO.

NOVEMBER 20TH, 1928

MR. S. L. AVERY,
United States Gypsum Company,
Chicago, Ill.

MY DEAR MR. AVERY:

Endeavored to reach you by phone as promised. Discussed the patent matter with some of the members of our Board and having gone into more or less of the details of our Chicago meeting, will consider it a favor if you will forward me a copy of the new licensed agreement you expected to prepare. Some of the clauses in the 1926 agreement were objected to by our people and if you will kindly send me copy of what you are now preparing to offer the other manufacturers I will be able to give you definite answer without delay.

Regretting I was unable to reach you by phone, I remain

Respectfully yours,

JNO. A. KLING

10344 *Government's Exhibit No. 172*

JNO. A. KLING
CLEVELAND

FEBRUARY 7th, 1929

MR. S. L. AVERY, *President,*
United States Gypsum Company,
300 West Adams Street,
Chicago, Ill.

MY DEAR MR. AVERY:

Was informed that you were in Florida but today learned you have returned.

Am desirous of going over the various differences of our respective companies with you at your convenience.

Am planning to visit my mother in Los Angeles next week and naturally prefer meeting before leaving for the West.

Respectfully yours,

JNO. A. KLING

10345 *Government's Exhibit No. 173*

THE AMERICAN GYPSUM CO.

FEBRUARY 13th, 1929

MR. S. L. AVERY, *President,*
United States Gypsum Company,
300 West Adams Street,
Chicago, Ill.

DEAR MR. AVERY:

Was obliged to be out of the City for a few days, especially since I am sailing for the Pacific Coast on the California, Saturday February 16th, leaving Cleveland tomorrow for New York.

Was very anxious to discuss with you personally the differences between our respective companies with an idea of trying to arrive at something that will relieve both you and ourselves annoyance and expense in litigation, and at the same time justify our meeting your views and recognizing rights that we might question as a matter of good business for both.

After our Chicago meeting I carried out my promise in suggesting to our Directors that we submit all our papers to our counsel in this City, and am sorry that we were not able to come to some decision before, however, our attorney has suggested a contract that he believes would protect you and at the same time be more just to ourselves, as we feel your contract was very unjust in several details.

Will take up with our Executive Board and suggest that either Mr. Davis or Mr. C. F. Miller call on you personally with the proposed agreement that our attorney feels we could both sign in fairness to each other. If this is not satisfactory I will stop and spend a day with you on my return from Los Angeles and a line from you will be forwarded to me.

Respectfully yours,

JNO. A. KLING,
Chairman

Jno. A. Kling
TR

10346 *Government's Exhibit No. 174*

THE AMERICAN GYPSUM CO.

APRIL 30th, 1929

MR. S. L. AVERY,
United States Gypsum Company
300 West Adams Street,
Chicago, Ill.

MY DEAR MR. AVERY:

Mr. Watson received a twelve page document from your Attorney, which I admit I cannot fully grasp and Mr. Watson feels it is practically the same as originally proposed with a few additions.

Am under the impression that attorneys carry out instructions and assuring you of my desire to not only adjust past differences, but work together on some legal basis, I am enclosing copy of letter written Mr. Watson and would suggest your attorney calling Mr. Watson requesting an appointment for personal meeting.

Awaiting your pleasures, I remain

Respectfully yours,

JNO. A. KLING,
Chairman

Jno. A. Kling
TR

10347 *Government's Exhibit No. 175*

THE AMERICAN GYPSUM CO.

MAY 1st, 1929

MR. S. L. AVERY,
United States Gypsum Company,
Chicago, Ill.

MY DEAR MR. AVERY:

Attorney John Watson phoned me that he had phone conference with your Attorney with a view of getting together if there was a possibility of forgetting words and preparing a contract that would be acceptable to you and our Company, and was under the impression that your Attorney would insist on the contract signed by Beaver Board and others, and under the circumstances I can hardly believe, if this is the case, it is worth while getting together and wonder if you are not a little too positive in taking the stand you have.

If there is a possible chance of our getting together based on my letter, which was influenced after my conference with you, I will instruct Mr. Watson to meet your Attorney, otherwise fear it is useless.

The writer feels that he has tried to see the entire matter in fairness to you and made a number of concessions that were not considered by our Directors and feel it is up to you to complete the License Agreement in the interest of the industry.

Awaiting your pleasures, I remain

Respectfully yours,

JNO. A. KLING,
Chairman

Jno. A. Kling
TR

10348 *Government's Exhibit No. 176*

THE AMERICAN GYPSUM CO.

JUNE 7th, 1929

MR. S. L. AVERY,
United States Gypsum Company,
Chicago, Ill.

MY DEAR MR. AVERY:

Mr. Watson read a letter from your Counsel John E. MacLeish to the effect that the contract submitted was not acceptable, which was a surprise to the writer after our phone conversation, as I assumed from your remarks you accepted our request that if you licensed others on any new board we would be given the same privilege. Also accepted our selling to Jobbers as we have been since doing business and as we paid a royalty on all board sold by us, we like yourself would insist on jobbers maintaining our selling price.

You did except our bundle clause but suggested our preparing what we wanted for your consideration.

Since our phone talk I have assumed we were practically together and was in hopes that you would concede to our reference to the bundling clause as we committed ourselves for two years regardless of what system we used to pay the royalty, which in my judgment is a long time; however, as I am anxious to have the matter a closed incident, if the balance of the contract as submitted will be acceptable, I will call my Executive Committee together and have them either accept or decline to sign up on the bundling license.

Assuring you there is no other motive than getting a contract satisfactory to both and having agreed to practically everything suggested by your Attorney, I feel you are now delaying the matter being brought to a conclusion.

Respectfully yours,

JNO. A. KLING,
Chairman

Jno. A. Kling
TR

10349 *Government's Exhibit No. 177*

JNO. A. KLING
1421 Leader Bldg.
CLEVELAND

SEPTEMBER 18TH, 1929.

MR. S. A. AVERY, *President,*
United States Gypsum Co.,
Chicago, Ill.

MY DEAR SEWAL:—

Since our meeting last Thursday, have given the jobber situation some thought and from my experience as Sewer Pipe Commissioner the past year, believe in the interest of any industry the fewer jobbers the better.

I gave you a list of five from those that have been recommended by our Sales Department. If you will give me a list of jobbers that have been approved and are now recognized by the Gypsum industry, I will see that same are respected.

I expect to be in Chicago tomorrow (Thursday) and would consider it a favor if you will have lunch with me at the Palmer House as I have received a call obliging me to be in your city on other matters.

Respectfully yours,

JNO. A. KLING

Jno. A. Kling/M

10350 *Government's Exhibit No. 178*

THE AMERICAN GYPSUM CO.

OCTOBER 14TH, 1929.

MR. S. L. AVERY,
United States Gypsum Co.,
300 West Adams Street,
Chicago, Ill.

MY DEAR SEWELL:

The last time we met at the Palmer House you spoke of sending us contract similar to the one signed by the other board manufacturers permitting the use of your new board, bundler and approving the few jobbers we recommended.

From phone message understand the manufacturers met with you in Chicago last Monday and if at this meeting an agreement was made, will suggest mailing me copy of the contract, as I had an accident about three weeks ago that is confining me to the house, giving me an opportunity of going over the contract carefully.

Assuming the reference in contract approved by Attorneys MacLeish and Watson, in connection with settlement for past sins, will be satisfactory I will do my utmost to get the matter closed to permit of our working together.

Sending regards, I am

Respectfully yours,

JNO. A. KLING,
Chairman

Jno. A. Kling
TR

10351 *Government's Exhibit No. 179*

THE AMERICAN GYPSUM CO.

OCTOBER 18TH, 1929.

MR. S. L. AVERY,
United States Gypsum Co.,
300 West Adams Street,
Chicago, Ill.

MY DEAR SEWELL:

Yours of the 15th, at hand. Am I to understand that the contracts to make bubbled plaster and the use of starch have not been submitted to other manufacturers?

Was informed by one of the group, who claims they were to receive a contract that would cancel the original making a new deal such as you spoke to me about at our last meeting, that contract was received.

If you are prepared to submit contract to other manufacturers, why not send me copy to permit of my going over it and be prepared to sign what the others agree to at the proper time.

Respectfully yours,

JNO. A. KLING,
Chairman

Jno. A. Kling
TR

10352 *Government's Exhibit No. 180*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 22, 1929.

MR. JOHN A. KLING,
The American Gypsum Company,
1421 Leader Building,
Cleveland, Ohio.

DEAR JOHN:

I acknowledge receipt of your favor of the 18th instant. As you were advised in my last letter, we have not yet concluded our purchase of the starch patents as that question depends on the action of the Federal Courts in the Universal receivership. Although certain license agreements have been made subject to the approval by these courts of the sale of the patents to us, we have not concluded to negotiate or make any other licenses at this time. It may be we will decide not to grant any other licenses. Under the circumstances, we prefer to await the action of the courts and the assignment of the starch patents to us before taking up the question of granting any other licenses.

Yours truly,

S. L. AVERY,
President.

10353 *Government's Exhibit No. 181*

JNO. A. KLING
1421 Leader Bldg.
CLEVELAND

Nov. 12-29

S. L. AVERY, Esq
Prest U. S. Gypsum Co
Chicago

DEAR SEWELL

Have been in Hospital since I left Chicago, while here went over agreement delivered by Mr. McLeash.

As explained to you personaly I will sign same but want you to enlighten me a little on 3 points.

First. Feel the U.S.G. Co. should establish cash discount — & the clause referring to discount should be what ever your Co allow as basis for all licensees.

Second—the U.S.G. as owners of patent should establish or make the minimum selling price be our guide.

Third—give me the royalties on each patent covered by the agreement.

Fourth—your approval of our (4) Jobbers—The Fairmount WPCo The Toledo P P Co. The Cleveland
10354 Gypsum Co. & Abbey & Co.

Also what is the Haggerty patent. Am writing under a handycap, but anxious to get the whole thing cleaned up, for our meeting next Tuesday.

Wishing you can read my writing & understand my questions—sending regards.

Respectfully yours,

JNO. A. KLING

10355 *Government's Exhibit No. 182*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 16, 1929

MR. JOHN A. KLING
1421 Leader Building
Cleveland, Ohio

DEAR JOHN:

I am sorry to hear that you have been in the hospital and hope that by this time you are well on your way to recovery.

Taking up the points you refer to, I advise you as follows:

First: You said you felt that the U.S.G. Co. should establish cash discount and that the clause referring to discount should be whatever we allow as basis for all licensees. In so far as the price of the patented product is concerned, we fix the minimum price at which the same may be sold, which is the only right we have as owner of the patent. After we have fixed the price the licensee cannot sell by way of discount or otherwise below the price so fixed. In that part of the contract providing for the payment of royalties to us based upon the selling price, the selling price is defined as the delivered price less freight paid by the customer and less regular cash discount. The regular cash discount is a known definite percentage determined according to the custom existing in the business and requires no further definition. We have no right to establish a cash discount. Our only right under our patents is to fix the minimum price at which the patented article may be sold by the licensee.

Second: You said U.S.G. as owner of the patent should establish or make the minimum selling price be the guide of the licensee. I am advised that the only right the owner of a patent has in so far as prices are concerned is to control the price for the protection of the patent. By fixing

the minimum price, as we did in the license, we exhausted the full right we had in that respect. It is for this reason that the contract provides for the minimum price only, which is ample for the protection and has been sustained by the courts.

Third: You asked that I give you the royalties on each patent covered by the agreement. This is impossible. You pay 3½% until 1937, which consists of 1½% for all of the patents and applications for letters patent described in Exhibit A except the Roos and Bayer applications 10356 and the Haggerty and Hite patents; 1% for the Roos and Bayer applications; and 1% for the Haggerty and Hite patents. From 1937 and until July 8, 1941, you pay 2%, consisting of 1% for the Haggerty and Hite patents and 1% for the Roos and Bayer applications or patents. Upon the expiration of the Haggerty and Hite patents on July 8, 1941, then commencing with that date you pay 1% on the Roos and Bayer applications or patents. If no patent issues upon the Roos and Bayer applications or patents within two years from the date of the contract, then the royalties you are required to pay are reduced by 1% until a patent does issue.

In addition to the above royalties, you pay 1½% in reduction of the claim which we have against you for damages, the amount of such claim to be determined in the manner as set forth in the contract.

Fourth—You ask for our approval of your jobbers. Under paragraph 9 of the contract you have the right to sell jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail) without any approval from us. If the jobbers you name are regular jobbers as above stated, then you would have the right to sell the patented product to them. As to other manufacturers or wholesale distributors, then you must have our consent, this provision simply being to prevent the licensee from defeating the license by manufacturing for other manufacturers or wholesale distributors not within the jobber class and who may sell at any price they please as we have no right to control the re-sale price of persons to whom the licensee may sell the patented product.

Fifth—You ask what is the Haggerty patent. The Haggerty patent, generally speaking, covers the use of carbohydrates in the manufacture of plasterboard or gypsum wallboard. This includes starch and all starchy substances. The claims of the patent cover the use of carbohydrates or starch to lighten the board as well as for a bonding agent. I do not wish to be understood as defining the limits or the full scope of the Haggerty patent, as it contains many claims, all of which, as owners of the patent, we reserve the right to enforce. This, in my judgment, is a very valuable patent and by its use great benefits are obtained, such as lighter weight, better nailing, better flexibility and better insulation. As a bonding agent it is of the utmost importance under the present methods of manufacture. As used by the Universal Gypsum & Lime Co., the former owner of the patent, the starch is cooked and added to the gauging water and then combined in the
10357 plastic mix. The result is a lighter board containing voids or forming a cellular product to which the paper adheres very firmly. The use of starch with our Roos and Bayer process makes an improved board of a decidedly superior quality and embodies both the claims of the Haggerty patent and the Roos and Bayer applications.

I hope the above clears up all of the questions you had in mind.

Sincerely yours,

SEWELL AVERY

10358 *Government's Exhibit No. 183*

THE AMERICAN GYPSUM COMPANY

Record of Executive Committee meeting held at 1421 Leader Building, Monday April 1. 1929., in Cleveland, Ohio.

Meeting called to order by Chairman Jno. A. Kling at 9:30 AM.

Members present

Jno. A. Kling, Harry W. Benn, J. B. Davis
J. H. McCrady

Others present

John, H. Watson, Jr. Atty.
C. F. Miller, Director

The Proposed Wall-board Edge License Agreement with The U. S. Gypsum Company was very generally gone over and discussed by those present.

Resolution by Jno. A. Kling, that whereas, on February 23, 1929, J. B. Day is as Treasurer and Harry W. Benn; as Vice President of The American Gypsum Company, did sign two Life Insurance Surrender Deeds No. 780830 and 780831 each for the sum of $4240.75, issued by the Travelers Insurance Company, a corporation of the City and County of Hartford and State of Connecticut, both covering contracts upon the life of Frank J. Griswold; now therefore, the signatures of said officers, J. B. Davis and Harry W. Benn are hereby ratified and approved and the Secretary is requested to furnish P. K. Tadsen, Insurance Agent of Port Clinton, Ohio, a copy of this resolution for him to forward to the Travelers Insurance Company. Resolution seconded by J. H. McCrady and unanimously carried.

An extended report from Superintendent, F. Wolfe to Jno. A. Kling, Chairman, dated March 20, 1929, was read by the Secretary. It covered a full statement of the conditions in which he found the Port Clinton plant, and what he and his assistants had done to improve conditions; upon

motion by Harry W. Benn, seconded by J. H. McCrady and carried, this report was accepted and ordered filed.

The order given by Chairman Jno. A. Kling, to move the farm house and farm buildings located upon the lands of the Company in Portage Township, Ottawa County, Ohio, to other suitable locations thereon and to use the farm house when moved as a laboratory, was ratified and approved by motion of Harry W. Benn seconded by J. H. McCrady and carried.

The action of the Chairman in directing that all storm water drainage of area contiguous to our mills, which is now drained into our mine and then pumped therefrom, be diverted into natural outfalls through suitable ditches and conduits, was approved, thus releaving our mine pumping.

The action of Chairman Jno. A. Kling and Secretary and Treasurer, J. B. Davis, in selecting Richey & Watts, Patent Attorneys of Cleveland Ohio., to represent this Company in all new patent application now or hereafter pending, as being more practical and workable for us, was unanimously approved.

10359 The action of the Chairman in the settlement of the Poole Hospital Clinic bill against Employee, G. A. New for one half of the bill rendered, equaling $279.30; and that of H. E. Christiansen's auto service bill on the same basis, equaling 197.00; also the payment in full of the bill of Dr. Poole of Port Clinton, against E. A. Wiechel, for medical services, were upon motion by Harry W. Benn, seconded by J. B. Davis and carried, approved.

Harry W. Benn moved that authority be given Chairman John A. Kling to negotiate with Blair & Co., Bankers of New York City for the purchase of the stock of The American Gypsum Company, and report the most favorable proposal that he can get from them. Seconded by J. H. McCrady and unanimously carried.

It was moved by Harry W. Benn, seconded by J. H. McCrady and carried, that Chairman John A. Kling and Director C. F. Miller be, and they are hereby authorized and given power to act in negotiating with President Avery of the U. S. Gypsum Company in any settlements or agreements required in the Wall Board Edge litigation now pending in the United States Court of Ohio.

The Executive Committee authorized the payment of $250.00 to George N. Lenci, Secretary for Judge H. W. Rippey and associates as our contribution for services rendered in the pending tariff change upon gypsum rock importation into the United States.

The audit report of Ernst & Ernst of Cleveland, Ohio, was read in brief by Chairman John A. Kling, and passed to members present for their examination as to details; J. H. McCrady then moved that the report be accepted and referred to the Board of Directors to be read at its next meeting. Motion seconded by Harry W. Benn and carried.

It was decided that the next meeting of the Board of Directors be held at the General Office of the Company in Portage Township, Ottawa County, Ohio.

On motion, duly seconded and carried, this meeting closed.

JNO. A. KLING,
Chairman

J. B. DAVIS,
Secretary

10360 *Government's Exhibit No. 184*

THE BEAVER PRODUCTS COMPANY, INC.
Wall and Roofing Materials
BUFFALO, N. Y.

DECEMBER 12, 1925.

MR. S. L. AVERY, *President,*
United States Gypsum Company,
205 West Monroe Street,
Chicago, Ill.

Subject—U.S.G. vs. Bestwall

DEAR MR. AVERY:

During our conversation in Chicago last Thursday, I told you that we had naturally been sizing up all the possibilities that might happen in regard to the suit between our two Companies, and that Mr. Mitchell, our general counsel, who by the way, is not a patent attorney and I have been working up a memorandum in which we have attempted to analyze the results of all possible decisions by the Circuit Court of Appeals of the matters in controversy and contrasted such results with a compromise and adjustment of the suit along the lines which I have discussed with you.

I beg to enclose a copy of this memorandum herewith for your information. I have not attempted to make any argument or weigh the probabilities of this or that decision of the question involved. I have merely attempted to indicate the results that would follow the possible decisions by the Circuit Court of Appeals.

Neither have I, as you will see, filled in any of the figures. There might be a difference of opinion between us as to these various amounts, but frankly I do not see how there can be any difference of opinion on the fundamental proposition that, whatever estimates of future results are made, a settlement along the lines discussed by us would be more advantageous than any possible decision by the Circuit Court of Appeals.

This letter and the memorandum enclosed herewith are of course submitted without prejudice to the rights of our Companies in the pending suit.

Yours very truly,

A. S. BLAGDEN
President.

ASB/h

10361 *Government's Exhibit No. 185*

MEMORANDUM RE U.S.G.—BESTWALL PATENT SUIT

	Gain	*Loss*
If defendant's appeal from the decision of the District Court is argued and submitted, the Circuit Court of Appeals may decide:		
I. That the Utzman patents are invalid.		
The result of such a decision would be:		
1. Plaintiff would lose all chance of recovering any profits realized by defendant on its closed-edge board, estimated at		
2. Plaintiff would lose all chance of collecting future royalties from defendant during life of Utzman patents, estimated (on basis of annual production by defendant of ..... sq. ft. of wallboard, a royalty of ..... per M sq. ft. and a five-year period covering remaining life of patents) at		
3. Plaintiff would lose all chance of recovering profits realized by manufacturers other than defendant on closed-edge board, estimated at		
4. Plaintiff would lose all chance of collecting future royalties from manufacturers other than defendant, 10362 estimated (on basis of annual production by such other manufacturers of ..... sq. ft. of wallboard, a royalty of ..... per M sq. ft. and a five-year period covering remaining life of Utzman patents) at		

Gain *Loss*

5. The field now occupied by plaintiff, defendant and certain other manufacturers of closed-edge wallboard would be thrown open to unlimited competition. Plaintiff's *annual* loss through such additional competition may fairly be estimated at .....

6. Plaintiff would be out the costs and expenses of the appeal, estimated at....

7. Plaintiff would be out the costs and expenses of suits against other alleged infringers, estimated at .....

8. Plaintiff would lose irrevocably its present opportunity to organize the industry and stabilize prices.

II. That the Utzman patents are valid but are not infringed by defendant's edge.

The result of such a decision would be:

1. Plaintiff would lose all chance of recovering any profits realized by defendant on its closed-edge board, estimated at .....

10363 2. Plaintiff would lose all chance of collecting future royalties from defendant during life of Utzman patents, estimated (on basis of annual production by defendant of ..... sq. ft. of wallboard, a royalty of ..... per M sq. ft. and a five-year period covering remaining life of patents) at .....

3. The supposed decision would to all practical intents and purposes determine that the closed-edge wallboards of other manufacturers did not infringe the Utzman patents. Plaintiff would therefore

Gain *Loss*

lose all chance of recovering profits realized by manufacturers other than defendant on closed-edge board, estimated at....

4. Plaintiff would likewise lose all chance of collecting future royalties from manufacturers other than defendant, estimated (on basis of annual production by such other manufacturers of ..... sq. ft. of wallboard, a royalty of ..... per M sq. ft. and a five-year period covering remaining life of Utzman patents) at.....

5. Plaintiff would be out the costs and expenses of the appeal, estimated at.....

6. If plaintiff claimed that closed edges of other manufacturers did infringe

10364 the Utzman patents, notwithstanding supposed decision that defendant's edge did not so infringe, plaintiff would be put to expense of bringing suits against such manufacturers to establish such claim, estimated at .....

7. Plaintiff would lose irrevocably its present opportunity to organize the industry and stabilize prices.

III. That the Utzman patents are valid and infringed by defendant's edge, but plaintiff is not entitled to recover any profits realized by defendant prior to entry of decree August 17, 1925.

The result of such a decision would be:

1. Plaintiff would lose all chance of recovering any profits realized by defendant on its closed-edge board prior to August 17, 1925, estimated at .....

Gain *Loss*

2. Plaintiff would be entitled to recover defendant's profits due to assumed infringement from and after such date, estimated at .....

3. Defendant would naturally proceed to produce either an open edge or semi-open edge or other non-infringing edge,
10365 and plaintiff in consequence would lose all chance of collecting future royalties from defendant, estimated (on basis of annual production by defendant of ..... sq. ft. of board, a royalty of ..... per M sq. ft. and a five-year period covering remaining life of Utzman patents) at .....

4. Manufacturers other than defendant would naturally follow defendant's example, and plaintiff would therefore lose all chance of collecting future royalties from such manufacturers, estimated (on basis of annual production by such other manufacturers of ..... sq. ft. of wallboard, a royalty of ..... per M sq. ft. and a five-year period covering remaining life of Utzman patents) at .....

5. In promoting sales of new and non-infringing edges, defendant and other manufacturers would naturally and probably reduce prices below current levels. To maintain volume, plaintiff would be obliged to meet such competitive prices, perhaps a number of times on successive reductions. This would result in an annual loss to plaintiff, estimated (on basis of annual production by plaintiff of
10366 ..... sq. ft. of wallboard and price reduction of ..... per M sq. ft.) at .....

6. Decision would not necessarily determine whether edges produced by manu-

Gain *Loss*

facturers other than defendant infringed Utzman patents. Plaintiff would therefore be put to expense of bringing suits against such manufacturers to establish claim that their edges did infringe Utzman patents, estimated at.....

7. Plaintiff's right to recover profits realized by manufacturers other than defendant on closed-edge board would remain undetermined.

8. Plaintiff would incur costs and expenses of appeal, estimated at .....,

9. Plaintiff would lose, perhaps irrevocably, its present opportunity to organize the industry and stablize prices.

IV. That the Utzman patents are valid and infringed by defendant's edge, but plaintiff is not entitled to recover any profits realized by defendant prior to filing of plaintiff's amended second supplemental bill in July, 1922.

The result of such a decision would be:

10367 1. Plaintiff would lose all chance of recovering any profits realized by defendant on its closed-edge board prior to July, 1922, estimated at.....

2. Plaintiff would be entitled to recover defendant's profits due to assumed infringement from and after such date, estimated at .....

3. Defendant would naturally proceed to produce either an open edge or semi-open edge or other non-infringing edge, and plaintiff in consequence would lose

Gain *Loss*

all chance of collecting future royalties from defendant, estimated (on basis of annual production by defendant of ..... sq. ft. of board, a royalty of ..... per M sq. ft. and a five-year period covering estimated life of Utzman patents) at....

4. Manufacturers other than defendant would naturally follow defendant's example, and plaintiff would therefore lose all chance of collecting future royalties from such manufacturers, estimated (on basis of annual production by such other manufacturers of ..... sq. ft. of wallboard, a royalty of ..... per M sq. ft. and a five-year period covering re-
10368 maining life of Utzman patents) at .....

5. In promoting sales of new and non-infringing edges, defendant and other manufacturers would naturally and probably reduce prices below current levels. To maintain volume, plaintiff would be obliged to meet such competitive prices, perhaps a number of times on successive reductions. This would result in an annual loss to plaintiff, estimated (on basis of annual production by plaintiff of ..... sq. ft. of wallboard and price reduction of ..... per M sq. ft.) at .....

6. Decision would not necessarily determine whether edges produced by manufacturers other than defendant infringed Utzman patents. Plaintiff would therefore be put to expense of bringing suits against such manufacturers to establish claim that their edges did infringe Utzman patents, estimated at .....

7. Plaintiff's right to recover profits realized by manufacturers other than defendant on closed-edge board would remain undetermined.

Gain *Loss*

8. Plaintiff would incur costs and expenses of appeal, estimated at.....

10369 9. Plaintiff would lose, perhaps irrevocably, its present opportunity to organize the industry and stabilize prices.

V. That the Utzman patents are valid and infringed by defendant's edge and plaintiff is entitled to recover all profits realized by defendant by reason of such infringement.

The result of such a decision would be:

1. Plaintiff would be entitled to recover defendant's profits due to assumed infringement estimated at .....

2. Defendant would naturally proceed to produce either an open edge or semi-open edge or other non-infringing edge and plaintiff in consequence would lose all chance of collecting future royalties from defendant, estimated (on basis of annual production by defendant of ..... sq. ft. of board, a royal of ..... per M sq. ft. and a five-year period covering estimated life of Utzman patents) at .....

3. Manufacturers other than defendant would naturally follow defendant's example, and plaintiff would therefore lose all chance of collecting future roy-
10370 alties from such manufacturers, estimated (on basis of annual production by such other manufacturers of ..... sq. ft. of wallboard, a royalty of ..... per M sq. ft. and a five-year period covering remaining life of Utzman patents) at .....

4. In promoting sales of new and non-infringing edges, defendant and other manufacturers would naturally and probably reduce prices below current levels. To maintain volume, plaintiff would be obliged to meet such competitive prices, perhaps a number of times on successive reductions. This would result in an annual loss to plaintiff, estimated (on basis of annual production by plaintiff of ..... sq. ft. of wallboard and price reduction of ..... per M sq. ft.) at....

5. Decision would not necessarily determine whether edges produced by manufacturers other than defendant infringed Utzman patents. Plaintiff would therefore be put to expense of bringing suits against such manufacturers to establish claim that their edges did infringe Utzman patents, estimated at .....

6. Plaintiff's right to recover past
10371 profits realized by manufacturers other than defendant on closed-edge board would remain undetermined.

7. Plaintiff would incur costs and expenses of appeal, estimated at.....

8. Plaintiff would lose perhaps irrevocably, its present opportunity to organize the industry and stabilize prices.

On the other hand, if the suit were compromised and settled on the terms outlined below, the result would obviously be more advantageous to the United States Gypsum Company than any decision which the Circuit Court of Appeals could possibly render.

The settlement suggested would cover the following points:

	Gain	*Loss*
1. Defendant would acknowledge validity of Utzman patents.		
2. Defendant, in consideration of release of claims of past infringement, would agree to pay plaintiff a reasonable royalty, not to exceed ..... per M sq. ft., on all closed-edge wallboard sold by defendant during remaining life of Utzman patents. Such royalties, estimated on the basis of an annual production by defendant of ..... sq. ft. of wallboard for the five-year period covering the remaining life of Utzman patents, would amount to		
3. Defendant would agree to use its best endeavors to induce manufacturers of closed-edge wallboard other than defendant to accept licenses from plaintiff and to pay plaintiff a like royalty. Such royalties, estimated on the basis of an annual production by such manufacturers of ..... sq. ft. of wallboard for the five-year period covering the remaining life of Utzman patents, would amount to.....		
4. Such recognition of and acquiescence in plaintiff's patents would enable plaintiff to maintain a lawful price control and avoid the necessity of a reduction by plaintiff of current prices to meet competition. This saving, estimated on the basis of an annual production by plaintiff of ..... sq. ft. of wallboard and a price reduction of ..... per M sq. ft. would amount annually to		
5. Plaintiff would save the costs and expenses of the present appeal, estimated at		
6. Plaintiff would save costs and expenses of suits against other manufacturers, estimated at		

10372

10373

Gain *Loss*

7. Plaintiff would be able to take a dominating position in the industry with an opportunity to control or at least to participate in the control of prices through legitimate means of patent licenses.

10374 *Government's Exhibit No. 186*

THE BEAVER PRODUCTS COMPANY, INC.
Wall and Roofing Materials
BUFFALO, N. Y.

OCTOBER 1, 1926.

MR. S. L. AVERY, *President,*
U. S. Gypsum Company,
205 West Monroe St.,
Chicago, Ill.

DEAR MR. AVERY:

For your information, I am attaching copy of letter from Mr. Whittemore of the Certain-teed Company.

Yours very truly,

A. S. BLAGDEN

ASB/b
enc.

10376 *Government's Exhibit No. 187*

CERTAIN-TEED PRODUCTS CORPORATION
100 East 42nd Street
NEW YORK

SEPTEMBER 27, 1926.

MR. A. S. BLAGDEN, *Pres.*,
Beaver Products Co., Inc.
Buffalo, New York.

DEAR MR. BLAGDEN:—

We acknowledge receipt of your letter of the 22d.

Frankly, we could see no reason for taking the matter up further with Mr. Avery of the United States Gypsum Company because we had outlined very clearly the things that we felt should be in a license agreement to make it satisfactory to us, which letter you gave to Mr. Avery. While the writer does not remember all the provisions in the license agreement, it is his recollection that practically none of the things that we considered vital, as covered in our letter, were incorporated in the license agreement, so we could see no reason for going further with the matter.

Yours very truly,

(Signed) AUDENRIED WITTIMORE,
Vice President.

AW:LC

10378 *Government's Exhibit No. 188*

SEPTEMBER 24 1926

MR. A. S. BLAGDEN.
Beaver Products Company
Buffalo, New York

DEAR GUS:

This will acknowledge the letter and check covering the first month's royalty. I am taking your comment on the hurt of payment as a playful one. As a matter of fact I think that the method of settlement is, as we so often thought, a fine evidence of a sensible and economical adjustment of a serious and menacing difficulty to us both. I feel that the Gypsum Company's position is generous, but of course ask no enthusiasm from you on this point. I think the situation entitles you to a greater credit of accomplishment than you are apt to claim. I believe the whole thing is fair, and while I realize that the stress of payment will be present, that you and your company will not overlook the benefits it has assured.

With kind regards, I am

Yours truly,

10380 *Government's Exhibit No. 189*

THE BEAVER PRODUCTS COMPANY, INC.
Wall and Roofing Materials
BUFFALO, N. Y.

OCTOBER 1, 1926.

MR. S. L. AVERY, *President,*
U. S. Gypsum Company,
205 West Monroe St.,
Chicago, Ill.

DEAR SEWELL:

I have your letter of September 24th and appreciate very much all you have to say.

You are right—my comment was entirely a playful one. I sincerely believe that the arrangement agreed upon by our two companies will work out to the mutual advantage of both. I feel that the "entente cordial" that has started between our companies is only a beginner and

that if we play the game right it should bring about big things.

Incidentally, the Southern Gypsum Company and ourselves have reached an agreement which I think will work out to our mutual satisfaction.

Hoping to see you soon, and with kindest regards,

Sincerely yours,

A. S. BLAGDEN

ASB/b

10382 *Government's Exhibit No. 190*

THE BEAVER PRODUCTS COMPANY, INC.
Wall and Roofing Materials
BUFFALO, N. Y.

OCTOBER 19, 1926.

MR. S. L. AVERY, *President,*
U. S. Gypsum Company,
205 West Monroe Street,
Chicago, Ill.

DEAR SEWELL:

Attached is a royalty statement and check for $11,752.45, made out exactly as the last one was.

I would rather make no change until we can get together and thrash out the point you brought up in regard to jobbers, and several other questions that should be settled at once.

I expect to be in Chicago on Friday and Saturday, but will be tied up in the Roofing Association. If you expect to be there Monday, the 25th, I will arrange to stay over so that we will have plenty of time to straighten out these matters. I will make it a point to phone you upon arrival in Chicago Friday morning.

In the meantime, Mr. Henley will be in Chicago on Thursday, the 21st, and I have asked him to go over the several points in question with Mr. Henning. In this way, it ought to save you and me a good deal of time.

Sincerely,

A. S. BLAGDEN

ASB/b
encs.

10384 *Government's Exhibit No. 191*

OCTOBER 19 1926

MR. A. S. BLAGDEN, *President*
Beaver Products Company
Buffalo, New York

DEAR GUS:

Thinking from your letter of the twelfth that you would appear in a few days, I have not answered it before. We can take up this matter and the others you mention when you come.

You will be interested to know that nothing formal has developed in the matter of the license agreement since the Universal signed. The American Gypsum Company's committee called upon me several weeks ago, and left with, seemingly, a better impression of the agreement. Mr. Griswold has written me in the last day or two that a Board of Directors meeting on the subject referred the matter back to a committee, and that this committee intended to meet Thursday the twenty-first with all other manufacturers of board who have not yet signed the license agreement. "This committee expects to meet with the object in view of getting united action." While I will admit to being a little disappointed in the loss of time on this matter I do fully appreciate the very intelligent treatment that Mr. Griswold gives to this subject, and have confidence that his plans will be wise and influential. I do not know whether you expect to be a part of this meeting, but I hope so.

Mr. Henning spent a day in New York recently with Mr. Collins of the Certainteed and with Mr. Walker, and came on to Chicago with Mr. Walker, who happened to be traveling on the same section. This provided the opportunity for a long general discussion of their points of view on business and business policies generally. It left with Mr. Henning quite definitely many impressions about the Certainteed method of distribution that you have described to me. I will be glad of a chance to talk it over with you when you are next here.

With kindest regards, I am

10386 *Government's Exhibit No. 192*

SEPTEMBER 15, 1927.

THE BEAVER PRODUCTS CO.,
Buffalo,
New York.

GENTLEMEN:

Mr. Blagdon in a recent conversation suggested the advisibility of having a meeting of the Board Licencees. It would undoubtedly be of advantage to review the situation and I am writing to ask an expression from you as to your attendance and the time such a meeting would be most convenient.

With kind regards, I am

Yours very truly,

President.

10388 *Government's Exhibit No. 193*

THE BEAVER PRODUCTS COMPANY, INC.
Wall and Roofing Materials
BUFFALO, N. Y.

SEPTEMBER 16, 1927

MR. S. L. AVERY, *President,*
United States Gypsum Company,
300 West Adams St.
Chicago, Ill.

DEAR SEWELL:

Upon returning here this morning I have had several discussions in regard to plaster board, which I think makes it more important than ever that we have a meeting as soon as possible of your licensees to discuss the matter, so I hope you will write the letters that you decided upon at our last meeting.

With kindest regards,

Sincerely yours,

A. S. BLAGDEN

ASB/b

10390 *Government's Exhibit No. 194*

THE BEAVER PRODUCTS COMPANY, INC.
Wall and Roofing Materials
BUFFALO, N. Y.

SEPTEMBER 21, 1927

MR. S. L. AVERY, *President,*
United States Gypsum Company,
300 West Adams Street,
Chicago, Ill.

DEAR SEWELL:

I have your letter of September 15th in regard to a meeting of the Board of Licensees.

I have to be in New York for a Directors' meeting next Wednesday and Thursday, the 28th and 29th. I could attend a meeting at any other time that you may set and the sooner the better.

I had a note from Mr. Fuller stating that he had received your letter and thought it an excellent plan.

With kindest regards,

Sincerely yours,

A. S. BLAGDEN

ASB/b

10392 *Government's Exhibit No. 195*

POSTAL TELEGRAM

NEW YORK, FEB. 27, 1928, 3:45 PM

To S. L. AVERY,
Pine Hills Club,

Mr. C. O. Brown and I arranging to arrive Chicago Wednesday morning stop Like to see you then if possible Wire me New York when you will be there

"A. S. BLAGDEN"

10393 *Government's Exhibit No. 196*

Confirmation of
TELEGRAM
UNITED STATES GYPSUM CO.

A. G. BLAGDEN
Beaver Products Company
New York

TELEGRAM RECEIVED CHICAGO WEDNESDAY AND PLEASED TO SEE YOU GUS CONVEY TO CERTAINTEED THAT WHILE I HAVE NO OBJECTIONS TO O C BROWN I CONSIDER THE SENDING OF AN ASSISTANT WITHOUT AUTHORITY TO ME AS DISCOURTEOUS AND ON THIS ACCOUNT WILL ARRANGE IF HE CARES TO COME THAT HE BE RECEIVED BY SOMEONE OF HIS OWN RELATIVE POSITION IT MAY BE ADVISABLE TO SAY THAT THE LICENSE STAND WE HAVE TAKEN IS FIRM AND UNLESS CERTAINTEED WISHES TO PROPOSE ACTION IN PRACTICAL ACCORD WITH IT ANY CONFERENCE IS USELESS

S. L. AVERY

10395 *Government's Exhibit No. 197*

Minutes of Meeting of the Board of Directors of the NATIONAL GYPSUM COMPANY held at the principal office of the Corporation, at No. 409 Jackson Building, in the City of Buffalo, New York, on the 27th day of November, 1928, pursuant to notice.

Present:—J. F. HAGGERTY, *Chairman*
J. W. ANDERSEN
M. H. BAKER
E. W. G. BORER
H. H. BURKHARDT
W. M. CURRIE
E. E. FINCK
W. G. HOUCK
C. E. THOMSON

Absent:—E. F. GUTH
V. W. NELSON
C. E. WILLIAMS

The above named being all of the Directors of the CORPORATION.

Minutes of the Directors' Meeting of September 25th were approved as read.

The President presented in detail the September and October business of the Company.

The President outlined the present conditions in the industry.

The President related in detail the occurrences in connection with the meetings held in Chicago recently in the matter of license agreement on plaster wallboard, and on motion of Mr. Borer, seconded by Mr. Currie, it was

"RESOLVED: That the proper officials of the CORPORATION be and they hereby are authorized and directed to take such action as regards entering a license agreement with the United States
10396 Gypsum Company on plaster wallboard as they may see fit."

No further business coming before the Board, the meeting duly adjourned.

F. E. DAVIS,
Secretary.

10397 *Government's Exhibit No. 198*

Minutes of Special Meeting of the Board of Directors of NATIONAL GYPSUM COMPANY, held at the principal office of the CORPORATION, at No. 409 Jackson Bldg., in the City of Buffalo, N. Y., on the 14th day of May, 1929, pursuant to notice.

Present:—M. H. BAKER, *Chairman*
J. W. ANDERSON
E. W. G. BORER
H. H. BURKHARDT
W. M. CURRIE
E. E. FINCK
W. G. HOUCK
V. W. NELSON
C. E. THOMSON
C. E. WILLIAMS

Absent:—E. F. GUTH

The above named being all of the Directors of the CORPORATION.

The Chairman announced that the meeting had been called for the purpose of discussing the license agreement submitted to all the manufacturers of gypsum products in the United States east of the Rocky Mountains by the United States Gypsum Co.

The Chairman outlined the principal provisions in the contract and stated to the Board that he had been definitely informed that all other manufacturers of gypsum products east of the Rocky Mountains, except the American Gypsum Company, had agreed to sign the license contract in substantially the form as submitted to this Board. That a final meeting was to be held in Chicago, Ill., within a week following this date, for final disposition of the license contract, and it is therefore imperative that immediate action be taken by this Board on the pro-
10398 posed contract and to definitely decide whether this Company shall enter into a license agreement with the U.S. Gypsum Company.

After a thorough discussion of the contract, it was

"RESOLVED: That the proper officers of this Corporation be and they hereby are authorized and empowered to execute on behalf of the Company in substantially the same form as the contract submitted by the United States Gypsum Company to this meeting, for the purpose of entering into a license agreement with the United States Gypsum Company under all of its patents relating to the making, using and selling of gypsum wall board and to pay the United States Gypsum Company as a royalty and in consideration of said license and in settlement and discharge of all claims for infringement, an amount equivalent of 5% of the selling price of all plaster board or gypsum wall board of every kind, whether patented or unpatented and sold by this Company between the date of said contract and August 6, 1929, the date of the expiration of said Utzman Patent No. 1034746, and thereafter an amount equivalent to 1½% of the selling price of all plaster board or gypsum wall board sold by this Company from August 6, 1929, until February 10, 1937, the date of the expiration of U. S. Patent No. 1330413, and in addition thereto, an amount equivalent to 3½% of the selling price of all plaster board or gypsum wall board sold by this Company from August 6, 1929, until said 3½% of said selling price shall have aggregated the sum of approximately $180,000.00; and, it is further

"RESOLVED: That the proper officers of the Corporation be and they hereby are authorized and empowered to do any and all things necessary or proper in order to effectuate the foregoing resolution."

10399 The Secretary read the following Resolution submitted by Mr. Finck, whereupon the following minute was unanimously adopted:

With feelings of intense sadness, we, the Board of Directors of National Gypsum Company, record the death of Joseph F. Haggerty, our President and Leader, which occurred suddenly Friday, April 26, 1929.

Joseph F. Haggerty early in life foresaw the eventual economic potentialities of the wallboard idea. In

his organization of the National Gypsum Company, he sought to carry out his ideals in that direction, and while he was not permitted to accomplish his purpose fully, he has charted the course and leaves an organization prepared to carry on with the same energy and the same spirit that he implanted in all of his close associates. He possessed a great gift of leadership, intuitive sense of vision, personal magnetism and unflinching moral integrity, which made his influence as inescapable as it was unassuming. Open and frank, he opposed conceit and indiscretion. Long will his example be an inspiration to those who had the privilege of being associated with him.

Ever kindly and genial, he formed many warm friendships and his death comes as a personal loss not only to his associates on this Board,
10400 but to all who worked with him in this organization.

Therefore, be it

"RESOLVED: That this Board permanently record our deep debt of gratitude for the great work he accomplished, the heritage which he left us and the affection, love and respect which we have for him. We will forever cherish him in loving remembrance; and further,

"RESOLVED: That we express to his devoted wife and family our most profound and sincere sympathy; and further

"RESOLVED: That a copy of this minute be presented in suitable form to his wife and family."

Upon motion made by Mr. Finck, seconded by Mr. Williams, put to vote and unanimously carried, it was

"RESOLVED: That the proper officers of the Corporation be and they hereby are authorized to pay the regular stated salary formerly paid to Mr. Joseph F. Haggerty as President of the Corporation, to Mrs. Joseph F. Haggerty, until February 28, 1930.

The Chairman announced that while this meeting had been called expressly for the purpose of obtaining the opinion of the Directors as to whether or not this Corporation should enter into a License Agreement with the U. S. Gypsum Company, no other business would be taken up at this time unless the Directors desired to do so.

10401 Mr. Thomson thereupon nominated Mr. M. H. Baker as President of the Corporation to fill the vacancy existing on account of the death of Mr. Joseph F. Haggerty. Mr. Burkhardt seconded the motion. The Chairman thereupon put the question to vote and Mr. Baker was unanimously duly elected President of the Corporation to fill the vacancy existing on account of the death of Mr. J. F. Haggerty.

Upon motion duly made, seconded, put to vote and unanimously carried, it was

"RESOLVED: That the salary of Mr. Baker as President of the Corporation, be the same as the salary he received as Vice President and Sales Manager of the Corporation."

Upon motion made by Mr. Williams, seconded by Mr. Anderson, put to vote and unanimously carried, it was

"RESOLVED: That E. E. Finck be and he hereby is elected Treasurer of the Corporation, to fill the vacancy existing on account of the death of Mr. Joseph F. Haggerty."

Upon motion made by Mr. Nelson, seconded by Mr. Houck, put to vote and unanimously carried, it was

"RESOLVED: That E. E. Finck be and he hereby is elected to serve on the Executive Committee, to fill the vacancy existing on account of the death of Mr. Joseph F. Haggerty."

No further business coming before the Board, the Meeting duly adjourned.

F. E. DAVIS,
Secretary.

10402 *Government's Exhibit No. 199*

Minutes of Meeting of the Board of Directors of the NATIONAL GYPSUM COMPANY, held at the principal office of the Corporation, at No. 409 Jackson Bldg., in the City of Buffalo, N.Y., on the 28th day of May, 1929, pursuant to notice.

Present:—M. H. BAKER, *Chairman*
H. H. BURKHARDT
W. M. CURRIE
E. E. FINCK
E. F. GUTH
W. G. HOUCK
C. E. THOMSON
C. E. WILLIAMS

Absent:—J. W. ANDERSON
E. W. G. BORER
V. W. NELSON

The above named being all of the Directors of the CORPORATION.

The minutes of the Directors' Meeting of April 23, 1929, and the minutes of the Special Meeting of the Board on May 14, 1929, were approved as read.

The Secretary read for the information of the Board excerpts from the minutes of the Management Committee Meetings of April 22, 1929, and May 7, 1929.

The Chairman submitted Profit & Loss Statement covering the Company's April operations and gave his estimate of the May operations of the Company.

The Chairman announced that the Company had signed a license agreement with the United States Gypsum Company covering plaster wall boards and the method
10403 of bundling gypsum lath, as authorized at the last meeting of the Board of Directors. The Chairman advised that prices on wall boards had been increased on May 23, 1929, as follows:

Gold Bond	$20.00 per M ft.
Protector	17.50 per M ft.
Lath	13.50 per M ft.
Seconds	15.00 per M ft.

The Chairman announced that he had appointed Mr. R. F. Burley, General Director of Sales and the Board unanimously expressed its approval of Mr. Baker's action in the matter.

The Chairman stated that prior to the death of Mr. Haggerty, Mr. W. M. Currie had given much of his time and energy in assisting the officers of the Company in solving various problems and that his advice and counsel had always been helpful and valuable. The Chairman stated that he had obtained Mr. Currie's consent to serve on the Executive Committee and that it would be a great favor to him and helpful to the Company if the Board would enlarge the present Executive Committee and appoint Mr. Currie a member thereof.

Thereupon on motion of Mr. Guth, seconded by Mr. Williams, put to vote and unanimously carried, it was

RESOLVED: That Mr. W. M. Currie be and he hereby is designated and appointed as a member of the Executive Committee.

10404 Mr. Williams pointed out the present possibilities of acquiring gypsum businesses. After a discussion it was the sense of the meeting that at the present time there should be no attempts to expand the Company's activities outside of its own immediate operations.

No further business coming before the Board, the Meeting duly adjourned.

F. E. Davis,
Secretary.

10405 *Government's Exhibit No. 200*

Minutes of Meeting of the Board of Directors of the NATIONAL GYPSUM COMPANY, held at the principal office of the Corporation, at No. 409 Jackson Bldg., in the City of Buffalo, N.Y., on the 23rd day of July, 1929, pursuant to notice.

Present—M. H. BAKER
E. W. G. BORER
H. H. BURKHARDT
W. M. CURRIE
E. E. FINCK
W. G. HOUCK
C. E. THOMSON

Absent:—J. W. ANDERSON
E. F. GUTH
V. W. NELSON
C. E. WILLIAMS

The above named being all of the Directors of the CORPORATION.

The minutes of the Directors' Meeting of June 26, 1929, and the minutes of the meeting of the Executive Committee of June 25, 1929, were approved as read.

The President presented an account of the operations of the Company for June and explained it in detail.

The President outlined his anticipations for July and the second six months of the year.

The President stated that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry and has offered to license the entire Industry under the new method of manufacturing gypsum wall board known as the "Bubble System." The license agreements
submitted to each of the wall board manufacturers
10406 contain price fixing clauses and under the agreements submitted the prices of wall board would be fixed for the whole Industry for the term of approximately seventeen years.

The President further stated that if co-operation in the Industry could be accomplished by such means, he believed that it would be worth while for this Corporation to enter into such an agreement, if the "Bubble System" could be obtained for a reasonable consideration.

After a general discussion as to the advisability of this Corporation entering into a license agreement with the United States Gypsum Company for the use of its Bubble System in the manufacture of wall board, it was,

Upon motion duly made, seconded, put to vote and unanimously carried,

"RESOLVED: That the Executive Committee of the Corporation be and they hereby are authorized and empowered to negotiate and enter into an agreement or agreements with the United States Gypsum Company for a license under certain patents owned by the United States Gypsum Company, controlling the manufacture of gypsum wall board, upon such terms and conditions as a majority of the said Committee shall deem most advisable, provided that the United States Gypsum Company, by virtue of the agreement with this Corporation and with other manufacturers of gypsum wall board, shall control the price of wall board sold in the United States and its possessions.

It is further

"RESOLVED: That the Executive Committee be and it hereby is authorized and empowered to settle the pending litigation with the Universal Gypsum and Lime Company, upon such terms and conditions as a majority of the Executive Committee may deem most advisable."

10407

Mr. Burkhardt suggested the advisability of the Corporation's insuring the life of its President on a term policy. After discussion, Mr. Burkhardt was asked to bring in full report for the next Directors' Meeting.

No further business coming before the Board, the Meeting adjourned.

F. E. DAVIS
Secretary.

10408 *Government's Exhibit No. 201*

Minutes of Meeting of the Board of Directors of the NATIONAL GYPSUM COMPANY, held at the Hamilton Golf and Country Club, Ancaster, Ontario, on the 27th day of August, 1929, pursuant to notice.

Present:—M. H. BAKER
H. H. BURKHARDT
W. M. CURRIE
W. G. HOUCK
C. E. THOMSON
C. E. WILLIAMS

Absent:—J. W. ANDERSEN
E. W. G. BORER
E. F. GUTH
E. E. FINCK
V. W. NELSON

The above named being all of the Directors of the CORPORATION.

The minutes of the Directors' Meeting of July 23, 1929, were approved as read. The minutes of the Executive Committee Meetings of July 30th, August 2nd and August 10th, 1929, were approved with corrections.

The President presented in detail an account of the operations of the Company for the month of July.

The President set forth the situation in the matter of the agreement with Universal Gypsum and Lime Company as set forth in the Executive Committee minutes of August 2, 1929, and on motion duly made, seconded and unanimously carried, it was

"RESOLVED: That the President of the Corporation be and he hereby is authorized and empowered to sign a contract in settlement of the litigation with Universal Gypsum and Lime Company, which settlement shall be substantially that set forth in
10409 the minutes of the Executive Committee Meeting of August 2, 1929.

The President outlined the present situation regarding the United States Gypsum Company's proposed license agreement covering their Bubble Patent and the Haggerty Patent, and after a discussion, the following Resolution was moved by Mr. Williams, seconded by Mr. Burkhardt, put to vote and unanimously approved:

"RESOLVED: That the President of the Corporation be and he hereby is authorized and empowered to sign a license agreement with the United States Gypsum Company, covering the use of the Bubble and the Haggerty Patents, at a cost not greater than 2½% of the net selling price of all gypsum wallboard manufactured and sold by National Gypsum Company until the expiration of the above patents—against which 2½% there would be credited 1½% which might be paid to Universal Gypsum and Lime Company as royalties on the Hite and Haggerty Patents—provided that all the present licensees of the United States Gypsum Company enter into a similar license and provided further that in the judgment of the President such action will result in legal stabilization of the markets."

Mr. Burkhardt recommended that the Corporation insure the life of its President in the amount of Two Hundred and Fifty Thousand Dollars ($250,000.00) either under a ten year term policy or under a modified life policy. After discussion the matter was held over for discussion at a later meeting when a larger proportion of the Board should be present.

10410 The President announced that the office of Assistant Treasurer of the Corporation to which the Board had appointed Mr. T. W. Hammond at their meeting of March 15, 1927, now was without incumbent.

No further business coming before the Board, the meeting adjourned.

F. E. DAVIS
Secretary.

10411 *Government's Exhibit No. 202*

MAY 18, 1928.

Executive Committee of
UNIVERSAL GYPSUM & LIME CO.:

I have called this meeting in order to acquaint you with the serious situation confronting our company. The present management cannot continue very long unless something is done immediately.

There is a reduction in annual salary account, because of changes made to date, amounting to approximately $115,000.00. In addition to this there will be considerable savings in the traveling expense of some of the traveling men who have been let out. In spite of these savings we are continuing to lose money and will do so until the competitive situation changes.

The result of our savings is reflected in our April statement, not yet available, which shows that we have reduced our selling expense $10,000.00 under the March figure, but this again is offset by a loss in gross profit of approximately $9,000.00. This will show you the tendency of the market.

In order to continue to operate, we are today faced with the necessity of closing down our Rotan plant and our lime plant in Texas. This would mean a complete abandonment of the southeastern and southwestern territories. I mention these two plants because they are showing the largest proportionate loss. The loss at Fort Dodge is terrific, but now that we have closed the Iowana plant this loss will be reduced materially.

We are having to remove good men from our organization and will lose others whom we want to retain because of the uncertainty evident. We have opportunities to employ new men who would be valuable to us but cannot conscientiously recommend our company to them.

Negotiation with competitors towards ending the severe competitive situation should be entered into.

We now have Dr. Nelson clearing up our entire patent situation for us, which involves license agreements with our competitors and settlements of lawsuits pending.

It is impossible for us to carry on this sort of work efficiently under present conditions. The condition of our financial status is well known because of indiscretions on the part of stockholders and officers of this company, which serves a further handicap to the management.

10412 We are making daily purchases necessary for our production, knowing that there is a possibility of not being able to pay for these purchases when the bills are due. It is very unfair to place your management in this position. We have practically no money in the bank today, and although our collections will undoubtedly take care of our immediate requirements for some little time, we have on hand approximately $61,000.00 worth of unpaid bills which are no past due.

EUGENE HOLLAND
President.

10413 *Government's Exhibit No. 203*

THE AMERICAN GYPSUM CO.
General Offices and Mills
PORT CLINTON, OHIO

OCTOBER 11, 1928.

MR. JOHN A. KLING,
Leader News Building,
Cleveland, Ohio.

DEAR SIR:

Referring to the conferences in New York, the following gentlemen were asked to go to Mr. Ebsary's room Monday evening: Mr. Holland, president of the Universal Gypsum Company, Mr. Reeb, Mr. Haggerty, Mr. Baker—a little later on Mr. Walker and Mr. Warren Henley of the Certain-teed arrived.

Mr. Ebsary is exceedingly anxious to have something done to straighten things up, and I noticed that Mr. Haggerty and Mr. Baker also seemed considerably more anxious than they were thirty days ago. It seems that Mr. Ebsary had passed the word around that the President of the Certain-

teed would be present at the meeting in New York, but Mr. Walker announced that Mr. Brown had started that day on a week's vacation but in case it was decided to have a meeting in Chicago this week, he thought that Mr. Brown would be pleased to return and attend the meeting. It was then decided I was to get in touch with you and see whether or not it was convenient for you to come to New York on the following day and I, of course, reported to them, after talking with you, it was not convenient for you to be in New York this week, but that you would meet the above mentioned gentlemen in Chicago some day next week in order to call on Mr. Avery, if such an action was decided upon.

After the meeting on Tuesday Mr. Ebsary asked the same gentlemen to go over to the Certainteed Office, and Mr. Walker, in particular, and supported by Mr. Holland, took the same position they did the day before, that every one must be very sure before going to Chicago that they were willing to walk up and sign up a license agreement with the U. S. G., and also to foot the bill whatever it may be. He also stated that he was very sure that their Mr. Brown would not be willing to take out a license agreement with the U. S. G. on board unless it carried with it a general cleaning up of unsatisfactory conditions of all gypsum products.

10414 It was very apparent that the Certainteed, as well as Mr. Holland of the Universal, were trying to get every one present to commit himself to practically do whatever the U.S.G. would dictate, and Mr. Walker said that Mr. Brown would be glad to use his efforts to get the U.S.G. to make the back royalty payments, if there were any, of the National and ourselves as low as possible. As you know, the Universal people are already operating on the U. S. G. license on board, and it seemed to me that Mr. Holland was mainly a representative of the U. S. G., and I am inclined to think that he reports everything in detail that goes on at these sessions to Mr. Avery. My part, of course, was to listen and report to you, and I made it very plain that all decisions regarding these matters rested with you.

Respectfully yours,

ARTHUR R. BLACK

ARB/FAA

10415 *Government's Exhibit No. 204*

UNIVERSAL GYPSUM & LIME CO.
CHICAGO

JAN. 7, 1929

MR. J. F. HAGGERTY, *President*
National Gypsum Company
Buffalo, N. Y.

DEAR MR. HAGGERTY:

I wonder if you have had any talk with Mr. Kling regarding the settlement of litigation between his company and the U. S. Gypsum Co. I have heard indirectly that they are committed among themselves to a settlement but that they have hopes of reducing the amount involved by delaying the time of settlement.

It is my opinion that we should make an effort to hold another meeting of those interested in the board situation. Mr. Kling surely should consider the others involved to the extent of at least letting us know what they propose to do so that yourself and others could be governed accordingly.

Rather than initiate the move again myself, it would probably carry more weight if you and Mr. Brown would request me to call such a meeting. Personally, I cannot see how the American can hope to gain anything at all by delaying the settlement because of the fact this delay is going to be the cause of demoralizing prices during most of 1929 unless the situation is handled promptly.

Please let me have your reaction to my idea as soon as possible.

Very truly yours,

EUGENE HOLLAND
President

EH W

10417 *Government's Exhibit No. 205*

JANUARY 9, 1929

MR. EUGENE HOLLAND
Universal Gypsum & Lime Co.
Conway Bldg.
Chicago, Ill.

DEAR MR. HOLLAND:

When I was in New York Saturday, I had a few minutes with Kling and took the occasion to very pointedly question him on his attitude toward the license agreement. He told me very definitely that they had decided to stay out and I, personally, am willing to accept that as a conclusion.

The question now in my mind is whether or not the other four board makers, who are outside the license agreement, feel that it would be advantageous to go in without the American Gypsum Company. It would seem to me that the chief value in a meeting would be to discuss that point.

As far as we are concerned, there is one question that has come up in my discussion of the subject with some of our directors and I have not been able to answer it satisfactorily. It is this. At the present time, the United States Gypsum Company is naturally unwilling to discuss price, but would feel free to do so under the license agreement because of the price control feature which, as I understand it, gives them that right. If this price control feature was discontinued in August, as is the case in the present form of the agreement, how could we expect the cooperation of the United States Gypsum Company in anything bearing upon a discussion of price? Would not their position then be exactly what it is now, and rightly so?

If this assumption is correct, then is not the price control feature during the eight year period of very vital importance, provided it can be worked out and what is the conclusion of the United States Gypsum Company on that phase of the matter?

My talk with Kling was so brief that I did not have a chance to discuss the reason for his conclusion, but I do

recall that the objection he made to the present form of license agreement, when I talked the matter over with him in Atlantic City, was that there was no price control beyond next August, when the Utzman patent expires.

I would like to hear from you if you care to let me have your opinion before determining our interest in attending another meeting, particularly if Kling does not recede from his present attitude.

Very truly yours

President

J. F. Haggerty: MP

10420 *Government's Exhibit No. 206*

UNIVERSAL GYPSUM & LIME CO.
CHICAGO

JAN. 12, 1929

MR. J. F. HAGGERTY, *President*
National Gypsum Company
Buffalo, N. Y.

DEAR MR. HAGGERTY:

I am inclined to think that the matter of future prices is not the deciding factor in the attitude of the American Gypsum Company on the wallboard proposition. You will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the Utzman patent expires next August is not a practical reason for continuing the conflict.

It is my opinion that if you and the others interested in the settlement of the wallboard controversy bring enough pressure to bear on the American crowd that something can be done. You will remember that Mr. Kling stated several times that they would be materially influenced by the attitude of the other men involved and I believe we should make an effort to hold him to this idea. I am quite sure

that Mr. Avery would not be interested in negotiating settlements unless everyone involved was included. However, if after conferring with Mr. Brown and Mr. Reeb it is thought advisable that this should be done, I would be willing to make an effort to bring this about.

I am expecting to be East next week, at which time I will talk further with Mr. Brown and will communicate with you later as to his ideas. In the meantime, if you have any new information I will be glad to hear from you.

Very truly yours,

EUGENE HOLLAND
President

EH W

10422 *Government's Exhibit No. 207*

5-18-29

MR. EUGENE HOLLAND
5114 Dodge Street
Omaha, Nebraska

Mr. Kling has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license.

S. L. AVERY.

10424 *Government's Exhibit No. 208*

UNIVERSAL GYPSUM & LIME CO.
CHICAGO

SEPTEMBER 7, 1934

MR. C. HENNING, *Vice President*
United States Gypsum Company
300 West Adams Street
Chicago, Ill.

DEAR MR. HENNING:

Replying to your letter of August 20, we will consider favorably signing a license agreement for the reflective backing of plasterboard and wallboard. We are, however, more interested in purchasing finished products from you than we are in equipping our plant to manufacture this type of board.

If you find the other wallboard licensees interested and want to make it unanimous, we believe that we can obtain an order in Court authorizing us to enter into such an agreement.

Very truly yours,

ABEL DAVIS AND EUGENE HOLLAND,
Trustees of Universal Gypsum & Lime Co.

EUGENE HOLLAND,
Co-Trustee

EH W

10427 *Government's Exhibit No. 209*

CERTAIN-TEED PRODUCTS CORPORATION

FEBRUARY TWENTIETH 1928

DEAR MR. AVERY:

Mr. Blagdon advises that you expect to be back in Chicago the last of this week or the first of next week.

I am planning to be in Chicago the early part of next week. We feel there should be some way to take over the contract that you have with the Beaver Company on closed edge board to our mutual advantage, therefore, if agreeable to you will see you there and talk it over more fully than we have yet done.

Hoping you have had a pleasant vacation, I am

Yours very truly,

C. O. BROWN
Assistant to President.

MR. S. L. AVERY,
Care, Golf Hills Club,
Pass Christian, Miss.

10428 *Government's Exhibit No. 211*

NEW YORK, FEBRUARY 7, 1928

MEMORANDUM:

Subject: Cravath, Henderson & DeGersdorff's Letter of February 6, 1928

MR. BROWN:

I would accept the assignment of the Board contract by the U. S. Gypsum Company to us, providing it would apply to those plants that we are now taking over from the Beaver Board Company and providing it would not effect

our Acme, Texas Plant or other plants that we may hereafter build.

The royalty would not be more than $1.10 to $1.15 per thousand as a maximum until August 6, 1929, and not more than 30¢ to 40¢ as a maximum after August 6, 1929. It is estimated that 60¢ of this would be saved due to lower cost in manufacturing closed edge board and I believe it would take a differential of approximately $2.00 under the closed edge board to get the business on the open edge board as against the closed edge board, during the next year. Thereafter it may be possible to hold the business at less that this, but this is problematical.

It is my understanding that the U. S. Gypsum Company have not and will not ask us to respect the re-sale price on the closed edge board until August 6, 1929 and after that they have no control over the re-sale price.

If the U. S. Gypsum Company refuse to allow us to manufacture closed board in the present Beaver Plants and open edge board in our other plants, I would take a license under which we would have to manufacture the closed edge board at all of our plants until the expiration of their license agreement, provided we could cancel this agreement and go back to open edge board if we found it desirable to do so, but I would agree not to go back until August 6, 1929.

As this is a matter of so much importance I recommend that Mr. C. O. Brown and Mr. Blagden go to Chicago and discuss this matter with Mr. Avery. Of course if he is unreasonable there is nothing for us to do but make an open edge board and fight it out, but I believe it means too much to both the Gypsum Company and ourselves to not do our part towards working out an amiable arrangement.

L. R. W.

10429 *Government's Exhibit No. 212*

MARCH 1, 1928

MEMORANDUM REGARDING THE POSSIBILITY OF MAKING PLASTER BOARD UNDER THE ROYALTY BASIS.

Geo. M. Brown, President — DS

The attitude of the U. S. Gypsum Company at the meeting yesterday was firmly in favor of a closed agreement until 1937 although the main patent runs out next year and, so far as we know, any patent situation thereafter would be very flimsy and probably would not justify any benefits of any kind. We offered to work under the patents until the expiration of the real patent but insisted upon the right to withdraw at that time, if the situation should be unduly irritating, but expressed the hope that we could in the meantime establish cordial relations in the trade and could gladly continue indefinitely.

We are trying to analyze the result of trading or not trading along these lines, our present position being that we will not trade. We see no reason why we cannot trade their way any day because the proposition made us is the most extreme proposition given to anybody. We must bear in mind that the Ebsary Company is proposing to make an open edge board, and their history is one of secret rebating on prices which are supposed to be firm. If they should later sign a royalty contract and go to the closed edge board, we have no assurance that they would not use many subterfuges and would in that way take our loyal trade because we could hardly compete with them in such manner and we would be tied up on all selling conditions. The National Company, under Mr. Haggerty, is supposed to be lacking dependibility. There would be others. The Texas Company has been most irritating. We are afraid to tie ourselves up indefinitely unless we are willing to acknowledge that we will resort to any subterfuge to offset the subterfuge of others—something that we cannot undertake. The U. S. Gypsum Company themselves have been doing many things which are not supposed to be done in the trade in the way of secret rebates, etc. Our offer to try out this plan until the real patent runs out in August of next year seems to be our

limit. Price wars will cost the U. S. Gypsum Company two or three dollars to each dollar of cost to us. They can less afford to be stubborn than we can.

In looking over the Beaver Board figures and our own figures on Plaster Board for last year, we find that Beaver Board, apparently, made a gross profit of 27.6% on their board for the year. We made 25.3% but in our last quarter we made about 29%. We believe Beaver Board showed much less in their last quarter than their average but have not the figures. Our volume was growing during the last quarter and is in good shape today. Beaver Board's, we believe, was shriveling and with the new competition coming in and continuing to work under their royalty plan, we believe, they would shrivel much more and their profit would shrink further. We are convinced that, if we must have price wars, we can, at least, hold our trade against all comers. We can probably make more profit under the aggressive selling plan and without subterfuges and we can get peace any day, if we should conclude that we must have it.

10430 The Beaver Board Sales Department expresses the opinion that we will lose much of their trade by changing to open edge board but they have expressed doubt about everything in the past and we have found that such doubts have not been justified to date. We believe their opinion in this matter is unreliable and my opinion is that we have broken the ice on open edge board and can drive into big business at some sort of profit and in a way that will force peace before very long and leave us loaded with business and with the good will of the trade, which, otherwise, would probably be sacrificed.

Working along these lines we must prepare to answer the suit of the U. S. Gypsum Company. We should appear as a party to it and we should claim what we believe to be true, that the suit is filed not in the interests of royalties but for the sole purpose of trade domination and monoply and price control—all of which mean far more than the total of royalty could possibly mean. Our Company has been selling an open edge board entirely satisfactory to our trade at much lower prices than we would have been permitted to sell closed edge board but we have been able to reach the Southwest trade only. They are determined, if possible, to prevent our extending like opportunities to

our Eastern trade. We have offered to continue a royalty basis on the Beaver Board plants and even to include our Texas Plant during the life of the patent, with the possibility of continuing thereafter. This is all they could fairly ask under any conditions. It is more than they were entitled to but their determination to gather in a monopoly, if possible, leads them to risk everything for such domination because of the big rewards possible, if they can succeed. It is not the matter of royalty in any sense that is of importance.

10431 *Government's Exhibit No. 213*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 20, 1928.

CERTAIN-TEED PRODUCTS CORP.,
New York,
N. Y.

GENTLEMEN:

Attn: Geo. M. Brown, President.

We have been informed that in your answer to our bill of complaint filed against you, The Beaver Companies, and The Beaver Products Company on account of the breach by the latter of our license agreement, you have alleged that we refused to grant to you a license under our patents unless you would accept the same extended to 1937 and that we had indicated that it would not be acceptable to us if you assumed the license agreement as to the properties of The Beaver Products Company until 1937, exclusive of your other plants. We also understand that you are informing the trade that we have refused to grant you a license to manufacture and sell the protected edge board under our patents.

As you know, every license we have granted has been for a term expiring February 10, 1937, the date of the expiration of patent number 1,330,413. We have repeatedly offered you a license under our patents upon exactly the same terms and conditions and for the same period as we

have granted the same to other licensees, which offer you have refused to accept. In this connection we have explained to you that we were not in a position to grant a license upon terms and conditions different from any other licensee.

This is to advise you that we are ready to grant to you a license to use our patents until the date of the expiration of our patent number 1,330,413 on February 10, 1937, upon exactly the same terms and conditions contained in the license agreement made with The Beaver Products Company and all other licensees.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. HENNING,
Vice President in Charge of Sales

CFH:MS

10432 *Government's Exhibit No. 214*

CERTAIN-TEED PRODUCTS CORPORATION
100 East 42nd Street
NEW YORK

MARCH 23, 1928.

U. S. GYPSUM COMPANY,
205 West Monroe Street,
Chicago, Ill.

GENTLEMEN:—

Attn: Mr. C. Henning, Vice-Pres:
In Charge of Sales

Replying to your letter of March 20th to the company for the attention of Mr. Geo. M. Brown, President, will say that we thank you for your offer to grant us a license under your patents, etc., as contained in the last paragraph of your letter.

We have not believed it to the best interest of our trade to manufacture goods under a license from your company

as we have understood your license contract. We have had objections to your license agreement as we have understood it, and especially for the time covered after the expiration of the Utzman Patent.

We have considered the possibility of offering to continue the Beaver Board plants only, but not any other plants which we have now or may have in future, under a license agreement. Our present information is to the effect that such an offer, if made, would not meet with your approval and would be refused by you.

We are not sure what your attitude is on some matters under the license agreement, so we have possibly been unable to intelligently discuss any plan for taking a license. We, therefore, ask you the following questions:

1—Does a licensee under your patent have to agree to fixed selling prices as directed by you from time to time, and if so, in what form do you give such directions, and do you advise each licensee of any change before you put it into effect yourself so as to let all of them operate on an equal basis with you and begin on the same date?

2—Is any rebating in any form or manner, or any extra allowance in any form or manner, as a selling aid permissible, and would you use anything of that kind without authorizing a licensee to use it at the same time and under the same conditions by giving advance notice?

3—In case you do fix selling prices in any way, with the requirement that they be maintained by yourself and
10433 all licensees, and some licensee may fail to maintain such prices, causing much loss and annoyance to another licensee who maintains the prices according to the strictest conditions, what protection is given the well-behaved licensee against the bad action of any other seller, whether licensed or unlicensed?

4—It has been repeatedly stated to us by others, and it appears to be understood by some of your licensees, that in case a license should become unduly burdensome, you would authorize a release from it on or after the expiration of the Utzman Patent, and at least one of your licensees understands that you are ready to do that at any time. What is your position on these matters?

5—Will you grant the license for the use of the Beaver plants only, excluding any other plants that we may have now or in the future?

6—Will you grant the license including all of our plants but limiting the license to the expiration of the Utzman Patent?

Perhaps a complete statement of your views on each of the above matters where our information is either incomplete or possibly in error, would enable us to reach some basis for doing business that would be mutually satisfactory. We have assumed that this would not occur and our plans for making open edge board at the Beaver plants will promptly go into effect, unless something in the meantime may warrant a change or delay.

In addition to the above matters, there have been in our discussions many questions of how you handle various details, and your manner of handling may be in some cases most unsuitable for our plan of doing business. For instance, we understand that you give a lineyard company a special price which we do not give them on our products, as we sell the lineyard company and the single yard on the same basis. We also understand that you perhaps make your lowest price to some contractors. We could hardly work well under such a plan as we do business entirely through dealers and distributors. Where a line can be suitably handled by a distributor we like to give our distributor a commission for handling carloads or less. We do not know how you would set prices. We perhaps could not use your plan. There are various such questions in our minds.

We are entirely unwilling to undertake to work with any business interests in the way that we would have to do under a license plan, and later find that they propose to force all operations along lines which we cannot follow. We find that we cannot undertake to get different prices for different areas in a city like Chicago on any product, except as such differences are made necessary because of handling or other legitimate charges, easily explained without causing endless argument. Arbitrary dif-
10434 ferences to keep up with odd-shaped plans are practically impossible for us to use.

These ideas are mentioned only for the purpose of being sure that we may understand each other in case this subject is to be pursued further so that we need not waste our time in any hopeless discussions.

Very truly yours,

C. O. BROWN
Assistant to the President.

Government's Exhibit N. 215

Original letter of Henning to C. O. Brown dated March 29, 1928.

Reproduction affixed on opposite page.

~~Exhibit 1925~~ 215 215

Item No. 1378

United States Gypsum Company

300 West Adams Street

Chicago

215
12-19-43
March 8017

March 29, 1928

FILED
NOV 1 - 1946
CHARLES A. STEWART, Clerk

Certain-teed Products Corporation
100 East 42nd Street
New York, N. Y.

Gentlemen: Attn: C. O. Brown, Assistant to President.

The single purpose of our letter directed to Mr. George M. Brown under date of March 20 was to formally make to you the proposal of our regular license made with the Beaver Products Company and other licensees, heretofore verbally offered.

The questions you put in reference to the license conditions have been fully discussed by you with the president of our company, ar we assume there is no misunderstanding. On the subject of trade practises you are already fully informed, or can readily acquaint yourself with these in their relations to this company by reference to the management of the Beaver Products Company, with whom you are of course in close contact.

Very truly yours,

UNITED STATES GYPSUM COMPANY

CPH:GS Vice President in Charge of Sales

10435

Government's Exhibit No. 216

Original letter from C. O. Brown to Henning dated April 4, 1928.

Reproduction affixed on opposite page.

216

216.

Certain-teed Products Corporation

C. O. BROWN
ASSISTANT TO PRESIDENT

100 EAST 42ND STREET
NEW YORK

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NOV 1 - 1946
BRANDES & BRANDES, Chgo

April 4, 1928.

United States Gypsum Company,
300 West Adams Street,
Chicago, Illinois.

Attention Mr. C.F. Henning,
Vice President in Charge of Sales.

Gentlemen:-

Replying to your letter of the 29th, will say that in writing you my letter of the 23rd we really had in mind a desire to learn from you exactly how things are handled under the various questions asked in that letter. We were confused from various reports in the trade as to how you direct affairs under the license agreement, and our confusion had been added to by the statements of some of the people of The Beaver Company. Some of the questions could, of course, be answered only by you.

Your own answer to the questions asked should have ended all confusion, and if the answers had been along the lines of what we think are best for business, we would have been inclined to see if we could go any further than we have previously thought we could go in the way of working under the license.

We regret that you did not write us fully in reply yourselves, as there would then have been no misunderstanding on any point.

Yours very truly,

Assistant to President.

COB:G

Please make no reply

Government's Exhibit No. 217

Carbon copy of Government's Exhibit No. 216.

Reproduction affixed on opposite page.

Govt. Trial Ex. No. 217

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Item No. 1327

FILED
NOV 1 - 1946

April 4, 1928.

Date 12-13-45

United States Gypsum Company.
300 West Adams Street,
Chicago, Illinois.

Attention Mr. C.F. Henning,
Vice President in Charge of Sales.

Gentlemen:-

Replying to your letter of the 29th, will say that in writing you my letter of the 23rd we really had in mind a desire to learn from you exactly how things are handled under the various questions asked in that letter. We were confused from various reports in the trade as to how you direct affairs under the license agreement, and our confusion had been added to by the statements of some of the people of The Beaver Company. Some of the questions could, of course, be answered only by you.

Your own answer to the questions asked should have ended all confusion, and if the answers had been along the lines of what we think are best for business, we would have been inclined to see if we could go any further than we have previously thought we could go in the way of working under the license.

We regret that you did not write us fully in reply yourselves, as there would then have been no misunderstanding on any point.

Yours very truly,

Assistant to President.

CGB:G

10438 *Government's Exhibit No. 218*

CHICAGO, DEC. 13, 1927.

TO: MR. A. S. BLAGDEN BUFFALO

Referring to conference at Chicago yesterday afternoon, regarding Plaster Wallboard market situation, and conclusions tentatively concurred in.

1—No change in our sales policy until after first of year.

2—Another conference to be held about the middle of January to determine future policy covering this product.

3—Operating Department to check into possibility of manufacturing so-called No. 2 board, the specifications of which to follow as near as possible, the outline incorporated on memorandum attached to Mr. Cary's copy of this letter.

4—Suggest Mr. Cary discuss this matter with Messrs. Vanhagen and Codwise, letting me have the benefit of their suggestions as to the manufacture of this board as soon as possible.

5—For Mr. Peterson's information, the thought as expressed indicated a decline in the market to a basis of $25.00 per thousand on No. 1 board in the $30.00 markets and $20.00 per thousand on No. 2 board in the $30.00 markets.

6—It was also suggested that $23.00 per thousand for No. 1 in $25.00 markets be given consideration and $18.00 per thousand for No. 2 board in the same area.

7—The situation above mentioned as affecting $25.00 markets (in the Southwest) will work a decided hardship on our company, inasmuch as we can ship only from Fort Dodge and will, of necessity, have to equalize with Texas Producing Mills and, as well, furnish our trade with mixed car service out of Agatite based on a $23.00 market.

I believe the above covers the discussion and, as stated, no changes will be made until absolutely necessary and in no event until after another conference is held.

WARREN HENLEY

WH:LK
CC—J. B. Cary—Buffalo
H. E. Peterson "
H. H. Vanhagen "

10439 *Government's Exhibit No. 224*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 29 1929

MR. GEO. M. BROWN
Certainteed Products Company
100 East 42nd Street
New York City.

MY DEAR COLONEL:

We have drawn up a tentative and suggested outline of license for the bubble system which we discussed when you were here. The idea has been to indicate in this draft what occurs to us as suitable expression of the proposed granting of the system rights. If you are interested in this subject, we would much appreciate the views of your Company as to the defects or possible improvements.

Thinking that you would desire to take advantage of the bundle license for the economy and salability that it supplies, we are offering you the license and enclose a copy for such consideration as you care to give it. This very low price has been offered in a cooperative spirit and at a value very much less than the use of the bundle provides.

Permit me, Colonel, to say that I have a most pleasant recollection of your last visit and hope our future relations may travel on that pleasant plan hereafter.

Yours very truly,

S. L. AVERY
President.

10440 *Government's Exhibit No. 225*

CERTAIN-TEED PRODUCTS CORPORATION
100 East 42nd Street
NEW YORK

JUNE 4, 1929

MR. S. L. AVERY, *President,*
United States Gypsum Company,
300 West Adams Street,
Chicago, Ill.

MY DEAR MR. AVERY:

Your letter of May 29th, enclosing copy of License Agreement, has just been received on my return to the office after a cruise up to Fisher's Island since Decoration Day.

I am catching up with some work today and leaving for Chicago tomorrow, so will give this matter attention on my return from Chicago.

We are most anxious to promote harmony and friendship in the Gypsum Industry, especially with your own Company, and we can see no reason why any other attitude should be considered for one moment, so a proper consideration of any questions arising should always lead to the conclusion that is best for the Industry and, therefore, best for all of us.

I certainly appreciate to the utmost the kind expression of your letter and am reminded of a most delightful evening which all of us had at your home in Chicago recently. It was a very delightful occasion.
With regards, I am

Yours very truly,

GEO. M. BROWN
President.

GMB:LK

10441 *Government's Exhibit 226*

This exhibit consists of a Memorandum of G. Brown dated June 4, 1929.

Reproduction affixed on opposite page.

17-11

Item No. 447

New York, June 6, 1929

Subject: LICENSE UNDER BUBBLE SYSTEM AND FOR BUNDLING FILE ATTACHED.

By: Geo. M. Brown, President-LE

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After reading Mr. Redfield's report and giving the matter as much consideration as I am able to do at this time,

I feel that we should not take out a license under either patent at this time and should go ahead with the application for our Bundling License. We should offer to take out a License under a more reasonable contract for bundling, as that is not a matter of great importance, but we cannot afford to tie ourselves up to use a certain system regardless of its future merit in comparison with what may be developed. We should have the right to discontinue its use, and pay royalty only when it is used, or some such fair general outline. If they seek to be disagreeable and force the matter upon us in any way I feel that we will be able to afford quite as much independence as they can afford. If they desire to risk our present friendly relations for so trifling a matter, and they are insistent, we certainly have the right of resistance and objection.

In regard to the Bubble Plan, it appears to me that this is not far enough along or sufficiently established and any consideration of it should provide a proper freedom for such action in future as we might on questions of merit decide to take. We could use it and pay the royalty, and not use it and not be committed, etc.

A Claim was made by Mr. Avery in his conversation that 30¢ and, perhaps, $1.00 of cost would be saved on each thousand square feet. Of this, 25¢ would go to pay royalty. Another unknown part would go to pay for equipment of a lot of machinery and it would take a good while to get even. They would have a price control of our business, which might be to our advantage and might be to our disadvantage in future. They should be just as anxious to have us use this as we should be to get it if there are to be the benefits that they anticipate in stabilizing the whole industry by making a uniform product and get away from the fierce warfare between different products like we have recently had. The saving is too slight to cause us very great worry even if never permitted to use it and the door will certainly be open later for its use if it has the merit that they believe it has. Under a contract sufficiently liberal, we would proceed at once.

I will acknowledge Mr. Avery's letter as per the attached copy.

10441

10442 *Government's Exhibit No. 227*

Buffalo JUNE 11, 1929. New York

MR. H. H. VAN HAGAN

BUBBLE BOARD
A. WHITTEMORE, V.P.—LC.

We are attaching copy of memorandum made by Mr. C. O. Brown after the meeting at Chicago on the bubble patent. From this memorandum you can easily see the possibilities in this bubble patent. We are submitting the bubble patent to Mr. Redfield for revision in a satisfactory way so that we could sign it, just as we have done with the bundling patent.

Do you expect to be in Chicago before the 26th? We would like to have your comments on the bubble patent, and as soon as we have these, would like to have you talk with Mr. Knode to check up on the savings that he states can be made by using the bubble process.

In the meantime, Mr. Redfield can be working on his revision and by the time we have yours and also the results of your talk with Mr. Knode we will pretty nearly know how to act.

10443

MEMORANDUM

JUNE 6, 1929.

BUBBLE PATENT

The Bubble Patent for use in the manufacture of plaster wall board is in litigation and has not been issued. It was thought that this Patent would not be issued before January 1st, but it now looks as if it might be issued earlier. The litigation is between the Foreign Company, U.S.G., and a man by the name of Rice. U.S.G.'s attorney feels that the Rice interference will not amount to anything. U.S.G., in case they don't get the patent, already have a contract with the Foreign Company for exclusive agency in the United States, so if the Rice interference is ruled out U.S.G. will have control of the patent regardless of whether they win or the Foreign Company wins.

Price control on plaster board expires in August of this year with the expiration of the Basic Patent. Price control on plaster board can be extended for another 17 years if a satisfactory working arrangement can be made with the Bubble Patent. For legal reasons, however, the bubble patent should not be considered from the standpoint of price control but should be gone into by each manufacturer from the standpoint of economy and benefit. Price control would naturally follow such a move.

Mr. Knode, Vice-President, in charge of Manufacturing, of U.S.G. Company estimates a saving in manufacturing cost under the Bubble Patent to be 50¢ to $2.00 per thousand, depending on the type of board made. Mr. Knode of the U.S.G. Company will be glad to have any of our manufacturing men call on him and go into the proposition in detail and assure themselves of the saving in cost and its advantages, prior to signing license. I would suggest that Mr. Van Hagan arrange to see Mr. Knode sometime in the next two weeks, the reason for this being that the lawyers feel that speed is advisable in lining up various manufactures under this Patent and upon the expiration of the Basic Patent on plaster board, even though the patent will not be issued by that time, and it will be necessary to pay a royalty of 25¢ per square, prior to actual issuance of the patent on any board manufactured. This will not be a hardship, however, if the saving is as outlined and they assure us that they can prove that their figures are conservative.

The License Agreement sent out on the above patent, copy of which we received, is the first draft. U.S.S. Company claim they are not at all arbitrary and are willing to have suggestions on any changes. They suggest that each manufacturer first convince himself that the saving is as outlined, then submit it to their own attorney for suggestions and criticism, and after doing so write their recommended changes to Mr. McLeash, U.S.G.'s attorney. After getting these reports they will consider them from all angles and then resubmit another licensed contract. This should be done within the next two weeks as the meeting has been set for Wednesday, June 26th, in Chicago, when this license will be in definite consideration.

Some things are now in the license that were brought up —one being under this Bubble patent, even though some

improved development might develop in the next 17 years, U.S.G. Company said that this could be changed and they would be willing to write the contract so that if they developed an improvement they would license it to all of the other manufacturers under conditions similar in this license. On the other hand, if we should develop an improvement, or any other manufacturer should do so, we would be obligated to become the licensor and license all other manufacturers under the same agreement as entered in the license under the Bubble Patent.

U.S.G. Co. are now making a Bubble Edge Board and so they know from actual experience it is practical. Four plants are in operation and all of the others will be equipped as fast as possible.

10444 The lawyers are very emphatic that there is a much less chance of being accused of using the patent as a subterfuge to control price—first being, it is gone into before the expiration of the Basic patent on plaster board and second, it is gone into from the standpoint of economy in cost.

The lawyers that have gone over the patent and made a careful study of the situation pronounce the patent a very strong one if and when issued.

Government Exhibit No. 228

This exhibit consists of Memorandum of C. O. Brown dated July 3, 1929 of three pages.

Reproduction affixed on opposite page.

FILED

A-11

Item No. 270

July 3, 1929

TO BE ATTACHED TO BUBBLE CONTRACT AND BUNDLING CONTRACT BETWEEN UNITED STATES GYPSUM COMPANY and CERTAIN-TEED PRODUCTS CORPORATION.

228

Attached is letter from our attorney, Mr. T. W. Chaffee, outlining certain legal reasons why it might not be desirable to sign these License Agreements. For the following business reasons, however, after discussion with Mr. Geo. M. Brown, Mr. A. Whittemore and the writer, it was decided to take a License from the United States Gypsum Company covering patents mentioned in the two above listed contracts.

BUNDLING PATENT

The Bundling Patent covers the use of paper and paste for bundling Plaster lath and Gypsum wallboard. The royalty is nominal, 10¢ per M feet. The Gypsum Company has developed a machine for doing this that is expected to save at least the amount of the royalty, 10¢ per M. feet, which machine we are at liberty to use.

We have been accused by the United States Gypsum Company of infringing their patent and they had papers drawn starting litigation against us for infringement. In signing this License, we avoid this litigation and back royalties were waived by the Licensor.

We are obligated to use only said bundle set forth and claimed in said Patent #1,696,877 during term of said license . The Licensor refused to waive this clause and it was decided to sign the License for reason that we doubt if it would be possible to develop a cheaper method and, further, in the interest of harmony in the Industry.

Prior to our signing the agreement, it was signed by all producers of Gypsum lath and Gypsum wallboard except the Atlantic Gypsum Company and ourselves. It is our opinion that all Gypsum lath and Gypsum wallboard producers will take a license under this patent.

BUBBLE PATENT

This patent covers replacing sawdust in gypsum wallboard with air bubbles, resulting in a much lighter board and as good if not better board from other standpoints. The saving in cost in using this process over the old method is estimated at a minimum of 80¢ per M. feet and a maximum of $2.00 per M. feet. The royalty is 1% with a minimum of 2½¢ per M. feet. Any known methods for getting this result other than covered by Patent in question are much more expensive and if the big producer in the Industry used this method we would be forced to use at least a method that got the same results, regardless of expense, if we were to sell at the same price because of the quality of the board and its lightness, weight being quite a factor due to the saving in freight or, if we continued to make gypsum wallboard as we are now making it, sell at a lower price in order to compete, which method does not usually tend toward satisfactory conditions in any industry.

10445

10448 *Government's Exhibit No. 230*

SUPPLEMENTAL LICENSE AGREEMENT.

THIS AGREEMENT executed in duplicate this 3d day of July, 1929, by and between the UNITED STATES GYPSUM COMPANY, an Illinois Corporation, of Chicago, Illinois, hereinafter referred to as "Licensor", and the CERTAIN-TEED PRODUCTS CORPORATION, a Maryland corporation, having its principal office in Baltimore, Maryland, hereinafter referred to as "Licensee", Witnesseth:

WHEREAS, Licensor entered into a license agreement with Licensee on the 22nd day of May, 1929, granting unto Licensee an indivisible and non-exclusive right, license and privilege of using the processes and making and using the machines and/or inventions set forth and claimed in letters patent of the United States numbered 1,029,328 dated June 11, 1912, and number 1,034,746 dated August 6, 1912, and in certain other patents and applications for letters patent more specifically described in Exhibit A attached to said license agreement, upon the terms and conditions as in the said license agreement contained; and

WHEREAS, Licensor is the owner of that certain patent known as the Birdsey Plasterboard Bundle Patent number 1,696,877 dated December 25, 1928, and Licensee is desirous of obtaining a license under said last mentioned patent;

NOW, THEREFORE, in consideration of the sum of one dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to-wit:

1. The Licensor does hereby give and grant unto Licensee an indivisible and non-exclusive right, license
10449 and privilege of making and using the inventions set forth and claimed in the said Birdsey Plasterboard Bundle Patent number 1,696,877 dated December 25, 1928, at any and all factories now or hereafter owned and/or operated and controlled by Licensee, or any subsidiary of Licensee, and of selling bundles of plasterboard and/or gypsum wallboard set forth and claimed in said patent number 1,696,877 so long as the said license agreement dated May 22, 1929, shall remain in full force and effect between the parties hereto; Provided, However, that if the said li-

cense agreement dated May 22, 1929, shall remain in full force and effect until February 10, 1937, then the license and privilege granted to Licesee in this paragraph shall continue until the expiration of said patent number 1,696,877. This said license is granted upon the terms and conditions hereinafter stated.

2. The Licensee agrees to pay to the Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said patent number 1,696,877, in addition to the license fees or royalties agreed to be paid by it to Licensor under said license agreement of May 22, 1929, a license fee or royalty of ten cents (10¢) per thousand square feet of plasterboard and/or gypsum wallboard which is sold by it in bundles of any kind, payable at the times and in accordance with the terms of paragraph 4 hereof. It is expressly understood and agreed that Licensee in its business of manufacturing and selling plasterboard and/or gypsum wallboard will use only said bundle set forth and claimed in said patent number 1,696,877, and will not use any other bundle or method of bundling plasterboard during the term of said license.

3. It is expressly understood and agreed that the
10450 license herein granted shall be personal to the Licensee and that the same or any right therein or hereunder shall not be sold, assigned or transferred without operation of law.

4. Licensee agrees to keep separate full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard sold by it in bundles, and agrees that on or before the 20th day of each and every calendar month it will render unto Licensor true written returns verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and gypsum wallboard put up and sold by it in bundles, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said plasterboard and gypsum wallboard put up and sold by it in bundles during the next preceding calendar month.

5. Licensor or its duly authorized representative shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard put up and sold by it in bundles, and to make copies thereof and memoranda therefrom.

6. Licensee agrees that all bundles put up and sold by it embodying the claims of said patent number 1,696,877 shall be distinctly marked with the word "PATENTED", together with the date of said patent, and with the further words, "LICENSED UNDER THE ABOVE LET-
10451 TERS PATENT", which markings shall be plainly visible.

7. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of the letters patent granted and to be granted forming the subject-matter of this license throughout the full term of this contract, and agrees that it will not at any time during said period, directly or indirectly, by itself, through or together with another or others contest the validity of said letters patent or the title thereto of licensor, or question the prima facie scope of said letters patent.

8. In the event that Licensee shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements herein to be by it kept and performed, then Licensor may at its election serve upon Licensee written notice of intention to terminate this agreement, which notice shall specify the alleged neglect failure or refusal, and if within thirty (30) days from the date of delivery of said notice the Licensee shall not cure the default specified in said notice then Licensor may cancel and terminate this agreement by notifying Licensee in writing of its election so to do without the necessity of any court action; provided, however, that Licensee shall not be relieved thereby from any liability accrued to Licensor at the time of such termination. In case at any time Licensee shall be adjudged a bankrupt, then the License hereunder shall immediately be and become cancelled and terminated, but Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by Licensor shall not be interpreted as constituting a waiver

of any further breach or breaches. Licensor may specifically enforce this contract or any of the terms, conditions and covenants hereof by injunction or in such other manner as may be provided by law.

10452 9. Any notice to be given under the terms hereof may be served upon Licensee by mailing the same to Licensee, postage prepaid, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

10. The terms "plasterboard" and "gypsum wallboard" shall be understood to mean all board by whatever name called having structural characteristics of plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used.

11. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by Licensee, except as hereinabove specifically provided.

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY

By S. L. AVERY

Its President.

ATTEST:

R. G. BEAR
Secretary

[Seal]

CERTAIN-TEED PRODUCTS CORPORATION

By C. O. BROWN

Its Vice President.

ATTEST:

ROBERT M. NELSON
Secretary

[Seal]

10453 *Government's Exhibit No. 231*

MEMORANDUM:

NEW YORK, AUGUST 9, 1929.

MR. GEO. M. BROWN, *President.*

Subject: *Wallboard Patents*

By: C. O. BROWN, V.P.

I spent Tuesday and Wednesday of this week in Chicago in conference with Gypsum manufacturers on question of License and Royalty covering various patents in the manufacture of Gypsum Wallboard. In order that you may have a full picture, am attaching memorandum written after meeting held in Chicago two weeks ago in which the combined royalty under U.S.G. Patents and Universal Patents totals 5%.

As a result of meeting held this week, proposition has been submitted as follows:

U.S.G. to take over Starch Patent of Universal, no cash to be involved in the transaction but Universal to get a free license under U.S.G.'s Bubble Patent for the life of the Starch Patent, which has about twelve (12) years to run. After expiration of the Starch Patent Universal would pay regular royalty on the Bubble Patent. U.S.G. in return to get free license under the Starch Patent; U.S.G. to take over the responsibility of defending the Starch Patent in case of litigation, handle the licensing, collect all royalties and for this service retain 5¢ per M. Ft. on any royalty collected under the Starch Patent, balance of the royalties to be paid to the Universal. Stareh Patent royalty to be 1% of the selling price on both Board and Lath. This is considerable concession on the part of Universal, as they have licensed this Patent to the Canadian Gypsum Company and are collecting 50¢ per M. Ft. royalty.

Before the Starch patent of Universal was injected into the picture, it was planned to continue the license and price control on Board through U.S.G.'s Bubble Patents when issued on the basis of royalty of 1% per M. Ft. with

a minimum of 25¢ per M. This meant that we would pay 25¢ per M. on Board and Lath as a minimum. U.S.G. has agreed to reduce this royalty to a straight 1% on Board and Lath which, on basis of today's prices would be 22½¢ on Board and about 14¢ on Lath as against a minimum of 25¢ on the old basis. This brings total royalties under all licenses and patents to 3½% on the selling price.

It would be the plan to write one contract covering all Patents involved, Machinery Patent on closed edge board, Bubble Patent, Starch Patent and Bundling Patent. The Attorneys feel that such a contract would be exceptionally strong and price control could be maintained for the life of the Contract without difficulty.

Putting it another way, using both the Starch and Bubble Patents, the cost to us as against using the Bubble Patents only would be 22½¢ more on Board and 5¢ per M. more on lath than the old proposition. It will give us a stronger set-up and a Patent to work under immediately. As a matter of fact, the royalty would be less than this, as they are figuring on gross selling price, whereas royalty is paid after freight equalization, discounts, allowances, etc. We did not get the benefit of this, however, on the U.S.G. Patent royalty of 1% with 25¢ per M. minimum.

10454 The National and Universal have settled their litigation on basis of cash settlement by National to Universal. With this settlement, everything seems to be in shape to go ahead under Patent control continuing without a break, if we are willing to pay 3½% royalty.

All of the Independent Gypsum Companies are willing to sign on this basis. I told them I would recommend it to the Company for consideration. Another meeting will be held during the week of August 20th at which time it is hoped that a contract can be agreed to and signed. Preliminary proof of the contract will be here in a week or ten days.

Summing up the royalty, we would have 3½% to pay until 1937, at which date Machinery Patents on closed edge Board expire. We would have 2% to pay from 1937 to approximately 1941, when the Starch Patent expires. We would have 1% to pay until the expiration of the Bubble

Patents. They have not actually been issued, so they would run seventeen (17) years from date of issuance. Should anything interfere with the issuance of the Bubble Patents, our royalty under that obligation would stop after two years—two years' royalty to be paid as recompense to U.S.G. for getting our Plants equipped and teaching our organization how to use the system.

The original proposition, as submitted by the U.S.G. Company, of 1% with 25¢ per M. minimum, would figure about 1¼%, taking the percentage of lath into consideration. 1½% already obligated for under the Closed Edge patent would make a total, as originally considered, of 2¾%, so injecting the Starch Patent raises the royalty ¾ of one per cent.

On $25.00 Board, 3½% would figure something less than 87½¢ per M. as the royalty is figured after freight absorptions, discounts and allowances, etc. And Lath would figure something less than 52½¢ per M. Savings in cost by using the Bubble and Starch patents have been variously estimated at between 50¢ and $2.00 per M. If U.S.G.'s statement is correct as to cost compared with ours, they are manufacturing Board cheaper than we are by more than the extent of the total royalty.

10455 MEMORANDUM:

JULY 30, 1929

CHICAGO GYPSUM BOARD MEETING

The National Gypsum Company, Atlantic Gypsum Company and Ebsary Gypsum Company were in Chicago with their attorneys. The attorneys went over the Bubble Contract with the U.S.G. Company attorney and, inasmuch as we did not have a lawyer present, I attended the lawyers' conference.

Considerable progress was made between the attorneys on an agreement for contract covering Bubble license. There are difficulties outside of the contract, however, which prevent two Companies, Universal and National Gypsum Company from signing.

The Universal Gypsum Company is suing the National Gypsum Company for infringement of the Starch Patent sold by Mr. Haggerty, formerly connected with National, to the Universal Gypsum Company. In selling this patent, Mr. Haggerty recognized its validity and the contract is binding on the National Gypsum Company, making it almost impossible for them to contest the Patent. It is my understanding that Universal are asking National to pay damages in the amount of $250,000. National, of course, does not want to contract a double obligation until this is settled.

The Universal Gypsum Company are placing the blame for not signing on the fact that they have not assured themselves that the Bubble process is more economical than the Starch process and the fact that they are in the hands of the receivers would make it impossible for them to bind themselves for a longer period than the receivership. Other attorneys, however, feel this is largely a smoke screen for not signing and it is my opinion that they feel by holding out they can make the Starch patent of value by forcing it on the industry by sale or on a royalty basis whereas if they and National sign the Bubble Patent, which National would not do before first getting a release from Universal on their Starch Patent litigation, then their Starch patent would be practically no value.

The United States Gypsum Company advise that they have nothing to fear from the Starch Patent under their present Bubble process. There is some doubt as to the strength of this Starch Patent and, of course, all of the Companies, if they did use it, would be free to contest its validity in case of litigation, with the exception of the National Gypsum Company.

In the interest of harmony, however, the U.S.G. Company has been making some tests to see if there was any value in combining the two processes, the Starch and the Bubble. They advised that, based on their experiments to date, they feel there would be some benefit to using Starch in a limited degree with their Bubble process, such a combination resulting in better working of the Stucco, fewer Seconds, etc.

Further benefit could be derived by combining the two patents due to the fact that the Starch Patent has been issued, whereas only applications have been filed under

the Bubble Patent, so a combination of the two systems would give a patent to work under in the manufacture and sale of Gypsum Wallboard immediately, whereas under only the Bubble process there would be an interim between August 6th and the date of issuance of the Bubble Patent where there would be no Patent control. There is, of course, considerable benefit to having Patent control continue without a break.

10456 Mr. Avery spent considerable time in the last two days with Mr. Holland, and the other co-receivers of Universal, trying to work out some mutually satisfactory proposition for buying the Starch Patent, or licensing the Industry under both the Starch and the Bubble process.

The Universal Gypsum Company, however, being in the hands of receivers, are anxious to capitalize this patent for its maximum value and have asked for royalties far beyond its worth, in the opinion of several of the Gypsum Companies. Their best proposition to date is a 2½% royalty for use of the Starch Patent. This would mean that if we O.K'd taking a license under both the Starch and Bubble Patents we would be obligating ourselves for 5% royalty until 1938, and 1% thereafter on the Bubble patent until the expiration of that Patent, this royalty made up as follows: 1½% on Closed Edge, 1% on Bubble and 2½% on Starch.

The Atlantic Gypsum Company and the National Gypsum Company feel that at least until recently this Patent could have been bought for $200,000 or less. If prices were maintained on the present levels until 1938 and entire industry paid a royalty, I estimate the royalties paid by the Industry would total $3,500,000 to $4,000,000. These are industry figures, however, so they would be shades some by the amount of business Universal might do, as, of course, they would not collect royalty on their own business and there is some doubt in our mind as to whether the U.S.G. Company expect to pay royalty. They might have in mind giving Universal a free License under the Bubble process in exchange for free License under the Starch process, or something of that sort. I asked Mr. Avery what the arrangement between the two companies would be, or what royalty he would pay if any, and he was not willing to answer the question.

I am sure considerable concession can be secured in the amount of this royalty through further conferences. Before the meeting adjourned, the Industry was asked if they would be willing to consider a maximum of 5% on Board and 4% on Lath. This is a concession of 1% on the Lath. The Universal Gypsum Company and the U.S.G. Company were told this would not be satisfactory.

Mr. Avery asked what royalty we would consider fair and I told him that was something I was not willing to answer without giving it considerable thought, but license contracts that I was familiar with were based on a considerably smaller royalty than 5%, and that I felt U.S.G. Company should buy their Starch Patent outright, provided they could do so at any reasonable figure and then license both patents on some proper basis. From a cost standpoint I feel the Bubble process offers considerably more chance of reducing costs than the Starch process, yet the Universal Company are asking 2½ times the royalty that U.S.G. are asking under their Bubble patent.

There will be further conferences between Universal and U.S.G. within the next ten days and another meeting is to be held in Chicago on either August 5th or 6th when the situation will be discussed further.

10457 *Government's Exhibit No. 232*

MEMORANDUM OF AGREEMENT, executed in duplicate this 22nd day of May, 1929, by and between the UNITED STATES GYPSUM COMPANY, an Illinois corporation, of Chicago, Illinois, as First Party, and CERTAIN-TEED PRODUCTS CORPORATION, a Maryland corporation, having its principal office at Baltimore, Maryland, as Second Party, witnesseth, that:

Whereas, heretofore, on or about the 21st day of February, 1928, the UNITED STATES GYPSUM COMPANY filed its Bill of Complaint in the United States District Court for the Northern District of Illinois, Eastern Division, against THE BEAVER PRODUCTS COMPANY, INC., THE BEAVER BOARD COMPANIES, and CERTAIN-TEED PRODUCTS CORPORATION (Equity No. 7907), which suit is still pending and undetermined; and

Whereas, thereafter in said suit a motion was made for a preliminary injunction, and the Court ordered that said Motion for Injunction be continued generally, upon the condition that the CERTAIN-TEED PRODUCTS CORPORATION give bond in the penal sum of One Million Dollars ($1,000,000.00), with surety to be approved by the Court, conditioned to secure the payment of any judgment, decree, damages, interest and costs finally rendered or to be rendered in said cause; and

Whereas, thereafter the said bond was filed in said cause, with CERTAIN-TEED PRODUCTS CORPORATION as Principal and GEORGE M. BROWN and
10458 ELISHA WALKER as Sureties, which bond was approved by the Court; and

Whereas, it is proposed to adjust the matters in controversy in said cause through the execution and performance of a certain License Agreement between the parties hereto to be entered into simultaneously with the execution of this instrument,

Now, therefore, in consideration of the premises and of the sum of One Dollar ($1.00) by each of the parties to the other in hand paid, and for other good and valuable considerations, the receipt and sufficiency whereof are hereby acknowledged and confessed, the parties hereto do hereby mutually agree as follows, to-wit:

1—The said cause now pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, entitled "United States Gypsum Company, Complainant, vs. The Beaver Products Company, Inc., The Beaver Board Companies, and Certain-Teed Products Corporation, Defendants, in Equity, No. 7907," shall be dismissed without prejudice and without costs.

2—The said bond given by the Certain-Teed Products Corporation, as Principal, George M. Brown and Elisha Walker, as Sureties, pursuant to order of Court in the aforesaid cause, shall be and hereby is released.

3—The parties hereto shall respectively execute
10458A such other instruments or papers as may be necessary to carry out this agreement.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY
By S. L. AVERY
Its President.

[CORPORATE SEAL]

JOHN E. MACLEISH
Witness

CERTAIN-TEED PRODUCTS CORPORATION
By GEO. M. BROWN
Its President.

[CORPORATE SEAL]

AUDENREID WHITTEMORE
Witness

10459 *Government's Exhibit No. 234*

CERTAIN-TEED PRODUCTS CORPORATION

For New York DATE OCTOBER 3, 1929

From New York Office

Attention of MR. A. WHITTEMORE, *V.P.*
Subject BUBBLE BOARD

Dictated by C. O. BROWN, *V.P.—LK*

It is my belief that License for the Bubble Board will be drawn up and signed within the next two weeks. If our Engineering Department is familiar with the equipment, etc., required for this installation, think they should proceed with the work. It is my information, however, that we know very little about the actual process, equipment, etc.

The United States Gypsum Company would not be willing to turn over all information on this prior to the License being signed. After it is signed, everything will be available. So, if we are not entirely familiar with what is required, think we should wait until we can get all information from the United States Gypsum Company. We will not be required to pay royalty on the Bubble until the plants are in production, and ample time will be given after the license is signed for our plants to get in production.

This delay will not interfere with the operation of patent and price control, as the Universal Starch patent will control that feature and royalty will start on that patent as soon as the License is signed. We are all using enough Starch to say we are making Board under the Universal Patent.

There is supposed to be a substantial saving in cost by using the Bubble either from standpoint of a lighter Board or by increased production from a heavier board, but until standards are set, think it will be necessary for us to make the same weight board the Industry is manufacturing, in which case our saving would be in an increased production. At present time, however, we are not selling the production of the Plants on their present capacity and doubt if they will be oversold the balance of this year, so there is really little incentive to crowd this from a cost standpoint. It would be my feeling that we should wait until the License is signed before doing much work on the Bubble Board equipment.

10460 *Government's Exhibit No. 235*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 5, 1929

CERTAIN-TEED PRODUCTS CORPORATION,
100 East 42nd Street,
New York City, New York.

Attention: MR. C. O. BROWN

DEAR SIRS:

This is to advise you that the Federal Courts in the Universal Gypsum & Lime Co. receiverships entered orders approving the contract with United States Gypsum Company. We have this day received the conveyance and assignment of the Haggerty and Hite patents to us pursuant to authority granted by the United States District Court for the Northern District of Illinois, Eastern Division, and the other Federal District Courts in which receivership proceedings are pending, to the receivers of the Universal Gypsum & Lime Co. and said Company to sell and assign said Haggerty and Hite patents to us. Your license agreement dated October 15, 1929, therefore becomes effective on this date. In the future all royalties for our patents will be collected in accordance with the terms of the license agreement of October 15, 1929.

Yours very truly,

UNITED STATES GYPSUM COMPANY

R. G. BEAR,
Secretary

10461 *Government's Exhibit No. 236*

New York 12/3/29 Chicago Dist.

MR. W. E. COFFIN RE-CUT WALLBOARD

WARREN HENLEY—EL

cc — Messrs.
C. O. BROWN, V.P.—N.Y.
H. H. VAN HAGEN—Buffalo Dist.

Licensor do not feel it advisable to sell Open Edge Recut Wallboard on a basis of the "seconds" price.

They feel it would be quite demoralizing in the various markets where this type of board is sold.

Some manufacturers would accummulate considerable more footage than others and it would continually be a problem as to just what basis the various markets were on.

Licensor, of course is up against the same problem, and for your information, "dumped" some $40,000.00 worth of Recut Wallboard rather than demoralize the market by selling same.

They have approximately two or three million feet of accummulation on hand and are making every endeavor possible to dispose of same at, however, the No. 1 price.

I am at the present time endeavoring to work out with Licensor "seconds" policy and it may be possible to work out of this situation by selling Recut Wallboard at the "seconds" price, provided, however, that the board is stamped with the word "seconds" on the reverse side of the board. I am also giving a copy of this memorandum to Mr. Van Hagan which will have reference to his memorandum of October 19, subject—"Accumulation of Off Goods".

The subject is an industry problem and must, of course, be given serious consideration by all concerned, but in the meantime, if the Sales Department can dispose of 33" Recut Wallboard into markets that our already classed as

"seconds markets", then it will be O.K. to move same, provided that the board is stamped with the word "seconds" on the reverse side.

Licensor feel this situation so important, and the fact that their plants are operating around 97% efficiency, that it would be wise to "dump" the 3 or 4% rather than offset the market, but of course such efficiency as they enjoy will not apply to all Licensees, particularly so in the next sixty days when plants are being changed over to a new method of manufacture.

I would suggest that Mr. C. O. Brown, at the next Licensor meeting, bring this matter up for discussion, and if possible, develop a definite policy covering.

10462 *Government's Exhibit No. 237*

CERTAIN-TEED PRODUCTS CORPORATION
100 East 42nd Street
NEW YORK

C. O. BROWN
Vice-President

JANUARY 2, 1930.

UNITED STATES GYPSUM CO.,
300 West Adams St.,
Chicago, Ill.

GENTLEMEN:— Atten:—MR. HENNING, *Vice Pres.*

This will acknowledge receipt of your letter of December 31st, establishing new minimum prices on Plaster Board and Gypsum Wall Board manufactured under Haggerty and Hite Patents and covered by our license contract with you.

These prices will be made effective at once.

Yours very truly,

C. O. BROWN
Vice President.

COB:L

10463 *Government's Exhibit No. 238*

SCOTT, BANCROFT, MARTIN & MACLEISH
Law Offices
134 South LaSalle Street
CHICAGO

JANUARY 18, 1930

MR. C. O. BROWN,
Certain-teed Products Corporation,
100 East 42nd Street,
New York, N. Y.

DEAR MR. BROWN:

I have just received word from our patent attorneys that they have completed their investigations and consideration of patents No. 1,725,243 and 1,709,475 and that they consent to the consummation of the exchange license agreement which you and the United States Gypsum Company have agreed to.

I enclose herewith three copies of the license agreement which I believe covers the situation. This agreement was drawn shortly after our conference and consequently is dated "this———day of December, 1929." I have not changed this in view of the fact that you have both been operating under the license and I suggest that you insert the date on which you really put this agreement in effect.

In drafting this agreement is seemed to me that the time might come when this patent should be included in our general license agreement as we might later want the right to fix prices included in our license to use this patent. This could not be done later unless some reservation to that effect was made in the present agreement. Consequently by the second section of the agreement I have made provision for including this license in our general license agreement with you and I assume that there will be no objection to this in view of the fact that we have provided that you shall not be required to pay any additional royalty or license fee for the use of this patent if it is included in the general license agreement.

If the form of the agreement is satisfactory to you I would appreciate your executing the original and the
10464 copy which is on heavy paper and returning them to me. I will then see that the United States Gypsum Company immediately executes one copy and returns it to you. The third copy which I enclose is for your files.

Yours very truly,

JOHN E. MACLEISH

JML:B
Enclosure.

10465 *Government's Exhibit No. 241*

AGREEMENT between UNITED STATES GYPSUM COMPANY and CERTAIN-TEED PRODUCTS CORPORATION

Agreement made in duplicate this first day of July, 1932, by and between UNITED STATES GYPSUM COMPANY, an Illinois corporation having its principal office and place of business at Chicago, Illinois, hereinafter called the First Party, and CERTAIN-TEED PRODUCTS CORPORATION, a Maryland corporation having its principal office and place of business in New York City, New York, hereinafter called Second Party,

Wherein the Parties hereto agree as follows:

1. First Party agrees to sell to Second Party and Second Party agrees to purchase from the First Party all the Second Party's needs and requirements for sale to its customers in the States of Florida, Georgia, North Carolina, South Carolina, Alabama, eastern Tennessee and such other states or parts of states in southeastern United States as Second Party may elect, of the following products, at the following prices:

	In Bulk	In Paper Sacks (Sacks extra)	In Jute Sacks (Sacks extra)
Crushed Gypsum Rock	$1.75 per ton		
Land Plaster	2.30 " "	$2.75 per ton	$3.00 per ton
Stucco		4.25 " "	4.50 " "
Local Finishing Plaster		4.35 " "	4.60 " "
Cement Plaster		4.60 " "	4.85 " "
Wood Fiber Plaster		4.75 " "	5.00 " "
Gray Trowel Finish		11.00 " "	11.25 " "
White Trowel Finish		24.00 " "	24.25 " "
¼" Wall Board	$15.00 per 1000 sq. ft. (crating extra)		
⅜" Wall Board	16.00 " " " "	"	"
¼" Plaster Board	13.00 " " " "	"	"
⅜" Plaster Board	13.00 " " " "	"	"

f. o. b. cars Plasterco, Virginia (the above prices being based upon average cost of manufacture in 1931 at Plasterco, Virginia); provided, however, that at the
10466 end of each calendar year during the whole or any part of which this contract is in force, the First Party shall determine the average mill cost per ton to First Party on cars Plasterco, Virginia of each of the above plaster products shipped to Second Party or Second Party's customers during the calendar year last past, and if such cost of any plaster product or products exceeds the average mill cost of such plaster products to First Party on cars Plasterco, Virginia for the base year 1931, the Second Party will pay to the First Party the difference in cost per ton on all such plaster products purchased hereunder during the calendar year just completed, and if such cost is less than the average mill cost for the base year 1931 First Party will pay the Second Party the difference in cost per ton on all such plaster products purchased during such calendar year; provided, further, that whenever the cost per M square feet to First Party of any of said plaster board or wall board products exceeds 66⅔ per cent of the price quoted herein, the price to the Second Party of such products during the period such cost so exceeds 66⅔ per cent of the quoted price, shall be the price quoted herein plus the difference between the cost and 66⅔ per cent of the quoted price, until such time as the cost is equal to or lower than 66⅔ per cent of the quoted price, at which time the price to the Second Party shall again be the price herein quoted; provided further,
Second Party may purchase or acquire elsewhere
10467 than from First Party, trowel finish plaster, plaster board or wall board to fill orders from customers

exclusive of depreciation and of the cost of sacks or crat-
in said territory for carload shipments of either of such products.

Cost as used herein shall mean the total mill cost of the product on cars at the mill, in accordance with the method of computing such costs now employed by the First Party, ing.

The word ton, wherever used in this contract, shall mean a net ton of two thousand (2000) pounds.

2. All plaster products sold hereunder shall be manufactured by the First Party in accordance with formulas furnished by Second Party from time to time, and if no formula is furnished, according to the standard practices of the First Party. The word formula as used herein shall be construed only to mean that the Second Party shall have the right to specify the quantities of such ingredients as fiber, lime, clay, talc and similar materials which are added to stucco in order to produce the abovementioned plasters, having such varying characteristics as will suit the requirements of Second Party's customers, and to specify the setting time of such wall plaster, such setting time to be regulated by the First Party by variations in the amount of retarder added to such plasters during mixing. First Party shall not be responsible either to Second Party or Second Party's customers for the quality or performance of any plaster manufactured according to for-
10468 mula furnished by Second Party.

3. All paper sacks shall be furnished by the First Party at an additional cost to the Second Party of One Dollar ($1.00) for each ton of plaster shipped in paper sacks. Such paper sacks shall be printed with such labels and branding marks as the Second Party may from time to time designate, and shall be of the same type and quality as is or shall be at the time regularly used by the First Party.

All crating of wall board or plaster board products shall be done by the First Party at an extra cost to the Second Party of Five Dollars ($5.00) per M square feet but shall only be done when directed by the Second Party.

All jute or cloth sacks shall be furnished by the Second Party and shall be in good condition when received. First Party shall not be responsible or liable either to Second Party or Second Party's customers for the condition of any jute or cloth sacks in which shipment is made. First Party will receive, condition and store all return shipments of Second Party's jute or cloth sacks in the same manner as it handles its own jute or cloth sacks, and will furnish Second Party, each month, a memorandum of account of the number of jute or cloth sacks received and the worthless sacks thrown out.

4. All shipments made hereunder by the First Party shall be made to the Second Party or the Second Party's customers, routed as Second Party shall direct, upon
10469 the written order of the Second Party, and all shipments shall be handled with the same promptness and efficiency as First Party handles its own shipments. First Party will invoice Second Party each month for all products shipped either to Second Party or Second Party's customers during the preceding calendar month, and for all paper sacks, crating or other charges or expenses for which Second Party may be liable, and all such invoices shall be paid by the Second Party net, in cash, within ten (10) days after invoicing. Upon failure at any time on the part of the Second Party to pay promptly any bill rendered by the First Party to the Second Party for products sold Second Party hereunder, or for any charges payable under this contract when the same are due and payable, First Party may withhold any and all further shipments or deliveries to Second Party or on Second Party's account, until payment in full is made, and if any such bills are not paid within a period of thirty (30) days after the same are due and payable then the First Party may at its option terminate this agreement, with or without notice to the Second Party, provided that any such termination shall be without prejudice to any claim of either party against the other arising out of any breach of or failure to perform this agreement occurring prior to such termination.

First Party shall not compile and turn over to its Sales Department any sales data, customers names or
10470 prices the knowledge of which is received by the First Party by reason of the sales and shipments made hereunder.

5. Second Party may, at its option, ship to First Party's plant at Plasterco, Virginia any products manufactured by Second Party at any of its mills and required in mixed car shipments with products sold hereunder, and First Party agrees to warehouse all such products for the Second Party at a cost of One Dollar ($1.00) per ton. All such products so warehoused shall be insured by the Second Party at its own expense, and First Party shall not be liable to Second Party for the loss, damage or destruction of any warehoused stocks except where grossly negligent in the handling thereof.

6. In the event the First Party shall for any reason whatsoever cease to manufacture the above products or any of them at its mill at Plasterco, Virginia, First Party will promptly notify Second Party thereof and will present to Second Party immediately thereafter a new schedule of prices f. o. b. cars its mill closest to Plasterco, manufacturing such product or products, covering the products the manufacture of which at Plasterco, Virginia has been stopped, and Second Party may thereupon elect to accept such schedules or ship from other sources until the manufacture of such product or products is resumed by First Party at Plasterco, Virginia. Such new schedule of prices shall bear approximately the same relation to cost of manufacture at the new mill as the prices herein stated bear to the cost of manufacture at Plasterco, if accepted by Second
10471 Party, and shall become a part of this contract the same as if originally set forth herein, in place of the schedule of prices f. o. b. cars Plasterco, Virginia, as long as any such products are not manufactured at Plasterco, Virginia; provided, however, that if the First Party permanently ceases to manufacture any such product or products at Plasterco, Virginia and notifies the Second Party of that fact Second Party may, at its option, cancel this contract with reference to any such product or products, the contract to remain in full force, however, as to all products which First Party continues to manufacture at Plasterco, Virginia.

7. In case either the First or Second Party shall at any time become bankrupt or insolvent or any bankruptcy or insolvency proceedings shall at any time be instituted against either party, or any proceedings shall be instituted for the appointment of a receiver or trustee for the assets, business or property of either the First Party or the Second

Party, or any assignment shall be made by either the First Party or the Second Party for the benefit of creditors, then in any or either of such events the other party hereto may cancel this agreement by giving written notice of cancelation. This agreement may also be canceled by either party in case the other party shall at any time be guilty of a breach of any of the terms or conditions hereof. In case of a waiver of a breach of any of the terms and conditions of this agreement by either of the parties hereto the
10472 same shall not constitute a waiver of any other or subsequent breach hereof.

8. First Party shall not be liable to Second Party for any failure to ship or delay in shipment of any order by reason of strikes, floods, shortage of cars, or any other cause or reason beyond the control of the First Party, whether or not of a class or kind specifically mentioned herein, and during the period of any such delay the Second Party may purchase its requirements of the above products elsewhere until such time as First Party can resume regular shipments.

9. Any and all notices required to be served by the First Party upon the Second Party may be served by mailing a copy of such notice, registered mail, postage prepaid, addressed to the Second Party at New York City, New York, and any and all notices required to be served by the Second Party upon the First Party may be served by mailing a copy of such notice, registered mail, postage prepaid addressed to the First Party at 300 West Adams Street, Chicago, Illinois, and such mailing of notice shall in each case be deemed to be proper service of notice hereunder.

10. This agreement shall become effective on the date hereof and shall remain in force to and including December 31, 1937 and from year to year thereafter unless terminated by either party upon six (6) months prior written notice given at any time after December 31, 1937; provided, however, that Second Party may dispose of any products similar to those covered hereby which may be stored or
10473 warehoused by Second Party in the territory described above, on the effective date of this agreement. In the event that the gypsum mill now located at North Holston, Virginia shall again be placed in operation First Party may at any time thereafter cancel this agreement by

giving the Second Party at lease sixty (60) days prior written notice of cancelation.

11. This contract shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto, but may not be voluntarily assigned by Second Party and shall not inure to the benefit of any successor without the consent of the First Party in writing first had and obtained.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

UNITED STATES GYPSUM COMPANY
By O. M. KNODE
Vice President.

[SEAL]

ATTEST:

T. R. PARRISH
Secretary.

CERTAIN-TEED PRODUCTS CORPORATION
By C. O. BROWN
Vice President.

[SEAL]

ATTEST:

Asst. Secretary.

10474 *Government's Exhibit No. 244*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

24TH SEPTEMBER, 1934

MR. C. O. BROWN, *Vice President*
Certain-teed Products Corporation
100 East 42nd Street
New York, New York

Reflective Plasterboard License

DEAR SIR:

Attached please find copy of my letter to to Mr Van Hagan and also copy of his letter.

As discussed with you, we are anxious to have the entire industry under license for the manufacture of this product. The Universal, National and American Gypsum companies have agreed to sign the license, and it is my suggestion that you do likewise.

I am attaching hereto a revised, up-to-date contract, the same as submitted to the other members of the industry.

As you will note this contract is on a ninety day mutual cancelation basis: this so that should there be any changes of minor nature in the licenses for the other industries the same will be incorporated in subsequent licenses.

Very truly yours,

C. HENNING
Vice President.

10475 *Government's Exhibit No. 245*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 14TH, 1934.

MR. H. H. VAN HAGAN, *General Manager,*
Gypsum Division,
Certain-teed Products Corporation,
Beaver and Military Roads,
Buffalo, New York

Metalized Plasterboard

DEAR SIR:—

Referring to your letter of August tenth relative to the above, attached please find copy of license.

As you will understand this is a tentative copy which may be changed in minor points, inasmuch as it is our intention to license plasterboard manufacturers, metal lath manufacturers and insulation board and wire lath manufacturers, and all these contracts must naturally contain the same clauses and specifications. I do not think that the changes will be of anything of great importance.

I do not think at this time that we are contemplating selling this commodity to you, and believe that it would be wise for you to figure on manufacturing it.

In order to have a price control on this commodity it will be necessary for you to take out a license to manufacture it.

Very truly yours,

/s/ C. HENNING
Vice-President

10476 *Government's Exhibit No. 246*

CERTAIN-TEED PRODUCTS CORPORATION
Beaver and Military Roads
BUFFALO, N. Y.

SEPTEMBER 4, 1934.

MR C HENNING, *Vice President*
United States Gypsum Co.
300 West Adams
Chicago

SUBJECT: *Metalized Plasterboard*

DEAR SIR:

This is to acknowledge your letter of August 14th and indicating that your company would not consider at this time the selling of the Metalized Plasterboard to our company.

With reference to the proposed form of license agreement, is my understanding correct that your company would furnish full details and specification both for the metalized plasterboard and the necessary mechanism for the manufacture of same? If this is the case can you give me a rough estimate as to the cost of installation which might be required to put us into production on this product?

Yours very truly,

CERTAIN-TEED PRODUCTS CORPORATION

By /s/ H H VAN HAGAN
General Manager
Gypsum Division

10477 *Government's Exhibit No. 247*

NEW YORK
METALLIZED BOARD
C. O. BROWN, V.P.—MW

District Managers
Sales Managers
Sales Men
District Auditors
H. H. VAN HAGEN, *Buffalo*
WARREN HENLEY, *Chicago*
W. A. PHELPS, *N. Y.*
E. H. LANEY, *N. Y.*

Attached is price information sent out by Licensor on metallized board.

We have signed license on this product but do not contemplate manufacturing it at the present time.

U. S. Gypsum Company will sell us their board, unbranded, at published prices less 12¢% on lath and 15% on board. They were not willing to do this until we signed a license and heretofore we have had to buy this board when necessary to furnish same, through dealers, taking a loss on each sale.

If district and sales managers feel that this product should be labelled with one or more of our brand names, I am sure it can be arranged. Please advise whether you would want to use the Bestwall name or Certainteed name or both.

Will Mr. Henley find out from U. S. Gypsum Company whether they would have any objection to putting our label on the package, provided we furnished same, and at same time, allow us above discounts.

Will Mr. Henley also advise me at what points U.S. Gypsum Company manufacture metallized board at the present time so that we will know where the product is available.

Will Mr. Henley also find out whether or not we can send an order direct to the plant, picking up such quantity of board as may be desired at any time or must the orders be placed through Chicago.

Pending definite information on where orders are to be sent, send any orders for metallized board direct to Mr.

Henley, who will handle direct with U.S. Gypsum Company's Chicago office.

It is my understanding that metallized board is beginning to run into considerable volume. I am told National Gypsum Company are selling approximately 200,000 feet per month and U. S. Gypsum Company are selling between 400,000 and 500,000 feet per month.

10478 "METALLIZED" BOARD LICENSE BULLETIN No. 2—PRICES F.O.B. TRUCKS MILLS AND WAREHOUSES

Referring to our license contract with you, you are hereby notified that the minimumprices effective until further notice, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Minimum Prices per M Square Feet F.O.B. Trucks (Pick-ups) at Mills or Warehouses (See Note "a"):

	⅜" Metallized Gypsum Wallboard Weight 1600# per M	*Gypsum Plasterboard ⅜" Metallized Weight 1600# per M*
Charlestown, Mass.	$39.50	—
Fort Dodge, Iowa	33.50	—
Grand Rapids, Mich.	—	—
Gypsum, Ohio	35.50	—
Metro N.Y.-N.J. Whses.	36.62	23.12
Oakfield, N. Y.	35.50	22.12
Philadelphia, Pa.	36.62	—
Plasterco, Va.	34.50	—
Southard, Okla.	35.50	—
Sweetwater, Texas	35.50	—

(a) The above prices are for board or lath with one surface metallized. Add $15.00 per M Sq. Ft. when furnished with both surfaces metallized.

10479 *Government's Exhibit No. 248*

DEC. 3, 1934. NEW YORK

District Managers
Sales Managers
Salesmen
District Auditors
H. H. VAN HAGAN, *Buffalo*
WARREN HENLEY, *Chicago*
W. A. PHELPS, *N. Y.*
E. H. LANEY, *N. Y.*

METALLIZED BOARD
C. O. BROWN, V. P.

Supplementing my recent bulletin above subject.

The U. S. Gypsum Company quote prices on metallized gypsum wallboard at the following points:

Fort Dodge, Iowa
Grand Rapids, Michigan
Gypsum, Ohio
Oakfield, N. Y.
Plasterco, Va.
Southard, Okla.
Sweetwater, Texas.

On gypsum lath they quote only at Oakfield, N. Y.

The price on gypsum metallized lath is $20.00 f.o.b. Oakfield, N. Y., no freight equalization with other gypsum producing points.

The U. S. Gypsum Company agrees to apply our label, either Certain-teed or Bestwall Brand, on any orders placed with them for metallized board, we to furnish the labels. Mr. Phelps will prepare these labels in the immediate future and forward a supply to the Fort Dodge and Oakfield mills of the U. S. Gypsum Company. If District Managers wish labels sent to any other mills of the U. S. Gypsum Co., please advise Mr. Phelps. It would be my recommendation, however, that we operate from as few of their mills as possible. For example, U. S. Gypsum Company state that while they show a price at Plasterco, Va., they have shipped no mixed cars of this board from that mill.

We have ordered a small supply of samples of this board from U. S. Gypsum Company, to be shipped to N. Y.—Ad-

vertising Department, attention of Mr. Phelps. You can requisition samples for salesmen from N. Y. Advertising Department, New York Office. Only 250 samples have been requested to date, size 2½" x 5", so confine your requisitions only to such quantities as are required for salesmen's use. For the time being, these samples will be sent to you unlabelled.

Orders for metallized board and lath can be sent through to the controlling order writing department in the regular way. When order reaches plant from which shipment is to be made, we can send our truck to U. S. Gypsum plant with an order for quantity of board required and U. S. Gypsum plant manager is authorized to recognize same and deliver board to us.

Will Mr. Van Hagan please advise our plant managers of procedure for picking up metallized board.

†4. Minimum Prices in Markets Adjacent to Cities.

Minimum prices of patented metallized gypsum board for delivery in the following markets adjacent to the following cities shall be:

Delivered Minimum Prices in—	*Same as—*
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, and Bridgetown, Ohio	Cincinnati, Ohio
North Randall, Ohio	Cleveland, Ohio
Dodson, Edgecomb, Waldo and Westport, Mo.; Overland Park and Merriam, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory and Indian Orchard, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio
Algiers, Gretna and Marrero, La.	New Orleans, La.

†5. Pickup Prices at Mills and Warehouses

Minimum prices of patented metallized gypsum board per M sq. ft. f.o.b. trucks at mills and warehouses are as follows:

Mills and Warehouses	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Plaster Lath	1/2" Metallized Gypsum Plaster Lath
Fort Dodge, Iowa Mills	$28.00	$33.00	$34.00	$30.00	$23.00	$25.00
Grand Rapids, Mich....	28.00	33.00	34.00	30.00	23.00	25.00
Metro N.Y.-N.J. Whses.	27.80	33.10	34.50	30.50	23.10	25.50

† Indicates change.

10481 4. Minimum Prices in Markets Adjacent to Cities.

Minimum prices of patented metallized gypsum board for delivery in the following markets adjacent to the following cities shall be:

Delivered Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, and Bridgetown, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, Ohio	Cleveland, Ohio
Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

†5. Pickup Prices at Mills or Warehouses.

Minimum prices of patented metallized gypsum board per M sq. ft. f.o.b. trucks at mills and warehouses are as follows:

Mills and Warehouses	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Plaster Lath	1/2" Metallized Gypsum Plaster Lath
Texas Mills	$28.00	$33.00	$34.00	$30.00	$23.00	$25.00
Fort Dodge, Iowa Mills	28.00	33.00	34.00	30.00	23.00	25.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00	25.00
Metro N.Y.-N.J. Whses.	27.80	33.10	34.50	30.50	23.10	25.50

† Indicates change.

10482

	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath	1/2" Metallized Gypsum Lath
(f) Into Sullivan, Ulster and Dutchess Counties, New York, and Litchfield County, Connecticut; also towns of Stroudsburg and East Stroudsburg (in Monroe County), Penna.:	28.30	33.85	35.50	31.50	23.85	26.50
(g) Into Delaware, Greene and Columbia Counties, New York:	28.60	34.20	36.00	32.00	24.20	27.00
(h) Into Niagara and Erie Counties, New York (including town of Gowanda):	27.75	33.05	34.40	30.40	23.05	25.40
(i) Into Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest in Lake County, Illinois:	27.40	32.55	33.75	29.75	22.55	24.75
(j) Into McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	27.55	32.75	34.00	30.00	22.75	25.00
(k) Into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.	27.80	33.10	34.50	30.50	23.10	25.50
(l) Into Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	28.00	33.00	34.00	30.00	23.00	25.00
(m) Into Jacksonville and So. Jacksonville, Fla. Switching Area, where per car switching rates apply (as described in published railroad tariffs):	28.25	33.25	34.25	30.25	23.25	25.25
(n) Into Savannah and Port Wentworth, Georgia, Switching Limits where per car switching rates apply (as described in published railroad tariffs):	28.25	33.25	34.25	30.25	23.00	25.00
†(o) Into Milwaukee, Wisc. Switching Area (as described in published railroad tariffs), also towns of Butler and West Allis, Wisc.:	——	——	——	——	23.98	——

† Indicates change effective October 2, 1939.

10483

	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath	1/2" Metallized Gypsum Lath
†(a) Into Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass., north of continuation of Southern boundary of Norfolk County, and town of Mansfield, Mass., also Rockingham and Strafford Counties, New Hampshire; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J., west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also that portion of Bucks County, Penna. south and east of line drawn between and including towns of Lexington and Lumberville; also that portion of Montgomery County, Penna. south and east of line drawn between and including towns of Mont Clare and So. Hatfield; also Delaware and Philadelphia Counties, Penna.:	27.80	33.10	34.50	30.50	23.10	25.50
(b) Into Chester County, Penna.; also that portion of Bucks County, Penna. north and west of line drawn between but not including towns of Lexington and Lumberville; also that portion of Montgomery County, Penna. north and west of line drawn between but not including towns of Mont Clare and So. Hatfield:	27.85	33.20	34.65	30.65	23.20	25.65
†(c) Into balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also State of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May and Cumberland Counties, New Jersey; also that portion of Burlington County, N. J., east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also that portion of New Castle County, Delaware south of line extending through, but not including towns of New Castle, Tasker, State Road and Audenried; also Cecil County, Maryland; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.; also town of Milford (in Pike County), Penna.:	28.05	33.50	35.00	31.00	23.50	26.00
(d) Into Westchester, Rockland and Suffolk Counties, New York; Gloucester and Salem Counties, New Jersey; also that portion of New Castle County, Delaware north of line extending through and including towns of New Castle, Tasker, State Road and Audenried:	27.90	33.30	34.75	30.75	23.30	25.75
(e) Into State of Connecticut (except Fairfield and Litchfield Counties):	28.20	33.65	35.25	31.25	23.65	26.25

† Indicates change effective September 1, 1939.

10484 4. Minimum Prices in Markets Adjacent to Cities.

Minimum prices of patented metallized gypsum board for delivery in the following markets adjacent to the following cities shall be:

Delivered Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, and Bridgetown, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, Ohio	Cleveland, Ohio
Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City, Kansas	[illegible]nsas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline an Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

†5. Pick-up Prices at Mills or Warehouses.

Minimum prices of patented metallized gypsum board per M sq. ft. f.o.b. trucks at mills and warehouses are as follows:

Mills and Warehouses	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Shenthing	3/8" Metallized Gypsum Plaster Lath	1/2" Metallized Gypsum Plaster Lath
Texas Mills	$28.00	$33.00	$34.00	$30.00	$23.00	$25.00
Fort Dodge, Iowa Mills	28.00	33.00	34.00	30.00	23.00	25.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00	25.00
Port Clinton, Ohio	28.00	33.00	34.00	30.00	23.00	25.00
Metro N.Y.-N.J. Whses.	27.80	33.10	34.50	30.50	23.10	25.50

† Indicates change.

10485 4. Minimum Prices in Markets Adjacent to Cities.

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Delivered Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot and Bridgetown, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, Ohio	Cleveland, Ohio
Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

5. Pick-up Prices at Mills or Warehouses.

Minimum prices of patented metallized gypsum board per M sq. ft. f.o.b. trucks at mills and warehouses are as follows:

Mills and Warehouses	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Plaster Lath	1/2" Metallized Gypsum Plaster Lath
Texas Mills	$28.00	$33.00	$34.00	$30.00	$23.00	$25.00
Boston, Mass.	27.80	33.10	34.50	30.50	23.10	25.50
Fort Dodge, Iowa Mills	28.00	33.00	34.00	30.00	23.00	25.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00	25.00
Port Clinton, Ohio	28.00	33.00	34.00	30.00	23.00	25.00
Portsmouth, N. H.	28.05	33.50	35.00	31.00	23.50	26.00
Metro N.Y. N.J. Whses.	27.80	33.10	34.50	30.50	23.10	25.50

10486 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 10, 1939.

Metallized Board License Bulletin (Page 1)
Cancels All Previous Bulletins

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective June 14, 1939, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed, are as follows:

Minimum prices per M sq. ft. of patented metallized gypsum board products shall be the mill price listed below plus carload rail freight from producing mill to destination of the shipment. Carload rail freight may be equalized with the carload rail freight from any of the gypsum board producing mills listed below having a lower carload rail freight to such destination.

GYPSUM BOARD PRODUCING MILLS	MILL PRICE PER M SQ. FT.					
	1/4" Metallized Gypsum Wallboard (Wt. 1075# Per M)	3/8" Metallized Gypsum Wallboard (Wt. 1525# per M)	1/2" Metallized Gypsum Wallboard (Wt. 2050# per M)	1/2" Metallized Gypsum Sheathing (Wt. 2050# per M)	3/8" Metallized Gypsum Plaster Lath (Wt. 1525# per M)	1/2" Metallized Gypsum Plaster Lath (Wt. 2050# per M)
Acme, Texas Akron, N. Y. Boston, Mass. Clarence Center, New York Delawanna, N. J. Detroit, Mich. East Chicago, Ind. Fort Dodge, Iowa Grand Rapids, Michigan Gypsum, Ohio Jacksonville, Florida National City, Michigan New Brighton, S. I., N. Y. Oakfield, New York Philadelphia, Pa. Plasterco, Va. Portsmouth, N. H. Rotan, Texas Savannah, Ga. Southard, Okla. Sweetwater, Texas Wheatland, N. Y.	$27.00	$32.00	$33.00	$29.00	$22.00	$24.00

10487 In computing the delivered minimum price hereunder, rail freight wherever mentioned in this bulletin, shall mean rail freight in accordance with rail rates published in regular freight tariffs, using the weights shown above, and shall include all stopover, switching, cartage and other extra delivery charges applicable to the shipment.

If the applicable rail rate, to be used in computing the delivered minimum price, is on a per ton basis, then the rate per CWT shall first be determined, and fractions of less than 1/4¢ per CWT over or under an even 1¢ or 1/2¢ shall be dropped and the even 1¢ or 1/2¢ shall be used, and fractions of 1/4¢ or more over an even 1¢ or 1/2¢ shall be considered as the next even 1/2¢ or 1¢. Example: the rate of $3.55 per ton equaling 17-3/4¢ per CWT shall be considered 18¢ per CWT. In converting the applicable per CWT rate into freight per M sq. ft. to determine the minimum price hereunder, fractions of less than 1/2¢ per M sq. ft. shall be dropped and the nearest even 1¢ shall be used, and fractions of 1/2¢ or more per M sq. ft. shall be considered the next even 1¢.

The above prices apply to all sales of patented metallized gypsum board except as follows:

1. Pacific Coast. Until further notice the above minimum prices shall not apply to sales of patented gypsum board for shipment to or delivery in the following area: states of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington; also that portion of the state of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

2. Stopover Cars. The minimum price for each portion of a stopover car consigned to a different destination shall be the mill price plus the carload rail freight from the producing mill, provided that carload freight may be equalized with the carload freight from any of the gypsum board producing mills listed above having a lower carload rail freight to the destination of that portion of the car, except that stopover charges need not be added to determine minimum price on shipments to destinations in which deliveries are made by truck.

3. Delivered Price Areas. Minimum prices of patented metallized gypsum board products per M sq. ft. for delivery within the areas listed below are the prices set forth below plus any stopover charges (except that stopover charges need not be added to determine the minimum price on shipments to destinations in which deliveries are made by truck).

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	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath	1/2" Metallized Gypsum Lath
(a) Into Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass., north of continuation of Southern boundary of Norfolk County, and town of Mansfield, Mass., also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J., west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also that portion of Bucks County, Penna. south and east of line drawn between and including towns of Lexington and Lumberville; also that portion of Montgomery County, Penna. south and east of line drawn between and including towns of Mont Clare and So. Hatfield; also Delaware and Philadelphia Counties, Penna.:	27.80	33.10	34.50	30.50	23.10	25.50
(b) Into Chester County, Penna.; also that portion of Bucks County, Penna. north and west of line drawn between but not including towns of Lexington and Lumberville; also that portion of Montgomery County, Penna. north and west of line drawn between but not including towns of Mont Clare and So. Hatfield:	27.85	33.20	34.65	30.65	23.20	25.65
(c) Into balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also Rockingham and Strafford Counties, New Hampshire; also State of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May and Cumberland Counties, New Jersey; also that portion of Burlington County, N. J., east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also that portion of New Castle County, Delaware south of line extending through, but not including towns of New Castle, Tasker, State Road and Audenried; also Cecil County, Maryland; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.; also town of Milford (in Pike County), Penna.:	28.05	33.50	35.00	31.00	23.50	26.00
(d) Into Westchester, Rockland and Suffolk Counties, New York; Gloucester and Salem Counties, New Jersey; also that portion of New Castle County, Delaware north of line extending through and including towns of New Castle, Tasker, State Road and Audenried:	27.90	33.30	34.75	30.75	23.30	25.75
(e) Into State of Connecticut (except Fairfield and Litchfield Counties):	28.20	33.65	35.25	31.25	23.65	26.25

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	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath	1/2" Metallized Gypsum Lath
(f) Into Sullivan, Ulster and Dutchess Counties, New York, and Litchfield County, Connecticut; also towns of Stroudsburg and East Stroudsburg (in Monroe County), Penna.:	28.30	33.85	35.50	31.50	23.85	26.50
(g) Into Delaware, Green and Columbia Counties, New York:	28.60	34.20	36.00	32.00	24.20	27.00
(h) Into Niagara and Erie Counties, New York (including town of Gowanda):	27.75	33.05	34.40	30.40	23.05	25.40
(i) Into Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest in Lake County, Illinois:	27.40	32.55	33.75	29.75	22.55	24.75
(j) Into McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	27.55	32.75	34.00	30.00	22.75	25.00
(k) Into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	27.80	33.10	34.50	30.50	23.10	25.50
(l) Into Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	28.00	33.00	34.00	30.00	23.00	25.00
(m) Into Jacksonville and So. Jacksonville, Fla. Switching Area, where per car switching rates apply (as described in published railroad tariffs):	28.25	33.25	34.25	30.25	23.25	25.25
(n) Into Savannah and Port Wentworth, Georgia, Switching Limits where per car switching rates apply (as described in published railroad tariffs):	28.25	33.25	34.25	30.25	23.00	25.00

10490 4. Minimum Prices in Markets Adjacent to Cities.

Minimum prices of patented metallized gypsum board for delivery in the following markets adjacent to the following cities shall be:

Delivered Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown, Mount Healthy and North College Hill, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, Ohio	Cleveland, Ohio
Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Shepard and Wilmont, Okla.	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

5. Pick-up Prices at Mills or Warehouses.

Minimum prices of patented metallized gypsum board per M sq. ft. f.o.b. trucks at mills and warehouses are as follows:

Mills and Warehouses	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Plaster Lath	1/2" Metallized Gypsum Plaster Lath
Texas Mills	$28.00	$33.00	$34.00	$30.00	$23.00	$25.00
Boston, Mass.	27.80	33.10	34.50	30.50	23.10	25.50
Fort Dodge, Iowa Mills	28.00	33.00	34.00	30.00	23.00	25.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00	25.00
Port Clinton, Ohio	28.00	33.00	34.00	30.00	23.00	25.00
Portsmouth, N. H.	28.05	33.50	35.00	31.00	23.50	26.00
Metro N.Y.-N.J. Whses.	27.80	33.10	34.50	30.50	23.10	25.50

10491 6. Minimum Prices for Delivery by Truck:

Minimum prices for patented metallized gypsum board per M sq. ft. when delivered by truck (truckloads containing 7500 sq. ft. or more) in the areas named below shall be the same as the prices heretofore named for delivery into such areas:

Eastern Area—which includes the States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware; towns of Stroudsburg and East Stroudsburg in Monroe County, and Town of Milford in Pike County, Pennsylvania.

Western New York Area—which includes Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates, Chemung, Schuyler and Livingston Counties, New York; also Crawford, Erie, McKean and Warren Counties, Pennsylvania.

Detroit Area—which includes Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

7. Minimum Prices to Contractors—Consumers:

On sales to contractors, roofing contractors, metal ceiling contractors, prefabricated house manufacturers and other consumers, the minimum price shall be the minimum price as above established plus the following amounts per M sq. ft.:

To Contractors (Inc. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. and Consumers Generally		To Contractors for Use on Roof Decks	
Std. Sizes		Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

10492 8. Standard Size Products:

The minimum prices hereinabove established apply to sales of patented metallized gypsum board in sizes suitable for use in construction and regularly manufactured and offered for sale for use in construction, which products are commonly known in the trade as standard size products and are as follows:

Thickness & Width	*Lengths*
(1) Square Edge Metallized Wallboard	
1/4″x32″ or 48″	4′-5′-6′-7′-8′-9′-10′-11′ and 12′
3/8″x32″ or 48″	4′-5′-6′-7′-8′-9′-10′-11′ and 12′
1/2″x32″ or 48″	4′-5′-6′-7′-8′-9′-10′-11′ and 12′
(2) T&G Edge Metallized Wallboard	
1/2″x48″	8′-9″ and 10′
(3) T&G Edge Metallized Sheathing	
1/2″x24″	6′-8″ and 8′
(4) Metallized Plaster Lath	
3/8″x16″	32″ and 48″
1/2″x16″	48″

9. Non-Standard Size Products.

For sales of non-standard size products, minimum prices per M sq. ft. shall be the minimum price above established plus the following amounts per M sq. ft. (except that such amounts need not be added on sales of non-standard sizes to contractors for use on roof decks):

Wall Bd. & Sheathing	Lath
2.50	1.25

Effective Date of Minimum Prices:

Advances in Minimum Prices

In the event of an increase in the minimum prices of patented metallized gypsum board products, the advanced minimum price shall apply to all shipments made after the effective date of the price increase, except that the price in effect just prior to the advance in minimum price shall apply in the following instances.

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

10493 (2) On sales of metallized gypsum plaster lath to dealers for any specific job requiring not less than the minimum carload quantity of plaster lath (each building of a project to be considered as a separate specific job hereunder); and

On sales of metallized gypsum wallboard to gypsum roofing contractors for specific gypsum roof jobs; and

On sales of metallized gypsum wallboard and metallized gypsum sheathing to dealers for specific industrial housing projects; and

On sales of metallized gypsum wallboard and metallized gypsum sheathing on direct bids to the federal government for specific federal government jobs;*

but only where the general contract for such specific job is awarded prior to the effective date of the price increase, or where the dealer (or contractor on specific roof jobs) has made a written quotation on such job prior to the effective date of the price increase, and providing the order is placed by such dealer or contractor and accepted by the licensee within 30 days on private jobs, and 60 days on federal government jobs, after the effective date of the price increase.

(3) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee, prior to the effective date of price increase.

* Note: A Federal Government job is one where the Federal Government lets the contract to a general contractor or places an order directly with licensee.

Decreases in Minimum Price

In the event of a decrease in the minimum prices of the patented metallized gypsum board products, the new and lower minimum prices are applicable to all sales and shipments made after the effective date of the decrease in minimum price, including all orders for the patented metallized gypsum board products on file at the time of decrease in minimum prices, and also shipments in transit; but licensee must be prepared to furnish licensor with satisfactory evidence of the fact that the shipment was actually in transit and not delivered when the price decrease became effective. Carrier's freight bill will be accepted as evidence of that fact.

Rebates, Allowances, Etc.:

Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indiractly reduces the actual price charged by licensee below such minimum price by granting the customer rebates, unearned or unwarranted refunds, credits or discounts, by reducing the price of other products, by hiring customers' trucks, by
10494 granting allowances for advertising or other purposes, by splitting of salesmen's compensation or commissions with customers, by overshipment of patented products, by including board under the guise of dunnage, or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by licensee below such minimum price.

The minimum prices set forth herein pertain to existing conditions, and, as provided in the license agreement, Licensor has and reserves the right to change and alter such minimum prices from time to time.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10495 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1939

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1 Dated—May 6, 1938

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective February 7, 1939, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed, are as follows:

Minimum prices per thousand square feet of patented metallized gypsum board products for delivery by rail, in straight cars or cars mixed with other gypsum products, including pool cars and stopover cars, shall be the lowest combination of mill price listed below and all rail freight from such mill to destination. Rail freight shall be determined in accordance with rail rates as published in regular freight tariffs, using weights shown below, plus all stopover, switching, cartage and other extra delivery charges in connection with the shipment. In stopover cars, minimum prices of the patented metallized gypsum board products in any portion of the car shall be the minimum prices as herein defined to the point of delivery of that portion of the car.

MILLS	1/4" Metallized Gypsum Wallboard (Wt. 1050 # per M)	3/8" Metallized Gypsum Wallboard (Wt. 1475 # per M)	1/2" Metallized Gypsum Wallboard (Wt. 2000 # per M)	1/2" Metallized Gypsum Sheathing (Wt. 2000 # per M)	3/8" Metallized Gypsum Plaster Lath (Wt. 1475 # per M)	1/2" Metallized Gypsum Plaster Lath (Wt. 2000 # per M)
Acme, Texas Boston, Mass. Detroit, Mich. East Chicago, Ind. Fort Dodge, Iowa Grand Rapids, Mich. Gypsum, Ohio Jacksonville, Fla. National City, Mich. New Brighton, S. I., N. Y. Oakfield, N. Y. Philadelphia, Pa. Plasterco, Va. Southard, Okla. Sweetwater, Texas	27.00	32.00	33.00	29.00	22.00	24.00

10496 The above minimum prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. to minimum prices both surfaces metallized.

Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on the basis of rate per cwt., fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt.

to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

The above prices apply to the sale of all patented metallized gypsum board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Pacific Coast—Until further notice, minimum prices as above defined shall not apply to sales of the patented metallized gypsum board products for shipments to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington; also that portion of the State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) Minimum Prices into Delivered Price Areas

Minimum prices of the patented metallized gypsum board products in straight cars or cars mixed with other gypsum products, including pool cars and stopover cars, for delivery by rail within areas listed below, are the prices set forth below plus any stopover charges (except that stopover charges need not be added to determine the minimum price on shipments to destinations in delivered price areas wherein the minimum price delivered by truck is the same as the minimum price for delivery by rail):

	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath	1/2" Metallized Gypsum Lath
(a) Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, N. Y.; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:	27.80	33.10	34.50	30.50	23.10	25.50

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	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath	1/2" Metallized Gypsum Lath
(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also Rockingham and Strafford Counties, New Hampshire; also State of Rhode Island; also Fairfield County, Conn.; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:	28.05	33.50	35.00	31.00	23.50	26.00
(c) Westchester, Rockland and Suffolk Counties, New York:	27.90	33.30	34.75	30.75	23.30	25.75
(d) State of Connecticut (except Fairfield and Litchfield Counties):	28.20	33.65	35.25	31.25	23.65	26.25
(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:	28.30	33.85	35.50	31.50	23.85	26.50
(f) Delaware, Greene and Columbia Counties, New York:	28.60	34.20	36.00	32.00	24.20	27.00
(g) Niagara and Erie Counties, New York (including town of Gowanda:	27.75	33.05	34.40	30.40	23.05	25.40
(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest in Lake County, Illinois:	27.40	32.55	33.75	29.75	22.55	24.75
(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	27.55	32.75	34.00	30.00	22.75	25.00
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	27.80	33.10	34.50	30.50	23.10	25.50
(k) Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	28.00	33.00	34.00	30.00	23.00	25.00
†(l) Into Jacksonville and So. Jacksonville, Fla., Switching Area where per car switching rates apply (as described in published railroad tariffs):	28.25	33.25	34.25	30.25	23.25	25.25

10498 (3) Minimum prices delivered in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, **Maryland**	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown, Mount Healthy and North College Hill, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, O.	Cleveland, Ohio
Dodson, Edgecomb, Waldo and Westport, Mo.; Argentine, Rosedale, Overland Park, Merriam and Kansas City, Kans.	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

(4) Minimum Prices to Contractors—Consumers

On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors, prefabricated house manufacturers and consumers generally, the minimum price shall be the minimum price as above established plus the following amounts per M sq. ft.:

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. and Consumers Generally Std. Sizes		To Contractors for Use on Roof Decks Std. Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	1.25	1.25

10499 (5) Minimum prices for non-standard or odd sizes

On sales of non-standard or odd sizes, the minimum price shall be the minimum price as above established plus the following amounts per M sq. ft.:

To Dealers		To Contractors (Inc. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. and Consumers Generally		To Contractors for Use on Roof Decks	
Odd Sizes		Odd Sizes		Odd Sizes	
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath & Liner
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President

10500 (3) Delivered Price Areas: (Cont'd.)

Del'd Prices Into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath	1/2" Metallized Gypsum Lath
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	27.80	33.10	34.50	30.50	23.10	25.50
(k) Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	28.00	33.00	34.00	30.00	23.00	25.00

†(4) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown, Mount Healthy and North College Hill, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, O.	Cleveland, Ohio
†Dodson, Edgecomb, Waldo and Westport, Mo.; Argentine, Rosedale, Overland Park, Merriam and Kansas City, Kans.	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Rosslyn and Lacy, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

† Indicates change in this reissue.

10501 (3) Delivered Price Areas: (Cont'd.)

dealers warehouse or siding within areas listed below are as follows:

Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath	1/2" Metallized Gypsum Lath
(a) Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, N. Y.; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:	27.80	33.10	34.50	30.50	23.10	25.50
†(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also Rockingham and Strafford Counties, New Hampshire; also State of Rhode Island; also Fairfield County, Conn.; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:	28.05	33.50	35.00	31.00	23.50	26.00
(c) Westchester, Rockland and Suffolk Counties, New York:	27.90	33.30	34.75	30.75	23.30	25.75
(d) State of Connecticut (except Fairfield and Litchfield Counties):	28.20	33.65	35.25	31.25	23.65	26.25
(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:	28.30	33.85	35.50	31.50	23.85	26.50
(f) Delaware, Greene and Columbia Counties, New York:	28.60	34.20	36.00	32.00	24.20	27.00
(g) Niagara and Erie Counties, New York (including town of Gowanda):	27.75	33.05	34.40	30.40	23.05	25.40
(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest in Lake County, Illinois:	27.40	32.55	33.75	29.75	22.55	24.75
(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	27.55	32.75	34.00	30.00	22.75	25.00

† Indicates change this reissue, to become effective June 1, 1938.

10502

Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath	1/2" Metallized Gypsum Lath
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	27.80	33.10	34.50	30.50	23.10	25.50
(k) Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	23.00	33.00	34.00	30.00	23.00	25.00

†(4) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
†Cheviot, Bridgetown, Mount Healthy and North College Hill, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, O.	Cleveland, Ohio
Dodson and Edgecomb, Mo., Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Rosslyn and Lacey, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline & Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

† Indicates change in this reissue, to become effective June 1, 1938.

10503 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 6, 1938

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1—Dated April 1, 1938 (Confirms and supersedes telegram date May 5, 1938).

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs apply with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4). See Note (a).	¼" Metallized Gypsum Wallboard. Weight—1050 # per M	⅜" Metallized Gypsum Wallboard. Weight—1475 # per M	½" Metallized Gypsum Wallboard. Weight—2000 # per M	½" Metallized Gypsum Sheathing. Weight—2000 # per M	⅜" Metallized Gypsum Plaster Lath. Weight—1475 # per M	½" Metallized Gypsum Plaster Lath. Weight—2000 # per M †
Acme, Texas	$27.00	$32.00	$33.00	$29.00	$22.00	$24.00†
Boston, Mass.	27.00	32.00	33.00	29.00	22.00	24.00†
Detroit, Mich.	27.00	32.00	33.00	29.00	22.00	24.00†
East Chicago, Ind.	27.00	32.00	33.00	29.00	22.00	24.00†
Fort Dodge, Iowa	27.00	32.00	33.00	29.00	22.00	24.00†
Grand Rapids, Mich.	27.00	32.00	33.00	29.00	22.00	24.00†
Gypsum, Ohio	27.00	32.00	33.00	29.00	22.00	24.00†
Heath, Montana	32.78	40.11	44.00	40.00	30.11	35.00†
National City, Mich.	27.00	32.00	33.00	29.00	22.00	24.00†
New Brighton, S. I., N. Y.	27.00	32.00	33.00	29.00	22.00	24.00†
Oakfield, N. Y.	27.00	32.00	33.00	29.00	22.00	24.00†
*Philadelphia, Pa.	*27.00	*32.00	*33.00	*29.00	*22.00	*24.00†
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00	24.00†
Southard, Okla.	27.00	32.00	33.00	29.00	22.00	24.00†
Sweetwater, Texas	27.00	32.00	33.00	29.00	22.00	24.00†

† Indicates change in this reissue.

10504 (3) Delivered Price Areas: (Cont'd.)

dealers warehouse or siding within areas listed below are as follows:

Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath	1/2" Metallized Gypsum Lath†
(a) Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, N. Y.; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:						
†	27.80	33.10	34.50	30.50	23.10	25.50†
(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also State of Rhode Island; also Fairfield County, Conn.; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:						
†	28.05	33.50	35.00	31.00	23.50	26.00†
(c) Westchester, Rockland and Suffolk Counties, New York:						
†	27.90	33.30	34.75	30.75	23.30	25.75†
(d) State of Connecticut (except Fairfield and Litchfield Counties):						
†	28.20	33.65	35.25	31.25	23.65	26.25†
(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:						
†	28.30	33.85	35.50	31.50	23.85	26.50†
(f) Delaware, Greene and Columbia Counties, New York:						
†	28.60	34.20	36.00	32.00	24.20	27.00†
(g) Niagara and Erie Counties, New York (including town of Gowanda):						
†	27.75	33.05	34.40	30.40	23.05	25.40†
(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest in Lake County, Illinois:						
†	27.40	32.55	33.75	29.75	22.55	24.75†
(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):						
†	27.55	32.75	34.00	30.00	22.75	25.00†

† Indicates change in this reissue.

10505 (3) Delivered Price Areas: (Cont'd.)

Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath	1/2" Metallized Gypsum Lath†
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:						
†	27.80	33.10	34.50	30.50	23.10	25.50†
(k) Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):						
†	28.00	33.00	34.00	30.00	23.00	25.00†

(4) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown and North College Hill, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, O.	Cleveland, Ohio
Dodson and Edgecomb, Mo., Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Rosslyn and Lacey, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

† Indicates change in this reisaue.

10506 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 1, 1938

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1—Dated December 17, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective April 5, 1938, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs apply with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4). See Note (a).	¼" Metallized Gypsum Wallbd. Weight—1050 # per M	⅜" Metallized Gypsum Wallbd. Weight—1475 # per M	½" Metallized Gypsum Wallbd. Weight—2000 # per M	½" Metallized Gypsum Sheathing. Weight—2000 # per M	⅜" Metallized Gypsum Plaster Lath. Weight—1475 # per M
Acme, Texas	$27.00	$32.00	$33.00	$29.00	$22.00
Boston, Mass.	27.00	32.00	33.00	29.00	22.00
Detroit, Mich.	27.00	32.00	33.00	29.00	22.00
East Chicago, Ind.	27.00	32.00	33.00	29.00	22.00
Fort Dodge, Iowa	27.00	32.00	33.00	29.00	22.00
Grand Rapids, Mich.	27.00	32.00	33.00	29.00	22.00
Gypsum, Ohio	27.00	32.00	33.00	29.00	22.00
†Heath, Montana	32.78†	40.11†	44.00†	40.00†	30.11†
National City, Mich.	27.00	32.00	33.00	29.00	22.00
New Brighton, S. I., N. Y.	27.00	32.00	33.00	29.00	22.00
Oakfield, N. Y.	27.00	32.00	33.00	29.00	22.00
*Philadelphia, Pa.	*27.00	*32.00	*33.00	*29.00	*22.00
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	27.00	32.00	33.00	29.00	22.00
Sweetwater, Texas	27.00	32.00	33.00	29.00	22.00

(Reference notes on following page)

10507 Stopover, switching and other extra delivery charges:

All stopover charges, switching charges and other extra delivery charges, will be paid by customers: that is to say, in arriving at the minimum price all such charges must be added. Exception: Stop-over charges need not be included on shipments to destinations within any Gypsum Board Del'd Price Area, wherein minimum prices of patented gypsum board products delivered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented metallized gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

†(2) 3/8" Metallized Plaster Lath Exceptions:

The minimum price of 3/8" patented metallized gypsum plaster lath, in straight and pool carloads, or in mixed carloads with other gypsum products is $31.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(Reference notes from preceding page)

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(#) Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

(*) Prices f.o.b. cars Philadelphia, Pa. apply for shipments into following area only: States of New York, New Jersey, Maryland, Delaware and Virginia; the District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

† Indicates change in this reissue (effective April 5, 1938).

(3) Delivered Price Areas:

Prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products f.o.b. cars delivered to

10508 Stopover, switching and other extra delivery charges:

All stopover charges, switching charges and other extra delivery charges, will be paid by customers; that is to say, in arriving at the minimum price all such charges must be added. Exception: Stop-over charges need not be included on shipments to destinations within any Gypsum Board Del'd Price Area, wherein minimum prices of patented gypsum board products delivered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented metallized gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(#) Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17 1/4¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17 1/2¢ shall be used.

(*) Prices f.o.b. cars Philadelphia, Pa. apply for shipments into following area only: States of New York, New Jersey, Maryland, Delaware and Virginia; the District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

†(2) 3/8" Metallized Plaster Lath Exceptions:

The minimum price of 3/8" patented metallized gypsum plaster lath, in straight and pool carloads, or in mixed carloads with other gypsum products is $30.41 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(3) Delivered Price Areas:

Prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to

† Indicates change.

10509 (3) Delivered Price Areas (Cont'd.)

Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	27.80	33.10	34.50	30.50	23.10
(k) Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	28.00	33.00	34.00	30.00	23.00

†Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College ~~Park~~, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown and North College Hill, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, O.	Cleveland, Ohio
Dodson and Edgecomb, Mo., Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma.	Oklahoma City, Okla.
†Rosslyn and Lacey, Virginia, and Montgomery County, Md.	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
Boardman, Ohio	Youngstown, Ohio

† Indicates change in this reissue, to become effective January 15, 1938.

10509A Stopover, switching and other extra delivery charges:

All stopover charges, switching charges and other extra delivery charges, will be paid by customers; that is to say, in arriving at the minimum price all such charges must be added. Exception: Stop-over charges need not be included on shipments to destinations within any Gypsum Board Del'd Price Area, wherein minimum prices of patent-

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(#) Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

(*) Prices f.o.b. cars Philadelphia, Pa. apply for shipments into following area only: States of New York, New Jersey, Maryland, Delaware and Virginia; the District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juanita, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

ed gypsum board products delivered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented metallized gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 3/8" Metallized Plaster Lath Exceptions:

(a) Cancelled, effective January 10, 1938.

(3) Delivered Price Areas:

Prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to

10510 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 17, 1937

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1—Dated October 21, 1937

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective December 20, 1937, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs apply with exceptions as provided for in this bulletin. To determine board, footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4). See Note (a).	¼" Metallized Gypsum Wallbd. Weight—1050# per M	⅜" Metallized Gypsum Wallbd. Weight—1475# per M	½" Metallized Gypsum Wallbd. Weight—2000# per M	½" Metallized Gypsum Sheathing. Weight—2000# per M	⅜" Metallized Gypsum Plaster Lath. Weight—1475# per M
Acme, Texas	$27.00	$32.00	$33.00	$29.00	$22.00
Boston, Mass.	27.00	32.00	33.00	29.00	22.00
Detroit, Mich.	27.00	32.00	33.00	29.00	22.00
East Chicago, Ind.	27.00	32.00	33.00	29.00	22.00
Fort Dodge, Iowa	27.00	32.00	33.00	29.00	22.00
Grand Rapids, Mich.	27.00	32.00	33.00	29.00	22.00
Gypsum, Ohio	27.00	32.00	33.00	29.00	22.00
Heath, Montana	32.50†	39.70†	43.40†	39.40†	29.70†
National City, Mich.	27.00	32.00	33.00	29.00	22.00
New Brighton, S. I., N. Y.	27.00	32.00	33.00	29.00	22.00
Oakfield, N. Y.	27.00	32.00	33.00	29.00	22.00
*Philadelphia, Pa.	*27.00	*32.00	*33.00	*29.00	*22.00
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	27.00	32.00	33.00	29.00	22.00
Sweetwater, Texas	27.00	32.00	33.00	29.00	22.00

(Reference notes on following page)

10511 Stopover, switching and other extra delivery charges:

All stopover charges, switching charges and other extra delivery charges, will be paid by customers; that is to say, in arriving at the minimum price all such charges must be added. Exception: Stop-over charges need not be included on shipments to destinations within any Gypsum Board Del'd Price Area, wherein minimum prices of patented gypsum board products delivered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented metallized gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

†(2) 3/8" Metallized Plaster Lath Exceptions:

(a) The minimum price of 3/8" patented metallized gypsum plaster lath, in straight and pool carloads, or in mixed carloads with other gypsum †products is $29.16 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(3) Delivered Price Areas:

Prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to

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(Reference notes from preceding page)

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(#) Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17 1/4¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17 1/2¢ shall be used.

(*) Prices f.o.b. cars Philadelphia, Pa. apply for shipments into following area only: States of New York, New Jersey, Maryland, Delaware and Virginia; the District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juanita, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:	27.80	33.10	34.50	30.50	23.10
(k) Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	28.00	33.00	34.00	30.00	23.00

†(4) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indictaed below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown and North College Hill, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, O.	Cleveland, Ohio
Dodson and Edgecomb, Mo., Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Rosslyn and Lacey, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.
†Boardman, Ohio	Youngstown, Ohio

10512 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 21, 1937.

Carload Shipments—Metallized Board License Bulletin No. 1 (Pg. 1)—Cancels Page 1—Dated July 13, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective November 1, 1937, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs apply with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4). See Note (a).	½" Metallized Gypsum Wallbd. Weight—1050 # per M †	⅜" Metallized Gypsum Wallbd. Weight—1475 # per M †	½" Metallized Gypsum Wallbd. Weight—2000 # per M †	½" Metallized Gypsum Sheathing. Weight—2000 # per M †	⅜" Metallized Gypsum Plaster Lath. Weight—1475 # per M †
Acme, Texas	$27.00	$32.00	$33.00	$29.00	$22.00
Boston, Mass.	27.00	32.00	33.00	29.00	22.00
Detroit, Mich.	27.00	32.00	33.00	29.00	22.00
East Chicago, Ind.	27.00	32.00	33.00	29.00	22.00
Fort Dodge, Iowa	27.00	32.00	33.00	29.00	22.00
Grand Rapids, Mich.	27.00	32.00	33.00	29.00	22.00
Gypsum, Ohio	27.00	32.00	33.00	29.00	22.00
†Heath, Montana	32.25†	39.40†	43.00†	39.00†	29.40†
National City, Mich.	27.00	32.00	33.00	29.00	22.00
New Brighton, S. I., N. Y.	27.00	32.00	33.00	29.00	22.00
Oakfield, N. Y.	27.00	32.00	33.00	29.00	22.00
*Philadelphia, Pa.	*27.00	*32.00	*33.00	*29.00	*22.00
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	27.00	32.00	33.00	29.00	22.00
Sweetwater, Texas	27.00	32.00	33.00	29.00	22.00

† Note changes in weights.

(Reference notes on following page)

10513 †Stopover, switching and other extra delivery charges:

All stopover charges, switching charges and other extra delivery charges, will be paid by customers; that is to say, in arriving at the minimum price all such charges must be added. Exception: Stop-over charges need not be included on shipments to destinations within any Gypsum Board Del'd Price Area, wherein minimum prices of patented gypsum board products delivered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented metallized gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 3/8" Metallized Plaster Lath. Exceptions:

†(a) The minimum price of 3/8" patented metallized gypsum plaster lath, in straight and pool carloads, or in mixed carloads with other gypsum products is $28.80 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(3) Delivered Price Areas:

Prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers

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(Reference notes from preceding page)

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(#) Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17 1/4¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17 1/2¢ shall be used.

(*) Prices f.o.b. cars Philadelphia, Pa. apply for shipments into following area only: States of New York, New Jersey, Maryland, Delaware and Virginia; the District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juanita, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

10514 warehouse or siding within areas listed below are as follows:

Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
(a) Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, N. Y.; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:					
†	27.80†	33.10†	34.50†	30.50†	23.10†
(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also State of Rhode Island; also Fairfield County, Conn.; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:					
†	28.05†	33.50†	35.00†	31.00†	23.50†
(c) Westchester, Rockland and Suffolk Counties, New York:					
†	27.90†	33.30†	34.75†	30.75†	23.30†
(d) State of Connecticut (except Fairfield and Litchfield Counties):					
†	28.20†	33.65†	35.25†	31.25†	23.65†
(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:					
†	28.30†	33.85†	35.50†	31.50†	23.85†
(f) Delaware, Greene and Columbia Counties, New York:					
†	28.60†	34.20†	36.00†	32.00†	24.20†
(g) Niagara and Erie Counties, New York (including town of Gowanda):					
†	27.75†	33.05†	34.40†	30.40†	23.05†
(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest in Lake County, Illinois:					
†	27.40†	32.55†	33.75†	29.75†	22.55†
(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):					
†	27.55†	32.75†	34.00†	30.00†	22.75†

10515 Del'd Prices Into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan:					
†	27.80†	33.10†	34.50†	30.50†	23.10†
(k) Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):					
	28.00	33.00	34.00	30.00	23.00

(4) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, Glen Burnie, Catonsville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, Bridgetown and North College Hill, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, O.	Cleveland, Ohio.
Dodson and Edgecomb, Mo., Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Rosslyn and Lacey, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.

Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as

follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this issue.

10516 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 13, 1937.

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1—Dated June 12, 1937.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 16, 1937, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs apply with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4). See Note (a).	¼" Metallized Gypsum Wallbd. Weight—950# per M	⅜" Metallized Gypsum Wallbd. Weight—1400# per M	½" Metallized Gypsum Wallbd. Weight—1900# per M	½" Metallized Gypsum Sheathing. Weight—1900# per M	⅝" Metallized Gypsum Plaster Lath. Weight—1400# per M
Acme, Texas	$27.00	$32.00	$33.00	$29.00	$22.00
Boston, Mass.	27.00	32.00	33.00	29.00	22.00
Detroit, Mich.	27.00	32.00	33.00	29.00	22.00
East Chicago, Ind.	27.00	32.00	33.00	29.00	22.00
Fort Dodge, Iowa	27.00	32.00	33.00	29.00	22.00
Grand Rapids, Mich.	27.00	32.00	33.00	29.00	22.00
Gypsum, Ohio	27.00	32.00	33.00	29.00	22.00
Heath, Montana	31.75†	39.00†	42.50†	38.50†	29.00†
National City, Mich.	27.00	32.00	33.00	29.00	22.00
New Brighton, S. I., N. Y.	27.00	32.00	33.00	29.00	22.00
Oakfield, N. Y.	27.00	32.00	33.00	29.00	22.00
*Philadelphia, Pa.	*27.00	*32.00	*33.00	*29.00	*22.00
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	27.00	32.00	33.00	29.00	22.00
Sweetwater, Texas	27.00	32.00	33.00	29.00	22.00

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 12, 1937

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1—Dated February 24, 1937.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective June 17, 1937, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs apply with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

†Dealer Prices Per M sq. ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4). See Note (a).	⅜" Metallized Gypsum Wallbd. Weight—950 # per M	½" Metallized Gypsum Wallbd. Weight—1400 # per M	½" Metallized Gypsum Wallbd. Weight—1900 # per M	½" Metallized Gypsum Sheathing. Weight—1900 # per M	⅜" Metallized Gypsum Plaster Lath, Weight—1400 # per M
Acme, Texas	$27.00	$32.00	$33.00	$29.00	$22.00
Boston, Mass.	27.00	32.00	33.00	29.00	22.00
Detroit, Mich.	27.00	32.00	33.00	29.00	22.00
East Chicago, Ind.	27.00	32.00	33.00	29.00	22.00
†Fort Dodge, Iowa	27.00	32.00	33.00	29.00	22.00†
Grand Rapids, Mich.	27.00	32.00	33.00	29.00	22.00
Gypsum, Ohio	27.00	32.00	33.00	29.00	22.00
†Heath, Montana	32.00	39.50	43.00	39.00	29.50†
†National City, Mich.	27.00	32.00	33.00	29.00	22.00
New Brighton, S. I., N. Y.	27.00	32.00	33.00	29.00	22.00
Oakfield, N. Y.	27.00	32.00	33.00	29.00	22.00
*Philadelphia, Pa.	*27.00	*32.00	*33.00	*29.00	*22.00
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	27.00	32.00	33.00	29.00	22.00
Sweetwater, Tex.	27.00	32.00	33.00	29.00	22.00

(Reference notes on following page)

10517 Stopover, switching and other extra delivery charges:

All stopover charges, switching charges and other extra delivery charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stop-over charges need not be included on shipments to destinations within any Gypsum Board Del'd Price Area, wherein minimum prices of patented gypsum board products delivered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented metallized gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(Reference notes from preceding page)

†(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(#) Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

†(*) Prices f.o.b. cars Philadelphia, Pa. apply for shipments into following area only: States of New York, New Jersey, Maryland, Delaware and Virginia; the District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

(2) 3/8" Metallized Plaster Lath Exceptions:

(a) The minimum price of 3/8" patented metallized gypsum plaster lath, in straight and pool carloads, or in mixed carloads with other gypsum products is $28.45 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(3) Delivered Price Areas:

Prices of patented metallized gypsum board prod-
10518 ucts, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
(a) Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, N. Y.; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:	27.70	33.00	34.45	30.45	23.00
(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also State of Rhode Island; also Fairfield County, Conn.; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:	27.95	33.40	34.90	30.90	23.40
(c) Westchester, Rockland and Suffolk Counties, New York:	27.85	33.25	34.65	30.65	23.25
(d) State of Connecticut (except Fairfield and Litchfield Counties):	28.05	33.60	35.15	31.15	23.60
(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:	28.20	33.75	35.40	31.40	23.75
(f) Delaware, Greene and Columbia Counties, New York:	28.45	34.10	35.85	31.85	24.10
(g) Niagara and Erie Counties, New York (including town of Gowanda):	27.70	33.00	34.35	30.35	23.00
(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest in Lake County, Illinois:	27.35	32.50	33.70	29.70	22.50
(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	27.50	32.70	33.95	29.95	22.70

10519 Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb County, Michigan:	27.70	33.00	34.45	30.45	23.00
(k) Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	28.00	33.00	34.00	30.00	23.00

†(4) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
†Elkridge, Glen Burnie, Catsonville, Riderwood and Towson, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
†Cheviot, Bridgetown and North College Hill, Ohio	Cincinnati, Ohio
Euclid, North Randall and Bedford, O.	Cleveland, Ohio
Dodson and Edgecomb, Mo., Randalé, Waldo, Argentine, Westport, Overland Park and Kans. City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
†Rosslyn and Lacey, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa.
Virginia Beach, Virginia	Norfolk, Va.

10520 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only).

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.		To Roofing Contractors	
Std. Sizes		Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.		To Roofing Contractors	
Odd Sizes		Odd Sizes		Odd Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10521. (3) Delivered Price Areas (Cont'd)

Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also State of Rhode Island; also Fairfield County, Conn.; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancaster Counties, Penna.:	27.95	33.40	34.90	30.90	23.40
(c) Westchester, Rockland and Suffolk Counties, New York:	27.85	33.25	34.65	30.65	23.25
(d) State of Connecticut (except Fairfield and Litchfield Counties):	28.05	33.60	35.15	31.15	23.60
(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:	28.20	33.75	35.40	31.40	23.75
(f) Delaware, Greene and Columbia Counties, New York:	28.45	34.10	35.85	31.85	24.10
(g) Niagara and Erie Counties, New York (including town of Gowanda):	27.70	33.00	34.35	30.35	23.00
†(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest in Lake County, Illinois:	27.35	32.50	33.70	29.70	22.50
†(i). McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Park, Blodgett, Briergate and Lake Forest):	27.50	32.70	33.95	29.95	22.70

10522 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1937.

Carload Shipments—Metallized Board License Bulletin No. 1 (Pg. 1)—Cancels Bulletin No. 1 Dated December 29, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 1, 1937, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

†Patented metallized gypsum board products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. Rates as shown in published freight tariffs apply with exceptions as provided for in this bulletin. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4)	⅜" Metallized Gypsum Wallboard — Weight 950 # per M	⅜" Metallized Gypsum Wallboard — Weight 1400 # per M	½" Metallized Gypsum Wallboard — Weight 1900 # per M	½" Metallized Gypsum Sheathing — Weight 1900 # per M	⅜" Metallized Gypsum Plaster Lath — Weight 1400 # per M
Acme, Texas	$27.00	$32.00	$33.00	$29.00	(See Note 'a')
†*Boston, Mass.	*27.00	*32.00	*33.00	*29.00	
Detroit, Mich.	27.00	32.00	33.00	29.00	
East Chicago, Ind.	27.00	32.00	33.00	29.00	
Fort Dodge, Iowa	27.00	32.00	33.00	29.00	
Grand Rapids, Mich.	27.00	32.00	33.00	29.00	
Gypsum, Ohio	27.00	32.00	33.00	29.00	
Heath, Montana	32.00	39.50	43.00	39.00	
†*New Brighton, S. I., N. Y.	*27.00	*32.00	*33.00	*29.00	
Oakfield, N. Y.	27.00	32.00	33.00	29.00	
†*Philadelphia, Pa.	*27.00	*32.00	*33.00	*29.00	
Plasterco, Va.	27.00	32.00	33.00	29.00	
Southard, Okla.	27.00	32.00	33.00	29.00	
Sweetwater, Tex.	27.00	32.00	33.00	29.00	

(Reference notes on following page)

10523 †Stopover, switching and other extra delivery charges:

All stopover charges, switching charges and other extra delivery charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stop-charges need not be included on shipments to destinations within
10524 any Gypsum Board Del'd Price Area, wherein minimum prices of patented gypsum board products de-

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(Reference notes from preceding page)

(a) 3/8" Metallized Plaster Lath:

†(1) $22.00 per M sq. ft. f.o.b. Philadelphia, Pa., New Brighton, S. I., N. Y. and Boston, Mass. for shipments into following area only: States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Maryland, Delaware and Virginia; the district of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

†(2) $22.00 per M sq. ft. f.o.b. Oakfield, N. Y., Gypsum, Ohio, Detroit, Mich., East Chicago, Ind., Grand Rapids, Mich., and Plasterco, Va. for shipments into area east of the Mississippi River, also cities of Duluth, Minneapolis, and St. Paul, Minn., and towns below St. Paul on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

(3) $22.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Texas for shipments into States of Kansas, Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana West of the Mississippi River, also into towns of Kansas City, Dodson and Edgecomb, Missouri.

(4) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa, or $32.50 per M sq. ft. f.o.b. Heath, Montana for shipments into area west and north of areas described above.

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(#) Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

†(*) Prices f.o.b. cars Boston, Mass., New Brighton, S. I., N. Y. and Philadelphia, Pa. apply for shipments into following area only: States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Maryland, Delaware and Virginia; the District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

livered by truck are same as minimum prices for deliveries in carloads by rail.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented metallized gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

†(2) 3/8" Metallized Plaster Lath Exceptions:

(a) The minimum price of 3/8" patented metallized gypsum plaster lath, in straight and pool carloads, or in mixed carloads with other gypsum products is $28.45 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

†(3) Delivered Price Areas:

Prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
†(a) Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, N. Y.; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.:	27.70	33.00	34.45	30.45	23.00

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Del'd Prices into:

	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
†(b) Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfiel Worcester and Barnstable Counties, Mass.; also State of Rhode Island; also Fairfi County, Conn.; also Orange and Putnam Counties, New York; also Sussex, Warr Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counti New Jersey; also that portion of Burlington County, N. J. east of line extending fr the southwest corner of Monmouth County to the northeast corner of Camden Count also New Castle County, Delaware; also Lehigh, Northampton, Berks and Lancas Counties, Penna.:	27.95	33.40	34.90	30.90	23.4
†(c) Westchester, Rockland and Suffolk Counties, New York:	27.85	33.25	34.65	30.65	23.2
†(d) State of Connecticut (except Fairfield and Litchfield Counties):	28.05	33.60	35.15	31.15	23.6
†(e) Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Connecticut:	28.20	33.75	35.40	31.40	23.7
†(f) Delaware, Greene and Columbia Counties, New York:	28.45	34.10	35.65	31.85	24.1
†(g) Niagara and Erie Counties, New York (including town of Gowanda):	27.70	33.00	34.35	30.35	23.0
†(h) Cook and Du Page Counties, Illinois; Lake County, Indiana; and towns of Deerfie Highland Park and Lake Forest, Illinois:	27.35	32.50	33.70	29.70	22.5
†(i) McHenry, Kane and Lake Counties, Illinois (except towns of Deerfield, Highland Pa and Lake Forest:	27.50	32.70	33.95	29.95	22.7

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Del'd Prices into:	1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
†(j) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb County, Michigan:	27.70	33.00	34.45	30.45	23.00
†(k) Grand Rapids, Mich. Switching Area (as described in published railroad tariffs):	28.00	33.00	34.00	30.00	23.00

(4) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, and Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.

10527 †Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only).

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
1.25	1.25	2.50	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall. Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath	Wall. Bd. & Sheathing	Lath
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

10528 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 29, 1936.

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1 Dated September 14, 1936. This Reissue Cancels All Supplements to Metallized Board License Bulletin No. 1 Dated September 14, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective January 1, 1937, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

†Patented metallized gypsum wallboard and metallized gypsum plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Metallized Gypsum Wallboard—Weight—950# per M	⅜" Metallized Gypsum Wallboard—Weight—1400 # per M	½" Metallized Gypsum Wallboard—Weight—1900 # per M	½" Metallized Gypsum Sheathing—Weight—1900 # per M	⅜" Metallized Gypsum Plasterboard—Weight—1400 # per M
Acme, Texas	$27.00	$32.00	$33.00	$29.00	
Boston (Charlestown) Mass.	27.00	32.00	33.00	29.00	
Detroit, Mich.	27.00	32.00	33.00	29.00	
East Chicago, Ind.	27.00	32.00	33.00	29.00	
Fort Dodge, Iowa	27.00	32.00	33.00	29.00	
Grand Rapids, Mich.	27.00	32.00	33.00	29.00	
Gypsum, Ohio	27.00	32.00	33.00	29.00	
†Heath, Montana	32.00	39.50	43.00	39.00	
New Brighton, S. I., N. Y.	27.00	32.00	33.00	29.00	
Oakfield, N. Y.	27.00	32.00	33.00	29.00	
Philadelphia, Pa.	27.00	32.00	33.00	29.00	
Plasterco, Va.	27.00	32.00	33.00	29.00	
Southard, Okla.	27.00	32.00	33.00	29.00	
Sweetwater, Tex.	27.00	32.00	33.00	29.00	

(See Note 'a')

(*Reference notes on following page*)

10529 †Stopover, switching and other extra delivery charges:

All stopover charges, switching charges and other extra delivery charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within the following Gypsum Board Del'd Price Areas: Metro New York-New Jersey, Philadelphia, Boston, Southeast New York, Southern New Jersey Areas; Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware; State of Connecticut; Cheshire, Sullivan, Merrimac and Belknap Counties, New Hampshire. (Refer to page 5 for description of areas).

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) Until further notice the above minimum prices shall not apply to sales of patented metallized gypsum wallboard

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(*Reference notes from preceding page*)

(a) 3/8" Metallized Plasterboard:

(1) $22.00 per M sq. ft. f.o.b. Oakfield, N. Y., Philadelphia, Pa., New Brighton, S. I., N. Y., Boston, Mass., Gypsum, Ohio, Detroit, Mich., East Chicago, Ind., Grand Rapids, Mich., and Plasterco, Va. for shipments into area east of the Mississippi River, also cities of Duluth, Minneapolis, and St. Paul, Minn., and towns below St. Paul on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

(2) $22.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Texas for shipments into States of Kansas, Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana West of the Mississippi River, also into towns of Kansas City, Dodson and Edgecomb, Missouri.

†(3) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa, or $32.50 per M sq. ft. f.o.b. Heath, Montana for shipments into area west and north of areas described in paragraphs (1) and (2) above.

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

and metallized gypsum plasterboard products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington, also that portion of State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

10530 (2) 5/16" Metallized Plasterboard. The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following areas only, is as follows:

(a) $19.75 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan or $22.75 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipment into State of Minnesota, also into City of Superior, Wisconsin.

(b) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Cumberland County, Pennsylvania
—Dallas County, Texas (Dallas)
—Dauphin County, Pennsylvania (Harrisburg)
—Franklin County, Massachusetts (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts (Northampton)
—Hanover County, Virginia
—Hartford County, Connecticut (Hartford)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island
—Lancaster County, Pennsylvania (Lancaster)
—Lackawanna County, Pennsylvania (Scranton)
—Luzerne County, Pennsylvania (Wilkes-Barre)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton) See paragraph (4) for minimum quantity required for shipment in pool cars or mixed cars.
—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)

—Tazewell County, Illinois
—Tulsa County, Oklahoma (Tulsa)

also the St. Louis Area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.

(c) $23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in DeKalb and Fulton Counties, Georgia, (Atlanta); Shawnee County, Kansas (Topeka); Sedgewick County, Kansas (Wichita); the following towns of Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri, also towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; also that portion of Kentucky west of and including Marshall and Calloway Counties and that portion of Tennessee west of and including Henry, Benton, Decatur and Hardin Counties.

(d) $25.00 per M sq. ft. f.o.b. (cars delivered to
10531 dealers warehouse or siding in Woodbury County, Iowa (Sioux City); Pottawatomie County, Iowa (Council Bluffs) and Douglas County, Nebraska (Omaha).

(e) $24.50 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Orleans County, Louisiana (New Orleans).

(f) $26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Newton County, Missouri (Joplin)

(g) Minimum price of 5/16" patented metallized gypsum plasterboard is same as minimum price of 3/8" patented metallized gypsum plasterboard f.o.b. cars delivered to dealers warehouse or siding in Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.

(3) 3/8" Metallized Plasterboard Exceptions:

†(a) The minimum price of 3/8″ patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $28.45 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(b) The minimum price of 3/8″ patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $22.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Niagara, Erie (including town of Gowanda, N. Y.) Monroe and Wayne Counties, New York.

†(c) The minimum price of 3/8″ patented metallized gypsum plasterboard for shipment into Lower Michigan (except Monroe County and except the Detroit Area) is $21.00 per M sq. ft. in cars f.o.b. mill, Detroit, Michigan or $22.00 per M sq. ft. f.o.b. Grand Rapids, Michigan. Refer to next paragraph for minimum price into Monroe County, Michigan. Refer to paragraph (4) for minimum price into the Detroit Area.

†(d) The minimum price of 3/8″ patented metallized gypsum plasterboard for shipment into Monroe County, Michigan, in straight, pool or mixed cars, is $22.50 per M sq. ft., f.o.b. cars, delivered to dealers warehouse or, siding.

†(e) The minimum price of 3/8″ patented metallized gypsum plasterboard for shipment into Lucas County, Ohio and town of Perrysburg, Ohio, in straight, pool or mixed cars, is $23.00 per M sq. ft. f.o.b. cars, delivered to dealers warehouse or siding.

†(f) The minimum price of 3/8″ patented metal-
10532 lized gypsum plasterboard in straight, pool or mixed cars, is $21.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Kings, Queens, Nassau and Suffolk Counties, New York.

(4) Delivered Price Areas:

Prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gyp-

sum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

Del'd Prices into: (See Descriptions of Areas Below)		1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
Metro N. Y.—N. J., Boston and Philadelphia Areas (See Notes b and c)	Straight Cars	27.00	32.00	33.00	29.00	22.00
	Pool or Mixed Cars	28.00	33.00	34.00	30.00	23.00
†Southeast New York & Southern New Jersey Areas, Also State of Connecticut: Cheshire, Sullivan, Merrimac, and Belknap Counties, New Hampshire; Lehigh and Northampton Counties, Pa. & New Castle County, Del.	Straight, Pool or Mixed Cars	28.00	33.00	34.00	30.00	23.00
†Chicago Area	Str., Pool or Mxd. Cars	27.50	32.50	33.50	29.50	22.50
†Detroit Area	Straight, Pool or Mixed Cars	27.60	32.60	33.60	29.60	22.00
Grand Rapids Switching Area	Str., Pool or Mxd. Cars	28.00	33.00	34.00	30.00	23.00

Notes & Exceptions Applying to Delivered Price Areas Listed Above:

(a) Descriptions of Areas:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Boston Area: Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester counties, Mass.; Rockingham, Hillsborough and Strafford counties, New Hampshire; York and Cumberland counties, Maine; and State of Rhode Island.

(*Reference notes continued on next page*)

(5) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, and Bridgetown, O.	Cincinnati, O.
10534 Euclid, North Randall and Bedford, O.	Cleveland, O.
—Dodson and Edgecomb, Mo.; Rosedale, Waldo Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.

(*Reference notes continued from preceding page*)

Southeast New York Area: Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York.

10533 Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey.

Chicago Area: Cook and Du Page Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

Detroit Area: Wayne county, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores and Centerline in Macomb County, Michigan.

Grand Rapids, Mich. Switching Area: As described in published railroad freight tariffs.

(b) Delivered prices for shipment in straight cars into Metro New York-New Jersey, Philadelphia and Boston Areas apply on straight carloads of patented board products consigned to one destination and invoiced to one account. Any mixture of regular patented board products (including special surfaced gypsum board products) and metallized patented board products may be combined to make up the required minimum. Exception: Refer to section (b) of paragraph (2) for minimum price of 5/16" plasterboard into Mercer County, New Jersey, Kent and Providence Counties, Rhode Island; also refer to section (f) of paragraph (3) for minimum price of 3/8" plasterboard into Kings, Queens, Nassau and Suffolk Counties, New York.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(*Reference notes continued on following page*)

(6) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only).

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only).

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

(Reference notes continued from preceding page)

†(c) In pool cars or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum. Exceptions: Refer to section (b) of paragraph (2) for minimum price of 5/16" plasterboard into Mercer County, New Jersey, Kent and Providence Counties, Rhode Island; also refer to section (f) of paragraph (3) for minimum price of 3/8" plasterboard into Kings, Queens, Nassau and Suffolk Counties, New York.

10535 Delivered Price Areas (Cont'd.)

Notes and Exceptions Applying to Delivered Price Areas Listed Above:

Notes and Exceptions Applying to Delivered Price Areas Listed Above:

(a) Descriptions of Areas:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New York.

†Boston Area: Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester counties, Mass.; Rockingham, Hillsborough and Strafford counties, New Hampshire; York and Cumberland counties, Maine; and state of Rhode Island.

Southeast New York Area: Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York.

Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington counties, New Jersey.

Chicago Area: Cook and Du Page counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois; Deerfield, Highland Park and Lake Forest.

Detroit Area: Wayne county, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores and Centerline, in Macomb County, Michigan.

Grand Rapids, Mich. Switching Area: As described in published railroad freight tariffs.

(b) Delivered prices for shipment in straight cars into Metro New York-New Jersey, Philadelphia and Boston Areas apply on straight carloads of patented board products consigned to one destination and invoiced to one account. Any mixture of regular patented board products (including special surfaced gypsum board products) and metallized patented board products may be combined to make up the required minimum. Exception: Refer to section (c) of paragraph (1) and section (b) of paragraph (2) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk county, New York, also of 5/16" plasterboard into Mercer County, New Jersey, Kent and Providence counties, Rhode Island.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a

† Indicates change (to become effective October 28, 1936).

10536 metallized gypsum sheathing is $26.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $27.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Erie and Niagara Counties, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $22.00 per M sq. ft. f.o.b. Oakfield, New York.

(2) 5/16" Metallized Plasterboard. The minimum price of 5/16"# patented metallized gypsum plasterboard (weight 1175# per M) in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following areas only, is as follows:

(a) $19.75 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan or $22.75 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipment into State of Minnesota, also into City of Superior, Wisconsin.

(b) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Cumberland County, Pennsylvania
—Cuyahoga County (Cleveland) and the towns of Willoughby and Wickliffe, Ohio.
—Dauphin County, Pennsylvania (Harrisburg)
—Franklin County, Massachusetts (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts (Northampton)
—Hanover County, Virginia
—Hartford County, Connecticut (Hartford)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island
—Lancaster County, Pennsylvania (Lancaster)
—Lackawanna County, Pennsylvania (Scranton)
—Luzerne County, Pennsylvania (Wilkes-Barre)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton) See paragraph

(4) for minimum quantity required for shipment in pool cars or mixed cars.

—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Provindence)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tazewell County, Illinois
—Tulsa County, Oklahoma (Tulsa)

also the St. Louis Area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.

(c) $23.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in DeKalb and Fulton Counties, Georgia (Atlanta); Shawnee County, Kansas (Topeka); Sedgewick County, Kansas (Wichita); the following towns of Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri, also towns of Rosedale, Waldo, 10537 metallized gypsum sheathing is $26.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $27.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Erie and Niagara Counties, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $22.00 per M sq. ft. f.o.b. Oakfield, New York.

(2) 5/16" Metallized Plasterboard. The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following areas only, is as follows:

††(a) $19.75 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan or $22.75 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipment into State of Minnesota, also into City of Superior, Wisconsin.

(b) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

† Indicates change (to become effective October 24, 1936).

†† Indicates change (to become effective October 14, 1936).

—Cumberland County, Pennsylvania
—Cuyahoga County (Cleveland) and the towns of Willoughby and Wickliffe, Ohio.
—Dauphin County, Pennsylvania (Harrisburg)
—Franklin County, Massachusetts (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts (Northampton)
—Hanover County, Virginia
—Hartford County, Connecticut (Hartford)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island
—Lancaster County, Pennsylvania (Lancaster)
—Lackawanna County, Pennsylvania (Scranton)
—Luzerne County, Pennsylvania (Wilkes-Barre)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton) See paragraph (4) for minimum quantity required for shipment in pool cars or mixed cars.
—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)

also the St. Louis Area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.

(c) $23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in DeKalb and Fulton Counties, Georgia (Atlanta); Shawnee County, Kansas (Topeka); Sedgewick County, Kansas (Wichita); the following towns of Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri, also towns of Rosedale, Waldo,

price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(c) In pool cars or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the

Boston Area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum. Exceptions: Refer to section (c) of paragraph (1) and section (b) of paragraph (2) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey, Kent and Providence Counties, Rhode Island.†

(5) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo., Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois	Davenport, Iowa
Virginia Beach, Virginia	Norfolk, Va.

(6) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only).

10539 metallized gypsum sheathing is $26.00 per M sq. ft. for shipment in straight carloads of patented

† Indicates change.

gypsum board products consigned to one destination and invoiced to one account, or $27.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Erie and Niagara Counties, New York; the minimum price of 1/2" patented metallized gypsum sheathing is $22.00 per M sq. ft. f.o.b. Oakfield, New York.

(2) 5/16" Metallized Plasterboard. The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following areas only, is as follows:

(a) $19.75 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan or $22.75 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipment into State of Minnesota.

(b) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

†—Cumberland County, Pennsylvania (Effective October 6, 1936.)
—Cuyahoga County (Cleveland) and the towns of Willoughby and Wickliffe, Ohio.
—Dauphin County, Pennsylvania (Harrisburg)
—Franklin County, Massachusetts (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts (Northampton)
—Hanover County, Virginia
—Hartford County, Connecticut (Hartford)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island
—Lancaster County, Pennsylvania (Lancaster)
—Lackawanna County, Pennsylvania (Scranton)
—Luzerne County, Pennsylvania (Wilkes-Barre)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton) See paragraph (4) for minimum quantity required for shipment in pool cars or mixed cars.
—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)

† Indicates change.

—Peoria County, Illinois (Peoria)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)

also the St. Louis Area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.

(c) $23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in DeKalb and Fulton Counties, Georgia (Atlanta); Shawnee County, Kansas (Topeka); Sedgewick County, Kansas (Wichita); the following towns of Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri, also towns of Rosedale, Waldo,

10540 (4) Delivered Price Areas (Con'td.)

price less than th minimum price fixed by the licensor and a violation of the terms of the license agreement.

(c) In pool cars mixed cars into Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum. Exceptions: Refer to section (c) of paragraph (1) and section (b) of paragraph (2) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

(5) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

† Indicates change.

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
†Moline, East Moline and Rock Island, Illinois	Davenport, Ia.
†Virginia Beach, Virginia	Norfolk, Va.

(6) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only).

10541 (4) Delivered Areas (Cont'd)

Notes and exceptions applying to delivered price areas listed above:

(a) Descriptions of Areas:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

†Boston Area: Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester counties, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine; and State of Rhode Island.

Southeast New York Area: Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York.

Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland Burlington Counties, New Jersey.

Chicago Area: Cook and Du Page Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

Detroit Area: Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores and Centerline in Macomb County, Michigan.

(*Reference notes continued on following page*)

10542 (5) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo., Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline and Rock Island, Illinois	Davenport, Ia.

(*Reference notes continued from preceding page*).

Grand Rapids, Mich. Switching Area: As described in published railroad freight tariffs.

†(b) Delivered prices for shipment in straight cars into Metro New York-New Jersey, Philadelphia and Boston Areas apply on straight carloads of patented board products consigned to one destination and invoiced to one account. Any mixture of regular patented board products (including special surfaced gypsum board products) and metallized patented board products may be combined to make up the required minimum. Exception: Refer to section (c) of paragraph (1) and section (b) of paragraph (2) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey, Kent and Providence Counties, Rhode Island.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

†(c) In pool cars or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum. Exceptions: Refer to section (c) of paragraph (1) and section (b) of paragraph (2) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey, Kent and Providence Counties, Rhode Island.

† Indicates change (to become effective September 19, 1936).

(6) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only).

† Indicates change.

10543 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 14, 1936.

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1 Dated July 23, 1936. This Reissue Cancels all Supplements to Metallized Board License Bulletin No. 1 Dated July 23, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective September 15, 1936, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum wallboard and metallized gypsum plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Metallized Gypsum Wallboard — Weight 950 # per M †	⅜" Metallized Gypsum Wallboard — Weight 1400 # per M †	½" Metallized Gypsum Wallboard — Weight 1900 # per M †	½" Metallized Gypsum Sheathing — Weight 1900 # per M	⅜" Metallized Gypsum Plasterboard — Weight 1400 # per M
†Acme, Texas	$27.00	$32.00	$33.00	$29.00	
†Boston (Charlestown) Mass.	27.00	32.00	33.00	29.00	
†Detroit, Mich.	27.00	32.00	33.00	29.00	
†East Chicago, Ind.	27.00	32.00	33.00	29.00	
†Fort Dodge, Iowa	27.00	32.00	33.00	29.00	
†Grand Rapids, Mich.	27.00	32.00	33.00	29.00	
†Gypsum, Ohio	27.00	32.00	33.00	29.00	
†New Brighton, S. I., N. Y.	27.00	32.00	33.00	29.00	
†Oakfield, N. Y.	27.00	32.00	33.00	29.00	
†Philadelphia, Pa.	27.00	32.00	33.00	29.00	
†Plasterco, Va.	27.00	32.00	33.00	29.00	
†Southard, Okla.	27.00	32.00	33.00	29.00	
†Sweetwater, Tex.	27.00	32.00	33.00	29.00	

(See Note 'a')

(a) 3/8" Metallized Plasterboard:

(1) $22.00 per M sq. ft. f.o.b. Oakfield, N. Y., Philadelphia, Pa., New Brighton, S. I., N. Y., Boston, Mass., Gypsum, Ohio, Detroit, Mich., East Chicago, Ind., Grand Rapids, Mich., and Plasterco, Va. for shipments into area east of the Mississippi River, also cities of Duluth, Minneapolis, and St. Paul, Minn. and towns below St. Paul on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

(2) $22.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Texas for shipments into States of Kansas, Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana West of the Mississippi River, also into towns of Kansas City, Dodson and Edgecomb, Missouri.

(3) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipments into area west and north of areas as described in paragraphs (1) and (2) above.

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

10544 Emergency Freight Charges:

The minimum delivered prices of patented metallized gypsum wallboard and metallized gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented metallized gypsum wallboard and metallized gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented metallized gypsum wallboard and metallized gypsum plasterboard shall be as detailed in following schedule:

10545 Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds.

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within the following Gypsum Board Del'd Price Areas: Metro New York-New Jersey, Philadelphia, Boston, Southeast New York, Southern New Jersey Areas; Lehigh and Northampton Counties, Pennsylvania, and New Castle County, Delaware, also Detroit, Michigan Area. Refer to pages 5 & 6 for descriptions of areas).

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) 1/2" Metallized T&G Sheathing Exceptions:

(a) For shipment into Lake and McHenry Counties, Illinois, also Porter County, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $24.66 per M sq. ft. f.o.b. cars delivered to dealer's warehouse or siding.

(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $28.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(c) For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the mini-
10546 mum price of 1/2" patented metallized gypsum sheathing is $26.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $27.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Erie and Niagara Counties, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $22.00 per M sq. ft. f.o.b. Oakfield, New York.

(2) 5/16" Metallized Plasterboard. The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following areas only, is as follows:

(a) $19.75 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan or $22.75 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipment into State of Minnesota.

(b) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and the towns of Willoughby and Wickliffe, Ohio.
—Dauphin County, Pennsylvania (Harrisburg)
—Franklin County, Massachusetts (Greenfield)

—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts (Northampton)
—Hanover County, Virginia
—Hartford County, Connecticut (Hartford)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island
—Lancaster County, Pennsylvania (Lancaster)
—Lackawanna County, Pennsylvania (Scranton)
—Luzerne County, Pennsylvania (Wilkes-Barre)
—Marion County, Indiana (Inidanapolis)
—Mercer County, New Jersey (Trenton) See paragraph

(4) for minimum quantity required for shipment in pool cars or mixed cars.

—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)

also the St. Louis Area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.

(c) $23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in DeKalb and Fulton Counties, Georgia (Atlanta); Shawnee County, Kansas (Topeka); Sedgewick County, Kansas (Wichita); the following towns of Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri, also towns of Rosedale, Waldo, 10547 Argentine, Westport, Overland Park and Kansas City, Kansas; also that portion of Kentucky west of and including Marshall and Calloway Counties and that portion of Tennessee west of and including Henry, Benton, Decatur and Hardin Counties.

(d) $25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Woodbury County, Iowa (Sioux City); Pottawatomie County, Iowa (Council Bluffs) and Douglas County, Nebraska (Omaha).

(e) $24.50 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding i Orleans County, Louisiana (New Orleans).

(f) $26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Newton County, Missouri (Joplin)

(3) 3/8" Metallized Plasterboard Exceptions:

(a) The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $28.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(b) The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $22.00 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding in Niagara, Erie (including town of Gowanda, N. Y.) Monroe and Wayne Counties, New York.

(4) Delivered Price Areas:

Prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

Del'd Prices into: (See Descriptions of Areas Below)		1/4" Metallized Gypsum Wallboard†	3/8" Metallized Gypsum Wallboard†	1/2" Metallized Gypsum Wallboard†	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
letro N. Y.-N. J., Boston nd Philadelphia Areas (See Notes b and c)	Straight Cars	27.00	32.00	33.00	29.00	22.00
	Pool or Mixed Cars	28.00	33.00	34.00	30.00	23.00
Southeast New York & uthern New Jersey Areas, lso Lehigh and Northamp- n Counties, Pa. & New astle County, Del.	Straight, Pool or Mixed Cars	28.00	33.00	34.00	30.00	23.00
hicago Area	Straight, Pool or Mixed Cars	27.50	32.50	33.50	24.66	22.50
etroit Area	Straight, Pool or Mixed Cars	27.60	32.60	33.60	27.47	22.00
rand Rapids Switching Area	Straight, Pool or Mixed Cars	28.00	33.00	34.00	30.00	23.00

10548 Notes and exceptions applying to delivered price areas listed above:
(a) Descriptions of Areas:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Boston Area: Essex, Middlesex, Suffolk, Norfolk and Worcester counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine.

Southeast New York Area: Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York.

Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey.

Chicago Area: Cook and Du Page Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

Detroit Area: Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores and Centerline in Macomb County, Michigan.

Grand Rapids, Mich. Switching Area: As described in published railroad freight tariffs.

(b) Delivered prices for shipment in straight cars into Metro. New York-New Jersey, Philadelphia and Boston Areas apply on straight carloads of patented gypsum board products consigned to one destination and invoiced to one account. Any mixture of regular patented board products (including special surfaced gypsum board products) and metallized patented board products may

(Reference notes continued on following page)

10549 (5) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo., Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline and Rock Island, Illinois	Davenport, Ia.

(6) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(*Reference notes continued from preceding page*)

be combined to make up the required minimum. Exception: Refer to section (c) of paragraph (1) and section (b) of paragraph (2) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(c) In pool cars or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum. Exceptions: Refer to section (c) of paragraph (1) and section (b) of paragraph (2) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only.)

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To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates changes in this reissue.

10551 (c) For shipment into Queens and Nassau Counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $26.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $27.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Erie and Niagara Counties, New York, the minimum price of 1/2" patented metallized

gypsum sheathing is $22.00 per M sq. ft. f.o.b. Oakfield, New York.

(5) 5/16" Metallized Plasterboard: The minimum price of 5/16" patented metallized gypsum plasterboard, (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

(a) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and the towns of Willoughby and Wickliffe, Ohio.
—Dauphin County, Pennsylvania (Harrisburg)
—Franklin County, Massachusetts (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts (Northampton)
—Hanover County, Virginia
—Hartford County, Connecticut (Hartford)
—Hennepin County, Minnesota (Minneapolis)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island
—Lancaster County, Pennsylvania (Lancaster)
—Lackawanna County, Pennsylvania (Scranton)
—Luzerne County, Pennsylvania (Wilkes-Barre)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton) See paragraph (7) for minimum quantity required for shipment in pool cars or mixed cars.
—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Princess Anne County, Virginia
—Providence County, Rhode Island (Providence)
—Ramsey County, Minnesota (St. Paul)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)

also the St. Louis Area as follows: the City of St. Louis, Missouri; all of Saint Louis County, Missouri; and the town of Imperial (in Jefferson County), Missouri.†

† Indicates change (to become effective August 25, 1936).

price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(c) In pool cars or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum. Exceptions: Refer to section (c) of paragraph (4) and section (a) of paragraph (5) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

(8) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid; North Randall and Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
†Saint Louis County and town of Imperial (in Jefferson County), Missouri	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
Omaha, Nebraska	Council Bluffs, Ia.
Moline and Rock Island, Illinois	Davenport, Ia.

(9) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft., as

† Indicates change (to become effective August 25, 1936).

follows: (Note: Sales to roofing contractors are for specific roof jobs only).

10553 ††(b) $23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in DeKalb and Fulton Counties, Georgia (Atlanta); Shawnee County, Kansas (Topeka); Sedgewick County, Kansas (Wichita); the following towns in Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri, also towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; also that portion of Kentucky west of and including Marshall and Calloway Counties and that portion of Tennessee west of and including Henry, Benton, Decatur and Harden Counties.

(c) $25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Woodbury County, Iowa (Sioux City); Pottawatamie County, Iowa (Council Bluffs) and Douglas County, Nebraska (Omaha).

(d) $24.50 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Orleans County, Louisiana (New Orleans).

(e) $26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Greene County, Missouri (Springfield).
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Newton County, Missouri (Joplin)

(6) 3/8″ Metallized Plasterboard Exceptions:

The minimum price of 3/8″ patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $28.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

†† Indicates change (to become effective August 24, 1936).

(7) Delivered Price Areas:

Prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

Del'd Prices into: (See Descriptions of Areas Below)		1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
Metro N. Y.—N. J., Boston and Philadelphia Areas (See Notes b and c)	Straight Cars	27.50	33.50	36.00	29.00	22.0
	Pool or Mxd. Cars	28.50	34.50	37.00	30.00	23.0
Southeast New York & Southern New Jersey Areas, Also Lehigh and Northampton Counties, Pa. & New Castle County, Del.	Straight, Pool or Mxd. Cars	28.50	34.50	37.00	30.00	23.0
Chicago Area	Straight, Pool or Mxd. Cars	28.00	34.00	36.50	24.66	22.5
Detroit Area	Straight, Pool or Mxd. Cars	28.10	34.10	36.60	27.47	22.0
Grand Rapids Switching Area	Straight, Pool or Mxd. Cars	28.50	34.50	37.00	30.00	23.0

10554 † and Florida, minimum price of 3/8" patented metallized gypsum wallboard is $32.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

†(b) For shipment into states of Minnesota, Iowa and Missouri minimum price of 3/8" patented metallized gypsum wallboard is $32.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $33.50 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

†(c) For shipment into Logan, Mingo, Wyoming, McDowell, Raleigh, Mercer, Summers and Fayette Counties, West Virginia, also into that portion of Virginia west of and including Highland, Augusta, Nelson, Amherst, Campbell and Halifax Counties, minimum price of 3/8" patented metallized gypsum wallboard is, $32.00 per M

† Indicates changes (to become effective August 17, 1936).

sq. ft. f.o.b. Plasterco, Virginia; or $33.50 per M sq. ft. f.o.b. Gypsum, Ohio.

(3) 1/2" Metallized Wallboard Exceptions:

†(a) For shipment into states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisiana, New Mexico, Oklahoma, Texas, Arkansas, Kansas, Nebraska, South Dakota, North Dakota, Colorado, Wyoming, and Montana, minimum price of 1/2" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Plasterco, Virginia; Philadelphia, Pennsylvania; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

†(b) For shipment into states of Minnesota, Iowa and Missouri, minimum price of 1/2" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $36.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

†(c) For shipment into Logan, Mingo, Wyoming, McDowell, Raleigh, Mercer, Summers and Fayette Counties, West Virginia, also into that portion of Virginia west of and including Highland, Augusta, Nelson, Amherst, Campbell and Halifax Counties, minimum price of 1/2" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Plasterco, Virginia; or $36.00 per M sq. ft. f.o.b. Gypsum, Ohio.

(4) 1/2" Metallized T&G Sheathing Exceptions;

(a) For shipment into Lake, and McHenry Counties, Illinois, also Porter County, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $24.66 per M sq. ft. f.o.b. cars delivered to dealer's warehouse or siding.

(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $28.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

† Indicates changes (to become effective August 17, 1936).

(c) For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $26.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $27.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Erie and Niagara Counties, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $22.00 per M sq. ft. f.o.b. Oakfield, New York.

(5) 5/16" Metallized Plasterboard: The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

†(a) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and the towns of Willoughby and Wickliffe, Ohio.
—Dauphin County, Pennsylvania (Harrisburg).
—Franklin County, Massachusetts (Greenfield).
—Franklin County, Ohio (Columbus).
—Hampden County, Massachusetts (Springfield).
—Hampshire County, Massachusetts (Northampton).
—Hanover County, Virginia.
—Hartford County, Connecticut (Hartford).
—Hennepin County, Minnesota (Minneapolis).
—Henrico County, Virginia (Richmond).
—Kent County, Rhode Island.
—Lancaster County, Pennsylvania (Lancaster).
†—Lackawanna County, Pennsylvania (Scranton).
†—Luzerne County, Pennsylvania (Wilkes-Barre).
—Marion County, Indiana (Indianapolis).
—Mercer County, New Jersey (Trenton) See paragraph (7) for minimum quantity required for shipment in pool cars or mixed cars.
—Norfolk County, Virginia (Norfolk).

† Indicates changes (to become effective August 17, 1936).

—Oklahoma County, Oklahoma (Oklahoma City).
—Peoria County, Illinois (Peoria).
—Princess Anne County, Virginia.
—Providence County, Rhode Island (Providence).
—Ramsey County, Minnesota (St. Paul).
—Roanoke County, Virginia (Roanoke).
—Sangamon County, Illinois (Springfield).
—Tulsa County, Oklahoma (Tulsa).

also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

10555 †(b) $23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in DeKalb and Fulton Counties, Georgia (Atlanta); Shelby County, Tennessee (Memphis); Shawnee County, Kansas (Topeka); Sedgewick County, Kansas (Wichita); and following towns in Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri, also towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(c) $25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Woodbury County, Iowa (Sioux City); Pottawatomie County, Iowa (Council Bluffs) and Douglas County, Nebraska (Omaha).

†(d) $24.50 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Orleans County, Louisiana (New Orleans).

(e) $26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Newton County, Missouri (Joplin)

(6) 3/8" Metallized Plasterboard Exceptions:

The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed

† Indicates changes (to become effective August 17, 1936).

carloads with other gypsum products is $28.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

(7) Delivered Price Areas:

Prices of patented metallized gypsum products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

Del'd Prices Into: (See Descriptions of Areas Below)		1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
Metro N. Y.-N. J., Boston and Philadelphia Areas (See Notes b and c)	Straight Cars	27.50	33.50	36.00	29.00	22.00
	Pool or Mxd. Cars	28.50	34.50	37.00	30.00	23.00
Southeast New York & Southern New Jersey Areas, Also Lehigh and Northampton Counties, Pa. & New Castle County, Del.	Straight, Pool or Mxd. Cars	28.50	34.50	37.00	30.00	23.00
Chicago Area	Straight, Pool or Mxd. Cars	28.00	34.00	36.50	24.66	22.50
Detroit Area	Straight, Pool or Mxd. Cars	28.10	34.10	36.60	27.47	22.00
Grand Rapids Switching Area	Straight, Pool or Mxd. Cars	28.50	34.50	37.00	30.00	23.00

10556 †and Florida, also into Kansas City, Missouri, minimum price of 3/8" patented metallized gypsum wallboard is $32.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

†(b) For shipment into States of Minnesota, Iowa and Missouri (except Kansas City—see paragraph (a) above) minimum price of 3/8" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and

† Indicates changes (to become effective August 3, 1936).

Southard, Oklahoma; or $33.50 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(3) 1/2" Metallized Wallboard Exceptions:

(a) For shipment into States of New Mexico, Oklahoma, Texas and Arkansas also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(b) For shipment into States of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisiana (except Counties listed in (a) above), Kansas, Nebraska, South Dakota, North Dakota, Colorado, Wyoming, and Montana, minimum price of 1/2" patented metallized gypsum wallboard is $34.00 per M sq. ft. f.o.b. Plasterco, Virginia; Philadelphia, Pennsylvania; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

(c) For shipment into States of Minnesota, Iowa and Missouri, minimum price of 1/2" patented metallized gypsum wallboard is $35.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $36.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(4) 1/2" Metallized T&G Sheathing Exceptions:

(a) For shipment into Lake, and McHenry counties, Illinois, also Porter county, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $24.66 per M sq. ft. f.o.b. cars delivered to dealer's warehouse or siding.

(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $28.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(c) For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs

Harbor in Suffolk County, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $26.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $27.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

10557 (7) Delivered Price Areas (Cont'd.)

price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(c) In pool cars or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Any mixture of metallized and regular patented board products (including special surfaced gypsum products) may be combined to make up the required minimum. Exceptions: Refer to section (c) of paragraph (4) and section (a) of paragraph (5) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

(8) Delivered carload minimum prices in markets as listed are same as in adjacent cities, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot, and Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford O.	Cleveland, O.
Dodson and Edgecomb, Mo., Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.
†Omaha, Nebraska	Council Bluffs, Ia.
†Moline and Rock Island, Illinois	Davenport, Iowa

† Indicates changes (to become effective August 8, 1936).

(9) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as specific roof jobs only).

10558 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 23, 1936.

Carload Shipments—Metallized Board License Bulletin No. 1—Cancels Metallized Board License Bulletin No. 1—Dated July 10, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 28, 1936, the minimum prices at which you may sell metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum wallboard and metallized gypsum plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see p ge 2) from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Metallized Gypsum Wallboard—Weight—950 # per M	⅜" Metallized Gypsum Wallboard—Weight—1400 # per M	½" Metallized Gypsum Wallboard—Weight—1900 # per M	½" Metallized Gypsum Sheathing—Weight—1900 # per M	⅜" Metallized Gypsum Plasterboard—Weight—1400 # per M
Acme, Texas	$27.50	$33.50	$36.00	$29.00	(See Note 'a')
Boston (Charlestown) Mass.	27.50	33.50	36.00	29.00	
Detroit, Mich.	27.50	33.50	36.00	29.00	
East Chicago, Ind.	27.50	33.50	36.00	29.00	
Fort Dodge, Iowa	27.50	33.50	36.00	29.00	
Grand Rapids, Mich.	27.50	33.50	36.00	29.00	
Gypsum, Ohio	27.50	33.50	36.00	29.00	
New Brighton, S. I., N. Y.	27.50	33.50	36.00	29.00	
Oakfield, N. Y.	27.50	33.50	36.00	29.00	
Philadelphia, Pa.	27.50	33.50	36.00	29.00	
Plasterco, Va.	27.50	33.50	36.00	29.00	
Southard, Okla.	27.50	33.50	36.00	29.00	
Sweetwater, Texas	27.50	33.50	36.00	29.00	

(a) 3/8" Metallized Plasterboard:

(1) $22.00 per M sq. ft. f.o.b. Oakfield, N. Y., Philadelphia, Pa., New Brighton, S. I., N. Y., Boston, Mass., Gypsum, Ohio, Detroit, Mich., East Chicago, Ind., Grand Rapids, Mich., and Plasterco, Va. for shipments into area east of the Mississippi River, also cities of Duluth, Minneapolis, and St. Paul, Minn., and towns below St. Paul on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

(2) $22.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Texas for shipments into States of Kansas, Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana West of the Mississippi River, also into towns of Kansas City, Dodson and Edgecomb, Missouri.

(3) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipments into area west and north of areas as described in paragraphs (1) and (2) above.

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt, nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

10559 Emergency Freight Charges: The minimum delivered prices of patented metallized gypsum wallboard and metallized gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented metallized gypsum wallboard and metallized gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented metallized gypsum wallboard and metallized gypsum plasterboard shall be as detailed in following schedule:

10560 Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds.

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered price when delivered by truck.

The above prices apply to the sale of all metallized board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) 1/4" Metallized Wallboard Exceptions:

For shipment into states of Florida, New Mexico, Colorado, Montana, and Wyoming, minimum price of 1/4" pat-

ented metallized gypsum wallboard is $27.00 per M sq. ft. f.o.b. Plasterco, Virginia; Acme, Texas; Sweetwater, Texas; Southard, Oklahoma and Fort Dodge, Iowa.

(2) 3/8" Metallized Wallboard Exceptions:

(a) For shipment into states of New Mexico, Colorado, Montana, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina, and Florida minimum price of 3/8" patented metallized gypsum wallboard is $32.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

10561

(b) For shipment into states of Minnesota, Iowa and Missouri, minimum price of 3/8" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $33.50 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(3) 1/2" Metallized Wallboard Exceptions:

(a) For shipment into states of New Mexico, Oklahoma, Texas and Arkansas also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(b) For shipment into states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisiana (except counties listed in (a) above), Kansas, Nebraska, South Dakota, North Dakota, Colorado, Wyoming, and Montana, minimum price of 1/2" patented metallized gypsum wallboard is $34.00 per M sq. ft. f.o.b. Plasterco, Virginia; Philadelphia, Pennsylvania; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

(c) For shipment into states of Minnesota, Iowa and Missouri, minimum price of 1/2" patented metallized gypsum wallboard is $35.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $36.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(4) 1/2" Metallized T&G Sheathing Exceptions:

(a) For shipment into Lake, and McHenry counties, Illinois, also Porter county, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patenfed metallized gypsum sheathing is $24.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $28.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(c) For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $26.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $27.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

10562 (d) For shipment into Erie and Niagara counties, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $22.00 per M sq. ft. f.o.b. Oakfield, New York.

(5) 5/16" Metallized Plasterboard: The Minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

(a) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and the towns of Willoughby and Wickliffe, Ohio.
—Dauphin County, Pennsylvania (Harrisburg)
—Franklin County, Massachusetts (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts (Northampton)
—Hanover County, Virginia.

—Hartford County, Connecticut (Hartford)
—Hennepin County, Minnesota (Minneapolis)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island.
—Lancaster County, Pennsylvania (Lancaster)
—Marion County, Indiana (Indianapolis)
—Mercer County, New Jersey (Trenton) See paragraph (7) for minimum quantity required for shipment in pool cars or mixed cars.

—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Princess Anne County, Virginia.
—Providence County, Rhode Island (Providence)
—Ramsey County, Minnesota (St. Paul)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)

also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

(b) $23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in DeKalb and Fulton Counties, Georgia (Atlanta).

(c) $25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Woodbury County, Iowa (Sioux City); Pottawatomie County, Iowa (Council Bluffs) and Douglas County, Nebraska (Omaha).

10563 (d) $26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Newton County, Missouri (Joplin)
—Sedgewick County, Kansas (Wichita)

also following towns in Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri; also towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(6) 3/8" Metallized Plasterboard Exceptions:

(a) The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $28.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

†(7) Delivered Price Areas

Prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within areas listed below are as follows:

Del'd Prices Into: (See Descriptions of Areas Below)		1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Sheathing	3/8" Metallized Gypsum Lath
Metro N. Y.—N. J., Boston and Philadelphia Areas (See Notes b and c)	Straight Cars	27.50	33.50	36.00	29.00	22.00
	Pool or Mxd. Cars	28.50	34.50	37.00	30.00	23.00
Southeast New York & Southern New Jersey Areas, Also Lehigh and Northampton Counties, Pa. & New Castle County, Del.	Straight, Pool or Mxd. Cars	28.50	34.50	37.00	30.00	23.00
Chicago Area	Straight, Pool or Mxd. Cars	28.00	34.00	36.50	24.66	22.50
Detroit Area	Straight, Pool or Mxd. Cars	28.10	34.10	36.60	27.47	22.00
Grand Rapids Switching Area	Straight, Pool or Mxd. Cars	28.50	34.50	37.00	30.00	23.00

10564 Notes and Exceptions Applying to Delivered Price Areas Listed Above:

(a) Descriptions of Areas:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also

(*Reference notes continued on following page*)

(*Reference notes continued from preceding page*)

Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

†Boston Area: Essex, Middlesex, Suffolk, Norfolk and Worcester counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine.

†Southeast New York Area: Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York.

†Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey.

Chicago Area: Cook and Du Page Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

†Detroit Area: Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores and Centerline in Macomb County, Michigan.

Grand Rapids, Mich. Switching Area: As described in published railroad freight tariffs.

(b) Delivered prices for shipment in straight cars into Metro. New York-New Jersey, Philadelphia and Boston Areas apply on straight carloads of patented gypsum board products consigned to one destination and invoiced to one account. Any mixture of regular patented board products (including special surfaced gypsum board products) and metallized patented board products may be combined to make up the required minimum. Exception: Refer to section (c) of paragraph (4) and section (a) of paragraph (5) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(c) In pool cars or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum. Exceptions: Refer to section (c) of paragraph (4) and section (a) of paragraph (5) for minimum prices of 1/2" T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" plasterboard into Mercer County, New Jersey.

10565 (8) Delivered Carload Minimum Prices in Certain Suburbs Same as In City Proper, as Indicated Below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Dodson and Edgecomb, Mo., Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.
Roslyn, Virginia	Washington, D. C.

(9) Sales to Contractors and Prefabricated House Manufacturers, Also Extras on Odd Sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

10566

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs, Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President

† Indicat[illegible] change in this

10567 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 10, 1936.

Carload Shipments—Metallized Board License Bulletin No. 1—Cancels Metallized Board License Bulletin No. 1—Dated June 25, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 13, 1936, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum wallboard and metallized gypsum plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Metallized Gypsum Wallboard—Weight—950 # per M	⅜" Metallized Gypsum Wallboard—Weight—1400 # per M	½" Metallized Gypsum Wallboard—Weight—1900 # per M	½" Metallized Gypsum Sheathing—Weight—1900 # per M	⅜" Metallized Gypsum
Acme, Texas	$27.50	$33.50	$36.00	$29.00	
Boston (Charlestown) Mass.	27.50	33.50	36.00	29.00	
Detroit, Mich.	27.50	33.50	36.00	29.00	
East Chicago, Ind.	27.50	33.50	36.00	29.00	
Fort Dodge, Iowa	27.50	33.50	36.00	29.00	
Grand Rapids, Mich.	27.50	33.50	36.00	29.00	
Gypsum, Ohio	27.50	33.50	36.00	29.00	
New Brighton, S. I., N. Y.	27.50	33.50	36.00	29.00	
Oakfield, N. Y.	27.50	33.50	36.00	29.00	
Philadelphia, Pa.	27.50	33.50	36.00	29.00	
Plasterco, Va.	27.50	33.50	36.00	29.00	
Southard, Okla.	27.50	33.50	36.00	29.00	
Sweetwater, Texas	27.50	33.50	36.00	29.00	

(Reference notes on following page)

10568 Emergency Freight Charges: The minimum delivered prices of patented metallized gypsum wallboard and metallized gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented metallized gypsum wallboard and metallized gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented metallized gypsum wallboard and metallized gypsum plasterboard shall be as detailed in following schedule:

(Reference notes from preceding page)

(a) 3/8" Metallized Plasterboard:

(1) $22.00 per M sq. ft. f.o.b. Oakfield, N. Y., Philadelphia, Pa., New Brighton, S. I., N. Y. Boston, Mass., Gypsum, Ohio, Detroit, Mich., East Chicago, Ind., Grand Rapids, Mich., and Plasterco, Va. for shipments into area east of the Mississippi River, also cities of Duluth, Minneapolis, and St. Paul, Minn., and towns below St. Paul on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

†(2) $22.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Texas for shipments into States of Kansas, Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana West of the Mississippi River, also into towns of Kansas City, Dodson and Edgecomb Missouri.

(3) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipments into area west and north of areas as described in paragraphs (1) and (2) above.

(b) The above prices are for Board or Lath with one surfated metallized. Add $15.00 per M sq. ft. when furnished with both surfaced metallized.

Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt, nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

10569 Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds.

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered price when delivered by truck.

The above prices apply to the sale of all metallized board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) 1/4" Metallized Wallboard Exceptions:

For shipment into states of Florida, New Mexico, Colorado, Montana, and Wyoming, minimum price of 1/4" patented metallized gypsum wallboard is $27.00 per M sq. ft. f.o.b. Plasterco, Virginia; Acme, Texas; Sweetwater, Texas; Southard, Oklahoma and Fort Dodge, Iowa.

(2) 3/8" Metallized Wallboard Exceptions:

(a) For shipment into states of New Mexico, Colorado, Montana, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Caro-
10570 lina, North Carolina, and Florida minimum price of 3/8" patented metallized gypsum wallboard is $32.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

(b) For shipment into states of Minnesota, Iowa and Missouri, minimum price of 3/8" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $33.50 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(3) 1/2" Metallized Wallboard Exceptions:

(a) For shipment into states of New Mexico, Oklahoma, Texas and Arkansas also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(b) For shipment into states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisana (except counties listed in (a) above), Kansas, Nebraska, South Dakota, North Dakota, Colorado, Wyoming, and Montana, minimum price of 1/2" patented metallized gypsum wallboard is $34.00 per M sq. ft. f.o.b. Plasterco, Virginia; Philadelphia, Pennsylvania; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan;

Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

†(c) For shipment into states of Minnesota, Iowa and Missouri, minimum price of 1/2″ patented metallized gypsum wallboard is $35.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $36.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(4) 1/2″ Metallized T&G Sheathing Exceptions:

(a) For shipment into Cook, Lake, Du Page and McHenry counties, Illinois, also Lake and Porter counties, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2″ patented metallized gypsum sheathing is $24.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2″ patented metallized gypsum sheathing is $28.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(c) For shipment into Wayne County, Michigan, towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan, in straight and pool carloads or
10571 in mixed carloads with other gypsum products, the minimum price of 1/2″ patented metallized gypsum sheathing is $27.47 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(d) For shipment into Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York, in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2″ patented metallized gypsum sheathing is $31.80 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

†(e) For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2″ patented metallized gypsum sheathing is $26.00 per M sq. ft. for shipment in straight carloads of patented

gypsum board products consigned to one destination and invoiced to one account, or $27.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

(f) For shipment into Erie and Niagara counties, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $22.00 per M sq. ft. f.o.b. Oakfield, New York.

(g) For shipment into states of Oklahoma and Texas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, the minimum price of 1/2" patented metallized gypsum sheathing is $33.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(5) 5/16" Metallized Plasterboard: The Minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

(a) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and the towns of Willoughby and Wickliffe, Ohio.
—Dauphin County, Pennsylvania (Harrisburg)
—Franklin County, Massachusetts (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
—Hampshire County, Massachusetts (Northampton)
—Hanover County, Virginia.
—Hartford County, Connecticut (Hartford)
—Hennepin County, Minnesota (Minneapolis)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island.
—Lancaster County, Pennsylvania (Lancaster)
—Marion County, Indiana (Indianapolis)
10572 —Mercer County, New Jersey (Trenton) See paragraph (8) for minimum quantity required for shipment in pool cars or mixed cars.
—Norfolk County, Virginia (Norfolk)
—Oklahoma County, Oklahoma (Oklahoma City)
—Peoria County, Illinois (Peoria)
—Princess Anne County, Virginia.

—Providence County, Rhode Island (Providence)
—Ramsey County, Minnesota (St. Paul)
—Roanoke County, Virginia (Roanoke)
—Sangamon County, Illinois (Springfield)
—Tulsa County, Oklahoma (Tulsa)

also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

(b) $23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in DeKalb and Fulton Counties, Georgia (Atlanta).

(c) $25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouses or siding in Woodbury County, Iowa (Sioux City); Poftawatomie County, Iowa (Council Bluffs) and Douglas County, Nebraska (Omaha).

(d) $26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Newton County, Missouri (Joplin)
—Sedgewick County, Kansas (Wichita)

also following towns in Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri; also towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(6) 3/8" Metallized Plasterboard Exceptions:

(a) The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(b) The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $28.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

10573 (7) In straight carloads of patented gypsum board and/or lath products consigned to one destination and invoiced to one account, minimum prices of patented metallized gypsum board products f.o.b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston areas (as described below) shall be same as prices applying f.o.b. cars New Brighton, Philadelphia or Boston mills. This applies into areas as follows:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. Exception: Refer to section (e) of paragraph (4) and section (a) of paragraph (5) for minimum prices of 1/2" Metallized T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" metallized plasterboard into Mercer County, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Boston Area: Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight

cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(8) For minimum prices of patented metallized gypsum board products, in pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston Areas as described in paragraph (7) above, add $1.00 per M sq. ft. to prices applying f.o.b. cars New Brighton, Philadelphia and Boston Mills. Exceptions: Refer to section (e) of paragraph (4) and section (a) of paragraph (5) for minimum prices of 1/2" metallized T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" metallized plasterboard into Mercer County, New Jersey.

On pool cars or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described in paragraph (7) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

10574 (9) Grand Rapids Switching District. For minimum prices of patented metallized gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Grand Rapids, Michigan Switching District, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

(10) Chicago Area. For minimum prices of patented metallized gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products (either 40,000# or 60,000# cars) f.o.b. cars delivered to dealers warehouse or siding within the Chicago Area, add 50¢ per M sq. ft. to prices applying f.o.b. cars, East Chicago Mill. This applies into Cook and Du Page Counties, Illinois, Lake County, Indiana and following towns in Lake County,

Illinois: Deerfield, Highland Park and Lake Forest. Exception: Minimum price of 1/2" metallized gypsum sheathing for shipment into the Chicago Area as described above is $24.66 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding.

(11) Detroit Area. For minimum prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area, add 60¢ per M sq. ft. to prices applying f.o.b. cars, Detroit Mill. This applies into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan. Exception: Minimum price of 3/8" patented metallized gypsum plasterboard is $22.00 per M sq. ft. and minimum price of 1/2" metallized gypsum sheathing is $27.47 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area as described above.

(12) Delivered Carload Minimum Prices in Certain Suburbs Same as in City Proper, as Indicated Below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage Counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois; Deerfield, Highland Park & Lake Forest	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland County; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb County, Michigan	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Kings County, New York	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.

10575 *Delivered Carload Minimum Prices in—*	*Same as—*
Armory, Indian Orchard, Oak Street & Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.
Rosslyn, Virginia	Washington, D. C.

(13) Sales to Contractors and Prefabricated House Manufacturers, Also Extras on Odd Sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

Indicates change in this reissue.

10576 (2) 1/4" Metallized Wallboard Exceptions:

For shipment into states of Florida, New Mexico, Colorado, Montana, and Wyoming, minimum price of 1/4" patented metallized gypsum wallboard is $27.00 per M sq. ft. f.o.b. Plasterco, Virginia; Acme, Texas; Sweetwater, Texas; Southard, Oklahoma and Fort Dodge, Iowa. (Plasterco, Virginia omitted in error in issue dated June 25, 1936)

(3) 3/8" Metallized Wallboard Exceptions:

(a) For shipment into states of New Mexico, Colorado, Montana, Wyoming, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina, and Florida minimum price of 3/8" patented metallized gypsum wallboard is $32.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana, Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

(b) For shipment into states of North Dakota, South Dakota, Nebraska and Kansas, minimum price of 3/8" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma.

(c) For shipment into states of Minnesota and Missouri, minimum price of 3/8" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $33.50 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(4) 1/2" Metallized Wallboard Exceptions:

For shipment into states of New Mexico, Oklahoma, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(5) 1/2" Metallized T&G Sheathing Exceptions:

(a) For shipment into Cook, Lake, DuPage and McHenry Counties, Illinois, also Lake and Porter Counties, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $24.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $28.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

(c) For shipment into Wayne County, Michigan, towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan, in straight and pool carloads or in mixed carloads

10577 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 25, 1936.

Carload Shipments—Metallized Board License Bulletin No. 1—Cancels Metallized Board License Bulletin No. 1—Dated June 2, 1936 and Supplements Thereto Dated June 23, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum wallboard and metallized gypsum plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Metallized Gypsum Wallboard—Weight—950 # per M	⅜" Metallized Gypsum Wallboard—Weight—1400 # per M	½" Metallized Gypsum Wallboard—Weight—1900 # per M	½" Metallized Gypsum† Sheathing—Weight—1900 # per M	⅜" Metallized Gypsum Plasterboard—Weight—1400 # per M
†Acme, Texas	$27.50	$33.50	$36.00	$29.00	
†Boston (Charlestown) Mass.	27.50	33.50	36.00	29.00	
†Detroit, Mich.	27.50	33.50	36.00	29.00	
†East Chicago, Ind.	27.50	33.50	36.00	29.00	
†Fort Dodge, Iowa	27.50	33.50	36.00	29.00	
†Grand Rapids, Mich.	27.50	33.50	36.00	29.00	
†Gypsum, Ohio	27.50	33.50	36.00	29.00	
†New Brighton, S. I., N. Y.	27.50	33.50	36.00	29.00	
†Oakfield, N. Y.	27.50	33.50	36.00	29.00	
†Philadelphia, Pa.	27.50	33.50	36.00	29.00	
†Plasterco, Va.	27.50	33.50	36.00	29.00	
†Southard, Okla.	27.50	33.50	36.00	29.00	
†Sweetwater, Texas	27.50	33.50	36.00	29.00	

(See Note 'a')

(a) 3/8" Metallized Plasterboard:

(1) $22.00 per M sq. ft. f.o.b. Oakfield, N. Y., Philadelphia, Pa., New Brighton, S. I., N. Y., Boston, Mass., Gypsum, Ohio, Detroit, Mich., East Chicago, Ind., Grand Rapids, Mich., and Plasterco, Va. for shipments into area east of the Mississippi River, also cities of Duluth, Minneapolis, and St. Paul, Minn., and towns below St. Paul on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

†(2) $22.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Texas for shipments into States of Kansas, Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana West of the Mississippi River, also into towns of Kansas City, Dodson and Edgecomb, Missouri.

(3) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipments into area west and north of areas described in paragraphs (1) and (2) above.

(b) The above prices are for Board or Lath with one surfaced metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt, nearest to rate per ton, fractions of less than 1/4¢ per cwt. to be dropped, fractions of 1/4¢ per cwt. to 1/2¢ per cwt. to be considered as 1/2¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

10578 Emergency Freight Charges:

The minimum delivered prices of patented metallized gypsum wallboard and metallized gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented metallized gypsum wallboard and metallized gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented metallized gypsum wallboard and metallized gypsum plasterboard shall be as detailed in following schedule:

10579 Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds.

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat .3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered price when delivered by truck.

The above prices apply to the sale of all metallized board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge, East Chicago or Grand Rapids) is in effect, delivered prices of patented metallized board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum

products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented metallized board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

10580 (2) 1/4" Metallized Wallboard Exceptions:

†For shipment into states of Florida, New Mexico, Colorado, Montana, and Wyoming, minimum price of 1/4" patented metallized gypsum wallboard is $27.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma and Fort Dodge, Iowa.

(3) 3/8" Metallized Wallboard Exceptions:

†(a) For shipment into states of New Mexico, Colorado, Montana, Wyoming, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina, and Florida minimum price of 3/8" patented metallized gypsum wallboard is $32.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

†(b) For shipment into states of North Dakota, South Dakota, Nebraska and Kansas, minimum price of 3/8" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma.

†(c) For shipment into states of Minnesota and Missouri, minimum price of 3/8" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $33.50 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(4) 1/2" Metallized Wallboard Exceptions:

† For shipment into states of New Mexico, Oklahoma, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented metallized gypsum wallboard is $33.00 per M sq. ft. f.o.b. Acme,

Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

†(5) 1/2" Metallized T&G Sheathing Exceptions:

†(a) For shipment into Cook, Lake, DuPage and McHenry Counties, Illinois, also Lake and Porter Counties, Indiana in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $24.66 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

†(b) For shipment into Allegheny County (Pittsburgh) Pennsylvania in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $28.42 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

†(c) For shipment into Wayne County, Michigan, towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan, in straight and pool carloads or
10581 in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $27.47 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

†(d) For shipment into Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York, in straight and pool carloads or in mixed carloads with other gypsum products, the minimum price of 1/2" patented metallized gypsum sheathing is $31.80 per M sq. ft. f.o.b. cars delivered to dealers' warehouse or siding.

†(e) For shipment into Queens and Nassau counties, New York, also towns of Amityville, Huntington, Northport, Babylon, Lindenhurst, Bayshore and Cold Springs Harbor in Suffolk County, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $26.00 per M sq. ft. for shipment in straight carloads of patented gypsum board products consigned to one destination and invoiced to one account, or $28.00 per M sq. ft. for shipment in pool cars or mixed cars, f.o.b. cars delivered to dealers' warehouse or siding.

†(f) For shipment into Erie and Niagara counties, New York, the minimum price of 1/2" patented metallized gypsum sheathing is $22.00 per M sq. ft. f.o.b. Oakfield, New York.

†(g) For shipment into state of Oklahoma and Texas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, the minimum price of 1/2" patented metallized gypsum sheathing is $33.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(6) 5/16" Metallized Plasterboard: The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

(a) $21.68 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Mercer County, New Jersey (Trenton). See paragraph (9) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

(b) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and the towns of Willoughby and Wickliffe, Ohio.
†—Dauphin County, Pennsylvania (Harrisburg)
†—Franklin County, Massachusetts (Greenfield)
—Franklin County, Ohio (Columbus)
—Hampden County, Massachusetts (Springfield)
†—Hampshire County, Massachusetts (Northampton)
—Hanover County, Virginia.
—Hartford County, Connecticut (Hartford).
—Hennepin County, Minnesota (Minneapolis)
—Henrico County, Virginia (Richmond)
—Kent County, Rhode Island.
10582 —Lancaster County, Pennsylvania (Lancaster).
—Marion County, Indiana (Indianapolis).
—Norfolk County, Virginia (Norfolk).
—Oklahoma County, Oklahoma (Oklahoma City).
—Peoria County, Illinois (Peoria).
—Princess Anne County, Virginia.
—Providence County, Rhode Island (Providence).
—Ramsey County, Minnesota (St. Paul).

—Roanoke County, Virginia (Roanoke).
—Sangamon County, Illinois (Springfield).
—Tulsa County, Oklahoma (Tulsa).

also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

(c) $23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in DeKalb and Fulton Counties, Georgia (Atlanta).

(d) $25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Woodbury County, Iowa (Sioux City); Pottawatomie County, Iowa (Council Bluffs) and Douglas County, Nebraska (Omaha).

(e) $26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph).
—Cass County, North Dakota (Fargo).
—Greene County, Missouri (Springfield).
—Jasper County, Missouri (Joplin).
—Lancaster County, Nebraska (Lincoln).
—Minnehaha County, South Dakota (Sioux Falls).
—Newton County, Missouri (Joplin).
—Sedgewick County, Kansas (Witchita).

also following towns in Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri; also towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(7) 3/8" Metallized Plasterboard Exceptions:

(a) The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(b) The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or

in mixed carloads with other gypsum products is $28.87 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Palm Beach, Dade, Broward and Monroe Counties, Florida.

10583 (8) In straight carloads of patented gypsum board and/or lath products consigned to one destination and invoiced to one account, minimum prices of patented metallized gypsum board products f.o.b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston areas (as described below) shall be same as prices applying f.o.b. cars: New Brighton, Philadelphia or Boston mills. This applies into areas as follows:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. Exception: Refer to section (e) of paragraph (5) and section (a) of paragraph (6) for minimum prices of 1/2" Metallized T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" metallized plasterboard into Mercer County, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden county, New Jersey.

Boston Area: Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

†(9) For minimum prices of patented metallized gypsum board products, in pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston Areas as described in paragraph (8) above, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton, Philadelphia and Boston Mills. Exceptions: Refer to section (e) of paragraph (5) and section (a) of paragraph (6) for minimum prices of 1/2" metallized T&G Sheathing into Queens and Nassau Counties and several towns in Suffolk County, New York, also of 5/16" metallized plasterboard in Mercer County, New Jersey.

On pool cars or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described in paragraph (8) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

10584 (10) Grand Rapids Switching District. For minimum prices of patented metallized gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Grand Rapids, Michigan Switching District, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

†(11) Chicago Area. For minimum prices of patented metallized gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products (either 40,000# or 60,000# cars) f.o.b. cars delivered to dealers warehouse or siding within the Chicago Area, add 50¢ per M sq. ft. to prices applying to f.o.b. cars, East Chicago Mill. This applies into Cook and Du Page Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest. Exception: Minimum price of 1/2" metallized gypsum sheathing for shipment into the Chicago Area as described above is $24.66 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding.

(12) Detroit Area. For minimum prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area, add 60¢ per M sq. ft. to prices applying f.o.b. cars, Detroit Mill. This applies into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan. Exception: Minimum price of 3/8" patented metallized gypsum plasterboard is $22.00 per M sq. ft. and minimum price of 1/2" metallized gypsum sheathing is $27.47 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area as described above.

(13) Delivered Carload Minimum Prices in Certain Suburbs Same as in City Proper, as Indicated Below:

10585 *Delivered Carload Minimum Prices in—*	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage Counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois; Deerfield, Highland Park & Lake Forest	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland County; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb County, Michigan	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Kings County, New York	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.

Delivered Carload Minimum Prices in—	*Same as—*
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.
Roselyn, Virginia	Washington, D. C.

(14) Sales to Contractors and Prefabricated House Manufacturers, Also Extras on Odd Sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

† Indicates change in this reissue.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10586 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 2, 1936.

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1—Dated May 26, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective June 4, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum wallboard and metallized gypsum plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Metallized Gypsum Wallboard—Weight—950 # per M	⅜" Metallized Gypsum Wallboard—Weight—1400 # per M	½" Metallized Gypsum Wallboard—Weight—1900 # per M	½" Metallized Gypsum Sheathing—Weight—1900 # per M	⅜" Metallized Gypsum Plasterboard—Weight—1400 # per M
Acme, Texas	$27.50	$33.50	$36.00	$31.00	(See Note 'a')
Boston (Charlestown) Mass.	27.50	33.50	36.00	31.00	
Detroit, Mich.	27.50	33.50	36.00	31.00	
East Chicago, Ind.	27.50	33.50	36.00	31.00	
Fort Dodge, Iowa	27.50	33.50	36.00	31.00	
Grand Rapids, Mich.	27.50	33.50	36.00	31.00	
Gypsum, Ohio	27.50	33.50	36.00	31.00	
New Brighton, S. I., N. Y.	27.50	33.50	36.00	31.00	
Oakfield, N. Y.	27.50	33.50	36.00	31.00	
Philadelphia, Pa.	27.50	33.50	36.00	31.00	
Plasterco, Va.	27.50	33.50	36.00	31.00	
Southard, Okla.	27.50	33.50	36.00	31.00	
Sweetwater, Texas	27.50	33.50	36.00	31.00	

(Reference notes on following page)

10587 · Emergency Freight Charges:

The minimum delivered prices of patented metallized wallboard and metallized gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented metallized gypsum wallboard and metallized gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented metallized gypsum wallboard and metallized gypsum plasterboard shall be as detailed in following schedule:

(Reference notes from preceding page)

(a) 3/8" Metallized Plasterboard:

(1) $22.00 per M sq. ft. f.o.b. Oakfield, N. Y., Philadelphia, Pa., New Brighton, S. I., N. Y., Boston, Mass., Gypsum, Ohio, Detroit, Mich., East Chicago, Ind., Grand Rapids, Mich., and Plastereo, Va. for shipments into area east of the Mississippi River, also cities of Duluth, Minneapolis, and St. Paul, Minn., and towns below St. Paul on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

(2) $22.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Texas for shipments into states of Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana West of the Mississippi River.

(3) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipments into area west and north of areas as described in paragraphs (1) and (2) above.

(b) The above prices are for Board or Lath with one surfaced metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than ¼¢ per cwt. to be dropped, fractions of ¼¢ per cwt. to ½¢ per cwt. to be considered as ½¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds.

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

10588 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered price when delivered by truck.

The above prices apply to the sale of all metallized board embodying the claims of our patentes in all markets except where an exception is made as hereinafter expressly stated:

(1) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge, East Chicago or Grand Rapids) is in effect, delivered prices of patented metallized board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented metallized board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

(2) 1/4" Metallized Wallboard Exceptions:

(a) For shipment into states of New Mexico, Colorado, Montana, and Wyoming, minimum price of 1/4" patented metallized gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma and Fort Dodge, Iowa.

(b) For shipment into states of Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina and Florida, minimum price of 1/4" patented metallized gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

(c) For shipment into states of North Dakota, South Dakota, Nebraska and Kansas, minimum price of 1/4" patented metallized gypsum wallboard is $27.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma.

(d) For shipment into state of Minnesota, minimum price of 1/4" patented metallized gypsum wallboard is $27.00 per M sq. ft. f.o.b. Fort Dodge, Iowa or $27.50 per M sq. ft. f.o.b. Grand Rapids, Michigan and East Chicago, Indiana.

(3) 3/8" Metallized Wallboard Exceptions:

(a) For shipment into states of New Mexico, Colorado, Montana, Wyoming, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina, and Florida minimum
10589 price of 3/8" patented metallized gypsum wallboard is $30.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

(b) For shipment into states of North Dakota, South Dakota, Nebraska and Kansas, minimum price of 3/8" patented metallized gypsum wallboard is $31.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma.

(c) For shipment into states of Minnesota and Missouri, minimum price of 3/8" patented metallized gypsum wallboard is $31.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and Southard, Oklahoma; or $33.50 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(4) 1/2" Metallized Wallboard Exceptions:

(a) For shipment into states of New Mexico, Oklahoma, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented metallized gypsum wallboard is $31.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

(b) For shipment into states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisiana (except counties listed in (a) above, Kansas, Nebraska, South Dakota, North Dakota, and Montana, minimum price of 1/2" patented metallized gypsum wallboard is $34.00 per M sq. ft. f.o.b. Plastereo, Virginia; Philadelphia, Pennsylvania; Gypsum, Ohio; East Chicago, Indiana; Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Sweetwater, Texas and Acme, Texas.

(c) For shipment into states of Minnesota and Missouri, minimum price of 1/2" patented metallized gypsum wallboard is $34.00 per M sq. ft. f.o.b. Fort Dodge, Iowa and

Southard, Oklahoma; or $36.00 per M sq. ft. f.o.b. East Chicago, Indiana and Grand Rapids, Michigan.

(d) For shipment into state of Arizona, minimum price of 1/2" patented metallized gypsum wallboard is $34.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(5) 5/16" Metallized Plasterboard: The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

(a) $21.68 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Mercer County, New Jersey (Trenton). See paragraph (8) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

(b) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

10590 —Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
—Franklin County, Ohio (Columbus).
—Hampden County, Massachusetts (Springfield).
—Hanover County, Virginia.
—Hartford County, Connecticut (Hartford).
—Hennepin County, Minnesota (Minneapolis).
—Henrico County, Virginia (Richmond).
—Kent County, Rhode Island.
—Lancaster County, Pennsylvania (Lancaster).
—Marion County, Indiana (Indianapolis).
—Norfolk County, Virginia (Norfolk).
—Oklahoma County, Oklahoma (Oklahoma City).
—Peoria County, Illinois (Peoria).
—Princess Anne County, Virginia.
—Providence County, Rhode Island (Providence).
—Ramsey County, Minnesota (St. Paul).
—Roanoke County, Virginia (Roanoke).
—Sangamon County, Illinois (Springfield).
—Tulsa County, Oklahoma (Tulsa).

also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

(c) $23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in DeKalb and Fulton Counties, Georgia (Atlanta).

(d) $25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Woodbury County, Iowa (Sioux City); Pottawatomie County, Iowa (Council Bluffs) and Douglas County, Nebraska (Omaha).

(e) $26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph).
—Cass County, North Dakota (Fargo).
—Greene County, Missouri (Springfield).
—Jasper County, Missouri (Joplin).
—Lancaster County, Nebraska (Lincoln).
—Minnehaha County, South Dakota (Sioux Falls).
—Newton County, Missouri (Joplin).
—Sedgewick County, Kansas (Wichita).

also following towns in Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri; also towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(6) 3/8" Metallized Plasterboard. The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

10591 (7) In straight carloads of patented gypsum board and/or lath products consigned to one destination and invoiced to one account, minimum prices of patented metallized gypsum board products f.o.b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston areas

(as described below) shall be same as f.o.b. New Brighton, Philadelphia or Boston mill prices as listed on page one of this bulletin. This applies into areas as follows:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. Exception: Refer to section (a) of paragraph (5) for minimum price of 5/16" metallized plasterboard into Mercer County, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Boston Area: Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(8) For minimum prices of patented metallized gypsum board products, in pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston Areas as described in paragraph (7) above, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton, Philadelphia and Boston Mills. Exception: Refer to section (a) of paragraph (5) for minimum price of 5/16" metallized plasterboard into Mercer County, New Jersey.

On pool or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described in paragraph (7) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(9) Grand Rapids Switching District. For minimum prices of patented metallized gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Grand Rapids, Michigan Switching District, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

10592 (10) Chicago Area. For minimum prices of patented metallized gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products (either 40,000# or 60,000# cars) f.o.b. cars delivered to dealers warehouse or siding within the Chicago Area, add 50¢ per M sq. ft. to prices applying f.o.b. cars, East Chicago Mill. This applies into Cook and Du Page Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

(11) Detroit Area. For minimum prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area, add 60¢ per M sq. ft. to prices applying f.o.b. cars, Detroit Mill. This applies into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan. Exception: Minimum price of 3/8" patented metallized gypsum plasterboard is $22.00 per M sq. ft., f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area as described above.

(12) Delivered Carload Minimum Prices in Certain Suburbs Same as in City Proper, as Indicated Below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage Counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois; Deerfield, Highland Park and Lake Forest	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland County; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb County, Michigan	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Kings County, New York	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Oklahoma	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.
†Rosslyn, Virginia	Washington, D. C.

10593 (13) Sales to Contractors and Prefabricated House Manufacturers, Also Extras on Odd Sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10594

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 26, 1936.

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1—Dated April 8, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective May 28, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum wallboard and metallized gypsum plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination (see note # on page 2). In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Sq. Ft. f.o.b. Cars: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Metallized Gypsum Wallboard—Weight—950 # per M	⅜" Metallized Gypsum Wallboard—Weight—1400 # per M	½" Metallized Gypsum Wallboard—Weight—1900 # per M	½" Metallized Gypsum Sheathing—Weight—1900 # per M	⅜" Metallized Gypsum Plasterboard—Weight—1400 # per M
†Acme, Texas	$27.50	$33.50	$36.00	$31.00	
†Boston (Charlestown) Mass.	27.50	33.50	36.00	31.00	
†Detroit, Mich.	27.50	33.50	36.00	31.00	
†East Chicago, Ind.	27.50	33.50	36.00	31.00	
†Fort Dodge, Iowa	27.50	33.50	36.00	31.00	
†Grand Rapids, Mich.	27.50	33.50	36.00	31.00	
†Gypsum, Ohio	27.50	33.50	36.00	31.00	
†New Brighton, L. I., N. Y.	27.50	33.50	36.00	31.00	
†Oakfield, N. Y.	27.50	33.50	36.00	31.00	
†Philadelphia, Pa.	27.50	33.50	36.00	31.00	
†Plasterco, Va.	27.50	33.50	36.00	31.00	
†Southard, Okla.	27.50	33.50	36.00	31.00	
†Sweetwater, Texas	27.50	33.50	36.00	31.00	

(See Note 'a')

(*Reference notes on following page*)

10595 Emergency Freight Charges: The minimum delivered prices of patented metallized gypsum wallboard and metallized gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Comission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented metallized gypsum wallboard and metallized gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented metallized gypsum wall-

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(Reference notes from preceding page)

(a) 3/8" Metallized Plasterboard:

†(1) $22.00 per M sq. ft. f.o.b. Oakfield, N. Y., Philadelphia, Pa., New Brighton, L. I., N. Y., Boston, Mass., Gypsum, Ohio, Detroit, Mich., East Chicago, Ind., Grand Rapids, Mich., and Plasterco, Va. for shipments into area east of the Mississippi River, also cities of Duluth, Minneapolis, and St. Paul, Minn., and towns below St. Paul on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

†(2) $22.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Texas for shipments into States of Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana west of the Mississippi River.

(3) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipments into area west and north of areas as described in paragraphs (1) and (2) above.

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

†# Where an odd 'rate per ton' is in effect (example: $3.45 per ton) the freight per M sq. ft. shall be figured on basis of rate per cwt. nearest to rate per ton, fractions of less than ¼¢ per cwt. to be dropped, fractions of ¼¢ per cwt. to ½¢ per cwt. to be considered as ½¢. Example: The rate of $3.45 per ton equals 17¼¢ per cwt. For purpose of arriving at delivered price, however, the rate of 17½¢ shall be used.

board and metallized gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds.

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

10596 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming; also stopover charges need not be included on shipments to destinations within any Gypsum Board Trucking Area wherein the delivered price in pool or mixed carloads is same as delivered price when delivered by truck.

The above prices apply to the sale of all metallized board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

†(1) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge, East Chicago or Grand Rapids) is in effect, delivered prices of patented metallized board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented metallized board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

†(2) 1/4" Metallized Wallboard Exceptions:

†(a) For shipment into states of New Mexico, Colorado, Montana, and Wyoming, minimum price of 1/4" patented metallized gypsum wallboard is $25.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma and Fort Dodge, Iowa.

†(b) For shipment into states of Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina and Florida, minimum price of 1/4" patented metallized gypsum wallboard is $26.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

†(3) 3/8" Metallized Wallboard Exceptions:

†(a) For shipment into states of New Mexico, Colorado, Montana, Wyoming, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, South Carolina, North Carolina, and Florida minimum price of 3/8" patented metallized gypsum wallboard is $30.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge Iowa; Grand Rapids, Michigan; East Chicago, Indiana; Gypsum, Ohio; Plasterco, Virginia; and Philadelphia, Pennsylvania.

10597 †(4) 1/2″ Metallized Wallboard Exceptions:

†(a) For shipment into states of New Mexico, Oklahoma, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville Webster and Claiborne Counties, Louisiana, minimum price of 1/2″ patented metallized gypsum wallboard is $31.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

†(b) For shipment into states of Louisiana (except counties as listed in (a) above), and into Kansas and Nebraska, minimum price of 1/2″ patented metallized gypsum wallboard is $34.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas, Southard, Oklahoma; and Fort Dodge, Iowa.

(5) 5/16″ Metallized Plasterboard: The minimum price of 5/16″ patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

†(a) $21.68 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Mercer County, New Jersey (Trenton). See paragraph (8) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

† (b) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
—Hampden County, Massachusetts (Springfield)
—Hanover County, Virginia.
—Hartford County, Connecticut (Hartford).
—Hennepin County, Minnesota (Minneapolis).
—Henrico County, Virginia (Richmond).
—Lancaster County, Pennsylvania (Lancaster).
—Marion County, Indiana (Indianapolis).
—Norfolk County, Virginia (Norfolk).
†—Oklahoma County, Oklahoma (Oklahoma City).
—Peoria County, Illinois (Peoria)
—Princess Anne County, Virginia.
—Providence County, Rhode Island (Providence)
—Ramsey County, Minnesota (St. Paul).
—Roanoke County, Virginia (Roanoke).

—Sangamon County, Illinois (Springfield).
—Tulsa County, Oklahoma (Tulsa).

also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

10598 (c) $25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Woodbury County, Iowa (Sioux City); Pottawatomie County, Iowa (Council Bluffs) and Douglas County, Nebraska (Omaha).

(d) $26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Buchanan County, Missouri (St. Joseph)
—Cass County, North Dakota (Fargo)
—Greene County, Missouri (Springfield)
—Jasper County, Missouri (Joplin)
—Lancaster County, Nebraska (Lincoln)
—Minnehaha County, South Dakota (Sioux Falls)
—Newton County, Missouri (Joplin)
—Sedgewick County, Kansas (Wichita)

also following towns in Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri; also towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(6) 3/8" Metallized Plasterboard. The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(7) In straight carloads of patented gypsum board and/or lath products consigned to one destination and invoiced to one account, minimum prices of patented metallized gypsum board products f.o.b. cars delivered to dealers warehouse or siding within the Metro New York-New

Jersey, Philadelphia and Boston areas (as described below) shall be same as f.o.b. New Brighton, Philadelphia or Boston mill prices as listed on page one of this bulletin. This applies into areas as follows:

Metro New York-New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Boston Area: Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass; Rockingham and Strafford Counties, New Hampshire; York County, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to the York County line.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car
10599 quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(8) For minimum prices of patented metallized gypsum board products, in pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Metro New York-New Jersey, Philadelphia and Boston Areas as described in paragraph (7) above, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton, Philadelphia to Boston Mills. Exception: The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M) in straight and pool carloads or in mixed carloads with other

gypsum products, for shipment into Mercer County, New Jersey (not to be sold in balance of Metro New York-New Jersey Area) is $21.68 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding.

On pool cars or mixed cars into the Metro New York-New Jersey Area, the Philadelphia Area and the Boston Area as described in paragraph (7) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(9) Grand Rapids Switching District. For minimum prices of patented metallized gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Grand Rapids, Michigan Switching District, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

(10) Chicago Area. For minimum prices of patented metallized gypsum board products, in straight and pool cars, or in mixed cars with other gypsum products (either 40,000# or 60,000# cars) f.o.b. cars delivered to dealers warehouse or siding within the Chicago Area, add 50¢ per M sq. ft. to prices applying f.o.b. cars, East Chicago, mill. This applies into Cook and Du Page Counties, Illinois, Lake County, Indiana and following towns in Lake County, Illinois: Deerfield, Highland Park and Lake Forest.

(11) Detroit Area. For minimum prices of patented metallized gypsum board products, in straight and pool cars or in mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding within the Detroit Area, add 60¢ per M sq. ft. to prices applying f.o.b. cars, Detroit Mill. This applies into Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; and towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan. Exception: Minimum price of 3/8" patented metallized gypsum plasterboard is $22.00 per M sq. ft. f.o.b. cars delivered to dealers ware-

house or siding within the Detroit Area as described above.

10600 (12) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage Counties, Ill., Lake County, Indiana; also following towns in Lake County,	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland County; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb County, Michigan	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Kings County, New York	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mo.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie) New York	Poughkeepsie, N. Y.

(13) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

10601 . (b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice-President.

† Indicates change in this reissue.

10602 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 8, 1936.

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1—Dated March 18, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective April 10, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum wallboard and metallized gypsum plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination. In stop-over cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Square Feet F.O.B. Cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Metallized Gypsum Wallboard Weight—950 # per M	3/8" Metallized Gypsum Wallboard Weight—1400 # per M	1/2" Metallized Gypsum Wallboard Weight—1900 # per M	3/8" Metallized Gypsum Wallboard, Weight—1400 # per M
Acme, Texas	$27.50	$33.50	$36.00	(See Note 'a')
Fort Dodge, Iowa	27.50	33.50	36.00	
Grand Rapids, Mich.	27.50	33.50	36.00	
Gypsum, Ohio	27.50	33.50	36.00	
Oakfield, N. Y.	27.50	33.50	36.00	
Plasterco, Va.	27.50	33.50	36.00	
Southard, Okla.	27.50	33.50	36.00	
Sweetwater, Texas	27.50	33.50	36.00	

(a) 3/8" Metallized Plasterboard:

(1) $22.06 per M sq. ft. f.o.b. Oakfield, N. Y., Gypsum, Ohio, Detroit, Mich., Grand Rapids, Mich., and Plasterco, Va. for shipments into area east

(*Reference notes continued on following page*).

10603 Emergency Freight Charges

The minimum delivered prices of patented metallized gypsum wallboard and metallized gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented metallized gypsum wallboard and metallized gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented metallized gypsum wallboard and metallized gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds:

(Reference notes continued from preceding page)

of the Mississippi River, also city of Minneapolis, Minn, and towns below Minneapolis on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

(2) $30.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Tex. for shipments into states of Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana west of the Mississippi River.

(3) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipments into area west and north of areas as described in paragraphs (1) and (2) above.

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

10604 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming

The above prices apply to the sale of all metallized board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge or Grand Rapids) is in effect, delivered prices of patented metallized board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum

out of Fort Dodge or Grand Rapids into these states will be used in pricing patented metallized board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

(2) 3/8" Metallized Wallboard Exceptions:

(a) For shipment into States of New Mexico and Texas, also into City of Texarkana, Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 3/8" patented metallized gypsum wallboard is $30.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(b) For shipment into states of Oklahoma, Arkansas (except City of Texarkana—see above), Louisiana (except counties as listed above), Mississippi, Alabama, Georgia, South Carolina and Florida, also into Hamilton County only in State of Tennessee minimum price of 3/8" patented metallized gypsum wallboard is $32.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma, Fort Dodge, Iowa; Grand Rapids, Michigan; and Plasterco, Virginia.

(3) 1/2" Metallized Wallboard Exceptions:

(a) For shipment into states of New Mexico, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented metallized gypsum wallboard is $31.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Okla.; and Fort Dodge, Iowa.

(c) For shipment into states of Oklahoma, Louisiana (except counties as listed above), Arizona, Kansas, and Nebraska, minimum price of 1/2" patented metallized gypsum wallboard is $34.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

10605 (4) 5/16" Metallized Plasterboard. The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

†(a) $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:

—Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio.
—Hampden County, Massachusetts (Springfield).
—Hanover County, Virginia.
—Hartford County, Connecticut (Hartford).
†—Hennepin County, Minnesota (Minneapolis).
—Henrico County, Virginia (Richmond).
—Lancaster County, Pennsylvania (Lancaster).
—Marion County, Indiana (Indianapolis).
—Mercer County, New Jersey (Trenton). See paragraph (7) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.
—Norfolk County, Virginia (Norfolk).
†—Peoria County, Illinois (Peoria).
—Princess Anne County, Virginia.
—Providence County, Rhode Island (Providence).
†—Ramsey County, Minnesota (St. Paul).
—Roanoke County, Virginia (Roanoke).
—Sangamon County, Illinois (Springfield).

also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

†(b) $25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Woodbury County, Iowa (Sioux City); Pottawatomie County, Iowa (Council Bluffs) and Douglas County, Nebraska (Omaha).

†(c) $26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in the following markets:
—Buchanan County, Missouri (St. Joseph).
†—Cass County, North Dakota (Fargo).
†—Greene County, Missouri (Springfield).
†—Jasper County, Missouri (Joplin).
—Lancaster County, Nebraska (Lincoln).
†—Minnehaha County, South Dakota (Sioux Falls)
†—Newton County, Missouri (Joplin).
—Sedgewick County, Kansas (Wichita).

also following towns in Kansas City Area: Kansas City, Dodson and Edgecomb, Missouri; also towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(d) $30.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Oklahoma County, Oklahoma (Oklahoma City) and Tulsa County, Oklahoma (Tulsa).

10606 (5) 3/8" Metallized Plasterboard. The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(6) In straight carloads of patented gypsum board and/or lath products, (except 5/16" thickness plasterboard—see par. 4), consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York-New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York, Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex, and Ocean Counties, New Jersey; also in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(7) On pool cars or mixed cars into the Metropolitan New York-New Jersey Area and the Philadelphia Area as described in paragraph (6) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products consigned to one destination and invoiced to one account. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board

products) may be combined to make up the required minimums.

(8) Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

(9) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage Counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois; Deerfield, Highland Park & Lake Forest (all to be priced on rate of 13¢ per cwt. plus Emergency Charge regardless of minimum shipped)	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
10607 Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland County; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb County, Michigan	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Kings County, New York	Brooklyn, N. Y.
Fergusen, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.

(10) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

On odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers				To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.				To Roofing Contractors			
Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
—	—	2.50	1.25	2.50	1.25	5.00	2.50	1.25	1.25	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

☞ Indicates change in this reissue.

10608 (4) 5/16" Metallized Plasterboard. The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

—$22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Marion County, Indiana (Indianapolis); Sangamon County, Illinois (Springfield); Henrico County, Virginia (Richmond); Princess Anne County, Virginia; Hanover County, Virginia; Norfolk County, Virginia (Norfolk); Roanoke County, Virginia (Roanoke); Hartford County, Connecticut (Hartford); Hampden County, Massachusetts (Springfield); Providence County, Rhode Island (Providence); Mercer County, New Jersey (Trenton); Lancaster County, Pennsylvania (Lancaster); Cuyahoga County, Ohio (Cleveland) and towns of Willoughby and Wickliffe, Ohio; also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction. See paragraph (7) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey. (Price for Princess Anne and Hanover Counties, Virginia effective April 6, 1936)

—$23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Hennepin County, Minnesota (Minneapolis) and Ramsey County, Minnesota (St. Paul).

—$25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Woodbury County, Iowa (Sioux City).

—$26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in towns of Kansas City, Dodson and Edgecomb, Missouri; also into towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; Lancaster County, Nebraska (Lincoln); Buchanan County, Missouri (St. Joseph); Sedgewick County, Kansas (Witchita).

—$30.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Oklahoma County, Oklahoma (Oklahoma City) and Tulsa County, Oklahoma (Tulsa).

(5) 3/8" Metallized Plasterboard. The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(6) In straight carloads of patented gypsum board and/or lath products, (except 5/16" thickness plasterboard—see par. 4), consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York-New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York, Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey; also in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Where any license or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

10609 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 18, 1936

Carload Shipments—Metallized Board License Bulletin No. 1 (Page 1)—Cancels Page 1 Dated February 24, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 20, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum wallboard and metallized gypsum plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination. In stop-over cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Square Feet F.O.B. Cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Metallized Gypsum Wallboard Weight—950 # per M	3/8" Metallized Gypsum Wallboard Weight—1400 # per M	1/2" Metallized Gypsum Wallboard Weight—1900 # per M	3/8" Metallized Gypsum Plasterboard Weight—1400 # per M
Acme, Texas	$27.50	$33.50	$36.00	(See Note 'a')
Fort Dodge, Iowa	27.50	33.50	36.00	
Grand Rapids, Mich.	27.50	33.50	36.00	
Gypsum, Ohio	27.50	33.50	36.00	
Oakfield, N. Y.	27.50	33.50	36.00	
Plasterco, Va.	27.50	33.50	36.00	
Southard, Okla.	27.50	33.50	36.00	
Sweetwater, Texas	27.50	33.50	36.00	

(a) 3/8" Metallized Plasterboard:

(1) $22.00 per M sq. ft. f.o.b. Oakfield, N. Y., Gypsum, Ohio, Detroit, Mich., Grand Rapids, Mich., and Plasterco, Va. for shipments into area East of the Mississippi River, also city of Minneapolis, Minn. and towns below Minneapolis on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

(Reference notes continued on following page)

The minimum delivered prices of patented metallized gypsum wallboard and metallized gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented metallized gypsum wallboard and metallized gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented metallized gypsum wallboard and metallized gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate, using the table below, is the proper new pricing rate, including emergency freight charge, in cents per 100 pounds:

(Reference notes continued from preceding page)

(2) $30.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Tex. for shipments into states of Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana west of the Mississippi River.

(3) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipments into area west and north of areas as described in paragraphs (1) and (2) above.

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.43
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

10611 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming.

The above prices apply to the sale of all metallized board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge or Grand Rapids) is in effect, delivered prices of patented metallized board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum

out of Fort Dodge or Grand Rapids into these states will be used in pricing patented metallized board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

(2) 3/8" Metallized Wallboard Exceptions:

(a) For shipment into States of New Mexico and Texas, also into City of Texarkana, Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 3/8" patented metallized gypsum wallboard is $30.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(b) For shipment into states of Oklahoma, Arkansas (except City of Texarkana—see above), Louisiana (except counties as listed above), Mississippi, Alabama, Georgia, South Carolina and Florida, also into Hamilton County only in State of Tennessee minimum price of 3/8" patented metallized gypsum wallboard is $32.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma, Fort Dodge, Iowa; Grand Rapids, Michigan; and Plasterco, Virginia.

(3) 1/2" Metallized Wallboard Exceptions:

(a) For shipment into states of New Mexico, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Clairborne Counties, Louisiana, minimum price of 1/2" patented metallized gypsum wallboard is $31.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Okla.; and Fort Dodge, Iowa.

(c) For shipment into states of Oklahoma, Louisiana (except counties as listed above), Arizona, Kansas, and Nebraska, minimum price of 1/2" patented metallized gypsum wallboard is $34.50 per M sq. ft. f.o b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

10612 "(4) 5/16" Metallized Plasterboard. The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

—$22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Marion County, Indiana (Indianapolis); Sangamon County, Illinois (Springfield); Henrico County, Virginia (Richmond); Norfolk County, Virginia (Norfolk); Roanoke County, Virginia (Roanoke); Hartford County, Connecticut (Hartford); Hampden County, Massachusetts (Springfield); Providence County, Rhode Island (Providence); Mercer County, New Jersey (Trenton); Lancaster County, Pennsylvania (Lancaster); Cuyahoga County, Ohio (Cleveland) and towns of Willoughby and Wickliffe, Ohio; also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction. See paragraph (7) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

—$23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Henepin County, Minnesota (Minneapolis) and Ramsey County, Minnesota (St. Paul).

—$25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Woodbury County, Iowa (Sioux City).

—$26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in towns of Kansas City, Dodson and Edgecomb, Missouri; also into towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas; Lancaster County, Nebraska (Lincoln); Buchanan County, Missouri (St. Joseph); Sedgewick County, Kansas (Wichita).

$30.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Oklahoma County, Oklahoma (Oklahoma City) and Tulsa County, Oklahoma (Tulsa).

(5) 3/8" Metallized Plasterboard. The minimum price of 3/8" patented metallized gypsum plasterboard, in

straight and pool carloads, or in mixed carloads with other gypsum products is $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(6) In straight carloads of patented gypsum board and/or lath products, (except 5/16" thickness plasterboard —see par. 4), consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York-New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York, Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey; also in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

10613 †(7) On pool cars or mixed cars into the Metropolitan New York-New Jersey Area and the Philadelphia Area as described in paragraph (6) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products to one destination. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(8) Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

(9) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage Counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois; Deerfield, Highland Park & Lake Forest (all to be priced on rate of 13¢ per cwt. plus Emergency Charge regardless of minimum shipped)	Chicago, Ill.
Euclid, North Randall and Bedford, O.	Cincinnati, O.
Eucid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland County; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb County, Michigan	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Kings County, New York	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.

10614 (10) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

On odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers				To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.				To Roofing Contractors			
Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
—	—	2.50	1.25	2.50	1.25	3.00	2.50	1.25	1.25	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10615. Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Daktoa, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming.

The above prices apply to the sale of all metallized board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge or Grand Rapids) is in effect, delivered prices of patented metallized board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented metallized board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

(2) 3/8" Metallized Wallboard Exceptions:

(a) For shipment into States of New Mexico and Texas, also into City of Texarkana, Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 3/8" patented metallized gypsum wallboard is $30.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(b) For shipment into states of Oklahoma, Arkansas (except City of Texarkana—see above), Louisiana (except counties as listed above), Mississippi, Alabama,

Georgia, South Carolina and Florida, minimum price of 3/8" patented metallized gypsum wallboard is $32.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma, Fort Dodge, Iowa; Grand Rapids, Michigan; and Plasterco, Virginia.

†(3) 1/2" Metallized Wallboard Exceptions:

†(a) For shipment into states of New Mexico, Texas and Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented metallized gypsum wallboard is $31.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

†(c) For shipment into states of Oklahoma, Louisiana (except counties as listed above), Arizona, Kansas, and Nebraska, minimum price of 1/2" patented metallized gypsum wallboard is $34.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

† Indicates change in this reissue.

10616 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1936

"Metallized" Board License Bulletin No. 1—Carload Shipments—Cancels "Metallized Board License Bulletin No. 1 Dated December 31, 1934 and All Supplements Thereto

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective February 26, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claim in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Patented metallized gypsum wallboard and metallized gypsum plasterboard products shall be quoted and sold on a delivered basis, f.o.b. cars destination. Delivered price is lowest combination of mill price plus freight, including emergency freight charge (see page 2) from that mill to destination. In stop-over cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as shown below:

Dealer Prices Per M Square Feet F.O.B. Cars: (Applying for standard sizes as listed in Bulletin No. 4)	1/4" Metallized Gypsum Wallbd. Weight—950# per M	3/8" Metallized Gypsum Wallbd. Weight—1400# per M	1/2" Metallized Gypsum Wallbd. Weight—1900# per M	3/8" Metallized Gypsum Plasterbd. Weight 1400# per M
Acme, Texas	$27.50	$33.50	$36.00	(See Note 'a')
Fort Dodge, Iowa	27.50	33.50	36.00	
Grand Rapids, Mich.	27.50	33.50	36.00	
Gypsum, Ohio	27.50	33.50	36.00	
Oakfield, N. Y.	27.50	33.50	36.00	
Plasterco, Va.	27.50	33.50	36.00	
Southard, Okla.	27.50	33.50	36.00	
Sweetwater, Texas	27.50	33.50	36.00	

(a) 3/8" Metallized Plasterboard:

†(1) $22.00 per M sq. ft. f.o.b. Oakfield, N. Y., Gypsum, Ohio, Detroit, Mich., Grand Rapids, Mich., and Plasterco, Va. for shipments into area East

(*Reference notes continued on following page*)

10617 Emergency Freight Charges:

The minimum delivered prices of patented metallized gypsum wallboard and metallized gypsum plasterboard are directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented metallized gypsum wallboard and metallized gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented metallized gypsum wallboard and metallized gypsum plasterboard shall be as detailed in following schedule:

Opposite old rate using the table below, is the proper new pricing rate including emergency freight charge, in cents per 100 pounds:

(Reference notes from preceding page)

of the Mississippi River, also city of Minneapolis, Minn., and towns below Minneapolis on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

(2) $30.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Texas for shipments into States of Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana west of the Mississippi River.

(3) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipments into area west and north of areas as described in paragraphs (1) and (2) above.

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

10618 Stopover, Switching and Other Extra Delivery Charges:

All stopover charges, switching charges and other extra delivery charges, including full Emergency Increase applicable to such charges, will be paid by customers. Exception: Stopover charges need not be included on shipments into the states of Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas, Nebraska, Kentucky, Montana, Colorado and Wyoming.

The above prices apply to the sale of all metallized board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly stated:

(1) In the states of Illinois and Wisconsin, to all destinations where a 60,000 lb. minimum (from Fort Dodge or Grand Rapids, is in effect, delivered prices of patented

metallized board and/or lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60,000 lb. rate, regardless of minimum shipped. Rate applying to 80,000 lbs. minimum out of Fort Dodge or Grand Rapids into these states will be used in pricing patented metallized board and/or lath in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80,000 lb. rate when included in 80,000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

(2) 3/8" Metallized Wallboard Exceptions:

(a) For shipment into States of New Mexico and Texas, also into City of Texarkana, Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 3/8" patented metallized gypsum wallboard is $30.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(b) For shipment into states of Oklahoma, Arkansas (except City of Texarkana—see above), Louisiana (except counties as listed above), Mississippi, Alabama, Georgia, South Carolina, and Florida, minimum price of 3/8" patented metallized gypsum wallboard is $32.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; Fort Dodge, Iowa; Grand Rapids, Michigan; and Plasterco, Virginia.

(3) 1/2" Metallized Wallboard Exceptions:

(a) For shipment into states of New Mexico and Texas, also into city of Texarkana, Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana, minimum price of 1/2" patented metallized gypsum wallboard is $31.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; and Southard, Oklahoma.

(c) For shipment into states of Oklahoma, Arkansas (except city of Texarkana—see above), Louisiana (except counties as listed above), Arizona, Kansas and Nebraska, minimum price of 1/2" patented metallized gypsum wall-

board is $34.50 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; Southard, Oklahoma; and Fort Dodge, Iowa.

10619 (4) 5/16" Metallized Plasterboard. The minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, for shipment into following markets only, is as follows:

—$22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Marion County, Indiana (Indianapolis); Sangamon County, Illinois (Springfield); Henrico County, Virginia (Richmond); Hartford County, Connecticut (Hartford); Hampden County, Massachusetts (Springfield); Providence County, Rhode Island (Providence); Mercer County, New Jersey (Trenton); Lancaster County, Pennsylvania (Lancaster); Cuyahoga County, Ohio (Cleveland) and towns of Willoughby and Wickliffe, Ohio; also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction. See paragraph (7) for minimum quantity required for shipment in pool cars or mixed cars into Mercer County, New Jersey.

—$23.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Hennepin County, Minnesota (Minneapolis) and Ramsey County, Minnesota (St. Paul).

—$25.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in Woodbury County, Iowa (Sioux City).

—$26.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in towns of Kansas City, Dodson and Edgecomb, Missouri; also into towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

(5) 3/8" Metallized Plasterboard. The minimum price of 3/8" patented metallized gypsum plasterboard, in straight and pool carloads, or in mixed carloads with other gypsum products is $22.00 per M sq. ft. f.o.b. cars delivered to dealers warehouse or siding in (Detroit Area) Wayne County, Michigan; towns of Birmingham, Clauson, Farm-

ington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan.

(6) In straight carloads of patented gypsum board and/or lath products, (except 5/16" thickness plasterboard —see par. 4.) consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York-New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York, Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey; also in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined areas have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

10620 (7) On pool cars or mixed cars into the Metropolitan New York-New Jersey Area and the Philadelphia Area as described in paragraph (6) above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products to one destination. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

(8) Straight or mixed cars board f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

(9) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
†Cook and DuPage Counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois; Deerfield, Highland Park & Lake Forest (all to be priced on rate of 13¢ per cwt. plus Emergency Charge regardless of minimum shipped)	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland County; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb County, Michigan	Detroit, Mich.
Dodson and Edgecomb, Mo., Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas	Kansas City, Mo.
Kings County, New York	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Gabe, Sheppard and Wilmont, Okla.	Oklahoma City, Okla.
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.

10621 (10) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

On odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers				To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.				To Roofing Contractors			
Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd
—	—	2.50	1.25	2.50	1.25	5.00	2.50	1.25	1.25	1.25	1.2

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 31, 1934.

"Metallized" Board License Bulletin No. 1—Carload Shipments—Cancels "Metallized" Board License Bulletin No. 1 Dated December 22, 1934.

FILE COPY

(See Reverse Side)

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. In stop-over cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates and minimum weights as shown in published railroad freight tariffs apply.

Minimum Prices Per M Square Feet F.O.B. Cars: (See Note "b")	1/4" Metallized Gypsum Wallbd. Weight—1050# per M	3/8" Metallized Gypsum Wallbd. Weight—1600# per M	1/2" Metallized Gypsum Wallbd. Weight—2150# per M	3/8" Metallized Gypsum Plasterbd. Weight 1600# per M
Acme, Texas	$29.50	$33.50	$36.00	
Fort Dodge, Iowa	29.50	33.50	36.00	
(#) Grand Rapids, Mich.	29.50	33.50	36.00	
Gypsum, Ohio	29.50	33.50	36.00	
(y) Oakfield, N. Y.	29.50	33.50	36.00	
Plasterco, Va.	29.50	33.50	36.00	
Southard, Okla.	29.50	33.50	36.00	
Sweetwater, Texas	29.50	33.50	36.00	

(See Note "a")

†(a) 3/8" Metallized Plasterboard—Weight 1600# per M:

(1) $22.00 per M sq. ft. f.o.b. Oakfield, N. Y., Gypsum Ohio, Grand Rapids, Mich. and Plasterco, Va. for shipments into area East of the Missis-

(Reference notes continued on following page)

10623 The above prices apply to the sale of all metallized board and/or metallized lath embodying the claims of patents under which you are licensed in all markets except where an exception is made as hereinafter expressly stated.

(1) Allowances, etc.: The minimum price fixed by licensor for patented metallized board and/or metallized lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding, for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented metallized board and/or metallized lath, or stopover charges. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers, or the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall

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(Reference notes from preceding page)

sippi River, also city of Minneapolis, Minn. and towns below Minneapolis on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

(2) $30.00 per M sq. ft. f.o.b. Southard, Okla., Sweetwater, Texas and Acme, Texas for shipments into States of Oklahoma, Texas, Arkansas, Arizona, New Mexico and that portion of Louisiana west of the Mississippi River.

(3) $25.00 per M sq. ft. f.o.b. Fort Dodge, Iowa for shipments into area west and north of areas as described in paragraphs (1) and (2) above.

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(#) In straight or mixed cars f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

(y) In straight carloads of patented gypsum board and/or lath products, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York-New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York ;Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth Hunterdon and Ocean Counties, New Jersey.

be the minimum price. Exception: Stopover charges need not be included in minimum price for shipments into Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas and Nebraska, also to following towns in Kentucky: Newport, Latonia, Ludlow, Erlanger, Covington, Bellevue, Brent and Dayton.

(2) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices In—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage counties, Ill. Lake County, Indiana; also following towns in Lake County, Illinois: Deerfield, Highland Park, and Lake Forest (all to be priced on rate of 13¢ per cwt. plus Emergency Charge regardless of minimum shipped.	Chicago, Ill.
10624 Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Wilmont, Gabe and Sheppard, Okla.	Oklahoma City, Okla.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10625 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

File Copy
(See Reverse Side)

12/22/34

"Metallized" Board License Bulletin No. 1—Carload Shipments—Cancels "Metallized" Board License Bulletin No. 1 Dated 10/30/34

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. In stop-over cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates and minimum weights as shown in published railroad freight tariffs apply.

Minimum Prices per M Square Feet F.O.B. Cars: (See Note "a")	1/4" Metallized Gypsum Wallboard Weight 1050# per M	3/8" Metallized Gypsum Wallboard Weight 1600# Per M	1/2" Metallized Gypsum Wallboard Weight 2150# Per M	3/8" Metallized Gypsum Wallboard Weight 1600# Per M
Acme, Texas	$29.50	$33.50	$36.00	$30.00
Fort Dodge, Iowa	29.50	33.50	36.00	25.00
(#) Grand Rapids, Mich.	29.50	33.50	36.00	25.00
Gypsum, Ohio	29.50	33.50	36.00	25.00
(y) Oakfield, N. Y.	29.50	33.50	36.00	22.00
Plasterco, Va.	29.50	33.50	36.00	25.00
Southard, Okla.	29.50	33.50	36.00	30.00
Sweetwater, Texas	29.50	33.50	36.00	30.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*Reference notes continued on following page*)

The above prices apply to the sale of all metallized board and/or metallized lath embodying the claims of patents under which you are licensed in all markets except where an exception is made as hereinafter expressly stated.

10626 (1) Allowances, etc.: The minimum price fixed by licensor for patented metallized board and/or metallized lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding, for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented metallized board and/or metallized lath, or stopover charges. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers, or the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price. Exception: Stopover charges need not be included in minimum price for shipments into Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas and Nebraska, also to following towns in Kentucky: Newport, Latonia, Ludlow, Erlanger, Covington, Bellevue, Brent and Dayton.

(*Reference notes continued from preceding page*)

(#) In straight or mixed cars f.o.b. dealers siding in switching limits of Grand Rapids, Michigan; add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

(y) In straight carloads of patented gypsum board and/or lath products, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York-New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth and Ocean Counties, New Jersey.

(2) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge, and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois: Deerfield, Highland Park, and Lake Forest.	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne county; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb county, Michigan.	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard, and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Wilmont, Gabe and Sheppard, Okla.	Oklahoma City, Okla.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10628 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 30, 1934.

"Metallized" Board License Bulletin No. 1—Carload Shipments

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. In stop-over cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates and minimum weights as shown in published railroad freight tariffs apply.

Minimum Prices Per M Square Feet F.O.B. Cars (See Note "a"):

	3/8" Metallized Gypsum Wallboard. Weight 1600# per M	3/8" Metallized Gypsum Plasterboard. Weight 1600# per M
Fort Dodge, Iowa	$33.50	—
#Grand Rapids, Mich.	33.50	—
Gypsum, Ohio	33.50	—
Oakfield, N. Y.	33.50	20.00
Plasterco, Va.	33.50	—
Southard, Okla.	33.50	—
Sweetwater, Texas	33.50	—

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(#) In straight or mixed cars f.o.b. dealers siding in switching limits of Grand Rapids, Michigan, add $1.00 per M sq. ft. to prices applying f.o.b. cars, Grand Rapids Mill.

The above prices apply to the sale of all metallized board and/or metallized lath embodying the claims of patents under which you are licensed in all markets except where an exception is made as hereinafter expressly stated.

10629 (1) Allowances, etc.: The minimum price fixed by licensor for patented metallized board and/or metallized lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding, for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented metallized board and/or metallized lath, or stopover charges. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers, or the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price. Exception: Stopover charges need not be included in minimum price for shipments into Michigan, Wisconsin, Illinois, Indiana, Ohio, Kansas, Missouri, Arkansas, Oklahoma, Iowa, Minnesota, North Dakota, South Dakota, Texas and Nebraska, also to following towns in Kentucky: Newport, Latonia, Ludlow, Erlanger, Covington, Bellevue, Brent and Dayton.

(2) Delivered carload minimum prices in certain suburbs same as in city proper, as indicated below:

Delivered Carload Minimum Prices in—	*Same as—*
College Park, Ga.	Atlanta, Ga.
Elkridge and Glen Burnie, Maryland	Baltimore, Md.
Bristol, Tenn.	Bristol, Va.
Cook and DuPage Counties, Ill., Lake County, Indiana; also following towns in Lake County, Illinois:, Deerfield, Highland Park and Lake Forest	Chicago, Ill.
Cheviot & Bridgetown, O.	Cincinnati, O.
Euclid, North Randall and Bedford, O.	Cleveland, O.
Wayne County; and towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak, in Oakland County; and Warren, Halfway, Fraser, Roseville, and Centerline in Macomb County, Michigan	Detroit, Mich.
Dodson and Edgecomb, Mo.; Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.	Kansas City, Mo.
Kings County, N. Y.	Brooklyn, N. Y.

10630 *Delivered Carload Minimum Prices in—*	*Same as—*
Ferguson, Kinlock, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction, Mo.	St. Louis, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass.	Springfield, Mass.
South Windham, Maine	Portland, Maine
Wilmont, Gabe and Sheppard, Okla.	Oklahoma City, Okla.

10630 Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10631 *Government's Exhibit No. 250*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1939.

Prices F.O.B. Trucks at Mills & Warehouses—Metallized Board License Bulletin No. 2 (Page 1)—Cancels Page 1 Dated May 6, 1938.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective February 7, 1939, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed, are as follows:

Minimum prices per M sq. ft. at which you may sell patented metallized gypsum board products f.o.b. trucks at mills and warehouses (Truckloads containing 7500 sq. ft. or more) are as follows:

MILLS AND WAREHOUSES	¼" Metallized Gypsum Wall bd. Weight—1050# per M	⅜" Metallized Gypsum Wall bd. Weight—1475#, per M	½" Metallized Gypsum Wall bd. Weight—2000# per M	½" Metallized Gypsum Sheathing. Weight—2000# per M	⅜" Metallized Gypsum Plaster Lath. Weight—1475# per M	½" Metallized Gypsum Plaster Lath. Weight—2000# per M
Texas Mills	$28.00	$33.00	$34.00	$30.00	$23.00	$25.00
Boston, Mass.	27.80	33.10	34.50	30.50	23.10	25.50
Cleveland, Ohio	— —	— —	— —	— —	25.00	— —
Fort Dodge, Iowa Mills	28.00	33.00	34.00	30.00	23.00	25.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00	25.00
Port Clinton Gypsum, Ohio Mills	28.00	33.00	34.00	30.00	23.00	25.00
Heath, Montana	32.78	40.11	44.00	40.00	30.11	35.00
Metro N. Y.-N. J. Whses.	27.80	33.10	34.50	30.50	23.10	25.50
National City, Mich.	28.00	33.00	34.00	30.00	23.00	25.00
Western N. Y. Mills & Whses.	27.75	33.05	34.40	30.40	23.05	25.40
Philadelphia, Pa. Area	27.80	33.10	34.50	30.50	23.10	25.50
Plasterco, Va.	28.00	33.00	34.00	30.00	23.00	25.00
Portsmouth, N. H.	28.05	33.50	35.00	31.00	23.50	26.00
Southard, Okla.	28.00	33.00	34.00	30.00	23.00	25.00

10632 The above minimum prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. to minimum prices when both surfaces metallized.

On sales to contractors, roofing contractors, metal ceiling contractors, prefabricated house manufacturers and consumers, and sales of odd or non-standard sizes, the minimum price at which you may sell for delivery f.o.b. trucks at mills and warehouses shall be the minimum prices established above plus the same amounts shown in Bulletin #1 for such sales for delivery by rail.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10633 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 27, 1938.

"Metallized" Board License Bulletin No. 2 Prices F.O.B. Trucks at Mills & Warehouses—Cancels. "Metallized" Board License Bulletin No. 2 (Page 1) Dated May 6, 1938.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective June 1, 1938 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq. Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	¼" Metallized Gypsum Wallboard. Weight—1050 # per M	⅜" Metallized Gypsum Wallboard. Weight 1475 # per M	½" Metallized Gypsum Wallboard. Weight 2000 # per M	½" Metallized Gypsum Sheathing. Weight 2000 # per M	⅜" Metallized Gypsum Plaster Lath. Weight 1475 # per M	½" Metallized Gypsum Plaster Lath. Weight 2000 # per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00	$25.00
*Boston, Mass.	27.80	33.10	34.50	30.50	23.10	25.50
Cleveland, O.	— —	— —	— —	— —	25.00	— —
Fort Dodge, Iowa	28.00	33.00	34.00	30.00	23.00	25.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00	25.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00	25.00
Heath, Montana	32.78	40.11	44.00	40.00	30.11	35.00
*Metro N. Y. N. J. Whses.	27.80	33.10	34.50	30.50	23.10	25.50
Miami, Fla.	— —	— —	— —	— —	32.00	— —
National City, Mich.	28.00	33.00	34.00	30.00	23.00	25.00
*Oakfield, N. Y.	27.75	33.05	34.40	30.40	23.05	25.40
*Philadelphia, Pa.	27.80	33.10	34.50	30.50	23.10	25.50
Plasterco, Pa.	28.00	33.00	34.00	30.00	23.00	25.00
†*Portsmouth, N. H.	28.05†	33.50†	35.00†	31.00†	23.50†	26.00†
Southard, Okla.	28.00	33.00	34.00	30.00	23.00	25.00
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00	25.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any

† Indicates change in this reissue, to become effective June 1, 1938.

10634 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 6, 1938.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated April 1, 1938.

(Confirms and supersedes telegram dated May 5, 1938).

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq. Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	¼" Metallized Gypsum Wallboard. Weight—1050# per M	⅜" Metallized Gypsum Wallboard. Weight 1475# per M	½" Metallized Gypsum Wallboard. Weight 2000# per M	½" Metallized Gypsum Sheathing. Weight 2000# per M	⅜" Metallized Gypsum Plaster Lath. Weight 1475# per M	½" Metallized Gypsum Plaster Lath. Weight 2000# per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00	$25.00†
*Boston, Mass.	27.80	33.10	34.50	30.50	23.10	25.50†
Cleveland	— —	— —	— —	— —	25.00	— —
Fort Dodge, Iowa	28.00	33.00	34.00	30.00	23.00	25.00†
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00	25.00†
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00	25.00†
Heath, Montana	32.78	40.11	44.00	40.00	30.11	35.00†
*Metro N. Y.-N. J. Whses.	27.80	33.10	34.50	30.50	23.10	25.50†
Miami, Fla.	— —	— —	— —	— —	32.00	— —
National City, Mich.	28.00	33.00	34.00	30.00	23.00	25.00†
*Oakfield, N. Y.	27.75	33.05	34.40	30.40	23.05	25.40†
*Philadelphia, Pa.	27.80	33.10	34.50	30.50	23.10	25.50†
Plasterco, Va.	28.00	33.00	34.00	30.00	23.00	25.00†
*Portsmouth, N. H.	28.47	34.07	35.80	31.80	24.07	26.80†
Southard, Okla.	28.00	33.00	34.00	30.00	23.00	25.00†
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00	25.00†

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 square feet patented gypsum board products.

Note: Any

† Indicates change in this reissue.

10635 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 1, 1938.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated March 15, 1938.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective April 5, 1938 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq. Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—1050# per M	3/8" Metallized Gypsum Wallbd. Weight—1475# per M	1/2" Metallized Gypsum Wallbd. Weight—2000# per M	1/2" Metallized Gypsum Sheathing. Weight—2000# per M	3/8" Metallized Gypsum Plaster Lath. Weight—1475# per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
*Boston, Mass.	27.80	33.10	34.50	30.50	23.10
Cleveland	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	28.00	33.00	34.00	30.00	23.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
†Heath, Montana	32.78†	40.11†	44.00†	40.00†	30.11†
*Metro. N. Y.–N. J. Whses.	27.80	33.10	34.50	30.50	23.10
†Miami, Fla.	— —	— —	— —	— —	32.00†
National City, Mich.	28.00	33.00	34.00	30.00	23.00
*Oakfield, N. Y.	27.75	33.05	34.40	30.40	23.05
*Philadelphia, Pa.	27.80	33.10	34.50	30.50	23.10
Plasterco, Va.	28.00	33.00	34.00	30.00	23.00
*Portsmouth, N. H.	28.47	34.07	35.80	31.80	24.07
Southard, Okla.	28.00	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 7500 ft. minimum.

10636 The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an exception is made as follows:

Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq .ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only);

To Contractor (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10637 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 15, 1938.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated March 10, 1938.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective March 21, 1938 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—1050 # per M	3/8" Metallized Gypsum Wallbd. Weight—1475 # per M	1/2" Metallized Gypsum Wallbd. Weight—2000 # per M	1/2" Metallized Gypsum Sheathing. Weight—2000 # per M	3/8" Metallized Gypsum Plaster Lath. Weight—1475 # per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
*Boston, Mass.	27.80	33.10	34.50	30.50	23.10
Cleveland	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	28.00	33.00	34.00	30.00	23.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
Heath, Montana	32.50	39.70	43.40	39.40	29.70
*Metro N. Y.—N. J. Whses.	27.80	33.10	34.50	30.50	23.10
Miami, Fla.	— —	— —	— —	— —	31.41
National City, Mich.	28.00	33.00	34.00	30.00	23.00
*Oakfield, N. Y.	27.75	33.05	34.40	30.40	23.05
*Philadelphia, Pa.	27.80	33.10	34.50	30.50	23.10
Plasterco, Va.	28.00	33.00	34.00	30.00	23.00
†*Portsmouth, N. H.	28.47†	34.07†	35.80†	31.80†	24.07†
Southard, Okla.	28.00	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 7500 ft. minimum.

10638 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only);

To Contractor (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contractors) & Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	5.00	2.50	†1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10639 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 10, 1938.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated January 4, 1938.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective March 21, 1938 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—1050# per M	3/8" Metallized Gypsum Wallbd. Weight—1475# per M	1/2" Metallized Gypsum Wallbd. Weight—2000# per M	1/2" Metallized Gypsum Sheathing. Weight—2000# per M	3/8" Metallized Gypsum Plaster Lath. Weight—1475# per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
*Boston & Portsmouth	27.80	33.10	34.50	30.50	23.10
Cleveland	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	28.00	33.00	34.00	30.00	23.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
Heath, Montana	32.50	39.70	43.40	39.40	29.70
*Metro N. Y.-N. J. Whses.	27.80	33.10	34.50	30.50	23.10
Miami, Fla.	— —	— —	— —	— —	31.41
National City, Mich.	28.00	33.00	34.00	30.00	23.00
*Oakfield, N. Y.	27.75	33.05	34.40	30.40	23.05
*Philadelphia, Pa.	27.80	33.10	34.50	30.50	23.10
Plasterco, Va.	28.00	33.00	34.00	30.00	23.00
Southard, Okla.	28.00	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.00	33.00	34.00	30.	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 7500 ft. minimum.

10640 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractor (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10641 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 4, 1938.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated December 31, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective January 15, 1938 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—1050 # per M	3/8" Metallized Gypsum Wallbd. Weight—1475 # per M	1/2" Metallized Gypsum Wallbd. Weight—2000 # per M	1/2" Metallized Gypsum Sheathing. Weight—2000 # per M	3/8" Metalized Gypsum Plaster Lath. Weight—
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.0
*Boston & Portsmouth	27.80	33.10	34.50	30.50	23.1
Cleveland	— —	— —	— —	— —	25.0
Fort Dodge, Iowa	28.00	33.00	34.00	30.00	23.0
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.0
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.0
Heath, Montana	32.50	39.70	43.40	39.40	29.1
*Metro N. Y.-N. J. Whses.	27.80	33.10	34.50	30.50	23.1
Miami, Fla.	— —	— —	— —	— —	30.5
National City, Mich.	28.00	33.00	34.00	30.00	23.0
*Oakfield, N. Y.	27.75	33.05	34.40	30.40	23.0
*Philadelphia, Pa.	27.80	33.10	34.50	30.50	23.1
†Plasterco, Va.	28.00	33.00	34.00	30.00	23.0
Southard, Okla.	28.00	33.00	34.00	30.00	23.0
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.0

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 7500 ft. minimum.

† Indicates change in this reissue, to become effective January 15, 1938.

10642 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 31, 1937.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated December 17, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective January 10, 1938 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight 1050# per M	3/8" Metallized Gypsum Wallbd. Weight—1475# per M	1/2" Metallized Gypsum Wallbd. Weight—2000# per M	1/2" Metallized Gypsum Sheathing. Weight—2000# per M	3/8" Metallized Gypsum Plaster Lath. Weight—1475# per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
*Boston & Portsmouth	27.80	33.10	34.50	30.50	23.10
Cleveland	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	28.00	33.00	34.00	30.00	23.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
Heath, Montana	32.50	39.70	43.40	39.40	29.70
*Metro N. Y.-N. J. Whses.	27.80	33.10	34.50	30.50	23.10
Miami, Fla.	— —	— —	— —	— —	30.91
National City, Mich.	28.00	33.00	34.00	30.00	23.00
*Oakfield, N. Y.	27.75	33.05	34.40	30.40	23.05
*Philadelphia, Pa.	27.80	33.10	34.50	30.50	23.10
Plastereo, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	28.00	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum-board products) may be combined to make up the 7500 ft. minimum.

10643 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 17, 1937.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1). Dated October 21, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective December 20, 1937 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—1050 # per M	3/8" Metallized Gypsum Wallbd. Weight—1475 # per M	1/2" Metallized Gypsum Wallbd. Weight—2000 # per M	1/2" Metallized Gypsum Sheathing. Weight—2000 # per M	3/8" Metallized Gypsum Plaster Lath. Weight—1475# per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
*Boston & Portsmouth	27.80	33.10	34.50	30.50	23.10
Cleveland	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	28.00	33.00	34.00	30.00	23.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
†Heath, Montana	32.50†	39.70†	43.40†	39.40†	29.70†
*Metro N. Y.-N. J. Whses.	27.80	33.10	34.50	30.50	23.10
Miami, Fla.	— —	— —	— —	— —	30.41†
National City, Mich.	28.00	33.00	34.00	30.00	23.00
*Oakfield, N. Y.	27.75	33.05	34.40	30.40	23.05
*Philadelphia, Pa.	27.80	33.10	34.50	30.50	23.10
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	28.00	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 7500 ft. minimum.

10644 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractor (Incl. Metal Ceiling Contrs.† and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & To Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10645 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 21, 1937.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated October 5, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective November 1, 1937 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—1050# per M †	3/8" Metallized Gypsum Wallbd. Weight—1475# per M †	1/2" Metallized Gypsum Wallbd. Weight—2000# per M †	1/2" Metalized Gypsum Sheathing. Weight—2000# per M †	3/8" Metallized Gypsum Plaster Lath. Weight—1475# per M †
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
†*Boston & Portsmouth	27.80†	33.10†	34.50†	30.50†	23.10†
Cleveland	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	28.00	33.00	34.00	30.00	23.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
†Heath, Montana	32.25†	39.40†	43.00†	39.00†	29.40†
*†Metro N. Y.—N. J. Whses.	27.80†	33.10†	34.50†	30.50†	23.10†
†Miami, Fla.	— —	— —	— —	— —	30.11¢
National City, Mich.	28.00	33.00	34.00	30.00	23.00
†*Oakfield, N. Y.	27.75†	33.05†	34.40†	30.40†	23.05†
†*Philadelphia, Pa.	27.80†	33.10†	34.50†	30.50†	23.10†
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	28.00	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 7500 ft. minimum.

10646 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractor (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10647 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 5, 1937.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated July 13, 1937.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950# per M	3/8" Metallized Gypsum Wallbd. Weight—1400# per M	1/2" Metallized Gypsum Wallbd. Weight—1900# per M	1/2" Metallized Gypsum Sheathing. Weight—1900# per M	3/8" Metallized Gypsum Plaster Lath. Weight—1400# per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
*Boston & Portsmouth	27.70	33.00	34.45	30.45	23.00
Cleveland, Ohio	— —	— —	— —	— —	25.00
†Fort Dodge, Iowa	28.00†	33.00†	34.00†	30.00†	23.00†
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
Heath, Montana	31.75	39.00	42.50	38.50	29.00
*Metro N. Y.—N. J. Whses.	27.70	33.00	34.45	30.45	23.00
Miami, Fla.	— —	— —	— —	— —	29.70
National City, Mich.	28.00	33.00	34.00	30.00	23.00
*Oakfield, N. Y.	27.70	33.00	34.35	30.35	23.00
*Philadelphia, Pa.	27.70	33.00	34.45	30.45	23.00
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	28.00	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 7500 ft. minimum.

10648 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10649 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 13, 1937.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated June 12, 1937.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 16, 1937 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq. Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950# per M	3/8" Metallized Gypsum Wallbd. Weight—1400# per M	1/2" Metallized Gypsum Wallbd. Weight—1600# per M	1/2" Metallized Gypsum Sheathing. Weight—1900# per M	3/8" Metallized Gypsum Plaster Lath. Weight—1400# per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
*Boston & Portsmouth	27.70	33.00	34.45	30.45	23.00
Cleveland	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	27.00	32.00	33.00	29.00	22.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
Heath, Montana	31.75†	39.00†	42.50†	38.50†	29.00†
*Metro N. Y.-N. J. Whses.	27.70	33.00	34.45	30.45	23.00
Miami, Fla.	— —	— —	— —	— —	29.70
National City, Mich.	28.00	33.00	34.00	30.00	23.00
*Oakfield, N. Y.	27.70	33.00	34.35	30.35	23.00
*Philadelphia, Pa.	27.70	33.00	34.45	30.45	23.00
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	28.00	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 7500 ft. minimum.

10650 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10651 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 12, 1937.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated February 24, 1937.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective June 17, 1937 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950 # per M	3/8" Metallized Gypsum Wallbd. Weight—1400 # per M	1/2" Metallized Gypsum Wallbd. Weight—1900 # per M	1/2" Metallized Gypsum Sheathing. Weight—1900 # per M	3/8" Metallized Gypsum Plaster Lath. Weight—1400 # per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
*Boston & Portsmouth	27.70	33.00	34.45	30.45	23.00
Cleveland, Ohio	— —	— —	— —	— —	25.00
†Fort Dodge, Iowa	27.00	32.00	33.00	29.00	22.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
†Heath, Montana	32.00	39.50	43.00	39.00	29.50
*Metro N. Y.—N. J. Whses.	27.70	33.00	34.45	30.45	23.00
Miami, Fla.	— —	— —	— —	— —	29.70
†National City, Mich.	28.00	33.00	34.00	30.00	23.00
*Oakfield, N. Y.	27.70	33.00	34.35	30.35	23.00
*Philadelphia, Pa.	27.70	33.00	34.45	30.45	23.00
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	28.00	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 7500 ft. minimum.

10652 The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10653 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1937.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated December 29, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 1, 1937 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4).. See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950# per M	3/8" Metallized Gypsum Wallbd. Weight—1400# per M	1/2" Metallized Gypsum Wallbd. Weight—1900# per M	1/2" Metallized Gypsum Sheathing. Weight—1900# per M	3/8" Metallized Gypsum Plaster Lath. Weight—1400# per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
†*Boston & Portsmouth	27.70	33.00	34.45	30.45	23.00
Cleveland, Ohio	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	27.00	32.00	33.00	29.00	25.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
Heath, Montana	32.00	39.50	43.00	39.00	32.50
†*Metro N. Y.—N. J. Whses	27.70	33.00	34.45	30.45	23.00
Miami, Fla.	— —	— —	— —	— —	29.70
†*Oakfield, N. Y.	27.70	33.00	34.35	30.35	23.00
†*Philadelphia, Pa.	27.70	33.00	34.45	30.45	23.00
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	28.00	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

†(*) Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 7500 ft. minimum.

The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

10654 †Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
Wall Bd. & Sheathing	Lath	Wall Bd. & Sheathing	Lath
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) Odd Sizes		To Roofing Contractors Odd Sizes	
Wall Bd. & Sheathing	Lath	Wallbd. & Sheathing	Lath	Wallbd. & Sheathing	Lath
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10655 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 29, 1936.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 (Page 1) Dated September 14, 1936 and all Supplements Thereto.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective January 1, 1937 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gyp sm Wallbd. Weight—950 # per M	3/8" Metallized Gypsum Wallbd. Weight—1400 # per M	1/2" Metallized Gypsum Wallbd. Weight—1900 # per M	1/2" Metallized Gypsum Sheathing. Weight—1900 # per M	3/8" Metallized Gypsum Plaster Lath. Weight—1400 # per M
Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
*Boston & Portsmouth	28.00	33.00	34.00	30.00	23.00
Cleveland, Ohio	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	27.00	32.00	33.00	29.00	25.00
Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
†Heath, Montana	32.00	39.50	43.00	39.00	32.50
*Metro N. Y.—N. J. Whses	28.00	33.00	34.00	30.00	23.00
†Miami, Fla.	— —	— —	— —	— —	29.70
*Oakfield, N. Y.	28.00	33.00	34.00	30.00	23.00
*Philadelphia, Pa.	28.00	33.00	34.00	30.00	23.00
Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
Southard, Okla.	28.00	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 5000 ft. minimum.

The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

10656 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10657 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10658 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 14, 1936.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated August 13, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective September 15, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950# per M †	3/8" Metallized Gypsum Wallbd. Weight—1400# per M †	1/2" Metallized Gypsum Wallbd. Weight—1900# per M †	1/2" Metallized Gypsum Sheathing. Weight—1900# per M †	3/8" Metallized Gypsum Plaster Lath. Weight—1400# per M †
†Acme, Texas	$28.00	$33.00	$34.00	$30.00	$23.00
†*Boston & Portsmouth	28.00	33.00	34.00	30.00	23.00
†Cleveland, Ohio	— —	— —	— —	— —	25.00
†Fort Dodge, Iowa	27.00	32.00	33.00	29.00	25.00
†Grand Rapids, Mich.	28.00	33.00	34.00	30.00	23.00
†Gypsum, Ohio	28.00	33.00	34.00	30.00	23.00
†*Metro. N. Y.–N. J. Whses.	28.00	33.00	34.00	30.00	23.00
Miami, Fla.	— —	— —	— —	— —	30.12
†*Oakfield, N. Y.	28.00	33.00	34.00	30.00	23.00
†*Philadelphia, Pa.	28.00	33.00	34.00	30.00	23.00
†Plasterco, Va.	27.00	32.00	33.00	29.00	22.00
†Southard, Okla.	28.00	33.00	34.00	30.00	23.00
†Sweetwater, Texas	28.00	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 5000 ft. minimum.

The above prices apply to all pickups of all board embodying the claims of our patents in all markets except where an exception is made as follows:

10659 †(1) 3/8" Metallized Plasterboard—Minimum price when picked up for destinations in Niagara, Erie (including town of Gowanda, N. Y.) Monroe and Wayne Counties, New York is $22.50 per M sq. ft. F.O.B. Trucks at Oakfield, N. Y.

(2) Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufauctrers, add differentials per M sq. ft. as follows. (Note: Sales to rooting contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contractors) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10660 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 13, 1936.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated July 23, 1936.

DEAR SIRS: Referring our license contract with you, you are hereby notified that effective August 17, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950# per M	3/8" Metallized Gypsum Wallbd. Weight—1400# per M	1/2" Metallized Gypsum Wallbd. Weight—1900# per M	1/2" Metallized Gypsum Sheathing. Weight—1900# per M	3/8" Metallized Gypsum Plaster Lath. Weight—1400# per M
Acme, Texas	$28.50	$33.00	$34.00	$30.00	$23.00
*Boston & Portsmouth	28.50	34.50	37.00	30.00	23.00
Cleveland, Ohio	— —	— —	— —	— —	25.00
†Fort Dodge, Iowa	27.50	32.00	33.00	29.00	25.00
Grand Rapids, Mich.	28.50	34.50	37.00	30.00	23.00
Gypsum, Ohio	28.50	34.50	37.00	30.00	23.00
*Metro N. Y.—N. J. Whses.	28.50	34.50	37.00	30.00	23.00
Miami, Fla.	— —	— —	— —	— —	30.12
*Oakfield, N. Y.	28.50	34.50	37.00	30.00	23.00
*Philadelphia, Pa.	28.50	34.50	37.00	30.00	23.00
†Plasterco, Va.	28.00	32.00	33.00	30.00	23.00
Southard, Okla.	28.50	33.00	34.00	30.00	23.00
Sweetwater, Texas	28.50	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 5000 ft. minimum.

10661 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

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10662 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 23, 1936.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated July 13, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 28, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950# per M	3/8" Metallized Gypsum Wallbd. Weight—1400# per M	1/2" Metallized Gypsum Wallbd. Weight—1900# per M	1/2" Metallized Gypsum Sheathing. Weight—1900# per M	3/8" Metallized Gypsum Plaster Lath. Weight—1400# per M
†Acme, Texas	$28.50	$33.00	$34.00	$30.00	$23.00
*Boston & Portsmouth	28.50	34.50	37.00	30.00	23.00
Cleveland, O.	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	27.50	33.00	35.00	29.00	25.00
†Grand Rapids, Mich.	28.50	34.50	37.00	30.00	23.00
†Gypsum, Ohio	28.50	34.50	37.00	30.00	23.00
*Metro N. Y.—N. J. Whses.	28.50	34.50	37.00	30.00	23.00
Miami, Fla.	— —	— —	— —	— —	30.12
†*Oakfield, N. Y.	28.50	34.50	37.00	30.00	23.00
*Philadelphia, Pa.	28.50	34.50	37.00	30.00	23.00
†Plasterco, Va.	28.00	34.00	36.00	30.00	23.00
†Southard, Okla.	28.50	33.00	34.00	30.00	23.00
†Sweetwater, Texas	28.50	33.00	34.00	30.00	23.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 5000 ft. minimum.

10663 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		† To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contractors) & to Prefabricated House Mfrs. Odd Sizes		† To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10664 UNITED STATES GYPSUM COMPANY
300 West Adams Street.
CHICAGO

JULY 13, 1936.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated July 10, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—850 # per M	3/8" Metallized Gypsum Wallbd. Weight—1400 # per M	1/2" Metallized Gypsum Wallbd. Weight—1900 # per M	1/2" Metallized Gypsum Sheathing. Weight—1900 # per M	3/8" Metallized Gypsum Plasterboard Weight—1400 # per M
Acme, Texas	$29.50	$34.00	$35.00	$35.00	$24.00
*Boston & Portsmouth	28.50	34.50	37.00	30.00	23.00
Cleveland, Ohio	— —	— —	— —	— —	25.00
†Fort Dodge, Iowa	27.50	33.00	35.00	29.00	25.00
Grand Rapids, Mich.	29.50	35.50	38.00	31.00	24.00
Gypsum, Ohio	29.50	35.50	38.00	31.00	24.00
*Metro N. Y.—N. J. Whses.	28.50	34.50	37.00	30.00	23.00
Miami, Fla.	— —	— —	— —	— —	30.12
*Oakfield, N. Y.	29.50	35.50	38.00	31.00	24.00
*Philadelphia, Pa.	28.50	34.50	37.00	30.00	23.00
Plastereo, Va.	28.00	34.00	37.00	30.00	23.00
Southard, Okla.	29.50	34.00	35.00	35.00	24.00
Sweetwater, Texas	29.50	34.00	35.00	35.00	24.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 5000 ft. minimum.

10665 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contra.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contractors) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

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10666 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 10, 1936.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills & Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated June 23, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 13, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufacturers by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roose patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950# per M	3/8" Metallized Gypsum Wallbd. Weight—1400# per M	1/2" Metallized Gypsum Wallbd. Weight—1900# per M	1/2" Metallized Gypsum Sheathing. Weight—1900# per M	3/8" Metallized Gypsum Plaster Lath. Weight—1400# per M
Acme, Texas	$29.50	$34.00	$35.00	$35.00	$24.00
†*Boston & Portsmouth	28.50	34.50	37.00	30.00	23.00
Cleveland, Ohio	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	27.50	33.50	36.00	29.00	25.00
Grand Rapids, Mich.	29.50	35.50	38.00	31.00	24.00
Gypsum, Ohio	29.50	35.50	38.00	31.00	24.00
†*Metro N. Y.—N. J. Whses.	28.50	34.50	37.00	30.00	23.00
Miami, Fla.	— —	— —	— —	— —	30.12
*Oakfield, N. Y.	29.50	35.50	38.00	31.00	24.00
†*Philadelphia, Pa.	28.50	34.50	37.00	30.00	23.00
†Plasterco, Va.	28.00	34.00	37.00	30.00	23.00
Southard, Okla.	29.50	34.00	35.00	35.00	24.00
Sweetwater, Texas	29.50	34.00	35.00	35.00	24.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board product (including special surfaced gypsum board products) may be combined to make up the 5000 ft. minimum.

10667 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Incl. Metal Ceiling Contractors) & To Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 23, 1936.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated May 26, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective June 25, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950# per M	3/8" Metallized Gypsum Wallbd. Weight—1400# per M	1/2" Metallized Gypsum Wallbd. Weight—1900# per M	1/2" Metallized Gypsum Sheathing. Weight—1900# per M	3/8" Metallized Gypsum Plaster Lath. Weight—1400# per M
†Acme, Texas	$29.50	$34.00	$35.00	$35.00	$24.00
†*Boston & Portsmouth	29.50	35.50	38.00	31.00	24.00
Cleveland, Ohio	— —	— —	— —	— —	25.00
†Fort Dodge, Iowa	27.50	33.50	36.00	29.00	25.00
†Grand Rapids, Mich.	29.50	35.50	38.00	31.00	24.00
†Gypsum, Ohio	29.50	35.50	38.00	31.00	24.00
†*Metro N. Y.—N. J. Whses.	29.50	35.50	38.00	31.00	24.00
Miami, Fla.	— —	— —	— —	— —	30.12
†*Oakfield, N. Y.	29.50	35.50	38.00	31.00	24.00
†*Philadelphia, Pa.	29.50	35.50	38.00	31.00	24.00
†Plasterco, Va.	28.50	34.50	37.00	30.00	23.00
†Southard, Okla.	29.50	34.00	35.00	35.00	24.00
†Sweetwater, Texas	29.50	34.00	35.00	35.00	24.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 5000 ft. minimum.

10668 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs.		To Roofing Contractors	
Std. Sizes		Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales or odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers; add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers		To Contractors (Incl. Metal Ceiling Contractors) & To Prefabricated House Mfrs.		To Roofing Contractors	
Odd Sizes		Odd Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10669 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 26, 1936.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated March 18, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective May 28, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950 # per M	3/8" Metallized Gypsum Wallbd. Weight—1400 # per M	1/2" Metallized Gypsum Wallbd. Weight—1900 # per M	1/2" Metallized Gypsum Sheathing. Weight—1900 # per M	3/8" Metallized Gypsum Plaster Lath. Weight—1400 # per M
†Acme, Texas	$28.00	$32.00	$33.00	$33.00	$24.00
†*Boston & Portsmouth	29.50	35.50	38.00	33.00	24.00
Cleveland, Ohio	— —	— —	— —	— —	25.00
†Fort Dodge, Iowa	27.50	33.50	36.00	31.00	25.00
†Grand Rapids, Mich.	29.50	35.50	38.00	33.00	24.00
†Gypsum, Ohio	29.50	35.50	38.00	33.00	24.00
†*Metro N. Y.—N. J. Whses.	29.50	35.50	38.00	31.00	24.00
Miami, Fla.	— —	— —	— —	— —	30.12
†*Oakfield, N. Y.	29.50	35.50	38.00	33.00	24.00
†*Philadelphia, Pa.	29.50	35.50	38.00	33.00	24.00
†Plasterco, Va.	28.50	34.50	37.00	32.00	23.00
†Southard, Okla.	28.00	32.00	33.00	33.00	24.00
†Sweetwater, Texas	28.00	32.00	33.00	33.00	24.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 5000 ft. minimum.

10670 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Contractors (Incl. Metal Ceiling Contrs.) and to Prefabricated House Mfrs. Std. Sizes		To Roofing Contractors Std. Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	1.25	1.25

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers Odd Sizes		To Contractors (Inc. Metal Ceiling Contractors) & to Prefabricated House Mfrs. Odd Sizes		To Roofing Contractors Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
2.50	1.25	5.00	2.50	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10671 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 18, 1936.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated February 24, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Sq Ft. f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950 # per M	3/8" Metallized Gypsum Wallbd. Weight—1400 # per M	1/2" Metallized Gypsum Sheathing. Weight—1900 # per M	3/8" Metallized Gypsum Plaster Lath. Weight—1400 # per M
Alma, Texas	$29.50	$32.00	$33.00	$32.00
*Boston & Portsmouth	32.07	39.28	43.13	27.78
Cleveland, Ohio	— —	— —	— —	25.00
Fort Dodge, Iowa	27.50	33.50	36.00	25.00
Grand Rapids, Mich.	29.50	35.50	38.00	24.00
Gypsum, Ohio	29.50	35.50	38.00	24.00
*Metro. N. Y.–N. J. Whses.	29.50	36.44	39.99	24.94
Miami, Fla.	— —	— —	— —	30.12
*Oakfield, N. Y.	29.50	35.50	38.00	24.00
*Philadelphia	29.50	36.44	39.99	24.94
Plasterco, Va.	28.50	34.50	37.00	23.00
Southard, Okla.	29.50	34.50	36.50	32.00
Sweetwater, Texas	29.50	32.00	33.00	32.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

†(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products.

Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the 5000 ft. minimum.

10672 Sales to contractors and prefabricated house manufacturers, also extras on odd sizes:

On odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows. (Note: Sales to roofing contractors are for specific roof jobs only):

To Dealers				To Contractors (Incl. Metal Ceiling Contrs.) & to Prefabricated House Mfrs.				To Roofing Contractors			
Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes		Std. Sizes		Odd Sizes	
W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.	W. Bd.	Pl. Bd.
—	—	†2.50	1.25	2.50	1.25	5.00	2.50	1.25	1.25	1.25	1.25

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

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10673

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1936

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated February 6, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective February 26, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Square Feet f.o.b. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in Bulletin No. 4). See Note (a).	1/4" Metallized Gypsum Wallbd. Weight—950 # per M	3/8" Metallized Gypsum Wallbd. Weight—1400 # per M	1/2" Metallized Gypsum Wallbd. Weight—1900 # per M	3/8" Metallized Gypsum Plasterbd. Weight—1400 # per M
Acme, Texas	$29.50	$32.00	$33.00	$32.00
*Boston & Portsmouth	32.07	39.28	43.13	27.78
Cleveland, Ohio	— —	— —	— —	25.00
Fort Dodge, Iowa	27.50	33.50	36.00	25.00
Grand Rapids, Mich.	29.50	35.50	38.00	24.00
Gypsum, Ohio	29.50	35.50	38.00	24.00
*Metro. N. Y.—N. J. Whses.	29.50	36.44	39.99	24.94
Miami, Fla.	— —	— —	— —	30.12
*Oakfield, N. Y.	29.50	35.50	38.00	24.00
*Philadelphia	29.50	36.44	39.99	24.94
Plasterco, Va.	28.50	34.50	37.00	23.00
†Southard, Okla.	29.50	34.50	36.50	32.00
Sweetwater, Texas	29.50	32.00	33.00	32.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products may be combined to make up the 5000 ft. minimum.

10674 Refer to Metallized Board License Bulletin No. 1 for differentials applicable on odd sizes and on sales to contractors, roofing contractors, metal ceiling contractors and Prefabricated House Manufacturers. (Note: Sales to roofing contractors are for specific roof jobs only.)

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10675 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1936.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated January 10, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective February 7, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Square Feet F.O.B. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Metallized Gypsum Wallboard. Weight 950 # per M	⅜" Metallized Gypsum Wallboard. Weight 1400 # per M	½" Metallized Gypsum Wallboard. Weight 1900 # per M	¼" Metallized Gypsum Plasterboard. Weight 950 # per M †	⅜" Metallized Gypsum Plasterboard. Weight 1400 # per M
Acme, Texas	$29.50	$32.00	$33.00	$32.00	$32.00
*Boston & Portsmouth	32.07	39.28	43.13	26.57	27.78
Cleveland, Ohio	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	27.50	33.50	36.00	25.00	25.00
Grand Rapids, Mich.	29.50	35.50	38.00	24.00	24.00
Gypsum, Ohio	29.50	35.50	38.00	24.00	24.00
*Metro. N. Y.–N. J. Whses.	29.50	36.44	39.99	24.00	24.94
Miami, Fla.	— —	— —	— —	— —	30.12
*Oakfield, N. Y.	29.50	35.50	38.00	24.00	24.00
†*Philadelphia	29.50	36.44	39.99	24.00	24.94
Plastereo, Va.	28.50	34.50	37.00	23.00	23.00
Southard, Okla.	29.50	35.50	36.50	32.00	32.00
Sweetwater, Texas	29.50	32.00	33.00	32.00	32.00

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products may be combined to make up the 5000 ft. minimum.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

10676 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 10, 1936

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated November 6, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Square Feet F.O.B. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Metallized Gypsum Wallboard. Weight 950# per M	⅜" Metallized Gypsum Wallboard. Weight 1400# per M	½" Metallized Gypsum Wallboard. Weight 1900# per M	¼" Metallized Gypsum Plasterboard. Weight 950# per M†	⅜" Metallized Gypsum Plasterboard. Weight 1400# per M
Acme, Texas	$29.50	$32.00	$33.00	$32.00	$32.00
*Boston & Portsmouth	32.07	39.28	43.13	26.57	27.78
Cleveland, Ohio	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	27.50	33.50	36.00	25.00	25.00
Grand Rapids, Mich.	29.50	35.50	38.00	24.00	24.00
Gypsum, Ohio	29.50	35.50	38.00	24.00	24.00
*Metro. N. Y.-N. J. Whses.	29.50	36.44	39.99	24.00	24.94
†Miami, Fla.	— —	— —	— —	— —	30.12
*Oakfield, N. Y.	29.50	35.50	38.00	24.00	24.00
*Philadelphia, Pa.	31.50	38.44	41.99	26.00	26.94
Plasterco, Va.	28.50	34.50	37.00	23.00	23.00
Southard, Okla.	29.50	35.50	36.50	32.00	32.00
Sweetwater, Texas	29.50	32.00	33.00	32.00	32.00

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products may be combined to make up the 5000 ft. minimum.

Very truly yours,
UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

10677 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 6, 1935

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated August 27, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective November 8, 1935, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Dealer Prices Per M Square Feet F.O.B. Trucks at Mills or Warehouses: (Applying for standard sizes as listed in Bulletin No. 4)	¼" Metallized Gypsum Wallboard. Weight 950# per M	⅜" Metallized Gypsum Wallboard. Weight 1400# per M	½" Metallized Gypsum Wallboard. Weight 1900# per M	¼" Metallized Gypsum Plasterboard. Weight 950# per M†	⅜" Metallized Gypsum Plasterboard. Weight 1400# per M
†Acme, Texas	$29.50	$32.00	$33.00	$32.00	$32.00
*Boston & Portsmouth	32.07	39.28	43.13	26.57	27.78
Cleveland, Ohio	— —	— —	— —	— —	25.00
Fort Dodge, Iowa	27.50	33.50	36.00	25.00	25.00
Grand Rapids, Mich.	29.50	35.50	38.00	24.00	24.00
Gypsum, Ohio	29.50	35.50	38.00	24.00	24.00
*Metro. N. Y.–N. J. Whses.	29.50	36.44	39.99	24.00	24.94
*Oakfield, N. Y.	29.50	35.50	38.00	24.00	24.00
*Philadelphia, Pa.	31.50	38.44	41.99	26.00	26.94
Plasterco, Va.	38.50	34.50	37.00	23.00	23.00
†Southard, Okla.	29.50	35.50	36.50	32.00	32.00
†Sweetwater, Texas	29.50	32.00	33.00	32.00	32.00

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products may be combined to make up the 5000 ft. minimum.

Very truly yours,
UNITED STATES GYPSUM COMPANY
Vice President.

† Indicates changes in this reissue.

10678 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 27, 1935

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated August 21, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective September 1, 1935, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Minimum Prices Per M Square Feet f.o.b. Trucks (Pickups) at Mills or Warehouses: (See note "b")	1/4" Metallized Gypsum Wallbd. Weight—950# per M	3/8" Metallized Gypsum Wallbd. Weight—1400# per M	1/2" Metallized Gypsum Wallbd. Weight—1900# per M	3/8" Metallized Gypsum Plasterbd. Weight—1400# per M
Acme, Texas	$29.50	$35.50	$38.00	$32.00
†*Boston & Portsmouth, Mass.	32.07	39.28	43.13	27.78
Cleveland, Ohio	— —	— —	— —	25.00
Fort Dodge, Iowa	27.50	33.50	36.00	25.00
Grand Rapids, Mich.	29.50	35.50	38.00	24.00
Gypsum, Ohio	29.50	35.00	38.00	24.00
†*Metro. N. Y.—N. J. Whses.	29.50	36.44	39.99	24.94
†*Oakfield, N. Y.	29.50	35.50	38.00	24.00
†*Philadelphia, Pa.	31.50	38.44	41.99	26.94
Plasterco, Va.	28.50	34.50	37.00	23.00
Southard, Okla.	29.50	35.50	38.00	32.00
Sweetwater, Texas	29.50	35.50	38.00	32.00

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products may be combined to make up the 5000 ft. minimum.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

10679 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 21, 1935

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated July 5, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective August 26, 1935, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Minimum Prices Per M Square Feet f.o.b. Trucks (Pickups) at Mills or Warehouses: (See note "b")	1/4" Metallized Gypsum Wallbd. Weight—950# per M	3/8" Metallized Gypsum Wallbd. Weight—1400# per M	1/2" Metallized Gypsum Wallbd. Weight—1900# per M	3/8" Metallized Gypsum Plasterbd. Weight—1400# per M
Acme, Texas	$29.50	$35.50	$38.00	$32.00
*Boston & Portsmouth, Mass.	34.07	39.28	43.13	27.78
Fort Dodge, Iowa	27.50	33.50	36.00	25.00
†Grand Rapids, Mich.	29.50	35.50	38.00	24.00
†Gypsum, Ohio	29.50	35.50	38.00	24.00
*Metro. N. Y.—N. J. Whses.	31.50	36.44	39.99	24.94
*Oakfield, N. Y.	31.50	35.50	38.00	24.00
*Philadelphia, Pa.	33.50	38.44	41.99	26.94
Plasterco, Va.	28.50	34.50	37.00	23.00
Southard, Okla.	29.50	35.50	38.00	32.00
Sweetwater, Texas	29.50	35.50	38.00	32.00

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M. sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products may be combined to make up the 5000 ft. minimum.

Very truly yours,
UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates changes in this reissue.

10680 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 5, 1935

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated April 16, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective July 10, 1935, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Minimum Prices Per M Square Feet f.o.b. Trucks (Pickups) at Mills or Warehouses: (See note "b")	1/4" Metallized Gypsum Wallbd. Weight—950 # per M	3/8" Metallized Gypsum Wallbd. Weight—1400 # per M	1/2" Metallized Gypsum Wallbd. Weight—1900 # per M	3/8" Metallized Gypsum Plasterbd. Weight—1400 # per M
Acme, Texas	$29.50	$35.50	$38.00	$32.00
*Boston & Portsmouth, Mass.	34.07	39.28	43.13	27.78
†Fort Dodge, Iowa	27.50	33.50	36.00	25.00
Grand Rapids, Mich.	31.50	35.50	38.00	24.00
Gypsum, Ohio	31.50	35.50	38.00	24.00
*Metro. N. Y.—N. J. Whses.	31.50	36.44	39.99	24.94
*Oakfield, N. Y.	31.50	35.50	38.00	24.00
*Philadelphia, Pa.	33.50	38.44	41.99	26.94
†Plasterco, Va.	28.50	34.50	37.00	23.00
Southard, Okla.	29.50	35.50	38.00	32.00
Sweetwater, Texas	29.50	35.50	38.00	32.00

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products may be combined to make up the 5000 ft. minimum.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10681 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 16, 1935

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated April 12, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective April 18, 1935, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Minimum Prices Per M Square Feet f.o.b. Trucks (Pickups) at Mills or Warehouses: (See note "b")	1/4" Metallized Gypsum Wallbd. Weight—950# per M	3/8" Metallized Gypsum Wallbd. Weight—1400# per M	1/2" Metallized Gypsum Wallbd. Weight—1900# per M	3/8" Metallized Gypsum Plasterbd. Weight—1400# per M
Acme, Texas	$29.50	$35.50	$38.00	$32.00
†*Boston & Portsmouth, Mass.	34.07	39.28	43.13	27.78
Fort Dodge, Iowa	29.50	33.50	36.00	25.00
Grand Rapids, Mich.	31.50	35.50	38.00	24.00
Gypsum, Ohio	31.50	35.50	38.00	24.00
†*Metro. N. Y.—N. J. Whses.	31.50	36.44	39.99	24.94
*Oakfield, N. Y.	31.50	35.50	38.00	24.00
†*Philadelphia, Pa.	33.50	38.44	41.99	26.94
Plasterco, Va.	30.50	34.50	37.00	23.00
Southard, Okla.	29.50	35.50	38.00	32.00
Sweetwater, Texas	29.50	35.50	38.00	32.00

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products may be combined to make up the 5000 ft. minimum.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10682 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 12, 1935

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated February 25, 1935.

A. W. IRWIN

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(Note changes in weights) Minimum Prices Per M Square Feet f.o.b. Trucks (Pickups) at Mills or Warehouses: (See note "b")	1/4" Metallized Gypsum Wallbd. Weight—950 # per M	3/8" Metallized Gypsum Wallbd. Weight—1400 # per M	1/2" Metallized Gypsum Wallbd. Weight—1900 # per M	3/8" Metallized Gypsum Plasterbd. Weight—1400 # per M
†Acme, Texas	$29.50	$35.50	$38.00	$32.00
*Boston & Portsmouth, Mass.	33.88	39.00	42.75	27.50
Fort Dodge, Iowa	29.50	33.50	36.00	25.00
Grand Rapids, Mich.	31.50	35.50	38.00	24.00
Gypsum, Ohio	31.50	35.50	38.00	24.00
*Metro. N. Y.—N. J. Whses.	31.35	36.23	39.71	24.73
*Oakfield, N. Y.	31.50	35.50	38.00	24.00
*Philadelphia, Pa.	33.35	38.23	41.71	26.73
Plastereo, Va.	30.50	34.50	37.00	23.00
†Southard, Okla.	29.50	35.50	38.00	32.00
†Sweetwater, Tex.	29.50	35.50	38.00	32.00

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products may be combined to make up the 5000 ft. minimum.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10683 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 25, 1935

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective March 1, 1935, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(Note changes in weights) Minimum Prices Per M Square Feet f.o.b. Trucks (Pickups) at Mills or Warehouses: (See note "b")	1/4" Metallized Gypsum Wallbd. Weight—950 # per M	3/8" Metallized Gypsum Wallbd. Weight—1400 # per M	1/2" Metallized Gypsum Wallbd. Weight—1900 # per M	3/8" Metallized Gypsum Plasterbd. Weight—1400 # per M
Acme, Texas	$31.50	$35.50	$38.00	$32.00
†Boston, & Portsmouth, Mass.	33.88	39.00	42.75	27.50
Fort Dodge, Iowa	29.50	33.50	36.00	25.00
Grand Rapids, Mich.	31.50	35.50	38.00	24.00
Gypsum, Ohio	31.50	35.50	38.00	24.00
†Metro. N. Y.—N. J. Whses.	31.35	36.23	39.71	24.73
Oakfield, N. Y.	31.50	35.50	38.00	24.00
†Philadelphia, Pa.	33.35	38.23	41.71	26.73
Plastereo, Va.	30.50	34.50	37.00	23.00
Southard, Okla.	31.50	35.50	38.00	32.00
Sweetwater, Texas	31.50	35.50	38.00	32.00

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10684 - UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 31, 1934.

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated December 22, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Minimum Prices Per M Square Feet f.o.b. Trucks (Pickups) at Mills or Warehouses: (See note "b")	1/4" Metallized Gypsum Wallbd. Weight—1050 # per M	3/8" Metallized Gypsum Wallbd. Weight—1600 # per M	1/2" Metallized Gypsum Wallbd. Weight—2150 # per M	3/8" Metallized Gypsum Plasterbd. Weight—1600 # per M
Acme, Texas	$31.50	$35.50	$38.00	$32.00
Boston, & Portsmouth, Mass.	34.13	39.50	43.38	28.00
Fort Dodge, Iowa	29.50	33.50	36.00	25.00
†Grand Rapids, Mich.	31.50	35.50	38.00	24.00
†Gypsum, Ohio	31.50	35.50	38.00	24.00
Metro. N. Y.—N. J. Whses.	31.55	36.62	40.19	25.12
Oakfield, N. Y.	31.50	35.50	38.00	24.00
Philadelphia, Pa.	33.55	38.62	42.19	27.12
†Plasterco, Va.	30.50	34.50	37.00	23.00
Southard, Okla.	31.50	35.50	38.00	32.00
Sweetwater, Texas	31.50	35.50	38.00	32.00

(b) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10685 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

12/22/34

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses—Cancels "Metallized" Board License Bulletin No. 2 Dated 10/30/34

File Copy
(See Reverse Side)

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Minimum Prices Per M Square Feet F.O.B. Trucks (Pickups) at Mills or Warehouses: (See Note "a")	1/4" Metallized Gypsum Wallboard Weight 1050# per M	3/8" Metallized Gypsum Wallboard Weight 1600# Per M	1/2" Metallized Gypsum Wallboard Weight 2150# Per M	3/8" Metallized Weight 1600# Per M
Acme, Texas	$31.50	$35.50	$38.00	$32.00
Boston & Portsmouth, Mass.	34.13	39.50	43.38	28.00
Fort Dodge, Iowa	29.50	33.50	36.00	25.00
Grand Rapids, Mich.	31.50	35.50	38.00	27.00
Gypsum, Ohio	31.50	35.50	38.00	27.00
Metro. N. Y.—N. J. Whses.	31.55	36.62	40.19	25.12
Oakfield, N. Y.	31.50	35.50	38.00	24.00
Philadelphia, Pa.	33.55	38.62	42.19	27.12
Plasterco, Va.	30.50	34.50	37.00	26.00
Southard, Okla.	31.50	35.50	38.00	32.00
Sweetwater, Texas	31.50	35.50	38.00	32.00

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Very truly yours,
UNITED STATES GYPSUM COMPANY

Vice President.

10686 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

10/30/34

"Metallized" Board License Bulletin No. 2—Prices F.O.B. Trucks at Mills and Warehouses

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Minimum Prices per M Square Feet F.O.B. Trucks (Pickups) at Mills or Warehouses (See Note "a"):

	3/8" Metallized Gypsum Wallboard Weight 1600# per M	3/8" Metallized Gypsum Plasterboard Weight 1600# Per M
Charlestown, Mass.	$39.50	—
Fort Dodge, Iowa	33.50	—
Grand Rapids, Mich.	—	—
Gypsum, Ohio	35.50	—
Metro N. Y.—N. J. Whses.	36.62	23.12
Oakfield, N. Y.	35.50	22.00
Philadelphia, Pa.	36.62	—
Plasterco, Va.	34.50	—
Southard, Okla.	35.50	—
Sweetwater, Texas	35.50	—

(a) The above prices are for Board or Lath with one surface metallized. Add $15.00 per M sq. ft. when furnished with both surfaces metallized.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10687 *Government's Exhibit 251*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 13, 1939

Metallized Board Prices, Delivered by Truck—Metallized Board License Bulletin No. 3 (Page 1)—Cancels Bulletin No. 3 Dated March 3, 1939

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed, are as follows:

Minimum prices per M sq. ft. at which you may sell the patented metallized gypsum board products when delivered by truck in the areas named below, (Truckloads containing 7500 sq. ft. or more) shall be the same for deliveries in carloads by rail as heretofore provided:

†Eastern Area—which includes the States of New Jersey, Connecticut and Rhode Island, Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Dutchess and Putnam Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware; towns of Stroudsburg and East Stroudsburg (in Monroe County) and town of Milford (in Pike County) Pennsylvania.

Western New York Area—which includes Erie, Niagara, Orleans, Genesee; Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates, Chemung, Schuyler and Livingston Counties, New York; also Crawford, Erie, McKean and Warren Counties, Pennsylvania.

Detroit Area—which includes Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

Very truly yours,
UNITED STATES GYPSUM COMPANY
Vice President.

† Indicates change.

10688 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 3, 1939

Metallized Board Prices, Delivered by Truck—Metallized Board License Bulletin No. 3 (Page 1)—Cancels Bulletin No. 3 Dated February 6, 1939

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed, are as follows:

Minimum prices per M sq. ft. at which you may sell the patented metallized gypsum board products when delivered by truck in the areas named below, (Truckloads containing 7500 sq. ft. or more) shall be the same for deliveries in carloads by rail as heretofore provided:

†Eastern Area—which includes the States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange and Putnam Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware.

Western New York Area—which includes Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming Cattaraugus, Chautauqua, Allegany, Steuben, Yates, Chemung, Schuyler and Livingston Counties, New York; also Crawford, Erie, McKean and Warren Counties, Pennsylvania.

Detroit Area—which includes Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

Very truly yours,
UNITED STATES GYPSUM COMPANY
Vice President.

† Indicates change.

10689 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1939

Metallized Board Prices, Delivered by Truck—Metallized Board License Bulletin No. 3 (Page 1)—Cancels Pages 1 & 2 Dated July 16, 1938

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed, are as follows:

Minimum prices per M sq. ft. at which you may sell the patented metallized gypsum board products when delivered by truck in the areas named below, (Truckloads containing 7500 sq. ft. or more) shall be the same for deliveries in carloads by rail as heretofore provided:

Eastern Area—which includes the States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Sullivan, Ulster and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware.

Western New York Area—which includes Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates, Chemung, Schuyler and Livingston Counties, New York; also Crawford, Erie, McKean and Warren Counties, Pennsylvania.

Detroit Area—which includes Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

Very truly yours,
UNITED STATES GYPSUM COMPANY

Vice President.

10690 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 16, 1938

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses—Metallized Board License Bulletin No. 3 (Pg. 1)—Cancels Page 1 Dated October 21, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Eastern Area: Minimum prices for patented metallized board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Metallized Board License Bulletin No. 1. This applies into states of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Bellknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Sullivan, Ulster and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware. See paragraph 3 for minimum loads.

(2) Western New York Area: Minimum prices for patented metallized board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Metallized Board License Bulletin No. 1. This applies into Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York; also Crawford, Erie, McKean and Warren Counties, Pennsylvania. See paragraph 3 for minimum loads.

(3) Minimum Quantities: (Applying to paragraphs 1 and 2 above). Each truck delivery of patented metallized

gypsum board products at carload prices shall contain a minimum of 7,500 sq. ft. gypsum board products consigned to one destination and invoiced to one account. Truck deliveries shall be made by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum load.

10691

†(4) Detroit Area: Minimum prices for patented metallized gypsum board products delivered by truck to dealer's warehouse are same as prices for deliveries in carloads by rail, as provided in Metallized Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board products, or in mixed loads minimum weight 10 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

(5) Miami Area: Minimum prices for patented metallized gypsum plaster lath as provided in Metallized Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with other gypsum products to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10692 (3) Minimum Quantities: (Continued)
ing companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum load.

†(4) Detroit Area: Minimum prices for patented metallized gypsum board products delivered by truck to dealer's warehouse are same as prices for deliveries in carloads by rail, as provided in Metallized Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board products, or in mixed loads minimum weight 7½ tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

(5) Miami Area: Minimum prices for patented metallized gypsum plaster lath as provided in Metallized Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with other gypsum products to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue, to become effective January 15, 1938.

10693 (3) Minimum Quantities: (Cont'd.)
ing companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum load.

(4) Detroit Area: Minimum prices for patented metallized gypsum board products delivered by truck to dealer's warehouse are same as prices for deliveries in carloads by rail, as provided in Metallized Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

†(5) Miami Area: Minimum prices for patented metallized gypsum plaster lath as provided in Metallized Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with other gypsum products to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10694 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 21, 1937.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3 (Pg. 1)—Cancels Metallized Board License Bulletin No. 3 Dated February 24, 1937.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective November 1, 1937 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Eastern Area: Minimum prices for patented metallized board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Metallized Board License Bulletin No. 1 This applies into states of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Sullivan, Ulster and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware. See paragraph 3 for minimum loads.

(2) Western New York Area: Minimum prices for patented metallized board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Metallized Board License Bulletin No. 1. This applies into Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York; also Crawford, Erie, McKean and Warren Counties, Pennsylvania. See paragraph 3 for minimum loads.

(3) Minimum Quantities: (Applying to paragraphs 1 and 2 above). Each truck delivery of patented metallized gypsum board products at carload prices shall contain a minimum of 7,500 sq. ft. gypsum board products consigned to one destination and invoiced to one account. Truck deliveries shall be made by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum load.

10695

(4) Detroit Area: Minimum prices for patented metallized gypsum board products delivered by truck to dealer's warehouse are same as prices for deliveries in carloads by rail, as provided in Metallized Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

(5) Miami Area: Minimum prices for patented metallized gypsum plaster lath as provided in Metallized Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with gypsum bag goods to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10696 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1937

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3 (Pg. 1)—Cancels Metallized Board License Bulletin No. 3 Dated February 11, 1937.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 1, 1937 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Eastern Area: Minimum prices for patented metallized board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Metallized Board License Bulletin No. 1. This applies into states of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Sullivan, Ulster and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northhampton Counties, Pennsylvania; New Castle County, Delaware. See paragraph 3 for minimum loads.

(2) Western New York Area: Minimum prices for patented metallized board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Metallized Board License Bulletin No. 1. This applies into Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York; also Crawford, Erie, McKean and Warren Counties, Pennsylvania. See paragraph 3 for minimum loads.

†(3) Minimum Quantities: (Applying to paragraphs 1 and 2 above). Each truck delivery of patented metallized gypsum board products at carload prices shall contain a minimum of 7,500 sq. ft. gypsum board products consigned to one destination and invoiced to one account. Truck deliveries shall be made by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum load.

10697

†(4) Detroit Area: Minimum prices for patented metallized gypsum board products delivered by truck to dealer's warehouse are same as prices for deliveries in carloads by rail, as provided in Metallized Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb County, Michigan.

(5) Miami Area: Minimum prices for patented metallized gypsum plaster lath as provided in Metallized Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with gypsum bag goods to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10698 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 11, 1937.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3 (Pg. 1)—Cancels Metallized Board License Bulletin No. 3 Dated December 29, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard (except 3/8" thickness metallized plasterboard—see exception below) delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Oakfield mill as listed in bulletin #1, except when for delivery to destinations to which regular carload freight exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genessee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 7 for minimum loads.

3/8" Metallized Plasterboard: Minimum price 3/8" metallized plasterboard delivered by truck to dealers warehouse in Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne counties, New York is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

(2) Metropolitan New York-New Jersey Area: Minimum price metallized wallboard and/or metallized plasterboard (see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk

counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex, and Ocean counties, New Jersey. See paragraph 7 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

3/8" Metallized Plasterboard. Minimum price of 3/8" Metallized plasterboard delivered by truck to dealers warehouse in Kings, Queens, Nassau and Suffolk Counties, New York is $21.00 per M sq. ft. See paragraph 7 for minimum loads.

(3) Philadelphia Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

(4) Boston Area: Minimum price metallized wallboard and/or metallized plasterboard (except 5/16" plasterboard—see exception below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston Mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester counties, Mass.; Rockingham, Hillsborough and Strafford counties, New Hampshire; York and Cumberland Counties, Maine; and State of Rhode Island. See paragraph 7 for minimum loads.

5/16" Metallized Plasterboard: Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Kent and Providence counties, Rhode Island (this product not to be sold in balance of Boston Area) is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

(5) Southeast New York Area: Minimum price metallized wallboard and/or metallized plasterboard delivered

by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh & Northampton Counties, Pa., New Castle, County, Del., the State of Connecticut and Cheshire, Sullivan, Merrimac, Belknap Counties, New Hampshire. Minimum price metallized wallboard and/or metallized plasterboard (except 5/16" plasterboard—see exception below) delivered by truck to dealers warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia, New Brighton or Boston mills as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton counties, Pennsylvania; New Castle County, Delaware; State of Connecticut; and Cheshire, Sullivan, Merrimac, Belknap Counties, New Hampshire. See paragraph 7 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealers warehouse in Hartford County, Connecticut is $23.00 per M sq. ft. See paragraph 7 for minimum loads.

(7) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5,000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum-board products) may be combined to make up the required minimums.

(8) Fort Dodge (Iowa) Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truck-
10699 load 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Hum-

boldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone, and Story Counties, Iowa.

(9) Detroit Area. Minimum price patented metallized gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb County, Michigan.

†(10) Cancelled, effective February 13, 1937.

(11) Miami Area. Minimum prices for patented metallized gypsum lath as provided in Metallized Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum lath may be combined with gypsum bag goods to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10700 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 29, 1936.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3 (Pg. 1)—Cancels Metallized Board License Bulletin No. 3 Dated October 27, 1936 and all Supplements Thereto.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective January 1, 1937 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard (except 3/8" thickness metallized plasterboard—see exception below) delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Oakfield mill as listed in bulletin #1, except when for delivery to destinations to which regular carload freight exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 7 for minimum loads.

3/8" Metallized Plasterboard: Minimum price 3/8" metallized plasterboard delivered by truck to dealers warehouse in Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne counties, New York is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

(2) Metropolitan New York-New Jersey Area: Minimum price metallized wallboard and/or metallized plasterboard (see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond,

Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex, and Ocean Counties, New Jersey. See paragraph 7 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

10701 †3/8" Metallized Plasterboard. Minimum price of 3/8" Metallized plasterboard delivered by truck to dealers warehouse in Kings, Queens, Nassau and Suffolk Counties, New York is $21.00 per M sq. ft. See paragraph 7 for minimum loads.

(3) Philadelphia Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

(4) Boston Area: Minimum price metallized wallboard and/or metallized plasterboard (except 5/16" plasterboard—see exception below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston Mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester counties, Mass.; Rockingham, Hillsborough and Strafford counties, New Hampshire; York and Cumberland Counties, Maine; and State of Rhode Island. See paragraph 7 for minimum loads.

5/16" Metallized Plasterboard: Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Kent and Providence counties, Rhode Island (this product not to be sold in balance of Boston Area) is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

(5) Southeast New York Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to

prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh & Northampton Counties, Pa., New Castle County, Del., the State of Connecticut and Cheshire, Sullivan, Merrimac, Belknap Counties, New Hampshire. Minimum price metallized wallboard and/or metallized plasterboard (except 5/16" plasterboard—see exception below) delivered by truck to dealers warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia, New Brighton or Boston mills as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton. Counties, Pennsylvania; New Castle County, Delaware; State of Connecticut; and Cheshire, Sullivan, Merrimac, Belknap Counties, New Hampshire. See paragraph 7 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealers warehouse in Hartford County, Connecticut is $23.00 per M sq. ft. See paragraph 7 for minimum loads.

(7) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5,000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(8) Fort Dodge (Iowa) Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun,

10702

Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone, and Story Counties, Iowa.

(9) Detroit Area. Minimum price patented metallized gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit and Centerline in Macomb County, Michigan.

(10) Franklin County (Columbus) Ohio. Minimum price of patented metallized gypsum lath delivered by truck to dealers warehouse or direct to job within Franklin County, Ohio is same as price for deliveries in carloads by rail. Truck delivery shall be in straight or mixed loads minimum weight 5 tons, consigned to one destination and invoiced to one account. Gypsum bag goods only may be included with patented gypsum lath to make minimum weight.

†(11) Miami Area. Minimum prices for patented metallized gypsum lath as provided in Metallized Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum lath may be combined with gypsum bag goods to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10703 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 27, 1936.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3 (Page 1)—Cancels Page 1 Dated September 14, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective October 29, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard (except 3/8" thickness metallized plasterboard—see exeeption below) delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Oakfield mill as listed in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 7 for minimum loads.

3/8" Metallized Plasterboard: Minimum price 3/8" metallized plasterboard delivered by truck to dealers warehouse in Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne counties, New York is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

(2) Metropolitan New York-New Jersey Area: Minimum price metallized wallboard and/or metallized plasterboard (except 5/16" thickness plasterboard and 1/2" T&G Sheathing—see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings,

Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex, and Ocean Counties, New Jersey. See paragraph 7 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

Minimum price 1/2" Metallized Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York is $27.00 per M sq. ft. See paragraph 7 for minimum loads.

10704 (3) Philadelphia Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft., to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

(4) Boston Area: Minimum price metallized wallboard and/or metallized plasterboard (except 5/16" plasterboard—see exception below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston Mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester counties, Mass.; Rockingham, Hillsborough and Strafford counties, New Hampshire; York and Cumberland counties, Maine; and state of Rhode Island. See paragraph 7 for minimum loads.

5/16" Metallized Plasterboard: Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Kent and Providence counties, Rhode Island (this product not to be sold in balance of Boston Area) is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

(5) Southeast New York Area: Minimum price metallized wallboard and/or metallized plasterboard delivered

by truck to dealer's warehouse, add $2.00 per M. sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess counties, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa., and New Castle County, Delaware: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealers warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton counties, Pennsylvania; and New Castle County, Delaware. See paragraph 7 for minimum loads.

(7) Minimum Quantities: (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5,000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(8) Fort Dodge (Iowa) Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone, and Story Counties, Iowa.

(9) Detroit Area: Minimum price patented metallized gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account.

Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne county, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and
10705 Royal Oak in Oakland County, Michigan; also towns of Warren, †Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, and Centerline in Macomb County, Michigan.

†(10) Franklin County (Columbus) Ohio. Minimum price of patented metallized gypsum lath delivered by truck to dealers warehouse or direct to job within Franklin County, Ohio is same as price for deliveries in carloads by rail. Truck delivery shall be in straight or mixed loads minimum weight 5 tons, consigned to one destination and invoiced to one account. Gypsum bag goods only may be included with patented gypsum lath to make minimum weight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10706 (3) Philadelphia Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft., to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware, and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

†(4) Boston Area: Minimum price metallized wallboard and/or metallized plasterboard (except 5/16" plasterboard —see exception below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston Mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester counties, Mass.; Rockingham, Hillsborough and Strafford counties, New Hampshire; York and Cumberland counties, Maine; and state of Rhode Island. See paragraph 7 for minimum loads.

5/16" Metallized Plasterboard: Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Kent and Providence counties, Rhode Island (this product not to be sold in balance of Boston Area) is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

(5) Southeast New York Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess counties, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa., and New Castle County, Delaware: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealers warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton counties, Pennsylvania; and New Castle County, Delaware. See paragraph 7 for minimum loads.

(7) Minimum Quantities: (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5,000 sq. ft. gypsum board and/or

† Indicates change, (to become effective October 28, 1936).

lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(8) Fort Dodge (Iowa) Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone, and Story Counties, Iowa.

(9) Detroit Area: Minimum price patented metallized gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne county, Michigan; towns of Birmingham, Clawson, Farmington,

10707 (3) Philadelphia Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

†Boston Area: Minimum price metallized wallboard and/or metallized plasterboard (except 5/16" plasterboard —see exception below) delivered by truck to dealer's ware-

† Indicates change (to become effective September 19, 1936).

house, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston Mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk, Plymouth, Bristol, Barnstable and Worcester Counties, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine; and state of Rhode Island. See paragraph 7 for minimum loads.

†5/16" Metallized Plasterboard: Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Kent and Providence counties, Rhode Island (this product not to be sold in balance of Boston Area) is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

(5) Southeast New York Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess counties, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa., and New Castle County, Delaware: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealers warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton Counties, Pennsylvania; and New Castle County, Delaware. See paragraph 7 for minimum loads.

(7) Minimum Quantities: (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5,000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(8) Fort Dodge (Iowa) Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or

† Indicates change (to become effective September 19, 1936).

mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone, and Story Counties, Iowa.

(9) Detroit Area: Minimum price patented metallized gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington,

10708 UNITED STATES GYPSUM, COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 14, 1936.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses—Metallized Board License Bulletin No. 3—Cancels Bulletin No. 3 Dated July 23, 1936, and All Supplements Thereto.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective September 15, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard (except 3/8" thickness metallized plasterboard—see exception below) delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Oakfield mill as listed in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft, then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 7 for minimum loads.

3/8" Metallized Plasterboard—Minimum price 3/8" metallized plasterboard delivered by truck to dealers warehouse in Niagara, Erie (including town of Gowanda, N. Y.), Monroe and Wayne counties, New York is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

(2) Metropolitan New York-New Jersey Area: Minimum price metallized wallboard and/or metallized plasterboard (except 5/16" thickness plasterboard and 1/2" T&G Sheathing—see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris,

Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex, and Ocean Counties, New Jersey. See paragraph 7 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

Minimum price 1/2" Metallized Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York is $27.00 per M sq. ft. See paragraph 7 for minimum loads.

10709 (3) Philadelphia Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

(4) Boston Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston Mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk and Worcester counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine. See paragraph 7 for minimum loads.

(5) Southeast New York Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York. See paragraph 7 for minimum loads.

(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa. and New Castle County, Delaware: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealers warehouse, add $2.00

per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton Counties, Pennsylvania; and New Castle County, Delaware. See paragraph 7 for minimum loads.

(7) Minimum Quantities: (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5,000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(8) Fort Dodge (Iowa) Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story Counties, Iowa.

(9) Detroit Area: Minimum price patented metallized gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham,
10710 Clawson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores and Centerline in Macomb County, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10711 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 23, 1936.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses—Metallized Board License Bulletin No. 3 Dated July 10, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 28, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Oakfield mill as listed in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 7 for minimum loads.

(2) Metropolitan New York-New Jersey Area: Minimum price metallized wallboard and/or metallized plasterboard (except 5/16" thickness plasterboard and 1/2" T&G Sheathing—see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 7 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealer's ware-

house in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $22.00 per M sq. ft. See paragraph 7 for minimum loads.

Minimum Price 1/2" Metallized Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York is $27.00 per M sq. ft. See paragraph 7 for minimum loads.

(3) Philadelphia Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 7 for minimum loads.

10712 †(4) Boston Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk, Norfolk and Worcester counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine. See paragraph 7 for minimum loads.

†(5) Southeast New York Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York. See paragraph 7 for minimum loads.

†(6) Southern New Jersey Area, Lehigh and Northampton Counties, Pa., and New Castle County, Delaware: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealers warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Atlantic, Cape

May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey; Lehigh and Northampton Counties, Pennsylvania; and New Castle County, Delaware. See paragraph 7 for minimum loads.

†(7) Minimum Quantities: (Applying to paragraphs 1, 2, 3, 4, 5 and 6 above) 5,000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(8) Fort Dodge (Iowa) Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story Counties, Iowa.

†(9) Detroit Area: Minimum price patented metallized gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10713 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 10, 1936.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3—Cancels Bulletin No. 3 Dated June 25, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective July 13, 1936 the minimum prices at which your may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Oakfield mill as listed in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

(2) Orange County, New York: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area: Minimum price metallized wallboard and/or metallized plasterboard, (except 5/16" thickness plasterboard and 1/2" T&G Sheathing—see exceptions below) delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Pas-

saic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

†5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $22.00 per M sq. ft. See paragraph 6 for minimum loads.

†Minimum Price 1/2" Metallized Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, Lindenhurst and Bayshore in Suffolk County, New York, is $27.00 per M sq. ft. See paragraph 6 for minimum loads.

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†(4) Philadelphia Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 6 for minimum loads.

†(5) Boston Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $1.00 per M sq. ft. to prices applying f.o.b. cars Boston mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine. See paragraph 6 for minimum loads.

(6) Minimum Quantities: (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5,000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area: Minimum price metallized wallboard and/or metallized plasterboard delivered

by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area: Minimum price patented metallized gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne county, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10715 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 25, 1936.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses—Metallized Board License Bulletin No. 3—Cancels Bulletin No. 3—Dated June 2, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Oakfield mill as listed in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus; Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

(2) Orange County, New York: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area: Minimum price metallized wallboard and/or metallized plasterboard (except 5/16" thickness plasterboard and 1/2" T&G Sheathing—see exceptions below) delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars New Brighton mill as listed in bulletin #1. This applies to Manhattan, Bronx, Kings, Queens,

Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $21.68 per M sq. ft. See paragraph 6 for minimum loads.

†Minimum Price 1/2" Metallized Gypsum Sheathing, delivered by truck to dealers warehouse in Queens and Nassau Counties, New York and towns of Amityville, Huntington, Cold Springs Harbor, Northport, Babylon, 10716 Lindenhurst and Bayshore in Suffolk County, New York, is $28.00 per M sq. ft. See paragraph 6 for minimum loads.

(4) Philadelphia Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Philadelphia mill as listed in bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 6 for minimum loads.

†(5) Boston Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to prices applying f.o.b. cars Boston mill as listed in bulletin #1. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine. See paragraph 6 for minimum loads.

(6) Minimum Quantities: (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5,000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

†(8) Detroit Area: Minimum price patented metallized gypsum board and/or lath products delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne county, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10717 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 2, 1936.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3—Cancels Bulletin No. 3 Dated May 26, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective June 4, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices as listed on page one of bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

(2) Orange County, New York: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area: Minimum price metallized wallboard and/or metallized plasterboard, except 5/16" thickness plasterboard (see next par.), delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. New Brighton prices as listed on page one of bulletin #1. This applies to Manhattan, Bronx, Kings,

Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $21.68 per M sq. ft. See paragraph 6 for minimum loads.

(4) Philadelphia Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Philadelphia prices as listed on page one of bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 6 for minimum loads.

10718 (5) Boston Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Boston prices as listed on page one of bulletin #1. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine. See paragraph 6 for minimum loads.

(6) Minimum Quantites. (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5,000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with

patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area: Minimum price 3/8" metallized plasterboard delivered by truck to dealer's warehouse $22.00 per M sq. ft. Minimum price patented metallized gypsum board and/or lath products other than 3/8" plasterboard delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne county, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10719 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 26, 1936.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3—Cancels Bulletin No. 3 Dated March 2, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective May 28, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices as listed on page one of bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See Paragraph 6 for minimum loads.

(2) Orange County, New York: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area. Minimum price metallized wallboard and/or metallized plasterboard, except 5/16" thickness plasterboard (see next par.), delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. New Brighton prices as listed on page one of bulletin #1. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and

Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $21.68 per M sq. ft. See paragraph 6 for minimum loads.

(4) Philadelphia Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Philadelphia prices as listed on page one of bulletin #1. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. See paragraph 6 for minimum loads.

10720 (5) Boston Area. Minimum price metallized and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Boston prices as listed on page one of bulletin #1. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk County, Mass., Rockingham and Strafford Counties, New Hampshire; York County, Maine; and that portion of Cumberland County, Maine south of a line drawn from Portland directly west to the York county line. See paragraph 6 for minimum loads.

(6) Minimum Quantities. (Applying to paragraphs 1, 2, 3, and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with

patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area. Minimum price 3/8" metallized plasterboard delivered by truck to dealer's warehouse $22.00 per M sq. ft. Minimum price patented metallized gypsum board and/or lath products other than 3/8" plasterboard delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne county, Michigan; towns of Birmingham, Clawson, Farmington, Ferndale and Royal Oak in Oakland county, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10721 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 2, 1936.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3—Cancels Bulletin No. 3 Dated February 24, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 4, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

(2) Orange County, New York. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area. Minimum price metallized wallboard and/or metallized plasterboard, except 5/16" thickness plasterboard (see next par.), delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex,

Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $22.00 per M sq. ft. See paragraph 6 for minimum loads.

(4) Philadelphia Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania and Camden County, New Jersey. (Note: Camden County was omitted in error in issue dated February 24, 1936) See paragraph 6 for minimum loads.

10722 (5) Boston Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk county, Mass., Rockingham and Strafford Counties, New Hampshire; York county, Maine; and that portion of Cumberland county, Maine south of a line drawn from Portland directly west to the York county line. See paragraph 6 for minimum loads.

(6) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with

patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area. Minimum price 3/8" metallized plasterboard delivered by truck to dealer's warehouse $22.00 per M sq. ft. Minimum price patented metallized gypsum board and/or lath products other than 3/8" plasterboard delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne county, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland county, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10723 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1936.

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3—Cancels Bulletin No. 3 Dated January 10, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective February 26, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Steuben, and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

(2) Orange County, New York. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area. Minimum price metallized wallboard and/or metallized plasterboard, except 5/16" thickness plasterboard (see next par.), delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex,

Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean Counties, New Jersey. See paragraph 6 for minimum loads.

5/16" Metallized Plasterboard. Minimum price 5/16" metallized plasterboard delivered by truck to dealer's warehouse in Mercer County, New Jersey (this product not to be sold in balance of Metro New York-New Jersey Area) is $22.00 per M sq. ft. See paragraph 6 for minimum loads.

(4) Philadelphia Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania. See paragraph 6 for minimum loads.

10724 (5) Boston Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk county, Mass., Rockingham and Strafford Counties, New Hampshire; York county, Maine; and that portion of Cumberland county, Maine south of a line drawn from Portland directly west to the York county line. See paragraph 6 for minimum loads.

(6) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet,

O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area. Minimum price 3/8" metallized plasterboard delivered by truck to dealer's warehouse $22.00 per sq. ft. Minimum price patented metallized gypsum board and/or lath products other than 3/8" plasterboard delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne county, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland county, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10725 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 10, 1936

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3—Cancels Bulletin No. 3 Dated December 20, 1935.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area: Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to f.o.b. Oakfield prices shown in bulletin #1, except when for delivery to destinations to which regular carload freight including emergency charge exceeds $2.00 per M sq. ft. then the regular carload delivered price shall apply. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Steuben, and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

(2) Orange County, New York. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and

Ocean counties, New Jersey. See paragraph 6 for minimum loads.

(4) Philadelphia Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Bucks, Montgomery, Chester, Delaware, and Philadelphia counties, Pa. and Camden county, N. J. See paragraph 6 for minimum loads.

(5) Boston Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk and Norfolk counties,
10726 Mass., the town of Mansfield, Mass., that portion of Plymouth county north of the continuation of the southern boundary of Norfolk county, Mass., Rockingham and Strafford Counties, New Hampshire; York county, Maine; and that portion of Cumberland county, Maine south of a line drawn from Portland directly west to the York county line. See paragraph 6 for minimum loads.

(6) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area. Minimum price 3/8" metallized plasterboard delivered by truck to dealer's warehouse $22.00

per M sq. ft. Minimum price patented metallized gypsum board and/or lath products other than 3/8" plasterboard delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne county, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland county, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10727 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 20, 1935

Metallized Board Prices, Delivered by Truck to Dealers' Warehouses

Metallized Board License Bulletin No. 3

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

(1) Buffalo-Oakfield Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per m sq. ft. to f.o.b. Oakfield prices shown in bulletin #1. This applies to Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Steuben, and Livingston counties, New York, also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 6 for minimum loads.

(2) Orange County, New York. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse in Orange County, New York, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. See paragraph 6 for minimum loads.

(3) Metropolitan New York-New Jersey Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse is same as delivered price by rail in mixed cars. This applies to Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon, Warren, Sussex and Ocean counties, New Jersey. See paragraph 6 for minimum loads.

(4) Philadelphia Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Bucks, Montgomery, Chester, Delaware, and Philadelphia counties, Pa. and Camden county, N. J. See paragraph 6 for minimum loads.

(5) Boston Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse, add $2.00 per M sq. ft. to price delivered by rail to dealer's warehouse or nearest siding. This applies to Essex, Middlesex, Suffolk and Norfolk counties, Mass., the town of Mansfield, Mass., that portion of Plymouth county lying north of the continuation of the southern boundary of Norfolk county, Mass., Rockingham and Strafford Counties, New Hampshire; York county,
10728 Maine; and that portion of Cumberland county, Maine south of a line drawn from Portland directly west to the York county line. See paragraph 6 for minimum loads.

(6) Minimum Quantities. (Applying to paragraphs 1, 2, 3, 4 and 5 above) 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

(7) Fort Dodge (Iowa) Area. Minimum price metallized wallboard and/or metallized plasterboard delivered by truck to dealer's warehouse add $3.00 per M sq. ft. to minimum f.o.b. Fort Dodge prices. Minimum truckload 4000 lbs.; only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Osceola, Dickinson, Emmet, O'Brien, Clay, Palo Alto, Kossuth, Winnebago, Hancock, Cherokee, Buena Vista, Pocahontas, Humboldt, Wright, Franklin, Ida, Sac, Calhoun, Webster, Hamilton, Hardin, Crawford, Carroll, Greene, Boone and Story counties, Iowa.

(8) Detroit Area. Minimum price 3/8" metallized plasterboard delivered by truck to dealer's warehouse

$22.00 per M sq. ft. Minimum price patented metallized gypsum board and/or lath products other than 3/8" plasterboard delivered by truck to dealer's warehouse is same as price delivered by rail. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board and/or lath products, or in mixed loads minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board and/or lath to make minimum weight. This applies to Wayne county, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland county, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb county, Michigan.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10729 *Government's Exhibit No. 252*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1939.

Application of Prices—Metallized Board License Bulletin No. 4 (Page 1)—Cancels Bulletin No. 4 Dated May 6, 1937

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed, are as follows:

The minimum prices named in Bulletins 1, 2 and 3 apply (except where otherwise specified) to sales of patented metallized gypsum board products in sizes suitable for use in construction and regularly manufactured and offered for sale for use in construction, which products are sometimes referred to herein as standard size products. Such sizes are now as follows:

Thickness and Width	*Lengths*
(1) Square Edge Metallized Wallboard:	
1/4"x32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8"x32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2"x32" or 48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
(2) T&G Edge Metallized Wallboard:	
1/2"x48"	8'-9' and 10'
(3) T&G Edge Metallized Sheathing:	
1/2"x34"	6'8" and 8'
(4) Metallized Plaster Lath:	
3/8"x16"	48"
1/2"x16"	32" and 48"

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10730 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 6, 1938.

"Metallized" Board License Bulletin No. 4—Cancels Bulletin No. 4 Dated February 24, 1937
(Confirming telegram dated May 5, 1938)

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Standard Sizes are as follows:

Thickness and Width	*Lengths:*
(1) Square Edge Metallized Wallboard:	
1/4"x32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/4"x48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8"x32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8"x48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2"x32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2"x48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
(2) T&G Metallized Wallboard:	
1/2"x48"	8'-9' and 10'
(3) T&G Edge Metallized Sheathing:	
1/2"x24"	6'8" and 8'
†(4) Metallized Plaster Lath:	
3/8"x16"	32" and 48"
†1/2"x16"	48"

Very truly yours,
UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this issue.

10731 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1937.

"Metallized" Board License Bulletin No. 4—Cancels Bulletin No. 4 Dated May 26, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 1, 1937 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Standard Sizes are as follows:

Thickness and Width	*Lengths*
(1) Square Edge Metallized Wallboard:	
1/4"x32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/4"x48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8"x32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
3/8"x48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2"x32"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
1/2"x48"	4'-5'-6'-7'-8'-9'-10'-11' and 12'
(2) T&G Metallized Wallboard:	
1/2"x48"	8'-9' and 10'
(3) T&G Edge Metallized Sheathing:	
1/2"x24"	6'8" and 8'
†(4) Metallized Plaster Lath:	
3/8"x16"	32" and 48"

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this issue.

10732 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 26, 1936.

"Metallized" Board License Bulletin No. 4—Cancels Bulletin No. 4 Dated February 24, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective May 28, 1936 at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Standard Sizes of patented Metallized Gypsum Wallboard and Plasterboard are as follows: (Minimum prices on patented metallized board and lath apply on standard sizes only).

(1) For 32" and 48" widths, 1/4"—3/8"—1/2" Thicknesses Square Edge Metallized Wallboard—4', 5', 6', 7', 8', 9', 10', 11' and 12' lengths.

†(2) For 1/2" Thickness T&G Edge Metallized Sheathing—24" wide x 6'8" and 8' only.

(3) For 1/2" Thickness T&G Edge Metallized Wallboard—48" wide x 8', 9' and 10' only.

(4) For 3/8" Thickness only, Metallized Lath—16"x32" and 16"x48" only.

(5) For 5/16" Thickness Metallized Lath—16"x32" and 16"x48" only. This item for shipment into markets as described in Bulletin No. 1 only.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this issue.

10733 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1936.

"Metallized" Board License Bulletin No. 4—Cancels Bulletin No. 4 Dated February 13, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Standard Sizes of patented Metallized Gypsum Wallboard and Plasterboard are as follows: (Minimum prices on patented metallized board and lath apply on standard sizes only).

(1) For 32" and 48" widths, 1/4"—3/8"—1/2" Thicknesses Square Edge Metallized Wallboard—4', 5', 6', 7', 8', 9', 10', 11' and 12' lengths.

(2) For 1/2" Thickness T&G Edge Metallized Wallboard—48" wide x 8', 9' and 10' only.

†(3) For 3/8" Thickness only, Metallized Lath—16"x32" and 16"x48" only.

(4) For 5/16" Thickness Metallized Lath—16"x32" and 16"x48" only. This item for shipment into markets as described in Bulletin No. 1 only.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this issue.

10734 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 13, 1936.

"Metallized" Board License Bulletin No. 4—Cancels Bulletin No. 4 Dated July 3, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,349, are as follows:

Standard sizes of patented Metallized Gypsum Wallboard and Plasterboard are as follows: (Minimum prices on patented metallized board and lath apply on standard sizes only).

(1) For 32" and 48" widths, 1/4"—3/8"—1/2" Thicknesses Square Edge Metallized Wallboard—4', 5', 6', 7', 8', 9', 10', 11' and 12' lengths.

†(2) For 1/2" Thickness T&G Edge Metallized Wallboard—48" wide x 8', 9' and 10' only.

(3) For 1/4" and 3/8" Thicknesses only, Metallized Lath (or cutstock) 16"x48", 16"x32", and 32"x36" only.

†(4) For 5/16" Thickness Metallized Lath—16"x32" and 16"x48" only. This item for shipment into markets as described in Bulletin No. 1 only.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this issue.

10735 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 3, 1935.

"Metallized" Board License Bulletin No. 4—Cancels Bulletin No. 4 Dated April 26, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Standard sizes of patented Metallized Gypsum Wallboard and Plasterboard are as follows: (Minimum prices on patented metallized board and lath apply on standard sizes only).

†(1) For 32" and 48" widths, 1/4"—3/8"—1/2" Thicknesses Square Edge Metallized Wallboard—4', 5', 6', 7', 8', 9', 10', 11' and 12' lengths.

(2) For 36" width, 1/2" Thickness Square Edge Metallized Wallboard—8', 9' and 10' lengths only.

(3) For 1/2" Thickness T&G Metallized Wallboard—36" or 48" wide x 8', 9' and 10' only.

†(4) For 1/4" and 3/8" Thicknesses only, Metallized Lath (or cutstock) 16"x48", 16"x32", and 32"x36" only.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this issue.

10736 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 26, 1935.

A. W. IRWIN,
Office

"Metallized" Board License Bulletin No. 4—Cancels Bulletin No. 4 Dated April 24, 1935

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Standard sizes of patented Metallized Gypsum Wallboard and Plasterboard are as follows: (Minimum prices on patented metallized board and lath apply on standard sizes only).

†(1) For 1/4"—3/8"—1/2" Thicknesses Square Edge Metallized Wallboard—48" wide x 4', 5', 6', 7', 8', 9', 10', 11' and 12'.

(2) For 1/2" Thicknesses Square Edge Metallized Wallboard—36" wide x 8', 9' and 10' only.

(3) For 1/2" Thicknesses T&G Edge Metallized Wallboard—36" or 48" wide x 8', 9' and 10' only.

(4) For 1/4" and 3/8" Thicknesses only, Metallized Lath—16"-18" only.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this issue.

10737 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 24, 1935.

"Metallized" Board License—Bulletin No. 4.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Standard Sizes of patented Metallized Gypsum Wallboard and Plasterboard are as follows: (Minimum prices on patented metallized board and lath apply on standard sizes only).

(1) For 1/4"—3/8"—1/2" Thicknesses Square Edge Metallized Wallboard—48" wide x 6', 7', 8', 9', 10' and 12'.

(2) For 1/2" Thickness T&G Edge Metallized Wallboard—36" or 48" wide x 8', 9' and 10' only.

(3) For 3/8" Thickness only, Metallized Lath—16"x48" only.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10738 Effective June 10, 1939 Bulletins 1, 2, 3, 4, and 5 were combined into one bulletin. See Bulletin No. 1 Master Book for all issues after June 10, 1939.

10739 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1939.

Effective Date of Minimum Prices—Rebates—Metallized Board License Bulletin No. 5 (Page 1)—Cancels Bulletin No. 5 Dated February 24, 1937

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed, are as follows:

Advances in Minimum Price

In the event of an increase in the minimum prices of patented metallized gypsum board products, the advanced minimum prices shall apply to all shipments made after the effective date of the price increase, except that in the following cases the minimum price shall be the minimum price in effect immediately prior to such increase:

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

(2) On sales of gypsum plaster lath to dealers for any specific job requring not less than the minimum carload quantity of plaster lath (each building of a project to be considered as a separate job hereunder); and

On sales of metallized gypsum wallboard or gypsum liner to gypsum roofing contractors for specific gypsum roof jobs only; and

On sales of metallized gypsum wallboard and metallized gypsum sheathing to dealers for specific industrial housing projects; and

On sales of metallized gypsum wallboard and metallized gypsum sheathing on direct bids to the federal government for specific federal government jobs;*

But only where the general contract for such specific job is awarded prior to the effective date of the price in-

* NOTE: A Federal Government job is one where the Federal Government lets the contract to a general contractor or places an order directly with licensee.

crease, or where the dealer (or contractor on specific roof jobs) has made a written quotation on such job prior to the effective date of the price increase, and pro-
10740 viding the order is placed by such dealer or contractor and accepted by the licensee within 30 days, on private jobs, and 60 days on federal government jobs, after the effective date of the price increase.

(3) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee, prior to the effective date of price increase.

Decreases in Minimum Price

In the event of a decrease in the minimum prices of the patented metallized gypsum board products, the new and lower minimum prices shall apply to all sales and shipments made after the effective date of the decrease in minimum price, including all orders for the patented metallized gypsum board products on file at the time of decrease in minimum prices, and also shipments in transit; but licensee must be prepared to furnish licensor with satisfactory evidence of the fact that the shipment was actually in transit and not delivered when the price decrease became effective. Carrier's freight bill will be accepted as evidence of that fact.

Rebates, Allowances, Etc.

Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price by granting the customer rebates, unearned or unwarranted refunds, credits or discounts, by reducing the price of other products, by hiring customers' trucks, by granting allowances for advertising or other purposes, by splitting of salesmen's compensation or commissions with customers, by overshipment of patented products, by including board under the guise of dunnage, or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by licensee below such minimum price.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

10741 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1937

Conditions of Sale—Metallized Board License Bulletin No. 5—Cancels Bulletin No. 5 (Page 1) Dated March 20, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 1, 1937 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Duration of Quotations and Specific Job Protection Price Advances:

In the event of an increase in the minimum prices of patented metallized gypsum board products, the advanced minimum price shall apply to all shipments made after the effective date of the price increase, except:

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase. Exception: Bona fide orders for discontinued types of patented metallized gypsum board for dealers' stocks, received and accepted by you at your home office in writing within one week from date of discontinuance, for shipment within two weeks from the date of discontinuance, may be invoiced at minimum prices in effect at time of discontinuance.

(2) For gypsum plaster lath on any specific job requiring not less than a minimum carload quantity of plaster lath (28,600 sq. ft.) where the general contract for such specific job is awarded prior to the effective date of the price increase, or where the dealer has made a written quotation on such job prior to the effective date of the price increase, and provided order for gypsum plaster lath is immediately placed by dealer and accepted by licensee within thirty days on private jobs, sixty days

on federal government jobs after the effective date of price increase. Each building of a project shall be considered as a separate specific job hereunder, subject to minimum requirement of carload quantity (28,600 sq. ft.) for each such building. Exception: Minimum quantity for each specific job on 5/16" plaster lath shall be 34,000 sq. ft.

†(3) For metallized gypsum wallboard on specific gypsum roof jobs to gypsum roofing contractors on which the general contract is awarded prior to the effective date of the price increase, or on which contractor has made written quotation prior to the effective date of the price increase, and provided order for metallized gypsum wallboard is immediately placed by contractor and accepted by licensee within thirty days on private jobs, sixty days on federal government jobs after the effective date of price increase.

10742 Price Advances (Cont'd.)

†(4) (a) For metallized gypsum wallboard and metallized gypsum sheathing on direct bids to the Federal Government for specific Federal Government jobs on which the general contract is awarded prior to the effective date of price increase, or on which written bid is made by licensee prior to the effective date of price increase, provided order for metallized gypsum wallboard or metallized gypsum sheathing is immediately placed by the Federal Government and accepted by licensee within sixty days after the effective date of price increase.

†(b) For metallized gypsum wallboard or metallized gypsum sheathing on specific industrial housing projects on which the general contract is awarded prior to the effective date of price increase, or on which the dealer has made a written quotation prior to the effective date of the price increase, and provided order for metallized gypsum wallboard or metallized gypsum sheathing is immediately placed by the dealer and accepted by licensee within thirty days from effective date of the price increase.

(5) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee prior to the effective date of price increase.

Price Decreases:

In the event of a decrease in the minimum prices of patented metallized gypsum board products, all orders on file shall be invoiced at the new and lower prices. Shipments in transit shall be invoiced at the reduced prices, provided carrier's expense bill is presented by customer, as evidence that shipment actually was in transit and not delivered when the price decrease became effective.

Federal Government Jobs

A Federal government job or contract is one where a department of the Federal government, as defined below, lets a contract direct to a general contractor, or where such a department of the Federal Government places an order directly with a licensee, such order being invoiced directly to such department for use solely and directly by such dapartment.

The "Federal Government" as used herein shall mean the following departments of the Federal government.

1. Agricultural
2. Bureau of Indian Affairs
3. Coast Guard
4. Commerce
5. Interior
6. Justice
7. Labor
8. Marine Corps
9. Navy
10. Post Office
11. State
(**)12. Treasury
13. Veterans' Bureau
(*) 14. War (Including CCC Camps)
15. District of Columbia

(*) CCC Camps:
(Metallized Gypsum Wallboard)

In areas where the Federal government carries out CCC Camp Construction directly or by letting contract to a contractor to furnish both material
10743 and labor (such contractor is considered as the direct representative of the Federal government on the specific project being figured) the minimum price of patented metallized gypsum wallboard direct to the Federal government or to such contractor under such conditions only for CCC Projects, in minimum carload quantities, is the dealer delivered price f.o.b. cars railhead delivery only.

Where less carload quantities of metallized gypsum wallboard are required, or CCC Camp site delivery any quantity is requested, quotation will be made only through dealers.

(*Reference notes continued on following page*)

The classification "Federal Government" does not include the following: TVA, PWA, CWA, HOLC, FERA, SHD, or any corporation formed by the Federal Government for carrying out any works or projects, all such purchasers to be classified as consumers, and sold at the dealers delivered price plus contractor differentials as specified in Metallized Board License Bulletin No. 1 whether such sale is made to the corporation or directly to the department under which the corporation is formed.

Allowances, Etc.: The minimum price fixed by Licensor for patented metallized board and/or metallized lath shall be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding; for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented metallized board and/or metallized lath. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of

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(Reference notes from preceding page)

†(**) WPA Projects

(a) State Projects. On purchase by or thru the State Procurement Division of the Treasury Department (to be invoiced direct to the Federal Government) for use on State WPA projects, the minimum quoted price of patented metallized gypsum wallboard and/or metallized gypsum lath, for shipment in carloads, shall be the dealer delivered price f.o.b. cars railhead delivery only, plus $2.50 per M sq. ft. on wallboard or $1.25 per M sq. ft. on lath, less 2% cash discount on gross amount.

Shipment in carloads may include shipment in mixed cars with other gypsum products, providing all materials contained in such car are for use on a WPA project and providing entire carload is invoiced direct to the Federal government.

Patented metallized gypsum board products for State WPA projects when specified in quantities not for shipment in carloads as above outlined, or when State WPA job site delivery, any quantity, is requested, shall be quoted through dealers only.

†(b) Federal Projects. On purchases by the Procurement Division or Resettlement Purchase Section of the Treasury Department (to be invoiced direct to the Federal Government) for use on Federal WPA projects, the minimum quoted price of patented metallized gypsum wallboard and/or metallized gypsum lath, for shipment in carloads, for delivery at railhead shall be the regular dealer carload delivered price less 2% cash discount on gross amount. For delivery to project site, the minimum quoted price of patented metallized gypsum wallboard and/or metallized gypsum lath shall be the regular dealer carload delivered price f.o.b. cars at railhead specified in bid form, plus $1.00 per M sq. ft., less 2% cash discount on gross amount.

warehouses with dealers or other buyers; or
10744 through allowance or adjustment on board which customer claims is of poor grade and not up to standard, except when such an allowance or adjustment on substandard board is first authorized by the licensor; or by allowance for any other reason whatsoever by a licensee direct or by a salesman of patented board out of his own compensation; or through the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

Also, where a salesman selling patented metallized board to a customer is authorized by licensee or its agent to sell the same wholly or partly on a commission basis, or where a salesman not employed by licensee makes a sale of patented metallized board to a customer on a commission basis and licensee or his agent accepts such sale, in either of such events the commission paid by the licensee is a deduction from the price at which the board is sold by licensee, and where after deducting such commission, the amount is less than the minimum price, licensor shall regard the sale as made at a price less than the minimum price fixed by licensor and a violation of the terms of the license agreement. Licensor also regards sales of patented metallized board by commission salesmen, without the written consent of licensor, as a violation of the terms of the license agreement.

Sales to Other Gypsum Manufacturers:

There shall be no sale of patented metallized board products to manufacturers of gypsum products without the written consent of the licensor. When such written approval has been granted maximum discounts from the minimum dealer prices established by the licensor, as listed in Metallized Board License Bulletin No. 1, shall be 15% on wallboard and 12½% on plasterboard. Such permission is restricted to sales of patented metallized board products to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

†The minimum of 7500 sq. ft. of patented gypsum board and/or lath products as required for pickups and shipments out of Eastern mills and warehouses does not apply for pickups by or deliveries to other gypsum manufacturers, providing such pickups or deliveries are destined for manufacturer's own warehouse or plant. If picked up or shipped for delivery direct to a dealer's warehouse, then the 7500 sq. ft. minimum shall apply.

10745 Dunnage:

Gypsum boards used for dunnage and not invoiced to the customer shall be not larger than 4'x4' and any gypsum boards so used with any dimension greater than 12" shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3" high. Excessive dunnage is a violation of the license agreement. Exception: Greater New York Market (Manhattan, Bronx, Kings, Queens and Richmond counties, New York)

a. Shipments in cars.

Gypsum boards used for dunnage in shipments by car and not invoiced to customer shall be not larger than 12"x48", shall be plainly stamped in red on the face of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3" high, and shall be board with no value and unfit for use or resale. Excessive dunnage is a violation of the license agreement.

†b. Shipments in trucks.

Gypsum boards used for dunnage in shipments by truck and not invoiced to the customer shall be not larger than 12"x48" except when larger sheets might be necessary to protect the bottom of a truck. All gypsum boards used for dunnage shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3" high, and be defaced, marred, diagonally scored or mutilated and otherwise so marked that they will have no value and will be unfit for use or resale. Excessive dunnage is a violation of the license agreement.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10746 by the licensor; or by allowance for any other reason whatsoever by a licensee direct or by a salesman of patented board out of his own compensation; or through the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

Also, where a salesman selling patented metallized board to a customer is authorized by licensee or its agent to sell the same wholly or partly on a commission basis, or where a salesman not employed by licensee makes a sale of patented metallized board to a customer on a commission basis and licensee or his agent accepts such sale, in either of such events the commission paid by the licensee is a deduction from the price at which the board is sold by licensee, and where after deducting such commission, the amount is less than the minimum price, licensor shall regard the sale as made at a price less than the minimum price fixed by licensor and a violation of the terms of the license agreement. Licensor also regards sales of patented metallized board by commission salesmen, without the written consent of licensor, as a violation of the terms of the license agreement.

Sales to Other Gypsum Manufacturers:

There shall be no sale of patented metallized board products to manufacturers of gypsum products without the written consent of the licensor. When such written approval has been granted maximum discounts from the minimum dealer prices established by the licensor, as listed in Metallized Board License Bulletin No. 1, shall be 15% on wallboard and 12½% on plasterboard. Such permission is restricted to sales of patented metallized board products to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

The minimum of 5000 sq. ft. of patented gypsum board and/or lath products as required for pickups and shipments out of Eastern mills and warehouses does not

apply for pickups by or deliveries to other gypsum manufacturers, providing such pickups or deliveries are destined for manufacturer's own warehouse or plant. If picked up or shipped for delivery direct to a dealer's warehouse, then the 5000 sq. ft. minimum shall apply.

†Dunnage:

Gypsum boards used for dunnage and not invoiced to the customer shall be not larger than 4'x4' and any gypsum boards so used with any dimension greater than 12" shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3" high. Excessive dunnage is a violation of the license agreement. Exception: Greater New York Market (Manhattan, Bronx, Kings, Queens and Richmond counties, New York)

a. Shipments in cars.

Gypsum boards used for dunnage in shipments by car and not invoiced to customer shall be not larger
10747 than 12"x48", shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3" high, and shall be board with no value and unfit for use or resale. Excessive dunnage is a violation of the license agreement.

b. Shipments in trucks

Gypsum boards used for dunnage in shipments by truck and not invoiced to the customer shall be not larger than 12"x48" except when larger sheets might be necessary to protect the bottom of a truck in which instances such sheets shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3" high, and be defaced, marred, diagonally scored or mutilated and otherwise so marked that they will have no value and will be unfit for use or resale. Excessive dunnage is a violation of the license agreement.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10748 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 20, 1936.

Conditions of Sale—Metallized Board License Bulletin No. 5—Cancels Bulletin No. 5 Dated February 24, 1936

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective March 23, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Duration of Quotations and Specific Job Protection Price Advances:

In the event of an increase in the minimum prices of patented metallized gypsum wallboard or metallized gypsum plasterboard, the advanced minimum price shall apply to all shipments made after the effective date of the price increase, except:

(1) On bona fide orders for dealer's stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

(2) For metallized gypsum lath on specific jobs on which the general contract is awarded prior to date of any price change and order for metallized gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on Federal government jobs after the effective date of the price increase.

(3) For metallized gypsum wallboard and/or metallized gypsum lath on specific gypsum roof jobs to gypsum roofing contractors on which the general contract is awarded prior to date of any price change and order for metallized gypsum wallboard and/or metallized gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on Federal government jobs after the effective date of the price increase.

(4) (a) For metallized gypsum wallboard on specific Federal government jobs on which the general contract

is awarded prior to date of any price change and order for metallized gypsum wallboard is placed with the licensee within 60 days from effective date of price increase.

(b) For metallized gypsum wallboard on specific industrial housing projects on which the general contract is awarded prior to date of any price change and order for metallized wallboard is placed with the licensee within 30 days from effective date of price increase.

10749 (5) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee prior to the effective date of price increase.

Federal Government Jobs

A Federal government job or contract is one where a department of the Federal government, as defined below, lets a contract direct to a general contractor, or where such a department of the Federal Government places an order directly with a licensee, such order being invoiced directly to such department for use solely and directly by such department.

The "Federal Government" as used herein shall mean the following departments of the Federal government.

1. Agricultural
2. Bureau of Indian Affairs
3. Coast Guard
4. Commerce
5. Interior
6. Justice
7. Labor
8. Marine Corps
9. Navy
10. Post Office
11. State
(**)12. Treasury
13. Veterans' Bureau
(*) 14. War (Including CCC Camps)
15. District of Columbia

(*) CCC Camps:
(Metallized Gypsum Wallboard)

In areas where the Federal government carries out CCC Camp construction directly or by letting contract to a contractor to furnish both material and labor (such contractor is considered as the direct representative of the Federal

(Reference notes continued on following page)

10750 The classification "Federal Government" does not include the following: TVA, PWA, CWA, HOLC, FERA, SHD, or any corporation formed by the Federal Government for carrying out any works or projects, all such

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(Reference notes from preceding page)

government on the specific project being figured) the minimum price of patented metallized gypsum wallboard direct to the Federal government or to such contractor under such conditions only for CCC Projects, in minimum carload quantities, is the dealer delivered price f.o.b. cars railhead delivery only.

Where Metallized gypsum wallboard is sold and invoiced directly to the Federal government or to such contractor under such conditions, for CCC Projects only, in minimum carload quantities, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Where less carload quantities of metallized gypsum wallboard are required, or CCC Camp site delivery, any quantity, is requested, quotation will be made only through dealers.

(**) WPA Projects

†(a) State Projects. On purchases by or thru the State Procurement Division of the Treasury Department (to be invoiced direct to the Federal Government) for use on State WPA projects, the minimum quoted price of patented metallized gypsum wallboard and/or metallized gypsum lath, for shipment in carloads, shall be the dealer delivered price f.o.b. cars railhead delivery only, plus $2.50 per M sq. ft. on wallboard or $1.25 per M sq. ft. on lath, less 2% cash discount on gross amount.

Shipment in carloads may include shipment in mixed cars with other gypsum products, providing all materials contained in such car are for use on a WPA project and providing entire carload is invoiced direct to the Federal government.

Where patented metallized gypsum wallboard and/or metallized gypsum lath is sold and invoiced directly to the Federal Government for State WPA projects, a maximum allowance of $2.50 per M sq. ft. on wallboard and $1.25 per M sq. ft. on lath may be made to a dealer as a dealer commission.

Patented metallized gypsum board products for State WPA projects when specified in quantities not for shipment in carloads as above outlined, or when State WPA job site delivery, any quantity, is requested, shall be quoted through dealers only.

†(b) Federal Projects. On purchases by the Procurement Division or Resettlement Purchase Section of the Treasury Department (to be invoiced direct to the Federal Government) for use on Federal WPA projects, the minimum quoted price of patented metallized gypsum wallboard and/or metallized gypsum lath, for shipment in carloads for delivery at railhead shall be the regular dealers carload delivered price less 2% cash discount on gross amount. For delivery to project site, the minimum quoted price of patented metallized gypsum wallboard and/or metallized gypsum lath shall be the regular dealer carload delivered price f.o.b. cars at railhead specified in bid form, plus $1.00 per M sq. ft., less 2% cash discount on gross amount. On patented metallized gypsum wallboard and/or metallized gypsum lath sold and invoiced direct to the Federal Government for Federal WPA Projects, either railhead or project site delivery, a maximum allowance of $1.00 per M sq. ft. may be made to a dealer as a dealer commission.

purchasers to be classified as consumers, and sold at the dealers delivered price plus contractor differentials as specified in Metallized Board License Bulletin No. 1 whether such sale is made to the corporation or directly to the department under which the corporation is formed.

Allowances, Etc.: The minimum price fixed by licensor for patented metallized board and/or metallized lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding; for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented metallized board and/or metallized lath. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers; or through allowance or adjustment on board which customer claims is of poor grade and not up to standard, except when such an allowance or adjustment on substandard board is first authorized by the licensor; or by allow-
10751 ance for any other reason whatsoever by a licensee direct or by a salesman of patented board out of his own compensation; or through the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

Also, where a salesman selling patented metallized board to a customer is authorized by licensee or its agent to sell the same wholly or partly on a commission basis, or where a salesman not employed by licensee makes a sale of patented metallized board to a customer on a commission basis and licensee or his agent accepts such sale, in either of such events the commission paid by the licensee is a deduction from the price at which the board is sold by licensee, and where after deducting such commission, the amount is less than the minimum price, licensor shall regard the sale as made at a price less

than the minimum price fixed by licensor and a violation of the terms of the license agreement. Licensor also regards sales of patented metallized board by commission salesmen, without the written consent of licensor, as a violation of the terms of the license agreement.

Sales to Other Gypsum Manufacturers:

There shall be no sale of patented metallized board products to manufacturers of gypsum products without the written consent of the licensor. When such written approval has been granted maximum discounts from the minimum dealer prices established by the licensor, as listed in Metallized Board Bulletin No. 1 shall be 15% on wallboard and 12½% on plasterboard. Such permission is restricted to sales of patented metallized board products to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

The minimum of 5000 sq. ft. of patented gypsum board and/or lath products as required for pickups and shipments out of Eastern mills and warehouses does not apply for pickups by or deliveries to other gypsum manufacturers, providing such pickups or deliveries are destined for manufacturer's own warehouse or plant. If picked up or shipped for delivery direct to a dealer's warehouse, than the 5000 sq. ft. minimum shall apply.

Dunnage:

Gypsum boards used for dunnage and not invoiced to the customer shall be not larger than 4'x4' and any gypsum boards so used with any dimension greater than 12" shall be plainly stamped in red on the face side of each board, showing the words "DUNNAGE—NOT TO BE SOLD" in letters at least 3" high. Excessive dunnage is a violation of the license agreement.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

† Indicates change in this reissue.

10752 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 24, 1936

Conditions of Sale—Metallized Board License Bulletin No. 5

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

Duration of Quotation and Specific Job Protection Price Advances:

In the event of an increase in the minimum prices of patented metallized gypsum wallboard or metallized gypsum plasterboard, the advanced minimum price shall apply to all shipments made after the effective date of the price increase, except:

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

(2) For metallized gypsum lath on specific jobs on which the general contract is awarded prior to date of any price change and order for metallized gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on Federal government jobs after the effective date of the price increase.

(3) For metallized gypsum wallboard and/or metallized gypsum lath on specific gypsum roof jobs to gypsum roofing contractors on which the general contract is awarded prior to date of any price change and order for metallized gypsum wallboard and/or metallized gypsum lath is placed with the licensee within 30 days on private jobs, 60 days on Federal government jobs after the effective date of the price increase.

(4) (a) For metallized gypsum wallboard on specific Federal government jobs on which the general contract

is awarded prior to date of any price change and order for metallized gypsum wallboard is placed with the licensee within 60 days from effective date of price increase.

(b) For metallized gypsum wallboard on specific industrial housing projects on which the general contract is awarded prior to date of any price change and order for metallized gypsum wallboard is placed with the licensee within 30 days from effective date of price increase.

10753 (5) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee prior to the effective date of price increase.

Federal Government Jobs

A Federal government job or contract is one where a department of the Federal government, as defined below, lets a contract direct to a general contractor, or where such a department of the Federal Government places an order directly with a licensee, such order being invoiced directly to such department for use solely and directly by such department.

The "Federal Government" as used herein shall mean the following departments of the Federal government.

1. Agricultural	9. Navy
2. Bureau of Indian Affairs	10. Post Office
3. Coast Guard	11. State
4. Commerce	(**)12. Treasury
5. Interior	13. Veterans' Bureau
6. Justice	(*) 14. War (Including
7. Labor	CCC Camps)
8. Marine Corps	15. District of Columbia

(*Reference notes continued on following page*)

(*) CCC Camps:
(Metallized Gypsum Wallboard)

In areas where the Federal government carries out CCC Camp construction directly or by letting contract to a contractor to furnish both material and

10754 This classification does not include the following: TVA, PWA, CWA, HOLC, FERA, SHD, or any corporation formed by the Federal government for carrying out any works or projects, all such purchasers to be classified as consumers, and sold at the dealers delivered price plus contractor differentials as specified in Metallized Board License Bulletin No. 1 whether such sale is made to the corporation or directly to the department under which the corporation is formed.

(Reference notes from preceding page)

labor (such contractor is considered as the direct representative of the Federal government on the specific project being figured) the minimum price of patented metallized gypsum wallboard direct to the Federal government or to such contractor under such conditions only for CCC Projects, in minimum carload quantities, is the dealer delivered price f.o.b. cars railhead delivery only.

Where Metallized gypsum wallboard is sold and invoiced directly to the Federal government or to such contractor under such conditions, for CCC Projects only, in minimum carload quantities, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Where less carload quantities of metallized gypsum wallboard are required, or CCC Camp site delivery, any quantity, is requested, quotation will be made only through dealers.

(**) WPA Projects:

On purchases by or thru the State Procurement Division of the Treasury Department (to be invoiced direct to the Federal Government) for use on WPA projects, the minimum quoted price of patented metallized gypsum wallboard and/or metallized gypsum lath, for shipment in carloads, shall be the dealer delivered price f.o.b. cars railhead delivery only, plus $2.50 per M sq. ft. on wallboard or $1.25 per M sq. ft. on lath, less 2% cash discount on gross amount.

Shipment in carloads may include shipment in mixed cars with other gypsum products, providing all materials contained in such car are for use on a WPA project and providing entire carload is invoiced direct to the Federal government.

Where patented metallized gypsum wallboard and/or metallized gypsum lath is sold and invoiced directly to the Federal Government for WPA Projects, a maximum allowance of $2.50 per M sq. ft. on wallboard and $1.25 per M sq. ft. on lath may be made as a dealer commission.

Patented metallized gypsum board products for WPA projects when specified in quantities not for shipment in carloads as above outlined, or when WPA job site delivery, any quantity, is requested, shall be quoted through dealers only.

Allowances, Etc.: The minimum price fixed by licensor for patented metallized board and/or metallized lath shall not be reduced below such minimum price or prices by or through allowances, payment or rebate to customers for use of railroad siding; for switching performed after car has been originally set for unloading; for warehousing, trucking or unloading, or other service by them in connection with shipments or deliveries of patented metallized board and/or metallized lath. Nor shall such net cost to customer be reduced below such minimum price or prices by the establishment or continuance of warehouses with dealers or other buyers, or through allowance or adjustment on board which customer claims is of poor grade and not up to standard, except when such an allowance or adjustment on substandard board is first authorized by the licensor; or by allowance for any other reason whatsoever by a licensee direct or by a salesman of patented board out of his own compensation; or through the extension of other than regular terms to any such dealer or buyer. Quotations deducting the regular cash discount so that the quoted price is less than the minimum price to the licensee, are considered as quotations to sell at less than the minimum price and therefore in violation of the license agreement. On quotations to U. S. Government regular minimum delivered price less 2% of delivered price (cash discount) shall be the minimum price.

Also, where a salesman selling patented metallized board to a customer is authorized by licensee or its agent to sell the same wholly or partly on a commission basis, or where a salesman not employed by licensee makes a sale of patented metallized board to a customer on a commission basis and licensee or his agent accepts such sale, in either of such events the commission paid by the licensee is a deduction from the price at which the board is sold by licensee, and where after deducting such commission, the amount is less than the minimum price, licensor shall regard the sale as made at a price less than the minimum price fixed by licensor and a violation of the terms of the license agreement. Licensor also regards sales of patented metallized board by commission salesmen, without the written consent of licensor,
10755 as a violation of the terms of the license agreement.

Sales to Other Gypsum Manufacturers:

There shall be no sale of patented metallized board products to manufacturers of gypsum products without the written consent of the licensor. When such written approval has been granted maximum discounts from the minimum dealer prices established by the licensor, as listed in Metallized Board License Bulletin No. 1, shall be 15% on wallboard and 12½% on plasterboard. Such permission is restricted to sales of patented metallized board products to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail.

The minimum of 5000 sq. ft. of patented gypsum board and/or lath products as required for pickups and shipments out of Eastern mills and warehouses does not apply for pickups by or deliveries to other gypsum manufacturers, providing such pickups or deliveries are destined for manufacturer's own warehouse or plant. If picked up or shipped for delivery direct to a dealer's warehouse, then the 5000 sq. ft. minimum shall apply.

Dunnage:

Gypsum boards used for dunnage and not invoiced to the customer shall be not larger than 4′ x 4′ and any gypsum boards so used with any dimension greater than 12″ shall be plainly stamped in red on the face side of each board, showing the words "Dunnage—Not To Be Sold" in letters at least 3″ high. Excessive dunnage is a violation of the license agreement.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

† Indicates change in this reissue.

10756 *Government's Exhibit No. 253*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 10, 1936.

Supplement to Metallized Board License Bulletin No. 1

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

Effective December 12, 1936, the minimum dealer price of 3/8" patented metallized gypsum plasterboard for shipment into Lower Michigan (except Monroe County and except the Detroit Area as described in Board License Bulletin No. 1) is $21.00 per M sq. ft. in cars f.o.b. mill, Detroit, Michigan.

Effective December 12, 1936, the mimimum dealer price of 3/8" patented metallized gypsum plasterboard for shipment into Monroe County Michigan, in straight, pool or mixed cars, is $22.50 per M sq. ft., f.o.b. cars, delivered to dealers warehouse or siding.

Effective December 12, 1936, the minimum dealer price of 3/8" patented metallized gypsum plasterboard for shipment into Lucas County, Ohio and town of Perrysburg, Ohio, in straight, pool or mixed cars, is $23.00 per M sq. ft .f.o.b. cars, delivered to dealers warehouse or siding.

Minimum dealer price of 3/8" patented metallized gypsum plasterboard for shipment into the Detroit Area remains as stated in Board License Bulletins Nos. 1 and 3.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10757 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 9, 1936.

Supplement to Metallized Board License
Bulletins No. 1 and No. 2.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective December 11, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

Effective December 11, 1936 minimum dealer prices for patented metallized gypsum board products f.o.b. cars Heath, Montana, are as follows:

	Weight Per M Sq. Ft.	Price Per M Sq. Ft.
1/4" Metallized Gypsum Wallboard	950#	$32.00
3/8" Metallized Gypsum Wallboard	1400#	39.50
1/2" Metallized Gypsum Wallboard	1900#	43.00
1/2" Metallized Gypsum Sheathing	1900#	39.00
3/8" Metallized Gypsum Plasterboard	1400#	32.50

Prices also apply for pickups.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10758 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 5, 1936.

Supplement to Metallized Board License
Bulletins No. 1 and No. 3.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective December 7, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

(1) Effective December 7, 1936, the minimum prices of patented metallized gypsum board products, in straight and pool cars, or mixed cars with other gypsum products, f.o.b. cars delivered to dealers warehouse or siding in State of Connecticut and in Cheshire, Sullivan, Merrimac and Belknap Counties, New Hampshire, are as follows:

1/4" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	1/2" Metallized Gypsum Wallboard	3/8" Metallized Gypsum Lath
$28.00	$33.00	$34.00	$30.00	$23.00

For minimum prices of patented metallized gypsum board products delivered to dealers warehouse by truck within the above outlined area, add $1.00 per M sq. ft. to prices for deliveries by rail. Minimum truckloads shall be as defined in paragraph (7) of Metallized Board License Bulletin No. 3.

(2) Effective December 7, 1936, the minimum prices for 3/8" patented metallized gypsum lath as provided in Metallized Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) delivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum lath may be combined with gypsum bag goods to make minimum weight.

Very truly yours,
UNITED STATES GYPSUM COMPANY

Vice President.

10759 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 24, 1936.

Supplement to Metallized Board License
Bulletins No. 1 and No. 3

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective November 27, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

Effective November 27, 1936, the minimum price of 3/8" patented metallized gypsum plasterboard, in sizes 16" x 32" and 16" x 48" only, for shipment into Kings, Queens, Nassau and Suffolk Counties, New York is $21 per M sq. ft. f.o.b. cars or truck delivered to dealers warehouse or siding. Price applies for shipment in straight, pool or mixed cars, also for shipment in minimum truckloads (any mixture) as defined in paragraph (7) of Board License Bulletin No. 3.

Cancel all 1/2" T&G Metallized Sheathing exceptions as listed in Metallized Board License Bulletins #1 and #3. Effective November 27, 1936, the minimum price of 1/2" patented metallized gypsum sheathing is $29.00 per M sq. ft. f.o.b. mills as listed in Metallized Board License Bulletin No. 1, without exception. For truck deliveries add amounts as specified in Board License Bulletin #3. For deliveries in cars into Chicago and Detroit Areas, minimum prices become $29.50 and $29.60 per M sq. ft. respectively, f.o.b. cars delivered to dealers warehouse or siding.

Very truly yours,

UNITED STATES GYPSUM COMPANY

President.

10760

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 3, 1936

Supplement to Metallized Board License
Bulletins No. 1 and No. 3 Dated July 23, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective September 5, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

3/8" Metallized Plasterboard: Effective September 5, 1936 the minimum price of 3/8" patented metallized gypsum plasterboard in straight, pool or mixed carloads or in trucks with other gypsum products is $22.00 per M sq. ft. FOB cars or trucks delivered to dealers warehouse or siding in Niagara, Erie (including town of Gowanda, N. Y.) Monroe and Wayne Counties, New York.

This price does not apply to 32" x 48" board.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10761 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 3, 1936.

Supplement to Metallized Board License Bulletin No. 1
Dated July 23, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective September 5, 1936 the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

5/16" Metallized Plasterboard: Effective September 5, 1936 the minimum price of 5/16" Metallized Plasterboard (weight 1175# per M) for shipment into state of Minnesota is $19.75 per M sq. ft. FOB Fort Dodge, Iowa, East Chicago, Indiana and Grand Rapids, Michigan.

This cancels price of $22.00 per M sq. ft. FOB cars delivered into Hennepin and Ramsey Counties, Minnesota as shown on page 5 of Metallized Board License Bulletin No. 1 dated August 22, 1936.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10762 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 23, 1936.

Supplement of Metallized Board License Bulletins

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective June 25, 1936, the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

(1) 1/4" Metallized Wallboard:

(a) For shipment into those areas where mill price of 1/4" regular patented gypsum wallboard is $20.00 per M sq. ft., the minimum mill price of 1/4" patented metallized gypsum wallboard is $27.00 per M sq. ft.

(b) For shipment into those areas where mill price of 1/4" regular patented gypsum wallboard is $21.00, $22.00 or $22.50 per M sq. ft., the minimum mill price of 1/4" patented metallized wallboard is $27.50 per M sq. ft.

(2) 3/8" Metallized Wallboard:

(a) For shipment into those areas where mill price of 3/8" regular patented gypsum wallboard is $25.00 per M sq. ft., the minimum mill price of 3/8" patented metallized gypsum wallboard is $32.00 per M sq. ft.

(b) For shipment into those areas where mill price of 3/8" regular patented gypsum wallboard is $26.00 per M sq. ft., the minimum mill price of 3/8" patented metallized gypsum wallboard is $33.00 per M sq. ft.

(c) For shipment into those areas where mill price of 3/8" regular patented gypsum wallboard is either $27.00 or $28.50 per M sq. ft., the minimum mill price of 3/8" patented metallized gypsum wallboard is $33.50 per M sq. ft.

(3) 1/2" Metallized Wallboard:

(a) For shipment into those areas where mill price of 1/2" regular patented gypsum wallboard is $26.00 per M sq. ft., the minimum mill price of 1/2" patented metallized gypsum wallboard is $33.00 per M sq. ft.

(b) For shipment into those areas where mill price of 1/2" regular patented gypsum wallboard is either $29.00 or $31.00 per M sq. ft., the minimum mill price of 1/2" patented metallized gypsum wallboard is $36.00 per M sq. ft.

10763 (4) 1/2" Metallized T & G Gypsum Sheathing:

(a) The minimum price of 1/2" patented metallized T & G Gypsum sheathing for shipment in cars, also for shipment by truck into established trucking areas, is $7.00 per M sq. ft. higher than corresponding mill or delivered price of regular 1/2" patented T & G gypsum sheathing.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President

10764 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 7, 1936

Supplement to "Metallized" Board License Bulletins.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

Effective immediately minimum dealer prices of patented metallized gypsum wallboard and metallized gypsum lath f.o.b. cars at Boston (Charlestown), Mass., Detroit, Mich., East Chicago, Ind., New Brighton, S. I., N. Y., and Philadelphia, Pa. mills, are as follows:

Metallized Wallboard			Metallized Lath
¼"	⅜"	½"	⅜" Only.
27.50	33.50	36.00	*22.00

* Minimum price of $22.00 for patented metallized lath applies for shipment to destinations east of the Mississippi River only.

Minimum prices for pickups and shipments in carloads or by truck into Metro New York-New Jersey, Philadelphia and Boston Trucking Areas, for shipment in carloads or by truck into the Detroit Trucking Area and for shipment in carloads into the Chicago Area are $5.00 per M sq. ft. (on metallized wallboard) and $7.00 per M sq. ft. (on metallized lath) higher than corresponding prices for regular patented gypsum wallboard and/or lath as listed in regular Board License Bulletins dated May 4, 1936 and in supplemental telegram dated May 6, 1936.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10765 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 13, 1936.

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective February 15, 1936 at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

(1) 3/8" Metallized Wallboard. The minimum price of 3/8" patented metallized gypsum wallboard for shipment into city of Texarkana, Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster and Claiborne Counties, Louisiana is $30.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; or Southard, Oklahoma.

(2) 1/2" Metallized Wallboard. The minimum price of 1/2" patented metallized gypsum wallboard for shipment into city of Texarkana, Arkansas, also into Caddo, Bossier, De Soto, Red River, Bienville, Webster, and Claiborne Counties, Louisiana is $31.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; or Southard, Oklahoma.

The minimum price of 1/2" patented metallized gypsum wallboard for shipment into states of Kansas and Nebraska is $34.50 per M sq. ft. f.o.b. Fort Dodge, Iowa or Southard, Oklahoma.

Prices apply for standard sizes as listed in Bulletin No. 4.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10766 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 6, 1936.

Supplement to "Metallized" Board License Bulletin No. 1—Dated December 31, 1934. And "Metallized" Board License Bulletin No. 3—Dated January 10, 1936.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective February 7, 1936 at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

(1) In straight carloads of patented gypsum board and/or lath products, consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Philadelphia Area as follows: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pa. and Camden County, N. J.

On pool cars or mixed cars into the Philadelphia Area as described above, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products to one destination. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimums.

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined area have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum price fixed by the licensor and a violation of the terms of the license agreement.

(2) Del'd by Truck Prices into Philadelphia Area. Minimum price of patented gypsum board and/or lath delivered by truck to dealer's warehouse is same as delivered by rail in mixed cars. This applies to Bucks, Montgomery, Chester,

Delaware and Philadelphia Counties, Pa. and Camden County, N. J. Minimum quantity 5000 sq. ft. gypsum board and/or lath consigned to one destination and invoiced to one account, delivered by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products may be combined to make up the required minimum.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10767 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 20, 1935.

Supplement to "Metallized" Board License Bulletin No. 1—Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

Referring to paragraph number one of supplement dated November 6, 1935 in reference to minimum prices of 5/16" patented metallized gypsum plasterboard:

Effective immediately the sale of 5/16" patented metallized gypsum plasterboard for shipment into Kings and Queens counties, New York and Mercer county, New Jersey is discontinued.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10768 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

DECEMBER 9, 1935

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

Effective December 11, 1935, the minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, is as follows:

$23.00 per M sq. ft. f.o.b. cars delivered into Hennepin County, Minnesota (Minneapolis) and Ramsey County, Minnesota (St. Paul).

The above price applies for sizes 16"x32" and 16"x48" only, bundled.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10769 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 22, 1935

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

(1) Effective November 25, 1935 the minimum price of 3/8" patented metallized gypsum plasterboard for delivery into Detroit Area consisting of Wayne County, Michigan; towns of Birmingham, Clauson, Farmington, Ferndale and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville and Centerline in Macomb County, Michigan is as follows:

$22.00 per M sq. ft. delivered to dealers warehouse or siding, in cars or trucks. Truck delivery shall be in minimum straight loads of 5000 sq. ft. (any mixture) patented gypsum board and/or lath products, or in mixed loads, minimum weight 5 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included to make minimum weight. Patented metallized gypsum board products other than 3/8" plasterboard included in such truckloads shall take the regular carload delivered price.

(2) Effective November 25, 1935 the minimum price of 3/8" patented metallized gypsum plasterboard for shipment in straight and pool carloads or in mixed carloads with other gypsum products, to destinations outside the Detroit Area as described above is $22.00 per M sq. ft. f.o.b. cars Detroit, Michigan; Grand Rapids, Michigan; or Gypsum, Ohio.

The above prices apply for standard sizes as listed in Metallized Board License Bulletin No. 4.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10770 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 6, 1935.

Supplement to "Metallized" Board License Bulletin No. 1—Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

(1) Effective November 8, 1935, the minimum price of 5/16" patented metallized gypsum plasterboard (weight 1175# per M), in straight and pool carloads, or in mixed carloads with other gypsum products, is as follows:

—$22.00 per M sq. ft. f.o.b. cars delivered into Marion County, Indiana (Indianapolis); Sangamon County, Illinois (Springfield); Henrico County, Virginia (Richmond); Hartford County, Connecticut (Hartford); Hampden County, Massachusetts (Springfield); Providence County, Rhode Island (Providence); Mercer County, New Jersey (Trenton); Lancaster County, Pennsylvania (Lancaster); Cuyahoga County (Cleveland) and towns of Willoughby and Wickliffe, Ohio; also following towns in Missouri: St. Louis, Ferguson, Kinloch, Overland, Brentwood, Kirkwood, Jennings, Wellston, Clayton, Webster Groves, Maplewood, Gravois Station, Old Orchard and Lake Junction.

—$22.00 per M sq. ft., in minimum quantities of 5000 sq. ft. consigned to one destination and invoiced to one account, f.o.b. cars or trucks delivered into Kings and Queens Counties, New York.

—$25.00 per M sq. ft. f.o.b. cars delivered into Woodbury County, Iowa (Sioux City).

—$26.00 per M sq. ft. f.o.b. cars delivered into towns of Kansas City, Dodson and Edgecomb, Missouri; also into towns of Rosedale, Waldo, Argentine, Westport, Overland Park and Kansas City, Kansas.

The above prices apply for sizes 16"x32" and 16"x48" only, bundled.

(2) Effective November 8, 1935 the minimum price of 3/8" patented metallized gypsum wallboard, for shipment into states of Texas and New Mexico is $30.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; or Southard, Oklahoma. Price applies for standard sizes as listed in Bulletin No. 4.

(3) Effective November 8, 1935 the minimum price of 1/2" patented metallized gypsum wallboard for shipment into states of Texas and New Mexico is $31.00 per M sq. ft. f.o.b. Acme, Texas; Sweetwater, Texas; or Southard, Oklahoma; for shipment into states of Oklahoma, Arkansas, Louisiana and Arizona $34.50 per M sq. ft.
10771 f.o.b. Fort Dodge, Iowa; Acme, Texas; Sweetwater, Texas; or Southard, Oklahoma. Prices apply for standard sizes as listed in Bulletin No. 4.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10772 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 25, 1935

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

A. W. IRWIN,
Office

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

CCC Camps—(As listed below)
(Metallized Gypsum Wallboard)

The minimum prices of 1/4" patented metallized gypsum wallboard in minimum carload quantities f.o.b. cars delivered, railhead delivery only, sold direct to and invoiced direct to the Federal Government for CCC Camps at destinations listed below, are as follows:

Item No.	Camp	Railhead	Net Prices F. O. B. Railhead		
			Per M Sq. Ft.	Per Square Foot	Total For 47000 Sq. Ft.
1	A-3	Beltsville, Md.	$29.09	$ .02909	1367.23
2	A-4	Beltsville, Md.	29.09	.02909	1367.23
3	S-64	Parkton, Md.	28.91	.02891	1358.77
4	S-65	Piedmont, W. Va.	28.91	.02891	1358.77
5	S-66	Frostburg, Md.	28.91	.02891	1358.77
6	S-67	Oakland, Md.	28.91	.02891	1358.77
7	S-68	Piedmont, W. Va.	28.91	.02891	1358.77
8	SCS-5	White Hall, Md.	28.91	.02891	1358.77
9	NP-12	Luray, Va.	28.81	.02881	1354.07
10	P-77	Lawrenceville, Va.	29.09	.02909	1367.23
11	P-78	Hanover, Va.	28.91	.02891	1358.77
12	P-79	Fremont, Va.	28.99	.02899	1362.53
13	P-80	Moseley, Va.	28.81	.02881	1354.07
14	P-88	Amelia, Va.	28.81	.02881	1354.07
15	P-89	Farmville, Va.	28.53	.02853	1340.91
16	SCS-2	Danville, Va.	28.53	.02853	1340.91
17	SCS-3	Rocky Mount, Va.	28.25	.02825	1327.75
18	SCS-4	Ridgeway, Va.	28.53	.02853	1340.91
19	SCS-9	Lynchburg, Va.	28.53	.02853	1340.91
20	SP-22	Quantico, Va.	28.99	.02899	1362.53
21	SP-23	Alexandria, Va.	28.91	.02891	1358.77
22	F-16	Massie's Mill, Va.	29.37	.02937	1380.39
23	F-17	Big Island, Va.	28.81	.02881	1354.07

10773

Item No.	Camp	Railhead	Net Prices F. O. B. Railhead Per M Sq. Ft.	Per Square Foot	Total For 47000 Sq. Ft.
24	F-8	Endeavor, Pa.	$29.55	$ .02955	1388.85
25	F-9	Marienville, Pa.	28.72	.02872	1349.84
26	F-10	Ridgway, Pa.	28.53	.02855	1340.91
27	F-11	Kane, Pa.	28.53	.02853	1340.91
28	F-12	Kane, Pa.	28.53	.02853	1340.91
29	F-13	Sheffield, Pa.	28.53	.02853	1340.91
30	F-14	Bradford, Pa.	28.53	.02853	1340.91
31	SCS-1	Home, Pa.	28.62	.02862	1345.14
32	SCS-2	Punxsutawney, Pa.	28.53	.02853	1340.91
33	S-143	Karthaus, Pa.	28.91	.02891	1358.77
34	S-144	Emporium, Pa.	28.53	.02853	1340.91
35	S-145	Montoursville, Pa.	28.72	.02872	1349.84
36	P-146	Austin, Pa.	29.09	.02909	1367.23
37	S-147	Emporium, Pa.	28.53	.02853	1340.91
38	S-148	Mifflinburg, Pa.	28.91	.02891	1358.77
39	S-149	Gouldsboro, Pa.	28.91	.02891	1358.77
40	P-150	Moosic, Pa.	28.72	.02872	1349.84
41	P-153	Nesquehoning, Pa.	28.91	.02891	1358.77
42	S-154	Bedford, Pa.	28.91	.02891	1358.77
43	S-155	Galeton, Pa.	29.09	.02909	1367.23
44	SP-6	Burgettstown, Pa.	28.53	.02853	1340.91
45	SP-8	Rockwood, Pa.	28.91	.02891	1358.77
46	SP-11	Jamestown, Pa.	28.53	.02853	1340.91
47	SP-12	Ohiopyle, Pa.	28.91	.02891	1358.77
48	SP-13	Allentown, Pa.	28.91	.02891	1358.77
49	SP-15	Rockwood, Pa.	28.91	.02891	1358.77
50	SP-16	Burgettstown, Pa.	28.53	.02853	1340.91
51	SP-17	Birdsboro, Pa.	28.91	.02891	1358.77

Where patented metallized gypsum wallboard is sold and invoiced directly to the Federal Government for the above CCC Projects, in minimum carload quantities, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10774 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 9, 1935

Supplement to "Metallized" Board License Bulletin No. 1—Dated December 31, 1934. (Confirms Telegram)

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

CCC Camps—Michigan
(Metallized Gypsum Wallboard)

The minimum prices of 3/8" patented metallized gypsum wallboard in minimum carload quantities f.o.b. cars delivered, railhead delivery only, sold direct to and invoiced direct to the Federal Government for Michigan CCC Camps at destinations listed below, are as follows:

Destination		Net Prices Item No. 1 (3/8"x48"x8')		Net Prices Item No. 2 (3/8"x48"x10'4")	
		Per Piece	Total For 740 Pieces	Per Piece	Total Fo 600 Piec
Skandia	(for Camp Dukes)	$1.16	$858.40	$1.60	$960.00
Chatham	(for Camp Chatham)	1.156	855.44	1.594	956.40
Ensign	(for Camp Sundstrum)	1.156	855.44	1.594	956.40
Gibbs City	(for Camp Gibbs)	1.156	855.44	1.594	956.40
Nahma Jct.	(for Camp Mormon Creek)	1.156	855.44	1.594	956.40
Wetmore	(for Camp Evlyn)	1.156	855.44	1.594	956.40
Trout Lake	(for Camp Trout)	1.156	855.44	1.594	956.40
Iron River	(for Camp James Lake)	1.156	855.44	1.594	956.40
Munising	(for Camp Antrim)	1.156	855.44	1.594	956.40
Crystal Falls	(for Camp Venabic)	1.156	855.44	1.594	956.40
Semy	(for Camp Fox)	1.156	855.44	1.594	956.40
St. Ignace	(for Camp St. Martins)	1.151	851.74	1.589	953.40
Watersmeet	(for Camp Duck Lake and Camp Paulding)	1.165	862.10	1.6056	963.36
Ironwood	(for Camp Norrie)	1.165	862.10	1.6056	963.36

Where patented metallized gypsum wallboard is sold and invoiced directly to the Federal Government for the above CCC Projects, in minimum carload quantities, a

maximum allowance of $1.50 per M square feet may
10775 be made as a dealer commission. When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10776 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 27, 1935

Supplement to "Metallized" Board License Bulletin No. 1—Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective September 1, 1935 at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

Effective September 1, 1935 the minimum price of 1/4" patented metallized gypsum wallboard for shipment into states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland and District of Columbia is $27.50 per M sq. ft. f.o.b. Oakfield, New York, Gypsum, Ohio and Plasterco, Virginia.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10777 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 21, 1935

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective August 26, 1935 at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

Effective August 26, 1935 the minimum price of 1/4" patented metallized gypsum wallboard for shipment into states of Illinois, Indiana, Ohio and Michigan is $27.50 per M sq. ft. f.o.b. Grand Rapids, Mich., Fort Dodge, Ia., and Gypsum, Ohio.

Effective August 26, 1935 add the states of Montana, Colorado and Wyoming to area wherein stopover charges need not be included in the minimum price of patented metallized gypsum board.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10778 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 19, 1935

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective July 22d, 1935 at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufac-

tured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

Effective July 22d, 1935 add the state of Kentucky to area wherein stopover charges need not be included in the minimum price of patented metallized gypsum board.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10779 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 5, 1935

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective July 10th, 1935 at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

Effective July 10, 1935 the minimum price of 1/4" patented metallized gypsum wallboard for shipment into states of Minnesota, Iowa, Wisconsin, Upper Michigan, Kentucky, West Virginia and Virginia is $27.50 per M sq. ft. f.o.b. Fort Dodge, Ia., Gypsum, Ohio, Grand Rapids, Mich., Oakfield, N. Y., and Plasterco, Va.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10780 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 3, 1935

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

Add to paragraph (2), page 3, Bulletin No. 1:

Delivered Carload Minimum Prices to—	Same as—
Arlington Siding (Poughkeepsie), N. Y.	Poughkeepsie, N. Y.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10781 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 19, 1935.

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

Cancels letter Supplement of February 26, 1935
CCC Camps

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

CCC Camps:
(Metallized Gypsum Wallboard)

In areas where the Federal Government carries out CCC Camp construction directly or by letting contract to a contractor to furnish both material and labor (such contractor is considered as the direct representative of the Federal Government on the specific project being figured) the minimum price of patented metallized gypsum wallboard direct to the Federal Government or to such contractor under such conditions only for CCC Projects, in minimum carload quantities, is the respective dealer delivered price, f.o.b. cars railhead delivery only.

Where patented metallized gypsum wallboard is sold and invoiced directly to the Federal Government or to such contractor under such conditions, for CCC Projects only, in minimum carload quantities, a maximum allowance of $1.50 per M square feet may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M square feet, total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, amount and date of payment to each dealer, must be filed with the licensor with the regular monthly reports.

Where less carload quantities of patented metallized gypsum wallboard are required, or CCC Camp site delivery, any quantity, is requested, quotation will be made only through dealers.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10782 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 12, 1935

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

Effective immediately the minimum price of 1/4" patented metallized gypsum wallboard for shipment into the following states:

Alabama	Louisiana	Oklahoma
Arizona	Mississippi	So. Carolina
Arkansas	Missouri	So. Dakota
Colorado	Montana	Tennessee
Florida	Nebraska	Texas
Georgia	New Mexico	Utah
Idaho	No. Carolina	Wyoming
Kansas	No. Dakota	

is $27.50 per M sq. ft. f. o. b. Plasterco, Va., Grand Rapids, Mich., Ft. Dodge, Ia., Southard, Okla., Sweetwater, Texas and Acme, Texas.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10783 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 9, 1935

Supplement to "Metallized" Board License Bulletin No. 1—Dated December 31, 1934.

MR. A. W. IRWIN,
Office

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

The minimum delivered prices of patented metallized gypsum wallboard and metallized gypsum plasterboard will be directly affected by the permissive order of the Interstate Commerce Commission authorizing an increase in freight rates. On Interstate traffic the freight increase becomes effective on the effective date of the Interstate tariff, and in Intrastate traffic the freight increase is effective when approved by the State Commission.

When emergency freight charges become effective the minimum delivered price of patented metallized gypsum wallboard and metallized gypsum plasterboard is to be the lowest combination of mill price plus freight, including emergency charge, from that mill to destination, as follows:

Where the minimum delivered price is the result of mill price plus Interstate freight, the increase is to be added on the effective date of the Interstate tariff.

Where the minimum delivered price is the result of mill price plus Intrastate freight, the increase is effective when approved by the State Commission.

The amount of increase in freight to be added to minimum f.o.b. mill prices of patented metallized gypsum wallboard and metallized gypsum plasterboard shall be as detailed in schedule attached.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10784 Patented Metallized Gypsum Wallboard and Lath

Opposite old rate, using the table below, is the proper new pricing rate, in cents per 100 pounds:

Old rate	New rate	Old rate	New rate	Old rate	New rate
.05	.05	.18	.19	.31	.33
.055	.06	.185	.20	.315	.34
.06	.06	.19	.20	.32	.34
.065	.07	.195	.21	.325	.35
.07	.07	.20	.21	.33	.35
.075	.08	.205	.22	.335	.36
.08	.09	.21	.22	.34	.36
.085	.09	.215	.23	.345	.37
.09	.10	.22	.24	.35	.37
.095	.10	.225	.24	.355	.38
.10	.11	.23	.25	.36	.39
.105	.11	.235	.25	.365	.39
.11	.12	.24	.26	.37	.40
.115	.12	.245	.26	.375	.40
.12	.13	.25	.27	.38	.41
.125	.13	.255	.27	.385	.41
.13	.14	.26	.28	.39	.42
.135	.14	.265	.28	.395	.42
.14	.15	.27	.29	.40	.43
.145	.16	.275	.29	.405	.43
.15	.16	.28	.30	.41	.44
.155	.17	.285	.30	.415	.44
.16	.17	.29	.31	.42	.45
.165	.18	.295	.32	.425	.45
.17	.18	.30	.32	.43	.46
.175	.19	.305	.33		

On all old rates over 43¢ per cwt. to secure new rate add flat 3¢ per cwt. (.435 becomes .465, .44 becomes .47, etc.)

Stopover Charges: In that area where stopover charges are now absorbed the Emergency increase applicable to stopover charge shall also be absorbed. In those states where stopover charges are not absorbed, the Emergency increase (10%) which is applicable to stopover charges shall be added. ($6.30 charge becomes $6.93, etc.)

10785 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 4, 1935

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

Add Warren and Sussex Counties, New Jersey to Metro N. Y.-N. J. Area as described in paragraph (y) on page 2 of Metallized Board License Bulletin No. 1 dated December 31, 1934.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10786 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 18, 1935.

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective immediately at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345 are changed as follows:

Refer to page 1 of "Metallized" Board License Bulletin No. 1 dated December 31, 1934. Change second paragraph to read as follows:

Delivered price is lowest combination of mill price plus freight from that mill to destination. In stopover cars delivered price for any part of car is carload delivered price as above defined to point of delivery of that part of car. In every case rates as shown in published railroad freight tariffs apply. To determine board footage required to meet straight or mixed carload minimum weights, as shown in published railroad freight tariffs, use weights per M sq. ft. as given in supplement dated February 25, 1935.

The weights referred to above, given you in supplement dated February 25, 1935, are as follows:

1/4" thickness— 950# per M sq. ft.
3/8" " —1400# " " " "
1/2" " —1900# " " " "

We desire to emphasize that all shipments of patented gypsum board products, in straight carloads or in mixed carloads with other gypsum products, are to be figured, for purposes of meeting required minimum weights, at weights per M sq. ft. as shown above.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10787

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 12, 1935.

Supplement to "Metallized" Board License Bulletin No. 1—
Dated December 31, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

Add the following to emphasize the meaning of paragraph (y) on page 2 of "Metallized" Board Bulletin No. 1 dated December 31, 1934:

Where any licensee or any of its employees, salesmen or executives has knowledge or notice, either directly or indirectly, that orders for less than straight car quantities of patented gypsum board products to be shipped into the above defined area have been pooled for the purpose of or for effect of obtaining the reduced price for straight cars for each participant in the pool, licensor shall regard such sale as made at a price less than the minimum priced fixed by the licensor and a violation of the terms of the license agreement.

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President.

10788

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 26, 1935

Supplement to 'Metallized' Board License Bulletin No. 1 Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are as follows:

CCC Camps:

The minimum price of metallized wallboard and/or metallized plasterboard direct to the Federal Government for CCC Projects in minimum carload quantities is the dealer delivered price f.o.b. cars, railhead delivery only.

Where patented metallized wallboard or metallized plasterboard is sold and invoiced direct to the Federal Government for CCC Projects, a maximum allowance of $1.50 per M sq. ft. may be made as a dealer commission.

When such commissions are paid to dealers, a detailed statement of the name and location of the camp, date shipped, footage sold, the unit price per M sq. ft., total amount of the billing, total amount of the commission, name and location of the dealer or dealers receiving the commission, method of distribution, and amount and date of payment to each dealer must be filed with the licensor with the regular monthly reports.

Where less carload quantities of patented metallized wallboard and/or metallized plasterboard are required, or Campsite delivery any quantity is requested, quotation will be made only through dealers.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10789 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 25, 1935

Supplement to "Metallized" Board License Bulletin No. 1—Dated December 31, 1934.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective March 1, 1935, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are changed as follows:

Change Weights of patented Metallized Wallboard and Metallized Plasterboard as follows:

1/4" thickness— 950# per M sq. ft.
3/8" " —1400# " " " "
1/2" " —1900# " " " "

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10790 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 21, 1935

Supplement to "Metallized" Board License Bulletin No. 1—Dated December 31, 1934 and to "Metallized" Board License Bulletin No. 2—Dated December 31, 1934

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

Change paragraph (y) on page 2 of "Metallized" Board Bulletin No. 1 dated December 31, 1934 to read as follows:

(y) In straight carloads of patented gypsum board and/or lath products, consigned to one destination and invoiced to one account, deduct $2.00 per M sq. ft. from f.o.b. Oakfield prices for shipment by rail to dealers warehouse or nearest siding in Metropolitan New York-New Jersey Area as follows: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, New York; Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset, Monmouth, Hunterdon and Ocean Counties, New Jersey.

On pool cars or mixed cars into this area, minimum quantity is 5000 sq. ft. of patented gypsum board and/or lath products to one destination. Note: Any mixture of metallized and regular patented board products may be combined to make up the 5000 ft. minimum.

Add reference (*) to pickup prices as shown in "Metallized" Board Bulletin No. 2 dated December 31, 1934 f.o.b. Boston and Portsmouth, Metro N. Y.-N. J. Warehouses, Oakfield and Philadelphia as follows:

(*) Minimum pickup 5000 sq. ft. patented gypsum board and/or lath products. Note: Any mixture of metallized and regular patented board products may be combined to make up the 5000 ft. minimum.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

10791 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 9, 1935

Supplement to "Metallized" Board License Bulletin No. 1—Dated December 31, 1934—Carload Shipments.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

Change second sentence of reference (*) as issued January 4, 1935 to read:

"Rate applying to 80,000 lb. minimum out of Fort Dodge or Grand Rapids into these states etc."

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10792 UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 4, 1935.

Supplement to "Metallized" Board License Bulletin No. 1—Dated 12-31-34—Carload Shipments.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that the minimum prices effective until further notice, at which you may sell metallized gypsum wallboard and metallized gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in patents under which you are licensed, including Roos patent number 1,914,345, are supplemented as follows:

Add reference (*) to minimum prices for patented Metallized Wallboard f.o.b. Ft. Dodge, Iowa and Grand Rapids, Michigan, also add reference (*) to minimum price for patented Metallized Plasterboard f.o.b. Grand Rapids, Michigan, as follows:

(*) In the states of Illinois and Wisconsin, to all destinations where a 60000 lb. minimum (from Fort Dodge or Grand Rapids) is in effect; delivered prices of patented Metallized Wallboard and/or Lath, in pool cars, stopover cars, straight cars or mixed cars with other gypsum products, will be mill base price plus 60000 lb. rate regardless of minimum shipped. Rate applying to 80000 lb. minimum out of Fort Dodge into these states will be used in pricing patented Metallized Wallboard in carloads or pool cars consigned to a single destination only, with the exception that shipments to the City of Superior, Wisconsin may be priced on the 80000 lb. rate when included in 80000 lb. stopover cars with shipments for the Twin Cities, Duluth and Steelton, Minnesota.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President.

10793 *Government's Exhibit No. 254*

NOVEMBER 26, 1934

BUFFALO

Subject: METALLIZED GYPSUM BOARD & LATH

H. H. Van Hagan - eoc

TO: Messrs.
H. F. Barnard--Acme
H. W. Neumeister—Akron
E. L. Flinn—Fort Dodge
O. F. Grieve—Grand Rapids
C. C. Whetstone—Gypsum
cc: C. O. Brown, V.P.—New York
W. A. Phelps—New York
G. A. Hoggatt—Buffalo

For your information would advise that our company has recently signed up a license agreement with the United States Gypsum Company permitting us to manufacture and sell Metallized Wallboard and Lath. By Metallized Wallboard we mean the board with pasted sheet of aluminum foil applied to one or both sides, as the order may specify. By reference to your Gypsum Price List you will note price on this product incorporated therein.

For your further information would advise that we do not propose to maufacture this product for the present but have worked out an arrangement for the purchase of this board from the United States Gypsum Company and which we will secure from their various plants, locations of which will be furnished you later.

There is also the matter of samples and labels to be used on the board, all of which is to be developed and on which matters you will be advised later. I am merely giving you this preliminary notice so that you will understand what is taking place and so that when further data is given you regarding points at which stock can be secured and source of samples, you can readily get yourself into position to handle orders for this product when submitted by the Sales Department.

I am giving copy of this letter to Mr. Phelps and presume that he is developing information regarding the sizes and quantities of samples which we will provide together with labels for samples and labels to be applied to the wallboard and lath panels themselves.

10794 *Government's Exhibit No. 255*

MARCH 26, 1935

MR. A. W. IRWIN, *Assistant Comptroller*
United States Gypsum Company,
300 West Adams Street,
Chicago, Illinois.

DEAR SIR:

Your letter of March 19th, for the attention of Mr. Nelson, has been referred to the writer.

Item X in the Plaster Board Agreement reads in part as follows:

"Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report * * * showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month and which was manufactured by Licensee under the rights, licenses and privileges herein granted * * *".

This is to advise that Certain-teed has not manufactured any Board under the License Agreement, but all Board which todate has been sold has been purchased from your Company. Under these circumstances, is it your desire that we send through a report each month showing no information to be reported or is this letter sufficient? You may rest assured that as soon as we start in manufacturing metallized board we will promptly report all sales in accordance with the Agreement.

Awaiting your further advice in regard to the matter in question, we are

Very truly yours,

Assistant Auditor

EHL/H

10795 *Government's Exhibit No. 256*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 4, 1935.

CERTAIN-TEED PRODUCTS CORPORATION
100 East 42nd Street,
New York, N. Y.

Attention: Mr. E. H. Laney,
Assistant Auditor

Gentlemen:

Thank you for your letter of March 26th, advising us that you have not manufactured any board under the license agreement dated November 2, 1934.

While it would be preferable that you send us a report each month even though you have manufactured and sold no board under this license, it will be agreeable with us if you merely advise us of the fact, by letter, that you have manufactured no such board, until your production of this product begins.

We do wish to be informed currently of your activities under this license and shall appreciate having either a report or letter each month covering that license.

Yours very truly,

UNITED STATES GYPSUM COMPANY

A. W. IRWIN,
Assistant Comptroller

AWI:PE

5786

10796

Government's Exhibit No. 258

CERTAIN-TEED PRODUCTS CORPORATION

Box 6917 N Phila Sta — Philadelphia Pa

Sold to: Pinellas Lbr. Co. 2
Street and No.: 1400 Central Ave. 9
City and State: St. Petersburg, Fla. 52

Invoice Date: 9-8-37
Ship to: same
Destination: same

Register No.: 907080 Salesman: 1111
S. O. No.: At-3113 Customer No.:
Date Ordered: 9-1 Entered: 9-3

Total No. Sheets: Sheet No.:
To be Shipped: at once From: Acme
Date Shipped: 9-2 From: AT #10
Route: QA&P Frisco L&N Montgomery SAL
Car No.: C&NW 122326

Terms: Dis 10th prox (see below) net 30th prox
From date of invoice. Not contingent upon delivery

F. O. B.: Acme full freight allowed ef — Invoice No. 28 EW

Quantity	Unit	Est. Wt.: 9500 Min.:	Rate: 67	Weight Shipped	Price	Amount	Total
		Beaver Gypsum Lath ⅜" C E					
157	bdls	16x48" 5024 sq ft per M sq ft		6988	20.00	100.48	
		Cert Reflective Insulating Lath ⅜" (Metallized one side) (O S P)					
63	bdls	16x48 2016 sq ft per M sq ft		2804	29.00	58.46	
							158.94
		Less Freight: 9792 @ .67					65.61
							93.33

Ship in car with AT-3114

Freight Absorption:

Shipping Plant Rate.. 9.38
Plast Basic Rate..... 7.00
..... tons @ 2.38M $16.76
7040 Sq. Ft.

Confirming to 1550-AT

Discount Notice:
Discount of $3.20 allowed if paid within discount period.

Certain-teed Roofings and Shingles—"Millerized" for Longer Life

10797 *Government's Exhibit No. 259*

CERTAIN-TEED PRODUCTS CORPORATION

Box 6917 N Phila Sta Phila Pa

Sold to: C. W. Kempkau & Co 2
Street and No.: 812 Third Ave N 41
City and State: Nashville Tenn 19
Register No.: 809125 Salesman: 1117
S. O. No.: At 2667 Customer No.:
Date Ordered: 8/4 Entered: 8/6

Invoice Date: 8/12/37
Ship to: same
Destination: same
Total No. Sheets: Sheet No.:
To be Shipped: at once, From: Acme
Date Shipped: 8/10 From: AT 10
Route: QA&P Frisco SSW IC TC
Car No.: C&O 1598

Terms: Dis 10th prox (see below) net 30th prox
From date of invoice. Not contingent upon delivery

F.O.B.: Acme full frt allowed lp Invoice No.: 141 EW

Quantity	Unit	Est. Wt.: 17920 Min.:	Rate: 50	Weight Shipped	Price	Amount	Total
		Beaver Gypsum ⅜" C.E.					
200	bdls.	16x48 6400 sq ft per M		8845	17.34	110.98	
		Beaver Reflective Insulating Lath ⅜" (Metallized one side) (O S P)					
200	bdls	16x48 6400 sq ft per M			26.34	168.58	
							279.56
		Less Freight: 17690 @ .50					88.45
							191.11

Ship in car with AT 2666
Confirming T. O. 1330

Freight Absorption:
Shipping Plant Rate.. 7.00
E Chi Basic Rate..... 4.34
..... tons @ 2.66 $34.05
12800 Sq. Ft.

Discount Notice:
Discount of $4.48 allowed if paid within discount period.

Certain-teed Roofings and Shingles —"Asphalterized" for Longer Life

5788

10798 *Government's Exhibit No. 260*

CERTAIN-TEED PRODUCTS CORPORATION

Box 6917 N Phila Sta Phila Pa

Sold to: Witt Lbr Co 2
Street and No.: Knoxville Tenn 41
City and State: 47
Register No.: 726092 Salesman: 1116
S. O. No.: At 2447 Customer No.:
Date Ordered: 7/20 Entered: 7/22

Invoice Date: 7/27/37
Ship to: same
Destination: same
Total No. Sheets: Sheet No.:
To be Shipped: at once From: Ft. Dodge
Date Shipped: 7/24/37 From: FD 24
Route: FTDD&S CB&Q SOU
Car No.: MP 46824

Terms: Dis 10th prox (see below) net 30th prox
From date of invoice. Not contingent upon delivery

F. O. B.: Ft Dodge—Full Frt Allowed MG Invoice No.: 387 EW

Quantity	Unit	Est. Wt.: 3360 Min.:	Rate: 45	Weight Shipped	Price	Amount	Total
		Cert Reflective Insulating Lath ⅜" C.E. (Metallized one side) (O S P)					
75	bdls	16x48 2400 sq ft per M		3600	25.08		60.19
		Less freight: 3600 @ .45					16.20
							43.99

Ship in car with AT 2448-2449

Confirming T.O. 1226

Freight Absorption:

Shipping Plant Rate.. 6.30
Plast Basic Rate..... 3.08
..... tons @ 3.22M $7.73
2400 Sq. Ft.

Discount Notice:
Discount of $1.06 allowed if paid within discount period.

Certain-teed Roofings and Shingles—"Millerized" for Longer Life

10799 *Government's Exhibit No. 261*

CERTAIN-TEED PRODUCTS CORPORATION OF VIRGINIA

Box 6917 No Phila Sta Phila Pa

1 RD

Invoice Date: December 16 1936

Sold to: Morris-Austin Co. 2 Ship to: same

Address: Asheville N C 31 Destination: same

Register No.: 1211085 Salesman: Bradford Total No. Sheets: Sheet No.

S. O. No.: Rd 2268 Customer No.: 25 To be Shipped: at once From: Plasterco

Date Ordered: 12/10 Entered: 12/11 Date Shipped: 12/12 From: Plasterco 29

Route: N&W SOU

Car No.: PRR-91075

Terms: Dis 10th prox (see below) net 30th prox
From date of invoice. Not contingent upon delivery

F.O.B.: Plasterco—Full Frt Allowed MG Invoice No.: 37 VA

2 240

23 plus 7%

			Quantity Shipped	Price	Amount	Total
		Certain-teed Reflective Insulating Lath % (metallized one side)				
50	bdls	16x48 1600 sq ft OSP per M sq ft	1600	25.50	40.80	
		Less Freight 2414# @ .23		5.56		
		Emer. Chge. 7%		.39	5.94	
						34.86

Ship in car with RD 2266-7
Confirming T.O. 1147

Discount Notice:
Discount of $.70 allowed if paid within discount period.

Certain-teed Roofings and Shingles—"Millerized" for Longer Life

5790

10800 *Government's Exhibit No. 262*

CERTAIN-TEED PRODUCTS CORPORATION

Box 6917 N Phila Sta Phila Pa

Sold to: Smith-Kelly Sup Co Inc 9 Invoice Date: 9/27/37A

Street and No.: SW Cor Va & Conception Sts 1 Ship to: same

City and State: Mobile Ala 49 Destination: same

Register No.: 924227 Salesman: Auman 1112 Total No. Sheets: Sheet No.:

S. O. No.: At 3465 Customer No.: To be Shipped: at once From: Acme

Date Ordered: 9/18 Entered: 9/22 Date Shipped: 9/21/37 From: AT 10

Route: FWDC T&P Y&MV GM&N
Car No.: SLSF 161247

Terms: Dis 10th prox (see below) net 30th prox
From date of invoice. Not contingent upon delivery

F. O. B.: Acme—Full Frt Allowed MG Invoice No.: 388 EW

Quantity	Unit	Est. Wt.: 15718 Min.:	Rate: 47	Weight Shipped	Price	Amount	Total
		Beaver Gypsum Lath ⅜					
225	bdls	16x48 7200 sq ft per M		10015	18.74	134.93	
		Cert Reflective Insulating Lath ⅜ (Metallized one side) (O S P)					
30	bdls	16x48 960 sq ft per M		1335	27.74	26.63	
		Bestwall Gypsum Board ¼ Ivory Triple Mounting					
42	pcs	4x6 1008 sq ft					
51	pcs	4x7 1428 sq ft					
30	pcs	4x8 960 sq ft					
30	pcs	4x10 1200 sq ft					
		4596 sq ft per M		4379	23.90	109.84	
							271.40
		Less Freight 15729 @ .47					73.93
							197.47

Freight Absorption on ⅜":
Shipping Plant Rate.. 6.58
Plast Basic Rate..... 5.74
..... tons @ .84M $6.85
8160 Sq. Ft.

Ship in car
Confirming T.O. 1720

Freight Absorption on ¼":
Shipping Plant Rate... 4.47
Plast Basic Rate..... 3.90
..... tons @ .57M $2.62
4596 Sq. Ft.

Discount Notice:
Discount of $4.13 allowed if paid within discount period.

Certain-teed Roofings and Shingles—"Millerized" for Longer Life

10801 *Government's Exhibit No. 263*

CERTAIN-TEED PRODUCTS CORPORATION

Box 6917 N Phila Sta Phila Pa

Sold to: Smith Kelly Supply Co 2
Street and No.: 1
City and State: Mobile Ala 49
Register No.: 816155 Salesman: 1112
S. O. No.: At 2776 Customer No.:
Date Ordered: 8/11 Entered: 8/13

Invoice Date: 8/17/37
Ship to: same
Destination: same
Total No. Sheets: Sheet No.:
To be Shipped: at once From: Acme
Date Shipped: 8/11/37 From: AT 10
Route: QA&P FWDC SP L&N
Car No.: SLSF 148539

Terms: Dis 10th prox (see below) net 30th prox
From date of invoice. Not contingent upon delivery

F. O. B.: Acme—Full Frt Allowed MG Invoice No.: 244 EW

Quantity	Unit	Est. Wt. 1344 Min.:	Rate: 49	Weight Shipped	Price	Amount	Total
		Cert Reflective Insulating Lath ⅜ (Metallized one side) (O.S.P.)					
30	bdls	16x48	960 sq ft per M	1326	27.74		26.63
			Less Freight 1326 @ .47				6.23
							20.47

Ship in car with AT 2775
Confirming T.O. 1382

Freight Absorption:
Shipping Plant Rate.. 6.86
Plasterco Basic Rate.. 5.74
960 tons @ 1.12M $1.08
..... Sq. Ft.

Discount Notice:
Discount of $.42 allowed if paid within discount period.

Certain-teed Roofings and Shingles—"Millerized" for Longer Life

5792

10802

Government's Exhibit No. 264

CERTAIN-TEED PRODUCTS CORPORATION

Box 6917 N Phila Sta — Phila Pa

Sold to: Smith Kelly Sup Co Inc — 2 — Invoice Date: 7/7/37

Street and No.: SW cor Virginia & Conception Sts — 1 — Ship to: same

City and State: Mobile Ala — 49 — Destination: same

Register No.: 703132 Salesman: 1112 — Total No. Sheets: — Sheet No.:

S.O. No.: At 2101 Customer No.: — To be Shipped: 7/1 — From: Acme

Date Ordered: 6/29 Earned: 7/2 — Date Shipped: 7/2/37 From: AT 10

Route: QA&P FWDC L&A MC WANILLA GM&N

Car No.: GN 13597

Terms: Dis 10th prox (see below) net 30th prox
From date of invoice. Not contingent upon delivery

F. O. B.: Acme—Full Frt Allowed — MG — Invoice No.: 16 EW

Quantity	Unit	Est. Wt. 672, Min.:	Rate: 47	Weight Shipped	Price	Amount	Total
		Cert Reflective Insulating Lath ⅜ (O S P)					
15	bdls	16x48 480 sq ft per M			27.74		13.32
664#		Less Freight 664 @ .47					3.12
							10.20

Ship in car with AT 2099-2100

Confirming T.O. 1082

Freight Absorption:

Shipping Plant Rate.. 6.58

Plast Basic Rate..... 5.74

..... tons @ .84M $.40

480 Sq. Ft.

Discount Notice:
Discount of $.21 allowed if paid within discount period.

Certain-teed Roofings and Shingles—"Millerized" for Longer Life.

10803

Government's Exhibit No. 265

CERTAIN-TEED PRODUCTS CORPORATION

Box 6917 N Phila Sta — Phila Pa

Att orig B/L

Sold to: Campbell Coal Co. 2
Street and No.: 240 Marietta St N W 10
City and State: Atlanta Ga 60
Register No.: 728034 Salesman: 1121
S.O. No: At 2493 Customer No.: 1653
Date Ordered: 7/23 Entered: 7/26

Invoice Date: 7/28/37
Ship to: same
Destination: same
Total No. Sheets: Sheet No.:
To be Shipped: at once From: Acme
Date Shipped: 7/24/37 From: AT 0
Route: QA&P Frisco SOU
Car No.: SLSF 148863

Terms: Dis 10th prox (see below) net 30th prox
From date of invoice. Not contingent upon delivery

F.O.B.: Acme full frt allowed lp Invoice No.: 413 EW

Quantity	Unit	Est. Wt.: 13440 Min.:	Rate: .54	Weight Shipped	Price	Amount	Total
		Certainteed Reflective Insulation Lath ⅜" (Metallized one side) (O S P)					
300	bdls	16x48 9600 sq ft per M		13277	26.34		252.86
		Less freight 13277 @ .54					71.70
							181.16

Ship in car with AT 2492

Confirming T.O. 1241

Freight Absorption:

Shipping Plant Rate.. 7.56

Plast Basic Rate..... 4.34

..... tons @ 3.22M $30.91

9600 Sq. Ft.

Discount Notice:
Discount of $4.22 allowed if paid within discount period.

Certain-teed Roofings and Shingles—"Millerized" for Longer Life

10804 *Government's Exhibit No. 266*

CERTAIN-TEED PRODUCTS CORPORATION

Box 6917 N Phila Sta Phila Pa

Sold to: Campbell Coal Co 2
Street and No.: 236-40 Marietta St N W 10
City and State: Atlanta Ga 60
Register No.: 715019 Salesman: 1121
S. O. No.: At 2265 Customer No.: 1493
Date Ordered: 7/9 Entered: 7/12

Invoice Date: 7/15/67
Ship to: same
Destination: same
Total No. Sheets: Sheet No.:
To be Shipped: at once From: Acme
Date Shipped: 7/10/37 From: AT 10
Route: QA&P Frisco MFS SOU
Car No.: SISF 160975

Terms: Dis 10th prox (see below) net 30th prox
From date of invoice. Not contingent upon delivery

F.O.B.: Acme full frt allowed lp Invoice No.: 166 EW

Quantity	Unit	Est. Wt.: 8960	Min.: 40000	Rate 54	Weight Shipped	Price	Amount	Total
		Beaver Reflective Insulating Lath ⅜" (Metallized one side) (O S P)						
200	bdls	16x48	6400 sq ft per M		8851	26.34		168.58
			Less freight 8851 @ .54					47.80
								120.78

Freight Absorption:
Shipping Plant Rate.. 7.56
Plast Basic Rate..... 4.34
..... tons @ 3.22M $20.61
6400 Sq. Ft.

Ship in car with AT 2266

Confirming T. O. 1148

Discount Notice:
Discount of $2.82 allowed if paid within discount period.

Certain-teed Roofings and Shingles—"Millerized" for Longer Life

10805 *Government's Exhibit No. 268*

New York City DEC. 26, 1934 Buffalo

WALLBOARD LICENSEES MEETING
DECEMBER 20, 1934.

MR. C. O. BROWN, V.P. H. H. VAN HAGAN—eoc

This is to advise that the writer attended the Gypsum Wallboard Licensees Meeting in Chicago at the Bismark Hotel on December 20, 1934 and would advise regarding meeting as follows:

The Licensor is arranging to set up a Board Survey Company under the direction of Mr. Carey and which company will function very similar to the Gypsum Code Authority in the handling of complaints and violations of the license agreement. The Board Survey Company will arrange to handle necessary audits of licensees books for royalty purposes and it is proposed that the licensor will become more active in the handling of all matters in connection with the wallboard license agreement.

I am attaching hereto a copy of the proposed complaint forms which were submitted at this meeting, one covering violations as determined by auditors and the other covering exceptions from licensor's bulletin prices. Additional forms and procedures will be developed and handled as the board survey becomes active.

The principal item of discussion at this meeting was with reference to the light weight board and lath as manufactured by the National Gypsum Company. Mr. Baker, President of the National Gypsum Company stated that these tests had proceeded to a point where their company was fully satisfied that the 1350 lb. board and lath was fully satisfactory and that they intended to develop at once necessary literature covering these products; also that they expect to turn their Sales Department loose on them at their January sales meeting.

Protests were entered by the licensor that tests should be completed before coming to a decision. It is contemplated that these tests will be completed and reports available by December 29th.

As Mr. Baker stood firm in his position, Mr. Henning announced that in order to be competitive the licensor

would therefore bring out a light weight board also; that they would probably market two wallboard,—one at 1600 lbs. and one at about 1400 lbs. He also stated that it would probably be necessary for them to reduce the billing weight on ⅜" board from 1600 lbs. to 1400 lbs. per M square feet. It, of course, will be necessary for the licensor to issue bulletins before this becomes effective.

Mr. Henning also advised that as licensor they were ready to transmit to any of the licensees full information
10806 on the manufacture of a 1400 lbs. board and that this could be secured thru their Mr. Knode at any time. The writer is communicating with Mr. Knode to get such information as he may have available.

The above for your information.

10807 *Government's Exhibit No. 269*

CERTAIN-TEED PRODUCTS CORPORATION
100 East 42nd Street
NEW YORK

OCTOBER 28, 1935

MR. H. DORSEY SPENCER,
Newell & Spencer & Safford,
420 Lexington Avenue,
New York, N. Y.

DEAR MR. SPENCER,

I have discussed the matter of the Super Tomastone plaster being offered by the U. S. Gypsum Company, with our people here and they agree with me that possibly we can tackle this whole proposition from a little different angle and get the end-product we are looking for whatever way we approach the situation.

I talked with Mr. Morton Knode of the U. S. Gypsum Company and found him considerably annoyed because we had approached the infringement of the U. S. Gypsum Company through a buyer rather than direct. I am inclined to believe where concerns are as well-known to one another as U. S. G. and Certain-teed, there is considerable doubt as to the method of approaching the customer rather than the primary infringer and I suggest that I write a letter to

Mr. Knode somewhat on the lines of the attached draft which you may correct any way you see fit, declaring an armistice on correspondence and action in connection with this matter, awaiting an opportunity for a discussion between the two companies along the lines of combining the patent interests on this character of material in an attempt to bring something constructive out of such combination of patents.

The question as to whether or not these patents are valid is bound to arise if enough pressure is put upon them and I think it is better if it can be arranged that the patents be combined and in the hands of such strong concerns as ourselves, U. S. Gypsum, etc., where there would be less liability of their validity being attacked.

Yours very truly,

CHESTER E. RAHR,
Vice-President.

CER:AGS

10808 *Government's Exhibit No. 269*

FIRST DRAFT

OCTOBER 28, 1935

MR. MORTON KNODE, *Vice-President*
U. S. Gypsum Company
300 West Adams Street
Chicago, Illinois

DEAR MR. KNODE,

I have looked into the matter of the correspondence which has been going on with regard to our patent No. 1,996,372. I have noted the correspondence between Newell & Spencer & Safford and Jones, Addington, Ames & Seibold in connection with this matter and I propose that we discontinue for the time being any correspondence about this matter until we can have an opportunity to discuss this patent and any that you may have in this connection and the use of these patents in the most constructive way to protect the sales of our companies and possibly other companies.

As you know, we would much prefer something constructive to any sort of conflict as, actually, there can be very little conflict of interests between us.

We would arrange for such conversations at a later date if you agree the principal thing to do is to call off the present activities.

With kindest personal regards, I am

Yours very truly,

Vice-President.

CER:AGS

10809 NOVEMBER 1, 1935.

MR. CHESTER E. RAHR
Certain-teed Products Corp.
100 East 42nd Street
New York, N. Y.

Re: United States Gypsum

DEAR MR. RAHR:-

Referring to your proposed letter to Mr. Knode of the U. S. Gypsum Company which accompanied your letter of October 28, I think the letter in the form in which you drafted it is probably all right for the present.

As you suggest in the letter, there are a number of patent issues between the two companies due to the extremely thin patents that U. S. Gypsum has succeeded in getting. One of the patents that has irritated Mr. Van Hagan particularly is the Roos Patent No. 1,938,354, granted December 5, 1933, on the perforated plasterboard, this patent being granted on an application filed March 15, 1933.

This patent is probably completely invalid because of prior public use of perforated plasterboard on the Pacific Coast that anticipates any possible patentability in the structure disclosed in the Roos patent.

Mr. Van Hagan thinks he can make a perforated plasterboard that will compete strongly with metal lath. The situation here in New York which gave rise to the U. S. Gypsum Company's rush to get this invalid patent is no longer

urgent but there is apparently a big field in a per-
10810 forated board that can be used as a substitute for metal lath. I have before me a sample of perforated board which I understand has been made on the Pacific Coast since at least 1920 which apparently, if used as a justification for ignoring the U. S. Gypsum Company's patent, would give Mr. Van Hagan a rather free hand. In view of this situation and one or two other patent situations in which comparatively thin patents of the U. S. Gypsum Company hamstring free development, it might be well to come to some decision as to what policy we shall follow, whether to help them maintain these thin patents for the benefit of the industry, or get together for a possible exchange of licenses. We are apparently in a comparatively good position at the present time to deal with them as it appears to be quite obvious that they have been infringing our Patent No. 1,996,372.

Very truly yours,

HDS:GN

10811 *Government's Exhibit No. 271*

CERTAIN-TEED PRODUCTS CORPORATION
Daily News Building
1 North Canal Street
CHICAGO, U.S.A.

AUGUST 25, 1931.

MR. CHARLES F. HENNING, *Vice-President*
United States Gypsum Company
300 West Adams Street
Chicago, Illinois

DEAR SIR:

Referring to your inquiry of July 21st requesting information as to terms of sale of licensed gypsum plasterboard and/or wallboard to other manufacturers, give you below the information desired.

Arrangement with the National Gypsum Company of Buffalo, New York for the sale of 3/8" plaster lath at $13.50 per M. square feet, f.o.b. our mill, Fort Dodge, Iowa, no freight equalization.

Also to National Gypsum Company, 3/8" Gypsum wallboard at $16.96 per M. square feet, f.o.b. cars, our Plant Fort Dodge, Iowa, no freight equalization.

Arrangement with the Atlantic Gypsum Company of Boston, Mass. covering the sale of 1/4" gypsum lath at $13.00 per M, f.o.b. cars our plant, Akron, New York, no freight equalization.

Arrangement with the Oakfield Gypsum Products Corporation of Utica, N. Y. and/or their subsidiary, the American Hard Wall Company, for the sale of gypsum wallboard and/or lath at our regular dealer prices, less 10%.

Arrangement with the Wasem Plaster Company of Fort Dodge, Iowa, covering the sale of 3/8" gypsum wallboard on a basis of our regular dealer prices, less 10%.

The above covers our sale of gypsum wallboard and/or lath to date, and we would appreciate your O.K. to the arrangements above outlined.

Yours very truly,

WARREN HENLEY,
Merchandise Manager,
Gypsum Division.

Warren Henley/MS

10812 *Government's Exhibit No. 274*

THIS AGREEMENT, made in duplicate this 7th day of May, 1930, by and between UNITED STATES GYPSUM COMPANY, an Illinois corporation, having its principal office at Chicago, Illinois, First Party, and CERTAIN-TEED PRODUCTS CORPORATION, a Maryland corporation, having its principal office at New York, New York, Second Party,

WITNESSETH: That

WHEREAS, Second Party desires to have such gypsite products as it now manufactures in its plant at Laramie, Wyoming, manufactured for it by First Party in such quantities as it may require for distribution in the territory which such plant now serves, and further desires to have such other gypsum products and materials as it has reg-

ularly warehoused at Laramie, Wyoming, warehoused in said city for it by First Party; and

WHEREAS, First Party is willing to manufacture for Second Party such gypsite products and to warehouse for Second Party such other gypsum products and materials,

NOW, THEREFORE, the said parties hereto, in consideration of the foregoing and of the mutual covenants and agreements hereinafter contained, and the performance of the same by the respective parties, do hereby covenant and agree as follows:

1. First Party agrees to manufacture for Second Party, according to Second Party's formulae and specifications, and Second Party agrees to have manufactured for it by First Party, all such gypsite products as Second
10813 Party now manufactures or has customarily manufactured in its gypsite calcining plant at Laramie, Wyoming, which Second Party may require for sale to its customers in the territory which is now served by Second Party's said plant at Laramie, Wyoming, as a distributing point, and First Party agrees to deliver the same on cars at First Party's plant at Laramie, Wyoming, properly sacked or otherwise prepared for shipment, at cost as hereinafter defined.

2. First Party shall have the right to take and use from time to time, without cost, charge or other expense to First Party, or any claim of damage for the removal thereof, an amount or amounts of gypsite from the beds owned by Second Party at Laramie, Wyoming, equivalent to the amount or amounts of gypsite used from time to time by First Party in manufacturing the products herein required to be manufactured by it for Second Party; provided, however, that First Party shall remove such gypsite from said beds of Second Party in a good and workmanlike manner without unnecessary waste or damage thereto.

3. The cost at which First Party shall manufacture and deliver the aforesaid products to the Second Party shall be cost on cars, as aforesaid, and shall include the usual and customary items composing the cost of such products, including bagging, other preparation for shipment, formula cost, compensation insurance, fire insurance on all material inventory and taxes on all material inventory, but excluding depreciation, interest on investment, fire insurance and taxes on plant and equipment, and depletion of supplies

of raw material, it being understood that in exclud-
10814 ing depletion it is intended to exclude all value of raw gypsite, as Second Party is to receive no credit for gypsite taken from its beds pursuant to Paragraph 3 hereof. Cost statements shall be prepared by First Party each month covering products manufactured during the preceding month and shall be furnished to Second Party at the time products delivered during the preceding month are billed to Second Party as hereinafter provided.

4. First Party agrees to warehouse for Second Party, free of cost except handling charges and insurance coverage of all usual kinds, such gypsum materials and products as are not regularly manufactured at Laramie, Wyoming, and such as have been regularly carried as warehouse products by Second Party in the past, and which may be reasonably necessary to be carried by Second Party to meet the requirements of its trade in said territory in and around Laramie, Wyoming; provided that in the event the quantities of such materials or products to be stored, together with the materials and products of First Party, shall exceed the warehousing capacity of First Party at Laramie, Wyoming, First Party shall have the right to use the warehouse space of the Second Party at Laramie, Wyoming, free of all charges, cost or expense to it.

5. It is understood that Second Party intends to ship to Laramie from points outside of the territory affected by this agreement, mixed cars of board and lath and small quantities of plaster, and upon arrival at Laramie break the seal and remove the plaster for warehousing under this agreement or reshipment on Second Party's orders, and reship the board and plaster in same cars, but on the Laramie rate. First Party agrees to handle this type of business for Second Party free of cost except handling charges and any other necessary expenses incurred thereby.

10815 6. First Party shall furnish paper bags, printed with Second Party's brand, for products manufactured by it for Second Party hereunder of the same type and quality as regularly used by First Party, at a price to Second Party not greater than Second Party would have to pay for the same type and quality of bag delivered at its Laramie plant, which price shall be included in the cost of material manufactured hereunder for Second Party by First Party delivered on cars as aforesaid.

7. First Party will bill Second Party each month for all goods delivered to Second Party or shipped on Second Party's orders during the preceding month, at cost, as hereinbefore defined, of goods manufactured during such preceding month, as soon as such cost shall have been ascertained. First Party will also bill Second Party for all costs, charges and expenses for handling materials warehoused by it for Second Party under this agreement, and all further costs or charges for warehousing or trucking for which Second Party may be liable, at the same time, and Second Party agrees that it will pay all amounts billed to it, in cash, within ten (10) days after billing.

8. Orders of Second Party shall be given the same consideration in handling and shipping as is given to orders of First Party, and First Party agrees that sales data, customers' names, prices, etc. on business of Second Party will not be compiled and turned over to the Sales Department of First Party.

9. First Party shall not be liable for any loss or damage to materials or products warehoused by it for Sec-10816 ond Party except for failure to insure the same with reasonable promptness after the same come into its possession, and except to the extent that it shall have received compensation under its insurance policies or otherwise for loss or damage to such materials or products. First Party shall be required to exercise only ordinary and reasonable care in manufacturing and preparing for shipment the products to be manufactured by it for Second Party under this agreement, and shall not be liable to Second Party or any of its customers for any defects in materials manufactured by it, nor for any failure to deliver, nor any delay in delivery of any materials or products manufactured or warehoused by it for Second Party hereunder, unless the same shall have been caused by the willful misconduct or gross negligence of its officers, agents, servants or employees.

10. In the event of default by Second Party in the payment of any bills rendered to it by First Party hereunder, and upon failure of the Second Party to correct such default within thirty (30) days after written notice of such default has been served upon it by First Party, First Party, at its option, may declare this agreement terminated, without prejudice, however, to any claim of either party against the other arising out of any breach of or failure to perform the agreement occurring prior to such termination.

11. This agreement shall become effective as soon as executed by the parties hereto (provided that nothing herein contained shall restrict in any way the right of Second Party to dispose of its present stock of goods at Laramie, Wyoming in the usual course of business, or otherwise, as it may see fit), and shall remain in full
10817 force and effect to and including May 1, 1936, and from year to year thereafter unless canceled by either party on May 1st of any year upon six months' prior written notice; and provided further that this agreement shall be subject to cancelation at any time by Second Party upon six months' prior written notice, for unsatisfactory service rendered by First Party or unsatisfactory quality of product manufactured by First Party which is shown to result in loss of business by Second Party.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed in their respective corporate names by their respective ——— Presidents, and their corporate seals to be affixed and attested by their respective ——— Secretaries, the day and year first above written.

UNITED STATES GYPSUM COMPANY

S. L. AVERY,
President.

ATTEST:

R. G. BEAR,
Secretary.

[SEAL]

CERTAIN-TEED PRODUCTS CORPORATION

GEO. M. BROWN,
President.

ATTEST:

ROBT. M. NELSON,
Secretary.

[SEAL]

THIS AGREEMENT, made in duplicate this 28th day of October, 1930, by and between UNITED STATES GYPSUM COMPANY, an Illinois corporation, having its principal office at Chicago, Illinois, hereinafter referred to as First Party; and CERTAIN-TEED PRODUCTS CORPORATION, a Maryland corporation, having its principal office at New York, New York, hereinafter referred to as Second Party,

WITNESSETH: That

WHEREAS, Second Party desires to purchase from First Party certain gypsum products now manufactured by First Party at some one or more of its various plants in the United States, including its Gypsum, Ohio plant; and

WHEREAS, First Party is willing to sell the same to Second Party as is herein provided;

NOW, THEREFORE, the said parties hereto, in consideration of the foregoing and of the mutual covenants and agreements herein contained, and the performance thereof by the respective parties, do hereby covenant and agree as follows:

1. First Party will sell to Second Party and Second Party will purchase from First Party, such quantities of Crushed Rock, Land Plaster, Stucco, local Finishing Plaster, Cement Plaster and Wood Fibre Plaster, manufactured at First Party's mills at Gypsum, Ohio, as Second Party may from time to time determine, as evidenced by
10819 written orders from Second Party to First Party.

First Party agrees to manufacture said local Finishing Plaster, Cement Plaster and Wood Fibre Plaster in accordance with formulae furnished from time to time by Second Party, it being understood that the word "formulae" shall be construed only to mean that Second Party shall have the right to specify the quantities of such ingredients as fibre, lime, clay, talc and similar materials which are to be added to stucco in order to produce the above mentioned wall plasters having such varying characteristics as will suit the requirements of Second Party's customers; provided, that Second Party shall also have the right to specify the setting time of such wall plasters, such setting time to be regulated by First Party by variations in the amount of retarder added to such plasters during mixing.

The prices to be paid by Second Party for the above products shall be as follows:

Crushed Rock — Cost plus 60 cents a ton;
Land Plaster — Cost plus 75 cents a ton;
Stucco — Cost plus $1.00 a ton;
Local Finishing Plaster — Cost plus $1.10 a ton;
Cement Plaster — Cost plus $1.10 a ton;
Wood Fibre Plaster — Cost plus $1.10 a ton.

The above prices are f.o.b. cars Gypsum, Ohio.

As used in this Paragraph 1, cost shall be deemed to mean total cost of the product on cars at the mill in accordance with the method of computing such costs now employed by First Party, but excluding depreciation and depletion. All cost of bags shall be added to these costs.

10820 2. First Party will also sell to Second Party and Second Party will purchase from First Party, such quantities, as Second Party shall from time to time determine, as evidenced by written orders to First Party, of all those certain gypsum products more particularly set forth in the schedule attached hereto and marked Schedule A. The prices to be paid by Second Party for the said gypsum products so set forth in said Schedule A shall be as specified in said schedule. The prices set forth in said Schedule A shall continue in force for the remaining portion of the calendar year 1930 and for the calendar year 1931. The prices for any succeeding calendar year, so long as this contract shall continue in force, shall be the prices as set forth in said Schedule A, increased by an amount equal to the increase, if any, in First Party's costs for the calendar year immediately preceding, over First Party's average costs for the year 1930. All prices applicable to the said gypsum products, set forth in said Schedule A, shall be f.o.b. cars Gypsum, Ohio, and shall at all times be subject to be increased or decreased by the amount of any increase or decrease in freight rates from First Party's mill, other than at Gypsum, Ohio, where said gypsum products so sold to Second Party from time to time are actually manufactured, to Gypsum, Ohio.

Second Party, at its option, may ship to First Party's plant at Gypsum, Ohio, such gypsum products not manufactured at Second Party's plant at Gypsum, Ohio but required in mixed cars and First Party agrees to warehouse such products for Second Party at a cost of seventy-five cents (75¢) per ton.

10821 3. First Party will bill Second Party each month for all goods delivered to Second Party or shipped on Second Party's orders during the preceding month, at prices hereinbefore defined, as soon as costs for such preceding month shall have been ascertained. First Party will also bill Second Party for all other costs, charges and expenses for which Second Party may be liable, at the same time, and Second Party agrees that it will pay all amounts billed to it, net in cash, within ten (10) days after billing.

4. All paper bags necessary for packaging any of the products purchased by Second Party hereunder shall be furnished by First Party, printed with Second Party's brand. Such bags shall be of the same type and quality as is, or shall be, regularly used by First Party, at a price to Second Party not in excess of the price which Second Party would have to pay for bags of the same type and quality delivered at its plant at Gypsum, Ohio.

5. All orders given by Second Party to First Party shall be given the same consideration in handling and shipping as is given to orders of First Party, and First Party agrees that sales data, customers' names, prices, etc. on Second Party's business, will not be compiled and turned over to the Sales Department of First Party.

10822 6. Failure on the part of Second Party promptly to pay any bills rendered by First Party to Second Party for goods sold to Second Party hereunder when the same are due and payable, shall be sufficient to authorize First Party to withhold any and all further shipments or deliveries to Second Party, or on Second Party's account, and if any such bills are not paid within a period of thirty (30) days after the same are due and payable, then First Party shall have the right, at its option, to terminate this agreement, with or without notice to Second Party, provided that any such termination shall be without prejudice to any claim of either party against the other arising out of any breach of or failure to perform this agreement occurring prior to such termination.

7. It is understood and agreed that the prices mentioned in Paragraph 1 hereof and in said Schedule A are based upon the respective products therein mentioned being manufactured at specific mills of First Party. It is specifically agreed therefore, that in the event that, on account of fires, floods, strikes, labor troubles or for any other reason, whether of like kind to those specified or of a wholly different character, not due to the wilfull neglect of First Party, the

specific mill at which said gypsum products are to be manufactured as contemplated by First Party, shall cease either temporarily or permanently to manufacture such products, First Party will promptly notify Second Party thereof and will as soon as may be furnish Second Party with a new schedule of prices covering such of said products, 10823 the manufacture of which at such specific mill shall have so ceased. In such event, if Second Party finds that it can purchase or manufacture such product or products at a less price than as set forth in such new price list, it shall have the right to purchase or manufacture such products elsewhere than from First Party so long as such specific mill shall not be in operation, and also has the option of cancelling this contract, it being understood and agreed that upon the happening of any of the events mentioned in this Paragraph 7, First Party shall be under no liability whatsoever to Second Party for failure or refusal on First Party's part to furnish such gypsum products, except at such new prices. Such new prices, so long as said respective products shall not be manufactured at such specific mill, shall be substituted for the prices otherwise mentioned herein with respect to such products, and shall be subject to all of the terms herewith to the same extent as the prices specifically mentioned in said Paragraph 1 and in said Schedule A.

8. This agreement shall become effective as soon as executed by the parties hereto and as of the date hereof, and shall remain in force to and including December 31, 1931, and from year to year thereafter, unless terminated by either party upon six months' prior written notice given at any time after said December 31, 1931, provided that the right of termination given in this paragraph 8 shall be in addition to any right of termination given in any other paragraph of this agreement; and provided further that 10824 this agreement shall be subject to cancellation at any time by Second Party upon sixty (60) days' prior written notice, for unsatisfactory service rendered by First Party, or unsatisfactory quality of product manufactured by First Party which is shown to result in loss of business by Second Party. Written notice of termination, as provided for in this Paragraph 8, shall be deemed to have been sufficiently given by either party hereto, if deposited in the United States mails, postage prepaid, and addressed to the other party at its principal office.

9. All Jute or cloth bags furnished by Second Party to First Party shall be in good condition and in any event,

First Party shall incur no responsibility or liability whatsoever, either to Second Party or to Second Party's customers, on account of or in any way due to such bags. First Party will receive, condition, and store return shipments of Second Party's bags in the same manner as First Party handles its own bags. First Party will furnish monthly to Second Party, a memorandum of the count and the worthless bags thrown out.

10. First Party shall not be liable for any loss or damage to materials or products warehoused by it for Second Party, except for failure to insure the same with reasonable promptness after the same came into its possession and except to the extent that it shall have received compensation under its insurance policies or otherwise for loss or damage to such materials or products. First Party shall be required to exercise only ordinary and reasonable care in the manufacturing and preparing for shipment the products
10825 to be manufactured by it for Second Party, under this agreement, and shall not be liable to Second Party or to any of Second Party's customers for any defects in materials manufactured by it or for any failure to deliver, nor any delay in delivery of any materials or products manufactured or warehoused by it for Second Party hereunder, unless the same shall have been caused by the willful misconduct or gross negligence of First Party's officers, agents, servants or employees.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed in their corporate names by their respective Presidents and their respective corporate seals to be affixed hereto and attested by their respective Secretaries, the day and year first above written.

UNITED STATES GYPSUM COMPANY
S. L. AVERY,
President.

ATTEST:
R. G. BEAR,
Secretary.
[SEAL]

CERTAIN-TEED PRODUCTS CORPORATION
GEO. M. BROWN,
President.

ATTEST:
ROBT. M. NELSON,
Secretary.
[SEAL]

10826 SCHEDULE A

Prices F.O.B. cars Gypsum, Ohio for shipment to or on orders of Second Party.

1.	¼" Wall Board	$14.00	per	M. ft.	Crating	Extra
2.	⅜" Wall Board	15.00	"	"	"	"
3.	¼" Plaster Board	13.00	"	"	"	"
4.	⅜" Plaster Board	13.00	"	"	"	"
5.	Gray Trowel Finish	12.00	"	ton	see U.S.G. letter	
6.	White Trowel Finish	16.00	"	ton	11/1/30—COB File	

Plaster shipments in Jute or cloth bags shall be in Second Party's bags and prices will be as above less cost of paper bags.

10827 *Government's Exhibit No.* 276

ASSIGNMENT

For and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, Certain-teed Products Corporation, a Maryland corporation, hereby assigns and transfers to Certain-teed Products Corporation of Virginia, a Virginia corporation, all of its rights, title and interest in and to the contract with U. S. Gypsum Company, dated September 1, 1932, a copy of which is annexed hereto. Subsequent to the date hereof the words "second party" wherever used in said contract shall include the said assignee.

IN WITNESS WHEREOF Certain-teed Products Corporation has caused this assignment to be executed in its behalf at New York City, N.Y., by one thereunto duly authorized and its corporate seal to be hereunto affixed this 14th day of July, 1933.

CERTAIN-TEED PRODUCTS CORPORATION

By C. O. BROWN, *V.P.*

Accepted July 14, 1933.

CERTAIN-TEED PRODUCTS CORPORATION OF VIRGINIA

By WATSON
Asst. Treasurer

In consideration of the execution by Certain-teed Products Corporation of the Guaranty below set forth, the undersigned hereby consents to the foregoing assignment. Dated July 14th, 1933.

U. S. GYPSUM COMPANY

By C. HENNING, *V.P.*

GUARANTY

Certain-teed Products Corporation, a Maryland corporation, having its principal office and place of business in New York City, New York, for and in consideration of the execution by U. S. Gypsum Company of its written consent to the foregoing assignment by Certain-teed Products Corporation to Certain-teed Products Corp. of Virginia of the contract between U. S. Gypsum Company and Certain-teed Products Corporation dated September 1, 1932, copy of which is annexed hereto, does hereby unconditionally guarantee to the U. S. Gypsum Company the full and faithful performance by Certain-teed Products Corporation of Virginia of all of the provisions, terms and conditions of the said contract therein provided to be performed by Certain-teed Products Corporation including the prompt payment in accordance with the terms of said contract of such sum or sums of money as Certain-teed Products Corporation of Virginia shall at any time owe U. S. Gypsum Company.

IN WITNESS WHEREOF Certain-teed Products Corporation has caused this instrument to be signed in its behalf at New York City, N.Y. by one thereunto duly authorized, and its corporate seal to be hereunto affixed this 14th day of July, 1933.

CERTAIN-TEED PRODUCTS CORPORATION

By C. O. BROWN, *V.P.*

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FOR VALUABLE CONSIDERATION, the receipt of which is hereby acknowledged, the undersigned, CERTAIN-TEED PRODUCTS CORPORATION OF VIRGINIA does hereby sell, assign and transfer to CERTAIN-TEED PRODUCTS CORPORATION, a Maryland corporation, all of its right, title and interest in, to and under the certain Contract, dated September 1, 1932, by and between UNITED STATES GYPSUM COMPANY and said CER-

TAIN-TEED PRODUCTS CORPORATION, a Maryland corporation, as thereafter amended, which said Contract was heretofore assigned to said CERTAIN-TEED PRODUCTS CORPORATION OF VIRGINIA by Instrument of Assignment, dated July 14, 1933. This Assignment shall be effective as of June 1, 1937. Subsequent to the date hereof, the term "second party", wherever used, or referred to directly or indirectly, in said contract, shall include the said Maryland company.

The undersigned, CERTAIN-TEED PRODUCTS CORPORATION, a Maryland corporation, hereby accepts the foregoing Assignment and does hereby agree to be bound by all the terms and conditions in said agreement contained, and does hereby agree to perform all the terms and conditions in said Agreement of September 1, 1932, provided to be performed by the second party thereto, from and after said first day of June, 1937. Nothing herein contained shall be deemed to relieve said Maryland Company from any of its obligations or liabilities arising and of its Guaranty heretofore made with respect to said Virginia Company's performance under said agreement of September 1, 1932.

IN WITNESS WHEREOF, each of the parties has caused this instrument to be executed by its respective officers thereunto duly authorized and its corporate seal to be hereunto affixed, this 12th day of August, 1937.

CERTAIN-TEED PRODUCTS CORPORATION
OF VIRGINIA

By JAMES K. NORRIS,
Vice President

ATTEST:

THOMAS H. DUGAN
Secretary.

CERTAIN-TEED PRODUCTS CORPORATION
(a Maryland corporation)

By JAMES K. NORRIS,
Vice President

ATTEST:

THOMAS H. DUGAN
Secretary.

The undersigned, UNITED STATES GYPSUM COMPANY, does hereby consent to the foregoing Assignment, hereby reserving all rights and powers vested in it as first party in said contract of September 1, 1937.

Dated August 12, 1937.

UNITED STATES GYPSUM COMPANY
By W. L. KEADY,
Vice-President

ATTEST:

Secretary.

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AGREEMENT made in duplicate this 1st day of September, 1932, by and between UNITED STATES GYPSUM COMPANY, an Illinois corporation having its principal office and place of business at Chicago, Illinois, hereinafter called the First Party, and CERTAIN-TEED PRODUCTS CORPORATION, a Maryland corporation having its principal office and place of business in New York City, New York, hereinafter called the Second Party,

WHEREIN THE PARTIES HERETO AGREE AS FOLLOWS:

1. First Party agrees to sell to Second Party and Second Party agrees to purchase from First Party all the Second Party's needs and requirements for sale to its customers in the states of Florida, Georgia, North Carolina, South Carolina, Alabama, eastern Tennessee and such other states or parts of states in southeastern United States as Second Party may elect, of the following products, at the following prices:

	In Bulk	*In Paper Sacks (Sacks Extra)*	*In Jute Sacks (Sacks Extra)*
Crushed Gypsum Rock	$1.75 per ton		
Land Plaster	2.30 " "	$2.75 per ton	$3.00 per ton
Stucco		4.25 " "	4.50 " "
Local Finishing Plaster		4.35 " "	4.60 " "
Cement Plaster		4.60 " "	4.85 " "
Wood Fiber Plaster		4.75 " "	5.00 " "
Gray Trowel Finish		11.00 " "	11.25 " "
White Trowel Finish		24.00 " "	24.25 " "
¼" Wall Boar	$15.00 per 1000 sq. ft. (crating extra)		
⅜" Wall Board	16.00 " " " "	" "	
¼" Plaster Board	13.00 " " " "	" "	
⅜" Plaster Board	13.00 " " " "	" "	

f.o.b. cars Plasterco, Virginia (the above prices based
10830 upon average cost of manufacture in 1931 at Plas-
terco, Virginia); provided, however, that at the end of each calendar year during the whole or any part of which this contract is in force, the First Party shall determine the average mill cost per ton to First Party on cars Plasterco, Virginia, of each of the above plaster products shipped to Second Party or Second Party's customers during the calendar year last past, and if such cost of any plaster product or products exceeds the average mill cost of such plaster products to First Party on cars Plasterco, Virginia, for the base year 1931, the Second Party will pay to the First Party the difference in cost per ton on all such plaster products purchased hereunder during the calendar year just completed, and if such cost is less than the average mill cost for the base year 1931, First Party will pay the Second Party the difference in cost per ton on all such plaster products purchased during such calendar year; provided, further, that whenever the cost per M square feet to First Party of any of said plaster board or wall board products exceeds 66⅔ per cent of the price quoted herein, the price to the Second Party of such products during the period such cost so exceeds 66⅔ per cent of the quoted price, shall be the price quoted herein plus the difference between the cost and 66⅔ per cent of the quoted price, until such time as the cost is equal to or lower than 66⅔ per cent of the quoted price, at which time the price to
the Second Party shall again be the price herein
10831 quoted; provided further, Second Party may pur-
chase or acquire elsewhere than from First Party, trowel finish plaster, plaster board or wall board to fill orders from customers in said territory for carload shipments of either of such products.

Cost as used herein shall mean the total mill cost of the product on cars at the mill, in accordance with the method of computing such costs now employed by the First Party, exclusive of depreciation and of the cost of sacks or crating.

The word ton, wherever used in this contract, shall mean a net ton of two thousand (2000) pounds.

2. All plaster products sold hereunder shall be manufactured by First Party in accordance with formulas furnished by Second Party from time to time, and if no formula is furnished, according to the standard practices of the First Party. The word formula as used herein shall be construed only to mean that the Second Party shall have

the right to specify the quantities of such ingredients as fiber, lime, clay, talc and similar materials which are added to stucco in order to produce the abovementioned plasters, having such varying characteristics as will suit the requirements of Second Party's customers, and to specify the setting time of such wall plaster, such setting time to be regulated by the First Party by variations in the amount of retarder added to such plasters during mixing. First Party shall not be responsible either to Second Party or Second Party's customers for the quality or performance of any plaster manufactured according to formula furnished by second party.

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3. All paper sacks shall be furnished by the First Party at an additional cost to the Second Party of One Dollar ($1.00) for each ton of plaster shipped in paper sacks. Such paper sacks shall be printed with such labels and branding marks as the Second Party may from time to time designate, and shall be of the same type and quality as is or shall be at the time regularly used by the First Party.

All crating of wall board or plaster board products shall be done by the First Party at an extra cost to the Second Party of Five Dollars ($5.00) per M square feet, but shall be done only when directed by the Second Party.

All jute or cloth sacks shall be furnished by the Second Party and shall be in good condition when received. First Party shall not be responsible or liable either to Second Party or Second Party's customers for the condition of any jute or cloth sacks in which shipment is made. First Party will receive, condition and store all return shipments of Second Party's jute or cloth sacks in the same manner as it handles its own jute or cloth sacks, and will furnish Second Party, each month, a memorandum of account of the number of jute or cloth sacks received and the worthless sacks thrown out.

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4. All shipments made hereunder by the First Party shall be made to the Second Party or the Second Party's customers, routed as Second Party shall direct, upon the written order of the Second Party, and all shipments shall be handled with the same promptness and efficiency as First Party handles its own shipments. First Party will invoice Second Party each month for all products shipped either to Second Party or Second Party's customers during the preceding calendar month, and for all paper sacks,

crating or other charges or expenses for which Second Party may be liable, and all such invoices shall be paid by the Second Party net, in cash, within ten (10) days after invoicing. Upon the failure at any time on the part of the Second Party to pay promptly any bill rendered by the First Party to the Second Party for products sold Second Party hereunder, or for any charges payable under this contract when the same are due and payable, First Party may withhold any and all further shipments or deliveries to Second Party or on Second Party's account, until payment in full is made, and if any such bills are not paid within a period of thirty (30) days after the same are due and payable, then the First Party may at its option terminate this agreement, with or without notice to the Second Party, provided that any such termination shall be without prejudice to any claim of either party against the
10834 other arising out of any breach of or failure to perform this agreement occurring prior to such termination.

First Party shall not compile and turn over to its Sales Department any sales data, customers' names or prices the knowledge of which is received by the First Party by reason of the sales and shipments made hereunder.

5. Second Party may, at its option, ship to First Party's plant at Plasterco, Virginia, any products manufactured by Second Party at any of its mills and required in mixed car shipments with products sold hereunder, and First Party agrees to warehouse all such products for the Second Party at a cost of One Dollar ($1.00) per ton. All such products so warehoused shall be insured by the Second Party at its own expense, and First Party shall not be liable to Second Party for the loss, damage or destruction of any warehoused stocks except where grossly negligent in the handling thereof.

6. In the event the First Party shall for any reason whatsoever cease to manufacture the above products or any of them at its mill at Plasterco, Virginia, First Party will promptly notify Second Party thereof and will present to Second Party immediately thereafter a new schedule of prices f.o.b. cars its mill closest to Plasterco, manufacturing such product or products, covering the products the manufacture of which at Plasterco, Virginia, has
10835 been stopped, and Second Party may thereupon elect to accept such schedules or ship from other sources until the manufacture of such product or products is re-

sumed by First Party at Plasterco, Virginia. Such new schedule of prices shall bear approximately the same relation to cost of manufacture at the new mill as the prices herein stated bear to the cost of manufacture at Plasterco, if accepted by Second Party, and shall become a part of this contract the same as if originally set forth herein, in place of the schedule of prices f.o.b. cars Plasterco, Virginia, as long as any such products are not manufactured at Plasterco, Virginia; provided, however, that if the First Party permanently ceases to manufacture any such product or products at Plasterco, Virginia, and notifies the Second Party of that fact, Second Party may, at its option, cancel this contract with reference to any such product or products, the contract to remain in full force, however, as to all products which First Party continues to manufacture at Plasterco, Virginia.

7. In case either the First or Second Party shall at any time become bankrupt or insolvent or any bankruptcy or insolvency proceedings shall at any time be instituted against either party, or any proceedings shall be instituted for the appointment of a receiver or trustee for the 10836 assets, business or property of either the First Party or the Second Party, or any assignment shall be made by either the First Party or the Second Party for the benefit of creditors, then in any or either of such events the other party hereto may cancel this agreement by giving written notice of cancelation. This agreement may also be canceled by either party in case the other party shall at any time be guilty of a breach of any of the terms or conditions hereof. In case of a waiver of a breach of any of the terms and conditions of this agreement by either of the parties hereto, the same shall not constitute a waiver of any other or subsequent breach hereof.

8. First Party shall not be liable to Second Party for any failure to ship or delay in shipment of any order by reason of strikes, floods, shortage of cars, or any other cause or reason beyond the control of the First Party, whether or not of a class or kind specifically mentioned herein, and during the period of such delay the Second Party may purchase its requirements of the above products elsewhere until such time as First Party can resume regular shipments.

9. Any and all notices required to be served by the First Party upon the Second Party may be served by mailing a copy of such notice, registered mail, postage prepaid, ad-

dressed to the Second Party at New York City, New
10837 York, and any and all notices required to be served by the Second Party upon the First Party may be served by mailing a copy of such notice, registered mail, postage prepaid, addressed to the First Party at 300 West Adams Street, Chicago, Illinois, and such mailing of notice shall in each case be deemed to be proper service of notice hereunder.

10. This agreement shall become effective on the date hereof and shall remain in force to and including December 31, 1937, and from year to year thereafter, provided, however, that this agreement may be terminated by either party hereto at any time during the term hereof by giving the other party sixty (60) days' prior written notice of cancelation, and at the end of sixty (60) days from the service of such notice of cancelation this agreement shall become terminated without any further notice or act.

11. This contract shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto, but may not voluntarily be assigned by Second Party and shall not inure to the benefit of any successor without the consent of the First Party in writing first had and obtained.

12. That certain agreement bearing date July 1, 1932, between the parties hereto, under the terms of which
10838 First Party agreed to sell and Second Party agreed to buy all Second Party's needs and requirements of the said gypsum products for sale to its customers in the said states, has been and is hereby terminated and canceled.

IN WITNESS WHEREOF, the parties hereto have hereunto set their Hands and Seals the day and year first above written.

UNITED STATES GYPSUM COMPANY
By O. M. KNODE,
Vice President

ATTEST:
T. R. PARRISH
Asst. Secretary

[SEAL]

CERTAIN-TEED PRODUCTS CORPORATION
By C. O. BROWN,
Vice-President

ATTEST:
NAME ILLEGIBLE
Asst. Secretary

[SEAL]

10839 *Government's Exhibit No. 277*

AGREEMENT made in duplicate this 15th day of January, 1936, by and between UNITED STATES GYPSUM COMPANY, an Illinois corporation having its principal office and place of business at Chicago, Illinois, hereinafter called "Seller", and CERTAIN-TEED PRODUCTS CORPORATION, a Maryland corporation having its principal office and place of business at New York City, New York, hereinafter called "Buyer", wherein the parties hereto agree as follows:

(1) Seller agrees to manufacture for and sell to Buyer, and Buyer agrees to purchase from Seller, f.o.b. cars or trucks, Laramie, Wyoming, at the prices and subject to the terms and conditions hereinafter stated, Buyer's entire requirements of the products listed below for shipment to its customers from Laramie, Wyoming:

Product	*Container*	*Price f.o.b. cars or trucks, Laramie, Wyo.*
Fibered cement plaster	100# paper bags	$4.10 per ton plus cost of bags
Unfibered cement plaster	" " "	4.10 " " " " " "
Wood fibered plaster	" " "	4.50 " " " " " "

Provided, however, that the price to be paid by Buyer for each product listed above is based on the average cost of manufacture of such product per ton f.o.b. cars at
10840 Seller's Laramie, Wyoming, plant in the calendar year 1935 (exclusive of bags). At the end of each calendar year during the whole or any part of which this contract is in force and upon the effective date of termination, if termination becomes effective during any such year, Seller shall determine for such year or part thereof during which the contract is in force, the average cost of manufacture per ton f.o.b. cars (exclusive of bags) of each such product at such mill; and if the average cost of manufacture per ton as so determined exceeds the average cost of manufacture per ton of such product in the base year 1935, then the price to be paid by Buyer for each ton delivered to Buyer hereunder during such year or part year shall be increased by the amount of such excess per ton; and if the average cost of manufacture per ton as so determined is less than the average cost of manufacture of such product during the base year 1935, then the price to

be paid by Buyer for each ton delivered to Buyer hereunder during such year or part year shall be decreased by the amount per ton by which such cost is less than the average cost for the base year 1935. Such adjustment shall be made within sixty (60) days after the end of such year or the effective date of termination, as the case may be. "Cost", as used herein, shall mean the total mill cost of the product on cars or trucks at the mill in accordance with the method of computing such cost now employed by Seller, and
10841 shall include, without limitation, cost of packing and other preparation for shipment, formula cost, compensation insurance, fire insurance, payroll taxes and taxes on material inventory, but shall exclude depreciation, interest on investment, fire insurance and taxes on plant and equipment, and depletion of supplies of raw material. Buyer hereby grants to Seller the right to remove from its gypsite beds at Laramie, Wyoming, all gypsite required to manufacture products above listed, without charge, cost or other expense to Seller, but Seller shall not be required to use gypsite taken or removed from Buyer's gypsite deposits at Laramie, Wyoming, and in the event that during any calendar year or part thereof Seller uses, in the manufacture of products hereunder for Buyer, any gypsite from its own gypsite deposits, Buyer shall, within sixty (60) days after the end of such calendar year, or, if this contract is terminated during any calendar year, then on or before the effective date of termination, compensate Seller for such quantities of Seller's gypsite so used during such calendar year or part thereof at the rate of three cents (3¢) per ton; provided, however, that Buyer may at its option, in lieu of making the aforesaid payment and in full discharge thereof, convey to Seller by general warranty deed, within the time aforesaid, unimproved real estate, free and clear of all defects, liens and encumbrances whatsoever and located adjacent to gypsite deposits then owned by Sel-
10842 ler at Laramie, Wyoming, and containing a quantity of gypsite useable in the manufacture of wall plaster at least equal to the quantity so used by Seller during such calendar year or part thereof; but before such option may be exercised by Buyer, Buyer shall submit to Seller a description of the real estate intended to be so conveyed, and evidence of title thereto in Buyer, free and clear of all liens, defects and encumbrances whatsoever, and that all taxes then assessed thereon have been paid in full, and Seller shall have ten (10) days after receipt thereof to notify Buyer of

any objections to the title of Buyer; and upon any such conveyance to Seller, real estate taxes for any period extending both before and after the date of conveyance shall be pro-rated between the parties hereto; provided, further, that if the parties hereto shall at any time or times agree upon some other period of time within which such payments or conveyances shall be made, then such payments or conveyances shall be made within the period of time so agreed upon. Seller agrees that any gypsite removed from Buyer's deposits at Laramie shall be removed in good and workmanlike manner, without unnecessary waste or damage thereto; and Buyer agrees that Seller shall not be liable for any loss, costs or damages suffered or sustained by Buyer by reason of Seller's removing gypsite from Buyer's property or the manner of removing such gypsite, except such as results directly from the gross negligence of Seller.

10843 (2) Seller agrees to stock at its warehouse at Laramie, Wyoming, a reasonable supply of the products listed in Exhibit A attached hereto and made a part hereof; and Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller f.o.b. Laramie, Wyoming, Buyer's entire requirements of products listed in said Exhibit A for shipment to its customers in mixed cars or L.C.L. quantities in cars or trucks from Laramie, Wyoming, at the prices and in the quantities stated in said Exhibit A;

Provided, however, that Seller shall have the right to revise, amend, add to or detract from the said Exhibit A and the products and prices named therein at any time upon giving the Buyer written notice thereof; and

Provided, further, that Seller shall not be required to stock any such products for Buyer beyond twenty-five percent (25%) of the capacity of Seller's present warehouse.

(3) All products delivered hereunder shall be of the same grade and quality as like products manufactured by Seller for sale to its own dealer trade from its Laramie, Wyoming, mill; provided, however, that Buyer may from time to time spec y the formulas to be used by Seller in the manufacture of any or all of the products listed in Paragraph (1) hereof, and all such products for which Buyer has specified the formula shall be manufactured by
10844 Seller according to Buyer's formula and with materials of quality equal to those used by Seller at its Laramie, Wyoming, mill in the manufacture of similar prod-

ucts for sale to its own dealer trade and otherwise according to standard practices in the industry for the manufacture of similar products. The word "formula" as used herein shall be construed to mean only that Buyer shall have the right to specify quantities of ingredients such as fiber, lime, clay, talc, and similar materials which are added to stucco in order to produce wall plaster and to specify the setting time of such wall plaster, such setting time to be regulated by variations in the amount of retarder added to such products during mixing. Seller shall not be responsible either to Buyer or Buyer's customers for the quality or performance of any products listed in Paragraph One (1), unless it wilfully fails to follow formulas furnished by Buyer or to use materials of the same grade and quality used in its own formulas. All products listed in Exhibit A shall be manufactured by Seller according to Seller's standard formulas and specifications for manufacturing such products for sale to its own trade.

(4) All shipments made hereunder shall be made to Buyer or Buyer's customers upon Buyer's written order, and routed as Buyer shall designate, and all shipments shall be made with the same promptness and efficiency
10845 as Seller handles its own shipments. Seller agrees that sales data, customers' names, prices, etc., pertaining to Buyer's business will not be compiled and turned over to Seller's sales department. Seller will invoice Buyer each month for all products shipped on Buyer's orders during the preceding calendar month and all invoices shall be paid by Buyer net in cash within ten (10) days after date of invoice.

In the event Buyer shall fail at any time to promptly pay any bill rendered by Seller for products delivered hereunder or for any charges payable by Buyer under this contract when the same are due and payable, Seller may withhold any and all further shipments or deliveries to Buyer or its customers until payment is made in full, and if any such invoices or charges are not paid within a period of thirty (30) days after the same are due and payable, then Seller may at its option, at any time thereafter while such invoices or charges are unpaid, terminate this agreement by giving Buyer written notice thereof, such termination to become effective on the date stated in the notice, which shall not be less than forty-eight (48) hours after the giving of such notice.

(5) All paper bags required hereunder for the shipment of the products listed in Paragraph One (1) hereof shall be furnished by Seller, shall be of the same quality used by Seller for its own like trade, and shall be printed with such labels or brands as Buyer may from time to time des-
10846 ignate; provided, however, that in the event Buyer at any time changes its labels or branding marks it shall first use up or pay for at cost all bags then on hand bearing the labels or branding marks which are being discontinued. The words "plus price of bags", as used in Paragraph One (1) hereof shall mean a price, to be fixed by Seller, which shall not in any case exceed the price Buyer would have had to pay for bags of the same type and quality delivered Laramie, Wyoming, at the time of the use thereof.

In the event any claim is made by Seller or by any third party that any labels or branding marks used by Buyer in connection with the sale of any of the aforesaid products infringe or conflict with the labels or branding marks of Seller or others, Buyer shall upon notice change its labels or branding marks to such labels and branding marks as do not in any way infringe or conflict with the labels or branding marks of others. And Buyer agrees in such event to purchase and pay for at Seller's cost all bags bearing the labels or branding marks complained of.

(6) Upon termination of this contract by lapse of time or otherwise, the purchase price of all such products theretofore shipped to Buyer or Buyer's customers shall become immediately due and payable, and Buyer agrees to accept delivery of and pay for all bags then in Seller's
10847 hands, bearing Buyer's labels or branding marks. After the effective date of termination of this contract by lapse of time or otherwise, Seller shall not be obligated to make any further shipments of any of the aforesaid products, but no termination of this contract by lapse of time or otherwise shall relieve Buyer of the payment of any amounts of money due at that time for shipments previously made or for bags then on hand bearing Buyer's labels or branding marks.

(7) In case either party hereto shall at any time be adjudicated bankrupt or insolvent by a court of competent jurisdiction, or any assignment shall be made of the assets of either party for the benefit of creditors, then in either of such events, the other party may cancel this agreement by giving written notice of cancelation within thirty (30) days after the happening of such event has come to the notice or knowledge of such party.

(8) Any and all notices to be served hereunder by Seller upon Buyer may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Buyer at 100 East 42nd Street, New York City, New York; and any and all notices required to be served hereunder by Buyer upon Seller may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Seller at 300 West
10848 Adams Street, Chicago, Illinois; and such mailing of notice shall constitute proper service of notice hereunder.

(9) This agreement shall become effective on May 1, 1936, and shall remain in full force and effect to and including April 30,1941; provided, however, that either party may terminate this agreement at any time by giving the other party at least sixty (60) days' prior written notice of termination.

(10) This agreement shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto, but may not be voluntarily assigned by either party hereto without the consent of the other party first had and obtained, and upon any assignment hereof by operation of law, this contract may be canceled by the other party with or without notice.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

UNITED STATES GYPSUM COMPANY
By O. M. KNODE,
Vice-President.

ATTEST:

C. H. THAVER,
Secretary.

[SEAL]

CERTAIN-TEED PRODUCTS CORPORATION
By CHESTER E. RAHR,
President.

ATTEST:

NAME ILLEGIBLE
Asst. Secretary.

[SEAL]

EXHIBIT A

Product	Container	Price f.o.b. cars or trucks, Laramie, Wyo.
Finishing plaster	100# paper bags	($ 9.20 per ton excluding bags (10.30 " " including bags
Moulding plaster	" " "	(10.10 " " excluding bags (11.20 " " including bags
Keene's cement	" " "	18.60 " " including bags
Hydrated finishing lime	5# " "	22.80 " " " "
Mason's hydrate	5# " "	21.00 " " " "
Wood fiber plaster	10# " "	14.25 " " excluding bags
3/8" Wallboard	None	26.91 " M sq. ft. (crating extra)
1/4" Wallboard	None	21.72 " " " " " "
3/8" Gypsum tile board	None	50.00 " " " " " "
Retarder	Sacks	3.00 " CWT in sacks
Hydrated lime	10# Sacks	28.35 " ton including sacks

10850 *Government's Exhibit No. 278*

LICENSE AGREEMENT

THIS AGREEMENT, executed in duplicate this ——— day of ———————, A. D. 1929, by and between the UNITED STATES GYPSUM COMPANY, an Illinois corporation of Chicago, Illinois, hereinafter referred to as "Licensor," and ———————, a ——————— corporation, of ———————, ———————, hereinafter referred to as "Licensee,"

WITNESSETH, THAT

WHEREAS, Licensor is the owner of all rights in and to an application for United States Letters Patent filed by Carlisle K. Roos, entitled "CEMENTITIOUS MATERIAL," now pending in the United States Patent Office and covering the process of forming a cellular product through the formation of a tenacious foam and mixing the foam with a cementitious material, and has heretofore acquired the sole and exclusive rights in the United States of America (when gypsum is used as the main binding material) in that certain application for United States Letters Patent filed by Erik Christian Bayer, entitled "METHODS OF

MANUFACTURING POROUS BUILDING MATERIALS" and relating to a process similar to that of said Roos application; and

WHEREAS, Licensee desires the right to manufacture and sell gypsum plasterboard and gypsum wallboard made by said processes described in said Roos and Bayer applications,

NOW, THEREFORE, in consideration of the sum of one dollar and other good and valuable considerations, receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to-wit:

1. Licensor agrees to disclose to Licensee all information and formulae which it now has or may obtain
10851 covering the process of making a cellular product through the formation of a tenacious foam and mixing the foam with cementitious material insofar as the same is or may be applied to gypsum, including all information and formulae for the manufacture of gypsum plasterboard and gypsum wallboard with such cellular product, together with a description of the machine or machines which it now has for making the same. It will assist Licensee to make its plant ready for the manufacture of said gypsum plasterboard and gypsum wallboard by furnishing to Licensee the advice and instruction of Licensor's experts and information with respect to the purchase and cost of said machines and appliances.

2. Licensor has agreed to and does hereby grant and give unto Licensee an indivisible and non-exclusive right, license and privilege of using the processes and/or inventions set forth and claimed in said Roos and Bayer applications for letters patent of the United States and in any patent or patents granted for or upon either of said applications, for the manufacture of gypsum plasterboard and gypsum wallboard at the plant or factory now owned and/or operated by Licensee at ————————, in the State of ————————, and at any other plant or factory which may hereafter be owned or operated by Licensee in the United States of America, and of manufacturing at said plants or factories, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said applications for letters patent or in any patent or patents

granted for or upon either of said applications for the full term of any such patent or patents.

10852 It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time during the existence of said license but commencing with the date when a patent or patents shall have been granted or issued for or upon either of said applications the minimum price or prices at which the Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the improvements set forth and claimed in any such patent or patents, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee accompanied with a statement of the minimum price or prices at which the Licensee shall sell said patented product, and thereafter shall give to the Licensee written or telegraphic notice of any change in such price or prices, and the Licensee expressly covenants and agrees that it will not at any time during the term of any such patent or patents, so long as this agreement shall continue in force and effect, and after the receipt of such notice, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard embodying the improvements set forth and claimed in any such patent or patents at a price or prices less than that stated by the Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

3. Licensee agrees to pay to Licensor for the said disclosures, information and assistance and the agree-
10853 ments of Licensor herein contained, and for the right, license and privilege of manufacturing and selling gypsum plasterboard and/or gypsum wallboard, and of using the processes for the manufacture of the same, embodying the inventions set forth and claimed in said applications for letters patent and in any and all letters patent which may be granted or issued for or upon either of said applications, an amount, hereinafter for convenience referred to as a license fee or royalty, equivalent to one per cent. (1%) of Licensee's selling price (not less, however, than twenty-five cents per thousand square feet) of all gypsum pasterboard or gypsum wallboard of every kind, whether or not embodying the said processes, inventions or improvements manufactured and sold by Licensee between the date

hereof and the date of the expiration of any such patent or patents, provided, however, that if no patent shall be issued or granted for or upon either the said Roos or Bayer applications within a term of two (2) years from January 1st, 1930, or from such earlier date as Licensee shall have commenced the manufacture of gypsum plasterboard and/or gypsum wallboard embodying said inventions and improvements in any of its said plants, then this agreement shall terminate at the end of said two (2) year term, and provided further that if letters patent upon final ap-
10854 peal shall be denied or refused for or upon both said Roos and Bayer applications at any time within said two (2) year term, or if at any time during the existence of this license the patents granted or issued for or upon said applications upon final appeal shall have been held invalid, then this license shall thereupon become terminated and cancelled.

4. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent of the Licensor, or transferred by operation of law.

5. Licensee agrees to keep separate full and accurate books of account and records showing the exact quantity of all gypsum plasterboard and gypsum wallboard manufactured and sold by it, and agrees that on or before the 20th day of each and every calendar month during the term hereof it will render to Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and gypsum wallboard manufactured and sold by it during the preceding calendar month, together with the price or prices at which the same was sold, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said gypsum plasterboard and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

6. Licensor or its authorized representative shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee re-

ferred to in the next preceding paragraph hereof,
10855 including all records of every kind, showing the
quantity of said gypsum plasterboard and gypsum wallboard manufactured and sold by it, the price or prices at which the same was sold and to make copies thereof and memoranda therefrom, provided, however, that if at the time of any such examination Licensee shall request it in writing such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by both parties. If the parties at any time shall not agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing not otherwise employed by it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make said examination itself.

7. Licensee agrees that all gypsum plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said applications for letters patent shall be distinctly marked with the words "PATENT APPLIED FOR," and that upon the issuance of any patent under or upon said applications for letters patent that all gypsum plasterboard or gypsum wallboard manufactured and sold by Licensee embodying the claims of any such patents shall be distinctly marked with the word "PATENTED" together with the numbers of such patents. Licensee further agrees to mark said gypsum plasterboard or gypsum wallboard with the words "LICENSED UNDER PENDING APPLICATIONS FOR LETTERS PATENT" prior to the issuance of any patent thereupon, and "LICENSED UNDER THE ABOVE LETTERS PATENT" after the issuance of any patent or patents thereupon, which markings shall be plainly visible.

8. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products,
jobbers, or other wholesale distributors of such
10856 products who do not or may not manufacture gypsum wallboard or gypsum plasterboard but who desire or may desire to have the same manufactured for them, it is understood and agreed that if Licensee shall manufacture gypsum wallboard or gypsum plasterboard embodying the inventions and improvements set forth and claimed in said applications for letters patent for any such other manufacturer, jobber or other wholesale

distributor the said license fee or royalty to be paid to the Licensor, as hereinbefore provided, shall be based upon all gypsum wallboard or plasterboard, whether or not the same shall embody the said improvements or inventions, manufactured for and sold and invoiced to such other manufacturer, jobber or other wholesale distributor, and upon the regular selling price of Licensee of such gypsum plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which the same is sold and invoiced by Licensee to such other manufacturer, jobber or other wholesale distributor, and provided further that after a patent or patents shall have been granted or issued upon either of said applications Licensee shall first obtain the written consent of Licensor to the sale of any such patented product to any such other manufacturer, jobber or other wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said applications for letters patent or in any patent or patents granted or issued for or upon either of said applications for other manufacturers, jobbers or wholesale distributors of such products, or to sell the same to such other manufacturers, jobbers or wholesale distributors, after the issuance of any patent for or upon either
10857 of said applications, without the written consent of Licensor.

9. The Licensee covenants and agrees that all of said gypsum plasterboard and gypsum wallboard manufactured and sold by it embodying the said improvements or inventions and commonly known in the trade as seconds shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "SECONDS" in letters at least three inches in height.

10. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of any letters patent which may be granted or issued for or upon either of said applications forming the subject-matter of said license, so long as said license shall remain in full force and effect, and agrees that it will not at any time during the existence of said license, directly or indirectly, by itself,

through or together with another or others, contest the validity of either or any of said letters patent or the title thereto of Licensor or question in any way the prima facie scope of either or any of said letters patent.

11. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action,
provided, however, that neither party shall be re-
10858 lieved thereby from any liability accrued at the
time of such termination. In case at any time the Licensee shall be adjudged a bankrupt, then the License hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may specifically enforce this contract or any of the terms, conditions and covenants thereof by injunction or in such other manner as may be provided by law.

12. Any notice to be given under the terms hereof may be served by the Licensor or the Licensee by mailing the same to the Licensor or Licensee, postage prepaid, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

13. It is understood and agreed that if at any time during the term hereof the Licensee shall in the judgment of the Licensor suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, whether now or hereafter issued, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper.

In case the Licensor shall grant to any other person any license under said patents for the manufacture and sale of plasterboard or gypsum wallboard embodying the said inventions or improvements or any right under any such license, upon terms more favorable than those granted hereunder to this Licensee then it will grant to
10859 this Licensee a license on the same terms or extend to it the same right granted to any such other person.

14. The terms "gypsum plasterboard" and "gypsum wallboard" shall be understood to mean all board made of gypsum by whatever name called having the structural characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

15. Licensor agrees at any time during the term hereof to extend to Licensee upon its written request an indivisible and non-exclusive license or privilege to use said inventions or improvements for the manufacture in its said plants of any other gypsum product not specifically covered by this agreement and in which the Licensor shall use the same in its own manufacture, and to sell the same upon the payment to Licensor of one per cent. (1%) of the selling price of Licensee (not more, however, than twenty-five cents per thousand square feet where the same applies) of all such other products whether or not embodying the said inventions or improvements, manufactured and sold by Licensee, and upon the same terms as set forth herein and subject to all of the conditions hereof, in which event there shall be substituted for the words "plasterboard and/or gypsum wallboard" the name of such other product or products, and the words "not less than twenty-five cents per thousand square feet" wherever used shall be eliminated unless said other product is sold by the square foot as in the case of plasterboard or gypsum wallboard. Upon the request of Licensee as aforesaid, an agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective, but Licensor shall at all times be obligated to execute the same.

16. If at any time after the expiration of five (5) years from the date any patent shall have been granted
10860 or issued for or upon either of said applications, there shall have been invented or come into use any

process for the manufacture of gypsum products which shall make the said cellular product obsolete or shall displace the same and the Licensor shall abandon the use of the same in whole or in part in its own manufacture, then Licensee, upon thirty (30) days' written notice to Licensor, shall have the right to cancel and terminate this license or any such other license, as in paragraph 15 hereof contained, to the extent that the Licensor shall have abandoned the use of said cellular product in its own manufacture, provided, however, that if any such partial abandonment by Licensor shall consist of manufacturing and selling any plasterboard or gypsum wallboard without the use of said cellular product therein, then the amount to be paid by Licensee hereunder shall be reduced by one per cent. (1%) of the selling price of Licensee (not less, however, than twenty-five cents per thousand square feet) of any plasterboard or gypsum wallboard manufactured and sold by Licensee without the use of said cellular product, or if such partial abandonment shall consist of manufacturing and selling any other product covered by any license issued under paragraph 15 hereof without the use of said cellular product therein, then the amount to be paid by Licensee thereunder shall be reduced by one per cent. (1%) of the selling price of Licensee (not less, however, than twenty-five cents per thousand square feet thereof, where such term applies) of the same product manufactured and sold by Licensee without the use of said cellular product therein, and this license or such other license shall in all other respects remain in full force and
10861 effect.

17. If the Licensor shall at any time during the existence of this agreement, make or obtain any improvement of the inventions set forth and claimed in either of said Roos or Bayer applications or make or obtain any new or improved method of forming or making cellular products, then so long as the Licensee shall continue to pay the license fee or royalties hereinbefore stipulated, the right, license or privilege herein or in any such other license, as in paragraph 15 hereof contained, shall be extended to and include the use of such improvement and/or new or improved method, for the manufacture of gypsum plasterboard or gypsum wallboard or other gypsum product covered by such other license, and selling and using said gypsum plasterboard and gypsum wallboard or other gypsum product embodying said improvement and/or new and improved method, subject to all of the terms and

conditions hereinbefore contained, except only that Licensee shall not be required to pay any additional sum, royalty or license fee therefor. It is further understood that if a patent or patents shall be granted or issued upon any such improvement and/or new or improved method, then all the provisions of this agreement as well as the provisions of paragraph 2 hereof reserving the right in Licensor to determine and fix at any time and to change from time to time the minimum price or prices at which Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the improvements set forth and claimed in any patent or patents granted or issued for or upon either of said first two applications, shall apply to the improvements and inventions claimed or set forth in any patent or patents granted or issued for or upon any such improvement and/or new or improved method.

10862 18. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by the Licensee, except as hereinabove specifically provided.

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY

By_____
Its President.

ATTEST:

_____
Secretary.

_____

By_____
Its President.

ATTEST:

_____
Secretary.

10863 *Government's Exhibit No. 279*

ATLANTIC GYPSUM PRODUCTS COMPANY
40 Central Street
BOSTON, U.S.A.

MAY 24, 1927.

MR. SEWALL L. AVERY, *President*
United States Gypsum Company
300 West Adams Street
Chicago, Illinois

DEAR MR. AVERY:

I have delayed my reply to your letter of May 16 relative to wallboard seconds until I could check for myself the facts as they apply to our business here in New England. As you saw from our statement to you covering April wallboard sales, they were certainly not of sufficient size to be a disturbing factor in any market. This question of wallboard seconds, however, we have considered seriously, and as you may have heard from Mr. Henning, the matter was discussed in Buffalo at a meeting of wallboard manufacturers operating under the license agreement. We concurred with the general opinion that selling seconds in certain markets was undesirable to all concerned and, consequently, we have restricted our wallboard seconds sales to such territory as might absorb them with least disturbance to the trade in general. We do not sell seconds in the Metropolitan area of Boston but we have sold them in Maine and other outlying districts.

Our policy is to sell as few seconds anywhere as is possible under our circumstances, and to cut up seconds stock to sell as plaster lath. You, of course, appreciate the situation we are in at this time in getting a new wallboard plant running smoothly. Seconds will run at a much higher percentage during this period than they should later on. If any of our friendly competitors would like to show us how to eliminate seconds in our manufacture, we should be delighted to receive their advice.

It seems to me each wallboard manufacturer must have some outlet for his #2 board. This outlet is logically in territory fairly near his plant as this reduced price commodity cannot bear much freight. Here in New England we are hoping to be able to accomplish that same result and dispose of our necessary seconds output with as little

damage to established markets as is possible. This,
10864 of course, is primarily a selfish viewpoint on our part but I can readily see why adherence to this will benefit the industry as a whole as well as it should benefit our own company.

I wish to thank you especially for your advice in this matter and to assure you that it is much appreciated.

Sincerely yours,

WILLARD P. FULLER,
Treasurer.

WPF:A

10865 *Government's Exhibit No. 280*

MAY 29, 1929.

MR. W. P. FULLER
Atlantic Gypsum Company
40 Central Street
Boston, Mass.

DEAR MR. FULLER:

Enclosed is a form of the bundle license, fully executed by us and ready for your signature. There is also enclosed for your consideration and comment a first outline of the suggested bubble system license.

I have found no suitable opportunity heretofore to express appreciation for your active and successful cooperation in the settlement of our patent litigation. I assure you that this has been a decided benefit in relieving the industry of its legal mess, which should be and is greatly valued by all those affected.

Yours very truly,

President.

10866 *Government's Exhibit No. 281*

ATLANTIC GYPSUM PRODUCTS COMPANY
40 Central Street
BOSTON, U.S.A.

MAY 31, 1929

MR. S. L. AVERY, *President*
United States Gypsum Company
300 West Adams Street
Chicago, Illinois

DEAR MR. AVERY:

Thank you for your letter of May 29, with enclosures of the bundle license contract in duplicate and the outline for the bubble system license. We will act on both these matters promptly.

Thank you also for your expression in regard to the now happily completed settlement of the patent litigation in the wallboard field. Whatever we have done has been based on a sincere, even if self-interested, desire to help in eliminating from a fundamentally good industry in which we have a moderate part the elements of litigation and controversy that have been so largely responsible for our recent troubles.

Sincerely yours,

WILLARD P. FULLER,
Treasurer.

WPF:A

10867 *Government's Exhibit No. 282*

ATLANTIC GYPSUM PRODUCTS COMPANY
New England Division
40 Central Street
BOSTON, U.S.A.

22 JULY 1929

MR. M. H. BAKER,
c/o National Gypsum Company,
Buffalo, New York.

DEAR MEL:

Please pardon my delay in acknowledging the receipt of your letter of 12 July. I have been almost continually out of town, and have had no opportunity to reply to your letter.

Mr. Fuller, Mr. Channing and I are planning to arrive in Chicago on Wednesday. We shall stop either at the University Club or at the Palmer House.

If you can conveniently arrange to do so, it might be advantageous for you and all concerned, for you to be there that day so that we may talk over the Foam Board contract in advance of the meeting to be held on Thursday.

Very truly yours,

L. I. NEALE

LIN:N

10868 *Government's Exhibit No. 283*

ATLANTIC GYPSUM PRODUCTS COMPANY
40 Central Street
BOSTON, U.S.A.

AUGUST 9, 1929

MR. M. H. BAKER, *President*
National Gypsum Company
Buffalo, New York

DEAR MR. BAKER:

I have just received your letter of August 8 enclosing your memorandum covering the meeting of wallboard manufacturers in Chicago August 6. This is a sound presentation of the case and makes it unnecessary for me to write one for our records here, as I shall use your copy. Thank you for sending it.

I expect to be in Montreal two days this next week, probably the 14th and 15th. The following week I am starting on quite a trip and will probably take Mrs. Fuller with me. I plan to be in New York, the 21st; Ottawa, the 22nd; Montreal, the 23rd; and then on to Nova Scotia for about a week's stay there, getting back to Boston about the first of September.

What is the possibility of connecting with you at some point on this trip, preferably in New York?

Sincerely yours,

WILLARD P. FULLER,
Treasurer.

WPF:A

10869 *Government's Exhibit No. 284*

ATLANTIC GYPSUM PRODUCTS COMPANY
INCORPORATED
Rock Plaster Division
40 Rector Street, New York

29 AUGUST 1929.

MR. M. E. BAKER, *Pres.*,
National Gypsum Company,
Buffalo, New York.

DEAR MEL:

Mr. Fuller being in Nova Scotia, I am a little out of touch with the board situation in Chicago. About all I know is that the meeting which was scheduled for last Thursday was called off because of some difference between your Company and the Universal Gypsum & Lime Company, and that it was expected a meeting might be held this week.

I should appreciate very much if you would let me know promptly the present state of affairs in regard to the getting together of the various manufacturers for signing up the combination bubble starch patent, stating what is holding this matter up and what in your opinion is likely to be the eventual outcome.

Very truly yours,

ATLANTIC GYPSUM PRODUCTS COMPANY INC.,

L. I. Neale
L. I. NEALE,
General Sales Manager.

LIN:IRC

10870 *Government's Exhibit No. 285*

ATLANTIC GYPSUM PRODUCTS COMPANY
INCORPORATED
Lincoln Building
60 East 42nd Street
NEW YORK

2 MAY 1932

UNITED STATES GYPSUM COMPANY,
300 West Adams Street,
Chicago, Ill. Att: Mr. C. F. Henning, V.P.

GENTLEMEN:

As a licensee under license contract existing between us, we would inquire at what price the Kelley Plasterboard Company, also a licensee, is selling gypsum wallboard and gypsum plasterboard to the Structural Gypsum Corporation, a non-licensee, for resale by them and also whether or not the regulation of the licensor in regard to a minimum quantity of 5,000 sq. ft. for pick-ups in the Metropolitan area as contained in the licensor's bulletin dated 12 April 1932 is being enforced in regard to sales of the patented articles by the Structural Gypsum Corporation?

Very truly yours,

ATLANTIC GYPSUM PRODUCTS CO., INC.
L. I. NEALE,
L. I. Neale
Vice President.

LIN:AB

10871 *Government's Exhibit No. 286*

30 MARCH 1933.

W. P. FULLER
L. I. NEALE
LEON H. FLEMING

At the last meeting of the board licensees I was asked by Mr. Henning exactly how Leon H. Fleming was remunerated by F. B. Lawton, Inc. You will recall that some time ago the Board Survey Company asked us about Fleming's remuneration and that I replied that Fleming was an employee of F. B. Lawton, Inc.

They raise the question again now because it is felt that the requirement concerning the remuneration of salesmen of gypsum wallboard and/or gypsum plasterboard of paying a commission applies not only to the manufacturer who makes the board, but also to any selling agency employed by that manufacturer.

The question which was asked about Fleming is also asked about the salesmen of the Oakfield Gypsum Products Corp. and the Structural Gypsum Corp. both of which companies purchase board from Kelley.

The licensor feels that he has a right to demand that salesmen employed by such companies as Structural, Oakfield, F. B. Lawton, Inc., Tomkins-Rockwall Corp., etc. should not receive their remuneration on a commission basis. This seems to me to be fair for it would be foolish to exact this rule for manufacturers in their direct selling and not to imply the same rule to manufacturers' selling agents.

It is my belief that Fleming is not paid on a commission basis unless some very recent changes have been made by Lawton. This being the case, I should like to be able to inform the licensor of the method used by Lawton if this be agreeable to you.

ATLANTIC GYPSUM PRODUCTS CO., INC.

L. I. Neale
L. I. NEALE,
Vice President.

LIN:AB
cc-C. A. WARREN
R. H. HALLOWELL

10872 *Government's Exhibit No. 287*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

20TH AUGUST 1934

MR. L. I. NEALE, *Vice President.*
Atlantic Gypsum Products Co.
60 East 42d Street
New York, New York

DEAR MR. NEALE:

At the board license meeting May 23d 1934 we presented you with a contract for the reflective backing of plasterboard and wallboard.

It was the intention to license all of our board licensees, and to date we have received nothing from you in regard to your position on this matter.

Please give me your comments or criticism.

Very truly yours,

C. F. HENNING,
Vice President.

10873 *Government's Exhibit No. 288*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

6TH SEPTEMBER 1934

ATLANTIC GYPSUM COMPANY
60 East 42d Street
New York, New York

Attention Mr. L. I. Neale, *Vice President*

Subject: *Metallized Plasterboard*

DEAR SIRS:

On August twentieth I wrote you regarding the license contract for reflective backing on plasterboard and wallboard.

It is our intention to license the wallboard manufacturers to manufacture this product under license.

I have received word from the National Gypsum Company, Certain-teed and Universal that they are agreeable to enter the license.

Please let me know your intentions.

Very truly yours,

C. F. HENNING,
Vice President.

10874 *Government's Exhibit No. 289*

MEMORANDUM

Date SEPTEMBER 6, 1934.

To MR. L. I. NEALE

From W. P. FULLER

Subject Aluminum Back Gypsum Board

1. We have been considering this matter, and, although favorably inclined to the idea of taking a license from U.S.G. on the Alfol patents when and if we do put out this sort of product, are not yet ready to act. You can pass this on to U.S.G.

2. For your own information, there is another group of patents that may make a more desirable license set-up. The costs of manufacturing equipment, quality and range of products, etc. are factors to be determined.

3. The time element also comes in. A lot of work and money have got to be spent getting this type of product accepted in volume. I would rather see U. S. G. and National bear the brunt of this work, and hop on when the bus is running. Where we are sure a license will be available to us *when* we want to go in, we need only watch any sales handicap to us by not having the product to offer with our present lines. When and if this handicap hurts us more than making the necessary expenditures in plant and promotion, we shall probably go in.

4. Offhand, the primary objection I see in the license U.S.G. offers is that it is restricted to *gypsum* plasterboards. Perhaps this is all they have to offer in their control of the Alfol patents. The best product may come as an insulating or structural board, not necessarily gypsum, with the aluminum treatment. I would want to be sure U.S.G. includes in their license to us *all* the rights they have from *their* license covering the Alfol patents.

WILLARD P. FULLER

WPF:A

10875 *Government's Exhibit No. 290*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

30TH NOVEMBER 1934

MR. L. I. NEALE, *Vice President*
Atlantic Gypsum Products Co.
60 East 42d Street
New York, New York

DEAR MR. NEALE:

On October eighth I submitted to you final form of contract for reflective surface plasterboard. I have heard nothing from you since your letter September fourteenth. I expect to be in New York Wednesday, December fifth, and will go over this entire matter with you.

Very truly yours,

C. F. HENNING,
Vice President.

10876 *Government's Exhibit No. 291*

MEMORANDUM

Date NOVEMBER 30, 1934

To MR. L. I. NEALE
From MR. R. H. HALLOWELL
Subject NICKEL-PLATED GYPSUM LATH

Before Willard left for England via New York, we discussed the necessity of our carrying in stock aluminum foil lath. Willard thinks we can temporarily buy this either from the U.S.G. or National Companies and later make it ourselves if conditions warrant. Willard expected to talk with Henning before he sailed, but if he did not do so, asked me to take this matter up with you and have you talk with either Henning or Baker.

The U.S.G. here in Boston is very decent in selling Tile Board to us, not stamped with their name. If we could buy unlabeled Nickel-Plated Lath it would be fine.

I think it very important that we should secure some of this lath at once, and would like to carry a carload of it in Portsmouth stock. We have had several requests for it, the most important being from Kesseli & Morse of Worcester, who want a few thousand feet and will buy a mixed car from National, unless we can supply it.

Please let me hear from you.

R.H.H.

10877 *Government's Exhibit No. 292*

MEMORANDUM

Date DECEMBER 3, 1934

To MR. L. I. NEALE
From C. A. WARREN

Subject

We return to you, duly executed in duplicate by A.G.P., license agreement with U.S.G. for the use of foil on plasterboard. We also enclose herewith the original draft, with notations in pencil of the changes as compared with the executed agreement.

What seems to me to be the most important one is in Paragraph X, where they changed the word "manufactured" to "sold", thereby limiting our paying royalty to what we sold rather than what we manufactured.

C. A. WARREN

CAW/BW

10878 *Government's Exhibit No. 293*

5 DECEMBER 1934

R. H. HALLOWELL
L. I. NEALE

ALUMINUM COVERED GYPSUM LATH

In reply to your memorandum of 3 December I would inform you that before Willard left for England he signed the license agreement with the U.S.G. for the manufacture and sale of gypsum board covered with aluminum foil. Although we shall not be in a position to manufacture this product for some little time, I have made arrangements with the U.S.G. Co. for the purchase of aluminum covered gypsum lath and have ordered a car to be shipped from Oakfield to our Portsmouth plant on Friday of this week which should reach Portsmouth by Monday. Before that time, I shall expect to have in your hands a price filing on this material.

ATLANTIC GYPSUM PRODUCTS CO., INC.
L. I. Neale
L. I. NEALE,
Vice President.

LIN:AB

10879 *Government's Exhibit No. 294*

10 DECEMBER 1934

MR. C. F. HENNING, *Vice Pres.,*
United States Gypsum Company,
300 West Adams Street,
Chicago, Ill.

DEAR MR. HENNING:

Enclosed you will find in duplicate the plasterboard agreement for Metallized (Aluminum Covered) Gypsum Wallboard and Gypsum Lath duly signed and executed by the officers of this corporation. We would ask you to be good enough to execute these documents and return one of them to me for our files.

May we point out that Paragraph VIII is not entirely satisfactory in that you, as licensor, do not assume any obligation to indemnify us, as licensees, against any judgment, order, or decree that may result from a suit or action brought against us. It is our suggestion that this paragraph be rewritten to take better care of the objectionable feature and offer it as a supplement, or rather amendment, to the present agreement.

Very truly yours,

ATLANTIC GYPSUM PRODUCTS CO., INC.

L. I. Neale,
L. I. NEALE,
Vice President.

LIN:AB
Encl.

P.S. Will you be good enough when you return the executed copy of the agreement to send me an additional copy.

cc-W. P. FULLER
C. A. WARREN

10880 *Government's Exhibit No. 295*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 27, 1935.

MR. L. I. NEALE, *V. P.*,
Atlantic Gypsum Products Company,
205 East 42d Street,
New York City.

DEAR MR. NEALE:

In connection with your purchases of 5/16" metallized gypsum lath which you may have occasion to make from us, we will allow you the usual 12½% manufacturer's discount from the net price after deduction of basing mill freight. In other words, in those areas where a delivered price on 5/16" patented metallized gypsum lath has been established, we would first deduct the freight from that mill which normally governs price on other types of metallized patented gypsum lath for the destination involved, and your discount would be figured on the net price at that mill.

Very truly yours,

UNITED STATES GYPSUM COMPANY
H. F. SADLER,
Ass't General Sales Manager.

HFS:AB

10881 *Government's Exhibit No. 298*

23 MARCH 1936

CONFIDENTIAL

W. P. FULLER
L. I. NEALE

NEAT PLASTER IN METROPOLITAN NEW YORK

This memorandum is being written so that upon your return from Bermuda you may have before you a picture of what has occurred during your absence in reference to the price situation on neat plaster in metropolitan New York.

On 29 February the American Cyanamid Company sent a letter to dealers in metropolitan New York (this comprises Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk and Westchester Counties) stating that after 1 March they would take no contracts for specific jobs, and that on 1 April the price of neat plaster, concrete bonding plaster and sanded plaster would be raised 25¢ per ton. U.S.G. followed with a similar announcement to the trade a few days thereafter. No other company followed. This plan, as you can readily guess, was put forward by Cyanamid with the knowledge of U.S.G.,—no one else was taken into their confidence.

This plan to raise prices was utterly worthless for two reasons; (1) it was not fair; (2) it was impracticable. It was not fair because Cyanamid and U.S.G. have signed a great many specific job contracts at the $7.50 price. We have signed very few, and Ebsary, so far as I am able to determine, has signed very few. Under the plan as soon as the price of $7.75 became effective, all of the contracts which Cyanamid and U.S.G. has signed would be validated. So long as the price of Ebsary, ourselves and other gypsum companies remains at $7.50, the specific job contracts of Cyanamid and U. S. G. taken at that price are hardly worth the paper they are written on, because dealers would be free to buy any brand of plaster at the contract price. With the validating of their contracts by raising the price 25¢ these two companies, particularly Cyanamid, would have a virtual monopoly on all of the business in New York. Because competition being so keen between dealers no dealer could afford to pay even 25¢ a ton more.

The plan was impracticable because it made no provision for any protection of specific jobs after 1 March. C. F. H. has told me that he did not feel that it was possible for the gypsum industry to get away from giving protection and that this was a really fundamental 10882 principle of his company. This being so, it was utterly absurd to make a statement to the trade that protection would not be taken at any price after 1 March. Furthermore, at the time of putting forth this plan, no provision whatsoever had been made for reporting specific job contracts or policing them.

Ebsary would have nothing whatsoever to do with this plan and definitely stated to the trade that they would not

follow: When I was in Chicago the week before last I went over this whole situation thoroughly with C. F. H. and pointed out to him that the plan was not really a plan at all and contained no element which would insure its success in raising the price. You may recall that some months ago Fred Ebsary advanced the idea that a small raise of 25 or 50¢ would be a good idea provided that there was no protection at all. He did not say it would be a good idea if there was a tremendous amount of protection at $7.50 in the files of gypsum companies. Therefore the plan did not follow Ebsary's idea of a small raise at a time.

I also pointed out to C. F. H. how unfair such a plan as this was to companies which had no or very little coverage.

After the adjournment of the Gypsum Association meeting in Chicago there was held a meeting of the directors of the old Gypsum Statistical Institute which is still in existence although it has not been operating for a couple of years. The purpose of the meeting which was called at the request of C. F. H. was to set the machinery of the Institute in operation again and to use the personnel of the Association for this purpose. The idea back of it was to provide some means for reporting specific job contracts in the New York area. You may have forgotten but you were a member of the Board of Directors of the Gypsum Statistical Institute and as there has been no election since the last meeting held, which I believe was in the early part of 1933, you would still be a director because no successor has been elected. A waiver of notice of the meeting was past around to those who were present and you may or may not, after we talk the matter over upon your return, wish to sign the waiver.

10883 Last Tuesday C. F. H. was in New York (primarily for the purpose of taking over the Asbestos Company out in the Newark flats) and while here I put up to him a plan which I felt at least had the chance of working and which on the whole was fair to all concerned. It is not an original plan, because I have taken a leaf out of the book of the Ohio Finishing Lime Producers. It is this: that after some predetermined future date specific job contracts shall only be taken at a certain price. The price I had in mind was $9.00,—and the price for stock requirements of dealers should not be changed at this time

at all. In other words, after 1 April specific job contracts should be protected only at $9.00. All companies should immediately report to the Gypsum Statistical Institute their outstanding contracts at $7.50 and at some later date, maybe three months or six months when these contracts have been cleaned up or nearly cleaned up, then the market price for stock requirements could be raised up to the level of $9.00 at which specific job contracts had been signed up.

By this program you will see that an end would be put to taking any more contracts at $7.50 and an incentive would be given to all companies to clean up their $7.50 contracts as quickly as possible in order to get the increased price. As a result of this talk the following day the U.S.G. put a notice out to the trade to the effect that after 1 April they would take specific job contracts only at $8.50 per ton, and that there would be no change in the price of stock requirements. In other words, they accepted the plan but felt that a dollar raise was better than $1.50 which I had in mind. I followed the U.S.G. with a letter to the trade two days later, copy of which is enclosed.

This is where the situation stands at the present time. Ebsary himself has just returned from the south and has not made up his mind whether he will follow or not. It is my guess that the plan would appeal to him but that he would want some agency for receiving reports on the protected jobs and the checking of these jobs other than the personnel of the Gypsum Association. I am afraid that tying the Gypsum Statistical Institute, of which Ebsary is still a member, up to the Gypsum Association will not appeal to him. This remains to be seen.

10884 At any rate, here is at least an attempt to set up something that will give us an increase in price of $1.00 at some future date, which is better than having nothing at all operative or even in mind. If the plan works, and like every other plan its working would depend upon mutual confidence and a mutual will to make it work, it will be at least six months before we can hope to raise the market price for stock deliveries.

ATLANTIC GYPSUM PRODUCTS COMPANY, INC.

L. I. NEALE,
Vice President.

LIN:MK

10885 *Government's Exhibit No. 299*

THE AMERICAN GYPSUM CO.

AUGUST 15TH, 1929

MR. A. R. BLACK,
American Gypsum Company,
Port Clinton, Ohio.

DEAR MR. BLACK:

Again referring to the U.S.G. Clause referring to jobbers and answering yours of the 14th.

The U.S.G. Company refused to consider allowing us to sell jobbers. As I explained to you last week I am still unable to understand Mr. Avery's last move as I was under the impression from our phone conference that we had agreed on everything but the bundler patent, which was either to be dropped entirely or signed up meeting their demands and under the circumstances I feel Mr. Avery was very hasty and did not appreciate my efforts in concluding the agreement with his Company.

Will insist on the privilege of keeping the jobbers we now have as I feel as you do about their strangling us unless we have some protection.

Respectfully yours,

JNO. A. KLING,
Chairman.

Jno. A. Kling
TR

10886 *Government's Exhibit No. 300*

NATIONAL GYPSUM COMPANY
General Offices, Buffalo, N. Y.

JUNE 23, 1934

MR. ARTHUR BLACK,
The American Gypsum Co.
Port Clinton, Ohio

DEAR ARTHUR:

Pursuant to our conversation yesterday, I am attaching copy of our attorney's report on U.S.G.'s proposed license contract covering aluminum foil wallboard.

Very truly yours

M. H. BAKER,
President.

MP

10887 *Government's Exhibit No. 300-A*

JUNE 18, 1934.

NATIONAL GYPSUM CO.
188 Delaware Ave.
Buffalo, N. Y.

GENTLEMEN:

Re: Non-Exclusive License to Manufacture Metallized Gypsum Board

The agreement submitted wherein the United States Gypsum Company proposes to license National Gypsum Company to manufacture, use and sell plaster board having a metallized surface embodying certain inventions set forth in the patents and applications set forth in Schedule "A" attached to said agreement, has been reviewed by me.

In my opinion, the agreement is satisfactory, save in the following respects:

1. Paragraph 9 of the proposed agreement is unreasonable in respect to the payment for examination of Licensee's books, and I would suggest and strongly urge that the last sentence of paragraph 9 of the proposed agreement be revised to read as follows:

   "Gypsum Company shall have the right to make copies of any such records and make memoranda therefrom, provided that if, at the time of such examination, Licensee shall so request, such examination shall be made by a certified public accountant satisfactory to Gypsum Company, in which event the expense of such examination by said certified public accountant shall be borne equally by both parties."

2. Paragraph 10 of the proposed agreement is quite unnecessary, and casts upon the Licensee a great administrative burden. The report is of no consequence to the Licensor as a regular report. If the Licensor desires such information from time to time, it has the right to examine the books of the Licensee and obtain such data. I am informed that this subject has given no trouble in the Gypsum Board Agreement and I
10888 see no reason for placing the additional burden upon the Licensee in order to get the information regarding the amount of board manufactured having a metallized surface. I therefore recommend the elimina-

tion of the first clause in paragraph 10 and a limitation of the report to be made to the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month, together with the prices at which said board is sold, etc.

I further recommend that the report should be called for on the 20th of each month, instead of the 15th day, in order that this agreement will coincide with the wallboard and dry insulation agreements under which the Licensee now makes reports which are due on the 20th day of each month.

3. Paragraph 11 also contains a covenant which seems to be unreasonable and unwarranted. Licensee is asked to covenant that it will not manufacture board with a metallized surface, except pursuant to bona fide sales thereof. I agree that no goods should be manufactured to be sent out on consignment, but that situation can be covered very acceptably without compelling Licensee to agree that nothing will be manufactured except pursuant to bona fide sales made thereof. The paragraph as now written would prevent the Licensee from manufacturing for experimental purposes and for warehouse stock. The text referring to manufacturing should be omitted from the paragraph.

4. Paragraph 13 as written in the proposed agreement should be stricken out and a paragraph substantially as follows should be substituted:

"The Licensee hereby agrees as one of the considerations for the indivisible and non-exclusive rights, licenses and privileges herein and hereby granted, that the Licensee will not during the life of this agreement, dispute the validity of any patent or patents, under which it is hereby licensed, nor aid others in doing so. But, in the event that any such patent, under which Licensee is licensed, is held invalid or of limited construc-
10889 tion by a court of competent jurisdiction from whose decision no appeal is or can be taken, then the Licensee shall have the right to make, use or vend the structure so held to be outside of the scope of said patent rights, free and clear of the terms of this agreement."

5. The proposed agreement gives no protection to the Licensee, in the event of suits brought by others against

the National Gypsum Company or any other Licensee for infringement. Some protection must be had and I therefore suggest that a clause be added substantially as follows:

"That the Licensor shall indemnify the Licensee against any and all actions, suits, claims, demands, or prosecutions, that may be brought or instituted, against the Licensee, and, also, against all damages, costs and expenses, including attorney's and counsel fees; that the Licensee may pay, or incur, or become liable for, in defending, or compromising, the same, or any of them, in consequence of making and/or selling the aforesaid patented article. The Licensee agrees to give prompt notice of any suit or action which shall be brought against it and thereupon if the Licensor shall desire to conduct the defense of such suit, the Licensor shall have the right to do so, but the Licensee shall have the right in such event to be represented in such suit by counsel of its own selection."

There are many other minor objections to the agreement as proposed, but I assume from our conversation that in the interest of harmony in the Industry, that you did not desire to have me make any objection to any matters contained in the proposed agreement, which are not, in my opinion, of major importance.

I believe that if the agreement is amended as suggested above, that the National Gypsum Company will obtain the rights and privileges it desires to manufacture gypsum board having a metallized surface.

Very truly yours,

(*Signed*) ELMER E. FINCK

10890 *Government's Exhibit No. 301*

NATIONAL GYPSUM COMPANY
General Offices
Gold Bond Products
Buffalo, New York

SEPTEMBER 17, 1934

MR. ARTHUR R. BLACK
The American Gypsum Co.
Port Clinton, Ohio

DEAR ARTHUR:-

I talked to Mel this morning and he tells me that we did not effect any change in that paragraph on the foil license that had to do with protection against suit but we accepted the paragraph substantially as U.S.G. had written it.

Yours very truly,

NATIONAL GYPSUM COMPANY

RFB

Vice President.

RFBurley/B

10891 *Government's Exhibit No. 302*

SEPT. 18, 1934

MR. RALPH BURLEY
National Gypsum Co.
Buffalo, N. Y.

DEAR RALPH:

Many thanks for your favor of the 17th inst., advising that you were not able to have the particular paragraph in the foil license changed; and in the same mail with your letter there arrived a communication from Charlie Henning, stating why they could not change this clause. We are, therefore, replying to Mr. Henning's letter, advising that we are ready to sign the contract.

Very truly yours,

THE AMERICAN GYPSUM CO.

ARB:IW

General Sales Manager.

10892 *Government's Exhibit No. 305*

MR. EUGENE HOLLAND,
c/o Universal Gypsum & Lime Co.,
Chicago, Ill.

DEAR SIR:

Our price on Neat Plaster for the City of Cleveland is $8.00 per ton, exclusive of sacks, f.o.b. Port Clinton, and our rate is $2.20 per ton. Our shipments of Neat Plaster to Cleveland are in paper sacks.

It is my understanding the other Gypsum Companies operating in Cleveland are quoting this same price, and I hope you will find it convenient to use this same figure for any quotations to dealers in Cleveland.

Will you favor me with your advice as to how you feel about this?

Yours very truly,

ARTHUR R. BLACK.

ARB/FAA
Port Clinton, Ohio,
October Sixteenth,
Nineteen Hundred Twenty-eight.

10893 *Government's Exhibit No. 306*

OCT. 17, 1928

MR. ARTHUR R. BLACK
Port Clinton, Ohio.

DEAR SIR:

We believe that we are able to get as much as our competitor for Neat Plaster or any other gypsum commodity. Our policy has been and will be to meet competition, and we will be glad to continue this policy in Cleveland.

I thank you for giving me your opinion as to the market conditions in Cleveland.

Very truly yours,

EH:W *President.*

10894 *Government's Exhibit No. 307*

THE AMERICAN GYPSUM CO.
General Offices and Mills
Port Clinton, Ohio

OCTOBER 16, 1930.

MR. CHARLES HENNING, *Vice President,*
United States Gypsum Company,
300 West Adams Street,
Chicago, Illinois.

DEAR CHARLEY:

Replying to your favor of the 14th inst., regarding the report from your salesman on the National Housewrecking Company, North Belmont Avenue, Springfield, Ohio, we wish to advise that your letter, making the price on Seconds the same as Firsts, was dated April 7th, and we sent out our notices to the trade April 8th. Our salesman took an order on April 11th, from the National Housewrecking Company, Springfield, Ohio, for 9500 feet of Seconds—as he understood they were committed for this amount—shipment of the same to be made on April 20th. This is the last shipment of Seconds we have made to these people, and we have not offered to sell them any more Seconds since the date of the above transaction.

In support of the above transaction, I am enclosing our salesman's order. From the above facts you will see that the stock that the National Housewrecking Company has at present, of our Board, is old stock from the shipment of April.

Our salesmen are not offering any Seconds to the trade, neither are they giving our customers to understand that we will supply them with any more Seconds.

We wish to thank your salesman for the compliment paid our Board when he stated they look like Firsts, as this is the first time any one ever paid our Seconds such a compliment.

Yours very truly,

ARB/s. ARTHUR R. BLACK.

10895 *Government's Exhibit No. 308*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
Chicago

20TH AUGUST 1934

MR. A. R. BLACK, *Vice President*
American Gypsum Company
Port Clinton, Ohio

DEAR MR. BLACK:

At the board license meeting May 23d 1934 we presented you with a contract for the reflective backing of plasterboard and wallboard.

It was the intention to license all of our board licensees, and to date we have received nothing from you in regard to your position on this matter.

Please give me your comments or criticism.

Very truly yours,

C. HENNING,
Vice President.

10896 *Government's Exhibit No. 311*

"OLD FORT DRUMMOND"

SUNDAY, SEPT. 26th.

Dear Jim—

Yours of Sept. 20th, containing copy of suggested "License Agreement" reached me yesterday. I also received letter from Charles Miller relating to this subject.

I will give the document careful reading, but I feel certain that I will be unable to get much, if any, satisfaction out of it.

It looks to me that while the Chicago people are doing much talking about the "good to the industry", they are at the same time trying to scalp us, or hope to get our entire hide or at least wing us.

It will be interesting to know what Jno. A. K. thinks about the whole matter and the position he will take when conclusion must be reached.

We will close up the cabin by Tuesday next and go to Detour, will remain there a couple of days and return home by rail by the way of the Soo.

Mrs. Davis is fine and sends kindest regards to yourself and Mrs. McCrady.

Yours truly,

J. B. DAVIS

10897 *Government's Exhibit No. 310*

THE ROLL MANUFACTURING COMPANY
ROMACO
Mortar Colors — Stucco Retarder
Cleveland

SEPTEMBER 16, 1926.

MR. J. B. DAVIS,
Detour,
Chippewa County,
Michigan.

MY DEAR J. B.:

Was certainly pleased to receive your letter of the 9th and to note from the same that you were relieved of your hay fever on Lake Huron. Hope that it is gone for the Season.

Am also pleased to note that Mrs. Davis is well and that you have Warren and his family with you. I sincerely hope that the trip will do Mrs. Warren Davis much good. From the description of her troubles I can readily realize that anything that can help to build her up will be a great blessing.

Spent Monday and Tuesday of this week in Chicago with J. H. and F. J. We had sessions on Monday with our Attorneys, Bill Shearer, Mr. Avery and the Universal Company's Patent attorney. On Tuesday we had another long session with Mr. Avery. The things that have developed at these sessions will come up at the next meeting, but I can tell you briefly that we are in for a ten years' contract on practically the terms that were outlined in the original contract. A few things have been modified, but the most objectionable things plus the payments stand. On the present rate of business this will amount to about $75,000.00 per year for the next three years and a total of about $187,000.00 for the following seven years, beside the cash payment of $50,000.00. There is also no assurance that this agreement can stabalize the market after the expiration of three years. It is a long-headed, well thought out plan on the part of the U. S. G. to tie up the various Companies to the payment of quite a sum of money each year for a period of years without in any way tying them to anything.

We have one alternative and that is to refuse to put our signature on the dotted line and fight the cases which are now pending. If we lose we will be at the mercy of the Master to whom the matter of the question of damages will

be referred and in addition to that take a chance on the U. S. Company refusing to license us to do business for the balance of term of the Utzman patents.

10898

I asked Attorney Pool for an absolutely frank statement as to what he thought our chances were in the two cases now pending. He stated promptly that he thought we would win in the Utzman case, because we are not infringing these patents, but he had his doubts about the Birdsey case and he figured that the Attorneys for the U. S. Company would undoubtedly ask the Courts to try the Birdsey case first, as they know this is their strongest case. If this procedure was followed the longest delay that we could get before a decision was rendered would be one and a half to two years. It would mean that we would have one and a half to two years that we could manufacture if they won the case and then we would have to make open edge board until the Utzman patent expires.

Griswold reports business continuing good and is again quite enthusiastic over proposed mergers and combinations that he says are forming. It seems this subject cannot be gotten out of his system.

Both Mrs. Miller and the writer extend best wishes to the Davis families and we hope that your stay at "Old Fort Drummond" will be exceedingly pleasant.

Yours very truly,

C. F.

CFM.H

10899 *Government's Exhibit No. 312*

JUNE 10, 1929

MR. S. L. AVERY, *President,*
United States Gypsum Company,
300 West Adams Street,
Chicago, Ill.

DEAR MR. AVERY:

Referring to your recent letter on the subject of bundling Gypsum Lath, will say that we are anxious to do what the Industry does so as to have a uniform product and help the development of the business. As far as I know, our plan of bundling has been meeting our requirements, but I am hoping that your own plan will be a much better one and afford an economy which would also justify its use.

I have felt that the license should not forbid a development of better conditions, so your License Contract tying a Licensee down to using it over a period of seventeen years regardless of any improvements that might be developed by you or others, seems doubtful business for all of us as we all want to develop economies and improvements from time to time. If we should find an improvement we would be glad to offer it to yourselves, or the trade, and if others should find improvements we would hope for such cooperation and to be allowed to take advantage of such development. I feel confident that you will approve of these ideas and am asking our office here to re-draw the license plan covering this feature and forward it with this letter. I will not be here to look it over as I am leaving on the Idler for a couple of days at West Point during the Commencement exercises there.

I hope you had a delightful visit at Greenwich, and with regards, I am

Very truly yours,

President.

GMB:LK
Enclosure.

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Certain-teed Products Corporation

FOR NEW YORK DATE 3/13/36 FROM CHICAGO OFFICE

ATTENTION OF MR. I. WHITTEMORE, V. P. SUBJECT PERFORATED GYPSUM LATH

ANSWERING YOURS 3/5 to Mr. Van Hagan DICTATED BY WARREN HENLEY - M

cc-Mr. C. O. Brown, V. P. - New York
Mr. H. H. Van Hagan - Buffalo

Your memo. of above reference, and as well Mr. Van Hagan's reply of March 7:

On March 11, '36, Mr. Henning called a conference of licensees. Those present were:

Messrs.	Henning	- U. S. G.
	Sadler	- "
	Neale	- Atlantic Gypsum
	Black	- American Gypsum
	Burley	- National Gypsum
	Price	- Counsel
	Van Hagan	- Certain-teed
	Henley	- "

FILED NOV - 1935 CHARLES L. STEWART, CLERK

Item No. Assay

Mr. Henning presented their position in respect to subject matter, as follows:

1. As announced February 19, '36, they propose to place this material on the market on or about April 1, '36.

2. They were willing to license on a basis of 10¢ per M sq. ft.

3. Propose to set a minimum price of $15.25 per M f.o.b. mill.

4. Estimated cost of production-15¢ per M sq. ft.

5. Were willing to supply such companies as accept a licenke, with perforated lath on the usual discount basis (12 1/2%), pending installation of equipment by such licensee.

6. Standard size - 3/8" thickness - 16"x48" - bundled.

The following objections were expressed to the proposed procedure (above outlined).

1. Altogether too short a time for proper consideration not only of patent situation, royalty asked, production difficulties, but also the effect on present Gypsum Lath market.

2. Royalty of 10¢ per M was too high in view of low selling price. Consensus of opinion was that present royalty now being paid covering "foam", "starch" and "bundling" was ample and, therefore, no additional royalty should be paid for the perforated feature.

3. Consensus of opinion was that selling price should at least carry $1.00 per M premium, i.e., $16.00 mill, inasmuch as perforated lath would be competitive with metal lath and adaptable to fireproof construction in the better class of homes. It was thought advisable to introduce this product carrying at least $1.00 per M premium rather than disturb the entire Lath market involving an approximate footage of 300,000,000 feet for the year 1936.

10900

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Chicago, Mar.18,1936. New York

Mr.Warren Healey

of 3/13

PERFORATED GYPSUM LATH

A.Whittemore, V.C. - LC.

Item No A-e-54

CC-Mr.C.O.Brown, New York
Mr.H.H.Van Hagan, Buffalo

Your report of the 13th is most interesting. As we see this situation, there is nothing much to do now except to await developments and see if U.S. G. is willing to revise their ideas along the lines suggested at the meeting.

Please keep us advised of anything that may occur.

- - - -

10901

2-16-34-02

10902

4. Comment was made that Bureau of Standards' test covered partition construction only (not ceiling) and the plaster used was "Neat" and two to one "Sanded" — neither of which plasters are generally used by the trade. Mr. Henning stated that his company had made ceiling tests in their own laboratories and found same to be satisfactory. A suggestion was made that Bureau of Standards should test perforated lath for ceilings and as well use the "usual" type of plaster available.

5. Comment was made that mechanical key lath (including perforated) had been used on the Pacific Coast for the past twenty years, such as "Key Hold", "Button Lath" and "Lock Lath".

6. Comment was made that present status not only on perforated but regular wallboard does not apply to West Coast producers and there is no license arrangement in effect.

In conclusion, Mr. Henning stated that he would discuss with his management this entire situation and advise later; however, there was no commitment to prevent their placing this material on the market around the first of April, as originally planned.

Mr. Van Hagan attended this conference and is present during the writing of this memo. We outline below our general comments and as well affirmative and negative sides of the questions.

GENERAL: — Perforated Lath will weigh less — thus having a freight advantage. Disadvantage is that Lath will require about 5% additional plaster. Marketing of this product would require additional lath stocks by dealers. They now carry 5/16"; 3/8" and Metallized, together with various widths and lengths.

IN FAVOR OF LICENSE:

(a) Would permit our use of present fire test data — (over one hour fire rating) thus avoiding expense of tests which would be required if we proceeded to manufacture our own design of perforated lath.

(b) Licensor would assume the responsibility for any litigation either in sustaining their patent or because of alleged infringement of Makowski ("Key Hold") owned by Paraffine.

(c) Avoid our own patent investigation and opinion expense.

(d) Secure production on our own machines more rapidly.

(e) Avoid sales resistance on non-tested product.

(f) Save development expense on manufacturing equipment, etc.

(g) Strengthening of license arrangement.

(h) Proposed increase in selling price to cover royalty and extra manufacturing cost.

10903 AGAINST LICENSE:

(a) In accepting, we recognize a very flimsy (in our opinion) patent.

(b) Payment of royalty for life of patent of 10¢ per M.

(c) Royalties now paid seem ample to cover questionable patent situation on the perforated feature.

(d) The general market trend is toward lower lath prices to meet wood lath competition, thus narrowing margin of profit. Therefore feel that the $1.00 per M or the 25¢ per M premium suggested would not necessarily be maintained for any definite length of time.

(e) In our opinion, any form of perforated lath (similar to that used on West Coast) would be acceptable for general home use.

CONCLUSION:

Mr. Van Hagan and I have discussed this matter and feel that any conference we might have with Mr. Henning (at this time) would be unwise and would tend to weaken the position generally taken by licensees at the conference. However, I will plan on seeing Mr. Henning on other matters next week, and if no statement has been issued by that time I will informally undertake to discuss this situation further and advise all concerned.

10904 *Government's Exhibit No. 314*

PERFORATED GYPSUM LATH
New York — Chicago

MR. A. WHITTEMORE, V. C.
WARREN HENLEY — M

3/25/36

cc—MR. C. O. BROWN, *V. P.* — New York
MR. H. H. VAN HAGAN — Buffalo

In further reference my memo. March 23, above subject: Have just discussed subject matter with Mr. Burley of National Gypsum Company and outline below their definite feeling in the matter:

1. Are of the opinion that patent is very weak.

2. To use Burley's expression, they feel U.S.G. have a lot of "crust" in asking a 10¢ per M royalty.

3. National's Patent Attorney has advised them to go ahead and manufacture a Perforated Lath with, however, a different size hole and, perhaps, staggered as to location.

4. Burley stated that U.S.G.'s alleged patent on Standard "X" had been thrown out. Further, that U.S.G. some time ago claimed to have a patent involving a certain type of edge (to prevent calcination in drying) and National proceeded to manufacture a similar type without, however, receiving any notice to "desist" from U.S.G.; in fact, received a phone message requesting National to change slightly the color of their edge in order that same would not conflict in appearance with U.S.G.'s type of edge.

5. Burley is definitely of the opinion that U.S.G. will not take an alleged infringement (involving Perforated Lath) into court, inasmuch as it would involve probably all of their patents and there might arise some serious question as to the validity of U.S.G.'s patent position and the question would arise as to whether or not same were used as a "vehicle" for price control purposes.

6. Burley felt that Certain-teed having stepped out and developed "Plastisized Plaster" and as well "Twin Mounted" Board were, in the opinion of the trade, an independent concern and not necessarily tied to U.S.G.'s apron strings and, therefore, it was his opinion that our accepting a license on Perforated Lath would put us back where we

started, i.e., dependent on U. S. G. for the development of new Gypsum products.

7. Mr. Burley stated that they had already ordered, some three or four weeks ago, a drilling machine to perforate lath, at a cost of some $2500., and same should be installed very shortly at their Clarence Center, New York plant. Mr. Burley stated that they would be willing to furnish us Perforated Lath, provided we would stand our share of the subsequent litigation, if any. In his opinion, no such litigation will develop and he further advised that if Certainteed, Atlantic and National stood firm on this proposition and refused to accept a license that a "pooling" of the three interests and a three-way division of the expense, both in development and necessary tests at Bureau of Standards, would be very helpful under the circumstances, and would, no doubt, bring about a change in U.S.G.'s position, 10905 and would also permit of accepting a license from U.S.G. without any additional royalty, other than what is now paid on our present Lath production.

I asked Mr. Burley to give Mr. Van Hagan the "high points" of our conversation. I also suggest that this memo. be retained in your personal files.

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Form 184 120M 1-36
PRINTED IN U.S.A.

Certain-teed Products Corporation

9590

-315-

FOR NEW YORK DATE 3/23/36 FROM CHICAGO OFFICE 315

ATTENTION OF MR. A. WHITEHOUSE SUBJECT PERFORATED GYPSUM LATH

ANSWERING YOURS 3/18 DICTATED BY WARREN HENLEY - M

cc-Mr. C. O. Brown, V. P. - New York
Mr. H. H. Van Hagan - Buffalo

315
12-21-43
Doc 8017

Exhibit No. A-264

Friday, March 20, discussed subject matter with Mr. Henning of Licensor most informally; however, Mr. Henning stated that he had discussed this situation with Mr. Avery after Licensee Conference, March 11, and it was their opinion that they would proceed to market subject material in accordance with the policy originally announced - February 19, inasmuch as they felt their patent position "good".

It is my personal opinion, from the informal discussion held with Mr. Henning, that they are "bluffing" but in either event it is my recommendation that we promptly develop a perforated Gypsum Lath incorporating 1 1/2" hole, same to be staggered along lines suggested by Mr. VanHagan when he was last in Chicago.

The nailing device which Mr. VanHagan showed us would be well to develop also but in my opinion it will not be as "acceptable" as the Perforated Lath, inasmuch as we would have this additional item to sell; same would have to be stocked at each of our plants and it would require an additional package to be furnished along with each shipment taking a different freight classification, etc. etc.

Mr. Cowan and I have discussed this matter and he concurs in the above recommendation.

*****

10906

10907 *Government's Exhibit No. 316*

CERTAIN-TEED PRODUCTS CORPORATION
1830 Bankers Building
105 West Adams Street
Chicago, Ill.

OCTOBER 26, 1938

MR. WILLIAM L. KEADY, *Vice President*
United States Gypsum Company
300 West Adams Street
Chicago.

Re: Perforated Gypsum Lath

DEAR MR. KEADY:

In accordance with our phone conversation, will you kindly advise in respect to the payment made by us of royalty during the period — May 2, 1938 to September 1, 1938, — this in the amount of $480.07.

You will recall that as licensor you discontinued the 25¢ per M premium as of May 2, 1938, and shortly thereafter Mr. Baumhogger requested the immediate discontinuance of royalty payments as of the date above mentioned.

You will also recall that the writer discussed this situation with you in respect to the elimination of premium, particularly in view of the definite verbal commitment on the part of Mr. Henning that licensor would undertake to maintain a 25¢ per M differential for perforated over plain.

You are, of course, also familiar with the fact that competitive companies have not paid from the beginning and are not now paying the 10¢ per M royalty, and we, therefore, request payment for the amount above mentioned.

Hoping you will give this mattter your favorable consideration and letting us hear from you by early mail, we remain,

Sincerely yours,

WARREN HENLEY,
Merchandise Manager,
Gypsum Division.

WH:k

10908 *Government's Exhibit No. 317*

CERTAIN-TEED PRODUCTS CORPORATION
100 East 42nd Street
New York

MAY FIFTEENTH, 1929

MR. S. L. AVERY, *President,*
The United States Gypsum Company,
300 West Adams Street,
Chicago, Ill.

DEAR MR. AVERY:

As we have assumed that we will take out a license for making closed edge board under certain conditions, which we have discussed, and as we are informed that a new license contract has been drawn, I wish you would let us have, as early as may be convenient, a copy of the old license contract and also a copy of the new so we may prepare ourselves for prompt action whenever the matter may be ready for further consideration.

With regards, I am

Yours very truly,

GEO. M. BROWN,
President.

GMB:LK

10909 *Government's Exhibit No. 318*

5-18-29

MR. GEO. M. BROWN
Certain-teed Products Company
100 E. 42nd Street
New York City

Mr Kling has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license.

S. L. AVERY

10910 *Government's Exhibit No. 321*

U. S. GYPSUM SUIT
New York
Office

MR. GEORGE M. BROWN, *Pres.*
ROBT. M. NELSON, *Treas.—S*

FEB. 23, 1928.

cc—MR. ADKINS, of Cravath, Henderson.

MR. MITCHELL, of Kenefick, Mitchell, Cook & Bass.

At about 1:45 P.M. today the following item appears on the news ticker:

"Beaver Board Merger.

Chicago — U. S. Gypsum has filed suit in the U.S. District Court here for an injunction to restrain The Beaver Board Companies and Beaver Products Company, Inc. from entering into a consolidation with Certain-teed Products Corporation, claiming that under merger arrangements it would be prevented from collecting royalties on Beaver Wallboard which it agreed to accept in 1926 in settlement of a $4,000,000 claim for infringement of Wallboard Patents owned by U. S. Gypsum Company."

10911 *Government's Exhibit No. 322*

MARCH 2, 1928.

MEMORANDUM REGARDING THE POSSIBILITY OF MAKING PLASTER BOARD UNDER THE ROYALTY BASIS.

ROBT. M. NELSON, *Treas.—S.*

Answering yours of March 1st.

Without going into the details of whether we can make as much money as, or more than, Beaver Board on Open Edge Gypsum Board, I should like to comment on some of the broader aspects of this situation.

When the plan of taking over The Beaver Board Companies came up and I called your attention to the complicated situation in that company, the strongest argument advanced by you for taking over these properties was the

fact that if we made our company a larger and stronger concern, it would put us in a better position to obtain peace in all divisions of our business, and that if we stood still and remained in a "weakened" position tradewise, we might suffer serious consequences, if the price situation should become bad on all sides. Discussions were had at the time in which the sentiment and the policy seemed to be one of conciliation and a desire for peace in all divisions of our business, and enlargement of our company would be a means towards that end, according to the theory discussed at that time.

It seems to me then, and it seems to me now, that size, while important, would not of itself bring about the desired peace, but that in order to attain this goal it would be necessary for us to do a certain amount of giving as well as taking. I feel, therefore, that in the matter of the U. S. Gypsum suit, we should not too readily be willing to enter into a long and costly war, when at the same time we are engaged in battle in the floor covering division, and when the price situation in the roofing division is in such a demoralized state as it is. I believe that in order to preserve outstanding and position we should do a little more than average giving to obtain peace in the gypsum division of our business, and rather than go into a war and a long, drawn-out suit, I would strongly favor taking over the Beaver Board License Agreement as it is, making an effort, however, to limit the application of the License Agreement to the Beaver Board plants. I think it is a far more serious situation to go into such a fight right after the consummation of a deal of this kind, and find it necessary to reduce or omit dividends on Common Stock, than if this condition were brought about in the company as it now stands. I think it is a poor policy, furthermore, to enter into a three-cornered fight and have to wage war on three enemies at the same time, and think that we should have peace in at least one of our divisions while we are making war on the others.

We would pay royalties at the higher rate only up to August 1929, and from that point on the 1½% isn't large enough to make any difference one way or the other to us. The cost of a legal and trade war undoubtedly would be far in excess of the royalties we would pay.

10912 *Government's Exhibit No. 323*

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION, ss

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
Equity 7907

UNITED STATES GYPSUM COMPANY,
a corporation, Complainant

v.

THE BEAVER PRODUCTS COMPANY, INC.,
THE BEAVER BOARD COMPANIES, and
CERTAIN-TEED PRODUCTS CORPORATION, Defendants

BILL OF COMPLAINT

To the Honorable Judges of Said Court:

The United States Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, brings this, its bill of complaint, against The Beaver Products Company, Inc., The Beaver Board Companies, and the Certain-teed Products Corporation, and respectfully shows unto your Honors as follows:

1. That the United States Gypsum Company is a corporation duly incorporated and existing under the laws of the State of Illinois, with its principal office and place of business in Chicago, Illinois, and a citizen and resident of the State of Illinois; that The Beaver Products Company, Inc. is a corporation duly incorporated and existing under the laws of the State of New York, with its principal office and place of business in the Town of Tonawanda, Erie County, in the State of New York, and a citizen and resident of the State of New York and of the Western District of New York; that The Beaver Board Companies is
10913 a corporation duly incorporated and existing under the laws of the State of Delaware, with its principal office and place of business in the City of Wilmington in the State of Delaware, and a citizen and resident of the State of Delaware; that Certain-teed Products Corporation is a corporation duly incorporated and existing under the

laws of the State of Maryland, with its principal office and place of business in Baltimore, Maryland, and a citizen and resident of the State of Maryland; that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

2. That on or about the 26th day of June, 1911, Clarence W. Utzman was the original and sole inventor and discoverer of a new and useful improved method of manufacturing plaster board as well as the product of said method, not known or used by others in this country or elsewhere before his invention or discovery thereof and not theretofore patented; that so being the original and sole inventor thereof the said Clarence W. Utzman made due application according to law on, to-wit: the 26th day of June, 1911, for Letters Patent of the United States therefor, and thereafter by written instrument duly filed in the United States Patent Office, all right, title and interest in and to said invention and in any Letters Patent granted therefor was duly assigned by the said Clarence W. Utzman to the United States Gypsum Company, a New Jersey corporation, with its principal office and place of business in the City of Chicago, State of Illinois; that thereafter and on to-wit: the 11th day of June, 1912, upon said application and in conformity to law and in accordance with said assignment, Letters Patent of the United States of America dated June 11, 1912, numbered 1,029,328, were duly granted, issued and delivered to the said United States Gypsum Company, whereby there was granted and secured to it, its successors and assigns, for a term of seventeen years from and after the 11th day of June, 1912 the exclusive right to
10914 employ said method in the manufacture of plaster board throughout the United States and territories thereof and to practice the said invention and discovery aforesaid, a description whereof was given in the schedule annexed to said Letters Patent and made a part of the same, as by reference thereto or to a duly certified copy thereof here in court to be produced and shown unto your Honors will more fully and at large appear.

3. That thereafter, upon the direction of the Commissioner of Patents, the plaster board, the product of said method, was made the subject matter of a divisional application for Letters Patent, and thereafter was in the same manner, by written instrument duly filed in the Patent Office, duly assigned by the said Clarence W. Utzman to the said United States Gypsum Company as aforesaid; that

thereafter, and on to-wit: August 6, 1912, upon said divisional application, in conformity to law and in accordance with said assignment, Letters Patent of the United States of America, dated August 6, 1912, numbered 1,034,746, were duly granted, issued and delivered to the said United States Gypsum Company, whereby there was granted and secured to it, its successors and assigns, for a term of seventeen years from and after the 6th day of August, 1912, the exclusive right to make, use and vend to others, to be used throughout the United States and territories thereof, the invention and discovery of said plaster board as aforesaid, a description whereof was given in the schedule annexed to said Letters Patent and made a part of the same, as by reference thereto or to a duly certified copy thereof here in court to be produced and shown unto your Honors will more fully and at large appear.

4. That thereafter, and on to-wit: the 26th day of August, 1920, the said United States Gypsum Company, a corporation organized and existing under the laws of the State of New Jersey, duly changed its name under said laws to the Avery Gypsum Company; that by mesne
10915 assignment from said Avery Gypsum Company to the United States Gypsum Company, an Illinois corporation, all right, title and interest in and to said Letters Patent Number 1,029,328, granted June 11, 1912, and Number 1,034,746, granted August 6, 1912 including all right to recovery for past infringement and all rights of whatever name and nature therein and thereunder, was duly transferred to your orator, the United States Gypsum Company, an Illinois corporation having its office and principal place of business in the City of Chicago in said State of Illinois, whereby the said United States Gypsum Company acquired all right, title and interest in and to said Letters Patent and in and to all matters of interest in the suit hereinafter mentioned, including the right to conduct the same and to recover for past infringement, as by said assignment, or a duly authenticated copy thereof, here in court to be produced will more fully and at large appear.

5. That the said improvement and invention as aforesaid was and is of great utility and value, the novelty, utility and value of which had been greatly acquiesced in by the public, and that the said United States Gypsum Company, a New Jersey corporation, and your orator, the United States Gypsum Company, an Illinois corporation,

have manufactured large quantities of plaster board according to said method and have extensively introduced said improved plaster board into public use at great expense and sold large quantities of the same, and that it has been favorably received by the public.

6. That the Bestwall Mfg. Company, a corporation organized and existing under the laws of the State of Delaware, well knowing the premises and the rights of the said United States Gypsum Company, a New Jersey corporation, under said Letters Patent, with intent to violate said rights and deprive the said United States Gypsum Company, a New Jersey corporation, of the profits and advantages thereof since the granting of the said Letters
10916 Patent and since June 11, 1912 and since August 6, 1912 and within six years prior to the commencement of the suit hereinafter more specifically mentioned, without the consent of the said United States Gypsum Company, a New Jersey corporation, at Chicago, Illinois and elsewhere throughout the United States, manufactured and sold plaster board embodying the improvements secured exclusively by the said Letters Patent 1,029,328 and 1,034,746, and continued its unauthorized manufacture and sale thereof at Chicago, Illinois and elsewhere as aforesaid, in defiance of the rights of the said United States Gypsum Company, a New Jersey corporation, as aforesaid, and that the said plaster board so manufactured and so sold by the said Bestwall Mfg. Company without any license or consent as aforesaid infringed the claims of the said Letters Patent Number 1,029,328 and Number 1,034,746, and that said infringement caused the said United States Gypsum Company, a New Jersey corporation, great damage, loss and injury; that the said Bestwall Mfg. Company made and realized large profits and advantages from its infringement of the said patents of an amount, as your orator is informed and believes and upon such information and belief so states the fact to be, in excess of One Million Dollars ($1,000,000); that notice was given to the said Bestwall Mfg. Company and to the public of the existence of said Letters Patent by marking the plaster board embodying said patented improvement since the date said Letters Patent were issued with the word "PATENTED," together with the date said Letters Patent were issued, and in addition thereto the said United States Gypsum Company, a New Jersey corporation, caused written notice to be given the said Bestwall Mfg. Company of the existence of said

Letters Patent, ownership thereof by the said United States Gypsum Company, a New Jersey corporation, and the defendant's infringement of the same, and requested
10917 the said Bestwall Mfg. Company to desist and refrain from said infringement, but that the said Bestwall Mfg. Company disregarded said notice and refused to desist from said infringement and continued to manufacture and sell in said districts and elsewhere within the United States said infringing plaster board.

7. That the said United States Gypsum Company, a New Jersey corporation, prior to the assignment of the said Letters Patent to your orator, the United States Gypsum Company, an Illinois corporation, and on to-wit: the 18th day of July, 1917, filed its amended bill of complaint in the United States District Court, Northern District of Illinois, Eastern Division, on the equity side thereof, against the said Bestwall Mfg. Company, a corporation, as defendant in a suit then pending in said United States District Court, entitled United States Gypsum Company, a corporation, complainant, v. Bestwall Mfg. Company, a corporation, defendant, in equity number 779; that in and by said amended bill of complaint all of the facts as aforesaid with respect to the making of the said invention and discovery, the application for Letters Patent thereupon, the assignment thereof to the United States Gypsum Company, a New Jersey corporation, the issuance of the said Letters Patent to the said United States Gypsum Company, and the infringement thereof by the said Bestwall Mfg. Company were fully set forth and alleged; that it was prayed in and by said amended bill of complaint that the defendant therein named should answer all and singular the allegations contained in said amended bill of complaint and should render a just and full account of all gains, profits and savings unlawfully realized by the said defendant and should be compelled by the decree of said court to pay such gains, profits and savings to complainant in said suit and pay the costs thereof and desist from further infringing complainant's rights in the premises; that it was
10918 further prayed in and by said amended bill of complaint that the court therein should grant unto complainant therein named a writ or writs of injunction perpetually restraining and enjoining the said Bestwall Mfg. Company from directly or indirectly manufacturing, using or selling any plaster board embodying the invention or discovery secured to complainant therein by said Letters

Patent Number 1,029,328 and 1,034,746, and specified in the claims thereof; that it was further prayed in and by said amended bill of complaint that upon rendering final decree therein there should be assessed, in addition to the profits to be accounted for by the said defendant therein, the damages complainant therein had sustained by reason of such infringement, and that the court should increase the actual damages so assessed to a sum equal to three times the amount of said assessment under the circumstances of the unlawful, illegal and unjust infringement by the said defendant, and that a provisional or preliminary injunction should be granted and that such other and further relief should be given as the nature of the case required and to the court seemed meet; that thereafter an answer was filed to the said amended bill of complaint by the said defendant in said suit and such proceedings were had therein that on to-wit: the 11th day of August, 1919 a decree was entered in said cause, in which said decree it was adjudged that the said defendant, Bestwall Mfg. Company, had infringed upon said Letters Patent and upon the exclusive rights of the complainant in said suit under the same; that it was further adjudged in said decree that the said complainant recover of and from the said defendant the profits, gains and advantages which the said defendant, directly or indirectly, had derived by reason of said infringement and that complainant recover of said defendant any and all damages which complainant had sustained since the
10919 date of the issue of the said two Letters Patent or should sustain by reason of said infringement in the future; that in and by said decree said cause was referred to a Master in Chancery to take and state the account of said gains, profits and advantages and to assess said damages, and it was directed thereby that a perpetual injunction issue therein enjoining the said Bestwall Mfg. Company from directly or indirectly making or causing to be made, using or causing to be used, or vending to others to be used, in any manner any plaster board containing, embodying or employing the said invention and improvements granted by said Letters Patent Number 1,034,746 and said Letters Patent Number 1,029,328, and that complainant recover of the defendant its costs and disbursements in said suit; that thereafter and on to-wit: the 4th day of September, 1919, the defendant in said suit, the Bestwall Mfg. Company, prayed and was allowed an appeal from the said decree to the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1919, which said appeal was duly perfected by the giving of bond and the filing of a

transcript of record of said cause in the United States Circuit Court of Appeals in and for the said Seventh Circuit and entitled Bestwall Mfg. Company, Appellant, v. United States Gypsum Company, Appellee, Number 2764, in said court; that thereafter such proceedings were had in the said United States Circuit Court of Appeals for said Seventh Circuit upon said appeal that after a hearing in said court said decree was, by said Court of Appeals, in all things affirmed and the mandate of said Court of Appeals so ordering was filed in the said District Court of the United States on to-wit: the 7th day of February, 1921.

8. That the invention and discovery so made by the said Utzman consisted of protecting the edge of an ordinary sheet of plaster board by extending the paper covering one side of the board and folding the same over the edge and using the plastic material thus enclosed as an adhe-
10920 sive material to seal the folded edge; that prior to such discovery the edges of plaster board were left open so that, in handling, the edges were easily chipped or broken, and it was held by the said Circuit Court of Appeals that the covering for the edges of the gypsum was the heart of the discovery; that notwithstanding the character of the said invention, the said Bestwall Mfg. Company and its successor, The Beaver Products Company, Inc., subsequent to the rendition of said decree in the District Court of the United States in said patent suit, commenced the manufacture and sale of a modified form of plaster board by covering the edge of the board in the same manner that the same was covered in the board held to be an infringement of the said patents, except only that the folded edge was not carried under or over the other side of the board, but had for its purpose and did effect a protected edge by folding the paper over the edge; that such modified form was a mere makeshift on the part of the said Bestwall Mfg. Company and its successor, the said The Beaver Products Company, Inc., to avoid the effect of the said decree, and plainly constituted an infringement of the said patents; that although the said defendant, the Bestwall Mfg. Company, was then notified by the said United States Gypsum Company, a New Jersey corporation, to cease the manufacture of such modified form of infringement, nevertheless, the said Bestwall Mfg. Company, and subsequently its successor, the said The Beaver Products Company, Inc., continued to use said slightly modified form and to further infringe the said patents by the manufacture and sale

thereof, in utter disregard of the rights of the said United States Gypsum Company in the premises.

9. That thereafter, and on to-wit: the 13th day of June, 1921, in said cause in equity Number 779, your orator, the United States Gypsum Company, an Illinois corporation, filed a supplemental bill in said cause as the successor and assignee of the plaintiff in said original cause
10921 as aforesaid; that it was alleged in said supplemental bill that after the filing of the said amended bill of complaint, the said defendant, the Bestwall Mfg. Company, began to manufacture, at its factory at or near the City of Grand Rapids, Michigan, and to sell at Chicago, within the aforesaid Eastern Division of the Northern District of Illinois, and elsewhere throughout the United States, a modified form of its aforesaid plaster board and by a method in the manufacture of the same slightly modified from the method and the plaster board which had been adjudged to infringe said Letters Patent by the decree of said court, and that said modified method and modified product so manufactured and sold by the said defendant was not substantially different from its aforesaid method and product which was decreed to be an infringement of said Letters Patent, and embodied the inventions described and claimed in said Letters Patent and was an infringement thereof; that it was further alleged in said supplemental bill of complaint that the said defendant therein had derived and received, and was still deriving and receiving, great gains and profits from its said modified method of manufacture and the sale of said modified form of plaster board, and that by reason thereof your orator had suffered and was suffering great loss, damage and injury; that it was further alleged in said supplemental bill of complaint that after the filing of the said amended bill and after the entry of the said decree as aforesaid, your orator's predecessor, the United States Gypsum Company, a New Jersey corporation, had changed its name to the Avery Gypsum Company, and that, by mesne assignment from said Avery Gypsum Company to your orator, the United States Gypsum Company, an Illinois corporation, all right, title and interest in and to said Letters Patent Number 1,029,328, and 1,034,746, including all rights to recover for past infringement and all rights of whatever name and nature therein and thereun-
10922 der, were duly transferred and assigned to your orator, the United States Gypsum Company, an

Illinois corporation, whereby the said United States Gypsum Company, an Illinois corporation, acquired all the right, title and interest in and to said Letters Patent and in and to all matters of interest in said suit, including the right to conduct the same and to recover for past infringement; that it was prayed in and by said supplemental bill of complaint that your orator, the said United States Gypsum Company, an Illinois corporation, be substituted as the plaintiff in said cause, with all the right in relation thereto formerly enjoyed by its said predecessor and that it have the benefit of the pleadings, evidence and proceedings theretofore had in said cause; that it was further prayed in and by said supplemental bill of complaint that the said modified method and modified produet of the said defendant should be decreed to infringe said Letters Patent and be subject to the provisions of said decree, and that a supplemental writ of injunction should issue enjoining and restraining the said defendant, the Bestwall Mfg. Company, from further employing the said method and from further manufacturing the modified form of said plaster board and from the use or sale of said modified product; that an answer was filed by said Bestwall Mfg. Company to the said supplemental bill denying all of the allegations thereof and averring that it began the manufacture of the plaster board and the use of the process complained of therein long prior to the aforesaid decree referred to in the said supplemental bill of complaint and prior to the hearing upon which said decree resulted, and that complainant therein had full knowledge of the use by said defendant of its new and different process and of the manufacture of its new and different plaster board, and made no claim then or thereafter, save by said supplemental bill of complaint, that defendant was thereby infringing any alleged rights of complainant or its successor 10923 in business; that it was further averred in said answer that the plaster board complained of was entirely different from that held to infringe by the aforesaid decree and that the process or method by which said plaster board was manufactured was entirely different from the process held to infringe by said decree, said process being a different invention covered by Letters Patent Number 1,348,387 granted on August 3, 1920 to M. K. Armstrong, assignor, to said defendant; that it was further averred in said answer that the said Letters Patent Number 1,029,328 and 1,034,746 and the claims thereof were so limited by prior art that neither the plaster board or the

process or method made and used by the defendant infringed said patents or either of them.

10. That the said Bestwall Mfg. Company, from the time it commenced the manufacture and sale of said modified form of plaster board as aforesaid and so long as it continued in business, continued to manufacture the same at its factory at or near the City of Grand Rapids, Michigan, and to sell the same at Chicago within said Eastern Division of the Northern District of Illinois, and elsewhere throughout the United States; that said modified form was not substantially different from its aforesaid method and product which was decreed to be an infringement of said Letters Patent and embodied the invention described and claimed in said Letters Patent and was an infringement thereof; that on or about June, 1920, the capital stock of the said Bestwall Mfg. Company was acquired by the said defendant, The Beaver Board Companies, and since that time, up to the reorganization hereinafter mentioned, the said Bestwall Mfg. Company was a subsidiary, with other companies, of the said The Beaver Board Companies and was controlled and directed by the said The Beaver Board Companies, the latter being then and ever since having a regular and established place of business
10924 in the City of Chicago in said Northern District of Illinois, where acting in conjunction with its said subsidiary, the Bestwall Mfg. Company, it handled the sale of the said modified form of plaster board made by the said Bestwall Mfg. Company according to said modified method, in infringement of said Letters Patent Number 1,034,746 and 1,029,328; that after the filing of the aforesaid supplemental bill of complaint and the answer thereto, and while said cause was still pending, and on or about the 8th day of June, 1922, the said Bestwall Mfg. Company, the American Cement Plaster Company and other subsidiaries of the said The Beaver Board Companies, duly conveyed and assigned and set over unto the defendant, The Beaver Products Company, Inc., all their assets and properties of every kind and description, in consideration of which The Beaver Products Company, Inc. assumed all of the then existing debts, obligations and liabilities of every kind of the said Bestwall Mfg. Company, the American Cement Plaster Company and said other subsidiaries; that the said defendant, The Beaver Products Company, Inc., thereupon became, and is now, vested with the title to and is the true and lawful owner of the business and of

all of the assets theretofore belonging to the said Bestwall Mfg. Company and said subsidiaries, and at the time of the acquisition of the same had, and now has, full knowledge and notice of said decree and of all of the proceedings theretofore had in said cause, and thereupon became liable for all of the debts and obligations of every kind theretofore incurred by its predecessors, the said Bestwall Mfg. Company, including all liabilities and obligations imposed by the force of said decree; that the said defendant, The Beaver Products Company, Inc., had at all times since the 8th day of June, 1922 and up to the 29th day of July, 1926, the date of the License agreement hereinafter more specifically mentioned, continued the opera-
10925 tions of the infringing business theretofore conducted by the said Bestwall Mfg. Company and to manufacture at the plants of the Bestwall Mfg. Company and to sell at Chicago, within the Eastern Division of the Northern District of Illinois, and also at its plants in Akron, Erie County, New York, in the Western District of New York, and elsewhere throughout the United States, the same modified form of the aforesaid plaster board, and to manufacture such plaster board by the same slightly modified method of manufacture as it had been manufactured and sold by the defendant, Bestwall Mfg. Company, previous to the transfer of its said business to the said The Beaver Products Company, Inc. as aforesaid, and as set forth in said supplemental bill of complaint filed in said cause Equity Number 779; that under the said plan of reorganization, pursuant to which all of the assets of the subsidiaries of the defendant, The Beaver Board Companies, including the said Bestwall Mfg. Company, were acquired by the defendant, The Beaver Products Company, Inc., the said The Beaver Board Companies has, since the 8th day of June, 1922, been the holding company of the defendant, The Beaver Products Company, Inc., owning the entire capital stock of said The Beaver Products Company, Inc., and that the said The Beaver Board Companies, acting in conjunction with the Bestwall Mfg. Company and the said defendant, The Beaver Products Company, Inc., and as the sales agency of said companies, between the said 8th day of June, 1922 and the 29th day of July, 1926, the date of said license agreement, sold in the City of Chicago, in the Northern District of Illinois, and in the City of Akron, Erie County, New York, and elsewhere

throughout the United States, such modified, infringing form of plaster board made by the said Bestwall Mfg. Company and the said The Beaver Products Company, Inc. as aforesaid, according to the said modified, infringing method; that the said defendant, The Beaver
10926 Board Companies, derived and received great gains and profits from the said sale of the plaster board heretofore adjuged by said court to be an infringement of the aforesaid patents, and that the said defendants, The Beaver Board Companies and The Beaver Products Company, Inc., derived and received great gains and profits from the said modified method of manufacture and sale of said modified form of plaster board by them respectively, and that by reason of such manufacture and sale thereof your orator suffered great loss, damage and injury.

11. That subsequent to the filing of said supplemental bill as aforesaid, and on to-wit: the 30th day of June, A.D. 1922, your orator filed in said cause, Equity Number 779, a second supplemental bill setting forth the acquisition of the capital stock of the said Bestwall Mfg. Company by the said The Beaver Board Companies, and the acquisition of all of the assets and plants of the said Bestwall Mfg. Company by the said The Beaver Products Company, Inc. and of the manufacture and sale by the said The Beaver Board Companies and the said The Beaver Products Company, Inc. of the said infringing product, all as more specifically set forth in the next preceding paragraph hereof; that it was prayed in and by said second supplemental bill that the said The Beaver Products Company, Inc. and the said The Beaver Board Companies be made additional parties defendant in said cause, and that complainant therein have the full benefit of the pleadings, evidence and proceedings theretofore had in said cause against the said The Beaver Products Company, Inc. and the said The Beaver Board Companies; that it was further prayed in and by said second supplemental bill that the aforesaid modified method and modified product manufactured and sold by the said defendants, The Beaver Products Company, Inc. and The Beaver Board Companies, be decreed to infringe said Letters Patent and to be within the decree for an injunction and an accounting heretofore entered in said cause, and that a supplemental writ of injunction be granted against the
10927 said The Beaver Products Company, Inc. and the said The Beaver Board Companies, enjoining and

restraining them from further employing the said modified method and from further manufacturing and selling the said modified form of plaster board or employing any similar method in any manner infringing the said Letters Patent Number 1,034,746 and 1,029,328; that it was further prayed in and by said second supplemental bill that the said defendants, The Beaver Products Company, Inc. and the said The Beaver Board Companies, be directed to account to your orator, the said United States Gypsum Company, an Illinois corporation, for the profits and damages resulting from the manufacture and sale by them of the products adjudged by said decree to be an infringement of the said patents and from the subsequent manufacture and sale by them of the aforesaid modified form of said plaster board; that thereafter an answer was filed by the original defendant in said cause, Equity Number 779, to the said second supplemental bill of complaint, and the said defendants, The Beaver Products Company, Inc. and The Beaver Board Companies appeared therein and also filed answers to said second supplemental bill of complaint.

12. That thereafter such proceedings were had in said cause, Equity Number 779, that a decree was entered upon said supplemental bill of complaint and said second supplemental bill of complaint on, to-wit: the 17th day of August, 1925; that it was adjudged in and by said decree that the said Letters Patent Numbers 1,029,328 and 1,034,746 were good and valid as to each and all of the claims thereof; that the United States Gypsum Company, an Illinois corporation, was the owner of said two Letters Patent and of all rights of recovery for past infringement thereof and as the successor to the said United States Gypsum Company, a New Jersey corporation, was substituted for the said original plaintiff in said cause and entitled to all of the benefits, advantages and rights of recov-
10928 ery with respect to said Letters Patent as fully as though it had been the original plaintiff in said cause; that it was further adjudged in and by said decree that the defendants in said cause, Bestwall Mfg. Company, American Cement Plaster Company, The Beaver Board Companies and The Beaver Products Company, Inc. had infringed upon said patents Numbers 1,029,328 and 1,034,746 and upon each and every of the claims thereof, and upon the exclusive rights of the said United States Gypsum Company, an Illinois corporation, under said Letters Patent by manufacturing, using and selling the said so-

called modified product and employing the so-called modified method charged to infringe said patents; that it was further adjudged thereby, that complainant, United States Gypsum Company, an Illinois corporation, substituted for said original complainant as aforesaid, recover from the said defendants Bestwall Mfg. Company, American Cement Plaster Company, The Beaver Board Companies and The Beaver Products Company, Inc. all profits, gains and advantages which said defendants respectively had derived, received or made by reason of said infringement, and all damages which the complainant in said cause had sustained or should sustain by reason of said infringement; that it was further adjudged in said decree that the said cause be referred to a Master in Chancery for an accounting of profits and damages due to the infringements of said patents as aforesaid, and that a perpetual injunction issue enjoining and restraining the said Bestwall Mfg. Company, American Cement Plaster Company, The Beaver Board Companies and The Beaver Products Company, Inc. from directly or indirectly making or causing to be made, using or causing to be used, or vending to others to be sold or used, the said modified form of board or any other form of board substantially the same, or causing to be used said modified method of making said modified form of board or the method employed with the mechanism described in said Armstrong patent or any method
10929 the same as, or substantially the same as, such method or form, or from otherwise infringing the said patents Numbers 1,034,746 and 1,029,328.

13. That an appeal was prayed from said decree to the United States Circuit Court of Appeals for the Seventh Circuit by the defendants in said cause on or about the 24th day of August, 1925, which said appeal was perfected by filing a transcript of the record in said cause in the said United States Circuit Court of Appeals to the October term, 1925 thereof; that on or about the 4th day of November, 1925, the said United States Circuit Court of Appeals granted a stay of the said accounting proceedings and of the issuance of the said injunction so ordered by the said District Court upon the filing by the said defendants of a bond in the penal sum of $1,000,000, which said bond was duly filed and said cause was then pending on appeal in the said United States Circuit Court of Appeals for the Seventh Circuit at the time of the events hereinafter more specifically set forth.

14. That thereafter and until the execution of the license agreement hereinafter mentioned, the said The Beaver Products Company, Inc. and the said The Beaver Board Companies, by themselves and through their said subsidiaries, without the consent of your orator, continued to manufacture and sell said modified form of plaster board at Chicago, Illinois and elsewhere throughout the United States in defiance of the rights of your orator, which said plaster board so manufactured and sold by the said The Beaver Products Company, Inc. and the said The Beaver Board Companies infringed the claims of said Letters Patent Number 1,029,328 and 1,034,746, and said infringement caused your orator great damage, loss and injury; that at the time of the execution of said contract and license agreement the said The Beaver Prod-
10930 ucts Company, Inc. and its said subsidiaries had manufactured and sold a large quantity of said infringing plaster board at Chicago, Illinois aforesaid, and in and from said plants at Akron, New York, Grand Rapids, Michigan, Fort Dodge, Iowa, Blue Rapids, Kansas, and elsewhere throughout the United States, consisting of upwards of 553,000,000 feet thereof at a profit of upwards of $4,000,000; that prior to the date of said license agreement and at the time of the organization of the said The Beaver Products Company, Inc. as hereinabove set forth, the said The Beaver Products Company, Inc. had assumed, in writing, all of the liabilities and obligations of the said Bestwall Mfg. Company, the said American Cement Plaster Company and the said other subsidiaries for or on account of the infringement of the said patents, and your orator had theretofore and on or about August 26, 1920 received from its said predecessor, the United States Gypsum Company, a New Jersey corporation, a full assignment of its said claims against the said The Beaver Products Company, Inc., the said Bestwall Mfg. Company and the said American Cement Plaster Company and said other subsidiaries of the said The Beaver Products Company, Inc. and had succeeded to all of the rights of the said United States Gypsum Company, a New Jersey corporation, against the said The Beaver Products Company, Inc. and said other companies, that at the time of the execution of said contract and license agreement, the said The Beaver Products Company, Inc. had become liable to your orator and was indebted to it in said sum of over $4,000,000 for profits, gains and advantages derived from the manufacture and sale of said infringing plaster board and for

damages sustained by your orator by reason of such wrongful infringement of its said patents.

15. That on or about the 29th day of July, 1926, the said The Beaver Products Company, Inc. requested your orator to grant to it a license to manufacture and
10931 sell plaster board under said patents Numbers 1,034,746 and 1,029,328 and to enter into an agreement with it to settle said claim which your orator then had against it for past infringements of said patents; that the said The Beaver Products Company, Inc. offered to pay to your orator, in settlement and discharge of its said claim and for a license to manufacture and sell under said Letters Patent, the sum of $250,000 in cash and an amount equivalent to five per cent (5%) of the selling price of all plaster board or gypsum wallboard of every kind manufactured and sold by it until the date of the expiration of said Patent Number 1,034,746 on August 6, 1929 and one and one-half per cent (1½%) of such selling price until the expiration of a certain other patent, Number 1,330,413, on February 10, 1937, owned by your orator governing the method of manufacture of plaster board; that at the time said offer was made by the said The Beaver Products Company, Inc. and at the time of the execution of the agreements hereinafter mentioned, it had plaster board plants for the manufacture of plaster board and gypsum wallboard located at Akron, New York, Grand Rapids, Michigan, Fort Dodge, Iowa, and Blue Rapids, Kansas, and it manufactured and sold large quantities of such plaster board, to-wit: upwards of 90,000,000 feet thereof a year; and that it then and there represented to your orator that such payments upon the sale of said plaster board until August 6, 1929 would amount to over $10,000 a month, and thereafter and until February 10, 1937, to over $3,000 a month without respect to any increase which there might be in the business of the said The Beaver Products Company, Inc.; that it was further represented to your orator by the said The Beaver Products Company, Inc. that it was in sound financial condition and capable of continuing in its said manufacturing business throughout the said term, and that the normal increase in its said business would net to your orator sums far in excess of the amounts hereinabove stated, and that it would continue the
10932 manufacture and sale of said plaster board and gypsum wallboard at its said plants throughout said period; that your orator then relying upon the representa-

tions so made by the said The Beaver Products Company, Inc. and induced by the same, agreed to grant the said license and to settle its said claim in payment to it by the said The Beaver Products Company, Inc. of $250,000 in cash and an amount equivalent to five per cent (5%) of the selling price of all plaster board or gypsum wallboard manufactured by the said The Beaver Products Company, Inc. until said date, August 6, 1929, and of one and one-half per cent (1½%) of such selling price until said date, February 10, 1937, throughout the full term between the date of the granting of the said license and the dates of the expiration of the said two patents on August 6, 1929 and February 10, 1937 respectively, and upon the conveyance by the said The Beaver Products Company, Inc., to your orator of all Letters Patent and Applications for Letters Patent owned by the said The Beaver Products Company, Inc., dealing with the subject matter of plaster board or the process or method of manufacturing plaster board, to all of which the said The Beaver Products Company, Inc. then and there agreed.

16. That thereupon and on, to-wit: the 29th day of July, 1926, the agreement so made between your orator and the said The Beaver Products Company, Inc. was reduced to writing and signed by them, the original of which said agreement your orator is ready to produce in court upon the hearing of this cause; that it was provided in said agreement of July 29, 1926 that your orator, the United States Gypsum Company, was the owner of the entire right, title and interest in and to and under said Letters Patent Number 1,029,328, dated June 11, 1912, for the method of manufacturing plaster board, and Number 1,034,746, dated August 6, 1912, for plaster board, 10933 and that it was also the owner of the entire right, title and interest in and to and under certain other Letters Patent and Applications for Letters Patent, a list of which was attached to said contract and marked Exhibit A and made a part thereof, among them being said Letters Patent Number 1,330,413 expiring on February 10, 1937; that it was further provided in said contract that it had been adjudged in the United States District Court for the Northern District of Illinois and the United States Circuit Court of Appeals for the Seventh Circuit in said causes hereinabove set forth, that the said Letters Patent, commonly known as the Utzman Patents Numbers 1,029,328 and 1,034,746, had been infringed by the method of manufacture and by the modified form of plaster board then

being manufactured and sold by the said The Beaver Products Company, Inc.; that it was admitted in and by said agreement that your orator had a substantial claim against the said The Beaver Products Company, Inc. because and on account of said infringement, which was the same claim as heretofore set forth which your orator then had against said The Beaver Products Company, Inc. for the infringement of its said patents; that it was further provided in said agreement that the parties thereto had agreed to settle said claim by the payment to your orator of the sum of $250,000 in cash and an amount equivalent to five per cent (5%) of the selling price of the said The Beaver Products Company, Inc. of all plaster board or gypsum wallboard manufactured and sold by it until August 6, 1929 and one and one-half per cent (1½%) of such selling price from August 6, 1929 to February 10, 1937, and the assignment to your orator of certain Letters Patent and Applications for Letters Patent owned by the said The Beaver Products Company, Inc. and more specifically set forth in Exhibit B thereto attached and made a part thereof.

17. That it was further provided in said agreement of July 29, 1926, that in consideration of the payment by
The Beaver Products Company, Inc. to your orator
10934 of the sum of $250,000 and the assignment or transfer by it to your orator of said Letters Patent described in said Exhibit B, and in consideration of the payment by the said The Beaver Products Company, Inc. to your orator of the amounts consisting of five per cent (5%) of the selling price of the said The Beaver Products Company, Inc. of all plaster board or gypsum wallboard of every kind manufactured and sold by it between the date thereof and August 6, 1929, the date of the expiration of said Utzman Patent Number 1,034,746, and thereafter of an amount equivalent to one and one-half per cent (1½%) of such selling price until February 10, 1937, the date of the expiration of said Patent Number 1,330,413, your orator released and discharged the said The Beaver Products Company, Inc., the said The Beaver Board Companies, Bestwall Mfg. Company, American Cement Plaster Company and all subsidiary, associated or affiliated companies from all claims and demands for damages or profits which your orator then had against them for or on account of the infringement of the said Utzman patents; that it was further provided in said contract that all actions both at

law and in equity then pending, arising out of, or in any way connected with, the infringement of said Utzman patents and commenced against The Beaver Products Company, Inc., The Beaver Board Companies, Bestwall Mfg. Company, American Cement Plaster Company, or any subsidiary, associated or affiliated companies of any of them were to be dismissed without further costs to either party thereto, provided that the appeal in Cause Number 3693, October Term, 1925, pending in the Circuit Court of Appeals for the Seventh Circuit would be so dismissed that the decree below finding that said patents were valid and had been infringed by the said defendants should stand as a final adjudication in said cause.

18. That pursuant to the terms of said agreement of July 29, 1926, a separate license was entered into between your orator and the said The Beaver Products Com-
10935 pany, Inc. bearing date the 29th day of July, 1926, the original of which said license your orator is ready to produce in court upon the hearing of this cause; that in said license it was recited that your orator was the owner of the said Utzman patents and of the said patent set forth in said Exhibit A and that it had been found and decreed by the United States District Court for the Northern District of Illinois and by the United States Circuit Court of Appeals for the Seventh Circuit in said cause, that the said Utzman patents were valid and infringed by the said defendants by reason of the making, using or selling of plaster board or gypsum wallboard having protected edges; that in and by said license the said The Beaver Products Company, Inc. further admitted the validity and scope of said Utzman patents and that it had theretofore infringed upon the same and that your orator had a large and substantial claim against it for damages and profits because and on account of said infringement; that it was also recited in said license that the parties thereto had agreed to settle said claim by the payment to your orator by the said The Beaver Products Company, Inc. of a sum of money in cash and an amount equivalent to five per cent (5%) of the selling price of the said The Beaver Products Company, Inc. of all plaster board or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent (1½%) of such selling price from August 6, 1929 to February 10, 1937, and the assignment to your orator of certain Letters Patent and Applications for Letters Patent set forth in said Exhibit B, and the granting of said license by your orator.

19. That the said The Beaver Products Company, Inc. became obligated, in and by said contract of July 29, 1926 and the said license agreement of even date therewith, to continue the manufacture and sale of plaster board and gypsum wallboard at its said plants throughout the
10936 full term of the said license agreement, from the date thereof, on July 29, 1926, to the date of the expiration of said Patent Number 1,330,413, on February 10, 1937, and to pay to your orator during the full term of said license, in addition to said sum of $250,000, the said amount equivalent to five per cent (5%) of the selling price of The Beaver Products Company, Inc. of all of said plaster board and gypsum wallboard manufactured and sold by it between July 29, 1926 and August 6, 1929, and one and one-half per cent (1½%) of such selling price of all plaster board and gypsum wallboard manufactured and sold by it between August 6, 1929 and February 10, 1937.

20. That it was further provided in said agreement of July 29, 1926, and in said license of even date therewith, that your orator would give and grant, and had given and granted, unto the said The Beaver Products Company, Inc. an indivisible and non-exclusive right, license and privilege of using the processes and using the machines and/or inventions set forth and claimed in said Utzman patents and in any and all of said patents or applications for letters patent described in said Exhibits A and B at any and all factories owned and/or operated and controlled by said The Beaver Products Company, Inc. or any subsidiary, associated or affiliated company, and manufacturing at any such place or places, selling and using plaster board or gypsum wallboard embodying the inventions and improvements set forth and claimed in said Utzman patents and said patents and applications for letters patent described in said Exhibits A and B until the 10th day of February, 1937, the date of the expiration of said Patent Number 1,330,413.

21. That it was further expressly provided in said agreement of July 29, 1926, and in said license bearing even date therewith that The Beaver Products Company,
Inc. agreed to pay to your orator, in settlement and
10937 discharge of said claim of your orator and for the right, license and privilege of manufacturing and selling plaster board or gypsum wallboard, and for the privilege of using the processes and making and using the machines or inventions embodying the inventions and im-

provements set forth and claimed in said Utzman patents and in all of said patents and applications for letters patent described in said Exhibits A and B, an amount equivalent to five per cent (5%) of the selling price of the said The Beaver Products Company, Inc. of all plaster board or gypsum wallboard of every kind manufactured and sold by the said The Beaver Products Company, Inc. between the date of said contract and August 6, 1929, the date of the expiration of said Utzman Patent Number 1,034,746, and thereafter an amount equivalent to one and one-half per cent (1½%) of the selling price of the said The Beaver Products Company, Inc. of all such plaster board or gypsum wallboard from August 6, 1929 until February 10, 1937, the date of the expiration of said Patent Number 1,330,413.

22. That it was further expressly provided in said agreement of July 29, 1926, and in the said license of even date therewith that the said license was personal to the said The Beaver Products Company, Inc. and that the same, or any right therein or thereunder, would not be sold, assigned or transferred without the written consent of your orator or transferred by operation of law, except that the same could be assigned to any such successor or subsidiary corporation of the said The Beaver Products Company, Inc. and that in the event of the appointment of a receiver or receivers for the purpose of conserving the business and assets of the said The Beaver Products Company, Inc. such receiver or receivers should succeed to all of the said Company's rights under said license and under said agreement.

23. That it was further provided in and by said agreement of July 29, 1926, and in said license of even
10938 date therewith that the said The Beaver Products Company, Inc. agreed during the full term of said license to keep separate, full and accurate books of account and records showing the exact quantity of all plaster board and gypsum wallboard manufactured and sold by it and that it would, on or before the 20th day of each and every calendar month during said full term, render unto your orator true, written returns verified under oath by one of its officers or agents, setting forth the quantity of all of said plaster board and gypsum wallboard manufactured and sold by it during the preceding calendar month, together with the price or prices at which the same was

sold; that such written returns would be delivered to your orator at its office in Chicago, Illinois, and that the said The Beaver Products Company, Inc. would pay to your orator on or before the 20th day of each calendar month at its office in Chicago, Illinois, the said stipulated amounts under said license on account of all of said plaster board and gypsum wallboard manufactured by it during the next preceding calendar month.

24. That it was further provided in said agreement of July 29, 1926 and in said license of even date therewith, that your orator, during the full term of said license, would have the right at all reasonable times during business hours to inspect the books of account and records of the said The Beaver Products Company, Inc. showing the quantity of all plaster board and gypsum wallboard manufactured and sold by it, and the price or prices at which the same were sold, and to make copies thereof and memoranda therefrom.

25. That it was further provided in said agreement of July 29, 1926, and in said license of even date therewith, that all plaster board or gypsum wallboard manufactured and sold by the said The Beaver Products Company, Inc. embodying the claims of any of said patents would
10939 be distinctly marked with the word "PATENTED" together with the dates of the Utzman patents and the dates of any other patents which licensor may properly specify, and that in connection with the said markings it would further mark said patented product with the words, "Licensed under the above Letters Patent."

26. That it was further provided in said agreement of July 29, 1926, and in said license of even date therewith, that the said The Beaver Products Company, Inc. might manufacture gypsum wallboard or plaster board embodying the inventions and improvements set forth and claimed in said Letters Patent for any other manufacturer, provided that the amount to be paid to your orator on account thereof would be based upon all gypsum wallboard or plaster board manufactured for such other manufacturer and upon the regular selling price of The Beaver Products Company, Inc. of such plaster board or gypsum wallboard to its regular dealer trade.

27. That it was further provided in said agreement of July 29, 1926, and in said license of even date therewith,

that all of the patented product sold by the said The Beaver Products Company, Inc. and commonly known in the trade as seconds, would be plainly invoiced as seconds and plainly marked with a visible red stamp or label firmly affixed on each of said boards showing the word "Seconds" in letters at least three inches in height.

28. That it was further provided in said contract of July 29, 1926, and in said license of even date therewith, that the patented product manufactured and sold by the said The Beaver Products Company, Inc. under said license would include all board having a protected edge, and that it was recognized by the parties to said license that any board manufactured by the said The Beaver Products Company, Inc. having a protected edge was within the scope of said Utzman Patents Numbers 1,029,328 and 1,034,746; that after the expiration of said Letters Patent
10940 Number 1,034,746 and until the expiration of said Letters Patent Number 1,330,413 it was expressly agreed thereby that the patented product manufactured and sold under said license agreement would include all board having a protected edge and that all board having a protected edge was within the claims or was manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent Number 1,330,413 or of one or more of the other of said Letters Patent listed in said Exhibit A.

29. That it was further provided in said agreement of July 29, 1926, and in said license of even date therewith, that as one of the considerations for said license the said The Beaver Products Company, Inc. acknowledged the validity of said Letters Patent granted and to be granted forming the subject matter of said license throughout the respective lives of said Letters Patent and agreed that it would not at any time before or after the expiration or termination of said license, directly or indirectly, through or together with another or others, contest the validity of either or any of said Letters Patent, or the title thereto of your orator or question in any way the prima facie scope of either or any of said Letters Patent or the priority, novelty or patentability of the subject matter of any of said Applications for Letters Patent.

30. That it was further provided in said agreement of July 29, 1926, and in said license of even date therewith, that if the said The Beaver Products Company, Inc. should

at any time neglect, fail or refuse to keep or perform any of the conditions and agreements in said license agreed by it to be kept and performed, then your orator, at its election, might serve notice upon the said The Beaver Products Company, Inc. of its intention to terminate the same, that such notice should specify the alleged neglect, failure or refusal, and that if within thirty days from the date of
the delivery of such notice the said The Beaver
10941 Products Company, Inc. should not give or perform
the conditions and agreements specified therein, then said license and all rights acquired by the said The Beaver Products Company, Inc. thereunder should, at the election of your orator, become cancelled and terminated, provided that the said The Beaver Products Company, Inc. in such event would not thereby be relieved from paying to your orator any license fees or royalties or any other obligations accrued under said license at the time of such termination; that it was further provided therein that in case the said The Beaver Products Company, Inc. should commit any act of bankruptcy, then the said license would immediately be and become cancelled and terminated without, however, terminating the right of your orator to collect for all license fees or royalties and other obligations accrued under said contract at the time of such termination; that it was further provided therein that failure on the part of your orator to notify the said The Beaver Products Company, Inc. of a breach of said license agreement or to terminate the same because of such breach would not constitute a waiver of your orator's right to terminate the same in accordance with the provisions thereof; that it was further provided therein that your orator might specifically enforce said agreement or any of the terms, conditions and covenants thereof by injunction or in such other manner as might be provided by law.

31. That it was further provided in said agreement of July 29, 1926, and in said license of even date therewith, that if at any time during the full term thereof, the said The Beaver Products Company, Inc. should, in the judgment of your orator, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, then you orator would afford the said The Beaver Products Company, Inc. such reasonable protection as in its judgment was necessary or proper, and
that in case your orator granted to any such in-
10942 fringer or to any other person any license under said patents upon terms more favorable than those

granted under said license of July 29, 1926, then your orator would grant to the said The Beaver Products Company, Inc. a license on the same terms.

32. That it was further provided in and by said agreement of July 29, 1926, and in said license of even date therewith, that the terms "plaster board" and "gypsum wallboard" were understood to mean all board by whatever name called having the structural characteristics of plaster board or gypsum wallboard, irrespective of the purpose for which the same might be sold or used.

33. That it was further provided in said agreement of July 29, 1926, and in said license of even date therewith, that all of the covenants and agreements therein contained should be binding upon and inure to the benefit of the successors and assigns of the parties thereto, but that nothing therein contained should be construed to permit an assignment of said license agreement by the said The Beaver Products Company, Inc. except as in said license agreement specifically provided.

34. That it was provided in said agreement of July 29, 1926, that your orator, upon the expiration of said license, would grant to the said The Beaver Products Company, Inc. a license to manufacture, use and/or sell under said patents and applications for letters patent described in said Exhibits A and B, upon such terms and conditions as might then be agreed upon between the parties thereto, and failing to arrive at any such agreement, that your orator would grant to the said The Beaver Products Company, Inc. from and after such expiration date a license to make and use the machines and use the processes, and to manufacture, use and sell the articles disclosed in said patents and applications for letters patent described in said Exhibit B, whether or not disclosed or claimed in any patent or ap-
plications for letters patent described in said Exhibit
10943 A, in consideration of the sum of One Dollar.

35. That it was further provided in said agreement of July 29, 1926, that the patents and applications for Letters Patent set forth in said Exhibit B were pledged with the Central Trust Company of Illinois and Aksel K. Bodholdt, Trustees under a certain First and Refunding Mortgage executed by the said The Beaver Products Company, Inc. to the said Central Trust Company and the said Aksel K. Bodholdt, Trustees, on July 1, 1922, and that the

same were to be released and assigned to your orator by said Trustees; that it was further provided therein that the said The Beaver Products Company, Inc. was authorized and empowered to pledge the said license with said Trustees under said mortgage with the express understanding that the same would not be transferred or assigned by said Trustees on a foreclosure of said mortgage to any person or persons without the consent of your orator.

36. That upon the execution and delivery of the said contract of July 29, 1926 and the said license agreement of even date therewith, the said The Beaver Products Company, Inc. transferred, assigned and conveyed to your orator all of the said patents and applications for letters patent described in said Exhibit B and paid to your orator, on the 31st day of July, 1926, the said sum of $250,000; that the said The Beaver Products Company, Inc., commencing with the date of the said license agreement and ever since has continued the manufacture and sale of plaster board and gypsum wallboard at and from its said plants under the terms and conditions of the said license agreement and the said contract; that pursuant to the terms and conditions of the said license agreement and the said contract, the said The Beaver Products Company, Inc. became obligated to manufacture and sell, at and from its said plants, plaster board and gypsum wallboard, with the full right and privilege of using the inventions and improvements
10944 set forth in all of said patents described in said Exhibits A and B, including the said Utzman patents Number 1,029,328 and Number 1,034,746, throughout the full term of the said contract, commencing with the date thereof and ending on the 10th day of February, 1937, and to pay to your orator, in settlement of said claim and for said license, in addition to said sum of $250,000 paid in cash as aforesaid, an amount equivalent to five per cent (5%) of its selling price of all plaster board or gypsum wallboard of every kind manufactured and sold by it until August 6, 1929, the date of the expiration of said Utzman Patent Number 1,034,746, and thereafter an amount equivalent to one and one-half per cent (1½%) of its selling price upon all of said plaster board or gypsum wallboard from August 6, 1929 until February 10, 1937, the date of the expiration of said Patent Number 1,330,413, so that your orator might receive the full consideration for the settlement, release and discharge of the said claim for infringement and for said license.

37. That the said The Beaver Products Company, Inc., commencing with the date of the said contract and license agreement and during each month of the term thereof, manufactured and sold plasterboard and gypsum wallboard at its said plants and paid to your orator the sums of money under said license in the quantities and amounts as follows:

1926	Footage	Sales	Amount Paid
7-29 to 8-31	10,234,803	$263,740.12	$13,187.01
September,	9,499,012	235,048.95	11,752.45
October,	10,112,600	248,947.66	12,447.38
November,	9,425,504	230,253.38	11,512.67
December,	6,402,937	150,921.97	7,546.10
1927			
January,	7,281,149	173,269.56	8,663.48
February,	8,690,882	213,260.21	10,663.01
March,	10,940,841	273,699.22	13,684.96
April,	11,493,079	283,113.55	14,155.68
May,	10,212,203	243,613.74	12,180.69
June,	9,738,754	230,069.79	11,503.49
July,	8,884,111	208,716.02	10,435.80
10945			
August,	9,843,659	230,644.89	11,532.24
September,	9,273,973	214,140.80	10,707.04
October,	9,627,132	227,792.40	11,389.62
November,	9,146,329	216,800.18	10,840.01
December,	5,779,222	133,366.01	6,688.30
1928.			
January,	7,117,839	153,228.27	7,911.41

making the full sum of $196,781.34 paid to your orator by the said The Beaver Products Company, Inc. under said license, which, with said sum of $250,000.00 paid as aforesaid, amounts to $446,781.34.

38. That the said The Beaver Board Companies and the said The Beaver Products Company, Inc., on or about the 20th day of January, 1928, entered into a contract with the said defendant, Certain-teed Products Corporation, to sell to the said Certain-teed Products Corporation all of the plants, properties and assets of the said The Beaver Board Companies and the said The Beaver Products Company, Inc. located at Akron, New York, Grand Rapids, Michigan, Fort Dodge, Iowa, Blue Rapids, Kansas, and elsewhere,

including all of the plaster board plants or mills belonging to the said The Beaver Products Company, Inc., in consideration of the payment by the said Certain-teed Products Corporation of Fifty Dollars ($50.00) a share to the holders of the preferred capital stock of the said The Beaver Board Companies or the holders of Voting Trust Certificates of some or all of said preferred stock under a Voting Trust Agreement made on January 1, 1922 between the holders of said preferred stock and James G. Alexander, George R. Baker, Augustus S. Blagdon, T. Edward Hambleton, J. A. Henley, Warren Henley and Alvin F. Cramer, Voting Trustees, or at the option of said certificate holders or the holders of said preferred stock, one-half share for each share of said preferred stock or Voting Trust Certificate held by them of the seven per cent (7%) cumulative preferred stock of the said Certain-teed Products Corporation and Five Dollars ($5.00) per share to the holders of the common capital stock of the said The Beaver Board Com-
10946 panies and the payment by the said Certain-teed Products Corporation of the funded indebtedness of the said The Beaver Board Companies and its subsidiaries, amounting to $6,463,205.50; that the said The Beaver Board Companies and the said The Beaver Products Company, Inc. have, as your orator is informed and believes and so states the fact to be, already delivered and transferred to the said Certain-teed Products Corporation under said contract certain of the business and properties of the said The Beaver Board Companies and the said The Beaver Products Company, Inc., and are about, unless restrained by order of this court, to sell, assign, transfer and deliver to the said Certain-teed Products Corporation, under and pursuant to the terms of the said contract, all of the plants, properties and assets of every kind belonging to the said The Beaver Board Companies and the said The Beaver Products Company, Inc., including the plaster board plants and mills belonging to said companies at Akron, New York, Grand Rapids, Michigan, Fort Dodge, Iowa, Blue Rapids, Kansas, and elsewhere; that upon said sale, assignment and transfer and the consummation of the said contract between the said Certain-teed Products Corporation and the said The Beaver Board Companies and The Beaver Products Company, Inc., the said The Beaver Board Companies and the said The Beaver Products Company, Inc. will remain and be without any assets whatsoever and without any plaster board plants or mills with which to manufacture plaster board or gypsum wallboard, so that the said The

Beaver Products Company, Inc. will be wholly unable to continue the manufacture and sale of plaster board and gypsum wallboard pursuant to the terms of said contract of July 29, 1926 and the said license agreement of even date therewith; that no provision has been made of any kind by the said The Beaver Board Companies or the said The Beaver Products Company, Inc., or anyone else, to
10947 pay to your orator the consideration agreed to be paid by the said The Beaver Products Company, Inc. in satisfaction of your orator's said claim and for said license in accordance with the terms of the said contract of July 29, 1926 and the said written license agreement, of an amount equivalent to five per cent (5%) of the selling price of all plaster board or gypsum wallboard of every kind manufactured and sold under said license between the date thereof and August 6, 1929, the date of the expiration of said Utzman Patent Number 1,034,746, and to one and one-half per cent (1½%) of said selling price from August 6, 1929 until February 10, 1937, the date of the expiration of said Patent Number 1,330,413.

39. That by reason of the said contract of January 20, 1928 for the sale of all of its said properties, plants and assets, including said plaster board plants, by the said The Beaver Products Company, Inc. to the Certain-teed Products Corporation and the transfer of part of its said business and properties as aforesaid, the said The Beaver Products Company, Inc. has declared to your orator its intention to repudiate its said contract of July 29, 1926 and said license agreement of even date therewith, and to refuse to perform the same, as well as its intention to refuse to further continue the manufacture of plaster board and gypsum wallboard at its said plants or elsewhere, and to pay to your orator the full consideration agreed to be paid to it by the said The Beaver Products Company, Inc. in satisfaction of your orator's said claim for infringement by failing to pay to your orator the said amount equal to five per cent (5%) of the selling price of plaster board and gypsum wallboard sold by the said The Beaver Products Company, Inc. between January 1, 1928 and August 6, 1929, and one and one-half per cent (1½%) of such selling price from August 6, 1929 to February 10, 1937; that by the conveyance of its said properties, assets and plants
10948 as aforesaid to the said Certain-teed Products Corporation, under the terms of said contract of January 20, 1928, the said The Beaver Products Company, Inc. will

have rendered itself wholly unable to perform its said contract and license of July 29, 1926, and to make the payments to your orator as therein provided; that the said The Beaver Products Company, Inc. did, on to-wit: the 20th day of January, 1928, and does now, refuse to perform its said contract and license of July 29, 1926 with your orator and to continue the manufacture and sale of said plaster does now, refuse to pay to your orator the said amount board and gypsum wallboard throughout the full term of said contract and license agreement, and did then and equal to five per cent (5%) of said selling price from July 29, 1926 to August 6, 1929, and one and one-half per cent (1½%) thereof from August 6, 1929 to February 10, 1937, to-wit, that part thereof which would accrue to your orator between February 1, 1928 and February 10, 1937; that as a result thereof your orator has and will suffer great loss and irreparable injury and damage; that your orator has at all times kept and performed all of the agreements by it agreed to be kept and performed in and by said contract and license agreement of July 29, 1926.

40. That the said The Beaver Products Company, Inc. is or was immediately prior to said sale on January 20, 1928, a large going concern manufacturing and selling plaster board and gypsum wallboard at and from its said plants at Akron, New York, Grand Rapids, Michigan, Fort Dodge, Iowa, Blue Rapids, Kansas, and elsewhere throughout the United States, and with contracts, as your orator is informed and believes and so states the fact to be, for the manufacture and sale of plaster board and gypsum wallboard extending over many years to the termination of said license agreement on February 10, 1937; that during the period of said contract and license from July 29, 1926 to February 1, 1927, the said The Beaver Products Company, Inc. manufactured and sold at its said plants and in its said business 158,303,664 feet of said plaster board
10949 and gypsum wallboard, or approximately 9,210,364 feet thereof per month, at a selling price of $3,935,-626.72; that the demand for plaster board and gypsum wallboard has greatly increased and the consumption thereof between the present time and the expiration of said license on February 10, 1937 will be far in excess of the consumption thereof during the prior period of said license; that on the basis of its past sales of said products, without regard to the natural increase in said business, the said The Beaver Products Company, Inc. would manufacture

and sell between the present time and February 10, 1937 the number of feet from which your orator would receive payments under said contract approximately as follows:

	Wallboard		Payments	Plaster Board		Payments
1928	85,142,382	5%	93,656	25,759,484	5%	16,100
1929 (To Aug.)	49,665,000	"	54,632	15,036,000	"	9,398
1929 (5 mos.)	35,485,000	1½%	11,710	10,740,000	1½%	2,175
1930	87,000,000	"	28,710	35,000,000	"	7,088
1931	89,000,000	"	29,370	45,000,000	"	9,112
1932	91,000,000	"	30,030	55,000,000	"	11,138
1933	93,000,000	"	30,690	65,000,000	"	13,163
1934	95,000,000	"	31,350	75,000,000	"	15,187
1935	97,000,000	"	32,010	85,000,000	"	17,212
1936	99,000,000	"	32,670	95,000,000	"	19,238
1937 (2 mos.)	15,000,000	"	4,950	15,000,000	"	3,038
			$ 379,778			$ 122,849

that during the whole period commencing with the present time and ending February 10, 1937, your orator would receive in satisfaction of its said claim the sum of not less than $502,627.00, which, with said cash payment of $250,000.00 and said further payments made under said license aggregating $196,781.34, would make a total payment to your orator of $959,408.34; that your orator is also engaged in the business of manufacturing and selling plaster board and gypsum wallboard and would, in its said business, realize other great gains, profits and advantages by the continued sale of said products by the said The Beaver Products Company, Inc. under said license; that the said claim for infringement which had accrued to your orator at the time of the execution and delivery of said
10950 agreement of July 29, 1926 and said license of even date therewith, and which was to be satisfied by the payment of said sum $250,000.00 in cash and the further payment by the said The Beaver Products Company, Inc. of an amount equal to five per cent (5%) of its selling price of said plaster board and gypsum wallboard manufactured and sold by it between July 29, 1926 and August 6, 1929, and one and one-half per cent (1½%) of such selling price between August 6, 1929 and February 10, 1937, and the conveyance of said patents described in said Exhibit B to your orator, as in said contract and license agreement provided, aggregated at the time said contract and license agreement were executed more than $4,000,000 as aforesaid; that up to the present time your orator has only received, of the amount agreed to be paid by the said The Beaver Products Company, Inc. in said contract and license agreement, the said cash payment of $250,000 and said payments

aggregating $196,781.34, making total payments to your orator of $446,781.34, and leaving wholly unpaid the full balance of said consideration of an amount equal to five per cent (5%) of the selling price of the said The Beaver Products Company, Inc. of all the plaster board and gypsum wallboard manufactured and sold by it from February 1, 1928 to August 6, 1929, and one and one-half per cent (1½%) of said selling price from August 6, 1929 to February 10, 1937; agreed to be paid as aforesaid by said defendant, The Beaver Products Company, Inc. in satisfaction of said claim; that the said patents described in said Exhibit B, and so assigned to your orator under said contract of July 29, 1926, were worthless, and were then and are now of no value whatsoever; that the payments so made to your orator, as aforesaid, by the said The Beaver Products Company, Inc. were insufficient to satisfy and discharge the said claim of your orator for infringement in accordance with the terms of said contract and license agreement of July 29, 1926; that as a result thereof and by reason of

10951 the repudiation as aforesaid by the said The Beaver Products Company, Inc. of its said contract and license of July 29, 1926, and its failure and refusal to perform the same as aforesaid, there has become due and owing to your orator the full amount of its said claim for infringement, amounting to, to-wit: $4,000,000, less the said sum of $446,781.34 paid to it under said contract and license agreement; that it is impossible to determine the exact amount of the said claim of your orator for said infringement until the said The Beaver Products Company, Inc. has rendered a full account of all such gains, profits and savings realized by it and its said predecessor and subsidiaries, through the unlawful infringement of said patents as aforesaid, which the said defendant has never rendered to your orator; that the said The Beaver Products Company, Inc. and the said The Beaver Board Companies should be compelled to render a full, true and accurate account of all of the gains, profits, savings and advantages realized by them and their said predecessor and subsidiaries as a result of their said unlawful infringement of the said patents of your orator, and should be required to pay such gains, profits, savings and advantages to your orator, together with all other damages sustained by it on account of such infringement, less the said sum of $446,781.34 paid to your orator as aforesaid, or that the said defendant The Beaver Products Company, Inc. should be required by the

decree of this court to specifically perform said contract and license agreement of July 29, 1926 by continuing the manufacture and sale of said plaster board and gypsum wallboard throughout the full term of said contract, and to pay to your orator an amount equal to five per cent (5%) of said selling price until August 6, 1929 and one and one-half per cent (1½%) of said selling price from August 6, 1929 to February 10, 1937, or to pay to your orator the full amount of all loss and damage sustained by it by reason of the failure of the said The Beaver Products Company, Inc. to continue the manufacture and sale of said product and of its refusal to pay to your orator the said amount equal to five per cent (5%) of said selling price to August 6, 1929 and one and one-half per cent (1½%) of said selling price from said last mentioned date to February 10, 1937; that if the said The Beaver Products Company, Inc. and the said The Beaver Board Companies are permitted to consummate the said contract of January 20, 1928 and to sell and convey to the said Certain-teed Products Cor-
10952 poration the said properties, assets and plants under the terms of said contract, the said The Beaver Products Company, Inc. and the said The Beaver Board Companies will be without any assets whatsoever and wholly unable to pay your orator's said claim and your orator will suffer great and irreparable loss and damage; that the said The Beaver Products Company, Inc. and the said The Beaver Board Companies, their officers, agents and attorneys, should be restrained and enjoined by the decree of this court from further consummating the said contract of January 20, 1928 and from selling, transferring or conveying the said properties, assets and plants to the said Certain-teed Products Corporation under said contract of January 20, 1928, or any like or similar contract; that your orator offers to do equity in the premises and to allow to the said defendants any sums or amounts with which it may be just or proper to credit them upon the taking of said account.

41. That at the time of the making of said contract on or about January 20, 1928 between the said The Beaver Board Companies and the said The Beaver Products Company, Inc. on the one part, and the said Certain-teed Products Corporation on the other part, to buy all of said plants, properties and assets of the said The Beaver Board Companies, and the said The Beaver Products Company, Inc., the said defendant, Certain-teed Products Corporation, had full knowledge of the prior infringement of the said patents

by the said The Beaver Products Company, Inc. and its predecessors and of the said claim of your orator in the sum of, to-wit: $4,000,000 resulting therefrom, and of the agreement made between your orator and the said The Beaver Products Company, Inc. to settle said claim by the payment to your orator of the said sum of $250,000 and an
amount equal to five per cent (5%) of the selling
10953 price of the said The Beaver Products Company, Inc.
of all plaster board or gypsum wallboard manufactured and sold by it between July 29, 1926 and August 6, 1929, and one and one-half per cent (1½%) of said selling price between August 6, 1929 and February 10, 1937; that the said Certain-teed Products Corporation then and there also had full knowledge of the undertaking by the said The Beaver Products Company, Inc. to continue the manufacture and sale of plaster board and gypsum wallboard throughout the full term of said contract and license, and was fully aware, of all the terms and conditions of the said contract of July 29, 1926 and of the said license agreement of even date therewith; that the said Certain-teed Products Corporation then and there well knew that the sale of the said plants, properties and assets, including the said plaster board plants at Akron, New York, Grand Rapids, Michigan, Fort Dodge, Iowa, Blue Rapids, Kansas, and elsewhere, and the payment of the consideration therefor to the stockholders of the said The Beaver Board Companies as hereinabove more specifically set forth, would render the said The Beaver Products Company, Inc. wholly unable to continue the manufacture and sale of plaster board and gypsum wallboard pursuant to the terms of said contract and license agreement and prevent it from paying to your orator the full consideration agreed to be paid by it in satisfaction of its said claim, and that by reason thereof and as a result of the sale of the said plants, properties and assets in the manner as aforesaid, the said The Beaver Products Company, Inc. would be without any assets or ability whatsoever to pay to your orator an amount equivalent to five per cent (5%) of the selling price of said plaster board and gypsum wallboard during the period ending August 6, 1929, and one and one-half per cent (1½%) of such selling price between August 6, 1929 and February 10, 1937; as in
said contract and license agreement provided, and
10954 that it would be wholly unable to pay to your orator
the balance of its said claim for infringement; that the transfer and sale of the said plants, properties and assets to the said Certain-teed Products Corporation as

aforesaid will constitute a fraud upon the rights of your orator in the premises, and the agreement so entered into between said defendants on, to-wit: January 20, 1928, has and will constitute a breach by the said The Beaver Products Company, Inc., with full knowledge on the part of the said Certain-teed Products Corporation, of the said agreement of The Beaver Products Company, Inc. to continue the manufacture of plaster board and gypsum wallboard throughout the full term of said license agreement, and to pay to your orator, in settlement of its said claim and for said license, an amount equivalent to five per cent (5%) of the selling price of The Beaver Products Company, Inc. of all plaster board and gypsum wallboard until August 6, 1929 and one and one-half per cent (1½%) of such selling price between August 6, 1929 and February 10, 1937; that all of the said properties, plants and assets of the said The Beaver Products Company, Inc. which have already been transferred to the said Certain-teed Products Corporation as well as all such properties, plants or assets which may hereafter be transferred to it under said contract of January 20, 1928 should be subjected to the payment of your orator's said claim and of the loss and damage sustained by it by reason of such fraudulent transfer and the breach of said agreement by the said The Beaver Products Company, Inc.; that the said Certain-teed Products Corporation, its officers, agents and attorneys, should be enjoined and restrained from in any way disposing of any of said assets which may have been transferred to it under said contract.

42. That your orator is informed and believes, and so states the fact to be, that upon the consummation of the said sale to the said Certain-teed Products Corporation under said contract of January 20, 1928, action will
10955 be taken by the stockholders and directors of the said The Beaver Board Companies and the said The Beaver Products Corporation, Inc. to dissolve the same without making any provision whatsoever for the payment to your orator of its said claim or of the said amount equivalent to five per cent (5%) of the selling price of the said The Beaver Products Company, Inc. of all plaster board and gypsum wallboard until August 6, 1929 and of one and one-half per cent (1½%) of such selling price from August 6, 1929 to February 10, 1937; that if the said sale is consummated the stockholders of the said The Beaver Board Companies will receive all of the consideration for the sale of said properties, plants and assets, and the said stockholders should be required to pay to your orator the

full amount of its said claim for infringement less the said payments as aforesaid, or to pay to your orator five per cent (5%) of the selling price of the said The Beaver Products Company, Inc. of all plaster board and gypsum wallboard until August 6, 1929 and of one and one-half per cent (1½%) of such selling price between August 6, 1929 and February 10, 1937; and if necessary, the amounts paid to said stockholders under said contract of January 20, 1928 should be subjected to the payment of the said sums to your orator; that the said defendants, The Beaver Board Companies and The Beaver Products Company, Inc., should be required to file with their answer in this cause a full list of all of the stockholders of the said corporation and the holders of said Voting Trust Certificates, together with their addresses and the number of shares of stock or Voting Trust Certificates owned or controlled by them, and the amount, if any, then paid to them for their said stock or Voting Trust Certificates; that the said stockholders, when named, should be made parties defendant to this bill and each of them required to pay unto this Court that part of the consideration for the sale of said assets re-
10956 ceived by him, or to give good and sufficient security therefor.

FORASMUCH, THEREFORE, as your orator is without remedy except in a court of equity where such matters are properly cognizable and relievable;

TO THE END that the said The Beaver Products Company, Inc., The Beaver Board Companies, and the Certainteed Products Corporation, which are made parties defendant to this bill, may be required to make full and direct answer to the same (but not under oath, answer under oath being hereby expressly waived), and that the said The Beaver Products Company, Inc. and the said The Beaver Board Companies fully set forth a true and just account of all of the profits, savings and advantages which they, or either of them, and their said predecessor, the Bestwall Mfg. Company, and their said subsidiaries, have derived from the manufacture and sale of the said infringing plaster board, and that an account may be taken under the direction of this honorable Court of all of the said profits, savings and advantages; that the said defendant, The Beaver Products Company, Inc. and the said The Beaver Board Companies be required to pay to your orator the full amount of the said gains, profits, savings and advantages so found due upon the said accounting, together

with all other damages sustained by your orator on account of the infringement of said patents, less the said sum of $446,781.34 paid to your orator as aforesaid, or that the said defendant, The Beaver Products Company, Inc. should be required to specifically perform said contract and license agreement of July 29, 1926 by continuing the manufacture and sale of said plaster board and gypsum wallboard throughout the full term of said contract or to pay to your orator the said sum of five per cent (5%) of the
10957 selling price of all of said plaster board or gypsum wallboard which would or ought to be manufactured by the said The Beaver Products Company, Inc. between February 1, 1928 and August 6, 1929, and one and one-half per cent (1½%) of such selling price from August 6, 1929 to February 10, 1937; that the said The Beaver Products Company, Inc. and the said The Beaver Board Companies, their officers, agents and attorneys, be enjoined and restrained from further consummating the said contract of January 20, 1928 and from selling, transferring or conveying the said properties, assets and plants to the said Certain-teed Products Corporation under said contract of January 20, 1928 or any like or similar contract; that all of the said properties, plants and assets of the said The Beaver Products Company, Inc. which have heretofore been transferred to the said Certain-teed Products Corporation pursuant to the terms of the said contract of January 20, 1928, as well as all of such properties, plants or assets which may hereafter be transferred to it under said contract of January 20, 1928, be decreed by this court to be subject to the payment of your orator's said claim and of the loss and damage sustained by it; that the said Certain-teed Products Corporation, its officers, agents and attorneys, be enjoined and restrained from in any way disposing of any of said assets, properties and plants which may have been transferred to it under said contract; that the stockholders of the said The Beaver Products Company, Inc. and the said The Beaver Board Companies be required to pay to your orator, if said contract of January 20, 1928 should be consummated and said properties, assets and plants conveyed to the said Certain-teed Products Corporation pursuant to the terms thereof, the full amount of its said claim for infringement less the said payments as aforesaid, or to pay to your orator five per cent (5%) of the selling price of the said The Beaver Products Company, Inc. for
10958 all plaster board and gypsum wallboard which the said The Beaver Products Company, Inc. would have

sold between February 1, 1928 and August 6, 1929 and one and one-half per cent (1½%) of such selling price between August 6, 1929 and February 10, 1937, and that the said stockholders or the holders of the said Voting Trust Certificates be required to pay into this court that part of the consideration which they or each of them have received for the sale and conveyance of said properties, assets and plants to the said Certain-teed Products Corporation or to give good and sufficient security therefor, so that the same may be subjected to the payments of the said amounts so due and owing to your orator as aforesaid; that the said defendants, The Beaver Board Companies and The Beaver Products Company, Inc., be required to report to this court the names of all of their stockholders, together with their addresses and the number of shares of stock owned or controlled by them, including the names, addresses and interest held by the said holders of Voting Trust Certificates, and that your orator have such other and further relief in the premises as to the Court shall seem meet and proper.

MAY IT PLEASE THE COURT to grant unto your orator a writ or writs of subpoena of the United States of America, directed to the said The Beaver Board Companies, The Beaver Products Company, Inc. and the Certain-teed Products Corporation according to law, commanding them that on a certain date and under a certain penalty therein mentioned, to be and appear in this honorable Court, then and there to answer all and singular the premises and to stand by such further order, direction and decree as may be made against them.

MAY IT PLEASE YOUR HONORS to grant unto your orator a writ or writs of injunction under the seal of this honorable Court, according to law, perpetually enjoining and restraining the said The Beaver Products Com-
10959 pany, Inc., its officers, agents and attorneys, and the said The Beaver Board Companies, its officers, agents and attorneys, from further consummating the said contract of January 20, 1928 and from selling, transferring or conveying the said properties, assets and plants to the said Certain-teed Products Corporation under said contract of January 20, 1928, or any like or similar contract, and enjoining and restraining the said Certain-teed Products Corporation, its officers, agents and attorneys, from in any way disposing of any of said assets, properties and plants which

may have been transferred to it under said contract of January 20, 1928.

UNITED STATES GYPSUM COMPANY,

By O. M. KNODE, *Vice President.*
Complainant.

SCOTT, BANCROFT, MARTIN & MACLEISH
Solicitors for Complainant.

STATE OF ILLINOIS, }
COUNTY OF COOK. } SS.

O. M. KNODE, being first duly sworn, on oath deposes and says that he has read the foregoing bill of complaint subscribed by him on behalf of the said United States Gypsum Company and knows the contents thereof; that the same are true of his own knowledge except as to such matters therein stated to be upon information and belief, and as to such matters that are so stated on information and belief, he believes the same to be true.

O. M. KNODE

Subscribed and Sworn to before me this
21st day of February, A. D. 1928.

FRED SCHROEDER, JR.
Notary Public.

(Notarial Seal)

10960

UNITED STATES OF AMERICA
Northern District of Illinois } SS.
Eastern Division

IN THE DISTRICT COURT OF THE UNITED STATES

Term, A. D. 1928.

In Equity No.

UNITED STATES GYPSUM COMPANY,
a corporation,

Complainant
vs.

THE BEAVER PRODUCTS COMPANY, INC.,
THE BEAVER BOARD COMPANIES, and
CERTAIN-TEED PRODUCTS CORPORATION,
Defendants

I enter my security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the Complainant of any costs ordered or adjudged to be paid by it I hereby agree and stipulate that execution may issue against my property for all costs not exceeding two hundred dollars taxed against Complainant herein.

Dated this 21st day of February, A. D. 1928.

(Signed) ROBERT G. BEAR
1035 Maple Ave.
Residence Evanston, Ill.

Acknowledged before me this 21st day of February, 1928.

(Signed) FRED SCHROEDER, JR.
Notary Public

(Notarial Seal)

10962 *Government's Exhibit No. 324*

UNITED STATES OF AMERICA
Northern District of Illinois } ss
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
Equity 7907.

UNITED STATES GYPSUM COMPANY, a corporation,
Complainant,

v.

THE BEAVER PRODUCTS COMPANY, INC. THE BEAVER BOARD COMPANIES, and CERTAIN-TEED PRODUCTS CORPORATION,
Defendants.

The Answer of the Defendant, Certain-teed Products Corporation to the Bill of Complaint.

Now comes Certain-teed Products Corporation, defendant in the above entitled cause, and for answer unto said bill of complaint and particularly the various paragraphs thereof hereinafter referred to, says:

1. It admits the allegations of paragraph 1.

2. It is without knowledge of the truth of the allegations of paragraph 2.

3. It is without knowledge of the truth of the allegations of paragraph 3, but this defendant admits that by license agreement dated July 29, 1926, the defendant, The Beaver Products Company, Inc., acquired a non-exclusive right, license and privilege of using the processes and using the machines and/or inventions set forth and claimed
10963 in said Utzman Patents and in any and all of the Patents or applications for Letters Patent described in Exhibits A and B attached to said license agreement, at any and all factories owned and/or operated and controlled by the said defendant The Beaver Products Company, Inc., or any subsidiary, associated or affiliated company, and manufacturing at any such place or places, selling and using plaster board or gypsum wallboard embodying the inventions

or improvements set forth and claimed in said Utzman Patents and in said Patents and applications for Letters Patent described in said Exhibits A and B, until the 10th day of February, 1937, and that said license agreement, hereinafter set forth in full in paragraph 16 of this answer, was executed under the circumstances hereinafter alleged and included Letters Patent dated June 11, 1912, numbered 1,029,328, and Letters Patent dated August 6, 1912, numbered 1,034,746, referred to in paragraphs 2 and 3.

4. It is without knowledge of the truth of the allegations of paragraph 4.

5. It is without knowledge of the truth of the allegations of paragraph 5.

6. It admits that the United States Gypsum Company, a New Jersey corporation, in its bill of complaint filed in this court against the Bestwall Mfg. Company, and particularly in its amended bill of complaint filed in said cause, made substantially the same allegations as are contained in paragraph 6; that thereafter the Bestwall Mfg. Company was enjoined by order of this court from making, using, or causing to be used, or selling to others to be used in any manner, any plaster board containing, embodying or employing the alleged inventions and improvements granted by said Letters Patent Number 1,034,746 and said
10964 Letters Patent Number 1,029,328. It denies on information and belief that said alleged infringement by the Bestwall Mfg. Company caused the United States Gypsum Company, a New Jersey corporation, great damage, loss and injury; that the said Bestwall Mfg. Company made and realized large profits and advantages from said alleged infringement, and that any such profits equaled or exceeded the sum of One Million Dollars ($1,000,000.) or any amount approaching said sum.

7. It admits that the United States Gypsum Company, a New Jersey corporation, instituted the proceedings in this court against the Bestwall Mfg. Company described in paragraph 7; that the defendant, Bestwall Mfg. Company, in said suit filed its answer to the amended bill of complaint of said United States Gypsum Company, a New Jersey corporation, and that a decree was entered in said cause as alleged in said paragraph 7; that the defendant in said cause prayed and was allowed an appeal from said decree to the United States Circuit Court of Appeals, and

that said decree was by said Court of Appeals affirmed as alleged in said paragraph 7.

8. It denies on information and belief that either the Bestwall Mfg. Company or the defendant The Beaver Products Company, Inc., manufactured and sold a modified form of plaster board as a makeshift to avoid the effect of said decree, and that such modified form constituted an infringement of said Patents and that the said Bestwall Mfg. Company and said defendant The Beaver Products Company, Inc., continued to infringe said Patents by the manufacture and sale of such modified form in disregard of the rights of the complainant or of the said United States Gypsum Company, a New Jersey corporation.

9. It admits that on or about June 13, 1921, the complainant filed a supplemental bill in said cause referred to in paragraph 7, which supplemental bill contained
10965 the allegations set forth in paragraph 9 and contained the prayers for relief therein set forth; that an answer was filed to said supplemental bill by said Bestwall Mfg. Company, containing the averments set forth in paragraph 9.

10. It admits that the Bestwall Mfg. Company continued to manufacture plaster board, but denies on information and belief that said plaster board embodied the inventions described in said Letter Patent and was an infringement thereof as alleged in paragraph 10. It admits that the defendant, The Beaver Board Companies, acquired the capital stock of said Bestwall Mfg. Company in the year 1920, and that since that time and until on or about June 8, 1922, the said Bestwall Mfg. Company was a subsidiary of the defendant The Beaver Board Companies; that the latter had then and has ever since had a regular and established place of business in the City of Chicago, in the Northern District of Illinois, where, acting in conjunction with said Bestwall Mfg. Company until on or about June 8, 1922, it handled the sale of plaster board made by said Bestwall Mfg. Company, but on information and belief denies that the same was an infringement of said Letters Patent. It admits that the Bestwall Mfg. Company, the American Cement Plaster Company and other subsidiaries of said defendant The Beaver Board Companies, on or about June 8, 1922, conveyed and assigned to the defendant The Beaver Products Company, Inc., all their assets and properties of every kind and description, upon the con-

sideration set forth in paragraph 10, and that said defendant The Beaver Products Company, Inc., thereupon became and is now vested with the title to and is the true and lawful owner of the business and of all the assets theretofore belonging to the Bestwall Mfg. Company and said subsidiaries; that the defendant The Beaver Products Company, Inc., during the period from June 8, 1922, to July 29, 1926, continued the operations of the business theretofore conducted by said Bestwall Mfg. Com-
10966 pany and to manufacture plaster board at its various plants; but on information and belief denies that the same infringed any rights of the complainant or any Letters Patent owned or controlled by it, or any invention or inventions embodied therein. It admits that since June 8, 1922, the defendant, The Beaver Board Companies, has been the holding company of the defendant, The Beaver Products Company, Inc., and owns its entire capital stock and that said defendants last mentioned manufactured and sold between June 8, 1922, and July 29, 1926, in the cities of Chicago, Akron, New York and elsewhere throughout the United States, such plaster board, but on information and belief denies that the same infringed any rights of the complainant or of any Letters Patent owned or controlled by it, or any invention embodied therein. It denies on information and belief that either of these defendants derived and received great gains and profits from the sale of such plaster board, and that by reason of such manufacture and sale the complainant suffered great loss, damage and injury as alleged in paragraph 10.

11. It admits that complainant filed in said cause a supplemental bill on June 30, 1922, making the allegations set forth in paragraph 11 and praying for relief as therein set forth, and that thereafter an answer was filed by the Bestwall Mfg. Company to said supplemental bill of complaint, and the defendants The Beaver Products Company, Inc., and The Beaver Board Companies appeared therein and also filed answers to said supplemental bill of complaint as alleged in paragraph 11.

12. It admits that a decree was entered in said cause subsequent to the filing of said supplemental bill of complaint, containing the matters set forth and alleged in paragraph 12.

13. It admits the allegations of paragraph 13.

10967 14. It denies on information and belief the allegations of paragraph 14 that the defendants The Beaver

Products Company, Inc., and The Beaver Board Companies, by themselves and through their subsidiaries, continued to manufacture and sell any plaster board in defiance of the rights of complainant or in infringement of said Letters Patent or any inventions embodied therein, or that any alleged infringement by said defendants caused complainant great loss, damage and injury, and denies on information and belief that at the time of the execution of said contract and license agreement or at any other time the defendant The Beaver Products Company, Inc., and/or its subsidiaries had manufactured and sold a large quantity of plaster board at a profit of upwards of Four Million Dollars ($4,000,000.) or any amount approximating said sum, as alleged in paragraph 14. It admits that defendant The Beaver Products Company, Inc., assumed all liabilities and obligations of the Bestwall Mfg. Company, the American Cement Plaster Company and other subsidiaries. It has no knowledge of the truth of the allegations of said paragraph 14 that the complainant on or about August 26, 1920, received from the United States Gypsum Company, a New Jersey corporation, assignments of claims as alleged in paragraph 14. It denies that at the time of the execution of said contract and license agreement or at any other time the defendant The Beaver Products Company, Inc., became liable to the complainant and was indebted to it in the sum of over Four Million Dollars ($4,000,000.) or any amount approximating said sum for profits, gains and advantages derived from the manufacture and sale of any plaster board or for damages sustained by complainant by reason of any infringement of its patents.

15. On information and belief it alleges that prior to July 29, 1926, the complainant had asserted claims for damages against the defendant The Beaver Prod-
10968 ucts Company, Inc., because of alleged infringements of complainant's patents by reason of the manufacture and sale by said defendant The Beaver Products Company, Inc., and said Bestwall Mfg. Company of plaster board and wallboard having a so-called protected edge as distinguished from an open edge; that such claims had been asserted in the proceedings in this court mentioned and described in the bill; that this court by decree entered in said proceeding had determined that the manufacture and sale of such plaster board and wallboard by said defendants in said cause did infringe the inventions owned

and controlled by the complainant embodied in said Letters Patent; that said litigation had consumed and appeared likely to consume a great deal of time, and had involved and appeared likely to involve a very substantial expense to said defendants, and notwithstanding said defendants had taken an appeal which was then pending in the Circuit Court of Appeals from the decree last entered in said cause and were advised by eminent counsel and believed that said decree should be and would be reversed on the hearing on said appeal, nevertheless said defendants considered it advisable from a business standpoint to settle, without the necessity of further litigation, the disputes which had arisen between them and said complainant in regard to the respective rights of the parties in the premises; that the defendant The Beaver Products Company, Inc., obtained from complainant a license to manufacture and sell plaster board under said Patents Numbers 1,034,746 and 1,029,328 upon the royalty payments set forth in said license agreement, and said defendants thereby recognized the validity of said Letters Patent; that the complainant and said defendant The Beaver Products Company, Inc., entered into an agreement of settlement whereby said defendant The Beaver Products Company, Inc., agreed to pay the sum of Two Hundred Fifty Thousand Dollars ($250,000.) in cash and to assign certain patents and applications for letters patent as specified in said settlement agreement and to enter 10969 into said license agreement. It admits that the defendant The Beaver Products Company had plaster board plants for the manufacture of plaster board and gypsum wallboard at Akron, New York, Grand Rapids, Fort Dodge and Blue Rapids, and that it manufactured and sold large quantities of plaster board. It denies on information and belief that the defendants The Beaver Products Company, Inc., and The Beaver Board Companies or either of them represented to complainant that payments upon the sale of said plaster board until August 6, 1929, would amount to over Ten Thousand Dollars ($10,000.) a month, and thereafter and until February 10, 1937, to over Three Thousand Dollars ($3,000.) a month without respect to any increases which there might be in the business of the said defendant The Beaver Products Company, Inc.; that the defendants The Beaver Products Company, Inc., and The Beaver Board Companies, or either of them, represented to complainant that the said The Beaver Products Company, Inc., was in sound financial condition and capable of continuing in its manufacturing business

throughout the said term; that the normal increase in its business would net to complainant sums in excess of the amounts above stated; that the defendants The Beaver Products Company, Inc., and The Beaver Board Companies, or either of them, represented that the said The Beaver Board Products Company, Inc., would continue the manufacture and sale of said plaster board and wallboard at its plants throughout said period. And this defendant says that while no such representations were made by the defendants The Beaver Products Company, Inc., and The Beaver Board Companies, or either of them, even if any such statements or estimates had been made they would be without materiality in this case and would have no bearing upon the rights of the respective parties hereto, for the reason that any such statements and/or estimates were not representations of and did not concern existing facts but were purely prospective in their nature, and in any event would be merged in the said settlement
10970 agreement and license agreement and could not have the effect of adding to or subtracting from said agreements or varying the terms thereof or changing in any way the rights and obligations of the parties to such agreements thereunder.

It denies on information and belief that the complainant was induced by any representations of the defendants The Beaver Products Company, Inc., and The Beaver Board Companies, or either of them, to grant said license and/or to settle any claims which it might have had against the defendants The Beaver Products Company, Inc., and The Beaver Board Companies, or either of them, as alleged in paragraph 15.

16. On information and belief it alleges that thereupon to-wit: on July 29, 1926, the agreement so made between the complainant and the defendant The Beaver Products Company, Inc., was reduced to writing and executed and delivered by the respective parties, and is, except for Exhibits A, B and C, in words and figures as follows, to-wit:

"This Agreement, executed in duplicate this 29th day of July, 1926, by and between the UNITED STATES GYPSUM COMPANY, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as 'Gypsum Company', party of the first part, and THE BEAVER PRODUCTS COMPANY, INC., a New York corporation, of the Town of Tonawanda, State of New York, hereinafter referred to as 'BEAVER COMPANY', party of the second part;

WITNESSETH:

Whereas, the Gypsum Company is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, No. 1,029,328, dated June 11th, 1912, for Method of Manufacturing Plaster Board, and No. 1,034,746, dated August 6th, 1912, for Plaster Board, (hereinafter called the 'Utzman patents'), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and Applications for Letters Patent of the United States set forth in Exhibit 'A' attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

10971 Whereas, the Gypsum Company is about to acquire in part settlement of its claims against said Beaver Company the entire right, title and interest in, to and under the Letters Patent and Applications for Letters Patent of the United States, set forth in Exhibit 'B' attached hereto and made a part hereof; and

Whereas, heretofore, on or about November 20th, 1916, the Gypsum Company filed its Bill of Complaint in the United States District Court for the Northern District of Illinois, Eastern Division, against the Bestwall Manufacturing Company, (a predecessor in title of the Beaver Company) charging infringement by it of the aforesaid Letters Patent, Numbers 1,029,328 and 1,034,746, and thereafter the said Court, upon a trial of the issues in said cause, by its decision rendered July 21st, 1919 (258 Fed. 647) found both of the said Letters Patent valid and infringed by the defendant in said cause, and subsequently on or about January 4th, 1921, the decree of the District Court entered pursuant to the aforesaid decision and awarding an accounting for profits and damages and ordering the issuance of a permanent injunction, was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit (270 Fed. 542) and subsequently the Gypsum Company on June 13th, 1921, filed its Supplemental Bill in said cause charging infringement of the said last mentioned Letters Patent by the method employed in the manufacture of and by the modified form of plaster board then being manufactured and sold by the defendant in said cause, and thereupon further proceedings were had and taken in said cause (decisions with respect to which are reported in 290 Fed. (C.C.A.) 798, 290 Fed. (C.C.A.) 800, and 263 U. S. 713), and thereafter upon trial in open court the said District Court

on or about July 21, 1925, found the issues under said supplemental bill in favor of the Gypsum Company and that the said Letters Patent were infringed by the method of manufacture and by the modified form of plaster board then being manufactured and sold by the defendant therein and ordered an accounting of profits and damages and the issuance of a permanent injunction (decision not yet reported) and more recently, on or about November 4, 1925, the United States Circuit Court of Appeals for the Seventh Circuit granted a stay of the accounting proceedings and of the issuance of the injunction so ordered by the District Court upon the filing by the defendant (appellant) of a bond in the penal sum of One Million Dollars ($1,000,000.), which said bond was duly filed and said cause is now pending on appeal in the said United States Circuit Court of Appeals for the Seventh Circuit; and

Whereas, the Gypsum Company has a substantial claim against the Beaver Company because and on account of said infringement, and the parties hereto have expended large sums of money in said patent litigation and the same has been otherwise costly and expensive to them and they are desirous of making a full and complete settlement of said controversy and of avoiding further litigation; and

Whereas, the parties hereto have agreed to settle said claim by the payment to the Gypsum Company by the Beaver Company of the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) in cash, and an amount equivalent to five per cent (5%) of Beaver Company's selling price of all plaster board or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent (1½%) of such selling price from
10972 August 6, 1929 to February 10, 1937, and the assignment to the Gypsum Company of the said Letters Patent and applications for Letters Patent set forth in said Exhibit 'B', and the granting to Beaver Company of the license as in this agreement contained.

Now, therefore, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to-wit:

1. The Beaver Company hereby agrees to pay to the Gypsum Company upon the execution of this agreement the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) and to assign, transfer, convey and set over, or cause to be

assigned, transferred, conveyed and set over, unto the Gypsum Company the said Letters Patent and Applications for Letters Patent described in said Exhibit 'B' and any and all Letters which may be issued therefor or thereupon, in consideration of which, and of the payment by the Beaver Company to the Gypsum Company of the amounts hereinafter mentioned, the Gypsum Company does hereby release and discharge the Beaver Company, the Beaver Board Companies, Bestwall Manufacturing Company, the American Cement Plaster Company, and every subsidiary, associated or affiliated company, and all persons privy to or claiming under any of them, from all claims and demands, whether for damages or profits or for both damages and profits, which the Gypsum Company now has against them or any of them, for or on account of any infringement of any of its said Utzman patents and said patents described in Exhibit 'A', by the Beaver Company or any predecessor in interest or title, prior to the date hereof.

2. The parties hereto do hereby agree to dismiss, without further cost to either party, all actions both at law and in equity, wheresoever pending, arising out of or in any way connected with the infringement of the said Utzman patents, against The Beaver Products Company, Inc., the Beaver Board Companies, Bestwall Manufacturing Company, the American Cement Plaster Company, or any subsidiary, associated or affiliated company of any of them, it being understood, however, that the Appeal in Cause No. 3693, October Term, 1925, now pending in the Circuit Court of Appeals for the Seventh Circuit, shall be dismissed so that the decree below shall stand as a final adjudication in said cause. It is further understood that the judgment therein for an accounting shall be satisfied of record and that the Gypsum Company waives all right to the issuance of a writ of injunction pursuant to the terms of said decree.

3. The Gypsum Company agrees to give and grant unto Beaver Company an indivisible and non-exclusive right, license and privilege of using the processes and making and using the machines and/or inventions set forth and claimed in said Utzman patents and in any and all of said patents or applications for letters patent described in said Exhibits 'A' and 'B', at any and all factories now or hereafter owned and/or operated or controlled by the Beaver Company or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using plaster board or gypsum wallboard em-

bodying the inventions and improvements set forth
10973 and claimed in said Utzman patents and said patents and applications for letters patent described in Exhibits 'A' and 'B', until the 10th day of February, 1937, the date of expiration of Patent No. 1,330,413, mentioned in said Exhibit 'A', which said license shall be evidenced by a separate instrument this day executed and delivered to the Beaver Company, a true copy of which is hereto attached marked Exhibit 'C' and made a part hereof.

4. The Beaver Company further agrees to pay to the Gypsum Company in settlement and discharge of the said claim, and for the right, license and privilege of manufacturing, using and/or selling plaster board or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions embodying the inventions and improvements set forth and claimed in said Utzman patents and in any and all of said patents and applications for letters patent described in Exhibits 'A' and 'B', an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to five per cent (5%) of the selling price of the Beaver Company, of all plaster board or gypsum wallboard of every kind, manufactured and sold by the Beaver Company between the date hereof and August 6, 1929 the date of the expiration of said Utzman Patent No. 1,034,746, and thereafter an amount equivalent to one and one-half per cent (1½%) of the selling price of the Beaver Company, of all such plaster board or gypsum wallboard, from August 6, 1929, until February 10, 1937, the date of the expiration of said patent No. 1,330,413.

5. It is expressly understood and agreed that the said license shall be personal to the Beaver Company and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent of the Gypsum Company or transferred by operation of law, except that the same may be assigned to any successor or subsidiary corporation of the Beaver Company, and except that in the event of the appointment of a receiver or receivers for the purpose of conserving the business and assets of the Beaver Company, such receiver or receivers shall succeed to all the Beaver Company's rights under said license and under this agreement.

6. The said License shall contain a provision that the said license is granted upon the condition that the Gypsum Company shall have, and that it does thereby reserve, the

right to determine and fix at any time, and to change from time to time during the term of said Utzman Patent Number 1,034,746, the minimum price or prices (not more, however, than the then prevailing market price or prices) at which the Beaver Company shall sell any plaster board or gypsum wallboard manufactured by the Beaver Company embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon the Beaver Company, accompanied with a statement of the price or prices at which the Beaver Company shall sell said patented product, and thereafter shall give to the Beaver Company written or telegraphic notice of any change in such price or prices, and the Beaver Company expressly covenants and agrees that it will not at any time during the term of said Utzman Patent Number 1,034,746, after the receipt of such
10974 notice, directly or indirectly sell or offer for sale any plaster board or gypsum wallboard, embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746, at a price or prices less than that stated by the Gypsum Company in said notice, or in any such written or telegraphic notice of a change in such price or prices. It is expressly understood and agreed that this provision of the said License shall apply only to the said Utzman Patent Number 1,034,746, and shall not apply to any of said other Letters Patent.

7. The Beaver Company agrees, during the term of said license, to keep separate, full and accurate books of account and records showing the exact quantity of all plaster board and gypsum wallboard manufactured and sold by it, and agrees that on or before the 20th day of each and every calendar month during said term it will render unto the Gypsum Company true written returns, verified under oath by an officer or other agent of the Beaver Company, setting forth the quantity of all said plaster board and gypsum wallboard manufactured and sold by it during the preceding calendar month, together with the price or prices at which the same was sold, such written returns to be delivered to the Gypsum Company at its office in Chicago, Illinois, and the Beaver Company agrees to pay to the Gypsum Company, on or before the 20th day of each calendar month, at the office of the Gypsum Company at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under the said license on account of all of said plaster board and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

8. The Gypsum Company, or its duly authorized representative, shall during the term of said license have the right at all reasonable times during business hours to inspect the books of account and records of the Beaver Company referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plaster board and gypsum wallboard manufactured and sold by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom.

9. The Beaver Company agrees that all plaster board or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents, shall be distinctly marked with the word 'PATENTED' together with the dates of the Utzman patents and the dates of any other patents which the Gypsum Company may properly specify, and in connection with the said markings it will further mark said patented product with the words 'Licensed under the above Letters Patent,' which markings shall be plainly visible.

10. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products who do not or may not manufacture gypsum wallboard or plaster board but who desire or may desire to have gypsum wallboard or plaster board manufactured for them, it is understood and agreed that the Beaver Company may manufacture gypsum wallboard or plaster board embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer; provided, however, that the said license fee or royalty to be
10975 paid to the Gypsum Company as hereinbefore provided, shall be based upon all gypsum wallboard or plaster board manufactured for such other manufacturer, and upon the regular selling price of the Beaver Company of such plaster board or gypsum wallboard to its regular dealer trade at the time of such sale, and shall not be based upon the price at which said plaster board or gypsum wallboard is sold by the Beaver Company to such other manufacturer.

11. The Beaver Company expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as 'seconds' shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word 'seconds' in letters at least three inches in height.

12. It is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by the Beaver Company having a protected edge is within the scope of said Utzman patents Nos. 1,029,328 and 1,034,746.

After the expiration of said Letters Patent No. 1,034,746, and until the expiration of Letters Patent No. 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a protected edge is within the claims or is manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent No. 1,330,413, or of one or more of the other of said Letters Patent listed in Exhibits 'A' and 'B' hereto, under which the aforesaid indivisible and none-exclusive right, license and privilege is granted.

13. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Beaver Company hereby acknowledges the validity of the letters patent, granted and to be granted, forming the subject-matter of said license, throughout the respective lives of the said letters patent and each of them, and agrees that it will not at any time before or after the expiration or termination of said license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said letters patent or the title hereto of the Gypsum Company, or question in any way the prima facie scope of either or any of said letters patent, or the priority, novelty or patentability of the subject matter of any of the said applications for letters patent.

14. In the event that the Beaver Company shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements herein to be by the Beaver Company kept and performed, then Gypsum Company, at its election, may serve upon Beaver Company notice of intention to terminate the license herein granted, which notice shall specify the alleged neglect, failure or refusal; and if, within thirty (30) days from the date of delivery of said notice, the Beaver Company shall not keep or perform the conditions and agreements specified in said notice, then

said license and all rights acquired by the Beaver
10976 Company thereunder shall be and become cancelled and terminated, without the necessity of any court action; provided, however, that the Beaver Company shall not be relieved thereby from paying to the Gypsum Company any license fees or royalties or any other obligations accrued hereunder at the time of such termination. In case at any time the Beaver Company shall commit any act of bankruptcy, then the license hereunder shall immediately be and become cancelled and terminated, but the Gypsum Company shall not thereby be prevented from collecting all license fees or royalties and other obligations accrued hereunder at the time of such termination. Failure on the part of the Gypsum Company to notify the Beaver Company of a breach of the license or to terminate said license because of such breach shall not constitute a waiver of the Gypsum Company's right to terminate said license in accordance with the provisions of this paragraph. The Gypsum Company may specifically enforce this contract or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be provided by law.

15. It is understood and agreed that if at any time during the continuance of the license the Beaver Company shall, in the judgment of the Gypsum Company, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents whether now or hereafter issued under which the license is granted, the Gypsum Company will afford the Beaver Company such reasonable protection as in the judgment of the Gypsum Company shall be necessary or proper, and in case the Gypsum Company shall grant to any such infringer, or to any other person, any license under said patents upon terms more favorable than those contained in the said license, then it will grant to Beaver Company a license on the same terms.

16. The Gypsum Company agrees, upon the expiration of the said license, to grant to the Beaver Company a license to manufacture, use and/or sell under said patents and applications for letters patent described in said Exhibits 'A' and 'B', upon such terms and conditions as may then be agreed upon between the parties hereto, and failing to arrive at any such agreement the Gypsum Company will grant to the Beaver Company from and after such expiration date, a license to make, and use the machines and use the processes and to manufacture, use and sell

the articles disclosed in said patents and applications for letters patent described in said Exhibit 'B', whether or not disclosed or claimed in any patent or application for letters patent described in Exhibit 'A', in consideration of the sum of One Dollar ($1.00), the receipt whereof is hereby acknowledged by the Gypsum Company.

17. The term 'plasterboard' and 'gypsum wallboard' shall be understood to mean all board by whatever name called having the structural characteristics of plasterboard or gypsum wallboard, irrespective of the purpose for *the* which the same may be sold or used.

18. This agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph contained shall be construed to permit assignment by the Beaver Com-
10977 pany of any right hereunder, or under said license, except as hereinabove specifically authorized.

19. It is understood and agreed that the patents and applications for Letters Patent set forth in Exhibit 'B' are pledged with Central Trust Company of Illinois and Aksel K. Bodholdt, Trustees under a certain First and Refunding mortgage, executed by Beaver Products Company, Inc., to said Central Trust Company and Aksel K. Bodholdt, Trustees, dated July 1, 1922, and the same are to be released and assigned to the Gypsum Company by said trustees, or one of said trustees. It is further understood and agreed that the Beaver Company shall be authorized and empowered to pledge the license herein provided for with said trustees under said mortgage, with the express understanding, however, that the same shall not be transferred or assigned by said trustees, on a foreclosure of said mortgage, to any person or persons, without the consent of the Gypsum Company.

In Witness Whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the date and year first above written.

UNITED STATES GYPSUM COMPANY,
By /s/ S. L. AVERY,
(*Its President*).

(SEAL)

ATTEST:

/s/ GEO. H. GLYNN,
Asst. Secretary.

THE BEAVER PRODUCTS COMPANY, INC.,
By /s/ A. S. BLAGDEN,
(*Its President*).

(SEAL)

ATTEST:

/s/ E. H. LETCHWORTH,
(*Secretary*)."

On information and belief it alleges that on or about July 29, 1926, the complainant and the defendant The Beaver Products Company, Inc., executed, pursuant to the terms of the above mentioned settlement agreement, a license agreement in the form of Exhibit "C" to said settlement agreement, which license agreement, except for Exhibit "A" and the signatures of the parties, is in the words and figures following, to-wit:

10978 "LICENSE AGREEMENT

This Agreement executed in duplicate this 29th day of July, 1926, by and between the UNITED STATES GYPSUM COMPANY, an Illinois corporation of Chicago, Illinois, hereinafter referred to as "Licensor" and THE BEAVER PRODUCTS COMPANY, INC., a New York corporation of the Town of Tonawanda, State of New York, hereinafter referred to as 'Licensee'.

WITNESSETH:

Whereas, Licensor is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, No. 1,029,328, dated June 11th, 1912, and No. 1,034,746, dated August 6, 1912, (hereinafter called the "Utzman Patents"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and applications for Letters Patent of the United States set forth in Exhibit 'A' attached hereto and made a part hereof, and

any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, heretofore said Utzman patents have been adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; see also 263 U.S. 713) and said courts have decreed that said Utzman patents are valid and were infringed by the defendants in the cases so reported, and in the decision of the said District Court rendered on or about July 21, 1925, and not yet reported, by reason of the making, using and selling of plaster board or gypsum wallboard having protected edges, and said District Court has ordered perpetual injunctions and accountings against said defendants; and

Whereas, Licensee recognizes and admits the validity and scope of said Utzman patents and admits that Licensee has heretofore infringed upon the same, and that Licensor has a substantial claim against Licensee for damages and profits because and on account of said infringement, and both Licensor and Licensee have expended or will be compelled to expend large sums of money in patent litigation in respect of said infringement, and such litigation has been, or will be otherwise costly and expensive to both of said parties who are therefore desirous of making a full and complete settlement of their controversies and of avoiding further litigations; and

Whereas, the parties hereto have agreed to settle said claim by the payment to the Licensor by the Licensee, of a sum of money in cash and an amount equivalent to five per cent (5%) of Beaver Company's selling price of all plaster board or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent (1½%) of such selling price from August 6, 1929, to February 10, 1937, and the assignment to Licensor of certain Letters Patent and applications for Letters Patent, and the granting of this License to the Licensee.

Now, therefore, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to wit:

10979 1. Licensor has agreed to and does hereby give and grant unto Licensee, an indivisible and non-

exclusive right, License and privilege of using the processes, and making and using the machines and/or inventions set forth and claimed in said Utzman Patents, and in any and all of said patents or applications for letters patent described in said Exhibit 'A', at any and all factories now or hereafter owned and/or operated or controlled by Licensee or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and/or using plaster board or gypsum wallboard embodying the inventions and improvements set forth and claimed in said Utzman patents and said patents and applications for Letters Patent described in Exhibit 'A', until the 10th day of February, 1937, the date of expiration of Patent No. 1,330,413, mentioned in said Exhibit 'A'.

It is expressly agreed and understood that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves the right to determine and fix at any time, and to change from time to time during the term of said Utzman patent No. 1,034,746, the minimum price or prices, (not more, however, than the then prevailing market price or prices) at which the Licensee shall sell any plaster board or gypsum wallboard manufactured by Licensee embodying the improvements set forth and claimed in said Utzman Patent 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the price or prices at which the Licensee shall sell said patented product and thereafter shall give to the Licensee written or telegraphic notice of any change in such price or prices, and the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman patent No. 1,034,746 after the receipt of such notice, directly or indirectly sell or offer for sale, any plaster board or gypsum wallboard embodying the improvements set forth and claimed in said Utzman patent No. 1,034,746 at a price or prices less than that stated by the Licensor in said notice, or in any such written or telegraphic notice of a change in such price or prices. It is expressly understood and agreed that this provision of the said License shall apply only to the said Utzman patent No. 1,034,746, and shall not apply to any of said other Letters Patent.

2. The Licensee further agrees to pay to the Licensor, in settlement and discharge of the said claim, and for the right, license and privilege of manufacturing, using and/or

selling plaster board or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions, embodying the inventions and improvements set forth and claimed in said Utzman patents and in any and all of said patents and applications for Letters Patent described in Exhibit 'A', an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to five per cent (5%) of the selling price of the Licensee, of all plaster board or gypsum wallboard of every kind, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman patent No. 1,034,746, and thereafter an amount equivalent to one and one-half per cent (1½%) of the selling price of the Licensee, of all such plaster board or gypsum wallboard, from
10980 August 6, 1929 until February 10, 1937, the date of the expiration of said patent No. 1,330,413.

3. It is expressly understood and agreed that the said License shall be personal to the Licensee and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent of the Licensor or transferred by operation of law, except that the same may be assigned to any successor or subsidiary corporation of Licensee, and except that in the event of the appointment of a receiver or receivers for the purpose of conserving the business and assets of Licensee, such receiver or receivers shall succeed to all of Licensee's rights under said license and under this agreement.

4. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plaster board and gypsum wallboard manufactured and sold by it, and agrees that on or before the 20th day of each and every calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plaster board and gypsum wallboard manufactured and sold by it during the preceding calendar month, together with the price or prices at which the same was sold, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor, on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said

plaster board and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

5. Licensor, or its duly authorized representative shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plaster board and gypsum wallboard manufactured and sold by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom.

6. Licensee agrees that all plaster board or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents shall be distinctly marked with the word 'PATENTED', together with the dates of the Utzman patents, and the dates of any other patents which Licensor may properly specify, and in connection with the said markings it will further mark said patented product with the words 'Licensed under the above Letters Patent', which markings shall be plainly visible.

7. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products who do not or may not manufacture gypsum wallboard or plaster board but who desire or may desire to have gypsum wallbard or plaster board manufactured for them, it is understood and agreed that Licensee may manufacture gypsum wallboard or plaster board embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer; provided, however, that the said license fee or royalty to be
10981 paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard or plaster board manufactured for such other manufacturer and upon the regular selling price of Licensee of such plaster board or gypsum wallboard to its regular dealer trade at the time of such sale, and shall not be based upon the price at which plaster board or gypsum wallboard is sold by Licensee to such other manufacturer.

8. Licensee expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as 'seconds' shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said board showing the word 'seconds' in letters at least three inches in height.

9. It is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by Licensee having a protected edge is within the scope of said Utzman patents Nos. 1,029,328 and 1,034,746.

After the expiration of said Letters Patent No. 1,034,746 and until the expiration of Letters Patent No. 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a protected edge is within the claims or is manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent No. 1,330,413, or of one or more of the other of said letters patent listed in Exhibit 'A' hereto, under which the aforesaid indivisible and non-exclusive right, license and privilege is granted.

10. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledge the validity of the Letters Patent, granted and to be granted, forming the subject-matter of this license, throughout the respective lives of the said Letters Patent and each of them, and agrees that it will not at any time before or after the expiration or termination of this license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said Letters Patent or the title thereto of Licensor, or question in any way the prima facie scope of either or any of said Letters Patent, or the priority, novelty or patentability of the subject matter of any of the said applications for letters patent.

11. In the event that Licensee shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements herein to be by Licensee kept and performed, then Licensor, at its election, may serve upon Licensee notice of intention to terminate the license herein granted, which notice shall specify the alleged neglect, failure or refusal; and if, within thirty (30) days from the date of delivery of said notice, Licensee shall not keep or perform the conditions and agreements specified in said notice, then said license and all rights acquired by Licensee hereunder shall be and become cancelled and
10982 terminated without the necessity of any court action; provided, however, that Licensee shall not be

relieved thereby from paying to Licensor any license fees or royalties or any other obligations accrued hereunder at the time of such termination. In case at any time Licensee shall commit any act of bankruptcy, then the license hereunder shall immediately be and become cancelled and terminated, but Licensor shall not thereby be prevented from collecting all license fees or royalties and other obligations accrued hereunder at the time of such termination. Failure on the part of Licensor to notify Licensee of a breach of this license contract or to terminate said license because of such breach shall not constitute a waiver of Licensor's right to terminate said license in accordance with the provisions of this paragraph. Licensor may specifically enforce this contract or any of the terms, conditions and covenants hereof, by injunction or in such other manner as may be provided by law.

12. Any notice to be given under the terms hereof may be served upon the Licensee by mailing the same to the Licensee, postage prepaid, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of said notice upon the Licensee.

13. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, whether now or hereafter issued, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper; and in case the Licensor shall grant to any such infringer, or to any other person, any license under said patent upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms.

14. The terms 'plasterboard' and 'gypsum wallboard' shall be understood to mean all board by whatever name called having the structural characteristics of plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used.

15. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but

nothing in this paragraph shall be construed to permit an assignment hereof by the Licensee except as hereinabove specifically provided.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the da and year first above written.

10983 UNITED STATES GYPSUM COMPANY,

By_____
Its President.

ATTEST:

_____
Secretary.

THE BEAVER PRODUCTS COMPANY, INC.,

By_____
Its President.

ATTEST:

_____
Secretary."

To said settlement agreement and said license agreement this defendant refers for the terms and conditions and legal effect thereof.

17. The allegations of paragraphs 16 to 36 inclusive of the bill of complaint herein contain the conclusions of the complainant as to the terms and provisions and legal effect of said settlement agreement and said license agreement. This defendant refers to and relies upon said agreements hereinabove set forth in *haec verba* for the terms, provisions and legal effect thereof.

18. It admits that upon the execution and delivery of said settlement agreement and said license agreement the defendant The Beaver Products Company, Inc., transferred, assigned and conveyed to the complainant all of the patents and applications for Letters Patent described in said Exhibit B, and paid to complainant on July 31, 1926, the sum of Two Hundred Fifty Thousand Dollars $250,000.) in cash, as alleged in paragraph 36, and that the said

The Beaver Products Company, Inc., commencing with the date of the said license agreement and ever since has continued the manufacture and sale of plaster board
10984 and gypsum wallboard at and from its said plants under the terms and conditions of said license agreement. It denies that under the terms and conditions of said license agreement and/or said settlement agreement the defendant The Beaver Products Company, Inc. became obligated to manufacture and sell any plaster board or gypsum wallboard, but alleges that the intent and effect of said agreements was to obligate the defendant The Beaver Products Company, Inc., to pay the royalties provided for in said license agreement for so long as the said The Beaver Products Company, Inc., manufactured and sold any plaster board and gypsum wallboard.

The defendant further answering says that the complainant has entered into license agreements with other manufacturers and dealers in plaster board and gypsum wallboard which provide for the same payment of royalties on all plaster board or gypsum wallboard manufactured or sold by such licensees as are provided in said license agreement with said The Beaver Products Company, Inc.; that such license agreements were made with certain other licensees where admittedly such licensees had not infringed such Letters Patent or applications therefor.

This defendant further answering says that no part of the royalty payments provided to be made by the defendant The Beaver Products Company, Inc., under the terms of said license agreement dated July 29, 1926, was in payment of any part of the claim made prior to said date by the complainant against said defendant, but that said royalty payments were to be made in consideration of the privilege granted in said license agreement to said defendant The Beaver Products Company, Inc., to manufacture and sell products embodying the inventions covered by the Letters Patent and applications for Letters Patent owned and controlled by said complainant; that said license agreement dated July 29, 1926, and the other
10985 license agreements made by said complainant with other licensees, provide that in case the complainant as licensor should grant to any other person any license under said Patents upon terms more favorable than those granted to such licensee or licensees, it, the said complainant, would grant to the licensee named in said license agreement a license on the same terms; that if any part

of the royalty payments provided to be made by the defendant The Beaver Products Company, Inc., under said license agreement dated July 29, 1926, is a payment for or on account of any amount claimed to be due to complainant prior to the execution therof, then the royalty payments so far as they constitute payment for the privilege of manufacturing and selling plaster board and/or wallboard embodying the inventions covered by the Letters Patent and applications therefor owned and controlled by complainant, are more favorable than those granted to other licensees not claimed to have been infringers, under similar contracts; that this defendant is advised and therefore alleges the fact to be that the complainant has not reduced the rates of payment under said other license agreements to any of the licensees in such agreements.

19. It is without knowledge of the truth of the allegations of paragraph 37.

20. That subsequent to July 29, 1926, the complainant, United States Gypsum Company, and the defendants, Bestwall Mfg. Company, American Cement Plaster Company, The Beaver Board Companies and The Beaver Products Company, Inc., entered into a stipulation in said proceedings in this court, being Equity No. 779, which stipulation was filed in this court in said cause last mentioned and recited that said cause had been settled between the parties out of court, that plaintiff in said cause, being the complainant herein, waived its right to a writ of in-
10986 junction and accounting and a reference to a master, that said plaintiff, being the complainant herein, had received satisfaction in full for all claims and demands against the defendants arising out of infringement of Patents Numbers 1,029,328 and 1,034,746, and that the clerk of the court enter of record a notation that the recovery awarded from Bestwall Mfg. Company, as sole defendant, in the decree entered in this court on August 11, 1919, and the recovery awarded from the said defendants in the decree entered August 17, 1925, had been satisfied in full, and that an accounting and the right to the issuance of a writ of injunction had been waived by said plaintiff, all pursuant to a settlement between the parties out of court; that the interlocutory decree entered August 11, 1919 and the interlocutory decree entered August 17, 1925, be made final decrees and that no further costs be charged to either party or parties. All of which will more fully and

at large appear from the original stipulation filed in said cause No. 779 in Equity in this court, and from a true and correct copy of said stipulation ready to be produced in court by this defendant upon the hearing hereof. That pursuant to the foregoing stipulation, on October 4, 1926, an order was entered in this court in accordance with the terms thereof, which order recited that the recovery awarded from Bestwall Mfg. Company in the said decree entered August 11, 1919, and the recovery from the defendants in the decree entered August 17, 1925, had been satisfied in full. All of which will more fully and at large appear from the records of this court in said cause, a true and correct copy of which is ready to be produced by this defendant upon the hearing hereof. That thereafter on to-wit: October 4, 1926, by stipulation between Bestwall Mfg. Company, American Cement Plaster Company, The Beaver Board Companies and The Beaver Products Company, Inc., as appellants, and the complainant herein,

United States Gypsum Company, as appellee, in
10987 Case No. 3693 in the United States Circuit Court of appeals for the Seventh Circuit, being the appeal then pending from the decree of this court entered August 17, 1925, above mentioned, it was agreed that the said appeal be dismissed without further costs to either party, and thereafter, on the same date, by stipulation between the same parties in said case in said United States Circuit Court of Appeals for the Seventh Circuit, it was recited that the United States Gypsum Company, being the complainant herein and the plaintiff appellee in said cause in the said Circuit Court of Appeals, had received satisfaction in full for all claims and demands under the decree or decrees entered in this court against the above named appellants. That pursuant to said stipulation an order was entered in said cause in said United States Circuit Court of Appeals, reciting that the said appellee had received satisfaction in full for all claims and demands against the above named appellants under the decree entered in this court on August 17, 1925, and ordering that the certain bond in the sum of One Million Dollars ($1,000,000.) executed on November 5, 1925, as a condition to the staying of the execution and operation of said decree, including the staying of the injunction ordered thereby, pending appeal, be canceled, and that the principals and sureties named in said bond be discharged and released from all liability thereunder; all of which will more fully and at large appear from the records of the said United States

Circuit Court of Appeals in said cause, a true and correct copy of which stipulation and order is ready to be produced by this defendant upon the hearing of this cause.

21. That the defendants, The Beaver Products Company, Inc., and The Beaver Board Companies, on or about January 16, 1928, entered into a contract (hereinafter called the "purchase contract") with this defendant, Certain-teed Products Corporation, for the transfer
10988 and sale by said defendants The Beaver Products Company, Inc., and the Beaver Board Companies to this defendant of all the properties and assets of said The Beaver Products Company, Inc., and of said The Beaver Board Companies other than the stock of The Beaver Products Company, Inc. It alleges that the consideration to be paid by this defendant for said properties is a sum in cash in excess of Twelve Million Dollars ($12,000,000.), and denies that the consideration for said properties or any part thereof is the payment by this defendant of Fifty Dollars ($50.), or Five Dollars ($5.00), or any other amount, to the stockholders of the defendant The Beaver Board Companies, or any of them. It admits that unless restrained by order of this court this defendant will purchase from the defendants The Beaver Products Company, Inc., and The Beaver Board Companies the property and assets contracted by them to be sold and delivered by them to this defendant under the terms of the purchase contract, and alleges that it has a perfect right so to do. It denies that upon the consummation of said contract the defendants The Beaver Products Company, Inc., and The Beaver Board Companies will be without any assets whatsoever, but alleges that under the terms of said purchase contract provision is made for the satisfaction and discharge of all obligations of both of said companies. That said purchase contract provides "in consideration of the conveyance of all said properties and assets Certain-teed" (meaning Certain-teed Products Corporation) agrees among other things "(c) To assume all liabilities of the holding company" (meaning the defendant The Beaver Board Companies) "and the asset company" (meaning The Beaver Products Company, Inc.), other than the funded indebtedness of said companies, which under the terms of said purchase contract
is to be paid." That this defendant, Certain-teed
10989 Produets Corporation, is entirely solvent and able fully to perform its obligations in this behalf, as shown by its balance sheet of November 30, 1927, attached

hereto and marked Exhibit "A". It admits that upon the consummation of the purchase contract the defendant The Beaver Products Company, Inc., will not own any plaster board plants or mills in which to manufacture plaster board or gypsum wallboard, but it alleges that said defendant The Beaver Products Company, Inc., has no obligation to continue the manufacture and sale of plaster board and gypsum wallboard, and that said license agreement conferred upon the defendant The Beaver Products Company, Inc., the privilege of manufacturing and selling plaster board and/or gypsum wallboard embodying the inventions covered in the Letters Patent and applications for Letters Patent alleged to be owned and controlled by the complainant, and did not impose upon said defendant The Beaver Products Company, Inc., any duty or obligation to continue to manufacture and sell plaster board and/or gypsum wallboard, and that said settlement agreement and said license agreement dated July 29, 1926, did not impose any restrictions upon the defendants The Beaver Products Company, Inc., and The Beaver Board Companies, or either of them, as to transferring and selling their assets and property, and particularly did not impose any restrictions upon the performance and consummation of the purchase contract.

22. On information and belief it denies that the said defendant The Beaver Products Company, Inc., has, or has declared, any intention of repudiating its contract of July 29, 1926, and said license agreement of even date therewith, and refusing to perform the same, and alleges as above stated, that the said defendant The Beaver Products Company, Inc., is under no obligation to continue the manufacture of said plaster board or gypsum wallboard at its said plants or elsewhere. It denies that said
10990 defendant The Beaver Products Company, Inc., has refused to pay to the complainant the consideration agreed to be paid to it in satisfaction of complainant's claim for infringement. It alleges that such consideration was paid in full by the payment of Two Hundred Fifty Thousand Dollars ($250,000.) in cash and the assignment to the complainant of said Letters Patent and applications for Letters Patent, and the execution of said license agreement, and denies that complainant has and will suffer any loss or irreparable injury or damage by reason of the performance and consummation by the defendants hereto of said purchase contract, as alleged in paragraph 39 or otherwise.

23. It denies on information and belief the allegations of paragraph 40 so far as they relate to the prediction by complainant that said defendant The Beaver Products Company, Inc., would, between the present time and February 10, 1937, manufacture and sell the number of feet of wallboard and plaster board therein mentioned, and that the defendant The Beaver Products Company, Inc., has, or ever had, contracts for the manufacture and sale of plaster board or gypsum wallboard extending to February 10, 1937. It alleges that the allegations of paragraph 40 are wholly immaterial to this cause for the reason, among others, that the said defendant The Beaver Products Company, Inc., is under no obligation to manufacture and sell wallboard and/or plaster board; it denies that the complainant would suffer any damage by reason of the discontinuance by said The Beaver Products Company, Inc., of the manufacture and sale of plaster board and/or wallboard, for the reason, among others, that the complainant is also engaged in the manufacture and sale of plaster board and wallboard, and if the defendant The Beaver Products Company, Inc., should discontinue the manufacture and sale of protected edge plaster
10991 board and wallboard under said license and withdraw from the field, the complainant or its other licensees would obtain a larger portion of said business. It alleges that any claim of the complainant against the said The Beaver Products Company, Inc., has been satisfied and discharged, and denies that the complainant is entitled to any accounting from these defendants or any of them or that the defendants The Beaver Products Company, Inc., and The Beaver Board Companies, or either of them, are indebted in any way, shape or manner to said complainant by reason of any matter or thing in said bill of complaint alleged. It denies that at the time of the execution of said settlement agreement the complainant had a claim for infringement against the defendants The Beaver Products Company, Inc., and The Beaver Board Companies, or either of them, amounting to Four Million Dollars ($4,000,000.) or any other amount. It denies that the Patents and applications for Letters Patent assigned to the complainant under said agreement were worthless, but alleges that such Patents and applications for Letters Patent were of substantial value. It denies that there is due and owing to the complainant the sum of Four Million Dollars ($4,000,000.) or any other sum. It denies that the complainant is entitled to an injunction against

this defendant restraining it from consummating the said purchase contract or from purchasing the properties and assets of the defendants The Beaver Products Company, Inc., and The Beaver Board Companies under said contract.

24. It denies that this defendant, Certain-teed Products Corporation, had knowledge of any infringement of the said patents of complainant by the said defendant The Beaver Products Company, Inc., or of the claim of complainant in the sum of Four Million Dollars ($4,000,000.) resulting therefrom, as alleged in paragraph 41. It admits that this defendant had knowledge of the settlement agreement of July 29, 1926, and the said li-
10992 cense agreement of even date therewith, but denies that this defendant had knowledge of any undertaking by the said defendant The Beaver Products Company, Inc., to continue the manufacture and sale of plaster board and gypsum wallboard until 1937 or until any other date, and denies that any such obligation exists or ever existed. It denies that the performance and consummation of said purchase contract will deprive the defendant The Beaver Products Company, Inc., of its ability to pay any debt which it owes. It denies that the transfer and sale of the assets and properties pursuant to said purchase contract will constitute a fraud upon the rights of complainant or will constitute a breach by said defendant The Beaver Products Company, Inc., of any agreement with the complainant and particularly of said settlement agreement and said license agreement dated July 29, 1926. It denies that any of the plants, properties and assets of The Beaver Products Company, Inc., should be subjected to the payment of any claim of the complainant by reason of any matter or thing in said bill of complaint set forth, and denies that this defendant, its officers, agents or attorneys, should be enjoined and restrained as alleged in paragraph 41 or otherwise.

25. It denies that the defendant The Beaver Products Company, Inc., is required to make any further payments of royalties under said license agreement unless it shall hereafter manufacture and sell plaster board and/or gypsum wallboard. It alleges that the stockholders and directors of the defendants The Beaver Products Company, Inc., and The Beaver Board Companies have the right to dissolve either or both of said companies upon making provision for the payment to complainant of royalties

under said license agreement payable on account of plaster board and/or gypsum wallboard manufactured and sold by them prior to such dissolution.

26. That this court should not grant any relief to the complainant since the complainant has a full, ade-
10993 quate and complete remedy at law for any breach of said settlement agreement or said license agreement by the defendant The Beaver Products Company, Inc., which right will not be affected by the sale of the properties of the defendant The Beaver Products Company, Inc., to this defendant, since, as hereinabove stated, this defendant has agreed to assume all liabilities of The Beaver Products Company, Inc., and is amply able so to do.

27. It alleges on information and belief that said license agreement between the complainant and the defendant The Beaver Products Company, Inc., and the similar license agreements made by the complainant with others, were entered into by the complainant, not for the purpose of securing to itself the royalties payable thereunder, but for the purpose of enabling the complainant to continue to dominate the gypsum wallboard and plaster board industry, to control the prices at which said products are sold, and to restrain trade, all in violation of the terms of the final decree entered January 3, 1923, by the District Court of the United States for the Southern District of New York in the cause entitled "United States of America, Petitioner, vs. Gypsum Industries Association et al., Defendants", to which the complainant and certain of its officers and directors were parties defendant, and of the Anti-Trust Laws of the United States, said purpose of the complainant being shown by the fact that said license agreements require the licensees thereunder to pay the royalties therein stipulated, not only on gypsum wallboard and plaster board alleged to be covered by the Utzman patents, but also on gypsum wallboard and plaster board of every kind manufactured and sold, whether patented or unpatented. This defendant is informed and believes that said requirements were made for the purpose of and with the intention of restraining trade by in effect
10994 preventing such licensees from manufacturing or selling "open-edge" wallboard not covered by said patents, and thus restricting or eliminating competition which would otherwise have arisen between such unpatented "open-edge" wallboard and the patented "protected edge" wallboard manufactured by complainant or

under its patents. This defendant further alleges that, for the reasons above stated, said license agreement is a contract in restraint of trade in violation of said final decree, and of the Anti-Trust Laws of the United States.

28. This defendant alleges that it has, for more than a year and a half, manufactured unpatented "open-edge" wallboard at its plant at Acme, Texas, and has built up a large and growing trade therein and that said "open-edge" wallboard is in active competition with the patented "protected edge" wallboard manufactured by the complainant and its licensees. This defendant further alleges on information and belief that, in order to maintain and perpetuate its monopoly, the complainant has instituted legal proceedings, under its alleged patent rights or otherwise, against substantially all its competitors in the plaster board business who were not willing to submit to the burdens of a license agreement, and that the primary purpose of complainant in instituting this suit is not to secure to itself the royal s specified in the license agreement but to prevent this defendant from increasing its manufacture and sale of "open-edge" wallboard and becoming an even stronger competitor of complainant in the wallboard business, thus threatening the complainant's long continued domination and substantial monopoly of that business. This defendant alleges that, in order to avoid litigation, it offered to accept a license from the complainant extending to August 6, 1929, the period of expiration of the so-called Utzman patents covering not only the plants of the defendant, The Beaver Products Company, Inc., but also all plants of this defendant Certain-teed Products Corporation, but the complainant refused to grant such license unless this defendant would ac-
10995 cept a license extending to 1937. In a further attempt to avoid litigation, certain officers of this defendant thereupon inquired of certain officers of the complainant whether the complainant would be satisfied if this defendant assumed the license agreement as to the properties to be acquired by it from The Beaver Products Company, Inc., until 1937, and on the same terms, but were told that this would not be acceptable to complainant unless this defendant would also agree to pay like royalties on all wallboard, whether "open-edge" or "protected edge", manufactured by it at its present plant in Texas or elsewhere. Since it is reasonable to suppose that this defendant, having a large and growing business, will be in a position to manufacture at the plants now owned by

defendant The Beaver Products Company, Inc., and to sell, a larger amount of wallboard than has heretofore been manufactured and sold by The Beaver Products Company, Inc., thus increasing the royalties payable to the complainant, it is obvious that the purpose of this suit is not to collect the royalties to which the complainant claims it is entitled, but to enable the complainant to continue to dominate and monopolize the industry and to restrain competition by this defendant.

29. This defendant further alleges, on information and belief, that the complainant has unlawfully sought to dominate and monopolize the wallboard industry, in substantial restraint of trade, and in violation of said final decree entered June 3, 1923, and of the Anti-Trust Laws of the United States, not only by controlling prices under its license agreements or otherwise, but also by granting rebates to customers and by other unfair practices, in violation of the Federal Trade Commission Act of the United States, and has instituted this suit to enable it to continue and extend its unlawful domination and monopoly of said industry, and that, for the reasons aforesaid, complainant is not entitled to the relief prayed for by it, or any other relief.

10996 30. It denies each and every allegation of said bill of complaint not herein specifically admitted or denied.

31. It denies that the complainant is entitled to the relief herein prayed for, or any part thereof, and asks that the said bill be dismissed at complainant's costs.

CERTAIN-TEED PRODUCTS CORPORATION,
By CRAVATH HENDERSON & DEGERSDORF,
52 William Street, New York, N. Y.

WINSTON STRAUB & SHAW
38 S. Dearborn Street, Chicago, Ill.

RALPH M. SHAW AND WALTER H. JACOBS,
Its Solicitors.

CRAVATH HENDERSON & DEGERSDORF,
WINSTON STRAUB & SHAW
Solicitors for said Defendant.

EXHIBIT "A"

CERTAIN-TEED PRODUCTS CORPORATION
Balance Sheet
November 30, 1927.

ASSETS

Current Assets	
Cash,	$ 977,565.40
Notes Receivable,	205,654.28
Accounts Receivable,	3,515,578.84
Salesmen's Advances and Sundry Employees' Accounts,	21,191.30
Inventories,	4,979,335.40
Total Current Assets,	$ 9,699,325.22
Other Assets	
Expenses Paid in Advance,	$ 183,568.13
Investments,	68,708.10
Fixed Assets	
Land, Bldg. & Equipment,	$14,396,995.60
Gypsum Deposits,	3,014,131.30
Water Power Rights,	653,804.35
Good Will, etc.	1.00
Total Assets,	$28,016,533.70

LIABILITIES

Current Liabilities	
Notes Payable,	$ 300,000.00
Accounts Payable,	938,760.70
Accrued Taxes—Local and Federal,	110,170.65
Dividends Payable,	283,941.66
Total Current Liabilities,	$ 1,632,873.01
Reserves	
Federal Taxes for 1927,	$ 355,500.00
Capital Stock	
First Preferred,	$ 4,120,000.00
Second Preferred,	2,675,000.00
Common,	12,720,000.00
Capital Surplus,	2,739,190.10
Appropriated Surplus,	1,540,000.00
Earned Surplus,	2,233,970.59
Total Liabilities,	$28,016,533.70

10998 *Government's Exhibit No. 325*

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss.
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

UNITED STATES GYPSUM COMPANY,
Complainant,

v.

THE BEAVER PRODUCTS COMPANY, INC., THE BEAVER BOARD COMPANIES and CERTAIN-TEED PRODUCTS CORPORATION,
Defendants.

In Equity No. 7907

This cause came on to be heard upon the motion of the complainant herein for a temporary injunction, and the court having considered the same and having heard the arguments of counsel:

IT IS ORDERED that the defendant Certain-teed Products Corporation give bond in the penal sum of One Million Dollars ($1,000,000.), with security to be approved by this court, conditioned to secure the payment of any final judgment, decree, damages, interests and costs rendered or to be rendered in this cause against any one or more of said defendants or in any cause which may be commenced within six months from the date of said bond for the same claim or claims set forth in this cause No. 7907, said bond also to provide that nothing therein shall release the said Certain-teed Products Corporation or any of said other defendants from liability for any final judgment, decree, costs, interests or damages which may be rendered against them or any of them in this cause or in any such other cause in excess of the penal sum of said bond.

10999 Said bond having been presented to the court by the defendant Certain-teed Products Corporation, the same is hereby approved and ordered filed with the Clerk of this court.

AND IT IS FURTHER ORDERED that the motion of complainant for a temporary injunction be and the same is hereby continued generally.

ENTER:
NAME ILLEGIBLE
Judge.

DATED 2nd APRIL, 1928.

11001 *Government's Exhibit No. 326*

UNITED STATES OF AMERICA
Northern District of Illinois
Eastern Division
} SS.

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR SAID DISTRICT AND DIVISION

UNITED STATES GYPSUM COMPANY, a corporation,
Complainant,

vs.

THE BEAVER PRODUCTS COMPANY, INC., THE BEAVER BOARD COMPANIES and CERTAIN-TEED PRODUCTS CORPORATION,
Defendants.

In Equity No. 7907

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective attorneys, as follows:

1. The said cause may be dismissed without prejudice and without costs to either party;

2. That certain bond given by Certain-teed Products Corporation, as principal, and George M. Brown and Elisha Walker, as sureties, pursuant to order of court entered herein on the 3rd day of April, 1928, be and the same hereby is released and discharged.

SCOTT BANCROFT MARTIN & MACLEISH
Solicitor for Complainant.

FILLAUSKI SHORRY & SCHUFF
Solicitors for The Beaver Products Company, Inc.

FILLAUSKI SHORRY & SCHUFF
Solicitors for The Beaver Board Companies.

WINSTON STRAUB & SHAW
Solicitors for Certain-teed Products Corporation.

11003 *Government's Exhibit No. 327*

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES GYPSUM COMPANY, a corporation,
Complainant,

vs.

THE BEAVER PRODUCTS COMPANY, INC., THE BEAVER BOARD COMPANIES and CERTAIN-TEED PRODUCTS CORPORATION,
Defendants.

In Equity No. 7907

ORDER

Upon stipulation of the parties, IT IS ORDERED that the above entitled cause be, and the same hereby is, dismissed without costs to either party, that that certain bond for the sum of One Million Dollars ($1,000,000.00) given by the Certain-teed Products Corporation, as principal, and George M. Brown and Elisha Walker, as sureties, pursuant to order of court entered in said cause on the 3rd day of April, 1928, be and the same is hereby released and discharged.

Dated May ——, 1929.

ENTER:

JAMES T. UHELSON
Judge.

11005 *Government's Exhibit No. 328*

UNITED STATES GYPSUM COMPANY Twenty-fourth Annual Report Fiscal Year Ending December 31, 1925

11006 United States Gypsum Company of Illinois [formerly of New Jersey] Twenty-fourth Annual Report Fiscal Year Ending December 31, 1925

11007 February 10, 1926.

To the Stockholders of the United States Gypsum Company:

Your Board of Directors submits the following report on the business of the United States Gypsum Company and its subsidiaries for the year ended December 31, 1925.

The net income for the year is $8,414,116.88 after deducting federal taxes and depreciation. This net income, after providing for the 7% dividend on the preferred stock, is equal to an earning of $15.45 per share on the Company's outstanding common stock.

Disposition of this net income has been made as follows: cash dividends, $3,047,758.41; stock dividend (at par), $1,322,169.00; added to surplus, $4,044,189.47.

Expenditures for new plants, additions and improvements amount to $4,241,298.07. While increases in capacities have resulted from these investments, the major purpose has been to attain that economy of production which an increasingly active competitive condition demands.

The continued growth of the Company's business has required an increase of $2,161,680.09 in net working capital.

A liberal program of expenditures for the year 1926 has been authorized by your Board of Directors and is in action. Its purpose is very largely to reduce costs. Provision to finance these commitments has been made in part by setting aside funds in the government securities listed in the attached report.

For the past seven years the building industry has been engaged in making up a building shortage occasioned by conditions incident to the war. Capacities of production, transportation, distribution and erection have in varying degrees been inadequate to these demands during most of this

period. The nation's annual construction program
11008 has increased from $3,142,000,000 in 1919 to an average of $4,341,000,000 during the past seven years, with a maximum of $6,500,000,000 in 1925. This peak demand of the year just closed has, however, been supplied promptly by manufacturers, transported quickly by railroads, distributed by dealers without delay and erected with speed by the trades. The capacity for construction in all its branches may safely be said to be equal to the present high demand and in several important branches to exceed such demand. Authorities best equipped to make such estimates are convinced that the building shortage generally has been made up and that the building industry will hereafter have to depend upon the normal growth of the country for its business. If these assumptions are correct, a continuation of the present rate of building is improbable and the capacities now supplying it and then in part unemployed will create a heightened competition, resulting in reduced prices and smaller profits. In the gypsum industry the conditions reflected in the above are conspicuous. Capacity has been steadily increased and during the year just passed has been in excess of demand. Competition in all important branches has been increasingly severe, and prices have continued to decline. Fortunately the steady business enjoyed by your Company throughout the year, together with the benefits of earlier investment, has permitted reductions in costs more than equal to the declines in price.

New products of proved excellence are being successfully introduced to the building trade and hold promise of great growth. Despite the disturbing fundamentals above referred to, it is certain that present demand for your Company's products is good and so much of the future as is disclosed by building contracts seems to assure a continuation of the present favorable condition for at least six months.

Respectfully submitted,

SEWELL L. AVERY
President

UNITED STATES GYPSUM COMPANY AND SUBSIDIARY COMPANIES

Consolidated Balance Sheet as of December 31, 1925

5956

ASSETS

Property Account:		
Plant	$22,520,159.46	
Gypsum and Gypsite	5,727,500.25	
Total Property Account	$28,247,659.71	
Deduct: Reserve for Depreciation and Depletion	4,296,041.77	
		$23,951,617.94
Treasury Holdings, Book Values:		
Securities of Other Companies	16,710.00	
Securities Deposited for Insurance Reserve	102,408.50	
		119,118.50
Inventory and Current Assets:		
Products, Material and Supplies	3,319,318.56	
Erection Contract Advances	680,457.68	
Accounts and Notes Receivable	$4,628,331.46	
Deduct: Reserve for Doubtful Accounts	146,224.93	4,482,106.53
Cash on Hand and in Banks	899,270.20	
U. S. Treasury Notes and Liberty Bonds	6,515,129.25	
Total Inventory and Current Assets		15,896,282.22
Deferred Charges to Operations:		
Expenses Applicable to Future Income		238,682.28

LIABILITIES

Capital Stock:		
Preferred 7% Cumulative		
Authorized	$10,000,000.00	
Issued	8,614,100.00	
Deduct:		
In Treasury	326,900.00	
Outstanding		$ 8,287,200.00
Purchased but not issued		454,400.00
Common		
Authorized	$15,000,000.00	
Issued	11,288,600.00	
Deduct:		
In Treasury	1,150,300.00	
Outstanding		10,138,300.00
		$18,879,900.00
Current Liabilities:		
Accounts Payable		1,183,038.52
Accrued Taxes, Interest, Etc.		1,697,991.93
		2,881,030.45
Reserves:		
For Returnable Bags and Contingencies		1,654,799.12
Surplus		16,789,971.37

11011

UNITED STATES GYPSUM COMPANY
and Subsidiary Companies
Consolidated Surplus Account

	1925	1924
Net Earnings after deducting all expenses incident to operations, including repairs and maintenance of plants	$10,474,302.09	$ 8,825,696.65
Deductions:		
Depreciation and Depletion	848,007.59	670,590.37
Federal Taxes	1,212,177.62	988,725.43
Total Deductions	$ 2,060,185.21	$ 1,659,315.80
Net Income for the Year	$ 8,414,116.88	$ 7,166,380.85
Less Dividends Paid:		
Preferred	$ 579,925.29	$ 592,076.52
Common	3,790,002.12	4,292,515.07
Total Dividends	$ 4,369,927.41	$ 4,884,591.59
Surplus for the year	$ 4,044,189.47	$ 2,281,789.26
Surplus paid in on Capital Stock	150,101.12	1,301,344.03
Surplus, at beginning of year	12,595,680.78	9,012,547.49
Surplus, at end of year	$16,789,971.37	$12,595,680.78

11012 The Audit Company of New York

Report on United States Gypsum Company and Subsidiary Companies

Certificate for Publication

Sewell L. Avery, President,
United States Gypsum Company,
Chicago, Illinois.

Dear Sir:

We have audited the books and accounts of the United States Gypsum Company and its Subsidiary Companies at Chicago, Illinois, for the year ending December 31, 1925, and we certify that, in our opinion, the attached Consolidated Balance Sheet and Statement of Surplus Account are true exhibits of the condition of the Company as of December 31, 1925, and of the results of its operation for the period stated.

Very truly yours,

THE AUDIT COMPANY OF NEW YORK,

E. C. GOODMAN,
Western Manager.

Chicago,
February 9, 1926

Consolidated Report

Assets:	1925	1924	1923	1922	1921	1920
Plant and Property	$22,520,159.46	$18,626,091.02	$10,964,563.23	$ 8,876,055.99	$ 7,167,645.44	$ 6,725,102.84
Gypsum and Gypsite	5,727,500.25	5,815,500.25	5,815,500.25	5,815,500.25	5,815,500.25	5,813,447.75
Treasury Holdings	119,110.50	127,087.42	14,850.00	9,256.70	15,650.00	5,349.00
Deferred Charges	238,682.28	162,341.95	131,852.82	149,166.85	105,519.60	103,931.02
Total	$28,605,460.49	$24,731,020.64	$16,926,766.30	$14,849,979.79	$13,104,315.29	$12,647,830.61
Current Assets:						
Cash on hand and in banks	$ 899,270.20	$ 1,277,287.04	$ 477,570.57	$ 367,921.49	$ 382,959.40	$ 299,854.10
Marketable Securities	6,515,129.25	4,551,928.95	3,513,926.42	1,018,666.83	508,304.14	1,242.89
Accounts and Notes Receivable	4,628,331.46	3,885,913.60	3,197,713.81	2,523,375.20	1,503,405.31	1,598,708.44
Erection Contract Advances	680,457.68	445,414.60	687,754.76	456,607.69	151,816.33	430,030.71
Inventories	3,319,318.56	3,107,081.53	2,004,395.90	1,531,919.59	1,325,299.83	1,981,836.06
Total Current Assets	$16,042,507.15	$13,267,625.72	$ 9,881,361.46	$ 5,898,490.80	$ 3,871,785.01	$ 4,311,672.20
Total Assets	$44,647,967.64	$37,998,646.36	$26,808,127.76	$20,748,470.59	$16,976,100.30	$16,959,502.81
Liabilities:						
Common Stock	$10,138,300.00	$ 8,786,960.00	$ 5,911,680.00	$ 4,431,040.00	$ 4,172,140.00	$ 3,948,693.84
Preferred Stock	8,741,600.00	9,032,900.00	6,920,300.00	6,013,800.00	5,968,500.00	5,964,810.00
5% Gold Notes: 5 years	None	None	None	None	None	1,000,000.00
Reserves	6,097,065.82	5,315,276.47	3,904,758.68	2,818,635.32	1,807,456.39	1,365,049.38
Surplus	16,789,971.37	12,595,680.78	9,012,547.49	5,615,795.15	3,535,302.07	2,624,714.87
Total	$41,766,937.19	$35,730,817.25	$24,849,286.17	$18,879,270.47	$15,483,398.46	$14,903,268.09
Current Liabilities:						
Notes Payable	None	None	None	None	$ 38,500.00	$ 460,000.00
Accounts Payable, Including Dividends	$ 1,183,038.52	$ 1,126,980.41	$ 1,059,523.19	$ 1,213,946.57	898,476.60	1,142,947.97
Taxes, Interest, Etc., Accrued	1,697,991.93	1,140,848.70	899,318.40	655,253.55	555,725.24	453,286.75
Total Current Liabilities	$ 2,881,030.45	$ 2,267,829.11	$ 1,958,841.59	$ 1,869,200.12	$ 1,492,701.84	$ 2,056,234.72
Total Liabilities	$44,647,967.64	$37,998,646.36	$26,808,127.76	$20,748,470.59	$16,976,100.30	$16,959,502.81
Net Working Capital	$13,161,476.70	$10,999,796.61	$ 7,922,519.87	$ 4,029,290.68	$ 2,379,083.17	$ 2,255,437.48

11015 UNITED STATES GYPSUM COMPANY

Directors

SEWELL L. AVERY, Chicago, Ill.
WALDO A. AVERY, Detroit, Mich.
R. G. BEAR, Chicago, Ill.
C. R. BIRDSEY, Chicago, Ill.
H. E. BROOKBY, Chicago, Ill.
A. E. ENGLISH, Omaha, Neb.
P. A. ENGLISH, Los Angeles, Cal.
JOHN W. FOWLER, Chicago, Ill.
C. F. HENNING, Chicago, Ill.
A. F. KING, New York, N. Y.
G. R. KING, New York, N. Y.
O. M. KNODE, Chicago, Ill.
E. L. MARSH, Sandusky, Ohio
JOHN E. MACLEISH, Chicago, Ill.
RALPH VAN VECHTEN, Chicago, Ill.

Officers

President.....SEWELL L. AVERY
Vice-President.....O. M. KNODE
Vice-President.....C. F. HENNING
Secretary-Treasurer.....R. G. BEAR

General Counsel

SCOTT, BANCROFT, MARTIN & MACLEISH

Transfer Agent

CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, Chicago, Ill.

Registrar of Transfers

THE NORTHERN TRUST CO., Chicago, Ill.

11016 UNITED STATES GYPSUM COMPANY

General Offices
205 West Monroe Street
CHICAGO, ILLINOIS

Branch Offices

New York	Detroit
Buffalo	Milwaukee
Boston	Minneapolis
Washington	St. Louis
Philadelphia	Kansas City
Pittsburgh	Omaha
Cleveland	Denver
Cincinnati	Los Angeles
Baltimore	Atlanta

San Francisco

Subsidiary Companies

Canadian Gypsum Company, Limited

United States Gypsum Company of Delaware

Samson Plaster Board Company

United States Gypsum Transportation Co.

Gypsum Packet Company, Limited

Wentworth Gypsum Company, Limited

Hillsborough Plaster Quarrying and Manufacturing Company, Limited

Windsor Cement Company, Inc., of Connecticut

Windsor Cement Company of Massachusetts

11017 *Government's Exhibit No. 329*

UNITED STATES GYPSUM COMPANY Twenty-fifth Annual Report Fiscal Year Ending December 31, 1926

11018 United States Gypsum Company of Illinois [formerly of New Jersey] Twenty-fifth Annual Report Fiscal Year Ending December 31, 1926

11019 February 9, 1927.

To the Stockholders of the United States Gypsum Company:

Your Board of Directors submits the following report on the business of the United States Gypsum Company and its subsidiaries for the year ended December 31, 1926.

The net income for the year is $8,375,747.43 after deducting federal taxes and depreciation. This net income, after providing for the 7% dividend on the preferred stock, is equal to an earning of $11.35 per share on the Company's outstanding Common stock.

Disposition of this net income has been made as follows: cash dividends, $3,115,885.22; stock dividend, $3,567,767.00 (at par); added to surplus, $1,692,095.21.

Expenditures for new plants, additions and improvements amount to $6,123,546.81. While increases in capacity have resulted from these investments, the major purpose this year, as last, has been to attain economy of production and improvement of quality.

A somewhat smaller program of expenditures for 1927 has been authorized by the Board of Directors, and is progressing. These needed developments have the same purpose of economy. Provision to finance these commitments has been made by setting aside funds in the government securities listed in the attached reports.

Competition has been increasingly active throughout the year, and indications point to a continuation of this condition. While the average price reduction approximates 4% on the Company's sales generally considered, it is
11020 to be noted that the markets in many sections have on some commodities met such reductions in price as to seriously reduce profits. This development has been experienced in the face of an active building demand, and indi-

cates plainly a capacity in the industry in excess of such large demand. If the generally expected reduction in building proves a reality there seems little justification to expect any decrease of these competitive factors in the commodities affected.

Decrease in manufacturing cost has been more than equal to the decline in price. This is a gratifying justification of past plant expenditures, as the major part of this cost reduction is the direct result of recent plant investments.

An outstanding feature of the year's business has been the need of increased sales effort to maintain the position of our established products in the trade and to introduce and widen the use of our steadily growing newer commodities.

The physical condition of your Company's properties has never been so good. The producing and distributing organizations are excellent, and the outlook seems to justify the expectation of a satisfactory year.

Respectfully submitted,

SEWELL L. AVERY

President.

United States Gypsum Company and Subsidiary Companies

Consolidated Balance Sheet as of December 31, 1926

5964

ASSETS

Property Account:		
Plant	$28,643,706.27	
Gypsum and Gypsite	5,727,500.25	
Total Property Account	$34,371,206.52	
Deduct: Reserve for Depreciation and Depletion	5,038,772.75	
		$29,332,433.77
Treasury Holdings, Book Values:		
Securities of Other Companies	25,600.00	
Securities Deposited for Insurance Reserve	102,214.58	
		127,814.58
Inventory and Current Assets:		
Products, Material and Supplies	3,754,122.74	
Erection Contract Advances	838,053.60	
Accounts and Notes Receivable $4,567,001.45		
Deduct: Reserve for Doubtful Accounts 118,224.02	4,448,777.43	
Cash on Hand and in Banks	1,123,703.51	
U. S. Treasury Notes and Liberty Bonds	5,647,006.23	
Total Inventory and Current Assets		15,811,663.51
Deferred Charges to Operations:		
Expenses Applicable to Future Income		463,956.21
		$45,735,868.07

LIABILITIES

Capital Stock:			
Preferred 7% Cumulative			
Authorized	$10,000,000.00		
Issued	8,727,700.00		
Deduct:			
In Treasury	626,900.00		
Outstanding		$ 8,100,800.00	
Purchased but not issued		340,800.00	
Common			
Authorized	$15,000,000.00		
Issued	14,856,380.00		
Deduct:			
In Treasury	1,098,880.00		
Outstanding		13,757,500.00	
			$22,199,100.00
Current Liabilities:			
Accounts Payable		1,210,554.53	
Accrued Taxes, Interest, Etc.		1,858,182.95	
			3,068,737.48
Reserves:			
For Returnable Bags and Contingencies			1,663,048.97
Surplus			18,804,981.62
			$45,735,868.07

11023

United States Gypsum Company and Subsidiary Companies

Consolidated Surplus Account

	1926	1925
Net Earnings after deducting all expenses incident to operations, including repairs and maintenance of plants	$10,763,219.02	$10,474,302.09
Deductions:		
Depreciation and Depletion	1,063,379.57	848,007.59
Federal Taxes	1,324,092.02	1,212,177.62
Total Deductions	$ 2,387,471.59	$ 2,060,185.21
Net Income for the Year	$ 8,375,747.43	$ 8,414,116.88
Less Dividends Paid:		
Preferred	$ 567,563.42	$ 579,925.29
Common	6,116,088.80	3,790,002.12
Total Dividends	$ 6,683,652.22	$ 4,369,927.41
Surplus for the year	$ 1,692,095.21	$ 4,044,189.47
Surplus paid in on Capital Stock	322,915.04	150,101.12
Surplus, at beginning of year	16,789,971.37	12,595,680.78
Surplus, at end of year	$18,804,981.62	$16,789,971.37

11024 The Audit Company of New York

Report on United States Gypsum Company and Subsidiary Companies

Certificate for Publication

Sewell L. Avery, President,
United States Gypsum Company,
Chicago, Illinois.

Dear Sir:

We have audited the books and accounts of the United States Gypsum Company and of its Subsidiary Companies at Chicago, Illinois, for the year ending December 31, 1926, and we certify that, in our opinion, the attached Consolidated Balance Sheet and Statement of Surplus Account are true exhibits of the condition of the Company as of December 31, 1926, and of the results of its operation for the period stated.

Very truly yours,

THE AUDIT COMPANY OF NEW YORK,

E. C. GOODMAN,
Western Manager.

Chicago,
February 9, 1927

Consolidated Report

Assets:	1926	1925	1924	1923	1922	1921
Plant and Property	$28,643706.27	$22,520,159.46	$18,626,091.02	$10,964,563.23	$ 8,876,055.99	$ 7,167,645.44
Gypsum and Gypsite	5,727,500.25	5,727,500.25	5,815,500.25	5,815,500.25	5,815,500.25	5,815,500.25
Treasury Holdings	127,814.58	119,118.50	127,087.42	14,850.00	9,256.70	15,650.00
Deferred Charges	463,956.21	238,682.28	162,341.95	131,852.82	149,166.85	105,519.60
Total	$34,962,977.31	$28,605,460.49	$24,731,020.64	$16,926,766.30	$14,849,979.79	$13,104,315.29
Current Assets:						
Cash on hand and in banks	$ 1,123,703.51	$ 899,270.20	$ 1,277,287.04	$ 477,570.57	$ 367,921.49	$ 382,959.40
Marketable Securities	5,647,006.23	6,515,129.25	4,551,928.95	3,513,926.42	1,018,666.83	508,304.14
Accounts and Notes Receivable	4,567,001.45	4,628,331.46	3,885,913.60	3,197,713.81	2,523,375.20	1,503,405.31
Erection Contract Advances	838,053.60	680,457.68	445,414.60	687,754.76	456,807.69	151,816.33
Inventories	3,754,122.74	3,319,318.56	3,107,081.53	2,004,395.90	1,531,919.59	1,325,299.83
Total Current Assets	$15,929,887.53	$16,042,507.15	$13,267,625.72	$ 9,881,361.46	$ 5,898,490.80	$ 3,871,785.01
Total Assets	$50,892,864.84	$44,647,967.64	$37,998,646.36	$26,808,127.76	$20,748,470.59	$16,976,100.30
Liabilities:						
Common Stock	$13,757,500.00	$10,138,300.00	$ 8,786,900.00	$ 5,911,680.00	$ 4,431,040.00	$ 4,172,140.00
Preferred Stock	8,441,600.00	8,741,600.00	9,032,900.00	6,020,300.00	6,013,800.00	5,968,500.00
Reserves	6,820,045.74	6,097,065.82	5,315,276.47	3,904,758.68	2,818,635.32	1,807,456.39
Surplus	18,804,981.62	16,789,971.37	12,595,680.78	9,012,547.49	5,615,795.15	3,535,302.07
Total	$47,824,127.36	$41,766,937.19	$35,730,817.25	$24,849,286.17	$18,879,270.47	$15,483,398.46
Current Liabilities:						
Accounts Payable, Including Dividends	$ 1,210,554.53	$ 1,183,038.52	$ 1,126,980.41	$ 1,059,523.19	$ 1,213,946.57	$ 936,976.60
Taxes, Interest, Etc., Accrued	1,858,182.95	1,697,991.93	1,140,848.70	899,318.40	655,253.55	555,725.24
Total Current Liabilities	$ 3,068,737.48	$ 2,881,030.45	$ 2,267,829.11	$ 1,958,841.59	$ 1,869,200.12	$ 1,492,701.84
Total Liabilities	$50,892,864.84	$44,647,967.64	$37,998,646.36	$26,808,127.76	$20,748,470.59	$16,976,100.30
Net Working Capital	$12,861,150.05	$13,161,476.70	$10,999,796.61	$ 7,922,519.87	$ 4,029,290.68	$ 2,379,083.17

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11027 UNITED STATES GYPSUM COMPANY

Directors

SEWELL L. AVERY, Chicago, Ill.
WALDO A. AVERY, Detroit, Mich.
R. G. BEAR, Chicago, Ill.
C. R. BIRDSEY, Chicago, Ill.
H. E. BROOKBY, Chicago, Ill.
A. E. ENGLISH, Omaha, Neb.
P. A. ENGLISH, Los Angeles, Cal.
JOHN W. FOWLER, Chicago, Ill.
C. F. HENNING, Chicago, Ill.
A. F. KING, New York, N. Y.
G. R. KING, New York, N. Y.
O. M. KNODE, Chicago, Ill.
E. L. MARSH, Sandusky, Ohio
JOHN E. MACLEISH, Chicago, Ill.
RALPH VAN VECHTEN, Chicago, Ill.

Officers

President.....SEWELL L. AVERY
Vice-President.....O. M. KNODE
Vice-President.....C. F. HENNING
Secretary-Treasurer.....R. G. BEAR

General Counsel

SCOTT, BANCROFT, MARTIN & MACLEISH

Transfer Agent

CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, Chicago, Ill.

Registrar of Transfers

THE NORTHERN TRUST CO., Chicago, Ill.

11028 UNITED STATES GYPSUM COMPANY

General Offices
205 West Monroe Street
CHICAGO, ILLINOIS

Branch Offices

New York	Detroit
Buffalo	Milwaukee
Boston	Minneapolis
Washington	St. Louis
Philadelphia	Kansas City
Pittsburgh	Omaha
Cleveland	Denver
Cincinnati	Los Angeles
Baltimore	Atlanta

San Francisco

Subsidiary Companies

Canadian Gypsum Company, Limited
United States Gypsum Company of Delaware
United States Gypsum Company of Maryland
Samson Plaster Board Company
United States Gypsum Transportation Co.
Gypsum Packet Company, Limited
Windsor Cement Company, Inc., of Connecticut
Windsor Cement Company of Massachusetts

11029 *Government's Exhibit No. 330*

UNITED STATES GYPSUM COMPANY Twenty-sixth Annual Report Fiscal Year Ending December 31, 1927

11030 United States Gypsum Company of Illinois [formerly of New Jersey] Twenty-sixth Annual Report Fiscal Year Ending December 31, 1927

11031 February 8, 1928.

To the Stockholders of the United States Gypsum Company:

Your Board of Directors submits the following report on the business of the United States Gypsum Company and its subsidiaries for the year ended December 31, 1927.

The net income for the year is $7,538,507.84, after deducting federal taxes and depreciation. This net income, after providing for the 7% dividend on the preferred stock, is equal to $10.10 per share on the Company's outstanding common stock.

Disposition of this net income has been made as follows: cash dividends, $2,348,096.46; added to surplus, $5,190,411.38.

Expenditures for new plants, additions and improvements amount to $5,598,555.73. These investments have brought into satisfactory operation an economic producing capacity, advantageously located, that has demonstrated its value during the latter part of the past year. It marks the near completion of a general plan designed to this end and undertaken three years ago. While the growth of the Company's business and the changed market conditions will continually require plant investment, the needs for the ensuing year are expected to be greatly reduced.

Competition has been increasingly severe throughout the year. The moderate decline in building has been most pronounced in those branches of the industry which our products serve. Additional competitive capacity has rendered these severe market conditions still more difficult, and in consequence prices have declined. In many sections they have reached so low a level on important commodities as to preclude a satisfactory profit. As this development has been

gradual and due to the excess of capacity over de-
11032 mand, the year's report herewith submitted reflects the average of the twelve months just passed, rather than the lower rate of earnings which must prevail if present conditions continue.

Our newer commodities are rapidly growing in general use, and are increasingly contributing to the Company's profit. Our properties and morale are on a uniformly high level, and cost reductions through our recent large investments are definitely assured. The outlook for tonnage for the first half of the year seems promising, and while a decline in profits is anticipated it seems safe to expect a reasonably satisfactory earning for 1928.

Respectfully submitted,

SEWELL L. AVERY
President.

Consolidated Balance Sheet as of December 31, 1927

5972

ASSETS

Property Account:		
Plant	$34,242,262.00	
Gypsum and Gypsite	5,727,500.25	
Total Property Account	$39,969,762.25	
Deduct: Reserve for Depreciation and Depletion	5,961,156.27	
		$34,008,605.98
Treasury Holdings, Book Values:		
Securities of Other Companies	58,012.00	
Securities Deposited for Insurance Reserve	102,020.66	
		160,032.66
Inventory and Current Assets:		
Products, Material and Supplies	3,431,907.45	
Erection Contract Advances	498,544.91	
Accounts and Notes Receivable $4,423,100.65		
Deduct: Reserve for Doubtful Accounts 164,120.35	4,258,980.30	
Cash on Hand and in Banks	1,333,346.10	
U. S. Treasury Notes and Liberty Bonds	6,100,350.37	
Total Inventory and Current Assets		15,623,129.13
Deferred Charges to Operations:		
Expenses Applicable to Future Income		639,366.51
		$50,431,134.28

LIABILITIES

Capital Stock:		
Preferred 7% Cumulative		
Authorized $10,000,000.00		
Issued 8,727,700.00		
Deduct: In Treasury 813,300.00		
Outstanding	$ 7,914,400.00	
Purchased but not issued	227,200.00	
Common		
Authorized $25,000,000.00		
Issued 14,856,380.00		
Deduct: In Treasury 1,032,420.00		
Outstanding	13,823,960.00	
		$21,965,560.00
Current Liabilities:		
Accounts Payable	924,426.23	
Accrued Taxes, Interest, Etc.	1,714,815.39	
		2,639,241.62
Reserves:		
For Returnable Bags and Contingencies		1,593,113.63
Surplus		24,233,219.03
		$50,431,134.28

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United States Gypsum Company and Subsidiary Companies

Consolidated Surplus Account

	1927	1926
Net Earnings after deducting all expenses incident to operations, including repairs and maintenance of plants	$ 9,961,465.79	$10,763,219.02
Deductions:		
Depreciation and Depletion	1,307,997.57	1,063,379.57
Federal Taxes	1,114,960.38	1,324,092.02
Total Deductions	$ 2,422,957.95	$ 2,387,471.59
Net Income for the Year	$ 7,538,507.84	$ 8,375,747.43
Less Dividends Paid:		
Preferred	$ 554,551.66	$ 567,563.42
Common	1,793,544.80	6,116,088.80
Total Dividends	$ 2,348,096.46	$ 6,683,652.22
Surplus for the year	$ 5,190,411.38	$ 1,692,095.21
Surplus paid in on Capital Stock	237,826.03	322,915.04
Surplus, at beginning of year	18,804,981.62	16,789,971.37
Surplus, at end of year	$24,233,219.03	$18,804,981.62

11036 The Audit Company of New York

Report on United States Gypsum Company
and Subsidiary Companies

Certificate for Publication

Sewell L. Avery, President,
United States Gypsum Company,
Chicago, Illinois.

Dear Sir:

We have audited the books and accounts of the United States Gypsum Company and its Subsidiary Companies at Chicago, Illinois, for the year ending December 31, 1927, and we certify that, in our opinion, the attached Consolidated Balance Sheet and Statement of Surplus Account are true exhibits of the condition of the Company as of December 31, 1927, and of the results of its operation for the period stated.

Very truly yours,

THE AUDIT COMPANY OF NEW YORK,

E. C. GOODMAN,
Western Manager.

Chicago,
February 8, 1928

Consolidated Report

Assets:	1927	1926	1925	1924	1923	1922
Plant and Property	$34,242,262.00	$28,643,706.27	$22,520,159.46	$18,626,091.02	$10,964,563.23	$ 8,876,055.99
Gypsum and Gypsite	5,727,500.25	5,727,500.25	5,727,500.25	5,815,500.25	5,815,500.25	5,815,500.25
Treasury Holdings	160,032.66	127,814.58	119,118.50	127,087.42	14,850.00	9,256.70
Deferred Charges	639,366.51	463,956.21	238,682.28	162,341.95	131,852.82	149,166.85
Total	$40,769,161.42	$34,962,977.31	$28,605,460.49	$24,731,020.64	$16,926,766.30	$14,849,979.79
Current Assets:						
Cash on hand and in banks	$ 1,333,346.10	$ 1,123,703.51	$ 899,270.20	$ 1,277,287.04	$ 477,570.57	$ 367,921.49
Marketable Securities	6,100,350.37	5,647,006.23	6,515,129.25	4,551,928.95	3,513,926.42	1,018,666.83
Accounts and Notes Receivable	4,423,100.65	4,567,001.45	4,628,331.46	3,885,913.60	3,197,713.81	2,523,375.20
Erection Contract Advances	498,544.91	838,053.60	680,457.68	445,414.60	687,754.76	456,607.69
Inventories	3,431,907.45	3,754,122.74	3,319,318.56	3,107,081.53	2,004,395.90	1,531,919.59
Total Current Assets	$15,787,249.48	$15,929,887.53	$16,042,507.15	$13,267,625.72	$ 9,881,361.46	$ 5,898,490.80
Total Assets	$56,556,410.90	$50,892,864.84	$44,647,967.64	$37,998,646.36	$26,808,127.76	$20,748,470.59
Liabilities:						
Common Stock	$13,823,960.00	$13,757,500.00	$10,138,300.00	$ 8,786,960.00	$ 5,911,680.00	$ 4,431,040.00
Preferred Stock	8,141,600.00	8,441,600.00	8,741,600.00	9,032,900.00	6,020,300.00	6,013,800.00
Reserves	7,718,390.25	6,820,045.74	6,097,065.82	5,315,276.47	3,904,758.68	2,818,635.32
Surplus	24,233,219.03	18,804,981.62	16,789,971.37	12,595,680.78	9,012,547.49	5,615,795.15
Total	$53,917,169.28	$47,824,127.36	$41,766,937.19	$35,730,817.25	$24,849,286.17	$18,879,270.47
Current Liabilities:						
Accounts Payable, Including Dividends	$ 924,426.23	$ 1,210,554.53	$ 1,183,038.52	$ 1,126,980.41	$ 1,059,523.19	$ 1,213,946.57
Taxes, Interest, Etc., Accrued	1,714,815.39	1,858,182.95	1,697,991.93	1,140,848.70	899,318.40	655,253.55
Total Current Liabilities	$ 2,639,241.62	$ 3,068,737.48	$ 2,881,030.45	$ 2,267,829.11	$ 1,958,841.59	$ 1,869,200.12
Total Liabilities	$56,556,410.90	$50,892,864.84	$44,647,967.64	$37,998,646.36	$26,808,127.76	$20,748,470.59
Net Working Capital	$13,148,007.86	$12,861,150.05	$13,161,476.70	$10,999,796.61	$ 7,922,519.87	$ 4,029,290.68

Directors

SEWELL L. AVERY, Chicago, Ill.
WALDO A. AVERY, Detroit, Mich.
R. G. BEAR, Chicago, Ill.
C. R. BIRDSEY, Chicago, Ill.
H. E. BROOKBY, Chicago, Ill.

A. E. ENGLISH, Omaha, Neb.
P. A. ENGLISH, Los Angeles, Cal.
JOHN W. FOWLER, Chicago, Ill.
C. F. HENNING, Chicago, Ill.
A. F. KING, New York, N. Y.

G. R. KING, New York, N. Y.
O. M. KNODE, Chicago, Ill.
E. L. MARSH, Sandusky, Ohio
JOHN E. MACLEISH, Chicago, Ill.
MELVIN A. TRAYLOR, Chicago, Ill.

Officers

President.....SEWELL L. AVERY
Vice-President.....O. M. KNODE
Vice-President.....C. F. HENNING
Secretary-Treasurer.....R. G. BEAR

General Counsel

SCOTT, BANCROFT, MARTIN & MACLEISH

Transfer Agent

CONTINENTAL NATIONAL BANK AND TRUST CO., Chicago, Ill.

Registrar of Transfers

THE NORTHERN TRUST CO., Chicago, Ill.

General Offices
300 West Adams Street
CHICAGO, ILLINOIS

Branch Offices

New York	Detroit
Buffalo	Milwaukee
Boston	Minneapolis
Washington	St. Louis
Philadelphia	Kansas City
Pittsburgh	Omaha
Cleveland	Denver
Cincinnati	Los Angeles
Baltimore	Atlanta

San Francisco

Subsidiary Companies

Canadian Gypsum Company, Limited
United States Gypsum Company of Delaware
United States Gypsum Company of Maryland
Samson Plaster Board Company
United States Gypsum Transportation Co.
Gypsum Packet Company, Limited

11041 *Government's Exhibit No. 331*

UNITED STATES GYPSUM COMPANY Twenty-seventh Annual Report Fiscal Year Ending December 31, 1928

11042 United States Gypsum Company of Illinois [formerly of New Jersey] Twenty-seventh Annual Report Fiscal Year Ending December 31, 1928

11043 February 13, 1929.

To the Stockholders of the United States Gypsum Company:

Your Board of Directors submits the following report on the business of the United States Gypsum Company and its subsidiaries for the year ended December 31, 1928.

The net income for the year is $6,301,635.16, after deducting federal taxes and depreciation. This net income, after providing for the 7% dividend on the preferred stock, is equal to $7.22 per share on the Company's outstanding common stock.

Disposition of this net income has been made as follows: cash dividends, $1,703,201.34; stock dividends, $1,383,004.00; added to surplus, $2,960,054.67.

Expenditures for new plants, additions and improvements amount to $6,137,592.27. Included in the above are mills in Montana and Wyoming acquired to better serve these markets, and the investment in new plants now in the course of construction at Boston, Philadelphia, Detroit, Alabaster and Chicago.

Competitive conditions have been of a severity unknown in the industry for many years. Starting early in the spring and continuing without abatement throughout the year, price declines have been such as to severely assail all commodities in all sections. In important sales divisions and on major commodities the common struggle to retain establishment has led manufacturers to sell frequently at prices lower than cost. Our Company has faced this condition with reluctance and met the conditions with restraint. As
11044 this development has been gradual the year's report herewith submitted reflects again the average of the

past twelve months, rather than the lower rate of earnings which must prevail if present conditions continue.

Our recently introduced commodities and the newer products now being offered continue increasingly to contribute to the Company's earnings. The profit showing made under such adverse conditions confirms the wisdom of the Company's investment program of the past and gives confidence in the economic security of the development now under way.

Respectfully submitted,

SEWELL L. AVERY,
President.

Consolidated Balance S

ASSETS

Current Assets:			
Cash and cash resources—			
Bank balances and working funds	$1,491,516.49		
U. S. Government securities, including accrued interest—at cost	7,497,095.55	$ 8,988,612.04	
Receivables—			
Accounts and notes	$3,756,719.06		
Construction contracts	749,168.68		
	$4,505,887.74		
Less—Reserves for bad debts	302,749.82	4,203,137.92	
Inventories of finished goods, raw materials, supplies, etc., as taken by the company, priced at cost which is not in excess of market		3,084,988.03	$16,276,737.99
Stock Subscriptions Receivable, Investments, Etc.:			
Installments receivable for stock subscribed on warrants, etc.		$ 6,411,394.86	
Bonds on deposit for insurance reserve, including interest—at cost		101,826.74	
Miscellaneous stock and bonds—at book value		94,871.00	6,608,092.60
Plant and Equipment—at Book Value:			
Land, gypsum, buildings, machinery, steamers, etc.	$46,022,197.51		
Less—Reserves for depreciation and depletion	7,530,495.06	38,491,702.45	
Deferred Charges:			
Stripping costs, amortizable patent expenditures and prepaid expenses			750,571.11
			$62,127,104.15

Sheet of December 31, 1928

LIABILITIES

Current Liabilities:			
Accounts payable		$ 1,139,715.56	
Accrued liabilities—			
Payrolls, local taxes, etc.	$ 1,040,839.13		
Federal income taxes	776,604.85	1,817,443.98	$ 2,957,159.54
Reserves:			
Contingencies		$ 912,801.13	
Accident insurance, guarantees, etc.		411,349.78	1,324,150.91
Capital Stock and Surplus:			
Capital stock—			
7% cumulative preferred— $100 par value—			
Authorized— 100,000 shares			
Outstanding— 77,281 shares	$ 7,728,100.00		
Paid for but unissued— 1,136 shares	113,600.00		
Common—$20 par value—			
Authorized— 1,250,000 shares			
Outstanding— 760,436 shares	15,208,720.00		
Subscribed on warrants issued to stockholders on July 14, 1928— 380,105 shares	7,602,100.00	$30,652,520.00	
Surplus		27,193,273.70	57,845,793.70
			$62,127,104.15

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UNITED STATES GYPSUM COMPANY
and Subsidiary Companies

Summary of Consolidated Surplus Account
For the Years 1927 and 1928

	1928	1927
Net Profits before deducting depreciation, depletion and Federal income taxes	$ 8,325,322.06	$ 9,961,465.79
Deduct Provisions for:		
Depreciation and depletion	$ 1,517,082.05	$ 1,307,997.57
Federal income taxes	776,604.85	1,114,960.38
Total	$ 2,293,686.90	$ 2,422,957.95
Surplus Net Profits for Year	$ 6,031,635.16	$ 7,538,507.84
Surplus resulting from issuance of Capital Stock	14,624.85	237,826.03
Gross Increase in Surplus during year	$ 6,046,260.01	$ 7,776,333.87
Deduct Distributions to Stockholders:		
Cash dividends on preferred stock	$ 541,502.94	$ 554,551.66
Cash dividends on common stock	1,161,698.40	1,793,544.80
Stock dividends on common stock	1,383,004.00	—
Total	$ 3,086,205.34	$ 2,348,096.46
Net Increase in Surplus during year	$ 2,960,054.67	$ 5,428,237.41
Surplus at beginning of year	24,233,219.03	18,804,981.62
Surplus at end of year	$27,193,273.70	$24,233,219.03

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ARTHUR ANDERSEN & Co.
Certified Public Accountants

Report on United States Gypsum Company
and Subsidiary Companies

Certificate for Publication

Sewell L. Avery, President,
United States Gypsum Company,
Chicago, Illinois.

Dear Sir:

We have examined the accounts of the United States Gypsum Company and its Subsidiary Companies for the year ended December 31, 1928. Accepting the balances of plant, equipment and surplus accounts of December 31, 1927, as previously certified to by the Audit Company of New York, we certify that, in our opinion, the accompanying balance sheet and summary of surplus account correctly present the consolidated financial position of the companies at December 31, 1928, and the consolidated surplus net profits for the year ended that date.

Very truly yours,

ARTHUR ANDERSEN & Co.

Chicago,
February 11, 1929.

United States Gypsum Company and Subsidiary Companies

Comparative Consolidated Balance Sheets

	1928	1927	1926	1925	1924	1923
ASSETS						
Current Assets:						
Cash on hand and in banks	$ 1,491,516.49	$ 1,333,346.10	$ 1,123,703.51	$ 899,270.20	$ 1,277,287.04	$ 477,570.57
U. S. Government Securities	7,497,095.55	6,100,350.37	5,647,006.23	6,515,129.25	4,551,928.95	3,513,926.42
Accounts and notes receivable	3,756,719.06	4,423,100.65	4,567,001.45	4,628,331.46	3,885,913.60	3,197,713.81
Construction contracts receivable	749,168.68	498,544.91	838,053.60	680,457.68	445,414.60	687,754.76
Inventories	3,084,988.03	3,431,907.45	3,754,122.74	3,319,318.56	3,107,081.53	2,004,395.90
Total	$16,579,487.81	$15,787,249.48	$15,929,887.53	$16,042,507.15	$13,267,625.72	$ 9,881,361.46
Stock Subscriptions Receivable, Investments, Etc.:						
Stock subscriptions	$ 6,411,394.86	$ —	$ —	$ —	$ —	$ —
Bonds and other securities	196,697.74	160,032.66	127,814.58	119,118.50	127,087.42	14,850.00
Total	$ 6,608,092.60	$ 160,032.66	$ 127,814.58	$ 119,118.50	$ 127,087.42	$ 14,850.00
Plant and Equipment	$46,022,197.51	$39,969,762.25	$34,371,206.52	$28,247,659.71	$24,441,591.27	$16,780,063.48
Deferred Charges	$ 750,571.11	$ 639,366.51	$ 463,956.21	$ 238,682.28	$ 162,341.95	$ 131,852.82
Total Assets	$69,960,349.03	$56,556,410.90	$50,892,864.84	$44,647,967.64	$37,998,646.36	$26,808,127.76
LIABILITIES						
Current Liabilities:						
Accounts Payable	$ 1,139,715.56	$ 924,426.23	$ 1,210,554.53	$ 1,183,038.52	$ 1,126,980.41	$ 1,059,523.19
Accrued Liabilities	1,817,443.98	1,714,815.39	1,858,182.95	1,697,991.93	1,140,848.70	899,318.40
Total	$ 2,957,159.54	$ 2,639,241.62	$ 3,068,737.48	$ 2,881,030.45	$ 2,267,829.11	$ 1,958,841.59
Reserves	$ 9,157,395.79	$ 7,718,390.25	$ 6,820,045.74	$ 6,097,065.82	$ 5,315,276.47	$ 3,904,758.68
Capital Stock and Surplus:						
Preferred stock	$ 7,841,700.00	$ 8,141,600.00	$ 8,441,600.00	$ 8,741,600.00	$ 9,032,900.00	$ 6,020,300.00
Common stock outstanding	15,208,720.00	13,823,960.00	13,757,500.00	10,138,300.00	8,786,960.00	5,911,680.00
Common stock subscribed	7,602,100.00	—	—	—	—	—
Surplus	27,193,273.70	24,233,219.03	18,804,981.62	16,789,971.37	12,595,680.78	9,012,547.49
Net Worth	$57,845,793.70	$46,198,779.03	$41,004,081.62	$35,669,871.37	$30,415,540.78	$20,944,527.49
Total Liabilities	$69,960,349.03	$56,556,410.90	$50,892,864.84	$44,647,967.64	$37,998,646.36	$26,808,127.76
Net Working Capital	$13,622,328.27	$13,148,007.86	$12,861,150.05	$13,161,476.70	$10,999,796.61	$ 7,922,519.87

11051 UNITED STATES GYPSUM COMPANY

Directors

SEWELL L. AVERY, Chicago, Ill.
WALDO A. AVERY, Detroit, Mich.
R. G. BEAR, Chicago, Ill.
C. R. BIRDSEY, Chicago, Ill.
A. E. ENGLISH, Los Angeles, Calif.

P. A. ENGLISH, Los Angeles, Calif.
JOHN W. FOWLER, Chicago, Ill.
C. F. HENNING, Chicago, Ill.
C. W. HIGLEY, Chicago, Ill.
A. F. KING, New York, N. Y.

G. R. KING, New York, N. Y.
O. M. KNODE, Chicago, Ill.
JOHN E. MACLEISH, Chicago, Ill.
E. L. MARSH, Black Hall, Conn.
MELVIN A. TRAYLOR, Chicago, Ill.

Officers

President.....SEWELL L. AVERY
Vice-President.....O. M. KNODE
Vice-President.....C. F. HENNING
Secretary-Treasurer.....R. G. BEAR

General Counsel

SCOTT, BANCROFT, MARTIN & MACLEISH

Transfer Agent

CONTINENTAL NATIONAL BANK & TRUST CO., Chicago, Ill.

Registrar of Transfers

THE NORTHERN TRUST CO., Chicago, Ill.

11052 UNITED STATES GYPSUM COMPANY

General Offices
300 West Adams Street
CHICAGO, ILLINOIS

Branch Offices

New York	Milwaukee
Buffalo	Minneapolis
Boston	St. Louis
Washington	Kansas City
Baltimore	Omaha
Philadelphia	Dallas
Pittsburgh	Denver
Cleveland	Atlanta
Cincinnati	Memphis
Detroit	Los Angeles

San Francisco

Subsidiary Companies

Canadian Gypsum Company, Limited
United States Gypsum Company of Delaware
United States Gypsum Company of Maryland
Samson Plaster Board Company
United States Gypsum Transportation Co.
Gypsum Packet Company, Limited

11053 *Government's Exhibit No. 332*

UNITED STATES GYPSUM COMPANY Twenty-eighth Annual Report Fiscal Year Ending December 31, 1929

11054 United States Gypsum Company of Illinois [formerly of New Jersey] Twenty-eighth Annual Report Fiscal Year Ending December 31, 1929

11055 February 13, 1930.

To the Stockholders of the United States Gypsum Company:

Your Board of Directors submits the following report on the business of the United States Gypsum Company and its subsidiaries for the year ended December 31, 1929.

The net income for the year is $5,102,304.92, after deducting federal taxes and depreciation. This net income, after providing for the 7% dividend on the preferred stock is equal to $3.98 per share on the common stock now outstanding, and represents an earning of $5.33 per share on the average number of shares of common stock outstanding during the year. Cash dividends of $1,904,114.90 were paid, and the net amount added to surplus was $3,491,490.72.

Expenditures for new plants, additions and improvements amounted to $11,254,534.36, which includes the construction started in 1928 of the new plants at Boston, Philadelphia, Detroit, Alabaster and Chicago. The partial financing of these new plants through the issuance of rights to the stockholders, yielded $5,645,306.48 from the year's installments, the balance being provided out of earnings. These new mills were completed and put into production too late in the year to permit them to make a substantial contribution to earnings. The results already attained from their operation demonstrate the soundness, security and advantages of these investments.

For many years the Company has suffered from a general infringement of its wallboard patents and has in-
11056 curred the expense of litigation in their defense. During the year these conditions have been corrected by arrangements for the payment to us of damages suffered and through the granting of licenses under royalty. The returns to be received, while substantial, are relatively

of a minor amount. The major benefits anticipated are a relief from the disadvantages of and incident to legal contention, and the increased consumption of wallboard products which should follow the quality improvements that a full and uniform use of the patented methods and products should assure.

The benefits expected from an improvement in market conditions occurring in the middle of the year were offset by a drastic decline in building which was first felt in August. While improvement is confidently expected, it is obvious that in the cities, in divisions important to our business, building has exceeded the present demand.

Disclaiming ability to foretell the next year's developments at this time, it may be fairly stated that the general feeling of the organization is that we shall have in 1930 a satisfactory and a better year.

Respectfully submitted,

SEWELL L. AVERY,
President.

United States Gypsum Company and Subsidiary Companies

Consolidated Balance Sheet as of December 31, 1929

ASSETS

Current Assets:			
Cash and cash resources—			
Bank balances and working funds	$ 715,193.01		
U. S. Government securities including accrued interest—at cost	5,433,219.62	$ 6,148,412.63	
Receivables—			
Accounts and notes	$3,821,161.70		
Construction contracts	643,822.49		
	$4,464,984.19		
Less—Reserves for bad debts	379,997.18	4,084,987.01	
Inventories of finished goods, raw materials, supplies, etc. as taken by the company, priced at cost which is not in excess of market		4,051,556.84	$14,284,956.48
Stock Subscriptions Receivable, Investments, Etc.:			
Employees' stock purchase contracts		$ 1,393,977.48	
Bonds on deposit for insurance reserve, including interest—at cost		135,336.87	
Miscellaneous stocks and bonds—at book value		74,309.20	1,603,623.55
Plant and Equipment—at Book Value:			
Land, gypsum, buildings, machinery, steamers, etc.		$56,632,037.38	
Less—Reserves for depreciation and depletion		8,992,610.83	47,639,426.55
Deferred Charges:			
Stripping costs, amortizable patent expenditures and prepaid expenses			856,675.49
			$64,384,682.07

LIABILITIES

Current Liabilities:			
Accounts payable		$ 644,090.46	
Accrued liabilities—			
Payrolls, local taxes, etc.	$ 515,303.48		
Federal income taxes	575,052.47	1,090,355.95	$ 1,734,446.41
Reserves:			
Contingencies		$ 903,012.32	
Accident insurance, guarantees, etc.		534,958.92	1,437,971.24
Capital Stock and Surplus:			
Capital stock—			
7% cumulative preferred—$100 par value—			
Authorized—100,000 shares			
Outstanding—75,417 shares	$ 7,541,700.00		
Common—$20 par value—			
Authorized—1,250,000 shares			
Outstanding—1,149,290 shares	22,985,800.00	$30,527,500.00	
Surplus		30,684,764.42	61,212,264.42
			$64,384,682.07

11059 UNITED STATES GYPSUM COMPANY
and Subsidiary Companies

Summary of Consolidated Surplus Account
For the Years 1928 and 1929

	1929	1928
Net Profits before deducting depreciation, depletion and Federal income taxes	$ 7,415,619.61	$ 8,325,322.06
Deduct Provisions for:		
Depreciation and depletion	$ 1,766,082.31	$ 1,517,082.05
Federal income taxes	547,232.38	776,604.85
Total	$ 2,313,314.69	$ 2,293,686.90
Surplus Net Profits for Year (after credit in 1929 for adjustment of taxes previously deducted from income)	$ 5,102,304.92	$ 6,031,635.16
Surplus resulting from issuance of Capital Stock	293,300.70	14,624.85
Gross Increase in Surplus during year	$ 5,395,605.62	$ 6,046,260.01
Deduct Distributions to Stockholders:		
Cash dividends on preferred stock	$ 528,089.91	$ 541,502.94
Cash dividends on common stock	1,376,024.99	1,161,698.40
Stock dividends on common stock	—	1,383,004.00
Total	$ 1,904,114.90	$ 3,086,205.34
Net Increase in Surplus during year	$ 3,491,490.72	$ 2,960,054.67
Surplus at beginning of year	27,193,273.70	24,233,219.03
Surplus at end of year	$30,684,764.42	$27,193,273.70

11060 Auditors' Certificate

We have examined the accounts of the United States Gypsum Company and its Subsidiary Companies for the year ended December 31, 1929, and we certify that, in our opinion, the accompanying balance sheet and summary of surplus account correctly present the consolidated financial position of the companies at December 31, 1929, and the consolidated surplus net profits for the year ended that date.

ARTHUR ANDERSEN & Co.

Chicago, Illinois,
February 10, 1930.

Comparative Consolidated Balance Sheets

ASSETS	1929	1928	1927	1926	1925	1924
Current Assets:						
Cash on hand and in banks	$ 715,193.01	$ 1,491,516.49	$ 1,333,346.10	$ 1,123,703.51	$ 899,270.20	$ 1,277,287.04
U. S. Government Securities	5,433,219.62	7,497,095.55	6,100,350.37	5,647,006.23	6,515,129.25	4,551,928.95
Accounts and notes receivable	643,822.49	749,168.68	498,544.91	4,567,001.45	4,628,331.46	3,885,913.60
Construction contracts receivable	3,821,161.70	3,756,719.06	4,423,100.65	838,053.60	680,457.68	445,414.60
Inventories	4,051,556.84	3,084,988.03	3,431,907.45	3,754,122.74	3,319,318.56	3,107,081.53
Total	$14,664,953.66	$16,579,487.81	$15,787,249.48	$15,929,887.53	$16,042,507.15	$13,267,625.72
Stock Subscriptions Receivable, Investments, Etc.:						
Stock purchase contracts	$ 1,393,977.48	$ 6,411,394.86	$ —	$ —	$ —	$ —
Bonds and other securities	209,646.07	196,697.74	160,032.66	127,814.58	119,118.50	127,087.42
Total	$ 1,603,623.55	$ 6,608,092.60	$ 160,032.66	$ 127,814.58	$ 119,118.50	$ 127,087.42
Plant and Equipment	$56,632,037.38	$46,022,197.51	$39,969,762.25	$34,371,206.52	$28,247,659.71	$24,441,591.27
Deferred Charges	$ 856,675.49	$ 750,571.11	$ 639,366.51	$ 463,956.21	$ 238,682.28	$ 162,341.95
Total Assets	$73,757,290.08	$69,960,349.03	$56,556,410.90	$50,892,864.84	$44,647,967.64	$37,998,646.36
LIABILITIES						
Current Liabilities:						
Accounts Payable	$ 644,090.46	$ 1,139,715.56	$ 924,426.23	$ 1,210,554.53	$ 1,183,038.52	$ 1,126,980.41
Accrued Liabilities	1,090,355.95	1,817,443.98	1,714,815.39	1,858,182.95	1,697,991.93	1,140,848.70
Total	$ 1,734,446.41	$ 2,957,159.54	$ 2,639,241.62	$ 3,068,737.48	$ 2,881,030.45	$ 2,267,829.11
Reserves	$10,810,579.25	$ 9,157,395.79	$ 7,718,390.25	$ 6,820,045.74	$ 6,097,065.82	$ 5,815,276.47
Capital Stock and Surplus:						
Preferred stock	$ 7,541,700.00	$ 7,841,700.00	$ 8,141,600.00	$ 8,441,600.00	$ 8,741,600.00	$ 9,032,900.00
Common stock outstanding	22,985,800.00	15,208,720.00	13,823,960.00	13,757,500.00	10,138,300.00	8,786,960.00
Common stock subscribed	—	7,602,100.00	—	—	—	—
Surplus	30,684,764.42	27,193,273.70	24,233,219.03	18,804,981.62	16,789,971.37	12,595,680.78
Net Worth	$61,212,264.42	$57,845,793.70	$46,198,779.03	$41,004,081.62	$35,669,871.37	$30,415,540.78
Total Liabilities	$73,757,290.08	$69,960,349.03	$56,556,410.90	$50,892,864.84	$44,647,967.64	$37,998,646.36
Net Working Capital	$12,930,507.25	$13,622,328.27	$13,148,007.86	$12,861,150.05	$13,161,476.70	$10,999,796.61

5990

11063 • UNITED STATES GYPSUM COMPANY

Directors

SEWELL L. AVERY, Chicago, Ill.
WALDO A. AVERY, Detroit, Mich.
R. G. BEAR, Chicago, Ill.
C. R. BIRDSEY, Chicago, Ill.
A. E. ENGLISH, Los Angeles, Calif.
P. A. ENGLISH, Los Angeles, Calif.
JOHN W. FOWLER, Chicago, Ill.
C. F. HENNING, Chicago, Ill.
C. W. HIGLEY, Chicago, Ill.
A. F. KING, New York, N. Y.
G. R. KING, New York, N. Y.
O. M. KNODE, Chicago, Ill.
JOHN E. MACLEISH, Chicago, Ill.
E. L. MARSH, Black Hall, Conn.
MELVIN A. TRAYLOR, Chicago, Ill.

Officers

President.....SEWELL L. AVERY
Vice-President.....O. M. KNODE
Vice-President.....C. F. HENNING
Secretary-Treasurer.....R. G. BEAR

General Counsel

SCOTT, BANCROFT, MARTIN & MACLEISH

Transfer Agent

CONTINENTAL ILLINOIS BANK & TRUST CO., Chicago, Ill.

Registrar of Transfers

THE NORTHERN TRUST CO., Chicago, Ill.

11064 UNITED STATES GYPSUM COMPANY

General Offices
300 West Adams Street
CHICAGO, ILLINOIS

Branch Offices

New York	Milwaukee
Buffalo	Minneapolis
Boston	St. Louis
Washington	Kansas City
Baltimore	Omaha
Philadelphia	Dallas
Pittsburgh	Denver
Cleveland	Atlanta
Cincinnati	Memphis
Detroit	Los Angeles

San Francisco

Subsidiary Companies

Canadian Gypsum Company, Limited
United States Gypsum Company of Delaware
United States Gypsum Company of Maryland
Samson Plaster Board Company
United States Gypsum Transportation Co.
Gypsum Packet Company, Limited
The Gypsum Company

11065 *Government's Exhibit No. 333*

MEMBERS OF THE MANAGEMENT BOARD:

NEW YORK, MAY 10, 1938

Subj: *Perforated Gypsum Lath*

Dict. by: W. G. BAUMHOGGER, *Pres.*-E.D.

Effective May 2nd, the U. S. Gypsum Company eliminated the differential of 25¢ per thousand feet on Perforated Lath; in other words, both Perforated and Non-Perforated Lath now sell at $13.00 per thousand feet.

I do not have the file before me as I dictate this memorandum (Mr. Ernst has it with him and is out of town), but the Licenses on Perforated Lath were offered by the U. S. Gypsum Company to its various Licensees early in 1936. Acting as our representatives, Messrs. Henley and Van Hagan attended a meeting called by Mr. Henning, then Vice President of the U. S. Gypsum Company, for the purpose of discussing the proposed Licenses. One of the commitments made by Mr. Henning at that meeting was that the U. S. Gypsum Company would maintain the minimum price on Perforated Lath at a sufficiently higher level (over Non-Perforated Lath) to cover (a) the additional manufacturing costs; (b) the additional royalty of 10¢ per thousand feet. It was assumed that the additional manufacturing costs would be 15¢ per thousand feet; therefore, the minimum differential was to be 25¢ per thousand feet.

Actually, the additional manufacturing cost of Perforated Lath has been more than 15¢ per thousand feet. Mr. Krug tells me that our additional cost is 35¢ per thousand feet.

The former differential of 25¢ on Gypsum Lath has, therefore, not covered the additional manufacturing cost and the additional royalties.

In eliminating the former differential of 25¢, the U. S. Gypsum Company, as I see it, has done as follows:

1. Failed to keep faith with its Licensees in connection with its promise to maintain the minimum price of Perforated Lath at a higher price than Non-Perforated.

2. Taken a step which will result in a very much larger proportion of Perforated Lath being sold than was the case heretofore.

3. Reduced the income which its Licensees obtain on the sale of Lath. (If, as I assume, a larger proportion of the sales go to Perforated Lath, and as Perforated Lath is now sold at the same price as Non-Perforated, and as Perforated Lath costs more to manufacture than Non-Perforated, and as the Licensees pay a higher royalty to U.S.G. on Perforated Lath, this means that the income of Licensees on their total Lath sales is reduced.)

4. Obtains increased royalties for itself. (The royalty on Perforated Lath is 10¢ per thousand feet more than on Non-Perforated; hence the more Per-
11066 forated Lath that is sold, the larger are the royalties collected by the U. S. Gypsum Company.) Possibly these larger royalties will offset the U. S. Gypsum Company's additional manufacturing cost of Perforated Lath.

In other words, this action of the U. S. Gypsum Company has placed the rest of the Industry at a disadvantage; without similarly affecting the U. S. Gypsum Company. It seems to me that this is a perfect example of the type of monopolistic and patent control which the Federal Government has said it does not favor. We may wish to consider the advisability of discussing with general counsel the question of filing a complaint with the Federal Trade Commission. Before filing such a complaint, however, I would want to have the data carefully analyzed by a legal firm which specializes in cases of this nature. We would also have to give a great deal of consideration to the effect that such action might have on our future relations with the U. S. Gypsum Company; and to retaliatory action which they might take—such as reducing the price of Wallboard, etc.

According to opinions from counsel, which we have in our files, the U. S. Gypsum Company's Patents on Perforated Lath could probably not be sustained were anyone to attack them. As a matter of fact, there seems to be no reason for believing that the Patents could be sustained. We knew this at the time we signed the License; but, presumably, were influenced by our belief that as other Gypsum Lath and Wallboard items were under Patent and

price control, it would be well to have the same situation apply to Perforated Lath.

The National Gypsum Company has not taken a License for the manufacture of Perforated Lath; but is manufacturing Perforated Lath without the payment of royalty. Mr. Ernst is obtaining the data for us. In comparison with our two largest competitors, therefore, we are at a cost disadvantage to the extent of 10¢ a thousand feet.

The License under which we are operating on Perforated Lath may be cancelled by either party on eighteen months' notice. In view of the fact that the Patents are of doubtful validity, it does not appear likely that the U. S. Gypsum Company will cancel the License. If, however, the Patents are stronger than we have reason to believe they are, there is always the possibility that after the Perforated Lath market has been developed, the U. S. Gypsum Company will cancel the Licenses and thus have that market to themselves.

After considering the various angles of this situation, it is my opinion that we should write a friendly letter to Mr. Knode, President of the U. S. Gypsum Company, along the following lines:

"Effective May 2nd, your Company reduced the price of Perforated Lath from $13.25 per thousand feet to $13.00—in other words, wiped out the differential which has heretofore existed in the prices of Perforated Lath and Non-Perforated Lath.

"We have every reason to believe in the integrity of the U. S. Gypsum Company; and we are sure that the management of the U. S. Gypsum Company would not, knowingly, violate its commitments. For that reason, we are of the opinion that you are not acquainted with
the assurance given us by Mr. Henning prior to our
11067 acceptance of a License for the manufacture of Perforated Lath, which assurance was to this effect: That the U. S. Gypsum Company would, while such License was in effect, maintain the price of Perforated Lath at a sufficiently higher price than Non-Perforated Lath to cover (a) the additional manufacturing cost; (b) the additional royalties of 10¢ per thousand feet. It was, furthermore, agreed by Mr. Henning—in his capacity as Vice President of the U. S. Gypsum Company—that this differential would be a minimum of 25¢ per thousand feet, on the assumption that the ad-

ditional cost of manufacturing Perforated Lath would be 15¢ per thousand feet, which, plus the 10¢ per thousand feet extra royalties, amounted to an additional cost to Licensees of 25¢ per thousand feet.

"Actually, the former differential of 25¢ per thousand feet did not cover such additional costs. Our experience to date indicates that Perforated Lath costs us 35¢ per thousand feet more than Non-Perforated Lath, exclusive of the 10¢ per thousand feet additional royalty.

"If Perforated Lath cost the same to manufacture as Non-Perforated, and if the royalty on Perforated Lath were no higher than on Non-Perforated, there would, of course, be no valid reason for selling Perforated Lath at a higher price than Non-Perforated; but, as stated above, that is not the case. Your action, therefore, in reducing the price of Perforated Lath places us at a distinct disadvantage with respect to both yourselves and the National Gypsum Company, inasmuch as the National Gypsum Company is not operating under a similar license and is not required to pay an additional 10¢ per thousand feet royalty. If, as we believe, the establishing of the same selling price on Perforated and Non-Perforated Lath will result in a very much larger proportion of Perforated Lath being sold, this disadvantage to us is likely to become acute, in that we not only fail to recoup the higher cost of manufacturing Gypsum Lath, but will be required to pay you the additional royalty on a much larger proportion of our Gypsum Lath business than has been the case heretofore.

"Under the circumstances, and particularly in view of the assurances given to us by Mr. Henning prior to our acceptance of the License on Perforated Lath, we request that you reinstate the price of Perforated Lath at $13.25 per thousand feet; and we also request that during the time this License is operative, this differential of 25¢ per thousand feet between the price of Perforated and Non-Perforated Lath be maintained.

"So that you may understand our position in the matter, may we say that Mr. Henning's assurances as to the maintenance of an adequate differential between the price of Perforated and Non-Perforated Lath were

a prime consideration in our decision to accept the license? In other words, if this assurance had
11068 not been given, we would not have signed the License Agreement.

"We believe your action in recently eliminating the former 25¢ per thousand feet differential indicates that you are not acquainted with the assurance that was given us by Mr. Henning. We hope that you will be disposed to accept our word that this assurance was given. If you desire it, however, we shall be glad to furnish affidavits to this effect from several people who were present at the meeting at which Mr. Henning gave this assurance.

"We particularly request that you do not reinstate the differential of 25¢ per thousand feet between the minimum selling prices of Perforated and Non-Perforated Lath, by maintaining Perforated Lath at $13.00 per thousand feet and reducing Non-Perforated Lath to $12.75. Gypsum Lath, as you know and as I believe all of your Licensees will tell you, is and has been selling at a lower price than is warranted by its manufacturing cost and distributing expense.

"An early statement from you regarding your decision in the matter will be appreciated."

I sent Mr. Henley a copy of a proposed letter, similar to the one quoted above, and asked him to give me a frank expression of opinion regarding the advisability of such a letter.

Mr. Henley's reply is as follows:

"In my opinion a 'letter of disapproval' should not be written (for the following reasons):

1. Matters of this kind can always be handled by conference to a much better advantage than by formal correspondence.

2. I am doubtful that U. S. G. would make any change in policy on account our protest or because of Mr. Henning's commitment.

3. Information received confidentially that U.S.G. are selling approximately 50% to 60% of their lath in perforated form—National about 12% and Certain-teed only some 5%.

4. U.S.G. are 'sold' on the potential market that cheap Gypsum Lath will 'open' to the industry (Wood

Lath Market) and are definitely of the opinion that $13.00 Perforated will further materially increase market (Metal Lath) possibilities."

I do not agree with Mr. Henley's conclusions.

In paragraph "1", he states that matters of this kind can always be handled by conference to much better ad-
11069 vantage than by formal correspondence. I doubt that this is the case. True, the U. S. G. Company prefers to have conferences, but we know that they are past masters in the art of promising nothing at conferences. It seems to me that it would be much better for us in this instance to follow a technique that they do not like—that of stating our position, and our reasons for it, in writing. We shall, of course, have to consult counsel to determine whether we are incriminating ourselves by admitting that we were party to an agreement to maintain the price of Perforated Lath at a higher level than Non-Perforated; but it seems to me that the additional manufacturing cost and the additional royalty was, from our point of view, sufficient consideration for entering into such an agreement.

The second point made by Mr. Henley is that the U.S.G. Company will not honor the commitment made by Mr. Henning. That is an assumption; we won't know until we ask them. My own opinion is that the U. S. Gypsum Company does not wish to be in the position of violating an agreement which it has made.

The other two points raised by Mr. Henley are irrelevant.

Please consider this subject carefully prior to the next Management Board Meeting on the 20th, at which time it will be discussed.

11070 *Government's Exhibit No. 334*

PERFORATED GYPSUM LATH

MAY 16, 1938

H. H. VAN HAGAN—eoc

cc: Messrs.
A. Whittemore, *V.P.—New York*
E. G. Roos, *V.P.—New York*
James K. Norris, *V.P.—New York*
G. P. Krug—*New York*
O. R. Orr—*New York*

Referring to your memorandum of May 10 regarding the price situation on Perforated Gypsum Lath would comment on this as follows:

Referring to the second paragraph of your letter, while it is true that Mr. Henning did state that a price differential of 25¢ would apply on Perforated Gypsum Lath I do not believe that any guarantee was given that this price would be indefinitely maintained. In fact, when the license agreement was finally made up and submitted for signature this agreement did state that Licensor would have the privilege of changing prices at any time in future. This information was clearly contained in the agreement and agreement was negotiated on that basis. Taking this into consideration I would hesitate to recommend the proposed letter to Mr. Knode.

Referring to the third paragraph and information furnished by Mr. Krug on additional costs of perforating, which I interpret as the manufacturing cost of 35¢ per M. feet plus a royalty of 10¢ per M. feet, would advise that these figures need further explanation. There is included in this figure an Overhead running from 11¢ per M. at Akron with a standard production of 600,000' to 21¢ per M. at Acme, Texas with a standard production of 200,000'. You can readily appreciate that if any considerable production were actually developed that this Overhead figure would readily reduce itself from 2¢ to 5¢ per M.

Also with reference to the manufacturing cost, it was not contemplated at the time original installation of these machines was made that the Perforated Lath production would be a very large percentage of the total. Consequently machines were set up in out of the way places

where material could be conveyed to them by skids and in turn removed by skids. This made a 2 man operation out of the perforator. As production has stepped up we are rearranging these machines to put them into line with the lath bundlers and for complete automatic operation and when these matters have all been worked out the manufacturing cost will be considerably reduced. It is my estimate that the direct manufacturing cost without
11071 Overhead will be below 15¢ per M. feet. The Acme, Texas and Fort Dodge machines are now installed in this manner. The Akron machine is in process of being changed and appropriation has been submitted to cover. When these changes have been completed and production has reached a point where Overhead is in proper proportion to the balance of the cost I estimate the cost of perforating in total and including Overhead will range between 15¢ and 20¢ per M. square feet.

While it is true that Perforated Lath has made tremendous strides on the Pacific Coast it must be taken into consideration that California has State laws which demand a mechanical key of plaster to Gypsum Lath. This has resulted in development of Perforated Lath, Button Lath, Key Lath, etc. on the Pacific Coast. I have not felt that the reduction in the price in the East is going to swing all of our lath business over to Perforated Lath. My reason for this statement is that because of the perforation in this lath an excess of 5% of plaster is required on one of these jobs. This means the purchase of this 5% of material, the handling, mixing and application of same, and which is going to be quite an item on a plastering contractors costs. I believe the addition of Perforated Lath for general use is going to be slow for this reason.

It is my present thought that it would not be advisable to write the proposed letter to the U.S.G. Company and my reason for this comment is due to the fact that we still have a considerable job to do to bring our percentage of the industry up to 18% to 20%. Also that this additional percentage can be gained more readily by constant "wood sawing" rather than by developing any antagonism at this time. We also, of course, can protect ourselves to a much greater extent by the establishment of board and lath production at our other plaster mills, such as Grand Rapids and possibly Blue Rapids. The elimination of freight absorption is a much bigger factor than the small differential and royalty involved in this recent price change on

Perforated Lath. It is quite possible that putting the Perforated Lath and the regular lath on the same basis may assist in greatly enlarging the Gypsum Lath market, which in turn will mean more production for everyone. I believe this should be seriously considered.

As a further protection to our Gypsum Lath business I believe that the better control of paper prices for our western plants by our own production at East St. Louis is very necessary.

If it should be the majority opinion of the Management Board that a letter along the lines submitted be written to Mr. Knode I would suggest that the name of the National Gypsum Company be deleted and reference simply made to "another competitor." It was my understanding that the National Gypsum Company have al-
11072 ready received an infringement notice on their Perforated Lath.

I am giving you below an outline of the reasons which were taken into consideration in the signing of this license agreement:

First,—It was contended that the signing of the license agreement and payment of royalty was an added feature in maintaining the general patent structure covering Gypsum Wallboard and Lath and that it was correct procedure to do this, even taking into consideration the extra royalty which would be involved.

Second,—Our Company has no fire test data on our own products. It would be necessary that we conduct a fire test at the Bureau of Standards, at least on a side wall construction, and get a definite rating on our own products; otherwise we must use the Licensor's test data and which we have been doing in the past. The writer checked with the Bureau of Standards as to cost involved and which would amount to from $500.00 to $700.00 for a side wall construction fire test.

The above is written to express my present thoughts on this situation.

11073 *Government's Exhibit No. 335*

New York 7/11/38 Chicago Sales

PERFORATED GYPSUM LATH

MR. W. G. BAUMHOGGER, *Pres.*
WARREN HENLEY—*LP*

7/7/38

cc MR. E. G. ROOS, *V.p., New York*
MR. A. WHITTEMORE, *V.p., New York*

Saturday morning, July 9, I asked Mr. Knode as to present status of subject matter.

Mr. Knode advised that they had given this subject very careful consideration for the reason that if patent was "good," they definitely were of the opinion that same should be preserved for not only the benefit of licensor, but the licensees as well. However, he mentioned that they were not particularly interested in the income received from royalties.

To answer your specific question, Mr. Knode stated that they had decided that the patents were "good" and in order to clarify the situation, a formal letter had been written to manufacturers who had not recognized the perforated feature, the first letter being written July 8, and it was their intention to follow with another one within the next few days.

Mr. Knode went on to say that it is true—perforated lath had been manufactured for the last eight or ten years, containing, however, a ⅜ inch opening, whereas the real patent feature claimed by them consisted of a perforation ¾ inch in diameter together with proper spacing, and it is this combination "differing from previous board manufactured" that they claim is "new" and provides for the one-hour fire rating which the other types do not measure up to. It is therefore their decision to vigorously defend their patent position.

Mr. Knode went on to say that their position did not necessarily close the door on a discussion involving a possible reduction in royalty payments by us, and inasmuch as he plans on being in New York later this week or early next week, he will make it a point to drop in and see you and discuss this matter further.

I asked Mr. Knode to give me a ring a day or so previous to his leaving Chicago and I would teletype you day of his arrival in order, that if possible you could arrange to see him.

In conclusion. U. S. Gypsum intend to defend their perforated lath patent situation. They are quite willing to discuss possible reduction in royalty on our part during interim, i.e., from May 2, 1938 until patent position is fully clarified.

11074 *Government's Exhibit No. 336*

OAKFIELD GYPSUM PRODUCTS CORP.

Manufacturers of Gypsum Products

OAKFIELD, N. Y.

No. 11777

May 21, 1938

Sold to: Quality Materials Co.

Address: 220 Depew Avenue, Buffalo, N. Y.

Shipped to: City Material & Coal Co. Bessemer Ave. Cleveland, Ohio — Via PRR Dely.

In Car: SO 306423 — F. O. B. Cleveland Ohio

Our Order: — Your Order: Phone AMD — Terms: 2% 10 Days 30 Days Net

Quantity		Price	Total
10	Tons Oakleaf Neat Plaster 100# Paper	12.60	126.00
	Less 15% commission on net mill price of plaster or $7.40 per ton		11.10
			114.90
	Less 2%		2.30
			112.60

Paid

Board billed direct to City Material & Coal Co. and freight deducted from their invoice

Order 279
Invoice 459

Remittance #220

Send All Remittances to 728 Broad Street, Utica, N. Y.

Cost of cloth bags is included in billed price and must be paid with the material. Cloth bags are purchased at 15 cents each when returned within 6 months, in good condition, freight prepaid to us at Oakfield, N. Y.

11075 *Government's Exhibit No. 337*

OAKFIELD GYPSUM PRODUCTS CORP.

OAKFIELD, N. Y

Order No.:

Sold to: Thomas Cox Co., Inc.
205 11th Street, Niagara Falls, N. Y.

Ship to: Thomas Cox Co., Inc.
205 11th Street
Niagara Falls, N. Y.

June 16, 1938.

Route Via: Our Truck

Make Shipment: Today

Terms (See other side)

Quantity	Description	Price	Unit
63 Bdls.	Oakleaf Metallized Gypsum Lath, ⅜", 16" x 48"		
134 Bdls.	Oakleaf Gypsum Lath, ⅜", 16" x 48"		
150 Pcs.	Oakleaf Plasterboard, ⅜", 32" x 36", Folded Edges.		

Confirming 'phone from Mr. Hawkins and confirming 'phone to Oakfield Mill.

Dear Charlie: I told Mr. Hawkins to send you the order, you can forward it on to me as of course this being for Board we will bill direct.

AL,

Oakfield Gypsum Products Corp.

By A.M.D.

11076 *Government's Exhibit No. 338*

OAKFIELD GYPSUM PRODUCTS CORP.

OAKFIELD, N. Y.

Order No.: 264

Sold to: Thomas Cox Co., Inc.
205 11th St., Niagara Falls, N. Y.

Ship to: Same
Johnson Warehouse
2532 Hyde Park Blvd., Niagara Falls, N. Y.

June 20, 1938.

Route Via: Our Truck

Make Shipment: Deliver before noon today.

Terms (See other side)

Quantity		Description	Price	Unit
52 Pcs.	⅜"	4x8' Oakleaf Recessed Edge Gypsum Wallboard	1664	Sq. Ft.
10 Pcs.	⅜"	4x10 Oakleaf Recessed Edge Gypsum Wallboard	400	Sq. Ft.
8 Pcs.	⅜"	4x12 Oakleaf Recessed Edge Gypsum Wallboard	384	Sq. Ft.
158 Bdles.	⅜"	16"x48" Oakleaf Plain Gypsum Lath	5056	Sq. Ft.

Confirming 'phone to mill.

Thanks,

AL.

Oakfield Gypsum Products Corp.

By A.M.D.

11077 *Government's Exhibit No. 339*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

MAY 17, 1932.

MR. M. H. BAKER, *Pres.*,
National Gypsum Company,
Buffalo, N. Y.

DEAR SIR:

Re: Dwight Hinckley Lbr Co.

Since receipt of your letter of the first ult. regarding your sales to the above account of patented gypsum wallboard and plasterboard manufactured and sold by you under your license agreement we have received information indicating that Dwight Hinckley Lumber Company is offering such patented wallboard for sale at prices less than our minimum price to you therefor. It seems unreasonable to us that this dealer would be selling such patented board at a loss and we must therefore ask you for more specific information concerning your sales to this account.

We desire that you supplement your letter of April 1st with an affidavit advising us of the price actually paid by this dealer for the board shipped under the invoices listed in your letter. The affidavit should also state what, if any, adjustments, rebates or credit allowances of any nature whatsoever have been allowed to this dealer during the period that these shipments were made and should state the amount of any unpaid balances due on any of the shipments referred to in your letter.

Yours very truly,

BOARD SURVEY COMPANY

FRANK M. MILLER
Executive Secretary.

11078 *Government's Exhibit No. 340*

NATIONAL GYPSUM COMPANY
Inter-Office Correspondence

From R. F. BURLEY

Date MAY 25, 1932

After several days check-up Chicago will do nothing to stop Port Clinton pick-up and trucking until the Cleveland situation is disposed of.

By this they mean that Dwight Hinckley is selling to other dealers L.C.L. lots at less than carload price. To compete U.S.G. and others have to truck to Cleveland dealers. They won't entertain cleaning up Port Clinton until the Dwight Hinckley situation is cleaned out. I explained we were practically through but they want something quite definite on this—a definite commitment not to sell them. I felt before I gave this I would ask L. R. Lund to give me a memorandum of what Dwight Hinckley owe us and then check with you on the best type of official notice to give Dwight Hinckley that we have made other plans of distribution and won't sell them.

Would like your suggestions for handling this with Dwight Hinckley and as soon as possible. Perhaps it would be best to handle personally so as not to get involved in any correspondence. Then I will notify Chicago of our action and the wheels will be put in motion to try and correct the whole Port Clinton situation.

Yours very truly,

R. F. BURLEY

11079 *Government's Exhibit No. 341*

NATIONAL GYPSUM COMPANY
Inter-Office Correspondence

To C. A. HIGGINS

Date MAY 25, 1932

In reference to Dwight Hinckley, if they mail in an order for a carload of board what are your suggestions for handling it? I mean what is the best basis on which to turn it down.

Yours very truly,

B R. F. BURLEY

11080 *Government's Exhibit No. 343*

MAY 24, 1932

MR. F. M. MILLER
Board Survey Co.
300 West Adam's Bldg.
Chicago, Ill.

DEAR MR. MILLER:

Attached are certified statements covering our transactions during the last six months with the Dwight Hinckley Lumber Co., Cleveland, Ohio, as requested in your letter of the 17th.

It would naturally strike you as unreasonable that this dealer would be selling patented board at less than his cost. I personally had an opportunity to check into this some months ago and out of a discussion with this dealer it developed that they have been using the price on wallboard as a leader to sell certain other products. We recognize that such a policy is detrimental to our interest with other dealers and for that reason we hope to either correct this policy or discontinue the sale of Gold Bond wallboard to this account.

Very truly yours

M. H. Baker:MP *President*

11081 *Government's Exhibit No. 343-A*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, N. Y.

MAY 24, 1932

MR. F. M. MILLER
Board Survey Co.
300 West Adams Bldg.
Chicago, Ill.

DEAR MR. MILLER:

Attached are certified statements covering our transactions during the last six months with the Dwight Hinckley Lumber Co., Cleveland, Ohio, as requested in your letter of the 17th.

It would naturally strike you as unreasonable that this dealer would be selling patented board at less than his cost. I personally had an opportunity to check into this some months ago and out of a discussion with this dealer it developed that they have been using the price on wallboard as a leader to sell certain other products. We recognize that such a policy is detrimental to our interest with other dealers and for that reason we hope to either correct this policy or discontinue the sale of Gold Bond wallboard to this account.

Very truly yours

M. H. BAKER
President

M. H. Baker:MP

11082

MAY 24, 1932

During the past six months we have had no credit for allowances on the account of the Dwight-Hinckley Lumber Co., Cleveland, Ohio.

Certified true and correct statement.

IRWIN W. HILS
Bookkeeper

Subscribed and sworn to before me this 24th day of May, 1932.

CATHERINE HOGG
Notary Public

[SEAL]

6010

14083

NATIONAL GYPSUM COMPANY

Jackson Building

BUFFALO, N. Y.

Invoice No. 58467

Terms: { March 1st dating. 2-10-30

No discount allowed on freight.

Shipped to

Dwight-Hinckley Lumber Corp.,
Cleveland, Ohio.

Sold to

Dwight-Hinckley Lumber Corp.,
4223 E. 49th Str.,
Cleveland, Ohio.

Date	Feb. 11, 1932.
Your Order No.	....
Our Order No.	20952
Territory	Ritchie
F. O. B.	Mill Frt Allowed
Car Initial & No.	D&M 2618
Shipped from	National City Mich
Shipped Via	DM-MC-Toledo-NYC N&SS Dely

COPY

1000 Panels 4x8 Gold Bond Board	32,000 sq ft	$29.00		$928.00
Less Freight				103.96
				$824.04

This is a true and certified copy of original invoice.

J. E. TABER
Accounting Department.

Subscribed and sworn to before me
this 24th day of May, 1932

CATHERINE HOGG
Notary Public

(Notarial Seal)

When deducting for freight charges, paid Expense Bill must accompany remittance

11084

NATIONAL GYPSUM COMPANY

Jackson Building

BUFFALO, N. Y.

Invoice No. 57851

Terms: } 2/10 N/30

No discount allowed on freight.

Shipped to

Dwight-Hinckley Lumber Co.,
Cleveland, Ohio.

Sold to

Dwight-Hinckley Lumber Corp.,
4223 E. 49th Str.,
Cleveland, Ohio.

Date	Jan. 27, 1932.
Your Order No.	....
Our Order No.	20849
Territory	Ritchie
F. O. B.	Mill Frt Allowed
Car Initial & No.	D&M 2531
Shipped from	National City Mich
Shipped Via	DM-MC-Toledo-NYC N&SS Dely

COPY

675	Panels	4x6	Gold Bond	Board	16200	
575	"	4x7	"		16100	
					32300 sq ft	$29.00	$936.70
					Less Freight		104.91
							$831.79

This is a true and certified copy of original invoice.

J. E. TABER
Accounting Department.

Subscribed and sworn to before me
this 24th day of May, 1932

CATHERINE HOGG
Notary Public

(Notarial Seal)

When deducting for freight charges, paid-Expense Bill must accompany remittance

6012

11085

NATIONAL GYPSUM COMPANY

Jackson Building

BUFFALO, N. Y.

Invoice No. 56568

Terms: 2% Cash Discount if paid before March 1st.

No discount allowed on freight.

Shipped to

Dwight-Hinckley Lumber Co.,
Cleveland, Ohio.

Sold to

Dwight-Hinckley Lumber Co.,
4223 E. 49th Str.,
Cleveland, Ohio,

Date	Dec. 22, 1931.
Your Order No.	....
Our Order No.	20659
Territory	Ritchie
F. O. B.	Mill Frt Allowed
Car Initial & No.	D&M 2666
Shipped from	National City Mich
Shipped Via	DM-MC-Toledo-NYC N&SS Dely

COPY

5628 Panels 16x48 Lath	30,016 sq ft	$16.76	$503.07
	Less Freight		80.03
			$423.04

This is a true and certified copy of original invoice.

J. E. Taber
Accounting Department.

Subscribed and sworn to before me
this 24th day of May, 1932

Catherine Hogg
Notary Public

(Notarial Seal)

When deducting for freight charges, paid Expense Bill must accompany remittance

11086

NATIONAL GYPSUM COMPANY

Jackson Building

BUFFALO, N. Y.

Invoice No. 56499

Terms: 2% Cash Discount if paid before March 1st.
No discount allowed on freight.

Shipped to	Date	Dec. 22, 1931.
Dwight-Hinckley Lumber Co., Cleveland, Ohio.	Your Order No.	....
	Our Order No.	20660
	Territory	Ritchie
Sold to	F. O. B.	Mill F/t Allowed
	Car Initial & No.	D&M 2601
Dwight-Hinckley Lumber Co., 4223 E. 49th Str., Cleveland, Ohio.	Shipped from	National City Mich
	Shipped Via	DM-MC-Toledo-NYC N&SS Dely

COPY

1000 Panels 4x8 Gold Bond Board	32,000 sq ft	$28.76	$920.32
	Less Freight		89.26
			$831.06

This is a true and certified copy of original invoice.

J. E. TABER
Accounting Department

Subscribed and sworn to before me
this 24th day of May, 1932

CATHERINE HOGG
Notary Public

(Notarial Seal)

When deducting for freight charges, paid Expense Bill must accompany remittance

11087

NATIONAL GYPSUM COMPANY

Jackson Building

BUFFALO, N. Y.

Invoice No. 56376

Terms: { 2% Cash Discount if paid before Feb. 20th.

No discount allowed on freight.

Shipped to

Dwight-Hinckley Lumber Co.,
Cleveland, Ohio.

Sold to

Dwight-Hinckley Lumber Co.,
4823 E. 49th Str.,
Cleveland, Ohio.

Date	Dec. 18, 1931.
Your Order No.	....
Our Order No.	20644
Territory	Ritchie
F. O. B.	Mill Frt Allowed
Car Initial & No.	PRR 93375
Shipped from	National City Mich
Shipped Via	DM-MC-WLE-N&SS

COPY

500	Panels	4x9	Gold Bond Board	18000		
450	"	4x10	"	18000		
				36000 sq ft	$28.76	$1,035.36
				Less Freight		100.14
						$ 935.22

This is a true and certified copy of original invoice.

J. E. TABER
Accounting Department.

Subscribed and sworn to before me
this 24th day of May, 1932

CATHERINE HOGO
Notary Public

(Notarial Seal)

When deducting for freight charges, paid Expense Bill must accompany remittance

11088 NATIONAL GYPSUM COMPANY

Jackson Building

BUFFALO, N. Y.

Invoice No. 55233

Terms: Dec. 1st Dating.

No discount allowed on freight.

Shipped to
Dwight-Hinckley Lumber Co.,
Cleveland, Ohio.

Sold to
Dwight-Hinckley Lumber Co.,
4223 E. 49th Str.,
Cleveland, Ohio.

Date Nov. 16, 1931.
Your Order No. ....
Our Order No. 20436
Territory Ritchie
F. O. B. Mill Frt Allowed
Car Initial & No. L&M 2572
Shipped from National City Mich
Shipped Via DM-MC-WLE-N&SS Dely

COPY

150 Panels	4x9	Gold Bond Board	5400		
250 "	4x10	"	10000		
			15400 sq ft	$28.76	$442.90
2850 Panels	16x48	Lath	15200 "	16.76	254.75
					$697.65
			Less Freight		83.51
					$614.14

This is a true and certified copy of original invoice.

J. E. TABER
Accounting Department.

Subscribed and sworn to before me
this 24th day of May, 1932

CATHERINE HOGG
Notary Public

(Notarial Seal)

When deducting for freight charges, paid Expense Bill must accompany remittance

11089 *Government's Exhibit No. 345*

NATIONAL GYPSUM COMPANY
General Offices
BUFFALO, N. Y.

SEPTEMBER 20, 1927

MR. W. T. BLACK, *Gen. Mgr.*
Fairmont Wallplaster Co.
Fairmont, W. Va.

DEAR SIR:-

If convenient, we would like very much to have a reply to our letter of September 8th, copy of which is attached.

We feel we have something of interest, providing the subject is open for discussion at this time.

Yours very truly,

NATIONAL GYPSUM COMPANY

R F BURLEY
Assistant Director of Sales

RFBurley/FC

11090 *Government's Exhibit No. 345-2*

SEPT. 8, 1927

MR. W. T. BLACK, *Gen. Mgr.*
Fairmont Wallplaster Co.
Fairmont, W. Va.

DEAR SIR:-

You are familiar with our recent entry into the plaster field in the East. We have at Clarence, N. Y. one of the purest gypsum deposits and have in the past few months introduced our product in to the more important centers and are meeting an enthusiastic support on the part of the trade.

We are set up for big production and have the capacity to render service. Although we understand that a fair part of your business is taken care of out of Port Clinton, we thought you might be interested in advising us how much tonnage you had for direct shipment in the Eastern field. Would you be at all interested in having us handle this tonnage for you and on what differential.

Yours very truly,

NATIONAL GYPSUM COMPANY

11091 *Government's Exhibit No. 346*

NATIONAL GYPSUM COMPANY
General Offices
BUFFALO, N. Y.

OCTOBER 12, 1927

MR. W. T. BLACK, *Gen. Mgr.*
Fairmont Wallplaster Co.
Fairmont, W. Va.

DEAR MR. BLACK:-

We have written you several times in regard to serving you on your requirements for direct shipment in the Eastern field.

Won't you be kind enough to drop us a note and let us know if the subject is open for discussion, as we feel that we have something of interest to you.

Yours very truly,

NATIONAL GYPSUM COMPANY

R. F. BURLEY
Assistant Director of Sales

RFBurley/FC

11092

FRIDAY, OCTOBER 14TH, 1927.

MR. R. F. BURLEY,
National Gypsum Company,
Buffalo, New York.

DEAR MR. BURLEY:

The writer regrets to have your letter of the 12th conveying the information that you have had no reply to your former letter. I of course knew that I had not personally replied to your former letter, but I thought our Mr. Conaway had written you.

I think you will appreciate that the bulk of our tonnage goes from our American Gypsum plant at Port Clinton. It is a fact however that it is advantageous to supply some of our Eastern trade with shipments from New York mills.

This tonnage is being supplied with mills with which we have had very close connections for a number of years and we simply do not have occasion at any time to require any additional sources of supply. We trust you will appreciate our position in this matter and we thank you very much for your invitation to deal with you.

Yours very truly,

FAIRMONT WALL PLASTER COMPANY,

W. T. Black, *Manager.*
//sy

11093 *Government's Exhibit No. 347*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, N. Y.

SEPTEMBER 27, 1929

MR. J. R. SPEASE
Fairmont Wall Plaster Co.
Fairmont, W. Va.

DEAR MR. SPEASE:

This morning I had a letter from Charlie Higgins telling me about his visit with you. Immediately my imagination went back fifteen years to a very pleasant and profitable relationship. While I have been out of touch with you personally, I understand the world has been good to you and that you have managed to exist during the disastrous gypsum warfare.

I have been looking over the maps and records all day with the one thought of working out something in our business that would justify the support of your organization and I believe there is a distinct opportunity for you to make some money out of our proposition.

I would like to suggest that you and Mr. Conaway take a day off and visit Buffalo as my guests, see our plant and analyze every angle to our business. Then if you see an opportunity for your company, I will go the limit in helping you work it out to our mutual interest.

Since we are approaching the active fall season, I believe it would be best for you to come up right away. How-

ever, wire me a day or so ahead as I want to be here when you come.

With kind personal regards, I am,

Very truly yours

M. H. BAKER
MP
President

M.H.Baker:MP

11094 *Government's Exhibit No. 348*

THURSDAY, OCTOBER 3RD, 1929.

MR. M. H. BAKER, *President,*
The National Gypsum Company,
Buffalo, New York.

DEAR MR. BAKER:

Your letter of September 27th received some days ago. I have read it with a good deal of interest and thank you for your invitation to come to Buffalo and visit your plants. Both Mr. Conaway and myself would like the opportunity to visit you and your plants. Just when we can come I can not say today as there are one or two other little matters pending that must be disposed of before we make a change. I firmly believe, however, this will be worked out soon and that we can offer you some tonnage. It is much more satisfactory to us to confine our purchases to one company and your products have the reputation. I regret that I can not make a more definite arrangement at this time but will let you hear from us in the very near future. With kind regards and best wishes, I beg to remain

Very truly yours,

FAIRMONT WALL PLASTER COMPANY,

JRS/sy *President.*

11095 *Government's Exhibit No. 349*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, N. Y.

OCTOBER 7, 1929

MY DEAR MR. SPEASE:
Fairmont Wall Plaster Co.
Fairmont, West Viriginia

MY DEAR MR. BAKER:

I understand from your letter of the 3rd that you and Mr. Conaway will visit us at an early date.

I will look forward with interest to seeing you.

Very truly yours

M. H. BAKER
MP
President

M.H.Baker:MP

11096 *Government's Exhibit No. 350*

SATURDAY, JANUARY 11TH, 1930.

MR. M. H. BAKER, *President,*
The National Gypsum Company,
Buffalo, New York.

MY DEAR MR. BAKER:

Mr. Conaway and myself would like to meet you in your office next Friday morning, Januarv 17th about 9:30 a.m., if it is convenient for you to meet us at that time. In the event you can not meet us please advise us immediately.

With kind regards I beg to remain

Very truly yours,

FAIRMONT WALL PLASTER COMPANY,

JRS/sy *President.*

11097 *Government's Exhibit No. 351*

NATIONAL GYPSUM COMPANY
General Offices
BUFFALO, N. Y.

JANUARY 22, 1930

MR. J. R. SPEASE,
c/o *Fairmont Wall Plaster Co.,*
Fairmont, W. Va.

DEAR MR. SPEASE:-

There are some developments in the gypsum field now being worked out, with which you are undoubtedly familiar, and I have the feeling that it might be more satisfactory to delay our meeting for another thirty days or so for this reason. I can go into this in more detail when I see you.

In the meantime, I am sending you a special portfolio covering part of our 1930 program which will give you an interesting slant on some of our activities. Your letter of January 11th is indeed appreciated and I hope in another thirty days we can get together to discuss things intimately.

With kindest regards, I am

Yours very truly,

M. H. BAKER
President

MHBaker/B

11098 *Government's Exhibit No. 352*

NATIONAL GYPSUM COMPANY
General Offices
BUFFALO, N. Y.

APRIL 3, 1930

MR. J. R. SPEASE
Fairmont Wall Plaster Co.
Fairmont, W. Va.

DEAR MR. SPEASE:

This will acknowledge your letter of April 1st in reference to your contemplated visit to see us.

MICRO

TRADE

1112

CARD 22

MARK ®

MATTHEW BENDER & COMPANY

MB

63

microcard

Since I first opened the subject with you there has been some change in the industry affecting jobber arrangements. This makes it more difficult to work out a proposition such as I originally had in mind for you.

Until the program now being developed by the industry has been clarified, I question the advisability of taking the time for a trip to Buffalo, although I would be pleased to see you personally and spend a day with you. If you feel like taking the time for a trip here under these conditions, you might wire me and I will make it a point to be here.

With kind regards, I am,

Very truly yours

M. H. BAKER
MP
President

M.H.Baker:MP

11099 *Government's Exhibit No. 353*

4/7/30

To M H BAKER

National Gypsum Co.
Buffalo, N. Y.

Agreeable to you, I will be in Buffalo Thursday morning.

J. R. SPEASE

11100 *Government's Exhibit No. 354*

4/7/30

Buffalo 4:27 PM

To J. R. SPEASE

Glad to see you Thursday. Will be tied up most of morning.

M. H. BAKER

11101 *Government's Exhibit No. 355*

NATIONAL GYPSUM COMPANY
General Offices
BUFFALO, N. Y.

MAY 23, 1930

MR. J. R. SPEASE

Fairmont Wall Plaster Co.
Fairmont, West Virginia

DEAR MR. SPEASE:

I have been away a great deal for the last two weeks, during which time I did not have the opportunity of getting the final conclusion of our Sales Department for working out a jobbing proposition which we discussed when you were up here.

However, in checking this up, we do not see any immediate possibility for working out a proposition that would be of interest to you. I want you to know, however, that we appreciate your interest in our products. If at some future date it is possible to set up a working arrangement to our mutual interest, you can rest assured that we will get in touch with you.

With kind personal regards to yourself and Mr. Black, I am,

Very truly yours

M. H. BAKER
MP
President

M.H.Baker:MP

11102 *Government's Exhibit No. 356*

OAKFIELD GYPSUM PRODUCTS CORP.
Plant at Oakfield, N. Y.
Address Reply to 300 W Water St
Syracuse N Y

APRIL 24 1933.

FAIRMONT WALL PLASTER CO.
Fairmont West Virginia

GENTLEMEN-

Replying to your favor of the 22nd, we are sending you, under separate cover, samples of our Oakleaf Cork Gypsum Wallboard. This is made for us by the Kelley Plasterboard Company at Delawanna, New Jersey, and it is made of our gypsum.

The shipping weight of the gypsum wallboard is 1570 pounds per M square feet, and on the gypsum lath 1552 pounds per M square feet. The Kelley board is slightly lighter than these weights, but this is the agreed billing basis.

We carry in stock at Oakfield the Gypsum Board in 4' widths 6, 7, 8, 9, 10, and 12' long; and we carry the Gypsum Lath in 16x32, 16x48, 32x36, and 32x48.

Due to the license agreement among the board manufacturers, we have no way of making the sale of this product profitable to you. It is, of course, distinctly to our advantage to sell all of the board you can either in carloads or in mixed carloads.

Very truly yours,

OAKFIELD GYPSUM PRODUCTS CORP

EMIL HANSEN
Secretary

EH:LR

11103 *Government's Exhibit No. 357*

OAKFIELD GYPSUM PRODUCTS CORP.
Plant at Oakfield, N. Y.

Address Reply to *300 W Walter St*
Utica, N. Y.

DEC. 17TH 1933.

FAIRMONT WALL PLASTER CO.,
Att. MR. J. R. SPEASE, *Pres.*,
Fairmont, W. Va:

DEAR SIR:

Confirming our recent conversation with regard to continuing our sales arrangement with you which has been in effect since Feb. 14th, 1933, we are pleased to state that we will enter into an agreement with you to furnish you our Neat Plaster and other materials, as outlined hereinafter.

NEAT PLASTER:

We are pleased to furnish you from our Oakfield, N. Y. mill, our Neat Plaster put up in bags of your trade-mark furnished by you on the basis of the established market price to dealers, F.O.B. Cars our plant, in carload lots, less $1.00 per ton allowance for your sacks. You will be invoiced at the established market price to dealers, F.O.B. Oakfield, N. Y., less 15% commission based upon the net price.

FREIGHT ABSORPTION:

When it is necessary to absorb a freight differential because of the Virginia Mills competition, we will absorb the same up to $1.00 per ton, such absorption to be deducted from the established market price before figuring your commission. When it is necessary to absorb freight in excess of $1.00 per ton, we will absorb one-half of the additional amount over $1.00 per ton, you to absorb the other one-half. For example: With the present established market price of $11.00 per ton at Norfolk, Va. where the differential is $1.40 per ton in freight we will absorb $1.20, making the mill base on today's price $8.80 per ton. Your commission on this transaction would be $1.32 per ton, which would reflect a net price to us of $7.48 per ton. From your commission of $1.32 per ton, you would be out 20¢ on freight absorption, so that this business would net you $1.12 per ton.

You have our permission to operate and sell in any territory where, because of freight absorption as outlined in the preceding paragraph, or because of lower established market price, our net price would in no instance be less than $5.50 per ton, exclusive of sacks, F. O. B. Cars Oakfield.

11104 TERMS:

2% cash discount, based upon F.O.B. Car prices at Oakfield, N. Y., same to be allowed for payment of invoices by the 10th of the following month, or 30 days Net.

If, at any time, the financial responsibility of either your Company or ours becomes impaired or unsatisfactory to either buyer or seller, it is mutually agreed your Company or ours has the right to require payments in advance, or satisfactory security or guarantee that invoices will be paid when due.

DURATION OF CONTRACT:

It is mutually agreed that the contract shall be for a period of five years, beginning Dec. 17th, 1933, but may be cancelled by either party at the end of any year during the said period, by either party giving to the other party hereto, three months' written notice, prior to Dec. 17th of any year while contract is in force, of its intention to cancel the same. Said written notice to be given by mail at the last known address of the party, and this contract will not bind or enure to the benefit of any person, co-partnership or corporation other than the parties hereto and shall not bind or enure to the benefit of the heirs, successors, or assigns of either party to this contract.

MIXED CARLOAD SHIPMENTS:

We are pleased to quote you the present F.O.B. Car Oakfield, N. Y. prices, which prices are subject to price changes, in accordance with general market conditions.

	per M. Sq. Ft
Gypsum Wall Board	$27.00
Gypsum Plaster Board and Gypsum Lath	15.00
	per ton
Keene's Cement, in paper sacks	25.00
White Swan Plaster of Paris, in paper	16.50

FINISHING HYDRATED LIME:

We will be pleased to continue the present arrangement which we have with you of permitting you to purchase

direct, your Finishing Hydrated Lime, and warehouse the same at our Oakfield Mill, and for unloading and
11105 reloading charge you $1.00 per ton.

Acceptance of this proposition, you will realize, puts your Company in a position to act, during the duration of the contract, as our selling agents, and as such, if this proposition is accepted, we shall expect you at all times to respect established market conditions, terms, customs, and ethics of the Gypsum Industry, of which we are a member.

This contract is prepared in duplicate. We have signed the original copy, and if you will sign in the blank space provided, we shall consider the contract immediately in force.

Yours very truly,

OAKFIELD GYPSUM PRODUCTS CORPORATION.

T P ELDRED

TPE/W *Treasurer*

Accepted by FMT WALL PLASTER CO
Per J R SPEASE Pres.
Date DEC 18 1933

11106 *Government's Exhibit No. 359*

OAKFIELD GYPSUM PRODUCTS CORP.
Plant at Oakfield, N. Y.

Address Reply to 728 Broad St.,
Utica, N. Y.

APRIL 27TH, 1935.

FAIRMONT WALL PLASTER CO.,
Att. MR. SPEASE,
Fairmont, West Va.

DEAR MR. SPEASE:

I received a call this morning from the United States Gypsum Company, which made our wire to you, copy of which is enclosed, necessary.

I was informed that if the Paragon Companies and the American Hard Wall Plaster Company did not discontinue quoting Board on these Government inquiries, that the licensors were going to insist upon the licensees dis-

continuing selling to Oakfield at a discount. I sincerely regret that they have taken this action, but we must be obedient to their commands, because we could not afford, of course, to be placed in a position whereby Oakfield was unable to purchase Board so that we could resell it to Fairmont and our three Sanded Companies, as we have been doing. Since the objection was only filed on Government work, everything else will continue to function as it has in the past. I understand that the insulation people are assuming the same attitude.

Trusting that you will understand that we regret to have this rule put into effect, but know that it is a matter over which we have no control, we are, with kindest personal regards from the writer, to you,

Yours very truly,

THE OAKFIELD GYPSUM PRODUCTS CORP.

T. P. ELDRED
Treasurer

TPE.W

11107 *Government's Exhibit No. 960*

SATURDAY, JULY 23RD 1938.

MR. M. H. BAKER, *President,*
National Gypsum Company,
Buffalo, New York.

MY DEAR MR. BAKER:

Some weeks ago I visited your new board plant at Mobile which looks like a very fine outlay. This suggested to me that you may have changed your policies since you told me back in 1929 that you could not sell us plaster and board. We still have some business here but are very much handicapped because we do not have plaster board.

Now that the patent on the folded edge has expired, would you be willing to ship us plaster and board in mixed cars and allow us commission to reimburse us for our efforts? We are quite sure that we can give you some tonnage and that an arrangement of this kind would work out to our mutual advantage.

With kind regards I beg to remain,

Very truly yours,

FAIRMONT WALL PLASTER COMPANY,

President.

JRS/sy

11108 *Government's Exhibit No. 361*

NATIONAL GYPSUM COMPANY
General Offices
BUFFALO, N. Y.

JULY 26, 1938

MR. J. R. SPEASE

Fairmont Wall Plaster Co.
Fairmont, W. Va.

DEAR MR. SPEASE:

I was very happy to get your letter of the 23rd and to know that you are interested in our business.

The Mobile plant is now in full operation and we are shipping a wonderful product from that mill. I do not know what your position is on insulation but would suggest that you work out any reasonable program you can with our Sales Department as here is something you can sell.

The folded edge patent on wallboard has expired but there were other important patents in the group which have acted to extend the license agreement for about fifteen years yet. Consequently we cannot make any jobber discounts on this product.

I hope you will find other items in our line on which you can see prospects for making money with us.

With kind personal regards.

Very truly yours,

M. H. BAKER
President

MP

11109 *Government's Exhibit No. 362*

This Agreement, Made and entered into this 29th day of April, A.D. 1937, by and between United States Gypsum Company, an Illinois corporation, of Chicago Illinois (hereinafter referred to as "Gypsum"), Kelley Plasterboard Company, Inc., a New Jersey corporation, of Delawanna, New Jersey (hereinafter referred to as "Kelley"), and Newark Plaster Company, a New Jersey corporation, of Newark, New Jersey (hereinafter referred to as "Newark"), witnesseth that:

Whereas, Gypsum and Kelley are parties to certain license agreements dated April 23, 1930 (as supplemented by letter from Gypsum to Kelley dated June 18, 1930) and October 12, 1934, and

Whereas, negotiations are now pending for the purchase by Newark of all of the outstanding shares of the capital stock of Kelley, and

Whereas, Newark, before consummating the purchase of the stock of Kelley as aforesaid, desires to determine the present status of said license agreements and the extent of the existing obligations and liabilities of Kelley thereunder;

Now, therefore, in consideration of the sum of 11110 One Dollar and other good and valuable considerations each to the other in hand paid, receipt whereof is hereby acknowledged by each of the parties hereto, and in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

1. Gypsum represents that it has examined Kelley's books of account and records, or an audit thereof made for the purposes of said license agreements, up to and including December 31, 1935, and agrees to and does hereby waive all breaches by Kelley of the terms and provisions of said license agreements, if any, occurring on or before December 31, 1935. Gypsum has not at the date hereof examined Kelley's books of account and records, or an audit thereof made for the purposes of said license agreements, for any period subsequent to December 31, 1935, but represents that at the date hereof it has no actual knowledge of any breach by Kelley of the provisions of said license agreements occurring subsequent to December 31, 1935, subject, however, to royalty payments due for operations under said license agreements subsequent to February 28, 1937. Gypsum further represents and certifies that said license agreements are now in full force and effect.

2. Gypsum, insofar as it may be affected by such transaction, consents to the sale and transfer to Newark by the stockholders of Kelley of all of the capital stock of Kelley, and agrees that such transaction shall not be construed or deemed to be a breach of or a default under said license agreements or either of them.

11111 3. Nothing herein contained shall be deemed to give Newark any rights or privileges of any kind or nature under said license agreements or either of them, or to constitute a waiver by Gypsum of any of the agreements, covenants or conditions contained therein, or a waiver by Gypsum of any breach by Kelley of the terms and provisions of said license agreements except as specifically provided herein. Without in any way limiting the generality of the foregoing, it is expressly agreed that any sale by Newark or by any subsidiary or affiliated company, of materials or products manufactured or sold by Kelley and embodying any of the inventions and improvements which are covered by or included within the provisions of said license agreements, or either of them, and any dealings of any kind in any such materials or products by Newark or by any subsidiary or affiliated company, shall, at the option of Gypsum, be deemed to be the act of Kelley for all purposes of said license agreements; PROVIDED, HOWEVER, that nothing herein contained shall be deemed or construed to give Kelley the right to sell or otherwise dispose of such materials or products in any way to Newark, except upon the prior written consent of Gypsum as provided in said license agreements.

4. This agreement shall not be effective or become binding upon the parties hereto or any of them for any purpose whatever unless and until the aforesaid
11112 sale of the capital stock of Kelley to Newark is consummated. In the event such sale is consummated, this agreement shall thereupon be and become binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, but nothing in this paragraph shall be construed to permit an assignment by Kelley of any rights arising under said license agreements except as specifically provided in such agreements.

IN WITNESS WHEREOF, the parties hereto have caused their corporate seals to be hereto affixed, attested by their Secretaries, and these presents to be signed by their duly authorized officers the day and year first above written.

UNITED STATES GYPSUM COMPANY

By W. L. KEADY
Vice President

ATTEST:

C. H. THAYER
Secretary

[SEAL]

KELLEY PLASTERBOARD COMPANY, INC.

By S. J. KELLEY,
President

ATTEST:

LOUIS LEFELAR
Treasurer

[SEAL]

NEWARK PLASTER COMPANY

By FREDERICK TOMKINS
President

ATTEST:

FRANKLIN H. MILES
Ass't Secretary

[SEAL]

11113 *Government's Exhibit No. 363*

THIS INDENTURE, Made this 16th day of December, A. D. 1938, between the KELLEY PLASTERBOARD COMPANY, INC., a New Jersey corporation, of Delawanna, New Jersey, Party of the First Part, and NEWARK PLASTER COMPANY, a New Jersey corporation, of Newark, New Jersey, Party of the Second Part, witnesseth, that

Whereas, by license agreement dated April 23, 1930 (as supplemented by letters from the United States Gypsum Company to First Party, dated June 18, 1930, and August 31, 1938), and made between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, the licensor, of the one part, and Kelley Plasterboard Company, Inc., the licensee, of the other part, said licensor granted unto said licensee certain indivisible and non-exclusive rights, licenses and privileges under certain letters patent and applications for letters patent relating to the manufacture and sale of gypsum plasterboard and gypsum wallboard, as more specifically described and set forth in said license agreement; and

Whereas, Newark Plaster Company, a New Jersey corporation, of Newark, New Jersey, and said Kelley Plasterboard Company, Inc., are about to effect a merger under and pursuant to the provisions of the New Jersey General Corporation Law, under the corporate name of Newark Plaster Company; and

Whereas, it is provided in said license agreement
11114 that the license therein granted shall be personal to licensee and that the same, or any right therein or thereunder, shall not be sold or assigned or transferred without the written consent of licensor, or transferred by operation of law, provided that the same may be assigned by licensee to any company acquiring all the assets and business or all the capital stock of licensee, on condition that licensee shall first obtain an agreement in writing from any such assignee, agreeing to assume all of the obligations of licensee thereunder and to be bound by all of the terms and conditions thereof, and shall deliver such agreement to licensor.

NOW, THIS INDENTURE WITNESSETH, That in consideration of the sum of One Dollar ($1.00), and other good and valuable considerations, receipt whereof is hereby acknowledged, First Party does hereby assign, transfer and set over unto the said Newark Plaster Company resulting from the merger of Newark Plaster Company, a New Jersey corporation, of Newark, New Jersey, and Kelley Plasterboard Company, Inc., a New Jersey corporation, of Delawanna, New Jersey, effective however as of the date on which said merger shall become effective, all of the right, title and interest of First Party in and to said license agreement and the rights, licenses and privileges therein contained, upon and subject to all of the conditions, terms, and agreements as in said license agreement set forth.

11115 The parties agree that the Newark Plaster Company resulting from said merger shall assume all of the obligations of licensee under said license agreement, and shall be bound by all of the terms and conditions thereof to the same effect as if it originally had been named in said license agreement as licensee therein.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate

seals to be hereunto affixed, in duplicate, the day and year first above written.

KELLEY PLASTERBOARD COMPANY, INC.

By VINCENT S. VILLARD
Vice President.

ATTEST:

F. H. MILES
Ass't. Secretary.

[SEAL]

NEWARK PLASTER COMPANY

By FREDERICK TOMKINS
Its President.

ATTEST:

CALVIN TOMKINS, JR.
Secretary.

[SEAL]

11116 —*Government's Exhibit No. 364*

This Agreement, Made and entered into this 3rd day of January, A.D. 1939, by and between the UNITED STATES GYPSUM COMPANY, an Illinois corporation, of Chicago, Illinois (hereinafter sometimes referred to as "Gypsum"), and NEWARK PLASTER COMPANY, a New Jersey corporation, of Newark, New Jersey, resulting from the merger of Newark Plaster Company, a New Jersey corporation, of Newark, New Jersey, and Kelley Plasterboard Company, Inc., a New Jersey corporation (hereinafter sometimes referred to as "Newark"), witnesseth, that

Whereas, Gypsum and said Kelley Plasterboard Company, Inc., entered into a certain license agreement dated April 23, 1930 (as supplemented by letters from Gypsum to Kelley dated June 18, 1930, and August 31, 1938), under the terms of which Gypsum, as licensor therein named, granted to said Kelley Plasterboard Company, Inc., as licensee therein named, certain indivisible and non-exclusive rights, licenses and privileges under certain letters patent and applications for letters patent relating to the manufacture and sale of gypsum plasterboard and gypsum wallboard, as therein more specifically described and set forth; and

Whereas, said Newark Plaster Company existing before said merger and said Kelley Plasterboard Company, Inc., have effected a merger in accordance with the provisions of the New Jersey General Corporation Law, under 11117 the corporate name of Newark Plaster Company, and said Kelley Plasterboard Company, Inc. has assigned, transferred and set over unto Newark, all of its right, title and interest in and to said license agreement and the rights, licenses and privileges therein contained, upon and subject to all of the conditions, terms and agreements as in said license agreement set forth; and

Whereas, it is provided in said license agreement that the licenses therein granted shall be personal to licensee and that the same, or any right therein or thereunder, shall not be sold or assigned or transferred without the written consent of licensor, or transferred by operation of law, provided that the same may be assigned by licensee to any company acquiring all of the assets and business or all of the capital stock of licensee, on condition that licensee shall first obtain an agreement in writing from any such assignee, agreeing to assume all of the obligations of licensee under said agreement and to be bound by all of the terms and conditions thereof, and shall deliver such agreement to licensor,

Now, therefore, in consideration of the sum of One Dollar ($1.00), and other good and valuable considerations, each to the other in hand paid, receipt whereof is hereby acknowledged by each of the parties hereto, and in consideration of the mutual covenants and agreements herein after contained, the parties hereto have agreed as 11118 follows:

1. Gypsum consents to the assignment to Newark of the said license agreement, together with all of the rights, licenses and privileges therein contained, subject to all of the conditions, terms and agreements as in said license agreement set forth,

2. Newark agrees to, and does hereby, assume all of the obligations of licensee under said license agreement, and agrees to be bound by all of the terms and conditions thereof to the same effect as if Newark originally had been named in said license agreement as licensee therein.

3. In case Newark shall at any time sell any gypsum plasterboard or gypsum wallboard, or cause the same to be sold, through or by any of its wholly owned subsidiaries, then Sections 6 and 7 of said license agreement shall be read as if the words "or sold by its wholly owned subsidiary" were inserted after the words "sold by it", wherever such last mentioned words appear in said Sections 6 and 7 of said license agreement, and as if the words "or its wholly owned subsidiary" were inserted after the words "of licensee" in the third line of said Section 7 of said license agreement. The sales or acts of any such subsidiary shall for all purposes of said license agreement be construed as the sales or acts of Newark as such licensee, and Newark shall be fully responsible therefor. Nothing herein contained shall be construed to grant any license under said patents to any wholly owned subsidiary
11119 of Newark, or to authorize the sale of gypsum plaster board or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said patents to or by any such subsidiary, without the written consent of Gypsum thereto first had and obtained.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY

By W. L. KEADY
Vice President.

[SEAL]

ATTEST:

C. H. THAVER
Secretary.

NEWARK PLASTER COMPANY

By FREDERICK TOMKINS
Its President.

[SEAL]

ATTEST:

F. H. MILES
Asst Secretary.

11120 *Government's Exhibit No. 365*

JANUARY 3, 1939.

NEWARK PLASTER COMPANY (*A Merged Corporation*),
Newark, New Jersey.

GENTLEMEN:

This will advise you that under your license of April 23, 1930, and until you are notified to the contrary, you have our consent to sell through your wholly owned subsidiary, Calvin Tomkins Company, a New York corporation, of New York, New York, gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in the patents covered by your said license, which includes the right to effect sales of said gypsum plasterboard or gypsum wallboard to your said wholly owned subsidiary at a maximum discount of twelve and one-half per cent (12½%) from your regular price to your dealer trade f.o.b. mill.

It is understood that the acts of your wholly owned subsidiary shall constitute your acts as such licensee, and that you shall be fully responsible therefor.

For the purpose of computing license fees or royalties under your said license, such license fees or royalties on all gypsum plasterboard or gypsum wallboard sold to your said wholly owned subsidiary shall be based upon your regular selling price to your regular dealer trade at the time of the sale and invoice as provided in said license agreement.

It is agreed that this consent may be withdrawn by us at any time, by giving you written notice to that effect.

If satisfactory, please sign and return the duplicate of this letter, indicating your acceptance thereof, whereupon this consent shall become effective.

Very truly yours,

UNITED STATES GYPSUM COMPANY

By W. L. KEADY
Vice-President

ACCEPTED, this 3rd
day of January, 1939.

NEWARK PLASTER COMPANY (*A Merged Corporation*)
By FREDERICK TOMKINS *Pres.*

11121 *Government's Exhibit No. 366*

JULY 8, 1937

UNITED STATES GYPSUM CO.,
300 West Adams Street,
Chicago, Ill.

Att. Mr. W. L. Keady, Vice-President.

DEAR SIR:

In conformity with our Licensee Agreement with you, we hereby apply for permission to sell Wallboard, Plasterboard and/or Lath to The Connecticut Adamant Plaster Co., New Haven, Connecticut, at the regular Calciners discount of 12½% on Plasterboard and/or Lath and 15% on Wallboard. The above discounts to apply on the f.o.b. mill base prices.

Kindly let us hear from you as promptly as possible and oblige,

Yours very truly,
KELLEY PLASTERBOARD COMPANY, INC.,
G. A. WILEMAN.

GAW:CAB.

11122 *Government's Exhibit No. 366-A*

JULY 16, 1937.

MR. FRED TOMPKINS, *President,*
Kelley Plasterboard Co., Inc.
Delawanna, New Jersey.

DEAR MR. TOMPKINS:

We acknowledge receipt of your letter of July 8, returning two copies of License Agreement, covering Patented Perforated Plaster Board Lath. We are returning herewith one copy, duly executed by this company.

With regard to your sale to other manufacturers, jobbers, or wholesalers, this will advise you that until you are notified to the contrary, you have our consent to sell Patented Perforated Plasterboard Lath, embodying the claims and inventions of the patents described in the license to the Oakfield Gypsum Products Company, and the

Connecticut Adamant Plaster Company, at a maximum discount of 12½% from the mill price, which will, of course, not be less than the mill prices set forth in our license bulletin #1. The royalty on such sales shall be based on your regular selling price to our regular dealer trade at the time of such sale and invoice as provided in our license agreement with you.

We assume that these are the manufacturers you desire to sell. If there are any others, we will consider an additional request with reference to them. However, we would rather not give a blanket approval for you to sell Perforated Lath to manufacturers, jobbers, or wholesalers to whom you sell regular Patented Board, as conditions and circumstances differ from time to time.

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice-President.

11123 *Government's Exhibit No. 367*

JULY 14, 1937

MR. FRED TOMPKINS, *President*
Kelley Plasterboard Co., Inc.
Delawanna, New Jersey

DEAR MR. TOMPKINS:

Referring to your letter of July eighth, this is to advise you that until you are notified to the contrary, you have our consent to sell regular patented gypsum wallboard and/or plasterboard embodying the claims and inventions of our patents to the Connecticut Adamant Plaster Company, New Haven, Connecticut, at the following maximum discounts from f.o.b. mill prices listed in Board License Bulletin No. 1:

Wallboard	15%
Plasterboard	12½%

The royalty on all such sales shall be based upon your regular selling price to your regular dealer trade at the time of such sale and invoice, as is provided by our license agreement with you.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice-President

11124 *Government's Exhibit No. 368*

JULY 21, 1937.

MR. W. L. KEADY, *Vice-President,*
United States Gypsum Co.,
300 West Adams Street,
Chicago, Ill.

DEAR BILL:

This will acknowledge receipt of your letter of July 16th, together with the License Agreement covering the manufacture and sale of Perforated Plaster Board Lath.

We desire your consent to sell this material to the Structural Gypsum Division, of the American Cyanamid & Chemical Co., as well as to the Oakfield Gypsum Products Co. and the Connecticut Adamant Plaster Co., which you cover in your letter of July 16th.

Under date of December 24th, 1932 you gave your consent to us to sell Wallboard and Plasterboard to the Structural Gypsum Co.

Will you please confirm this to us so that our records will be complete.

Yours very truly,

KELLEY PLASTERBOARD COMPANY, INC.,

FREDERICK TOMKINS,
President.

FT:CAB.

11125 *Government's Exhibit No. 368-A*

JULY 26, 1937

MR. FREDERICK TOMKINS, *President,*
Kelley Plasterboard Company, Inc.
Delawanna, New Jersey.

DEAR MR. TOMKINS:

We have your letter of July 21st, requesting consent to sell Perforated Plasterboard Lath to the Structural Gypsum Division of the American Cyanamid & Chemical Company. This pertains to license agreement dated June 23, 1937.

Until advised to the contrary you have our consent to sell patented Perforated Plaster Lath, embodying the claims and inventions of the patents described in the license, to the Structural Gypsum Division of the American Cyanamid & Chemical Company. The maximum discount will be 12½% from the mill price, which will of course not be less than the mill prices set forth in our license bulletin No. 1.

Yours very truly,

WLK:DM *Vice President*

11126 *Government's Exhibit No. 369*

KELLEY PLASTERBOARD CO., INC.
Manufacturers and Distributors of Building Materials
DELAWANNA, N. J.

SEPTEMBER 23, 1938.

UNITED STATES GYPSUM CO.,
300 West Adams Street,
Chicago, Illinois.

Attention: Mr. W. L. Keady.

GENTLEMEN:

We request your consent to sell both Perforated and Plain Plasterboard Lath manufactured under our license agreement with you to the following manufacturers:

Structural Gypsum Company, Linden, New Jersey.
Connecticut Adamant Company, New Haven, Connecticut.

Yours very truly,

KELLEY PLASTERBOARD CO., INC.

FREDERICK TOMKINS
President.

FT:DN

11127 *Government's Exhibit No. 369-A*

KELLEY PLASTERBOARD CO., INC.
Manufacturers and Distributors of Building Materials
DELAWANNA, N. J.

SEPTEMBER 23, 1938.

UNITED STATES GYPSUM CO.,
300 West Adams Street,
Chicago, Illinois.

Attention: Mr. W. L. Keady.

GENTLEMEN:

We enclose herewith copy of your letter to us of September 16th, which we have accepted, and in which you grant to us the right to use certain of your Letters Patent without the payment of additional royalties or license fees.

We are not entirely clear as to the meaning of the first paragraph on the second page. Consequently, we enclose also a request for your consent for us to sell the Lath referred to in your letter, to Structural Gypsum Company and Connecticut Adamant Company at the regular manufacturer's discounts. We already have your consent to sell other board products to these companies.

We are contemplating the liquidation of Kelley Plasterboard Company as of the end of this year. In this event, we will want to transfer all license agreements between your Company and the Kelley Plasterboard Company to Newark Plaster Company. As you know, Kelley Plasterboard Company is a wholly owned subsidiary of Newark Plaster Company. In the event we effect the liquidation of the Kelley Plasterboard Company and transfer the license to Newark Plaster Company, all products manufactured under this license will be sold and billed by the Calvin Tomkins Company, which is also a wholly owned subsidiary of the Newark Plaster Company. The Calvin Tomkins Company will not purchase any products from Newark Plaster Company and will act simply as a selling agency.

Will you kindly let us hear from you in connection with these matters at your earliest convenience?

Yours very truly,

KELLEY PLASTERBOARD CO., INC.

FREDERICK TOMKINS
President.

FT:DN

11128 *Government's Exhibit No. 369-B*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 16, 1938

KELLEY PLASTERBOARD CO., INC.
Delawanna
New Jersey

GENTLEMEN:

In view of the fact that perforated plasterboard lath, which also embodies the claims of the patents contained in our original board license, has attained such importance and constitutes a large volume of the board manufactured and sold thereunder, we have decided to grant to you as one of our board licensees the right to use our U. S. Letters Patent No. 1,938,354 in the manufacture and sale of plasterboard without the payment of additional royalties or license fees, the same as if such patent were listed in Exhibit A of our original board license, upon the terms and conditions hereinafter set forth.

You are therefore granted an indivisible and non-exclusive license to manufacture at your plants perforated plasterboard lath having a gypsum core and paper covering adhering thereto, embodying the claims of Letters Patent of the United States No. 1,938,354 and of selling and using the same in the United States of America and the territories and possessions thereof, subject to the terms and conditions hereinafter set forth.

It is understood that nothing herein contained shall give you the right to use any of our other patents, or change or alter in any way the terms of your original board license agreement of April 23, 1930, it being understood that your only right to manufacture and sell gypsum plasterboard and/or gypsum wallboard, including perforated plasterboard lath, embodying the claims of any of the patents set forth and described in Exhibit A of your said original board license agreement is under and in accordance with the terms and conditions of said last mentioned agreement.

It is of course understood that all perforated plasterboard lath manufactured and sold by you shall be included

in computing your royalties or license fees under your said original board license agreement and you will make reports of your manufacture and sale thereof and we shall have the right to inspect books of account and records, in the same manner and to the same extent as set forth in said original board license agreement.

11129 You are not to manufacture any of said lath for or to sell the same to another manufacturer or to any manufacturer or distributor selling plaster or gypsum products as a manufacturer, or to deliver any of said lath to any person or company on consignment, or to sell any of the same of inferior manufacture, commonly known as "seconds."

You will mark all such patented lath "Licensed under United States Letters Patent No. 1,938,354".

You will not assign this license without our written consent, nor shall the same or any right hereunder be transferred by operation of law or otherwise.

This license may be cancelled or terminated by either party hereto upon giving to the other party hereto one (1) year's written notice of cancellation or termination thereof. Any such notice shall become effective upon depositing the same in the United States mails, postage prepaid and registered, addressed to you at your principal office in Delawanna, New Jersey, or to us at our principal office, 300 West Adams Street, Chicago, Illinois.

Your perforated plasterboard lath license agreement dated June 23, 1937, shall become cancelled and terminated upon the acceptance of this letter by you, provided, however, that neither party shall thereby be relieved of any liability thereunder accrued prior to September 1, 1938.

This license shall become effective as of September 1, 1938, when accepted by you in writing.

If satisfactory, please sign the duplicate copy of this letter indicating your acceptance thereof and return the same to us.

Yours very truly,

UNITED STATES GYPSUM COMPANY

O. M. KNODE,
President

ACCEPTED, this —— day of
————————, 1938.

KELLEY PLASTERBOARD CO., INC.
By————————

11130 *Government's Exhibit No. 370*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO.

OCTOBER 3, 1938

KELLEY PLASTERBOARD CO., INC.
Delawanna, New Jersey.

DEAR SIRS:

This will advise you that under your license of September 16, 1938, and until you are notified to the contrary, you have our consent to sell to Structural Gypsum Company and Connecticut Adamant Plaster Company perforated plasterboard lath embodying the inventions and improvements set forth and claimed in the patents covered by your board license agreements, at a maximum discount of 12½% from your regular price f.o.b. mill.

For the purpose of computing license fees or royalties under your board license agreement of April 23, 1930, such license fees or royalties shall be based upon your regular selling price to your regular dealer trade at the time of the sale and invoice, as provided in said license agreement.

It is agreed that this consent may be withdrawn by us at any time by giving you written notice to that effect.

This consent cancels and terminates all prior consents given by us to you to sell patented perforated plasterboard lath to other manufacturers.

If satisfactory, please sign and return the duplicate of this letter, indicating your acceptance thereof, whereupon this consent shall become effective.

Yours very truly,

UNITED STATES GYPSUM COMPANY

W. L. KEADY,
Vice-President

WLK:DM

ACCEPTED this sixth day
of October, 1938.

KELLEY PLASTERBOARD CO., INC.

By FREDERICK TOMKINS

11131 *Government's Exhibit No. 370-A*

OCTOBER 3, 1938

KELLEY PLASTERBOARD CO., INC.
Delawanna, New Jersey.

DEAR SIRS:

We acknowledge receipt of your favor of September 23, enclosing copy of our letter of September 16, 1938, accepted and signed by the Kelley Plasterboard Co., Inc. on September 23, 1938. We preferred that you sign the carbon copy of the original letter, but are accepting your copy signed by you in lieu thereof.

The first paragraph on page 2 of the letter of September 16 was intended to make it clear that the license did not include the right to manufacture for or to sell to another manufacturer or distributor of gypsum products. We of course can consent at any time to your selling another manufacturer or distributor upon such terms and conditions as seen proper to us.

As to your request for consent to sell the patented lath to Structural Gypsum Company and Connecticut Adamant Plaster Company at regular manufacturer's discounts, we are glad to do so upon the terms and conditions as set forth in the enclosed form of consent, the duplicate copy of which please sign and return to us.

We note your intention to liquidate Kelley Plasterboard Company at the end of the year. We shall be glad to consent to the assignment of your license agreements to the Newark Plaster Company, or to grant to the Newark Plaster Company new licenses in lieu of the old license agreements, whichever our attorneys advise us at the time is the best way to handle the matter. Your advice that all products manufactured by Newark under such licenses will be sold and billed by Calvin Tomkins Company, a wholly owned subsidiary, raises a question which should be referred to our attorneys for advice based on all of the facts existing at the time you are ready to change the licenses over to Newark Plaster Company. We shall be glad at that time to ask our attorneys to look into the matter and advise us what our position should be as licensor.

Very truly yours,

UNITED STATES GYPSUM COMPANY

WLK:DM

Vice-President

11132 *Government's Exhibit No. 371*

KELLEY PLASTERBOARD CO., INC.
Manufacturers and Distributors of Building Materials
DELAWANNA, N. J.

SEPTEMBER 21, 1936.

MR. CHARLES F. HENNING, *Vice-President,*
United States Gypsum Co.,
30 Rockefeller Plaza,
New York City.

DEAR MR. HENNING:

You are aware that we sell Gypsum Board and Lath to Oakfield Gypsum Co. and the Structural Gypsum Co., and inasmuch as it is our desire that they be immediately posted of any price changes, we would appreciate it very much if you would send them copies of Licensee Bulletins, or if you do not care to do this if you would be kind enough to send us extra copies so that we can forward them to our customers and thereby immediately post them of any changes which take place. By doing so you would save us the trouble of making copies of bulletins and eliminate any possibility of error in transposition.

Awaiting an early reply we remain,

Yours very truly,

KELLEY PLASTERBOARD COMPANY, INC.,

S. J. KELLEY,
Pres.

SJK:CAB.

11133 *Government's Exhibit No. 372*

JUNE 7, 1937.

PARAGON PLASTER & SUPPLY CO.,
Scranton,
Pa.

GENTLEMEN:

We are enclosing a copy of our price list eliminating Berks and Lancaster Counties, Pa. and Delaware, Greene and Columbia Counties, New York, from the trucking area on Gypsum Board.

The prices as shown for these respective Counties are still the prices which apply when delivered by carload, mixed car or pool carload lots only; minimum quantity 7500 sq. ft.

Yours very truly,

KELLEY PLASTERBOARD COMPANY, INC.,

G. A. WILEMAN.

GAW:CAB.

11134 *Government's Exhibit No. 373*

JUNE 7, 1937.

STRUCTURAL GYPSUM DIVISION,
American Cyanamid & Chemical Corp.,
30 Rockefeller Plaza,
New York City.

Att: Mr. Kugler.

GENTLEMEN:

We are enclosing a copy of our price list eliminating Berks and Lancaster Counties, Pa. and Delaware, Greene and Columbia Counties, New York, from the trucking area on Gypsum Board.

The prices as shown for these respective Counties are still the prices which apply when delivered by carload, mixed car or pool carload lots only; minimum quantity 7500 sq. ft.

Yours very truly,

KELLEY PLASTERBOARD COMPANY, INC.,

G. A. WILEMAN.

GAW:CAB.

11135 *Government's Exhibit No. 374*

APRIL 2, 1938

OAKFIELD-GYPSUM CORPORATION
Syracuse
New York

GENTLEMEN:

In some places on March 28th and in others on April 25th, a general freight increase goes into effect, which increases the delivered price of plasters and board. At the moment, I do not know just how much this will affect various items at the different destinations, and, until such a time as we can advise positively, would suggest that, if you do not know the new price, you take orders subject to a slight increase in price due to this freight raise.

Yours very truly,

KELLEY PLASTERBOARD COMPANY, INC.,
G. A. WILEMAN.

GAW . . LH

11136 *Government's Exhibit No. 375*

This is an Itemized List of Materials Being Delivered on this Shipment.
Invoice Will Follow. Claims or Shortages Must be Reported Immediately.

KELLEY PLASTERBOARD COMPANY, INC.

Manufacturers and Distributors

Building Materials

Delawanna, N. J., Sept. 27, 1937

E 3038

Delivered to: United Clay Products Co.

Address: University Station, Washington, D. C.

Charge to: Oakfield Gypsum Prod. Corp. B & O dely

Address: 728 Broad St., Utica, N. Y. Driver or Car No.: D L & W 45747

Quantity	Description	Tons	Price	Extension
938 Bdls	⅜"—16x48 Oakleaf Lath 30016 sq. ft. @ 14.96M			449.04
	Less 12½% on 13.00 base			48.78
				400.26
	Less ft. 41022 #	.19 cwt		77.94
				322.32

Entered Sep 27 1937

Return of Merchandise Not Accepted Unless Authorized by Office.

Received by: Office Voucher

2% 10 days on net after ft.

11137 *Government's Exhibit No. 375-A*

Date: Sept. 27/37

Consignee: United Clay Products Co.

Car Nos.: D L & W 45747

Seal Nos.: 964280-1

11138 *Government's Exhibit No. 375-B*

United Clay Products Co., Washington D. C.

D L & W 964280-1

Sept 27-1937

938 Bdls. ⅜"—16x48

Oakleaf Lath

11139 *Government's Exhibit No. 375-C*

KELLEY PLASTERBOARD COMPANY, INC.

Manufacturers and Distributors

Building Materials

DELAWANNA, N. J.

September 27, 1937

Oakfield Gypsum Products Corp.,
728 Broad Street,
Utica, N. Y.

Shipped to: United Clay Products Co.

Freight Station.: University Station, Washington, D. C.

Routing: B & O Daly.

Car No.: DL&W 45747

Salesman: F. T.

Date Shipped:

Your Order No.:

2%—10 days on net after freight

F.O.B. Destination

TERMS: Discounts to Apply on Mill Price after Deducting Freight

Ticket No.	Quantity	Commodity	Price
E 3038	938 bdls.	3/8"—16x48 Oakleaf Lath—30016 sq. ft. @ 14.96M	449.04
		Less 12½% on 13.00 base.....	48.78
			400.26
		Less Freight:—41022# @ .19 cwt.	77.94
			322.32

11140 *Government's Exhibit No. 375-D*

OAKFIELD GYPSUM PRODUCTS CORP.

728 Broad St.

UTICA, N. Y.

Order No. 2399

Sept. 27, 1937.

To: Kelley Plasterboard Co., Inc.

Delawanna, N. J.

Ship to: The United Clay Products Co. Via B&O Delivery.
University Station, Washington, D. C.

Send Bill of Lading Showing Weight and Rate of Freight

---

1 Minimum Carload Oakleaf Plain Gypsum Lath, 3/8", 6x48"

Rush Shipment.
Confirming Telephone to Mr. G. A. Wileman.

Yours truly,

Oakfield Gypsum Products Corp.
Per A. M. D. (A. M. Dunn)

Shipped attach to 9/27

Mail B/L or shipping receipt immediately. This will identify shipments on arrival and help us to expedite delivery.

IMPORTANT! Acknowledge Receipt of this order, giving exact date shipment will be made.

If material ordered is for ourselves at Oakfield, N. Y., invoice should be rendered in duplicate.

11141 *Government's Exhibit No. 376*

This is an Itemized List of Materials Being Delivered on this Shipment. Invoice Will Follow. Claims or Shortages Must be Reported Immediately.

KELLEY PLASTERBOARD COMPANY, INC.

Manufacturers and Distributors

Building Materials

E 5892

Delawanna, N. J., Dec. 10, 1937.

Delivered to: United Clay Products Co.

Address: University, D. C. B&O dely.

Charge to: Oakfield Gypsum Products Corp.

Address: 728 Broad St. Utica Car No.: D L & W 47415

Quantity	Description	Tons	Price	Extension
625 Bdls.	3/8"—16x48 1 Oakleaf Lath, 20,000 sq. ft. @	15.07	301.40	
	Less 12½% on 13.00 base		32.50	268.90
313 Bdls.	3/8"—16x48 Oakleaf Perforated Lath 10016 sq. ft. @	15.32	153.45	
	Less 12½% on 13.25 base		16.59	136.86
				405.76
	Less ft. 41016# @ .19 cwt			77.93
				327.83

Returns of Merchandise Not Accepted Unless Authorized by Office.

Received by: Office Voucher

Entered Dec 10 1937

2% 10 days on net after ft.

11142 *Government's Exhibit No. 376-A*

Utica, N. Y.

Ship today United Clay Products Co., University, D. C. B&O delivery, minimum carload oakleaf 16x48 containing 2/3 car Plain and 1/3 car Perforated.

Oakfield

625 Bdls. Plain ..... 20,000 ft.

313 Bdls. Perf. ..... 10,016 ft.

11143 *Government's Exhibit No. 376-B*

UNITED CLAY PRODUCTS CO.

UNIVERSITY, D. C.

D. L. & W. 196008-9

Dec. 10, 1937.

625 Bdls. 3/8"—16x48 Oakleaf Lath

313 Bdls. 3/8"—16x48 Oakleaf Perforated Lath

11144 *Government's Exhibit No. 376-C*

KELLEY PLASTERBOARD COMPANY, INC.

Manufacturers and Distributors

Building Materials

DELAWANNA, N. J.

December 10th, 1937.

Oakfield Gypsum Products Corp.,
728 Broad Street
Utica, N. Y.

Shipped to: United Clay Products Co.,
University, D. C.

Routing: D. L. & W.

Car No.: 47415

Salesman: F. T.

Date Shipped:

Your Order No.:

F.O.B.: Your yard

Terms: Discounts to apply on mill price after deducting freight
2%—10 days on net after freight

Ticket No.	Quantity	Commodity			Price
E 5892	625 Bdls.	3/8"—16x48 Oakleaf Lath			
		20,000 sq. ft.	15.00 M	301.40	
		Less 12½% on 13.00 base		32.50	268.90
	313 Bdls.	3/8"—16x48 Oakleaf Perforated Lath			
		10,016 sq. ft.	15.32 M	153.45	
		Less 12½% on 13.25 base		16.59	136.86
					405.76
		Less Freight—41,016 lbs. .19 cwt.			77.93
					327.83

11145 *Government's Exhibit No. 377*

This is an Itemized List of Materials Being Delivered on this Shipment. Invoice Will Follow. Claims or Shortages Must be Reported Immediately.

KELLEY PLASTERBOARD COMPANY, INC.

Manufacturers and Distributors

Building Materials

Delawanna, N. J., Nov. 18, 1937.

E 5123

Delivered to: Geo. H. Robinson & Sons

Address: Alexandria, Va.

Charge to: Oakfield Gyp. Prod. Corp. R. F. & P. dely.

Address: 300 W. Water St., Syracuse, N. Y. Driver or Car No.: D. L. & W. 45490

Quantity	Description	Tons	Price	Extension
	#319			
469 Bdls.	3/8"—16x48 Oakleaf Lath 15008 ft.	@	15.07	226.17
	Less 12½% on $13.00 base.....			24.39 201.78
469 Bdls.	3/8"—16x48 Oakleaf Perf. Lath—15008 ft.	@	15.32	229.92
	Less 12½% on $13.25 base.....			24.86 205.06
				406.84
	Less ft. 41022# @			90.25
				316.59

Entered Nov 18 1937

Returns of Merchandise Not Accepted Unless Authorized by Office.

Received by: Office Voucher

2% 10 days on net after ft.

11146 *Government's Exhibit No. 377-A*

Date: Nov. 18, 1937.

Consignee: Alexandria & Sons

Car No.: D. L. & W. 45490

Seal Nos.: 964480-1

11147 *Government's Exhibit No. 377-B*

OAKFIELD GYPSUM PRODUCTS CORP.

300 West Water Street

Order No. 319

Syracuse, N. Y., Nov. 9, 1937

To: Kelley Plasterboard Co., Delawanna, N. J.

Ship to: George H. Robinson & Sons, Alexandria, Va. Via RF&P

Send Bill of Lading Showing Weight and Rate of Freight

1/2 Car Oakleaf 3/8" Plaster Lath—Standard

1/2 Car Oakleaf 3/8" Plaster Lath—Perforated

Shipment to be made previous to increase in Freight Rates but as late as possible

Yours truly,

Oakfield Gypsum Products Corp.

Per A. H. M.

Mail B/L or shipping receipt immediately.
This will identify shipments on arrival and help us to expedite delivery.

IMPORTANT! Acknowledge Receipt of this order, giving exact date shipment will be made.

If material ordered is for ourselves at Oakfield, N. Y., invoice should be rendered in duplicate.

11148 *Government's Exhibit No. 377-C*

GEO. W. ALEXANDRIA & SONS

ALEXANDRIA, VA.

D. L. & W. 964480-1

Nov. 18, 1937

469 Bdls. 3/8"—16x48 Oakleaf Lath

469 Bdls. 3/8"—16x48 Oakleaf Perforated Lath

GOVERNMENT'S EXHIBIT 377-II

377-5

(1)

Form G. F. D. 96 3-36 1st SHEET

Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930

UNIFORM STRAIGHT BILL OF LADING
ORIGINAL—NOT NEGOTIABLE

Shipper's No.

Agent's No.

746095 • 9780

The Delaware, Lackawanna and Western Railroad Company

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

At DELAWANNA, N. J. NOV. 18, 1937. 193

From OAKFIELD GYPSUM PRODUCTS CORP.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to GEO. H. ROBINSON & SONS (Mail or street address of consignee—For purposes of notification only.)

Destination ALEXANDRIA State of VA. County of

Route

Delivering Carrier RF&P DELIVERY Car Initial DL&W Car No. 45490

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	Class or Rate	Check Column
	3/8" GYPSUM PLASTER BOARDS			
469	Bundles (15008 sq.ft.)	20411		
469	Bundles (15008 sq.ft.)	20411		
	Dunnage	200		
		41022		
	Seals 964480-1			

This Shipment is correctly described
Correct Weight is ..... Lbs.
Subject to Verification by the
TRUCK LOAD FREIGHT INSPECTION BUREAU
According to Agreement

SHIPPER

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

OAKFIELD GYPSUM PRODUCTS CORP.
(Signature of consignor.)

If charges are to be prepaid write or stamp here, "To be Prepaid."

277-D

SHIPPERS LOAD & TALLY.

Cvt. Ex. No. 277-D

Dock 8017

Received $.....
to apply in prepayment of the charges on the property described hereon.

.....
Agent or Cashier.

Per.....
(The signature here acknowledges only the amount prepaid.)

Charges advanced:

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ..... per .....

OAKFIELD GYPSUM PRODUCTS CORP.

Per ..... *Shipper*

Per .....

Permanent post-office address of shipper SYRACUSE, N. Y.

1114

LACKAWANNA R. R. CO. NOV 18 1937 RECEIVED DELAWARE, L. & W. R. R. CO. OFFICE

Agent

RENNIE

LACKAWANNA ROUTING INSURES DEPENDABILITY IN SERVICE.

38

746095 9781

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the Act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or in the carrier's discretion at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expenses of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property said hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route such water carriage shall be performed subject to all the terms and provisions of, and all the exceptions from liability contained in, the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States amending carriers by water the protection of limited liability and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or inlets, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

11150 *Government's Exhibit No. 377-E*

KELLEY PLASTERBOARD COMPANY, INC.

Manufacturers and Distributors

Building Materials

DELAWANNA, N. J.

November 18th, 1937.

Shipped to: Geo. H. Robinson & Sons

Oakfield Gypsum Products Corp.,
300 West Water Street,
Syracuse, N. Y.

Freight Station: Alexandria, Va.

Routing: R. F. & P. Dely.

Car No.: D. L. & W. 45490

Salesman: F. T.

Date Shipped:

Your Order No.: 319

F.O.B.: Destination

Terms: Discounts to apply on mill price after deducting freight
2%—10 days on net after freight

Ticket No.	Quantity	Commodity	Price	
E 5123	469 Bdls.	3/8"—16x48 Oakleaf Lath		
		15008 ft. ..... 15.07 M	226.17	
		Less 12½% on 13.00 base	24.39	201.78
	469 Bdls.	3/8"—16x48 Oakleaf Perf. Lath		
		15008 ft. ..... 15.32 M	229.92	
		Less 12½% on 13.25 base	24.86	205.06
				406.84
		Less Freight:—41022# @ .22 cwt.		90.25
				316.59

11151 *Government's Exhibit No. 378*

This is an Itemized List of Materials Being Delivered on this Shipment. Invoice Will Follow. Claims or Shortages Must be Reported Immediately.

KELLEY PLASTERBOARD COMPANY, Inc.

Manufacturers and Distributors

Building Materials

Delawanna, N. J., Oct. 14, 1937.

E 3777

Delivered to: United Clay & Supply Corp.

Address: Moreland Ave., Baltimore, Md.

Charge to: Oakfield Gyp Prod Corp.

Driver or Car No.: W. M. Dely. D. L. & W. 45241

Address: 728 Broad St., Utica, N. Y.

Quantity	Description	Tons	Price	Extension
188 Bdls.	3/8"—16x48 Oakleaf Perforated Lath 6016 sq. ft.	@ 14.93	89.82	
	Less 12½% on 13.25 base		9.96	79.86
250 Bdls.	3/8"—16x48 Oakleaf Lath 8000 sq. ft.	@ 14.68	117.44	
	Less 12½% on 13.00 base		13.00	104.44
205	100# bgs. Old Newark Neat—10¼ tons @ 10.00			102.50
				286.80
	Less ft			69.81
				216.99

Returns of Merchandise Not Accepted Unless Authorized by Office.

Received by: Office Voucher

Entered Oct. 14, 1937

2% 10 days on net after ft.

6062

11152 *Government's Exhibit No. 378-A*

1937 Oct 13 PM 10 17

RECEIVED AT 169 PROSPECT STREET, PASSAIC, N. J.

NAN 1 12 30 NL=Washington DC 13

THE KELLY PLASTER BOARD CO=

DELAWANNA NJ=

SHIP THURSDAY SIX THOUSAND FEET 16 BY 48 PERFORATED EIGHT THOUSAND FEET SAME PLAIN AND TEN TONS NEAT TO UNITED CLAY AND SUPPLY CORPORATION MORELAND AVENUE WESTERN MARYLAND

DELIVERY BALTIMORE=

OAKFIELD TRAVERS.

11153 *Government's Exhibit No. 378-B*

UNITED CLAY SUPPLY CORP.

BALTIMORE, MD.

D. L. & 964212-3

Oct. 14 ——

188 Bdls. 3/8"—16x48 Oakleaf Perforated Lath

250 Bdls. 3/8"—16x48 Oakleaf Lath

205 100# bags Old Newark Neat

11154 *Government's Exhibit No. 378-C*

KELLEY PLASTERBOARD COMPANY, INC.

Manufacturers and Distributors

Building Materials

DELAWANNA, N. J.

October 14th, 1937.

Oakfield Gypsum Products Corporation
728 Broad Street
Utica, New York

Shipped to: United Clay & Supply Corp., Baltimore, Maryland
Freight Station: Baltimore, Maryland
Routing: WM Delivery
Car No.: DL&W 45241
Salesman: F. T.

F.O.B.: Destination

Terms: Discounts to apply on mill price after deducting freight
2%—10 days on net after freight

Ticket No.	Quantity	Commodity	Price	
E3777	188 Bundles—3/8"—16x48 Oakleaf Perforated Lath—6016 sq ft. ..... 14.93 M'		89.82	79.86
		Less 12½% on $13.25 base	9.96	
	250 Bundles—3/8"—16x48 Oakleaf Lath 8000 sq ft. ..... 14.68 M'		117.44	
		Less 12½% on $13.00 base	13.00	104.44
	205 Bags Old Newark Neat Plaster 10-1/4 Tons 10.00			102.50
				286.80
		Less freight		69.81
				216.99

11155 *Government's Exhibit No. 379*

KELLEY PLASTERBOARD COMPANY, INC.

Manufacturers and Distributors

Building Materials

DELAWANNA, N. J.

April 16, 1937.

Shipped to: Geo. H. Robinson & Sons,

Freight Station: Alexandria, Va.

Oakfield Gypsum Products Corp.,
300 West Water Street,
Syracuse, N. Y.

Routing: RF&P Delivery

Car No.: DL&W-44249

Salesman: SJK

Date Shipped: 4/16/37

Your Order No.: 120

F.O.B.: Delawanna, N. J., freight allowed to destination

Terms: Discounts to apply on mill price after deducting freight
2%—10 days on net after freight

Ticket No.	Quantity	Commodity	Price	
21316	469 Bundles	3/8"—16x48 Oakleaf Cork Gypsum Lath—15008' ..... 14.96 M	224.52	
		Less 12% on $13.00 Mill Base	24.38	
				200.14
	313 Bundles	3/8" 16x48 Oakleaf Perforated Gypsum Lath—10016' ..... 15.21 M	152.34	
		Less 12½% on $13.25 Mill Base	16.59	
				135.75
	157 Bundles	3/8"—16x48 Oakleaf Metallized Gypsum Lath—5024' ..... 23.96 M	120.37	
		Less 12½% on $22.00 Mill Base	13.82	
				106.55
				442.44
		Less freight on 41066# @ 22¢ cwt.		90.35
				352.09

Please mail receipted paid freight bill promptly.

In case of breakage or damage of any kind in car please notify your agent immediately so that he can make proper notation on freight bill.

11156 *Government's Exhibit No. 379-A*

This is an Itemized List of Materials Being Delivered on this Shipment. Invoice Will Follow. Claims or Shortages Must be Reported Immediately.

KELLEY PLASTERBOARD COMPANY, Inc.

Manufacturers and Distributors

Building Materials

D 21316

Delawanna, N. J., April 16, 1937.

Delivered to: Geo. H. Robinson & Sons

Address: Alexandria, Va. RS&P

Charge to: Oakfield Gyp. Prod. Corp. Driver or

Address: Syracuse, N. Y. Car No.: DL&W 44249

Quantity	Description	Tons	Price	Extension
469 Bdls.	16x48 Oakleaf Lath—15008	14.96 M	224.52	
	Less 12½% on $13.00 base		24.38	200.14
313 Bdls.	16x48 Oakleaf Perforated Lath 10016 sq. ft. .....@	15.21	152.34	
	Less 12½% on $13.25 base.....		16.59	135.75
157 Bdls.	16x48 Oakleaf Metallized Lath 5024 sq. ft. .....@	23.96	120.37	
	Less 12½% on $22.00 base.....		13.82	106.55
				442.44
	Less fr.—41066 #0.22			90.35
				352.09

Returns of Merchandise Not Accepted Unless Authorized by Office.

Received by: Office Voucher

Entered Apr 16, 1937

2% 10 days on net after ft.

11156-A *Government's Exhibit No. 379-B*

Consignee: Geo. H. Robinson & Sons Date 4-16-37

Car No.: 44249

Seal Nos.: 316236-7

11157 *Government's Exhibit No. 379-C*

GEO. H. ROBINSON & SONS

316236-7

April 16, 1937

469 Bdls 16x48 Oakleaf Lath

313 Bdls 16x48 Oakleaf Perforated Lath

157 Bdls 16x48 Oakleaf Perforated Lath

11158 *Government's Exhibit No. 379-D*

Syracuse, N. Y.

Rush Geo. H. Robinson & Sons, Alexandria, Va., 15,000 ft. Gypsum Lath, 10,000 same Perforated, 5,000 Insulated. Consign to them via R. S. & P.

Oakfield Gypsum.

11159 *Government's Exhibit No. 379-E*

OAKFIELD GYPSUM PRODUCTS CORP.

300 West Water Street

Order No. 120

Syracuse, N. Y., April 16, 1937

To: Kelley Plasterboard Co., Delawanna, N. J.

Ship to: George H. Robinson & Sons, Alexandria, Va. Via R. F. & P.

Send Bill of Lading Showing Weight and Rate of Freight

15,000 sq. ft. Oakleaf Plaster Lath 16/48

10,000 sq. ft. Perforated Plaster Lath 16/48

5,000 sq. ft. Insulated Plaster Lath 16/48

Confirms Wire.

Yours truly,

Oakfield Gypsum Products Corp.

Per A. H. M.

Mail B/L or shipping receipt immediately. This will identify shipments on arrival and help us to expedite delivery.

IMPORTANT! Acknowledge Receipt of this order, giving exact date shipment will be made.

If material ordered is for ourselves at Oakfield, N. Y., invoice should be rendered in duplicate.

11160 *Government's Exhibit No. 380*

NOVEMBER 17TH, 1937.

MR. T. P. ELDRED,
Oakfield Gypsum Products Corp.,
728 Broad Street,
Utica, New York.

DEAR TOM:

I had luncheon yesterday with Harry McCormick, and he told me there had been a good deal of excitement among the dealers in Philadelphia several days ago owing to the fact that a shipment of Oakleaf Lath had been delivered directly to the job at 52nd and Spruce Streets. Will you please investigate this matter, as I think it possible we may be called upon for some explanation. I am sure that neither you nor any of your affiliates would knowingly make direct job deliveries in the areas where they are not permitted, and I am simply passing this on for your information.

I was interested in your letter concerning your visit with Fred Epsary, and will look forward to discussing this and other matters when we next meet.

I have heard nothing from Jack Best since he left New York, but assume he is going through with the plans he outlined to us at our last meeting.

With kind regards.

Yours sincerely,

FT:DN

11161 *Government's Exhibit No. 381*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO ILLINOIS

DECEMBER 27, 1937

MR. FREDERICK TOMKINS, *President*
Newark Plaster Company
50 Church Street
New York, N. Y.

DEAR FRED:

The attached form of complaint is the result of information received by me. The information must, of course, be treated as confidential so that it does not get back to either the dealer or plastering contractor involved.

When you secure the facts on this complaint I would appreciate if you would use one copy of the attached form in reporting to me.

Very truly yours,

SIDNEY F. BARTLETT

SFB-hs

11162 *Government's Exhibit No. 382*

Complaint on Sale of Patented Gypsum Wallboard and Gypsum Plasterboard in Violation of License to Manufacture and Sell Such Patented Products

December 27, 1937
(Date)

To:

Newark Plaster Company
Licensee
c/o Calvin Tomkins Company
50 Church Street
New York, N. Y.

Attention: Mr. Frederick Tomkins, President.

A complaint has been filed against your company as follows:

Name of Customer involved: Oakfield Gypsum Products Company

Address of Customer involved: Philadelphia, Pa.

Date of Violation: Dec., 1937 Shipped From Delawanna, N. J. (Mill) By Truck (Rail or Truck)

Type of Violation: Price

Footage Involved	Size	Billed Price Per M	Price Should Have Been
(Wallboard) / (Plasterboard)	(Wallboard) / (Plasterboard)	(Wallboard) / (Plasterboard)	(Wallboard) / (Plasterboard)

Facts Concerning Complaint

Is reported that Frankford Coal & Supply Company, Philadelphia, through Oakfield Gypsum Products salesman, has offered Plastering Contractor Sam Levin a price of $14.00 per M, delivered to job. Material is trucked direct from Delawanna, N. J. by local trucking contractor. Licensed price on Plaster Lath delivered in truckload quantity to dealers in Zone 1 is $14.10 per M.

Board Survey Company

By D. F. Bartlett
Executive Secretary.

11163 *Government's Exhibit No. 383*

DECEMBER 29, 1937.

MR. T. P. ELDRED,
Oakfield Gypsum Products Corp.,
728 Broad Street,
Utica, New York.

DEAR TOM:

I am today in receipt of a formal complaint from the Board Survey Company as follows:

"FACTS CONCERNING COMPLAINT

Is reported that Frankford Coal & Supply Company, Philadelphia, through Oakfield Gypsum Products salesman, has offered Plastering Contractor Sam Levin a price of $14.00 per M, delivered to job. Material is trucked direct from Delawanna, N. J. by local trucking contractor. Licensed price on Plaster Lath delivered in truckload quantity to dealers in Zone 1 is $14.10 per M."

My guess is that this complaint is the one I mentioned to you some time ago here in New York, on which occasion you showed me a letter from your Philadelphia salesman giving an outline of the situation. Under the terms of the License Agreement I am compelled to file an answer to this complaint on the regular complaint form, a copy of which I enclose herewith. I suggest that you note on this form your suggestions for reply. Please understand that I am not in the least worried by this situation and am only bothering you with it to fulfill my obligations under the License Agreement.

With best wishes for the New Year, believe me.

Yours sincerely,

FT:DN
ENCL.

11164 *Government's Exhibit No. 384*

OAKFIELD GYPSUM PRODUCTS CORP.
Sales Office Utica, New York

DECEMBER 30, 1937.

MR. FREDERICK TOMKINS
The Calvin Tomkins Co.
50 Church Street
New York, N.Y.

DEAR FRED:

In reply to yours of the 29th, I can only enclose to you our representative's letter of Nov. 24 and our dealer customer's letter of the 23rd to assist you in filling out complaint as requested by licensors.

On my trip to Philadelphia, I might say to you that our representative, Mr. Robertson, told me of a case where one of the dealers requested that he deliver a very small quantity of Lath to his warehouse. The quantity required was much less than the 7500 Sq. Ft. requirement, and he told him that it would be impossible for him to do this. The dealer replied, "Never mind, I will get it from the U. S. G."

He said he immediately got in his car and drove over to this dealer's yard, only to find that delivery had just been made by U. S. G's truckman and the warehouse foreman, a negro, showed him the material on the warehouse floor.

Mr. Robertson asked me not to make a disturbance regarding this for fear he would lose the good will of the dealer, and I am just giving you this information, so that you may know that those who are trying to throw stones at us are not so Simon pure, after all.

After the enclosures I am sending you have served your purpose, we would be glad to have you return them for our files.

11165 With Best Wishes for a Happy and Prosperous New Year, I am

Sincerely yours,

TOM

TPE:R

Enc.

11166 *Government's Exhibit No. 385*

Complaint on Sale of Patented Gypsum Wallboard and Gypsum Plasterboard in Violation of License to Manufacture and Sell Such Patented Products

January 3rd, 1938
(Date)

To:

Board Survey Company,
300 West Adams Street,
Chicago, Illinois.

Date of Complaint: December 27th, 1937.

Name of Customer involved: Oakfield Gypsum Products Corporation

Address of Customer involved: Philadelphia, Pa.

Date of Violation: Dec., 1937. Shipped from Delawanna, N. J. By Truck
(Mill) (Rail or truck)

Type of Violation: Price

Footage Involved	Size	Billed Price Per M	Price Have Should Been
(Wallboard)	(Wallboard)	(Wallboard)	(Wallboard)
(Plasterboard)	(Plasterboard)	(Plasterboard)	(Plasterboard)

Licensee's Explanation

Oakfield Gypsum Products Corp. states that it has not made a direct delivery to Contractor Sam Levin from Delawanna, New Jersey as stated in Complaint dated December 27th, 1937. Oakfield Gypsum Products Corp. states further that it has not offered said Contractor a price of $14.00 per M, delivered to job. Oakfield Gypsum Products Corp. states it is willing to make affidavit to this effect if required.

KELLEY P. B. Co.
(Name of Licensee)

By: FREDERICK TOMKINS
President.
(Title)

(Use this Form to Answer Complaints from Board Survey Co.)

11167 *Government's Exhibit No. 386*

JANUARY 3RD, 1938.

MR. T. P. ELDRED,
Oakfield Gypsum Products Corp.,
728 Broad Street,
Utica, New York.

DEAR TOM:

I enclose herewith the letters you sent me in connection with the Philadelphia complaint. I have today sent my answer to the Board Survey Company and have stated simply that the Oakfield Gypsum Products Company denies having made a direct job delivery to the dealer in question, and denies that it has offered to sell Lath delivered to this Contractor at a price of $14.00 per M, as stated in the complaint. I have further advised that the Oakfield Gypsum Products Company is willing to make an affidavit to this effect, which I trust will not be necessary.

I do not think I will hear any more from this complaint, and see no reason for me to go into a great deal of detail in answering it.

I thank you for furnishing me with the necessary information as promptly as you did. With kind regards, I am

Yours sincerely,

FT:DN
ENCLS:-2

11168 *Government's Exhibit No. 387*

MAY 17, 1938

MR. FREDERICK TOMKINS
President, Newark Plaster Company
50 Church Street
New York, N. Y.

DEAR MR. TOMKINS:

I have the following report on Philadelphia area:

"In further connection with my memo of the 5th instant advising you of apparent violation of trucking regulations, I have been informed that Structural Gypsum Co., and Newark Plaster Co. (Kelly Cork Lath) are making a regular practice of delivering material direct to jobs. In the case of Structural Gypsum Co., I have been informed that it is the practice of their salesman in this territory, Roger Laird, to meet truck containing gypsum products consigned to a dealer, and have this truck deliver material direct to job."

Will you please investigate and advise?

Very truly yours,

S. F. BARTLETT

SFB-hs

11169 *Government's Exhibit No. 388*

MAY 20TH, 1938.

MR. S. F. BARTLETT,
United States Gypsum Company,
300 West Adams Street,
Chicago, Illinois.

DEAR MR. BARTLETT:

I have your memorandum of May 17th and believe you have been misinformed as to the deliveries said to have been made for Structural Gypsum Company and Newark Plaster Company in Philadelphia. The Newark Plaster Company has never made any sales of Gypsum Lath in Philadelphia, and the Kelley Plasterboard Company has at no time made any deliveries direct to jobs of Gypsum Lath.

The Kelley Plasterboard Company discontinued the delivery of Gypsum Lath in Philadelphia and vicinity for the account of Structural Gypsum Company several months ago because we were given to understand at that time there were some irregularities in connection with the sale of Lath by Structural to several dealers, and also because the business was unattractive to us. Since that time I understand Structural Gypsum Company has been purchasing Lath from your Philadelphia mill.

Yours very truly,

NEWARK PLASTER CO.

President.

FT:DN

Government's Exhibit No. 389

KELLEY PLASTERBOARD CO., INC.
Manufacturers and Distributors of Building Materials
DELAWANNA, N. J.

JULY 11, 1932.

BOARD SURVEY COMPANY,
300 West Adams Building,
Chicago, Ill.

GENTLEMEN:-

We are in receipt of your letter of the 1st in reference to Dussol Co. and note contents carefully. In reply we wish to advise that we do not expect to discontinue selling Dussol & Co. Wall Board and Plaster Board, and that we are not selling them at any other prices than the prevailing prices published in bulletins by the licensor.

George Dussol is an employee of ours on a straight commission, and we expect to continue his services with us.

We regret very much that you shall treat this transaction as a violation of our licensee agreement. We do not feel that you are just in this matter, and would like to have you reconsider your decision.

Yours very truly,

KELLEY PLASTERBOARD COMPANY, INC.

S. J. KELLEY
Pres.

SJK.MK

11171 *Government's Exhibit No. 390*

JULY 1, 1932.

KELLEY PLASTERBOARD COMPANY
Delawanna, New Jersey.

Attention: Mr. S. J. Kelley

GENTLEMEN:

Re: L. A. Dussoll and Company

Referring to our previous correspondence regarding the above account, we are advised that Dussoll and Company are continuing to sell patented gypsum board manufactured and sold by you under your license agreement at prices which it would be unable to quote unless it were purchasing the board from you at less than the minimum price to you therefor as fixed by the licensor.

Information has also come to us indicating that Dussoll and Company is getting a rebate on its price for such board purchased from you through the medium of George Dussoll, whom we understand you claim is a commission salesman for you. This is to advise you that we shall treat as a violation of your license agreement any sale of such patented board to the above account at less than the minimum price to you therefor effected by a rebate through the payment of commissions to George Dussoll on sales to the Dussoll Company.

Will you please advise us of the action taken by you to correct this situation?

Yours very truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11172 *Government's Exhibit No. 391*

KELLEY PLASTERBOARD CO., INC.
Manufacturers and Distributors Plaster Products
DELAWANNA, N. J.

JUNE 1, 1932

MR. C. F. HENNING,
United States Gypsum Co.,
300 West Adams St.,
Chicago, Ill.

DEAR MR. HENNING:-

We are in receipt of your letter of the 23rd, referring to the Reserve Supply Co., Mineola, Long Island, L. A. Dussoll Co., Brooklyn, N. Y. and George Cartier & Sons Co., Providence, R. I.

You claim that your records indicate that we have warehousing and trucking arrangements with the above mentioned firms. We wish to advise that you are very much mistaken. The only warehousing arrangement which we had was with the Reserve Supply Co. of Mineola, about which we wrote you previously, and again wrote the Board Survey Co. on May 23rd, advising that we had billed the Reserve Supply Warehouse for all the board which they had on hand, and that all future shipments to them would be made by rail in carload lots at carload prices. We might further state that we have made one such shipment to them within the past week or ten days.

We have today written to the Board Survey Co. about L. A. Dussoll & Co. and wish to further advise that we have no special arrangement with Dussoll & Co. We sell them as dealers at dealers prices.

We wish to also advise you that we have no special arrangement with M. N. Cartier Sons Co., of Providence, R. I. We sell this firm at dealers' prices and are paid at dealers' prices by Cartier & Co. Our books are open to you, and we would welcome an investigation.

We have no accounts on our books to whom we make any warehousing or trucking allowances.

11173 We sincerely hope that the above information is satisfactory.

Yours very truly,

KELLEY PLASTERBOARD COMPANY, INC.

S. J. KELLEY
Pres.

SJK.MK

11174 *Government's Exhibit No. 392*

KELLEY PLASTERBOARD CO., INC.
Manufacturers and Distributors Plaster Products
DELAWANNA, N. J.

MAY 23, 1932.

BOARD SURVEY COMPANY,
300 West Adams Building,
Chicago, Ill.

GENTLEMEN:-

Replying to your favor of the 17th in reference to the Reserve Supply Co., we believe you refer to the Reserve Supply Co. of Mineola, L.I.

In connection with this account, wish to advise that for some time past, we rented floor space from this firm, and previously advised you or Mr. Henning of the arrangements which we had with them.

On May 14th, we billed the Reserve warehouse for all board on hand at $30.84 per thousand, which is the truck-load price.

All future shipments to this firm will be made by rail in carload lots at carload prices, and no allowance will be made for handling in any way.

Trusting that the information above is clear and satisfactory, we remain

Yours very truly,

KELLEY PLASTERBOARD COMPANY, INC.

S. J. KELLEY
Pres.

SJK.MK

11175 *Government's Exhibit No. 393*

MAY 17, 1932.

MR. S. J. KELLEY, *Pres.*,
Kelley Plasterboard Company,
Delawanna, N. J.

DEAR MR. KELLEY:

Re: Reserve Supply Company

We are informed that you have sold to the Reserve Supply Company gypsum wallboard and/or plasterboard embodying the claims and inventions of the licensor's patents at prices below the licensor's minimum price to you and consequently in violation of the terms and conditions of your license agreement.

Specifically, that this violation occurred on your sale to the Reserve Supply Company under date of April 28.

Please forward us complete record of your shipments to this firm under that date, including a verified statement of your shipments showing the amount of board sold, price at which board was invoiced and price actually paid by the dealer for such board, including any and all allowances then or subsequently made by your company affecting such sales.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11176 *Government's Exhibit No. 394*

MAY 9, 1932.

MR. WARREN HENLEY
Certain-teed Products Corp
Daily News Building
Chicago, Ill.

DEAR MR. HENLEY:

Re: Reserve Supply Co.

We acknowledge receipt of your letter of May 2 concerning the sale to the above concern of gypsum wallboard and/or plasterboard manufactured and sold by the Kelley Plasterboard Company under its license agreement and embodying the claims and inventions of the license patents.

We appreciate your calling this matter to our attention and will immediately investigate same and take such action as may seem necessary or proper to fully protect the licensor's rights in the premises.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11177 *Government's Exhibit No. 395*

CERTAIN-TEED PRODUCTS CORPORATION
1 North Canal St.
CHICAGO, ILL.

MAY 2, 1932

MR. FRANK MILLER, *Executive Secretary*
c/o Board Survey Company
300 W. Adams St.
Chicago, Ill.

SUBJECT:

DEAR MR. MILLER: *Kelley Plasterboard Co.*

For your information, subject concern on Thursday, April 28, trucked a load of gypsum board to Reserve Supply Co.'s warehouse on some sort of special arrangement and in violation of minimum prices set by you to our company as licensee.

Will you please check and advise promptly.

Yours very truly,

WARREN HENLEY
Merchandise Manager
Gypsum Division H

WH/H

11178 *Government's Exhibit No. 396*

MARCH 22, 1932.

MR. S. J. KELLEY, *Pres.,*
Kelley Plasterboard Company, Inc.
Delawanna, N. J.

DEAR MR. KELLEY:

The entire correspondence pertaining to the warehousing arrangement you have entered into with the Reserve Supply Company of Long Island, whereby the dealer whose warehouse is used by you is paid a handling and warehousing charge on gypsum wallboard and plasterboard, embodying the claims and inventions of the licensor's patents, which passes through such dealer's warehouse, has been referred to us by the licensor for further handling.

Our attorneys advise us there can be no doubt but that such an arrangement effects a rebate to the dealer on its purchases of such board from you, and consequently results in sales to that dealer being made at prices below our minimum price to you.

We, therefore, cannot recede from the position taken in this matter, both in regard to yourself and the other licensees you mention in your letter of March 8.

Your immediate compliance with our request is urged so there will not be further violations.

Yours very truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11179 *Government's Exhibit No. 397*

NATIONAL GYPSUM COMPANY
General Offices
BUFFALO, N. Y.

MARCH 21, 1932

MR. F. M. MILLER
Board Survey Co.
300 W. Adams St.
Chicago, Ill.

DEAR MR. MILLER:

It has been brought to our attention that one of your licensees, Kelley Plasterboard Company, is selling board manufactured under a license agreement with you to the Reserve Lumber Company, Mineola, L. I., N. Y., and as an inducement for getting the required price he is paying this dealer a stipulated amount per month for warehousing board and for handling it in and out of the warehouse.

Counsel has advised us that this is a rebate acting as a direct reduction in the price at which we are required to sell board under our license agreement with the United States Gypsum Company. Will you, therefore, please advise what steps the United States Gypsum Company proposes in this situation.

Very truly yours

M. H. BAKER
President

M.H.Baker:MP

11180 *Government's Exhibit No. 398*

KELLEY PLASTERBOARD CO., INC.
Manufacturers and Distributors of Building Materials
DELAWANNA, N. J.

OCT. 25, 1933.

BOARD SURVEY CO.,
300 West Adams St.,
Chicago, Ill.

GENTLEMEN:-

We have reason to believe that the following Companies are getting special prices on Plaster when purchasing Board. Of course, we may be entirely wrong, but it is reported to us that the Ebsary Gypsum Co. are making these arrangements.

G. Radish — Stapleton, S.I.

Universal Material Co., E. 4th St., New York City

Trio Builders Supply Co., Ft. of E. 109th St., N.Y.C. East 109th St., New York City.

We would be very glad to have you investigate and advise whether or not there is any proof of these reports.

Yours very truly,

KELLEY PLASTERBOARD COMPANY, INC.

F. F. PELLETT
Department Manager.

FFP.MDK

11181 *Government's Exhibit No. 399*

NOVEMBER 7, 1933.

KELLEY PLASTERBOARD COMPANY, INC.,
Delawanna,
New Jersey.

Att: F. F. Pellett, *Department Manager.*

DEAR SIRS:

Re: G. Radish, Stapleton, S. I.

Universal Matls Co., E. 4th St., N. Y. C.

Trio Builders Supply Co., Ft. of E. 109th St., N.Y.C.

We acknowledge receipt of your letter of October 25th regarding the alleged sale of patented board in conjunction with plaster by the licensee, Ebsary Gypsum Company, to G. Radish, Stapleton, Staten Island, Universal Material Company, New York City and the Trio Builders Supply Company, New York City; said sale being made in such a manner as to effect a lower price on patented board than the licensor's minimum price.

We have investigated these complaints and have been unable to substantiate.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11182 *Government's Exhibit No. 400*

JAN. 20TH, 1937.

EBSARY GYPSUM COMPANY, INC.,
52 Vanderbilt Avenue,
New York City, N.Y.

GENTLEMEN: *Att. of Mr. George N. Lenci*

We have your letter of Jan. 19th and very much regret to advise that it is absolutely impossible for us to put you in a position where you can handle white plaster profitably in this market so long as the resale price is held at the present ridiculously low level. The price that we are now charging you for white plaster takes into consideration the fact that we do not figure any selling expense or overhead in our sales to your Company and we cannot reduce this price without actually incurring a direct loss.

We are hoping that something will be done in the near future to increase the resale price and you may be sure that we will do everything we can to make your business in this material profitable at the earliest possible moment.

Yours very truly,

FT:MW NEWARK PLASTER CO.

11183 *Government's Exhibit No. 403*

UNIVERSAL GYPSUM & LIME CO.
NEW YORK, N. Y.
Graybar Bldg. 420 Lexington Ave.

JANUARY 8TH, 1930.

MR. RALPH F. BURLEY,
National Gypsum Co.,
Jackson Building,
Buffalo, N. Y.

DEAR RALPH:

Per your request I am enclosing copy of our bulletin on Sanded Plaster which is self-explanatory.

Regarding the prices for Ohio, Michigan, Wisconsin and Illinois territories, so far as I know there has been no change in the figures carried in our bulletin. However I suggest you check this with Charlie the next time you are in Chicago to make sure.

Trusting this gives you the information you want and with kindest regards, remain

Very truly yours,

ABEL DAVIS and EUGENE HOLLAND
Receivers in Equity for
UNIVERSAL GYPSUM AND LIME CO.

W. G. Stromquist
W. G. STROMQUIST
Eastern Sales Manager

WGS:HH
Att.

11184 *Government's Exhibit No. 403-A*

11184

Effective 8-1-29

Chicago
GSB #27-A
Cancels
GSB #27

GENERAL SALES BULLETIN
Dealers Prices
Prepared Sanded Plaster 3474
(Hair Fibered or Wood Fibered)

The following price policy will apply in all Sales Territories, except as noted under "Exceptions":

Basing Mills	Mill Price—Including Containers In Paper Bags	In Jute Bags
Oakfield, N. Y.	$8.00 per ton	$11.00 per ton
Gypsum, Ohio	8.00 per ton	11.00 per ton
Plasterco, Va.	8.00 per ton	11.00 per ton
Fort Dodge, Ia.	8.00 per ton	11.00 per ton

Prices are f.o.b. mills indicated and include cost of containers. In figuring delivered price, use mill basing price, plus freight from such mills to destination, lowest combination thus obtained to apply.

EXCEPTIONS

NEW ENGLAND

Territory	
Maine New Hampshire Vermont Massachusetts Rhode Island Connecticut	In figuring delivered price to points in these States, use mill base price of $6.00 per ton including paper bags or $9.00 per ton, including jute bags, f.o.b. Oakfield, N. Y., plus actual freight from Oakfield to destination.

NEW YORK STATE

Territory	
Manhattan County Bronx County Westchester County Kings County Queens County Richmond County	$9.50 per ton, including paper bags, or $11.50 per ton, including jute bags, f.o.b. our Warehouse in New York City, when called for by dealer's own truck. These prices also apply and are f.o.b. any delivery point in this area, when delivered by steam lighter or carload.
Territory	
Utica, N. Y.	In figuring delivered price to these two markets, use mill base price of $5.00 per ton including paper bags or $7.00 per ton, including jute bags, f.o.b. Oakfield, N. Y., plus actual freight from Oakfield.

11185 *Government's Exhibit No. 404*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 23, 1929.

MR. GEO. N. LENCI, *V. Pres.*
Ebsary Gypsum Co.
135th St. & Mott Haven Rd.
New York, N. Y.

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimum Prices f.o.b.—	Oakfield, N. Y. Gypsum, Ohio Plasterco, Va. Sweetwater, Texas	Grand Rapids, Mich. Ft. Dodge, Ia. Southard, Oklahoma Acme, Texas
3/8"—#1 Grade Gypsum Wallboard	$20.00 per M sq. ft.	
3/8"—#2 Grade Gypsum Wallboard	$17.50 per M sq. ft.	
1/4"— Gypsum Wallboard	$17.50 per M sq. ft.	
1/2"— Gypsum Wallboard	$22.50 per M sq. ft.	

3/8"—Gypsum Wallboard SECONDS—$15.00 per M sq. ft.

All Wallboard Seconds "to be plainly invoiced as 'SECONDS' and shall be plainly marked with visible red stamp or label firmly fixed on each of said boards showing the word "SECONDS" in letters at least three (3) inches high."

1/4" and 3/8" Gypsum Plasterboards, either bundled or unbundled, all sizes—$13.50 per M sq. ft. or 10.8¢ per 8 sq. ft. board.

1/2" Gypsum Plasterboard—$14.75 per M sq. ft. or 11.8¢ per 8 sq. ft. board.

Minimum Prices f.o.b. New Brighton, New York:

3/8"—#1 Grade Gypsum Wallboard—$22.60 per M sq. ft.
3/8"—#2 Grade Gypsum Wallboard—$20.10 per M sq. ft.
1/4"— Gypsum Wallboard—$19.00 per M sq. ft.
1/2"— Gypsum Wallboard—$26.00 per M sq. ft.

3/8"—Gypsum Wallboard SECONDS—$17.60 per M sq. ft.

All Wallboard SECONDS "to be plainly invoiced as 'SECONDS' and shall be plainly marked with
11186 visible red stamp or label firmly fixed on each of said boards showing the word 'SECONDS' in letters at least three (3) inches high."

1/4" and 3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes—$16.10 per M or 13¢ per board.

1/2" Gypsum Plasterboard—$18.15 per M or 14 1/2¢ per board.

Truck deliveries from New Brighton Mill add $3.00 to New Brighton base prices, or $2.00 to Oakfield delivered carload prices.

Minimum Prices f.o.b. New York and Newark Warehouses.

3/8"—#1 Grade Gypsum Wallboard—$23.60 per M
3/8"—#2 Grade Gypsum Wallboard—$21.10 per M
1/4"— Gypsum Wallboard—$20.00 per M
1/2"— Gypsum Wallboard—$27.00 per M

1/4" and 3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes—$17.10 per M
1/2" Gypsum Plasterboard—$19.15 per M

Truck deliveries from New York and Newark Warehouses, add $2.00 per M sq. ft. to warehouse prices.

Minimum Prices f.o.b. Charlestown, Mass.

3/8"—#1 Grade Gypsum Wallboard—$23.65 per M
3/8"—#2 Grade Gypsum Wallboard—$21.15 per M
1/4"— Gypsum Wallboard—$19.65 per M
1/2"— Gypsum Wallboard—$27.20 per M
3/8"—Gypsum Wallboard SECONDS—$18.65 per M

All Wallboard SECONDS "to be plainly invoiced as 'SECONDS' and shall be plainly marked with visible red stamp or label firmly fixed on each of said boards showing the word 'SECONDS' in letters at least (3) inches high."

1/4" and 3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes—$17.15 per M

1/2" Gypsum Plasterboard—$19.40 per M

Boston Warehouses add $3.00 per M to Charlestown base prices or $2.00 per M to Oakfield delivered carload prices.

11187 Minimum Prices f.o.b. Buffalo Warehouse:

3/8"—#1 Grade Gypsum Wallboard—$22.73 per M
3/8"—#2 Grade Gypsum Wallboard—$20.23 per M
1/4"— Gypsum Wallboard—$19.75 per M
1/2"— Gypsum Wallboard—$25.55 per M
3/8"—Gypsum Plasterboard, either bundled or unbundled, all sizes—$16.23 per M

Minimum Prices f.o.b. Laramie, Wyoming, for Mixed Car Shipments:

1/4"—Gypsum Wallboard only —$19.65 per M
3/8"—Gypsum Plasterboard only—$20.00 per M

Minimum Prices f.o.b. Loveland, Colorado for Mixed Car Shipments:

3/8"—#1 Grade Gypsum Wallboard only —$30.00 per M
1/4"— Gypsum Wallboard —$24.00 per M
1/2"— Gypsum Wallboard —$35.00 per M
3/8"— Gypsum Plasterboard (Only) —$20.50 per M

Minimum Prices f.o.b. Philadelphia Warehouse:

3/8"—#1 Grade Gypsum Wallboard—$22.60 per M
3/8"—#2 Grade Gypsum Wallboard—$20.10 per M
1/2"— Gypsum Wallboard—$26.00 per M
3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes—$16.10 per M or 13¢ per board.

Truck deliveries from Philadelphia Warehouse add $3.00 to Philadelphia Warehouse prices, or $2.00 to Oakfield delivered carload prices.

The following are billing weights used at all basing points:

1/4"	Board	1250 lbs. per 1000 sq. ft.
3/8"	Board	1850 lbs. per 1000 sq. ft.
1/2"	Board	2250 lbs. per 1000 sq. ft.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. HENNING
Vice President in Charge of Sales.

CHF'AN

11188 *Government's Exhibit No. 405*

New York Office

MAY 23rd, 1929

EBSARY GYPSUM CO., INC.
Newark, N. J.

Attention of Mr. Ed. A. Niel, Jr.

GENTLEMEN:

For your information please be advised that effective immediately the following prices on wall board and plaster board will prevail:

3/8" Gypsum Lath (16x48—16x32—32x48) @	$13.50 per M ft. F.O.B. Mill
1/4" (32x36)	13.50 " " " " "
3/8" (32x36)	13.50 " " " " "
1/2" (32x36)	14.75 " " " " "
Open edge wall board 4x6–12' long @	15.00 per M ft. F.O.B. Mill
New covered edge wall board 4x6–12' long @	17.50 per M ft. F.O.B. Mill when ready.

These are minimum prices at our Mill to which you will please add schedule weights for freight.

Will you please notify all salesmen in your territory at once and oblige,

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

By

GEORGE N. LENCI
Vice-President

EHD:SF

11189 *Government's Exhibit No. 406*

MAY 23RD, 1929

ALL SALESMEN :-

Effective immediately please be governed by the following list of new prices on our gypsum boards:

All Lath and Plaster Boards either ¼" or ⅜"
@ $13.50 per M ft. F.O.B. Mill
1½ 32x36 @. 14.75 " " " " ".
⅜" wall board 4x6-12' long open edge @
15.00 per M ft. F.O.B. Mill

We will also start manufacturing covered edge wall board and you will kindly figure $17.50 per M ft. F.O.B. Mill. When ready.

These are minimum prices F.O.B. Mill to which you will have to add the schedule freight rate for a delivered price.

You will be duly notified when we will be able to make shipments of the covered edge board.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

By

GEORGE N. LENCI
Vice-President

EHD:SF.

C. H. Crowther
F. M. Johnson
W. J. Kelleher
J. F. Murtha
J. McConnell
G. F. Heal
A. H. Robinson.

11190 *Government's Exhibit No. 407*

NEW YORK OFFICE

MAY 24TH, 1929.

EBSARY GYPSUM CO., INC.
Newark, N. J.

GENTLEMEN: *Attention of Mr. Ed. A. Niel, Jr.*

Supplementing my letter of May 23rd giving new prices on gypsum boards, you will please use the following weights in figuring the freight:

¼"	1250 lbs. per M ft.
⅜"	1850 " " " "
½"	2250 " " " "

In giving you the price of $15.00 F.O.B. Mill on the open edge wall board this price will remain only in effect until such time as we use up the quantity of paper that we now have on hand. After that all of the 32x36 board, regardless of thickness as well as the wall board, will be covered edge.

At this time we are not in a position to say definitely when the lath, that is 16x48 — 16x32 and 32x48 will be made in a covered edge wall board.

Would also suggest that you make every effort to sell as much joint filler as possible and the price will be $3.60 per case (one dozen cartons) F.O.B. Mill.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

By
GEORGE N. LENCI
Vice-President

EHD:SF

Copy for Mr. R. B. Hepner

11191 *Government's Exhibit No. 408*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 24, 1929.

MR. GEO. N. LENCI, *V.Pres.*,
Ebsary Gypsum Company,
135th St. & Mott Haven Road,
New York, N.Y.

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimun Prices to Manufacturers and Jobbers of Gypsum Products — 10% discount from minimum list prices as per our letter of May 23, applicable at all basing points.

The standard size of patented gypsum plasterboards are; 32 and 48-inch widths, and from 4-ft. to 12-ft. lengths, inclusive.

The standard sizes of patented gypsum plasterboards are; 32-inches x 48-inches, and 32-inches x 36-inches, and less, either bundled or unbundled.

You will please send us a list of the jobbers to whom you are selling patented board.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,
Vice President in Charge of Sales

CFH:HDS

11192 *Government's Exhibit No. 409*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MAY 25, 1929.

MR. GEO. N. LENCI, *Vice-Pres.*
Ebsary Gypsum Company,
135th St. & Mott Haven Road,
New York City.

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimum Prices f.o.b. Acme, Texas, shall be the same as minimums given in our letter of May 23, 1929, f.o.b.:

Oakfield, N.Y.	Grand Rapids, Mich.
Gypsum, Ohio	Ft. Dodge, Ia.
Plasterco, Va.	Southard, Oklahoma

Sweetwater, Texas.

Very truly yours,

UNITED STATES GYPSUM COMPANY
C. F. HENNING,
Vice-President in Chg. Sales

CFH/WP

11193 *Government's Exhibit No. 410*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 7, 1929.

MR. GEO. N. LENCI, *Vice Pres.,*
%Ebsary Gypsum Company,
135th St. & Mott Haven Canal,
New York City, New York.

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimum Prices f.o.b.

Oakfield, N.Y.	Ft. Dodge, Iowa
Gypsum, Ohio	Southard, Oklahoma
Plasterco, Va.	Sweetwater, Texas
Grand Rapids, Mich.	Acme, Texas:

3/8" #2 Grade Gypsum Wallboard, price changed from $17.50 per M sq. ft. to $18.75 per M sq. ft.

3/8" Gypsum Wallboard SECONDS, price changed from $15.00 per M sq. ft. to $16.25 per M sq. ft.

Minimum Prices f.o.b. New Brighton, New York:

3/8" #2 Grade Gypsum Wallboard, price changed from $20.10 per M sq. ft. to $21.35 per M sq. ft.

3/8" Gypsum Wallboard SECONDS, price changed from $17.60 per M sq. ft. to $18.85 per M sq. ft.

Minimum Prices f.o.b. New York and Newark Warehouses:

3/8" #2 Grade Gypsum Wallboard, price changed from $21.10 per M sq. ft. to $22.35 per M sq. ft.

Minimum Prices f.o.b. Charlestown, Mass.

11194 3/8" #2 Grade Gypsum Wallboard, price changed from $21.15 per M sq. ft. to $22.40 per M sq. ft.

3/8" Gypsum Wallboard SECONDS — Price changed from $18.65 per M sq. ft. to $19.90 per M sq. ft.

Minimum Prices f.o.b. Buffalo Warehouse:

3/8" #2 Grade Gypsum Wallboard, price changed from $20.23 per M sq. ft. to $21.48 per M sq. ft.

Minimum Prices f.o.b. Philadelphia Warehouse:

3/8" #2 Grade Gypsum Wallboard, price changed from $20.10 per M sq. ft. to $21.35 per M sq. ft.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,
Vice President in Charge of Sales

CFH:PBN

11195 *Government's Exhibit No. 411*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 19, 1929

MR. GEO. N. LENCI, *V. Pres.,*
Ebsary Gypsum Company,
135th St. & Mott Haven Canal, N.Y.

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimum Prices for board F.O.B. Grand Rapids, Mich. Mill:

3/8" —	#1 Grade Gypsum Wallboard —	$20.00 per M sq. ft.
3/8" —	#2 Grade Gypsum Wallboard —	18.75 per M sq. ft.
1/4" —	Gypsum Wallboard —	17.50 per M sq. ft.
1/2" —	Gypsum Wallboard —	22.50 per M sq. ft.
3/8" —	Gypsum Wallboard Seconds —	16.25 per M sq. ft.
1/4" & 3/8"	Gypsum Plasterboard, either bundled or unbundled, all sizes —	$13.50 per M sq. ft.

For shipment in straight or mixed cars delivered to dealers in Grand Rapids, Mich., switching limits, add $1.00 per M sq. ft. to prices listed above.

Yours truly,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,
Vice-President in Chg. Sales

CFH'AC

11196 *Government's Exhibit No. 412*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 19, 1929

MR. GEO. N. LENCI, *Vice President,*
Ebsary Gypsum Company,
135th St. & Nott Haven Canal,
New York, New York.

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimum Prices f.o.b. Harrison, N. J. Warehouse or Port Morris, N. Y. Warehouse:

⅜"—#1 Grade Gypsum Wallboard—$26.50 per M sq. ft.
⅜"—#2 Grade Gypsum Wallboard— 24.35 per M sq. ft.
¼"—Gypsum Plasterboard — 17.10 per M sq. ft. or 13.7¢ per board.
⅜"—Gypsum Plasterboard — 17.10 per M sq. ft. or 13.7¢ per board.
½"—Gypsum Plasterboard — 19.15 per M sq. ft. or 15.3¢ per board.

Minimum prices delivered in truck lots to dealers' warehouses in Brooklyn, Queens, Manhattan, and Bronx Counties:

⅜"—#1 Grade Gypsum Wallboard—$25.60 per M sq. ft.
⅜"—#2 Grade Gypsum Wallboard— 24.35 per M sq. ft.
Minimum Truck-load 10,000 sq. ft.

¼"—Gypsum Plasterboard—$17.95 per M sq. ft. or 14.35¢ per board
⅜"—Gypsum Plasterboard— 19.10 per M sq. ft. or 15.3 ¢ per board
½"—Gypsum Plasterboard— 21.15 per M sq. ft. or 16.9 ¢ per board

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Minimum prices delivered in truck lots to dealers' warehouses in Nassau, Long Island, and Westchester Counties, N. Y.:

⅜"—#1 Grade Gypsum Wallboard—$26.35 per M sq. ft.
⅜"—#2 Grade Gypsum Wallboard— 25.10 per M sq. ft.
Minimum Truck-load 8,000 sq. ft.

¼"—Gypsum Plasterboard—$18.70 per M sq. ft. or 15¢ per board.
⅜"—Gypsum Plasterboard— 19.85 per M sq. ft. or 15.9¢ per board.
½"—Gypsum Plasterboard— 21.90 per M sq. ft. or 17.5¢ per board.

Minimum prices delivered in truck lots to dealers' warehouses in counties and towns as follows:

⅜"—#1 Grade Gypsum Wallboard—$25.60 per M sq. ft.
⅜"—#2 Grade Gypsum Wallboard— 24.35 per M sq. ft.
Minimum Truck-load 7,500 sq. ft.

11197

¼"—Gypsum Plasterboard—$17.94 per M sq. ft. or 14.3¢ per board.
⅜"—Gypsum Plasterboard— 19.11 per M sq. ft. or 15.8¢ per boafd.
½"—Gypsum Plasterboard— 21.14 per M sq. ft. or 16.9¢ per board.

Hudson County, N. Y. — All Towns.

Essex County, N. Y. — All Towns.

Union County, N. Y. — All Towns.

Bergen County, N. J.

Bergenfield	Teaneck	Little Ferry	Mosmere
Bogota	W. Ft. Lee	Lodi	N. Hackensack
Carlstadt	Garfield	Rochelle Park	Palisades Park
Englewood	Hackensack	Tenafly	Ridgefield
Fairview	Grantwood	Woodridge	Ridgefield Park
Ft. Lee	Hasbrouck Heights	Lyndhurst	Rutherford
Riveredge	Leonia	Maywood	W. Englewood

Passaic County, N. J.

Athenia	Little Falls	Singac
Clifton	Mountain View	Totowa
Delawanna	Passaic	Wayne
Great Notch	Paterson	W. Paterson
Hawthorne	Prospect Park	

Morris County, N. J.

Long Hill	Whippany	Moristown	Green Village
Morris Plains	Dover	Mt. Tabor	Hanover
Mt. Freedom	Florham Park	Pine Brook	Millington
Parsippany	Gillette	Sterling	Mountain Lakes
Stanley	Madison	Green Pond	New Vernon

Middlesex County, N. J.

Avenel	Sewaren	Perth Amboy	New Market
Cartaret	South River	Roosevelt	Nixon
Cheesequake	Highland Park	South Amboy	Oak Tree
Chrome	Iselin	Stelton	Oldbridge
Dunellin	Keasbey	Metucheon	Saysville
Fords	Lincoln	Middlesex	So. Plainfield
Parlin	Maurer	Milltown	Woodbridge
Port Reading	Menlo Park	New Brunswick	

Monmouth County, N. J.:

Matawan
Keyport

Minimum prices to all towns in Passaic, Bergen, and Morris Counties, not listed above, delivered to dealers' warehouses, as follows:

⅜"—#1 Grade Gypsum Wallboard—$26.10 per M sq. ft.
⅜"—#2 Grade Gypsum Wallboard— 24.85 per M sq. ft.
Minimum Truck-load 7,500 sq. ft.

11198

¼"—Gypsum Plasterboard—$19.60 per M sq. ft. or 15.7¢ per board.
⅜"—Gypsum Plasterboard— 19.60 per M sq. ft. or 15.7¢ per board.
½"—Gypsum Plasterboard— 21.65 per M sq. ft. or 17.32¢ per board.

Yours truly,

UNITED STATES GYPSUM COMPANY

C. HENNING
Vice-President in Chg. Sales.

CFH'

11199 *Government's Exhibit No. 413*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 26, 1929

GEORGE H. LENCI, *V. Pres.,*
Ebsary Gypsum Company,
135th St. & Mott Haven Canal,
New York, New York.

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimum Prices f.o.b.:	Oakfield, N.Y.	Grand Rapids, Michigan
	Gypsum, Ohio	Fort Dodge, Ia.
	Plasterco, Va.	Southard, Okla.
	Sweetwater, Tex.	Acme, Texas.

3/8" #2 Grade Gypsum Wallboard, price changed from $18.75 per M sq. ft. to $20.00 per M sq. ft.

3/8" Gypsum Wallboard Seconds, price changed from $16.25 per M sq. ft. to $17.50 per M sq. ft.

For shipments in straight or mixed cars delivered to dealers in Grand Rapids, Michigan, switching limits, add $1.00 per M sq. ft. to prices listed above.

Minimum Prices f.o.b. New Brighton, New York:

3/8" #2 Grade Gypsum Wallboard, price changed from $21.35 per M sq. ft. to $22.60 per M sq. ft.

3/8" Gypsum Wallboard Seconds, price changed from $18.85 per M sq. ft. to $20.10 per M sq. ft.

Minimum Prices f.o.b. Harrison, N. J. Warehouse, or Port Morris, N. Y. Warehouse:

3/8" #2 Grade Gypsum Wallboard, price changed from $24.35 per M sq. ft. to $25.60 per M sq. ft.

Minimum prices delivered in truck lots to dealers' warehouses in Brooklyn, Queens, Manhattan, and Bronx Counties, N. Y.:

3/8" #2 Grade Gypsum Wallboard, price changed from $24.35 per M sq. ft. to $25.60 per M sq. ft.

11200 Minimum prices delivered in truck lots to dealers' warehouses in Nassau, Long Island, and Westchester Counties, N. Y.:

3/8" #2 Grade Gypsum Wallboard, price changed from $25.10 per M sq. ft. to $26.35 per M sq. ft.

Minimum prices delivered in truck lots to dealers' warehouses in counties and towns listed on page 2 of our letter to you of June 19:

3/8" #2 Grade Gypsum Wallboard, price changed from $24.35 per M sq. ft. to $25.60 per M sq. ft.

Minimum prices to all towns in Passaic, Bergen, and Morris Counties, not listed on page 2 of our letter to you of June 19:

3/8" #2 Grade Gypsum Wallboard, price changed from $24.85 per M sq. ft. to $26.10 per M sq. ft.

Minimum prices f.o.b. Charlestown, Mass.:

3/8" #2 Grade Gypsum Wallboard, price changed from $22.40 per M sq. ft. to $23.65 per M sq. ft.

3/8" Gypsum Wallboard Seconds, price changed from $19.90 per M sq. ft. to $21.15 per M sq. ft.

Minimum Prices f.o.b. Buffalo Warehouse:

3/8" #2 Grade Gypsum Wallboard, price changed from $21.48 per M sq. ft. to $22.73 per M sq. ft.

Minimum Prices f.o.b. Philadelphia Warehouse:

3/8" #2 Grade Gypsum Wallboard, price changed from $21.35 per M sq. ft. to $22.60 per M sq. ft

Yours very truly,

UNITED STATES GYPSUM COMPANY

C. F. HENNING
Vice President in Charge of Sales

CFH:

11201 *Government's Exhibit No. 414*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 9, 1929.

GEO. N. LENCI, *Vice Pres.,*
Ebsary Gypsum Company,
135th St. & Mott Haven Canal,
New York.

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimum Prices f.o.b.: Oakfield, N. Y. Gypsum, Ohio Plasterco, Va. Sweetwater, Tex.	Grand Rapids, Mich. Fort Dodge, Ia. Southard, Okla.
3/8" Gypsum Wallboard —	$22.50 per M sq. ft.
1/4" Gypsum Wallboard —	20.00 per M sq. ft.
1/2" Gypsum Wallboard —	25.00 per M sq. ft.
3/8" Gypsum Wallboard Seconds —	20.00 per M sq. ft.

For shipment in straight or mixed cars delivered to dealers in Grand Rapids, Mich., switching limits, add $1.00 per M sq. ft. to prices listed above.

Minimum Prices f.o.b. New Brighton, New York:

3/8" Gypsum Wallboard —	— $25.10 per M sq. ft.
1/4" Gypsum Wallboard —	— 21.50 per M sq. ft.
1/2" Gypsum Wallboard —	— 28.50 per M sq. ft.
3/8" Gypsum Wallboard Seconds —	22.60 per M sq. ft.

Truck deliveries from New Brighton Mill add $3.00 to New Brighton base prices, or $2.00 to Oakfield delivered carload prices.

Minimum Prices f.o.b. Harrison, N. J. Warehouse or Port Morris, N. Y. Warehouse:

3/8" Gypsum Wallboard —	— $28.10 per M sq. ft.
1/4" Gypsum Wallboard —	— 23.50 per M sq. ft.
1/2" Gypsum Wallboard —	— 30.50 per M sq. ft.

Minimum Prices delivered in truck lots to dealers' warehouses in Brooklyn, Queens, Manhattan, and Bronx Counties:

3/8" Gypsum Wallboard $28.10 per M sq. ft.
Minimum Truck-load 10,000 sq. ft.

11202 Minimum Prices delivered in truck lots to dealers' warehouses in Nassau, Long Island, and Westchester Counties, N. Y.:

3/8" Gypsum Wallboard $28.85 per M sq. ft.
Minimum Truck-load 8,000 sq. ft.

Minimum Prices delivered in truck lots to dealers' warehouses in counties and towns as follows:

3/8" Gypsum Wallboard $28.10 per M sq. ft.
Minimum Truck-load 7,500 sq. ft.

Hudson County, N. Y.	All Towns.
Essex County, N. Y.	All Towns.
Union County, N. Y.	All Towns.

Bergen County, N. J.

Bergenfield	Teaneck	Little Ferry	Moramere
Bogota	W. Ft Lee	Lodi	N. Hackensack
Carlstadt	Garfield	Rochelle Park	Palisades Park
Englewood	Hackensack	Tenafly	Ridgefield
Fairview	Grantwood	Woodridge	Ridgefield Park
Ft. Lee	Hasbrouck Heights	Lyndhurst	Rutherford
Riveredge	Leonia	Maywood	W. Englewood

Passaic County, N. J.

Athenia	Little Falls	Signac
Clifton	Mountain View	Totawa
Dalawanna	Passaic	Wayne
Great Notch	Patterson	W. Patterson
Hawthorne	Prospect Park	

Morris County, N. J.

Long Hill	Whippany	Moristown	Green Village
Morris Plains	Dover	Mt. Tabor	Hanover
Mt. Freedom	Florham Park	Pine Brook	Millington
Parsippany	Gillette	Sterling	Mountain Lakes
Stanley	Madison	Green Pond	New Vernon

Middlesex County, N. J.

Avenel	Sewaren	Perth Amboy	New Market
Cartaret	South River	Roosevelt	Nixon
Cheesequake	Highland Park	South Amboy	Oak Tree
Chrome	Iselin	Stelton	Oldbridge
Dunellin	Keasbey	Metucheon	Sayaville
Fords	Lincoln	Middlesex	So. Plainfield
Parlin	Maurer	Milltown	Woodbridge
Port Reading	Menlo Park	New Brunswick	

11203 Monmouth County, N. J.

Matawan
Keyport

Minimum prices to all towns in Passaic, Bergen, and Morris Counties not listed above, delivered to dealers' warehouses, as follows:

3/8" Gypsum Wallboard — — $28.60 per M sq. ft.
Minimum Truck-load 7,500 sq. ft.

Minimum Prices f.o.b. Charlestown, Mass.

3/8" Gypsum Wallboard —	—	$26.15 per M sq. ft.
1/4" Gypsum Wallboard —	—	22.15 per M sq. ft.
1/2" Gypsum Wallboard —	—	29.70 per M sq. ft.
3/8" Gypsum Wallboard Seconds —		23.65 per M sq. ft.

Boston Warehouses add $3.00 per M to Charlestown base prices or $2.00 per M to Oakfield delivered carload prices.
Minimum Prices f.o.b. Buffalo Warehouse:

3/8" Gypsum Wallboard —	—	$25.23 per M sq. ft.
1/4" Gypsum Wallboard —	—	22.25 per M sq. ft.
1/2" Gypsum Wallboard —	—	28.05 per M sq. ft.

Minimum Prices f.o.b. Philadelphia, Pa. Warehouse:

3/8" Gypsum Wallboard —	—	$25.10 per M sq. ft.
1/2" Gypsum Wallboard —	—	28.50 per M sq. ft.

Truck deliveries from Philadelphia Warehouse add $3.00 to Philadelphia Warehouse prices, or $2.00 to Oakfield delivered carload prices.

Minimum Prices f.o.b. Laramie, Wyoming, for mixed car shipments into Colorado, Wyoming, Utah and Idaho:

1/4" Gypsum Wallboard —	— $25.50 per M sq. ft.

Minimum Prices f.o.b. Laramie, Wyoming, for mixed car shipments into Nebraska:

1/4" Gypsum Wallboard —	— $24.50 per M sq. ft.

Minimum Prices f.o.b. Loveland, Colorado, for mixed car shipments into Nebraska, Colorado, Wyoming, Utah and Idaho:

3/8" Gypsum Wallboard —	— $30.00 per M sq. ft.
1/4" Gypsum Wallboard —	— 25.00 per M sq. ft.

Minimum Prices f.o.b. E. Chicago, Ind.:

3/8" Gypsum Wallboard —	— $24.45 per M sq. ft.
1/4" Gypsum Wallboard —	— 21.32 per M sq. ft.
1/2" Gypsum Wallboard —	— 27.36 per M sq. ft.
3/8" Gypsum Wallboard Seconds —	21.95 per M sq. ft.

11204 Minimum Prices f.o.b. River Rouge, Michigan:

3/8" Gypsum Wallboard —	— $23.89 per M sq. ft.
1/4" Gypsum Wallboard —	— 20.94 per M sq. ft.
1/2" Gypsum Wallboard —	— 26.69 per M sq. ft.
3/8" Gypsum Wallboard Seconds —	21.39 per M sq. ft.

Yours truly,

UNITED STATES GYPSUM COMPANY

C. HENNING
Vice President in Charge Sales

CFH'

11205 *Government's Exhibit No. 415*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 24, 1929

MR. GEO. N. LENCI, *Vice-Pres.,*
Ebsary Gypsum Co.,
135th St. & Mott Haven Canal,
New York City.

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimum prices on 3/8" gypsum plasterboard delivered to dealers f.o.b. cars, straight or mixed carloads, in Chicago, and suburbs as follows:

$16.46 per M sq. ft. in 20-ton minimum cars.

$15.91 per M sq. ft. in 30 or 40 ton minimum cars.

North Side Suburbs: Deerfield, Desplaines, Edison Park, Evanston, Glenview, Hubbard Woods, Morton Grove, Niles Center, North Brook, Northfield, Norwood Park, Park Ridge, Valley, Wheeling, Wilmette, Winnetka, Edison Park.

West Side Suburbs: Bensenville, Berwyn, Brookfield, Cicero, Downers Grove, Elmhurst, Forest Park, Glen Ellyn, Hinsdale, LaGrange, Lombard, Maywood, Melrose Park, Oak Park, River Forest, Riverside, Villa Park, Westmont, and Wheaton.

South Side Suburbs: Argo, Blue Island, Chicago Heights, Clearing, Harvey, Homewood, Lansing, Midlothian, Oaklawn, Oak Glen, Summitt.

Minimum price on 3/8" gypsum plasterboard is $15.63 per M sq. ft. in straight or mixed carloads delivered f.o.b.

cars to dealers in Wayne county, Michigan, and the following Michigan towns outside of Wayne county: Centerline, Clawson, Farmington, Ferndale, Fraser, Halfway, Roseville, Royal Oak, and Warren.

Minimum price on 3/8" gypsum plasterboard is $17.11 per M sq. ft. in straight or mixed carloads delivered f.o.b. cars to dealers in Philadelphia County, Pa., and town of Cheltenham in Montgomery County, Pa., also town of Milbourne Mills in Delaware County, Pa.

Minimum price on 1/4" and 3/8" gypsum Plasterboard is $17.11 per M sq. ft.

11206 Minimum price on 1/2" gypsum plasterboard is $19.14 per M sq. ft., in straight or mixed carloads, delivered, f.o.b. cars to dealers in following counties in New York: Westchester, Kings, Bronx, New York, Queens, Richmond; and following counties in New Jersey: Hudson, Essex, Bergen, Hunterdon, Somerset, Union, Warren county (except town of Phillipsburg), Mercer, Middlesex, Monmouth, Morris, Sussex, Passaic (except town of Sterling Forest).

Minimum price on 3/8" gypsum plasterboard is $18.13 per M sq. ft. in straight or mixed carloads delivered, f.o.b. cars to dealers in Suffolk County, Mass.; Norfolk County, Mass. (except town of Foxboro); also following towns in Middlesex County, Mass.: Newton, Newton Center, Newton Lower Falls, Newton Upper Falls, Newtonville, Cambridge, East Cambridge, North Cambridge, New Newton.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,
Vice-President in Chg. Sales.

CFH'

11207 *Government's Exhibit No. 416*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 25, 1929

GEO: N. LENCI, *Vice Pres.*,
Ebsary Gypsum Company,
135th St. & Mott Haven Canal,
New York, New York

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimum Prices f.o.b.—Oakfield, N. Y. Grand Rapids, Mich.
Gypsum, Ohio Ft. Dodge, Ia.
Plasterco, Va. Southard, Okla.
Sweetwater, Texas. Acme, Texas

1/4 and 3/8" Gypsum Plasterboards, either bundled or unbundled, all sizes ..... $15.00 per M sq. ft. or 12¢ per 8 sq. ft. board.
1/2" Gypsum Plasterboard ..... 16.25 per M sq. ft. or 13¢ per 8 sq. ft. board.

For shipment in straight or mixed cars delivered to dealers in Grand Rapids, Michigan, switching limits, add $1.00 per M sq. ft. to prices listed above.

Minimum Prices f.o.b. New Brighton, New York:

1/4" and 3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes ..... $16.11 per M or 13¢ per board.
1/2" Gypsum Plasterboard ..... 18.14 per M or 14½¢ per board.

Truck deliveries from New Brighton Mill add $3.00 to New Brighton base prices, or $2.00 to Oakfield delivered carload prices.

Minimum prices f.o.b. Harrison, N. J. Warehouse, or Port Morris, N. Y. Warehouse:

1/4" or 3/8" Gypsum Plasterboard ... $17.11 per M sq. ft. or 13.7¢ per board.
1/2" Gypsum Plasterboard ..... 19.14 per M sq. ft. or 15.3¢ per board.

Minimum prices delivered in truck lots to dealers' warehouses in Brooklyn, Queens, Manhattan, and Bronx Counties:

1/4" Gypsum Plasterboard ..$17.95 per M sq. ft. or 14.35¢ per board.
11208 3/8" Gypsum Plasterboard .. 19.10 per M sq. ft. or 15.3¢ per board.
1/2" Gypsum Plasterboard .. 21.15 per M sq. ft. or 16.9¢ per board.

Minimum prices delivered in truck lots to dealers' warehouses in Nassau, Long Island, and Westchester Counties, N. Y.:

1/4" Gypsum Plasterboard .....$18.70 per M sq. ft. or 15¢ per bd.
3/8" Gypsum Plasterboard ..... 19.85 per M sq. ft. or 15.9 " "
1/2" Gypsum Plasterboard ..... 21.90 per M sq. ft. or 17.5 " "

Minimum prices delivered in truck lots to dealers' warehouses in counties and towns as follows:

1/4" Gypsum Plasterboard .....$17.94 per M sq. ft. or 14.3¢ per bd.
3/8" Gypsum Plasterboard ..... 19.11 per M sq. ft. or 15.3¢ " "
1/2" Gypsum Plasterboard ..... 21.14 per M sq. ft. or 16.9¢ " "

Hudson County, N. Y. All towns.

Essex County, N. Y. All towns.

Union County, N. Y. All towns.

Bergen County, N. J.

Bergenfield	Teaneck	Little Ferry	Moramere
Bogota	W. Ft. Lee	Lodi	N. Hackensack
Carlstadt	Garfield	Rochelle Park	Palisades Park
Englewood	Hackensack	Tenefly	Ridgefield
Fairview	Grantwood	Woodridge	Ridgefield Park
Ft. Lee	Hasbrouck Heights	Lyndhurst	Rutherford
Riveredge	Leonia	Maywood	W. Englewood

Passaic County, N. J.

Athenia	Little Falls	Signac
Clifton	Mountain View	Totawa
Delawanna	Passaic	Wayne
Great Notch	Patterson	W. Patterson
Hawthorne	Prospect Park	

Morris County, N. J.

Long Hill	Whippany	Moristown	Green Village
Morris Plains	Dover	Mt. Tabor	Hanover
Mt. Freedom	Florham Park	Pine Brook	Millington
Parsippany	Gillette	Sterling	Mountain Lakes
Stanley	Madison	Green Pond	New Vernon

Middlesex County, N. J.

Avenel	Sewaren	Perth Amboy	New Market
Cartaret	South River	Roosevelt	Nixon
Cheesequake	Highland Park	South Amboy	Oak Tree
Chrome	Iselin	Stelton	Oldbridge
Dunellin	Keasbey	Metucheon	Saysville
Fords	Lincoln	Middlesex	So. Plainfield
Parlin	Maurer	Milltown	Woodbridge
Port Reading	Menlo Park	New Brunswick	

16209 Monmouth County, N. J.

Matawan
Keyport

Minimum prices to all towns in Passaic, Bergen, and Morris Counties, not listed above, delivered to dealers' warehouses, as follows:

1/4" or 3/8" Gypsum Plasterboard ....$19.60 per M sq. ft. or 15.7¢ per board.
1/2" Gypsum Plasterboard ..... 21.65 per M sq. ft. or 17.32¢ per board.

Minimum prices f.o.b. Charlestown, Mass.

1/4" and 3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes .....$17.13 per M sq. ft.
1/2" Gypsum Plasterboard ..... 19.38 per M sq. ft.

Add $3.00 per M to Charlestown base prices or $2.00 per M to Oakfield delivered carload prices for truckload deliveries to dealers warehouses.

Minimum Prices for material picked up at Charlestown Mill by dealers:

1/4" and 3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes .....$18.13 per M sq. ft.
1/2" Gypsum Plasterboard ..... 20.38 per M sq. ft.

Minimum Prices f.o.b. Buffalo Warehouse:

3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes .....$17.73 per M sq. ft.

Minimum Prices f.o.b. Philadelphia, Pa. Mill:

3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes .....$16.11 per M or 13¢ per board.

Add $3.00 per M to Philadelphia base price or $2.00 per M to Oakfield delivered carload prices for truckload deliveries to dealers warehouses.

Minimum prices for material picked up at Philadelphia Mill by dealers:

3/8" Gypsum Plasterboard .....$17.11 per M sq. ft.

Minimum Prices f.o.b. East Chicago, Indiana:

1/4" and 3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes .....$15.45 per M sq. ft.

Minimum Prices f.o.b. River Rouge, Michigan:

1/4" and 3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes .....$14.89 per M sq. ft.

Minimum prices f.o.b. Laramie, Wyoming, for mixed car shipments into Colorado, Wyoming, Utah, Idaho, and Nebraska:

3/8" Gypsum Plasterboard .....$21.50 per M sq. ft.

Minimum prices f.o.b. Loveland, Colorado, for mixed car shipments into Nebraska, Colorado, Wyoming, Utah and Idaho:

3/8" Gypsum Plasterboard .....$22.50 per M sq. ft.

Yours truly,

UNITED STATES GYPSUM COMPANY

C. HENNING
Vice-President in Chg. Sales.

CFH/EG

11210 *Government's Exhibit No. 417*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 26, 1929.

MR. GEO. N. LENCI, *Vice Pres.,*
Ebsary Gypsum Company,
135th St. & Mott Haven Canal,
New York City, N. Y.

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimum prices f.o.b. Charlestown, Mass.

1/4" and 3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes ..... $17.13 per M sq. ft.
1/2" Gypsum Plasterboard ..... $19.38 per M sq. ft.

Minimum Prices for material picked up at Charlestown Mill by dealers:

1/4" and 3/8" Gypsum Plasterboard, either bundled or unbundled, all sizes ..... $20.13 per M sq. ft.
1/2" Gypsum Plasterboard ..... $22.38 per M sq. ft.

Plasterboard not delivered by our trucks to dealers warehouses. Please disregard the minimum price for delivery by truck given in our letter of July 25.

Yours truly,

UNITED STATES GYPSUM COMPANY

C. HENNING
Vice-President in Chg. Sales.

CFH'HS

11211 *Government's Exhibit No. 418*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

AUGUST 3, 1929

MR. GEO. N. LENCI, *V-Pres.*,
Ebsary Gypsum Company,
New York, New York.

DEAR SIR:

Referring to paragraph 1 of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard or gypsum wallboard manufactured by you and embodying the improvements set forth in Utzman Patent No. 1,034,746 are as follows:

Minimum price on 3/8" gypsum plasterboard is $17.11 per M sq. ft. in straight or mixed carloads delivered f.o.b. cars to dealers in the following towns in addition to those listed in our letter of July 24th, 1929 as follows:

DELAWARE COUNTY—PA.

Llanerch	Grassland
Lansdowne	Wallingford
Sharon Hill (Collingdale)	Glenolden
Devon	Moore
Clifton	Norwood
Wayne	Primos
Darby	Swarthmore
	Arlington

MONTGOMERY COUNTY—PA.

Fort Washington	Jenkintown
Glenside	Ardmore
Rosemont	Willow Grove
Bryn Mawr	Beth Ayres
West Manayunk	Cynwyd
Elkins Park	Rydal
Abington	Conshohocken
	Wyncote

Minimum price on 3/8" gypsum plasterboard is $18.13 per M sq. ft. in straight or mixed carloads delivered, f.o.b. cars to dealers in the following towns of Middlesex County, Mass. in addition to those listed in our letter of 11212 July 24th, 1929 as follows:

Waltham	Arlington
Watertown	Lexington
Belmont	Woburn
Reading	Melrose
Wakefield	Saugus
Stoneham	Lynn
Winchester	Nahant
Arlington	Swampscott
Medford	Marblehead
Belmont	Salem
Sumerville	Peabody
Everett	Danvers
Malden	Beverly

Refer to paragraph in our letter of July 24, 1929, reading "Minimum price on 1/4" and 3/8" gypsum plasterboard is $17.11——" (in Metropolitan N. Y. area), and omit Suffolk and Nassau counties.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. HENNING
Vice President in Charge of Sales

CFH:

11213 *Government's Exhibit No. 420*

JUNE 21ST, 1929

MR. H. W. RIPPEY
Powers Building,
Rochester, N. Y.

DEAR SIR:

I understand that sometime ago the United States Gypsum Company sent a copy of the proposed license agreement covering the patent for making bubble board to Mr. Ebsary and at the last meeting in Chicago he stated that he would have you look this over so that it could be discussed at the next meeting on June 26th in Chicago.

As he no doubt has turned it over to you I wish that you would write me on Monday to the Palmer House, Chicago, sending it to me together with your comments.

This will not come up for definite action at that time but I would at least like to be familiar with the conditions of the license together with your views so that I can talk it over with some of the other Manufacturers and get their ideas.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

By
GEORGE N. LENCI
Vice-President

GNL:SF

JUNE 21ST, 1929

UNITED STATES GYPSUM COMPANY,
300 West Adams St.,
Chicago, Ill.

Attention of Mr. C. F. Henning, *Vice-President*

GENTLEMEN:

We have received your letter of June 19th establishing under the license contract new prices on board from the various warehouses and also for truckload deliveries and we are changing our price list immediately in accordance with this information.

The first item under the Harrison Warehouse is No. 1 — Wall Board — $26.50. Should this not be $25.60 which is $1.25 higher than the No. 2 wall board scheduled at $24.35?

At the June 6th meeting in Chicago you asked me to send a list of customers who we consider as Jobbers or Distributors and these are as follows:—

H. M. Coeyman Company, Newark, N. J.

G. B. Raymond & Company, Long Island City, N. Y.

Eastern Builders Supply Company, Baltimore, Md.

Unless I hear from you to the contrary I will be at the Palmer House on Wednesday morning, June 26th.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

By

GEORGE N. LENCI
Vice-President

GNL:SF.

11215 *Government's Exhibit No. 422*

SCOTT, BANCROFT, MARTIN & MACLEISH
Law Offices
134 South LaSalle Street
CHICAGO

JULY 3, 1929.

EBSARY GYPSUM CO.,
135th St. & Mott Haven Canal,
New York City, N. Y.

Attention Mr. George N. Lenci

DEAR SIRS:

Enclosed please find draft of license contract under the bubble patent. This contract should have your careful consideration before the meeting of July 9th.

Very truly yours,

JOHN E. MACLEISH

JML:EM
Encl:

11216 *Government's Exhibit No. 423*

JULY 17TH, 1929

MR. H. W. RIPPEY,
Powers Building,
Rochester, N. Y.

DEAR SIR:

I am enclosing herewith original license as proposed for the bubble board and also the revision made up after the July meeting.

Will you please look over this revised license, take it up with Mr. Ebsary and get his approval of it and arrange to meet me in Chicago on the morning of Thursday, July 25th, at the Palmer House.

Please get all information from Mr. Ebsary before leaving so that if this contract is properly revised and all of the other Companies agree to it we will be in a position to do the same.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

By

GEORGE N. LENCI
Vice-President

GNL:SF.

R/c for Mr. E. C. Ebsary

11217 *Government's Exhibit No. 424*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 5, 1930.

MR. G. N. LENCI, *Vi. Pres.*,
Ebsary Gypsum Company,
New York, New York.

DEAR SIR:

Referring to paragraph 2 of our license contract with you, you are hereby notified that the minimum price at which you may sell open edge plasterboard embodying the inventions and improvements set forth in Haggerty patent number 1,500,452 and Hite patent number 1,230,297 and our other patents described in said contract is $14.00 per thousand square feet bundled f.o.b. the following mills:

Oakfield, N. Y.; Gypsum, Ohio; Plasterco, Virginia; Sweetwater, Texas; Grand Rapids, Michigan; Fort Dodge, Iowa; Southard, Oklahoma; Acme, Texas.

Sizes only 16" x 48" and 16" x 32" bundled.

Only in the specific markets definitely described as follows:

City of Atlanta, Cobb, DeKalb and Fulton Counties.

" " Baltimore, Md., and Baltimore City County.

" " Boston, Mass.; and Suffolk and Norfolk Counties, and towns of Newton, Newton Center, Newton Lower & Upper Falls, Newtonville, Cambridge, East Cambridge, North Cambridge and West Newton.

" " Buffalo, N. Y.; and Niagara and Erie Counties.

" " Chicago, Ill.; Chicago City bounded on North by Howard St., directly West to Park Ridge inclusive; then due South on a direct line with Cumberland Avenue to 79th St. as the Southern boundary; then East on 79th St. to Lake Michigan. — This area includes the West Sub-

urban Towns of Oak Park, River Forest, Forest Park, Maywood, Melrose Park, LaGrange, Hinsdale, and Riverside.

11218 City of Detroit, Mich.; and Wayne County, Mich.; Towns of Birmingham, Clawson, Framington, Ferndale and Royal Oak in Oakland County; and Warren, Halfway, Fraser, Roseville and Centerline in Macomb County.

City of Kansas City, Mo.; and Jackson Co., Mo.; Wyandotte and Johnson Counties, Kansas.

City of Philadelphia, Pa.; and Philadelphia County, and Town of Cheltenham in Montgomery County, also Milbourne Mills in Delaware County.

City of Pittsburgh, Pa.; and Beaver and Allegheny Counties.

City of Rochester, and Monroe and Wayne Counties.

City of St. Louis, Mo.; St. Louis City and St. Louis County.

Twin Cities, Minn.; and Hennepin, Ramsey and Washington Counties in Minnesota.

The minimum price at which other sizes of open edge plasterboard embodying said inventions and improvements may be sold by you as such Licensee is $15 per thousand sq. ft. f.o.b. above mills.

Minimum delivered price is combination of mill price plus freight.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,
Vice President in Charge of Sales

CH'BD

11219 *Government's Exhibit No. 425*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

APRIL 15, 1930.

MR. GEO. N. LENCI, *Vice Pres.*
Ebsary Gypsum Company,
135 St. & Mott Haven Canal,
New York, New York.

DEAR SIR:

Supplementing our letter of April 5, which refers to paragraph 2 of our license contract with you, and gives the minimum prices at which you may sell open edge plasterboard embodying the inventions and improvements set forth in Haggerty Patent number 1,500,452 and Hite Patent number 1,230,297 and our other patents described in said contract, you are further advised that:

The sizes listed in paragraph 3 are changed to 16" x 48", 16" x 32" (bundled or unbundled); and 32" x 36", 48" x 32", 24" x 32" (unbundled).

Minimum prices on ¼" and ⅜" open edge Gypsum Plasterboard are as follows:

F.O.B. Dealers' trucks at Charlestown, Mass. (Boston) Warehouse or trucked to dealers' warehouses:
..... $19.63 per M sq. ft.
F.O.B. Dealers' trucks at Philadelphia Warehouse, or trucked to Dealers' Warehouse ..... $18.61 per M sq. ft.
F.O.B. Buffalo, N. Y. Warehouse: $16.73 per M sq. ft.
Delivered truckloads to dealers' warehouses in switching limits of Buffalo, N. Y.: ..... $18.00 per M sq. ft.
F.O.B. Dealers' trucks at River Rouge (Detroit) Michigan Warehouse: ..... $17.13 per M sq. ft.
Delivered to Dealers' warehouses by truck (Minimum truckload 10,000 sq. ft.) within switching limits of Detroit, Michigan: ..... $18.13 per M sq. ft.
F.O.B. Dealers' trucks East Chicago, Indiana (Chicago Warehouse): ..... $17.41 per M sq. ft.

Yours truly,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,
Vice-President in Charge of Sales.

CFH:BO

11220 *Government's Exhibit No. 426*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 3, 1930.

MR FRED EBSARY, *Pres.*
Ebsary Gypsum Company
Caledonia (Wheatland)
New York.

cc MR GEO. N LENCI, *Vice Pres.*
Ebsary Gypsum Company
135th St. & Mott Haven Canal
New York, New York.

DEAR SIR:

Referring to paragraph two of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard and gypsum wallboard manufactured by you embodying the inventions and improvements set forth in Haggerty Patent number 1,500,452 and Hite Patent number 1,230,297 and our other patents described in said contract (not including applications for letters patent) are as follows:

Minimum prices on OPEN EDGE Plasterboard for shipments into St. Louis, Mo., including St. Louis County; Minneapolis and St. Paul, Minn., including Hennepin, Ramsey, and Washington Counties:

F.O.B. Ft. Dodge, Ia.; Southard, Okla.; Sweetwater, Texas. 1/4" or 3/8" OPEN EDGE Plasterboard---------- $14.50 per M sq. ft.

This price applies only on following sizes and bundling; 16"x32", 16"x48" (bundled or unbundled) and 32"x36", 48"x32", and 24"x32", (unbundled). Use freight rates in effect prior to May 25, 1930.

Yours truly,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,
Vice-President in Charge Sales

CFH/WP

11221 *Government's Exhibit No. 427*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 11, 1931

MR. FRED EBSARY, *Pres.*,
Ebsary Gypsum Company, Inc.
Caledonia (Wheatland)
New York.

cc MR. GEO. N. LENCI, *V.P.*
Ebsary Gypsum Company, Inc.
135th St. & Mott H. Canal
New York, N.Y.

DEAR SIR:

Referring to paragraph two of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard manufactured by you embodying the inventions and improvements set forth in Haggerty Patent Number 1,500,452 and Hite Patent Number 1,230,297, and other patents described in said contract (not including applications for letters patent) are as follows:

Minimum price of open edge plasterboard shall be same as closed edge plasterboard except in following markets where the price will be as follows:

¼" or⅜" open edge plasterboard sizes 16"x48"; 16"x32" (bundled or unbundled); and 32"x36", 48"x32", 24"x32" (unbundled),
$12.50 per M sq. ft. f.o.b. Oakfield, N. Y.; Gypsum, Ohio; Plasterco, Va., Grand Rapids, Mich.; Ft. Dodge, Ia.; Southard, Okla.; Acme, Texas:

Buffalo, N. Y.; Niagara and Erie Counties.
Chicago, Ill.; (area described in our letter of April 5, 1930).
Detroit, Mich.; (area described in our letter of April 5, 1930).
Rochester, N. Y.; City of Rochester, and Monroe and Wayne Counties.

$13.00 per M sq. ft. (applying on same sizes open edge plasterboard listed above) f.o.b. Ft. Dodge, Ia.; Southard, Oklahoma, Acme, Texas for shipment to

St. Louis, Mo.; Including St. Louis County.
Kansas City; Jackson County, Mo.; Wyandotte and Johnson Counties, Kansas.

Minimum prices open edge plasterboard f.o.b. all warehouses except Buffalo, Chicago and Detroit, now
11222 become same as closed edge lath.

Yours truly,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,

CFH' *Vice-President in Charge Sales*

11223 *Government's Exhibit No. 428*

MR. C. F. HENNING, *Vice-President,*
United States Gypsum Company
300 West Adams St.
Chicago, Ill.

JANUARY 20TH, 1930

DEAR SIR:

Will you please advise by return mail whether or not the Teachout Company of Akron and Cleveland, Ohio, may be considered as a wallboard jobber?

These people are wholesalers and sell to lumber dealers exclusively.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

By

GEORGE N. LENCI
Vice-President

GNL:SF

Government's Exhibit No. 428-A

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JANUARY 22, 1930

MR. GEORGE N. LENCI, *Vice Pres.*
Ebsary Gypsum Company, Inc.
135th St. & Mott Haven Canal
New York, New York.

DEAR SIR:

Replying to yours of January 20. There are no jobbers in the State of Ohio.

Teachout formerly jobbed Universal board, but was discontinued December 15, and is not considered a jobber.

Truly yours,

C. F. HENNING,
Vice President Charge of Sales

CH/MC

11225 *Government's Exhibit No. 429*

Mott Haven 3847
FEBRUARY 13TH, 1930

MR. C. F. HENNING, *Vice-President*
United States Gypsum Company
300 West Adams St.
Chicago, Ill.

DEAR SIR:

Will you please let me know as soon as possible whether or not Winslow & Company of Portland, Maine and John Varick Company of Manchester, N. H. are considered as jobbers?

I would also like this same information regarding the Culver Lumber Company, 3614 - 15th Ave., Brooklyn, N. Y. I understand that these people are doing a considerable wholesale business only with other lumber dealers and that they are not retailers.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

By
GEORGE N. LENCI
Vice-President

GNL:SF

11226 *Government's Exhibit No. 430*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO.

AUGUST 8, 1930.

MR FRED EBSARY, *Pres.*
Ebsary Gypsum Co.
Caledonia (Wheatland)
New York.

cc MR GEO N. LENCI, *Vice Pres.*
Ebsary Gypsum Co.
135th & Mott Haven Canal
New York, N. Y.

DEAR SIR:

Referring to paragraph two of our license contract with you, you are hereby notified that until further notice the minimum prices at which you may sell plasterboard and gypsum wallboard manufactured by you embodying the inventions and improvements set forth in Haggerty Patent number 1,500,452 and Hite Patent number 1,230,297, and our other patents described in said contract (not including applications for letters patent) are as follows:

Effective this date the price to jobbers and distributors is the same as the price to the regular dealer trade, as per our letters to you of the following dates:

July 12, June 14, 10, and 3, May 29 and 24, April 15, 7, and 5, 1930, and December 31, 1929.

Yours very truly,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,
Vice President in Charge Sales.

CFH'

11227 *Government's Exhibit No. 431*

MEMORANDUM FOR ATTENTION:
MR. LENCI, 9/22/30

At our regular salesmen's meeting held on September 13th, the following matters were brought to my attention which I feel should be straightened out,—

DuSoll who was handling Atlantic board is now selling for Kelly. It is my understanding that there were not to be anymore jobbers.

Astoria Lumber Co. promised our man Hellman an order for a car and DuSoll of Kelly Plasterboard Company was there and Astoria Lumber Co. cooled off entirely when we went there for the order.

On or about September 8th, Baxter sold for USG 2 truckloads of Wallboard at $30.61 to the New Broadway Lumber Company, Jamaica, L. I.

Richmond Hill Lumber Co. (Mr. Deutschman)

Bergen Lumber Company,

Zashinsky Lumber Co.

These three companies are run by relatives and Kelly took an order for three truckloads to make up a car, which is perfectly alright, but instead of delivering them all to one yard, they deliver one truckload to each yard and bill accordingly.

GEO. P. TURNER,
Sales Manager

11228 *Government's Exhibit No. 432*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

4TH MARCH 1932

MR F G EBSARY, *President*
Ebsary Gypsum Company, Inc.
Scottsville, New York.

cc MR GEORGE N LENCI
Ebsary Gypsum Company, Inc.
52 Vanderbilt Avenue
New York, New York.

DEAR SIR:

As you know, in addition to our license agreement with you under date of October 18, 1929, we have a number of other outstanding agreements wherein, as licensor, we have authorized the respective licensees to manufacture and sell, in competition with us, gypsum wallboard and plasterboard embodying the claims and inventions of our patents. We are naturally interested in seeing that all sales of the patented board by the licensees are made in compliance with the terms and conditions of the respective license agreements.

As a result of the audits which we made or caused to be made of the books of our licensees it became apparent to us that a considerable quantity of patented board was being sold in violation of the license agreements. In order to more fully protect our rights and interests in this regard we have therefore entered into an agreement with the Board Survey Company, an Illinois corporation, whereby it is now charged with the duty of seeing that our license agreements are being complied with and that our rights in connection therewith are being fully protected.

We feel confident that we will have your cooperation in thus attempting to more effectively prevent license violations, in the future. To that end we ask you to send in to Mr. Frank Miller, Executive Secretary, Board Survey Company, 300 West Adams Street, Chicago, Illinois, all instances of violations of any of our gypsum wallboard

and plasterboard license agreements which come to your attention, in each case furnishing him with all the data you are able to collect evidencing the apparent violation. You may be sure that the Survey Company, through its Executive Secretary, will make a thorough check-up of all such reported violations and is authorized by us to take such action as it may deem necessary or proper to fully enforce our rights under our license agreements and to protect our rights and interests under our patents.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,
Vice President

CH HC

11229 *Government's Exhibit No. 433*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 16, 1934.

MR. GEO. N. LENCI, *Secy*
Ebsary Gypsum Company
414 Ogden Street
Newark, New Jersey.

DEAR MR. LENCI:

In the future, all matters involving specific job commitments, supplemental reports and reported violations as covered by our license contract with you should be referred to him at 300 West Adams Street, Chicago, Illinois.

Yours truly,

C. F. HENNING,
Vice President.

11230 *Government's Exhibit No. 434*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

3D DECEMBER 1934

MR F G EBSARY, *President*
Ebsary Gypsum Company Inc.
Scottsville, New York

DEAR SIR:

Effective immediately Mr. E. W. Carey has been appointed secretary of the Board Survey Company.

There will be a licensee meeting the day following the annual Association meeting.

Very truly yours,

C. F. HENNING.

cc Mr George N Lenci
Secretary

11231 *Government's Exhibit No. 435*

OCTOBER 29, 1935.

MR. F. G. EBSARY, *President*
Ebsary Gypsum Company
Scottsville, New York.

DEAR MR. EBSARY:

This is to advise you that effective November 1 the Board Survey Company has engaged Scott, MacLeish & Falk to act as its attorneys in all matters involving violations of our board licenses, including the analyses of all audits and the handling of any violations disclosed by such audits.

Complaints of violations should, as heretofore, be filed with the Board Survey Company, at its present address, 300 West Adams Street, Chicago, Illinois. However, the complaints will now be immediately referred to Scott, MacLeish & Falk, with full power to investigate and take such action as they deem warranted.

It is believed that this arrangement will lead to a prompt, effective disposition of any complaints of license violations which we as licensor or any of our licensees may have.

Yours very truly,

UNITED STATES GYPSUM COMPANY

C. HENNING,
Vice President.

Copy to
Geo. N. Lenci, N. Y. C.

11232 *Government's Exhibit No. 436*

EBSARY GYPSUM COMPANY, INC.
414 Ogden Street
NEWARK, N. J.

APRIL 20, 1932.

MR. HOUGH
Newark, N. J.

DEAR MR. HOUGH:

While making my usual dealer calls to-day, I was requested by a dealer located in Union Co. to take an order for 2 M ft. 16x48 Lath & finish the load with Sanded plaster. I explained the new ruling & expressed my regrets that I could not take the order unless 5 M of board was on the load. The dealer then stated that a salesman of Structural Gypsum Co. had called yesterday & informed him that his Company would supply his requirements on Board & Lath in any quantity he desired either delivered or for dealer to pick up at Linden plant. Price same as ours for 5 M ft. deliveries by truck.

To verify their statements I telephoned the Structural Gypsum Co. at Linden, N. J. time 10.30 A.M. to-day & requested to speak to some one regarding Lath.

When ask who was calling I represented my-
11233 self as being a dealer located in Union County, N. J.

They verified dealers statements to me & further went on to say they handled only board & lath as manufactured by Kelley Plasterboard Co. of Delawanna, N. J. They only had on hand 1335 ft. Plasterboard 32x36 & I could call & pick up 1000 ft. of same at any time to-day at 18.44 per M. ft. or any quantity I wanted.

Was informed that Structural salesmen made remark that they now had the other manufacturers where they wanted them as they were not governed by any rulings set up by U. S. G. Co.

Trusting this fully explains matters I remain

Respectfully yours,

TED E. EHRLICHER

11234 *Government's Exhibit No. 436-A*

APRIL 20, 1932.

MR. HOUGH
Newark, N. J.

DEAR MR. HOUGH:-

While making my usual Dealer calls today, I was requested by a Dealer located in Union County to take an order for 2M. ft. 16x48 Lath and finish the load with sanded plaster. I explained the new ruling and expressed my regrets that I could not take the order unless 5 M. of board was on the load. The Dealer then stated that a Salesman of Structural Gypsum Co. had called yesterday and informed him that his company would supply his requirements on Board and Lath in any quantity he desired either delivered or for Dealer to pick up at Linden Plant. Price same as ours for 5 M ft. deliveries by truck.

To verify their statements I telephoned the Structural Gypsum Co. at Linden, N. J. time 10:30 A.M. today and requested to speak to some one regarding Lath.

When asked who was calling I represented myself as being a Dealer located in Union County, N. J.

They verified Dealers statements to me and further went on to say they handled only Board and Lath as manufactured by Kelley Plasterboard Co. of Delawanna, N. J. They only had on hand 13335 ft. and I could call and pick up 1000 ft. of same at any time today at 18.44 per M. ft. or any quantity I wanted.

Was informed that Structural salesman made remark that they now had the other manufacturers where they wanted them as they were not governed by any ruling set up by U. S. G. Co.

Trusting this fully explains matters, I remain

Respectfully yours,

(signed) TED EHRLICHER

11235 *Government's Exhibit No. 437*

NEWARK, N. J.
MAY 5, 1932.

EBSARY GYPSUM COMPANY, INC.
New York City

GENTLEMEN:

Attention of Mr. George N. Lenci:

Our Mr. Robinson reports having met Mr. McGraf of the Kelley Company and in talking over the effects of the new board price it was discovered that Kelley Company feels that they are withing their rights and according to Mr. McGraf have already put into effect an exchange system, if that is the proper way to term it.

This is what I understand they are preparing to have done and are doing. If a customer having in stock 4x6 or 4x8 or whatever size they may have and are short 4x10 or 4x12 or in fact any size other than what they have the Kelley Company will exchange with them the size that they want in place of the size that they have too much of and are returning. This seems like a short way around and of course the question may come up as to how much the customer actually returned and how much they are getting and probably leave an open door for a lot of things that we do not quite know how to do.

I thought that you might be glad to have this information and make inquiries regarding it so that this practice which appears to me to be out of order can either be made general or eliminated.

Mr. Diegel told me that he knows of a case where Structural delivered a car in which there was only 2000 feet of board. I just do not recall the name of the concern, but as I advised you some time ago you know Structural's attitude and the feeling they are not bound by any restrictions of the U. S. G. Company, and if they are doing this by the car load it is a question of what might be done in truck loads. We are not running into any irregularities but we might cross the bridge after it is too late and want to get

on record of this one instance of a car load so as to prevent unfair competition in our territory over here.

I think it might be well to refer these two matters to the U. S. G. Company, but keep in mind that the practice of the Kelly Company is just word of mouth and no concrete evidence. If we are able to get a transaction of this kind we will give you the full details, but Mr. Graf is supposed to have said they have done it and are within their rights, or words to this effect.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

C. E. Hough

C. E. HOUGH, *Treasurer*

CEH:L

11236 *Government's Exhibit No. 438*

MAY 6, 1932.

BOARD SURVEY COMPANY,
300 W. Adams St.,
Chicago, Ill.

GENTLEMEN:

Referring to the recent bulletin of the United States Gypsum Company advising the licensees that selling through Jobbers had been eliminated.

We would advise that Daniel Duskis, Inc., Glendale, L. I. is still buying Certainteed Board through Orin F. Perry, New York.

Also referring to the same bulletin wherein a $2.00 differential was established between board shipped in mixed carloads and full carloads for Metropolitan New York:

Last week the Tisdale Lumber Company, Flushing, New York bought a mixed carload of Plaster and Board (16,000 sq. ft.) from the Structural Gypsum Corporation. The Boards were made by the Kelley Plasterboard Company at carload price.

We wish that you would make an immediate investigation of these two complaints and advise us as we are most anxious to see this situation cleared up as soon as possible.

It has been called to our attention that the Kelley Company, while they are keeping to the 5,000 sq. ft. minimum sales out of their plant, are permitting dealers who run short of certain sizes of Wallboard to return boards of different sizes and take the equivalent footage in other sizes.

Is this permissable?

11236-A cc: MR. C. E. HOUGH, *Treas.*

MAY 6, 1932.

PAGE 2.

BOARD SURVEY COMPANY,
300 West Adams St.,
Chicago, Ill.

GENTLEMEN:

It does not seem to us that it should be allowed, as it does not make the dealer carry a sufficient stock which was one of the objects of the change in the selling policy. Please advise regarding this also.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.,

GEORGE N. LENCI,
Secretary.

GNL:G

11237 *Government's Exhibit No. 439*

NEWARK, N. J.
JUNE 9, 1932.

EBSARY GYPSUM COMPANY, INC.
New York City

GENTLEMEN:

Attention of Mr. George N. Lenci:

Confirming our telephone conversation, this will give you the information that the Gyp Steel people will take an order from a dealer for 5,000 feet of board and permit him to come and take this board in any quantity that he wants to truck it in.

This information was obtained by Mr. Bickle from Gornitzky & Company who states that it would not be difficult for anyone to see this practice being carried out at the Steel Plant, because they are running across other trucks, mentioning the Rahway Lumber Company as getting less than the minimum load of 5,000 feet which we are compelled to adhere to.

We will be glad to hear what can be done in this particular case.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

C. E. Hough

C. E. HOUGH,
Treasurer.

CEH:L

11238 *Government's Exhibit No. 440*

cc: MR. C. E. HOUGH, *Treas.*

JUNE 9, 1932.

MR. C. F. HENNING, *V. P.*
United States Gypsum Company,
300 West Adams Street,
Chicago, Ill.

DEAR SIR:

Referring to your letter of May 17th regarding Kelley board being sold by the Structural Gypsteel not in accordance with the licensee bulletins.

This condition has not been corrected as the Structural Company are now taking orders for 5000 sq. ft. lots of board permitting dealers to pick up in small lots until the 5000 sq. ft. is all taken.

We have had several instances of this in New Jersey recently and only today we had a specific case—Gornitsky & Company who had been buying small lots at our Newark warehouse until the rules were changed, tried to continue with us on that basis, but we would not do it. Gornitsky then made arrangements with Structural as outlined above and has been picking up small lots at his convenience from Structural.

He got a small load there yesterday and brought it down to our Newark Warehouse so that we could see it and in an endeavor to get us to meet it.

He gave us the names of other dealers who were buying on the same basis but we have as yet no first hand information therefore we are not reporting them now.

Kelley has been making the same proposition to small lumber leaders in New York City and we have been asked by several to meet this condition.

Won't you please personally get back of this matter and get it cleaned up at once and for all time?

11239 MR. C. F. HENNING, *V. P.*,
United States Gypsum Company,
300 West Adams Street,
Chicago, Ill.

DEAR SIR:

It can be done but as it is now Kelley is jumping from one thing to another to evade the clearly laid down rules for the operation of the license agreement.

Let me hear from you soon on this.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

GEORGE N. LENCI,
Secretary.

GNL:G

11240 *Government's Exhibit No. 441*

cc: MR. C. E. HOUGH, *Treas.*

JUNE 25, 1932.

MR. C. F. HENNING, *V. P.*,
United States Gypsum Company,
300 West Adams Street,
Chicago, Ill.

DEAR SIR:

Under date of June 9th we wrote you calling your attention to the fact that dealers were picking up board in lots of less than 5000 sq. ft. from the Structual Gypsum Company. Up to the present time we have not had an acknowledgement to our letter. Will you kindly let us have an acknowledgement by return mail and your assurance that steps are being taken to have this condition corredted?

Thanking you in advance for a reply by return mail, we are,

Very truly yours,

EBSARY GYPSUM COMPANY, INC.,

GEORGE N. LENCI,
Secretary.

GNL:G

11241 *Government's Exhibit No. 443*

Copy to Mr. Ebsary

JULY 26, 1932.

REGISTERED MAIL

UNITED STATES GYPSUM COMPANY
300 W. Adams St.
Chicago, Ill.

GENTLEMEN:

Attention of Mr. C. F. Henning,
Vice-President

Please refer to our letter to you of July 16th in which we gave you complete details of a delivery of Board made by the Structural Gypsum Company in violation of the License Agreement.

We asked you to acknowledge receipt of that letter and to let us know how this matter was settled. So far we have had no reply.

You must realize that we cannot afford or be expected to keep a man to watch deliveries made from the Structural Plant, but that we look to you for full protection.

We believe that other sales have been made not in accordance with the Agreement, and we believe that we are losing business every day from our old customers who used to come to our Newark Plant to pick up small loads of Board, but who cannot come here now on account of the 5,000 sq. ft. minimum which we are enforcing and that they go to Linden instead.

This is a very serious matter and we would ask that you give it your immediate personal attention, and upon receipt of this letter advise us that it is being investigated and will be taken care of.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GNL:L

11242 *Government's Exhibit No. 442*

JULY 16, 1932.

UNITED STATES GYPSUM COMPANY
300 W. Adams St.,
Chicago, Ill.

GENTLEMEN:

Attention of Mr. C. F. Henning,
Vice-President

Referring to the recent conversation I had with you when you were in New York with reference to the sales of Licensed Board by the Kelley Plaster Company and particularly with reference to sales made of this Board by the Structural Gypsum Company, we wish to file a very vigorous protest based upon the following transaction.

On July 15, 1932 a mixed truck load of Plaster, Lime and Board left the Plant at Linden on Keating's truck bearing the New Jersey license X-41063. This load went direct from Linden to a house at the corner of Longwood & Delwood Aves., Chatham, N. J. and the material was unloaded and put in the house.

This load contained 3200 sq. ft. of 32 x 48 Board, 2-½ tons Neat Wood Fiber Plaster, ⅝ ton of Finishing Lime and 2/10 ton Gauging Plaster.

You will note from the foregoing that there were at least three violations.

First — the load went directly to the job, instead of to a Dealer.

Second — there were less than 5,000 sq. ft. of Board on the load.

Third — the total load was less than 7-½ tons.

The building had a sign in front of it indicating that all building materials were being furnished by Sears-Roebuck & Company, 155 Washington St., Newark, N. J.

UNITED STATES GYPSUM CO.
C. F. HENNING, *Vice-President*

This complaint is not based upon heresay evidence, but I saw the complete transaction myself from the time the truck left the Structural Plant until it was unloaded and left the job.

Would like to say that we have not seen any recent violation made directly by the Kelley Plaster Company, but evidently Mr. Kelley is unable to control the actions of the Structural Company, and in as much as Kelley as a Licensee has to have your permission to sell the Structural as a Manufacturer below the Dealer's prices, we believe you will agree with us that this permission should be withdrawn.

We would ask that you take this matter up personally and see that this situation is promptly cleared up, as it is very unfair to the other Licensed Manufacturers and we must insist upon this correction.

Kindly acknowledge receipt of this letter and let us know what is done about it.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GNL:L

11244 July 15th—2 P.M. — Structural Gypsum Co.
Keating truck N J-X-41063

Picked up extra man from N. J. U-10605 mixed load plaster and 32"x48". Took to job direct—House on Longwood Ave. cor. Delwood Ave., Chatham, N. J. Left all board & plaster there. Took back few bags of plaster (5 or 6).

300	pieces 32x48	3200 sq. ft.
50	bags wood fibred neat	2½ tons
25	" finishing lime	5/8 "
4	" gauging plaster	2/10 "

All building materials in this house furnished by Sears Roebuck & Co., 155 Washington St., Newark, N. J.

11245 *Government's Exhibit No. 444*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
Chicago

1ST AUGUST 1932

MR. G. N. LENCI, *Secretary*
Ebsary Gypsum Company, Inc.
414 Ogden Street
Newark, New Jersey

DEAR MR. LENCI:

Acknowledging your letter of July 26, as yet we have had no answer from the Kelley Plasterboard Company regarding the sale of patented board by the Structural Gypsum Company reported by you under date of July 16.

This matter is being handled with the Kelley Plasterboard Company and we will advise you just as soon as we have their reply.

Yours truly,

C. HENNING,
Vice-President

CH HC

11246 *Government's Exhibit No. 445*

NEWARK, N. J.
AUGUST 10, 1932.

MR. F. G. EBSARY
Scottsville, N.Y.

DEAR MR. EBSARY:-

Mr. Gallagher of the U. S. G. Company called me up yesterday at the request of Mr. Henning. It was in regard to our complaint against the delivery made by the Gyp Steel of less than 500 sq. ft to a job.

He said that Mr. Kelley had personally notified Mr. Williams that no further variations from the license agreement would be permitted and that if it happened once more he would cancel his contract with the Structural.

No doubt we will get a letter from Chicago on this confirming it, but if we don't by Saturday I will write then for it and also look for a reply regarding the Certain-teed-Perry combination.

Yours very truly,
EBSARY GYPSUM COMPANY, INC.
G. N. LENCI,
Secretary.

GNL:L

11247 *Government's Exhibit No. 446*

Copy to Mr. Ebsary.

AUGUST 16, 1932.

UNITED STATES GYPSUM COMPANY
300 West Adams St
Chicago, Ill.

GENTLEMEN:

Attention of Mr. C. F. Henning, *Vice-President*:

Will you please refer to your letter of August 1st with reference to the complaint we made against Kelley Plasterboard Company for the sales of licensed boards by the Structural Gypsum Company.

Will you please advise us whether or not this matter has been settled and whether we may feel assured that the trouble complained of will not happen again.

Please let us hear from you promptly on this.

Yours very truly,
EBSARY GYPSUM COMPANY, INC.
G. N. LENCI,
Secretary.

GNL:L

11248 *Government's Exhibit No. 447*

cc: Ed. H. Diegel, *Sales Manager.*
F. G. Ebsary, *President.*
C. E. Hough, *Treas.*
File.

MAY 16, 1932.

BOARD SURVEY COMPANY,
300 West Adams St.,
Chicago, Ill.

GENTLEMEN:

Please let us have a reply to our letter of May 6th.

In addition to the complaints we made in that letter we wish to file a vigorous protest against the Kelley Plasterboard Company for the practice they have established through Dusol, their New York Agent, of making sales of less than 5,000 sq. ft. They are making these sales to some of the small lumber yards who come to them on the plea that their trucks will not hold 5,000 sq. ft. at one time. They get about 2,000 sq. ft. at a time and if necessary offer to pay for and accept an invoice for 5,000 sq. ft., but the board is to be picked up at their convenience.

A sale of this type was made last week by Kelley to the Yorkville Lumber Company. This condition must be stopped at once or the whole wallboard structure will be broken down.

We also wish to file a complaint against Kelley for selling small board under the bulletin price within the past ten days to Robert S. Green of Baltimore.

As licensees we are trying to abide by the bulletins in every way but we cannot sit idly by and see our customers enticed away by these tactics.

Kindly acknowledge receipt of this letter and our letter of the 6th, and let us know that something is being done to definitely correct these conditions.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.,

GNL:G GEORGE N. LENCI, *Secretary.*

11249 *Government's Exhibit No. 448*

F. G. Ebsary, *Pres.*

C. E. Hough, *Treas.*

Attached is a copy of USG's acknowledgement to our letter of May 6th. This for your information.

G.N.L.

11250 UNITED STATES GYPSUM COMPANY
300 West Adams St.
CHICAGO, ILL.

MAY 17, 1932.

MR. GEORGE N. LENCI, *Sec'y.*,
Ebsary Gypsum Co., Inc.,
52 Vanderbilt Ave.,
New York, N. Y.

GENTLEMEN:

We have referred the violations referred to in your letter of May 6th to the Board Survey Company, also to the licensee, and have taken the necessary action so that gyp[illegible]n wallboard and plasterboard manufactured under our patents will be sold in accordance with our license bulletins to you.

The matter of sales by the Certainteed Products Corporation to Orin F. Perry has also had the required attention.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

(Signed) C. HENNING
Vice President.

CFH:WP:C

11251 *Government's Exhibit No. 449*

cc: F. G. Ebsary, *Pres.*
C. E. Hough, *Treas.*

JUNE 17, 1932.

MR. C. F. HENNING, *V. P.*
United States Gypsum Company,
300 West Adams St.,
Chicago, Ill.

DEAR SIR:

I was sorry to have missed seeing you when you were in New York last week but I was out of town a good part of the time.

Mr. Gallagher asked me to see him on Tuesday which I did.

At that time he took up two matters regarding the Kelley Plasterboard Company — their relations with Dusol and their omission of name and patent numbers from their board. He said the latter would be corrected at once. Will you please confirm this so that our records will be complete.

As to the L. A. Dusol Company, this matter is still open and we would appreciate it if you would investigate it, have it corrected and so advise us. L. A. Dusol is doing quite a business with the small lumber dealers who we all used to sell prior to the April bulletins. We have given you specific cases where they are selling less than 5,000 sq. ft. loads to them at $30.44. This in spite of the fact that Kelley claims to be selling Dusol at $28.44 f.o.b. cars New York which leaves $2.00 for labor, cartage and profit. We believe that the only way L. A. Dusol can work on this basis is through some split with with George Dusol who is working as a salesman for the Kelley Plasterboard Company.

Please look into these matters, also several others which still remain open between us so that the conditions complained of may be promptly corrected. Kindly acknowledge receipt.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.,
GEORGE N. LENCI, *Secy.*

GNL:G

11252 *Government's Exhibit No. 450*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

JUNE 25, 1932.

MR. GEORGE N. LENCI, *Secy.*,
Ebsary Gypsum Company, Inc.,
52 Vanderbilt Ave.,
New York City.

DEAR MR. LENCI:

Re: Kelley Plasterboard Company

This will acknowledge receipt of your June 17th letter to Mr. Henning regarding the sales of patented wallboard and/or plasterboard by the Kelley Plasterboard Company in violation of their license contract. These matters are being investigated, and, if found to be correct, proper stops to protect the licensor's interests in the matter will be taken.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

11253 *Government's Exhibit No. 451*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

AUGUST 18, 1932.

MR. GEO. N. LENCI, *Secy.,*
Ebsary Gypsum Company, Inc.,
414 Ogden Street,
Newark, N. J.

DEAR MR. LENCI:

Re: Orin F. Perry
New York City.

Acknowledging receipt of your letter of August 16, we have had the matter up with the licensee, Certain-teed Products Company, regarding their sales of patented board to Orin F. Perry, New York City at less than the licensor's minimum price to you for such board in such market.

We have only partially completed our investigation in regard to this account, but will advise you immediately when we have concluded same.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

ccMr. C. E. Hough, *Treas.*—Mr. Ebsary says that your cancellation of Abbey's agreement should be in writing. Will you take care of it.

G.N.L.

MAY 26, 1932.

MR. C. F. HENNING, *V. P.*,
United States Gypsum Company,
Chicago, Ill.

DEAR SIR:

We have your letter of May 23rd with reference to sales of board to the Abbey Company.

When we received your bulletin of April 12th regarding the discontinuance of jobbing arrangements we immediately notified the Abbey Company. Our contract which has been in effect with them prior to our signing the license agreement provides that we give them 60 days notice of cancellation and further that we must take care of any bonafide orders they may have on file at time of cancellation.

In spite of this we agreed that May 1st was to be the date of cancellation and the only order on file to be shipped after that date was for 12,000 sq. ft.

We had no warehouse or trucking arrangement with Abbey and have no jobbing, warehousing or trucking arrangement with anyone else at the present time.

We feel that we have been over scrupulous in matters of this kind and we have suffered through a laxness on the part of other licensees, particularly those mentioned in our letters of May 6th and 16th to the Board Survey Company. We have still no reply from them on either of these letters except your letter of May 17th.

Will you please see that full and complete replies are made so that our confidence may be re-established.

If there is anything specific back of your letter of the 23rd about Abbey, please bring it out into the open so that you can be satisfied, as we assure you that we are working in full accordance with your bulletins.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.
GEORGE N. LENCI, *Secretary*

GNL:G

cc: F. G. Ebsary, *Pres.*
C. E. Hough, *Treas.*
E. H. Diegel, *Sales Mgr.*

MAY 31, 1932.

BOARD SURVEY COMPANY,
300 W. Adams St.,
Chicago, Ill.

GENTLEMEN:

The April bulletin of the USG Co. notified licensees that the practice of shipping board on consignment would be considered as a rebate and therefore must be discontinued.

We wish to file two vigorous protests against violations of this rule and to ask for an explanation.

Both of these violations occured since that bulletin and both are by the USG's subsidiary — the Samson Plaster Company.

The shipments on consignment were made to:

Wilcox-Johnson Co., Victor, N. Y.
O'Dell Lumber Co., Webster, N. Y.

An immediate reply will be expected.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

GEORGE N. LENCI,
Secretary.

GNL:G

11256 *Government's Exhibit No. 454*

NEWARK, N. J.
JUNE 9, 1932.

EBSARY GYPSUM COMPANY, INC.
New York City

GENTLEMEN:

Attention of Mr. George N. Lenci:

Confirming our telephone conversation, we are advised that Louis Brooks of Washington, N. J. endeavored to buy a truckload of board from one of our representatives and being told they were not in the trucking area we were not able to obtain this business.

Since that time we are informed that Tomkins Bros. delivered a truckload of material to them.

We hope you will useevery effort running down this information and see whether there is not something that can be done to get this board situation straightened around so that we will not be penalized in our merchandising of the material by keeping strictly to the contract as we interpret it.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.,
C. E. Hough
C. E. HOUGH,
Treasurer.

CEH:L

cc: C. E. Hough, *Treas.*

JUNE 11, 1932.

BOARD SURVEY COMPANY,
300 West Adams St.,
Chicago, Ill.

GENTLEMEN:

Referring to the limited area in New Jersey where we may make truck-load deliveries of board, we were asked a few days ago by Louis Brooks, a dealer in Washington, N. J., to deliver a truckload.

As Washington is in Warren County, we refused. The order was taken and delivery was made by the Tomkins-Rockwall Co. in violation of the license contract.

We wish to file a protest on this and ask that the practice be discontinued and an explanation given.

Please let us have a prompt reply.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

GEORGE N. LENCI,
Secretary.

GNL:G

cc: Mr. C. E. Hough, *Treas.*

JUNE 21, 1932.

BOARD SURVEY COMPANY,
300 West Adams St.,
Chicago, Ill.

GENTLEMEN:

This supplements our letter of June 11th wherein we called to your attention a truck-load delivery of board to Louis Brooks, Washington, N. J. outside the restricted area by the Tomkins-Rockwall Company.

Will you kindly let us have an acknowledgement by return mail, and your assurance that an investigation is in progress and that this practice will be discontinued?

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

GEORGE N. LENCI,
Secretary.

GNL:G

11259 *Government's Exhibit No. 457*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

JUNE 23, 1932.

MR. GEORGE N. LENCI, *Secy.*,
Ebsary Gypsum Company,
52 Vanderbilt Avenue,
New York City.

DEAR MR. LENCI:

Re: Louis Brooks
Washington, N. J.

We have your letter of the 11th inst. regarding the sale of patented gypsum wallboard to Louis Brooks of Washington, New Jersey.

Since the minimum price to you for less than carload deliveries of such board in such market as fixed by the licensor is $36.28 per thousand square feet you were correct in refusing to sell the truckload quantity thereof at less than that price.

We are taking up with the Atlantic Gypsum Products Company the matter of the reported sale to the above account by Tomkins Rockwall Company, which according to the Atlantic Gypsum Products Company is its subsidiary selling organization.

Yours very truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

Government's Exhibit No. 458

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

SEPTEMBER 21, 1932.

MR. GEORGE N. LENCI, *Secy,*
Ebsary Gypsum Company,
414 Ogden Street,
Newark, N. J.

DEAR MR. LENCI:

We are advised that you have recently sold wallboard and/or plasterboard manufactured and sold by you under your license contract with the licensor, U. S. Gypsum Company, to a manufacturer of Gypsum products at less than the licensor's minimum price to you on your sales of patented board without the consent of the licensor as required in your license contract.

Please advise us of your sales of patented board to any gypsum manufacturer, including in your report name of manufacturer, price at which such board is being invoiced and any discount allowed to them that is less than the licensor's minimum price to you for patented board.

We will appreciate your early reply.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

11261 *Government's Exhibit No. 459*

EBSARY GYPSUM COMPANY, INC.
414 Ogden Street
NEWARK, N. J.

SEPTEMBER 24, 1932.

BOARD SURVEY COMPANY
300 West Adams St
Chicago, Ill

GENTLEMEN:

Referring to your letter of September 21st regarding sales of board to other manufacturers. We are selling board to Connecticut Adamant Plaster Company at New Haven and Atlantic Gypsum Products Company at New York.

Sales to both of these companies are in accordance with the Licensor's Bulletins, less a manufacturers discount of 10% on the Mill price.

Several months ago I told Mr. Henning that we were doing this and he said was correct.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.
George N. Lenci
G. N. LENCI
Secretary.

GNL:L

11262 *Government's Exhibit No. 460*

SEPTEMBER 27, 1932

EBSARY GYPSUM COMPANY, INC.,
414 Ogden Street,
Newark, N. J.

Attention Mr. George N. Lenci, *Secretary.*

DEAR SIRS:

Referring to your letter addressed to Board Survey Company, September 24. This is to advise you that until you are notified to the contrary, you have our consent to your sale of gypsum wallboard and/or plasterboard embodying the claims and inventions of our patents to the Connecticut Adamant Plaster Company at New Haven and the Atlantic Gypsum Products Company, New York, at dealer's minimum price less 10%. This consent is given on condition that it may be withdrawn by us at any time that we may see fit so to do.

The royalty on all such sales shall, of course, be based upon your regular selling price to your regular dealer trade at the time of such sale and invoice as is provided by our license agreement with you.

Very truly yours,

UNITED STATES GYPSUM COMPANY

Vice President

CFH/WP

11263 *Government's Exhibit No. 461*

EBSARY GYPSUM COMPANY, INC.
414 Ogden Street
NEWARK, N. J.

DECEMBER 6, 1932.

UNITED STATES GYPSUM COMPANY
300 West Adams St
Chicago, Ill

GENTLEMEN:

Attention of Mr. C. F. Henning,
Vice-President:

Referring to the Board License Agreement, we wish to advise that we have made a change with the Connecticut Adamant Plaster Company, and we are now allowing them a commission of 10% on Plasterboard and Lath and 12-½% on Wallboard.

Will you kindly acknowledge receipt of this letter and send us your approval.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

George N. Lenci

G. N. LENCI,
Secretary.

GNL:L

Government's Exhibit No. 462

DECEMBER 23, 1932

MR. F. G. EBSARY, *President*
Ebsary Gypsum Company, Inc.,
Scottsville, New York.

DEAR SIRS:

Referring to our letter to you of September 27, 1932, and your letter of December 6, in connection with our consent to sell Gypsum wallboard and plasterboard embodying the claims and inventions of our patents.

This is our consent to sell gypsum wallboard and plasterboard embodying the claims and inventions of our patents, to the Connecticut Adamant Plaster Co. at New Haven, and Atlantic Gypsum Products Company at New York, at the following maximum discounts from f.o.b. mill prices listed in board license bulletin #1:

Wallboard	15%
Plasterboard	12½%

Yours very truly,

UNITED STATES GYPSUM COMPANY

Vice President

11265 *Government's Exhibit No. 463*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

MAY 8, 1933.

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, New Jersey.

Att: Geo. N. Lenci, *Secy.*

DEAR SIRS:

Re: New Haven Reserve Supply Co.,
New Haven, Connecticut.

We are advised that the Connecticut Adamant Plaster Company, New Haven, Connecticut is offering patented board manufactured and sold by you to the New Haven Reserve Supply Company, New Haven, Connecticut and other New Haven dealers f.o.b. their warehouse in any quantity at the licensor's minimum price to you for minimum carload lots of said patented board, delivered New Haven.

Please advise.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

Government's Exhibit No. 464

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

MAY 11, 1933.

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, New Jersey.

Att: Geo. N. Lenci, *Secy.*

DEAR SIRS:

Re: Southbury Lumber Co.,
Southbury, Conn.

We are advised that the Connecticut Adamant Plaster Company, New Haven, Connecticut sold 100 pieces 4x7 patented wallboard manufactured and sold by you to the Southbury Lumber Company, Southbury, Connecticut at the licensor's minimum price to you for patented wallboard. This would hardly seem possible if your sales of patented board to the Connecticut Adamant Plaster Company, New Haven, Connecticut had been made at the licensor's minimum price to you.

We will appreciate your early reply.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

11267 *Government's Exhibit No. 465*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

MAY 29, 1933.

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, N. J.

Att: Mr. G. N. Lenci, *Treas.*

DEAR SIRS:

Re: New Haven Reserve Supply Co.,
New Haven, Connecticut.

May we have a reply to our May 8th letter in regard to your sales of patented board to the Connecticut Adamant Plaster Company, New Haven, Connecticut?

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

Government's Exhibit No. 466

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

MAY 31, 1933.

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, New Jersey.

Att: Geo. N. Lenci, *Secy.*

DEAR SIRS:

Re: Southbury Lumber Co.,
Southbury, Connecticut.

To date we have had no reply to our letter of May 11 concerning your sales of patented board to the Connecticut Adamant Plaster Company, New Haven, Connecticut.

We will appreciate your early reply.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

11269 *Government's Exhibit No. 467*

EBSARY GYPSUM COMPANY, INC.
414 Ogden Street
NEWARK, N. J.

JUNE 13, 1933.

BOARD SURVEY COMPANY.
300 West Adams Bldg
Chicago, Ill.

GENTLEMEN:

Regerring to your letter regarding the New Haven Reserve Supply Company, we would advise that our customer, the Connecticut Adamant Plaster Company, has made no sales of board to them.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

George N. Lenci

G. N. LENCI,
Secretary.

GNL:L

11270 *Government's Exhibit No. 468*

E. H. Diegel:- Please note reply. You will note that I have avoided making a justification of the right of the Conn. Adamant to sell any quantity at the carload price as I feel that it would weaken our case against the Paragon and American Hardwall. They only asked us how Conn. Adamant could resell our board to a Dealer at the Dealer's price, and this I have explained.

G. N. LENCI.

6170

JUNE 13, 1933.

BOARD SURVEY COMPANY
300 West Adams Bldg
Chicago, Ill

GENTLEMEN:

We have your letter regarding sales of wallboard by the Connecticut Adamant Plaster Company to the Southbury Lumber Company of Southbury, Conn.

The Connecticut Adamant Plaster Company is rated as a manufacturer and we have the permission of the Licensor to sell them as such, making them the usual discount as manufacturers. This naturally enables them to sell board at their plant in New Haven at the correct Bulletin price of $31.32 FOB New Haven.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GNL:L

11271 *Government's Exhibit No. 469*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

JUNE 15, 1933.

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, New Jersey.

Att: Geo. N. Lenci, *Secy.*

Re: Southbury Lumber Co.,
Southbury, Connecticut.

DEAR SIRS:

With reference to your June 13th letter, the licensor's minimum price to you on patented wallboard in New Haven, Connecticut is $31.32 per M sq. ft., and not $31:24 as you indicated in your letter. Please advise us if you are selling patented board delivered in New Haven, Connecticut on the basis of the price you indicate. Further, the licensor's minimum price to you of $31.32 is for carload shipments.

If you are, through your agent, the Connecticut Adamant Plaster Company, selling patented board f.o.b. the warehouse at the price you indicate, said sale is at less than the licensor's minimum price to you, and it will be necessary for us to report the same to the licensor.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

Government's Exhibit No. 470

EBSARY GYPSUM COMPANY, INC.
135th Street & Mott Haven Canal
NEW YORK, N. Y.

NOVEMBER 21, 1932.

MR. G. N. LENCI, *Secy.*,
Ebsary Gypsum Company, Inc.,
Newark, N. J.

DEAR SIR:

Mr. Broas advises that while he was in Orin F. Perry's office this a.m. he observed a notation on Mr. Perry's desk covering an order for

500 Pcs 3/8" Plasterboard
3500 Pcs 1/4" Plasterboard

ordered November 11th and shipped to Daniel Duskis.

From the above report it does not appear that Certainteed has fallen into line and we will appreciate having you take this matter up with the Board Survey Company, secure a report and have steps taken to correct this situation.

However please do not disclose the circumstances in which we secured this information to prevent any possibility of embarrassing ourselves with Perry or Duskis.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.,

Ed. H. Diegel
ED. H. DIEGEL,
Sales Manager.

EHD:G

11273 *Government's Exhibit No. 471*

Copty to F. G. Ebsary
E. H. Diegel

NOVEMBER 28, 1932.

BOARD SURVEY COMPANY
300 West Adams Bldg
Chicago, Ill.

GENTLEMEN:

This is to advise that on or about November 11th an order was taken by Orin F. Perry of New York for shipment of a carload of board to Daniel Duskis containing 4000 sq. ft. 3/8" plasterboard and 28000 sq. ft. 1/4" plasterboard.

This is in direct violation of the Bulletins eliminating sales of licensed board through jobbers and commission men.

Will you please investigate this at once and report.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GNL:L

11274 *Government's Exhibit No. 472*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JULY 29, 1929.

MR. GEO. N. LENCI, *Vice President,*
Ebsary Gypsum Company,
135th St. & Mott Haven Canal,
New York, New York

DEAR SIRS:

There will be a meeting held at the Palmer House at 10:30 A.M. on Tuesday, August, 6, 1929.

Yours very truly,

UNITED STATES GYPSUM COMPANY

C. F. HENNING
Vice President in Charge of Sales

RNMcK:SP

11275 *Government's Exhibit No. 473*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 26, 1930

MR. GEORGE N LENCI, *V.P.*
Ebsary Gypsum Company
135th St. & Mott Haven Canal
New York, N. Y.

DEAR SIR:

There will be a Licensees' Meeting held Thursday, April 3rd, at 10 o'clock at the Palmer House, Chicago.

Very truly yours,

C. F. HENNING,
Vice Pres. Charge of Sales

CH/HC

11276 *Government's Exhibit No. 474*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

MARCH 4, 1931

MR GEORGE N LENCI, *Vice President*
Ebsary Gypsum Company
135th St. & Mott Haven Canal
New York, New York.

DEAR MR LENCI:

Confirming my long distance conversation with Mr Stromquist, the meeting will be held at the Palmer House, Room 836, at three P.M., Tuesday, March 10th.

It is my understanding Mr Stromquist will attend the meeting.

Truly yours,

C. F. HENNING,
Vice President in Charge of Sales

CH HC

11277 *Government's Exhibit No. 475*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

JUNE 4, 1936

MR. GEORGE N. LENCI, *Secretary*
Ebsary Gypsum Company, Inc.,
52 Vanderbilt Avenue
New York, New York

DEAR MR. LENCI:

There will be a meeting of the wallboard licensees held at the Commodore Hotel, New York City, Wednesday, June 10, 1936.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,
Vice-President

CFH:HM

11278 *Government's Exhibit No. 476*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

FEBRUARY 7, 1936

MR. GEO. N. LENCI, *Secretary*
Ebsary Gypsum Co., Inc.,
52 Vanderbilt Avenue
New York, New York

DEAR MR. LENCI:

There will be a board license meeting at the Commodore Hotel, Wednesday, February 19, 1936, at 10 A.M.

Please advise if you will be present.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. F. HENNING,
Vice-President

CFH:HM

11279 *Government's Exhibit No. 480*

Copy to Mr. Ebsary

DECEMBER 7, 1932.

UNITED STATES GYPSUM COMPANY
300 West Adams St.
Chicago, Ill.

GENTLEMEN:

Attention of Mr. C. F. Henning:
Vice-President

We wish to call your attention to another development in the sale of board by the Structural Gypsum Company.

They have established a Dealer in their own Warehouse at Linden. This allows Structural to buy board at the proper price because it is to all intents and purposes delivered to the Structural but the sales can be made by the Dealer without any restriction whatever.

This permits the Structural to sell Sears-Roebuck & Company and others in less than truckload quantities to the detriment of the other licensees.

This is a very serious matter and we must ask that you get after it at once and give us the protection we are entitled to under our license.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GNL:L

11280 *Government's Exhibit No. 481*

Copy to C. E. Hough
W. P. Regan

NEWARK, N. J.
DECEMBER 19, 1932.

EBSARY GYPSUM COMPANY, INC.
New York City

GENTLEMEN:

Attention of Mr. E. H. Diegel:

At the last Board Meeting in Chicago on December 13th it was decided that Wallboard and Plasterboard must be sold upon the usual terms of the Gypsum business — that is 2-10-30 and not allow to drop back to the slower Lumber terms.

It was also decided to discourage taking Notes or Trade Acceptances wherever possible, and only to take them when it was necessary to secure the payment of doubtful accounts and never to be taken as an inducement to make a sale.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.
G. N. LENCI,
Secretary.

GNL:L

11281 *Government's Exhibit No. 482*

FEBRUARY 16, 1933.

BOARD SURVEY COMPANY
300 West Adams St
Chicago, Ill.

GENTLEMEN:

We understand that the Warehousing arrangement is still in effect between the National Gypsum Company and the Trygar Lumber Company, Perth Amboy, N. J.

We understood that this was to be discontinued a long time ago and we wish you would please investigate and let us know about it.

Yours very truly

EBSARY GYPSUM COMPANY, INC.
G. N. LENCI,
Secretary.

GNL:L

11282 *Government's Exhibit No. 483*

OFFICE COMMUNICATION

Date 3/3/33

From ED. H. DIEGEL, *S. M.*
To G. N. LENCI, *Secy.*

Subject Eastern Builders Supply Co., Richmond, Va.

We have received the copy of the Board Survey Company's letter to you of February 15th relative to the above.

Since receiving this letter we have asked Garner to look into this and in his report he makes the following statement:

> I saw Jim Smith of the Eastern Builders Supply Co., Richmond while in Richmond and he told me that he was handling Univeral Plaster and Board on the same arrangement he orginally had it — commission.

I though this was the case. That makes two people I got this information from and I will appreciate it if you will take this matter up again. Please let me know what develops.

ED. H. DIEGEL,
Sales Manager.

EHD:G

11283 *Government's Exhibit No. 484*

MARCH 24, 1933.

BOARD SURVEY COMPANY
300 West Adams St
Chicago, Ill

GENTLEMEN:

Referring further to our letter of February 15th regarding the Eastern Builders Supply Company of Richmond, Va., we have the following report from our Virginia salesman.

'I saw Jim Smith of the Eastern Builders Supply Company, Richmond while in Richmond and he told me that he was handling Universal Plaster and Board on the same arrangement he orginally had it — commission'.

We have every reason to believe that Mr. Smith is still working on a commission basis contrary to the License Agreement, and we would appreciate it if you would investigate further and report to us.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GNL:L

11284 *Government's Exhibit No. 485*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

MARCH 28, 1933.

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, N. J.

Att: Geo. N. Lenci

DEAR SIRS:

Re: Eastern Building Supply Co.,

Richmond, Virginia.

Refer to your letter of March 24 and previous correspondence.

The licensee, Universal Gypsum & Lime Company, have submitted data to me, which conclusively shows that Jim Smith of the Eastern Builders Supply Company, Richmond, Virginia has not had the privilege of selling patented board manufactured by the Universal Gypsum & Lime Company since November 1932.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

11285 *Government's Exhibit No. 486*

EBSARY GYPSUM COMPANY, INC.
414 Ogden Street
NEWARK, N. J.

APRIL 13, 1933.

BOARD SURVEY COMPANY
300 West Adams Bldg
Chicago, Ill.

GENTLEMEN:

One of our dealers in Boston has just been offered a carload of lath at the dealer's price by Wyman & Allen Lumber Company of Charlestown, Mass. These people as you know were jobbers of American Gypsum Company board and were supposed to have been put on dealer's basis.

Please investigate this at once and let me hear from you.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

11286 *Government's Exhibit No. 487*

APRIL 17, 1933.

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, New Jersey.

Att: George N. Lenci, *Secy.*

DEAR SIRS:

Re: Wyman & Allen Lbr. Co.,
Charlestown, Mass.

We acknowledge receipt of your letter of April 13 concerning the sale of plasterboard manufactured and sold by the licensee, American Gypsum Company, under their license contract and embodying the claims and inventions of the licensor's patents.

We appreciate your calling this matter to our attention. You are, however, not specific, and we request that you advise us the name of the dealer to whom this quotation has been made. This will be of material assistance to us in investigating the complaint.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11287 *Government's Exhibit No. 489*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

MARCH 31, 1933.

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, New Jersey.

Att: Geo. N. Lenci, *Secy.*

DEAR SIRS:

Re: Wallace & Herring
Alexandria, Virginia.

We are advised that your company has recently sold wallboard and/or plasterboard embodying the claims an inventions of the patents under which you are licensed to Wallace & Herring, Alexandria, Virginia at prices below the licensor's minimum price to you for such board in such market.

Specifically, that you did sell this firm a mixed carload of plaster and patented board and did not invoice or charge to this firm a certain amount of plaster, and this was also handled so as to reflect to the said Wallace & Herring, Alexandria, Virginia a rebate on the patented board they purchased from you.

Please advise in detail as to your sales of patented board to this firm, and specifically advise us of any donations or credits made in conjunction with your sales of said board.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

11288 *Government's Exhibit No. 490*

EBSARY GYPSUM COMPANY, INC.
52 Vanderbilt Avenue
NEW YORK, N. Y.

APRIL 10TH, 1933

MR. GEO. N. LENCI, *Secretary*
Ebsary Gypsum Company, Inc.
414 Ogden Street,
Newark, N. J.

SUBJECT: Wallace and Herring,
Alexandria, Virginia

DEAR SIR:

Referring to the attached letter which you received from Frank M. Miller, Secretary of the Board Survey, we secured regular prices on the board and regular prices on the plaster to apply against protections which we have and are listed on the protected sheets.

There is nothing out of the ordianary on this sale and you can go on record with them accordingly.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

ED. H. DIEGEL
General Sales Manager

EHG:G

11289 *Government's Exhibit No. 491*

Copy to New York Office:-

APRIL 12, 1933.

BOARD SURVEY COMPANY
300 West Adams Bldg
Chicago, Ill.

GENTLEMEN:

Referring to your letter of March 31st with reference to Wallace & Herring, Alexandria, Virginia, we wish to advise that we have secured from them in every case the full Bulletin price for wallboard or plasterboard under the License Agreement.

Whatever sales of plasterboard have been made to this firm have been made at the prevailing price and no special price made to induce board business.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GNL:L

11290 *Government's Exhibit No. 492*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

APRIL 14, 1933

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, N. J.

Att: George N. Lenci, *Secy.*

DEAR SIRS:

Re: Wallace & Herring
Alexandria, Virginia.

We have your letter of April 12 concerning your sales of patented board to Wallace & Herring, Alexandria, Virginia, and we do not feel that you have fully answered the second paragraph of our March 31 letter.

We asked that you advise us as to whether or not you had donated to this firm plaster so as to reflect to it a rebate on its purchases of patented board from you.

We will appreciate your early reply.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

11291 *Government's Exhibit No. 493*

APRIL 20, 1933.

BOARD SURVEY COMPANY
300 West Adams Bldg
Chicago, Ill.

GENTLEMEN:

We have your letter of April 14th with reference to Wallace & Herring, Alexandria, Va.

In reply to your inquiry we wish to state definitely that we have made no donation of plaster to these people. Furtheremore, that we did not make them any special price on plasterboard in order to induce an order for board.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GN.L

11292 *Government's Exhibit No. 494*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

JUNE 15, 1933.

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, New Jersey.

Att: Geo. N. Lenci, *Secy.*

DEAR SIRS:

Re: Waltham Lime Company
Waltham, Massachusetts.

We are advised that your company has recently sold plasterboard embodying the claims and inventions of the patents under which you are licensed to the Waltham Lime Company, Waltham, Massachusetts at prices below the licensor's minimum price to you for such sale.

According to the information that has been given to us, this dealer recently quoted patented plasterboard manufactured by you at $20.82 per M sq. ft. delivered on a job in Quincy, Massachusetts, which is fourteen miles from Waltham. This would hardly seem possible if your sales of patented board had been made at the licensor's minimum price to you.

It is further alleged that your sales of plaster to this firm have been at less than the market price, same being made so as to reflect to this customer a lower price on its purchases of patented board than the licensor's minimum price to you.

Please advise us in detail as to your sales of patented board to this firm as mentioned herein.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

11293 *Government's Exhibit No. 495*

EBSARY GYPSUM COMPANY, INC.
414 Ogden Street
NEWARK, N. J.

JUNE 20, 1933.

BOARD SURVEY COMPANY
300 West Adams Bldg
Chicago, Ill

GENTLEMEN:

We have your letter of June 15th regarding Waltham Lime Company.

In reply would advise that our sales of board to the Waltham Lime & Cement Company, which we presume is the company to whom you are referring, have been strictly in accordance with the Bulletins issued under the License Agreement.

Our sales of plaster to this company are made on the same basis as the prevailing prices made by our competitors for similar business and are not made by us with the intent to influence board sales.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GNL:L

11294 *Government's Exhibit No. 496*

Subject: Waltham Lime, Waltham, Mass.

JUNE 13, 1933

MR. F. M. MILLER
Board Survey Company
Chicago, Illinois.

E. A. Gallagher reported that the Waltham Lime Company, Waltham, Massachusetts, who sell patented plasterboard as manufactured by the Ebsary Gypsum Company, recently quoted $20.82 per M delivered to a job in Quincy, Massachusetts, which is fourteen miles from Chelsea.

A price of $20.82 allows the dealer $1.50 per M gross profit above the licensor's minimum price on plasterboard delivered to Chelsea.

According to the information we have, the Ebsary Company sold this firm plaster at less than its regular price so as to influence its plasterboard business.

H. F. SADLER
A. V. P.

11295 *Government's Exhibit No. 497*

JUNE 15, 1933.

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, New Jersey.

Att: Geo. N. Lenci, *Secy.*

DEAR SIRS:

Re: Liberty Coal Company
Chelsea, Massachusetts.

We are advised that your company has recently sold plasterboard embodying the claims and inventions of the patents under which you are licensed to the Liberty Coal Company, Chelsea, Massachusetts at prices below the licensor's minimum price to you for such sale.

According to the information that has been given to us, this dealer recently quoted patented plasterboard manufactured by you at $20.82 per M. sq. ft. delivered on a job in Quincy, Massachusetts, which is fourteen miles from Chelsea. This would hardly seem possible if your sales of patented board had been made at the licensor's minimum price to you.

It is further alleged that your sales of plaster to this firm have been at less than the market price, same being made so as to reflect to this customer a lower price on its purchases of patented board than the licensor's minimum price to you.

Please advise us in detail as to your sales of patented board to this firm as mentioned herein.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11296 *Government's Exhibit No. 498*

EBSARY GYPSUM COMPANY, INC.
414 Ogden Street
NEWARK, N. J.

JUNE 20, 1933.

BOARD SURVEY COMPANY,
300 West Adams Bldg.
Chicago, Ill.

GENTLEMEN:

We have your letter of June 15th regarding Liberty Coal Company.

In reply would advise that our sales of board to the Liberty Coal & Cement Company, which we presume is the company to whom you are referring, have been strictly in accordance with the Bulletins issued under the License Agreement.

Our sales of plaster to this company are made on the same basis as the prevailing prices made by our competitors for simi;ar business and are not made by us with the intent to influence board sales.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GNL:L

11297 *Government's Exhibit No. 499*

Subject: Liberty Coal; Chelsea, Mass.

JUNE 13, 1933.

MR. F. M. MILLER
Board Survey Company
Chicago.

E A. Gallagher reported that the Liberty Coal, Chelsea, Massachusetts, who sell patented plasterboard as manufactured by the Ebsary Gypsum Company, recently quoted $20.82 per M delivered to a job in Quincy, Massachusetts, which is fourteen miles from Chelsea.

A price of $20.82 allows the dealer $1.50 per M gross profit above the licensor's minimum price on plasterboard delivered to Chelsea.

According to the information we have, the Ebsary Company sold this firm plaster at less than its regular price so as to influence its plasterboard business.

H. F. SADLER
A.V. P.

11298 *Government's Exhibit No. 500*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

APRIL 24, 1934.

MR. GEO. N. LENCI, *Secretary*
Ebsary Gypsum Company
414 Ogden Street
Newark, New Jersey.

DEAR MR. LENCI:

Re: Service Masons Supply Company
New York City.

We are informed that your company had recently sold in a carload lot gypsum plasterboard embodying the claims and inventions of the patents under which you are licensed to the Service Masons Supply Company, New York City at prices below the licensor's minimum price to you for such lath in that market, the reduction of the licensor's minimum price being in the form of allowances on other commodities, the allowances being made to influence the purchase of patented lath from your company and thus reducing the price of such lath.

We desire a verified statement from you fully reporting the sales of such board to the Service Masons Supply Company within the last six months, showing date of sale, amount of board sold, price at which board was invoiced, and the price actually paid by the dealer for such board, including any and all allowances then or subsequently made affecting such shipment.

Yours very truly,

BOARD SURVEY COMPANY

H. F. SADLER
Executive Secretary.

Government's Exhibit No. 501

EBSARY GYPSUM COMPANY, INC.
52 Vanderbilt Avenue
NEW YORK, N. Y.

MAY 3RD, 1934.

BOARD SURVEY COMPANY,
300 West Adams Bldg.,
Chicago, Illinois.

GENTLEMEN:

We have your letter of April 24th regarding the sales of board to Service Masons Supply Company of New York.

During the past six months we have only shipped them one car of board and no truck loads of board. This car was shipped January 26th and contained:

2700 Pcs (21,600 Sq. Ft.) ¼"-32x36 @ .1205 ($15.06 per M.)
1500 " (12,000 " ") ⅜ -32x36 @ .129 (16.12 " ")
500 " (4,000 " ") ½ -32x36 @ .1475 (18.44 " ")

This carload was well over the minimum load and was charged and paid for at the proper bulletin price.

Furthermore, we wish to state that sales of other materials were paid for at the prices prevailing in the New York market and no special prices or other concessions of any kind were made to influence the sale of this car of board.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.,

G. N. LENCI,
Secretary.

GNL:R

11300 *Government's Exhibit No. 502*

NOVEMBER 8, 1934.

Day Letter

MR. C. F. HENNING
c/o United States Gypsum Company
300 West Adams Street
Chicago, Illinois.

Lee story and companys man in Brooklyn is quoting on Kelly board up to two dollars per thousand below license bulletin prices to lumber dealers in New York City. You must investigate and correct this immediately as we look to you for protection under our contract Lee story must be eliminated immediately as a jobber Wire us full information at once tonight

EBSARY GYPSUM COMPANY INC.

11301 *Government's Exhibit No. 502-A*

First name Joe.

Lee Story & Co Man
Brooklyn

Sells Kelly
Board

Mr. C. E. Hough

(2% off)

Yorkville Sh Co
Williamsburg Sh Co

(Cantor)

Myron Sh Co
Basle

11302 *Government's Exhibit No. 503*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

APRIL 22, 1932.

MR. M. H. BAKER, *Pres.,*
National Gypsum Company,
Buffalo, N. Y.

DEAR MR. BAKER:

We have delayed replying to your several letters of the 21st ult. regarding warehousing arrangements with dealers until we were able to state that the situation had been corrected.

Our attorneys are quite in accord with the opinion of your attorneys that a warehousing arrangement with a dealer whereby that dealer is paid a warehousing charge on gypsum wallboard embodying the claims and inventions of the licensor's patents constitutes a rebate to that dealer on all such board sold to the dealer by the licensee.

Please refer to the licensee letter to you of April 12, 1932 "Supplement to Board License Bulletins Nos. 1, 2 & 3"; "Supplement to Board License Bulletin No. 1", dated April 14, 1932; "Supplement", April 15, 1932; and "Supplement to Board License Bulletins", April 16, 1932.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

11303 *Government's Exhibit No. 504*

EBSARY GYPSUM COMPANY, INC.
135th Street & Mott Haven Canal
NEW YORK, N. Y.

MARCH 30TH, 1933.

MR. GEO. N. LENCI, *Sec.*,
Ebsary Gypsum Co., Inc.,
Newark, N. J.

DEAR MR. LENCI:

While at Syracuse this week, I find that the Paragon Plaster Company of that city will supply dealers board at $1.00 per M sq. ft. above the regular Syracuse price. I consider this unfair competition, due to the fact, that any dealer can call at their warehouse, and obtain any quanity they desire, plus a slight warehouse charge.

For instance, a dealer can call on Paragon Company for, say 2000 sq. ft. of ⅜" 16x48 board, and obtain same for $18.00 per M sq. ft. The mill price is $15.00, the freight, based from Oakfield, $2.00 per M sq. ft., plus $1.00 for unloading cars, warehousing, and loading on to the dealers trucks.

At no time are we allowed to truck into Syracuse, nor the surrounding towns. At no time are we allowed to truck less than 5000 sq. ft. into certain counties. But, the dealers in the vicinity of Syracuse, Utica, and Scranton can call at these various warehouses and obtain any amount they desire.

Even in the counties where we are allowed trucking, if a dealer should call at our mill, which is a warehouse in comparison with the Paragon, we are not allowed to give the dealer less than 5000 sq. ft.

This has also occured to me. I do not know if the board Paragon sells is shipped to Oakfield, then forwarded to Syracuse, or if it is shipped direct from Delawanna, N. J. to Syracuse, but, at either manner — if Paragon has to pay $15.00 mill, how can they sell it to dealers at $18.00 per M sq. ft.? The Kelley plasterboard company must have to do some absorbing of freight rates.

The above for your information.

Very truly yours,

GEORGE F. NEAL

11304 *Government's Exhibit No. 505*

APRIL 12, 1933.

UNITED STATES GYPSUM COMPANY
Chicago, Ill.

GENTLEMEN:

Attention of Mr. C. F. Henning,
Vice-President:

We are very much disturbed over the Board situation. As we are Licensee's and you expect us to live under the terms of said License Agreement, we are writing to ask you to get the matter of the Oakfield Gypsum Products situation straightened out; also Atlantic Gypsum Company jobbers situation in Providence, Rhode Island; Also the Kelley Situation straightened out with the Structural Gypsum Company and with Cartier of Providence, and any other jobbers situation that no doubt you know of yourselves that are still existing; also the Certain-teed Products Company arrangement with Orin F. Perry.

These matters we feel should have been straightened out long ago as it is doing the Ebsary Gypsum Company, Inc. a great injustice, especially in Scranton, Syracuse and Utica; also in Jersey by the Structural Gypsum Company.

As we are paying you a royalty and as we, the Ebsary Gypsum Company, Inc., are doing everything we know how to do to keep things clean we look to you for protection as these matters have cost us several thousand dollars and we demand that you get these matters straightened out at once.

I do not wish to get personal with any of these companies or with you, but we want a reply on this at once.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

F. G. EBSARY
President.

FGE:L

11305 *Government's Exhibit No. 506*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

APRIL 17, 1933.

EBSARY GYPSUM COMPANY
414 Ogden Street
Newark, New Jersey.

Att: F. G. Ebsary, *Pres.*

DEAR SIRS:

Your April 12th letter with reference to the sales of patented board by several licensees at less than the licensor's minimum price to you for such sales has been referred to me by Mr. Henning.

I am compiling the data, and will report on same at our next meeting. Suggest that you have with you at that meeting specific data in connection with the situations you mention in your April 12th letter.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

11306 *Government's Exhibit No. 508*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO, ILLINOIS

MAY 8, 1933.

EBSARY GYPSUM COMPANY, INC.,
414 Ogden Street,
Newark, N. J.

Att: George N. Lenci, *Secy.*

DEAR SIRS:

Referring to your May 5th letter addressed to Mr. Henning and to Mr. Ebsary's letter of April 12, we do not feel that you have supplied us with sufficient information, or have given specific cases to substantiate the charges you have made against the various licensees.

Mr. Ebsary registers a complaint against the Atlantic Gypsum Company's sales of patented board to F. B. Lawton, Inc., Providence; Rhode Island; Kelley Plasterboard Company's sales to the Structural Gypsum Company, and to Cartier, Providence, Rhode Island; also Certain-teed's sales of patented board to Orin F. Perry, but in none of these cases did he, then or since, give us specific information that would substantiate the charge that the license contract has been violated.

In the case of the Kelley Plasterboard Company's sales of patented board to the Paragon Company, also the American Hardwall Plaster Company, Utica, New York through the Oakfield Gypsum Products Company, you have based your complaint upon the fact that these firms resell patented board to dealers at $1.00 M above the licensor's minimum price, which hardly seems to be a sufficient profit if said patented board is purchased at the licensor's minimum price to you. However, you do not substantiate this with specific sales, and we have before us a copy of the American Hardwall Plaster Company's price list dated March 1, 1933, which we are attaching. This price list is contradictory to the information you have given us. You will note that the

prices as shown are f.o.b. warehouse, and deliveries to freight station or auto terminal carry the additional charge of $1.00 per ton. The price on patented plasterboard is $2.02 M above the licensor's minimum price, and the price on patented wallboard is $3.52 M f.o.b. warehouse with trucking additional as noted above.

We have no information which will enable us to dispute the prices as shown on this price list. If you have knowledge that patented board is being sold for less than the prices shown herein, and at a price which would cause you to assume that a sale of patented board had been made at less than the licensor's minimum price to you, we ask that you give us that data in the form of specific cases.

We will appreciate your early reply.

Yours truly,

BOARD SURVEY COMPANY

FRANK M. MILLER,
Executive Secretary.

FMM:AB

11307 *Government's Exhibit No. 509*

EBSARY GYPSUM COMPANY, INC.
135th Street & Mott Haven Canal
NEW YORK, N. Y.

MAY 17TH, 1933.

MR. GEO. N. LENCI, *Sec.,*
Ebsary Gypsum Co., Inc.
414 Ogden St.,
Newark, N. J.

DEAR MR. LENCI:

In further reference to the board matter at Syracuse and Utica, N. Y. You will recall that I wrote you stating that the Paragon was selling dealers board F.O.B. their warehouse in Syracuse at $19.00 per M sq. ft. for the lath sizes and $31.00 for the wallboard sizes.

In addition to the above the board is shipped from Dellawanna, N. J. to them at Syracuse and also to Oakfield. The board at Oakfield is to be placed in their mixed car orders, and the board shipped direct to Syracuse is sold to dealers and also retailed out. The $19.00 and $31.00 board is the price charged to dealers calling there, with the usual terms of 2% ten days or 30 days net.

Very truly yours,

GEORGE F. NEAL

11308 *Government's Exhibit No. 510*

MAY 22, 1933

BOARD SURVEY COMPANY
Chicago, Ill.

GENTLEMEN:

We have your letter of May 8th with reference to sales of licensed board by the Oakfield Gypsum Company and its subsidiaries, Paragon Plaster Company and the American Hardwall Plaster Company.

We note the enclosed price list of the latter Company showing that wallboard is priced $3.52 per M above the carload price and plasterboard $2.03 higher than the carload price.

You do not give any information about the Paragon Plaster Company's prices in Syracuse, which Company has been causing us to lose considerable business by permitting Dealers to pick up from their Syracuse Warehouse small quantities of board at little or nothing above that we have to charge our Dealers who take full carloads.

We do not care to give specific instances because the complaint would simpy be traced back through us causing us to lose our Dealer's good will as well as his business.

The conditions complained of are common knowledge and should be corrected at once. One solution would be to open up the Counties adjacent to Syracuse and Utica to trucking by all manufacturers on the basis at one time discussed namely $27.00 Mill for wallboard and $15.00 Mill for plasterboard plus $2.00 per M square feet plus actual rail freight to place of destination, delivery to Dealer's Yard only and with the usual 5000 foot minimum.

11309 I am enclosing part of a map of New York State showing the Counties I would suggest that be included: Onondago, Oswego, Oneida, Madison and lowere part of Kerkimer County.

Please take this up with the United States Gypsum Company and let us have an early reply.

Yours very truly,

ERSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GNL:L
Enc.

11310 *Government's Exhibit No. 511*

KJUNE 1, 1933

BOARD SURVEY COMPANY
300 West Adams Bldg
Chicago, Ill.

GENTLEMEN:

We would appreciate it very much if you would let us have a reply to our letter of May 22nd regarding sale of licensed board by the Oakfield Gypsum Products Company and its subsidiaries.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

G. N. LENCI,
Secretary.

GNL:L

11311 *Government's Exhibit No. 512*

EBSARY GYPSUM COMPANY, INC.
52 Vanderbilt Avenue
NEW YORK, N. Y.

MARCH 28TH, 1936.

MR. C. F. HENNING, *Vice President,*
United States Gypsum Company,
300 West Adams Street,
Chicago, Illinoia.

DEAR SIR:

Referring to the board license agreement, we are advised that the Delaware Clay Products Company of Pittsburgh, Pa. are jobbing Paragon Oakleaf Gypsum Board to dealers in western Pennsylvania.

This is contrary to the agreement and we will appreciate it if you would investigate it and let us know about it.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.,

G. N. LENCI,
Secretary.

GNL:R

11312 *Government's Exhibit No. 513*

SCOTT, MAC LEISH & FALK
Law Offices
134 South LaSalle Street
CHICAGO

MAY 9, 1936

EBSARY GYPSUM COMPANY
52 Vanderbilt Avenue
New York, N. Y.

GENTLEMEN: Attention Mr. George N. Lenci

We are enclosing herewith a memorandum concerning the investigation undertaken by the Board Survey Company as a result of your letter of April 1. Do you believe that any further investigation would develop any facts to the countrary?

Yours very truly,

SCOTT, MAC LEISH & FALK

By CHARLES M. PRICE

CMP:IC

Encl.

cc—Board Survey Company
Kelley—2—Oakfield Gyp. Prod. Co.

 Government's Exhibit No. 513-A

Complaint on Sale of Patented Gypsum Wallboard and Gypsum Plasterboard in Violation of License to Manufacture and Sell Such Patented Products

April 1, 1936.
(Date)

To:

Board Survey Company,
300 West Adams Street,
Chicago, Illinois.

Complaint against Kelley Plasterboard Company
(Manufacturer)

Name of Customer involved Oakfield Gypsum Products Company

Address of Customer involved _____

Date of Violation _____ Shipped From _____ (Mill) By _____ (Rail or Truck)

Type of Violation _____

Footage involved	Size	Billed Price Per M	Price Should Have Been
(_____ (Wallboard) / _____ (Plasterboard)	(_____ (Wallboard) / _____ (Plasterboard)	(_____ (Wallboard) / _____ (Plasterboard)	(_____ (Wallboard) / _____ (Plasterboard)

Facts Concerning Complaint

We have a report that the Delaware Clay Products Company, Pittsburgh, Pennsylvania are selling Paragon Oakfeaf gypsum board to dealers in western Pennsylvania. In view of the fact that the Oakfield Gypsum Products Company are themselves not manufacturers of gypsum board and that the Kelley Plasterboard Company supply them, we are unable to understand what arrangement or concession is being made that permits them in turn to sell a distributor who is also able to sell dealers at the regular carload dealer delivered price.

Ebsary Gypsum Company Inc
(Name of Complainant)

By Geo. N. Lenci, Secy

_____
(Title)

(Use reverse side, if more space needed for complaint)

11314 *Government's Exhibit No. 514*

(COPY)

Complaint on Sale of Patented Gypsum Wallboard and Gypsum Plasterboard in Violation of License to Manufacture and Sell Such Patented Products

April 1, 1936
(Date)

To:

Board Survey Company,
300 West Adams Street,
Chicago, Illinois.

Date of Complaint _____

Name of Customer involved Oakfield Gypsum Products Company

Address of Customer involved _____

Date of Violation _____ Shipped From _____ (Mill) By _____ (Rail or Truck)

Type of Violation _____

Footage Involved	Size	Billed Price Per M	Price Should Have Been
(Wallboard) _____	(Wallboard) _____	(Wallboard) _____	(Wallboard) _____
(Plasterboard) _____	(Plasterboard) _____	(Plasterboard) _____	(Plasterboard) _____

Licensee's Explanation

5/1/36

Today the writer spoke to Mr. E. L. Merriman, Treasurer of the Paragon Plaster & Supply Co., and brought to his attention the complaint which was registered. He advised me that the Delaware Clay Products Co. sell Plasterboard for them without any compensation. It is necessary for them to sell Plasterboard in order to secure business for Plaster, and meet competition of mixed carload shipments. All sales are made at the scheduled price, and no compensation is allowed to the Delaware Clay Products Co. on any sales of Wallboard or Plasterboard by them.

Kelley Plasterboard Company, Inc.,
(Name of Licensee)

By S. J. Kelley

President
(Title)

11315 *Government's Exhibit No. 515*

Complaint on Sale of Patented Gypsum Wallboard and Gypsum Plasterboard in Violation of License to Manufacture and Sell Such Patented Products

April 1, 1936
(Date)

To:

Board Survey Company,
300 West Adams Street,
Chicago, Illinois.

Date of Complaint _____

Name of Customer involved Oakfield Gypsum Products Company

Address of Customer involved _____

Date of Violation _____ Shipped From _____ (Mill) By _____ (Rail or Truck)

Type of Violation _____

Footage involved	Size	Billed Price Per M	Price Should Have Been
(Wallboard) / (Plasterboard)	(Wallboard) / (Plasterboard)	(Wallboard) / (Plasterboard)	(Wallboard) / (Plasterboard)

Licensee's Explanation

5/1/36.

Today the writer spoke to Mr. E. L. Merriman, Treasurer of the Paragon Plaster & Supply Co., and brought to his attention the complaint which was registered. He advises me that the Delaware Clay Products Co. sell Plasterboard for them without any compensation. It is necessary for them to sell Plasterboard in order to secure business for Plaster, and meet competition of mixed carload shipments. All sales are made at the scheduled price, and no compensation is allowed to the Delaware Clay Products Co. on any sales of Wallboard or Plasterboard by them.

Kelley Plasterboard Company, Inc.,
(Name of Licensee)

By S. J. Kelley

President

_____
(Title)

(Use this Form to Answer Complaints From Board Survey Co.)

11316 *Government's Exhibit No. 516*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 11, 1936

MR. G. N. LENCI, *Secretary*
Ebsary Gypsum Company
52 Vanderbilt Avenue
New York, New York

DEAR SIR:

Replying to yours of September 8, an error was made in the pickup price for cutstock, which is being rectified by special bulletin. The pickup price is $15.00 instead of $13.50.

Cutstock was eliminated due to the fact that licensees and licensor were cutting new board to supply demand. This was thoroughly discussed and approved of by Mr. Ebsary at the licensee meeting in New York, September 10.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. HENNING
Vice-President

CFH:HM

11317 *Government's Exhibit No. 517*

SEPTEMBER 14, 1936.

Mr. C. F. HENNING, *Vice President,*
United States Gypsum Company,
300 West Adams Street,
Chicago, Illinois.

DEAR SIR:

I understand from Mr. Ebsary who attended the recent Board License Meeting in Buffalo that there was considerable discussion regarding the promotion of 3/8" 16x48 Gypsum Lath in the Metropolitan New York Area.

We have carefully considered this matter and we certainly would like to secure business now going to Wood Lath and other substitutes and if you think it necessary to make a cut in the price of Gypsum Lath in order to bring this about we would suggest a $14.00 carload price and a $15.00 truckload price. You must realize that with our mill in Upstate New York we are under a considerable freight handicap in getting our material to the New York market and this very materially reduces our mill price.

We believe that should you decide to give this a trial it should be confined to the four Long Island Counties in order to prevent it spreading to New Jersey where it is now being used in considerable quantities.

We would be glad to have you give this matter your consideration and let us hear further from you about it.

Yours very truly,

EBSARY GYPSUM COMPANY INC.,

GEORGE N. LENCI,
Secretary.

11318 *Government's Exhibit No. 518*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

SEPTEMBER 18, 1936.

MR. GEORGE N. LENCI, *Secretary*
Ebsary Gypsum Company, Inc.
52 Vanderbilt Avenue
New York City

DEAR MR. LENCI:

Thanks for yours of September 4, and I wish to register that you are the first one of the licensees to reply to my request. It is only too bad that you were not at the meeting where we utlined in detail our program, and also told of our experience in converting the California wood lath market to gypsum lath. It was necessary to introduce a price more competitive to wood lath, and, after the material was established, it was possible to increase our price because the quality of the plaster wall demonstrated the value at the additional cost. I am afraid that the prices outlined in your letter are not sufficiently low competitively to really tap the market considering the resistance against small board.

In order to get full appreciation of the problems, I ask that you get in touch with Mr. Gallagher and have him give you all the data that he developed for me relative to competitive costs on gypsum lath, Ecod and wood lath. Also go over with him the restricted market and the material on which we may want to make the trial.

Yours truly,

UNITED STATES GYPSUM COMPANY

C. HENNING,
Vice-President.

CFH:AB

11319 *Government's Exhibit No. 519*

EBSARY GYPSUM COMPANY, INC.
52 Vanderbilt Avenue
NEW YORK, N. Y.

JULY 20, 1938.

MR. LENCI:

For your information the Certainteed Products Company have made a jobbing arrangement with the Building Material Wholesalers Inc., Rutherford Avenue, Charlestown, Mass.

This is the wholesale end of the L. Grossman Co. Inc., Quincy, Mass. and they do all of the purchasing for lumber and building materials for the nine yards of the L. Grossman Co.

We have had this business for the past 10 years for all of these yards and can still have it price being equal.

This for your information.

E. J. Blanchfield

E. J. BLANCHFIELD

11320 *Government's Exhibit No. 520*

JULY 22, 1938,

UNITED STATES GYPSUM CO.,
300 West Adams Street,
Chicago, Illinois.

GENTLEMEN:

Referring to the board license agreement, it has been called to our attention that the Certainteed Products Company have made a jobbing arrangement with the Building Material Wholesalers Inc., Rutherford Ave., Charleston, Mass.

The above mentioned Company is the Wholesale Division of L. Grossman & Sons of Quincy, Mass. and they do all of the purchasing of lumber and building materials for the nine different yards of the Grossman Company.

We have been selling Grossman Wall Board and Lath for a number of years and this jobbing arrangement which is not permitted by the board license agreement will cause us to lose this Grossman business.

We feel that we are justified in filing a complaint in this matter and would appreciate it if you would make an early investigation and see that this condition is corrected and also acknowledge receipt of this letter.

Yours very truly,

EBSARY GYPSUM COMPANY INC.,

GEORGE N. LENCI,
Vice President.

GNL:R

11321 *Government's Exhibit No. 521*

AUGUST 30, 1938.

UNITED STATES GYPSUM COMPANY,
300 West Adams Street,
Chicago, Illinois.

GENTLEMEN:

We would appreciate it very much if you would let us have a reply to our letter of July 22nd in which we inquired about the jobbing arrangement made by the Certainteed Products Company with the Building Material Wholesalers Inc., of Charlestown, Mass.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.,
GEORGE N. LENCI,
Vice President.

GNL:R

11322 *Government's Exhibit No. 522*

SEPTEMBER 15, 1938.

UNITED STATES GYPSUM COMPANY,
300 West Adams Street,
Chicago, Illinois.

GENTLEMEN:

We have not received your reply to our letters of July 22nd and August 30th in which we inquired about the jobbing arrangement made by the Certainteed Products Company with the Building Material Wholesalers Inc., of Charlestown, Mass.

Won't you be good enough to give this your early attention?

Yours very truly,

EBSARY GYPSUM COMPANY INC.,
GEORGE N. LENCI,
Vice President.

GNL:R

11323 *Government's Exhibit No. 523*

CARDIFF GYPSUM COMPANY
The Able Independent
Manufacturers of Quality Plaster since 1895
Fort Dodge - Iowa

JULY 31, 1939.

MR. FRED EBSARY, *President,*
Ebsary Gypsum Company,
52 Vanderbilt Avenue,
New York, New York.

DEAR MR. EBSARY:

From time to time we have considered going into the gypsum roof deck business, especially here in Chicago. U. S. G. and National have a monopoly on this at the present time; Certainteed not being active in it and none of the independents bothering with it. Through our sand and gravel operations here we are in close touch with a number of contractors who do this type of work, and we believe that we could secure a substantial portion of the business if we went after it.

Our difficulty is the lack of the required gypsum board to lay on the purlins. I am wondering whether you manufacture a gypsum board for this purpose, and, if so, whether you would consider shipping it to Chicago and on what basis. There is a bid coming up on August 10th for a roof on one of the city buildings, and even if we cannot get ready to bid this we might make arrangements now so we could go after future work. I shall be glad to hear from you on the subject.

Our business so far this year has been about 20% ahead of last year, and we are maintaining this rate currently. We hope for a pretty decent year. How are things with you?

Please accept my best personal regards. I may be in New York shortly, and, if so, I shall stop in to see you.

Yours cordially,

EZRA SENSIBAR,
President.

CARDIFF GYPSUM COMPANY.

ES:K

11324 *Government's Exhibit No. 524*

AUGUST 3, 1939

CARDIFF GYPSUM COMPANY
Fort Dodge, Iowa

Attention of Mr. Ezra Sensibar, Pres.

GENTLEMEN:

Mr. Ebsary has received your letter of July 31st and handed it over to me to reply as to the prices on Board.

It is our understanding that the price of 3/8" Wall Board is $23.55 and 1/2" Wall Board $25.75 to Dealers FOB cars Chicago, and we could sell you our 3/8" Wall Board in carload lots at $20.68 and 1/2" Wall Board at $22.78 FOB cars Chicago. This Board would be in the 32" or 48" widths and in any length from 4 to 12 feet in even feet. It will be our regular Wall Board with the cream paper on face and grey on back.

If you can use 32"x48" Plaster Board with a round edge and grey paper on both sides the prices on the 3/8" to Dealers in Chicago is $15.55, and for the 1/2" $17.00, and on this we could quote you $14.42 for the 3/8" and $15.95 for the 1/2" in carload lots FOB Chicago.

We will be very glad to have you give this your consideration and we could make prompt shipments of any orders you place with us.

We note what you say about business conditions and they are running about the same here with us in the East, except that competition is very keen and Plaster prices very low all along the Atlantic Seaboard.

With very kindest regards, beg to remain

Yours very truly,

EBSARY GYPSUM COMPANY, INC

GEORGE N. LENCI,
Vice-President

11325 *Government's Exhibit No. 525*

CARDIFF GYPSUM COMPANY
The Able Independent
Manufacturers of Quality Plaster since 1895

Fort Dodge - Iowa

CHICAGO ILLINOIS, AUGUST 3, 1939

MR. GEORGE N. LENCI,
Ebsary Gypsum Company,
52 Vanderbilt Ave.,
New York, N. Y.

DEAR MR. LENCI:

Mr. Ezra Sensibar has asked me to work on the matter of Wall Board as outlined in your letter of August 3rd.

We have checked over the prices included in your letter, and find that the Wall Board prices are correct, namely $23.55 for 3/8" and $25.75 for 1/2" board. These are dealer prices.

However, the prices you mention on the 32" x 48" board seems to be what is called Liner Board. We will work with the prices you mention and see what can be developed in relation to the roofing business.

In addition to the Wall Board tonnage that this market furnishes, there is considerable volume of rock lath tonnage that we are able to deliver. This applies not only to Chicago and Milwaukee markets, but to points in Illinois, St. Louis Missouri, and Southern Territory.

Rock lath sells here for $13.50 (3/8") and $15.75 (1/2") —all sizes, 16 x 32 or 32 x 48 inches. We wonder if it would be possible for you to supply the necessary rock lath if we went after the business.

As soon as we can get more specific information as to sizes required for the roofing contractors, we will post you. In the meantime, we would appreciate word about the rocklath matter.

Very truly yours,

M. GUTMAN

CARDIFF GYPSUM COMPANY.

11326 *Government's Exhibit No. 526*

AUGUST 10, 1939.

CARDIFF GYPSUM COMPANY,
Box 705,
Fort Dodge, Iowa.

DEAR SIRS:

We have Mr. Gutman's letter and note what you say regarding our quotations in Chicago.

What is known as gypsum lath sells for $13.55 for 3/8" and $15.75 for 1/2" to dealers in Chicago and the sizes are 16x32 and 16x48, the great majority of the business being in the 16x48 size. 32x48" Board is not lath but is classified as liner board and the prices for that are $15.55 for 3/8" and $17.00 for 1/2" to dealers, f.o.b. cars Chicago.

Practically no 1/2" gypsum lath is sold and the best price which we could make to you on the 3/8" lath would be $12.92 f.o.b. cars Chicago.

At the present writing we have no freight rates in this office to points in Illinois, Missouri and the Southwest, but if you will give us a list of specific points at which you want prices I will be very glad to check them up and if the freight absorption is not too great we will quote you. In the meantime we will be very glad to hear from you further regarding the Wall Board for roof construction.

Yours very truly,

EBSARY GYPSUM COMPANY INC.,

GEORGE N. LENCI,
Vice President.

GNL:R

11327 *Government's Exhibit No. 527*

SEPTEMBER 18, 1939

CARDIFF GYPSUM COMPANY,
Box 705,
Fort Dodge, Iowa.

DEAR SIRS:

I am writing to ask if you have had a further opportunity of considering the matter about which we write you on August 10th and September 1st, as we rather thought we would have a letter from you after Mr. Sensibar's visit to New York.

If there is any way that we can cooperate with you in this matter we hope you will let us hear from you.

Very truly yours,

EBSARY GYPSUM COMPANY INC.,

GEORGE N. LENCI,
Vice President.

GBL:R

11328 *Government's Exhibit No. 528*

CARDIFF GYPSUM COMPANY
The Able Independent
Manufacturers of Quality Plaster since 1895

Fort Dodge - Iowa

CHICAGO ILLINOIS, SEPTEMBER 18, 1939

MR. GEORGE N. LENCI,
Ebsary Gypsum Company,
52 Vanderbilt Ave.,
New York, N. Y.

DEAR MR. LENCI:

Mr. Sensibar has discussed his visit with you since my letter of August 3rd, and has asked me to send you a list of some of the points in which we are interested, as to wallboard and gypsum lath. I am attaching this list, with controlling rates.

We have been in touch with a roofing engineer who formerly worked for the USG and who is interested in doing some gypsum-roof work on his own account, and expect to gather some data from him in the next few days. This work involves wallboard, of course, and the tonnage and sizes would be more or less influenced to a particular job.

It has been Mr. Sensibar's suggestion that it is convenient for you, he would like me to come to New York the first of next week to put in a day or two going over the board situation. I would also like to have the opportunity to visit your plant at Wheatland at this time.

Let me know whether you can spare the time, as I know that the Employing Plasterers' Convention is going to be in session commencing next Monday.

Yours very truly,

M. GUTMAN,
CARDIFF GYPSUM COMPANY,
33 N. LaSalle St., Chicago, Ill.

CARDIFF GYPSUM COMPANY
The Able Independent
Manufacturers of Quality Plaster since 1895

Fort Dodge - Iowa

CHICAGO ILLINOIS, SEPTEMBER 18, 1939

Destination Points on 3/8" Gypsum Lath.

Destination	*Controlling Point*	*Rate.*
Chicago Illinois	E. Chicago	55¢ M Switch.
Peoria Ill	" "	17¢
St. Louis Mo.	" "	18¢
Kansas City Mo.	Fort Dodge Ia.	29¢
St. Joseph Mo.	" " "	26¢
Milwaukee Wis.	E. Chicago	13¢
Madison Wis.	" "	15¢
Wausau Wis.	" "	24¢
Wisconsin Rapids Wis.	" "	24¢
Dubuque Ia.	Fort Dodge Ia.	13¢
Indianapolis Ind.	E. Chicago	18¢
Birmingham Ala.	Saltville	36¢
Jackson Miss.	Jax & Sav.	43¢
Shreveport La.	Acme	35¢
New Orleans La.	Jax	43¢
Minneapolis Minn.	Fort Dodge.	25¢
Cincinnati Ohio	Oakfield	26¢

11330 *Government's Exhibit No. 529*

SEPTEMBER 28, 1939

UNITED STATES GYPSUM COMPANY,
300 West Adams Street,
Chicago, Illinois.

DEAR SIRS:

Referring to the Board License agreement, we are writing to ask for your permission for us to sell our board to the Cardiff Gypsum Company as a gypsum manufacturer.

Your early reply will be greatly appreciated.

Very truly yours,

EBSARY GYPSUM COMPANY INC.,

GEORGE N. LENCI,
Vice President.

GNL:R

11331 *Government's Exhibit No. 530*

CARDIFF GYPSUM COMPANY
The Able Independent
Manufacturers of Quality Plaster since 1895

Fort Dodge - Iowa

CHICAGO, ILLINOIS, SEPTEMBER 29, 1939

MR. GEORGE N. LENCI,
Ebsary Gypsum Company,
52 Vanderbilt Ave.,
New York N. Y.

DEAR MR. LENCI:

I had a very fine visit at your plant yesterday and went through the whole lay-out with Mr. Wilbur. You are certainly entitled to a lot of admiration for the way your plant is laid out and for the type of equipment you are using.

We are going to start in right away to line up some board and lath business. In the meantime, we want to stock a car at Fort Dodge Ia., so that our men in the Western territory can fill orders with both board and lath.

Acting on Mr. Winslow's suggestion, we had planned to have you ship the following carload:

50	pieces	4 x 8	(1200 ft)
50	"	4 x 7	(1200 ft)
250	"	4 x 8	(8000 ft)
80	"	4 x 9	(2880 ft)
40	"	4 x 10	(1600 ft)
Plain lath		16 x 48	12000 ft
Perforated lath		"	3000 ft

When you ship to the mill you will naturally use your own bill of lading. I am sending Mr. Winslow a letter authorizing him to sign as our agent on bills of lading to points of destination other than Fort Dodge, and will furnish our bills of lading.

We learn from Mr. Henley that there is no restriction at Fort Dodge on truck pick-ups as to minimum requirements, although there is the usual price mark-up of $1.00 per M ft.

11332 Will you kindly arrange with your billing department to send a copy of all invoices to this office, as well as the original which will go to Fort Dodge.

As soon as you have checked the figures which we went over, will you send me a complete sheet of the delivered prices, amount of discount, and actual discount based upon your average weight agreement. Then, as we add different points of destination we can keep identical diuplicate sheets.

We are sending you some rate schedules and supplements in accordance with our arrangement.

Mr. Sensibar sends his regards to both you and Mr. Ebsary.

Very truly yours,

M. GUTMAN,
CARDIFF GYPSUM COMPANY
33 N. LaSalle St., Chicago Ill.

11333 *Government's Exhibit No. 531*

OCTOBER 3, 1939.

SERIAL

UNITED STATES GYPSUM COMPANY
300 West Adams Street
Chicago, Illinois.

Please let us have prompt reply our letter september twenty eighth regarding Cardiff.

EBSARY GYPSUM COMPANY INC.

11334 *Government's Exhibit No. 532*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 3, 1939

EBSARY GYPSUM COMPANY
52 Vanderbilt Avenue
New York, N. Y.

Attention: Mr. George N. Lenci, Vice-President

GENTLEMEN:

Only yesterday I received your letter of September 28. I have not yet had opportunity to discuss your request with our people but will do so as soon as possible and advise you.

Yours very truly,

UNITED STATES GYPSUM COMPANY

SFB-hs By S. F. BARTLETT

11335 *Government's Exhibit No. 533*

OCTOBER 7, 1939

SALES DEPARTMENT:

We have secured a credit report on the Cardiff Gypsum Company, Fort Dodge, Iowa.

This concern refuses to furnish a financial statement and an involuntary petition in bankruptcy was filed under the Trade reports slow to 60 days. On October 6, 1934 Section 77-B and the present business represents a reorganization which took place in July 1935.

In the absence of any more detailed information we believe it advisable to extend credit for one car only.

F. W. ALLEN
Secretary

11336 *Government's Exhibit No. 534*

OCTOBER 11, 1939.

SERIAL

UNITED STATES GYPSUM COMPANY
300 WEST ADAMS STREET
CHICAGO, ILLINOIS.

MUST HAVE PROMPT REPLY OUR REQUEST CARDIFF GYPSUM COMPANY.

EBSARY GYPSUM COMPANY INC.

11337 *Government's Exhibit No. 535*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 12, 1939

EBSARY GYPSUM COMPANY, INC.
52 Vanderbilt Avenue,
New York, New York

DEAR SIRS:

Referring to your telegram of the 11th, the matter is having our consideration and we expect to reply within a few days.

Yours very truly,

UNITED STATES GYPSUM COMPANY

S. F. BARTLETT,
Director of Trade Extension

SFB:s

11338 *Government's Exhibit No. 536*

OCTOBER 13, 1939.

AIR MAIL.

CARDIFF GYPSUM COMPANY,
33 North LaSalle Street,
Chicago, Illinois.

Att: M. M. Gutman.

DEAR SIR:

Referring to telephone conversation we are writing you today as promised.

We did not hear anything further from the United States Gypsum Company regarding permission to ship you under the Board License Agreement and we have therefore wired them again insisting on a prompt reply.

We hope to have something definite from them not later than Monday when we will again communicate with you. We are very sorry for this delay.

Yours very truly,

EBSARY GYPSUM COMPANY INC.,
GEORGE N. LENCI,
Vice President.

11339 *Government's Exhibit No. 537*

CARDIFF GYPSUM COMPANY
THE ABLE INDEPENDENT
Manufacturers of Quality Plaster since 1895

FORT DODGE - IOWA

CHICAGO ILLINOIS, OCTOBER 14, 1939

MR. GEORGE N. LENCI,
Ebsary Gypsum Company,
52 Vanderbilt Ave.,
New York N. Y.

DEAR MR. LENCI:

We have your letter of October 13th and hope that by Monday you will be able to start shipments of board and plaster.

On the strength of our arrangement I secured the following order for gypsum lath which is to be shipped immediately:

30,000 ft gypsum lath, plain. Destination Wilmette Illinois at yard of Evanston Fuel & Material Company. Stopover at Highland Park Ill., at yard of Paul Borchardt. C & N. W. delivery at both points.

This is a split car, so it will be necessary to brace the loading so that the first stop can take out his half of the car. I am assuming that this can be arranged.

Please notify me as soon as convenient when this shipment will leave.

Enclosed please find freight rate supplements.

With regards,

Very truly yours,

M. GUTMAN

CARDIFF GYPSUM COMPANY
33 N. LaSalle St., Chicago Ill.

CC Fort Dodge

11340 *Government's Exhibit No. 538*

OCTOBER 16, 1939.

MR. S. F. BARTLETT:
United States Gypsum Co.,
300 West Adams Street,
Chicago, Illinois.

MY DEAR MR. BARTLETT:

I have your letter of October 12th regarding our request for permission under the Board License Agreement, to make shipments to the Cardiff Gypsum Company as a gypsum manufacturer.

Our first request to you was under date of September 28th and we wired you on October 3rd and October 11th and the only word we have gotten from you is, that the matter is having your consideration.

We really feel that plenty of time has elapsed for you to reach a decision in this matter and we must ask that you write us one way or the other by return mail.

Yours very truly,

EBSARY GYPSUM COMPANY INC.,

GEORGE N. LENCI,
Vice President.

11341 *Government's Exhibit No. 539*

OCTOBER 16, 1939.

AIR MAIL

CARDIFF GYPSUM COMPANY,
33 N. LaSalle Street,
Chicago, Illinois.

Att: Mr. M. Gutman.

DEAR SIRS:

We have your letter of October 14th and we are also in receipt of a letter from the United States Gypsum Company advising that they are now giving this matter of approval their consideration and that they will let us hear from them in a few days. This letter was dated October 12th so we certainly should hear from them on Wednesday at the latest.

I am writing them again to hurry this matter through, and in the meantime, I believe we had better hold up any shipments until we hear further from them and I will write you again on Wednesday.

Yours very truly,

EBSARY GYPSUM COMPANY INC.,

GEORGE N. LENCI,
Vice President.

11342 *Government's Exhibit No. 540*

CARDIFF GYPSUM COMPANY
THE ABLE INDEPENDENT
Manufacturers of Quality Plaster since 1895

FORT DODGE - IOWA

CHICAGO ILLINOIS, OCTOBER 17, 1939

MR. GEORGE N. LENCI,
Ebsary Gypsum Company,
52 Vanderbilt Ave.,
New York N. Y.

DEAR MR. LENCI:

Thank you for your prompt reply to my letter of October 14th. We note that you are still waiting for a reply from the United States Gypsum Company.

Frankly it appears to us that they are stalling, as they indicated in previous exchange of correspondence with you that the reply to your request would be forthcoming at least a week to ten days ago. It is certain that you have been conscientious as to your obligation under the terms of your contract, and are entitled to a definite answer without any further delay upon their part.

We are in a rather embarrassing spot in this matter as we have notified our salesmen to take orders for lath and board and the particular order which was mailed to you on Saturday is urgent.

May we suggest that if no definite reply is received from the licensor by Wednesday you ship the Highland Park and Evanston order under your own billing. You can also ship the Fort Dodge car on the retail basis and we can discuss the matter of commission allowance when the issue in question has been settled.

Yours very truly,

M. GUTMAN
CARDIFF GYPSUM COMPANY
33 N. LaSalle St., Chicago Ill.

OCTOBER 21, 1939.

CARDIFF GYPSUM COMPANY,
33 N. LaSalle Street,
Chicago, Illinois.

Att: Mr. M. Gutman.

DEAR SIR:

Referring to your letter of October 17th, we have still not received permission under the License Agreement to make sales of board to you as a gypsum manufacturer.

Mr. Bartlett was in New York this Thursday and he promised to take it up just as soon as he returned to Chicago, so we should hear something from the U S G Company the first of the week.

We are very sorry indeed for the delay in this matter but we would much prefer to hear definitely from them before we make any shipments and we would also prefer not to make direct sales to your customers as suggested, until this matter is straightened.

Yours very truly,

EBSARY GYPSUM COMPANY INC.,

GEORGE N. LENCI,
Vice President.

11344 *Government's Exhibit No. 542*

NA 62 16-Z Chicago Ill 1245P Oct 21 1939

EBSARY GYPSUM COMPANY INC=
52 VANDERBILT AVE=

REFERRING YOUR SEPTEMBER TWENTY NINE AND SUBSEQUENT WIRES WE HAVE CONCLUDED NOT TO GIVE OUR CONSENT=

UNITED STATES GYPSUM COMPANY.

11345 *Government's Exhibit No. 543*

OCTOBER 25, 1939.

STRAIGHT TELEGRAM
CARDIFF GYPSUM COMPANY
33 N. LASALLE STREET
CHICAGO, ILLINOIS.

LICENSOR HAS TELEGRAPHED THAT THEY WILL NOT GIVE CONSENT FOR US TO SELL BOARD TO YOU WE REGRET THIS AND IF ANYTHING FURTHER DEVELOPS WILL ADVISE YOU.

EBSARY GYPSUM COMPANY INC.

11346 *Government's Exhibit No. 544*

1935 NOV 8 AM 10 05

CAL74 13=ZG NEWYORK NY 8 1043A

UNITED STATES GYPSUM CO=
300 WEST ADAMS ST=

WIRE IMMEDIATELY PERMISSION TO SELL LICENSED BOARD TO AMERICAN CYANAMID AT MANUFACTURERS DISCOUNT=

EBSARY GYPSUM CO INC.

11347 *Government's Exhibit No. 545.*

Confirmation of Telegram United States Gypsum Co.

NOVEMBER 8, 1935.

EBSARY GYPSUM COMPANY
52 VANDERBILT AVE
NEW YORK CITY

UNTIL NOTIFIED TO CONTRARY YOU HAVE OUR CONSENT TO SELL PATENTED GYPSUM WALLBOARD AND OR PLASTERBOARD EMBODYING CLAIMS AND INVENTIONS OF OUR PATENTS TO AMERICAN CYANAMID AT FOLLOWING MAXIMUM DISCOUNT FROM FOB MILL PRICES LISTED IN BOARD LICENSE BULLETIN NUMBER ONE VIZ WALLBOARD FIFTEEN PERCENT AND PLASTERBOARD TWELVE AND ONE HALF PERCENT

UNITED STATES GYPSUM COMPANY
C F HENNING VICE PRESIDENT

11348 *Government's Exhibit No. 546*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

NOVEMBER 8, 1935.

EBSARY GYPSUM COMPANY
52 Vanderbilt Avenue
New York City.

DEAR SIRS:

Confirming our telegram of November 8, this is to advise you that until you are notified to the contrary you have our consent to sell patented gypsum wallboard and/or plasterboard embodying the claims and inventions of our patents to the American Cyanamid Company, New York, New York, at the following maximum discount from f.o.b. mill prices listed in Board License Bulletin No. 1.

Wallboard	15%
Plasterboard	12½%

Royalty on all such sales shall, of course, be based upon your regular sale price to your regular dealer trade at the time of such sale and invoice, as is provided by our license agreement with you.

Very truly yours,

UNITED STATES GYPSUM COMPANY

C. HENNING.
Vice President.

11349 *Government's Exhibit No. 547*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

20th AUGUST 1934

MR G N LENCI, *Secretary*
Ebsary Gypsum Company
52 Vanderbilt Avenue
New York, New York

DEAR MR LENCI:

At the board license meeting May 23d 1934 we presented you with a contract for the reflective backing of plasterboard and wallboard.

It was the intention to license all of our board licensees, and to date we have received nothing from you in regard to your position on this matter.

Please give me your comments or criticism.

Very truly yours,

C. HENNING,
Vice President

11350 *Government's Exhibit No. 548*

NATIONAL GYPSUM COMPANY
General Offices—Gold Bond Products
Buffalo, New York

APRIL 1, 1935

MR. GEORGE N. LENCI
Ebsary Gypsum Company, Inc.
52 Vanderbilt Ave.
New York City

DEAR GEORGE:—

Attached is copy of letter I wrote Mr. Diegel on March 18th.

Have you been able to discuss this with Fred yet or have you organized to sign the foil license? Would like to see this detail disposed of so we can sell you on the right basis.

Yours very truly,

NATIONAL GYPSUM COMPANY
R F B
Vice President

RFBurley/B

11351 MARCH 18, 1935

MR. DIEGEL
Ebsary Gypsum Co. Inc.
52 Vanderbilt Ave.
New York City

DEAR MR. DIEGEL:—

Confirming our phone conversation, I find that we are not privileged to sell you foil lath at the 12½% discount until Mr. Ebsary signs the foil license. It is my understanding that everyone else has signed and if you can cover this detail promptly, we will then be all organized to handle your foil business in the future at the discount specified.

To avoid any complication with the license set-up. I will have to bill your current order of 5.024' at the current dealer price without any discount and am handling on this basis.

I took occasion to phone you on this as I didn't want to convey the impression that we were holding back on this foil program. As Mr. Baker told George, we will be glad to manufacture for you and act as your source of supply until such time as you are in production yourself, but you will have to first go through the red tape of signing the license.

Kindest regards.

Yours very truly,

RFBurley/B *Vice President*

P. S. I gathered from Winslow's call that the 5,000 feet was for delivery in the trucking area around Buffalo and wired him as attached so we would save him the trucking costs if he wanted us to truck direct to the dealer.

R. F. B.

11352 *Government's Exhibit No. 549*

DECEMBER 28, 1934.

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO—ILLINOIS

MR. GEO. N. LENCI, *Secretary*
Ebsary Gypsum Company
52 Vanderbilt Avenue
New York City.

DEAR MR. LENCI:

For your information we are enclosing the following lists pertaining to your license contract with the United States Gypsum Company covering patented gypsum wallboard and gypsum plasterboard.

a. Classes of violations disclosed by the last audits of the licensees' records.

b. Classes of violations reported recently to the Board Survey Company.

You are requested to study this data from the standpoint of the possible effect of changing conditions upon policies under the licenses. Your suggestions relative to marketing policies which may be necessary to meet these new conditions will be welcomed.

Yours truly,

BOARD SUEVEY COMPANY

E. W. CAREY
Executive Secretary.

11353 Summary of Violations * * * Per Last Audit of Board Licenses

Absorption of s/O charges (In states not authorized)

Stopover point priced same as carload to that destination (before 7/5/32)

Emergency charge not included in price

Used incorrect freight rate

Light cars priced at full car rate, also small cars priced at large car rate

Failure to add differential for truck deliveries and pickups

Delivery by truck outside authorized trucking area (priced at C/L delivered price)

Less than minimum truckload as specified by licensor

Billed f.o.b. mill instead of f.o.b. delivered

32"x48" board priced as lath in wallboard area

Defective, obsolete or damaged board sold at less than minimum price

Commission allowance to jobbers after jobbers were placed in dealer price classification

Policy and advertising allowance

Absorption of switching charges

Cutstock priced below minimum

Allowance of reduced price on shipments prior to price reduction 6/1/31

Sale to gypsum manufacturer at greater allowance than authorized

Miscellaneous price violations

11354 Summary of Classes of Recent Reported Violations

Quoting and Selling Below Authorized Price.

Selling 32"x48" Wallboard as Plasterboard.

Price Concession on Other Material in Connection with Board Sales.

Splitting Commissions by Salesmen

Jobbers and Distributors Allowances.

Paying Commissions to a Dealer on Another's Purchases.

Absorbing Stopover Charges.

Delivery of l.c.l. Quantities by Truck at Carload Prices.

Delivery or Pickup of Less Than Minimum Truckload.

11355 *Government's Exhibit No. 550.*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO—ILLINOIS

DECEMBER 28, 1934.

MR. ARTHUR R. BLACK
General Sales Manager
American Gypsum Company
Port Clinton, Ohio.

DEAR MR. BLACK:

For your information we are enclosing the following lists pertaining to your license contract with the United States Gypsum Company covering patented gypsum wallboard and gypsum plasterboard.

a. Classes of violations disclosed by the last audits of the licensees' records.

b. Classes of violations reported recently to the Board Survey Company.

You are requested to study this data from the standpoint of the possible effect of changing conditions upon policies under the licenses. Your suggestions relative to marketing policies which may be necessary to meet these new conditions will be welcomed.

Yours very truly,

BOARD SURVEY COMPANY

E. W. CAREY
Executive Secretary.

11356 Summary of Classes of Recent Reported Violations

Quoting and Selling Below Authorized Price.
Selling 32"x48" Wallboard as Plasterboard.
Price Concession on Other Material in Connection with Board Sales.
Splitting Commissions by Salesmen.
Jobbers and Distributors Allowances.
Paying Commissions to a Dealer on Another's Purchases.
Absorbing Stopover Charges.
Delivery of l.c.l. Quantities by Truck at Carload Prices.
Delivery or Pickup of Less Than Minimum Truckload.

11357 Summary of Violations * * * Per Last Audit Of Board Licenses

Absorption of s/O charges (In states not authorized)
Stopover point priced same as carload to that destination (before 7/5/32)
Emergency charge not included in price
Used incorrect freight rate
Light cars priced at full car rate, also small cars priced at large car rate
Failure to add differential for truck deliveries and pickups
Delivery by truck outside authorized trucking area (priced at C/L delivered price)
Less than minimum truckload as specified by licensor
Billed f.o.b. mill instead of f.o.b. delivered
32"x48" board priced as lath in wallboard area
Defective, obsolete or damaged board sold at less than minimum price
Commission allowance to jobbers after jobbers were placed in dealer price classification
Policy and advertising allowance
Absorption of switching charges
Cutstock priced below minimum
Allowance of reduced price on shipments prior to price reduction 6/1/31
Sale to gypsum manufacturer at greater allowance than authorized
Miscellaneous price violations

11358 *Government's Exhibit No. 553*

DECEMBER 31, 1934.

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO—ILLINOIS

MR. GEO. N. LENCI, *Secretary*
Ebsary Gypsum Company
52 Vanderbilt Avenue
New York City.

DEAR MR. LENCI:

Re: 32"x48" Patented Gypsum Board.

Referring to your license contract authorizing you to manufacture and sell gypsum wallboard and gypsum plasterboard embodying the claims and inventions of the patents of the licensor thereunder, we would appreciate an expression from you as to whether or not, in your opinion, there would be any advantage from a merchandising standpoint in revising the present minimum price to you as licensee on your sale of 32"x48" patented gypsum board manufactured and sold by you under the above mentioned license agreement.

The licensor is giving consideration to this particular matter, and it would be of assistance to the licensor in making its decision with respect thereto if it could have the benefit of your views on this subject.

Your prompt reply will be appreciated.

Yours very truly,

BOARD SURVEY COMPANY

E. W. CAREY
Executive Secretary.

Government's Exhibit No. 554

DECEMBER 31, 1934.

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO—ILLINOIS

MR. ARTHUR R. BLACK
General Sales Manager
American Gypsum Company
Port Clinton, Ohio.

DEAR M. BLACK:

Re: 32"x48" Patented Gypsum Board.

Referring to your license contract authorizing you to manufacture and sell gypsum wallboard and gypsum plasterboard embodying the claims and inventions of the patents of the licensor thereunder, we would appreciate an expression from you as to whether or not, in your opinion, there would be any advantage from a merchandising standpoint in revising the present minimum price to you as licensee on your sale of 32"x48" patented gypsum board manufactured and sold by you under the above mentioned license agreement.

The licensor is giving consideration to this particular matter, and it would be of assistance to the licensor in making its decision with respect thereto if it could have the benefit of your views on this subject.

Your prompt reply will be appreciated.

Yours very truly,

BOARD SURVEY COMPANY

E. W. CAREY
Executive Secretary.

11360 *Government's Exhibit No. 555*

DECEMBER 31, 1934.

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO—ILLINOIS

MR. GEO. N. LENCI, *Secretary*
Ebsary Gypsum Company
52 Vanderbilt Avenue
New York City.

DEAR MR. LENCI:

Re: Dunnage.

In order to protect its rights as owner of the patents involved in your license contract authorizing you to manufacture and sell gypsum wallboard and gypsum plasterboard embodying the claims and inventions of the licensor's patents, the licensor has been giving further consideration to the matter of license violations through sale of patented board at less than the minimum price effected by means of using such board for dunnage.

In the opinion of the Board Survey Company, the dunnage problem might be in large part met by adoption of one or more of the following requirements with respect to dunnage:

1. Restrict size—
   Maximum size as dunnage—24"x24"
   Sluter strips—not over 8" wide.
   All dunnage to be stamped on both sides—
   "Dunnage—Not to be Sold".
2. Scratch paper on both sides.
3. Use size or other treatment to destroy usefulness of board for plastering or painting.
4. Eliminate use of patented board in New York metropolitan area as dunnage.

We would appreciate your giving this problem consideration in order that we may have your views of the above suggestions, or any others as a means of preventing license violations in this regard.

Yours truly,

BOARD SURVEY COMPANY

E. W. CAREY
Executive Secretary.

11361 *Government's Exhibit No. 556*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO—ILLINOIS

DECEMBER 31, 1934.

MR. ARTHUR R. BLACK
General Sales Manager
American Gypsum Company
Port Clinton, Ohio.

DEAR MR. BLACK:

Re: Dunnage.

In order to protect its rights as owner of the patents involved in your license contract authorizing you to manufacture and sell gypsum wallboard and gypsum plasterboard embodying the claims and inventions of the licensor's patents, the licensor has been giving further consideration to the matter of license violations through sale of patented board at less than the minimum price effected by means of using such board for dunnage.

In the opinion of the Board Survey Company, the dunnage problem might be in large part met by adoption of one or more of the following requirements with respect to dunnage:

1. Restrict size—
   Maximum size as dunnage—24"x24"
   Sluter strips—not over 8" wide.
   All dunnage to be stamped on both sides—
   "Dunnage—Not to be Sold".
2. Scratch paper on both sides.
3. Use size or other treatment to destroy usefulness of board for plastering or painting.
4. Eliminate use of patented board in New York metropolitan area as dunnage.

We would appreciate your giving this problem consideration in order that we may have your views of the above suggestions, or any others as a means of preventing license violations in this regard.

Yours truly,

BOARD SURVEY COMPANY

E. W. CAREY
Executive Secretary.

11362 *Government's Exhibit No. 558*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO—ILLINOIS

MAY 10, 1935

MR. GEO. N. LENCI, *Secretary*
Ebsary Gypsum Company
52 Vanderbilt Avenue
New York City.

DEAR MR. LENCI:

In order to protect its rights as owner of the patents involved in your license contract authorizing you to manufacture and sell gypsum wallboard and gypsum plasterboard embodying the claims and inventions of the licensor's patents, the licensor has been giving consideration to the matter of license violations through the sale of patented board at less than the established minimum price effected by means of advertising allowances, painting dealers' signs, donations of patented gypsum board for dealers' offices, donations of carpenters' aprons or the sale of such below cost, and concessions of a like nature.

We would appreciate a statement of your policies in this regard to assist the licensor in its further study of this problem.

Yours truly,

BOARD SURVEY COMPANY

Signed—E. W. CAREY
Executive Secretary

11363 *Government's Exhibit No. 562*

EBSARY GYPSUM COMPANY, INC.
135th St. & Mott Haven Canal
103 Park Avenue
NEW YORK

JULY 31ST, 1929

THE PARAGON PLASTER CO.,
Syracuse, N. Y.

GENTLEMEN:

Referring to your letter of July 27th we can make you the following proposition on Ebsary Wall Board and Plasterboard.

In order to put you in a position to ship mixed cars of plaster and board from your plant at Oakfield we quote price of $22.50 per 1000 sq. ft. of Wallboard and $15.50 per 1000 sq. ft. of plasterboard F.O.B. cars Wheatland with freight allowed to Oakfield, and less a manufacturers discount of 10% on $22.50 and $15.00 respectively.

For shipments on your account to dealers outside of your city we quote you $22.50 and $15.00 respectively F.O.B. cars Wheatland plus freight and subject to the same discount as above.

For shipments to you at Syracuse $24.64 and $17.14 respectively less the same discounts. These prices are with freight allowed to Syracuse.

All of the above prices are subject to immediate acceptance only and we trust they will be of interest to you.

With the prevailing low prices for gypsum blocks we cannot do better than our regular dealers prices based on 3¢ for 3" and 4¢ for 4" hollow F.O.B. cars Wheatland.

I would be very glad to hear from you as soon as you have had an opportunity to consider this proposal.

Very truly yours,

EBSARY GYPSUM COMPANY, INC.

By GEORGE N. LENCI

George N. Lenci
Vice President

GNL:SF

11364 *Government's Exhibit No. 571*

Letter to Copy to
E. L. Merriman
T. P. Eldred
Emil Hansen
H. W. Olmsted

728 Broad St.,
Utica, N. Y.

DEC. 1ST, 1933.

Kelley Plasterboard Co. Inc.,
Att. Mr. S. J. Kelley, President,
Delawanna, N. J.

GENTLEMEN:

The contract dated Nov. 23rd, 1932, under which you have purchased Stucco of us and we have purchased Wall Board, Plaster Board, and Gypsum Lath, expired on Nov. 30th, 1933.

Since the operation of your company and ours under this contract seems to have been mutually satisfactory, as indicated at our conference in New York Nov. 23rd, 1933, we herein desire to confirm in writing the understanding for renewing this contract arrived at at this Nov. 23rd, 1933 conference.

From Dec. 1st, 1933, to Dec. 1st, 1938, we will furnish you and you will furnish us, the following mentioned products, under prices, terms, and conditions as herein outlined.

Stucco

For the first 2000 tons Stucco purchased by you	$5.00	per ton
For the next 1500 tons Stucco purchased by you	4.50	" "
For the next 1000 tons Stucco purchased by you	4.25	" "
For any additional tonnage Stucco purchased by you	4.00	" "

The prices above quoted on Stucco are f.o.b. Cars our mill at Oakfield, New York, and are based upon shipment in full carload lots, in cloth bags furnished by us. The cloth bags to be charged extra at five (5¢) cents each, and the same amount credited to you when they are returned to us in usable condition.

Neat Plaster—For shipment to your Delawanna N. J. Plant.:

If you desire to purchase our Neat Plaster for shipment to your Delawanna, N. J. Plant, while this contract is in force you may do so at a price of $5.50 per ton, in carload lots, f.o.b. Oakfield, N. Y.

Neat Plaster—For direct shipment to your trade:

If, and when, you desire to purchase our Neat Plaster for shipment to other points of destination than Delawanna, N. J., our price to you on same will be $3.00 per ton, in carload lots, f.o.b. Cars Oakfield, N. Y., less than the established Gypsum Industry price for Neat Plaster in
11365 carload lots, but in no instance shall this price net us less than $5.00 per ton, Net, exclusive of bags, f.o.b. Cars Oakfield.

All paper bags for Neat Plaster are to be furnished by you, delivered Oakfield, N. Y., and to bear your own trade name and Company name.

Note: In the event of an advance in the present delivered price of Neat Plaster in the Metropolitan, N. Y. and Northern New Jersey Areas, fifty percent of such advance shall be added to the Oakfield mill price on Neat Plaster for shipments to Delawanna.

Terms: 2% each discount, based upon f.o.b. Car prices at Oakfield, N. Y., same to be allowed for payment of invoices by the 10th of the following month, or 30 days net.

If, at any time, the financial responsibility of either your Company or ours becomes impaired or unsatisfactory to either buyer or seller, it is mutually agreed your Company or ours has the right to require payments in advance, or satisfactory security or guarantee that invoices will be paid when due.

Labor

The prices quoted herein are based upon present labor, coal, and explosives costs to us, which are as follows:

Mine Department

Miners, Helpers and Muckers	$.38	per ton
Propman, Trackman, Pumpman, Motorman & Repair men	.50	" hour
Cager and Hoist Operator	.55	" "
Motorman Helper, Repairman Helper & General Mine Labor	.45	" "

Mill Department

General Labor, Millwright Helper & Watchman	.40	per hour
Carpenter & Truck Driver	.45	" "
Tube Mill Operator and Electrician	.50	" "
Calciner Operator and Millwright	.55	" "
Blacksmith and Crusherman	.65	" "
Machinist	.60	" "

Mixing Department

Tacking Cost—piece work—Stucco	18½	per ton
Tacking Cost—piece work—Neat, etc.	21½¢	" "
Coal	$ 3.92	per Net ton, F.O.B. Oakfield, N. Y.
Explosives	10.50	per Cwt. ton, F.O.B. Oakfield, N. Y.

11366 Should the costs on these items of manufacture be increased or decreased, it is mutually agreed, we will advance or decrease our prices to you on any material we are selling you by the same ratio that the above manufacturing items are increased or decreased. This adjustment to be made not more often than every thirty (30) days, and you are to have access to our payroll account to verify any figures in this connection.

Reciprocal Transactions:

This contract is based upon the mutual understanding that during the life of it, you are to furnish us Wall Board, Plaster Board, and Gypsum Lath of a satisfactory quality, at the established market price to dealers, less Calciner's discount on Wall Board of fifteen percent, and less Calciner's discount on Plaster Board and Gypsum Lath of twelve and one-half percent. This discount to be based on the per thousand feet price, f.o.b. Cars Oakfield, N. Y. The freight from Delawanna, N. J. to our plant at Oakfield, N. Y. to be absorbed by you.

Terms: A cash discount of 2% on the net amount of the invoice, after deducting freight, will be allowed for payment of invoices by the 10th of the following month—net 30 days.

Duration of Contract:

It is mutually agreed that the contract shall be for a period of five years, beginning Dec. 1st, 1933, but may be cancelled by either party at the end of any year during the said period, by either party giving to the other party hereto, three months' written notice, prior to Dec. 1st of any year while contract is in force, of its intention to cancel the same. Said written notice to be given by mail at the last known address of the party, and this contract will not bind or inure to the benefit of any person, co-partnership or corporation other than the parties hereto and shall not bind or inure to the benefit of the heirs, successors, or assigns of either party to this contract.

11367 This contract is prepared in duplicate. We have signed the original copy, and if you will sign in the blank space provided, we shall consider the contract immediately in force.

Yours very truly,

OAKFIELD GYPSUM PRODUCTS CORPORATION

T. P. ELDRED
Treasurer.

TPE/W

Accepted by Kelley Plasterboard Co. Inc.
Per Signed by S. J. Kelley, Pres.
Date Dec. 1st, 1933.

11368 *Government's Exhibit No. 572*

CHICAGO 8/25/33

AMERICAN GYPSUM CO.
Port Clinton, Ohio.

Can come tomorrow to negotiate deal have you secured authority

EZRA SENSIBAR

Dea 3200
Room 1508
33 N. LA SALLE ST.

11369 *Government's Exhibit No. 573*

1933 AUG 25 PM 3 13

DW B 37 8 11 XC=PORTCLINTON OHIO 25 406P

EZRA SENSIBAR
CHICAGO

MR. BLACK OUT OF TOWN CAN YOU COME MONDAY OR TUESDAY

AMERICAN GYPSUM CO.

11370 *Government's Exhibit No. 574*

THE AMERICAN GYPSUM COMPANY
GYPSUM PRODUCTS
General Offices and Mills
PORT CLINTON, OHIO.

SEPT. 21, 1933

MR. EZRA SENSIBAR, *Vice Pres.*
Cardiff Gypsum Plaster Co.
33 North LaSalle Street, Room 1508
Chicago, Illinois

DEAR MR. SENSIBAR:

There is certainly an apology due you from me for not replying sooner to your telegram received some time ago and your later favor of the 8th inst.

It has, however, been necessary for me to be away from my office almost constantly, so that my correspondence has been sadly neglected. As you probably know, we returned to Chicago on the 11th and again spent three days on the code, finally adopting the automobile code with the terms changed to suit our particular industry.

Because of all this extra work, and also because of the situation, there has not been an opportunity for me to approach the licensor regarding the matter we have in mind, but I expect to do so within the very near future and shall then immediately get in touch with you.

If, in the meantime, you are in this community, I shall, of course, be very glad to see you.

With kindest regards,

Sincerely yours,

THE AMERICAN GYPSUM CO.

ARTHUR R. BLACK
General Sales Manager

ARB:IW

11371 *Government's Exhibit No. 575*

CHICAGO 10/3/33

AMERICAN GYPSUM CO.
Port Clinton, Ohio.

What is your decision

EZRA SENSIBAR
ROOM 1508
33 N. LASALLE

11372 *Government's Exhibit No. 576*

CARDIFF GYPSUM PLASTER COMPANY
Manufacturers of Gypsum Products Since 1895
FORT DODGE, IOWA

FEBRUARY 1, 1936

MR. ARTHUR BLACK, *Sales Manager,*
American Gypsum Company,
Port Clinton, Ohio.

DEAR MR. BLACK:—

The Montague Mill Work Company, Richmond, Virginia, has asked us for a quotation on a carload of gypsum wall board. We have given them your name, and we suggest that you communicate with them.

I have not heard from you since our pleasant visit at Port Clinton sometime ago. I trust that your investigation has since disclosed that we did not sell the Severin job in Indianapolis at a price below that made by our competitors; that the transaction was handled in the method customary in the industry and approved by yourself and others. If such be the case, I hope that you can now see your way clear to consummate the board arrangements that we talked about and that the Licensor and others will now raise no objection. They need have no fear that we would sell plaster below the price established by them in order to move the board. We have a certain sales expense and we want to spread it over a larger gross volume of business. One way to do that is to have the same salesman sell board along with our plaster.

Please let us hear from you definitely in the very near future.

Yours very truly,

CARDIFF GYPSUM COMPANY

By; EZRA SENSIBAR
President.

ES:G

11373 *Government's Exhibit No. 577*

FEBRUARY 10, 1936

MR. EZRA SENSIBAR, *President*
Cardiff Gypsum Plaster Company
Fort Dodge, Iowa

DEAR MR. SENSIBAR:

Kindly pardon the delay, which was occasioned by my absence, in replying to your favor of the 1st inst.

As you may possibly know, Mr. John A. Kling, the chairman of our Board, was buried the day you wrote your letter, he having been shot three days previously by his chauffer.

Many thanks for referring the Montague Mill Work Company of Richmond, Virginia, to us, and we will communicate with them at once.

Our Indianapolis representative was at the office last Friday, and I mentioned to him the Indianapolis job, and while he did not have positive information regarding the price, he made the statement that he would not be surprised if your price was not below the market and your transaction was regular in every respect. I did not talk with him very much about it as I consider it water over the dam.

Mr. Charles Henning of the United States Gypsum Company has been away on a vacation, but I hope to have the pleasure of talking with him in the near future and shall be pleased to bring up the matter of our selling you wall board.

It was very nice of you and Mrs. Sensibar to stop and see us, and we enjoyed your visit very much. Please repeat the occasion in the very near future. The "Boss" at our home joins me in sending kindest regards to both of you.

Sincerely yours,

ARB:IW

11374 *Government's Exhibit No. 578*

NATIONAL GYPSUM COMPANY
General Offices
BUFFALO, N. Y.

OCTOBER 24, 1938

MR. EZRA SENSIBAR
Cardiff Gypsum Co.
Box 705
Fort Dodge, Iowa

DEAR MR. SENSIBAR:

I have your very nice letter of October 22nd.

Since you were in Buffalo we have had an opportunity to canvass the prospects for selling you board and because of our limited capacity at Fort Dodge I think it would be a mistake for us to start with you. Any substantial upturn in building will consume our capacity out there and then you would be right back in the same position as now.

With kind personal regards.

Very truly yours,

M. H. BAKER
President

MP

11375 *Government's Exhibit No. 584*

CHICAGO, ILLINOIS, OCTOBER 4, 1939

MR. GEORGE LENCI,
Ebsary Gypsum Co.,
52 Vanderbilt Ave.,
New York N. Y.

DEAR MR. LENCI:

Enclosed please find some rate supplements which will help to keep your records up to date.

On September 30th I addressed a letter to Mr. Winslow at Wheatland thanking him for the courtesy shown my visit to the plant, and we have been notified that there is no Post Office at Wheatland. Will you kindly let me know where your mail is received for the plant at Wheatland.

To date we have received no advice about the car of board and lath ordered for our plant at Fort Dodge. Naturally, we are anxious to have this available for our salesmen who work in the Fort Dodge territory, and as soon as we know that the car is in transit we will instruct our men to start pushing board and lath.

We expect to have something very soon in the way of business on board and lath in the Chicago territory, and are awaiting the rechecked list of destination points which I left with you.

Very truly yours,

CARDIFF GYPSUM COMPANY
33 N. LaSalle St., Chicago, Ill.

Government's Exhibit No. 585

EBSARY GYPSUM COMPANY, INC.
52 Vanderbilt Avenue
NEW YORK, N. Y.

OCTOBER 5, 1939

CARDIFF GYPSUM COMPANY
33 N. La Salle St
Chicago, Ill.

GENTLEMEN:

We have your letter of October 4th addressed to Mr. George Lenci. Mr. Lenci is out of town today and for that reason I am writing you to give you the following information requested in your letter.

The Post Office address for Mr. Winslow is CALEDONIA, N. Y., as there is no Post Office at Wheatland, N. Y.

Regarding the car of Board and Lath which you have on order. We have not as yet received permission from the United States Gypsum Company to ship this order. You understand that we must first be permitted by the United States Gypsum Company if we are to sell other manufacturers. We are today in receipt of a letter from them in which they state that have not had an opportunity to discuss this with their people and as soon as we hear further we will advise you accordingly.

We are sorry that this delay has been caused, but can assure you that it is absolutely beyond our control at the present time.

Yours very truly,

EBSARY GYPSUM COMPANY, INC.

C. E. Hough

C. E. HOUGH
Treasurer

CEH:L

11377 *Government's Exhibit No. 591*

KELLEY PLASTERBOARD COMPANY, INC.
DELAWANNA, N. J.

April 26, 1932.

Phone:— Passaic 2-5350-1-2.

Confidential price list to dealers in truckload lots on materials which we manufacture or distribute. The following prices apply within our usual trucking radius. Delivered prices in other sections will be furnished upon request. Carload prices on application.

	F.O.B. Delawanna	*Dealer's Yard*	*Job Delivery*
Mono-Coat Colored Texturing Plaster			
Paper bags—100 lb., 50 lb., or 25 lb.	$80.00 Ton	$80.00 Ton	$80.00 Ton
Arrow-Tex Colored Texturing Material			
Paper Bags—50 lb. or 25 lb.	.08 lb.	.08 lb.	.08 lb.
Dela-Tex Texturing Material or Plastic Paint			
50 lb. paper bags	.12 lb.	.12 lb.	.12 lb.
25 lb. cartons	.12½ lb.	.12½ lb.	.12½ lb.
10 lb. cartons	.13 lb.	.13 lb.	.13 lb.
Colored Sand			
3-1/4 lb. Cartons and 25 lb. bags.			
All colors excepting Green and Blue	.12 lb.	.12 lb.	.12 lb.
Green and Blue	.15 lb.	.15 lb.	.15 lb.
Monument Colored Stucco			
100# paper bags			
All colors excepting Green	29.00 Ton	29.00 Ton	29.00 Ton
Green	34.00 Ton	34.00 Ton	34.00 Ton
Monument Interior Colored Finish			
100# paper bags			
All colors excepting Green	29.00 Ton	29.00 Ton	29.00 Ton
Green	34.00 Ton	34.00 Ton	34.00 Ton
Cedar Plaster			
50# paper bags	.15 lb.	.15 lb.	.15 lb.

	Carload Lots By Rail	*Pool or Mixed Cars*		
Plaster Boards				
1/4"	$.1221 ea.	$.1381 ea.	.1381 ea.	.1381 ea.
3/8"	.1315 ea.	.1475 ea.	.1475 ea.	.1475 ea.
1/2"	.151 ea.	.167 ea.	.167 ea.	.167 ea.
	No job Delivery—See note*			
Plaster or Gypsum Lath (Bundled)				
3/8x16x48"	16.44 M.	18.44 M.	18.44 M.	18.44 M.sq.ft.) See
3/8x16x32"	16.44 "	18.44 "	18.44 "	18.44 " " ") Note*
Wall Board				
Cork Gypsum Wall Board				
	28.44 M	30.44 M.	30.44 M.	30.44 M. sq. ft.) See Note*

*Note—Minimum Quantities:

Pick-ups	5,000 sq.ft. Plaster Boards, Plaster Lath and Wall Board
Pool Cars	5,000 sq.ft. Plaster Boards, Plaster Lath and Wall Board
Truck Deliveries	5,000 sq.ft. Plaster Boards, Plaster Lath and Wall Board
Mixed Truck-loads	5,000 sq.ft. Plaster Boards, Plaster Lath and Wall Board

and sufficient other Plaster Products to make up a seven and one-half ton load total weight.

Area:—To all points taking old $.19½ rate from Oakfield in following territory only:

Metropolitan New York:—New York City,—Bronx, Manhattan, Queens, Brooklyn, Richmond, also Westchester, Rockland and Nassau Counties, N. Y., also Amityville and Cold Spring Harbor in Suffolk County.

Metropolitan New Jersey: Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Somerset and Monmouth Counties.

Separate quotations will be gladly furnished to all points other than the above.

These Prices Are Subject To Change Without Notice.

11378	*F.O.B. Delawanna*	*Dealer's Yard*	*Job Delivery*
INSULATING BOARD AND PLASTER LATH:			
Johns-Manville:			
27,500 to 54,998 sq. ft.	$33.00 M.	$33.00 M.	
1 to 27,498 sq. ft.	35.00 M.	36.00 M.	
Delivered in carload lots (via rail from factory)—$32.00 M. sq. ft.			
Insulite:			
30,000 to 59,998 sq. ft.	$34.00 M.	$34.00 M.	
1 to 30,000 sq. ft.	35.00 M.	36.00 M.	
Delivered in carload lots (via rail from factory)—$33.00 M. sq. ft.			
SANDED PLASTER:			
Kelley, Red Top or King Windsor.			
100 lb. cloth, including bags	10.50 Ton	10.50 Ton	11.00 Ton
100 lb. paper bags	8.50 Ton	8.50 Ton	9.00 Ton
NEAT PLASTER			
Kelley, Red Top or King Windsor.			
100 lb. paper bags	9.90 Ton	9.90 Ton	10.40 Ton
BOND PLASTER			
100 lb. paper bags	11.90 Ton	11.90 Ton	12.40 Ton
PLASTER PARIS or GAUGING PLASTER			
Higginson or U.S.G.			
100 lb. paper bags	16.70 Ton	16.70 Ton	16.70 Ton
50 lb. paper bags	17.70 Ton	17.70 Ton	17.70 Ton
25 lb. paper bags	19.20 Ton	19.20 Ton	19.20 Ton
250 lb. barrels	3.13 bbl.	3.13 bbl.	3.13 bbl.
HYDRATED FINISHING LIME			
Kelley or Washington			
50# paper bags	12.95 Ton	13.95 Ton	13.95 Ton
HYDRATED MASONS LIME			
50# paper bags	11.95 Ton	12.95 Ton	12.95 Ton
LUMP LIME—PALMER			
200# steel drums	2.25 bbl.	2.35 bbl.	2.35 bbl.
WHITE CEMENT—MEDUSA			
100# paper bags	1.65 bag	1.65 bag	1.65 bag
KEENES CEMENT			
100# cloth, including bags	30.00 Ton	32.00 Ton	32.00 Ton

MORTAR COLORS (F.O.B. DELAWANNA OR DELIVERED BY TRUCK OR RAIL):

Clinton Hematite Red #10	50# paper bags	$37.00 per ton
Clinton Hematite Red #10	100# cloth bags	39.00 per ton
Clinton Colonial Buff #700	50# paper bags	50.00 per ton
Clinton Colonial Buff #700	100# cloth bags	52.00 per ton
Clinton Dark Buff #717	50# paper bags	50.00 per ton
Clinton Dark Buff #717	100# cloth bags	52.00 per ton
Clinton Single Strength Black #900	50# paper bags	53.00 per ton
Clinton Single Strength Black #900	100# cloth bags	55.00 per ton
Clinton Double Strength Black #800	100# cloth bags	71.00 per ton
Clinton Double Strength Black #800	50# paper bags	71.00 per ton
Clinton Pompeii Buff #600	100# cloth bags	52.00 per ton
Clinton Double Strength Chocolate #402	100# cloth bags	51.00 per ton

(The 100 lb. cloth bags are paper lined and waterproof.)

CABOT'S TRIMOUNT GERMANTOWN LAMPBLACK

60—1 pound packages to the carton.

In lots of 60 lbs.	$.21 per pound
In less than full cartons	.25 per pound

CABOT'S T PROCESSED LAMPBLACK

6—12½ lb. packages to the carton—(75 lbs.)

In lots of 75 lbs.	$.12 per pound

CARBON BLACK (BINNEY & SMITH #242)

60—1 lb. packages to the carton.

In lots of 60 lbs.	$.18 per pound
In less than full cartons	.22 per pound

CARBON BLACK (BINNEY & SMITH #242)

4—12½ lb. packages to the carton

In lots of 50 lbs.	$.10 per pound

These Prices Are Subject otChange Without Notice.

11379 METAL LATH, CORNER BEADS, ETC.

			F.O.B. Delawanna or Dealer's Yard
Super Bostwick Truss—Loop	4.5	Painted	$.245 yard
Sheet Lath	5.25	Galvanized	.365 yard
Diamond Mesh Lath	2.2	Painted	.135 yard
Diamond Mesh Lath	2.5	Painted	.145 yard
Diamond Mesh Lath	3.0	Painted	.16 yard
Diamond Mesh Lath	3.4	Painted	.17 yard
Diamond Mesh Lath	2.5	Galvanized	.17 yard
Diamond Mesh Lath	3.4	Galvanized	.20 yard
Boss—Rib Lath	2.75	Painted	.18 yard
Boss—Rib Lath	3.0	Painted	.19 yard
Boss—Rib Lath	3.4	Painted	.20 yard
Boss—Rib Lath	3.4	Galvanized	.23 yard
Flat Rib Lath	2.75	Painted	.18 yard
Flat Rib Lath	3.0	Painted	.19 yard
Flat Rib Lath	3.4	Painted	.20 yard
⅜" High Rib Lath	3.0	Painted	.19 yard
⅜" High Rib Lath	3.4	Painted	.20 yard
Self-Furring Lath	2.5	Galvanized	.18 yard
Self-Furring Lath	3.4	Galvanized	.21 yard
Self-Furring Lath	3.4	Painted	.18 yard

Cornerite 4" Wings—8'		—$14.00 per thousand feet.
Cornerite 3" Wings—8'		— 13.00 per thousand feet.
4" Striplath—8'		— 8.50 per thousand feet.
Arch Bead—Economy—4'	Lengths	— 25.00 per thousand feet.
Flat Wing Corner Bead		— 18.00 per thousand feet.
Truss Wing Corner Bead		— 18.00 per thousand feet.
Expanded Corner Bead 3"—8' and 9'		— 27.00 per thousand feet.

Wall Ties—7"x⅞" (1000 per box—35#) 1.60 per thousand.

No charge for trucking to points in our regular trucking zone.

JOHNS MANSVILLE TYPE "B" INSULATION IN BAT FORM.

	Weight	*Size*	*Coverage*
One Bat with chipboard center	5.6#	15x18x3" (15" wide) (18" long) (3" thick)	Approx. 2 sq. ft. gross surface.
One Package (6 Bats) paper between bats.	33½ net Approx. 34# Gross	15x18x18"	Approx. 12 sq. ft. gross surface.

Shipments—Carloads only from Alexandria, Ind. L. C. L. from Distributors' stock.

Minimum Car—24,000 lbs.—12 tons. *Cwt. per car*—240 cwt.

Packages per car—Approximately 708-8496 sq. ft. gross surface.

Estimating—Amount of material required will vary, depending on what subtractions are made from gross surface area. Some leeway should be allowed for safety. Doors, windows and other openings should be subtracted from gross areas. If it is desired to subtract studs, joints and rafters, deduct 12½% from gross surface area, less openings (windows and doors). Deduct 15% for studs if only walls are to be figured. Deduct 10% for roof or ceiling members if only attic or roof work is figured.

BELOW ARE LISTED NET PRICES.

	Net Prices F.O.B. Delawanna or Delivered	*Net Carload Prices Delivered from Factory*
Consumer	$.12 sq. ft. (wall area)	$.12 sq. ft.
Contractor	.09 sq. ft. (wall area)	.08 sq. ft.
Dealer	.07½ sq. ft. (wall area)	.0613 sq. ft.

These Prices Are Subject to Change Without Notice.

	F.O.B. Delawanna	*F.O.B. Dealers Yard Within Zone No. 1*
STANDARD THICKNESS SEWER PIPE		
3"–24" Standard Pipe 2' lengths and fittings	72%	66%
6"–12" Standard Pipe 3' lengths	69%	63%
30" Standard Pipe 3' lengths	51%	45%
DOUBLE STRENGTH SEWER PIPE		
15" D.S.2' lengths and fittings	66%	60%
15" D.S.3' lengths and fittings	63%	57%
18"—24" D.S.2' lengths and fittings	61%	55%
18"—24" D.S.3' lengths and fittings	58%	52%
30"—D.S. 3' lengths	48%	42%
CHIMNEY TOPS	67%	61%
THIMBLES	67%	61%
SEPTIC TANKS	62%	56%
WALL COPING—8" and 12"	72%	66%
FLUE LINING		
Flue Lining up to 18" square and 24" round	76%	70%
Flue Lining 20x20, 20x24 and 24x24	59%	53%
Flue Lining 30" Round	62%	56%
ROUND DRAIN TILE		
	Weight	
3"	4 lbs.	$40.00 M.	$ 45.00 M.
4"	5½ lbs.	48.00 M.	56.00 M.
6"	10 lbs.	92.00 M.	104.50 M.
HEXAGON DRAIN TILE		
3"	4 lbs.	42.00 M.	47.00 M.
4"	5½ lbs.	50.00 M.	58.00 M.
6"	10 lbs.	95.00 M.	107.50 M.
FIRE BRICK		
Orvis—9"—3100° (For Domestic Oil Burners)	60.00 M.	68.00 M.
Hayes Run—9"—3200° (For Industrial Plants)	65.00 M.	73.00 M.
Eagle—9"—2876°	45.00 M.	53.00 M.
Eagle—8¼"—2876°	39.00 M.	46.00 M.
OVEN TILE—12x12x12	.22 ea.	.22 ea.
FIRE CLAY—(20 mesh) Suitable for all brick		
In ton lots	13.00 T.	13.00 T.
In less than ton lots	.75 Bag 100#	.75 Bag 100#
STANDARD BONDING MORTAR (Plastic High Temperature Cement)		
In 100 lb. drums—For use up to 2900°	4.25 cwt.	4.25 cwt.
FACE BRICK		
Red Face Brick—Smooth, Vertical Texture or Matts, straight shades, ranges with or without black	28.00 M.	34.00 M.
Similar ranges with Buffs or Greens added	29.00 M.	35.00 M.
Buff Range—Matt Texture (3 shades of Buff)	30.00 M.	36.00 M.

These Prices Are Subject to Change Without Notice.

11381 VENTO STEEL SASH

PREMIER PUTTYLESS SASH

Glass Size	*Opening Overall*	*Orders of $5 or More*	*Orders of Less than $5*
2 light 10x12	23½x15	$2.10 each	$2.40 each
3 light 10x12	33¾x15	2.40 each	2.70 each
3 light 12x18	39¾x21	2.65 each	2.95 each
3 light 10x20	33¾x23	2.65 each	2.95 each
2 light 14x20	31⅝x23	2.50 each	2.80 each
3 light 10x16	33¾x19	2.65 each	2.95 each
3 light 12x20	39¾x23	2.75 each	3.05 each

PREMIER OUTSIDE COPPER SCREENS

2 light 10x12	1.45 each	1.75 each
3 light 10x12	1.70 each	2.00 each
3 light 12x18	1.70 each	2.00 each
3 light 10x20	1.70 each	2.00 each
2 light 14x20	1.70 each	2.00 each
3 light 10x16	1.70 each	2.00 each
3 light 12x20	1.95 each	2.30 each

CHALLENGER PUTTYLESS SASH

Glass Size	*Opening Overall*	*Orders of $5 or More*	*Orders of Less than $5*
3 light 10x12	33¾x15	$2.05 each	$2.35 each
3 light 12x18	39¾x21	2.30 each	2.60 each
3 light 10x20	33¾x23	2.30 each	2.60 each
2 light 14x20	31⅝x23	2.10 each	2.40 each

CHALLENGER OUTSIDE SCREENS

3 light 10x12	1.70 each	2.00 each
3 light 12x18	1.70 each	2.00 each
3 light 10x20	1.70 each	2.00 each
2 light 14x20	1.70 each	2.00 each
15" Mullion Bars (Per Pair)	.25	.30
21" Mullion Bars (Per Pair)	.35	.40
23" Mullion Bars (Per Pair)	.40	.45

Above Prices F.O.B. Delawanna or Delivered by Rail or Truck Without Charge.

These Prices Are Subject to Change Without Notice.

DAMPERS—COAL CHUTES—MORTAR BOXES—GARBAGE RECEIVERS, ETC.

Rotary Control Dampers

No. 3.30—$4.10 each.
3.36— 4.50 "
3.42— 5.10 "
3.48— 6.00 "
3.54—10.80 "
3.60—12.15 "

Poker Control Dampers

No. 2.30—$3.60 each.
2.36— 4.10 "
2.42— 4.60 "
2.48— 5.20 "
2.54—10.10 "
2.60—11.25 "
2.72—13.75 "

Angles—3x3x¼

36"—.60 each.
42"—.70 "
48"—.75 "
54"—.85 "

Ash Pit Doors or Clean Out Doors

8 x 8 — .65 each.
8 x 10— .75 "
10 x 12—1.10 "

Mortar Boxes

No. 1—Top 7'6" Width 40" Depth 12" $14.50 each.

No. 2—Top 5'10" Width 34" Depth 10" 10.00 each.

Ash Dumps

5 x 8—.40 each.

Coal Chutes

8" No. 29—Solid Door—$4.30 ea.
8" No. 48—Glass Door— 6.25 "
12" No. 213—Solid Door— 5.40 "

Garbage Receivers

No. 109— 9 Gallon—$4.50 each
112—12 " — 5.25 "
115—15 " — 6.25 "

Package Receivers

No. 1—5.75 each.
2—5.75 "
3—5.00 "

Bell Traps

6 x 6— .35 each
9 x 9— .75 "
12 x12—1.50 "

Mail Receivers

No. 2 F (Frame) 5.00 each.
2 B (Brick) 5.50 "

Brick Clamps

$1.40 each.

Man Hole Ring & Cover

No. 2 18" cover diameter—$4.10 ea.
No. 3 20" cover diameter— 5.00 "

Dutch Oven Doors

$4.00 each.

Salamanders

No. 118 (complete)—$5.65 each.

No Charge for Trucking When Loaded With Other Material.

Above Prices Are Subject to Change Without Notice.

REVISED PRICE LIST ON JOHNS-MANSVILLE ASBESTOS SHINGLES AND ACCESSORIES

The numbers correspond to the style, description and catalog numbers and colors as described on pages 3 and 4 of Johns-Mansville Company's price list.

The following prices are net and include both dealer cost and recommended consumers resale. Discounts have already been deducted.

The following points constitute "WITHIN ZONE" area:—

"All of Bergen County, that portion of Passaic County lying east and south of the line of the New York Susquehanna and Western Railroad at Pompton Lakes, N. J., all of Essex County, Hudson County, Union County, and the area of Middlesex, Monmouth and Ocean Counties lying north and east of a line drawn from Monmouth Junction, Jamesburg, Englishtown, Freehold, Adelphia, Fort Plains, Southard, Lakewood, Toms River, Beachwood to Seaside Park.

	Colors	*F.O.B. Delawanna*	*Delivered Within Zone*	*Delivered Outside Zone*	
		Per Square			
No. 90 Diamond	All Colors	$ 7.02	$ 7.34	$ 7.67	Resale
		5.85	6.12	6.39	Cost
No. 30 Dutch Lap	All Colors	7.56	7.95	8.35	Resale
		6.30	6.63	6.96	Cost
No. 70 Hexagonal	All Colors	7.56	7.95	8.33	Resale
		6.30	6.63	6.94	Cost
No. 25 American	Gray & Black	10.80	11.48	12.15	Resale
		9.00	9.57	10.13	Cost
No. 25 American	Breton Red-Moss Green and Copper	11.51	12.19	12.86	Resale
		9.59	10.16	10.72	Cost
No. 35 American	All Colors	13.67	14.35	15.02	Resale
		11.39	11.96	12.52	Cost
No. 235 American		13.67	14.35	15.02	Resale
		11.39	11.96	12.52	Cost
No. 45 American	Siding	12.96	13.57	14.18	Resale
		10.80	11.31	11.82	Cost
No. 130 Dutch Lap	Siding	6.22	6.61	7.00	Resale
		5.18	5.51	5.84	Cost
No. 55 Salem 5/16 Butts	All Colors	20.94	21.69	22.44	Resale
		17.45	18.08	18.70	Cost
No. 55 Salem 7/16 Butts	All Colors	27.21	28.22	29.23	Resale
		22.68	23.52	24.36	Cost
No. 91 Starters		3.24	3.36	3.48	Resale
		2.70	2.80	2.90	Cost
No. 31 Starters	Mixed Colors	1.08	1.15	1.22	Resale
		.90	.96	1.02	Cost
No. 71 Starters	All Colors	3.78	3.93	4.08	Resale
		3.15	3.28	3.40	Cost
No. 17 Starters	Mixed Colors	1.08	1.15	1.23	Resale
		.90	.96	1.03	Cost
No. 97 Hip & Ridge	All Colors	9.50	9.97	10.44	Resale
		7.92	8.31	8.70	Cost
No. 26 Starters	Mixed Colors	6.48	6.74	7.01	Resale
		5.40	5.62	5.84	Cost
No. 27 Hip & Ridge	All Colors	9.50	10.07	10.62	Resale
		7.92	8.39	8.85	Cost
No. 36 Starters	All Colors	6.48	6.74	7.02	Resale
		5.40	5.63	5.85	Cost

Starters and Hip & Ridge Shingles Are Priced Per 100 Lineal Feet.

These Prices Are Subject to Change Without Notice.

11384	Colors	F.O.B. Delawanna	Delivered Within Zone	Delivered Outside Zone	
		Per 100 Lineal Feet.			
No. 37 Hip & Ridge	All Colors	$12.69	$13.26	$13.81	Resale
		10.58	11.05	11.51	Cost
No. 56 Starters 5/16 Butts	All Colors	11.34	11.62	11.89	Resale
		9.45	9.68	9.91	Cost
No. 56 Starters 7/16 Butts	All Colors	14.76	15.12	15.48	Resale
		12.30	12.60	12.90	Cost
No. 57 Hip & Ridge	All Colors	18.24	18.85	19.46	Resale
		15.20	15.71	16.22	Cost
Ridge Roll	Gray	16.74	17.11	17.48	Cost
Ridge Roll	Red or Blue Black	20.07	20.44	20.81	Cost
Ridge Roll	Green	22.32	22.69	23.06	Cost
J. M. Clinchers		.20 per 100 pieces.			
Copper Storm Anchors		.20 per 100 pieces.			
Copper Ridge Roll Fasteners		.75 per 100 pieces.			
Galvanized Needle Point Nails		.08¼ per lb. in keg lots.			
Galvanized Needle Point Nails		.10 per lb. in less keg lots.			

Carload freight is allowed in the "WITHIN ZONE" area on all Asbestos Shingles and accessories when shipped in straight or mixed carload lots, excepting No. 55 Salem Shingles, No. 56 Starters and No. 57 Hip & Ridge. On carload shipments outside of this zone, the freight will be equalized.

JOHNS-MANVILLE ASBESTOS WAINSCOTING & ACCESSORIES.

	Tile or Plain Design in Plain Colors		Tile or Plain Design in Mottled Colors	
	List	F.O.B. our Yard or delivered	List	F.O.B. our yard or delivered
		(Basis—20%)		(Basis—20%)
Sheets (32"x48"x¼") per sq. ft.	$.36	$.29	$.41	$.33
Wood Cap (1½"x48, 64x¾") per lin. ft.	.11	.09	.17	.14
Asbestos Cap (1-1/8"x48x½") per lin. ft.	.17	.14	.22	.18
Wood base (3"x48", 64"x¾") per lin. ft.	.23	.19	.28	.23
Asbestos base (6"x48"x½"). per lin. ft.	.36	.29	.40	.33
Standard Color Strips				
Straight Joint—48" per lin. ft.	.17	.14	.22	.18
Inside Corner—48" per lin. ft.	.23	.19	.28	.23
Outside Corner—48" per lin. ft.	.29	.23	.33	.27
Straight Joint—73" per lin. ft.	.20	.16	.25	.20
Inside Corner—73" per lin. ft.	.26	.21	.31	.26
Outside Corner—73" per lin. ft.	.31	.26	.36	.30
Chromium Plated Strips				
Straight Joint—48" per lin. ft.	.26	.21		
Inside Corner—48" per lin. ft.	.28	.23		
Outside Corner—48" per lin. ft.	.33	.27	On special order from factory only.	
Straight Joint—73" per lin. ft.	.30	.24		
Inside Corner—73" per lin. sq. ft.	.32	.26		
Outside Corner—73" per lin. ft.	.38	.31		
Clips (Nails included) per 100	2.12	1.70		
Cement Compound—per gallon	2.12	1.70		
Lacquer—(1/8 pt. can)—each.	.26	.21		

NOTE:—Direct mill shipments in unbroken crates (6 sheets) 30% discount from Johns-Manville Factory List F.O.B. Nashua, N. H. Crate includes one drill point and sufficient nails for six sheets.

These Prices Are Subject to Change Without Notice.

11385 PRICE LIST ON JOHNS-MANVILLE ASPHALT SHINGLES, SMOOTH AND SLATEKOTE ROLL ROOFINGS, BUILDING PAPERS, ROOF PUTTY, ROOF COATINGS, ETC.

Discounts are applicable to prices shown in Johns-Manville Company's price list.

Carload Deliveries by Rail or Trucks From Factory:

1 to 6 cars —20% 10% and 5%
6 to 12 cars —20% 10% and 7½%
12 cars and over—20% 10% and 10%

As per Johns-Manville discount schedule.

Pick-Ups at Delawanna

List price less 20% and 10%.

Deliveries by Our Trucks Within Our Usual Radius

List price less 20% and 10%. (This does not include Rockland and Sussex Counties.)

Delivered Prices in Rockland and Sussex Counties.

Full seven and one-half ton loads—List price less 20% and 10%.
Less than seven and one-half ton lots.—List price less 20% and 5%.

Asphalt Felt:—List price less 10% in carload lots, or mixed carloads. Less than carload lots—List net.

Asbestos Roll Roofings:—List net plus $.31 per cwt.

Cement Filled Columns—With caps and bases—$1.50 each.

4" Diameter—6' to 7'-6" Lengths.
For each 6" above 7'-6"—Add $.20

These Prices Are Subject to Change Without Notice.

11386 *Government's Exhibit No. 592*

Price List

KELLEY PLASTERBOARD COMPANY

INCORPORATED

DELAWANNA, NEW JERSEY

Manufacturers and Distributors of
Building Materials

January, 1938

Prices Subject to Change Without Notice

All taxes of any nature whatsoever now or hereafter levied by any government, Federal, state, or local, either directly or indirectly upon the sale of any product covered hereby, or upon the subject matter hereof, shall be paid by the purchaser.

Unless otherwise specified delivered prices apply within our usual trucking radius, and in various quantities according to the materials.

11387 PLASTERBOARD—PLASTER LATH—CORK GYPSUM WALLBOARD

For delivery Carload, Mixed Carload or Trucks, (minimum 7500 sq. ft.) F.O.B. DELAWANNA, or into following territories use prices listed below each territory.

Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to northwest corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.

	Gypsum Sheathing Per M sq. ft. ½"	Wallboard Per M sq. ft. ¼"	⅜"	½"	Plasterboard (Liner Board) Per M sq. ft. ¼"	⅜"	½"	Gypsum Lath ⅜" 16x48 or 16x32 Per M sq. ft.	Perforated Lath Per M sq. ft.
Plain	$23.80	$30.80	$24.10	$26.50	$18.80	$16.10	$17.75	$14.10	$14.95
Metallized	30.50	27.80	33.10	34.50	.....	.....	.....	23.10	.....

Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also State of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J., east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware; also Lehigh and Northampton Counties, Pa.;

Plain	$24.00	$21.05	$24.50	$27.00	$16.05	$16.50	$18.25	$14.50	$14.75
Metallized	31.00	28.05	33.50	35.00	.....	.....	.....	23.50	.....

Westchester, Rockland and Suffolk Counties, New York:

Plain	$23.75	$20.90	$24.90	$26.75	$15.90	$16.30	$18.00	$14.30	$14.85
Metallized	30.75	27.90	33.30	34.75	.....	.....	.....	23.30	.....

State of Connecticut (except Fairfield and Litchfield Counties):

Plain	$24.25	$21.20	$24.65	$27.25	$16.20	$16.65	$18.50	$14.65	$14.90
Metallized	31.25	28.20	33.65	35.25	.....	.....	.....	23.65	.....

Sullivan, Ulster and Dutchess Counties, New York, and Litchfield County, Connecticut:

Plain	$24.50	$21.30	$24.35	$27.50	$16.30	$16.55	$18.75	$14.85	$15.10
Metallized	31.50	28.30	33.85	35.50	.....	.....	.....	23.85	.....

For Carload or Mixed Carload shipments into territories other than preceding, use following Mill Base prices, plus lowest combination of freight and Mill Base.

Mill Basing Points:

Oakfield, New York; Plasterco, Va.; Gypsu[illegible] Ohio; New Brighton, S. I.; Boston, Mass., and Philadelphia,* Pa. (See exception No. 1).

	Gypsum Sheathing Per M sq. ft. ½"	Wallboard Per M sq. ft. ¼"	⅜"	½"	Plasterboard (Liner Board) Per M sq. ft. ¼"	⅜"	½"	Gypsum Lath ⅜" 16x48 or 16x32 Per M sq. ft.	Perforated Lath Per M sq. ft.
Plain	$22.00	$20.00	$23.00	$25.00	$15.00	$15.00	$16.25	$13.00	$13.25
Metallized	29.00	27.00	32.00	33.00	.....	.....	.....	22.00	.....

***Exception No. 1:**

Prices F.O.B. cars Philadelphia, Pa. apply for shipments into the following area only: States of New York, New Jersey, Maryland, Delaware and Virginia; the District of Columbia; that portion of Pennsylvania east and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, west Virginia.

The above prices are for standard sizes only, as follows:

****Wallboard—¼" and ⅜"—4'x8', 5', 6', 7', 8', 9', 10', 11', 12'.**
Plasterboards—¼", ⅜" and ½"—32"x36" or 32"x48".
Gypsum Lath—⅜"—16"x32" or 16"x48"—Bundled 6 pieces per bundle.

****We do not manufacture ¼" Wallboard in 11' or 12' lengths.**

The weights which are to be used in connection with Mill Bases for pricing purposes are as follows:

¼" Gypsum Wallboard, Plasterboard and Lath	1050 lbs. per M sq. ft.
⅜" Gypsum Wallboard, Plasterboard and Lath	1475 lbs. per M sq. ft.
½" Gypsum Wallboard, Plasterboard and Lath	2000 lbs. per M sq. ft.
½" Gypsum Sheathing	2000 lbs. per M sq. ft.

11388

WALL PLASTERS

	SANDED Kelley and Old Newark	NEAT Old Newark	PLASTER PARIS Old Newark	
Price per Ton in 100 lb. Paper Bags F.O.B. Delawanna	NEAT $ 9.50	SANDED $ 6.50	PLASTER PARIS $16.50	
NEW JERSEY—Delivered cars or trucks.				
Hudson, Essex, Bergen, Passaic, Union, Morris, Middlesex, Somerset, Mercer and Monmouth Counties	9.50	6.50	16.50	
Camden County	9.50	7.00	16.50	
Sussex, Warren, Hunterdon and Ocean Counties	10.00	7.00	17.00	
Burlington County, on a line drawn from S. W. corner of Monmouth County to N. E. corner of Camden County	10.00	.....	17.00	
Balance of Burlington County	9.50	.....	16.50	
Burlington County—Entire	.....	7.00	.....	
Atlantic, Cape May, Gloucester, Salem and Cumberland Counties	10.00	7.50	17.00	
NEW YORK				
Manhattan, Bronx, Kings, Queens, Nassau and Richmond Counties	9.50	6.50	16.50	
Rockland, Westchester and Suffolk Counties	9.75	6.75	16.75	
Ulster, Sullivan and Dutchess Counties	10.50	7.50	17.50	
Putnam and Orange Counties	10.00	7.00	17.00	
PENNSYLVANIA				
Philadelphia, Delaware, Chester, Montgomery, and Bucks Counties	9.50	7.00	16.50	
Lehigh and Northampton Counties	10.00	7.50	17.00	
Berks and Lancaster Counties	10.00 cars	7.50 cars	17.00 cars	
F.O.B.—Philadelphia, Pa. for shipment (C/L or mixed C/L only) into that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties, also States of Delaware (except New Castle County), Maryland and District of Columbia	8.00*	5.50*	15.00*	
New Castle County, Delaware	8.00*	.....	15.00*	
New Castle County, Delaware, Delivered	.....	7.50 cars	.....	

*To the above F.O.B. prices must be added freight from Philadelphia to destination.

Bond Plaster-$1.00 per ton higher than Neat Plaster.

Wood Fibred Sanded Plaster $1.00 per ton higher than Sanded Plaster.

50 lb. Gauging Plaster $1.00 per ton higher than 100 lb. Gauging.
25 lb. Gauging Plaster 1.50 per ton higher than 100 lb. Gauging.
10 lb. Gauging Plaster 6.00 per ton higher than 100 lb. Gauging.
5 lb. Gauging Plaster 8.25 per ton higher than 100 lb. Gauging.

INSULITE PRODUCTS

SEABOARD ZONE

The states of Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, and the District of Columbia; and that part of the state of New York which lies south and east of and which includes the following counties: Rensselaer, Schenectady, Albany, Greene, Ulster, Sullivan.

That part of the state of Pennsylvania which lies east of and which includes the following counties: Wayne, Lackawanna, Wyoming, Sullivan, Lycoming, Union, Snyder, Juniata, Perry, Cumberland, Adams.

That part of the state of Maryland which lies east of and which includes the following counties and which lie north of the Potomac River: Baltimore, Howard, Montgomery.

And, the following counties in the state of Virginia: Fairfax, Arlington, Accomac, Northampton; and the city of Alexandria.

Prices per M Sq. Ft., surface measurement—Freight allowed to destination.

PRODUCT	Thickness	Car Lots 45,000' ⅛" Basis	30,000' to 44,999' ⅛" Basis	7,000' to 29,999' ⅛" Basis	Less Than 7,000' ⅛" Basis	No. Pieces Per Bundle	Approx. Shpg. Wt. Per M (Sq. Ft.)
STANDARD OR GRAYLITE BUILDING BOARD							
4'x4', 5', 6', 7', 8', 8'6", 9', 9'6", 10' and 12'	½"	$33.00	$34.00	$35.00	$36.00	6	725
LOK-JOINT LATH 18" x 48"	½"	33.00	34.00	35.00	36.00	12	740
BILDRITE SHEATHING							
4'x8', 8'6", 9', 9'6", 10' and 12'	25/32"	42.00	43.50	45.00	46.50	4	1270
LARGE TILE 16" x 32" and larger	½"	36.00	37.00	39.00	41.50	.....	725
SMALL TILE OR PLANK							
6", 8", 10", 12", 16" Widths 6', 8', 9', 10', 12' Lengths	½"	41.00	42.00	44.50	47.00	.....	725
DUAL BOARD							
4'x8', 4'x12'	¼"	27.00	28.00	31.00	33.00	6	880
4'x8', 4'x9', 4'x10'	¼"	29.00	30.00	33.00	35.00	6	880
Shorts—3' and 4'x4'	¼"	23.00	24.00	27.00	29.00	10	880
DE LUXE DUALBOARD							
4'x8', 4'x12'	¼"	47.00	48.00	52.00	56.00	6	1080
4'x8', 4'x9', 4'x10'	¼"	49.00	50.00	54.00	58.00	6	1080
Shorts—2', 3' and 4'x4'	¼"	35.00	36.00	39.00	41.00	10	1080
HARDBOARD							
4'x8', 4'x12'	¼"	43.00	44.00	48.00	52.00	6	780
4'x8', 9' and 10'	¼"	45.00	46.00	50.00	54.00	6	780
Shorts—2'x4'	¼"	31.00	32.00	35.00	39.00	10	780
Shorts—3'x4' and 4'x4'	¼"	35.00	37.00	39.00	43.00	10	780
4'x8', 4'x12'	3/16"	55.00	56.00	60.00	65.00	6	1080
4'x8', 9' and 10'	3/16"	57.00	58.00	62.00	67.00	6	1080
Shorts—2', 3', and 4'x4'	3/16"	46.00	47.00	51.00	57.00	10	1080

11389

KELLEY ROCK WOOL

F.O.B. Delawanna or delivered in our New Jersey Trucking area

	CARLOAD	L.C.L.
KELLEY ROCK WOOL Pads 9" x 15" wall-thick, packed 20 in a carton to cover 18¾ sq. ft. actual surface 20 sq. ft. gross area (including 2" joists on 16" centers). Price per 1,000 sq. ft.	$0.50	$1.50
Figures per carton	.94	1.14
KELLEY ROCK WOOL Loose or Commercial Wool packed in 35-lb. paper bags, 57-1/7 bags per ton, for packing around pipes, stuffing in corners, etc. Price per ton	40.00	49.00
Figures per Bag	.70	.85½

A minimum carload is 12 tons of Granulated Wool or Loose Wool, or approximately 10,000 sq. ft. of batts.

VENTO BASEMENT SASH

CHAMPION — PUTTYLESS

Size and Type All Windows	Masonry Openings	Weight Lbs.	List Prices	NET PRICES At 84% Discount 1 to 49	At 87% Discount 50 or More
2 Light — 10 x 12	23¼ x 15	13	$4.90	$2.35	$2.11
2 Light — 14 x 20	31⅝ x 23	18	5.35	2.46	2.30
3 Light — 10 x 12	23⅝ x 15	16	5.20	2.39	2.24
3 Light — 10 x 16	23⅝ x 19	19	5.45	2.51	2.34
3 Light — 10 x 20	23⅝ x 23	21	5.70	2.62	2.45
3 Light — 12 x 18	29⅝ x 21	21	5.70	2.62	2.45
3 Light — 12 x 20	29⅝ x 23	22	6.00	2.76	2.58
Copper Screens for any of above Sash			Any Quantity 1.75 each		
Mullion Bars 15", 21" or 23"			Any Quantity .45 per pair		

The above prices are F.O.B. Delawanna, or delivered by truck within our regular trucking radius or freight allowed in eastern states. Screen orders of less than six screens will carry a crating charge of $1.50 if shipped by rail.

To meet competition we can furnish "Defender" Putty Sash, at three points greater discount than above. Direct shipment from the Factory—Freight allowed.

Prices and Discounts on Premier Sash quoted on application.

TILE FINISH BOARDS

WALL TILE FOR KITCHENS, BATH ROOMS, ETC.

5/16" x 4' x 4'—Colonial Ivory, Porcelain White, (scored with Black lines) Victoria Green (scored with White lines) Anthracite Black (unscored) ..... per sq. ft.	$ .23
French Orchid, Twilight Blue, Anthracite Black (scored with White lines) ..... per sq. ft.	.25
¼" x 4' x 4'—White (scored gray or black lines) Hollywood Ivory (white scores), Colonial Ivory (black scores) Green (white scores) per sq. ft.	.16
Black Cap—scored every 8", size 5/16 x 2" x 4' ... per lin. ft	.12
Black Base—scored every 8", size 5/16 x 4" x 4' ... per lin. ft.	.15
Chrome Corner Strips. Inside corners—8' lengths; Outside corners—8' lengths ..... per ft.	$ .15

The above prices are f.o.b. Delawanna, or delivered by truck within our regular trucking radius.

MORTAR COLORS

(F.O.B. Delawanna or Delivered by Truck or Rail)

	Per Ton
Clinton Hematite Red No. 10 ..... 50lb paper bags	$43.00
Clinton Colonial Buff No. 700 ..... 50lb paper bags	54.00
Clinton Dark Buff No. 717 ..... 50lb paper bags	54.00
Clinton Double Strength Black No. 800 ... 50lb paper bags	72.00
Clinton Pompeiin Buff No. 900 ..... 50lb paper bags	54.00
Clinton Double Strength Choc. No. 402 ... 50lb paper bags	54.00
	Per lb
Cabots Lampblack—4—12¼ lb Pkgs.—50lb Cartons	.12
Cabots Lampblack—12¼ lb Pkgs.—Less than 50lb	.15
Cabots Lampblack—50—1lb Pkgs.—50lb Cartons	.21
Cabots Lampblack—1lb Pkgs.—Less than 50lb	.25

NAILS AND STAPLES

WIRE NAILS

1 to 9 Keg Lots	$3.50 Base
10 to 24 Keg Lots	3.35 "
25 Keg Lots or more	3.25 "

CUT NAILS

1 to 5 Keg Lots	4.65 "
5 Keg Lots or more, (may include wire nails)	4.50 "

TILE CORNELL BOARD

	F.O.B. Delawanna or Delivered
5000 or more	$35.50 per M ft.
Less than 2000	38.00 per M ft.

Tile Board scored—4" x 4".

COLORED SAND

Orange, Red, Brown, Yellow

3¼ lb Cartons	each	.40
25lb Bags	lb	.12
Green and Blue		
3¼ lb Cartons	each	.50
25lb Bags	lb	.15

WATERPROOFING

FASTITE—LIQUID WATERPROOFING

1 gallon cans	$1.25 per gal.
5 gallon cans	1.10 per gal.
30 and 55 gallon drums	1.00 per gal.
Less discount as follows:	
10 to 199 gallons	5o%
200 to 499 gallons	30% & 10%
500 gallons or more	30% & 15%

WHITE CEMENT (MEDUSA)

	F.O.B. Delawanna	Dealer's Yard
100lb Paper Bags	$ 6.50 bbl.	$ 6.60 bbl.

KEENES CEMENT

100lb Paper Bags ..... [illegible] ton [illegible] ton

MARBLE DUST

100lb Non-Returnable Cloth Bags ..... $13.50 ton $[illegible].00 ton

11390 STUCCO AND TEXTURES

F.O.B. Delawanna or Delivered

MONO-COAT (Colored Texture)

50lb Packages, all colors and white ..... per lb $ .04

DELA-TEX (White Texture)

25lb, 50lb Packages ..... per lb .05

ARROW-TEX (Colored Texture)

25lb and 50lb Packages,
All colors and white ..... per lb .08

MONUMENT EXTERIOR COLORED STUCCO
and
MONUMENT INTERIOR COLORED FINISH

100lb Paper Bags

Regular colors, except Green, Blue and Special ... $26.50 per ton
Green, Blue and Special Colors ..... 31.50 per ton

The above prices apply on pick-ups at our Factory, or are with freight or trucking allowed in our regular trucking radius. For shipments outside of trucking area the price will be $1.50 per ton less than above F.O.B. Delawanna.

KELLEY JOINT FILLER

		F.O.B. Delawanna	Dealer's Yard
60lb Cartons (12-5lb Pkgs.)	Per Carton	$3.68	$3.73
5lb Packages (less than Carton)	Per lb	.07	.07
50lb Bags	Per lb	.06	.06

KELLEY JOINT TAPE (Fabric)

250' per roll ..... Per Roll .75 .75

CEDAR PLASTER

50lb Paper Bags ..... Per lb 12 .12

FINISHING HYDRATED LIME

(KELLEY, WASHINGTON OR HAWK SPREAD)

	Ohio Mill Base	F.O.B. Delawanna	Dealer's Yard*
50lb Paper Bags	$10.50 ton	$15.95 ton	$17.45 ton
25lb Paper Bags	12.50 ton	17.95 ton	19.45 ton
10lb Paper Bags	16.00 ton	21.45 ton	22.95 ton
5lb Paper Bags	20.00 ton	25.45 ton	26.95 ton

KELLEY MASON'S HYDRATED LIME

	F.O.B. Delawanna	Dealer's Yard*
50 lb. Paper Bags	$12.25 T.	$13.75 T.
ALL PURPOSE HYDRATE		
10 lb. Bags (5 per container)	13.75 T.	20.25 T.
5 lb. Bags (10 per container)	22.75 T.	24.25 T.
LUMP LIME		
180 lb. net weight barrels	2.10 Bbl.	2.35 Bbl.

*In New York and New Jersey Metropolitan Area.

Attractive prices quoted on 5 Ton truck loads of above Mason's Hydrate delivered on 24 hour notice to dealers' yards in following area:

Southern parts of Sullivan and Ulster Counties, Orange, Rockland, Westchester Counties New York, Greater New York; Staten Island, New York; Sussex, Passaic, Bergen, Hudson, Essex, Union, Middlesex, Somerset, Hunterdon, Warren, Morris Counties, New Jersey; also Wayne, Pike, Monroe and Northampton Counties, Pa.

Prices on 15 Ton or 25 Ton cars quoted on request.

OLD NEWARK ACOUSTICAL PLASTER

Price on ½" Basis:

To Contractors ..... $ .75 per sq. yd.
To Dealers ..... .65 per sq. yd.

Packed in 50 lb. paper bags.

Supplied in Natural color, Ivory, Cream or Buff.

The above prices are f.o.b. Delawanna, or for shipment into the States of New Jersey, New York, Connecticut, Pennsylvania, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Ohio, Delaware, Maryland, Virginia and District of Columbia.

If order is handled through a dealer, dealer should invoice the contractor at the above contractor's price.

This price covers ample material to be applied one-half inch thick in accordance with our standard specifications.

OLD NEWARK PATCHING PLASTER

FOR ALL PATCHING PURPOSES

2½ lb. Package (packed 40 to a case) ..... 10c per package
5 lb. Package (packed 20 to a case) ..... 18c per package
10 lb. Package (packed 6 to a case) ..... 30c per package
15 lb. Package (packed 4 to a case) ..... 40c per package

FENOLITE PASTE WALL PAINT

	F.O.B. Delawanna or Dealer's Yard	
	White	Tinted
Per Gal.—In gal. cans	$1.65	$1.75
Per Gal.—In quart cans	1.95	2.05

A really washable Wall Paint for all Interior Decorations, made in ten beautiful colors. Fenolite is a new kind of paint, different from both oil paint and the casein water paint, which it supersedes. It combines the best features of oil and water paints, and has the washability of oil paint. After three days Fenolite is thoroughly washable.

SEMATEX WATERPROOF CEMENT PAINT

	F.O.B. Delawanna or Dealer's Yard	
	White	Tinted
Per lb.—in 25 lb. Pails	6½c	7½c
Per lb.—in 5 lb. Cans	7½c	8½c

Made in Ivory, Buff, Fawn, Gray, Green, Red, and White Colors.

SEMATEX CEMENT PAINT is the ideal beautifying and protective coating for all porous masonry surfaces which have not been previously coated with oil paint, kalsomine or casein water paints.

KELLEY CONCRETE FILLED COLUMNS

11391

4" Columns 16 lbs. per foot—3½" Columns 13 lbs. per foot. Standard Lengths—5', 5'6", 6', 6'6", 6'4", 6'6", 6'8", 6'10", 7', 7'3", 7'4", 7'6", 8', 8'6", 9', 9'6", 10', 10'6", 11', 11'6", 12', 12'6", 13', 13'6". Any length not standard carries a cutting charge.

DEALER'S NET PRICES

Quantity	3½" 5'-7'6"	4" 5'-7'6"	Each 6" Above 7'6"	Cutting Charge
1 to 5	$2.21	$2.34	$ .32½	$ .32½
6 to 49	2.04	2.16	.30	.30
50 or more	1.94	2.05	.28½	.28½

Extra caps and bases $.30 per set.

Allowance for omitting caps and bases $.10 per set.

These prices are for pick-up at Delawanna or delivered by truck or freight allowed. They apply in Maine, New Hampshire, Vermont, Rhode Island, Massachusetts, Connecticut, New York, New Jersey, Delaware and Maryland, also Pennsylvania, east of a north and south line 25 miles west of Harrisburg.

Cash discount 2% on delivered price.

SPECIAL COLUMNS—5' or longer F.O.B. Delawanna*

		Loose Caps and Bases	Weight
6"	Light weight	$1.10 per ft.	$1.36 per set	30lb per ft.
8"	Light weight	1.00 per ft.	1.36 per set	24lb per ft.
4½"	Heavy weight	.80 per ft.	1.36 per set	34lb per ft.

Cash discount—2% after freight.
Fraction of a foot 6" or under 6" charged at ½ ft. price.
Fraction of a foot over 6" charged at 1 ft. price.
*Or delivered within 100 miles.

SEWER PIPE

Flue Lining, Fire Brick, Clay

STANDARD THICKNESS SEWER PIPE

F. O. B. Delawanna

8"-24" Standard Pipe 2' lengths and fittings	66%
6"-12" Standard Pipe 3' lengths	63%

DOUBLE STRENGTH SEWER PIPE

15" D. S. 2' lengths and fittings	57%
15" D. S. 3' lengths and fittings	55%
18"-24" D. S. 2' lengths and fittings	55%
18"-24" D. S. 3' lengths and fittings	53%
WALL COPING 8" and 12"	66%
THIMBLES	66%

FLUE LINING

Flue Lining up to 18" square and 24" round	66%
Flue Lining 20x20, 20x24 and 24x24	55%
Flue Lining 30" Round	54%
Chimney Tops—A, B, C and D	66%

Excelsior Type Tops	For	8½x 8½	Flue	$5.25 Net
Excelsior Type Tops	For	8½x13	Flue	$7.50 Net
Hollywood Pots 20" High	For	8½x13	Flue	$4.00 Net
Hollywood Pots 20" High	For	13x 13	Flue	$4.50 Net
Meadowbrook Pots 24" High	For	8½x13	Flue	$4.50 Net
Meadowbrook Pots 24" High	For	13 x13	Flue	$5.00 Net

*Prices on pots are F.O.B. Delawanna or delivered in our regular trucking area.

ROUND DRAIN TILE

F.O.B. Delawanna

3"— 4 lbs. weight	$ 50.00M
4"— 6 lbs. weight	63.00M
6"—12 lbs. weight	135.00M

DELIVERY CARTAGE ON PIPE AND DRAIN TILE

	Drain Tile Per M ft. 3"	4"	6"	Pipe and Flues
Zone A (Nearby)	$4.00	$ 6.00	$12.00	3%
Zone B (Intermediate)	6.00	9.00	18.00	5%
Zone C (Staten Island)	7.50	11.00	22.00	6%
Zone D (Beyond B & C)	8.50	12.50	25.00	7%

FIRE BRICK AND CLAY

F.O.B. Delawanna

Mt. Savage—9" No. 1, 8175, 7½ lbs.	$76.00 M
M. F. B.—9" No. 2, 2950, 7½ lbs.	55.00 M
Globe Smooth Fireplace Ladle Brick, 8½", 6½ lbs.	42.00 M
Oven Tile—2 x 12 x 12 Each	.21½
Clay—Best Grade—30 Mesh—per 100 lbs.	.75
Brik-Lok Bonding Mortar—Sets without heat—per 100 lb. Keg	5.50

Delivery charges of above on application.

DONLEY PRODUCTS

Package Receivers, Dampers, Etc.

ROTARY CONTROL DAMPERS

	Each
No. 2.30	$ 4.05
No. 2.36	4.60
No. 2.42	5.15
No. 2.48	6.10
No. 2.54	10.50
No. 2.60	11.65

POKER CONTROL DAMPERS

	Each
No. 2.30	$ 3.50
No. 2.36	4.15
No. 2.42	4.70
No. 2.48	5.40
No. 2.54	9.50
No. 2.60	10.75
No. 2.72	13.00

STEEL ANGLES

Angles should be 6" longer than width of fireplace opening.

	Each
36"—3"x3"	$ .55
42"—3"x3"	.60
48"—3"x3"	.70
54"—4"x3"	1.20
60"—4"x3"	1.30
72"—4"x3"	1.45

ASH PIT DOORS or CLEAN OUT DOORS

	*Per Doz.
8 x 8 Per Dozen	$ 7.20
8 x 10 Per Dozen	9.00
10 x 12 Per Dozen	13.05

GARBAGE RECEIVERS

	Each
No. 100— 9 Gallon	$5.00
No. 112—12 Gallon	5.75
No. 115—15 Gallon	6.75

ASH DUMPS

	Per Dozen
8 x 8 Hearth Opening	$4.80
7 x 10 Hearth Opening	7.20

BELL TRAPS

	Each
6 x 6 Per Dozen	$ 3.60
9 x 9 Per Dozen	5.80
12 x 12 Per Dozen	13.00

COAL CHUTES

	Each
8" No. 29—Solid Door	$5.10
12" No. 213—Solid Door	5.35

BRICK CLAMPS

$1.25 each

DUTCH OVEN DOORS

$2.00 each

MAIL RECEIVERS

	Each
No. 2 F (Frame)	$5.00
No. 2 B (Brick)	5.30

MORTAR BOXES

No. 1—7' 6"x12"x40"	$13.25
No. 2—5'10"x12"x24"	9.50
Tube— 30"x30"x 6"	3.00

PACKAGE RECEIVERS

	Each
No. 1	$5.50
No. 2	5.50
No. 3	5.10

No charge for trucking when loaded with other material.

11392 BENNETT DAMPERS

	Width of Fireplace	Poker List	*Poker Net	Rotary List	*Rotary Net
No. 31	29" to 31"	$5.00	$2.25	$5.00	$2.90
No. 34	32" to 34"	5.50	3.00	6.50	4.25
No. 37	35" to 37"	6.00	3.90	7.00	4.55
No. 43	39" to 43"	7.00	4.55	8.00	5.20

All above carried in stock. These sizes of Bennett Dampers are made with wide flange and may be used without angle irons. The best authorities, however, recommend the placing of all Dampers two courses of brick above the Arch, and the consequent use of angle irons under the Arch course of brick.

*These are Net Dealer Prices, F.O.B. Delawanna, or delivered by truck or rail in any quantity from our warehouse.

METAL LATH

Sold by KELLEY METAL LATH CO., Sales Agents

For Bostwick Steel Lath Co.

Size 24" x 96"

All Types Lath Packed 9 Sheets per Bundle; 16 sq. ft. per Sheet 16 sq. yds. per Bundle. Diamond Mesh also Packed 20 Sheets per Bundle in 27" Width—20 sq. yds. per Bundle.

ZONE 1—EASTERN STATES

F.O.B. Delawanna or Delivered Price per Yard

Bostwick Truss Loop, 4.5 Painted	$ .365
Bostwick Truss Loop, 5.25 Galvanized	.385
Diamond Mesh Lath, 2.2 Painted	.16
Diamond Mesh Lath, 2.5 Painted	.17

METAL LATH - continued

Diamond Mesh Lath, 3.0 Painted	.185
Diamond Mesh Lath, 3.4 Painted	.195
Diamond Mesh Lath, 2.5 Galvanized	.20
Diamond Mesh Lath, 3.4 Galvanized	.225
Flat Rib—Boss or Vee Rib Type, 2.75 Painted	.185
Flat Rib—Boss or Vee Rib Type, 3.0 Painted	.205
Flat Rib—Boss or Vee Rib Type, 3.4 Painted	.215
Flat Rib—Boss Rib Type, 3.4 Galvanized	.245
¾" Rib Lath, 3.0 Painted	.205
¾" Rib Lath, 3.4 Painted	.215
Self-Furring Lath, 2.5 Galvanized	.21
Self-Furring Lath, 3.4 Galvanized	.225

	Price per 1000 ft.
Cornerite 2" Wings—8'—82 pcs.—504 ft. per bdle.	$12.50
Cornerite 3" Wings—8'—82 pcs.—504 ft. per bdle.	14.50
Cornerite 4" Wings—8'—63 pcs.—504 ft. per bdle.	15.50
3" Stripite—8'	8.50
Arch Bead—Economy—4' Lengths	22.50
Truss Wing Corner Bead—6', 7', 8', 9'6", 9', 10' and 12'	19.00
Bull Nose Corner Bead—¾", per M ft.	22.50
Expanded Corner Bead—3"—6', 7', 8', 9', 10', and 12'	22.50
Wall Ties—7" x ¾" (1000 per box—35 lb.) per box	1.50

METAL ARCHES

	Size	Price
No. 11 True half circle design for 29" openings, set	24x9	$1.60
No. 22 True half circle design for 31½" openings, set	30x9	1.50
No. 33 Gothic design for 31½" openings, set	30x9	2.65
No. 44 Gothic design for 49½" openings, set	42x9	2.50
No. 55 Elliptic design for 61½" openings, set	54x9	2.50
No. 66 Elliptic design for 90½" openings, set	78x9	2.70
		2.85

MASONS HYDRATE OR AGRICULTURAL LIME

We are now in a position to deliver Masons or Agricultural Hydrate Lime—Kelley brand—in truckload lots of 8 to 15 tons in the territory mentioned below. Deliveries to points near that area may be arranged and prices will be quoted on application. Our regular trucking area for lime will be as follows: Wayne, Pike, Monroe and Northampton Counties, Pennsylvania; Southern half of Sullivan and Ulster Counties, New York, Orange, Rockland, and Westchester Counties, New York, Greater New York including Staten Island and all of Long Island; Sussex, Passaic, Bergen, Essex, Hudson, Morris, Warren, Hunterdon, Somerset, Union, Middlesex, Mercer and Monmouth Counties, New Jersey.

We are listing below the delivered prices on Masons or Agricultural Lime to different points giving you the 15 and 25 ton carload delivered prices and the truckload price in lots of 8 to 15 tons.

In order to meet certain competition, we are quoting Agricultural Hydrate only, for delivery to farm sites at the same price as delivered to the dealer's yard. All sales will be made through dealers.

NEW JERSEY BERGEN CO.	Carload 15 Ton	Carload 25 Ton	Truckload 8-15 Ton
Allendale	$11.50	$11.00	$11.75
Bergenfield	11.50	11.10	11.75
Bogota	11.50	11.00	11.75
Carlstadt	11.50	11.00	11.75
Closter	11.60	11.00	11.75
Cresskill	11.60	11.10	11.85
Dumont	11.60	11.10	11.85
Englewood	11.50	11.10	11.85
Fair Lawn	11.50	11.00	11.75
Garfield	11.50	11.00	11.75
Glen Rock	11.60	10.40	11.15
Hackensack	11.40	10.80	11.55
Kingsland	11.50	11.00	11.75
Leonia	11.50	11.00	11.75
Little Ferry	11.50	11.00	11.75
Lyndhurst	11.50	11.00	11.75
Midland Park	11.50	11.00	11.75
Parkridge	11.60	10.40	11.15
Ramsey	11.60	11.10	11.85
Ridgefield Park	11.50	11.00	11.75
Rochelle Park	11.50	11.00	11.75
Tenafly	11.60	11.00	11.75
Waldwick	11.50	11.10	11.85
	11.50	11.00	11.75

ESSEX CO.	Carload 15 Ton	Carload 25 Ton	Truckload 8-15 Ton
Bloomfield	11.20	10.60	11.35
Caldwell	11.20	10.60	11.35
E. Orange	11.40	10.80	11.55
Irvington	11.50	11.00	11.75
Millburn	11.40	10.80	11.55
Montclair	11.00	10.40	11.15
Newark	11.50	11.00	11.75
Nutley	11.50	11.00	11.75
Orange	11.40	10.80	11.55
Verona	11.20	10.60	11.35
West Orange	11.40	10.80	11.55

HUDSON CO.			
Bayonne	11.50	11.00	11.75
Harrison	11.50	11.00	11.75
Hoboken	11.50	11.00	11.75
Jersey City	11.50	11.00	11.75
Kearny	11.50	11.00	11.75
North Bergen	11.50	11.00	11.75
Secaucus	11.50	11.00	11.75

HUNTERDON CO.	Carload 15 Ton	Carload 25 Ton	Truckload 8-15 Ton
Annandale	11.00	10.40	11.15
Clinton	11.50	11.00	11.75
Flemington	11.50	11.00	11.75
Frenchtown	11.60	11.10	11.85
Hampton	10.80	10.20	11.05
High Bridge	11.00	10.40	11.15
Milford	11.50	11.00	11.75
Pittstown	11.50	11.00	11.75
White House	11.50	11.00	11.75

MERCER CO.			
Hightstown	11.50	11.00	11.75
Hopewell	11.50	11.00	11.75
Lawrenceville	11.40	10.80	11.55
Pennington	11.50	11.00	11.75
Princeton	11.40	10.80	11.55
Princeton Jct.	11.50	11.00	11.75
Robbinsville	11.50	11.00	11.75
Trenton	10.80	10.20	10.95
Yardville	11.50	11.00	11.75

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	Carload 15 Ton	Carload 20 Ton	Truckload 5-15 Ton
MIDDLESEX CO.			
Carteret	11.80	11.10	11.85
Metuchen	11.50	11.00	11.75
Milltown	11.60	11.10	11.85
Monmouth Jct.	11.50	11.00	11.75
New Brunswick	11.50	11.00	11.75
New Market	11.60	11.10	11.85
Perth Amboy	11.60	11.10	11.85
Plainsboro	11.40	10.90	11.65
Sayreville	11.60	11.10	11.85
Sewaren	11.60	11.10	11.85
South Amboy	11.60	11.10	11.85
South Plainfield	11.60	11.10	11.85
Woodbridge	11.60	11.10	11.85
MONMOUTH CO.			
Allenwood	11.70	11.20	11.95
Asbury Park	11.70	11.20	11.95
Atlantic Highlands	11.70	11.20	11.95
Belmar	11.70	11.20	11.95
Bradley Beach	11.70	11.20	11.95
Eatontown	11.70	11.20	11.95
Englishtown	11.60	11.10	11.85
Farmingdale	11.60	11.10	11.85
Freehold	11.60	11.10	11.85
Highlands	11.70	11.20	11.95
Keansburg	11.70	11.20	11.95
Keyport	11.70	11.20	11.95
Long Branch	11.70	11.20	11.95
Manasquan	11.70	11.20	11.95
Matawan	11.60	11.10	11.85
Monmouth Beach	11.70	11.20	11.95
N. Asbury Park	11.70	11.20	11.95
Red Bank	11.70	11.20	11.95
Spring Lake	11.70	11.20	11.95
West End	11.70	11.20	11.95
MORRIS CO.			
Boonton	10.40	10.95	10.80
Butler	10.40	10.00	10.75
Chatham	11.20	10.80	11.55
Denville	10.40	10.00	10.75
Dover	10.30	9.95	10.70
Lincoln Park	10.40	10.05	10.80
Madison	11.20	10.80	11.55
Millington	11.50	11.00	11.75
Morris Plains	10.60	10.05	10.80
Morristown	10.60	10.05	10.80
Netcong	10.10	9.85	10.60
Newfoundland	10.40	10.00	10.75
Pequannock	10.30	10.20	10.95
Rockaway	10.40	10.00	10.75
Whippany	11.20	10.80	11.55
PASSAIC CO.			
Allwood	11.00	10.40	11.15
Athenia	11.00	10.40	11.15
Bloomingdale	10.40	10.00	10.75
Clifton	11.00	10.40	11.15
Delawanna	11.50	11.00	11.75
Hawthorne	11.00	10.40	11.15
Little Falls	10.90	10.20	10.95
Mountain View	10.60	10.05	10.80
Passaic	11.00	10.40	11.15
Paterson	11.00	10.40	11.15
Pompton	10.80	10.20	10.95
Pompton Lakes	11.00	10.40	11.15
Singac	10.80	10.20	10.95
Wanaque-Midvale	11.00	10.40	11.15
SOMERSET CO.			
Belle Meade	11.50	11.00	11.75
Bernardsville	11.50	11.00	11.75
Bound Brook	11.60	11.10	11.85
Far Hills	11.50	11.00	11.75
Gladstone	11.50	11.00	11.75
Manville	11.50	11.00	11.75
Raritan	11.50	11.00	11.75
Rocky Hill	11.50	11.00	11.75
Somerville	11.50	11.00	11.75
SUSSEX CO.			
Andover	10.00	9.80	10.55
Branchville	10.20	9.90	10.65
Franklin	10.20	9.90	10.65
Hamburg	10.50	9.95	10.70
Lafayette	10.10	9.85	10.60
Newton	10.10	9.85	10.60
Ogdensburg	10.20	9.90	10.65
Sparta	10.20	9.90	10.65
Sussex	10.50	9.95	10.70
UNION CO.			
Cranford	11.50	11.00	11.75
Elizabeth	11.50	11.00	11.75
Elizabethport	11.50	11.00	11.75
Hillside	11.50	11.00	11.75
Linden	11.50	11.00	11.75
Picton	11.50	11.00	11.75
Plainfield	11.60	11.10	11.85
Rahway	11.60	11.10	11.85
Roselle	11.50	11.00	11.75
Summit	11.20	10.80	11.55
Townley	11.50	11.00	11.75
Westfield	11.60	11.10	11.85
WARREN CO.			
Belvidere	10.40	10.00	10.75
Blairstown	10.40	10.00	10.75
Buttzville	10.40	10.05	10.75
Great Meadows	10.20	9.90	10.65
Hackettstown	10.60	10.05	10.80
Phillipsburg	11.00	10.40	11.15
Washington	10.60	10.05	10.80
PENNSYLVANIA			
MONROE CO.			
Stroudsburg	11.00	10.40	11.15
NORTHAMPTON CO.			
Bethlehem	11.40	10.90	11.65
Easton	11.00	10.40	11.15
Nazareth	11.20	10.80	11.55
Penn Allen	11.50	11.00	11.75
WAYNE CO.			
Hawley	11.20	11.20	12.05
Honesdale	11.80	11.20	12.05
NEW YORK			
ORANGE CO.			
Central Valley	11.40	10.90	11.65
Chester	11.00	10.40	11.15
Cornwall	11.50	11.00	11.75
Highland Falls	11.60	11.10	11.85
Highland Mills	11.40	10.90	11.65
Middletown	11.00	10.40	11.15
Midrose	11.40	10.90	11.65
Montgomery	11.40	10.90	11.65
Newburgh	11.50	11.00	11.75
Port Jervis	11.50	11.00	11.75
Washingtonville	11.40	10.90	11.65
ROCKLAND CO.			
Congers	11.60	11.10	11.85
Haverstraw	11.50	11.10	11.85
Mooney	11.50	11.00	11.75
Nanuet	11.60	11.10	11.85
New City	11.60	11.10	11.85
Nyack	11.60	11.10	11.85
Orangeburg	11.60	11.10	11.85
Pearl River	11.60	11.10	11.85
Ramapo	11.50	11.00	11.75
Sloatsburg	11.50	11.00	11.75
Sparkill	11.50	11.00	11.75
Spring Valley	11.50	11.00	11.75
Suffern	11.50	11.00	11.75
Tappan	11.60	11.10	11.85
West Haverstraw	11.60	11.10	11.85
West Nyack	11.60	11.10	11.85
SULLIVAN CO.			
Callicoon	11.90	11.30	12.05
Fallsburg	11.60	11.10	11.85
Ferndale	11.90	11.30	12.05
Liberty	11.90	11.30	12.05
Monticello	11.60	11.10	11.85
Mountaindale	11.60	11.10	11.85
Narrowsburg	11.70	11.20	11.95
Sumnitville	11.50	11.00	11.75
Wurtsboro	11.60	11.10	11.85
NEW YORK CITY			
AND LONG ISLAND POINTS			
Manhattan	11.60	11.10	11.85
Bronx	11.60	11.10	11.85
Richmond	11.60	11.10	11.85
Kings	11.60	11.10	11.85
Queens	11.60	11.10	11.85
Jamaica, L. I.	11.70	11.20	11.95
Mineola, L. I.	12.20	11.70	12.45
Patchogue, L. I.	12.40	11.90	12.65
W. Hampton, L. I.	13.00	12.50	13.25
WESTCHESTER CO.			
Yonkers	11.70	11.20	11.95
Mt. Vernon	11.70	11.20	11.95
New Rochelle	11.70	11.20	11.95
Port Chester	12.00	11.50	12.25
Tuckahoe	11.90	11.30	12.05
White Plains	11.90	11.30	12.05
Katonah	12.00	11.40	12.15
Peekskill	11.80	11.30	12.05
Tarrytown	11.70	11.20	11.95
Irvington	11.70	11.20	11.95
Croton	11.80	11.30	12.05

All prices subject to a cash discount of 25c per ton. For prices on quantities of less than eight tons, see Lime set-up on page No. 5 of this price list.

MARCH 1ST, 1937

GYPSUM BOARD

Pick-Up at Delawanna (7500 sq. ft. Minimum)

	Wallboard		Plasterboard			Gypsum Lath 3/8"	Perforated Lath
	1/4" Per M Sq. Ft.	3/8"	1/4"	3/8"	1/2"	16x48 or 16x32 Per M Sq. Ft.	Per M Sq. Ft.
Plain	$20.70	24.00	15.70	16.00	17.70	14.00	14.25
Metallized	27.70	33.00	—	—	—	23.00	—

For delivery Carload, Mixed Carload or Trucks (minimum 7500 sq. ft.) into following territory use same prices as above:

Essex, Middlesex, Suffolk and Norfolk Counties, Mass., that portion of Plymouth County, Mass. north of continuation of southern boundary of Norfolk County, and town of Mansfield, Mass.; also Manhattan, Bronx, Kings, Queens, Richmond and Nassau Counties, New York; also Hudson, Essex, Bergen, Passaic, Union, Morris, Somerset, Middlesex, Monmouth, Mercer and Camden Counties, New Jersey; also that portion of Burlington County, N. J. west of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Penna.

For delivery Carload, Mixed Carload or Trucks (minimum 7500 sq. ft.) into following territory, use prices as listed below each territory:

Balance of Plymouth County, Mass., Bristol County, Mass. (except town of Mansfield), Worcester and Barnstable Counties, Mass.; also state of Rhode Island; also Fairfield County, Connecticut; also Orange and Putnam Counties, New York; also Sussex, Warren, Hunterdon, Ocean, Atlantic, Cape May, Cumberland, Salem and Gloucester Counties, New Jersey; also that portion of Burlington County, N. J. east of line extending from the southwest corner of Monmouth County to the northeast corner of Camden County; also New Castle County, Delaware, also Lehigh, Northampton, Berks and Lancaster Counties, Penna.

	Wallboard 1/4" Per M Sq. Ft.	Wallboard 3/8" Per M Sq. Ft.	Plasterboard 1/4"	Plasterboard 3/8"	Plasterboard 1/2"	Gypsum Lath 3/8" 16x48 or 16x32 Per M Sq. Ft.	Perforated Lath Per M Sq. Ft.
Plain	20.95	24.40	15.95	16.40	18.15	14.40	14.65
Metallized	27.95	33.40	—	—	—	23.40	—
Westchester, Rockland and Suffolk Counties, New York:							
Plain	20.85	24.25	15.85	16.25	17.90	14.25	14.50
Metallized	27.85	33.25	—	—	—	23.25	—
State of Connecticut (except Fairfield and Litchfield Counties):							
Plain	21.05	24.60	16.05	16.60	18.40	14.60	14.85
Metallized	28.05	33.60	—	—	—	23.60	—
Sullivan, Ulster and Dutchess Counties, New York and Litchfield County, Conn.:							
Plain	21.20	24.75	16.20	16.75	18.65	14.75	15.00
Metallized	28.20	33.75	—	—	—	23.75	—
Delaware, Greene and Columbia Counties, New York:							
Plain	21.45	25.10	16.45	17.10	19.10	15.10	15.35
Metallized	28.45	34.10	—	—	—	24.10	—
Niagara and Erie Counties, New York (including town of Gowanda):							
Plain	20.70	24.00	15.70	16.00	17.60	14.00	14.25
Metallized	27.70	33.00	—	—	—	23.00	—

11395 Plain—Wallboard, Plasterboard and Lath

For Carload or Mixed Carload shipments into territories other than above, use following Mill Base prices, plus lowest combination of freight and Mill Base.

	Wallboard		Plasterboard			Gypsum Lath 3/8"	Perforated
	1/4"	3/8"	1/4"	3/8"	1/2"	16x48 or 16x32	Lath
	Per M Sq. Ft.		Per M Sq. Ft.			Per M Sq. Ft.	Per M Sq. Ft.
Oakfield, N. J.	$20.00	23.00	15.00	15.00	16.25	13.00	13.25
Plasterco, Va.	20.00	23.00	15.00	15.00	16.25	13.00	13.25
Gypsum, Ohio	20.00	23.00	15.00	15.00	16.25	13.00	13.25
*New Brighton, S. I.	*20.00	*23.00	*15.00	*15.00	*16.25	*13.00	*13.25
*Philadelphia, Pa.	*20.00	*23.00	*15.00	*15.00	*16.25	*13.00	*13.25
*Boston, Mass.	*20.00	*23.00	*15.00	*15.00	*16.25	*13.00	*13.25

(*) Prices f.o.b. cars Boston, Mass., New Brighton, N. Y. and Philadelphia, Pa. apply for shipments into the following area only; States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Maryland, Delaware and Virginia; the District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center, Mifflin, Juniata, Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

We do not list basing point farther west than Gypsum, Ohio. For shipments into western territories it would be necessary to use Western basing points.

The above prices are for standard sizes only, as follows:

** Wallboard—1/4" and 3/8"—4'x4', 5', 6', 7', 8', 9', 10', 11', 12'

Plasterboards—1/4", 3/8" and 1/2"—32x36

Gypsum Lath—3/8"—16x32 or 16x48

** We do not manufacture 1/4" Wallboard in 11' or 12' lengths.

11396 Metallized Wallboard and Lath (One Side Only)

For Carload, or Mixed Carload shipments into territories other than listed before use following Mill Base prices, plus lowest combination of freight and Mill Base.

	Wallboard 1/4" Per M Sq. Ft.	Wallboard 3/8" Per M Sq. Ft.	Metallized Gypum Plaster Lath 16x32 or 16x48
Oakfield, N. Y.	$27.00	32.00	
Plasterco, Va.	27.00	32.00	
Gypsum, Ohio	27.00	32.00	See Note A
*New Brighton, S. I.	*27.00	*32.00	
*Philadelphia, Pa.	*27.00	*32.00	
*Boston, Mass.	*27.00	*32.00	

(a) 3/8" Metallized Plaster Lath:

(1) $22.00 per M Sq. Ft. f.o.b. Philadelphia, Pa., New Brighton, S. I., N. Y. and Boston, Mass. for shipments into following area only; States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Maryland, Delaware, and Virginia; the District of Columbia; that portion of Pennsylvania east of and including Potter, Cameron, Clinton, Center Mifflin, Juniata Perry, Franklin and Fulton Counties; also Morgan, Berkeley and Jefferson Counties, West Virginia.

(a) $22.00 per M Sq. Ft. f.o.b. Oakfield, N. Y., Gypsum, Ohio, Detroit, Mich., East Chicago, Ind., Grand Rapids, Mich., and Plasterco, Va. for shipments into area east of the Mississippi River, also cities of Duluth, Minneapolis and St. Paul, Minn., and towns below St. Paul on the west bank of the Mississippi River down to the Arkansas-Tennessee line.

11397 *Government's Exhibit No. 594*

Complaint on Sale of Patented Gypsum Wallboard and Gypsum Plasterboard in Violation of License to Manufacture and Sell Such Patented Products

JUNE 5, 1936.
(Date)

To:

Board Survey Company,
300 West Adams Street,
Chicago, Illinois.

---

mplaint against Kelley Plasterboard Company
(Manufacturer)

ame of Customer involved _____

ate of Violation _____ Shipped From _____ (Mill) By _____ (Rail or Truck)

pe of Violation _____

otage volved	((Wallboard) / ((Plasterboard)	Size	((Wallboard) / ((Plasterboard)	Billed Price Per M	((Wallboard) / ((Plasterboard)	Price Should Have Been	((Wallboard) / ((Plasterboard)

Facts Concerning Complaint

Licensee, through Mr. Stremble, a free lance commission man, quoted the carload price on a truckload of patented gypsum board to the Alco Lumber Company and Universal Lumber & Trim Company, both of Brooklyn, New York.

It is also reported that Mr. Stremble quoted Tom Tesauro Lumber & Coal Company, Coney Island, New York a price of $1.10 per M sq. ft. less than the license price on a truckload of patented board.

UNITED STATES GYPSUM COMPANY
(Name of Complainant)

By H. F. SADLER

_____
(Title)

(Use reverse side, if more space needed for complaint)

11398 *Government's Exhibit No. 595*

JUNE 8, 1936

KELLEY PLASTERBOARD COMPANY, INC.
Delawanna, New Jersey

GENTLEMEN:

We encolse herewith memorandum of a matter which the Board Survey Company has been asked to investigate. We will be glad to receive your explanation concerning this matter.

Yours very truly,

CBM:IC
Encl.
Kelley—3—Alco Lumber
Universal Lumber
Tom Tesauro Lumber

11399 *Government's Exhibit No. 596*

JULY 16, 1936

UNITED STATES GYPSUM COMPANY
300 West Adams Street
Chicago, Illinois

Attention: MR. H. F. SADLER

GENTLEMEN:

June 8th the substance of your request for investigation dated June 5th concerning price quotations by the Kelley Plasterboard Company to the Alco Lumber Co,, Universal Lumber & Trim Co. and Tom Tesauro Lumber & Coal Co. was sent to the Kelley Plasterboard Company. There is herewith enclosed a copy of their reply. Is this answer satisfactory or do you believe the matter requires further investigation, and if so, in what respect?

If we do not have a request for further investigation we shall assume that you consider the answer sufficient and shall close our files in the matter.

Yours very truly,

CBM:HR
Enc.
Kelley—3—Alco
Universal
Tom Tesauro
cc—Board Survey Co.

11400 *Governmen s Exhibit No. 596A*

Complaint on Sale of Patented Gypsum Wallboard and Gypsum Plasterboard in Violation of License to Manufacture and Sell Such Patented Products

JUNE 22, 1936.
(Date)

To:

Board Survey Company,
300 West Adams Street,
Chicago, Illinois.

(COPY)

Date of Complaint: June 5, 1936.

Name of Customer involved: Alco Lumber Co., Brooklyn, N. Y.
Universal Lumber & Trim Co., Brooklyn, N. Y.
Tom Tesauro Lumber & Coal Co., Coney Island, N. Y.

Address of Customer involved _____

Date of Violation _____ Shipped From _____ (Mill) By _____ (Rail or Truc

Type of Violation _____

Footage Involved	(_____ (Wallboard) (Plasterboard)	Size	(_____ (Wallboard) (Plasterboard)	Billed Price Per M	(_____ (Wallboard) (Plasterboard)	Price Should Have Been	(_____ (Wallboard) (Plasterboard)				

Licensee's Explanation

Mr. Stremble we find is an employee of the Structural Gypsum Co., a division of the American Cyanamid & Chemical Co., to whom we sell Gypsum Board. We have taken up with them the charges made against Mr. Stremble, and have been definitely advised that he will no longer offer for sale Gypsum Wallboard and Gypsum Lath. They however deny any charges which are made against Stremble, but in order to eliminate any further complaint they have agreed to restrict his sales to products manufactured by them only.

KELLEY PLASTERBOARD COMPANY, INC.
(Name of Licensee)

By S. J. Kelley
(Title)

(Use this Form to Answer Complaints From Board Survey Co.)

11401 *Government's Exhibit No. 597*

JUNE 20, 1938

MR. WILLIAM STREMBLE
3 Third Street
Meadow Mere Park
Jamaica, L. I.
New York

DEAR BILL:

Enclosed is confirmation of our wire to you this afternoon, which is self-explanatory.

There have been evidences of split commissions, to which, of course, we cannot be parties. As you know, all gypsum board is manufactured and sold under license agreement, and we have to adhere rigidly to the terms.

I am sorry that we have to take this action, but in view of the circumstances, there is nothing else that can be done.

Very truly yours,

AMERICAN CYANAMID & CHEMICAL CORP.
STRUCTURAL GYPSUM DIVISION

H. G. McCORMACK
Assistant Manager

HGMcC:jvl

SEPTEMBER 14, 1936.

Effective September 15th, 1936, the Following Prices Will Apply on Plasterboard, Lath and Wallboard

***Note: 1/4" Wallboard reduced $1.00 per M sq. ft.**
3/8" Wallboard reduced $2.00 per M sq. ft.
Plasterboard and Lath Do Not Change

Prices in effect will be			Carload–Min. 40,000 lbs.	Truckload–Min. 5000 sq.ft.
Metro. N.Y.–N.J., Boston and Philadelphia Areas.	Wallboard	1/4"	$20.00 M sq.ft.	$21.00 M sq.ft.
		3/8"	25.00 M sq.ft.	26.00 M sq.ft.
	Plasterboard or Lath	1/4"	15.00 M sq.ft.	16.00 M sq.ft.
		3/8"	15.00 M sq.ft.	16.00 M sq.ft.
		1/2"	16.25 M sq.ft.	17.25 M sq.ft.
			Carload–Min. 40,000 lbs.	Truckload–Min. 5000 sq.ft.
Southeast New York and Southern New Jersey Areas, also Lehigh and Northampton Counties, Pa. and New Castle County, Del.	Wallboard	1/4"	$21.00 M sq.ft.	$22.00 M sq.ft.
		3/8"	26.00 M sq.ft.	27.00 M sq.ft.
	Plasterboard or Lath	1/4"	16.00 M sq.ft.	17.00 M sq.ft.
		3/8"	16.00 M sq.ft.	17.00 M sq.ft.
		1/2"	17.25 M sq.ft.	18.25 M sq.ft.

Description of Trucking Areas:

Metro. New York–New Jersey Area: Manhattan, Bronx, Kings, Queens, Richmond, Westchester, Rockland, Nassau and Suffolk Counties, N. Y., also Hudson, Essex, Union, Bergen, Passaic, Morris, Middlesex, Mercer, Monmouth, Hunterdon, Warren, Somerset, Sussex and Ocean Counties, New Jersey.

Philadelphia Area: Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Pennsylvania, and Camden County, New Jersey.

Boston Area: Essex, Middlesex, Suffolk, Norfolk, and Worcester Counties, Mass., the town of Mansfield, Mass., that portion of Plymouth County lying north of the continuation of the southern boundary of Norfolk County, Mass.; Rockingham and Strafford Counties, New Hampshire; York and Cumberland Counties, Maine.

Southeast New York Area: Orange, Ulster, Sullivan, Putnam and Dutchess Counties, New York.

Southern New Jersey Area: Atlantic, Cape May, Gloucester, Salem, Cumberland and Burlington Counties, New Jersey.

11403 *Government's Exhibit No. 599*

LICENSE AGREEMENT.

This agreement executed in duplicate this 11 day of April, 1927, by and between the United States Gypsum Company, an Illinois corporation of Chicago, Illinois, (hereinafter referred to as "Lecensor") and Texas Cement Plaster Co., a Texas corporation, of Oklahoma City, Oklahoma, (hereinafter referred to as "Licensee") witnesseth:

Whereas, Licensor is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, Number 1,029,328, dated June 11, 1912, and Number 1,034,746, dated August 6th, 1912, (hereinafter called the "Utzman Patents"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and Applications for Letters Patent of the United States set forth in Exhibit A attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, heretofore said Utzman patents have been adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; see also 263 U. S. 713), and said courts have decreed that said Utzman patents are valid and were infringed by the defendants in the cases so reported, and in the decision of the said District Court rendered on or about July 21, 1925, and not yet reported, by reason of the making, using and selling of plaster board or gypsum wallboard having protected edges, and said District Court has ordered perpetual injunctions and ac-
11404 countings against said defendants; and

Whereas Licensee recognizes and admits the validity and scope of said Utzman Patents; and

Whereas Licensee has equipped its plant with machines for the manufacture of plaster board and gypsum wallboard embodying the inventions set forth in said patents and applications for letters patent, and Licensor has threatened to prosecute Licensee for patent infringement in case it shall manufacture and sell any of said

product and Licensee is desirous of avoiding litigation and of obtaining a license to use the processes and make and use the machines and/or inventions set forth and claimed in said Utzman patents and in all of said patents or applications for letters patent described in said Exhibit A; and

Whereas Licensee has offered to pay a royalty for said license of five per cent (5%) of the selling price of Licensee of said patented product until August 6, 1929, the date of the expiration of said Utzman Patent number 1,034,746, and thereafter of one and one-half per cent (1½%) of the selling price of said patented product from August 6, 1929 until February 10, 1937, the date of the expiration of said patent number 1,330,413; and

Whereas Licensor has refused to accept said offer and has been unwilling to grant such a license except upon the express condition that Licensee will manufacture said plaster board or gypsum wallboard only with a folded or protected edge similar to that manufactured by Licensor, so that Licensor may be protected in its own business of manufacturing and selling said patented product and realize to the fullest extent the benefits under said patents from the manufacture by Licensee; and

Whereas Licensor has agreed to waive the express condition aforesaid and grant the said license in consideration of the egreement of Licensee to pay to
11405 it for the license to use the processes and make and use the machines and/or inventions set forth and claimed in all of said patents and applications for letters patent, an amount monthly equivalent to five per cent (5%) of the selling price of Licensee of all plaster board or gypsum wall board of every kind manufactured and sold by it during each calendar month between the date hereof and August 6, 1929, the date of the expiration of said Utzman Patene number 1,034,746, and thereafter an amount monthly equivalent to one and one-half per cent (1½%) of such selling price during each calendar month from August 6, 1929 until February 10, 1937, the date of the expiration of said patent number 1,330,413, and upon the terms and conditions as hereinafter set forth;

Now, therefore, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations,

the receipt whereof is hereby acknowledged, the parties hereto do hereby agree as follows, to-wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee, an indivisible and non-exclusive right, license and privilege of using the processes, and making and using the machines and/or inventions set forth and claimed in said Utzman Patents, and in any and all of said patents or applications for letters patent described in said Exhibit A, at the plant or factory now owned and/or operated by Licensee at Hamlin, Texas, and of manufacturing at said plant or factory and selling and/or using plaster board or gypsum wallboard manufactured at said plant or factory and embodying the inventions and improvements set forth and claimed in said Utzman Patents and said patents and applications for letters patent described in Exhibit A, until the 10th day of February, 1937, the date of expiration of patent number 1,330,413, mentioned in said Exhibit A.

It is expressly agreed and understood that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor
11406 shall have, and it hereby reserves the right to determine and fix at any time, and to change from time to time during the term of said Utzman patent number 1,034,746 the minimum price or prices (not more, however, than the then prevailing market price or prices) at which the Licensee shall sell any plaster board or gypsum wallboard manufactured by Licensee embodying the improvements set forth and claimed in said Utzman Patent number 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the price or prices at which the Licensee shall sell said patented product, and thereafter shall give to the Licensee written or telegraphic notice of any change in such price or prices, and the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman Patent number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale, any plaster board or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent number 1,034,746 at a price or prices less than that stated by the Licensor in said notice, or in any such written or telegraphic notice of a change

in such price or prices. It is expressly understood and agreed that this provision of the said license shall apply only to the said Utzman Patent number 1,034,746, and shall not apply to any of said other Letters Patent.

2. The Licensee further agrees to pay to the Licensor for said right, license and privilege of manufacturing, using and/or selling plaster board or gypsum wallboard, and for said privilege of using the processes and making and using the machines and/or inventions, embodying the inventions and improvements set forth and claimed in said Utzman patents and in any and all of said patents and applications for letters patent described in Exhibit A, an amount equivalent to five per cent (5%) of the selling price of the Licensee, of all plaster board or gypsum wallboard of every kind, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman
11407 Patent number 1,034,746, and thereafter an amount equivalent to one and one-half per cent (1½%) of the selling price of the Licensee, of all such plaster board or gypsum wallboard, from August 6, 1929 until February 10, 1937, the date of the expiration of said patent number 1,330,413.

3. It is expressly understood and agreed that the said License shall be personal to the Licensee and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent of the Licensor or transferred by operation of law, except that the same may be assigned to any successor or subsidiary corporation of Licensee, and except that in the event of the appointment of a receiver or receivers for the purpose of conserving the business and assets of Licensee, such receiver or receivers shall succeed to all of Licensee's rights under said license and under this agreement. Notwithstanding anything to the contrary herein contained, it is expressly understood that this license shall not be assigned to any other gypsum company manufacturing and/or selling plaster board or gypsum wallboard, nor shall the same in any way apply to any such company or to any of the plants or factories theretofore owned or operated by any such company, in case of a merger or consolidation between such companies, or any of them, and the Licensee, or an acquisition of the assets and business of Licensee, or any part thereof, by any

such company, or of any such company by said Licensee, nor shall any such merger, consolidation or acquisition affect any claim which Licensor has against any such other company for infringement of its said patents.

4. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plaster board and gypsum wallboard manufactured and sold by it, and agrees that on or before the 20th day of each and every calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plaster board and gypsum wallboard manufactured and sold by it during the preceding
11408 calendar month, together with the price or prices at which the same was sold, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor, on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said plaster board and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

5. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plaster board and gypsum wallboard manufactured and sold by it, the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom.

6. Licensee agrees that all plaster board or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents shall be distinctly marked with the word "PATENTED", together with the dates of the Utzman patents, and the dates of any other patents which Licensor may properly specify, and in connection with the said markings it will further mark said patented product with the words, "Licensed under the above Letters Patent," which markings shall be plainly visible.

7. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, or jobbers of such products, who do not or may not manu-

facture gypsum wallboard or gypsum plaster board but who desire or may desire to have gypsum wallboad or plaster board manufactured for them, it is understood and agreed
11409 that Licensee may manufacture gypsum wallboard or plaster board embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer and/or jobber; provided, however, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard or plaster board manufactured for, and sold and invoiced to, such other manufacturer and/or jobber and upon the regular selling price of Licensee of such plaster board or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plaster board or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer or jobber.

8. Licensee expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as "seconds" shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

9. It is understood and agreed that the patented product manufactured and sold hereunder by Licensee shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by Licensee having a protected edge is within the scope of said Utzman Patents number 1,029,328 and 1,034,746.

After the expiration of said Letters Patent number 1,034,746 and until the expiration of Letters Patent number 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a protected edge is within the claims or is manufactured
according to the processes or by the use of machines
11410 embodying the claims either of said Letters Patent number 1,330,413, or of one or more of the other said Letters Patent listed in Exhibit A hereto, under which the aforesaid indivisible and non-exclusive right, license and privilege is granted.

10. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges only until February 10, 1937, the date of the expiration of the said Letters Patent number 1,330,413, the validity of the aforesaid Utzman patents and all of the said Letters Patent, granted and to be granted on applications for patents specified in Exhibit A, and only in so far as each and every of said Letters Patent relate to plaster board and/or gypsum wallboard, and agrees that it will not at any time prior to February 10, 1937, the date of the expiration of said Letters Patent number 1,330,413, whether before or after the termination of this license, in so far only as they relate to plaster board and/or gypsum wallboard, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said Letters Patent or the title thereto of Licensor, or question in any way the prima facie scope of either or any of said Letters Patent; but it is expressly understood that the Licensee shall have full right to contest the priority, novelty or pantentability of the subject matter of any and all of the claims of the applications for letters patent specified in Exhibit A in accordance with customary patent office procedure to the same extent as though this agreement had never been entered into.

11. In the event that Licensee shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements hereinafter in this paragraph specified
11411 to be by Licensee kept and performed, then Licensor, at its election, may serve upon Licensee notice of intention to terminate the license herein granted, which notice shall specify the alleged neglect, failure or refusal; and if Licensee, within thirty (30) days from the date of the delivery of said notice, shall not have paid to Licensor the license fees or royalties then due and payable in accordance with the terms hereof if specified in said notice; or within such thirty (30) day period shall not have made and kept the books of account and records hereinbefore mentioned if specified in said notice; or within such thirty (30) day period shall not have permitted Licensor to examine said books of account and records as hereinbefore provided if specified in said notice; or within thirty (30) days after receipt of such notice shall not have marked said plaster board or gypsum wallboard manufactured by it sub-

sequent to the receipt of such notice "Patented", with the dates of the patents, or marked or invoiced the same as "seconds", as hereinbefore provided if specified in said notice; or shall, after the receipt of such notice, fail in good faith to comply with the conditions contained in paragraph 1 hereof, in the sale of plaster board and/or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent number 1,034,746, in case Licensor shall exercise the right therein reserved by it, if specified in said notice, then in either of such events the said license and all rights acquired by Licensee hereunder shall be and become cancelled and terminated without the necessity of any court action; provided, however, that Licensee shall not be relieved thereby from paying to Licensor any license fees or royalties accrued hereunder at the time of such termination; and provided further that should a difference of opinion arise at any time under this agreement between the parties hereto as to the validity of the grounds for
11412 any default that may be specified in said notice, the Licensor shall in such case not be privileged to declare a default hereunder on account of any such alleged default specified in said notice with respect to which a difference of opinion has arisen as aforesaid, until and unless the same has first been settled by arbitration as hereinafter provided. In such case of a difference of opinion, Licensee shall, within said thirty (30) day period, first state in writing to Licensor wherein and in what respect such difference of opinion shall consist and shall at the same time appoint in writing one person as an arbitrator and the Licensor shall thereupon appoint another person as an arbitrator and in case the two persons so appointed shall not agree, within thirty (30) days after such appointment, upon the difference of opinion which shall have arisen, then the two persons so appointed shall appoint a third person, and the decision of a majority of the three arbitrators so appointed shall constitute a final settlement of the said difference of opinion and be binding upon both the Licensor and the Licensee; provided, further, that in case the difference of opinion above mentioned shall constitute a difference of opinion as to the amount of the royalties or license fees to be paid hereunder then the Licensee shall first pay or offer to pay the amount of such license fees or royalties which it then admits is due and payable in accordance with the terms hereof and the acceptance thereof by the Licensor shall not waive its rights in the controversy with respect

thereto. Upon the determination of the said dispute by the said arbitrators as aforesaid, then if the Licensee shall fail or refuse to comply with the terms of the award or finding made by the said arbitrators within thirty (30) days from the date of such award or finding, in the event such award or finding is against the Licensee, then the Licensor
11413 may at its election terminate and cancel this license.

In the event of default hereunder by the Licensee and notice of such default is served on Licensee by Licensor, as herein provided, and after service of such notice Licensee shall cure such default as herein provided, the same shall constitute a nullification of the said notice by the Licensor as though the same had not been served. In case at any time Licensee shall commit any act of bankruptcy then the license hereunder shall immediately be and become cancelled and terminated, but Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. Failure on the part of Licensor to notify Licensee of a breach of this license contract as aforesaid or to terminate said license because of such breach shall not constitute a waiver of Licensor's right to terminate said license at a later time in accordance with the provisions of this paragraph. Licensor may specifically enforce this contract or any of the terms, conditions and covenants hereof, by injunction or in such other manner as may be provided by law,

12. Any notice to be given under the terms hereof may be served upon the Licensee by mailing the same to the Licensee, postage prepaid, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of said notice upon the Licensee.

13. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, whether now or hereafter issued, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the
11414 Licensor shall be necessary or proper; and in case the Licensor shall grant to any infringer, or to any other person, any license under said patents upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms.

14. The terms "plaster board" and "gypsum wallboard" wherever used in this agreement, shall be understood to mean plaster board and gypsum wallboard of every kind having the structural characteristics of plaster board or gypsum wallboard, as now commercially recognized, and with fibrous or paper covering on or adjacent to both sides, but the terms shall not be construed to mean precast slabs manufactured from gypsum mixtures that are more than one and one-half (1½) inches in thickness and which do not have a protected edge either in whole or in part.

15. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by the Licensee except as hereinabove specifically provided.

In Witness Whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY

By S. L. AVERY,

Its President.

ATTEST:

R. G. BEAR,

Secretary.

TEXAS CEMENT PLASTER CO.,

By S. M. GLOYD,

Its President.

ATTEST:

T. W. MCGOHEN,

Secretary.

11415 EXHIBIT "A"

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expres October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

11416 Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Birdsey application Serial No. 437,062, filed January 13, 1921.

Birdsey application Serial No. 506,676, filed October 10, 1921.

Birdsey application Serial No. 545,231, filed March 20, 1922.

Birdsey application Serial No. 555,627, filed April 19, 1922.

Birdsey application Serial No. 583,795, filed August 23, 1922.

Moore application Serial No. 590,356, filed September 25, 1922.

Knode application Serial No. 590,358, filed September 25, 1922.

Birdsey application Serial No. 605,896, filed December 9, 1922.

Smith application Serial No. 662,359, filed September 12, 1923.

Birdsey application Serial No. 737,237, filed September 12, 1924.

Utzman application Serial No. 750,224, filed November 17, 1924.

Birdsey application Serial No. 754,927, filed December 10, 1924.

Brookby application Serial No. 50,538, filed August 17, 1925.

11417 Birdsey application Serial No. 57,507, filed September 21, 1925.

Brookby & Absmeier application Serial No. 91,297, filed March 1, 1926.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial 565,737.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial 567,205.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14, 1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Armstrong application Serial No. 310,470, filed July 12, 1919.

Utzman application Serial No. 374,833, filed April 19, 1920.

Armstrong application Serial No. 377,421, filed April 29, 1920.

Speer application Serial No. 427,044, filed November 29, 1920.

Speer application Serial No. 427,045, filed November 29, 1920.

Mehlhope application Serial No. 473,288, filed May 28, 1921.

11418 Utzman application Serial No. 477,371, filed June 14, 1921.

Kohler application Serial No. 482,073, filed July 2, 1921.

Gustafson application Serial No. 509, 366, filed December 2, 1919, renewed October 21, 1921.

Kohler, et al., application Serial No. 540,412, filed March 2, 1922.

Armstrong application Serial No. 565,737, filed June 3, 1922.

Armstrong application Serial No. 567,205, filed June 9, 1922.

Utzman application Serial No. 581,361, filed August 12, 1922.

Utzman application Serial No. 581,362, filed August 12, 1922.

Williams application Serial No. 582,606, filed August 18, 1922.

Tonning application Serial No. 590,221, filed September 25, 1922.

Armstrong application Serial No. 596,983, filed October 26, 1922.

Speer application Serial No. 610,739, filed January 5, 1923.

Rehm application Serial No. 8,654, filed February 12, 1925.

Rehm application Serial No. 8,655, filed February 12, 1925.

Rehm application Serial No. 8,656, filed February 12, 1925.

Rehm application Serial No. 8,657, filed February 12, 1925.

Rehm application Serial No. 23,775, filed April 17, 1925.

11419 *Government's Exhibit No. 601*

NEWELL & SPENCER & SAFFORD
ATTORNEYS AND COUNSELORS AT LAW
Graybar Building
420 Lexington Avenue
NEW YORK

MARCH 4, 1936.

CERTAIN-TEED PRODUCTS CORP.
Beaver & Military Roads
Buffalo, N. Y.

Re: Perforated Gypsum Lath

Att. Mr. H. H. Van Hagan
and Mr. G. A. Hoggatt

GENTLEMEN:—

We have Mr. Van Hagan's letter of February 26 enclosing memorandum from report on meeting of the board licensees held in New York on February 20 and Mr. Hoggatt's letter of February 29 recounting his conferences with Dr. L. S. Wells and Dr. Emley of the Bureau of Standards regarding the tests described in Bureau of Standards' Technologic Paper #70. Since receiving these letters we have reviewed our files relating to the Roos patent #1,938,354 including the opinion which we addressed to Mr. Straub on December 27, 1933.

I am still of the opinion that the Roos patent is completely invalid. It is a patent for empirical formulae and empirical formulae are ordinarily not patentable since they are within the ordinary skill of any competent research man in the particular art in which the work is done. As I said in my opinion of December 27, 1933, given the Rader patent cited in the file history of the Roos patent and the problem

of making a practical commercial perforated plasterboard for the purpose of keying the plaster to the board, with the fire-resistance problem also put up to the plaster-
11420 board and plaster man, any one of them would reach practically the same result as Roos reached.

At the time this opinion was given we did not have before us the history of the practical work that had been done along this line in California. Apparently also the Bureau of Standards, when it made certain tests around about February, 1933, did not know that the California perforated plasterboard had been on the market for a number of years, since in their Technical News Bulletin No. 190 they made the statement "Although perforated plasterboard had been used experimentally as early as 1915 (Bureau of Standards' Technologic Paper #70) it had not become commercially available until within the past year."

Since we gave our opinion of December 27, 1933, there has been a tendency in the courts, the Supreme Court included, to raise the standards of invention, that is, to require a much higher degree of ingenuity and originality in anything which is to be held to constitute an invention. As a result of this tendency, orders have been issued in the Patent Office to stiffen up on examinations so that I doubt if now this Roos patent could get through the Patent Office in its present form, if at all.

I think the entire patent could be completely ignored with perfect confidence in the outcome of any litigation involving it. It might be expensive to do so, because patent litigation is necessarily expensive, and it might be unwise to do so from the standpoint of commercial policy since the patent might be useful, if acquiesced in, for stabilizing the manufacture and sale of plasterboard lath coming within its terms.

11421 In any event, you can safely ignore altogether the first three claims of the patent, which are completely functional and do not define anything that could be said to come definitely within their terms. I think undoubtedly that with the right consistency of plaster the plasterboard shown in the Makowski Patent 1,349,778, granted August 17, 1920, on an application filed September 7, 1917, would completely anticipate these three functional claims. Moreover, it is to be noted that this Makowski patent is not limited to any particular size of hole or thickness of board and that persons

making the Makowski wall board are entitled to use any size hole that they desire to. In the drawings of the Makowski application as filed the holes shown were apparently about one inch in their smallest diameter since they appear as one-half inch holes in the printed patent. The drawings of an application are reduced to one-quarter size when printing the patent, that is, each dimension of the drawing is reduced one-half.

When considering, if you wish to consider, avoiding the Roos patent by using dimensions other than defined in the claims of the Roos patent or by using dimensions such as were in public use long before the Roos patent and such as are illustrated in the sample of plasterboard received from the West Coast which we have here, you have to consider also avoiding the Makowski patent which still has somewhat over a year to run. This patent expires August 17, 1937.

Claim 1, for example, of the Makowski patent reads as follows:

11422 "1. A process of manufacturing wall board comprising flowing a core of plastic material between reinforcing sheets of fiber, allowing the same to stand until dry, and then punching holes through the completed board."

There are seven claims in the Makowski patent, some of the others of which you might also infringe if you approximated the Makowski construction.

U. S. Gypsum tries to get away from the Makowski patent by boring the holes instead of punching them. Their file wrapper shows that they had in the original application claims to the process of making the board as well as claims to the article. When they cancelled the process or method claims which covered the stacking of the lath and simultaneously drilling a plurality of perforations completely through the bundle, among other things, they stated in the remarks accompanying the amendment cancelling the claims that "a divisional application will be filed covering the subject-matter thereof". We are not advised at present as to whether such an application has matured into a patent, or not.

I would suggest that if you wish to avoid the patent that you make up some experimental board and give it the necessary tests to determine how important the particular dimen-

sions recited in the claims of the Roos patent are since apparently after August of next year the field will be pretty wide open for making a perforated plasterboard if, in fact, it is not already wide open in view of the Rader and other earlier patents. It may be, of course, that U. S. Gypsum and its licensees will try to get the claims of the Roos patent written into the specifications of the fire prevention codes of various cities and thus practically force you either
11423 to use these particular dimensions or fight the patent. If this is to be prevented, someone will have to demonstrate that their talk about the importance of these particular relationships, size of hole and spacing of holes is more or less "hot air" and that other factors such as nature and consistency of the plaster, etc. may make other hole sizes and hole spacings just as effective for slowing up fires.

It seems to me that it might be wise to have a round table conference on this whole situation so that we may know a little more definitely just what you want to do, whether to play along with U. S. Gypsum, defy their patent, or avoid it so that we may be in a better position to give you definite advice.

Very truly yours,

H. Dorsey Spencer

HDS:GN

11424 *Government's Exhibit No. 602*

NEWELL & SPENCER & SAFFORD
ATTORNEYS AND COUNSELORS AT LAW
Graybar Building
420 Lexington Avenue
NEW YORK

DECEMBER 27, 1933.

MR. S. C. STRAUB
Certain-teed Products Corp.
100 East 42nd Street
New York, N. Y.

Re: U. S. Gypsum Co. Patent 1,938,354, Roos, Granted Dec. 5, 1933; Application filed Mar. 15, 1933.

DEAR MR. STRAUB:—

We have obtained and examined the file history of the above patent and find that the only recorded actions by the Patent Office in the case were a requirement for division and an affirmation of the requirement for division and the notice of allowance. The principal work on the case was done at oral interviews with the examiner.

The case as filed contained 24 claims, of which claims 21 to 24 inclusive were claims to the method of producing the perforations or the perforated plasterboard. The requirement for division was between the method claims and the article claims which are now in the patent. The claims of the patent are the article claims originally filed, with very slight amendments, claim 7, however, having been rewritten and considerably amplified.

When making the requirement for division the examiner cited 6 patents, as follows:

228,939	Rogers	907,876	Rader
767,362	Phillips	1,123,304	Jester
694,111	Schratwieser	1,569,947	Buttress

11425 Of these six patents, two related to the method, and four related to perforated lath boards, the most pertinent being the patent to Rader 907,876, which we have already discussed as a result of the search that was made

sometime ago, and the patent to Buttress 1,569,947, January 19, 1926. The patent to Rader shows an ordinary plasterboard with straight perforations through it for keying the plaster to the plasterboard. The patent to Buttress also shows a plasterboard with perforations through it for keying the plaster to the plasterboard, the Buttress perforations, however, being countersunk on each side so that, as set forth in the claim, the openings are "formed of two frusto-conical co-axial holes having their smallest diameter near the center of the board."

I do not believe that the entire Roos patent discloses a single thing that rises to the dignity of invention but it is a patent that has a tremendous nuisance value. Given the Rader patent and the problem of making a practical commercial perforated plasterboard for the purpose of keying the plaster to the board, I haven't the slightest doubt that any practical plasterboard and plaster man would have reached substantially the same solution of the problem as reached by Roos and would have considered it a part of his technical work, not a problem requiring the exercise of inventive ingenuity. There is always a gamble, however, in trying to get this fact across to the ordinary federal district judge who, before he goes on the bench, has had no contact with patent law, and therefore, as I said above, the patent has a tremendous nuisance value and there is a remote chance that some district judge, impressed by
11426 the commercial demand for this type of board which may be created as a result of new building codes, might sustain the patent, and that a Circuit Court of Appeals, equally impressed, might affirm his decision and thus give the U. S. Gypsum Company an undeserved adjudication of a patent based upon a mere routine solution of an ordinary technical problem.

The Roos patent is based upon an alleged discovery that, to make a practical commercial perforated plasterboard lath, a newly discovered relationship between the thickness of the board, the diameter of the perforation and the area of unperforated material between any four perforations marking the four corners of a square must be utilized. This relationship is defined in various ways in the claims and in the first three claims it is defined functionally. In other words, there is no definite relationship set forth.

For example, claim 1 calls for a wall construction which includes a perforated plasterboard lath and plaster coating

on the face of the lath and extending into and through the perforations. It then goes on to say that the perforations extend completely through the lath and are of such size and spacing that they are completely filled with portions of the plaster in the normal acts of applying the plaster and that the plaster goes through and forms keys which protrude beyond and engage with the inner face of the board, the size of each key and the area of plaster supported thereby, that is, the area on the other face of the board, being co-related to retard calcination of the keys considerably beyond the calcination of the plaster coating when the construction is subjected to continued high temperature. The claim further defines the area supported by the keys
11427 as sufficiently large to provide spaced rows of uniformly positioned perforations and defines the rows as being positioned to avoid the supporting members, that is, the studding spaced at standard distances, when the boards are supported thereon in normal adjacent aligned or staggered relation. The claim also defines the perforations as being of a number and distribution not materially to weaken the board in any direction.

I cannot conceive of a claim that defines a perforated plasterboard lath construction that would be reached by any practical plasterboard man making such a construction for the market any better than this claim does. In other words, I do not believe that there is the slightest trace of invention set forth in the claim and yet the Patent Office has allowed it, the patent is presumptively valid, it is held by a large and aggressive organization that it would therefore be a very costly matter to make exactly what is shown in the patent.

The weakness of the prior art as shown in the patents listed in the file is that the Rader patent was solicited by one of the poorest firms of advertising solicitors that ever existed, a firm that has fortunately now gone out of existence, and it seems quite probable that what they have shown and described was probably not what Miss or Mrs. Rader invented. I note that she was living, at the time the application was filed, at Upper Monclair, N. J. If still living, it would seem to be advisable to get into touch with her and find out what she actually made and whether or not it was ever used.

The patent to Buttress was solicited by an attorney in

California whom I know and it seems quite probable
11428 that from Buttress or his attorney something might
be learned as to the use of perforated plasterboard lath. The Buttress patent shows some of the perforations coming over the studs. This, of course, in Buttress was not objectionable because Buttress has a lock by reason of his countersunk holes. Buttress does show the plaster going through the perforated board and forming a key on the back side and shows a relationship of the size of the holes to the thickness of the board that is the practical equivalent of that shown in the Roos patent. The Buttress patent, however, shows what I would estimate to be a considerably larger number of holes and necessarily closer together.

As a practical board, of course, Buttress' board is more costly to manufacture because of the countersinknig of the holes on both faces. Rader, however, shows a perfectly straight smooth hole. In this connection, I might add that in dividing out claims 21 to 24 inclusive, a statement was made that a divisional application was made to cover the process. I assume that this has been done.

The Roos process of making the holes consists essentially of drilling the lath in the bundle by means of twist drills that have the usual outline cutting lips on the sides in order to make a smooth cut through the paper before the drill proper hits the plasterboard.

Certain-teed's problem as I see it, if they do not care to pay tribute to the U. S. Gypsum Company, is to let its practical plasterboard and plaster man study this Roos patent to see how much of it is pure hot air. It seems probable that there are other relationships besides those defined in the claims of this patent that will produce practical re-
sults. Certain of the claims are related specifically
11429 to and practically solely to the arrangement of the
perforations to dodge the studding. I do not believe that these claims could be sustained, this being such an obvious thing to do when it is desired that the plaster go through the perforation and form a key on the back face of the lath.

I would suggest that you send the enclosed copy of the Roos patent to Mr. Van Hagen or someone equally conversant with problems of this sort and then ask him to come in and talk to us as to whether or not the conditions set forth in the patent are essential from a practical commercial viewpoint.

In connection with the claims, certain of them contain a definition that is evidently based on an erroneous mathematical computation. For example, claim 6 says "said perforations having a diameter of approximately twice the thickness of the lath and symmetrically spaced to provide an area between any four adjacent perforations in the same lath and between any two perforations of an adjacent lath and any two of the same lath of approximately 36 times the cross-sectional area of the perforations."

In the specification it is stated that the perforations are 3/4ths of an inch in diameter and that they are spaced on the board 4" from the center of one perforation to the center of the next. This would give an area of 16 square inches between the centers of any four perforations constituting the four corners of a square. There would be deducted from this area to give the area of the solid board between the perforations, a quarter of a perforation on each corner making a whole perforation altogether, which would have to be subtracted from the 16 square inches to give the area of the solid material. This would, therefore, give an area to perforation ratio of 35 to 1 instead of 36 to 1.

11430

The error, however, is probably not important in view of the fact that the proper spacing has been fully set forth in the specification.

Very truly yours,

H. DORSEY SPENCER

HDS:GN
Encl.

Government's Exhibit No. 603

TEXAS CEMENT PLASTER COMPANY
FIRST NATIONAL BUILDING
OKLAHOMA CITY, OKLA.

MARCH 16, 1939

THE UNITED STATES GYPSUM CO.,
Chicago, Illinois.

Attention: Mr. F. Sadler.

DEAR MR. SADLER:

Referring to your price bulletin applying on Metallized Gypsum Board, effective March 1, 1937, wish you would advise me the mill price applying to points in the State of Missouri. I am of the opinion that this State should be included under Item 1 of this price list, but would like to have this confirmed by you.

Also want to call your attention to the fact that a dealer at Warrensburg, Missouri, states he has been quoted a price of $26.43 on Metallized Lath for delivery to that point and it has been necessary for me to meet such price.

We would like to have the above information for future reference.

Yours very truly,

TEXAS CEMENT PLASTER CO.

By H. E. CHISM

HEC:MK

11432 *Government's Exhibit No. 604*

UNITED STATES GYPSUM COMPANY
300 West Adams Street
CHICAGO

OCTOBER 21, 1937

MR. A. R. MOYLAN, *Vice President*
Schumacher Wallboard Corporation
5721 South San Pedro Street
Los Angeles, California

DEAR MR. MOYLAN:

In line with our conversation, I attach two estimate sheets, one covering the cost of the equipment required to make lightweight foam board, and the other sheet giving the formula from which you can figure the savings per thousand feet by use of our system.

You will note the estimate for equipment is greater than the figure we discussed when I was in your office. In giving the figure I did at the time, I assumed that you would have some of this equipment now in use in your plant. If you have such equipment available, the expense will be substantially reduced. This feature of the installation can be gone into thoroughly by our engineer in the event you conclude to sign a license.

This estimate does not include the removal of present equipment, changes in bins, conveyors, floor levels, etc., as we have no information on which to base such calculations. Our engineer will, however, be able to give you a close figure before the work is started, after he has had an opportunity to study conditions surrounding the wet end of your machine.

We know nothing about your present power consumption on the wet end of your machine. Our system calls for two motors, the demand on one varies between 7½ and 20 and averages 15 HP at the maximum. The demand on the other varies between 5 and 15 and averages about 9. If this is more power than you are using, you can charge the difference against this system and deduct it from the estimated savings.

On the second estimate sheet we have taken such information as we have available regarding the wet end of your board machine and set up the present and proposed weights.

We have estimated your cost of stucco which you can correct to the exact figure.
We have shown a charge of five cents a thousand for labor preparing the foam and starch mixtures which you may not require, in fact it is possible we may be able to reduce the number of men employed around the wet end of the machine by two or three men per shift.

11433 The freight savings we have taken at the figure discussed in your office. This you will, of course, change to the figure you find correct from your experience. The royalty of 2% shown is correct but we may not have used your correct net f.o.b. mill price. We have also deducted from the estimated savings the royalties for perforating and bundling. These charges obviously apply only to the products that are bundled or perforated.

The estimates attached show a substantial saving after deducting the royalties chargeable at the present time. You will recall I stated that these royalties under the main license decline to 1% on July 7, 1941.

As to the mixers which we propose furnishing. These mixers are the product of years of study by the company and large expenditures for engineering and experimental work. The mixers are patented and we do not sell them to anyone but lease them with a license covering their use. The annual rental for these mixers is $375 a year which, on the basis of an annual production of 37,500,000 feet, amounts to a charge of one cent per thousand.

It is my belief that the installation of this equipment will bring other savings which we cannot estimate without knowing more about your operation. When you reach the point where you are ready to actively consider taking the license, we will be willing to send our engineer to make exact estimates of cost for the installation and more complete estimates of the savings that are possible through the adoption of this system.

I trust this gives you the information you want. If it does not, please do not hesitate to ask for what additional information you require.

Very truly yours,

UNITED STATES GYPSUM COMPANY

O. M. KNODE

President

10—13—37

Estimated cost reduction obtainable by Schumacher Wallboard Company through adoption of U.S.G. Lightweight Board process

	Board Thickness 1/4"	5/16"	3/8"
Present Weight–#/M sq.ft.	1390#	1620#	1850#
Proposed " "	1090	1270	1450
Actual Reduction "	300	350	400
Stucco Saved	255	297	342
Value of Stucco @ $10.00/ton	$1.27	$1.48	$1.71
Foam Cost			
Starch	$ .45	$ .575	$ .65
Soap	.075	.0875	.10
Labor	.05	.05	.05
Total Foam Cost	$0.575	$ .7125	$0.80
Savings in Cost of Core– per M sq.ft.	$0.695	$ .7675	$0.910
Freight Savings @ .15 per 100#	0.450	0.525	0.600
Total Gross Savings per M sq.ft.	$1.145	$1.292	$1.510
Wallboard			
Total Gross Savings per M sq.ft.	1.145	1.292	1.510
Less Mixer Rent 375.00/year estimated at 1¢/M sq.ft.	.01	.01	.01
	1.135	1.282	1.500
Less Royalty on Patents 2% f.o.b. Price	.450	—	.50
Net Saving if Unbundled	.685		1.00
Less Bundling Royalty 10¢/M	.10		.10
Net Savings–Bundled	.585		.90
Lath			
Total Gross Savings per M sq.ft.		1.292	1.510
Less Mixer Rent 375.00/year estimated at 1¢/M sq.ft.		.01	.01
		1.282	1.500
Less Royalty on Patents 2% f.o.b. Price		.29	.365
Net Savings if Unbundled		.992	1.135
Less Bundling Royalty 10¢/M sq.ft.		.10	.10
Net Saving–Bundled		.892	1.035
Less Perforating Royalty, 10¢/M sq.ft.		.10	.10
Net Savings–Bundled and Perforated		.792	.935

6316

11435 Estimate Sheet

SCHUMACHER WALLBOARD COMPANY

10-13-37

1.	Mixer Installation		
	Equipment—		
	Mixers	Not Sold	
	Cleveland Speed Reducer	$325	
	Texrope Drive (2 required)	160	
	Bearings	35	
	Transmission Support	50	
	20 H.P. Vertical Motor–for primary mixer	300	
	15 H.P. Motor for Secondary Mixer	350	
	Estimated Equipment Cost	1220	
	Freight	250	
	Total delivered materials	1470	
	Labor	300	
	Total installed Cost		$1770
2.	Foam Equipment		
	Equipment–		
	2—450 gal. Starch Tanks—Complete with 1 H.P. Motor, Vertical reducer and agitator @ 319	$638	
	1—225 gal. Soap tank—Complete with 1 H.P. motor, reducer and agitator.	299	
	1—Gas Fired Cooking tank, complete with agitator, drive, burner, etc.	500	
	1—Francis Glue Mixer	315	
	1—Soap Solution Feeder	225	
	1—Starch Solution Feeder	300	
	Chain, Sprockets, Coupling, etc. for feeder drive.	50	
	1—Gearhead motor for feeder drive	75	
	1—Foam Equalizer	75	
	1—Vertical Motor for Foam Generator	122	
	Piping, Valves, etc.	300	
		2903	
	Freight	150	
		3053	
	Labor	350	
	Total Installed Cost		$3353

746095 1007
6317

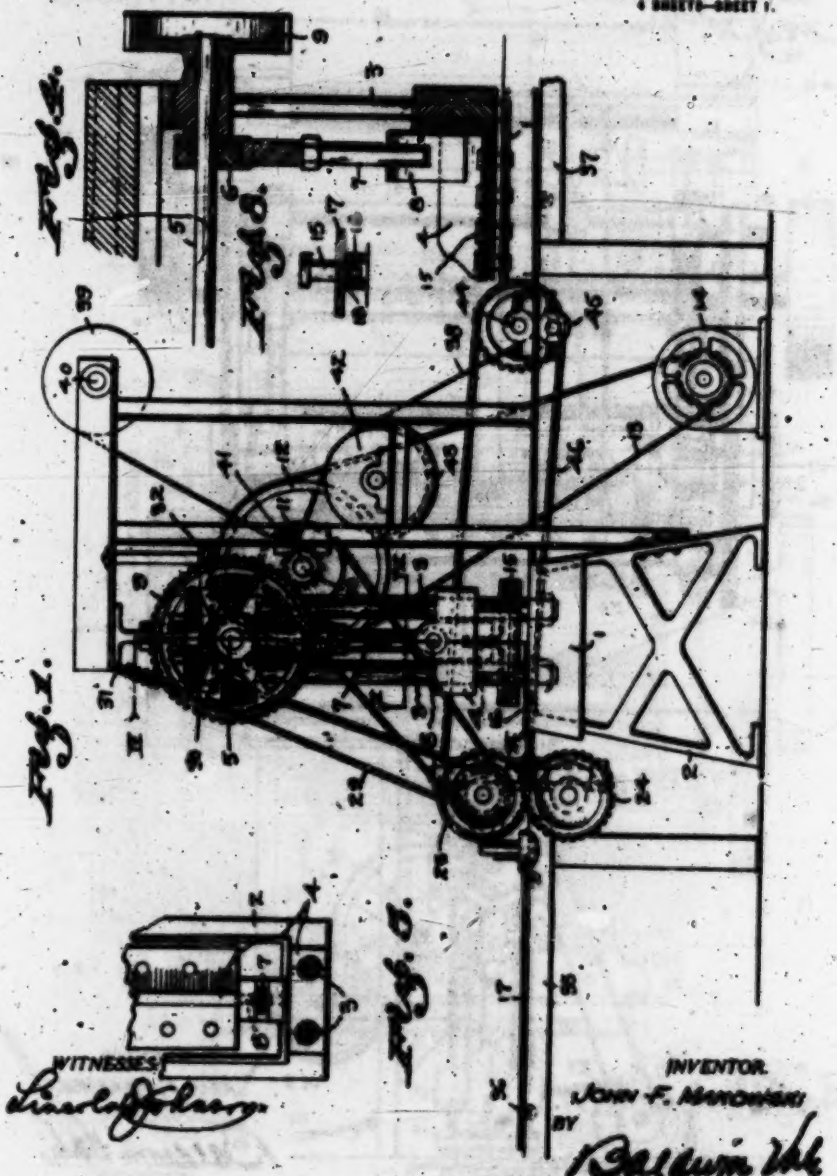
J. F. MAKOWSKI.

WALL BOARD AND PROCESS OF MANUFACTURING THE SAME.

APPLICATION FILED SEPT. 7, 1917. RENEWED DEC. 29, 1919.

1,349,778. Patented Aug. 17, 1920.

4 SHEETS—SHEET 1.



WITNESSES:

INVENTOR.
JOHN F. MAKOWSKI
BY
ATTORNEY.

11437

6318 746095 10073

J. F. MAKOWSKI.

WALL BOARD AND PROCESS OF MANUFACTURING THE SAME.

APPLICATION FILED SEPT. 7, 1917. RENEWED DEC. 29, 1919.

1,349,778. Patented Aug. 17, 1920.

4 SHEETS—SHEET 2.

Fig. 2.

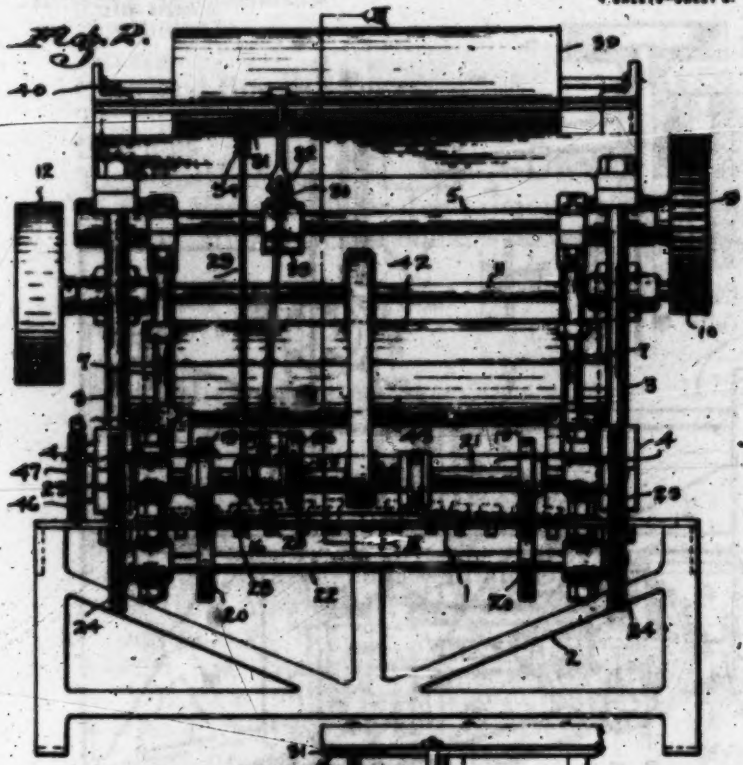
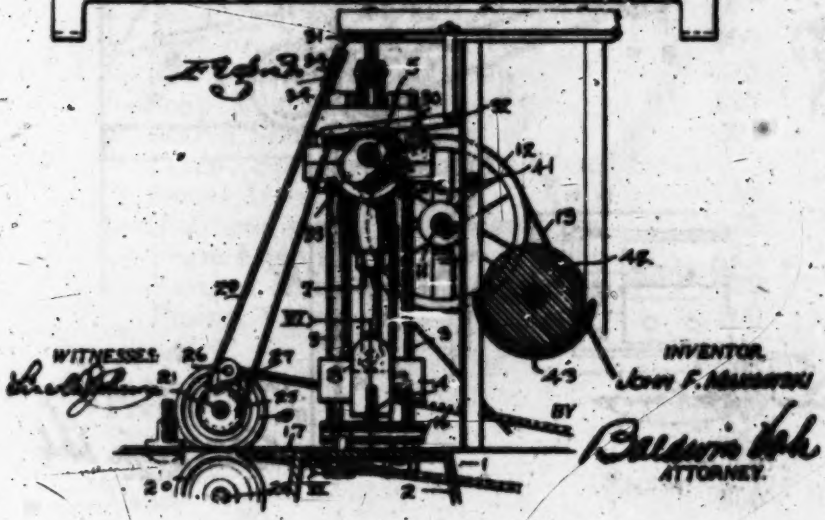


Fig. 3.



WITNESSES:

INVENTOR.
John F. Makowski

BY

Baldwin & Wight
ATTORNEY.

11429

746095 10074

J. F. MAKOWSKI.

WALL BOARD AND PROCESS OF MANUFACTURING THE SAME.

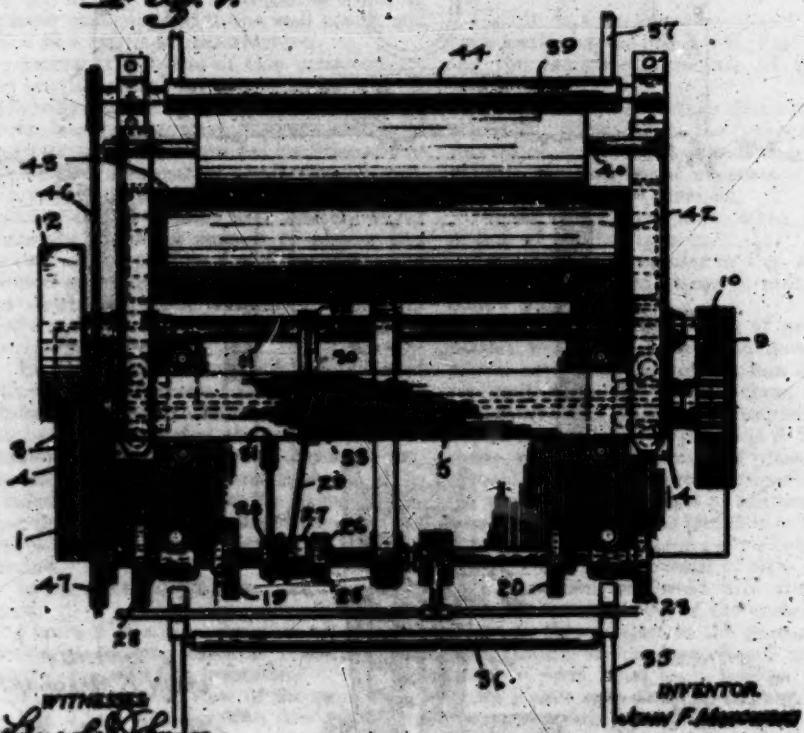
APPLICATION FILED SEPT. 7, 1917. RENEWED DEC. 23, 1919.

1,349,778. Patented Aug. 17, 1920.

4 SHEETS—SHEET 3.

Fig. 6.

Fig. 7.



WITNESSES

INVENTOR.

BY

ATTORNEY.

746095 10075

6320

J. F. MAKOWSKI.

WALL BOARD AND PROCESS OF MANUFACTURING THE SAME.

APPLICATION FILED SEPT. 7, 1917. RENEWED DEC. 29, 1919.

1,349,778. Patented Aug. 17, 1920.

4 SHEETS—SHEET 4.

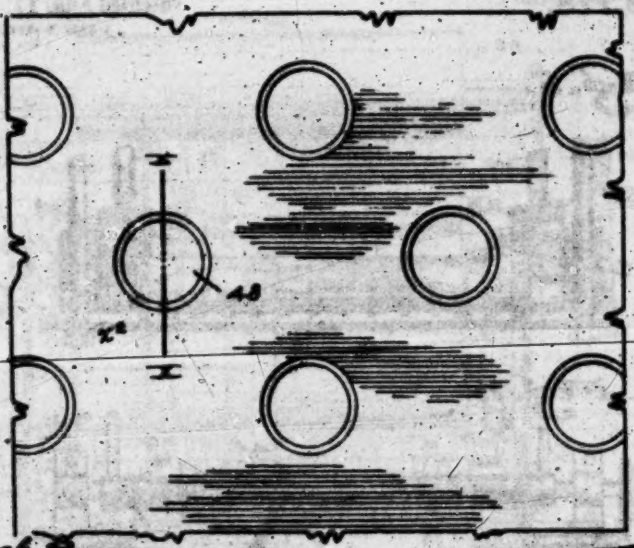
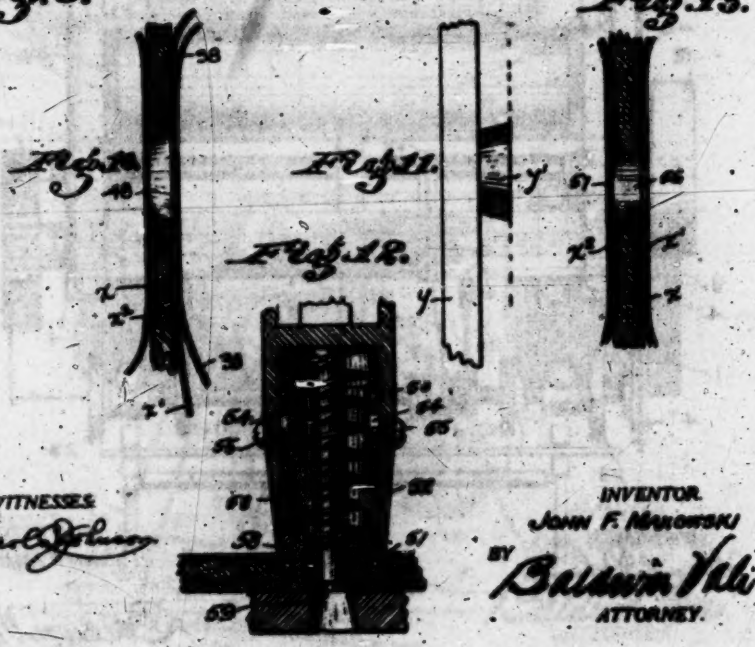


Fig. 8.



WITNESSES.

INVENTOR.
JOHN F. MAKOWSKI
BY Baldwin Vali
ATTORNEY.

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UNITED STATES PATENT OFFICE.

JOHN F. MAKOWSKI, of SAN FRANCISCO, CALIFORNIA, ASSIGNOR OF ONE-HALF TO JAMES A. LEVERSALEE, OF SAN FRANCISCO, CALIFORNIA.

WALL-BOARD AND PROCESS OF MANUFACTURING THE SAME.

1,349,778. Specification of Letters Patent. Patented Aug. 17, 1920.

Application filed September 7, 1917, Serial No. 190,121. Renewed December 20, 1919. Serial No. 346,044.

To all whom it may concern:

Be it known that I, JOHN F. MAKOWSKI, a citizen of the United States, and a resident of the city and county of San Francisco, State of California, have made a new and useful Improvement in Wall-Boards and Processes of Manufacturing the Same; and I do hereby declare the following to be a full, clear, concise, and exact description of the same.

The invention relates to a new and useful art particularly to means for perforating stable or dry wall-board; and to the process of forming holes or recesses therein adapted to act as key holes for bonding finishing plaster coats applied to the wall board, and to a new article of manufacture.

Among the objects of this invention are to provide means for economically and effectively processing a wall board of the nature described, to produce a new article of manufacture with improved qualities and at greatly reduced cost of production; to produce a wall board to which the finishing plaster can be applied and securely keyed with the minimum amount of plaster and waste, and to produce a wall board fire and water proof on the side opposite to that to which the plaster is applied. Other objects and advantages will appear as the description progresses.

In this specification and the annexed drawings, the invention is illustrated in the form considered to be the best, but it is to be understood that the invention is not limited to such form because it may be embodied in other forms, and it is also to be understood that in and by the claims following the description, it is desired to cover the invention in whatever form it may be embodied.

In the accompanying four sheets of drawings:

Figure 1 is a side elevation of an automatic perforating machine constructed in accordance with this invention.

Fig. 2 is a front view of the same.

Fig. 3 is a side elevation detail in cross-section of the perforating mechanism on the line III—III of Fig. 2.

Fig. 4 is a fragmentary enlarged detail of one side of the machine illustrating the punch operating mechanism in cross-section on the line IV—IV, Fig. 1.

Fig. 5 is a plan view from above of the same taken on the line V—V, Fig. 1.

Fig. 6 is a front elevation of the punching mechanism in cross-section on the line VI—VI, Fig. 3.

Fig. 7 is a plan view from above of the perforating machine taken from Fig. 1.

Fig. 8 is an enlarged fragmentary detail of the counter-sinking punch and die for forming the perforations in the wall board, Sheet 1.

Fig. 9 is a plan view of a fragmentary section of plaster board constructed and perforated in accordance with this invention.

Fig. 10 is a fragmentary detail view in cross section on the line X—X, Fig. 9, showing the laminated structure of the wall board.

Fig. 11 is a fragmentary detail diagrammatically illustrating the integral key formed on the casting of plaster when applied to the wall board as it would remain were the wall board removed.

Fig. 12 is a fragmentary detail in cross section of a hollow punch.

Fig. 13 is detail similar to Fig. 10, illustrating the form of recess formed by the hollow punch.

Broadly stated, the process of producing plaster wall board consists in flowing the plastic core composed of gypsum or other compositions in the unstable state, between two reinforcing sheets of prepared pulp paper, then rolling or pressing it into flat sheets, resulting in a core X of plaster faced on both sides by the sheets of paper X'—X', the whole forming a sheet of uniform thickness throughout, that is trimmed to size and permitted to set or season before being marketed. Other forms consist of slabs of plastic composition reinforced with fibrous and other matter. Because of the unstable condition to this product in the process of its manufacture, it has been found impracticable to form holes in it because the unstable plastic core would crush and destroy the marketability or practicability of the product. I am aware, however, that wall boards of different composition have been formed with perforations or holes therethrough, such holes being uniform in cross-section and having parallel sides.

In the process of forming plaster wall

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boards in accordance with this invention, the dry or stabilised board is passed through a machine wherein it is punched, the punched portion being removed entirely from the board, as will be hereinafter more fully described.

In detail the construction illustrated in the drawings consists of an automatic punching machine, adaptable to processing wall board in accordance with this invention, having a bed 1 supported upon a suitable base 2, to which the upright sides 3—3 are bolted on opposite sides of the bed. The reciprocating breast beam 4 engages these guides 3 and is guided thereby in its vertical reciprocations. The cam shaft 5 is suitably journaled in bearings supported by the guides 3—3 and provided with the eccentrics 6 (see Fig. 4) engaged by the adjustable connecting rod 7 pivoted at 8 in the breast beam 4, whereby the rotation of the camshaft 5 causes the vertical reciprocation of the breast beam 4. The cam shaft is back-geared through the gear 9 enmeshed with the driving pinion 10, fixed on the drive shaft 11, which is provided with a pulley 12 driven by the belt 13 engaging a pulley on the motor 14, the proper gearing being interposed between the motor and the cam shaft to give the necessary power and speed reduction. The breast beam 4 is provided with a series of alined male punches 15, fixed therein and cooperating with the female dies 16, to perforate the plaster board 17 set therebetween. To reduce the applied power necessary to perforate the board, and to prevent possible transverse cracking thereof in the punching process, it is advisable to arrange the male punches so that they perforate the board *serially*; this is easily accomplished by progressively lengthening the punches from the center to the edge as is illustrated in Fig. 6 or vice versa, the length being varied from the cutting edge to the tapered shoulder at 18, so that these shoulders will all strike the board simultaneously. It is important that these shoulders all strike the board simultaneously to bevel the edges of the holes by compression, whereby the resultant holes are of greater diameter at one surface of the board than at the opposite side, for reasons that will hereinafter be described. Two rows of punches can be provided as illustrated in Fig. 3, arranged in off-set relation out of longitudinal alinement and placed a uniform distance apart, the board being fed forward the space of two rows of holes at each operation.

The intermittent feeding mechanism comprises the two traction rollers 19 and 20 between which the plaster board 17 is fed. These traction rollers are fixed upon their respective shafts 21—22 and are rotated in unison by the gears 23—24. The shaft 21 is rotated by a ratchet 25 fixed thereon engaged by the pawl 26, pivoted on the arm 27 formed on the hub 28 rotatable on the shaft 21. The hub 28 is operated by the cable 29 wrapped thereabout and having its opposite ends fixed to the lever 30 and the frame of the machine at 31 respectively. The lever is pivoted at 32 and rests upon the cam 33 fixed on the shaft 5. The cam 33 is so timed that the rise of the punches out of the board, brings the cam under the lever 30 which is raised thereby, which exerts a pull on the cable 29 to rotate the hub 28 which carries the ratchet 25 forward to rotate the traction wheels 19 and 20, pushing the board forward a distance equal to the distance between the transverse rows of holes. This distance may be accurately regulated by varying the position on the lever 30 at which the cable 29 is attached.

When the cam 33 has passed underneath the lever 30 the tension of the spring 34 returns the arm 27 to the operative position for the next operation, the ratchet 25 returning without engaging the ratchet.

The board 17 laid on the receiving table 35 is supported on the rollers 36 from which it is conveniently fed between the feed rollers 19 and 20 beneath the punching machine and ejected onto the delivery table 37.

In producing the type of board illustrated in Fig. 9 having the backing sheet 38 placed thereon, means are provided in connection with the punching machine to apply this sheet as the board passes through the machine. It is best accomplished by providing the sheet 38 in rolls as at 39, Figs. 1 and 2, mounted upon a cross shaft 40, suitably journaled in a superstructure on the machine. The sheet 38 is fed behind the roller 41, over the top of the roller 42 and carried down to contact with the top face of the board. The roller 42 is journaled in the trough 43 containing paste submerging the lower portion of the roller 42, by which means a coating of paste is transferred to the surface of the paper 38 tractively passing over the roller 42. Before reaching the delivery table 37, the board 17 passes between the compression rollers 44 and 45, geared together and driven by the sprocket chain 46 engaging a sprocket 47 on the shaft 21 of the feed roll 19, whereby these compression rolls operate in unison with the feed roll. In starting, the end of the paper 38 is carried down in front of the rolls 44 and 45 between which it is pushed by the approaching end of the board 17 on its travel through the machine. The roll 44 presses the paper 38 against the upper surface of the board 17 to which it is caused to adhere by the paste covering one side of the holes 48 to form recesses in the

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wall boards, resulting in the product illustrated in Fig. 9.

It is the particular function of the paper 38 which has been previously water proofed to make the back side of the board impervious to moisture to prevent sweating and to prevent the emergence of the key formed by the applied coat of plaster protruding through the hole 48 in the board 17. Where it is desired to produce a plaster board having the advantages as set forth, plus the additional advantages of being fire-proof, the paper 38 can be treated with suitable fire-proofing solution, or it may be composed of asbestos or another non-inflammable material, by which means the plaster board having a non-inflammable back and a coating of non-inflammable plaster on the opposite side forms a fire proof wall or partition. So far as I am aware I am the first to produce such a wall in this manner.

To improve the keying qualities of the hole 48, they are countersunk by the tapered shoulder 16 on the male punches as previously described, producing a hole smaller in diameter on the plaster side of the board than on the back which is covered by the sheet 38. This results in forming a key integral with the plaster Y and taking the form Y^1 as illustrated in Fig. 11, the form of the hole forming a clench or rivet-like bond between the plaster Y and the wall board 17, in addition to the natural adhesion between the plaster and the surface of the wall board between the openings, the dove-tail shape of the key Y^1 insuring a mechanical bond in addition to its adhesion to the surrounding wall board. The countersinking of the holes has the further advantage that it can be made to fracture or shatter the adjacent plaster core to improve the keying qualities of the bond; particularly where small, straight, or inclined holes are punched. The punches may be of forms to punch holes of any desired shape and the holes may be variously spaced.

In Fig. 12 is illustrated a hollow punch 50 adapted to be forced into the wall board through the paper X' and the core X having the paper X^2 intact. The rise of the punch lifts the punching 51 out of the wall board. This punching 51 is ejected from the punch by the stripper 52 actuated by the expansion of the spring 53, the stripper being held in assembly by the slots 54 engaging the screws 55 in the punch 50; this form of punch forms a recess such as 56, see Fig. 13. If it is desired in addition to puncture the paper backing X^2 as at 57, the punch 56 can be combined with the punch 50 to cooperate with the die 39 to punch the hole 57, which permits the plaster coating to pass through the wall board and clench. This hollow type of punch is desirable when the wall board is to be treated in the moist or semi-stable state as it comes from the machine within which it is fabricated.

While I have laid particular stress upon the advantages of punching wall board after it has set or dried, in which stable state it is more easily processed and produces a superior article for the purpose; I do not wish to be understood as limiting this invention thereby, as it can be punched during its various stages of production or curing with various results.

Having thus described this invention, what I claim and desire to secure by Letters Patent is:

1. A process of manufacturing wall board comprising flowing a core of plastic material between reinforcing sheets of paper, allowing the same to stand until dry, and then punching holes through the completed board.

2. A process of manufacturing wall board comprising flowing a core of plastic material between reinforcing sheets of paper, pressing the same into flat sheets, allowing said sheets to stand until dry, and then punching holes through the dry sheets.

3. A process of manufacturing wall board comprising flowing a core of plastic material between reinforcing sheets of paper, allowing the same to stand until dry, and then punching tapered holes through the dry board.

4. A process of manufacturing wall board comprising flowing a core of plastic material between reinforcing sheets of paper, allowing the same to stand until dry, then punching holes through the completed board, and enlarging said holes by compression.

5. A process of manufacturing wall board comprising flowing a core of plastic material between reinforcing sheets of paper, allowing the same to stand until dry, and then punching holes through the dry board in such manner as to shatter the substance of the board adjacent to the hole.

6. The process of treating dry wall board consisting in punching holes therethrough and covering one side of said holes to form a recess in said wall board.

7. An article of manufacture consisting of a sheet of wall board composed of a core of dry plaster between reinforcing sheets having holes punched therethrough while in the dry state, and a sheet of fire proof material applied to one side of said board after said punching operation.

In testimony whereof I have hereunto set my hand at San Francisco, California, this 7th day of August, 1917.

JOHN F. MAKOWSKI.

In the presence of—
BALDWIN VALE,
LINCOLN V. JOHNSON.

11444 UNIVERSAL GYPSUM & LIME CO.
CHICAGO, ILL.
111 WEST WASHINGTON STREET

JUNE 3, 1929.

PARAGON PLASTER COMPANY,
Syracuse, New York.

Attention: Mr. Emil Hansen.

Gentlemen:—

You will find enclosed copies of our General Sales Bulletins numbers three and four giving complete information on our new Board prices—also the policy to be followed in quoting prices to the dealer trade.

We believe the bulletins are self explanatory insofar as concerns method of arriving at delivered prices. However, please note particularly the policy to be followed in submitting prices. All prices must be quoted for immediate acceptance and for immediate shipment and subject ot change without notice. Please make no price committments or price guarantees beyond a period of immediate or rush delivery. Should any of your customers want you to accept future orders calling for shipments beyond immediate delivery, you may accept such orders only on the condition that the price will be subject to the price in effect when shipment moves.

On such orders as you send us for shipment to your dealer customers, we shall allow you the following rates of commission:

Gypsolite Wallboard	10%	Oakfield mill basing price.
Gypsolite Sheating	10%	" " " "
Star Gypsum Wallboard	10%	" " " "
Universal Gypsum Lath, all sizes	7%	" " " "
Gypsum Wallboard, second or recuts	7%	" " " "

All shipments made to your warehouse in Syracuse will be invoiced to you at our regular dealer's price for Syracuse delivery, this for the reason that you do a retail business as well as a wholesale business out of Syracuse. Under the terms of our license agreement, we are not permitted to allow you any jobbing commission on retail sales, however, we are permitted and shall be glad
11445 to give you commissions per the above schedule on such wholesale business as you do out of your Syra-

cuse warehouse. In order to secure commission on the wholesale business you do in Syracuse, it will be necessary for you to send us at teh end of each month a statement of such wholesale deliveries, and in this statement show the date of the delivery, the dealer's name, address of dealer, grade of Broad delivered, and quantity. Your statement will have to be itemized in this manner for each delivery. There is a further condition in our license agreement which makes it necessary for us to be permitted to check your books or records on such wholesale deliveries from your Syracuse warehouse in the event such audit is necessary at any time.

We are today writing your other sales offices supplying them with price bulletins and the commission arrangement as above outlined.

If there is anything in the bulletins that is not entirely clear to you, will you pleaseadvise the writer here and he will be very glad indeed to explain anything not entirely clear to you.

Kindly continue to send your orders to our New York Office for handling with the plant the same as you have been doing in the past.

Yours very truly,

ABEL DAVIS AND EUGENE HOLLAND
RECEIVERS IN EQUITY FOR
UNIVERSAL GYPSUM & LIME CO.
W. G. STROMQUEST
Eastern Sales Manager.

WGS:HW

Effective 5/22/29 — Chicago G.S.B. #3

General Sales Bulletin
Dealers Minimum #1 Board Prices

Grade	Thickness	Size of Sheets	Minimum Price Per M Sq. Ft.
Gypsolite Wallboard	3/8"	32" or 48" Wide 4' to 10' lengths	$20.00
Gypsolite Sheathing	1/2"	4' x 8'–Only size we make	22.50
Star Gypsum Wallboard	3/8"	32" or 48" wide 4' to 10' lengths	17.50
Gypsum Wallboard (We do not make 1/4" Wallboard–Price for Information only)	1/4"	32" or 48" Wide 4' to 10' lengths	17.50
Universal Gypsum Lath (Closed or open edge)	3/8"	All Sizes #1 Lath — Recuts or Cut Stock *16 x 32 — 16 x 24 *16 x 48 — 18 x 32 32 x 36 — 18 x 36 32 x 48 — 24 x 32 * Bundled — 24 x 36	13.50
Universal Gypum Lath (Closed or open edge)	1/2"	Standard Sizes 16 x 32 Bundled 16 x 48 " 32 x 36 Unbundled 32 x 48 "	14.75

Dealers Minimum Board Prices–Recuts and Seconds

Gypsum Wallboard–Seconds 3/8" (Star or Gypsolite Grade–Folded Edge)	32" or 48" Wide 4' to 10' lengths	15.00
#Gypsum Wallboard–Recuts (Star or Gypsolite Grade–Open Edge)	32" Wide–#1 Label 4' to 10' lengths.	17.50

When Wallboard Recuts are marked "Seconds" use Seconds basing price of $15.00 per M.

Gypsolite Finisher

Packed in 5 lb. cartons—12 cartons to case—6¢ per lb. or $3.60 per case. Packed in Bags—80 lb. paper bags only—2¢ per lb. Extra small paper bags included with bag finisher for dealers convenience. Always ship in case lots

if possible. Full printed directions for use printed on cartons. We recommend 10#. finisher per M. sq. ft. of square edge board, 40 lb. per M. sq. ft. of Bevel Edge Board. Prices indicated are delivered whether shipped in cars with Board or other plaster products or by L C L. shipment. We will no longer furnish Finisher gratis to any dealer. Prices must be made in accordance with above schedule.

No Exceptions Allowed

11447 Board Price Policy

In applying price shown on G.S.B. #3 dated 5/22/29, be governed by the following policy:

Prices listed are minimum mill basing prices and are F.O.B. following producing points:

Oakfield, N. Y.	Gypsum, Ohio	Ft. Dodge, Iowa	Acme, Texas
Plasterco, Va.	Grand Rapids, Mich.	Southard, Okla.	Sweetwater, Texas

Use lowest freight rate from above basing points to destination in figuring delivered price.

All board prices must be quoted F. O. B. destination freight allowed using the following weights at all basing points in determining freight per M Sq. Ft.

1/4" Board — 1250 lbs. per M. Sq. Ft.
3/8" " — 1850 " " " " "
1/2" " — 2250 " " " " "

Please note prices given are our minimum prices. Under no condition are you to quote or accept business at less than these minimum prices.

All board prices are to be quoted for immediate acceptance and for immediate shipment, and to be subject to change without notice.

Make no price commitments or price quarantees beyond period of immediate or rush delivery.

You may accept Board orders for future shipment subject, however, to price in effect at time of shipment. A future order is one calling for delivery beyond immediate or rush shipment.

All special competitive conditions must be reported to Chicago office for decision. Make no promises or statements that will commit the Company before passing such reports to Chicago for consideration.

UNITED STATES DEPARTMENT OF COMMERCE
WASHINGTON

National Bureau of Standards

NDM:KW
III-6

Report on Fire Endurance Tests of Partitions with Facings of Plaster on Gypsum Lath

T. G. 3619-16; F. R. 1120

I. Purpose and Scope of Tests

Two fire endurance tests, Nos. 120 and 123, on load-bearing, wood-stud partitions faced with gypsum plaster on a perforated gypsum lath were made by the National Bureau of Standards in cooperation with the Schumacher Wall Board Corporation of Los Angeles, California. The gypsum laths for the two partitions were alike except for the spacing of the holes. The two gypsum plasters used differed widely in strength and time of set.

The partitions were 16 ft long and 10 ft 4 in. high. The top plates were bolted to the test frame and the bottom to the steel beam resting on hydraulic jacks. Spaces 1/2 in. in width were left between the ends of the partitions and the test frame. These spaces were lightly caulked on the fire exposed side with asbestos fiber.

The illustrations, fig 1 to 6, inclusive, show details of construction of the partitions and their appearance during and after the tests, the temperatures within the furnace, and within the partitions and on the unexposed surfaces. The principal results of the tests are given in table 1.

11449 Table 1. Summary of tests of wood-stud partitions faced with gypsum plaster on perforated gypsum lath for fire endurance under load.[1]

Test No.	Age when tested	Fire exposure[2]	Tests and results			Fire resistance rating of partition
			Limit as surface finish[3]	Partition failure		
				Kind	Time	
		percent	min		min	
120	40	101	34	Load	50 1/2	Load bearing, 50 min., combustible
				Limiting temp. max. and avg	58	Non-load-bearing, 1 hour, combustible
123	30	100	32	Load	62	Load-bearing or non-load bearing, 1 hour, combustible
				Limiting temp. max	70	

[1] A load of 30550 lb was applied during the test until failure occurred.

[2] This value is the ratio of the area under the curve of average temperatures to the area under the standard reference curve expressed in percentage.

[3] Limit or rating as surface finish as per par. 24 (c) of the Standard Fire Test Specification.

II. Materials, Design and Construction of Partitions

1. Materials

The materials for the partitions, except the perforated gypsum lath and the lot of gypsum plaster used for facing the partition for test No. 123, were from local dealers stocks.

(a) Lumber—The framework of the partitions was of structural grade yellow pine. The trim was also of yellow pine.

(b) Lath.—The two lots of lath were alike in size and thickness, but the perforations differed. The boards were 16 3/16 by 48 in. by 3/8 in. thick.

11450 Table 2. Characteristics of perforated gypsum lath.

	Lot 1	Lot 2
Dimensions, inches	48x16-3/16x3/8	48x16-1/4x3/8
Weight, lb/ft²	1.70	1.74
Number of 13/16 in. diameter holes	42	48
Percent of board area removed by holes	2.8	3.2
Breaking Load:		
Span:		
Lengthwise of board:		
Max	120	170
Min	105	130
Avg (5)	116	142
Crosswise of board:		
Max	52	58
Min	45	40
Avg (5)	48	53
Modulus of rupture:[1]		
Span:		
Lengthwise of board:		
Avg (5)	1444	1767
Crosswise of board:		
Avg (5)	597	660

[1] Modulus based on gross area although breaks were through holes.

(c) Sand.—Screened and washed Potomac River building sand was used for the sanded gypsum plaster.

(d) Plaster.—Properties of the two lots of sisal-fibered gypsum cement plaster, labeled, "Gold Bond", when tested in accordance with Federal Specification SS-P-401 were as follows:

Table 3. Properties of gypsum plaster.

Test	Lot 1	Lot 2
Consistency	52	44
Time of set, hr	18	5 1/4
Tensile strength, lb/in² (Avg of 6)	175	465
Bags marked	2-J	5-N

11451 · Table 4.—Strength of 2 in. cubes of 1:2 sanded plaster

Test partition No.	120	123
No. of cubes tested	3	7
Age when tested, days	60	31
Compressive strength, lb/in.²:		
Max	790	1682
Min	710	1380
Avg	750	1530

2. Design and construction

(a) Framework:—The framework of each partition consisted of 2 by 4 in. studs spaced 16 in. on centers and toe nailed to 2 by 4 in. plates top and bottom. The blocking at mid height of the studs stayed the studs laterally and served as fire stops.

(b) Lathing.—The lath was placed across, and bearing on four studs, with four 13 gage nails, 1 1/4 in. long by 5/16 in. heads, to each bearing. The end joints between lath were staggered from course to course. The edges of the lath were not spaced apart in the construction of partition No. 120 but were spaced about 1/8 in. apart in No. 123.

(c) Grounds.—The thickness of the plaster was gaged to 1/2 in. by metal base beads along the bottom of the partitions and by nails driven into the studs at mid height and near the top.

(d) Plastering.—The gypsum plaster was mixed with sand in the proportions 1 part plaster to 2 parts sand by weight of the dry materials. The weight of water required to make a workable mix was two-thirds that of the dry gypsum plaster.

The scratch and brown coats of plaster were applied by the "double up" method; that is, by applying the second coat within a few minutes after the scratch coat had been applied and before set had begun. Nails for gaging the thickness of the plaster were removed from the fire exposed side before the plaster was set. The thickness of the sanded plaster was 7/16 in. which together with the 1/16 in. thickness of white finish totaled 1/2 in. over the lath.

11452 (e) Trim.—Yellow pine base boards were applied to each face by nailing through the lath and plaster into the studs.

(f) Workmanship.—The workmanship was like that found in local building practice.

III. Methods of Testing

1. Specifications

The tests were conducted in accordance with the requirements of the Specifications for Fire Tests of Building Construction and Materials of the American Standards Association except that no fire and hose test was made, previous tests having proven the adequacy of this type of construction in this respect.

2. Testing Equipment

The large wall testing equipment of the National Bureau of Standards was used for the tests. This comprises a gas-fired furnace with suitable movable frames into which the walls are built and seasoned for test. The frames employed were each equipped with four hydraulic jacks bearing on a beam to impose the test load.

The furnace is equipped with pyrometers to measure the temperature at nine points within the furnace chamber, at six points within the partition, and under nine asbestos pads on the unexposed surface of the partition. Chromel-alumel thermocouples and portable type potentiometers were used for indicating temperatures in comparison with the temperature of melting ice.

Deflections of the partitions during test were observed by measurements from three wires stretched between the top and bottom members of the test frames, one opposite the vertical center line and one 4 ft. each side of the center line.

3. Procedure

Each wall with its test frame was placed to form one wall of the combustion chamber of the furnace. In each test the fires were controlled to give temperatures conforming as nearly as possible to the standard reference curve. Loads were applied previous to starting the test fires and maintained until failure occurred, after which the pressure in the jacks was released to prevent collapse of the partition.

The fires were continued for a time after the first criterion of failure had been observed in order to obtain information beyond this limit.

11453 IV. Results of Tests

1. Test No. 120

This was a fire endurance test of a fully loaded 5 1/2 in. thick wood-stud partition, 16 ft long by 10 1/3 ft high, faced on both sides with 1/2 in. of 1:2 sanded gypsum plaster on 3/8 in. thick perforated gypsum lath. The completed partition was seasoned 40 days before being subjected to the test. The load applied was 30,550 lb. The test was made on November 24, 1937, the fire being continued one hour.

(a) Furnace temperature.—The furnace fire gave an exposure as measured by the area under the curve of average temperature, F, (fig 2a) of 101 percent of that derived from the area under the standard reference curve. The dashed lines above and below curve F show maximum and minimum temperatures indicated by the nine thermocouples exposed to the furnace fire.

(b) Partition temperatures.—The average of the temperatures indicated by the three thermocouples between the lath and the studs on the fire-exposed side of the partition, at 2 ft from the top opposite points 10 to 15, fig 1, is shown by curve 1 (fig 2a), and the maximum of the three by curve 1 max. The temperatures within the spaces between the studs are similarly shown by curves 2 and 2 max.

The average of the surface temperatures measured under the nine asbestos pads on the unexposed surface, and the maximum of the nine are shown by curves P and P max of the same figure. Curve R shows the temperature of the test room.

(c) Deflections.—The partition deflected 3/16 in. towards the fire during the first five minutes of the test after which the movement was in the opposite direction, passing through its original position between 10 and 20 min after the start of the test. The average deflection of the three points at mid height was 0.4 in. at 40 min. and at 50 min 3.4 in. The deflections were increasing rapidly at 50 1/2 min and the gage indicated a 10 percent drop in pressure in the jacks. The pressure was then reduced from 123 to 15 lb and the test continued.

(d) Effects of test, fire exposed side.—No cracks were seen on either side before the partition was placed in front of the furnace for test.

11454 The first cracking on the exposed side was across a 1 1/2 ft diameter bulge just above the base near the mid point of length at 15 1/2 min.

This was followed soon by a vertical crack 3 ft long at 3 1/2 ft opposite pad 7, fig. 1. At 20 min a bulge in the plaster 2 ft in diameter was observed in the north corner almost opposite pad 3. At 22 min the plaster in the lower north corner opposite pad 9 was bulged outwards. Although the plaster surface was much bulged and broken over nearly the entire surface at 23 min none fell until 35 1/2 min and at 37 min above one square yard of the lath was exposed. At 40 min 4 sq ft of the lath fell exposing the pine studs to the fire, and at 43 1/2 min about 80 sq ft had fallen. The volume of flame in the furnace at 55 min prevented any estimate of the quantity of lath and plaster remaining, but it was probably of negligible quantity.

The furnace fire was stopped at 1 hr and the fire in the burning studs quenched after the panel and frame had been pulled away from the furnace. Fig 3 shows the condition of the portion of the test specimen remaining as viewed from the fire exposed side.

(e) Effects of test, unexposed side.—Several cracks were observed in the upper part of the partition at 5 min after the start of the test. These were all very narrow. Steam, first seen at 4 min after the start of the test, flowed in considerable volume from various cracks and all margins a 14 min. Steam flow diminished gradually after this until 33 min after which time it was not visible.

After 40 min cracks which had appeared early in the test began to open somewhat and more appeared until the partition had deflected so much at 50 1/2 min that cracks were quite numerous.

After removal of the load cracking proceeded somewhat less rapidly. The general condition of the surface at 57 min is shown by fig. 1. As soon as the fire was stopped and the partition removed from the furnace water was applied to quench the fires in the burning studs.

(f) Failure.—Failure of the partition to support the load of 30,550 lb occurred at 50 1/2 min.

The allowable limits of temperature rise, 325°F (181°C) at one point, and 250°F (139°C) as the average rise at nine points, were both reached at 58 min.

11455 The limit of fire resistance of the lath and plaster on one side of the partition as an incombustible finish over combustible construction (wood studs) was reached at 34 1/2 min,

(g) Condition after test.—Figures 1 and 3 show the condition of the partition after failure. Little strength remained after the fire was quenched but there were no breaks of sufficient size to permit the passage of flame and hot gases in quantity.

2. Test No. 123

This, also, was a fire endurance test of a fully loaded, 5 1/2 in. thick partition, 16 ft long by 10 1/2 ft high, faced on both sides with 1/2 in. of 1:2 sanded gypsum plaster on 3/8 in. thick perforated gypsum lath. The completed partition was seasoned 30 days before being subjected to the test. The load applied was 30,550 lb. The test was made on March 17, 1938.

(a) Furnace temperature.—The furnace fire exposure as measured under the curve of average temperature, F, (fig 2b) was 100 percent.

(b) Partition temperatures.—The average of the temperatures indicated by the three thermocouples between the lath on the fire exposed side and the studs is shown by curve 1 (fig 2b) and curve 1 max shows the maximum of the three. Curve 2 shows the average of temperatures in the spaces between the studs.

The average of the surface temperatures measured under the nine asbestos pads on the unexposed surface, and the maximum of the nine, are shown by curves P and P max of the same figure. Curve R shows the temperature of the test room.

(c) Deflections.—The partition deflected 0.3 in. towards the fire at its mid point in the first 5 min and at 10 min had returned to its original position after which the deflections were away from the fire, reaching 0.3 in. at 1/2 hr and 1.5 in. at 57 min. At 61 min, just previous to failure under load, the deflections at the mid points of height were 2.1, 2.4 and 2.1 in., for points 4, 5 and 6, respectively.

(d) Effects of test, fire exposed side.—The pine base board started flaming at 2 1/2 min after the start of the test.

The first crack in the plaster on the fire exposed side was seen at 23 min. This resulted from bulging of the plaster at the central part of the panel. The plaster keys were broken off over an area 5 ft long by 2 ft high permitting the expanding plaster to buckle out and crack.
11456 Other cracks were observed at 29 1/2 and 30 min.

At 35 min about one square yard of plaster fell from the buckled area noted first above and one minute later the lath broke from an area of about one square foot exposing two studs to the fire.

At 40 min a 4-ft long strip of plaster 1 ft wide pulled away from the lath along the south vertical edge of the panel. At 44 min another small area of plaster fell exposing the lath over a total area of about 1 1/4 sq yd. At this time the fall of several square yards of plaster appeared imminent. A small area of lath fell at 46 min and large volumes of flame from burning wood filled the upper half of the furnace.

A large area of plaster fell from the north end of the panel at 56 min and at 58 min all the plaster then remaining fell from the fire exposed face.

The studs began to buckle under load at 62 min and at 63 min the pump supplying oil to the jacks was stopped. The load was reduced and the screw jacks set to prevent tilting of the loading beam on the rocker bearings. The fire was continued until 73 min when the gas was shut off from the burners. The wood studs which had been fully exposed to the fire for 15 min continued to burn vigorously.

The burning studs were sprayed with water from a garden hose nozzle about 6 min after the gas was shut off and at 10 min after the panel and frame were withdrawn from the furnace.

(e) Effects of test, unexposed side.—In the period from 6 to 10 min after the start of the test four narrow cracks appeared in the unexposed surface, the first being a vertical one from mid-height to the top of the panel near the center line. Six additional cracks were observed in the period from 11 min to 60 min, none of which were large. Figure 5 shows

the condition of the unexposed surface after 1 hr exposure of the opposite side to fire.

Failure under load at 62 min caused outward deflection and several cracks. Figure 6 shows the condition of the panel at 77 1/2 min after the start of the test, or 4 1/2 min after the furnace fire was stopped.

(f) Failure.—Failure of the partition at 62 min came through its inability longer to sustain the imposed load while subjected to fire.

11457 The limiting rise of temperature of 325°F (181°C) at one point on the unexposed surface was observed at 70 min. The limiting rise of 250°F (139°C) as the average of the observed rises at nine points was not reached.

The limit of fire resistance of the lath and plaster on one side of the partition as an incombustible finish over combustible construction (wood studs) was 32 min.

(g) Condition after test.—The partition was subjected to the test fire for 11 min after failure under load had occurred, and was then sprayed on the fire exposed side with water from a garden hose nozzle. This treatment did not result in any breaks that would permit the passage of flame or gas in any considerable quantity. The test frame and partition were withdrawn from the furnace several minutes after the fire was stopped and further sprayed to quench fires continuing in the studs. Collapse of the remaining charred structure with the plaster facing occurred about 1 hr after the test had ended.

V. Summary of Tests

Reference is made to table 1 for a summary of the tests. The two partitions were substantially alike. The laths of lot 1 (test No. 120) were perforated with 42 holes 13/16 in. in diameter, each, and those of lot 2, with 48 holes of the same diameter. A more noteworthy difference apparently was the greater strength of the plaster used in the facings of test partition No. 123 then in No. 120.

The construction employed in test no. 120, that is, 2 by 4 in. yellow pine studs spaced 16 in. on centers, faced with gypsum lath, 48 by 16 by 3/8 in., and perforated with 42 holes of 13/16 in. diameter and 1/2 in. thickness of 1:2 sanded gypsum plaster of 750 lb/in.^{2} compression strength

as 2 in. cubes, has a fire resistance rating of 50 min., combustible, as a load-bearing partition, and as a non-load-bearing partition, 1 hour, combustible.

The construction employed in test No. 123, like that of test No. 120 except for the six additional holes in the laths and plaster of double the strength of that used in test No. 120, achieved a fire resistance rating of 1 hour, combustible either as a load-bearing or non-load-bearing partition. The requirements for the hose stream test for the tests reported herein are considered to have been met in test No. 65, report No. T. G. 3619-10; F. R. 788, dated February 18, 1937.

This report is submitted for your information and is not released for publication in whole or part for general use in connection with sales promotion. It is allowable, however, to cite the ratings given above as based on tests conducted according to the specifications referred to under Section III. 1 of this report.

Washington, D. C.

March 31, 1938.

L. J. Briggs

Lyman J. Briggs, Director

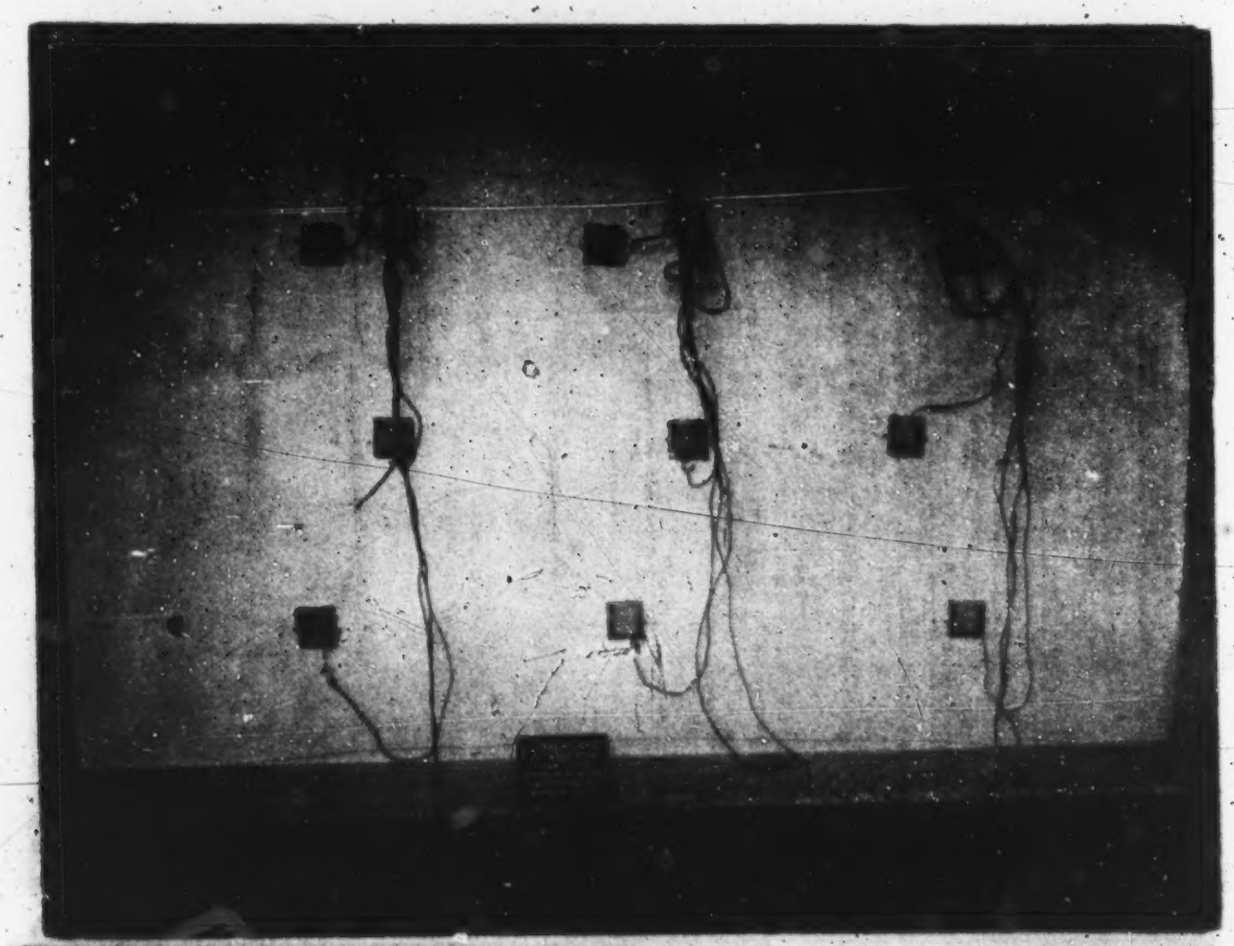


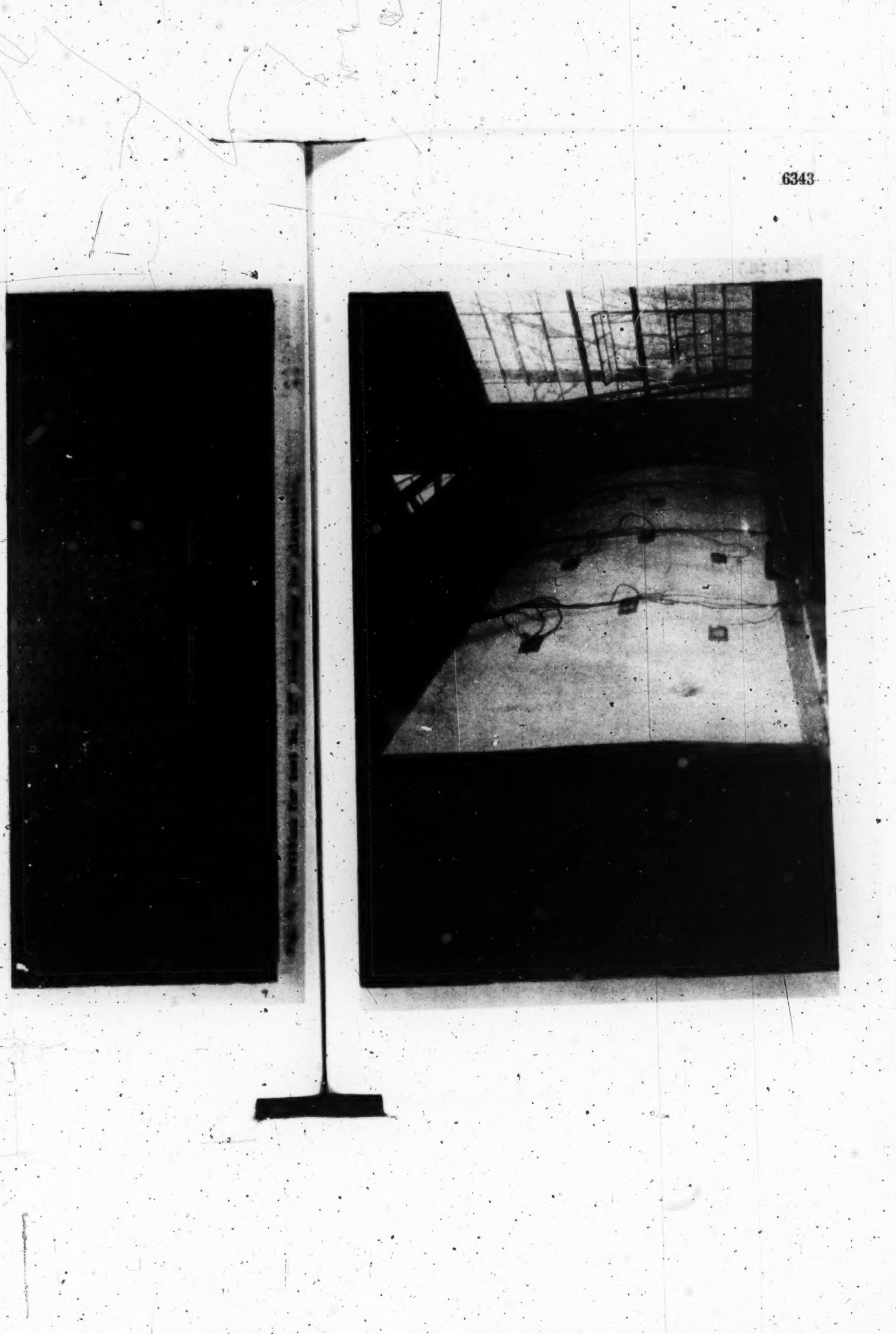
Fig. 1. Test No. 12D. Unexposed face of partition after 57 min. exposure of opposite face to fire.

6339

Fig. 2. Section of rail specimen showing shear test No. 126.

Fig. 5. Test 28. 125. Unexposed face of partition after 1-hour exposure of opposite face to fire.

6241



5/8 in. diameter, those in the second lot, 7/8 in.

11465 (c) Sand.—The sand used in the plaster facings had been dredged from the Potomac River, washed, and screened to pass a No. 14 sieve.

(d) Plaster.—The plaster for each partition was delivered in a separate lot. The following data are from the report on physical tests of the two lots.

	Lot 1	Lot 2
Consistency	45	40
Time of Set	6 hrs.	12 hrs.
Tensile Strength	400 lb./in.^{2}	380 lb/in.^{2}

Both lots met the requirements of Federal Specification SS-P-401, Plaster; Gypsum.

Each bag bore the markings, "Gold Bond" and "Double fibered".

The finish coat of plaster was made from four parts putty to one part gaging plaster. The putty was made by soaking Washington Finish Hydrate in water for three or more days, after which it was gaged with calcined gaging plaster mixed in batches on the board.

2. Design

These partitions of the usual design for wood-stud load-bearing partitions had 2 by 4 in. scantlings for plates, studs and bridging between studs at mid-height. The allowable load on the partitions was 358 lb/in^2 of net area of studs, or 30,550 lb. on the 13 studs of each partition. The partitions were free to expand endwise.

3. Construction

(a) Framing.—The top and bottom plates were bolted to the test frame members with three 1/2 in. diameter bolts in each. The studs were spaced 16 in. on centers and toe nailed to the plates with not less than three 8d nails in each end. The bridging blocks, cut herringbone fashion,

were nailed between the studs to form a fire stop at mid-height.

(b) Plaster base.—The gypsum lath boards were nailed to each stud bearing with four sharp-pointed, thin-headed nails 1 1/4 in. long by 13 1/2 gage wire with 5/16 in. diameter head—a total of 16 nails per board. The boards were spaced 1/4 in. apart along their edges and the end joints were staggered from course to course.

11466 (c) Grounds.—Perforated metal base beads were applied over the lath at 7 in. from the bottom and 12 in. from the top of the partitions. These formed screeds to give 1/2 in. thickness of plaster over the face of the lath.

(d) Plastering.—The plaster was applied in three coats. The first two coats were applied by the "double up" method. The second coat was applied as soon as the suction of the plaster base had removed enough water to permit the application of more plaster over the first coat. The plaster was mixed with sand in the proportions 1 part plaster to 2 parts sand by weight of the dry materials. The average strength of 2 in. cubes of the sanded plaster was 1220 and 1320 lb. per sq. in., respectively, when tested at 60 days.

The white finish was applied on the 8th day after the scratch and brown coats had been applied. The strength of 2 in. cubes was 490 lb. per sq. in.

(e) Trim.—The wooden base board and the strips serving as picture molds were applied just previous to the fire tests.

(f) Workmanship.—The workmanship was comparable with that found in local building practice.

(g) Illustrations.—The appearances of the partitions before, during, and after the tests are shown by figs. 1 to 5. Details of the construction, placement of thermocouples and the temperatures of the furnace and at points within the partition and on the unexposed surface are shown by fig. 6.

III. Methods of Testing

1. Specifications

The tests were conducted in accordance with the requirements of the Specifications for Fire Tests of Building Construction and Materials of the American Standards Association except that no partition was subjected to the fire and hose stream test, the adequacy of this type of construction to meet the requirements of this test having been shown by two previous tests.

2. Testing Equipment

The large wall testing equipment of the National Bureau of Standards was used for the tests. This comprises a gas-fired furnace with frames suitable, into which the walls are built to season for test. Each of the frames for these tests was equipped with four hydraulic jacks for applying load.

11467 The furnace is equipped with pyrometers to measure temperatures at nine points within the furnace chamber, at six points within the partition, and under nine asbestos pads distributed on the unexposed surface of each partition. Chromel-alumel thermocouples and portable type potentiometers were used for indicating temperatures in comparison with melting ice.

Deflections of the partitions during tests were observed by measuring from three wires stretched between the top and bottom members of the test frames, one opposite the vertical center line and one at 4 ft. each side of the center line.

3. Procedure

Each wall was built into a test frame and allowed to season 30 days before being subjected to test. The wall with its test frame was then drawn to form one side of the combustion chamber of the furnace and the load was applied before the start of the fire by pumping oil into the four jacks. The temperature was controlled to conform as nearly as possible to the standard reference curve.

The fires were continued for a short time after failure under load had occurred in order to determine when failure of non-bearing partitions might be expected.

IV. Results of Tests

1. Test No. 78

A fire endurance test of a fully-loaded wood-stud partition 16 in. long by 10 ft. 4 in. high by 5 1/2 in. thick faced on each side with 1/2 in. sanded gypsum plaster on perforated gypsum lath. The partition is shown in fig. 1. The test was conducted on September 10, 1936, the fire being continued 1 hr. 2 min.

(a) Furnace temperature.—The furnace fire gave an exposure as measured by the area under the curve of average temperatures, F, (fig. 6a) of 103 per cent of that derived from the area under the standard reference curve. The dashed lines above and below curve F show the maximum and minimum temperatures indicated by the thermocouples exposed to the furnace fire.

(b) Partition temperatures.—The average of the temperatures indicated by the three thermocouples between the lath and the studs on the fire exposed side of the partition, at 2 ft. from the top, is shown by curve 1, fig. 6a, and the maximum of the three by curve 1 max.

11468 The temperatures within the spaces between the studs at the same level are shown by curves 2 and 2 max.

The average of the surface temperatures measured under the nine asbestos pads on the unexposed surface, and the maximum of the nine, are shown by curves P and P max. of the same figure.

(c) Deflections.—The center of the partition deflected towards the fire about 1/4 in. during the first five minutes exposure to the fire, after which it returned, reaching its original position between 10 and 15 min. The deflection was subsequently away from the fire, at 45 min. was 1 1/2 in., and at 48 min., the time of failure under load, was about 2 1/2 in.

(d) Effects of test, fire exposed side.—The first break to appear in the plaster was at 5 1/2 min. when about 1/4 sq. ft. of white finish spalled off.

At 17 3/4 min. a bulge of plaster 3 ft. long was observed at the center of the panel. This bulge had cracked at 20 3/4 min. and the broken edge was standing out 3 1/2 in. from its original position. The break in the bulged

central part of the panel had extended to the south end at 22 3/4 min.

At 23 1/3 min. about 10 sq. ft. of plaster fell from just to the north of the center of the panel. This was quickly followed by the falling of a strip 20 in. wide extending from the center to the south end. At 25 min. another area of plaster fell, bringing the total area fallen to 40 sq. ft.

Vigorous flaming of the paper facing of the gypsum lath followed the fall of plaster. At 28 min. the plaster had separated from the lath above the area from which the plaster had fallen and the lower edge stood 6 to 8 in. from the lath.

The fall of the first piece of lath to expose the wood studs occurred at 32 1/2 min. and 2 min. later a considerable area of lath fell, resulting in a large volume of flame from the exposed studs and paper facings on the lath. At 35 1/2 min. more plaster and lath fell from above the central part of the partition. At 42 1/2 min. about all of plaster and lath had fallen from the upper part of the partition, there remained, however, a strip across the bottom about 2 ft. high.

Failure under load occurred at 48 min. The pressure of oil in the jacks was reduced from 120 lb. per sq. in. to 25 lb. per sq. in. and the screw jacks were set to hold the loading beam in this position. The fire was continued in order to determine when the limiting temperature on the unexposed side of the partition would be reached. At 55 1/4 min. practically all of the plaster had fallen from the fire exposed side. The limiting temperature having been exceeded, the fire was stopped at 62 min.

11469

(e) Effects of test, unexposed side.—The first crack appeared at 4 min. after the start of the test. It was a vertical crack along the first stud south of the center of the panel. At 5 min. a similar crack along the second stud north of the center line appeared and steam had begun to issue from the openings around thermocouple leads Nos. 10 to 15 (fig. 1) and along ends of the partition. At 9 min. the cracks noted above were closed.

A crack about 1 ft. long appeared in the upper south corner (fig. 1) at 13 min. and spalling of white finish along it had begun at 16 min. At 25 min. similar cracks appeared

near the lower corners at both north and south ends. A vertical crack 7 ft. long just north of pad 3 was observed at 42 min.

The cracks noted at 4 and 5 min. were observed to be opening again very slightly at 45 min.

Failure under load at 48 min. was accompanied by the opening of a crack between pads 4 and 7 (fig. 1).

An irregular horizontal crack 6 ft. long opened below pads 5 and 6 just after failure under load. Several other cracks in the plaster opened within the period 48 to 61 1/4 min. at which time the limiting rise of temperature under pad 5 had been reached and the photograph (fig. 2) was made.

(f) Failure.—Failure of the partition in this test was by inability to support the full working load beyond 48 min.

The limit of endurance as a surface finish over wood framing, a temperature rise of 325°F (181°C), was reached at 31 3/4 min. in locations not affected by the falling of plaster, and the limiting rise of the same amount on the unexposed surface under pad 5 was reached at 61 min. The thickness of the plaster on the unexposed side at pad 5 was 1/2 in. This was also the average thickness as measured at the nine pads.

(g) Condition after test.—All the studs except those at the ends were burnt in two and collapse of the partition was imminent at the time of removal from the furnace. The gypsum lath had been calcined for almost its entire area on the unexposed side, and much of the plaster likewise had been calcined. This construction could not be depended upon as a barrier against the sweep of fire beyond its load endurance limit, or beyond 1 hr. when used as a non-bearing partition. The plaster facing was held to the lath by keys in the perforations.

11470 2. Test No. 89.

A fire endurance test of a fully loaded wood stud partition 16 ft. long by 10 ft. high by 5 1/2 in. thick faced on each side with 1/2 in. sanded gypsum plaster on perforated gypsum lath. The partition, ready for test, is shown in fig. 4. The test was conducted on November 30, 1936, the fire being continued 1 hr. 11 1/2 min.

(a) Furnace temperature.—The fire exposure, by curve F, fig. 6, was 101 percent of that determined from the area under the standard reference curve. The dashed lines above and below curve F show the maximum and minimum temperature measured in the furnace during the test.

(b) Partition temperatures.—The average of the temperature indicated by the three thermocouples between the lath and the studs on the fire exposed side at 2 ft. from the top, is shown by curve 1, fig. 6b, and the maximum of the three by curve 1 max. The temperatures within the spaces between the studs at the same level are shown by curves 2 and 2 max.

The average of the surface temperatures measured under the nine asbestos pads on the unexposed surface, and the maximum of the nine, are shown by curves P and P max. of the same figure.

(c) Deflections.—The partition deflected towards the fire at its center 1/5 in. during the first 5 min. of the test and at 15 min. had returned to its original position, after which no movement was recorded before 30 min., at which time an outward movement of 1/10 in. was observed. At 55 min. the deflection at the center had reached one inch and was away from the fire.

(d) Effects of test, fire exposed side.—At 9 min. after the start of the fire three small horizontal ridges 6 to 10 in. long in the white finish were seen over joints between courses of gypsum lath.

At 18 min. the base board was charred through and ready to fall away. A bulge in the surface of the plaster at mid-height near the north end of the panel was observed at 27 min. and at 28 min. a vertical crack 5 ft. long was seen at 2 ft. south of the center. The plaster was soon standing out about 3/4 in. to 1 in. along this crack. At 30 1/2 min. a horizontal crack 1 ft. long branched off from the middle of the vertical crack and at 32 min. the lower end of the vertical crack branched into two cracks.

11471 At 34 min. several cracks were to be seen and flames were burning at four of them. The plaster at this time had bulged out 3 to 3 1/2 in. along the first vertical crack.

About two-thirds of a square yard of plaster fell from near the center of the panel at 38 1/2 min. and a half min. later almost a square yard of plaster and a half square yard of lath fell, exposing the studs. At 44 min. the plaster south of the first observed vertical crack and below the horizontal crack noted at 30 1/2 min, had fallen to expose the studs. Flames filled the south half of the furnace chamber. The total area of plaster fallen up to this time was about 4 1/2 sq. yd.

At 54 1/2 min. another small area of plaster fell from the upper south end of the panel.

The partition failed to support the full working load after 59 1/2 min. The load was relieved and the fire continued in order to determine the time at which the limiting temperature would be attained under the asbestos pads on the unexposed surface.

The fire was stopped at 1 hr. 11 1/2 min.

(e) Effects of test, unexposed side.—At 5 min. after the start of the test steam was issuing from the top and ends of the partition and around the thermocouple leads Nos. 10 to 15 (fig. 5).

Four cracks, nearly all vertical, were observed at 6 min. and at 10 min. a horizontal crack at 1 1/2 ft. below mid-height and a diagonal crack 1 1/2 ft. above the bottom were seen at the south end of the panel, also similar cracks at the north end. Another vertical crack about 2 1/2 ft. long south of pad 4 appeared at 12 min.

At 30 min. most all of the surface cracks were closed and little steam was seen. At 42 min. small round spots began to appear on the surface of the wall opposite holes in lath. At 57 min. a bulge at the south quarter length of the panel was growing perceptibly. More cracks developed as the partition deflected. Several cracks were developed after load failure before the limiting temperature had been reached.

(f) Failure.—Failure in this test, as in test No. 78 was by inability of the partition longer to support the test load. This occurred at 59 1/2 min.

The limit of endurance as a surface finish over wood framing, a temperature rise of 325°F (181°C) at one point, was reached at 31 min. and the limiting rise of the same amount on the unexposed side under pad 7 was reached

at 65 min. The thickness of plaster at the 9 pads
11472 on the unexposed surface ranged from 1/2 to 5/8 in., and averaged 9/16 in.

(g) Condition after test.—The studs were nearly all found to be burnt in two after the fire had been quenched about 18 min. after failure had occurred. The board and plaster on the unexposed side remained in place until the fire was quenched, there was, however, little strength in the plaster at the time the fire was stopped.

V. Summary and Discussion

Tests on two wood framed partitions faced with sanded gypsum lath for fire endurance while subjected to full working load gave different results with different sizes of holes through the lath. The plaster facing exposed to the fire was retained longer with the larger holes; and, likewise, the fire endurance limit was increased from 48 min. to 59 1/2 min.

Two fire and hose stream tests made on partitions of similar construction showed that this type of construction has a reserve above that required to resist erosion of the hose stream after 30 min. exposure to the test fire, therefore, no hose stream test was required.

The fire resistance rating of the load-bearing partition of 2 in. by 4 in. yellow pine studs with plates of the same material top and bottom and fire-stopped at mid-height, when faced with 1/2 in. of 1:2 sanded gypsum plaster applied over 3/8 in. thick gypsum lath perforated with 10 holes of 5/8 in. diameter per sq. ft., is 45 min.

The fire resistance rating of the partition of the same construction but having 3/8 in. thick gypsum lath perforated with 10 holes of 7/8 in. diameter per sq. ft., is 1 hour.

This report is submitted for your information and is not released for publication in whole or part nor for general use in connection with sales promotion. It is allowable, however, to cite the ratings given above as based on tests conducted according to the specifications referred to under Section III-1 of this report.

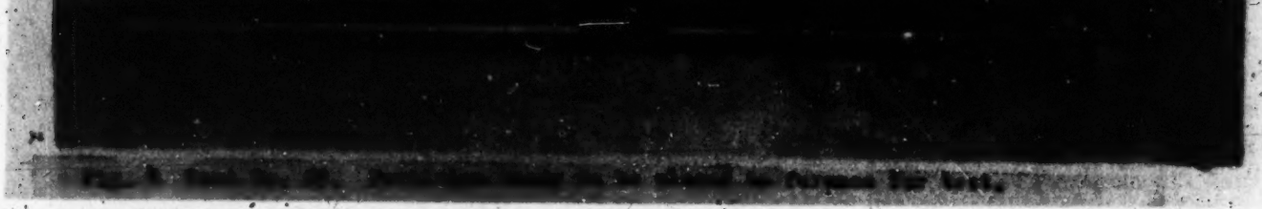
Respectfully submitted,

L. J. Briggs

Lyman J. Briggs, *Director*

December 31, 1936.

Fig. 5 Test No. 89. Partition at time of failure under load after exposure at opposite side to fire for 1 hr.



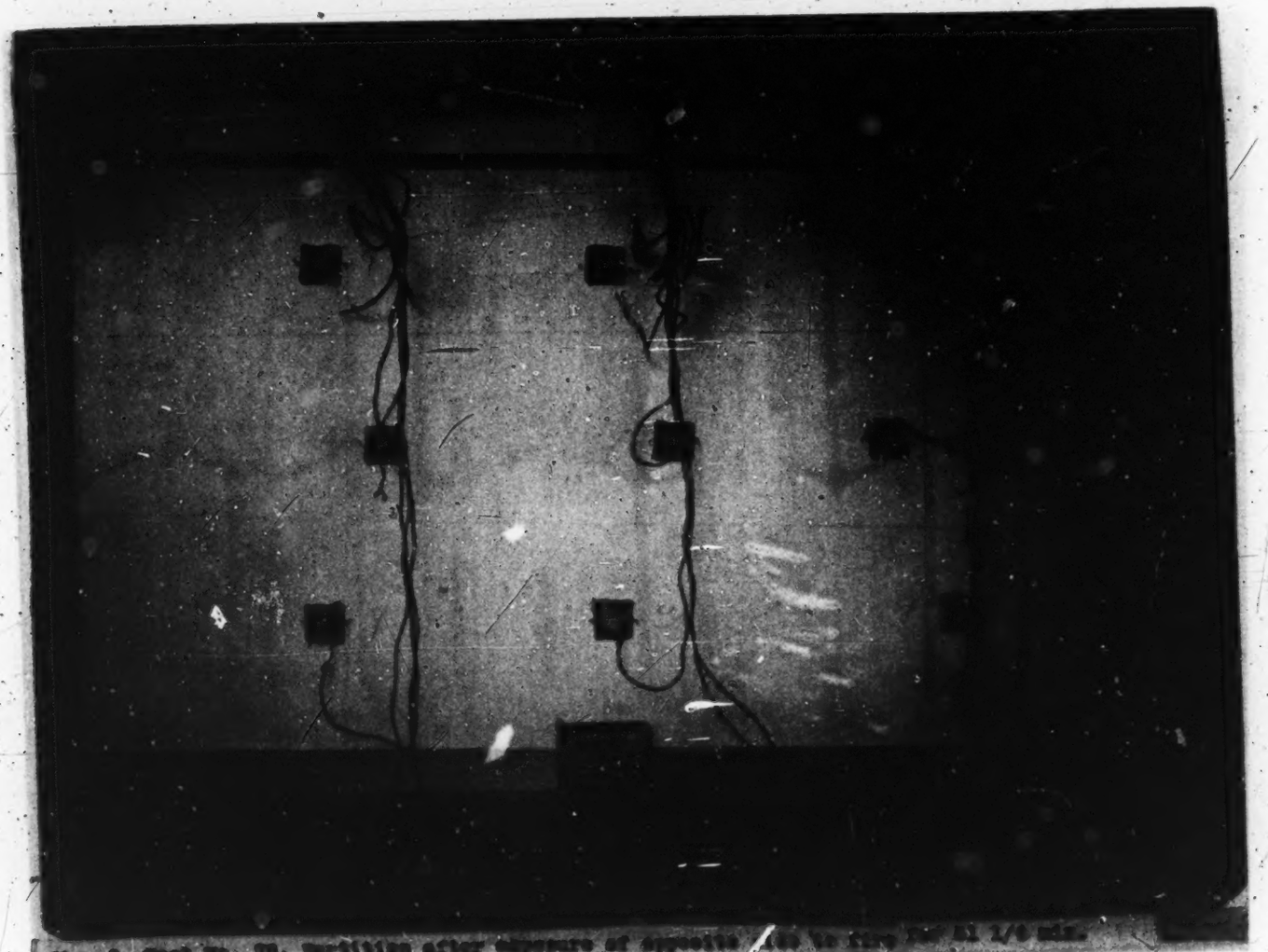


Fig. 8. Test No. 70. Partition after exposure of opposite face to fire for 21 1/2 min.

6357

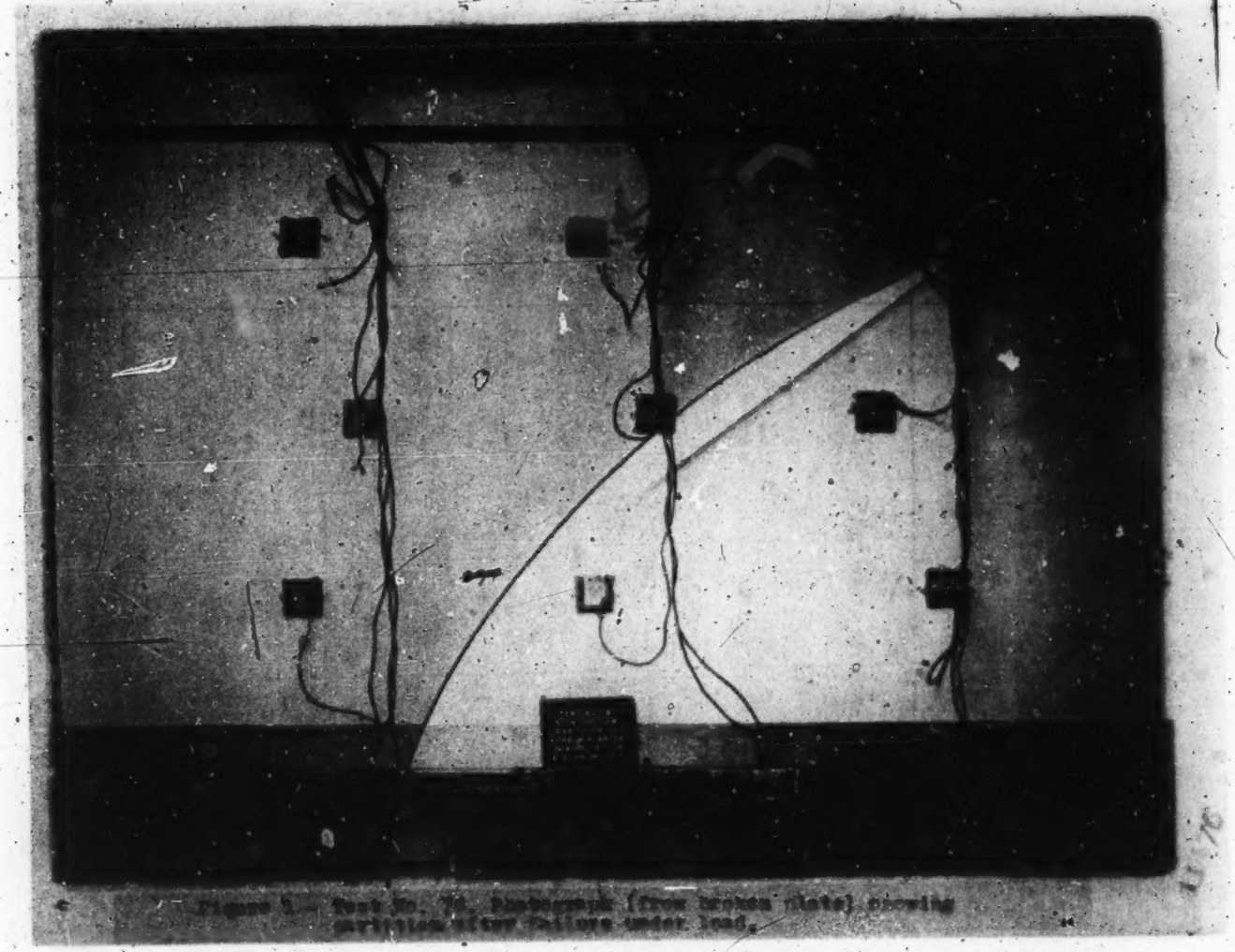


Figure 5.— Test No. 7B. Photograph (from screen plate) showing partition after failure under load.

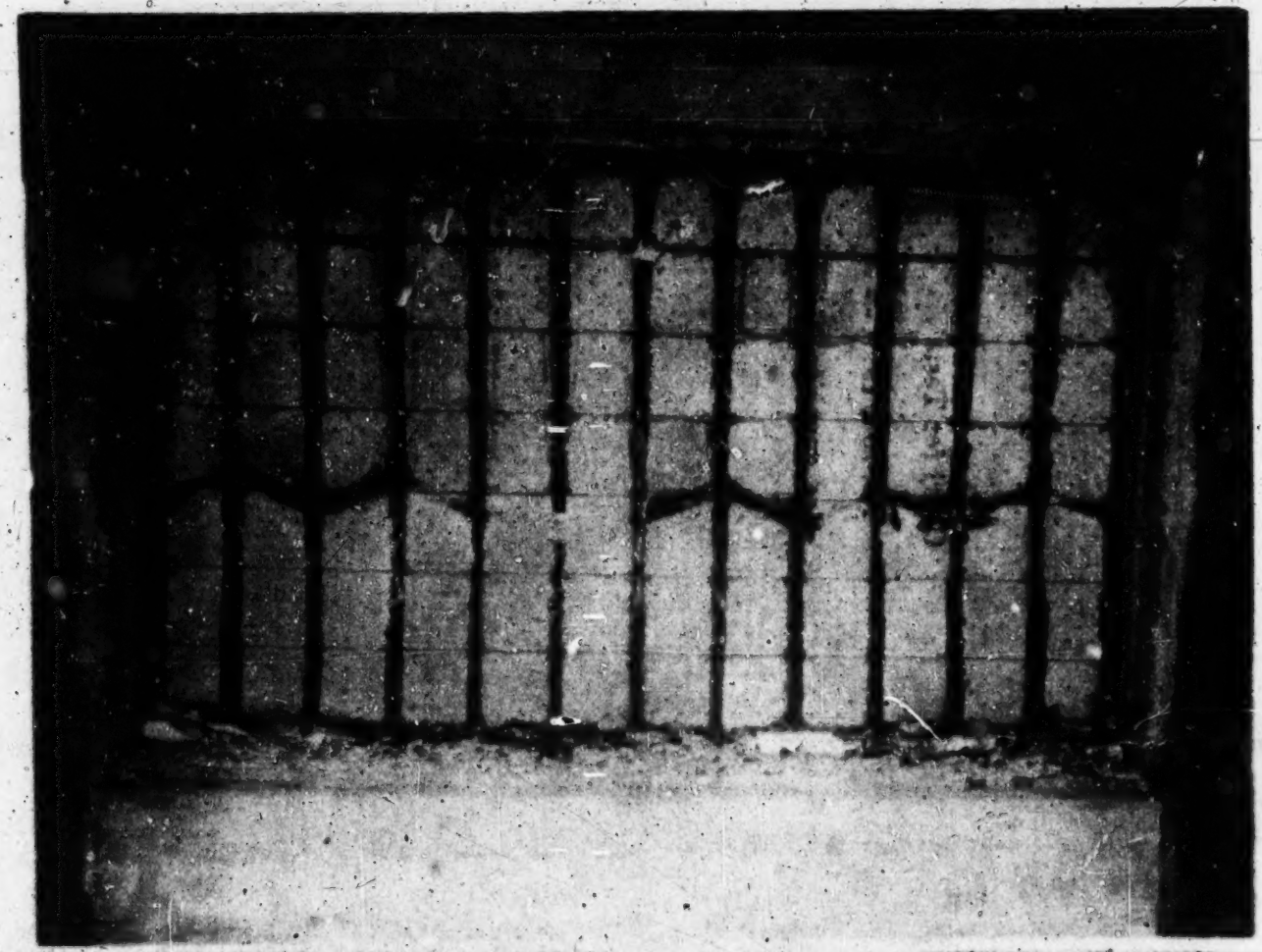
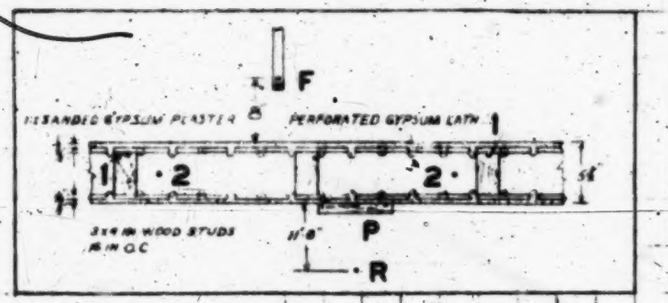


Fig. 3 Test No. 78. Fire exposed side of partition following removal from the furnace after test.

Chart for Tests

No. 78 & 79

See opposite



TEST NO. 78

TEST NO. 89

TEMPERATURE IN DEGREES CENTIGRADE

TEMPERATURE IN DEGREES FAHRENHEIT

1300 1200 1100 1000 900 800 700 600 500 400 300 200 100 0

2400 2300 2200 2100 2000 1900 1800 1700 1600 1500 1400 1300 1200 1100 1000 900 800 700 600 500 400 300 200 100

REFERENCE CURVE

F

1MAX

2MAX

2

1

PMAX

P

R

FAILURE UNDER LOAD 1 HOUR

LIMITING MAX. TEMP. 1 HOUR

FAILURE UNDER LOAD 5 1/2

LIMITING MAX. TEMP. 5 HOURS

0 1/2 1

TIME IN HOURS

11418

Fig. 6. Furnace and partition temperatures, Tests Nos. 78 and 89

11479 *Government's Exhibit No. 612*

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Holding a Three Judge Statutory Court

Civil Action No 8017

UNITED STATES OF AMERICA

Plaintiff

v.

UNITED STATES GYPSUM COMPANY, ET AL.

Defendants

GOVERNMENT EXHIBIT

CONTAINING CERTAIN INTERROGATORIES ON BEHALF OF THE UNITED STATES OF AMERICA AND ANSWERS THERETO BY DEFENDANT

UNITED STATES GYPSUM COMPANY

PURSUANT TO RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND ORDER OF COURT DATED APRIL 5, 1943

11480 Interrogatory No. 22—State the dates and places of all conferences or meetings held during the period from September 1, 1925 to April 1, 1926, between your representatives and representatives of Beaver Products Company, Inc., and The American Gypsum Company, or of either of said companies, and the names of all of such representatives present at each of such conferences or meetings, in any way relating to (1) settlement of pending litigation between you and Beaver or American, (2) the issuance of a license to Beaver or American or to any other company by you [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—So far as we have definite information there were two meetings between Sewell L. Avery, President of the United States Gypsum Company and Augustus S. Blagden, President of Beaver Products, Inc., one in December, 1925, and the other in February, 1926, relating to the possibility of a settlement of litigation then existing between United States Gypsum Company and Beaver Products, Inc. and to the possibility of the issuance of a license

by United States Gypsum Company to Beaver Products, Inc. The former meeting occurred in Chicago, Illinois, and the latter in New York, N. Y.

Interrogatory No. 23—State the dates and places of all conferences or meetings held during the period from April 1, 1926 to May 1, 1927 between your representatives and representatives of any other companies manufacturing gypsum board at that time or any time thereafter, in any way relating to the issuance of licenses by you under any patent owned by you. State the names of all companies represented at each of said conferences or meetings, the names of the representatives of each of said companies, the names of all other individuals present at each of said conferences or meetings, [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—As presently advised, there were the following meetings:

(a) May 20, 1926; Chicago, Illinois. Sewell L. Avery, President of United States Gypsum Company, attended for a time a meeting of several representatives of other companies interested in the gypsum board business. The names of the representatives and their companies are not definitely known.

(b) June—July, 1926; Chicago, Illinois. Numerous meetings were held between Sewell L. Avery, President of United States Gypsum Company and Augustus S. Blagden, President of Beaver Products, Inc. and/or their respective attorneys, John E. MacLeish and J. McMitchell. The dates of such meetings were: June 15, June 16, June 17, June 21, July 7, July 8, July 9, July 10, July 22, July 23, July 24, and July 29, 1926.

(c) June 18, 1926; Chicago, Illinois; present: Sewell L. Avery, President of United States Gypsum Company, Frank J. Griswold, Vice-President of American Gypsum

Company and M. A. Reeb, President of Niagara Gypsum Company.

(d) August—September, 1926; Chicago, Illinois. Several meetings were held between Sewell L. Avery, President of United States Gypsum Company and W. E. Shearer, President of Universal Gypsum & Lime Company and/or their respective attorneys, John E. MacLeish and Messrs. Carnahan and Fricke. The dates of such meetings were August 3, August 10, August 24, August 31, and September 17, 1926.

(e) September 13, 1926; Chicago, Illinois; present: Sewell L. Avery, President of United States Gypsum Company, John E. MacLeish, its attorney, J. H. McCrady, President, Frank J. Griswold, Vice-President and C. F. Miller, director, of American Gypsum Company.

(f) March 3, 4 and 5, 1927; Chicago, Illinois. Meetings were held between Sewell L. Avery, President of United States Gypsum Company, and W. P. Fuller, President of Atlantic Gypsum Products, Inc. and/or their respective attorneys, John E. MacLesh and H. M. Channing.

11481 (g) March 22, 1927; Chicago, Illinois; present: Sewell L. Avery, President of United States Gypsum Company and Samuel M. Gloyd, representing Texas Cement Plaster Company.

Interrogatory No. 32—State the dates and places of all conferences or meetings held during the period from January 1, 1928, to June 1, 1929, between your representatives and representatives of any and all other gypsum companies, in any way relating to (1) the settlement of any patent litigation; (2) the issuance of licenses by you under patents owned by you and state the names of all representatives of all companies who were present at each of said conferences or meetings, the names of all companies who were represented at each of such conferences or meetings, [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—As presently advised, there were the following meetings:

(a) February 29, 1928; Chicago, Illinois; present: Sewell L. Avery, President of United States Gypsum

Company, George M. Brown, President of Certain-teed Products Corporation and Augustus S. Blagden, President Beaver Products, Inc., the assets of which latter company had just been purchased by Certain-teed.

(b) Shortly prior to November 20, 1928; Chicago, Illinois; present: Sewell L. Avery, President of United States Gypsum Company and John A. Kling, President of American Gypsum Company.

(c) April 11, 1929, Cleveland, Ohio; present: Sewell L. Avery, President of United States Gypsum Company and John A. Kling, President of American Gypsum Company.

(d) May 9, 1929; Chicago, Illinois; present: Sewell L. Avery, President of United States Gypsum Company, John A. Kling, President of American Gypsum Company and their respective attorneys, John E. MacLeish and John H. Watson.

(e) May 21, 22 and 23, 1929; Chicago, Illinois. Meetings were held at which some or all of the following persons attended from time to time: Sewell L. Avery, President of United States Gypsum Company, and John E. MacLeish, attorney; W. P. Fuller, President of Atlantic Gypsum Products, Inc., and H. M. Channing, attorney; George M. Brown, President, and Audenreid Whittemore, Vice-President of Certain-teed Products Corporation; Frederick G. Ebsary, President of Ebsary Gypsum Company, Inc., and Harlan W. Rippey, attorney; Melvin H. Baker, President of National Gypsum Company, and Elmer E. Finck, attorney; M. A. Reeb, President of Niagara Gypsum Company; Eugene Holland, President of Universal Gypsum & Lime Company, and F. E. Britton, attorney.

(f) Although we have no definite record as to dates, F. J. Griswold, Vice-President of American Gypsum Company called on Sewell L. Avery, President of United States Gypsum Company at Mr. Avery's office on a few occasions during this period.

(g) Although we have no definite record as to dates, Eugene Holland, President of, and later Co-Receiver for, Universal Gypsum & Lime Company, called on Sewell L. Avery, President of United States Gypsum Company at Mr. Avery's office on a few occasions during this period.

Interrogatory No. 34—State the dates and places of all conferences or meetings between your representatives and the Universal Gypsum & Lime Company, or any other company, in any way relating to (1) any allegation, statement, or claim, that the use of starch in the foam process infringed or would infringe the Hite or Haggerty patents, (2) the acquisition by you of the Hite or Haggerty patents. State by whom these conferences or meetings on each occasion were attended on your behalf and on behalf of Universal, or any other company, [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

11482 Answer—As presently advised, there were the following meetings relating to claims that United States Gypsum Company infringed the Haggerty and Hite patents in its manufacture of gypsum board or the aquisition by United States Gypsum Company of the Hite and Haggerty patents:

(a) July, 1929; Chicago, Illinois; present: Sewell L. Avery, President of United States Gypsum Company and Eugene Holland, co-receiver of Universal Gypsum & Lime Company.

(b) July 25, 1929; Chicago, Illinois; a meeting was held at which some or all of the following attended: Sewell L. Avery, President of United States Gypsum Company, and its attorney, John E. MacLeish; W. P. Fuller, President of Atlantic Gypsum Products, Inc., and its attorney, H. M. Channing; C. O. Brown, Vice-President of Certain-teed Products Corporation; Frederick G. Ebsary, President, and/or George N. Lenci, Vice-President of Ebsary Gypsum Company, Inc., and/or its attorney, Harlan W. Rippey; Melvin H. Baker, President of National Gypsum Company and its attorney, Elmer E. Finck; M. E. Reeb, President of Niagara Gypsum Company; and Eugene Holland, co-receiver of Universal Gypsum & Lime Company.

(c) August 6, 1929; Chicago, Illinois. A meeting was held at which some or all of the following attended: Sewell L. Avery, President of United States Gypsum Company, and its attorney, John E. MacLeish; W. P. Fuller, President of Atlantic Gypsum Products, Inc., and its attorney, H. M. Channing; C. O. Brown, Vice-President of Certain-teed Products Corporation; Frederick G. Ebsary, Presi-

dent, and/or George N. Lenci, Vice-President of Ebsary Gypsum Company, Inc., and/or its attorney, Harlan W. Rippey; Melvin H. Baker, President of National Gypsum Company and its attorney, Elmer E. Finck; M. E. Reeb, President of Niagara Gypsum Company; and Eugene Holland, co-receiver of Universal Gypsum & Lime Company.

(d) August—November, 1929; Chicago, Illinois. Meetings were held between John E. MacLeish, attorney for United States Gypsum Company and L. W. Fricke and/or F. E. Britton, attorneys for Universal Gypsum & Lime Company, on the following dates: August 19, August 20, September 4, September 6, September 16, September 17, September 18, September 24, September 26, September 27, September 30, October 3, October 10, October 14, October 15, October 17, October 21, October 22, October 25, October 26, October 29, November 4 and November 5, 1929. A few of the foregoing meetings were attended by Sewell L. Avery, President of the United States Gypsum Company and Eugene Holland, co-receiver of Universal Gypsum & Lime Company. The meetings of August 20, August 30 and October 3, 1929, were attended by Melvin H. Baker, President of National Gypsum Company and its attorney, Elmer E. Finck.

Interrogatory No. 35—State the dates and places of all conferences or meetings between your representatives and representatives of the Texas Cement Plaster Company at which you offered to license Texas under the Hite and Haggerty and foam process patents, the names of all officials and representatives of either company that were present at such conferences or meetings [and state the substance of what was said by each person present at such conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—As presently advised, there were meetings between Oliver M. Knode, President of United States Gypsum Company and Samuel M. Gloyd of Texas Cement Plaster Company on January 13 and 14, . 37, at which a license to manufacture and sell gypsum board under the Haggerty patent and patents covering cellular gypsum board and other patents was offered by United States Gypsum Company to Texas Cement Plaster Company.

11483 Interrogatory No. 39—State the dates and places of all conferences or meetings between you and

your licensees and the names of all individuals who attended such meetings at which the prices and terms and conditions of sale for gypsum board prescribed by you in the various bulletins issued by you were discussed or at which complaints of alleged violations by licensees of said bulletin prices and terms and conditions of sale were discussed.

Answer—As presently advised, licensee meetings were held on or about the following dates in the following places and were attended by the following representatives of United States Gypsum Company:

Date	Place	Representatives of U. S. Gypsum Company
March 10, 1931	Chicago, Ill	Sewell L. Avery, C. F. Henning, and John E. Mac Leish, attorney.
October 17, 1932	New York, N. Y.	C. F. Henning and John E. Mac Leish, attorney.
November 15, 1932	New York, N. Y.	C. F. Henning and John E. Mac Leish, attorney.
December 13, 1932	Chicago, Ill.	C. F. Henning, F. M. Miller and John E. Mac Leish, attorney.
March 21, 1933	Buffalo, N. Y.	C. F. Henning, F. M. Miller and John E. Mac Leish, attorney.
April 27, 1933	New York, N. Y.	C. F. Henning, F. M. Miller E. A. Gallagher and John E. Mac Leish, attorney.
June 13, 1933	Chicago, Ill.	C. F. Henning & F. M. Miller.
May 23, 1934	Chicago, Ill.	C. F. Henning and R. J. Sterling.
December 20, 1934	Chicago, Ill.	C. F. Henning, E. W. Carey, and John E. Mac Leish, attorney.
March 13, 1935	Chicago, Ill.	C. F. Henning and E. W. Carey.
April, 1935	New York, N. Y.	C. F. Henning, E. W. Carey and E. A. Gallagher.
June 6, 1935	Chicago, Ill.	C. F. Henning and E. W. Carey
September 11, 1935	Chicago, Ill.	C. F. Henning and E. W. Carey.
December 11, 1935	Chicago, Ill.	C. F. Henning, H. F. Sadler and C. M. Price, attorney.
February 19, 1936	New York, N. Y.	C. F. Henning, M. J. Powers and C. M. Price, attorney
June 10, 1936	New York, N. Y.	C. F. Henning.
September 10, 1936	Buffalo, N. Y.	C. F. Henning
March 17, 1937	New York, N. Y.	W. L. Keady, H. F. Sadler.

We have no definite information as to what other persons attended the above-mentioned meetings but such meetings were customarily attended by some or all of the following licensees and by one or more of the representatives indicated:

Licensee	Representatives
National Gypsum Company	M. H. Baker, R. F. Burley.
Certain-teed Products Corp.	C. O. Brown, Warren Henley, E. H. Roos
Ebsary Gypsum Company	F. G. Ebsary, George N. Lenci.
American Gypsum Company	A. R. Black
Atlantic Gypsum Products Company	W. P. Fuller, L. I. Neale.
Kelley Plasterboard Company	S. J. Kelley
Universal Gypsum & Lime Company	Eugene Holland.

11484 *Government's Exhibit No. 613*

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Holding a Three Judge Statutory Court

Civil Action No. 8017

UNITED STATES OF AMERICA

Plaintiff

v.

UNITED STATES GYPSUM COMPANY, ET AL.

Defendants

GOVERNMENT EXHIBIT

CONTAINING CERTAIN INTERROGATORIES ON BEHALF OF THE UNITED STATES OF AMERICA AND ANSWERS THERETO BY DEFENDANT

NATIONAL GYPSUM COMPANY

PURSUANT TO RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND ORDER OF COURT DATED APRIL 5, 1943

11486 Interrogatory No. 28—State the dates and places of all conferences or meetings held during the period from January 1, 1928 to June 1, 1929, between representatives of U.S.G. and representatives of any and all other gypsum companies, in any way relating to (1) the settlement of any patent litigation; (2) the issuance of licenses by U.S.G. under patents owned by U.S.G. and state the names of all representatives of all companies who were present at each of said conferences or meetings, the names of all companies who were represented at each of such conferences or meetings, [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained obection to matters enclosed in brackets.]

Answer—National Gypsum Company has no reasonably acceptable records from which it can supply the dates and places of meetings and the names of persons present at conferences or meetings held during the period from Janu-

ary 1, 1928 to July 1, 1929, between the representatives of the United States Gypsum Company and the representatives of any and all other gypsum companies in any way relating to (1) the settlement of any patent litigation; (2) the issuance of licenses by U.S.G. under patents owned by U.S.G.; except that meetings of the representatives of various gypsum companies took place in Chicago, Illinois, in May, 1929. The actual dates and places of such conferences or meetings cannot be given with any reasonable accuracy from any available record. Such conferences or meetings were usually attended by Melvin H. Baker, as representative of National Gypsum Company.

As now advised the present employees of National competent to speak state that they cannot with reasonable accuracy name the representative or representatives of any and all other gypsum companies present at each of such conferences or meetings.

Interrogatory No. 29—State the dates and places of all conferences or meetings held during the period from January 1, 1928 to June 1, 1929 between representatives of any and all gypsum companies, relating to (1) the settlement of any litigation; (2) the issuance of licenses under patents owned by U.S.G. and state the names of all representatives of all companies who were present at each of said conferences or meetings, the names of all companies who were represented at each of such conferences or meetings [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—Same as No. 28.

Interrogatory No. 31—State the dates and places of all conferences or meetings between representatives of U.S.G. and the Universal Gypsum & Lime Company, or any other company, in any way relating to (1) any allegation, statement, or claim, that the use of starch in the foam process infringed or would infringe
11485 the Hite or Haggerty patents, (2) the acquisition by U.S.G. of the Hite or Haggerty patents. State by whom these conferences or meetings on each occasion were attended on your behalf and on behalf of Universal and U.S.G. or any other company, [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—As presently advised National Gypsum Company or any one of its present employees competent to speak has no reasonably accurate record or recollection with respect to the information requested in Interrogatory No. 31.

Interrogatory No. 37—State the dates and places of all conferences or meetings between U.S.G. and its licensees and the names of all individuals who attended such meetings at which the prices and terms and conditions of sale for gypsum board prescribed by U.S.G. in the various bulletins issued by U.S.G. were discussed or at which complaints of alleged violations by licensees of said bulletin prices and terms and conditions of sale were discussed.

Answer—As presently advised licensee meetings were held from time to time after the signing of the license agreement, but Natonal Gypsum Company has no definite information as to the individuals who attended such meetings nor as to the dates and places of such meetings. The recollection of present employees competent to speak is that some or all of such meetings were attended by M. H. Baker or R. F. Burley, representing National Gypsum Company; C. F. Henning, W. R. Keady, John MacLeish, Attorney, F. M. Miller, H. F. Sadler or E. W. Carey, representing United States Gypsum Company; C. O. Brown or Warren Henley, representing Certain-teed Products Company; F. G. Ebsary or George Lenci, representing Ebsary Gypsum Company; A. R. Black, representing American Gypsum Company; W. P. Fuller or L. I. Neale, representing Atlantic Gypsum Products Company; S. J. Kelly, representing Kelly Plasterboard Company, and Eugene Holland, representing Universal Gypsum & Lime Company.

11487 *Government's Exhibit No. 614*

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Holding a Three Judge Statutory Court

Civil Action No. 8017

UNITED STATES OF AMERICA

Plaintiff

v.

UNITED STATES GYPSUM COMPANY, ET AL.

Defendants

GOVERNMENT EXHIBIT

CONTAINING CERTAIN INTERROGATORIES ON BEHALF OF THE UNITED STATES OF AMERICA AND ANSWERS THERETO BY DEFENDANT

CERTAIN-TEED PRODUCTS CORPORATION

PURSUANT TO RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND ORDER OF COURT DATED APRIL 5, 1943

11488 Interrogatory No. 24—State the dates and places of all conferences or meetings held during the period from September 1, 1925 to May 1, 1927 between your representatives and representatives of any other companies manufacturing gypsum board at that time or any time thereafter, in any way relating to the issuance of licenses by U.S.G. under any patent owned by U.S.G. State the names of all companies represented at each of said conferences or meetings, the names of the representatives of each of said companies, the names of all other individuals present at each of said conferences or meetings, [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—We are unable to supply the answer to this interrogatory from any company record or the memory of any present employee competent to speak.

Interrogatory No. 33—State the dates and places of all conferences or meetings held during the period from January 1, 1928 to June 1, 1929, between representatives of U.S.G. and representatives of any and all other gypsum companies, in any way relating to (1) the settlement of any patent litigation; (2) the issuance of licenses by U.S.G. under patents owned by U.S.G. and state the names of all representatives of all companies who were present at each of said conferences or meetings, the names of all companies who were represented at each of such conferences or meetings, [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—In so far as we have been able to ascertain there were the following meetings:

1. On or about February 28, 1928 there was a meeting which was attended by Mr. G. M. Brown on behalf of Cer-

tain-teed Products Corporation. We are unable to state where the meeting was held or what other companies were represented other than that United States Gypsum Company was represented by some person whose name we are unable to supply.

2. On or about May 22, 1929 there was a meeting at Chicago, Illinois at which Certain-teed Products Corporation was represented by Mr. George M. Brown and Mr. Audenried Whittemore. United States Gypsum Company was represented by Mr. Sewell L. Avery and Mr. John E. McLeish. We are unable to state the names of anyone else who was present.

Interrogatory No. 34—State the dates and places of all conferences or meetings held during the period from January 1, 1928 to June 1, 1929 between representatives of any and all gypsum companies, relating to (1) the settlement of any litigation; (2) the issuance of licenses under patents owned by U.S.G. and state the names of all representatives of all companies who were present at each of said conferences or meetings, the names of all companies who were represented at each of such conferences or meetings [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—Other than as stated in the answer to interrogatory No. 33 we are unable to supply any information in answer to this interrogatory.

Interrogatory No. 36—State the dates and places of all conferences or meetings between representatives of U.S.G. and the Universal Gypsum & Lime Company, or any other company, in any way relating to (1) any allegation, statement, or claim, that the use of starch in the foam process infringed or would infringe the Hite or Haggerty patents, (2) the acquisition by U.S.G. of the Hite or Haggerty patents. State by whom these conferences or meetings on each occasion were attended on your behalf and on behalf of Universal and U.S.G. or any other company, [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

11489 Answer—So far as we are able presently to state the following meetings took place:

1. July 26, 1929 at Chicago, Illinois. Present: Mr. C. O. Brown of Certain-teed Products Corporation, Mr. Sewell L. Avery of United States Gypsum Company. There were also present representatives of National Gypsum Company, Atlantic Gypsum Company, Ebsary Gypsum Company and their attorneys but we are unable to supply the names of such representatives and attorneys.

2. August 6, 1929 at Chicago, Illinois. Present: Mr. C. O. Brown of Certain-teed Products Corporation. We are unable to state what other persons were present.

Interrogatory No. 42—State the dates and places of all conferences or meetings between U.S.G. and its licensees and the names of all individuals who attended such meetings at which the prices and terms and conditions of sale for gypsum board prescribed by U.S.G. in the various bulletins issued by U.S.G. were discussed or at which complaints of alleged violations by licensees of said bulletin prices and terms and conditions of sale were discussed.

Answer—So far as we are able presently to state the following meetings took place at which the persons listed below were present:

1. On May 23, 1934 at Chicago, Illinois. Present: Warren Henley and H. H. Van Hagan of Certain-teed Products Corporation; C. F. Henning of United States Gypsum Company.

2. On December 20, 1934 at Chicago, Illinois. Present: H. H. Van Hagan of Certain-teed Products Corporation; C. F. Henning of United States Gypsum Company.

3. On June 10, 1936 at New York, New York. Present: C. O. Brown of Certain-teed Products Corporation; C. F. Henning of United States Gypsum Company.

4. On September 10, 1936 at New York, New York. Other than as stated above we are unable to state who was present at the foregoing meetings.

11490 *Government's Exhibit No. 615*

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Holding a Three Judge Statutory Court

Civil Action No. 8017

UNITED STATES OF AMERICA

Plaintiff

v.

UNITED STATES GYPSUM COMPANY, ET AL.

Defendants

GOVERNMENT EXHIBIT

CONTAINING CERTAIN INTERROGATORIES ON BEHALF OF THE UNITED STATES OF AMERICA AND ANSWERS THERETO BY DEFENDANT

EBSARY GYPSUM COMPANY

PURSUANT TO RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND ORDER OF COURT DATED APRIL 5, 1943

11491 Interrogatory No. 22—State the dates and places of all conferences or meetings held during the period from September 1, 1925 to May 1, 1927 between your representatives and representatives of any other companies manufacturing gypsum board at that time or any time thereafter, in any way relating to the issuance of licenses by U.S.G. under any patent owned by U.S.G. State the names of all companies represented at each of said conferences or meetings, the names of the representatives of each of said companies, the names of all other individuals present at each of said conferences or meetings, [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—We did not make gypsum board at any time between September 1, 1925, and May 1, 1927, and we had no meetings with other companies relating to the issuance of any license by U.S.G. under any patent.

Interrogatory No. 27—State the dates and places of all conferences or meetings held during the period from January 1, 1928 to June 1, 1929, between representatives of U.S.G. and representatives of any and all other gypsum companies, in any way relating to (1) the settlement of any patent litigation; (2) the issuance of licenses by U.S.G. under patents owned by U.S.G. and state the names of all representatives of all companies who were present at each of said conferences or meetings, the names of all companies who were represented at each of such conferences or meetings, [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—We have no knowledge, recollection or record of any meetings between January 1, 1928, and June 1, 1929, except a meeting of May 21st—23rd, 1929, which was held at Chicago, Illinois, when the original license agreement was issued by U.S.G. to Ebsary. We had no occasion to meet with U.S.G. or other companies to discuss settlement of litigation, as we did not make any closed edge board until after the issuance of a license by U.S.G. We had no suits pending against us in relation to any patents.

We have no record of those present at the May 1929 meeting, but believe that all of the following companies were represented by one or more of their executives, and in some cases also by counsel:

U.S.G.	Niagara	Certain-teed
National	Kelley	Universal
Atlantic	Ebsary	American

Ebsary was represented at said meeting by Frederick G. Ebsary and George N. Lenci and possibly by Harlan W. Rippey.

Interrogatory No. 28—State the dates and places of all conferences or meetings held during the period from January 1, 1928 to June 1, 1929 between representatives of any and all gypsum companies, relating to (1) the settlement of any litigation; (2) the issuance of licenses under patents owned by U.S.G. and state the names of all representatives of all companies who were present at each of said conferences or meetings, the names of all companies who were represented at each of such conferences or meetings [and state

the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—Same as No. 27 above.

Interrogatory No. 30—State the dates and places of all conferences or meetings between representatives of U.S.G. and the Universal Gypsum & Lime Company, or any other company, in any way relating to (1) any allegation, statement, or claim, that the use of starch in the foam process infringed or would infringe the Hite or Haggerty patents, (2) the acquisition by U.S.G. of the Hite or Haggerty patents. State by whom these conferences or meetings on each occasion were attended on your behalf and on behalf
11492. of Universal and U.S.G. or any other company, [and state the substance of what was said by each person present at said conferences or meetings.] [Court sustained objection to matters enclosed in brackets.]

Answer—To the best of our present information and belief, there was a meeting at Chicago in or about August or September 1929 in relation to the Hite and/or Haggerty patents whcih Frederick G. Ebsary attended. At such meeting we believe U.S.G. was represented by Sewell L. Avery, National by Melvin H. Baker, Universal by Eugene Holland, and Certain-teed by C. O. Brown. We have no record of the meeting or the date thereof or of those present. There may have been additional companies represented at this meeting.

Interrogatory No. 37—State the dates and places of all conferences or meetings between U.S.G. and its licensees and the names of all individuals who attended such meetings at which the prices and terms and conditions of sale for gypsum board prescribed by U.S.G. in the various bulletins issued by U.S.G. were discussed or at which complaints of alleged violations by licensees of said bulletin prices and terms and conditions of sale were discussed.

Answer—The dates and places of all conferences or meetings between U.S.G. and its licensees referred to in this interrogatory of which we have knowledge, and the names of the individuals who attended such meetings were as follows:

Meeting of October 17, 1932, held at New York City:

Company	*Represented by*
U. S. G.	C. F. Henning and John E. MacLeish
Atlantic	L. I. Neale
Kelley	S. J. Kelley
Ebsary	F. G. Ebsary and G. N. Lenci
	C. E. Hough and E. H. Diegel
National	M. H. Baker
Certain-teed	C. O. Brown and E. H. Roos
American	A. R. Black
Universal	Eugene Holland

Meeting of November 15th, 1932, held at New York City:

Company	*Represented by*
U. S. G.	C. F. Henning and John E. MacLeish
Atlantic	L. I. Neale and W. P. Fuller
Kelley	S. J. Kelley
Ebsary	F. G. Ebsary and G. N. Lenci
National	M. H. Baker
Certain-teed	C. O. Brown and E. H. Roos
American	A. R. Black
Universal	Eugene Holland

Meeting of December 13, 1932, held at Chicago:

Company	*Represented by*
U. S. G.	C. F. Henning and John E. MacLeish
Universal	Eugene Holland and Frank Krumholtz
Atlantic	L. I. Neale
Kelley	S. J. Kelley
Ebsary	F. G. Ebsary and G. N. Lenci
Certain-teed	Warren Henley
National	M. H. Baker
American	A. R. Black

Meeting of April 27, 1933, held at New York City:

Company	*Represented by*
U. S. G.	C. F. Henning and E. A. Gallagher
National	M. H. Baker and R. F. Burley
Atlantic	L. I. Neale and W. P. Fuller
Certain-teed	C. O. Brown, E. H. Roos, and Ben McCausland

(Continued)

11493 Meeting of December 13, 1932 (continued):

Company	*Represented by*
Universal	Eugene Holland
Kelley	S. J. Kelley
Ebsary	G. N. Lenci and E. H. Diegel

Also, meeting held on or about March 17, 1937, at New York City:

Company	*Represented by*
U. S. G.	W. K. Keady
Ebsary	F. G. Ebsary

There was also a meeting held in Chicago on or about June 23, 1934, for the purpose of considering the testing of light weight gypsum board, at which there were present:

Company	*Represented by*
Atlantic	L. I. Neale
Universal	Eugene Holland
American	A. R. Black
Certain-teed	Van Hagen, Sterling, E. H. Roos
National	M. H. Baker
U. S. G.	C. F. Henning
Ebsary	G. N. Lenci

11494 *Government's Exhibit No. 616*

Report of Sales Department—Year 1926

MR. S. L. AVERY,
President,
Office.

Shipments comparing the year 1926 with the year 1925 as follows:

Commodity (Inc. F.P.)	1926	1925	Comparison
Total Tonnage	2,877,402	2,733,718	G 5.3%
Bag Tonnage	1,817,318	1,749,932	G 3.8%
Unmixed Tonnage	421,683	412,215	G 2.3%
Lime Tonnage	127,557	124,661	G 2.3%
Textone Poundage	2,414,244	1,770,953	G 36.3%
Sheetrock & St. Bd. Footage	380,541,000	386,346,000	L 1.5%
Rocklath Footage	122,108,000	66,196,000	G 84.5%
Partition Tile Footage	21,777,000	19,767,000	G 10.2%

Gross sales for the year 1926 were $33,540,389 as compared with $32,373,353 for the year 1925 or an increase of 3.6%; also 73.4% greater than the average of the past seven years.

Sales Expense increased 23.2% over the twelve months of 1925 as compared with the Gross Sales increase of 3.6% and the Total Tonnage increase of 5.3%.

The Advertising Expense $1,068,820, represents an increase of 40.0% over the 1925 expenditure.

The 1926 Sales Expense plus the Advertising Expense equals $3,562,226, an increase of 27.8% over 1925.

	Percent Sales Expense to Net Sales					
	1926	1925	1924	1923	1922	1921
Excluding Advertising Expense	7.6	6.4	5.9	6.3	7.7	8.7
Including Advertising Expense	10.9	8.8	7.8	7.8	9.9	9.9

As of December 31, 1926.

Occupation	1926	1926	1924	1923	1922
Salesmen	236	139	142	123	100
Supervisors	21	19	10	9	9
Specialty Salesmen	0	36	18	9	7

Purchased lime shipments for year 1926 were 5561 tons as compared with 6628 tons for year 1926 and represents a decrease of 16.1%.

11495 Rock—The rock tonnage shows a gain of 1% in volume for 1926 as compared with previous year.

This is a decline over the percentage increase for the 9 months, which is due to the difficulties encountered in shipping New Brighton rock to the Lehigh Portland Cement Company which will be overcome during the year.

Our propaganda is slowly taking effect and there is no doubt but we will slowly, but gradually increase our rock tonnage from New Brighton.

Prices show a 1% increase, this due to the transfer of Oakfield business to New Brighton. Prices in general are holding firm.

Stucco—Stucco shows an increase of 5% for the year as compared with the previous year, with price decline of 6%. This price decline is due to meeting competitive quotations and increasing our tonnage.

Stucco Specialties show an increase of 16% for the year as compared with the previous year, with price decline of 1%.

We are meeting German competition in Cuba, Boston and Philadelphia, which will mean lower prices in these markets. We are also forced to meet the lower prices from other New York manufacturers, on account of our aggressiveness and sales.

Neat Wall Plaster—Cement Plaster shows an increase of 3% over the year as compared with the previous year, and a price decline of 3%. The price decline is identical with the showing for the nine months, but the low prices due to the competitive conditions in the Southwest on account of protected tonnage have not shown themselves in the price average.

Although the Southwest and Southeast condition has been somewhat rectified, the prices have declined 12½% which will hold.

We are also facing serious price declines in the larger eastern markets on account of competitive aggression. In the balance of the territories, prices are stable and look for but little declines for the immediate future.

Sanded Wall Plaster—Shows a decrease in tonnage of 14% for the year, as compared with the previous year, with price increase of 1%. Tonnage is holding the same as for the previous quarters with a better outlook on sanded for the coming year.

11496 Plaster Board—Shows an increase in volume of 118% with a price reduction of 16%. The campaign on Rocklath is showing consistent increases, the total increase for the year being 110,819,000 square feet. Since the beginning of the year, we have introduced Bundled Rocklath, having shipped 1,000,000 square feet of this commodity in January. This looks like a wonderful opportunity for increasing Plaster Board tonnage.

Sheetrock—Sheetrock shows a decrease of 4% and a price decline of 1% as compared with the previous year. The principal competitive activity is due to the agression of the National Gypsum Company, who are now starting sales operations in the central territory preparatory to opening their Northern Michigan Mill.

Certainteed competition is severe, due to the fact that they have made a price decline of 10% in all markets on both plaster wallboard and plaster board. We have not as yet met this price decline.

The larger markets in the east are being flooded by seconds which are presumably firsts and are changing $30.00 markets to $20.00 markets. We are meeting this condition where necessary to hold our establishment, but thereby suffering a loss in sales valuation.

The other competitors manufacturing Plaster Board are starting strenuous advertising campaigns and it has been necessary to increase the sales organization and advertising effort, to counteract these campaigns.

Sterling Board—Sterling board for the year shows 10,400,000 square feet with a sales valuation of $206,228.00. No sales made in 1925. We are making new gains in Sterling establishment, especially on the Pacific Coast where sales are now running 2,000,000 feet per month.

Gyp-Lap—Gyp-Lap sales for the year are 8,954,000 feet as compared with 5,183,000 feet for previous year, showing 73% increase. Gyp-Lap sales are still a disappointment and we believe that we have finally discovered the sales resistance, which is thickness, weight and dimensions of board, and we are now preparing to ship boards of various dimensions to determine the most practical type of board.

This material has not shown any complaints and has shown a saving wherever used.

11497 Total Board Footage—Total board footage shows a gain of 12% for the year with a gain in sales valuation of 3%.

Total Footage for 1925	455,690,000
Total Footage for 1926	509,018,000
Sales Valuation 1925	$ 12,370,078
Sales Valuation 1926	12,711,320

The above figures show conclusively that Sterling and Rocklath sales have increased sales valuation, with a corresponding increase in gross profits over the shrinkage in Sheetrock sales valuation and gross profits.

The future of the board business from a footage and profit depends entirely upon our increase in Rocklath, Sterling and Gyp-Lap, to overcome any shrinkages in Sheetrock valuation and footage.

Partition Tile—Shows an increase of 21% with a price decline of 11%, due to the fact that there are more competitive tile manufacturers aggressively selling and it has become necessary to meet price conditions to increase volume. Tile prices are comparatively firm at the present time and do not look for any local price changes.

Hydrated Finishing Lime—Shows a tonnage increase of 10% and price decline of 4% as compared with the previous year. Prices on finish are becoming more unstable and look for further reduction for the coming year, due to the fact that we are now meeting all competitive prices on account of increased capacity at Genoa.

We are also taking on additional jobbing business at 10% to 12% price reduction.

Masons Hydrated Lime—Shows a decrease in price of 15% as compared with the previous year. The market prices on this commodity were demoralized throughout the year, but are stabilized again at about 10% less than last year's prices.

Textone—Shows an increase in volume of 36% as compared with previous year's sales being 2,414,200 pounds as compared with 1,771,000 pounds.

Textone Net Sales Valuation—1925	$340,586
Textone Net Sales Valuation—1926	437,080
Gain 28%	

11498 Oriental Stucco (Finish and Base)—Sales for the year are 17,907 tons as compared with 10,673 tons for the same period of the previous year. Oriental

Stucco has been shipped to every state in the Union and this commodity has now earned its place among exterior stuccoes and we look for very healthy tonnage gains for the coming year. It would be necessary to meet prices in larger cities and to meet the competition of locally manufactured stuccoes to increase our tonnage.

Oriental Sales Valuation—1925.....	$290,746
Oriental Sales Valuation—1926.....	489,746
Gain 68%	

Plastint—Sales for the year average 3830 tons, with no sales for the previous year.

We have increased dealer establishment and look for a healthy increase for 1927.

This commodity has changed so as to make it possible to both sand float and texture the material and our colors have been intensified, as we have discovered that the previous colors did not suit the popular taste on account of being in pastel shades only.

Pyrocell and Thermofill—Pyrocell sales for 1926 show 2469 tons—Thermofill 1930 tons. We are increasing our sales organization and manufacturing facilities for Thermofill, which will give us a production which should show greater volume for 1927.

General—Our advertising propaganda is showing remarkable results and the work for the month of January enlisting our dealers to support our National Campaign by newspaper advertising has resulted in securing newspaper campaigns from 483 dealers, equivalent to 187 full pages of advertising, using our cut and copy service. 1684 advertising portfolios have been sent to 1684 dealers and this will undoubtedly minimize the effect of competitive advertising campaigns and give the dealers a greater appropriation of advertising propaganda.

The sales force recommended in last report, to sell materials to the job is now working and promises good results. The increase in Rocklath in the larger cities can largely be contributed to the work of these men and as the season opens up, similar returns should be made on our other specialties.

From present indications, business should hold up for the first six months with continuous decline in prices, proportional to our sales aggression.

C. F. HENNING,
Vice-Pres. in charge of Sales

CFH:KO

11499 *Government's Exhibit No. 617*

Report of Sales Department—First Quarter 1927.

MR. S. L. AVERY,
President,
Office.

Shipments comparing the first three months of 1927 with same period 1926 as follows:

Commodity (Incl. F.P.)	1927	1926	Comparison
Total Tonnage	606,374	568,875	G 6.6%
Bag Tonnage	390,111	368,783	G 5.8%
Unmixed Tonnage	65,228	67,787	L 3.8%
Lime Tonnage	27,182	26,267	G 3.5%
Textone Poundage	815,097	510,304	G 59.8%
Sheetrock, Sheetrock Seconds & Sterling Board Footage	91,275,000	86,786,000	G 5.2%
Rocklath Footage	31,597,000	20,104,000	G 57.1%
Partition Tile Footage	5,827,000	4,802,000	G 21.4%

Gross sales for the first three months 1927 were $7,472,640 as compared with $7,019,639 same period last year or an increase of 6.4%, also 65.1% greater than the average for the first quarter of the previous seven years.

Sales expense increased 20% over first quarter 1926 as compared with a gross sales increase of 6.4% and Total Tonnage increase of 6.6%.

The Advertising Expense $256,774 represents an increase of 19.9% over three months of 1926.

The combined Sales and Advertising Expense, $993,030 for first quarter 1927 is 20% over 1926 expenditure, same period.

	Percent Sales Expense to Net Sales—3 Mos.					
	1927	1926	1925	1924	1923	1922
Excluding Advertising Expense	10.0	8.9	6.6	7.3	9.2	9.8
Including Advertising Expense	13.5	12.0	8.0	9.2	10.2	13.3

Field Employees, as of March 31.

	1927	1926	1925	1924	1923	1922
Salesman	246	172	144	139	105	93
Supervisors & City Managers	28	21	10	9	9	4
Specialty Salesman	0	59	20	10	9	7

Purchased lime shipments for three months 1927 were 1224 tons as compared with 1531 last year or a decrease of 20%.

11500 Rock—The rock tonnage shows a 2% increase in volume for the first quarter, of 1927, as compared with the previous year. We are successfully overcoming the objections to New Brighton rock and with the further decrease in price, have been able to contract with larger users for the year.

Prices show a 5% decrease. This due to our voluntary decrease in price on New Brighton rock and also to price cuts by Certainteed in the Southwest and Grand Rapids areas, and new independent companies now offering crushed rock.

Stucco—Stucco shows a 31% decrease for the quarter, as compared with the same quarter of previous year, with a price increase of 2%. Certainteed at Grand Rapids—National at Oakfield, are making a drive for stucco at lower prices.

Stucco specialties show an increase of 7% for the quarter as compared with the quarter of the previous year, with a price decline of $3.00.

Neat Wall Plaster—Cement plaster shows an increase of 6% for the quarter as compared with the quarter for previous year, with a price decline of 2%. Competition is aggressive in all territories and the smaller companies are offering inducements on large jobs and larger companies are offering large dealers and users price inducements.

Sanded Wall Plaster—Shows an increase in tonnage of 2% for the quarter, as compared with same quarter previous year, with a price increase of 5%.

Plaster Board—Shows an increase in volume of 57% with a price reduction of 4%. The campaign on Rocklath is showing consistent increases. The total increase for the quarter being 11,491,000 square feet. Competition is meeting our Rocklath Campaign with cut down wallboard at lower prices.

Sheetrock and Sterling—Sheetrock and Sterling show a decrease of 5%, with a price decline of 2½% as compared with the same quarter previous year. We are still confronted with the problem of the National Company selling mixed cars of firsts and seconds averaging $25.00 for their board and also disastrous Certainteed competition, offering board at any price to get the initial order.

With the use of the folded edge, Beaver and Universal have increased sales and advertising aggression, and lower prices on lath and plaster are also restricting Sheetrock sales. The problem now is to hold the present rate of sales and we are confronted with both a decrease in price and volume.

GypLap—GypLap sales for the quarter-1,434,000
11501 feet as compared with 2,033,000 feet for the same quarter previous year, showing a 30% decrease.

Gyplap is a disappointment, but believe that a proper field study of price and dimensions should make this product more salable.

Total Board Footage—Total board footage of all kinds shows a gain of 13.6% for the quarter with a gain in sales valuation of 7%.

Total Footage three months 1926—108,604,000 feet.
Total Footage three months 1927—123,409,000 feet.

Net Sales Valuation three months 1926—$2,827,658.00.
Net Sales Valuation three months 1927—$3,018,320.00.

Although total board sales are greater than last year with greater sales valuation, the result in profits will not be proportional because losses in Sheetrock at $30.00 are substituted by sales in Rocklath at $15.00.

Partition Tile—Shows an increase of 21%, with a price decline of 25%.

The increased activity of competitive tile manufacturers is causing tile to be sold at an extremely low level and with the large over production of tile, there is little hope of price advances, although prices at the present time are comparatively firm.

Practically every factor in the plaster business is now producing tile and in addition, a number of small independent companies are also engaged exclusively in tile production.

Hydrated Finishing Lime—Shows a tonnage increase of 4½% and price decline of 1.3% as compared with same quarter previous year.

Prices on Finish Hydrate are comparatively stable, but Masons Hydrate prices are still demoralized.

Textone—Textone shows an increase in volume of 60% as compared with the same quarter previous year, sales being 815,097 pounds as compared with 510,304 pounds.

Textone net sales valuation three months 1926—$ 96,554.00.
Textone net sales valuation three months 1927—$143,835.00.

Showing a gain of 49%.

Oriental Stucco Finish and Base—Sales for first quarter 2266 tons as compared with 2608 tons same period 1926. The decrease in tonnage is satisfactory, due to the extremely rainy weather and there is no doubt but
11502 what Oriental should show rapidly increasing sales.

Oriental sales valuation three months 1926—$75,971.00.
Oriental sales valuation three months 1927—$63,614.00.

Loss—16%.

Plastint—Sales for three month 1927—793 tons, as compared with 351 tons three months 1926—a gain of 126%.

Pyrocell and Thermofill

Pyrocell for three months 1926—290 tons.
Pyrocell for three months 1927—290 tons.

Thermofill sales three months 1926—129 tons; three months 1927—563 tons.

We find a gradually limiting field for the sale of Pyrocell, due to the fact that wet mixtures cause difficulties under humidity conditions.

Our experience with Thermofill make us realize in this commodity a very valuable addition to our sales line and the tonnage should increase with its more general introduction and use.

General—The advertising campaign with Sheetrock dealers made a remarkable showing by securing 1856 dealers to co-operate with newspaper advertising, resulting in securing 681½ full pages of advertising, using our cut and copy service, equivalent to full pages or 1,546,834 lines.

The sales organization of specialty men to sell the full line on jobs is coming along as rapidly as can be expected, and in markets where these men have had three or more months actual selling experience, the results are gratifying, showing that intensified selling on jobs means introduction and sale of our specialties in larger and more profitable quantities.

General Competitive Conditions

Atlantic Sea Board—The Atlantic Gypsum Company operating a plant in New York City and a plant at Portsmouth, Mass., is active competition on full line of wall plasters and wallboard, manufacturing later at their Portsmouth Plant. Although they are holding the general price on wall plasters and No. 1 wallboard, they are introducing No. 2 wallboard at $20.00 into a large number of markets where No. 2 wallboard has not previously been sold.

The Pennsylvania Gypsum Company at Chester, Penn., is actively marketing plaster products, gypsum tile and are selling wallboard manufactured by the Universal Company at Akron. The plaster prices in the Metropolitan areas have degenerated to $7.00 Oakfield with the manufacturers making further concessions where necessary to get the business, The Pennsylvania Gypsum Com-
11503 pany is demoralizing the Philadelphia and adjacent markets by cutting prices and delivering plaster block to the job at carload prices.

In Metropolitan, New York, Tompkins Brothers, Kelley Plaster & Board Company and Structural Gypsum Company are demoralizing the plaster and tile markets by delivering to the job by truck at carload prices.

White plaster prices are being reduced by competitive activity of the Newark Plaster Company in Metropolitan New York and prices have been lowered in Boston and Philadelphia through the introduction of German Plaster. To meet this competition, it will be necessary to make further investments in storage ware houses.

The Certainteed Company are shipping into the Sea Board markets from their Texas mill, offering wallboard regularly at $3.00 less than our delivered price and making a special offer to secure new dealers at $6.00 below this price on the first introductory car and larger dealers are taking three carloads at this lower rate, which is in reality a cut of $9.00 below our price.

The American Cement Plaster Company and Universal Companies are observing market prices, while the National is still offering mixed carloads of firsts at $25.00 and firsts billed as seconds at $30.00, averaging $25.00 per thousand on the carload.

Price conditions on plaster products are such that prices vary from $6.00 to $9.00 per ton, with no uniformity or stability, with possibility of reduction to lower mill base.

Every plaster manufacturer in this district is either making or distributing both plaster board and wallboard and can now parallel our mixed car service.

Oakfield District—The National Gypsum Company is in full operation and aggressively selling plaster products, stucco, wallboard and crushed rock. They have offered stucco as low as $5.00 per ton on 10,000 tons contract basis, are now aggressively selling plaster board in small markets where formerly they could not reach, owing to the mixed car service, but are now manufacturing plaster products and can also give this service.

National Gypsum Company has secured some orders on crushed rock at presumably a lower price.

The Empire Gypsum Company is increasing its activity on plaster products, selling at lower prices, especially on large job operations, becoming very aggressive on block sales since entering into block manufacture.

Niagara Gypsum Company although inactive in the past on wallboard is now aggressive in the sale of cut down seconds for plaster board at lower prices than Rocklath and are making a drive on special jobs at lower prices.

The Beaver Products Company have, since their increase in block production, aggressively entered
11504 Metropolitan markets and established dealers who are demoralizing the retail situation.

Universal Gypsum Y Lime Company is especially active in Metropolitan New York and other large markets, and are using their lime sales to increase dealer establishment and have increased their organization for wallboard sales.

The Oakfield Gypsum Products Company is extending its sales of neat and sanded plaster. They formerly sold their entire output to their stockholders for mixing plant purposes but are now entering the dealer field.

The Atlas Rock Company, a subsidiary of the Atlas Portland Cement Company are now actively engaged in the sale of crushed rock to other Portland Cement Companies and has been successful in securing the requirements of a number of concerns.

Every plaster manufacturer in this district is either making or distributing both plaster board and wallboard and can now parallel our mixed car service.

Ohio District—The American Gypsum Company is extending the sale of wallboard into markets outside of its logical area, and is demoralizing the wallboard business by offering seconds in markets where formerly only firsts were sold. They are without a connection for the distribution of wallboard in the southeast since the purchase of the Southern Gypsum Company by the Beaver Company and are now making mixed car shipments from their Gypsum, Ohio mill into this territory, which was formerly served from Plasterco. This concern is also aggressive in the sale of block through the entire territory it operates.

Every plaster manufacturer in this district is either making or distributing both plaster board and wallboard and can now parallel our mixed car service.

Michigan District—Certainteed Products Company has improved the quality of its plaster and stucco and is still aggressively selling at a dollar or more less than the market, not only in its logical territory, but reaching out farther. They are shipping board from their Texas plant to Grand Rapids and are able to serve mixed cars of board and plaster. Their wallboard is offered regularly in both mixed and full carloads at $3.00 off of our list price plus exceptional inducements for trial orders to new dealers.

Certainteed has lowered the price on crushed rock in its endeavor to secure new establishment. They are selling as low as $6.00 to increase their stucco establishments.

The National Gypsum Company plant north of Alabaster is about ready to operate. In the meanwhile, the National Company has put forth an aggressive sales program into the territory for distribution from this mill and is serving the dealers already secured on the mixed car
11505 first and seconds campaign from their New York mill. If this plan goes into operation, there will be a further demoralization in the wallboard market.

Michigan Gypsum Company is again active in both rock and plaster at reduced prices and have lowered our rock basis at Grand Rapids 25¢ a ton.

Every plaster manufacturer in this district is either making or distributing both plaster board and wallboard and can now parallel our mixed car service.

Fort Dodge—The Federal Gypsum Company is under new management and is making better products. They are consistently $2.00 below the market price, are not yet affecting dealer trade, but securing their business largely on large jobs. They are using cut prices to secure stucco and rock business and have been successful.

The Cardiff Gypsum Company is still $1.00 under the market on both dealer and large job sales throughout the entire area in which it operates.

Certainteed is offering board from Texas mill into this area on the same basis as any other areas.

The Interstate Tile Company manufacture gypsum tile at Joliet, Illinois from synthetic gypsum and are offering tile at low prices in the Chicago area. Both National Gypsum Company from their New York Plant and the American Gypsum Company from their Port Clinton Plant are offering seconds in Chicago and the Twin Cities, thus replacing $30.00 board with $20.00 board.

The Wassen Company is active in tile business at low prices and is after small dealer trade account general b siness depression.

Universal Gypsum Company is now making folded edge wallboard at Fort Dodge and has increased sales and advertising organization to push same. They are aggressive on mixed car shipments to smaller markets and on tile sales at lower prices in larger markets.

The Beaver Company also is manufacturing folded edge board at Fort Dodge with similar activity in sales and advertising on board, mixed cars and blocks.

On account of continued depression in the western agricultural sections, all Ft. Dodge manufacturers are extending sales activities into eastern territories thus aggravating over production conditions already existing, and are demoralizing price conditions in territories where they have no dealer establishment by selling jobs at dealer prices.

Certainteed is demoralizing the Ft. Dodge area by offering wallboard and plaster board at $3.00 off market with special inducements for initial orders.

Every plaster manufacturer in this district is either making or distributing both plaster board and wallboard and can now parallel our mixed car service.

11506 Plasterco—Since the merging of the Southern Gypsum Company with the Beaver Products Company, this plant is producing better and more uniform material and is more aggressively sold by the Beaver Products Company's larger sales organization. This applies also to board shipped in from their Grand Rapids Plant, thus giving Beaver a mixed car proposition from their Saltville mill. Beaver is also aggressively selling tile from this plant.

Texas District—Certainteed wallboard plant is now in operation, and they are selling through their entire sales organization at $3.00 less than price that we offer on wallboard in any area of the United States. Their sales program reaches from the Atlantic to the Pacific and from Canada to the Gulf of Mexico. In addition to the $3.00 cut in price, they are making a special reduction of $6.00 on first car to any new dealers and allowing larger dealers three cars on this basis. We have traced orders netting them as low as $13.00 fob their plant on No. 1 board, but understand that their stop price is around $18.00. They are also offering plaster board at $3.00 off our regular price, and we are losing both No. 1 and No. 2 business to this concern and they have affected our plaster business somewhat by the lower price inducement on their wallboard in mixed cars.

Since the Universal is making folded edge wallboard at Rotan, they are very aggressively selling this commodity throughout their entire territories.

Crushed rock prices have been reduced by the Certainteed Company in Texas, trying to secure new establishment, they have been unsuccessful in their tonnage attempts, as we have met their prices which has resulted in a general lowering of mill base.

The Texas Cement Plaster Company is now licensed to manufacture the square folded edge and we can look for more aggressive competition from this concern, which will affect our mixed car shipments.

Although plaster prices have reacted from a $4.00 level to $7.00 level, the larger markets such as Kansas City,

New Orleans, Atlanta, Birmingham have sufficient protected tonnage so that we will be shipping low priced plaster for the next three or four months to come.

In Florida, the jobbers have protected themselves to such an extent that the market has not reached to the higher level.

The Gulf Gypsum Company at Falfurrias, Texas is again in active operation on crushed rock.

The Atlas Portland Cement Company is soliciting crushed rock from their plant in Oklahoma.

Every plaster manufacturer in this district is either making or distributing both plaster board and wallboard and can now parallel our mixed car service.

Laramie District—Although business is practi-
11507 cally dormant, all companies are aggressive and the Certainteed Company is affecting our mixed car business on account of the low price of their board in shipments of dark plaster from their Laramie Mill. We also find that the jobbers in the mountain states are selling Certainteed wallboard at lower prices and the smaller gypsum plants in this area are selling plaster at lower prices.

Every plaster manufacturer in this district is either making or distributing both plaster board and wallboard and can now parallel our mixed car service.

California District—Due to the extensive over production, this market is completely demoralized. Plaster in Southern and Northern California, although normally at a $7.00 mill base is being offered as low as $5.50 and plaster board has recently been reduced in price from $24.00 per thousand to $16.00, with a corresponding 10% reduction on wallboard. Due to competitive relationships such as Portland Cement purchases by Blue Diamond Company from the Riverside Portland Cement Co., and with the relationship between the Portland Cement Companies, it was necessary to reduce our price on crushed rock from $3.00 to $1.50 per ton to retain our business. The low price on plaster board and wallboard also applies to Washington and Oregon, although at present, there is no further price reduction in plaster. Shipments from these areas net us as low as $3.80 at Loveland.

Attention must be called to the general competitive situation in the building material industry. Due to the extreme demand during the large building program, new materials have been evolved which substitute older materials and old type materials have found new uses.

We see increased activity on the part of all competitive building material industries to hold present consumption, to regain lost establishment and use and to create new uses and substitution through Association activities by means of sales work, advertising and through work with building departments and codes. We also find that we are meeting greater restrictions in sales, due to more rigid enforcement of building codes and regulations.

We find our Sheetrock establishment and use assailed by use of materials of greater insulation value, such as Celotex, Masonite, Insulite, etc. This also applies to plaster board where these insulating boards are being used because of their insulating value. The Lime industry is working on establishing mixed mortar plants in the larger cities with some success.

The metal lath industry is concentrating on better plastering and is restricting sales of plaster board through code regulations and enforcement.

The Clay Tile and Brick and Portland Cement industries are spending more money in sales and advertising promotion. The lumber industry has just appropriated five million dollars for a campaign to regain their business in a fight against lumber substitutes.

Incidentally, Union activities are also playing a
11508 more prominent part in our sales restrictions.

Considering the activities of competitive industries, it may also be necessary for our company and our industry to meet these changed conditions and competitive industrial activities by similar expenditures for industrial advertising and promotion.

In conclusion, we face lower prices and lower tonnage, and these can somewhat be mitigated by increased sales of our newer commodities, but it is not reasonable to presume that with the principle activity centered on wallboard that wallboard profit losses can entirely be counteracted by increased specialty sales profits.

C. HENNING,
Vice-Pres. in charge of Sales

CFH:KO

11509 *Government's Exhibit No. 618*

Report of Sales Department—First Half 1927

MR. S. L. AVERY,
President,
Office.

Shipments comparing the first six months of 1927 with the same period of 1926 as follows:

Commodity (Incl. F.P.)	1927	1926	Comparison
Total Tonnage	1,353,280	1,358,640	L 0.2%
Bag Tonnage	855,356	861,154	L 0.5%
Unmixed Tonnage	188,118	186,421	G 0.9%
Lime Tonnage	82,076	60,620	G 2.5%
Textone Poundage	1,755,380	1,115,386	G 57.4%
Sheetrock Footage	169,699,000	192,211,000	L 11.8%
Sterling Board Footage	10,118,000	2,829,000	G257.8%
Rocklath Footage	76,887,000	52,934,000	G 45.4%
Partition Tile Footage	11,002,000	11,423,000	L 3.5%

Gross sales for the first six months of 1927 were $16,046 465 as compared with $16,437,640 for the same period last year or a decrease of 2.4% but 49.1% greater than the average for the first six months of the previous seven years.

Sales expense increased 20.0% over the six months of 1926 as compared with the gross sales decrease of 2.4% and total tonnage decrease of 0.2%.

The Advertising Expense $506,074.96 represents a decrease of 5.7% of the 1926 expenditures same period.

The first half 1927 Sales Expense, plus the Advertising Expense equals $1,983,719.48, an increase of 11.1% over the first six months of 1926.

Percent Sales Expense to Net Sales

	1927	1926	1925	1924	1923	1922
Excluding Advertising Expense (Six Months)	9.4	7.6	6.1	6.1	6.8	8.5
Including Advertising Expense (Six Months)	12.6	11.0	8.5	7.8	8.2	11.5

Field Employees as of June 30th

	1927	1926	1925	1924	1923	1922
Salesmen	254	172	153	138	105	100
Supervisors & City Managers	34	21	11	9	9	9
Specialty Salesmen	0	60	21	12	8	10

Purchased lime shipments for six months 1927 were 2071 tons as compared with 2988 tons six months last year or a decrease of 30.7%.

11510 Rock—Rock tonnage shows an increase of 9679 tons,—6.7%. This increase is largely due to the success of the introduction of New Brighton rock. However, we are suffering decreases at other mills due to new competitive plants now in operation.

In the Oakfield district the Atlas Portland Cement Co., are furnishing rock to their own plants and have taken away not only this tonnage, but that of other cement companies. They are also shipping their own plants in the southwest and southeast from their Wautonga, Oklahoma rock crushing plant, and are also furnishing other Portland Cement companies whom we formerly supplied.

The National Gypsum Company is after crushed rock business from both their Oakfield and northern Michigan plants. They have secured two of our former customers and thus have caused us generally to reduce prices about 35¢ per ton in Michigan.

We have lost the Texas Portland Cement Company to the Gulf Gypsum Company at Falfuras, Texas. There is also being promoted a gypsum rock crushing plant near Houston, Texas, in which the Texas Cement Companies are interested.

The Centerville Gypsum Company has become aggressive in the sale of crushed rock and are making lower prices than heretofore, and taking advantage of the lower freight rates in the area they serve.

We are making a drive to regain lost accounts and establish new accounts which will increase our tonnage, but will reduce the selling price on all customers we serve.

Price of rock is off 7%.

Stucco—Stucco shows a decrease of 19.4%. Part of this loss is due to the fact that in the spring of 1926 we served the stucco requirements of the Rock Plaster Company when they were repairing their mill. The balance of the loss is due to National and Certain-Teed sales to our trade at prices from $1.00 to $2.00 per ton lower than our prices.

Bulk stucco price is off 8.7%.

Within the last month we have been successful in securing a number of our old accounts. We are meeting all competition at competitive prices for this business.

Stucco Specialties—the sales are approximately the same as the previous year.

We have lost no accounts and we can increase this tonnage.

Neat Wall Plaster—Neat Wall Plaster shows a decrease of 2.3%.

Competition is aggressive in all territories and prices are generally demoralized. Large jobs are being sold from $1.00 to $3.00 under the former market price and practically all large cities are below our mill base.

11511 In the Metropolitan New York all up-state competitors are selling 50¢ below our price, netting them $6.50 Oakfield. It is our intention as soon as New Brighton needs tonnage to meet existing prices. Pennsylvania Gypsum Company and National are offering plaster at $1.00 below our price with as yet no success.

Washington, D. C., is on a $6.50 Oakfield base; Philadelphia $6.00; Baltimore, $6.50; and Boston $7.00 with specific jobs from 50¢ to $1.00 below these prices.

The small country territories are holding at generally $8.00 and $9.00 with the exception that specific jobs which are quoted $1.00 under.

In the central states larger markets are generally $1.00 below our $9.00 mill base, with National and Certain-Teed offering plaster generally from $1.00 to $2.00 less.

In the Fort Dodge area Cardiff and Centerville are exceptionally active at $1.00 to $2.00 below our market price and all large jobs at $2.00 off.

The southwest and southeast are slowly slipping back to the $4.00 price which was put in effect by the Texas Company last spring. The large cities such as Kansas City, St. Louis, Memphis, New Orleans, Houston, Dallas, San Antonio and Fort Worth have ample protection on $4.00 or $5.00 to last them the balance of the year. In the smaller towns we are generally on a $7.00 base, but we find Certain-Teed and Texas selling for immediate shipment at prices lower than ours.

The Pacific situation shows no signs of improvement and our prices have been reduced another 50¢ a ton to meet the Blue Diamond competition who were delivering on the job at our dealers wholesale f. o. b. car prices.

Our policy is not to lose any business, and we are meeting any and all competition to protect and increase establishment and tonnage. At the present rate there is no doubt but what lower mill basis will prevail at all shipping mills.

Sanded Plaster—Sanded Wall Plaster shipments show a decrease of 3.8%. The competitive conditions in Sanded, from a price standpoint are not as extreme as Neat Plaster competition. Our principal losses are in Detroit and Cleveland, largely due to the decline in building and the wider use of Neat on larger jobs.

Plaster Board—Plaster Board shows an increase in footage of 45.4% with a price reduction of 2%. The campaign on Rocklath is showing consistent increases in the towns where introduced and adopted and there is no doubt that this business will continue to grow.

The total increase for the half year was 24,000,000 feet Competition is meeting Bundled Rocklath with cutdown wallboard bundled at lower prices.

11512 Sheetrock and Sterling—Sheetrock and Sterling show a decrease of 7.8% with a price decline of 2%.

Certain-Teed is more aggressive than in the past and are selling board at practically any price in order to get establishment and tonnage.

The National Company is operating its plants in the Oakfield and Michigan districts to capacity and are offering mixed cars of #1 and #2, both the same grade, averaging $25.00 per thousand.

We are meeting board competition by regaining customers lost to the National on price and are meeting Certain-Teed by the introduction of Sterling Board at $25.00 mill with freight based on 1250 lbs., which reduces the price approximately $6.50 to the dealer. This policy has not been in effect long enough to determine its success, but where it has been used if it has not secured the business it has cau[illegible] Certain-Teed to reduce their price $3.00 below the Sterling delivered price.

Gyplap—For the half year sales show a decline of 33.8%. We have not as yet discovered the causes of sales resistance of Gyplap and are experimenting with various sizes,

thicknesses and price to develop the proper board which should sell.

Total Board Footage—Total board footage of all kinds show a gain of 2.8% for the half year with a loss in sales valuation of 3.8%.

Total footage for six months 1926.....	253,158,000
Total footage for six months 1927.....	260,139,000
Net sales valuation six months 1926.....	$6,481,691
Net sales valuation six months 1927.....	$6,237,943

Partition Tile—Partition tile shows a decline of 3.5% with a price decline of 14.6%. Practically all gypsum manufacturers are now selling tile and a number of manufacturers in anticipation of large business stocked their yards with tile and are offering these at extremely low prices to move before fall so as not to carry over the winter.

We believe that we can hold tonnage for the balance of the year equal to the previous year by meeting competition.

Hydrated Finishing Lime—Hydrated Finishing Lime shows a decrease of 1.1% and price increase of 3.5%. Prices on Hydrated Finishing Lime are stable with the
11513 exception of the larger markets and we are increasing our business by meeting existing prices.

Textone—Textone shows an increase of 57.4% as compared with the same period for the previous year, sales being 1,755,380 lbs. as compared with 1,115,386 lbs.

Textone net sales valuation 1926—$208,158 (6 months)
Textone net sales valuation 1927—$310,542 (6 months)
or a gain of 49.2%.

Oriental Stucco, Finish and Base—Sales for the first half of 1927, 7839 tons as compared with 8855 tons. The decrease in tonnage is due to price competition on other colored stuccos manufactured locally by such companies as the California Stucco Company or by plants operated in larger cities by the dealers.

We are meeting these specific conditions and believe a lower selling price on Oriental will result in greater sales, and that this business should revert to us.

Oriental is extremely popular and its quality and workmanship is superior to any other material.

Plastint—Sales for six months, 1927, 2250 tons, a gain of 48.4%.

Plastint is growing in distribution and this material offers greater tonnage possibilities than Oriental.

Pyrocell and Thermofill—Pyrocell shows a decline of 21.5%. This decrease is due to the fact that we are limiting the field of sales as our material has not been entirely satisfactory for the purposes intended, but believe the new formula just evolved should overcome our past difficulties and give us a healthy tonnage on this commodity.

Thermofill sales for the six months, 1966 tons, as compared with 452 tons during same period last year, or a gain of 435%

Our experience to date convinces us that we have in Thermofill a real insulating material which will develop into large tonnage and help fill the present demand for home insulation.

We are revamping our sales and advertising policies for the sale of Thermofill.

11514 General—We have eliminated, with the exception of the Saturday Evening Post and Country Gentleman (where contracts made it impossible), our advertising for the balance of the year and we are making a drive for better results on direct advertising which should result in considerable saving.

Sales organization is functioning having eliminated a large number of men who could not meet the present competitive conditions.

In general the men hired in the spring to sell direct on jobs in the larger cities are working out to the advantage of the company and the policy is helping hold our establishment as well as to introduce new materials.

We find that due to the extreme competitive conditions on all our commodities that the regular line men do not have very much opportunity for promotional work as their entire time is taken up in holding and regaining our accounts.

In general, we are going through a keen competitive fight with an over-production in all lines and competitors

offering all commodities at lower prices to get tonnage and establishment.

Instead of a policy of stabilization on our part we are aggressively meeting all conditions on all commodities.

C. HENNING,
Vice-Pres. in Charge of Sales.

CHS:JR

11515 *Goverment's Exhibit No. 619*

Report of Sales Department—1927

MR. S. L. AVERY,
President,
Office:

Shipments comparing the year 1927 with 1926 as follows:

Commodity (Incl. F. P.)	1927	1926	Comparison
Total Tonnage	2,783,573	2,877,402	L 3.3%
Bag Tonnage	1,708,372	1,817,318	L 6 %
Unmixed Tonnage	447,490	421,683	G 6.1%
Lime Tonnage	120,997	127,557	L 5.2%
Textone Poundage	3,734,037	2,414,244	G 54.7%
Sheetrock Footage	309,795,000	369,390,000	L 16.1%
Sterling Board Footage	21,821,000	11,151,000	G 95.7%
Rocklath Footage	178,526,000	122,108,000	G 46.2%
Partition Tile Footage	19,707,000	21,777,000	L 9.5%

Gross sales for the year 1927 were $31,699,404 as compared with $33,540,389 for 1926, or a decrease of 5.5% but 38.1% increase over annual average for past seven years.

Sales expense increased 6% over 1926, as compared with the gross sales decrease of 5.5% and total tonnage decrease of 3.3%.

The Advertising Expense $846,268 represents a decrease of 20.8% of the 1926 expenditures.

The 1927 Sales Expense, plus the Advertising Expense, equals $3,490,077, a decrease of 2% from 1926.

Percent Sales Expense to Net Sales

	1927	1926	1925	1924	1923	1922
Excluding Advertising Expense	8.5	7.6	6.4	5.9	6.3	7.7
Including Advertising Expense	11.2	10.9	8.8	7.8	7.8	9.9

Field Employees as of December 31.

	1927	1926	1925	1924	1923	1922
Salesmen	247	236	175	160	132	107
Supervisors and City Managers	30	21	19	10	9	9

Purchased lime shipments for 1927 were 3,377 tons as compared with 5,561 tons last year, or a decrease of 39.3%.

11516 The competitive conditions outlined in my last report have become more keen and aggravated. The price conditions anticipated and the price declines recommended are now a reality. There is not a commodity nor an area which is not now highly competitive. Prices in some areas have gravitated as low as cost. Following our recommendation in our last report, we are meeting any price made by any competitor on any commodity in order to hold and increase our establishment. It was necessary on January 20 to announce a reduction of $5.00 per thousand on Sheetrock to meet price concessions and lower prices offered by our competitors. It was also necessary to introduce and offer a subgrade board—Crown Wallboard—at a mill price of $20.00 per thousand, or ten dollars less than our regular Sheetrock price. This drastic policy of price decline was absolutely necessary in order to stabilize the market and to make it possible for us to meet competitive conditions.

It was also necessary to decrease our prices in the Northwest mountain area $5.00 per thousand to meet lower prices put in effect by Perfection Wallboard Company and Certainteed.

We also inaugurated the consignment plan after the Sales Meetings, which is showing some signs of success, having signed up as of February 1—230 contracts with dealers.

An estimated shrinkage in prices on the basis of same business secured last year on the new prices shows $2,087,000, but we hope with the above plan to increase our volume to overcome this somewhat.

Rock—Rock tonnage shows an increase of 11.7% and a price decrease of 11.9% as compared with last year, due to increased shipments from New Brighton. Anhydrite rock from New Brighton is now accepted by nearly all the cement producers in the seaboard field and this tonnage ought to increase at least 50% during 1928.

With the exception of shipments from Oakfield and New Brighton, there is price competition for crushed rock business in all areas. Prices have gradually declined and

it was necessary to reduce prices to $1.60 per ton at Alabaster, meeting National competition; at Ft. Dodge meeting National and Atlas Portland Cement competition; and $1.60 Southard meeting Certainteed and Atlas Portland Cement competition.

We look for lower prices on crushed rock at all producing points.

Stucco—Stucco shows a decline in tonnage of 24.5% with a decrease in price for the year of 1.5%. For the last quarter decrease in price as compared with the same quarter last year shows 3% decline. Competition has been unusually severe on stucco. The National Gypsum Company, Certainteed, and Centerville, have reduced prices to our principal plate glass and terra cotta accounts to $4.50 per ton from Oakfield, Grand Rapids, Ft. Dodge, and Alabaster mills. We have lost several accounts, but feel sure that we will regain them.

11517 Stucco Specialties—German competition has decreased prices in Boston and Philadelphia and in addition the Pennsylvania Gypsum Company and Atlantic Gypsum Company have lowered the stucco specialty price on the Atlantic Seaboard. We have practically lost our Cuban business due to inability to meet their low prices.

Centerville Gypsum Company in the Western area has been making a drive on white goods, due to low plaster prices. We look for further reduction on white plaster.

Neat Wall Plaster—Neat wall plaster shows a tonnage decrease of 7.3% and a price decrease of 2.7%, as compared with 1927. In the Metropolitan New York area we are now selling on a $5.00 mill base, the price having declined 50¢ since the last quarter. Boston, Philadelphia, Washington, and Baltimore are now on $5.50 mill base and the general Oakfield mill base for specific jobs and larger city tonnage of the territory is on an average $6.00 level with country tonnage at $7.00.

In the central area Certainteed is maintaining its $5.00 Grand Rapids mill base and making special offerings of $4.00 to get the dealers' business. National is meeting Certainteed prices and as a consequence the large markets, Detroit, Cleveland, & Pittsburgh, are now on $7.00 and $6.00 bases. Due to the activity of National and Certainteed in the Chicago area, the price has been reduced to $5.70

Ft. Dodge from $8.00. Cardiff and Centerville are generally $2.00 below our $9.00 price in the Western area and Minneapolis has been reduced from $9.00 to $8.00 on account of competitive lower prices. It will be only a short time until the entire central and western areas will be on a $7.00, if not $6.00, base.

The Southwest and Southeast have degenerated from a $5.00 market at the last Directors' Meeting, to a general $3.50 market, plaster being offered as low as $3.00 for bulk tonnage for specific jobs. Some plaster has been sold by Texas Company as low as $2.50 and $2.00 mill on contract tonnage and offered at these prices to secure mixed car board business. The $3.50 price is general for the states of Kansas, Missouri, Arkansas, Texas, Mississippi, Louisiana, Tennessee, Georgia, Alabama, and Florida.

In the Plasterco Area the larger markets have gravitated from $9.00 to $8.00 and the general mill base has been reduced to $9.00. Specific jobs are sold as low as $6.00.

The Laramie district has just been reduced from $8.00 to $5.00 by Certainteed. This will cause us considerable losses meeting this price in shipments from Piedmont and our dark plaster mills.

The Pacific Coast shows no signs of improvement, prices being the same as last quarter.

11518 Sanded Plaster—Sanded Plaster tonnage has declined 4% and the price shows a decrease of 2.3%. Prices are demoralized in the Oakfield area, due to local sanded plaster plants and the Oakfield producers offering low priced tonnage.

The Detroit market has been reduced $2.00 per ton, but Cleveland and Milwaukee are holding fairly well. There will be lower prices on sanded plaster at all producing points, due to the fact that with the low prices on neat it is necessary to further reduce sanded prices in order to equalize with neat plaster prices.

Plasterboard—Plasterboard shows an increase of 46.2% with price reduction of 3%. The total increase in footage for the year was 56,418,000 feet. Competition is quoting lower prices in larger markets, as they cannot sell their open edge bundled board at the same price as the folded edge Rocklath. We are not meeting these prices, however.

Competition is not seriously interested in plasterboard, simply making price concessions to hold their establishment. The gains made in 1927 should be increased in 1928.

Sheetrock & Sterling—Sheetrock and Sterling show a decrease of 12.9% with a price decline of 1.6%. We were successful during the last quarter in regaining a great number of accounts taken by National and Certainteed by price concessions. Certainteed competition has not abated, but with our new policy and lower price on Sheetrock and Crown and with the consignment plan, our business is being materially increased.

Due to Crown board, we are able to regain lost establishment and protect our mixed car business against competition.

Gyplap—For the year Gyplap shows a decline of 28.6% as compared with 1926. We are hopeful for increased footage and valuation on Gyplap, due to the change in size and concentration in markets where Gyplap business is available.

Total Board Footage—Total board footage of all kinds shows a gain of 1% for the year with a loss in valuation of 6.3%.

Total footage for the year 1926 was 511,620,000 ft.
Total footage for the year 1927 was 516,544,000 ft.
Net sales valuation for 1926..... $12,756,781
Net sales valuation for 1927..... $11,954,368

Partition Tile—Partition tile shows a decline in volume of 9.5% with a price decline of 11.2%. Competitors have not succeeded in moving large stocks on hand and are offering tile practically at cost in all areas which we are meeting wherever advisable to hold our establishment. Jobs below cost we are letting competitors have.

Hydrated Finishing Lime—Hydrated Finishing Lime has generally declined $1.00 per ton in price since last quarter. Hydrated finishing lime shows a decrease of 9.7% in volume with no appreci-
11519 able price change. There has been a general price reduction of $1.00 per ton, and prices in the larger markets, due to increased competition and new factors in the business, are unstable. We are meeting these conditions and increasing our business by offering special inducement to the larger customers. Further price declines in Hydrated lime are inevitable.

Mason's Hydrate—Mason's Hydrate is in a demoralized condition, prices as low as $6.00, including bags, f. o. b. mill from all producing areas.

Textone—Textone shows an increase of 54.7% with a sales price decrease of 3.3%. Sales for the year 1926 were 2,414,244 pounds. Sales for 1927 were 3,734,037 pounds.

Textone net sales valuation 1926—$437,080
Textone net sales valuation 1927—$653,516.

Competition is becoming more keen and our competitors have in the last period made a drive for our sales force. We have lost several good salesmen on offers which we could not duplicate without demoralizing our own organization. Mr. Pringle reports there are now 61 competitive materials offered for texture work.

Oriental Stucco Finish & Base—Finish sales for 1927—11,596 tons, as compared with 12,598 tons for 1926, a decrease of 1002 tons. Sales valuation 1927—Finish, $382,786; Base, $52,454. This tonnage decrease is due to loss in residential building and price competition from locally manufactured colored stucco, by the California Stucco plants, and plants operated by dealers.

We have made prices necessary to hold and secure establishment in these markets and we look for a decided increase in tonnage for 1928. These local plants are slowly being eliminated.

Plastint—Sales for 1926—3,830 tons. Sales for 1927—5,850 tons, an increase of 52.7%. Sales valuation for 1927 $178,749. Plastint is now established through 700 dealers and is introduced and recognized as a regular commodity by the building trade. We are using the same sales methods as advocated for Oriental to overcome the local colored plaster competition, and 1928 should show a decided increase.

Thermofill—Sales for 1926—1,931 tons; for 1927—6,354 tons, an increase of 4,423 tons. Sales Valuation 1927, $111,159. Thermofill is growing in volume and distribution. We have now 750 dealers handling Thermofill. We have had splendid reaction from our National advertising and with the operation of the sales effort to be put forth in 1928, this business should increase.

Pyrocell—Pyrocell sales show a decline of 30.6%. We have overcome the difficulties with our new formulas and

look for a slow steady growth in this commodity when sold for the purposes intended.

11520, Sabinite—Sales for 1927—779 tons. Sales for 1926—140 tons. Sales valuation for 1927, $52,741. Sales valuation for 1926, $10,673.

Our Architectural force is now devoting its entire time to Sabinite sales and the specifications which they are securing should result in jobs making a healthy increase in tonnage for 1928.

General—It has been recommended to the management that we increase our sales organization by putting on specialty men on all our specialties and also to concentrate on wallboard in the Southwestern area to replace shiplap, which offers excellent opportunity.

During the last quarter twelve picked men were sent to Texas to introduce ½" tongue and groove Sheetrock to replace shiplap for interior wall construction and have found that this opens up a virgin field which was untouched with sheetrock. These men sold from November 1 to February 1 by direct sales 2,238,760 feet of ½" Sheetrock and were instrumental in additional dealers sales of 820,534 sq. ft. It is our intention to augment these men with men in other states where this is common construction.

In general we look for a $5.00 mill base on plaster, $4.00 on Stucco, and $1.50 on rock, throughout the United States with a possible $20.00 price on Sheetrock, and the only hope of helping profits is to increase tonnage of our regular commodities by meeting competitive prices, enlarging establishment, and to build specialties by intensive and direct work.

What the competitive reaction to our new prices and policy will be we can not at this time state, but there is no doubt but what we will have to meet lower prices on subgrade board and it is our policy to meet any prices offered by any competitor on the low grade board, but to try to sell Sheetrock, to maintain Sheetrock profits and Sheetrock name and quality.

C. HENNING
Vice President
in Charge of Sales.

CFH/WP.

11521 *Government's Exhibit No. 620*

Report of Sales Department—First Half 1928.

MR. S. L. AVERY,
President
Office:

Shipments comparing the first half 1928 with first half 1927 as follows:

Commodity (Incl. F. P.)	1928	1927	Comparison
Total Tonnage	1,415,229	1,353,280	G 4.6%
Bag Tonnage	850,926	855,356	L 0.5%
Unmixed Tonnage	209,484	188,118	G 11.4%
Lime Tonnage	75,277	62,076	G 21.3%
Textone Poundage	2,443,047	1,755,380	G 39.2%
*Sheetrock Footage	168,063 M	169,699 M	L 1.0%
Sterling Bd. Footage	18,326 M	10,118 M	G 81.1%
Rocklath Footage	114,491 M	76,887 M	G 48.9%
Partition Tile Footage	10,960 M	11,002 M	L —

*Includes Sheetrock #2 and Crown

Gross sales for the first half 1928 were $14,553,229 as compared with $16,046,465, same period 1927, or a decrease of 9.3% but 19.1% above first six months average for past seven years.

Sales expense increased 2.7% over the first half of 1927, as compared with the gross sales decrease of 9.3% and total tonnage increase of 4.6%.

The Advertising Expense for the first six months of 1928 was $256,029, which represents a decrease of 52.7% of the expenditures of the same period last year.

The Sales Expense for the first half 1928, plus the Advertising Expense, equals $1,630,562, a decrease of 12.3% from the first half of 1927.

Percent Sales Expense to Net Sales For the First Six Months

	1928	1927	1926	1925	1924	1923	1922
Excluding Advertising Expense	9.7	8.5	7.8	6.2	6.3	6.9	8.6
Including Advertising Expense	11.5	11.8	11.1	8.6	7.9	8.3	11.5

Field Employees as of June 30.

	1928	1927	1926	1925	1924	1923	1922
Salesmen	277	254	232	174	150	113	110
Supervisors and City Mgrs.	28	34	21	11	9	9	9

11522 Competitive conditions have become more acute since the last report and prices are daily declining. Prices on all commodities in all territories have reached lower levels.

Rock—Rock tonnage shows an increase of 13.3% and a price decline of 21.7% as compared with the same period last year.

Rock prices have declined at all mills due to competitive activity offering lower prices to our rock accounts. We are meeting these situations individually and will secure more establishment.

Stucco—Stucco shows a decline in tonnage of 13.6% with a decrease in price of 14.3% as compared with the same period last year. We have regained 4% of this decline during the last three months and now have our lost accounts and new accounts so lined up so that we should regain lost tonnage by the end of the year.

Stucco Specialties—Stucco specialties show a decrease of 1.9% and a price decline of 3.5%. The price aggressers are the Pennsylvania Gypsum Company serving the Pennsylvania area and the Atlantic Gypsum Company in the Boston area. They are trying to increase establishment through the price route and we are meeting same and have so far lost no establishment. The Texas Company has made a price of $8.50 on white goods against our $10.50 and we are meeting same by offering Sweetwater material at the Texas price where necessary to hold establishment, but are holding our Southard goods at the regular market price.

Neat Wall Plaster—Neat Wall plaster tonnage is practically the same as the same period last year with a price decline of 13½%. Prices are continually lowered by competition. Since last report the seventeen Southeastern and Southwestern states have been reduced to a $2.00 price f. o. b. mill on dark plaster. Texas Company is quoting $4.00 on white cement plaster. The Ft. Dodge mill base has been reduced from $9.00 to $4.00. The State of Michigan is from $9.00 to $6.00; Indiana from $9.00 to $7.00. Chicago is now on a $3.60 mill base with Detroit, Cleveland, and the larger central cities from $4.00 to $5.00. Oakfield mill base is $4.50 to $5.00. Metropolitan New York, Philadelphia, and Boston areas are on a $4.00 to $4.50 with Baltimore at a

$3.50. The Certainteed Company has refused to accept dark plaster at less than $2.50 and we are protecting their trade for the balance of the year for $2.00, resulting in a large gain in tonnage and establishment. We look for still lower prices on cement plaster.

Sanded Plaster—Sanded Plaster tonnage has increased .9% (9/10%) with a price decline of 4.2%. Although sanded plaster prices are fairly well established, our tonnage on sanded plaster is falling off due to the low price on neat plaster; contractors now make their own job mix rather than use sanded plaster. It may be necessary to reduce sanded prices in order to hold some of the trade to sanded. However we will let it gravitate where it will.

11523 Plasterboard—Plasterboard shows an increase of 48.9% and a price decline of 3.2% as compared with the same period last year. The total increase in footage for the half year was 37,573,000 sq. ft. Competition is now offering cut stock bundled plasterboard at $10.00 to $12.50 mill. However, we have not as yet reduced any prices on Rocklath, but are still holding the same $15.00 price. We are meeting competitive board with our own bundled cut stock. We believe we can hold the situation for the balance of the year with increased tonnage.

All Wallboard—Wallboard shows a gain of 3.7% with a price decline of 17.9% as compared with the same period last year. Meeting competitive prices has regained establishment and increased tonnage.

We are endeavoring to maintain a differential of $5.00 between Sheetrock and Crown and Sterling board and have been successful in holding 65% of the footage on Sheetrock for the first 6 months; however, for the month of July this percentage has been reduced to 48%.

Due to Certainteed's activities, who are now offering wallboard for $12.00 in all areas except the central area where they are on a $15.00 price, Crown has gravitated to $14.00 and $16.00 which was necessary to hold establishment and get tonnage. With the wide spread between $14.00 on Crown and $25.00 on Sheetrock, making a $11.00 differential, it has been necessary during July to drop the price of Sheetrock in order to hold Sheetrock in the markets. In these areas we are now quoting Crown at $14.00 against

Certainteed's $12.00 board and holding Sheetrock at $18.00 and the same applies proportionally where other prices on Certainteed prevail. We look for further declines both in Sheetrock and Crown prices with increased tonnage and establishment.

Gyplap—Gyplap shows a decline of 15.4% for the period. However, during the last quarter shipments have been improving.

Total Board Footage—Total board footage shows a gain of 17.1% with a loss in valuation of 25.7%, not including consignments.

Total footage for the 6 months of 1928—302,834,000 sq. ft.
Total footage for the 6 months of 1927—258,585,000 sq. ft.
Net sales valuation for 6 months 1928—$5,808,102.00
Net sales valuation for 6 months 1927— 6,211,717.00

Partition Tile—Partition tile footage for the period is practically the same as for the first half of 1927 with a price decline of 18.2%. For the first quarter of 1928 there was a loss in volume of 22% as compared with the same quarter of 1927, but we have made up this loss and the balance of the year will show greater gains. Partition tile will sell at cost, due to competitors moving stocks on hand.

Hydrated Finishing Lime—Hydrated Finishing Lime shows an increase in volume of 18.2% and a price decline of 12.4%. We are increasing both establishment and tonnage—however look for lower prices.

11524 Masons Lime—Masons Lime is still on a $6.00 mill base. We are increasing both tonnage and establishment.

Textone—Textone shows an increase of 39.2% with a price decline of 2½%.

Sales for 1st 6 months 1927—1,755,385 pounds.
Sales for 1st 6 months 1928—2,443,047 pounds.

This increase is largely in the Metropolitan New York area and in the Texas district where the combination of Tongue and Groove Sheetrock and Textone are replacing shiplap, canvas and wallpaper. We are making a drive

on this class of construction with excellent prospects for both Sheetrock and Textone.

Textone net sales valuation 6 months 1928—$421,095.
Textone net sales valuation 6 months 1927— 310,542.

Oriental Stucco Finish and Base—Finish sales for the 6 months of 1928—6,408 tons as compared with 5,717 tons for the same period 1927, an increase of 691 tons.

Sales valuation for 6 months 1928—Finish —$207,428.
Sales valuation for 6 months 1928—BaseCoat — 18,513.

With the new plant at Sweetwater giving better service and uniformity of color, the tonnage and valuation will be further increased.

Plastint.—Plastint sales for the 6 months of 1927 were 2,250 tons; same period 1928—2,901 tons, an increase of 651 tons or 29.%. Sales valuation for the 6 months 1928—$84,760. Now that the new formula is satisfactory, eliminating bond complaints, we believe Plastint will show further increases.

Thermofill—Thermofill sales for the 6 months of 1927—1,966 tons as compared with 3,458 tons for the same period 1928, showing an increase of 1,491 tons. Sales valuation for the 6 months of 1928—$61,506. The National Gypsum Company and American Gypsum Company are now offering a substitute for Thermofill at $5.00 less than ours. We have not as yet met this price condition.

Sabinite—Sabinite sales for the 6 months of 1928—679 tons as compared with 277 tons for the same period 1927. Sales valuation for 1928—$44,206. The sales force working on Sabinite is showing results in increased specifications and sales.

Consignments—Total materials shipped out on the consignment plan for the 6 months 1928:

	Rocklath	2,745,517 sq. ft.
	Cutstock	225,864 sq. ft.
	Sheetrock	8,384,613 sq. ft.
	Crown	4,316,854 sq. ft.
	Sterling	4,281,132 sq. ft.
	Gyplap	377,127 sq. ft.
	Total Board	20,331,107 sq. ft.
11525	Oriental Stucco Finish	63 tons
	Plastint	152 tons
	Thermofill	620 tons
	Textone	74,710 lbs.

Valuation of all materials on consignment—$470,611.

An interesting feature of our consignment plan is that returns made by the dealers are on the old prices of $25.00 for Sheetrock and $20.00 for Crown and Sterling, very few price reductions having been made. Gross profit on the material sold by the dealers from consignment stock during the first six months amounted to $61,331 on sales of $118,298.

We have 927 dealers on the consignment plan as of June 30, 1928.

General—Competition is more aggressive than last quarter and there is no market on any of our materials. We are trying to sell all products at a differential above our competitors' prices and are making a consistent effort to hold Sheetrock rather than sell Crown, however, losing no establishment or footage on account of price. We are showing consistent gains in tonnage and establishment on all commodities and the policy inaugurated to meet competition in order to get increased tonnage to reduce costs is showing in profits. Commodities showing an increase in tonnage as compared with the previous year show less losses than the price decline on the previous year's tonnage.

During the second quarter the Sales Department has decentralized, establishing District Offices, localizing its sales efforts under direct management for closer contact with the trade which is resulting in increased business. We now have in effect the Boston, Philadelphia, Metropolitan, Buffalo, Pittsburgh, Chicago, Detroit, St. Louis, and Dallas District Offices and before the first of September will have opened up offices in Atlanta, Memphis, Omaha, and Minneapolis. In all there will be 15 district offices.

We look for further price recessions on all commodities in all areas, but believe that our new plan of organization will show consistent gains in establishment and tonnage which will mitigate to some extent the results of price declines.

C. Henning

MR. S. L. AVERY,
President.

Report of Sales Department, First Quarter 1929.

Gross Sales for the first quarter 1929 as compared with same period 1928 decreased 15.5% as shown below:

Gross Sales—3 Mos. 1929—$5,591,924
Gross Sales—3 Mos. 1928—$6,620,968

Sales Expense Excluding Advertising, 3 Mos. 1929, $633,664, decreased 6.5%
Sales Expense Excluding Advertising, 3 Mos. 1928, $677,735.

Advertising Expense $45,838, decreased 69.2% from 1928 expenditures.
Sales Expense, plus Advertising $679,502, decreased 18.1%.

Percent Sales Expense to Net Sales.

	1929	1928	1927	1926	1925
Excluding Advertising	11.7	10.5	9.1	9.1	6.7
Including Advertising	12.4	12.9	12.7	12.2	9.0

Field Employees.

Salesmen	261	271	247	230	175
Supervisors & City Managers	5	32	30	21	19

A general survey of price and tonnage conditions by commodities for the first quarter of 1929, as compared with same period for the previous year is listed below.

Rock—Rock tonnage increased 12%. Price declined 5.4%. Rock prices seem stabilized in practically all sections. We are preparing to increase our tonnage for the new mills.

Stucco—Stucco tonnage increased 19½%; price declined 8.8%. Prices seem stabilized on this commodity. Our program to secure additional establishment and tonnage has developed an increased business.

Stucco Specialties—Stucco Specialties decreased 1.7% in tonnage; price declined 11.3%. Prices are still declining on white goods, due to aggression of Certainteed and Atlantic Gypsum Companies on this commodity group.

Neat Wall Plaster—Neat Wall Plaster tonnage increased 3.6%. Price declined 34.6%. The Southeastern and Southwestern areas have stabilized on a $2.00 mill base and the balance of the country at practically $4.00 with the exception of some of the larger markets, which are at $3.50 and $3.60. Competitors are offering plaster in some localities and on large jobs at $3.50, which will result in further price declines, as also will our aggression to get tonnage at competitive prices for the new mills.

Sanded Plaster—Sanded Plaster decreased 17.1%. Price declined 19.5%. Sanded Plaster tonnage and prices are still decreasing due to the economic use of low priced neat plaster.

11527 Plasterboard—Plasterboard increased 7%; price declined 9.4%. Total footage increase for the period was 3,545,000 sq. ft. It has been necessary to reduce prices in practically all large markets where plasterboard has been established, on account of competitors offering cutstock and plasterboard at $10.50 to $12.00. We are meeting this competition with unbranded plasterboard and cutstock for the lower prices where possible, but look for a general $13.00 price on Rocklath in all markets, with larger percentage of cutstock. Plasterboard will show continued healthy increases in footage.

Wallboard—Wallboard increased 10.4%. Price declined 24.4%. We maintained 42.5% of the wallboard business on Sheetrock at an average price of $20.06 per thousand. We are meeting competition and regaining establishment with Crown Board, which has declined to an average of $14.63 per thousand in the month of March. It has also been necessary, due to the rapidly declining prices on Crown, to adjust Sheetrock to lower levels in most markets.

We have 843 dealers on consignment selling 5,897,501 square feet for the first quarter.

Gyplap—Gyplap declined 8.7%. In order to increase footage we are analyzing price and market conditions on this commodity with hopes of betterment.

Total Board Footage—Total board footage of all kinds increased 9%. Price declined 20.4%.

Total footage for the 3 Mos. 1929—149,082,000 ft.
Total footage for the 3 Mos. 1928—136,781,000 ft.
Net sales valuation—3 Mos. 1929—$2,356,700
Net sales valuation—3 Mos. 1928—$2,715,152

Partition Tile—Partition Tile increased 47.8%. Price declined 24.8%. This increase due to meeting competitive prices in all markets.

Hydrated Lime Finish and Masons.—Total Hydrated Lime increased 5.8%; price declined 16.4%. Competition becoming severe and there is every indication of still lower prices.

Paint Products—All Paint Products increased 3½%; price declined 13.2%. Sales for first quarter 1929, 1,212,805 pounds.

Paint Products net sales valuation 1st 3 Mos. 1929—$184,912.
Paint Products net sales valuation 1st 3 Mos. 1928—$205,426.

Competition is more keen, with lower prices in prospect. It is necessary to introduce a lower priced Textone to meet the competitive situation.

Oriental Stucco. Finish & Base.—Oriental Finish sales decreased 31%; price declined 9½%. Due to the rapid growth of local mixing plants, further price cuts will be necessary to hold establishment, and plans are in progress to meet this local manufacturing condition.

Oriental Base Coat increased 16.8%; price declined 6.8%. Manufacturing this commodity at the new mills will increase its distribution.

11528 Plastint—Plastint increased 60.9%; price declined 14½%. This commodity is increasing, but we are meeting the same conditions of local manufacture as with Oriental Finish and the same policy in regard to price and distribution will be followed.

Thermofill—Thermofill sales practically the same, price declined 6½%. We are meeting new competition, both in the gypsum industry and from other industries on this material. Prospects are for increased tonnage at lower prices.

Sabinite—Sabinite tonnage practically the same, with increase of 5½% in price. This price increase is due to shipments being made in territories where we do not absorb freight. With the change in the acoustical organization, this volume should be increased.

Metal Lath Products—Metal Lath sales 264,290 sq. yds., total sales valuation, including accessories, $53,098. 85% of sales territories show distribution on Metal Lath. 20% of total business was represented in carloards and 80% in less-carload business, of which 60% was in mixed cars with other gypsum products. Sales valuation doubled each successive month. Prospects are very much greater for second quarter. We really got a late start on metal lath, as our display kits, price lists, literature, etc., were not available until nearly March 1.

6418

Standard X Lath Base Coat & Accessories.—Sales of Standard X Lath for the first quarter total 744,728 sq. ft. 971 tons of Standard X Base Coat plaster was sold. 1,221,248 lineal feet flat strips, 289,080 ft. of angles, and 51,864 lineal feet of corner bead was sold.
6424

The sales force are very enthusiastic over Standard X System, and on the basis of the first jobs established in the important markets, prospects seem exceedingly good for the second quarter.

We have established 76 Licensed Dealers, 55 Licensed Contractors, and have sold approximately 100 jobs during the first quarter.

C. HENNING

CFH/WP

11529 *Government's Exhibit No. 624*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from July 1, 1929 to July 31, 1929, inclusive by the Certain-Teed Products Corporation, licensee under agreement dated May 22, 1929, between United States Gypsum Company and Certain-Teed Products Corporation

	Square Ft.	*Average Selling Price*	*Amount*
Gypsum Wall Board	7,455,003	$ 17.72	$132,101.27
Gypsum Wall Board—Seconds	62,284	17.70	1,102.34
Gypsum Lath	3,595,122	12.15	43,679.05
Gypsum Wall Board—Export	191,883	25.43	4,879.70
	11,304,292		$181,762.36
Less:			
Adjustments & Allowances:			
Errors in Pricing		293.30	
Errors in Commissions		77.39	
Errors in Shipping		8.47	
Errors in Freight		576.02	
Errors in Billing		30.00	
Defective		252.06	
Freight on Returned Material		87.98	
Policy		109.02	
London & Canada		977.07	
Extra Cost of Export Packing		1,469.80	
Freight to Distributing Warehouses		2,737.73	4,664.70
			177,097.66
Less Cash Discount			3,081.50
Net Sales			174,016.16
Amount of Royalty for July at 5%			$ 8,700.81
Less:			
Former Beaver Material on Hand 5/31/29			
55,571 ft. Gypsum Board @ 17.72		$ 984.71	
180,039 ft. Gypsum Lath @ 12.15		2,187.47	
		3,172.18	
Less Cash Discount		55.20	
		3,116.98	
Royalty at 5%			155.85
			$ 8,544.96

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 20th day of August, 1929

EDWARD J. HOLGAN
Notary Public
Notary Public Kings Co. Clerk's No. 661
Cert. filed in N. Y. Co. No. 959 Reg. No. 1-H-627
Commission expires March 30, 1931

(Notarial Seal)

11530 *Government's Exhibit No. 625*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from August 1, 1929 to August 31, 1929, inclusive by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between United States Gypsum Company and Certain-teed Products Corporation

	Square Ft.	*Average Selling Price*	*Amount*
Gypsum Wall Board	5,996,600	$ 20.08	$120,441.25
Gypsum Wall Board—Seconds	127,902	16.11	2,060.44
Gypsum Lath	3,046,051	12.80	38,994.13
Gypsum Wall Board—Export	238,044	25.66	6,109.43
	9,408,597	17.81	167,605.25
Less:			
Adjustments & Allowances			
Errors in pricing		$1,456.08	
Errors in commissions		61.86	
Errors in shipping		426.10	
Errors in freight		1,528.93	
Errors in billing		45.08	
Equalization of freight		1,500.48	
Defective		32.83	
Freight on returned material		.....	
Policy		75.81	
London & Canada		*1,175.00*	
Extra Cost of export packing		1,196.97	
Freight to distributing warehouses		3,168.25	8,257.39
			159,347.86
		Less Cash Discount	2,772.65
		Net Sales	156,575.21
		Total amount for August @ 5%	$ 7,828.76

Gross Sales:

Aug. 1st to 6th	$36,785.51	= 22.14%
Aug. 7th to 31st	129,319.26	77.86%

Net Sales	$156,575.21 x 22.14% = $ 34,665.75 x 5% =	1,733.29
Net Sales	156,575.21 x 77.86% = $121,909.46 x 1½	1,828.64
	Royalty due for August	3,561.93
Net Sales	$156,575.21 x 77.86% = $ 121,909.46 x 3½%	
	August payment due on fixed amount	4,266.83
		$ 7,828.76

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 17th day of September, 1929

EDWARD J. HOLGAN
Notary Public
Notary Public Kings Co. Clerk's No. 661
Cert. filed in N. Y. Co. No. 959 Reg. No. 1-H-627
Commission expires March 30, 1931

(Notarial Seal)

11531 *Government's Exhibit No. 626*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from September 1, 1929 to September 30, 1929, inclusive by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	*Average Selling Price*	*Amount*
Gypsum Wall Board	4,595,804	$ 21.78	$100,094.08
Gypsum Wall Board—Seconds	112,693	17.14	1,931.38
Gypsum Lath	2,011,313	14.26	28,687.72
Gypsum Wall Board—Export	419,073	27.92	11,700.52
	7,138,883	$ 19.95	$142,413.70

Less:

Adjustments and Allowances		
Errors in pricing	$ 404.36	
Errors in commission	161.62	
Errors in shipping	1.80	
Errors in freight	1,554.96	
Errors in billing	45.75	
Returned Material	516.19	
Equalization of Freight	3,905.01	
Freight on Returned Goods	224.02	
Policy	96.50	
Defective	157.37	
London & Canada	*280.21*	
Extra Cost of Export Packing	2,631.39	
Freight to Distributing Warehouse	2,086.07	
Total		11,504.83
		$130,908.87
Less Cash Discount		2,277.81
Net Sales		$128,631.06
Total September Royalty @ 5%		$ 6,431.55
Current royalty @ 1½%	$1,929.47	
Back royalty @ 3½%	4,502.08	
	$6,431.55	

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 21st day of October, 1929

EDWARD J. HOLGAN
Notary Public
Notary Public Kings Co. Clerk's No. 661
Cert. filed in N. Y. Co. No. 959 Reg. No. 1-H-627
Commission expires March 30, 1931

(Notarial Seal)

11532 *Government's Exhibit No. 627*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from October 1, 1929 to October 31, 1929, inclusive by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	*Average Selling Price*	*Amount*
Gypsum Wall Board	5,302,276	$ 22.06	$116,954.59
Gypsum Wall Board—Seconds	12,116	19.95	241.68
Gypsum Lath	2,383,335	14.25	33,974.11
Gypsum Wall Board—Export	362,101	22.66	8,204.61
	8,059,828	$ 19.77	$159,374.99

Less:

Adjustments and Allowances		
Errors in pricing	$ 818.87	
Errors in commission	328.46	
Errors in shipping	105.53	
Errors in freight	1,113.36	
Errors in billing	.52	
Returned material	.....	
Equalization of Freight	5,419.18	
Freight on Returned Goods	39.60	
Policy	26.18	
Defective	42.08	
London and Canada	46.27	
Extra Cost of Export Packing	2,416.41	
Freight to Distributing Warehouse	2,366.49	
Total		$ 12,722.95
		$146,652.04
Less Cash Discount		2,551.74
Net Sales		$144,100.30
Total Royalty for October @ 5%		$ 7,205.00
Current Royalty @ 1½%	$2,161.50	
Back Royalty @ 3½%	5,043.50	
	$7,205.00	

State of New York)
County of New York) ss.

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 20th day of November, 1929

EDWARD J. HOLGAN
Notary Public
Notary Public Kings Co. Clerk's No. 661
Cert. filed in N. Y. Co. No. 959 Reg. No. 1-H-627
Commission expires March 30, 1931

(Notarial Seal)

11533 *Government's Exhibit No. 628*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from November 1, 1929 to November 30, 1929, inclusive by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	Average Selling Price	Amount	Royalty Current	Royalty Fixed Sum
Gypsum Wall Board	4,876,853	$21.886	$106,735.89	$2,294.45	$2,616.13
Gypsum Wall Board Seconds	114,516	20.182	2,311.28	49.68	56.65
Gypsum Lath	1,867,142	14.258	26,622.88	572.31	652.55
Gypsum Wall Board Export	134,796	27.341	3,685.50	79.23	90.33
	6,993,307	$19.927	$139,355.55	$2,995.67	$3,415.66

Less:

Adjustments and Allowances		
Errors in Pricing	160.97	
Errors in Commission	217.10	
Errors in Shipping	52.77	
Errors in Freight	290.39	
Errors in Billing	—	
Returned Material	—	
Equalization of Freight	4,450.49	
Freight on Returned Goods	—	
Policy	127.09	
Defective	144.15	
London & Canada	127.54	
Extra Cost of Export Packing	1,241.57	
Freight to Distributing Whse.	2,046.23	
Total		8,858.30
		$130,497.25
Less Cash Discount		2,270.65
Net Sales		$128,226.60
Total Royalty for Nov. @ 5%		$ 6,411.33

Gross Sales for Month of November ..... $139,355.55 = 100%
Gross Sales for Nov. 1st to 5th ..... $ 22,823.22 = 16.377%

Net Nov. Sales	Net Sales 11/1–4	Current Royalty	Back Royalty	Total Royalty
128,226.60 x 16.377% =	$ 20,999.67 @ 1½%	$ 315.00 @ 3½%	$ 734.98	$1,049.98
	Net Sales 11/5–30			
128,226.60 x 83.623% =	107,226.93 @ 2½%	2,680.67 @ 2½%	2,680.68	5,361.35
Total	$128,226.60	$2,995.67	$3,415.66	$6,411.33

	Square Ft.	Bundle Patent License Royalty
Gypsum Lath	1,387,476	$ 138.75

State of New York)
County of New York) ss.

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 20th day of December, 1929

EDWARD J. HOLGAN
Notary Public
Notary Public Kings Co. Clerk's No. 661
Cert. filed in N. Y. Co. No. 959 Reg. No. 1-H-627
Commission expires March 30, 1931

(Notarial Seal)

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from December 1, 1929 to December 31, 1929, inclusive by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	*Average Selling Price*	*Amount*	*Royalty Current*	*Royalty Fixed Sum*
Gypsum Wall Board	3,253,624	$21.706	$70,623.46	$1,580.55	$1,580.55
Gypsum Wall Board Seconds	44,088	22.105	974.58	21.81	21.81
Gypsum Lath	952,240	14.394	13,706.86	306.76	306.76
Gypsum Wall Board Export	309,395	24.757	7,659.57	171.43	171.43
	4,559,347	$82.962	$92,964.47	$2,080.55	$2,080.55

Less:

Adjustments & Allowances—		
Errors in Pricing	$ 333.97	
Errors in Commission	863.91	
Errors in Shipping	77.70	
Errors in Freight	1,107.43	
Errors in Billing	—	
Returned Material	—	
Equalization of Freight	2,024.71	
Freight on Returned Goods	100.38	
Policy	114.09	
Defective	16.34	
London & Canada	464.39	
Extra Cost of Export Packing	2,286.87	
Freight to Distributing Whse.	1,379.12	
Total		8,268.91
		$84,695.56
Less Cash Discount		1,473.70
Net Sales		$83,221.86
Total Royalty @ 5% for December		$ 4,161.10

Current Royalty @ 2½%	$2,080.55
Back Royalty @ 2½%	2,080.55
	$4,161.10

Bundle Royalty

Gypsum Lath	688,400 Sq. Ft.	$68.84

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 20th day of January, 1930

EDWARD J. HOLGAN
Notary Public
Notary Public Kings Co. Clerk's No. 661
Cert. filed in N. Y. Co. No. 959 Reg. No. 1-H-627
Commission expires March 30, 1931

(Notarial Seal)

11535 *Government's Exhibit No. 630*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from January 1, 1930 to January 31, 1930, inclusive by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	*Average Selling Price*	*Amount*	*Royalty Current*	*Royalty Fixed Sum*
Gypsum Wall Board	8,541,976	$.0224	$191,327.11	$6,218.48	$2,665.05
Gypsum Wall Board Seconds	53,416	.0216	1,151.31	37.42	16.04
Gypsum Lath	2,068,600	.0149	30,839.86	1,002.35	429.58
Gypsum Wall Board Export	242,060	.0240	5,817.58	189.08	81.03
	10,906,052		$229,135.86	$7,447.33	$3,191.70

Less:

Adjustments & Allowances—		
Errors in Pricing	$ 111.81	
Errors in Commission	138.29	
Errors in Shipping		
Errors in Freight	*189.33*	
Errors in Billing	21.94	
Returned Material	42.80	
Equalization of Freight	7,726.26	
Freight on Returned Goods	—	
Policy	116.45	
Defective	120.68	
London & Canada	34.20	
Extra Cost of Export Packing	1,776.10	
Freight to Distributing Whse.	2,688.12	
Total		12,587.32
		$216,548.54
Less Cash Discount		3,767.95
Net Sales		$212,780.59
Total Royalty at 5% for January		$ 10,639.03
Current Royalty @ .035	$ 7,447.33	
Back Royalty @ .015	3,191.70	
	$10,639.03	
Gypsum Lath—1,375,890 Sq. Ft.		137.59
Total Royalty		$ 10,776.62

State of New York)
County of New York) ss.

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 3rd day of March, 1930

EDWARD J. HOLGAN
Notary Public
Notary Public Kings Co. Clerk's No. 661
Cert. filed in N. Y. Co. No. 959 Reg. No. 1-H-627
Commission expires March 30, 1931

(Notarial Seal)

11536 *Government's Exhibit No. 631*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from February 1, 1930 to February 28, 1930, inclusive by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation

	Square Ft.	Average Selling Price	Amount	Royalty Current	Royalty Fixed Sum
Gypsum Wall Board	3,241,523	$22.77	$ 73,795.80	$2,378.93	$1,018.09
Gypsum Wall Board Seconds	37,780	21.17	799.97	25.79	11.04
Gypsum Lath	1,357,302	14.75	20,020.29	645.39	278.19
Gypsum Wall Board Export	245,671	26.59	6,532.86	210.60	90.13
	4,882,276	$20.72	$101,148.92	$3,260.71	$1,397.45

Less:

Adjustments & Allowances—		
Errors in Pricing	$ 675.12	
Errors in Commission	*18.45*	
Errors in Shipping	8.03	
Errors in Freight	*23.57*	
Errors in Billing	73.65	
Returned Material	14.40	
Equalization of Freight	2,133.88	
Freight on Returned Goods	—	
Policy	169.41	
Defective	—	
London & Canada	45.46	
Extra Cost & Export Packing	1,566.31	
Freight to Distributing Whse.	1,686.12	
Total		6,336.08
		$ 94,812.84
Less Cash Discount		1,649.74
Net Sales		$ 93,163.10
Total Royalty @ 5% for February		$ 4,658.16
Current Royalty @ .035	$3,260.71	
Back Royalty @ .015	1,397.45	
	$4,658.16	
Bundling Royalty 964,576 Sq. Ft.	$ 96.46	

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 15th day of March, 1930

EDWARD J. HOLGAN
Notary Public
Notary Public Kings Co. Clerk's No. 661
Cert. filed in N. Y. Co. No. 959 Reg. No. 1-H-627
Commission expires March 30, 1931

(Notarial Seal)

11537 *Government's Exhibit No. 633*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from March 1, 1930 to March 31, 1930, inclusive by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation

	Square Ft.	Average Selling Price	Amount	Royalty Current	Royalty Fixed Sum
Gypsum Wall Board	4,738,274	$24.28	$115,052.46	$3,687.54	$1,580.36
Gypsum Wall Board Seconds	828	21.75	18.01	.58	.25
Gypsum Lath	1,488,149	14.71	21,886.93	701.50	300.64
Gypsum Wall Board Export	265,925	27.69	7,362.19	235.96	101.14
	6,493,176	$22.23	$144,319.59	$4,625.58	$1,982.39

Less:

Adjustments & Allowances—		
Errors in Pricing	$ 195.31	
Errors in Commission	665.00	
Errors in Shipping	47.12	
Errors in Freight	657.86	
Errors in Billing	12.45	
Returned Material	—	
Equalization of Freight	3,632.25	
Freight on Returned Goods	329.16	
Policy	153.84	
Defective	23.60	
London & Canada	19.62	
Extra Cost & Export Packing	1,904.84	
Freight to Distributing Whse.	2,217.32	
Total		9,819.13
		$134,500.46
Less Cash Discount		2,341.10
Net Sales		$132,159.36
Total Royalty @ 5% for March		$ 6,607.97
Current Royalty @ .035	$4,625.58	
Back Royalty @ .015	1,982.39	
	$6,607.97	
Bundling Royalty—927,264 Sq. Ft.		$ 92.73
		$ 6,700.70

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 16th day of April, 1930

EDWARD J. HOLGAN
Notary Public Kings Co. Clerk's No. 661
Cert. filed in N. Y. Co. No. 959 Reg. No. 1-H-627
Commission expires March 30, 1931

(Notarial Seal)

11538 *Government's Exhibit No. 633*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from April 1, 1930 to April 30, 1930, inclusive by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	Average Selling Price	Amount	Royalty Current	Royalty Fixed Sum
Gypsum Wall Board	4,790,534	$24.24	$116,102.38	$3,728.57	$1,597.96
Gypsum Wall Board Seconds	65,342	24.45	1,597.84	51.31	21.99
Gypsum Lath	1,919,047	15.12	29,023.23	932.06	399.46
Gypsum Wall Board Export	261,013	26.41	6,894.19	221.44	94.89
	7,035,936	$21.83	$153,617.64	$4,933.37	$2,114.30

Less:

Adjustments & Allowances		
Errors in Pricing	519.29	
Errors in Commission	89.09	
Errors in Shipping	145.28	
Errors in Freight	740.96	
Errors in Billing	—	
Returned Material	—	
Equalization of Freight	4,207.61	
Freight on Returned Goods	—	
Policy	56.88	
Defective	351.00	
London & Canada	13.75	
Extra Cost of Export Packing	1,535.57	
Freight to Distributing Whse.	2,508.80	
Total		10,168.23
		143,449.41
Less Cash Discount		2,496.01
Net Sales		140,953.40
Total Royalty @ 5% for April		$ 7,047.67
Current Royalty @ .035	$4,933.37	
Back Royalty @ .015	2,114.30	
	$7,047.67	
Bundle Royalty—1,422,536 sq. ft.		142.25
Total Royalty		$ 7,189.92

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 14th day of May, 1930

GERRIT H. KIP
Notary Public Bronx Co. Clerk's No. 201
Cert. filed in N. Y. Co. No. 912, Reg No. 2-K-559
Commission expires March 30th, 1932

(Notarial Seal)

11539 *Government's Exhibit No. 634*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from May 1, 1930 to May 31, 1930, inclusive by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	*Average Selling Price*	*Amount*	*Royalty Current*	*Royalty Fixed Sum*
Gypsum Wall Board	6,347,038	$23.74	$150,675.23	$4,878.63	$2,090.84
Gypsum Wall Board Seconds	37,000	22.51	832.82	26.97	11.57
Gypsum Lath	2,423,641.9	15.05	36,477.97	1,181.10	506.18
Gypsum Wall Board Export	251,733	26.72	6,725.63	217.77	93.33
	9,059,412.9	$21.49	$194,711.65	$6,304.47	$2,701.92
Less:					
Adjustments & Allowances					
Errors in Pricing		37.88			
Errors in Commission		287.64			
Errors in Shipping		14.72			
Errors in Freight		326.58			
Errors in Billing		*195.29*			
Returned Material		—			
Equalization of Freight		5,721.20			
Freight on Returned Goods		—			
Policy		251.87			
Defective		229.06			
London & Canada		64.14			
Extra Cost of Export Packing		1,389.55			
Freight to Distributing Warehouse		3,266.88			
Total			$ 11,394.23		
			183,317.42		
Less Cash Discount			3,189.72		
Net Sales			$180,127.70		
Total Royalty @ 5% for May			$ 9,006.39		
Current Royalty @ .035		$6,304.47			
Back Royalty @ .015		2,701.92			
		$9,006.39			
Bundle Royalty—1,768,554 sq. ft.			176.86		
			$ 9,183.25		

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 17th day of June, 1930

GERLIT H. KIP
Notary Public Bronx Co. Clerk's No. 201
Cert. filed in N. Y. Co. No. 912, Reg. No. 2-K-559
Commission expires March 30th, 1932

(Notarial Seal)

11540 *Government's Exhibit No. 635*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from June 1, 1930 to June 30, 1930, inclusive, by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	Average Selling Price	Amount	Royalty Current	Royalty Fixed Sum
Gypsum Wallboard	5,612,367	$24.98	$140,197.02	$4,429.86	$1,898.50
Gypsum Wallboard Seconds	952	20.00	19.04	.60	.26
Gypsum Lath	2,078,510	15.38	31,971.29	1,010.20	432.94
Gypsum Wallboard Export	198,428	24.74	4,909.50	155.13	66.49
	7,890,257	$22.45	$177,096.85	$5,595.79	$2,398.19

Less:

Adjustments & Allowances		
Errors in Pricing	$1,429.22	
Errors in Commission	124.18	
Errors in Shipping	26.65	
Errors in Freight	857.63	
Errors in Billing	*157.76*	
Returned Material	—	
Equalization of Freight	7,467.26	
Freight on Returned Goods	—	
Policy	319.00	
Defective	—	
London & Canada	*20.85*	
Extra Cost of Export Packing	1,167.55	
Freight to Distributing Whse.	2,173.18	
		$ 13,386.06
Total		$163,710.79
Less Cash Discount		2,848.57
Net Sales		$160,862.22
Total Royalty at 5% for Wallboard		$ 8,043.11
Current Royalty at 3½%	$5,595.79	
Back Royalty at 1½%	2,398.19	
	$8,043.11	
Bundle Royalty—1,599,068 sq. ft. at 10¢ M		159.91
Grand Total		$ 8,203.02

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG.

Sworn to and subscribed before me
at New York, N. Y.
this 15th day of July, 1930

GERRIT H. KIP
Notary Public Bronx Co. Clerk's No. 201
Cert. filed in N. Y. Co. No. 912, Reg. No. 2-K-559
Commission expires March 30th, 1932

(Notarial Seal)

11541 *Government's Exhibit No. 636*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from July 1, 1930 to July 31, 1930, inclusive, by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	*Average Selling Price*	*Amount*	*Royalty Current*	*Royalty Fixed Sum*
Gypsum Wallboard	4,572,280	$25.48	$116,500.16	$3,688.51	$1,580.79
Gypsum Wallboard Seconds	344	21.05	7.24	.23	.10
Gypsum Lath	1,803,992	15.63	28,191.74	892.58	382.53
Gypsum Wallboard Export	606,976	25.49	15,473.11	489.90	209.96
	6,983,592	$22.94	$160,172.25	$5,071.22	$2,173.38

Less:

Adjustments and Allowances		
Errors in Pricing	$ 254.74	
Errors in Commission	71.53	
Errors in Shipping	217.85	
Errors in Freight	*220.89*	
Errors in Billing	31.35	
Returned Material	7.85	
Equalization of Freight	6,055.07	
Freight on Returned Goods	5.00	
Policy	122.77	
Defective	4.75	
London & Canada	337.80	
Extra Cost of Export Packing	3,748.56	
Freight to Distributing Whse.	2,078.09	12,714.47
Total		$147,457.78
Less Cash Discount		2,565.76
Net Sales		$144,892.02
Total Royalty @ 5%		$ 7,244.60
Current Royalty @ 3½%	$5,071.22	
Back Royalty @ 1½%	2,173.38	
	7,244.60	
Bundle Royalty—1,289,674 sq. ft.		128.97
Total Royalty		$ 7,373.57

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 14th day of August, 1930

11542 *Government's Exhibit No. 637*

Statement of plaster wallboard and gypsum wallboard manufactured and sold during the period from August 1, 1930, to August 31, 1930, inclusive, by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	*Average Selling Price*	*Amount*	*Royalty Current*	*Royalty Fixed Sum*
Gypsum Wallboard	2,392,171	$25.13	$60,117.76	$1,894.39	$ 811.89
Gypsum Wallboard Seconds	1,160	27.00	31.32	.99	.42
Gypsum Lath	2,137,606	15.02	32,105.18	1,011.67	433.57
Gypsum Wallboard Export	137,463	21.96	3,018.97	95.13	40.77
	4,668,400	$20.41	$95,273.23	$3,002.18	$1,286.65

Less:

Adjustments and Allowances		
Errors in Pricing	$ 344.64	
Errors in Commission	—	
Errors in Shipping	4.00	
Errors in Freight	347.54	
Errors in Billing	4.30	
Returned Material	360.49	
Equalization of Freight	3,180.42	
Freight on Returned Goods	—	
Policy	139.58	
Defective	—	
London & Canada	272.46	
Extra Cost of Export Packing	1,115.67	
Freight to Distributing Whse.	2,208.48	7,977.58
Total		$87,295.65
Less Cash Discount		1,518.94
Net Sales		$85,776.71
Total Royalty @ 5%		$ 4,288.83
Current Royalty @ 3½%	$3,002.18	
Back Royalty @ 1½%	1,286.65	
	$4,288.83	
Bundle Royalty—1,597,760 sq. ft.		$ 159.78
Total Royalty		$ 4,448.61

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, N. Y.
this 15th day of September, 1930

GERRIT H. KIP
Notary Public Bronx Co. Clerk's No. 201
Cert. filed in N. Y. Co. No. 912, Reg. No. 2-K-559
Commission expires March 30th, 1932

11543 *Government's Exhibit No. 638*

Statement of plaster wallboard and gypsum wallboard manufactured and sold during the period from September 1, 1930 to September 30, 1930, inclusive, by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	Average Selling Price	Amount	Royalty Current	Royalty Fixed Sum
Gypsum Wallboard	3,258,565	$25.765	$ 83,958.06	$2,727.39	$1,168.89
Gypsum Wallboard Seconds	—	—	—	—	—
Gypsum Lath	1,748,630	14.645	25,609.43	831.93	356.54
Gypsum Wallboard Export	165,752	21.857	3,622.80	117.70	50.44
	5,172,947	$21.881	$113,190.29	$3,677.02	$1,575.87

Less:

Adjustments and Allowances		
Errors in Pricing	$ 108.24	
Errors in Commission	*52.41*	
Errors in Shipping	23.16	
Errors in Freight	216.08	
Errors in Billing	161.99	
Returned Material	2.81	
Equalization of Freight	3,270.89	
Freight on Returned Goods	—	
Policy	41.44	
Defective	99.97	
London & Canada	50.83	
Export Cost of Export Packing	604.30	
Freight to Distributing Whse.	1,744.76	6,272.06
Total		$106,918.23
Less Cash Discount		1,860.38
Net Sales		$105,057.85
Total Royalty @ 5%		$ 5,252.89
Current Royalty @ 3½%	$3,677.02	
Back Royalty @ 1½%	1,575.87	
	$5,252.89	
Bundle Royalty—1,037,408 sq. ft.		$ 103.74
Total Royalty		$ 5,356.63

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and subscribed before me
at New York, New York
this 18th day of October, 1930

GERRIT H. KIP
Notary Public Bronx Co. Clerk's No. 201
Cert. filed in N. Y. Co. No. 912, Reg. No. 2-K-559
Commission expires March 30th, 1932

(Notarial Seal)

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from October 1, 1930, to October 31, 1930, inclusive, by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	Average Selling Price	Amount	Royalty Current	Royalty Fixed Sum
Gypsum Wallboard	4,066,624	$25.486	$103,641.63	$3,377.90	$1,447.67
Gypsum Wallboard Seconds	—	—	—	—	—
Gypsum Lath	2,018,805	14.931	30,142.44	982.41	421.03
Gypsum Wallboard Export	24,936	25.239	629.36	20.53	8.80
	6,110,365	$21.998	$134,413.43	$4,380.84	$1,877.50

Less:

Adjustments & Allowances		
Errors in Pricing	$ 100.05	
Errors in Commission	210.94	
Errors in Shipping	24.54	
Errors in Freight	381.62	
Errors in Billing	907.53	
Returned Material	9.06	
Equalization of Freight	2,860.02	
Freight on Returned Goods	—	
Policy	299.68	
Defective	610.71	
London & Canada	44.07	
Export Cost of Export Packing	837.34	
Freight to Distributing Whse.	744.55	7,030.11
Total		$127,383.32
Less Cash Discount @ .0174		2,216.47
Net Sales		125,166.85
Total Royalty @ 5% for October		$ 6,258.34
Current Royalty @ 3½%	$4,380.84	
Back Royalty @ 3½%	1,877.50	
	$6,258.34	
Bundle Royalty—1,372,604 sq. ft.		$ 137.26
Total Royalty		$ 6,395.60

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

Geo. P. Krug

Sworn to and subscribed before me
at New York, New York
this 14th day of November, 1930

Gerrit H. Kip
Notary Public Bronx Co. Clerk's No. 201
Cert. filed in N. Y. Co. No. 912, Reg. No. 2-K-559
Commission expires March 30th, 1932

11545 *Government's Exhibit No. 640*

Statement of plaster wall board and gypsum wall board manufactured and sold during the period from January 1st, 1931 to January 31st, 1931, inclusive, by the Certain-teed Products Corporation, licensee under agreement dated May 22, 1929, between the United States Gypsum Company and Certain-teed Products Corporation.

	Square Ft.	Average Selling Price	Amount	Royalty Current	Royalty Fixed Sum
Gypsum Wallboard	3,634,480	$25.6803	$ 93,334.81	$3,059.49	$1,311.20
Gypsum Wallboard Seconds	—	—	—	—	—
Gypsum Lath	1,609,414	14.7926	23,807.34	780.39	334.46
Gypsum Wallboard Export	26.420	30.2324	798.74	26.18	11.22
	5,270,314	$22.3783	$117,940.69	$3,866.06	$1,656.88
Less:					
Adjustments and Allowances					
Errors in Pricing		$ 402.57			
Errors in Commission		58.40			
Errors in Shipping		—			
Errors in Freight		133.67			
Errors in Billing		—			
Returned Material		44.42			
Equalization of Freight		2,841.01			
Freight on Returned Goods		—			
Policy		25.95			
Defective		—			
London & Canada		33.35			
Export Cost of Export Packing		999.95			
Freight to Distributing Whse.		986.56			
Total		$5,525.88	$112,414.81		
Less Cash Discount			1,956.02		
Net Sales			$110,458.79		
Current Royalty @ 3½%		$3,866.06			
Back Royalty @ 1½%		1,656.88			
			$ 5,522.94		
Bundle Royalty—1,055,425 sq. ft.			$ 105.54		
Total Royalty			$ 5,628.48		

State of New York)
County of New York) ss

I, George P. Krug, being duly sworn, depose and say that I am General Auditor of the Certain-teed Products Corporation, that I have read the foregoing statement and that the same is true and correct to the best of my knowledge and belief.

GEO. P. KRUG

Sworn to and Subscribed before me
at New York, New York
this 17th day of February, 1931

GERRIT H. KIP
Notary Public Bronx Co. Clerk's No. 201
Cert. filed in N. Y. Co. No. 912, Reg. No. 2-K-559
Commission expires March 30th, 1932

(Notarial Seal)

11546 *Government's Trial Exhibit No. 641*

BESTWALL

A BETTER SYSTEM OF WALL AND CEILING CONSTRUCTION

The sample enclosed is an actual section cut from a piece of Bestwall.

Bestwall comes in pieces three-eighths of an inch thick, forty-seven and five eighths inches wide, and is made in stock lengths of 6, 7, 8, 8½ and 10 feet. It is purposely made a little less than forty-eight inches wide to simplify setting and filling and finishing the joints.

You can always identify Bestwall by the distinctive Bestwall trade-mark on the back of each piece and the exclusive Bestwall tapered edge.

THE BEAVER PRODUCTS COMPANY, INC.
BUFFALO, N. Y.

11547 *Government's Trial Exhibit No. 642*

This exhibit consists of A. S. Speer patent No. 1,790, 252 reproduction follow hereafter.

6455
746095 10183

Jan. 27, 1931. A. S. SPEER 1,790,252

PLASTER BOARD MANUFACTURE

Filed Jan. 12, 1927 2 Sheets-Sheet 1

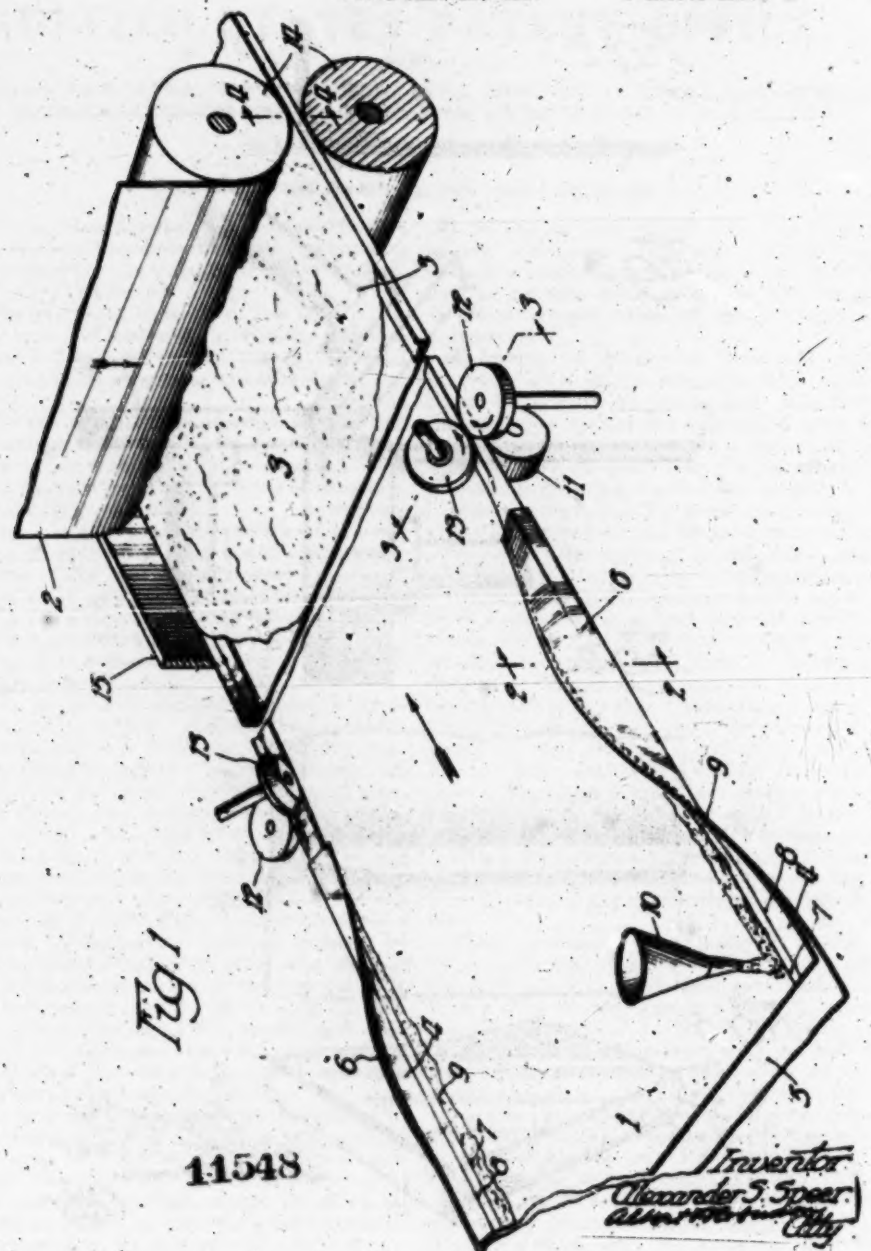


Fig. 1

11548

Inventor
Alexander S. Speer

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Jan. 27, 1931. A. S. SPEER 1,790,252

PLASTER BOARD MANUFACTURE

Filed Jan. 12, 1927 2 Sheets-Sheet 2

Fig. 2.

Fig. 3.

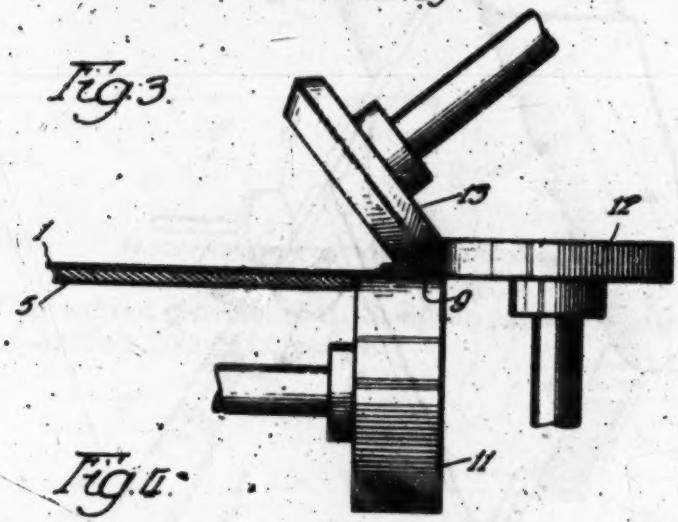


Fig. 4.

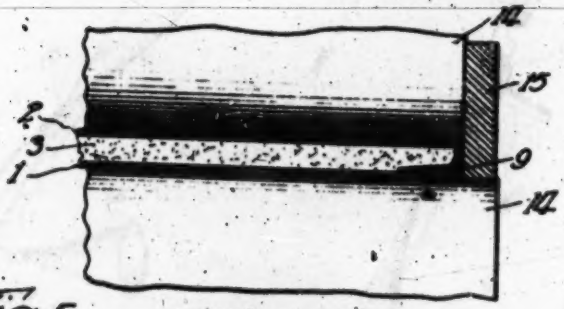
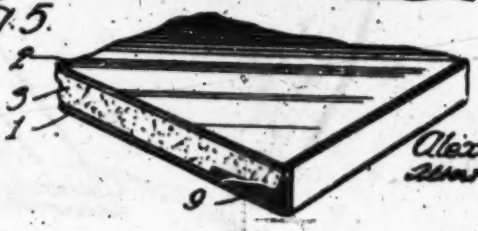


Fig. 5.



Inventor
Alexander S. Speer
Attorney

11549

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Patented Jan. 27, 1931

1,790,252

UNITED STATES PATENT OFFICE

ALEXANDER S. SPERR, OF BUFFALO, NEW YORK, ASSIGNOR, BY MESNE ASSIGNMENTS, TO CERTAIN-TEED PRODUCTS CORPORATION, A CORPORATION OF MARYLAND

PLASTER-BOARD MANUFACTURE

Application filed January 12, 1927. Serial No. 160,826.

This invention pertains to the manufacture of composite boards and the like, and among other objects aims to provide a new and superior type of board.

The invention consists in the novel combinations and methods, herein described or claimed, for carrying out the above object and such other objects as will hereinafter appear.

The character of the invention may be best understood by referring to one illustrative construction embodying the invention, such as that shown for example, in the accompanying drawings, in which:

Fig. 1 is a view in perspective of a board forming apparatus and board during the process of the board construction;

Fig. 2 is a view taken on line 2—2 of Fig. 1;

Fig. 3 is a view taken on line 3—3 of Fig. 1;

Fig. 4 is a view taken on line 4—4 of Fig. 1;

Fig. 5 is a perspective view of the completely formed board.

The illustrative composite board is typified herein by a plaster board or the like which is composed of a plastic body material contained between two fibrous cover sheets, one at least of the cover sheets having its margins folded and strengthened to reenforce the corners and edges of the plastic body. In the present instance, the margins of the bottom sheet are folded over the edges of the plastic body and retroverted to reenforce the edges and corners of the sheet, there being a colored strengthening material inclosed by the margins to further reenforce the edges of the sheet and render a distinctive marking to the finished board. While only the bottom sheet is illustrated with overturned edges it will be understood that the margins of the upper sheet may be appropriately folded or reenforced and made distinctive.

According to the illustrative method of manufacture the board is made in a continuous strip with one of the cover sheets preformed into a trough-like container or mold and also advantageously reenforced along the edges, and after an interval plastic material is deposited in the container or mold and covered with another cover sheet. Thus constructed, the board is then subjected to forming devices or rolls which reduce it to the proper thickness. At any appropriate period, subsequently to forming, the board may be cut into suitable lengths and transferred to dryers where all excess moisture is removed.

Referring to illustrative apparatus and process shown in the drawings, two cover sheets 1 and 2 are fed from supply rolls into the receiving end of the apparatus, sheet 1 being first formed to receive a plastic body material 3 and the other sheet 2 being adhered thereto for covering the body material.

Bottom cover sheet 1 is constructed to provide distinctive and reenforced edges, and is adapted to form a trough or receptacle into which the plastic body may be poured and contained during the formation of the board. Such a structure is accomplished in this instance, by turning or folding margins 4 upwardly and retroverting them to incloss a distinctive plaster core which will have first been deposited in a thin ribbon along the margins of the sheet, after which the core is subjected to pressure for accelerating setting thereof and intimately bonding it to the sheet. The sheet is cut to the proper width and traversed over plate 5 which has on opposite sides folding horns 6 to engage and overturn the margins. Folding of the margins is facilitated by scoring the sheet along lines 7 and 8 by any conventional scoring device.

Plastic material 9 advantageously distinctively colored, is deposited on the bottom sheet along the margins of the sheet near score line 7 in a thin stream from a source 10, after which it is inclosed by the folded margins and pressed into a thin layer with the folded margins approximating the contour of the underlying sheet. This plastic material may advantageously differ in kind or color from that plastic material which makes up the body of the board, or it may differ only in color. It will be referred to throughout the specification and claims as colored plastic material to distinguish from the plaster body material. The colored plaster, for example, may be ordinary gypsum plaster colored red to contrast with its original color which is substan-

tially white. Or the colored plaster may be of a material which will not only produce distinctive edges but one specially prepared which will also give strengthened or reenforced edges. Edges which contrast with the main body portion of the board are distinguishing and distinctive, thereby serving admirably for trade-mark purposes.

After being folded to enclose the colored plaster, the margins of the lower sheet are subjected to pressure means which accelerate the setting of the plaster, bond the plaster to the sheet and form the margins into the desired shape. Pressure means for shaping the edges are illustrated by supporting roll 11 over which the paper traverses, edge roll 12, and pressure roll 13. Supporting roll 11 and edge roll 12 are cylindrical in configuration and are preferably arranged at right angles to each other to provide a square corner on the sheet. Pressure roll 13 has a double conical periphery for cooperating with the overturned margin to carry the folded edges inwardly and to squeeze the colored plaster into a relatively thin layer which is intimately bonded with the sheet. Pressure hastens setting, and hence the formed edges are rigid and strong enough to act as a trough for receiving and holding the plaster. Rollers of different contour or the present rollers differently arranged will give various shapes to the overturned margins and the colored plaster. After the pressure is applied to the margins, the sheet is thus formed into a substantial rigid trough-like container ready to receive the plaster body material which is distributed uniformly over the sheet between the upturned edges.

Top sheet 2 is narrowed to the proper width and brought into union with the plaster as the board thus constructed is subjected to pressure rolls 14. Preferably sheet 2 is narrowed to seat on the plaster body and lie substantially flush with the upturned edges. The colored plaster is sufficiently rigid to retain the shape of the edges during the time that the board is subjected to the forming rolls, altho plates 15 may be advantageously located on each side of the machine to contact with the edges, thereby preventing any deformation which might occur when the board is subjected to the forming rolls.

It will be obvious from the foregoing disclosure, that my invention is not limited to the details of the illustrative embodiment above described, since these may be variously modified. Moreover, it is not indispensable that all features of my invention be used conjointly, since it will be obvious to those skilled in the art, that various schemes may be advantageously employed in various other combinations and subcombinations.

Having described one embodiment of my invention, I claim:

1. A plaster board comprising a plaster body, cover sheets for facing the body, margins on one of the cover sheets being folded over the edge of the body and retroverted, and plaster material inclosed within the folds to reenforce the edge of the board.

2. A plaster board comprising a plaster body, cover sheets for facing opposite sides of the body, margins of one cover sheet being upturned over the edge of the body and retroverted to reenforce the upturned edge and a substantial portion of sheet adjacent the upturned edge, and plaster material inclosed within the retroverted margin.

3. In an article of manufacture, a fibrous sheet, margins of the sheet folded at an angle to the said sheet to provide upturned edges and then retroverted, and an adhesive material for bonding the margins of the sheet.

4. In an article of manufacture, a fibrous sheet having the margins thereof folded at an angle to provide reenforced upturned edges between which a plastic mass is adapted to be contained, and means for retaining the margins in folded position.

5. In an article of manufacture, a fibrous sheet having the margins thereof folded at an angle to provide reenforced upturned edges between which a plastic mass is adapted to be contained, and plaster means bonded to the margins to retain same in folded position.

6. In an article of manufacture, a fibrous sheet having the margins thereof folded at an angle thereto to provide upturned edges, a plaster material deposited on the sheet adjacent the folded edge, and an extension of the margins retroverted towards the sheet to enclose the plaster material.

7. The method of fabricating composition board characterized by feeding a film of adhesive along the margins of a fibrous sheet, folding the margins of the sheet at an angle thereto to provide upturned edges, and compressing the adhesive into contact with the folded margins.

8. The method of fabricating composition board characterized by feeding a ribbon of adhesive along the margins of a fibrous sheet, folding the margins of the sheet at an angle thereto to provide upturned edges, retroverting a portion of the margins over the adhesive, applying pressure to the adhesive, and filling the space between the upturned edges with plastic material.

9. The method of fabricating composition board characterized by feeding a ribbon of plastic material along the margins of a fibrous sheet, folding the margins of the sheet at an angle thereto, retroverting a portion of the margins over the plastic material, accelerating the setting of the plastic material to support the folding margins, feeding a plastic material between the folded margins, and adhering a face sheet to the plastic material.

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10. The method of fabricating composition board by feeding a ribbon of plastic material along the margins of a fibrous sheet, folding the margins at an angle to the sheet, applying pressure to the plastic ribbon, depositing plastic material between the folded margins, and facing the plastic material with a cover sheet.

11. The method of fabricating composition board characterized by feeding a colored plastic material along the margins of a fibrous sheet, retroverting the margins over the colored plastic material, folding the retroverted margins at an angle to the sheet to provide edges, depositing plastic material between the edges, and adhering a cover sheet to the plastic material.

In testimony whereof I affix my signature.

ALEXANDER S. SPEER.

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GOVERNMENT'S EXHIBIT 643

746095 10188

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE

To all persons to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the File Wrapper and Contents, with exception of Printed Specification and Drawings, in the matter of the

Letters Patent of

Alexander S. Speer, Assignor, by Mesne Assignments, to Certain-Teed Products Corporation,

Number 1,790,252, Granted January 27, 1931,

for

Improvement in Plaster-Board Manufacture.

This certified copy ordered by the Justice Department.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this fourth day of April, in the year of our Lord one thousand nine hundred and forty-four and of the Independence of the United States of America the one hundred and sixty-eighth.

ATTEST: P. A. Coulter
Acty. Chief of Division.

Commissioner of Patents.

[redacted] RECORD BOOK

[redacted] Class of 1909

160585

DIV. 15 50 36

PATENT No. 1790[redacted]

1927 DATE JAN 27 1931

EX'R'S BOOK 64-8

L-101-8

Name ALEXANDER S. SPEER

Assignor to The Beaver Products Company, Inc., a corp. of New York

Obtain-tead Product & Corporation, a corp. of Maryland

of BUFFALO

State of NEW YORK

Invention PLASTER BOARD MANUFACTURE

Filed 19

ORIGINAL

APPLICATION FILED COMPLETE JAN 12, 1927

FEES OF APPLICANT PAID

Petition, Specification, Oath, First Fee $30, 2 sheets Drawings, JAN 12, 1927

RENEWED

64 72 87

Examined and passed for Issue JUL 3 - 1930, 193

Ex. Div. 67a

Notice of Allowance JUL 3 - 1930, 193

By Commissioner

Final Fee $25 Rec 29, 1930

Division of Appn. No.

Attorney ALBERT F. ROBINSON C/O THE BEAVER PRODUCTS CO. INC., BUFFALO N.Y.

Address Buffalo, New York, U.S.A.

Associate Attorney Newell & Spencer, Brayton Bldg.

420 Lexington Ave., New York N.Y.

No. of Claims Allowed 11 Print Claim 11 to O. G. Class 1-4-

Title as Allowed Plaster-Board Manufacture

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PETITION

TO THE COMMISSIONER OF PATENTS:

Your petitioner, Alexander S. Speer, a citizen of the United States, residing at Buffalo, in the County of Erie, State of New York, whose post office address is 169 Depew Avenue, Buffalo, New York, prays that Letters Patent may be granted to him for improvements in

PLASTER BOARD MANUFACTURE

as set forth in the annexed specification.

And he hereby appoints Albert F. Robinson, c/o The Beaver Products Company, Inc., Buffalo, N.Y., his Attorney, with full power of substitution and revocation, to prosecute this application, to make alterations and amendments therein, to sign the drawings, to receive the Patent, and to transact all business in the Patent Office connected therewith.

Signed at Buffalo, in the county of Erie, and State of New York, this 18th day of January, 1927.

Alexander S. Speer
(Inventor's Full Name).

SPECIFICATION

TO ALL WHOM IT MAY CONCERN:

BE IT KNOWN, that I, Alexander S. Speer, a citizen of the United States, residing in the City of Buffalo, County of Erie, State of New York, have invented certain new and useful improvements in

PLASTER BOARD MANUFACTURE

and I do hereby declare the following to be a full, clear and exact description of the invention, such as will enable others skilled in the art to which it appertains, to make and use the same:

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This invention pertains to the manufacture of composite boards and the like, and among other objects aims to provide a new and superior type of board.

The invention consists in the novel combinations and methods, herein described or claimed, for carrying out the above object and such other objects as will hereinafter appear.

The character of the invention may be best understood by referring to one illustrative construction embodying the invention, such as that shown for example, in the accompanying drawings, in which:

Fig. 1 is a view in perspective of a board forming apparatus and board during the process of the board construction;

Fig. 2 is a view taken on line 2 -- 2 of Fig. 1;

Fig. 3 is a view taken on line 3 -- 3 of Fig. 1;

Fig. 4 is a view taken on line 4 -- 4 of Fig. 1;

Fig. 5 is a perspective view of the completely formed board.

The illustrative composite board is typified herein by a plaster board or the like which is composed of a plastic body material contained between two fibrous cover sheets, one at least of the cover sheets having its margins folded and strengthened to reenforce the corners and edges of the plastic body. In the present instance, the margins of the bottom sheet are folded over the edges of the plastic body and retroverted to reenforce the edges and corners of the sheet, there being a colored strengthening material inclosed by the margins to further reenforce the edges of the sheet and render a distinctive marking to the finished board. While only the bottom sheet is illustrated with overturned edges it will be understood that the margins of the upper sheet may be appropriately folded or reenforced and made distinctive.

According to the illustrative method of manufacture the

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board is made in a continuous strip with one of the cover sheets [illegible] into a trough-like container or mold and also advantageously reenforced along the edges, and after an interval plastic material is deposited in the container or mold and covered with another cover sheet. Thus constructed, the board is then subjected to forming devices or rolls which reduce it to the proper thickness. At any appropriate period, subsequently to forming, the board may be cut into suitable lengths and transferred to dryers where all excess moisture is removed.

Referring to illustrative apparatus and process shown in the drawings, two cover sheets 1 and 2 are fed from supply rolls into the receiving end of the apparatus, sheet 1 being first formed to receive a plastic body material 3 and the other sheet 2 being adhered thereto for covering the body material.

Bottom cover sheet 1 is constructed to provide distinctive and reenforced edges, and is adapted to form a trough or receptacle into which the plastic body may be poured and contained during the formation of the board. Such a structure is accomplished in this instance, by turning or folding margins 4 upwardly and outwardly thus to inclose a distinctive plaster core which will have first been deposited in a thin ribbon along the margins of the sheet, after which the core is subjected to pressure for accelerating setting thereof and intimately bonding it to the sheet. The sheet is cut to the proper width and traversed over plate 5 which has an opposite side folding, bevel 6 to engage and overturn the margins. Folding of the margins is facilitated by scoring the sheet along lines 7 and 8 by any conventional scoring device.

Plastic material 3 advantageously distinctively colored, is deposited on the bottom sheet along the margins of the sheet near score line 7 in a thin stream from a nozzle 10, after which it is inclosed by the folded margins and pressed into a thin layer with the folded margins approximating the contour of the underlying

sheet. This plastic material may advantageously differ in kind or color from that plastic material which makes up the body of the board, or it may differ only in color. It will be referred to throughout the specification and claims as colored plastic material to distinguish from the plaster body material. The colored plaster, for example, may be ordinary gypsum plaster colored red to contrast with its original color which is substantially white. Or the colored plaster may be of a material which will not only produce distinctive edges but one specially prepared which will also give strengthened or reenforced edges. Edges which contrast with the main body portion of the board are distinguishing and distinctive, thereby serving admirably for trade-mark purposes.

After being folded to enclose the colored plaster, the margins of the lower sheet are subjected to pressure means which accelerate the setting of the plaster, bond the plaster to the sheet and form the margins into the desired shape. Pressure means for shaping the edges are illustrated by supporting roll 11 over which the paper traverses, edge roll 12, and pressure roll 13. Supporting roll 11 and edge roll 12 are cylindrical in configuration and are preferably arranged at right angles to each other to provide a square corner on the sheet. Pressure roll 13 has a double conical periphery for cooperating with the overturned margin to carry the folded edges inwardly and to squeeze the colored plaster into a relatively thin layer which is intimately bonded with the sheet. Pressure hastens setting, and hence the formed edges are rigid and strong enough to act as a trough for receiving and holding the plaster. Rollers of different contour or the present rollers differently arranged will give various shapes to the overturned margins and the colored plaster. After the pressure is applied to the margins, the sheet is thus formed into a substantial rigid trough-like container ready to receive the plaster body material

which is distributed uniformly over the sheet between the upturned edges.

Top sheet 2 is narrowed to the proper width and brought into union with the plaster as the board thus constructed is subjected to pressure rolls 14. Preferably sheet 2 is narrowed to seat on the plaster body and lie substantially flush with the upturned edges. The colored plaster is sufficiently rigid to retain the shape of the edges during the time that the board is subjected to the forming rolls, althe plates 15 may be advantageously located on each side of the machine to contact with the edges, thereby preventing any deformation which might occur when the board is subjected to the forming rolls.

It will be obvious from the foregoing disclosure, that my invention is not limited to the details of the illustrative embodiment above described, since these may be variously modified. Moreover, it is not indispensable that all features of my invention be used conjointly, since it will be obvious to those skilled in the art, that various schemes may be advantageously employed in various other combinations and subcombinations.

Having described one embodiment of my invention, I claim:

X

1. A plaster board comprising a body material, cover sheets for facing the opposite sides of the body material, and colored material deposited along the edges of the body material to contrast therewith and provide a distinctive edge for the board.

2. A plaster board comprising a plastic body material, cover sheets for facing the opposite sides of the plastic material, and a plastic material contrasting in color with the body material for marking the edges of the board distinctive.

3. A plaster board comprising a plastic body, cover sheets for facing the body, a strip adhered to the edge of the plaster body, and means located adjacent the strip to contrast with the color of the plastic body.

4. A plaster board comprising a plastic body, cover sheets for facing the body, one of said sheets having margins overturned to engage the edge of the body, and means inserted between the overturned margins and the plastic body to provide a contrasting color along the edges.

5. A plaster board comprising a plaster body, cover sheets for facing the body, margins on one of the cover sheets being folded over the edge of the body and retroverted, and plaster material inclosed within the folds to reenforce the edge of the board.

6. A plaster board comprising a plaster body, cover sheets for facing opposite sides of the body, margins of one cover sheet being upturned over the edge of the body and retroverted to reenforce the upturned edge and a substantial portion of sheet adjacent the upturned edge, and plaster material inclosed within the retroverted margin.

7. In an article of manufacture, a fibrous sheet, margins of the sheet folded at an angle to the said sheet, and an adhesive material for bonding the margins of the sheet.

4 8. In an article of manufacture, a fibrous sheet having the margins thereof folded at an angle to provide reinforced edges, and means for retaining the margins in folded position.

5 9. In an article of manufacture, a fibrous sheet having the margins thereof folded at an angle to provide reinforced edges, and plaster means bonded to the margins to retain same in folded position.

6 10. In an article of manufacture, a fibrous sheet having the margins thereof folded at an angle thereto to provide reinforced edges, a plaster material deposited on the sheet adjacent the folded edge, and an extension of the margins retroverted towards the sheet to enclose the plaster material.

7 11. The method of fabricating composition board characterized by feeding a film of adhesive along the margins of a fibrous sheet, folding the margins of the sheet at an angle thereto to provide reinforced edges, and compressing the adhesive into contact with the folded margins.

8 12. The method of fabricating composition board characterized by feeding a ribbon of adhesive along the margins of a fibrous sheet, folding the margins of the sheet at an angle thereto to provide reinforced edges, retroverting a portion of the margins over the adhesive, and applying pressure to the adhesive.

9 13. The method of fabricating composition board characterized by feeding a ribbon of plastic material along the margins of a fibrous sheet, folding the margins of the sheet at an angle thereto, retroverting a portion of the margins over the plastic material, accelerating the setting of the plastic material to support the folding margins, feeding a plastic material between the folded margins, and adhering a face sheet to the plastic material.

10 14. The method of fabricating composition board by feeding a ribbon of plastic material along the margins of a fibrous sheet, folding the margins at an angle to the sheet, applying pressure

to the plastic ribbon, depositing plastic material between the folded margins, and facing the plastic material with a cover sheet.

M. The method of fabricating composition board characterized by feeding a colored plastic material along the margins of a fibrous sheet, retroverting the margins over the colored plastic material, depositing plastic material between the margins, and adhering a cover sheet to the plastic material.

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IN TESTIMONY WHEREOF I affix my signature. 5120

Alexander S. Speer

(Inventor's full name).

OATH

STATE OF NEW YORK)
: ss
COUNTY OF ERIE)

I, ALEXANDER S. SPEER, the above-named petitioner, being duly sworn, depose and say that I am a citizen of the United States and a resident of Buffalo, New York, and that I verily believe myself to be the original, first and sole inventor of the improvements in

PLASTER BOARD MANUFACTURE

described and claimed in the annexed specification; that I do not know and do not believe that the same was ever known or used before my invention or discovery thereof, or patented or described in any printed publication in any country before my invention or discovery thereof, or more than two years prior to this application or in public use or on sale in the United States for more than two years prior to this application; that said invention has not been patented in any country foreign to the United States on an application filed by me or my legal representatives or assigns more than twelve months prior to this application; and that no application for patent on said improvements has been filed by me or my representatives or assigns in any country foreign to the United States.

Alexander S. Speer

(Inventor's full name).

Subscribed and sworn to before me this 11th day of January 1924.

(SEAL)

(Signature of notary public)

(Official character)

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Jan 27

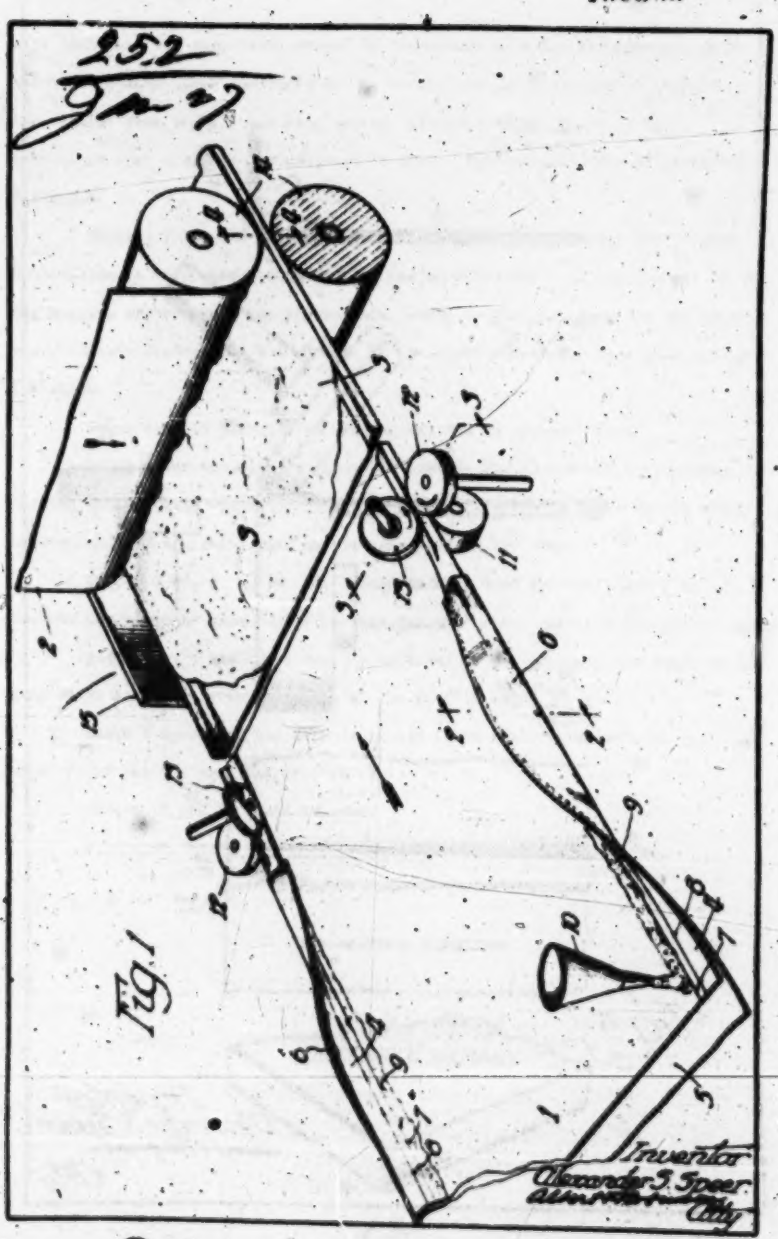

Fig 1

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Fig 2

Fig 3

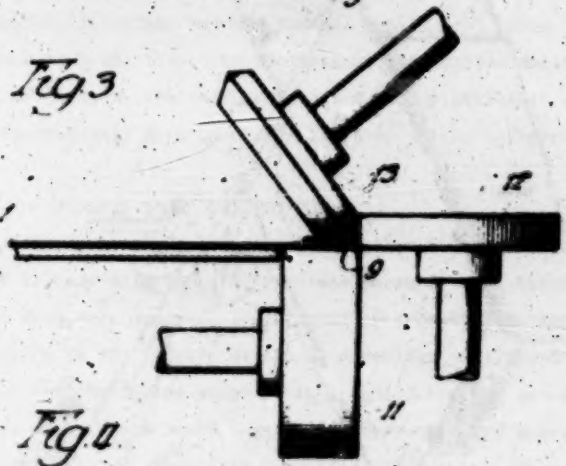


Fig 4

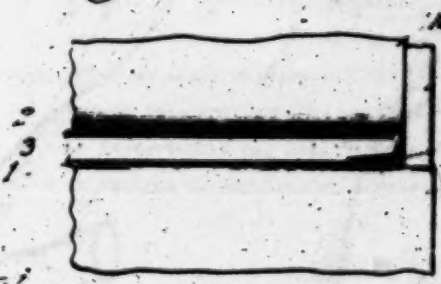
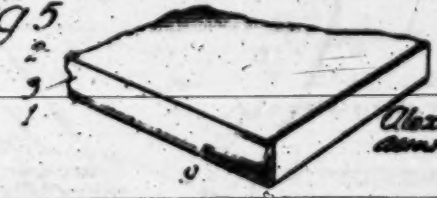


Fig 5



Inventor:
Alexander S. Spear
Atty

edge portions, the same being formed by intermingling colloidal material with the plastic mass along the edges of the board. While the toughened mixture does differ from the plastic mass in some characteristics there is no disclosure that there is any contrast in color. The same is true of Armstrong 1,878,220.

Birdsey 1,886,207 shows an open edge plaster board having the margins retroverted to reinforce the corners of the cover sheets. In applicant's device, the margins of the sheet (or sheets) are folded to provide edges for the plastic mass, thereby reinforcing the corners of the board and at the same time fusing the edges.

Johns 418,819 pertains to roofing and not to plaster board.

The colored material is deposited beneath the folded and retroverted margins and hardened, thereby providing substantially rigid edges on the sheet between which the plastic mass may be deposited on the sheet.

Claims 6, 7, 8, 9, 10, 11, 12 and 13 have been further amended to include the upturned edges which provide fusing for the edges of the plastic mass.

Claims 1 - 4 inclusive specify material deposited along the edges of the body which contrasts with the color of the plaster body.

Claim 6 specifies the margins of the cover sheet upturned over the edge of the plaster body and retroverted.

Claims 13 and 14 stand allowed.

Favorable reconsideration of the rejected claims is requested.

Respectfully submitted,

Attorney for Applicant.

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Rev. 56. Room 311

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

Paper No. 4

JR/jmk

Please find below a communication from the EXAMINER in charge of this application.

Thomas E. Robertson
Commissioner of Patents.

December 7, 1928

Albert F. Robinson,
C/o The Beaver Products
Co., Inc., Buffalo,
N.Y.

Applicant: Alexander S.Speer

Ser. No. 160,585
Filed Jan. 12, 1927
For Plaster board manufacture

DEC 7 1928

Responsive to amendment filed Feb. 17, 1928.

The following additional references are cited of record:

Trade Mark	288,609	June 7, 1927	used since Dec.6,1926
Trade Mark	189,933	Sept.30,1924	used since Nov.1,1915

Claims 1, 2 and 3 are again rejected on Armstrong of record. The nature of the composition used at the edge of the board is such as to give a colored edge. These claims are also rejected as being met by the trade marks cited above showing boards having colored edges.

The rejection of claim 4 is repeated. Schumacher shows the margins overturned to engage the edge of the body. The specification of the color of the plaster material does not define any structure over Schumacher who also shows a plastic material enclosed by the margins. The color has no structural utility and no cooperative relation with the remaining structure. The color limitation in claims 1 to 3 is likewise of no patentable significance for the same reasons.

Claim 7 is again rejected on Birdsey who shows the margins folded and an adhesive for binding the margins. The amendment to this claim cannot be entered since the word "sheets" does not occur in this claim.

The amendment to claim 15 cannot be entered. The word "materials" is not found in line 3.

Claims 5, 6, 8 to 14 are allowable.

14 Examiner.

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No. 80 Room 322 DEPARTMENT OF COMMERCE Paper No. 8
UNITED STATES PATENT OFFICE
WASHINGTON
IV/VS

Please find below a communication from the EXAMINER in charge of this application.

MAILED
MAR 24 1927

Thomas E. Robertson
Commissioner of Patents.

Albert F. Robinson
The Beaver Products Co. Inc.
Buffalo, N. Y.

Applicant: A. S. Speer

Ser. No. 160,585
Filed Jan. 12, 1927
For Plaster Board Manufacture

References made of record:

Birdsey	1,526,307	Feb. 10, 1925	154-45.9
Brookby	1,499,695	Apr. 8, 1924	154-1A
Armstrong	1,578,280	Mar. 30, 1926	154-24
Schumacher	1,576,142	Mar. 9, 1926	154-45.9
Johns	418,819	Dec. 31, 1889	154-58 X

Claims 1, 2 and 3 are rejected on each of Brookby and Armstrong showing a colored material at the edge of the plaster board.

Claims 4 and 15 are rejected on Schumacher showing a margin of the cover sheet overturned in view of Brookby or Armstrong showing a colored material at the edge of the board.

Claims 5 to 10 are rejected on each of Birdsey and Schumacher showing a retroverted margin with a binding material enclosed within the folded margin such as plaster or glue.

Claims 5, 7 and 8 are also rejected on Johns. Fig. 6 shows a retroverted edge reenforced with a cord.

Claims 11, 12 and 15 are rejected on Birdsey disclosing the steps claimed.

Claims 13 and 14 are allowed.

C. L. Bean
Examiner.

TM 228,669
color June 7, 1927
plate
TM 159,933
Nov. 1, 1921

MAIL DIVISION
FEB 20 1928
U. S. PATENT OFFICE
FEB 18 1928
DIVISION 50

IN THE UNITED STATES PATENT OFFICE.

In re application of)
Alexander S. Speer)
PLASTER BOARD MANUFACTURE) Div. 50 Room 322
Serial No. 160,866)
Filed - January 12th, 1927.)

Buffalo, N.Y.
February 16th, 1928.

AMENDMENT

Commissioner of Patents,
Washington,
D.C.

Sir:

In response to Office Action of March 26th, 1927 please amend the above entitled application in the following particulars:

Claim 6, line 3, cancel "means" and insert — plaster material —.

Claim 7, line 2, following "sheets" insert — to provide upturned edges and then retroverted —.

Claim 8, line 2, cancel "edges" and insert — upturned edges between which a plastic mass is adapted to be contained —.

Claim 9, line 2, cancel "edges" and insert — upturned edges between which a plastic mass is adapted to be contained —.

Claim 10, line 2, cancel "an edge" and substitute — upturned edges —.

Claim 11, line 3, following "thereto" insert — to provide upturned edges —.

Claim 12, line 3, following "thereto" insert — to provide upturned edges; same claim, line 4, cancel "and"; same claim, line 5, following "adhesive" change the period (.) to a comma (,) and add — and filling the space between the upturned edges with plastic material —.

Claim 15, line 3, following "materials," add — folding the retroverted margins at an angle to the sheet to provide edges, —; same claim, line 4, cancel "margins" and insert — edges —.

REMARKS

Reconsideration of the rejected claims is requested.

Brooks 1,469,893 discloses a plaster board having toughened or hardened

U.S. PATENT OFFICE
JUN 6 1929
DIVISION 56

MAIL DIVISION
JAN -4 29
U.S. PATENT OFFICE

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NO. ATTY ON

IN THE UNITED STATES PATENT OFFICE

In re application of :
ALEXANDER S. SPEER :
Serial No. 160,585 : Division 56
Filed January 12, 1927 :
For PLASTER BOARD MANUFACTURE :

POWER OF ATTORNEY

TO THE COMMISSIONER OF PATENTS:

The CERTAIN-TEED PRODUCTS CORPORATION, assignee of the entire interest in the above entitled application, revokes all previous powers of attorney and hereby appoints Alden D. Redfield, 100 East 42nd Street, New York, N. Y., whose Registration Number is 12,682, its attorney, with full power of substitution and revocation, to prosecute this application, to make alterations and amendments therein, to sign the drawings, to receive the Patent, and to transact all business in the Patent Office connected therewith.

CERTAIN-TEED PRODUCTS CORPORATION,
By Arthur C. Cale.
Vice President.

Accepted
JUN 6 1929
J. E. Robertson

160585

7/9

JAN 4 1929

IN THE UNITED STATES PATENT OFFICE.

In re application of : Division 56
ALEXANDER S. SPARR :
Serial No. 160,585 :
Filed January 12, 1927 :
For PLASTER BOARD MANUFACTURE :

U. S. PATENT OFFICE
JAN 5 1929
Division 56

AMENDMENT

Hon. Commissioner of Patents,
Washington, D. C.

Sir:

Responsive to the Office Action of December 7, 1928 please amend the above entitled application as follows:

Cancel claims 1 to 3 inclusive.

Claim 4, line 3 before "means" insert reenforcing: Same claim line 4 cancel "to provide" and insert providing.

Claim 7, line 2, after "sheet", first occurrence, insert to provide upturned edges and then retroverted.

Claim 15, line 3, after "material" insert folding the retroverted margins at an angle to the sheet to provide edges.

Add the following claims:

16. A plaster board comprising a poly material, cover sheets for facing the opposite sides of the body material, one of said sheets having margins overturned to engage the edges of the body material, and colored material deposited under said overturned edges to reenforce same and to contrast with said body material and provide a distinctive edge for the board.

17. A plaster board comprising a plastic body material, cover sheets for facing the opposite sides of the plastic material, one of said sheets having margins

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overturned to engage the edges of the body material, and a plastic material contrasting in color with the body material compressed between said overturned margins and the adjacent cover sheet for reenforcing the edge of the board and making same distinctive.

REMARKS

Claims 1 to 3 have been cancelled.

Claim 4 has been amended to recite reenforcing means inserted between the overturned margins and the plastic body providing a contrasting color along the edges. Schumacher shows margins overturned to engage the edge of the body yet this reference does not show such means as providing a reenforcement together with a contrasting color along the edges. Brookby and Armstrong show open edge boards with strengthening plastic material along the edges. No reference is made to the novel idea of providing a colored strengthening means which is inserted between the overturned margins and the plastic body and which not only provides a superior edge but also provides a distinctive edge whereby the product of one manufacturer is readily distinguishable from that of others. It is felt that claim 4 now recites patentable subject matter. The trade marks cited in the last Office Action merely disclose colored edges and suggest nothing to anticipate applicant's novel reenforced edge which is recited as being of contrasting color in this claim.

Claims 7 and 15 have been amended properly to insert the matter attempted to be inserted in the last amendment. It is felt that the claims as now restricted are clearly patentable over the art along with the allowed claims.

New claims 16 and 17 have been modeled generally

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after some of the cancelled claims and are limited to Applicant's invention. It is thought that they now merit favorable consideration.

In view of the above reconsideration of the rejected claims is respectfully requested.

A. S. SPIER

By Allen A. Lesfield

Attorney

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DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

June 12, 1929.

Alden D. Redfield,
100 East 42nd St.,
New York, N.Y.

Applicant Alexander S. Speer
Serial No. 160,585
Filed Jan. 12, 1927
For Plaster Board Manufacture

In this case your power of attorney has been accepted.

revoked by assignee.

Respectfully,

Thomas E. Robertson
Commissioner.

Revoking power of attorney
to

Albert F. Robinson,
c/o The Beaver Products Co., Inc.,
Buffalo, N.Y.

160585

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Ex. 58 Ex. 311.

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

Paper No. 9

JR/jak

Please find below a communication from the EXAMINER in charge of this application.

January 10, 1930

Thomas E. Robertson
Commissioner of Patents.

Applicant: Alexander S.Speer

Alden D. Redfield,
100 East 42nd St.,
New York,N.Y.

Ser. No. 160,585
Filed Jan. 18, 1927
For Plaster Board Manufacture

MAILED
JAN 10 1930

Responsive to amendment filed June 4, 1929.

Claims 4, 16 and 17 are finally rejected as defining no invention over Schumacher of record. The folded margins of Schumacher engage the edges of the body material and the plastic material under the overturned margins acts as a reinforcement. The use of a colored plastic under the margins has no structural utility as has been pointed out previously.

Claims 5 to 14, inclusive, are allowed.

Examiner.

100585

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JAN 28 1930

IN THE UNITED STATES PATENT OFFICE

U. S. PATENT OFFICE
JAN 28 1930
DIVISION 56

In re application of
ALEXANDER S. APPEL
Serial No. 160,885
Filed January 18, 1927
For FLOATER BOARD MANUFACTURE

Division 56

BEFORE THE BOARD OF APP

Hon. Commissioner of Patents,
Washington, D. C.

In response to the Office action of January 10, 1930, please amend the above entitled application as follows:

Cancel Claims 4, 16 and 17.

REMARKS

The consideration of the rejected claims as herein amended to place this case in condition for allowance, prior hereto, is respectfully solicited.

Respectfully,

By Allen S. Lefferts

Attorney.

169585

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ADDRESS ONLY THE COMMISSIONER OF PATENTS WASHINGTON, D.C.

Serial No. 160,585

JR/R

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON July third 1930.

Alexander P. Speer, Assor. etg.

Your APPLICATION for a patent for an IMPROVEMENT in Plaster Board Manufacture

filed Jan. 18, 1927 has been examined and ALLOWED with 11 claims.

The final fee, TWENTY-FIVE DOLLARS, WITH $1 ADDITIONAL FOR EACH CLAIM ALLOWED IN EXCESS OF 20, must be paid not later than SIX MONTHS from the date of this present notice of allowance. If the final fee be not paid within that period, the patent will be withheld, but the application may be renewed within one year after the date of the original notice with a renewal fee of $25 and $1 additional for each claim in excess of 20.

The office delivers patents upon the day of their date, on which date their term begins to run. The preparation of the patent for final signing and sealing will require about four weeks, and such work will not be begun until after payment of the necessary final fee.

When the final fee is paid, there should also be sent, DISTINCTLY AND PLAINLY WRITTEN, the name of the INVENTOR, TITLE OF THE INVENTION, AND SERIAL NUMBER AS ABOVE GIVEN, DATE OF ALLOWANCE (which is the date of this circular), DATE OF FILING, and, if assigned, the NAMES OF THE ASSIGNEES.

If it is desired to have the patent issue to an ASSIGNEE OR ASSIGNEES, an assignment containing a REQUEST to that effect, together with the FEE for recording the same, must be filed in this office on or before the date of payment of the final fee.

After issue of the patent, uncertified copies of the drawings and specifications may be purchased at the price of TEN CENTS EACH. The money should accompany the order. Postage stamps will not be received.

The final fee will NOT be received from other than the applicant, his assignee or attorney, or a party in interest as shown by the records of the Patent Office.

NOTICE. WHEN THE NUMBER OF CLAIMS ALLOWED IS IN EXCESS OF 20, NO SUM LESS THAN $25 PLUS $1 ADDITIONAL FOR EACH CLAIM IN EXCESS OF TWENTY CAN BE ACCEPTED AS THE FINAL FEE.

Respectfully,

Thomas E. Robertson
Commissioner of Patents.

Alden D. Redfield,
100 East 42nd St.,
New York, N. Y.

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160585

IN REMITTING THE FINAL FEE GIVE THE SERIAL NUMBER AT THE HEAD OF THIS NOTICE.

UNCERTIFIED CHECKS WILL NOT BE ACCEPTED

6485

MAIL DIVISION
AUG 27 1930
U.S. PATENT OFFICE

Patent #10

AUG 27
U. S. PATENT OFFICE

IN THE UNITED STATES PATENT OFFICE

ALEXANDER S. SPEER;
Serial No. 160,585;
Filed January 18, 1927;
PLASTER BOARD MANUFACTURE.
Allowed July 8, 1930.

MAIL DIVISION
AUG 27 1930
U.S. PATENT OFFICE

Hon. Commissioner of Patents,
Washington, D. C.

S i r : -

The undersigned, attorney of record in the above-entitled application, hereby substitutes Newell & Spencer, Registration No. 11436, a firm consisting of Emerson R. Newell, H. Dorsey Spencer, George M. Dowe and Chauncey M. Sincerbeaux, of Graybar Building, 420 Lexington Avenue, New York, N. Y., as attorneys, with full power to sign the drawings, to prosecute this application, to make alterations and amendments therein, to receive the patent, and to transact all business in the Patent Office connected therewith.

Signed at New York City, in the County of New York and State of New York, this 25th day of August, 1930.

Alden D. Redfield
Alden D. Redfield

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1,809,493

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LAW OFFICES OF
NEWELL & SPENCER
GRAYBAR BUILDING
NEW YORK

MAIL ROOM
DEC 29 1930
U.S. PATENT OFFICE

December 27, 1930

DEC 2940 1 2 43 A [illegible] 25.00

U. S. Patent Office

Hon. Commissioner of Patents,
Washington, D.C.

Re: Alexander G. Speer, Ser. No. 160,565, Filed January 12, 1927, "Plaster Board Manufacture" Allowed, July 8, 1930.

Sir:

Enclosed please find our check for $25.00 to be applied as the final fee in the above-identified application.

Respectfully,

Newell & Spencer

NS/

Encl.

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CONTENTS:

1. Application ____ papers.
2. Patent 92 & 1927
3. Agreement Feb 17, 1927
4. Assignment Dec. 7, 1927
5. Gen. and Powers of Atty by Assignee June 4/29
6. Notices of Annexation and Acceptance " 12/29
7. C S B June 4, 1929
8. Assignment Jan. 10-1930
9. June 25-1930
10. Int. Atty Aug. 27. 1931
11. ____
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11582 *Government's Exhibit No. 644*

AGREEMENT

This agreement between Alexander S. Speer, of Buffalo, New York, hereinafter called "Speer", and the Certain-teed Products Corporation, a Maryland corporation, hereinafter called "Certain-teed", in consideration of the mutual covenants hereinafter contained, witnesseth, that

Whereas, Speer was the inventor of numerous patents which were ultimately acquired by the "Beaver" Companies, so called, under which patents exclusive licenses were later given to the Flintkote Company, a Massachusetts corporation, and

Whereas, the assets of the aforesaid "Beaver" Companies were acquired by Certain-teed, and

Whereas, certain obligations of said "Beaver" Companies were assumed by Certain-teed including the obligations to Speer, and in particular that Agreement dated June 3, 1920, between Alexander S. Speer and The Roofing Patents Company, a Delaware corporation, and The Beaver Board Companies, a Delaware corporation and

Whereas, in view of the many complications involved in the various Agreements and Assignments between Speer and the various "Beaver" Companies, and/or their subsidiaries, it has been decided to draw up this Agreement to take the place of all previous Agreements of Speer and the "Beaver" Companies relative to said patents, and

Whereas, Speer represents that under said Agreements and Assignments he was entitled to twenty-five per cent of the net royalties to be received by the "Beaver" Companies and/or their subsidiaries, and/or successors, and/or assigns,

Now therefore, it is agreed between the parties as follows:

(1) Speer hereby releases Certain-teed from all obligations to Speer under any Agreements whatsoever between Speer and the former "Beaver" Companies and/or their subsidiaries or affiliated Companies, except that Certain-teed is still obligated to pay the guaranteed salary up to 1935, as previously provided for under said Agreement dated June 3, 1920, as follows:

"The Beaver Company hereby guarantees the payment to Speer or his legal representatives or beneficiaries of the above mentioned sums of fifteen thousand (15,000) Dollars per year for ten (10) years from February 2nd, 1920 and ten thousand (10,000) dollars per year for the five years thereafter."

In the event that Speer shall die before the expiration of the five year period from February 1, 1930, Certain-teed shall pay the amounts equivalent to said salary to his legal representatives or to the beneficiary or beneficiaries who may become entitled through intestacy or under his Last Will and Testament to the rights of Speer under this Agreement, said payments to be made against the one-
11583 fourth interest of Speer, hereinafter set forth, payable by Certain-teed; and said payments shall be made until Certain-teed may have exercised its option, as hereinafter provided, to terminate this Agreement.

(2) Certain-teed hereby agrees to pay Speer one-fourth of all net royalties received by it as the result of any patents, or applications therefor which it may now, or hereafter, own, or have any interest in as the result of the inventions of Speer. It is understood that "net royalties" means the net amount received by Certain-teed after deduction has been made for all expenses incurred by Certain-teed in connection with said patents, including litigation, purchase of other patents to be used in conjunction with the Speer patents, the amounts paid as royalties by Certain-teed under the Speer patents in conjunction with other patents, and all other expenses incurred by Certain-teed relating to the Speer patents.

(3) All royalties paid to Speer under the guaranteed salary covered in clause (1), shall be deducted from the one-fourth interest of Speer in the net royalties payable according to clause (2) hereof.

(4) This Agreement shall take effect as of February 1, 1930, and said one-fourth of all net royalties (minus the monthly guaranteed salary) shall be payable monthly to Speer up to and including the month of January, 1931. Thereafter, such payments shall be made quarterly to Speer. It is understood, however, that in no period shall Speer receive less than his guaranteed salary unless aggregate payments made have exceeded the amount due hereunder.

(5) Speer agrees that the major portion of his time, energy and skill, shall be devoted exclusively to Certain-teed, and further covenants that all discoveries, inventions and improvements that may be discovered by him during this said employment and relating to any enterprise which may then be conducted or which may at any later time be conducted or contemplated by Certain-teed, or by any of its subsidiaries, shall belong to Certain-teed, and Speer agrees that he will immediately disclose all such discoveries, inventions and improvements, and upon request assign the same to Certain-teed, its successors, assigns, or nominees, and will, upon the request of Certain-teed, take all other further action as may be necessary in the interest of Certain-teed.

In the event that, subsequent to the five year period from February 1, 1930, the one-fourth interest of Speer in the net royalties received by Certain-teed should amount to less than $10,000 per year, Speer and Certain-teed shall mutually agree as to what proportion of Speer's time shall be devoted to the service of Certain-teed.

(6) If Certain-teed does not desire to acquire any certain patent or patents, and/or applications therefor, of Speer, Speer shall have full title to said patent or patents, and/or applications therefor.

(7) Speer hereby gives and grants unto Certain-teed an option to terminate this Agreement, and to be relieved of all obligations thereunder, for the sum of One Hundred and Fifty Thousand Dollars ($150,000), such option to be exercisable, however, only against the legal representatives, heirs, or beneficiaries of Speer at any time after his death.

(8) Speer hereby authorizes Certain-teed to exercise its best discretion relative to obtaining the best returns under all patents contemplated by this Agreement, 11584 and hereby ratifies all acts of Certain-teed now consummated or hereafter to be consummated; and Certain-teed hereby agrees to exercise, in good faith, its best judgment to that effect.

(9) Speer hereby acknowledges payment in full of all payments to which he was entitled up to and including January 31, 1930.

(10) This Agreement shall extend to the expiration of the latest Speer patent acquired, or to be acquired, by Certain-teed.

In Witness Whereof, the parties have hereunto set their hands and affixed their seals this 4th day of June, 1930.

ALEXANDER S. SPEER (Seal)

CERTAIN-TEED PRODUCTS CORPORATION

By AUDENRIED WHITTEMORE
Vice President.

STATE OF NEW YORK
COUNTY OF NEW YORK SS:

On this 4th day of June, 1930, personally appeared before me Alexander S. Speer, to me personally known, and known by me to be the individual who executed the above Agreement; and acknowledged before me that he executed the same as his free act and deed.

THOMAS F. BAKER

STATE OF NEW YORK
COUNTY OF NEW YORK SS:

On this 4th day of June, 1930, personally appeared before me Audenried Whittemore, to me personally known, and known by me to be the Vice President of the Certain-teed Products Corporation, and further known by me to be the individual who executed the above Agreement upon behalf of said Corporation; and acknowledged before me that he executed said Agreement upon behalf of the Certain-teed Products Corporation as its free act and deed under authority of the Board of Directors so to do; and that the Corporate Seal was affixed by like authority.

THOMAS F. BAKER

11585 *Government's Exhibit No. 693*

NATIONAL GYPSUM COMPANY
GENERAL OFFICES BUFFALO, N. Y.

SEPTEMBER 11, 1931

MR. C. HENNING
United States Gypsum Co.
300 W. Adams St.
Chicago, Ill.

DEAR MR. HENNING:

Mr. Burley has discussed with you the present trucking practice of the United States Gypsum Company as well as others in the Rochester area. Our understanding is that you have verbally instructed him to meet this situation and that you will confirm this in bulletin form.

To protect our business we are following this practice but feel that a definite schedule of prices on truck deliveries should be laid down and the area defined in an official bulletin.

Very truly yours.

M. H. BAKER
President.

M. H. Baker:MP

11586 *Government's Exhibit No. 694*

CC — M. H. Baker
M. A. Jordan
Harry Scott
E. B. Biesinger

MARCH 22, 1935

MR. ED. H. DIEGEL, GEN'L SALES MGR.
The Ebsary Gypsum Company, Inc.
52 Vanderbilt Avenue
New York City

DEAR MR. DIEGEL:—

Winslow phoned this morning for another 5,000 square feet of foil lath.

As I understand it, this is for an account in New England who ordered a full car of gypsum products, including the foil lath, and it might jeopardize the balance of the car if we delayed on the lath.

I, therefore, told Winslow we would truck it over at once but would have to bill it at the dealer price the same as the last lot on account of the license provisions. Can't you get ahold of Mr. Ebsary and have him sign this license right away? Mr. Baker wants to work cooperatively with Mr. Ebsary on this so you will not be penalized when one of your customers wants foil included in the car but, as explained to you, we can't extend the 12½% discount until Mr. Ebsary signs the foil license. If there is any question about Mr. Ebsary signing this, I suggest he phone Mr. Baker at once so we can get straightened away promptly.

Kindest regards to you and George.

Very truly yours,

Vice President.

RFBurley/B

11587 *Government's Exhibit No. 695*

AUGUST 27, 1935

MR. GEO. N. LENCI
Ebsary Gypsum Co.
52 Vanderbilt Ave.
New York City

DEAR GEORGE:

Attached price lists show the present schedule on foil gypsum board and lath.

After you have signed the foil license agreement I understand that, subject to the approval of licensor, we can sell you at our published dealer price less a manufacturer's discount of 12½% on lath and 25% on board from the F. O. B. mill carload prices.

If you have signed the foil license and see no objection, I would like to write U. S. G. now for permission to put above discounts in effect with you. Please advise me.

Very truly yours,

NATIONAL GYPSUM COMPANY
Vice President.

RFBurley/R

11588 *Government's Exhibit No. 696*

NATIONAL GYPSUM COMPANY
Inter-Office Correspondence

OCT. 7, 1935

E. B. BIESINGER
Earl North
12 E. Girard Blvd.
Kenmore, N. Y.

Earl North who represents Oakfield Gypsum Products Company, 728 Broad Street, Utica, N. Y. advises they have been buying the bulk of their wallboard from Universal although they also buy some from Steve Kelley.

Inasmuch as Oakfield Gypsum Products are not manufacturers of wallboard and, therefore, not licensees, they don't receive the price bulletins from the United States Gypsum Company but rely on their source of supply relaying these bulletins to them.

Earl just advised me that no one advised him of the extention of the trucking area from Western New York mills into Pennsylvania.

Will you please set up copies of all price bulletins on patented board and see that copies are passed to Mr. North and also Oakfield Gypsum Products at Utica on anything that affects their eastern operation?

I also told Mr. North that we would sell them foil board but they would first have to sign the license agreement with United States Gypsum Company on foil. I don't know the exact mechanics of this and would appreciate your discussing this angle with me. In the meantime, will you mail Earl North a copy of our pricing bulletin on foil board?

B R. F. BURLEY

11589 *Government's Exhibit No. 697*

Oct. 24, 1935

F. G. Krumholz
(*Chicago Office*)

Note attached correspondence with Texas Cement Plaster Company. They want to buy Foil Lath and Foil Wallboard from us and possibly Tile Board and Grain Board.

As I understand it, they have never signed the gypsum wallboard license agreement and yet I think U. S. G. is anxious to put them in a position to get these specialties on the usual basis rather than antagonize them in the market. Would you see what U. S. G's attitude is on this—are they already selling them—if so, on what basis—and, would they give us permission to sell them? I believe this is required under the license agreement.

On foil there is a separate license agreement and when we took up with U. S. G. some time ago the matter of our selling foil board to Ebsary, they took the position that Ebsary had to sign the foil license agreement before we could sell them at a discount. Ebsary tell me they have now signed the foil agreement.

While you are talking to Charlie Henning you might ask him to let you know about this.

As far as Texas Cement Plaster is concerned, based on their past attitude, I question if they would sign any kind of a license agreement but I still think it would be smart to let them buy the little foil board they want and we would like to have U. S. G's permission to sell them on the usual 12½% and 15% discount.

In the attached letter, you will note I have added the freight from Sweetwater to Texas Cement Plaster Company's mill. I don't believe that this is necessary and that we should sell them at $30.00 F.O.B. their mill. Would you clarify this as well and get the data back to me as quickly as possible?

Yours very truly,

B R. F. Burley

11590 *Government's Exhibit No. 699*

NATIONAL GYPSUM COMPANY
GENERAL OFFICE—GOLD BOND PRODUCTS
BUFFALO, NEW YORK

JUNE 25, 1932

BOARD SURVEY COMPANY
300 West Adams Bldg.
Chicago, Ill.

Re: Geo: J. Switzer Co.
Litchfield, Conn.

GENTLEMEN:—

The Certain-teed Company recently shipped the above patented wallboard in a car containing 30,000 lbs. of gypsum products and 10,000 lbs. fibre insulation wallboard to make a minimum car of 40,000 lbs.

Our interpretation of the various bulletins covering the terms and conditions under which patented wallboard may be sold is that the minimum car weight must be made up of gypsum and lime products. Our feeling is that the introduction of new products such as insulation board to make the minimum weight would have a tendency to give an undue and unfair advantage to various shippers.

Please advise us definitely on this.

Yours very truly,

NATIONAL GYPSUM COMPANY
R. F. BURLEY
Vice President.

RFBurley/B

11591 *Government's Exhibit No. 700*

JULY 2, 1932

MR. R. F. BURLEY, *V. P.*,
National Gypsum Company,
Buffalo, N. Y.

DEAR MR. BURLEY:

Re: Geo. J. Switzer Co.,
Litchfield, Conn.

Acknowledging your letter of June 25 regarding the sale of patented wallboard by the licensee, the Certain-teed Products Company to Geo. J. Switzer Company, Litchfield, Connecticut, we will investigate and if this sale has been made in violation of their license contract we will take such action as seems necessary and proper to protect the licensor's interest in the matter.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11592 *Government's Exhibit No. 701*

NATIONAL GYPSUM COMPANY
GENERAL OFFICES—GOLD BOND PRODUCTS
BUFFALO, NEW YORK

JULY 12, 1932

BOARD SURVEY COMPANY
300 West Adams Building
Chicago, Ill.

Re: Geo. J. Switzer Co.
Litchfield, Conn.

GENTLEMEN:—

In reference to your letter of July 2, please advise us if the practice of including insulation board to make up minimum weight of gypsum products is or is not in violation of the terms and conditions under which we are priviledged to sell patented wallboard.

Yours very truly,

NATIONAL GYPSUM COMPANY

R. F. BURLEY
Vice President.

RFBurley/B

11593 *Government's Exhibit No. 702*

AUGUST 9, 1932.

MR. R. F. BURLEY, V. P.,
National Gypsum Company,
Buffalo, N. Y.

DEAR MR. BURLEY:

Re: Geo. L. Switzer Co.,
Litchfield, Conn.

It appears from our files that although we have written you twice in regard to the reported sale to Geo. L. Switzer Company, Litchfield, Connecticut by the licensee, the Certain-teed Products Company, at less than the licensor's minimum price to you for such sale of patented board we have overlooked answering your letter of July 12 as to whether or not the practice of including insulation board to make up the minimum weight of gypsum products in a car is or is not in violation of the terms and conditions of your license contract.

Insulation board cannot be used to make up weight in a car of gypsum products where patented board is included. The licensor would construe such a practice as being in violation of your license contract.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11594 *Government's Exhibit No. 703*

NATIONAL GYPSUM COMPANY
General Offices—Gold Bond Products
BUFFALO, NEW YORK

SEPTEMBER 17, 1932

MR. FRANK M. MILLER
Board Survey Company
300 West Adams Bldg.
Chicago, Ill.

Re: James Lumber Company
Racine, Wis.

DEAR SIR:—

Referring to the terms and conditions under which we sell patented wallboard, we feel an audit should be made of Certain-teed's sale of patented board to the above account.

As indicated when you received our entire file on this account in Buffalo, we made allowance in good faith of $30.00 on the first car we shipped them being supported with our mill Superintendent's report that our board shipped at that time was not in good condition.

When this dealer deducted $30.00 on the second car in the Fall of 1931 we refused to make allowance and forced collection of the money. Dealer claimed at that time that Certain-teed would cut the price via the roofing route or with allowance or damaged board. Since forcing collection of their deduction we have not been able to sell James Lumber Co. patented board and they now have Certain-teed board in stock.

Under the circumstances we feel an audit should be made of the Certain-teed sales to this account to determine if roofing or allowances on damaged board have been in violation of the terms and conditions under which patented board can be sold.

Yours very truly,

NATIONAL GYPSUM COMPANY

R. F. BURLEY
Vice President

RFBurley/B

11595 *Government's Exhibit No. 704*

NATIONAL GYPSUM COMPANY
General Offices—Gold Bond Products
BUFFALO, NEW YORK

SEPTEMBER 26, 1932

BOARD SURVEY COMPANY
300 West Adams Bldg.
Chicago, Ill.

Re: Hyde Park Lumber Co.
Cincinnati, Ohio

GENTLEMEN:—

Referring to the terms and conditions under which we sell patented wallboards we have been given to understand that the above is in effect being rebated on patented board by the Certain-teed Company to effect lower than the minimum prices set by the licensor—the rebate being handled in connection with their roofing purchases from the Certain-teed Company. We believe a check of this account is in order.

Yours very truly,

NATIONAL GYPSUM COMPANY

R. F. BURLEY

B

Vice President

RFBurley/B

11596 *Government's Exhibit No. 705*

SEPTEMBER 27, 1932.

MR. R. F. BURLEY, V. P.,
National Gypsum Company,
Buffalo, New York.

DEAR MR. BURLEY:

Re: Hyde Park Lumber Company
Cincinnati, Ohio.

Acknowledging receipt of your letter of September 26 regarding the alleged sale of patented board in conjunction with roofing materials by the licensee, Certain-teed Products Corporation to the Hyde Park Lumber Company, Cincinnati, Ohio, said sale being made in such a manner as to reflect a lower price on patented board through the medium of a rebate on their roofing purchases.

We appreciate your forwarding this information, and will immediately investigate.

Yours very truly,

BOARD SURVEY COMPANY
Executive Secretary.

FMM:AB

11597 *Government's Exhibit No. 706*

NATIONAL GYPSUM COMPANY
General Offices—Gold Bond Products
BUFFALO, NEW YORK

OCTOBER 4, 1932

BOARD SURVEY COMPANY
300 West Adams Bldg.
Chicago, Ill.

Re: Nassau Suffolk Lumber Co.
Long Island

GENTLEMEN:—

Referring to the terms and conditions under which we sell patented wallboard, we have reason to believe that the Certain-teed Company give the above account special terms on roofing which in effect amounts to a rebate on their purchases of patented board. Mr. Gallagher of the United States Gypsum Company is in touch with this situation as well.

We feel an audit should be made of the Certain-teed's dealings with the above concern to determine the exact status of their roofing sales to the above account.

Yours very truly,

NATIONAL GYPSUM COMPANY

R. F. BURLEY
Vice President

RFBurley/B

11598 *Government's Exhibit No. 707*

OCTOBER 8, 1932.

MR. R. F. BURLEY, V. P.,
National Gypsum Company,
Buffalo, N. Y.

DEAR MR. BURLEY:

Re: Nassau Suffolk Lumber Co.,
Long Island, N. Y.

Acknowledging receipt of your letter of October 4 concerning the alleged sale of patented board by the licensee, Certain-teed Products Corporation, to the Nassau Suffolk Lumber Company, Long Island, N. Y. at less than the licensor's minimum price to you for such board in such market, same being effected through a special roofing rebate.

We appreciate your forwarding this information, and will immediately investigate same.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

Government's Exhibit No. 708

NATIONAL GYPSUM COMPANY
General Offices—Gold Bond Products
BUFFALO, NEW YORK

JUNE 2, 1933

BOARD SURVEY COMPANY
300 West Adams Bldg.
Chicago, Ill.

Re: Murphy & Ames
Rosslyn, Va.

GENTLEMEN:—

Referring to terms and conditions under which we sell patented board, the above account who have been buying Gold Bond Board for years recently bought Certain-teed board under Certain-teed's Roofing Contract whereby at the end of twelve months rebate is given on roofing in line with purchases, the understanding being that at the same time rebate will be given on the plaster wallboard purchased during the same period—either directly or in the form of extra discounts on the roofing. We are quite positive the above is in effect.

Yours very truly,

NATIONAL GYPSUM COMPANY

R. F. BURLEY
Vice President

RFBurley/B

11600 *Government's Exhibit No. 709*

JUNE 3, 1933.

NATIONAL GYPSUM COMPANY
Buffalo
New York.

Att: R. F. Burley, V. P.

DEAR SIRS:

Re: Murphy & Ames
Rosslyn, Virginia.

We acknowledge receipt of your letter of June 2 concerning the sale to Murphy & Ames, Rosslyn, Virginia of gypsum wallboard manufactured and sold by the Certain-teed Products Corporation under its license agreement and embodying the claims and inventions of the licensor's patents.

We appreciate your calling this matter to our attention and will immediately investigate same.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11601 *Government's Exhibit No. 701*

NATIONAL GYPSUM COMPANY
General Offices—Gold Bond Products
BUFFALO, NEW YORK

JULY 11, 1933

BOARD SURVEY COMPANY
300 West Adams Bldg.
Chicago, Ill.

Re: Furstenberg Lumber Co.
Saginaw, Mich.

GENTLEMEN:—

Referring to terms and conditions under which we sell patented board, we received the following note from our representative dated June 18th.

"It may be just a coincidence, it may be fate or what have you, but our Certain-teed friends have just gone in and sold the above account their first stock of Certain-teed lath.

At the same time Furstenberg suddenly decorates his buildings with Certain-teed roofing signs and goes out after the roofing business of the town."

On July 6th we received further report as follows—

"The Furstenburg car contained 3 tons of plaster that Furstenberg did not order. He never has used plaster but he now has this batch in his warehouse.

We are following Furstenberg now to see if they have been billed and credited on the plaster or what the final outcome will be.

Furstenberg bought lath and roofing but no board. More later."

We feel a check-up should be made at once to determine what items were included in the car recently shipped
11602 to them by Certain-teed. If Certain-teed records show no plaster shipped them, we suggest it would

be in order to send a special investigator to Saginaw to see if Furstenberg has Certain-teed plaster in stock as the situation now indicates that Certain-teed are in effect giving them prices on patented board under the minimum set by the licensor.

Yours very truly,

NATIONAL GYPSUM COMPANY
R. F. BURLEY
Vice President

RFBurley/B

11603 *Government's Exhibit No. 711*

JULY 29, 1933.

NATIONAL GYPSUM COMPANY
Buffalo
New York

Att: R. F. Burley, V. P.

DEAR SIRS:

Re: Furstenberg Lumber Company
Saginaw, Michigan.

To date we have not received a reply from the licensee, Certain-teed Products Corporation, regarding the alleged sale of patented board to the Furstenberg Lumber Company, Saginaw, Michigan, which you reported to us under date of July 11.

We will advise you immediately upon receiving their reply.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11604 *Government's Exhibit No. 712*

JANUARY 5, 1935

BOARD SURVEY COMPANY
300 West Adams St.
Chicago, Ill.

GENTLEMEN:—

In reply to your letter of December 28th, the present policies set up under the license contract have developed one practice which we feel could be given study with the idea that some more practical plan could be devised.

That is, the practice that permits any dealer to buy in pool cars in lots of 500 feet to 150C feet at the carload price.

We find that many dealers buy extremely small quantities, reordering every few weeks with a penalty to the manufacturer who has to take care of such deliveries.

If a minimum quantity of 5,000 square feet could be set or a mixed order of 5 tons, we do not feel that the industry would be penalized and a better scheme of distribution would prevail.

We also feel that the purchaser of less than a full car should pay as an illustration 50¢ per M up—particularly where stop-over charges are absorbed. If some equitable plan could be worked out along this line, the manufacturer could afford to absorb stop-over charges everywhere, switching charges, demurrage items, etc. all of which represent, we feel, the bulk of the minor disputes with the trade, the bulk of the minor violations of the code and the bulk of the small irritating details that now prevail under the present marketing policies on patented board.

Yours very truly,

NATIONAL GYPSUM COMPANY

Vice President

RFBurley/B

11605 *Government's Exhibit No. 713*

NATIONAL GYPSUM COMPANY
General Offices—Gold Bond Products
BUFFALO, NEW YORK

FEBRUARY 19, 1936

BOARD SURVEY COMPANY
300 West Adams Street
Chicago, Illinois

Attention: Mr. E. W. Carey

GENTLEMEN:

It is reported to us that on Patented Gypsum Board shipped by the United States Gypsum Company on November 6, 1935 and invoiced on November 7, 1935—3/8" Patented Gypsum Wallboard was invoiced at $28.78 per M sq. ft. f.o.b. Fort Sumner, New Mexico, to which point the lowest published freight rate from a base mill is 38½¢ per cwt. That freight rate would make a delivered price of $30.74 per M sq. ft.

It is also reported that included in the same car was some plaster priced at $16.40 per ton as against the correct delivered price of $16.80 per ton based on the manufacturers published price of $11.00 f.o.b. mill and a freight rate of .27 per cwt. plus emergency charge. This reduction in the price of plaster is in effect a cut price on the mixed car and therefore influences the sale of patented gypsum board.

This is in effect a violation of the license agreement in that the licensor does not adhere to his own published prices. Will you please check into the situation and let us have your comments?

Yours very truly,

NATIONAL GYPSUM COMPANY
EDW. B. BIESINGER

E. B. Biesinger:N

11606 *Government's Exhibit No. 714*

CERTAIN-TEED PRODUCTS CORPORATION
100 East 42nd Street
NEW YORK

DECEMBER 17, 1930.

NATIONAL GYPSUM CO.,
Buffalo, N. Y.

Atten:—Mr. M. H. Baker.

DEAR MR. BAKER:—

We received a letter from Mr. Van Hagan after his conversation with you, stating that you wished prices on materials other than those mentioned in the contract. Naturally, there are different conditions surrounding each one of these items and the tonnage of none of these items is to be included with the tonnage of Fibred Plaster and Stucco to get into the various price brackets, and all prices quoted in this letter are net the tenth of the following month, the same as in the contract.

We are giving you below the cost price to you, f.o.b. Fort Dodge and our established selling prices, f.o.b. Fort Dodge:

	Price to you F.O.B. Ft. Dodge	C. P. C. Established Sell. Price, f.o.b. Ft. Dodge
Land Plaster	$ 3.75	$ 6.00
Concrete Bond Plaster	8.75	12.50
Sand Float Finish	12.75	16.00
Prepared Trowel Finish	17.75	21.00
Keene's Cement	21.00	21.75
White Finish	13.75	17.25
White Moulding	14.75	17.25
2" Solid Blocks	.04-1/4	.04-1/2
6" Hollow Blocks	.08-3/4	.09

All prices quoted in this letter are subject to change if the general market price in the territory supplied by the Fort Dodge Plant changes, but in no case shall prices be lower than those quoted except by mutual consent.

On the above materials you are to supply bags, f.o.b. our Fort Dodge Plant, without cost to us, for Land Plaster, Concrete Bond Plaster, Sand Float Finish and Prepared Trowel Finish.

On Keene's Cement we will supply the material in Best Brothers' bags, and the price of $21.00 includes the bags.

On the White Finish and White Moulding, the prices at Fort Dodge are based on prices of $8.00 for White Finish and $9.00 for White Moulding, f.o.b. Blue Rapids, plus warehousing and Freight to Fort Dodge. You are now supplying the bags to Blue Rapids and we will ship sufficient quantities of this material in cars of our own materials going from Blue Rapids to Fort Dodge and will warehouse this material at Fort Dodge for you for mixed car service.

The 2" Solid and the 6" Hollow Blocks will, of
11607 course, carry our brand, the same as the other sizes.

We have not made you any price on Crushed Gypsum Rock because this is a material going to the Portland Cement trade only, and as the selling price is exceedingly low there would seem to be no reason for your organization to attempt to sell any of this material as we could not sell it to you for any less than we charge the Portland Cement plants, which is $1.60 per ton, f.o.b. Fort Dodge.

On all materials, like Hydrated Lime or any other similar materials, that you wanted to ship to the Fort Dodge Plant to be warehoused by us and shipped out in mixed cars, we will handle such materials at your risk for $1.25 per ton, which will include the unloading of material received, the storage and the shipping in mixed cars.

On the Keene's Cement, you will note that the price to you is only 75¢ less per ton than our selling price, but you realize that we are purchasers of this material and consequently if we are to get out even on it we can't allow you any greater margin of profit.

We trust the above arrangement will be entirely satisfactory to you, and if you will sign one copy of this letter and return to us, it can be attached to the original contract and made a part thereof.

Yours very truly,

AUDENRIED WHITTEMORE
Vice President.

ACCEPTED:

M. H. BAKER — NATIONAL GYPSUM CO.

Witness:

F. E. DAVIS

11608 *Government's Exhibit No. 714-A*

CERTAIN-TEED PRODUCTS CORPORATION
100 East 42nd Street
NEW YORK

NATIONAL GYPSUM CO.,
Buffalo, N. Y.

Atten:—Mr. M. H. Baker.

DEAR MR. BAKER:—

We are attaching signed copy of the contract and have dated same today, December 17th.

We have also asked Mr. Van Hagan to proceed immediately with instructions to our Billing Department and the plant so that you can start sending in your orders as soon as arrangements can be made for the necessary sacks, labels, etc.

We have made one change in the contract, merely to clarify the understanding which was undoubtedly clear to you but might not be clear to any one else reading the contract. We have added to the last paragraph of Article 2, the following:

"National agrees to stand the expense of handling and adjusting all complaints"

and we are assuming that as this was the understanding, there would be no objection to adding it to the contract.

There is another thing that we wish to call to your attention, which is that it is clearly understood that if for any reason we desire to shut down the Ft. Dodge Plant, we will have no obligation to ship additional orders for you after notification to you that the plant would be shut down. We have no thought that we will shut it down and we know that if we did shut it down you would not expect us to operate it simply to ship orders for you, but we want this matter clearly understood.

In view of these two points, your signature on the duplicate copy of this letter, and return to us, will be sufficient without changing the contract further.

We feel sure that this contract will work out to our mutual advantage, and we are in hopes that the tonnage you order from the Fort Dodge Plant will be sufficient to enable us to bill you at the minimum price.

Yours very truly,

AUDENRIED WHITTEMORE
Vice President.

AW:LC

ACCEPTED:

M. H. BAKER — NATIONAL GYPSUM CO.

Witness:

F. E. DAVIS

11609 *Government's Exhibit No. 714-B*

This Agreement, made in duplicate this 17th day of December, 1930, by and between Certain-Teed Products Corporation, a Maryland corporation, party of the first part, having its principal office at New York, New York, hereinafter referred to as Certain-teed, and National Gypsum Company, a Delaware corporation, party of the second part, having its principal office at Buffalo, New York, hereinafter referred to as National.

Witnesseth: That

Whereas, National desires to purchase from Certain-teed certain Gypsum products now manufactured by Certain-teed at its Fort Dodge, Iowa Plant; and

Whereas, Certain-teed is willing to sell certain gypsum products to National as is herein provided;

Now, Therefore, the said parties, hereto, in consideration of the foregoing and of the mutual covenants and agreements herein contained, and the performance thereof by the respective parties, do hereby covenant and agree as follows:

1. Certain-teed will sell to National and National will purchase from Certain-teed such quantities of Cement Plaster, Wood Fibered Plaster, Common Finish, Stucco, Plasterboard and Plaster Lath as National may from time to time determine as evidenced by written orders from National to Certain-teed. All products ordered by National and sold by Certain-teed to National will be the same grade of products as now manufactured at the Fort Dodge Plant of Certain-teed.

The prices to be paid by National shall all be f.o.b. cars Certain-teed's Plant Fort Dodge, Iowa, and shall be as follows:

(a) Cement Plaster, Wood Fibered Plaster and Common Finish, (not including bags):—If 5,000 tons per annum are purchased by National, the price will be $4.01 per ton. If less than 5,000 tons are purchased, actual standard cost will be charged but not less than $4.01 nor more than $4.27. If 10,000 tons per annum are purchased, the price on the entire amount will be $3.84 per ton. If more than 5,000 tons but less than 10,000 tons are purchased, actual standard cost will be charged for the entire amount, but not less than $3.84 nor more than $4.01 per ton. If 15,000 tons per annum are purchased, the price on the entire amount will be $7.73 per ton. If more than 10,000 tons but less than 15,000 tons are purchased, actual standard cost will be charged for the entire amount, but not less than $3.73 nor more than $3.84 per ton.

Stucco (not including bags) will be 33¢ per ton less than the above prices.

The total tonnage of the four above items will be used as a basis for the determination of the prices for various quantities, as outlined above.

(b) 3/8" Plaster Lath:—$13.50 per M. sq. ft., Certain-teed to pay the royalty.

3/8" Gypsum Wall Board:—$16.96 per M. sq. ft., Certain-teed to pay the royalty.

(c) 3" Hollow Gypsum Blocks:—3.75 Cents per Square foot.

4" Hollow Gypsum Blocks:—4.25 Cents per Square foot.

11610 If National desires to purchase other materials from time to time, the prices for such other materials will be quoted by Certain-teed to National.

The prices on Cement Plaster, Wood Fibered Plaster, Common Finish and Stucco shall remain in effect from date until December 31, 1931.

The prices on Plaster Board and Plaster Lath shall be subject to change if the licensor changes prices on these products, but in no case shall the prices on Board and Lath be lower than those quoted, except by mutual consent.

The price of Gypsum Blocks shall be subject to change if the general market price in the territory supplied by the Fort Dodge Plant changes, but in no case shall the prices on Blocks be lower than those quoted, except by mutual consent.

2. Certain-teed will bill to National each month for all goods shipped on National's order during the preceding month at the prices herein given. All invoices covering the calendar month will be due and payable net without discount on the tenth of the month following.

As the tonnage of Cement Plaster, Wood Fibered Plaster, Common Finish and Stucco purchased will determine the prices charged, until 5,000 tons have been purchased Certain-teed will bill to National and National will pay to Certain-teed monthly for all shipments made during the preceding month at the following prices:

Cement Plaster, Wood Fibered Plaster and Common Finish	$4.27 per ton
Stucco	3.94 " "

As soon as Certain-teed's shipments for National have reached 5,000 tons, Certain-teed will pay to National in cash an amount necessary to reduce the price paid by National to the prices named for 5,000 tons, and additional shipments will be billed at the 5,000 ton prices. As soon as Certain-teed's shipments for National have reached 10,000 tons, Certain-teed will pay to National in cash an amount necessary to bring the price paid by National to the prices named for 10,000 tons and additional shipments will be billed at the 10,000 ton prices. As soon as Certain-teed's shipments for National have reached 15,000 tons,

Certain-teed will pay to National in cash an amount necessary to bring the price paid by National to the prices named for 15,000 tons and additional shipments will be billed at the 15,000 ton price. It is agreed that no price, billing change or cash adjustment will be made except at the beginning of the month following the month in which quantity shipped by Certain-teed warrants such price and billing changes, and the cash payment by Certain-teed to National to adjust prices shall be made by the tenth of the month on the first of which such a price and billing change occurs; provided, however, all invoices rendered National by Certain-teed which are due have been paid.

National agrees to handle all complaints and adjustments of every kind or character whether or not Certain-teed may be at fault in the quality of product furnished, but Certain-teed agrees to furnish materials of the same grade and quality on National's orders that it supplied to its own customers. National agrees to stand the expense of handling and adjusting all complaints.

3. National will supply at their own expense all paper bags for packing the products purchased, f.o.b. Fort Dodge plant of Certain-teed, and printed with National's brands. Such bags are to be of the same size, type and quality as is or shall be regularly used by Certain-teed.

11611 If National desires Certain-teed to purchase paper bags for National, Certain-teed will do so, charging National the actual cost for such bags purchased. Any bags so purchased by Certain-teed will be paid for by National immediately on receipt of invoice covering the purchase.

Certain-teed assumes no liability for damage by causes beyond their control for any materials owned by National but stored in the Fort Dodge Plant of Certain-teed.

4. Wall Board and Lath supplied by Certain-teed to National shall be of the same appearance and quality as Certain-teed's product but shall be labeled with National's labels to be supplied by National, f.o.b. Fort Dodge Plant of Certain-teed, without charge. Gypsum Blocks shall be supplied with the Certain-teed's regular brand.

5. All orders given by National to Certain-teed shall be given the same consideration in handling and shipping

as is given to orders of Certain-teed, and Certain-teed agrees that sales data, customers' names, prices, etc., on National's business will not be compiled and turned over to the Sales Department of Certain-teed.

6. Failure on the part of National promptly to pay any bills rendered by Certain-teed to National for goods sold to National hereunder when the same are due and payable shall be sufficient to authorize Certain-teed to withhold any and all further shipments or deliveries to National or on National's account, and if any such bills are not paid within a period of thirty (30) days after the same are due and payable, then Certain-teed shall have the right, at its option, to terminate this agreement, with or without notice to National, provided that any such termination shall be without prejudice to any claim of either party against the other arising out of any breach of or failure to perform this agreement occurring prior to such termination.

7. In case National desires any products furnished in jute bags instead of paper, National will supply such jute bags, f.o.b. Fort Dodge Plant of Certain-teed, and the prices for the products shall be the same as if packed in paper. In case any jute bags are returned to the Fort Dodge Plant of Certain-teed, such bags shall be returned free of cost to Certain-teed and the actual cost for cleaning, repairing and putting these bags in serviceable condition will be charged to National by Certain-teed. Certain-teed will also render National a statement showing the number of bags returned, the number of bags requiring repairs and the number of bags unfit for further use. Any bags unfit for further use shall be disposed of as promptly as possible by National.

8. In order to facilitate prompt handling of orders for National by Certain-teed, it is mutually agreed that National can send shipping instructions on memo. shipping order direct to the Fort Dodge Plant of Certain-teed, but all such memo. orders shall be considered in exactly the same way as if regular written orders had been sent, and such memo. orders shall be promptly confirmed by regular orders. All such confirming orders shall be clearly marked with a red stamp "Confirmation" to prevent errors in duplications of shipments already made on memo. orders.

9. It is understood and agreed that the prices named on the various products covered in this contract are for prod-

ucts manufactured at the Fort Dodge, Iowa Plant of Certain-teed. It is specially agreed, therefore, that in the event that, on account of fires, floods, strikes, labor troubles or for any other reason, whether of like kind to those specified or of a wholly different character, not due to the willfull neglect of Certain-teed, the Fort Dodge Plant of Certain-teed shall cease, either temporarily or permanently, to manufacture such products, Cer-
11612 tain-teed will promptly notify National thereof and no liability of any kind or character will attach to Certain-teed for failure to fill orders by National and in such event National will have the right to immediately cancel this contract, provided that it be without prejudice to any claim of either party against the other arising out of any breach of or failure to perform this agreement occurring prior to such termination.

10. This contract, unless cancelled as provided for herein, shall remain in full force and effect from date hereof to December 31, 1931.

In Witness Whereof, the parties hereto have caused these presents to be signed in their respective corporate names by their respective Presidents, and their corporate seals to be affixed and attested by their respective Secretaries, the day and year first above written.

CERTAIN-TEED PRODUCTS CORPORATION

By GEO M BROWN

President

ATTEST:

ROBT M NELSON

Secretary

NATIONAL GYPSUM COMPANY

By M. H. BAKER

President

ATTEST:

F E DAVIS

Secretary.

11613 *Government's Exhibit No. 716*

May 17, 1929

CA7 34=W BUFFALO NY 17 903A
S L AVERY SR=

UNITED STATES GYPSUM CO 300 WEST ADAMS ST=

OUR CONTRACT SIGNED AND IN MAIL REEB READY STOP WE ARE WORKING WITH EBSARY WITH HOPE OF EVERYBODY BEING SET BY SATURDAY TO JUSTIFY YOUR CALLING MEETING ALL BOARD MAKERS MONDAY IF YOU LIKE=
=M H BAKER

11614 *Government's Exhibit No. 717*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, N.Y.

JUNE 20, 1929

MR. S. L. AVERY, *Pres.*
United States Gypsum Co.
300 W. Adams St.
Chicago, Ill.

DEAR MR. AVERY:

In your letter of the 18th you indicate that the Bubble System should be held in abeyance.

I had the impression that if we made a thorough check in on this that some of the other factors in the industry would be influenced by our decision, If we decided to go into the system. In fact, this was my reason for being aggressive in the matter.

I understand that the subject will come up at the meeting the 26th, at which time we may get some further impressions and if after that meeting you feel so inclined, you might pass word on that we complete our investigation.

Very truly yours

M. H. BAKER MP
President

M.H.Baker:MP

11615 *Government's Exhibit No. 718*

NATIONAL GYPSUM COMPANY
General Offices—Buffalo, N. Y.

NOVEMBER 2, 1931

MR. S. L. AVERY
United States Gypsum Co.
300 W. Adams St.
Chicago, Ill.

DEAR MR. AVERY:

In connection with your letter of October 26th I regret our inability to respond to the suggestions made to me while in Chicago some time ago. I have discussed this subject with several of our people, also with Mr. Finck, but we have not been able to develop any practical ideas for strengthening the license agreement.

If you have developed any concrete ideas for strengthening the licensee agreement which you believe will be acceptable to all the licensees, I would appreciate it very much if you would send me a copy of your plan and I will then have an opportunity to turn it over in my mind and discuss it with our Directors so that I will be able to discuss it further with you at an early date.

Very truly yours

M. H. BAKER
President

M.H.Baker:MP

11616 *Government's Exhibit No. 719*

BOARD SURVEY COMPANY
300 West Adams Building
CHICAGO—ILLINOIS

MAY 10, 1935.

MR. ARTHUR R. BLACK
General Sales Manager
American Gypsum Company
Port Clinton, Ohio.

DEAR MR. BLACK:

In order to protect its rights as owner of the patents involved in your license contract authorizing you to manufacture and sell gypsum wallboard and gypsum plasterboard embodying the claims and inventions of the licensor's patents, the licensor has been giving consideration to the matter of license violations through the sale of patented board at less than the established minimum price effected by means of advertising allowances, painting dealers' signs, donations of carpenters' aprons or the sale of such below cost, and concessions of a like nature.

We would appreciate a statement of your policies in this regard to assist the licensor in its further study of this problem.

Yours truly,

BOARD SURVEY COMPANY

E. W. CAREY
Executive Secretary.

11617 *Government's Exhibit No. 720*

DAY LETTER
MAY 17, 1929

S. M. GLOYD
Texas Cement Plaster Co.
Oklahoma City, Okla.

There has been much discussion of infringement settlement and license on board. Nothing has yet developed although I think it safe to say the outlook is favorable. If license were generally closed it would be desirable to discuss a reasonable market price for the licensed product. Will keep you informed in hope that you may participate if outcome favorable.

S. L. AVERY

11618 *Government's Exhibit 721*

5-18-29

MR. S. M. GLOYD
Texas Cement Plaster Co
Oklahoma City, Okla.

Mr. Kling has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license

S. L. AVERY.

11619 *Government's Exhibit No. 722*

53CHAC 16

CX OKLAHOMACITY OKLA MAY 20 29

S L AVERY

U S GYPSUM CO CHGO

JUST RETURNED HOPE YOU GET INFRINGEMENT SETTLEMENT AND ALL TAKE OUT LICENSE WITH YOU ON BOARD

S M GLOYD

11620 *Government's Exhibit No. 723*

MAY 20 1929

MR. S. M. GLOYD
Texas Cement Plaster Company
Oklahoma City, Okla.

DEAR MR. GLOYD:

Thanks for your telegram of May 20. I regret very much that you cannot be with us at the meeting to be held tomorrow although it does not seem to me that the situation makes it necessary. For the past several months, most of those manufacturing boards and infringing our patents have indicated a readiness to pay damages and to take out a license. The American Gypsum Company, however, have been unwilling to subscribe to the terms, the conditions in our opinion require. Mr. Brown, Mr. Reeb, Mr. Ebsary and the National Company have expressed themselves favorable to this adjustment and it is not improbable that the matter may be closed at the meeting tomorrow or soon thereafter. You will, of course, be fully informed of what takes place.

With kind regards, I am

Yours truly,

President.

11621 *Government's Exhibit No. 724*

5-18-29

MR. F. FRED G. EBSARY
Ebsary Gypsum Company
Scottsville, N. Y.

Mr. Kling has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license

S. L. AVERY

11622 *Government's Exhibit No. 725*

5-18-29

MR. M. H. BAKER
National Gypsum Company
Buffalo, N. Y.

Mr. Kling has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American License

S. L. AVERY.

11623 *Government's Exhibit No. 726*

JUNE 24, 1929.

M. H. BAKER, *Pres.*,
National Gypsum Co.,
409 Jackson Building,
Buffalo, New York.

Upon my return to city I find no suggestions from your counsel and since sole purpose of meeting on Wednesday is to consider form of bubble contract I urge that you forward your suggestions at once or have them available at meeting.

JOHN E MACLEISH

JML:EM
1 P. M.
Chg. U. S. G. Co. License Agreement
Copy to Ebsary, Niagara, Certain-teed and Atlantic

11624 *Government's Exhibit No. 727*

JUNE 13, 1933.

MR. F. M. MILLER
Board Survey Company
Chicago.

Recently E. A. Gailagher made the following report:

"Watertown Builders, Watertown, Massachusetts state as long as we insist on bulletin price for plaster, it was not to their advantage to buy our plasterboard. They buy Certain-teed materials, and are selling plasterboard f.o.b. job below our price on plasterboard to the dealer. It is apparent that Certain-teed is selling this firm plaster at less than its regular price so as to influence patented plasterboard business."

H. F. SADLER
A. V. P.

11625 *Government's Exhibit No. 729*

NOVEMBER 14, 1932.

MR. C. O. BROWN, *V. P.*,
Certain-teed Products Corporation,
100 E. 42d Street,
New York City.

DEAR MR. BROWN:

Re: Monroe Hardware Company
Monroe, North Carolina.

We are advised that your company is selling w lboard and/or plasterboard manufactured and sold by you under your license contract to the Monroe Hardware Company, Monroe, North Carolina at less than the licensor's minimum price to you for such board in such market; that you do effect a rebate to this firm on its purchases of patented board from you through means of special allowances and/or special terms on your plaster.

We desire from you a verified statement of your sales of patented board to the Monroe Hardware Company, including in your statement as to whether or not you have made special allowances or rebates to this firm, either on patented board or on your other products.

We will appreciate your early reply.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11626 *Government's Exhibit No. 730*

CERTAIN-TEED PRODUCTS CORPORATION
2246 West 49th Street
CHICAGO, ILL.

NOVEMBER 28th, 1932

MR. FRANK M. MILLER,
Executive Secretary,
Board Survey Company,
300 W. Adams St.,
Chicago, Ill.

Re: Monroe Hardware Co.,
Monroe, North Carolina.

DEAR MR. MILLER:

Acknowledging your inquiry of November 14th addressed our Mr. C. O. Brown reference alleged sale of Gypsum Wallboard and/or Plasterboard to subject concern:

Beg to advise that our sale of license material consists of a Mixed Car Gypsum Lath (3/8") on a basis of our Regular Delivered Price, i.e. $20.04 per thousand square feet and the other products in the car were priced at our regular schedule.

There are no rebates or other allowances of any kind involved.

Yours very truly,

WARREN HENLEY
Merchandise Manager
Gypsum Division.

WH-T

11627 *Government's Exhibit No. 731*

MAY 13, 1933.

MR. C. O. BROWN, *V. P.*,
Certain-teed Products Corp.,
100 E. 42d Street,
New York City.

DEAR MR. BROWN:

Re: Madison Lumber Company
Madison, Indiana.

Please refer to our March 1st letter and your reply of March 13th regarding your sale of patented board to the Madison Lumber Company, Madison, Indiana.

You advised us of rebates on plaster and paint to this dealer but stated that said rebates were not made so as to influence your sales of patented board to the said Madison Lumber Company. However, in addition to our original complaint we again have the statement from the dealer that its purchases of patented board from you are for the reason of the rebates you make on your sales of paint and roofing.

Please advise us as to your sales of patented Board as mentioned herein.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11628 *Government's Exhibit No. 732*

CERTAIN-TEED PRODUCTS CORPORATION
2246 West 49th Street
CHICAGO, ILL.

MAY 25, 1933.

MR. FRANK MILLER, *Executive Secretary,*
The Board Survey Company,
300 W. Adams St.,
Chicago, Ill.

Subject: Madison Lbr. Co., Madison, Ind.

DEAR MR. MILLER:

Acknowledging your inquiry of May 13 addressed to our Mr. C. O. Brown regarding alleged sale of patented gypsum wall board and/or lath to subject concern.

It is probably true that the dealer may have made statement "for the reason of the rebates Certain-teed makes on our sale of paint and roofing" as we are cooperating with this account covering roofing and paint in exactly the same way we cooperate with any other account handling our line of paint and roofing materials, in that our salesmen endeavor to cover the contractor trade to work up prospects for our dealer, and insofar as rebates made on other commodities is concerned, we have made no adjustments other than our regular policy would provide on materials of this nature which were found to be defective.

As mentioned in the writer's letter to you of March 13th, we have made no adjustments or allowances covering paint or roofing other than were absolutely justified, and in no way do such allowances affect their purchase of patented gypsum board and/or lath.

Yours very truly,

WARREN HENLEY,
Merchandise Manager.
Gypsum Division.

WH)MR.

11629 *Government's Exhibit No. 733*

AUGUST 2, 1933.

MR. C. O. BROWN, *V. P.*,
Certain-teed Products Corporation,
100 E. 42d Street,
New York City.

DEAR MR. BROWN:

Re: Smith Lumber Company
Rutland, Vermont.

We are advised that your company has recently sold wallboard and/or plasterboard embodying the claims and inventions of the patents under which you are licensed to the Smith Lumber Company, Rutland, Vermont at prices below the licensor's minimum price to you for such sale.

According to the information that has been given us, you did recently sell this firm patented board along with plaster, and that you did sell said plaster to this firm so as to reflect to it a price which was lower than the licensor's minimum price to you on the patented board.

We desire a verified statement from you fully reporting your sales of such board to this firm within the past three months. Show date of sale, amount of board sold, price at which board was invoiced, and price actually paid by the dealer for such board, including any and all allowances then or subsequently made, which would affect such shipment.

Where you have shipped this firm board in a mixed car with plaster, or board at the same time as plaster, the two orders having been simultaneous, please advise us as to the price you invoiced said plaster.

We will appreciate your early reply.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11630 *Government's Exhibit No. 734*

CERTAIN-TEED PRODUCTS CORPORATION
2246 West 49th Street
CHICAGO, ILL.

AUGUST 18, 1933.

MR. FRANK MILLER, *Ex. Secretary,*
The Board Survey Co.,
300 W. Adams St.,
Chicago, Ill.

Subject: Smith Lumber Company,
Rutland, Vt.

DEAR MR. MILLER:

Acknowledging your inquiry of August 2 addressed to our Mr. C. O. Brown regarding alleged sale of patented gypsum board and/or lath to subject concern.

Information received indicates that our sales to the above concern of patented gypsum board and/or lath, together with gypsum plaster, are in strict accordance with Licensor's bulletin insofar as patented items are concerned, and our sale of other gypsum products are definitely in accordance with our regular schedule of prices applicable, and there is no rebate or other price concession in the transaction that effects the price of gypsum board or lath.

Yours very truly,

WARREN HENLEY
Merchandise Manager,
Gypsum Division.

WH)MR.

11631 *Government's Exhibit No. 735*

AUGUST 3, 1933.

MR. C. O. BROWN, V. P.,
Certain-teed Products Corporation,
100 E. 42d Street,
New York City.

DEAR MR. BROWN:

Re: Arthur White & Son
Corinth, New York.

We are advised that your company has recently sold wallboard and/or plasterboard embodying the claims and inventions of the patents under which you are licensed to Arthur White & Son, Corinth, New York, at prices below the licensor's minimum price to you for such sale.

According to information that has been given us, you did recently sell this firm patented board along with plaster, and that you did sell said plaster to this firm so as to reflect to it a price which was lower than the licensor's minimum price to you on the patented board.

We desire a verified statement from you fully reporting your sales of such board to this firm within the past three months. Show date of sale, amount of board sold, price at which board was invoiced, and price actually paid by the dealer for such board, including any and all allowances then or subsequently made, which would affect such shipment.

Where you have shipped this firm board in a mixed car with plaster, or board at the same time as plaster, the two orders having been simultaneous, please advise us as to the price you invoiced said plaster.

We will appreciate your early reply.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11632 *Government's Exhibit No. 736*

CERTAIN-TEED PRODUCTS CORPORATION
2246 West 49th Street
CHICAGO, ILL.

AUGUST 18, 1933.

MR. FRANK MILLER,
Board Survey Co.
Chicago, Illinois.

Arthur White & Son,
Corinth, N. Y.

DEAR MR. MILLER:

Acknowledging your inquiry of August 3 addressed to our Mr. C. O. Brown regarding alleged sale of patented gypsum board and/or lath to subject concern.

Information received indicates that our sales to the above concern of patented gypsum board and/or lath, together with gypsum plaster, are in strict accordance with Licensor's bulletin insofar as patented items are concerned, and our sale of other gypsum products are definitely in accordance with our regular schedule of prices applicable, and there is no rebate or other price concession in the transaction that affects the price of gypsum board or lath.

Yours very truly,

(Sgd) WARREN HENLEY
Merchandise Manager,
Gypsum Division.

WH)MR.

 Government's Exhibit No. 737

AUGUST 3, 1933.

MR. C. O. BROWN, V. P.,
Certain-teed Products Corporation,
100 E. 42d Street,
New York City.

DEAR MR. BROWN:

Re: Charles Collins & Sons
Troy, New York.

We are advised that your company has recently sold wallboard and/or plasterboard embodying the claims and inventions of the patents under which you are licensed to Charles Collins & Sons, Troy, New York at prices below the licensor's minimum price to you for such sale.

According to the information that has been given us, you secure patented board business from this firm by reason of a special price which is less than the licensor's minimum price to you, by reason of a concession in price on your other products. Namely; plaster, paint or roofing.

We desire from you a verified statement as to your sales of patented board to this firm, also as to whether or not any allowances have been made on your other products which would affect your sales of patented board.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11634 *Government's Exhibit No. 739*

CERTAIN-TEED PRODUCTS CORPORATION
2246 West 49th Street
CHICAGO, ILL.

AUGUST 18, 1933.

MR. FRANK MILLER,
Board Survey Co.,
Chicago, Illinois.

Subject: Chas. Collins & Sons,
Troy, N. Y.

DEAR MR. MILLER:

Acknowledging your inquiry of August 3 addressed to our Mr. C. O. Brown regarding alleged sale of patented gypsum board and/or lath to subject concern.

Information received indicates that our sales to the above of patented gypsum board and/or lath, together with gypsum, roofing and paint products, are in strict accordance with Licensor's bulletin insofar as patented items are concerned, and our sale of other products mentioned above are definitely in accordance with our regular schedule of prices applicable, and there is no rebate or other price concession in the transaction that affects the price of gypsum board or lath.

Yours very truly,

WARREN HENLEY
Merchandise Manager,
Gypsum Division.

WH)MR.

11635 *Government's Exhibit No. 739*

AUGUST 19, 1932.

MR. WARREN HENLEY,
Certainteed Products Corp.,
One North Canal St.,
Chicago, Illinois.

DEAR MR. HENLEY:

Re: W. Skobliski
Long Island, N. Y.

Please refer to our previous correspondence and your June 21 letter regarding your sales of patented board to W. Skobliski, Long Island, N. Y. at less than the licensor's minimum price to you for such board in such market.

We are informed that subsequent to the licensor's bulletin of April 12, 1932 you have made special allowances on your other products sold to this firm in such a way as to reflect a lower minimum price to it on its purchases of patented board from you.

Please advise us in detail concerning the above mentioned transactions.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11636 *Government's Exhibit No. 740*

UNITED STATES GYPSUM CO.

Subject W. Skobliski, West Hempstead, L. I.

AUGUST 15, 1932.

MR. F. M. MILLER
Board Survey Company
Chicago, Illinois.

The following is a report submitted to Sales Manager Gallagher by Salesman Roche on August 5th, which is self-explanatory.

"Says he is wholesale and retail and that he sells more material to dealers than to jobs. Claims he handled 30 cars of Gypsum-Board last year and seven cars so far this year. Claims to be handling Certain-teed. I went through his warehouse and found mostly Bestwall and unlabeled board that looked like Bestwall. Also some Gypsolite and some Rockwall Finisher. Tried to get something definite from him. The best I could get was that he sells it to other dealers out of the car for from $29.00 to $31.00—that speaks for itself, and if Holloway can get some dealer to buy it at that price we have something to go on."

H. F. SADLER
A. V. P.

11637 *Government's Exhibit No. 741*

CERTAIN-TEED PRODUCTS CORPORATION
One Canal Street,
CHICAGO, ILL.

AUGUST 29TH, 1932.

MR. FRANK M. MILLER,
Executive Secretary,
Board Survey Company,
300 W. Adam St.,
Chicago, Ill.

Re: W. Skobliski, Long Island, N. Y.

DEAR MR. MILLER:

Acknowledging your inquiry of August 19th with reference to sale of patented board to subject concern at less than licensor's minimum price for such board:

In accordance with the writer's letter to you June 21st, under above subject, beg to advise that subsequent to licensor's Bulletin dated April 12, 1932, we are conforming strictly to licensor's prices and, further, we wish to advise that we are not selling subject concern any of our other products at a price that in any way has any relationship to this board business.

Yours very truly,

(Sgd) WARREN HENLEY
Merchandise Manager
Gypsum Division

WH-T

11638 *Government's Exhibit No. 742*

CC Warren Henley

AUGUST 23, 1932.

MR. C. O. BROWN, V. P.,
Certain-teed Products Corp.,
100 E. 42d Street,
New York City.

DEAR MR. BROWN:

Re: Cook Lumber Co.,
Louisville, Ky.

We are advised that your company has recently sold patented gypsum wallboard manufactured and sold under your license contract to the Cook Lumber Company, Louisville, Kentucky at less than the licensor's minimum price to you for such sales; that you did sell the said Cook Lumber Company patented wallboard on six portable county schools in a lump sum together with your roofing, and that the price you figured on the roofing was such as to reflect a lower price than the licensor's minimum price to you on patented wallboard in the Louisville, Kentucky market.

Please advise us in detail of your sale of patented wallboard to the Cook Lumber Company, Louisville, Kentucky as mentioned above.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

Government's Exhibit No. 743

CERTAIN-TEED PRODUCTS CORPORATION
One North Canal Street
CHICAGO, ILL.

SEPTEMBER 8th, 1932.

MR. FRANK MILLER,
Executive Secretary,
Board Survey Company,
300 W. Adams St.,
Chicago, Ill.

DEAR MR. MILLER:

Re: COOK LUMBER CO.,
Louisville, Ky.

Acknowledging your inquiry of August 23rd addressed to our Mr. C. O. Brown regarding sale by us to subject concern of GYPSUM BOARD:

This is to advise that we sold the board at our regular scheduled price involving approximately 20,000 feet and, in addition, we sold some 100 Sqs. of 10" Cut-Out Shingles at our regular price of $3.40 per square—this through our jobber, Central Paint & Roofing Company.

There was no cut price involved on the part of either roofing or gypsum board in this transaction. However, I understand we did promise to take some advertising space on subject concern's billboard similar to the arrangement entered into late last year by U. S. Gypsum Company, who at that time took advertising space on the billboard above mentioned.

Yours very truly,

WARREN HENLEY
Merchandise Manager
Gypsum Division

WH-T

11640 *Government's Exhibit No. 744*

CERTAIN-TEED PRODUCTS CORPORATION
2246 West 49th Street
CHICAGO, ILL.

MARCH 24, 1934.

MR. H. F. SADLER, *Executive Secretary,*
The Board Survey Company,
300 W. Adams St.,
Chicago, Ill.

Re: SERVICE MASONS SUPPLY CO.,
New York, New York

DEAR MR. SADLER:

Acknowledging your inquiry March 16th addressed to our Mr. C. O. Brown regarding alleged sale of patented gypsum board and/or lath to subject concern.

Our records indicate no sale of patented board or lath to subject concern within the last six months. Therefore, the information you have received is incorrect.

Yours very truly,

WARREN HENLEY
Merchandise Manager,
Gypsum Division.

WH)MR.

11641 *Government's Exhibit No. 746*

April 24, 1934.

MR. WARREN HENLEY
Certain-teed Products Corporation
2246 W. 49th Street
Chicago, Illinois.

DEAR MR. HENLEY:

Re: Shaffer Lbr Company
Laurel, Maryland.

Referring to your license contract covering the sale of patented gypsum board, it is reported you recently sold to the Shaffer Lumber Company of Laurel, Maryland a part carload of gypsum wallboard and other gypsum commodities included in a stopover car with final destination at Washington, D. C. It is further alleged that you absorbed all stopover charges in connection with the intermediate Laurel destination, and that you sold the other gypsum materials at substantially less than the published price in order to influence the sale of the patented gypsum board.

Will you please immediately examine this transaction and advise us concerning it?

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

11642 *Government's Exhibit No. 745*

MARCH 16, 1934.

MR. C. O. BROWN, V. P.
Certain-teed Products Corp.,
100 E. 42d Street,
New York City.

DEAR MR. BROWN:

We are informed that your company has recently sold in a carload lot gypsum plasterboard embodying the claims and inventions of the patents under which you are licensed to the Service Masons Supply Company, New York City at prices below the licensor's minimum price to you for such lath in that market, the reduction of the licensor's minimum price being in the form of allowances on other commodities, the allowances being made to influence the purchase of patented lath from your company and thus reducing the price of such lath.

We desire a verified statement from you fully reporting the sales of such board to the Service Masons Supply Company within the last six months, showing date of sale, amount of board sold, price at which board was invoiced, and the price actually paid by the dealer for such board, including any and all allowances then or subsequently made affecting such shipment.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

11643 *Government's Exhibit No. 747*

CERTAIN-TEED PRODUCTS CORPORATION
2246 West 49th Street
CHICAGO, ILL.

MAY 11, 1934

MR. H. F. SADLER, *Executive Secretary*
Care, Board Survey Company
300 West Adams Street
Chicago

SUBJECT: Shaffer Lumber Co
Laurel, Maryland

Dear Mr. Sadler:

Acknowledging your inquiry of April 24 regarding alleged sale of patented gypsum board to subject concern.

This is to advise that the gypsum board sold the above moved in a stop-over car on a basis of $30.44 per M sq. ft. No stop-over charges were allowed.

The balance of the car, consisting of plaster was destined Washington, D. C. and was sold on a basis of $1.00 per ton higher than other manufacturers are charging for plaster in the Washington market at the present time.

Yours very truly

WARREN HENLEY
Merchandise Manager
Gypsum Division

WH-os

11644 *Government's Exhibit No. 748*

JULY 19, 1934.

MR. C. O. BROWN, *V. P.*,
Certain-teed Products Corporation:
100 E. 42d Street,
New York City.

Re: Universal Building Material Company
New York City.

DEAR MR. BROWN:

We are informed that you have recently sold a carload of gypsum lath manufactured and sold by you under your license contract to the Universal Building Material Company, New York City at less than the licensor's minimum price to you for such sale.

Specifically, it has been reported to us that the reduction in price below the licensor's minimum price was accomplished through a rebate in May 1934 of $1.50 per ton on 80 tons of casting plaster shipped by you to this dealer during January and February 1934, the rebate having been made with the distinct understanding that your company would receive an order for a carload of patented lath in return. We are informed that the Universal Building Material Company, solely in consideration of this allowance, actually purchased from you and took into their stock a carload of 6000 pieces of patented lath.

We desire a verified statement from you fully reporting your sales of patented lath to the Universal Building Material Company, New York City within the last six months showing date of sale, amount of lath sold, price at which lath was invoiced, and price actually paid by the Universal Building Material Company for such lath, including any and all allowances then or subsequently made affecting such shipments, including specific reference to the alleged allowance of $1.50 per ton on the 80 tons of plaster above mentioned.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

11645 *Government's Exhibit No. 749*

CERTAIN-TEED PRODUCTS CORPORATION
2246 West 49th Street
CHICAGO, ILL.

JULY 31, 1934

MR. H. F. SADLER, *Executive Secretary*
Board Survey Company
300 W. Adams Street
Chicago

SUBJECT: Universal Building Material Co.,
New York City

DEAR SIR:

Acknowledging your inquiry of July 19 to our Mr. C. O. Brown reference alleged sale of patented gypsum board and/or lath to subject concern.

The information you have received is 100% incorrect. Early this year we were maintaining a firm price of $17.20 on "white goods". Competition compelled us to reduce our price to $15.00 and we therefore credited subject concern with our January invoicing to the extent of $2.20 per ton. The latter part of March and early in April we found that our competitors had again reduced price of basis of $12.00, and we again credited subject concern for April deliveries, not, however, down to $12.00, but to a basis of $13.50. Our April shipments had been invoiced at $15.00, and as mentioned we rebated them on the basis of $13.50 cost.

There is absolutely no connection between this competitive situation and our sale of gypsum board and lath to subject concern.

Yours very truly

WARREN HENLEY
Merchandise Manager
Gypsum Division

WH-os

11646 *Government's Exhibit No. 750*

COMPLAINT ON SALE OF PATENTED GYPSUM WALLBOARD AND GYPSUM PLASTERBOARD IN VIOLATION OF LICENSE TO MANUFACTURE AND SELL SUCH PATENTED PRODUCTS

9/13/35
(Date)

To:

Board Survey Company,
300 West Adams Street,
Chicago, Illinois.

Date of Complaint 9/3/35

Name of Customer involved A. Sklar & Sons, Inc.

Address of Customer involved Yonkers, N. Y.

Date of Violation..... Shipped From..... (Mill) By..... (Rail or Truck)

Type of Violation.....

Footage Involved	(Wallboard) / (Plasterboard)	Size	(Wallboard) / (Plasterboard)	Billed Price Per M	(Wallboard) / (Plasterboard)	Price Should Have Been	(Wallboard) / (Plasterboard)

LICENSEE'S EXPLANATION

We sold subject concern Gypsum Board and Lath and as well carload of Building Paper. Both cars sold strictly in accordance with our regular policy,—

⅛" Gypsum Lath at $15.30 per M and ¼" at $14.90 per M.

Building Paper sold on our current price list, i.e., $38.00 per ton less 7½%, plus the equalized freight to Yonkers.

CERTAIN-TEED PRODUCTS CORP.
(Name of Licensee)

By WARREN HENLEY
MERCHANDISE MANAGER—GYPSUM DIVISION
(Title)

(Use this Form to Answer Complaints from Board Survey Co.)

11647 *Government's Exhibit No. 751*

COMPLAINT ON SALE OF PATENTED GYPSUM WALLBOARD AND GYPSUM PLASTERBOARD IN VIOLATION OF LICENSE TO MANUFACTURE AND SELL SUCH PATENTED PRODUCTS

September 3, 1935.
(Date)

To:

Board Survey Company,
300 West Adams Street,
Chicago, Illinois.

Complaint against Certain-teed Products Corporation
(Manufacturer)

Name of Customer involved A. Sklar & Sons, Inc.

Address of Customer involved 55 Riverdale Avenue, Yonkers, New York.

Date of Violation..... Shipped From..... (Mill) By..... (Rail or Truck)

Type of Violation.....

Footage Involved	Size	Billed Price Per M	Price Should Have Been
(Wallboard)	(Wallboard)	(Wallboard)	(Wallboard)
(Plasterboard)	(Plasterboard)	(Plasterboard)	(Plasterboard)

FACTS CONCERNING COMPLAINT

The above dealer has been a USG customer on patented plasterboard. Early in August they purchased a car of building paper from Certain-teed and at the same time a car of plasterboard. It is our belief that the price of building paper was cut to procure the building board business.

Will you please investigate?

USG
(Name of Complainant)

By .....
.....
(Title)

(Use reverse side, if more space needed for complaint)

11648 *Government's Exhibit No. 752*

COMPLAINT ON SALE OF PATENTED GYPSUM WALLBOARD AND GYPSUM PLASTERBOARD IN VIOLATION OF LICENSE TO MANUFACTURE AND SELL SUCH PATENTED PRODUCTS

September 3, 1935.
(Date)

To:

Certain-teed Products Corp.,
Licensee
105 W. Adams Street,
Chicago, Illinois. Attention: Mr. Warren Henley

A complaint has been filed against your company as follows:

Name of Customer involved A. Sklar & Sons, Inc.

Address of Customer involved Yonkers, New York.

Date of Violation..... Shipped From..... (Mill) By..... (Rail or Truck)

Type of Violation.....

Footage Involved	Size	Billed Price Per M	Price Should Have Been
(Wallboard)	(Wallboard)	(Wallboard)	(Wallboard)
(Plasterboard)	(Plasterboard)	(Plasterboard)	(Plasterboard)

FACTS CONCERNING COMPLAINT

It has been reported to us that your company sold a car of building paper and a car of patented gypsum board to the above dealer in the early part of August, and that the building paper was sold at a low price for the purpose and with the result of procuring the patented gypsum board business, thereby in effect selling the patented product at less than the minimum established by the licensor.

Will you please investigate and advise us of your findings?

BOARD SURVEY COMPANY

By .....
Executive Secretary.

11649 *Government's Exhibit No. 753*

APRIL 13, 1932.

MR. M. H. BAKER, *President,*
National Gypsum Company,
Buffalo, New York.

DEAR MR. BAKER:

We are advised, by another licensee, that you have recently sold wallboard embodying the claims and inventions of the patents under which you are licensed, and insulation board to the Ashland Lbr. Co., Ashland, Ohio under such circumstances as to indirectly effect a rebate or discount to the Ashland Lumber Co. on the patented wallboard purchased by it and therefore in violation of your license contract.

Will you please advise us in detail all facts pertaining to the above mentioned transaction.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM'AR

11650 *Government's Exhibit No. 754*

CERTAIN-TEED PRODUCTS CORPORATION
Daily News Building
1 North Canal Street
CHICAGO, U. S. A.

April 5, 1932.

MR. FRANK M. MILLER,
Executive Secretary,
Board Survey Company,
300 W. Adams St.,
Chicago, Illinois.

Subject: Ashland Lumber Co.,
Ashland, Ohio.

DEAR MR. MILLER:

The National Gypsum Company have recently sold subject concern a carload of Gypsum Wallboard, which we understand was in accordance with regular price as set up by licensor.

However, sale of the Gypsum Board was predicated on a very low price having been made on a carload of Insulating Board. In other words, a very low price was made on the Insulating Board, *provided* customer bought a straight car of Gypsum Board.

Will you please check this situation at your earliest convenience, obliging

Yours very truly,

WARREN HENLEY
Merchandise Manager
Gypsum Division

WH-T

11651 *Government's Exhibit No. 755*

AUGUST 10, 1932.

MR. M. H. BAKER, *Pres.*,
National Gypsum Company,
Buffalo, N. Y.

DEAR MR. BAKER:

Re: Fisher Lumber Co.,
Vermilion, Ohio.

We are advised that your company has recently sold wallboard and/or plasterboard embodying the claims and inventions of the patents under which you are licensed to the Fisher Lumber Company, Vermilion, Ohio at prices below the licensor's minimum price to you for such sales.

It is reported to us that you donated Colortex to the Fisher Lumber Company, Vermilion, Ohio in amounts sufficient to redecorate the office of this firm, and that this donation was so made as to reflect a lower price on patented board, and in consequence of which you secured an order for patented board from this firm.

Will you please advise us in detail concerning this transaction?

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11652 *Government's Exhibit No. 756*

AUGUST 10, 1932.

MR. F. M. MILLER
Board Survey Co.

Re: Fisher Lbr. Co.,
Vermilion, Ohio.

Under date of August 6, our salesman reported that the licensee, National Gypsum Company, donated enough Colortex to redecorate the office of the Fisher Lumber Company, Vermilion, Ohio. As a result of this donation secured a ½ carload order of patented wallboard and lath.

Will you please handle with the licensee, National Gypsum Company?

H. F. SADLER
A. V. P.

11653 *Government's Exhibit No. 757*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, N. Y.

AUGUST 23, 1932

MR. F. M. MILLER
Board Survey Co.
300 West Adams Bldg.
Chicago, Ill.

DEAR MR. MILLER:

This will acknowledge your letter of August 10th in reference to a donation of Color Texture affecting the sale of patented board to Fisher Lumber Co., Vermilion, Ohio. Each and every shipment made this concern, according to our records, has been paid in full with no credit allowances of any nature.

On May 16th we shipped them 25 lbs. of Color Texture and settlement was received for this shipment by check June 13th. On June 13th we shipped them another 10 lbs. and check was received to cover that shipment June 17th. On June 20th we shipped them 200 lbs. which was paid for in full by check July 1st.

All of the above was invoiced at our regular prices of 10¢ per lb. on 25 lb. cases and 10½¢ per lb. on 10 lb. cases.

Very truly yours

M. H. BAKER

MP

President

M. H. Baker:MP

11654 *Government's Exhibit No. 758*

CERTAIN-TEED PRODUCTS CORPORATION
2246 West 49th Street
CHICAGO, ILL.

OCTOBER 13, 1932.

MR. FRANK M. MILLER,
Executive Secretary,
Board Survey Company,
300 W. Adams St.,
Chicago, Illinois.

Re: J. T. JUSTICE LUMBER CO.,
LOUISA, KENTUCKY.

DEAR MR. MILLER:

Subject concern advised us that they have purchased a mixed car of Board and Plaster Products. . . The board content on a price basis $2.00 per thousand under our delivered price for Louisa, Kentucky.

Will you kindly check the last shipment made by National Gypsum Company and advise us the delivered price on the Board and/or Lath contained in the car, and also whether or not there was any special price applicable to the other items in the car that would permit of this business being lost to us.

Yours very truly,

WARREN HENLEY
Merchandise Manager.
Gypsum Division

WH-t

11655 *Government's Exhibit No. 759*

OCTOBER 31, 1932.

MR. R. F. BURLEY, *V. P.*,
National Gypsum Company,
Buffalo, N. Y.

Re: J. T. Justice Lumber Co.,
Louisa, Kentucky.

DEAR MR. BURLEY:

We are informed that your company has recently sold in carload lots wallboard and/ plasterboard embodying the claims and inventions of the patents under which you are licensed to J. T. Justice Lumber Company, Louisa, Kentucky at prices below the licensor's minimum price to you and consequently in violation of the terms and conditions of your license agreement.

We desire a verified statement from you fully reporting your sales of such wallboard and/or plasterboard to the J. T. Justice Lumber Company, Louisa, Kentucky within the last six months showing date of sale, amount of board sold, price at which board was invoiced, and price actually paid by the dealer for such board, including any and all allowances then or subsequently made effecting such shipment.

This request is occasioned by a complaint from one of the licensees that you did sell wallboard to the above concern at $2.00 per thousand under the delivered price for Louisa, Kentucky, also, that on your last shipment special allowances were made on your other products sold to this firm in such a way as to reflect a lower minimum price to it on its purchases of patented board from you.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:EAB

11656 *Government's Exhibit No. 760*

DECEMBER 20, 1932.

MR. M. H. BAKER, *Pres.*,
National Gypsum Company,
Buffalo, New York.

DEAR MR. BAKER:

Re: Axinn Lumber Company
Queens Village, L. I.

We are advised that your company has recently quoted wallboar embodying the claims and inventions of the patents under which you are licensed to the Axinn Lumber Company, Queens Village, Long Island at prices below the licensor's minimum price to you for such sale; that you did recently quote your insulation board in conjunction with patented wallboard at such prices that would reflect to the said Axinn Lumber Company a lower price on its purchases of patented wallboard than the licensor's minimum price to you. It is further reported that your representative quoted a special price of $26.00 per M sq. ft. delivered carload lot on your Insulation board to this dealer, provided said dealer did also give you his patented wallboard business.

We will appreciate your advising us fully in regard to this transaction.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11657 *Government's Exhibit No. 761*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, New York
GOLD
BOND
PRODUCTS

JANUARY 9, 1933

BOARD SURVEY COMPANY
300 West Adams Bldg.
Chicago, Ill.

Re: Axinn Lumber Company
Queens Village, L. I.

GENTLEMEN:—

In reply to your letter of December 20th, all sales of patentee board to the above account were made at licensor's published price for patented board.

We sold them one car of insulation board October 17th at our published price for insulation board. After shipment was received Axinn found, due to the interested activities of one of our discharged salesmen, that we had previously shipped insulation at a lower price to some other lumber dealer on the Island and Axinn is now insisting on the lower insulation board price. So far we have not made any adjustment.

There was no connection between the sale of insulation board and patented plaster board.

Yours very truly,

NATIONAL GYPSUM COMPANY

Vice President

RFBurley/B

11658 *Government's Exhibit No. 762*

Subject: Michael Deutsch.

APRIL 15, 1933.

MR. F. M. MILLER
Board Survey Company
Chicago.

Under date of April 12, 1933 we have the following report from Mr. Jenkins, President of the Samson Plasterboard Company.

> "Reports we have indicate this dealer is now handling National Products and gave as his reason, our refusal to ship Insulating Board seconds. Deutsch no doubt was able to get Maftex Insulating Board in carload lots at less than $30.00 and this fact took the Gypsum Board and plaster business with it for National. Deutsch would not state what price he paid for Maftex but the fact that other dealers in that vicinity claim that they can go to Michael Deutsch's warehouse and pick up Maftex in any quantity at $30.00 indicates that he has a lower price on Insulation from National than our carload price, as he would hardly unload the material into his warehouse, store it and reload it on the dealers' trucks as they want it and invoice at the price he pays."

H. F. SADLER
A. V. P.

11659 *Government's Exhibit No. 763*

APRIL 17, 1933.

NATIONAL GYPSUM COMPANY,
Buffalo,
New York.

Att: M. H. Baker, Pres.

Re: Michael Deutsch
Woodridge, New York

DEAR SIRS:

We are advised that your company has recently sold wallboard and/or plasterboard embodying the claims and inventions of the patents under which you are licensed to Michael Deutsch, Woodridge, New York at prices below the licensor's minimum price to you for such sale.

Specifically, that you did sell your insulation board in conjunction with patented board at such prices that would reflect to the said Michael Deutsch a lower price on his purchases of patented board than the licensor's minimum price to you.

Please advise us of your sales of patented board to this firm, including statement as to any and all allowances you may have made to this firm, which would affect your sales of patented board.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary

FMM:AB

11660 *Government's Exhibit No. 764*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, New York
GOLD
BOND
PRODUCTS

MAY 1, 1933

MR. FRANK M. MILLER,
Board Survey Company
300 West Adams Bldg.
Chicago, Ill.

DEAR SIR:—

Re: Michael Deutsch
Woodbridge, N. Y.

Concerning the above mentioned inquiry which contends that we have used Insulation Board to influence the sale of patented gypsum board, I find that we have sold this dealer some of our products since 1931. We first sold him patented board in January 1932 and shipped him patented board as late as November 1932. We have, however, not shipped him any since then.

We made no Insulation Board sales to this dealer until the latter part of January 1933. There was a complaint on the quality of this Insulation Board and a credit allowed accordingly but the file indicates that the allowance was entirely on the merits of the Insulation Board case itself.

Furthermore, as we have not sold patented gypsum board since making the sale of Insulation Board, that can hardly have influenced any patented board sales so further detail on the Insulation Board incident will hardly be of interest on this inquiry.

Yours very truly,

NATIONAL GYPSUM COMPANY

R. F. BURLEY
Vice President

RFBurley/B

11611 *Government's Exhibit No. 765*

Subject: McCluskey Lumber Co., Kane, Pa.

APRIL 21, 1933.

MR. F. M. MILLER
Board Survey Company
Chicago.

E. A. Gallagher reports under date of Apr. 19.

This dealer is remodeling its offices and has obtained approximately 3000 ft wood grain gold Bond board from National for use in this remodeling work. Mr. McCluskey claims National made him a very attractive concession on this board.

H. F. SADLER
A. V. P.

11662 *Government's Exhibit No. 766*

JULY 31, 1933.

NATIONAL GYPSUM COMPANY
Buffalo
New York.

Att: R. F. Burley, V. P.

DEAR SIRS:

McCluskey Lumber Company
Kane, Pennsylvania.

In April we requested information from you regarding your alleged donation of patented board for remodel work on the office of the McCluskey Lumber Company, Kane, Pennsylvania, and have your reply that the wood grain board used was invoiced at the licensor's minimum price.

In answering, you failed to advise us as to whether or not you donated or sold at less than your regular price Insulation board, or Plastic paint, or other products, thus reflecting a lower price for this job on the patented board used than the licensor's minimum price to you.

We will appreciate your early reply.

Yours truly,

BOARD SURVEY COMPANY
Executive Secretary.

FMM:AB

11663 *Government's Exhibit No. 767*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, New York
GOLD
BOND
PRODUCTS

AUGUST 9, 1933

BOARD SURVEY COMPANY
300 West Adams Building
Chicago, Illinois.

Attention: Frank M. Miller, Executive Secretary

GENTLEMEN:

Re: McCluskey Lumber Company
Kane, Pennsylvania

Referring to your letter of July 31st, we did, on March 6th, give a small quantity of our Color Texture to McCluskey Lumber Company for demonstration of that material thru its use on some ceilings in their display offices.

We also sold them some Insulation Board Seconds. You understand, of course, that we do not manufacture our Insulation Board, having the exclusive sale of another manufacturer's out-put. The Insulation Board was shipped out of the regular run of Seconds laid aside by this other manufacturer and so billed to us—we in turn billing the customer accordingly.

As far as either the Color Texture or the Insulation Board are concerned, we fail to see how they have any bearing on our sales of patented board as we have been selling the account regularly for at least the past four years.

Yours very truly,

NATIONAL GYPSUM COMPANY

R. F. BURLEY
Vice President

R. F. Burley:N

11664 *Government's Exhibit No. 768*

COMPLAINT ON SALE OF PATENTED GYPSUM WALLBOARD AND GYPSUM PLASTERBOARD IN VIOLATION OF LICENSE TO MANUFACTURE AND SELL SUCH PATENTED PRODUCTS

June 23, 1936.
(Date)

To:

Board Survey Company,
300 West Adams Street,
Chicago, Illinois.

Complaint against National Gypsum Company
(Manufacturer)

Name of Customer involved Montgomery Mallue Lumber Company

Address of Customer involved.....

Date of Violation.... Shipped From.... By.....
(Mill) (Rail or Truck)

Type of Violation.....

Tonnage involved	Size	Billed Price Per M	Price Should Have Been
(Wallboard)	(Wallboard)	(Wallboard)	(Wallboard)
(Plasterboard)	(Plasterboard)	(Plasterboard)	(Plasterboard)

FACTS CONCERNING COMPLAINT

We have a report that the National Gypsum Company have, through the means of lower prices on other items, such as insulation board and fiber board, influenced the patented gypsum board business of this account. They were formerly our dealer, and the National Gypsum Company have been able to sell them as a result of the concessions which have been made to jobbing arrangements on other items. We believe this definitely reflects a lower price on patented gypsum board, and that the matter should be promptly investigated.

UNITED STATES GYPSUM COMPANY
(Name of Complainant)

By H. F. SADLER

.....
(Title)

(Use reverse side, if more space needed for complaint)

11665 *Government's Exhibit No. 769*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, New York
GOLD
BOND
PRODUCTS

NOVEMBER 11, 1936

SCOTT, MACLEISH & FALK
134 South LaSalle St.
Chicago, Ill.

Re: Montgomery Mallue Lumber Co.
Buffalo, N. Y.

GENTLEMEN:

Referring to the complaint of alleged license violations which accompanied your letter of July 17th, our sales to Montgomery Mallue Lumber Company of all products have been in accordance with the Merchandising Plan governing each specific product. We have not made sales to Montgomery Mallue Lumber Company contrary to our established pricing policy on any product outside of the gypsum industry field so we cannot see how any of our sales of other products could be construed as influencing in any way the sale of patented gypsum board. This account did not have to buy patented gypsum board in order to get the other products on exactly the same basis that he purchased them.

Yours very truly,

NATIONAL GYPSUM COMPANY

R. F. BURLEY
Vice President

B

RFBurley/R

11666. *Government's Exhibit No. 770*

MAY 21, 1935.

MR. WARREN HENLEY
Certain-teed Products Corporation
105 W. Adams Street
Chicago, Illinois.

DEAR MR. HENLEY:

Re: Joseph Lumber Company,
Chicago, Illinois.

Referring to your license contract covering the manufacture and sale of patented gypsum board, it has been reported to us that you are granting concessions to the Joseph Lumber Company, Chicago, Illinois, which have the effect of selling patented gypsum board below the minimum prices established by the licensor.

The complainant alleges that your company has painted a sign on the Kimball Avenue fence of the customer approximately 65′ x 7′ which reads in its entirety "Bestwall", "The Original Twin Mounted Wallboard". It is further stated that your company paid the Joseph Lumber Company $120.00 to defray the expense of this painting.

The complainant contends that this allowance on your part has operated as a reduction of the minimum prices established by the licensor, and has resulted in the loss of business to the licensee involved.

We request an investigation of this case, and will appreciate a report from you covering the findings in this regard.

Yours truly,

BOARD SURVEY COMPANY.

Executive Secretary.

11667 *Government's Exhibit No. 771*

CERTAIN-TEED PRODUCTS CORPORATION
1830 Bankers Building
105 West Adams Street
CHICAGO, ILL.

JUNE 11, 1935

MR. E. W. CAREY, *Executive Secretary*
c/o Board Survey Company
300 West Adams Building
Chicago, Illinois

DEAR MR. CAREY:

Re: Joseph Lumber Company
Chicago, Illinois

Acknowledging your inquiry of May 21 in respect to painting of sign in connection with subject concern's yard.

Investigation develops that through misunderstanding our Sales Department authorized this expenditure to the extent of $100.00 and in so doing misinterpreted our advertising policy, copy of which we understand you have received.

There was no intent to influence sale of gypsum board or any other commodity, and the writer is further advised that our local manager approved this expenditure feeling that in so doing he was within his rights as painting of sign was replacing a similar sign advertising U. S. G. products which sign was painted some two years ago.

Yours very truly,

WARREN HENLEY
Merchandise Manager
Gypsum Division

WH:BH

11668 *Government's Exhibit No. 772*

JUNE 14, 1935.

MR. WARREN HENLEY, *Merch. Mgr.,*
Certain-teed Products Corporation,
1830 Bankers Bldg. 105 W. Adams,
Chicago, Illinois.

In re: Keefner Concrete Co.
Des Moines, Iowa.

DEAR MR. HENLEY:

In connection with your license contract covering the manufacture and sale of patented gypsum board, a complaint has been filed which alleges that you have granted a concession to the Keefner Concrete Company of Des Moines, Iowa, which has the effect of selling patented gypsum board below the minimum prices established by the licensor.

The report states that you recently painted a sign approximately 8′ x 8′, illuminated, in front of the dealer's office on S. W. 9th Street, Des Moines, Iowa, which refers exclusively to your products.

The complainant takes the position that your allowance for the cost of this sign has placed said complainant at a disadvantage in the sale of patented board and is, in effect, a reduction in the minimum prices established under your license.

Will you kindly investigate this case and give us a prompt report.

Yours very truly,

BOARD SURVEY COMPANY

Executive Secretary.

11669 *Government's Exhibit No. 773*

CERTAIN-TEED PRODUCTS CORPORATION
1830 Bankers Building
105 West Adams Street
CHICAGO, ILL.

JUNE 19, 1935

MR. E. W. CAREY, *Executive Secretary*
Board Survey Company
300 West Adams Building
Chicago, Illinois

Re: Keefner Concrete Company
Des Moines, Iowa

DEAR MR. CAREY:

Acknowledging your inquiry of June 14, above subject.

The information you have received is approximately correct. However, we did not illuminate or erect the sign as mentioned but did stand the cost of painting same which, I am advised, came to approximately $18.00.

As I have advised you before, our Sales Organization misinterpreted Merchandising Plan in respect to painting of signs and in so doing assumed the entire expense therefor.

There was no intention on our part to violate in any way our license agreement and as above mentioned cost of painting sign was through misinterpretation of our Merchandising Policy.

Yours very truly,

WARREN HENLEY
Merchandise Manager
Gypsum Division

WH:BH

11670 *Government's Exhibit No. 774*

COMPLAINT ON SALE OF PATENTED GYPSUM WALLBOARD AND GYPSUM PLASTERBOARD IN VIOLATION OF LICENSE TO MANUFACTURE AND SELL SUCH PATENTED PRODUCTS

6-22, 1936.
(Date)

To:

Board Survey Company,
300 West Adams Street,
Chicago, Illinois.

Complaint against Certain-teed Products Corporation
(Manufacturer)

Name of Customer involved Caroline Lumber Company

Address of Customer involved Huntington, West Virginia.

Date of Violation.... Shipped From.... By .....
(Mill) (Rail or Truck)

Type of Violation.....

FACTS CONCERNING COMPLAINT

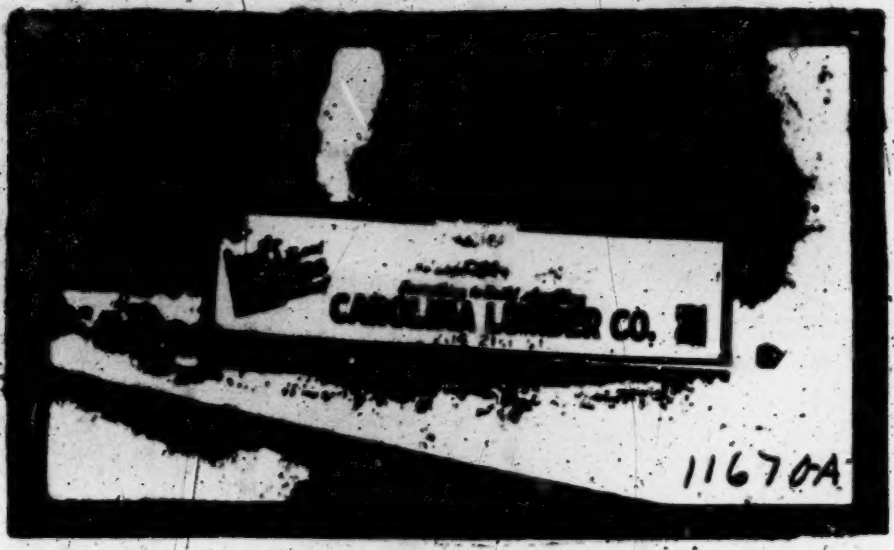
The Certain-teed Products Corporation, late in 1935, granted an advertising allowance to the above dealer for signboards, thereby enabling them to sell this dealer patented gypsum board. This advertising allowance has in effect resulted in a lower minimum price on patented board to this dealer, as he maintains several large signboards in the Huntington vicinity.

UNITED STATES GYPSUM COMPANY
(Name of Complainant)

By H. F. SADLER

.....
(Title)

(Use reverse side, if more space needed for complaint)


11670A

11671 *Government's Exhibit No. 775*

JULY 16, 1936

CERTAIN-TEED PRODUCTS CORPORATION
100 East 42nd Street
New York, N. Y.

Attention: Mr. C. O. Brown

GENTLEMEN:

We enclose herewith a memorandum of a matter which the Board Survey Company has been asked to investigate.

With the request for an investigation was enclosed a photograph of a signboard including the following advertising matter:

For Walls and Ceilings
We Recommend

Certain-teed Gypsum Wallboard & Plastisized Plaster
in the "life preserving" bag

Everything to Build Anything

CAROLINA LUMBER CO.
204 21st St.
Phone 4189

We will be glad to receive your explanation concerning this matter.

Yours very truly,

CBM:HR

cc—Mr. Warren Henley)
cc—Board Survey Company) Not shown on original
Certain-teed—7—Carolina Lbr. Co.)

11672 *Government's Exhibit No. 776*

COMPLAINT ON SALE OF PATENTED GYPSUM WALLBOARD AND MANUFACTURE AND SELL SUCH PATENTED PRODUCTS GYPSUM PLASTERBOARD IN VIOLATION OF LICENSE TO

7/29/36
(Date)

To:

Board Survey Company,
300 West Adams Street,
Chicago, Illinois.

Date of Complaint 6/22/36

Name of Customer involved Carolina Lumber Company

Address of Customer involved Huntington, West Virginia.

Date of Violation.... Shipped From.... By.....
(Mill) (Rail or Truck)

Type of Violation.....

Footage Involved	Size	Billed Price Per M	Price Should Have Been
(Wallboard) / (Plasterboard)	(Wallboard) / (Plasterboard)	(Wallboard) / (Plasterboard)	(Wallboard) / (Plasterboard)

LICENSEE'S EXPLANATION

Answering your inquiry of July 16 reference signboard advertising for subject concern:

This to advise that we have been selling this account (exclusive) their Gypsum Wallboard and Lath since August 30, 1935 and it was not until February of 1936 that subject concern advised us that they were erecting several billboards and would be interested in advertising our Gypsum Products, provided we would share 50% of the cost of erecting same.

The matter was taken up with our Advertising Dept. and in accordance with our regular policy we arranged to participate in the cost of *painting* the two billboards, to the extent of $60.00 each. This transaction was completed on February 28, 1936, and after billboards were erected payment was made *direct* to the Smoot Advertising Company of Parkersburg, W. Va.—this on May 13, 1936, to the extent of $120.00 (for two signs only) covering the *painting* expense only.

You will note from the above that your statement that we arranged for signboard advertising late in 1935 is incorrect and further that we sold this account in August, 1935, and the discussion relative to signboards did not occur for some six months later.

CERTAIN-TEED PRODUCTS CORPORATION
(Name of Licensee)

By Warren Henley.

.....
(Title)

(Use this Form to Answer Complaints From Board Survey Co.)

11673 *Government's Exhibit No. 777*

MAY 17, 1933.

MR. M. H. BAKER, *Pres.*,
National Gypsum Company,
Buffalo, New York.

DEAR MR. BAKER:

Re: Thomas Lumber Company
Owings, Maryland.

We are advised that the Thomas Lumber Company, Owings, Maryland purchased patented wallboard from you for the reason that you did effect a rebate on same by having sold this firm stock of the National Gypsum Company at less than the then market price.

This complaint has just been filed with us by one of the licensees, and we will appreciate your immediate reply.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11674 *Government's Exhibit No. 778*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, New York
GOLD
BOND
PRODUCTS

MAY 22, 1933

BOARD SURVEY COMPANY
300 West Adams Bldg.
Chicago, Ill.

Re: Thomas Lumber Co.
Owings, Md.

GENTLEMEN:—

In reply to your letter of May 17, I have had the stockholders record checked in connection with this inquiry and find no record of this company having at the present time or having ever had any stock in our company. There is, therefore, no basis on which the purchase price of stock in our company could have been an influencing factor on Gypsum Wallboard sales.

Yours very truly,

NATIONAL GYPSUM COMPANY

R. F. BURLEY
Vice President

RFBurley/B

11675 *Government's Exhibit No. 779*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, New York
GOLD
BOND
PRODUCTS

OCTOBER 31, 1932

BOARD SURVEY COMPANY
300 West Adams Bldg.
Chicago, Ill.

GENTLEMEN:—

Re: Milwaukee Lumber Co.
Milwaukee, Wis.

Referring to the terms and conditions under which we sell patented wallboard, the above dealer advise us the Universal Gypsum Company this spring donated $100 in cash for their ball club or something similar and which was in effect nothing more than a price rebate on the board purchased.

We previously had been selling this account and the donation by the Universal Gypsum & Lime Company was, we feel, the means of their unfairly taking this business from us and we have not benefitted by any of their business since the donation was made.

Yours very truly,

NATIONAL GYPSUM COMPANY

R. F. BURLEY
Vice President

RFBurley/B

11676 *Government's Exhibit No. 780*

NOVEMBER 21, 1932.

MR. F. G. KRUMHOLZ, *Treas.,*
Universal Gypsum Company,
105 W. Madison St.,
Chicago, Illinois.

DEAR MR. KRUMHOLZ:

Re: Milwaukee Lumber Co.,
Milwaukee, Wisc.

Referring to the license contract under which you sell patented wallboard and plasterboard, we are advised that your company donated $100.00 in cash to the Milwaukee Lumber Company, Milwaukee, Wisconsin for their ball club or some similar activity, which is a price rebate on purchases of patented board.

Please let us know whether or not you made this donation, and give us any facts or conditions surrounding the alleged donation which might have bearing on the matter.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11677 *Government's Exhibit No. 781*

Subject: Brown-Graves Lumber Company, Akron, Ohio.

JULY 20, 1933.

MR. F. M. MILLER
Board Survey Company
Chicago.

Under date of May 18, salesman Harold Van Deusen advised that the National Gypsum Company sold the Brown-Graves Lumber Company, Akron, Ohio a carload of wallboard and took in payment thereof certificates of deposit on the Harter bank.

H. F. SADLER
A. V. P.

11678 *Government's Exhibit No. 782*

JULY 29, 1933.

NATIONAL GYPSUM COMPANY
Buffalo
New York.

Att: R. F. Burley, V. P.

DEAR SIRS:

Re: Brown-Graves Lumber Company
Akron, Ohio.

We are advised that your company sold wallboard and/or plasterboard manufactured and sold by you under your license contract to the Brown-Graves Lumber Company, Akron, Ohio at other than your regular terms by reason of your having taken in payment thereof certificates of deposit of this firm on a bank, which at the present time is being liquidated; specifically, the Harter Bank.

Please advise us in detail as to your sales of patented board as mentioned herein.

Yours truly,

BOARD SURVEY COMPANY

Executive Secretary.

FMM:AB

11679 *Government's Exhibit No. 783*

NATIONAL GYPSUM COMPANY
General Offices Buffalo, New York
GOLD
BOND
PRODUCTS

AUGUST 9, 1933

BOARD SURVEY COMPANY
300 West Adams Building
Chicago, Illinois
Attention: Frank M. Miller, Executive Secretary

GENTLEMEN:

Re: Brown-Graves Lumber Company
Akron, Ohio

Reply to your letter of July 29th has been delayed awaiting the return of our credit manager from vacation.

On May 11th, we shipped a straight car of patented board and Filler to the subject customer for a total invoice price of $680.72. There was no indication when the order was received at the office that any portion of it was to be paid for by certificates of deposit in any closed bank.

On May 25th, remittance was received in full for this invoice, all in cash except for $162.34, representing credit by certificates of deposit on the Harter Bank as mentioned in your letter. Before these were accepted, our Credit Department investigated and felt reasonably sure that over a period of time they would collect one hundred cents on the dollar for these certificates. In the meantime, we are collecting interest on them, having had one payment on July 5th.

For the above reasons, we can not see where we have sold Brown-Graves Lumber Company at other than our regular terms—the certificates of deposit having been accepted only because when tendered, they were found acceptable by our financial division.

Yours very truly,

NATIONAL GYPSUM COMPANY
R. F. BURLEY
Vice President

R. F. Burley:N

11680 *Government's Exhibit No. 784*

SEPTEMBER 12, 1933.

MR. R. F. BURLEY, *V. P.*,
National Gypsum Company,
Buffalo, New York,

DEAR MR. BURLEY:

Re: Brown-Graves Lumber Company Akron, Ohio.

Please refer to your August 9th letter regarding your acceptance of certificates of deposit in payment of your sales of patented board to the Brown-Graves Lumber Company, Akron, Ohio.

Certificates of deposit are not legal tender, and are not established as a customary medium of exchange in payment of patented board. Therefore, we construe that this sale was made at other than regular terms and we are accordingly reporting the same to the licensor.

Yours truly,

BOARD SURVEY COMPANY,

Executive Secretary.

FMM:AB

11681 *Government's Exhibit No. 785*

Inter Company Discounts on Patented Gypsum Board.

CHICAGO, JULY 24, 1933.

MR. E. A. GALLAGHER,
Sales Manager,
New York Office.

You probably are aware our license agreement on patented board and lath gives us the right to control the sale of our licensees of the patented material to other manufacturers of Gypsum products. We set the maximum discount which they are permitted to sell to other manufacturers at, and reserve the right to withdraw permission to sell board manufactured under our patents to such other manufacturers. This is to advise you that this permission is now definitely restricted as follows:

> "Effective immediately said permission is restricted to sales of patented board and lath to manufacturers of Gypsum products for resale to the dealer trade at wholesale, and is not to apply to said materials sold at retail."

Am giving you this information so that you can be alert to sales made by gypsum manufacturers who have purchased patented board or lath from our licensees, and are selling other than at wholesale.

H. F. SADLER,
Asst. to Vice President

By.....

WP'BD

[Endorsement on cover:] File No. 51575. District of Columbia, D.C. U.S. Term No. 711. The United States of America, Appellant vs. United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, et al. Filed November 22, 1946. Term No. 711 O.T. 1946.

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NOV 22 1946

No. 711

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES GYPSUM COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the District of Columbia

CIVIL ACTION No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the District Court entered in this cause on August 5, 1946, on which day the District Court also filed its findings of fact and conclusions of law. A petition for appeal is presented to the District Court herewith, to wit, on September 30, 1946.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended

723286—46——1.

(32 Stat. 823; 36 Stat. 1167; 15 U. S. C. sec. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C., sec. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Crescent Amusement Co.*, 323 U. S. 173.

Interstate Circuit Inc. v. *United States*, 306 U. S. 208.

Sugar Institute, Inc. v. *United States*, 297 U. S. 553.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. secs. 1, 2, and 4, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or com-

merce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

THE ISSUES AND THE RULING BELOW

This is an equity suit brought in August 1940 in the United States District Court for the District of Columbia against seven companies and seven officers of defendant companies charging them with conspiring to restrain interstate commerce in gypsum board and gypsum products and with monopolizing, attempting to monopolize, and conspiring to monopolize such commerce, in violation of Sections 1, 2, and 3 of the Sherman Act. An expediting certificate was filed under the Expediting Act of February 11, 1903, as amended, and a three-judge district court was appointed. The court ruled in advance of trial that the Government was not entitled to show the invalidity of patents pursuant to which the defendants had fixed prices and imposed various other restraints (53 F. Supp. 889). Trial began in November 1943 and the Government closed its case on April

20, 1944. The defendants then moved to dismiss the case under Rule 41 (b) of the Rules of Civil Procedure upon the ground that the plaintiff had shown no right to relief. On June 15, 1946, the court rendered an opinion holding that this motion should be granted and on August 5, 1946, it entered judgment dismissing the complaint.

The defendants are the sole manufacturers east of the Rocky Mountains of gypsum board, which consists of two outer sheets of heavy, tough paper firmly attached to a central gypsum core. Defendants' price-fixing first began in 1926 and early 1927 when four companies (one a defendant and the other three predecessors of defendant companies) entered into licensing agreements with defendant United States Gypsum Company (referred to herein as U. S. G.). The agreements authorized the licensees to make and sell gypsum board under various patents owned by U. S. G., including a product patent on closed-edge board the validity of which had been previously upheld. The licenses authorized U. S. G. to fix the licensees' minimum sales price on all board made under the product patent on closed-edge board.

Before and after the making of these licenses, officers of various defendants or their predecessors endeavored to induce all members of the industry to enter into like licensing agreements with U. S. G. Manufacturers of open-edge board offered it at lower prices than those maintained by U. S.

G. for closed-edge board and this led to severe competition and by 1929 gypsum board prices were substantially below 1927 prices. Efforts to induce the nonlicensees to accept price-fixing licenses from U. S. G. were renewed and culminated in a meeting in Chicago in May 1929 attended by most of the members of the industry and acceptance of price-fixing licenses by four out of the six nonlicensee manufacturers. These agreements were executed although U. S. G.'s patent on closed-edge board ran only until August 6, 1929, and although the licenses authorized U. S. G. to fix prices only on board made under this patent and during its term.

As a basis for continuing price fixing after August 6, 1929, U. S. G. made a contract to purchase two patents owned by one of its licensees. One of these patents, issued 12 years earlier, claimed as an invention a porous insulating material made by adding a cooked starch mixture to gypsum or other similar material and the other, issued in 1924, claimed as an invention the use of such a starch mixture in making gypsum board in order to insure adhesion of the paper liners to the gypsum core. U. S. G. thereupon offered to the members of the industry a license agreement covering its existing patents, its two prospective starch patents, and whatever patents might issue on certain pending applications for patents to make gypsum board by a foam process. In Octo-

ber or November 1929 all of the outstanding licensees entered into substantially identical new license agreements and the two nonlicensees signed like agreements shortly thereafter. The agreements remained in effect up to the time the present suit was filed.

In the above agreements U. S. G. licensed manufacture and sale of gypsum board under 49 enumerated patents (including the two starch patents which U. S. G. had contracted to purchase) and under the inventions claimed in its foam-process patent applications. The agreements gave U. S. G. the right to fix the minimum prices at which the licensee might sell any gypsum board (1) made by the licensee by use of any of the machines or appliances covered by any of the licensor's 49 patents and embodying inventions claimed in any of these patents; "or" (2) made by "second parties" and embodying inventions claimed in the starch patents; "or" (3) after issuance of any foam patent, board made by the licensee according to the process claimed in said patent. It was further provided that the minimum prices prescribed by U. S. G. should not exceed the prices at which it sold its own board.

U. S. G., with the cooperation of its licensees, carried out the price fixing authorized by the licenses so as to prohibit or meticulously police all business practices which might cause the ultimate price received by a licensee to deviate in any

respect from the applicable minimum price prescribed in U. S. G.'s price bulletins. U. S. G. also set up a wholly owned corporation whose function it was to investigate and police, on the complaint of U. S. G. or any licensee, any deviation from the prescribed minimum prices.

The district court in concluding that the Government had not established that the defendants had illegally combined to fix the price of all gypsum board sold in the area east of the Rocky Mountains, made the following rulings:

(1) On the defendants' motion to dismiss pursuant to Rule 41 (b) of the Rules of Civil Procedure, every factual issue as to which the evidence before the court did not preponderate in favor of the plaintiff must be resolved against the plaintiff.

(2) The defendants' licensing agreements and their practices thereunder cannot be distinguished from those held to be valid in *United States* v. *General Electric Co.*, 272 U. S. 476.

(3) Defendants did not have the burden of establishing that their price fixing was justified by their patent rights; the Government had the burden of establishing the contrary.

(4) Apart from certain declarations by defendants, there was no evidence that the license agreements were *"non-bona fide"* in character or purpose; therefore each prior declaration by a defendant which was put in evidence was evidence

only against him and was not admissible as against any of his alleged coconspirators.

(5) The evidence, considered on the foregoing basis, does not establish that the license agreements were shams, i e., not intended to bind the parties to the promises made,[1] or that they were designed to achieve restraints of trade beyond the proper limits of U. S. G.'s patent rights.

(6) The defendants, in their actual operations under the license agreements, did not exceed the proper limits of rights given by patent law.

(7) Agreement among the defendants that all would enter into like price-fixing licensing contracts would not be illegal; in addition, the evidence fails to show that the defendants did so agree.

The most important issue raised by the appeal is whether the sanction which *United States* v. *General Electric Co.*, 272 U. S. 476, gave to price fixing as a means of enforcing monopoly rights conferred by patents, applies to and validates the particular price-fixing combination and conspiracy formed by the defendants under the aegis of patents held by U. S. G. The appeal also raises the question whether the *General Electric* case should be overruled. In addition, the appeal brings in issue each of the rulings of the district court set forth above, as well as the question

[1] The Government had never contended that the licensing agreements were sham in this sense.

whether the Government, in a suit in which price fixing is sought to be justified as being a legitimate exercise of defendants' patent rights, may show the invalidity of the patents on which this defense is based.

THE QUESTIONS ARE SUBSTANTIAL

The decision in *United States* v. *General Electric Co.*, 272 U. S. 476, is predicated upon the Court's view (see pp. 481, 488) that General Electric had a patent monopoly which completely covered the making, using, and vending of the product as to which the patentee fixed the minimum prices of its licensee. In the present case the licensing agreements provided for fixing minimum prices on all board made by U. S. G.'s licensees which embodied any invention claimed in any of 49 U. S. G. patents. Of these 49 patents, only the two starch patents are in evidence and their claims extend only to gypsum board made in a particular way. There was therefore no showing that U. S. G. had a patent monopoly covering the vending of board not made under the starch patents and the price-fixing agreement went beyond any patent monopoly which U. S. G. was shown to have. The question whether the *General Electric* case validates an agreement to fix prices which is not confined to products over which the licensor has a complete patent monopoly of the vending thereof is one of substance.

In the present case all members of the industry, pursuant to a common invitation, entered into substantially identical licensing agreements at approximately the same time and with knowledge by all the parties that the effect of their common action would be to eliminate all price competition in gypsum board. The appeal raises the question whether the resulting restraints of trade were the product of agreement and conspiracy among the parties and were not within any monopoly rights given by patent law, within the principles of this Court's decision in *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, and other like cases, or whether the restraints come within the ruling in the *General Electric* case. We submit that this question is substantial.

The appeal raises the question whether, under the circumstances presented in this case, all competing manufacturers may, without violating the Sherman Act, use patent license agreements as a means to organize their industry, increase and stabilize prices, eliminate jobbers, and otherwise regulate the industry in detail. The question whether the *General Electric* case is to be extended to permit an entire industry to be so knit together, thus giving all its members a noncompetitive profit, or whether such a combination transcends what is necessary for the protection of the patent monopoly and accomplishes a restraint of trade condemned by *United States* v. *Masonite*

Corp., 316 U. S. 265, and related cases, is a substantial one.

The appeal raises the question whether the *General Electric* case should be overruled. Reasons for regarding this question as one of substance are set forth in the statement as to jurisdiction filed by the Government in *United States* v. *Line Material Co.*, No. 464, this Term.

The district court held that the Government in a Sherman Act proceeding is not entitled to show the invalidity of the patents under which the defendants assert rights by way of justification for price fixing. This ruling is believed to be in conflict with the grounds of decision in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, and the appeal, in challenging the district court's ruling, presents a substantial question.

The appeal questions the district court's interpretation of Rule 41 (b) of the Rules of Civil Procedure. The decisions of different circuit courts of appeals are in conflict as to the meaning and effect of this Rule when a defendant moves to dismiss the action at the close of the plaintiff's evidence in a nonjury case, and the question raised by the appeal clearly is substantial.

The appeal raises other substantial questions concerning burden of proof and rules of evidence. Similar questions frequently arise in the trial of suits brought under the Sherman Act and determination by this Court of the issues which are

raised should materially contribute to the proper conduct of such trials.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

SEPTEMBER 30, 1946.

In the District Court of the United States for the District of Columbia

CIVIL ACTION No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY ET AL., DEFENDANTS

Opinion on motion to strike paragraph 46 (a) of the Government's complaint, or, in the alternative, for partial judgment dismissing that part of the Government's claim contained in that paragraph

Decided November 15, 1943

Messrs. *Roscoe T. Steffen* and *Edward Knuff*, Special Assistants to the Attorney General, for plaintiff.

Messrs. *Bruce Bromley* and *Hugh Lynch, Jr.*, for the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode; Messrs. *Nicholas J. Chase* and *Elmer E. Finck*, for the defendants National Gypsum Company and Melvin H. Baker; Messrs. *Harold F. McGuire, F. W. H. Adams, Leonard B. Ettelson* and *Stephen Allie*, for the defendants Certain-teed

Products Corporation and Henry J. Hartley; Messrs. *Walter G. Moyle, Ernest M. Oliver, Andrew J. Dallstream* and *Norman Waite,* for the defendants The Celotex Corporation and Bror G. Dahlberg; Messrs. *Joseph P. Tumulty, Joseph P. Tumulty, Jr., Alfred W. Varian* and *Herbert M. Simon,* for the defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary; Messrs. *James O'Donnell, Jr.,* and *Benjamin P. DeWitt,* for the defendants Newark Plaster Company and Frederick Tomkins; and Messrs. *George E. H. Goodner, Scott P. Crampton, D. I. Johnston, Roy C. Lytle, James R. Keaton,* and *Frank Wells,* for the defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company.

Before STEPHENS, Associate Justice, United States Court of Appeals for the District of Columbia (Presiding), and BLAND and GARRETT, Judges, United States Court of Customs and Patent Appeals, designated as Justices of the District Court of the United States for the District of Columbia.[1]

STEPHENS, *J.:* This action, commenced by the United States, hereafter for convenience referred to as the Government, on August 15, 1940, is for equitable relief under Section 4 of the Sherman Act. The complaint charges that the defendants

[1] Holding a three-judge statutory court pursuant to the provisions of 15 U. S. C. § 28, as amended by the Act of April 6, 1942, Public No. 515, 77th Congress, 2d Sess.

have been engaged in a combination and conspiracy in restraint of trade and commerce in gypsum products in violation of Sections 1, 2, and 3 of the Act.[2] It is alleged that the combination and conspiracy have been carried out in connection with certain patent license agreements based on patents owned by the United States Gypsum Company covering the manufacture of gypsum board. Upon these license agreements the defendants themselves rely as properly establishing prices and terms of sale of gypsum board within the doctrine of *United States* v. *General Electric Company*, 272 U. S. 476 (1926). On March 12, 1943, the Government was permitted by order of this court to amend its complaint by adding a paragraph 46 (a) attacking the validity of the patents upon which the license agreements are based. The paragraph is in the following terms:

> 46a: Many of the patents mentioned and described in said license agreements by which the said combination has been, and is being carried out in part, are process or machine patents. The article and product claims of Roos patents No. 2,017,022, No. 2,079,338, No. 2,080,009, No. 1,914,345, and No. 1,938,354 mentioned and described in said license agreements, and said patents, are each invalid and void for each of the following reasons: (a) there is no real invention or novelty in the claims of said

[2] 26 Stat. 209 (1890), as amended by 36 Stat. 1167 (1911), 50 Stat. 693 (1937); 15 U. S. C. §§ 1, 2, 3, 4 (1940).

patents; (b) the claims of said patents disclose no patentable invention in view of the prior art at the time the respective applications were filed; (c) the alleged inventions described in the claims of said patents were shown and described in printed publications in the United States more than two years prior to the filing of the respective applications; (d) the alleged inventions described in the claims of said patents are inoperative and devoid of novelty or utility; (e) the alleged inventions described in the claims of said patents were abandoned by the inventor and he was guilty of laches before the respective applications were filed; (f) the alleged inventions described in the claims of said patents were not reduced to practice until after other inventors had invented and reduced the same to practice and applied for patents thereon; (g) the said alleged inventions are described in ambiguous and not in properly clear, concise, and exact terms; and (h) the defendants have been informed of the invalidity of the claims of the said patents and have unreasonably failed to file in the United States Patent Office any disclaimer of such claims. The said patents mentioned and described in the said license agreements, even assuming they are valid, are not basic article or product patents and do not singly or all together cover completely the business of mining and selling gypsum, or cover completely gypsum board, which is one of the forms

in which unpatented gypsum is sold by the defendants, but at most constitute minor additions to the established and unpatented art of making gypsum board and afford no legal justification for the said combination.

The order allowing this paragraph to be added to the complaint was made expressly without prejudice to the right of the defendants to question the legal sufficiency of the allegations, and it was urged by counsel for all parties that a ruling upon this question should be made prior to the commencement of trial in order that counsel might be advised as to the necessity of preparation for attack upon, or defense of, the validity of the patents. The defendants accordingly filed this motion to strike or for partial judgment. The motion is one, pursuant to Rule 12 (f) of the Federal Rules of Civil Procedure, to strike paragraph 46 (a) upon the ground that the allegations thereof are immaterial and impertinent to the issues in the case; and the motion is made, in the alternative, under Rules 12 (b) and 56 (b) for partial judgment dismissing that part of the Government's claim contained in paragraph 46 (a) upon the ground that as a matter of law the Government may not attack the validity of the patents in this proceeding in the manner attempted. It is conceded that the five patents mentioned in the paragraph were issued by the Commissioner of Patents, sometimes hereafter

referred to as the Commissioner, and that none of them has heretofore been held invalid by any court. The dates of application and issuance of the Roos patents are: No. 2,017,022, application filed August 20, 1924, patent issued October 8, 1935; No. 2,079,338, application filed January 19, 1925, patent issued May 4, 1937; No. 2,080,009, application filed October 16, 1926,[3] patent issued May 11, 1937; No. 1,914,345, application filed July 7, 1932, patent issued June 13, 1933; No. 1,938,354, application filed March 15, 1933, patent issued December 5, 1933. The patents are each in the usual form, set forth in the margin.[4] It is not charged by the Government in its complaint that the issuance of the patents was obtained by fraud

[3] Original application January 19, 1925, which was a division of the August 20, 1924, application.

No. 2,017,022

THE UNITED STATES OF AMERICA

To All To Whom These Presents Shall Come:

Whereas Carlisle K. Roos, of Fort Dodge, Iowa, assignor to United States Gypsum Company, of Chicago, Illinois, a corporation of Illinois, presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in Cementitious Materials, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and complied with the various requirements of law in such cases made and provided, and

Whereas upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the Law.

Now, therefore, these Letters Patent are to grant unto the said United States Gypsum Company, its successors or as-

or any other wrongful act. What the Government asserts, in essence, is that, for the reasons set out in paragraph 46 (a), the Commissioner erred in issuing the patents. It is to be noted further that the attack upon the validity of the patents, in this aspect of the case, is not upon the ground that they are invalid because being used in violation of the Sherman Act; it is the converse, that the Sherman Act is being violated, through the license agreements, because the patents upon which the agreements are based are invalid. It is also to be borne in mind that, while this is not an independent cancelation proceeding, but an antitrust suit in which the Government

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signs for the term of seventeen years from the date of this grant the exclusive right to make, use, and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this eighth day of October, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the United States of America the one hundred and sixtieth.

[SEAL] CONWAY P. COE,
Commissioner of Patents.

Attest:
H. S. MILLER,
Law Examiner.

Roos patent No. 2,079,338 is in *haec verba*, as are the other patents except that No. 2,080,009 is for an improvement in plaster wallboards and methods of making them; No. 1,914,345 for an improvement in wall construction; and No. 1,938,354 for an improvement in fire-resistant wall and ceiling structures.

contends that the patents are invalid, nevertheless the Government is seeking a judicial determination that the Patent Office erred in issuing the patents and that they are for that reason invalid. This was conceded in the oral argument. And the Government's prayer asks cancelation of the provisions of the license agreements, asks that the defendants be perpetually enjoined from entering into any license agreements containing similar provisions, and that the defendants be enjoined from bringing any action for infringement of any of the patents now owned or controlled by them, and from attempting to collect royalties or license fees or profits for the use of the patents now owned or controlled by them, until it is made to appear to the court that all improper practices have been abandoned and the consequences of all misuses of the patents have been dissipated, and that the defendants be enjoined from entering into any license agreements relating to gypsum products without first obtaining the consent of the court. Accordingly, so far as the effect upon the defendants and the patents is concerned, the distinction between this suit and an independent cancelation proceeding is not substantial.

The essential question raised by the motion is whether or not the Government, in an antitrust proceeding prosecuted by its Department of Justice, can seek a determination that the Commis-

sioner erred in issuing patents relied on by the defendants as a foundation for license agreements, and that the patents are therefore invalid, it not being charged that the action of the Commissioner was obtained by fraud.[5] The question involves inquiry into the authority of the Government to question its own action, and into the power of the court to review an administrative determination.

I

No statute answers the question. The Act of June 25, 1910, 36 Stat. 851, 35 U. S. C. § 68 (1940), providing that whenever an invention covered by a United States patent is used or manufactured by the United States itself without license of the owner, or lawful right, the owner's remedy shall be by a suit against the United States in the Court of Claims for compensation and that in such suit the United States may avail itself of any defense that might be pleaded by a defendant in an action for infringement, contemplates, when read in connection with Rev. Stat. § 4920 (1875), 35 U. S. C. § 69 (1940), a defense based upon the ground that the patent was erroneously granted—thus allowing the Government to question the action taken by its own

[5] The term "invalid" as applied to patents issued in error is a misnomer. Strictly such a term should be applied only to patents obtained by fraud, or wholly beyond the jurisdiction of the Commissioner. But the term is constantly used in the authorities in application to patents issued in error, and for convenience and verbal consistency, will be so used herein.

official, the Commissioner of Patent. *Cf. Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331 (1928). But this statute is obviously not pertinent here. The Government is not in this case defending against accusation of infringement.

II

There is no controlling judicial decision directly in point. In *United States* v. *Porcelain Appliance Corp.,* unreported (N. D. Ohio E. D. Sept. 9, 1926), an antitrust proceeding to dissolve an allegedly illegal combination, the court denied a motion to strike from the Government's bill allegations pertaining to the validity and scope of patents. The court reasoned that, while the suit was not one to cancel patents and it was probably beyond the scope of all possible issues to decree patents or patent claims to be void, it was conceivable that patents invalid or limited in nature, in view of the prior art, might be wrongfully used in building up an illegal combination, and that whether the case was of such nature as to permit or require inquiry into questions of validity or scope of patents could not be determined adversely to the plaintiff on a motion to strike out. The court did not, however, discuss the essence of the matter, i. e., the question whether the Government can raise an issue as to the validity of its own action in granting patents, and the case is not, therefore, of persuasive value; and, as it is a District Court

decision from another jurisdiction, it is not controlling.

Other cases principally relied upon by the Government are the following, which are here enumerated, for convenience, in the order in which they will be discussed: *United States* v. *Standard Oil Co.*, 33 F. (2d) 617 (N. D. Ill. 1929), reversed on other grounds, 283 U. S. 163 (1931); *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, unreported (D. Mass. Oct. 4, 1943); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940); *United States* v. *Univis Lens Co.*, 316 U. S. 241 (1942); *Ethyl-Gasoline Corp.* v. *United States*, 309 U. S. 436 (1940); *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942); *United States* v. *Bell Telephone Company*, 167 U. S. 224 (1897). In *United States* v. *Standard Oil Co.*, an antitrust injunction suit alleging restraint of trade by virtue of agreements dealing with the right to use patented processes and apparatus, a master certified to the District Court the question of the admissibility of evidence offered by the Government to show lack of patentability in respect of two patents, and the court directed that the evidence be received. Later, in considering the master's report, which was favorable to the defendants on all issues, including that of validity of the patents, the District Court did not pass upon the patent

validity question, stating that it was "divided respecting the right of the Government to attack the validity of the patents in these proceedings * * *" (33 F. (2d) at 623). Otherwise, the District Court reversed the decision of the master on the merits and the defendants then appealed to the Supreme Court which reversed the District Court. But the Supreme Court likewise did not pass upon the question of patent validity. The case therefore constitutes no ruling of any value, on the question now before this court. In *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, the United States was allowed to intervene in an action brought by a patentee to collect royalties, the defense in the action being that the license agreement had been validly terminated by the defendant because it violated the Sherman Act and because the patents upon which it was based were invalid. This decision again, however, constitutes no direct ruling except that a court may properly exercise its discretion to allow Government intervention in such an action as described. The court did not rule that the Government as intervenor would be allowed to introduce evidence to the effect that the patents were invalid. Indeed, it appears from the opinion that the Government had informed the court that if allowed to intervene it would be chiefly concerned with directing the attention of the court "first to the operation of this and similar license

contracts made by plaintiff, and second to the form of decree which the Government deems appropriate." It is clear from the opinion that the court did not have in mind in allowing the intervention, and was not ruling upon, the question now before this court, *i. e.*, whether the Government can attack the validity of patents which the Government itself has, through its Commissioner, granted. *Sola Electric Co.* v. *Jefferson Electric Co.* holds that if the price fixing provisions of a patent license agreement are, if not within the protection of a lawfully granted patent monopoly, violations of the Sherman Act, a patent licensee sued for royalties may offer evidence of invalidity of the patents upon which the license agreement is founded, notwithstanding rules of estoppel, whether local or Federal, which would otherwise forbid him, because of his license agreement, to do so. But this is not a ruling that the Government itself may in a Sherman Act proceeding attack the validity of patents which it has issued through the Commissioner. The attack in *Sola Electric Co.* v. *Jefferson Electric Co.* was by a private party. In respect of *United States* v. *Univis Lens Co.*, *Ethyl Gasoline Corp.* v. *United States*, and *United States* v. *Masonite Corp.*, the reliance of the Government in the instant case is upon mere dicta uttered in cases decided in terms of the question whether licensing and price fixing arrangements were or

were not within the proper limits of a patent monopoly, but in which no question of validity of patents was raised.

In *United States v. Bell Telephone Company,* the Government relies in particular upon the following language in the opinion of Mr. Justice Brewer:

> Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also *when it is necessary in order to enable it to discharge its obligations to the public,* and sometimes when the purpose and effect are simply to enforce the rights of an individual. In the former cases it has all the privileges and rights of a sovereign. The statutes of limitation do not run against it. The laches of its own officials does not debar its right. *Van Brocklin* v. *Tennessee,* 117 U. S. 151; *United States* v. *Nashville, Chattanooga &c. Railway,* 118 U. S. 120; *United States* v. *Insley,* 130 U. S. 263. But when it has no proprietary or pecuniary result in the setting aside of the patent; *is not seeking to discharge its obligations to the public;* when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private liti-

gants. * * * (167 U. S. 264–5). [Italics supplied.]

When read alone this language seems to lend aid to the Government's contentions in support of paragraph 46 (a), but when read in the context of the opinion and decision as a whole it is clear that it is not in conflict with the holding of the Supreme Court in the case. The holding is that while the Government may, in a direct cancelation proceeding, attack a patent on the ground that it was obtained by fraud, it may not secure a determination that it was issued in error. This case is discussed in greater detail below.

III

In addition to relying on the cases discussed above, the Government in support of its right to attack the validity of the patents referred to in paragraph 46 (a) makes four contentions of law. The first of these is that the Government when prosecuting an antitrust suit is acting in a sovereign as distinguished from a proprietary capacity and is hence not subject to local rules of estoppel. It is true that the Government is suing in sovereign capacity. But to say this does not answer the question before the court. The question is not really one of estoppel, which assumes a right but forbids its exercise. The question is a deeper one—whether the Government, having once issued these patents through the Commis-

sioner of Patents, has any authority founded upon statute, case, or principle to repudiate its own action in so doing, or whether the courts have power, at the instance of the Government, to review the action of the Commissioner, in issuing the patents, in the absence of a charge of fraud in the obtaining of the same. It is to be noted in this connection that the grant of a patent is as much a sovereign act as the prosecution of an antitrust suit.

The second contention is that the present action, including the relief sought under paragraph 46 (a), is not a collateral attack upon the action of the Commissioner in granting the patents but a direct attack upon price fixing, in which the fact of invalidity of the patents may incidentally be shown and determined. But again, to demonstrate that the attack is incidental to a direct attack upon price fixing does not any more answer the question raised by the present motion than to say that the attack is sovereign. The fundamental question still remains: Where does the Government find the authority to question, even in an antitrust proceeding and incidentally, its own action once taken through the Commissioner of Patents, there being no charge of fraud in the obtaining of patents; or where does a Federal court find its power to review the action of the Commissioner at the instance of the Government?

The case principally relied upon by the Gov-

ernment under this aspect of its argument—*Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255 (1897); *Becher* v. *Contoure Laboratories, Inc.*, 279 U. S. 388 (1929); *United States* v. *Bradford*, 148 Fed. 413 (C. C. E. D. La. 1905), Affirmed per curiam, 152 Fed. 616 (C. C. A. 5th, 1907), certiorari denied 206 U. S. 563 (1907—do not answer these questions. The first two of these three cases correctly hold that, although a court does not have primary authority to deal with a question of patent invalidity, it may nevertheless determine such a question in a case in which it otherwise has power over the subject matter and parties. And all three of the cases correctly decide, stating their holding in general terms, that a court may incidentally determine a question of fact in a case in which the court has primary jurisdiction of the subject matter and parties even though it might not have authority to make such determination in a direct suit for that purpose. But obviously these cases do not decide the question involved in the instant motion to strike because in none of them was the incidental question raised by the very person whose action was being questioned. In *Pratt* v. *Paris Gas Light & Coke Company* the attack upon the validity of the plaintiff's patent was made by the defendant, a private party, and the same is true in *Becher* v. *Contoure Laboratories, Inc.* In neither case was the Government seeking

to repudiate and asking the court to review the Government's own action in the issuance of the patent. In *United States* v. *Bradford,* the attack in the Federal court, in a criminal prosecution, was upon the validity of the appointment of an administrator by a state court. But the question in that case would parallel the one involved under the instant motion to strike only if the United States itself had appointed the administrator. That case is further distinguishable because the appointment of the administrator was, according to the averments in the indictment, obtained by fraud and because the court appointing the administrator, under the facts averred in the indictment, lacked power to make the appointment so that the same was void. Thus these three cases leave unanswered the question before this court under the motion to strike paragraph 46 (a) of the Government's complaint.

The Government asserts, third, that patents for invention are only prima facie valid and the courts have always permitted a party "in a proper case" to show their actual invalidity in the respects mentioned in paragraph 46 (a) of the complaint. This is, of course, well established for private infringement cases. One accused of infringement may defend upon the ground that the accuser's patent is invalid for lack of invention. *Reckendorfer* v. *Faber,* 92 U. S. 347 (1875); *Dunbar* v. *Myers,* 94 U. S. 187 (1876). In *Reckendorfer* v.

Faber, where the plaintiff accuser contended that the Commissioner's decision was conclusive upon the point of invention and that that question was not open to the judgment of the court, the Court rejected the contention. The Government relies on the following statement of the Court:

> Before the commissioner is authorized to issue a patent, it must appear to him that the claimant is justly entitled to a patent; *i. e.*, that his art, machine, or manufacture possesses all the qualities before mentioned. The commissioner must also be satisfied, that, if it possesses these qualities, it is sufficiently useful and sufficiently important to justify him in investing it with the *prima facie* respect arising from the governmental approval. * * *
>
> It is nowhere declared in the statute that the decision of the commissioner, as to the extent of the utility or importance of the improvement, shall be conclusive upon that point * * * (92 U. S. at 351).

In *Dunbar* v. *Myers*, again an infringement suit between private parties, the question of the validity of the patent was raised by the defendant. The Supreme Court, reversing a ruling of the trial court that on the facts the plaintiff's patent was valid, said:

> Persons seeking redress for the unlawful use of letters-patent must allege and prove that they, or those under whom they claim, are the original and first inventors of the

> alleged improvement, and that the letters-patent have been infringed by the party against whom the suit is brought. *Prima facie* support to the first requirement is derived from the patent, if it is introduced in evidence and is in due form, provided the alleged improvement is one which in its nature is patentable. Evidence to overcome that presumption, however, is always admissible, if due notice is given by the opposite party, as required by law; and the question is now well settled, that the question whether the alleged improvement is or is not patentable, is, in an equity suit, a question for the court (94 U. S. at 196).

In *Slawson* v. *Grand Street R. R. Co.*, 107 U. S. 649 (1882), the Court took the position that lack of invention could be urged in an infringement suit even though not specifically pleaded.

But the defendants in the instant case are not accused of infringement and the Government is not so accused. The assertion of the Government and the cases cited still leave open the question whether or not the instant case is "a proper case" for determination by the court of invalidity of the patents upon which the defendants' license agreements rest. That is to say, neither the proposition stated by the Government nor the cases cited answer the question whether the Government which issued the patents can, even in an antitrust suit, attack and the court review the validity of the Government's own action in issuing them.

No such question was presented in the cases cited, for in those cases the attack upon the validity of the patents was made by a private party.

The Government contends, fourth, that, assuming that in an ordinary antitrust proceeding the Government would be estopped to question the validity of the defendants' patents, nevertheless, on the facts of the instant case, the defendants are themselves estoppped to insist upon the point. It has been suggested above that the question presented under the motion to strike paragraph 46 (a) cannot be answered in terms of mere estoppel—that the question is more fundamental. However, the contention of the Government in this aspect of the case will be discussed in the Government's own terms. The argument of "estoppel against estoppel" divides itself into two propositions. In one the Government asserts that the Patent Office is overburdened and is also not in a position to make a searching examination and final determination of all considerations bearing upon the right of an applicant to obtain a patent, such considerations as inventions, utility, commercial success, novelty, anticipation, and the like, and that it accordingly relies heavily upon the oath and affidavits of the applicant in issuing a patent. And the Government declares that at the time the application was made to the Commissioner for issuance of the Roos "Foam" patent, No. 2,017,022, counsel for the applicant sub-

mitted an affidavit stating that more than 3 billion square feet of wallboard embodying the Roos invention had been manufactured and sold during the preceding ten-year period and that seven manufacturers, to wit, the present defendants or their predecessors, had taken licenses and were producing the board in large quantities. Evidence of commercial success, the Government points out, may properly be considered by the Commissioner in determining whether or not an alleged invention is patentable. But, contends the Government, the Commissioner had no practical means of checking the Roos figures or affidavit but evidently assumed them to be true; and no mention was made to the Commissioner, the Government avers, that the United States Gypsum Company and its licensees comprised all of the manufacturers east of the Rocky Mountains, that the license agreements under which the licensees operate provide for price fixing and had the effect, alleged by the Government in the instant case, of driving unpatented board from the market. Such matters, so it is urged, if known to the Commissioner, might obviously have had a bearing upon his determination. Spelling out its argument somewhat further, the Government asserts that the primary purpose of the industry in adopting the Roos patents may not have been so much to take advantage of their novelty or utility as that they afforded a ready

means of bringing erstwhile competitors together in a combination in restraint of trade; that therefore some of the data furnished the Commissioner as a basis for the issuance of the Roos patent No. 2,017,022 may have been the result of the present combination. Hence, the Government contends, "It would be a strange perversion of law if the defendants could combine to provide the evidence of novelty and utility upon which a patent is issued and then be allowed to estop the Government from showing the true facts in an antitrust proceeding, since it had issued the patent[s] in reliance on that evidence."

But we think that the Government is itself "estopped" to make this contention in this case. The contention is in effect a charge that the Roos patent referred to was obtained by fraudulent misrepresentation on the part of the applicant. It is hence in conflict with the concession of the Government that there is no issue of fraud in this case in respect of the obtaining of the patents which it seeks to attack under paragraph 46 (a). At no point in the complaint, even in paragraph 46 (a), does the Government charge that the patents were obtained by fraud. And it is expressly stated at another point in the Government's brief presented under the instant motion to strike that fraud is a matter not in issue in the case. *Commonwealth* v. *Bierly*, 37 Pa. Super. Ct. 496 (1908), cited by the Government in this aspect

of the case, was a case in which a patent had been issued by the Commonwealth of Pennsylvania for land on an application for a warrant (to be followed by a patent) alleging a vacancy when in fact no vacancy existed. Subsequently the Commonwealth took title to the same land for forestry purposes by mesne conveyances from the holder of an older title. It was held that one claiming under the junior patent could not allege that as the junior patent was issued by the Commonwealth for a valuable consideration the Commonwealth was estopped from afterwards acquiring by purchase the older title and setting it up to defeat its own later grant. Two considerations distinguish the case from the instant case. One is that the land laws of the Commonwealth neither required nor authorized, upon the filing of an application for a warrant, an independent investigation by the land office to ascertain the truth of the basic fact asserted in it. The warrant issued as of course, and the responsibility for the result that, if the land had been previously appropriated no title passed, was left to rest with the applicant who had voluntarily assumed it. The other consideration is that the rule of estoppel of a grantor to dispute the title of his grantee, as by setting up a prior paramount title in himself or in a third person, applies only to solemn deeds with covenants of seizin and warranty or for quiet enjoyment, and not to mere quitclaims

containing none of the covenants referred to. A patent to an invention is not issued without investigation but on the contrary after consideration by expert patent examiners in the office of the Commissioner; and the grant of a patent to an invention is more than a mere quitclaim. There is set forth in the margin, *supra*, a copy of Roos patent No. 2,017,022 which is in the usual form in which the United States issues letters patent. The same indicates on its face due examination and a solemn grant.

The second proposition of the Government under its fourth contention of law is this: It is provided in each of the license agreements involved in the instant case that the licensees, who with the United States Gypsum Company comprise all of the manufacturers east of the Rocky Mountains, will not contest the validity of the United States Gypsum Company's patents; and in certain agreements of October 1929, the licensees in acknowledging the validity of patents already issued purport also to acknowledge the validity of any letters patent which may be granted or issued upon pending applications. In effect, therefore, the Government urges, the United States Gypsum Company has not only asked the Government through the Commissioner to issue the patents in suit upon its representations of fact but also it has combined with the licensee defendants to stop any normal test of

their validity. Ordinarily, the Government asserts, the check upon the determinations of the Commissioner is the infringement suit; an invalid patent will either not be used at all by the inventor or if used will be quickly challenged by others interested in the art, since Rev. Stat. § 4920 (1875), 35 U. S. C. § 69 (1940), fully recognizes the rights of an alleged infringer to contest the validity of a patent. But in the circumstances of the instant case, says the Government, no one outside the group of licensee defendants is likely to hazard the expense necessary to make an effective challenge against "a powerful combination carefully fenced in behind, not one, but many patents in the art." This is in effect an argument by the Government that the defendants are not in court with clean hands. It was so put in the oral argument on this motion. The defendants, therefore, it is urged, have estopped themselves to insist that the Government may not attack the validity of the patents, and the matter is now at large. But there is nothing inherently unclean about an agreement by a licensee not to contest the validity of his licensor's patent. Indeed there may be circumstances in which such an agreement is natural and wholesome, as, for example, where after expensive delaying litigation between patentees and alleged infringers it is desired by such parties to settle their controversies by an agreement which will

avoid future litigation. Such agreements not to contest the validity of patents are moreover not illegal, and the Government does not make an outright contention that they are. It suggests that they may be, or ought to be, treated as void as against public policy. But the only authority cited for this is *Pope Manufacturing Co.* v. *Gormully,* 144 U. S. 224 (1892). In that case the defendant had been granted a license to manufacture and sell stated patented devices under patents owned by the plaintiff and had agreed not to import, manufacture or sell devices covered by certain other patents, and had also agreed that he would not contest the validity of the plaintiff's patents or his title thereto. There was a further provision that if after termination of the license agreement the defendant manufactured, sold or used any devices covered by the patents involved in the agreement, the plaintiff might treat him as breaching the contract or as an infringer and might have an injunction issued by any court without notice. The action was for an accounting and injunction, it being asserted that the defendant had imported, manufactured or sold devices covered by "the other patents." But it was found that the defendant, due to the plaintiff's artifice, had signed the license agreement without comprehending its import so far as concerned the "unusual or oppressive" stipuations of that portion which forbade the defendant to contest the

validity of or title to the plaintiff's patents, bound him to agree not to import, manufacture or sell devices covered by other patents, and subjected him to an injunction without notice. The Court held that, because of the oppressive character of the contract and the apparent artifice used by the plaintiff in securing the defendant's consent to it, the plaintiff was not in court with clean hands and could therefore not seek equitable relief. But the Court expressly declined to pass upon the question whether the contract was invalid as against public policy, *i. e.*, it refused to answer the question whether the defendant could estop himself from disputing patents which might be void or to which the plaintiff might have no title. It is to be noted further that if, as the Government suggests, an agreement by a licensee not to contest the validity of the licensor's patent is void as against public policy, then the defendant licensees in the instant case are free to contest the validity of the patents, and therefore the premise of the Government's argument, that the Government ought not be forbidden to contest the validity of the patents for the reason that the normal test by individuals in infringement suits has been foreclosed, falls. It is to be noted also that the contention of the Government that the licensee defendants have bound themselves not to contest the validity of the patents and that no other persons are likely to do so and

that therefore the Government ought to be permitted itself to raise the question of validity, is an argument of what the law ought to be with respect to the right of the Government to repudiate the action of its own Commissioner of Patents and the power of the courts to review the action of the Commissioner except where induced by fraud; it is not an argument as to what the law is. On that subject further comment is made below.

IV

The answer to the question presented by the motion to strike or for partial judgment dismissing paragraph 46 (a) lies not in the contentions made, and authorities cited, by the Government, but in considerations of a more fundamental nature:

1. The United States is an entity of conferred, not inherent, powers. Its authority is found in the objective law set up by the people in the Constitution, in statutes, in judicially recognized principles. What is true of the United States in this respect is true of its governmental departments and agencies. The Constitution, Art. I, § 8, Clause 8, gives Congress power "To promote the Progress of Science and useful Arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective writings and Discoveries." The statute authorizing the issuance of patents provides that:

> Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof * * * not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefore [Rev. Stat. § 4886 (1875), amended 29 Stat. 692 (1897), 46 Stat. 376 (1930), 53 Stat. 1212 (1939), 35 U. S. C. § 31 (1940)].

The United States acts in its sovereign capacity in issuing patents under these constitutional and statutory provisions. There is nothing in them or in the Sherman Act or in judicially recognized principles that permits it to repudiate patents or to ask the courts to do so after their issuance, except for fraud in the obtaining of the patents. The right to cancel for fraud is mentioned below.

2. The attack upon the validity of the patents under paragraph 46 (a) involves a breach, as between the Government and the patentees and those dealing with the patentees, of the Government's

grant. In issuing the patents through the Commissioner, the Government "upon due examination * * * adjudged [the claimants] to be justly entitled to a patent under the Law" and thereupon made a solemn grant. When an alleged infringer attacks the validity of a patent under Rev. Stat. § 4920 (1875), 35 U. S. C. § 69 (1940), he is breaking no grant of his own since he did not issue the patent. No private litigant could expect relief in a court of equity upon the premise of a broken promise on his own part. A fortiori the Government should not. On the contrary it should scrupulously keep and perform each of its own covenants. One of the first objectives and essentials of good government is order and certainty in relations between government and citizen. This cannot be secured if the Government itself is not to be depended upon to abide its grants, even if they have been improvidently or erroneously made. The attack of the Government upon the patents under paragraph 46 (a) is based upon the extraordinary premise that the Government can in one department issue a grant and in another question its own action, in the absence of charges of fraud in inducing the action. Common principles of justice and fairness in dealings between patent applicants and the Government give patentees a right to assume that their patents are valid insofar as any attack on them by the Government which issued them is concerned,

unless the attack is for fraud in the obtaining of the patents.

In ruling that the Government cannot attack, nor the court review, in this proceeding the validity of the patents, the court does not assume to justify any misuse of the patents as a cloak for illegal restraints of trade or price fixing beyond the proper limits of a patent monopoly. If such conduct be shown, as charged, it is amenable to law. But that is a different aspect of this case; and two wrongs do not make a right. That the defendants may be shown to have misused the patents is no warrant for the Government's repudiating its own assurance that they were issued upon due examination and according to law and conferred an exclusive right for a given period of years. As pointed out above, in the present aspect of the Government's case, *i. e.*, that arising under paragraph 46 (a), the patents are not attacked as invalid because illegally used; on the contrary illegal use is predicated upon their invalidity, and this is not charged in the complaint as due to any fraud or over reaching, but only to erroneous action of the Commissioner in issuing the patents.

3. It is settled law that although the Federal courts may compel an officer or agency in the executive branch of the Government to perform a ministerial duty or to refrain from threatened action clearly beyond legal authority and may, under the due process clause of the Constitution,

examine upon a bill in equity into governmental action alleged to have been taken wholly without jurisdiction, or to have been arbitrary or induced by fraud, the courts do not have authority in the absence of statute to review the exercise of discretion or judgment by officers or agencies of the executive branch of the Government. *Welch* v. *Obispo Oil Co.*, 301 U. S. 190 (1937); *Leach* v. *Carlile*, 258 U. S. 138 (1922); *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479 (1919); see *American T. & T. Co.* v. *United States*, 299 U. S. 232, 236 (1936).[6] This is the theory which underlies the decision of *United States* v. *Bell Telephone Company*, 167 U. S. 224 (1897), certain language of which has been quoted above as relied upon by the Government in support of its contentions herein. That was a suit by the United States to cancel a patent to a telephone transmitter upon two separate grounds, one that the patent had been obtained by fraud, the other that the patentee was not the original and first inventor. It was held that the Government must fail as to the first ground because fraud had not been established; and that as to the second it must fail also, for the reason that "The judgment of the Patent Office, the tribunal established by Congress to determine such questions,

[6] For a description of matters appropriate for judicial review see *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 274–8 (1933).

was adverse to the contention of the Government, and such judgment cannot be reviewed in this suit." (167 U. S. at 264.) In the course of the opinion the Court discussed two previous cases, *United States* v. *Bell Telephone Co.*, 128 U. S. 315 (1888), and *United States* v. *American Bell Telephone Co.*, 159 U. S. 548 (1895), saying there was nothing in either of them to conflict with the views expressed in the opinion. In concluding its opinion the Court said:

> In *United States* v. *Telephone Co.*, *supra* [the reference is to the first of the two cases just mentioned], it was decided that where a patent for a grant of any kind issued by the United States has been obtained by fraud, by mistake or by accident, a suit by the United States against the patentee is the proper remedy for relief, and that in this country, where there is no kingly prerogative, but where patents for land and inventions are issued by the authority of the Government, and by officers appointed for that purpose, who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself, the appropriate remedy is by proceedings by the United States against the patentee.
>
> But while there was thus rightfully affirmed the power of the Government to proceed by suit in equity against one who had wrongfully obtained a patent for land or for an invention, there was no attempt

to define the character of the fraud, or deceit or mistake, or the extent of the error as to power which must be established before a decree could be entered cancelling the patent. It was not affirmed that proof of any fraud, or deceit, or the existence of any error on the part of the officers as to the extent of their power, or that any mistake in the instrument was sufficient to justify a decree of cancellation. *Least of all was it intended to be affirmed that the courts of the United States, sitting as courts of equity, could entertain jurisdiction of a suit by the United States to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred. We are of opinion, therefore, that the question, as stated, is not open for consideration in this case* * * * (167 U. S. at 269–270). [Italics supplied.]

The Court said also in the course of the opinion:

> * * * the Government is as much bound by the laws of Congress as an individual, and when Congress has created a tribunal to which it has given exclusive determination in the first instance of certain questions of fact and has specifically provided under what circumstances that

> determination may be reviewed by the courts, the argument is a forcible one that such determination should be held conclusive upon the Government, subject to the same limitations as apply in suits between individuals (167 U. S. at 268).

The decision of course does not constitute a direct ruling that the Government cannot seek in an antitrust proceeding, incidental to determination of the primary question of violation of the Sherman Act, a judicial determination of the invalidity of patents relied upon by the defendants as a basis of license agreements themselves urged in defense of the charge of Sherman Act violation. But the case does reflect the general principle that the Federal courts sitting in equity do not have power in the absence of statute to set aside at the instance of the Government a determination made by a tribunal or officer in the executive branch of the Government except when such determination has been induced by fraud. And the reasoning of the Court in the case is as apt for incidental attack upon the validity of patents as for direct attack.

There are similar rulings by the United States Supreme Court in respect of determinations of the Land Office. In *United States* v. *Coronado Beach Co.*, 255 U. S. 472 (1921), the Government sought by a bill in equity to ascertain the rights of private parties in an island in the harbor of San Diego, California, and to condemn the island

for public purposes. The Government contended that private ownership went only to the shore line, the Beach Company that it included tide lands. The title to the Beach Company was derived from a Mexican grant of 1846 to one Carrillo, a Mexican citizen, to whose rights the Beach Company had succeeded. Intermediate holders of the title had in 1852 petitioned Commissioners to settle Private Land Claims appointed under an Act of March 3, 1851, 9 Stat. 631, to confirm to them the land in question, and although this petition was rejected by the Commissioners, on appeal to the United States District Court the title was declared good and confirmed, the decree stating the boundaries on the north, east and south as in the original grant, and "west by the anchorage for ships, according to the documents of title and map to which reference is had." In 1869 a patent was issued reciting this decree, a return with a plat of a survey approved under the Act of 1851, and giving and granting the land described in the survey. The Government attempted to show that the extent of the land patent as thus confirmed was erroneous. The Court held that this was not allowable. Speaking for the Court Mr. Justice Holmes said:

> * * * The grant to Carrillo was bounded "west by the anchorage for ships" and although it well may be that in view of the purpose set out in his petition and the

> circumstances the grant could have been construed more narrowly, that was a matter to be passed upon and when the decree and the patent went in favor of the grantee it is too late to argue that they are not conclusive against the United States. It is said that the field notes, not put in evidence at the trial, show that the deep water line was not surveyed, but was taken from the Coast Survey maps. But however arrived at it was adopted by the United States for its grant and it cannot now be collaterally impeached * * * (255 U. S. at 488).

The Government's attack in *United States* v. *Coronado Beach Co.*, upon the land patent for error in issuing it was direct. *A fortiori* an indirect or collateral attack is not allowable. In *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669 (1914), there was a bill in equity to establish a right to lands. The plaintiff claimed under a clearly junior title but asserted that the grant to the defendant Railroad Company was invalid because the lands contained minerals. Mineral land was excepted by statute from grants. The District Court dismissed the bill and upon certification by the Circuit Court of Appeals of questions to the Supreme Court that Court said:

> The exclusion of mineral lands is not confined to railroad land grants, but appears in the homestead, desert-land, timber and stone, and other public-land laws, and the settled course of decision in respect of

all of them has been that the character of the land is a question for the Land Department, the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends, and that when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it. *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Maxwell Land Grant Case*, 121 U. S. 325, 379–381; *Heath* v. *Wallace*, 138 U. S. 573, 585; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 174; *Burfenning* v. *Chicago, &c. Railway Co.*, 163 U. S. 321, 323. In this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such a distinction.

Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral-land law, or if they issue a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a

bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it (234 U. S. at 691–2). [Citing cases.]

4. The Government's contentions in respect of the right to attack the validity of the patents under paragraph 46 (a) of the complaint really amount to an assertion not that it is, but that it ought to be, the law that notwithstanding the grant of a patent by the Commissioner of Patents the Government may test the validity of the patent in the courts. The Commissioner and his staff are asserted to be incapable, because of press of business and the conditions under which the Patent Office operated, including unavoidable ignorance of anticipation, of reaching conclusively dependable determinations in respect of the right to a patent; hence recourse to the courts to correct the Commissioner's action should be allowed, so it is urged. It is to be noted that this argument is as valid for direct attack as for incidental. If the assertions of the Government in respect of the limitations of the Patent Office are correct—upon this the court does not assume to pass—and if such limitations cannot otherwise be corrected, a case may perhaps be made for the devising of some test outside the Patent Office of the validity of patents. But it does not follow

that it is within the proper function of the courts to devise it. There is of course a recognized place for growth of the law through judicial decision in the "interstitial" or borderline case, but radical departures or innovations are not properly made by courts. Judges are not appointed in representative capacity for the purpose of law making; and judicial innovations upon the law are especially to be avoided when they would upset transactions entered into on the faith of the law as it is. Conceivably there should be Congressional action creating a statutory right in the Government to test in the courts the correctness of determinations of the Commissioner of Patents, some such remedy perhaps as is now afforded patent applicants under Rev. Stat. § 4915 (1875), 35 U. S. C. § 63 (1940). But such a remedy if created by statute would undoubtedly be made prospective in effect, that is to say, would apply only to patents issued after the passage of the act. Moreover, the actions permitted under such a statute would properly be made subject to a limitation in time, so that after a given period the rights under a patent would be secure to the patentee and those dealing with him so far as interference by the Government was concerned. It is not within the proper function of courts to open the door by judicial innovation to Government attack on patents, retroactive in effect and without limitation in time, and thus to unsettle

industrial security so far as it is based on the patent system.

There is authority to the effect that motions under Rule 12 (f) are not an appropriate means of testing the legal sufficiency of a pleading. *Hartford-Empire Co.* v. *Glenshaw Glass Co.*, 47 F. Supp. 711, 6 Fed. Rules Serv. 12 b. 51 (W. D. Pa. 1942); *Dysart* v. *Remington Rand*, 31 F. Supp. 296, 2 Fed. Rules Serv. 12 b. 51 (D. Conn. 1939). Therefore the motion now before the court is ruled on in terms of the alternative motion for a partial judgment, and the court will order a dismissal of that portion of the Government's complaint contained in paragraph 46 (a) except the first and last sentences of that paragraph. It is true that, as suggested by the defendants, the last sentence is in somewhat conclusional terms, but the court thinks not objectionably so under the broad allowances of the Federal Rules of Civil Procedure with respect to pleadings.

In deciding as the court does that the Government cannot properly attack the validity of patents as it seeks to do under paragraph 46 (a) of the complaint, it is not ruled that all evidence on the topics mentioned in those portions of paragraph 46 (a) other than the first and last sentences is necessarily inadmissible on some issue in the case other than that of the validity of the patents. It occurs from time to time in the trial of cases that evidence inadmissible in respect of one issue

is admissible in respect of another. So far as the right of the Government to attack the validity of the patents is concerned, the court rules definitely that it has no such right, and the court no authority to pass on the same; that the patentees and those dealing with them had and have a right to assume the validity of the patents so far as any attack by the Government on its own grant is concerned. But in respect of other issues the relevancy, materiality and competency of evidence offered, whether or not it touches the topics mentioned in paragraph 46 (a), will be passed upon at the time of the offer.

I am authorized to state that Judge Garrett concurs in the foregoing opinion and decision.

BLAND, J., dissenting:

In my view, it makes little difference whether or not paragraph 46 (a) of the complaint is stricken, but the implication drawn from the striking of it requires that I briefly express my view in dissenting.

The Sherman Anti-Trust Law forbids illegal combinations or monopolies which restrain interstate trade. It is well-settled that an inventor or his assignee has the right to a monopoly in the manufacture and sale of his patented article. *United States* v. *General Electric Co. et al.*, 272 U. S. 476 (1926). However, such a monopoly has been declared to be a "limited monopoly." *Oxford Varnish Corporation et al.* v. *Ault & Wiborg*

Corporation, 83 F. (2d) 764 (C. C. A. 6, 1936); see also *Bement* v. *National Harrow Co.*, 186 U. S. 70, 91 (1902). Thus it is seen that when Congress passed the Sherman Act, we had two conflicting laws on the subject of monopoly. It is the duty of the courts, if possible, to harmonize the two statutes in such a way as to give force and effect to both and arrive at the true intent of Congress in the enactment of the antitrust law.

As I understand it, the chief reliance of the defendants in support of their contention that the Government in this case has no right, through its Department of Justice, to attack the validity of a patent, is upon *United States* v. *Bell Telephone Company*, 167 U. S. 224 (1897). The holding in that case, as pertinent to the inquiry here, is in the following language:

> Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it *to discharge its obligations to the public*, and sometimes when the purpose and effect are simply to enforce the rights of an individual. In the former cases it has all the privileges and rights of a sovereign. The statutes of limitation do not run against it. The laches of its own officials does not debar its right. *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *United States* v. *Nashville, Chattanooga &c. Railway*, 118

> U. S. 120; *United States* v. *Insley*, 130 U. S. 263. But when it has no proprietary or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants. * * * [Italics mine.]

This case is not authority for a holding that the Government in the instant action, when acting for the public through the Department of Justice, being duly empowered by Congress to enforce the antitrust laws as against what it alleges is a combination built around certain invalid patents, is estopped from challenging the validity of said patents. On the contrary, the mandate of the Sherman Act is that, under the direction of the Attorney General by appropriate officers, proceedings *shall* be instituted to remedy the wrongs brought about by a violation of the Sherman Act. The statute calls into action and authorizes proceedings in which it may be determined whether the Sherman Act is being violated or "valid patent rights" are being exercised.

The exact question presented here has never been directly presented before as far as I know; and since I am convinced that there must be some

new declaration of law made by our highest court as to where the line of demarcation rests between the exercise of valid patent rights and acts that are in violation of the antitrust laws, I feel that such cases as *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942), should be given more consideration than has been accorded them by the majority. In that case (a royalty suit) the defendant-licensee was, under the decisions, when the case came to the Supreme Court, barred from pleading the invalidity of the patent, but it pleaded that the agreement was in violation of the antitrust laws and that therefore it had a right to say that the agreement was unlawful if the patent was invalid. The Supreme Court upheld this contention and stated:

> Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements. * * *

It also stated:

> * * * We granted certiorari * * * the question being of importance to the administration of the patent laws and the Sherman Anti-Trust Act.

As a basis for my conclusion, I rely also upon the following authorities: *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 (1942); *United States* v. *Univis Lens Co., Inc., et al.*, 316 U. S. 241 (1942); *United States* v. *Masonite Corporation et al.*, 316 U. S. 265 (1942); and *Becher* v. *Contoure Laboratories, Inc., et al.*, 279 U. S. 388 (1929). In the last-cited case the following is found:

> * * * Again, even if the logical conclusion from the establishing of Oppenheimer's claim is that Becher's patent is void, that is not the effect of the judgment. Establishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment *in rem* binds all the world, but the facts on which it necessarily proceeds are not established against all the world, *Hanson* v. *Williams*, 213 U. S. 453, 455, and conversely establishing the facts is not equivalent to a judgment *in rem*.
>
> That decrees validating or invalidating patents belong to the Courts of the United States does not give sacrosanctity to the facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is true an important patent is void—and, although there is language here and there that seems to suggest it, we can see no ground for giving less effect to proof of such a fact than to any other. * * *

The last-cited authority is important in view of my conclusion that the *fact* of invalidity is pertinent to the issue here involved aside from the question of the declaration of a patent's invalidity. The invalidity of defendants' patents, if any of them are invalid, is of concern here only in so far as it goes to the determination of the right of defendants to rely upon a patent monopoly for acts which would otherwise, admittedly, be contrary to the Sherman Act.

When the Department of Justice attempts to take action against a monopoly, it frequently occurs that the defendants contend that they have a right to have a monopoly and to restrain trade because their conduct is nothing more than the exercise of their rights under the patents laws. So, defendants file an answer, as they did in the instant case, showing that they rely upon the ownership of "valid patents" as an excuse for their contracts of price-fixing and trade-restraining. When such a defense is interposed, it is my view that, whether or not the Government has pleaded that the patents are invalid and regardless of the fact that they are to be regarded as *prima facie* valid, the Government has the right to show, if it can, that the patents relied upon are either invalid (concerning which the defendants would probably have more knowledge than anyone else) or are of such character in their relation to the prior art as to be no justification for violating the Sherman Act.

It seems to me that any other conclusion is anomalous. Can a defendant say, "Yes, I would be violating the Sherman Act if I were not acting under my valid patent rights," and then close the mouth of the Government to show that the patents are such as to be no justification for such a violation? In attacking the validity of the patents, as the Government seeks to do in the instant case, it is not attempting to establish invalidity for the purpose of cancellation or for the purpose of protecting any other inventor or anyone who wishes to manufacture defendants' products. It is attempting to show, in "discharge of its obligations to the public" under statutory mandate, the nature of the patents for the purpose of showing that they are no justification for the alleged monopoly and restraint of trade, whether valid or invalid.

In this view, it seems to me that the decisions relied upon by the majority are no authority for holding that the Government, under such circumstances, has no right to question the validity of the patents for the purposes stated. The result of the ascertainment of invalidity in the instant case is not the result sought in any decided case relied upon by the majority. It is the *fact* of invalidity which goes to the question as to whether or not the defendants in the instant case are using the patents as a smoke-screen (and I am not implying that they are) in order to carry on what the Government charges is a violation of the law.

If the striking of paragraph 46 (a), which alleges that the patents relied upon are invalid, implies that the court does not have the right to accept evidence as to the nature of the patents relied upon, even though it shows them to be invalid, I think the striking would be erroneous. If the paragraph is stricken because it is unnecessary, or if the evidence of invalidity could be accepted for other purposes, then it is of little consequence what happens to paragraph 46 (a).

I need not here discuss the broader aspect of the question as to whether or not the *General Electric* case (which, unlike the instant case, involved the conduct of principal and agent) should be modified where competitors and not *bona fide* agents are concerned, in the light of the present trend of decisions, and as to whether a valid patent monopoly should be held not to be one which encompasses the scope contained in the allegations of the Government. I have matured no view on this phase of the case.

For reasons hereinbefore stated, I feel compelled to dissent from the conclusion reached by the majority on the motion to strike and for partial judgment.

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No. 13

In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court on appellees' motion to dismiss the complaint (R. 3933–4131) is reported in 67 F. Supp. 397. Its opinion on appellees' motion to strike paragraph 46 (a) of the complaint, the paragraph alleging the invalid-

ity of certain patents, or, in the alternative, for partial judgment dismissing that part of the Government's claim therein contained (R. 369–395), is reported in 53 F. Supp. 889.

JURISDICTION

The judgment of the district court was entered on August 5, 1946 (R. 4169). The petition for appeal was filed on September 30, 1946, and was allowed the same day (R. 4187–4188). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 StSat. 804, 43 Stat. 938, 28 U. S. C. 345). Probable jurisdiction was noted on December 16, 1946 (R. 4204).

QUESTIONS PRESENTED

1. Whether a combination among appellees, who together comprise all manufacturers of gypsum board, to organize the gypsum industry and stabilize prices by entering into patent license agreements containing price-fixing provisions with USG, the owner of certain patents and the dominant manufacturer in the industry, constitutes a conspiracy to restrain and to monopolize trade and commerce in violation of the Sherman Act; and whether the evidence, properly considered, establishes the existence of such a combination among the appellees.

2. Whether the owner of process or narrow improvement patents may condition a license to use the patented process or to make, use, and vend the patented product upon the condition that the licensee not sell the unpatented product produced by the patented process or the product to which the narrow improvement patent relates at less than the minimum prices established from time to time by the patentee.

3. Whether the prices and conditions of sale which appellees have imposed upon trade and commerce in gypsum board and related products are normally and reasonably adapted to the securing of a pecuniary reward for the patentee's monopoly.

4. Whether the holding in *United States* v. *General Electric Co.*, 272 U. S. 476, which permitted a patentee to condition a license to make, use, and vend the patented product on the requirement that the licensee sell the patented product by the method and at the prices fixed by the patentee should now be overruled.

5. Whether the Government in a proceeding instituted under Section 4 of the Sherman Act to prevent and restrain violations of the Act may show the violation of the Act by proving the invalidity of patents relied upon to justify the restraint and monopolization of trade and commerce.

6. Whether under the rule of *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249, the declara-

tions of one person are admissible in evidence against and binding upon other persons when it has been shown by evidence *aliunde* that they are associated together in a combination lawful or unlawful.

7. Whether documents admitted to be genuine under Rule 36 F. R. Civ. P. which contain declarations in furtherance of a conspiracy are binding upon the non-admitting appellees.

8. Whether the Government in a proceeding under Section 4 of the Sherman Act to prevent and restrain a price-fixing combination establishes a *prima facie* violation of that Act by showing the existence of a combination among all the competitors in the industry to fix the prices and terms of sale of a patented product or whether, in addition, it is required to negative a defense based upon the ownership of patents.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209 (15 U. S. C. 1, 2, 4), known as the Sherman Act, provides in part as follows:

> SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the

trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action instituted by the United States in 1940 under Section 4 of the Sherman Act to enjoin and restrain violations of Sections 1, 2, and 3 of that Act. The complaint, as amended, charges the appellees with combining and conspiring to fix arbitrary and noncompetitive prices for gypsum board; to standardize gypsum board and its method of production for the purpose of eliminating competition; to raise and stabilize prices for plaster and miscellaneous gypsum products; to control the distribution of gypsum board and eliminate jobbers, and to control the resale price of manufacturing distribu-

tors of gypsum board (R. 1, 9–10). The case was tried before a three-judge district court constituted in 1942 pursuant to an expediting certificate filed under the Expediting Act of February 11, 1903, as amended (R. 304). In advance of trial the court ruled that the Government was not entitled to show the invalidity of patents pursuant to which the defendants had fixed prices and imposed various other restraints (R. 369, 396).

Trial began in November 1943 and the Government closed its case on April 20, 1944. The evidence introduced by the Government consisted of about 650 documents and the testimony of 28 witnesses, 21 of whom were, or had been, officers or employees of companies alleged to be parties to the conspiracy. Many of the documents consisted of contemporaneous letters or memoranda written by these 21 witnesses. After the Government had rested the defendants each moved to strike from the record all the exhibits and testimony which were received as to each defendant subject to the usual reservation with respect to the declarations of alleged co-conspirators (R. 3891); also to dismiss the case under Rule 41 (b) of the Rules of Civil Procedure upon the ground that upon the facts and the law plaintiff had shown no right to relief (R. 3901).

On June 15, 1946, the court rendered an opinion (R. 3933–4131) holding that the motions should

be granted and, on August 5, 1946, filed its findings of fact and conclusions of law and entered judgment dismissing the complaint (R. 4169). The district court in entering judgment made the following rulings:

1. Association of defendants in a common plan to organize the industry and stabilize prices under like price-fixing patent licensing contracts would not be illegal. In addition, the evidence shows that there was no such plan.

2. Defendants did not have the burden of establishing that their price fixing was justified by their patent rights; the Government had the burden of establishing the contrary.

3. The defendants' licensing agreements and their practices thereunder cannot be distinguished from those held to be valid in *United States* v. *General Electric Co.*, 272 U. S. 476.

4. The declarations of one defendant were inadmissible against other defendants because there was no independent evidence to establish the unlawful conspiracy.

5. Apart from these declarations by defendants, there was no evidence that the license agreements were *"nonbona fide"* in character or purpose; therefore each prior declaration by a defendant which was put in evidence was evidence only against him and was not admissible against any of his alleged co-conspirators.

6. The evidence, considered on the foregoing basis. does not establish that the license agree-

ments were "sham", i. e., not intended to bind the parties to the promises made,[1] or that they were designed to achieve restraints of trade beyond the proper limits of USG's patent rights.

7. The defendants in their actual operations under the license agreements did not exceed the proper limits of rights given by patent law.

8. On the defendants' motions to dismiss pursuant to Rule 41 (b) of the Rules of Civil Procedure, every factual issue as to which the evidence before the court did not preponderate in favor of the plaintiff must be resolved against the plaintiff.

The assignment of errors challenges each of these rulings, certain of the findings of fact and conclusions of law, and certain other holdings or rulings of the court made in course of trial, as well as the ruling made in advance of trial, that the Government was not entitled to show the invalidity of the patents on which the defendants rely.

The evidence upon which the Government relies consists in the main of contemporaneous documents and of the uncontradicted testimony of unimpeached witnesses. On a number of important matters the findings of the court below are, in our view, inconsistent with such evidence. The Court will not appreciate how clearly erroneous

[1] The Government had never contended that the license agreements were sham in this sense.

those findings are unless it actually reads many of the documents and some of the testimony. Accordingly, in order to facilitate the Court's consideration of the case and in the interest of ultimate brevity we are setting forth the documented facts in some detail in this Statement. Particular findings claimed to be erroneous are discussed in footnotes at an appropriate point in the narrative Statement. The unusual length of the Statement is, we believe, required by the nature and magnitude of the case.

I

THE APPELLEES

The appellee companies are engaged in the mining and production of gypsum and in the manufacture of gypsum products, principally gypsum board [2] and gypsum plaster (Fdg. 3, R. 4133). Each sells gypsum products in interstate commerce to distributors and consumers within the so-called Eastern area which includes the states east of the Rocky Mountains (Fdg. 3, R. 4133). The appellees combined manufacture 100% of the gypsum board and a substantial percentage of the plaster sold in the Eastern area (Fdg. 21, R. 4144).

United States Gypsum Company (USG) was incorporated in 1901 to effect a merger of 35

[2] Gypsum board or board is used to refer to gypsum plasterboard, gypsum lath, and gypsum wallboard.

producers, processors and distributors of gypsum products. During the last twenty years it has acquired the gypsum plants of eight additional producers including the Niagara Gypsum Company (Niagara). USG now operates 16 plants in the Eastern area, at 13 of which board is produced. Since its organization in 1901 it has been the largest producer of gypsum board and plaster in the United States. In 1939 it produced and sold approximately 55% of all the gypsum board and a substantial amount of all plaster sold in the Eastern area. In that year its sales in the Eastern area of gypsum board amounted to approximately $10,600,000. Appellee Sewell L. Avery was president of USG from 1920 to 1936 and since that time has been chairman of its board of directors. The appellee Oliver M. Knode is president of USG. (R. 3, 6, 162, 264, 270.)

National Gypsum Company (National) was incorporated in 1925 and commenced production of gypsum board and plaster in 1926. In 1935 it acquired Universal Gypsum and Lime Company (Universal) and in 1936 the Atlantic Gypsum Products Corporation (Atlantic). National, now the second largest producer of gypsum board in the United States, operates ten plants in the Eastern area, eight of which produce gypsum board. In 1939 it produced approximately 23% of all gypsum board and 20% of all plaster manu-

factured and sold in the Eastern area. In that year its sales in the Eastern area of gypsum board amounted to approximately $4,500,000. Appellee Melvin H. Baker is president of National. (R. 3, 7, 162, 215, 217.)

Certain-teed Products Corporation (Certain-teed) entered the gypsum industry in 1923 by acquiring the six gypsum plants of the Acme Cement Plaster Company, but did not commence manufacturing gypsum board until 1926. In 1928 it acquired the Beaver Products Company, Inc., and the Beaver Board Company (both sometimes referred to as Beaver), then the second largest producer of gypsum board. Beaver had entered the gypsum industry in 1920 by the purchase of the American Cement Plaster Company and Bestwall Manufacturing Company (Bestwall). Certain-teed now operates five plants, four of which produce gypsum board, and is the third largest producer of gypsum products in the United States. In 1939 it produced approximately 11% of all gypsum board and 10% of all plaster manufactured and sold in the Eastern area. In that year sales of Certain-teed in the Eastern area of gypsum board amounted to $2,100,000. Appellee Henry J. Hartley is president of Certain-teed. (R. 3, 7, 162, 230, 235.)

The Celotex Corporation (Celotex), the largest producer of fiber insulating board in the United States, entered the gypsum industry by acquir-

ing the American Gypsum Company (American) in 1939. In 1939 sales by Celotex in the Eastern area of gypsum board amounted to approximately $585,000. (R. 7, 162, 195.)

Ebsary Gypsum Company, Inc. (Ebsary) has been engaged in the manufacture of plaster since 1918, and gypsum board since 1928. Its sales of gypsum board in the Eastern area in 1939 amounted to approximately $670,000. Appellee Frederick G. Ebsary is president of Ebsary. (R. 8, 162, 164.)

Newark Plaster Company (Newark) has been engaged in the production of plaster since 1922 and the manufacture of gypsum board since 1937 when it acquired the Kelley Plasterboard Company, Inc., which had been engaged in the production of board since before 1918. Newark's sales in the Eastern area of gypsum board amounted to approximately $750,000 in 1939. Appellee Frederick Tomkins is president of Newark. (R. 8, 162, 298.)

Appellee Samuel M. Gloyd is the sole owner of an unincorporated business trading under the name of Texas Cement Plaster Company (Texas). It has been manufacturing plaster since about 1902 and gypsum board since 1924. Its sales in the Eastern area of gypsum board amounted to approximately $230,000 in 1939. (R. 8, 162, 176.)

II

THE GYPSUM INDUSTRY

Gypsum is a rocklike mineral composed of calcium sulphate in combination with water and is found in deposits in numerous states of the United States and in Canada. After it is mined it is crushed and subjected to a process known as calcination to evaporate part of its water content. The resulting product known as calcined gypsum or stucco has the characteristics of readily recombining with water to form a hard, rigid mass. Calcined gypsum is the primary constituent of various important products used in the construction industry. (Fdg. 4, R. 4133.) Its principal products are gypsum board and plaster. In addition, there are several less important products such as gypsum block and tile. In 1939 the sales value of all products of calcined gypsum used in the building industry in the United States amounted to $42,000,000, $23,000,000 of which was accounted for by gypsum board and $17,000,000 by plaster.

Until about the year 1900 lime was the principal ingredient of all wall plaster. About 1900, however, gypsum became commercially important as an ingredient of plaster in place of lime. Since that time, gypsum has gradually displaced lime in plaster, and over 90% of all plaster now used in building construction in the United States is made with gypsum.

The basic patents on gypsum board have long since expired. Commercial production of gypsum board commenced about 1905. For many years thereafter, by far the greatest amount of gypsum board produced was board designed to be used as a base for plaster in wall and ceiling structures and known as plasterboard. About 1925, a board smaller than plasterboard, known as gypsum lath, was introduced on the market as a plaster support. By reason of the smaller and, therefore, more convenient size of gypsum lath, it has displaced plasterboard in new construction, and plasterboard is now used solely for repair work. Today gypsum lath is usually 3/8 or 1/2 inch in thickness, 16 inches wide, and it is either 32, 36, or 48 inches long. The sales value of gypsum lath and plasterboard manufactured by the appellee companies and sold in the United States in 1939 was about $13,000,000.

Several years after the first commercial manufacture of plasterboard, a gypsum board, known as wallboard and designed to be used as a finished panel in place of plaster and lath, was introduced on the market. Gypsum wallboard is now one of the most important of various boards on the market which are used as substitutes for plaster and lath. Today wallboard is either 1/4, 3/8, or 1/2 inch in thickness, 32, 36, or 48 inches wide, and comes in various lengths from 4 to 12 feet long. The sales value of gypsum wallboard manufac-

tured by the appellees and sold in the United States in 1939 was about $8,500,000.

All gypsum board consists of a flat, thin core of hardened calcined gypsum covered on both surfaces with heavy paper, known as liners. Since gypsum lath and plasterboard are intended to support plaster, the paper liners with which the surfaces of the gypsum core are covered are coarse. Because gypsum wallboard is a substitute for both plaster and lath, and is therefore not covered with plaster, one of its liners consists of a good grade of heavy, smooth paper.

In the early period of its manufacture, gypsum board was crudely made by pouring buckets of calcined gypsum mixed with water in thin layers between two pieces of rough felt paper, smoothing the product with rollers, hardening it on racks and trimming the pieces to size (Fdg. 5, R. 4133). For many years—at least since 1920—board and lath have been made by depositing the wet gypsum or gypsum slurry on a continuous sheet of paper that unrolls and moves along on a belt or conveyor some several hundred feet in length. After the slurry is placed on the lower sheet of paper it is mechanically spread substantially even over it; the top sheet of paper then unrolls and is pressed down on the slurry as it passes under rollers. At the end of the conveyor the board is cut to size and placed in dryers from which it comes out as a finished product in about

thirty minutes. (R. 476–477.) Perforated lath is made by punching holes in lath made in this manner. Metallized board has a paper-thin thickness of metallic foil attached to one surface of ordinary board or lath.

III

THE CONSPIRACY

A. *The conspiracy in 1925–1926*

Prior to 1912 the edges of the core of all gypsum board were exposed. About 1912 USG commenced the manufacture of a gypsum board with the side edges bound and sealed by folding the lower paper liner over the edges of the core. The end edges of the board continued to be exposed as before. This improvement was covered by United States letters patent Number 1,034,746 issued August 6, 1912, upon the application of Clarence W. Utzman, and assigned by him to USG. The board embodying the edges described in the Utzman patent was known as a closed-edge board as distinguished from board with an unprotected edge which was known as open-edge board. The closed-edge board represented an improvement over the open-edge board then on the market since it reduced breakage in shipment and crumbling of the core at the side edges when being nailed into place.

Prior to 1917 the Bestwall Manufacturing Company (Bestwall) commenced the manufacture of

a closed-edge type of board. In July of that year USG filed suit against Bestwall and in July 1919 obtained a judgment holding the Utzman patent valid and infringed. This judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit on January 4, 1921 (Fdg. 6, R. 4434). During the course of this litigation Bestwall had been acquired by Beaver, which then became the second largest manufacturer of gypsum board in the United States, and both were manufacturing a board with semi-closed edges. By a supplemental bill USG sued both of these companies for infringement and again prevailed. Beaver appealed to the Circuit Court of Appeals for the Seventh Circuit.

Blagden, who had become president of Beaver in 1923, made overtures of compromise and settlement of this litigation to Avery, both before and after the decision of the trial court (R. 784–785). At a meeting of Blagden and Avery on December 10, 1925, Avery specified as terms of settlement the payment of damages by Beaver for infringement of USG's patents; acknowledgment by Beaver of the validity of USG's patents; payment of royalties; and the right in USG to fix prices on board made and sold by Beaver under the Utzman closed-edge patent (R. 785–790).

On December 12, 1925, immediately following this conference, Blagden wrote Avery that, as he had previously informed Avery, he, Blagden, and

his attorney "have been working up a memorandum in which we have attempted to analyze the results of all possible decisions by the Circuit Court of Appeals of the matters in controversy and contrasted such results with a compromise and adjustment of the suit along the lines I have discussed with you," and stated that he was enclosing a copy of the memorandum. His letter concluded that, "a settlement along the lines discussed by us would be more advantageous than any possible decision by the Circuit Court of Appeals" (Ex. 184, R. 5337).[3]

The memorandum, Exhibit 185 (R. 5338–5347),[4] accurately forecast what was to happen in the gypsum board industry in the next several years. In this memorandum, Blagden pointed out the various possible judicial decisions as to the status of the Utzman patent. With respect to each, Blagden stated in some detail what the normal result of such a decision would be, and under each concluded with the significant statement that, in such case:

> Plaintiff [USG] would lose irrevocably its present opportunity to organize the industry and stabilize prices.

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[3] Since the only exhibits referred to in this brief are those introduced by the Government, they are designated as "Ex. —" instead of as "Gov't. Ex. —."

[4] This letter (Ex. 184, R. 5337) together with the memorandum enclosed therewith (Ex. 185, R. 5338) was obtained from the files of USG. Blagden, called as a witness, identified the two exhibits, and his testimony on cross-examination in nowise weakened their force (R. 871).

Blagden then went on to contrast the enumerated results with the results that would follow if the suit were compromised and settled. He pointed out that if the suit were settled:

> 1. Defendant [Beaver] would acknowledge validity of Utzman patents.
>
> 2. Defendant [Beaver] * * * would agree to pay plaintiff [USG] a reasonable royalty * * *.
>
> 3. Defendant [Beaver] would agree to use its best endeavors to induce manufacturers of closed-edge wallboard * * * to accept licenses * * *.
>
> 4. Such recognition of and acquiescence in plaintiff's [USG's] patents would enable plaintiff to maintain a lawful price control and avoid the necessity of reduction by plaintiff of current prices to meet competition * * *.
>
> * * * * * *
>
> 7. Plaintiff [USG] would be able to take a dominating position in the industry with an opportunity to control or at least participate in the control of prices through legitimate means of patent licenses (R. 5346–5347).[5]

[5] The trial court in its opinion summarized Exhibit 185, R. 5338, by saying merely that Blagden had suggested a settlement and license enabling USG to maintain "a lawful price control" through the "legitimate means of patent licenses," Blagden to endeavor to induce other manufacturers to accept licenses and permit USG to take a "dominating position." It will be noted that the court took the phrase "lawful price control" from paragraph 4, quoted above, but omitted the rest of the sentence, which reads, "and avoid the necessity of reduction by plaintiff [USG] of current prices to

On May 12, 1926, Frank J. Griswold, general manager of American, wrote J. H. McCrady, president of American, that (Ex. 104, R. 5260):

> I just returned from a meeting at Buffalo yesterday with Mr. Blagden, President of Beaver Products Company. He has had one or two interviews with Avery on the matter of settling all disputes and litigations between the wall board manufacturers by entering into a licensing arrangement and the thing looks very favorable.[6] We are standing on 50¢ per M

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meet competition * * *" (R. 4102). The omission destroys the intent and purpose of the sentence.

An even more substantial omission on the part of the trial court is its failure through an extended opinion to make any reference whatever to Blagden's main proposition that, unless USG should settle with Beaver and grant industry-wide licenses with price fixing, it "*would lose irrevocably its present opportunity to organize the industry and stabilize prices.*" [Italics supplied.] The court's complete failure to attach any significance to this phrase was clearly erroneous.

[6] The court below stated that "Blagden testified that he did not discuss with Avery the matter of all companies settling disputes and taking licenses" (R. 4110). The record shows, however, that when Blagden was questioned concerning the meetings referred to in the second sentence of Ex. 104, he testified: "I only remember having interviews with him on discussing our own settlement. I remember that we had two or three meetings, several meetings in Chicago on other subjects, and naturally at some of them there we would discuss the board question" (R. 800). Following this the Presiding Justice asked: "Do you remember discussions on that broad a subject?", to which Blagden answered: "No, sir" (R. 801). It is evident that Blagden did not deny that he had had the discussions referred to with Avery, as the court stated, but at most that he could not remember events occurring 17 years

> royalty. Avery is talking about $1.00 per M and I am inclined to think he will probably stand pretty firm on this price. However, on his own admission he has so much at stake on the proposition that he may change his views.
>
> This matter will be discussed by all independent wallboard manufacturers at a meeting in Chicago next Wednesday afternoon and probably some definite action taken on it as the probabilities are that Avery may meet with us at that meeting * * *. *According to the plans we have*[7] *we figure that there is a possibility of us holding the price steady on wallboard for the next fourteen or fifteen years which means much to the industry.*[8]

The meeting referred to by Griswold was held as scheduled in Chicago on Wednesday, May 19, 1926, and was attended by Avery, Blagden, Griswold, and representatives of every board manu-

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previously; hence the force of the contemporaneously written Exhibit 104 is in no way impaired. The finding to the contrary is obviously without support. There is no doubt at all on the essential point that Blagden did talk with all members of the industry.

[7] Except as otherwise indicated, all italics are supplied.

[8] Griswold testified that when he wrote in Exhibit 104 of the plans for holding prices steady on wallboard for "the next fourteen or fifteen years" he was under the impression that the life of a patent was 20 years and that USG would base price control on the Birdsey patent, rather than the Utzman patent (R. 700). There is no question from Griswold's testimony that the plan he had in mind was to obtain price stabilization by means of patent licenses (R. 570–571, 576).

facturer except Texas and National (R. 240–241, 278, 520, 833–834). The subject of the conference was the licensing of those present (R. 278, 240–241). USG claims that the conference was concerned solely with "the possibility of the settlement of all outstanding litigation between * * * USG, and other manufacturers of gypsum board" (R. 278), but it is significant that Certain-teed, which was represented, was not then even manufacturing board, although it contemplated doing so.

In the succeeding months of June and July 1926, Blagden had further conferences with representatives of USG (R. 808). During these conferences Blagden offered to transfer to USG all the patents that Beaver had in any way relating to the manufacture of gypsum board. Blagden testified that the Beaver and USG patents on the closed-edge type of board were practically all the patents there were on this type of edge. Blagden pointed out to Avery that by combining the 30 or more Beaver patents and applications with those of USG, USG would be in a better position to come to an agreement with the other manufacturers (R. 790-797). USG accepted the offer of Blagden and the patents were in fact transferred to USG on July 29, 1926. On the same day Beaver and USG settled their litigation and USG granted Beaver a license (R. 39). About six weeks later Universal and USG also settled their patent infringement suit, and on

September 17, 1926, Universal, too, became a licensee of USG (Ex. 2, R. 4226). Both of the above license agreements were substantially identical and among other things provided that:

(a) USG licenses Beaver and Universal to use inventions covered by the Utzman patent, 29 other patents, and 38 applications for patents, in manufacturing gypsum board, until the expiration of the Utzman machine patent on February 10, 1937. These patents and applications included those transferred to USG by Beaver.

(b) USG reserved the right to determine and fix, during the life of the Utzman closed-edge patent, or until August 6, 1929, the price at which the licensees sold closed-edge board.

(c) The licensees agreed to pay specified royalties on all board manufactured by them, whether patented or unpatented, until February 10, 1937.

(d) The licensees agreed to admit that all board having a protected edge fell within the scope of the Utzman patent, during the life of that patent, and that, after its expiration, all board having a protected edge was made under the machine patent or under other patents covered by the license agreements.

(e) The licensees acknowledged, and agreed not to contest, the validity of all patents covered in the license agreements and of all patents subsequently issued on applications covered in the agreements.

After the execution of the Beaver-USG license agreement, Blagden continued his efforts to induce other manufacturers of board to become licensees, as he stated he would do in Exhibit 185. He testified that he had conversations with Brown of Certain-teed (R. 831), Haggerty of National (R. 862), Fuller of Atlantic (R. 862), Gloyd of Texas (R. 862), Ebsary of Ebsary (R. 861), and Shearer of Universal (R. 827). He also testified that he "undoubtedly talked to some others" (R. 863). He recalled the subject matter of these conversations as follows (R. 862):

> Whenever I met with these gentlemen they would ask me were we going to take out a license, or had we taken out a license with U. S. Gypsum, and I would tell them that we had, and if they would ask me, "Well, what do you think about it?" I would say, "I would advise you to join up."

On October 1, 1926, Blagden wrote Avery and, referring to the Beaver-USG license agreements, stated (Ex. 189, R. 5349):

> I feel that the "entente cordial" that has started between our companies is only a beginner and that if we play the game right it should bring about big things.

When Blagden was asked what he meant by this statement, he answered (R. 864–865):

> I said in my previous testimony—stability, and I meant by that that in addition to our taking out a license, that undoubt-

edly others would take out licenses and that would tend toward stability.

Q. And by "stability", what do you mean, sir?

A. Stabilizing the prices in the industry.[9]

After the industries meeting in Chicago in May 1926, Griswold began to play a more active part, his goal also being industry-wide participation in the licensing arrangement in order to eliminate litigation in the industry and to stabilize prices (R. 5285; 663–664; 574).[10] On June 2, 1926, Griswold wrote Avery that he had met with Haggerty of National, which had not been represented at the Chicago meeting, and given him the details of that meeting, and stated that when he left,

[9] The court below in its discussion of Exhibit 189 (R. 4111), referred only to that part of Blagden's testimony where he said he meant by "entente cordial" that "our bickering and squabbling and fighting was over" (R. 837–838). The court also said that by "if we play the game right," Blagden meant "*only* living up to the license agreement * * *" (R. 4111). Cf. R. 864–865. The court made no reference whatever to Blagden's later explicit statement, above quoted, that he also meant "Stabilizing the prices in the industry." Blagden was not impeached as a witness; nor was his testimony inconsistent or contradicted in any way. The court's failure to consider Blagden's entire testimony, therefore, gravely impugns the accuracy of the court's treatment of the evidence on this point.

[10] On January 1927, Griswold wrote Avery (Ex. 132, R. 5285):

"You will remember that I started out to deliver 100 percent of the manufacturers of board that would be willing to sign up on a license arrangement with your company which at that time only extended during the life of the Utzman

Haggerty "admitted being personally sold on the proposition." He also wrote that he would like to receive two copies of the Beaver contract when it was drafted because he wanted to forward one to the Texas Cement Plaster Company with any comments he desired to make on it. He concluded that, "It would be very nice if this matter could come up at the next meeting of the Industries, which is on July 13th and 14th" (Ex. 106, R. 5262).[11]

Avery, in acknowledging the letter, thanked Griswold for the information it contained and stated that, "I shall be pleased to send you the two copies of the contract you suggest as soon as it is drawn * * *. It seems reasonable to me that the contract should take form in plenty of

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patents and at a meeting that was held all of the manufacturers seemed to feel favorable to the matter. * * *"

On cross-examination Griswold testified that he was not asked by Avery to contact other manufacturers and that he had no "agreement" with Avery to do so and that he was not an "agent" of Avery's (R. 716, 691). However, as will appear, Avery knew of and approved of Griswold's activities. Moreover, in answer to a question propounded by the court as to what Avery said about industry-wide licenses, Griswold testified, "Well, as I remember, it was that he insisted at that time, or stated that he wanted them all to come in, * * *" (R. 620). This was uncontradicted testimony of an unimpeached witness.

[11] Griswold testified that Texas, which had either just entered or was proposing to enter the board business, knew of the suit against Beaver, and he wanted to show Texas "what had been done, if there had been anything, in the way of a settlement, or a proposed settlement, so that if he wanted to do likewise he could do so" (R. 545).

time for the consideration of those interested when they are here at the Industries meeting on the thirteenth and fourteenth". (Ex. 107, R. 5263).

On August 17, 1926, Griswold wrote Avery, "Do not think I am not working on the matter about which we have had some correspondence," and added that he was to see Haggerty of National and possibly Mr. Brown of Certain-teed Products shortly, and would report to Avery thereafter (Ex. 112, R. 5268). On August 31, 1926, Griswold reported to Avery that he had had an interview with Haggerty and also had met Fuller of Atlantic which proposed to enter the industry, adding (Ex. 113, R. 5269), "Had a very pleasant talk with him along the lines we are working on and expect another interview with him in the very near future." This interview with Fuller and Channing of Atlantic Gypsum took place early in October. Griswold wrote Avery (Ex. 121, R. 5276), "I have talked very earnestly to them on the matter of the licensing agreement and believe they will consider it favorably."[12] He also requested a copy of the license contract to forward

[12] Griswold testified that he had advised Atlantic to make a closed type edge, providing "they could reach an agreement with Mr. Avery," but that he had done nothing after October 1926 until Atlantic signed up "by way of inducing or attempting to induce either Atlantic or USG to enter into a contract with one another" (R. 712, 713). The trial court's inference from this evidence (R. 4038) that Griswold had nothing of importance to do with bringing Atlantic into the combination ignores his testimony as to his activities prior to October 1926.

to Fuller and Channing (Ex. 121). Avery sent Griswold a copy of the license for Fuller and Channing stating, "If you believe it advisable to forward it on to them I would be pleased to have you do it" (Ex. 122, R. 5277).

Griswold acknowledged the letter on October 15, 1926, stating he was of the opinion that it would be a wise move to forward the contract to Fuller with a request that the matter be kept confidential. He added, "I might advise you that the Directors of this Company had a meeting Monday of this week, and the License Agreement matter was referred back to a Committee. This Committee expects to meet with all other manufacturers of board who have not yet signed the License Agreement. The meeting will probably be Thursday of this coming week *with the object in view of getting united action* on this matter" (Ex. 123, R. 5278). In reply Avery wrote Griswold on October 19, 1926 (Ex. 124, R. 5279):

> I am glad to have the information this contains, and will be interested in hearing from you after the meeting that you expect to have with all other manufacturers of the board who have not so far signed the license agreement.[13] Regardless of the outcome of your efforts in this particular, I

[13] Avery's reply to Ex. 124 makes it clear beyond doubt that Griswold used the phrase "united action" with reference to the license arrangement, and not to his proposed merger to be discussed later.

> want to assure you of my appreciation not only of your interest but of the broad-visioned manner with which you have proceeded with this important subject.

On the same day Avery also wrote Blagden of the proposed meeting and added, "While I will admit to being a little disappointed in the loss of time on this matter, I do fully appreciate the very intelligent treatment that Mr. Griswold gives to this subject, and have confidence that his plans will be wise and influential. *I do not know whether you expect to be a part of this meeting, but I hope so*" (Ex. 191, R. 5351). Avery's letter was written less than three weeks after Blagden had written Avery about the "entente cordial" in the industry (Ex. 189, R. 5349).

Subsequently Griswold regretfully advised Avery that as some of the people interested could not be present at the selected time the group meeting would have to be postponed until after the first of November 1926. He assured Avery that "All of them have expressed the desire to come as soon as they can arrange their affairs to do so" and added that Atlantic "is very much interested" (Ex. 125, R. 5280). He also added:

> I am quite sure you appreciate what I have to contend with and also appreciate the fact that if the original plan should fail of unanimous consent of all of the manufacturers, and if the other deal about which you are familiar should materialize,

it would still leave the way open to bring the matter to a head in a much easier way. I am quite sure that one or the other will succeed by patient and persistent work.[14]

The combined efforts of Griswold and Blagden were unsuccessful. On November 16, 1926, Griswold wrote Avery (Ex. 128, R. 5282):

> After spending considerable time with the manufacturers of Wall and Plaster Board, discussing the proposed license agreement submitted by your company, I am now compelled to admit that further efforts would simply be a waste of time and that it would be impossible to get them to sign this agreement as written. The principal objection is the length of time which the agreement runs and the list of patents described as exhibit A, acknowledgment of the validity of which is required according to the present agreement. You will remember that when the matter was first up for discussion it was figured that the length of time which the agreement was to run was to be much shorter, as the Utzman Patent expired in about three years.
>
> I have discussed this matter pretty thoroughly with all of the companies with the exception of the Certainteed Products Com-

[14] The "other deal" was Griswold's plan to merge with American a number of the smaller companies such as Niagara, Empire, Ebsary, Atlantic, and Texas, all of whom would then be operating under the proposed American license from USG (R. 567–571, R. 703–714). Avery knew of this plan (R. 5279, 567–571).

> pany. I am not in a position to know where they would stand on a contract that only covered the Utzman Patent and run during the life of the Utzman Patent which is about three years. I expect to see them in a short time but I feel confident that all of the rest of the manufacturers will sign such an agreement along the same general lines of your present agreement. I also believe that the Atlantic Gypsum Company who are figuring on going into the Wall Board business will sign such an agreement, but know they will object to an agreement running practically ten years. I expect to be able to report to you in a short time exactly what they are willing to do.

Avery refused, however, to offer an alternative form of license. On November 22, 1926, he wrote Griswold "I appreciate your efforts with the other board manufacturers. I understand your statement of their position, and regret that we have no alternative to offer" (Ex. 129, R. 5283).

B. *The conspiracy in 1927*

Griswold's failure to induce all other manufacturers to enter into a license arrangement with USG in 1926 did not discourage him. On January 3, 1927, Griswold wrote Avery (Ex. 132, R. 5283):

> Am very sorry indeed that we have not been able to reach an adjustment in the matter referred to not only with this Company but all the other people interested

> and regret to note that you feel as you do about the matter but am frank to say to you I have not given it up.
>
> You will remember that I started out *to deliver 100 percent of the manufacturers of board that would be willing to sign up on a license arrangement with your company* which at that time only extended during the life of the Utzman patents and at a meeting that was held all of the manufacturers seemed to feel favorable to the matter * * *.

Griswold then stated that, "Since the meeting referred to the Certainteed Products Company began the manufacture of * * * an open edge type of board" and is "doing just what I anticipated would be done in case this license agreement was not entered into." Griswold undoubtedly was referring to the admitted fact that late in 1926 Certain-teed commenced the manufacture of open-edge board and sold it at a differential below the price of closed-edge board (R. 243, 281).

Then, following the practice initiated in 1926, Griswold went on to report in the same letter concerning the attitude of other manufacturers with reference to license agreements, stating (Ex. 132, R. 5285–5286):

> With the exception of the Certainteed Products Company and the possible change of mind of the National Gypsum Company every other manufacturer now is ready to

> enter into a shorter term contract. The Certainteed Company are considering the matter but have not given me a definite answer. If their actions are favorable every manufacturer will then be ready to enter into a shorter time contract which will be along the same general lines of your present contract and if I am successful in getting 100 percent the proposition will be submitted to you for consideration. As indicated above, at the present time, every concern including the Atlantic Gypsum Company is willing to enter into this contract with the exception of the Certainteed Products Company. The National Gypsum Company has so indicated but suggested one or two alternate propositions which I think they would waive providing all the rest of the manufacturers agreed on the proposed contract.

Griswold followed this letter with another written on January 31, 1927, in which he stated (Ex. 133, R. 5286): "I wish to advise that all of the manufacturers of Wall Board have now given me a final answer as to their attitude covering the license agreement with you," and advised Avery that he would be ready to meet with him at the earliest possible date. Avery wrote in answer (Ex. 134, R. 5287), "I gather from your communication that the position of the wall board interests with whom you have conferred is of the nature you indicated in your former letters," and

concluded that although he could hold out no encouragement to Griswold, he would be pleased to see him and discuss the matter. Apparently Avery, like Griswold, had not given up hope that an industry-wide license agreement could be negotiated. Certainly this letter did not close the door to further negotiations.

Griswold conferred with Avery with reference to the license agreement (Ex. 149, R. 5299). A few days later Griswold advised Gloyd of Texas of the conference.[15] Thereafter, between February 17, 1927, and April 13, 1927, Griswold and Gloyd communicated with each other concerning the license agreement. Gloyd expressed a willingness to become a licensee of USG (Ex. 149, R. 5299). Griswold then advised Gloyd that Atlantic "is considering signing up with him [Avery] on a long time contract and Williams of the National Gypsum Company seems to be inclined to sign up on a long time contract. Reeb [Niagara Gypsum Company] is also considering it favorable" (*sic*) (Ex. 150, R. 5300).

Gloyd replied that "if the folded edge business comes up again with Mr. Avery you can count

[15] It will be recalled that as early as June 2, 1926, Griswold advised Avery that he was anxious to obtain from Avery a copy of the USG-Beaver license contract to send to Gloyd (Ex. 106, R. 5262, *supra*, p. 26). In this connection, it is of interest that Griswold wrote Gloyd at a later date that, "I have you in mind at all times when I am talking with Avery * * *" (Ex. 152).

us in line" (Ex. 151, R. 5301). Griswold then wrote Gloyd, "Atlantic Gypsum Company have signed up their contract with the United States Gypsum Company" (Ex. 152, R. 5302). Gloyd replied that he had definitely "decided to apply to Mr. Avery right away for a license" (Ex. 153, R. 5303). Griswold replied expressing the belief that he was positive Gloyd would have no difficulty in securing the license from USG (Ex. 155, R. 5304), and at the same time Griswold advised Gloyd of the attitude of National. Griswold wrote (Ex. 155, R. 5305):

> It may interest you to know that I had an interview with the National people while in Chicago the other day, and when discussing the subject, they seemed to be thinking more favorably than they ever did, [and] I am expecting them to arrive at a conclusion when they discuss the matter further with Mr. Avery.

A week earlier, on March 24, 1927, Griswold had written to Williams of National, in part, as follows (Ex. 136B, R. 5289):

> I have not had the pleasure of hearing from you since discussing the board proposition with you in Buffalo and I suppose Mr. Haggerty is home, as he expected to be in a few days.
>
> I am very glad to inform you that the Texas Cement Plaster Company decided recently to enter into the license agree-

ment with the United States Gypsum Company, but I am still further pleased to advise you that since they reached that decision, they have reached the decision to join in our proposition so that they will become one of the group which we are merging. The Atlantic Gypsum Company signed up their agreement and the Certainteed Products Company are considering it with much greater favor. I would like to urge upon you to discuss the matter with Mr. Haggerty, because our organization, when we get lined up, will soon reach an agreement, which, if the Certainteed comes in, and I am sure they will, *will make it 100% with all manufacturers who will be operating under the license agreement*[16] and will do away with the legal

[16] In the opinion below the district court referred to "our proposition" and "make it 100%" as they appear in this letter (Ex. 136B), and drew the inference that Griswold was speaking solely with reference to his "contemplated merger" (R. 4113). While this may have been true of "our proposition," it was clearly not so as to the phrase "make it 100%." It is clear that Griswold at no time had in mind that Certainteed, referred to in the same sentence, would join his merger. The only reasonable construction of what Griswold meant, therefore, when he said "make it 100%," is that all companies would then be parties to the license arrangement. In fact, he says plainly that "if the Certainteed comes in" that "will make it 100% with all manufacturers who will be operating *under the license agreement* * * *" (Ex. 136B).

The court's further inference that Griswold's use of "united action" in Ex. 123, *supra*, p. 28, and "deliver 100

complications which have existed in the past and which are so unpleasant as well as expensive.

Meanwhile, during this period Blagden continued to be busy in promoting the idea of an industry-wide license arrangement. A letter written by Griswold stated (Ex. 157, R. 5306) that "Mr. Avery, who has been opposed to granting them [Certain-teed [redacted]] a license, has finally yielded to the persuasion of Mr. Blagden, Mr. Palmer and myself and has consented to consider their application."

Despite the attempt to persuade all nonlicensees to become licensees, only two price-fixing license agreements were entered into during 1927, i. e., the USG-Atlantic and the USG-Texas licenses (R. 6289), both of which were substantially iden-

per cent" in Ex. 132, *supra*, pp. 25, 31, also referred solely to his merger is manifestly erroneous. There is nothing whatever in these exhibits, or in the testimony concerning them, to justify any other construction than that Griswold was referring to "united action" under the license arrangement, and not to his proposed merger.

The trial court, further, failed completely to appreciate that, had Griswold been successful in his merger plans, it was his intention that the merged company would itself take a license with USG. His merger plan was, therefore, not inconsistent with the plan "to deliver 100 per cent of the manufacturers of board that would be willing to sign up on a license arrangement" (Ex. 132, R. 5285), but was in fact an alternative means by which that might be accomplished. The record is clear beyond possibility of misconstruction on this point (R. 567–571).

tical (R. 280) with the USG-Beaver license (*supra*, p. 23).

During 1926 and for several years prior thereto the price of board had been fairly stable (R. 571–572). However, every witness conversant with the facts testified that, beginning in 1927, board and plaster prices became increasingly demoralized (R. 572–573, 654, 902, 940–941, 2488–2489, 2527, 3573, 1329–1330, and 1390). Griswold testified that some of the "independent manufacturers" were quoting lower prices "on certain types of board"; that one of these independent manufacturers, Certain-teed, offered open-edge board "at quite a low price"; that to meet this competition, other manufacturers started selling culls of covered-edge board; that the price of No. 1 open-edge board "was disturbed to a certain extent"; and there was "quite a lot" of the open-edge board sold "at a lower price" (R. 572–573). Actually, Henning's report to the board of directors of USG showed a considerably more aggravated condition, and one which was giving USG great concern (R. 6380, 6385, 6396, 6402, 6409, and 6415). For example, Henning's report for 1927 contained the following (Ex. 619, R. 6403):

> The competitive conditions outlined in my last report have become more keen and aggravated. The price conditions anticipated and the price declines recommended

> are now a reality. There is not a commodity nor an area which is not now highly competitive. Prices in some areas have gravitated as low as cost. Following our recommendation in our last report, we are meeting any price made by any competitor on any commodity in order to hold and increase our establishment. It was necessary on January 20 to announce a reduction of $5.00 per thousand on Sheetrock to meet price concessions and lower prices offered by our competitors. It was also necessary to introduce and offer a subgrade board—Crown Wallboard—at a mill price of $20.00 per thousand, or ten dollars less than our regular Sheetrock price. This drastic policy of price decline was absolutely necessary in order to stabilize the market and to make it possible for us to meet competitive conditions.[17]

The Sheetrock referred to by Henning was the standard No. 1 closed-edge board which USG had sold for many years at $30 per thousand (Ex. 616, R. 6382). Had USG and other companies not introduced a lower grade board, it is obvious that the price of Sheetrock and comparable boards

[17] The court found (Fdg. 60, R. 4155), "The gypsum industry in the 'Eastern area' was in a demoralized condition in the years 1927–1929. There was litigation, bad feeling, price cutting. The prices of board had fallen so low that for some manufacturers business was no longer profitable. Prices could not go down and business continue; any change would, as a matter of economic necessity, be upward."

would have been further depressed by the competition of the open-edge board made by Certainteed and other nonlicensees.

Griswold testified that he favored industry-wide licensing to eliminate the competition of other types of board. He stated (R. 574):

> Q. Was this competition between the No. 2 Board, and the open-edge board, and the No. 1 Board, and the variance in prices, was that one reason why you favored the license agreements, to eliminate competition?
>
> A. Well, I figured that if these people elected to take out a license, naturally they would want to manufacture the best board they could, which it was pretty universally recognized was this closed edge type board; and if they did that, naturally that would have a tendency to eliminate these other boards from the market because they were only put out to compete with and raise a disturbance, as a rule.[18]

[18] In Fdg. 56, R. 4154, the trial court found: "There were no informal side agreements between USG and any of its licensees or between any of the defendants herein that they would discontinue making open-edge board or seconds of closed-edge board, or that USG would advance and stabilize the prices for board, or that all or any of the companies would increase their prices for other gypsum products * * *." Griswold's testimony, *supra*, and the other evidence to be discussed herein, leaves no doubt that all parties fully understood that industry-wide adoption of the license agreements would bring about all of the results mentioned in Fdg. 56. Moreover, such results in fact followed the signing of the agreements in 1929. Cf. Fdg. 60.

C. The conspiracy in 1928

On January 20, 1928, Certain-teed purchased the assets of Beaver (R. 1441–1442). Certain-teed was then making an open-edge board at its Texas mill and selling this board in competition with closed-edge board at $12 per thousand in all areas of the United States except the central area, where the price was $15 (Ex. 620, R. 6411). At that time Beaver was making a closed-edge board under a price-fixing license from USG. Certain-teed refused to assume this license and pay a royalty on its open-edge board as the USG-Beaver license required (R. 41). On February 23, 1928, USG instituted suit in the District Court of the United States in Illinois against Certain-teed and Beaver asserting that Certain-teed should be required to assume all liabilities of Beaver under its license agreement and seeking an injunction against the distribution of the proceeds of the sale to the Beaver stockholders (Ex. 321, R. 5874, Ex. 323, R. 5876). Certain-teed was required to post a million dollar bond, or otherwise suffer a temporary injunction, as security for damages which might be found to be due USG (Fdg. 9, R. 4136). Certain-teed therefore commenced making an open-edge board at all of its Beaver plants (R. 282).

On February 29, 1928, Avery, Blagden and George M. Brown of Certain-teed met in Chicago to discuss the questions raised by the suit (R.

1442). Brown testified that he "got nowhere" in his meeting with Avery (R. 1438) but, he wrote in a memorandum of this conference (Ex. 212, R. 5376):

> The attitude of the U. S. Gypsum Company at the meeting yesterday was firmly in favor of a closed agreement until 1937 although the main patent runs out next year and, so far as we know, any patent situation thereafter *would be very flimsy and probably would not justify any benefits of any kind.*

With reference to the suit filed by USG, Brown wrote in this memorandum (Ex. 212):

> Working along these lines we must prepare to answer the suit of the U. S. Gypsum Company. We should appear as a party to it and we should claim what we believe to be true, that the suit is filed not in the interest of royalties but for the sole purpose of trade domination and monopoly and price control—all of which mean far more than the total of royalty could possibly mean. Our Company has been selling an open edge board entirely satisfactory to our trade at much lower prices than we would have been permitted to sell closed edge board but we have been able to reach the Southwest trade only. They are determined, if possible, to prevent our extending like opportunities to our Eastern trade. We have offered to continue a royalty basis on the Beaver Board plants and even to in-

clude our Texas Plant during the life of the patent, with the possibility of continuing thereafter. This is all they could fairly ask under any conditions. It is more than they were entitled to but their determination to gather in a monopoly, if possible, leads them to risk everything for such domination because of the big rewards possible, if they can succeed. It is not the matter of royalty in any sense that is of importance.

In accordance with these convictions, the answer filed by Certain-teed on March 14, 1928, alleged that the license agreements which had been entered into with USG and the suits which had been filed by USG were not for the purpose of securing royalties to USG but for the purpose of restraining competition; that the purpose of requiring the payment of royalties on unpatented board was to prevent the manufacture and sale of the competing open-edge board; and that the purpose of the suit against Certain-teed was to "prevent this defendant from increasing its manufacture and sale of 'open-edge' wallboard and becoming an even stronger competitor of complainant in the wallboard business" (Ex. 324, R. 5947–5948).

Griswold met with George M. Brown on or about April 12, 1928. He testified that Brown's attitude was (R. 604): "As I remember it, Mr. Brown at that time stated that if all of the other manufacturers, or certain ones of them, took out a license, he might possible consider it, but he felt

that his competitors, especially since Ebsary and the Certain-teed Products were pretty hot competitors in that territory, he felt they should both be licensed."

Blagden, who was still active in promoting industry-wide licensing, had one or more conferences concerning them with Avery about this time. On April 12, 1928, Griswold wrote McCrady, president of American, that Blagden had contacted him, and added (Ex. 141, R. 5292):

> * * * that inasmuch as he [Blagden] and I had done as much or more work than anybody else on the license agreement between the Wall Board manufacturers and the U. S. G. Company some time ago, the result of which the Beaver Products Company, the Universal Company, the Texas Cement Plaster Company and the Atlantic Gypsum Company had entered into a license agreement with the U. S. G. Company, that he in the last two or three weeks had had one or more conferences with Avery of the U. S. G. Company and he had also talked to his own people, the principal of which is George M. Brown, President of the Certainteed Products Company, and it was his own personal opinion that if The American Gypsum Company, the National Gypsum Company, the Ebsary Gypsum Company and the Niagara Gypsum Company would all get together and agree and then some of us talk to George M. Brown, President of the Certainteed Products, it

was his opinion that Mr. Brown would agree to join us, and he felt pretty sure that Brown would join.

You remember I reported when I was in New York I had a two and one-half hour conference with Brown, at which time he stated very plainly to me that they were willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred percent.

When I was in Chicago about ten days ago I saw Avery for a few minutes and I was given to understand by him that notwithstanding the fact they had an injunction suit against the Certainteed Products Company to try to make them carry out the Beaver Products Company's license agreement, the U. S. G. was willing to drop the suit against the Certainteed providing the Certainteed would carry out the Beaver Products Company's contract. Of course, we have got to make allowance to the fact that Blagden is now connected with the Certainteed Products Company and he may be acting as Brown's spokesman in this case, it really being the object of the Certainteed Products Company to get matters fixed up again and the markets stabilized.

Griswold concluded his letter (Ex. 141, R. 5292) as follows:

For your information will say that the Wall Plaster market will never be straight-

ened up or stabilized providing the Wall Board and Gypsum Lath market remains in the condition it is. There is no question but that if the Wall Board market were fixed up the Wall Plaster market would automatically be affected at the same time. Blagden was very anxious to know what our position in the matter would be and I told him that I could not tell him until sometime about the middle of the coming week. He seems very anxious to get at the matter at once, because he thot if it could be done now, before the market gets to the extreme bottom like it is in the south-west territory where plaster is selling for $2.50 a ton, it would probably be much easier to get it fixed up than it would be when matters get worse."[19]

In addition to contacting Griswold and suggesting to him that a committee of manufacturers call on Brown, Blagden conferred with Brown concerning the license agreement. He testified

[19] Griswold testified that along about this time he had a conversation with Avery in which they discussed whether or not a stable price on board would have an effect upon the price of plaster. His testimony was (R. 622):

"I would say that we probably exchanged views on the possibility of that being the case, because that naturally would follow, that if prices on one of the principal products of a company were at a fairly remunerative basis, and had been changed to that basis, and another article they sold was sold below the cost of manufacture, it was natural to figure that it would influence to a certain extent the lower prices, that a man wouldn't be trying to make all of his money on one product he was selling, and giving the other one away."

that he advised Brown to take a license from USG, and explained to him the benefits of such a license. He explained to Brown that he could not afford to make a board without a closed edge, that the cost was prohibitive, and that the closed-edge board was a superior product. He further testified as follows (R. 831):

> Q. Did you talk to him about stabilizing prices under a license agreement?
>
> A. I told him that, undoubtedly, if he were in with the others he would get the benefit of stabilization.
>
> Q. By "stabilization" what do you mean?
>
> A. Stable prices.
>
> Q. And by "stable prices" do you mean uniform prices?
>
> A. He would get the benefit of the license price, which would be the same price.

In 1928, Holland, a newcomer to the gypsum industry, became president of Universal. Despite the fact that Universal had been a licensee of USG since 1926, Holland in 1928 became extremely active in promoting industry-wide licensing (R. 916). Sometime prior to September 10, 1928, Holland had written to Griswold and Griswold replied advising Holland as to American's attitude (Ex. 144, R. 5295). Holland testified (R. 897–898):

> Q. Do you know of any reason why Mr. Griswold would write this letter to you, sir?

A. Well, at that time I would have liked to have had everybody making closed-edge board, and I think probably, or that you might, have suggested to Mr. Griswold to take a license similar to ours with the United States Gypsum Company.

* * * * *

Q. Why did you want to see everyone making closed-edge board?

A. Well, that was a better board. Wallboard generally would get a black eye where it was sold with an open edge. That would be one reason, just a sound business reason.

The open-edge board usually sold for less than the closed-edge board, and yet, as you were meeting competitive prices, you would never know for sure whether you were meeting the price on an open-edge or a closed-edge board, and I thought it would be beneficial to the industry to have the people making one kind of board.

Holland replied to Griswold's letter, stating (Ex. 145, R. 5296):

In the second paragraph of your letter of September 10 you state you believe that possibly your company could be interested in a modified license agreement on closed edge wallboard. I wish you would give me definite information, if you care to, as to just what your idea of this license agreement should be, stating clearly all of the points you think should be covered. I

would not expect to use this information received from you other than as a background in approaching this whole situation when the proper time comes.

I think Mr. Haggerty and others interested are still of the opinion that some time in the near future I should attempt to arrange a meeting; in order to be in a position to intelligently handle the situation I should have a very definite idea from everyone involved as to just what they hope to accomplish in such a meeting.

Griswold replied implying USG was not sufficiently interested in securing a stabilized market to make concessions. He stated (Ex. 146, R. 5297):

There apparently is no question but that the other manufacturers would all welcome better market conditions, but such conditions cannot be brought about without the U. S. Gypsum Company wanting better market conditions and being willing to make an attempt to improve conditions themselves. So far as I know they have not shown any indications up to the present time that they cared for better market conditions. Conditions are settling down to what might be quite a siege in warfare. Everybody is getting ready to hang out as long as they can, and hoping, of course, that it will not be long before an armistice of some kind is agreed upon and the warfare ended.

Holland answered on September 20, 1928, stating (Ex. 147, R. 5298):

> I am afraid that nothing can be done toward stabilization until the board matter is entirely out of the way. I believe that Mr. Avery has been very definite in a statement to that effect. Inasmuch as Certain-teed, National, and others are unwilling to negotiate any on the board proposition until your decision is clearly defined, it would seem that the entire matter rests with your decision.
>
> Possibly you are better able to negotiate this yourself, but several of us have thought that maybe we could get farther by having a meeting of several representatives of firms who are involved in the board situation. It might at least be worth while trying, and such a meeting would at least result in finding out just exactly wherein the difference of opinion exists. I was in hopes that you would be in a position to attend such a meeting in case the others were so disposed. If any change takes place in your position, I would be very glad to be informed if you so desire.

On October 11, 1928, a meeting was held attended by Holland and representatives of other companies which had not yet signed an agreement. Black of American reported what took place as follows (Ex. 203, R. 5367.):[20]

[20] Black was called as a witness, identified the letter, Ex. 203, and confirmed that the meeting was held. The force of the exhibit was not impaired upon cross-examination. (R. 1353.)

Referring to the conferences in New York, the following gentlemen were asked to go to Mr. Ebsary's room Monday evening: Mr. Holland, president of the Universal Gypsum Company, Mr. Reeb, Mr. Haggerty, Mr. Baker—a little later on Mr. Walker and Mr. Warren Henley of Certain-teed arrived.

Mr. Ebsary is exceedingly anxious to have something done to straighten things up, and I noticed that Mr. Haggerty and Mr. Baker also seemed considerably more anxious than they were thirty days ago. It seems that Mr. Ebsary had passed the word around that the President of the Certain-teed would be present at the meeting in New York, but Mr. Walker announced that Mr. Brown had started that day on a week's vacation but in case it was decided to have a meeting in Chicago this week, he thought that Mr. Brown would be pleased to return and attend the meeting. It was then decided I was to get in touch with you and see whether or not it was convenient for you to come to New York on the following day and I, of course, reported to them, after talking with you, it was not convenient for you to be in New York this week, but that you would meet the above mentioned gentlemen in Chicago some day next week in order to call on Mr. Avery, if such an action was decided upon.

After the meeting on Tuesday, Mr. Ebsary asked the same gentlemen to go over

to the Certainteed Office, and Mr. Walker, in particular, and supported by Mr. Holland, took the same position they did the day before, that everyone must be very sure before going to Chicago that they were willing to walk up and sign up a license agreement with the U. S. G., and also to foot the bill whatever it may be. He also stated that he was very sure that their *Mr. Brown would not be willing to take out a license agreement with the U. S. G. on board unless it carried with it a general cleaning up of unsatisfactory conditions of all gypsum products.*

It was very apparent that the Certainteed, as well as Mr. Holland of the Universal, were trying to get every one present to commit himself to practically do whatever the U. S. G. would dictate, and Mr. Walker said that Mr. Brown would be glad to use his efforts to get the U. S. G. to make the back royalty payments, if there were any, of the National and ourselves as low as possible. As you know, the Universal people are already operating on the U. S. G. license on board, and it seemed to me that Mr. Holland was mainly a representative of the U. S. G., and I am inclined to think that he reports everything in detail that goes on at these sessions to Mr. Avery. My part, of course, was to listen and report to you, and I made it very plain that all decisions regarding these matters rested with you.

Shortly after this meeting in Mr. Ebsary's room, representatives of National had further conferences with representatives of USG concerning a license agreement, as a result of which the board of directors of National adopted the following resolution on November 27, 1928 (Ex. 197, R. 5355):

> The President related in detail the occurrences in connection with the meetings held in Chicago recently in the matter of license agreement on plaster wallboard, and on motion of Mr. Borer, seconded by Mr. Currie, it was
>
> "*Resolved,* That the proper officials of the CORPORATION be and they hereby are authorized and directed to take such action as regards entering a license agreement with the United States Gypsum Company on plaster wallboard as they may see fit."

The demoralization of the price structure which was under way in 1927 continued in an even more aggravated manner throughout 1928. Henning of USG reported in 1928 as follows (Ex. 620, R. 6411, 6412, 6414):

> *Plasterboard*—* * * Competition is now offering cut stock bundled plasterboard at $10.00 to $12.50 mill. However, we have not as yet reduced any prices on Rocklath, but are still holding the same $15.00 price. We are meeting competitive board with our own bundled cut stock. * * *
>
> *All wallboard*—* * *

We are endeavoring to maintain a differential of $5.00 between Sheetrock and Crown and Sterling board and have been successful in holding 65% of the footage on Sheetrock for the first 6 months; however, for the month of July this percentage has been reduced to 48%.

Due to Certain-teed's activities, who are now offering wallboard for $12.00 in all areas except the central area where they are on a $15.00 price, Crown has gravitated to $14.00 and $16.00 which was necessary to hold establishment and get tonnage. With the wide spread between $14.00 on Crown and $25.00 on Sheetrock, making a $11.00 differential, it has been necessary during July to drop the price of Sheetrock in order to hold Sheetrock in the markets. In these areas we are now quoting Crown at $14.00 against Certain-teed's $12.00 board and holding Sheetrock at $18.00 and the same applies proportionally where other prices on Certain-teed prevail. We look for further declines both in Sheetrock and Crown prices with increased tonnage and establishment.

* * * * *

General—Competition is more aggressive than last quarter and there is no market on any of our materials. We are trying to sell all products at a differential above our competitors' prices and are making a consistent effort to hold Sheetrock rather

than sell Crown, however, losing no establishment or footage on account of price. * * *

D. *The conspiracy in 1929*

On January 7, 1929, Holland wrote Haggerty, of National, stating (Ex. 204, R. 5369):

> I wonder if you have had any talk with Mr. Kling [of American] regarding the settlement of litigation between his company and the U. S. Gypsum Co. I have heard indirectly that they are committed among themselves to a settlement but that they have hopes of reducing the amount involved by delaying the time of settlement.
>
> It is my opinion that we should make an effort to hold another meeting of those interested in the board situation. Mr. Kling surely should consider the others involved to the extent of at least letting us know what they propose to do so that yourself and others could be governed accordingly.[21]
>
> Rather than initiate the move again myself, it would probably carry more weight if you and Mr. Brown would request me

[21] The trial court in its summary of Exhibit 204 omitted reference to this part of Holland's letter (R. 4103). But it was important to Holland that American should reach a decision so that the others "could be governed accordingly." In other words, the true import of the letter is that unless all, or substantially all, of the industry should sign up under the licenses, prices would become still further demoralized, and Holland wished to avoid that.

> to call such a meeting. Personally, I cannot see how the American can hope to gain anything at all by delaying the settlement because of the fact this delay is going to be the cause of demoralizing prices during most of 1929 unless the situation is handled promptly.

The implication of the second paragraph of this letter that each license was not a separate and isolated transaction is supported by Holland's testimony. He testified that "I hoped that other board manufacturers would take out a closed-edge license, take out a license on the closed-edge patent," * * * that "I think I kept trying to talk these people into taking out a license," * * * and "I imagine that I talked to all of them" (R. 931–932).

Haggerty wrote Holland in reply on January 9, 1929 (Ex. 205, R. 5370):

> When I was in New York Saturday, I had a few minutes with Kling and took the occasion to very pointedly question him on his attitude toward the license agreement. He told me very definitely that they had decided to stay out and I, personally, am willing to accept that as a conclusion.
>
> *The question now in my mind is whether or not the other four board makers, who are outside the license agreement, feel that it would be advantageous to go in without the American Gypsum Company. It would*

seem to me that the chief value in a meeting would be to discuss that point.

As far as we are concerned, there is one question that has come up in my discussion of the subject with some of our directors: and I have not been able to answer it satisfactorily. It is this. At the present time, the United States Gypsum Company is naturally unwilling to discuss price, but would feel free to do so under the license agreement because of the price control feature which, as I understand it, gives them that right. If this price control feature was discontinued in August, as is the case in the present form of the agreement, how could we expect the cooperation of the United States Gypsum Company in anything bearing upon a discussion of prices? Would not their position then be exactly what it is now, and rightly so?

If this assumption is correct, then is not the price control feature during the eight-year period of very vital importance, provided it can be worked out, and what is the conclusion of the United States Gypsum Company on that phase of the matter?

My talk with Kling was so brief that I did not have a chance to discuss the reason for his conclusion, but I do recall that the objection he made to the present form of license agreement, *when I talked the matter over with him in Atlantic City, was that*

there was no price control beyond next August, when the Utzman patent expires.

I would like to hear from you if you care to let me have your opinion before determining our interest in attending another meeting, particularly if Kling does not recede from his present attitude.

It will be noted that while Haggerty, like Holland, was interested in the position that American was going to take concerning the license, he was probably much more disturbed about the manner in which prices could be controlled after the Utzman patent expired on August 6, 1929. Holland promptly replied on January 12, 1929, stating (Ex. 206, R. 5371):

I am inclined to think that the matter of future prices is not the deciding factor in the attitude of the American Gypsum Company on the wallboard proposition. *You will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the Utzman patent expires next August is not a practical reason for continuing the conflict.*

It is my opinion that if you and the others interested in the settlement of the wallboard controversy bring enough pressure to bear on the American crowd that something can be done. You will remem-

ber that Mr. Kling stated several times that they would be materially influenced by the attitude of the other men involved and I believe we should make an effort to hold him to this idea. *I am quite sure that Mr. Avery would not be interested in negotiating settlements unless everyone involved was included.*[22] However, if after conferring with Mr. Brown and Mr. Reeb it is thought advisable that this should be done, I would be willing to make an effort to bring this about.

I am expecting to be East next week, at which time I will talk further with Mr. Brown and will communicate with you later as to his ideas. In the meantime, if you have any new information I will be glad to hear from you.

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[22] The trial court referred to Exhibit 206 (R. 4104), but omitted entirely two very significant points: (1) it made no mention of the second sentence that "Mr. Avery made it very clear to us that if this *plan* could not be worked out on the Utzman patent that there was other patents available * * *," and (2) no mention likewise was made of the statement that "Mr. Avery would not be interested in negotiating settlements unless everyone involved was included." After omitting these sentences, the trial court stated that it is clear that Exhibit 204 and Exhibit 206 "have no reference to an alleged USG plan to blanket the industry under patent licenses" (R. 4114). On the contrary, it is submitted, the plain import of these exhibits, when read in their entirety, is that there was a very definite "plan" afoot to bring the entire gypsum industry under licenses for the purpose of stabilizing prices. In fact, Holland said unequivocally in Exhibit 206 that there *was* a "plan," and the inference is

Holland was asked to explain the meaning of the language used in this letter. His answers for the most part consisted of a series of "I don't know's" or "I don't remember's" (R. 937–943). He did testify, however, that he wrote truthful letters (R. 938–939):

> Q. I see. Well, again I want to say that I am not casting any aspersions on your truthfulness, and I don't want you to think that the next question does, but I want to ask you—did you write truthful letters?
>
> * * * * *
>
> The WITNESS. Well, I will answer the question this way, that I always try to write truthful letters.
>
> Q. And your statement there that "Mr. Avery made it very clear to us that if this plan could not be worked out on the Utz-

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irresistible that the plan was for the industry to take out licenses under the Utzman patent, or some other, in order to stabilize prices. The trial court's treatment of this evidence is entirely without basis.

The court stated further that Holland was interested in helping "his company as well as the other manufacturers out of their unfortunate financial situation due to the litigation *and the price war*" (R. 4114). That is, Holland wanted the others to join in the "plan" in order to end all price competition in the industry. It is submitted, therefore, that so far from excusing Holland in his activities, the court's statement is in effect an explicit finding that the appellees were engaged in a conspiracy to organize the gypsum industry and stabilize prices as charged.

man patent that there were other patents available," and so forth—is that a truthful statement?

A. I would think so, yes, sir.[23]

Following this exchange of letters between Holland and Haggerty, on May 14, 1929, the board of directors of National Gypsum Company held a meeting "for the purpose of discussing the license agreement submitted to all the manufacturers of gypsum products in the United States east of the Rocky Mountains by the United States Gypsum Co." (Ex. 198, R. 5356). At this meeting "the Chairman [Mr. Baker] outlined the principal provisions in the contract and stated to the Board that he had been definitely informed that all other manufacturers of gypsum products east of the Rocky Mountains, except the American Gypsum Company, had agreed to sign the license contract in substantially the form as submitted to this

[23] The trial court in its opinion made no mention of this part of Holland's testimony, but was at some pains to say that *Griswold* did not have "any understanding with Avery or anyone else that price control would be extended under some patent after the expiration of the Utzman patent; that he never had any discussion with Avery or anyone else about Avery's finding some patent other than the Utzman patent to give a longer price control * * *". (R. 4115). This testimony of Griswold, who left the industry in 1928, in no way discredited the uncontradicted and unimpeached testimony of Holland as set forth above.

Board.[24] That a final meeting was to be held in Chicago, Ill., within a week following this date, for final disposition of the license contract, and it is therefore imperative that immediate action be taken by this Board on the proposed contract * * *" (Ex. 198, R. 5356). The board of directors by resolution authorized their officers to execute the proposed contract.

After this meeting of the board of directors of National on May 14, 1929, events moved rather quickly. On May 16, 1929, National signed a license agreement with USG (Ex. 3, R. 4239) and on the following day, May 17, 1929, Baker of National sent the following telegram to Avery (Ex. 716, R. 6521):

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[24] The trial court stated that the recitals in Exhibit 198, above quoted, are "equivocal", and hence apparently of no probative value, because "it is no more inferable from these minutes that the various (prospective) licensees had agreed with each other to sign the license contract with USG than it is that they had agreed severally with USG to do so" (R. 4116).

Exhibit 198, as in the case of other exhibits, is not to be disposed of piecemeal, but is to be read in the light of all other evidence in the case. Viewed in the light of the other evidence discussed *supra*, it is clear that Exhibit 198 means that all manufacturers except American, had finally reached an understanding among themselves that they would take out licenses. In fact, the exhibit itself shows, in a part omitted by the court, that "a final meeting was to be held in Chicago * * * within a week * * * for final disposition of the license." This was the general meeting of May 21, 1929, to be discussed later, which could not have been held except by concerted action. The exhibit, therefore, is not equivocal, but when read realistically shows a concerted plan to which National was a party.

> Our contract signed and in mail Reeb ready Stop We are working with Ebsary with hope of everybody being set by Saturday to justify your calling meeting all board makers Monday if you like.[25]

Upon the receipt of Baker's telegram, Avery immediately wired Gloyd as follows (Ex. 720, R. 6524):

> There has been much discussion of infringement settlement and license on board. Nothing has yet developed although I think it safe to say the outlook is favorable. If license were generally closed it would be desirable to discuss a reasonable market price for the licensed product. Will keep you informed in hope that you may participate if outcome favorable.

[25] The court below (R. 4116), in discussing this telegram (Ex. 716) and other related evidence referred to in the opinion, stated that it is conceded that the May 1929 meeting of licensees and prospective licensees was "prearranged." But the court said this is "not necessarily" evidence that the parties were engaged "in a common plan or enterprise to blanket the entire gypsum industry with licenses and stabilize prices." The court pointed out (1) that each prospective licensee *might* have gone to Chicago merely to see that one of the others did not get better license terms, and (2) each would "naturally be interested in attending the meeting in order to know whether the others were going to settle with USG." Even Channing of Atlantic, an existing licensee, and presumably Holland of Universal, who also attended, might have gone for the same reasons, in the court's opinion (R. 4117). These inferences, even if true, are not inconsistent with the plain inference that the May meeting was called and everyone was present as part of a plan to organize the industry and stabilize prices.

Before Gloyd answered the above telegram, USG received from American the license contract with material changes in it. Avery again acted promptly and on May 18, 1929, sent identical telegrams to Holland of Universal (Ex. 207, R. 5372), Brown of Certain-teed (Ex. 318, R. 5873), Baker of National (Ex. 725, R. 6526), Ebsary (Ex. 724, R. 6526), and Gloyd (Ex. 721, R. 6524). These telegrams were as follows:

> Mr. Kling has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license.

Gloyd was absent from his place of business when Avery's telegram arrived. He returned on May 20, 1929, and wired Avery that he hoped "all take out license with you on board" (Ex. 722, R. 6524). Upon receipt of Gloyd's wire, Avery wrote him as follows (Ex. 723, R. 6525):

> Thanks for your telegram of May 20. I regret very much that you cannot be with us at the meeting to be held tomorrow, although it does not seem to me that the situation makes it necessary. For the past several months, most of those manufacturing boards and infringing our patents have indicated a readiness to pay damages and to take out a license. The American Gypsum Company, however, have been unwilling to subscribe to the terms, the conditions

> in our opinion require. Mr. Brown, Mr. Reeb, Mr. Ebsary, and the National Company have expressed themselves favorable to this adjustment and it is not improbable that the matter may be closed at the meeting tomorrow or soon thereafter. You will, of course, be fully informed of what takes place.

It should be noted that the implication that Certain-teed and Ebsary were infringing is incorrect. Both were manufacturing only open-edge board (R. 1388, 2477).[26]

Avery's expectation "that the matter may be closed at the meeting tomorrow," was correct. A meeting was held at the Palmer House, Chicago, during the period May 21 through 23, 1929. At this meeting there were present one or more representatives of every nonlicensee board manufacturer in the Eastern area, except American and Kelley, and one or more representatives of all existing licensee board manufacturers except the Texas Company. George N. Lenci, vice-president of Ebsary Gypsum Company, attended this meeting and described in some detail just what occurred (R. 2472–2476). Lenci related that

[26] The court below in Fdg. 90, R. 1161, found that Texas, Certain-teed, and Ebsary were the only companies that prior to their licenses made open-edge board. This finding is contrary to the admitted facts in the case. The admitted facts are that American and Niagara also manufactured open-edge board prior to their becoming licensees. See answers of USG, (R. 282), Certain-teed (R. 243), Celotex (R. 201), and Ebsary (no denial in answer, R. 164) to paragraph 71 of the complaint (R. 17).

when all the manufacturers were assembled in one room on May 21, 1929, Avery made a short statement and "welcomed us as prospective licensees" (R. 2475), and, among other things, stated "that if all companies would take out a license from USG, that that would correct the demoralized condition which the board industry now found itself in" (R. 2476, 2485). Lenci recalled that at some time during the first day of the meeting either Mr. McLeish (counsel for USG), or Mr. Avery, "illustrated their point by saying that under the General Electric case it was permissible for the owner of a patent to fix the price of a patented product" (R. 2794).

Lenci testified (R. 2967) that the Ebsary Company had decided to become a licensee of USG before going to the May 1929 meeting.[27] He testi-

[27] The lower court found (Fdg. 37, R. 4150), that "the decision to take a license was reached by each of the companies independently" and that, "the licensees took their respective licenses, without regard to what other companies did." The first part of the finding may well be true in a limited sense, that is, that each company had to decide for itself what it would do. Lenci testified that Ebsary had reached a decision before it went out to Chicago. Whittemore testified to the same effect (R. 1398). But the finding that each company acted "without regard to what other companies did" is manifestly and completely erroneous. In the first place Avery was not "interested in negotiating settlements unless everyone involved was included" (Ex. 206, R. 5372). In the next place the May meeting was admittedly "prearranged" (R. 4117), and substantially the entire industry attended. Avery, and everyone, recognized that by bringing the whole industry

fied that the reasons for this decision were (a) principally that his company desired to make a closed-edge board (R. 2970), and (b) that "we did hear that there would be a price control feature in the license, and that was not unattractive to us" (R. 2970). Two factors warrant doubt as to the importance of the first reason: first, that Ebsary had at no time previously applied to Avery for a license to make a closed-edge board (R. 2967), and second, that in May 1929, when Ebsary took a license, the Utzman patent which related to closed edge board had only some 11 weeks to run, or until August 6, 1929, before it expired. At the very least, however, Lenci's testimony indicates that a substantial reason for Ebsary's actions was in fact the "price control feature in the license."

This conclusion is substantiated by Lenci's further testimony that the competition between open-edge and closed-edge board resulted in a price

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under the license it would be possible, for the first time, to have effective price control (Ex. 720, R. 6524; Ex. 723, R. 6525). It would scarcely be possible to get stronger or more positive evidence that, contrary to the court's finding 37, the May licenses were signed by each licensee with complete "regard to what other companies did."

In the case of the November licenses the evidence, which will be discussed later, again shows conclusively that the industry acted as a unit and not "independently." Lenci, for example, testified that Ebsary had pretty well made up its mind at the May meeting to sign the November license (R. 2810), and on July 17, 1929 (Ex. 423, R. 6121), Lenci asked counsel to review the draft contract for the July meeting in Chicago, so that if "all of the other Companies agree to it we will be in a position to do the same."

spiral which had reached such a point in 1928, and particularly in 1929, that his company was in a rather serious financial situation. He testified (R. 2971):

> Q. So that it was extremely important to you, from a business standpoint, to get on the one hand a closed-edge board, and on the other hand to make sure that the price conditions were going to be corrected so that you could make a profit?
>
> A. Yes.[28]

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[28] The court below found that the companies which became licensees did so: (1) "because they desired to settle or avoid litigation," and (2) "to obtain the right to use USG's patents" (Fdgs. 36, 74, R. 4149, 4158). It was further found that USG, in addition to wanting settlement of the litigation, granted the licenses in order to obtain (1) "royalties," (2) "the fixing of a profitable price," and (3) "the various advantages which would normally flow from the general manufacture and sale of the superior product" (Fdg. 74, R. 4158).

It will be noted that the court failed to find that the *licensees* wanted "the fixing of a profitable price" and the "various advantages" which would result from selling a uniform product. Of course it is scarcely conceivable that *only* USG could have wanted the advantages to come from "the fixing of a profitable price." In fact, Lenci gave uncontradicted testimony, as noted above, that one of the reasons why Ebsary signed the May license agreements was "to make sure that price conditions were going to be corrected" so that he "could make a profit." The court below said (R. 4114) that Holland also "was interested in promoting better conditions so far as marketability of gypsum board was concerned in order to help his company ts well as the other manufacturers out of their unfortunate financial situation due to the litigation and the price war."

After the parties were all assembled in one room on the first day of the May 1929 meeting and after Avery had made his short talk to them, each non-licensee manufacturer, except Ebsary, then met separately with representatives of USG and proceeded to work out individually the details of their settlement of the USG infringement claims and the claim against Certain-teed.[29] By the afternoon of May 22, 1929, all the non-licensee manufacturers present were able to reach an

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The record is also very clear that the licensees wanted to make a uniform product. The point was made on June 4, 1929, by Geo. M. Brown in Ex. 226 (R. 5391), where he speaks of the advantages of "stabilizing the whole industry by making a uniform product and get away from the fierce warfares between different products like we have recently had." Holland testified (R. 897–898) that, "I thought it would be beneficial to the industry to have the people making one kind of board."

It is accordingly submitted that the findings are clearly erroneous in that the court should have found that the *licensees*, as well as USG, signed the license agreements for the express purpose, *inter alia*, of (1) "fixing a profitable price" and (2) gaining the "various advantages" to flow from industry-wide manufacture of a uniform product. Indeed, the fact that the Utzman patent had less than three months to run when the licensees were first accepted strongly suggests that the licensees were not really motivated by fear of USG's patent position. When the November licenses were signed, the Utzman patent to make the "superior" closed-edge board had expired and the litigation had all been settled, except in the case of American, and that was settled on November 25, 1929 (R. 4446).

[29] The USG suit against Certain-teed was settled at this time and the million dollar bond posted by George M. Brown was released (Ex. 327, R. 5953).

agreement with USG and the licenses were signed (Exs. 4 and 5; R. 4253, 4267). These license agreements were substantially identical with the Beaver agreement (Ex. 1, R. 4205), except that they contained the following additional provisions: (a) the licensees agreed to sell gypsum board to manufacturers, jobbers, and other wholesale distributors only with the written consent of USG; and (b) the licensees agreed to use only USG's bundling patent in packaging their board for shipment.

On the afternoon of May 22, 1929, all of the licensees, both new and old, were again assembled in one room and at this time USG passed out to each licensee a price bulletin (Ex. 404, R. 6090). Lenci described what took place, as follows (R. 2972–2973):

> Q. And the whole group of licensees were present at that time?
>
> A. I don't remember whether they were all there at that time, but I would say the great majority were there.
>
> Q. You had all signed up your license agreements by that time, and USG then handed out their prices?
>
> A. Yes, after that.
>
> Q. Now, were you surprised when you opened the envelope and saw what the prices were?
>
> A. We were surprised, because we hadn't any idea of what they were going to be.
>
> Q. Were they higher or lower than the prevailing prices at that time, Mr. Lenci?

A. I am not sure, but it is my recollection that they were about what the USG Company was getting for their board at the time.

Q. And that was higher than you were getting for your board?

A. Yes.

Q. So that were you displeased with the prices that they handed out at that time?

A. I don't think I was, no.

Q. As a matter of fact, wasn't everyone there present rather well pleased with the prices?

A. I couldn't speak for others, I don't know.

Q. Did anybody say that they were too low or too high or anything about it?

A. The only comment I recall was that somebody made the remark that they hoped they would get $30 wallboard, that is the only remark I remember.

Q. Do you know who made that remark?

A. I haven't the ghost of an idea.

Q. And $30 wallboard would have been putting wallboard back to the position where Sheetrock had been for a number of years?

A. Yes.

Q. Now, as a matter of fact, Mr. Lenci, the prices of gypsum board couldn't very well go any lower and permit companies to stay in business, could they, at that time?

A. It would have been very difficult.

Q. So that an honest answer would be that your expectation, and that of every other licensee there, was that they were going to be stabilized and raised?

A. We were all human enough to hope that, yes.

Q. And you weren't disappointed?

A. No.[30]

The license bulletins passed out by USG on May 22, 1929, introduced a number of new practices into the industry. The principal innovation was the establishment of a basing point price system (Ex. 404, R. 6090), limited to only seven shipping points.[31] Board prices to dealers were

[30] The court below (Fdg. 58, R. 4155) found that: "The licenses were not executed with an intent to fix prices of gypsum board at high levels or any given levels. There was at no time any understanding or agreement or even discussion as to what the prices of gypsum board would be upon the execution of the licenses." It is surely clear from Lenci's testimony, as above quoted, which was uncontradicted and unimpeached, that both old and new licensees *understood fully* that, when all the licenses were signed, prices would go *up*. In fact, the court itself, in Finding 60 (R. 4155), found that "any change would, as a matter of economic necessity, be upward." It is perhaps true, as the court found, that there was no understanding as to the precise "high" or "given" levels at which prices would be fixed, but such a finding does not negative the fact that it was understood that they would be raised to some level. And the circumstance that all parties were content to delegate to USG the ultimate task of dictating the price does not alter the fact that they understood and intended that prices would be raised. Finding 58 is, therefore, manifestly erroneous.

[31] Exhibit 404, as it appears in the record, lists Acme, Texas, as an eighth basing point, but this is a printer's error.

to be calculated on the basis of a fixed mill base price plus freight from the nearest of these seven points to the point of destination. Since board made by different manufacturers varied in weight it was necessary also to prescribe a uniform billing weight of 1,850 pounds per thousand upon which to calculate the freight charge (R. 6093). Only by so doing, could the price to dealers be kept uniform. In addition special provisions were made for truck deliveries. All wallboard seconds were to "be plainly marked with visible red stamp" as seconds. Such elaborate regulations, when considered in the face of the fact that the Utzman patent was to expire in eleven weeks, suggests strongly that there was a general understanding that price control was to continue under some other patent.

On May 23, 1929, the same manufacturers were again assembled in the Palmer House for their third joint meeting. It was at this meeting that Avery made good on his previous assurance to Holland, "that if this plan could not be worked out on the Utzman patent that there were other patents available" (Ex. 206, R. 5371). According to Lenci, Avery told those assembled that USG had secured the American rights for the Bayer application for a patent on a process to make a so-called "bubble board." Roos, of USG, also had an application pending for a patent for a similar process. Avery explained that the inven-

tions related to a lightweight board made by the introduction of soap foam in the gypsum slurry (R. 2531–2532), and proposed that the industry take out licenses under the Roos and Bayer applications (R. 2982).

Following the last day of the May 1929 meeting, Avery promptly sent out to all licensees a proposed license agreement under the Roos and Bayer applications (R. 2531–2532; Ex. 224, 225, R. 5389, 5390). Thus on May 29, 1929, Avery wrote to George M. Brown (Ex. 224, R. 2389) that they had "drawn up a tentative and suggested outline of license for the bubble system which we discussed when you were here." On June 4, 1929 (Ex. 225, R. 5390) Brown acknowledged the receipt of the copy of the license agreement and stated that, "We are most anxious to promote harmony and friendship in the Gypsum Industry, especially with your own Company * * *." On the same date, Brown also wrote a candid memorandum about this proposal, the material portions of which are as follows (Ex. 226, R. 5390):

> A claim was made by Mr. Avery in his conversation that 50¢ and, perhaps, $1.00 of cost would be saved on each thousand square feet. Of this, 25¢ would go to pay royalty. Another unknown part would go to pay for equipment of a lot of machinery and it would take a good while to get even. They would have a price control of our busi-

ness, which might be to our advantage and might be to be our disadvantage in future. *They should be just as anxious to have us use this as we should be to get it if there are to be the benefits that they anticipate in stabilizing the whole industry by making a uniform product and get away from the fierce warfares between different products like we have recently had.* The saving is too slight to cause us very great worry even if never permitted to use it and the door will certainly be open later for its use if it has the merit that they believe it has. Under a contract sufficiently liberal, we should proceed at once.

A meeting of all licensees was held in Chicago on June 6, 1929, attended by all of the licensees with the possible exception of Texas (R. 2529). According to Lenci, who represented Ebsary, Henning of USG presided, and, among the matters discussed was the proposed new price-fixing patent license agreement recently submitted to the licensees by USG (R. 2531). The licensees were advised by Henning that American expected to become a licensee (R. 2533). At this time Henning asked those in attendance to "get after" their lawyers to look over the proposed license contracts and send to USG their comments concerning the contracts (R. 2531). C. O. Brown, assistant to the president of Certain-teed, attended the June 6 meeting and shortly after wrote a memorandum of what occurred, which leaves no

doubt that the licensees were greatly interested in promoting price control by means of price-fixing patent license agreements in order to maintain stabilized market conditions in the industry. The material portions of the memorandum are as follows (Ex. 227, R. 5392–5394):

> Price control on plaster board expires in August of this year with the expiration of the Basic Patent. Price control on plaster board can be extended for another 17 years if a satisfactory working arrangement can be made with the Bubble Patent. For legal reasons, however, the bubble patent should not be considered from the standpoint of price control but should be gone into by each manufacturer from the standpoint of economy and benefit. Price control would naturally follow such a move.
>
> Mr. Knode, Vice-President in charge of Manufacturing, of U. S. G. Company estimates a saving in manufacturing cost under the Bubble Patent to be 50¢ to $2.00 per thousand, depending on the type of board made. Mr. Knode of the U. S. G. Company will be glad to have any of our manufacturing men call on him and go into the proposition in detail and assure themselves of the saving in cost and its advantages, prior to signing license. I would suggest that Mr. Van Hagan arrange to see Mr. Knode sometime in the next two weeks, the reason for this being that the lawyers feel that speed is advisable in lining up various manufacturers under this

Patent and upon the expiration of the Basic Patent on plaster board, even though the patent will not be issued by that time, and it will be necessary to pay a royalty of 25¢ per square, prior to actual issuance of the patent on any board manufactured. This will not be a hardship, however, if the saving is as outlined and they assure us that they can prove that their figures are conservative.

* * * * *

The lawyers are very emphatic that there is a much less chance of being accused of using the patent as a subterfuge to control price—first being, it is gone into before the expiration of the Basic patent on plaster board and second, it is gone into from the standpoint of economy in cost.

The lawyers that have gone over the patent and made a careful study of the situation pronounce the patent a very strong one if and when issued.

Sometime prior to July 3, 1929, a conference was held between George M. Brown, A. Whittemore, and C. O. Brown, all connected with Certain-teed, at which conference it was decided that Certain-teed would become a licensee of USG under the Roos and Bayer Application (Ex. 228, R. 5394). C. O. Brown wrote a memorandum of this conference "To be attached to bubble contract and bundling contract between United States Gypsum Company and Certain-

teed Products Corporation." In this memo, C. O. Brown wrote as follows:

> Taking these things into consideration, *plus other advantages in working under the patent,* we feel justified in taking a license and paying the royalty set out by the licensor.

When questioned what was meant by the phrase "other advantages," Brown testified as follows (R. 1069):

> Q. I want to take you to the second page, the first line. There you say, "Taking these things into consideration, plus the other advantages," and so forth, and I would like to ask you what the "other advantages" are that you had in mind there?
>
> A. There would be a stabilized market on gypsum lath.
>
> Q. And by "stabilized," you mean what?
>
> A. Price control.

Both George M. Brown and A. Whittemore approved the reasoning of C. O. Brown for on the face of the memo itself George M. Brown wrote, "O..K. to sign up GMB," and Whittemore wrote, "7/3/29, O. K. AW" (Ex. 228, R. 5394).

On July 23, 1929, the board of directors of National met and discussed the proposed license under the Roos application. The minutes of this meeting indicate that the industry was not so much concerned with the Roos application as an advancement in the art of making gypsum board,

but instead, was interested in it as a means of stabilizing prices. The material portions of the minutes are as follows (Ex. 200, R. 5362):

* * * * *

The President stated that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry and has offered to license the entire Industry under the new method of manufacturing gypsum wall board known as the "Bubble System." The license agreements submitted to each of the wallboard manufacturers contain price fixing clauses and under the agreements submitted the prices of wall board would be fixed for the whole industry for the term of approximately seventeen years.

The President further stated that if cooperation in the Industry could be accomplished by such means, he believed that it would be worth while for this Corporation to enter into such an agreement, if the "Bubble System" could be obtained for a reasonable consideration.

* * * * *

Upon motion duly made, seconded, put to vote and unanimously carried,

"Resolved, That the Executive Committee of the Corporation be and they hereby are authorized and empowered to negotiate and enter into an agreement or agreements with the United States Gypsum Company, controlling the manufacture of gypsum

wall board, upon such terms and conditions as a majority of the said Committee shall deem most advisable, *provided that the United States Gypsum Company, by virtue of the agreement with this Corporation and with other manufacturers of gypsum wall board, shall control the price of wall board sold in the United States and its possessions.*"

Two days after Baker advised his board of directors about the plan of USG to stabilize the gypsum industry, a conference was held in Chicago which was attended by substantially all the licensees of USG. This conference was held on or about July 25, 1929 (Ex. 612, R. 6366, Answer of USG to interrogatory No. 34). C. O. Brown wrote a memo of this conference in which he stated, "considerable progress was made between the attorneys on an agreement for contract covering Bubble license" (Ex. 231, R. 5402). However, events did not move too smoothly at this conference, for Brown writes that "There are difficulties outside the contracts, however, which prevent two Companies, Universal and National Gypsum Company, from signing." Brown sets forth these difficulties as follows:

> The Universal Gypsum Company is suing the National Gypsum Company for infringement of the Starch Patent sold by Mr. Haggerty, formerly connected with National, to the Universal Gypsum Com-

pany. In selling this patent, Mr. Haggerty recognized its validity and the contract is binding on the National Gypsum Company, making it almost impossible for them to contest the Patent.[22] It is my understanding that Universal are asking National to pay damages in the amount of $250,000. National, of course, does not want to contract a double obligation until this is settled.

The Universal Gypsum Company are placing the blame for not signing on the fact that they have not assured themselves that the Bubble process is more economical than the Starch process and the fact that they are in the hands of the receivers would make it impossible for them to bind themselves for a longer period than the receivership. Other attorneys, however, feel this is largely a smoke screen for not signing and it is my opinion that they feel by holding out they can make the Starch patent of value by forcing it on the industry by sale or on a royalty basis whereas if they and National sign the Bubble Patent, which National would not do before first getting a release from Universal on their

[22] In Fdg. 12, R. 4139, the court below found that in the case of *Universal Gypsum & Lime Co.* v. *Haggerty*, 21 F. 2d 544 (W. D. N. Y.), the litigation mentioned in the text, the district court held that Haggerty patent No. 1,500,452 was valid. This finding represents a misreading of the opinion in that case. Judge Hazel did not decide that that patent was valid, but that defendant was estopped to challenge its validity.

> Starch Patent litigation, then their Starch patent would be practically no value.
>
> The United States Gypsum Company advise that they have nothing to fear from the Starch Patent under their present Bubble process. There is some doubt as to the strength of this Starch Patent and, of course, all of the Companies, if they did use it, would be free to contest its validity in case of litigation, with the exception of the National Gypsum Company.

According to Brown, although the United States Gypsum Company felt that it had nothing to fear from the Starch patent, nevertheless, "in the interest of harmony, however, the USG Company has been making some tests to see if there was any value in combining the two processes, the Starch and the Bubble" [22] (Ex. 231, R. 5403). Brown then suggests that the real purpose of USG in combining the processes was not so much to advance the art in the industry by the use of the starch patents, but instead, the two were to be combined to provide a means for immediate price control. He wrote (R. 5403):

> * * * They [USG] advised that, based on their experiments to date, they feel there would be some benefit to using Starch in a limited degree with their Bubble process, such a combination resulting in better working of the Stucco, fewer Seconds, etc.

[22] The starch patents referred to are the Hite and Haggerty patents (R. 60, 64).

> Further benefit could be derived by combining the two patents due to the fact that the Starch Patent has been issued, whereas only applications have been filed under the Bubble Patent, so a combination of the two systems would give a patent to work under in the manufacture and sale of Gypsum Wallboard immediately, whereas under only the Bubble process there would be an interim between August 6th and the date of issuance of the Bubble Patent where there would be no Patent control. There is, of course, considerable benefit to having Patent control continue without a break.

Brown further stated in his memorandum that, "Mr. Avery spent considerable time in the last two days with Mr. Holland * * * trying to work out some mutually satisfactory proposition for buying the Starch Patent, or licensing the industry under both the Starch and Bubble process," and also that, "There will be further conferences between Universal and U. S. G. within the next ten days and another meeting is to be held in Chicago on either August 5th or 6th when the situation will be discussed further." (Memo attached to Ex. 231, R. 5405.)

A meeting of licensees was held in Chicago on August 6, 1929, the day the Utzman patent expired, which was attended by substantially all the persons who had attended the meeting on July 25, 1929 (Ex. 612, R. 6366, Answer of USG to Interrogatory 34). C. O. Brown wrote a memo of what

transpired and from this memo it is apparent that some time prior to August 6, 1929, USG and Universal had reached an understanding on the starch patent. Brown stated (Ex. 231, R. 5400) that a "proposition has been submitted as follows":

> USG to take over Starch Patent of Universal, no cash is to be involved in the transaction but Universal to get a free license under USG's Bubble Patent * * *.
>
> Before the Starch patent of Universal was injected into the picture, it was planned to continue the license and price control on Board through USG's Bubble Patents when issued * * *.
>
> It would be the plan to write one contract covering all Patents involved, Machinery Patent on closed-edge board, Bubble Patent, Starch Patent, and Bundling Patent. The Attorneys feel that such a contract would be exceptionally strong and price control could be maintained for the life of the Contract without difficulty.
>
> * * * * *
>
> The National and Universal have settled their litigation on basis of cash settlement by National to Universal. With this settlement everything seems to be in shape to go ahead under Patent control continuing without a break, if we are willing to pay 3½% royalty.
>
> All of the Independent Gypsum Companies are willing to sign on this basis * * *. Another meeting will be held dur-

ing the week of August 20th at which time it is hoped that a contract can be agreed to and signed * * *.

On August 27, 1929, the board of directors of National held a meeting, the minutes of which state (Ex. 201, R. 5364):

> *Resolved,* That the President of the Corporation be and he hereby is authorized and empowered to sign a license agreement with the United States Gypsum Company covering the use of the Bubble and the Haggerty Patents, * * * *provided that all the present licensees of the United States Gypsum Company enter into a similar license and provided further that in the judgment of the President such action will result in legal stabilization of the markets.*

On October 3, 1929, C. O. Brown pointed out that USG would not "turn over all information on this [the bubble process] prior to the License being signed," but this delay would not interfere with immediate price control. He wrote (Ex. 234, R. 5408):

> This delay will not interfere with the operation of patent and price control, as the Universal Starch patent will control that feature and royalty will start as soon as the license is signed. We are all using enough Starch to say we are making Board under the Universal Patent.

New price-fixing patent license agreements based on the Roos "foam" application, and the

Hite and Haggerty "starch" patents which Universal sold to USG for that purpose, were thereafter executed. These licenses became effective with respect to price control on November 5, 1929 (Ex. 235, R. 5409). See Exs. 6, 7 to 13 inclusive, and 15; R. 4280, 4315, 4337 to 4448, and 4474.

The agreements entered into by each licensee with USG under the so-called "starch" and "foam" patents were substantially identical and, among other things, provided in substance as follows:

> (a) USG agreed to disclose the "foam" process to its licensees.
>
> (b) In addition to the Hite and Haggerty patents, and the applications relating to the Roos or Bayer process, the licenses included all the patents and applications which were licensed under the previous agreements.
>
> (c) USG reserved the right to determine and fix the prices at which the licensees sold board (1) "manufactured by licensee by use of any of the machines or appliances covered by any letters patent * * *"; "or" (2) "manufactured by second parties and which shall embody the inventions * * * claimed in either patent number 1,500,452 or * * * 1,230,297"; "or (3) "commencing with the date when a patent shall have been granted upon the Roos or Bayer applications any of said board manufactured by licensee, the body or core of which is made according to the

process * * * of said Roos or Bayer inventions * * *."

(d) The licensees agreed to pay stipulated royalties on all board whether patented or unpatented.

(e) USG licensed the licensees to use the methods covered by certain of its patents in packaging gypsum board, and the licensees agreed to pay royalties on packages of all kinds whether patented or unpatented.

(f) The licensees agreed to sell gypsum board to manufacturers and other wholesale distributors only with the written consent of USG.

(g) Jobbers were defined as "those who do not manufacture but buy and sell * * * board in straight or mixed cars * * * and who do not sell at retail," and no consent was required to sell to them.

(h) The licensees acknowledged, and agreed not to contest, the validity of all patents then issued and of all patents subsequently to be issued on applications described in the agreements.

It should be noted that while the foregoing agreement covered 50 patents and seven applications for patents, the only new patents and applications for patents that were not already covered by the so-called May 1929 agreements were the Hite and Haggerty "starch" patents, three applications by Roos on the "foam" process, and the Bayer application.

E. *Concerning Texas, Newark, and Celotex*

Texas was the only licensee under the Utzman patent that did not sign the license agreement under the Roos application and the Hite and Haggerty patents at approximately the same time the other licensees signed. On February 10, 1937, after the license it acquired in 1927 had expired, Texas finally signed up (Ex. 8, R. 4337). At that time it was, of course, a matter of common knowledge in the industry that prices on board had been fixed for a number of years and Texas had long been familiar with the general licensing arrangements and sold its board at "prevailing prices" (R. 3435). Texas admits that since February 10, 1937, it has complied with the USG price bulletins (R. 183–184).

Kelley Plasterboard, the predecessor of the appellee, Newark Plaster Company, was not a licensee under the Utzman patent. Kelley, however, did sign the November agreements on the "starch" and "foam" patents on April 23, 1930 (Ex. 15, R. 4474). Thereafter Kelley attended a number of licensee meetings, particularly the licensee meetings of October 17, 1932 (R. 2602), of November 15, 1932 (R. 2640), of December 13, 1932 (R. 2672), and on April 27, 1933 (R. 2709).

Newark Plaster Company acquired Kelley in 1937, and, Tomkins of Newark testified that when

his company acquired Kelley he had talked with officers of USG and was conversant with the general licensing arrangements that existed in the industry (R. 1861). Newark assumed the license to Kelley (Ex. 16, R. 4495).

Celotex did not become a licensee until 1939. American, the predecessor of Celotex, had long been an active member when Celotex took over its business. American's license with USG, dated November 25, 1929 (Ex. 13, R. 4446), was assigned by American to Celotex on April 12, 1939 (Ex. 14, R. 4469).

In the nature of the case, Celotex had no part in the early negotiations. However, it does appear that C. F. Miller, Manager of American, who continued as Manager of American Gypsum Division of Celotex (R. 1374), after April 12, 1939, had met with Avery in the early license negotiations between American and USG, and was fully conversant with the purpose, scope, and effect of the licensing arrangement (Ex. 310, R. 5859).

Moreover, Celotex admits "that USG entered into similar agreements with National, Universal, Atlantic, Ebsary and Certain-teed * * *" (R. 204). Celotex also admits that "from the year 1939 to the date of filing of said complaint, USG has determined and fixed minimum selling prices and terms and conditions of sale of this defendant as its licensee * * *" (R. 206).

F. *The Metallized Board Licenses*

"Metallized board," which USG claims to be covered by another Roos patent, is nothing more than ordinary gypsum board or gypsum lath except that one surface of the "board" has affixed thereto a paper-thin sheet of metallic foil. Generally speaking, it may be manufactured by the same process that is usually employed in the manufacture of board or lath (R. 3439). However, since the commonest purpose of using this type of "board" is to reflect both heat and cold, and since its most common use in the building field is to provide insulation, it is usually used as lath. The metallic foil side is placed next to the studding and the plaster coat is applied to the room side of the "board." Usually, it is made in the same dimensions as common gypsum lath (R. 2788).

By 1934 the industry had been operating under price-fixing patent license agreements for a period of approximately five years. By this time, as will be later pointed out (*infra*, pp. 102–160), the industry had been thoroughly organized at all levels and its prices had been stabilized. At a meeting of board licensees held on May 23, 1934, USG presented to those present a price-fixing license agreement relating to metallized board. It was the intention at this time to bring all existing licensees under this new patent license agreement.

As Henning of USG wrote Lenci of Ebsary on August 20, 1934 (Ex. 547, R. 6238):

> At the board license meeting May 23d, 1934, we presented you with a contract for the reflective backing of plasterboard and wallboard.
>
> It was the intention to license all of our board licensees, and to date we have received nothing from you in regard to your position on this matter.
>
> Please give me your comments or criticism.

Under date of August 20, 1934, USG sent similar letters to Atlantic, Universal, and American (Exs. 287, 208, 308; R. 5841, 5373, 5858). By September 6, 1934, National, Certain-teed, and Universal had expressed their willingness to enter into such a license, and the attitude that these companies took concerning this license was communicated to Atlantic (Ex. 288, R. 5842). By September 24, 1934, American also had agreed to become a licensee under this agreement, and the fact that Universal, National, and American had "agreed to sign the license" was also communicated to Certain-teed (Ex. 244, R. 5420).

During these negotiations the prospective licensees also were in communication with one another on the subject. For instance, under date of June 23, 1934, National sent a letter to American enclosing a copy of an opinion concerning this proposed license submitted to them by their

attorney (Ex. 300, 300A, R. 5851, 5852). The attorney's opinion concluded with this language (R. 5854):

> * * * I assume from our conversation that *in the interest of harmony in the Industry,* that you did not desire to have me make any objections to any matters contained in the proposed agreement, which are not, in my opinion, of major importance.

Under date of September 18, 1934, American wrote National that it was ready to sign the license agreement (Ex. 302, R. 5855).

In the fall of 1934 Certain-teed contemplated selling metallized board to their trade. They at first decided not to manufacture it but to purchase their requirements from USG at the usual manufacturers' discount. However, when they approached USG to buy, USG refused to sell until they became a licensee under the metallized board patent. C. O. Brown wrote his district managers about Certain-teed's experience with USG (Ex. 247, R. 5423):

> Attached is price information sent out by Licensor on metallized board.
>
> We have signed a license on this product but do not contemplate manufacturing it at the present time.
>
> U. S. Gypsum Company will sell us this board, unbranded, at published prices less 12% on lath and 15% on board. They were not willing to do this until we signed a license. * * *

Brown's statements are supported by Henning's [USG] letter to Certain-teed in which he said in part (Ex. 245, R. 5421):

> I do not think at this time that we are contemplating selling this commodity to you, and believe that it would be wise for you to figure on manufacturing it.
>
> In order to have a price control on this commodity it will be necessary for you to take out a license to manufacture it.

Ebsary also had the same economic pressure put upon it to sign the agreement. They were not permitted to purchase metallized board at a discount until they signed the license agreement with USG (R. 2769; Exs. 548, 694; R. 6239, 6493). After the agreement was signed Ebsary could and did buy board at a discount (R. 2769).

Eventually all of the manufacturers who were licensees under the so-called November 1929 license agreements, except Texas and Niagara, became licensees of USG under substantially identical licenses relating to metallized board. These licenses were entered into late in 1934 or early in 1935 and are in force at the present time (Exs. 17 to 25, inclusive; R. 4499 to 4587). From the time they were entered into, USG has fixed and determined the price at which the licensees sold metallized board (Exs. 249 to 253, inclusive, R. 5427 to 5782).

USG's price fixing was based upon a provision in the license which reserved to them, "the right to determine * * * during the existence of

said patents and so long as said rights, licenses and privileges hereunder granted shall continue, the minimum price * * * at which Licensee shall * * * sell plaster board having a metallized surface which is covered by said Roos Patent [Patent No. 1,914,345, relating to metallized board] or any of the patents set forth in Schedule A * * *." (Exhibit 11 attached to complaint, paragraph IV, R. 116.)

Under date of April 12, 1939 (Ex. 23, R. 4571), an agreement was entered into between American and Celotex whereby Celotex assumed American's metallized board license (Ex. 22, R. 4559). On January 3, 1939, an agreement was entered into between USG and Newark whereby USG consented to the assignment of the Kelley metallized license to Newark (Ex. 25, R. 4585). Texas was not a licensee under the metallized board agreement.

G. *The Perforated Lath Licenses*

Perforated lath is ordinary gypsum lath with holes bored or stamped through it. The claimed purpose of placing holes in the lath is to allow the plaster to penetrate through the holes and form a mechanical key on the reverse side to hold the plaster to the lath better. Since perforated lath is a substitute for ordinary lath it is made in the same dimensions as ordinary lath.

Perforated lath is old in the art. As early as September 7, 1917, Makowski applied for a patent

on a board of this type of lath and in the application stated (Ex. 605, R. 6321):

> The invention relates to a new and useful art particularly to means for perforating stable or dry wall board; and to the process of forming holes or recesses therein adapted to act as key holds for bonding finishing plaster coats applied to the wall board, and to a new article of manufacture.

United States patent No. 1,349,778 was issued to Makowski on this application on August 17, 1920 (Ex. 605, R. 6321). Even prior to that date, six United States patents had been issued on that type of lath (Ex. 602, R. 6307). As a matter of fact, the Schumaker Wall Board Corporation, as early as 1926, had manufactured perforated lath on the Pacific coast that had holes through the lath 3/8 of an inch in diameter and the holes were spaced about 3½ inches apart horizontally and 2½ inches vertically (R. 3545; Ex. 313, R. 5862).

In the USG Patent, No. 1,938,354, Roos claimed to have invented a new perforated lath, the distinctive feature of which was that it had ¾ inch holes punched through it arranged in horizontal and vertical rows 4 inches apart (R. 3620–3621). The Roos board passed the Bureau of Standards' one-hour first test. Late in 1936 National made a perforated lath with holes 7/8 of an inch in diameter arranged in a staggered manner (R. 3470–3471, 3615), and in 1938 Schumaker made a board with holes 13/16 of an inch in diameter

(R. 3524). Both the National and the Schumaker board passed the one-hour fire test (Ex. 610, R. 6328; Ex. 611, 6345).

USG first offered its licensees a price-fixing license to manufacture and sell perforated gypsum lath under the Roos patent early in 1936. (See answers of defendants to paragraph 115 (R. 30) of the complaint.) In order to get an expression from the industry on this proposal, Henning of USG called a conference of licensees to meet on March 11, 1936 (Ex. 313, R. 5862). The conference was held on that date and representatives of USG, Atlantic, American, National, and Certain-teed attended (Ex. 313, R. 5862). At this conference Henning presented the case for USG and told those present: (a) that USG proposed to place this type of board on the market about April 1, 1936; (b) that USG would be willing to license all licensees to manufacture and sell this type of board on a 10¢ royalty basis; (c) that USG proposed to set a minimum price of $15.25 per thousand square feet; and (d) that USG would furnish those who accepted the new license with their requirements of perforated lath at the usual manufacturers' discount, pending installation by the licensee of equipment for manufacturing this type of board (Ex. 313, R. 5862).

The proposed plan did not meet with unanimous approval; it was pointed out to Henning (a) that the plan to offer this type of board to the

trade on April 1, 1936, did not afford to the industry sufficient time for any proper consideration of all factors involved; (b) that the royalty proposed was too high; (c) that the proposed minimum price was too low and should be at least $16.00 per thousand square feet; and (d) that the proposed patent under which the licensees were to be licensed was of doubtful validity since perforated lath had been marketed on the Pacific coast for the past twenty years under such trade names as "Key Hold," "Button Lath," and "Lock Lath" (Ex. 313, R. 5866). The price at this time fixed by USG for ordinary gypsum lath was $15.00 per thousand. This meeting was adjourned without the licensees coming to any definite decision.

Two days after this meeting, Henley of Certain-teed prepared a memorandum of what transpired at the conference and sent it to Whittemore, vice president of Certain-teed (Ex. 313, R. 5866–5867). In this memorandum Henley pointed out the advantages to Certain-teed that the proposal afforded: (a) if they became licensees they would be able to use the fire test data at hand and would not be put to any additional expense in having any type of lath they might develop fire tested; (b) that by accepting a license, Certain-teed would save the expense of any patent investigation; (c) that by accepting a license, Certain-teed could get into production at

an early date; and (d) that acceptance by Certain-teed would bring about a "strengthening of license arrangement" (Ex. 313, R. 5862). The last reason, of course, indicates that Certain-teed recognized the new license as further support for the general "license arrangement" existing in the industry.

In the same memorandum, Henley also pointed out the disadvantages of becoming a licensee: (a) that if they became licensees, "we recognize a very flimsy (in our opinion) patent"; and (b) that the royalty seemed excessive in view of the questionable value of the patent relating to perforated lath (Ex. 313, R. 5866). Henley concludes with the recommendation, "that any conference we might have with Mr. Henning (at this time) would be unwise and would tend to weaken the position taken generally by the licensees at the conference" (Ex. 313, R. 5867). This recommendation is further evidence that the proposed license agreement was not just a matter of individual concern, but rather was one of importance to the whole industry.

About three years prior to the March 11, 1936, meeting, patent counsel for Certain-teed had advised it that the USG patent was invalid (Ex. 602, R. 6307). Again, exactly one week prior to the conference of March 11, 1936, patent counsel for Certain-teed had an occasion to re-examine Roos Patent No. 1,938,354, on which the proposed

price-fixing license was to be based, and advised Certain-teed as follows (Ex. 601, R. 6303):

> I am still of the opinion that the Roos patent is completely invalid. It is a patent for empirical formulae and empirical formulae are ordinarily not patentable since they are within the ordinary skill of any competent research man in the particular art in which the work is done. As I said in my opinion of December 27, 1933, given the Rader patent cited in the file history of the Roos patent and the problem of making a practical commercial perforated plasterboard for the purpose of keying the plaster to the board, with the fire-resistance problem also put up to the plasterboard and plaster man, any one of them would reach practically the same result as Roos reached.
>
> * * * * *
>
> I think the entire patent could be completely ignored with perfect confidence in the outcome of any litigation involving it. It might be expensive to do so, because patent litigation is necessarily expensive, and *it might be unwise to do so from the standpoint of commercial policy, since the patent might be useful, if acquiesced in, for stabilizing the manufacture and sale of plasterboard lath coming within its terms.*

Within a few days after this conference of March 11, 1936, Henley of Certain-teed conferred with Burley of National concerning perforated

lath. Of this conference, Henley wrote to Certain-teed, in part, as follows (Ex. 314, R. 5868):

> In further reference my memo March 23, above subject: Have just discussed subject matter with Mr. Burley of National Gypsum Company and outline below their definite feeling in the matter:
>
> 1. Are of the opinion that patent is very weak.
>
> 2. To use Burley's expression, they feel USG have a lot of "crust" in asking a 10¢ per M royalty.
>
> 3. National's Patent Attorney has advised them to go ahead and manufacture a Perforated Lath with, however, a different size hole and, perhaps, staggered as to location.
>
> * * * * *
>
> 5. Burley is definitely of the opinion that USG will not take an alleged infringement (involving Perforated Lath) into court, inasmuch as it would involve probably all of their patents and *there might arise some serious question as to the validity of USG's patent position and the question would arise as to whether or not same were used as a "vehicle" for price-control purposes.*

Notwithstanding the advice of its patent counsel, Certain-teed accepted a license under the perforated lath patent (Ex. 26, R. 4587). In spite of his doubts of the v[illegible]ity of the Roos

patent Whittemore favored taking a license for business reasons (R. 1416). It is a fair inference from this action that Certain-teed was interested in obtaining the advantages of price control. The same is true of USG, for Knode of that company advised Henley of Certain-teed that USG was "not particularly interested in the income received from royalties" (Ex. 335, R. 6002). Ebsary, American, and Kelley also became licensees (Exs. 28, 30, 31; R. 4595, 4604, 4610).

USG first fixed a price of $15.25 per thousand at which it and its licensees would sell perforated lath (Ex. 313, R. 5862). This represented an advance of 25¢ per thousand over ordinary lath (Ex. 313, R. 5862). USG maintained this 25¢ differential on perforated lath until 1938, when the price for perforated lath was made the same as that of ordinary lath (Ex. 39, R. 5247). At this time USG, recognizing that it could not bring the whole industry under this license, offered to give all of its licensees a royalty-free license under the perforated lath patent (Exs. 27, 29, 32; R. 4593, 4602, 4616). Since acceptance of the license involved recognition of the validity of the USG perforated lath patent, National and Texas refused to become licensees either under the royalty-free agreement or, for that matter, under the original agreement. Celotex did not assume the American license;

Newark became a licensee under the royalty-free license (Ex. 32, R. 4616).

Since 1936 when USG placed its perforated lath on the market, National and Texas have sold the perforated lath marketed by them at the same prices at which USG and its licensees have sold their lath (R. 1594, 3471). No action has ever been brought by USG for the infringement of its perforated lath patent (Answers of defendants to paragraph 120 (R. 31, 296) of complaint). It is a fair inference from this that USG had strong doubts as to the validity of its perforated lath patent and has been reluctant to disturb the peace and harmony established by prior agreements.

IV

OPERATION AND EFFECT OF THE CONSPIRACY

The signing of the license agreements under the Utzman patent in May 1929 by Certain-teed and the other companies who were then making an open-edge board, was a turning point in the gypsum industry. Simultaneously with the execution of these agreements USG issued the first of a long series of so-called price bulletins (occupying 992 pages of the present record) (R. 4619–5256, 5427–5782), each containing progressively more elaborate and detailed provisions, until virtually every phase of the manufacture and sale of gypsum board was controlled and to a lesser degree the sale of re-

lated products. These regulations, cooperatively enforced and uniformly adhered to, have produced a completely regimented and noncompetitive industry.

A. *Raising and stabilizing prices*

The first price bulletin (Ex. 404, R. 6090) that of May 23, 1929, as above mentioned, set a mill base price of $20 per M square feet on 3/8" wallboard at Oakfield, N. Y., and at each of the six other listed basing points. In addition, at New Brighton, N. Y., the minimum f. o. b. price was put at $22.60 per M; at Charleston, Mass., $23.65; and at Buffalo, N. Y., Loveland, Colo. (mixed car shipments), and Philadelphia, Pa., $22.73, $30, and $22.60, respectively. The price for 3/8" plasterboard, including lath, was put at $13.50 per M sq. ft. at the seven basing points.

These prices represented a very substantial increase over the prices prevailing in 1927, 1928, and the first quarter of 1929. USG had, for many years prior to 1927, maintained a mill price of $30 per M square feet on its 3/8" wallboard, known as Sheetrock. During 1927, however, Henning, Vice President in charge of sales for USG, reported that it was necessary "to announce a reduction of $5.00 per thousand on Sheetrock to meet price concessions and lower prices offered by our competitors" (Ex. 619, R. 6403). Moreover, "It was also necessary to introduce and offer a subgrade board—Crown Wallboard—at a mill

price of $20.00 per thousand, or ten dollars less than our regular Sheetrock price" (Ex. 619, R. 6403).

Henning's report for 1928 (Ex. 620, R. 6411) shows that USG's prices had to be still further reduced:

> Due to Certain-teed's activities, who are now offering wallboard for $12.00 in all areas except the central area where they are on a $15.00 price, Crown has gravitated to $14.00 and $16.00 which was necessary to hold establishment and get tonnage. With the wide spread between $14.00 on Crown and $25.00 on Sheetrock, making a $11.00 differential, it has been necessary during July to drop the price of Sheetrock in order to hold Sheetrock in the markets. In these areas we are now quoting Crown at $14.00 against Certain-teed's $12.00 board and holding Sheetrock at $18.00 and the same applies proportionately where other prices on Certain-teed prevail. We look for further declines both in Sheetrock and Crown prices with increased tonnage and establishment.

For the first quarter of 1929, Henning, Vice President in charge of sales for USG, reported (Ex. 621, R. 6416) plasterboard selling at $12.00, with a statement that "We are meeting this competition with unbranded plasterboard * * *." Moreover, "due to the rapidly declining prices on Crown," it has been necessary "to adjust Sheet-

rock to lower levels in most markets."[34] It is evident, therefore, that when in May 1929 USG fixed the mill price for wallboard at $20.00 per thousand and for plasterboard at $13.50 per thousand (Ex. 404, R. 6090) this represented a very substantial increase in prices in most markets.[35]

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[34] In Fdg. 24 (R. 4146) the court below found that "when the closed-edge board of the Utzman patent came into the market the open-edge board was largely displaced under the demand of the trade for the better product."

The evidence in the record, without exception, is all to the contrary. Henning's reports for the years 1926–1929 (Exs. 616–621, R. 6380–6418), made it abundantly clear that throughout all this period open-edge board was sold at a lower price to the trade in active competition with closed-edge board. Griswold's testimony is to the same effect (R. 572–573) and the answers of USG and Certain-teed to paragraphs 68, 69, 71 through 73 of the complaint (R. 243, 281–283) admit that open-edge sold in competition with closed-edge board during this period. In fact, the lower court's own finding (Fdg. 90, R. 4161) states that Texas, Certain-teed and Ebsary were making open-edge board during this period, the Court erroneously omitting reference to Niagara and American which also made open-edge board prior to signing their licenses. See *supra*, p. 65. The court's finding is, therefore, manifestly erroneous.

It was only *after* the industry was finally brought together under the 1929 license agreements that open-edge board disappeared from the market. As far as the "demand of the trade" was concerned, after the agreements were entered into, it was simply a case of the trade accepting closed-edge board or nothing; the trade had no choice at all. For the reasons for the elimination of open-edge board, see pp. 108–113, *infra*.

[35] The court below found that USG "established patented board prices at the levels at which USG had been selling board just prior to the execution" of the May 1929 licenses (Fdg. 88, R. 4161). It is apparent that the court's finding is true only as respects certain markets.

B. *Eliminating No. 2 Board*

But the increase in price for Sheetrock did not mark the full advance, for Sheetrock, even at $18.00 per thousand, was being driven off the market. In the first quarter of 1929 more than half of USG's sales of wallboard consisted of Crown or No. 2 board (Ex. 621, R. 6416) which even in 1928 was being priced as low as $14.00 per thousand to sell in competition with the $12.00 open-edge board being sold by Certain-teed (Ex. 620, R. 6411). When the May 1929 bulletin was issued (Ex. 404, R. 6090), the price of No. 2 board was advanced to $17.50. Two weeks later, on June 7, 1929 (Ex. 410, R. 6099), this price was raised to $18.75, and on June 26, 1929 (Ex. 413, R. 6104), to $20.00 per thousand. In other words in a space of 5 weeks the price of No. 2 board was raised from a low of $14 to $20 and made the same as for No. 1 board.

On July 9, 1929 (Ex. 414, R. 6106) the price of 3/8" wallboard was further raised to $22.50 per thousand. No price was given in this nor has any been given in any subsequent bulletin for No. 2 board, which meant, according to the uncontradicted testimony of Lenci (R. 2518–2519), that No. 2 board was to be sold at the same price as No. 1 board or not sold at all. Obviously no one would pay $22.50 for No. 2 board when No. 1 could be had

for the same price.[36] Accordingly in the space of roughly 7 weeks a dealer who could have bought USG Crown board at $14 per thousand now had to pay $22.50 per thousand for Sheetrock, more than a 50% increase, or do without.

C. *Eliminating seconds*

Substantially the same course was taken in the elimination of seconds, except that it took

[36] The court below found that "there is no evidence concerning the elimination of No. 2 board" (Fdg. 91, R. 4162) and "there was no agreement or understanding that * * * No. 2 board would not be manufactured" (Fdg. 67, R. 4157). Contrary to the court's findings, there is strong evidence that appellees intended to eliminate No. 2 board as a first step in stabilizing prices. Griswold testified that when everyone took a license "naturally that would have a tendency to eliminate these other boards from the market because they were only put out to compete with and raise a disturbance, as a rule" (R. 574). Henning confirms that Crown board was put out purely as a temporary competitive measure (Ex. 619, R. 6403). Holland testified that "I thought it would be beneficial to the industry to have people making one kind of board" (R. 898). Geo. M. Brown in Ex. 226 (R. 5390) speaks of the importance of "making a uniform product" and getting "away from the fierce warfares between different products like we have recently had." And, finally, Avery in his report to the stockholders for 1929, stresses the advantages to follow from "a full and *uniform* use of the patented methods" (Ex. 332, R. 5987).

It is submitted that the clear inference from the above evidence is that appellees realized that No. 2 board (and seconds) would be eliminated as soon as possible after the licenses were signed. Moreover, Lenci testified that, as he construed the bulletins, USG had put the price of No. 2 board on a level with No. 1 board (R. 2518–2519), which for all practical purposes eliminated it from the market.

longer. The price bulletins (Exs. 404, 410, 413, and 414; R. 6090, 6099, 6104, and 6106) reveal that by successive steps during a period of slightly more than six weeks the price of seconds was raised respectively to $15.00, $16.25, $17.50, and on July 9, 1929, to $20.00 per thousand. The differential in price between 3/8" Sheetrock at $22.50 per thousand and seconds was then only $2.50. By letter dated April 7, 1930, USG advised its licensees that thereafter the price of seconds would be the same as No. 1 board (Ex. 307, R. 5857). No price bulletins have been issued for seconds since that time, and they have been eliminated from the market."

D. *Elimination of open-edge board*

It was essential to the success of price control not only that seconds and No. 2 board be eliminated but that unpatented open edge board be taken off the market as well. The years 1927–29 had demonstrated beyond question that USG and its licensees could not maintain a price of $30 per

"The court below found (Fdg. 91, R. 4162) that "the evidence fails to establish that there was an elimination of seconds * * *." "Every company unavoidably produces some seconds." It is of course immaterial whether some seconds are *produced*; the question is whether seconds have been eliminated from the *market*. The USG bulletin of April 7, 1930, referred to in the text, and apparently overlooked by the court below, effectually eliminated seconds from the market, since seconds obviously cannot be sold at the same price as No. 1 board. If it refers to production the court's finding is, therefore, meaningless; if to marketing it is clearly erroneous.

thousand for Sheetrock, or even a price of $25, or $20 or $18, when faced with such open edge competition (Exs. 619, 620, 621; R. 6402–6418). As Lenci testified (R. 2970), the effect of having two competing products in the market was that as the price of open edge would be cut the price for closed edge would follow, and then open edge would go still lower. The witness Stormquist, of Universal, testified that he never knew, when being told by a dealer of a competitive price, whether it was for open edge or closed edge board, but that in order to sell he would have to meet the price quoted (R. 3573–3574).

Griswold, of American, gave uncontradicted and unimpeached testimony to the same effect (R. 574):

> Q. Was this competition between No. 2 Board and the open-edge board and the No. 1 Board, and the variance in prices, was that one reason why you favored the license agreements, to eliminate competition?
>
> A. Well, I figured that if these people elected to take out a license, naturally they would want to manufacture the best board they could, which it was pretty universally recognized was this closed edge type board; and if they did that, naturally that would have a tendency to eliminate these other boards from the market because they were only put out to compete with and raise a disturbance, as a rule.

Holland, of Universal, was impatient with certain members of the industry for not joining the licensing plan; "this delay," he wrote, "is going to be the cause of demoralizing prices during most of 1929 unless the situation is handled promptly" (Ex. 204, R. 5369). His uncontradicted oral testimony makes it clear that he understood that a uniform product would contribute to stable conditions (R. 940).

> Q. Well, why were patents so necessary for the plan you had in mind, or why did you think they were necessary?
>
> A. Well, as I stated before, I thought the industry would be better off by a uniform and better product.

In 1928 Certain-teed was clearly of the opinion that USG wanted to drive open-edge board off the market, "thus restricting or eliminating competition which would otherwise have arisen between such unpatented 'open-edge' wallboard and the patented 'protected edge' wallboard" (Exs. 324, 212; R. 5947, 5376). After Certain-teed joined the plan in May 1929 by taking out a license, Geo. M. Brown made it completely clear that he understood the business advantage to be gained from making a single uniform product. In his memorandum of June 4, 1929 (Ex. 226, R. 5390), Brown wrote:

> They [USG] should be just as anxious to have us use this [bubble process] as we should be to get it if *there are to be the*

*benefits that they anticipate in stabilizing the whole industry by making a uniform product and get away from the fierce warfares between different products like we have recently had * * *"*[38]

Even in the initial negotiations between Blagden and Avery it was recognized that unless a licensing scheme could be worked out there would be serious competition from open-edge board. As Blagden put it (Ex. 185, R. 5344), Beaver "would naturally proceed to produce an open-edge or semi-open-edge" board and, moreover, "manufac-

[38] The court below in Finding 40 (R. 4151) found that Exhibits 324 and 212, concerning Certain-teed's expressed belief that USG intended by its licensing plan to dominate the industry and restrain competition, "are at most equivocal in meaning." That is, the court said Certain-teed might have changed its mind and reached the conclusion "that its statement concerning USG's purpose in bringing the suit was erroneous." Moreover, the court said the exhibits "do not establish bad faith in the execution of the license agreement."

In assuming that Certain-teed *might* have changed its mind the court evidently overlooked the Geo. M. Brown memorandum of June 4, 1929 (Ex. 226), quoted in the text, which indicates clearly that Brown had not changed his mind in this respect. He understood fully when he signed the license that the USG plan was intended as a means of "stabilizing the whole industry" (Ex. 226). Exhibits 324 and 212 are not susceptible of any interpretation other than what they say quite plainly; the finding of the court that they are equivocal in meaning consequently is clearly erroneous.

The latter part of the finding that the exhibits "do not establish *bad faith* in the *execution* of the license agreements" does not negative the fact that Certain-teed understood the purpose of the USG plan to stabilize the industry and gave its adherence to it.

turers other than" Beaver "would follow" its "example." At this time, as above noted, Certain-teed and others were preparing to enter the wallboard business.

Two exhibits, uncontradicted in any way, show that Avery understood fully the need for a uniform product if price control were to succeed. The point was made with reasonable clearness in the May 1929 licenses, the fifth "whereas" clause of which reads as follows (Ex. 3, R. 50):

> Whereas, Licensor has been unwilling to grant a license except on the express condition that the Licensee will manufacture plaster board or gypsum wallboard *only* with a folded or protected edge similar to that manufactured by Licensor * * *.

That is to say USG had openly insisted until May 1929, that only a closed-edge board should be made by its licensees. With the industry for the first time substantially all signed up under the license to make a closed-edge board—or pay a royalty anyway if it made open-edge board—USG was willing, as appears in the sixth "whereas" clause (R. 50), to waive the requirement. What the "fifth" whereas clause establishes, however, is that until May 1929, at least, USG had not wanted open-edge board on the market.

There is nothing to indicate that USG ever changed its position in this respect. In his report to the stockholders of USG for 1929, after the November licenses were in effect and open-edge

board, Seconds, and No. 2 board had been substantially eliminated, Avery made clear what he expected the industry-wide agreements would accomplish (Ex. 332, R. 5986):

> The returns to be received [by way of royalties], while substantial, are relatively of a minor amount. The major benefits anticipated are * * * the increased consumption of wallboard products which should follow the quality improvements that a *full and uniform use* of the patented methods and products should assure.

Lenci testified on cross-examination that there was no "understanding" or "agreement" among the licensees that they would discontinue making an open-edge board (R. 3081–3082). The record shows, however, that Ebsary and the other licensees did discontinue making open-edge board immediately after the May licenses were signed (R. 2982, 2553). In fact, Lenci testified that it would have been difficult, if not impossible as a business matter, to pay a royalty on open-edge board as required by the license, and sell such board at a profit (R. 2983). Lenci's testimony on direct examination (R. 2983), therefore, to the effect that everyone expected to discontinue making open-edge board when the licenses were signed, accords with the facts, whether there was any "agreement" to that effect or not. This definitely establishes that there was at least an "understanding."

E. *Standard size and packaging*

Two other moves were made to produce a uniform product. In its price bulletin of May 24, 1929 (Ex. 408, R. 6097), USG wrote: "The standard size of patented gypsum plasterboard are: 32- and 48-inch widths, and from 4-ft. to 12-ft. lengths, inclusive." Subsequently a more elaborate and detailed description of so-called standard sizes of board was provided (Ex. 7 to complaint, R. 89). So-called nonstandard or odd sizes could be manufactured, but the bulletin provides that they could only be sold at price differentials which in some cases amounted to as much as $5 per thousand square feet (Ex. 7 to complaint, R. 93). The prescribed differentials are not only unrelated to the degree of variation from standard but are practically prohibitive.

The second move was to bring about a uniform method of packaging or "bundling" for lath and board. USG owned Birdsey patent No. 1,696,877 which related to a process for applying a gummed tape along the sides of a bundle of four or five pieces of lath. In the May 1929 agreements the purpose to force this type of bundle on the industry was made explicit: "It is expressly understood that licensee * * * will use *only* said bundle * * * and will not use any other bundle or method of bundling plasterboard * * *" (Ex. 3 attached to complaint, R. 52). When the November agreements were drafted

this provision was omitted as probably no longer necessary, but it was provided that licensees should pay USG a royalty of ten cents (10¢) per thousand, "whether or not the bundles shall be made according to the claims set forth and claimed in said patents" (Ex. 6, attached to complaint, R. 75–76).[39]

F. *Basing points and uniform billing weights*

The fixing of uniform mill base prices, the elimination of seconds and open-edge board, and the standardization program were important

[39] The court in Finding 71 (R. 4157) found that the license provisions charging a royalty on all bundling, regardless of whether the USG method was used, "do not establish an attempt to standardize by eliminating other methods of packaging," and in Finding 72 (R. 4158), that "the license agreements were not executed with an intent to standardize in respect to the bundling patents."

The court appears to have based these findings on the further finding that "no other method was available" (Fdg. 71, R. 4157). The findings, accordingly, do not negative the fact that the royalty provision would operate, as charged, to bring about uniform packaging, and the appellees must be deemed to have known that and so intended when they signed the license agreements.

On June 10, 1929, Brown wrote Avery concerning the bundling matter that so far as he knew, "our plan of bundling has been meeting our requirements" but "we are anxious to do what the Industry does so as to have a uniform product" (Ex. 312, R. 5861). After receipt of Brown's letter the provision requiring use of the USG bundling was dropped, but the royalty provision was nevertheless included in the November agreements. It is a fair inference that, contrary to the court's findings, the industry intended to bring about a uniform method of packaging board.

moves directed to the control of prices and the elimination of competition. A further move was the inauguration of a basing point system. The first bulletin handed out by USG to its assembled licensees at the Palmer House on May 23, 1929, as above-mentioned, named only seven points, but from time to time other basing points were added until in 1939 there were a total of 24 (Ex. 33, R. 4863). At all times, however, there have been board mills at places not named as basing points.[40]

In order to obtain a uniform—and hence non-competitive—delivered price USG specified an arbitrary billing weight to be used by each licensee in calculating prices on rail shipments. The dealer price, in other words, was to "be the lowest combination mill price * * * and all rail freight from such mill to destination," calculated on the basis of the specified uniform bill-

[40] For example, Wheatland, New York, where Ebsary has its mill, was not made a basing point until June 10, 1939. Compare Ex. 33, R. 4863 and Ex. 33, R. 4846. Lenci testified that Ebsary construed the bulletin basing-point requirement, to be a "freight equalization" system, Ebsary's practice being to quote a price to dealers "based on the mill having the cheapest freight rate to the destination in question" (R. 2909). The latest bulletin in the record (Ex. 33, R. 4863), however, explicitly provides that prices "shall be the mill price listed below plus carload freight from producing mill to destination of the shipment." Then follows a list of 24 "producing mills," called in earlier bulletins *basing points* (Ex. 404, R. 6093). It will be noted, moreover, that this bulletin, while adding Wheatland as a "producing mill," has omitted Laramie, Wyoming, and Loveland, Colorado, which were listed in the bulletin of April 1, 1938 (Ex. 33, R. 4846).

ing weights (Ex. 7 to complaint, R. 89). In addition the licensees were each to charge exactly the same stop-over, switching, cartage, and other extra delivery charges. The result was that each licensee charged identically the same price to the dealer, either absorbing an extra freight cost or charging the dealer with phantom freight, depending on the location of its mill.[41]

The adoption of a uniform billing weight was necessary—if a uniform selling price was to be had—since different manufacturers made board of different weights. Griswold testified that American made a 3/8" board in 1920 weighing 2,000 to 2,100 pounds per thousand square feet (R. 478). The weight fixed by USG in the May 23, 1929, bulletin (Ex. 404, R. 6093) was 1,850 pounds. Then on May 25, 1931 (Ex. 33, R. 4623), the weight was reduced to 1,600 pounds; on July 23, 1936 (Ex. 33, R. 4757), to 1,400 pounds; on October 21, 1937 (Ex. 33, R. 4831), the weight was increased to 1,475 pounds; and in the last bulletin in evidence, that of June 10, 1939 (Ex. 33, R. 4863), the weight was still further increased to 1,525 pounds. Throughout these operations, if a manufacturer made a board lighter than the

[41] In Fdg. 18, R. 4143, the court below found that the price on board in USG's bulletins "was calculated on the basis of a mill base price plus freight from the nearest mill (freightwise) to the point of destination." This finding implies that all mills are basing-point mills but the bulletins in evidence do not support it. See footnote 40.

uniform weight he would charge a phantom freight, if heavier, he must absorb the freight.

G. *Truck deliveries and pick-ups*

The delivery of gypsum products by truck presented a further problem to the industry which, as in the case of rail shipments, was handled in a manner to eliminate further competition between the appellees. In its bulletin of June 19, 1929 (Ex. 412, R. 6102), USG inaugurated a system of uniform delivered prices for board delivered by truck in designated areas. For example, 3/8" wallboard delivered in truck lots to dealers' warehouses in Brooklyn took a price of $25.60 per M square feet, while truck deliveries in Nassau, Long Island, and Westchester counties were assigned a delivered price of $26.35.

USG also inaugurated a new practice at this time (R. 2511) to fix the *size* of all truck loads. The minimum load which could be delivered to dealers in Brooklyn—at the bulletin price—was 10,000 square feet. In Westchester county the minimum load was fixed at 8,000 square feet (Ex. 412, R. 6102). Special truck rates were prescribed only for designated areas. The bulletins did not expressly forbid a licensee to deliver smaller quantities to a dealer in one load, or to deliver by truck outside of a designated area, but the only price designated by USG for such deliveries was the l. c. l. (less than carload) freight

rate. This rate, Lenci testified, would have made the price to the dealer "so high that nobody would buy" (R. 3064); he construed the bulletins in practical effect, therefore, to prohibit such deliveries.

The location and extent of trucking areas was obviously a matter of great importance to the appellees. The bulletin of June 27, 1931 (Ex. 35, R. 5062), for example, designated only Niagara and Erie counties in the Buffalo area for truck deliveries. Thereafter National, which has a mill at Clarence Center, N. Y., arranged privately with USG for truck deliveries in the Rochester, Monroe County, area. On September 11, 1931 (Ex. 693, R. 6492), Baker of National wrote USG that "to protect our business"[42] we are following the arrangement agreed upon, "but feel that a definite schedule of prices on truck deliveries should be laid down and the area defined in an official bulletin." A week later, on September 18, 1931 (Ex. 35, R. 5060), USG issued a bulletin adding Orleans, Genesee and Monroe counties to the Buffalo trucking area.

The minimum size of truckloads permitted in the Buffalo area was fixed by the bulletin of September 18, 1931 (Ex. 35, R. 5061) at 5,000 square feet of board, or at 7½ tons in the case of mixed loads. This limit of 5,000 feet in Buffalo, compares with the limit of 8,000 or 10,000 feet in

[42] It will be noted that Baker was interested in protecting his business and not in providing pecuniary reward for the patentee's monopoly.

the New York area. From subsequent bulletins it appears that by "mixed loads" was meant "gypsum board and/or lath and other materials" (Ex. 38, R. 5234), or subsequently, "gypsum board and/or lath and other gypsum materials" (Ex. 38, R. 5231). The record is completely silent as to why USG prescribes the size of mixed loads made up, in addition to board, of plaster and other unpatented material.

The companion problem of how to handle so-called dealer "pick-ups" at mill or warehouse was discussed at the meeting between USG and its licensees on June 6, 1929 (R. 2538–9). Lenci testified that a statement was made that "it cost more at the mill, for instance, when a customer's truck backed in to be loaded with a small quantity of material, than would be the case in our usual course of business to take the material right from our kilns to the boxcar * * *" Thereafter USG proceeded to fix the permissible quantity of pick-ups. For example, the bulletin of August 12, 1932 (Ex. 34, R. 4981) read: "Minimum pick-up 5,000 sq. ft. board and/or lath." Later, on February 24, 1937 (Ex. 34, R. 4922), the amount was increased: "Minimum pick-up 7500 sq. ft. patented gypsum board products."

The consequence of these trucks and pick-up regulations has been that dealers throughout the Eastern area have been unable to buy at usual dealer prices less than 5,000 sq. ft. of gypsum

board (R. 2885). Moreover, it appears from a letter written by Lenci on May 6, 1932 (Ex. 438, R. 6139), that the reason for these restrictions was not solely to account for differences in cost of handling small orders. Lenci in that letter says categorically, and the statement was not qualified upon cross-examination (R. 6139), that one of the reasons for the selling policy was to "make the dealer carry a sufficient stock."

These restrictions, of course, also eliminated all temptation on the part of USG and its licensees to compete with each other on a purely service level by accommodating a dealer with a small order of board when he may have run short of certain sizes.

H. *Classification of dealers*

At the licensee meeting of June 6, 1929, the problem of how to classify dealers was raised (R. 2535). For example, were mail order houses to receive a 10% discount from the dealer prices, as had been the practice (R. 2535), or were they to be sold as dealers? Were "house wreckers", known as "bathtub yards", to be classified as dealers? And, should the industry continue to sell the Federal government at the dealer price on direct sales? Lenci testified that "I expressed my views" that mail order houses should receive no discount (R. 2536). On the question of "bathtub yards" Lenci could not remember, but "if I

took any position it would be that they were dealers" (R. 2537). In both cases Henning of USG agreed.

Henning further decided that, on direct sales, the government should be classified as a dealer (R. 2537). Lenci testified: "I don't remember what the comments were, but I believe everybody felt that was the right thing to do" (R. 2537). Under this policy the local dealer got nothing. On February 26, 1935 (Ex. 38, R. 5176), a bulletin was issued applicable to sales to the Federal Government for C. C. C. Projects, which provided for a maximum dealer commission of $1.50 per M sq. ft. on such sales. Then on October 31, 1935 (Ex. 38, R. 5138), in the case of direct sales to the Federal Government for W. P. A. Projects, it was ordered that the government was to be charged an advance over the regular dealer price of $2.50 per M sq. ft. on wallboard and $1.25 on lath. The bulletin provided further that these advances could be paid to dealers by way of commission.

I. *Elimination of jobbers*

Prior to May 23, 1929, it was customary in the gypsum industry, as in the mason's supply business generally (R. 1555, 1568), for manufacturers to distribute their products through distributors and jobbers (Ex. 617, R. 6394). Lenci testified that plaster and gypsum products other than wallboard are still sold in that way (R. 2898).

The May 1929 licenses, recognized the practice but, *for the first time,* required that licensees obtain USG consent before selling "manufacturers of plaster or gypsum products, or jobbers of such products, who do not or may not manufacture gypsum wallboard * * *" (Ex. 3, attached to complaint, R. 77-78).

The price bulletin of May 24, 1929 (Ex. 408, R. 6097), provided as follows:

> Minimum prices to Manufacturers and Jobbers of Gypsum Products—10% discount from minimum list prices as per our letter of May 23, applicable at all basing points.

The bulletin concluded with a request that: "You will please send us a list of the jobbers to whom you are selling patented board." At the licensee meeting of June 6, 1929, Henning of USG repeated the request and asked all those present to send him a list of the companies that were being sold as jobbers (R. 2534).

Ebsary replied on June 21, 1929 (Ex. 421, R. 6120), naming three jobbers or distributors: H. M. Coeyman Company, Newark, New Jersey; G. B. Raymond & Company, Long Island City, New York; Eastern Builders Supply Company, Baltimore, Maryland. American was insistent that it should keep its jobbers for, as Kling put it, "I feel as you do about their strangling us unless we have some protection" (Ex. 299, R. 5851). Later, on November 12, 1929, Kling asked Avery

for "your approval of our (4) jobbers"—The Fairmont W. P. Co., The Toledo P. P. Co., The Cleveland Gypsum Company, and Abbey & Co. (Ex. 181, R. 5330).

At some time not disclosed in the record the November agreement was drafted to read differently than the May agreement, and no consent was required in the case of jobbers (Ex. 6 attached to complaint, R. 78). Avery's reply to Kling as to the reasons for this (Ex. 182, R. 5332) is illuminating:

> Fourth—You ask for our approval of your jobbers. Under paragraph 9 of the contract you have the right to sell jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail) without any approval from us. If the jobbers you name are regular jobbers as above stated, then you would have the right to sell the patented product to them. As to other manufacturers or wholesale distributors, then you must have our consent, this provision simply being to prevent the licensee *from defeating the license* by manufacturing for other manufacturers or wholesale distributors not within the jobber class and who may sell at any price they please as we have no right to control the re-sale price of persons to whom the licensee may sell the patented product.

By "defeating the license" Avery could only have meant *defeating price control.* In other words, since USG had no legal right to control the prices at which the 9 or more plaster manufacturers (called manufacturing distributors in the complaint) (R. 158) might resell board purchased from licensees, Avery thought it necessary to require a consent. The implication is irresistable that Avery intended, if it should ever develop that such manufacturing distributors were re-selling wallboard below the fixed dealer prices, to withdraw the USG consent, in order, as he said, not to defeat the license."[43]

Avery defined jobbers exactly as they were described in the November license agreement (Ex. 6 attached to complaint, R. 78). But plaster manufacturers, i. e., manufacturing distributors, also were—and still are—jobbers, in that they buy board in carload lots and resell to dealers at dealer prices. Why Avery saw the possibility of the "license" being defeated in the case of sales by the latter and not by the former is not obvious. Probably it was a maneuver to satisfy American that it could keep its jobbers. At all

[43] In Findings 84, 81 (R. 4160, 4159) the court below found that the "clause of the licenses forbidding sales to manufacturing distributors without the written consent of USG was not intended to control the prices of such distributors, nor was it so used." The court, in making these findings, appears to have overlooked Avery's express statement in Exhibit 182 (R. 5332) that the provision *was* intended as a means of controlling the resale price of manufacturing distributors.

events, on November 25, 1929, American signed up. Less than a year later USG issued the price bulletin of August 8, 1930 (Ex. 430, R. 6130), which provided:

> Effective this date the price to jobbers and distributors is the same as the price to the regular dealer trade * * *.

The obvious purpose and effect of Exhibit 430 was to eliminate jobbers, as defined in the November agreement, from the gypsum industry.[*] Jobbers could not buy in car lots at dealer prices and resell to dealers at those same prices. And

[*] The court below made three findings directed to the point that there was no "intent" or "agreement" or "understanding" on the part of appellees when the licenses were executed or later that "jobbers would be eliminated" or that the "jobbers discount" would be discontinued (Fdgs. 75, 77, 101; R. 4158, 4159, 4164).

The court in making these findings appears to have relied on certain general testimony of Lenci and others that they had no *specific* intent or understanding that jobbers would be eliminated (R. 2898). But the court overlooked the fact that the *broad* purpose of the appellees was "to organize the industry and stabilize prices" (Ex. 185, R. 5339). To accomplish that broad purpose they delegated to USG the power to price jobbers out of the market whenever USG saw fit. USG determined to eliminate jobbers for the reason, as the court pointed out in its opinion (R. 4085), that jobbers set up an "unfair artificial competition" with USG and the licensees. Moreover, when USG issued its bulletin (Ex. 430, R. 6130), the licensees acted aggressively in concert to carry it out with the end result that jobbers have been wholly eliminated (R. 2997, 1991). It is submitted, therefore, that whether or not there was specific intent at the time of the agreement there was subsequent understanding and cooperation.

dealers would not buy at higher prices when they could buy directly from a licensee at bulletin prices. Higgins, a successful general mason's supply jobber, formerly with National, when asked whether he had ever tried to get a board connection on a jobber basis, testified (R. 1574):

> Well, having been in the industry for a period of nine years, I knew that I could not buy board and resell it at a profit as a jobber.

The uncontradicted testimony of Lenci and Tompkins (R. 2997, 1991) establishes beyond any question that jobbers have been eliminated. At Record 2997, Lenci testified:

> Q. But there are no jobbers who buy at a discount from the manufacturer and sell to the dealer at dealer prices?
>
> A. Not so far as our company is concerned.
>
> Q. And you don't know of any in the industry?
>
> A. No, not at the present time.
>
> Q. And insofar as that constitutes being a jobber, those jobbers are eliminated?
>
> A. Yes.[45]

[45] The court below (Fdg. 100, R. 4164) found that, in spite of the bulletin leveling off the price to jobbers with that to dealers (R. 6130), "Many jobbers continued to buy board and were able to perform a proper jobber's function." In explanation of this, the finding continues in Lenci's own words (R. 2996-2997), "There were small dealers who * * * were not able to buy or store board in the minimum quantities in which the licensees were required by the bulletins to sell it. A jobber * * * having adequate warehouse

J. Control of manufacturing distributors

After "jobbers" were eliminated, the industry continued to sell board on a jobber basis to manufacturing distributors, i. e., plaster manufacturers who buy board and resell to dealers. In all cases USG first gave its revocable consent to the licensee (R. 6236). For example, on November 30, 1934 (Ex. 38, R. 5183), a bulletin was issued consenting that all licensees might sell at a discount to Oakfield Gypsum Products Corporation and to Connecticut Adamant Plaster Company. On November 8, 1935 (Ex. 545, R. 6236), Ebsary was permitted to sell at a discount to Structural Gypsum Division of American Cyanimid. Other special consents were given from time to time.

At the licensee meeting of November 15, 1932 (R. 2666–2667), USG raised the discount from the

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space could, though he purchased at the dealer price, resell in small lots to such dealers at an advance, because of the service he thus rendered them."

The court in making this finding overlooked Lenci's further testimony, quoted above, which followed immediately. The court further completely overlooked the fact that jobbers had been defined in the November licenses and that what constituted jobbing, accordingly, was not open to question; as so defined, jobbers both "buy and sell" in straight cars or in mixed cars (R. 78). Moreover, the witness Higgins made it clear that the transaction described by the court as "a proper jobber's function" was not jobbing at all in the usual sense, but a relatively unimportant "warehouse business" (R. 1593). The court's finding that jobbers, in the customary sense in which that term is understood in the industry, have not been eliminated, has no basis. In any event the survival of one small class of jobbers would be immaterial.

initial flat 10% to 12½% on lath and 15% on board, where it has remained ever since. Manufacturing distributors, as plaster manufacturers, were potential board makers. Hansen of Oakfield testified that his company had from time to time considered starting a board mill (R. 3180–3181), since it was scarcely possible to sell plaster to a dealer unless his board requirements could be met at the same time. He further testified that the new discounts barely permitted his company to do business (R. 3181) and that it would have been economically impossible to sell below the established dealer prices (R. 3187).

On July 20, 1933 (Ex. 38, R. 5210) USG notified its licensees that its consent to sell manufacturing distributors at the 12½% and 15% discounts would thereafter be "restricted to sales of patented board and lath to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail." This meant, in plain language, that manufacturing distributors must confine their sales to dealers or have their source of supply cut off. Gallagher, New York Sales Manager of USG, was notified on July 24, 1933 (Ex. 785, R. 6583) to be on the alert for sales made by manufacturing distributors "other than at wholesale."

In making sales to the dealer trade, moreover, manufacturing distributors were expected to conform both to the USG prices and methods of dis-

tribution. Tompkins (R. 1979–1980) testified that he furnished his distributors with his dealer prices. Kellog of Connecticut Adamant testified (R. 3408) that he obtained the dealer prices from USG when selling its board as a distributor. Similarly, the distributors were expected to conform to the minimum quantity regulations for truck deliveries and pickups as prescribed by USG for its licensees.

For example, on June 9, 1932 (Ex. 440, R. 6142) Ebsary wrote USG that Structural, a manufacturing distributor, was violating the 5,000 sq. ft. minimum pick-up regulation. Structural, which was being supplied by Kelley, would sell 5,000 sq. ft. to a dealer in one lot and then permit the dealer to pick it up in small amounts rather than in one load as required by the bulletin. USG did not reply at once, whereupon Lenci wrote (Ex. 443, R. 6144) that Ebsary was losing some of his "old customers" and demanded that the matter "be taken care of." On July 16, 1932 (Ex. 442, R. 6146) Lenci became explicit:

> * * * evidently Mr. Kelley is unable to control the actions of the Structural Company, and in as much as Kelley as a Licensee has to have your permission to sell the Structural as a Manufacturer below the Dealer's prices, we believe you will agree with us this permission should be withdrawn.

On August 1, 1932, Henning of USG wrote Lenci that: "This matter is being handled with the Kelley Plasterboard Company and we will advise you just as soon as we have their reply" (Ex. 444, R. 6147). Ten days later, on August 10, 1932, Gallagher, the New York sales manager of USG, at the request of Henning of USG, phoned Lenci concerning what had been done. According to Lenci, Gallagher advised him (Ex. 445, R. 6148):

> that Mr. Kelley had personally notified Mr. Williams [of Structural] that no further variations from the license agreement would be permitted and that if it happened once more he would cancel his contract with Structural.[46]

It is clear, moreover, that should a manufacturing distributor sell below bulletin prices or on better terms, he would very soon lose his source of supply. Tompkins, of Newark, when asked

[46] On cross examination an attempt was made to weaken the force of the above exhibits (R. 2885). Lenci was led to explain that his complaint was not directed at Structural but at Kelley, that is, he was supposed to have thought that Kelley must be giving more than the usual 12½ to 15% discount, otherwise Structural could not have afforded to extend the small service of permitting dealers to pick up lots of less than 5,000 sq. ft. at one time. The explanation is not credible, as the cost of the extra service is obviously very small. Also, at this time Lenci believed the licensor had the legal right to control a distributor's sales (R. 3033), so that there was need to resort to such a roundabout explanation. The explanation, moreover, even if true, does not weaken the force of the evidence that pressure was actually brought to bear on Structural with the purpose and effect of forcing Structural to conform to the bulletin terms.

about what he would do in such situation testified (R. 1990):

> A. I don't remember my exact words, but what I meant to convey was that if we were selling to any manufacturing distributor or jobber at a discount, and that jobber or distributor took our material and sold it at a lower price than we were willing or able to sell, to our own customers, we would not continue selling him.
>
> Q. And that was exactly what Structural was doing in Philadelphia.
>
> A. Exactly.
>
> Q. So you refused to sell them any longer?
>
> A. That is correct.

The evidence is equally clear that the manufacturing distributors understood fully that they must comply with bulletin prices and terms. McCormack of Structural, when asked if he was under any obligation to sell at his supplier's prices, testified (R. 3381):

> I wouldn't say it was an obligation; it was good business sense to go along with those prices.

His reason was:

> If we undersold our source of supply, and continuously did it, I don't believe we would have a source of supply very long.[47]

[47] The court below, in Fdgs. 104, 105, and 106 (R. 4165), found that the defendants did not, by any of their operations, fix or control the resale prices of manufacturing distributors. It is submitted that when the above evidence is considered

K. *Sales to other licensees*

There have been a number of occasions when one licensee has purchased substantial amounts of board and lath from USG or another licensee for resale to its regular dealer trade (Ex. 271, R. 5799). For instance, in 1932 Certain-teed bought from USG its entire requirements of all types of board in the territory served by its North Holston mill (Ex. 241, R. 5413). C. O. Brown testified that all such board was sold at the same prices as that which it manufactured itself, that is, at USG bulletin prices (R. 1193, 1240).

The license agreements for so-called metallized board provide expressly that no licensee may manufacture and sell metallized board to another "without the written consent of Gypsum Company first obtained" (R. 4515). In 1940, for a period after Newark's board mill had burned down, Newark purchased from USG and other licensees with USG consent, all its requirements of board, lath, and metallized board at the usual manufacturing distributor discounts (R. 2026–2027). Tomkins testified that all such board was sold at

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in the light of Avery's blunt statement (Ex. 182, R. 5332), not mentioned by the court, that licensee dealings with distributors had been put on a *consent* basis for the purpose of maintaining price control, no other inference can reasonably be drawn than that appellees intended to control resale prices and that resale prices were controlled. In fact, manufacturing distributors were even forced to comply with bulletin terms and conditions of sale. Fdgs. 104, 105, and 106 are, therefore, clearly erroneous.

USG bulletin prices. He explained his reason as follows (R. 2027):

> —Well, during this period we wanted to maintain our position as manufacturers of board as nearly as we could. We didn't want to destroy the price structure that we expected to work under when we were again in operation.

This practice to sell at USG prices was likewise followed by Texas and National in the case of perforated lath. National made lath not covered by the USG perforated lath patent, Roos patent No. 1,938,354, and for a period sold substantial quantities to Texas (R. 3470–3471). Both National and Texas sold such perforated lath at USG prices (R. 1594, 3471).

L. *Board Survey, Inc.*

With the general structure of its new distribution system established, the industry turned its attention to policing, in order to insure strict compliance with the bulletin provisions. In 1932 USG organized a wholly owned subsidiary corporation, Board Survey, Inc., to act as an enforcement agent. On March 4, 1932, USG notified its licensees that the company had been formed and invited them "to send in * * * all instances of violations of any of our * * * board license agreements which come to your attention * * *" (Ex. 432, R. 6132).

The procedure for hearing complaints was carefully stated (Ex. 432, R. 6132–6133). USG or any of the licensees making a complaint to Board Survey was to furnish "all the data you are able to collect evidencing the apparent violation." Board Survey would then make "a thorough check-up of all such reported violations" and "take such action as * * * necessary * * * to fully enforce our rights under license agreements * * * and to protect our rights and interests under our patents." In the next several years many complaints, some of which are discussed later herein, were filed with Board Survey and thoroughly checked up.

M. *Licensee meetings*

During the year 1932 USG conducted an audit of all of its licensees' sales of Gypsum board. It was authorized so to do by the license agreements (R. 77). According to USG the audit disclosed a great many violations, or supposed violations, of the license agreements. As a result (R. 2603), on October 17, 1932, USG held a licensee meeting at the Commodore Hotel in New York. According to Lenci, those present included Henning and MacLeish of USG; Neale of Atlantic; Kelley of Kelley Plasterboard; Ebsary, Hough, Lenci, and Diegal of Ebsary; Baker of National; C. O. Brown and E. G. Roos of Certain-teed; Black of American; and Holland of Universal (R. 2602). MacLeish, counsel for USG, conducted the

meeting. "He was very much perturbed at the number of violations of the terms of the license bulletins" (R. 2603). The Ebsary Gypsum Company, for example, was alleged to have violated the licensing agreement 711 times, involving about 6,700,000 feet of board (R. 2603). According to Lenci, MacLeish then "made the statement that if the situation did not improve, there were only three things to do: either to cancel the licenses; or for the United States Gypsum Company to institute damage suits against the licensees; or to eliminate the price control feature entirely from the licenses" (R. 2603).

No licenses were cancelled; no damage suits were brought; and the industry did not give up price control (R. 2605). On the contrary, the meeting proceeded to a long and detailed consideration of the alleged violations. As Lenci testified. "Well, the whole idea of the bulletins was new, and a great many of the matters embodied in the bulletins were not clearly expressed, we couldn't understand them, and we naturally had to have the bulletins clarified" (R. 3006). Or, as he testified earlier, "there had been a tremendous number of bulletins issued, piecemeal, and honestly none of us could be blamed for making mistakes" (R. 2614).

The licensee meeting of October 17, 1932 (R. 2603) and the several meetings held thereafter went beyond what was necessary merely to clarify

the bulletins. Several matters were brought up upon which there were no bulletin regulations. What the industry actually did at these meetings was to work out, concertedly, the details of the distribution system which had been established generally under the licensing plan. Some of these were incorporated into bulletins and became the written law of the industry. Among the topics covered were the following:

1. *Commission men*

At the meeting of October 17, 1932, for example, MacLeish brought up the licensees' practice of employing salesmen on a commission basis (R. 2613). He said that "the audit showed that these commission men, if they didn't have a good mouth, would be very apt to give part of their commissions away to the customer, and that therefore the employment of commission men was a bad practice" (R. 2613). Not only was it a bad practice, but it, he said, "would have to be discontinued" (R. 2613).

The members of the industry present made no objection. According to Lenci (R. 2613), "Well, there were very few commission men employed, and the ones who had them said that they would be glad to rearrange them and put them on a salary basis." One week later, on October 24, 1932, USG issued a bulletin (Ex. 38, R. 5221) which provided that it would be a violation of the license for any licensee to pay a commission

to a salesman even though he sold at dealer prices and did not split commissions with the dealer. Moreover, commission salesmen were not to be employed in any case "without the written consent of licensor."

At the licensee meeting of November 15, 1932, USG again brought up the subject, with a statement that commission men "must be cleaned up" (R. 2668). At this time Lenci objected that Ebsary would not make any change until Atlantic had done something about a commission man in its employ (R. 2668). At the next meeting, December 13, 1932, Henning said that "now all commission men had been cleared up * * * with the exception of Blanchfield and Parker" (R. 2672) employed by Ebsary. Lenci replied that they would be "taken care of." Thereafter Blanchfield was put on a salary basis and "we let Parker go" (R. 2672).[46]

2. *Dunnage*

Another matter brought up by MacLeish at the October 17, 1932, meeting related to dunnage (R. 2607). The complaint, according to Lenci, was "that the licensees were putting in an unusual number of boards as culls, for packing, which in

[46] On cross examination (R. 2857) Lenci testified that he did not understand the bulletin to outlaw commission men, as such, but only the splitting of commissions. But Lenci's own actions in putting Blanchfield on a salary basis, though he was not shown to have split commissions (R. 2895), indicates his real understanding (R. 3021-3022).

reality were first-class material and in a way were a rebate." MacLeish said the practice "would have to cease" (R. 2607). At the meeting of November 15, 1932, Lenci made a complaint that Atlantic, a licensee, was using an unnecessary amount of board as dunnage (R. 2659–2660). Whereupon Henning asked that each licensee mail to Board Survey a complete statement of the amount and kind of dunnage it used (R. 2660).

At the meeting of December 13, 1932, Henning announced that each of the eight licensees had made a dunnage report (R. 2680). The average was 610 sq. ft. per car and, according to Lenci, Henning then said that "as most of the companies were using between 500 and 600 square feet, that that would be considered a fair amount of board, a proper amount of board to be used as dunnage to properly pack the car" (R. 2680). The licensees were also "asked to use, as far as possible, narrow strips, that is, boards not over 12 inches wide, * * *" and whenever wider board was used it should be stamped "dunnage."

On December 22, 1932, USG issued a bulletin (Ex. 38, R. 5217) dealing with the matter. In later bulletins the regulations were further elaborated, and also made to apply to truck deliveries. For instance, it was later provided that all gypsum board used for dunnage "shall be plainly stamped in red on the face side of each board, showing the words 'Dunnage—Not to Be Sold'

in letters at least 3" high, and be defaced, marred, diagonally scored or mutilated, and otherwise so marked that they will have no value and will be unfit for use or resale" (Ex. 37, R. 5099).

3. Trade discounts and payments

The subject of "discounts" was brought up by MacLeish at the October 17, 1932, license meeting (R. 2606). Previously, on April 12, 1932, USG had issued a bulletin (Ex. 38, R. 5242), in which it had said that "extending other than regular terms" to dealers or other buyers would be construed as a rebate and in violation of the minimum price provisions of the license. Some or all of the licensees, it was charged, had granted excessive discounts contrary to this regulation (R. 2606).

At the meeting on December 13, 1932, Henning brought the matter up again. Terms in the lumber trade often run 30, 60, 90 or 120 days, while in the cement, lime, and gypsum business shorter terms had prevailed. Lenci testified that "we didn't want to have—you see, at this time this was in the low part of the depression—we didn't want to have all our money let out on these long terms if we could avoid it, and we wanted to hold the gypsum end of the business into the 2 percent 10-day group, or 30 days net, rather than have it drop into the lumber classification. We were asked by the licensor not to offer these long terms as an inducement in order to make

sales" (R. 2682). Everyone present agreed with the licensor, for as Lenci said, "We all felt it was a good thing"[49] (R. 2683).

The phrase "other than regular terms" in the bulletin was also intended to regulate the medium of payment. MacLeish, at the October 17, 1932, meeting complained that National had taken Chicago World's Fair bonds in payment for wallboard (R. 2612). Later, at the meeting of December 13, 1932, Henning told the licensees that they "were not to voluntarily offer to take notes, or offer to take trade acceptances, or offer to take bonds or other securities, in lieu of cash," as an inducement to make a sale (R. 2683). On July 29, 1933 (Ex. 782, R. 6580) Board Survey investigated a complaint that National had accepted certificates of deposit in a closed bank as payment.

How to quote prices in bidding on contracts was regulated. It was considered a violation of the license to deduct in advance the amount of the cash discount (Ex. 37, R. 5097). In making quotations to the U. S. Government, however, the regular minimum delivered price less 2% (cash discount) was to be used (R. 5097). In either case all bids were to be identical.

Nothing, it seems, was too small to regulate in order to eliminate all possible competition.

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[49] It will be noted that Lenci speaks of uniform discount terms as "a good thing" for the licensees, and not as necessary to provide pecuniary reward to USG for its patent monopoly.

4. Warehousing and consignment sales

The bulletin of April 12, 1932 (Ex. 38, R. 5242), provided, without qualification, that the establishment or continuance of warehouses by a licensee at a dealer's place of business would be construed "as a rebate and in violation of the minimum price" provisions of the license. Likewise, "consigning of stocks" to a dealer was construed as a rebate. The effect of these two provisions was to prohibit dealer warehousing and to eliminate all sales on consignment.[50]

Both matters were discussed by MacLeish at the licensee meeting of October 17, 1932 (R. 2609). Lenci testified that under the bulletins, as he understood them, a licensee was not permitted to rent warehouse space from a dealer (R. 2609, 3023, 6178). The "business reason" for the prohibition was "Because the thing was not done for the purpose of renting space, it was done for the purpose of influencing sales" (R. 2610). Likewise, shipments of goods to a dealer for sale on consignment was regarded by the industry "as very bad business" (R. 3024). And, it was Lenci's understanding, that that was the reason for the bulletin provision forbidding them (R. 3025).

[50] On May 31, 1932 (Ex. 453, R. 6155), Lenci complained to Board Survey that USG was shipping board on consignment to two dealers contrary to the bulletin. He testified that the practice gave a distinct competitive advantage to any manufacturer still employing it (R. 2877).

In the competitive era prior to May 1929, selling on consignment was a recognized industry practice. Henning reported that USG had in 1927 signed up some 230 consignment contracts with dealers (Ex. 619, R. 6403). During the first half of 1928, USG shipped over 20,000,000 sq. ft. of board to dealers on a consignment basis (Ex. 620, R. 6413). For the first quarter of 1929 USG had some 843 dealers on a consignment basis, who sold some 5,897,501 square feet of board (Ex. 621, R. 6416). The evident purpose of the bulletins was to eliminate this type of competition and put the entire industry on a "regular terms" sales basis.

5. Policing the jobber regulation

The matter of selling jobbers at a discount was brought up by MacLeish at the October 17, 1932 meeting. According to Lenci, "Well, as I recall it, my best recollections is that the discussion was that a bulletin had been issued which put jobbers and dealers on the same basis, but that in spite of that, some of the licensees had continued to sell jobbers at a discount below the dealer price" (R. 2611). There evidently was no particular discussion, "MacLeish made a statement that it was one of the things that would have to be corrected" (R. 2611).

At the next licensee meeting, on November 15, 1932, a number of jobber situations were discussed. According to Lenci, Kelley reported that Dusol was no longer "being sold at a special discount as a jobber, but was being sold as a

dealer" (R. 2667). Kelley also reported that "he would sell Paragon Plaster Company of Syracuse, the Paragon Plaster and Supply Company of Scranton, and the American Hardwall Plaster Co. of Utica as dealers and not as jobbers" (R. 2668–2670). At the December 13, 1932, meeting, Kelley complained that USG was soliciting business from one Cartier on a jobbing basis (R. 2672). Two or three other similar complaints were made (R. 2678–2679).

During this period and sporadically thereafter a number of complaints concerning jobbers were made to Board Survey. For example, on May 6, 1932 (Ex. 438, R. 6139), Ebsary complained that Certain-teed sold to Orin F. Perry as a jobber. Board Survey replied on August 18, 1932 (Ex. 451, R. 6153), that it had not completed its investigation. On November 28, 1932 (Ex. 471, R. 6173), Ebsary again complained about Perry and concluded with the statement: "This is in direct violation of the Bulletins eliminating sales of licensee board through jobbers and commissionmen." Again, on November 8, 1934, Ebsary wired to USG: "Lee Story must be eliminated as a jobber" (Ex. 502, R. 6197).[51]

[51] The court below found that the exhibits discussed in the text "do not establish concerted action to 'eliminate' jobbers" but show only "that particular licensees had made arrangements with jobbers * * * in violation of the minimum price bulletins" (Fdg. 102, R. 4164).

The exhibits mentioned by the court are not, of course, to be considered alone. When considered in the light of

6. Truck deliveries to the job

At the licensee meeting of December 13, 1932, a matter concerning truck deliveries to the job was discussed (R. 2683–2686). From the first, the bulletins had quoted only a price "to dealers' warehouses" (Ex. 412, R. 6102). Subsequent bulletins also restricted the licensees to use of their own trucks or those of independent owners; dealers' trucks could not be hired (Ex. 35, R. 5054). The complaint at this meeting was that some dealers, when receiving a truck delivery from a licensee, would pay the driver a small sum to carry the load on and deliver it at the job. Henning of USG took the position that this was actually the same as if "the manufacturer was making the job delivery" (R. 2686), and that where the licensees hired trucks "we would have to see that they abided by our regulations just as though they were our own trucks" (R. 2684).

So far as appears no further job deliveries were made by licensees. But the question did come up

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all the evidence showing that jobbers were in fact eliminated, they establish clearly that the actions of Ebsary as set forth in the exhibits contributed to that end.

The latter part of the finding is curiously misleading. Lenci, on cross-examination, was led to explain that when he wired: "Lee Story must be eliminated as a jobber" (Ex. 502, R. 6197) he really meant that "Kelley must cease giving Lee Story a jobber's discount" (R. 2924). Obviously, whichever reading is adopted, it does not alter the fact that pressure was being brought to eliminate Lee Story as a jobber, and that he was eliminated. The finding is, accordingly, either immaterial or clearly erroneous.

later in the case of manufacturing distributors. On November 17, 1937, Tomkins, of Newark, a licensee, wrote Oakfield, its manufacturing distributor, as follows (Ex. 380, R. 6067):

> I had luncheon yesterday with Harry McCormick, and he told me there had been a good deal of excitement among the dealers in Philadelphia several days ago owing to the fact that a shipment of Oakleaf Lath had been delivered directly to the job at 52nd and Spruce Streets. Will you please investigate this matter, as I think it possible we may be called upon for some explanation. I am sure that neither you nor any of your affiliates would knowingly make direct job deliveries in the areas where they are not permitted, and I am simply passing this on for your information.

Thereafter a formal complaint was made by Board Survey (Exs. 381, 382; R. 6068, 6069); Tomkins transmitted it to Oakfield for report (Ex. 383, R. 6070); Oakfield replied explaining the situation (Ex. 384, R. 6071); and on January 3, 1938 (Ex. 385, R. 6072), Tomkins reported to Board Survey.

Under date of May 17, 1938 (Ex. 387, R. 6074), Bartlett of USG wrote Tomkins in connection with another complaint that a manufacturing distributor was delivering directly to the job:

> In further connection with my memo of the 5th instant advising you of apparent

violation of trucking regulations, I have been informed that Structural Gypsum Co., and Newark Plaster Co. (Kelly Cork Lath) are making a regular practice of delivering material direct to jobs.

The fact that in both of these cases Tomkins was able to deny that any violation took place does not negative the fact that the direct to job trucking restriction was being strictly policed and enforced and with the full approval of USG.

7. Control of advertising

The advertising policies of the licensees also came in for discussion at the meeting of October 17, 1932 (R. 2607). MacLeish complained that "a great many of the dealers were demanding that the licensees buy advertising matter, or paint fences for them,[32] or decorate their offices, or furnish materials with which to fix up their offices, and things of that kind * * * without charging for it" (R. 2607). MacLeish said, according to Lenci, that such "advertising policy would have to be corrected" (R. 2607).

At the meeting of November 15, 1932, someone complained that National had given away seven boards to Feldman Lumber Company (R. 2662). Lenci explained, "That was a complaint in con-

[32] "A dealer would decide that he wanted to repaint his whole place, fences and everything else, and on the fence there would be a small sign of one of the manufacturers, but the manufacturer would have to spend the money to do the whole job" (R. 2608).

nection with the matter of advertising, that is, giving away boards for completing work in a customer's office." (R. 2662). On November 21, 1932, Board Survey investigated National's complaint that Universal had donated $100 to a dealer "for their ball club" (Exs. 779, 780, R. 6578, 6579). In the next few years a number of similar complaints were made.

The matter of advertising on dealers' fences, for example, gave trouble. On May 21, 1935, someone complained that Certain-teed had allowed a Chicago dealer $120 to paint a Certain-teed sign extending 65′ along the dealer's fence (Ex. 770, R. 6568). Certain-teed replied that its Sales Department had "misinterpreted our advertising policy," but pointed out that the sign replaced a similar one advertising USG products (Ex. 771, R. 6569). On June 14, 1935 (Ex. 772, R. 6570), Certain-teed was charged with painting a sign 8′ x 8′ referring exclusively to its products in front of a Des Moines, Iowa, dealer's office. And a year later, on June 6, 1936, Certain-teed was called to account for granting an allowance to a West Virginia dealer for painting a sign advertising Certain-teed products (Exs. 774, 775, 776, R. 6572–6576).

On May 10, 1935, Board Survey sent a letter to all of the licensees asking for "a statement of your policies" regarding "advertising allowances, painting dealers' signs, donations of patented

gypsum board for dealers' offices, donations of carpenters aprons or the sale of such below cost, and concessions of a like nature" (Exs. 558, 719, R. 6249, 6523). Thereafter, in its bulletin of September 16, 1935 (Ex. 37, R. 5114), USG provided broadly that minimum prices must not be reduced "by allowance for any other reason whatsoever." In its bulletin of February 6, 1939 (Ex. 37, R. 5093), the licensees were expressly forbidden to grant "allowances for advertising or other purposes," as constituting rebates.

N. *Exclusion of Cardiff Gypsum Company because of price cutting on plaster*

The Cardiff Gypsum Company has for many years owned gypsum properties in the vicinity of Fort Dodge, Iowa, and operated a plaster mill at that place (R. 3229). Its plaster and other related products are widely sold throughout the middle west (R. 3229). The company has at no time manufactured gypsum board or lath (R. 3229). Its position in the gypsum industry has thus long been substantially that of Oakfield Gypsum Products Corporation, Connecticut Adamant Plaster Co., and the other manufacturing distributors named in the bill of particulars to the complaint (R. 158).[53]

[53] Cardiff could not be named in the bill of particulars as a manufacturing distributor since it had never been permitted by the industry to buy board at the general industry discount.

In June 1933, Sensibar of Cardiff asked Holland of Universal "whether we might not make arrangements so that Cardiff would be sold board on the customary industry basis" (R. 3237). Sensibar meant by this at the "discount of 15 percent on long board and 12½ percent on lath" applying in the case of manufacturing distributors (R. 3238). Holland stated that the matter was one requiring USG consent. Later he took the matter up with USG, but was unable to get their consent. Holland explained the USG action, according to Sensibar, as follows: "He told me that there was a general impression in the industry that Cardiff had been cutting prices on gypsum plaster; that he doubted, under those circumstances, whether we could make a connection to get board" (R. 3238).

During the summer of 1933 Sensibar saw Henning of USG and explained that the status of Cardiff had changed due to changes in stock ownership, and expressed the hope that the company "would be treated a little differently than they had been in the past" (R. 3240). In reply, "Mr. Henning confirmed the fact that it was the impression around his organization that Cardiff had been a price-cutter in the plaster field, and that this was not a very propitious time to talk about such a matter as I wanted to discuss; but that after a little experience with the new policy of Cardiff, the situation might be better" (R. 3241).

In the course of the next several years Sensibar tried to buy board at a discount from American, in 1933 to 1936 (R. 3241–3245, 3257–3259); Certain-teed, in 1933 (R. 3245–3247); National, from 1936 to 1938 (R. 3260–3270); in 1939, from Ebsary (R. 3291–3293). In the case of American, for example, he pointed out to Black "that it ought to be a very good thing for his company, especially since our sales territory reached out a good deal farther than his sales territory did, and in that way that it might increase his business immeasurably" (R. 3243). Black was in full accord with this argument (R. 3243). In each case, however, USG refused to give its consent.

Sensibar had a further conversation with Henning in 1935 with a view to obtaining board at a discount from USG (R. 3252). Henning's answer again was the same: "that there were people in his organization who were still not willing to believe that we would sell, or continue to sell, plaster at the going prices" (R. 3252). Then in 1938 he saw Keady of USG and told him that Cardiff had "adhered to the sales practices established by USG" and that "it simply wasn't a healthy thing for a large company, dominating that kind of a situation, to keep a small competitor from having the same recognition as other people" (R. 3265). Sensibar, shortly after, discussed the matter with Knode, President of USG, and Cardiff was then finally refused the right to buy board at a discount (R. 3268).

O. *Control of plaster prices*

The Cardiff evidence, related above, admits of only one inference, that USG and the gypsum industry sought to maintain a stable price for plaster, as well as for board. In fact, as pointed out earlier, it was assumed from the outset by Avery that if the board market could be improved and stabilized it "naturally would follow" that plaster prices would likewise be improved and stabilized (R. 622). The court below found that there was, in fact, an "increase in price of plaster and miscellaneous gypsum products over the price during the 1927–1929 price war * * *" (Fdg. 94, R. 4162).[54]

The industry took positive measures to insure that plaster prices would be stabilized. Gypsum board and lath is sold to dealers in combination with plaster and other products. The industry very early

[54] The court further found that the defendants did not "raise, maintain, or stabilize" the prices of plaster by any "device" or "action" or by any of their "operations under the license agreements" (Fdg. 94, R. 4162).

This finding completely ignores not only the evidence as to Cardiff referred to in the text, but the basic point that everyone understood that by getting together under the board licenses the prices of plaster and related products would improve (Ex. 141, R. 5293). Moreover, the evidence discussed in the text concerning the bulletin price rebate provisions (Ex. 37, R. 5092) and the Board Survey policing activities show conclusively that the defendants did employ various devices to stabilize prices on plaster. The finding is, therefore, clearly erroneous.

recognized, moreover, that any variation in plaster prices would have a direct bearing on the sale of board. If board prices were to be stabilized, therefore, the price of plaster and of other products customarily sold with board would likewise have to be stabilized (Ex. 147, R. 5298).

One of the first instances of industry control concerned a sale by National of board in combination with a quantity of fiber insulating board, called Maftex. Ebsary complained at the licensee meeting of November 15, 1932, that National "in trying to make a sale of gypsum board to Axinn Brothers, were maintaining the price of gypsum board but quoting an unsually low price on the Maftex board which was, in effect, unduly influencing the sale" (R. 2661). The matter was thereupon turned over to Baker of National to investigate, (R. 2661). In the next several years many such complaints concerning plaster and other products sold in conjunction with board were made to Board Survey.

For example, on June 15, 1933, Board Survey wrote Ebsary that one of its dealers had sold board at a price which would "hardly seem possible if your sales of patented board had been made at the licensor's minimum price," and that "It is further alleged that your sales of plaster to this firm have been at less than the market price, same being made so as to reflect to this customer a lower price on its purchases of patented board

than the licensor's minimum price to you" (Ex. 494, R. 6189).

Ebsary replied on June 20, 1933 (Ex. 495, R. 6190), that its sales of board had been strictly in accordance with the bulletins and further that, "Our sales of plaster to this company are made on the same basis as the prevailing prices made by our competitors for similar business and are not made by us with the intent to influence board sales."

A summary of a number of other typical complaints investigated by Board Survey, in which it was charged that prices had been cut on plaster and other products in order to influence the sale of board, follows:[55]

> In Exhibit 499 (R. 6194), dated June 13, 1933, USG complains to Board Survey that Ebsary is cutting prices on plaster; in Exhibit 497 (R. 6192), Board Survey writes Ebsary and asks for an explanation; in Exhibit 498 (R. 6193), Ebsary replies and denies price cutting.
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> In Exhibit 500 (R. 6195), dated April 24, 1934, Board Survey complains to Ebsary that Ebsary is cutting prices on "other

[55] In addition to the exhibits summarized, the following also relate to Board Survey complaints that USG or one of the licensees was cutting prices on plaster, other unpatented gypsum products, roofing material, insulating board or other commodities (Exs. 703 thru 708, R. 6501–6506; Exs. 710, 711, R. 6508, 6509; Ex. 713, R. 6511; Ex. 731, R. 6530; Exs. 733 thru 745 (except 740), R. 6532–6545; Exs. 748 thru 754, R. 6547–6553; Exs. 760 thru 769, R. 6559–6567).

commodities"; in Exhibit 501 (R. 6196), Ebsary replies denying cutting prices on board and states that the "other materials were paid for at the prices prevailing in the New York market."

In Exhibit 727 (R. 6527), dated June 13, 1933, USG complained to Board Survey that Certain-teed was selling plaster at less than its regular price.

In Exhibit 729 (R. 6528), dated November 14, 1932, Board Survey complains to Certain-teed that it is cutting the price of plaster; in Exhibit 730 (R. 6529) Certain-teed replies that the board was sold at Bulletin prices "and the other products in the car were priced at our regular schedule."

In Exhibit 746 (R. 6544), dated April 24, 1934, Board Survey complains to Certain-teed that it sold a mixed car of board and "other gypsum commodities" and that it cut prices on the other gypsum materials; in Exhibit 747, (R. 6546) Certain-teed replied that the plaster was sold at $1.00 per ton higher than other manufacturers were charging for it.

In Exhibit 758 (R. 6557), Certain-teed complains to Board Survey that National was cutting the price on board and "other items" in a mixed car sold to a Kentucky dealer; in Exhibit 759 (R. 6558), Board Survey demanded from National "a verified statement from you fully reporting your sales of such wallboard" covering a

period of six months and "including any and all allowances then or subsequently made effecting such shipment."[56]

The bulletin provision relative to price cuts on plaster and other materials is as follows:

> Rebates, Allowances, Etc. Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum * * * *by reducing the price of other products* * * * (Ex. 37, R. 5092).

[56] The court below in Findings 96 and 97 (R. 4163) found that the exhibits there mentioned involved complaints that Ebsary or certain other licensees had violated the minimum price on board through the device of "giving away plaster" or other products to a dealer, "and do not establish that defendants or any of them raised, maintained, or stabilized the prices of unpatented materials." These findings represent a complete misreading of all of the exhibits mentioned by the court except Exhibits 489–493, and these five exhibits related to but one isolated complaint. None of the complaints, except as noted, had to do with a charge that plaster or other commodities were being *given away*, or sold at an abnormally low price; on the contrary they all had to do with charges that Ebsary or some other licensee had *sold* plaster or other unpatented commodities at less than the established or market price.

It is submitted that when these exhibits are read in the light of the other evidence in the case they establish affirmatively that the defendants did raise, maintain, and stabilize the price of plaster and other materials as charged in the complaint.

The witness, Lenci, testified that he knew of no "agreements" or "prior understanding, oral or written, that certain prices would be established" for board, "and what those prices would be" (R. 2992). But he understood fully that the license agreement itself would operate to stabilize board prices (R. 2992). Similarly, Lenci testified that there was no "understanding" or "agreement" with respect to what price he should quote or charge for plaster (R. 2993). But Lenci understood from the beginning that he would not be permitted to sell plaster in order to influence board sales (R. 2993).

When asked specifically whether the result would not be, in a measure, to stabilize his plaster prices, Lenci admitted, "It might have that effect, yes" (R. 2993).[57] Prior to 1929 Lenci said he

[57] The court below found that there was at no time an "understanding" among USG and the licensees that prices on plaster or any unpatented gypsum products would be stabilized, raised or fixed and that the license agreements were not executed with that intent (Fdgs. 56, 73, and 94; R. 4154, 4158, 4162).

Lenci's testimony makes it clear, contrary to the court's finding, that he understood that the signing of the license agreements would have a tendency to stabilize both board and plaster prices. Blagden (Ex. 185, R. 5339) pointed out to Avery that the licensing scheme would enable Avery "to organize the industry and stabilize prices." Griswold, in Exhibit 141 (R. 5293), put the matter this way: "* * * There is no question but that if the Wall Board market were fixed up the Wall Plaster market would automatically be affected at the same time." See also R. 622.

Holland of Universal understood that the license agreements would have a stabilizing effect on plaster prices. In

could make any change in plaster prices that he saw fit to influence the sale of board (R. 2994). He described the situation thereafter as follows (R. 2995):

> Q. And subsequent to that, you could not make an adjustment in the price of plaster for purposes of influencing the sale of board; isn't that correct?
>
> A. That is correct, but I don't know where you would draw that line as to how much of a cut in plaster was made in order to sell the plaster, and how much of the cut was for the purpose of influencing the board sale. I couldn't tell you where that point would be.
>
> Q. Well, I wouldn't know, either. But the bulletin—and I refer to Government's

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Exhibit 147 (R. 5298) he stated: "I am afraid nothing can be done toward stabilization until the board matter is entirely out of the way. I believe that Mr. Avery has been very definite in a statement to that effect * * *." At R. 909–910, Holland was asked what he meant by the term "stabilization," as used above, and his reply was, "* * * I would assume it had reference to the hope that the downward spiral of prices in the gypsum industry would stop."

Certain-teed and National understood that the agreements would stabilize plaster prices. In Exhibit 203 (R. 5368), Walker of Certain-teed is quoted as saying that, "* * * Brown would not be willing to take out a license agreement with USG on board unless it carried with it a general clearing up of unsatisfactory conditions of all gypsum products. * * *" In Exhibit 200 (R. 5362), a National board of directors minutes, it was recorded "* * * that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry * * *."

In the face of such unequivocal evidence the court's findings are clearly erroneous.

Exhibit 37, page 923—doesn't make any distinction as to whether it is large or a small reduction in plaster prices which might influence the sale of board?

A. I know that.

Later, in Lenci's testimony he made it clear that he was largely influenced by the USG prices on plaster in setting his own prices. "We would have to be, *it would be the condition of the market.* We couldn't get more, and we naturally wouldn't want to sell for any less" (R. 3054). When this testimony is considered in the light of the fact that Board Survey was actively policing plaster prices and all provisions of the bulletins, the inference is irresistible that appellees have controlled the price of plaster and other unpatented gypsum products.[58]

The court below in Finding 19 (R. 4143) found that "During the periods when price bulletins were sent out by USG to its licensees, each licensee, in the main, sold gypsum board manufactured by it *at the prices* and *upon the terms and conditions* stipulated in the bulletins." This

[58] The licenses all contained a clause giving USG a right at any time "to inspect the books of account and records" of its licensees (R. 77). It is obvious that this right gave USG power to check up directly on any possible variation in the price of plaster or other products sold in conjunction with board. In 1932 a searching general audit was made of all the licensees' books and operations, as above discussed. A summary of the matters covered in the audits in 1934 is set out in Exhibit 549 (R. 6241–6242).

finding sets at rest any question of fact not only as to whether board was sold at ostensibly correct prices, but as to whether all the bulletin *terms and conditions* as above discussed were obeyed by the industry. Since the bulletin (quoted *supra*, p. 156) specifically prohibits reducing prices on board, "by reducing the price of other products," this finding as to compliance with the conditions of the bulletin in itself shows that prices of plaster and other unpatented Gypsum products were stabilized and controlled by appellees to the extent that they came within the scope of this provision.

SPECIFICATION OF ERRORS TO BE URGED

Appellant specifies as errors to be urged each of the errors assigned (R. 4178–4186) except numbers 8 through 11 (R. 4179). In substance, these assignments present the questions enumerated under the caption "Questions Presented" (*supra*, pp. 2–4) and, in addition, challenge all or part of each of the following Findings rendered by the court below: Numbers 11–12, 16–18, 24–30, 35–37, 39–40, 43, 53–54, 56–59, 61, 64, 66–67, 69, 71–75, 77, 80–81, 83–87, 89–91, 93–97, 99–102, 104–107, 109–110, 116–118.

SUMMARY OF ARGUMENT

I

A. A combination among all the members of an industry, being erstwhile competitors, to organize the industry and stabilize prices by means of

patent license agreements containing price fixing provisions is unlawful. Price fixing combinations are unlawful *per se*. It is well settled that though the means employed by the combination to fix prices be lawful when looked at as isolated transactions, they may nevertheless be steps in an unlawful scheme or conspiracy. Patent licenses stand on no different footing. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *United States* v. *Masonite Corp.*, 316 U. S. 265. In *Bement* v. *National Harrow Co.*, 186 U. S. 70, and *United States* v. *General Electric Co.*, 272 U. S. 476, the Court was not concerned with an industry-wide program designed to fix prices and eliminate competition. Each merely held that the license contract before the Court, when viewed as an isolated transaction, was not unlawful.

B. The evidence viewed as a whole and in context undeniably establishes the existence of such a conspiracy. In 1926, before any license agreements had been signed, Blagden of Beaver told Avery that USG, by virtue of its ownership of the Utzman patent, had an opportunity, by getting general industry recognition of its patents, "to organize the industry and stabilize prices" and thus "avoid the necessity of a reduction * * * of current prices to meet competition." In addition, Blagden offered to induce competitors to become licensees under USG's Utzman patent. Therafter, Blagden and Gris-

wold, with the knowledge and approval of Avery, engaged actively in promoting industrywide licensing with price control. Their activities, supplemented by the assistance of others, resulted in a number of licenses being taken out under the Utzman patent between 1926 and 1929. In the latter year, at the height of a bitter price war and eleven weeks before the Utzman patent expired, substantially all of the existing licensees and those who had not yet become licensees met in Chicago with Avery. At this meeting all of those who were then manufacturing the competing open-edge board, except American and Kelley, became licensees under the Utzman patent. Avery then handed out the first of a series of so-called price bulletins which raised prices and established an elaborate non-competitive pattern of distribution for the industry.

Prior to this time some of the prospective licensees had questioned the advisability of signing licenses under the Utzman patent, since it would shortly expire and price control could not be maintained thereafter. Avery advised them that if the plan could not be worked out under the Utzman patent, there were other patents available. Holland actively promoted the plan in order to improve financial conditions in the industry. At the May 1929 meeting, Avery advised the licensees of rights which USG proposed to acquire by patents on so-called "foam" board and suggested that the industry take out licenses

with price control. These patents were in interference and their issuance was delayed. Avery then purchased from Universal the Haggerty "starch" patent, a narrow improvement patent of doubtful validity. Thereafter all competitors became licensees under this patent and the Roos "foam" applications. The drastic regulation of the industry which had been begun in May was continued to the extent that every competitive factor has now been eliminated from the industry.

The finding of the lower court that the evidence did not establish a conspiracy to fix prices was largely influenced by an erroneous interpretation of the applicable law in that it was of the opinion that the conspiracy would be unlawful only if the licenses were "sham"—that is, not meant to be adhered to. In addition the court erroneously held that declarations were not admissible against all defendants until the unlawful nature of the conspiracy, as well as the fact of combination, had been proved by other evidence. Both because of and apart from these considerations, the finding as to the lack of evidence to show a concerted plan to fix prices and eliminate competition is clearly erroneous.

II

Appellees have gone beyond anything sanctioned by the *General Electric* case in basing price control on mere process or narrow improvement patents. In that case the patents "covered com-

pletely" the superior tungsten filament incandescent lamp and it was conceded gave the patentee "a practical monopoly of the manufacture and sale of incandescent electric lamps". The so-called principal USG patents—the Utzman closed-edge patent which expired in 1929, the Haggerty starch patent which expired in 1941, and the three Roos foam patents the last of which expires in 1954—are at most narrow improvement patents containing article and process claims. The Haggerty patent did not claim a new or superior product, but merely a means to promote adhesion between the paper liners of the board and the core; the Roos patent claimed a somewhat lighter board.

Under the rule announced in the *General Electric* case price control must be shown to be "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly". This means that price fixing must be proportioned to the contribution of the patent, and should be allowed, if at all, only where the patentee's invention is coextensive with the article sought to be subjected to price control. Clearly a narrow improvement patent, of which there may be many relating to a single marketable product, could not warrant control of the completed article. This Court has never held that a minor improvement in an old article of commerce will justify price control; on the contrary in *Katzinger Co.* v. *Chi-*

cago Metallic Mfg. Co., 329 U. S. 394, 400, this Court has recently adverted to "the broad public interest in freeing our competitive economy from the trade restraints which might be imposed by price fixing agreements stemming from *narrow* or invalid patents". In the analogous infringement situation, the Court has consistently denied the holder of such a patent the right to recover from an infringer the entire profits derived from the sale of the article to which the patent relates. As to process patents, price control of the article made by the process is clearly not justified inasmuch as the patent does not cover the article produced. As the lower courts have repeatedly held, the patent grant may not be extended to allow the patentee to fix prices on the unpatented article produced in whole or in part by use of the patented process.

III

The *General Electric* case does not authorize the complete elimination of competition at all levels which appellees have carried into effect here. There the Court did not pass upon the reasonableness of the various regulations involved in the *del credere* agency plan of distribution before it. The question passed upon was whether a licensor may ever fix his licensee's prices, not whether the particular prices and methods of sale were reasonable.

Appellees' operations under the licensing arrangements, including the price bulletins, do not meet the test laid down in the *General Electric* case, that they be "reasonably and normally adapted to secure pecuniary reward" to USG for its patent monopoly. In active competition during the years 1926–1929 the Utzman closed-edge board and Haggerty starch board dropped in price from $30 per thousand to $20 and below. This established the actual value of the so-called patented board while it was in competition with unpatented open-edge board. After the agreements were generally signed in 1929 and competition was eliminated, the price was rapidly pushed up to a high of $28.50 in 1934. Both USG and all of its licensees, therefore, obtained a profit not due to the patentee's monopoly, but to the elimination of competition in the industry. Appellees also have eliminated No. 2 board and discontinued sale of open-edge board and seconds. Sizes have been stabilized. Packaging has been made uniform. A basing point system, with uniform billing weights, has been established. Truck and carload sizes have been regulated; deliveries to job sites prohibited; dunnage is prescribed; these, and a great many other things have been done with the object in view of eliminating competition. It is submitted they have only a remote relation, if any, to securing pecuniary reward to USG for its patent monopoly. In ad-

dition jobbers and commission men have been eliminated; the resale prices of manufacturing distributors have been controlled; both USG and the licensees have subjected themselves to policing by Board Survey; and the prices of plaster and other unpatented products sold with board have been stabilized. In so doing appellees have attempted to extend their patent grant over things not included within its terms and hence their actions are unreasonable and not sanctioned by the *General Electric* doctrine. Clearly the totality of all these things goes far beyond anything approved in the *General Electric* decision.

IV

If the regulation of the gypsum industry disclosed in this case is sanctioned by the holding in the *General Electric* case, we submit that case should now be re-examined and overruled, for the reasons stated in the *Line Material* brief (No. 8, this Term), supported by the following considerations illustrated by this case.

A. The *General Electric* test is uncertain and difficult of application. It has been held not to go so far as to sanction all license conditions, even though they return pecuniary reward to the licensor. The conditions imposed must be "normally and reasonably" adapted to secure pecuniary reward for "the patentee's monopoly." Where, as here, an entire industry of erstwhile

competitors has been licensed, there is no possible way in the ordinary case of determining whether the royalty, the price which the public must pay for the product, or the methods of sale are only such as are "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." The Court, it is submitted, should therefore abandon any attempt to assess "reasonableness" for the reasons stated in the *Trenton Potteries* case. The present rule is both difficult of administration and affords no certain guide for lawful conduct.

B. The facts of this case establish that the rule of the *General Electric* case inevitably leads to consequences of a sort condemned by the Sherman Act. Licensees have every incentive to bring others into the combination to eliminate competition and make price control effective. When patents are offered with price control the importance of the patent is of secondary consideration. And, once an industry embarks on a program of stabilizing prices there is no logical stopping point short of complete regimentation, such as has come to exist in this case. It is not enough to declare that such action goes too far; the harm will often be done before corrective action can be taken. A rule having such potentialities for harm, it is submitted, should be abolished, particularly since it rests on no positive foundation in patent law.

C. Price control further tends to defeat the purposes of the patent law. In the present case the appellees are reasonably assured of a non-competitive profit until at least 1954, when the third Roos patent expires. The principal incentive to develop new and better products has been eliminated. Moreover, this case shows that narrow and doubtful patents are given currency. Licensees agree not to contest validity; they have little incentive to do so, since that would upset the price control arrangement. In the present case it was usual until 1929 to contest the validity of industry patents, or to attempt to patent around them. Since that date there has been no patent litigation, and none of the patents in this case, with the exception of the early Utzman patent, has ever been litigated. The Court has, in the public interest, modified the long standing rule that a licensee may not question his licensor's patents in order to prevent illegal price fixing schemes from being based on invalid patents. The Court should now strike at the root of the evil and declare all patent license price control to be illegal.

V

The Government in an antitrust proceeding may show the fact that the patents upon which a price fixing combination rests are invalid. A price fixing combination based upon invalid patents is illegal *per se*. *Sola Electric Co.* v. *Jefferson Elec-*

tric Co., 317 U. S. 173. If, as this Court has held, the public interest requires that a private litigant be permitted to show patent invalidity to relieve the public of unlawful trade restraints based on such patents, despite the private law principles of estoppel, it is clear that the Attorney General may do so in this proceeding, since he is charged by Section 4 of the Sherman Act with the duty to bring proceedings in equity to protect that public interest. The *American Telephone* case is not an authority to the contrary and, in fact, actually recognizes that the Government may properly contest the validity of a patent "when it is necessary in order to enable it to discharge its obligations to the public." To permit such a showing in a proceeding under Section 4 is not the equivalent of a suit for a judgment declaring the patents invalid and does not constitute the exercis of an appellate jurisdiction over the Patent Office. *Becher* v. *Contoure Laboratories, Inc.*, 279 U. S. 388.

Finally, it is submitted that within the holding of *Slawson* v. *Grand Street R. R. Co.*, 107 U. S. 649, this Court should now find the article claims of the Roos "foam" patents to be invalid. Roos and USG admitted before the patents were issued that "porous" or "cellular" gypsum wall board was old in the art. The article claims of the Roos patents therefore either claim an old product or are not stated in clear and precise terms as re-

quired by the holding of this Court in the *Wabash* case. In either case they are invalid and it "ill becomes" an equity court to permit appellees to justify their price fixing arrangement upon such patents.

ARGUMENT

I

APPELLEES, BEING ERSTWHILE COMPETITORS, ARE ENGAGED IN AN UNLAWFUL CONSPIRACY TO ORGANIZE THE GYPSUM INDUSTRY AND STABILIZE PRICES BY MEANS OF COMMON PRICE-FIXING LICENSE AGREEMENTS

The Government's position is that, even if it be assumed that under *United States* v. *General Electric Co.*, 272 U. S. 476, a patentee may in some circumstances lawfully fix a licensee's prices, this does not protect an agreement among members of an industry by which a patent licensing system with price fixing is created and maintained for the purpose of stabilizing prices and eliminating price competition. If an object of those who combined to fix prices through patent licenses is price control and not merely protection of the patentee's right to reasonable reward on his patent, the combination is unlawful. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, discussed, *infra*, pp. 182–184, in itself is sufficient authority for this proposition.

In the present case we submit that the evidence demonstrates that the purpose and motive of the parties in entering into the licensing plan was

to eliminate price competition.[59] This is shown, almost without more, by the fact that the general licensing plan was put into effect only eleven weeks before the crucial patent was due to expire. But even if it be assumed that appellees were in part motivated by proper patent considerations, that would not protect their scheme if price stabilization was also an important object. In other words, if price fixing is an object of the plan,

[59] In the court below the Government argued that when a motion to dismiss is made at the conclusion of the plaintiff's evidence, the trial court will view the evidence in the light most favorable to the plaintiff to determine whether substantial evidence exists justifying the relief requested. This is the ancient rule in non-jury law cases. *George A. Fuller Co.* v. *Brown*, 15 F. 2d, 672, 675 (C. C. A. 4). It is also the rule followed in the 3rd Circuit: *Schad* v. *Twentieth Century-Fox Film Corporation*, 136 F. 2d 991 (C. C. A. 3), which was decided under Rule 41 (b) of the Rules of Civil Procedure. It was the view, it is submitted, which the framers of the Rules intended. See comment, W. D. Mitchell, before the New York Symposium (1938), Proceedings of Institutes, at pp. 336–337. The court below, after appellant had rested, signified that it intended to "weigh" the evidence and make findings of fact, in accordance with Rules 41 (b) and 52 (a) as construed in *Gary Theatre Co.* v. *Columbia Pictures Corporation*, 120 F. 2d 891 (C. C. A. 7) (R. 3966). Rule 41 (b) has since been amended to give the trial court an option either to decline to pass upon the defendant's motion until the close of the case or "as trier of the facts" to then "determine" them. Amendments, Rules of Civil Procedure, Rule 41 (b). We submit that in this case the evidence must be found to support the Government's contentions irrespective of which view of the court's functions is taken.

and not merely a method of assuring the patentee a pecuniary reward, the scheme is unlawful.

We recognize that our contention that appellees combined for the purpose of stabilizing prices is contrary to the findings of the court below. In this Point, after discussing the legal principles to which we have briefly referred, we shall show that the findings below on this question are clearly and manifestly wrong.

A. *A plan designed to control prices is unlawful even though it rests on patent license agreements*

There is no question in this case but that, since 1929 at least, the appellees have fixed and maintained non-competitive prices in the sale of gypsum board (Finding 19, R. 4143). Under the guise of price control, as discussed above, they have, in fact, brought about a complete regulation of the gypsum industry. They enjoy a monopoly of the business. Apart from the question of patent justification, therefore, appellees' action in bringing about this state of affairs would unquestionably be in flagrant violation of the Sherman Act.

As this Court stated in *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 218, 221, in reaffirming the principles enunciated in *United States* v. *Trenton Potteries*, 273 U. S. 392:

> Thus for over forty years this Court has consistently and without deviation ad-

> hered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. * * *.
>
> * * * * *
>
> Any combination which tampers with price structures is engaged in an unlawful activity.

Stated succinctly, "Price-fixing, reasonable or unreasonable, is 'unlawful, per se' ", *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.

Moreover, it is clear that prices are nonetheless fixed by agreement, although the actual control is delegated to one of the parties. In the present case appellees carefully point out that only USG issued price bulletins. The licensees never knew exactly what price would be fixed, though they hoped it would be high (R. 2972–2973). But here, as in *United States* v. *Masonite Corporation*, 316 U. S. 265, at p. 276:

> Prices are fixed when they are agreed upon. *United States* v. *Socony-Vacuum Oil Co., supra*, p. 222. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action.

It is further established beyond question that when competitors in an industry engage in a plan to fix prices, it is wholly immaterial that the means adopted, when viewed apart from the conspiracy, may be quite lawful. In the history of the Sherman Act many devices have been employed, but without exception the courts have brushed them aside to condemn the underlying vice of concerted action to eliminate competition. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 181. One of the clearest expressions of the point is that of Mr. Justice Holmes in *Swift & Co.* v. *United States*, 196 U. S. 375, where he said (p. 396):

> The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful.

And see *Aikens* v. *Wisconsin*, 195 U. S. 194, 206; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254.

The argument upon this point, accordingly, comes down to the simple proposition that if the appellees adopted a patent-licensing scheme as a means to organize their industry and stabilize prices, the scheme is *per se* unlawful. That the appellees may have acted in "good faith," or upon the advice of counsel, as seems to have been the case here, in carrying out a scheme to circumvent the Sherman Act is of course no defense. For, as said in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49:

> The law is its own measure of right and wrong, of what it permits, or forbids, and the judgments of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results. *United States* v. *Trans-Missouri Freight Asso.*, 116 U. S. 290; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 62.

Nor is it important that appellees may not have been familiar with the statute, though the contrary is true here, or not have "intended" to do anything in violation of its provisions. The position of this Court upon such a contention was well stated in *United States* v. *Patten*, 226 U. S. 525, 543:

> Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and

materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-trust Act is designed to prevent. See *Swift & Co.* v. *United States,* 196 U. S. 375; 396–400; *Loewe* v. *Lawlor,* 208 U. S. 274; *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106. And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 243; *United States* v. *Reading Co.,* 226 U. S. 324, 370.

The foregoing propositions of law are too well settled almost to bear restatement. They are set out here only because the appellees, and the court below, seem not to have appreciated their true force and effect. Appellees argue, however, that while the law may forbid conspirators to stabilize prices throughout an industry by other devices, however lawful in and of themselves, that law

does not apply where patent licenses are the means employed.

Appellees rely for authority upon two decisions of this court: *Bement* v. *National Harrow Co.*, 186 U. S. 70, and *United States* v. *General Electric Co.*, 272 U. S. 476. But a brief examination of these cases will show that they do not stand for the proposition that competitors may lawfully conspire to organize an entire industry and stabilize prices by the simple device of using common patent licenses. The question was not presented in either case. The pattern of fact in each case was merely that of a patentee granting a license to a single licensee.

Under those circumstances Chief Justice Taft in the *General Electric* case said that a patent holder might properly control his "licensee's" prices and methods of sale, "provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly" (*Ibid.* p. 490). Obviously such a holding falls far short of sanctioning a conspiracy to organize an industry and stabilize prices. But in the *Bement* case the express point was raised in argument that actually what the parties were doing by their licensing plan was to circumvent the Sherman Act by organizing and controlling the entire harrow industry. The comments of Mr. Justice Peckham upon this point are illuminating (pp. 94–95):

> But there is no finding by the referee that such contracts were in fact entered

> into by those other parties nor that they constituted a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination. As between these parties, we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express an opinion upon a state of facts not found.

In the lower courts, with the facts fully developed, the scheme to make use of the patents as a means of controlling prices had been held to be unlawful. There is no suggestion in the *Bement* case that these cases were wrongly decided. *National Harrow Co.* v. *Hench et al.*, 83 Fed. 36 (C. C. A. 3); *National Harrow Co.* v. *Hench et al.*, 76 Fed. 667 (C. C. E. D. Pa.); *National Harrow Co.* v. *Hench et al.*, 84 Fed. 226 (C. C. N. D. N. Y.). And subsequently in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, at 48, the Court recognized that the *Bement* decision was confined in its scope, saying that the price fixing scheme there involved had

> * * * a purpose and accomplished a result not shown in the *Bement Case*. There

> was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. * * *

The *Bement* and *General Electric* cases thus afford no direct support for appellees' position. Appellees contend, however, that a logical structure can be erected upon the *General Electric* doctrine which forces the conclusion that it is perfectly lawful for competitors to combine to organize an industry and stabilize prices. That is, if a patentee may license one competitor and fix his prices, it follows, they say, that he may license two or three or more. And from this it is but a short step to say that competitors may employ patent licenses for the purpose of fixing prices for an entire industry. Needless to say there is nothing in the *Bement* or *General Electric* cases or the patent law which goes so far.[59a]

[59a] See *United States* v. *Paramount Pictures*, 66 F. Supp. 323, 340 (S. D. N. Y.) where Judge A. Hand distinguished the *General Electric* case: "for there a license to only a single licensee—the Westinghouse Company—was involved, and therefore, no conspiracy which sought to amplify the rights of the licensor under the Patent Act."

Price control is not a positive right which a patentee may hold out to his competitors as an inducement to eliminate competition in an industry. At most, as will be discussed more fully under Point II, it is a mere protective right, sanctioned by "public policy" and enforced by the courts, "as a mode of maintaining the integrity of a patent." See dissent, *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402, at 413. A right so carefully limited may not be inflated into an aggressive means of organizing an industry and stabilizing prices, with the purpose and effect of circumventing the Sherman Act.

Moreover, appellees' contention flies squarely in the face of a basic concept of the Sherman Act. That is, many things which, if done by one person may be entirely lawful, take on a very different aspect when done by the concerted action of many. The Sherman Act, Section 1, is directed at combination and conspiracy. Assuming, therefore, that a patentee may lawfully fix the prices of a single licensee, it by no means follows, as the appellees would have it, that erstwhile competitors may conspire to blanket an entire industry under such licenses in order to organize the industry and stabilize prices.

The point has been discussed with great clarity by this Court in numerous cases where lawful devices other than patent license agreements have been employed by the parties. In *United States*

v. *Reading Co.*, 226 U. S. 324, for example, the point was made as follows (p. 357):

> It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. *Aikens* v. *Wisconsin*, 195 U. S. 194, 206. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful.

To the same effect see *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 440; *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600, 614; *Binderup* v. *Pathe Exchange*, 263 U. S. 291; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809.

But it is not necessary to treat the question in terms of nonpatent cases. In the case of *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, this Court was faced with an industry wide price fixing scheme based on patent license agreements. It differed from the present scheme principally in that the patent was not held by the

principal manufacturer, Standard, but was transfered to one Wayman, who then licensed the industry upon a royalty basis with provisions to eliminate "seconds," control jobbers and fix prices. Defendants urged that the license they had used "followed the precedents and was based on that principle of the patent law which gives to the owner of an invention the power to grant to others its use or to withhold it, or to grant it upon such terms as he may choose to impose."

The Government's contention there, as here, was that the scheme was largely subterfuge, "illegal purpose liveried in legal forms to give color of right to illegal practices" (p. 39). The Court decided that the agreements "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it" and "accomplished a restraint of trade condemned by the Sherman law" (p. 48). It is significant that the Court did not say that since a patent holder may license one manufacturer he may license all, and "upon such terms as he may choose to impose." On the contrary the Court said, (p. 49):

> Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

Appellees seek to distinguish the *Standard Sanitary* case. They say that in the present case USG has kept the patents in its own hands and, moreover, has been careful as respects prices to fix them according to its own wishes without consulting the licensees. But this, it is submitted, is, under the present circumstances, an irrelevant distinction. If the parties in fact have conspired to organize the industry in that manner, rather than as in the *Standard Sanitary* case, the apparent regularity of the transaction would be greater, but the evil accomplished would be the same. Appellees would have been ill advised indeed to have adopted no other device than the identical one in the *Standard Sanitary* case.

Moreover, the case of *United States* v. *Masonite Corporation*, 316 U. S. 265, it is submitted, affords a complete answer to appellees' contentions. In that case, Masonite, like USG in this case, held certain patents on the principal industry product. It was engaged in manufacturing "hardboard", and sold it in active competition. There, as here, there was a history of patent infringement and litigation. And, in that case as in this, an arrangement was finally worked out to organize the industry and stabilize prices. The scheme agreed upon was that Masonite alone would manufacture the patented board, and it in turn would license its erstwhile competitors to sell as *del credere* agents at fixed prices.

Masonite, it will be noted, was even more circumspect than USG has been in its retention of control of the patents and the right to dictate the prices to be charged for the patented product. Moreover, in that case, as here, it could be argued that since a patentee may lawfully license one licensee to vend the patented product as a *del credere* agent, the patentee could likewise license two or three or more. Hence, it would follow, if appellee's position were correct, that Masonite could properly have licensed all its competitors to sell as *del credere* agents and thus entirely eliminate competition in the industry.[60]

But a unanimous court held to the contrary. The dominant concern of the patent system, it said, was that stated by Mr. Justice Story in *Pennock* v. *Dialogue*, 2 Pet. 1, 19, i. e., the promotion of the progress of science and the useful arts; reward of inventors is secondary and merely a means to that end. The Court stated (pp. 278–279):

> That must be the point of departure for decision on the facts of cases such as the

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[60] The circumstance that in the *General Electric* case the patent license was to "make" and "vend," while in *Masonite* it was limited to the latter, it is submitted, is without significance. Both rights, like the right to "use," derive from the same statute and have equal sanctity. "The statutory authority to grant the exclusive right to 'use' a patented machine is not greater, indeed it is precisely the same, as the authority to grant the exclusive right to 'vend' * * *." *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 516.

> present one lest the limited patent privilege be enlarged by private agreements so as to by-pass the Sherman Act. *Ethyl Gasoline Corp.* v. *United States, supra,* pp. 456–459. Certainly if the *del credere* agency device were given broad approval, whole industries could be knit together so as to regulate prices and suppress competition. That would allow the patent owner, under the guise of his patent monopoly, not merely to secure a reward for his invention but to secure protection from competition which the patent law, unaided by restrictive agreements, does not afford.

And further (p. 282):

> The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se.* If it were sanctioned in this situation, it would permit the patentee to add to his domain at public expense by obtaining command over a competitor. He would then not only secure a reward for his invention; he would enhance the value of his own trade position by eliminating or impairing competition.

The result, it is submitted, is that a combination between erstwhile competitors to organize an industry and stabilize prices, *by whatever means,* is unlawful *per se.* Patent licenses with price control may not more than any other device be adopted concertedly by the members of an in-

dustry to eliminate competition and circumvent the Sherman Act.

B. *Appellees have engaged in a conspiracy to employ patent license agreements to organize the gypsum industry and stabilize prices*

It has been established, it is submitted, that a combination or conspiracy to organize an industry and stabilize prices is unlawful *per se*, notwithstanding lawful patent licenses may have been used as a means of carrying the conspiracy into effect. The scheme or plan being unlawful it is immaterial that the parts of the plan, when viewed by themselves, are lawful. It is submitted, further, that the facts of this case establish conclusively, not only that appellees have conspired to organize the gypsum industry and stabilize prices by means of patent license agreements, but that they have actually carried this plan into effect and completely eliminated competition in the industry.

The concept of a conspiracy or combination within the terms of the Sherman Act is relatively simple. Concerted action on the part of erstwhile competitors according to a common plan or scheme to restrain trade is the gist of the offense. It is not essential that there be any "contract" or "agreement" or "understanding"; the parties may never have met or talked with each other;[61]

[61] *Direct Sales Co.* v. *United States*, 319 U. S. 703.

one conspirator may not regard himself as the "agent" or "emissary" of another; it is enough that they all act in concert in furtherance of a common purpose to restrain trade and eliminate competition.

Speaking of the conspiracy found to exist in *United States* v. *Masonite Corp.*, 316 U. S. 265, this Court said (p. 275):

> It is not clear at what precise point of time each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that, as the arrangement continued, each became familiar with its purpose and scope. Here, as in *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226, "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."

And continuing:

> The circumstances surrounding the making of the 1936 agreements and the joinder in 1937 of the two other companies leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking. As this Court stated in the *Interstate Circuit* case (p. 227): "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of

the conspirators. * * * Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

The most recent statement of this Court is ound in *American Tobacco Co.* v. *United States,* 28 U. S. 781, wherein the Court, through Mr. ustice Burton, said (p. 809–810):

> It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential

combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words. *United States* v. *Schrader's Son*, 252 U. S. 85. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.

1. The lower court's finding that no conspiracy has been shown in this case is clearly erroneous

Here, as in the *Masonite* case, the lower court made findings that no conspiracy existed on the part of the appellees. Some of these findings, to which error is assigned, relate to specific items of evidence. We have dealt with them at the appropriate point in the course of the Statement of Facts. In Finding 118, R. 4167, however, the court found broadly that "The evidence * * * fails to establish that defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices, as charged by the Government." It is submitted that the court erred in examining the evidence piecemeal and not in the light of the actual charges of the complaint, and that its finding is clearly erroneous.[62]

[62] The scope of the review where findings are challenged on appeal in an equity case was stated by Mr. Justice Jackson in *District of Columbia* v. *Pace*, 320 U. S. 698, as follows

The court below did not examine all of the evidence in the case upon conspiracy at any one time, but took up different parts of it at two widely separate places in its opinion. The court's reasons for so doing throw considerable light on the weight to be given to its evaluation of the evidence. Early in its opinion the court determined, contrary to the legal principles above discussed, that industry-wide or multilateral licensing, as employed by the appellees, was proper within the doctrine of the *General Electric* case (R. 3995–3996). That being true, a matter not conceded by appellant, the court stated that there were two questions of fact left for decision: one, whether the licenses were entered into as "bona fide" agreements and not as "sham"; the other, whether appellees carried their actual operations beyond the proper limits of their patent monopolies (R. 3999). By "sham" the court apparently meant agreements which the parties did not enter into in good faith or intend to carry out. See R. 4030.

In thus framing the first issue of fact for decision, it is submitted, the court below entirely misconceived the Government's position on the present point. It was not contended below, and it is not now, that the license agreements were

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(p. 703): "* * * the whole case, both facts and law, is open for consideration in the appellate court, subject to the long-standing rule that findings of fact are treated as presumptively correct and are accepted unless clearly wrong."

"sham" in the sense meant by the court.[63] The evidence clearly shows that the appellees regarded the licenses as binding legal documents, and that they paid substantial royalties to USG. Griswold and Lenci both testified on direct examination that they understood the USG licensing plan, with price control, was legal and supported by the rulings of this court (R. 512–513, 2476). The court below seemingly did not appreciate that the Government's argument was that the scheme was illegal if an object of it was priee fixing and not merely patent protection. Even if the patent motive was a subterfuge, this would not have made the licensing agreements "sham" in the court's sense of agreements made in bad faith, since the agreements were intended to be observed.

The court below, nevertheless, made an extended review of much of the evidence in the case to determine its bearing on the issue of "sham." Each exhibit and each bit of testimony so taken up was examined to see whether it evidenced bad

[63] In Reply Brief, May 18, 1944, at p. 44, when answering appellee's argument that there was nothing in Blagden's testimony to indicate that he thought the patent licenses were "sham," we said: "Surely they [defense counsel] understand that it is not necessary to prove conscious 'sham,' lack of 'bona fides,' or 'cover-up,' in order to make out a conspiracy case. The parties had supposedly competent legal counsel who advised that the *General Electric* case would permit them to organize the industry and stabilize prices. Defense counsel, even now, argue to the same effect. Their contention that the plaintiff has failed to show 'sham,' is therefore made simply to confuse the issue."

faith (R. 4028–4072). The court found that none of this evidence showed either (1) that the license agreements were entered into in bad faith as "sham" (Fdg. 30, R. 4148), or, (2) that they were "non-bona fide" because executed with "intent" to accomplish restraints beyond the proper limits of the patent monopoly (Fdg. 57, R. 4155). Hence, in the lower court's view, there was no evidence of conspiracy.

Much later in its opinion, the court took up what it termed "additional" evidence which it said was urged by the Government as showing conspiracy (R. 4101–4117). This evidence likewise does not appear to have been reviewed by the court in the light of the Government's actual position below, i. e., that a combination among erstwhile competitors to blanket an industry under common license agreements in order to organize the industry and stabilize prices is illegal *per se*. The court's consideration of the evidence was clouded by its view that an unlawful conspiracy could not be shown unless it involved a showing of "sham" (R. 4105). Our position below, as here, was that a conspiracy between competitors to by-pass the Sherman Act by taking out patent licenses for the purpose of price control is illegal, irrespective of whether the licenses are "sham" or valid. And we insisted below, as we do here, that all of the evidence in the record,

not merely certain "additional" evidence, is to be considered in determining that issue.

The court below disposed of a great part of the evidence of conspiracy as not showing that the licenses were "sham."[44] The small number of exhibits or "additional" evidence, reviewed by the court later in its opinion (R. 4101–4117), were taken up out of context and gave only a partial picture of the actual facts of the case on the conspiracy point, discussed at pp. 16–160 in the statement herein. It is submitted, accordingly, that the lower court's finding that the evidence does not "establish that defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices" (Fdg. 118, R. 4167), was based on an inadequate consideration of only part of the evidence. It is our present position, as it was below, that when all the evidence is considered, both in the shape of uncontradicted testimony and exhibits, a finding that appellees were engaged in a conspiracy to organize the gypsum industry and stabilize prices, and not in merely seeking to protect the USG patent monopoly, is clearly required.

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[44] Among the many findings addressed to the question whether the evidence shows "sham" or lack of "bona fides" are the following: Fdgs. 29, 30, 35, 39, 40, 43, 57, R. 4148–4152, 4155. It is submitted that these findings are immaterial to the issues of the case and may be disregarded.

2. *The lower court erred in holding that the declarations of the appellees were binding only upon the declarants.*[*]

It is further essential to an understanding of the lower court's action in making Finding 118, as well as other findings, to consider its holding

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[*] During the course of the trial the Government followed the procedure outlined in Rule 36 of F. R. C. P. and served separate requests on USG and National to admit the genuineness of certain documents, which they did. When these exhibits were offered in evidence, however, the district court ruled, upon objection, that such exhibits could only be received as binding upon the party making the admission, since the nonstipulating party had had no opportunity to cross-examine the writer upon the question of authenticity (R. 3776, 3801–3802). This ruling, it is submitted, if correct, would largely destroy the value of Rule 36 as a means of expediting trial in conspiracy cases.

In the case of *United States* v. *Vehicular Parking Ltd., et al.*, 52 F. Supp. 751 (D. Del.) the court said (p. 755): "It seems to me nonstipulating defendants are bound by these admissions, until they disprove authenticity." And in *United States* v. *National Lead Co., et al.*, 63 F. Supp. 513 (S. D. N. Y.), Judge Rifkind ruled in the course of trial (Tr. 421–427) to the same effect. His reasoning upon the point is persuasive: "It seems to me the balance of convenience lies here in overruling the objection especially since I take it that your objection to authenticity is not because you are really questioning the authenticity of the signature, but simply because you want an opportunity to cross-examine with respect to the verity of the declarations in the agreement. I think that that would not be accomplished by sustaining your objections, and if you want to challenge these declarations you will have to (A) either produce evidence to contradict it, or, (B) establish the absence of any conspiratorial relationship between the two parties, in which case the document would go out as far as your client is concerned." In view of this apparent conflict in interpretation

with respect to the declarations of alleged co-conspirators. The case below was tried in consonance with the many holdings of this Court that the acts and declarations of a conspirator in furtherance of a conspiracy are binding upon his coconspirators.[66] The rule is perhaps best stated in the case of *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, where Mr. Justice Pitney said (p. 249):

> The proceedings of the international and sub-district conventions were shown by the introduction of official verbatim reports, properly authenticated. It is objected that these proceedings, especially in so far as they include the declarations and conduct of others than the answering defendants, are not admissible because the existence of a criminal or unlawful conspiracy is not made to appear by evidence *aliunde.* The objection is untenable. In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, *but it is not necessary to*

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of Rule 36 an expression of the Court upon the question would, it is submitted, be in the public interest.

The trial court's ruling applied to the following exhibits, certain of which contained declarations in furtherance of the alleged conspiracy: Exs. 550, 554, 556, and 693 to 785, except exhibits 698, 715, 716, and 728. R. 6243–6246, 6248, 6492–6583. Ex. 693 was subsequently admitted. R. 3873.

[66] See, for example, *Connecticut Mutual Life Ins. Co.* v. *Hillmon,* 188 U. S. 208; *International Indemnity Co.* v. *Lehman,* 28 F. 2d 1, 4 (C. C. A. 7).

> *show by independent evidence that the combination was criminal or otherwise unlawful.* The element of illegality may be shown by the declarations themselves. The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them.

Much of the evidence in the case below was introduced, as exhibits, in the form of letters, memoranda, and agreements written by the active participants in the alleged conspiracy. Speaking of evidence of this sort in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S. D. N. Y.), Judge Learned Hand said (p. 978):

> Ordinarily the intent, which plays so large a part in the decisions of the court in cases of this sort, must be gathered alone from the conduct of the defendants themselves; but in this case, by an unusual chance, the evidence goes much further. The officers of the Corn Products Refining Company apparently had a custom of communicating

> with each other by typewritten, unsigned memoranda * * *. The documents were never intended to meet the eyes of any one but the officers themselves, and were, as it were, cinematographic photographs of their purposes at the time they were written. They have, therefore, the highest validity as evidence of intention, and, although in many instances Bedford attempted to contradict them, his contradiction only served to affect the general credibility of his testimony.

It will be noted that, within the *Hitchman* rule, before evidence of this type is admissible as binding upon alleged coconspirators, it must first be shown *prima facie,* by evidence *aliunde* the declarations, that an association or combination exists, but not that it is unlawful. That is, it was necessary here to show that appellees were associated together "in the prosecution of a common plan or enterprise, *lawful or unlawful.*" With that established, the large number of exhibits in the case would then become binding "as primary and original evidence" against each conspirator.[67]

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[67] That counsel for appellees fully recognized the force of the *Hitchman* holding is shown by the following excerpt from the proceedings (R. 3896):

"Mr. BROMLEY. * * * I am mindful of the fact that the Government need only prove a lawful arrangement, I know that, sure.

"Justice STEVENS. Prove what?

"Mr. BROMLEY. That they need only establish for their *prima facie* case, a lawful arrangement, then they can come along with declarations and give the illegal color or character if they want to."

The court below ruled (R. 4028), "that there is no evidence, outside the declarations, of the conspiracy charged." Hence it followed, in the lower court's view, that the many writings made by the parties in carrying out the alleged conspiracy, must be disregarded, except as they would constitute admissions in each case on the part of the declarant. The court reached this conclusion upon a review in only four pages (R. 4024–4028), of but a small part of the evidence in the case independent of the declarations.

It is submitted that in so doing the lower court erred in failing to find that a *prima facie* conspiracy had been made out within the rule of the *Hitchman* case. It largely disregarded that case. Nowhere in its short consideration of the evidence under this topic is there recognition that it is only necessary to show an informal association in furtherance of a common plan, "lawful or unlawful." On the contrary the court speaks throughout as though the evidence at this point in the proceeding must actually "prove the conspiracy charged" (R. 4026), by which the court seemingly meant that both the fact of combination and the unlawful purpose which made it a "conspiracy" must be proved. Obviously the *Hitchman* case announced no such rule, for if the independent evidence proved the case, it would be unnecessary to bother with the declarations at all. A ruling which would thus destroy, for all prac-

tical purposes, the value of that evidence which has the "highest validity" is manifestly erroneous.

3. *Appellees have associated themselves together in furtherance of a common plan.*

There is an abundance of evidence in the record apart from the declarations, it is submitted, to show that appellees have been associated together "in the prosecution of a common plan or enterprise, lawful or unlawful," within the rule of the *Hitchman* case. The "plan" stands out on almost every page of the record; briefly stated, it was to blanket the entire gypsum industry under common patent license agreements with price control. New patents and new licenses were added from time to time, one or another party has joined the group or been absorbed and dropped out, but the basic "plan," it is submitted, has not changed.

That such a "plan" has been in successful operation since at least 1929, as related *supra* pp. 102–160, can be established entirely by evidence apart from declarations. The May and November license agreements between USG and the earlier defendant were admited generally (R. 450–455). The same is true of the large batch of price bulletins (Exs. 33–39, R. 460–463) which were issued under these licenses. Moreover, the court below found, and the fact is not now questioned, that "each licensee, in the main, sold gypsum board manufac-

tured by it at the prices and upon the terms and conditions stipulated in the bulletins" (Fdg. 19, R. 4143). Also it is not questioned that the meetings between representatives of the many licensee companies were held, or that the subject of price control was discussed (R. 2617–18).

In addition, the witness Lenci testified at great length concerning the raising and stabilization of prices (R. 2972–2973); the actual elimination of open-edge board and No. 2 board (R. 2553, 2982, 2518, 2519); the licensee meetings (R. 2534–2540, 2601–2613, 2640–2689); the policing of USG and the licensees (R. 2758–2761); the elimination of jobbers (R. 2997); the tampering with the price of plaster (R. 2992–2993); and generally concerning the progressive control of distribution which appellees have put into effect.

It is not necessary to review the testimony of Lenci; or of the other witnesses: Higgins, Tomkins, McCormack, Sensibar, and others who likewise gave testimony concerning the operation and effect of the licensing arrangement. It should be noted, simply, that this was all evidence, apart from the declarations, showing that since 1929 at least appellees have been intimately associated together in actual operation under industry wide license agreements with price control.

This state of affairs did not happen by chance; on the contrary, it is submitted, it was the fruit of the "plan" which had its inception in the con-

versations between Blagden and Avery in 1925, and which was actively promoted by Blagden, Avery and Griswold in the next two or three years. Both Blagden and Griswold were called as witnesses, identified various exhibits, and gave testimony, under cross-examination, not only of conferences with Avery, but that each contacted the members of the industry on one or more occasions and urged them to take out a license with USG with price control.

Blagden testified that on the Thursday preceding December 12, 1925, he met with Avery in Chicago and discussed the possibility of settling USG's infringement suit against Beaver (R. 784–786). The details of the discussion were not recalled by Blagden, but he did remember that there was discussed at this conference, (a) that Beaver would pay damages to USG, (b) that Beaver would acknowledge the validity of USG's patents, (c) that Beaver would become a licensee of USG under their board patents, and (d) that USG would have price control (R. 785–790).

After further conferences with Avery, Blagden testified that the original Beaver-USG license was signed (Ex. 1, R. 4205). This license, providing prominently for price control, became the pattern for all subsequent agreements. Thereafter Blagden testified that he had conversations with the other members of the industry, in particular: George M. Brown of Certain-teed (R. 831); Hag-

gerty of National (R. 862); Fuller of Atlantic (R. 862); Gloyd of Texas (R. 862); Ebsary of Ebsary (R. 861); Shearer of Universal (R. 827); and "I undoubtedly talked to some others, but I can't remember" (R. 863).

Blagden testified generally as to these conversations as follows (R. 862):

> Q. Well, can you recall the subject-matter that you discussed?
>
> A. Whenever I met with these gentlemen they would ask me were we going to take out a license, or had we taken out a license with U. S. Gypsum, and I would tell them we had, and if they would ask me, "Well, what do you think about it?", I would say, "I advise you to join up."

When questioned as to what reasons he gave the members of the industry for signing the license, Blagden testified that he told each in substance the same thing (R. 831):

> Q. Now did you give Mr. Brown any further advice as to the benefits of a license agreement?
>
> A. I can't remember any.
>
> Q. Did you talk to him about stabilizing prices under a license agreement?
>
> A. I told him that, undoubtedly, if he were in with the others he would get the benefit of stabilization.
>
> Q. By "stabilization" what do you mean?
>
> A. Stable prices.

Q. And by "stable prices" do you mean uniform prices?

A. He would get the benefit of the license price, which would be the same price.

Griswold also was called as a witness, subject to cross-examination, and testified that he talked with Blagden in May 1926, concerning the USG license arrangement, and that "it would probably have a stabilizing influence on the market" (R. 513). On May 12, 1926, he wrote a letter, concerning his meeting (Ex. 104, R. 5260), in which he said: "according to the plans we have we figure that there is a possibility of us holding the price steady on wall board for the next fourteen or fifteen years which means much to the industry." On cross-examination he testified as to this (R. 701):

> Yes, I figured that if the different parties took out a license agreement with the United States Gypsum Company, and the law gave them the right to establish the price at which the licensee could sell the product, that the price on wallboard would remain fairly stationary unless it was disturbed by competition of other products.

Griswold wrote and talked with Avery on different occasions about the license arrangement. On October 15, 1926, he wrote Avery saying, in part, that a committee had been appointed which "expects to meet with all other Manufacturers of board who have not signed the License Agree-

ment. The meeting will probably be Thursday of this coming week with the object in view of getting united action on this matter" (Ex. 123, R. 5278). On receipt of this letter Avery wrote stating his appreciation of Griswold's efforts (Ex. 124, R. 5279). On the same day Avery wrote Blagden (Ex. 191, R. 5351), quoting from Griswold's letter that "this committee expects to meet with the object in view of getting united action" and concluding with the statement, "I do not know whether you expect to be a part of this meeting, but I hope so."

Griswold's meeting was not held as scheduled (Ex. 132, R. 5285), and on January 3, 1927, he wrote Avery that: "You will remember that I started out to deliver 100 percent of the manufacturers of board that would be willing to sign up on a license arrangement * * *." In answer to a question propounded by the court concerning this statement Griswold testified (R. 663): "That as I remember it, it simply had reference to the fact that at the beginning of efforts along this line, I voluntarily stated to Mr. Avery that I thought I could deliver one hundred per cent." And further (R. 664): "* * * I thought I could convince these people that they were making a mistake in not taking out a license, because they could make the board under the license as cheap, or cheaper, then they could make something that brought about a conflict."

Later Griswold testified that he had a meeting with Avery in Chicago in which he urged that the license offer be held open (R. 619). In answer to a question by the court as to what Avery said, Griswold testified: "Well, as I remember, it was that he insisted at that time, or stated that he wanted them all to come in, and of course, I had no connection with Certain-teed Products, and very seldom called upon them" (R. 620).

It is unnecessary to prolong this recital. As reviewed in detail in the statement of facts, *supra*, there was much additional evidence bearing on the point. For example, Holland was also active, in 1928 and 1929, in promoting the industry-wide licensing agreement. He testified: "Oh, I think I kept trying to talk these people into taking out a license" (R. 932). And what transpired at the May 1929 meetings in Chicago, at which substantially industry-wide acceptance of the original Beaver-USG licensing arrangement with price control was finally obtained, was developed by the oral testimony of Lenci (R. 2472–2476). But the Avery, Griswold, and Blagden evidence[46] alone, it is submitted, establishes overwhelmingly, apart from the declarations, that they were engaged in a common plan, lawful or unlawful. As each additional party became acquainted with the "plan" and gave his adherence to it, he

[46] Avery did not testify orally, but the record contains many letters written by him.

became a co-conspirator against whom the declarations of all became admissible and binding as original evidence. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208.

4. The purpose of appellees' "plan" was to organize the gypsum industry and stabilize prices

Blagden, Avery and Griswold, as has just been shown, were associated together in a "plan" to bring about industry-wide licensing with price control. Within the doctrine of the *Hitchman* case their acts and declarations in furtherance of the plan may now be examined as original evidence, binding upon them and all subsequent parties who were acquainted with the plan and gave their adherence to it. In other words, the declarations may now be used with all other evidence in the case to show the unlawful character of the "plan" or conspiracy.

The first exhibits to be considered as declarations are Blagden's letter and memorandum of December 12, 1925, sent to Avery of USG (Exs. 184, 185, R. 5337, 5338). Herein, Blagden not only states very clearly the "plan" of the conspiracy, as shown above by oral testimony, but lays bare its unlawful purpose. That is, Blagden was urging upon Avery a plan "along the lines which I have discussed with you" (Ex. 184, R. 5337), by which Avery "would be able to take a dominating position in the industry with an opportunity to control * * * prices through

legitimate means of patent licenses" (Ex. 185, R. 5347). In other words, as Blagden put it several times, the opportunity was one "to organize the industry and stabilize prices" (Ex. 185, R. 5339).

To implement the plan, Blagden said that Beaver "would agree to use its best endeavors to induce manufacturers of closed-edge wallboard other than defendant to accept licenses * * *" (Ex. 185, R. 5346). And, as discussed above, Blagden not only kept his word, but endeavored to persuade Brown of Certain-teed, an open-edge manufacturer, to take out a license (R. 830–831). With general recognition of the USG patents, Blagden pointed out, USG would be able "to maintain a lawful price control and avoid the necessity of a reduction by plaintiff [USG] of current prices to meet competition."

In other words Blagden was proposing that by licensing the gypsum industry, it should be possible, putting it bluntly, to eliminate competition. Blagden's hope was not immediately realized, for the entire industry did not come together under the licenses until 1929; and, as he predicted, USG had to revise its prices sharply downward during 1926–1929 to meet competition. *Supra*, pp. 38–40, 53–55, 67–68. It is submitted, however, that no clearer statement could well be made of a purpose to circumvent the Sherman Act than Blagden gave in these exhibits.

On October 1, 1926, Blagden wrote to Avery that "I feel that the 'entente cordial' that has

started between our companies is only a beginner and that if we play the game right it should bring big things" (Ex. 189, R. 5349–5350). Later, when questioned as to the meaning of the expression "entente cordial" in his letter, Blagden testified that he meant that "in addition to our taking out a license, that undoubtedly others would take out licenses and that would tend toward stability" (R. 864–865). It may very well be assumed that Blagden acted in "good faith," but it is incontestable from his testimony that he was promoting a plan to license the industry for the sake of "stability." And by "stability" he testified he meant "stabilizing the prices in the industry" (R. 865).

Sometime in April 1928, Griswold had a conference with Geo. M. Brown of Certain-teed about "the advisability of his taking out a license agreement" (R. 604). On April 12, 1928, Griswold wrote that Brown "stated very plainly to me that they were willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred percent" (Ex. 141, R. 5292). Brown was not "willing to take out a license agreement with the USG on board," however, "unless it carried with it a general cleaning up of unsatisfactory conditions of all gypsum products" (Ex. 203, R. 5368).

This evidence shows that Certain-teed was fully advised of the plan to bring the industry together under the USG license. Moreover, Brown understood exactly what the purpose was, that is, to get rid of competition, and that of Ebsary in particular. Indeed, Exhibits 212 and 324 (R. 5376, 5947–5949), show that Brown knew only too well that the plan was one to give USG dominance over the industry. Therefore, when Brown went to Chicago in May 1929 in company with all his principal competitors, and signed up, the inference is irresistible that he intended to join the conspiracy "to organize the industry and stabilize prices."

The witness Black, of American, testified that he attended a meeting in October 1928 in New York at which the licensing arrangement was discussed (R. 1353). There were present: Holland of Universal, Reeb of Niagara, Haggerty and Baker of National, Walker and Henley of Certain-teed, and Ebsary. In a report to Kling (Ex. 203, R. 5367), Black said: "Mr. Ebsary is exceedingly anxious to have something done to straighten things up, and I noticed that Mr. Haggerty and Mr. Baker also seemed more anxious than they were thirty days ago."

It is evident further that the plan being discussed was that of getting everybody together under the license. "Mr. Walker, in particular, and supported by Mr. Holland, took the same

position they did the day before, that everyone must be very sure before going to Chicago that they were willing to walk up and sign up a license agreement with the USG, and also to foot the bill whatever it may be" (Ex. 203, R. 5368). This exhibit shows clearly that everyone knew that the plan was one to get the whole industry under license. Moreover, it is a fair inference that they understood that only by making it unanimous could they eliminate competition and correct the price situation.

Holland's presence at this meeting (Ex. 203, R. 5367) is significant. His company, Universal, was already a licensee, enjoying the privilege of making the "superior" closed-edge board (Ex. 2, R. 4226). But his company was in receivership, and as the lower court stated in its opinion (R. 4114), his purpose was quite frankly to get everyone in under the license "in order to help his company as well as the other manufacturers out of their unfortunate financial situation due to the litigation and the price war." That is, Holland frankly wanted to eliminate all competition in the industry.

Nor was Holland merely interested in board prices; he wanted general industry prices corrected. Thus on Sept. 20, 1928, he wrote Griswold: "I am afraid that nothing can be done towards stabilization until the board matter is entirely out of the way. I believe that Mr. Avery

has been very definite in a statement to that effect" (Ex. 147, R. 5298). When asked what he meant by the term "stabilization," he testified: "* * * I would assume it had reference to the hope that the downward spiral of prices in the gypsum industry would stop" (R. 909–910).

By the end of 1928 only American was still unwilling to join the combination. On January 9, 1929, Haggerty wrote Holland that the question in his mind was whether it would be "advantageous to go in" without American, particularly since, "If this price control feature was discontinued in August, as is the case in the present form of the agreement, how could we expect the cooperation of the United States Gypsum Company in anything bearing upon a discussion of price?" (Ex. 205, R. 5370).

Holland replied on January 12, 1929, that he did not think the matter of future price control was the deciding factor with American. "You will remember that Mr. Avery made it very clear to us that if this *plan* could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the Utzman patent expires next August is not a practical reason for continuing the conflict" (Ex. 206, R. 5371). Holland was called as a witness and failed to remember what the "plan" was, but he admitted that he wrote truthful letters (R. 938–939).

Holland's letter, as corroborated by his testimony, necessarily refers to the original Blagden-Avery "plan" to bring the entire gypsum industry under common license agreements in order "to organize the industry and stabilize prices." With the Utzman patent about to expire, "there were other patents available"; the essential thing was to get the industry together somehow under patent licenses with price control and end the competition.

Finally, eleven weeks before the Utzman patent was to expire, a meeting of the industry was arranged to be held in Chicago on May 21, 1929. American, however, still held out, probably for better terms on the USG infringement claim. Avery thereupon wired everyone: "Mr. Kling has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We can not accept them and regret that the Tuesday meeting will be *futile* unless other companies wish to proceed *as outlined* without American license" (Ex. 721, R. 6524).

What Avery meant when he suggested that the meeting might prove "futile" without American is reasonably clear. On May 17, 1929, the day before these wires were sent out, Avery wired Gloyd of Texas about the license discussions and said: "If license were generally closed it would be desirable to discuss a reasonable market price

for the licensed products" (Ex. 720, R. 6524). In other words Avery recognized, flatly, that he had to have the license "generally closed" before price control could succeed, and there was not much use in going ahead unless substantially all competition was eliminated.

What took place at the May 1929 meetings has been set out in detail, *supra,* pp. 65–74, and need not be repeated. Avery assured Lenci that industry-wide licensing with price control was perfectly legal under the *General Electric* case (R. 2794). Ebsary, Niagara, and Certain-teed all signed up, National having signed on May 16 (Ex. 3, R. 4239). On the next day price bulletins were passed out. *Supra,* pp. 70–73. Everyone present hoped that prices would be raised and stabilized (R. 2972–2973). There was to be no more price competition, or, as it turned out, any other type of competition in the gypsum industry, *supra,* pp. 102–160. The initial "plan" of Blagden, Avery and Griswold, "to organize the industry and stabilize prices" had finally borne fruit.

Appellees seek to dismiss all this evidence by pointing out that various witnesses testified that they made up their minds independently (Fdg. 37, R. 4150). And, further, that they would have taken out a license even though the others had not (*ibid*). It is no doubt true, in a sense, that each member of the combination had to decide in his own mind what to do. But, it is submitted,

to say that they each acted independently of the others is not true. Even until the last moment it was an open question whether Certain-teed and the others would go ahead without American. The decision to hold the May meetings irrespective of American was obviously the result of concerted action.

With the industry finally together under the Utzman patent, the next step was to find some other patent to continue the plan. On the last day of the May meeting, Avery proposed licensing with price control under the Roos "foam" patents (R. 2982). These, as it developed, could not be issued at once, and after many negotiations during the summer of 1929 it was arranged that Universal would sell the Haggerty starch patent to USG, and the industry would be licensed under it, with price control. *Supra,* pp. 80–87.

There can be no question, it is submitted, that these maneuvers were merely further steps in the original "plan" to maintain industry price control. As Avery had assured Holland, if the "plan" could not be worked out on the Utzman patent, "there were other patents available" (Ex. 206, R. 5371). Reference will be made to but one additional declaration upon the point. On July 23, 1929, the Board of Directors of National held a meeting at which Baker "stated that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry" by grant-

ing licenses with price control on the "bubble system" patents. Under the agreements, Baker said "the prices of wall board would be fixed for the whole Industry for the term of approximately seventeen years" (Ex. 200, R. 5362).

Baker further said that "if co-operation in the Industry could be accomplished by such means, he believed it would be worth while" (Ex. 200, R. 5363). He did not say, it will be noted, that it would be important to National to have the use of the Roos patents; he was interested in "co-operation." The Board, thereupon, voted to authorize signing: "provided that the United States Gypsum Company, by virtue of the agreement with this Corporation and with other manufacturers of gypsum wall board, shall control the price of wall board sold in the United States and its possessions."

By "co-operation," it is submitted, Baker could only have meant the elimination of competition and the raising and stabilizing of prices. Lenci testified likewise that one of the reasons why Ebsary signed was to make sure that price conditions would be corrected, so that he "could make a profit" (R. 2970–2971). C. O. Brown of Certain-teed favored price control in order to have "a stabilized market" (R. 1069). Finally, the court in its opinion, states that Holland was interested in improving the "financial situation" of his company, and that of the other manufacturers as well (R. 4114).

That USG was interested in the "plan" in order to make "profits" is admitted. The lower court in Finding 74, R. 4158, said, "The primary purpose of USG in granting the licenses was [1] the settlement of litigation, [2] the collection of damages for infringement, [3] the obtaining of royalties, [4] *the fixing of a profitable price on patented board* and [5] the securing of the various advantages which would normally flow from the general manufacture and sale of the superior product."

By the time the industry came to negotiate the November 1929 licenses on the "starch" and "bubble" patents all the litigation had been cleared up, except with American, and that company settled on November 25, 1929. Reasons (1) and (2) therefore did not apply to these licenses. Aside from the matter of royalties which, though substantial, were deemed by Avery to be of secondary importance (Ex. 332, R. 5986), USG then had but two purposes in mind: (1) to make "profits" and (2) to obtain the "advantages" to come from "general manufacture" of a uniform product.

The licensees' purposes, it is submitted, were exactly the same. There can be no question that they wanted to make "profits", as above stated. Moreover, they likewise were ready to make a uniform product, whether "superior" or not. In fact, the lower court did not find that board made

according to the Haggerty patent was a "superior" product. But the licensees' understood fully the purpose to make a uniform product and approved of it. This was shown clearly by Brown's statement concerning the benefits to come from "stabilizing the whole industry by making a uniform product and get away from the fierce warfares between different products like we have recently had." (Ex. 226, R. 5390).

II

THE FIXING OF PRICES FOR A BASIC UNPATENTED ARTICLE BECAUSE OF NARROW IMPROVEMENT OR PROCESS PATENTS WOULD BE AN UNWARRANTED EXTENSION OF THE DOCTRINE OF *UNITED STATES* v. *GENERAL ELECTRIC COMPANY*

The burden of proof.—We do not understand that appellees question that they are parties to a combination which, apart from rights conferred by the patent law, would violate the Sherman Act. Rather, their position is that the combination is sanctified by rights conferred by the patent law as construed in *United States* v. *General Electric Co.*, 272 U. S. 476.

The Government has, however, made out a *prima facie* case when it has shown (1) that appellees are engaged in a combination or conspiracy, (2) to restrain trade in gypsum board and related products by fixing prices and controlling distribution. Such a combination is not only a violation of the Sherman Act, but it has long

been held to be illegal *per se*. (See Point I.) Accordingly, insofar as the rights conferred upon appellees by the patent laws may afford them a justification for their actions, it is for them to allege and carry the burden of establishing that they come within such protection. In the court below, the Government urged, and we urge here, that appellees have the burden of establishing: (a) that they have valid patents of a type to justify price control; (b) that the gypsum board made and sold by appellees has been, in fact, covered by such patents; and (c) that the price control exercised by appellees went no further than strictly necessary for the protection of their patents.

The court below, in its opinion, held that it was for appellant to carry the burden on these issues (R. 4004, 4049). In so doing, it is submitted, the court not only misconceived the true effect of the well-settled doctrine that price fixing among competitors is illegal *per se* (*United States* v. *Trenton Potteries*, 273 U. S. 392, and related cases), but misread Rule 8 (c), Federal Rules of Civil Procedure, which, for reasons of relative convenience and orderly presentation, provides in considerable detail that all defenses of the type urged by appellees in this case must be pleaded affirmatively. There are no cases squarely in point under Rule 8 (c). However, in *United States* v. *Motion Picture Patents Co.*, 225 Fed. 800

(E. D. Pa.), which presented issues similar to those in this case, the court said (p. 803):

> The next branch of the defense which presents itself for analysis and discussion is that based upon the patent rights of the Motion Picture Patents Company. The plea is, in legal effect and in practical acknowledgement, one in confession and avoidance, for there is, as already stated, a substantial (although not formal) admission that, with this patent ownership out of the case, plaintiff should have the relief prayed.

Compare *National Harrow Co.* v. *Hench*, 83 Fed. 36, 38 (C. C. A. 3); *United States* v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172, 190 (C. C. D. Md.); *United States* v. *Eastman Kodak Company*, 226 Fed. 62 (W. D. N. Y.); *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 237–239; *United States* v. *Univis Lens Co.*, 316 U. S. 241.

Gypsum board and gypsum products are articles of commerce to be sold in a free market, except as appellees can show that they hold patents which carve out an exception in their favor. "Since patents are privileges restrictive of a free economy, the rights which Congress has attached to them must be strictly construed so as not to derogate from the general law beyond the necessary requirements of the patent statute." *United States* v. *Masonite Corp.*, 316 U. S. 265, at 280.

It will be appreciated that this position of the court below must have had an important bearing on its treatment and evaluation of the evidence. Some adverse findings might very well have been favorable to appellant had the burden of patent justification been put properly on the appellees. However, irrespective of where the burden is placed, it is submitted that the appellees have no justification under the *General Electric* case or the patent laws for their actions in this case.

A. *The USG patents are not basic patents representing fundamental developments*

The *General Electric* case was deemed by the court to be concerned with basic patents representing fundamental developments. Whatever justification there may be for permitting price fixing with respect to such patents does not extend to patents such as are here involved.

The patents "upon which the main board license agreements in the instant case were founded" (Fdg. 24, R. 4145), were five in number, to wit, the Utzman "closed-edge" patent (No. 1,034,746); the Haggerty "starch" patent (No. 1,500,452); and the three Roos "foam" or "bubble" patents (Nos. 2,017,022; 2,079,338, and 2,080,009). Each of these patents is set out as an exhibit to the complaint (R. 35, 64, 100, 104, 109). These are the patents which, in the view of the court below, justified appellees in their

price control and regimentation of the gypsum industry.[69]

The court below found that "no substantial distinction can properly be drawn between the instant case and the *General Electric* case in respect of the importance of the patented improvements within the respective industries, or, in respect of the nature of the patents which underlie the license agreements in the two cases" (Fdg. 25, R. 4146)." And in Finding 24 (R. 4145), the court found that "these patents covered fundamental developments in the gypsum board manufacturing industry." It is submitted that both of these are unwarranted.

The *General Electric* case was tried upon certain broad stipulations which made it unnecessary for the court to examine in detail the claims of the three patents involved. It was stipulated

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[69] The court below also found that licenses "to make, use, and sell board having a metallized surface" were granted on the Roos "metallized board" patent (No. 1,914,345) which covered "the use of foil as a thermal insulating element in board" (Fdg. 16, R. 4141), and that licenses were taken out on the Roos "perforated lath" patent (No. 1,938,354) "covering a fire resistant plasterboard" made by having "holes of given size punched through it at designated intervals." (Fdg. 17, R. 4142). Neither of these patents was introduced in evidence or brought before the court as exhibits to the complaint. These patents are obviously even less basic than the "closed-edge," "starch," and "foam" patents, and the argument in the text clearly would apply to them as well.

[70] Although a part of the findings, this comparison of cases is obviously not a finding of fact but a legal conclusion. The facts as to the General Electric patents were not, of course, in the record in this case.

that the validity of the patents involved had been tested in litigation (R. 89, No. 113, 1926 Term, hereinafter referred to as GE. R. ——), and the Government raised no issue either as to validity or scope (GE. R. 90). Moreover, not only was it assumed in the *General Electric* case that the lamps manufactured by the parties were "covered" by the patents, but it was stipulated (GE. R. 104) that General Electric had acquired "a practical monopoly of the manufacture and sale of incandescent electric lamps."

Supplementing this stipulation, the Government in its brief at page 7, made the further concession that:

> * * * the General Electric Company does control through its patents on tungsten lamps and processes of manufacturing such lamps 86 percent, and can control *100 per cent of the electric-lamp business of the United States.*

On this showing, after only a cursory description of the patents taken from the stipulated facts, Chief Justice Taft said: "These three patents *cover completely* the making of the modern electric lights with the tungsten filaments, and secure to the Electric Company the monopoly of their making, using and vending." *United States* v. *General Electric Co.*, 272 U. S. 476, 481.[71] If the

[71] The court below regarded the tungsten filament lamp patents in the *General Electric* case as "not basic" but as "merely improvements" (R. 3980), but held that the patents

five USG patents are to be compared with those in the *General Electric* case, as the court below did in Finding 25, they must be shown to have given USG virtual dominance of the gypsum board industry. An examination of the USG patents will show that they do not possess any such characteristics:

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here involved "covered fundamental developments" (R. 3981) (Fdg. 24, R. 4145). We think the court erred with respect to both. This Court's opinion in the *General Electric* case demonstrates that it regarded the tungsten filament patent as fundamental to the "making of the modern electric lights." 272 U. S. at 481. Indeed in their brief below (p. 25), appellees cited with approval *General Electric Co.* v. *Laco-Philips Co.*, 233 Fed. 96 at 105–6 (C. C. A. 2), where the court, in holding the Just and Hanaman patent valid, gave its approval to Judge Mayer's glowing description of the tungsten lamp as follows:

"I think the invention here in suit is of great merit, entitled to firm support, and second only to Edison's. Edison found a dim pathway and transformed it into an illuminated road. Just & Hanaman have broadened that road into a boulevard, alive with blazing lights. It is not hyperbole to say that the tungsten lamp has made millions happier for its greater comfort and its better cheer * * *."

Appellees also cited *General Electric Co.* v. *Independent Lamp & Wire Co., Inc.*, 267 Fed. 824 (D. N. J.), where similar language was used in describing the ductile tungsten filament claimed by Coolidge. Although the tungsten filament patents were in a sense improvements of the original light bulb, they actually created a new and different product with which the former product could not compete. This was obviously not the situation in the instant case, since there is no such fundamental difference between open-edge and closed-edge gypsum board; the record shows that they did compete until the combination of appellees effectively stifled the competition. See pp. 38–40, 53–55, 67–68, *supra*.

1. *The Utzman patent.*—During the years 1926–1929, the Utzman "closed-edge" patent was the only principal patent upon which the court found that the parties based price control, and accordingly it may appropriately be examined alone. The court below found that the Utzman "closed-edge" board was a "superior product" (Fdg. 74, R. 4158).

This can be conceded, and still it is unquestionably true that Utzman contributed by his invention only a modest improvement in the method of making plasterboard. When his patent was issued in 1912, wallboard was already old in the art. Judge Evans, referring to the Utzman patent, said in *Bestwall Mfg. Co.* v. *United States Gypsum Co.*, 270 Fed. 542 (C. C. A. 7), that "the covering for the edges of the gypsum was the heart of the discovery" (p. 545), and also said (p. 544); "We may not, and in fact do not, agree with counsel for patentee that this was a 'broad novelty,' nor with its expert witness that this was a 'daring conception'."

That the Utzman patent did not make a fundamental change in product appears from the fact that until the remaining manufacturers of open-edge board became licensees in 1929 unpatented open-edge board was sold in active competition with the patented closed-edge board, despite repeated and drastic reductions in the price of closed-edge board and the introduction of still

lower priced "fighting" brands of closed-edge board (*supra,* pp. 38–40, 53–55, 67–68). The open-edge board did not disappear from the Eastern market until 1929 when those who were manufacturing it became licensees under the Utzman patent. It may also be observed that open-edge board continued to be sold in the Pacific Coast states in competition with closed-edge board after the Utzman patent expired (R. 3508, 3531–33, 3546).

It would seem clear that the Utzman patent did not, contrary to the lower court's finding (Fdg. 24, R. 4145), cover "fundamental developments in the gypsum board manufacturing industry" of equal significance with the stipulated importance of the General Electric patents. Even if true, the point would be of minor importance in this case, since industry-wide price fixing founded on the Utzman patent did not get under way until May 22, 1929, a matter of only eleven weeks before the patent expired. USG and its licensees were, of course, aware of this when the license agreements were signed, and obviously could not have regarded this patent as a fundamental basis for the price-fixing plan if they were thinking of the patent value alone. On and after August 6, 1929, appellees could make the "superior product" as they saw fit without benefit of license.

2. *The "starch" patent.*—From November 1929 until sometime in 1935 when the first Roos "foam" patent issued, the only principal patent upon

which the appellees could base their license agreements, as the court below found (Fdg. 24, R. 4145), was the Haggerty "starch" patent. The patent was acquired by USG from Universal so as to furnish a basis for maintaining the licensing system and price fixing after the Utzman patent expired. Numerous other patents were included in the November agreements,[72] but these are not in evidence. And, moreover, all such patents had already been licensed to the appellees who had signed the May agreements. In addition to the "starch" patents, therefore, only the Roos "foam" or "bubble" and the Bayer applications were new to the November licenses.

It was on the basis of the Haggerty patent that the appellees really organized the gypsum industry and stabilized prices. Contrary to the lower court's findings, it is submitted that the Haggerty patent unquestionably did *not* represent a "fundamental development in the gypsum board manufacturing industry" (Fdg. 24, R. 4145); nor can it be said that "no substantial distinction" may be drawn between Haggerty and the General Electric patents as they were stipulated to be in that case. The Haggerty patent represented, at

[72] It will be recalled that C. O. Brown wrote on August 9, 1929, that the reason for this was that: "The Attorneys feel that such a contract would be exceptionally strong and price control could be maintained for the life of the Contract without difficulty" (Ex. 231, R. 5401).

most, but a narrow and unimportant improvement in the art of making wall board.

There is no suggestion in the record that Haggerty created a new and different product. The claims of his patent read upon the old product long known to the trade to which a quantity of "cooked starch" had been added "to insure secure adhesion" of the paper covering or liners to the gypsum core (Claim 1, R. 68). The validity or scope of his patent has never been litigated; it was not considered of much consequence in the industry until the summer of 1929, when some vehicle had to be found upon which to base price control. Until that time companies not using the starch device had been able without difficulty to compete with the company owning the starch patent (Ex. 231, R. 5403). In fact that company went into receivership during this period despite sole ownership of the starch patent and its license under the Utzman patent.

The district court did *not* find that the Haggerty patent made a "superior" product. It found merely that Haggerty "solved the 'peeler' trouble in the gypsum board industry and made possible modern high speed production of gypsum board" (Fdgs. 12, 24; R. 4138, 4145). By the "peeler" problem the court had reference to the fact that on occasion, particularly when board was dried too rapidly, the paper liners might come loose in places from the gypsum core, causing blisters or "peelers." Since "peelers" ordinarily

could be discovered at the plant by proper inspection (R. 1414), the most that Haggerty could have contributed was some saving in time and expense in the manufacture of board.[73]

3. *The "foam" or "bubble" patents.*—In 1935 the first of the Roos "foam" or "bubble" patents was issued, and in 1937, the second and third (Exs. 8, 9, and 10 attached to complaint, R. 100, 104, 109). Upon the expiration of the Haggerty patent on July 8, 1941, these were the only principal patents upon which the license agreements rested (Fdg. 24, R. 4145). These patents, like the Utzman and Haggerty patents, were found by the court below to be "products patents upon a building material called * * * wallboard"; each reading "upon the entire product"; and covering "fundamental developments in the gypsum board manufacturing industry" (Fdg. 24, R. 4145).

The lower court's finding that the three Roos "foam" patents are patents reading upon a material "called wallboard" is manifesty erroneous.

[73] In fact there is no evidence in the record that the Haggerty patent "solved" anything. The record shows that some witnesses testified that certain of the appellees used "starch" in the manufacture of board, but none testified to the use of starch according to Haggerty (C. O. Brown, R. 1241-1242; Whittemore, R. 1413; Chism, R. 3482). In fact Chism testified that Texas took out its license under the Utzman closed edge patent in 1927 in order to reduce manufacturing costs "due to loss from bad board, what we called 'peelers,' and broken edges" (R 3479).

Brief examination of the claims of the three patents will show that the first and second patents have to do with an intermediate cellular or porous cementitious material described as being useful in the manufacture of many different types of building materials (R. 100, 104). Only the third Roos patent (No. 2,080,009) contains claims reading upon wallboard (R. 109).

It is submitted that the Roos "foam" patents, like the several patents above discussed, are merely narrow improvement patents. The basic or fundamental idea of making a lighter board by the introduction of sawdust or fiber, or of chemicals to produce air cells, as appears from the Roos specifications (R. 105), was old in the art. Roos did not invent a basically new product (and there is no evidence that any board was made according to his patent);[74] at most he contributed a new process to make an old product."[75] The court's finding that no substantial distinction can be drawn between the Roos "foam" patents and the patents in the *General Electric* case is plainly in error.

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[74] The Government's position was and is that once a price-fixing conspiracy is proved, the burden is on the defendant to prove a patent justification, which includes proof that the patents were used. See pp. 218–221, *supra*. The court below apparently assumed that board was made according to the patents, on the theory that the burden was on the Government to prove the contrary (R. 4011).

[75] Both the scope and the validity of these patents is doubtful. See pp. 288–290, *infra*.

B. *Narrow improvement and process patents afford no basis for price control*

At the heart of the argument on this point is the question: under what circumstances and for what reasons may a patent holder license another and control the prices and terms of sale at which his licensee may sell the patented article. In *United States* v. *General Electric*, 272 U. S. 476, 490, Chief Justice Taft stated the rule to be that the licensor may limit his licensee's method of sale and the price: "*provided* the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." This is the test, as above noted, which appellees must satisfy as a matter of affirmative defense.

It is beyond the scope of this point to discuss the basis for the Court's holding. It will be noted, however, that the Court did not say that the licensor has an *unqualified* right to require his licensee to sell at such prices and on such terms as he may see fit to impose. The right to fix a licensee's prices, thus, is not treated as part of the patent grant, but as a mere subsidiary right fashioned by contract and sanctioned by the Court as a protection to the licensor in the enjoyment of his patent monopoly.

In *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 48, the Court had employed substantially the same test as that announced by Chief Justice Taft in the *General Electric* case.

There, in striking down industry-wide price-fixing licenses, the Court said: "The agreements clearly, therefore, transcended *what was necessary to protect the use of the patent or the monopoly which the law conferred upon it.* They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law." [78]

Two questions are thus presented in any case when a court is considering whether a licensor has pushed his price fixing too far: the first, whether the scope and importance of the patent is such as to justify any price control, will now be considered; the second, whether the licensor and his licensees have carried their activities beyond what is normally and reasonably adapted to secure pecuniary reward to the patentee for his patent monopoly, will be discussed in the next Point.

Since price control is a protective measure, it must be proportioned to the scope and character of the licensor's patents. Many patents do not admit of any degree of price control under the doctrine announced by the Court in the *General Electric* case. It is submitted that the Roos "foam" patents and the Haggerty "starch"

[78] In the recent case of *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402, it was stated in the dissent (p. 413) that the right of a licensor to fix his licensee's pricing was "a mode of *maintaining the integrity* of a patent and as such is sanctioned by public policy." It is considered that this language is wholly consistent with the test laid down in the *Standard Sanitary* and *General Electric* cases.

patents, which as shown above are merely narrow improvement or process patents, fall in this class. And, *a fortiori*, as will be discussed later, they do not justify the complete regimentation of the gypsum industry carried out in this case. In so doing, the appellees went beyond what was necessary for the "protection" of their patents.

To illustrate, in the *Standard Sanitary* case the patent involved covered a "dredger"; that is, a machine, tool, or appliance used to distribute enamelling powder evenly when making bathtubs. By its use, as the parties contended, it was possible to make a "superior" bathtub. But, since the patent covered merely the "dredger" and not the bathtub, the Government contended that price control based on the finished product was not for the protection of the patentee's monopoly, but to protect his business of making bathtubs. The lower court put its decision in part upon the ground that a mere tool or appliance patent would not justify price control of the unpatented finished product."[11] In this Court the combination

[11] The opinion of the three-judge circuit court, in concluding its discussion of this subject, stated: "The fact that Wayman had a patent on something else, even though it was a tool used in one step of the making of the ware, gives neither him nor his licensees the right to restrain interstate trade in the ware. The ownership of a patent for a tool by which old, well-known, and unpatented articles of general use can be more cheaply made gives no right to combine the makers and dealers in the unpatented articles in an agreement to make the public pay more for it." *United States* v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172, 192 (C. C. D. Md).

was found to be illegal without, as the Court said (p. 49), "entering into the consideration of the distinction of rights for which the Government contends between a patented article and a patented tool used in the manufacture of an unpatented article."

A mere process patent, it is submitted, likewise does not justify price control of the finished product. The patent grant in the case of a process patent gives the patentee a right to exclude others from using the patented process; the products, whatever they may be, are outside the patent grant. Price control of the finished product made by a licensee from his own materials, with his own labor and according to his own designs, and sold to the public by his own efforts, would not afford protection to the patentee for his "patent monopoly," but would be permitting him illegally to extend his control over the unpatented articles.

The question whether a licensor may base price control on a process patent, like the question concerning tool or appliance patents, has not been passed upon by this Court. It is submitted, however, that the situation in each case does not differ in principle from those in which this Court has refused to permit a patentee to use his patent to suppress competition in an unpatented article. For the patent on the process is, by its nature, not a burden on the article produced by the process.

The various circuit courts of appeals to which the question has been presented have, with a single exception,[78] denied the holder of a tool or process patent the right to fix the price at which his licensee may sell the unpatented product. *American Equipment Co.* v. *Tuthill Bldg. Material Corp.*, 69 F. 2d 406, 409 (C. C. A. 7); *Barber-Colman Co.* v. *National Tool Co.*, 136 F. 2d 339 (C. C. A. 6); *Cummer-Graham Co.* v. *Straight Side Basket Corp.*, 142 F. 2d 646 (C. C. A. 5); *Sylvania Industrial Corp.* v. *Visking Corp.*, 132 F. 2d 947, 955 (C. C. A. 4).

The rationale of the *General Electric* case leads to no different conclusion. Rather it supplies a second reason upon which to deny price control in the case of a process patent. Undoubtedly the holder of such a patent, particularly if he used it in his own business, would gain "pecuniary re-

[78] The Second Circuit ruled to the contrary in *Straight Side Basket Corp.* v. *Webster Basket Co.*, 82 F. 2d 245 (C. C. A. 2), without adverting to the nature of the patent, in reliance upon *Bement* v. *National Harrow Co.*, 186 U. S. 70, and the *General Electric* case. But in neither of these cases was the Court speaking of tool or process patents. The Second Circuit's decision has not only been expressly disapproved by the Fifth and Sixth Circuits in the *Barber-Colman* and *Cummer-Graham* cases, cited in the text, but as the latter case (which involved the same company) indicates, has been abandoned as protective authority by the successful party. And the Second Circuit itself, after referring to a conflicting decision and the present "tendency" of this Court, has stated that at the present time "the whole subject is plainly in flux." *United States* v. *Aluminum Co.*, 148 F. 2d 416, 438.

ward" if he could control his licensee's prices on the unpatented finished product. But it could hardly be said that such control was "normally and reasonably adapted" merely to secure reward for his patent monopoly. Rather, he would be going beyond anything "necessary to protect" the use of his patent and gaining an advantage by contract due to the elimination of competition in the unpatented article.

Another reason for differentiating between patents on an article itself and minor improvement and process patents lies in the possibility of multiple restraints if the latter provided a sufficient basis for price fixing. There may be a number of such patents relating to a single article. Can the owner of each patent fix prices on the product? To take a hypothetical case which has some resemblance to the case at bar, could the person who owned a patent on the method of putting sides on a freight car, the person who owned a patent on the bolts which hold the other parts of the car together, or the person who owned the patent on an improved but not indispensable type of insulating material fix the sale price for manufacturers of the entire car? And if each could, and if they had not gotten together by pooling their patents, which would prevail? Clearly the confusion which would result if such patents supported the price fixing on a finished product is as obvious as is the fact that allowing such control

of the finished product would permit a reward out of all proportion to the magnitude of the invention.

Both the Haggerty "starch" patent and the Roos "foam" patents contain a number of process claims (R. 68, 103, 108, 113). For example, Haggerty, in claim 4, claimed "the method of making a paper lined gypsum board which consists in intimately mixing cooked starch with dry gypsum and then rolling into shape on a paper liner" (R. 68). Roos, in patent No. 2,080,009, claim 7, claims "The process of making wallboard which comprises mixing a dense foam with a starch paste to expand the latter and form cells therein, adding the mixture to a slurry of calcined gypsum, placing the mass between sheet liners and drying the same" (R. 114). It is submitted that, on the authorities and principles above discussed, these and the other method or process claims in the Roos and Haggerty patents afford no justification whatever for the price control on wallboard exercised in this case.

Both patents, however, also contain article claims. Claim 10 of the Roos "foam" patent, No. 2,080,009, which is fairly typical of the article claims in that patent, reads as follows: "10. A plaster board having a porous body comprising a hardened cementitious material enclosing a plurality of voids encased in tough pliable films" (R. 114).

But the discussion of prior art in the specifications (R. 110)[79] shows clearly that "porous or cellular" gypsum is old. Haggerty in 1922 described the making of a "porous" wallboard (R. 65). When the Roos patents were in interference with Rice, moreover, it was conceded by Roos that "cellular" gypsum was old in the art, and the court so held.[80] It is thus clear that both

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[79] The specifications admit that (R. 110): "certain chemicals or minerals have sometimes been added to the dry calcined gypsum which will upon the addition of water evolve a gas causing the mixture to puff out or expand in volume and upon the setting of the gypsum will form a porous or cellular body * * *."

[80] See *Bayer* v. *Rice, et al.*, 75 F. 2d 238 (App. D. C.), where the court said (p. 240):

"The evidence discloses that partition tile made from gypsum, as well as wallboard made from gypsum, had been used commercially for years prior to the making of this invention. Of course, concrete blocks were still older. The evidence also discloses that cellular gypsum and cellular cement were known to the art. The patent to Sanford, No. 230151, dated July 20, 1880, covers a cellular gypsum product wherein the cellular structure is produced by means of a chemical reaction occurring in situ. The Luttgen patent, No. 845365, February 26, 1907, discloses a process of making a cementitious product filled with air spaces * * *."

In the brief filed on behalf of Roos and United States Gypsum Company in the above proceeding on October 24, 1934, No. 6141, the point was insisted upon, over and over again throughout the brief, that (p. 9): "*cellular cement as a product—a building material—was old in the art at the time that Roos and Rice and Bayer separately made their inventions.*" It was explicitly stated (p. 86):

"*So when Roos entered the field by making cellular cement products by his specific process, the ensuing product—namely, the cellular cement or the cellular gypsum—was well*

Roos and Haggerty are at most narrow improvement patents. Wallboard is old. Many inventors, particularly Utzman with his closed-edge patent, have contributed to the making of the board being sold today. Neither Roos nor Haggerty could say when this suit was brought that commercial gypsum board was in any large part the result of their inventive genius.

It was held in the *General Electric* case, as discussed above, that a licensor may control his licensee's prices provided the conditions of sale are "normally and reasonably" adapted to secure pecuniary reward for the "patentee's monopoly." No sanction is given to obtain reward for anything but the patentee's monopoly. The control of prices on products not embraced within the patentee's monopoly or on basic products on which the patentee is responsible for a nonbasic improvement would not be reasonably adapted to the securing of a reward on the patent. In other words, price control, to be permitted at all, must be carefully proportioned to the patentee's invention, to his actual contribution to the art sought to be controlled. He is entitled to "pecuniary reward" for nothing else. This would appear to be a basis for this Court's refer-

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known in the art and, consequently, there was nothing new or novel about such lightweight cellular products made in the form of gypsum partition tile and gypsum wallboard." [Italics in original.]

ence in *Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394, 400, to "the broad public interest in freeing our competitive economy from the trade restraints which might be imposed by price-fixing agreements stemming from *narrow* or invalid patents."

Upon this analysis it is submitted that Haggerty contributed nothing which would entitle him, as a "reward," to control the entire wallboard industry as was done in this case. And the same can be said for Roos. The one contributed, at most, a saving in expense of manufacture in making it possible to dry the board more rapidly without producing "peelers" (Fdg. 24, R. 4145); the other claimed a somewhat lighter board (R. 2532) which might be less costly to make and ship. (See, *supra*, pp. 73–76.) It needs no argument to point out that these inventions are not to be compared in importance with the inventions before this Court in the *General Electric* case, which were deemed to be basic and fundamental to the creation of the tungsten filament lamp.

Such being the case, to what, if any, extent should Haggerty or Roos be permitted to control the price of wallboard? There are no express holdings on the point in this Court, and hence it will be necessary to resort to analogy. In *Garretson* v. *Clark*, 111 U. S. 120, where the holder of a patent "for an improvement in the construc-

tion of mop-heads" sued an infringer to recover as damages the entire profits which the infringers had made in the sale of the completed mop, the Court said, in rejecting this measure of recovery (p. 121):

> When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated.

In the earlier case of *Mowry* v. *Whitney*, 14 Wall. 620, the patent was upon a process for annealing cast-iron railroad car wheels. The Court, in denying the patent holder damages based upon the whole profit made by the infringer, pointed out that many inventors may have held patents which contributed to the value of the finished product. To allow each a recovery of the full profits upon sale of the article would mean that "an infringer might be mulcted in several times the profits he had made from the whole manufacture" (p. 651). See also, *Seymour* v. *McCormick*, 16 How. 480, 487.

It would seem beyond dispute that neither Haggerty nor Roos could be said to have contributed by their inventions more than a fractional value

to the gypsum board sold by appellees. It was Utzman who made the "superior" closed-edge board, and inventors before him had contributed the basic patents on board. The above cases establish that in a suit for infringement Haggerty or Roos could recover no more than the value which their inventions contributed to the finished product.

It is submitted that, for similar reasons, neither the Haggerty nor Roos inventions were of an order to justify price control of the commercial product, wallboard. To permit price control in such case would be to give the patentee a "pecuniary reward" not only for his narrow patent improvement, but a much larger reward from the sale of wallboard itself in a noncompetitive market. He would gain a business profit, not merely a reward for his invention. Here, as in the case of the tool, appliance, or process patents, discussed above, to sanction price control would be to permit the patentee to extend his patent monopoly far beyond the reward due to his invention. The facts of this case disclose that the holder of a narrow improvement patent, *when armed with the right to offer price control to his competitors,* can exert enormous power to eliminate competition and regiment an industry. Such a power to nullify the economic policy declared by Congress in the Sherman Act should be conferred sparingly, if at all.

III

APPELLEES HAVE CARRIED PRICE CONTROL AND INDUSTRY REGULATION BEYOND ANYTHING REASONABLY ADAPTED MERELY TO SECURE PECUNIARY REWARD TO USG FOR ITS PATENT MONOPOLY

The evidence is undisputed that appellees have in fact organized the gypsum industry and stabilized prices. They have discontinued the sale of all board but that allegedly manufactured under USG's patents; they have discontinued the sale of No. 2 board and seconds for which there had been a substantial market; they have standardized board sizes; they have adopted a uniform method of packaging; they have adopted a uniform delivered price system; they have adopted arbitrary billing weights; they have prescribed minimum car and mixed car weights; they have agreed upon uniform switching and carriage charges; they have regulated the amount of dunnage; they have prescribed minimum truck load sizes; they have agreed upon the areas in which truck deliveries can be made; they have prohibited truck deliveries to the job-site; they have agreed to minimum pick-ups at mills; they have agreed not to rent the warehouses or trucks of a dealer; they have agreed upon the classes of customers and upon the particular persons in certain of those classes to whom they will sell; they have discriminated between customers within the same general class; they have agreed upon the manner in which price quotations shall be made; they have agreed upon

the terms of discount and the medium of payment; they have prohibited the employment of commission salesmen and sales upon consignment; they have proscribed certain types of advertising; and they have tampered with the price at which unpatented products may be sold.

Nothing in the *General Electric* case requires the Court to sustain any such system of private regimentation.

The *General Electric* case does not hold that conditions on the method and price of sale comparable to those imposed by General Electric on Westinghouse are legal under all circumstances. This is implicit in the critical language of the opinion. Thus the Court said that a patentee may grant a license to make, use and vend, "upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure" (p. 489). And again (p. 490):

> If the patentee goes further, and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, *provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly.*

The notion that the *General Electric* case holds that there is inherent in the patent grant an unrestricted right to fix the methods of sale and minimum prices must rest upon the assumption that

the exercise of this right will never result in an enlargement of the patent grant or that any enlargement which may result is sanctioned. Both of these assumptions are negatived by the *Masonite* case. The *del credere* agency agreements there involved were regarded as "license[s] to vend" a patented product (p. 277). Each of the agreements fixed the minimum price at which the agent might vend the product. Thus as here and as in the *General Electric* case, the question was the legality of conditions imposed on the right to vend. The Masonite agreements were held to result in "an enlargement of the limited patent privilege" (p. 279) and were condemned for that reason. In reaching this conclusion the Court said (p. 280):

> In the *General Electric* case, the Court thought that the purpose and effect of the marketing plan was to secure to the patentee only a reward for his invention. We cannot agree that this is true here.

It is not sufficient, therefore, merely to compare the provisions of the license agreements and bulletins in the *General Electric* case with those in the present case. The purpose for which the restraints were imposed, their extent and the factual context in which they operate are decisive factors.

It was assumed in the *General Electric* case that the patents of General Electric gave it the power to "control 100 percent of the electric-lamp busi-

ness of the United States" (*supra*, p. 223). And it was in this factual context that Chief Justice Taft said that when a patentee licenses another "It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself' " (p. 490). In other words, the Court regarded price-fixing as a purely protective device to safeguard a patentee in the enjoyment of his patent monopoly.

The district court was of the view that the *General Electric* case sustained the validity of license agreements the terms and conditions of which were not materially different from those in the present case, and that each and all of appellees' activities under the licensing arrangement, including price control, are "reasonably and normally adapted to secure to USG the pecuniary reward for its patents and do not go beyond the limits of the monopoly granted by the patent laws" (Fdg. 28, R. 4148).

As to the first of these conclusions, it is clear that this Court's opinion in the *General Electric* case did not consider restrictions of the various types involved here. It is true that examination of the record in *General Electric* will disclose that the pricing regulations there established by contract were detailed and complicated, and controlled many aspects of the licensee's business—though not,

in our opinion, to the extent involved here.[81] But a line-by-line comparison of USG's price bulletins with the *General Electric* agreement is unnecessary.[82] For in the *General Electric* case the Government stood on the basic proposition that no price control at all should be permited, and the question principally debated was whether the *del credere* agency plan involved a sale with unlawful resale price control. There was no assignment of error and no discussion in the briefs or in the Court's opinion as to whether each or any of the many price regulations employed were "reasonably adapted" to secure proper reward for the *General Electric* patents. The Court was thus not called upon to examine these regulations or to determine their validity. The question now presented, therefore, only lurked in the record of that case, and the decision is not, under established principles, to be regarded as a precedent as to such matters. *Webster* v. *Fall,* 266 U. S. 507, 511; *KVOS, Inc.* v. *Associated Press,* 299 U. S. 269, 279.

[81] This will appear from a comparison of the summary of the *General Electric* agreement in the opinion below (R.3987–3999) with the facts of the instant case as summarized at pp. 102–160, *supra.*

[82] We do not, of course, concede that the conditions in the *General Electric-Westinghouse* license went no further than normally and reasonably necessary to secure a pecuniary reward for the patentee's monopoly. Since crucial facts in the *General Electric* case and the present case differ, it is not now necessary to discuss this question.

A brief review of what appellees have done under their licenses will show that they have gone far beyond what is necessary to secure a reasonable pecuniary reward for their patents.

Price.—The facts of the present case afford dramatic illustration of the improper use of price control. It is not disputed that during the years 1927, 1928 and 1929 the price of Sheetrock manufactured by USG had dropped from $30 to $25 to $20 and lower in competition with open-edge board. In many markets Sheetrock was not sold at all but Crown, a cut rate closed-edge board, was being sold by USG at prices as low as $16 per thousand. *Supra,* pp. 38–40, 53–55, 67–68.

While these conditions were spoken of as a "price war", nevertheless they establish that, in free and open competition with unpatented board the so-called Utzman closed-edge board, a "superior" product, could not command a price better than from $16 to $20 per thousand—which was about two dollars higher than open-edge board (Ex. 620, R. 6411). It is submitted that these figures measure the value of USG's Utzman patent as compared to unpatented board, and thus demonstrate with the clarity of a laboratory test the actual extent of the pecuniary reward to which the owner of the patent at that time was entitled.

Once the licenses were generally signed in May 1929 and competition (including that from open edge board) eliminated, the price of wallboard

was rapidly pushed up to $22.50 per thousand on July 9, 1929 (Ex. 414, R. 6106), and thereafter, during a period of depression and falling prices, to a high point in 1934 of $28.50 per thousand. At the same time, as the appellees fully understood and intended (R. 622, 5298, 910), the price of plaster and related products "improved." (Fdg. 74, R. 4158). Ordinarily, perhaps, it would have to be assumed that these prices were merely the normal reward due to the patentee's monopoly. On the face of the present record, however, no other conclusion can be drawn, it is submitted, than that USG was reaping a reward where it had not sown; its price control was "unreasonable" and an unlawful extension of the patent grant.

Indeed, when it is considered that during the years 1930 to 1935 the only "principal" patent on which price control could be based was the Haggerty "starch" patent, the case is even more striking. The facts as to the importance of this patent and the manner in which appellees seized upon it as a support for price fixing when the Utzman patent was about to expire have already been related. See pp. 73–87, *supra*. Moreover, this patent was owned by Universal, which was also an early licensee under Utzman. Nevertheless, Universal was unable to do better than USG in maintaining the price for its board in open competition (R. 3573); during this very period

it was in receivership. It is simply inconceivable, therefore, that the high prices which appellees charged the public for board during the five years, 1930–1935, had any relation to what was proper pecuniary reward to USG as purchaser of this patent.

The same is true of the other conditions in this case.

Standardized Product.—One of the first steps appellees took was to price out of the market No. 2 board, seconds and open-edge board, for all of which there had been a consumer demand. No. 2 board and seconds were eliminated by an agreement among appellees that they be sold at the same price as No. 1 board. Obviously, no one would purchase the seconds and No. 2 board under these circumstances. Open-edge board was eliminated in part by the provision of the license agreements requiring the payment of the same royalty on the unpatented open-edge board as on the closed-edge board (R. 2983, see pp. 108–114, *supra*). In addition, all board has been standardized as to size by agreeing upon price differentials for other sizes bearing no relation to the variation from standard and prohibitively costly. And a uniform system of packaging was adopted. This complete standardization was accomplished by agreement and was possible only because all manufacturers were parties to the combination.

Basing Points and Uniform Billing Weights.—Appellees have adopted a uniform multiple

basing-point delivered-price system. All mills are not basing points, with the necessary result that the net return to the vendor differs between customers similarly situated. Appellees have implemented this system by prescribing uniform billing weights which require a manufacturer either to absorb a freight cost or charge the purchaser with "phantom" freight, depending upon whether the board which it manufacturers is heavier or lighter than the arbitrarily agreed upon billing weight. The result is price discrimination probably in violation of Section 2 (a) of the Clayton Act. See *Corn Products Refg. Co.* v. *Federal Trade Commission*, 324 U. S. 726; *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746.

Uniform Methods of Delivery and Regulations of Trucking.—USG has established for the industry uniform methods of delivery. USG permitted deliveries by truck of certain specified minimum quantities in certain specified areas at a delivered price. In all other areas the licensee was required to charge the prohibitive less than carload price for truck deliveries (*supra*, pp. 118-119). The result is that USG and not the consumer determines when shipment by truck will effect savings; and USG regulates the competition between truck and rail. The bulletins, in addition, prohibited the delivery of board to the job-site and required that it be delivered first to the dealer's warehouse, and then re-transported to the job-site (*supra*, pp. 145–

147), which often was uneconomical. USG has also specified the amount of dunnage which may be used in shipping board.

Elimination of Jobbers.—It cannot seriously be disputed that jobbers, as defined in the license agreements and as that term is commonly employed, have been eliminated from the gypsum industry by means of appellees' agreement to charge the the same price as was charged to those who constitute the customers of the jobbers. The only possible pretext for eliminating jobbers is that appellees could not lawfully control the resale price of jobbers and therefore their price competition. *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8.

Manufacturing Distributors.—While denying a discount to jobbers, appellees have granted a discount to so-called manufacturing distributors. These manufacturing distributors differed from other jobbers only in that they also manufactured gypsum products other than board. These manufacturing distributors, already engaged as they were in the manufacture of gypsum products, were natural potential competitors of appellees. In addition, they possessed an incentive to manufacture board since their competitive position in the sale of gypsum products would be weakened if they were unable to sell a full line of products. By granting them the right to purchase at a discount, appellees removed at least one of their incentives for entering the board business. More-

over, appellees agreed to sell only to those manufacturing distributors approved by USG. This permitted appellees to control the prices at which the distributors resold board.

Prices of Unpatented Products.—Appellees have refused to sell board to a manufacturer[48] who sold plaster, an unpatented product, below prevailing industry prices. The complete exclusion of this manufacturer from trade in all board was of course possible only because all manufacturers of board were parties to the combination. In addition, appellees have agreed that they will not reduce the price of plaster or other products for the purpose of influencing the sale of board.

Board Survey.—USG organized a separate corporation in 1932 to police the license agreements. Not only were the sales of licensees subject to scrutiny and investigation but those of USG as well (Fdg. 20, R. 4143). Nothing of the sort was done in the *General Electric* case. Obviously, when USG joined with the others and permitted its own prices and practices as well as theirs to be policed, it was giving up a right under the general law and not merely protecting its patent monopoly. It would not have needed to be protected against itself, if it were not that it was cooperating with the licensees to eliminate price competition. Cf. *Pfotzer* v. *Aqua Systems, Inc.*, 162 F. 2d 779 (C. C. A. 2).

[48] *Cardiff*, see pp. 149–151, *supra*.

Licensee Meetings.—A great many matters having to do with the detailed regulation of the industry were taken up by the appellees at licensee meetings. Among the matters discussed were commission men; these were eliminated. Trade discounts were fixed at 30 days net, 2 per cent 10 days. It was even sought to regulate the medium of payment, inasmuch as National had taken Chicago Worlds Fair bonds. Consignment sales and the establishment or continuance of warehouses at a dealer's place of business were proscribed (*supra,* pp. 142–143). USG also prohibited certain types of advertising, such as donations to a dealer for its baseball club, donations or sales below cost of carpenters aprons and the painting of signs on dealers' fences (*supra,* pp. 147–149).

We think it obvious that none of these restrictions could have been accomplished except by agreement among all the manufacturers in the industry. None bears any direct relationship to the USG patents, although all have in common the element of elimination of methods of competition which might lead to lower prices. None in our opinion is reasonably adapted to the securing of a proper pecuniary award for the patents nor designed to protect the licensor in the enjoyment of its patent monopoly. The notion that appellees must be permitted to control the price of related products in order to make price control effective was repudiated in *Mercoid Corp.* v. *Mid-Continent*

Investment Co., 320 U. S. 661, 666, where the Court said:

> The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create other monopolies.

Cf. *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495, 498.

It has been possible, of course, only to consider one of appellee's activities at a time. But only when they are looked at as a whole can their full import be appreciated. The result of the restrictions imposed under the licenses has been a complete regimentation of the industry not proportioned in any sense to the normal values of the patents themselves. The court below found, and appellees argue, that each type of restriction bore a relation to the price of gypsum board, and hence that each came within the *General Electric* doctrine. We do not deny that there was a *relation* between the price of board and such restrictions as, for example, the refusal to permit deliveries of goods to the job-site or sales on consignment.[24] It can be said that if one licensee sells on consignment he may take trade from another, or from USG, and hence, possibly, diminish to some extent the profit which USG or such other licensee may have expected to make.

[24] It is difficult to see, however, how the refusal to sell board to Cardiff because of fear that it might reduce the price of the plaster it manufactured and sold bore any relation to the price of board.

It is clear that if a patentee may control and regulate under the *General Electric* doctrine all business activities which have any relation to the price at which the patented product is sold, the result will be an extension of the patent privilege over matters clearly not within the patent grant. Thus, for example, appellees apparently treated sales of plaster by a manufacturer of board at what they regarded as sub-normal prices as a method of reducing the price of board. It may be true that dealers will prefer to purchase board from manufacturers who will furnish plaster at reduced prices. But nevertheless, to prevent manufacturers who sell board from reducing the price of unpatented plaster clearly is allowing the owners of the patent on board to "tamper with" the price of an unpatented commodity. Cf. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 221.

Such a result would be clearly inconsistent with the many cases in which this Court has held that patentees may not so extend the scope of their patent monopoly. We do not believe that such practices can be regarded as normally and reasonably adapted to secure a pecuniary reward for the patent monopoly, under the *General Electric* case.

IV

IF APPELLEES' COMBINATION IS SANCTIONED BY THE *GENERAL ELECTRIC* CASE, THAT CASE SHOULD BE OVERRULED

Even if the district court's findings are fully accepted, the facts of this case show a price fixing

system going far beyond anything legitimate under the patent law and clearly inconsistent with the policy and provisions of the antitrust law. We think this appears from the face of the opinion of the court below. That court felt that it was required by the *General Electric* case to sustain the validity of such a combination. The very fact that the *General Electric* doctrine can be thought to go that far suggests its unsoundness. We submit that if this Court is of the view that appellees' price fixing combination is sanctioned by the *General Electric* decision, that decision should be re-examined and overruled.

In our brief filed last term in *United States* v. *Line Material Co.* (No. 8, this Term), p. 40–68, we have set forth at some length the reasons why we are convinced that the *General Electric* case was wrongly decided. We reaffirm that argument here; in the interest of avoiding repetition the Court is respectfully referred to the *Line* brief for our basic theory as to why the *General Electric* case is unsound. In what follows it is proposed briefly to apply the arguments there presented in the context of this case.

A. THE RULE IS UNCERTAIN AND DIFFICULT OF APPLICATION

It is, of course, clear that if the *General Electric* case means that *all* prices and conditions imposed by a licensor upon his licensee are proper so long only as they are related in some degree, however remote, to furnishing pecuniary reward

to the inventor—or his corporate assignee—there would be little difficulty in applying the case, however horrendous the result. However narrow the patent, or however extensive the regulation, all would be proper.

The Court has never applied the rule to sanction such a result. The holder of a patent is not to be given a blanket authority to carve out such exceptions to the antitrust laws as he may see fit. The line of cases beginning with *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, which holds that a patentee may not require the purchase of unpatented products from himself, shows clearly that "pecuniary reward" to the patentee is not the sole test, since the patentee unquestionably would get financial "reward" from such an arrangement. Likewise in *United States* v. *Masonite Corp.*, 316 U. S. 265, 280, the Court said clearly enough that a patent may not be used both to get a pecuniary reward for the patentee and also to enhance his trade position by bringing all erstwhile competitors together under price control to eliminate competition.

But apart from these instances, to give a construction to the *General Electric* doctrine limited only by the words "pecuniary reward" would be to ignore the plain words of the opinion. Chief Justice Taft did not say that a patent holder may fix a licensee's prices and methods

of sale as he sees fit. He said the patentee may do so: "provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." These words, however difficult of application, may not be read out of the case.

The empirical test laid down by the Court is deceptively simple. When, however, are conditions of sale "normally and reasonably" adapted to secure pecuniary reward? And, when is the "patent monopoly" one of a scope and importance sufficient to merit pecuniary reward derived from control of a licensee's prices? The opinion is almost devoid of explanation except as the Court says (p. 490): "The higher the price, the greater the profit, unless it is prohibitory." Common observation will show that this statement is doubtful economics; in many cases a lower, not a higher, price will produce greater profits, or pecuniary reward.

The facts of this case give dramatic illustration of the difficulty of determining what price is normally and reasonably adapted to secure pecuniary reward to the patent holder for his invention. In the first place, as has been demonstrated supra, (pp. 38–40, 53–55, 67–68), the Utzman board could not command better than $20 in 1928–1929 in active competition with unpatented open-edge board. With competition eliminated the price was raised sharply *supra* (pp. 103–105). This evidence,

it is submitted, is a complete demonstration that USG, and its licensees were obtaining "pecuniary reward" not proportioned to what was due as a reward for the patent, but reward which could only come from the elimination of competition.

But, we are fortunate in having that evidence in this case, because there was a period before the price fixing scheme became effective in which the patented product was forced to compete with unpatented board. This was not so as to the Roos patents. In subsequent years, assuming industry operations under the Roos "foam" patents, there is no way of applying the test as to price. The parties, being all the manufacturers in the field, could charge whatever they saw fit. There was not the long established test of a competitive market to put some check on the patentee. And, while it is true that a patent holder may sell at such prices as he sees fit, it by no means follows, as it is submitted the Court in the *General Electric* case recognized by its proviso, that the patent holder may reach out by contract and impose those prices upon his licensees. Or where, as here, his licensees are willing victims, upon the buying public.

When it comes to determining the "reasonableness" of the "methods of sale" which may be imposed, there is even more difficulty. If "pecuniary reward" were the sole test, aside from any question of reasonableness, the patent holder

could tie an industry up tighter than a drum. In fact that is substantially what has been done here. But when the question is posed as to where to draw the line, that is, as to what trade practices are "reasonably adapted" and what are not, there is no certain guide laid down in the decision.

To illustrate by one of the questions in this industry, discussed *supra* (pp. 147–149), consider the matter of painting dealer's fences. Many complaints were made to Board Survey that one or another of appellees had painted too far. In painting the sign he had painted the fence, and hence might be said to have given the dealer a price concession in the sale of patented board. But, within the *General Electric* doctrine, how far may USG or a licensee go in painting a sign advertising his wares on a dealer's fence? To state the question is enough to show the difficulty of answering it. The same is true of a great many questions discussed *supra* (pp. 147–149). But appellees, nonetheless, proceeded to legislate, all ostensibly under the doctrine of the *General Electric* case, with the result that the industry is now completely regimented.

Turning now to the patent aspect of the decision, the same uncertainty is presented. Assuming as we do, that the Court will declare that no patent other than an article patent will justify price control, the problem is by no means answered. The Court in the *General Electric* case

had before it patents which were deemed to cover completely the making of the tungsten filament lamp and to give the company control of the lamp industry. But when narrow improvement patents are used for price control purposes, as in the present case, an entirely different situation is presented. Surely the most narrow and unimportant improvement patent will not suffice; but where is the line to be drawn?

One of the problems which has long vexed the patent bar is the question in infringement cases of apportioning the profits derived by an infringer upon a wrongful sale of the patented product. In the early case of *Seymour* v. *McCormick,* 16 How. 480, the inventor of a seat to be used on a harvester claimed the entire profits upon sale of the harvester by an infringer. That case was easily disposed of by denying the contention, but in succeeding years the problem has come up in many ways and proved very difficult of solution. See *Westinghouse Co.* v. *Wagner Mfg. Co.,* 225 U. S. 604, 614, and cases cited. There is no certain test, likewise it is submitted, of when a particular patent has so far contributed value to an article that price control of the article could be justified under the *General Electric* doctrine.

Of course the Court could say, as a matter of convenience, that the holder of a narrow improvement patent or of a process patent should be

permitted to control the price and methods of sale of his licensees. Such a rule would at least be easy to apply—unless more than one person owned patents relating to the same article. But that, it is submitted, would not be giving the patent holder a pecuniary reward for his invention alone. On the other hand, price fixing limited to the patentee's invention would, of course, be difficult if not impossible of practical use; buyers pay one price for the finished product, not several prices apportioned to each inventor's contribution. But, as this Court has said in a similar situation, the convenience of the patent holder is not to be consulted as a test of his patent rights. "The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly" *Mercoid Corp* v. *Mid-Continent Co.*, 320 U. S. 661, 666.

The result is that a highly unpredictable situation has been created, where relative certainty should prevail. In the present case, as the lower court found (Fdg. 31, R. 4148), the appellees fashioned their combination in supposed compliance with the holding in the *General Electric* case. The Government submits, on the other hand, that appellees have gone far beyond what was essential to the "protection" of their patents, as said in the *Standard Sanitary* case, and have entered the field denounced by the Sherman Act.

Although the present case might, as urged in Point I, be decided without reaching the *General Electric* case, a further expression of the Court should be made either to clarify the test announced in the *General Electric* case or to abandon it. We submit that the Court should adopt the position it has taken in the case of ordinary price fixing agreements, and abandon any attempt to ascertain whether the price and methods of sale imposed by a licensor upon a licensee are reasonably adapted to secure pecuniary reward for the patentee's monopoly. All such control by a licensor should be declared unlawful.

It will be noted, of course, that the patentee would not by such a holding be denied a proper reward for his invention. He would still be entitled to make such profit as he properly could from the exclusive right to make, use or vend the article in a competitive market, or, if he saw fit he might forego his patent protection and license others on a royalty basis. If he wishes to maintain a very high price for the patented article he may make the royalty correspondingly high; but he certainly is entitled to no more than the superiority of the patented product will command in the market. There is no suggestion in the present case that such a royalty would not have given adequate protection to USG, the dominant manufacturer in the gypsum industry, for its patent monopoly, assuming its patents to have

been valuable. But, for the Court to fashion other means to secure reward for the patentee by giving him control over his licensees' prices and methods of sale, and then to attempt to limit that right by saying it may only go so far as necessary to protect the patentee in the enjoyment of his patent monopoly, is to create a rule which, whatever else may be said of it, is impossible of administration.

Here, as the Court said in *United States* v. *Trenton Potteries,* 273 U. S. 392, with respect to "reasonable prices," conditions of sale which may be "reasonably adapted" properly to secure pecuniary reward to an inventor at a given time, or under certain conditions of the market, may become entirely unreasonable at a subsequent time. And, not only is the rule difficult of administration but, by similar token, from the point of view of industry and business, it affords no certain guide to lawful action. The language of Mr. Justice Stone puts the matter with complete clarity (p. 398):

> Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.

B. THE RULE LEADS TO CONSEQUENCES OF A SORT CONDEMNED BY THE ANTITRUST LAWS

The rule, though announced as a means of protecting a patent holder in the enjoyment of his patent monopoly, lends itself readily to the accomplishment of restraints of trade. Once it is granted that a patent holder may go into the market and offer not only the use of his patent, but price protection as well, he has been given a powerful weapon with which to subvert the purposes of Congress as declared in the Sherman Act.

It is clear that the situation long existing in the gypsum industry is exactly the opposite of what should exist in a free economy. Prices are fixed, the commodity is standardized, methods of sale are regulated and all competition at whatever level is eliminated. Such things are a more or less inevitable consequence of the rule that a patentee may fix his licensee's prices, regardless of how carefully the Court may seek to condition the right. The additional reward which the rule may give the patentee to which he is fairly entitled, if any, is to be balanced against the very great potentialities for harm to the public which the rule possesses.

That the right to fix prices leads to the elimination of all competition can easily be demonstrated on the facts of this case. Consider for example, the situation of Beaver in 1926 after it had signed the USG-Beaver license agreement (R. 39).

Waiving all question of whether Blagden intended by signing the agreement to organize the gypsum industry and stabilize prices, as he probably did, that is exactly what anyone in his situation would be persuaded to do. Blagden appreciated that price control would not be successful unless all other members of the industry were likewise under license. He frankly told Avery that unless general recognition of the USG patents were obtained it would be necessary to reduce prices in order to meet the competition from open-edge board. (Ex. 185, R. 5346.) Moreover, as promised (Ex. 185, R. 5346), Blagden proceeded to contact the various members of the industry to persuade them to take out licenses. In talking with Brown of Certain-teed, for example, he said: "I told him that, undoubtedly, if he were in with the others he would get the benefit of stabilization" (R. 831). In other words Blagden recognized that the obvious way to correct his competitive disadvantage due to the royalty, as well as to meet the competitive threat, was to get everyone into the same boat, so to speak. Then, with that accomplished, as Blagden further told Brown, prices could be stabilized (R. 831).

Price control makes each licensee, almost of necessity, an ardent proponent of industry wide licensing. Consider further the case of Universal, one of the early licensees. The company, caught in a sharp competitive fight, went into

receivership, although it alone had both the starch patent and the license for Utzman. Holland, like Blagden, felt impelled to do everything he could to talk the industry into coming together under the licenses (R. 932). He definitely wanted to have prices stabilized, not only for board but for all industry products, and the USG license agreement with price control afforded him a means to that end (Ex. 147, R. 5298). The court below in its opinion said, in fact, that Holland's actions were all for the very purpose of helping his company and the others "out of their unfortunate financial situation" (R. 4114). No better illustration could be given of the cumulative force of the right to control prices.

Whether the patent is important or not, moreover, becomes a matter of secondary consequence when price control is involved. Haggerty, of National, was very much concerned about what could be done about price control after the Utzman patent expired on August 6, 1929 (Ex. 205, R. 5370). Holland explained, "you will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available * * *" (Ex. 206, R. 5371). What the other patents were was incidental; it was enough for Haggerty and Holland and Avery, at least that there were other patents available

Weak and dubious patents will serve, if no others are available. The Haggerty starch patent, for example, had been known to the industry for several years before it was suddenly promoted to a place of importance in the summer of 1929. According to Brown there was "some doubt as to the strength of this Starch Patent" (Ex. 231, R. 5403). Then the idea was conceived of using both the starch and the bubble patents "so a combination of the two systems would give a patent to work under" after the Utzman patent expired in August and pending the time when the Roos bubble patents should issue (*ibid*). Whether the combined patents were useful was again a matter of minor concern; the important thing was to have some patent so that "patent control" would "continue without a break" (Ex. 231, R. 5404).

Moreover, once a licensing arrangement has been set up in an industry, the same force that created it serves to maintain it. The parties all agree, as in this case, not to contest the validity of any of the patents, irrespective of how invalid or how limited in scope they may be. And, though other patents of equal or even superior worth may be at hand, there is less incentive to use them, since to do so might upset the price control arrangement. Of course, it is not to be supposed that all research will be discontinued, since it is essential to have new patents of some

sort available if for no other reason than to permit a perpetuation of price control.

But these are only the more obvious consequences of the rule. Once an industry embarks on price control there is no logical stopping place. Today they fix the price of board; tomorrow it becomes necessary to police the sales of plaster and related products sold in conjunction with board. Since jobbers may sometimes cut the resale price of board, as they have the legal right to do, jobbers are eliminated. The rule has far reaching and unpredictable consequences, inimical to a free economy.

Quite apart from any question as to the legality of these actions, it is surely demonstrated that price control is a powerful inducement to bring about a complete elimination of competition. As the Court said in *United States* v. *Masonite Corp.*, 316 U. S. 265, 281:

> The extent to which that inducement in a given case will have or has had the desired effect is difficult, if not impossible, of measurement. The forces which that influence puts to work are subtle and incalculable. Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition.

C. PRICE CONTROL TENDS TO DEFEAT THE OBJECTIVES OF THE PATENT LAWS

The primary objective of the patent laws is the encouragement of invention, reward to the patentee, as this Court has often said, being secondary and merely a means to that end. Presumably the Court in the *General Electric* case was of the view that increasing the patentee's reward by permitting him to control his licensee's prices and methods of sale would have the effect of stimulating invention. We submit, to the contrary, that price control, instead of promoting this objective, tends to defeat it.

Necessity, it has been said, is the mother of invention. But, however that may be, profit to the inventor—or to his corporate employer—is not an inconsiderable inducement. The Court in the *General Electric* case appears to have based its decision, in part, on the assumption that the greater the reward that can be heaped on a single inventor, or his corporate-employer, the greater will be the inducement to invention. And, hence, the patent system will serve that much more certainly "to promote the progress of Science and useful Arts" (Const. Art. I, Sec. 8).

The facts of this case demonstrate the error of that assumption. Price control, instead of encouraging invention, has destroyed the principal incentive to research and discovery. Since 1929 the gypsum industry has been held in a patent strait-jacket, so to speak. Unless the arrange-

ment is declared illegal, it will continue until 1954, when the third Roos foam patent expires, and beyond that indefinitely if appellees can find some other minor improvement or process patent to serve as an excuse for its continuation. But, so long as USG fixes a price at which everyone can make a relatively sure and noncompetitive profit, there is no need either for USG or anyone else to bestir himself to develop a new or better product.

The real value of a patent, as measured by what royalty it could command on its merits, is completely distorted when it is offered with price control. The licensee buys price protection. And, though the royalties amount to a substantial sum, as Avery reported to his shareholders in 1929 (Ex. 332, R. 5986), the principal advantages both to licensor and licensee lie in the *general* manufacture and sale of a uniform product. The licensee recoups his royalty payments from the enhanced price to the public, and the licensor makes both that profit, which he could not get except for the price control provisions, plus the royalties.

The price control system, however, not only removes the incentive to invent; it, for the same reason promotes the use of narrow and doubtful patents. The members of the industry most affected and who might be relied upon in defence of their own business life to contest the validity of such patents, customarily agree to keep quiet

in the interest of profits. In this case USG insisted from the beginning that each licensee must recognize the validity of the USG patents and, in the case of the Roos "foam" patents, the licensees covenanted five years before they were issued not to contest validity.

The consequence is both unfair to the public and destructive of the purposes of the patent system. As this Court has said: "It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly." *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224, 234. The patent system rests on an assumption that a patentee by contributing a valuable discovery is entitled to a reward; to the extent that price control distorts the usual test of patent importance and restrains those who would ordinarily be impelled to contest invalid patents a reward is given where none is earned. In such measure price control is destructive of the patent system itself.

The importance of these considerations to the public has been recognized by this Court. In *Sola Electric Company* v. *Jefferson Electric Company*, 317 U. S. 173, a price control case, the Court refused to apply the rule that a licensee may not contest the validity of his licensor's patents where to do so would "fasten upon the public as well as the petitioner the burden of an

agreement in violation of the Sherman Act * * *" (p. 177). And, more recently this view was stated to be "firmly grounded upon the broad public interest in freeing our competitive economy from the trade restraints which might be imposed by price-fixing agreements stemming from narrow or invalid patents." *Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394, 400.

These cases, it will be noted, go so far as possible on their facts to aid the licensee in freeing the patent system of narrow and invalid patents. But they represent the unusual situation, where some licensee finally decides to break away from the price fixing combination. The root of the matter, though, is price control, which, as in the present case, is often the principal inducement to the creation of such combinations in the first place. The Court should not hesitate now, it is submitted, to take the next step and deny altogether the right of a licensor to bring his competitors together by means of a price control license.

In so doing, of course, the Court would not rest its decision solely on the tendency of price control to give currency to doubtful patents. The rule of the *General Electric* case, in actual operation, destroys the incentive to invention, contrary to the basic purposes of the patent laws; it tends almost inevitably, as in this case, to the sort of restraints condemned by the Sherman Act; it is

difficult of administration, and affords no certain guide to business; it provides a "reward" to the inventor, not suggested by Congress, where so far as appears a royalty would be wholly sufficient. For these reasons, we submit, the *General Electric* case should now be overruled.

V

IN A PROCEEDING UNDER SECTION 4 OF THE SHERMAN ACT, THE GOVERNMENT MAY SHOW THE INVALIDITY OF PATENTS RELIED UPON TO JUSTIFY A PRICE FIXING COMBINATION

Up to this point we have argued that, even assuming USG's patents to be valid, appellees' conduct was in violation of the Sherman Act. The Court need reach the issue here discussed as to the Government's right to assert the invalidity of the patents only if it rejects each of our prior arguments. However, the question is of such importance in the administration of the anti-trust laws and the patent law that we submit a decision on this point would be in the public interest.

Appellees have pleaded that their price fixing combination is justified because it operates under the protection of "valid patent monopolies" conferred upon USG by the ownership of patents. The only so-called "principal patents" now owned by USG and upon which price fixing could be justified are the three Roos "foam" patents. The validity of none of these patents has been tested. The Government pleaded in rebuttal, by amending its complaint, that each of these patents was

invalid for numerous reasons such as lack of invention, indefiniteness, etc. (R. 349). Appellees moved to strike these allegations, or, in the alternative, for partial judgment dismissing that part of the Government's complaint. The court (Bland, J. dissenting) rendered an opinion holding that the Government was without power to attack the validity of these patents (R. 369–395), and entered an order granting appellees' motion (R. 396).[88]

The novel question presented by this ruling may be simply stated: A price fixing agreement based upon an invalid patent is a violation of the Sherman Act. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402. Section 4 of that Act provides that "*it shall be the duty* of the several district attorneys of the United States * * * under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain *such violations.*" The question is whether Congress meant what it said, or whether an exception in favor of violations based upon invalid patents should be read into the general directive of Congress. The Court has not passed upon this precise question, but we submit its

[88] The correctness of the lower court's holding is considered at greater length in Steffen, *Invalid Patents and Price Control*, 56 Yale L. J. 1. See, in addition 53 Yale L. J. 579, 57 Harv. L. Rev. 387.

decisions in analogous situations negatives the existence of any such exception.

There is a "broad public interest in freeing our competitive economy from the trade restraints * * * imposed by price-fixing agreements stemming from narrow or *invalid* patents." *Katzinger Co.* v. *Chicago Mfg. Co., supra,* at p. 400. So overwhelming is this public interest that a private individual acting solely for his personal pecuniary profit may establish the violation of the Sherman Act by showing the invalidity of the patent on which it is based, despite the fact that he has by agreement with the patentee acknowledged and agreed not to question the validity of the patent. See *Sola Electric Co.* v. *Jefferson Electric Co., supra; Katzinger Co.* v. *Chicago Mfg. Co., supra; MacGregor* v. *Westinghouse Co., supra.* In the *Sola* case the Court said in emphatic terms (p. 177):

> Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements.

The present case is not a mere private litigation. It is not instituted to favor one individual at the expense of another. The Government has

brought this suit, pursuant to Congressional com
mand, to protect the "broad public interest" re
ferred to in the *Katzinger* case, supra, and ther
is no other way in which the Government can dis
charge its obligation to the public. Under such cir
cumstances it follows *a fortiori* that the Govern
ment is not estopped to assert the invalidity o
USG's patents. Indeed, we think the Court recog
nized this to be true in *United States* v. *America
Bell Telephone Co.*, 167 U. S. 224, when it said (pp
264–265):

> Suits may be maintained by the Govern
> ment in its own courts to set aside one of it
> patents not only when it has a proprietar
> and pecuniary interest in the result, bu
> also *when it is necessary in order to enabl
> it to discharge its obligations to the public*
> and sometimes when the purpose and effec
> are simply to enforce the rights of an in
> dividual. In the former cases it has all th
> privileges and rights of a sovereign. Th
> statutes of limitation do not run against
> it. The laches of its own officials does no
> debar its right. *Van Brocklin* v. *Ten
> nessee*, 117 U. S. 151; *United States* v
> *Nashville, Chattanooga &c. Railway*, 11
> U. S. 120; *United States* v. *Insley*, 13
> U. S. 263. But when it has no proprietary
> or pecuniary result in the setting aside o
> the patent; *is not seeking to discharge it
> obligations to the public;* when it has
> brought the suit simply to help an indi
> vidual; making itself, as it were, the instru

> ment by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants.

The *Telephone* case, *supra,* held that the Attorney General was without authority, under the common law or by statute, to bring an action to set aside a patent upon the bare allegation that in his opinion the Patent Office had failed to give proper weight to a prior patent. In reaching this conclusion, the Court made statements much stressed in appellees' brief and the majority opinion below which we believe serve to point up distinctions favorable to the Government. These statements are:

> * * * the Government is as much bound by the laws of Congress as an individual, and when Congress has created a tribunal to which it has given exclusive determination in the first instance of certain questions of fact and has specifically provided under what circumstances that determination may be reviewed by the courts, the argument is a forcible one that such determination should be held conclusive upon the Government, *subject to the same limitations as apply in suits between individuals* [p. 268].
>
> * * * * *
>
> Least of all was it intended to be affirmed that the courts of the United States, sitting as courts of equity, could entertain jurisdiction of a suit by the United States

> to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred [p. 269].

This holding and these statements are inapposite. The Government here proceeds upon the express authority of Section 4 of the Sherman Act. Moreover, it does not ask the Court to exercise an appellate jurisdiction over the Patent Office.[86] The proceeding does not seek the cancellation of USG's patents.[87] All that is sought

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[86] The majority opinion below stated that the Government "conceded in the oral argument" that it "is seeking a judicial determination that the Patent Office erred in issuing the patents and that they are for that reason invalid" (R. 372). The Government has assigned this as error (R. 4178). The Government at no time made any such concession. The Court subsequently explained its statement by saying that it was a matter of "interpretation" (R. 736.)

[87] The majority opinion below concluded a review of the Government's prayer for relief with the statement that (R. 372–373): "Accordingly, so far as the effect upon the defendants and the patents is concerned, the distinction between this suit and an independent cancelation proceeding is not substantial." We submit that the relief we seek is for violations of the Sherman Act and would be the same and entirely proper if appellees' combination is unlawful for any reason other than the invalidity of USG's patents. See *United States* v. *National Lead Co.*, No. 89, 1946 Term, decided June 23, 1947. Cf. *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495.

is the right to show the *fact* of the invalidity of USG's patents in a direct attack upon an unlawful combination. As the Court said in *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255, 259, "There is a clear distinction between a case and a question arising under the patent laws." And it is settled that a private party may show the fact of patent invalidity in any case where that fact would be material to the litigation. *Becher* v. *Contoure Laboratories, Inc.*, 279 U. S. 388. There an action had been brought in a state court to have Becher declared trustee *ex maleficio* of a patent upon the ground that not Becher but the plaintiff was the true inventor. Suit was then brought in the district court by Becher to enjoin the state action for the reason that to permit the fact to be shown that Becher was not the first inventor would be to sanction a collateral attack which would show the patent to be invalid. This argument was effectively answered by Mr. Justice Holmes in these words (p. 391):

> Again, even if the logical conclusion from the establishing of Oppenheimer's claim is that Becher's patent is void, that is not the effect of the judgment. Establishing a fact and giving a specific effect to it by judgment are quite distinct. * * *
>
> That decrees validating or invalidating patents belong to the Courts of the United States does not give sacrosanctity to facts

> that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is true an important patent is void—and, although there is language here and there that seems to suggest it, we can see no ground for giving less effect to proof of such a fact than to any other.

If a private individual may ask a state court to determine the fact of invalidity when it is material to the issues, it is no more an exercise of appellate jurisdiction over the Patent Office when it is material to the issues in a suit to enforce the Sherman Act.

The district court appeared to be influenced by a notion that it would be a breach of good governmental morals to permit the Government to show the fact of invalidity. But the *ex parte* determinations of its Patent Office, based in large part upon the data submitted by the applicants themselves, are not conclusive. *Reckendorfer* v. *Faber*, 92 U. S. 347; *Dunbar* v. *Myers*, 94 U. S. 187. In the *Reckendorfer* case, which held invalid for lack of invention a patent having to do with a combination drawing pencil and eraser, the Court said (p. 351):

> Before the commissioner is authorized to issue a patent, it must appear to him that the claimant is justly entitled to a patent; *i. e.*, that his art, machine, or manu-

facture, possesses all the qualities before mentioned. The commissioner must also be satisfied, that, if it possesses these qualities, it is sufficiently useful and sufficiently important to justify him in investing it with the *prima facie* respect arising from the governmental approval * * *

It is nowhere declared in the statute that the decision of the commissioner, as to the extent of the utility or importance of the improvement, shall be conclusive upon that point; * * *

The Act of June 25, 1910, 36 Stat. 851 (35 U. S. C. 68) is pertinent in this regard. This Act which is mainly concerned with conferring jurisdiction upon the Court of Claims to entertain suits when the United States is itself an infringer of a patent, contains a provision that "in any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise." This provision is significant as a Congressional belief that a patent is no more final and conclusive on the Government than on any one else. It is particularly significant in its implication that there is no impropriety in permitting the Government to queston validity in a proper case. In *Slawson* v. *Grand Street R. R. Co.*, 107 U. S. 649, the lower court dismissed an infringement action

on the ground that the patent was invalid even though the defendant had not pleaded invalidity. This Court, in affirming the action of the lower court, said (p. 652):

> We think the practice thus sanctioned is not unfair or unjust to the complainant in a suit brought on letters-patent. If they are void because the device or contrivance described therein is not patentable, it is the duty of the court to dismiss the cause on that ground whether the defence be made or not. *It would ill become a court of equity* to render a money decree in his favor for the infringement of letters-patent which are void on their face for want of invention.

We suggest that it would "ill become a court of equity", faced with the problem of ascertaining the intention of Congress, to find an intent to observe a concept of governmental morality which Congress itself has specifically failed to embrace.

In no case has this Court so much as intimated that the Government might be estopped in the enforcement of its anti-trust laws by the existence of invalid patents. The implication is definitely to the contrary. In *Standard Oil Co. v. United States*, 283 U. S. 163, the complaint charged a conspiracy to restrain trade in gasoline by means of a pool of patents covering the cracking process and a cross-licensing system. The case was tried before a Master. The Government

offered in evidence two patents to show that certain of the defendants' patents were anticipated and to show that defendants' patents were granted through error or mistake on the part of the Patent Office. The defendants objected, *inter alia*, on the ground that the Government could not introduce evidence to show the invalidity of patents (No. 378, 1930 Term, Record Vol. 1, p. 411). The matter was certified to the district court which entered an order that the evidence should be received (*ibid.*, 423–424). Subsequently, when the Master's Report came before the district court for disposition two of the questions presented were whether the Government could question the validity or scope of the patents it had issued and, if so, whether the patents were invalid (33 F. 2d 617). The court stated that it was "divided respecting the right of the government to attack the validity of the patents in these proceedings" (p. 623). The issue of the right to attack the validity of the patents was avoided by affirming the Master's finding that the patents were valid. The district court, nevertheless, found for the Government and the defendants appealed to this Court, which disposed of the present question as follows (283 U. S., at p. 181):

> Inasmuch as the Government did not appeal from these findings, we need not consider any of the issues concerning the validity or scope of the cracking patents; and we accept the finding that they were

> acquired in good faith. Neither the findings nor the evidence on this issue supply any ground for invalidating the contracts.

We think this case affords a measure of support for the Government in this case.

There have been, in addition, *dicta* in recent opinions of this Court in antitrust proceedings involving patents which also afford support for the Government's position. In *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 456, Mr. Justice Stone said, "In considering that question we assume the validity of the patents, which is not questioned here." In the *Masonite* case, 316 U. S. 265, 276, it was said, "We assume *arguendo* that the patents in question, owned by Masonite, are valid." In *United States* v. *Univis Lens Co.*, 316 U. S. 241, the Court said (p. 248):

> The Government has not put in issue the validity of the lens patents, but argues that their scope does not extend beyond the structure of the lens blanks and consequently affords no basis for the Corporation's restrictions on the sale of the finished lenses which the wholesalers and finishing retailers fashion from blanks purchased from the Lens Company * * *.
>
> The record gives no account of the prior art and does not provide us with other material to which, if available, resort might appropriately be had in determining the nature of an alleged invention and the

validity and scope of the patent claims founded upon it.

These statements strongly suggest that the Government has the right to attack the validity of a patent in an antitrust proceeding.

The precise question now raised was considered by Judge Westenhaver in *United States* v. *Porcelain Appliance Corp.* (N. D. Ohio, E. Div., Sept. 9, 1926). In an unreported opinion he stated:

> Obviously, this is not a suit by the United States to cancel patents. It is probably beyond the scope of all possible issues to decree certain patents or certain claims thereof to be void. The issue here is whether or not the defendants have organized and are members of an illegal conspiracy and a final decree can probably not have any broader scope. These expressions are not to be taken as the final determination of any such question. However, assuming they correctly state the law, it would still appear that the allegations of the bill are proper and that the testimony in support thereof might be received * * * I can perceive many combinations, in violations of the Sherman antitrust law, in which patents or claims thereof, invalid in view of prior art, or limited in nature, may be wrongfully used in building up or maintaining such an illegal conspiracy * * *

As a consequence of the trial court's ruling the Government, of course, was not permitted to introduce evidence for the purpose of showing the invalidity of the "principal" patents upon which appellees now rely to justify their price fixing.** However, evidence introduced for other purposes does in fact show the invalidity of the article claims of the Roos "foam" patents. We submit that it would be consonant with the position which this Court took in *Slawson* v. *Grand Street R. R. Co., supra,* now to examine this evidence of invalidity and pass upon the validity of these patents.

The principal ground of invalidity to be urged is that Roos does not describe a new or novel article or product. Claim 10 of the third Roos patent, which may be regarded as typical of the article claims of this patent, reads upon wallboard, which of course is old, and then goes on to say "having a porous body comprising a hardened cementitious material enclosing a plurality of voids encased in tough pliable films" (R. 114). We have already demonstrated in some detail that this claim does not describe a new or novel article (*supra,* pp. 229–230, 237–239). It is evident, therefore, that insofar as the Roos invention is based simply on the making of a "porous" or "cellular" wallboard, his claims are void. It is further submitted that the words of the claim "enclosing

** The Utzman and starch patents have expired.

a plurality of voids encased in tough pliable films" add nothing to the claim.[88] A porous or cellular board naturally would enclose a plurality of voids. If there is a distinction, the claim is wholly devoid of language to make the distinction clear and precise. So far as appears cells are voids and voids are cells. There is nothing, moreover, to indicate the size of the "voids", their shape or arrangement, or even their number, except as they are said to constitute a "plurality."[88] Only the final words of the claim—"encased in tough pliable films"—have a semblance of novelty about them. But these words constitute a misdescription of the finished product; they refer to the board in course of manufacture when the foam made up of "tough pliable films" is incorporated into the wet gypsum slurry. When the gypsum hardens or sets the bubbles have served their purpose. Then, as is admitted in the specifications, "the tough film envelope of the confined air or gas aggregate is *replaced* * * *" (R. 110). In other words, the bubbles evaporate in the drying process and leave merely a porous or cellular product which is old in the art.

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[88] Claims expressed in terms so general and vague as these have uniformly been held to invalidate a patent. The public is given no means whatever by which to identify the patented product. *General Electric Co.* v. *Wabash Appliance Corp.*, 304 U. S. 364; *United Carbon Co.* v. *Binney Co.*, 317 U. S. 228. The further phrase, "tough pliable films", is equally meaningless. When are films "tough" or "pliable"? The article claims are accordingly void not only for lack of novelty but because not expressed in clear and precise terms.

The remaining article claims of this patent are likewise void and for the same reasons. The article claims of the first two Roos patents (Nos. 2,017,022 and 2,079,338) need not be considered, since they do not read upon a wallboard but merely upon an intermediate product, a cementitious material, which can be used in the manufacture of products of many types and descriptions.

We submit that to prevent appellees from "fasten[ing] upon the public * * * the burden of an agreement in violation of the Sherman Act" (*Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 177), this Court should now hold that the Government may show the invalidity of appellees' patents and should also hold on the present record that the article claims of the Roos "foam" patents are invalid.

CONCLUSION

For the reasons set forth herein it is respectfully submitted that the judgment of the court below should be reversed.

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OCTOBER 1947.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. ~~711~~ 13

THE UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT OPPOSING JURISDICTION

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DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

against

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants

OPPOSING STATEMENT AS TO JURISDICTION

Plaintiff's "Statement as to Jurisdiction" herein fails accurately to set forth the nature of the case and the decision dismissing the complaint on the merits. Rather plaintiff's statement presents the case in terms of what it charged but failed to prove after a protracted trial and unusually careful consideration of the evidence by a three-judge court, as fully appears in the final opinion of the Court. It totally disregards the findings of facts of the Trial Court which are to the effect that the evidence not only failed to establish the charges but proved that the facts were directly contrary thereto. We submit that a fair appreciation of the facts and decision will demonstrate that no substantial question is presented for review by the Supreme Court.

The case involved an attack by plaintiff on patent license agreements entered into at various times between United States Gypsum Company (hereinafter referred to as USG) as licensor and the other defendant companies as licensees. The licenses covered the manufacture and sale of patented gypsum board under patents owned by USG. The history and background of these licenses is as follows.

Prior to 1912, gypsum board was a rough and crude product. It was made in a slow, cumbersome way, by pouring a mix of calcined gypsum and water between pieces of paper and pressing the mass on a table. After the gypsum had set, the pieces of board were dried out by stacking them in the open air under sheds. In 1912, USG commenced the development of more satisfactory products and more efficient methods of manufacture. An important advance was in the making, by virtue of patent No. 1,034, 746, issued in 1912 to USG on application of an inventor-employee named Clarence W. Utzman, of "closed-edge board." This patent covered board with closed or protected edges and eliminated the wastage and breakage which were attendant on the prior product. Various other improvements were developed, including a board making machine, the use of foam as a substitute for sawdust as an "aggregate" in the gypsum board to lighten the board, and the use of starch to increase the bond between paper and core from which the board principally derives its strength. Metallized board was devised for purposes of insulation; and a gypsum lath perforated in such a manner as to increase the fire resisting qualities of a wall structure. These improvements were covered by patents—product, process, and machine—many of which were issued to USG; others were acquired by that company. A demand arose in the trade for these improved products, and companies other than USG commenced to copy them. There ensued many years of litiga-

tion in which USG strove to enforce and eventually succeeded in enforcing, its patent rights. (Finding of Fact, No. 5).

Prior to 1917 the Bestwall Manufacturing Company (Bestwall) commenced the manufacture of closed-edge board. USG sued for infringement and won. *Bestwall Mfg. Co.* v. *United States Gypsum Co.*, 270 Fed. 542 (C. C. A. 7th, 1921), *cert. denied*, 263 U. S. 713 (1923). Bestwall had, however, in the course of the litigation, been acquired by The Beaver Products Company, Inc. (Beaver), and USG by a supplemental bill sued both of these companies for infringement and again prevailed. *United States Gypsum Co.* v. *Bestwall Mfg. Co.*, 15 F. (2d) 704 (N. D. Ill. 1925). These decisions made the manufacture of closed-edge board by a competitor of USG impossible without infringement of USG's patent rights. Prior to the last mentioned decision, Augustus S. Blagden, president of Beaver, made overtures of settlement to Sewell L. Avery, president of USG; he continued these efforts after the decree under the supplemental bill. Avery, at a meeting with Blagden in December, 1925, specified as terms of settlement the payment of damages by Beaver for infringement of USG's patents, acknowledgment by Beaver of the validity of USG's patents, payment of royalties, and the right in USG to fix prices of gypsum board made and sold by Beaver under the Utzman closed-edge patent. A settlement agreement was executed on July 29, 1926, Beaver paying $250,000 cash damages and USG granting Beaver a license to make, use and sell the patented products, to use the patented processes and to make and use the patented machines. (Finding of Fact, No. 6.)

In September, 1925, after the decision against Beaver, USG sued The American Gypsum Company (American) and the Universal Gypsum and Lime Company (Universal)

for infringement, and served a notice of infringement upon the Niagara Gypsum Company (Niagara). On September 17, 1926, a settlement and license agreement was entered into with Universal similar to that with Beaver, except that the lump sum payment was approximately $35,000. A license agreement was entered into between USG and the Atlantic Gypsum Products Company (Atlantic) on March 5, 1927. In this instance no damages were paid, Atlantic not having previously made gypsum board. Texas Cement Plaster Company (Texas) signed a license agreement on April 11, 1927 under similar circumstances. (Finding of Fact, No. 7.)

In May, 1929, following further litigation, four more license contracts were entered into between USG and Certain-teed Products Corporation (Certain-teed), National Gypsum Company (National), Ebsary Gypsum Company, Inc. (Ebsary), and Niagara Gypsum Company, respectively. In 1923 Certain-teed, originally a manufacturer of roofing products, entered the gypsum industry with the acquisition of the Acme Cement Plaster Company (Acme). In 1926 it commenced the manufacture of open-edge gypsum board at the former Acme plant in Texas. On January 20, 1928, it purchased the assets of Beaver. Beaver was then making a closed-edge board. Certain-teed refused to assume the Beaver-USG settlement agreement and license. USG thereupon, on or about February 21, 1928, instituted suit in the District Court of the United States in Illinois against Certain-teed and Beaver, seeking an injunction against the distribution of the proceeds of sale to the Beaver stockholders and asserting that Certain-teed should be required to assume all liabilities of Beaver under its settlement agreement and license. Certain-teed was required to put up a million dollar bond, or otherwise to suffer a temporary injunction, as security for damages which might be found due to USG. On May 22, 1929, Certain-teed settled this suit with USG, agreeing to pay damages of approximately

$64,000 and to fulfill the obligations of Beaver under its original settlement agreement and license; USG executed in Certain-teed's favor a patent license agreement and the suit was dismissed and the bond released. On May 16, 1929, National settled two patent infringement suits which USG had brought against it, one on November 5, 1926, the other on May 7, 1928, paying on account of damages for past infringement approximately $178,000 and entering into a patent license agreement with USG. Ebsary, which had commenced making open-edge gypsum board in 1928, was granted a patent license by USG on May 22, 1929. This license was not a part of settlement of an infringement claim, since Ebsary had not manufactured closed-edge board and there was no infringement suit or basis therefor against it. Niagara commenced making an open-edge gypsum board, but later made board with a semi-protected edge covered by a Clark application for a patent owned by American. This board had been developed by American in an attempt to compete with USG's closed-edge board. USG claimed that this board infringed its Birdsey patent No. 1,358,508 covering the manufacture of board with a partially closed edge. Priority over the Clark application had been awarded Birdsey by the Commissioner of Patents; this was affirmed by the Court of Appeals of the District of Columbia in 1926. *Clark* v. *Birdsey*, 56 App. D. C. 136, 10 F. (2d) 1001. A contract of settlement was entered into between Niagara in May, 1929, providing for the payment of damages of approximately $28,000 and for a patent license to Niagara. (Finding of Fact, No. 9.)

In 1929 USG owned three applications for patents of Carlisle K. Roos covering cellular core gypsum board produced by the employment of foam or a foaming agent in the core of the board to produce a multitude of cells or voids thereby lightening the board, eliminating the use of sawdust, which had been an unsatisfactory material, as an

"aggregate," and resulting in quicker drying. These applications were in interference with an application for a patent by Erick Christian Bayer, a foreign patentee, the American rights to whose patent had been acquired by USG. The Roos applications prevailed in the interference proceeding and Roos patents Nos. 2,017,022, 2,079,338, and 2,080,009 were ultimately issued to USG (October 8, 1935, May 4, 1937, and May 11, 1937, respectively). On May 23, 1929, after the last of the May 1929 license agreements had been executed, Avery of USG described the scope and nature of the Roos bubble board invention and outlined its advantages, including weight reduction, lower freight cost, elimination of the sawdust problem, easier handling and quicker drying, and offered the various licensees above referred to a license on this invention. (Finding of Fact, No. 11.)

Shortly after this, Universal through its president and co-receiver, Eugene Holland, claimed that USG, by using starch in its board to obtain adhesion between the core and paper liners, was infringing two patents owned by Universal known as the Hite and Haggerty patents Nos. 1,230,297 and 1,500,452, respectively. The Hite patent covered a heat insulating material and method of making the same. The Haggerty patent covered a gypsum plaster wallboard employing starch or a cooked carbohydrate in the core of the board to insure a good bond between the core and the paper covering sheets. This had solved the "peeler" trouble in the gypsum board industry and made possible modern high speed production of gypsum board. Without it, high temperatures used to expedite drying of the board would result in defective board in the form of "peelers," i. e., board having insufficient bond between the liners and the core. In 1927 Universal had brought suit in the United States District Court in Buffalo, New York, against National for infringing of the Haggerty patent, demanding an injunction

and an accounting, and the court had ruled that the Haggerty patent was valid and infringed (*Universal Gypsum & Lime Co.* v. *Haggerty*, 21 F. (2d) 544 (W. D. N. Y. 1927)), and National had posted a substantial bond rather than suffer enforcement of a temporary injunction. Avery told Holland that it was not USG's policy to infringe patent rights and that he would investigate the claim. In June and July of 1929 negotiations were going on between USG and its various licensees in respect of a possible license covering the bubble board invention, and the various companies were investigating to ascertain whether the invention had merit. During this same period Holland continued to discuss with Avery separately the matter of the alleged infringement of the Haggerty and Hite starch patents. As a result of these discussions USG agreed to purchase and did purchase these patents. Universal was in receivership and the sale was a favorable one from its standpoint because it provided Universal with substantial funds permitting it to reorganize and emerge from receivership with its accounts paid. The original and ancillary receivership proceedings were in seven different Federal district courts and the sale was approved by all of these courts on or about November 5, 1929. The sale was consummated in a license contract of November 5, 1929, which settled a claim of USG against Universal for infringement of USG's partially closed-edge patent and the claim of Universal against USG for infringement of the Hite and Haggerty patents. Universal was itself granted a license under these patents and under the Birdsey patent No. 1,358,508 and under patents which might be issued under the Roos and Bayer applications and under numerous other patents. This license contract superseded the 1926 license agreement between USG and Universal. In August, 1929, USG had announced its arrangement to purchase the Haggerty and Hite patents

and offered its licensees new licenses which would replace the prior license contracts and include in one document the outstanding patents of the earlier licenses, the Haggerty and Hite patents, and the applications for patents on the Roos bubble board invention. This offer was made subject to the approval of the district courts above referred to. (Finding of Fact, No. 12.)

Niagara on October 8, 1929, Certain-teed on the 15th, National on the 17th, Ebsary on the 18th, and Atlantic on the 21st, entered into new patent license contracts with USG which superseded the previous agreements between these companies and USG, and these new contracts covered the Hite and Haggerty patents and also the anticipated patents under the Roos and Bayer applications as well as the unexpired patents of the earlier contracts. (Finding of Fact, No. 13.)

As mentioned above, USG had in September, 1925, instituted a suit against American for infringement of USG's closed-edge patent. It had also in the same month commenced a suit against American for infringement of the Birdsey patent on partially closed-edge board. American attempted to obtain a more favorable settlement than had been granted to other infringers. USG's infringement suit with respect to the Birdsey patent had been postponed pending settlement negotiations, reinstated, and ultimately tried and decided in favor of USG. Settlement discussions by American were resumed, with renewed efforts to obtain concessions with USG. On November 25, 1929, American finally settled its outstanding litigation with USG on the terms originally offered, *i. e.*, on terms similar to those of the earlier settlements with other companies, and accepted a license from USG similar to the license contracts of the other licensees. American paid in settlement of past infringement approximately $152,000. On April 23, 1930, Kelley Plasterboard Company, Inc. (Kelley) took a similar

license. On January 3, 1939, USG consented to the assignment of this license to Newark. Texas did not enter into a license contract in 1929, but continued as a licensee under its license of April 11, 1927, although it was not subject to price control after August 6, 1929, the date of the expiration of the Utzman closed-edge patent, and no effort was made by any defendant or any agent of any defendant to establish or control the price at which Texas sold gypsum board during the period from August 6, 1929, until February 10, 1937, at which time its license of April 11, 1927, expired and Texas accepted a further license contract similar in form to the November, 1929, contract with the other licensees. (Finding of Fact, No. 14.)

The foregoing outlines the circumstances surrounding the signing of the main patent licenses involved in suit. Under each license royalties were paid and USG reserved the right to establish the minimum prices of patented gypsum board made and sold by each licensee thereunder. Under the earlier licenses, price control was limited to gypsum board made under the Utzman closed-edge patent, and such control terminated at the expiration of that patent on August 6, 1929. Under the later licenses, price control was operative only with respect to gypsum board made under product patents such as the Haggerty starch patent or, when issued, the Roos "bubble board" or foam patents. In other words, the right of the patentee to establish the licensee's minimum price was in all instances limited, by the terms of the contract and in actual operation, to patented board.

Plaintiff attacked these license agreements on various grounds:

> (1) It was claimed that the licenses were not *bona fide* but were sham agreements executed to disguise illegal purposes. The Trial Court found, and the evidence established, directly the contrary. (Findings

of Fact, Nos. 29, 30.) Among other things the Court found that the licenses were openly negotiated between the respective parties, that the licensees took the licenses because they desired to settle or avoid litigation and because they considered it a business necessity to obtain the right to use USG's patents, that each of the companies decided to take a license independently and without regard to what other compaines did, and that the licenses were executed on the faith of the *Bement* (186 U. S. 70) and *General Electric* (272 U. S. 476) cases. (Findings of Fact, Nos. 31-38.)

(2) It was claimed that defendants had, in addition to the patent license agreements, informal side agreements that unpatented products would be discontinued; that USG would advance and stabilize the prices for gypsum board; that all the companies would increase their prices on other, unpatented products; and that USG would continue to control prices through the use of other patents after the expiration of the Utzman closed-edge patent in August, 1929. The Trial Court found, and the evidence established, that no such agreements were made. (Finding of Fact, No. 56.)

(3) It was claimed defendants' operations under the licenses went beyond the proper limits of the patent monopoly. The Trial Court found, and the evidence established, that no such improper practices occurred. (Findings of Fact, Nos. 86-87, 89, 94, 99, 104.)

(4) It was claimed that the defendants unlawfully associated themselves in a plan to blanket the gypsum industry under patent licenses and stabilize prices. The Trial Court found, and the evidence established, that there was no such plan. (Finding of Fact, No. 118.)

(5) It was claimed that the *General Electric* case did not apply. The Trial Court held that there was no distinction between the *General Electric* case and the case at bar. (Findings of Fact, Nos. 24-28.)

Plaintiff asserts in its "Statement as to Jurisdiction" that the Trial Court ruled, on defendants' motion to dismiss, that every factual issue as to which evidence before the Court did not preponderate in favor of the plaintiff must be resolved against the plaintiff. What the Trial Court actually held was that on a motion to dismiss filed at the close of the plaintiff's case, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, it is the duty of the Court to weigh the evidence, to draw inferences therefrom, and if it finds the evidence insufficient to make out a case for the plaintiff, to render a decision for the defendants on the merits and make findings of fact and conclusions of law. The Trial Court so applied the rule and each of its findings against the plaintiff was fully supported by the evidence.

Plaintiff also erroneously states that the Trial Court ruled that defendants did not have the burden of establishing that their price fixing was justified by their patent rights and that the Government had the burden of establishing the contrary. What the Court actually held was that the Government alleged various restraints of trade and commerce and had the burden of proving such alleged restraints. And in connection with allegations on the part of the Government that patent license agreements existed containing restraints which might have been improper without patents, the Trial Court held that the plaintiff had the burden of establishing some reason why the normal consequences which flow from the ownership of a patent should not follow in this case. For example, the Trial Court held that the plaintiff, having asserted that the patent licenses were intended by the parties to accomplish restraints beyond the proper limits of the patent monopoly and in actual operation were carried beyond such limits, had the burden of proving the charges made.

Plaintiff asserts that the Trial Court ruled that an agreement among the defendants that all would enter into like price-fixing licensing contracts would not be illegal and that the evidence failed to show that the defendants did so agree. The Court found, and the evidence established, that there was no such agreement. The Court in its opinion said that in the absence of sham licenses and an intent to accomplish objectives beyond the proper limits of the patent monopoly such an agreement would not have been illegal.

Plaintiff asserts that the Court held that apart from certain declarations by defendants there was no evidence that the license agreements were "non bona fide" in character or purpose and that the evidence considered on this basis does not establish that the license agreements were sham or designed to achieve restraints of trade beyond the proper limits of the patent rights. The Court, as shown in its opinion, concluded, first, that the evidence introduced by plaintiff shows that the license agreements were executed as bona fide agreements intended to bind each party to the promises made therein, not as sham agreements to disguise illegal purposes, and, second, that the evidence fails to show that the license agreements were executed with intent to gain objectives beyond the proper limits of a patent monopoly in any of the respects charged. The Court also held that the evidence failed to establish that the operations of the defendants were carried beyond the proper limits of the patent monopoly and licensing thereunder. In reaching these conclusions the Court first applied the familiar rule that the declarations of certain of the defendants received in evidence subject to connection were binding only upon the declarant, the declarations rule having been invoked by the defendants and the plaintiff having failed, as found by the Court, to prove by evidence outside the declarations the existence of the conspiracy charged. The Court also stated its views

as to the meaning of all of the evidence when the declarations were considered as binding not merely upon the declarant but also upon all of the alleged co-conspirators and conclued that the plaintiff still had not proved that the license agreements were executed not as bona fide license agreements but only as sham agreements to give color of legality to the illegal purposes alleged in the complaint or that the operations of the defendants were carried beyond the proper limits of the patent monopoly.

Plaintiff asserts that the licensing agreements provided for the fixing of minimum prices on all board made by USG's licensees which embodied any invention claimed in any of 49 patents. Price fixing only applied to product patents and, contrary to the plaintiff's assertion, not only are the two starch patents in evidence but a number of other patents including three patents covering gypsum board made with foam. In connection with such foam patents it may be noted that they are product patents and not process patents as plaintiff repeatedly implies. Moreover, there was evidence and a Finding that the use of starch contemplated by the so-called starch patents, which were also product patents, was essential to the successful manufacture of gypsum board.

Plaintiff further asserted that there was no showing that USG had a patent monopoly covering the vending of board not made under the starch patents and that consequently the price fixing agreement went beyond any patent monopoly which USG was shown to have. The complaint charged that the defendant licensees under their respective license agreements produced and sold patented board embodying the claims of the several product patents held by USG and the showing of which, plaintiff complains, was made by plaintiff itself. Upon the trial plaintiff failed to present any evidence that the gypsum board made and sold by defendants under the patent license agreements

was not covered by the patents and the Trial Court made a specific finding to this effect. (Finding of Fact, No. 55.) The application of the elementary rule which the Court applied that a pleader must prove those allegations which are essential to his complaint required the plaintiff to prove that the price fixing went beyond the limits of the patent monopoly. This it failed to do.

The Trial Court held, on the basis of the patents before it, that there was no distinction between such patents, which were product patents covering gypsum board, and the patents covering incandescent lamps in the *General Electric* case. (Findings of Fact, Nos. 24-28.) The Trial Court referred to those patents the plaintiff introduced which were but a few of the USG patents referred to in the licenses, just as the Court in the *General Electric* case referred to but three of the 216 patents included in the General Electric-Westinghouse license. That the licenses covered patents which the plaintiff failed to introduce can hardly be used to pose the question of whether the price fixing under the licenses referred to in the complaint went beyond the patent monopoly shown by plaintiff to exist.

It is thus clear that the first question asserted by plaintiff to be substantial on the appeal herein, *i.e.* "whether the *General Electric* case validates an agreement to fix prices which is not confined to products over which the licensor has a complete patent monopoly of the vending thereof," is in fact of no substance in this case.

The second question, asserted by plaintiff to be of substance, is whether the *General Electric* case authorizes "all members of the industry, pursuant to a common invitation," to enter into substantially identical licensing agreements. As we have stated, the evidence established, and the Trial Court found, that each of the licenses in suit

was entered into independently by each of the licensees and without regard to what other companies might do. Furthermore, in the absence of sham licenses or an intent to accomplish objectives beyond the proper limits of the patent monopoly, a common invitation to make such license agreements could hardly be said to be illegal. The Supreme Court's decision in *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208, referred to by plaintiff in this connection, does not apply because there was no question there of the right of a patentee to fix the prices of his licensees under a patent monopoly and the case is clearly distinguishable from the *Bement* and *General Electric* cases, as pointed out in the opinion in the *Interstate Circuit* case and by the Trial Court in its opinion in this case under Topic VIII, pages 149-150. Thus, this question is without substance.

The next question, asserted by plaintiff to be substantial, is whether the *General Electric* case authorizes all competing manufacturers to "use patent license agreements as a means to organize their industry, increase and stabilize prices, eliminate jobbers, and otherwise regulate the industry in detail." In so far as plaintiff by this intends to imply that a plurality of licenses is wrongful, there can be no escape from the holdings in the *General Electric* and *Bement* cases, since, as the Trial Court held, the public is equally excluded and equally subjected to the patent owner's price whether there is no license, one license, or more. The Court also specifically found that the defendants herein did not use their patent license agreements for any of the purposes mentioned and further found specifically that there were no agreements among the defendants to organize the industry or to increase and stabilize prices or to eliminate jobbers or to otherwise regulate the industry, which findings are fully supported by the evidence. The decision of the Supreme Court in *United States* v. *Ma-*

sonite Corporation, 316 U. S. 265, referred to by plaintiff in this connection, does not apply since there was no question there as to the validity of a license to manufacture and sell under a patent monopoly, and is clearly distinguishable from the *Bement* and *General Electric* cases, as pointed out by the Court in its opinion in the *Masonite* case and by the Trial Court in its opinion in this case under Topic VIII, pages 150-151. Thus this question is without substance.

Plaintiff asserts that this case raises the question of whether the *General Electric* case should be overruled and that such a question is a substantial one. It is submitted that the rule of the *General Electric* case has been followed and reaffirmed by this Court from 1926 until the present time, that the rule has been relied upon by innumerable persons and companies in good faith and that the rule should not be changed by judicial act. We submit, therefore, that this question is not substantial.

The plaintiff asserts that a question of substance is presented because the Trial Court made a ruling that "the Government in a Sherman Act proceeding is not entitled to show the invalidity of the patents under which the defendants assert rights by way of justification for price fixing." This reference to a preliminary ruling of the Trial Court is inaccurate. The point passed upon was whether the Government in an anti-trust case could allege in its complaint that patents issued by the Government were invalid and therein seek a judicial determination that the Patent Office erred in issuing the patents. In other words, could the plaintiff in this case thus attack patents on grounds such as lack of invention, lack of novelty or utility and the like, all of which matters are delegated by

statute to the Commissioner of Patents for determination prior to the issuance of the patents. A careful reading of the opinion of the Trial Court on this point will show the true issue involved. Thus the Trial Court stated in its opinion on the subject (53 Fed. Supp. 889, at p. 892):

> "It is not charged by the Government in its complaint that the issuance of the patents was obtained by fraud or any other wrongful act. What the Government asserts, in essence, is that, for the reasons set out in paragraph 46(a), the Commissioner erred in issuing the patents. It is to be noted further that the attack upon the validity of the patents, in this aspect of the case, is not upon the ground that they are invalid because being used in violation of the Sherman Act; it is the converse, that the Sherman Act is being violated, through the license agreements, because the patents upon which the agreements are based are invalid. It is also to be borne in mind that, while this is not an independent cancelation proceeding, but an antitrust suit in which the Government contends that the patents are invalid, nevertheless the Government is seeking a judicial determination that the Patent Office erred in issuing the patents and that they are for that reason invalid. * * *"

Thus the ruling of the Trial Court was simply to the effect that plaintiff, having granted patents through its Commissioner of Patents to whom the duty was delegated by statute of determining questions of patentability, could not through its attorney general attack such determination in an antitrust suit. In so ruling the Trial Court followed the doctrine announced in *United States v. American Bell Telephone Company*, 167 U. S. 224. The Court applied a rudimentary principle of fairness and justice by holding that the plaintiff, having once issued patents through the Commissioner of Patents, should not be able

to repudiate its own action, in the absence of a charge of fraud in the obtaining of such patents. We submit that an appeal from such a ruling does not present a substantial question.

Finally plaintiff contends that the Trial Court's interpretation of Rule 41(b) of the Rules of Civil Procedure presents a question of substance. The point thus raised is simply whether on a motion to dismiss at the close of plaintiff's case it is the duty of the Court to weigh the evidence, to draw inferences therefrom and, if it finds the evidence insufficient to make out a case for the plaintiff, to render a decision for the defendants on the merits and make findings of fact and conclusions of law. The Trial Court so ruled following similar rulings made by the Circuit Courts of Appeals for the Seventh Circuit, the Sixth Circuit and the Ninth Circuit. It refused to follow two decisions both from the Circuit Court of Appeals for the Third Circuit. It is submitted that the Trial Court correctly acted in this action. Therefore this ruling presents no substantial question.

Dated, October 15, 1946.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 13

THE UNITED STATES OF AMERICA,

vs. *Appellant,*

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; FREDRICK G. EBSARY; AND FREDERICK TOMKINS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE CELOTEX CORPORATION

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SUPREME COURT OF THE UNITED STATES

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Appellant,

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE CELOTEX CORPORATION

I

Preliminary Statement

This supplemental brief is submitted on behalf of appellee, The Celotex Corporation, and is in addition to the general brief submitted on behalf of all appellees, including

The Celotex Corporation. This supplemental brief is not intended to duplicate any of the matters included in such general brief, to which this appellee subscribes without reservation; it will be limited to matters pertaining particularly to this appellee. To avoid unnecessary duplication, the reference to the opinion below and the statement of jurisdiction contained in such general appellees' brief are adopted to the extent that the same may be necesary.

II

Statement

The Celotex Corporation (hereinafter referred to as Celotex) entered the gypsum industry for the first time in 1939 when it acquired the assets of The American Gypsum Company (hereinafter referred to as American) (Fdg. 15, R. 4141; Govt. Br., pp. 11-12). In order to acquire such assets Celotex was required to take over the license which had been entered into by American with United States Gypsum Company (hereinafter referred to as USG), dated November 25, 1929 (Govt. Ex. 13, R. 4446, 4455). The terms of said license expressly obligated American to secure such assumption by a successor to its assets and business, and, accordingly, such license was acquired by Celotex on April 12, 1939, as a part of the assets of American (Govt. Ex. 14, R. 4469). At the same time, Celotex also took over as a part of the assets of American, American's license from USG, dated December 4, 1934, relating to metallized board (Fdg. 16, R. 4142).

In its answer Celotex admits that from April 12, 1939, to the date of the filing of the complaint herein (August 15, 1940) "U. S. G. has determined and fixed the minimum selling prices and terms and conditions of sale of this defendant as its licensee for all gypsum board manufactured by this defendant as its licensee under patents owned by

U. S. G. and which this defendant was licensed to utilize," and that throughout such period this appellee "has sold all gypsum board manufactured by it at the prices and on the terms and conditions of sale determined and fixed by U. S. G. as aforesaid" (R. 206). Other than as summed up in the foregoing statements, the record contains no reference to any activities of Celotex, its officers, agents, or employees.

Appellant admits that "In the nature of the case, Celotex had no part in the early negotiations" (Govt. Br., p. 89). This is manifestly true, since Celotex did not enter the gypsum industry until April, 1939.

Certain additional statements at the same page regarding this appellee, however, contain inaccuracies. The record does not supoprt appellant's statement that C. F. Miller continued as Manager of the American Gypsum Division of Celotex after April 12, 1939. The evidence is that C. F. Miller continued with the American Gypsum Division of Celotex until July, 1940, but the record is completely silent as to the capacity in which he was employed or the title, if any, which he had (R. 1374). The admission by Celotex in its answer, referred to by appellant, that USG entered into similar agreements (similar to USG's license to American, dated Nov. 25, 1929) "with National, Universal, Atlantic, Ebsary and Certain-teed" speaks only as of the time of the filing of this appellee's answer, July 31, 1941 (R. 214), and does not admit or imply knowledge of such similarity as of any period prior to the time Celotex was required to prepare and file its answer in these proceedings, or knowledge by it at any time of any negotiations leading up to the issuance of these licenses.

III

Summary of Argument

Celotex entered the gypsum business for the first time in 1939. There is no showing that Celotex was in combination, lawful or unlawful, with any other person or company in the gypsum industry, or had any connection with any other person or company in such industry except for the licenses which it acquired to use certain patents owned by USG and its operations thereunder. There is a complete lack of evidence of any knowing participation in a plan, combination or conspiracy, if any there was.

IV

Argument

The argument on behalf of Celotex should not be understood as admitting directly, or by inference, the existence of any plan, combination, or conspiracy in the gypsum industry as alleged by appellant. The Court below determined that there was no such conspiracy or combination, and its conclusions (R. 4167-68) are fully supported by the evidence as shown in the general brief filed on behalf of all the appellees which this appellee has subscribed and adopts in full. However, since under the first point of its brief (Govt. Br., p. 171) appellant insists that there was an unlawful conspiracy to organize the gypsum industry and stabilize prices by means of patent license agreements, this appellee desires to point out to the Court that there is no evidence with respect to it which will support a conclusion that it was a party to any plan, combination or conspiracy, if any there was.

1. *Celotex had no part in any transaction relied upon by the Government.*

In the Government brief, counsel painstakingly review in great detail various transactions, including many letters, memoranda, and other exhibits, conversations, meetings, and activities over a long period beginning in 1925. Presumably this recital includes all the evidence relied upon by them to support their contention that there was a conspiracy or combination by erstwhile competitors to organize the gypsum industry and stabilize prices therein by means of common price-fixing license agreements.

Under Part III of the Statement, entitled "The Conspiracy" (Govt. Br., pp. 16-102), they review the matters which they contend show the conspiracy. Part III in turn is subdivided into seven parts, the first four being entitled respectively "The conspiracy in 1925-1926," "The conspiracy in 1927," "The conspiracy in 1928," and "The conspiracy in 1929." There is not even a reference to Celotex in any of the many transactions and detailed matters referred to under said headings, and obviously so, for, as conceded by the Government, Celotex did not even enter the gypsum industry until 1939, ten years after the latest alleged conspiracy (Govt. Br., pp. 11-12), and "In the nature of the case, Celotex had no part in the early negotiations" (Govt. Br., p. 89).

Subdivision E of Part III of the Statement (Govt. Br., pp. 88-89) is entitled "Concerning Texas, Newark, and Celotex"; but the Government there points out no evidence whatsoever of any negotiations, transactions or other action by Celotex subsequent to April 12, 1939, when Celotex first entered the industry, other than the admission by Celotex that its licensor, USG, determined and fixed minimum prices and terms and conditions of sale of Celotex as licensee.

Appellant sets forth only a part of this admission, but the full text is included in its Statement (*supra*, pp. 2-3).

In subdivision F under Part III of the Statement, entitled "The Metallized Board Licenses" (Govt. Br., pp. 90-94), the only reference to Celotex is that under date of April 12, 1939, it assumed the metallized board license from USG to American (Govt. Br., p. 94). There is no reference to any transaction or any action taken by Celotex subsequent to April 12, 1939.

And in the last subdivision in Part III, entitled "The Perforated Lath Licenses" (Govt. Br., pp. 94-102), the sole statement concerning Celotex is that it did not assume the perforated lath license between USG and American (Govt. Br., p. 101).

Under Part IV of the Statement (Govt. Br., pp. 102-160) counsel review at great length the evidence in the record which they contend shows the operation and effect of the claimed conspiracy. For the reasons stated in appellees' general brief, to which, as previously stated, we fully subscribe, we do not believe that the portions of the evidence assembled and presented by appellant in Parts III and IV of its Statement show that any conspiracy, plan or combination to organize the gypsum industry and to stabilize prices therein ever existed at any time. *A fortiori*, there could be no operation and effect of a non-existent conspiracy.

Additionally, however, we wish to call the Court's attention in this supplemental brief to the fact that in all of the detailed review of such evidence in Part IV of appellant's Statement, there is not a single reference to any act by Celotex, or to any transaction in which it is said Celotex participated, with the single possible exception that it is therein indicated that the last price bulletin issued by USG in evidence is dated June 10, 1939 (and Celotex affirms that it sold at bulletin prices in this period).

Thus, in the entire resume of the portions of the record upon which the Government relies to support its contention that a conspiracy or combination to organize the gypsum industry and stabilize prices therein was formed or existed, the only statements as to action or conduct on the part of Celotex are: (1) that on April 12, 1939, Celotex entered the gypsum business by acquiring the assets of American, among which was the general license, dated November 25, 1929, from USG to American, and the metallized board license from USG to American, dated December 4, 1934; and (2) that following the acquisition of the assets of American, USG determined and fixed the minimum selling prices and terms and conditions of sale of Celotex as the licensee of USG. It is clearly apparent that there has been no showing by the Government that Celotex ever was in combination with any other person in the gypsum industry. On the contrary, the only evidence of a connection which Celotex had, after its entry into the gypsum business, with any other person or company in the gypsum industry was the licensor-licensee relationship between Celotex and USG. Thus, there is a complete lack of proof of connection between Celotex and any other licensee in the industry. Lacking such proof, the Government cannot successfully maintain that Celotex participated in any combination or conspiracy among "appellees," if any there was.

2. *No evidence of any knowing participation by Celotex in any plan, combination or conspiracy, if any there was.*

Recognizing the complete absence of any evidence of any conduct by Celotex in either the formation of the claimed conspiracy or plan, or in any of the claimed operations thereunder, at least until after April 12, 1939, the Government apparently predicates its claim for relief against Celotex upon the theory that Celotex is claimed to have joined

and participated in the alleged conspiracy, plan or combination at that date, with knowledge thereof.

At pages 206-207 of their brief, counsel admit that acquaintance with the alleged "plan" prior to adherence thereto is a prerequisite in order to include as conspirators parties who subsequently adhere to the "plan". But the evidence relied upon by the Government as a basis for obtaining injunctive relief against Celotex falls far short of meeting this agreed test. As was shown in the preceding point, such evidence does not include a single act of "participation" on the part of Celotex subsequent to its entry into the gypsum business on April 12, 1939, with the single exception that subsequent to said date, as admitted in its answer, Celotex has observed the prices and terms and conditions of sale fixed by USG for gypsum products manufactured by Celotex as its licensee and incorporating inventions covered by some or all of the patents included in said licenses (R. 206).

The principal evidence claimed by the Government (Br., p. 89) to impute to Celotex knowledge of the claimed conspiracy or plan is that C. F. Miller, manager of American, continued as manager of the American Gypsum Division of Celotex, subsequent to April 12, 1939; and that the same Miller met with Avery in the early negotiations between American and USG and was fully conversant with the purpose, scope and effect of the licensing arrangement. As pointed out in our Statement (*supra*, p. 3), the record does not show that C. F. Miller continued or ever was manager of the American Gypsum Division of Celotex. The record is completely silent as to the capacity in which Miller continued with Celotex between April 12, 1939, and July, 1940. In the absence of any such evidence, no claim can successfully be made that any knowledge on the part of Miller can be imputed to Celotex.

The tenuous nature of appellant's argument is best demonstrated by an examination of Exhibit 310 (R. 5859), relied upon by the Government to sustain its assertions concerning the knowledge of C. F. Miller. This exhibit is wholly inadequate for such purpose. It is merely a letter by Miller, dated September 16, 1926, reporting on a conference had by Miller and other representatives of American with Avery and other representatives of USG, concerning a proposed settlement of the patent infringement litigation brought by USG against American. The settlement proposal was refused and American decided to go ahead and fight the litigation, which it did (R. 1378, 1380). It was not until November 25, 1929, after having lost the infringement litigation (R. 1380), that American took a license from USG (Gov. Ex. 13, R. 4446). At most, this exhibit portrays only one step in unsuccessful negotiations to settle patent litigation then pending between the two corporations.

Also in its effort to show knowledge of the claimed conspiracy on the part of Celotex at the time it entered the gypsum industry, the Government refers to portions of two admissions contained in the answer filed by Celotex (Govt. Br., p. 89). The first is an admission by Celotex that USG entered into agreements with National, Universal, Atlantic, Ebsary and Certain-teed. Reference to Paragraph 85 of said answer (R. 204) shows that the agreements referred to were licenses similar to the license agreement between USG and American, dated November 25, 1929. This admission, however, speaks only as of the date of the answer from which it has been extracted and is wholly insufficient to establish knowledge of such matters on the part of Celotex at any time prior to such answer.

Moreover, even assuming knowledge on the part of Celotex as of April 12, 1939, that other licensees had received from USG license agreements similar to that acquired by

Celotex from American, such knowledge is totally insufficient to show knowledge by Celotex of the existence of the claimed conspiracy, plan or combination asserted and charged by the Government in this case. It must always be remembered that the charges in this case, as stated under Point I of the Argument in the Government's brief (pp. 171-218), relate to a claimed conspiracy between erstwhile competitors to organize the gypsum industry and stabilize prices therein and to use the common price-fixing license agreements as a means of effectuating such conspiracy. The conspiracy alleged by the Government is understood to relate to understandings and transactions outside of, and part from, the license agreements. A mere showing of the existence of numerous similar license agreements would not sustain the Government's position, and, similarly, an admission that licenses were held by others fails to establish any knowledge of or acquaintance with the claimed conspiracy.

The other admission in the Celotex answer referred to is that from 1939 to the date of the complaint, USG has determined and fixed the minimum selling prices and terms and conditions of sale of Celotex as the licensee of USG. As shown in the Statement in this brief (*supra*, pp. 2-3), the portion quoted by the Government is incomplete. The record is that this appellee, subsequent to April 12, 1939, has sold board manufactured by it under the patents covered by the license at prices fixed by its licensor, USG. Such mere compliance with the terms and provisions of the license agreement, without which it could not have manufactured these products, has no conceivable bearing on the question of whether or not Celotex had knowledge of the claimed conspiracy, plan or combination sought to be established by the Government in this case or of any of the facts and circumstances reviewed and relied upon by the Government in its brief.

It is fundamental that, as stated by this Court, "Those having no knowledge of the conspiracy are not conspirators". *U. S.* v. *Falcone*, 311 U.S. 205, 210.

There is no distinction in this connection between persons acting at the time an alleged conspiracy was formed or persons whose connection with the alleged conspiracy or alleged conspirators occurs at a later date. The Circuit Court of Appeals for the 8th Circuit well stated and applied this rule in *Johnson* v. *J. H. Yost Lumber Co.*, 117 F. (2d) 53 (1941), where it cited this Court's decision in *Interstate Circuit, Inc.*, v. *U.S.*, 306 U.S. 208, and said (p. 62):

> "As to some of these defendants there were other reasonable explanations, bu' liability on their part could only result from a knowing participation in the combination of retail dealers. *Interstate Circuit* v. *United States*, supra. There is no evidence, direct or circumstantial, showing such knowledge. It was not enough to establish a cause of action against them to show that there was a conspiracy among the lumber dealers to prevent plaintiffs from securing supplies sold by this group of defendants, in the absence of evidence that these defendants knew there was such a conspiracy. They refused to sell plaintiffs because they feared such act would displease their other customers, causing loss of their business. They perhaps knew that other suppliers were refusing presumably for like reasons."

The foregoing ruling is singularly apt. We perceive nothing in this Court's subsequent opinion in *U.S.* v. *Masonite Corporation*, 316 U.S. 265, which precludes its application here.

V

Conclusion

It is, we believe, established beyond question that there was no conspiracy, plan or combination in the gypsum industry of the nature alleged by appellant here. The Court

below found no evidence of such a conspiracy or combination and its determinations are fully sustained by the record. The judgment based upon these findings was a dismissal of the complaint as to all defendants. It is submitted that the judgment of the Court below should be sustained. Furthermore, the judgment of the Court below should be sustained as to this appellee for the additional reason hereinabove set forth.

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November, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 13

THE UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, CERTAIN-TEED PRODUCTS CORPORATION, THE CELOTEX CORPORATION, EBSARY GYPSUM COMPANY, INC., NEWARK PLASTER COMPANY, SAMUEL M. GLOYD, doing business under the name of Texas Cement Plaster Company, SEWELL L. AVERY, OLIVER M. KNODE, MELVIN H. BAKER, HENRY J. HARTLEY, FREDERICK G. EBSARY, and FREDERICK TOMKINS,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA,
Appellant,

vs.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, CERTAIN-TEED PRODUCTS CORPORATION, THE CELOTEX CORPORATION, EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY, SAMUEL M. GLOYD, doing business under the name of Texas Cement Plaster Company, SEWELL L. AVERY, OLIVER M. KNODE, MELVIN H. BAKER, HENRY J. HARTLEY, FREDERICK G. EBSARY, and FREDERICK TOMKINS,
Appellees.

No. 13

BRIEF FOR APPELLEES

Opinions Below

The opinion of the three-judge District Court dismissing the case on the merits at the close of the Government's evidence is reported in 67 F. Supp. 397. The opinion of the District Court on the matter of patent validity is reported in 53 F. Supp. 889.

Jurisdiction

This is a civil anti-trust action brought August 15, 1940, by the United States pursuant to Section 4 of the Sherman

Act, to restrain defendants from alleged violations of Section 1, 2 and 3 of said Act.[1] The action was tried and most of the preliminary proceedings were heard by a three-judge court which was constituted on September 15, 1942, after the Government had filed a certificate under the Expediting Act.[2]

The final judgment of the three-judge District Court dismissing the Government's complaint on the merits was entered on August 5, 1946 (R. 4169). A petition for appeal was filed and allowed on September 30, 1946 (R. 4187, 4188). Probable jurisdiction was noted on December 16, 1946 (R. 4204).

Jurisdiction is conferred on this Court by Section 2 of the Expediting Act[3] and Section 238 of the Judicial Code.[4]

Statutes Involved

The material parts of Sections 1, 2, 3 and 4 of the Sherman Act are:

> "§1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * * July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.
>
> "§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with

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[1] Act of July 2, 1890, C. 647, Secs. 1, 2, 3 and 4, 26 Stat. 209; 15 U. S. C., Secs. 1, 2, 3 and 4.

[2] Act of February 11, 1903, as amended, 32 Stat. 823; 36 Stat. 854; 36 Stat. 1167; 56 Stat. 198; 15 U. S. C. Sec. 28.

[3] Act of February 11, 1903, as amended, 32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 15 U. S. C., Sec. 29.

[4] 36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C., Sec. 345.

any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, §2, 26 Stat. 209.

"§3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. * * * July 2, 1890, c. 647, §3, 26 Stat. 209.

"§4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * * July 2, 1890, c. 647, §4, 26 Stat. 209; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167."

STATEMENT OF CASE.

The Issue

The main issue upon the appeal is whether a patent owner will continue to be permitted to grant a license to

another to make, use and sell a patented article and to impose a restriction upon his licensee against underselling him in respect of the patented product made and sold under the license; in short, whether the *General Electric* case[5] should be sustained or overruled.

This is the basic question in the case. The Government seeks to avoid a clear-cut consideration of the question by attempting to distinguish the *General Electric* case. To the extent that the attempted distinction involves legal principles, we shall argue that it is unsound. To the extent that it involves factual matters, we shall show that it is based upon a presentation of the case in terms of what the Government charged but failed to prove upon the trial. The discussion of alleged facts in the Government's brief is in shocking disregard of the Trial Court's findings of fact all of which were well supported, indeed compelled, by the evidence. The result is to present the Court with a distorted, misleading and inaccurate view of the case. It is necessary therefore for appellees to restate the case in this brief. Further consideration of the Government's discussion of alleged facts appears in Point IV.

In addition, the Government's brief raises some incidental points on procedure, burden of proof, the declarations rule, and the right of the Government to review in an anti-trust action determinations of the Patent Office on matters of patent validity. These questions are considered in Points III and V of this brief.

The Defendants

The defendant companies in this case comprise the members of the gypsum manufacturing industry of the United

[5] *United States* v. *General Electric Co.*, 272 U. S. 476 (1926).

States in the area east of the Rocky Mountains.[6] They are: United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, The Celotex Corporation, Ebsary Gypsum Company, Inc., and Newark Plaster Company, all of which are corporations, and Texas Cement Plaster Company, which is the name under which Samuel M. Gloyd was doing business as an individual. These companies are hereinafter referred to respectively as USG, National, Certain-teed, Celotex, Ebsary, Newark and Texas. Besides Gloyd, the individual defendants are the chief executive officers of the defendant companies. As of the time when the suit was filed Sewell L. Avery was chairman of the Board of Directors of USG, Oliver M. Knode, president of USG, Melvin H. Baker, president of National, Bror G. Dahlberg, president of Celotex and chairman of the Board of Directors of Certain-teed,[7] Henry J. Hartley, president of Certain-teed, Frederick G. Ebsary, president of Ebsary and Frederick Tomkins, president of Newark.

Gypsum Products[8]

The defendant companies are engaged in the mining of gypsum and in the manufacture and sale of products made from it, gypsum board, gypsum plaster, block, tile and Keene's cement.

Gypsum is a mineral consisting of hydrous calcium sulphate. It has rock-like qualities useful in building con-

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[6]This classification is limited to manufacturers of a full line of gypsum products.

[7]At the close of the case the Government consented to the granting of Dahlberg's motion to dismiss and he is therefore not named as an appellee (R. 4145).

[8]Finding of Fact 4, R. 4133.

struction and is found in large deposits in many states throughout the United States.

Gypsum rock is mined and then subjected to calcination —the process of driving off the water of crystallization by heating. The resultant calcined gypsum or stucco is the substance familiarly known as plaster of paris. It has the property of readily recombining with water and resuming its former content of water of crystallization and its original rock-like properties.

Gypsum plaster consists largely of calcined gypsum which is treated and supplemented with other materials to give greater strength, control its set, and impart other desirable qualities. Keene's cement is a highly refined type of gypsum plaster. Block and tile are, as their names suggest, articles of gypsum which are cast in the form of blocks or tile.

The most important gypsum product is gypsum board. It consists of two outer sheets of heavy tough paper, front and back, called "liners," between which there is a lightened gypsum core which is firmly bonded to the paper. Gypsum wallboard is a product used as a finished interior wall. Gypsum lath or plasterboard is a product used as a base to which a coat of plaster may be applied. The term board as herein used includes wallboard and lath or plasterboard.

Patents[9]

Prior to 1912, gypsum board was a rough, crude product. It was made by hand by pouring buckets of calcined gypsum mixed with water in thin layers between multiple pieces of

[9]FF. 5, 11, 12, 16, 17, 24, 42; R. 4133-4152.

rough felt paper and smoothing the product with rollers. After the gypsum had set, the pieces of board were trimmed to size and dried out by stacking in the open air under sheds. In 1912, USG commenced the development of more satisfactory products and more efficient methods of manufacture. These developments were covered by patents—product, process and machine—owned by USG. Among the more important patents were the following:

Closed edge board, Utzman Patent No. 1,034,746 (R. 35-38). When gypsum board was made with rough, exposed edges, great waste was attendant upon the trimming operations of manufacture and even greater waste resulted from the crumbling of the edges and the core in transit and use. The invention of closed edge board, *i.e.*, board having the liners folded over so as to enclose the edge, solved this problem. When the closed-edge board of the Utzman Patent came on the market, open-edge board was largely displaced under the demand of the trade for the better product.

Board making machine, Utzman Patent No. 1,330,413. A machine was developed for mixing the gypsum slurry and distributing it between paper liners and forming the closed-edge board in a continuous operation. The use of this patented machine was essential in the manufacture of closed-edge board.

Board containing starch, Haggerty Patent No. 1,500,542 (R. 64-69). The strength of gypsum board is due in large part to the lateral tensile strength of the paper liners. This strength is dependent upon the degree of bond which exists between gypsum core and liners. For many years difficulty had been experienced when the bond between core and liners

broke down causing "peelers". This difficulty became more pronounced with the development of high speed manufacture and the use of high temperatures in kilns where the board was dried. It was discovered that board containing stareh or cooked carbohydrate in the core would insure a good bond between core and liners. Gypsum board embodying this discovery was the subject of the Haggerty Patent.

Foam or Bubble Board, Roos Patents Nos. 2,017,022, 2,079,338 and 2,080,009 (R. 100-114). From the beginning gypsum board manufacturers incorporated a so-called "aggregate" in the gypsum core, usually sawdust, to lighten the board, give greater strength and resiliency, and improve nailing and sawing qualities. The quality of sawdust varied and later it became scarce and expensive. The Roos foam or bubble board patents took care of this situation. They covered gypsum board with a core of cellular structure produced by employing foam or a foaming agent in the gypsum mix during the course of manufacture. Board made with a foam "aggregate" not only did away with the sawdust problems but also was stronger, less brittle to saw and nail, dried more quickly, and was lighter in weight. This last factor resulted in a substantial saving of freight charges which constituted an important item on this heavy, bulky product of comparatively low cost.

Board bundle, Utzman Patents Nos. 1,696,877 and 1,724,740, and Birdsey Patents Nos. 1,730,113 and 1,946,056. Due to the nature of the product, gypsum board is difficult to package or bundle. For many years most manufacturers bundled board with wire but this method was unsatisfactory since the wire would slip and frequently

it would cut into the board causing cracks and breakage. These disadvantages were obviated through the development of a bundle formed by affixing strips of tape around the edges of a suitable number of pieces to form a tight, manageable package.

Metallized board, Roos Patent No. 1,914,345. In the early '30s, gypsum board was confronted with competition from other products which possessed insulation characteristics. This resulted in the invention of metallized gypsum board consisting of board with metallic foil to furnish insulation covered by this and other patent rights owned by USG.

Perforated lath, Roos Patent No. 1,938,354. In many localities, particularly in metropolitan areas, there are building code requirements providing that a wall structure consisting of a plaster base such as gypsum lath plus the applied coat of plaster must withstand a one hour fire test. Ordinary gypsum lath will not pass this test since the gypsum plaster and core calcine and crumble in the face of prolonged application of fire. A perforated lath was developed containing holes of such size and spacing as to permit a wall structure composed of it to withstand the one hour test. When plaster is applied to this type of lath some of it passes through the perforations to form a mechanical key which, because of the size and spacing of the holes, supports the coat of plaster with the result that it will resist fire for an hour. This type of gypsum lath was the first to pass the one hour fire test of the United States Bureau of Standards and to receive the Bureau's one hour fire rating.

Patent Litigation and Licenses[10]

As stated, the developments above described, as well as many others of lesser importance, were covered by patents owned by USG. A demand arose in the trade for these improved products and companies other than USG commenced to copy them. There ensued many years of litigation in which USG strove to enforce and eventually succeeded in enforcing its patent rights.

Prior to 1917 the Bestwall Manufacturing Company (Bestwall) commenced the manufacture of closed-edge board. USG sued for infringement and won. *Bestwall Mfg. Co.* v. *United States Gypsum Co.*, 270 Fed. 542 (C. C. A. 7th, 1921), *cert. denied*, 263 U. S. 713 (1923). Bestwall had, however, in the course of the litigation, been acquired by The Beaver Products Company, Inc. (Beaver), and USG by a supplemental bill sued both of these companies for infringement and again prevailed. *United States Gypsum Co.* v. *Bestwall Mfg. Co.*, 15 F. (2d) 704 (N. D. Ill. 1925). These decisions made the manufacture of closed-edge board by a competitor of USG impossible without infringement of USG's patent rights.[11] Prior to the last mentioned decision, Augustus S. Blagden, president of Beaver, made overtures of settlement to Sewell L. Avery, president of USG; he continued these efforts after the decree under the supplemental bill. Avery, at a meeting with Blagden in December, 1925, specified as terms of settlement the payment of damages by Beaver for infringement

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[10]FF. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20; R. 4134-4144.

[11]In the beginning the Government regarded it as important to assert this fact affirmatively (Complaint, par. 52, R. 12). Now it seeks to minimize the importance of the patents.

of USG's patents, acknowledgment by Beaver of the validity of USG's patents, payment of royalties, and the right in USG to fix prices of gypsum board made and sold by Beaver under the Utzman closed-edge patent. A settlement agreement was executed on July 29, 1926, Beaver paying $250,000 cash damages and USG granting Beaver a license to make, use and sell the patented products, to use the patented processes and to make and use the patented machines (FF. 6, R. 4134-4135).

In September, 1925, after the decision against Beaver, USG sued The American Gypsum Company (American) and the Universal Gypsum and Lime Company (Universal) for infringement, and served a notice of infringement upon the Niagara Gypsum Company (Niagara). On September 17, 1926, a settlement and license agreement was entered into with Universal similar to that with Beaver, except that the lump sum payment was approximately $35,000. A license agreement was entered into between USG and the Atlantic Gypsum Products Company (Atlantic) on March 5, 1927. In this instance no damages were paid, Atlantic not having previously made gypsum board. Texas signed a license agreement on April 11, 1927, under similar circumstances (FF. 7, R. 4135).

In 1923 Certain-teed, originally a manufacturer of roofing products, entered the gypsum industry with the acquisition of the Acme Cement Plaster Company (Acme). In 1926 it commenced the manufacture of open-edge gypsum board at the former Acme plant in Texas. On January 20, 1928, it purchased the assets of Beaver. Beaver was then making a closed-edge board under its license with USG. Certain-teed refused to assume the Beaver-USG settlement agreement and license. USG thereupon, on or about Feb-

ruary 21, 1928, instituted suit in the District Court of the United States in Illinois against Certain-teed and Beaver, seeking an injunction against the distribution of the proceeds of sale to the Beaver stockholders and asserting that Certain-teed should be required to assume all liabilities of Beaver under its settlement agreement and license. Certain-teed was required to put up a million dollar bond, or otherwise to suffer a temporary injunction, as security for damages which might be found due to USG. On May 22, 1929, Certain-teed settled this suit with USG, agreeing to pay damages of approximately $64,000 and to fulfill the obligations of Beaver under its original settlement agreement and license; USG executed in Certain-teed's favor a patent license agreement and the suit was dismissed and the bond released (FF. 9, R. 4136).

On May 16, 1929, National settled two patent infringement suits which USG had brought against it, one on November 5, 1926, the other on May 7, 1928, paying on account of damages for past infringement approximately $178,000 and entering into a patent license agreement with USG (FF. 9, R. 4137).

Ebsary, which had commenced making open-edge gypsum board in 1928, was granted a patent license by USG on May 22, 1929. This license was not a part of settlement of an infringement claim, since Ebsary had not manufactured closed-edge board and there was no infringement suit or basis therefor against it (FF. 9, R. 4137).

Niagara commenced making an open-edge gypsum board, but later made board with a semi-protected edge covered by a Clark application for a patent owned by American. This board had been developed by American in an attempt to compete with USG's closed-edge board.

USG claimed that this board infringed its Birdsey patent No. 1,358,508 covering the manufacture of board with a partially closed edge. Priority over the Clark application had been awarded Birdsey by the Commissioner of Patents; this was affirmed by the Court of Appeals of the District of Columbia in 1926. *Clark* v. *Birdsey*, 56 App. D. C. 136, 10 F. (2d) 1001. A contract of settlement was entered into between Niagara in May, 1929, providing for the payment of damages of approximately $28,000 and for a patent license to Niagara. (FF. 9, R. 4137).

In 1929 USG had pending applications for the three Roos patents covering foam or "bubble" board. These applications were in interference with an application for a patent by Erick Christian Bayer, a foreign patentee, the American rights to whose patent had been acquired by USG. The Roos applications prevailed in the interference proceeding and Roos patents Nos. 2,017,022, 2,079,338, and 2,080,009 were ultimately issued to USG on October 8, 1935, May 4, 1937, and May 11, 1937, respectively.

On May 23, 1929, after the last of the May 1929 license agreements had been executed, Avery of USG described the scope and nature of the Roos bubble board invention, which had just been put into use by USG with satisfactory results after earlier experimentation. Avery outlined its advantages including weight reduction, lower freight cost, elimination of the sawdust problem, easier handling and quicker drying, and stated that if the various licensees were interested he would be willing to grant them licenses on this invention. Following this the licensees did investigate the merits of the Roos bubble board invention and expressed their interest in the matter. In June and July, 1929, negotiations were going on between USG and its various licensees

in respect of a license covering the bubble board invention, and a form of license agreement on that invention had been offered to them. (FF. 11, 12; R. 4138-4139).

About this time, Universal through its president and co-receiver, Eugene Holland, complained to Avery that USG, by using starch in its board to obtain adhesion between the core and paper liners, was infringing two patents owned by Universal known as the Haggerty and Hite patents Nos. 1,500,452 and 1,230,297, respectively. As we have stated, the Haggerty patent covered gypsum board employing starch or a cooked carbohydrate in the core of the board to insure a good bond between the core and the paper covering sheets. This had solved the "peeler" trouble in the gypsum board industry and made possible modern high speed production of gypsum board. Without it, high temperatures used to expedite drying of the board would result in defective board. The Hite patent covered a heat insulating material and method of making the same. In 1927 Universal had brought suit in the United States District Court in Buffalo, New York, against National for infringment of the Haggerty patent, demanding an injunction and an accounting, and the court had ruled that the Haggerty patent was valid and infringed (*Universal Gypsum & Lime Co.* v. *Haggerty*, 21 F. (2d) 544 (W. D. N. Y. 1927)), and National had posted a substantial bond rather than suffer enforcement of a temporary injunction. (FF. 12, R. 4138-4139).

Avery told Holland that it was not USG's policy to infringe patent rights and that he would investigate the claim. Holland continued to discuss with Avery separately the matter of the alleged infringement of the Haggerty and Hite starch patents. As a result of these discussions, USG

agreed to purchase and did purchase these patents (FF. 12, R. 4139).

In August 1929, USG announced its arrangement to purchase the Haggerty and Hite patents and offered all of its licensees new licenses which would replace the prior license contracts and include in one document the outstanding patents of the earlier licenses, the Haggerty and Hite patents, and the applications for patents on the Roos bubble board invention. This offer was made subject to the approval of the District Courts hereinafter referred to (FF. 12, R. 4139-4140).

Pursuant to this offer, Niagara on October 8, 1929, Certain-teed on the 15th, National on the 17th, Ebsary on the 18th, and Atlantic on the 21st entered into new patent license contracts with USG which superseded the previous agreements between these companies and USG, and which covered the Haggerty and Hite patents and also the anticipated patents under the Roos and Bayer applications, as well as the unexpired patents of the earlier contracts (FF. 13, R. 4140).

The sale of the Haggerty and Hite patents by Universal to USG was consummated in a contract of November 5, 1929, which also settled a claim of USG against Universal for infringement of USG's partially closed edge patent and the claim of Universal against USG for infringement of the Haggerty and Hite patents, and which gave Universal a license superseding the 1926 license agreement between USG and Universal. Universal was in receivership and the sale was a favorable one from its standpoint because it provided Universal with substantial funds, permitting it to reorganize and emerge from receivership with its accounts paid. The original and ancillary receivership pro-

ceedings were in seven different Federal District Courts and the sale was approved by all of these courts on or about November 5, 1929 (FF. 12, R. 4138-4139).

As mentioned above, USG had in September, 1925, instituted a suit against American for infringement of USG's closed-edge patent. It had also in the same month commenced a suit against American for infringement of the Birdsey patent on partially closed-edge board. American attempted to obtain a more favorable settlement than had been offered to other infringers. USG's infringement suit with respect to the Birdsey patent had been postponed pending settlement negotiations, reinstated, and ultimately tried and decided in favor of USG. Settlement discussions by American were resumed, with renewed efforts to obtain concessions from USG. On November 25, 1929, American finally settled its outstanding litigation with USG on the terms originally offered, *i.e.*, on terms similar to those of the earlier settlements with other companies, and accepted a license from USG similar to the license contracts of the other licensees. American paid in settlement of past infringement approximately $152,000. On April 23, 1930, Kelley Plasterboard Company, Inc. (Kelley) took a similar license. On January 3, 1939, USG consented to the assignment of this license to Newark. Texas did not enter into a license contract in 1929, but continued as a licensee under its license of April 11, 1927, although it was not subject to price control after August 6, 1929, the date of the expiration of the Utzman closed-edge patent, and no effort was made by any defendant or any agent of any defendant to establish or control the price at which Texas sold gypsum board during the period from August 6, 1929, until February 10, 1937, at which time its license of April 11, 1927, expired and Texas accepted a further license contract similar in form

to the November, 1929, contract with the other licensees (FF. 14, R. 4140).

Niagara was acquired by USG in 1929. National acquired Universal in 1935 and Atlantic in 1936. Newark acquired the stock of Kelley in 1937 and merged with Kelley in 1939. Celotex entered the gypsum industry for the first time when it acquired the assets of American in 1939. Upon acquiring these companies respectively National, Newark and Celotex took over the above-mentioned licenses which had been entered into by Universal, Atlantic, Kelley and American with USG (FF. 15, R. 4141).

The foregoing outlines the circumstances surrounding the signing of the main patent licenses involved in this suit.

The companies which became licensees did so because they desired to settle or avoid litigation and to obtain the right to use USG's patents, considering it a business necessity to be able to do so. Several of the licensees had made the closed-edge board before they acquired the right to do so from USG, for which infringement of the Utzman patent they paid substantial damages. Also some of the licensees had manufactured board containing starch, which was covered by the Haggerty patent. Numerous other patents included in the licenses were essential to the manufacturing of modern gypsum board (FF. 36, R. 4149).

Under each license royalties were paid and USG reserved the right to establish the minimum prices of patented gypsum board made and sold by each licensee thereunder. ith the limitation that the minimum prices would not be more than those of USG to its own trade in the same market. Under the earlier licenses, price control was limited to gypsum board made under the Utzman closed-edge patent, and such control terminated at the expiration of that

patent on August 6, 1929, although such licenses were to continue until February 10, 1937, the date of the expiration of the Utzman machine patent (FF. 8, 10, R. 4135-4137). Under the later licenses, price control was operative only with respect to gypsum board made under product patents such as the Haggerty starch patent or, when issued, the Roos "bubble board" or foam patents (R. 4405).

From time to time minimum price bulletins were sent out by USG to its licensees under the various license contracts. The price bulletins were at all times limited in their application to patented board manufactured and sold by each licensee under its license. The price on board was calculated on the basis of a mill price plus freight from the nearest mill (freight-wise) to the point of destination. The bulletins provided for prices on various quantities of board such as carloads, less than carloads and truckloads. In particular markets, such as metropolitan areas, where it was economic to deliver gypsum board in truckload quantities, prices were established for such quantities and the areas in which such prices were to apply were defined. Outside of such areas a higher price was fixed. Provision was made in various instances for a variation in price to cover pool car shipments, railroad switching charges, and "pick-ups" at a mill (FF. 18, R. 4143).

The bulletins also contained provisions purposed to prevent the violation of the minimum price requirements through such devices, in connection with a sale of patented board, as the giving away of board as "dunnage", making advertisement allowances to the customer, granting fictitious damage claims, splitting commissions with the customer by commission salesmen, paying unearned warehousing charges, fictitious hiring of customers' trucks,

giving away plaster or other products, or the sale of such products at a price unusually below the licensees' prevailing market price (FF. 18, R. 4143).

During the periods when price bulletins were sent out by USG to its licensees, each licensee, in the main, sold gypsum board manufactured by it at the prices and upon the terms and conditions stated in the bulletins. No bulletins have been sent out since July 8, 1941 (FF. 19, R. 4143).

In 1932 USG set up as a department a wholly owned corporation called the Board Survey Company. Its function was to receive complaints of license violations, to investigate the facts, call them to the attention of the licensee involved, and upon occasion to the attention of the licensor USG. Board Survey Company was organized by USG for the purpose of bringing about compliance with the licenses. The licensees had no part in its formation, management, or operation. From time to time a representative of USG, as licensor, met with representatives of the licensee companies for the purpose of explaining to them the provisions of the minimum price bulletins and for the purpose of securing adherence to such minimum prices by the licensees (FF. 20, R. 4143-4144).

In addition to the main board license agreements, certain additional contracts relating to metallized board and perforated lath were executed.

At various times in 1934-1935 USG as owner of Roos Patent 1,914,345 and other patent rights covering the use of metallic foil as a thermal insulating element in board granted licenses to other companies. National executed such a license on October 5, 1934, Kelley on October 12, 1934 (USG on January 3, 1939, consented to the assignment of this contract to Newark), Certain-teed on Novem-

ber 2, 1934, Atlantic on November 30, 1934, American on December 4, 1934 (assigned to Celotex on April 12, 1939), Universal on April 4, 1935 and Ebsary on August 14, 1935. In these contracts USG granted licenses to make, use and sell board having a metallized surface embodying the inventions disclosed and claimed in the patents and patent applications covered by the contracts, and reserved the right to fix the minimum prices on board embodying the inventions in question, but at not more than USG's own price in the same market (FF. 16, R. 4141-4142).

Similarly, USG was the owner of Roos Patent No. 1,938,354 covering a fire resistant gypsum board referred to above as perforated lath. USG granted licenses to Certain-teed on June 8, 1936, American on July 10, 1936, Ebsary on February 2, 1937 and Kelley on June 23, 1937, for the manufacture, use and sale of this lath. The terms of these licenses were substantially similar to those of the metallized board license contracts. Later USG offered a revised perforated lath license to licensees, royalty free, *i.e.*, extended an offer to include the perforated lath patent in the main board license agreement at no additional royalty. Such revised licenses were accepted by Certainteed, Ebsary and Kelley. On January 3, 1939, USG granted Newark, which had merged with Kelley, a royalty free perforated lath license, at the same time canceling the Kelley revised license (FF. 17, R. 4142-4143).

The Government's Charges and Their Disposition by the Court Below

The Government charged that the license agreements entered into between USG as licensor and the other de-

fendants as licensees are not within the rule of the *General Electric* case[12] and are therefore illegal restraints of trade.

The Trial Court held that there is no substantial distinction between the instant case and the *General Electric* case: (a) in respect of the nature of the patents which underlie the license agreements; (b) in the fact that here a number of licenses with price control provisions were executed; and (c) in respect of the terms and conditions of the license agreements and price bulletins. As to (a), the Trial Court held that the patents here, although on different materials, are of similar character and bear a similar relationship to the industry and the development thereof as in the *General Electric* case. The patents principally involved in the instant case cover as completely the patented product as those principally involved in the *General Electric* case (FF. 25, R. 4146). As to (b) the Trial Court ruled that a patentee does not enlarge his patent monopoly by licensing a plurality of licensees (Conclusions of Law 2, 3, R. 4167). As to (c) the Trial Court held that the terms and conditions of the license agreements and price bulletins in the instant case as compared with the terms and conditions, including price provisions, in the *General Electric* case, disclose no material distinction. If there is any difference between the two, it is in the greater stringency and complexity of those in the *General Electric* case (FF. 27, R. 4147).

The Government charged that the license contracts, even if valid on their face, were not *bona fide* but were executed by defendants merely to give color of legality to a combination to restrain trade in gypsum products. The Trial Court found that the Government failed to establish that the agree-

[12] *U. S. v. General Electric*, 272 U. S. 476, *supra*.

ments were not made in good faith or were intended only as sham agreements to disguise illegal purposes. On the contrary, it affirmatively found that the license agreements were executed as *bona fide* agreements and were intended to bind each party to the promises made therein and were not sham agreements executed to disguise illegal purposes (FF. 30, R. 4148). The Trial Court specifically found that the license agreements were executed upon the faith of the *General Electric* and *Bement*[13] cases (FF. 31, R. 4148), that the licensees paid substantial damages for past infringement of patents and substantial royalties under the licenses (FF. 32, R. 4148), that USG insisted upon the same terms from all licensees (FF. 33, R. 4148-9), that the negotiations leading up to the various licenses were open and above board (FF. 34, R. 4149), that the licenses were enforced (FF. 35, R. 4149), that the companies which became licensees did so to settle or avoid litigation and obtain the right to use USG's patents, considering it a business necessity to be able to do so (FF. 36, R. 4149) and that each of the licensees decided to take a license independently of the other companies and without regard to what other companies did (FF. 37, R. 4150).

The Trial Court found that the evidence introduced by the Government did not establish that the license agreements were lacking in good faith because executed with intent to accomplish restraints of trade beyond the proper limits of the patent monopoly, by illegally raising and fixing at arbitrary and non-competitive levels the prices of gypsum board, by accomplishing improper standardization of gypsum board and its method of production, by raising, maintaining and stabilizing the level of prices of unpatented

[13] *Bement* v. *National Harrow Company*, 186 U. S. 70 (1902).

materials—plaster and miscellaneous gypsum products, by effectuating improper restrictions upon distribution of gypsum board, plaster and miscellaneous gypsum products, or by fixing the prices at which manufacturing distributors resell gypsum board (FF. 57, R. 4155).

The Government charged that the actual operations of the defendants were carried beyond the activities contemplated by the agreements as written and into the field denounced by the Sherman Act. The Trial Court held that the actual operations of the defendants under the license agreements were not carried beyond the proper limits of the patent monopoly and licensing thereunder, nor beyond the activities contemplated by the agreements as written, nor into the field denounced by the Sherman Act (FF. 86, R. 4160-1).

SUMMARY OF ARGUMENT

The establishment by a patentee of a minimum price for his licensee on the patented product made and sold by such licensee is a fundamental right under the patent law and is not an illegal restraint of trade.

The privileges granted by the Government under the patent laws create a limited monopoly. But the patent monopoly is not the "obnoxious" monopoly which was unlawful at common law and which was the object of the Sherman Act. The patent laws and the Sherman Act are not in conflict. Any monopoly or restraint of trade which is within the area of the patent coverage is not rendered unlawful by the Sherman Act.

The area of a patentee's power to exclude others is bounded by the claims of the patent. Within that area of exclusion the sanctions of the Sherman Act do not apply. The patentee may share that area of exclusion with another.

by way of license. In granting such a license the patentee may impose any restriction or condition which is not more restrictive of free competition than the patent itself. Accordingly a restriction on a licensee's price in respect of his sales of the patented article made under the license is a proper restriction and not outlawed by the Sherman Act. These considerations were recognized by this Court in the *General Electric* case.

The *General Electric* case was correctly decided. The doctrine that price control of a licensee is reasonably within the reward which the patentee by the grant of the patent is entitled to secure has not been changed or modified by subsequent decisions. All subsequent references by this Court to the *General Electric* doctrine recognize its soundness.

The doctrine of the *General Electric* case should not be overruled. The right of a patentee to charge a non-competitive price is the most important element of value in a patent. A patent license without a price limitation permits the licensee to destroy this main value of the patent. Consequently if the *General Electric* doctrine is overruled it is inevitable that patentees will grant no licenses. The ultimate result will be a lessening instead of an increase of competition. If it is desirable to change the rule of law recognized by the *General Electric* case, the change should be made by Congress, rather than this Court. Numerous bills have been introduced in Congress to effect such a change but none of them has been adopted.

The case at bar cannot be distinguished from the *General Electric* case. The principal patents involved in the licenses here are product patents of substantial value. They cover important developments in the manufacture of gypsum

board just as the three principal patents which were involved in the *General Electric* case.

The *General Electric* case cannot be distinguished upon the ground that in it there was involved only one license with price control whereas in the instant case there are several licenses. The reason behind the decision did not turn on the question of the number of licenses. If price control is proper for one license it is proper for a plurality of licenses. The exclusion of the public from the field marked out by the patent is complete, whether there be no license, one license, or many licenses.

The *General Electric* case cannot be distinguished in respect of the provisions for controlling the prices and terms and conditions of sale of the licensee. The *General Electric* decision sanctions the establishment not only of a price but also terms and conditions incidental thereto. The price provisions in the instant case are no more restrictive than those which existed in the *General Electric* case.

The Trial Court's procedure under Rule 41(b) of the Rules of Civil Practice was correct. Moreover, it properly held that the Government had the burden of establishing the unlawful conspiracy charged in the complaint. It also correctly applied the rule that declarations of one alleged co-conspirator are not binding upon another unless a conspiracy is established by evidence *aliunde* the declarations and even then only when the declarations are in furtherance of the common purpose.

The Trial Court's findings of fact were amply supported by the evidence and are not subject to review in this Court. The Government's statement of alleged facts is distorted, inaccurate and misleading.

There is no authority, statutory or otherwise, for one branch of the Government (the Department of Justice) to

review the determinations of another (the Patent Office) on matters entrusted to the latter by law. The Government may not attack its own patent grant for reasons other than fraud and contend that persons who relied upon such grants in good faith have violated the anti-trust laws. Accordingly, the Court below properly ruled that the Government in an anti-trust action may not review the determinations of the Patent Office and attack the validity of patents relied upon as a foundation for license agreements.

ARGUMENT

Point I.

THE ESTABLISHMENT BY A PATENTEE OF A MINIMUM PRICE FOR HIS LICENSEE ON THE PATENTED PRODUCT MADE AND SOLD BY SUCH LICENSEE IS A FUNDAMENTAL RIGHT UNDER THE PATENT LAW AND IS NOT AN ILLEGAL RESTRAINT OF TRADE.

(a) It Was Correctly Held in the General Electric Case that an Integral Part of the Patent Grant is the Right to Fix the Licensee's Price.

The doctrine of the *General Electric* case should be considered in the light of certain principles of the patent laws and the anti-trust laws which, while elementary, will bear recital here. Since 1790,[14] 100 years prior to the passage of the Sherman Act, the Congress of the United States has exercised its constitutional prerogative "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries."[15]

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[14]The first patent statute was enacted on April 10, 1790, during the Second Session of the First Congress. I Statutes at Large 109.

[15]United States Constitution, Art. I, Section 8, Clause 8.

In formulating the patent grant, Congress gave a right of exclusion rather than the right to make, use and sell the patented invention. "The franchise which the patent grants, consists altogether in the right to exclude everyone from making, using or vending the thing patented, without the permission of the patentee." *Bloomer* v. *McQuewan*, 14 How. 539, 549 (1852). "The patent grant is not of a right to the patentee to use the invention, for that he already possesses. It is a grant of the right to exclude others from using it." *Special Equipment Co.* v. *Coe*, 324 U. S. 370, 378 (1945).

A patent is a contract between the inventor and the public pursuant to which the former discloses the nature of his invention for all to study and know and at the end of the patent term to practice without restraint, and the latter covenants to grant and to protect the right of exclusion for a limited time. It is a bargain founded upon mutual considerations which should be supported and carried out in good faith by both sides.[16] Otherwise the promotion of the useful arts, which is the interest and policy of every enlightened government, will be defeated.

To the extent that a patent excludes all others from a particular area of trade for a limited time it is termed a monopoly. But it is not the monopoly which historically has been regarded as detrimental to the public welfare or illegal. The patent privilege is distinct from the "obnoxious" monopoly which repressed the rights and liberties of

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[16]In *Grant* v. *Raymond*, 31 U. S. 218, 242 (1832), this Court remarked that "the public faith is pledged" to give the inventor the full benefit of his discovery.

the people and was illegal at common law.[17] "A patent for a useful invention is not, under the laws of the United States, a monopoly in the old sense of the law."[18]

It was neither the purpose nor the result of the Sherman Act that the patent laws should be modified or changed. The background of the Act demonstrates that its sanctions were designed to apply to restraints of trade which were illegal at common law.[19] These, of course, were not such restraints as are set up by the so-called patent monopoly. The Court is familiar with the statement of Senator Sherman, the proponent of the Sherman Act:

> "* * * It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination. * * * A limited monopoly secured by a patent right is an admitted exception, for this is the only way by which an inventor can be paid for his invention."[20]

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[17] As early as the reign of Queen Elizabeth, there had grown up in England a practice on the part of the Sovereign of granting special privileges to merchants and others covering particular areas of trade and particular territories. The granting of these monopolies, also called patents, was greatly abused by the Crown until "there was scarcely a family in the realm that did not feel itself aggrieved by the oppression and extortion which the abuse naturally caused." *Macaulay*, History of England, Vol. I, p. 67. The Statute of Monopolies, passed by the English Parliament in 1623, was the culmination of a struggle against these monopolies. It outlawed the multitude of artificially created monopolies but specifically provided that its declarations should not extend to patents for invention (21 Jac. 1, Ch. 3).

[18] *Attorney General* v. *Rumford Chemical Works*, 2 Bann. & Ard. 298 (1876); *Allen* v. *Hunter*, 6 McLean 303 (1855); Robinson on The Law of Patents, (1890) Vol. I, pp. 51-67.

[19] *Standard Oil Co.* v. *United States*, 221 U. S. 1, 50-1.

[20] 21 Congressional Record 2457 (1890).

The Sherman Act and the Patent Laws are not in conflict because:

> "* * * there can be no monopolizing in the legal and accurate sense of the word where there can be no common occupation. Where in the very nature of things there must be exclusion of all others but one, there can be no monopolizing" (*Patterson* v. *United States*, 222 Fed. 599, 620 (1915) cert. denied 238 U. S. 635).

A patent by its very nature involves restraints of trade which otherwise might be unlawful. This Court has recognized that

> "Of course, there is restraint in a patent. Its strength is in the restraint, the right to exclude others from the use of the invention, absolutely or on the terms the patentee chooses to impose. This strength is the compensation which the law grants for the exercise of invention. Its exertion within the field covered by the patent law is not an offense against the Anti-Trust Act. * * *" (*United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 57 (1918)).

Admittedly parties may sometimes have improperly restrained trade beyond the permissible limits of the patent monopoly but the decisions dealing with such situations consistently uphold the monopoly within the proper area of the patent coverage. In *Boston Store of Chicago* v. *American Graphophone Company*, 246 U. S. 8 (1918) this Court stated (p. 26):

> "* * * nothing in the decided cases to which we have referred, having regard either to the application of the general law or of the patent law, deprives an

inventor of any right coming within the patent monopoly, since the cases alone concerned whether the monopoly of the patent law can be extended beyond the scope of that law or, in other words, applied to articles after they have gone beyond its reach. * * *"

A reconciliation of the apparent conflicts between the patent laws and the anti-trust laws was made in *United States* v. *Motion Picture Patents Co.*, 225 Fed. 800 (D. C. Penn. 1915), appeal dismissed by stipulation, 247 U. S. 524 (1918). The language of the Court is sufficiently pertinent to justify the following quotation. It was said (pp. 804-5):

"A peculiarity of the rights of the owner of a patent, as distinguished from other property, is this: Each has the right to sell that which is his, but the owner of the patent has the exclusive right to sell his patented article. This is, in a very substantial sense, a monopoly. It must be, however, that the monopoly here meant is not the monopoly condemned by the act of 1890. To hold otherwise would clearly be, as counsel for defendants urge, a logical absurdity, because there can be no such thing as restraint in a trade which has no existence, and a monopoly created by law, in pursuance of a policy of the law, cannot be said to result from such restraint. * * *

"The solution of the problem is to be sought by finding the special field of operation of each of these laws. There is a field of trade, the sole occupancy of which may be in a patentee. Here he is supreme, and the keeper of the gate of entrance. There is another field which is in the common occupancy of all. Where the law has given the whole field to a patentee, with the express right of exclusion of others, and the use of the power of the law to enforce

the exclusion, it is unthinkable that such exclusion is an illegal restraint of trade."

In the instant case the basic problem likewise is to find the particular field of operation of both the patent laws and the anti-trust laws as applied to the patent license agreements and activities of defendants here. More precisely, the question here is whether a patentee who agrees to share his patent monopoly with another on condition that his licensee maintain a minimum price on the patented article made and sold by the licensee is protected by the patent laws or condemned by the anti-trust laws.

It has been said that within the area of his invention, the patentee is supreme. The area of his power to exclude others is bounded by the claims of his patent. He may practice his invention by himself and reap what reward he can from being the sole maker and seller of the patented article. If he chooses, he may do nothing to exploit or practice his invention and, like a dog in the manger, exclude all others from the field of his control for the statutory period of 17 years. *Special Equipment Co.* v. *Coe*, 324 U. S. 370, *supra*. Or he may share his rights with others by way of license. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175 (1938).

A license is simply an agreement by which the patentee allows another to enter a part or all of the area of exclusion of his patent. Such an agreement does not conflict with the anti-trust laws any more than does the patent itself. In fact there is less conflict, for a license promotes competition by giving the public the benefit of two or more sources of supply where there was but one before. The common occupation in the field of the patent by the patentee and one or more licensees is fully in accord with freedom

of competition because, absent the license, the field would belong exclusively to the owner of the patent.

Since a patent license agreement is a sharing of the patent monopoly it too partakes of the characteristics of monopoly and must be considered in the light of the patent privilege rather than the rules of ordinary commercial transactions. Inevitably a patent license agreement contains restrictive provisions which, but for the patent, would be of questionable legality. But a patent license restriction which is operative only within the area of exclusion of the patent does not impinge upon the competitive guarantees of the anti-trust laws. Where the law grants the right to exclude all others and also the right to license others fully to practice within the field of exclusion, it cannot be unlawful for the parties to act between these extremes and for the patentee to yield and the licensee to accept but a portion of the patented field. In other words, a restriction or condition of a patent license cannot be unlawful so long as it is not more restrictive of free competition than the patent itself.

These fundamental concepts establish the legality of a license provision restricting the price of the licensee on his sales of the patented product made by him. Since the patent owner has a monopoly, theoretically every sale of the patented product would be an unreasonable restraint of trade.[21] But even the anti-trust Division has not yet contended that the prohibitions of the anti-trust laws extend to sales of the patented product by the owner of the patent himself. If it is lawful for the patentee to control his own price within the area of monopoly, no greater

[21]The point was made in *United States* v. *Aluminum Co. of America*, 148 Fed. (2d) 416, 427-8 (C. C. A. 2d, 1945).

restraint is imposed on free competition to permit the patentee to control the price of the licensee who is permitted to share the field of the patent. The position of the public in respect of price competition is certainly no worse than it was before the license. And as we have indicated before the public is otherwise benefited, for with each license there is an additional source of supply of the patented article with possibilities of better quality, more efficient service and the like.

The logic behind sustaining the right of a patentee to impose price restrictions on his licensees was recognized by the Court in *United States* v. *General Electric Co.*, 272 U. S. 476, *supra*, as follows (pp. 489-491):

> "But the question is a different one which arises when we consider what a patentee who grants a license to one to make and vend the patented article may do in limiting the licensee in the exercise of the right to sell. The patentee may make and grant a license to another to make and use the patented articles, but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. He owns the material of them and may use them. But if he sells them, he infringes the right of the patentee, and may be held for damages and enjoined. If the patentee goes further and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and

vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself.' He does not thereby sell outright to the licensee the articles the latter may make and sell, or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell.

"This question was considered by this court in the case of Bement v. National Harrow Co., 186 U. S. 70, 22 S. Ct. 747, 46 L. Ed. 1058. A combination of manufacturers owning a patent to make float spring tooth harrows, licensed others to make and sell the products under the patent, on condition that they would not during the continuance of the license sell the products at a less price, or on more favorable terms of payment and delivery to purchasers, than were set forth in a schedule made part of the license. That was held to be a valid use of the patent rights of the owners of the patent."

The foregoing discussion demonstrates, we submit, that the *General Electric* case was correctly decided and that the inevitable conclusion is that under our patent system, a patentee may impose price restrictions on his licensee.

(b) The Doctrine of the General Electric Case has not been Changed or Modified by Subsequent Decisions.

The recent decisions of this Court do not detract from the fundamental proposition that the owner of a patent

may establish the minimum price at which his licensee may manufacture and sell the patented product, originally upheld in *Bement* v. *National Harrow Company*, 186 U. S. 70 and reaffirmed in the *General Electric* case.[22] In fact, all later references by this Court to the *General Electric* doctrine recognize its soundness.

In *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27 (1931) this Court held that a patentee cannot provide as a condition of a license that unpatented materials used in connection with the invention should be purchased only from the patentee but nevertheless recognized that a patent owner "can grant licenses upon terms consistent with the limited scope of the patent monopoly. *United States* v. *General Electric Co.*, 272 U. S. 476, 489" (283 U. S. at p. 31).

In *General Talking Pictures Co.* v. *Western Electric Co.*, 304 U. S. 175 (1938), on rehearing, 305 U. S. 124 (1938), further rehearing denied, 305 U. S. 675 (1939), this Court stated when the case was first heard:

> "Unquestionably, the owner of a patent may grant licenses to manufacture, use or sell upon conditions not inconsistent with the scope of the monopoly" (304 U. S. at p. 181).

On rehearing of the same case it was stated:

> "That a restrictive license is legal seems clear. *Mitchell* v. *Hawley*, 16 Wall. 544. As was said in

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[22]The rule has been uniformly applied in the lower courts in many cases including *Straight Side Basket Corp.* v. *Webster Basket Co.*, 82 Fed. (2d) 245 (C. C. A. 2d, 1936); *General Electric Co.* v. *Willey's Carbide Tool Co.*, 33 Fed. Supp. 969 (D. C. Mich. 1940); and *United States* v. *Wayne Pump Co.*, 44 Fed. Supp. 949 (N. D. Ill. 1942).

> *United States* v. *General Electric Co.*, 272 U. S. 476, 489, the patentee may grant a license 'upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.' The restriction here imposed is of that character." (305 U. S. at p. 127).

In *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208 (1939), this Court held that certain restrictions in motion pictures' distributors' licenses to exhibitors had exceeded the scope of the copyright monopoly but referred to the *Bement* and *General Electric* cases and recognized that

> "a patentee has power to control the price at which his licensee may sell the patented article * * *" (306 U. S. at p. 228).

In *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436 (1940), this Court held that the effort to fix the resale price of jobbers was improper but no question was raised as to the provision in the licenses to the refining companies by which the licensees were required to sell "at a certain fixed price differential above the average net sales price of the licensees' best non-premium grade of gasoline" (309 U. S. at p. 448). In the opinion in that case, this Court stated:

> "The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using, or selling his invention. R. S. § 4884, 35 U. S. C. § 40. The extent of that right is limited by the definition of his invention, as its boundaries are marked by the specifications and

claims of the patent. *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502, 510. He may grant licenses to make, use or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give." (309 U. S. at p. 456).

In *United States* v. *Masonite Corporation*, 316 U. S. 265 (1942), this Court disapproved the *del credere* agency arrangement of the "hardboard" industry, but said that the case did not present

> "any question as to the validity of a license to manufacture and sell, since none of the 'agents' exercised its option to acquire such a license from Masonite. Hence we need not reach the problems presented by *Bement* v. *National Harrow Co.*, 186 U. S. 70, and that part of the *General Electric* case which dealt with the license to Westinghouse Company. * * *" (316 U. S. at p. 277).

In *United States* v. *Univis Lens Co.*, 316 U. S. 241 (1942), this Court held that the attempt to fix the price of a patented article beyond the first sale constituted an improper extension of the scope of the patent monopoly but this Court in no way rejected the proposition announced by the lower Court (41 Fed. Supp. 258) as follows:

> "Nor does the owner of a patent violate the Sherman anti-trust law by fixing prices in license agreements under which articles may be manufactured and sold by the licensees." (41 Fed. Supp. at p. 264).

In *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944), and *Mercoid Corporation* v. *Minneapolis-Honeywell Co.*, 320 U. S. 680 (1944), this Court was dealing with combination patents covering installed heating systems which neither the patent owner nor the licensees sold or installed. It was held that the monopoly of the combination patents could not be extended to impose restrictions on unpatented parts of the combination but this Court in no way disavowed the doctrine of the *Bement* and *General Electric* cases.

That the doctrine of the *General Electric* case has not been changed or modified by subsequent decisions was recognized in the expression of Mr. Justice Frankfurter in a dissenting opinion in *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402 (1947) as follows:

> "It is not questioned that a price-fixing clause in a license to manufacture under a valid patent falls outside the interdict of the anti-trust acts. *Bement* v. *National Harrow Co.*, 186 U. S. 70. The power to fix the price of patented articles is part of the patent grant. It is a mode of maintaining the integrity of a patent and as such is sanctioned by public policy. * * *"

(c) The Doctrine of the General Electric Case Should not be Overruled.

In subdivision (a), *supra*, we considered the logic and reasonableness of the decision in the *General Electric* case. A significant factor underlying the decision is that a normal and lawful incident of the patent monopoly is the ability of the patentee to establish his price as high as possible and without concern for the competition of others. "One of the valuable elements of the exclusive right of a patentee

is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory."[23] The right of a patentee to charge a non-competitive price is the chief element of value in his right of exclusion. It lies at the foundation of the patent right. Congress may have rewarded patentees for the disclosure of their inventions with specific grants of money or other property. Instead a monopoly for a limited period was given. Congress felt that this was the best way to reward a patentee commensurate with the value of his discovery. If his discovery was such that it resulted in great public demand and that other articles could not be used in substitution, obviously his profit was greater for he could charge more. The value of the patent varies in each case with the importance of the discovery, but it always depends on the right to charge a non-competitive price.

When a patent is shared with a licensee, the value of the patent is destroyed unless the licensee's price is restricted. Otherwise the licensee is a competitor with his licensor and able to cut his price and take his trade so long as any premium is charged for the invention itself. It is obvious from what we have said that if the owner of the patent has been able to charge a substantial premium because of the importance and novelty and usefulness of the patented product, his licensee, if unrestricted, has the power entirely to destroy that advantage.

It is no answer to argue that the patentee may protect himself against underselling by his licensee by charging royalties (Gov. brief, p. 264). The Government forgets principle for opportunity in making this argument since it

[23] *United States v. General Electric Co.*, 272 U. S. 476, p. 490, *supra*.

would seem that if a price restriction in a license is unlawful, so too is a royalty restriction, especially if maintained to influence the licensee's price. Furthermore, the argument loses sight of the fact that a royalty is the consideration for *sharing* the monopoly of the patent—not destroying it. A royalty cannot be realistically considered as a protection against price cutting by the licensee. To be such it would have to be assumed that the costs of production of licensor and licensee are identical and in addition that a licensee would not reduce his margin of profit to gain an advantage over his licensor. A licensee might well absorb the royalty and still cut prices by reducing his own margin of profit. An increase in royalty to the point where it wiped out any margin of profit would undoubtedly destroy the possibility of price cutting but by the same token it would destroy the value of the license.

The inevitable consequence of overruling the *General Electric* doctrine will be that patentees will no longer license others to share their monopolies. The net result then of a change in the law, requested in the name of free competition, will be instead a reduction of competition and a corresponding concentration of all trade controlled by patents in the hands only of the patentees.

The present record is replete with evidence, and the Trial Court found, that USG insisted as a condition of granting licenses that it should have the right to establish the minimum price of the patented product made and sold by the licensees (FF. 33, R. 4148-4149). If the parties had been unable lawfully to agree upon such a condition there would have been no licenses and the many licensees would have been unable over the years to supply their customers with the improved products. We may speculate on what would have been the result. The licensees might have gone

out of the gypsum board business leaving the field entirely to USG. They may have infringed and thereby subjected themselves to immense damages.[24]. They may have attempted to compete with inferior products with the probability of bankruptcy (see FF. 60, R. 4155). One thing seems certain and that is neither the position of the public nor the competitive situation would have been enhanced.

The Government's request that the *General Electric* case be overruled thus involves a complex problem of economic policy. The ramifications of the problem need only be alluded to to show that this Court is not an appropriate place to urge such a drastic change in the law. This Court has no facilities for determining how many industries are affected by patents, how many licenses with price control provisions exist, how many licensees would be thrown out of business if price controls were outlawed, and how much competition would be lost rather than gained. These are obviously matters that should be investigated and considered by the legislature which can then decide to what extent, if any, the law should be changed. That at least is our tradition in government.

The Government has argued that the *General Electric* case should be reconsidered because it was based upon the *Bement* case and because certain general principles mentioned in the latter case have since been modified. In the *Bement* case reference is made to the case of *Heaton-Peninsular Button Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. 288 (C. C. A. 6th, 1896) which, like *Henry* v. *A. B. Dick Company*, 224 U. S. 1 (1912) held that since

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[24]The aggregate damages collected by USG for past infringement was in excess of $700,000 (FF. 6, 7, 9, 14, R. 4135-4140).

a patentee has the complete power of exclusion he can impose any condition upon a licensee including conditions which would enlarge his patent monopoly so as to include unpatented materials. These cases were overruled in 1917 by the decision in *Motion Picture Patents Company* v. *Universal Film Manufacturing Company*, 243 U. S. 502. The Government thus contends that the *Bement* case has been discredited. What the Government fails to point out is that precisely this same argument was made nine years after the *Motion Picture Patents* case in the *General Electric* case. This Court then stated in answer to that argument that the overruling of the *Dick* and *Button Fastener* cases by the *Motion Picture Patents* case did not carry with it the overruling of the *Bement* case. *United States* v. *General Electric Company*, 272 U. S. 476, 493, *supra*. The reasoning of the *Dick* and *Button Fastener* cases was not invoked in the *General Electric* case. There the decision proceeded on the theory that a patentee may impose conditions upon his licensee which are reasonably within the reward which the patentee by the grant of the patent is entitled to secure. The test was, not whether the license restriction is convenient or profitable to the patentee wholly without regard to whether the patentee is profiting from or restraining trade beyond the area covered by his patent, but whether it is reasonably adapted to the securing of the pecuniary reward as defined and limited by the patent.

As early as 1912 proposals have been made in Congress to outlaw price restrictions in patent licenses but none of these has been enacted into law.[25] In 1941 the Temporary National Economic Committee recommended that the patent and anti-trust laws be amended to require patentees

[25] H. R. 22345, 62nd Cong. 2nd Sess. (1912).

to grant only unrestricted licenses.[26] Since then, particularly in the last five years, many bills outlawing price restrictions in patent licenses have been introduced.[27] But none has ever been adopted. This record shows that the legislative intent is that the *General Electric* doctrine should be adhered to. In any event it is clear that any change in the doctrine should not be initiated in this Court. The end sought to be achieved is legislative, rather than judicial; the Government's arguments would be more appropriately addressed to Congress. This type of commercial regulation is the duty of the elected representatives of the people which determine both the advisability of and the method for accomplishing the regulation. If Congress should change the attitude which it has had thus far and look upon the regulation here sought as wise, that regulation would operate prospectively and would not produce the serious economic problems that would flow from a court decree. A multitude of patentees and licensees have entered into and long practiced the privileges recognized by the *General Electric* decision. In the instant case the Trial Court specifically found that the license agreements were entered into upon the faith of the *General Electric* and *Bement* cases (FF. 31, R. 4148). It would be unconscionable for any Court summarily to upset these business relationships, wipe out substantial interests in patent privileges,

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[26] Final Report and Recommendations of the Temporary National Economic Committee, Senate Document No. 35, 77th Congress, First Session (1941) pp. 36-7.

[27] S. 2730, 77th Congress, Second Session, 1942; S. 2491, 77th Congress, Second Session, 1942; H. R. 7713, 77th Congress, Second Session, 1942; H. R. 1371, 78th Congress, First Session, 1943; H. R. 3874, 78th Congress, First Session, 1943; H. R. 3462, 79th Cong. 1st Sess. (1945); S. 2482, 79th Cong. 2nd Sess. (1946).

and retroactively subject the parties not only to civil liability in treble damage suits but to criminal penalties as well.

The Government argues that the *General Electric* doctrine produces confusion and uncertainty because it is difficult to determine what price is one "normally and reasonably" adapted to secure the pecuniary reward of the patent. This is a "red herring" argument. In the *General Electric* case this Court held that price control in general, and not any particular price, was a condition normally and reasonably adapted to secure the reward of the patent. This means that the patentee may establish any price he wants. There is nothing "horrendous" in this conclusion.[28] If the price of the patented article is fixed at a high level, fewer people will buy it, as is recognized in the *General Electric* opinion. In such case, many of the public will get along with what they had before the discovery of the particular patent, or purchase substitute materials. This will result in reduced volume in the sales of the patented article. By the same token if the price is fixed at a lower figure, the volume will correspondingly increase and produce a greater pecuniary reward. In every case it is obvious that this reward will tend to be constant no matter what the price is.

Of course the nature and importance of each patent will vary and the reward in each case will depend on the public demand—if great, because of the importance of the discovery, the price may be high—if minor, the premium obtainable for the patented invention will be low. These are but elementary laws of economics which the Government ignores. They demonstrate that there will always be a "ceiling" on the reward of every patent which is measured by

[28]The expression is from page 258 of the Government's brief.

the true value which the public places upon the patentee's discovery. Thus there is no confusion or uncertainty whatever in applying the *General Electric* doctrine.

The Government, however, argues that the instant case furnishes an illustration of the alleged uncertainty which attends the *General Electric* doctrine because, it asserts, the pecuniary reward of USG's patents was increased because the defendants eliminated the competition of open-edge board. That argument simply confuses the issue and is without merit because it injects a factual contention which the Trial Court found on ample evidence was entirely unwarranted (FF. 66, 89, 90, R. 4156, 4161).

The Government similarly confuses the issue by arguing that the *General Electric* doctrine produces uncertainty in testing the reasonableness of terms and conditions of sale, as well as price. In this connection it refers to its claims that licensees were prevented from painting dealers' fences and that the industry is completely regimented. In passing, we note that it failed to prove these claims (FF. 98; R. 4163).

However, there is no uncertainty, as the present case illustrates, in determining whether the terms and conditions of sale are reasonably designed to protect the patent monopoly. The Trial Court recognized, although the Government has never been satisfied to accept what seems axiomatic, that price control encompasses not only the establishment of a price but the establishment as well of incidental terms and conditions of sale. The latter fall into two classes, those factors which directly relate to price such as terms of payment, cost of delivery to various areas, quantity sold, type of product sold, and the like, and price protective provisions designed to prevent indirect price cutting. The Trial Court found that the terms and conditions here were not

materially different from those in the *General Electric* case (FF. 27, R. 4147). The price protective provisions of the instant case did not prevent licensees from painting dealers' fences, or from doing whatever they chose in respect of their customers. What these provisions did was simply to prevent a licensee from breaching his license and cutting the price on board through the indirect device of furnishing the customer with free paint, or any other gratuity used to influence a sale of the patented product. As the Trial Court found, the furnishing of such gratuities was just as much a cut in the price as granting an out-and-out rebate on the purchase price itself (FF. 98, R. 4163).

Next the Government contends that the very nature of patents produces uncertainty in the application of the General Electric doctrine. This contention is unsound because it proceeds on the false premise that the General Electric doctrine applies only to patents covering basic or fundamental inventions. The patentee of any product patent[29] may establish prices under a *bona fide* license without regard to the relative importance of his patent.[30]

The Government attempts further to confuse the issue by suggesting an analogy between a patentee's right to

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[29]Although the licenses in the instant case covered process and machine patents as well as article patents, price control was limited at all times to gypsum board embodying the claims of product patents (see *infra*, pp. 134-135). And in considering the patents, the Trial Court only considered the product patents. Therefore it is unnecessary to consider whether the *General Electric* principle extends to process patents.

[30]As is hereinafter discussed in greater detail the Trial Court here found on overwhelming evidence that the principal patents involved in the licenses were product patents and "covered fundamental developments in the gypsum board manufacturing industry" (FF. 24, 25, R. 4146), and further, that the licenses were *bona fide* (FF. 30, 38, 57, R. 4148, 4150, 4155).

control prices under a patent and his right to recover damages in infringement cases. It asserts that the rule is that damages for infringement of an improvement patent are withheld unless the patentee can show in what particulars his invention has added to the usefulness of the infringing machine and that he must separate its results distinctly from those of other parts of the machine not covered by his patent (Gov. brief, p. 241). The Government contends that the right of price control should be similarly withheld. It is sufficient answer to this contention that the rule of damages and the three cases cited by the Government in support of it do not represent the present law as this Court in *Westinghouse Electric & Mfg. Co.* v. *Wagner Electric Mfg. Co.*, 225 U. S. 604 (1912) squarely held. The correct rule is that a patentee is entitled to all the profits realized from the sale of products containing his invention except that the defendant may show, if possible, what part of the profits were not attributable to the invention.

Finally, the Government inquires rhetorically as to what happens when several patentees have patents on a single article and they all attempt to establish a price (Gov. brief, p. 236). The answer is quite simple. Under our patent system it frequently happens that a manufacturer wants to produce an article which is covered by two or more patents owned by different persons. In order to do so without infringing, he must get a license from all the patentees. If he cannot get a license from all he cannot practice all the inventions in his manufacture. Price control makes his problem no more difficult. The obvious arrangement for him would be to have the price control provision of the multiple licenses take the form of the establishment of a minimum price. This is the usual form in any event. Under

such an arrangement the manufacturer would satisfy all licenses by selling at the highest price established by any one patentee.

From the foregoing, it is clear that the only uncertainty in the application of the *General Electric* doctrine is that generated by the efforts of the Government to discredit the case.

Point II,

THE CASE AT BAR IS INDISTINGUISHABLE FROM THE *GENERAL ELECTRIC* CASE.

(a) In Respect of the Nature of the Patents.

In the *General Electric* case a statement appears in the discussion of the facts to the effect that three of the licensed patents—the Just & Hanaman patent covering the use of tungsten filaments in the manufacture of electric lamps; the Coolidge patent covering a process of manufacturing tungsten filaments by which their tensile strength and endurance are greatly increased; and the Langmuir patent covering the use of gas in the bulb, by which the intensity of the light is substantially increased; "cover completely the making of the modern electric lights with the tungsten filaments, and secure to the Electric Company the monopoly of their making, using and vending."[31] The Government has seized upon the words "cover completely" as the basis for an argument that it was the unusual nature of the patents which prompted the Court's decision and that price

[31] *United States* v. *General Electric Co.*, 272 U. S. 476, 481 *supra*.

control is not justified here because the patents are not on gypsum board but on improvements therein such as the closed-edge, starch and foam (Gov. brief, pp. 221-224).

There is no justification whatever for an argument that the *General Electric* doctrine turned upon the Court's remark that the patents completely covered the making of the incandescent electric lamp. The record in that case shows that the *General Electric* patents referred to covered improvements comparable to those in the case at bar.[32]

The incandescent electric light was invented in 1880 by Thomas Edison and the original patents for such lamps had long since expired at the time of the General Electric-Westinghouse license in 1912. The light giving element in the lamp of 1880 was a carbon filament. In 1904, an improved carbon filament known as the "metallized carbon filament" was invented. Next a tantalum filament lamp was introduced. It reduced the consumption of current by about one-third as compared with the ordinary standard carbon filament lamp, but it was not a satisfactory lamp for use on alternating current. Thereafter a tungsten filament incandescent electric lamp was introduced and was thereafter developed to such an extent that it consumed only about one-third of the current consumed by the carbon filament lamp in its best form and less than one-half of that consumed by the metallized carbon lamp for the production of an equal amount of light.

However, the patents covering the tungsten filament lamp were not "basic" in the sense that they covered a fundamentally new and basic invention covering completely an

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[32] *General Electric* Record on Appeal, pp. 88-90.

incandescent electric lamp. They were for improvements upon the original invention of Edison of 1880.[33]

The tungsten filament manufactured under the Just & Hanaman patent of 1912 was very brittle and consequently it was expensive to manufacture and easily broken in shipment and use. In 1913, Coolidge, by improvements described in his patent, increased the tensile strength and endurance of the tungsten filament. In 1916, Langmuir, by what is set forth in his patent, further improved the incandescent electric lamp by the introduction of gas into the bulb and his improvement was used in many, but not all, of the tungsten filament lamps made.

Thus the three patents specifically mentioned in the decision of the Court in the *General Electric* case covered various features of the incandescent lamp having a tungsten filament, which represented a further development in the incandescent light field over the lamp with carbon, metallized carbon or tantalum filaments. Nevertheless, there were still incandescent lamps made with these latter types of filament. In fact, at the time the General Electric-Westinghouse license was executed in 1912, about 50% in number of the total lamps sold were of the ordinary carbon filament type.[34] After nine years of operation under the license the percentage of tungsten filament lamps increased because

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[33]In this connection some idea of the extent of the electric lamp art as it existed at the time of the filing of the three General Electric patents may be gained from the fact that the United States Patent Office had issued 725 patents on electric incandescent lamps prior to the filing of the application for the Just & Hanaman patent, 889 patents prior to the filing date of the Coolidge patent, and 924 patents prior to the filing date of the Langmuir patent, as appears from the files of the main subclasses of the United States Patent Office directed to incandescent lamps.

[34]*General Electric* Record on Appeal, p. 862.

of their superior quality, to approximately 97% of total production.[35] Thus General Electric did not have, as the Government erroneously suggests on p. 223 of its brief, a practical monopoly immediately upon acquiring the tungsten filament patent, but only acquired it over the years as the public gradually recognized the superiority of the product.[36]

By these remarks we do not mean to question that General Electric Company occupied a dominant position in the incandescent lamp industry by reason of its patent ownership. It had patents not only on the tantalum filament lamps but also on the carbon and tungsten filament lamps, and the latter were included in the General Electric-Westinghouse license and the licensor reserved the right to fix the price of lamps having metallized carbon filaments and tantalum filaments the same as it did for tungsten filament lamps. The Court in the *General Electric* case drew no distinction as to General Electric's rights as the owner of patents covering different types of lamps. The new patented lamps then referred to by this Court were only steps in the progress of electric lamp production. They were more efficient than the old carbon filament lamp, but were nevertheless based upon

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[35] *General Electric* Record on Appeal, p. 90.

[36] The Government gives a partial and thus misleading quotation from p. 104 of the *General Electric* record on appeal (Gov. brief, p. 223). The full sentence reads:

> "Because of the superiority of the tungsten filament over the carbon filament, the exclusive right to make, use and vend lamps manufactured with tungsten filaments under the aforesaid patents, if valid and lawfully acquired by the General Electric Company, and of the scope indicated by their claims, vested in their owner, the General Electric Company, what has since become a practical monopoly of the manufacture and sale of incandescent electric lamps. * * *"

Edison's original invention.[37] And those lamps are today being displaced by the fluorescent lighting of modern times. This is the history of the development in most arts.

In the gypsum board industry, USG occupies the position held by General Electric in the electric light field. The principal patents of USG upon which the license agreements in the instant case were founded, likewise covered fundamental developments in gypsum board and were essential to the manufacture of modern gypsum board. Among these were the Utzman closed-edge, Haggerty starch, and Roos foam patents. It is to be noted that these patents were upon the entire product, not merely the closed edge or starch or foam, as urged by the Government (Gov. brief, pp. 221-230). It is true, of course, that in the broad sense the inventions were not of an entirely new product,

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[37]Thus, the Court in *General Electric Co.* v. *Laco-Philips Co.*, 233 Fed. 96 (C. C. A. 2nd, 1916), in speaking of the Just & Hanaman patent, at page 105, said:

> "I think the invention here in suit is of great merit, entitled to firm support, and second only to Edison's. Edison found a dim pathway and transformed it into an illuminated road. Just & Hanaman have broadened that road into a boulevard, alive with blazing lights."

But as the new lamp succeeded the old Edison carbon filament lamp, so it too was itself displaced by the Coolidge filament lamp. Thus, in *General Electric Co.* v. *Independent Lamp & Wire Co., Inc.*, 267 Fed. 824 (D. C. N. J., 1920), in speaking of the Coolidge patent, the Court said (p. 828):

> "The ductile tungsten filament has gone into general use, and has in large measure, if not entirely, supplanted all other filaments, including that of Just & Hanaman, for incandescent electric lamps. It is less expensive to produce, yet it has far greater durability and utility than the squirted filament. It is a commercially new product of great utility, having properties and characteristics unknown to the natural and normal tungsten, or, in fact, to any other material."

but by the same token neither were the inventions in the *General Electric* case.

The Utzman closed-edge patent No. 1,034,746 (R. 35-38) contained four claims, all of which were product claims. A reference to one will be illustrative of the others. Thus Claim 1 reads:

> "1. A plasterboard comprising a body, a covering of fibrous material adhering to one face of the body folded to inclose an edge of the body and overlie a portion of the opposite face thereof, and a covering of fibrous material for said opposite face of the body overlying said folded-over portion of the first mentioned covering but having its edge spaced from the edge of the board."

The Haggerty starch patent (R. 64-69) had eight product claims including, for example, the following:

> "1. A wallboard consisting mainly of gypsum and having a paper liner, cooked starch being incorporated with the gypsum, to insure secure adhesion of said paper liner."

> "9. A wallboard consisting mainly of gypsum and having a paper liner, cooked starch being incorporated with the gypsum to insure secure adhesion of the paper liner, fiber being thoroughly distributed throughout the starch to strengthen the board.

> "10. A wallboard consisting mainly of gypsum and having a paper liner, cooked carbohydrate being incorporated with the gypsum to insure secure adhesion of said paper liner."

> "11. A plasterboard, or the like, comprising a body portion of plaster, mixed with a finely comminuted starch product and a covering of paper adhering thereto."

The three Roos foam patents (R. 100-15) contained numerous product claims, for example, in the first patent, claim 9 reads:

> "9. A light weight building material composed of a hard mass of cellular structure which comprises set cementitious material having permanently fixed therein foam cells that possess their original form and which are arranged throughout the structure in foam-like formation."

and in the third foam patent, claim 14 reads:

> "14. A wallboard comprising a porous body of hardened cellular cementitious material enclosing a plurality of voids encased in tough pliable films, and cover sheets between which said cementitious material is interposed."

It is therefore clear that the principal patents in the instant case are product patents covering gypsum board. The Trial Court correctly stated in its opinion (R. 3982):

> "It is true that the gypsum and the paper in gypsum board are as such not patented; but that is equally true of the metal base and the glass of the General Electric tungsten filament lamps. The patents, although on different materials, are of similar character and bear a similar relationship to the respective industries and the development thereof. The patents principally involved in the instant case no less, and no more, cover completely the patented product than do those principally involved in the *General Electric* case."

The Government's criticism of the USG patents is that the inventions contained therein are not sufficiently basic or fundamental to justify price-fixing (Gov. brief, pp. 221-230). In this argument, the Government makes but passing reference to the Trial Court's finding that these patents

covered fundamental developments in the gypsum board manufacturing industry (FF. 24, R. 4145-4146), and entirely disregards the mass of evidence establishing this fact.

The question of whether a patent is of importance cannot be determined by an analysis of the patent itself. All the circumstances surrounding the patent have to be considered. A patent may be basic in the Government's sense as constituting an entirely new product but have no importance or value because the public has no interest in it. Under other circumstances what the Government would call a very minor improvement patent may be of great importance. For example, the increase of tensile strength in a filament appears to be an unimportant improvement yet it revolutionized the incandescent lamp industry. So, too, the discovery of a product which may not be superior at all but which can be manufactured more cheaply may be of great significance.

On the overwhelming evidence in the instant case the Trial Court concluded that the patents covered fundamental developments. The Trial Court found that prior to the Utzman invention of closed-edge board, gypsum board was a rough unfinished product with exposed edges requiring trimming in the course of manufacture and being subject to breakage in shipping and use, with consequent wastage, and that the discovery of closed-edge board solved this problem (FF. 5, R. 4133-4134). The Government assigned no error with respect to this finding (see R. 4180). The Trial Court also found that when the closed-edge board of the Utzman patent came into the market the open-edge board was largely displaced under the demand of the trade for the better product (FF. 24, R. 4145-4146). The evidence not only supports but compels these findings.

Blagden testified that Beaver "had definitely proven that the closed-edge board was the cheapest board to manufacture." "We had tried every other way, and even though we had to pay a royalty we thought it would save us money in the long run" (R. 874). He said that the consumers emphatically demanded the closed-edge type of board (R. 874-875). C. O. Brown testified that closed-edge board was a superior product costing less to make and that it was demanded by the trade (R. 1236). As to the unpatented open-edge board, he said "the trade didn't want it" (R. 1243). Miller testified as to the unpatented open-edge board that it could not be "profitably sold" and that "the trade would not accept it" (R. 1385). Whittemore testified that closed-edge board was so superior that you couldn't even sell open-edge board (R. 1398-1399, 1404). For additional evidence to the same effect see R. 1446-1447, 1455-1456, 2790, 2964-2965, 3479-3481.

Indeed the Government itself alleged in the complaint that closed-edge board represented a substantial improvement over that then on the market and that the consumer demand for it stimulated other manufacturers to produce and market a board with a protected edge (Par. 49, R. 11). The Government can hardly contend now that the closed-edge patent was of little value. The remark of Judge Evans in the opinion in *Bestwall Mfg. Co.* v. *United States Gypsum Co.*, 270 Fed. 542 that he did not agree that the closed-edge board was a "daring conception" is of no consequence. In that case the Utzman closed-edge patent was held valid and infringed and, moreover, the same Judge admitted that the evidence showed that the closed-edge "protected the exposed edge of the gypsum body, prevented waste, strengthened the finished board, increased the output, improved the appear-

ance of the finished product, and reduced cost of production. A very large increase in the production of plaster board followed the appearance of this patented article" (270 Fed. at p. 544).

As to the Haggerty patent, the Trial Court found that the Haggerty starch invention solved the "peeler" trouble in the gypsum board industry and made possible the modern high-speed production of gypsum board (FF. 12, 24, R. 4138-4139, 4145-4146). Whittemore of Certain-teed testified that starch is important in the manufacture of marketable gypsum board and that the only way to prevent "peelers" is to make starch board (R. 1230-1231, 1413-1414). Certain-teed had been using starch for a considerable period and was concerned that it would be held as an infringer (R. 1413). Holland testified that his investigation disclosed that everybody in the industry was infringing the Haggerty starch patent (R. 961). Since Universal was without funds it was unable to institute infringement suits other than the one against National (R. 961-962). This disposes of the assertion of the Government that other companies had been able to compete prior to the summer of 1929 although Universal owned the starch patent (Gov. brief, p. 228). Of course they could compete so long as they infringed.

In the suit by Universal against National on the Haggerty patent, the Court recognized that National would be irreparably injured if it were enjoined from using starch or carbohydrate in its board and therefore permitted it to continue its manufacture under bond (*Universal Gypsum & Lime Co.* v. *Haggerty*, 21 Fed. (2d) 544, 547). A substantial claim for infringement of the Haggerty patent was outstanding against USG (R. 963). Although the record does not show the precise amount, the price received by Univer-

sal upon the sale of the Haggerty patent was "a very large sum of money" which was instrumental in bringing the company out of receivership (R. 964). Other companies found it necessary to use starch to obtain adhesion between the core and the paper liners (R. 1384, 3481-3483).

All of this evidence demonstrates the fundamental character of the Haggerty invention. The Government's suggestion that the "peeler" problem is easily solved by proper inspection is in no way supported by the record reference cited (Gov. brief, p. 229) and is contrary to the fact. Gypsum board is made in a continuous strip which proceeds along a traveling belt and eventually passes through enclosed drying kilns. By the time a run of board emerges from the drying kiln and is inspected and found to be a peeler, thousands of square feet of board may have been wasted (See R. 472-478, 482-485, 2991).

As to the foam patents, the Government is not aided by the fact that cellular cements as a building product were, broadly speaking, known prior to Roos' invention (See Gov. brief, pp. 238-39). Merely creating holes or voids in a plastic mass was not enough in a gypsum building product. Roos' discovery was a cellular gypsum produced by a foam which was pre-made and introduced into the mass thereby creating a foamlike formation so as to leave the same kind of voids in the product as the foam itself and result in a product having cells or voids uniformly distributed throughout and therefore of necessary strength to form the core material of gypsum board.[38]

[38]There is no support for the idea that the first two Roos patents may be disregarded because "they do not read on wallboard." (Gov. brief, pp. 230, 290). The claims cover a "lightweight building material" and are therefore generic to a building material of which gypsum board is one of the species. Consequently it is obvious that the claims read on gypsum wallboard, lath and plasterboard.

Not only the text of the Roos patents (R. 105, 110) but also the testimony of Whittemore (R. 1409-1411) establish that attempts had been made to produce cellular gypsum and particularly cellular gypsum board by mixing an effervescing agent in the gypsum slurry during the course of manufacture. This proved inefficient and uncontrollable (R. 1409).

The Trial Court found that sawdust had become difficult to obtain and was moreover unsatisfactory as an "aggregate" because of variation in quality and character which produced manufacturing difficulties and that the use of the foam of the Roos patents solved these difficulties and produced a superior product with reduced manufacturing costs. No error is assigned with respect to these findings (see R. 4181).

There is ample evidence in the record that the Roos foam patents produced a superior product with reduced manufacturing costs and permitted a lighter weight board which was important in reducing shipping costs (R. 1407-9, 1413, 1414, 1464, 2030, 2790-92, 3481-3482).

Finally, in connection with all the patents, it is to be noted that substantial evidence of their great value lies in the fact that USG collected over $700,000 in damages for infringement, and royalties totaling many times this amount. The precise figure of royalties does not appear in the record but an indication of its size is given by the testimony that Ebsary, one of the smaller companies in the industry, paid approximately $200,000 (R. 3079).

(b) In Respect of the Number of Licenses with Price Control and the Extent of the Manufacture and Sale of the Patented Product under Such Control.

In the *General Electric* case the Court considered the General Electric-Westinghouse license which contained a

provision for price control. The Government argues therefore that the *General Electric* doctrine should be limited to a situation where there is but one license and should not be applied where there is a plurality of licenses extending throughout an industry (Gov. brief, p. 178-180).

In considering this argument, it is to be noted that whereas the General Electric-Westinghouse license was the primary point of conflict in the *General Electric* case it was not a simple, isolated license with insignificant effect upon the electric lamp industry. Actually, the Court had before it a patent license arrangement which encompassed substantially all of the incandescent light industry. It appears from the opinion of the Court[39] that in the year 1921 the relative percentages of the business done by the companies in the industry were as follows: General Electric 69%; Westinghouse 16%; other licensees 8%; and manufacturers not licensed 7%.

Thus as between the licensor General Electric and the licensee Westinghouse, 85% of the electric light business in the year 1921 was subject to the price restrictions of the license between them because, by its terms, the licensor was obligated not to sell at prices lower or on terms and conditions more favorable to the purchaser than those established by the licensor for sales by the licensee.[40] It is true that the General Electric licenses other than the Westinghouse license did not have price-fixing provisions, but they

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[39] *United States* v. *General Electric Co.*, 272 U.S. 476, 481, *supra*.

[40] *General Electric* Record on Appeal, pp. 121, 125. The Government is in error in asserting that there was nothing of this sort in the *General Electric* case. (Gov. brief, p. 253). Upon the principles we have discussed, the patentee may agree not to establish the licensee's price at any higher level than his own.

were restricted in respect of "the amount of lamps licensed to be sold by each such licensee during any one year."[41] The licenses granted by General Electric to Westinghouse and the other licensees contemplated a pro-rating of business between the licensor and all of its licensees, and also included type restrictions.[42]

License provisions limiting the quantity of products which a licensee may manufacture and sell or restricting the type of products may be fully as restrictive as a reservation of price control and, except for the legitimization of a patent, such provisions would be unlawful. Thus in the *General Electric* case the restrictive provisions of the licenses involved 93% of the industry, with actual price-fixing provisions applicable to 85%. These figures largely refute any argument that the *General Electric* case is distinguishable because in the instant case 100% of the gypsum board manufacturers located in the so-called Eastern area were licensor and licensees.

But, in any event, the reasoning of this Court in deciding the *General Electric* case did not turn on the number of price-fixing licenses nor the extent of an industry to which the control of the patented product applied. Its reasoning was as follows: The owner of the patent has a monopoly which excludes all others. He may share that monopoly by a license. It can make no difference so far as the Sherman Act is concerned whether the owner of the patent retains his monopoly or grants one license, or grants many licenses. The field of exclusion is always the same and there is no valid reason why the Sherman Act requires competition within the area of exclusion among licensor

[41] *General Electric* Record on Appeal, p. 92.
[42] *General Electric* Record on Appeal, p. 113.

and a plurality of licensees. This reasoning was adopted by the Trial Court in the instant case which stated that "if the patent laws, despite the Sherman Act, do not legitimatize a monopoly in the manufacture and sale of a patented product by a patentee-licensor and several licensees, they cannot legitimatize a monopoly by the patentee-licensor and one licensee or by the patentee alone, because in each instance the exclusion of the public from manufacture, use or sale within the field marked out by the patent is exactly the same, i.e., complete" (R. 3983).

Much of the Government's discussion of alleged facts has to do with talk among the members of the gypsum board industry; one manufacturer inquires whether a license should be taken, another recommends the license, another complains about the terms, all face large damages for infringement and look for the settlement most beneficial to his own company. That is what the proof adds up to. This cannot constitute unlawful conduct if it is lawful to have a plurality of licenses. If something is lawful, it can scarcely be unlawful to talk about it. These considerations were well stated by the Trial Court in the form of questions to Government counsel (R. 3996-3998):

> "Justice Stephens: * * *
>
> "Let's assume for the moment that the General Electric case means that he can only have one licensee. He cannot enter into an agreement with that licensee without discussion of terms and conditions and prices; so that far, at least, the discussion cannot be illegal. The getting together of the parties cannot be said to be the kind of a conspiracy which is illegal under the Sherman Act because the Sherman Act and the patent laws stand together.

"I have difficulty in seeing, taking the next step, how it can be said that the General Electric case confines a patentee to licensing one licensee—because what difference can it make, if he has a right to retain the whole patent monopoly in himself if he wishes to, whether he divides it with one or divides it with ten or with a hundred. It is still a patent monopoly. The public is excluded except to the extent that he gives it the benefit of the invention by using it himself or by dividing it with licensees. If it then follows from the General Electric case that a patentee can have more than one licensee, again how can it be illegal for the group of licensees or the several licensees to discuss either with him or with each other the terms of license arrangements? In short, how can the law both give and take away with the same hand? It gives the right to enter into either one or a group of patent-license agreements. Does it not necessarily also give the right to do the things that are normally necessary to constitute such agreements—talk about them and discuss the terms? Must a patentee go by stealth and by night to each licensee separately to make out the license agreement and avoid any discussion with the group?

"Moreover, if the suggestions I have made concerning the General Electric case are sound, if it is lawful to enter into a license agreement containing price-fixing terms and conditions in reasonable protection of the patent monopoly with either one or a series or a group of licensees, how can it be illegal to accomplish the inevitable economic consequences of that, which you phrase as blanketing an industry or stabilizing prices, or even producing uniformity in products because the patented product is more likely to sell because of its merit; and if it is not illegal to

> accomplish the normal economic consequences of licensing, how can it be illegal to talk about them and arrange for them in entering into license agreements?"

These questions have never been satisfactorily answered.

It is argued that the *Bement* case on which the *General Electric* decision in part relied expressly pointed out that only one price-fixing license was being considered, and the Government contends that it should be inferred that a different result would have been reached if the record, which was there defective, had shown that there was a plurality of licenses (Gov. brief, pp. 178-180). The point is not well taken. The defendant in the *Bement* case sought to establish that the license contract upon which it was being sued was part of a larger combination in restraint of trade which had been held unlawful in several other cases. But the record did not contain proof of this defense and this Court accordingly held that the one license agreement before it for consideration was valid. In commenting upon the condition of the record however, this Court stated that the defense of illegality would only have been made out (1) if there had been other similar agreements and (2) if such other agreements had constituted an illegal combination (186 U. S. at pp. 94-95). Thus, the opinion makes it clear that the mere plurality of licenses would not have been unlawful.

In *Standard Sanitary Co. v. United States*, 226 U. S. 20 (1912), an instance where there was a plurality of licensees with price-fixing, the arrangements were held unlawful because instead of *bona fide* agreements there was a price-fixing scheme which the parties had sought to cover up under the guise of lawful licenses. Moreover

the arrangements contemplated restraints far beyond the scope of the patent monopoly including resale price-fixing and control of products having no relation to the patents. The arrangements were held illegal for these reasons and not because there was a plurality of licenses covering 85% of the industry.

Finally, the *Masonite* case[43] does not support the proposition that a plurality of patent licenses to manufacture and sell may not contain price control provisions. There the defendant manufacturers had withdrawn from the field of the manufacture of "hardboard" and delegated to Masonite the right to manufacture for the entire industry. Masonite then supplied "hardboard" to all the other members of the industry under a *del credere* system and, of course, fixed the prices at which all should resell the product. This Court held that although a comprehensive *del credere* plan of distribution might be legal, as in the *General Electric* case, where it operated vertically through the normal channels of distribution and applied to those who would normally be the manufacturer's agents, *i.e.*, jobbers and dealers, the system becomes illegal when it is made to operate horizontally through an industry where manufacturing competitors fix prices under the guise of agency arrangements. The fact that "hardboard" was a patented article did not save the arrangement because the disposition of the product by Masonite to the *del credere* agent was tantamount to a sale and exhausted any patent privileges. This Court expressly recognized that it did not have before it

> "any question as to the validity of a license to manufacture and sell, since none of the 'agents' exer-

[43] *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942).

cised its option to acquire such a license from Masonite. Hence we need not reach the problems presented by *Bement* v. *National Harrow Co.*, 186 U. S. 70, and that part of the General Electric case which dealt with the license to Westinghouse Company" (316 U. S. at p. 277).

The Government's great reliance on the *Masonite* case is misplaced. It improperly construes the agency arrangements there as analogous to the agency arrangements considered in the first part of the *General Electric* case and contends that separate lawful agreements became unlawful because they ran throughout the industry. The faulty part of the argument is that the agency plans in the two cases were materially different. The illegality of the *Masonite* case stemmed from the fact that erstwhile competitors became the agents of one company. The decision was not controlled by the fact that there was a plurality of *del credere* agents. The arrangement would have been bad if it was limited to Masonite and one competitor.

(c) In Respect of the Terms and Conditions of Sale.

A summary of the terms and conditions relating to price as set forth in the licenses and price bulletins thereunder both in the instant case and in the *General Electric* case appears in the Trial Court's opinion and will not be repeated here (R. 3945-3947, fn. 13, 3987-3990, fn. 25). A comparison of the provisions in the two cases establishes no material distinction. If anything, the terms and conditions in the *General Electric* case were more detailed and restrictive than those in the instant case. In both cases the licenses were non-exclusive. There was to be no contest of the validity of patents; there were provisions for royalties, records and reports. In both cases the licenses were granted

upon the condition that the licensor should have the right to establish the minimum price at which the licensee should sell the patented product manufactured by it, and such minimum prices were not to be less than those of the licensor. In both cases, in respect of price, there were two classes of provisions; one class dealing with prices as such, the other intended to protect the price fixed, *i.e.*, to prevent indirect price cutting.

In each case the provisions for arriving at a price were formulated in the light of the fact that the actual price at which a product is sold cannot be arrived at merely by fixing an amount, but that other factors which have direct economic relationship to price—such as terms of payment, cost of delivery, including freight charges, quantities sold, type of product sold, and the like must also be stipulated.

It cannot be properly contended that terms and conditions of sale were not considered or passed upon by this Court in the *General Electric* case (Gov. brief, pp. 246-247). Contrary to the Government's statement on page 247 of its brief, error was assigned as to the holding that the licensor could control "the prices and terms of sales of lamps" and as to the failure to hold that the license was unlawful "because it was agreed therein that the licensee would adopt and maintain the conditions of sale, or sales method, in distributing the lamps manufactured by it and moving in interstate commerce adopted and maintained from time to time by the licensor."[44] Indeed one of the main disputes in the case was whether the license required Westinghouse to use the same *del credere* system which was the subject of discussion in the first branch of the case. But this Court

[44] *General Electric* case, Record on Appeal, pp. 873-874.

held that "the result must be the same" no matter which way the disputed question is resolved (272 U. S. at p. 489). It thus appears that this Court did not limit its ruling to price but specifically included "conditions of sale" (272 U. S. at p. 490).

Point III.

THE TRIAL COURT'S RULINGS IN RESPECT OF RULE 41(b), BURDEN OF PROOF, AND THE DECLARATIONS RULE WERE CORRECT.

(a) The Trial Court's Procedure under Rule 41(b) was proper.

Upon the defendants' motion to dismiss at the close of the Government's case under Rule 41(b) of the Federal Rules of Civil Procedure, the Trial Court weighed the evidence, drew inferences therefrom and, having determined that the Government had failed to establish its charges, rendered its decision dismissing the complaint and made findings of fact and conclusions of law. The procedure was in accord with reason, *Lambuth* v. *Stetson & Post Mill Co.*, 14 Wash. 187, 44 Pac. 148 (Sup. Ct. Wash. 1896), and the great weight of authority under Rule 41(b) in particular. *Gary Theater Co.* v. *Columbia Pictures Corp.*, 120 Fed. (2d) 891 (C. C. A. 7th, 1941); *Bach* v. *Friden Calculating Machine Co.*, 148 Fed. (2d) 407 (C. C. A. 6th, 1945); *Young* v. *United States*, 111 Fed. (2d) 823 (C. C. A. 9th, 1940); *cf. United States* v. *Blauner Construction Co.*, 37 Fed. Supp. 968 (D. C. Mass. 1941).

Any question concerning this procedure has been rendered academic by the recent amendments to the Rules of Civil Procedure which now expressly sanction the action of

the Trial Court in respect of Rule 41(b). Although the Government assigned error, this point has now been waived by its withdrawal of assignments of errors Nos. 8 to 11, inclusive (Gov. brief, p. 160).[45] The well-reasoned discussion in the Trial Court's opinion would have disposed of it in any event (R. 3958-3966).

(b) The Government had the Burden of Establishing the Unlawful Conspiracy Charged in the Complaint.

The first 43 paragraphs of the complaint describe the defendants and the gypsum industry (R. 1-9). The next 3 paragraphs bear the heading "Offenses Charged" (R. 9). Under this heading, paragraph 44 charges the defendants, in the language of the statute, with violations of Sections 1, 2 and 3 of the Sherman Act. These violations are given the collective reference of "the combination" (R. 9, 10). In paragraph 45, "the combination" is amplified by allegations that the defendants have combined to fix arbitrary and non-competitive prices for the sale of gypsum products, to standardize the manufacture of gypsum board, to control the distribution of gypsum products and to fix resale prices of manufacturing distributors (R. 10). The complaint then alleges, in paragraph 46, that "the combination" was entered into and carried out by the defendants in part under the guise of license agreements purporting to relate to the use of certain patents owned by USG; that to give color of legality to "the combination", the defendant companies and other companies agreed among themselves to enter into, and did enter into, these license agreements; and that such

[45]The point is mentioned in this brief only because the Government discusses it in a footnote (Gov. brief, p. 172) notwithstanding its waiver of the point.

agreements were not *bona fide* patent license agreements reasonably designed to secure to USG the pecuniary reward for valid patent monopolies, but were entered into and executed for the illegal purposes described in paragraphs 44 and 45 of the complaint. It is then alleged that "the combination is more fully set forth in paragraphs 47 to 120 hereof" (R. 10-11).

In paragraphs 47 to 120 of the complaint the patent infringement litigation and the signing of the patent licenses are set forth in considerable detail and it is further alleged that defendants not only controlled the prices and terms and conditions of sale of gypsum board through the license agreements, but that there were a number of secret side agreements as well (R. 11-31). For example, it is claimed that the parties agreed that the manufacture of unpatented open-edge board would be discontinued, that USG would stabilize and raise the prices on board, that all companies would raise their prices on plaster and miscellaneous gypsum products (par. 77, R. 18-19), that certain procedures of manufacture would be considered within the coverage of the Hite and Haggerty patents for the purpose of permitting price control (par. 86, R. 21), that the manufacture of board would be standardized (par. 93, R. 25), that the distribution of gypsum products through jobbers would be terminated (par. 95, R. 25-26), and that the resale prices of manufacturing distributors would be controlled (par 108, R. 29). Likewise, it was charged that the license contracts were used as a front for fixing prices of unpatented board and to accomplish the alleged illegal side agreements referred to (par. 97-107, R. 26-29). Copies of several of the patents and license agreements are annexed to the complaint as exhibits (R. 35-130).

Paragraphs 121 to 123 set forth the effects of the alleged "combination" and the prayer for relief follows (R. 32-34).

The Trial Court held that the Government had the burden of proving the alleged combination as charged, and overruled a contention that as soon as the Government had proved the execution of the license agreements with price control provisions it had made out its case and the burden was upon the defendants to establish that such price control was valid. It is submitted that the action of the Trial Court was proper.

Under the allegations of the complaint, the alleged violations of law were not in the price control provisions of the patent licenses, nor in the failure of the parties to make patented board under the licenses, but were that the licenses were *non bona fide* and that the operations thereunder went beyond the scope of the patent monopoly in specified ways. Certainly it would be extraordinary to say under these circumstances that proof simply of license agreements with price control provisions made out the Government's case and cast the burden on the defendants of going on to establish that the licenses and the operations thereunder were proper.

As the Trial Court stated in its opinion (R. 4004):

> "Where the Government has pitched its case as carefully and elaborately as it has upon violation of the Sherman Act through the execution of patent license agreements not bona fide, and not designed to secure to USG the pecuniary reward for valid patent monopolies, but executed only for illegal purposes, and where the Government has set forth in such detail as it has the manner of accomplishment, through misuse of patent license agreements, of these illegal purposes, it ought to be required to prove the case it has

thus alleged unless, as said, there is some clear rule of adjective or substantive law which relieves it of this burden."

The Government has been unable to furnish any authority which holds that it should be relieved of the burden of proving its case as charged. Its present brief refers to the proposition that price fixing among competitors is unlawful *per se* and mentions Rule 8(c) of the Federal Rules of Civil Procedure, which lists many affirmative defenses (but none relating to this problem) to be pleaded in a defendant's answer (Gov. brief, pp. 218-221). Obviously this does not establish that the Government, after pleading patents and patent licenses and specific unlawful conduct in connection therewith, can merely introduce the license agreements and cast upon the defendants the burden of establishing that they did not unlawfully restrain trade.

It may be admitted that price-fixing agreements are unlawful in the usual situation which has come before the courts. When disassociated from patents such agreements are unlawful because of necessity they involve an unreasonable restraint of trade. However, price control under patent licenses does not constitute an unlawful restraint of trade. If the Government in the instant case had merely alleged that type of price control, there would have been no sufficient charge of illegality. Something more than that would have had to be pleaded and proved to constitute a violation of law.

The only case cited by the Government having any bearing on the point in question is *United States* v. *Motion Picture Patents Co.*, 225 Fed. 800, *supra*, where a passing remark is made that a defense there asserted on the basis of patent rights was "one in confession and avoidance" (225 Fed. at p. 803). But as the Trial Court herein noted (R.

4005), the pleadings in that case were not described and it cannot be determined whether the charges were, as in the instant case, that the violations of law were accomplished through the misuse of patent license agreements. So far as appears, there may have been no mention whatever of patents or patent licenses in the complaint.

The Trial Court in the instant case properly recognized that the decision in *Patterson* v. *United States*, 222 Fed. 599 (C. C. A. 6th, 1915), *cert. denied* 238 U. S. 635 (1915), was a holding directly contrary to the Government's contention. There it was held that an indictment under the Sherman Act which charged a conspiracy in restraint of trade, and monopolization, by a company, its officers and agents, and alleged that the company had patents covering the products manufactured and sold, must also negative that the trade and commerce was covered by the patents. In the *Patterson* case, demurrers to three counts of the indictment had been overruled by the trial judge. On appeal after trial and conviction, the Circuit Court of Appeals found certain errors in the exclusion of evidence and in instructions to the jury in respect of the first count, and held that the demurrers should have been sustained in respect of the second and third counts. With respect to the third count, the Court said (222 Fed. at p. 625):

> "* * * The indictment, having thus charged that the National [Cash Register] Company had patents covering the cash registers made and sold by it, should have negatived that the trade and commerce which it so secured and held onto was covered by those patents. In the first count it is alleged that defendants' conduct therein complained of was not 'justified or warranted by any letters patent'; but it was not meant thereby to charge that the trade and commerce af-

fected by the conspiracy complained of therein was not covered by the National Company's patents, for it is the position of the government that the defendants were not justified or warranted by those patents in protecting the rights so secured in that way. It is charged in the first count that at the beginning of the 20 years the National Company did 80 per cent of the manufacturing of cash registers. This of itself was a practical monopoly. It is not alleged that it had been secured by wrongful acts. Presumably it was entitled to it under its patents. It is true that it is alleged that long before the 3 years preceding the finding of the indictment most of the basic patents and many of the improvement patents had expired. But this concedes that some of the basic patents were then still unexpired at the beginning of the 3 years, and it is consistent with the fact that such was the case as to a great number of improvement patents. Everything, therefore, which the count alleges, may be true, and yet the National Company have been entitled to hold onto the business which it had so secured, in which case its conduct in so doing could not have been monopolizing."

As is fully discussed in the opinion of the Trial Court herein (R. 3999-4012) on principles of both adjective and substantive law, the burden of proof was upon the Government to prove its case as charged. It is submitted that this ruling was correct.

(c) The Declarations of one Alleged Co-conspirator are not Binding upon Another Unless a Conspiracy is Established by Evidence Aliunde the Declarations and, even then, only when in Furtherance of the Common Purpose.

The Government contends that the Trial Court erred in the application of the declarations rule (Gov. brief pp.

195-200). Our ensuing discussion will show, we submit, that there was no error. But the question is academic in any event for the Trial Court held that the evidence was insufficient to sustain the Government's charges even if the declarations were regarded as binding on all defendants (R. 4101).

In discussing the facts in this case the Government's brief totally disregards the declarations rule and treats all evidence as if it were binding on everyone. It may come as some surprise to the Court to realize that the discussion of alleged facts set forth in the first 160 pages of the Government's brief is based almost entirely on declarations.

The declarations rule is that where two or more persons act in concert, with a common purpose, the acts and declarations of one during the existence, and in furtherance, of the conspiracy, are held in law to be the acts and declarations of the others. It is premised upon the law of agency and partnership that binds one person engaged in a common venture with the acts of all so long as they are done within the scope of the common program. The nature of the rule indicates the limitations applying to it. In order to render admissible as against one co-conspirator the acts and declarations of another, (a) the existence of the conspiracy charged must be shown by independent evidence, (b) the connection of the co-conspirators with the conspiracy charged must likewise be established independently, and (c) the acts and declarations must be in execution and in furtherance of the common purpose.

In *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U. S. 161 (1885), a common purpose to defraud other creditors of a vendor by a sale of property was charged against the vendor and a vendee creditor. The trial court

permitted evidence to be received as to statements made subsequent to the sale by an officer of the vendor which tended to prove the conspiracy charged. This Court reversed the case stating (p. 166):

> "* * * it is sufficient to say that such declarations are not admissible against the vendee, unless the alleged common purpose to defraud is first established by independent evidence, and unless they have such relation to the execution of that purpose that they fairly constitute a part of the *res gestae*. There was no such independent evidence in this case, and there is no foundation for the charge of a conspiracy between the vendors and vendee to hinder creditors, outside of certain statements which Webb is alleged to have made after his firm had parted with the title and surrendered possession."

In *Thomas* v. *U. S.*, 57 F. (2d) 1039 (C. C. A. 10th, 1932), in reversing a conviction for conspiracy to violate the Prohibition Laws, the Court said (pp. 1041-1042):

> "To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established. *Pope* v. *United States* (C. C. A. 3) 289 F. 312, 315; *Kelton* v. *United States* (C. C. A. 3) 294 F. 491, 495; *Isenhouer* v. *United States* (C. C. A. 8) 256 F. 842; *United States* v. *Goldberg*, 7 Biss. 175, Fed. Cas. No. 15,223; *United States* v. *McKee*, 3 Dill. 551, Fed. Cas. No. 15,686; *Burns* v. *United States* (C. C. A. 8) 279 F. 982, 986; *Dolan* v. *United States* (C. C. A. 9) 123 F. 52; *Stager* v. *United States* (C. C. A.) 233 F. 510.
>
> "Declarations made by one conspirator to another are not competent evidence to establish the connection of a third person with the conspiracy.

Kuhn v. *United States* (C. C. A. 9) 26 F. (2d) 463; *United States* v. *McKee, supra.*

"The existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirator done or made in his absence. *Hauger* v. *United States* (C. C. A. 4) 173 F. 54, 57; *United States* v. *Richards* (D. C. Neb.) 149 F. 443; *United States* v. *Goldberg, supra; United States* v. *McKee, supra.*"

See *Stager* v. *U. S.*, 233 Fed. 510, 513 (C. C. A. 2, 1916); *Mayola* v. *U. S.*, 71 F. (2d) 65, 67 (C. C. A. 9, 1934); *Ware* v. *U. S.*, 154 Fed. 577, 580 (C. C. A. 8, 1907).

In *Logan* v. *United States*, 144 U. S. 263, 309 (1892), this Court held that "the defendants on trial could not be affected by the admissions made by others of the alleged conspirators after the conspiracy had ended" since such declarations "were not in execution or furtherance of the conspiracy, but were mere narratives of a past fact."

Apparently in an effort to have this Court consider generally the evidence of alleged co-conspirators without proof by evidence *aliunde* of the existence of the conspiracy alleged here, the Government contends, on the basis of *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229 (1917) that it may take any association or contact between two individuals and build it into a broad illegal conspiracy by resort to declarations of one of the individuals. The *Hitchman* case does not support this proposition. There, seven defendants, individually and as officials of a labor union, were charged with an unlawful conspiracy to cause plaintiff's mine to be shut down, its plant to remain idle, and its contracts to be broken and unfulfilled, until such time as plaintiff would submit to the demand of the union

to unionize its plant. The evidence showed that the union had, in meeting assembled, adopted resolutions to achieve the common purpose of unionizing the plaintiff's mine. Official stenographic reports of the meeting, including declarations of others than the defendants, were admitted and it was held that such admission was proper on common law principles of agency because the independent proof established that the union members, including the defendants, had bound themselves together to accomplish a common purpose, with the result that each member of the group in effect constituted the others as his agents, thereby making the act or declaration of one in furtherance of the common purpose the act of all. But the limitation which is implicit in the *Hitchman* case is that the independent evidence which must be introduced by the Government before declarations of one co-conspirator can be used to bind another must prove *the very combination* charged. Declarations cannot be used to prove the common purpose, nor to enlarge the scope of any common purpose which has been proved. Without this limitation, one person might be bound by the declarations of another establishing some illegal undertaking quite different from an innocent transaction in which the two had been jointly engaged.

This limitation was recognized in *United States* v. *Food and Grocery Bureau of Southern California*, 43 Fed. Supp. 966 (D. C. Cal. 1942) discussed in the opinion of the Trial Court below (R. 4022-4024). That case involved a criminal prosecution for violation of Section 1 of the Sherman Act against the Food and Grocery Bureau and others, charging a conspiracy to stabilize retail prices of food and grocery products. The testimony for the Government showed that what started as an effort on the part of persons engaged in the food and grocery business to secure the enforcement of the

Unfair Trade Practices Act of California gradually developed into a price fixing and stabilization scheme. Thus, the starting point of the conspiracy dealt with a legal venture, *i.e.*, the association of various persons to assist in the enforcement of the California law. Evidence consisting of declarations of alleged co-conspirators showed that the association departed from the original object and started illegally to fix prices. At the conclusion of the Government's case it moved to apply to all of the defendants evidence which had been received subject to later connection as to certain defendants. In denying this motion in respect of several defendants who were not shown, by independent proof, to have been parties to the unlawful part of the plan, the court said (43 Fed. Supp. at p. 973):

> "But unless the passage from the legal to this illegal object is brought home individually to the various defendants, mere membership in the Bureau, mere contributions toward its support, or the collection of the tax on milk by wholesalers from retailers for the use of the Bureau, are not sufficient to charge the individual members—be they persons or groups—with these acts.
>
> "* * * Some of the defendant organizations are co-operatives—groups consisting of hundreds of petty tradesmen. It would be wholly unfair to charge this group with the actions of some of their officers in attempting to bind them to an illegal act, unless it be shown that the matter was brought up and explained at some meeting and that the nature of the activity was clearly understood by the membership. Our law abhors crime by association. To say that a hundred grocers, bound together in a cooperative, should be found guilty of the violation of a statute of the United States because one or two of their officers or directors were also on the Board of the

Bureau, would be applying to criminal law the civil law of agency. This cannot and should not be done."

The Government has consistently misconceived the theory of the declarations rule and paid no attention to its inherent limitations.[46] For example, the Government from the outset has contended that the mere showing of the existence of patent license agreements between USG and its respective licensees establishes a common program which binds every party with all the statements and acts of every other party (R. 500-507). That still appears to be its contention (Gov. brief, pp. 195-200). It certainly cannot be the law that a company which makes a lawful patent license agreement impliedly authorizes under the laws of agency and partnership all other licensees to speak and act on its behalf. The Government has two misconceptions: that similar action is synonymous with concerted action, and that a simple lawful act joined in by two parties can be automatically enlarged into a widespread program of illegality.

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[46]In a footnote on page 195 of its brief, the Government requests this Court to express its views on a ruling by the Trial Court that where one defendant has admitted the authenticity of a document under Rule 36 that document may be considered as binding upon all defendants under the declarations rule. This is a request for an advisory opinion since the Government does not, indeed could not, assert reversible error on the basis of the ruling below. The Trial Court did not unqualifiedly reject the documents in this category but merely imposed upon the Government the duty of calling a witness to authenticate them in the normal way. Moreover, even now the Government does not point to anything in these documents which would have had any material effect upon the decision below.

It is submitted that the Trial Court's ruling was correct under the declarations rule that admissions of one alleged co-conspirator are not binding on another unless made in furtherance of the conspiracy. Clearly admissions of a defendant in connection with pre-trial discovery procedure are not within that rule.

Point IV

THE FINDINGS OF THE TRIAL COURT ARE SUPPORTED BY AMPLE EVIDENCE AND ARE NOT SUBJECT TO REVIEW IN THIS COURT.[47] THE GOVERNMENT'S DISCUSSION OF ALLEGED FACTS DISREGARDS THE FINDINGS AND PRESENTS A DISTORTED, INACCURATE AND MISLEADING VIEW OF THE CASE.

In this Court, as it was in the Court below, it is difficult to grasp just what the unlawful conspiracy is that the Government claims the evidence establishes. A study and analysis of even the Government's present voluminous discussion of the alleged facts makes it apparent that the claim of conspiracy rests on nothing more than the fact that USG and the several other companies entered into patent license agreements. It is true, as the Government emphasizes, that many people discussed the matter of taking licenses and wrote letters and memoranda on the subject; but that is all the evidence amounts to. We have already argued that a plurality of licenses is not an unlawful con-

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[47]Rule 52 of the Federal Rules of Civil Procedure provides that "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This does not increase the scope of this Court's review but merely restates the existing rule. *District of Columbia* v. *Pace*, 320 U. S. 698 (1944). In *Adamson* v. *Gilliland*, 242 U. S. 350, 353 (1917) it was said that so long as a finding " 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' " The Government cannot "expect this Court to reverse a decree of the Circuit Court merely upon a doubt created by conflicting testimony." *Morewood* v. *Enequist*, 64 U. S. 491 (1859). See also *Zekendorf* v. *Johnson*, 123 U. S. 617 (1887), *Lawson* v. *United States Mining Co.*, 207 U. S. 1 (1907).

spiracy, but is sanctioned by the *General Electric* case (*supra*, pp. 59-66). If that proposition of law is correct, it cannot be that the licenses became unlawful simply because the parties discussed them.

The Government's brief, however, suggests at times that the unlawful conspiracy consists of the additional factor that the licenses were taken by concerted action. However, if a plurality of licenses is lawful under the *General Electric* case, it does not become unlawful if the licenses are signed in concert. The Trial Court so ruled on the obvious premise that "It is not unlawful to agree to do what is not unlawful when done" (R. 4107). Notwithstanding this ruling, the Trial Court also found on the facts that the defendants did not act in concert or, as the Government claims, associate themselves in a plan to blanket the industry under patent licenses and stabilize prices (FF. 118, R. 4167).

The Government unjustifiably argues that the Trial Court examined the evidence piece-meal and not in the light of the actual charges of the complaint (Gov. brief, pp. 190-194). In its opinion, the Trial Court recognized that "evidence as to conspiracy is, of course, to be considered as a whole—not piece-meal" (R. 4016). Pursuant to that rule the Trial Court did examine all of the evidence as is clear beyond all doubt from the opinion in the case. It is doubtful whether any more careful and considered opinion has been rendered by a court in the trial of any other case.

One of the charges in the complaint was that the licenses were sham licenses (Par. 46, R. 10-11) and Government counsel consistently urged below that defendants had used their patents as a mere subterfuge by which they illegally controlled prices and production. The Trial Court properly

found that the patent licenses were not "sham agreements to disguise illegal purposes" (FF. 30, R. 4148). But the Court did not conclude, as the Government asserts, "that an unlawful conspiracy could not be shown unless it involved a showing of 'sham'" (Gov. brief, p. 193). On the contrary it is clear from the very reference to the Trial Court's opinion which is cited by the Government that the Trial Court not only considered whether the licenses were "sham" licenses signed to give color of legality to illegal purposes" but also whether "the operations of the defendants were carried beyond the proper limits of the USG patent monopoly" (R. 4105).

From what has been said, it might seem that any dispute upon the facts is of little consequence in this case since the decision must ultimately rest on the question of the legality of the plurality of license agreements. It might seem too that an extended discussion of the facts is unnecessary since the Government seriously challenges only one finding of fact, namely, No. 118, that the defendants did not associate themselves in a plan to blanket the industry with patent licenses and stabilize prices. However, the good faith of the licenses is an issue, and since the Government's brief presents such an erroneous and distorted view of the facts, it is necessary to consider the Government's assertions regarding the facts in detail.

The Findings of the Trial Court in Respect of the Main Patent License Agreements

We have discussed the findings of the Trial Court generally in so far as they concern the circumstances surrounding the execution of the main license agreements in

volved in the case (*supra*, pp. 4-23). In addition the Trial Court made a number of findings of fact relating to the good faith of the parties in signing the licenses.

The Trial Court found that the principal patents upon which the main board license agreements in the instant case were founded, to wit, the Utzman (No. 1,034,746) Haggerty (No. 1,500,452) and Roos (Nos. 2,017,022, 2,079,338 and 2,080,009) patents, were product patents upon a building material called plaster board or wallboard. The patents were upon the entire product, not merely upon the edge of the board in the Utzman patent, or upon the starch in the Haggerty patent, or upon the bubbles or air cells in the Roos patents. These patents covered fundamental developments in the gypsum board manufacturing industry. It was further found that the closed edge board of the Utzman patent largely displaced the open-edge board under the demand of the trade for the better product, that the Haggerty patent solved the "peeler" problem in the gypsum industry and made possible modern high-speed production of gypsum board, and that the Roos patents solved the "sawdust" problem and produced a superior product with reduced manufacturing costs (FF. 24; R. 4145-4146).

The Trial Court also found that no substantial distinction can properly be drawn between the instant case and the *General Electric* case in respect of the importance of the patents, the terms and conditions of the license agreements and the price bulletins and the number of the licenses (FF. 25, 26, 27, R. 4146-4147, Conclusions of Law 2, 3, R. 4167).

The Trial Court further found that the license agreements were executed as *bona fide* agreements and were not

sham agreements executed to disguise illegal purposes (FF. 30, R. 4148). It was also found that the license agreements were executed upon the faith of the *General Electric* and *Bement* cases and that prior to the making of the licenses the parties thereto had been advised that such licenses giving price control to the licensor were proper and that they had a right to enter into them under the patent laws (FF. 31, R. 4148).

The Trial Court found that the license agreements required the licensees to pay, and they did pay, substantial royalties; and many of them were entered into, as noted above, in settlement of infringement litigation and in consideration of the payment of substantial damages, which damages were paid (FF. 32, R. 4148).

The Trial Court found that commencing as early as 1926 when the Beaver license was negotiated, USG offered terms of settlement of infringement claims and a license to any or all of the various board manufacturers. Throughout all of its negotiations with the various companies USG insisted upon the same terms which were: payment of damages for infringement, acknowledgment of the validity of USG's patents, payment of royalties, and the right in USG to fix prices upon board made and sold under its patents. At all times USG remained firm on these terms and rigidly insisted upon such terms for all settlements and licenses (FF. 33, R. 4148-4149).

The Trial Court found that in the making of the licenses there was nothing furtive in the action of the parties. There was open negotiation and discussion between USG and the other companies in the industry of the proposed licenses and there was open discussion among the companies other than USG of their mutual problems aris-

ing out of USG's ownership and insistence upon enforcement of dominant patent rights in the gypsum board field (FF. 34, R. 4149).

The Trial Court found that the companies which became licensees did so because they desired to settle or avoid litigation and to obtain the right to use USG's patents, considering it a business necessity to be able to do so. Several of the licensees had made the closed-edge board before they had acquired the right to do so from USG, for which infringement of the Utzman patents they paid substantial damages. Also some of the licensees had manufactured board containing starch which was covered by the Haggerty patent. Numerous other patents included in the licenses were essential to the manufacturing of modern gypsum board (FF. 36, R. 4149).

The Trial Court found that although there was discussion among the prospective licensees and with USG as to the terms of the proposed licenses and of the advantages of signing them, nevertheless the decision to take a license was reached by each of the companies independently. The licensees took their respective licenses, without regard to what other companies did. Neither Griswold of American, Blagden of Beaver, nor Holland of Universal acted, nor was told to act, as agent or emissary of USG or Avery in obtaining license agreements (FF. 37, R. 4150).

The Trial Court found that certain memoranda of C. O. Brown of Certain-teed with reference to the negotiations for the bubble board and starch licenses (Exs. 227, 231) did not establish bad faith in the execution of the license agreements either on the part of Certain-teed or any other person or company. The primary reason of Certain-teed in taking a license under the Haggerty starch and the

Roos bubble board patents was that the method of manufacture was cheaper, the products could be made much lighter with resultant savings in transportation costs, and a better product resulted. Certain-teed carefully investigated the bubble board invention and concluded, about July 3, 1929, that it had merit and that a license should be taken. It had already investigated the starch situation and thought that it might be subject, on account of its own use of starch, to a claim of infringement of the Haggerty patent. When the opportunity to obtain a license under the starch patents as well as bubble board was presented, Certain-teed was glad to take advantage of it. Certain-teed was not motivated by a desire for price-fixing when it determined to take a license. There was no understanding or agreement that the starch and bubble patents or the proposed licenses would be used as a vehicle to obtain price control (FF. 39, R. 4150-4151).

The Trial Court also found that the answer of Certain-teed in USG's injunction suit and the memorandum with respect thereto (Exs. 324 and 212) did not establish bad faith in the execution of the license agreement (FF. 40, R. 4151).

The Trial Court found that the fact that for the privilege of using the patents, royalties were fixed in the license agreements at an amount equivalent to a designated percentage of the selling price of the licensees of all gypsum board manufactured by them, whether or not patented, did not establish an agreement to make only the patented product and did not establish that the license agreements were executed in bad faith. The patents were numerous and covered not only the patented board, but machines and processes in the manufacture of board, and the rights and

privileges granted were of great value to the manufacturers of gypsum board. This royalty provision was in effect a provision for a percentage of gross sales, and as such was but a convenient means of measuring the amount paid for the privilege of using the patents. It might with equal propriety have been a lump sum. This provision in the license agreements was not an attempt to impose a royalty upon an unpatented product, nor was it intended to drive open-edge board off the market, nor did it have that effect (FF. 54, R. 4154).

The Trial Court found that there were no agreements between USG and licensee companies other than those which were put into formal writing. There were no informal side agreements between USG and any of its licensees or between any of the defendants herein that they would discontinue making open-edge board or seconds of closed-edge board, or that USG would advance and stabilize the prices for board, or that any of the companies would increase their prices for other gypsum products, or that USG would continue to control prices through the use of other patents after the expiration of the Utzman patent in August, 1929 (FF. 56, R. 4154-4155).

The Trial Court found that the licenses were not executed with an intent to fix prices of gypsum board at high levels or any given levels. There was at no time any understanding or agreement or even discussion as to what the prices of gypsum board would be upon the execution of the licenses (FF. 58, 59, R. 4155).

The Trial Court found that the Government had not established its charges that the license agreements were *non bona fide* because executed with an attempt to accomplish restraints of trade beyond the proper limits of the

patent monopoly specifically (1) illegally to raise and fix at arbitrary and non-competitive levels the price of gypsum board; (2) to accomplish improper standardization of gypsum board and its method of production; (3) to raise, maintain and stabilize the level of prices of unpatented materials—plaster and miscellaneous gypsum products; (4) to effectuate improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products; or (5) to fix prices at which the manufacturing distributors resell gypsum board (FF. 57, R. 4155). The license agreements in the instant case were not executed with an intent to obtain objectives beyond the proper limits of a patent monopoly (FF. 85, R. 4160).

Finally, the Trial Court found that the evidence (including certain evidence specially relied upon by the Government consisting in the large of intra and inter-company correspondence and memoranda relating to the terms upon which USG was offering to settle litigation and extend licenses and the advantages and disadvantages of taking licenses—Exhibits 104, 123, 124, 132, 136b, 157, 158, 185, 189, 198, 204, 205, 206 and 716—the admission in paragraph 7 of the answer of Ebsary and the testimony of Griswold, Blagden, Holland and Lenci) failed to establish that defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices, as charged by the Government (FF. 118, R. 4167).

These are the general findings with respect to the main license agreements in the instant case. In addition specific findings on detailed matters were made which will be mentioned from time to time in the subsequent discussion. It is submitted that the discussion of evidence hereinafter set forth establishes beyond question that the findings were fully supported and in fact compelled by the evidence.

The Licenses of 1926 and 1927

As we have noted, Beaver found itself at the end of its rope in 1925 when it was adjudged an infringer of the Utzman closed-edge patent (R. 784, 874). Its predecessor, Bestwall, had tried and lost, both in the District Court and in the Court of Appeals, and it was obviously a forlorn expectation that the appellate court might reverse itself in favor of Beaver on substantially the same case (FF. 6, R. 4134).

Naturally Beaver had to get out of the situation as best it could. Blagden, president of Beaver, realized his case was hopeless and therefore made overtures to Avery, president of USG. At a meeting in December, 1925, Avery and Blagden discussed the possibility of settlement and Avery specified the terms of settlement as follows: (a) payment of damages by Beaver for past infringement; (b) Beaver's acknowledgment of the validity of USG's patents; (c) payment of royalties; and (d) the right in USG to fix the prices of gypsum board made and sold by Beaver under the Utzman closed-edge patent (R. 786, 870-871). From that time forward those were the same unyielding terms of Avery and USG for any and all of the companies in the industry. There were no plans or schemes or conniving. If any company wanted a license on those terms it got one. If any company chose to violate USG's patent rights without a license, it was sued as an infringer. If any company chose to try to get along without the improvements of the superior patented products, it was free at all times to do so (FF. 6, 33, 34, R. 4134, 4148-4149). Obviously this is not the stuff of which conspiracies and concerted action are made.

After negotiations which took place largely in June and July, 1926, USG and Beaver settled their controversy on July 29, 1926 (Ex. 1, R. 4205, 450). The settlement agreement involved the cash payment by Beaver of $250,000 and the granting by USG to Beaver of a license to use the Utzman closed-edge patent and some sixty or more other patents and applications for patents involved in the manufacture of gypsum board. Although price control extended only to the expiration of the Utzman closed-edge patent on August 6, 1929, the license agreement continued under all the other patents until February 10, 1937, the expiration date of another Utzman patent covering the machine for manufacturing closed-edge board.

In describing the reasons of Beaver for settling its litigation with USG and taking a license, Blagden testified (R. 874-875, 880):

> "Well, we had lost the patent suit on two occasions, that is, we had lost our case with the United States Gypsum Company on two occasions, and after studying the situation deeply I felt that we would lose in a higher court, and if we could possibly get together and settle the matter it would be best to do so.
>
> * * * * * *
>
> "We had definitely proven that the closed-edge board was the cheapest board to manufacture, and we had tried every other way, and even though we had to pay a royalty we thought it would save us money in the long run.
>
> "Q. And what about the demand of your customers for this type of closed-edge board as opposed to open-edge?
>
> "A. They were emphatic about that.
>
> "Q. They wanted it, that is?
>
> "A. They wanted the closed-edge.
>
> * * * * * *

"Q. And were you concerned, and was it a reason for your decision to take a license, about the contingent liability which was constantly hanging over the company's head by way of liability for damages?

"A. Yes, sir."

* * * * *

"We only wanted to make the one board, and that was the closed-edge board, and that is why we signed the agreement."

Shortly after the decision against Beaver in August, 1925, USG instituted suits against American (R. 694), and Universal (Ex. 2, R. 4226, 450), for infringement of USG's closed-edge patents and served a notice of infringement upon Niagara (R. 546-547, FF. 7, R. 4135). In an effort to meet the demands of the trade for the closed-edge product and to develop a board to compete with USG's product, American developed a modified closed-edge board made by Clark, the superintendent of the American plant (R. 480-482). On July 31, 1920, Clark filed an application for a patent covering this type of board, but a patent application for a similar type had been previously filed on January 2, 1920, by Birdsey of USG (R. 481). The Birdsey patent was issued on November 9, 1920, and on May 10, 1921, an interference between the Birdsey patent and the Clark application was instituted (R. 481). There ensued a bitter contest in the Patent Office and in the Courts which resulted in the award of priority to Birdsey by the Commissioner of Patents and the ultimate affirmance of this decision by the Court of Appeals for the District of Columbia on February 1, 1926 (R. 693-696). Thus, in early 1926, American likewise was near the end of its rope in making a closed-edge board.

Universal had been infringing USG's patents. In September, 1926, it settled with USG and entered into a license agreement. The settlement and license in this instance was similar to that made with Beaver except that the lump sum payment covering damages amounted to approximately $35,000 (Ex. 2, R. 4226, 450, FF. 7, R. 4135). The testimony of Holland, President of Universal, makes it clear that Universal regarded closed-edge board as a far superior product to open-edge board (R. 888, 897-898, 932-934).

In March, 1927, Atlantic entered into the manufacture of gypsum board for the first time and requested and obtained a license from USG (R. 710, FF. 7, 62, R. 4135, 4156). Griswold of American testified to the effect that he talked to Fuller and Channing of Atlantic when they asked him for advice as to the necessary equipment for construction of a board manufacturing plant (R. 710-712). Griswold advised Fuller and Channing that closed-edge board was a better product, cheaper to make, and had fewer manufacturing difficulties (R. 712). In October, 1926, he obtained from Mr. Avery and forwarded to Atlantic a copy of the form of license (Exhibits 121, 122, and 123, R. 5275-5277, 563-565) and had nothing further to do with the Atlantic license which was signed some six months later (R. 713).

In April, 1927, Texas took a license from USG. Prior thereto it had equipped its plant to make closed-edge board and USG was threatening to sue if such board were produced (R. 6289). Chism of Texas testified that prior to the license Texas was making an open-edge board which proved to be very unsatisfactory to the trade and caused his company to lose business. The cost of manufacture was high due to peelers and broken edges and the open-edge

product was getting increasingly difficult to sell to the trade. Texas knew that the closed-edge board was a patented product and that USG owned other patents on the machine necessary to make it and covering board having special features such as the recessed edge. Texas took the license because it wanted to get the right to make board under USG's patents and, after taking the license, it immediately commenced the manufacture of closed-edge board which is the type of product it has made at all times since (R. 3479-3481).

These are the essential facts surrounding the first four license agreements. The Government, however, stresses a number of exhibits, all declarations received subject to proof of conspiracy by evidence *aliunde* the declarations, which in the last analysis prove nothing more than that many people in the industry were interested in and talking about licenses.

Great emphasis is placed by the Government on Ex. 185 (R. 5338, 814), a memorandum written in December, 1925, by Blagden's attorney (R. 813) and setting forth various possible results which might follow from the USG-Beaver litigation (Gov. brief, pp. 17-19, 207-208). Many of the possibilities which are mentioned in the memorandum are predicated upon a reversal of the decision in favor of USG by the Circuit Court of Appeals. The memorandum concludes with the alternative of a settlement and license, pointing out that this would be the most advantageous course for USG to pursue because Beaver would acknowledge the validity of USG's patents, pay damages and royalties, use its best endeavors to induce other manufacturers to accept licenses, and permit USG to control prices and take a dominating position in the industry.

The evidence shows that Exhibit 185 played no part whatsoever in the settlement negotiations of Beaver and USG, and was of no consequence in any other connection. It was not even in existence on the date of the conference at which Avery set forth USG's terms for settlement which were ultimately accepted by Beaver (R. 813, 871). The document was obviously prepared in an effort to enhance Beaver's bargaining position but it is predicated in large part on an unexplained weakness of USG's position in the Circuit Court of Appeals—obviously a poor argument since, as we have noted, the same Court of Appeals had previously sustained USG's position in substantially the same case. Blagden was reluctant to send the memorandum to Avery because he did not think it presented an argument which would appeal to him (R. 788, 870-871). There is no suggestion that this Blagden memorandum was ever seen or its contents discussed by any other persons in the industry. Blagden testified that he did not discuss with Avery the matter of all companies settling disputes and taking licenses (R. 800-801).

The Government criticizes (Brief p. 20) the Trial Court because it failed specifically to mention one phrase in summarizing Exhibit 185 in its opinion. Sufficient answer to this criticism is that the Trial Court thoroughly considered the exhibit as a whole. This particular exhibit was 14 pages long. It is ridiculous to contend that the omission of one phrase in a summary of the exhibit is error. Furthermore, the Trial Court properly considered the exhibit in the light of Blagden's testimony regarding it, hereinbefore referred to.

The Government also criticizes a statement in the Trial Court's opinion that Blagden testified that he did not discuss

with Avery the matter of all companies settling disputes and taking licenses (Gov. brief, p. 20). The basis of this criticism is an involved argument that the witness really said he did not remember having had such discussions rather than that they did not occur. We submit that the argument is based on a distinction without a difference. In any event, the record fully supports the precise statement contained in the Trial Court's opinion (R. 800-801).

It seems to be the Government's purpose to convince the Court that at or about the time his company settled its litigation and took a license, Blagden talked from time to time with other members of the industry on the subject of settlement and license. But that establishes nothing. Beaver was the "guinea pig" of the industry and all the other companies were interested to know what it was doing in connection with its litigation concerning gypsum board (R. 790, 874). Naturally all members of the industry were comparing notes on their common predicament of being caught as infringers. Blagden answered inquiries by others as to what was happening between his company and USG and, having determined that settlement was the best thing for his own company, of course he recommended that the others would be better off with a license agreement than with a lawsuit for infringement (R. 790, 844, 860, 862, 874-876).

The Government conceives Exhibit 185 to be the commencement of its alleged conspiracy, and argues that from that point on, Blagden and Avery were joined in an unlawful concert of action (Gov. brief, pp. 17-19). The argument is inconsistent with another proposition of the Government, *i.e.*, that the motivation for the conspiracy was the great need for price stabilization (Gov. brief, pp. 53-55). But prices were admittedly stable in 1925 and 1926 when

gypsum board was selling at $30 per 1000 square feet, a higher price than has existed ever since (R. 480, 571, FF. 88, R. 4161). The fact of the matter is that there is abundant evidence that Blagden had no deal with Avery to promote license agreements. His company settled its lawsuit and took a license without any consideration whatever as to what the other companies in the industry might do on the subject (R. 874). Blagden had nothing to do with the later licenses, of Universal in September, 1926, Atlantic in March, 1927, and Texas in April, 1927 (R. 875-876). Blagden left the gypsum industry early in 1928 (R. 777, 878). All of the foregoing considerations amply support a finding that there was no concerted action between Blagden of Beaver and Avery of USG (FF. 37, R. 4150).

The Trial Court found that Blagden did not act, nor was he told to act, as agent or emissary for USG or Avery in obtaining license agreements and that the Avery-Blagden discussions involved only the settlement of the USG-Beaver infringement litigation (FF. 37, R. 4150). The findings are amply supported by the evidence and the Government assigned no error as to them (R. 4178-4186).

In its discussion of alleged facts, the Government stresses the circumstance that in connection with the Beaver settlement and license, Beaver transferred to USG a number of patents and patent applications bearing on the closed-edge type of board (Gov. brief, p. 22). This was a normal incident of the final settlement of all controversies between the two companies in respect of the infringement litigation. It is sufficient to note that during the trial the Government expressly stated that it did not contend that there was anything wrong or unlawful about this transfer of patents (R. 817, 3911-3913).

From what has been said concerning Blagden, it is improper for the Government to contend that "Blagden continued his efforts to induce other manufacturers of board to become licensees, as he stated he would do in Exhibit 185" (Gov. brief, p. 24). Blagden engaged in no efforts to induce others to become licensees (R. 819). Nor did he state that he would do this, or anything else, in Exhibit 185, which merely lists a number of alternatives none of which was shown to have been acted upon.

After the settlement and license between Beaver and USG, Blagden wrote to Avery in a light vein on the occasion of paying Beaver's first month's royalties. Avery replied that he assumed that Blagden's comment about the payments hurting was playful. In turn, Blagden wrote:

> "You are right—my comment was entirely a playful one. I sincerely believe that the arrangement agreed upon by our two companies will work out to the mutual advantage of both. I feel that the 'entente cordiale' that has started between our companies is only a beginner and that if we play the game right, it should bring about big things" (Ex. 189, R. 5349, 838).

This obviously is a statement that if the settlement and license are lived up to in good faith it will be for the benefit of both companies. But the Government seizes upon the phrase last quoted and the testimony of Blagden that he meant "stabilizing prices in the industry" as evidencing an unlawful combination (Gov. brief, pp. 24-25). But again the Government neglects to give the Court the full story. In connection with this subject, Blagden's prior direct testimony with respect to Exhibit 189 reads (R. 837-838):

> "Q. In the second paragraph of that letter, you state: 'I feel that the entente cordiale that has been

started between our companies is only the beginning, and that if we play the game right it should bring about big things.' Do you see that, sir?

"A. Yes, sir.

"Q. What did you mean by that?

"A. Well, that all our bickering and squabbling and fighting was over, and that from there on everything ought to be all right.

"Q. What did you mean by 'entente cordiale'?

"A. The friendship between the two companies.

"Q. Were the companies friendly before that, or not?

"A. No, sir..

"Q. They weren't friendly?

"A. We hadn't been.

"Q. And what did you mean by 'playing the game right'?

"A. Living up to the agreement.

"Q. That is, obeying the published prices of USG?

"A. Yes, sir.

"Q. Now, at that time, how many companies had taken out a license with USG?

"A. I don't remember; I was only referring to our own arrangement."

and his subsequent testimony reads (R. 876-877):

"Q. On page 1608 of your testimony, the part which was read to you this morning, and particularly beginning at line 11, all in reference to Exhibit 189, which is your letter to Mr. Avery of October 1, 1926, this question and answer appear:

'Q. And what did you mean by "playing the game right"?

'A. Living up to the agreement.'

"Isn't it a fact that in that answer, when you used the word 'agreement', you meant license agreement?

"A. That is right.

"Q. Now wasn't your use of the phrase 'entente cordiale', in the third sentence of the second paragraph of that letter, merely your expression of the better feeling that might result, probably would result, from the settlement and license which you had taken?

"A. Yes, sir.

* * * * * * *

"Q. You felt, didn't you, Mr. Blagden, that your company should live up to the agreement?

"A. Absolutely."

The foregoing testimony fully justifies the Trial Court's statement concerning Exhibit 189 and the "entente cordiale" that Blagden testified that the "bickering and squabbling and fighting" which had been going on between Beaver and USG was over upon the signing of the license agreement, and that the two companies were again friendly, that the phrase "entente cordiale" was merely his expression in respect of the better feeling that probably would result from the settlement and license and by the phrase "if we play the game right" he meant living up to the license agreement and obeying the published price of USG and in this respect he was referring only to Beaver's agreement with USG (R. 4111).

The greater part of the Government's statement of alleged facts for this period has to do with the testimony and writings of Griswold of American (Gov. brief, pp. 20-22, 25-40). The substance of such evidence is that Griswold discussed the matter of a license with a number of gypsum manufacturers and recommended that they settle their infringement litigation with USG and take licenses (R. 690-

691, 695-697, 701, 702, 704-705, 713, 719). The reasons for Griswold's activity are readily understandable. He recognized the value of the closed-edge product from the time when his company first started the manufacture of gypsum board in 1919 and always wanted to make it (R. 478, 480, 570, 575). At that time he had tried unsuccessfully to get a license from USG (R. 478-480). During the next seven years his company carried on a bitter litigation with USG in the Patent Office and in the courts on the Clark-Birdsey interference and in connection with USG's infringement suit (R. 480-482, 485-487, 642). The adverse decision of the Court of Appeals of the District of Columbia in February, 1926, impressed upon Griswold the need for making a settlement with USG for, as of that time, American had the choice of making the peace with USG or of manufacturing an inferior type of open-edge board (R. 694-695).

During this period Griswold was working on a merger of his company and most or all of the other manufacturers except USG (R. 568-570, 632-633). The evidence is clear that at all times the thing which was uppermost in Griswold's mind was the success of his merger and continual reference is made to the subject throughout his correspondence (R. 568, 618-619, 632-633, 685-686, 691, 703, 710, 714-716, 717-719, 724-725, 727, 728-729). Neither Avery nor USG had anything to do with the promotion of this venture (R. 703). Griswold of course knew that his plan of merger could not be consummated with outstanding infringement suits and the existence of a very real possibility of judgments for infringement damages against many or all of the constitutent companies (R. 568-569). Griswold's firm conviction that a gypsum board manufacturer had to make closed-edge board in order to continue in business

made it imperative that he remain in a position to obtain a license for his merged company. In addition, Griswold was not without hope that he might get special concessions in connection with USG's claim against his own company by giving Avery the impression that he was promoting USG's interests (R. 687). Griswold testified unequivocally, however, that at no time was he an agent or emissary of Avery's in trying to get other companies to take a license (R. 691).

It is in the light of this background that the testimony and writings of Griswold are to be considered. In May of 1926 there was a discussion among several gypsum board manufacturers of the matter of settling the claims of USG and taking licenses (R. 520-521). Griswold said that the discussion had to do with what would face the manufacturers if USG finally won the pending infringement suits and the serious position in which such an eventuality would place all companies concerned. All realized that if they had to manufacture only an open-edge type of board, they would be up against a serious handicap in carrying on their business (R. 525).

The subject of the foregoing meeting is discussed in Exhibit 104, a letter of May 12, 1926, from Griswold to the President of his company (R. 5260, 514). This was a document received in evidence subject to the declarations rule. The Government stresses a remark in that letter that "According to the plans we have we figure that there is a possibility of us holding the price steady on wallboard for the next fourteen or fifteen years which means much to the industry" (Gov. brief, p. 21). Griswold explained that at the time he thought that the Utzman patent had fourteen or fifteen years to run and he assumed that if licenses were

taken USG would fix prices under that patent and that, as a result of legal price-fixing, the price of wallboard would remain fairly stationary during the life of the patent (R. 513, 701). Therefore it is clear that Griswold was not talking about a plan in the sense of a common program agreed upon by the parties. Moreover, Griswold's reference in the same letter that Blagden had talked with Avery "on the matter of settling all disputes and litigations between the wallboard manufacturers by entering into a licensing arrangement" was denied by Blagden who also stated that he did not discuss any plan for "holding the price steady on wallboard for the next fourteen or fifteen years" (R. 800-801).

Among the writings of Griswold[48] relied on by the Government, all admitted in evidence subject to the declarations rule, are Exhibits 106 and 107, an exchange of letters between Griswold and Avery, dated June 2, 1926, and July 6, 1926, respectively (R. 5262-5263, 543, 546). Griswold refers to a meeting with Haggerty of National, states that Blagden told him that a draft of license was being prepared, requests a copy of the form of contract for forwarding to Texas, and states that it would be nice if a copy of the form of contract could be available on the occasion of the next meeting of the trade association of the industry. Avery acknowledges Griswold's letter and mentions that the negotiations for the settlement and license between USG and Beaver are progressing.

In connection with these exhibits Griswold testified that he had mentioned the possibility of a license to Haggerty of

[48] It is a commentary on the Government's case that Griswold, who is supposed to have lined up all the members of the industry, could not even convince his own company to take a license.

National (which was just about entering the field of gypsum board manufacture) because he hoped that that company would be a part of his merger (R. 718, FF. 9, R. 4137). He also wanted to send the form of license to Texas since Texas was to be part of the merger (R. 545, 702). To the extent that Griswold's letter states that Haggerty was "sold on the proposition", Griswold's comment is on the exaggerated side. National, in fact, became an infringer and did not take a license until May, 1929, when it settled and paid damages of $178,000 (FF. 9, R. 4137).

The Government relies on Exhibits 121 and 122 (R. 5275-5277, 563, 564), an exchange of letters between Griswold and Avery, dated October 9, 1926, and October 11, 1926, respectively. Griswold mentions a meeting with Fuller and Channing of Atlantic, newcomers to the gypsum business. He reports favorably on his opinion of these men, refers to a discussion with them on the advisability of taking a license and suggests that a copy of the form of license be sent to them. Avery, in reply, sends a copy of the form of license to Griswold for forwarding to Fuller and Channing, pointing out that he (Avery) has not met these gentlemen. As we have pointed out, Griswold testified that Fuller and Channing had consulted him on the subject of the necessary equipment for building a gypsum board plant and, at the time, he recommended that they try to obtain a license (R. 712). Except for the forwarding of a form of license to Fuller in October, 1926, mentioned in these exhibits, Griswold had nothing further to do with the Atlantic license which was not made until six months later, in March, 1927 (R. 712-713). On this state of the evidence the Trial Court necessarily concluded that Griswold had nothing to do with the Atlantic license except as

stated (R. 4038). The statement in the Trial Court's opinion to this effect is clearly correct, rather than clearly erroneous as asserted by the Government (Gov. brief, p. 27).

Exhibits 123 through 135, inclusive, are letters between Griswold and Avery in the fall of 1926, and the early part of 1927, and Exhibit 191 is a related letter from Avery to Blagden dated October 19, 1926 (R. 5278-5287, 5351, 565-567, 582-587, 590-591, 840). These exhibits are discussed on pages 28-33 of the Government's brief. The net result of all this correspondence is that Griswold discussed the matter of a license agreement with various gypsum board manufacturers, that some of the companies (including his own) told Griswold that they were not satisfied with the license offered and that USG refused to make any concessions whatsoever from the terms of settlement and license which had been given to Beaver and Universal. The Government emphasizes a statement in Exhibit 123, Griswold's letter to Avery of October 15, 1926, that a meeting of board manufacturers might be held "with the object in view of getting united action on this matter" (R. 5278) (Gov. brief, p. 28). This expresses merely a pious hope on Griswold's part and, plus the fact that the contemplated meeting admittedly was never held, negatives the Government's claim that there actually was united action (R. 714). Indeed the Government itself admits that whatever ideas, if any, Griswold or Blagden might have had about united or concerted action failed to materialize (Gov. brief, p. 30).

In Exhibit 132, Griswold's letter to Avery dated January 3, 1927, Griswold states that he "started out to deliver 100 percent of the manufacturers of board that would be willing to sign up on a license arrangement" (R. 5285). Obviously, Griswold never achieved that result.

Nor does the letter establish that Griswold had any arrangement with Avery to promote licenses. The Government concedes that Griswold stated that he was not asked by Avery to contact other manufacturers and that he had no agreement with Avery to do so (Gov. brief, p. 26). And he emphatically denied that he was an agent or emissary of Avery's. He testified (R. 691):

> "Q. During any of this period did you act as agent or emissary of Mr. Avery?
>
> "A. No, I did not.
>
> "Q. Did you have any agreement or understanding with him that you were going out to act for him?
>
> "A. Not for Mr. Avery or for the United States Gypsum Company.
>
> "Q. Did you have any agreement with Mr. Blagden, or anyone else, that you were going out and act for him or anyone else?
>
> "A. No, I did not. As I remember it, I had never met Mr. Blagden until that first meeting, May 12, I think it was, the date mentioned in the correspondence."

The Trial Court found that Griswold did not act, nor was he told to act, as agent or emissary of USG or Avery in obtaining license agreements and that any interest by Griswold in the settlement of litigation in the industry was motivated by concern for his own company and the merger he was promoting (FF. 37; R. 4150). The finding is not only amply supported by the evidence but the Government assigned no error with respect to it (see R. 4178-4186).

Griswold further testified that there was never any agreement among the companies as to what should or should not be done with respect to the license (R. 720). The Government's assertion that Griswold's statement to

the effect that Avery insisted on industry-wide licenses (Gov. brief, p. 26) is plainly wrong since the facts show any company could take the license or leave it as it saw fit. The very fact that the licenses were signed at different times over a period of four years is refutation of the Government's statement.

From time to time Griswold mentions Texas in his letters but, except for forwarding a draft of a form of license to Texas, he had nothing to do with that company's license with USG (R. 636, 723-726). Griswold contemplated that Texas would be part of his merger (R. 660) and that proposition is the main subject matter of correspondence between Griswold and Gloyd of Texas, illustrated by Exhibits 149 to 158 (R. 5299-5307, 630-632, 634-638). This correspondence clearly shows that Texas was not a party to any general arrangement to blanket the industry with licenses, but that it went ahead on its own initiative and took a license in April, 1927, completely without regard to what other companies were doing.

Griswold also mentions Niagara in his correspondence. He testified that he arranged a meeting between Reeb of Niagara and Avery, so that their differences might be adjusted. Griswold felt responsible for the claim for infringement which USG asserted against Niagara, because Niagara had manufactured a modified closed-edge board under the Clark method which Griswold had licensed Niagara to use (R. 546-547). Furthermore, Niagara was to be part of Griswold's proposed merger (R. 568, 618, 660, 724).

Throughout all of the foregoing the position of USG is clear and consistent, as appears from Avery's letters to Griswold. On November 22, 1926, Avery wrote (Ex. 129, R. 5283, 586):

> "Your letter of the sixteenth I find on my return to the office. I appreciate your efforts with the other board manufacturers. I understand your statement of their position, and regret that we have no alternative to offer. * * *"

On December 30, 1926, Avery wrote (Ex. 131, R. 5284, 587):

> "As the attempts made to adjust the differences between us relating to the plaster-board edge seem to have exhausted themselves without result, I am writing to advise you that we hereby withdraw the proposal made to you in this connection."

The proposal referred to was an offer of a settlement and license to American.

Finally, on February 2, 1927, Avery wrote (Ex. 134, R. 5287, 590):

> "Yours of the thirty-first is at hand. I think our conversations and the correspondence we have had on the patent matter have made clear the company's position on this subject. I gather from your communication that the position of the wall board interests with whom you have conferred is of the nature indicated in your former letters. While I should be very pleased to see you and to discuss this matter, I can hold out no encouragement to you for any change in our position."

These letters alone establish beyond question that Avery and USG were not parties to any plans, schemes, or combinations of any kind. Obviously if there had been a common program to violate the law Avery would never have said, upon being advised of objections of the various companies to the form of the license, "we have no alternative

to offer." Nor, assuming a scheme or combination, would Avery have replied: "I can hold out no encouragement to you for any change in our position." The Government asserts that these letters of Avery did not close the door to further negotiations (Gov. brief, p. 34), but no evidence is given in support of the statement and the fact is that Griswold left the industry shortly thereafter when his merger program failed.

One final word on Griswold. The Government refers to his testimony that it would be natural that when a company signed a license they would manufacture the superior patented product which would have a tendency to eliminate other boards from the market which had been put out only to create a disturbance (R. 574). This is no more than a statement that certain normal economic consequences will undoubtedly follow from the execution of a license agreement. Obviously it is not in conflict with the Trial Court's finding on ample evidence that there were no informal side agreements between USG and any of its licensees to discontinue the manufacture of open-edge board or seconds (FF. 56, R. 4154).

We submit that the foregoing evidence fully supports the Trial Court's finding that there was no common program to organize the gypsum industry and stabilize prices (FF. 118, R. 4167). Up to this point, Blagden had settled and taken a license and recommended when asked that others do likewise. His company sold out to Certain-teed which was to renew the litigation with USG. Blagden had left the industry. Griswold had favored a license but he could not even convince his own company to take one. Avery at all times was willing to settle with infringers and grant licenses on the original terms but also at all times he was

unyielding toward demands for special concessions. In addition to Beaver, some companies took licenses, Universal, Texas and Atlantic. Neither Blagden nor Griswold promoted those licenses. They were taken because the respective companies wanted to use USG's patents. There was no concerted action whatsoever.

The Government contends (Gov. brief, pp. 200-207) that it has supplied adequate proof of conspiracy simply by showing that in 1925 Blagden had discussions with Avery on the subject of settlement of the Beaver litigation and a license, that USG and Beaver settled their litigation and signed a license, that Blagden recommended when asked that other companies do likewise,[49] that Griswold expressed the view that a license would have a stabilizing effect on the industry, and that Griswold talked to Avery and tried but failed "to get united action." It is this evidence which the Government contends establishes that Blagden, Avery and Griswold "were associated together in a 'plan' to bring about industry-wide licensing with price control" and asserts that all declarations may now be examined as original evidence under the rule of the *Hitchman* case (Gov. brief, p. 207). It is plain, we submit, that the evidence fails to show any common arrangement among Blagden, Avery, Griswold or anyone else to do anything.

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[49]The Government flagrantly misstates the evidence at p. 203 of its brief. Blagden testified that in talking to George M. Brown of Certain-teed he mentioned price stabilization as one of the benefits of a license agreement and that by price stabilization he meant the benefit of the license price which would be the same price (R. 831). The Government asserts that Bladgen told in substance the same thing to the other members of the industry. Blagden's testimony is directly to the contrary (R. 827-832). When Government counsel sought to have him so testify he denied the proposition pointing out that "You must remember that we were selling the company to Mr. Brown." (R. 832)

1928 and early 1929

At the beginning of 1928, Certain-teed purchased the assets of Beaver and refused to assume the Beaver-USG settlement agreement and license (FF. 9, 4136). As a result USG instituted suit in the Federal District Court in Chicago against Certain-teed and Beaver in which an injunction was sought against the distribution of the proceeds of sale to the Beaver stockholders and in which USG asserted that Certain-teed should be required to assume all liabilities of Beaver under its settlement agreement and license (Ex. 323, R. 5876, 1499, FF. 9, R. 4136.) In a preliminary proceeding Certain-teed was required to put up a million dollar bond as security for damages which might be found due to USG and George M. Brown, President of Certain-teed, and Elisha Walker, one of its directors, were personal guarantors on the bond (Exs. 325-327, R. 5951-5953, 1506, 1450).

In connection with the purchase by Certain-teed of the assets of Beaver, George M. Brown testified that the question arose as to whether Certain-teed should continue the manufacture of closed-edge board in the Beaver plants (R. 1437). Blagden of Beaver had urged that Certain-teed should carry out the Beaver agreement with USG and recommended that Certain-teed should assume the Beaver-USG license (R. 877-879). Blagden arranged a meeting between George M. Brown and Avery on February 29, 1928, for the purpose of trying to work out an arrangement whereby Certain-teed would assume the Beaver license (Exs. 195, 196, R. 5353-5354, 844, 1442). Avery and Brown were unable to arrive at any agreement (R. 1438-1442). At this time George M. Brown felt, contrary to the views of others in the Certain-teed organization, C. O.

Brown (R. 1222-1223), Whittemore (R. 1398-1399), Nelson (R. 1475, 1490), that Certain-teed could continue successfully in the gypsum board industry with an open-edge board, but he later became convinced that it was necessary for Certain-teed to make the closed-edge product (R. 1440, 1446-1447, 1455-1456).

The Government's discussion of alleged facts gives the erroneous impression that statements made and letters written in connection with the sale of Beaver to Certain-teed and the resumption of the litigation with USG were applicable to the industry generally (Gov. brief, 41-55, 203). For example, we have already noted that one of the benefits of a license which Blagden mentioned to George M. Brown was a more stable price (*supra*, p. 110). Blagden testified that this statement was made in connection with the sale of the Beaver company to Mr. Brown and was not a topic which he discussed with other members of the industry (R. 830, 832).

The meeting of Blagden, Brown and Avery on February 29, 1928, resulted from an attempt by Blagden to settle the controversies between Certain-teed, as Beaver's successor, and USG, and was not part of any program of concerted action in the gypsum industry. On the contrary, it appears that concerted action was probably the thought which was most remote in the minds of the parties (R. 1438-1440, 1450, 1463). The effort at settling the differences of the parties failed and George M. Brown, obviously in the heat of controversy, composed Exhibit 212, a document heavily relied upon by the Government (Gov. brief, pp. 41-43, Ex. 212, R. 5376, 1485). In this memorandum Brown stated that at a meeting "yesterday", USG insisted upon a license agreement running until 1937, but that Certain-teed

was only willing to take the license until the expiration of the "main patent", in 1929. The memorandum further states that open-edge board can be sold although it is recognized that trade will be lost by the manufacturer of the open-edge type product. Reference is made to the suit instituted by USG and it is stated that the action should be defended and an answer filed alleging that the suit was commenced "not in the interest of royalties but for the sole purpose of trade domination, monopoly and price control".

The Government also relies on Exhibit 324 (R. 5916, 1499), a copy of the unverified answer of Certain-teed filed in the USG suit containing several conclusional allegations that the USG license is in violation of the anti-trust law (Gov. brief, pp. 42-43). This document was received in evidence only as a possible admission on the part of Certain-teed and not as binding on any other defendant in the case (R. 1499, 1503, 1505). Obviously neither the answer nor the memorandum is in furtherance of any common purpose so that the documents would not be binding on other defendants under the declarations rule. However, the documents do not aid the Government's case. In the first place, they disprove rather than prove concerted action. In the second place they recognize in accord with the contentions of defendants that closed-edge board is a superior product demanded by the trade and that business would be lost if the manufacturer was unable to make it. The references to USG's interest in trade domination, monopoly and price control are mere conclusions, and were unquestionably prompted by the over-zealous sentiments of George M. Brown faced with USG's substantial claim for damages. It is clear that these conclusional allegations were made solely for the purpose of the lawsuit. Brown expressly

states in Exhibit 212 that Certain-teed would be willing to take a license until 1929 (R. 5376-5377). It is inconsistent for him to argue in the same breath that such a license is unlawful and unenforcible. Moreover, in May, 1929, Certain-teed settled its lawsuit with USG and signed a license agreement (FF. 9, R. 4136-4137). Consequently, as the Trial Court concluded (R. 4044, FF. 40, R. 4151), the only reasonable inference is that Certain-teed ultimately reached the conclusion that its statements concerning USG were erroneous.

The Government in its brief (pp. 44-46) quotes at length from a Griswold letter dated April 12, 1928, to the president of his company, which of course is a declaration, containing an implication that Griswold brought about license agreements between USG and Beaver, Universal, Texas and Atlantic (Ex. 141, 5292, 605). Griswold conceded that any such implication was not in accord with the facts (R. 719). The letter also mentions that Avery told Griswold that USG would drop its suit against Certain-teed if Certain-teed would carry out the Beaver license. That establishes nothing for the very purpose of the lawsuit was to compel Certain-teed to assume the Beaver agreement. The observation of Griswold at the concluding part of this letter that the plaster market would never be straightened up or stabilized so long as the board market remains as it is, does not prove a combination to accomplish stabilization. At this time, prices in the industry had become very low with the result that many companies were selling board and other products below cost (R. 664-665, 902-903, 966, 1388). Griswold firmly believed that the reason for the low prices which were driving many companies toward bankruptcy was the litigation, dissension

and bad feeling throughout the industry (R. 663-664, 721-722). His remark, as well as his testimony, that a stable price on board would undoubtedly improve plaster prices (R. 622) was but the statement of an economic truism.

In 1928, Holland became president of Universal and immediately commenced a struggle to keep that company out of bankruptcy (R. 887, 896, 961-962, 966-967). Holland, like Griswold, attributed the chaotic conditions in the industry to the litigation and dissension (R. 966). Since the future of his company was seriously endangered by such conditions, Holland sought in the fall of 1928 to bring about better conditions by formulating fair trade practice rules for the members of the industry under Federal Trade Commission guidance (R. 911-913, 969-971). Another method in which he sought to save his company from bankruptcy was through an attempted merger of various small manufacturers, such proposal having been promoted by Blair & Company, bankers (R. 896, 967-969). Moreover, Holland sought to clear up the litigation in the industry and frankly testified that he would have liked to have all companies make a closed-edge product which was a better product (R. 897-898, 935, 966).

It is the Government's theory that Holland took up the alleged program to blanket the industry with license agreements and stabilize prices as the emissary of USG (Gov. brief, pp. 55-61; 210-213). Holland emphatically denied this contention (R. 971):

> "Q. Now is it true, Mr. Holland, that either at that time or any other time you were a representative of USG?
>
> * * * * * * *
>
> "A. No.

"Q. And did you ever agree, or have an understanding with USG or anyone in that company that you would promote any plan looking toward the licensing of all the industry under price-fixing agreements?

"A. No, sir."

As indicative of the lack of any concerted action between Holland and Avery, the latter being the one whose efforts the Government would have this Court believe were primarily responsible for the consummation of the alleged agreement to blanket the industry with licenses and price-fixing, Mr. Holland stated (R. 971-972):

"Q. Isn't it a fact that on such occasions as you talked with Mr. Avery in 1928 and 1929, you found him somewhat disinclined to discuss the matter of settlement and the license * * *?

"The Witness. He was a very hard man to reach, he rather ignored me most of the time in my efforts to bring about a discussion."

The Government's reliance on letters of Holland (all declarations) as establishing group action is unwarranted (Gov. brief, pp. 48-50). Holland's letters such as Exhibits 145 and 147 merely show that he was interested only in resolving the differences between the various non-licensee companies in litigation with USG in the hope that the cessation of litigation would bring about better conditions (Exs. 145, 147, R. 5296, 5298, 627, 638). It appears that in the latter part of 1928 Holland met with representatives of non-licensee companies and urged the other companies to settle their litigation and pay their infringement damages and take licenses (Ex. 203, R. 5367, 1331). However, nothing came of that advice (R. 1356-1358).

The Government criticizes the Trial Court's summary of Exhibit 204, a letter of Holland to Haggerty dated January 7, 1929, concerning the reluctance of Kling of American to do anything to settle its litigation with USG (Gov. brief, p. 55; Ex. 204, R. 5369, 936). Holland complains that Kling is inconsiderate for not letting anyone know what he proposes to do so that the others could be governed accordingly. The Trial Court summarizes this letter stating that "Holland wrote Haggerty of National that an effort should be made to hold another meeting of those interested in the board situation; that American cannot hope to gain by delaying the settlement because this will demoralize prices throughout 1929" (R. 4103). We submit that the Trial Court's summary was fair particularly in view of Holland's testimony that he hoped that other board manufacturers would take out a closed-edge license and that he urged the various board manufacturers to do so. (R. 900-901, 932-935). All of this evidence stresses the lack of a joint program.

Haggerty's letter to Holland of January 9, 1929 (Ex. 205, R. 5370, 937), points out that the price control provision of the existing licenses was operative only until the expiration of the Utzman closed-edge patent on August 9, 1929, whereas the license agreement ran until February, 1937, the date of the expiration of the Utzman patent on the machine for making closed-edge board. The Government complains that the Trial Court failed to mention in its summary of Holland's reply (Ex. 206, R. 5371, 943), the statement that Avery made it clear "that if this plan could not be worked out on the Utzman patent that there were other patents available", and a further statement that Holland is "quite sure that Avery would not be interested in negotiat-

ing settlements unless everyone involved was included" (Gov. brief, p. 59). Neither of these references supports an inference that there was any concerted action to license the industry and stabilize prices.[50] The use of the word "plan" in Exhibit 206 does not evidence concert of action. On pages 59-60 of its brief the Government seizes upon the word as creating an irresistible inference that there was a combination for the industry to take out licenses and stabilize prices. But the use of the word "plan" by Holland does not establish concerted action or combination. What the Government set out to prove was a "common plan" (Gov. brief, p. 200) which is substantially different from a single person's "plan" or idea which is the sense the word was used in Holland's letter (R. 939-940). The Government erroneously argues that the specific proposition that Holland favored other manufacturers taking licenses establishes the general proposition that all defendants were engaged "in a conspiracy to organize the gypsum industry and stabilize prices as charged" (Gov. brief, p. 60). The statement in Exhibit 206 that Holland felt quite sure that Avery "would not be interested in negotiating settlements unless everyone involved was included" is on its face an opinion of Avery's state of mind and, as events show, was wrong in point of fact.

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[50]To the extent that this letter suggests an understanding that price control would be continued after the expiration of the Utzman closed-edge patent, all witnesses testified that there was no such understanding (Griswold, R. 701), (Holland, R. 966), (C. O. Brown, R. 1231), (Whittemore, R. 1400-1401), (George Brown, R. 1463, 1465), (Lenci, R. 2973-2974). The Government's suggestion on page 61 of its brief that Griswold was the only witness who denied having any understanding with Avery or anyone else that price control would be extended under some patent after the expiration of the Utzman closed-edge patent is therefore entirely unwarranted.

The evidence is clear that Holland, like Griswold, recognized that the litigation and dissension caused by the infringement of USG's rights were demoralizing the industry and rapidly causing the smaller companies to go into bankruptcy. Holland, like Griswold, knew that the closed-edge board was a superior product. He was also interested in the settlement of disputes and the taking of licenses, as in the case of Griswold, by reason of his connection with a second merger proposal. His activity in no way establishes concerted action to take licenses and stabilize prices, in fact, like the evidence concerning Griswold, it emphasizes the great lack of unanimity and the absence of concerted activity from which a combination or conspiracy could be inferred.

The Trial Court found that Holland did not act, nor was he told to act as agent or emissary of USG or Avery in obtaining license agreements and that any interest by Holland in the settlement of litigation in the industry was motivated by concern for his own company and the merger he was promoting (FF. 37; R. 4150). The finding is amply supported by the evidence and the Government assigned no error with respect to it (R. 4178-4186).

The May, 1929 Licenses

The litigation throughout the industry still prevailed in 1929. USG's infringement suit against American had been tried in 1928 resulting in a judgment in favor of USG. This prompted renewed efforts on the part of American to settle but all of these efforts involved requests for special concessions which USG refused to give.

As noted above, Niagara had manufactured an infringing board on the advice of American. Although

suit had not yet been instituted notice of infringement and a substantial claim for damages had been served on that company. USG's two infringement suits against National were approaching trial. The action to compel Certain-teed to assume the obligations of the Beaver license had not been settled. Ebsary was the only non-licensee company which had avoided infringement litigation by attempting to sell open-edge board with unsatisfactory results (R. 2790).

On May 16, 1929, National settled its litigation and signed a license. This involved a payment of damages for infringement of $178,000 (FF. 9, R. 4137). On the following day Baker of National telegraphed Avery that the license had been executed and mailed (Ex. 716, R. 6521, 3829). The telegram also stated that Reeb of Niagara was ready and that Baker was working with Ebsary with hope of everybody being set by Saturday to justify a meeting of all board makers. This telegram negatives concert of action for National signed its license and sent it to USG, notwithstanding that Niagara and Ebsary admittedly had not signed licenses. It is indeed apparent that Ebsary had not yet indicated an intention to sign. Certainly if there were any substance to the charge that there was a common plan that all companies would take licenses as a group, one prospective licensee would not have signed a license and delivered it unqualifiedly until the others had done likewise, particularly in this industry where there had been years of litigation, dissension and distrust.

These considerations apply as well to the recitals in the minutes of the Board of Directors of National on May 14, 1929 (Ex. 198, R. 5356, 886), stating that all manufacturers of gypsum products, except American, had agreed

to sign a license. The Trial Court properly refused to infer that these words evidenced a concerted agreement of all manufacturers to take a license (R. 4116). It can be equally inferred from the language that each manufacturer had individually indicated a willingness to sign a license. The Trial Court's conclusion is the only justifiable one particularly in the light of the testimony of all witnesses that each company took its license without regard to what any other company did (Griswold, R. 720; C. O. Brown, R. 1081-1084; Whittemore, R. 1398-1399, 1404-1406; George M. Brown, R. 1463; Nelson, R. 1491-1492; Lenci, R. 2790-2791, 2793, 2800, 2966-2967, 2968; FF. 37, R. 4150). The Government's argument on page 62 of its brief that the Trial Court failed to consider the National minutes in the light of all the evidence in the case is unwarranted. The Government is arguing in effect that the Court should regard the exhibit in the light only of evidence favorable to the Government without considering the mass of testimony favorable to defendants.

By May 18, 1929, Ebsary, Niagara and Certain-teed had indicated their respective intentions of taking a license and although the record does not contain the circumstances it appears that arrangements were made for these licenses to be signed at or about the same time in Chicago. Representatives of existing licensees and prospective licensees were invited to attend a meeting.

On May 18, 1929, American still was trying to get concessions and these were refused by USG. Accordingly, Avery telegraphed the other companies that there would be no American license and that the meeting would be futile unless the other companies desired to proceed without American. The other companies so elected and accord-

ingly on May 21, 1929, Niagara settled the claim against it for damages for the sum of approximately $28,000 and took a license. On the following day Certain-teed settled its litigation with USG, agreeing to pay damages of approximately $64,000 and to assume the obligations of Beaver under its original settlement agreement and license. Also on May 22, 1929, Ebsary took a license (FF. 9, R. 4136-4137).

In connection with the May licenses, the Government fails to call to this Court's attention the great mass of evidence in the case unequivocally establishing that there was no concert of action in connection with the taking of licenses. Whittemore and George M. Brown of Certain-teed, prior to their trip to Chicago in May of 1929, had decided that Certain-teed would take a license and the trip was for the purpose of working out a deal with USG on all matters, including payment of past royalties on board made at the Beaver plants, cancelation of the million dollar bond in the USG-Certain-teed lawsuit, and the settlement in general of the controversies between the two companies (R. 1398). Whittemore's testimony as to Certain-teed's reasons for taking a license is as follows (R. 1398-1399):

> "Q. Did the decision which you and your president and your management made prior to your going out there, to settle and take a license if you could, have anything to do with any other company in the business, or didn't it?
>
> "A. No, sir, it did not. We were in enough trouble ourselves without worrying about the other fellow.
>
> "Q. And is it a fact, sir, that your company would have taken a license if it could have gotten it without regard to what any other company did or did not do?

"A. Yes, sir.

"Q. What was the attitude of your company and yourself toward whether or not you desired to manufacture the Utzman closed-edge board?

"A. We wanted to make it.

"Q. Will you tell the Court the reasons why you wanted to make it?

"A. Well, there were a number of reasons. The board was a better board than the open-edge board; it was less subject to damage in transit because of the edge coverage by paper; it was easier to manufacture; and it was decidedly more salable.

"Q. Now when you say that it was 'decidedly more salable', do you include in that answer the fact that as of this time, at least, there was a strong customer demand in the trade for closed-edge board?

"A. Yes. If you will let me answer that question in my own may, I think I can get at what you want to develop.

"Q. I wish you would.

"A. The Certain-teed Products Corporation made an open-edge board. At the same time, the Beaver Products were making a closed-edge board; when we took over the Beaver products we immediately discontinued the manufacture of closed-edge board in the Beaver plant, and went to an open-edge board. We found that the customer demand precluded our selling an open-edge board at the same price as the closed-edge board, and prices declined, declined and declined.

"Q. Then would you say that the primary reason for your taking this license from USG was to get the right to manufacture the product covered by the closed-edge patent?

"A. That was one reason, and also to get rid of the possibility of future litigation. You referred to

the Utzman patent. The Utzman patent was only one of some fifty to one hundred patents that we were licensed to use. Some of those patents were vital in the production of closed-edge board, and had we not had a blanket license to use all of the patents of USG, we would have been subject to possible litigation, and we wanted to avoid that—we had had plenty."

Notwithstanding the fact that representatives of other companies were in attendance at the meetings, Whittemore positively testified that Certain-teed made its agreement with USG independently (R. 1404). The Certain-teed negotiations were conducted with USG individually and there was no agreement or understanding of any kind among the manufacturers (R. 1406).

George M. Brown, who in large part formulated the policies of Certain-teed (R. 986) was violently opposed to the idea that USG should control the price of Certain-teed on patented board (R. 1222; 1401, 1405, 1439, 1443), and the fact that the Utzman closed-edge patent, under which price control was to be exercised, expired in but a short time, was one of the reasons why he agreed to take the license (R. 1401). Brown testified that Certain-teed, probably from wishful thinking, originally had decided to try to get along with the open-edge board. Due to the demands of the trade and of Certain-teed's sales and manufacturing departments, this viewpoint changed (R. 1455-1456). Certain-teed undoubtedly would have taken a license at an earlier date than May, 1929, if it could have obtained one without price control (R. 1463). Certain-teed's decision to take a license was not in any way dependent on what its competitors did with respect to signing a similar license (R. 1463). In

fact, Brown would have preferred that other companies did not have the right to make closed-edge board (R. 1463). Certain-teed opposed price-fixing at all times and finally took the license with a price-fixing provision in it because that was the only basis on which it could be obtained (R. 1464).

In further connection with Certain-teed's decision to take a license, Nelson testified that his company's decision to settle its lawsuit with USG and take a license had nothing to do with what any other company might do (R. 1491). The management of Certain-teed concluded that it was best for the company to take a license and the fact that price-fixing only extended to August, 1929, was a factor which influenced Certain-teed to take a license (R. 1490-1491).

C. O. Brown of Certain-teed testified that his reasons for favoring the May license were to get the right to make closed-edge board and to settle the suit between USG and Certain-teed. Price-fixing did not enter his mind (R. 1081-1084).

The other representative of one of the four companies which signed licenses in May, 1929, who appeared as a witness was Lenci of Ebsary. He testified that in 1928 when Ebsary began to manufacture gypsum board of the open-edge type, it was found that the open-edge board was expensive and wasteful to make (R. 2790, 2964). The Ebsary Company had considered the desirability of making a closed-edge board from the time it entered the board business, but concluded that it would make no attempt to manufacture a closed-edge board without a license because of the outcome of the patent suits instituted by USG against infringers (R. 2967). Lenci's testimony is abundantly clear that the dealer trade was demanding the closed-edge board and he

freely admitted that it was extremely difficult to sell open-edge board (R. 2790, 2965).

Prior to going to Chicago in May, 1929, Ebsary had received a draft of license and this had been turned over to its lawyer, Judge Rippey (R. 2790-2791, 2966). Before leaving for Chicago, the Ebsary Company had fully determined to take a license (R. 2790-2791, 2967). Ebsary's primary reason for taking the license was its desire and need to make closed-edge gypsum board (R. 2791, 2800, 2949, 2970). It also wanted to get the benefit of USG's research in the manufacture of board (R. 3082). Ebsary also knew of and desired to use the various patents other than the Utzman closed-edge patent covered by the license, including the machine patent and others which ran for many years after the expiration of the Utzman closed-edge patent in August, 1929 (R. 2791-2792). Ebsary was satisfied that it had to have the right to use many, if not all, of the patents in the license in order to make a satisfactory closed-edge board (R. 2792). Lenci read a summary of the various patents and knew that USG had many patents which Ebsary might infringe if it attempted to make a closed-edge board without a license, even after August, 1929 (R. 2971-2972, 3079-3080).

The conclusion of the Ebsary company to take a license was reached independently and without regard to what other companies might or might not do with respect to the same subject (R. 2800). Lenci never discussed the subject of a license with any other company nor, to his knowledge, had Frederick Ebsary (R. 2968). There was no general agreement or understanding at the May, 1929, meetings, and, so far as Lenci knew, the other prospective licensees had each independently determined to take a license prior to going to Chicago (R. 2968).

In the light of the foregoing testimony the Trial Court could hardly have found otherwise than that each company acted independently and not by concerted action. The Government's argument that this finding is erroneous is frivolous. That argument is based on a partial and misleading quotation from Exhibit 206 (R. 5371, 943) that Avery was not "interested in negotiating settlements until everyone involved was included" (Gov. brief, pp. 59, 66). This quotation is from a Holland letter to Haggerty in which Holland says "I am quite sure that Mr. Avery would not be interested in negotiating settlements unless everyone was included" (R. 5372). As we have noted, Holland was wrong in his conclusion for Avery was willing to and did license any company which agreed to the terms which had been formulated in the original settlement with Beaver. Next, the Government asserts that the meeting in May was "pre-arranged" (Gov. brief, p. 63). However that does not prove nor tend to prove that the licenses were signed by virtue of concerted action. Finally the Government asserts that Avery and everyone else recognized that by bringing the whole industry under licenses it would be possible for the first time to have effective price control (Gov. brief, pp. 66-67). This assertion fails to establish concerted action and, in any event, is neither supported by the record references cited by the Government nor by any other evidence.[51]

[51]Although it originally pleaded that price control immediately followed each license as it was signed (Complaint, par. 66, R. 16), the Government now would have the Court believe that USG did not exercise its right to establish minimum prices on patented gypsum board under the earlier licenses but waited until the May, 1929, licenses were executed (Gov. brief, pp. 72-73, 103). This is contrary to the uncontradicted evidence (R. 789-790, 809-810, 814-815, 841-842).

The Government unsuccessfully attempts to establish that the primary if not the sole purpose of the companies in taking licenses was to get prices raised and stabilized (Gov. brief, p. 68). Its argument relies on (1) testimony of Lenci who agreed with a leading question of Government counsel that it was important for him to get a closed-edge board and also to make sure that price conditions were going to be corrected so that he could make a profit (R. 2971), and (2) testimony of Holland that he was interested in better conditions in the marketability of board so as to help his company and the other manufacturers out of their unfortunate financial situation brought about by the litigation and price war (Gov. brief, p. 68). This evidence by itself does not even justify the conclusion that any of the licensees took licenses with the primary idea of raising and stabilizing prices. Furthermore the mass of evidence that this was not their purpose must also be considered.

The Government makes a similar argument that the licensees signed the licenses with the idea of getting a uniform product because George M. Brown expressed the view that by all companies making a uniform product (i.e. closed-edge board) they would get away from "fierce warfares" and because Holland testified that it would be beneficial to have one kind of board (Gov. brief, p. 69). Such evidence hardly establishes that a dominant motive for the licenses was the desire of all licensees to have a uniform product.

The Government makes much of Lenci's testimony that after the May licenses were executed, USG issued new price bulletins to the licensees covering patented gypsum board (Gov. brief, pp. 70-73), and that in his opinion all of the licensees were human enough to hope that the prices would go up (R. 2973). The prices were of course higher than what Ebsary had been getting since Ebsary had not

been selling closed-edge board (R. 2973). The level of the prices was not raised, however, but remained at what USG had been getting for its product (R. 2973). This, we submit, is a strange culmination of a conspiracy to fix prices. No licensee had any idea what the prices would be beyond a hope that they would be better than those prevailing during the price war. There were no understandings or agreements of any kind about the establishment of prices and indeed the subject was not discussed. The great mass of evidence on this point alone establishes the absence of the combination charged.

The evidence is overwhelming that the licenses were not signed pursuant to any agreement to raise prices. Griswold testified that USG would never even discuss what prices it might establish on patented gypsum board under the licenses (R. 624-625, 698-699, 720).

Blagden stated that Beaver never had any understanding or agreement or discussion with Avery as to what minimum prices would be established under the licenses (R. 876).

Holland testified that there were no agreements or understandings between Universal and USG outside of the existing written license agreement (R. 965-966).

C. O. Brown testified that Certain-teed had nothing whatever to do with the establishment of minimum prices under its license and that the establishment of minimum prices for patented board was entirely in USG's discretion (R. 1235).

George M. Brown testified that there never was any understanding or agreement that gypsum board prices would be raised or stabilized and he denied that he even discussed with Avery the matter of the fixing of prices on patented gypsum board (R. 1464-1465).

Nelson similarly testified that he never heard of any agreement or understanding as to what USG would do about gypsum board prices after Certain-teed took a license (R. 1491).

Whittemore strenuously denied that the license agreement was made for the purpose of getting gypsum board prices fixed (R. 1404) and testified that USG never agreed to do anything with respect to establishing prices on patented gypsum board nor, in fact, would USG even discuss the subject (R. 1402-1403).

As we have said, Lenci made it clear that no licensee knew what USG would or would not do with respect to prices subsequent to the execution of the licenses (R. 2792). He repeatedly stated that there was no understanding or agreement that prices would be raised and stabilized and, indeed, he had never heard the subject mentioned (R. 2808, 2876, 2972, 2992, 3032, 3087-3088).

The Government's argument that the May, 1929, licenses were signed in bad faith and with the motive of eliminating competition because the Utzman closed-edge patent had only eleven weeks to run is without merit (Gov. brief, pp. 172, 226). On the contrary, the shortness of that time interval to which price control was confined, proves beyond any doubt that price control was not a significant factor. Indeed it appears that George M. Brown of Certain-teed, who was violently opposed to price control (R. 1222, 1401), took the license because price control terminated a short time later (R. 1401). Moreover, the Government disregards the fact that the May licenses covered many other patents essential to the manufacture of gypsum board and did not expire until February, 1937. As Whittemore said (R. 1399):

> "The Utzman patent was only one of some fifty to one hundred patents that we were licensed to use.

Some of those patents were vital in the production of closed-edge board, and had we not had a blanket license to use all of the patents of USG, we would have been subject to possible litigation, and we wanted to avoid that—we had had plenty."

The November, 1929 Licenses[52]

We have already recited in detail the Trial Court's findings with respect to USG's offer of a foam board license to its licensees, the advantages of the new product, the claims of infringement of the Haggerty starch patent made by Universal, the acquisition of the Haggerty patent by USG, the offer of new licenses covering the outstanding patents of the prior licenses, the Haggerty patent and the applications for patents on the foam board invention, the signing of new licenses at various times during October, 1929, by all licensees except Texas, the settlement of the litigation with American and the granting of a license, and the signing of a license by Kelley (*supra*, pp. 13-17).

The foregoing facts were found by the Trial Court on ample evidence and the Government has not assigned any error with respect to them (R. 4178-4186). They are disregarded by the Government in its discussion of alleged facts which is largely based on governmental inferences drawn from certain memoranda of C. O. Brown of Certain-teed (Gov. brief, pp. 75-78, 80-85). The C. O. Brown memoranda were exhibits 227 and 231 (R. 5392, 1057-1058, 1060, 5400, 1075-1076) and, as we have noted, the Trial Court made an express finding that they did not

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[52]Used for convenience of reference. Actually, most of the licenses were executed on various dates during October, 1929, but became effective on November 5, 1929.

establish bad faith in the execution of the license agreements on the part of Certain-teed or any other person or company (FF. 39, R. 4150). That this finding is justified is clear.

The Government first suggests that the memoranda in question establish an agreement or understanding that another patent would be found to support price control after the expiration of the Utzman patent. All witnesses testified that there was not such agreement or understanding (R: Griswold, 701; Blagden, 875; Holland, 966; C. O. Brown, 1231; Whittemore, 1400-1401, 1408-1409, 1415; G. M. Brown, 1465; Lenci, 2810, 2973-2974). The Government also contends that an inference should be drawn from these memoranda that Certain-teed and the other licensees were not interested in the starch or bubble patents except as a vehicle for price control. But such an inference cannot be drawn in the face of overwhelming testimony directly to the contrary. The primary reason of Certain-teed in taking a license under the Haggerty starch and Roos bubble board patents was that the method of manufacture was cheaper, products could be made much lighter with resultant saving in transportation costs and a better product resulted (FF. 39; R. 4150, 1407). It had already investigated the starch situation and thought that it might be subject, on account of its own use of starch, to a claim of infringement of the Haggerty patent (R. 1407-1408, 1413). When the opportunity to obtain a license under the starch patents as well as the bubble board was presented Certain-teed was glad to take advantage of it. It was not motivated by a desire for price-fixing (R. 1405, 1413, 1428). There was no understanding or agreement that the starch and bubble patents or the proposed licenses would

be used as a vehicle to obtain price control (R. 1415). Certain-teed made a careful investigation of the merits of the bubble board invention before deciding to take the November license (R. 1407-1408). It had experimented with other materials in an effort to find something like bubble board and something to replace sawdust as an aggregate. It had attempted to create voids in the core with an effervescent material but that proved to be inefficient and uncontrollable (R. 1409-1411). After thorough consideration and experimentation by its research department, Certain-teed proceeded to take the bubble license because it wanted to use the bubble board invention (R. 1411-1412). After taking the license, Certain-teed used the inventions covered by the patents (R. 1421-1422).

Lenci testified that Ebsary had been advised to decide whether it wanted to avail itself of the bubble board invention (R. 2819-2820, 2876-2877). Ebsary investigated the matter of the new development and decided, as a completely independent matter, that it wanted to use the patents and take a license (R. 2811-2812, 3004, 3082-3083). In fact, Ebsary was so anxious to get into production under the new invention that it wanted the right to make bubble board prior to the date when the license became effective (R. 2832). The fact that Ebsary paid approximately $200,000 in royalties[53] for the starch-bubble license negatives any charge that the license was taken in bad faith (R. 3079). Lenci testified that at all times the Ebsary company used the patents of USG after taking the license making closed-edge board (R. 2479), board with foam (R. 2832), and with starch (R. 2832).

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[53]It is conceded that all licensees paid the full royalties called for by the license contracts. The amount paid by Ebsary was but a small fraction of the total royalties paid (see R. 162).

The representatives of other licensees who testified upon the trial uniformly established that the companies desired to use USG's patents and did use them after taking the licenses. Holland of Universal (R. 958); Neale of Atlantic (R. 1296, 1311); Black of American (R. 1368); Miller of Celotex (R. 1382-1384); Chism of Texas (R. 3481-3483); Tomkins of Newark (R. 2030, Ex. 362, R. 6029, 1876).

All of this testimony, direct, positive and unequivocal compelled the conclusion of the Trial Court that the licensees took the licenses in entire good faith because they wanted and needed USG's patents in order to remain in the business of manufacturing gypsum board.

The Government improperly criticizes the Trial Court's finding with respect to the case of *Universal Gypsum & Lime Co.* v. *Haggerty*, 21 Fed. (2d) 544 (W. D. N. Y. 1927). (Gov. brief, p. 81). As appears from the opinion in that case, Universal sued National and Haggerty claiming infringement of the Haggerty starch patent. The Court granted a motion for a preliminary injunction. The Court construed the patent broadly and held that it was infringed, that defendants were not in a position to challenge its validity, and required National to post a substantial bond or suffer the enforcement of the temporary injunction. Accordingly we submit that the Trial Court's finding on this subject is correct.

At this stage of its discussion of alleged facts, the Government is guilty of another false statement. On page 86 of its brief it is stated that "USG reserved the right to determine and fix the prices at which the licensees sold board (1) 'manufactured by licensee by use of any of the machines or appliances covered by any letters patent * * *' ". By this

the Government unquestionably means that it was agreed under the licenses that USG might fix prices under machine or process patents. The error in the Government's statement lies in the fact that the language which is omitted and merely indicated by asterisks qualifies the preceding language so as to limit the price control to product patents. The omitted language is "and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued" (R. 72, 4294, 4318, 4339, 4358, 4382, 4426, 4449, 4477). Thus price-fixing was limited to gypsum board embodying the inventions of patents already issued which means, of course, product patents, for only the inventions of a product patent will be embodied in the resultant article. It would appear that the erroneous quotation is a deliberate attempt to mislead the Court in view of the Government's strenuous contention that the *General Electric* doctrine is limited to product patents.

Metallized Board

In or about 1934 gypsum board became confronted with competition from fibre insulation boards which had been developed and put on the market. For the purpose of meeting this competition USG developed metallized board. Henning of USG was anxious for the entire industry to get behind the manufacture of metallized board and he realized that the only way to accomplish this was to have all manufacturers produce the product (R. 1303, Exs. 287, 288, 290, R. 5841-5842, 5844, 1261, 1263, 1266).

USG offered to each of its licensees a license to manufacture and sell metallized board under USG's patent rights. Each of the licensees, except Texas, signed such license

agreements at varying times in 1934 and 1935 (Exs. 17-22, 24, R. 4499-4559, 4573, 457).

The only contention raised by the Government in respect of the metallized board licenses is that set forth in Par. 114 of the complaint (R. 30) that at the time of the execution of said licenses, none of the licensees, except National, intended to manufacture metallized board but that all of said licensees, except National, intended to purchase metallized board from USG or National for resale to retail dealers and consumers at the prices and upon the terms and conditions of sale established by USG. In effect the charge was one of resale price-fixing. The Trial Court found specifically and in detail that the Government failed to establish that the metallized board licenses were signed by the various licensees without any expectation that they would manufacture such board, but with the intention that they would purchase it from USG or National and then resell it at the prices and under conditions fixed by USG. On the contrary, it was found that said licenses were made in good faith by each of the licensees with the intention to manufacture such board and that the prices fixed by USG under the metallized board licenses applied only to the patented metallized board manufactured and sold by the respective licensees and that there was no resale price-fixing in respect of such board (FF. 46-53, R. 4152-4154).

The Government assigned no error as to any of these findings except that portion of finding No. 53 that there was no resale price fixing in respect of such board. (R. 4182-4183, Gov. brief, p. 160). The evidence not only supports but compels the findings of the Trial Court. Certainteed (R. 1238, 1240, 1402, 1428; Atlantic, R. 1268-1270, 1296-1297, 1303-1308; American, R. 1363-1364, 1368; Kelley and Newark, R. 1897-1898, 1961; Ebsary, R. 2761, 2939-2941, 3059-3060).

The Government's discussion of alleged facts on this topic contains the suggestion that the metallized board licenses were the result of concerted action. The Trial Court's findings and the record references shown above dispose of this contention.

On page 93 of the Government's brief it is stated that economic pressure was put upon certain manufacturers to become licensees. But it is apparent that the only "pressure' was the manufacturers' own desires to market the patented product (FF. 46-53, R. 4152-4154). Moreover, as the Trial Court properly found, there is no issue in this case that the licenses were obtained by coercion (FF. 29, R. 4148).

Perforated Lath

The Trial Court found that in many localities there are building code requirements in the case of plaster bases that a wall structure (the base plus the applied coat of plaster) must stand a one-hour fire test. To meet this requirement, USG developed the perforated gypsum lath covered by the Roos patent, which contained perforations of such size and spacing as to permit a wall structure composed of it to withstand the one hour test. When plaster is applied to this type of lath some of it passes through the perforations and forms a mechanical key which, because of the size and spacing of the holes, supports the coat of plaster with the result that it will resist fire for an hour. USG's perforated lath passed the one hour fire test of the United States Bureau of Standards and received the Bureau's one hour fire rating. This was the first gypsum lath ever to pass this test. The only perforated lath which ever passed the Bureau's one hour test was of the type covered by the Roos perforated lath

patent (FF. 42, R. 4151-4152). No error is assigned as to these findings, (Gov. brief, p. 160).

USG granted patent licenses to Certain-teed on June 8, 1936, American on July 10, 1936, Ebsary on February 2, 1937, and Kelley on June 23, 1937, for the manufacture, use and sale of perforated lath. Until May, 1938, USG established minimum prices on perforated lath made and sold by the licensees and charged a small royalty therefor. Then USG offered a revised perforated lath license to its licensees royalty free and such revised licenses were accepted by Certain-teed, Ebsary and Kelley. On January 3, 1939, USG granted Newark a royalty free perforated lath license after that company had merged with Kelley (Ex. 39, R. 5247, 462; FF. 17, R. 4142-4143). Of these facts the Government's assignment of errors challenges only that a royalty free license was offered (R. 4178-4186), but the evidence fully supports that finding.

The only charge with respect to perforated lath is that at the time of the execution, and throughout the period of the operation, of the perforated lath license agreements, USG, Certain-teed, and American were informed and believed that the perforated lath patent was void and that the license agreements were therefore not *bona fide* (Complaint, par. 19, R. 31).

The Trial Court found, on ample evidence, that the evidence established that Certain-teed and Newark were acting in good faith in respect of the perforated lath license (FF. 43, 44, R. 4152). It was also found that the Government failed to introduce any evidence questioning the good faith of American or Ebsary in respect of taking perforated lath licenses (FF. 45, R. 4152).

In discussing perforated lath, the Government gives the misleading and erroneous impression that the Roos patent

is invalid because lath with perforations was old (Gov. brief, p. 94). Whether or not lath with perforation was old is beside the point since the Roos invention covers a lath with perforations of such size and spacing as to permit the board to pass a one hour fire test. The invention lies in the size and spacing of the holes rather than the fact of perforation. The evidence establishes that in tests performed at the United States Bureau of Standards many laths with holes, gouges, indentations or other similar devices designed to give greater bond between the lath and applied coat of plaster failed to pass the one hour fire test. The only perforated lath which ever passed the test was the type covered by the Roos perforated lath patent (R. 3616, FF. 42, R. 4151-4152).

The Government's charges of bad faith (Brief, p. 98) are based on evidence that before taking a license Certain-teed received two letters from a patent attorney to the effect that in the patent attorney's view the Roos perforated lath patent was invalid (Exs. 601, 602, R. 6303-6307, 3454). This attorney, Spencer, admitted however that in advising Certain-teed on this subject he pointed out, as the letters show, that his opinion might be wrong, that the patent was valid on its face, and that litigation which might ensue could be expensive and the damages high (R. 3455-3456). He further recognized the possibility that a district court could well hold the patent valid and that such a decision could be affirmed by a Circuit Court of Appeals (R. 6308). Finally, he recommended that Certain-teed should not ignore the patent but should attempt to make a perforated lath which would avoid the claims of the patent (R. 6305-6306). Whittemore of Certain-teed testified that since USG was proposing to bring out a perforated lath, Certain-teed would

have to obtain a supply of the product in order to be competitive. If Certain-teed tried to make its own product, it would have the expense of testing and obtaining a one hour rating and it might get into litigation. Whittemore's experience with opinions of patent attorneys caused him not to rely too confidently on their judgment. Certain-teed therefore, determined to take the perforated lath license as a matter of sound business judgment (R. 1416-1418).

Tomkins of Newark testified that his company took a perforated lath license from USG because it felt that it had to be in a position to market the product. The sale of the product had been increasing rapidly and Newark wanted to be able to manufacture and sell it lawfully and without infringing the patent rights of USG (R. 2054-2055).

It is therefore apparent that the findings of the Trial Court that the perforated lath licenses were entered into in good faith are well supported by the evidence.

Operations under the Licenses

The Trial Court found that the Government failed to establish that the license agreements were executed with intent to accomplish restraints of trade beyond the proper limits of the patent monopoly (FF. 57, R. 4155). It also found that the actual operations of the defendants under the license agreements were not carried beyond the proper limits of the patent monopoly and licensing thereunder (FF. 86, R. 4160). In addition to these general findings, the Trial Court specifically found that the evidence failed to sustain the Government's charges that defendants (1) illegally raised and fixed at arbitrary and non-competitive levels the price of gypsum; (2) accomplished improper standard-

ization of gypsum board and its method of production; (3) raised, maintained and stabilized the level of prices of unpatented material—plaster and miscellaneous gypsum products; (4) effectuated improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products; or (5) fixed the prices at which manufacturing distributors resold gypsum board (FF. 86, R. 4160-4161). It will appear in the following discussion that these findings are correct.

Establishment of Prices on Patented Board

The Trial Court found that the defendants did not by any of their operations under the license agreements, nor by any agreement or understanding, illegally raise or fix at arbitrary or non-competitive levels the price of gypsum board. Of course, as is recognized by the Trial Court, the right to establish minimum prices under the General Electric doctrine involves in a sense the establishment of a "non-competitive" price for the patented article. However this is what the law allows (R. 4051-4055, 4073-4074).

Since the Government urged in the Court below, as here, that USG established unreasonably high prices, the Trial Court found that the evidence did not support the charge. After the signing of the May, 1929, licenses, the USG bulletins established patented board prices at the levels at which USG had been selling board just prior to the execution of these licenses, and subsequently these bulletin prices were advanced over what they had been during the price war. But the prices so established did not exceed those which prevailed prior to the first license (the Beaver license) and the price war. Since 1935 the prices have been lowered so that for the past several years wallboard has sold for

$23 per thousand square feet and lath for $13, as compared with $30 and $15-$16, respectively, before the first license (FF. 87, 88, R. 4161).

The Government's contentions about gypsum board prices appearing on pages 248-250 of its brief are deceptive and unsound. It is stated that during the period from 1927 to 1929 the price of closed-edge board dropped from $30 to $20 allegedly because there was competition from open-edge board and that closed-edge board could only command a premium of $2 over open-edge board. The Government then makes the comparison that after 1929 board prices went up to a high of $28.50 in 1934. The Government fails to recognize that the conditions in 1927-1929 were not normal, that because of the dissension and bitterness engendered by years of patent infringement litigation a demoralizing price war pervaded the industry with the result that many companies were selling gypsum products below cost (FF. 60, R. 4155, 973). These conditions caused the drop in the price of closed-edge board from $30 to $20, not the fact that open-edge board was being marketed. Thus the very exhibits relied upon by the Government show that the prices of all gypsum products were very low during this period (Exs. 619, 620, 6403-6414). For example, plaster was selling for as low as $2 per ton (R. 6410). Furthermore, the Government itself pleaded in its complaint that "the litigation of the last nine years had already created bitterness in the industry which reflected itself in increasing price competition in an industry which until 1925 had been unusually stable and profitable" (Par. 56, R. 13). Prior to 1925, when the Government does not even charge that a conspiracy existed, open-edge board was in competition with closed-edge board yet the latter admittedly had a stable price of $30. Yet after the alleged conspiracy is said to have

gone into effect the highest price was $28.50 in 1934 which prevailed for but a short period. Since 1935 the price of wallboard has been only $23 (FF. 88, R. 4161). These considerations show how unsound the argument is that open-edge board was the fundamental factor in determining the level of prices.

The remark that the closed-edge patent was of little value because that type board could command but a $2 premium is false (Gov. brief, p. 248). Actually the premium was higher (R. 2964, 6411). Moreover, the premium in price does not tell the whole story since closed-edge board is cheaper to make (R. 874, 1236, 1243, 2790, 2944-2965, 3479). In any event, a $2 premium on a $20 product is of tremendous value to the practical business man. Obviously a discovery which permits a manufacturer to get $2 more for his product than anyone else can get for theirs is of great value.

Open-edge Board

The Government charged that USG and its licensees were guilty of unlawful practices of standardization in concertedly eliminating open-edge board, seconds and No. 2 board and by restrictions on the packaging of board.

As to open-edge board, the Trial Court found that there was no understanding or agreement by defendants to refrain from or discontinue the manufacture and sale of open-edge board and that the license agreements were not executed with an intent to eliminate that type of board (FF. 62-66, 90, R. 4155-4156, 4161).

The evidence conclusively establishes the correctness of these findings. Closed-edge board not only was a superior

product but was cheaper to make and the trade demanded it (R. 687, 874-875, 1236, 1243, 1385, 1398-1399, 1404, 1446-1447, 1455-1456, 2790, 2964-2965, 3479-3481). The Government itself alleged in the complaint that closed-edge board represented a substantial improvement of that then on the market and that the consumer demand for it stimulated other manufacturers to produce and market board with a protected edge (Par. 49, R. 11). All companies in the industry recognized that they needed the superior product to stay in business. Many of them went so far as to market boards with closed edges or modified closed edges which infringed USG's patents. It is not disputed that an aggregate of over $700,000 was paid to USG by these infringing companies in part payment of damages for infringement. Naturally when any company became a licensee it no longer desired to manufacture the open-edge type of board. This is an additional indication of the importance of the patents rather than evidence of an unlawful combination. The witnesses uniformly testified that there was no agreement or understanding, either within or without the license agreements, that the manufacture of open-edge board would be discontinued (Whittemore, R. 1403-1404; Nelson, R. 1494; Lenci, R. 2790, 2791-2792, 2800, 3080-3082).

The Government complains of the Trial Court's finding that only Texas, Certain-teed and Ebsary had made open-edge board before signing their licenses (FF. 62, R. 4155) although no error was assigned in respect of the finding (Gov. brief, p. 160). It is contended that this finding is contrary to the admitted facts of the case since there is an allegation in the complaint that after July 11, 1928, American and Niagara marketed open-edge board and this is

admitted in the answers of some of the defendants (Gov. brief, pp. 65, 105). We submit that the Trial Court's finding is justified. For years American made closed-edge board with the so-called Clark edge and Niagara followed suit as an informal licensee of American (R. 480, 546-547). On July 11, 1928, judgment was entered holding American an infringer and it was to be assumed that they went to an open-edge. Upon the trial, however, it was established by the Government's witness that after July, 1928, American made a board with the edge enclosed with tape (R. 669).

The Government criticizes the Trial Court's finding that "when the closed-edge board of the Utzman patent came into the market the open-edge board was largely displaced by the demand of the trade for the better product" (Gov. brief, p. 105). As we have noted, the Government's own complaint alleges that closed-edge board was "a substantial improvement" and that there was consumer demand for that type of product (see Complaint, pars. 49, 68, R. 11, 16). Moreover, a mass of testimony establishes that the trade demanded the closed-edge board and that open-edge board could not be sold (R. 478, 480, 546, 570-571, 573, 575-576, 670, 687, 690, 695, 712, 874-875, 1236, 1243, 1385, 1398-1399, 1446-1447, 1455-1456, 2790, 2964-2965, 3479-3481).

The Government's discussion of alleged facts on the matter of open-edge board is based for the most part on general statements in letters or testimony that the industry would be better off if there was uniformity of product. That is a statement which could doubtless be applied to any industry but it would hardly prove that the speaker was in a conspiracy to bring about standardization.

The Government again relies on Exhibits 324 and 212, the answer of Certain-teed and the memorandum of George

M. Brown charging USG with aspiring to unlawful domination (Gov. brief, p. 111). We have discussed these exhibits above and the Court's specific finding that they do not establish any bad faith in the execution of the license agreement (*supra*, pp. 112-114).

Finally, the Government relies on the fifth "whereas" clause of the May licenses to the effect that the licensor has been unwilling to grant a license except on condition that the licensee will manufacture only a closed-edge board to establish that the parties conspired to eliminate open-edge board. The Government glosses over the sixth "whereas" clause which waives the requirement of the fifth (R. 50). The Trial Court specifically held that the sixth "whereas" clause was not a purported waiver of the condition referred to in the fifth and that there was no understanding or agreement that open-edge board was to be discontinued (FF. 65, R. 4156). This finding is fully supported by the evidence (R. 380-382, 880, 1403-1404, 1495, 2790-2792, 2800, 2807).

Seconds and No. 2 Board

The Trial Court found that a "second" is a defective board produced unintentionally in the manufacture of standard board while a No. 2 board is a board made of lower grade material than that used in the manufacturing of the standard board. Both seconds and No. 2 board are by definition board made under the patents. There was no agreement or understanding that seconds or No. 2 board would not be manufactured. On the contrary, the parties to the license agreements were free at all times to make and sell such board (FF. 67, R. 4156-4157).

The Government attacks the finding of the Trial Court that the evidence failed to establish that there was an elimination of seconds and No. 2 board. The Court noted that it is admitted that all companies make some seconds in the course of manufacture. The Government contends that its charge did not mean elimination in that sense but meant that seconds have been eliminated from sale on the market (Gov. brief, pp. 107-108). It thus appears that the Government's real complaint is that USG established one price for all patented board or, conversely, failed to establish a lower price for seconds and No. 2 board. The Trial Court rightly held that even if seconds and No. 2 board went wholly off the market as the result of the bulletins, there would be no illegality (R. 4077-4078). Nevertheless there was no evidence of any elimination of seconds and No. 2 board and the witnesses established that there was no agreement or understanding on the subject (R. 1236, 1297, 1365, 3047-3048).

Bundling

Among the patents owned by USG were those covering a method of binding gypsum board together with gummed tape running lengthwise along the edges of the board. There was no satisfactory method of bundling gypsum board or lath except by means of the patented bundle. Attempts to tie the board with wire resulted in the wire slipping and cutting the board thereby causing much breakage. Delivery of board by the licensees in broken condition would tend to devalue the product and thus lessen the pecuniary reward of the patentee's monopoly (FF. 70, R. 4157). No error was assigned as to this finding (Gov. brief, p. 160).

The four licenses which were executed in May, 1929, granted rights under a bundling patent and required the licensees to use this bundling method and no other.[54] However, the restrictive provision was abandoned when the November, 1929, licenses were executed, and no such provision has been incorporated in those or any later licenses. The Trial Court inferred that the restrictive provision of the May, 1929, licenses was to exploit the bundling patent and to accomplish packaging of board by the licensees in a manner which would preserve quality, *i.e.*, without breakage (FF. 70, R. 4157). The Trial Court found that any question as to the propriety of the restrictive provision has become moot (R. 4078-4079, FF. 93, R. 4162). The Trial Court further found that the royalty provision relating to the bundling patents did not establish an attempt to standardize by eliminating other methods of packaging, and that the provisions were not so intended and did not have such effect, and that no other method (except an uneconomic one) was available (FF. 71, R. 4157).

The Government does not challenge the holding of the Trial Court in respect of the restrictive provision of the May, 1929 licenses (see Par. 48, R. 4184). Its only contention is that illegal standardization came about because, under the November licenses, royalties were charged on all bundled board whether or not under the patents (Gov. brief, p. 115). The royalty was charged for the privilege of using the patents and was measured by the quantity bundled by any method. The Trial Court properly held that this provision did not establish an attempt to eliminate other methods of bundling (FF. 71, R. 4157-4158). It found on ample evi-

[54]Certain-teed's license under this patent was granted in a separate agreement executed July 3, 1929 (Ex. 230, R. 5396, 1075).

dence that there was no satisfactory way of bundling gypsum board or lath except by means of the patented bundle (FF. 70, R. 4157, 1068, 1071-1073, 1225, 1456). Attempts to tie the board with wire resulted in the wire slipping and cutting the board thereby causing much breakage (FF. 70, R. 4157, 3489-3491). There was no evidence, and the Government points to none, that any existing method of packaging was driven off the market. Thus there was no reason for the Trial Court to adopt the Government view that the royalty clause brought about unlawful standardization. Its present argument to that effect (Gov. brief, p. 115) is nothing more than a request that this Court reject the findings and inferences of the Trial Court and adopt the inferences requested by the Government although the latter are unsupported by any evidence. The argument is manifestly without merit (see discussion on inferences, R. 4013-4015).

Bulletin Provisions

In the exercise of its right to establish minimum prices under the licenses, USG issued licensee bulletins establishing the minimum prices at which the respective licensees should sell the patented gypsum board manufactured by them under the licenses. The price bulletins in the instant case contained two classes of provisions, one class providing how price should be arrived at, the other intended to protect the price fixed, *i.e.*, to prevent indirect price cutting in the sale of the patented product. The price provisions were drafted in view of the fact that the ultimate price at which the patented product was to be sold cannot be arrived at merely by naming an amount, but other factors which have economic relationship to price—such as terms of payment, cost of delivery

to various areas, including freight charges, quantity sold, type of product sold, and the like must also be stipulated (FF. 26, R. 4147).

The Trial Court found that the minimum price bulletins were limited in their application to patented board manufactured and sold by each licensee under its license (FF. 18, R. 4143). The Government assigned no error with respect to this finding (See par. 26, R. 4181).

We believe that it would serve no useful purpose to review at length the various provisions of the bulletins. These were considered in detail by the Trial Court (R. 3945-3947, fn. 13) and are compared with the provisions in the license in the *General Electric* case (R. 3987-3990, fn. 25). The Trial Court found that there was no material distinction between the terms and conditions of the license agreements and price bulletins in the instant case, as compared with the terms and conditions, including price provisions, in the *General Electric* case (FF. 27, R. 4147).

The Government's discussion of alleged facts dwells on a number of detailed terms and conditions of sale mentioned in the price bulletins with the apparent objective of conveying the erroneous impression that there was tremendous "regimentation" in the gypsum industry (Gov. brief, pp. 114-122, 172, 243, 248-252, 255). To begin with it is to be noted that the price bulletins admittedly applied only to patented gypsum board and not to the many other gypsum products. All that the bulletins did was to establish minimum prices for patented gypsum board sold upon certain terms (R. 2503, 2509, 2510-2514, 2518-2523, 2559, 2562-2563, 2605-2613, 2812, 2837, 2857-2864, 2903-2905, 2907-2908, 2910, 2913, 2914-2916, 2922-2924, 2929-2932, 2941-2942). It would have been meaningless for the bulletins merely to

have named an amount of money as the minimum price (Exs. 33-39; R. 4619-5247, 462). Numerous other factors relating thereto such as method of delivery, quantity, terms of payment, etc. have to be known since all of these matters affect the value of and the price of the patented article (R. 2834-2843). The terms and conditions of sale of the bulletins were not arbitrary delimitations but were the normal and economic terms which grow up in any business (R. 2815-2816). Many of them had been in existence for years (R. 970-971, 2481, 2815, 2816, 2869-2876, 2908-2909, 3072-3073, 3074-3078; 3083-3087). The same applies to the method of pricing (R. 2908-2909).

The Government questions the Trial Court's finding that the price of board was calculated on the basis of a mill base price plus freight from the nearest mill (freight-wise) to the point of destination (Gov. brief, pp. 116, 117). This is precisely what its own witness testified to (R. 2909) and is the fact as shown by the bulletins. The Government's effort to establish that the bulletins provide for a basing point system rather than a freight equalization system is erroneous and irrelevant. There has never been any charge in this case that the method of pricing is unlawful and the observation on page 251 of the Government's brief that basing points would probably constitute a price discrimination in violation of Section 2(a) of the Clayton Act is manifestly unjustified.

Jobbers

A jobber is a functionary in the wholesaling process who buys from the manufacturer, or from another wholesaler who has bought from the manufacturer, and sells to

the dealer. The jobber's service is that of relieving the manufacturer, or, in some instances, the wholesaler, from the necessity of direct contact with the dealer—this being accomplished by the jobber's sales force. In the gypsum industry, jobbers occupy a somewhat ambiguous position since it is difficult to know whether or not a given person is a jobber (FF. 76, R. 4158-4159).

After the May licenses were signed, the license bulletins established a 10% discount off the price of patented gypsum board on sales to jobbers (Ex. 408, R. 6097, 2505). On August 8, 1930, USG established the minimum price at which a licensee might sell its patented board to jobbers at the same level as the minimum price to the regular dealer trade. Thereafter a jobber who purchased patented board from either USG or one of its licensees was obliged to pay the same price as a dealer. The discontinuance of the discount did not have the effect of forbidding sales of board to jobbers if they were willing to buy at the dealer price. Many jobbers continued to buy board and were able to perform a proper jobbers' function (FF. 100, R. 4164).

In addition to the foregoing, the Trial Court found that the license agreements were not executed with an intent to effectuate improper restrictions upon the distribution of gypsum board, plaster or miscellaneous gypsum products, specifically, to "eliminate" jobbers through the discontinuance of a sales discount (FF. 75, R. 4158). The Court also found that the discontinuance of the jobber discount on patented gypsum board was not accomplished pursuant to any understanding or agreement among defendants or any of them (FF. 101, R. 4164), and that the Government failed to introduce any evidence concerning any dealings

by USG or its licensees with jobbers in respect of plaster and miscellaneous gypsum products (FF. 80, R. 4159).

All of the foregoing findings are fully justified by the evidence. As to patented gypsum board, numerous witnesses testified that there was no agreement or understanding whereby jobbers would be eliminated from the distribution system of gypsum board; nor was there any understanding or agreement that the jobber discount would be discontinued or the price to jobbers made the same as the dealer price (Lenci, R. 2809-2810, 2876, 2995-2996, 3038-3040; 3077-3078; George M. Brown, R. 1465; Black, R. 1358-1360). There was nothing in the license agreement or bulletins which prohibited sales of gypsum board to jobbers (R. 2809, 2876). As to the charge that jobbers were eliminated in respect of plaster and miscellaneous gypsum products, the Government's brief does not challenge the Trial Court's finding (See Gov. brief, p. 122).

The Government asserts that the only possible pretext for eliminating "jobbers" is that appellees could not lawfully control the resale price (Gov. brief, p. 252). No attempt is made to support this statement and there is no evidence in the entire record to justify it. If any reason were necessary to justify USG's establishment of a uniform price for patented gypsum board for both dealers and jobbers it lies in the fact that a jobber serves no economic purpose to a manufacturer who maintains an adequate sales department.

The Government's underlying contention in respect of jobbers is not that jobbers were kept from buying and selling patented gypsum board but that USG in exercising its right of price control failed to maintain a lower price for jobbers than for other classes of trade. The Govern-

ment's real quarrel is with the doctrine of the *General Electric* case rather than the findings of the Trial Court.

Manufacturing Distributors

The term "manufacturing distributor" is applicable to companies which manufacture and sell gypsum plaster but which do not, for lack of investment in the large amount of plant equipment necessary in the making of gypsum board, manufacture board. In order to be able to market a full line of products, the manufacturing distributors purchase gypsum board from USG or one or more of its licensees. The purchases are made at a discount, and the sales of the board are made to the same dealer trade as that to which USG and its licensees sell their board, and are therefore made in competition with USG and its licensees. The license agreements provided that a licensee might not sell patented gypsum board to manufacturing distributors without the written consent of USG (FF. 82, R. 4159, 4160).

USG freely, and without conditions attached, granted consents to the licensees to sell manufacturing distributors. No consent once granted was ever withdrawn. The Trial Court found that the consents were never used in any way to control or attempt to control the resale price of any of the manufacturing distributors (FF. 106, R. 4165).

The manufacturing distributors referred to in the evidence are Structural Gypsum Corporation, of Linden, New Jersey; the Connecticut Adamant Plaster Company, of New Haven, Connecticut; and the Oakfield Gypsum Products Corporation, of Oakfield, New York.

The Trial Court found that there was no understanding or agreement of any kind that the resale prices of

manufacturing distributors should be regulated or controlled[55] (FF. 83-84, 104-117, R. 4160, 4165 4167).

The foregoing findings are amply justified by the evidence. Numerous witnesses testified directly and unequivocally that there was no agreement or understanding of any kind that the resale prices of manufacturing distributors on gypsum board would be regulated or controlled (Neale, R. 1298-1299; Whittemore, R. 1402; Tomkins, R. 1987; Lenci, R. 2665, 2888-2891, 2943-2944, 2947-2948, 3033, 3071; Stromquist, R. 3602). The manufacturing distributors themselves likewise testified that they had no agreements or understandings as to the resale prices they should charge on gypsum board (Hansen, R. 3146-3147; 3215-3216; McCormack, R. 3382; Kellogg, R. 3410).

As to the consent to sell clauses of the licenses, the testimony is uniformly to the effect that USG granted to licensees consents to sell manufacturing distributors at a discount freely and without any conditions attached (Tomkins, R. 2035; Lenci, R. 2944; see also Hansen, R. 3217; McCormack, R. 3386; Kellogg, R. 3411).

The Government stresses here, as it did in the Trial Court, a number of exhibits having to do with charges of license violations of the minimum prices of patented board

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[55]This is the second time that a Court has held that the Government's charges in respect of jobbers and manufacturing distributors are without substance. In a prior criminal proceeding in which it was charged that USG, National, Certain-teed, Ebsary, and Newark, and numerous officers and employees of these companies and of American conspired illegally to control the prices of manufacturing distributors and to eliminate jobbers from the gypsum board industry, the District Court of the United States for the District of Columbia directed a verdict in favor of defendants at the conclusion of the Government's case (R. 4144).

in which reference is made to manufacturing distributors (Gov. brief, pp. 128-132). It has been the Government's contention that these are complaints against and regulations of manufacturing distributors. However, the Trial Court made specific and detailed findings that such evidence involved instances of violations of minimum prices by licensees, and not manufacturing distributors (FF. 112-117, R. 4166-4167). These findings are amply justified. For the most part, they are established by the very exhibits which the Government relies on. (*Structural*, Ex. 438, R. 6139, 2573; Lenci, R. 2846-2849, 2569; Ex. 443, R. 6144, 2573; Ex. 444, R. 6147, 2573; Ex. 436, R. 6136, 2573; Ex. 437, R. 6138, 2573; Ex. 438, R. 6139, 2573; Ex. 447, R. 6149, 2591; Ex. 439, R. 6141, 2573; Ex. 440, R. 6142, 2573; Ex. 449, R. 6151, 2591; Ex. 441, R. 6143, 2573; Ex. 442, R. 6145, 2573; Ex. 445, R. 6148, 2573; Ex. 446, R. 6148, 2573; Ex. 450, R. 6152, 2591; Lenci, R. 2585-2586, 3033-3034, 2568-2573; *Oakfield*, Ex. 512, R. 6206, 2744; Ex. 513A, R. 6208, 2744; Ex. 514, R. 6209, 2744; Lenci, R. 2718-2720, 2743-2744, 2926-2927; Hansen, R. 3093-3104; *Connecticut Adamant*, Ex. 463, R. 6165, 2591; Ex. 467, R. 6169, 2591; Lenci, R. 2892-2893; Ex. 464, R. 6166, 2591; Ex. 468, R. 6169, 2591; Lenci, R. 2891-2892, 2597-2598).

Board Survey and Licensee Meetings

In 1932 USG set up as a department a wholly owned corporation called the Board Survey Company. Its function was to receive complaints of license violations, to investigate the facts, call them to the attention of the licensee involved, and upon occasion to the attention of the licensor USG. Board Survey Company was organized by USG for

the purpose of bringing about compliance with the licenses. The licensees had no part in its formation, management or operation. From time to time a representative of USG, as licensor, met with representatives of the licensee companies for the purpose of explaining to them the provisions of the minimum price bulletins and for the purpose of securing adherence to such minimum prices by the licensees (FF. 20, R. 4143-4144).

The Government assigned no error in respect of the foregoing findings (See R. 4178-4186), but devotes 15 pages of its brief discussing numerous minor details in connection with price bulletins which were raised from time to time by licensor and licensees (Gov. brief, pp. 135-149).

Although the Government concedes that there was a relation between the price of board and the bulletin provisions (Gov. brief, p. 255), it nevertheless complains that licensee meetings were the occasions for concerted agreement on all those practices. The evidence is clear that there was no concerted action at licensee meetings (R. 2943). The Trial Court's findings that such meetings (the last of which was held ten years ago) were held simply to clarify the license bulletins is fully supported by evidence (R. 2814-2815; 3005-3006). Among the things complained of as having been discussed at the licensee meetings are questions with respect to commission salesmen, the use of dunnage, allowance of trade discounts and payments, warehousing and consignment sales, jobber sales, truck deliveries to the job, and advertising allowances, all which were covered from time to time by provisions in the various license bulletins.

With respect to commission salesmen, there was a practice in the industry to cut the price of the patented board

by paying commissions to a salesman who would in turn split his commission with the customer, the effect of which was to reduce the price of the board (R. 2853-2854). That was all that was discussed at the meeting of October 17, 1932, and the license bulletin which followed was intended to prevent that practice and was so understood by the licensees (R. 2857). This, together with other price concessions, was covered by a later bulletin dated February 6, 1939, to the effect that any sale of patent products, though ostensibly made at the minimum price, would be considered a violation if licensee reduces the price below the minimum by granting rebates, including the splitting of salesmen's commissions with customers (R. 100). The splitting of commissions was a deliberate rebate from the minimum price, and whenever the subject was discussed at a meeting or dealt with in a bulletin it was clearly understood that the licensor's position was that a reduction of the minimum price by splitting commissions was a license violation.

With respect to dunnage, which was board used to properly pack a shipment in cars, the practice arose among the licensees to put in a large amount of board ostensibly as dunnage but for the sole purpose of giving to the customer additional board by way of a rebate on the minimum price (R. 2659-2660). This practice was the subject matter of license bulletins issued by the licensor, and when discussed at a meeting simply represented a complaint by the licensor that overshipment of patented products in this way constituted a violation of the minimum p[illegible] bulletin. Finally, the subject was covered by the bulletin of February 23, 1937, above referred to, wherein it was provided that any reduction of the minimum price, by including board in shipments

under the guise of dunnage for the purpose of effecting a reduction in the minimum price, would be regarded by the licensor as a license violation (R. 100).

With respect to trade discounts, warehousing and consignment sales, jobber sales, truck deliveries to the job and advertising allowances, like the foregoing, practices grew up of using these items to cut the minimum price of board. Bulletins were issued by the licensor to curtail such practices which finally were included in the bulletin of February 6, 1939, above referred to, to the effect that a reduction in the minimum price by means of granting rebates, unwarranted refunds, credits or discounts, by hiring customers' trucks, by granting allowances for advertising or other purposes or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price below the minimum price, was a license violation.

This is all there was to the discussions at the licensee meetings complained of by the Government. The bulletins from time to time were a development of practices which arose and were discovered by the licensor and long before this suit was commenced had been crystallized and combined into the single bulletin of February 6, 1939, attached to the bill of complaint (R. 100).

Plaster and Miscellaneous Gypsum Products

The Trial Court found that there was at no time any agreement or understanding among any of the parties to the respective license agreements that prices would be raised or fixed upon plaster or any other unpatented gypsum product. The license agreements were not executed with an intent to

raise, maintain and stabilize the prices of unpatented materials. The parties to the respective license agreements knew that the licensor's right to fix minimum prices was limited to the prices on patented gypsum board manufactured and sold by the respective licensees (FF. 73, R. 4158).

The Trial Court further found that the defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, raise, maintain or stabilize the level of prices of plaster or miscellaneous gypsum products or any other unpatented product as charged by the Government. The increase in the price of plaster and miscellaneous gypsum products over the prices during the 1927-1929 price war was not the result of any device adopted or action taken by the defendants to bring about such increase (FF. 94, R. 4164).

The Trial Court also made a specific finding that a price protective provision of the bulletins that "Any sale of patented products, though ostensibly made at or above minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price * * * by reducing the price of other products * * *" is but part of a larger provision concerning rebates and allowances made for the purpose and with the effect of reducing the licensee's price on patented board below the minimum price therefor. It was not a device to raise, maintain or stabilize the price of plaster or miscellaneous gypsum products, and it was not applied by the defendants to that end. Nor did it have that effect. On the contrary the provision in question was a proper price protective measure reasonably designed to secure to USG the pecuniary reward of its patent monopoly.

In operation, it was not used to raise, maintain or stabilize the price of unpatented materials (FF. 95, R. 4162-4163).

The Trial Court made additional findings that a number of exhibits, many of which are again relied upon by the Government in its present discussion of alleged facts, did not establish that the defendants or any of them raised, maintained or stabilized, the prices of unpatented material (FF. 96, 97, 98, R. 4163-4164).

All of these findings are fully supported by the evidence (Griswold, R. 621-623, 699-700; Blagden, R. 876; Holland, R. 996; C. O. Brown, R. 1231-1234, 1238; George M. Brown, R. 1464-1465; Nelson, R. 1492; Whittemore, R. 1401-1402; Lenci, R. 2809, 2993-2995, 3075-3077; Black, R. 1365; Tomkins, R. 2010-2011, 2023, 2033, 2061; Chism, R. 3483).

In the face of this mass of unequivocal testimony by the Government's own witnesses, the Government's contention (Gov. brief, p. 152) that the Court should draw a contrary inference from the testimony regarding Cardiff Gypsum Company, is wholly without merit, nor is the testimony of Sensibar, the only witness on the subject, open to any such inference.

Point V

THE COURT BELOW CORRECTLY HELD THAT THE GOVERNMENT MAY NOT ATTACK THE VALIDITY OF PATENTS AS ALLEGED IN PARAGRAPH 46(a) OF THE AMENDED COMPLAINT.

The license agreements in the instant case involved some 60 patents—product, process and machine—covering the manufacture of gypsum board. The complaint, as origi-

nally filed in August, 1940, charged that the alleged conspiracy had been carried out in connection with such license agreements. It was not charged that any of the patents were invalid. By amendment some three years later, the Government attacked five of the patents (the three foam patents, the perforated lath patent and one of the metallized board patents) alleging that these were invalid and void as follows (R. 349):

> "46a. Many of the patents mentioned and described in said license agreements by which the said combination has been, and is being carried out in part, are process or machine patents. The article and product claims of Roos patents No. 2,017,022, No. 2,079,338, No. 2,080,009, No. 1,914,345, and No. 1,938,354 mentioned and described in said license agreements; and said patents, are each invalid and void for each of the following reasons: (a) there is no real invention or ~~novelty~~ in the claims of said patents; (b) the claims of said patents disclose no patentable invention in view of the prior art at the time the respective applications were filed; (c) the alleged inventions described in the claims of said patents were shown and described in printed publications in the United States more than two years prior to the filing of the respective applications; (d) the alleged inventions described in the claims of said patents are inoperative and devoid of novelty or utility; (e) the alleged inventions described in the claims of said patents were abandoned by the inventor and he was guilty of laches before the respective applications were filed; (f) the alleged inventions described in the claims of said patents were not reduced to practice until after other inventors had invented and reduced the same to practice and applied for patents thereon; (g) the said alleged inventions are described in ambiguous and not in properly clear, concise and

exact terms and; (h) the defendants have been informed of the invalidity of the claims of the said patents and have unreasonably failed to file in the United States Patent Office any disclaimer of such claims.[56] The said patents mentioned and described in the said license agreements, even assuming they are valid, are not basic article or product patents and do not singly or all together cover completely the business of mining and selling gypsum, or cover completely gypsum board, which is one of the forms in which unpatented gypsum is sold by the defendants, but at most constitute minor additions to the established and unpatented art of making gypsum board and afford no legal justification for the said combination."

By this amendment the Government sought a judicial determination that the Patent Office erred in issuing the patents and that they were for that reason invalid.

On motion of defendants before the commencement of trial, the Court dismissed paragraph 46(a) except the first and last sentences thereof (R. 369-395), reported at 53 F. Supp. 889.

The precise question considered by the Court below was whether the Government in an anti-trust case could allege in its complaint that patents issued by it were invalid for reasons other than fraud and thereby predicate a charge of unlawful conduct upon a basis that the Patent Office erred in issuing the patents.[56a] Stated differently, the Court below

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[56]The Government waived and withdrew the charge contained in Subdivision (h) (R. 434, 3931).

[56a]The three Roos foam patents were issued after proceedings in the Supreme Court of the District of Columbia under R. S. 4915, 35 U. S. C. 63 (R. 365). *Bayer* v. *Rice*, 75 Fed. (2d) 238 (Ct. of App. Dist. of Col. 1934). It is submitted that such proceedings have the effect of an adjudication of patentability. *Hill* v. *Wooster*, 132 U. S. 693 (1890).

held that the Government could not attack its own patent grants and seek to have them adjudicated invalid on grounds such as lack of invention, novelty or utility, which matters are delegated by statute to the Commissioner of Patents for determination prior to the issuance of the patents.

In connection with the allegations of paragraph 46(a), the Court below noted that the patents were not attacked upon the ground that they were invalid because being used in violation of the Sherman Act but that, conversely, the defendants were violating the Sherman Act, through patent license agreements, because the patents were invalid. In short, paragraph 46(a) requested the Court to sit in review on the Commissioner of Patents and determine that the Patent Office erred in issuing the patents and that as a consequence the defendants violated the anti-trust laws for having sought in good faith to enjoy the privileges of the patent grants (R. 371-2).

The Court below ruled that the Government had no right, statutory or otherwise, to attack the validity of the patents. It did not, however, either in its ruling with respect to 46(a)[57] or in its rulings on the submission of evidence during the trial of the case,[58] foreclose the Government from introducing evidence on the topics therein mentioned as might be relevant or material to other issues in the case. And by sustaining the first and last sentences of paragraph 46(a), the Court below gave the Government full

[57]R. 391.

[58]For example, in connection with the perforated lath patent, evidence was admitted, as bearing on the question of good faith, that one of the licensees, Certain-teed, had been advised prior to its acceptance of a license that the patent was lacking in invention. (Exhibits 601, 602, R. 1204, 1291, 3452).

opportunity to attempt to narrow the scope of the patents in question or show that they were not basic or of any substantial value.[59]

(a) The Government having made the Patent Grant after due Administrative Action Should not be Allowed to Question its own Action in an Anti-Trust Proceeding.

Under Constitutional authority, Congress has set up an extensive system for the issuance of patents designed to protect both the inventor and the public. Every patent application is studied and considered by experienced examiners skilled in the particular art of the invention.

The law provides for a Commissioner of Patents, assistant commissioners and examiners of "competent legal knowledge and scientific ability."[60] When a patent application is filed, the Commissioner "shall cause an examination to be made of the alleged new invention or discovery; and if on such examination it shall appear that the claimant is justly entitled to a patent under the law, and the same is sufficiently useful and important, the Commissioner shall issue a patent therefor."[61] Where necessary, hearings are held and testimony is taken.[62] Appeals within the Patent Office are allowed to the Board of Appeals.[63] A further appeal is allowable to the United States Court of Customs and Patent Appeals.[64] In the alternative, a suit in equity may be brought to compel the issuance of a patent.[65]

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[59] No attempt whatever was made to establish these allegations.

[60] R. S. § 476, 35 U. S. C. 2; R. S. § 482, 35 U. S. C. 7.

[61] R. S. §4893, 35 U. S. C. 36.

[62] R. S. § 4904, 35 U. S. C. 52; R. S. § 4905, 35 U. S. C. 53; R. S. 4906, 35 U. S. C. 53.

[63] R. S. § 4909, 35 U. S. C. 57.

[64] R. S. § 4911, 35 U. S. C. 59(a).

[65] R. S. § 4915, 35 U. S. C. 63.

The Government, through the Commissioner of Patents, is acting in its sovereign capacity in determining questions of patentability and issuing patents under these provisions of the patent law. In issuing patents, the Government makes a solemn covenant that the applicant shall have an exclusive right to the prescribed invention for 17 years, the patentee bargaining on the other hand fully to disclose his invention so as to increase the knowledge of the art.

By seeking to contend now that the Commissioner of Patents erred in issuing the patents in suit, the Government is at the very least breaching its solemn covenant with the patentee and those dealing with him in reliance upon the patent grant. Certainly a court of equity should not condone such conduct. As stated in the opinion of the Court below (R. 385):

> "No private litigant could expect relief in a court of equity upon the premise of a broken promise on his own part. *A fortiori* the Government should not. On the contrary it should scrupulously keep and perform each of its own covenants. One of the first objectives and essentials of good government is order and certainty in relations between government and citizen. This cannot be secured if the Government itself is not to be depended upon to abide its grants, even if they have been improvidently or erroneously made. The attack of the Government upon the patents under paragraph 46(a) is based upon the extraordinary premise that the Government can in one department issue a grant and in another question its own action, in the absence of charges of fraud in inducing the action. Common principles of justice and fairness in dealings between patent applicants and the Government give patentees a right to assume that their patents are valid insofar as any attack on

> them by the Government which issued them is concerned, unless the attack is for fraud in the obtaining of the patents."

It has become well settled by this Court and throughout the law that while courts may review actions of an administrative agency when they go beyond legal authority, or have been arbitrary, or induced to act by fraud, there is no authority, at least in the absence of statute, to review the exercise of discretion or judgment by such administrative agencies. *Welch* v. *Obispo Oil Co.*, 301 U. S. 190 (1937); *Leach* v. *Carlile*, 258 U. S. 138 (1922); *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479 (1919).

The foregoing doctrine has been applied in preventing the Government from attempting to cancel a patent on grounds other than fraud. *United States* v. *Bell Telephone Company*, 167 U. S. 224 (1897). In that case the Government brought a bill in equity to set aside and cancel a patent covering a telephone transmitter on grounds of both fraud and lack of patentability. It was held that the Government failed to establish the alleged fraud. As to the grounds of patentability, the Court held against the Government upon the ground that "the judgment of the Patent Office, the tribunal established by Congress to determine such questions, was adverse to the contention of the Government, and such judgment cannot be reviewed in this suit".[66] This Court stated (167 U. S. at p. 267):

> "But, further, Congress has establishd the Patent Office, and thereby created a tribunal to pass upon all questions of novelty and utility. It has given to that

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[66] *United States* v. *Bell Telephone Company*, 167 U. S. 224, at 264.

office exclusive jurisdiction in the first instance, and has specifically provided under what circumstances its decisions may be reviewed, either collaterally or by appeal. As said in *Butterworth* v. *Hoe*, 112 U. S. 50, 67, 5 Sup. Ct. 25, 34: 'That it was intended that the Commissioner of Patents, in issuing or withholding patents, in reissues, interferences, and extensions, should exercise quasi-judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed.'

"Sections 4911-4914, Rev. St., grant appeals in certain cases to the Supreme Court of the District of Columbia. It is true those sections do not authorize appeals on behalf of the Government, but the failure so to do may be evidence that Congress thought the Government ought not to interfere, and because it believed it had made ample provision for securing the rights of all without the intervention of the Government. Section 4915, Rev. St., authorizes a suit in equity on behalf of an applicant for a patent whose application has been refused. *Morgan* v. *Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, presented a controversy under that section, and in the opinion, on page 124, 153 U. S., and page 773, 14 Sup. Ct., we said: 'It is a controversy between two individuals over a question of fact which has once been settled by a special tribunal, entrusted with full power in the premises. As such it might be well argued, were it not for the terms of this statute, that the decision of the Patent Office was a finality upon every matter of fact.'

"It is true that all these sections refer to proceedings between individuals, but the Government is as much bound by the laws of Congress as an individual, and when Congress has created a tribunal to which it has given exclusive determination in the

first instance of certain questions of fact, and has specifically provided under what circumstances that determination may be reviewed by the courts, the argument is a forcible one that such determination should be held conclusive upon the Government, subject to the same limitations as apply in suits between individuals."

In conclusion, the Court stated that in prior proceedings[67] it had affirmed the right of the Government to proceed by suit in equity against one who had fraudulently obtained a patent but pointed out that (p. 269):

"* * * there was no attempt to define the character of the fraud, or deceit or mistake, or the extent of the error as to power which must be established before a decree could be entered cancelling the patent. It was not affirmed that proof of any fraud, or deceit, or the existence of any error on the part of the officers as to the extent of their power, or that any mistake in the instrument, was sufficient to justify a decree of cancellation. Least of all was it intended to be affirmed that the courts of the United States, sitting as courts of equity, could entertain jurisdiction of a suit by the United States to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred. We are of opinion, therefore, that the question, as stated, is not open for consideration in this case."

[67] *United States* v. *Bell Telephone Co.*, 128 U. S. 315 (1888) and *United States* v. *American Bell Telephone Co.*, 159 U. S. 548 (1895).

The Government's attack on the validity of patents in the present case constitutes precisely the same attempt to have this Court exercise an appellate jurisdiction over the decisions of the Patent Office which was rejected in the *Telephone* case. The attempt should be similarly rejected here.

There are many similar rulings by this Court in respect of the comparable determinations of land patents. In the case of *United States* v. *Coronado Beach Company*, 255 U. S. 472 (1921), the Government sought by a bill in equity to ascertain the rights of private parties in an island in the harbor of San Diego, California, and to condemn the entire island for public purposes. A dispute arose as to the extent of the original grant, the Government charging that it went only to the shore line and the company contending that it included the tide lands. The Government attempted to show that the extent of the original land patent was erroneous, but Mr. Justice Holmes, speaking for this Court said (p. 488):

> "The grant to Carrillo was bounded 'west by the anchorage for ships' and although it well may be that in view of the purpose set out in his petition and the circumstances the grant could have been construed more narrowly, that was a matter to be passed upon and when the decree and the patent went in favor of the grantee it is too late to argue that they are not conclusive against the United States. It is said that the field notes, not put in evidence at the trial, show that the deep water line was not surveyed, but was taken from the Coast Survey maps. But however arrived at it was adopted by the United States for its grant and it cannot now be collaterally impeached."

See also *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669 (1914); *Steel* v. *Smelting Co.*, 106 U. S. 447 (1882); *Mowry* v. *Whitney*, 81 U. S. 434 (1871).

The Government argues that it really isn't attempting to attack the patents, or obtain a cancelation thereof, but is merely attempting to show the fact of invalidity. It is submitted that this is an argument based on phraseology rather than substance. It has no merit. Upon the argument of the motion to dismiss paragraph 46(a) the Government conceded that it was seeking a judicial determination that the patents were invalid. On several previous occasions as well as in its present brief, the Government has contended it made no such concession but the record is clear that it did.[68] Indeed, the Government not only conceded

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[68]Upon the argument of the motion to dismiss paragraph 46(a) the following colloquy between Government counsel and Justice Stephens and Justice Garrett took place (R. 416-7):

"Justice Stephens. But we would have to make a judicial determination, would we not? The defense to price-fixing here is that price-fixing is proper under the General Electric case because it is price-fixing which occurs under patent license agreements. You assert that the patent license agreements are not valid for two reasons; first, because they go beyond the corporate confines of the General Electric case decision; and second, because of the patents on which they are founded being invalid. It seems to me that that goes to the very gist of the contentions. Have we got to reach a judicial determination that these patents are invalid, and if we do what is the difference between that and cancelling them, except in the form of the ruling?

"Mr. Steffen. I would say that you are quite right, that you would have to make a judicial determination. The difference is one in remedy. We don't ask to have it cancelled. Our only authority, as I see it here, is to enforce the Sherman Act, and that is all that we ask, that such remedies be granted as are necessary to make sure that the central policy of the Sherman Act is fully carried out.

but asserted the point. But whether or not the concession was made, the fact remains that by paragraph 46(a) the Government sought a judicial determination that the patents were invalid. No device of language will alter that fact. As the Trial Court noted (R. 3932):

> "The Government cannot by any contention or form of words or affidavit avoid the plain fact that in asking for a judicial determination of invalidity of the patents for the reasons charged in paragraph 46(a), it was in legal effect asking for a determination that the Commissioner erred in issuing them, because if the court determined that they were invalid it would of necessity have determined that the Commissioner erred in issuing them."

(b) There is no Statutory Authority for the Attack on Patents.

The patent statutes admittedly do not authorize an attack upon the validity of patents as alleged in paragraph

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And if, in the course of that, it is necessary to say that patent number so and so is invalid, and therefore their price-fixing scheme is invalid based on that, that would be a judicial determination, but we do not ask to have the patent cancelled.

"I might point out, Judge Garrett, that the other ground is that we are not proceeding on any question of fraud, which was granted in the American Bell Telephone case as being a proper means of proceeding.

"Justice Garrett. Yes, I understand that. The particular thing I was inquiring about is that I was curious to see if there was a judicial determination and that the patent was invalid, what is the difference between that and an order to cancel it. It has the same effect, doesn't it? That throws that process open to the public and destroys the value of the patent as far as its owner is concerned?

"Mr. Steffen. I should think so, * * *"

46(a).. On the contrary the legislative history of the patent law establishes that Congress never intended that the Government should be able to attack its own patent grant as here attempted.

Since the enactment of the first patent statute in 1790, Congress has provided for the granting of exclusive rights to inventors to make, use and sell their discoveries and for corresponding rights in certain members of the public to question the rights of patentees.

In the beginning, patents were issued upon petition to the Secretary of State, the Secretary for the Department of War and the Attorney General who granted a patent whenever they or two of them regarded the invention or discovery as sufficiently useful and important. At this time there was no system for carefully examining the patent applications of inventors nor for testing the claims by examiners skilled in the prior art. To counteract this situation, the law provided that within one year (later three years) of the issuance of a patent, anyone might seek a repeal of the patent by showing that it "was obtained surreptitiously or upon false suggestion," or "that the patentee was not the first and true inventor or discoverer" and, as in all later patent statutes, a defendant in any action brought by a patentee for infringement might plead that the patent was invalid.[69]

This situation remained without substantial change until 1836 when the Patent Office was first established. The 1836 law[70] created the office of Commissioner of Patents with a staff of examining clerks, a draftsman and a machinist, and the Commissioner was directed to make

[69] 1 Statutes at Large 109.
[70] 5 Statutes at Large 117.

an examination of the alleged new inventions to ascertain whether the same had been previously discovered by any other person or described in any printed publication. The Commissioner was further authorized to determine whether the invention was useful and important and properly described in the application. The section permitting a defendant in an infringement suit to question the validity of patents was preserved but the former section permitting anyone to seek a cancelation of a patent was repealed. In addition, the courts were authorized to declare patents invalid in suits between owners of interfering patents. The general framework of the patent law of 1836 remains unchanged to this time.

The Congressional intention is clear from the foregoing. Prior to the formation of the Patent Office, when there was no procedure for careful surveillance of the issuing of patents, Congress granted broad powers in all the public to bring proceedings to invalidate and cancel patents. Later, however, those powers became unnecessary, and were repealed. From that time the instances when the validity of patents could be attacked were limited. For the most part, the issue was raised in infringement suits.

In 1910 a law was passed permitting suits for patent infringement to be instituted against the United States in the Court of Claims.[71] This law specifically provided that in such an action the United States could avail itself of any and all defenses, general or special, that might be pleaded in an action for infringement. The Government relies on this circumstance to show that Congress was not adverse on moral grounds to permit the Government to challenge its own patent grant. In this instance the moral

[71] 36 Stat. 851, 35 U. S. C. 68.

question is of little substance since prior to the Act the Government was not liable for infringement at all and, in granting relief to patentees whose rights had been infringed by the Government, Congress saw no reason to place patentees in a more favorable position than they would have occupied in respect of a non-governmental infringer.

But we regard the statute in question as of significance for another reason. It shows that Congress deemed it necessary, after permitting a suit against the Government for infringement, specifically to reserve the right to the Government to challenge validity. The law already provided that "in any action for infringement the defendant" might show that the patent was invalid.[72] In the normal case, that law surely was broad enough to protect the Government since it provided for the defense of invalidity on behalf of any defendant in an infringement suit. The reason for making special provision for such a defense by the Government in this instance was that Congress recognized that the Government was in a special situation since it had itself granted the patent.

In the last few years several bills have been introduced specifically authorizing the Government to attack patents in an anti-trust case. None of these bills has become law.[73]

The Government contends that Congress gave it authority to attack patents when it enacted Section 4 of the Sherman Act authorizing the Attorney General to enjoin violations of the anti-trust law. This argument is faulty because the Government can only assert here that the Sherman Act has been violated after the Court has determined the pat-

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[72] R. S. 4920, 35 U. S. C. 69.

[73] H. R. 3874, 78th Cong. 1st Sess (1943); H. R. 3462, 79th Cong. 1st Sess. (1945); S. 2482, 79th Cong. 2nd Sess. (1946).

ents to be invalid. There is a bar against the suit at the threshold.

On the basis of the foregoing, it is submitted that Congress never intended that the decisions of the Patent Office on matters properly before it for determination should be questioned by another branch of the Government. For reasons similar to those urged above in connection with changing the rule of the *General Electric* case, this Court should not now change the law to subject patentees to governmental attacks via anti-trust law proceedings. As expressed by the Court below (R. 390):

> "The Government's contentions in respect of the right to attack the validity of the patents under paragraph 46(a) of the complaint really amount to an assertion not that it is, but that it ought to be, the law that notwithstanding the grant of a patent by the Commissioner of Patents the Government may test the validity of the patent in the courts. The Commissioner and his staff are asserted to be incapable, because of press of business and the conditions under which the Patent Office operates, including unavoidable ignorance of anticipation, of reaching conclusively dependable determinations in respect of the right to a patent; hence recourse to the courts to correct the Commissioner's action should be allowed, so it is urged. It is to be noted that this argument is as valid for direct attack as for incidental. If the assertions of the Government in respect of the limitations of the Patent Office are correct—upon this the court does not assume to pass—and if such limitations cannot otherwise be corrected, a case may perhaps be made for the devising of some test outside the Patent Office of the validity of patents. But it does not follow that it is within the proper function of the courts to devise it. There is

of course a recognized place for growth of the law through judicial decision in the "interstitial" or borderline case, but radical departures or innovations are not properly made by courts. Judges are not appointed in representative capacity for the purpose of law making; and judicial innovations upon the law are especially to be avoided when they would upset transactions entered into on the faith of the law as it is. Conceivably there should be Congressional action creating a statutory right in the Government to test in the courts the correctness of determinations of the Commissioner of Patents, some such remedy perhaps as is now afforded patent applicants under Rev. Stat. § 4915 (1875), 35 U. S. C. § 63 (1940). But such a remedy if created by statute would undoubtedly be made prospective in effect, that is to say, would apply only to patents issued after the passage of the act. Moreover, the actions permitted under such a statute would properly be made subject to a limitation in time, so that after a given period the rights under a patent would be secure to the patentee and those dealing with him so far as interference by the Government was concerned. It is not within the proper function of courts to open the door by judicial innovation to Government attack on patents, retroactive in effect and without limitation in time, and thus to unsettle industrial security so far as it is based on the patent system."

(c) The Authorities Relied upon by the Government do not Authorize the Attack on the Patents.

As the Court below stated in its opinion, there is no controlling judicial decision directly in point. The Government relies on *United States* v. *Porcelain Appliance Corp.*, Unreported (N. D. Ohio, E. D. Sept. 9, 1926), an anti-trust proceeding, where the Court denied a motion by defendants

to strike from the complaint allegations pertaining to the validity and scope of patents. The Court there said that, while the suit was not one to cancel patents and it was probably beyond the scope of all possible issues to decree patents or patent claims to be void, it was conceivable that invalid patents or patents of limited coverage, in the light of the prior art, might be wrongfully used in creating an illegal combination, and that whether the case was of such a nature as to permit or require inquiry into such questions could not be determined on the motion to strike. The Court did not consider the question whether the Government can raise an issue as to the validity of its own action in granting patents.

In *United States* v. *Standard Oil Co.*, 33 Fed. (2d) 617 (D. C. Ill. 1929), reversed 283 U. S. 163 (1931), an anti-trust case involving alleged restraints of trade arising from patent license agreements on cracking oil, the trial was conducted before a Master. During the course of the proceedings the Government offered evidence to show the lack of patentability of two of the patents. After objections, the Master certified the question to the District Court (consisting of three Circuit Judges under the Expediting Act) for a ruling and the Court directed that the evidence be received.[74] However, when the Master filed his report at the close of the trial he held that the Government could not attack the validity of the patents.[75] The District Court, in considering the Master's report, stated that it was "divided

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[74] *United States* v. *Standard Oil Co.*, 283 U. S. 163, Record on Appeal, Vol. I, pp. 410-424.

[75] *United States* v. *Standard Oil Co.*, 283 U. S. 163, Record on Appeal, pp. 447-449. The Government finds it convenient to omit any reference to this circumstance in its discussion of this case (Gov. brief, p. 285).

respecting the right of the government to attack the validity of the patents in these proceedings" (33 Fed. (2d) 617, at p. 623). This Court did not pass on the question. The case constitutes no ruling of any value on the question now before this Court.

Sola Electric Co. v. *Jefferson Electric Co.*, 317 U. S. 173, holds that a patent licensee sued for royalties is not estopped from counterclaiming for a declaratory judgment that the patents covered by the license were invalid. This Court held that under the circumstances of that case where price-fixing provisions were contained in the license, notwithstanding the rules of estoppel the defendant licensee could challenge the validity of the patents as asserted in its counterclaim. The Government argues that since this case and the similar rulings in *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394 (1947), and *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402 (1947) permit a private person to show invalidity notwithstanding an agreement not to do so, the Government ought to be able to do the same thing. But obviously these decisions do not reach the heart of the question, *i.e.* whether the Government itself may attack its own patent grant. Other cases, *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436 (1940), *United States* v. *Univis Lens Co.*, 316 U. S. 241 (1942), and *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942), have language implications which suggest to the Government that this Court might hold that it might attack patents in a Sherman Act case. In each instance no question of the validity of patents was raised and the language relied upon is mere dicta.

For the purpose of this question we may treat the amended complaint as charging only that the license agreements, though valid on their face and without the scope of

the Sherman Act, are nevertheless invalid because the patents are invalid. This, as shown, is an attempt by the Government to obtain a judicial determination of the validity of the patents.

It has been held by this Court that in an action to enforce a license agreement with price control defendants may defend on the ground that the patents are invalid. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88, *supra; Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 177, *supra.* It is important however to bear in mind that these cases involved only the right of a private party to defend against enforcement by the court of such a contract. There the judgment is a denial of future enforcement and is binding only upon the parties to the suit.

No such question arises here because (a) this is not an action to enforce a contract, (b) the Government granted the patents and may not seek a judicial determination of their validity for want of invention or other reason alleged in paragraph 46(a), and (c) the use of the patents by the defendants for the very purpose for which issued could not constitute a combination or conspiracy to violate the Sherman Act.

A patent, when issued, constitutes a solemn grant of the Government of the exclusive right to the invention, including the right to license others with price control. The patent has the presumption of validity and can not be attacked collaterally by the Government which granted it, nor does the law provide for any sort of direct suit by the Government to have a patent declared illegal for want of invention or any other reason except fraud on the Patent Office. It follows that no court has jurisdiction to review the action of the Commissioner or to adjudicate the validity of the patents for any reason alleged in the amendment.

The only right of the United States to bring a civil action to enjoin is found in Section 4 of the Act, wherein the several district courts are invested with jurisdiction to prevent and restrain violations of the Act at the suit of the Attorney General. Such an action may be maintained only where it is shown by the complaint that there is an unlawful combination, conspiracy or monopoly prohibited by Sections 1, 2 or 3 of the Act, to be enjoined. *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 377. There could be no violation of the Act by th exercise of the monopoly granted by the Government, nor could any intent to violate the Act be inferred therefrom. *Swift* v. *U. S.*, 196 U. S. 375, 396. The Government, in such a suit, may not anticipate a violation of the Act by seeking to review the action of the Commissioner and to obtain a judicial determination of the validity of the patents.

As stated, the use of the patents by the defendants for the very purpose for which they were issued could establish no combination or conspiracy to violate the Act. The patents, as between the United States and defendants, carry the presumption of validity. As shown, there is no court to which the United States may go to have the validity of the patents determined for want of invention or other reason alleged in paragraph 46(a) because the Congress has seen fit to withhold the right. To say the least, the Government's position is inconsistent, immoral and without any legislative support whatsoever.

(d) The Government's Attack on the Roos foam Patents is Without Substance.

In view of the importance of the Roos foam board invention as shown by the record in this case, the doctrine

of *Slawson* v. *Grand Street R. R. Co.*, 107 U. S. 649 (Gov. brief, pp. 283, 288) has no application here. Nor are the claims of the Roos patents open to attack because of functionality or indefiniteness, which were the fatal features of the claims held invalid in *General Electric Co.* v. *Wabash Appliance Corporation*, 304 U. S. 364, and *United Carbon* v. *Binney Co.*, 317 U. S. 228, relied upon by the Government in its attack on the claims of the Roos patents (Gov. brief, pp. 288-289). Thus in the *Wabash* case the tungsten filaments were not described by their properties, but by functional statements which called for a filament of tungsten

> "made up mainly of a number of comparatively large grains of such size and contour as to prevent substantial sagging and offsetting during a normal or commercially useful life for such a lamp."

Similarly in the *Binney* case, the claims were directed to what was otherwise an old product, carbon black "in the form of commercially uniform, comparatively small, rounded, smooth aggregates having a spongy or porous interior." Obviously this was too vague and indefinite and does not bear any resemblance to the claims of the Roos patents.

In the present case the Roos claims are clear and unequivocal, and not functional, as a brief analysis thereof will show. For example, Claim 9 of the basic Roos patent, No. 2,017,022, (quoted *supra*, p. 52) definitely specifies, first, that the product is a "light weight building material." This contrasts it with heavy concrete, bricks, stone, iron, steel, etc. Furthermore, it is "composed of a hard mass of cellular structure", which is made of a "set cementitious material." This defines the nature of the structure as being of set cement encompassing cells or voids within it.

These cells are then more definitely described as "foam cells permanently fixed therein" and which "possess their original form." The claim further defines these foam cells as "arranged throughout the structure in foam-like formation." This negatives the inclusion in the structure of merely heterogeneous pores or individually scattered holes or voids, such as might have been accidentally produced by the mere inclusion of some trapped air, as disclosed in the prior art products of Sanford and Luttgen, referred to by the Government (Gov. brief, p. 238).

Any one even slightly skilled in the building material art will recognize the nature of the product as being a set cementitious material (such as set gypsum) which, when broken open, will disclose therein voids in foam-like formation. Thus mere visual inspection will reveal the nature of the product and will permit of a comparison thereof with the claims. This is all the law requires. *Eibel Co.* v. *Paper Co.*, 261 U. S. 45, 65.

The second Roos patent, No. 2,079,338 claims the product there disclosed in even more definite terms. Thus Claim 1 (R. 108) not only positively recites the presence of bubbles, but further states that the walls thereof are reinforced by a colloidal agent from a given group. The purpose of such reinforcement is further stated, but this is not a functional statement. It is only a more detailed definition of the bubble walls.

The third Roos foam patent, No. 2,080,009, is specific to wallboard having a porous body which is like that of the two previous Roos patents. The claims, including claim 10 which is the main subject of the Government's criticism, are definite and precise and entirely proper.

We submit that the claims of the Roos foam board patents adequately, clearly and definitely cover the gypsum board involved in the present case.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

November 7, 1947

Respectfully submitted,

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FILE COPY

No. 13

In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

LIST OF EXHIBITS CITED IN BRIEF FOR THE UNITED STATES

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14	453	4469	122	562	5277
15	453	4474	123	564	5278
16	453	4495	124	565	5279
17	456	4499	125	566	5280
18	456	4511	128	584	5282
19	456	4523	129	585	5283
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21	456	4547	131	587	5284
22	456	4559	132	587	5285
23	456	4571	133	589	5286
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26	457	4587	136B	592	5289
27	457	4593	141	605	5292
28	457	4595	142	608	5293
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157	637	5306	228	1062	5394
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172	679	5321	231	1076	5400
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174	679	5326	235	1091	5409
175	679	5324	241	1629	5413
176	679	5325	244	1158	5420
177	679	5326	245	1158	5421
178	679	5327	246	1158	5422
179	679	5328	247	1163	5423
180	679	5329	248	1163	5425
181	679	5330	249	1166	5427
182	679	5331	250	1166	5607
183	679	5334	251	1166	5664
184	801	5337	252	1166	5721
185	801	5338	253	1166	5750
186	837	5347	271	3870	5799
187	837	5348	274	1629	5800
188	837	5349	275	1629	5805
189	838	5349	276	1629	5810
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197	882	5355	287	1260	5841
198	882	5356	288	1263	5842
199	882	5360	299	1331	5851
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201	885	5364	300A	1332	5852
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328	1507	5954	440	2573	6142
329	1507	5962	441	2573	6143
330	1507	5970	442	2573	6145
331	1507	5978	443	2573	6144
332	1507	5986	444	2573	6147
333	1522	5993	445	2573	6148
334	1525	5999	446	2573	6148
335	1525	6002	447	2590	6149
380	1986	6067	448	2590	6150
381	1986	6068	449	2590	6151
382	1986	6069	450	2590	6152
383	1986	6070	451	2589	6153
384	1986	6071	452	2590	6154
385	1986	6072	453	2590	6155
386	1986	6073	454	2590	6156
387	1988	6074	455	2590	6157
388	1988	6075	456	2590	6158
404	2478	6090	457	2590	6159
408	2505	6097	458	2591	6160
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493	2698	6188	694	3782	6493
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544	2758	6235	706	3815	6504
545	2758	6236	707	3815	6505
546	2758	6237	708	3816	6506
547	2768	6238	709	3816	6507
548	2767	6239	710	3817	6508
549	2770	6243	711	3817	6509
550	2771	6241	712	3817	6510
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725	3840	6526	759	3859	6558
726	3840	6527	760	3860	6559
727	3840	6527	761	3860	6560
729	3842	6528	762	3861	6561
730	3842	6529	763	3861	6562
731	3843	6530	764	3861	6563
732	3843	6531	765	3861	6564
733	3843	6532	766	3861	6564
734	3843	6533	767	3861	6563
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748	3856	6547	781	3867	6580
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750	3856	6549	783	3867	6581
751	3857	6550	784	3867	6582
752	3857	6551	785	3869	6583
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U. S. GOVERNMENT PRINTING OFFICE: 3647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 13

THE UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, CERTAIN-TEED PRODUCTS CORPORATION, THE CELOTEX CORPORATION, EBSARY GYPSUM COMPANY, INC., NEWARK PLASTER COMPANY, SAMUEL M. GLOYD, doing business under the name of Texas Cement Plaster Company, SEWELL L. AVERY, OLIVER M. KNODE, MELVIN H. BAKER, HENRY J. HARTLEY, FREDERICK G. EBSARY, and FREDERICK TOMKINS,

Appellees.

PETITION FOR REHEARING

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March 23, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA, *Appellant,* *vs.* UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, CERTAIN-TEED PRODUCTS CORPORATION, THE CELOTEX CORPORATION, EBSARY GYPSUM COMPANY, INC., NEWARK PLASTER COMPANY, SAMUEL M. GLOYD, doing business under the name of Texas Cement Plaster Company, SEWELL L. AVERY, OLIVER M. KNODE, MELVIN H. BAKER, HENRY J. HARTLEY, FREDERICK G. EBSARY, and FREDERICK TOMKINS, *Appellees.*	No. 13

PETITION FOR REHEARING

Come now the above named appellees, and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully state the following as grounds therefor.

I.

This Court's Holding that a *Prima Facie* Conspiracy Was Established by Reason of the Plurality of Licenses Fails to Give Proper Effect to the Rule of the *General Electric* Case, as Recognized by the Court in the *Line Material* Decision.

At this juncture of the case the principal question is whether the Court was correct in holding that the license

agreements and the bulletins issued under them were sufficient to establish a *prima facie* case of a conspiracy among the defendants to make "industry-wide" licenses with price limitation, in violation of the Sherman Act. We maintain that under the Patent Laws of the United States and the rule laid down in the *Bement* and *General Electric*[1] cases followed by this Court since 1902, United States Gypsum had the right to license its competitors with price limitation and the defendant competitors had the right to accept such licenses. The license agreements and bulletins were protected by the monopoly of the patents.

(a) It is now settled that a patentee has the right to license a competitor to make and sell a patented product in interstate commerce and to fix or control the price and terms and conditions of sale at which the product is sold. It is recognized in the *Line Material*[2] case that the adjustment between the lawful restraint of trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act has reached the point that a patentee may validly license a competitor to make and vend, with a price limitation, under the rule of the *General Electric* case. It follows that the patentee may within the rule grant the same license to any number of his competitors.

Within the rule as stated, in order to have practical application, the patentee must necessarily have the right to discuss with his prospective licensee the advantages or disadvantages of the proposed license both to himself and the licensee, their desire to enter into the license, the stabilization of price to be attained, and the provision for

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[1] *Bement* v. *National Harrow Co.*, 186 U. S. 70; *United States* v. *General Electric Co.*, 272 U. S. 476.

[2] *United States* v. *Line Material Company*, decided March 8, 1948.

price limitation, and finally to execute and deliver the written license as previously negotiated and agreed to. If this is legal, then duplication of the same negotiations with other competitor licensees is legal.

Any agreement or combination which operates as a restraint of trade or commerce among the several states is a violation of the Sherman Act except as otherwise provided by Act of Congress, such as the monopoly reserved to an inventor under the Patent Laws. Thus a single agreement between a patentee and a licensee competitor with price limitation would be as well a violation of the Sherman Act as a plurality of such licenses except for the monopoly of the patent. It follows that no distinction can be drawn between a single license to a competitor with price limitation and a plurality of such licenses with any number or all of patentee's competitors.

The Court, in the *Line Material* case, although urged by the government to do so, refused to overrule the *General Electric* case and proceeded to determine the issues on the assumption that the *General Electric* case continues as a precedent. As we read the opinion of Mr. Justice Reed in that case and the dissent of Mr. Justice Burton with whom the Chief Justice and Mr. Justice Frankfurter concurred, they all accept the rule of the *General Electric* case that a patentee may validly license a competitor to make and vend the patented product with a price limitation. This, as shown, must necessarily include any one or more competitors and a plurality of such licenses is entitled to the protection of the Patent Laws even if it covers the industry. It seems to us that any contrary view involves an economic or social question, not a legal one, and is a proper subject for the Congress, not the Courts.

(b) The opinion, without reference to the declarations, shows that as the result of the settlement of substantial claims for damages on account of infringement of the Utzman patents and the desire of certain manufacturers to avoid infringement of patents which the Court of Appeals had sustained and held infringed, licenses covering the Utzman board and machine patents and other patents were originally negotiated and granted to seven board manufacturers between 1926 and 1929. Subsequently the licensees and two other board manufacturers accepted licenses covering the same group of then pending patents and applications, including the so-called bubble and starch inventions, which licenses became effective upon the approval of the sale of the starch patent to United States Gypsum by the several district courts in which Universal's receiverships were pending. The government introduced in evidence all of the licenses and the price bulletins issued under them. Upon this record the District Court held at the close of plaintiff's case that plaintiff had failed to establish a *prima facie* case of conspiracy and ruled that the declarations of certain of the defendants were admissible only against those making them.

This Court, in rejecting the ruling that the declarations were admissible only against the defendants making them, said that a consideration of that point really involves the heart of the case, since the treatment of the declarations may vitally affect the outcome; that some may have doubts as to whether the agreements and bulletins alone are sufficient to establish a conspiracy but the admission of the separate declarations against all greatly strengthens the government's position (Slip op., p. 23). The Court then concluded that the industry-wide license agreements entered

into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a *prima facie* case of conspiracy to make industry-wide licenses with price limitation.

Thus, notwithstanding the holding in the *Line Material* case that the adjustment between the Patent Law and the Sherman Act has reached the point that a patentee may validly license a competitor to make and vend with a price limitation, it was held in this case that a plurality of licenses with price limitation was illegal. It is clear to us that the dissenting opinion of Mr. Justice Burton in *Line Material,* joined in by the Chief Justice and Mr. Justice Frankfurter, recognized not only the validity of such a license to a competitor licensee but the validity of a plurality of such licenses, within the rule of the *General Electric* case. There is no logic or reason for holding that one or any number short of all competitors may receive such a license and that the others may not.

In a group of such licenses separately negotiated and granted, the resulting monopoly divided among the patentee and his competitors is nevertheless the same monopoly originally granted by the patent. Obviously in such a case both the patentee and each of his licensees desire the license, seek the advantage of the price limitation, and in fact trade the disadvantages for the advantages, or vice versa, and agree to price control, the same as between the patentee and his licensee in the case of a single license.

Could it possibly be said that the repetition of similar desires, discussions or agreements with each of the other

licensees resulting in the execution of a group of licenses with price limitation was beyond the rule of the *General Electric* case? If not, as it seems clear enough, is it not equally clear that "industry-wide" license agreements so entered into with knowledge on the part of the licensor and licensees of the adherence of others, establish no *prima facie* case of conspiracy?

(c) It was stated in the opinion that in this case each licensee, as is shown by uncontradicted references to the meetings and discussions that were preliminary to the execution of the licenses, could not have failed to be aware of the intention of United States Gypsum and the other licensees to make the arrangements for licenses "industry-wide" (Slip op., p. 23). As we view it, the statement is not supported by the record, nor could it be inferred from the licenses introduced in evidence by the government. But even if conceded *arguendo*, could the intention of the United States Gypsum and its licensees to make licenses "industry-wide" with respect to the patent monopoly violate the Sherman Act? If the rule of the *General Electric* case recognizes the right, as we insist it must, of the patentee to license the industry, how could the intention of the patentee disclosed to its licensees or the intention of the patentee and some or all of its licensees to make the licenses "industry-wide", take the case out of the rule of the *General Electric* case? There certainly was no evidence of any agreement between the licensor and any of its licensees to do so nor could it be inferred from anything in the record, but if it could be, it would not be unlawful if we are correct in our position that plurality of such licenses with competitors is within the rule of the case.

The District Court was right when it said[3] such a license agreement ordinarily, and when the prices are (as in the *General Electric* case) a part of the license contract necessarily, involves negotiation and discussion between the licensor and the licensee and agreement upon the terms and conditions, the purpose to execute and carry out the agreement, combined action in signing the agreement and in performing the obligations thereof with knowledge that it will result in a stabilized and presumably profitable price for the patented product as between the parties and in the industry, and knowledge that it will result in a divided patent monopoly.

(d) It was said in the opinion that if the District Court had thought that a plan such as is evidenced by the license agreements and the bulletins was illegal under the Sherman Act, it might have had a different conclusion on the question of the admissibility of the declarations of some appellees against all; that its position stemmed logically from its understanding of the *General Electric* case (Slip op., p. 24). It seems clear that if the District Court's interpretation of the *General Electric* case in this respect is correct, its position with respect to the declarations as binding only upon those who made them is correct. It is equally clear that if this Court accepts the interpretation that plurality of licenses to competitors with price limitation is within the rule of the *General Electric* case, then its ruling that the license agreements and the bulletins make a *prima facie* case of conspiracy in violation of the Sherman Act is incorrect.

The government charged, as stated by the Court, that the defendants acted in concert in entering into the license

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[3] 67 F. Supp. 439-40.

agreements and that as a result of such concert of action competition was eliminated by fixing the price of patented board. How could concert of action in the negotiations for such licenses result in eliminating competition by unlawfully fixing the price of patented board if the negotiations contemplated a license under valid patents within the rule of the *General Electric* case? The acceptance of that theory is but to hold that a plurality of such licenses is not within the rule of the *General Electric* case, a thing we have demonstrated is without logic or reason so long as the rule of the case as interpreted by this Court in the *Line Material* case recognizes the right of a patentee to license his competitor with price limitation. To so hold is inconsistent and in conflict with the statement that the adjustment between the lawful restraint of trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act has reached the point that a patentee may validly license a competitor to make and vend, with a price limitation, under the *General Electric* case.

It was stated in this Court's opinion in the *Gypsum* case that the opinions in the *Line Material* case, whatever may be the different views expressed, make clear that the District Court's interpretation of the *General Electric* case differs from that of this Court; that with its interpretation of the rule of the *General Electric* case, the District Court was not required to balance the privilege of United States Gypsum and its licensees under the patent grants with the prohibitions of the Sherman Act against combinations and attempts to monopolize (Slip op., p. 25). In the *Line Material* case the Court, as shown, accepted the rule of the *General Electric* case but held that by cross-licensing between Southern and Line the dominant Lemmon and the subservient Schultz

patents were combined to fix prices, in which arrangement all of the defendants joined by virtue of the granting and accepting of the licenses with price limitation. The Court, according to its view of that case, was required to balance the privilege of the licensor and its licensees under the patent grants with the prohibition of the Sherman Act against a monopoly or restraint not within the rule of the *General Electric* case. It seems reasonably clear from all that was said in the opinion that the Court would have affirmed the District Court except for the cross-licensing feature of the case. If that case, instead of involving cross-licensing which was the turning point in the opinion, had involved merely plurality of licenses, the Court would have been compelled under the language of its own opinion to affirm the District Court, for did not the Court say that the adjustment between the lawful restraint of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act had reached the point, as the precedents now stand, that a patentee may validly license a competitor to make and vend with a price limitation under the *General Electric* case?

As shown above, it follows logically that a plurality of licenses, even "industry-wide", is within the rule of the *General Electric* case. If this Court accepted, as we think it did in the *Line Material* case, the plurality rule as within the rule of the *General Electric* case, then, as hereinbefore stated, it can not consistently hold in this case that the "industry-wide" license agreements and the bulletins are sufficient to establish a *prima facie* case of conspiracy. The net practical result after the negotiations are completed in a case involving plurality of licenses is a group of licenses to competitors under the protection of the Patent Laws and therefore within the rule of the *General Electric* case.

It follows that the Court erred in concluding that the "industry-wide" license agreements in this case and the bulletins were sufficient to establish a *prima facie* case of conspiracy in entering into the licenses, and therefore erred in ruling that the declarations of each defendant were admissible against the other defendants.

(e) The Court held that in so far as Finding 118 and the subsidiary findings were based by the District Court on its belief that the *General Electric* rule justified the arrangements or because of a misapplication of *Masonite* or *Interstate Circuit*, errors of law occurred which this Court could correct (Slip op., p. 28). The inference is that if the *General Electric* rule justified plurality of licenses "industry-wide", Finding 118 and the subsidiary findings should not be disturbed. We have demonstrated that whether the licenses are separately negotiated and granted or granted after discussion and knowledge of the plan by licensor and its licensees, there is no logic or reason to say that in the one case the rule of the *General Electric* case does apply and in the other it does not, since the result is the same in both cases. Under the rule of the *General Electric* case as recognized by the Court in the *Line Material* case there could be no error of law in interpreting the *General Electric* case to support a plurality of licenses among competitors with price limitation, even if "industry-wide", and made with knowledge of the purpose as hereinabove shown.

It only remains to be shown that the doctrines laid down in *Interstate Circuit* v. *United States*, 306 U. S. 208, and *United States* v. *Masonite Corp.*, 316 U. S. 265, as to the quantum of proof required for the government to establish its claim that the defendants conspired to violate the Sherman Act, have no application here.

It was said in the opinion that this Court in *Interstate* concluded that proof of an express understanding that each party would sign the agreements was not a prerequisite to an unlawful conspiracy; that it was sufficient that all of the defendants had engaged in concert of action within the meaning of the Sherman Act to enter into the agreements (Slip op., p. 28). The charge there was that the agreement of the distributors with each other and *Interstate* to impose the price restrictions upon subsequent run exhibitors and carrying of the agreement into effect with the aid of Interstate and Consolidated, constituted a combination in restraint of trade in violation of the Sherman Act. It was not denied that the conspiracy was established if the distributors agreed among themselves to impose the restrictions upon subsequent run exhibitors. The Court held that the acceptance by the competitor distributors, without previous agreement, of an invitation to participate in the plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

In the *Gypsum* case there was no evidence of concerted action but assuming *arguendo* that it may be inferred from the licenses and the bulletins, as stated in the opinion, the only concerted action which could be inferred would be that the defendants acted in concert in making industry-wide licenses with price limitation under valid patents. Whether separately negotiated without preliminary discussions or negotiated after meetings and discussions, as stated by the Court, the consequence is the same, a group of patent licenses within the rule of the *General Electric* case. To hold otherwise is to recognize the rule of plurality of licenses within the rule of the *General Electric* case but

at the same time to destroy it by a wholly impractical application. In the *Interstate* case the agreement or plan among the distributors and Interstate was in itself an agreement to restrain trade, which if carried out was a restraint of interstate commerce prohibited by the Sherman Act, whereas the concert of action inferred here could only be to make a group of licenses with price limitation under valid patents within the rule of the *General Electric* case.

In the *Masonite* case the Court held that a comprehensive *del credere* plan of distribution made to operate horizontally through an industry where manufacturing competitors fixed prices under the guise of agency arrangements was a violation of the Sherman Act. The fact that the product was a patented article did not save the arrangement because the disposition of the product by Masonite to the *del credere* was tantamount to a sale and exhausted any patent privileges. From a plurality of similar arrangements among Masonite and its competitors an inference arose that the arrangement resulted from concerted action and the whole plan was held to be illegal.

The very nature of the agreements under which hardboard was disposed of, tantamount to a sale, by Masonite to its competitors, exhausted any patent privilege and an agreement for price limitation with respect to such board was obviously in violation of the Sherman Act. In fact each separate agreement which involved disposition of the board to a competitor with price limitation, constituted a conspiracy between Masonite and the *del credere* and of course a plurality of such agreements operated as a conspiracy among Masonite and all the *del crederes* holding and operating under such agreements. No such situation exists here because, as shown, the plurality of license agree-

ments, even though "industry-wide", were nevertheless licenses under valid patents within the rule of the *General Electric* case.

In short, if we are right in our contention that plurality of licenses with price limitation among competitors, although "industry-wide", is within the rule of the *General Electric* case, as interpreted by the Court in the *Line Material* case, then we are not concerned with either the *Interstate* or the *Masonite* cases. The license agreements and the price bulletins in that situation could not, by any inference, show a conspiracy to violate the Sherman Act. Under these circumstances the declarations are binding only upon those who made them.

It is stated in the opinion that in those cases, as here, separate identical agreements were executed between one party and a number of others; that one thing the two cases established is the principle that when a group of competitors enters into a series of separate but similar agreements with competitors or others a strong inference arises that such agreements are the result of concerted action (Slip op., p. 28). But in both cases the inference was with respect to agreements which competitors had no right to make, agreements to restrain trade, the carrying out of which was a restraint of interstate commerce in violation of the Sherman Act. In the *Gypsum* case the patentee has the right to license its competitors with price limitation and may, as shown, license any or all of its competitors, even "industry-wide", under the rule just recognized by this Court as within the rule of the *General Electric* case. Separate but similar lawful agreements must still be lawful if the result is lawful and no preliminary agreements or understandings to make them could be unlawful. There is

no magic in the phrase "concert of action" for concert of action to do a lawful thing, even among competitors, is still lawful.

The Court also stated in its opinion that the conclusion that the defendants acted in concert follows despite the assumed legality of each separate patent license, for it is a familiar doctrine that lawful acts may become unlawful when taken in concert (Slip op., p. 35). That is true, but not where the concert of action results in a lawful act (such as here if it existed at all), to-wit: a group of licenses with price limitation under valid patents within the rule of the *General Electric* case. In both the *Interstate* and the *Masonite* cases a careful examination discloses that the concert of action was to do an unlawful thing and the result of carrying it out in each case was a direct restraint of commerce in violation of the Sherman Act. The rule of those cases inferring concert of action applies only to concert of action to do an unlawful thing. The cases cited by the Court in support of the statement that lawful acts may become unlawful when taken in concert, do not support the proposition that where even competitors take common action to do a lawful thing by lawful means it thereby becomes unlawful, which is illustrated by *Swift & Co.* v. *United States,* 196 U. S. 375, 396, where each of the defendants had the right at any time acting alone not to bid against his competitor, but he could not join with his competitors in an agreement not to bid against each other. In these cases the combination was to do an unlawful thing, notwithstanding the right of the individual acting alone to take the same action. We have found no case where the agreement or concert of action resulted in a lawful thing (as here, if there was any concert of action, in the making of

valid license agreements) where the court has held it unlawful.

It follows from what we have said that there was no error of law or mistake by the District Court in making Finding 118 and the subsidiary findings, as stated in the opinion, and that such findings should not be disturbed.

(f) We have shown above that plurality of licenses, even industry-wide, with price limitation, even under a plan by a patentee and its competitors to accomplish such licensing, is within the rule of the *General Electric* case. It necessarily follows, as stated before, that the holding of the Court that the licenses and bulletins are sufficient to establish a *prima facie* case and that the declarations referred to in the opinion may be received as binding upon all of the defendants is incorrect. But treating the declarations as binding upon the defendants, and giving them all the force the government claims for them, it clearly appears that the licenses and bulletins, together with such declarations, wholly fail to establish a *prima facie* case of conspiracy in violation of the Sherman Act. The industry-wide licensing, as shown, was in itself valid within the rule of the *General Electric* case, and preliminary understandings to make the licenses, whether individually or collectively, could not take them out of the rule. The Court said in its opinion that each licensee by the uncontradicted references to the meetings and discussion that were preliminary to the execution of the licenses could not have failed to be aware of the intention of United States Gypsum and the other licensees to make the arrangements for licenses industry-wide; that the industry-wide license agreements entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over

prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a *prima facie* case of conspiracy (Slip op., p. 23). There the Court gave to the declarations all the evidentiary value that could be claimed for them and yet it shows that they, according to the government's own view of the case, had the effect of doing no more than making the licensees aware of the intention of the patentee and other of its licensees to make the arrangements for licenses industry-wide. Being preliminary negotiations pointing only to the making of licenses with price limitation under valid patents, in a situation where all of the licensees had a keen interest in protecting their own business affairs, the declarations could not evidence any unlawful concert of action to violate the Sherman Act. This, as pointed out before, is not one of those cases where the concert of action, if it existed at all, was to accomplish an unlawful purpose, but on the contrary had for its purpose a group of licenses with price limitation under valid patents within the rule of the *General Electric* case.

It follows that Finding 118 and subsidiary findings of the District Court were proper and should not have been disturbed.

II.

The District Court's Findings with Respect to the Collateral Issues Should Not Have Been Rejected.

The District Court made findings adverse to the government's claims that the defendants conspired (a) to eliminate the production of unpatented open-edge board, (b) to eliminate jobbers of patented board, and (c) to stabilize the price of plaster and other unpatented products. In

rejecting these findings, we feel that this Court must have overlooked certain evidence and certain business and economic factors which make the findings of the Trial Court inevitable.

(a) *Elimination of unpatented open-edge board.* This Court has rejected the Trial Court's findings 54, 56, 62, 63, 64, 65, 66, 89 and 90 adverse to the government's claim that the defendants conspired to eliminate the production of unpatented open-edge board and to the effect that there was no agreement to discontinue the production of such board (Slip op., p. 30). The government assigned no error with respect to findings 62, 63 and 65 (Gov't. Brief, p. 160; R. 4178-4186).

This Court states that it is undisputed that after 1929 the defendants ceased to manufacture open-edge board, and suggests that the government's evidence shows that the parties anticipated that one result of industry wide licensing would be the elimination of open-edge board (Slip op., pp. 19, 31). An agreement or understanding to eliminate open-edge board cannot be inferred from this when the facts are clearly understood.

The government charged that it was essential to price control that unpatented open-edge board be taken off the market. It is important therefore to bear in mind that the licenses originally granted between 1926 and May, 1929, contained no price control except under the Utzman closed-edge patent which expired on August 6, 1929, and that the charge then is that the defendants conspired to eliminate open-edge board in order to support price control of the closed-edge board. Under the November, 1929, licenses, by the express terms of the license there was no price control of the board by reason of the patented closed-edge (FF. 10, R. 4137).

The witnesses testified unqualifiedly that there was no agreement to discontinue the manufacture and sale of open-edge board (C. O. Brown, R. 1236; G. M. Brown, R. 1465; Lenci, R. 2800, 3082; Whittemore, R. 1403; Holland, R. 966). Nothing in the license agreements forbids it. On the other hand, it was the uncontradicted, unqualified testimony of all of the government witnesses questioned on the point that the closed-edge board was a superior product; that it was easier and less expensive to make and that the trade was not satisfied with the open-edge board and demanded the closed-edge board (FF. 5, R. 4134; Whittemore, R. 1398-1399, 1404; C. O. Brown, R. 993-994, 1223, 1236, 1242; G. M. Brown, R. 1446-1447, 1455-1456; Lenci, R. 2790, 2964-2965; Chism, R. 3479-3481, 3502-3503; Blagden, R. 874-875; Miller, R. 1379, 1385-1386; Griswold, R. 478, 575). This Court said in its opinion that the closed-edge board was superior in quality to open-edge board, as it was cheaper to produce, did not break so easily in shipment, and was less subject to crumbling at the edges when nailed in place (Slip op., p. 4).

Beaver, Universal, National and Niagara had desired the folded-edge board to the point of infringing United States Gypsum's patents to make it. Beaver (successor to Bestwall), after the United States Circuit Court of Appeals for the Seventh Circuit held the closed-edge board patent valid and infringed and the United States Supreme Court had denied certiorari, and after its efforts to make a modified edge had likewise been held an infringement, settled United States Gypsum's claim for infringement against it by paying substantial damages and taking a license to cover the closed-edge board so that it could continue its manufacture without further infringement (FF.

6; R. 4134-4135; Blagden, R. 874-875). Universal and National, with infringement suits pending against them, and Niagara, with a notice of infringement, then chose to settle United States Gypsum's claims against them by paying substantial damages and taking a license to cover the closed-edge board patent (FF. 7, 9; R. 4135-4137). Could it be expected that they would turn to the manufacture of the inferior open-edge board after they had acquired the legal right to make the closed-edge board which they had been making as infringers?

Atlantic never made any board until it took its license under United States Gypsum's patents in March 1927. It took the license so that it might be equipped to make and sell closed-edge board and avail itself of the most modern methods of manufacture in its new plant (FF. 7, 62; R. 4135, 4156). Having done this, would it be expected to change over its machines to make the inferior product which the trade did not want?

Of the licensees taking the first closed-edge board license, only Certain-teed, Ebsary and Texas make the open-edge board. The government called as its witnesses G. M. Brown, Whittemore, Nelson and C. O. Brown, none of whom had any connection with the gypsum industry at the time they testified, but all of whom were officers of Certain-teed at the time it took its closed-edge board license from United States Gypsum. When Certain-teed acquired the assets of Beaver in 1928, certain of its officers, particularly G. M. Brown, thought that the company could get by with open-edge board, but their testimony establishes beyond a shadow of doubt that they had learned from experience that Certain-teed was unable to compete with the closed-edge board and had accordingly settled its liti-

gation with United States Gypsum, assumed Beaver's obligations under its closed-edge license, and taken a license of its own so that it might manufacture and sell the closed-edge board its trade was demanding (Whittemore, R. 1398-1399, 1403-1404; C. O. Brown, R. 1222-1223, 1236, 1242-1243; G. M. Brown, R. 1455-1456; Nelson, R. 1490-1491).

The government also called as its witnesses Lenci of Ebsary and Chism of Texas. It is equally clear that both Ebsary and Texas found that it was necessary for them to make the closed-edge board and considered it a business necessity to acquire the right to do so in order to meet the demands of their trade (Lenci, R. 2790-2792; Chism, R. 3479-3481). It is also undisputed that Texas manufactured and sold closed-edge board without any price control from August 6, 1929, until February 10, 1937, the date of the expiration of its original license (FF. 14, R. 4140).

Having determined to take licenses under these circumstances, can an inference of conspiracy to eliminate open-edge board possibly be drawn from the fact that Certainteed, Ebsary and Texas ceased making the wholly unsatisfactory product and produced the board covered by the license? Furthermore, having equipped their plants to produce closed-edge board, business men would not perpetrate the economic waste of making the closed-edge board and then trimming off the valuable closed-edge to produce the open-edge board.

The new licenses made in November 1929 combined the old inventions to the extent that the patents had not then expired with the bubble and starch inventions for convenience in one instrument. These licenses, which contained no price control based on the closed-edge invention, were taken

for the express purpose of making the new improved bubble and starch board which required the combined use of the bubble invention, the starch patent and the valuable board machine patent. At this time the plants which already had been equipped to make the improved closed-edge board were further equipped to make the bubble and starch board, and as so fully equipped could not make board without using the board machine and the starch patents (Whittemore, R. 1399, 1412-1414). Under these circumstances, the licensees naturally would not commit the economic waste of producing an open-edge board; nor could there be any inference of an agreement to eliminate the production of open-edge board to support price control.

The Court refers to a provision in the license agreements that royalties should be paid on the sale of all board sold whether patented or unpatented as strongly indicative of an agreement not to manufacture unpatented board (Slip op., pp. 19, 31). The royalty provision in the license agreements is to pay royalty for the privilege of using the patents, some of which, both under the original licenses and the November 1929 licenses, had to be used to make a successful operation. In the original licenses the royalty was stated to be for the privilege of manufacturing and selling board using the machines and inventions covered by the patents and applications under which the license was granted. These consisted of some 67 patents and applications among which were the Utzman closed-edge patent and, as shown, the most important Utzman board machine patent (Complaint, par. 61, R. 14). No board could be made without the use of one or more of the principal patents in this group after the plant had been equipped to use these improvements (Whittemore, R. 1399; Lenci, R. 2792). The November 1929 licenses likewise contained a provision that royalties would

be paid for the privilege of manufacturing and selling board using the machines and inventions covered by the patents and applications under which the license was granted. These consisted of some 57 patents and applications among which were the Utzman board machine patent, the starch patent and the bubble invention. When these licenses were made, no improved bubble and starch board could be made without the use first of the board machine patent and the starch patent and later these two patents and the bubble patent. Under these circumstances, it could hardly be said that the royalty provision in either group of licenses, simply for the privilege of using any or all of the patents, but which in practical operation required the use of some of the patents, was indicative of an agreement not to manufacture unpatented board. The evidence affirmatively shows that there was no agreement to discontinue the manufacture and sale of the open-edge board.

Furthermore, it should be borne in mind that the royalty provisions had their origin in the fact that the original licenses were largely made in settlement of damages for infringement and that United States Gypsum had insisted as part of the settlement that the licensee become obligated to pay royalty at least to the expiration date of the Utzman machine patent. Having had years of litigation to establish its patent rights in the face of wholesale infringement by other manufacturers, it is no wonder that United States Gypsum made certain that its licensees could not attempt to avoid payment of royalty on the pretense that the board was produced without the use of one or all of the patents under which the licenses were granted.

The "understanding" of certain witnesses that having acquired the licenses open-edge board would not be manu-

factured (Slip op., pp. 19, 31) was not an understanding in the sense of an agreement but merely an understanding in the sense of a realization of the business and economic factors hereinbefore stated. The testimony of these witnesses, taken as a whole, shows clearly that they were not speaking of an agreement to eliminate open-edge board, but rather of their understanding of the fact that no one having acquired the right to make the superior closed-edge board would think of making the inferior product.

There was never in the minds of the licensor or the licensees any thought of preventing the latter from making an open-edge board, for the simple reason that the improved methods, practical manufacture and economies, compelled the production of closed-edge board. The industry was required to do so not only because of the speed with which the board could be produced with resultant cost saving, but also because the public demanded the better board, just as gypsum plaster supplanted lime (Complaint, par. 23; R. 4), as the tungsten filament supplanted the carbon filament in electric lamps, as machines for producing materials in almost every industry supplanted hand made production of materials, and as the automobile supplanted the horse and buggy.

It follows that the Trial Court's findings, 54, 56, 62, 63, 64, 65, 66, 89 and 90, to the effect that there was no agreement to eliminate the production of open-edge board, were proper and should not be disturbed.

(b) *Elimination of jobbers of patented board.* This Court has rejected the Trial Court's findings 75-79 and 99-102 to the effect that the license agreements were not executed with the intent of eliminating jobbers, that the discontinuance of the jobbers' discount was an exercise by

United States Gypsum of its right to establish a price for a patented product, and that complaints by licensees that other licensees had sold to jobbers at a discount did not establish concerted action to eliminate jobbers (Slip op., p. 31). This was done although the government assigned no error with respect to findings 76, 78 and 79 (Gov't. Brief, p. 160; R. 4178-4186).

It should be pointed out at the outset that findings 80 and 103 to the effect that the government failed to introduce any evidence that the defendants effectuated any restriction upon the distribution of plaster and miscellaneous gypsum products through jobbers have not been rejected by this Court (FF. 80, 103; R. 4159, 4164-4165). The government did not even assign error as to finding 103 and concedes that plaster and gypsum products other than patented board are still sold through distributors and jobbers (Gov't. Brief, pp. 122, 160, 165; R. 4178-4186). The evidence referred to by the Court was that relating to patented board (Slip op., pp. 19-20, 32). The only question involved, then, is whether a patentee, in establishing a minimum price under licenses with price limitation, may establish the same price for the patented product to all classes of trade.

The government's underlying contention in respect of jobbers appears to be that United States Gypsum, in exercising its lawful right of price control over the patented product, failed to maintain a lower price for jobbers than for other classes of trade. As patentee, United States Gypsum could sell such board to the various classes of trade at any price it saw fit. That being so, how could the protection of its price by establishing the same price for its licensees be outside the scope of the patent monopoly which it had by reason of its patent ownership?

We believe that the evidence amply supports the Trial Court's findings that the jobbers' discount was not eliminated by United States Gypsum, except by the exercise of its right as patentee. Licensor expressly reserved the right to fix the minimum price at which any of the patented board was to be sold by the licensees, which right was at all times exercised by it according to licensor's own determination (Blagden, R. 876; Holland, R. 965-966; C. O. Brown, R. 1235; G. M. Brown, R. 1464-1465; Nelson, R. 1491; Whittemore, R. 1402-1403; Lenci, R. 2792, 2808, 2876, 2972, 2992, 3032, 3087-3088). There is no evidence that the bulletin of August 8, 1930, establishing the minimum price at which a licensee might sell its patented board to jobbers at the same level as the minimum price to the regular dealer trade, was anything other than United States Gypsum's independent exercise of the right reserved to it as licensor to fix the licensee's price on the patented board. There was no conflict in the testimony of the witnesses that there was no agreement or understanding whereby jobbers would be eliminated from the distribution system of patented board; nor was there any understanding or agreement with the licensees that the jobber discount would be discontinued or the price to jobbers made the same as the dealer price (Lenci, R. 2809-2810, 2876, 2995-2996, 3038-3040, 3077-3078; G. M. Brown, R. 1465; Black, R. 1358-1360).

The action of the patentee in eliminating the jobbers' discount on patented board could not result in an unlawful conspiracy among patentee and its licensees in violation of the Sherman Act, since the action is within the field of the patent monopoly granted by the patent law.

There was no showing, as stated in the opinion, that jobbers were eliminated for the purpose of preventing com-

petition by uncontrolled resale prices (Slip op., p. 32), nor can such a purpose be inferred from the exercise of the right of the licensor to fix the minimum prices of its licensees to the jobbers. Assuming, *arguendo,* that the price as fixed had the effect of eliminating jobbers of patented board, it would have been a proper exercise of United States Gypsum's rights, as patentee, within the rule of the *General Electric* case, as expressly applied by this Court in that case.

In the *General Electric* case both jobbers and retailers were eliminated and this Court found nothing illegal in such elimination. Yet the General Electric plan of distribution, which was adopted by Westinghouse, was devised to enable General Electric "to deal directly with consumers and purchasers, and * * * to avoid selling the lamps owned by the company to jobbers or dealers, and prevent sale by these middle men to consumers at different and competing prices." (272 U. S. at 483). It was held also in that case that a requirement that the licensee must follow the same plan of distribution as that adopted by the licensor would have been lawful (272 U. S. at 489).

It follows that the Trial Court's findings 75-79 and 99-102 were proper and should not be disturbed.

(c) *Stabilization of price of unpatented gypsum products.* This Court has rejected the Trial Court's findings 73 and 94-97 to the effect that there was no agreement that prices would be raised or fixed upon plaster or any unpatented product, that the bulletin provision prohibiting rebates was designed to protect the price of patented board and was not used to tabilize the price of unpatented materials (Slip op., p. 33).

In holding these findings to be erroneous, we think the Court has misunderstood the defendants' position as to the

licensor's right to protect the price on the patented product against indirect price cuttting, has misconstrued the evidence offered by the government in support of its charges that the prices of plaster and miscellaneous gypsum products were concertedly raised, maintained and stabilized, and has failed to give full effect to the ruling in the *General Electric* case.

The defendants do not contend and never have contended that United States Gypsum, as licensor, had the right, in the exercise of its lawful price control over the patented product, to control the price of plaster or other unpatented products, whether or not sold in conjunction with the patented board (Slip op., p. 32). Their position is that, if recognition be accorded to the principle that a patentee may protect his own price on the patented product by granting to his competitors licenses with price limitation, as we have shown above the Court recognized in the *General Electric* case and in the *Line Material* case, then it must follow, in practical application of the rule, that he be permitted to protect his price on the patented product against indirect price cutting by his licensee. This proposition was fully recognized by this Court in the *General Electric* ruling. The provisions in the General Electric-Westinghouse license and in the licenses in the instant case in respect of indirect price cutting on patented products—i.e., the price protective provisions, including those which relate to reduction in the price of patented board by reducing the price of other products sold in conjunction therewith for the purpose and with the intent of reducing the price of the patented board below the minimum price therefor as fixed by the licensor—are of similar character (R. 3991).

In rejecting the Trial Court's findings on this point, the Court is likewise rejecting the unqualified, uncontradicted

testimony of all of the witnesses in the case who were examined upon the subject that there was no agreement or understanding as to the prices to be charged for plaster and other miscellaneous gypsum products and who stated that they were free at all times to charge any price for plaster and any other unpatented product that they desired to charge (Griswold, R. 699-700; Blagden, R. 876; Holland, R. 966; C. O. Brown, R. 1231-1234, 1238; G. M. Brown, R. 1464-1465; Nelson, R. 1492; Whittemore, R. 1401-1402; Lenci, R. 2809, 2923, 2993-2995, 3075-3077; Black, R. 1365; Tomkins, R. 2010-2011, 2023, 2033, 2061; Chism, R. 3483).

Surely it should take unequivocal and convincing evidence to overcome the testimony of these witnesses, all of whom were called to the stand as government witnesses and most of whom had ceased to have any connection with the industry long prior to their appearance on the stand.

This Court states that the government cited letters written by officers of the corporate defendants showing they anticipated that price stabilization of patented board would be accompanied with stabilization of gypsum products and refers to the Trial Court's finding that the price of plaster and miscellaneous gypsum products in fact did increase after 1929 (Slip op., p. 20). This evidence showed no intent or purpose of an illegal conspiracy to fix the price of unpatented products. It amounted to nothing more than an awareness on the part of some in the industry that a settlement of the litigation, and elimination of the bitterness engendered thereby, would normally lead to better conditions in the industry generally. In giving significance to the fact that the price of plaster and miscellaneous gyp-

sum products did increase after 1929, this Court apparently has overlooked the fact that in 1927 and 1928 there was an intense price war in the industry wherein prices of plaster had reached a level which could not be maintained if most of the companies were to survive (FF. 60, 94, R. 4155, 4162; Holland R. 902, 966; Black, R. 1329-1330; Stromquist, R. 3573. See also R. 6398, 6410, 6414).

This Court refers to the license bulletin forbidding rebates and allowances on patented board as stating that a sale of board at posted prices would be in violation of the licenses if the licensee reduced the price of other products (Slip op., pp. 20-21).

It is clear from the provision of the bulletin itself (R. 5092-5093) and uncontradicted in the testimony of witnesses that this bulletin was not intended or understood to be an attempt to control the licensee's price of unpatented products, but was merely to prevent a reduction of the actual price charged for the patented board through the means of giving away other products or selling them in combination with patented board at a fake or false price therefor for the purpose and with the effect of giving a rebate to the purchaser on the patented board (Tomkins, R. 2023; Lenci, R. 2922-2923, 2993-2995, 3052-3053). In other words, although the licensee might sell its plaster and other unpatented products at any price it saw fit, or give them away, United States Gypsum, as licensor, had a legitimate interest in protecting the price of patented board when the licensee, in a sale of patented board, makes a deal with the buyer to cut the price on other products solely for the purpose and with the effect of reducing the price actually received by it for the patented board below the minimum price established by the licensor.

The Court refers to complaints of licensees made to Board Survey as to their competitors' failure to maintain prevailing prices on plaster (Slip op., p. 20). But an examination of the full correspondence with Board Survey will show that it had to do only with charges that a licensee was selling its patented board in violation of the minimum price therefor established by the licensor and that the licensor, through Board Survey, was merely enforcing the rebate provision of the bulletin within the meaning set forth above.

It follows that the Trial Court's findings 73 and 94-97 were proper and should not be disturbed.

CONCLUSION

For the foregoing reasons, and on the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted.

March 23, 1948.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Bruce Bromley, one of the attorneys for the above named appellees, United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

BRUCE BROMLEY

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1947.

The United States of America, Appellant, v. United States Gypsum Company et al.	On Appeal From the District Court of the United States for the District of Columbia.

[March 8, 1948.]

Mr. Justice Reed delivered the opinion of the Court.

The United States instituted this suit on August 15, 1940, in the District Court of the United States for the District of Columbia against United States Gypsum Company, five other corporate defendants, and seven individual defendants, as a civil proceeding under the Sherman Act. The complaint charged that the appellees had violated both §§ 1 and 2 of the Sherman Act by conspiring to fix prices on patented gypsum board and unpatented gypsum products, to standardize gypsum board and its method of production for the purpose of eliminating competition, and to regulate the distribution of gypsum board by eliminating jobbers and fixing resale prices of manufacturing distributors.

The Attorney General filed an expediting certificate on December 16, 1941, and on September 17, 1942, a three-judge court was constituted to hear the case. By amendment to the complaint the government charged that the article claims of five patents, owned by United States Gypsum were invalid and void. The appellees moved to strike the amendment to the complaint or in the alternative for partial judgment dismissing the amendment. On November 15, 1943, the court granted appellees' motion for partial judgment on the ground that the government had no standing to attack the validity of the patents in

an antitrust proceeding. The case thereupon went to trial and upon conclusion of the government's case on April 20, 1944, the appellees moved to dismiss the complaint under Rule 41 (b) of the Federal Rules of Civil Procedure upon the ground that on the facts and the law the Government had shown no right to relief. On June 15, 1946, the court filed an opinion holding that the motion should be granted, and on August 5, 1946, the court filed findings of fact and conclusions of law and entered judgment dismissing the complaint. The government appealed directly to this Court, 32 Stat. 823, and probable jurisdiction was noted on December 16, 1946. — U. S. —. The decisions below are reported as *United States* v. *United States Gypsum Co.*, 53 F. Supp. 889 and 67 F. Supp. 397. *United States* v. *Line Material Co.*, decided today, will be of value to the reader in considering this opinion.

I.

The appellees are engaged in the production of gypsum and the manufacture of gypsum products, including gypsum plasterboard, gypsum lath, gypsum wallboard, and gypsum plaster. At the time of the alleged conspiracy, appellees sold nearly all of the first three products which were marketed in states east of the Rocky Mountains, and a substantial portion of the plaster sold in the same area. Gypsum products are widely used in the construction industry. In 1939, the sales value of gypsum products was approximately $42,000,000, of which $23,000,000 was accounted for by gypsum board (plasterboard, lath, and wallboard), $17,000,000 by gypsum plaster and the remainder by gypsum block and tile and other products. Over 90% of all plaster used in building construction in the United States is made with gypsum.

Gypsum is found in numerous deposits throughout the country. Gypsum board is made by taking the crushed

and calcined mineral, adding water, and spreading the gypsum slurry between two paper liners. When the gypsum hardens, the mineral adheres to the paper and the resulting product is used in construction. Plasterboard and lath have a rough surface and are used as a wall and ceiling base for plaster; wallboard has a finished surface and does not require the addition of plaster.

Since its organization in 1901, United States Gypsum has been the dominant concern in the gypsum industry. In 1939, it sold 35% of all gypsum board in the eastern area. By development and purchase it has acquired the most significant patents covering the manufacture of gypsum board, and beginning in 1926, United States Gypsum offered licenses under its patents to other concerns in the industry, all licenses containing a provision that United States Gypsum should fix the minimum price at which the licensee sold gypsum products embodying the patents. Since 1929, United States Gypsum has fixed prices at which the other defendants have sold gypsum board.

The other corporate appellees are National Gypsum Co., Certain-teed Products Corp., Celotex Corp., Ebsary Gypsum Co., and Newark Plaster Co. Appellee Gloyd is the owner of an unincorporated business trading under the name of Texas Cement Plaster Co. National produced 23% of all gypsum board sold in the eastern area in 1939, Certain-teed 11%, and the other four companies correspondingly smaller amounts. Seven companies which were active when the licensing plan was evolved in 1929 and before have been acquired by other companies, and defendant Celotex entered the industry in 1939 when the licensing plan was fully in effect by acquiring the assets and licenses of American Gypsum Company. The seven individual defendants are presidents of the corporate defendants. The tabulation in the margin lists the cor-

porate and individual defendants, and shows the corporate changes which have taken place.[1]

Prior to 1912, gypsum board was manufactured with an open edge, leaving the gypsum core exposed on all four sides. In 1912, United States Gypsum received as assignee a patent issued to one Utzman, No. 1,034,746, covering both process and product claims on board with closed side edges, the lower paper liner being folded over the exposed gypsum core. Closed-edge board was superior in quality to open-edge board, as it was cheaper to produce, did not break so easily in shipment, and was less subject to crumbling at the edges when nailed in place. United States Gypsum also acquired a number of other patents relating to the process of making closed-edge board. In 1917, United States Gypsum sued a competitor claiming infringement of the Utzman patent and in 1921 the Circuit Court of Appeals affirmed a judgment holding that the Utzman patent was valid and infringed.[2] United States Gypsum settled with an infringer, Beaver Products Co., in 1926, by granting Beaver a license to practice the closed-edge board patent with a provision that United States Gypsum should fix the price at which Beaver sold patented board. Shortly before the settlement with Beaver, United States Gypsum instituted suits against American Gypsum Co., Universal Gypsum and Lime Co., and gave notice of infringement to Niagara Gypsum Co. Universal did not contest the suit but accepted a license with price fixing provisions, and two other small companies followed suit in 1927. American and Niagara would not settle, and in 1928 judgment was entered against American holding that American's partially closed-edge board infringed one of United States Gypsum's patents. United States Gypsum also instituted suits for infringement against National Gypsum Co.

[1] See p. 5.

[2] *Bestwall Mfg. Co. v. United States Gypsum Co.*, 270 F. 542.

FOOTNOTE 1

Name of firm	Date entered gypsum board industry	Sales of board in eastern area in 1939	Individual defendants	Companies acquired
United States Gypsum Co.	1901	$10,600,000	Sewell L. Avery, president, 1920–36; chairman of board, 1936 to date. Oliver M. Knode, president, 1936 to date.	Niagara Gypsum Co. (1929).
National Gypsum Co.	1925	3,500,000	Melvin H. Baker, president	Universal Gypsum and Lime Co. (1935); Atlanta Gypsum Products Corp. (1936).
Certain-teed Products Corp.	1926	2,100,000	Henry J. Hartley, president	Beaver Products Co. (1928); Beaver Board Co. (1928).
Newark Plaster Co.	1937	750,000	Frederick Tomkins, president	Kelley Plasterboard Co. (1937).
Ebsary Gypsum Co.	1928	670,000	Frederick G. Ebsary, president	
Celotex Corp.	1939	565,000		American Gypsum Co. (1939).
Texas Cement Plaster Co. (unincorporated).	1924	230,000	Samuel M. Lloyd, owner	

in 1926 and 1928 which were settled by the execution of a license and payment of damages as part of the industry-wide settlement with all other defendants in 1929. In that year, two sets of license agreements were signed in which United States Gypsum licensed all but two companies manufacturing gypsum board in substantially identical terms and from that date United States Gypsum has maintained rigid control over the price and terms of sale of virtually all gypsum board. Since 1937 the control has been complete.

Up to this point there is no dispute as to the facts. The government charged that the defendants acted in concert in entering into the licensing agreements, that United States Gypsum granted licenses and the other defendants accepted licenses with the knowledge that all other concerns in the industry would accept similar licenses, and that as a result of such concert of action, competition was eliminated by fixing the price of patented board, eliminating the production of unpatented board, and regulating the distribution of patented board. To support its allegations, the government introduced in evidence the license agreements, more than 600 documentary exhibits consisting of letters and memoranda written by officers of the corporate defendants, and examined 28 witnesses, most of whom were officers of the corporate defendants. Since the appellees' motion to dismiss when the government had finished its case was sustained, the appellees introduced no evidence. They did cross-examine the government's witnesses. The documentary exhibits present a full picture of the circumstances surrounding the negotiation of the patent license agreements, and are chiefly relied on by the government to prove its case.

Although the industry-wide network of patent licenses was not achieved until 1929, the government claims that the documentary exhibits show that the process of formulation of the plan began in 1925. On December 12,

1925, Augustus S. Blagden, president of Beaver, sent a memorandum to Sewell Avery, president of United States Gypsum. Beaver had been adjudged an infringer of the Utzman patent, and Blagden and Avery had negotiated terms for settling the suit. Blagden testified that Avery had offered to settle with Beaver by granting Beaver a license with a price-fixing limitation and provision that Beaver should pay damages for past infringement and acknowledge the validity of United States Gypsum's patents. In the memorandum Blagden analyzed in detail the consequences that would flow from five possible decisions of the Circuit Court of Appeals if the decree adjudging Beaver an infringer were appealed. Blagden noted that whether the court upheld or denied United States Gypsum's claim, United States Gypsum "would lose, perhaps irrevocably, its present opportunity to organize the industry and stabilize prices." The memorandum further pointed out that if the suit were settled on the terms offered by Avery, the result would be more favorable to United States Gypsum than any possible decision by the Court of Appeals. Beaver would accept a license and "would agree to use its best endeavors" to induce other manufacturers to accept similar licenses; if Beaver were successful in persuading other manufacturers to execute licenses, United States Gypsum could "maintain a lawful price control and avoid the necessity of a reduction by plaintiff [United States Gypsum] of current prices to meet competition." Under such circumstances, United States Gypsum "would be able to take a dominating position in the industry with an opportunity to control or at least to participate in the control of prices through legitimate means of patent licenses."

Although there is no proof that Avery approved Blagden's memorandum, Blagden did accept a license on the terms offered by Avery in July, 1926, and Blagden testified that he talked to a number of representatives from

other companies and urged them to accept licenses from United States Gypsum. Frank J. Griswold, general manager of American Gypsum Company, also was active in promoting a scheme of industry-wide licensing. On May 12, 1926, Griswold wrote a letter to the president of American, stating that he had talked to Blagden, and added that "This matter will be discussed by all independent wallboard manufacturers at a meeting in Chicago next Wednesday afternoon." Griswold concluded the letter with the statement: "According to the plans we have we figure that there is a possibility of us holding the price steady on wallboard for the next fourteen or fifteen years which means much to the industry."

Blagden and Griswold did not succeed in persuading other manufacturers to accept licenses in 1926. Universal accepted a license in September, 1926, but there is no evidence that Blagden and Griswold played any part in negotiating the settlement. Griswold suggested to Avery that United States Gypsum offer a shorter term license, but Avery was unwilling to make such a concession. During 1927 Griswold and Blagden continued their negotiations. Griswold and Samuel M. Gloyd, owner of the Texas Cement Plaster Co., corresponded with each other in regard to the licensing proposal. When Griswold informed Gloyd that Atlantic Gypsum Co. had signed a long-term license with United States Gypsum, Gloyd replied that he would apply for a license right away. Previously Gloyd had been trying to secure a shorter term license. Gloyd and Atlantic both signed licenses similar to the original license granted to Beaver.

In January 1928 Certain-teed Products Corp. purchased the assets of Beaver. Certain-teed had previously been making open-edge board and selling it at lower prices than the closed-edge board manufactured by United States Gypsum and its licensees. Certain-teed refused to accept the license agreement of Beaver and United

States Gypsum filed suit to compel Certain-teed to accept the license. Certain-teed posted a million dollar bond and commenced to make open-edge board at all Beaver plants. George M. Brown, president of Certain-teed, and Avery had several conferences at which they attempted to compose their differences, but without result. The government introduced in evidence a memorandum written by Brown, dated March 1, 1928, in which Brown expressed confidence that he could make open-edge board and sell it in competition with United States Gypsum, and that he was afraid to sign up a license with price-fixing provisions because his competitors would grant secret rebates. Brown concluded that Certain-teed should answer the suit of United States Gypsum to enforce the Beaver license by claiming that the suit was filed not in the interest of royalties but for the sole purpose of trade domination and monopoly and price control. Brown concluded with the statement that United States Gypsum's "determination to gather in a monopoly, if possible, leads them to risk everything for such domination because of the big rewards possible, if they can succeed." Certain-teed did file an answer to the suit couched in those terms. Griswold testified that in a conversation with Brown in the following month Brown stated that he might possibly consider taking out a license if "all of the other manufacturers, or certain ones of them" took out a license. Griswold also wrote the president of American that he had had a conference with Brown at which Brown had said that "they were willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred per cent."

No settlement was reached between United States Gypsum and Certain-teed in 1928, and no other license agreements were signed. A meeting of representatives of the

principal non-licensee manufacturers took place in October, and in November the board of directors of National adopted a resolution authorizing the officials of the company to enter into a license agreement. Besides Certain-teed and National, American, Ebsary, Niagara, and Kelley Plasterboard Company manufactured gypsum board but did not hold licenses from United States Gypsum.

The patent licenses in force at the beginning of 1929 provided that United States Gypsum could fix prices only during the term of the principal Utzman patent, which was scheduled to expire on August 6, 1929, although the remaining features of the agreements were to remain in force until the expiration of the last patent included under the license, which was in 1937. In negotiations in 1929, various defendants expressed concern over the possibility of an effective plan of price fixing in view of the imminent expiration of the Utzman patent. In a letter dated January 9, J. F. Haggerty, president of National, wrote Eugene Holland, president of Universal, asking his views as to possibility of continuing price control after the expiration of the Utzman patent. Holland in reply wrote as follows:

> "You will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the Utzman patent expires next August is not a practical reason for continuing the conflict."

Holland also stated: "I am quite sure that Mr. Avery would not be interested in negotiating settlements unless everyone involved was included." In point of fact, Holland's interpretation of Avery's views was incorrect; several months later licenses were granted to four unlicensed manufacturers but not to American or Kelley. Other exhibits suggest that the prospective licensees were

interested in accepting licenses at the same time. In his letter of January 9, Haggerty wrote as follows:

> "The question now in my mind is whether or not the other four board makers, who are outside the license agreement, feel that it would be advantageous to go in without the American Gypsum Company. It would seem to me that the chief value in a meeting would be to discuss that point."

On May 14, 1929, the board of directors of National held a meeting "for the purpose of discussing the license agreement submitted to all the manufacturers of gypsum products in the United States east of the Rocky Mountains by the United States Gypsum Co." The minutes of the meeting further quoted the chairman as saying that "he had been definitely informed that all other manufacturers of gypsum products east of the Rocky Mountains, except the American Gypsum Company, had agreed to sign the license contract in substantially the form as submitted to this Board." The board of directors authorized the execution of the proposed license contract.

Two days later National signed the license agreement. On the following day National sent a telegram to Avery as follows:

> "Our contract signed and in mail Reeb [of Niagara] ready Stop We are working with Ebsary with hope of everybody being set by Saturday to justify your calling meeting all board makers Monday if you like."

On May 18 Avery dispatched identical telegrams to United States Gypsum's licensees, and to Certain-teed and Ebsary, as follows:

> "Mr. Kling [of American] has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop

> We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license."

On May 20 Avery wrote Gloyd of Texas Cement Plaster, a licensee since 1927, stating that although American was unwilling to accept a license, officers of Certain-teed, Niagara, Ebsary, and National had expressed themselves favorably "to this adjustment" and "it is not improbable that the matter may be closed at the meeting tomorrow or soon thereafter."

On the following day, a meeting of representatives of all but one of the licensed manufacturers, and all unlicensed manufacturers except American and Kelley, took place in Chicago. The three unlicensed manufacturers who were present—Certain-teed, Ebsary and Niagara—signed license agreements.

At the same meeting, Avery explained to the licensees that United States Gypsum had acquired applications for a patent covering so-called "bubble board" and suggested that the licensees take out licenses under these applications. The applications covered a process for making gypsum board by introducing a soap foam in the gypsum slurry which would result in a lighter and cheaper board. Avery subsequently mailed proposed license agreements under the "bubble board" applications to the licensees. George M. Brown of Certain-teed on June 4th acknowledged receipt of the license proposal in a non-committal reply, but composed a memorandum for his own files in which he commented that the savings resulting from taking a license would be doubtful, and then added:

> "They would have a price control of our business, which might be to our advantage and might be to our disadvantage in future. They should be just as anxious to have us use this as we should be to

get it if there are to be the benefits that they anticipate in stabilizing the whole industry by making a uniform product and get away from the fierce warfares between different products like we have recently had. The saving is too slight to cause us very great worry even if never permitted to use it and the door will certainly be open later for its use if it has the merit that they believe it has. Under a contract sufficiently liberal, we should proceed at once."

On June 6th the licensees met again in Chicago to discuss the question of accepting a license under the "bubble board" patents. Shortly thereafter Certain-teed agreed to take out a license. National also agreed to accept a license; the minutes of the meeting of the board of directors on July 23 read in part as follows:

"The President stated that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry and has offered to license the entire Industry under the new method of manufacturing gypsum wallboard known as the 'Bubble System.' The license agreements submitted to each of the wallboard manufacturers contain price fixing clauses and under the agreements submitted the prices of wallboard would be fixed for the whole industry for the term of approximately seventeen years."

The board passed a resolution authorizing the executive committee to negotiate a license agreement, "provided that the United States Gypsum Company, by virtue of this agreement with this Corporation and with other manufacturers of gypsum wallboard, shall control the price of wallboard sold in the United States and its possessions."

Two days later another conference of licensees was held in Chicago. C. O. Brown, vice-president of Certain-teed,

prepared a memorandum for George M. Brown, president of Certain-teed, describing what happened at that meeting. According to the memorandum, National and Universal were unwilling to accept "bubble board" licenses until they had settled their litigation over National's infringement of Universal's starch patent. That patent included process and product claims on wallboard made with starch. Brown noted that United States Gypsum was working on a proposal to combine the starch and "bubble board" processes; although such a combination would have technological advantages, Brown commented on the fact that the starch patent had already been issued "so a combination of the two systems would give a patent to work under in the manufacture and sale of Gypsum Wallboard immediately, whereas under only the Bubble process there would be an interim between August 6th and the date of issuance of the Bubble Patent where there would be no Patent control. There is, of course, considerable benefit to having Patent control continue without a break." Brown further noted that Avery was trying to work out a proposition with Holland to buy the starch patent or to license the industry under both processes.

Another meeting of licensees was held in Chicago on August 6, the day on which the Utzman patent expired. In a memorandum summarizing what happened at the meeting, C. O. Brown said that it had been agreed that Universal would assign the starch patent to United States Gypsum, and the latter company would issue a single license contract covering all patents and patent applications. Brown further reported that "All of the Independent Gypsum Companies are willing to sign on this basis" and that "The Attorneys feel that such a contract would be exceptionally strong and price control could be maintained for the life of the Contract without difficulty." On August 27 the board of directors of National held

a meeting at which the president was authorized to sign a license with United States Gypsum covering the "bubble board" and starch patents "provided that all the present licensees of the United States Gypsum Company enter into a similar license and provided further that in the judgment of the President such action will result in legal stabilization of the markets."

Soon thereafter, National, Certain-teed, Ebsary, Niagara and Atlantic executed licenses with United States Gypsum, to become effective on the date when Universal's receiver transferred the starch patents to United States Gypsum. On November 5 the starch patents were assigned to United States Gypsum, and on the same date Universal also accepted a license. On November 25 American settled its litigation with United States Gypsum and accepted a license. All manufacturers of gypsum board were now licensed by United States Gypsum, except Kelley Plasterboard Co., and that concern executed a license in April of the following year. Texas Cement Plaster, a licensee under the Utzman patent, did not accept a license under the starch and "bubble board" patents until 1937 when the original license expired. Texas was thus free to sell board at any price from 1929 to 1937.

The contracts which became effective in November 1929 were in substantially identical terms. The license with Universal contained preferential royalty terms which were granted as consideration for the transfer of the starch patents; every other license (except that of Texas) provided that if the licensor should subsequently grant more favorable terms to any licensee (except Universal), the same more favorable terms would be granted to the first licensee. Each licensee agreed to pay as royalty a stipulated percentage on the selling price of "all plasterboard and gypsum wallboard of every kind" whether or not made by patented processes or embodying product claims.

The contract covered fifty patents and seven patent applications, including the starch patent and the "bubble board" applications; the contract was to run until the most junior patent expired. As two "bubble board" patents were issued in 1937, the licenses ran until 1954. The licensees agreed not to sell patented wallboard to manufacturing distributors unless United States Gypsum gave its consent as to each prospective purchaser. As in the previous contracts, United States Gypsum reserved the right to fix the minimum price at which each licensee sold wallboard embodying the licensor's patents, the licensor agreeing that such minimum price would be not greater than the price at which the licensor itself offered to sell. The more important provisions of the license to this litigation are set forth in an appendix to this opinion. Nothing has been omitted that appears to be significant on the issues considered.

In 1934 and 1935 United States Gypsum offered supplemental licenses to practice a patent covering metallized board, which was accepted by almost all licensees, and in 1936 United States Gypsum offered licenses under its perforated lath patent which were also accepted by most licensees. These supplemental licenses contained provisions allowing United States Gypsum to fix the minimum price on board made according to the patents which were licensed.

The government charged that the execution of the license agreements in May and November 1929 marked a turning point in the gypsum industry. The government introduced evidence tending to show that the price of first quality wallboard was raised, that United States Gypsum standardized the type of board sold by requiring its licensees to sell No. 2 wallboard and seconds at the same price as standard wallboard, and standardized the methods of sale so that no licensee could offer more favorable terms to a customer than any other licensee.

Although the license contracts gave the licensor the right only to fix the minimum price at which the licensee should sell, United States Gypsum issued a series of bulletins which defined in minute detail both the prices and terms of sale for patented gypsum board. They are printed on nearly a thousand pages of the record. The bulletins adopted a basing point system of pricing, according to which each licensee was required to quote a price determined by taking the mill price at the nearest basing point and adding the all rail freight from the basing point to the destination. The freight was to be computed on specified uniform billing weights, in order to prevent variations in freight arising from the differences in weight of board made by different manufacturers, and each licensee was directed to charge exactly the same switching, cartage, and extra delivery charges. Specified board sizes and minimum quantities were prescribed, licensees were forbidden to employ commission salesmen without the written consent of the licensor, regulations were prescribed as to the size, quantity and markings of gypsum board used for packing shipments, granting of long term credit was prohibited, sales on consignment were enjoined and licensees were forbidden to deliver board directly to a building site.

It is not practicable to quote one of the hundreds of comprehensive bulletins on prices and terms. The industry accepted directions for distribution of product as corollary to price control, so that prices would not be infringed by variations of seller contracts. The detail of directives is well illustrated by the directive for computation of freight to be added to the mill price and the provision against subtle price reduction. The excerpts below are from the Board License Bulletin of June 10, 1939.[1]

[1] "In computing the delivered minimum price hereunder, rail freight, wherever mentioned in this bulletin shall mean rail freight in accordance with rail rates published in regular freight tariffs, using the

In order to insure compliance with the price bulletins, United States Gypsum established a wholly owned subsidiary in 1932 named Board Survey, Inc. Licensees were invited to send in complaints as to violations of pricing bulletins to Board Survey and that organization forwarded the complaints to the alleged delinquent licensees. Board Survey was authorized to make a thorough check-up of all reported violations and to take such action as it might deem necessary or proper to protect United States Gypsum's rights under the license agreements and patents. Although the record discloses no instance in which Board Survey took or even threatened to take legal action against any licensee, there are many instances in which Board Survey sent letters to licensees requesting an explanation as to alleged violations. Meetings of licensees were held at which doubtful provisions of the price bulletins were explained. The trial court found that "in the main" licensees complied with the bulletin conditions.

The government further charged that the defendants had discontinued the production of unpatented open-edge board, eliminated jobbers by requiring jobbers to pur-

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weights shown above, and shall include all stopover, switching, cartage and other extra delivery charges applicable to the shipment. . . .

"Rebates, allowances, etc.:

"Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price by granting the customer rebates, unearned or unwarranted refunds, credits or discounts, by reducing the price of other products, by hiring customers' trucks, by granting allowances for advertising or other purposes, by splitting of salesmen's compensation or commissions with customers, by overshipment of patented products, by including board under the guise of dunnage, or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by licensee below such minimum price."

chase board at the same price as board sold to dealers, induced manufacturing distributors to observe bulletin prices upon resale of board purchased from licensees, and stabilized the price of gypsum plaster and other unpatented products.

It is undisputed that after 1929 the defendants ceased to manufacture open-edge board; the government claims that production of the unpatented board was discontinued in order to protect the patented board from competition. Prior to 1929 open-edge board had sold at lower prices than closed-edge board, and the government's exhibits show that the officers of the corporate defendants realized that there could be no effective stabilization of prices on closed-edge board as long as open-edge board was sold without price control. The license agreements provided that royalties should be paid on the sales of all board sold, patented or unpatented, a provision which would tend to discourage the production of higher cost unpatented board. Although the government produced no evidence of any agreement between the defendants to eliminate production of open-edge board, corporate officers of the licensees testified that they anticipated that one result of industry-wide licensing would be the elimination of open-edge board.

The May 1929 licenses required licensees to obtain the consent of the licensor before selling board to manufacturing distributors or to jobbers and a price bulletin issued under those licenses allowed licensees to grant a 10% discount to both classes. The November 1929 licenses, however, eliminated the consent requirement with respect to jobbers, although it was retained with respect to manufacturing distributors.

The jobbers' discount was continued in bulletins issued under the later licenses until August 8, 1930, when United States Gypsum ordered that the discount be eliminated. Although jobbers could still buy board if they so desired,

jobbers could remain in business only by selling to dealers at an advance over the bulletin prices. The court below found that some jobbers were able to remain in business by selling board in odd lots to dealers who did not wish to buy the minimum lot required in the price bulletins. The government points to the definition of "jobber" in the license agreements as "those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail," and points to uncontradicted testimony that jobbers as so defined were eliminated.

We do not stop to set forth the evidence upon which the government relied to support its charge that the defendants fixed prices at which manufacturing distributors sold gypsum board which they had purchased from United States Gypsum or its licensees, as that issue is not necessary for a decision of the case. To support the charge of stabilizing the price of unpatented plaster, the government cited letters written by officers of the corporate defendants showing that they anticipated that price stabilization in patented board would be accompanied with stabilization of all gypsum products. The trial court found that the price of plaster and miscellaneous gypsum products in fact did increase after 1929. The government charged that plaster prices were stabilized by requiring licensees who sold plaster together with patented board to sell plaster at prevailing prices. Board and plaster were usually sold together and the defendants claim that cutting of prices on plaster, in sales of the two together, operated in effect as a rebate on the price of board, and hence was legally subject to control. The government introduced in evidence a large number of complaints to Board Survey by licensees as to their competitors' failure to maintain prevailing prices on plaster. A bulletin provision forbidding rebates and allowances

stated that a sale of board at posted prices would be in violation of the license if the licensee reduced the price of other products, and Board Survey in summarizing violations of bulletin terms revealed through audit of the licensees' books listed "Price concessions on other material in connection with board sales."

II.

Appellees admit that in the absence of whatever protection is afforded by valid patents the licensing arrangements described would be in violation of the Sherman Act. Accordingly, the government sought to amend its complaint to allege that the "bubble board" patents were not valid. The trial court held that the government was estopped to attack the validity of the patents in the present proceeding, on the ground that such attack would constitute a review of action by the Commissioner of Patents which was not authorized by statute.[4] The trial court thought that the issue was controlled by *United States v. Bell Telephone Co.*, 167 U. S. 224, in which the United States was held without standing to bring a suit in equity to cancel a patent on the ground of invalidity.

While this issue need not be decided to dispose of this case, it seems inadvisable to leave the decision as a precedent. *Hurn* v. *Oursler*, 289 U. S. 238, 240. We cannot agree with the conclusion of the trial court. The United States does not claim that the patents are invalid because they have been employed in violation of the Sherman Act and that a decree should issue canceling the patents; rather the government charges that the defendants have violated the Sherman Act because they granted licenses under patents which in fact were invalid. If the government were to succeed in showing that the patents were in fact invalid, such a finding would not

[4] 53 F. Supp. 889.

in itself result in a judgment for cancellation of the patents.[5]

In an antitrust suit instituted by a licensee against his licensor we have repeatedly held that the licensee may attack the validity of the patent under which he was licensed, because of the public interest in free competition, even though the licensee has agreed in his license not to do so. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402. In a suit to vindicate the public interest by enjoining violations of the Sherman Act, the United States should have the same opportunity to show that the asserted shield of patentability does not exist. Of course, this appeal must be considered on a record that assumes the validity of all the patents involved.

III.

The trial court ruled that on motion to dismiss pursuant to Rule 41 (b), the court should weigh the evidence and grant the motion if the government failed to establish its case by a preponderance of the evidence, and the court further ruled that the government had the burden of proving both the charge of conspiracy and the charge that the licensing agreements were not within the protection of the patent grant.[6] We do not stop to consider those rulings. They are not of importance in this case as we think the preponderance of evidence at the conclusion of the government's case indicated a violation of the Sherman Act.

We are unable to accept, however, the ruling of the court that declarations of each defendant were admissible

[5] Compare *Becher* v. *Contoure Laboratories*, 279 U. S. 388.

[6] 67 F. Supp. 397, 417, 441.

only against the defendant making the declaration.[7] A consideration of that point really involves the heart of the case since the treatment of the declarations may vitally affect the outcome. Some may have doubts as to whether the agreements and bulletins alone are sufficient to establish a conspiracy but the admission of the separate declarations against all greatly strengthens the government's position. We think that the industry-wide license agreements, entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a *prima facie* case of conspiracy. Each licensee, as is shown by the uncontradicted references to the meetings and discussion that were preliminary to the execution of the licenses could not have failed to be aware of the intention of United States Gypsum and the other licensees to make the arrangements for licenses industry wide. The license agreements themselves, on their face, showed this purpose. The licensor was to fix minimum prices binding both on itself and its licensees; the royalty was to be measured by a percentage of the value of all gypsum products, patented or unpatented; the license could not be transferred without the licensor's consent; the licensee opened its books of accounts to the licensor; the licensee was protected against competition with more favorable licenses and there was a cancellation clause for failure to live up to the arrangements. See the Appendix. Furthermore, the bulletins gave directions to the industry as to its prices and methods of operation in unmistakable terms. The District Court did not accept the foregoing facts as definite evidence of a conspiracy. To us, these

[7] See discussion of "The rule concerning admissibility of declarations of alleged co-conspirators," 67 F. Supp. at 451, and "Significance of the evidence, assuming the declarations connected," *id.*, at 500.

facts are proof of a conspiracy. Certainly they are overwhelming evidence of a plan of the licensors and licensees to fix prices and regulate operations in the gypsum board industry.

If the District Court had thought that a plan such as is evidenced by the license agreements and the bulletins was illegal under the Sherman Act, it might have had a different conclusion on the question of the admissibility of the declarations of some appellees against all. Its position stemmed logically from its understanding of *United States* v. *General Electric Co.*, 276 U. S. 476.[8]

[8] To the District Court the *General Electric* case establishes "that a patent license agreement granting the right to make, use and vend a patented product, under terms and conditions, including prices, fixed by the licensor, is lawful. Such a license agreement ordinarily, and, when the prices are (as in the *General Electric* case) a part of the license contract, necessarily, involves negotiation and discussion between the licensor and the licensee and agreement upon the terms and conditions, a purpose to execute and carry out the agreement, combined action in signing the agreement and in performing the obligations thereof, with knowledge that it will result in a stabilized and presumably profitable price for the patented product as between the parties and in the industry (since the parties are, by virtue of the patent, the only ones having a right to make, use and sell the superior patented product) and with knowledge that it will result in a monopoly (*i. e.*, a divided patent monopoly), in probable discontinuance of manufacture and sale by the licensee of inferior materials (the licensee's incentive to take a license is the right to make the superior product), and in control of distribution. What a lawful patent license agreement normally involves cannot be unlawful. Additionally, since a patent owner may lawfully divide his patent monopoly with a plurality of licensees, there will in the usual course be with each of such licensees the same negotiation and discussion, agreement upon terms, purpose to execute and carry out a license contract and to accomplish its normal results, and combined action in so doing, as in the case of a single licensee. And each licensee will be informed of and discuss with the licensor the terms and conditions of the proposed licenses; otherwise no more than a single license could be executed. A patent owner would not be able to license competing manufacturers upon different price terms; no

The opinions in No. 8, *United States* v. *Line Material Co.*, decided today, whatever may be the different views expressed, make clear that the District Court's interpretation of *General Electric* differs from that of this Court. With its interpretation of the rule of *General Electric*, the District Court was not required to balance the privileges of United States Gypsum and its licensees under the patent grants with the prohibitions of the Sherman Act against combinations and attempts to monopolize. Conspiracies to control prices and distribution, such as we have here, we believe to be beyond any patent privilege.

Under its view of the *General Electric* case, the District Court concluded that only a lack of good faith by defendants in the execution of what that court considered legitimate exploitation of the patents could justify in this case

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one such would be willing to suffer competitive disadvantages; no one such would be willing to sign in the dark as to the terms to be extended to the others; ordinarily, moreover, there will be discussion at large, *i. e.*, within the trade, of the advantages and disadvantages of the licenses proposed by the patent owner. Each of a plurality of licensees will, moreover, have the same purpose to take a license and to secure its resulting advantages. The licensor and each licensee of such a plurality constitute a 'combination' to effectuate the purposes of their license. Since a plurality of licenses is lawful, all of this must be lawful. Further, if in practical effect the licensor and the plurality of licensees are a 'combination' to the same end, such a 'combination' is not stigmatized by the law—provided in purpose and effect it does not secure to the patent owner more than the normal reward of a patent monopoly, nor to any of the licensees with whom that monopoly is divided more than the advantages which naturally result to a licensee, as well as to a licensor, from patent licensing. All of this necessarily follows from the *General Electric* case." 67 F. Supp. at 439–40.

Referring to the evidence above, the District Court said, *id.*, p. 457: "These items do not prove the conspiracy charged because they do not show that the licenses were not bona fide or that they were executed to accomplish restraints outside the proper limits of a patent monopoly."

a determination adverse to the defendants.[9] The trial court held that an association of defendants in a common plan to organize the gypsum industry and stabilize prices through a network of patent licenses was legally permissible, and that in any event the government failed to prove that the defendants had associated themselves in such a plan. The trial court further found that the license agreements were entered into in good faith, in reliance upon *United States* v. *General Electric, supra*, and *Bement* v. *National Harrow Co.*, 186 U. S. 70, and were intended to bind the parties to the promises made; that the explicit terms in the licenses were within the scope of the patent grant, and that the government had failed to prove any agreement among the defendants to take

[9] 67 F. Supp. 500–501.

"But in view of the importance of this case and the consequent probability that it will reach a higher tribunal, we think it desirable also to state our views as to the meaning of the evidence when the declarations are considered as binding not merely upon the declarant but also upon all of the alleged co-conspirators. We have considered the evidence in this light, and we think the Government still has not proved that the license agreements were executed not as bona fide license agreements reasonably designed to secure to USG the pecuniary rewards of its patent monopoly but only as sham agreements to give color of legality to the illegal purposes alleged in the complaint, and has not proved that the operations of the defendants were carried beyond the proper limits of the USG patent monopoly, and therefore has not proved the combination and conspiracy charged. The evidence discussed in topics V and VI no more proves lack of bona fides in the execution of the license agreements, or operations beyond the limits of the patent monopoly, when the declarations are regarded as binding upon all of the alleged co-conspirators, than it does when such declarations are considered as binding only upon the declarant. This is necessarily so—in the view we take of the significance of the declarations. Since, as demonstrated in topics V and VI they fail to convict the declarants themselves of lack of bona fides in the execution of the licenses, or of operations beyond the proper limits of the USG patent monopoly, they cannot convict others thereof."

actions which were outside the scope of the patent grant. Specifically, the trial court found that there was no agreement among the defendants to raise the price of board to arbitrary and non-competitive levels, to standardize the production of board by pricing No. 2 board and seconds out of the market, to eliminate the production of open-edge board, to eliminate jobbers, to control the resale price of board sold to manufacturing distributors, or to stabilize the price of unpatented gypsum products. The court further held that as to all those charges except the last two the defendants would have been acting within the scope of the patent grant even if they had agreed to do the things charged. We conclude that regardless of motive, the Sherman Act bars patent exploitation of the kind that was here attempted. The license agreements and the bulletins establish the conspiracy of the licensor and each licensee to violate the Sherman Act. With the conspiracy thus fully established, the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy.[10] We think that all of the declarations and acts which we have set forth in this opinion are in aid of the ultimate conspiracy. We do not attempt to fix a date when the conspiracy was first formed. At least, the declarations which we have quoted were made with the purpose of advancing a plan which ultimately eventuated in the licenses of 1929.

IV.

We turn now to a different phase of the case—the correctness of the findings. The trial court made findings of fact which if accurate would bar a reversal of its order.

[10] *Van Riper* v. *United States*, 13 F. 2d 961, 967; *Lefco* v. *United States*, 74 F. 2d 66, 68; *Deacon* v. *United States*, 124 F. 2d 352, 358; *United States* v. *Compagna*, 146 F. 2d 524, 530.

In Finding 118 the trial court found that the evidence "fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices." The opinion indicates that in making this finding the trial court assumed *arguendo* that declarations of one defendant were admissible against all. 67 F. Supp. at 500. In examining the finding we follow *Interstate Circuit* v. *United States*, 306 U. S. 208, and *United States* v. *Masonite Corp.*, 316 U. S. 265, as to the quantum of proof required for the government to establish its claim that the defendants conspired to achieve certain ends. In those cases, as here, separate identical agreements were executed between one party and a number of other parties. This Court, in *Interstate Circuit*, concluded that proof of an express understanding that each party would sign the agreements was not a "prerequisite to an unlawful conspiracy." We held that it was sufficient if all the defendants had engaged in a concert of action within the meaning of the Sherman Act to enter into the agreements. In *Masonite* the trial court found that the defendants had not acted in concert and that finding was reversed by this Court. One of the things those two cases establish is the principle that when a group of competitors enters into a series of separate but similar agreements with competitors or others, a strong inference arises that such agreements are the result of concerted action. That inference is strengthened when contemporaneous declarations indicate that supposedly separate actions are part of a common plan.

In so far as Finding 118 and the subsidiary findings were based by the District Court on its belief that the *General Electric* rule justified the arrangements or because of a misapplication of *Masonite* or *Interstate Circuit*, errors of law occurred. These we can, of course, correct. In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts,

heretofore described or set out, Rule 52 (a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice.[11] Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies[12] or by a jury,[13] this Court may reverse findings of fact by a trial court where "clearly erroneous." The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however.[14] A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination

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[11] H. Doc. No. 588, 75th Cong., 3d Sess., Notes to Rules of Civil Procedure; Report of the Advisory Committee, Supreme Court of the United States, on Rules of Civil Procedure, April, 1937, Rule 59 and notes; Preliminary Draft, Rules of Civil Procedure for the District Court of the United States, May 1936, Rule 68 and notes.

[12] *Corn Products Co.* v. *Federal Trade Comm'n*, 324 U. S. 726, 739; *Labor Board* v. *Greyhound Lines*, 303 U. S. 261, 268.

[13] *Lawrence* v. *McCalmont*, 2 How. 426, 453; *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U. S. 163, 170.

[14] 2 Street, Federal Equity Practice (1909) §§ 1510, 1514; *Furrer* v. *Ferris*, 145 U. S. 132; *Tilghman* v. *Proctor*, 125 U. S. 136, 149–50; *District of Columbia* v. *Pace*, 320 U. S. 698, 701; *Virginia R. Co.* v. *United States*, 272 U. S. 658, 675.

counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous.

In Findings 54, 56, 62, 63, 64, 65, 66, 89 and 90, the trial court made findings adverse to the government's claim that the defendants conspired to eliminate the production of open-edge board.[15] The tenor of those

[15] We quote Findings 54 and 89 as typical:

"54. The fact that for the privilege of using the patents, royalties are fixed in the license agreements at an amount equivalent to a designated percentage of the selling price of the licensees of all gypsum board manufactured by them, whether or not patented, does not establish an agreement to make only the patented product and does not establish that the license agreements were executed in bad faith. The patents were numerous and covered not only the patented board but machines and processes in the manufacture of board, and the rights and privileges granted were of great value to the manufacturers of gypsum board. This royalty provision is in effect a provision for a percentage of gross sales, and as such is but a convenient means of measuring the amount to be paid for the privilege of using the patents. It might with equal propriety have been a lump sum. This provision in the license agreements was not an attempt to impose a royalty upon an unpatented product, nor was it intended to drive open-edge board off the market, nor did it have that effect."

"89. The defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, accomplish any improper standardization of gypsum board or its method of production, as charged by the Government."

findings is that there was no agreement among the licensees to discontinue the production of open-edge board, although the trial court conceded that it might be "inferred" that each licensee did not expect to continue the manufacture of open-edge board. The provision in the license contracts that royalties should be paid on the production of unpatented board is strongly indicative of an agreement not to manufacture unpatented board, and the testimony of the witnesses is ample to show that there was an understanding, if not a formal agreement, that only patented board would be sold. Such an arrangement in purpose and effect increased the area of the patent monopoly and is invalid.

In Findings 75–79, 99–102,[16] the trial court considered the problem of jobbers. Those findings state, in effect, that the license agreements were not executed with the intent of eliminating jobbers, that the discontinuance of the jobbers' discount was an exercise by United States Gypsum of its right to establish a price for a patented product, and that complaints by licensees that other licensees had sold to jobbers at a discount did not establish concerted action to eliminate jobbers. We are unable to agree to these holdings. Since the defendants entered into a common scheme to stabilize the industry, and since the elimi-

[16] We quote Findings 75 and 77 as typical:

"75. The license agreements were not executed with an intent to effectuate improper restriction upon the distribution of gypsum board, plaster or miscellaneous gypsum products, specifically, to 'eliminate' jobbers through the discontinuance of a sales discount."

"77. There was no agreement or understanding between any of the parties to the license agreements in the instant case whereby jobbers would be eliminated from the gypsum board distributive system. Nor was there any understanding or agreement that jobbers' discounts would be discontinued. The issuance of the bulletin of August 8, 1930 (Exhibit 430) making the price to jobbers the same as to dealers was the exercise of the right of USG to establish a price for the patented product."

nation of jobbers was undertaken by United States Gypsum in furtherance of that purpose, a finding of specific intent as to each licensee is not necessary. Nor do we agree that the elimination of jobbers falls within the protection of the patent grant when the purpose, as here, is to prevent competition by uncontrolled resale prices. The inference we draw from the uncontradicted evidence is that the defendants acted in concert to eliminate an important class of jobbers.

In Findings 73, 94–97,[17] the trial court dealt with the government's charge that the defendants had stabilized

[17] We quote Findings 73 and 95 as typical:

"73. There was at no time any understanding or agreement among any of the parties to the respective license agreements that the prices would be raised or fixed upon plaster or any unpatented gypsum product. Nor were the license agreements in the instant case executed with an intent to raise, maintain and stabilize the prices of unpatented materials such as plaster and miscellaneous gypsum products. The parties to the respective license agreements knew that the licensor's right to fix minimum prices was limited to the prices on patented board manufactured and sold by the respective licensees."

"95. The Bulletin provision that 'Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price . . . by reducing the price of other products . . .' is but part of a larger provision concerning rebates and allowances made for the purpose and with the effect of reducing the licensee's price on patented board below the minimum price therefor—a price protective provision. It was not a device to raise, maintain or stabilize the price of plaster or miscellaneous gypsum products, and it was not applied by the defendants to that end. Nor did it have that effect. On the contrary the provision in question was a proper price protective measure reasonably designed to secure to USG the pecuniary reward of its patent monopoly. In operation, it was not used to raise, maintain or stabilize the price of unpatented materials."

the price of unpatented gypsum products. Those findings hold that there was no understanding or agreement that prices would be raised or fixed upon plaster or any unpatented product, that the bulletin provision prohibiting the reduction of price on unpatented products was designed to protect the price of patented board, and was not used to stabilize the price of unpatented materials. We reject all these findings as clearly erroneous. The bulletin provision and the complaints by licensees addressed to Board Survey convince us that the defendants attempted to stabilize plaster prices, and the fact that plaster prices were stabilized only when plaster was sold in conjunction with board appears to us to be immaterial.

The trial court made many other findings to which the government objected and yet to determine here whether each is erroneous is unnecessary.[18] Perhaps looked at in isolation some of the government's charges are not proven with that fullness that would justify our reversal of the finding of the District Court on the point. It may be that in the light of this opinion the District Court will conclude that many such findings are no longer significant in reaching its decision. As to others a different result will be required. Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings in accord with our present ruling.

V.

The foregoing discussion foreshadows our conclusion. What we have said above under III on the invalidity of

[18] Objection was made to those findings which held that the defendants had not conspired to fix resale prices of board sold to manufacturing distributors.

the arrangements as tested by the Sherman Act in discussing the admissibility of the declarations and acts of separate defendants against all others is applicable here. These licenses and bulletins show plainly a conspiracy to violate the Sherman Act. Price fixing of this type offends. It is well settled that price fixing, without authorizing statutes, is illegal, *per se*. See note 21, *United States* v. *Line Material Co.*, decided today. Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences. *United States* v. *National Lead Co.*, 332 U. S. 319, 327; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 406; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 170–74; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20. The defendants did undertake to control prices and distribution in gypsum board. They did utilize an agency, Board Survey, Inc., to make this control effective. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 465. Such facts, together with the other indicia of intent to monopolize the gypsum board industry, hereinbefore detailed as to the agreements, bulletins and declarations, convinces us that the defendants violated the Sherman Act.

The *General Electric* case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented prod-

ucts suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized. We apply the "rule of reason" of *Standard Oil Co.* v. *United States*, 221 U. S. 1, to efforts to monopolize through patents as well as in non-patent fields. Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices. That conclusion follows despite the assumed legality of each separate patent license, for it is familiar doctrine that lawful acts may become unlawful when taken in concert.[19] Such concerted action is an effective deterrent to competition; as we said in *Masonite*, p. 281:

> "The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition. . . . Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition. . . ."

The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally

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[19] *Binderup* v. *Pathé Exchange*, 263 U. S. 291; *Eastern States Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600; *United States* v. *Reading Co.*, 226 U. S. 324, 357; *Swift & Co.* v. *United States*, 196 U. S. 375, 396.

adapted to secure pecuniary reward for the patentee's monopoly.

By the record now presented, violation of the Sherman Act is clear. As the order of dismissal came at the end of the government's presentation on appellee's motion to dismiss under Rule 41 (b) [20] of the Federal Rules of Civil Procedure, the order is reversed and the case remanded for further proceedings in conformity with this opinion.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

[20] 4 Fed. Rules Serv. (Pike & Fischer) 931; *Gulbenkian* v. *Gulbenkian*, 147 F. 2d 173, 177. We know of no reason why the statement in the *Gulbenkian* case that it is unnecessary for the appellant to offer his evidence a second time is not here applicable.

APPENDIX.

License Agreement.

This agreement made this 18th day of October, A. D. 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and Ebsary Gypsum Co., Inc. a New York corporation, of Newark, New Jersey, hereinafter referred to as Licensee, Witnesseth, that

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters patent described in said Exhibit A, for the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege

aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum wallboard, and thereafter shall give to Licensee written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof

shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by second parties and which during the existence thereof shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

3. Licensee agrees to pay to Licensor for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind,

whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,452, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; . . .

. . . . . .

5. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; Provided, However, that the same may be assigned by Licensee to any company acquiring all the assets and business or all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connec-

tion therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, and to agree to be bound by all of the terms and conditions of this contract, and deliver such agreement to Licensor.

6. Licensee agrees to keep separate full and accurate books of accounts and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, ...

7. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it and the quantity thereof put up and sold by it in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; . . . .

9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail) gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in

any letters patent after the same shall have been issued, granted for or upon any of the said applications and may with the written consent of first party manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent or in any letters patent after the same shall have geen granted for or upon any of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in

said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; . . . .

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1947.

The United States of America, Appellant, v. United States Gypsum Company et al.	On Appeal From the District Court of the United States for the District of Columbia.

[March 8, 1948.]

Mr. Justice Frankfurter, concurring.

In Part II of the opinion the Court confessedly deals with an issue that "need not be decided to dispose of this case." Deliberate *dicta*, I had supposed, should be deliberately avoided. Especially should we avoid passing gratuitously on an important issue of public law where due consideration of it has been crowded out by complicated and elaborate issues that have to be decided. Accordingly, I join in the Court's opinion, except Part II.

The Court is agreed that the arrangements challenged by the Government as violative of the Sherman Law cannot find shelter under the patent law, howsoever valid the patents of the defendants may be. In short, we have found that the validity of the patents in the suit is irrelevant to the invalidity of the arrangements based upon them. While fully recognizing this, the Court needlessly considers the question whether the Government may, in view of *United States* v. *American Bell Telephone Co.*, 167 U. S. 224, attack the validity of the patents in the present proceeding.

It does so because "it seems inadvisable to leave as a precedent the decision" of the trial court that "the Government was estopped to attack the validity of the patents in the present proceeding." But, surely, it is easy enough to sterilize the trial court's decision by the explicit declaration that the issue need not be decided.

I shall not follow the Court's lead and indulge in *dicta* on the question whether, in a suit like this, the issue of patentability can be contested by the Government. But, as bearing upon the undesirability of announcing *dicta* on this issue, it is pertinent to point out that the cases on which the Court relies for its pronouncement hardly dispose of the problem. They are cases in which a licensee resisted claims for royalties on what purported to be valid patents. Royalties were refused because there were no patents on which they were owed. Such was the issue involved in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402. Different considerations come into play when the Government seeks a declaration of invalidity. See *United States* v. *American Bell Telephone Co., supra.* I am not remotely intimating that the differences are decisive. I am merely suggesting that a due weighing of the differences, in the light of the *Bell Telephone* case, should await the duty of adjudication. It should not be the undesirable product of deliberate *dicta.*

The Court refers to *Hurn* v. *Oursler,* 289 U. S. 238, 240, as reason for passing on an issue that "need not be decided to dispose of this case," because "it seems inadvisable to leave the [trial court's] decision as a precedent." As to our problem, *Hurn* v. *Oursler* was exactly the opposite from this case. The issue on which this Court pronounced in *Hurn* v. *Oursler* was inescapably the issue that had to be decided to dispose of the case.

The issue in *Hurn* v. *Oursler* was this: where a suit for infringement of a copyrighted play was brought in a federal court and with it was joined a non-federal cause of action based on unfair competition in regard to that play, has the federal court jurisdiction to pass on the merits of the claim of unfair competition after the court had rejected the federally-based suit of infringement?

The trial court held not, and dismissed the non-federal claim for want of jurisdiction after dismissing the federal claim on the merits. When the case came here this Court could not possibly sustain the trial court (which had been affirmed by the Circuit Court of Appeals) without necessarily affirming the trial court's ruling on the issue of jurisdiction. This Court reversed the trial court on that issue and held that the district court had jurisdiction. It found, however, that the cause of action should have been dismissed but *on the merits*. Accordingly, this Court modified the decree so that the dismissal was on the merits and not for want of jurisdiction. This Court could not have reached the merits without first determining whether there was jurisdiction to reach them. In short, in *Hurn* v. *Oursler* the precedent of the district court had to be set aside in order to decide the case. Here, the "precedent" of the district court is upon an issue which is essentially irrelevant, and therefore we should not follow the error of the district court in pronouncing upon an issue which "need not be decided to dispose of this case."